HEINONLINE

DATE DOWNLOADED: Wed Aug 2 19:53:30 2023
SOURCE: Content Downloaded from HeinOnline

Citations:
Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

Bluebook 21st ed.
19 LOY. U. CHI. INT'l L. REV. i (2023).

ALWD 7th ed.
, , 19 Loy. U. Chi. Int'l L. Rev. i (2023).

APA 7th ed.
(2023). Loyola University Chicago International Law Review, 19(2), i-vi.

Chicago 17th ed.
"," Loyola University Chicago International Law Review 19, no. 2 (Spring 2023): i-vi

AGLC 4th ed.
" (2023) 19(2) Loyola University Chicago International Law Review i

OSCOLA 4th ed.
" (2023) 19 Loy U Chi Int'l L Rev i Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at https://heinonline.org/HOL/License
-- The search text of this PDF is generated from uncorrected OCR text.
-- To obtain permission to use this article beyond the scope of your license, please use: Copyright Information

CONTENTS

Featured Articles

Student Articles

LOYOLA UNIVERSITY CHICAGO INTERNATIONAL LAW REVIEW
2022-2023

Executive Board

HOLLY JACOBS
Editor-in-Chief

SUET LEE
Executive Editors

KAJAL PATEL
Executive Editor

DARLENE M. BURKER
Featured Articles Editor

KELLIE R. TOMIN
Student Articles Editor

ABIGAIL R. PETHO
Symposium Editor

ABIGAIL MAGAT
Assistant Symposium Editor

ALISHA SHAH
Assistant Symposium Editor

Senior Editors

MEGAN ALDWORTH
LEJLA ALIBASIC
SUMMER ARDELL
ANNA SCHILLING
MOLLY SMITHSON

Associate Editors

ALEXANDRA ANGYALOSY
BRYAN E. BOTT
KATHRYN N. BROOKS
NAKISHA RENE BRYANT
EDWARD N. CAIN
MARINA JUSTINE CORBISIERO
KEVIN M. CRÉMOUX
MARGUERITE FISHER-HEATH
SAMANTHA H. HUGHES
JEAN W. JOSEPH
KENNETH H. KANG
ABIGAIL N. MAGAT
HANNAH G. NEWMAN
MARCOS RASSI SIMÕES OLIVEIRA
ALISHA S. SHAH
SOPHIE SHAPIRO
ELIZABETH J. SHINNERS
ERIN E. VANCE
ONEIDA VARGAS MOLINA
ANNE MARIE YURIK
MARLA ZEPEDA

Faculty Advisor

PROFESSOR MARGARET MOSES

Published semi-annually by Loyola University Chicago School of Law
Loyola University Chicago School of Law
25 East Pearson Street
Chicago, IL 60611

Cite as 19 LOY. U. CHI. INT'L L. REV. __ (2023)

LOYOLA UNIVERSITY CHICAGO INTERNATIONAL LAW REVIEW

Loyola University Chicago School of Law
25 East Pearson Street
Chicago, IL 60611
E-mail: InternationalLawReview@luc.edu
Phone: (312) 915-7490

SUBSCRIPTIONS: **two issues per year at $10.**

Please start my subscription to Loyola University Chicago International Law Review.

_____

Name

_____

School

_____

Address

_____

City, State Zip Code

_____

E-mail Address

If you would like to subscribe, please complete the information above, include a $10 check payable to **Loyola University Chicago International Law Review**, and send to:

LOYOLA UNIVERSITY CHICAGO INTERNATIONAL LAW REVIEW
Loyola University Chicago School of Law
25 East Pearson Street
Chicago, IL 60611

International Focus at Loyola University Chicago School of Law

Curriculum

Loyola University Chicago School of Law provides an environment where a global perspective is respected and encouraged. International and Comparative Law are not only studied in theoretical, abstract terms but also primarily in the context of values-based professional practice. In addition to purely international classes, courses in other disciplines – health law, child and family law, advocacy, business and tax law, antitrust law, and intellectual property law – have strong international and comparative components.

International Centers

The United Nations has designated Loyola University Chicago School of Law as the home of its Children's International Human Rights Initiative. The Children's International Human Rights Initiative promotes the physical, emotional, educational, spiritual, and legal rights of children around the world through a program of interdisciplinary research, teaching, outreach and service. It is part of Loyola's Civitas ChildLaw Center, a program committed to preparing lawyers and other leaders to be effective advocates for children, their families, and their communities.

Study Abroad

Loyola's international curriculum is also expanded through its foreign programs and field-study opportunities:

International Programs

- A four-week annual summer program at Loyola's permanent campus in Rome, Italy – the John Felice Rome Center – focusing on varying aspects of international and comparative law.
- A two-week annual summer program at Loyola's campus at the Beijing Center in Beijing, China focusing on international and comparative law, including a semester long course in the spring in Chicago to educate students on the Chinese legal system.

International Field Study

- A ten-day, between-semester course in London on comparative advocacy, where students observe trials at Old Bailey, then meet with judges and barristers to discuss the substantive and procedural aspects of the British trial system. Students also visit the Inns of the Court and the Law Society, as well as have the opportunity to visit the offices of barristers and solicitors.
- A comparative law seminar on *Legal Systems of the Americas*, which offers students the opportunity to travel to Chile over spring break for on-site study and research. In Santiago, participants meet with faculty and students at the Law Faculty of Universidad Alberto Hurtado.
- A one-week site visit experience in San Juan, Puerto Rico, where students have the opportunity to research the island-wide health program for indigents as well as focus on Puerto Rico's managed care and regulation.
- A comparative law seminar focused on developing country's legal systems. The seminar uses a collaborative immersion approach to learning about a particular country and its legal system, with particular emphasis on legal issues affecting children and families. Recent trips have included Tanzania, India, Thailand, South Africa, and Turkey.

Wing-Tat Lee Lecture Series

Mr. Wing-Tat Lee, a businessman from Hong Kong, established a lecture series with a grant to the School of Law. The lectures focus on aspects of international or comparative law.

The Wing-Tat Lee Chair in International Law is held by Professor James Gathii. Professor Gathii received his law degree in Kenya, where he was admitted as an Advocate of the High Court, and he earned an S.J.D. at Harvard. He is a prolific author, having published over 60 articles and book chapters. He is also active in many international organizations, including organizations dealing with human rights in Africa. He teaches International Trade Law and an International Law Colloquium.

International Moot Court Competition

Students hone their international skills in two moot competitions: the Phillip Jessup Competition, which involves a moot court argument on a problem of public international law, and the Willem C. Vis International Commercial Arbitration Moot, involving a problem under the United Nations Convention on Contracts for the International Sale of Goods. There are two Vis teams that participate each spring – one team participates in Vienna, Austria against approximately 300 law school teams from all over the world, and the other team participates in Hong Kong SAR, China, against approximately 130 global law school teams.

Acknowledgments

We would like to recognize friends and alumni of Loyola who contributed this past year to our international law program by supporting Loyola's Vis Moot Program:

Cara A. Boyle
Karen and John Calhoun
Chicago International Dispute Resolution Association
Chicago Branch of the Chartered Institute of Arbitrators
William Cannon
Ellie Carey
Freddi L. Greenberg
Hanh Diep Meyers
Carol and Terry Moritz
Silvia and Fabio Pettanati
Susan Walker
Margaret Moses
Michael Brandenberg
Mark Calaguas
Shirley Chen
Christina Cotter
Caroline Driscoll and Samuel Barancik
Michael Eurich
William Eveland
Brian Fahrenbach
Sean Farrell
Elisabeth Fiordalisi
Elizabeth Hanford
Kevin Harris
Joshua Heffernan
Chantal Kazay
Elizabeth and Kevin Kearney
Kelsey Leingang
Katherine and Kyle Lennox
Bradley Lorden
Patrick McFadden
Kelly O'Brien
Geoffrey Robilotto
Barry Sullivan
Kristen and Michael Viglione
Erin Wenger
Brandon Wurzinger

HEINONLINE

DATE DOWNLOADED: Wed Aug 2 19:56:52 2023
SOURCE: Content Downloaded from HeinOnline

Citations:
Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

Bluebook 21st ed.
Ata R. Hindi, Membership in an Exclusive Club: International Humanitarian Law Rules as Peremptory International Law Norms, 19 LOY. U. CHI. INT'l L. REV. 127 (2023).

ALWD 7th ed.
Ata R. Hindi, Membership in an Exclusive Club: International Humanitarian Law Rules as Peremptory International Law Norms, 19 Loy. U. Chi. Int'l L. Rev. 127 (2023).

APA 7th ed.
Hindi, A. R. (2023). Membership in an exclusive club: international humanitarian law rules as peremptory international law norms. Loyola University Chicago International Law Review, 19(2), 127-156.

Chicago 17th ed.
Ata R. Hindi, "Membership in an Exclusive Club: International Humanitarian Law Rules as Peremptory International Law Norms," Loyola University Chicago International Law Review 19, no. 2 (Spring 2023): 127-156

McGill Guide 9th ed.
Ata R. Hindi, "Membership in an Exclusive Club: International Humanitarian Law Rules as Peremptory International Law Norms" (2023) 19:2 Loy U Chi Int'l L Rev 127.

AGLC 4th ed.
Ata R. Hindi, 'Membership in an Exclusive Club: International Humanitarian Law Rules as Peremptory International Law Norms' (2023) 19(2) Loyola University Chicago International Law Review 127

MLA 9th ed.
Hindi, Ata R. "Membership in an Exclusive Club: International Humanitarian Law Rules as Peremptory International Law Norms." Loyola University Chicago International Law Review, vol. 19, no. 2, Spring 2023, pp. 127-156. HeinOnline.

OSCOLA 4th ed.
Ata R. Hindi, 'Membership in an Exclusive Club: International Humanitarian Law Rules as Peremptory International Law Norms' (2023) 19 Loy U Chi Int'l L Rev 127
Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at https://heinonline.org/HOL/License
-- The search text of this PDF is generated from uncorrected OCR text.
-- To obtain permission to use this article beyond the scope of your license, please use: Copyright Information

MEMBERSHIP IN AN EXCLUSIVE CLUB: INTERNATIONAL HUMANITARIAN LAW RULES AS PEREMPTORY INTERNATIONAL LAW NORMS

Ata R. Hindi*†

Abstract

This paper entertains the somewhat scattered debate as to whether international humanitarian law ("IHL") rules could, and should, be considered peremptory norms of international law. For some time, the "basic rules of IHL" have been found to constitute peremptory norms of international law, with scant identification of those rules. Through a doctrinal analysis, this paper argues that, so long as they meet the Vienna Convention on the Law of Treaties' criteria, IHL rules should be treated as peremptory norms, creating erga omnes obligations for third States. Further, in theory, while the third State (external) obligation to "ensure respect" in IHL may be considered equivalent to, and even supplemented by, the rules on State responsibility, the scope of the latter may offer a stronger device for international law compliance and enforcement vis-a-vis third States and Parties. A convergent approach is suggested between Common Article 1 of the four Geneva Conventions ("to respect and ensure respect") and the rules on States responsibility to strengthen the legal basis for third State and Party action, both individually and collectively, against IHL violations.

Table of Contents

* The author would like to especially thank Teemu Ruskola (University of Pennsylvania Carey School of Law) for his critical and patient guidance and support. He also wishes to thank Adil Haque (Rutgers Law School), Dire Tladi (University of Pretoria), Ralph Wilde (University College-London), and Andreas Zimmermann (University of Potsdam) for their comments and suggestions.

† Ata Hindi is a Research Fellow in International Law at the Birzeit University Institute of Law, where he serves as Assistant Editor to the Palestine Yearbook of International Law. He has worked for several organizations including, amongst others, the Diakonia International Humanitarian Law Resource Center, the Bahrain Independent Commission of Inquiry, and the Coalition for the International Criminal Court. He holds a JD from Emory University, Advanced LLM in Public International Law from Leiden University, and a Masters in Global Affairs and Bachelors in Political Science from Rutgers University-Newark. He is currently pursuing his PhD in Law at Tilburg University on the topic of "Colonial and Imperial Legacies on the Laws of War."

I. Introduction

Are there international humanitarian law ("IHL") rules that would qualify as peremptory norms of international law? If so, would it matter? International lawyers and jurists *love* (or *hate*) peremptory norms. It is an exclusive club with limited membership, and practitioners and scholars alike have argued over what rules constitute peremptory norms. Generally speaking, the doctrine teaches us that peremptory norms sit at the top of international law's hierarchy. This exclusive club rarely accepts new members. More recently, to the joy of peremptory norm lovers, the United Nations ("UN") International Law Commission ("ILC") flirted with this question. ILC member Dire Tladi took on the role of "Special Rapporteur" covering the topic of "peremptory norms of general international law (*jus cogens*)."[1] As discussed below, in the later stages of his work, Tladi put together an illustrative list of peremptory norms and, within that list, included the oft-used terminology "basic rules of international humanitarian law." Unfortunately, that was the extent of the study, with little interactive discussion. Of course, the topic—as intriguing as it may be—was inconsequential to Tladi's overall work. Nonetheless, in light of Tladi's inclusion, this contribution builds upon previous discussions (in practice, jurisprudence, and scholarship) and explores the extent to which IHL rules could be treated as peremptory norms and why it matters.

In "Human Rights and the Magic of Jus Cogens," Andrea Bianchi concludes that "the future of *jus cogens* is primarily in their hands" – they being the "magicians."[2] Unless we believe in fantasy, magicians are not really magicians; they are, more appropriately, illusionists. One may argue that one of international law's greatest illusions was the advent of peremptory norms; another may argue that the illusion is cloaking their existence. Regardless, international law's evolution has resulted in several determinations for blanket prohibitions on slavery, forcible acquisition of territory, and racial discrimination and apartheid, among others. Law is a construct – a language of rules, application, and interpretation. Regardless of the legal culture or system – poof! Rules, standards, factors, tests, and so on can appear; some over time, others almost instantaneously and out of nowhere.

This paper, then, will attempt to make magic with two areas of law: the rules on State responsibility, based largely on the UN ILC-compiled *Articles on the*

[1] The term—peremptory norm—has been used synonymously, or interchangeably, with the term *jus cogens*.

[2] Andrea Bianchi, *Human Rights and the Magic of* Jus Cogens, 19 EUR. J. INT'L L. 491, 508 (2008).

Responsibility of States for Internationally Wrongful Acts ("ARSIWA"),[3] and IHL, also referred to as the "law of armed conflict" or the "laws of war."[4] In reviewing these two areas of law, this contribution argues in favor of the identification of IHL rules as peremptory norms of international law, creating *erga omnes* obligations for third States. It does not engage in a debate as to the existence of peremptory norms – generally, that would be a futile exercise.[5] While international lawyers and jurists disagree on which norms are peremptory, their existence is treaty-inscribed and rooted in State practice, of which States are cognizant. This paper attempts to "deconstruct" the definition and criteria of peremptory norms, then "reconstruct" that process with IHL rules. It would not be feasible within the margins of this paper to engage in a stocktaking exercise of *all* IHL rules, although attention should be given to those that are both conventional and customary in nature.[6] However, it adopts a nuanced approach, building largely upon determinations (and subsequent ambiguities) from the International Court of Justice ("ICJ") and the ILC, as well as the academic discourse.

This contribution tackles two general questions. *Firstly,* can IHL rules be considered peremptory norms? The conclusion is yes or, at least, that many should be. *Secondly,* is there a utility to identifying IHL norms as also constituting peremptory norms?[7] In theory, while the third State (external) obligation to "ensure respect" in IHL may be considered equivalent to, and even supplemented by, the rules on State responsibility, the scope of the latter may offer a stronger device for international law compliance and enforcement vis-à-vis third States and Parties.

---

[3] *See* Draft Articles on Responsibility of States for Internationally Wrongful Acts, *in* Report of the International Law Commission on the Work of Its Fifty-Third Session, U.N. GAOR, 56th Sess., Supp. No. 10 at 43, U.N. Doc. A/56/10 (2001) [hereinafter ARSIWA].

[4] This author is of the opinion that the broad concept of the "laws of war" is too general a term and may, in fact, include not only the *jus in bello*, but also the *jus ad bellum*. As such, this article will refer to "IHL." *See generally, Jus ad Bellum and Jus in Bello*, ICRC (Oct. 29, 2010), https://www.icrc.org/en/document/jus-ad-bellum-jus-in-bello.

[5] *See* Eric Suy, *Volume II, Part V: Invalidity, Termination and Suspension of the Operation of Treaties, s.2 Invalidity of Treaties, Art.53 1969 Vienna Convention*, in VIENNA CONVENTIONS ON THE LAW OF TREATIES 1226, paras. 4-5 (Olivier Corten & Pierre Klein eds., 2011) ("Although some held that the principle was 'too little developed to be able to be included into the codification of the treaties'. . .the majority were of the view that it should be incorporated within the Convention. Few believed that it amounted to codification of an established principle. . .. Forty years later, this difference of views has largely dissipated, and the international community now accepts that the rule on the voidance of a treaty where it conflicts with a peremptory rule of law forms part of substantive law."); *see also* Bianchi, *supra* note 2, at 505 ("Frontal attacks on *jus cogens* remain sporadic and their proponents often fail to make a convincing case against it.").

[6] *See generally Rules*, ICRC, IHL DATABASES, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul [hereinafter ICRC Customary IHL]; *see Rule 139: Respect for International Humanitarian Law*, ICRC, IHL DATABASES, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule139; *Rule 144: Ensuring Respect for International Humanitarian Law Erga Omnes*, ICRC, IHL DATABASES [hereinafter ICRC, Customary IHL, Erga Omnes], https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule144.

[7] *See* Anthony D'Amato, *It's a Bird, It's a Plane, It's Jus Cogens!*, 6 CONN. J. INT'L L. 1, at 1 (1990) (noting where Amato asks "(1) What is the utility of a norm of *jus cogens* (apart from its rhetorical value as a sort of exclamation point)? (2) How does a purported norm of *jus cogens* arise? (3) Once one arises, how can international law change it or get rid of it?").

Section II seeks to deconstruct peremptory norms of international law. *Firstly,* it covers the definition of peremptory norms. *Secondly,* it breaks down the criteria for identifying peremptory norms based on that definition. *Thirdly,* it provides an overview of the determinations made by international bodies on peremptory norms, including the extent of their analysis of the definition and criteria. This sub-section will also refer to those determinations made specifically on IHL rules as peremptory norms. Section III attempts to reconstruct peremptory norms with IHL rules. In order to guide the analysis, it entertains the (primarily academic) discourse on IHL rules as peremptory norms. It then generally applies the definition from the Vienna Convention on the Law of Treaties ("VCLT") and criteria to IHL rules. It analyzes IHL rules as peremptory norms, through various authorities, and gives a general overview of how conventional rules that enjoy customary status seem to satisfy the definition and criteria through the reconstruction process. Finally, Section IV discusses the identification of IHL rules as peremptory norms and its legal consequences for third States, *i.e.* the "added value" of finding that these IHL rules possess peremptory norm status.

II. Deconstructing Peremptory Norms

This section deconstructs peremptory norms by explaining their definition and criteria, followed by an overview of authoritative determinations made by international bodies on IHL rules as peremptory norms. This analysis will feed into the following section, reconstructing peremptory norms through IHL, *i.e.* applying the definition and criteria to IHL rules for the purpose of arguing in favor of their peremptory norm status.

A. The Definition of Peremptory Norms

Generally, there is virtual consensus that peremptory norms exist in international law (*i.e.*, not an illusion). These norms sit at the top of the international law hierarchy (of obligations and sources).[8] The definition of peremptory norms can be found in the VCLT.[9] VCLT article 53 provides that a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[10]

---

[8] There is quite a bit of literature on this debate, however beyond the scope of this paper. *See generally* PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW (JUS COGENS): DISQUISITIONS AND DISPUTATIONS (Dire Tladi ed., 2021).

[9] *See* Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]; *see also* Rafael Nieto-Navia, *Are Those Norms Truly Peremptory? with Special Reference to Human Rights Law and International Humanitarian Law,* 2015 GLOB. COMM. Y.B. INT'L L. JUR. 48 (2016) [hereinafter Nieto-Navia (2016)]; *see generally* THOMAS WEATHERALL, JUS COGENS: INTERNATIONAL LAW AND SOCIAL CONTRACT (2015); DANIEL COSTELLOE, LEGAL CONSEQUENCES OF PEREMPTORY NORMS IN INTERNATIONAL LAW (2017); ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS OF INTERNATIONAL LAW (2008).

[10] VCLT, *supra* note 9, art. 53. For commentaries on VCLT, art. 53, *see* MARK E. VILLAGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 661-78 (2009); Kirsten

The language was subject to little dispute.[11] VCLT article 64 stipulates that "[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."[12] The language is dynamic, forecasting the "emergence" of norms that otherwise did not exist at the time of the VCLT's adoption, or in the future adoption of treaties. VCLT article 66, in turn, allows for dispute settlement vis-à-vis the ICJ, unless the parties agree to submit the dispute to arbitration.[13]

In the Oxford-published VCLT commentaries, Eric Suy accurately warns against confusing the terminology between *jus cogens* and *erga omnes*. Suy explains that "while their source is the same—notably peremptory norms—the effects are different."[14] Suy continues:

> A treaty that conflicts with *jus cogens* is void, whereas an act or action that breaches a peremptory norm establishing an *erga omnes* obligation invokes a special responsibility of the State. The distinction between *jus cogens* norms as peremptory norms of international law and *erga omnes* obligations, which are also mandatory norms, is the fact that *jus cogens* forms part of treaty law, whereas *erga omnes* obligations form part of the law on the responsibility of States for internationally wrongful acts. The latter involves a breach of a peremptory norms by an act or deed, not a conflict between a treaty and peremptory norm.[15]

As such, this contribution is particularly concerned with situations where an "act or deed" breaches a peremptory norm, triggering *erga omnes* obligations; *i.e.*, third State responsibility. Drawing from the ICJ, in *Barcelona Traction,* Jochen Frowein distinguishes between "'obligations of a State towards the international community as a whole' which are 'the concern of all States' and for whose protection all States have a 'legal interest'" and "those [obligations] existing vis-à-vis another State."[16] Capturing the essence of *erga omnes* obliga-

Schmalenbach, *Article 53: Treaties Conflicting with a Peremptory Norms of General International Law ("Jus Cogens")*, *in* VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 961-1020 (Oliver Dörr & Kirsten Schmalenbach eds., 2nd ed., 2018). This paper largely follows the Oxford-published commentaries, as below.

[11] With the exception of France, who "saw the sanctity of treaty obligations threatened by recognition of [*jus cogens*]." Jochen A. Frowein, *Ius Cogens*, *in* MAX PLANCK ENCYCS. PUB. INT'L L., ¶ 2 (2013) [hereinafter Frowein Jus Cogens]. As noted by the VCLT ILC commentaries, "only one [government] questioned the existence of rules of *jus cogens* in the international law of to-day."; *see Draft Articles on the Law of Treaties with Commentaries 1966, in* Documents of the Second Part of the Seventeenth Session and of the Eighteenth Session Including the Reports of the Commission to the General Assembly, Y.B. Int'l L. Comm'n, 1966 Vol. II, U.N. Doc. A/CN.4/SER.A/1966/Add.1, at 247 [hereinafter VCLT ILC Commentaries]. However, Suy notes "both the unreserved support for the concept of jus cogens among 'socialist' States and the reluctance of 'western and other' States to accept this notion in the absence of any guarantee of an objective evaluation." Suy, *supra* note 5, at 1221, ¶ 2.

[12] VCLT, *supra* note 9, at art. 64.

[13] *Id.* at art. 66. This mechanism has never been employed, and the identification of peremptory norms has largely been left to judicial—and to a lesser extent, State—discretion.

[14] Suy, *supra* note 5, at 1228, ¶ 13.

[15] Suy, *supra* note 5, at 1228-29, ¶ 13.

[16] Jochen Frowein, *Obligations Erga Omnes*, *in* MAX PLANCK ENCYCS. PUB. INT'L L., ¶ 1 (2008), [hereinafter Frowein Erga Omnes] (citing Barcelona Traction, Light and Power Company, Limited (New

tions, Frowein explains that although *jus cogens* and obligations *erga omnes* have different legal consequences, they are related to each other in important aspects. A rule from which no derogation is permitted because of its fundamental nature will normally be one in whose performance all States seem to have a legal interest.[17]

The ARSIWA appropriately relies on the VCLT's definition of peremptory norms.[18] Interestingly, Suy notes that the ARSIWA does not include the term *jus cogens*: "[this] omission is no mere coincidence and implies that the expression should, in the ILC's view, be reserved for conflicts between treaties and peremptory norms of general international law,"[19] while adding that in the ARSIWA, the ILC "equates peremptory norms of general international law with *erga omnes* obligations for the purposes of [State responsibility]."[20]

The ARSIWA is a non-binding legal document, although it largely covers binding legal sources drawn from conventional and customary international law. It is particularly concerned with *erga omnes* obligations since it deals with the legal framework of State responsibility rather than treaty conflicts.[21] This contribution will thus stick with the term "peremptory norms" and in the context of State responsibility—hence, where peremptory norms create *erga omnes* obligations. For IHL purposes, this contribution does not assess conflicts between IHL treaties and peremptory norms; rather, it discusses violations of IHL rules for the purposes of ascertaining State responsibility. Subsequently, it seeks to address the added value of identifying IHL rules as peremptory norms.

B. The Criteria of Peremptory Norms

Breaking down the VCLT definition, the criteria for identifying peremptory norms are that it is: (a) a norm accepted and recognized by the international community of States as a whole; (b) a norm from which no derogation is permitted; *and* (c) a norm which can be modified only by a subsequent norm of general international law having the same character.[22] Guidance for identifying peremp-

Application: 1962) (Belg. v. Spain) Second Phase, Judgment, 1970 I.C.J. 3, ¶ 33 (Feb. 5) [hereinafter ICJ Barcelona Traction]).

[17] Frowein Erga Omnes, *supra* note 16, at ¶ 3.

[18] *See, e.g.*, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, [2001] Y.B. Int'l L. Comm. Vol. II, Part Two, U.N. Doc. A/56/10, at 56, 84-85, 111-13 [hereinafter ARSIWA ILC Commentaries]; *see also* Suy, *supra* note 5, at 1233, ¶ 25.

[19] Suy, *supra* note 5, at 1232-33, ¶ 25. This is a particular point to which this author agrees, yet this seems to be a recurring confusion, within both practice and scholarship (including some of those cited within this piece).

[20] *Id.*

[21] *See id.*; *see also* ARSIWA ILC Commentaries, *supra* note 18, at 110-16.

[22] *See* Rafael Nieto-Navia, *International Peremptory Norms (Jus Cogens) and International Humanitarian Law*, *in* MAN'S INHUMANITY TO MAN, ESSAYS OF INTERNATIONAL LAW IN HONOUR OF ANTONIO CASSESE 610-12 (Lal Chand Vohrah et al. eds., 2003) [hereinafter Nieto-Navia (2003)] (Nieto-Navia breaks down the first of these as follows: "A) The norm must be a norm of general international law;" and "B) The norm must be "accepted and recognized by the international community of States as a whole."). However, *see also* VCLT, *supra* note 9, art. 64; Anne Lagerwall, *Volume II, Part V Invalidity, Termination and Suspension of the Operation of Treaties, s.4 Procedure, Art. 64 1969 Vienna Convention*, *in* THE VIENNA CONVENTIONS ON THE LAW OF TREATIES 1463, ¶ 14 (Olivier Corten & Pierre Klein

tory norms can be drawn from the findings of judicial and other international bodies on the matter, rather than engaging in an academic exercise altogether (although this is covered in the next sub-section). While the trend is progressively changing, the ICJ (and other international bodies) has traditionally dealt with the topic with a ten-foot pole. This seems to demonstrate an unwarranted culture of caution that has inhibited international law's progressive development and codification. Moreover, international bodies—and especially the ICJ—have exercised restraint from any sophisticated legal analysis on the identification of peremptory norms.

The first part is identifying the norm, which would be derived best from treaty or custom, the latter requiring two elements: state practice and *opinio juris* (*i.e.*, recognition/acceptance that there is a legal obligation vis-à-vis that specific norm/rule).[23] As such, for the ILC, the determinative element of a peremptory norm is that it is "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted."[24] During the discussions, the Chairman of the VCLT Drafting Committee explained that a "very large majority" of States accepting and recognizing the norm as peremptory was sufficient.[25] However, there have been no actual comprehensive stocktaking exercises performed by States collectively in identifying peremptory norms.[26] In many ways, the bulk of the work has been left to the discretion of international bodies and how they perceive State *acceptance* and *recognition*.

State practice need not be uniform, but rather consistent with the particular rule.[27] This does not necessarily mean that States have refrained from violating peremptory norms in one way or another. Many States still engage in the practice of torture, and there are several contemporary instances of the forcible acquisition of territory, for example. Challenging this "quasi-universal" acceptance would be in the "firm opposition of several States to the recognition of the peremptory character of a norm would preclude it from acquiring this character."[28] The reality is that it would be difficult to argue that one State's historical opposition (if it existed) to the prohibitions on torture or forcible acquisition of territory

eds., 2011) (in the leadup to the VCLT discussions, "States pointed out, particularly, the lack of precise criteria to define a norm of jus cogens and the inadequacy of the settlement procedure to resolve interpretation issues concerning Article 64.").

[23] *See* North Sea Continental Shelf (Germ. v. Neth.), 1968 I.C.J. 3, ¶ 77 (Feb. 20). The ICRC study naturally follows this approach, against the backdrop of international treaty law's impact; *see Introduction: Assessment of Customary International Law*, ICRC, https://www.icrc.org/customary-ihl/eng/docs/v1_rul_in_asofcuin (last visited May 19, 2023).

[24] *See* Lagerwall, *supra* note 22, at 1467, ¶ 23. The ILC explains that "it is sufficient to use the phrase 'international community as a whole', rather than 'international community of States as a whole." *See* ARSIWA ILC Commentaries, *supra* note 18, at 84 (as used in ICJ Barcelona Traction).

[25] Suy, *supra* note 5, at 1227, ¶ 9; *see also* Lagerwall, *supra* note 22, at 1470-71, ¶ 31.

[26] Even where certain treaties specifically interact with peremptory norms—such as the prohibitions on torture (Convention against Torture) or the forcible acquisition of territory (UN Charter)—they are not identified as peremptory norms *per se*.

[27] *See* THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 61 (1991) [hereinafter Meron (1991)] (citing Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1984 I.C.J. 14, 98, ¶ 186 (June 27) [hereinafter ICJ Nicaragua]).

[28] Lagerwall, *supra* note 22, at 1472, ¶¶ 33-34.

would undermine their status as peremptory norms. Similarly, while IHL rules are occasionally violated, there is generally no opposition to, and no possibility of derogation from, the obligations drawn from IHL rules which enjoy customary status. Perhaps different *interpretations* of the rule, but not *opposition* to the rule altogether.

In order to assess the status of a norm as peremptory, Anne Lagerwall draws inferences from the terminology of ICJ Statute article 38[29] in interpreting VCLT article 53 ("accepted" and "recognized").[30] She adds that "consensualism" is informative in meeting the "accepted and recognized" standard, by way of either treaty or custom:

> treaty and custom are those that rely most explicitly on consensualism in their development process: by way of the consent to be bound to certain norms, in the case of a treaty, and through the adoption of a constant practice conveying the recognition of the compulsory character of certain norms, in the case of customary law.[31]

Rafael Nieto-Navia more expansively advances that peremptory norms may be derived not only from treaties and custom, but from general principles of international law.[32] The same logic may also be applied to the works of "high qualified publicists,"[33] although with lesser weight. This is keeping in mind that publicists are arguably most dynamic and productive in peremptory norm discussions.

As for the impossibility of derogation, both treaty and customary law present their own sets of difficulties. On the one hand, for custom, Lagerwall presents two challenges. Firstly, unlike ordinary custom, *opinion juris* vis-à-vis peremptory norms requires that States "not only have the conviction that they are bound by a rule, but also that the rule is one from which no derogation is possible."[34] Secondly, there is difficulty in establishing the precise moment in time *when* the norm came into being.[35] On the other hand, treaties come with their own set of challenges. Here, the treaties should be joined by virtually *all* States.[36] Further, "the treaty must convey the belief of States that the norms it embodies are not subject to any type of derogation."[37] Some prominent examples of peremptory norms featured in treaties either explicitly or implicitly stipulate non-dero-

---

[29] *See* Statute of the International Court of Justice, art. 38.

[30] Lagerwall, *supra* note 22, at 1468, ¶ 26; *see also* Nieto-Navia (2003), *supra* note 22, at 612-13.

[31] Lagerwall, *supra* note 22, at 1468, ¶ 26.

[32] Nieto-Navia (2003), *supra* note 22, at 612-13; *see generally* M. Cherif Bassiouni, *A Functional Approach to "General Principles of International Law,"* 11 MICH. J. INT'L L. 768 (1990).

[33] *See generally* Sir Michael Wood, *Teachings of the Most Highly Qualified Publicists (Art. 38(1) ICJ Statute), in* MAX PLANCK ENCYCS. PUB. INT'L L. (2017).

[34] Lagerwall, *supra* note 22, at 1468, ¶ 27 ("Only a perfectly consistent and unambiguous practice, including precedents in which States have condemned derogations to the rule, could help to establish such conviction (internal citation omitted). Such practice is rare.").

[35] *See id.*

[36] *See id.* at 1468, ¶ 28.

[37] *Id.* (As Lagerwall explains, this can be found by analyzing the convention's terms, its preparatory works, State declarations, and reservations.)

gability. For example, the International Covenant on Civil and Political Rights ("ICCPR") clearly stipulates the non-derogability of the prohibition against torture.[38] Generally, treaties are not so explicit.

Ideally, in order to meet the criteria, it is best to "combine different sources together in order to establish the peremptory character of those norms, as well as the time at which they emerged."[39] One such example used by Lagerwall is the prohibition on racial discrimination, based on its development vis-à-vis the UN Charter, the International Convention on the Elimination of Racial Discrimination, and several United Nations General Assembly resolutions.[40] Lagerwall suggests that the preferable means of identifying peremptory norms are where treaties actually codify customary norms.[41] Yet it should be noted that the process may involve the opposite (for example, the prohibition on genocide). Together, Lagerwall explains that there should be "double consent" in that States "must have both recognized the norm as legally binding and considered it a norm from which no derogation is permitted."[42]

In sum, it is established that the norm should be derived from treaty or custom, from which no derogation is permitted.[43] This would work best where there is consensualism *and* double consent; ideally, although not necessarily, drawn from treaty *and* custom. Such determinations have been left to international bodies and, for the most part, following this formula.

C. Determinations on Peremptory Norms, Including International Humanitarian Law Rules

Several international bodies have made determinations on peremptory norms, including references to IHL rules (although usually vague). For the most part, the ICJ has exercised restraint when dealing with peremptory norms. The ILC, however, has been most active in advancing the analysis, particularly through its commentaries. Illustrative lists have been largely avoided and, where peremptory norms have been identified, it has not necessarily entertained a rigorous application of the definition and criteria. As mentioned, while States were hesitant about the inclusion of an illustrative list during the drafting of the VCLT,[44] the ILC inserted a few ideas into the commentaries.[45] The ILC would later expand these ideas in their ARSIWA commentaries.

---

[38] *See* G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, at art. 4(2) (Dec. 16, 1966). It does not, however, identify it as a peremptory norm, of course.

[39] Lagerwall, *supra* note 22, at 1469, ¶ 30.

[40] *See id.*

[41] *See id.*

[42] Lagerwall, *supra* note 22, at 1467, ¶ 24.

[43] *See* Nieto-Navia (2016), *supra* note 9, at 52-54 (referring to treaties, custom, and general principles).

[44] Suy, *supra* note 5, at 1228, ¶ 11-12 (finding Suy's limited scope of peremptory norms includes "the prohibition of the use of force, slavery, genocide, piracy, unequal treaties, interference in internal affairs, or the obligation to settle disputes peacefully.").

[45] *See* VCLT ILC Commentaries, *supra* note 11, at 248 ("Examples suggested included (a) a treaty contemplating an unlawful use of force contrary to the principles of the Charter, (b) a treaty contemplat-

With respect to the ICJ, Bianchi opines that the Court "was never fond of *jus cogens* – admittedly not a legal category of its own creation" and that this "is further attested to by the Court's alternative use of the notion of obligations *erga omnes*."[46] ICJ references to peremptory norms are scant. Yet, perhaps it is not that the ICJ was never fond of the term altogether. Rather, it seems that the ICJ has restrained itself from concretely identifying peremptory norms, not unlike the views—particularly by States—against formulating illustrative lists in ILC contexts. Additionally, by referring to *erga omnes* rather than *jus cogens,* it is more plausibly employing the legal terminology indispensable to the rules on State responsibility; *i.e.*, peremptory norms creating *erga omnes* obligations.

The large part of those rules that have been designated as peremptory norms are human rights-based.[47] In *Barcelona Traction,* the ICJ made its first determinations on *erga omnes*, including the prohibitions against aggression, genocide, and "principles and rules concerning the basic rights of the human persons" which includes protection from slavery and racial discrimination.[48] Some two and a half decades later, the ICJ explained that "the rights and obligations enshrined by the [Genocide] Convention are. . .*erga omnes*."[49] In *East Timor,* the ICJ adds the right to self-determination as having an *erga omnes* character.[50] In the *Wall* advisory opinion, the ICJ reiterates the right to self-determination's *erga omnes* character, with the addition of ambiguous IHL rules.[51] In the *Wall,* the ICJ attempted to remedy the inarticulate language of its *Nuclear Weapons* advisory opinion by clarifying that the IHL rules alluded to in *Nuclear Weapons* "incorporate obligations which are essentially of an *erga omnes* character."[52] In *Nuclear Weapons,* the ICJ's inarticulate language was as follows:

> It is undoubtedly because a great many rules of [IHL] applicable in armed conflict are so fundamental to the respect of the human person and "elementary considerations of humanity". . .that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules

ing the performance of any other act criminal under international law, and (c) a treaty contemplating or conniving at the commission of acts, such as trade in slaves, piracy or genocide, in the suppression of which every State is called upon to co-operate. Other members expressed the view that, if examples were given, it would be undesirable to appear to limit the scope of the article to cases involving acts which constitute crimes under international law; treaties violating human rights, the equality of States or the principle of self-determination were mentioned as other possible examples."). In line with the pure meaning of *jus cogens*, the commentaries refer only to *treaties* that include *peremptory norms.*

[46] Bianchi, *supra* note 2, at 502 ("While the two notions may be complementary, they remain distinct, and to consider them as synonyms risks undermining the legal distinctiveness of each category.").

[47] Bianchi, *supra* note 2, at 492; *see generally* ARSIWA ILC Commentaries, *supra* note 18.

[48] ICJ Barcelona Traction, *supra* note 16, ¶ 33-34 (finding it did not refer to them as peremptory norms).

[49] *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Preliminary Objections, 1996 I.C.J. 595, ¶ 31 (July 11) [hereinafter ICJ Genocide].

[50] *See* East Timor (Port. v. Austl.), Judgment, 1995 I.C.J. 90, ¶ 29 (June 30).

[51] *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 ¶ 155-57 (July 9) [hereinafter ICJ Wall Advisory Opinion].

[52] *Id.* at ¶ 157; *see generally* Peter Bekker, *Legality of the Threat or Use of Nuclear Weapons*, 91 AM. J. INT'L L. 126 (1997).

> are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.[53]

The ICJ stopped there, making no mention of *erga omnes*. The ICJ referred back to the "human person," giving no indication as to what those IHL rules were and providing no legal basis for its use of the term "intransgressible" – the key ambiguity (although the use of the term "fundamental" has its history)[54] Bianchi believes that the ICJ "created the cacophonic neologism of 'intransgressible principles of humanitarian law' to avoid referring to *jus cogens*."[55] To a certain extent, the ICJ discusses aspects of consensualism and double consent with respect to IHL rules,[56] but stops short in its determination:

> It has been maintained in these proceedings that these principles and rules of international humanitarian law are part of *jus cogens* as defined in [VCLT article 53]. The question whether a norm is part of the *jus cogens* relates to the legal character of the norm. The request addressed to the Court by the General Assembly raises the question of the applicability of the principles and rules of international humanitarian law in cases of recourse to nuclear weapons and the consequences of that applicability for the legality of recourse to these weapons. But it does not raise the question of the character of the humanitarian law which would apply to the use of nuclear weapons. There is, therefore, no need for the Court to pronounce on this matter.[57]

The ICJ excluded any detailed analysis as to whether IHL rules—and which of them—constitute peremptory norms.[58] It does, however, refer to the "cardinal principles" of IHL as including the principle of distinction and prohibition against unnecessary suffering.[59] Yet, as noted above, the ICJ makes its determination only a few years later in the *Wall* advisory opinion, where the "great many rules of humanitarian law applicable in armed conflict" that "are so fundamental to the respect of the human person and 'elementary consideration of humanity'"—which, in *Nuclear Weapons*, constitute "intrangressible principles of international customary law"—"incorporate obligations which are essentially of an *erga omnes* character."[60] The ICJ does not automatically equate IHL rules with

---

53 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 ¶ 79 (July 8) [hereinafter ICJ Nuclear Weapons Advisory Opinion].

54 *See* ICJ Nicaragua, *supra* note 27, at ¶ 218 (". . .fundamental general principles of humanitarian law"); *see also* Judith Gardham, *The Contribution of the International Court of Justice to International Humanitarian Law*, 14 LEIDEN J. INT'L L. 349, 355 (2001); Rosemary Abi-Saab, *The "General Principles" of Humanitarian Law According to the International Court of Justice*, 27 INT'L REV. RED CROSS 367 (1987).

55 Bianchi, *supra* note 2, at 502.

56 ICJ Nuclear Weapons Advisory *Opinion*, *supra* note 53, at ¶ 82.

57 *Id.* at ¶ 83.

58 *See* Gardham, *supra* note 54, at 357.

59 ICJ Nuclear Weapons Advisory Opinion, *supra* note 53, at ¶ 78.

60 ICJ Wall Advisory Opinion, *supra* note 51, at ¶ 79.

peremptory norms establishing *erga omnes*; rather, it enigmatically explains that IHL rules incorporate *erga omnes* obligations. In his report on the "fragmentation" of international law, ILC rapporteur Martti Koskeniemmi supposes that the norms the ICJ are referring to involve the "prohibition of hostilities directed at a civilian population ('the basic rules of [IHL]')."[61] While this is somewhat helpful, it is still elusive, as the grouping can encompass numerous IHL rules.

Of course, there is much to be said about the ICJ's failure to more critically examine the legality of nuclear weapons.[62] What is more unsatisfying is the Court's failure to more critically *apply* IHL rules to the use of such weapons[63] (and the impracticality of such an analysis). While the use of nuclear weapons would involve numerous IHL violations, the ICJ specifically discussed the principle of distinction and the prohibition against unnecessary suffering in *Nuclear Weapons*.[64] It may be inferred that these two are what most clearly constitute the ICJ's "intrangressible" principles. Nevertheless, Timothy McCormack expresses the opinion that "[*p*]*rima facie,* the application of these principles to the threat or use of nuclear weapons, particularly in view of the earlier steps in the [ICJ's] reasoning outlined above, would lead to a conclusion of illegality in almost all conceivable circumstances."[65]

The ILC explains in its ARSIWA commentaries that "[i]n the light of the description by ICJ of the basic rules of [IHL] applicable in armed conflict as "intransgressible" in character, it would also seem justified to treat these as peremptory."[66] The term "these" is not further scrutinized, but should be inclusive of the "great many" IHL rules that the ICJ has referred to. More explicitly, ILC also explains its view that "peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination."[67] The ILC then goes on to add that "[t]here also seems to be wide-spread agreement with other examples listed in the [ILC's] commentary to article 53: viz. the

---

[61] Int'l Law Comm'n, Rep. of the Study Group on the Fifty-Eighth Session, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law,* U.N. Doc. A/CN.4/L.682, at 189, ¶ 374 (Apr. 13, 2006).

[62] *See generally* Christopher Greenwood, *The Advisory Opinion on Nuclear Weapons and the Contribution of the International Court to International Humanitarian Law*, 6 INT'L REV. RED CROSS 65 (1997).

[63] *See* Timothy McCormack, *A Non Liquet on Nuclear Weapons: The ICJ Avoids the Application of General Principles of International Humanitarian Law*, 37 INT'L REV. RED CROSS 76 (1997); *see also* Gardham, *supra* note 54. Interestingly, and perhaps unfortunately, even the ICRC has shown caution; *see A Statement by Helen Durham, Director of Law and Policy, ICRC*, ICRC (Mar. 14, 2022), https://www.icrc.org/en/document/icrc-appeals-nuclear-weapons-never-used (saying instead that "[i]t is extremely doubtful that nuclear weapons could ever be used in accordance with the principles and rules of international humanitarian law.").

[64] *See* McCormack, *supra* note 63, at 84-85; *see also* ICJ Nuclear Weapons, *supra* note 53, at ¶ 78 (these two principles are nevertheless significant and revisited below).

[65] McCormack, *supra* note 63, at 85 (holding this is an opinion that this author subscribes to, however in *all,* rather than "almost all" circumstances).

[66] ARSIWA ILC Commentaries, *supra* note 18, at 113; *see also* Marco Sassòli, *State Responsibility for Violations of International Humanitarian Law*, 84 INT'L REV. RED CROSS 401, 420 (2002).

[67] ARSIWA ILC Commentaries, *supra* note 18, at 58, 85.

prohibitions against slavery and the slave trade, genocide, and racial discrimination and apartheid."[68] Forcible acquisition of territory (*i.e.*, annexation) also makes the list.[69]

Some mention should also be made from determinations of the International Criminal Tribunal for the Former Yugoslavia ("ICTY"). In *Furundzija*, the ICTY explained that the prohibition on torture constituted a peremptory norm.[70] The ICTY also made a similar determination with regards to the prohibition on genocide.[71] In *Kupreskic*, the ICTY explained that "most norms of [IHL], in particular those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms of international law or *jus cogens*, *i.e.*, of a non-derogable and overriding character."[72] This determination seems to be encompass several different areas of law unless it is to be understood that the ICTY was referring to IHL prohibitions that, when breached, would result in different categories of crimes.

For the purposes of understanding the relationship between State responsibility and IHL, the definition and subsequent criteria of peremptory norms are translated into *erga omnes*. Determinations have been made on the identification of peremptory norms, including IHL rules –although these decisions seem to be somewhat haphazard. The rules that fall within this scope are not particularly clear. The determinations have identified these rules, albeit a rigorous application of the criteria. Nonetheless, we are left with a framework applying the definition and criteria to certain IHL rules. The opinions of several commentators on this topic are instructive, which will be seen in the next section.

D. Tladi's Work

Over the past few years, ILC member Dire Tladi has covered the topic of "peremptory norms of general international law (*jus cogens*)."[73] An illustrative list was annexed to Tladi's fourth report and limited to peremptory norms that had been previously referred to by the ILC.[74] As explained in the summary within the next paragraph, Tladi's work is largely in line with the various authorities discussed above. Here, it is worth noting Tladi's draft conclusions, in line with the process of defining and identifying peremptory norms, as well as those references to IHL.

---

[68] ARSIWA ILC Commentaries, *supra* note 18, at 112 (noting that racial discrimination and apartheid are not actually specifically mentioned as such in the VCLT ILC Commentaries).

[69] *Id.* at 114.

[70] Prosecutor v. Furundzija, Case No. IT-95–17/1-T, Judgment, ¶ 145 (Int'l Crim. Trib. for the Former Yugoslavia 1998); *see also* Suy, *supra* note 5, at 1232, ¶ 24.

[71] Prosecutor v. Stakic, Case No. IT-97–24-T, Judgment, ¶ 500 (Int'l Crim. Trib. for the Former Yugoslavia 2002); *see also* Suy, *supra* note 5, at 1232, ¶ 24.

[72] Prosecutor v. Kupreskic et al, Case No. IT-95-16-T, Judgment, ¶ 520 (Int'l Crim. Trib. for the Former Yugoslavia 2000).

[73] *See* Dire Tladi (Special Rapporteur), *Fifth Report on Peremptory Norms of General International Law (Jus Cogens)* Int'l L. Comm'n, U.N. Doc. A/CN.4/747 (Jan. 24, 2022) [hereinafter Tladi ILC Report].

[74] *See id.* at 5.

Tladi's draws the definition of peremptory norms from the VCLT.[75] Tladi adds that peremptory norms "are hierarchically superior to other rules of international law and are universally applicable."[76] Tladi then breaks down the criteria of identifying a peremptory norm: "(a) it is a norm of general international law; and (b) it is accepted and recognized by the international community of States as a whole as a norms from which no derogation is permitted and which can be modified only by a subsequent norm of international law having the same character."[77] For Tladi, "[c]ustomary international law is the most common basis for peremptory norms of international law (*jus cogens*)."[78] This is a bit of a departure from a more stringent standard that relies on both treaty and custom. Tladi then differentiates between "acceptance and recognition" between peremptory norms and general international law norms; that is, the former's non-derogability.[79]

Tladi then adds his draft conclusions on acceptance and recognition, in that: "[i]t is the acceptance and recognition by the international community of States as a whole that is relevant for the identification of peremptory norms of general international law (*jus cogens*);"[80] and "[a]cceptance and recognition by a very large majority of States is required for the identification of a norm as a peremptory norm of general international law (*jus cogens*)" while "acceptance and recognition by all States is not required."[81] Further, acceptance and recognition can take a wide range of forms.[82] Determinations made by international courts and tribunals (including reference to the ICJ specifically), as well as the "works of expert bodies" and "teachings of the most highly qualified publicists" are considered subsidiary means for determining peremptory norms.[83] Of course, this is keeping in mind that the wide range of forms that Tladi refers to in finding evidence of acceptance and recognition surely requires authoritative determinations, such as those of the ICJ.

With respect to *erga omnes*, Tladi's report provides the following:

> 1. Peremptory norms of general international law (*jus cogens*) give rise to obligations owed to the international community as a whole (obligations *erga omnes*), in which all States have a legal interest.

---

[75] Tladi ILC Report, *supra* note 73, at 15.

[76] *Id.* at 16.

[77] *Id.* at 22.

[78] *Id.* at 23.

[79] *Id.* at 27 (stating that the former "can only be modified by a subsequent norm of general international law having the same character.").

[80] *Id.* at 29.

[81] *Id.*

[82] *Id.* at 34 ("Such forms of evidence include but are not limited to: public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; legislative and administrative acts; decisions of national courts; treaty provisions; and resolutions adopted by an international organization or at an intergovernmental conference.").

[83] *Id.* at 37.

