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CONFRONTING GLOBAL PANDEMICS: RESPONDING TO A STATE'S REFUSAL OF INTERNATIONAL ASSISTANCE IN A PANDEMIC

A. Louis Evans[*]

Abstract

Pandemics have plagued civilization since the dawn of time, with contagious diseases responsible for killing hundreds of millions of people in the last century alone. In choosing victims, pandemics spread and kill without respect to national borders; therefore, any effective counter to pandemics demands an international response. Indeed, a significant factor in containing pandemics of the last thirty years such as SARS, Ebola, influenza, cholera and the pneumonic plague has been the rapid response and cooperation of the international community in providing assistance to the infected State. This indispensable international cooperation, however, demands that the international community offers the assistance AND that the infected State accepts the assistance. If a State refuses international assistance, no mechanism is currently available to force the infected State to accept the aid essential to controlling a pandemic and preventing global infection.

Under the current international health paradigm, a number of reasons exist explaining why States might deny an outbreak in their borders or subsequently refuse international assistance. Without consent to enter the infected State, the international community cannot compel assistance without violating the territorial sovereignty of the infected State. If a pandemic occurred in a country that refused to accept international assistance or was incapable of effectively implementing or distributing such aid, the pandemic would likely spread throughout the infected State unchecked, posing a tremendous threat to the health and well-being of the global population. This article argues that several existing international law norms could be interpreted to confront a pandemic without consent of the infected State. Arguably, Chapter VII of the U.N. Charter could be used to compel an infected State to accept international assistance by the use of force, if necessary. However, even if

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[*] Judge Advocate, Major, U.S. Marine Corps. International Law Department Head, U.S. Naval Justice School. The views herein should not be attributed to any of the author's institutional affiliates, to include the U.S. Department of Defense. The author thanks Professors Ashley Deeks and Michael N. Schmitt for their helpful comments, as well as his family Ali, Lou-Lou and Caroline Evans, PhD.

Chapter VII is legally a valid option under international law, Chapter VII resolutions are politically vulnerable to veto; therefore, two alternative approaches are also explored. First, an Article 25 plea of necessity stemming from the International Law Committee's (ILC) Articles on State Responsibility, and second humanitarian intervention. These alternatives have the potential to be used as an excuse for non-compliance with international law, and are explored as alternatives to action under Chapter VII.

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INTRODUCTION

In 1918, during the global flu pandemic, the influenza virus infected 500 million people and killed between 50 to 100 million, which was somewhere between 3 to 5% of the world's population. If a pandemic of similar proportions struck today and killed at the same rate, between 228 and 380 million people would die.[1] In 2014, when Africa suffered an Ebola epidemic, the U.N. Security Council took historic action in U.N. Security Council Resolution (UNSCR) 2177 and, for the first time, declared a public health issue a "threat to international peace and security."[2] In this instance the affected countries: Liberia, Sierra Leone and Guinea, welcomed international assistance to contain the outbreak.

In reviewing this crisis, researchers at Yale University found that there had been a narrow window for international assistance to be effective and predicted that intervention within a week's time would avert almost 98,000 cases of Ebola. However, if intervention was delayed by just two weeks only around 54,000 cases of Ebola would be averted.[3] Modern medicine has made advances in the treatment and prevention of disease, but many of these prevention methods rely on limiting the spread of the disease and mutual aid agreements.[4] If, in response to a pandemic, international assistance is not accepted in a timely manner, a global pandemic of 1918 proportions is a real possibility.

Consider the following hypothetical situation: A young woman in Yangon, Myanmar becomes ill with the common flu. She goes to her job at a poultry processing plant and becomes infected with H5N1, better known as avian flu. Inside the woman's body, the avian flu virus receives a microscopic amount of genetic material from the common flu, creating a strain of avian flu that is contagious among humans. As the disease spreads, those infected begin dying at the rate of sixty percent.[5] For economic, military, and diplomatic reasons, Myanmar initially denies the presence of the disease and minimizes the extent of the outbreak. Even though the Myanmar government is unable to control the outbreak, the government refuses offers of international supplies and medical personnel from the international community. As thousands die, the Myanmar population begins to panic and disperse throughout the country the pandemic threatens to become an international crisis.

While Myanmar's refusal of international assistance in the above hypothetical may seem unrealistic and irrational, consider the following. In 2008, Cyclone Nargis

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[1] Based on a world population of 7.6 billion.

[2] S.C. Res. 2177, ¶ 5, U.N. Doc. S/RES/2177 (Sept. 18, 2014).

[3] *Without Swift Influx of Substantial Aid, Ebola Epidemic in Africa Poised to Explode*, YALE NEWS (Oct. 23, 2014), https://news.yale.edu/2014/10/23/without-swift-influx-substantial-aid-ebola-epidemic-africa-poised-explode.

[4] Forum on Microbial Threats, Board on Global Health, Institute of Medicine. (as summarized in) *Ethical and Legal Considerations in Mitigating Pandemic Disease: Institute of Medicine* (US) Forum on Microbial Threats. Washington (DC): National Academies Press (2007).

[5] Most human cases of "highly pathogenic" H5N1 virus infection have occurred in people who had recent contact with sick or dead poultry that were infected with H5N1 viruses. About 60% of people infected with the virus died from their illness. *Influenza (flu)*, U.S. DEP'T OF HEALTH AND HUM. SERV., http://www.flu.gov/about_the_flu/h5n1/ (last visited May 24, 2016).

devastated Myanmar leaving thousands of people without food, clean water or access to basic medical care. The Myanmar military junta government however refused all offers of international assistance and prohibited foreign military and aid workers from operating in the country.[6] Ultimately, over a hundred thousand were declared missing or dead, largely due to lack of resources and the refusal of international aid.[7] While the loss of life from the cyclone was tragic, it was limited to the borders of Myanmar. What would happen in a country that could not prevent a disease from spreading and would not cooperate with the international community or relief agencies in containing the outbreak?

Under international law and the U.N. Charter, the international community, including states and non-governmental organizations could not violate the territorial sovereignty of Myanmar to provide the support needed to control the pandemic. Under the U.N. Charter system all countries are prohibited from the "use of force against the territorial integrity or political independence of any state," with limited exceptions, none of which expressly cover a pandemic scenario.[8] The primary exceptions to this ban are Chapter VII resolutions; however, Chapter VII resolutions have never been used to address a pandemic.[9] Pandemics have been addressed using Chapter VI resolutions, but Chapter VI resolutions are non-binding and do not permit the international community to violate the territorial sovereignty of a State without consent.[10] Therefore, a Chapter VII resolution that is binding and permits the use of force to carry out the resolution would be necessary to confront a pandemic in an infected State in which the government was refusing assistance.

Part I of this article begins with an examination of the counterintuitive nature as to why a State that is facing a pandemic would deny the outbreak or refuse international assistance. Further examination reveals that both developed and undeveloped nations have incentives for refusing international aid, but that international assistance is necessary to control a pandemic. Part I concludes by establishing that in a pandemic international assistance must be imposed, even against the will of an infected State, if necessary.

Part II argues that Chapter VII resolutions could be used to force international assistance on an infected State. To support this argument, there will be an examination of Chapter VII resolutions that have been used to address humanitarian crises that could create secondary effects similar to a pandemic. Although Chapter VII has never been used to address a pandemic, Chapter VI has been used on three

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[6] *Let Cyclone aid in 'Without Hindrance': UN Chief to Burma Leaders*, CBC NEWS (May 9, 2008), http://www.cbc.ca/news/world/let-cyclone-aid-in-without-hindrance-un-chief-to-burma-leaders-1.753901.

[7] *Myanmar: Cyclone Nargis 2008 Facts and Figures*, INT'L FED'N RED CROSS & RED CRESCENT SOC'YS (May 3, 2011), http://www.ifrc.org/en/news-and-media/news-stories/asia-pacific/myanmar/myanmar-cyclone-nargis-2008-facts-and-figures/.

[8] U.N. Charter art. 2, ¶ 4.

[9] Repertoire of the Practice of the Sec. Council, Actions with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression (Ch. VII), http://www.un.org/en/sc/repertoire/actions.shtml.

[10] Gian Luca Burci & Jakob Quirin, *Ebola, WHO, and the United Nations: Convergence of Global Public Health and International Peace and Security*, 18 AM. SOC'Y INT'L L. INSIGHTS 25 (2014).

occasions.[11] While resolutions passed under Chapter VI cannot grant the "all necessary means" authority to breach sovereignty, examining these three UNSCRs and the official records surrounding their passage act as a valuable measure of the international community's willingness to address pandemics under Chapter VII.[12]

However, the Chapter VII solution presented in this article has two acknowledged weaknesses. First, Security Council members might disagree with extending Chapter VII jurisdiction in order to impose assistance on an infected State. Second, even if Chapter VII could be used legally to impose assistance on an infected State, Chapter VII resolutions are politically vulnerable to vetoes by the five permanent members of the Security Council (P5). To address these acknowledged weaknesses, Part III concludes by proposing alternatives to Chapter VII such as an Article 25 plea of necessity, which come from the Articles on State Responsibility[13], or humanitarian intervention.

I. DENIAL OF OUTBREAKS AND REFUSAL OF ASSISTANCE

A. *Why Countries Deny the Presence of Outbreaks*

A country's acknowledgment that it is experiencing a pandemic is the first step in accepting international assistance. If a country refuses to admit an outbreak of a disease or illness has risen to the severity of a pandemic, the country is less likely to either request or accept international assistance. Moreover, a country's failure to accurately report the presence of a disease or the number of people infected not only contributes to the spread of the disease, but also exacerbates the destabilizing impact of the disease and further limits the ability to contain the spread of the disease. In dealing with foreign States, a baseline assumption exists that all States are rational actors. On the basis of this assumption, it seems irrational, and thus unlikely that States would not report deadly pandemics and even more irrational that States would refuse international assistance. However, further inspection can identify a number of

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[11] HIV/AIDS was addressed by UNSCR 1308 and UNSCR 1983, Ebola was addressed by UNSCR 2711. S.C. Res. 1308 (July 17, 2000); S.C. Res. 1983 (June 7, 2011); S.C. Res. 2177 (Sept. 18, 2014).

[12] In order for the Security Council to have jurisdiction under Chapter VII per Article 39 of the U.N. Charter there must be a "threat to the peace, breach of the peace, or act of aggression." The jurisdictional nexus for action under Chapter VI is less and only requires an event that is "likely to endanger the maintenance of international peace and security." However, Chapter VI resolutions are non-binding and thus the Chapter VI resolutions concerning pandemics to date are insufficient for the problem addressed by this article. Despite this jurisdictional difference between Chapter VI and VII the most recent Chapter VI resolution on Ebola, UNSCR 2177 labeled the Ebola pandemic "a threat to the peace." This marks the first time the Security Council has used Chapter VII jurisdictional language to address a pandemic, therefore providing guidance as to how a Chapter VII resolution dealing with a pandemic could evolve.

[13] Responsibility of States for Internationally Wrongful Acts, With Commentaries, G.A. Res. 56/83, art. 25 (Jan. 28, 2002) [hereinafter Articles on State Responsibility]. The Articles on State Responsibility are non-binding as they are not a treaty, but they are authoritative as portions have been described as reflective of customary international law by international courts and tribunals, and they were developed by the U.N. International Law Commission. Michael N. Schmitt, *"Below the Threshold" Cyber Operations: The Countermeasures Response Option and International Law*, 54 VA. J. INT'L L. 697, 700 (2014).

economic, political, and military reasons why countries might not report outbreaks in a timely or accurate manner and subsequently refuse international assistance.

1. Economic Factors for Denying Outbreaks

Economic factors play a large role in countries' decisions to not report widespread outbreaks of disease. For example, the 1991 outbreak of cholera in South America serves as a cautionary tale for the economic repercussions of States reporting pandemics. In 1991, Peru experienced an outbreak of cholera and tried to reduce the impact on the economy by minimizing reports of the epidemic. By the time Peru reported the outbreak, cholera had spread to Ecuador, Columbia, and Chile.[14] Once the Peruvian government did report the outbreak, the international community banned the import of Peruvian fish, and the European Community later banned all imports from the country. Peruvian citizens were denied entry into countries and the Peruvian tourism industry evaporated. As the outbreak spread further into Chile and Columbia, these countries were subjected to similar bans, embargos, and restrictions. Many of these measures exceeded the World Health Organization's (WHO) recommendations for addressing cholera.[15] By the end of the 1991, Peru had lost an estimated 770 million US dollars (USD) in trade and Chile predicted its economic losses would exceed 300 million USD.[16]

Although cholera is an easily preventable disease, the cholera outbreak in Peru spread rapidly among the poor because of lack of proper sanitation and hygienic water supplies.[17] Further, cholera is easily treated with antibiotics such as doxycycline that have been in use since the 1960s.[18] Despite known and available treatments, the international community reacted harshly, imposing significant economic hardship on already impoverished South American countries and worsening the conditions that generated the outbreak. Peru received criticism for minimizing the outbreak, but, from an economic standpoint, it is clear that countries face significant risk of economic loss, and thus, are likely to choose to delay or minimize reports of disease outbreaks.

2. Political Factors for Denying Outbreaks

In contrast to the delayed reporting of the South American cholera pandemic, an outbreak of pneumonic plague in India was reported prematurely. In 1994, Indian

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[14] James Brooke, *Cholera Kills 1,100 in Peru and Marches on, Reaching the Brazilian Border,* N.Y. TIMES (Apr. 19, 1991), http://www.nytimes.com/1991/04/19/world/cholera-kills-1100-in-peru-and-marches-on-reaching-the-brazilian-border.html.

[15] Richard A. Cash & Vasant Narasimhan, *Impediments to Global Surveillance of Infectious Diseases: Consequences of Open Reporting in a Global Economy,* 78 BULL. WORLD HEALTH ORG. 1359, 1363 (2000).

[16] *Id*.

[17] *Id*.

[18] *Id*.

hospitals in Surat admitted several patients with plague-like symptoms.[19] As more patients were admitted and the first reported cases started dying, the Indian government had to decide whether to report the outbreak as the plague. The Indian government chose to report the outbreak as pneumonic plague without confirmation of the plague bacteria.[20] Within 48 hours of the report, more than 200,000 people tried to flee the city of Surat and residents "reported scenes of confusion and panic,"[21] and according to the top civil servant in Surat the city was placed "on a war footing."[22]

As a direct result of reporting the outbreak as pneumonic plague, the Indian government suffered a massive civil destabilization that led to a loss of government control over the movement of individuals, which could have further spread the plague virus. No nation is prepared for the stress that the mass exodus of more than 200,000 people places on police, infrastructure, and civil services. Further, the report had an enormous economic impact on India, with an estimated loss of 2 billion USD to the country's economy.[23] In the aftermath of the report, it remained unclear whether the plague was present at all because no case of pneumonic plague was confirmed on the basis of WHO bacteriological standards.[24] However, by trying to be responsible and making an early report of a suspected outbreak, India suffered tremendous internal political unrest and external economic consequences, thus demonstrating the political disincentive to reporting outbreaks.

3. Military Factors for Denying Outbreaks

In addition to economic disincentives for reporting an outbreak, the decision to not report pandemics can be strongly influenced by military policy. The 1918 Spanish Flu was so named because Spain was the only country that published accurate news stories about the virus and accurately reported the number of cases. Germany, Britain, and France suffered equally severe outbreaks of the flu, but as combatants in World War I, each country had news blackouts on stories that had the potential to lower morale or show low troop readiness.[25] In the American Army alone, the most conservative estimates placed the influenza infection rate at 26% of active troops, with 30,000 troops dying before they even reached French battlefields.[26] During times of armed conflict, a tremendous military incentive exists

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[19] John F. Burns, *Thousands Flee Indian City in Deadly Plague Outbreak*, N.Y. TIMES (Sept. 24, 1994), http://www.nytimes.com/1994/09/24/world/thousands-flee-indian-city-in-deadly-plague-outbreak.html.

[20] Cash & Narasimhan, *supra* note 15, at 1360.

[21] Burns, *supra* note 19.

[22] *Id*.

[23] Cash & Narasimhan, *supra* note 15, at 1362.

[24] N.S. Deodhar, Vishwanath L. Yemul & Kalyan Banerjee, *Plague that Never Was: A Review of the Alleged Plague Outbreaks in India in 1994,* 19 J. PUB. HEALTH POL'Y 184 (1998).

[25] Vikki Valentine, *Origins of the 1918 Pandemic*: *The Case for France,* NPR (Feb. 20, 2006, 10:54 AM ET) http://www.npr.org/templates/story/story.php?storyId=5222069.

[26] Carol R. Byerly, *The U.S. Military and the Influenza Pandemic of 1918–1919*, 125 PUB. HEALTH REP. 82, 83 (Supp. 3 2010).

for world governments to conceal information about extent of disease outbreaks in their countries and the number of people infected with the disease. For example, during the height of World War I, if the enemy had known that at least 26% of American forces were too ill to be effective in combat, the incentive to attack American positions would likely have been too great to ignore.

However, pandemics do not have to strike during times of war for countries to have military reasons to either not report or under-report the severity of an outbreak. The 1918 example cited above may seem antiquated, as the current International Health Regulations (IHR) requires states to report serious outbreaks within 24 hours "as far as practicable."[27] The United States' reservations to this requirement however demonstrate that not reporting for military readiness reasons remains a reality. In filing its understandings to the 2005 IHR the United States declared that "it is the United States' understanding that any notification that would undermine the ability of the U.S. Armed Forces to operate effectively in pursuit of U.S. national security interests would not be considered practicable."[28] By filing this reservation, the United States has demonstrated that information regarding military readiness in a pandemic would be a factor in deciding how timely and accurately American reports of an outbreak would be.

Beyond the United States, many countries have strained relations with their neighbors. For example, tense military relations exist between Pakistan and India, North and South Korea, and Israel and its Middle Eastern neighbors. Moreover, a number of countries rely heavily on their military to control the population in their country. If either of these military models was affected by a pandemic—or an accurate and timely report of an outbreak—then States could very well face invasion or loss of control of their government. In a pandemic it is possible that many countries, following the model of the United States, would consider carefully the military consequences of reporting a pandemic.

In examining these historical models, it is apparent that reporting a pandemic has significant economic, political, and military consequences. Thus, while it may seem contrary to national self-preservation to refrain from reporting outbreaks, the incentives for doing so are real and significant. Even if countries accurately report pandemics, additional disincentives exist for accepting international assistance.

B. *Why Countries Might Refuse International Assistance*

To date, no country has rejected international assistance for a pandemic; however, several countries have turned down international assistance in the aftermath of natural disasters. Responses to natural disasters provide a useful parallel to a country affected by a pandemic in terms of understanding why a country would refuse international assistance. Refusal of international assistance is not limited to developing nations with military regimes such as Myanmar. For example, the United

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[27] WORLD HEALTH ORG., INT'L HEALTH REGS. 12 (3d ed. 2005).

[28] Diplomatic Note from the Permanent Mission of the United States of America to the World Health Organization (Dec. 13, 2006), reprinted in International Health Regulations app. 2 at 60 (World Health Organization 2005), http://apps.who.int/iris/bitstream/10665/43883/1/9789241580410_eng.pdf.

States has turned down offers of assistance from the U.N. and other countries both after Hurricane Katrina devastated the Gulf Coast in 2005 and the massive BP oil spill in 2010.[29] Similar refusals of aid were made by India after a tsunami in 2004. The Chinese Maoist government infamously declined aid after the 1975 Tangshan earthquake and, even though a historic regime change had occurred after that incident, the Chinese government again refused international aid after massive flooding in 2007.[30]

The two broad reasons State's refuse international assistance following a natural disaster center first, control over domestic affairs and second control over international political standing; notably, these reasons also apply to a country suffering from a pandemic. These two reasons are compounded by the fact that from a practical perspective the need for rapid mobilization and ready access to supply chains means that international disaster relief is often provided or facilitated by military units.[31] The negative implications of allowing foreign militaries to cross the borders of a State are clear and act as strong disincentives for accepting international assistance.

Beyond complete refusal of aid, in some cases, countries might accept international assistance but then put barriers in place that prevent effective distribution of the aid such as accepting supplies but refusing foreign aid workers, doctors, and relief personnel access to the country. Such barriers mean the threat posed by the pandemic has not been eliminated. Alternatively, even if the infected State accepted international assistance, but was incapable or refused to distribute the assistance effectively, the threat posed by the pandemic has again not been eliminated. A scenario in which a government might refuse to distribute the aid effectively can be envisioned in States with marginalized political, ethnic, economic, or religious groups.[32] If a State's government did not distribute supplies equally to the population, the pandemic could continue to infect those marginalized members of the affected State. Thus, the imposition of aid by force extends beyond states simply refusing aid. In addition to a flat refusal, if a state is either incapable of, or refusing to, effectively distribute assistance, it may become necessary to impose assistance and effective distribution of aid within the infected state.

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[29] Matt Mayer, et al., *Accepting Disaster Relief From Other Nations: Lessons From Katrina and the Gulf Oil Spill*, Heritage Found. (Feb. 17, 2011), https://www.heritage.org/homeland-security/report/accepting-disaster-relief-other-nations-lessons-katrina-and-the-gulf-oil.

[30] Maggie Farley, *How to Help When Help is Refused?,* L.A. TIMES (May 14, 2008), http://articles.latimes.com/2008/may/14/world/fg-aid14.

[31] Lydia Poole, *Counting the Cost of Humanitarian Aid Delivered Through the Military,* GLOBAL HUMANITARIAN ASS'N., March 2013; Frederick C. Cuny, *Use of the Military in Humanitarian Relief*, PBS FRONTLINE (Nov. 1989), https://www.pbs.org/wgbh/pages/frontline/shows/cuny/laptop/humanrelief.html [hereinafter *Use of Military in Humanitarian Relief*].

[32] This scenario occurred following the first Gulf War where Iraq was unwilling to distribute food aid to the disenfranchised Kurdish population. This refusal was dealt with in part by UNSCR 712, which will be examined fully in Part II.

1. Domestic Reasons for Refusing International Assistance

From a domestic perspective, a country's acceptance of international assistance could send the message to the population that the government is unable to take care of its citizens, thus violating the most basic of social contracts. This perception is a dangerous threat to any form of government. Even in the United States, where federal power is a mainstay, politicians are often harshly judged on their handling of natural disasters.[33] Maintaining citizens' faith in the capacity of a government is even more important in countries such as Myanmar and China that rely heavily on the perception of total control to maintain power; therefore, accepting international assistance would undermine the government's domestic image.[34] For these reasons, the acceptance of international assistance can be considered domestically damaging to governments.

2. International Reasons for Refusing International Assistance

Just as in the domestic setting, a country's acceptance of international assistance can damage the international perception of the country's standing regarding competence and effectiveness as a State.[35] India is a prime example of a country that has recently declined offers of foreign aid in a bid to be perceived by the international community as a strong State. In 2013, the Indian Telegraph noted,

> New Delhi has turned down bilateral assistance from foreign countries for the Uttarakhand calamity, building on a quiet but assertive diplomatic aid policy that has coincided with its growing economic clout. This is a policy that has seen India change from a country that happily accepted foreign aid to tide it over natural disasters just a decade ago to a nation that routinely rejects bilateral assistance to handle such crises.[36]

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[33] Prime examples on the negative impact of mishandled relief efforts in the U.S. can be seen in the perceptions surrounding President Bush following Katrina, and President Obama's perceived lack of response to the BP oil spill. These negative responses can be countered with the positive polling President Obama received following the hurricane Sandy response. Reid Wilson, *Hurricane Katrina and the Politics of Disaster*, MORNING CONSULT (Aug. 30, 2015), https://morningconsult.com/2015/08/30/hurricane-katrina-and-the-politics-of-disaster/; Lymari Morales, *Americans Critical of Oil Spill Response; Keeping Close Tabs,* GALLUP (May 27, 2010), https://news.gallup.com/poll/137615/americans-critical-oil-spill-response-keeping-close-tabs.aspx; Jon Cohen, *WaPo-ABC Tracking Poll: High Marks for President Obama on Hurricane Sandy Response*, WASH. POST (Oct. 31, 2012), https://www.washingtonpost.com/news/the-fix/wp/2012/10/31/wapo-abc-tracking-poll-high-marks-for-president-obama-on-hurricane-sandy-response/?utm_term=.d9ba2b92194e.

[34] Allison Carnegie & Lindsay Dolan, *The Effects of Aid on Recipients' Reputations: Evidence from Natural Disaster Responses*, AIDDATA (Apr. 3, 2015), http://aiddata.org/sites/default/files/carnegiedolan_2015_aid_legitimacy.pdf.

[35] *Id*.

[36] Charu S. Kasturi, *Foreign Aid? No, Thanks*, TELEGRAPH INDIA (July 7, 2013), http://www.telegraphindia.com/1130707/jsp/nation/story17090124.jsp#.V0SwoZErI2w.

Just as in the domestic setting, States have strong international incentives to appear self-sufficient and by refusing international assistance. While accepting assistance in the short term might be beneficial, it could mean the tangible loss of international investment, or the more intangible loss of international prestige. Therefore, if a government's analysis shows that the short-term gains from accepting aid are outweighed by the long-term consequences, then there is a good chance the assistance will be refused.

3. Practical Reasons for Refusing International Assistance

Last, from a practical perspective, countries might refuse international assistance if they believe such aid will do more harm than good in the long term. As discussed above, if the long-term cost of accepting domestic or international assistance is higher than the short-term gain, then States are likely to refuse the aid. Moreover, international assistance can also entail an immediate concrete disadvantage involving the presence of foreign military forces within the country.

A large amount of disaster relief over the last decade has been provided by the military for a myriad of reasons, including prepositioning of forces, access to sought after assets such as "fuel; communications; commodities including food, building supplies and medicines; tools and equipment; manpower; technical assistance (especially logistics and communications) and facilities," as well as ready access to emergency medical staff and organizational support.[37] Particularly in a pandemic situation, in which the rapid deployment of assistance is a critical factor, the use of military forces, supplies and medical personnel already positioned near the affected areas is a difficult asset to ignore. For obvious reasons, many States are loathed to have foreign military present in their borders, regardless of whether the stated intention is to have the military forces delivered only humanitarian aid. The use of the military in international assistance is a classic catch-22 situation.[38]

Typically, military forces are the best prepared and best positioned organizations to provide the required international assistance. Despite this, the fact that the international assistance is being provided by a foreign military makes it more likely that countries will reject offers of international assistance. Further, if there is any ongoing armed conflict during the humanitarian crisis if a foreign military intervenes, regardless of the motives, it will often appear that the State providing assistance has chosen a side.[39] This natural rejection of foreign military presence

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[37] *Use of Military in Humanitarian Relief*, *supra* note 31.

[38] *Catch-22*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/catch-22 (last visited Sept. 14, 2018) (defines "catch-22" as:
1 : a problematic situation for which the only solution is denied by a circumstance inherent in the problem or by a rule . . . also: the circumstance or rule that denies a solution . . . 2 a : an illogical, unreasonable, or senseless situation . . . b : a measure or policy whose effect is the opposite of what was intended . . . c : a situation presenting two equally undesirable alternatives).

[39] *Use of Military in Humanitarian Relief*, *supra* note 31.

clearly creates an additional disincentive to accept international assistance in a disaster scenario such as a pandemic.[40]

C. *Why International Assistance is Necessary in a Pandemic*

A wide range of international organizations and countries have acknowledged that international assistance is a requisite for controlling a deadly pandemic. On the international stage the current IHR states,

> [p]arties *shall undertake to collaborate with each other*, to the extent possible, in: (a) the detection and assessment of, and *response to, events as provided under these Regulations*; (b) the provision or facilitation of technical cooperation and logistical support…(d) the formulation of proposed laws and other legal and administrative provisions for the implementation of these Regulations.[41] [emphasis added]

In the international collaboration described above, the WHO assumes the role of a supranational organization that will coordinate collaborative efforts. In doing so however the WHO acknowledges that States might refuse assistance. In recognizing this, Article 10 of the IHR essentially permits the WHO to "name and shame" the country refusing aid, "[i]f the State Party does not accept the offer of collaboration, WHO may, when justified by the magnitude of the public health risk, share with other States Parties the information available to it, whilst encouraging the State Party to accept the offer of collaboration by WHO."[42] By examining the IHR and other international policy documents regarding pandemics, it is clear that international assistance and mutual aid are considered necessities to effectively confront a deadly pandemic.[43]

In addition to international organizations, individual States acknowledge the necessity of international cooperation. The current American *National Strategy for Pandemic Influenza* recognizes, "[t]he challenge of avian influenza and the threat of a pandemic have required, and have produced, a coordinated international response."[44] The United Kingdom's (U.K.) 2011 *Influenza Pandemic Preparedness Strategy* makes a similar claim noting, "[an] influenza pandemic is an international

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[40] *Sri Lanka Rejects Israel Rescuers,* BBC NEWS (Dec. 28, 2004), http://news.bbc.co.uk/2/hi/middle_east/4130599.stm (Sri Lanka's refusal of Israeli aid workers in 2004, because of their military status, serves as a prime example).

[41] WORLD HEALTH ORG., *supra* note 27, at 30.

[42] *Id.* at 13.

[43] *See* International Covenant on Economic, Social and Cultural Rights, Dec. 16. 1966, 993 U.N.T.S. 3 (note that this treaty has not been ratified by the U.S.); DAVID FIDLER & NICK DRAGER, GLOBAL HEALTH AND FOREIGN POLICY: STRATEGIC OPPORTUNITIES AND CHALLENGES BACKGROUND PAPER FOR THE SECRETARY—GENERAL'S REPORT ON GLOBAL HEALTH AND FOREIGN POLICY (WHO ed., 2009).

[44] *National Strategy for Pandemic Influenza Implementation Plan One Year Summary*, HOMELAND SECURITY COUNCIL (July 17, 2007), https://georgewbush-whitehouse.archives.gov/homeland/pandemic-influenza-oneyear.html#intr.

public health emergency."[45] However, what these strategic plans have overlooked is clearly defining what international assistance looks like and what levels and types of assistance either country would be willing to accept to stop a pandemic within their borders.

The fact that the U.K. and the U.S., as two of the wealthiest and most industrialized nations in the world, admit that international cooperation is necessary in confronting pandemics is telling. The 2007 *U.S. National Influenza Strategy* highlights this reality in stating, "[t]he Federal Government will provide medical countermeasures, resources, and personnel, if available, in support of communities experiencing pandemic influenza, but communities should anticipate that in the event of multiple simultaneous outbreaks, the Federal Government may not possess sufficient medical resources or personnel to augment local capabilities."[46] If the U.S. acknowledges the likelihood of insufficient national medical resources, then it is highly likely that less-developed States would also be unable to cope with a widespread pandemic either. Despite this universal need for international aid to control pandemics, a number of strong reasons exist explaining why countries would turn away international assistance. Therefore, the next question that must be considered is whether there is a mechanism under international law whereby the global community could impose aid on an affected State?

II. USING CHAPTER VII TO FORCE INTERNATIONAL ASSISTANCE ON A COUNTRY IN A PANDEMIC

Because Chapter VII has never been used to address a pandemic, this section examines prior use of Chapter VII resolutions to address humanitarian crises that could be analogized by their effects on a country to the effects of a pandemic. While Chapter VII resolutions have never been used to address a pandemic, non-binding Chapter VI resolutions have been. By using the language of these past Chapter VII and VI resolutions, it is possible to demonstrate how Chapter VII could theoretically be used to impose aid on an infected State refusing international assistance.

A. *Why Chapter VII is Necessary*

The inviolable sovereignty of a State's borders is a hallmark of international law under the Charter System and enshrined in Article 2(4) of the U.N. Convention, which states, "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[47]

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[45] DEPARTMENT OF HEALTH, SOCIAL SERVICES AND PUBLIC SAFETY, U.K. INFLUENZA PANDEMIC PREPAREDNESS STRATEGY 2011 33 (2011), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/213717/dh_131040.pdf.

[46] HOMELAND SECURITY COUNCIL, NATIONAL STRATEGY FOR PANDEMIC INFLUENZA IMPLEMENTATION PLAN 109 (2006), https://www.cdc.gov/flu/pandemic-resources/pdf/pandemic-influenza-implementation.pdf.

[47] U.N. Charter art. 2, ¶ 4.

A notable omission in this sweeping declaration is the lack of an exception for altruistic motives. Unlike just war theory,[48] Article 2(4) does not address whether a State's motives are altruistic in using force against another State, thus the use of force is forbidden outside of a few exceptions.

The most notable exception for the prohibition on the use of force under Article 2(4) of the U.N. Charter is Chapter VII. Chapter VII of the Charter permits the Security Council to authorize "all necessary means" to restore international peace and security in certain situations.[49] Based on this understanding, States could use force to confront a pandemic if approval to do so was granted under Chapter VII. Therefore, if a State refused assistance by withholding consent, then the best legal alternative would be a binding Chapter VII resolution imposing aid on the infected State.

For Chapter VII to apply, the Security Council must find that the situation involves a "threat to the peace, breach of the peace, or act of aggression."[50] Even though all Chapter VII resolutions are binding, not all Chapter VII resolutions authorize the use of force. The traditional additional necessary language for the approved use of force is language granting the power to use "all necessary means" to carry out the resolution. Thus, to impose assistance by force on an unwilling State the Security Council would have to approve the action under Chapter VII that included the language authorizing "all necessary means" to provide the assistance. This understanding necessarily leads to a discussion of what criteria are required for Chapter VII to apply, and whether, based on those criteria, Chapter VII is the appropriate tool in a pandemic.

Given that the Security Council has never addressed a pandemic under Chapter VII, the remainder of Part II will provide an analysis of whether a pandemic could be covered by Chapter VII jurisdiction.