> 2. Any State is entitled to invoke the responsibility of another State for a breach of a peremptory norm of general international law (*jus cogens*), in accordance with the rules on the responsibility of States for internationally wrongful acts.[84]

Overall, for the most part, Tladi's conclusions mostly find agreement with the above-discussed scholarship in relation to the definition and criteria, acceptance, and recognition, as well as *erga omnes* obligations.[85] The next section will expand on Tladi's brief mention of IHL rules and, afterwards, the legal consequences pertaining to their possible peremptory norm status.

III. IHL Rules as Peremptory Norms of International Law

This section will discuss the IHL rules as peremptory norms, entertaining the academic discourse and applying the VCLT definition and criteria. It gives a general overview of how rules that are both conventional and customary—and as such non-derogable—can satisfy the definition and criteria through the reconstruction process. It will then be followed by a discussion on how the identification of IHL rules as peremptory norms leads to different considerations on the legal consequences for third States.

As discussed, Tladi annexes a non-exhaustive list of norms that the ILC has previously referred to as being peremptory. These include the following: the prohibition of aggression; the prohibition of genocide; prohibition of crimes against humanity; *the basic rules of international humanitarian law*; the prohibition of racial discrimination and apartheid; the prohibition of slavery; the prohibition of torture; and the right of self-determination.[86] As mentioned, there was a divide as to whether such a list should be published. For the most part, the language is, like its terminology on IHL rules, "basic" in that it avoids what might have rather been a lengthy discussion. While ICJ has given some indication as to what these IHL rules might be, we can also draw several ideas from the academic discourse.

A. The Academic Discourse

The previous section ended with a discussion on authoritative determinations of peremptory norms generally and IHL rules as peremptory norms specifically (primarily vis-à-vis the ICJ and ILC). However, there has been, over time, a healthy academic discourse on IHL rules as peremptory norms. Some scholars share similar ideas, others not so much.

From the outset, if we were to take a more conservative "treaty-plus-custom" approach and apply consensualism and double consent as described above, there should be little to no reason as to why the "great many" IHL rules could not be considered peremptory norms. Without judicial decisions (and from the ICJ in

---

[84] Tladi ILC Report, *supra* note 73, at 52 (Draft conclusion 17).

[85] Throughout the Report, Tladi includes the comments of various States. For more of the development of Tladi's Report, as well as the views of States and other ILC members, readers can refer to Tlad's first to fourth reports.

[86] Tladi ILC Report, *supra* note 73, at 66 (Draft conclusion 23).

particular), we would be somewhat oblivious to a particular norm's status. None of the identified peremptory norms have gone through a comprehensive stocktaking exercise to assess their status. If we are to consider that peremptory norms are part of an exclusive club as a matter of legal policy and economy, then we would be severely constrained regardless.

In line with the above, Marco Sassòli explains that "[t]he ICJ, the ICTY and ILC consider that the basic rules of [IHL] are peremptory."[87] Sassòli agrees with the qualification of IHL's "basic rules" as peremptory.[88] Sassòli notes Condorelli and Chazournes' belief that "all rules of [IHL] are peremptory."[89] While this may seem to be a sweeping statement, none of the determinations—from the ICJ, ILC, or ICTY—provide such broad conclusions. Yet, according to Sassòli:

> It would be difficult to find rules of [IHL] that do not directly or indirectly protect rights of protected persons in international armed conflicts. In both international and non-international armed conflicts, those rules furthermore protect "basic rights of the human person" which are classic examples of *jus cogens*.[90]

Thus, these "basic rights/rules" are the classic examples of peremptory norms (creating *erga omnes*), amongst possible others. As such, Sassòli implies agreement with the Condorelli and Chazournes' position. The late James Crawford, one of the key figures behind the ARSIWA, similarly states that the basic rules of [IHL] are amongst "the least controversial" peremptory norms recognized by the ICJ.[91] He does not expand on this statement, but such interpretations can be both liberal and conservative at the same time, depending on how one views the basic rules. Overall, Sassòli's pool of IHL rules that enjoy peremptory norm status seem to be much larger than Crawford's pool, and closer to the Condorelli and Chazournes position.

Theodor Meron has opined that the "Geneva Conventions already contain some norms that can be regarded as *jus cogens*."[92] Meron suggests that "basic rights" in the Geneva Conventions and "especially Common Article 3" create *erga omnes* obligations (when read in conjunction with Common Article 1's ex-

---

87 Sassòli, *supra* note 66, at 413-14 (explaining that "[i]t would be beyond the scope of this article to analyse which rules of international humanitarian law are basic enough to belond to *jus cogens*."); *see also* Frowein Jus Cogens, *supra* note 11, at ¶ 6 (as Frowein explains "the ICJ gave examples of obligations *erga omnes* which by their nature must also form part of *ius cogens*.").

88 Sassòli, *supra* note 66, at 420.

89 *Id.* at 413-14 (citing L. Condorelli and L. Boisson De Chazournes, *Quelques remarques à pro- pos de l'obligation des États de 'respecter et faire respecter' le droit international humani- taire en toutes circonstances, in* STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES IN HONOUR OF JEAN PICTET 33-34 (1984)).

90 *Id.* at 414 (citing ICJ Barcelona Traction, *supra* note 16, at ¶ 34).

91 JAMES CRAWFORD, STATE RESPONSIBILITY: THE GENERAL PART 380 (2013). This is keeping in mind that Crawford cites the ICJ's ambiguous language from *Nuclear Weapons. See also* CRAWFORD, at 694-95.

92 THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 9 (1991) [hereinafter Meron (1991)]; *see also* Theodor Meron, *The Geneva Conventions as Customary Law,* 81 AM. J. INT'L L. 348, 350 (1987) [hereinafter Meron (1987)].

ternal obligation to "ensure respect").[93] This seems to find common ground with both Sassòli's and Crawford's thinking. However, Meron's inference to the "basic rights" are those primarily in Common Article 3, in addition to possible others. He states that "the prohibitions of murder, mutilation and torture, mentioned in Article 3(1)(a)" are *jus cogens*.[94] He comes to this conclusion based on the view that contractual norms are crystallized "into a principle of customary law and culminates in its elevation to *jus cogens* status."[95] This interpretation is seemingly in line with Lagerwall's analysis. His reasoning is as follows:

> The development of the hierarchical concept of *jus cogens* reflects the quest of the international community for a normative order in which higher rights are invoked as particularly compelling moral and legal barriers to derogations from and violations of human rights.[96]

Navia-Nieto entertains the possibility of adding the "grave breaches" of the four Geneva Conventions to the mix, which require penal sanctions and investigations and prosecutions for certain violations.[97] However, he explains that

> [a]lthough it can be suggested that there is a strong presumption that at least the 'grave breaches' provisions of the four Geneva Conventions have gained peremptory status, it has also been acknowledged that many of the norms contained within the conventions do not fulfil the criteria which are necessary for such a norm to be considered as *jus cogens*.[98]

Navia-Nieto believes, like Meron, that Common Article 3, paragraphs one and two, are what may be "*truly* peremptory in nature."[99] The common theme between these scholars is the grouping of "basic rules/rights." This finds its place in Common Article 3 to the four Geneva Conventions with the possibility of others. While Common Article 3 was originally focused on non-international armed con-

---

[93] *See* Meron (1991), *supra* note 92, at 31; *see also* Meron (1987), *supra* note 92, at 355.

[94] Meron (1991), *supra* note 92, at 31; *see also* Meron (1987), *supra* note 92 (finding Meron does not provide the examples in his earlier piece).

[95] Meron (1991), *supra* note 92, at 8-9 (he also cites a previous text where, in reference to the US Foreign Relations Law, where *jus cogens* norms "contents will be established through general custom or by universal or quasi-universal agreements" (citing THEODOR MERON, HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS: A CRITIQUE OF INSTRUMENTS AND PROCESS 194 (1986)).

[96] Meron (1991), *supra* note 92, at 9.

[97] *See* Navia-Nieto (2003), *supra* note 22, at 636; *see also How "Grave Breaches" are Defined in the Geneva Conventions and Additional Protocols*, ICRC (June 4, 2004), https://www.icrc.org/en/doc/resources/documents/faq/5zmgf9.htm (noting the Fourth Geneva Convention provides the following "Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.").

[98] Navia-Nieto (2016), *supra* note 9, at 68 (citing LAURI HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW 605-606 (1988) (internal citation omitted)).

[99] Navia-Nieto (2016), *supra* note 9, at 68.

flicts, the approaches of the ICJ in *Nicaragua* and of the ICRC provide that these are clearly the minimum to be applied in all armed conflicts.[100] This is what the ICJ refers to as "fundamental general principles" of IHL in *Nicaragua*,[101] as drawn from Common Article 3.[102]

Navia-Nieto concludes that "based on a *strict* interpretation of the concept, it is suggested that many of the [Geneva Conventions] provisions cannot *truly* be described as *jus cogens*."[103] This seems to be largely based on Navia-Nieto's concerns with the possibility of denunciation or reservations and based entirely on treaty law. Yet, it should be noted that the Geneva Conventions do not allow for separate agreements that would adversely affect protected persons. Sassòli compares, for example, *jus cogens* vis-à-vis the law of treaties on the one hand,[104] and the prohibition of "separate agreements that adversely affect the situation of protected persons."[105] There is very little room to argue that IHL rules enjoying customary status are derogable. Laura Hannikainen argues that several factors in the Geneva Conventions seem to satisfy the peremptory norms criteria. These include: the absolute nature of many provisions; the prohibition on special agreements and denunciations contrary to its protections; the invalidity of renunciations; and the (near) universality of ratifications/accessions.[106] Yet, Navia-Nieto overlooks these considerations, explaining in a footnote, that Hannikainen also recognizes that "the number of norms fulfilling all the criteria is not necessarily very small, even if limited."[107]

A conservative view of IHL rules as peremptory norms revolves around what can be considered "basic rules." However, jurisprudence and literature tell us little about what the basic rules are. Some have included Common Article 3 to the Geneva Conventions as a baseline, with some other considerations, assuming their application to both non-international and international armed conflicts. A broader view includes the grave breaches regime. An even broader view says that most, if not all (or perhaps the ICJ's "great many") IHL rules that enjoy customary status (like those outlined in the ICRC study) are peremptory, on the basis of their non-derogability.

---

[100] *See* Navia-Nieto (2016), *supra* note 9, at 69-70; *see also* Meron (1991), *supra* note 92, at 33; *see also* ICJ Nicaragua, *supra* note 27, ¶ 218-20.

[101] *See* Gardham, *supra* note 54, at 355; *see also* ICJ Nicaragua, *supra* note 27, ¶ 218.

[102] *See* Gardham, *supra* note 54, at 356; *see also* ICJ Nicaragua, *supra* note 27, ¶ 219.

[103] Navia-Nieto (2016), *supra* note 9, at 70 (emphasis in original) (including other provisions within the Geneva Conventions, Additional Protocols, and other IHL instruments "which reflect the principles contained within common Article 3"). *See also* Navia-Nieto (2003), *supra* note 22, at 640 (finding between the two pieces, Navia-Nieto's position remains similar).

[104] *See* Sassòli, *supra* note 66, at 414 (citing VCLT, *supra* note 9, at art. 53.).

[105] Sassòli, *supra* note 66, at 414 (citing arts. 6/6/6 & 7, respectively, of the four Geneva Conventions).

[106] *See* Hannikainen, *supra* note 98, at 605-06.

[107] Navia-Nieto (2003), *supra* note 22, at 636, n.170; *see also* Navia-Nieto (2016), *supra* note 9, at 68.

B. Applying the Definition and Criteria

As mentioned, the academic discourse draws its similarities and differences, with some conclusions more stringent than others, and with varying degrees of rigor. Of course, it should be noted that parts of the discourse are somewhat outdated, considering the lengths of progressive development and codification of international law over the past few decades.

Generally speaking, it should be noted that the four Geneva Conventions are virtually universal, with 196 High Contracting Parties, while Additional Protocol I includes 174, and Additional Protocol II includes 169. A significant portion of the Geneva Conventions is customary, as are part of the Additional Protocols.[108] The many IHL rules, particularly those that are both convention and customary, are non-derogable. These include those that the ICRC customary study classifies under the categories of: the principle of distinction; specifically protected persons and objects; specific methods of warfare; weapons; the treatment of civilians and person *hors de combat*; and implementation.[109]

On derogation, there is the question of the extent of denunciation and reservations within the Geneva Conventions; yet, even these should not undermine the underlying non-derogability of these rules.[110] For example, it is clear that there are no conditions whatsoever that would enable a State to commit torture during armed conflict. Torture in armed conflict is prohibited, with no exception, just like its prohibition under international human rights law ("IHRL").[111] However, one must be cognizant of those rules that have wiggle room, such as with respect to considerations of military necessity. Applying the VCLT definition and criteria would find difficulty where, for example, the destruction and seizure of property of an adversary is concerned.[112] The prohibition is not absolute, given that destruction or seizure can occur when required by imperative military necessity. However, the essence of the rule, minus the imperative, may also be considered non-derogable.

Drawing from the language of the ICJ in *Nuclear Weapons*, we can consider two particular rules: (1) distinction; and (2) prohibition on weapons of a nature to cause superfluous or unnecessary suffering. The broad concept of distinction can be expanded into several rules, such as the prohibitions on indiscriminate attacks, precautions, proportionality, and others. The specific rule of distinction—between civilians and combatants—would find no issues relating to its customary

---

[108] *See generally* ICRC Customary IHL, *supra* note 6; *see also* Navia-Nieto (2016), *supra* note 9, at 67 ("In any event, many of the terms of the conventions are considered to constitute customary international law").

[109] *See generally* ICRC Customary IHL, *supra* note 6.

[110] *See* Navia-Nieto (2016), *supra* note 9, at 68.

[111] *See Rule 90: Torture and Cruel, Inhuman or Degrading Treatment*, ICRC, IHL DATABASES, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule90 (last visited May 19, 2023). Torture has been regularly referred to as a peremptory norm, without reference to either body of law.

[112] *See Rule 50: Destruction and Seizure of Property of an Adversary*, ICRC, IHL DATABASES, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule50 (last visited May 19, 2023).

status.[113] This principle—which is not specifically referred to in either the Hague Regulations or Geneva Conventions—finds its codification in articles 48, 51(2), and 52(2) of Additional Protocol I.[114] Moreover, there is no possibility of derogation.[115] With respect to unnecessary suffering, the same arguments and logic apply with respect to its specificity (or lack thereof), customary status, and non-derogability.[116] As explained, while the ICJ did not use the term "peremptory" *per se* to discuss these specific IHL rules, the ILC interprets the ICJ conclusions to mean just that.[117] The jurisprudence has broadly implied different sets of IHL rules as constituting peremptory norms creating *erga omnes* obligations through general language, without identifying each specifically.

Peremptory norms should generally encompass IHL rules that meet the VCLT definition and criteria. If we consider the arguments for Common Article 3, grave breaches, or distinction and unnecessary suffering based on *Nuclear Weapons*, how would it be any different than applying VCLT article 53 to, the range of IHL rules on, for example: those falling under the concept of distinction; rules pertaining to specifically protected persons (medical, humanitarian, *etc.*); certain methods of warfare; certain weapons; and others? It would be a futile exercise to assume that because of the diversity of IHL rules, it would be difficult to recognize certain norms as peremptory as opposed others, particularly those that are considered to have customary status and are non-derogable. Consider IHRL, which includes several broad provisions in various treaties, such as prohibitions on the denial of the right to self-determination, torture, arbitrary deprivation of life, and slavery. These have all assumed peremptory norm status.[118] Of course, while the context of a specific violation may be argued, it would not, as such, challenge the essence of the particular rule. These are not unlike IHL rules on hostilities or specifically protected humanitarian workers within the Geneva Conventions and Additional Protocols. The ICCPR, for example, includes a number of these IHRL rules, but never once mentions their peremptory norm status.[119] The same logic can, and should be, applied to various Geneva Conventions provisions, to say the least.

Complementing the authoritative determinations and academic discourse, one can use the example of the principle of distinction and related principles applica-

---

[113] *See Rule 1: The Principle of Distinction between Civilians and Combatants*, ICRC, IHL DATABASES, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule1 (last visited May 19, 2023).

[114] *Id.; see also Practice Relating to Rule 1. The Principle of Distinction between Civilians and Combatants*, ICRC, IHL DATABASES, https://ihl-databases.icrc.org/customary-ihl/eng/docs/_rul_rule1 (last visited May 19, 2023).

[115] *See generally Practice Relating to Rule 1*, *supra* note 114 (emphasis on ICTY cases therein).

[116] *See Rule 70: Weapons of a Nature to Cause Superfluous Injury or Unnecessary Suffering*, ICRC, IHL DATABASES, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule70 (last visited May 19, 2023). One difference to be noted here are the specific prohibitions on specific weapons in other treaties. *See generally,* ICRC Customary IHL, *supra* note 6 (stating rules on various weapons, including those weapons that are indiscriminate, poisonous, nuclear, biological, chemical, *etc.*).

[117] *See* ARSIWA ILC Commentaries, *supra* note 18, at 113.

[118] See the discussion above.

[119] See the discussion above.

ble to situations of hostilities. As mentioned, the key language on distinction is to be found in Additional Protocol I.[120] The same goes for related principles pertaining to the prohibition on indiscriminate attacks,[121] proportionality in attacks,[122] and precautions in attack.[123] Of course, each of these has a history of developing the core principle, but the essence of these rules are prescribed in Additional Protocol I rather than the Geneva Conventions. These rules enjoy customary status, and do not allow for the possibility of derogation, although specific attacks may be argued with varying interpretations. Nevertheless, the rules pertaining to distinction are relied upon by the ICJ, ILC, and scholars for the purpose of arguing for their peremptory norm status. There are no bright lines, but a reliance on how they perceive those rules in terms of consensualism and double consent.

One should also consider the fact that IHL rules are regularly violated. While most, if not all, States would agree on particular peremptory norms, it does not mean that they are not seriously breached in quite numerous and various contexts. Regardless of these breaches, compared to IHL, third State measures on these peremptory norms have stricter requirements. When the obligations of Common Article 1 are looked at within the scope of rules on State responsibility, third States may argue for stronger measures in like with the latter. In fact, the updated commentaries on the Geneva Conventions attempt to do just that (as explained in the next sub-section).

The ICRC unfortunately does not delve into the legal character of the rules it considers as peremptory norms. Instead, it broadly reviews the extent of Common Article 1, and translating the obligation to "ensure respect" into *erga omnes* obligations.[124] The ICRC is not—although it should have been—explicit in tying *erga omnes* with peremptory norms. Otherwise, then, it would seem that *erga omnes* is a much, much broader concept that the one that is typically tied to peremptory norms.[125] Perhaps the ICRC's hesitancy may be explained by the protective nature of IHL lawyering and its hesitancy in "conflating" with the law on State responsibility. Perhaps it is the ICRC's somewhat unwavering, and perhaps naïve, reliance on the body of law that it serves. Perhaps it is an attempt to

---

[120] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protections of Victims of International Armed Conflicts arts. 48, 51(2), 52(2), 8 June 1977, 1125 UNTS 3 [hereinafter Additional Protocol I].

[121] *See Rule 11: Indiscriminate Attacks*, ICRC, IHL DATABASES, https://ihl-databases.icrc.org//eng/docs/v1_rul_rule11 (last visited May 19, 2023); *see also* Additional Protocol I, *supra* note 120, at art. 51(4).

[122] *See Rule 14: Proportionality in Attack*, ICRC, IHL DATABASES, https://ihl-databases.icrc.org//eng/docs/v1_rul_rule14 (last visited May 19, 2023); *see also* Additional Protocol I, *supra* note 120, at art. 51(5)(b).

[123] *See Rule 15: Principle of Precautions in Attack*, ICRC, IHL DATABASES, https://ihl-databases.icrc.org//eng/docs/v1_rul_rule15 (last visited May 19, 2023); *see also* Additional Protocol I, *supra* note 120, at art. 57(1).

[124] *See* ICRC, Customary IHL, *Erga Omnes, supra* note 6.

[125] *See generally* THOMAS WEATHERALL, JUS COGENS: INTERNATIONAL LAW AND SOCIAL CONTRACT 351-83 (2015); *see* Paolo Picone, *The Distinction Between Jus Cogens and Obligations Erga Omnes*, THE LAW OF TREATIES: BEYOND THE VIENNA CONVENTION 411 (Enzo Cannizaro ed., 2011).

link *erga omnes* with the body of law as a whole, rather than specific rules. Nonetheless, the ICRC approach provides a convenient segue into the discussion on what may be the added value of arguing that IHL rules enjoy peremptory norm status. This answer is to be found in legal consequences—*i.e.*, the roles and responsibilities of third States—for violations of peremptory norms.

IV. Peremptory Norms as a Means of Compliance and Enforcement

This final section will explore the added value of finding that IHL rules enjoy peremptory norm status, thus creating *erga omnes* obligations. Generally, there should be no issue with Sassòli's belief that "perceived disrespect for IHL is worse than its actual disrespect."[126] Yet, the disrespect for IHL is real and the regime seems at times primitive and inefficient in dealing with violations. This might be due to a misconception that Common Article 1 provides a sufficient interpretation of the law on State responsibility for IHL purposes, or perhaps even a superior interpretation in light of its perceived primacy. This is certainly debatable. While it is progressing, Common Article 1 is still a *primitive* law when compared to the strides that the law of State responsibility has undertaken and continues to undertake. This is especially in light of jurisprudence to that effect. Moreover, while the ICRC presents a sophisticated, and significantly developed, interpretation of third State obligations vis-à-vis Common Article 1, it also exercises restraint.

In the *Wall* advisory opinion, the ICJ specifically called for the High Contracting Parties to the Fourth Geneva Convention to "ensure compliance" with that Convention.[127] Over the years, there have been several attempts to raise and address the gaps in IHL compliance and enforcement.[128] Yet, what does this actually mean in practice? The IHL system is full of problems – not from without, but from within. Reciprocity between warring parties, for example, cannot alone serve as a sufficient means of compliance or enforcement.[129] IHL cannot operate as a "self-contained" system capable of ensuring compliance and enforcement without the developed (and developing) jurisprudence on State responsibility.[130] The IHL treaties are, like their IHRL treaty counterparts, self-imposed by way of ratification or accession and subject to considerable deference. Where

---

[126] *See Is the Law of Armed Conflict in Crisis and How to Recommit to its Respect?*, ICRC (June 3, 2016), https://www.icrc.org/en/document/law-armed-conflict-crisis-and-how-recommit-its-respect.

[127] *See* ICJ Wall Advisory Opinion, *supra* note 51, ¶ 149.

[128] *See 31st International Conference 2011: Resolution 1 – Strengthening Legal Protection for Victims of Armed Conflicts*, ICRC, https://www.icrc.org/en/doc/resources/documents//31-international-conference-resolution-1-2011.htm (last visited May 19, 2023); *see generally* Rep. by Int'l Comm. Red Cross on the 28th International Conference of the Red Cross and Red Crescent, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, Switzerland, 03/IC/09, (Sep. 2003) https://www.icrc.org/en/doc/assets/files//__final_ang.pdf.

[129] *See generally Rule 140: Principle of Reciprocity*, ICRC, IHL DATABASES, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule140 (last visited May 19, 2023); BRYAN PEELER, THE PERSISTENCE OF RECIPROCITY IN INTERNATIONAL HUMANITARIAN LAW 3 (2019).

[130] *See* Sassòli, *supra* note 66, at 403-04 ("To hold that [IHL] may be implemented only by its own mechanisms would leave it as a branch of law of a less compulsory character and with large gaps"). Sassòli weighs the pros and cons of both legal regimes throughout the piece.

IHRL obligations find their limits, peremptory norm status creates an additional layer in compliance and enforcement through third State scrutiny (*e.g.*, on torture, racial discrimination, denial of the right to self-determination, *etc.*). Through convergence, third States are given a stronger, and more stringent legal basis to act. As is well known, the rules on State responsibility demand not only non-recognition and non-aid or assistance, but international cooperation that is *both* individual and collective. IHL, in that sense, should not be seen unlike IHRL.

So, what difference would it make if particular IHL rules were treated as peremptory norms? What is offered here is a comparative view of the IHL and State responsibility regimes, in terms of secondary rules for third States. This addresses how third States play a role in compliance and enforcement vis-à-vis the IHL and State responsibility regimes – and how the former *necessitates* the latter. The arguments for roles and responsibilities of third States in IHL have certainly evolved over time. Much of this has been dependent on broadening the narrow scope of Common Article 1. The "external dimension" of the obligation to "ensure respect" was not really a fundamental aspect of Common Article 1, which more catered to an "internal dimension" when the Geneva Conventions were adopted.[131] This is, for the most part, a more recent evolution and far from its peak. More contemporary interpretations of Common Article 1 heavily depend on the law of State responsibility to re-interpret its scope. This has further developed IHL beyond its primitive nature.

Over time, IHL has moved to expand the scope of third State obligations by way of Common Article 1. First, there are the *negative* obligations. In line with contemporary IHL interpretations, the updated ICRC commentaries explain that third States have an obligation to neither encourage nor aid or assist in violations of conventions, despite its textual absence.[132] This language is not owed to IHL, but to the law on State responsibility. Interestingly, in the context of negative obligations, the ICRC commentaries explain that

> Common Article 1 and the rules on State responsibility thus operate at different levels. The obligation to ensure respect for the Conventions is an autonomous primary obligation that imposes more stringent conditions than those required for the secondary rules on State responsibility for aiding or assisting. What is at stake is more than aid or assistance to violations of the rules of international law but concerns aid or assistance to violations of rules whose observance the High Contracting Parties have specifically undertaken to respect and ensure respect for. Financial, mate-

---

[131] *See* Theo Boutruche & Marco Sassòli, *Expert Opinion on Third States' Obligations Vis-à-Vis IHL Violations Under International Law, with a Special Focus on Common Article 1 to the 1949 Geneva Conventions* (Nov. 8, 2016).

[132] *See Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949, Commentary of 2016,* ICRC, IHL DATABASES, ¶¶ 154, 158-63, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=OpenDocument&documentId=72239588AFA66200C1257F7D00367DBD [hereinafter ICRC Updated Commentaries] (this is drawn from the commentaries to the Third Geneva Convention, as the provision is identical throughout the four Geneva Conventions).

> rial or other support in the knowledge that such support will be used to commit violations of humanitarian law would therefore violate common Article 1, even though it may not amount to aiding or assisting in the commission of a wrongful act by the receiving States for the purposes of State responsibility.[133]

This seems to be a narrow reading of ARSIWA Article 16, and removed from the language of articles 40 and 41 on peremptory norms.[134] As Harriet Moynihan explains, the reality of the mental element "may lie somewhere in between" knowledge and intent.[135] Moreover, with respect to peremptory norms, a showing of knowledge or intent is unnecessary.[136] As the ILC commentaries explain, while ARSIWA Article 16 "presupposes that the State has 'knowledge of the circumstances of the internationally wrongful act'. . .[t]here is no need to mention such a requirement in [Article 41(2)] as it is hardly conceivable that a State would not have notice of the commission of a serious breach by another State."[137] Thus, it would appear that the ICRC paradoxically narrows the scope of the rules on State responsibility, distancing itself from peremptory norms, while broadening scope of Common Article 1 vis-à-vis those very rules. While the primary rules are to be found in conventional and customary IHL, the regime offers little without the secondary rules in terms of how States are to interpret their negative obligations under IHL. Further, the ICRC's updated commentaries offer little to show anything of significant relevance to contemporary perceptions of third State roles and responsibilities vis-à-vis the Geneva Conventions (and IHL generally).

The ICRC then adds that "under general international law, States have an obligation not recognize as lawful a situation created by a serious breach of peremptory norms of international law and not to render aid or assistance in maintaining such a situation."[138] For IHL, despite the textual absence once again, the ICRC adds

> These obligations are relevant for the Geneva Conventions inasmuch as they embody norms from which no derogation is permitted. In its 2004 Advisory Opinion in the *Wall* case, the International Court of Justice seems to have linked the same obligations with Article 1 of the Fourth Convention. These obligations can be seen, moreover, as a corollary of

---

133 ICRC Updated Commentaries, *supra* note 132, at ¶ 160 (identifying that the ICRC, the utility of Common Article 1 is that there is no *intent* requirement, while the rules on State responsibility require intent); *see also id.* at ¶ 159.

134 ARSIWA ILC Commentaries, *supra* note 18, at art. 16 ("A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.").

135 Harriet Moynihan, *Aiding and Assisting: The Mental Element Under Article 16 of the International Law Commission's Articles on State Responsibility*, 71 INT'L COMP. L. Q. 455, 471 (2018) (and further conclusions).

136 *See id.* at 470.

137 ARSIWA ILC Commentaries, *supra* note 18, at 115.

138 ICRC Updated Commentaries, *supra* note 132, at ¶ 163.

> the duty neither to encourage nor to aid or assist in the *commission* of violations of the Conventions.[139]

As such, the ICRC commentaries refrain from exploring the status of IHL rules as peremptory norms and, subsequently, the more stringent measures offered by the rules on State responsibility. The ICRC cautiously explains that the ICJ "seems to have linked" the obligations of non-recognition and non-aid and assistance with Common Article 1. Yet, this seems to be a stretch. Given the nature of the ICRC's interpretation of Common Article 1, it is unfortunate that its commentaries end there. The ICRC could have engaged in an analysis that builds upon ICJ, ILC, and other determinations but, for one reason or another, chose otherwise.

In addition to negative obligations, there are also the *positive* obligations. As per the ICRC, States are to do everything reasonably within their power to bring an end to violations, and prevent them from occurring.[140] However, States are "free to choose between different possible measures, as long as those adopted are considered adequate to ensure respect."[141] These are obligations of *means*, and not of *results*, to be carried out with *due diligence*.[142] States are not scrutinized then because a desired result was not achieved; rather, they are if they failed to take all measures within their power to achieve the desired result.[143] As explained by the ICRC, the required *due diligence* varies according to various contextual factors: "its content depends on the specific circumstances, including the gravity of the breach, the means reasonably available to the State, and the degree of influence it exercises over those responsible for the breach."[144] This explanation is drawn from minimal authority[145] and instead, the ICRC explains that a "similar due diligence obligation exists under Article 1 of the 1948 Genocide Convention."[146] For third States not party to an armed conflict involving IHL violations, a singular approach that neglects convergence with the rules on State responsibility gives them little to work with. The law on State responsibility, in many ways a homogenization of international law's secondary rules, is kept at a distance.

Under IHL, there are limits to the measures that can be adopted. Common Article 1 does not provide clear grounds to adopt measures and is unclear in terms of specificity. In theory, measures adopted should be proportionate to the violation they are meant to end. Since Common Article 1 does not establish pri-

---

139 ICRC Updated Commentaries, *supra* note 132, at ¶ 163.

140 *Id.* at ¶¶ 164-65.

141 *Id.* at ¶ 165.

142 *Id.*

143 *See* Knut Dörmann & Jose Serralvo, *Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations*, 96 INT'L REV. RED CROSS, 707, 724 (2014).

144 ICRC Updated Commentaries, *supra* note 132, at ¶ 165.

145 *Id.* (and sources cited therein).

146 *See id.* at ¶ 166; *see also* Dörmann & J. Serralvo, *supra* note 143, at 725; *see also* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶ 430 (Feb. 26).

macy between collective and individual measures, States can "pick-and-choose" among a wide range of measures to be taken individually, by a group of States or within the framework of international organizations. These can include: friendly and diplomatic (weaker) measures, such as diplomatic dialogue and exerting diplomatic pressure by means of confidential protests or public denunciations; and also stronger measures, such as applying measures of retorsion, adopting lawful countermeasures, conditioning, limiting or refusing arms transfers, and referring the issue to a competent international organization (*e.g.*, through the UN Security Council or General Assembly).[147] Overall, the ICRC's approach is based on a collection of scattered and inconsistent State practice. While admirable, it can be reduced to practically nothing. By all means, the greater the political relationship between the offending State and the third State, the "friendlier" the measures may be. Of course, all this is not to say that a thorough and progressive reading of Common Article 1 and its external dimension is not of profound importance – particularly in light of IHL's compliance and enforcement gaps. Rather, it is to say Common Article 1, again, *necessitates* convergence with the rules on State responsibility.

When it comes to serious breaches of peremptory norms, the ARSIWA defines a specific set of third State obligations. ARSIWA Article 41 determines that when a serious[148] breach of a peremptory norm occurs, all States are obliged not to *recognize* as legal any effect of the violation, nor to *aid* or *assist* in the commission of the violation, and to positively *cooperate* to bring an end to the violation.[149] In terms of non-assistance, this "extends not only to assistance in the commission of the breach, but assistance in maintaining an internationally unlawful situation that may result."[150] Thus, the "obligation not to assist the responsible State is limited to acts that would assist in preserving the situation created by the breach."[151] While not specifically an obligation, "a State may legitimately avoid all types of international co-operation with the responsible State if it so wishes."[152] As Crawford notes, the qualification of a situation as unlawful is but a first step to bring an unlawful situation to an end.[153] As such, "[a]n authoritative prior determination as to the nature of the wrongful act is desirable, if not a necessity, if the obligation to cooperate is to be meaningful."[154] States should collectively bring to an end, through lawful means, an unlawful situation. This is a departure from the IHL "pick-and-choose" approach. Cooperation is key and,

147 A more specific list can be found in ICRC's updated commentaries to the four GCs; *see* ICRC Updated Commentaries, *supra* note 132, at ¶¶ 180-81.

148 "A breach will be considered 'serious' where 'it involves a gross or systematic failure by the responsible state to fulfil the obligation.'" Crawford, *supra* note 91, at 381.

149 *See* ARSIWA, *supra* note 3, at art. 41; *see also* Crawford, *supra* note 91, at 380.

150 Crawford, *supra* note 91, at 385.

151 Nina H. B. Jørgensen, *The Obligation of Non-Assistance to the Responsible States*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY 687, 691 (James Crawford, Alain Pellet & Simon Olleson eds., 2010).

152 *Id.*

153 Crawford, *supra* note 91, at 389.

154 Nina H. B. Jørgensen, *The Obligation of Cooperation*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY 695, 700 (James Crawford, Alain Pellet & Simon Olleson eds., 2010).

as the ILC ARSIWA commentaries explain "such cooperation. . . is often the *only* way of providing an effective remedy." [155] This is in addition to that fact that *all* States may invoke the responsibility of another States for breaches of obligations owed to the international community as a whole (*i.e.*, individual measures).[156] In Sassòli's discussion of State responsibility for IHL violations,[157] he opines:

> Rules on State responsibility, in particular as codified by the ILC, are exclusively addressed to States individually and as members of the international society. Their possible impact on better respect for [IHL] should therefore not be overestimated, especially not when compared to the preventive and repressive mechanisms directed at individuals.[158]

Similarly, if we were to look at IHRL treaties—take the Convention Against Torture—we may come to the same conclusion. There, we find that in conjunction with conventional and customary IHRL, we can treat State responsibility as separate from the particular provisions pertaining to the "preventive and repressive mechanisms directed at individuals."[159] Here, we must clearly differentiate between State responsibility and individual criminal responsibility. Sassòli then adds that the ARSIWA and its commentaries "do clarify, however, many important questions concerning implementation of international humanitarian law and may therefore help to improve the protection of war victims by States."[160] Here, Sassòli favors convergence, arguing that "through the combined mechanisms of international humanitarian law and of the general rules on State responsibility, all other States are able and are obliged to act when violations occur" and that the ARSIWA "applied to international humanitarian law violations, remind us that all States can react lawfully and clarify to a certain extent what States should do."[161]

For the ICRC, ensuring respect for IHL is an *erga omnes* obligation.[162] However, the ICRC makes no mention of IHL rules as constituting peremptory norms. For the ARSIWA, where peremptory norms are concerned, a State owing *erga omnes* obligations may invoke the responsibility of another State for breaching those obligations.[163] Neither the Geneva Conventions nor the Additional Protocols offer that extent of the possibility. Where Common Article 1 has been inter-

---

155 *See* ARSIWA ILC Commentaries, *supra* note 18, at 114 (emphasis added).

156 *See* ARSIWA, *supra* note 3, at art. 48; *see also* ARSIWA ILC Commentaries, *supra* note 18, at 127; *see also* ARSIWA, *supra* note 3, at art. 54; *see also* ARSIWA ILC Commentaries, *supra* note 18, at 137-39.

157 *See* Sassòli, *supra* note 66, at 402.

158 *See id.* at 433.

159 *See* Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment arts. 4-9, Dec. 10, 1984, 1465 U.N.T.S. 85.

160 *See* Sassòli, *supra* note 66, at 433.

161 *Id.*

162 *See* ICRC, Customary IHL, Erga Omnes, *supra* note 6.

163 *See* ARSIWA, *supra* note 3, at arts. 33, 42, 48, and 54; *see also* Frowein Erga Omnes, *supra* note 16, at ¶ 9.

preted as encompassing IHL rules as creating obligations *erga omnes*,[164] the ARSIWA clearly creates this obligation. Additional Protocol I Article 89 is more expansive in that it provides that "[i]n situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter."[165] Overall, it is argued here that ARWISA cooperation obligations are much broader and should not be seen as a choice between individual and collective measures.

Tladi reiterates the ARSIWA language. In terms of the particular consequences of serious breaches of peremptory norms:

> 1. States shall cooperate to bring to an end through lawful means any serious breach by a State of an obligation arising under a peremptory norm of general international law (*jus cogens*).
>
> 2. No State shall recognize as lawful a situation created by a serious breach by a State of an obligation arising under a peremptory norm of general international law (*jus cogens*), nor render aid or assistance in maintaining that situation.
>
> 3. A breach of an obligation arising under a peremptory norm of general international law (*jus cogens*) is serious if it involves a gross or systematic failure by the responsible State to fulfil that obligation.
>
> 4. This draft conclusion is without prejudice to the other consequences that a serious breach by a State of an obligation arising under a peremptory norm of general international law (*jus cogens*) may entail under international law.[166]

Given IHL's development, it is possible that Common Article 1's external dimension (*i.e.*, ensuring respect) can have greater significance. However, this is still a work in progress and, much of this owes itself to the rules on State responsibility. The convergence of these two regimes would offer much to contemporary situations of armed conflict. For one, where IHL rules also constitute peremptory norms, there is a stronger legal basis to act and both collectively *and* individually. Moreover, in line with *erga omnes* obligations, *all* States have a legal interest and, as such, an obligation to take action. The IHL regime is still very much a primitive regime, particularly where this concerns the roles and responsibilities of third States. Where IHL rules are treated as peremptory norms, an additional, and more sophisticated and meaningful, layer of responsibilities and obligations comes into play. The IHL regime's "pick-and-choose" approach neither holds ground in terms of its effectiveness, nor its limited view of non-recognition. Of course, as Sassòli explains "[a]lthough there unquestionably has to be the necessary political will, the need to respect and ensure respect for inter-

---

[164] *See* Sassòli, *supra* note 66, at 426.

[165] *Id.* at 428-430.

[166] *See* Tladi ILC Report, *supra* note 73, at 54 (draft conclusion 19).

national humanitarian law is not a matter of politics, but rather a matter of law."[167] Nevertheless, a convergence between Common Article 1 and the rules on State responsibility is suggested. A convergent model would necessitate international cooperation and not leave third State action to a makeshift list of suggestions.

V. Conclusions

This paper argues for treating IHL rules as peremptory norms of international law. In particular, it explains that IHL rules that are both conventional and customary, and are non-derogable, should meet the definition and criteria of peremptory norms as provided by the VCLT. Here, it is preferred, although not necessary, that the rule is derived from treaty-plus-custom. This should not be controversial, particularly where there is consensualism and double consent. While the ICJ has exercised restraint in identifying IHL rules as peremptory norms, the ILC and several publicists have understood the ICJ's language as meaning that IHL rules enjoy peremptory norm status, especially where linked to *erga omnes* obligations. It is time to move beyond the generalities of referring to the "basic rules of IHL" as constituting peremptory norms.

Unfortunately, much of the literature has not undergone a rigorous application of the VCLT definition and criteria to IHL rules. At the same time, determinations have not done the same for other peremptory norms of international law, such as the denial of the right to self-determination, racial discrimination, and apartheid, as well as others. The "great many" IHL rules determined as having customary status, such as those listed by the ICRC, include no possibility of derogation, even in situations of withdrawal or denunciation from an IHL treaty, like the Geneva Conventions. While this is not to say that there can be varying interpretations in specific cases, the essence of the rules remains. Applying the VCLT criteria to these rules, with the support of international jurisprudence on IHL rules as peremptory norms, creates a convincing argument.

In terms of legal consequences, the primitive nature of the IHL regime has only been developed through an interpretation guided by the law and rules on State responsibility. In effect, the rules on State responsibility create a legal basis for stronger, more stringent measures, particularly international cooperation, in dealing with violations of IHL rules considered to have peremptory norm status. A convergent model between IHL and the rules of State responsibility is suggested, and even necessary. It shifts away from the "pick-and-choose" model of individual and collective measures collected from an inconsistent and a scattered State practice. While the peremptory norm club has largely remained exclusive, there are, in fact, a "great many" IHL rules that satisfy the criteria for membership. Practice, scholarship, and jurisprudence should not shy away from backing their membership, and award them the benefits of that club (*i.e.*, third State responsibility).

---

[167] *See* Sassòli, *supra* note 66, at 433.

HEINONLINE

DATE DOWNLOADED: Wed Aug 2 20:02:45 2023
SOURCE: Content Downloaded from HeinOnline

Citations:
Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

Bluebook 21st ed.
Diana Ramirez, Comparative Immigration Policies for Unaccompanied Minors: A Shared Challenge, 19 LOY. U. CHI. INT'l L. REV. 157 (2023).

ALWD 7th ed.
Diana Ramirez, Comparative Immigration Policies for Unaccompanied Minors: A Shared Challenge, 19 Loy. U. Chi. Int'l L. Rev. 157 (2023).

APA 7th ed.
Ramirez, D. (2023). Comparative immigration policies for unaccompanied minors: shared challenge. Loyola University Chicago International Law Review, 19(2), 157-186.

Chicago 17th ed.
Diana Ramirez, "Comparative Immigration Policies for Unaccompanied Minors: A Shared Challenge," Loyola University Chicago International Law Review 19, no. 2 (Spring 2023): 157-186

McGill Guide 9th ed.
Diana Ramirez, "Comparative Immigration Policies for Unaccompanied Minors: A Shared Challenge" (2023) 19:2 Loy U Chi Int'l L Rev 157.

AGLC 4th ed.
Diana Ramirez, 'Comparative Immigration Policies for Unaccompanied Minors: A Shared Challenge' (2023) 19(2) Loyola University Chicago International Law Review 157

MLA 9th ed.
Ramirez, Diana. "Comparative Immigration Policies for Unaccompanied Minors: A Shared Challenge." Loyola University Chicago International Law Review, vol. 19, no. 2, Spring 2023, pp. 157-186. HeinOnline.

OSCOLA 4th ed.
Diana Ramirez, 'Comparative Immigration Policies for Unaccompanied Minors: A Shared Challenge' (2023) 19 Loy U Chi Int'l L Rev 157 Please note:
citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at https://heinonline.org/HOL/License
-- The search text of this PDF is generated from uncorrected OCR text.
-- To obtain permission to use this article beyond the scope of your license, please use: Copyright Information

Comparative Immigration Policies for Unaccompanied Minors: A Shared Challenge

Diana Ramirez*

Abstract

Unaccompanied minors from the Northern-Triangle and Mexico have been arriving at the United States border in large numbers over the past decade as a result of forced migration movements. Although the arrival of unaccompanied minors is not a new phenomenon in the United States, recent administrations have responded in ways that have made the country's immigration system increasingly hostile towards them.

However, this issue is not exclusive to the United States. Unaccompanied minors traveling alone to Europe, Australia, South Africa, Canada, or the United States face similar dangers and are particularly vulnerable to abuse and trafficking. Regardless of jurisdiction, the treatment, care, and protection of the human rights of unaccompanied minors pose significant challenges. Around the world, unaccompanied minors are subject to similar human rights violations, and both international and domestic laws have proven to be ineffective in protecting them.

As long as countries prioritize the enforcement of their immigration laws, which are not designed to protect minors, the human rights and international standards of unaccompanied minors will continue to be violated as they migrate and seek asylum. It is crucial to recognize and address the unique needs and vulnerabilities of unaccompanied minors. Only then can we hope to ensure their safety and protect their fundamental human rights.

Table of Contents

* Associate Director for Graduate Programs and International Affairs and Adjunct Professor at the Elisabeth Haub School of Law at Pace University.

I. Introduction

Forced migration has caused millions of people around the world to be uprooted. The current migration crisis is one of the most profound and least understood global challenges of our time.[1] The most common factors for forced migration can be listed as follows: (1) various forms of persecution; (2) armed conflicts or heavy gang violence; (3) human rights violations; (4) inequality and poverty; (5) lack of protection of economic, social, and cultural rights; and (6) political instability, corruption, or insecurity in the region.[2]

Unaccompanied minors "are widely recognized as among the most vulnerable of all migrants, and yet their basic human rights are often neglected."[3] The development of international law has taken into consideration the multiple factors that

[1] GLOBAL FORCED MIGRATION, THE POLITICAL CRISIS OF OUR TIME, S. DOC. NO. 116 48, at (i) (2d Sess. 2020).

[2] *Human Mobility, Interamerican Standards: Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System*, Inter-Am. Comm'n H.R., Rep. No. 46/15, OEA/Ser.L/V/II, doc. 46, at 11, 12 (2015) [hereinafter *Human Mobility*].

[3] Michael J. Wynne, *Treating Unaccompanied Children Like Children: A Call for the Due Process Right to Counsel for Unaccompanied Minors Placed in Removal Proceedings*, 9 ELON L. REV. 431, 440 (2017).

lead unaccompanied minors to migrate, like situations of vulnerability and international protection needs.[4] For many, the right to leave is a prerequisite to secure protection against (anticipated) persecution and the enjoyment of human rights.[5]

Multiple international laws include provisions relevant to protecting the human rights of unaccompanied minors, including their dignity, health and well-being.[6] The Universal Declaration of Human Rights ("UDHR"), the International Covenant on Civil and Political Rights ("ICCPR"), the Convention on the Rights of the Child ("CRC"), and regional treaties outline fundamental freedoms and conditions that unaccompanied minors are entitled to enjoy.[7] These freedoms and conditions include the principles of the "best interests of the child" as a primary consideration in all decisions affecting the life of the child, the principle of non-refoulement,[8] the right to health, the right to due process, and the right to freedom from all forms of violence, among others.[9]

Yet, international standards remain far and unreachable in most domestic jurisdictions. As long as they keep putting the enforcement of their immigration laws first, the human rights of unaccompanied minors will still be violated.[10] The United States, Canada, Australia, South Africa, and some countries in the EU share similar problems. The absence of adequate legal representation; unreliable or harmful age determination procedures; the abusive use of detention, including punitive measures; and the failure to have child-appropriate proceedings taking into account unaccompanied minors' special vulnerability are all making immigration systems across the world increasingly hostile towards unaccompanied minors.[11]

The Refugee Convention of 1951 has no provision that specifically applies to migrant children, such as unaccompanied minors. However, the UNHCR Guidelines on International Protection for Child Asylum Claims provide legal interpretation and guidance to a child-sensitive application of the refugee definition. The Refugee Convention was designed after World War II, and therefore it reflects the concerns and thinking of a different period.[12] The time period in which the Refugee framework was created translates into a particularly striking disconnect

---

[4] *Human Mobility*, *supra* note 2, at ¶ 81.

[5] Marjoleine Zieck, *Refugees and the Right to Freedom of Movement: From Flight to Return*, 39 MICH. J. INT'L L., 19, 21 (2018).

[6] Janna Ataiants et al., *Unaccompanied Children at the United States Border, a Human Rights Crisis That Can Be Addressed with Policy Change*, J. IMMIGRANT & MINORITY HEALTH 1000, 1006 (2018).

[7] *Human Mobility*, *supra* note 2, at ¶ 83.

[8] Non-refoulement is a fundamental principle of international law that forbids a country receiving asylum seekers from returning them to a country in which they would be in likely danger of persecution based on race, religion, nationality, membership of a particular social group or political opinion.

[9] Ataiants, *supra* note 6.

[10] Bridgette A. Carr, *Incorporating a Best Interests of the Child Approach into Immigration Law and Procedure*, 12 YALE HUM. RTS. & DEV. L. J.,120, 159 (2009).

[11] Jacqueline Bhabha, *Children, Migration and International Norms*, *in* MIGRATION AND INTERNATIONAL NORMS 203, 218 (Alexander Aleinikoff & Vincint Chetail eds., TMC Asser Press 2003).

[12] NUALA MOLE, ASYLUM AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS 5, 6 (6th ed. 2000).

between law, policy and practice in regard to current issues.[13] The fact that similar problems were found in different jurisdictions leads to the conclusion that the complexity and scope of the forced displacement of unaccompanied minors call for efforts by the international community to formulate new policy responses.[14]

Currently, the main issues with the protection of unaccompanied minors' human rights in immigration proceedings include a lack of child-appropriate proceedings; concern for their life, dignity, and safety during detention; and concerns about due process and representation in immigration courts.[15] To comply with international standards and resolve these issues international and domestic law should ensure the following: (1) the addition of the principle of the "best interest of the child" to immigration legislation and policymaking; (2) stop the unnecessary and prolonged detention of unaccompanied minors; (3) reform the structure of immigration courts and proceedings to accommodate child-appropriate proceedings; (4) provide free legal counsel to unaccompanied minors; and (5) recognize other forms of social violence as a form of persecution.

II. Immigration Laws and Policies for Unaccompanied Minors Seeking Asylum in Europe

A. European Standards on International Law and Migration

Migration has always been common in Europe, but in recent years several member states of the European Union ("EU") have experienced the arrival of significant numbers of unaccompanied minors from non-European countries seeking refuge.[16] The core reasons for the rise of unaccompanied minors in Europe mirror in some capacity those expressed by children arriving at the United States border: better economic opportunities; family reunification; fleeing from violence, disturbance, civil conflicts or war; sexual and labor exploitation; and in some cases forced marriage and/or torture.[17]

Assessing the exact number and statistics for unaccompanied minors in Europe is a hard task since every member state has its own immigration ministry; the quality of statistics on unaccompanied minors varies significantly between

---

[13] Alison Luke, *Uncertain Territory: Family Reunification and the Plight of Unaccompanied Minors in Canada*, 16 DALHOUSIE J. LEGAL STUDS. 69, 79 (2007).

[14] Arthur C. Helton & Eliana Jacobs, *What Is Forced Migration?*, 13 GEO. IMMIGR. L. J., 521, 521-22 (1999).

[15] Maura M. Ooi, *Unaccompanied Should Not Mean Unprotected: The Inadequacies of Relief for Unaccompanied Immigrant Minors*, 25 GEO. IMMIGR. L. J. 883, 883 (2011); *see generally* Deborah S. Gonzalez, *Sky Is the Limit: Protecting Unaccompanied Minors by Not Subjecting Them to Numerical Limitations*, 49 ST. MARY'S L. J. 555 (2018); *see also* Samantha Casey Wong, *Perpetually Turning Our Backs to the Most Vulnerable: A Call for the Appointment of Counsel for Unaccompanied Minors in Deportation Proceedings*, 46 CONN. L. REV. 853 (2013); Zahra Lanewala, *Shifting Focus from Deportation of Unaccompanied Minors to Investing in Long-Term Reintegration Process*, 5 U. BALT. J. INT'L L. 124 (2016); Sarah J. Diaz, *Failing the Refugee Child: Gaps in the Refugee Convention Relating to Children*, 20 GEO. J. GENDER & L. 605, 620 (2019).

[16] GABRIELLA LAZARIDIS, SECURITY, INSECURITY AND MIGRATION IN EUROPE 138, 140 (1st ed. 2011).

[17] *Id.* at 143.

member states and the data from individual states is not necessarily comparable.[18] However, patterns show that most unaccompanied minors in Europe come mainly from Afghanistan, Iraq, Somalia, and the Syrian Arab Republic, and in lesser numbers from Eritrea, Turkey, Venezuela, Nigeria, and Iran.[19] The number of applications for international protection has significantly increased in the European Union over recent years, mostly related to the ongoing crisis in Syria.[20] The latest data published by UNICEF in 2018 showed that out of the 30,000 minors arriving in Europe—mostly through Italy, Greece, Bulgaria, and Spain—12,700 were separated or unaccompanied. Of these minors, 70 percent sought asylum mainly in three countries, Germany, France, and Greece, and in lesser numbers in Italy and the United Kingdom.[21] The top destination for separated and unaccompanied minors in Europe is still Germany, registering 43 percent of all child asylum applications in 2018.[22]

Understanding the relationship between international law and domestic law within the EU is important to establish the rights and protections of unaccompanied minors in the region. Recognition of fundamental rights as an integral part of the EU legal order implies that the member states have to respect these rights whenever they act within the scope of EU law (or, "when they are implementing Union law," as the Charter of Fundamental Rights puts it).[23] The Charter of Fundamental Rights of the European Union ("CFR") includes human rights standards and elements of the CRC, which are directly incorporated as obligations to all European Union member states.[24] The European Convention on Human Rights ("ECHR") provides an express regional recognition of most of the rights set out in the UDHR, but it does not contain any provision to reflect Article 14 of the Universal Declaration which guaranteed the right to seek and enjoy asylum from persecution.[25] It does, however, provide asylum seekers in the EU with a minimum standard framework of protection for their human rights.[26] It has been said by the European Commission that the protections for unaccompanied minors come from two sources: the standards of the EU Charter of Fundamental Rights,

---

[18] Alison Hunter, *Between the Domestic and the International: The Role of the European Union in Providing Protection for Unaccompanied Refugee Children in the United Kingdom*, 3 EUR. J. MIGRATION L. 383, 383-84 (2001).

[19] LAZARIDIS, *supra* note 16, at 143; U.N. Refugee Agency, UNICEF & U.N. Migration Agency, *Refugee and Migrant Children in Europe: Overview of Trends (January-December 2018)*, https://www.unicef.org/greece/sites/unicef.org.greece/files/2019-11/Refugee-and-migrant-response-service-mapping-data-report-january-december-2018.pdf (last visited Oct. 29, 2019) [hereinafter UNICEF].

[20] *See* European Migration Network, *(Member) States' Approaches to Unaccompanied Minors Following Status Determination* (2018).

[21] UNICEF, *supra* note 19.

[22] *Id.*

[23] Jurgen Bast, *Of General Principles and Trojan Horses – Procedural Due Process in Immigration Proceedings under EU Law*, 11 GER. L. J. 1006, 1009 (2010).

[24] MARY CROCK ET AL., PROTECTING MIGRANT CHILDREN: IN SEARCH OF BEST PRACTICE 239, 243 (Mary Crock & Lenni B. Benson eds., Edward Elgar Publishing 2018).

[25] MOLE, *supra* note 12, at 6.

[26] Hunter, *supra* note 18, at 386.

and the CRC.[27] On the jurisprudence side, the European Court on Human Rights ("ECtHR" or "European Court") has played a major role in establishing and interpreting human rights in refugee cases.[28]

B. The Significance of Children's Rights in the European Regional System to Award Special Protections to Unaccompanied Minors

While every state has its own agencies and institutions that deal with immigration issues, the EU widely recognizes that unaccompanied minors are especially vulnerable in accessing their rights and should therefore be additionally protected.[29] Personal dignity, the best interest of the child, and the unity of the family must be guaranteed by states when dealing with children who apply for international protection.[30] Along with Article 24 of the EU Charter of Fundamental Rights, which confers on states a duty of care for children, the Geneva Convention takes into account this special vulnerability of children and considers them a "social group" for persecution claims.[31] In those terms, the forms of prosecution targeted especially at children can include, for example, sexual exploitation, child abuse, and female genital mutilation.[32]

The European Council has acknowledged a connection between substantive and procedural rights, reasoning that unaccompanied minors require "specific procedural guarantees on account of their vulnerability."[33] Although vulnerability does not have an express legal basis in international human rights law, international human rights courts, particularly the ECtHR, have increasingly drawn on this concept in their jurisprudence. The Court has developed an important line of cases concerning migrant children, whom it considers particularly vulnerable to physical and mental harm during the migratory process.[34] It has deployed its conception of vulnerability in this regard, emphasizing that migrant children are in an extremely vulnerable situation as they are not only minors, but also aliens in an irregular situation in a foreign country who are not always accompanied by

---

[27] EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS & COUNCIL OF EUROPE, 2022 HANDBOOK ON EUROPEAN LAW RELATING TO THE RIGHTS OF THE CHILD 13 (2022).

[28] CROCK, *supra* note 24, at 243.

[29] LAZARIDIS, *supra* note 16, at 146.

[30] Parliamentary Assembly, *Improving the Quality and Consistency of Asylum Decisions in the Council of Europe Member States*, Res. 1695, at ¶ 8.3.4 (Nov. 20, 2009), https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17795&lang=en.

[31] Henriette D. C. Roscam Abbing, *Age Determination of Unaccompanied Asylum-Seeking Minors in the European Union: A Health Law Perspective*, 18 EUR. J. HEALTH L. 1, 11-12 (2011).

[32] EU Network of Independent Experts on Fundamental Rights, *Thematic Comment no. 4: Implementing the Rights of the Child in the European Union*, at 70-71 (May 20, 2006) (positing that because the EU considers itself bound by the Convention relating to the Status of Refugees of 18 July 1951 (Geneva Convention) and the New York Protocol relating to the Status of refugees of 31 January 1967, the instruments adopted by the Union in the field of asylum should be read in conformity with the Geneva Convention as interpreted by the United Nations High Commissioner for Refugees).

[33] Council Directive 2005/85, On Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, 2005 O.J. (L 326) 10, at ¶14 [hereinafter Council Directive 2005/85].

[34] Ana Beduschi, *Vulnerability on Trial: Protection of Migrant Children's Rights in the Jurisprudence of International Human Rights Courts*, 36 B.U. INT'L L. J. 1, 55 (2018).

an adult.[35] In addition, the principle of the best interests of the child is used as a complement to the concept of vulnerability by the European Court, which tends to combine both when deciding on issues relating to the protection of migrant children's rights.[36] In fact, in February of 2019, the European Court issued two judgments in which it reaffirmed that the respect for the double vulnerability of child asylum seekers must be the primary consideration and not just an equal factor such as their irregular status.[37]

C. The Right to Legal Representation for Unaccompanied Minors in Europe

Some countries in Europe also provide some degree of free representation to unaccompanied minors. While some appoint lawyers, others only appoint special representatives or social workers to help the unaccompanied minors frame their views during the immigration proceedings.[38] It is important to mention that the right to representation is different from the right to have free legal counsel. While it is true that even a non-lawyer representative may guarantee some level of expertise and care in a certain part of the process, they will never possess the necessary skills to navigate the often complicated asylum proceedings.[39] While this type of system does convey important rights, it "may not rise to the level of complexity that would require an attorney under human rights standards that govern the right to free legal counsel."[40]

Finland, Norway, Switzerland, Sweden, and the Netherlands all appoint, with some differences between each country, one or two representatives for unaccompanied minors; when two representatives are appointed, one will be an attorney and the other a personal representative. They both identify and advocate for the child's best interests but in different capacities. While the attorney will represent the unaccompanied minor in court, the personal representative will advocate for the child's best interest in issues like living arrangements or assist the minors at interviews with immigration authorities. In other countries, such as Austria, the United Kingdom, France, and Denmark, the right to representation is reserved exclusively for children seeking asylum.[41] The right to an appointed attorney at the expense of the government right holds an exception in Sweden, for cases where it is obvious that there are no reasons to believe an unaccompanied minor will gain his/her/their claim, representation will not be provided.[42]

---

[35] *See, e.g.*, *Popov v. France*, App. Nos. 39472/07 and 39474/07, Eur. Ct. H.R., ¶ 91 (2012); *Rahimi v. Greece*, Application No. 8687/08, Eur. Ct. H.R., ¶ 87 (2011); *Mayeka and Mitunga v. Belgium*, 2006-XI Eur. Ct. H.R, ¶ 103.

[36] Beduschi, *supra* note 34, at 71.

[37] *See generally Rahimi* v. *Greece*, App. No. 8687/08, Eur. Ct. H.R. (2011); *see also H.A. and Others v. Greece*, App. No.19951/16, Eur. Ct. H.R. (2019); *Khan v. France*, App. No. 12267/16, Eur. Ct. H.R. (2019).

[38] Shani M. King, *Alone and Unrepresented: A Call to Congress to Provide Counsel for Unaccompanied Minors*, 50 HARV. J. ON LEGIS. 331, 367 (2013).

[39] *Id.* at 370.

[40] *Id.* at 371.

[41] *Id.* at 367-68.

[42] *Id.* at 368-69.

The existing policies and legislation in the EU provide a general framework for the protection of the rights of the child in migration, covering aspects such as reception conditions, the treatment of their asylum applications, and their integration into the EU.[43] European countries have subscribed to the Dublin III Regulation, an EU rule that requires that an asylum applicant applies in the first EU country she or he reaches, under the assumption that they all provide similar protections for asylum seekers and refugees. To achieve that goal, member states have put efforts into drafting more harmonized EU policies to lay down the minimum standards for the treatment of unaccompanied minors.[44] This has been instrumental in raising awareness about the protection needs of unaccompanied minors, and in promoting protective actions such as training for guardians, public authorities, and other actors who are in close contact with unaccompanied minors.[45] These standards, while binding for all member states, are not extensive and leave gaps such as the recognition of child-specific forms of persecution, age assessment techniques, and responsibilities of legal guardians within the competence of each Member State.[46]

Some of the general EU policies include:

> (1) The appointing of a legal guardian or any other appropriate representation of unaccompanied minors to enable unaccompanied minors to express her or his views in proceedings.[47] For example, The European Convention on the Exercise of Children's Rights states its objective as promoting children's rights, granting children procedural rights, and facilitating the exercise of these rights by ensuring that children are informed and allowed to participate in proceedings that affect them.[48] Although, as stated above, not all member states grant the right to representation by a lawyer, the general policy requires member states to grant children the right to be assisted by an appropriate person of their choice to help them express their views.[49] This helps to ensure that unaccompanied minors are placed with adult relatives, a foster family, or in reception centers for minors, ensuring that siblings are being kept together. A huge concern is that in some countries, like Germany, unaccompanied minors that are 16 years of age or over can be placed in adult asylum seekers' facilities.[50]

---

[43] *See* European Migration Network, *supra* note 20.

[44] *See, e.g.*, Council Directive 180/29 O.J. 2013 (L 180) ("The Reception Conditions Directive"); Council Directive 304/12 O.J. 2004 (L 304) ("Qualification Directive"); Council Regulation 604/2013, 2013 (180/31) ("Dublin Regulation"); Council Directive 251/12 O.J. 2003 (L 251) ("Family Reunification Directive"); Council Directive 2008/115 O.J. 2008 (L 348) (EC) ("Return Directive").

[45] *See* European Migration Network, *supra* note 20.

[46] LAZARIDIS, *supra* note 16.

[47] European Convention on the Exercise of Children's Rights, *opened for signature* Jan. 25, 1996, 1996 E.T.S. No. 160 (entered into force July 1, 2000).

[48] *Id.*

[49] King, *supra* note 38, at 352.

[50] LAZARIDIS, *supra* note 16, at 151.

(2) Taking the necessary steps to trace the family members of unaccompanied minors as soon as possible. For example, in the case of unaccompanied minors who have been recognized by a member state, then this member state has the obligation to authorize the entry and residence of a legal guardian (parents, and in case they cannot be traced, any other family member).[51] In the event an unaccompanied minor is returned, member states are required to make sure that the unaccompanied minor will be returned to a family member.[52]

(3) Ensuring that those working with unaccompanied minors receive appropriate training.[53] However, it has also frequently been argued that asylum procedures are designed for adults and that the environment of the interrogation rooms is not suitable for minors.[54]

The EU appears to have enough protections for the rights of unaccompanied minors. And, unlike the United States, all the member states have signed and ratified the CRC. However, the reality lived by the thousands of unaccompanied minors in Europe is not too different from those in the United States. Too often, EU member states' national standards and practices are insufficient to ensure the minors' rights, and sometimes even contravene their protection needs.[55] There have been concerns raised about the treatment, detention, and due process for unaccompanied minors in Europe.[56]

In Greece, for example, one of the countries that receive the biggest influx of individuals, the UN Working Group on Arbitrary Detention ("WGAD") found issues with the guardianship system and detention of minors in 2013.[57] Unaccompanied minors often remain in overcrowded detention centers with adults and face "oppressive Greek law enforcement."[58] Because of these conditions, the ECtHR ruled that Greece is violating Article 3 of the European Convention on Human Rights by subjecting migrants to inhumane and degrading treatment.[59]

---

51 LAZARIDIS, *supra* note 16.

52 *Id.*

53 *Id.* at 149.

54 *Id.* at 153.

55 Marta Tomasi, *The European Court of Human Rights and the Best Interests of Unaccompanied Migrant Minors: A Step Towards a More Substantive and Individualized Approach?*, INT'L L. BLOG (Oct. 10, 2019), https://internationallaw.blog/2019/10/10/the-european-court-of-human-rights-and-the-best-interests-of-unaccompanied-migrant-minors-a-step-towards-a-more-substantive-and-individualized-approach/.

56 LAZARIDIS, *supra* note 16, at 151-57.

57 *Working Group on Arbitrary Detention Statement upon the Conclusion of Its Mission to Greece*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R (Jan. 31, 2013), https://www.ohchr.org/en/statements//01/working-group-arbitrary-detention-statement-upon-conclusion-its-mission-greece [hereinafter *Mission to Greece*]; *see also Greece: Humanitarian Crisis on the Islands*, HUM. RTS. WATCH (July 11, 2015, 12:00 AM), https://www.hrw.org/news/2015/07/11/greece-humanitarian-crisis-islands [hereinafter *Greece: Humanitarian Crisis*].

58 Victoria Galante, *Greece's Not-so-Warm Welcome to Unaccompanied Minors: Reforming EU Law to Prevent the Illegal Treatment of Migrant Children in Greece*, 39 BROOK. J. INT'L L. 745, 752 (2014).

59 *M.S.S. v. Belgium & Greece*, App. No. 30696/09 Eur. Ct. H.R. (Jan. 21, 2011).

More recently, in June of 2019, the European Court ruled yet again against Greece's practice of locking up unaccompanied migrant and asylum-seeking children in police-like cells. Human Rights Watch found that detained children are constantly forced to live in unsanitary conditions, alongside adults they do not know and are often abused and ill-treated by police.[60]

The treatment of unaccompanied minors was also highly debated in Italy recently because of *Trawalli and Others v. Italy*.[61] In this 2018 case, the European Court was called to rule, among other issues, on whether the detention and reception conditions for unaccompanied minors were lawful and/or constituted an inhuman or degrading treatment under the European Convention on Human Rights.[62] The Court stated, among other arguments, that:

> [w]hen the authorities deprive or seek to deprive a child of her or his liberty, they must ensure that he/she effectively benefits from an enhanced set of guarantees in addition to undertaking the diligent assessment of her/his best interest noted above. The guarantees include prompt identification and appointment of a competent guardian; a child-sensitive due process framework, including the child's rights to receive information in a child-friendly language, the right to be heard and have her/his views taken into due consideration depending on his/her age and maturity, to have access to justice and to challenge the detention conditions and lawfulness before a judge; free legal assistance and representation, interpretation and translation. The Contracting Parties must also immediately provide the child access to an effective remedy.[63]

III. Immigration Laws and Policies for Unaccompanied Minors Seeking Asylum in Australia

Asylum in Australia has been granted to many refugees since 1945 when half a million Europeans displaced by World War II were given asylum. Since then, there have been periodic waves of asylum seekers from Southeast Asia, mainly Vietnam and Indochina, and the Middle East.[64] Historically, most asylum seekers arrived by plane. However, since 2000, the arrival of asylum seekers by boat increased.[65] Around that time, suspected illegal boat arrivals started to be trans-

---

[60] Eva Cossé, *European Court Condemns Greece's Migrant Kid Lockups*, HUM. RTS. WATCH (June 15, 2019, 1:00 AM), https://www.hrw.org/news/2019/06/15/european-court-condemns-greeces-migrant-kid-lockups.

[61] *Trawalli and Others v. Italy*, App. No. 47287/17 Eur. Ct. H.R. (2018).

[62] *Id.*

[63] *Id.* at 9.

[64] *See generally* U.N. High Commissioner for Refugees, Asylum Levels and Trends in Industrialized Countries, 2005 (Mar. 17, 2006) https://www.unhcr.org/statistics/country//-trends-industrialized-countries-2005.html; U.N. High Commissioner for Refugees, *Refugee Data Finder (2001-2004)*, https://www.unhcr.org/refugee-statistics/download/?url=R03KjD (last visited May 22, 2023); U.N. High Commissioner for Refugees, *UNHCR Statistical Yearbook (2004)* (Aug. 21, 2005), https://www.unhcr.org/us//unhcr-statistical-yearbook-2004.

[65] Janet Phillips & Harriet Spinks, *Boat Arrivals in Australia Since 1976*, 1-3 (Parliament of Australia, 2013).

ferred to Australian Navy vessels to then be transported to off-shore detention facilities for processing.[66]

A. Immigration Detention of Unaccompanied Minors in Australia Violates International Human Rights Standards

The growing number of people arriving by boat initiated a change in Australia's treatment of refugees; in particular, the introduction of mandatory detention of unauthorized arrivals marked the "beginning of a gradual slide into a policy of deterrence, detention, and denial by systematically discriminating against asylum seekers."[67] To detain refugee children, the Australian government relies mainly on the legislative provisions of the Migration Act of 1958.[68] The Act provides that an "unlawful non-citizen" must be kept in "immigration detention" until deported or granted a visa, which makes Australia the only western country that has a mandatory detention policy for all undocumented immigrants.[69] The detention requirement continues until the person is determined to have a lawful reason to remain in Australia (and is granted a visa) or is removed from Australia.[70] These provisions apply to all unlawful non-citizens regardless of their age, so in effect, all refugee children without valid visas must be detained until they are either granted a visa or deported.[71]

One of the biggest concerns regarding the mandatory detention policy is the conditions of the offshore detention facilities: Nauru, Papua New Guinea, and Christmas Island. Several reports found the detainees' poor health and treatment conditions, including water shortage, lack of education access, overcrowding, and sexual abuse of women and children.[72] Although the legislation states that the detention of minors must be a measure of last resort, the reality is that it is not done as such.[73] Detention may last as long as five and a half years.[74] In 2018, reports surfaced of children as young as eight years old engaging in self-harm and exhibiting suicidal behaviors in The Nauru Regional Processing Centre.[75] Children are often detained among adults, behind 1200-volt electric, barbed-wire

66 Andreas Schloenhardt, *Deterrence, Detention and Denial: Asylum Seekers in Australia*, 22 U. QUEENSLAND L. J. 54, 60 (2002).

67 *Id.* at 54.

68 Fiona Martin & Terry Hutchinson, *Mental Health and Human Rights Implications for Unaccompanied Minors Seeking Asylum in Australia*, 1 J. MIGRATION & REFUGEE ISSUES 1, 2 (2005).

69 Emily A. Benfer, *In the Best Interests of the Child: An International Human Rights Analysis of the Treatment of Unaccompanied Minors in Australia and the United States*, 14 IND. INT'L & COMP. L. REV. 729, 740 (2004).

70 Martin & Hutchinson, *supra* note 68, at 2.

71 *Id.* at 2-3.

72 PETER MARES, BORDERLINE: AUSTRALIA'S RESPONSE TO REFUGEES AND ASYLUM SEEKERS IN THE WAKE OF THE TAMPA 132–133 (UNSW Press 2002); MICHAEL GORDON ET AL., AN OPEN LETTER TO THE AUSTRALIAN PEOPLE (Australian Association of Social Workers 2015).

73 Benfer, *supra* note 69, at 733.

74 *Id.* at 752.

75 Virginia Harrison, *Nauru Refugees: The Island Where Children Have Given up on Life*, BBC (Sept. 1, 2018) https://www.bbc.com/news/world-asia-45327058.

fences, until their cases are reviewed.[76] As a result of this comingling of age groups, some unaccompanied minors were forced to have their lips sewn together by adult detainees protesting the human rights violations in the detention centers.[77] The Australian Human Rights Commission has expressed grave concern at the prolonged and indefinite detention of children in remote locations stating that it breaches international human rights standards and is often prolonged under conditions that are unacceptable and violate Australia's human rights obligations.[78]

The government's view, however, is that the UN Convention on the Rights of the Child is irrelevant to the detention of children.[79] The case of *Re Woolley*, heard in 2004, involved four Afghan children whose parents had brought them to Australia in 2001.[80] The children, held in the Baxter detention center, sought a court order for their release, arguing that the mandatory detention regime in the Migration Act did not apply to them. This argument was rejected by the Court on the basis that the law clearly provided no express exceptions for children.[81] In *Jaffari v. Minister for Immigration & Multicultural Affairs*, it was questioned whether the Minister had performed according to the terms of international obligations of Australia.[82] Although the application was unsuccessful in the end, Justice French expressed concern about unaccompanied minors refugees, stating that: "there appears to be a significant discrepancy between the guidelines published by the United Nations High Commissioner on refugees in respect of unaccompanied minors seeking asylum and the current administration of the Migration Act concerning such persons."[83]

B. Due Process and Representation in Immigration Proceedings Under Australian Law

The protection visa program, established in the Migration Act, is the domestic mechanism through which Australia executes its obligations under the Refugee Convention.[84] When arriving at an immigration detention center, the individual should be made aware that they may apply for a visa and that unless they obtain

---

[76] Benfer, *supra* note 69, at 752.

[77] *Id.*

[78] Phillips & Spinks, supra note 65, at 13.

[79] *See Minister for Immigration & Multicultural & Indigenous Affairs v B* [2004] HCA 20 (29 April 2004) (Austl.).

[80] *Re Woolley; Ex Parte Applicants M276/2003* [2004] HCA 49 (7 October 2004) (Austl.).

[81] *Id.*

[82] *Jaffari v. Minister for Immigration & Multicultural Affairs* [2001] FCA 985 (26 July 2001) (Austl.).

[83] *Id.* at 43.

[84] *Migration Act 1958* (Cth) ss 35A, 36 (Austl.) [hereinafter *Migration Act*]; *see* U.N. High Commissioner for Refugees, *States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol*, https://www.unhcr.org/us//39149 (last updated Apr. 17, 2015) (showing that Australia's signature on January 22, 1954, brought into force the 1951 UN Convention relating to the Status of Refugees).

it, they will be removed from Australia.[85] Under Australian law, however, the officers have no obligation to ask unauthorized arrivals if they wish to apply for a protection visa or if they want to contact lawyers or independent advisers.[86] So to reduce the number of visa applications, this information is typically not made available to persons who arrive in Australia unlawfully.[87] Although not advised of their rights, unaccompanied minors are briefly screened to identify prima facie claims for protection.[88] Those who are screened are given the opportunity to seek legal advice, but only upon request. The ones who are not screened will be returned to the most recent country of departure.[89] This leaves unaccompanied minors completely uninformed about their status, the circumstances of their detention, the few legal rights they do have, and the assistance they can obtain. This lack of minimum procedural safeguards makes it more likely that they may be refouled even if they have grounds for protection.[90] In the few cases when unaccompanied minors can secure representation, the remote location of the processing (detention) facilities serves as a barrier for attorneys to contact the children.[91]

The Immigration Act of 1946 makes the Minister of the Department for Immigration and Multicultural and Indigenous Affairs ("DIMIA")[92] responsible for providing guards, translators, meal services, cleaning services, education, and health care to children. These responsibilities make the DIMIA the entity in charge of both the guardianship of children and removing them from the country, making the Minister "both guardian and jailer,"[93] all while serving as the child's representative throughout the immigration process.[94] As a result, the person who is designated to protect the best interests of the child is also the child's prosecutor.[95] This dual role makes Australian immigration structurally flawed and presents a conflict of interest because the child's welfare may not always be a priority.[96] The guardianship of the child must come before the duty to prosecute and according to the Migration Act, it should be interpreted consistently with Australia's international obligations under the CRC.[97] Still, the government's conflicting roles of both the guardian of unaccompanied minors and the entity

---

[85] *Migration Act*, *supra* note 84, at ss 35A, 36.

[86] Schloenhardt, *supra* note 66, at 61.

[87] *Id.*

[88] CROCK, *supra* note 24, at 357.

[89] *Id.* at 358.

[90] *Id.*; Schloenhardt, *supra* note 66, at 61.

[91] Benfer, *supra* note 69, at 755.

[92] *Id.* at 741 (highlighting that the DIMIA outsources the management of detention centers to Australian Correctional Services (ACS)).

[93] Martin & Hutchinson, *supra* note 68, at 4.

[94] Benfer, *supra* note 69, at 741; Eliana Corona, *The Reception and Processing of Minors in the United States in Comparison to that of Australia and Canada*, 40 HASTINGS INT'L & COMP. L. REV. 205, 218 (2017).

[95] Corona, *supra* note 94, at 218.

[96] Corona, *supra* note 94, at 218; Benfer, *supra* note 69, at 741.

[97] Corona, *supra* note 94, at 218.

responsible for deporting them must be repaired to ensure the best interest of the child.[98]

IV. Immigration Laws and Policies for Unaccompanied Minors Seeking Asylum in South Africa

A. African Standards on International Law, Migration, and the Protection on Unaccompanied Minors' Rights

Following the dismantling of the apartheid system in 1994, South Africa joined the international refugee regime.[99] The International Labor Organization ("ILO") estimates that Africa has the largest number of migrant workers.[100] Labor migration to richer countries in the region is an upward trend; the top destination countries in the region are South Africa, Botswana, and Namibia.[101] Since the economic and social breakdown in Zimbabwe, hundreds of thousands of people have fled the country for South Africa, including thousands of unaccompanied refugee minors.[102] The majority are between the ages of 12 and 18, and approximately 70 percent of the children are boys, but there are likely a greater number of girls who tend to work as domestic laborers or sex workers and thus remain unseen.[103]

To address the new flow of asylum seekers into the country, the South African Parliament passed the Refugees Act of 1998, in which the definition of a refugee set by Article 1 of the UN Refugee Convention was incorporated.[104] The Act also incorporated the 1969 Organization of African Unity's Convention Regarding the Specific Aspects of Refugee Problems ("OAU Convention") which allows those who are not specifically persecuted as individuals to claim asylum when fleeing generalized violence.[105] Under the OAU Convention, a person can be awarded refugee status when "[o]wing to external aggression, occupation, foreign domination, or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence."[106]

Unlike the American and European Regional Systems, Africa has also enacted its own children's rights charter (the African Charter on the Rights and Welfare of the Child) which has been ratified by forty-seven of the African Union's fifty-

---

98 Benfer, *supra* note 69, at 768.

99 Lindsay M. Harris, *Untold Stories: Gender-Related Persecution and Asylum in South Africa,* 15 MICH. J. GENDER & L. 291, 296 (2009).

100 Adriette H. Dekker, *The Social Protection of Non-Citizen Migrants in South Africa,* 22 S. AFR. MERCANTILE L. J. 388, 389 (2010).

101 *Id.* at 390.

102 Cerise Fritsch, et al., *The Plight of Zimbabwean Unaccompanied Refugee Minors in South Africa: A Call for Comprehensive Legislative Action,* 38 DENV. J. INT'L L. & POL'Y 623, 623 (2010).

103 *Id.* at 624.

104 Refugees Act 130 of 1998 .§ 3(a) (S. Afr.).

105 Harris, *supra* note 99, at 297.

106 Organization of African Unity Convention: Governing the Specific Aspects of Refugee Problems in Africa, U.N.T.S. No. 14691, art. I(2) (entered into force Sept. 10, 1969).

three members.[107] The African Children's Charter reaffirms in its preamble the adherence to the principles contained in the CRC and adopts in article 4(1) the "best interests of the child" standard for all actions concerning the child.[108]

All legislation on refugees and asylum seekers must be framed according to the South African Constitution, which guarantees fundamental rights to all individuals within the borders of South Africa, regardless of citizenship.[109] In 2005, the Pretoria High Court affirmed the application of the Constitution to unaccompanied minors, and further entrenched the principle that government departments cannot without due process detain and deport unaccompanied foreign children from South Africa.[110] Under this analysis, unaccompanied minors should be granted the same legal mechanisms of protection and due process rights as national children from South Africa according to the principle of the best interest of the child.[111]

Like unaccompanied minors in every region, minors who travel to South Africa experience multiple challenges, and their socio-economic and human rights, in general, are often not fully protected.[112] They face threats to their physical safety; life without a parent or guardian; legal and social discrimination; xenophobia; and a constant struggle to find food, shelter, education, health care, and employment.[113] Unaccompanied minors who were displaced in South Africa are sheltered in sites set up around the country. Yet, some of these sites are not provided with food or water.[114] There is a chronic shortage of shelter for refugees, and it has been reported that hundreds of children are left with no access to a shelter at all and have been forced to sleep in the streets or the bush. In Cape Town, for example, 150 refugees were found living on the street.[115] Although the law stipulates that an asylum claim be adjudicated within 180 days of the applicant's date of entry into South Africa, in reality, many claims languish for years due to a backlog of cases.[116] While there is no clear explanation for this backlog, it is likely rooted in South Africa's shortage of resources combined with a lack of political will for reform and high levels of xenophobia.[117]

---

107 *See List of Countries Which Have Signed, Ratified/Acceded to the African Charter on the Rights of the Child,* African Committee of Experts on the Rights and Welfare of the Child, https://www.acerwc.africa/en/member-states/ratifications (last visited May 22, 2023); *see generally* Organization of African Unity, African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990).

108 King, *supra* note 38, at 354.

109 Harris, *supra* note 99, at 295.

110 *Centre for Child Law & Another v. Minister of Home Affairs & Others* 2005 (6) SA 50 (S. Afr.), http://www.childlawsa.com/case_04.html.

111 *Id.*

112 Fritsch, *supra* note 102, at 623; Sarah Swart, *Unaccompanied Minor Refugees and the Protection of Their Socio-Economic Rights under Human Rights Law,* 9 AFR. HUM. RTS. L. J. 103, 124 (2009).

113 Fritsch, *supra* note 102, at 623.

114 Swart, *supra* note 112, at 111.

115 Swart, *supra* note 112, at 112.

116 Harris, *supra* note 99, at 301.

117 *Id.*

South Africa's refugee system is shaped by international and regional standards, which are implemented by domestic legislation. The relatively progressive legal framework stands in sharp contrast to the reality facing asylum seekers and refugees in South Africa, where those international and regional standards are not being protected.[118] Although these children have rights under international and domestic law, political and other factors combined have denied children the protection and support to which they are legally entitled.[119] The reality is that unaccompanied minors face numerous barriers to obtaining asylum in South Africa including being prevented from lodging claims, failing to have their claims fairly adjudicated, failing to have their rights respected, and continually facing arbitrary arrest, detention, and unlawful deportation.[120]

V. Immigration Laws and Policies for Unaccompanied Minors Seeking Asylum in Canada

A. The Significance of Children's Rights in Canada to Award Special Protections to Unaccompanied Minors Seeking Asylum

The Canada Border Services Agency is the entity responsible for the administration and enforcement of the Immigration and Refugee Protection Act, which, along with jurisprudence as well as internal policies, directives, and guidelines, establishes the rules for the arrest and detention of foreign nationals in Canada.[121] Nonetheless, Canada has no national policy for the care and treatment of child refugees, but rather each of the ten provinces and three territories has its own system for unaccompanied and separated minors.[122]

Depending on the province, unaccompanied minors are warranted special procedural guarantees throughout their refugee status determinations, such as: the appointing of an officer responsible for the child's case throughout the entirety of the determination procedure; prioritizing these claims to process them as expeditiously as possible; and facilitating pre-hearing conferences to assess what evidence the child can provide, including the best way to elicit this information.[123] But the fact that there is a lack of national policy results in an inconsistent framework for the immediate care, protection, and legal representation of unaccompanied minors.[124]

One example is that the Immigration and Refugee Protection Act provides the right to counsel for all persons subject to immigration proceedings before the

---

[118] Harris, *supra* note 99, at 295.

[119] Fritsch, *supra* note 102, at 623.

[120] *Id.* at 646.

[121] Canada Border Service Agency, *National Directive for the Detention or Housing of Minors,* GOVERNMENT OF CANADA, https://www.cbsa-asfc.gc.ca/security-securite/detent/nddhm-dndhm-eng.html (last visited May 22, 2023) [hereinafter Canada Border Service Agency].

[122] *Canada's Treatment of Non-Citizen Children*, CANADIAN COUNCIL FOR REFUGEES https://ccrweb.ca/files/noncitizenchildrenbackgrounderen.pdf (last visited Jan. 10, 2020) [hereinafter *Canada's Treatment of Non-Citizen Children*]; CROCK, *supra* note 24, at 300.

[123] *See generally* Canada Border Service Agency, *supra* note 121.

[124] CROCK, *supra* note 24, at 300.

Immigration and Refugee Board and the appointment of a "Designated Representative" ("DR") that has the responsibility of representing minors in those proceedings.[125] However, each province is responsible to establish the rule for the appointment of those DRs and the availability to obtain free legal representation.[126] In Quebec, the minor will be assigned two trained social workers; one will help the unaccompanied minors to retain counsel during their asylum cases, and the other will help with settlement issues like helping them contact relatives who may already reside in Canada, and placement with families from a similar ethnic background if no relatives were found.[127] While in Ontario, under an agreement with the Immigration and Refugee Board and a private law firm, the DRs will be pro bono lawyers.[128] The Committee on the Rights of the Child has made recommendations to Canada to make sure that unaccompanied minors are provided with guardianship and social services in every part of the country and that they are not subject to immigration detention.[129]

B. The Best Interest of The Child Principle as a Means to Protect Unaccompanied Minors in the Canadian Legal System

The Canadian immigration system does recognize that refugee determinations for all children, including unaccompanied minors, must reflect the best interests of the child.[130] According to Section 60 of the Immigration and Refugee Protection Act, the detention of a minor must be a measure of last resort respecting the best interests of the child.[131] The Canadian system offers the Alternatives to Detention Policy, which allows individuals to live in non-custodial, community-based settings while their immigration status is being resolved. This policy ensures that minors are not detained for reasons relating to their immigration status. Alternatives to detention include community programming (in-person reporting, cash or performance bond, and community case management and supervision) and electronic supervision tools, such as voice reporting.[132]

Even though Canadian law says that unaccompanied minors should only be detained as a matter of last resort, the reality is that children are routinely held in immigration detention centers for weeks or even months.[133] In the last decade, there were several cases when separated and unaccompanied minors were intercepted while being smuggled through the United States into Ontario and Quebec,

---

[125] Immigration and Refugee Protection Act, S.C. 2001, c 27, s. 167(2) (Can.).

[126] CROCK, *supra* note 24, at 301.

[127] *Unaccompanied Minors*, CANADIAN COUNCIL FOR REFUGEES, https://ccrweb.ca/en/res/unaccompanied-minors (last visited May 22, 2023) [hereinafter *Unaccompanied Minors*].

[128] CROCK, *supra* note 24, at 301.

[129] *Id.* at 302.

[130] *Id.*

[131] Canada Border Service Agency, *supra* note 121.

[132] *Id.*

[133] *Canada's Treatment of Non-Citizen Children*, *supra* note 122.

and a decision was made to seek their detention on the ground that they would likely not report for removal.[134]

To make a more uniform policy that is aligned with their international obligations, the Government of Canada made the National Directive for the Detention or Housing of Minors.[135] The Directive establishes that the best interest of the child is "an international principle to ensure children enjoy the full and effective benefit of all their rights recognized in Canadian law and the CRC."[136] According to the Directive, the best interest of the child is to be determined separately and before the decision to detain the unaccompanied minors. It needs to be reviewed on an ongoing basis to facilitate any decision-making based on the legal situation of the minor and their well-being. It may only be outweighed by other significant considerations such as public safety, flight risk, danger to the public, or national security.[137]

There is an official list of factors that officers need to use to determine the best interest of the child and it includes: (1) the child's physical, mental and emotional needs; (2) the child's educational needs; (3) the preservation of the family environment and maintaining relationships; (4) the care, protection, and safety of the child; (5) the level of dependency between the child and the parent or guardian; (6) the child's views if they can be reasonably ascertained; and (7) any other relevant factor.[138]

C. Extended Protection to Qualify for Asylum Under Canadian Law

According to the Immigration and Refugee Protection Act, unaccompanied minors can seek protection in Canada under Section 96, which sets the criteria under the Refugee Convention, but it also provides two different alternatives.[139] One is extended protection in Section 97, which applies to persons who could be in some kind of danger, such as a fear of persecution or harm which does not fit in one of the five enumerated grounds of the Refugee Convention.[140] The other is humanitarian and compassionate reasons under Section 25(1). Humanitarian and compassionate grounds apply to people with exceptional cases, and it does not assess risks of persecution but focuses on other criteria such as: (1) how settled the person is in Canada; (2) general family ties of the applicant to Canada; (3) the best interests of any children involved; and (4) what could happen to the applicant if the requested application is denied.[141]

Section 97 has been used in cases of persons fleeing from gang and drug violence, and while there is a burden of proof that the person seeking this protection

---

[134] Geraldine Sadoway, *Canada's Treatment of Separated Refugee Children*, 3 EUR. J. MIGRATION & L. 347, 367 (2001).

[135] Canada Border Service Agency, *supra* note 121.

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] Immigration and Refugee Protection Act, *supra* note 125, at s. 96.

[140] CROCK, *supra* note 24, at 314.

[141] Immigration and Refugee Protection Act, *supra* note 125, at s. 25.

is personally targeted by such violence and is not only fleeing due to a generalized fear, it has also been more successful than arguing persecution due to membership to a social group or political opinion.[142] Section 97 provides:

> A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence would subject them personally:
> (a) To a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention against Torture; or
> (b) To risk to their life or a risk of cruel and unusual treatment or punishment if:
> (i) The person is unable or, because of that risk, unwilling to avail themself of the protection of that country,
> (ii) The risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,
> (iii) The risk is not inherent or incidental to lawful sanctions unless imposed in disregard of accepted international standards, and
> (iv) The risk is not caused by the inability of that country to provide adequate health or medical care.[143]

Section 25(1) provides an exemption if there are any humanitarian and compassionate reasons, considering the best interest of the child.[144] It provides that:

> Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35, or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.[145]

Since the enactment of the Immigration and Refugee Protection Act, there has been substantial litigation on how the principle of the "best interest of the child" needs to be interpreted and applied in immigration proceedings.[146] Even though Federal Courts often limit the scope of this principle, in 2015, in *Jeyakannan*

---

[142] CROCK, *supra* note 24, at 315.

[143] Immigration and Refugee Protection Act, *supra* note 125, at s. 97.

[144] CROCK, *supra* note 24, at 315.

[145] Immigration and Refugee Protection Act, *supra* note 125, at s. 25.

[146] CROCK, *supra* note 24, at 316.

Kanthasamy v. Minister of Citizenship and Immigration,[147] the Supreme Court of Canada ruled that humanitarian and compassionate considerations should include the best interests of a child directly affected. Some saw this development as the first step from the Court to favor a more equitable and humanitarian approach to immigration and refugee law.[148]

The significance of international law upon Canadian jurisprudence was also recently discussed in similar terms by the Supreme Court of Canada in *Baker v. Canada*.[149] In this case, the deportation challenge was, like in *Kanthasamy*, based on humanitarian and compassionate grounds.[150] As part of her defense, Baker argued that it was in the best interests of her children, who were all Canadian citizens, that she remain in Canada.[151] The most important part of the decision regarding the CRC and the significance of international law in the Canadian system lies in the Court's argument establishing that although the Children's Convention was not directly binding on domestic law, the "values reflected in international humanitarian rights law may help inform the contextual approach to statutory interpretation and judicial review."[152] The Court held that the CRC has special deference on the protections for children, including their interests, needs, and rights.[153] It also gives the principle importance as a rule of procedure when includes the assessment of the possible impacts (positive or negative) of a decision concerning the child.[154]

Canada's Safe Third Country Agreement with the United States has become a flashpoint this past year, both in Canada and in the United States.[155] It came into place in 2004 and under it, the United States and Canada were both designated as

---

147 Kanthasamy v. Canada, [2015] S.C.R. 61 (Can.).

148 Mary Thibodeau, *The Expansion of "Humanitarian and Compassionate Grounds": Kanthasamy v Canada* (2015), THE COURT (DEC. 22, 2015) http://www.thecourt.ca/the-expansion-of-humanitarian-and-compassionate-grounds-kanthasamy-v-canada/.

149 Baker v. Canada, [1999] 2 S.C.R. 817 (Can.).

150 *Id.*; Luke, *supra* note 13; Kanthasamy v. Canada, *supra* note 147.

151 Baker v. Canada, *supra* note 149.

152 *Id.*; While not considering the application of the Children's Convention, in Suresh v. Canada (Minister of Citizenship and Immigration) [2002] 1 S.C.R. 3, ¶ 46 (Can.), the Supreme Court of Canada also recognized the important role international norms play in the interpretation of immigration legislation, opining that "a complete understanding of the Immigration Act and the Charter requires consideration of the international perspective."

153 Baker v. Canada, *supra* note 149; Luke, *supra* note 150, at 82.

154 Canada Border Service Agency, *supra* note 121.

155 Marcia Brown, *An Imperiled Border Agreement Could Doom Canada's Welcoming Immigration Policy*, THE AMERICAN PROSPECT, (July 3, 2019), https://prospect.org/world/-agreement-doom-canada-s-welcoming-immigration-policy/ (explaining that from November 4th to 8th the Federal Court of Canada will hear a challenge to the designation of the U.S. as a safe third country for refugees. The court will hear that sending refugee claimants back to the United States violates Canadian law, including the Canadian Charter of Rights and Freedoms, and Canada's binding international human rights obligations. The Canadian Council for Refugees, Amnesty International and The Canadian Council of Churches alongside an individual litigant and her children, initiated the legal challenge in July 2017. The hearings are taking place at the Federal Court of Canada in Toronto, at 180 Queen Street West. The case is still open.).

a "Safe Third Country."[156] According to the Agreement, refugees entering through a regular point of entry by land from the United States are ineligible to claim refugee status in Canada unless they were denied the claim before in the United States. In other words, the Agreement stipulates that asylum seekers must claim asylum in whichever of the two countries they arrive first, as both countries are considered safe for asylum-seekers under the agreement.[157] There are some exemptions; the first is that if the refugee already has family in Canada, they will be allowed to make their claim there even if they have not done so first in the United States.[158] The other exemption is for unaccompanied minors who have no legal guardian in either the United States or Canada.[159]

According to the parties to the Agreement, the purpose of the Agreement is, inter alia, to share refugee status determination responsibility, identify persons in need of protection, and avoid refoulement.[160] Originally this was intended as a guarantee to ensure that unaccompanied minors as a vulnerable group of migrants would enjoy access to refugee protections, but the reality is that there is no information regarding how many unaccompanied minors have used the exemption of the Safe Third Country Agreement to cross from the United States to Canada, making it hard to determine its impact on the matter.[161] One of the few statistics found was issued by the UNHCR in 2006 as part of a "first-year evaluation" of the then-new Agreement. In this document, it was reported that between December 2004 and December 2005, "there were 190 claimants younger than 18 years old who sought refuge" at the Canada-United States land border, "48 of whom were unaccompanied minors."[162]

The Safe Third Country Agreement has faced some backlash in the past year. In fact, in 2019, a group of immigration advocates initiated a challenge in Canadian federal courts under the argument that the United States does not qualify as a "safe" due to former President Trump's policies on asylum, claiming that they

---

156 *See Canada-US Safe Third Country Agreement*, GOVERNMENT OF CANADA, https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/agreements/safe-third-country-agreement.html (last modified Mar. 27, 2023).

157 *Id.*

158 Family member can be: spouse; sons and daughters; parents and legal guardians; siblings; grandparents; grandchildren; aunts and uncles; and nieces and nephews.

159 *Canada-United States Safe Third Country Agreement*, *supra* note 156.

160 The last paragraph of the Preamble states that the Parties are: "Aware that such sharing of responsibility must ensure in practice that persons in need of international protection are identified and that the possibility of indirect breaches of the fundamental principle of non-refoulement are avoided, and therefore determined to safeguard for each refugee status claimant eligible to pursue a refugee status claim who comes within their jurisdiction, access to full and fair refugee status determination procedure as a means to guarantee that the protections of the Convention, the Protocol, and the Torture Convention are effectively afforded." *Final Text of the Safe Third Country Agreement*, GOVERNMENT OF CANADA, https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/agreements/safe-third-country-agreement/final-text.html (last modified Dec. 5, 2002).

161 CROCK, *supra* note 24, at 305.

162 U.N. High Commissioner for Refugees, *Monitoring Report: Canada-United States "Safe Third Country" Agreement*, 1, 11 (June 2006), https://www.unhcr.org/sites/default/files/legacy-pdf/455b2cca4.pdf.

leave asylum seekers facing the risk of refoulement, and that they experience human rights violations like unlawful and unnecessary detention.[163]

It is clear by now that the problem of unaccompanied minors is regional. Canada has a long story of welcoming refugees, in fact, in a recent UNHCR report, it was found that the country resettled more refugees—mostly persons fleeing from the Syrian conflict—than any other nation in 2018.[164] But Canada's absence and lack of any kind of response to the crisis at the United States-Mexico border has been gnawing, to say the least, and as part of the Organization of American States ("OAS"), it should help ease the current burden of unaccompanied minors trying to reach safety.

VI. Comparative Analysis with the United States: A Shared Challenge

In the past decade, the number of unaccompanied minors attempting to enter the United States at the southwest border from Mexico, Guatemala, Honduras, and El Salvador has increased significantly.[165] For the first time, unaccompanied minors and families accounted for more than half of border crossers in the United States.[166] However, the steps taken to create and provide legal protections for children under international law and under domestic legal systems leave them almost wholly unprotected.

A. The Best Interest of the Child as a Corner Stone Principle for the Protection of Unaccompanied Minors

A somewhat obvious difference is that the United States is the only one that has not ratified the CRC.[167] The policy stating that a "'child's best interest" should not be considered by the adjudicator in immigration proceedings makes the United States immigration system one of the most hostile for unaccompanied minors.[168] The principle of the "best interests of the child" has been a guiding principle in United States law for more than 125 years. It has been incorporated

---

163 Anna Mehler Paperny, *Canada Defends Safe Third Country Agreement as Court Challenge Wraps up*, GLOBAL NEWS (Nov. 8, 2019), https://globalnews.ca/news/6148781/safe-third-country-agreement-court/; Stephanie Levitz & Paola Loriggio, *Federal Court Hears Case on Whether Asylum Agreement with U.S. Violates Charter*, CBC (Nov 4, 2019), https://www.cbc.ca/news/politics/safe-third-country-1.5346557.

164 U.N. High Commissioner for Refugees, *Global Trends, Forced Displacement in 2018*, https://www.unhcr.org/statistics/unhcrstats/5d08d7ee7/unhcr-global-trends-2018.html (last visited May 22, 2023); Sara Miller Llana, *Canada Asks, 'Why Aren't We Helping More Central American Refugees?*, THE CHRISTIAN SCIENCE MONITOR, (Sept. 5, 2019) https://www.csmonitor.com/World/Americas/2019/0905/Canada-asks-Why-aren-t-we-helping-more-Central-American-refugees.

165 PETER J. MEYER ET AL, CONG. RESEARCH SERV. R43702, UNACCOMPANIED CHILDREN FROM CENTRAL AMERICA: FOREIGN POLICY CONSIDERATIONS, 1, 15 (2016).

166 Amelia Cheatham & Diana Roy, *U.S. Detention of Child Migrants*, COUNCIL ON FOREIGN RELATIONS (2020). https://www.cfr.org/backgrounder/us-detention-child-migrants (last updated Mar. 27, 2023, 3:11 PM).

167 *Status of Ratification: Interactive Dashboard*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, https://indicators.ohchr.org/ (last visited May 22, 2023).

168 Wendy Young & Megan McKenna, *The Measure of a Society: The Treatment of Unaccompanied Refugee and Immigrant Children in the U.S.*, 45 HARV. C.R. - C.L. L. REV. 247, 249 (2010).

in several statutes governing issues like adoption, dependency proceedings, foster care, divorce, custody, criminal law, education, and labor, among others.[169] Under current United States immigration law, unaccompanied children who are directly affected by immigration proceedings have no opportunity for their best interests to be considered.[170] There is a lack of mandate for immigration judges to consider this principle in decisions concerning children.[171] To the contrary, it has expressly been stated that a "child's best interest" should not be considered by the adjudicator.[172]

The failure of United States immigration law and procedure to incorporate a "best interests of the child" approach ignores a successful means of protecting children that is common both internationally and domestically.[173] The African Children's Charter reaffirms in its preamble the adherence to the principles contained in the CRC and adopts in article 4(1) the "best interests of the child" standard for all actions concerning the child.[174] Similarly, in the EU, the notion that an unaccompanied minor is first a child and second a migrant is essential to making the "best interests of the child" a primary consideration during the immigration proceedings.[175] The European Court has recognized their special vulnerability and recognizes children's rights accordingly.[176]

In the Canadian System, the "best interest" principle has two main applications: (1) as a standard for government policy-making; and (2) as a rule of procedure that requires an assessment of the possible impact, whether positive or negative, of a decision concerning the child.[177] It recognizes the importance of the principle of 'the best interest of the child" as a pillar in its immigration system and accepts it as an international principle to ensure children enjoy the full and effective benefit of all their rights recognized under Canadian law and the CRC.