B. *Pandemics and Chapter VII Jurisdiction*

Chapter VII of the U.N. Charter empowers the Security Council to "determine *the existence of any threat to the peace*, breach of the peace, or act of aggression" [emphasis added].[51] If the Security Council so finds, the Charter grants the Council the power to take military or nonmilitary action to "restore international peace and security."[52] The latter two clauses regarding Chapter VII jurisdiction—breach of the peace or an act of aggression—strongly imply the use of force by State or non-State

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[48] Just war theory can best be summarized as the premise that the use of force to defend important moral values, the security of the state and innocent human life is a legally defensible basis to resort to force in international relations. Under this philosophy so long as the reasons for using force are moral then the use of force itself is moral. It could certainly be argued that using force to defend the world from a deadly pandemic was a legitimate defense of human life and moral values, however, the just war theory has been essentially replaced by the Charter system.

[49] U.N. Charter art. 39.

[50] *Id*.

[51] *Id*.

[52] *Id*.

actors, and thus, do not inherently apply to a pandemic scenario.[53] Therefore, the remainder of this article uses the term "threat to the peace" as the necessary condition for Chapter VII action in a pandemic.

It is important to note that a finding of a threat to the peace, *presently in existence*, is a precursor to allowing the Security Council to act under Chapter VII. In contrast, Chapter VI's jurisdiction is broader and requires only a dispute that is "*likely to endanger* the maintenance of international peace and security [emphasis added]."[54] This distinction between Chapter VII and VI is important because Chapter VII requires a higher threshold of a threat to exist whereas Chapter VI requires only that a level of threat is likely to come into existence.

Whether a pandemic constitutes a threat to the peace is a question of primary importance because the determination is the difference between national sovereignty and international jurisdiction under the U.N. Charter. How direct a threat is dictates whether Security Council action is more appropriate under Chapter VII or Chapter VI. Those threats that are more direct and imminent are covered by Article 39 of Chapter VII while those more distant and remote are covered by Article 34 of Chapter VI.[55] This distinction can still be seen in the context of a pandemic. Chapter VI resolutions have been used twice to address the HIV/AIDS epidemic and once to address Ebola, whereas Chapter VII has not yet been invoked to deal with a pandemic.[56]

Over the last few decades, however, the conditions considered to constitute a threat to the peace have expanded. As Michael Matheson points out in his work, *Council Unbound,* this traditional understanding of a threat to the peace has evolved substantially from the original intent. Since the end of the Cold War the Security Council has become more willing and able to use Chapter VII to classify certain domestic policies of States as a threat to the peace. Specifically, the Security Council has shown a willingness to invoke Chapter VII where particular domestic policies cause or exacerbate humanitarian disasters that could in turn destabilize a region. Matheson convincingly proves his point by citing a number of specific examples of such intervention.[57]

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[53] The word inherently is used to distinguish the pandemic itself from secondary effects. While there may be acts of aggression or breaches of the peace by state or non-state actors during a pandemic that could allow Chapter VII action, those are not the direct result of the pandemic and are thus outside the scope of this article.

[54] U.N. Charter art. 33.

[55] This distinction was first articulated by the representative from France on 18 April 1946 comparing the language of Article 34 under Chapter VI with the language of Article 39 under Chapter VII by stating, "[i]f the two Articles [34 and 39] of the Charter referred to are compared, it seems to me that the report merely meant to say that we ought to rely on Article 39 or Article 34, according to whether the threat is more or less remote, or more or less imminent." UNITED NATIONS SECURITY COUNCIL, *Chapter XI Consideration of the Provisions of Chapter VII of the Charter 1946-1951*, *in* REPERTOIRE OF THE PRACTICE OF THE SECURITY COUNCIL, 425 (1951), *available at* http://www.un.org/en/sc/repertoire/46-51/46-51_11.pdf#page=5.

[56] S.C. Res. 1308, *supra* note 11; S.C. Res. 1983, *supra* note 11; S.C. Res. 2177, *supra* note 11.

[57] MICHAEL MATHESON, COUNCIL UNBOUND: THE GROWTH OF UN DECISION MAKING ON CONFLICT AND POST CONFLICT ISSUES AFTER THE COLD WAR 41-59 (U.S. Inst. of Peace 2006) [hereinafter COUNCIL UNBOUND]. *See*, *e.g.*, S.C. Res. 688 (Apr. 5, 1991) (which mentioned Iraqi repression of its

The most compelling example is UNSCR 2177, which deals with Ebola. Although UNSCR 2177 was a Chapter VI Resolution, the Council chose to use the Chapter VII jurisdictional language by stating that Ebola was a "threat to international peace and security."[58] UNSCR 2177 will be examined in detail below in the section on Chapter VI, but it is important to address it here briefly as evidence of the willingness of the Security Council to expand the jurisdiction of Chapter VII resolutions. Therefore, based on the language of recent Chapter VI and Chapter VII resolutions it is possible to argue that Chapter VII could be invoked to impose international assistance on a country that had refused such assistance or was incapable of effectively distributing assistance.

1. Chapter VII's Historical Use in Addressing Humanitarian Aspects of Breaches to the Peace.

Looking at three historical Chapter VII humanitarian crises resolutions shows that conditions which are likely to occur during a pandemic have been addressed by Chapter VII in the past. UNSCRs 814, 841 and 986 were used to address an *acts dei*, a governmental coup and a famine, respectively. In examining these three humanitarian crises resolutions it is important to note these UNSCRs were enacted in the context of greater threats to the peace such as civil war, a coup d'état, or international armed conflict. With this context in mind, it is instructive to examine these resolutions to understand the way in which the Security Council approached these humanitarian crises, because similar effects are likely to be present in a pandemic context.

a) U.N. Security Council Resolution 814 Regarding Somalia

An *acts dei* is usually considered a natural catastrophe that no one can prevent. Such a definition is an accurate description of both a pandemic and a drought, with a drought being the subject of UNSCR 814. In the early 1990s, Somalia suffered a series of coups and tribal conflicts across large parts of the country. These conflicts and political upheaval, coupled with drought, led to the destruction of Somalia's agriculture and then to mass starvation. On March 26, 1993, the Security Council found that the situation in Somalia was a threat to the peace and security of the region. Responding under Chapter VII, UNSCR 814 addressed the humanitarian suffering in Somalia, and the Security Council stated,

> [c]oncerned that the crippling famine and drought in Somalia, compounded by the civil strife, have caused massive destruction to the means of production and the natural and human resources of

civilian population); S.C. Res. 713 (Sept. 25, 1991) (citing to refugee flows in Yugoslavia); S.C. Res. 841 (June 16, 1993) (addressing the military coup in Haiti).

[58] S.C. Res. 2177, *supra* note 2.

> that country….determining that the situation in Somalia continues to threaten peace and security in the region.[59]

Notably, UNSCR 814 specifically cites the drought as part of the reason for acting under Chapter VII. Other reasons for the acting under Chapter VII are outlined in the resolution as well, including acts of violence against aid workers, widespread violations of international humanitarian law, the creation of large numbers of refugees, and civil unrest.[60]

Similar to a drought, a pandemic is an unforeseen natural catastrophe. Thus, Security Council Resolution 814 is significant from the perspective of the potential to use Chapter VII in a pandemic scenario. In this context, UNSCR 814 demonstrates that the Security Council is willing to consider *acts dei* and the impact on the civilian population, at least in part, as reasonable grounds for Chapter VII action. Similar to the drought and famine that caused widespread suffering in Somalia, a pandemic could be seen as an *acts dei* that causes widespread suffering within a country, consequently threatening the peace and security of the region, and thus enabling action under Chapter VII.

b) U.N. Security Council Resolution 841 Regarding Haiti

Another potential pandemic trait could be the flow of refugees within a country or over a State's borders and the resulting strain on national governments. The creation of refugee populations as a trait of humanitarian crises has been addressed in a series of UNSCRs concerning Haiti, in particular UNSCR 841 and 940. In the early 1990s, the Haitian government suffered a military coup that created a significant refugee crisis. In describing the crisis in UNSCR 841 the Security Council declared that under Chapter VII the "climate of fear" coupled with, "the number of Haitians seeking refuge in neighnouring [sic] Member States" could have a negative repercussions on the region.[61] Thirteen months later in UNSCR 940, the Security Council stated that it was "[g]ravely concerned by the significant further deterioration of the humanitarian situation in Haiti, in particular the continuing escalation by the illegal de facto regime of systematic violations of civil liberties, the desperate plight of Haitian refugees and the recent expulsion of the staff of the International Civilian Mission."[62] Given these threats to the peace and stability of the region, UNSCR 940 authorized member States, "to form a multinational force under

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[59] S.C. Res. 814, ¶¶ 11, 26 (Mar. 26, 1993).
[60] *See,* S.C. Res. 794, ¶ 10 (Dec. 3, 1992); S.C. Res. 814 (Mar. 26, 1993) (UNSCR 814 was implemented under Chapter VII, but it did not contain the language "all necessary means" which would have authorized the use of force. UNSCR 814 did in its opening paragraph, however, "reaffirm" a number of resolutions, including UNSCR 794 which had authorized member states to "use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia." Even though UNSCR 814 reaffirmed UNSCR 794, UNSCR 814 does not appear to authorize the use of force).
[61] S.C. Res. 841 (June 16, 1993).
[62] S.C. Res. 940 (July 31, 1994).

unified command and control and, i*n this framework, to use all necessary means* to facilitate the departure from Haiti of the military leadership [emphasis added]."[63]

UNSCR 841 and 940 further demonstrate that the post-Cold War understanding of a threat to the peace does not require that threat to exist between two States. The internal strife within the borders of one State that threatens to destabilize a region can be sufficient to invoke Chapter VII. Although none of the modern pandemic examples cited thus far have resulted in the failure of a national government, such an outcome is not only possible but probable when the scenario includes a State's armed forces and police succumbing to panic, the erosion and degradation of governmental services, and ultimately, the people's loss of faith in their government to protect and care for its citizens.

Such panic and its sequelae were seen on a micro scale in Liberia during the Ebola outbreak. After citizens in Monrovia suddenly found themselves inside a quarantined zone, a crowd of hundreds tried to break through the barriers and soldiers fired live rounds into the crowd to regain control.[64] In addition to the possible collapse of government, refugees fleeing a deadly outbreak is a near certainty; note that in India's 1994 possible plague outbreak, 200,000 individuals fled an infected city within 48 hours of the initial report of plague cases.[65] Based on Security Council actions addressing the Haiti's situation in the 1990s, it appears likely that in a pandemic scenario, the Security Council would be willing to view the collapse governments and mass exodus of refugees as a regional threat to the peace that could permit forcible action to be taken under Chapter VII to impose international assistance to control a pandemic.

c) U.N. Security Council Resolution 986 Regarding Iraq.

Following the First Gulf War, Iraq was subject to numerous sanctions that had the unintended consequence of harming the Iraqi civilian population.[66] The effect of these sanctions inside the borders of Iraq was exacerbated by President Saddam Hussein when he refused to equitably distribute medicine and foodstuffs to particular regions and categories of Iraqi civilians despite their need for the supplies.[67] In response, the Security Council acted under Chapter VII and expressed concern for "the serious nutritional and health situation of the Iraqi population."[68] Adopted in 1994, UNSCR 986 created the oil for food program whereby Iraq was allowed to export oil, for specific enumerated purposes, among which was to finance humanitarian aid to the county. Based on the historical background and language of UNSCR 986, it appears that the Security Council is willing to act under Chapter VII

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[63] *Id.* at ¶ 14.
[64] Norimitsu Onishi, *Clashes Erupt as Liberia Sets an Ebola Quarantine*, N.Y. TIMES (Aug. 20, 2014), http://www.nytimes.com/2014/08/21/world/africa/ebola-outbreak-liberia-quarantine.html?_r=0.
[65] Burns, *supra* note 19.
[66] COUNCIL UNBOUND, *supra* note 57, at 86-87.
[67] S.C. Res. 706, para. 7–8 (Aug. 15, 1991); S.C. Res. 712, ¶ 7, 9–10 (Sep. 19, 1991).
[68] *Id*.

when the actions of a nation's government create a humanitarian crisis that endangers or exacerbates the dangers to the civilian populace.[69]

UNSCR 986 provides evidence that the Security Council is also willing to act in cases where the humanitarian crisis has been caused or exasperated by the malfeasance of the State where the crisis exists. Based on the language of UNSCR 986, it is possible to argue that the Security Council could act under Chapter VII if a State was incapable of or refused to use international assistance in an effective manner.[70]

Addressing the refusal aspect first, if a State refused to distribute humanitarian aid equitably and was supplying pandemic assistance to only certain ethnic groups or the elite members of a society or government then, in a manner similar to Iraq, the Security Council could act to assure "equitable distribution to meet humanitarian needs of all regions…and categories of the…civilian population."[71] Further, if a State was incapable of distributing the international assistance effectively, Chapter VII could be used to force the infected State to accept assistance in distributing medicines, quarantining sick individuals, and treating those infected. Thus, based on UNSCR 986, the Security Council appears willing to declare a threat to the peace in a humanitarian crisis where the affected State's government has through ineffectiveness or inaction exacerbated the situation.[72]

By examining the historical applications of these resolutions, it is possible to argue that many of the secondary effects of a pandemic have already been addressed by Chapter VII action in the past. UNSCR 814 addressed an *act dei* unleashed on Somalia in the form of a drought, which creates precedence for addressing an outbreak of a bacteria or virus as an act of nature. UNSCR 841 dealt with the collapse of a nation's government and masses of refugees that are akin to reactions witnessed in the Ebola and plague epidemics of the last twenty years. Finally, UNSCR 986 addressed a situation in which the national government of Iraq exacerbated a humanitarian crisis and refused to effectively distribute international assistance, thus causing or worsening widespread humanitarian suffering.

It is important to note that although Chapter VII was used in these three humanitarian crises, the humanitarian aspect was never the sole reason for the Security Council's finding that the situation represented a threat to the peace. Thus,

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[69] Another important aspect of UNSCR 986 is that although the resolution was adopted under Chapter VII, Iraq refused to comply. It was eleven months later after a Memorandum of Understanding (S/1996/356) between Iraq and the U.N. was signed that U.N. Security Council Resolution 986 went into effect. S.C. Res. 986 (Apr. 14, 1995).

[70] A state that is incapable of or refusing to use international assistance in an effective manner is similar in language and concept to the unwilling or unable test under *jus ad bellum* self-defense. Despite this similarity in language and concept it is not the author's intent to make any claim that aid can be forced onto a country under a self-defense paradigm, or that the unwilling and unable test is applicable to a pandemic. For further reasoning on why a self-defense paradigm is not an appropriate construct for a pandemic *see infra* note 95.

[71] S.C. Res. 706 (Aug. 15, 1991) (omitting the references to Iraq in the quotation to demonstrate the generic application of a resolution to any country in a pandemic crisis).

[72] A fair counter to this point is that in 1994 Iraq had exhausted any good will possessed by the international community or the Security Council. Based on this point, it could be difficult to extrapolate any larger trends from Security Council action taken against Iraq.

the Security Council has yet to find that a humanitarian crisis alone, without additional conflict, creates sufficient jurisdiction to act under Chapter VII. Based on the historical precedents set by these resolutions, substantial evidence exists to believe Chapter VII could be used to address a pandemic *if the pandemic coincided with other security concerns*. For example, if a pandemic occurred in the context of an ongoing civil war it is relatively clear, based on the above resolutions, that the Security Council would address the pandemic in the larger context of the specific threat to the peace.

The question remains whether a pandemic alone provides sufficient grounds to invoke a Chapter VII response and force international assistance on an unwilling country. Since 2000, a handful of Chapter VI resolutions have been passed addressing standalone pandemics in Africa. Looking at the language of these Chapter VI resolutions on pandemics in conjunction with the Chapter VII resolutions discussed above provides further guidance on how a Chapter VII resolution could be used to address a pandemic in a country that had refused international assistance.

2. Chapter VI's Historical Usage to Address Pandemics

In contrast to Chapter VII's binding authority, Chapter VI resolutions are not binding on States and cannot be implemented by the international community through the use of force. Over the seventy-year history of the Security Council, the Council has acted only three times against pandemics and all have been under Chapter VI. In 2000 and 2011, the Security Council passed Resolutions 1308 and 1983 addressing the HIV/AIDS pandemic, and in 2014 UNSCR 2177 addressed Ebola. These resolutions marked the first instances of the Security Council addressing a possible link between health and security. In both UNSCR 1308 and 1983, the Security Council did so under Chapter VI, using traditional Chapter VI language that did not mention a threat to the peace, breach of the peace, or act of aggression.[73] In 2014, the Security Council passed UNSCR 2177 declaring that Ebola was a threat to the peace, marking the first time that a pandemic, or any health crisis, had been declared a direct threat to the peace. Examining UNSCRs 1308, 1983, and 2177 reveals the ways in which the Security Council addressed the HIV/AIDS pandemic and how the Ebola epidemic was ultimately acknowledged as a threat to the peace. Tracking the history of these three resolutions helps to foster a better understanding of whether action against a pandemic under Chapter VII might be possible.

a) U.N. Security Council Resolution 1308 Concerning HIV/AIDS

UNSCR 1308 addressing HIV/AIDS was passed in 2000. Across the globe in 2000 alone, 5.3 million people were newly infected with HIV, 36.1 million people

[73] S.C. Res. 1308, ¶ 12, 16 (July 17, 2000); S.C. Res. 1983, ¶ 10, 1 (June 7, 2011).

were living with HIV/AIDS, and 3 million people died from AIDS.[74] Given the scope of the HIV/AIDS pandemic, the Security Council took historic action in passing Resolution 1308, which was the first-ever resolution focused on a health issue.[75] The resolution was passed under Chapter VI, using the following language:

> Reaffirming the importance of a coordinated international response to the HIV/AIDS pandemic, given its possible growing impact on social instability and emergency situations, Further recognizing that the HIV/AIDS pandemic is also *exacerbated by conditions of violence and instability*, which increase the risk of exposure to the disease through large movements of people, widespread uncertainty over conditions, and reduced access to medical care, Stressing that the HIV/AIDS pandemic, *if unchecked may pose a risk to stability and security* [emphasis added].[76]

An examination of the language of Resolution 1308 reveals the language mirrors that of other humanitarian resolutions discussed in the previous section.

While acknowledging the humanitarian aspects of the pandemic, the resolution cites and relies heavily on the traditional notions of "violence and instability" upon which the Security Council has focused historically. In debating the extent of the HIV/AIDS pandemic, most of the representatives used traditional Chapter VI language, referring to the pandemic as a situation that "may pose a risk to stability," as opposed to the stronger language of Chapter VII that something posed a threat to international peace and security. The Argentinian ambassador was the only State representative who used Chapter VII language, stating, "[o]nly the concerted efforts of all relevant actors…will make it possible to prevent AIDS from *becoming a threat to international peace, stability and security* in the future [emphasis added]."[77] In making this statement, the Argentinian representative was using the stronger Chapter VII language, which was not included in the final resolution. Even though the resolution was taken solely under Chapter VI, it is an important milestone in the discussion on pandemics because it marks the first time the Security Council addressed a health issue via a resolution.

b) U.N. Security Council Resolution 1983 Concerning HIV/AIDS.

After UNSCR 1308, the Security Council did not address pandemics through resolutions again until 2011. In 2011, the Security Council again addressed

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[74] U.N. Dept. of Publication, HIV/AIDS: A Call to Action, DPI/2199 (Apr. 2001), http://www.un.org/ga/aids/pdf/stats.pdf.

[75] Press Release, Security Council, Security Council, Adopting 'Historic' Resolution 1308 (2000) On HIV/AIDS, Calls For Pre-Deployment Testing, Counselling For Peacekeeping Personnel, U.N. Press Release SC/6890 (July 17, 2000).

[76] S.C. Res. 1308, ¶ 9-11 (July 17, 2000).

[77] U.N. SCOR, 55th Sess., 4172d mtg. at 8, U.N. Doc. S/PV.4172 (July 17, 2000).

HIV/AIDS, this time through UNSCR 1983, which was also enacted under Chapter VI. The Security Council opened the resolution by noting that since the beginning of the HIV epidemic, AIDS had infected 60 million people and killed 25 million worldwide. The Council then recognized, "that HIV poses one of the most formidable challenges to the development progress and stability of societies."[78] The remainder of the UNSCR 1983 is similar to Resolution 1308 in that the danger of the pandemic is acknowledged, but largely in the context of external conflict and through the creation of "large movements of people…and reduced access to medical care."[79]

UNSCR 1983 is novel, however, in that during the discussion on the resolution, additional countries—including three members of the P5—were willing to acknowledge the AIDS pandemic was having an impact on international peace and security. These acknowledgments clearly demonstrate further movement toward a pandemic being considered within the jurisdiction of Chapter VII. Specifically, the press release on the meeting stated the Security Council was, "[r]eaffirming its previous commitment to address the HIV/AIDS pandemic as a threat to international peace and security."[80] At the meeting, the representatives for France, the U.K, and the U.S. all specifically noted the HIV/AIDS epidemic had a negative impact on international peace and security. In her capacity as the U.S. ambassador to the U.N., Susan Rice stated that "[i]n the twenty-first century, in our interconnected world, threats to peace and security stem not only from traditional armed conflicts. They also derive from more diffuse dangers that know no borders, including the unchecked spread of lethal disease."[81] This language from the U.S. ambassador, echoed by France and the U.K., demonstrated that by 2011, the international community had begun to regard pandemics as an inherent standalone threat to peace and security.[82]

The single caveat to this endorsement by three members of the P5 was the more reserved comments from Russia's representative. As a staunch supporter of State sovereignty, Russia put forth the view that the AIDS epidemic was not an inherent threat to peace and security, but rather an exacerbating factor. In putting forth this viewpoint, the Russian representative stated, "HIV/AIDS is not a source of conflicts, but conflicts create conditions that contribute to the spread of the epidemic and also complicate efforts to curb it."[83] Russia's comments in the context of UNSCR 1983 demonstrated that, as of 2011, some countries still had reservations about considering pandemics as a matter under Chapter VII jurisdiction.

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[78] S.C. Res. 1983, ¶ 6 (June 7, 2011).
[79] *Id*. at ¶ 10.
[80] Press Release, Security Council, Unanimously Adopting 1983 (2011), Security Council Encourages Inclusion of HIV Prevention, Treatment, Care, Support in Implementing Peacekeeping Mandates, U.N. Press Release SC/10272 (June 7, 2011).
[81] U.N. SCOR, 66th Sess., 6547th mtg. at 9, U.N. Doc. S/PV.6547 (June 7, 2011).
[82] *Id.* at 12 (referring to the United Kingdom's statements); *id*. at 9 (referring to France's statements).
[83] *Id*. at 13.

c) U.N. Security Council Resolution 2177 Concerning Ebola.

In contrast to the slow, steady death rate of the HIV/AIDS pandemic, an outbreak of Ebola exploded across West Africa in 2014, grabbing the world's attention. Within months of the outbreak, Ebola gained Security Council attention that resulted in the passage of UNSCR 2177. This resolution built upon the foundation of the HIV/AIDS resolutions and expanded the link between pandemics and national security by declaring "the unprecedented extent of the Ebola outbreak in Africa constitutes a *threat to international peace and security* [emphasis added]."[84] In contrast to the Security Council Resolutions discussed previously, UNSCR 2177 made a direct link between a pandemic and international peace and security.

UNSCR 2177 was historic for two reasons. First, the resolution was the first time the subject matter of a Chapter VI Resolution was declared a threat to international peace and security. As discussed, this kind of direct link is traditionally the jurisdictional language exclusively used for Chapter VII resolutions.[85] The second notable characteristic of Resolution 2177 was that it marked the first time that the Security Council declared a health issue a threat to international peace and security. The HIV/AIDS resolutions had used qualifying language such as "*may* pose a threat." This is contrasted with UNCR 2177 where the Security Council found Ebola to be a direct threat stating,

> *Expressing grave concern* about the outbreak of the Ebola virus in, and its impact on, West Africa, in particular Liberia, Guinea and Sierra Leone, as well as Nigeria and beyond,
>
> *Recognizing* that the peacebuilding and development gains of the most affected countries concerned could be reversed in light of the Ebola outbreak and *underlining* that the outbreak is undermining the stability of the most affected countries concerned and, unless contained, may lead to further instances of civil unrest, social tensions and a deterioration of the political and security climate,
>
> *Determining* that the *unprecedented extent of the Ebola outbreak in Africa constitutes a threat to international peace and security.* [emphasis added].[86]

Although Resolution 2177 marked a significant break with the traditional definition of the term threat to the peace, the stance of the resolution was not a sudden or unforeseeable evolution. First, as discussed, following the Cold War a significant expansion took place in what constituted a threat to the peace. Second, the Security

[84] S.C. Res. 2177, ¶ 5 (Sept. 18, 2014).
[85] Anna Hood, *Ebola: A Threat to the Parameters of a Threat to the Peace*, 16 MELB. J. INT'L L. 29 (2015).
[86] S.C. Res. 2177, ¶ 3-5 (Sept. 18, 2014).

Council had passed several Chapter VI resolutions regarding pandemics. The coalescence of Chapter VII jurisdiction expanding into humanitarian crises and Chapter VI moving to address pandemics makes UNSCR 2177 seem a natural evolution.

Resolution 2177 was co-sponsored by 130 countries, the greatest number in the Council's history, and was unanimously passed by the Security Council.[87] The widespread support received for the passage of the UNSCR 2177 underscored the shifting perceptions of what constituted a threat to the peace and, consequently, of Chapter VII's jurisdiction, especially in the context of a public health crisis. It is important to note that the widespread support for the resolution was likely based on the fact that the Resolution did not try to address a pandemic under Chapter VII, but instead under Chapter VI. Examining the statements made before the Security Council illustrates this point.

In debating the resolution a total of 45 countries made statements expressing their thoughts on the resolution. Thirteen countries expressed the belief that the Ebola outbreak was an existing independent threat to international peace and security, twelve countries took the position that Ebola was a likely indirect threat to international peace and security, two countries argued Ebola was not a threat to international peace and security, and the remaining eighteen countries did not appear to take a position on Ebola's threat to the peace.[88] Clearly, the statements of the countries in the meeting ran the gamut of opinion as to whether the Chapter VII language of threat to the peace could be used to address the Ebola pandemic.

Addressing the statements of each country individually is beyond the scope of this article; however, it is worthwhile to examine the statements on either end of the debate to better understand to what extent Chapter VII language can be used to address a pandemic. Brazil and Columbia were the strongest opponents of finding Ebola a threat to security, whether direct or indirect. Expressing this view, the Brazilian representative stated, "we underline the need to treat the outbreak first and foremost as a health emergency and a social and development challenge rather than a threat to peace and security."[89] Although neither Brazil nor Columbia were on the Security Council at the time of this discussion, it is noteworthy that vocal resistance still exists regarding pandemics as constituting a threat to peace and encroaching on traditional Chapter VII jurisdiction.[90]

A more moderate position was taken by the twelve countries that conceded an Ebola outbreak could cause conditions that were a threat to international peace and security, but maintained that a pandemic itself was not an inherent threat to

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[87] U.N. SCOR, 69th Sess., 7268th mtg. at 7, U.N. Doc. S/PV.7268 (Sept. 18, 2014).

[88] *Id.* (the position of each country can be inferred from the language the countries used at the 7268th meeting of the Security Council. Therefore, these positions cannot be considered the official position of the countries; however, it is a good metric to determine where the countries generally position themselves on this issue. The position of the countries as determined by the author is annotated in the corresponding footnotes below).

[89] *Id*. at 28.

[90] *Id.* at 29 & 45 (providing that the only countries who declared that Ebola was not a challenge to peace and security were Brazil and Columbia).

international peace and security.[91] These countries expressed the traditional view that a pandemic had the potential to or was likely to endanger the maintenance of international peace and security, and therefore, was a matter for Chapter VI jurisdiction. In espousing this view, New Zealand's ambassador called the Ebola pandemic "a crisis that is unprecedented in scale, impact, and *potential to threaten* international peace and security" [emphasis added].[92]

Chile represented the far end of the spectrum and called for Chapter VII to be expanded into areas well beyond its traditional bounds. In supporting the argument that epidemics should unquestionably be a Chapter VII threat, in explaining why Ebola was a threat to the peace, the Chilean ambassador stated that: "[t]he threats to international peace and security have extended beyond the traditional borders of armed inter- and intra-state conflicts."[93] Chile's statements certainly suggest that pandemics should be within Chapter VII jurisdiction, but this view was at the far end of Security Council power regarding Chapter VII and pandemics.[94]

This thirteen-to-twelve country split on whether the language of Chapter VII or Chapter VI was most appropriate for addressing the Ebola pandemic also mirrored the positions of the P5 countries. Among the P5 States, the U.S., the U.K., and France supported the stronger Chapter VII language, whereas China and Russia supported the weaker Chapter VI language. Examining the positions of the P5 countries and the general international position on using Chapter VI versus VII language to address a pandemic is helpful for several reasons. First, the opposing positions of the P5 countries are of particular importance because the P5 countries are permanent members of the Security Council, whereas other international actors may or may not be on the Council during the next pandemic. The P5 members also possess veto power and thus their opinions carry substantial influence in international politics. However, the P5 members are a small sample set; and therefore, it is important to compare the P5 opinions against the general international community as a way to gauge wider international opinion on the matter. Based on both the P5 and the international communities' statements on UNSCR 2177, it is apparent that an almost equal split exists regarding how far Chapter VII and threats to the peace can be expanded to address a pandemic.

C. *How Chapter VII Could Be Used Under the Current State of International Law to Address a Pandemic*

From the examination of historical Chapter VI and VII resolutions in the preceding sections, a firm understanding of two facts has emerged. First, the Security

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[91] *See id.* (providing that the countries who believed Ebola was an indirect threat to peace and security were Argentina, China, Russia, Rwanda, Switzerland, Morocco, Turkey, Netherlands, Israel, Norway, New Zealand and Nicaragua).
[92] *Id*. at 43.
[93] *Id*. at 22.
[94] *See id.* (providing that the countries who expressed the opinion that Ebola was a direct threat to peace and security were Australia, Chad, Chile, France, Luxemburg, Korea, United Kingdom, United States, Spain, Italy, Germany, Guinea and Guyana).

Council is willing to use Chapter VII to address humanitarian crises that result from a larger conflict. Second, the Security Council is willing to use the threat to the peace language in a Chapter VI resolution to address pandemics. Based on the examination of the six resolutions in the preceding sections, this appears to be the current state of international law. Although the foundation seems to be in place for the Security Council to use Chapter VII to address a pandemic, doing so would mark significant evolution in customary international law regarding Chapter VII jurisdiction. While the preceding sections have established that such an evolution of Chapter VII is possible, how that evolution would occur remains unclear. Furthermore, the acknowledged weakness in using Chapter VII is that although the proposed action may be in line with international law, any action, no matter how legal or legitimate, could still be precluded by a veto or threat of veto by a P5 member. Therefore, alternatives must be considered.

III. ALTERNATIVES TO CHAPTER VII

To acknowledge the weaknesses of a Chapter VII Resolution discussed above, Part III briefly explores two alternatives to Chapter VII action. The two best alternatives to action under Chapter VII are an excused breach of international law under a plea of necessity, which stems from Article 25 of the Articles on State Responsibility, or humanitarian intervention.[95] Although these alternatives diverge slightly from the main scope of this article, and are less accepted principles in international law, they are proposed as necessary alternatives that could be the basis of additional literature in this field of study.

In *Recourse to Force*, Professor Thomas Franck suggests that resorting to the use of force in response to a humanitarian crisis is generally predicated upon two alternative theories. First, a gradual reinterpretation of Article 2(4) which, as argued above, could be used in applying Chapter VII to a pandemic. The second option is for States to knowingly use unlawful force to address the crisis where "ascertainable circumstances mitigates the consequences of such wrongful acts."[96] This second option has been appropriately labeled the "excusable breach" approach, whereby the use of force might be technically illegal under the Charter, but it may be "morally and politically justified in certain exceptional cases. In short, it is a violation of the

[95] A third interesting proposal would be to take action under a theory of self-defense. The author thoroughly researched this proposal and found it untenable for the following reason. First, under a traditional theory of self-defense a state must suffer an unlawful armed attack, or at the *very least* an unlawful use of force. Both of these prerequisites require action on the part of a state or non-state actor. Because a pandemic is neither a state nor non-state actor it is unlikely that the necessary prerequisite act could be established to apply this theory. A second theory of establishing a right to act under self-defense could be based on a historic precedent for invoking self-defense in a pandemic context pre U.N. Charter. If this historic right to self-defense against a pandemic could be established it could be argued that the "inherent right to self-defense" as preserved by Article 51 of the U.N. Charter could include a right to act in self-defense of a pandemic. This theory was exhaustively researched and no support could be found in historical practice by the author.

[96] THOMAS FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 139 (2002).

Charter for which States are unlikely to be condemned or punished."[97] In a pandemic situation where international action under Chapter VII was thwarted for one of the two reasons noted above, it is quite likely that States would be willing to violate the U.N. Charter and take illegal action that they perceived as morally defensible to stop the further spread of a deadly pandemic.

Under current interpretations of international law, both an Article 25 plea of necessity and humanitarian intervention fall into the "excusable breach" category in that they are not justifications under the law but rather excuses. The distinction between excuse and justification is important, as justifications modify an existing rule or norm, while excuses relieve the State from accountability for violating a rule that remains unmodified.[98] While similar in their status as excusable breaches in international law, humanitarian intervention and a plea of necessity differ in one key respect. Use of force under a plea of necessity is based on the wellbeing of the State using force, whereas a humanitarian intervention model is founded on the wellbeing of the citizenry within the State against whom force is being used. Further distinguishing the two principles is the commentary on the Articles on State Responsibility where the ILC noted, "the question whether measures of forcible humanitarian intervention, not sanctioned pursuant to Chapters VII or VIII of the Charter of the United Nations, may be lawful under modern international law, is not covered by Article 25."[99] Due to these recognized fundamental differences between humanitarian intervention and an Article 25 plea of necessity the two principles must be examined independently as excusable breaches for the use of force against an infected State in a pandemic.