---

169 *See generally Human Mobility*, *supra* note 2.

170 Carr, *supra* note 10, at 123.

171 Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children, O.P.P.M. 17-01, U.S. DEP'T OF JUSTICE, at 4 (May. 22, 2007).

172 Young & McKenna, *supra* note 168, at 249.

173 Carr, *supra* note 10, at 123.

174 King, *supra* note 38, at 354.

175 Council Directive 2005/85, *supra* note 33, at 13, 14 (explaining that the European Commission has also been concerned with the rights of unaccompanied minors, adopting in 2010 a four-year Action Plan on Unaccompanied Minors that promotes "the best interests of the child" as "the primary consideration in all action related to children taken by public authorities."); *Communication from the Commission to the European Parliament and the Council: Action Plan for Unaccompanied Minors (2010-2014)*, COM (2010) 213 final (Jun. 5, 2010).

176 *See* Council Resolution 221/103, Unaccompanied Minors Who Are Nationals of Third Countries, 1997 O.J. (C 221) 23, 24-25.

177 Luke, *supra* note 150, at 73-77.

B. Immigration Detention for Unaccompanied Minors Is Used Consistently in All Jurisdictions Despite Being Against International Law and Standards

Problems regarding unaccompanied minors' detention are also under the public eye in all of the regions reviewed, and in many of them, such as Australia and some countries in the EU (like Italy and Greece), immigration detention is violating international conventions and standards. Current practices in immigration detention for minors are contrary to the intentions of the 1951 Refugee Convention, the ICCPR,[178] the CRC, and the UNHCR guidelines on refugees.[179] While international covenants impose an obligation to use the detention of children as a last resort, the domestic legal systems are failing to do so.[180]

In the EU, for example, there are reports that unaccompanied minors often remained in immigration detention in Greece and Italy for prolonged periods and under unsafe conditions. Because of this, the European Court has called for domestic reform to comply with international and European human rights standards.[181] This problem seems to be even bigger in Australia, where UN officials claimed that criminals were treated better than asylum seekers.[182] The Australian Federal Government is using the detention of refugee children as its first option and "Australia's response to growing numbers of onshore asylum seekers has been characterized by a rigid policy of deterrence, detention, and denial."[183] Although the United States gives some protection to migrants regarding detention with the Flores Agreement, which sets a nationwide policy for the treatment, detention, and release of unaccompanied minors, the actual conditions of the detention centers do not comply with the Flores Agreement nor with international standards.[184] At the very least, detention facilities should be upgraded to meet international human rights standards.[185]

The failure of countries to meet their obligations to maintain safe and sanitary conditions inside detention centers has become an increasingly concerning issue. Reports indicate that issues regarding the lack of such conditions are widespread, with unaccompanied minors in both Australia and the United States often being detained alongside adults. This practice poses a serious threat to the safety and

---

[178] *See Status of Ratification of the International Covenant on Civil and Political Rights*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en (last updated May 22, 2023). The ICCPR has been ratified by the United States, Australia, all countries of the EU and South Africa.

[179] Benfer, *supra* note 69, at 757.

[180] U.N. High Commissioner for Refugees, *Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012), https://www.refworld.org/docid/503489533b8.html.

[181] *Mission to Greece, supra* note 57; *see also Greece: Humanitarian Crisis, supra* note 57.

[182] Benfer, *supra* note 69, at 754.

[183] Martin & Hutchinson, *supra* note 68, at 1; Schloenhardt, *supra* note 66, at 72.

[184] Rachelle G. Cecala, *The Substantive and Procedural Rights and Protections of Unaccompanied Immigrant Minors in Detention Centers*, 7 WIDENER J. L. ECON. & RACE 91, 96 (2016).

[185] Benfer, *supra* note 69, at 763.

well-being of children, who are at high risk of experiencing sexual and physical abuse and being trafficked.[186]

Reports both in the EU and in the United States have surfaced showing that many of the detention centers lack basic services like access to clean drinking, food provisions, and showers and soap, and the centers provide conditions that are not proper for children like freezing temperatures, prison-like detention cells, and inadequate sleeping conditions.[187] The situation in Australia and South Africa is reported to be even worse. In Australia, there have been cases of children with suicidal behaviors due to the dire conditions of their detention, and in South Africa, hundreds of children are left with no access to a shelter and have been forced to sleep in the streets.[188]

C. Due Process Guarantees and the Right to Access to Justice

Due Process violations are also a common obstacle unaccompanied minors face. The main due process violation in most cases is the lack of legal representation. The lack of proper, free legal counsel leaves unaccompanied minors experiencing substantial hurdles as they navigate often complex immigration proceedings in search of an asylum grant.[189] These systems are often designed in a way only a trained lawyer will be able to understand, so representation by child advocates and social workers, while useful for some circumstances, is not enough to comply with the due process requirement of legal counsel according to international law.

Some countries in Europe have made efforts to grant some degree of free representation to unaccompanied minors. While some appoint lawyers, others only appoint special representatives or social workers to help the unaccompanied minors frame their views during the immigration proceedings.[190] The examples of Finland, Norway, Switzerland, Sweden, and the Netherlands, where they appoint two representatives for unaccompanied minors (an attorney and a personal representative), may constitute one of the best practices when it comes to access to counsel in immigration proceedings for unaccompanied minors.[191] However, it has to be taken into consideration that not all unaccompanied minors in Europe enjoy a categorical right to legal representation.[192]

While representation is mandated in the Trafficking Victims Protections Reauthorization Act ("TVPRA"), which establishes that unaccompanied minors will have independent child advocates,[193] appointed counsel is not provided as a

---

[186] Harrison, *supra* note 75, at 201.

[187] *The Flores Settlement and Family Incarceration: A Brief History and Next Steps*, HUM. RTS. FIRST, (Oct. 30, 2018), https://humanrightsfirst.org/wp-content/uploads/2022/10/FLORES_SETTLEMENT_AGREEMENT.pdf.

[188] Harrison, *supra* note 75; Swart, *supra* note 112, at 112.

[189] Ataiants, *supra* note 6.

[190] King, *supra* note 38, at 367.

[191] *Id.* at 368-369.

[192] *Id.* at 352.

[193] 8 U.S.C. § 1232(c)(6) (2012).

necessary service to all unaccompanied minors in the United States.[194] Despite many initiatives to increase the availability of representation in unaccompanied minors' cases, still nearly three out of four cases remain unrepresented.[195] International law and courts have also pointed out the need to provide free legal counsel in immigration proceedings as part of due process guarantees, particularly for unaccompanied minors and separated children, who in view of international law and standards are especially vulnerable.[196]

The United States' continued denial of representation to unaccompanied minors in immigration proceedings, infants and toddlers among them, raises serious due process concerns, and the efforts to establish a constitutional right to counsel under the Fifth and Sixth Amendment through litigation have proven to be unsuccessful.[197] Since United States courts have thus far refused to recognize a federal constitutional right to representation, the answer necessarily implicates congressional policy and the creation of statutory rights to ensure that all unaccompanied minors facing immigration proceedings receive access to a free, government-appointed counsel.[198] Given the correlation between representation and outcome, the assistance by counsel needs to be given to unaccompanied minors to ensure fairness and protection of their due process guarantees.[199]

In Australia, the law establishes that immigration officers are under no obligation to advise detained unaccompanied minors that they can apply for a visa or seek representation.[200] And while in Canada some provinces have provisions in this regard, the fact that there is a lack of national policy results in an inconsistent framework for the immediate care, protection, and legal representation of unaccompanied minors.[201]

The countries in the EU, South Africa, Australia, Canada, and the United States are also bound by the provisions of the 1951 Refugee Convention.[202] However, many refugee law materials comment on the lack of a child-oriented policy or the recognition of child-specific forms of persecution.[203] In this sense, the legislation in Canada is the only one that recognizes that the protection needs for unaccompanied minors can go beyond the five enumerated grounds set by the

---

194 Ataiants *supra* note 6, at 5.

195 *Children: Amid a Growing Court Backlog Many Still Unrepresented*, TRAC IMMIGR. (Sept. 28, 2017) https://trac.syr.edu/immigration/reports/482/#f1; *New Data on Unaccompanied Children in Immigration Court*, TRAC IMMIGR. (July 15, 2014), https://trac.syr.edu/immigration/reports/359/.

196 Inter-Am Comm'n H.R., *supra* note 169, at ¶ 317; King, *supra* note 38, at 350; *see also* Committee on the Rights of the Child, General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin, CRC/GC/2005/6 (Sept. 1, 2005).

197 See J.E.F.M. v. Lynch, 837 F.3d 1026, 1040, n.8 (9th Cir. 2016) at 1038 (holding that the district court lacked jurisdiction to decide the minors' claims that they were entitled to court-appointed counsel because those claims arose from their removal proceedings and thus had to be resolved through the process set forth in 8 U.S.C. § 1252).

198 King, *supra* note 38, at 333.

199 *Id.* at 338.

200 Schloenhardt, *supra* note 66, at 61.

201 CROCK, *supra* note 24, at 300.

202 Benfer, *supra* note 69, at 757.

203 Corona, *supra* note 94, at 228.

Refugee Convention. It provides two different alternatives: one as extended protection that applies to persons that could be in some kind of danger, fear of persecution or harm which does not fit in one of the five enumerated grounds of the Refugee Convention; and the other based on humanitarian and compassionate grounds.[204]

Formally, unaccompanied minors have an alternative under the Safe Third Country Agreement to seek asylum in Canada. The Canadian system offers in general better protections than the United States, takes into consideration the best interest of the child, and offers additional grounds for relief under gang violence. The problem is that due to current policies in place, it is hard for unaccompanied minors to safely go all the way to Canada and present their asylum claim, and so many of them will be detained in Guatemala or the United States and face removal to their countries.

The activities of organized crime are becoming one of the prime movers of forced migration in several countries in Central America, and unaccompanied minors from the Northern Triangle and Mexico consistently cite gang or cartel violence as a primary motivation for fleeing.[205] However, gang-related violence has proven to be unsuccessful in many courts as a ground to establish persecution based on membership in a particular social group or as political opinion.[206] Unaccompanied minors in the Northern Triangle and Mexico face a specific type of harm and violence (cartels, gangs, *pandillas maras*) which is hardly recognized as persecution by United States judges.

The particularities of the region need to be taken into consideration. The scope of the five enumerated grounds for which an alien may qualify for asylum has been the subject of constant dispute and interpretation in courts, and is not sufficient to address the particularities of social violence claims.[207] Laws have to change to adapt to new social realities and circumstances.[208] Asylum laws need to open to the possibility of new types of claims of persecution.

Like Canadian Law, the TVPRA should include the recognition of social violence as a form of persecution for unaccompanied minors. This would translate to additional protection for unaccompanied minors and would apply when their life, safety, or freedom have been threatened by generalized pervasive social violence, internal violent conflicts, or massive violation of human rights, also integrating the best interest of the child as a consideration in the asylum claim.[209]

---

204 CROCK, *supra* note 24, at 314; Immigration and Refugee Protection Act, *supra* note 125, at 25, 97.

205 American Immigration Council, *A Guide to Children Arriving at the Border: Laws, Policies and Responses*, 2 (June 2015).

206 *See* HILLEL R. SMITH, CONG. RESEARCH SERV. LSB10207, ASYLUM AND RELATED PROTECTIONS FOR ALIENS WHO FEAR GANG AND DOMESTIC VIOLENCE (2019); *see* Lorena S. Rivas-Tiemann, *Asylum to a Particular Social Group: New Developments and Its Future for Gang-Violence*, 47 TULSA L. REV. 477 (2011); Timothy Greenberg, *The United States Is Unwilling to Protect Gang-Based Asylum Applicants*, 61 N.Y. L. SCH. L. REV. 473, 476 (2016).

207 See SMITH, *supra* note 206.

208 C. Thomas Dienes, *Judges, Legislators, and Social Change*, 13 AM. BEHAV. SCIENTIST 511, 520 (1970).

209 *Id.*

VII. Conclusions

Although migration has unique characteristics in each region, one commonality stands out: unaccompanied minors face tremendous hardships as they journey to new destinations. Irrespective of their country of arrival, these minors experience significant threats to their physical safety, including the dangers posed by human trafficking, kidnapping, and violence. Additionally, they often encounter legal and social discrimination, xenophobia, and due process violations such as lack of proper representation. The detention centers and shelters meant to provide temporary relief and support often fall short of the required standards, with poor safety and sanitary conditions compounding the already challenging situation. Immigration law has proven to be an area in which the United States is reluctant to be governed by international human rights rules.[210] The United States is a signatory to international treaties like the UDHR, the American Declaration, the Refugee Convention, and the ICCPR, but the practice of ratifying treaties as non-self-executory has left American courts with little room to apply and interpret them as part of the domestic legal system.

On the other hand, the United States' lack of action regarding some international treaties like the CRC, and the American Convention, as well as the reluctance to accept the jurisdictions of international courts has made experts and academics wonder about the commitment of the United States to its international obligations.[211] Immigration advocates are therefore doubtful to pursue arguments relying on international norms to enhance the protection of unaccompanied minors' human rights since international law has virtually no direct impact on domestic law. This was discussed as a divergence between international and domestic law and, as a result, there are two separate standards for the treatment of unaccompanied minors. International standards remain far and unreachable. Aspects of this diversion can be seen, for example, in the criminalization of immigration, in the significant expansion of detention in criminal-like facilities of non-citizens, and the lack of legal representation for unaccompanied minors in immigration proceedings as part of due process guarantees.[212]

But the divergence between international law and domestic law is not particular to the United States; similar problems were found in Australia, South Africa, and some countries in the EU. Shared problems include the absence of adequate legal representation; unreliable or harmful age determination procedures; the abusive use of detention, including punitive measures; and the failure to have child-appropriate proceedings taking into account unaccompanied minors' special vulnerability.[213] Although some countries award special protections to unaccompanied minors, as long as they keep putting the enforcement of their immigration laws first, the human rights of unaccompanied minors will still be

---

[210] Laura S. Adams, *Divergence and the Dynamic Relationship between Domestic Immigration Law and International Human Rights*,51 EMORY L. J. 983, 997 (2002).

[211] David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L., 129, 177 (1999).

[212] Adams, *supra* note 210, at 990.

[213] Bhabha, *supra* note 11.

violated.[214] The fact that similar problems were found in different jurisdictions leads to conclude that the complexity and scope of the forced displacement of unaccompanied minors call for efforts by the international community to formulate new policy responses.[215] The protection of unaccompanied minors' human rights in immigration proceedings faces significant challenges, including a lack of child-appropriate proceedings, concerns regarding their life, dignity, and safety during detention, and worries about due process and representation in immigration courts.

To address these issues and comply with international standards, it is crucial that international and domestic law incorporate the following measures: Firstly, the principle of the best interest of the child should be added to immigration legislation and policymaking. This would ensure that the welfare and interests of the child are given priority when making decisions that affect their lives. Secondly, unnecessary and prolonged detention of unaccompanied minors must be stopped. Detention poses significant risks to the physical and mental health of children and violates their right to liberty and security. Thirdly, the structure of immigration courts and proceedings should be reformed to accommodate child-appropriate proceedings. The process must be designed to take into account the developmental stage, language abilities, and cultural background of the child to ensure their full participation in the proceedings. Fourthly, unaccompanied minors should be provided with free legal counsel to ensure that they have adequate representation and access to justice. Legal representation is crucial to protect their rights and interests and ensure that their voices are heard in immigration proceedings. Finally, it is essential to recognize other forms of social violence as a form of persecution. Many unaccompanied minors flee their homes due to violence, including gang violence, organized crime, and internal violent conflicts. It is necessary to recognize these forms of persecution and offer protection to those who are at risk and seeking protection. Incorporating these measures into international and domestic law would go a long way towards protecting the human rights of unaccompanied minors in immigration proceedings and ensuring that their welfare and interests are given priority.

214 *See* Carr, *supra* note 10, at 159.

215 Helton & Jacobs, *supra* note 14.

HEINONLINE

DATE DOWNLOADED: Wed Aug 2 20:02:45 2023
SOURCE: Content Downloaded from HeinOnline

Citations:
Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

Bluebook 21st ed.
Diana Ramirez, Comparative Immigration Policies for Unaccompanied Minors: A Shared Challenge, 19 LOY. U. CHI. INT'l L. REV. 157 (2023).

ALWD 7th ed.
Diana Ramirez, Comparative Immigration Policies for Unaccompanied Minors: A Shared Challenge, 19 Loy. U. Chi. Int'l L. Rev. 157 (2023).

APA 7th ed.
Ramirez, D. (2023). Comparative immigration policies for unaccompanied minors: shared challenge. Loyola University Chicago International Law Review, 19(2), 157-186.

Chicago 17th ed.
Diana Ramirez, "Comparative Immigration Policies for Unaccompanied Minors: A Shared Challenge," Loyola University Chicago International Law Review 19, no. 2 (Spring 2023): 157-186

McGill Guide 9th ed.
Diana Ramirez, "Comparative Immigration Policies for Unaccompanied Minors: A Shared Challenge" (2023) 19:2 Loy U Chi Int'l L Rev 157.

AGLC 4th ed.
Diana Ramirez, 'Comparative Immigration Policies for Unaccompanied Minors: A Shared Challenge' (2023) 19(2) Loyola University Chicago International Law Review 157

MLA 9th ed.
Ramirez, Diana. "Comparative Immigration Policies for Unaccompanied Minors: A Shared Challenge." Loyola University Chicago International Law Review, vol. 19, no. 2, Spring 2023, pp. 157-186. HeinOnline.

OSCOLA 4th ed.
Diana Ramirez, 'Comparative Immigration Policies for Unaccompanied Minors: A Shared Challenge' (2023) 19 Loy U Chi Int'l L Rev 157 Please note:
citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at https://heinonline.org/HOL/License
-- The search text of this PDF is generated from uncorrected OCR text.
-- To obtain permission to use this article beyond the scope of your license, please use: Copyright Information

Comparative Immigration Policies for Unaccompanied Minors: A Shared Challenge

Diana Ramirez*

Abstract

Unaccompanied minors from the Northern-Triangle and Mexico have been arriving at the United States border in large numbers over the past decade as a result of forced migration movements. Although the arrival of unaccompanied minors is not a new phenomenon in the United States, recent administrations have responded in ways that have made the country's immigration system increasingly hostile towards them.

However, this issue is not exclusive to the United States. Unaccompanied minors traveling alone to Europe, Australia, South Africa, Canada, or the United States face similar dangers and are particularly vulnerable to abuse and trafficking. Regardless of jurisdiction, the treatment, care, and protection of the human rights of unaccompanied minors pose significant challenges. Around the world, unaccompanied minors are subject to similar human rights violations, and both international and domestic laws have proven to be ineffective in protecting them.

As long as countries prioritize the enforcement of their immigration laws, which are not designed to protect minors, the human rights and international standards of unaccompanied minors will continue to be violated as they migrate and seek asylum. It is crucial to recognize and address the unique needs and vulnerabilities of unaccompanied minors. Only then can we hope to ensure their safety and protect their fundamental human rights.

Table of Contents

* Associate Director for Graduate Programs and International Affairs and Adjunct Professor at the Elisabeth Haub School of Law at Pace University.

I. Introduction

Forced migration has caused millions of people around the world to be uprooted. The current migration crisis is one of the most profound and least understood global challenges of our time.[1] The most common factors for forced migration can be listed as follows: (1) various forms of persecution; (2) armed conflicts or heavy gang violence; (3) human rights violations; (4) inequality and poverty; (5) lack of protection of economic, social, and cultural rights; and (6) political instability, corruption, or insecurity in the region.[2]

Unaccompanied minors "are widely recognized as among the most vulnerable of all migrants, and yet their basic human rights are often neglected."[3] The development of international law has taken into consideration the multiple factors that

[1] GLOBAL FORCED MIGRATION, THE POLITICAL CRISIS OF OUR TIME, S. DOC. NO. 116 48, at (i) (2d Sess. 2020).

[2] *Human Mobility, Interamerican Standards: Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System*, Inter-Am. Comm'n H.R., Rep. No. 46/15, OEA/Ser.L/V/II, doc. 46, at 11, 12 (2015) [hereinafter *Human Mobility*].

[3] Michael J. Wynne, *Treating Unaccompanied Children Like Children: A Call for the Due Process Right to Counsel for Unaccompanied Minors Placed in Removal Proceedings*, 9 ELON L. REV. 431, 440 (2017).

lead unaccompanied minors to migrate, like situations of vulnerability and international protection needs.[4] For many, the right to leave is a prerequisite to secure protection against (anticipated) persecution and the enjoyment of human rights.[5]

Multiple international laws include provisions relevant to protecting the human rights of unaccompanied minors, including their dignity, health and well-being.[6] The Universal Declaration of Human Rights ("UDHR"), the International Covenant on Civil and Political Rights ("ICCPR"), the Convention on the Rights of the Child ("CRC"), and regional treaties outline fundamental freedoms and conditions that unaccompanied minors are entitled to enjoy.[7] These freedoms and conditions include the principles of the "best interests of the child" as a primary consideration in all decisions affecting the life of the child, the principle of non-refoulement,[8] the right to health, the right to due process, and the right to freedom from all forms of violence, among others.[9]

Yet, international standards remain far and unreachable in most domestic jurisdictions. As long as they keep putting the enforcement of their immigration laws first, the human rights of unaccompanied minors will still be violated.[10] The United States, Canada, Australia, South Africa, and some countries in the EU share similar problems. The absence of adequate legal representation; unreliable or harmful age determination procedures; the abusive use of detention, including punitive measures; and the failure to have child-appropriate proceedings taking into account unaccompanied minors' special vulnerability are all making immigration systems across the world increasingly hostile towards unaccompanied minors.[11]

The Refugee Convention of 1951 has no provision that specifically applies to migrant children, such as unaccompanied minors. However, the UNHCR Guidelines on International Protection for Child Asylum Claims provide legal interpretation and guidance to a child-sensitive application of the refugee definition. The Refugee Convention was designed after World War II, and therefore it reflects the concerns and thinking of a different period.[12] The time period in which the Refugee framework was created translates into a particularly striking disconnect

---

[4] *Human Mobility*, *supra* note 2, at ¶ 81.

[5] Marjoleine Zieck, *Refugees and the Right to Freedom of Movement: From Flight to Return*, 39 MICH. J. INT'L L., 19, 21 (2018).

[6] Janna Ataiants et al., *Unaccompanied Children at the United States Border, a Human Rights Crisis That Can Be Addressed with Policy Change*, J. IMMIGRANT & MINORITY HEALTH 1000, 1006 (2018).

[7] *Human Mobility*, *supra* note 2, at ¶ 83.

[8] Non-refoulement is a fundamental principle of international law that forbids a country receiving asylum seekers from returning them to a country in which they would be in likely danger of persecution based on race, religion, nationality, membership of a particular social group or political opinion.

[9] Ataiants, *supra* note 6.

[10] Bridgette A. Carr, *Incorporating a Best Interests of the Child Approach into Immigration Law and Procedure*, 12 YALE HUM. RTS. & DEV. L. J.,120, 159 (2009).

[11] Jacqueline Bhabha, *Children, Migration and International Norms*, *in* MIGRATION AND INTERNATIONAL NORMS 203, 218 (Alexander Aleinikoff & Vincint Chetail eds., TMC Asser Press 2003).

[12] NUALA MOLE, ASYLUM AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS 5, 6 (6th ed. 2000).

between law, policy and practice in regard to current issues.[13] The fact that similar problems were found in different jurisdictions leads to the conclusion that the complexity and scope of the forced displacement of unaccompanied minors call for efforts by the international community to formulate new policy responses.[14]

Currently, the main issues with the protection of unaccompanied minors' human rights in immigration proceedings include a lack of child-appropriate proceedings; concern for their life, dignity, and safety during detention; and concerns about due process and representation in immigration courts.[15] To comply with international standards and resolve these issues international and domestic law should ensure the following: (1) the addition of the principle of the "best interest of the child" to immigration legislation and policymaking; (2) stop the unnecessary and prolonged detention of unaccompanied minors; (3) reform the structure of immigration courts and proceedings to accommodate child-appropriate proceedings; (4) provide free legal counsel to unaccompanied minors; and (5) recognize other forms of social violence as a form of persecution.

II. Immigration Laws and Policies for Unaccompanied Minors Seeking Asylum in Europe

A. European Standards on International Law and Migration

Migration has always been common in Europe, but in recent years several member states of the European Union ("EU") have experienced the arrival of significant numbers of unaccompanied minors from non-European countries seeking refuge.[16] The core reasons for the rise of unaccompanied minors in Europe mirror in some capacity those expressed by children arriving at the United States border: better economic opportunities; family reunification; fleeing from violence, disturbance, civil conflicts or war; sexual and labor exploitation; and in some cases forced marriage and/or torture.[17]

Assessing the exact number and statistics for unaccompanied minors in Europe is a hard task since every member state has its own immigration ministry; the quality of statistics on unaccompanied minors varies significantly between

---

[13] Alison Luke, *Uncertain Territory: Family Reunification and the Plight of Unaccompanied Minors in Canada*, 16 DALHOUSIE J. LEGAL STUDS. 69, 79 (2007).

[14] Arthur C. Helton & Eliana Jacobs, *What Is Forced Migration?*, 13 GEO. IMMIGR. L. J., 521, 521-22 (1999).

[15] Maura M. Ooi, *Unaccompanied Should Not Mean Unprotected: The Inadequacies of Relief for Unaccompanied Immigrant Minors*, 25 GEO. IMMIGR. L. J. 883, 883 (2011); *see generally* Deborah S. Gonzalez, *Sky Is the Limit: Protecting Unaccompanied Minors by Not Subjecting Them to Numerical Limitations*, 49 ST. MARY'S L. J. 555 (2018); *see also* Samantha Casey Wong, *Perpetually Turning Our Backs to the Most Vulnerable: A Call for the Appointment of Counsel for Unaccompanied Minors in Deportation Proceedings*, 46 CONN. L. REV. 853 (2013); Zahra Lanewala, *Shifting Focus from Deportation of Unaccompanied Minors to Investing in Long-Term Reintegration Process*, 5 U. BALT. J. INT'L L. 124 (2016); Sarah J. Diaz, *Failing the Refugee Child: Gaps in the Refugee Convention Relating to Children*, 20 GEO. J. GENDER & L. 605, 620 (2019).

[16] GABRIELLA LAZARIDIS, SECURITY, INSECURITY AND MIGRATION IN EUROPE 138, 140 (1st ed. 2011).

[17] *Id.* at 143.

member states and the data from individual states is not necessarily comparable.[18] However, patterns show that most unaccompanied minors in Europe come mainly from Afghanistan, Iraq, Somalia, and the Syrian Arab Republic, and in lesser numbers from Eritrea, Turkey, Venezuela, Nigeria, and Iran.[19] The number of applications for international protection has significantly increased in the European Union over recent years, mostly related to the ongoing crisis in Syria.[20] The latest data published by UNICEF in 2018 showed that out of the 30,000 minors arriving in Europe—mostly through Italy, Greece, Bulgaria, and Spain—12,700 were separated or unaccompanied. Of these minors, 70 percent sought asylum mainly in three countries, Germany, France, and Greece, and in lesser numbers in Italy and the United Kingdom.[21] The top destination for separated and unaccompanied minors in Europe is still Germany, registering 43 percent of all child asylum applications in 2018.[22]

Understanding the relationship between international law and domestic law within the EU is important to establish the rights and protections of unaccompanied minors in the region. Recognition of fundamental rights as an integral part of the EU legal order implies that the member states have to respect these rights whenever they act within the scope of EU law (or, "when they are implementing Union law," as the Charter of Fundamental Rights puts it).[23] The Charter of Fundamental Rights of the European Union ("CFR") includes human rights standards and elements of the CRC, which are directly incorporated as obligations to all European Union member states.[24] The European Convention on Human Rights ("ECHR") provides an express regional recognition of most of the rights set out in the UDHR, but it does not contain any provision to reflect Article 14 of the Universal Declaration which guaranteed the right to seek and enjoy asylum from persecution.[25] It does, however, provide asylum seekers in the EU with a minimum standard framework of protection for their human rights.[26] It has been said by the European Commission that the protections for unaccompanied minors come from two sources: the standards of the EU Charter of Fundamental Rights,

---

[18] Alison Hunter, *Between the Domestic and the International: The Role of the European Union in Providing Protection for Unaccompanied Refugee Children in the United Kingdom*, 3 EUR. J. MIGRATION L. 383, 383-84 (2001).

[19] LAZARIDIS, *supra* note 16, at 143; U.N. Refugee Agency, UNICEF & U.N. Migration Agency, *Refugee and Migrant Children in Europe: Overview of Trends (January-December 2018)*, https://www.unicef.org/greece/sites/unicef.org.greece/files/2019-11/Refugee-and-migrant-response-service-mapping-data-report-january-december-2018.pdf (last visited Oct. 29, 2019) [hereinafter UNICEF].

[20] *See* European Migration Network, *(Member) States' Approaches to Unaccompanied Minors Following Status Determination* (2018).

[21] UNICEF, *supra* note 19.

[22] *Id.*

[23] Jurgen Bast, *Of General Principles and Trojan Horses – Procedural Due Process in Immigration Proceedings under EU Law*, 11 GER. L. J. 1006, 1009 (2010).

[24] MARY CROCK ET AL., PROTECTING MIGRANT CHILDREN: IN SEARCH OF BEST PRACTICE 239, 243 (Mary Crock & Lenni B. Benson eds., Edward Elgar Publishing 2018).

[25] MOLE, *supra* note 12, at 6.

[26] Hunter, *supra* note 18, at 386.

and the CRC.[27] On the jurisprudence side, the European Court on Human Rights ("ECtHR" or "European Court") has played a major role in establishing and interpreting human rights in refugee cases.[28]

B. The Significance of Children's Rights in the European Regional System to Award Special Protections to Unaccompanied Minors

While every state has its own agencies and institutions that deal with immigration issues, the EU widely recognizes that unaccompanied minors are especially vulnerable in accessing their rights and should therefore be additionally protected.[29] Personal dignity, the best interest of the child, and the unity of the family must be guaranteed by states when dealing with children who apply for international protection.[30] Along with Article 24 of the EU Charter of Fundamental Rights, which confers on states a duty of care for children, the Geneva Convention takes into account this special vulnerability of children and considers them a "social group" for persecution claims.[31] In those terms, the forms of prosecution targeted especially at children can include, for example, sexual exploitation, child abuse, and female genital mutilation.[32]

The European Council has acknowledged a connection between substantive and procedural rights, reasoning that unaccompanied minors require "specific procedural guarantees on account of their vulnerability."[33] Although vulnerability does not have an express legal basis in international human rights law, international human rights courts, particularly the ECtHR, have increasingly drawn on this concept in their jurisprudence. The Court has developed an important line of cases concerning migrant children, whom it considers particularly vulnerable to physical and mental harm during the migratory process.[34] It has deployed its conception of vulnerability in this regard, emphasizing that migrant children are in an extremely vulnerable situation as they are not only minors, but also aliens in an irregular situation in a foreign country who are not always accompanied by

---

[27] EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS & COUNCIL OF EUROPE, 2022 HANDBOOK ON EUROPEAN LAW RELATING TO THE RIGHTS OF THE CHILD 13 (2022).

[28] CROCK, *supra* note 24, at 243.

[29] LAZARIDIS, *supra* note 16, at 146.

[30] Parliamentary Assembly, *Improving the Quality and Consistency of Asylum Decisions in the Council of Europe Member States*, Res. 1695, at ¶ 8.3.4 (Nov. 20, 2009), https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17795&lang=en.

[31] Henriette D. C. Roscam Abbing, *Age Determination of Unaccompanied Asylum-Seeking Minors in the European Union: A Health Law Perspective*, 18 EUR. J. HEALTH L. 1, 11-12 (2011).

[32] EU Network of Independent Experts on Fundamental Rights, *Thematic Comment no. 4: Implementing the Rights of the Child in the European Union*, at 70-71 (May 20, 2006) (positing that because the EU considers itself bound by the Convention relating to the Status of Refugees of 18 July 1951 (Geneva Convention) and the New York Protocol relating to the Status of refugees of 31 January 1967, the instruments adopted by the Union in the field of asylum should be read in conformity with the Geneva Convention as interpreted by the United Nations High Commissioner for Refugees).

[33] Council Directive 2005/85, On Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, 2005 O.J. (L 326) 10, at ¶14 [hereinafter Council Directive 2005/85].

[34] Ana Beduschi, *Vulnerability on Trial: Protection of Migrant Children's Rights in the Jurisprudence of International Human Rights Courts*, 36 B.U. INT'L L. J. 1, 55 (2018).

an adult.[35] In addition, the principle of the best interests of the child is used as a complement to the concept of vulnerability by the European Court, which tends to combine both when deciding on issues relating to the protection of migrant children's rights.[36] In fact, in February of 2019, the European Court issued two judgments in which it reaffirmed that the respect for the double vulnerability of child asylum seekers must be the primary consideration and not just an equal factor such as their irregular status.[37]

C. The Right to Legal Representation for Unaccompanied Minors in Europe

Some countries in Europe also provide some degree of free representation to unaccompanied minors. While some appoint lawyers, others only appoint special representatives or social workers to help the unaccompanied minors frame their views during the immigration proceedings.[38] It is important to mention that the right to representation is different from the right to have free legal counsel. While it is true that even a non-lawyer representative may guarantee some level of expertise and care in a certain part of the process, they will never possess the necessary skills to navigate the often complicated asylum proceedings.[39] While this type of system does convey important rights, it "may not rise to the level of complexity that would require an attorney under human rights standards that govern the right to free legal counsel."[40]

Finland, Norway, Switzerland, Sweden, and the Netherlands all appoint, with some differences between each country, one or two representatives for unaccompanied minors; when two representatives are appointed, one will be an attorney and the other a personal representative. They both identify and advocate for the child's best interests but in different capacities. While the attorney will represent the unaccompanied minor in court, the personal representative will advocate for the child's best interest in issues like living arrangements or assist the minors at interviews with immigration authorities. In other countries, such as Austria, the United Kingdom, France, and Denmark, the right to representation is reserved exclusively for children seeking asylum.[41] The right to an appointed attorney at the expense of the government right holds an exception in Sweden, for cases where it is obvious that there are no reasons to believe an unaccompanied minor will gain his/her/their claim, representation will not be provided.[42]

---

[35] *See, e.g.*, *Popov v. France*, App. Nos. 39472/07 and 39474/07, Eur. Ct. H.R., ¶ 91 (2012); *Rahimi v. Greece*, Application No. 8687/08, Eur. Ct. H.R., ¶ 87 (2011); *Mayeka and Mitunga v. Belgium*, 2006-XI Eur. Ct. H.R, ¶ 103.

[36] Beduschi, *supra* note 34, at 71.

[37] *See generally Rahimi* v. *Greece*, App. No. 8687/08, Eur. Ct. H.R. (2011); *see also H.A. and Others v. Greece*, App. No.19951/16, Eur. Ct. H.R. (2019); *Khan v. France*, App. No. 12267/16, Eur. Ct. H.R. (2019).

[38] Shani M. King, *Alone and Unrepresented: A Call to Congress to Provide Counsel for Unaccompanied Minors*, 50 HARV. J. ON LEGIS. 331, 367 (2013).

[39] *Id.* at 370.

[40] *Id.* at 371.

[41] *Id.* at 367-68.

[42] *Id.* at 368-69.

The existing policies and legislation in the EU provide a general framework for the protection of the rights of the child in migration, covering aspects such as reception conditions, the treatment of their asylum applications, and their integration into the EU.[43] European countries have subscribed to the Dublin III Regulation, an EU rule that requires that an asylum applicant applies in the first EU country she or he reaches, under the assumption that they all provide similar protections for asylum seekers and refugees. To achieve that goal, member states have put efforts into drafting more harmonized EU policies to lay down the minimum standards for the treatment of unaccompanied minors.[44] This has been instrumental in raising awareness about the protection needs of unaccompanied minors, and in promoting protective actions such as training for guardians, public authorities, and other actors who are in close contact with unaccompanied minors.[45] These standards, while binding for all member states, are not extensive and leave gaps such as the recognition of child-specific forms of persecution, age assessment techniques, and responsibilities of legal guardians within the competence of each Member State.[46]

Some of the general EU policies include:

> (1) The appointing of a legal guardian or any other appropriate representation of unaccompanied minors to enable unaccompanied minors to express her or his views in proceedings.[47] For example, The European Convention on the Exercise of Children's Rights states its objective as promoting children's rights, granting children procedural rights, and facilitating the exercise of these rights by ensuring that children are informed and allowed to participate in proceedings that affect them.[48] Although, as stated above, not all member states grant the right to representation by a lawyer, the general policy requires member states to grant children the right to be assisted by an appropriate person of their choice to help them express their views.[49] This helps to ensure that unaccompanied minors are placed with adult relatives, a foster family, or in reception centers for minors, ensuring that siblings are being kept together. A huge concern is that in some countries, like Germany, unaccompanied minors that are 16 years of age or over can be placed in adult asylum seekers' facilities.[50]

---

[43] *See* European Migration Network, *supra* note 20.

[44] *See, e.g.*, Council Directive 180/29 O.J. 2013 (L 180) ("The Reception Conditions Directive"); Council Directive 304/12 O.J. 2004 (L 304) ("Qualification Directive"); Council Regulation 604/2013, 2013 (180/31) ("Dublin Regulation"); Council Directive 251/12 O.J. 2003 (L 251) ("Family Reunification Directive"); Council Directive 2008/115 O.J. 2008 (L 348) (EC) ("Return Directive").

[45] *See* European Migration Network, *supra* note 20.

[46] LAZARIDIS, *supra* note 16.

[47] European Convention on the Exercise of Children's Rights, *opened for signature* Jan. 25, 1996, 1996 E.T.S. No. 160 (entered into force July 1, 2000).

[48] *Id.*

[49] King, *supra* note 38, at 352.

[50] LAZARIDIS, *supra* note 16, at 151.

(2) Taking the necessary steps to trace the family members of unaccompanied minors as soon as possible. For example, in the case of unaccompanied minors who have been recognized by a member state, then this member state has the obligation to authorize the entry and residence of a legal guardian (parents, and in case they cannot be traced, any other family member).[51] In the event an unaccompanied minor is returned, member states are required to make sure that the unaccompanied minor will be returned to a family member.[52]

(3) Ensuring that those working with unaccompanied minors receive appropriate training.[53] However, it has also frequently been argued that asylum procedures are designed for adults and that the environment of the interrogation rooms is not suitable for minors.[54]

The EU appears to have enough protections for the rights of unaccompanied minors. And, unlike the United States, all the member states have signed and ratified the CRC. However, the reality lived by the thousands of unaccompanied minors in Europe is not too different from those in the United States. Too often, EU member states' national standards and practices are insufficient to ensure the minors' rights, and sometimes even contravene their protection needs.[55] There have been concerns raised about the treatment, detention, and due process for unaccompanied minors in Europe.[56]

In Greece, for example, one of the countries that receive the biggest influx of individuals, the UN Working Group on Arbitrary Detention ("WGAD") found issues with the guardianship system and detention of minors in 2013.[57] Unaccompanied minors often remain in overcrowded detention centers with adults and face "oppressive Greek law enforcement."[58] Because of these conditions, the ECtHR ruled that Greece is violating Article 3 of the European Convention on Human Rights by subjecting migrants to inhumane and degrading treatment.[59]

---

51 LAZARIDIS, *supra* note 16.

52 *Id.*

53 *Id.* at 149.

54 *Id.* at 153.

55 Marta Tomasi, *The European Court of Human Rights and the Best Interests of Unaccompanied Migrant Minors: A Step Towards a More Substantive and Individualized Approach?*, INT'L L. BLOG (Oct. 10, 2019), https://internationallaw.blog/2019/10/10/the-european-court-of-human-rights-and-the-best-interests-of-unaccompanied-migrant-minors-a-step-towards-a-more-substantive-and-individualized-approach/.

56 LAZARIDIS, *supra* note 16, at 151-57.

57 *Working Group on Arbitrary Detention Statement upon the Conclusion of Its Mission to Greece*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R (Jan. 31, 2013), https://www.ohchr.org/en/statements//01/working-group-arbitrary-detention-statement-upon-conclusion-its-mission-greece [hereinafter *Mission to Greece*]; *see also Greece: Humanitarian Crisis on the Islands*, HUM. RTS. WATCH (July 11, 2015, 12:00 AM), https://www.hrw.org/news/2015/07/11/greece-humanitarian-crisis-islands [hereinafter *Greece: Humanitarian Crisis*].

58 Victoria Galante, *Greece's Not-so-Warm Welcome to Unaccompanied Minors: Reforming EU Law to Prevent the Illegal Treatment of Migrant Children in Greece*, 39 BROOK. J. INT'L L. 745, 752 (2014).

59 *M.S.S. v. Belgium & Greece*, App. No. 30696/09 Eur. Ct. H.R. (Jan. 21, 2011).

More recently, in June of 2019, the European Court ruled yet again against Greece's practice of locking up unaccompanied migrant and asylum-seeking children in police-like cells. Human Rights Watch found that detained children are constantly forced to live in unsanitary conditions, alongside adults they do not know and are often abused and ill-treated by police.[60]

The treatment of unaccompanied minors was also highly debated in Italy recently because of *Trawalli and Others v. Italy*.[61] In this 2018 case, the European Court was called to rule, among other issues, on whether the detention and reception conditions for unaccompanied minors were lawful and/or constituted an inhuman or degrading treatment under the European Convention on Human Rights.[62] The Court stated, among other arguments, that:

> [w]hen the authorities deprive or seek to deprive a child of her or his liberty, they must ensure that he/she effectively benefits from an enhanced set of guarantees in addition to undertaking the diligent assessment of her/his best interest noted above. The guarantees include prompt identification and appointment of a competent guardian; a child-sensitive due process framework, including the child's rights to receive information in a child-friendly language, the right to be heard and have her/his views taken into due consideration depending on his/her age and maturity, to have access to justice and to challenge the detention conditions and lawfulness before a judge; free legal assistance and representation, interpretation and translation. The Contracting Parties must also immediately provide the child access to an effective remedy.[63]

III. Immigration Laws and Policies for Unaccompanied Minors Seeking Asylum in Australia

Asylum in Australia has been granted to many refugees since 1945 when half a million Europeans displaced by World War II were given asylum. Since then, there have been periodic waves of asylum seekers from Southeast Asia, mainly Vietnam and Indochina, and the Middle East.[64] Historically, most asylum seekers arrived by plane. However, since 2000, the arrival of asylum seekers by boat increased.[65] Around that time, suspected illegal boat arrivals started to be trans-

---

[60] Eva Cossé, *European Court Condemns Greece's Migrant Kid Lockups*, HUM. RTS. WATCH (June 15, 2019, 1:00 AM), https://www.hrw.org/news/2019/06/15/european-court-condemns-greeces-migrant-kid-lockups.

[61] *Trawalli and Others v. Italy*, App. No. 47287/17 Eur. Ct. H.R. (2018).

[62] *Id.*

[63] *Id.* at 9.

[64] *See generally* U.N. High Commissioner for Refugees, Asylum Levels and Trends in Industrialized Countries, 2005 (Mar. 17, 2006) https://www.unhcr.org/statistics/country//-trends-industrialized-countries-2005.html; U.N. High Commissioner for Refugees, *Refugee Data Finder (2001-2004)*, https://www.unhcr.org/refugee-statistics/download/?url=R03KjD (last visited May 22, 2023); U.N. High Commissioner for Refugees, *UNHCR Statistical Yearbook (2004)* (Aug. 21, 2005), https://www.unhcr.org/us//unhcr-statistical-yearbook-2004.

[65] Janet Phillips & Harriet Spinks, *Boat Arrivals in Australia Since 1976*, 1-3 (Parliament of Australia, 2013).

ferred to Australian Navy vessels to then be transported to off-shore detention facilities for processing.[66]

A. Immigration Detention of Unaccompanied Minors in Australia Violates International Human Rights Standards

The growing number of people arriving by boat initiated a change in Australia's treatment of refugees; in particular, the introduction of mandatory detention of unauthorized arrivals marked the "beginning of a gradual slide into a policy of deterrence, detention, and denial by systematically discriminating against asylum seekers."[67] To detain refugee children, the Australian government relies mainly on the legislative provisions of the Migration Act of 1958.[68] The Act provides that an "unlawful non-citizen" must be kept in "immigration detention" until deported or granted a visa, which makes Australia the only western country that has a mandatory detention policy for all undocumented immigrants.[69] The detention requirement continues until the person is determined to have a lawful reason to remain in Australia (and is granted a visa) or is removed from Australia.[70] These provisions apply to all unlawful non-citizens regardless of their age, so in effect, all refugee children without valid visas must be detained until they are either granted a visa or deported.[71]

One of the biggest concerns regarding the mandatory detention policy is the conditions of the offshore detention facilities: Nauru, Papua New Guinea, and Christmas Island. Several reports found the detainees' poor health and treatment conditions, including water shortage, lack of education access, overcrowding, and sexual abuse of women and children.[72] Although the legislation states that the detention of minors must be a measure of last resort, the reality is that it is not done as such.[73] Detention may last as long as five and a half years.[74] In 2018, reports surfaced of children as young as eight years old engaging in self-harm and exhibiting suicidal behaviors in The Nauru Regional Processing Centre.[75] Children are often detained among adults, behind 1200-volt electric, barbed-wire

66 Andreas Schloenhardt, *Deterrence, Detention and Denial: Asylum Seekers in Australia*, 22 U. QUEENSLAND L. J. 54, 60 (2002).

67 *Id.* at 54.

68 Fiona Martin & Terry Hutchinson, *Mental Health and Human Rights Implications for Unaccompanied Minors Seeking Asylum in Australia*, 1 J. MIGRATION & REFUGEE ISSUES 1, 2 (2005).

69 Emily A. Benfer, *In the Best Interests of the Child: An International Human Rights Analysis of the Treatment of Unaccompanied Minors in Australia and the United States*, 14 IND. INT'L & COMP. L. REV. 729, 740 (2004).

70 Martin & Hutchinson, *supra* note 68, at 2.

71 *Id.* at 2-3.

72 PETER MARES, BORDERLINE: AUSTRALIA'S RESPONSE TO REFUGEES AND ASYLUM SEEKERS IN THE WAKE OF THE TAMPA 132–133 (UNSW Press 2002); MICHAEL GORDON ET AL., AN OPEN LETTER TO THE AUSTRALIAN PEOPLE (Australian Association of Social Workers 2015).

73 Benfer, *supra* note 69, at 733.

74 *Id.* at 752.

75 Virginia Harrison, *Nauru Refugees: The Island Where Children Have Given up on Life*, BBC (Sept. 1, 2018) https://www.bbc.com/news/world-asia-45327058.

fences, until their cases are reviewed.[76] As a result of this comingling of age groups, some unaccompanied minors were forced to have their lips sewn together by adult detainees protesting the human rights violations in the detention centers.[77] The Australian Human Rights Commission has expressed grave concern at the prolonged and indefinite detention of children in remote locations stating that it breaches international human rights standards and is often prolonged under conditions that are unacceptable and violate Australia's human rights obligations.[78]

The government's view, however, is that the UN Convention on the Rights of the Child is irrelevant to the detention of children.[79] The case of *Re Woolley*, heard in 2004, involved four Afghan children whose parents had brought them to Australia in 2001.[80] The children, held in the Baxter detention center, sought a court order for their release, arguing that the mandatory detention regime in the Migration Act did not apply to them. This argument was rejected by the Court on the basis that the law clearly provided no express exceptions for children.[81] In *Jaffari v. Minister for Immigration & Multicultural Affairs*, it was questioned whether the Minister had performed according to the terms of international obligations of Australia.[82] Although the application was unsuccessful in the end, Justice French expressed concern about unaccompanied minors refugees, stating that: "there appears to be a significant discrepancy between the guidelines published by the United Nations High Commissioner on refugees in respect of unaccompanied minors seeking asylum and the current administration of the Migration Act concerning such persons."[83]

B. Due Process and Representation in Immigration Proceedings Under Australian Law

The protection visa program, established in the Migration Act, is the domestic mechanism through which Australia executes its obligations under the Refugee Convention.[84] When arriving at an immigration detention center, the individual should be made aware that they may apply for a visa and that unless they obtain

---

[76] Benfer, *supra* note 69, at 752.

[77] *Id.*

[78] Phillips & Spinks, supra note 65, at 13.

[79] *See Minister for Immigration & Multicultural & Indigenous Affairs v B* [2004] HCA 20 (29 April 2004) (Austl.).

[80] *Re Woolley; Ex Parte Applicants M276/2003* [2004] HCA 49 (7 October 2004) (Austl.).

[81] *Id.*

[82] *Jaffari v. Minister for Immigration & Multicultural Affairs* [2001] FCA 985 (26 July 2001) (Austl.).

[83] *Id.* at 43.

[84] *Migration Act 1958* (Cth) ss 35A, 36 (Austl.) [hereinafter *Migration Act*]; *see* U.N. High Commissioner for Refugees, *States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol*, https://www.unhcr.org/us//39149 (last updated Apr. 17, 2015) (showing that Australia's signature on January 22, 1954, brought into force the 1951 UN Convention relating to the Status of Refugees).

it, they will be removed from Australia.[85] Under Australian law, however, the officers have no obligation to ask unauthorized arrivals if they wish to apply for a protection visa or if they want to contact lawyers or independent advisers.[86] So to reduce the number of visa applications, this information is typically not made available to persons who arrive in Australia unlawfully.[87] Although not advised of their rights, unaccompanied minors are briefly screened to identify prima facie claims for protection.[88] Those who are screened are given the opportunity to seek legal advice, but only upon request. The ones who are not screened will be returned to the most recent country of departure.[89] This leaves unaccompanied minors completely uninformed about their status, the circumstances of their detention, the few legal rights they do have, and the assistance they can obtain. This lack of minimum procedural safeguards makes it more likely that they may be refouled even if they have grounds for protection.[90] In the few cases when unaccompanied minors can secure representation, the remote location of the processing (detention) facilities serves as a barrier for attorneys to contact the children.[91]

The Immigration Act of 1946 makes the Minister of the Department for Immigration and Multicultural and Indigenous Affairs ("DIMIA")[92] responsible for providing guards, translators, meal services, cleaning services, education, and health care to children. These responsibilities make the DIMIA the entity in charge of both the guardianship of children and removing them from the country, making the Minister "both guardian and jailer,"[93] all while serving as the child's representative throughout the immigration process.[94] As a result, the person who is designated to protect the best interests of the child is also the child's prosecutor.[95] This dual role makes Australian immigration structurally flawed and presents a conflict of interest because the child's welfare may not always be a priority.[96] The guardianship of the child must come before the duty to prosecute and according to the Migration Act, it should be interpreted consistently with Australia's international obligations under the CRC.[97] Still, the government's conflicting roles of both the guardian of unaccompanied minors and the entity

---

[85] *Migration Act*, *supra* note 84, at ss 35A, 36.

[86] Schloenhardt, *supra* note 66, at 61.

[87] *Id.*

[88] CROCK, *supra* note 24, at 357.

[89] *Id.* at 358.

[90] *Id.*; Schloenhardt, *supra* note 66, at 61.

[91] Benfer, *supra* note 69, at 755.

[92] *Id.* at 741 (highlighting that the DIMIA outsources the management of detention centers to Australian Correctional Services (ACS)).

[93] Martin & Hutchinson, *supra* note 68, at 4.

[94] Benfer, *supra* note 69, at 741; Eliana Corona, *The Reception and Processing of Minors in the United States in Comparison to that of Australia and Canada*, 40 HASTINGS INT'L & COMP. L. REV. 205, 218 (2017).

[95] Corona, *supra* note 94, at 218.

[96] Corona, *supra* note 94, at 218; Benfer, *supra* note 69, at 741.

[97] Corona, *supra* note 94, at 218.

responsible for deporting them must be repaired to ensure the best interest of the child.[98]

IV. Immigration Laws and Policies for Unaccompanied Minors Seeking Asylum in South Africa

A. African Standards on International Law, Migration, and the Protection on Unaccompanied Minors' Rights

Following the dismantling of the apartheid system in 1994, South Africa joined the international refugee regime.[99] The International Labor Organization ("ILO") estimates that Africa has the largest number of migrant workers.[100] Labor migration to richer countries in the region is an upward trend; the top destination countries in the region are South Africa, Botswana, and Namibia.[101] Since the economic and social breakdown in Zimbabwe, hundreds of thousands of people have fled the country for South Africa, including thousands of unaccompanied refugee minors.[102] The majority are between the ages of 12 and 18, and approximately 70 percent of the children are boys, but there are likely a greater number of girls who tend to work as domestic laborers or sex workers and thus remain unseen.[103]

To address the new flow of asylum seekers into the country, the South African Parliament passed the Refugees Act of 1998, in which the definition of a refugee set by Article 1 of the UN Refugee Convention was incorporated.[104] The Act also incorporated the 1969 Organization of African Unity's Convention Regarding the Specific Aspects of Refugee Problems ("OAU Convention") which allows those who are not specifically persecuted as individuals to claim asylum when fleeing generalized violence.[105] Under the OAU Convention, a person can be awarded refugee status when "[o]wing to external aggression, occupation, foreign domination, or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence."[106]

Unlike the American and European Regional Systems, Africa has also enacted its own children's rights charter (the African Charter on the Rights and Welfare of the Child) which has been ratified by forty-seven of the African Union's fifty-

---

98 Benfer, *supra* note 69, at 768.

99 Lindsay M. Harris, *Untold Stories: Gender-Related Persecution and Asylum in South Africa,* 15 MICH. J. GENDER & L. 291, 296 (2009).

100 Adriette H. Dekker, *The Social Protection of Non-Citizen Migrants in South Africa,* 22 S. AFR. MERCANTILE L. J. 388, 389 (2010).

101 *Id.* at 390.

102 Cerise Fritsch, et al., *The Plight of Zimbabwean Unaccompanied Refugee Minors in South Africa: A Call for Comprehensive Legislative Action,* 38 DENV. J. INT'L L. & POL'Y 623, 623 (2010).

103 *Id.* at 624.

104 Refugees Act 130 of 1998 .§ 3(a) (S. Afr.).

105 Harris, *supra* note 99, at 297.

106 Organization of African Unity Convention: Governing the Specific Aspects of Refugee Problems in Africa, U.N.T.S. No. 14691, art. I(2) (entered into force Sept. 10, 1969).

three members.[107] The African Children's Charter reaffirms in its preamble the adherence to the principles contained in the CRC and adopts in article 4(1) the "best interests of the child" standard for all actions concerning the child.[108]

All legislation on refugees and asylum seekers must be framed according to the South African Constitution, which guarantees fundamental rights to all individuals within the borders of South Africa, regardless of citizenship.[109] In 2005, the Pretoria High Court affirmed the application of the Constitution to unaccompanied minors, and further entrenched the principle that government departments cannot without due process detain and deport unaccompanied foreign children from South Africa.[110] Under this analysis, unaccompanied minors should be granted the same legal mechanisms of protection and due process rights as national children from South Africa according to the principle of the best interest of the child.[111]

Like unaccompanied minors in every region, minors who travel to South Africa experience multiple challenges, and their socio-economic and human rights, in general, are often not fully protected.[112] They face threats to their physical safety; life without a parent or guardian; legal and social discrimination; xenophobia; and a constant struggle to find food, shelter, education, health care, and employment.[113] Unaccompanied minors who were displaced in South Africa are sheltered in sites set up around the country. Yet, some of these sites are not provided with food or water.[114] There is a chronic shortage of shelter for refugees, and it has been reported that hundreds of children are left with no access to a shelter at all and have been forced to sleep in the streets or the bush. In Cape Town, for example, 150 refugees were found living on the street.[115] Although the law stipulates that an asylum claim be adjudicated within 180 days of the applicant's date of entry into South Africa, in reality, many claims languish for years due to a backlog of cases.[116] While there is no clear explanation for this backlog, it is likely rooted in South Africa's shortage of resources combined with a lack of political will for reform and high levels of xenophobia.[117]

---

107 *See List of Countries Which Have Signed, Ratified/Acceded to the African Charter on the Rights of the Child,* African Committee of Experts on the Rights and Welfare of the Child, https://www.acerwc.africa/en/member-states/ratifications (last visited May 22, 2023); *see generally* Organization of African Unity, African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990).

108 King, *supra* note 38, at 354.

109 Harris, *supra* note 99, at 295.

110 *Centre for Child Law & Another v. Minister of Home Affairs & Others* 2005 (6) SA 50 (S. Afr.), http://www.childlawsa.com/case_04.html.

111 *Id.*

112 Fritsch, *supra* note 102, at 623; Sarah Swart, *Unaccompanied Minor Refugees and the Protection of Their Socio-Economic Rights under Human Rights Law,* 9 AFR. HUM. RTS. L. J. 103, 124 (2009).

113 Fritsch, *supra* note 102, at 623.

114 Swart, *supra* note 112, at 111.

115 Swart, *supra* note 112, at 112.

116 Harris, *supra* note 99, at 301.

117 *Id.*

South Africa's refugee system is shaped by international and regional standards, which are implemented by domestic legislation. The relatively progressive legal framework stands in sharp contrast to the reality facing asylum seekers and refugees in South Africa, where those international and regional standards are not being protected.[118] Although these children have rights under international and domestic law, political and other factors combined have denied children the protection and support to which they are legally entitled.[119] The reality is that unaccompanied minors face numerous barriers to obtaining asylum in South Africa including being prevented from lodging claims, failing to have their claims fairly adjudicated, failing to have their rights respected, and continually facing arbitrary arrest, detention, and unlawful deportation.[120]

V. Immigration Laws and Policies for Unaccompanied Minors Seeking Asylum in Canada

A. The Significance of Children's Rights in Canada to Award Special Protections to Unaccompanied Minors Seeking Asylum

The Canada Border Services Agency is the entity responsible for the administration and enforcement of the Immigration and Refugee Protection Act, which, along with jurisprudence as well as internal policies, directives, and guidelines, establishes the rules for the arrest and detention of foreign nationals in Canada.[121] Nonetheless, Canada has no national policy for the care and treatment of child refugees, but rather each of the ten provinces and three territories has its own system for unaccompanied and separated minors.[122]

Depending on the province, unaccompanied minors are warranted special procedural guarantees throughout their refugee status determinations, such as: the appointing of an officer responsible for the child's case throughout the entirety of the determination procedure; prioritizing these claims to process them as expeditiously as possible; and facilitating pre-hearing conferences to assess what evidence the child can provide, including the best way to elicit this information.[123] But the fact that there is a lack of national policy results in an inconsistent framework for the immediate care, protection, and legal representation of unaccompanied minors.[124]

One example is that the Immigration and Refugee Protection Act provides the right to counsel for all persons subject to immigration proceedings before the

---

[118] Harris, *supra* note 99, at 295.

[119] Fritsch, *supra* note 102, at 623.

[120] *Id.* at 646.

[121] Canada Border Service Agency, *National Directive for the Detention or Housing of Minors,* GOVERNMENT OF CANADA, https://www.cbsa-asfc.gc.ca/security-securite/detent/nddhm-dndhm-eng.html (last visited May 22, 2023) [hereinafter Canada Border Service Agency].

[122] *Canada's Treatment of Non-Citizen Children*, CANADIAN COUNCIL FOR REFUGEES https://ccrweb.ca/files/noncitizenchildrenbackgrounderen.pdf (last visited Jan. 10, 2020) [hereinafter *Canada's Treatment of Non-Citizen Children*]; CROCK, *supra* note 24, at 300.

[123] *See generally* Canada Border Service Agency, *supra* note 121.

[124] CROCK, *supra* note 24, at 300.

Immigration and Refugee Board and the appointment of a "Designated Representative" ("DR") that has the responsibility of representing minors in those proceedings.[125] However, each province is responsible to establish the rule for the appointment of those DRs and the availability to obtain free legal representation.[126] In Quebec, the minor will be assigned two trained social workers; one will help the unaccompanied minors to retain counsel during their asylum cases, and the other will help with settlement issues like helping them contact relatives who may already reside in Canada, and placement with families from a similar ethnic background if no relatives were found.[127] While in Ontario, under an agreement with the Immigration and Refugee Board and a private law firm, the DRs will be pro bono lawyers.[128] The Committee on the Rights of the Child has made recommendations to Canada to make sure that unaccompanied minors are provided with guardianship and social services in every part of the country and that they are not subject to immigration detention.[129]

B. The Best Interest of The Child Principle as a Means to Protect Unaccompanied Minors in the Canadian Legal System

The Canadian immigration system does recognize that refugee determinations for all children, including unaccompanied minors, must reflect the best interests of the child.[130] According to Section 60 of the Immigration and Refugee Protection Act, the detention of a minor must be a measure of last resort respecting the best interests of the child.[131] The Canadian system offers the Alternatives to Detention Policy, which allows individuals to live in non-custodial, community-based settings while their immigration status is being resolved. This policy ensures that minors are not detained for reasons relating to their immigration status. Alternatives to detention include community programming (in-person reporting, cash or performance bond, and community case management and supervision) and electronic supervision tools, such as voice reporting.[132]

Even though Canadian law says that unaccompanied minors should only be detained as a matter of last resort, the reality is that children are routinely held in immigration detention centers for weeks or even months.[133] In the last decade, there were several cases when separated and unaccompanied minors were intercepted while being smuggled through the United States into Ontario and Quebec,

---

[125] Immigration and Refugee Protection Act, S.C. 2001, c 27, s. 167(2) (Can.).

[126] CROCK, *supra* note 24, at 301.

[127] *Unaccompanied Minors*, CANADIAN COUNCIL FOR REFUGEES, https://ccrweb.ca/en/res/unaccompanied-minors (last visited May 22, 2023) [hereinafter *Unaccompanied Minors*].

[128] CROCK, *supra* note 24, at 301.

[129] *Id.* at 302.

[130] *Id.*

[131] Canada Border Service Agency, *supra* note 121.

[132] *Id.*

[133] *Canada's Treatment of Non-Citizen Children*, *supra* note 122.

and a decision was made to seek their detention on the ground that they would likely not report for removal.[134]

To make a more uniform policy that is aligned with their international obligations, the Government of Canada made the National Directive for the Detention or Housing of Minors.[135] The Directive establishes that the best interest of the child is "an international principle to ensure children enjoy the full and effective benefit of all their rights recognized in Canadian law and the CRC."[136] According to the Directive, the best interest of the child is to be determined separately and before the decision to detain the unaccompanied minors. It needs to be reviewed on an ongoing basis to facilitate any decision-making based on the legal situation of the minor and their well-being. It may only be outweighed by other significant considerations such as public safety, flight risk, danger to the public, or national security.[137]

There is an official list of factors that officers need to use to determine the best interest of the child and it includes: (1) the child's physical, mental and emotional needs; (2) the child's educational needs; (3) the preservation of the family environment and maintaining relationships; (4) the care, protection, and safety of the child; (5) the level of dependency between the child and the parent or guardian; (6) the child's views if they can be reasonably ascertained; and (7) any other relevant factor.[138]

C. Extended Protection to Qualify for Asylum Under Canadian Law

According to the Immigration and Refugee Protection Act, unaccompanied minors can seek protection in Canada under Section 96, which sets the criteria under the Refugee Convention, but it also provides two different alternatives.[139] One is extended protection in Section 97, which applies to persons who could be in some kind of danger, such as a fear of persecution or harm which does not fit in one of the five enumerated grounds of the Refugee Convention.[140] The other is humanitarian and compassionate reasons under Section 25(1). Humanitarian and compassionate grounds apply to people with exceptional cases, and it does not assess risks of persecution but focuses on other criteria such as: (1) how settled the person is in Canada; (2) general family ties of the applicant to Canada; (3) the best interests of any children involved; and (4) what could happen to the applicant if the requested application is denied.[141]

Section 97 has been used in cases of persons fleeing from gang and drug violence, and while there is a burden of proof that the person seeking this protection

---

[134] Geraldine Sadoway, *Canada's Treatment of Separated Refugee Children*, 3 EUR. J. MIGRATION & L. 347, 367 (2001).

[135] Canada Border Service Agency, *supra* note 121.

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] Immigration and Refugee Protection Act, *supra* note 125, at s. 96.

[140] CROCK, *supra* note 24, at 314.

[141] Immigration and Refugee Protection Act, *supra* note 125, at s. 25.

is personally targeted by such violence and is not only fleeing due to a generalized fear, it has also been more successful than arguing persecution due to membership to a social group or political opinion.[142] Section 97 provides:

> A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence would subject them personally:
> (a) To a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention against Torture; or
> (b) To risk to their life or a risk of cruel and unusual treatment or punishment if:
> (i) The person is unable or, because of that risk, unwilling to avail themself of the protection of that country,
> (ii) The risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,
> (iii) The risk is not inherent or incidental to lawful sanctions unless imposed in disregard of accepted international standards, and
> (iv) The risk is not caused by the inability of that country to provide adequate health or medical care.[143]

Section 25(1) provides an exemption if there are any humanitarian and compassionate reasons, considering the best interest of the child.[144] It provides that:

> Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35, or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.[145]

Since the enactment of the Immigration and Refugee Protection Act, there has been substantial litigation on how the principle of the "best interest of the child" needs to be interpreted and applied in immigration proceedings.[146] Even though Federal Courts often limit the scope of this principle, in 2015, in *Jeyakannan*

---

[142] CROCK, *supra* note 24, at 315.

[143] Immigration and Refugee Protection Act, *supra* note 125, at s. 97.

[144] CROCK, *supra* note 24, at 315.

[145] Immigration and Refugee Protection Act, *supra* note 125, at s. 25.

[146] CROCK, *supra* note 24, at 316.

Kanthasamy v. Minister of Citizenship and Immigration,[147] the Supreme Court of Canada ruled that humanitarian and compassionate considerations should include the best interests of a child directly affected. Some saw this development as the first step from the Court to favor a more equitable and humanitarian approach to immigration and refugee law.[148]

The significance of international law upon Canadian jurisprudence was also recently discussed in similar terms by the Supreme Court of Canada in *Baker v. Canada*.[149] In this case, the deportation challenge was, like in *Kanthasamy*, based on humanitarian and compassionate grounds.[150] As part of her defense, Baker argued that it was in the best interests of her children, who were all Canadian citizens, that she remain in Canada.[151] The most important part of the decision regarding the CRC and the significance of international law in the Canadian system lies in the Court's argument establishing that although the Children's Convention was not directly binding on domestic law, the "values reflected in international humanitarian rights law may help inform the contextual approach to statutory interpretation and judicial review."[152] The Court held that the CRC has special deference on the protections for children, including their interests, needs, and rights.[153] It also gives the principle importance as a rule of procedure when includes the assessment of the possible impacts (positive or negative) of a decision concerning the child.[154]

Canada's Safe Third Country Agreement with the United States has become a flashpoint this past year, both in Canada and in the United States.[155] It came into place in 2004 and under it, the United States and Canada were both designated as

---

147 Kanthasamy v. Canada, [2015] S.C.R. 61 (Can.).

148 Mary Thibodeau, *The Expansion of "Humanitarian and Compassionate Grounds": Kanthasamy v Canada* (2015), THE COURT (DEC. 22, 2015) http://www.thecourt.ca/the-expansion-of-humanitarian-and-compassionate-grounds-kanthasamy-v-canada/.

149 Baker v. Canada, [1999] 2 S.C.R. 817 (Can.).

150 *Id.*; Luke, *supra* note 13; Kanthasamy v. Canada, *supra* note 147.

151 Baker v. Canada, *supra* note 149.

152 *Id.*; While not considering the application of the Children's Convention, in Suresh v. Canada (Minister of Citizenship and Immigration) [2002] 1 S.C.R. 3, ¶ 46 (Can.), the Supreme Court of Canada also recognized the important role international norms play in the interpretation of immigration legislation, opining that "a complete understanding of the Immigration Act and the Charter requires consideration of the international perspective."

153 Baker v. Canada, *supra* note 149; Luke, *supra* note 150, at 82.

154 Canada Border Service Agency, *supra* note 121.

155 Marcia Brown, *An Imperiled Border Agreement Could Doom Canada's Welcoming Immigration Policy*, THE AMERICAN PROSPECT, (July 3, 2019), https://prospect.org/world/-agreement-doom-canada-s-welcoming-immigration-policy/ (explaining that from November 4th to 8th the Federal Court of Canada will hear a challenge to the designation of the U.S. as a safe third country for refugees. The court will hear that sending refugee claimants back to the United States violates Canadian law, including the Canadian Charter of Rights and Freedoms, and Canada's binding international human rights obligations. The Canadian Council for Refugees, Amnesty International and The Canadian Council of Churches alongside an individual litigant and her children, initiated the legal challenge in July 2017. The hearings are taking place at the Federal Court of Canada in Toronto, at 180 Queen Street West. The case is still open.).

a "Safe Third Country."[156] According to the Agreement, refugees entering through a regular point of entry by land from the United States are ineligible to claim refugee status in Canada unless they were denied the claim before in the United States. In other words, the Agreement stipulates that asylum seekers must claim asylum in whichever of the two countries they arrive first, as both countries are considered safe for asylum-seekers under the agreement.[157] There are some exemptions; the first is that if the refugee already has family in Canada, they will be allowed to make their claim there even if they have not done so first in the United States.[158] The other exemption is for unaccompanied minors who have no legal guardian in either the United States or Canada.[159]

According to the parties to the Agreement, the purpose of the Agreement is, inter alia, to share refugee status determination responsibility, identify persons in need of protection, and avoid refoulement.[160] Originally this was intended as a guarantee to ensure that unaccompanied minors as a vulnerable group of migrants would enjoy access to refugee protections, but the reality is that there is no information regarding how many unaccompanied minors have used the exemption of the Safe Third Country Agreement to cross from the United States to Canada, making it hard to determine its impact on the matter.[161] One of the few statistics found was issued by the UNHCR in 2006 as part of a "first-year evaluation" of the then-new Agreement. In this document, it was reported that between December 2004 and December 2005, "there were 190 claimants younger than 18 years old who sought refuge" at the Canada-United States land border, "48 of whom were unaccompanied minors."[162]

The Safe Third Country Agreement has faced some backlash in the past year. In fact, in 2019, a group of immigration advocates initiated a challenge in Canadian federal courts under the argument that the United States does not qualify as a "safe" due to former President Trump's policies on asylum, claiming that they

---

156 *See Canada-US Safe Third Country Agreement*, GOVERNMENT OF CANADA, https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/agreements/safe-third-country-agreement.html (last modified Mar. 27, 2023).

157 *Id.*

158 Family member can be: spouse; sons and daughters; parents and legal guardians; siblings; grandparents; grandchildren; aunts and uncles; and nieces and nephews.

159 *Canada-United States Safe Third Country Agreement*, *supra* note 156.

160 The last paragraph of the Preamble states that the Parties are: "Aware that such sharing of responsibility must ensure in practice that persons in need of international protection are identified and that the possibility of indirect breaches of the fundamental principle of non-refoulement are avoided, and therefore determined to safeguard for each refugee status claimant eligible to pursue a refugee status claim who comes within their jurisdiction, access to full and fair refugee status determination procedure as a means to guarantee that the protections of the Convention, the Protocol, and the Torture Convention are effectively afforded." *Final Text of the Safe Third Country Agreement*, GOVERNMENT OF CANADA, https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/agreements/safe-third-country-agreement/final-text.html (last modified Dec. 5, 2002).

161 CROCK, *supra* note 24, at 305.

162 U.N. High Commissioner for Refugees, *Monitoring Report: Canada-United States "Safe Third Country" Agreement*, 1, 11 (June 2006), https://www.unhcr.org/sites/default/files/legacy-pdf/455b2cca4.pdf.

leave asylum seekers facing the risk of refoulement, and that they experience human rights violations like unlawful and unnecessary detention.[163]

It is clear by now that the problem of unaccompanied minors is regional. Canada has a long story of welcoming refugees, in fact, in a recent UNHCR report, it was found that the country resettled more refugees—mostly persons fleeing from the Syrian conflict—than any other nation in 2018.[164] But Canada's absence and lack of any kind of response to the crisis at the United States-Mexico border has been gnawing, to say the least, and as part of the Organization of American States ("OAS"), it should help ease the current burden of unaccompanied minors trying to reach safety.

VI. Comparative Analysis with the United States: A Shared Challenge

In the past decade, the number of unaccompanied minors attempting to enter the United States at the southwest border from Mexico, Guatemala, Honduras, and El Salvador has increased significantly.[165] For the first time, unaccompanied minors and families accounted for more than half of border crossers in the United States.[166] However, the steps taken to create and provide legal protections for children under international law and under domestic legal systems leave them almost wholly unprotected.

A. The Best Interest of the Child as a Corner Stone Principle for the Protection of Unaccompanied Minors

A somewhat obvious difference is that the United States is the only one that has not ratified the CRC.[167] The policy stating that a "'child's best interest" should not be considered by the adjudicator in immigration proceedings makes the United States immigration system one of the most hostile for unaccompanied minors.[168] The principle of the "best interests of the child" has been a guiding principle in United States law for more than 125 years. It has been incorporated

---

163 Anna Mehler Paperny, *Canada Defends Safe Third Country Agreement as Court Challenge Wraps up*, GLOBAL NEWS (Nov. 8, 2019), https://globalnews.ca/news/6148781/safe-third-country-agreement-court/; Stephanie Levitz & Paola Loriggio, *Federal Court Hears Case on Whether Asylum Agreement with U.S. Violates Charter*, CBC (Nov 4, 2019), https://www.cbc.ca/news/politics/safe-third-country-1.5346557.

164 U.N. High Commissioner for Refugees, *Global Trends, Forced Displacement in 2018*, https://www.unhcr.org/statistics/unhcrstats/5d08d7ee7/unhcr-global-trends-2018.html (last visited May 22, 2023); Sara Miller Llana, *Canada Asks, 'Why Aren't We Helping More Central American Refugees?*, THE CHRISTIAN SCIENCE MONITOR, (Sept. 5, 2019) https://www.csmonitor.com/World/Americas/2019/0905/Canada-asks-Why-aren-t-we-helping-more-Central-American-refugees.

165 PETER J. MEYER ET AL, CONG. RESEARCH SERV. R43702, UNACCOMPANIED CHILDREN FROM CENTRAL AMERICA: FOREIGN POLICY CONSIDERATIONS, 1, 15 (2016).

166 Amelia Cheatham & Diana Roy, *U.S. Detention of Child Migrants*, COUNCIL ON FOREIGN RELATIONS (2020). https://www.cfr.org/backgrounder/us-detention-child-migrants (last updated Mar. 27, 2023, 3:11 PM).

167 *Status of Ratification: Interactive Dashboard*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, https://indicators.ohchr.org/ (last visited May 22, 2023).

168 Wendy Young & Megan McKenna, *The Measure of a Society: The Treatment of Unaccompanied Refugee and Immigrant Children in the U.S.*, 45 HARV. C.R. - C.L. L. REV. 247, 249 (2010).

in several statutes governing issues like adoption, dependency proceedings, foster care, divorce, custody, criminal law, education, and labor, among others.[169] Under current United States immigration law, unaccompanied children who are directly affected by immigration proceedings have no opportunity for their best interests to be considered.[170] There is a lack of mandate for immigration judges to consider this principle in decisions concerning children.[171] To the contrary, it has expressly been stated that a "child's best interest" should not be considered by the adjudicator.[172]

The failure of United States immigration law and procedure to incorporate a "best interests of the child" approach ignores a successful means of protecting children that is common both internationally and domestically.[173] The African Children's Charter reaffirms in its preamble the adherence to the principles contained in the CRC and adopts in article 4(1) the "best interests of the child" standard for all actions concerning the child.[174] Similarly, in the EU, the notion that an unaccompanied minor is first a child and second a migrant is essential to making the "best interests of the child" a primary consideration during the immigration proceedings.[175] The European Court has recognized their special vulnerability and recognizes children's rights accordingly.[176]

In the Canadian System, the "best interest" principle has two main applications: (1) as a standard for government policy-making; and (2) as a rule of procedure that requires an assessment of the possible impact, whether positive or negative, of a decision concerning the child.[177] It recognizes the importance of the principle of 'the best interest of the child" as a pillar in its immigration system and accepts it as an international principle to ensure children enjoy the full and effective benefit of all their rights recognized under Canadian law and the CRC.

---

169 *See generally Human Mobility*, *supra* note 2.

170 Carr, *supra* note 10, at 123.

171 Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children, O.P.P.M. 17-01, U.S. DEP'T OF JUSTICE, at 4 (May. 22, 2007).

172 Young & McKenna, *supra* note 168, at 249.

173 Carr, *supra* note 10, at 123.

174 King, *supra* note 38, at 354.

175 Council Directive 2005/85, *supra* note 33, at 13, 14 (explaining that the European Commission has also been concerned with the rights of unaccompanied minors, adopting in 2010 a four-year Action Plan on Unaccompanied Minors that promotes "the best interests of the child" as "the primary consideration in all action related to children taken by public authorities."); *Communication from the Commission to the European Parliament and the Council: Action Plan for Unaccompanied Minors (2010-2014)*, COM (2010) 213 final (Jun. 5, 2010).

176 *See* Council Resolution 221/103, Unaccompanied Minors Who Are Nationals of Third Countries, 1997 O.J. (C 221) 23, 24-25.

177 Luke, *supra* note 150, at 73-77.

B. Immigration Detention for Unaccompanied Minors Is Used Consistently in All Jurisdictions Despite Being Against International Law and Standards

Problems regarding unaccompanied minors' detention are also under the public eye in all of the regions reviewed, and in many of them, such as Australia and some countries in the EU (like Italy and Greece), immigration detention is violating international conventions and standards. Current practices in immigration detention for minors are contrary to the intentions of the 1951 Refugee Convention, the ICCPR,[178] the CRC, and the UNHCR guidelines on refugees.[179] While international covenants impose an obligation to use the detention of children as a last resort, the domestic legal systems are failing to do so.[180]

In the EU, for example, there are reports that unaccompanied minors often remained in immigration detention in Greece and Italy for prolonged periods and under unsafe conditions. Because of this, the European Court has called for domestic reform to comply with international and European human rights standards.[181] This problem seems to be even bigger in Australia, where UN officials claimed that criminals were treated better than asylum seekers.[182] The Australian Federal Government is using the detention of refugee children as its first option and "Australia's response to growing numbers of onshore asylum seekers has been characterized by a rigid policy of deterrence, detention, and denial."[183] Although the United States gives some protection to migrants regarding detention with the Flores Agreement, which sets a nationwide policy for the treatment, detention, and release of unaccompanied minors, the actual conditions of the detention centers do not comply with the Flores Agreement nor with international standards.[184] At the very least, detention facilities should be upgraded to meet international human rights standards.[185]

The failure of countries to meet their obligations to maintain safe and sanitary conditions inside detention centers has become an increasingly concerning issue. Reports indicate that issues regarding the lack of such conditions are widespread, with unaccompanied minors in both Australia and the United States often being detained alongside adults. This practice poses a serious threat to the safety and

---

[178] *See Status of Ratification of the International Covenant on Civil and Political Rights*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en (last updated May 22, 2023). The ICCPR has been ratified by the United States, Australia, all countries of the EU and South Africa.

[179] Benfer, *supra* note 69, at 757.

[180] U.N. High Commissioner for Refugees, *Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012), https://www.refworld.org/docid/503489533b8.html.

[181] *Mission to Greece, supra* note 57; *see also Greece: Humanitarian Crisis, supra* note 57.

[182] Benfer, *supra* note 69, at 754.

[183] Martin & Hutchinson, *supra* note 68, at 1; Schloenhardt, *supra* note 66, at 72.

[184] Rachelle G. Cecala, *The Substantive and Procedural Rights and Protections of Unaccompanied Immigrant Minors in Detention Centers*, 7 WIDENER J. L. ECON. & RACE 91, 96 (2016).

[185] Benfer, *supra* note 69, at 763.

well-being of children, who are at high risk of experiencing sexual and physical abuse and being trafficked.[186]

Reports both in the EU and in the United States have surfaced showing that many of the detention centers lack basic services like access to clean drinking, food provisions, and showers and soap, and the centers provide conditions that are not proper for children like freezing temperatures, prison-like detention cells, and inadequate sleeping conditions.[187] The situation in Australia and South Africa is reported to be even worse. In Australia, there have been cases of children with suicidal behaviors due to the dire conditions of their detention, and in South Africa, hundreds of children are left with no access to a shelter and have been forced to sleep in the streets.[188]

C. Due Process Guarantees and the Right to Access to Justice

Due Process violations are also a common obstacle unaccompanied minors face. The main due process violation in most cases is the lack of legal representation. The lack of proper, free legal counsel leaves unaccompanied minors experiencing substantial hurdles as they navigate often complex immigration proceedings in search of an asylum grant.[189] These systems are often designed in a way only a trained lawyer will be able to understand, so representation by child advocates and social workers, while useful for some circumstances, is not enough to comply with the due process requirement of legal counsel according to international law.

Some countries in Europe have made efforts to grant some degree of free representation to unaccompanied minors. While some appoint lawyers, others only appoint special representatives or social workers to help the unaccompanied minors frame their views during the immigration proceedings.[190] The examples of Finland, Norway, Switzerland, Sweden, and the Netherlands, where they appoint two representatives for unaccompanied minors (an attorney and a personal representative), may constitute one of the best practices when it comes to access to counsel in immigration proceedings for unaccompanied minors.[191] However, it has to be taken into consideration that not all unaccompanied minors in Europe enjoy a categorical right to legal representation.[192]

While representation is mandated in the Trafficking Victims Protections Reauthorization Act ("TVPRA"), which establishes that unaccompanied minors will have independent child advocates,[193] appointed counsel is not provided as a

---

[186] Harrison, *supra* note 75, at 201.

[187] *The Flores Settlement and Family Incarceration: A Brief History and Next Steps*, HUM. RTS. FIRST, (Oct. 30, 2018), https://humanrightsfirst.org/wp-content/uploads/2022/10/FLORES_SETTLEMENT_AGREEMENT.pdf.

[188] Harrison, *supra* note 75; Swart, *supra* note 112, at 112.

[189] Ataiants, *supra* note 6.

[190] King, *supra* note 38, at 367.

[191] *Id.* at 368-369.

[192] *Id.* at 352.

[193] 8 U.S.C. § 1232(c)(6) (2012).

necessary service to all unaccompanied minors in the United States.[194] Despite many initiatives to increase the availability of representation in unaccompanied minors' cases, still nearly three out of four cases remain unrepresented.[195] International law and courts have also pointed out the need to provide free legal counsel in immigration proceedings as part of due process guarantees, particularly for unaccompanied minors and separated children, who in view of international law and standards are especially vulnerable.[196]

The United States' continued denial of representation to unaccompanied minors in immigration proceedings, infants and toddlers among them, raises serious due process concerns, and the efforts to establish a constitutional right to counsel under the Fifth and Sixth Amendment through litigation have proven to be unsuccessful.[197] Since United States courts have thus far refused to recognize a federal constitutional right to representation, the answer necessarily implicates congressional policy and the creation of statutory rights to ensure that all unaccompanied minors facing immigration proceedings receive access to a free, government-appointed counsel.[198] Given the correlation between representation and outcome, the assistance by counsel needs to be given to unaccompanied minors to ensure fairness and protection of their due process guarantees.[199]

In Australia, the law establishes that immigration officers are under no obligation to advise detained unaccompanied minors that they can apply for a visa or seek representation.[200] And while in Canada some provinces have provisions in this regard, the fact that there is a lack of national policy results in an inconsistent framework for the immediate care, protection, and legal representation of unaccompanied minors.[201]

The countries in the EU, South Africa, Australia, Canada, and the United States are also bound by the provisions of the 1951 Refugee Convention.[202] However, many refugee law materials comment on the lack of a child-oriented policy or the recognition of child-specific forms of persecution.[203] In this sense, the legislation in Canada is the only one that recognizes that the protection needs for unaccompanied minors can go beyond the five enumerated grounds set by the

---

194 Ataiants *supra* note 6, at 5.

195 *Children: Amid a Growing Court Backlog Many Still Unrepresented*, TRAC IMMIGR. (Sept. 28, 2017) https://trac.syr.edu/immigration/reports/482/#f1; *New Data on Unaccompanied Children in Immigration Court*, TRAC IMMIGR. (July 15, 2014), https://trac.syr.edu/immigration/reports/359/.

196 Inter-Am Comm'n H.R., *supra* note 169, at ¶ 317; King, *supra* note 38, at 350; *see also* Committee on the Rights of the Child, General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin, CRC/GC/2005/6 (Sept. 1, 2005).

197 See J.E.F.M. v. Lynch, 837 F.3d 1026, 1040, n.8 (9th Cir. 2016) at 1038 (holding that the district court lacked jurisdiction to decide the minors' claims that they were entitled to court-appointed counsel because those claims arose from their removal proceedings and thus had to be resolved through the process set forth in 8 U.S.C. § 1252).

198 King, *supra* note 38, at 333.

199 *Id.* at 338.

200 Schloenhardt, *supra* note 66, at 61.

201 CROCK, *supra* note 24, at 300.

202 Benfer, *supra* note 69, at 757.

203 Corona, *supra* note 94, at 228.

Refugee Convention. It provides two different alternatives: one as extended protection that applies to persons that could be in some kind of danger, fear of persecution or harm which does not fit in one of the five enumerated grounds of the Refugee Convention; and the other based on humanitarian and compassionate grounds.[204]

Formally, unaccompanied minors have an alternative under the Safe Third Country Agreement to seek asylum in Canada. The Canadian system offers in general better protections than the United States, takes into consideration the best interest of the child, and offers additional grounds for relief under gang violence. The problem is that due to current policies in place, it is hard for unaccompanied minors to safely go all the way to Canada and present their asylum claim, and so many of them will be detained in Guatemala or the United States and face removal to their countries.

The activities of organized crime are becoming one of the prime movers of forced migration in several countries in Central America, and unaccompanied minors from the Northern Triangle and Mexico consistently cite gang or cartel violence as a primary motivation for fleeing.[205] However, gang-related violence has proven to be unsuccessful in many courts as a ground to establish persecution based on membership in a particular social group or as political opinion.[206] Unaccompanied minors in the Northern Triangle and Mexico face a specific type of harm and violence (cartels, gangs, *pandillas maras*) which is hardly recognized as persecution by United States judges.

The particularities of the region need to be taken into consideration. The scope of the five enumerated grounds for which an alien may qualify for asylum has been the subject of constant dispute and interpretation in courts, and is not sufficient to address the particularities of social violence claims.[207] Laws have to change to adapt to new social realities and circumstances.[208] Asylum laws need to open to the possibility of new types of claims of persecution.

Like Canadian Law, the TVPRA should include the recognition of social violence as a form of persecution for unaccompanied minors. This would translate to additional protection for unaccompanied minors and would apply when their life, safety, or freedom have been threatened by generalized pervasive social violence, internal violent conflicts, or massive violation of human rights, also integrating the best interest of the child as a consideration in the asylum claim.[209]

---

204 CROCK, *supra* note 24, at 314; Immigration and Refugee Protection Act, *supra* note 125, at 25, 97.

205 American Immigration Council, *A Guide to Children Arriving at the Border: Laws, Policies and Responses*, 2 (June 2015).

206 *See* HILLEL R. SMITH, CONG. RESEARCH SERV. LSB10207, ASYLUM AND RELATED PROTECTIONS FOR ALIENS WHO FEAR GANG AND DOMESTIC VIOLENCE (2019); *see* Lorena S. Rivas-Tiemann, *Asylum to a Particular Social Group: New Developments and Its Future for Gang-Violence*, 47 TULSA L. REV. 477 (2011); Timothy Greenberg, *The United States Is Unwilling to Protect Gang-Based Asylum Applicants*, 61 N.Y. L. SCH. L. REV. 473, 476 (2016).

207 See SMITH, *supra* note 206.

208 C. Thomas Dienes, *Judges, Legislators, and Social Change*, 13 AM. BEHAV. SCIENTIST 511, 520 (1970).

209 *Id.*

VII. Conclusions

Although migration has unique characteristics in each region, one commonality stands out: unaccompanied minors face tremendous hardships as they journey to new destinations. Irrespective of their country of arrival, these minors experience significant threats to their physical safety, including the dangers posed by human trafficking, kidnapping, and violence. Additionally, they often encounter legal and social discrimination, xenophobia, and due process violations such as lack of proper representation. The detention centers and shelters meant to provide temporary relief and support often fall short of the required standards, with poor safety and sanitary conditions compounding the already challenging situation. Immigration law has proven to be an area in which the United States is reluctant to be governed by international human rights rules.[210] The United States is a signatory to international treaties like the UDHR, the American Declaration, the Refugee Convention, and the ICCPR, but the practice of ratifying treaties as non-self-executory has left American courts with little room to apply and interpret them as part of the domestic legal system.

On the other hand, the United States' lack of action regarding some international treaties like the CRC, and the American Convention, as well as the reluctance to accept the jurisdictions of international courts has made experts and academics wonder about the commitment of the United States to its international obligations.[211] Immigration advocates are therefore doubtful to pursue arguments relying on international norms to enhance the protection of unaccompanied minors' human rights since international law has virtually no direct impact on domestic law. This was discussed as a divergence between international and domestic law and, as a result, there are two separate standards for the treatment of unaccompanied minors. International standards remain far and unreachable. Aspects of this diversion can be seen, for example, in the criminalization of immigration, in the significant expansion of detention in criminal-like facilities of non-citizens, and the lack of legal representation for unaccompanied minors in immigration proceedings as part of due process guarantees.[212]

But the divergence between international law and domestic law is not particular to the United States; similar problems were found in Australia, South Africa, and some countries in the EU. Shared problems include the absence of adequate legal representation; unreliable or harmful age determination procedures; the abusive use of detention, including punitive measures; and the failure to have child-appropriate proceedings taking into account unaccompanied minors' special vulnerability.[213] Although some countries award special protections to unaccompanied minors, as long as they keep putting the enforcement of their immigration laws first, the human rights of unaccompanied minors will still be

---

[210] Laura S. Adams, *Divergence and the Dynamic Relationship between Domestic Immigration Law and International Human Rights*,51 EMORY L. J. 983, 997 (2002).

[211] David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L., 129, 177 (1999).

[212] Adams, *supra* note 210, at 990.

[213] Bhabha, *supra* note 11.

violated.[214] The fact that similar problems were found in different jurisdictions leads to conclude that the complexity and scope of the forced displacement of unaccompanied minors call for efforts by the international community to formulate new policy responses.[215] The protection of unaccompanied minors' human rights in immigration proceedings faces significant challenges, including a lack of child-appropriate proceedings, concerns regarding their life, dignity, and safety during detention, and worries about due process and representation in immigration courts.

To address these issues and comply with international standards, it is crucial that international and domestic law incorporate the following measures: Firstly, the principle of the best interest of the child should be added to immigration legislation and policymaking. This would ensure that the welfare and interests of the child are given priority when making decisions that affect their lives. Secondly, unnecessary and prolonged detention of unaccompanied minors must be stopped. Detention poses significant risks to the physical and mental health of children and violates their right to liberty and security. Thirdly, the structure of immigration courts and proceedings should be reformed to accommodate child-appropriate proceedings. The process must be designed to take into account the developmental stage, language abilities, and cultural background of the child to ensure their full participation in the proceedings. Fourthly, unaccompanied minors should be provided with free legal counsel to ensure that they have adequate representation and access to justice. Legal representation is crucial to protect their rights and interests and ensure that their voices are heard in immigration proceedings. Finally, it is essential to recognize other forms of social violence as a form of persecution. Many unaccompanied minors flee their homes due to violence, including gang violence, organized crime, and internal violent conflicts. It is necessary to recognize these forms of persecution and offer protection to those who are at risk and seeking protection. Incorporating these measures into international and domestic law would go a long way towards protecting the human rights of unaccompanied minors in immigration proceedings and ensuring that their welfare and interests are given priority.

214 *See* Carr, *supra* note 10, at 159.

215 Helton & Jacobs, *supra* note 14.

HEINONLINE

DATE DOWNLOADED: Wed Aug 2 20:04:10 2023
SOURCE: Content Downloaded from HeinOnline

Citations:
Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

Bluebook 21st ed.
Alexandra Angyalosy, How a Country Plagued with Corruption Leads to Lax Sex Laws for Women, 19 LOY. U. CHI. INT'l L. REV. 187 (2023).

ALWD 7th ed.
Alexandra Angyalosy, How a Country Plagued with Corruption Leads to Lax Sex Laws for Women, 19 Loy. U. Chi. Int'l L. Rev. 187 (2023).

APA 7th ed.
Angyalosy, A. (2023). How country plagued with corruption leads to lax sex laws for women. Loyola University Chicago International Law Review, 19(2), 187-204.

Chicago 17th ed.
Alexandra Angyalosy, "How a Country Plagued with Corruption Leads to Lax Sex Laws for Women," Loyola University Chicago International Law Review 19, no. 2 (Spring 2023): 187-204

McGill Guide 9th ed.
Alexandra Angyalosy, "How a Country Plagued with Corruption Leads to Lax Sex Laws for Women" (2023) 19:2 Loy U Chi Int'l L Rev 187.

AGLC 4th ed.
Alexandra Angyalosy, 'How a Country Plagued with Corruption Leads to Lax Sex Laws for Women' (2023) 19(2) Loyola University Chicago International Law Review 187

MLA 9th ed.
Angyalosy, Alexandra. "How a Country Plagued with Corruption Leads to Lax Sex Laws for Women." Loyola University Chicago International Law Review, vol. 19, no. 2, Spring 2023, pp. 187-204. HeinOnline.

OSCOLA 4th ed.
Alexandra Angyalosy, 'How a Country Plagued with Corruption Leads to Lax Sex Laws for Women' (2023) 19 Loy U Chi Int'l L Rev 187 Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at https://heinonline.org/HOL/License
-- The search text of this PDF is generated from uncorrected OCR text.
-- To obtain permission to use this article beyond the scope of your license, please use: Copyright Information

How a Country Plagued with Corruption Leads to Lax Sex Laws for Women

Alexandra Angyalosy*

Abstract

This Comment addresses Romania's failure to statutorily define and prosecute sexual violence perpetrators. Throughout history, women in Romania have found a justice system that fails them due to lax laws, corruption, and negligence by police departments. Specifically, Romanian women who are victims of sexual violence, domestic violence, and forced prostitution are often unable to report their crimes, attain proper counseling, and get justice against their abusers. Since the Romanian Revolution, the country has struggled with corruption and human trafficking and has become a major European hub for prostitution. The lack of adequate and appropriate laws needed to protect women, specifically in instances of rape and sexual assault, directly conflicts with human rights obligations and leads to more predators either domestically or from foreign countries. Ambiguity in the laws is a primary issue, specifically, the lack of a definitive definition of what rape or sexual violence entails. As it stands, the current laws do not define rape or sexual violence as the "lack of freely given consent." These ambiguities enable abusers, hinder sexual assault investigations, and prevent abusers from being prosecuted. The contamination of corruption in Romania makes it easier for abusers to get away with crimes, while simultaneously inadvertently encouraging these crimes.

The Romanian legislature must prioritize the basic rights of women and victims in the country by statutorily defining what rape and sexual violence are and making it a priority that all instances of sexual violence are investigated and prosecuted. Romania is one of several countries in the European Union which are bound by the Istanbul Convention, which aims to stop violence against women and girls. As it stands, Romania is not in compliance with this treaty, and in order to be compliant, they must elevate their protection of women. Specifically, Romania must statutorily define sexual violence so there is no room for ambiguities, as well as set up a comprehensive data collection system, train professionals to deal with crises, and improve the response of law enforcement and the judiciary to investigate and prosecute these crimes.

Table of Contents

* Alexandra Angyalosy is a rising third-year law student at Loyola University Chicago School of Law.

I. Introduction

Andrew Tate – known for his blatant misogyny, sexism, and lust for power, made his reasons for moving to Romania very clear: to escape sexual harassment and rape charges due to how lax Romania's sex laws are.[1] If this is public knowledge, and someone is very clearly making this statement known, what does that mean for victims of sexual violence, and how many abusers might this further encourage? Currently, Romania does not have a working definition of what rape actually is, clearly omitting a definition for "lack of freely given consent."[2]

Ambiguity in criminal statutes and codes creates problems, confusion, and potentially more crimes committed due to the lack of notice the statutes give these

[1] *See* Shanti Das, *Inside the Violent, Misogynistic World of TikTok's New Star, Andrew Tate*, THE GUARDIAN (Aug. 6, 2022), https://www.theguardian.com/technology/2022/aug/06/andrew-tate-violent-misogynistic-world-of-tiktok-new-star.

[2] Grevio Strasbourg, *Romania Has Improved Protection of Women from Domestic Violence, But Progress Needed on Definition of Rape*, COUNCIL OF EUROPE (June 16, 2022), https://www.coe.int/en/web/portal/-/romania-has-improved-protection-of-women-from-domestic-violence-but-progress-needed-on-definition-of-rape (explaining Romania's general improvements in the context of domestic violence, but those same efforts must be implemented towards sexual violence).

individuals.[3] This further leads to a lack of statutory recourse for the victims of alleged crimes, and is incredibly harmful to individual human rights.[4] Not only do ambiguous laws cause harm to victims, but they also may incentivize other criminals to move to such countries knowing that they might not be prosecuted for crimes they may have committed in other countries with stricter statutory definitions. How many more alleged criminals like Andrew Tate, might move to Romania to escape crimes, or be motivated to commit them in a Romanian jurisdiction?

Sexual violence is a big problem amongst the Romanian public, as 80 percent of Romanians are pushing toward stricter punishments for individuals who are found guilty of rape or sexual violence.[5] Several years ago, a case where an 18-year-old girl was raped and tortured for several hours gained serious national attention after her abusers were released from jail and placed under house arrest.[6] Following their release, the outcry amongst Romanians sparked a conversation about how the laws and punishments in the Romanian justice system may not be sufficient to deter prospective criminals and fails to give victims and society the closure and justice they deserve.[7]

So what is the recourse the Romanian public deserves? The Romanian government must strictly define their statutory definition of what rape is, and explicitly include the notion of "lack of freely given consent."[8] Furthermore, there must be strict compliance with the Convention on Preventing and Combating Violence Against Women and Domestic Violence ("Istanbul Convention"), a treaty created to protect women from sexual and domestic violence, which includes strictly defining what sexual violence means.[9] Lastly, Romania must provide a working protective framework, provide resources like rape crisis centers, and properly train all police departments, judges, and prosecutors to ensure that every single sexual violence accusation is properly investigated and potentially prosecuted.[10] This must be a public policy and legislative priority, or else more abusers will

---

[3] Timothy Sandefur, *Get Rid of Vague Laws*, FORBES (Mar. 30, 2010, 1:30 PM), https://www.forbes.com/2010/03/30/vague-laws-economy-government-opinions-contributors-timothy-sandefur.html?sh=4230f1cbd6ce.

[4] *Id.*

[5] Irina Marica, *Most Romanians Want Harsher Punishments for Rape*, ROMANIA INSIDER (Sept. 25, 2015), https://www.romania-insider.com/most-romanians-want-harsher-punishments-for-rape (discussing the findings of a survey found by INSCOP).

[6] *Id.*; *see also* Alessio Perrone, *Missing Romanian Teenager Begged Police to "Stay On Line" Before Murdered, Records Revealed*, INDEPENDENT (Aug. 3, 2019), https://www.independent.co.uk/news/world/europe/romanian-teenager-murdered-police-alexandra-macesanu-delay-caracal-call-transcript-death-a9037121.html.

[7] *See* Marica, *supra* note 5.

[8] *See* Strasbourg, *supra* note 2.

[9] *See generally* Council of Europe, *Convention on Preventing and Combating Violence Against Women and Domestic Violence* ("Istanbul Convention"), 11 V. 2011 (Aug. 1, 2014) (discussing the purpose behind the Istanbul Convention being to tackle violence against women and domestic violence throughout Europe, and its responsibilities as members of the European Union).

[10] *See generally* Strasbourg, *supra* note 2 (explaining how Romania currently does not apply the same prosecutorial standards towards sexual violence as it does towards domestic violence crimes).

continue to take advantage of a weakened system, and more victims will be left with little to no recourse.

II. Background

This section begins with a background on the history of Romania's government, its dictatorship, communism, and how that has affected the nature of the laws in Romania. It then explores why corruption is so rampant in the country, and how that has an implication on sexual violence, investigations, and the lack thereof in prosecution.