A. *An Article 25 Plea of Necessity*

In international law, necessity refers to those extreme cases where the only way a State can protect an essential interest is to not perform some other, lesser, international obligation.[100] The principle of necessity has been memorialized in Article 25 of the Articles on State Responsibility and has been referred to as customary international law by the ICJ in the Gabcikovo-Nagymaros Project case where the court held that "the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation."[101] In order to invoke a plea of necessity, States would have to meet the standards outlined in Articles on State Responsibility which are as follows:

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[97] Jane Stromseth, *Rethinking Humanitarian Intervention: The Case for Incremental Change*, *in* HUMANITARIAN INTERVENTION: ETHICAL, LEGAL AND POLITICAL DILEMMAS 232, 243 (J. L. Holzgrefe & Robert O. Keohane eds., 2003).
[98] Ian Johnstone, *The Plea of "Necessity" in International Legal Discourse: Humanitarian Intervention and Counter-terrorism*, 43 COLUM. J. TRANSNAT'L L. 337, 351 (2005).
[99] Articles on State Responsibility, *supra* note 13, at art. 25 commentary ¶ 21.
[100] *Id.* at art. 25.
[101] Gabcíkovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. Rep. 7, ¶ 51 (Sept. 25).

> 1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
>
> (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
>
> (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.[102]

As a starting point, it is important to note that Article 25 is structured in negative language ("necessity may not be invoked…unless"). Despite the negative language of Article 25, as a matter of first impression, a plea of necessity is well suited for the pandemic scenario considered by this article. The factors under 1(a) of the State safeguarding "essential interest against a grave and imminent peril" appear to be met. The health and survival of a State, which are threatened by a pandemic, are the personification of an "essential interest" that must be safeguarded by governments. Furthermore, as discussed in part I, pandemics of sufficient magnitude would constitute "grave and imminent peril."[103]

Part (1)(b) of the test however, is problematic when attempting to use a plea of necessity to confront a pandemic. Part 1(b) of Article 25 makes clear that a plea of necessity may not impair "an essential interest of the State towards which the obligation exists." This condition of the necessity test is the very reason a pandemic presents a conundrum under international law. Pursuant to Article 2(4) of the UN Charter, the sovereignty of a nation's boarders is the epitome of an essential interest under international law. In both the *Nicaragua* and *Corfu Channel* cases the ICJ has established the *jus cogens* status on the general prohibition on the use of force to intervene in the territory of another State.[104] Specifically, in the *Corfu Channel* case the court stated "the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot,

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[102] Articles on State Responsibility, *supra* note 13, (providing that the second portion of the necessity test does not apply to the pandemic scenario addressed by this article. The second portion of the test states: "(2) In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: (a) The international obligation in question excludes the possibility of invoking necessity; or (b) The State has contributed to the situation of necessity."). For 2(a) there is no international obligation which directly addresses intervention in a pandemic, and certainly no international obligations that specifically preclude possibility of invoking necessity in a pandemic. For 2(b) if a state seeking to intervene via force had contributed to the situation of necessity by creating the pandemic then this would be more akin to a biological attack scenario that would have greater self-defense ramifications that go outside the scope of this article, which only considers pandemics that are not intentionally inflicted. For these reasons, the second portion of the necessity test has been excluded from the analysis in the main body of this article.

[103] The factors under 1(a) are only given short analysis here, as even if the requirements of 1(a) are met, the requirements of 1(b) and Article 26, which applies to Article 25, appear to preclude a plea of necessity.

[104] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 202 (June 27) (referring to its Judgment in the Corfu Channel Case).

whatever be the present defects in international organization, find a place in international law." [105]

The best hope for overcoming the challenges presented by the requirements of 1(b) is the language in paragraph 17 of the commentary which reads, "the interest relied on must outweigh all other considerations, not merely from the point of view of the acting State but on a reasonable assessment of the competing interests, whether these are individual or collective."[106] This reference to "collective interests" could be interpreted to mean that intervention with the aim of ending a serious pandemic that posed a threat to *all* States could justify a violation of a *single* State's sovereignty.

However, if paragraph 17 of the Article 25 commentary was interpreted in this manner it would be a significant departure from State practice, as there is no historical basis for lawfully using a plea of necessity alone to breach the territorial sovereignty of another State.[107] The commentary to Article 25 cites ten historical examples of State's invoking a plea of necessity, only one of these cases involves a breach of territorial integrity, and that is the *Caroline* incident of 1837. [108] Despite citing the incident, the ILC correctly notes that the *Caroline* "though frequently referred to as an instance of self-defense, really involved the plea of necessity *at a time when the law concerning the use of force had quite a different basis than it has at present* [emphasis added]*."[109]*

Even interpreting the Article 25 commentary in the most favorable light possible, Article 26 appears to firmly preclude this kind of interpretation for Article 25. Article 26 states, "nothing in this chapter[110] precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a preemptory norm of general international law." [111] Paragraph 5 of Article 26's commentary states that among the preemptory norms that are clearly accepted and recognized includes the prohibitions on aggression.[112] Acts of aggression are defined by the U.N. General Assembly and explicitly include "[t]he invasion or attack by the

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[105] Corfu Channel Case (Assessment of the Amount of Compensation Due from the People's Republic of Albania), Judgment, 1949 I.C.J. Rep. 171 (Apr. 9).
[106] Articles on State Responsibility, *supra* note 13, at art. 25 ¶ 17.
[107] A number of cases exist where states have unsuccessfully offered a plea of necessity for their actions. One of the most often cited examples is Germany's occupation of Belgium and Luxemburg in 1914 where the German Chancellor Bethmann-Hollweg famously stated, "necessity knows no law." Editorial Comment, *The Neutrality of Belgium*, 9 AM. J. INT'L L. 707, 709 (1915).
[108] The ten cases cited are: The *Caroline* incident (1837); The *Russian Fur Seals* (1893); The *Russian Indemnity* case (1912); *Societe commercials de Belgique* (1939); The *Torrey Canyon* case (1967); *Rainbow Warrior* arbitration (1986); The *Gabcikovo-Nagymaros Projects* case (1998); *Fisheries Jurisdiction* case (1995); *Libyan Arab Foreign Investment Company* (*LAFICO*) *and the Republic of Burundi* (1991); *The M/V "SAIGA"* (*No. 2*) *Case* (*Saint Vincent and the Grenadines v. Guinea*) (1999). *See* Articles on State Responsibility, *supra* note 13, art. 25 ¶¶ 5-12.
[109] *Id*.
[110] When referring to "this chapter" Article 26 is referring to Chapter V of the Articles on State Responsibility which includes both Article 25 and 26. Paragraph 4 to Article 26's commentary makes this explicitly clear by stating, "The plea of necessity likewise cannot excuse the breach of a peremptory norm."
[111] Articles on State Responsibility, *supra* note 13, at Art. 26.
[112] *Id.* at Art. 26 ¶ 5.

armed forces of a State of the territory of another State, or any military occupation, however temporary."[113] As discussed previously, most humanitarian assistance, even when voluntarily accepted, is supported by military units. If assistance must be forced upon a State, then it is a forgone conclusion that, at a minimum, there will be a military component to the assistance, if only to protect aid workers and prevent their forcible expulsion by the infected State. Due to this inherent military presence, when forcing aid on an infected State, any aid provided would be an act of aggression and the intervening State would be unable to claim necessity due to Article 26's prohibition on violating preemptory norms.

Therefore, even though the population of the infected State and the international community as a whole would benefit from forcing aid on an infected State, condition 1(b) of Article 25 and Article 26 as a whole seem to preclude a plea of necessity to force aid on a country in a pandemic. Thus, a plea of necessity does appear to be a viable alternative to a Chapter VII UNSCR and humanitarian intervention must be explored as another possible alternative.

B. *Humanitarian Intervention*[114]

Humanitarian intervention cannot be considered established customary international law, nor is it codified like the Articles on State Responsibility; therefore, it does not have an agreed upon definition that must be met before it can be invoked. Despite this, the general principle of humanitarian intervention can be described as the use of force to protect people in another state to avert a humanitarian catastrophe, when the target state is unwilling or unable to act.[115] The principle of humanitarian intervention was discussed widely following its invocation as a justification for the NATO use of force against Federal Republic of Yugoslavia over Kosovo in 1999.[116]

Humanitarian intervention is worth discussing in the pandemic context for two reasons. First, although humanitarian intervention was developed in the context of human inflicted suffering, there is no requirement under the definition that the suffering be manmade. Therefore, the cause of the suffering is immaterial and the doctrine is prima facie applicable in a pandemic. Further, even though the pandemic considered by this article is not manmade, the effects of the pandemic are exacerbated by the action, or inaction, of governments. Second, while establishing a novel international doctrine is not easy, the last two decades have shown an increased

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[113] G.A. Res. 29/3314 (XXIX), at 143 (Dec. 14, 1974).

[114] When discussing the principle of humanitarian intervention, it is also prudent to mention the less accepted principle of responsibility to protect. Responsibility to protect as applied to pandemics was considered as an option but not discussed due to the lower status of responsibility to protect as an accepted international law principle when compared to humanitarian intervention.

[115] Vaughn Lowe & Antonios Tzankopoulos, *Humanitarian Intervention*, in MAX PLANK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 3 (2011).

[116] THE INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, THE KOSOVO REPORT 163 (2000).

acceptance of the principle in international law. This trend can be most readily observed through international actions in Kosovo, Libya and Syria.[117]

One of the most significant and comprehensive documents on humanitarian intervention is *The Kosovo Report,* which made several findings that are noteworthy when applying humanitarian intervention to the pandemic context. First, due to the widespread human suffering and the regional instability caused by the conflict the Commission noted that the "NATO campaign was illegal, [under international law] yet legitimate."[118] The Commission concluded that allowing this gap to exist between legality and legitimacy in the face of humanitarian suffering was unhealthy from an international law perspective.[119] Curing this unhealthy gap between legality and legitimacy is precisely where humanitarian intervention could be used in a pandemic.

As noted throughout this article, there is a legitimate need for international assistance and intervention in a pandemic, and yet under current international law, intervention without consent remains illegal. This gap between legality and legitimacy created by a pandemic could be an ideal scenario under which the international community would be willing to accept humanitarian intervention as a new legal justification for the use of force.[120] Even if humanitarian intervention were not accepted as legitimate on a broad scale, at a minimum it could be reinterpreted in the narrow context of pandemics.

New accepted justifications for the use of force, however, take significant time to evolve and a true pandemic would be a rapidly evolving threat. Without agreement beforehand as to how humanitarian intervention would be applied to a pandemic, there would be insufficient time for States to agree upon criteria and accept humanitarian intervention as a new legal justification. While there are legitimate concerns and arguments against acceptance of humanitarian intervention in general, many of the arguments are muted when applied to the specific pandemic scenario considered by this article.

The lack of uniform State practice as to the proper circumstances for humanitarian intervention makes it harder to apply the principle to a pandemic. The U.K. however, has accepted the doctrine, most notably before the ICJ as a defense to the NATO intervention in Kosovo, and has publicly published their criteria in the

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[117] The purpose of this article is not to explore the legitimacy of humanitarian intervention under international law. Therefore, aside from this footnote the author merely notes there are many articles and a strong case to be made for the future legitimacy of humanitarian intervention as an accepted principle in international law. *See generally* Ved P. Nanda et al., *Tragedies in Somalia, Yugoslavia, Haiti, Rwanda and Liberia- Revisiting the Validity of Humanitarian Intervention Under International Law- Part II*, 26 DENV. J. INT'L L. & POL'Y 827, 833-834 (1998); Gareth Evans, *From Humanitarian Intervention to the Responsibility to Protect*, 24 WIS. INT'L L.J. 703, 704 (2006); Michael N. Schmitt, *The Syrian Intervention: Assessing the Possible International Law Justifications*, 89 INT'L L. STUD. US NAVAL WAR COL. 744, 753 (2013).

[118] THE INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, THE KOSOVO REPORT 186 (2000).

[119] *Id.*

[120] This acceptance of humanitarian intervention as a justification would be in contrast to current the description of humanitarian intervention as an "excused breach" of international law.

context of the use of Chemical Weapons by the Syrian regime.[121] Accordingly, the factors articulated by the U.K. government can be used as a possible approach to analyze humanitarian intervention in a pandemic context. The factors articulated by the British government are:

> (i) [T]here is convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief;
>
> (ii) it must be objectively clear that there is no practicable alternative to the use of force if lives are to be saved; and
>
> (iii) the proposed use of force must be necessary and proportionate to the aim of relief of humanitarian need and must be strictly limited in time and scope to this aim (i.e. the minimum necessary to achieve that end and for no other purpose).[122]

Applying the first condition, there appear to be two sub criteria that must be satisfied; (1) extreme humanitarian distress and (2) the requirement of immediate and urgent relief. While scientists and doctors might agree on what is convincing evidence of large scale humanitarian distress that requires urgent relief, State leaders may not, for reasons discussed in Part I of this article. A possible solution would be to establish objective criteria for what diseases would justify forcible entry into a country to provide humanitarian assistance. The 2005 *WHO IHR* already contains a list of diseases that have "serious public health impact." [123] While "serious public impact" is a different standard than "extreme humanitarian distress," looking at the list of diseases it is clear that any of these diseases in sufficient quantity have the potential to cause "extreme humanitarian distress." As each disease is different, threshold numbers of infected patients categorized by disease could be established

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[121] Legality of Use of Force (Serb. & Montenegro v. U.K.), Judgment, 2004 I.C.J. Rep. 1307 (Dec. 15); *see also* Legality of Use of Force (Serb. & Montenegro v. Belgium), Preliminary Objections, 2004 I.C.J. Rep. 279 (Dec. 15) (noting that in addition to the United Kingdom, Belgium was the only other country that asserted the right of humanitarian intervention in the Legality of the Use of Force cases before the International Court of Justice over the Kosovo intervention).

[122] PRIME MINISTER'S OFFICE, CHEMICAL WEAPON USE BY SYRIAN REGIME: UK GOVERNMENT LEGAL POSITION (2013), https://www.gov.uk/government/publications/chemicalweapon-use-by-syrian-regime-uk-government-legal-position/chemical-weapon-use-bysyrian-regime-uk-government-legal-position-html-version.

[123] WORLD HEALTH ORG., INTERNATIONAL HEALTH REGULATIONS 43 (2d ed. 2005) (The following outbreaks require notification "A case of the following diseases is unusual or unexpected and may have serious public health impact, and thus shall be notified: Smallpox[;] Poliomyelitis due to wild-type poliovirus[;] Human influenza caused by a new subtype[; and] Severe acute respiratory syndrome (SARS) . . . . An event involving the following diseases shall always lead to utilization of the algorithm, because they have demonstrated the ability to cause serious public health impact and to spread rapidly internationally: Choler[;]Pneumonic plague[;] Yellow fever[;] Viral haemorrhagic fevers (Ebola, Lassa, Marburg)[;] West Nile fever[;] Other diseases that are of special national or regional concern, e.g. dengue fever, Rift Valley fever, and meningococcal disease").

to help determine whether the severity of a disease outbreak warrants a humanitarian intervention.[124]

The second condition under the U.K.'s humanitarian intervention test requires objective clarity that to save lives there is no practical alternative to the use of force. As demonstrated in Part II, when States refuse international assistance, or are incapable or refuse to distribute aid effectively, there are no mechanisms (short of the use of force) to compel acceptance of assistance. Empirical evidence, such as the Yale study on the spread of Ebola, makes it clear that, in a pandemic situation, doing nothing is not a viable option.[125] At a minimum in the case of pandemic influenza[126] or Ebola[127], it is recognized that inaction leads to exponential spread of disease and the corollary death and suffering, thereby providing the objective clarity that use of force is necessary to save lives.

The final condition under the U.K.'s test for humanitarian intervention attempts to limit the scope of the intervention by requiring "that the use of force is necessary, proportionate and strictly limited in time and scope."[128] Because of the real danger posed to intervening States in a pandemic, when evaluating whether the use of force is necessary, any State considering involvement will have to seriously consider the inherent self-risk posed by intervening. Real danger in this context references the grave risk of contamination, death or incapacitation, of the intervening State's doctors, military and scientists, as opposed to political danger such as loss of international standing or condemnation by other States. This ever-present real danger in a pandemic would help to ensure that States only intervene when it is truly a necessity. In further ensuring that States only intervene when true necessity exists, the list of diseases and numbers of infected maintained by the IHR and referenced in footnote 123 of this article could be used as an international watermark for the necessity of humanitarian intervention.

Similar arguments apply to the proportionality requirement for humanitarian intervention. The real danger element indicates that the larger the intervention, the greater the risk to weakening the intervening State's own pandemic readiness. The more citizens an intervening State uses in an intervention, the higher the risk is of the disease being brought back to the intervening State, and the lower the intervening States' ability is to respond. For these reasons, it is unlikely that States would send an unnecessary or disproportionate force into a foreign State to address a pandemic for fear of infecting, and thereby weakening, the supporting States own military and medical readiness.

Finally, it is required that States limit the time and scope of their intervention. However, this concern could be alleviated through objective scientific criteria that

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[124] For example, the more contagious or serious the disease is then the lower the threshold of infected persons is. By way of illustration the number of Ebola cases that trigger intervention might be 10 confirmed cases of infected individuals whereas SARS might require 1,000 confirmed cases.

[125] *See* YALE NEWS, *supra* note 3, at 2–3.

[126] HOMELAND SECURITY COUNCIL, THE NATIONAL STRATEGY FOR PANDEMIC INFLUENZA: IMPLEMENTATION PLAN 109 (2006), https://www.cdc.gov/flu/pandemic-resources/pdf/pandemic-influenza-implementation.pdf.

[127] *See* U.N. SCOR, 69th Sess., 7268th mtg., U.N. Doc. S/PV.7268 (Sept. 18, 2014).

[128] PRIME MINISTER'S OFFICE, *supra* note 122.

could be imposed to determine the end date for humanitarian intervention in a pandemic scenario. The conditions that mandate the cessation of humanitarian intervention in a pandemic is convincingly argued as: when no cases exist and zero new cases are reported for the appropriate incubation period, then the right to continue humanitarian intervention must come to an end.[129]

Using the U.K.'s factors to determine when humanitarian intervention is legitimate under international law, there is a strong argument to be made for States to use the principle of humanitarian intervention to impose international assistance on an infected State. As noted in *The Kosovo Report* however, humanitarian intervention, when conducted in the proper manner, remains illegal, yet legitimate. Therefore, although a viable alternative to Chapter VII action, humanitarian intervention should be viewed as a secondary means of intervention with Chapter VII action remaining the primary preferred method for addressing pandemics under international law.

CONCLUSION

This article has argued that under current international law norms real incentives exist for States to deny outbreaks or refuse international assistance when facing a pandemic. Simultaneously, the policies of several well-developed, wealthy States have been cited to demonstrate that international assistance and mutual aid are necessities for any country in addressing a deadly pandemic. To address this paradox, this article has demonstrated that recent, historical Chapter VI and VII resolutions passed by the Security Council have laid a possible foundation to mandate acceptance of international assistance, by force if necessary, in a pandemic crisis under Chapter VII. However, this article has also acknowledged that a Chapter VII resolution of this kind would represent a significant expansion in the jurisdiction of Chapter VII, thus, making the resolution vulnerable to legal inertia and the ever-present threat of a possible veto by any member of the P5. To address this weakness in the ability to act under Chapter VII, this article also proposed two alternatives to a Chapter VII Resolution.

As cited throughout this article, numerous States and international organizations have acknowledged that a pandemic of alarming lethality and magnitude is a harsh reality. This reality threatens the entire global population regardless of borders or nationality. For the international community to be adequately prepared to face this kind of international threat there must be an inherently unified international response. Diseases do not respect borders, treaties or international law, but when confronting serious outbreaks that threaten the health and well-being of millions, responsible States must make every attempt to provide assistance within the norms of accepted

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[129] Brady Dennis & Lena H. Sun, *The New Ebola Target Number: Zero Cases*, WASH. POST (Feb. 4, 2015), available at https://www.washingtonpost.com/national/health-science/next-phase-in-ebola-fight-getting-to-zero/2015/02/04/4f5b3ed4-a570-11e4-a7c2-03d37af98440_story.html ("'The only way you stop [Ebola] and not worry anymore is when the very last person is no longer transmitting — is either dead or better,' said Anthony Fauci, director of the National Institute of Allergy and Infectious Diseases.").

international law. By examining the current state of international law and advocating for international solutions, this article aims to help prepare the groundwork for international cooperation in confronting a pandemic when it occurs.


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GLOBAL WATER SECURITY IN THE AGE OF HUMANITY

Dr. Waseem Ahmad Qureshi [*]

Abstract

Water is the most essential requirement for the existence and survival of life. For a better quality of life, adequate water security is required, which means availability and access to clean drinking water, hygienic sanitation, and better quality of health standards. Nonetheless, the scarcity of water, pollution in fresh watercourses, transboundary water conflicts among states, inadequate availability of safe water, mismanagement of river basins, etc. threaten water security. To mitigate the threats, the sources of international water law, i.e., the Berlin Rules, the UN Watercourses Convention, and the 1992 UNECE Convention, endorse the establishment of cooperation among riparian states and the implementation of schemes entailing sustainable integrated management of watercourses. In addition, a number of international conferences and agencies such as the United Nations Development Programme have also provided numerous recommendations for realizing sustainable water security at the global and regional levels. International human rights law has endorsed the universal human right to water; therefore, states are required to follow the recommendations of the international water law regimes and implement sustainable water security schemes to ensure adequate water security for their people.

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INTRODUCTION

Water is essential for the survival of life on Earth.[1] The availability and access to water in sufficient quantity and good quality is called water security.[2] The most suitable definition of water security has been provided by UN-Water, which defines water security as:

> The capacity of a population to safeguard sustainable access to adequate quantities of acceptable quality water for sustaining livelihoods, human well-being, and socio-economic development, for ensuring protection against water-borne pollution and water-related disasters, and for preserving ecosystems in a climate of peace and political stability.[3]

Unfortunately, there are numerous threats looming over water security at the regional and global levels.[4] In particular, the scarcity of water, water pollution, and mismanagement of water resources are the main issues threatening water security.[5] Scarcity results from a lack of availability of sufficient quantities of water.[6] An extreme level of water scarcity can lead to complete or partial non-availability of water. For instance, there are several regions, rural areas of the southern hemisphere in particular, that suffer from a partial or complete lack of available water.[7] Approximately 1.6 billion people at present are facing water scarcity and this number

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[1] ASHANTHA GOONETILLEKE ET AL., SUSTAINABLE URBAN WATER ENVIRONMENT: CLIMATE, POLLUTION AND ADAPTATION 1 (Edward Elgar Publishing 2014) [hereinafter GOONETILLEKE ET AL.]. *See also* Monika Korn, *Water Quality and Waterborne Infectious Diseases*, *in* ENCYCLOPEDIA OF PUBLIC HEALTH: VOLUME 1: A - H VOLUME 2: I - Z 1452 (Wilhelm Kirch ed., 2008) [hereinafter Korn].

[2] Christina Cook & Karen Bakker, *Water Security: Critical Analysis of Emerging Trends and Definitions*, *in* HANDBOOK ON WATER SECURITY 27 (Anik Bhadduri, Claudia Pahl-Wostl, & Joyeeta Gupta eds., 2016) [hereinafter Cook & Bakker].

[3] J.A. TEJADA-GUIBERT ET AL., SUSTAINABLE DEVELOPMENT AND INTEGRATED WATER RESOURCES MANAGEMENT 204 (Maria Concepcion Donoso & Shimelis Gebriye Setegn et al., 2015). *See also* RICHARD CONNOR, THE UNITED NATIONS WORLD WATER DEVELOPMENT REPORT 2015: WATER FOR A SUSTAINABLE WORLD 8 (UNESCO Publishing 2015) [hereinafter CONNOR]; Zafar Adeel, *Water Security as the Centerpiece of the Sustainable Development Agenda*, *in* THE HUMAN FACE OF WATER SECURITY 26 (David Devlaeminck, Zafar Adeel, Robert Sandford eds., 2017).

[4] For details, *see* J.A.A. Jones, *Threats to Global Water Security: Population Growth, Terrorism, Climate Change, or Commercialization*, *in* THREATS TO GLOBAL WATER SECURITY 3 (Christina Hakopian, J. Anthony Jones, & Trahel Vardanian eds., 2009) [hereinafter Jones].

[5] Madan K. Jha, *Sustainable Management of Groundwater Resources in Developing Countries: Constraints and Challenges*, *in* ON A SUSTAINABLE FUTURE OF THE EARTH'S NATURAL RESOURCES 330 (Mu Ramkumar ed., 2013).

[6] OECD, WATER RESOURCES ALLOCATION: SHARING RISKS AND OPPORTUNITIES 20 (IWA Publishing 2015).

[7] For instance, *see* Prakash C. Tiwari & Bhagwati Joshi, *Rainfall Variability and its Impacts on Water Resources and Rural Health in Kumaon Himalaya, India*, *in* IMPACT OF CLIMATE CHANGE ON WATER AND HEALTH 297 (Velma I. Grover ed., 2012). *See also* E. NEVILLE ISDELL & ERIK ROSWELL PETERSON, DECLARATION ON U.S. POLICY AND THE GLOBAL CHALLENGE OF WATER: A REPORT OF THE CSIS GLOBAL WATER FUTURES PROJECT 3 (CSIS 2009) [hereinafter ISDELL & PETERSON]; SHOURASENI SEN ROY, LINKING GENDER TO CLIMATE CHANGE IMPACTS IN THE GLOBAL SOUTH 79 (Springer 2018) [hereinafter ROY].

is expected to reach at least 2.8 billion people by 2025.[8] Pertinently, a significant number of people also have no access to good-quality water, as the water available to them is either contaminated or unhygienic.[9]

Owing to the grave nature of the issues related to water security, the international community has given particular attention to it by holding a number of conferences, declarations, and summits. The Johannesburg Declaration, Agenda 21, and the Dublin Statement are some of the prominent international declarations endorsing sustainable water security.[10] Moreover, international water law has provided a number of rules and principles for ensuring water security.[11] In particular, the Berlin Rules, the United Nations Economic Commission for Europe (UNECE) Convention, and the United Nations Watercourses Convention (UNWC) have provided numerous rules regarding water utilization and management.[12] These rules, and the international declarations in particular, recognize sustainable development, integrated water management, elimination of water pollution, and establishment of cooperation among the riparian states as key to ensuring adequate water security around the world.[13] These rules and recommendations will be discussed briefly in this paper.

The first section of this paper entails the explanations of the term "water security." The second section of this paper explains the issues related to water security. The third section includes an elaboration of international water law's principles and rules governing the distribution, utilization, and management of water resources. A brief description of the human right to water provided by human rights law is also explained in this section. The fourth section includes an explanation of the key principles and goals set by the United Nations Development Programme (UNDP) in its agenda of Sustainable Development Goals (SDGs). This section also entails the important recommendations and principles provided by the international declarations and summits for ensuring global water security. In the concluding section of this paper, a summary of the recommendations for ensuring water security are briefly provided.

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[8] *See* ROY, *supra* note 7; s*ee also* ISDELL & PETERSON, *supra* note 7.

[9] *See* Korn, *supra* note 1, at 1453.

[10] For instance, *see* JEROME DELLI PRISCOLI & AARON T. WOLF, MANAGING AND TRANSFORMING WATER CONFLICTS 53 (Cambridge University Press 2010) [hereinafter PRISCOLI & WOLF]; *see also* INES DOMBROWSKY, CONFLICT, COOPERATION AND INSTITUTIONS IN INTERNATIONAL WATER MANAGEMENT: AN ECONOMIC ANALYSIS 11 (Edward Elgar Publishing 2007).

[11] Patricia Wouters & Dinara Ziganshina, *Tackling the Global Water Crises: Unlocking International Law as Fundamental to the Peaceful Management of the World's Shared Transboundary Waters – Introducing the H2O Paradigm*, *in* WATER RESOURCES PLANNING AND MANAGEMENT 179 (Karen Hussey & R. Quentin Grafton eds., 2011); *see also* BJØRN-OLIVER MAGSIG, INTERNATIONAL WATER LAW AND THE QUEST FOR COMMON SECURITY 46 (Routledge 2015).

[12] For details, see the texts of the Berlin Rules 2004, the 1992 UNECE Convention, and the 1997 UN Watercourses Convention. For instance, *also see* FELIX DODDS & TIM PIPPARD, HUMAN AND ENVIRONMENTAL SECURITY: AN AGENDA FOR CHANGE 174 (Earthscan 2013) [hereinafter DODDS & PIPPARD].

[13] *Id. See also* PRISCOLI & WOLF, *supra* note 10.

I. WHAT DOES "WATER SECURITY" MEAN?

The term "water security" has emerged as an important subject in the contemporary legal and public policy discourses.[14] To understand the discourse related to water security, we first need to understand the actual meaning of the term "water security." Different scholars have presented multifarious definitions of the term "water security."[15] Nonetheless, most scholars agree with the definition that explains water security as the guarantee to access adequate amounts of good-quality water as required for drinking, food, health care, sanitation, and other domestic purposes.[16] All these amenities are considered fundamental to living a healthy life.[17] Hence, water security is directly related to improving the quality of healthy life, as it ensures that every individual in a household has access to safe water in sufficient quantity required to live a productive and healthy life.[18]

The literature has pointed out that water security also implies access to clean water at an affordable cost.[19] "Affordability" is an essential element of water security.[20] Similarly, secure access to water is also another feature of water security, which demands that everyone should have adequate freedom and state of security to access water.[21] On the other hand, the literature also notes that water security also entails complete security from all kinds of water-related diseases.[22] Thus, the affordability, safety, and quality[23] of water, here, become essential elements in determining the guarantee to "water security."

It is pertinent to mention here that water security also implies sustainability and the protection of natural ecosystems from water-related hazards.[24] That is, the availability of the water must be acceptable and adequate in quantity so that, on the one hand, it should be enough to fulfill the basic necessities of life and, on the other hand, it should not be in such excess that it would result in damage to the natural

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[14] *See* Chad Staddon & Nick James, *Water Security: A Geology of Emerging Discourses*, *in* GLOBALIZED WATER: A QUESTION OF GOVERNANCE 261 (Graciela Schneier-Madanes ed., 2014).

[15] *See* Cook & Bakker, *supra* note 2, at 23–24.

[16] *Id.* at 27.

[17] GEORGE J. ANNAS, AMERICAN BIOETHICS: CROSSING HUMAN RIGHTS AND HEALTH LAW BOUNDARIES 219 (Oxford University Press 2009).

[18] *Id. See also* Maya Sabatello, *Human Rights and Global Health: Past, Present, and Future*, *in* LAW AND GLOBAL HEALTH: CURRENT LEGAL ISSUES 247 (Belinda Bennett, Michael Freeman, & Sarah Hawkes eds., 2014).

[19] For instance, *see* Ursula Oswald Spring & Hans Günter Brauch, *Securitizing Water*, *in* FACING GLOBAL ENVIRONMENTAL CHANGE: ENVIRONMENTAL, HUMAN, ENERGY, FOOD, HEALTH AND WATER SECURITY CONCEPTS 194 (Hans Günter Brauch et al., eds., 2009). *See also* Janos Bogardi, Ursula Oswald Spring, & Hans Günter Brauch, *Water Security: Past, Present, and Future of a Controversial Aspect*, *in* HANDBOOK ON WATER SECURITY 50 (Claudia Pahl-Wostl, Anik Bhadduri, & Joyeeta Gupta eds., 2016).

[20] Krasposy Kuijinga et al., *Household Water Insecurity in Different Settlement Categories of Ngamiland, Bostwana*, *in* WATER, ENERGY, FOOD AND PEOPLE ACROSS THE GLOBAL SOUTH: "THE NEXUS" IN AN ERA OF CLIMATE CHANGE 210 (Larry A. Swatuk & Corrine Cash 2017).

[21] *See* DODDS & PIPPARD, *supra* note 12, at 168.

[22] For instance, *see* Patricia Wouters, Sergei Vinogradov, & Bjørn-Oliver Magsig, *Water Security, Hydrosolidarity, and International Law: A River Runs Through It …*, *in* YEARBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 105 (David Hunter & Wang XI eds., 2009) [hereinafter Wouters et al.].

[23] For details, *see* PHILIP JAN SCHÄFER, HUMAN AND WATER SECURITY IN ISRAEL AND JORDAN 21 (Springer 2012).