A. Romania Under Communism

From 1964 to 1989, Romania was under the control of a dictator named Nicolae Ceausescu.[11] During this period, there was a constancy of injustice, poverty, and restriction including food shortages, gas shortages, and housing problems.[12] A new constitution was adopted the year after Ceausescu came into power, where the implications on the Romanian people were severe, and the dictator enforced several damaging social experiments.[13] Anyone who purchased basic food and household products above the limits set by the government risked imprisonment of up to five years.[14] Outside of food and household product shortages, television was limited, with the main channel being news propaganda.[15] Churches were banished, abortion was made illegal solely to increase the Romanian population, and anyone who tried to leave the country was either tortured, put in prison, or executed.[16] Ceausescu also heavily utilized the "Securitate," one of the most aggressive and dangerous secret police forces in the world, to antagonize, torture, or kill anyone who dissented with Ceausescu's reign.[17]

Following over a decade of tragedies and suffering, the anti-communist rebels began to come to power and started to riot and protest against the horrific mis-

[11] *See Romania Under Nicolae Ceausescu's Communist Regime*, ROLANDIA, https://rolandia.eu/en/blog/history-of-romania/romania-under-nicolae-ceausescu-s-communist-regime (last visited May 22, 2023) [hereinafter *History of Romania*] (illustrating the sequence of events from how Ceausescu came to power to his ultimate demise).

[12] *Id.; see also Nicolae Ceausescu*, BRITANNICA (Sept. 20, 2022), https://www.britannica.com/biography/Nicolae-Ceausescu [hereinafter *Ceausescu*].

[13] *See History of Romania*, *supra* note 11; *see also* Jennifer Llewellyn & Steve Thompson, *Romania Under Ceausescu*, ALPHA HISTORY (Oct. 8, 2022), https://alphahistory.com/coldwar/romania-under-ceausescu/.

[14] *See History of Romania*, *supra* note 11; *see also* B.P. Perry, *The Fall of Nicolae Ceausescu, Romania's Last Communist Leader*, SKY HISTORY, https://www.history.co.uk/article/the-fall-of-nicolae-ceausescu-romanias-last-communist-leader.

[15] *See History of Romania*, *supra* note 11; *see also Ceausescu*, *supra* note 12.

[16] *See History of Romania*, *supra* note 11; *see also* Zanfirache Diana-Andreea, *8 Curiosities About the Romanian Law*, R & R PARTNERS BUCHAREST, https://rrpb.ro/fara-categorie/8-curiosities-about-the-romanian-law/ (last visited May 22, 2023).

[17] *See* Perry, *supra* note 14; *see generally* Mary Battiata, *How Romania's Bloody Revolution Got its Start in Timisoara*, THE WASHINGTON POST (Dec. 31, 1989), https://www.washingtonpost.com/archive/politics/1989/12/31/how-romanias-bloody-revolution-got-its-start-in-timisoara/69fd06b4-9eb7-4d7e-8fdb-a2fe4fd5454b/.

treatment they had suffered.[18] On November 15, 1987, an anti-communist riot broke out at the Council of the Romanian Communist Party in Brasov, which sparked the beginning of the end for Ceausescu.[19] Although there were no radio or news channels broadcasting this information, word of the riot spread quickly throughout the country through songs, which encouraged other citizens in different cities to begin to also take action.[20] However, those involved in the protests and riots were imprisoned or tortured, and their families were threatened and brutalized.[21]

Following two years of protests, the anti-communist party had increased so substantially that they began seeing success within their movement.[22] However, in 1989, Ceausescu was re-elected, which caused a massive uproar within the Romanian countryside, and protests turned into violent riots.[23] On December 16, 1987, a riot broke out in Timisoara after anti-communist groups attempted to burn down the Communist Party's main headquarters.[24] Ceausescu ordered the army to open fire on any protestors involved, which resulted in the deaths of over one hundred people.[25] This event in particular triggered the final protests and riots before the communist party and Ceausescu fell from power.[26]

Four days later, after the violence which occurred in Timisoara, Ceausescu spoke critically about the violence, stating that there must be an end to the violence and the anti-communist party as a whole and labeling them "terrorists and hooligans."[27] After his speech, a nationwide uprising forced Ceausescu and his inner circle to attempt to flee, however, they were swiftly captured.[28] On December 25, 1989, Ceausescu and his wife were found guilty in a brief trial by a special military tribunal and were executed in front of a firing squad.[29] Following Ceausescu's execution, the communist party attempted to reform, but faced complete opposition and was never able to regain power.[30]

---

[18] *See History of Romania*, *supra* note 11; *see also Ceausescu*, *supra* note 12.

[19] *See* The Estonian Institute of Historical Memory, *Communist Dictatorship in Romania (1947-1989)*, COMMUNIST CRIMES (last visited Mar. 22, 2023), https://communistcrimes.org/en/countries/romania.

[20] *See* Battiata, *supra* note 17.

[21] *See History of Romania*, *supra* note 11.

[22] *See id.*; *see also* Perry, *supra* note 14.

[23] *See Battiata*, *supra* note 17; *see also History of Romania*, *supra* note 11.

[24] *See Battiata*, *supra* note 17; *see also History of Romania*, *supra* note 11.

[25] *See History of Romania*, *supra* note 11.

[26] *See id.*; *see also* Perry, *supra* note 14.

[27] *See* Perry, *supra* note 14; *see also* Battiata, *supra* note 17 (quoting Ceausescu and how he would refer to the protestors).

[28] Llewellyn & Thompson, *supra* note 13; *see also* Petyo Petkov & Michael Simmons, *Romania 1989: Ceausescu Goes Down in Blood*, THE GUARDIAN (Dec. 23, 2019), https://www.theguardian.com/world/2019/dec/23/romania-ceaucescu-goes-down-in-blood-1989; *see also Ceausescu*, *supra* note 12.

[29] Llewellyn & Thompson, *supra* note 13; *see also History of Romania*, *supra* note 11; *see also Ceausescu*, *supra* note 12.

[30] *See* Perry, *supra* note 14.

B. How Communism Led to Lax Legislation

Twenty-one years after the downfall of communism in Romania and Ceausescu's reign, Romania as a whole continued to struggle.[31] Although it is now a functioning democracy, the path to Westernization coupled with the country's old-school traditions and views makes modernization quite complex and difficult.[32] The political system as it stands, is the most unstable and fragile in all of Europe, as there have been nine different governments in the last decade.[33] The fragility of its government turned the country into one plagued with corruption and poverty, and it became an overwhelming sex-trafficking hub.[34]

Currently, Romania is the leading country of sex trafficking exports and prostitution in all of Europe.[35] This, coupled with massive corruption of government officials, leads to leniency in laws and prosecution for those officials and citizens.[36] As recently as 2017, Romania's government enacted an emergency ordinance to amend their Criminal Code, making it so that officials accused of corruption would receive lesser sentences, with its ultimate goal being to move towards the decriminalization of corruption offenses.[37] This amendment signaled to the Romanian people and its criminals that abuse of power, corruption, and violation of statutory laws would not be pursued.[38]

Romania has still not adequately recovered from the twenty-five years of dictatorship. Corruption and greed, running rampant, are major deterrents to a full-functioning democracy. Because Romania is one of the biggest exporters and hubs for prostitution in Europe, there is no surprise that sexual laws have never been adequately codified and victims remain helpless.[39] In 2018, the Chair of Deputy shared with the Senate that there were about 2,500 reported rapes annu-

---

[31] Emanuel Pietrobon, *How Romania Became Europe's Sex Trafficking Factory*, INSIDEOVER (Mar. 19, 2020), https://www.insideover.com/society/how-romania-became-europes-sex-trafficking-factory.html/amp.

[32] Peter Schroth & Ana Bostan, *International Constitutional Law and Corruption Measures in the European Union's Accession Negotiations: Romania in Comparative Perspective*, 52 AM. J. COMP. L. 625, 649 (2004); *see also* Julie Mertus, *Human Rights of Women in Central and Eastern Europe*, 6 AM. U. J. GENDER , SOC. POL'Y & L. 369, 387 (1998).

[33] *See* Pietrobon, *supra* note 31.

[34] *See* Schroth & Bostan, *supra* note 32.

[35] *See generally* Christina Giordano, *Reinventing the Wheel: Returning Sex Trafficking Discourse to Its Basic Human Rights*, 37 SUFFOLK TRANSNAT'L L. REV. 347, 347 (2014); *see also* Pietrobon, *supra* note 31.

[36] *See* Schroth & Bostan, *supra* note 32; *see also* Pietrobon, *supra* note 31.

[37] *Romanian Government's Ordinance Decriminalizes Major Corruption Offenses*, ROMANIA INSIDER (Feb. 1, 2017), https://www.romania-insider.com/romanian-govtss-ordinance-decriminalizes-corruption-offences-lower-penalties-others.

[38] *See id.*

[39] *See generally* Mertus, *supra* note 32; *see also* Pietrobon, *supra* note 31.

ally.[40] The people of Romania have called on their government to adequately amend the laws and to increase punishment and prosecution for those accused.[41]

III. Discussion

This section discusses the current status of Romania's sex laws, the impact the prominence of prostitution has on the country's legislation, the national sex offender registry (or lack thereof), and the current state of the Romanian justice system.

A. Current State of Romania's Sexual Violence Legislation

Currently, Romania's legislature does not explicitly define what sexual violence fully means, nor does it include the essential element of "lack of freely given consent" within its definition.[42] This lack of statutory definition goes in direct conflict with compliance with the Istanbul Convention. Although Romania has made significant progress regarding its domestic violence legislation, sexual violence legislation has unfortunately not advanced at the same pace.[43] Sexual violence and injuries inflicted on women are considered part of normal family orders in Romania, mainly because it is a fundamental, traditional, and religious stereotype where men are the main dominant authority of the family and women are supposed to be submissive.[44]

B. Prostitution in Romania

Since Romania's accession into the European Union in 2007, Romania has turned into one of the biggest exporters of prostitutes in all of Europe.[45] Around 70 percent of Europe's prostitutes are from Romania, and around 86 percent of women in British brothels are Romanians.[46] As it stands, most are underage minors sold or kidnapped by family members, boyfriends, or strangers.[47]

---

[40] *See* Irina Marica, *Romanian MP Wants Punishment for Rape Similar to That for Murder*, ROMANIA INSIDER (Feb. 26, 2018), https://www.romania-insider.com/deputy-rape-punish (discussing how the current number of rapes annually are concernedly high, and by increasing the punishment for rape the annual rate would potentially decrease).

[41] *See* Marica, *supra* note 5.

[42] *See* Strasborg, *supra* note 2.

[43] Strasborg, *supra* note 2.

[44] *See generally* Doina P. Harsanyi, *Women in Romania*, *in* GENDER POL. & POST-COMMUNISM 39 (Nanette Funk & Magda Mueller eds., 1993).

[45] *See* Andrea Bruce, *Romania's Disappearing Girls*, ALJAZEERA AMERICA (Aug. 9, 2015), http://projects.aljazeera.com/2015/08/sex-trafficking-in-romania/index.html (discussing that the majority of women working in brothels throughout Europe are from Romania); *see also* Graema Culliford, *Inside the Romanian Human Trafficking Rings Where Desperate Parents Are Selling Underage Daughters to Be Raped in UK*, THE SUN (Apr. 21, 2021), https://www.thesun.co.uk/news/13492095/romania-human-trafficking-uk-gangs-sex-trade/.

[46] *See* Pietrobon, *supra* note 31; *see also* Bruce, *supra* note 45.

[47] *See* Pietrobon, *supra* note 31; *see also* Bruce, *supra* note 45.

Unfortunately, Romania's response to prostitution and sex trafficking has been some of the worst in Europe.[48] The US Embassy in Bucharest recently downgraded Romania from level 1 to level 2 regarding awareness, sexual trafficking, and prostitution, creating some concern for the Romanian people.[49] Many people believe this to be motivated by the increase in corruption and alleged collusion between sex traffickers and politicians alike.[50]

Akin to sexual violence laws in Romania, prostitution laws suffer in a similar manner. Prostitution is one of the oldest professions in the world, but Romania has yet to clarify its prostitution laws in its criminal code.[51] Such ambiguous provisions make it difficult for the Romanian population to adhere to regulations, while simultaneously having an unclear understanding of what is criminally reprehensible and what is not.[52]

C. Lack of a Comprehensive National Sex Offender Registry

One glaring issue that Romania had long overlooked was creating a national sex offender registry. Although one currently exists, it was not signed into legislation until June 20, 2019, and it did not go into effect until January 1, 2020.[53] Prior to the sex offender registry being implemented, parliament member Oana Bizcan noted that frequently, "notes or reports" in the criminal record would be erased.[54] At the time, Romania had a 70 percent reoffending rate, leaving children and women exposed to a very dangerous reality.[55]

D. Workplace Sexual Harassment

Workplace harassment has been and continues to be a massive setback in the workforce for Romanian women. According to a report conducted by the local recruitment platform "BestJobs," 44 percent of Romanian employees have allegedly experienced sexual harassment in the workplace, 86 percent being female employees.[56] Importantly, the report noted that most of the time, sexual harassment cases are not reported, indicating that the number of cases is much higher

---

[48] *See* Bruce, *supra* note 45.

[49] *See* Pietrobon, *supra* note 31.

[50] *Id.*

[51] *See* Andrei Tinu, *Relevant Contemporary Aspects of Incrimination & Exculpation of the Prostitution in Romania*, THE INT'L CONF. EDUC. & CREATIVITY FOR A KNOWLEDGE BASED SOC'Y – L. 255, 258 (2013).

[52] Tinu, *supra* note 51, at 258.

[53] *See Romania to Have a National Sex Offender Registry*, ROMANIA INSIDER (June 21, 2019), https://www.romania-insider.com/romania-sex-offender-registry.

[54] *See* Oana Bizgan, *Sex Offenders Register – A Story from the Romanian Parliament*, DEPUTATĂ INDEPENDENTĂ (Sep. 7, 2020), https://oanabizgan.com/en/sex-offenders-register-a-story-from-the-romanian-parliament/.

[55] *Id.*

[56] *See Study: Workplace Sexual Harassment, Quite Common in Romania*, ROMANIA INSIDER (Feb. 20, 2019), https://www.romania-insider.com/study-workplace-sexual-harassment [hereinafter *Study: Workplace Sexual Harassment*].

than what actually is reported.[57] Finally, around 56 percent of employees who experienced some type of workplace harassment reported that the harassment had occurred at least three times, becoming a recurring issue.[58]

E. Lack of Prosecution, Investigation, and Judicial Intervention

A big roadblock for sexual violence victims seeking protection from their abusers has been the lack of protection orders available.[59] Currently, Romania does not have a protective order system in place for victims of sexual violence, meaning that they are unable to receive any type of protection from the courts or from police officers.[60]

Furthermore, research has shown that Romanian police are incredibly ineffective in investigating and arresting abusers.[61] Research and human rights activists have found that police officers in Romania have consistently tried to prevent victims of sexual violence from filing suit against their abusers.[62] The law as it stands states that prosecutors and police officers must receive a formal complaint from a victim of sexual violence before they investigate or prosecute, even if they have evidence that the crime existed.[63] The police typically only investigate homicide or cases of extreme assault, and therefore public distrust in the police and the judicial process in Romania is very high.[64]

IV. Analysis

This section addresses and critiques the impact lax legislation has on victims of both sexual and domestic violence in Romania, and how police, legislative, and judicial inaction hurts the country as a whole. Furthermore, this section analyzes where Romania stands with regard to its compliance with the Istanbul Convention and by extension, its compliance with the terms of admission with the European Union.

---

[57] Study: Workplace Sexual Harassment, *supra* note 56.

[58] *Id.*

[59] *See* Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), *Baseline Evaluation Report Romania*, COUNCIL OF EUROPE, 73 (June 16, 2022), https://rm.coe.int/final-report-on-romania/1680a6e439 [herienafter GREVIO] (explaining how protective orders are only available for domestic violence victims).

[60] *Romania-Rape*, EUROPEAN INSTITUTE FOR GENDER EQUALITY, https://eige.europa.eu/-violence/regulatory-and-legal-framework/legal-definitions-in-the-eu/romania-rape (last visited May 22, 20232).

[61] *See generally id.*; *see also* U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., 2021 Country Reports on Human Rights Practices: Romania (2021).

[62] U.S. Dep't of State, *supra* note 61 (discussing the prominence of discouraging women from pressing charges or delaying action in investigating alleged abusers).

[63] *Id.*

[64] Mertus, *supra* note 32, at 420.

A. Romania's Compliance and Non-Compliance with Elements of the Istanbul Convention

Although the Romanian government has made significant steps to improve its legislation and its implementation of the Istanbul Convention, a report conducted by The Group of Experts on Action against Violence against Women and Domestic Violence ("GREVIO") shows that progress in sexual violence contexts is still needed.[65] On June 16, 2022, GREVIO published a baseline evaluation report summarizing the Convention as a whole and Romania's requisite compliance.[66] GREVIO specifically observed Romania's actions in relation to "all forms of violence against women," and proposed additional ways in which the implementation of the Istanbul Convention may be improved.[67] Overall, the report highlighted that, although there has been significant progress toward combatting domestic violence, there is an urgent need for a corresponding effort in the realm of sexual violence and its subsequent investigative process and prosecution.[68]

i. Improvements in Domestic Violence

The report found that the area in which Romania has made the most significant improvements is that of domestic violence.[69] The Romanian government has implemented significant measures toward preventing and combatting domestic violence against women by creating a national regulatory and institutional framework to protect and care for victims.[70] Romanian authorities have built a comprehensive legal, policy, and institutionalized system catered solely to domestic violence cases.[71] The report highlights how the steps taken are the steps necessary to create the foundation for combating domestic violence through a "multi-agency and multi-sectoral response," one which was not available previously.[72] A national and multi-agency approach is imperative for departments to work cohesively in order to give victims the recourse and justice they deserve.

---

[65] *See generally* GREVIO, *supra* note 59 (noting GREVIO is an independent human rights group that monitors the implementation of the Istanbul Convention and reports on their findings).

[66] *Istanbul Convention: Romania Has Improved the Protection of Women from Domestic Women from Domestic Violence, but Progress is Needed*, ACTMEDIA (June 17, 2022), https://actmedia.eu/daily/istanbul-convention-romania-has-improved-the-protection-of-women-from-domestic-violence-but-progress-is-needed/98198 [hereinafter *Istanbul Convention - Romania*].

[67] GREVIO, *supra* note 59, at 4.

[68] *GREVIO Publishes Its Report on Romania,* COUNCIL OF EUROPE (June 16, 2022), https://www.coe.int/en/web/istanbul-convention/-/grevio-publishes-its-report-on-romania.

[69] *GREVIO Publishes Its Report on Romania, supra* note 68; *see also Istanbul Convention – Romania, supra* note 66.

[70] GREVIO, *supra* note 59, at 6; *see also Istanbul Convention – Romania, supra* note 66.

[71] Strasborg, *supra* note 68.

[72] GREVIO, *supra* note 59, at 6.

ii. "Lack of Freely Given Consent" and the Categorization of Victims

Furthermore, the report highlights the urgent need to insert language about the "lack of freely given consent" into the Romanian Criminal Code.[73] Article 36 of the Istanbul Convention requires the notion of "consent" to be added to the language of Romania's Criminal Code because without it, there cannot be a true definition of what sexual violence is.[74] GREVIO also illustrated that the Romanian judicial process must apply the same prosecutorial standards when there is no proof of resistance by the victim, as it is not a mandatory evidentiary burden for prosecuting sexual violence offenses.[75]

Additionally, the report examined a July 2021 amendment to Romania's Criminal Code, which increased protection for minors, specifically by removing the statute of limitations where victims were minors.[76] The report cited concerns over classifying victims, particularly in cases of non-consensual sexual intercourse.[77] Changing the prosecutorial standards depending on who the victim is ultimately creates more ambiguity within the legal system and hinders the creation of a consistent practice in sexual violence cases.

iii. Marital Rape

Moreover, as it stands, the Romanian Criminal Code does not criminalize marital rape.[78] The report suggested that an explicit amendment to the Criminal Code would be necessary to explicitly define and further criminalize marital rape.[79] Without such explicit criminalization, victims of sexual violence who are legally married to their abusers have no legal recourse. Furthermore, the report notes that in cases of marital rape, the crime is rarely reported and even more rarely prosecuted.[80]

iv. Protective Orders

Lastly, although protective orders are granted in cases of domestic violence, the same protection is not afforded to victims of sexual violence.[81] Protective orders (*i.e.*, restraining orders) were made available in Romania in 2012, under

---

[73] *See generally* Strasborg, *supra* note 68 (explaining how the notion must be incorporated to be compliant with the Istanbul Convention).

[74] GREVIO, *supra* note 59, at 56.

[75] *Id.*; *see also Istanbul Convention – Romania*, *supra* note 66 (discussing how all cases of non-consensual sexual violence acts must be a priority to be investigated and prosecuted).

[76] GREVIO, *supra* note 59, at 56.

[77] *Id.* (discussing that a hierarchy of victims based on characteristics like young age, helplessness, or disability may signal that certain victims are more "valuable" than others and deserve special prosecutorial attention).

[78] Mertus, *supra* note 32, at 426.

[79] GREVIO, *supra* note 59, at 56.

[80] *See* Mertus, *supra* note 32, at 426 (discussing the suspicion and fear of police officers and the criminal justice system and that cases of marital rape are only reported if the victim is "severely injured and cannot hide the crime").

[81] *See* GREVIO, *supra* note 59, at 72-73.

Article 23 of the Domestic Violence Law.[82] Although providing a temporary remedy for domestic violence victims was a big step for Romania,[83] these protective orders are only applicable in the context of domestic violence.[84] Additionally, it was found that these protective orders are often violated, and the sanctions vary greatly in administration.[85]

As it stands, the same protective orders are not available when crimes are not "domestic" in nature. Therefore, victims of sexual violence (who are not living under the same roof as their abusers), are not able to obtain protection from their abusers. The report urges the Romanian government to: (1) ensure the effectiveness of the protective orders; (2) expand the availability of the protective orders for *all* forms of violence against women; and (3) identify the causes of the violations and provide data on the sanctions imposed.[86]

B. How the Current Laws Permit Police Inaction

As it stands, Romania's laws do not explicitly define what sexual violence means,[87] and as such, police departments to fail to adequately respond, investigate, or arrest alleged abusers. When a legislature does not adequately and explicitly define what a crime is, it can cause ambiguity and confusion amongst its enforcers, specifically regarding what does and does not constitute a crime. If the Romanian legislature does not accurately define what a sexual violence crime consists of, members of the public, along with police, will not be able to adequately determine if a crime was committed, investigate the alleged crime, and further, prosecute the alleged crime. When police officers are unable to identify if a sexually violent crime occurred due to ambiguity or confusion, there can be no enforcement of the laws, nor prosecution of the crime.

i. Public Distrust of Police Officers

GREVIO, along with additional researchers, has found that the Romanian public, specifically women, have a serious distrust of police officers and the criminal justice system as a whole.[88] Typically, when a sexual violence crime occurs, police officers are the first to respond to the scene and discuss the circumstances

---

[82] GREVIO, *supra* note 59, at 72.

[83] *See* Giulia Crisan, *Implementing the Istanbul Convention into Romanian Legislation*, WOMEN AGAINST VIOLENCE EUROPE (Jan. 18, 2019), https://wave-network.org/implementing-the-istanbul-convention-into-romanian-legislation/.

[84] 40 Human Rights, *The Helsinki Accords and the United States: Selected Executive and Congressional Documents* 1, 30 (2016) [hereinafter *Helsinki Accords and the United States*] (discussing how protective orders are available only in domestic settings where you cohabit with the abuser, but not available if you live in different households).

[85] *See* GREVIO, *supra* note 59, at 73 (explaining that GREVIO found 30% of the protective orders were breached).

[86] *Id.*

[87] *Istanbul Convention – Romania*, *supra* note 66 (discussing how the definition is not aligned with the Istanbul Convention and should be amended).

[88] *See* U.S. Dep't of State, *supra* note 62; *see also* Mertus, *supra* note 32, at 426; GREVIO, *supra* note 59, at 65.

of the crime with the victim either at their homes or the police department.[89] However, several human rights activists have reported that police officers regularly try to discourage victims of sexual violence from pursuing charges, or encourage them to drop them altogether.[90] Victims have also reported "humiliation and mistreatment" by police officers and physicians when discussing the circumstances of the alleged crimes.[91]

Furthermore, there have been reports of police officers delaying action against sexual abusers, or refusing to register complaints altogether.[92] Additionally, if there is evidence of the crime, but the parties reconcile or the victim withdraws a complaint or is coerced to, the case is dropped and the abuser avoids punishment.[93] As such, there is a consistent practice by the criminal justice system of discouraging victims. This includes failing to pursue charges in cases of sexual violence and not protecting victims adequately, which leads to victims distrusting the justice system as a whole, and a country that does not protect its female victims.[94]

V. Proposal

This section discusses the amendments to the Romanian Criminal Code that must be implemented to better comply with the Istanbul Convention. Furthermore, this section proposes the standardization of Romania's criminal procedures regarding cases that involve violence towards women, and how the inconsistencies in practice lead to victims having little to no recourse. Finally, suggestions are presented for Romania to implement that would give victims resources and aid following trials, as well as the implementation of a standardized data collection system.

A. Heighten Compliance with the Istanbul Convention

Romania's legal system needs somewhat of an overhaul in regard to sexual violence laws. As discussed throughout this Comment, the most essential step for the Romanian legislature is to amend its Criminal Code and explicitly define what sexual violence is to include the notion of "lack of freely given consent."[95] Explicit classifications are an indispensable need in criminal proceedings – without them, law enforcement, prosecutors, and judges will have arbitrary and in-

---

89 Mertus, *supra* note 32, at 419; *see also* GREVIO, *supra* note 59, at 65.

90 *See* U.S. Dep't of State, *supra* note 62; *see also* Mertus, *supra* note 32, at 419; GREVIO, *supra* note 59, at 65.

91 Mertus, *supra* note 32, at 419 (discussing the reports of mistreatment of women by police officers and physicians).

92 U.S. Dep't of State, *supra* note 62.

93 *Helsinki Accords and the United States*, *supra* note 84, at 29 (explaining how prosecutors or police officers are not able to pursue or prosecute crimes if a victim withdraws their complaint, and abusers are relieved of any and all liability).

94 *See* U.S. Dep't of State, *supra* note 62; *see also* Mertus, *supra* note 32, at 419, 426; GREVIO, *supra* note 59, at 65.

95 *See Istanbul Convention – Romania*, *supra* note 66.

consistent applications of the law. Sexual violence victims will continue to be without recourse solely due to the varying interpretations of the law by different members of the criminal justice system.

Furthermore, requiring proof of "resistance by the victim" is an unnecessary evidentiary requirement which should be removed entirely.[96] Any instance in which a person is involuntarily forced into a sexual act, whether it be through violence or coercion, should be sufficient for a finding of violating sexual violence laws in Romania's Criminal Code. Additionally, there should be no hierarchy of "victims."[97] Instances where a minor is sexually assaulted automatically preclude consent, due to the minor's inability to legally consent. That is, there should not be a differentiation made depending on if a woman of more advanced age was sexually assaulted versus a minor – sexual violence without consent should be treated equally. The Istanbul Convention views all "sexual acts without the consent of the victim"[98] to be satisfactory for sexual violence crimes, and the Romanian Criminal Code should encompass this broadened view.

Finally, marital rape should be explicitly defined,[99] in accordance with the reasons discussed previously, so that victims who are sexually assaulted by their spouses may also seek recourse. In its entirety, there must be more explicit and concrete definitions. A broader definition of what constitutes sexual violence would be beneficial for the Romanian population as a whole.

i. Creation of a Nationwide Data Collection Program

Additionally, a comprehensive and integrated data collection system is necessary to better track offenders and their corresponding sanctions throughout the country.[100] By having a multi-department and national database, departments around the country will be in better positions to work in tandem with one another, and will not allow offenders to slip through the cracks and re-offend. Furthermore, by implementing an integrated data system, prosecutors and judges will be able to verify and set consistent sentencing precedents depending on the severity and complexity of the sexual violence act that occurred. Implementing comprehensive data collection systems will also aid legislatures and policymakers in shaping comprehensive laws that are attuned to their country's needs.[101]

B. The Standardization of Criminal Procedures to Better Aid Victims of Sexual Violence

As it stands, Romania's response to crimes against women has varied rather inconsistently. Although Romania has made improvements in terms of domestic

---

96 GREVIO, *supra* note 59, at 56.

97 *Id.*

98 *Id.*

99 *See generally* Mertus, *supra* note 32, at 426.

100 *See* Strasborg, *supra* note 68; *see also* GREVIO, *supra* note 59, at 62.

101 *Data Collection on Violence Against Women*, EUROPEAN INSTITUTE FOR GENDER EQUALITY, https://eige.europa.eu/gender-based-violence/data-collection.

violence crimes, there are additional steps that must be taken to ensure a standardized and consistent approach to the application for women of all crimes. Romania has a problem with the investigation and prosecution of crimes relating to sexual violence against women, including incompetence in the police force, "erasing" criminal records, and allowing abusers to re-offend.[102] When there is a percentage of the police force that has known ties to criminal gang networks, primarily in human trafficking,[103] there is no surprise that they may be lenient with investigating any type of crimes against women.

In order to combat the inconsistencies in application, ensure that officers and members of the criminal justice system perform their jobs effectively, and increase trust in the criminal justice system,[104] there must be some standardization of legal, prosecutorial, and investigatory requirements, along with dependability on the criminal justice process for women who are victims of sexual violence and domestic violence crimes. The GREVIO report highlights that although there have been multi-agency and multi-department frameworks set in place for domestic violence crimes, along with the standardization of police procedures, the same cannot be said for sexual violence crimes.[105] In order to fully protect the women in Romania, regardless of the crime, Romanian authorities and the criminal justice system should utilize or mimic the framework already established for domestic violence crimes.[106] The GREVIO report highlights that there have been no efforts to standardize or provide any institutional or legislative frameworks for victims of sexual violence.[107]

The first and easiest step the Romanian legislature can take to implement or mimic the domestic violence framework is to amend the Criminal Code and allow for protective orders for victims of sexual violence.[108] As aforementioned, protective orders are relatively new to the Romanian legislature, and their implementation is even newer. However, to ensure that women are protected in all cases of violence, their use must be broadened to encompass sexual violence crimes on top of domestic violence crimes.[109]

Furthermore, prosecutors should be obligated to pursue charges against an abuser when crimes of sexual violence occur. As it stands, even if there is physical evidence that a sexually violent crime occurred, prosecutors, along with po-

---

[102] Alison Mutler, *How It Took the Disappearance of Two Girls to Halt Romania's Controversial Legal Overhaul*, RADIOFREEEUROPE/RADIOLIBERTY (Aug. 4, 2019, 5:28 PM), https://www.rferl.org/a/how-it-took-the-disappearance-of-two-girls-to-halt-romania-s-controversial-legal-overhaul/30091869.html (discussing the incompetence of Romania's police force, along with many of the officers being tied to criminal human trafficking gangs); *see also* Bizgan, *supra* note 54 (explaining the high prevalence of officers erasing criminal records).

[103] *See* Mutler, *supra* note 102.

[104] *See generally* Mertus, *supra* note 32, at 426.

[105] *See Istanbul Convention – Romania*, *supra* note 66; *see also* GREVIO, *supra* note 59, at 65.

[106] *See generally* GREVIO, *supra* note 59.

[107] *Id.* at 65.

[108] *Id.* at 73 (explaining the process for which protective orders were implemented into the Romanian Criminal Code solely for domestic violence victims who cohabitate with their abusers).

[109] *Id.*

lice officers, may not pursue the case without the victim's complaint.[110] With police officers frequently discouraging or humiliating victims from coming forward with complaints against their abusers,[111] the reality is that very few cases are pursued and prosecuted, allowing abusers to get away with their crimes with no consequence. By mandating police officers and prosecutors to pursue and prosecute cases even without the victims' complaint (or if the victim withdraws the complaint), this will ultimately increase public trust in the criminal justice system, potentially encourage more victims to come forward, and alleviate the underreporting of crimes,[112] while eventually putting more criminals behind bars.

C. Mandatory Training for Professionals, Officers, Judges, Prosecutors, etc.

A critical step Romanian authorities must prioritize moving forward is the training of every member of the criminal justice system that has any interaction or role with women who are victims of sexual violence, along with professionals dealing with victims of sexual violence crimes.[113] Although there have been some efforts to train professionals in cases of domestic violence, the training must be broadened to include all types of violence, not just domestic violence, and must follow an elaborate, systemic, and tailored, training program compliant with the Istanbul Convention. Training of professionals can also have a preventative and "detection" benefit,[114] where women can be educated on what constitutes abuse, and victims can be provided an outlet and safe space if they are not comfortable or able to come forward.

Furthermore, Romanian authorities should prioritize creating safe houses for women and crisis centers for victims of all types of violence, not just domestic violence.[115] When there is a 30 percent breach of protective orders[116] (albeit in domestic violence cases), women need access to safe centers to protect themselves and their children. Additionally, there should be some specific sexual violence crisis and referral centers where women can not only seek refuge but have access to resources that may help them.[117]

---

[110] *See Helsinki Accords and the United States*, *supra* note 84, at 29; *see also* Strasborg, *supra* note 68 (discussing how all instances of non-consensual acts should be investigated, prosecuted, and sanctioned).

[111] U.S. Dep't of State, *supra* note 62; *see also* Mertus, *supra* note 32, at 419.

[112] *See* Mertus, *supra* note 32, at 419; *see also* GREVIO, *supra* note 59, at 65.

[113] GREVIO, *supra* note 59, at 30-32; *see also* Strasborg, *supra* note 68.

[114] *See generally* Deborah Fisher, et al., *Training Professionals in the Primary Prevention of Sexual and Intimate Partner Violence: A Planning Guide*, CTRS. FOR DISEASE CONTROL AND PREVENTION (2010), http://www.ncdsv.org/images/CDC_TrainingProfessionalsInThePrimaryPreventionOfSexualAndIPVaPlanningGuide_2010.pdf (last visited Apr. 26, 2023) (discussing the benefits of training professionals for cases of domestic and sexual violence).

[115] GREVIO, *supra* note 59, at 43.

[116] *Id.*

[117] *Id.* at 44.

VI. Conclusion

Romania committed to certain conditions when it joined the European Union and by extension, became a part of the Istanbul Convention. It is time they comply with their obligations and make basic human rights for women and girls a priority. For the reasons mentioned previously, Romania's lax attitudes toward certain crimes enable the mistreatment of women. Overlooking corruption, human trafficking, forced prostitution, sexual violence, *etc.* feeds into a dangerous precedent, signaling to women in the country that their government and criminal justice system will not protect them. It also signals to abusers that their crimes will go unpunished, and they may be more inclined to continue their violent habits. Additionally, people like Andrew Tate may be enticed to move to the country, knowing their abusive and criminal behavior will be overlooked. For the reasons discussed in this proposal, the Romanian government must standardize its criminal procedures, ensure crimes do not go unpunished and prioritize the safety of women in the country. If they do not, women will remain helpless and voiceless, and will continue to be overlooked in a country where their protection is of paramount importance.

HEINONLINE

DATE DOWNLOADED: Wed Aug 2 20:05:30 2023
SOURCE: Content Downloaded from HeinOnline

Citations:
Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

Bluebook 21st ed.
Edward N. Cain, European Court of Human Rights' Ruling in Georgia v Russia (II) and Its Application to the Current Crisis in Ukraine, 19 LOY. U. CHI. INT'l L. REV. 205 (2023).

ALWD 7th ed.
Edward N. Cain, European Court of Human Rights' Ruling in Georgia v Russia (II) and Its Application to the Current Crisis in Ukraine, 19 Loy. U. Chi. Int'l L. Rev. 205 (2023).

APA 7th ed.
Cain, E. N. (2023). European court of human rights' ruling in georgia russia (ii) and its application to the current crisis in ukraine. Loyola University Chicago International Law Review, 19(2), 205-230.

Chicago 17th ed.
Edward N. Cain, "European Court of Human Rights' Ruling in Georgia v Russia (II) and Its Application to the Current Crisis in Ukraine," Loyola University Chicago International Law Review 19, no. 2 (Spring 2023): 205-230

McGill Guide 9th ed.
Edward N. Cain, "European Court of Human Rights' Ruling in Georgia v Russia (II) and Its Application to the Current Crisis in Ukraine" (2023) 19:2 Loy U Chi Int'l L Rev 205.

AGLC 4th ed.
Edward N. Cain, 'European Court of Human Rights' Ruling in Georgia v Russia (II) and Its Application to the Current Crisis in Ukraine' (2023) 19(2) Loyola University Chicago International Law Review 205

MLA 9th ed.
Cain, Edward N. "European Court of Human Rights' Ruling in Georgia v Russia (II) and Its Application to the Current Crisis in Ukraine." Loyola University Chicago International Law Review, vol. 19, no. 2, Spring 2023, pp. 205-230. HeinOnline.

OSCOLA 4th ed.
Edward N. Cain, 'European Court of Human Rights' Ruling in Georgia v Russia (II) and Its Application to the Current Crisis in Ukraine' (2023) 19 Loy U Chi Int'l L Rev 205
Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at https://heinonline.org/HOL/License
-- The search text of this PDF is generated from uncorrected OCR text.

European Court of Human Rights' Ruling in *Georgia v Russia (II)* and Its Application to the Current Crisis in Ukraine

Edward N. Cain*

Abstract

Georgia v Russia (II) represents an important decision in the European Court of Human Rights case law. The Court sets out an important interpretation of Article 1 of the European Convention on Human Rights regarding the jurisdiction of signatory parties during times of invasion and war. The Court articulated that during active hostilities, there is no positive or negative obligation on the invading country to uphold or defend the human rights of the civilians of the invaded country. This is because they do not have effective control over the local population due to the dynamic nature of war. This precedent is very dangerous when applied to the current crisis in Ukraine. Following the Court's logic, because Ukraine is in an active state of war with Russia, the Russian government potentially would not be liable for human rights violations because they do not have "effective control" over the captured Ukrainian territory. If the human rights violations were to be presented before the Court, the Court could find this because of their holding in *Georgia v Russia (II)* that war is constantly changing the territory controlled by either side of the conflict. However, when examining the facts of the current invasion, there are three key differences between the facts in *Georgia v Russia (II)* and the current invasion that could lead to a different outcome in the case of the Ukraine conflict.

First, Russia has implemented a stronger political apparatus in Ukraine than they did in Georgia by actively installing Russian "mayors" and "regional administrative councils" in captured territories. These mayors and administrative councils place Ukrainian citizens under Russia's administrative control, satisfying the effective control test to determine jurisdiction. Second, looking at the Court's 2008 case of *Solomou and Others v. Turkey*, the Court outlined a cause-and-effect analysis for determining effective control over a population by examining the cause and effect of military intervention between two signatories to the European Charter of Human Rights. Because there has been widespread Russian military action leading to a direct effect on Ukrainian citizens and their human rights, Russia can be seen as to be exerting "effective control" over Ukraine. The administrative move in the four regions bordering Russia to annex them through a referendum vote directly places those Ukrainian citizens under Russian administrative control. This annexation means that Russia would incur all obligations, both positive and negative, to uphold human rights in those regions because they are now "Russian territory" (notwithstanding the claims of a sham referendum vote and reports of coercion and extortion to secure the vote in favor of joining

* Edward Cain is a second-year JD student at Loyola Universtiy Chicago School of Law.

Russia). Lastly, determining whether Belarus would fall under Russian effective control, and if they can be held accountable, would require a full detailed factual finding mission, which likely will not happen until the war is over.

Table of Contents

I. Introduction

On February 4, 2022, the world entered a new paradigm of global security. On that day, the Russian Federation ("Russia") invaded Ukraine and with it ushered in a war which, at this time, has no end.[1] Many industries and sectors in our global and interconnected world have been disrupted by the war.[2] The war also caused turmoil in the international financial markets when the United States ("US") and its allies removed Russia from the international banking mechanism, SWIFT, effectively removing Russia's access to international banks and financial

[1] *See* John Psaropoulos, *Timeline: The First 100 Days of Russia's War in Ukraine*, AL JAZEERA (June 3, 2022), https://www.aljazeera.com/features/2022/6/3/timeline-the-first-100-days-of-russias-war-in-ukraine.

[2] *Id.*

markets.[3] Additionally, the energy crunch felt by US and European Union ("EU") citizens alike can be attributed, in part, to the war.[4] Grain exports from Ukraine and Russia have significantly dropped as a result of the war, causing fear of famine and food insecurity in developing nations who rely on inexpensive Ukrainian and Russian wheat.[5] Lastly, Finland has joined the North American Treaty Organization ("NATO") and Sweeden is still working on joining.[6] Their accession to NATO is a clear break in precedent by each country of non-antagonism towards Russia and acting as a buffer between other NATO countries and Russia.[7]

With the backdrop of crisis and what likely will be a long grinding war and possible frozen conflict,[8] this article investigates whether Ukraine has any recourse against Russia in international court. There is case precedent that could provide insight into how this conflict could be resolved, or at least legal precedent that Ukraine could rely on, if they were to attempt to hold Russia accountable for any crimes committed during their invasion and occupation of Ukraine.[9]

In August 2008, Russia briefly invaded the country of Georgia, which is Russia's neighbor to the south and was a former satellite state before the dissolution of the Soviet Union.[10] After the Russo-Georgian conflict ended, Georgia brought

---

[3] *See* Amanda Marcias, *EU, UK, Canada, US Pledge to Remove Selected Russian Banks from Interbank Messaging Stystem SWIFT*, CNBC (Feb. 28, 2022, 12:27 AM), https://www.cnbc.com/2022/02/26/eu-uk-canada-us-pledge-to-remove-selected-russian-banks-from-swift.html.

[4] *See* Scott Patterson & Sam Goldfarb, *Why Are Gasoline Prices So High? Ukraine-Russia War Sparks Increases Across U.S.*, WALL ST. J. (Apr. 1, 2022, 2:00 PM), https://www.wsj.com/articles/why-gas-prices-expensive-11646767172; *see also* Eleanor Beardsley, *Russia's Effort to Break European Energy Unity Seems to be Failing — At Least for Now,* NPR (Sept. 2, 2022, 5:00 AM), https://www.npr.org/2022/09/02/1120518928/russia-europe-energy; *see also EU, G7, Australia to Cap Price on Russian Oil at $60 Per Barrel*, AL JAZEERA (Dec. 2, 2022), https://www.aljazeera.com/news/2022/12/2/eu-agrees-to-60-russian-oil-price-cap.

[5] *See* Food and Agriculture Organization of the U.N. ("FAO"), *The Importance of Ukraine and the Russian Federation for Global Agricultural Markets and the Risks Associated with the War in Ukraine*, 1 (Jun. 10, 2022), https://www.fao.org/3/cb9013en/cb9013en.pdf. "A large number of food- and fertilizer-importing countries, many of which fall into the Least Developed Country (LDC) and Low-Income Food-Deficit Country (LIFDC) groups, rely on Ukrainian and Russian food supplies to meet their consumption needs."

[6] *See Türkiye, Finland, and Sweden Sign Agreement Paving the Way for Finnish and Swedish NATO Membership,* NORTH ATLANTIC TREATY ORGANIZATION (NATO) (June 30, 2022), https://www.nato.int/cps/en/natohq/news_197251.htm. Author's note: this would be the first time since that a new member has joined the group since Northern Mascedonia in 2020. *See* Jim Garamone, *Finland's Accession to NATO Strengthens Alliance Security*, U.S. DEP'T OF DEF. NEWS (Apr. 4, 2023), https://www.defense.gov/News/News-Stories/Article/Article/3351900/finlands-accession-to-nato-strengthens-alliance-security/.

[7] *See* Michael M. Gunter, *Some Implications of Sweden and Finland Joining NATO,* 2 THE COMMENTARIES 91, 92 (2022), https://journals.tplondon.com/com/article/view/2710.

[8] *See* Denis Corboy et al., *Hitting the Pause Button: The "Frozen Conflict" Dilemma in Ukraine,* THE NAT'L INT. (Nov. 6, 2014), https://nationalinterest.org/feature/hitting-the-pause-button-the-frozen-conflict-dilemma-ukraine-11618?nopaging=1."'Frozen conflicts' describe places where fighting took place and has come to an end, yet no overall political solution, such as a peace treaty, has been reached."

[9] *See generally* Georgia v. Russia (II), App. No. 38263/08 (Jan. 21, 2021), https://hudoc.echr.coe.int/eng?i=001-207757 [*hereinafter* ECtHR Ruling].

[10] *See generally Georgia Country Profile,* BBC (Mar. 6), https://www.bbc.com/news/world-europe-17301647; *see also Q&A: Conflict in Georgia,* BBC (Nov. 11, 2008), http://news.bbc.co.uk/1/hi/world/europe/7549736.stm

claims against Russia in both the International Court of Justice ("ICJ") and the European Court of Human Rights ("ECtHR").[11] Although the ICJ case is important, the focus of this paper will show how the ECtHR would likely handle a case brought by Ukraine using the Georgia case as precedent. The comparison between the current crisis in Ukraine and the situation in Georgia in 2008 is apt because like Georgia, Ukraine also has a complicated history with Russia, and Russia appears to be employing a very similar military strategy in Ukraine to the one employed in Georgia.[12]

A. Roadmap of Investigation

For practical reasons, the focus of this article is only on the present conflict that is happening in Ukraine, and therefore Russia's annexation of Crimea in 2014 will not be discussed.[13] Furthermore, this article does not discuss the Court's 2023 ruling in *Ukraine and the Netherlands v. Russia*, joining the complaints of *Netherlands v. Russia* (no. 28525/20), *Ukraine v. Russia (re Eastern Ukraine)* (no. 8019/16), and *Ukraine v. Russia* II (no. 43800/14).[14] Although the ruling is important and concerns Russia's jurisdiction over events occurring in Eastern Ukraine and Crimea at that point in time, they are beyond the scope of this article.[15] This article only focuses on the territorial and alleged human rights violations that Russia committed when its troops invaded in February 2022, and the annexation of four Ukrainian provinces.[16]

This paper first outlines the 2008 invasion and brief war in Georgia and provide contextual background, including a discussion of the ethnic conflict between residents of Abkhazia and South Ossetia, and the main Georgian population, which set the stage for the Russian invasion in 2008. Then, the paper turns to the complaints filed and the ruling of the ECtHR regarding Georgia's complaint. Lastly, this paper applies the holdings and facts of the Georgia conflict to the current situation in Ukraine to develop an understanding of what would hypothetically happen if Ukraine were to launch a legal challenge against Russia, and what the outcome might be both legally and practically.

---

[11] Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ. Fed'n), Preliminary Objections, Judgment, 2011 I.C.J. 70 (April 1), [*hereinafter* ICJ Case]; ECtHR Ruling, *supra* note 9; *see also Information Note on the Court's Case*-Law 247 (Georgia v Russia II), EUROPEAN COURT OF HUMAN RIGHTS (Jan. 2021), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-13102%22]}.

[12] *See* Sergi Kapanadze, *Putin's Invasion Playbook All Too Familiar to Georgia,* CEPA (Feb. 24, 2022), https://cepa.org/article/putins-invasion-playbook-all-too-familiar-to-georgia/.

[13] *See Russia Approves Armed Forces Use,* DW (Mar. 1, 2014), https://www.dw.com/en/russian-parliament-approves-use-of-armed-forces-in-crimea/a-17467100.

[14] *See generally* Council of the Europe, *Press Release: Eastern Ukraine and Flight MH17 Case Declared Partly Admissible*, EUR. CT. HUM. RTS. (Jan. 25, 2023).

[15] Council of the Europe, *Press Release*, *supra* note 14.

[16] *Putin Announces Russian Annexation of Four Ukrainian Regions,* AL JAZEERA (Oct. 1, 2022, 6:38 AM), https://www.aljazeera.com/news/2022/9/30/putin-announces-russian-annexation-of-four-ukrainian-regions.

II. Background

To understand the basis of the complaint that Georgia launched against Russia after the 2008 invasion and the applicability of the decision to the current crisis in Ukraine, it is necessary to understand the nature of the "problem" that Russia was trying to fix by invading Georgia. In its simplest form, the pretext for the Russian invasion was to prevent further conflict between ethnic Georgians and ethnic Abkhazians and South Ossetians.[17] However, the root of the conflict between Georgians and Abkhazians/South Ossetians goes much deeper than the 2008 hot conflict.

A Early 1920s – Rise of Communism and Korenizatsiia[18]

The conflict in 2008 is a manifestation of decades of Russian and Soviet policy towards the region to create ethnic tension and to weaken states to create dependency on Soviet assistance.[19] Following the Bolshevik Revolution and the absorption of Georgia into the Soviet empire, there was a move towards respecting ethnic differences. An example of this was the first Georgian Communist Party's congressional directive on how to communicate with regions in Georgia with ethinc minorities, like Abkhazia and South Ossetia, who primarily spoke local dialects or Russian.[20] This led to the rise of popular leaders, such as Nestor

[17] COMM'N ON SEC. & COOP. IN EUR, HELSINKI COMMISSION REPORT, IN BRIEF: THE RUSSIAN OCCUPATION OF SOUTH OSSETIA AND ABKHAZIA 2 (Jul. 16, 2018), https://www.csce.gov/sites/helsinkicommission.house.gov/files/Occupation%20of%20Georgia%20Designed%20FINAL.pdf. "Following increased clashes between Georgian and separatist forces earlier in the month, hostilities erupted on August 7 between Georgia and separatist Ossetian forces, creating the pretext for an overwhelming Russian military intervention."

[18] GERHARD SIMON, NATIONALISM AND POLICY TOWARD THE NATIONALITIES IN THE SOVIET UNION: FROM TOTALITARIAN DICTATORSHIP TO POST-STALINIST SOCIETY 13 (Westview Press 1991) (noting this term was commonly used to refer to "the internal processes of change that convert an ethnic community into a nation"); *see generally* Ronald Grigor Suny, *Nationalist and Ethnic Unrest in the Soviet Union*, 6 WORLD POL'Y J. 503, 506 (1989), https://www.jstor.org/stable/40209117.

[19] *See generally* Theda Scocpol, *France, Russia, China: A Structural Analysis of Social Revolutions*, 18 COMPAR. STUD. IN SOC'Y & HIST. 175 (1976) (stating a strong state is generally characterized as a functioning unit with lots of oversight, where the governmental apparatus can exert control over its citizens. The capacity of the state and the degree to which it implements control constitutes a strong state. Therefore, weak states are often lacking in buy in from people to agree to the proffered ideology of the state).