[24] Umma Habiba et al., *Defining Water Security*, *in* WATER INSECURITY: A SOCIAL DILEMMA 5 (M. A. Abedin, Umma Habiba, and Rajib Shaw eds., 2013) [hereinafter Habiba et al.].

ecosystem (i.e., in the form of floods etc.[25]) Hence, safety and protection from natural disasters related to the flow and quantity of water are also implied in water security.[26]

A. *Definition by UN-Water*

The definition offered by the United Nations for the term "water security" is perhaps the most comprehensive as it covers, largely, the contemporary discourses on water security.[27] UN-Water defines water security as:

> The capacity of a population to safeguard sustainable access to adequate quantities of acceptable quality water for sustaining livelihoods, human well-being, and socio-economic development, for ensuring protection against water-borne pollution and water-related disasters, and for preserving ecosystems in a climate of peace and political stability.[28]

This definition has also paved the way for present and future discussions on the need to ensure water security worldwide.[29] In particular, UN-Water has made successful efforts to take this definition to become an eminent part of the United Nations Security Council's global agenda.[30] Furthermore, this definition has also been included by the UNDP in its SDGs.[31]

B. *Difference between Water Security and Water Scarcity*

"Water security" is a term quite different from "water scarcity." Water security is the access to sufficient quantities of good-quality water that is available for the people for fulfilling their basic amenities of life.[32] Hence, water security necessitates both good quality and sufficient quantity to be available for all.[33]

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[25] *Id.*

[26] *Id.*

[27] M. Dinesh Kumar, P.K. Viswanathan, & Nitin Bassi, *Water Security and Pollution South Asia: Problems and Challenges*, *in* ROUTLEDGE HANDBOOK OF ENVIRONMENT AND SOCIETY IN ASIA 211 (Paul G. Harris & Graeme Lang eds., 2014).

[28] See the direct source at the official website of UN-Water at *Water Security and the Global Water Agenda*, UN-WATER (May 8, 2013), http://www.unwater.org/publications/water-security-global-water-agenda; *see also* some indirect sources such as: BJØRN-OLIVER MAGSIG, INTERNATIONAL WATER LAW AND THE QUEST FOR COMMON SECURITY 30 (Routledge 2015); CONNOR, supra note 3, at 8; Zafar Adeel, *Water Security as the Centerpiece of the Sustainable Development Agenda*, *in* THE HUMAN FACE OF WATER SECURITY 26 (David Devlaeminck, Zafar Adeel, & Robert Sandford eds., 2017); Jose et al., *Sustainable Development and Integrated Water Resources Management*, *in* SUSTAINABILITY OF INTEGRATED WATER RESOURCES MANAGEMENT: WATER GOVERNANCE, CLIMATE AND ECOHYDROLOGY 204 (Shimelis Gebriye Setegn & Maria Concepcion Donoso eds., 2015).

[29] *See What Is Water Security?* Infographic, UN-WATER (May 8, 2013), http://www.unwater.org/publications/water-security-infographic.

[30] *Id.*

[31] *Id.*

[32] *See* Cook & Bakker, *supra* note 2, at 27.

[33] *Id.*

On the other hand, water scarcity is the lack of availability of water in sufficient quantities.[34] Water scarcity also entails degradation in the quality of water, inability of the existing water resources to meet the demands of public, and conflicts between states or different sectors in accessing water.[35] Hence, water scarcity implies toward a scarce and limited quantity of available water.[36] Thus, it can be asserted that both terms – water scarcity and water security – are opposite to each other in their meanings and, therefore, must not be confused.

It is a particular requirement of the term "water security" that the individuals living in upstream regions as well as in the downstream regions should have equal access to water for their basic amenities of life.[37] No riparian state can deprive the another from accessing a mutually shared transboundary water resource on the basis of its geographical location.[38] Pertinently, if scarcity of water exists in shared transboundary river basins, then the scarcity of water in the basin should be managed by both riparian states through cooperation in order to ensure sufficient water security to the locals of the both states, because the individuals of each riparian have equal water security rights in accessing water.[39]

In essence, water security is the availability and access to sufficient quantity and good quality of water required for fulfilling the basic necessities of life such as drinking, food, and sanitation.[40] It is a quite different term from water scarcity and it also entails protection from all kinds of water-related hazards and relevant threats that can deprive a person from accessing a sufficient amount of water required for living a quality life.[41]

II. CHALLENGES RELATED TO WATER SECURITY

Although there are many challenges, issues, and threats over global water security, these challenges are primarily related to three main aspects: 1) availability of water, 2) affordable access to water, and 3) transboundary conflicts.[42]

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[34] Valentina Lazarova & Takashi Asano, *Milestones in Water Reuse: Main Challenges, Keys to Success and Trends of Development: An Overview*, *in* MILESTONES IN WATER REUSE 1 (Valentina Lazarova et al., 2013).

[35] *Id.*

[36] *Id.*

[37] This is in accordance with the equitable utilization principle, which has been accepted universally in international law, in particular in international water law. See an application of this principle in JOHN W. JOHNSON, UNITED STATES WATER LAW: AN INTRODUCTION 24 (CRC Press 2008) [hereinafter JOHNSON].

[38] ARIEL DINAR ET AL., BRIDGES OVER WATER: UNDERSTANDING TRANSBOUNDARY WATER CONFLICT, NEGOTIATION AND COOPERATION 148 (World Scientific Publishing Company 2007).

[39] *Id. See also* JOHNSON, *supra* note 37.

[40] *See* Cook & Bakker, *supra* note 2, at 27.

[41] *See* HABIBA ET AL., *supra* note 24, at 5.

[42] *See* Wouters et al., *supra* note 22, at 106.

A. *Availability of Water*

The availability of water in sufficient quantities is an essential precondition for ensuring water security.[43] In different parts of the world, particularly in Africa and South Asia, there is a lack of availability of clean water.[44] Thus, the people residing in these areas do not have adequate water security.[45] In this regard, there are different factors that cause the lack of availability of water. For instance, the presence of insufficient water resources, a lack of rainfall, or inadequate water management facilities are some of the major causes for the lack of availability of adequate water resources.[46]

1. Climate Change: A Potential Factor in Affecting Water Availability

Climate change is a significant factor that greatly affects water availability and, in turn, water security.[47] For example, it influences the extent and variability of rainfall, which affect the availability of water.

2. Changes in Rainfalls

Rainfall is one of the primary sources of water in the fresh watercourses in most of the regions in the world.[48] Many countries are vulnerable to changes in rainfall.[49] A significant reduction in rainfall can deprive the locals of the availability of water, leading in extreme situations to droughts, entailing the non-availability of water for significant periods of time.[50] For instance, in Baluchistan province in Pakistan, there are several regions where the people store rainwater in natural ponds and use that water for drinking and domestic purposes as well as for agricultural purposes.[51] The absence of rainfall, in some seasons, deprives them of the availability of water when their natural ponds are dried out owing to the absence of rainfall.[52]

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[43] *See* Cook & Bakker, *supra* note 2, at 27.

[44] *See* ROY, *supra* note 7; *see also* ISDELL & PETERSON, *supra* note 7.

[45] *See* ROY, *supra* note 7; *see also* ISDELL & PETERSON, *supra* note 7.

[46] For instance, *see* some issues causing water security in India as explained by SHARAD K. JAIN, PUSHPENDRA K. AGARWAL, & VIJAY P. SINGH, HYDROLOGY AND WATER RESOURCES OF INDIA 871 (Springer 2007).

[47] Paul J. Smith & Charles H. Gross, *Water and Conflict in Asia*, *in* GLOBAL ENVIRONMENTAL CHALLENGES OF THE TWENTY-FIRST CENTURY: RESOURCES, CONSUMPTION, AND SUSTAINABLE SOLUTIONS 92 (David E. Lorey ed., 2002).

[48] For instance, *see* Stefan Kuks, *The Sustainability Performance of National Resource Regimes*, *in* THE EVOLUTION OF NATIONAL WATER REGIMES IN EUROPE: TRANSITIONS IN WATER RIGHTS AND WATER POLICIES 42 (Stefan Kuks and Ingrid Kissling-Näf eds., 2004) [hereinafter Kuks]. *See also* M. Akram et al., *Rehabilitation of Degraded Dryland Rangelands through Scientific Management of Land, Water and Vegetation Resources and Grazing Systems in Lal Sohanra Biosphere Reserve*, *in* SUSTAINABLE MANAGEMENT OF MARGINAL DRYLANDS: NEW INSIGHTS ON MANAGING DRYLANDS 102 (UNESCO 2010) [hereinafter M. Akram et al.].

[49] *See* Kuks, *supra* note 48, at 42.

[50] *Id.*

[51] *See* M. Akram et al., *supra* note 48, at 102.

[52] *Id.*

Changes in rainfalls also affect the flow of water in rivers.[53] That is, a reduction in rainfall can lower the flow of water in rivers and dams.[54] For instance, let us take the example of Pakistan, where recently the Tarbela Dam, which is a major resource of water in the country, surprisingly hit the dead level during the 2018 monsoon rainy season owing to lack of rainfalls in the country.[55] Similarly, the Mangla Dam, which is also an important water storage facility in Pakistan, was also reported at the dead level in March 2018,[56] and also in June 2018,[57] and it was a scant 83.70 feet higher than its dead level during the monsoon season in July.[58] Hence, the water level in the largest dams, the Tarbela and Mangla, in Pakistan has declined significantly, nearing dead level in the monsoon season.[59] In addition to the dams, the water levels in rivers have also declined significantly,[60] as, for instance, the water level in the Jhelum River, one of the major rivers of Pakistan, has declined to a 42-year low owing to lack of rainfall.[61] The dead level of the major water storage facilities in Pakistan also indicates that rainfall has declined significantly in the country, even in the monsoon seasons,[62] despite the fact that, historically, monsoon seasons have invited severe rainfalls in the country.[63]

B. *Affordable Access to Clean Water*

To ensure adequate water security, it is essential that people have affordable access to a good quality of water.[64] However, a significant portion of the world

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[53] FULCO LUDWIG & PAVEL KABAT, CLIMATE CHANGE ADAPTATION IN THE WATER SECTOR 37 (Earthscan 2012).

[54] *Id.*

[55] For details, see the latest news about dead level of Tarbela at: Kalbe Ali, *Tarbela makes history hitting dead level in peak monsoon season*, DAWN (July 8, 2018), https://www.dawn.com/news/1418687 [hereinafter K. Ali].

[56] *See* Khaleeq Kiani, *Major crop losses feared as water shortages deepen*, DAWN (Mar. 23, 2018), https://www.dawn.com/news/1397003 [hereinafter Kiani].

[57] *See* the report: Sehrish Wasif, *IRSA sweats as water storage deplets in Mangla Dam*, DAWN (June 23, 2018), https://tribune.com.pk/story/1741034/1-irsa-sweats-water-storage-depletes-mangla-dam.

[58] *See* K. Ali, *supra* note 55.

[59] *Id.*

[60] For details, *see Water flows in rivers drop to historic low*, BUSINESS RECORDER (June 28, 2018), https://fp.brecorder.com/2018/06/20180628385385.

[61] *See* Kiani, *supra* note 56.

[62] *See* K. Ali, *supra* note 55.

[63] For details about rainfalls extent in Pakistan, *see* Amir Nawaz & Amjad Ali, *Implication of Floods – 2010 on Education Sector in Pakistan*, *in* DISASTER RECOVERY: USED OR MISUSED DEVELOPMENT OPPORTUNITY 119 (Rajib Shaw ed., 2013). *See also* M. A. Kahlown et al., *The World's Largest Contiguous Irrigration System: Development, Successes, and Challenges of the Indus Irrigation System in Pakistan*, *in* A HISTORY OF WATER: VOLUME I: WATER CONTROL AND RIVER BIOGRAPHIES 35 (Terje Tvedt, Eva Jakobsson, & Richard Coopey eds., 2006).

[64] *See* Krasposy et al., *Household Water Insecurity in Different Settlement Categories of Ngamiland, Botswana*, *in* WATER, ENERGY, FOOD AND PEOPLE ACROSS THE GLOBAL SOUTH: "THE NEXUS" IN AN ERA OF CLIMATE CHANGE 209 (Larry A. Swatuk & Corrine Cash eds., 2017). *See also* Christina Cook & Karen Bakker, *Water Security: Critical Analysis of Emerging Trends and Definitions*, *in* HANDBOOK ON WATER SECURITY 27 (Anik Bhadduri, Claudia Pahl-Wostl, & Joyeeta Gupta eds., 2016).

population does not have this facility.[65] In different parts of the world, for instance parts of Africa, South Asia, and South America, people have to walk for several miles to access water.[66] Unfortunately, the quality of water they access after walking several miles is mostly unclean and unhygienic for health, which causes the spread of diseases among them.[67] For instance, cholera, jaundice, diarrhea, typhoid, and hepatitis are some of the prominent diseases that are resulted by drinking unclean water.[68] Unhygienic sanitation facilities also cause diseases such as ascariasis, dracunculiasis, trachoma, diarrhea, and infectious diseases such as hookworm infection.[69]

C. *Transboundary Conflicts over Water*

Another issue related to water security is that the riparian states have conflicts over the allocation and distribution of mutually shared transboundary water resources.[70] There have been several examples in history as well as recently when the upper riparian state halted the flow of a transboundary water resource to the lower riparian state, claiming that its own right to use the shared water resource is higher than the other's.[71]

1. Contemporary Examples of Transboundary Water Conflicts

A relevant example of transboundary water dispute in the contemporary era is the conflict between India and Pakistan over the distribution of a mutually shared Indus River Basin.[72] This conflict started only one year after the emergence of these

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[65] CHAD STADDON, MANAGING EUROPE'S WATER RESOURCES: TWENTY-FIRST CENTURY CHALLENGES 20 (Routledge 2016). *See also* LEWIS D. SOLOMON, ALLEVIATING GLOBAL POVERTY 27 (Xlibris Corporation 2014).

[66] *See* STEPHEN FEINSTEIN, CONSERVING AND PROTECTING WATER: WHAT YOU CAN DO 7 (Enslow Publishing 2010) [hereinafter FEINSTEIN]. *See also* GARY S. MOORE, LIVING WITH THE EARTH, THIRD EDITION: CONCEPTS IN ENVIRONMENTAL HEALTH SCIENCE 367 (CRC Press 2007).

[67] For instance, *see* PAULOS MILKIAS, DEVELOPING THE GLOBAL SOUTH: A UNITED NATIONS PRESCRIPTION FOR THE THIRD MILLENNIUM 49 (Algora Publishing 2014). *See also* FREDRIK SEGERFELDT, WATER FOR SALE: HOW BUSINESS AND THE MARKET CAN RESOLVE THE WORLD'S WATER CRISIS 9 (n 2005).

[68] For details, *see* H. Ahmad & Sanjeev Sinha, *Cyclosporiasis: An Emerging Potential Threat for Water Contamination*, in WATER AND HEALTH 179 (Daniel Moran ed., 2013).

[69] For instance, *see* Ajit Kumar Lenka & Golak B. Patra, *Water and Sanitation and Public Health Issues in Delhi*, *in* MARGINALIZATION IN GLOBALIZING DELHI: ISSUES OF LAND, LIVELIHOODS AND HEALTH 414 (Sanghmitra S. Acharya et al., eds., 2016).

[70] Richard E. Just & Sinaia Netanyahu, *International Water Resource Conflicts: Experience and Potential*, *in* CONFLICT AND COOPERATION ON TRANS-BOUNDARY WATER RESOURCES 6 (Richard E. Just & Sinaia Netanyahu eds., 2012) [hereinafter Just & Netanyahu].

[71] For details about total number of transboundary riparian disputes, *see* Bruno Messerli et al., *Mountains of the World: Water Towers for the Twenty-First Century?*, *in* MANAGING WATER RESOURCES IN A TIME OF GLOBAL CHANGE: CONTRIBUTIONS FROM THE ROSENBERG INTERNATIONAL FORUM ON WATER POLICY 25 (Alberto Garrido & Ariel Dinar eds., 2009). *See also* some examples of transboundary water disputes: Fereidoun Ghassemi & Ian White, INTER-BASIN WATER TRANSFER: CASE STUDIES FROM AUSTRALIA, UNITED STATES, CANADA, CHINA AND INDIA 42 (Cambridge University Press 2017) [hereinafter Ghassemi & White].

[72] *See* Ghassemi & White, *supra* note 71, at 42.

countries on the world map.[73] In 1948, India halted the flow of the Indus Basin's tributaries to Pakistan, which directly threatened Pakistan's agricultural sector, which was entirely dependent on the water flow in the Indus Basin.[74] Ultimately, the World Bank became the mediator and put efforts into formulating a mutual agreement between India and Pakistan over the distribution of water resources in the Indus Basin.[75] That agreement was named the Indus Waters Treaty.[76] According to the Treaty, the Indus Basin comprises six rivers.[77] The Treaty allocated the three eastern rivers, the Ravi, Sutlej, and Beas Rivers, to India for its full usage, while the three western rivers, the Chenab, Jhelum, and Indus Rivers, were allocated to Pakistan for its full exploitation.[78] This Treaty promised to resolve the conflict between India and Pakistan over the utilization of Indus Basin's water and put the foundation of ensuring water security to both nations.[79]

Owing to the fact that India is an upper riparian state over Pakistan,[80] the western rivers either originate or flow through India and then reach Pakistani soil.[81] Therefore, India has an advantage in utilizing the waters of these rivers before they reach Pakistan.[82] Using this advantage, for the last two decades, India has been constructing numerous dams on the western rivers.[83] These dams are causing a significant decline in the flow of water in the western river basins, which are located in Pakistan.[84] Pertinently, the reduction in the flow of water is posing a serious threat to water security in Pakistan.[85] Despite recurrent complaints by Pakistan, India is persistently pursuing its projects of constructing water storage facilities over the western rivers.[86] For instance, India has recently completed the construction of the controversial Kishanganga Dam, which uses the water resources of Pakistan's Neelum and Jhelum Rivers.[87] The Kishanganga Dam has the potential to

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[73] *Id.*

[74] For details, *see* Shaista Tabassum, *The Role of CBMs in Resolving Non-Military Issues between India and Pakistan: A Case Study of the Indus Waters Treaty*, *in* THE CHALLENGE OF CONFIDENCE-BUILDING MEASURES IN SOUTH ASIA 389 (Moonis Ahmar ed., 2001).

[75] For details, *see* AHMED ABUKHATER, WATER AS A CATALYST FOR PEACE: TRANSBOUNDARY WATER MANAGEMENT AND CONFLICT RESOLUTION 48 (Routledge 2013) [hereinafter ABUKHATER]. *See also* L.N. DASH, WORLD BANK AND ECONOMIC DEVELOPMENT OF INDIA 295 (APH Publishing 2000).

[76] *See* Ghassemi & White, *supra* note 71, at 42.

[77] *Id.*

[78] *Id.*

[79] *See* ABUKHATER, *supra* note 75, at 48.

[80] F. Naz, *Water: A Cause of Power Politics in South Asia*, *in* WATER AND SOCIETY II 107 (C.A. Brebbia 2013) [hereinafter Naz].

[81] For instance, the Indus River originates in China and flows through India before reaching Pakistan, whereas the Chenab and Jhelum Rivers originate in India and then reach Pakistan. For details, *see* Joydeep Gupta & Zofeen T. Ebrahim, *Win some, lose some, Indus Waters Treaty continues*, THETHIRDPOLE.NET (Jan. 6, 2017), https://www.thethirdpole.net/en/2017/01/06/win-some-lose-some-indus-waters-treaty-continues.

[82] *See* Naz, *supra* note 80, at 107.

[83] As illustrated by: MATTHEW ZENTNER, DESIGN AND IMPACT OF WATER TREATIES: MANAGING CLIMATE CHANGE 140 (Springer 2011) [hereinafter ZENTNER].

[84] A.K. CHATURVEDI, WATER: A SOURCE FOR FUTURE CONFLICTS 164 (Vij Books India Pvt Ltd 2013) [hereinafter CHATURVEDI].

[85] SHEHZAD QAZI, STRATEGIC POSTURE REVIEW: PAKISTAN 2007 (World Politics Review 2013) [hereinafter QAZI].

[86] *See* CHATURVEDI, *supra* note 84, at 164.

[87] Sofia Idris, *Water Security in Pakistan*, *in* PROMOTING GLOBAL ENVIRONMENTAL SUSTAINABILITY AND COOPERATION 59 (Sofia Idris ed., 2018).

substantially lower the amount of water in the Neelum River in Azad Kashmir.[88] Moreover, it can also significantly affect the water quantity in the Jhelum River.[89] Hence, this dam has further contributed to the threats that were already looming over water security in Pakistan.[90]

Transboundary water security issues have also been observed in other parts of the world.[91] For instance, China and its lower riparian countries have had issues over the distribution of the Mekong River water.[92] The Mekong River originates in China and then reaches Myanmar, Vietnam, Thailand, Laos, and Cambodia.[93] Nonetheless, these countries have successfully resolved the water distribution issues of the Mekong River through a mutual agreement, which has strengthened water security in the Mekong River Basin for all the riparian states.[94] The Agreement on Cooperation for Sustainable Development of the Mekong River was signed by four countries, Thailand, Vietnam, Cambodia, and Laos, in 1995.[95] In 2002, China finally signed the Information Sharing Agreement with the Mekong River Committee of the aforementioned four countries.[96]

In essence, transboundary conflicts may tend to harm the water security in a region, but the agreements to resolve such conflicts pave the way for ensuring water security.[97] These agreements are included in the arena of international water law because they regulate the actions of the riparian states in resolving water distribution issues in a legally apt manner.[98] Nonetheless, it is recommended that some international body should monitor the right implementation of such agreements in order to ensure water security to the parties of the agreements.

Worldwide, freshwater resources are not entirely nonexistent, but are limited in nature. The main issues relate to accessing, efficiently managing, and equitably utilizing the freshwater resources.[99] Therefore, it is essential that the aforementioned

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[88] Estimates suggest that Kishanganga could cause a 61 percent decline in the flow of water in the Neelum River. For details, *see* Naz, *supra* note 80, at 105.

[89] *Id.*

[90] *See* ZENTNER, *supra* note 83.

[91] For instance, see some examples at Ghassemi & White, *supra* note 71, at 42.

[92] For instance, *see* Guo Yanjun, *Multi-Governance of the Greater Mekong River's Water Resources Security and China's Policy Choice*, *in* PARTICIPATION AND INTERACTION: THE THEORY AND PRACTICE OF CHINA'S DIPLOMACY 271 (Chen Zhirui & Zhao Jinjun eds., 2012).

[93] JOAKIM ÖJENDAL, STINA HANSSON, & SOFIE HELLBERG, POLITICS AND DEVELOPMENT IN A TRANSBOUNDARY WATERSHED: THE CASE OF THE LOWER MEKONG BASIN 10 (Springer 2011). *See also* LAWRENCE E. SUSSKIND & SHAFIQUL ISLAM, WATER DIPLOMACY: A NEGOTIATED APPROACH TO MANAGING COMPLEX WATER NETWORKS 5 (Routledge 2012).

[94] VASUDHA PANGARE ET AL., GLOBAL PERSPECTIVES ON INTEGRATED WATER RESOURCES MANAGEMENT 68 (Academic Foundation 2006).

[95] Ashok Swain, *Politics or Development: Sharing of International Rivers in the South*, *in* POLITICS AND DEVELOPMENT IN A TRANSBOUNDARY WATERSHED: THE CASE OF THE LOWER MEKONG BASIN 26 (Joakim Öjendal, Stina Hansson, & Sofie Hellberg eds., 2011).

[96] PHILIPPE SANDS, JACQUELINE PEEL, & RUTH MCKENZIE, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 337 (Cambridge University Press 2012).

[97] *See* DODDS & PIPPARD, *supra* note 12, at 174.

[98] *Id.*

[99] Efficient management of freshwater resources can ensure availability of water for all, while the resolution of transboundary conflicts through cooperation among the riparian states can lead to the equitable utilization of the shared transboundary water resources among riparian states, which would ultimately establish water security. For instance, see some relevant recommendations in J.J. Bogardi & A. Szollosi-Nagi, *Towards the Water Policies for the 21st Century: A Review after the World Summit on Sustainable Development in Johannesburg*, *in* CHALLENGES OF THE NEW WATER POLICIES FOR THE XXI

issues related to the availability of water, the affordable access to good quality of water, and transboundary conflicts among riparian states should be dealt with and managed in an appropriate and efficient manner to ensure water security to the maximum number of people. In this regard, water management works, for instance integrated water management schemes, can be helpful in ensuring water security to the people who are facing any of the aforementioned three issues related to water security.[100]

III. THE RELEVANCE AND ROLE OF INTERNATIONAL LAW IN WATER SECURITY DISCOURSE

International law has provided some valuable guidelines, rules, and principles in the discourse of water security.[101] In particular, international water law has been a source of laws and principles for states for dealing with issues pertaining to water distribution, transboundary water conflicts, equitable water utilization, and other matters related to water security.[102] Moreover, human rights law has also come into action and has provided some fundamental rules through the International Covenant on Civil and Political Rights (ICCPR) that demand adequate water security for life sustenance of every human being.[103] The principles set out by international water law and by human rights law are elucidated below in sections that discuss the matters related to water security from different legal perspectives.

A. *International Water Law*

International water law is a branch of international law that addresses transboundary and all other issues related to the equitable utilization, management, and safety of freshwater resources including rivers, lakes, transboundary shared water resources, groundwater, etc.[104] International water law comprises the principles stated in the UNWC, the 1992 UNECE Convention, and the Berlin Rules on Water Resources.[105]

CENTURY: PROCEEDINGS OF THE SEMINAR ON CHALLENGES OF THE NEW WATER POLICIES FOR THE 21ST CENTURY, VALENCIA, OCTOBER 29–31, 2002, 36–37 (Enrique Cabrera & Ricardo Cobacho eds., 2004).

[100] *Id.*

[101] Tadesse Kassa Woldetsadik, *Remodelling Sovereignty: Overtures of a New Water Security Paradigm in the Nile Basin Legal Discourse*, *in* A HISTORY OF WATER: SOVEREIGNTY AND INTERNATIONAL WATER LAW 645 (Terje Tvedt, Owen McIntyre, & Tadessa Kasse Woldesadik eds., 2015).

[102] For details, *see* ARIEL DINAR ET AL., BRIDGES OVER WATER: UNDERSTANDING TRANSBOUNDARY WATER CONFLICT, NEGOTIATION AND COOPERATION 36 (World Scientific Publishing Company 2013) [hereinafter DINAR ET AL.].

[103] For instance, *see* Owen McIntyre, *Water, Law, and Equity*, *in* THE HUMAN FACE OF WATER SECURITY 48 (David Devlaeminck, Zafar Adeel, & Robert Sandford eds., 2017).

[104] For details, *see Chapter 2: The Development of International Law*, *in* UZWATER – WATER SHARING, WATER LAW, AND WATER DIPLOMACY 68 (Gunilla Bjorklund ed., 2013), http://www2.balticuniv.uu.se/bup-3/index.php/public/textbooks-course-materials/course-materials/uzwater/module-c-sustainable-water-management/549-water-sharing-water-law-and-water-diplomacy/file?download=1.

[105] ANTOINETTE HILDERING, INTERNATIONAL LAW, SUSTAINABLE DEVELOPMENT AND WATER MANAGEMENT 47 (Eburon Uitgeverij B.V., 2004) [hereinafter HILDERING].

1. History

Until the 1950s, there were inadequate rules pertaining to governing states regarding the distribution of transboundary shared water resources.[106] The first move to regulate the distribution of fresh watercourses at the international level was made by the International Law Association (ILA) by the adoption of the Helsinki Rules in 1966.[107] These rules laid down the foundation for international water law.[108] Eventually, with the passage of time, in accordance with contemporary demands and owing to the emerging complexities of the issues of water distribution among the states, the Helsinki Rules were replaced by a more advanced and thorough set of rules, the Berlin Rules, which were adopted in 2004.[109]

Following the Helsinki Rules and prior to the Berlin Rules, through the efforts of the International Law Commission (ILC) of the United Nations in collaboration with the Sixth Legal Committee of the General Assembly, the Convention on the Law of Non-Navigational Uses of International Watercourses[110] was adopted by the UN General Assembly's resolution on May 21, 1997.[111] It is pertinent to mention here that the negotiations to adopt the Convention on the Law of Non-Navigational Uses of International Watercourses started in 1967 and remained until 1997, when the final draft of the Convention was adopted by the ILC of the United Nations.[112]

2. Role of International Water Law

International water law has played an active and vigilant role in global efforts of ensuring water security. For instance, it has resulted in resolving several international transboundary water conflicts among riparian states.[113] There are around 250 major fresh watercourses that are shared between two or more international states.[114] Thus, international water law became active whenever competing riparian states waged competing moves over each other in their attempts to seize the higher share of their shared water resources.[115] Water law guided such states to resolve matters through

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[106] Patricia Wouters & Alistair Rieu-Clarke, *The Role of International Water Law in Ensuring "Good Water Governance": A Call for Renewed Focus and Action*, 15 WATER L. 89, 89–92 (2004) [hereinafter Wouters & Rieu-Clarke].

[107] *Id.*

[108] *Id. See also* Jens Teffner et al., *A-Z Glossary – International Water Law*, *in* THE POLITICS OF WATER: A SURVEY 264 (Kai Wegerich & Jeroen Warner eds., 2010) [hereinafter Teffner et al.].

[109] *See* Helmut Turk, *Water in the Contemporary World*, *in* COEXISTENCE, COOPERATION AND SOLIDARITY (2 VOLS.): LIBER AMICORUM RÜDIGER WOLFRUM 1047 (Holger P. Hestermeyer et al., eds., 2012).

[110] The Convention on the Law of Non-Navigational Uses of International Watercourses is also called the UN Watercourses Convention.

[111] *See* Wouters & Rieu-Clarke, *supra* note 106, at 90.

[112] *Id.*

[113] For instance, several transboundary water conflicts have been resolved through either mutual agreements or through the implementation of principles provided by the international water law. For details, *see* Ghassemi & White, *supra* note 71, at 42.

[114] *See* Wouters & Rieu-Clarke, *supra* note 106, at 90.

[115] *Id.*

either mutual agreements or by following the rules set forth in its Berlin Rules, the UNWC or the 1992 UNECE Convention.[116]

a) The UN Watercourses Convention

The UNWC imposes a general duty to cooperate on states that share a transboundary watercourse.[117] This duty is articulated in the text of Article 5 of the UNWC:

> Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present convention.[118]

This highlights that the protection and development of the watercourses is essential for a river basin, but these activities can only be pursued in a transboundary river basin if cooperation among riparian states is established.[119] There are several examples in history and in the contemporary era of the establishment of cooperation among riparian states.[120] For instance, the Indus Waters Treaty, between India and Pakistan; the Agreement on Cooperation in the Management, Utilization and Protection of Interstate Water Resources, among the Central Asian Republics; the International Boundary Waters Treaty, signed by the USA, Canada and Mexico; and the Agreement on Cooperation for Sustainable Development of the Mekong River are some of the prominent examples in which riparian states established mutual cooperation through signing bilateral or multilateral agreements that resulted in strengthening water security for their people.[121]

Here, the UNWC also directs cooperating riparian states to share data and exchange information about the quality and relevant aspects of the shared watercourses so that any mutual steps can be taken in the event of a decline in the quality or quantity of water or in case of other menaces such as pollution that may appear in the watercourse.[122] Article 9 of the Convention advises states that:

> Pursuant to Article 8, watercourse states shall on a regular basis exchange readily available data and information on the condition of the watercourse, in particular that of a hydrological, meteorological, hydrogeological and ecological nature and related to the water quality as well as related forecasts.[123]

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[116] *See* HILDERING, *supra* note 105, at 47–48.

[117] For details, *see* Christina Leb, *The Significance of the Duty to Cooperate for Transboundary Water Resource Management under International Water Law*, *in* ROUTLEDGE HANDBOOK OF WATER LAW AND POLICY 252 (Alistair Rieu-Clarke, Andrew Allan, & Sarah Hendry eds., 2017) [hereinafter Leb].

[118] For details, *see* UN Watercourses Convention art. 5, May 21, 1997.

[119] *Id.*

[120] For instance, *see* Ghassemi & White, *supra* note 71, at 42.

[121] For more details, *see* Waseem Ahmad Qureshi, *The Indus Basin: Water Cooperation, International Law and The Indus Waters Treaty*, 26 MICH. ST. INT'L L. REV. 43 (2017).

[122] *See* Leb, *supra* note 117, at 252.

[123] For details, *see* UN Watercourses Convention art. 9, May 21, 1997.

The timely exchange of information can ascertain more security related to the shared watercourses to the riparian states.[124] Article 11 of the UNWC also recommends that riparian states share information on any of their planned measures regarding the utilization of the shared watercourse.[125] Similarly, Article 12 recommends that riparian states notify each other if any of their planned measures on the shared watercourse could cause any kind of harm to the other riparian state.[126] Such notification would allow the states to evaluate the impacts of the planned measures on the shared watercourses and, consequently, they would be able to make arrangements in order to avoid any harm to their national water security.[127] Hence, the UNWC instructs the cooperating riparian states to cause no harm to each other in their ventures of utilizing the shared watercourse.[128] The text of Article 7 applies the no-harm rule to the riparian states: "Watercourse states shall, in utilising an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse states."[129]

The riparian states sharing a common transboundary watercourse have been prevented by the UNWC from causing significant harm to each other because a significant harm by one riparian state can threaten the water security of another.[130] For instance, the construction of large water storage dams by India on the Pakistani western rivers is resulting in a substantial drop to the water flow in Pakistani rivers,[131] which is ultimately posing significant threats to Pakistan's water security.[132] In particular, India's recently constructed Kishanganga Dam on the Jhelum River has the capacity to cause significant harm to Pakistan.[133]

The UNWC also recommends that riparian states perform joint collaborative measures to prevent or mitigate the potential threats or harms to the watercourses posed by a forecasted or actual natural disaster.[134] Article 27 of the UNWC recommends that:

> Watercourse states shall, individually and, where appropriate, jointly, take all appropriate measures to prevent or mitigate conditions related to an international watercourse that may be harmful to other watercourse states, whether resulting from natural causes or human conduct, such as flood or ice conditions, water-

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[124] *See* Leb, *supra* note 117, at 252.

[125] For more details, *see* UN Watercourses Convention art. 11, May 21, 1997.

[126] For details, *see* the text of UN Watercourses Convention art. 12, May 21, 1997.