[20] INDEPENDENT INTERNATIONAL FACT-FINDING MISSION ON THE CONFLICT IN GEORGIA, REPORT VOL. II at 62 (Sept. 2009), https://www.mpil.de/files/pdf4/IIFFMCG_Volume_II1.pdf [*hereinafter* Georgia Report Vol 2.] "Soviet federal policies radically transformed the relations between nations. It formally recognised certain rights and granted administrative powers to national elites. This increased their self-awareness and political aspirations, particularly with regard to their political status."; *see also* Timothy K. Blauvelt, *From Words to Action! National Policy in Soviet Abkhazia (1921-38)*, *in* THE MAKING OF MODERN GEORGIA, 1918-2012: THE FIRST GEORGIAN REPUBLIC AND ITS SUCCESSORS 1918-2009, 232, at 238 (Stephen Jones ed., 2014). "The Communist Party organization of Georgia, in its turn, declared at its First Congress that 'for communicating with central agencies of the republic, in accordance with the expressed will of the workers of each autonomous unit, the native language of the given people will be used, and they must receive replies to their appeals in that same language.' This principle was enshrined in the first constitution of Soviet Georgia in 1922."

Lakoba, with deep ethnic ties to the land and people that they represented.[21] This period was a time of overall stability in the region.[22] In these early days, the policy of Korenizatsiia led to the brief recognition of Abkhazia as a distinct region.[23]

Following the rise of Joseph V. Stalin, "all important elements of ethnic culture were undermined by forced modernization, industrialization, and collectivization of agriculture under the Soviet state." [24] Forced modernization along with the murder or imprisonment of local officials weakened distinct ethic cultures across the Soviet Union.[25] In Abkhazia, the beloved leader, Nestor Lakoba, died under mysterious circumstances, leaving a power vacuum that was filled by Lavrentiy Beria.[26] Following an uprising by the Bolshiviks in 1924, the Soviet response was characterized as, a "decapitation of the Georgian nation" which in 1936 gave way to Georgia's absorbtion into the USSR.[27] Full Soviet control set the back drop for an escalation of tensions in Georgia and Abkhazia that would carry through to 2008. Following the deaths of Beria and Stalin, the region was left in Soviet control, but with the deep scars of the policies outlined above until the dissolution of the Soviet Union in 1992.[28]

B. Post Collapse of the Soviet Union

Following the breakup of the Soviet Union, there were hopes for a shift in Georgian-Abkhaz relations, however, that was not the case. Upon the dissolution of the Soviet Union and Georgian independence, "Abkhazia reinstated its 1925 constitution and declared independence, which the international community refused to recognize."[29] During this time, civil conflict broke out between South Ossetia and Georgia, with the conflict taking place on South Ossetian territory, a

---

[21] Blauvelt, *supra* note 20, at 236. "[Nestor] Lakoba appears to have been genuinely popular among the ethnic Abkhazian population. Thus unlike most indi-genous elites in other 'Eastern' republics who were distrusted by the center and seen by their own populations as central government representatives, Lakoba and his subordinates had strong support both from Moscow and from the local population (especially among Abkhazians)."; *see also Nestor Lakoba (1893-1936*, ABKHAZ WORLD, https://abkhazworld.com/aw/abkhazians/personalities/1500-nestor-lakoba-1893-1936 (last visited Apr. 5, 2023).

[22] Georgia Report Vol 2, *supra* note 20, at 63.

[23] Blauvet, *supra* note 20, at 234. "On 31 March [1920], Abkhazia received the status of a Soviet Socialist Republic (SSR). . .In February 1922, this status was changed to "treaty republic" (dogovornaia respublika), and Abkhazia was attached to the Geor-gian SSR. . .Abkhazia's status was downgraded in February 1931 to an Autonomous Soviet Socialist Republic within Georgia, which itself remained part of the TSFSR until the latter's dismantling in 1936."

[24] Suny, *supra* note 18, at 507.

[25] *Id.*

[26] AMY KNIGHT, BERIA: STALIN'S FIRST LIEUTENANT 72 (Princeton University Press 1993); Evan Sarafian, The Dangers of Drawing Borders: Interethnic Tension in Soviet Abkhazia and the Emergence of an Ongoing Frozen Conflict (Apr. 18, 2020) (B.A thesis, Occidental College) (on file with author).

[27] Georgia Report Vol. 2, *supra* note 20, at 4. "In December 1936, all three Republics [Georgia, Azerbaijan, and Armenia] were incorporated into the USSR."

[28] *Id.* at 64.

[29] *Independent Georgia,* BRITANNICA, https://www.britannica.com/place/Georgia/Independent-Georgia (last visited Dec. 15, 2022).

prelude to what was to come in 2008.[30] This mini-conflict ended with the Sochi Agreement and an unsteady peace between South Ossetia and Georgia.[31]

Following the 1992 conflict, there was another instance of conflict in 1993.[32] The 1993 conflict involved Abkhazia and Georgia, and was resolved when Russia, through the association of independent states, deployed Russian peacekeepers to the area.[33] Following the Sochi Agreement and the installation of Russian peacekeepers in South Ossetia and Abkhazia, both regions remained "facially independent"[34] of Georgia. Furthermore, Russia offered special treatment to South Ossetia and Abkhazia.[35] Following a highly fractured government in 2003, revolution overtook Georgia in what would be called the "Rose Revolution."[36]

Following the revolution, there were hopes for democracy and a reset in relations between Georgia and Abkhazia/South Ossetia.[37] It is not practical to cover the entire history of conflict between 2003-2008. However, during this time, there were "serious and largely successful efforts to stabilise the situation on the ground and to reinvigorate the Georgian-Abkhaz peace process were made in the period between mid-2002 and mid-2006."[38] However, the euphoria of the Rose Revolution did not last and by 2008 the region was ready for armed conflict.[39]

C. The 2008 Conflict

Following the 2008 conflict, the Council of Europe created the Independent International Fact-Finding Mission on the Conflict in Georgia led by Swiss diplo-

---

30 Georgia Report Vol. 2, *supra* note 20, at 76. "The entry of the Georgian troops into Abkhazia on 14 August 1992, officially with the task of protecting the railway linking Russia with Armenia and Azerbaijan through Georgia's territory, resulted in armed hostilities."

31 *See generally* Agreement on Principles of Settlement of the Georgian - Ossetian Conflict, Russ. Fed'n-Geor., Jun. 24, 1992, Peace Agreements Database [*hereinafter* Sochi Agreement], available at https://www.peaceagreements.org/view/1699.

32 Georgia Report Vol 2 *supra* note 20, at 77.

33 *Id.* at 78. "The Moscow Agreement provided, inter alia, for a ceasefire, and the deployment of international observers and a peacekeeping force of the Commonwealth of Independent States (CIS PKF). The separation of forces was reinforced by the establishment of Security Zones and Restricted Weapons Zones on both sides of the ceasefire line, which at that time basically went along the Inguri River, coinciding with the Georgian-Abkhaz administrative boundary."; *see generally* S.C. Res. 937 (Jul. 21, 1994).

34 STAFF OF COMM. OF SECURITY AND COOPERATION IN EUROPE, 108TH CONG., GEORGIA'S ROSE REVOLUTION 1 (2004).

35 GEORGIA'S ROSE REVOLUTION, *supra* note 34, at 1. "Moscow also imposed a discriminatory visa regime with Georgia, from which Abkhazia and South Ossetia were exempted."

36 *Id.* at 4.

37 *Id.* at 7; LINCOLN A. MITCHELL, UNCERTAIN DEMOCRACY: U.S. FOREIGN POLICY AND GEORGIA'S ROSE REVOLUTION 79, 84, (Univ. of Penn. Press 2009). "Mikheil Saakashvili's election raised hopes both in Georgia and internationally that a new political era would begin in Georgia, one in which democracy, transparency, and the rule of law would replace the old regime of corruption, stolen elections, and kleptocracy."

38 *See generally* Georgia Report Vol 2, *supra* note 20, at 88.

39 *Id.* at 89-90. "Regretfully, the positive momentum the peace process had gained in the period between mid2002 and mid-2006 was not fully utilised and kept alive later on. . .the overall situation in the conflict zone began to deteriorate speedily in spring 2008, in both the security and political spheres."

mat Heidi Tagliavini.[40] Tagliavini's comprehensive report supplies much of the facts that underpin this section. The conflict started the night of August 7, 2008, which stretched into August 8 with "a massive Georgian artillery attack [on South Ossetia]."[41] According to Georgian officials, the goal of the operation was to protect Georgian sovereignty from Russia and to combat what the Georgian officials describe as a build-up of Russian troops in South Ossetia.[42]

However, Russia told a different story. Russia claimed that they were responding "to stop an allegedly ongoing genocide of the Ossetian population by the Georgian forces, and also to protect Russian citizens residing in South Ossetia and the Russian contingent of the Joint Peacekeeping Forces deployed in South Ossetia in accordance with the Sochi Agreement of 1992."[43] Georgia called for a ceasefire on August 10th, but it was swiftly rejected by Russia, who "entered deeper into Georgian territory by crossing the administrative boundaries of both South Ossetia and Abkhazia and set up military positions in a number of Georgian towns, including Gori, Zugdidi, Senaki and Poti".[44]

On a different front, on the same day, "Abkhazian units supported by Russian forces attacked the Georgian positions in the upper Kodori Valley and seized this territory, which had been vacated by the Georgian forces."[45] After reaching a peace agreement, with questionable compliance by the South Ossetian forces, Russian troops left Georgian territory and returned to Abkhazian and South Ossetian territory.[46] On September 8, 2008, "the theatre of events ceased to be in the military sphere of operations and went back to the realm of political and diplomatic action."[47]

---

[40] INDEPENDENT INTERNATIONAL FACT-FINDING MISSION ON THE CONFLICT IN GEORGIA, REPORT VOLUME I at 2 (Sept. 2009) https://www.echr.coe.int/Documents/HUDOC_38263_08_Annexes_ENG.pdf [hereinafter Georgia Report Vol. 1]. "By its decision of 2 December 2008 the Council of the European Union established an Independent International Fact-Finding Mission on the Conflict in Georgia (IIFFMCG). This is the first time in its history that the European Union has decided to intervene actively in a serious armed conflict. It is also the first time that after having reached a ceasefire agreement the European Union set up a Fact-Finding Mission as a political and diplomatic follow-up to the conflict. In its work, the Mission has been assisted and advised by a Senior Advisory Board (see Acknowledgements). The present Report is the result of the mandated inquiry. . .It should be stressed that the Fact-Finding Mission is strictly limited to establishing facts and is not a tribunal."; *see also* Council Decision 2008/901 of Dec. 2 2008, Concerning an Independent International Fact-Finding Mission on the Conflict in Georgia, 2008 O.J. (L 323).

[41] Georgia Report Vol. 1, *supra* note 40, at 19.

[42] *Id.* at 19. "The official Georgian information provided to the Mission says in this regard that to protect the sovereignty and territorial integrity of Georgia as well as the security of Georgia's citizens"; "The Georgian allegations of a Russian invasion were supported, inter alia, by claims of illegal entry into South Ossetia of a large number of Russian troops and armour, prior to the commencement of the Georgian operation." *Id.* at 20.

[43] Georgia Report Vol. 2, *supra* note 20, at 221.

[44] Georgia Report Vol. 1, *supra* note 40, at 21.

[45] *Id.*

[46] *Id.* at 22.

[47] *Id.*

III. Discussion

Following the 2008 conflict, Georgia launched two cases in international courts. They petitioned the ICJ and the ECtHR for relief with differing outcomes.[48] For the scope of this investigation into Ukraine's legal options, the focus will be on the ECtHR case as there was a finding of wrongdoing by Russia.[49] On the contrary, the ICJ held that one of Russia's preliminary objections to the jurisdiction of the ICJ was supported, which halted any further proceedings on the merits of the complaint.[50]

The best approach to understand how the ECtHR ruled in *Georgia v Russia (II)* is to ". . . divide [the ruling] into two parts: First, the ECtHR considered if the respondent state (Russia) had jurisdiction over the territory where violations were taking place. Second, if the respondent state did exercise jurisdiction, whether it is responsible for any human rights violations."[51] This framework will guide subsequent analysis of the case. This analysis will cover the jurisdictional finding and rationale of the Court to allegations during active combat and post-combat. However, there will only be a cursory discussion of the findings of the Court regarding the substantive allegations. This is because the human rights violations in the Georgian-Russo conflict may be different from those in the ongoing Russo-Ukrainian conflict and may be based on different facts and factors which prevent an effective comparison. However, the jurisdictional rulings provide key insight into Ukraine's path forward with litigating Russian violations of the European Charter of Human Rights ("ECHR").

A. Georgia's Allegations

Georgia advanced three main allegations against Russia for their role in the 2008 conflict. First, Georgia argued that Russia was responsible for the alleged atrocities because they "exercised effective authority and control over the relevant areas where the violations took place and/or exercised jurisdiction through state agent authority and control ."[52] Put simply, Georgia argued that Russia incured liability for any human rights violations committed in Georgia and South Ossetia because it was either occupied by Russia or by either South Ossetian

---

[48] *See generally* ICJ Case, *supra* note 11; *see generally* ECtHR Ruling, *supra* note 9.

[49] ECtHR Ruling, *supra* note 9 at 142. "*Holds*, by sixteen votes to one, that there was an administrative practice [by Russia] contrary to Articles 2, 3 and 8 of the Convention and Article 1 of Protocol No. 1 as regards the killing of civilians and the torching and looting of houses in Georgian villages in South Ossetia and in the "'buffer zone.'" Author's note: this is one of many findings that the ECtHR made regarding Russia's conduct during the war.

[50] ICJ Case, *supra* note 11, at 73. "As neither of the two modes of dispute settlement constituting preconditions to the seisin of the Court was attempted by Georgia, the Court does not need to examine whether these two preconditions are cumulative or alternative. [Therefore the] [s]econd preliminary objection of the Russian Federation upheld — Court not required to consider other preliminary objections raised by the Russian Federation — Case cannot proceed to the merits phase."

[51] Kanstantsin Dzehtsiarou, *The Judgement of Solomon That Went Wrong: Georgia v. Russia (II) by the European Court of Human Rights*, VÖLKERRECHTSBLOG 1 (Jan. 1, 2021). https://intr2dok.vifa-recht.de/receive/mir_mods_00009921.

[52] *See* ECtHR Ruling, *supra* note 9, at ¶ 48.

troops or Russian troops.[53] Second, Georgia claimed that Russia did not investigate alleged abuses or violations of human rights when they had a legal duty to do so, and the failure to do so was part of an administrative action of omission.[54] Lastly, Georgia alleged that Russia violated Articles 1, 2, 3, 5, 8, and 13 of the ECHR, and other provisions found within the ECHR.[55]

B. The Findings of the Court

i. Jurisdiction as a Threshold Question to Any Claim[56]

For any allegation of a violation of the ECHR, the perpetrating country must have jurisdiction over that person or territory for the claim to be heard on its merits.[57] As a universal principle of international relations and international law, it is unquestioned that states have jurisdiction within their borders. [58] However, in a case like the one before the ECtHR, given that South Ossetia and Abkhazia were effectively "Georgian territory," although disputed and with some history of autonomy [59], the ECtHR needed to determine whether Russia extended their sovereign jurisdiction to and over South Ossetia and occupied territories during and at the end of hostilities.[60]

The Court articulated that a finding of extraterritorial jurisdiction requires an analysis, "with reference to the particular facts [of the alleged violations]."[61] Furthermore, "as an exception to the principle of territoriality, a [perpetrating] State's jurisdiction under Article 1[62] may extend to acts of its authorities which

---

[53] ECtHR Ruling, *supra* note 9, at ¶ 48.

[54] *See id.* at ¶ 48; *see also id.* at ¶ 102. "An administrative practice comprises two elements: the 'repetition of acts' and 'official tolerance'" (citing *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, nos. 9940-9944/82, Commission decision of 6 December 1983, Decisions and Reports 35, p. 163, § 19, and *Cyprus v. Turkey* [GC], no. 25781/94, § 99). ("Official tolerance is defined as 'the superiors of those immediately responsible, though cognizant of such acts, take no action to punish them or to prevent their repetition; or that a higher authority, in face of numerous allegations, manifests indifference by refusing any adequate investigation of their truth or falsity, or that in judicial proceedings a fair hearing of such complaints is denied.") (Quoting *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, nos. 9940-9944/82 pp. 163-64, § 19)).

[55] ECtHR Ruling, *supra* note 9, at ¶ 48; Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 3, 1953, 213 U.N.T.S. 222. [*hereinafter* ECHR]. (Article 1 (Obligation to Respect Human Rights), Article 2 (Right to Life), Article 3 (Prohibition on Torture), Article 5 (Right to Liberty and Security), Article 8 (Right to Respect for Private and Family Life), Article 13 (Right to an Effective Remedy)).

[56] ECtHR Ruling, *supra* note 9, at ¶ 129. "'Jurisdiction' under Article 1 is a threshold criterion. The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions attributable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention."

[57] *Id.*

[58] *See Bankoviæ and Others v. Belgium and Others*, 2001-XII Eur. Ct. H.R. (2001) ¶ 59.

[59] BRITANNICA, *supra* note 29.

[60] ECtHR Ruling, *supra* note 11, at ¶ 84.

[61] *Id.* ¶ 132.

[62] ECHR, *supra* note 55, at art. 1 "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

produce effects outside its own territory."[63] Under Article 1, lawful or unlawful military intervention qualifies as an event that produces effects outside of one's territory.[64] Regardless of legality, ECtHR case law establishes that, under Article 1 of the ECHR, if an invader acquires more land or territory through miliary conquest or intervention, that invader becomes accountable to the citizens of the conquered territory.[65]

To make this determination, the ECtHR applies a test to the facts of the case. Under the test, jurisdiction can be found if the invading country had, "effective control"[66] over the area or if the invading country set up "state agent authorized control over the area [or individuals]."[67] Procedurally, the Court held that all substantive claims brought by Georgia must first fall within the jurisdiction of Russia as a result of their invasion before being heard on their merits.[68]

ii. Jurisdiction and Claims during Active Hostilities

Georgia submitted two claims of Russian ECHR violations during the active hostilities between the two countries.[69] It alleged a violation of the right to return for displaced Georgian nationals and a violation of the right to education.[70] The threshold question before a decision on the merits is whether Russia exercised jurisdiction over the territory. The first way to show jurisdiction over an area, effective control, requires an analysis of whether Russia's conduct in Georgia put them in effective control over the invaded Georgian territory.[71] On this point, the Court ruled that there was no effective control due to the dynamic nature of war and there was no established line for where Russia's jurisdiction began and Georgia's ended.[72] Therefore, the Court turned to the second avenue to prove jurisdiction, which required a deterimination of whether state agents or authorized authorities established control over individuals.[73]

---

[63] ECtHR Ruling, *supra* note 11, at ¶ 133 (Referencing, *Drozd v France and Janousek v Spain,* 26 June 1992, § 91[Series A no. 240]).

[64] *Id.* ¶ 81.

[65] *Id.* "The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control, whether it be exercised directly, through the Contracting State's own armed forces, or through a subordinate local administration."

[66] *Id.* ¶ 115; *Id.* ¶ 116. "[The] Court will primarily have reference to the strength of the State's military presence in the area. Other indicators may also be relevant, such as the extent to which its military, economic and political support for the local subordinate administration provides it with influence and control over the region."

[67] *Id.* ¶ 115; *Id.* ¶ 117. "What is decisive in such cases is the exercise of physical power and control over the person in question."

[68] *Id.* ¶ 84.

[69] *Id.* ¶ 110.

[70] *Id.*

[71] *Id.* ¶ 115.

[72] *Id.* ¶ 126. "The very reality of armed confrontation and fighting between enemy military forces seeking to establish control over an area in a context of chaos means that there is no control over an area."

[73] *Id.* ¶ 115.

Under their analysis of the second avenue, the Court made a similar finding that due to the dynamic nature of war there was no established jurisdiction over individuals.[74] The Court went further and distinguished the facts of the case from prior case law regarding state agent authority and control jurisdiction by noting, "those cases [regarding a finding of administrative control] concerned isolated and specific acts involving an element of proximity."[75] Because the Court did not find that Russia had jurisdiction over the invaded regions of Georgia directly or vicariously through either South Ossetia or Abkhazia during the active hostilities, they dismissed Georgia's claims of human rights violations during the active fighting between Georgia and Russia/South Ossetia.[76]

iii. Jurisdiction and Claims Post Active Hostilities

The second section of claims of human rights violations is alleged to have occurred after the cessation of hostilities.[77] Turning to the preliminary question of whether Russia had jurisdiction in the post-conflict occupation of Georgia, the Court found that Russia did.[78] To make this determination, the Court examined the two pathways starting with an effective control analysis.[79] The Court primarily looked at the military presence in the region following the conflict and noted that Russia had many troops in South Ossetia and the buffer zone.[80] Furthermore, the Court looked at the economic and political ties that South Ossetia and Abkhazia had with Russia.[81] Examining the economic ties, the Court took particular note of the emergency financial package given to South Ossetia and Abkhazia with the only difference being that Abkhazia did not receive oil from Russia.[82]

The Court concluded its analysis by discussing the political ties between the two countries, notably the Friendship, Cooperation, and Mutual Assistance Treaty between Russia and South Ossetia. [83] Then Prime Minister Vladimir Putin commented, "'Russia is going to continue rendering all-round political and eco-

---

[74] ECtHR Ruling, *supra* note 11, at ¶ 137.

[75] *Id.* ¶ 131; *id.* ¶ 132 (finding that the court noted that there were other cases that "applied the concept of 'State agent authority and control' over individuals to scenarios going beyond physical power and control exercised in the context of arrest or detention" however because level of proximity was different they were distinguishable from the case at hand.)

[76] *Id.* ¶ 144.

[77] *Id.* ¶ 146 (noting the court's headings and subsequent paragraph 146 show that there were different claims launched during active hostilities and after hostilities concluded).

[78] *Id.* ¶ 174.

[79] *Id.* ¶ 146.

[80] *Id.* ¶ 165.

[81] *Id.* ¶ 166.

[82] *Id.* ¶ 166.

[83] *Id.* ¶ 171 (explaining that Former Prime Minister Vladimir Putin stated, "In September 2008, we [Russia] signed a Treaty on Friendship, Cooperation, and Mutual Assistance, and last April, the Agreement on Cooperation in the Protection of South Ossetia's State Frontier. The Russian border guards have assumed responsibility for securing peace and tranquillity in the region.")

nomic support both to South Ossetia and Abkhazia.'"[84] These factors led the Court to conclude that Russia was in effective control of South Ossetia and Abkhazia and therefore, the claims of human rights violations made by Georgia could proceed to be decided on their merits.[85]

iv. Merits of Post-Hostilities Claims

Following the culmination of active hostilities, Georgia alleged violations of Articles 2, 3, and 8 of the ECHR.[86] These allegations come from, "killings, ill-treatment, looting and burning of homes had been carried out by the Russian armed forces and the South Ossetian forces in South Ossetia and the adjacent 'buffer zone'".[87] These claims were summarized by the Court, quoting witnesses W30 and W31, as, ". . .'ethnic cleansing' of Georgian villages had been committed by South Ossetian militias and gangs."[88] The Court made a finding that, "[t]he Russian forces, who had allegedly often attempted to interpose themselves and protect the Georgian villages, had not been in a position to prevent every incident and in any case had not controlled the South Ossetians, who had often been criminals."[89]

However, to square with their jurisdictional findings, the Court found that the Russian forces were responsible for the ethnic cleansing committed by the South Ossetian forces because of the strong economic and political ties.[90] The Court justified this claim by further stating that although there may have been some attempts by Russian forces to prevent the cleansing, the forces mostly sat idly by while the South Ossetian troops engaged in ethnic cleansing and other crimes.[91] The Court found the testimony of the witnesses present at trial compelling enough to find beyond a reasonable doubt that there was a violation of, "Articles 2 and 8 of the Convention and Article 1 of Protocol No. 1 as regards the killing of civilians and the torching and looting of houses in Georgian villages in South Ossetia and in the 'buffer zone.'"[92] The Court squarely says that Russia is the perpetrator of these violations.[93]

---

[84] ECtHR Ruling, *supra* note 11, at ¶ 171.

[85] *Id.* ¶ 175.

[86] *Id.* ¶ 176.

[87] *Id.*

[88] *Id.* ¶ 205.

[89] *Id.* ¶ 213.

[90] *Id.* ¶ 214.

[91] *Id.* ¶ 217. ("Nevertheless, from all the testimonies collected, it appears that the Russian authorities did not take the necessary measures to prevent or stop the widespread campaign of looting, burning and other serious violations committed after the ceasefire.").

[92] *Id.* ¶ 220.

[93] *Id.* ¶ 222.

v. Additional Claims

Additional claims were submitted by Georgia regarding the treatment of civilian detainees and the lawfulness of their detention,[94] specifically citing Articles 3 and 5 of the ECHR.[95] Examining the claims under Article 3, the Court found that they were meritorious and that violations of the Article 3 occurred when civilians were imprisoned in South Ossetian jails.[96] The Court went into detail describing the horrific circumstances at the prison, including the unsanitary conditions of the prison[97], physical beatings[98], and inadequate accommodations.[99] Even though the prison was exclusively run by the South Ossetian authorities,[100] because it was operating under Russian jurisdiction, the Court concluded that Russia was responsible.[101] Examining the claims under Article 5, the Court used the same set of facts as their determination of Article 3 and came to the same conclusion that there was a violation of Article 5 and that Russia was responsible.[102]

The next substantive claims related to the treatment of prisoners of war ("POWs") under Article 3.[103] Without repeating the horrific accounts of Georgian POWs, the Court concluded, "[it is] beyond reasonable doubt that Georgian prisoners of war were victims of treatment contrary to Article 3 of the Convention inflicted by the South Ossetian forces."[104] The Court then noted that, although these atrocities were committed by the South Ossetian forces, Russian forces were present and did not stop the torture.[105] Because of these findings and the Court's prior determination of Russia's jurisdiction over South Ossetia post-

---

94 ECtHR Ruling, *supra* note 11, ¶ 223.

95 ECHR, *supra* note 55, art. 3 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment."); ECHR, *supra* note 55, art. 5 (Author's note: for brevity I selected the main article not including sub articles under para 1) "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law, 2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him, 3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial. 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful. 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

96 ECtHR Ruling, *supra* note 11, ¶ 250.

97 *Id.* ¶ 242.

98 *Id.* ¶ 244.

99 *Id.* ¶ 243.

100 *Id.* ¶ 248.

101 *Id.* ¶ 252.

102 *Id.* ¶¶ 254, 256.

103 *Id.* ¶ 257; ECHR, *supra* note 55, at § 1, art. 3 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment.").

104 ECtHR Ruling, *supra* note 11, ¶ 275.

105 *Id.* ¶ 277.

conflict, the Court concluded that Russia was responsible for the violation of Article 3 by the South Ossetian forces toward Georgian POWs.[106]

The Court then examined Georgia's allegation of interference with the freedom of movement of displaced persons under Protocol No. 4, Article 2 of the ECHR.[107] This allegation is not as straightforward as the proceeding ones. Regarding the right to return, Georgia alleged that the "South Ossetian and Abkhazian authorities [refused] to allow the return of many ethnic Georgians to their respective homes."[108] Furthermore, the return of Georgians to their homes in South Ossetia is still a politically divisive question, as evidenced by the Court's notation in this 2021 opinion that there are ongoing negotiations regarding this issue in Geneva.[109] However, the Court still made a finding that Russia was responsible for this impasse and failure to grant the right of return under Protocol No. 4, Article 2.[110]

Georgia also claimed under Protocol No.1, Article 2, a violation of the right to education.[111] The Court did not find enough evidence to decide on the merits of this claim and therefore dismissed the claim.[112] The final claim that Georgia made was a procedural claim under Article 2 of the ECHR, specifically alleging that Russia had an obligation to investigate the conduct of the South Ossetian forces.[113] Recalling the jurisdiction analysis, the Court established that Russian military and peacekeeping forces in South Ossetia constituted effective control of the area and made Russia liable under Article 1 of the ECHR for any human rights violations that occurred in their jurisdiction.[114] Because Russia failed to

---

[106] ECtHR Ruling, *supra* note 11, ¶ 252.

[107] *Id.* at 120 (examining the header); ECHR, *supra* note 55, at protocol no. 4 art. 2 ("1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. 2. Everyone shall be free to leave any country, including his own. 3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. 4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.").

[108] *Id.* ¶ 297.

[109] *Id.* ¶ 298; *see also id.* ¶ 299 ("That situation [the prohibition of ethnic Georgian's to return to their homes in South Ossetia] was still ongoing on [as of] 23 May 2018, the date of the hearing on the merits in the present case, when the parties submitted their most recent (oral) observations to the Court.").

[110] *Id.* ¶ 301 (caveating that their ruling on this allegation only extends to May 23, 2018).

[111] *Id.* ¶ 302; ECHR, *supra* note 55, at protocol no. 1 art. 2 ("No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.").

[112] ECtHR Ruling, *supra* note 11, at ¶ 314.

[113] *Id.* ¶ 315; ECHR, *supra* note 55, at §1 art. 2 ("1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:(a) in defense of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.").

[114] ECtHR Ruling, *supra* note 11, ¶ 332.

investigate the legitimate allegations of ethnic cleansing, looting, and other atrocities, the Court found Russia to be in violation of Article 2.[115]

IV. Analysis

The Court's ruling is comprised of two parts: first, the court's jurisdictional findings on the active hostilities phase and the post hostilities phase; and second, the Court's decision on the substantive violations of the ECHR articles. Although the Court ultimately came to a near-unanimous conclusion that Russia had jurisdiction over Abkhazia and South Ossetia after hostilities ended and was responsible for the ECHR violations,[116] the majority opinion is not without flaws. The Court's analysis in both the determination of what is effective control and the burden of proof required to make a finding of jurisdiction during active hostilities raise concerns about the future application of Article 1 and the concept of jurisdiction and effective control.

A. Examining the Active Hostitilites Ruling

i. Banković and Others v Belgium and Others

In their description of the law regarding Article 1 and the concept of jurisdiction and effective control, the ECtHR majority's reasoning, in part, relied on the precedent set out in *Banković and Others v Belgium and Others.*[117] In a partially dissenting opinion, Judge Lemmens and others stated that the majority had "resuscitated" *Banković* with little regard to more modern case law.[118] Before addressing the critiques of the majority opinion by the dissenters, it is necessary to give an overview of *Banković.*

Banković concerned the conflict in Kosovo where a NATO rocket launched on April 23, 1999 hit a radio building which collapsed and subsequently killed relatives and family members of the petitioners.[119] The petitioners argued that NATO forces violated various Articles of the ECHR.[120] However, before assessing the merits of the violation of the ECHR articles, the *Banković* Court focused on, "whether the applicants and their deceased relatives were, as a result of that extra-territorial act, capable of falling within the jurisdiction of the respondent States [Belgium and other NATO countries]."[121]

In *Banković*, the Court recognized several exceptions to the general rule of territory and jurisdiction.[122] These special exceptions have been characterized as,

---

[115] ECtHR Ruling, *supra* note 11, ¶ 337.

[116] *See generally id.*, ¶¶ 142-44.

[117] Banković and Others v. Belgium and Others, 2001-XII Eur. Ct. H.R. (2001) [*hereinafter* Banković]; ECtHR Ruling, *supra* note 11, at ¶ 81.

[118] ECtHR Ruling, *supra* note 11, at ¶ 2 (Lemmens, J., dissenting).

[119] *Id.* at 56-57.

[120] Banković, *supra* note 117, at ¶ 28.

[121] Id. ¶ 54.

[122] Erik Roxstrom et al., *The NATO Bombing Case (Bankovic et. al. v. Belgium et. al.) and the Limits of Western Human Rights Protection,* 23 B.U. INT'L L. J. 55, 87 (2005).

"1) de jure jurisdiction, 2) military occupation (of another contracting state), and 3) special relationship jurisdiction."[123] Diving into the military occupation exception to territoriality, the Court developed the concept of effective control, and how once an invading (contracting) party has established effective control over a territory they assume responsibilities to protect human rights.[124] In *Banković*, the Court ultimately ruled that Belgium and others did not have jurisdiction over the airspace or the building.[125] The Court rationalized this decision by stating:

The [petitioner's] submission is tantamount to arguing that anyone adversely affected by an act imputable to a [foreign state], wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention.[126]

One major critique is that *Banković* is ambiguous and only outlines a highly general principle of what is within the jurisdiction of a state per Article 1.[127] The Court in *Georgia v Russia (II)* used this overly broad rationale as a means to show that during the active hostilities there was no effective control.[128] This was seen by the dissenting judges as a butchered application of the law and ignorant of other case precedents that draw on the concept of effective control but in a much broader sense, contrary to *Banković*.[129]

A large part of the criticism of the majority's holding in *Georgia v Russia (II)* is that the petitioners in *Banković* are former Yugoslavia citizens, and at the time Yugoslavia was not a signatory to the ECHR.[130] This is quite important because it shows a crucial deficiency in the way that the majority applies *Banković*. The Russo-Georgian conflict is between two parties to the convention, with Russia signing the convention in 1998[131] and Georgia in 2005.[132] The fact that both Russia and Georgia are signatories is a key premise for why Judge Grozev is not convinced by the majority's opinion.[133] Grozev presents a contrary, yet balanced

---

123 Banković, *supra* note 117, at 88.

124 *Id.* at ¶ 70; *see* Roxstrum, et al, *supra* note 122, at 91; *see Solomou and Others v. Turkey*, App. No. 36832/97, (2008), [hereinafter Cyprus Case] (developing the idea of effective control).

125 Banković, *supra* note 117, ¶ 82.

126 *ECHR, Bankovic and Others v. Belgium and 16 Other States,* INT'L COMM. RED CROSS, https://casebook.icrc.org/case-study/echr-bankovic-and-others-v-belgium-and-16-other-states (last visited May 23, 2023).

127 Roxstrom et al., *supra* note 122, at 75.

128 ECtHR Ruling, *supra* note 11, at ¶ 126 (judgment).

129 *See generally id.* ¶ 2 (Lemmens J. dissenting).

130 *Id.* ¶ 11 (Yudkivska, Wojtyczek and Chanturia J., partially concurring partially; dissenting); *see also Serbia Fact Page*, COUNCIL OF EUROPE, https://www.coe.int/en/web/impact-convention-human-rights/serbia (last visited Dec 14, 2022) (Serbia became a signatory to the ECHR in 2004); *see additionally Map and Members*, COUNCIL OF EUROPE, https://www.coe.int/en/web/tbilisi/the-coe/objectives-and-missions (last visited Dec. 14, 2022) (note that Kosovo is still not a signatory to the ECHR).

131 *See Russia and the European Court of Human Rights*, STITCH JUSTICE INITIATIVE, https://www.srji.org/en/echr/russia/#:~:text=the%20Russian%20Federation%20ratified%20the,against%20Russia%20came%20in%202002 (last visited Dec.16, 2022).

132 *See Georgia Fact Page*, COUNCIL OF EUROPE, https://www.coe.int/en/web/european-social-charter/georgia#:~:text=Georgia%20ratified%20the%20Revised%20European,the%20Revised%20Charter's%2098%20paragraphs (last visited Dec. 16, 2022).

133 ECtHR Ruling, *supra* note 11, at 169 (Grozev J., dissenting).

approach, contrasted with the narrow approach of the majority. Without suggesting *Bancoviæ* is a fundamentally flawed interpretation of Article 1, Grozev finds that the majority's reliance on *Banković* would be proper if the case was between a party to the ECHR and a non party (i.e. Australia).[134]

However, a conflict between two parties to the convention requires a different approach because the petitioning party, in the case of an international conflict, carries the immense burden of fitting their jurisdiction argument into one of the limited exceptions to the general territory rule established in *Banković*.[135] Because of the high pleading burden, the majority had to do little work to find that there was no jurisdiction during the active hostilities phase of the conflict. The relevant facts of the case highlighted by both Grozev's dissent and the majority's opinion touch on the fact Russia's goal in invading Georgia was to gain territory.[136] The unsolved question is to what degree a country's military action in another country constitutes control. Grozev's distinction between a conflict with a third party and a contracting party and between two contracting parties presents a simpler way to decide what is sufficient control.[137] It makes perfect sense that a non-contracting party to the convention would not incur responsibility under the convention should it invade a country that is a party to the convention. This is the rationale of *Banković*.

What Grozev proffers is that, in a war between two contracting parties, when one contracting party acquires new land and implements new laws and policies, the obligations under the ECHR remain. [138] Grozev continues on to say that both countries have the same obligations under the ECHR to the citizens regardless of the changes in local laws and customs, the only thing that changes is who is the guarantor of those rights.[139] In the case between Georgia and Russia, this means that even as the Russian military advanced, the general rights of the Georgian citizens under the ECHR never changed. The only thing that changed was the guarantor of the rights of Georgian citizens. Considering this distinction, the majority seems to have misapplied *Banković* and extra-judicially stripped Georgians of their rights under the ECHR during the active hostilities phase. This ruling created a dead zone where neither state had an obligation to secure the rights of Georgian citizens because the Court's findings absolved Russia of their duty to administer those rights, and Georgia could not effectively administer the rights as they were not physically present in the occupied areas.

The creation of a grey area in a conflict between two contracting parties where there is no administrator of rights is quite dangerous. This presents a slippery slope where the rights of citizens in the case of invasion by a foreign party who is also a party to the convention are determined by how well the petitioner/petitioning country can effectively establish that their claim falls under one of the three

---

[134] ECtHR Ruling, *supra* note 11, at 169-170 (Grozev J., dissenting).

[135] *Id.* at 170.

[136] *Id.* at 168.

[137] *See id.*

[138] *Id.* at 171.

[139] *See id.* at 171.

Banković exceptions.[140] This seems to point to an unintentional consequence of the Court's decision to limit the jurisdiction of Article 1. However, the Court seems content with this direction. The potential problem that the Court supposedly saw in *Banković* [141] is overstated given the numerous other safeguards in place before a decision on the merits is heard, such as the exhaustion of domestic remedies or that there must also be a substantive violation of the ECHR articles or protocols.[142] Therefore, the jurisdiction decision in *Banković* as applied in *Georgia v Russia (II)* is reflective of a court that is stuck in the old sense of territory, one that focuses on the geographic border of a country. A situation that is dynamic, like that in Georgia during the war, falls outside of the realm of jurisdiction.

ii. The Cause and Effect of Military Intervention

The joint dissenting opinion of Judges Yudkivska, Wojyczek, and Chanturia raises a very compelling point. These dissenters focus on *Banković* and criticize its narrow interpretation and application to the facts in *Russia v Georgia* (II).[143] They also focus on the role of the military as an extension of a state's capacity to craft and implement policy on citizens both domestic and abroad. [144] This focus ties in with the second avenue of determining jurisdiction, through state agent authority control. [145] This route is quite interesting and undermines the credibility of the majority's "fog of war" argument where they saw the dynamic and back-and-forth nature of military conflict as inhibiting the establishement of "effective control" under Article 1.[146]

These dissenters make the argument that a military used to quell a rebellion in their own country is akin to a military fighting a foreign military because the end goal is the same, to bring order and control over the individual civilians.[147] In a nod to *Banković*, the dissent states, "[a]n order to bomb specific targets in a city is an act of public power, not only in respect of the troops which will execute it but also over the persons who are in the city in question and who will suffer."[148] Taking this idea and putting it as a foil to the majority's "fog of war" argument

---

[140] *See generally* Roxstrum, et al., *supra* note 122, at 87.

[141] That by ascribing a non-member state obligation under the ECHR akin to member states it would mean that anybody anywhere could bring a claim against a member state for a violation of the ECHR regardless of whether the petitioner/petitioner state was a party.

[142] *See* ECHR, *supra* note 55, at art. 35 § 1; *see generally* ECHR, *supra* note 55, at art. 34; *see also* EUROPEAN COURT OF HUMAN RIGHTS, RULES OF COURT: RULE 47, 2016/1, (Oct. 5, 2015) https://www.echr.coe.int/Documents/Rule_47_ENG.pdf.

[143] *See* ECtHR Ruling, *supra* note 11, at ¶ 11 (Yudkivska, Wojyczek, and Chanturia J., partially concurring, partially dissenting).

[144] *See generally id.* ¶ 6 (Yudkivska, Wojyczek, and Chanturia J., partially concurring, partially dissenting).

[145] *See id.* ¶¶ 115, 117 (judgment).

[146] *Id.* ¶ 137.

[147] *Id.* ¶ 6. (Yudkivska, Wojyczek, and Chanturia J., partially concurring, partially dissenting).

[148] *Id.*

shows that the majority's argument fails to take into account what the dissent calls the "public power" of military intervention.[149]

There is a link between military activity and public life, regardless of whether the military action is domestic or foreign, and to ignore that link when addressing armed conflict would ignore the change in the lives of civilian population as a result of that war and invasion. For example, during the invasion of Georgia, the Russian/South Ossetian troops caused the widespread displacement of ethnic Georgians from the invaded towns closest to South Ossetia and Abkhazia.[150] As a result of the invasion, there was a cause and effect on individuals in Georgia. The court in *Banković* specifically addressed the cause-and-effect argument[151] and dismissed it. However, as outlined above, when examined in the light that the Russo-Georgian conflict was between two signatory parties to the ECHR, this cause-and-effect argument becomes a powerful tool to determine effective control.

However, this specific analysis should be limited to armed conflict between high contracting parties and not extended to any situation beyond that, lest the court fully reverse *Banković*. Therefore, in light of the cause and effect between Russian military activity in Georgia and a noticeable impact on Georgian individuals, there should have been a finding that Russia had jurisdiction in Georgia during the active hostilities. This cause-and-effect argument is also reflected in the case of *Solomou and Others v. Turkey*[152] which the dissent summarizes the findings of the Court as "the act of firing shots beyond a territory under a State's control brings the affected persons under that State's control."[153]

Although the majority in *Georgia v Russia (II)* did not use *Solomou and Others*, they instead relied on other cases to dismiss the cause-and-effect argument. The majority's dismissal of the cause-and-effect argument found in *Solomou and Others* and their reliance on *Banković* seems to ignore the hardship and suffering of Georgian citizens at the hand of the Russian and South Ossetian troops.[154] The majority's ruling also dangerously narrows the ability of future courts to apply Article 1 jurisdiction to situations of active conflict.

V. Impact

This section investigates how the *Georgia v Russia (II)* decision could impact the ability of the Ukrainian government to bring successful claims of ECHR vio-

[149] ECtHR Ruling, *supra* note 11, at ¶ 6. (Yudkivska, Wojyczek, and Chanturia J., partially concurring, partially dissenting).

[150] *Id.* ¶ 297 (judgment).

[151] Banković, *supra* note 117, at ¶ 75.

[152] *See generally* Cyprus Case, *supra* note 124 (noting where a person was shot by Turkish-Cypriot forces operating close to the UN neutral buffer zone in Norther Cyprus. The court found that Turkey had jurisdiction over the person because of the cause and effect. Deteermining that 'an agent of the state' shot a Greek-Cypriot during their attempt to cross the buffer zone and get into Turkeish-Cypriot territory killing them as a result of the state's exercise of power over that person).

[153] ECtHR Ruling, *supra* note 11, at 4. (Yudkivska, Wojyczek, and Chanturia J., partially concurring, partially dissenting).

[154] *Id.* ¶ 131-32 (judgment).

lations against Russia for their invasion. This section will focus entirely on the jurisdictional analysis of Russia and Belarus over the invaded and currently occupied Ukrainian territories.

A. Jurisdiction

i. The Jurisdiction Analysis in General

At the time of writing this article, there has been no treaty or cessation of active hostilities in Ukraine. There are reports of continued attacks by Russia on Ukraine and more allegedly on the way. [155] Based on Court's jurisdictional finding in *Georgia v Russia (II)*, there would likely not be a finding of effective control or control by an administrative agent of Russia in Ukraine. Recalling that in the majority's effective control analysis, they relied on the "fog of war" argument, saying that because of active war there is no delineating line between Russian and Georgian territory for the purpose of deciding whether there is effective control.[156] Here, should the Court follow its rationale in *Georgia v Russia (II)* there will likely be a finding that Russia did not establish effective control over the territory that they control in Ukraine.

Looking at *Banković*, it will be hard for Ukraine to fit into one of the three exceptions to the general rule of what is effective control and jurisdiction of a contracting party.[157] The most promising of these three paths is military occupation[158] and specifically the holding from *Solomou and Others*.[159] In light of the *Georgia v Russia (II)* majority's findings, Ukraine should rely heavily on the cause-and-effect argument from *Solomou and Others* to show that Russia has effective control over the occupied parts of Ukraine. To support the cause-and-effect argument, Ukraine should argue that the sieges at Mariupol are an example of Russian military intervention directly impacting people on the ground.[160] Similar to the forced expulsion of ethnic Georgians from their homes, the Russian bombing of a movie theater in Mariupol, filled with women and children, is a clear military action with an effect on Ukrainian civilians.[161] Additionally, this bombing alone is quite factually similar to the facts in the *Solomou and Others* case, and examining this specific situation through the lens of *Solomou and*

---

[155] Andrew E. Kramer, *Zelensky Warns Ukrainians That Russia Might Strike the Electrical Grid before New Year's Eve.* N. Y. TIMES (Dec 26, 2022), https://www.nytimes.com/live/2022/12/26//russia-ukraine-news?smid=url-share#zelensky-warns-ukrainians-that-russia-might-strike-the-electrical-grid-before-new-years-eve (last updated May 3, 2023).

[156] *See* ECtHR Ruling, *supra* note 11, ¶ 126.

[157] Roxstrum, et al., *supra* note 122, at 87-88.

[158] *Id.* at 91.

[159] *See generally* Cyprus Case, *supra* note 124 (holding that Turkey by virture of its role in the maitnance of the Turkish Republic of Northern Cyprus (TRNC) are liable for activities that occur within the TRNC. Additionally holding, that agents of the TRNC or individual citizens who engage in illegal conduct with the knowledge of state agents can be held liable for violating articles of the ECHR).

[160] Hugo Bachega, *Russia's Attack on Mariupol Theatre a Clear War Crime, Amnesty Says,* BBC (Jun. 30, 2022), https://www.bbc.com/news/world-europe-61979873.

[161] Bachega, *supra* note 160.

Others would lead to a finding of effective control by Russia.[162] To further reinforce this finding, Russia subsequently occupied the city of Mariupol and is rebuilding it in Russia's image.[163]

Even if the Court dismisses the effective control argument, the second prong of jurisdiction is easily satisfied because Russia is trying to establish administrative control over Ukrainian citizens by implementing Russian state agents as mayors.[164] The implementation of Russian mayors in cities like Kharkiv who were brought from Russia and who work on behalf of the Russian government would clearly be designated as state agents and therefore bring the citizens of Kharkiv under Russia's effective control. In *Georgia v Russia (II)*, the Court specifically stated that there was not an element of proximity between Russian control and the Georgian people for the state agent criteria to be satisfied.[165]

However, in Ukraine, the proximity between the Russian war effort and the Ukrainian citizens is different. The reported goal of the new mayor is to head a new Russian-appointed council of ministers in the Kharkiv province.[166] This changes the proximity analysis dramatically and shows that Russia is trying to control and make decisions on a more granular level rather than on a broader military level. In light of this development, the proximity element is most likely satisfied, and therefore the state agents that Russia implemented in the region establish Russia's jurisdiction over the areas where these "mayors" and "councils" are implemented. On the tail end of these appointed "mayors," there is a larger question that needs to be addressed regarding Russia's jurisdiction over the regions of Zaporizhzhia, Kherson, Donetsk, and Luhansk.[167]

ii. What about the "Annexed Territories"?

According to almost all Western sources, the "referendums" that happened in the disputed territories of Zaporizhzhia, Kherson, Donetsk, and Luhansk were a sham.[168] Regardless of the validity of these referendums, the fact that they took

---

[162] *See generally* Cyprus Case, *supra* note 124.

[163] *In Occupied Mariupol, Russia's Rebuild is Erasing Ukrainian Identity and Any Evidence of War Crimes,* EURONEWS (Dec. 12, 2022), https://www.euronews.com/2022/12/22/in-occupied-mariupol-russias-rebuild-is-erasing-ukrainian-identity-and-any-evidence-of-war.

[164] *See* ECtHR Ruling, *supra* note 11, at ¶ 115; *see also Former Russian Mayor Appointed Head of Russian-Occupied Kharkiv, TASS Reports,* REUTERS (Aug. 19, 2022), https://www.reuters.com/world/europe/former-russian-mayor-appointed-head-russian-occupied-kharkiv-tass-citing-local-2022-08-19/.

[165] ECtHR Ruling, *supra* note 11, at ¶¶ 132-33.

[166] *Council of Ministers Formed in the Liberated Part of Kharkiv Region,* TASS (Aug. 19, 2022) https://tass.ru/mezhdunarodnaya-panorama/15513713?utm_source=google.com&utm_medium=organic&utm_campaign=google.com&utm_referrer=google.com.

[167] *See* Jason Beaubien, et al., *Occupied Regions of Ukraine Vote to Join Russia in Staged Referendums,* NPR (Sept. 27, 2022), https://www.npr.org/2022/09/27/1125322026/russia-ukraine-referendums [hereinafter Referendum Article].

[168] *See* Referendum Article, *supra* note 167; *see additionally* Pavel Polityuk, *Russia Holds Annexation Votes; Ukraine Says Residents Coerced,* RETUERS (Sept. 24, 2022), https://www.reuters.com/world/europe/ukraine-marches-farther-into-liberated-lands-separatist-calls-urgent-referendum-2022-09-19/; *see also Former Russian Mayor Appointed Head of Russian-Occupied Kharkiv, TASS Reports,* REUTERS (Aug. 19, 2022). https://www.reuters.com/world/europe/former-russian-mayor-appointed-head-russian-occupied-kharkiv-tass-citing-local-2022-08-19/.

place and that the regions voted to join Russia[169] moves the jurisdiction analysis in these specific regions from a hypothetical concept requiring legal arguments and comparisons to prior case law like *Banković* and *Solomou and Others* and the general effective control/state agent control analysis into a realm of direct control or *de-jure* control. These regions now a part of Russia, at least in the minds of Russian officials, means that Russia automatically assumes all the obligations, both positive and negative[170], under the ECHR to the citizens in the regions. This means that the citizens of these regions can bring a complaint against Russia for any human rights violations regardless of the ongoing active hostilities.