[127] *Id.*

[128] *See* UN Watercourses Convention art. 7, May 21, 1997. For more details about the obligation not to cause significant harm, *see* Muhammad Mizanur Rahaman, *Principles of Transboundary Water Resources Management and Water-Related Agreements in Central Asia: An Analysis*, *in* WATER AND SECURITY IN CENTRAL ASIA: SOLVING A RUBIK'S CUBE 84 (Virpi Stucki et al., eds., 2014) [hereinafter Rahaman].

[129] For more details, *see* the complete text of UN Watercourses Convention art. 7, May 21, 1997.

[130] *See* Rahaman, *supra* note 128, at 84.

[131] *See* CHATURVEDI, *supra* note 84, at 164.

[132] *See* QAZI, *supra* note 85, at 2007. *See also* ZENTNER, *supra* note 83, at 133.

[133] *See* ZENTNER, *supra* note 83. *See also* Naz, *supra* note 80, at 105.

[134] ALISTAIR RIEU-CLARKE & RUBY MOYNIHAN, TRANSBOUNDARY WATER GOVERNANCE AND CLIMATE CHANGE ADAPTATION: INTERNATIONAL LAW, POLICY GUIDELINES AND BEST PRACTICE APPLICATION 42 (UNESCO Publishing 2015) [hereinafter RIEU-CLARKE & MOYNIHAN].

> borne diseases, siltation, erosion, salt-water intrusion, drought or desertification.[135]

The implementation of the aforementioned recommendations provided in Article 27 can reduce the intensity of damage caused to the watercourses by a particular natural disaster.[136]

In light of the above discussion of particular principles of the UNWC, it can be asserted that the UNWC has provided adequate guidance to riparian states for utilizing, protecting, and managing a transboundary watercourse.[137] The UNWC recommends mutual cooperation among riparian states to take place in such an efficient manner that may result in ensuring an increased level of water security to the local inhabitants who are dependent on the transboundary watercourses for the fulfillment of their basic life necessities.[138] Nonetheless, an equitable utilization of the shared watercourses is the central principle of the UNWC,[139] as recommended in the first paragraph of Article 5 of the Convention:[140] "Watercourse states shall in their respective territories utilise an international watercourse in an equitable and reasonable manner."[141]

An equitable distribution and utilization of a shared watercourse would ensure that no riparian state is deprived of accessing its due share of water in that particular watercourse.[142] When both states utilize water in an equitable manner, both will get adequate water necessary to ensure water security for their people.[143] Owing to such provisions, the UNWC has central importance in international water law.[144]

b) 1992 UNECE Water Convention

The 1992 UNECE Convention, also known as "The Convention on the Protection and Use of Transboundary Watercourses and International Lakes," was adopted in 1992 by the Economic Commission for Europe (ECE) of the United Nations.[145] This convention recommends cooperation among riparian states for utilizing transboundary watercourses in a sustainable manner[146] because the

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[135] For more details, *see* UN Watercourses Convention art. 27, May 21, 1997.

[136] *Id. See also* RIEU-CLARKE & MOYNIHAN, *supra* note 134.

[137] For details, *see* DODDS & PIPPARD, *supra* note 12, at 174.

[138] *Id.*

[139] DINARA ZIGANSHINA, PROMOTING TRANSBOUNDARY WATER SECURITY IN THE ARAL SEA BASIN THROUGH INTERNATIONAL LAW 92 (Martinus Nijhoff Publishers 2014) [hereinafter ZIGANSHINA].

[140] *See* UN Watercourses Convention art. 5, May 21, 1997.

[141] *Id.*

[142] *See* ZIGANSHINA, *supra* note 139, at 92.

[143] *Id.*

[144] *See* Irina Zodrow, *International Aspects of Water Law Reforms*, *in* WATER LAW FOR THE TWENTY-FIRST CENTURY: NATIONAL AND INTERNATIONAL ASPECTS OF WATER LAW REFORM IN INDIA 39 (Philippe Cullet et al., 2010).

[145] *See* Iulia Trombitcaia & Sonja Koeppel, *From a Regional towards a Global Instrument – The 2003 Amendment to the UNECE Water Convention*, *in* THE UNECE CONVENTION ON THE PROTECTION AND USE OF TRANSBOUNDARY WATERCOURSES AND INTERNATIONAL LAKES: ITS CONTRIBUTION TO INTERNATIONAL WATER COOPERATION 15 (Attila Tanzi et al., 2015).

[146] *See* CHRISTINA LEB, COOPERATION IN THE LAW OF TRANSBOUNDARY WATER RESOURCES 64 (Cambridge University Press 2013) [hereinafter C. LEB]. *See also* JACQUES GANOULIS & JEAN FRIED,

sustainable utilization of watercourses carried out through cooperative ventures can ensure an enhanced level of water security to riparian states.[147]

The UNECE Convention particularly recommends riparian states to come to multilateral or bilateral agreements with their neighboring riparian states.[148] Such agreements pave the way for the resolution of conflicts that may exist among riparian states over the distribution and utilization of shared transboundary watercourses.[149] In this regard, the UNECE Convention also makes it obligatory for riparian states to establish mutually coordinated joint bodies, committees, or commissions that could facilitate exchange of information about the flow, quality, and quantity of water in the transboundary river basins.[150] Such measures would automatically facilitate cooperation among the riparian states for the equitable utilization and joint management of their shared watercourses.[151]

The UNECE Convention also applies an obligation on states to cause no significant harm to the other riparian states in utilizing a shared transboundary water resource.[152] The prevention of transboundary impacts is by necessity made obligatory on riparian states. That is, the projects or water management operations of a state must not cause any harm to the other riparian state in any terms.[153] Furthermore, it is also dictated in the UNECE Convention that the water management and utilization activities of all riparian states must be "ecologically sound."[154]

The aforementioned rules provided in the UNECE Convention are necessary to be followed by the parties of the UNECE Convention.[155] In essence, the implementation of the UNECE Convention's rules and recommendations, in particular the obligation to cause no significant harm and engage in equitable utilization and management of the river basins can ensure an improved level of water security to the residents of the riparian states.

TRANSBOUNDARY HYDRO-GOVERNANCE: FROM CONFLICT TO SHARED MANAGEMENT 146 (Springer 2018).

[147] Anatole Boute, *The Water-Energy-Climate Nexus Under International Law: A Central Asian Perspective*, 5 MICH. J. ENVTL. & ADMIN. L. 371, 408 (2016) [hereinafter Boute].

[148] *See* UNITED NATIONS AND UNECE, RIVER BASIN COMMISSIONS AND OTHER INSTITUTIONS FOR TRANSBOUNDARY WATER COOPERATION: CAPACITY FOR WATER COOPERATION IN EASTERN EUROPE, CAUCASUS AND CENTRAL ASIA 8 (United Nations Publications 2009).

[149] For instance, *see* Ghassemi & White, *supra* note 71, at 42.

[150] Article 9 of the UNECE Convention makes it an obligation for the riparian states to establish joint bodies. For details, *see* the text of UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes art. 9, Mar. 17, 1992. *See also* C. LEB, *supra* note 146, at 133.

[151] Edith Hodl, *Legislative Framework for River Ecosystem Management on International and European Level*, *in* RIVERINE ECOSYSTEM MANAGEMENT: SCIENCE FOR GOVERNING TOWARDS A SUSTAINABLE FUTURE 329 (Stefan Schmutz and Jan Sendzimir eds., 2018) [hereinafter Hodl].

[152] For details, *see id.*, at 329.

[153] *Id.*

[154] For details, *see* Boute, *supra* note 147, at 409.

[155] *See* Hodl, *supra* note 151, at 329.

c) Berlin Rules on Water Resources

The Berlin Rules were adopted in 2004 by the ILA.[156] These rules provide recommendations to the states for sustainably managing and using the fresh watercourses.[157] The Berlin Rules also define different endeavors pertaining to the utilization of fresh watercourses.[158] For instance, Article 3 of the Berlin Rules explains that the management of water resources includes endeavors such as "the development, use, protection, allocation, regulation, and control of waters."[159]

In addition, the Berlin Rules have also elaborated on the meaning of the "sustainable use" of water resources.[160] According to Article 3 of the Berlin Rules:

> Sustainable use means the integrated management of resources to ensure efficient use of and equitable access to water for the benefit of current and future generations while preserving renewable resources and maintaining nonrenewable resources to the maximum extent reasonably possible.[161]

Hence, the sustainable use of water resources entails integrated management of water resources achieved so as to guarantee equitable utilization and access to water for generations alongside ensuring the preservation and development of the limited freshwater resources.[162]

Regarding integrated water management, Article 6 of the Berlin Rules instructs states to take adequate measures "to integrate appropriately the management of waters with the management of other resources."[163] Similarly, Article 7 includes a direct recommendation to states in the following unequivocal words: "States shall take all appropriate measures to manage waters sustainably."[164]

For integrated management and sustainable utilization of the water resources, the Berlin Rules recommend that riparian states cooperate with each other.[165] Article 11 of the Berlin Rules provides this guideline: "Basin States shall cooperate in good

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[156] Lan Hua, *Environmental Impact Assessment in Preventing Transboundary River Pollution under International Law: An Analysis*, *in* TRANSBOUNDARY POLLUTION: EVOLVING ISSUES OF INTERNATIONAL LAW AND POLICY 123 (S. Jayakumar et al., eds., 2015). *See also* ZIGANSHINA, *supra* note 139, at 102.

[157] *See* OWEN MCINTYRE, ENVIRONMENTAL PROTECTION OF INTERNATIONAL WATERCOURSES UNDER INTERNATIONAL LAW 247 (Routledge 2016) [hereinafter MCINTYRE]. *See also* Olivia Odom Green & Charles Perrings, *Institutionalized Cooperation and Resilience in Transboundary Freshwater Allocation*, *in* SOCIAL-ECOLOGICAL RESILIENCE AND LAW 181 (Ahjond S. Garmestani & Craig R. Allen eds., 2014).

[158] *See* MCINTYRE, *supra* note 157, at 247. For more details, *see* Article 3 of the Berlin Rules 2004.

[159] *See* the text of Article 3(14), The Berlin Rules on Water Resources, ILA 2004.

[160] *See* Article 3(19), The Berlin Rules on Water Resources, ILA 2004.

[161] *See* the full text of Article 3(19), The Berlin Rules on Water Resources, ILA 2004.

[162] *Id.*

[163] For more details, *see* the text of Article 6, The Berlin Rules on Water Resources, ILA 2004.

[164] *See* the text of Article 7, The Berlin Rules on Water Resources, ILA 2004.

[165] For instance, the Berlin Rules recommend the establishment of joint water management committees for management of transboundary shared watercourses. According to Article 64 of the Berlin Rules, such joint arrangements would facilitate sustainable and equitable utilization of the shared water resources. For details, *see* Article 64, The Berlin Rules on Water Resources, ILA 2004. *See also* Itay Fischhendler et al., *The Role of Creative Language in Addressing Political Realities: Middle-Eastern Water Agreements*, *in* SHARED BORDERS, SHARED WATERS: ISRAELI-PALESTINIAN AND COLORADO RIVER BASIN WATER CHALLENGES 58 (Sharon B. Megdal ed., 2012).

faith in the management of waters of an international drainage basin for the mutual benefit of the participating States."[166]

Through mutual cooperation, states are able to implement the water management and water utilization endeavors in a more efficient and mutually symbiotic manner, which would ultimately guarantee water security to the residents of both riparian states.[167] However, in this regard, the Berlin Rules exclusively endorse the equitable utilization of water resources so that the residents of the upper and lower riparian states could enjoy identical level of water security.[168] Article 12 of the Berlin Rules gives guidance about the equitable utilization in these clear words: "Basin States shall in their respective territories manage the waters of an international drainage basin in an equitable and reasonable manner having due regard for the obligation not to cause significant harm to other basin states."[169]

Here, the Berlin Rules also impose a duty on states to cause no significant harm to each other during their endeavors of equitable utilization of shared transboundary water resources.[170] The Berlin Rules recommend that the water resources be distributed, allocated, and utilized equitably by all the riparian states in such a manner that can cause no harm to the other riparian states sharing a common transboundary water resource.[171] Pertinently, a detailed procedure to determine the equitable and reasonable use of water resources is also described in the text of Article 13 of the Berlin Rules, which includes the consideration and evaluation of the geographical, hydrological, hydrographical, hydrogeological, climactic, ecological, and all other relevant aspects.[172]

In an effort to further ensure water security, the text of the Berlin Rules particularly instructs the states to first allocate the water resources toward fulfillment of the basic amenities of life.[173] The Berlin Rules employ the term "vital human needs" as the representation of basic amenities of life,[174] and define them in the following words,

> "Vital human needs" means waters used for immediate human survival, including drinking, cooking, and sanitary needs, as well as water needed for the immediate sustenance of a household.[175]

All these vital human needs are to be met first.[176] Article 14 prominently directs this:

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[166] *See* the text of Article 11, The Berlin Rules on Water Resources, ILA 2004.

[167] *See* Article 64, The Berlin Rules on Water Resources, ILA 2004.

[168] *See* MCINTYRE, *supra* note 157, at 69. *See also* Owen McIntyre, *International Water Law: Concepts, Evolution, and Development*, *in* TRANSBOUNDARY WATER MANAGEMENT: PRINCIPLES AND PRACTICE 66 (Anton Earle ed., 2013).

[169] *See* Article 12, The Berlin Rules on Water Resources, ILA 2004.

[170] *See* HILDERING, *supra* note 105, at 44.

[171] *See* Article 12(1), The Berlin Rules on Water Resources, ILA 2004. *See also* Article 16, The Berlin Rules on Water Resources, ILA 2004.

[172] For details, *see* Article 13, The Berlin Rules on Water Resources, ILA 2004.

[173] *See* MCINTYRE, *supra* note 157, at 164. For more details and direct reference, *see* Article 14, The Berlin Rules on Water Resources, ILA 2004. *See also* TAKELE SOBOKA BULTO, THE EXTRATERRITORIAL APPLICATION OF THE HUMAN RIGHT TO WATER IN AFRICA 204 (Cambridge University Press 2014) [hereinafter BULTO].

[174] *See* Article 3(20), The Berlin Rules on Water Resources, ILA 2004. *See also* MCINTYRE, *supra* note 157, at 164.

[175] *See* Article 3(20), The Berlin Rules on Water Resources, ILA 2004.

[176] *See* MCINTYRE, *supra* note 157, at 164. *See also* BULTO, *supra* note 173, at 204.

> In determining an equitable and reasonable use, States shall first allocate waters to satisfy vital human needs.[177]

It is pertinent to mention here that the Berlin Rules also define "the right to access water" in Article 17 in the following words:

> Every individual has a right of access to sufficient, safe, acceptable, physically accessible, and affordable water to meet that individual's vital human needs.[178]

In addition, the text of Article 17 directs the states to implement the right to access water by performing all necessary measures that are required to provide every individual with adequate access to water without any bias.[179] Article 17 also recommends that states monitor and thoroughly evaluate the implementation of the right of access to water in a transparent manner.[180] For this purpose, the Berlin Rules endorse the participation of public communities and the education of the public for spreading awareness about the right of access to water, to ensure that this right is understood as well as taken advantage of by every individual.[181]

The Berlin Rules also provide recommendations for protecting aquatic resources.[182] Chapter V of the Berlin Rules includes several principles that recommend that states as well as individuals ensure the protection of the watercourses during their endeavors of utilizing and managing the watercourses.[183] For instance, a primary recommendation is that states take adequate measures to eliminate the spread of pollution in the watercourses.[184] In this regard, the most important principle provided in the Berlin Rules for ascertaining water security is mentioned in Article 28, which directs states to establish water quality standards suitable for human health.[185] It recommends that states provide good-quality drinking water to their people.[186] In the situations of pollution accidents, states are recommended by Article 27 of the Berlin Rules to eliminate the pollution on an urgent basis so that the water quality in the watercourses does not deteriorate to a considerable degree.[187]

Articles 34 and 35 of the Berlin Rules recommend that states cooperate with each other to prevent and manage situations of droughts and floods.[188] States can perform necessary water management measures to ensure an adequate water security in the events of floods or droughts through mutual cooperation, consultation, and

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[177] For details, *see* Article 14, The Berlin Rules on Water Resources, ILA 2004.

[178] *See* Article 17(1), The Berlin Rules on Water Resources, ILA 2004.

[179] *See* Article 17(2), The Berlin Rules on Water Resources, ILA 2004.

[180] *See* the text of Article 17(3), The Berlin Rules on Water Resources, ILA 2004.

[181] *See* Article 18, The Berlin Rules on Water Resources, ILA 2004.

[182] *See* PHILIPPE SANDS, JACQUELINE PEEL, & RUTH MACKENZIE, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 309 (Cambridge University Press 2012) [hereinafter SANDS ET AL.].

[183] *Id.* For more details, *see* Chapter V – Protection of the Aquatic Environments, The Berlin Rules on Water Resources, ILA 2004.

[184] *See* SANDS ET AL., *supra* note 182, at 309

[185] For details, *see* Article 28, The Berlin Rules on Water Resources, ILA 2004.

[186] *See* Article 28(1), The Berlin Rules on Water Resources, ILA 2004.

[187] *See* Article 27, The Berlin Rules on Water Resources, ILA 2004. *See also* Article 33, The Berlin Rules on Water Resources, ILA 2004.

[188] Ha Le Phan & Inga T. Winkler, *Water Security*, *in* RESEARCH HANDBOOK ON DISASTERS AND INTERNATIONAL LAW 309 (Susan C. Breau & Katja L.H. Samuel eds., 2016). For more details, *see* the texts of Articles 34 and 35, The Berlin Rules on Water Resources, ILA 2004.

exchange of information.[189] At least, in this way, the negative impacts of the natural disasters, e.g. floods or droughts, would be reduced considerably if riparian states are able to devise effective fruitful mechanisms through mutual cooperation that would ultimately result in ensuring increased water security.[190]

Another significant contribution made by the Berlin Rules is the setting-up of principles for utilizing groundwater resources.[191] Groundwater is an important source of freshwater, and many people worldwide depend on groundwater resources for drinking, sanitation, and other household purposes.[192] However, in recent years, it has been observed that groundwater levels have dropped significantly in several parts of the world, particularly in South Asia.[193] This situation demands that the use of groundwater resources be regulated sustainably to ensure adequate groundwater security for future generations.[194] Chapter VIII of the Berlin Rules is dedicated solely to regulating the utilization of groundwater.[195] In particular, this chapter of the Berlin Rules advocates the sustainable utilization of groundwater resources.[196] For this purpose, Article 41 of the Berlin Rules also directs states to protect the groundwater aquifers from pollution, salinity, and other threats.[197]

In addition to situations of peace, the Berlin Rules also provide guidance about water security in situations of armed conflicts and wars.[198] This is addressed by Chapter X of the Berlin Rules.[199] Articles 50 to 55 of the Berlin Rules prohibit warring states from causing any damage to natural aquifers, dams, water storage works, ecological sites, and other water installations.[200]

In essence, the Berlin Rules on Water Resources are collections of a number of rules governing the utilization and distribution of water resources.[201] These rules recommend integrated water management and sustainable utilization of water resources.[202] For transboundary shared water resources among riparian states, the Berlin Rules recommend that each riparian state equitably use the shared

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[189] *See* a detailed set of recommendations provided in the text of Article 34 for managing and preventing floods. Article 34, The Berlin Rules on Water Resources, ILA 2004. *See also* some recommendations for managing and preventing droughts as provided in Article 35, The Berlin Rules on Water Resources, ILA 2004.

[190] *Id.*

[191] *See* SANDS ET AL., *supra* note 182, at 309. *See also* Joseph W. Dellapenna, *The Law of Transboundary Groundwater*, *in* THE EARTH CHARTER, ECOLOGICAL INTEGRITY AND SOCIAL MOVEMENTS 84 (Laura Westra & Mirian Vilela eds., 2014) [hereinafter Dellapenna].

[192] Marguerite de Chaisemartin et al., *Addressing the Groundwater Governance Challenge*, *in* FRESHWATER GOVERNANCE FOR THE 21ST CENTURY 209 (Eiman Karar ed., 2016). For more details, *see* ROLF NIEDER, DINESH K. BENBI, & FRANZ X. REICHL, SOIL COMPONENTS AND HUMAN HEALTH 224 (Springer 2018).

[193] Jason M. Buenkar & Robert A. Robinson, *A History of Tunneling in Los Angeles*, *in* NORTH AMERICAN TUNNELING: 2014 PROCEEDINGS 1112 (Gregg Davidson et al., eds. 2014).

[194] *See* Dellapenna, *supra* note 191, The Berlin Rules on Water Resources, ILA, 2004.

[195] *See* SANDS ET AL., *supra* note 182, at 309. For more details, *see* Chapter VIII, The Berlin Rules on Water Resources, ILA, 2004.

[196] For details, *see* Article 40, The Berlin Rules on Water Resources, ILA, 2004

[197] *See* Article 41, The Berlin Rules on Water Resources, ILA, 2004.

[198] *See* DAVID HUNTER & WANG XI, YEARBOOK OF INTERNATIONAL ENVIRONMENTAL LAW: 2008 124 (Oxford University Press 2009) [hereinafter HUNTER & XI].

[199] *Id.* For more details, *see* Chapter X, The Berlin Rules on Water Resources, ILA, 2004.

[200] *See* HUNTER & XI, *supra* note 198, at 124. *See also* Chapter X, The Berlin Rules on Water Resources, ILA, 2004.

[201] *See* HUNTER & XI, *supra* note 198, at 124.

[202] *See* Teffner et al., *supra* note 108, at 222.

transboundary water resource.[203] Furthermore, the Berlin Rules instruct states to utilize the groundwater resources sustainably and ensure the protection of groundwater resources from pollution and salinity.[204] Owing to the aforementioned numerous rules set by the Berlin Rules about water distribution and utilization, the Berlin Rules are also regarded as an important source of international water law.[205]

In sum, international water law's provisions in the Berlin Rules, the UNWC, and the 1992 UNECE Convention endorse the equitable utilization of shared watercourses.[206] Accordingly, international water law recommends the principle of equitable utilization to be adopted in bilateral agreements for distribution of shared watercourses among states.[207] The states are required to follow this principle as part of international law and customary international law, because it has also become a custom in the allocation of international transboundary watercourses among states.[208]

B. *Human Rights Law*

Although human rights law is not directly linked to international water law, and it doesn't provide rules for the distribution and utilization of water resources, it has contributed indirectly to international water law in terms of highlighting the importance of water security by implanting the "human right to water."[209]

The "human right to water" has been endorsed by the Human Rights Council, the UN General Assembly, and the UN Committee on Economic, Social and Cultural Rights.[210] Furthermore, Article 6 of the ICCPR accepts that every individual has an inherent right to life, which ought to be protected by law, and no one can be deprived of such a right.[211] It further articulates that the deprivation of the right to life constitutes an act of genocide.[212] On similar grounds, Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) endorses the right to an improved quality of life,[213] and Article 12 supports a right to health for every human being.[214] These rights have also been endorsed in other instruments including the 1989 Convention on the Rights of the Child, the 1990 African Charter on the Rights and Welfare of the Child, the 2003 Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, and the 2006 Convention on

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[203] *Id.*

[204] For details, *see* Article 38, The Berlin Rules on Water Resources, ILA, 2004. *See also* Article 40, The Berlin Rules on Water Resources, ILA, 2004.

[205] ALINE BAILLAT, INTERNATIONAL TRADE IN WATER RIGHTS 79 (IWA Publishing 2010).

[206] *See* about the inclusion of the Berlin Rules, UN Watercourses Convention, and UNECE Convention in the international water law: HILDERING, *supra* note 105, at 47. *See* about the adoption of equitable utilization principle in the international water law: Wouters & Rieu-Clarke, *supra* note 106, at 90.

[207] *See* Wouters & Rieu-Clarke, *supra* note 106, at 90.

[208] *Id.*

[209] Patrice C. MacMahon, *Cooperation Rules: Insights on Water and Conflict from International Relations*, *in* WATER SECURITY IN THE MIDDLE EAST: ESSAYS IN SCIENTIFIC AND SOCIAL COOPERATION 32 (Jean Cahan ed., 2017).

[210] *See* MCINTYRE, *supra* note 157, at 48.

[211] For details, *see* International Covenant on Civil and Political Rights (ICCPR) art. 6, OHCHR, Dec. 16, 1966.

[212] *See* ICCPR art. 6(3), OHCHR, Dec. 16, 1966.

[213] *See* ICCPR art. 11, OHCHR, Dec. 16, 1966.

[214] For details, *see* ICCPR art. 12, OHCHR, Dec. 16, 1966.

the Rights of Persons with Disabilities.[215] Pertinently, these conventions are included in international human rights law.[216]

Hence, in light of the above brief discussion, it can be declared that human rights law endorses basic rights such as the right to life, the right to health and the right to an improved quality of life.[217] These rights cannot be ensured without adequate water security, because water is an essential requirement for the survival of human life as well as for living a healthy life.[218]

IV. SUSTAINABILITY AND WATER SECURITY

Although international law has provided valuable guidance for achieving global water security and 2.6 billion people in the world have acquired complete or partial levels of water security,[219] there are still around 663 million people in the world who still do not have adequate water security.[220] These people do not have access to freshwater and also have unsatisfactory facilities of sanitation.[221] Similarly, around 1.8 billion people, living in different regions in the world, drink "fecally contaminated" water in different regions.[222] In addition, the water security of 40 percent of the world population is threatened by the ever-increasing scarcity of water.[223] Owing to this scarcity, the flows of water in river basins are also declining every year, which is posing grave threats to the water security of around 1.7 billion people who live around the river basins.[224]

In addition, around 2.4 billion people in the world do not have proper sanitation facilities[225] and in many regions, around 80 percent of wastewater produced from human activities is openly discharged into the rivers,[226] which is further deteriorating the quality of freshwater in rivers.[227] As a consequence of such harmful quality of river waters, as many as 1,000 children die every day due to diarrhea or other diseases caused by drinking contaminated water.[228]

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[215] For details, *see* Christina Leb & Patricia Wouters, *The Water Security Paradox and International Law: Securitisation as an Obstacle to Achieving Water Security and the Role of Law in Desecuritising the World's Most Precious Resource*, *in* WATER SECURITY: PRINCIPLES, PERSPECTIVES AND PRACTICES 39 (Bruce Lankford et al., 2013).

[216] *Id.*

[217] *Id.* at 39.

[218] *Id.*

[219] For details, *see* the facts and figures provided in Sustainable Development Goals: *Goal 6: Clean Water and Sanitation: Goal 6 Targets*, UNITED NATIONS DEVELOPMENT PROGRAMME (2016), http://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-6-clean-water-and-sanitation/targets/ [hereinafter UNITED NATIONS DEVELOPMENT PROGRAMME].

[220] *Id.*

[221] *Id.*

[222] *Id.*

[223] *Id.*

[224] *Id.*

[225] *Id.*

[226] *Id.*

[227] For instance, *see* Pham Mai Thao & Toshiya Aramaki, *Water Quality Assessment in the Saigon River by Mathematical Model*, *in* SOUTHEAST ASIAN WATER ENVIRONMENT 3, 9 (Satoshi Takizawa et al., eds., 2009). *See also* a case study by ALKA UPADHYAY, WATER MANAGEMENT AND PUBLIC PARTICIPATION: CASE STUDIES FROM THE YAMUNA RIVER BASIN, INDIA 51 (Springer 2012).

[228] For details, *see* UNITED NATIONS DEVELOPMENT PROGRAMME, *supra* note 219.

These alarming statistics have been revealed by the UNDP and portray the grave nature of existing water insecurity around the globe, which further points toward the presence of huge gaps between the recommendations provided by international law for ensuring water security and the actual implementation of these recommendations at the regional and global levels.[229] In order to diminish these gaps, the UNDP, with the support of national leaders, has exerted special efforts to arrange a number of conferences for devising realistic goals and procedures for ensuring global and regional water security.[230] The first step in these efforts is the setting-up by the UNDP of a "2030 Agenda for Sustainable Development," which aims to achieve sustainable development at the global level by the year 2030.[231]

According to the UNDP, sustainable development can end global poverty, which can ensure a prosperous life for people.[232] Moreover, sustainable development can also lead to increasing the efficiency of water utilization across all sectors and in managing water scarcity appropriately.[233]

A. *UNDP Goal 6: Sustainable Water Security*

As mentioned above, the UNDP has set special goals for achieving global sustainable development.[234] Among these goals, Goal 6 relates to ensuring sustainable water security at the global level.[235] This goal has also set targets to achieve sustainable water security at the global level.[236] The year 2030 has been set as the deadline for fully realizing these targets at the worldwide level.[237]

1. Essential Targets of Goal 6 of UNDP Sustainable Development Agenda

The first essential target included in Goal 6 aims at ensuring quick access to clean drinking water for all human beings by the year 2030.[238] The second objective of Goal 6 is to achieve complete access to hygienic sanitation facilities for all humans, especially for women and girls living in impoverished regions.[239] The third target of the sixth goal entails improving the quality of fresh watercourses worldwide by preventing the spread of water pollution, decreasing existing levels of pollution in fresh watercourses, and discouraging dumping and preventing the discharge of

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[229] *Id.*
[230] *Id.*
[231] *Id.*
[232] *Id.*
[233] *See* ADITYA SOOD ET AL., GLOBAL ENVIRONMENTAL FLOW INFORMATION FOR THE SUSTAINABLE DEVELOPMENT GOALS 3 (IWMI 2017).
[234] These are also called Sustainable Development Goals (SDGs). For details, *see* the official website of the UNDP at *Sustainable Development Goals*, UNITED NATIONS DEVELOPMENT PROGRAMME (2016), http://www.undp.org/content/undp/en/home/sustainable-development-goals.html.
[235] For details, *see* UNITED NATIONS DEVELOPMENT PROGRAMME, *supra* note 219.
[236] *Id.*
[237] *Id.*
[238] *Id.*
[239] *Id.*

harmful industrial pollutants into fresh watercourses sites.[240] Furthermore, this target also includes preventing wastewater from being thrown into the fresh watercourses without treatment.[241] In this regard, it also aims to promote recycling procedures at the global level for the safety of the fresh watercourses from harmful pollutants.[242]

The fourth objective of Goal 6 aims at globally enhancing the efficiency of utilization of freshwater resources across multiple sectors.[243] Such an increase in efficiency would result in the sustainable use of water resources, which would ultimately reduce the wastage of water and manage the existing and emerging levels of scarcity of water.[244]

The fifth target of Goal 6, in line with Article 11 of the Berlin Rules, recommends the integrated management of water resources via establishing cooperation among riparian states.[245] The sixth target stresses advancing protection for the natural ecosystems, particularly natural aquifers, rivers, lakes, and forests.[246]

The seventh objective of Goal 6 demands strengthening cooperation among all states at the international level for improving the implementation and development of programs intended to achieve the targets of Goal 6.[247] This objective also involves gaining the support of local communities for improving the water management and sanitation at the regional levels.[248]

In essence, the main targets of Goal 6 are related to preventing pollution in fresh watercourses, improving water efficiency, ensuring access to drinking water and sanitation for all, and recycling of used water.[249]

2. MAPS (Mainstreaming, Acceleration, and Policy Support)

In order to implement the 2030 Sustainable Development Agenda, the UNDP is working closely with the United Nations Development Group (UNDG).[250] Through this collaboration with the UNDG, the UNDP has been able to develop a new strategy, "MAPS," which includes activities of mainstreaming, acceleration, and policy support for UNDP SDGs.[251] Mainstreaming implies spreading public

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[240] *Id.*
[241] *Id.*
[242] *Id.*
[243] *Id.*
[244] *Id.*
[245] This is because both Article 11 of the Berlin Rules and Goal 6 of the UNDP, recommend the implementation of integrated water management schemes. For details, *see* Article 11, The Berlin Rules on Water Resources, ILA, 2004. *See also* UNITED NATIONS DEVELOPMENT PROGRAMME, *supra* note 219.
[246] *Id.*
[247] *Id.*
[248] *Id.*
[249] *Id.*
[250] For details, *see UNDG at the Global Level*, UNITED NATIONS DEVELOPMENT GROUP (2016), https://undg.org/about/undg-global.
[251] *See* UNDP Strategic Plan, 2018–2021, presented by the United Nations Executive Board of the United Nations Development Programme, the United Nations Population Fund, and the United Nations Office for Project Services 17, Special Session 2017, DP/2017/38, (Nov. 28, 2017), http://undocs.org/DP/2017/38 [hereinafter UNDP Strategic Plan].

awareness about the UNDP 2030 Sustainable Development agenda.[252] Another essential target of mainstreaming is to add the UNDP agenda into the national action plans of governments of all countries.[253] The second part of the MAPS Strategy is acceleration, which entails the core purpose of providing assistance to governments in increasing the pace of implementing the goals of the UNDP's sustainable development agenda.[254] Similarly, the third part of the strategy is policy support, which focuses on offering well-coordinated support to states to fulfill the targets set in the UNDP SDGs.[255]

The MAPS Strategy also aims to curb the health support gaps via improving health facilities and ensuring access to water and sanitation facilities.[256] Furthermore, this strategy includes providing access to sustainable energy, implementing procedures for sustainable management of ecosystems and governance of oceans, and providing adaptable response to the changes in climate.[257]

3. UNDP Strategic Plan, 2018–2021

In an attempt to implement its SDGs, the UNDP has presented a four-year strategic plan.[258] The previous strategic plan was from 2014 to 2017, and it focused primarily on poverty reduction,[259] while the new four-year plan stretches from 2018 to 2021 and also largely draws upon the principles and targets set in the previous plan.[260]

The 2018–2021 Strategic Plan has the primary focus of reducing poverty globally.[261] For this purpose, it aims to ensure food and water security for a larger number of people, particularly those who do not have adequate food and water security.[262] Part IV of the 2018–2021 Strategic Plan recommends "strengthened ecosystem management and nature-based solutions" to achieve an increased level of food and water security, along with ensuring sustainable livelihoods for the people.[263] It also reiterates the targets set out in the MAPS Strategy of the UNDP-UNDG.[264]

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[252] For details about Mainstreaming, *see* MAINSTREAMING THE 2030 AGENDA FOR SUSTAINABLE DEVELOPMENT – INTERIM REFERENCE GUIDE TO UN COUNTRY TEAMS 5 (United Nations Development Group 2015).