This would also be a strong argument should Ukraine bring claims of violations against Russia for activities in the regions because the regions are a clear extension of Russia both territorially and administratively. However, this analysis would change if Ukraine recaptures these territories or if Ukraine's military action questions Russia's administrative jurisdiction over them. When or if this happens, the jurisdiction analysis would flip back to a question of whether Russia has effective control or state agent control over the disputed territories.

iii. The Question of Belarus

The last question to be explored is regarding Russia's neighbor to the west, Belarus, and whether their activities in Ukraine are an extension of Russia and therefore fall under Russian jurisdiction. It does not matter that Belarus is not a signatory to the ECHR because its actions would be under the jurisdiction of Russia. The theory underlying this analysis is akin to the actions of South Ossetia in the Russo-Georgian conflict, where the Court found that South Ossetia was acting on behalf of Russia in the war and therefore Russia had administrative and effective control over South Ossetia.[171] The Court in *Russia v Georgia* (II) examined the economic and military ties between Russia and South Ossetia.[172] Following this framework, it is necessary to examine the relationship between Russia and Belarus.

---

169 *Ukraine 'Referendums': Full Results for Annexation Polls as Kremlin-Backed Authorities Claim Victory,* EURONEWS (Sept. 28, 2022), https://www.euronews.com/2022/09/27/occupied-areas-of-ukraine-vote-to-join-russia-in-referendums-branded-a-sham-by-the-west (Kherson voted to join Russia with 87 percent "yes" votes, Luhansk voted to join Russia with 98.4 percent "yes" votes, Zaporizhzhia voted to join Russia with 93.1 percent "yes" votes, and Donetsk voted to join Russia with 99.2 percent "yes" votes).

170 EUROPEAN COURT OF HUMAN RIGHTS, GUIDE ON ARTICLE 1 OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS 79, (Aug. 31, 2022), https://www.echr.coe.int/documents/guide_art_1_eng.pdf (noting when a state has jurisdiction over a person they incur "a positive obligation to guarantee respect for the rights and freedoms secured under the Convention" they also incur a "a negative obligation to refrain from actions incompatible with the Convention" (quoting *Ila?cu and Others v. Moldova and Russia* [GC], 2004, §§ 320-321)).

171 *See* ECtHR Ruling, *supra* note 11, at ¶ 174.

172 ECtHR Ruling, *supra* note 11, ¶ 165-66.

For brevity, Belarus and Russia have a long history of cooperation as Belarus was a former satellite state during the Soviet Union, similar to Georgia.[173] Following the dissolution of the USSR, Belarus and Russia made several agreements, the most important of which is the Union State Treaty of 1999.[174] This agreement, "established the infrastructure for a potential complete integration between the two states."[175] The agreement laid the groundwork for significant economic and cultural integration, however, the "[a]greement explicitly state[d] that the two states would retain sovereignty, independence, territorial integrity, state structure, constitutions, state flags, coats of arms, and other attributes of statehood."[176] In light of the Union State Treaty and despite subsequent disputes between Russia and Belarus regarding Russian oil discounts, mineral tariffs, and weapons sales, "[t]he economic, political, and military ties between Belarus and Russia indicate the two states are vastly interconnected. However, this connection is mostly one-sided because Russia holds most of its power and resources over the head of its former state."[177] Given the historically complex relationship between Russia and Belarus, and the protests against Belarusian President Alexander Lukashenko's re-election in 2020, which turned into a broader pro-democracy protest,[178] the jurisdiction analysis in the current Russia-Ukraine conflict is not as clear-cut as the analysis of South Ossetia and Russia. In the current war Belarus has been accused of:

[S]upporting the Russian military aggression against Ukraine – inter alia – by allowing Russia to fire ballistic missiles from the Belarusian territory, enabling transportation of Russian military personnel and heavy weapons, tanks, and military transporters, allowing Russian military aircraft to fly over Belarusian airspace into Ukraine, providing refuelling points, and storing Russian weapons and military equipment in Belarus.[179]

Two questions require answers: first, did Russia assert effective control over Belarus when Russia fired the rockets and invaded Ukraine from Belarus?; and second, could any action be taken against Belarus in light of their passivity and

---

[173] *See* Anthony Adamovich, *Belarus,* BRITANNICA, https://www.britannica.com/place/Belarus (last visited Dec. 18, 2022) ("[F]ormerly known as Belorussia or White Russia, was the smallest of the three Slavic republics included in the Soviet Union (the larger two being Russia and Ukraine.").

[174] *See Union State:The Republic of Belarus and the Russian Federation Signed the Uniton State Treaty on 8 December 1999*, PRESS SERVICE OF THE PRESIDENT OF THE REPUBLIC OF BELARUS, https://president.gov.by/en/belarus/economics/economic-integration/union-state (last visited Dec. 19, 2022).

[175] Trevor Eck, *Unrest in Belarus: The Legal Perspective for Effective Russian Integration and the Potential Western Response*, 50 GA. J. INT'L & COMP. L. 194, 199 (2021).

[176] *Id.*

[177] *Id.* at 203.

[178] News Wires, *Protestors Pack Belarus Capital, Russia Offers Lukashenko Military Help,* FRANCE24 (Aug, 17, 2020), https://www.france24.com/en/20200817-protestors-pack-belarus-capital-russia-offers-lukashenko-military-help.

[179] *See* Council of the European Union, *Press Release: Belarus' role in the Russian military aggression of Ukraine: Council Imposes Sanctions on Additional 22 Individuals and Further Restrictions on Trade* (Mar. 2, 2022), https://www.consilium.europa.eu/en/press/press-releases/2022/03/02/belarus-role-in-the-russian-military-aggression-of-ukraine-council-imposes-sanctions-on-additional-22-individuals-and-further-restrictions-on-trade/.

the fact that they did not put any troops in Ukraine nor are there any reports of Belarus housing Ukrainian POWs?

There is a strong argument that Russia is in effective control over Belarus, through the invitation prong articulated in *Banković*.[180] Given the long history of Russia and Belarus and the Union State Treaty and their intense economic connection it is easy to see how Russia (the more economically stable country) was able to control Belarus via oil and minerals.[181] Furthermore, following the protests, Lukashenko accepted loans from Russia with the promise of deeper economic and military ties. [182] When considering all of these factors, there is a strong argument that like South Ossetia, Russia has immense control over Belarus, such that Russia could be in effective and administrative control of Belarus. With this finding, however, comes the question of whether Belarus can be found in violation of any ECHR provisions.

The answer to whether Belarus is in violation of the ECHR would require a more complete factual record that has not been developed yet. In *Georgia v Russia (II)*, the Court found that Georgian POWs were housed in South Ossetian prisons facilitated by the South Ossetian government.[183] The Court in *Georgia v Russia (II)* also noted that Russia, despite their best efforts, failed to reign in the South Ossetian troops when they committed human rights violations.[184] Without a deeper understanding of the situation in Belarus, which would include information about Belarusian troops, whether individuals or troops in Ukraine are acting in the name of the Belarusian government, or whether Belarus launched rockets into Ukraine, there will likely be no way for Ukraine to pursue a claim against Belarus.

VI. Conclusion

The Court in *Georgia v Russia (II)* created a legal precedent that will fundamentally shift how the Court views active hostilities and human rights violations that happen during them. The dissenting opinions articulate ways in which the facts of the Russo-Georgian conflict can satisfy both the effective control test and the state agent control test. Additionally, the dissenting opinions show how the majority narrowly used prior case law to conclude that Russia had no jurisdiction during the active hostilities.[185] However, the majority's jurisdiction analysis is not a fatal blow to holding Russia accountable for its actions in Ukraine. The fatal blow came when the Council of Europe ("COE") suspended Russia from the

---

[180] Roxstrom et al., *supra* note 122, at 88.

[181] Eck, *supra* note 175, at 202-03.

[182] Alla Leukavets, *The Role of Belarus in the Ukrainian Crisis*, Wilson Ctr, (Apr. 4, 2022), https://www.wilsoncenter.org/blog-post/role-belarus-ukrainian-crisis.

[183] ECtHR Ruling, *supra* note 11, at ¶¶ 213, 275.

[184] *Id.* ¶ 213. ("The commanders of the Russian armed forces and Russian peacekeeping forces who had testified at the witness hearing had also stated that their troops had done everything in their power to protect the civilian population, but had often not had sufficient men to prevent every incident.")

[185] ECtHR Ruling, *supra* note 11, at ¶¶ 142-44 (judgment); *see also id.* ¶ 2 (Lemmens J. dissenting); *see id.* ¶ 6. (Yudkivska, Wojyczek, and Chanturia J., partially concurring, partially dissenting).

council.[186] This triggered an immediate response from Russia who in on March 10, 2022 threatened to leave the COE, but was voted out on March 16, 2022.[187] Russia also withdrew from the ECHR effective September 16, 2022.[188]

However, the Court is still able to hear cases that were filed against Russia before or on September 16, 2022.[189] Russia's withdrawal from the ECHR is a fatal blow to the analysis above and to hopes of accountability for Russia's actions in Ukraine beyond September 16, 2022. However, there still is hope for accountability under other international treaties that Russia is still a signatory to like the International Covenant on Civil and Political Rights, International Convention on the Elimination of All Forms of Racial Discrimination, and Convention on the Elimination of All Forms of Discrimination Against Women.[190] Until Russia rejoins the COE and accepts the ECHR again, there will likely be very little oversight and legal accountability for its actions in Ukraine.

[186] Council of Europe, *Resolution on Legal and Financial Consequences of the Suspension of the Russian Federation from its Rights of Representation in the Council of Europe,* CM/Res/(2022), 1, (Mar. 2, 2022), https://rm.coe.int/2022-cm-resolution-1/1680a5b463.

[187] Micaela del Monte, *Russia's War on Ukraine: Russia Ceases to Be a Member of the Council of Europe,* EUR. PARLIMENTARY RSCH. SERVS., (Mar. 2022) https://www.europarl.europa.eu/RegData/etudes/ATAG/2022/729296/EPRS_ATA(2022)729296_EN.pdf. "On 10 March, the Russian Federation declared its intention to leave the Council of Europe, though at that time it did not submit a formal declaration of withdrawal to the Council Secretary-General, as required by Article 7 of the Council Statute. On 15 March, the formal notification reached the Council Secretary-General together with a declaration of Russia's intention to denounce the European Convention on Human Rights."

[188] *See* European Court of Human Rights, *Press Release No. 286: The Russian Federation Ceases to be a Party to the European Convention on Human Rights*, (Sept. 16, 2022), https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-7435446-10180882%22]}.

[189] *Id.* "The Court remains competent to deal with applications directed against the Russian Federation in relation to acts or omissions capable of constituting a violation of the Convention provided that they occurred up until 16 September 2022."

[190] *See generally Ratification Status of the Russian Federation,* UNITED NATIONS HUMAN RIGHTS TREATY DATABASE , https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=144&Lang=EN (last visited Dec. 20, 2022).

DATE DOWNLOADED: Wed Aug 2 20:06:36 2023
SOURCE: Content Downloaded from HeinOnline

Citations:
Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

Bluebook 21st ed.
Samantha H. Hughes, Qatar v. UAE - The Weight of Words, 19 LOY. U. CHI. INT'l L. REV. 231 (2023).

ALWD 7th ed.
Samantha H. Hughes, Qatar v. UAE - The Weight of Words, 19 Loy. U. Chi. Int'l L. Rev. 231 (2023).

APA 7th ed.
Hughes, S. H. (2023). Qatar v. uae the weight of words. Loyola University Chicago International Law Review, 19(2), 231-248.

Chicago 17th ed.
Samantha H. Hughes, "Qatar v. UAE - The Weight of Words," Loyola University Chicago International Law Review 19, no. 2 (Spring 2023): 231-248

McGill Guide 9th ed.
Samantha H. Hughes, "Qatar v. UAE - The Weight of Words" (2023) 19:2 Loy U Chi Int'l L Rev 231.

AGLC 4th ed.
Samantha H. Hughes, 'Qatar v. UAE - The Weight of Words' (2023) 19(2) Loyola University Chicago International Law Review 231

MLA 9th ed.
Hughes, Samantha H. "Qatar v. UAE - The Weight of Words." Loyola University Chicago International Law Review, vol. 19, no. 2, Spring 2023, pp. 231-248. HeinOnline.

OSCOLA 4th ed.
Samantha H. Hughes, 'Qatar v. UAE - The Weight of Words' (2023) 19 Loy U Chi Int'l L Rev 231 Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at https://heinonline.org/HOL/License
-- The search text of this PDF is generated from uncorrected OCR text.
-- To obtain permission to use this article beyond the scope of your license, please use: Copyright Information

Qatar v. UAE — The Weight of Words

Samantha H. Hughes*

Abstract

In 2021, the International Court of Justice decided, in *Qatar v. United Arab Emirates*, that the term "national orgin" does not include current nationality as used in the International Convention on the Elemination of all Forms of Racial Discrimination ("CERD"). While the Court's decision is supported by various legal arguments, the majority's approach seems to stray from practices regarding interpreting ambiguous terms, and is contradictory to some of its earlier opinions. This Note uses CERD, other International Court of Justice opinions, and the dissenting opinions to the *Qatar v. United Arab Emirates* decision to critically analyze the strength of the majority's opinion. It then compares the dissenting opinions to conclude which Justice wrote the stongest argument. Finally, this Note explores the potential impacts of the decision in *Qatar v. United Arab Emirates*.

Table of Contents

* Samantha Hughes is a second-year law student at Loyola University Chicago School of Law. She is orginially from Cincinnati, Ohio and attended the University of Alabama, where she obtained her degree in International Studies. While in law school, Samantha has enjoyed her various classes and roles, but she has particularly enjoyed her position on the International Law Review because of the numerous opportunities it provides to explore important global events and legal theories.

I. Introduction

Human rights legal documents aim to provide broad protection of human rights and freedoms without distinction among those they protect.[1] With growing racial tensions, discrimination, and violence around the world, it is important that people within these countries are afforded maximum protection. In today's world, many of the "barriers to racial equality" are facially neutral laws that may seem fair but actually have a discriminatory effect.[2] However, the recent 2021 International Court of Justice (the "ICJ" or the "Court") opinion in *Qatar v. United Arab Emirates* ("*Qatar v. UAE*") takes the position of a limited definition of "national origin," as it is used in the International Convention on the Elimination of all Forms of Racial Discrimination ("CERD" or the "Convention"), and refuses to provide protection against discrimination of Qataris.[3] The ICJ's decision in *Qatar v. UAE* on the meaning of "national origin" is too restrictive and unnecessarily limits the scope of CERD's protection, providing room for disguised discrimination. Instead, Judge Bhandari's dissenting opinion provides the strongest legal reasoning and conclusion because he found that the term "national origin" includes current nationality, and he supported his opinion with reference to linguistic sources to determine the term's meaning, as well as the intent of CERD.[4]

This paper will provide background on the history, scope, and purpose of CERD and the specific case at issue. It will then delve into the claims of each country, the majority's opinion, and each dissenting opinion. Finally, this paper will argue that Judge Bhandari's dissenting opinion provides the strongest argument on the application of "national origin" in *Qatar v. UAE*, and evaluate the opinion's textual argument, as well as its potential impact for future decisions.

II. Background

A. The Origin of the Dispute

In June 2017, the United Arab Emirates ("UAE") enacted and implemented discriminatory measures against Qataris, including prohibiting entry by Qatari nationals and requiring Qatari residents to leave the country within fourteen days, allegedly based on their national origin.[5] The UAE Attorney General also issued a statement that any objections to the measures were considered crimes.[6] Furthermore, the UAE blocked Qatari company websites and prohibited broadcasting

---

[1] Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Unofficial Summary, 2021 I.C.J. 2, ¶ 103-04 (Feb. 4), https://www.icj-cij.org/public/files/case-related/172/172-20210204-SUM-01-00-EN.pdf [hereinafter Qatar v. UAE].

[2] Gay McDougall, *The International Convention on the Elimination of All Forms of Racial Discrimination*, U.N. Audiovisual Libr. Int'l L. 1, 3, https://legal.un.org/avl/pdf/ha/cerd/cerd_e.pdf.

[3] Qatar v. UAE, *supra* note 1, ¶ 105.

[4] *Id.* at 2-4 (Annex to Summary 2021/2).

[5] Qatar v. UAE, *supra* note 1, ¶ 26.

[6] *Id.*

television channels operated by Qatari companies.[7] Subsequently, in June 2018, Qatar instituted proceedings against the UAE for these actions, alleging violations of CERD.[8] The three racial discrimination claims Qatar asserted were: (1) the travel bans and expulsion orders were discriminatory and expressly mentioned Qatari nationals; (2) the restrictions on Qatari media corporations were discriminatory; and (3) the discriminatory measures resulted in indirect discrimination based on Qatari national origin.[9]

In its July 23, 2018 provisional measures order, the ICJ concluded that the UAE's acts were possibly within the scope of CERD.[10] UAE then objected that the Court lacked jurisdiction *ratione materiae*, or subject matter jurisdiction, over the case because, in its opinion, the conflict did not fall within the scope of CERD.[11] The term "national origin" is central to the ICJ opinion in *Qatar v. UAE* because, as the Court found, it is determinative of whether the case falls under the ICJ's jurisdiction.[12]

Ultimately, the majority opinion in *Qatar v. UAE* held that the case was outside the scope of the Court's jurisdiction because it found the term "national origin" refers to a person's place of birth, and not their current nationality.[13] The majority based this on several factors, including its conception of the traditional meaning of the term, the language of CERD, and the object and purpose of CERD.[14]

B. Background on the International Convention on All Forms of Racial Discrimination ("CERD" or "the Convention")

CERD serves as the primary international organ for enforcement against racial discrimination and unjust measures.[15] Entered into force in 1969, CERD was enacted in partial response to international events like WWII, African State independence and decolonization, and the recognized need to address the United Nations' obligation to eliminate racial discrimination and require a standard of substantive equality of outcomes.[16] The Preamble of CERD sets its purpose as to promote observance of human rights and fundamental freedoms for all humans without distinction, to end practices of segregation, discrimination, and the exis-

---

[7] Qatar v. UAE, *supra* note 1, ¶ 26.

[8] *Id.* ¶ 27.

[9] *Id.* ¶ 43.

[10] Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures Order, 2018 I.C.J. 406 (July 23).

[11] Qatar v. UAE, *supra* note 1, ¶ 39.

[12] *Id.* ¶ 105.

[13] *Id.*

[14] *Id.* ¶¶ 74-105; James Hendry, *A Narrowed Scope of "National Origin" Discrimination under CERD by the International Court of Justice*, QUEENS L. GLOB. JUST. J. (Mar. 30, 2021), https://globaljustice.queenslaw.ca/news/a-narrowed-scope-of-national-origin-discrimination-under-cerd-by-the-international-court-of-justice.

[15] McDougall, *supra* note 2, at 1.

[16] *Id.* at 1-3.

tence of racial barriers, and to "implement the principles embodied in the United Nations Declaration on the Elimination of All Forms of Racial Discrimination."[17]

CERD, in Article 1, defines "racial discrimination" as:

> any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[18]

Article 1 also contains a list of persons or groups that are protected under CERD.[19] However, the Convention has also adopted General Recommendations to afford protection to groups that are not specifically listed, such as women, non-citizens (including refugees), and certain religious groups facing intolerance.[20] This demonstrates that CERD has adopted a broad definition of protected groups. One of the CERD's specifically protected freedoms is that of movement.[21]

CERD evaluates a discriminatory act in terms of its nature, and not on whether the action intentionally or unintentionally has a discriminatory impact.[22] An action under CERD is discriminatory if it has "an unjustifiable disparate impact upon a group distinguished by race, colour, descent or national origin."[23] CERD imposes several obligations on States who ratify the Convention. For example, States who ratify the Convention obligate themselves to "end racial discrimination 'in all its forms.'"[24] It also urges States to condemn racial hate speech and propaganda, and requires the States to make it illegal to spread racially bigoted views and violent acts.[25] The jurisdictional scope of CERD is contained in Article 22, which provides that the Court has jurisdiction over disputes arising between member States relating to CERD's application and interpretation.[26]

C. History of Conflict between Qatar and United Arab Emirates ("UAE")

There has been a long history of conflict between Qatar and the UAE, rooted in their divide in the 1700s, colonial pasts, and extreme differences in politics.[27] An important divisive factor between the countries, which arose over time, was their respective relationships with other nations, specifically Saudi Arabia.

---

[17] G.A. Res. 2106 (XX), at 1-2, (Dec. 21, 1965).

[18] McDougall, *supra* note 2, at 2; G.A. Res. 2106, *supra* note 17, at 2.

[19] McDougall, *supra* note 2, at 2; G.A. Res. 2106, *supra* note 17, at 2.

[20] McDougall, *supra* note 2, at 2.

[21] *Id.*; G.A. Res. 2106, *supra* note 17, at 3.

[22] McDougall, *supra* note 2, at 3.

[23] *Id.* (citation omitted).

[24] *Id.*

[25] *Id.* at 5; *see also* G.A. Res. 2106, *supra* note 17, at 3.

[26] G.A. Res. 2106, *supra* note 17, at 9.

[27] KRISTIAN ULRICHSEN, QATAR AND THE GULF CRISIS, 17-41 (C. Hurst & Co. Ltd., 2020).

Throughout the 1930s, Qatar was subject to various expansion claims by Saudi officials, and oil prospects in the country led to further conflicts.[28] The Qataris' fears of border invasion by Saudi Arabia continued into the 1990s.[29] In response to these many threats, Qatar eventually adopted a political policy to "step beyond the overbearing 'Saudi shadow'" and establish their own independence.[30] Qatar attracted criticism from other Arab states for accepting political exiles from other parts of the Middle East.[31]

The UAE was also in conflict with Saudi Arabia until 1974, when the two countries executed a border agreement.[32] The relationship between the UAE and Saudi Arabia continued to be tense through the 2000s, but the two countries were eventually forced into a partnership with the onset of the Arab Spring.[33] Ultimately, the Arab Spring represented a diverging point for Qatar and the "troika" of Saudi Arabia, Bahrain, and the UAE, in which political conflict further divided the countries.[34]

Qatar had a change of leadership in 1995 that Saudi Arabia, the UAE, and Bahrain opposed and actively attempted to reverse.[35] The UAE gave refuge to some Qatari leaders who opposed the country's politics, namely Sheikh Hamad bin Khalifa, who was a member of the royal family.[36] In 1996, Sheikh Khalifa successfully seized power as Emir through a coup, assisted by Saudi Arabia, the UAE, Bahrain, and Egypt.[37] The effects of the coup sustained throughout history and led to further conflicts between the countries.[38]

Now, Qatar and the UAE are both members of the Gulf Cooperation Council ("GCC"), which also includes Saudi Arabia, Bahrain, Kuwait, and Oman.[39] The main objective of the GCC is to achieve unity among the member states and strengthen their diplomatic and economic relations.[40] UAE and Saudi Arabia, the two largest members of the GCC, have pushed to have unified GCC policy.[41] This push may be attributable to their own desires of establishing a more dominant position.[42] Qatar has challenged this by having independent foreign policy

---

28 *See* ULRICHSEN, *supra* note 27, at 21.

29 *Id.* at 29.

30 *Id.* at 30.

31 *Id.* at 28.

32 *Id.* at 25.

33 *Id.*

34 *Id.* at 41.

35 *Id.* at 30.

36 *Id.*

37 *Id.* at 31.

38 *See id.* at 32.

39 Interpretation and Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E), Memorial of the State of Qatar, 2019 I.C.J. 1, ¶ 2.6 (Apr. 25) [hereinafter Qatar Pleadings].

40 *Id.*

41 *Id.* ¶ 2.7.

42 *Id.*

and maintaining relationships with UAE competitors.[43] Another source of conflict between Qatar and the GCC has been its support and funding of an independent Middle Eastern news channel.[44] The UAE has expressly opposed this, labeling it as a "conduit of 'hate speech' and 'pro-terrorist output.'"[45]

In its preliminary objections, the UAE challenged Qatar's statements of the facts and claimed that it instituted the measures at issue because of Qatar's violation of the Riyadh Agreements, in which Qatar promised to terminate its support of regional threats, such as terrorists and violent extremist groups.[46] One provision of the Riyadh Agreements provides that if any country breached compliance, then the other "GCC countries were permitted to implement any 'appropriate action to protect their security and stability.'"[47] The UAE claimed that Qatar breached the agreements by failing to prosecute terrorists living in Qatar and supporting the Muslim Brotherhood.[48] The UAE also alleged Qatar provided millions of dollars to extremist and terrorist groups.[49] Therefore, the UAE claimed that its response, namely the enactment of the three measures at issue in *Qatar v. UAE*, was lawful.[50]

D. Background on the Alleged Discrimination

Qatar characterized the UAE's measures as "a series of coordinated and interconnected measures against Qataris, which separately and together, have had a serious impact on their fundamental rights."[51] The first UAE measure was announced on June 5, 2017.[52] This measure (i) ordered "Qatari residents and visitors in the UAE" to leave the country within 14 days for "precautionary security reasons"; (ii) enacted an unconditional travel and entry ban against "Qatari nationals"; (iii) banned "UAE nationals" from travel or entry into Qatar; and (iv) closed UAE airspace and seaports "for all Qataris" within 24 hours.[53]

Media outlets quickly reported on the announcement, and under a Qatari narrative, stated the basis of the UAE's motivation for the measures was to protect against Qatar and its citizens as security threats.[54] The announcement allegedly created panic among Qataris and a fear for their safety and that they would be seen as a threat to the UAE, making them potential victims of abusive police acts

---

[43] Qatar Pleadings, *supra* note 39, ¶2.7.

[44] *Id.* ¶ 2.8

[45] *Id.*

[46] Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E), Preliminary Objections, 2019 I.C.J 1, ¶ 19 (Apr. 29) [hereinafter UAE Preliminary Objection].

[47] *Id.* ¶ 22 (internal citation omitted).

[48] *Id.* ¶ 23.

[49] *Id.* ¶ 24.

[50] *Id.* ¶ 30

[51] Qatar Pleadings, *supra* note 39, ¶ 2.10.

[52] *Id.* ¶ 2.11.

[53] *Id.* ¶ 2.12.

[54] *Id.* ¶ 2.15.

or arrest.[55] This purported fear was supported by stories from Qataris of hearing constant anti-Qatari messaging and becoming victims of vandalization.[56]

Next, Qatar stated that the travel bans were immediate and severe, particularly to citizens of both counties who previously moved between the two countries freely.[57] These bans affected students, people who owned property in the UAE, families with cross-national ties, and companies.[58] Although the UAE made modifications to the bans, Qatar claimed none sufficiently ameliorated their discriminatory application, nor the effects on Qataris.[59]

The third contested UAE measure were the restrictions on speech, specifically suppressing criticism of the UAE's actions and criminalizing Qatar sympathy.[60] Qatar claimed this "allowed the UAE to pursue its anti-Qatar narrative unfettered. . .leading to the creation and perpetuation of a climate of fear and hostility against Qatar and Qataris."[61] Qatar further alleged that the UAE's suppression of free speech was paired with anti-Qatari propaganda of false news and state-sponsored hate speech, which fostered more hostility towards Qataris.[62] Qatar ended its review of the measures in its Application with a powerful statement:

> [T]he UAE's incitement and perpetuation of this climate of racial hatred and xenophobia, and its silencing of both Qatari voices and any potentially dissenting voices, in addition to causing harm in their own right, have also exacerbated the effects of the UAE's other measures against Qataris, and made their impacts particularly devastating for Qataris and their families.[63]

III. Discussion

A. The UAE's Argument

In response to Qatar's filings, the UAE presented preliminary objections to the Court's jurisdiction.[64] "The UAE argue[d] that the term 'national origin' does not include current nationality and that the Convention does not prohibit differentiation based on [an individual's] current nationality."[65] The UAE asserted that

---

[55] *See* Qatar Pleadings, *supra* note 39, ¶¶ 2.19-2.20.

[56] *Id.* ¶ 2.25.

[57] *Id.* ¶ 2.33.

[58] *Id.*

[59] *Id.* ¶ 2.35.

[60] *Id.* ¶ 2.36.

[61] *Id.*

[62] *Id.* ¶ 2.45.

[63] *Id.* ¶ 2.61.

[64] Qatar v. UAE, *supra* note 1, ¶ 25.

[65] *Id.* ¶ 74.

CERD is limited to racial discrimination, and not discrimination generally.[66] Thus, the UAE took a narrow approach to interpreting race and ethnicity.[67]

The UAE rested its argument on four main points.[68] First, the UAE claimed that when considered with the other terms in Article 1, which, in its view, were "immutable characteristics,'" "national origin" could not include "nationality" since nationality can change over time.[69] Second, the UAE argued that the drafters would have used the term "nationality" if they intended "national origin" to have that meaning.[70] Third, the UAE referenced other provisions of the CERD and stated, because Article 1(2) "permits differential treatment on the basis of nationality" and Article 1(3) "expressly uses the word 'nationality,'" it must mean "national origin" does not include "nationality."[71] Finally, the UAE turned to Article 5 of the CERD and argued that, because States could not discriminate based on "national origin" against certain enumerated rights, including "nationality" within "national origin," it would mean that States could not afford certain rights to citizens and not to non-citizens.[72] It contrasted this with the fact that many States do treat citizens and non-citizens differently, both practically and under law or regulations.[73]

B. Qatar's Argument

Qatar believed that the UAE's measures fell within the scope of CERD.[74] Qatar argued that the term "national origin," as used in Article 1, paragraph 1 of CERD, includes current nationality.[75] In Qatar's view, the purpose of CERD is to outlaw discrimination of individuals because of "certain shared characteristics. . .which extends beyond the concept of 'race' alone to include, among others, national origin."[76] Qatar asserted that the only interpretation of CERD consistent with its plain text results in "national orgin" including nationality-based discrimination, and not just racial discrimination.[77]

First, Qatar claimed that the plain meaning of "national origin" includes current nationality.[78] Qatar used dictionary definitions, including in different lan-

---

[66] Interpretation and Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E), Written Statement of the State of Qatar Concerning the Preliminary Objections of the United Arab Emirates, 2019 I.C.J 1, ¶ 2.16 (Aug. 30) [hereinafter Qatar's Written Statement].

[67] *Id.*

[68] *Id.* ¶ 2.30.

[69] *Id.* ¶ 2.31.

[70] *Id.* ¶ 2.33.

[71] *Id.* ¶ 2.36.

[72] *Id.* ¶ 2.44.

[73] *Id.*

[74] Qatar v. UAE, *supra* note 1, ¶ 74.

[75] *Id.*

[76] Qatar's Written Statement, *supra* note 66, ¶ 2.15.

[77] *Id.* ¶¶ 2.17-2.18, 2.20.

[78] *Id.* at 25.

guages, to demonstrate that "nation" refers to both where a person lives and to a common descent, race or culture, and that "origin" normally means where a person comes from, but does not exclude a person's current State-association.[79] Thus, from Qatar's view, "national origin" includes "nationality" when "taken in context and in accordance with the CERD's object and purpose."[80] Qatar also relied on jurisprudence of human rights courts, including the European Court of Human Rights, to show that certain courts have held that discrimination on the basis of nationality includes discrimination based on national origin.[81]

Next, Qatar argued that the context of the term "national origin" in Article 1 of CERD shows that it encompasses current nationality.[82] Qatar supported its interpretation by emphasizing that the term "national origin" has an independent meaning from "ethnic origin," which is also in Article 1 of CERD.[83] So, Qatar argued the terms were meant to cover separate characterizations, and that because where a person is born could reasonably fit under "ethnic origin," in order for "national origin" to have any purpose, it must also include current nationality.[84] Moreover, Qatar explained that Article 1, section 2, of CERD, which excludes distinctions between citizens and non-citizens from its scope as stated in Article 1, Section 1, does not "permit differential treatment on the basis of nationality," but instead permits States to distinguish between "their own citizens and non-citizens."[85]

Qatar claimed this argument was consistent with the Committee's interpretation.[86] Qatar explained how this supported its argument by saying,

> the inclusion of Article 1(2) suggests two points: first, that non-citizens generally fall under the protection of Article 1(1), and second, that Article 1(1) prohibits nationality-based discrimination. If Article 1(1) did not include nationality-based discrimination, Article 1(2) would be superfluous: none of the other grounds of discrimination in Article 1(1) implicate the treatment of non-citizens or non-nationals *as such*.[87]

Qatar also challenged some of the UAE's points. First, it contradicted the UAE's assertion that current nationality could not be within the CERD's scope because it could change over time, with the reference to "restrictive citizenship regimes" in Gulf countries that depend on immutable characteristics, namely birthplace and heritage.[88] This, Qatar claimed, shows nationality cannot be

---

79 Qatar's Written Statement, *supra* note 66, ¶¶ 2.23-2.24.

80 *Id.* ¶ 2.29.

81 *Id.* ¶ 2.26.

82 *Id.* at 31.

83 *Id.* ¶ 2.32.

84 *Id.* ¶ 2.32.

85 *Id.* ¶ 2.37.

86 *Id.*

87 *Id.* ¶ 2.40.

88 *Id.* ¶ 2.31.

wholly excluded from "immutable characteristics."[89] Next, Qatar challenged the UAE's claim that the drafters did not intend to include "nationality" because they chose not to use that word.[90] Qatar claimed that the drafters' interchangeable use in the CERD between "nationality" and "national origin" showed that they intended both terms to include, among other characteristics, present nationality.[91]

Finally, Qatar claimed that "nationality" must fit within the term "national origin" so that CERD could accomplish its purpose of eliminating racial discrimination.[92] Under this approach, Qatar claimed the Court was required to interpret terms to allow the treaty to achieve its stated goals and purposes.[93] Qatar provided various examples and arguments to establish that in order for CERD to fully accomplish its goals, nationality-based discrimination must be prohibited, and that the CERD Committee had "expressly relied on 'national origin' to assess violations of the Convention in the context of nationality-based discrimination between different non-citizen groups."[94] In conclusion, Qatar claimed that the ordinary meaning, context of CERD, and its purpose all support interpreting "national origin" to include "nationality."

C. Discussion of Majority Opinion

Ultimately, the majority of the Court agreed with the UAE and found that the term "national origin" does not encompass current nationality, and that therefore the UAE's allegedly discriminatory measures did not fall within CERD's scope.[95] The majority based its opinion on three main grounds: the term's ordinary meaning, read in light of CERD's purpose, the term's meaning from supplementary means of interpretation, and the practice of the CERD Committee.[96]

The Court initially aimed to interpret the term in accordance with its ordinary meaning, as required by the Vienna Convention.[97] Reading the term in its context to racial discrimination, the Court said that the ordinary meaning of "national or ethnic origin" refers to a perons's relationship to a group at birth, while the term "nationality" relates to whether a person is within the power of the State and can change over someone's life.[98] The Court noted that CERD also lists other characteristics to define racial discrimination, like race, that are decided at birth.[99]

Next, the Court turned to reading "national origin" as used in CERD. The majority concluded that because the Convention, in Article 1, states that laws

---

[89] Qatar's Written Statement, *supra* note 66, ¶ 2.31.

[90] *Id.* ¶ 2.34.

[91] *Id.* ¶ 2.35.

[92] *Id.* at 44.

[93] *Id.* ¶ 2.55.

[94] *Id.* at 44-49.

[95] Qatar v. UAE, *supra* note 1, ¶ 105.

[96] *Id.* at 5-7.

[97] *Id.* ¶ 78.

[98] *Id.* ¶ 79.

[99] *Id.*

concerning nationality and laws discriminating between citizens and non-citizens are outside its scope, it impliedly means "national origin" does not encompass current nationality.[100] The majority ended this part of its analysis by examining how the term related to the purpose of CERD, specifically looking at its Preamble.[101] The Court framed CERD's purpose as to "eliminate all forms and manifestations of racial discrimination against human beings on the basis of real or perceived characteristics as of their origin, namely at birth."[102]

It is important to note that the Court did not support those conclusions with any scientific findings, and failed to consider race as a social construct.[103] The Court rationalized its reasoning with the assertion that because CERD intends to eliminate practices that establish superiority between racial groups, it could not then intend to protect against all differentiation, including based on nationality.[104] The Court further supported its conclusion with evidence that many States do have legislation that differ between people based on nationality.[105]

The Court then turned to the supplementary materials the parties used in their arguments on the meaning of "national origin."[106] Focusing on the drafts of CERD, the Court found the drafters intended to definitionally distinguish "national origin" and "nationality"[107] Thus, the Court concluded CERD does not include current nationality.[108]

Finally, the majority addressed whether its interpretation of "national origin" fit within the Committee's practices. It first noted that in a General Recommendation, the Committee stated that

> differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.[109]

However, the Court stated it was not required to conform its interpretation around the Committee's, and therefore could diverge if it found rules of treaty interpretation supported the finding of a different meaning.[110] Following its prior explanations surrounding the terms' meanings, the Court then concluded that be-

---

[100] Qatar v. UAE, *supra* note 1, ¶ 80.

[101] *Id.* ¶ 86.

[102] *Id.*

[103] Dianne Desierto, *A Study in Contrasting Jurisdictional Methodologies*, BLOG EUR. J. INT'L L. (Feb. 15, 2021), https://www.ejiltalk.org/a-study-in-contrasting-jurisdictional-methodologies-the-international-court-of-justices-february-2021-judgments-in-iran-v-usa-and-qatar-v-uae/.

[104] Qatar v. UAE, *supra* note 1, ¶ 86-88.

[105] *Id.*

[106] *Id.* ¶ 89-97.

[107] *Id.*

[108] *Id.* ¶ 97.

[109] *Id.* ¶ 98.

[110] *Id.* ¶ 101.

cause "national origin" is determined at birth, and "nationality" can change, the object and purpose of CERD does not encompass current nationality.[111] In summation, the Court determined its interpretation of the term "national origin" in CERD meant current nationality did not fall within its scope, and refused to allow the answers to the legal and factual questions to proceed to the merits stage.[112]

D. Discussion of Dissenting Opinion

Six judges ultimately did not join the majority's opinion on dissented on both issues.[113] Judge Iwasawa did not join the majority, but instead appended a separate opinion.[114] He agreed with the majority's conclusion, but supported his opinion on different grounds.[115] The five dissenters included President Yusuf, Judge Cançado Trindade, Judge Sebutinde, Judge Bhandari, and Judge Robinson.[116] President Yusuf appended a declaration to the Court's judgment, while Judges Sebutinde, Bhandari, and Robinson appended dissenting opinions. Judge Cançado Trindade did not have a published opinion, so there will be no discussion of his position. This section, therefore, discusses the four published dissenting opinions.

First, President Yusuf disagreed with the majority on its conclusions and its reasoning on two issues: the subject-matter of the dispute, and the Court's jurisdiction regarding the indirect discrimination claim.[117] President Yusuf wrote that the way the Court "framed the subject-matter of the dispute [was] in a manner totally disconnected from [Qatar's] written and oral pleadings," because while Qatar claimed the UAE's actions were racially discriminatory based on a person's "national origin," the Court's entire judgment rested on "nationality," therefore not addressing the specific argument Qatar raised.[118]

In President Yusuf's opinion, the majority erred in its decision because it failed to give adequate attention to the applicant's framing of the issue, thereby departing from the Court's "long-standing jurisprudence."[119] Therefore, President Yusuf determined that if the majority followed its jurisprudence, it would have found that Qatar's claims of racial discrimination fit within CERD's scope.[120] Regarding the majority's determination regarding "indirect discrimination," President Yusuf thought that Qatar's claims of racial discrimination raised

---

111 Qatar v. UAE, *supra* note 1, ¶ 98-101.

112 *Id.* ¶ 105; Desierto, *supra* note 103.

113 Qatar v. UAE, *supra* note 1, ¶ 115.

114 *Id.*

115 *Id.*

116 *Id.*

117 *Id.* at 1 (Annex to Summary 2021/2).

118 *Id.*

119 *Id.*

120 *Id.*

questions of fact, and that therefore the determination of the merits of those claims should have happened at the merits stage.[121]

Next, Judge Sebutinde wrote a dissenting opinion. First, she wrote that the UAE's objection was not worthy of a preliminary disposition of the case, and a decision of the effects of the racial discrimination could only be decided during the merits stage of the dispute.[122] Second, she held that the UAE's second preliminary objection, that Qatar could not pursue action simultaneously from the CERD Committee and the ICJ, should have been rejected because CERD does not expressly prohibit concurrent actions, and because both bodies serve "fundamentally distinct roles."[123] Finally, Judge Sebuntide wrote that the Court should have rejected the UAE's third preliminary objection because it had not met the threshold of "exceptional circumstances" to warrant a claim dismissal on the grounds of "abuse of process."[124]

Judge Bhandari dissented based on disagreement regarding UAE's first preliminary objection and the Court's rejection of jurisdiction.[125] He framed the central issue as "whether the term 'national origin' in Article 1, paragraph 1, of CERD encompasses current nationality."[126] Judge Bhandari took a linguistic approach to his opinion on the difference between the two words.[127] He emphasized that the term "national origin" is the combination of two words, and when they are analyzed, "'national origin' refers to a person's belonging to a country or nation."[128] Based off this reasoning, Judge Bhandari concluded current nationality "is an event encompassed within the broader term 'national origin'" and that the terms were not sufficiently different to warrant exclusion of the matter based on the terms.[129] Judge Bhandari also supported his opinion with the explanation that practically, the UAE's measures targeted at Qatari nationals were "inevitable also affected persons of Qatari 'national origin' since Qatari nationals are primarily persons of Qatari heritage."[130]

Judge Robinson disagreed with the upholding of the the UAE's "first preliminary objection of no jurisdiction."[131] First, he concluded that Qatar was correct that the term "national origin," as used in Article 1 of CERD, includes nationality.[132] In his opinion, "nothing in the ordinary meaning of the term 'national origin' [renders] it inapplicable to a person's current nationality."[133] Judge

---

121 Qatar v. UAE, *supra* note 1, at 1.

122 *Id.* at 1-2.

123 *Id.*

124 *Id.* at 2.

125 *Id.*

126 *Id.*

127 *Id.*

128 *Id.*

129 *Id.*

130 *Id.*

131 *Id.* at 4.

132 *Id.*

133 *Id.*

Robinson found the majority's stance that nationality is changeable while national origin is instead acquired at birth was questionable and not persuasive enough to hold the matter fell outside CERD jurisdiction.[134] Further, Judge Robinson disagreed with the majority's diversion from the CERD Committee's recommendation that "national origin" includes nationality, and he also "noted that the majority did not offer any explanation for not following it."[135] He therefore dissented because he found the Court did have jurisdiction.[136]

E. The Court's Opinion in a Related Matter

The International Court of Justice faced a similar issue in *Iran v. USA*, a judgment it rendered in February 2021.[137] In *Iran v. USA*, Iran alleged that the United States' sanctions violated a Treaty of Amity, Economic Relations, and Consular Rights ("Treaty of Amity") between the two countries.[138] The United States argued that the subject matter of the dispute was another treaty, and so the Court was forced to determine whether the measures fell within the scope of the Treaty of Amity.[139] In determining the court's subject matter jurisdiction, the Court stated:

> to identify the subject-matter of the dispute, the Court bases itself on the application, as well as on the written and oral pleadings of the parties. In particular, it takes account of the facts that the applicant identifies as the basis for its claim.[140]

This demonstrates that the Court's test and approach for determining subject-matter in *Iran v. USA* was very different from that in *Qatar v. UAE*, as discussed earlier. In this case, the court heavily relied upon the claimant's framing of the issue in its interpretation.[141] Another methodical distinction between the Court's approach in these two cases was its willingness to allow *Iran v. USA* to proceed to the merits stage with some legal and factual ambiguities left unanswered, whereas in *Qatar v. UAE* it took the completely opposite approach.[142]

---

134 Qatar v. UAE, *supra* note 1, at 4-5.

135 *Id.* at 5.

136 *Id.* at 4-5.

137 Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Rep. of Iran v. U.S.), Unofficial Summary, 2021 I.C.J. (Feb. 3), https://www.icj-cij.org/sites/default/files/case-related/175/175-20210203-SUM-01-00-EN.pdf [hereinafter Iran v. U.S. Summary]; *see* Desierto, *supra* note 103.

138 Iran v. U.S. Summary, *supra* note 137.

139 *Id.*

140 *Id.* (quoting Iran v. US Judgment on Preliminary Objections).

141 *Id.*

142 *Id.*

IV. Analysis

A. Majority Opinion

The concern with the majority's opinion in this case is that the Court "decide[d] questions of law and fact at the jurisdictional stage, without fully explaining its reasons for doing so."[143] Some people "criticized the Court [in this decision] for not referring to some of its assumptions" that "national origin" is an "inherent characteristic" and "for not examining the idea that 'race is a social construct.'"[144] Furthermore, its opinion is not entirely convincing because the Court itself has issued contradictory opinions, exemplified in *Iran v. USA*.[145] Ultimately, the majority's opinion is not convincing enough because it jumped to a conclusory dismissal, that it not only failed to fully support, but has contradicted other cases and matters.

B. Dissenting Opinions

On the other hand, some of the dissenting opinions are stronger than the majority, and Justice Robinson's dissent is the strongest.[146] Although all dissenters agreed, for different reasons, that the Court should not have dismissed the case at this stage, Judge Robinson's opinion is the most persuasive.[147] First, his approach to interpreting the term "national origin" is both more logical and fits with the Court's approach in other matters.[148] Second, he is fully respecting the CERD Committee's interpretation of the term, which the majority seemingly failed to do.[149] Robinson's opinion is also stronger from the majority's because he seems to recognize the possibility that the answer to the questions could be different once it proceeds past the preliminary stage; he is ultimately deciding that it is too early to entirely dismiss the case based on the meaning of two words.[150]

V. Impact

The "international society" at large has taken a firm stance against racism and racial discrimination.[151] However, what those terms include has proven to "divde the Court and has now engendered a conflict between the ICJ and the CERD Committee."[152] The ICJ represents the primary judicial system of the United Nations, but has also, in other cases and conflicts, relied on the interpretation of the

---

143 Iran v. U.S. Summary, *supra* note 137.

144 Hendry, *supra* note 14.

145 *See* Desierto, *supra* note 103.

146 *See* Qatar v. UAE, *supra* note 1, at 2 (Annex Summary 2021/2).

147 *See generally id.* at 1-8.

148 *Id.* at 4.

149 *See id.*

150 *See id.*

151 Geir Ulfstein, *Qatar v. United Arab Emirates*, 116 Am. J. Int'l L. 397, 400 (2021).

152 *Id.* at 401.

drafter of specific instruments, such as the CERD Committee.[153] Although it is unclear who should hold a position of interpretation supremacy, this decision seems to cast the ICJ as the ultimate interpreter, and diminishes the influence from human rights perspectives.[154] Therefore, the Court's decision in this case could create an unstable front in the realm of international law, especially concerning human rights. Additionally, because the Court's approach with many human rights cases often appears to be similar to that in treaty interpretation and human rights court's decisions, it is possible this case and the Court's interpretation of "national origin," will impact its decisions in future disputes within those areas.[155]

Furthermore, this decision appears to add another challenge to the already difficult battle of eliminating racial discrimination.[156] Despite measures and promises to fight racial discrimination, like the Universal Declaration of Human Rights (1948) and CERD, "many individuals and groups belonging to the minority continue to experience various forms of discrimination."[157] The Court's decision in *Qatar v. UAE* also arguably seems to challenge the CERD's own recognition of "the importance of decision-making. . .'to detect and prevent at the earliest possible stage developments in racial discrimination'" through its refusal to hear this case.[158] It is possible to imagine how the UAE's actions could lead to further discrimination, and by limiting the definition of "national origin," the Court seems to be disregarding this duty.

Lastly, this decision affects both the people who are the direct targets of the measure, as well as victims of discrimination in the broader context. First, because the ICJ was unwilling to hear this case for lack of jurisdiction, the Qatari people are still subject to acts of alleged discrimination. Furthermore, the decision of the Court in *Qatar v. UAE* potentially leaves large group of people unprotected, while at the same time protecting many forms of indirect discrimination.[159] Statelessness remains a huge problem throughout the world, impacting more than an estimated twelve million people, which means for many people "their current nationality is their 'national origin.'"[160] These people are already especially vulnerable, facing "denial of a legal identity when they are born, access to education, health care, marriage and job opportunities" and more.[161] The United Nations has even identified that those affected by stateless-

---

153 Ulfstein, *supra* note 151, at 402.

154 *Id.*

155 *Id.* at 401.

156 *See* Alex Otieno, *Eliminating Racial Discrimination: The Challenges of Prevention and Enforcement of Prohibition*, U.N. CHRON., https://www.un.org/en/chronicle/article/eliminating-racial-discrimination-challenges-prevention-and-enforcement-prohibition (last visited Jan. 6, 2023).

157 *Id.*

158 *See id.*

159 Hendry, *supra* note 14.

160 U.N. Office of the High Commissioner, *OHCHR and the Right to a Nationality*, U.N., https://www.ohchr.org/en/nationality-and-statelessness (last visited Apr. 5, 2023).

161 *Id.*

ness tend to be members of already disadvantaged groups.[162] Therefore, rejecting the idea that "national origin" cannot encompass current nationality only further denies these people protection and human rights that others enjoy.[163]

VI. Conclusion

The majority's opinion, especially when considered in context with its *Iran v. USA* opinion, exemplifies the "argumentative practice" of international law.[164] International law is sometimes described as an "argumentative practice" because of the relationship between "political claims" and "international legal reasoning [that oscillates] between arguments on legal normativity and arguments on concreteness and social facts."[165] This kind of legal practice, though, tends to make decisions unpredictable and demonstrates that the International Court has a more potent power of discretion, which therein emphasizes its power to impact the world of international law.[166]

The first major impact of the Court's decision in *Qatar v.* UAE is how it limits the protections of CERD to characteristics a person obtains at birth.[167] This means that CERD could potentially not be an option for challenging laws that discriminate for characteristics that are not ascribed at birth, which seriously limits the people who will be protected under CERD. However, *Qatar v. UAE* is not the sole case in this area of law, and due to somewhat contradictory cases, like *Iran v. USA*, it is not especially clear if the Court will take the same stance in other cases for perpetuity.

Another impact of this case is that many in the international law field are left with more questions, and arguably distrust in the predictably of International Court of Justice decisions.[168] Further, the question stands on where the true balance is between the Court's interpretation of a treaty term and the treaty creating body.[169] Ultimately, though, the country of Qatar is left with the burning question of whether the alleged acts of discrimination would have ultimately been found to violate CERD, had they fit the Court's ultimate interpretation of those two words.

---

162 *OHCHR and the Right to a Nationality*, *supra* note 160.

163 *See id.*

164 *See* Desierto, *supra* note 103.

165 *Id.*

166 *See id.*

167 *Id.*

168 *See id.*

169 Hendry, *supra* note 14.