[253] *See* UNDP SUPPORT TO THE IMPLEMENTATION OF THE SUSTAINABLE DEVELOPMENT GOALS, UNITED NATIONS DEVELOPMENT PROGRAMME (Jan. 20, 2016), http://www.undp.org/content/undp/en/home/librarypage/sustainable-development-goals/undp-support-to-the-implementation-of-the-2030-agenda/ [hereinafter UNDP].

[254] *Id.*

[255] *Id.*

[256] *Id.*

[257] *Id.*

[258] *Id.* at 1.

[259] For details, *see* CHARGING THE WORLD – UNDP STRATEGIC PLAN: 2014–17 1 (United Nations Development Programme 2013–14).

[260] For details, *see* UNDP Strategic Plan, *supra* note 251, at 1.

[261] *Id.*

[262] *Id.* at 14.

[263] *Id.*

[264] *Id.* at 17.

In conclusion, Goal 6 of the UNDP Sustainable Development Agenda, the MAPS Strategy, and the 2018–2021 Strategic Plan present integrated sets of policies that are aimed at reducing poverty, ensuring water security, ending deprivation of poor regions, and achieving other relevant goals.[265] With all these policy frameworks, the UNDP is eager to provide support to countries to realize their SDGs in a globally well-coordinated manner.[266] The fulfillment of the UNDP sustainable goals will in particular result in eliminating poverty, improving health and sanitation services, and strengthening food and water security around the world, which will ultimately result in regional and global prosperity and human development.[267]

B. *Johannesburg Declaration on Sustainable Development*

The Johannesburg Declaration on Sustainable Development, also called the World Summit on Sustainable Development, was held in 2002 in Johannesburg, South Africa.[268] This summit supported the demands related to water security, i.e., "to speedily increase access to clean water and sanitation."[269] In addition, the participants in the Johannesburg Declaration pledged to work together to ensure the speedy access to water and sanitation facilities to people worldwide.[270] In particular, they ratified air, water, and marine pollution as among the gravest challenges faced by humanity.[271]

The participants in the Johannesburg Declaration formulated a separate plan of action involving different strategies for implementing the recommendations of the declaration.[272] For instance, in order to improve access to sanitation, the participants endorsed the development of "efficient household sanitation systems" and improvement of sanitation facilities at public institutions, especially schools, because children use sanitation services at schools.[273] The declaration also advised governments to promote hygienic sanitation practices and in particular spread awareness about such practices among children, because children act as agents of

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[265] *See* UNITED NATIONS DEVELOPMENT PROGRAMME, *supra* note 219. *See also* UNDP, *supra* note 253.

[266] *See* UNDP, *supra* note 253.

[267] *Id.*

[268] Marie-Claire Cordonier Segger, *Commitments to Sustainable Development through International Law and Policy*, *in* SUSTAINABLE DEVELOPMENT PRINCIPLES IN THE DECISIONS OF INTERNATIONAL COURTS AND TRIBUNALS: 1992–2012 48 (Marie-Claire Cordonier Segger & Judge C.G. Weeramantry eds., 2017). *See also* Marie-Claire Cordonier Segger, *International Law, Criminal Justice, and Sustainable Development*, *in* SUSTAINABLE DEVELOPMENT, INTERNATIONAL CRIMINAL JUSTICE, AND TREATY IMPLEMENTATION 22 (Sébastien Jodoin & Marie-Claire Cordonier Segger eds., 2013). *See also* ELIZABETH R. DESOMBRE, GLOBAL ENVIRONMENTAL INSTITUTIONS 29 (Taylor & Francis, 2017).

[269] This is mentioned in Postulate 18 of the text of Annex of Johannesburg Declaration. For details, *see* World Summit on Sustainable Development, *Johannesburg Declaration on Sustainable Development*, ¶ 18, U.N. Doc. A/CONF.199/20 (Sep. 4, 2002).

[270] *Id.*

[271] *See* World Summit on Sustainable Development, *Johannesburg Declaration on Sustainable Development*, ¶ 13, U.N. Doc. A/CONF.199/20 (Sep. 4, 2002).

[272] For details, *see* World Summit on Sustainable Development, Plan of Implementation of the World Summit on Sustainable Development, U.N. Doc. A/CONF.199/20 (Sep. 4, 2002).

[273] *See* World Summit on Sustainable Development, Plan of Implementation of the World Summit on Sustainable Development, ¶ 8(a), U.N. Doc. A/CONF.199/20 (Sep. 4, 2002).

change.[274] Moreover, the declaration also demanded that state parties "integrate sanitation into the water resources management strategies."[275]

The declaration particularly invites the participants to make efforts to:

> Increase access to sanitation to improve human health and reduce infant and child mortality, prioritizing water and sanitation in national sustainable development strategies and poverty reduction strategies where they exist.[276]

Ultimately, an increased access to clean water, sanitation, and health care would result in ensuring an improved level of water security at the regional and global levels.[277] Therefore, if the governments of all countries would start implementing the recommendations provided by the Johannesburg Declaration, then water security could be ensured globally in a well-coordinated way.

C. *Agenda 21*

Agenda 21 is an action plan approved at the United Nations Conference on Environment and Development (UNCED), also called the Earth Summit, which was held in 1992 in Rio de Janeiro, Brazil.[278] This action plan endorsed environmental protection and sustainable development.[279] In this regard, Chapter 18 of this action plan focused entirely on the quality and supply of freshwater resources.[280] It accepted the importance of universal access to freshwater resources on Earth,[281] adhering to the fact that water is necessary for the sustenance of life on Earth.[282] Accordingly, it aimed at efforts to ensure a sufficient quantity and quality of water available for all humans.[283] Furthermore, it had the ambition to prevent the spread of water-related diseases. For this purpose, it recommended the utilization of modern, innovative technological setups that could be helpful in the beneficial utilization of limited water resources and could also reduce water pollution.[284]

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[274] *See* full text of World Summit on Sustainable Development, Plan of Implementation of the World Summit on Sustainable Development, ¶ 8, U.N. Doc. A/CONF.199/20 (Sep. 4, 2002).

[275] *See* World Summit on Sustainable Development, Plan of Implementation of the World Summit on Sustainable Development, ¶ 8(g), U.N. Doc. A/CONF.199/20 (Sep. 4, 2002).

[276] *See* World Summit on Sustainable Development, Plan of Implementation of the World Summit on Sustainable Development, ¶ 7(m), U.N. Doc. A/CONF.199/20 (Sep. 4, 2002).

[277] *See* Meshack Khosa, *Infrastructure Mandates for Reconstruction*, *in* INFRASTRUCTURE MANDATES FOR CHANGE, 1994–1999 8 (2000).

[278] *See* UNITED NATIONS ECONOMIC AND SOCIAL COMMISSION FOR ASIA AND THE PACIFIC, REGIONAL FOLLOW-UP TO THE WORLD SUMMIT ON SUSTAINABLE DEVELOPMENT IN ASIA AND THE PACIFIC 3 (United Nations Publications 2003).

[279] *Id.*

[280] For details, *see* U.N. Conference on Environment and Development, RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT, U.N. Doc. A/CONF.151/26, ch. 18 (June 13, 1992).

[281] *See* U.N. Conference on Environment and Development, RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT, U.N. Doc. A/CONF.151/26, ch. 18, ¶ 49 (June 13, 1992).

[282] *See* U.N. Conference on Environment and Development, RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT, U.N. Doc. A/CONF.151/26, ch. 18, ¶ 2 (June 13, 1992).

[283] *Id.*

[284] *Id.*

Chapter 18 of Agenda 21 also highlighted the importance of implementation of integrated management schemes for the development, utilization, and management of freshwater resources.[285] According to the text of Postulate 3 in Chapter 18 of Agenda 21, the implementation of integrated water management schemes can also eliminate water pollution and manage the scarcity of water resources.[286] These schemes must also encapsulate both the freshwater and groundwater resources,[287]evaluating the appropriateness of the quality and quantity of water in the fresh watercourses.[288] Moreover, such integration must also recognize, allocate, and manage the quantity and quality of water for different sectors, e.g., industry, agriculture, fisheries, and sanitation, as required in these sectors.[289] It is recommended that appropriate and rational measures should be adopted for minimizing the wastage of water, but such procedures have to be in accordance with flood prevention policies.[290]

Agenda 21 also recommends the establishment of cooperation among riparian states sharing a transboundary common water resource.[291] The cooperation is possible via different agreements and arrangements among riparian states.[292] Such agreements or arrangements should facilitate the utilization of the shared transboundary water resource in a mutually beneficial manner for all involved.[293]

In sum, Agenda 21 proposes the integrated management and development of water resources, including freshwater and groundwater resources.[294] Such integration must also include the evaluation of the quality and quantity of available water resources and then, accordingly, allocate water to all sectors.[295] Pollution must be averted and particular attention must be given to ensuring the supply of clean drinking water and sanitation facilities.[296] Water should be conserved after the consideration of potential climactic changes.[297] The protection of water resources is also a priority highlighted by Agenda 21 to ensure adequate access and availability of water to the people.[298]

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[285] For details, *see* U.N. Conference on Environment and Development, RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT, U.N. Doc. A/CONF.151/26, ch. 18, ¶ 48 (June 13, 1992).

[286] *See* U.N. Conference on Environment and Development, RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT, U.N. Doc. A/CONF.151/26, ch. 18, ¶ 3 (June 13, 1992).

[287] *Id.*

[288] *Id.*

[289] *Id.*

[290] *Id.*

[291] *See* U.N. Conference on Environment and Development, RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT, U.N. Doc. A/CONF.151/26, ch. 18, ¶ 4 (June 13, 1992).

[292] *Id.*

[293] *Id.*

[294] *See* U.N. Conference on Environment and Development, RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT, U.N. Doc. A/CONF.151/26, ch. 18, ¶ 3, 5(a), 9 (June 13, 1992).

[295] U.N. Conference on Environment and Development, RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT, U.N. Doc. A/CONF.151/26, ch. 18, ¶ 3 (June 13, 1992).

[296] *Id. See also* U.N. Conference on Environment and Development, RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT, U.N. Doc. A/CONF.151/26, ch. 18, ¶ 5 (June 13, 1992).

[297] *See* U.N. Conference on Environment and Development, RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT, U.N. Doc. A/CONF.151/26, ch. 18, ¶ 82, 83 (June 13, 1992).

[298] *See* U.N. Conference on Environment and Development, RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT, U.N. Doc. A/CONF.151/26, ch. 18, ¶ 5(c) (June 13, 1992).

D. *The Dublin Statement on Water and Sustainable Development*

The Dublin Statement was adopted in 1992 at the International Conference on Water and the Environment (ICWE), held in Dublin, Ireland.[299] The main purpose of the Dublin Statement was to devise policy frameworks for ensuring adequate water security and sustainable development at the global level.[300] The Statement addressed different issues threatening water security, like scarcity of water resources, misappropriation and mismanagement of freshwater resources, pollution, industrial activities, and other issues that pose a risk to the ecosystem.[301] The participants in the ICWE called for the implementation of new strategies for management and development of freshwater resources via the establishment of an improved level of cooperation and political commitments from the governments and private societies.[302]

Moreover, the participants in the ICWE also asked all governments to implement the recommendations provided in the 1992 UNCED,[303] which had demanded actions for water and sustainable development.[304]

1. Four Major Principles in the Dublin Statement

More importantly, the ICWE set four major principles in the Dublin Statement for ensuring an improved level of water security and sustainable development worldwide.[305] The first principle accepts the fact that freshwater resources are finite on Earth and, therefore, are vulnerable resources, but also that these resources are very important for the sustenance of life and sustainability on Earth.[306] Therefore, freshwater and groundwater resources require effective management to fulfill the demands of the world's population.[307] Such effective management must entail a holistic approach including economic and social development along with ensuring the preservation of natural ecologies.[308]

The second principle in the Dublin Statement requires the management and development of water resources through well-coordinated cooperation among all

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[299] *See* RICHARD A MEGANCK & RICHARD E SAUNIER, DICTIONARY AND INTRODUCTION TO GLOBAL ENVIRONMENTAL GOVERNANCE 109 (Routledge 2013). *See also* Michelle Barnard & Willem Daniel Lubbe, *Sustainable Development of SADC's Watercourses: The IncoMaputo River Basin Agreement of 2002*, *in* REGIONAL ENVIRONMENTAL LAW: TRANSREGIONAL COMPARATIVE LESSONS IN PURSUIT OF SUSTAINABLE DEVELOPMENT 95 (Werner Scholtz & Jonathan Verschuuren eds., 2015).

[300] *See* the introductory paragraphs in the introduction of International Conference on Water and the Environment (ICWE), *The Dublin Statement on Water and Sustainable Development* (Jan. 31, 1992).

[301] For details, *see* the first introductory paragraph of International Conference on Water and the Environment (ICWE), *The Dublin Statement on Water and Sustainable Development* (Jan. 31, 1992).

[302] For details, *see* the introductory paragraphs in International Conference on Water and the Environment (ICWE), *The Dublin Statement on Water and Sustainable Development* (Jan. 31, 1992).

[303] *Id.*

[304] *Id.*

[305] *See* The Guiding Principles in International Conference on Water and the Environment (ICWE), *The Dublin Statement on Water and Sustainable Development* (Jan. 31, 1992).

[306] *See* Principle No. 1, International Conference on Water and the Environment (ICWE), *The Dublin Statement on Water and Sustainable Development* (Jan. 31, 1992).

[307] *Id.*

[308] *Id.*

users of the water resources with the assistance of specialized policymakers at all levels.[309] Public consultation should also be given consideration in such development and management of the freshwater resources.[310]

On the other hand, the third principle of the Dublin Statement highlights the vital role of women in the preservation, provision, and management of water at the household level.[311] It demands that women be empowered to participate in the management and preservation of water resources at the local level.[312] Women should also be equipped with the specific supplies needed by them to preserve and manage water at the household level.[313]

The fourth principle of the Dublin Statement considers water an economic good.[314] Since water is a fundamental requirement for the sustenance of life, the fourth principle of the Dublin Statement demands that clean water at an affordable price be made available to all humans for drinking and sanitation purposes.[315] The reason for imposing such an economic value on water is to avert the wastage of this resource.[316] The economic valuation of water should result in a more efficient and equitable utilization, development, and preservation of water resources on Earth.[317]

2. The Action Agenda Underlying the Principles of the Dublin Statement

The participants in the ICWE created an action agenda in accordance with the four principles of the Dublin Statement.[318] This agenda involves some important recommendations for the governments of all countries to manage and resolve their issues related to water security and scarcity.[319] For instance, the first recommendation relates to giving priority to the implementation of special endeavors for the management and development of freshwater resources.[320] Such endeavors must ensure adequate food and water security and hygienic sanitation facilities to the people who lack access to them.[321] This would potentially reduce poverty and the spread of waterborne diseases.[322]

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[309] *See* Principle No. 2, International Conference on Water and the Environment (ICWE), *The Dublin Statement on Water and Sustainable Development* (Jan. 31, 1992).

[310] *Id.*

[311] *See* Principle No. 3, International Conference on Water and the Environment (ICWE), *The Dublin Statement on Water and Sustainable Development* (Jan. 31, 1992).

[312] *Id.*

[313] *Id.*

[314] *See* Principle No. 4, International Conference on Water and the Environment (ICWE), *The Dublin Statement on Water and Sustainable Development* (Jan. 31, 1992).

[315] *Id.*

[316] *Id.*

[317] *Id.*

[318] For details, *see* The Action Agenda, International Conference on Water and the Environment (ICWE), *The Dublin Statement on Water and Sustainable Development* (Jan. 31, 1992).

[319] *Id.*

[320] For details, *see* Alleviation of Poverty and Disease – The Action Agenda, International Conference on Water and the Environment (ICWE), *The Dublin Statement on Water and Sustainable Development* (Jan. 31, 1992).

[321] *Id.*

[322] *Id.*

The second recommendation relates to preparedness against potential natural disasters such as floods and droughts.[323] Effective preparedness can mitigate the potential harmful effects of natural disasters through appropriate measures, such as protecting property and decreasing the probable number of deaths by rescuing people in deprived regions.[324] In the wake of ongoing rapid climatic changes such as increases in sea levels, the participants in the ICWE recommended that states predict the extent of climate change and take adequate measures in order to ensure security related to water resources.[325]

Another recommendation is that the freshwater resources be preserved and reutilized by minimizing the undue wastage of water.[326] Sufficient water can be saved in every sector—agriculture, industry, etc.—through adopting modern techniques.[327] For instance, the modern irrigation technique of "drip farming" saves water during irrigating crops and prevents undue wastage of water.[328] Hence, it is essential to install such efficient schemes of irrigation to preserve water. For other sectors, the participants of the ICWE recommended the recycling of used water, which can help to preserve water.[329]

In order to further protect freshwater courses, the participants in the ICWE recommended the adoption of the "polluter pays" principle.[330] According to this principle, the entity that causes pollution in a watercourse is required to pay a certain amount of money as a penalty in proportion to the relevant amount of pollution it caused.[331] The adoption of this principle would ultimately result in decreasing the rapid spread of pollution in watercourses, because the polluter would try to reduce the cost of pollution by decreasing the amount of pollution caused by it.[332]

The participants in the ICWE also called for a better access to water and sanitation for the rural population.[333] The participants asserted that increased food security, along with sustainable water security, is an essential target that the

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[323] *See* Protection Against Natural Disasters – The Action Agenda, International Conference on Water and the Environment (ICWE), *The Dublin Statement on Water and Sustainable Development* (Jan. 31, 1992).

[324] *Id.*

[325] *Id.*

[326] *See* Water Conservation and Reuse – The Action Agenda, International Conference on Water and the Environment (ICWE), *The Dublin Statement on Water and Sustainable Development* (Jan. 31, 1992).

[327] *Id.*

[328] For a detailed researched account about the efficiency of the drip irrigation scheme, *see* KASSIM JUMANNE MSUYA, APPLICABILITY OF DRIP IRRIGATION FOR SMALLHOLDER FARMERS: A CASE STUDY OF THE HORTICULTURAL INDUSTRY IN TANZANIA 13 (Ohio State University 2016).

[329] *See* Water conservation and reuse – The Action Agenda, International Conference on Water and the Environment (ICWE), *The Dublin Statement on Water and Sustainable Development* (Jan. 31, 1992).

[330] *Id.*

[331] *See* Barry Turner, *Globalization: A Winning Formula with Too Many Losers?*, *in* THE STATESMAN'S YEARBOOK 2008: THE POLITICS, CULTURES AND ECONOMIES OF THE WORLD 30 (Barry Turner ed., 2007).

[332] For instance, if the polluter is a factory, it would try to reduce the cost of pollution by reducing its discharge of the industrial waste entailing hazardous chemicals without treatment into the freshwater resources. For more details, *see* Mizan R. Khan, *Polluter-Pays-Principle: The Cardinal Instrument for Addressing Climate Change*, 4 LAWS 638, 640 (2015).

[333] *See* Agricultural production and rural water supply – The Action Agenda, International Conference on Water and the Environment (ICWE), *The Dublin Statement on Water and Sustainable Development* (Jan. 31, 1992).

international community must consider achieving.[334] In addition, the participants asked for an increased level of protection for the ecosystem, fisheries, agrarian lands, etc. from pollution, the degradation of water supplies, and water insecurity.[335] According to the collective statement, the integrated management of river basins can protect the natural aquatic systems from all kinds of water insecurities and relevant threats.[336] In particular, the integrated management of the river basins can provide sustainable benefits to society.[337] In this regard, such integrated management should also include the management of groundwater resources along with freshwater resources.[338]

For transboundary water resources, the statement also called for the establishment of an increased level of cooperation, planning, and joint management among the riparian states to achieve a better level of integrated management of the water resources in the transboundary shared river basins.[339] The joint management must also take into account the quality and quantity of water on a continual basis.[340] This can be done through an effective exchange of information among the riparian states.[341] Consequently, an improved level of water security would be ensured in the shared river basin for all the relevant riparian states.[342]

In essence, the UNDP SDGs, the MAPS Strategy of the UNDG in collaboration with the UNDP, the UNDP Strategic Plans, the Johannesburg Declaration, Agenda 21, and the Dublin Statement on Water and Sustainable Development and its Action Agenda are intended to ensuring sustainable development, sufficient availability and access to water and hygienic sanitation, and the protection and integrated management of freshwater resources from pollution and all relevant threats. The implementation of their recommendations can pave the way toward ensuring improved water security at the global level and, in particular, in water-insecure regions.

CONCLUSION

It is a commonly known fact that water is essential for the sustenance of life on Earth.[343] The availability and access to sufficient quantities of water for fulfilling the basic amenities of life such as drinking, food, and sanitation purposes constitute water security.[344] UN-Water defines water security as the assurance of a sustainable

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[334] *Id.*

[335] *See* Protecting Aquatic Ecosystems – The Action Agenda, International Conference on Water and the Environment (ICWE), *The Dublin Statement on Water and Sustainable Development* (Jan. 31, 1992).

[336] *Id.*

[337] *Id.*

[338] *See* Resolving Water Conflicts – The Action Agenda, International Conference on Water and the Environment (ICWE), *The Dublin Statement on Water and Sustainable Development* (Jan. 31, 1992).

[339] *Id.*

[340] *Id.*

[341] *Id.*

[342] *Id.*

[343] *See* GOONETILLEKE ET AL., *supra* note 1, at 1.

[344] *See* Cook & Bakker, *supra* note 2, at 27.

supply of water for safeguarding the basic amenities of life such as food, drinking, and sanitation.[345]

The international declarations and summits for sustainable development also support the idea of ensuring water security globally.[346] For instance, the Johannesburg Declaration, Agenda 21, and the Dublin Statement in particular have adopted the principles that provide guidance for ensuring adequate water security at the global level.[347] In particular, Goal 6 of the SDGs set by the UNDP[348] is specifically titled "Sustainable Water Security."[349] It provides several recommendations for effectively managing water resources around the world.[350] These recommendations include the integrated management and development of freshwater and groundwater resources, implementing stringent measures for the elimination of pollution, preventing the wastage of water, preserving water while mitigating threats of floods and other water-related natural disasters, adopting the "polluter pays principle" for imposing fines on industries that discharge industrial waste into the freshwater courses, and promoting recycling measures globally.[351]

In essence, water security is essential for the sustenance of life.[352] However, the scarcity of existing water resources along with other factors such as climate change in terms of lack of rainfalls, mismanagement of water resources, pollution in the fresh watercourses, and transboundary conflicts among riparian states poses a threat to water security for a significant number of people in the world.[353] Therefore, it is the need of the hour to develop and implement modern strategies to ensure adequate water security, i.e., the implementation of integrated water management schemes, the minimization of pollution and wastage of water resources, and the maximization of preservation of freshwater and groundwater resources to ensure an enhanced level of water security globally. Cooperation is also desired among states for implementing measures of water security at global and transboundary levels.[354] Cooperation among states through the exchange of information and joint management bodies will prove beneficial for establishing effective integrated management schemes for integrating transboundary water resources.[355] In this regard, it is recommended that access to a transboundary water resource should be granted in such a way that the natural biodiversity and ecosystems are not harmed in any manner.[356] Furthermore, in accessing and utilizing a natural aquifer, pollution should be prevented to take place in the aquifer so that the aquifer is able to provide

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[345] *See* CONNOR, *supra* note 3, at 8.

[346] For instance, *see* UN Conference on Environment (UNCED) held in 1992 that presented the Agenda 21; the Johannesburg Declaration on Sustainable Development held in 2002; the ICWE held in 1992 that presented the Dublin Statement and the Action Agenda to alleviate poverty and ensure food and water security at the global level.

[347] *Id.*

[348] UNITED NATIONS DEVELOPMENT PROGRAMME, *supra* note 219.

[349] *See* UNDP, *supra* note 253 (Goal 6: Sustainable Water Security).

[350] *Id.*

[351] *Id.*

[352] *See* GOONETILLEKE ET AL., *supra* note 1, at 1.

[353] *See* ROY, *supra* note 7.

[354] *See* C. LEB, *supra* note 146, at 64. *See also* Leb, *supra* note 117, at 252.

[355] *See* Leb, *supra* note 117, at 252. *See also* UN Watercourses Convention art. 9, May 21, 1997; Article 9, UNECE Convention 1992; C. LEB, *supra* note 146, at 133.

[356] This is recommended in Principle No. 1, International Conference on Water and the Environment (ICWE), *The Dublin Statement on Water and Sustainable Development* (Jan. 31, 1992).

clean water to individuals for drinking, food, sanitation, and other domestic, agricultural, or industrial purposes.[357]

It is recommended that efficient water management schemes should be implemented in areas where there is a lack of access to clean water. Such schemes should facilitate the people residing in underprivileged regions to access water at an affordable cost. For instance, it is recommended that government agencies take adequate measures such as the integrated management of water resources for supplying a good quality of water to people in urban and rural areas through pipelines or through containers on a regular basis.[358] If the water resources in a country are limited, then the government should take adequate steps to preserve the available water resources for as long as possible by minimizing wastage, reducing pollution, and recycling used water. Such measures can ensure adequate availability and access to hygienic water for all.[359]

[357] *See* Just & Netanyahu, *supra* note 70.

[358] For instance, *see* some relevant recommendations in J.J. Bogardi & A. Szollosi-Nagi, *Towards the Water Policies for the 21st Century: A Review After the World Summit on Sustainable Development in Johannesburg*, *in* CHALLENGES OF THE NEW WATER POLICIES FOR THE XXI CENTURY: PROCEEDINGS OF THE SEMINAR ON CHALLENGES OF THE NEW WATER POLICIES FOR THE 21ST CENTURY, VALENCIA, OCTOBER 29–31, 2002 36–37 (Enrique Cabrera & Ricardo Cobacho eds., 2004).

[359] *Id.*


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ACHIEVING FULL COMPLIANCE IN THE PHILIPPINES: A MORE STRINGENT ADHERENCE TO LABOR STANDARDS IN U.S. FREE TRADE AGREEMENTS

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INTRODUCTION

In July 2018, the Philippine ambassador to the United States (U.S.) asserted that negotiations for a bilateral free trade agreement between the Philippines and the United States would begin in September.[1] He also indicated that "labor" would be one of the few issues to be discussed in the first round of trade talks to be held in Washington, D.C.[2]

It was only two and a half years earlier, in December 2015, however, that the U.S. Trade Representative (USTR) closed its review of workers' rights in the Philippines under the preferential duty-free Generalized System of Preferences (GSP) program for developing countries.[3] One criterion in determining whether to designate a country as a beneficiary is "whether or not such country has taken or is taking steps to afford to workers in that country … internationally recognized workers rights."[4]

The Philippines' workers' rights record had been under scrutiny since 2008.[5] In closing its review, the USTR cited the progress made by the Philippine government in addressing workers' rights concerns.[6] Nonetheless, that the Philippines had been under review for years begs the question as to whether it can meet the more stringent labor standards required in U.S. free trade agreements.

In this article, I explore the sufficiency of workers' rights in the Philippines through the lens of the labor standards required in U.S. free trade agreements. Part II provides a brief history of the U.S.-Philippines trade relationship and its progression towards a bilateral trade agreement. In Part III, I find that the Philippines is in substantial compliance with the labor standards in U.S. free trade agreements because it has substantially adopted and maintained internationally-recognized workers' rights in its laws and practice. Part IV then identifies the gaps in law and practice that remain inconsistent with internationally-recognized workers' rights. To bridge these gaps, this part also recommends labor reforms and labor provisions that should be included in a trade agreement. Finally, in Part V, I recognize that bridging the gaps identified in Part IV would go beyond the precedents set by recent application of labor standards in U.S. free trade agreements. However, I advocate for this more stringent—but still attainable—application and direction for labor standards in light of U.S. foreign policy considerations in the Philippines and in Asia.

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[1] *PH, US to start free trade talks in Sept.*, MANILA BULLETIN (Jul. 12, 2018), https://business.mb.com.ph/2018/07/12/ph-us-to-start-free-trade-talks-in-sept/.

[2] *Id.*

[3] U.S. TRADE REPRESENTATIVE, USTR USES TRADE PREFERENCE PROGRAMS TO ADVANCE WORKERS RIGHTS, Nov. 25, 2015 (hereinafter "USTR USES GSP PROGRAM TO ADVANCE WORKERS RIGHTS"), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/november/ustr-uses-trade-preference; U.S. TRADE REPRESENTATIVE, U.S. GENERALIZED SYSTEM OF PREFERENCES GUIDEBOOK AUGUST 2017, at 3 (2017), https://ustr.gov/sites/default/files/files/gsp/GSP%20Guidebook%20August%202017.pdf.

[4] 19 U.S.C. § 2462(c)(7) (2002).

[5] International Labor Rights Forum (ILRF), Request for Review of the GSP Status of the Republic of the Philippines for Violations of Worker Rights, 2007 Annual Review of Generalized System of Preferences, June 22, 2007 (hereinafter "(hereinafter "ILRF 2007 Request for Review of Philippines"), https://laborrights.org/sites/default/files/publications-and-resources/GSPPhilippines.pdf.

[6] USTR USES GSP PROGRAM TO ADVANCE WORKERS RIGHTS, *supra* note 3.

I. THE U.S.-PHILIPPINES TRADE RELATIONSHIP: FROM COLONIAL TRADE TO A FREE TRADE AGREEMENT

The United States is the Philippines' third largest trading partner after China and Japan.[7] In 2016, the two countries exchanged over $25 billion in goods and services.[8] Although the Philippines is only the United States' 31st largest goods export market,[9] in 2016, the United States' trade deficit with the Philippines was $1.84 billion.[10] Foreign direct investment between the two countries is also substantial—in 2016, the United States invested $6.3 billion in the Philippines[11] and the Philippines invested $1.4 billion in the United States.[12] These substantial numbers are a culmination of a 100-year old trade relationship, which has now grown by 25% in the last decade.[13]

A. *Colonial and Post-Colonial Trade*

The Philippines was colonized by the United States from May 1, 1898 until July 4, 1946.[14] Consequently, trade between the two countries was initially significantly more favorable to the United States. In 1909, over the objections of the Philippine National Assembly,[15] new tariff legislation was enacted by the United States Congress which established free trade between the two countries.[16] This legislation afforded duty-free treatment to American goods entering the Philippines and vice versa.[17]

There were quotas, however, for sugar and tobacco shipped from the Philippines to the United States.[18] The quotas were then dropped in 1913,[19] which led to the

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[7] U.S. Dep't of State, Bureau of East Asian and Pacific Affairs, *U.S. Relations With the Philippines* Fact Sheet (hereinafter "U.S. Dep't of State Philippines Fact Sheet"), https://www.state.gov/r/pa/ei/bgn/2794.htm (last visited July 24, 2018).

[8] U.S. Census Bureau, *2017: U.S. trade in goods with Philippines* (hereinafter "*2017 U.S.-Philippines Trade in Good*"), https://www.census.gov/foreign-trade/balance/c5650.html (last visited July 24, 2018).

[9] U.S. Dep't of State Philippines Fact Sheet, supra note 7.

[10] *2017 U.S.-Philippines Trade in Good*, *supra* note 8.

[11] PHILIPPINE STATISTICS AUTHORITY, *FOREIGN INVESTMENTS (FOURTH QUARTER 2016)* 1 (2016), *available at* https://www.psa.gov.ph/sites/default/files/FI%20Q4%202016.pdf?lien_externe_oui=Continue.

[12] U.S. Dep't of Commerce, Bureau of Economic Analysis, *Foreign Direct Investment in the United States: Selected Items by Detailed Country, 2008–2016*, https://bea.gov/international/di1fdibal.htm (last visited Aug. 9, 2018).

[13] U.S. Trade Representative, *Philippines* (hereinafter "USTR, *Philippines*"), https://ustr.gov/countries-regions/southeast-asia-pacific/philippines (last visited Aug. 6, 2018).

[14] CLAUDE A. BUSS, THE UNITED STATES AND THE PHILIPPINES: BACKGROUND FOR POLICY 1 (The American Enterprise Institute for Public Policy Research 1977).

[15] Under colonial rule, the Philippines was allowed to establish a popularly elected National Assembly in 1907. The Philippine Organic Act of 1902, §7, 32 Stat. 691 (1902). The Philippine National Assembly was the precursor to the current House of Representatives. The Jones Law, §12, 39 Stat. 545 (1916).

[16] H.W. BRANDS, BOUND TO EMPIRE: THE UNITED STATES AND THE PHILIPPINES 97 (Oxford University Press 1992).

[17] *Id.* at 96.

[18] *Id.*

[19] *Id.* at 98.

extreme dependence of the Philippine economy on the United States—by 1934, nine-tenths of Philippine exports went to the United States.[20]

After World War II, the United States offered the Philippines $620 million for rebuilding efforts as an "incentive" to agree to the Bell Trade Act of 1946.[21] In reality, a significant portion of the $620 million aid was placed in escrow until the Philippine government agreed to the Bell Trade Act.[22]

The Bell Trade Act[23] provided eight years of no tariffs for U.S. and Filipino imports.[24] Thereafter, there would be twenty years of gradually increasing tariffs.[25] However, there were absolute quotas on sugar, cordage, rice, tobacco and coconut oil imports from the Philippines and no quotas for American exports.[26] Even more galling for Filipinos[27] was the parity clause which required the Philippines to grant U.S. citizens and corporations rights to Philippine natural resources in parity with Filipino citizens.[28]

In 1955, the Bell Trade Act was revised by the Laurel-Langley Agreement, which made parity privileges reciprocal, and extended the time for the progressive application of tariffs on Philippine goods exported to the United States.[29] The Laurel-Langley Agreement expired on July 3, 1974[30] before then-President Marcos could negotiate another preferential trade agreement with the United States.[31] When the Trade Act of 1974 was passed, it included general trade preferences for all underdeveloped countries, including the Philippines.[32]

B. *Review of Workers' Rights in the Philippines Under the GSP program.*

The Philippines later became,[33] and continues to be,[34] a beneficiary of the GSP program when it was first implemented in 1976. In 2015, the Philippines was the fifth largest beneficiary of the GSP program.[35] To decide which countries are

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[20] *Id.* at 153.
[21] Buss, *supra* note 14, at 21.
[22] Brands, *supra* note 16, at 223.
[23] Philippine Trade Act of 1946, 60 Stat. 141 (1946).
[24] Brands, *supra* note 16, at 222.
[25] *Id.*
[26] *Id.*
[27] Buss, *supra* note 14, at 22.
[28] *Id.*; Brands, *supra* note 17, at 222-223.
[29] Buss, *supra* note 14, at 35.
[30] *Id.*
[31] Buss, *supra* note 14, at 144.
[32] *Id.* at 146.
[33] Philippine Dep't of Trade and Industry, *Diversifying PHL Exports: The U.S. Generalized System of Preferences*, https://www.dti.gov.ph/region7/27-main-content/emb-news/9754-diversifying-phl-exports-the-us-generalized-system-of-preferences (last visited July 31, 2018).
[34] *US Generalized System of Preferences for Philippines for 3 years*, The Philippine Star, Mar. 26, 2018, https://www.philstar.com/business/2018/03/26/1800265/us-generalized-system-preferences-philippines-extended-3-years.
[35] Amy R. Remo, *PH ranks 5th biggest USP beneficiary*, Philippine Daily Inquirer, July 1, 2016, http://business.inquirer.net/211516/ph-ranks-5th-biggest-us-gsp-beneficiary.

eligible for the preferential duty-free GSP program, the U.S. President considers economic factors[36] and other mandatory and discretionary eligibility criteria.[37]

Since 1984,[38] one of the factors that the President "shall take into account" to determine whether to designate a country as a beneficiary is "whether or not such country has taken or is taking steps to afford to workers in that country (including any designated zone in that country) internationally recognized workers rights."[39] Under the GSP program, any person may file a request to have the GSP status of any beneficiary country reviewed under this criterion.[40] However, the USTR will only accept those which it decides warrant further consideration.[41]

In 2007, based on a petition filed by the International Labor Rights Fund (ILRF),[42] the USTR placed the Philippines under review for failing to take steps to afford its citizens internationally recognized workers' rights.[43] The United States never withdrew any GSP benefits from the Philippines but it remained under review for workers' rights for all subsequent annual reviews.[44] In December 2015, the USTR formally closed its review, citing the progress made by the Philippine government in addressing workers' rights concerns, including passing labor law reforms.[45]

C. *U.S.-Philippines Trade Today*

The U.S.-Philippines trade relationship was further bolstered in 1989 when the two countries started meeting regularly under a bilateral Trade and Investment Framework Agreement (TIFA) to address outstanding bilateral issues and coordinate on regional and multilateral issues.[46] Under the TIFA, the United States and the

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[36] Trade Act of 1974, 19 U.S.C. §2461(a)(1) (1996).

[37] 19 U.S.C. §§2462(b)-(c) (2002).

[38] Generalized System of Preferences Renewal Act of 1984, 19 U.S.C. §§2461-66 (1984).

[39] *Id.* at §2462(c)(7).

[40] 15 C.F.R. §2007.0(b)(2018).

[41] *Id.* at §2007.2(b)

[42] ILRF 2007 Request for Review of Philippines, *supra* note 5, at 2-3.

[43] U.S. Trade Representative, *Bush Administration Completes 2007 Annual Review of Generalized System of Preferences Program*, June 2008, https://ustr.gov/about-us/policy-offices/press-office/press-releases/archives/2008/june/bush-administration-completes-2007-annual-re.

[44] The U.S. Trade Representative (USTR) conducts an annual review of eligible articles and country practices under the GSP program. 15 C.F.R. §2007.3. USTR, *U.S. Trade Representative Froman Announces Outcome of Generalized System of Preferences Review*, June 2003 (Philippines remains under review for workers' rights), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2013/june/gsp-review-outcome; USTR, *USTR Announces Outcome of Generalized System of Preferences Review*, July 2012 (same), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2012/july/ustr-announces-outcome-gsp-review; USTR, *USTR Announces Outcome of Generalized System of Preferences Review*, Dec. 2011 (same), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2011/december/ustr-announces-outcome-generalized-system-prefere; USTR, *USTR Kirk Comments on Generalized System of Preferences Review*, June 2010 (same), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2010/june/ustr-kirk-comments-generalized-system-preferences-rev; USTR, *Obama Administration Completes 2008 Annual Review of the Generalized System of Preferences*, June 2009 (same), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2009/june/obama-administration-completes-2008-annual-review-gen.

[45] *USTR Uses GSP Program to Advance Workers Rights*, *supra* note 3.

[46] USTR, *Philippines*, *supra* note 13.

Philippines have agreements improving customs administration and trade facilitation protocol, cooperating on addressing illegal transshipments of textiles and apparel, and implementing minimum access commitments.[47] In a July 2017 meeting, the two countries agreed to continue to work towards a free, fair, and balance trade by eliminating trade barriers and promoting increased trade.[48]

Soon after the review of its workers' rights was lifted, the Philippines held informal talks with the United States to discuss joining the 12-nation Transpacific Partnership (TPP) trade agreement (TPP Agreement).[49] In December 2016, citing concerns about the TPP Agreement's restrictions on selling generic medicines, Philippine President Rodrigo Duterte rejected the agreement and expressed support for U.S. President Donald Trump's withdrawal from it.[50]

Despite rejection of the TPP Agreement, the two countries continued to engage in trade talks. Prior to the 31st Association of Southeast Asian Nations Summit in November 2017, the Philippine Department of Trade and Industry studied the possibility of a free trade agreement with the United States.[51] During bilateral talks between Duterte and Trump at the Summit, the United States indicated that it was open to a free trade agreement with the Philippines.[52]

Most recently, the Philippine ambassador to the United States told reporters that negotiations for a free trade agreement with the United States would begin in September, and that "labor" would be one of the first issues discussed.[53] The USTR has made no formal announcement. The two countries released a joint statement on October 22, 2018 lauding the two countries resolving certain outstanding trade issues under the TIFA but the statement did not mention future negotiations for a free trade agreement.[54] The Philippine government, however, continues to express optimism that the parties would soon explore a bilateral free trade agreement.[55]

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[47] *Id.*

[48] U.S. Trade Representative, *United States and Philippines Strengthen Engagement on Trade*, July 11, 2017, https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/july/united-states-and-philippines.

[49] Marius Zaharia, *Philippines holds informal TPP membership talks with U.S.*, Reuters, Aug. 4, 2016, http://www.reuters.com/article/us-philippines-trade-tpp/philippines-holds-informal-tpp-membership-talks-with-u-s-idUSKCN10F0C7.

[50] Alexis Romero, *Duterte rejects Trans-Pacific Partnership deal*, The Philippine Star, Dec. 15, 2016, http://www.philstar.com/business/2016/12/15/1653437/duterte-rejects-trans-pacific-partnership-deal.

[51] *Philippines studying possible free trade deal with US*, ABS-CBN News, Apr. 25, 2017, http://news.abs-cbn.com/business/04/25/17/philippines-studying-possible-free-trade-deal-with-us.

[52] Regine Cabato, *U.S. open to free trade agreement with PH*, CNN Philippines, Nov. 16, 2017, http://cnnphilippines.com/news/2017/11/16/United-States-open-Philippines-free-trade-agreement.html.

[53] *PH, US to start free trade talks in Sept.*, *supra* note 1.

[54] U.S. Trade Representative, *Joint Statement by U.S. Trade Representative Robert E. Lighthizer and Philippine Secretary of Trade and Industry Ramon M. Lopez*, Oct. 22, 2018, https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/october/joint-statement-us-trade.

[55] Philippine Dep't of Trade and Industry, *PH-US Joint Statement on TIFA Issues*, Oct. 22, 2018, https://www.dti.gov.ph/media/latest-news/12397-ph-us-joint-statement-on-tifa-issues.

II. THE PHILIPPINES' SUBSTANTIAL COMPLIANCE WITH THE LABOR STANDARDS IN U.S. FREE TRADE AGREEMENTS

A. *Labor Standards in U.S. Free Trade Agreements*

Since the bipartisan agreement on trade policy reached on May 10, 2007 (the May 10 Agreement), U.S. trade agreements are required to have an "[e]nforceable reciprocal obligation for the countries *to adopt and maintain in their laws and practice* the five basic internationally-recognized labor principles," [emphasis added] as stated in the International Labor Organization's (ILO) Declaration on Fundamental Principles and Rights at Work (ILO Declaration) and "to effectively enforce" those laws.[56]

These fundamental labor principles are: (1) freedom of association and the effective recognition of the right to collective bargaining; (2) elimination of all forms of compulsory labor; (3) effective abolition of child labor and a prohibition on the worst forms of child labor; and (4) elimination of discrimination in respect of employment and occupation.[57] In addition to the four fundamental labor principles, the May 10 Agreement also requires acceptable conditions of work.[58]

The May 10 Agreement, however, does not reference or require the ratification of the corollary eight core ILO Conventions,[59] which define the internationally-recognized labor principles in the ILO Declaration in detail.[60] There are also no other definitions for the requirement of "acceptable conditions of work." In effect, the lack of reference to the ILO Conventions or to any other expanded definitions means that, as discussed in Part V, determinations of whether certain countries are considered compliant with the labor standards in the May 10 Agreement vary widely.[61]

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[56] U.S. Trade Representative, *Bipartisan Agreement on Trade Policy: Labor* 1, May 10, 2007 (hereinafter "May 10 Agreement"), *available at* https://ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file127_11319.pdf; *see also* 19 U.S.C. §3802 (2004) (codifying the May 10 Agreement).

[57] *Id.*; *see also* 19 U.S.C. at §3813(6) (defining "Core labor standards").

[58] *Id.*

[59] A Convention is a legally binding international treaty setting out basic principles and rights at work. INTERNATIONAL LABOR ORGANIZATION, *RULES OF THE GAME: A BRIEF INTRODUCTION TO INTERNATIONAL LABOUR STANDARDS* 15 (3rd ed. 2014) ("ILO RULES OF THE GAME"), *available at* https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_318141.pdf. That the May 10 Agreement does not reference the ILO Conventions is expected given that the United States has only ratified the ILO Conventions on the Abolition of Forced Labor and the Worst Forms of Child Labor. International Labor Organization, *Ratifications for United States*, http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102871 (last visited July 24, 2018). The only reference to an ILO Convention in the labor standards of the May 10 Agreement is the promotion of the universal ratification and full compliance with the ILO Convention on the Elimination of the Worst Forms of Child Labor. 19 U.S.C. at §3802(9).

[60] ILO RULES OF THE GAME, *supra* note 59, at 15.

[61] *See* Jordi Agusti-Panareda, Franz Christian Ebert, and Desirée LeClercq, *ILO Labor Standards and Trade Agreements: A Case for Consistency*, 36 COMP. LAB. L. & POL'Y J. 347 (2015) (arguing that references to the ILO Declaration in trade agreements lead to "legal uncertainty" and "incoherent application in practice").

B. *The Philippines' Substantial Compliance with the Labor Standards in the May 10 Agreement*

While the Philippines is not required to ratify the corollary eight core ILO Conventions, that it has done so[62] provides a readily accessible tool to examine its adoption and maintenance of internationally-recognized labor principles, and whether it is effectively enforcing them.[63] By ratification, it has voluntarily subjected itself to the ILO's requirements that it report regularly on the steps it has taken in law and practice to apply the Conventions.[64]

Beyond ratification, however, as described below, it has taken concrete actions to implement the requirements of the eight core ILO Conventions, which define the internationally-recognized labor principles. Through these actions, the Philippines is in substantial compliance with the labor standards in the May 10 Agreement.

1. The Institutionalization of Workers' Rights in the Philippines

a) A Brief History of Workers' Rights in the Philippines.

As an initial matter, it is important to highlight that the Philippines' achievements in adopting and maintaining internationally-recognized workers' rights are informed by its deep history. It first adopted labor protection as a state policy in its 1935 Constitution,[65] two years before it gained independence from the United States.[66] It later became a member of the ILO in 1948.[67] Since the 1950s, workers' rights have become deeply institutionalized and heavily regulated in the Philippines.[68]

In 1953, trade unionism and collective bargaining became democratic institutions in the Philippines[69] after it ratified the ILO Conventions on Freedom of

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[62] International Labor Organization, *Ratifications for Philippines*, https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102970 (last visited July 24, 2018).

[63] *See* Ferdi De Ville, Jan Orbie, and Lore Van den Putte, *TTIP and Labour Standards, Study for the European Parliament's Committee on Employment and Social Affairs* 37*,* IP/A/EMPL/2015-07 (June 2016), http://www.europarl.europa.eu/RegData/etudes/STUD/2016/578984/IPOL_STU(2016)578984_EN.pdf (recognizing that where a country has ratified an ILO Convention, the ILO serves as an "effective supervisor system" that can determine compliance) (hereinafter "*TTIP and Labour Standards*").

[64] ILO RULES OF THE GAME, *supra* note 59, at 15.

[65] CONST. (1935), art. XIV, § 6 (Phil.). The 1935 Constitution was created after U.S. President Franklin D. Roosevelt signed a bill making the Philippines a commonwealth until 1946 when it would become fully independent. The Philippine Independence Act of 1934, Pub. L. No. 73–127, 48 Stat. 456 (1934).

[66] Buss, *supra* note 15, at 1.

[67] International Labor Organization, *ILO in the Philippines* 2, *available at* https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-manila/documents/publication/wcms_371657.pdf.

[68] *Id.* at 14.

[69] Benedicto E.R. Bitonio, Jr., *Industrial relations and collective bargaining in the Philippines* 12 (ILO Working Paper No. 41, 2012), *available at* http://www.ilo.org/legacy/english/inwork/cb-policy-guide/philippinesindustrialrelationsandcollectivebargaining.pdf.

Association and Protection of the Right to Organize, and the Right to Organize and Collective Bargaining.[70] The Philippines implemented these Conventions by enacting the Industrial Peace Act (IPA).[71] Modeled after the United States' National Labor Relations Act (NLRA) of 1935,[72] the IPA also established the Court of Industrial Relations to resolve labor disputes.[73]

In 1957, the Philippines' Department of Labor and Employment (DOLE), which had existed since American colonialism,[74] was reorganized with expanded powers to regulate, administer, and enforce labor and employment laws.[75] Eager to meet international labor standards, the Philippine government and labor and employer organizations became active participants in ILO conferences.[76]

Despite this auspicious start, the right to organize and engage in collective bargaining was severely curtailed—along with other basic political freedoms and civil rights—with the declaration of martial law in 1972 by President Ferdinand Marcos.[77] Ironically, it was Marcos who promulgated the Labor Code of the Philippines (Labor Code) in 1974.[78] The first of its kind in Southeast Asia,[79] the Labor Code consolidated all the existing laws related to labor and employment, as well as added provisions to conform the Philippines' laws with international standards.[80] Despite martial law extending to 1981,[81] the institutions and legal framework supporting internationally-recognized workers' rights remained intact.[82]

After the People Power Revolution in 1986, Marcos was overthrown and democracy was restored under the leadership of President Corazon Aquino.[83] Aquino immediately lifted the restrictions on the right to organize, to bargain and to

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[70] *ILO Ratifications for Philippines*, *supra* note 62.

[71] An Act to Promote Industrial Peace and For Other Purposes, Rep. Act No. 875 (June 17, 1953) (Phil.) (hereinafter "Industrial Peace Act" or IPA), http://www.lawphil.net/statutes/repacts/ra1953/ra_875_1953.html.

[72] Bitonio, *supra* note 69, at 12; *see also* 29 U.S.C. §§151-169 (1935).

[73] Industrial Peace Act at § 5.

[74] Philippine Dep't of Labor and Employment (DOLE), *DOLE Timelines*, Jan. 30, 2013, https://www.dole.gov.ph/files/DOLE%20Timeline.pdf\ (last visited Aug. 6, 2018).

[75] *Id.*

[76] Bitonio, *supra* note 69, at 13-14.

[77] *Id.* at 12.

[78] A Decree Instituting a Labor Code, Thereby Revising and Consolidating Labor and Social Laws to Afford Protection to Labor, Promote Employment and Human Resources Development and Ensure Industrial Peace Based on Social Justice, Pres. Dec. No. 442 (May 1, 1974) (Phil.) (hereinafter "Labor Code"), http://bwc.dole.gov.ph/images/Downloads/LaborCodeofthePhilippines2017.pdf.

[79] Bitonio, *supra* note 69, at 12.

[80] *Id.*

[81] Brands, *supra* note 16, at 298-318.

[82] Bitonio, *supra* note 69, at 11-12.

[83] *Id.* at 13-14.

strike,[84] although some restrictions have never fully been rolled back.[85] She also restored the right of the public sector to organize.[86]

In 1989, she amended the Labor Code to implement a wage rationalization law which created regional tripartite wage and productivity boards.[87] The regional boards were tasked with determining and fixing minimum wages and promoting productivity at the regional level.[88] The hope in establishing these wage boards was to improve minimum wage-fixing and collective bargaining outcomes to bolster both trade unionism and collective bargaining.[89]

b) The Philippines' Legal Framework and Administration of Workers' Rights

Today, workers' rights in the Philippines are embodied in its Constitution, Civil Code, and Labor Code. Under the Constitution, the State shall protect the rights of workers and promote policies that provide "adequate social services, promote full employment, a rising standard of living, and an improved quality of life for all."[90]

DOLE is responsible for administering all laws related to labor and employment.[91] It houses all adjudicatory bodies, agencies and bureaus tasked with distinct responsibilities in administering work programs or resolving labor disputes.[92] DOLE is also empowered to inspect and issue compliance orders to implement legal standards applicable to workplaces.[93]

As to the adjudication, the National Labor Relations Commission (the Commission) replaced the Court of Industrialization and has exclusive and original jurisdiction over "labor disputes."[94] Labor disputes encompass unfair labor practices, including the legality of strikes and lockout, termination disputes, cases involving wages, work hours, and other terms and conditions of work, and other claims arising out of the employer-employee relationship.[95] The Commission is

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[84] Amending Certain Provisions of the Labor Code of the Philippines, Exec. Ord. No. 111 (1986) (Phil.), http://www.officialgazette.gov.ph/1946/06/14/executive-order-no-111/.

[85] Unlike the Industrial Peace Act, the Labor Code still includes preconditions to exercising the right to organize and extended broad discretionary powers to the Secretary of Labor to intervene in labor disputes in industries. *See, e.g.,* Labor Code at Arts. 240(c), 268, 278(f), 278(g).

[86] Providing Guidelines for the Exercise of the Right to Organize of Government Employees, Creating a Public Sector Labor-Management Council, and For Other Purposes, Exec. Ord. No. 180 (1987) (Phil.), http://www.officialgazette.gov.ph/1987/06/01/executive-order-no-180-s-1987/.

[87] An Act to Rationalize Wage Policy Determination by Establishing the Mechanism and Proper Standards, Rep. Act. No. 6727 (June 9, 1989) (Phil.), https://www.lawphil.net/statutes/repacts/ra1989/ra_6727_1989.html.

[88] Labor Code at Art. 22.

[89] Bitonio, *supra* note 69, at 14.

[90] CONST. (1987), art. II, §§9-10, 18 (Phil.) (hereinafter "CONST. (1987)").

[91] Reorganizing the Ministry of Labor and Employment, Creating the Philippine Overseas Employment Administration, and for Other Purposes, Exec. Ord. No. 797 (May 1, 1982) (Phil.), http://www.officialgazette.gov.ph/1982/05/01/executive-order-no-797-s-1982/.

[92] *Id.*

[93] Labor Code at Art. 128.

[94] *Id.* at Art. 224(a)(6). Cases are first considered by Labor Arbiters and Regional Branch Directors at DOLE's Regional Branches. *Id.* at Art. 221.

[95] *Id.* at Art. 224(a)(6).

composed of a Chairman and fourteen members.[96] Five members each are chosen from nominees by workers and employers organization, while the Chairman and the four remaining members are chosen from the public sector through recommendations of the Labor Secretary.[97] The Commission hears cases in panels of three members or en banc.[98]

The Bureau of Labor Relations (Bureau) administers trade union laws. It has exclusive and original jurisdiction over inter-union (or representation) disputes, intra-union conflicts, all disputes, grievances or problems arising from or affecting labor-management relations, and complaints or requests for examination of union finances.[99] The Bureau is also responsible for the approval and denial of applications to register unions, cancellation of union registrations, maintenance of a registry of labor unions, and custody of collective-bargaining agreements.[100]

The National Conciliation and Mediation Board (NCMB) provides conciliation and mediation services.[101] It administers the voluntary arbitration program and compiles arbitration awards and decisions.[102] Finally, the Secretary of Labor has the ability to assume jurisdiction over certain labor disputes and certify them to the Commission for compulsory arbitration.[103]

Decisions by the Commission, the Bureau, Voluntary Arbitrators, and the Secretary of Labor are all subject to review by a Court of Appeals of the Philippines.[104] Decisions of the Courts of Appeals are then only reviewable by the Supreme Court of the Philippines.[105]

2. The Philippines' Adoption and Maintenance of Internationally Recognized Workers' Rights in Law and Practice

As described below, the Philippines has adopted and maintained the five labor principles in their laws and practice by ratifying the relevant ILO Convention(s), implementing the Convention's requirements, and, when necessary, continuing to be engaged with the ILO.

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[96] *Id.* at Art. 220.
[97] *Id.*
[98] *Id.*
[99] *Id.* at Art. 232.
[100] *Id.* at Art. 237.
[101] Reorganizing the Ministry of Labor and Employment and for Other Purposes, Exec. Ord. No. 126, §22 (1987), https://www.lawphil.net/executive/execord/eo1987/eo_126_1987.html.
[102] *Id.*
[103] Labor Code at Art. 278(g).
[104] *St. Martin Funeral Home v. National Labors Relations Commission*, G.R. No. 130866, Sept. 16, 1998 (affirming that the Courts of Appeals have appellate jurisdiction over adjudications of the NLRC, and that decisions of the Courts of Appeals are then appealable to the Supreme Court) (Phil.).
[105] *Id.*

a) Freedom of Association and Effective Recognition of the Right to Collective Bargaining

The Philippines ratified the ILO Convention on Freedom of Association and Protection of the Right to Organize in 1953.[106] Consistent with that ratification, the right to form and join labor organizations, associations, or societies by those employed in the public and private sectors is embodied both in the Philippine Constitution[107] and in the Labor Code.[108] The right to strike is also guaranteed in the Philippine Constitution.[109]

A labor organization is defined as "any union or association of employees which exist in whole or in part for the purpose of collective bargaining or of dealing with employers concerning terms and conditions of employment.[110] When a union is formed at an employer location, it can be registered as its own independent union or affiliate with a federation of unions as a charter or local.[111] Several unions can form a federation and two or more federations can form a trade union center.[112]

The right to organize in the Philippines extends to all persons employed in commercial, industrial and agricultural enterprises, public institutions, and in religious, charitable, medical or educational institutions, whether for profit or not.[113] In addition, ambulant, intermittent and itinerant workers, self-employed people, rural workers, and those without any definite employers may also form labor organizations for their mutual aid and protection.[114]

The Philippines also ratified the ILO Convention on the Right to Organize and Bargain Collectively in 1953,[115] and the right to bargain collectively is also guaranteed in the Philippine Constitution.[116] Under the Labor Code, employers and labor organizations commit unfair labor practices if they interfere, restrain or coerce employees in the exercise of their right to self-organization, or otherwise discriminate against an employee because of their union views or membership.[117] Employers are also prohibited from conditioning employment on union affiliation or non-affiliation, or influencing or interfering with the formation or administration of any labor organization, including providing financial or other types of support to union organizers or supporters.[118] Finally, it is unlawful for an employer and a labor organization to violate the duty to bargain collectively or to violate a collective-bargaining agreement.[119]

While employers and labor organizations are generally free to negotiate collective-bargaining agreements without interference from the government, the Labor Code imposes certain requirements. For example, a grievance procedure is mandatory in

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[106] *ILO Ratifications for Philippines*, *supra* note 62.
[107] CONST. (1987) at art. III, §8.
[108] Labor Code at Art. 3.
[109] CONST. (1987) at art XIII, §3.
[110] Labor Code at Art. 219(g).
[111] *Id.* at Arts. 240-249.
[112] *Id.* at Art. 244.
[113] Labor Code at Art. 253.
[114] *Id.*
[115] *ILO Ratifications for Philippines*, *supra* note 62.
[116] CONST. (1987) at art. VIII, §3.
[117] Labor Code at Arts. 259(a), (e),(f).
[118] *Id.* at Arts. 259(b), (d).
[119] *Id.* at Arts. 259(g), (i).

collective-bargaining agreements.[120] Grievances are also automatically referred to voluntary arbitration if not settled within seven calendar days.[121] In addition, the term of a collective-bargaining agreement is set for five years with no decertification petition entertained outside of the 60 days before the expiration of the agreement.[122] A collective bargaining agreement may also contain a no-strike or no-lockout clause, but it would only be applicable to economic strikes, and not to unfair labor practice strikes.[123]

b) The Elimination of All Forms of Forced or Compulsory Labor

As a source country and destination country, forced labor of men, women, and children in the Philippines has been and continues to be a significant problem.[124] There are an estimated 784,000 Filipinos currently living in modern slavery.[125] Poverty, conflict-ridden areas like Mindanao, and displacement from natural disasters all contribute to domestic servitude, forced begging, and forced labor in small factories.[126] Women and children from indigenous families and provincial areas are most vulnerable to domestic servitude, while the men are subjected to forced labor and debt bondage in the agricultural, fishing, and maritime industries.[127]

A significant number of the 10 million Filipinos working abroad in the Middle East, Asia, and North America are also subjected to forced labor.[128] The industries involved include agriculture, fishing, shipping, construction, domestic and janitorial services, and even education and nursing.[129] Traffickers are often aided by complicit or corrupt officials in diplomatic missions, law enforcement agencies, and other government agencies.[130] Traffickers also engage in unscrupulous recruitment practices including targeting migrant workers with excessive fees, confiscating identity documents, and abusing educational exchange program visas.[131]

Although forced labor is a significant problem in the Philippines, it has adopted and enforced laws to eliminate all forms of forced or compulsory labor. The Philippines has ratified the ILO Convention on the Abolition of Forced Labor.[132] In 2003, it also enacted the Anti-Trafficking in Persons Act (the Anti-Trafficking Act),

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[120] *Id.* at Art. 273.

[121] *Id.*

[122] *Id.* at Art. 265.

[123] *Master Iron Labor Union v. NLRC*, G.R. No. 92009 (Feb. 17, 1993) (Phil.) (strike held in response to what employees believed in good faith to be unfair labor practices committed by the employer did not violate the no-strike provision in their collective-bargaining agreement).

[124] U.S. DEP'T OF STATE OFFICE TO MONITOR AND COMBAT TRAFFICKING, TRAFFICKING IN PERSONS REPORT (JUNE 2018) 352 (2018) (hereinafter "TRAFFICKING IN PERSONS REPORT 2018"), *available at* https://www.state.gov/documents/organization/282798.pdf.

[125] The Global Slavery Index, *2018 Country Data: Philippines*, https://www.globalslaveryindex.org/2018/data/country-data/philippines/ (last visited Aug. 7, 2018).

[126] TRAFFICKING IN PERSONS REPORT 2018, *supra* note 124, at 352.

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *Id.* at 352-353.

[131] *Id.*

[132] *ILO Ratifications for Philippines*, *supra* note 62.

which created policies and established institutional mechanisms to eliminate and punish human trafficking, and to ensure the recovery and rehabilitation of victims.[133]

The Anti-Trafficking Act criminalized trafficking for the purposes of exploitation, including arranged marriage, adoption, sex tourism, prostitution, pornography, and the recruitment of children into armed conflict.[134] The use of services of trafficked persons was also criminalized.[135] The Act established penalties of up to life imprisonment and fines of up to five million pesos (approximately $96,800), with additional penalties imposed on government employees offenders.[136] The Inter-Agency Council Against Trafficking (IACAT) was also created to monitor and oversee the implementation of the Anti-Trafficking Act.[137]

The Anti-Trafficking Act only became effective, however, when it was expanded ten years later in 2013. The Act was amended, as part of this expansion, to criminalize acts that promoted human trafficking, including the destruction or tampering of evidence, influencing witnesses in an investigation, and using public office to impede an investigation.[138] Funding for government agencies involved in combatting forced labor and human trafficking was also increased.[139]

Since the expansion and creation of a National Strategic Action Plan against trafficking, IACAT has made substantial progress.[140] One part of that plan was the establishment of a public assistance center where the public can report or share information on trafficked persons.[141] IACAT also developed a manual to guide law enforcement bodies on forced labor and trafficking and victim-related issues.[142]

Significantly, IACAT taskforces—composed of prosecutors, law enforcement investigators, welfare officers and NGOs—were established to proactively combat trafficking in hotspot areas, particularly travel centers such as sea ports, airports, and bus terminals.[143] For example, the taskforces partnered with the National Bureau of Investigation (NBI) Anti-Trafficking Division to conduct almost 250 operations that led to the rescue of over 730 victims and the arrest of over 280 offenders.[144]

IACAT also established a hotline service to process requests for assistance and trafficking inquiries and referrals.[145] A temporary shelter was also set up to house

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[133] An Act to Institute Policies to Eliminate Trafficking in Persons Especially Women and Children, Establishing the Necessary Institutional Mechanisms for the Protection and Support of Trafficked Persons, Providing Penalties for its Violations, and for Other Purposes, Rep. Act. No. 9208 (May 26, 2003) (Phil.), http://www.officialgazette.gov.ph/2003/05/26/republic-act-no-9208-s-2003/.

[134] *Id.* at §4.

[135] *Id.*

[136] *Id.* at §10.

[137] *Id.* at §§20-21.

[138] An Act Expanding Republic Act No. 9208, Rep. Act No. 10364, §8 (Feb. 6, 2013) (Phil.), https://www.lawphil.net/statutes/repacts/ra2013/ra_10364_2013.html.

[139] *Id.* at §§24-25.

[140] International Labor Conference, *Report of the Committee of Experts on the Application of Conventions and Recommendations (CEACR)*, 219, ILC.106/III(1A) (2017) (hereinafter "*2017 Report of ILO CEACR*"), *available at* http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_543646.pdf.

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *Id.*

witnesses awaiting transfer to the care of the Department of Social Welfare and Development (DSWD).[146] To facilitate the prosecution of offenders, the shelter also housed and provided support to witnesses, including escorts to attend court hearings.[147] Through this comprehensive approach, convictions have increased steadily.[148]

In 2016, for the first time, the Philippines was designated a Tier 1 country by the U.S. State Department in its annual Trafficking of Persons Report.[149] It maintained that designation in 2017[150] and 2018.[151] The designation means that the Philippines meets the minimum standards for the elimination of trafficking as mandated in the Trafficking Victims Protection Act of 2000.[152] Through this designation, the United States recognizes that the Philippine government has acknowledged the existence of human trafficking and has made the efforts, as described above, to address the problem.[153]

c) The Effective Abolition of Child Labor and a Prohibition on the Worst Forms of Child Labor

There are up to 3.3 million Filipino children aged 5 to 17 who have engaged in some form of work or labor,[154] notwithstanding the Philippines' laws limiting their work and protecting them from all forms of abuse, cruelty, and exploitation. It also has ratified the ILO Conventions on Minimum Age for Admission to Employment, the Worst Forms of Child Labor, and the Rights of the Child and its Optional Protocol on Armed Conflict.[155]

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[146] *Id.*

[147] *Id.*

[148] Karen Liao, *Gradual justice: Human trafficking convictions over the years*, Rappler, Jan. 26, 2014, https://www.rappler.com/newsbreak/iq/43322-human-trafficking-convictions-2005-2013.

[149] U.S. DEP'T OF STATE OFFICE TO MONITOR AND COMBAT TRAFFICKING, TRAFFICKING IN PERSONS REPORT (JUNE 2016) 306 (2016), *available at* https://www.state.gov/documents/organization/271339.pdf. The State Department issues the annual Trafficking in Person Report pursuant to the Trafficking Victims Protection Act of 2000. 22 U.S.C. §7107(b)(2013). The Act requires the Secretary of State to provide Congress with an annual report describing the anti-trafficking efforts of the United States and other countries according to the minimum standards and criteria enumerated in the Act. *Id.*; *see also Id.* at §7106.

[150] U.S. DEP'T OF STATE OFFICE TO MONITOR AND COMBAT TRAFFICKING, TRAFFICKING IN PERSONS REPORT (JUNE 2017) 324 (2017), *available at* https://www.state.gov/documents/organization/271339.pdf.

[151] TRAFFICKING IN PERSONS REPORT 2018, *supra* note 124, at 352.

[152] *Id.* at 38; *see also* 22 U.S.C. §7106.

[153] *Id.* at 38-39. The efforts that the U.S. State Department considers include enactment of relevant laws and criminal punishment; vigorous prosecution; proactive victim identification measures; government funding and partnerships with non-governmental organizations to provide victims with access to shelter, health care, counseling, and legal assistance; and governmental measures to prevent human trafficking. *Id.*; *see also* 22 U.S.C. §7106.

[154] Philippine Statistics Authority (PSA) and International Labor Organization, International Program on the Elimination of Child Labor (ILO-IPEC), *2011 Survey on Children, Final Results* (hereinafter "*2011 Survey on Children*"), https://psa.gov.ph/statistics/survey/labor-and-employment/survey-on-children (last visited Aug. 7, 2018).

[155] *ILO Ratifications for Philippines*, *supra* note 62.

In the Philippines, children under 18 years of age may not be employed in work that is "hazardous or deleterious in nature."[156] This prohibition includes work that would expose children to physical and psychological abuse (e.g., bars, escort services, gambling halls), and work in hazardous environments (e.g., mining, logging, construction, any manufacturing using chemicals and other toxic materials).[157] They are also not allowed to work in excess of allowable work hours for children and at night time.[158]

Despite these prohibitions, 2.1 million Filipino children were engaged in prohibited child labor, including the worst forms such as forced domestic work and commercial sexual exploitation.[159] Child sex trafficking remains prevalent notwithstanding efforts to combat it.[160] Children are coerced into performing sex acts for live internet broadcasts to foreigners, and are trafficked for child sex tourists from Australia, Japan, the United States, and Europe.[161]

Children are also recruited into various armed militia groups[162] to fight, perform chores,[163] and even as human shields. With 93% of violations against children in armed conflict in the Philippines occurring in Mindanao,[164] there is potential for increased involvement of children in militant action. Martial law was extended in Mindanao until the end of 2018,[165] and there is no end in sight to the conflict between the National Democratic Front (NDF)[166]/NPA and the Philippine government.[167]

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[156] An Act Providing for the Elimination of the Worst Forms of Child Labor and Affording Stronger Protection for the Working Child, Rep. Act. No. 9231 (July 28, 2003) (Phil.), https://www.lawphil.net/statutes/repacts/ra2003/ra_9231_2003.html; DOLE, Dep't. Ord. No. 04: Hazardous Work and Activities to Persons Below 18 Years of Age (Sept. 21, 1999) (Phil.), https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/67443/64262/F596342500/PHL67443.pdf; An Act Providing for Stronger Deterrence and Special Protection Against Child Abuse, Exploitation and Discrimination, Rep. Act No. 7610 (June 17, 1992) (Phil.).

[157] DOLE Dep't. Ord. No. 4, *supra* note 156, at §3.

[158] Rep. Act. No. 9231, *supra* note 156, at §12A(1). Children 15 years and below may perform non-hazardous work directly under the sole responsibility of his parents or guardians so long as the work does not impair the child's normal development or interfere with primary and secondary education. *Id.*

[159] *2011 Survey on Children*, *supra* note 154.

[160] TRAFFICKING IN PERSONS REPORT 2018, *supra* note 124, at 352.

[161] *Id.*

[162] These militia groups include the New People's Army (NPA), the Moro Islamic Liberation Front, the Abu Sayyaf Group, and the Bangsamoro Islamic Freedom Fighters. *Id.*; U.S. DEP'T OF LABOR BUREAU OF INTERNATIONAL LABOR AFFAIRS (ILAB), 2016 FINDINGS ON THE WORST FORMS OF CHILD LABOR 807 (2016) (hereinafter "2016 FINDINGS ON THE WORST FORMS OF CHILD LABOR").

[163] *Id.*

[164] U.N. Secretary-General, *Rep. of the Secretary-General on children and armed conflict in the Philippines* 6, UN Doc. S/2017/294 (Apr. 5, 2017), *available at* http://www.un.org/ga/search/view_doc.asp?symbol=S/2017/294&Lang=E&Area=UNDOC.

[165] Euan McKirdy, *Philippines congress extends martial law in Mindanao*, CNN, Dec. 13, 2017, http://www.cnn.com/2017/12/13/asia/mindanao-martial-law-extension-intl/index.html.

[166] The NDF is the political arm of the NPA. *National Democratic Front of the Philippines: Revolutionary united front organization of the Filipino people*, National Democratic Front of the Philippines, International Information Office, https://www.ndfp.org/about/ (last visited Aug. 7, 2018). The NPA is the armed wing of the Communist Party of the Philippines (CCP). International Crisis Group, The Communist Insurgency in the Philippines: Tactics and Talks ii (2011), *available at:* https://d2071andvip0wj.cloudfront.net/202-the-communist-insurgency-in-the-philippines-tactics-and-talks.pdf.

[167] Julius N. Leonon*, Duterte's 'plan' to crush NPA 'set to fail'–CPP*, The Philippine Daily Inquirer, June 29, 2018, http://newsinfo.inquirer.net/1005530/dutertes-plan-to-crush-npa-set-to-fail-cpp.

Despite these challenges, its Tier 1 designation under the Trafficking Victims Protection Act extends to its consistent and persistent efforts to address trafficking involving children.[168] In addition, since 2012, the U.S. Department of Labor has also recognized the Philippines as having made "Significant Advancement" to eliminate the worst forms of child labor.[169] Most recently, it revised and expanded its list of hazardous occupations and activities prohibited for children.[170]

Another significant legislation passed was the Children's Emergency Relief and Protection Act, which enhanced the monitoring and prevention of child trafficking and labor during natural disasters.[171] DOLE's Labor Laws Compliance Officers, who are tasked with inspecting workplaces for labor violations,[172] are also now required to prioritize inspections where children are employed.[173] The U.S. Department of Labor further noted the Philippines' commitment to combating the sexual exploitation of children online when it established the Internet Crimes Against Children office at the Philippine National Police (PNP).[174]

The Philippines also has the necessary mechanisms to address the potential escalation of children involved in armed conflict. In 2013, then-President Benigno Aquino, III, established the Inter-Agency Committee on Children in Armed Conflict (IACCAC), a consortium of government agencies which advocates for the protection and prevention of children in armed conflict.[175] IACCAC ensures that international standards involving children and armed conflict are implemented across all government activities.[176] IACCAC formulates guidelines and programs, provides training and capacity building of local governmental units (LGU), and implements a monitoring, reporting, and response system.[177]

In fact, in 2017, the UN Special Representative for Children and Armed Conflict noted the progress made by IACCAC.[178] Specifically, he noted the development of guidelines for the AFP to protect children in armed conflict. He also noted the

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[168] *See supra* note 149.

[169] 2016 FINDINGS ON THE WORST FORMS OF CHILD LABOR, *supra* note 162, at 806. The Trade and Development Act of 2000 requires the production of an annual report on the efforts of U.S. trade beneficiary countries and territories to eliminate the worst forms of child labor. *Id.* at 5. Individual country assessments are identified as Significant, Moderate, Minimal, or No Advancement. *Id.* at 49.

[170] *Id.* at 806.

[171] An Act Mandating the Provision of Emergency Relief and Protection for Children Before, During, and After Disasters and Other Emergency Situations, Rep. Act. No. 10821 (May 18, 2016) (Phil.), https://www.lawphil.net/statutes/repacts/ra2016/ra_10821_2016.html.

[172] DOLE, Revised Rules on Labor Laws Compliance System, Dep't Order No. 131-B, Rule II, §1(q) (May 30, 2016) ("Revised Rules on Labor Laws Compliance System"), https://www.dole.gov.ph/files/Dept%20Order%20No_%20131-B-16.pdf.

[173] *Id.* at Rule V, §2.

[174] 2016 FINDINGS ON THE WORST FORMS OF CHILD LABOR, *supra* note 162, at 806.

[175] Adopting the Comprehensive Program Framework for Children in Armed Conflict, Strengthening the Council for the Welfare of Children (CWC) and for Other Purposes, Exec. Ord. No. 138, §2 (Aug. 2, 2013) (Phil.), http://www.officialgazette.gov.ph/2013/08/02/executive-order-no-138-s-2013/.

[176] *Id.* at §3.

[177] *Id.*

[178] Rep. of the Secretary-General on children and armed conflict in the Philippines, *supra* note 164, at 12-13, 16-17.

nationwide training of service providers in LGUs and nongovernmental organizations to monitor, report, and facilitate responses.[179]

d) The Elimination of Discrimination in Respect of Employment and Occupation

Equal opportunity in employment is codified in the Philippine Constitution and in the Labor Code. The State shall "promote full employment and equality of employment opportunities for all"[180] and will "ensure equal work opportunities regardless of sex, race or creed."[181] In hiring for the civil service, discrimination on the basis of "gender, civil status, disability, religion, ethnicity, or political affiliation" is also prohibited.[182] The Philippines has also ratified the Conventions on Equal Remuneration and Discrimination (Employment and Occupation),[183] and enacted laws to eliminate discrimination against specific groups of people.

(i) Women

Equal rights for women are specifically addressed in the Philippine Constitution, which states that the Philippine government "recognizes the role of women in nation-building, and shall ensure the fundamental equality before the law of women and men."[184] The government must also "protect working women by providing safe and healthful working conditions, taking into account their maternal functions, and such facilities and opportunities that will enhance their welfare and enable them to realize their full potential in the service of the nation."[185]

Most recently, in 2009, then-President Gloria Macapagal-Arroyo signed off on the Magna Carta of Women (MCW)[186] as a response to the Philippines' pledge to commit to the Convention on the Elimination of All Forms of Discrimination Against Women.[187] The MCW reviews, and, when necessary, works to amend or repeal existing laws that are discriminatory to women.[188] The Philippine Commission on Women (PCW), the primary policy-making and coordinating body on women and gender equality concerns, is implementing the MCW.[189]

Laws prohibiting discrimination against women in the workplace are also included in the Labor Code. It is unlawful to discriminate against female employees solely because of their gender with respect to the terms and conditions of

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[179] *Id.*

[180] CONST. (1987) at art. XIII, §3.

[181] Labor Code at Art. 3.

[182] Philippine Civil Service Commission, *Revised Policies on Merit Promotion Plan*, Mem. Circular Order No. 03-2001, at 1 (Jan. 26, 2001), http://csc.gov.ph/phocadownload//MC2001/mc3s2001.pdf.

[183] *ILO Ratifications for Philippines*, *supra* note 62.

[184] CONST. (1987) at art. II, §14.

[185] *Id.* at Art. XIII, §14.

[186] An Act Providing for the Magna Carta of Women, Rep. Act. No. 9710 (Aug. 14, 2009) (Phil.), http://www.officialgazette.gov.ph/2009/08/14/republic-act-no-9710/.

[187] *Id.* at §2.

[188] *Id.* at §12.

[189] *Id.* at §38.

employment.[190] Prohibited acts include unequal pay for work of equal value, favoring male employees for promotion, training, or other work opportunities,[191] and conditioning employment or continuation of employment on maintaining an unmarried status.[192]

The Labor Code also provides protection for pregnant employees. Employees may not be terminated due to pregnancy, a postpartum-related reason, or a fear that she may be pregnant again.[193] In addition to providing maternity leave and pay,[194] employers are also required to accommodate the pregnancy and postpartum needs of women, including providing alternatives to those engaged in night work.[195]

Penalties for violating anti-discrimination protections for women include criminal liability (e.g., imprisonment from 2-3 years) and fines from PhP 1000 to PhP 10,000 (approximately $19-$191).[196] In addition, female employees who are victims of violence (physical, sexual, or psychological) in or outside the workplace are entitled to a paid leave of 10 days in addition to other paid leaves.[197]

Since 1996, the Philippines has had anti-sexual harassment laws[198] but they remain underutilized.[199] For example, the Philippine government has been unable to assess the number of sexual harassment cases in the private sector because of the lack of a centralized reporting system and the continuing reluctance of women to issue complaints.[200] In response, the PCW's legislative agenda for the current session of Congress will prioritize the expansion of existing laws to address hostile work environments and to enhance the capacity to identify and address cases.[201]

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[190] Labor Code at Art. 133.

[191] *Id.*

[192] *Id.* at Art. 136; *PT&T Co. v. NLRC*, G.R. No. 118978 (May 23, 1997) (a female employee may not be dismissed on the ground of writing "single" on the space for civil status when she was married).

[193] *Id.* at Art. 137.

[194] *Id.* at Art. 131. Married fathers are also entitled to up to seven days of paternity leave while single parents are entitled to up to seven days a year of parental leave. The Solo Parents' Welfare Act of 2000, Rep. Act. No. 8972, §8 (Nov. 7, 2000) (Phil.), http://www.officialgazette.gov.ph/2000/11/07/republic-act-no-8972.

[195] An Act Allowing the Employment of Night Workers, Rep. Act. No. 10151 (June 21, 2011) (Phil.), http://www.officialgazette.gov.ph/2011/06/21/republic-act-no-1015/.

[196] Labor Code at Art. 133.

[197] An Act Defining Violence Against Women and Their Children, Providing for Protective Measures for Victims, Prescribing Penalties Therefore, Rep. Act. No. 9262 (Mar. 8, 2004) (Phil.), http://www.officialgazette.gov.ph/2004/03/08/republic-act-no-9262-s-2004/.

[198] The Anti-Sexual Harassment Act, Rep. Act. No. 7877, §5 (Feb. 14, 1995) (Phil.), http://pcw.gov.ph/law/republic-act-7877; *Domingo v. Rayala*, G.R. No. 155831 (Feb. 18, 2008) (finding that sexual harassment includes an intimidating, hostile or offensive environment for the employee even where there is no demand, request or requirement of a sexual favor).

[199] ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), *Direct Request, Discrimination (Employment and Occupation) Convention – Philippines*, ILC.105 (2016), *available at* http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3254587.

[200] ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), *Direct Request, Discrimination (Employment and Occupation) Convention – Philippines*, ILC.105 (2016), http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3254587.

[201] *Id.*; Philippine Commission Women, *Women's Priority Legislative Agenda*, http://www.pcw.gov.ph/wpla (last visited July 27, 2018).

(ii) People with disabilities

The Philippines requires all qualified disabled employees to be subject to the same terms and conditions of employment, including compensation and benefits, as other qualified able-bodied persons.[202] It also ratified the Convention on Vocational Rehabilitation and Employment (Disabled Persons).[203] Employers may also not discriminate against people with disabilities in all aspects of employment, including recruitment, hiring, continuing employment, career opportunities, and safe and healthy working conditions.[204]

Through the National Council on Disability Affairs, the Philippine government works to ensure that people with disabilities are considered and hired.[205] The Philippine government also sets minimum levels of hiring of people with disabilities in public agencies. At least one percent of a government agency's workforce must be people with disabilities.[206] In the private sector, the government incentivizes the hiring of people with disabilities. For example, employers who hire people with disabilities may deduct a percentage of the wages paid to people with disabilities from its gross income.[207] Fifty percent of the costs of improvements or modifications to the physical facilities of employers to provide reasonable accommodation for people with disabilities is also deductible from net taxable income.[208]

(iii) Other protected classes

The rights of indigenous peoples are protected under the Indigenous Peoples' Rights Act of 1997 (IPRA),[209] which is enforced by the National Commission on Indigenous Peoples.[210] The IPRA prohibits discrimination against indigenous peoples in employment, recruitment, terms and conditions of employment, and pay.[211]

The Philippines also bars discrimination in the workplace based on a person's HIV status, whether actual, perceived, or suspected.[212] Most recently, in August 2016, the Philippine Congress passed the Anti-Age Discrimination in Employment

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[202] An Act Expanding the Positions for Persons with Disability, Rep. Act. No. 10524, §1 (Apr. 23, 2013) (Phil.), http://www.officialgazette.gov.ph/2013/04/23/republic-act-no-10524/.

[203] *ILO Ratifications for Philippines*, *supra* note 62.

[204] Implementing Rules and Regulations of R.A. No. 10524, §6 (June 17, 2016) (Phil.), http://www.ncda.gov.ph/disability-laws/implementing-rules-and-regulations-irr/irr-of-ra-10524/.

[205] Implementing Rules and Regulations of R.A. No. 10524, at §12.

[206] *Id.* at §7.1.

[207] *Id.* at §15.1(a).

[208] *Id.* at §15.1(b).

[209] An Act to Reorganize, Protect and Promote the Rights of Indigenous Cultural Communities/Indigenous Peoples, Creating a National Commission on Indigenous Peoples, Establishing Implementing Mechanisms, Appropriating Funds Therefor, Rep. Act. No. 8371 (Oct. 29, 1997) (Phil.), http://www.officialgazette.gov.ph/1997/10/29/republic-act-no-8371/.

[210] *Id.* at §38.

[211] *Id.* at §§23-24.

[212] An Act Promulgating Policies and Prescribing Measures for the Prevention and Control of HIV/AIDS in the Philippines, Instituting a Nationwide HIV/AIDS Information and Educational Program, Establishing a Comprehensive HIV/AIDS Monitoring System, Strengthening the Philippine National Aids Council, Rep. Act. No. 9504 (Feb. 13, 1998) (Phil.), http://www.officialgazette.gov.ph/1998/02/13/republic-act-no-8504/.

Act.[213] The Act bars the use of age as a factor in hiring employees, including specifying age restrictions in job advertisements, requiring applicants to provide their age during the hiring process, and forced dismissal or early retirement of older workers.[214]

e) Acceptable Conditions of Work

The Philippine Constitution recognizes the minimum goal of "acceptable conditions of work," and states that workers are entitled to "security of tenure, humane conditions of work, and a living wage."[215] Accordingly, the Philippines has enacted minimum wage laws, and other legislation governing work conditions.

Minimum wage rates for agricultural and non-agricultural workers and domestic workers[216] are set by the Regional Tripartite Wage and Productivity Board in each of the Philippines' 17 administrative regions.[217] The Boards may not adjust the rates more than once a year and consider several factors, including the consumer price index, cost of living, and the equitable distribution of income and wealth.[218] Employees are also entitled to 13th month pay equivalent to one month of their regular monthly salary or wages.[219]

As to working conditions and rest periods, employees are entitled to overtime pay for work performed beyond eight hours within a day, to holiday or premium pay for work on holidays or rest days, and a night-shift differential for hours worked between 10 p.m. and 6 a.m.[220] Employers are also required to provide employees with 60 minutes for regular meals,[221] and a rest period of not less than 24 consecutive hours after every six consecutive normal work days.[222] In addition, after one year of service, employees are entitled to service incentive leave or five days paid leave.[223]

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[213] An Act Prohibiting Discrimination Against Any Individual in Employment on Account of Age and Providing Penalties Therefor, Rep. Act No. 10911(July 21, 2016) (Phil.), http://www.officialgazette.gov.ph/downloads/2016/07jul/20160721-RA-10911-BSA.pdf.

[214] DOLE, Dep't Order No. 170, Implementing Rules and Regulations of R.A. No. 10911, §4(a) (Feb. 3, 2017) (Phil.), https://www.dole.gov.ph/issuances/view/361.

[215] CONST. (1987) at art. XIII, §3.

[216] The Philippines ratified the Domestic Workers Convention in 2011. *ILO Ratifications for Philippines*, *supra* note 62. In 2013, it enacted An Act Instituting Policies for the Protection and Welfare of Domestic Workers, Rep. Act. 10361, §24 (Jan. 18, 2013) (Phil.), http://www.officialgazette.gov.ph/2013/01/18/republic-act-no-10361/ (establishing labor standards for domestic workers).

[217] Labor Code at Art. 99. Those who work in a farm tenancy or leasehold, homeworkers, workers in registered cooperatives and in a micro business enterprise are exempt. *Id.* at Art. 98; Barangay Micro Business Enterprises Act of 2002, Rep. Act No. 9178 (Nov. 13, 2002) (Phil.), http://www.officialgazette.gov.ph/2002/11/13/republic-act-no-9178/.

[218] Labor Code at Art. 124.

[219] Presidential Decree No. 851 (Dec. 16, 1975) (Phil.), http://www.officialgazette.gov.ph/1975/12/16/presidential-decree-no-851-s-1975/.

[220] Labor Code at Arts. 86-87, 93.

[221] Labor Code at Art. 85. Shorter meal periods are allowed but must be credited as compensable hours. *Id.* Time spent on standby during meal periods is considered overtime. *Pan Am v. Pan Am Employees Association*, G.R. No. L-16275 (Feb. 23, 1961).

[222] Labor Code at Art. 91.

[223] Id at Art. 95.

Under the Labor Code, DOLE is responsible for administering and enforcing "mandatory OSH [occupational safety and health] standards to eliminate or reduce OSH hazards in all workplaces."[224] It is also responsible for providing programs to ensure "safe and healthful working conditions in all place of employment."[225] In practice, DOLE has issued the OSH Standards, which is a collection of administrative requirements, general safety and health rules, technical safety regulations, and other measures to eliminate or reduce OSH hazards in the workplace.[226]

The OSH standards apply to all places of employment, except mines and those involved in transportation.[227] For establishments engaged in land, sea, and air transportation, the OSH standards only cover their garages, dry docks, port hangers, and maintenance and repair shops.[228] Maritime occupational safety and health are covered by the separate Guidelines on Maritime Occupational Safety and Health.[229] Occupational safety and health in air transportation, on the other hand, is overseen by a completely different agency, the Civil Aviation Authority of the Philippines.[230]

A different agency also oversees occupational safety and health in mines—the Mines and Geosciences Bureau (MGB) of the Department of Environment and Natural Resources (DENR).[231] MGB audits the implementation of mine and safety and health programs, conducts research and promotes best practices on mine safety and health, and investigates incidents and complaints related to mine safety and health.[232] Unlike the OSH Standards, there are penalties for violations of mine safety and health standards, including fines of up to PhP 10,000 (approximately $190) and imprisonment of up to one year.[233]

At DOLE, several agencies work together to enforce OSH standards. The Employees Compensation Commission administers the compensation program for public and private sector employees who suffer illness, death, or accident during work-related activities.[234] The Occupational Safety and Health Center researches and studies OSH issues, plans and implements training programs, and monitors

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[224] *Id.* at Art. 162.

[225] *Id.* at Art. 165.

[226] DOLE OCCUPATIONAL SAFETY AND HEALTH CENTER, OCCUPATIONAL SAFETY AND HEALTH STANDARDS AS AMENDED (1989) (OSH Standards), *available at* http://www.oshc.dole.gov.ph/images/Files/OSH%20Standards%202017.pdf.

[227] *Id.* at §§1003.03, 1003.04.

[228] *Id.* at §1003.03.

[229] DOLE OCCUPATIONAL SAFETY AND HEALTH CENTER, GUIDELINES ON MARITIME OCCUPATIONAL SAFETY AND HEALTH (2013), *available at* http://www.oshc.dole.gov.ph/images/Files/IEC%20Materials/DO%20132%20Guidelines%20in%20MOSH.pdf

[230] An Act Creating the Civil Aviation Authority of the Philippines, Rep. Act No. 9497, §21 (Mar. 4, 2008) (Phil.). http://www.caap.gov.ph/?page_id=284.

[231] An Act Instituting a New System of Mineral Resources Exploration, Development, Utilization and Conservation, Rep. Act No. 7942 (May 3, 1995) (Phil.), http://www.mgb.gov.ph/images/stories/RA_7942.pdf. The Philippines has also ratified the Safety and Health in Mines Convention. *ILO Ratifications for Philippines*, *supra* note 62.

[232] Philippine Dep't of Environment and Natural Resources, Mine Safety and Health Standards, Dep't Order No. 2000-98 (1998), http://www.mgb.gov.ph/images/stories/DAO_2000-98.pdf.

[233] *Id.* at §§108-109.

[234] Labor Code at Arts. 182, 183.

workers' exposure to hazardous conditions.[235] Finally, the Bureau of Working Conditions (BWC) oversees the implementation of laws related to working conditions by providing policy and program development and advice.[236]

To implement the OSH standards in the work place, employers are required to appoint at least one safety officer who must undergo mandatory training prescribed by the BWC.[237] Depending on the number of employees and whether the workplace is a hazardous or non-hazardous workplace, employers may be required to designate more than one safety officer or require that the safety officer work full time as a safety officer.[238]

OSH standards are enforced and monitored by Labor Laws Compliance Officers (LLCO) at DOLE's regional offices.[239] LLCOs conduct assessments and inspections of workplaces to determine compliance with general labor and OSH standards, including wages, working hours, conditions of working premises, health programs, and workplace observance of labor rights.[240] They also disseminate information as well as provide technical assistance.[241]

III. ACHIEVING "FULL COMPLIANCE" BY ELIMINATING LEGAL GAPS AND ENSURING ENFORCEMENT CAPABILITIES

As described above, the Philippines is in substantial compliance with the labor standards required in the May 10 Agreement. However, as I discuss below, there are also significant legal gaps and weak enforcement of existing laws that are contrary to the standards in the United States, and to the requirements of the ILO Conventions.

To obtain "full compliance" with the labor standards in the May 10 Agreement, these legal gaps must be bridged through legal reform described below. Weak enforcement must additionally be remedied through labor provisions in a free trade agreement. As I advocate more fully in Part V, the United States should not enter into a free trade agreement with the Philippines unless it implements these legal reforms and agrees to the labor provisions.

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[235] Establishing an Occupational Safety and Health Center in the Employees' Compensation Commission, Exec. Ord. No. 307 (Nov. 4, 1987) (Phil.), http://www.officialgazette.gov.ph/1987/11/04/executive-order-no-307-s-1987/.

[236] DOLE Bureau of Working Conditions, *BWC in a Nutshell*, http://www.bwc.dole.gov.ph/about-us/bwc-in-a-nutshell (last visited July 27, 2018).

[237] OSH Standards, *supra* note 226, §1033.

[238] *Id.*

[239] Revised Rules on Labor Laws Compliance System, *supra* note 172, at Rule II, §1(q); DOLE, MANUAL ON LLCS AND PROCEDURES FOR UNIFORM IMPLEMENTATION 30-32 (2014) ("LLCS Manual"), *available at* https://www.dole.gov.ph/files/Manual%20on%20the%20LLCS%209-12-14(1).pdf.

[240] *Id.* at 1, 34; *Labor agency enhances compliance officer capacity building*, SunStar Philippines, Aug. 29, 2017, https://www.sunstar.com.ph/article/161305/Labor-agency-enhances-compliance-officer-capacity-building.

[241] LLCS Manual, *supra* note 239, at 34-35.

A. *Eliminate Penal Sanctions for Peaceful Strikes and Limit Compulsory Arbitration to Essential Services*

On November 6, 2004, the union of the farmworkers working at the Hacienda Luisita sugar plantation (United Luisita Workers Union or ULWU) picketed the sugar mill after several hundred farm workers were retrenched.[242] When over 5,000 members of the ULWU participated in the action, the Philippine National Police (PNP) was called to disperse the group.[243] Despite the use of tear gas, truncheons, and water cannons, the policemen were unsuccessful.[244]

Four days later, the Philippine Secretary of Labor (Secretary) asserted jurisdiction over the dispute stating that the matter was of national interest because Hacienda Luisita was one of the country's major sugar producers.[245] The picketers were given five days to vacate or risk forcible removal.[246] The picketers stayed and were later joined by many of the people living in the barangays surrounding Hacienda Luisita, including families and children, who had heeded the ULWU's call for support.[247]

On November 15, 2004, 400 policemen were sent to disperse the 4,000-strong protesters but were unsuccessful again.[248] The following day, two tanks, 700 policemen and 17 trucks of Armed Forces of the Philippines (AFP) soldiers rolled into Hacienda Luisita and unleashed tear gas and water cannons on to the crowd. When the crowds did not disperse, the police and soldiers opened fire with 1000 rounds of ammunition.[249]

Seven people were killed and at least 121 were injured, including children and the elderly.[250] The following day, then-Congressman Benigno Aquino, III, son of former President Corazon Aquino and later President of the Philippines from 2010 to 2016, defended the dispersal of the protesters from his family's Hacienda Luisita.[251] He said: "It is an illegal strike, no strike vote was called."[252]

Although the right to strike is guaranteed in the Philippine Constitution,[253] its heavy regulation undoubtedly contributed to the tragic events at Hacienda Luisita and to all other similar events.[254] In the Labor Code, a strike is defined as a

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[242] Stephanie Dychiu, *Part III: How a workers' strike became the Luisita Massacre*, GMA News, January 26, 2010, http://www.gmanetwork.com/news/news/specialreports/182515/how-a-workers-strike-became-the-luisita-massacre/story/.

[243] *Id.*

[244] *Id.*

[245] *Id.*

[246] *Id.*

[247] *Id.*

[248] *Id.*

[249] *Id.*

[250] *Id.*

[251] *Id.*

[252] *Id.*

[253] CONST. (1987) at art. XIII, §3.

[254] See, e.g., Kilusang Mayo Uno (May First Labor Movement), *Observations by Kilusang Mayo Uno Labor Center on the Implementation of Convention No. 87, 98, and 100 in the Philippines (Article 22 Annual Report on ratified Conventions)*, 15-17 (Sept. 15, 2008) (describing incidents of violence at strike activities).

temporary stoppage of work by concerted action of employees as a result of an industrial or labor dispute.[255] It also encompasses slowdowns, mass leaves, sit-downs, attempts to damage, destroy or sabotage plant equipment and facilities, and similar activities.[256]

Only a legitimate labor organization can strike, which means that any concerted strike action by unorganized employees is prohibited.[257] Failure to comply with any administrative requirements[258] of declaring a legal strike also gives the employer the prerogative to discharge union officers, including shop stewards, for participating in an illegal strike.[259] Moreover, once there has been a final judgment declaring a strike illegal,[260] union officers may be criminally prosecuted, including up to three years of imprisonment.[261]

As the Secretary did at Hacienda Luisita, the Secretary can assert its authority to "assume jurisdiction" over a labor dispute which, in his or her opinion, is "causing or likely to cause a strike or lockout in an industry indispensable to the national interest."[262] Upon assuming jurisdiction, the Secretary may decide the dispute or refer it to the National Labor Relations Commission for compulsory arbitration.[263] Under an assumption of jurisdiction order, the Secretary has the power to enforce a return-to-work order—as it did at Hacienda Luisita—by requesting assistance from law enforcement agencies.[264]

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[255] Labor Code at Art. 219(o).

[256] *Samahang Manggagawa sa Sulpicio Lines, Inc.-NAFLU v. Suplicio Lines, Inc*., G.R. No. 140992 (March 25, 2004).

[257] Labor Code at Art. 278(b); *Visayas Community Medical Center (VCMC) formerly known as Metro Cebu Community Hospital (MCCH) v. Erma Yballe, et al.*, G.R. No. 196156 (Jan. 15, 2014) (affirming that strike held by group of employees was illegal where they had been suspended by their previous union and they were no longer part of a legally registered union).

[258] The requirements for a legal strike are: (1) the grounds must either be a deadlock in negotiations for a collective-bargaining agreement (CBA) or because of the employer's unfair labor practice (ULP); (2) the notice of strike must be timely—15 days before the intended date for a ULP strike and 30 days for a CBA deadlock strike; (3) the strike must have received majority approval from the unit members; (4) the vote of majority approval for the strike must be reported at least 7 days prior to the event; (5) the cooling-off period must be met—30 days for a CBA deadlock and 15 days for a ULP strike—except for union-busting cases; and (6) a 7-day waiting period or strike ban must also be met. Labor Code at Art. 278.

[259] *Id.* at Art. 279(a). Union members, however, may not be terminated for mere participation in an illegal strike unless he or she commits a prohibited act under the Labor Code such as threatening, coercing, and intimidating non-striking persons or obstructing the free ingress to and egress from the company premises. Labor Code at Art. 279. *VCMC v. Erma Yballe, et al.*, G.R. No. 196156 (a worker may not be discharged for participating in an illegal strike unless he or she participates in illegal acts).

[260] Where the employer has engaged in egregious conduct as well, a court may waive the illegality of a strike. See, e.g., *Automotive Engine Rebuilders, Inc. et al. v. Progresibong Unyon ng mg Manggagawa sa AER*, G.R. No. 160192 (July 13, 2011) (affirming the appellate court's ruling that employees who engaged in an illegal strike and illegal actions during their walkout were entitled to reinstatement and backpay where the employer required compulsory drug tests a day after the union filed a petition for certification and engaged in a runaway shop).

[261] Labor Code at Art. 287(a).

[262] Labor Code at Art. 278(g).

[263] *Id.*

[264] *Id.*; *see also Id.* at Art. 278(g), fn. 234.

These restrictions—penal sanctions for engaging in a peaceful strike[265] and compulsory arbitration for a dispute in an industry not in essential services[266]—are contrary to the right to organize freely. Under ILO standards, penal sanctions should only be imposed where there are violations of strike prohibitions such as threats and violence.[267] Penalties for illegal actions related to strikes should also be proportionate to the offence or fault.[268]

In October 2013, DOLE issued an order meant to harmonize the list of industries indispensable to the national interest with the essential services criteria of the ILO.[269] The list is consistent with the ILO criteria,[270] and includes the hospital sector, electric power services, water supply services, air traffic control and other industries recommended by the National Tripartite Industrial Peace Council.[271] The Labor Code, however, also recognizes the banking industry as "indispensable to the national interest,"[272] which is inconsistent with the ILO criteria.[273]

Although the DOLE order is a step forward, to come into full compliance, the list should be given permanence and codified in the Labor Code. In addition, Article 278(g) of the Labor Code should be amended to state that the banking industry is excluded from the essential services list, notwithstanding that it is designated as such by the General Banking Law of 2000.[274] Article 287 of the Labor Code should also be amended to remove penal sanctions for peaceful strike actions, even if the actions are inconsistent with the administrative requirements holding a legal strike. While amendments to the Labor Code have been pursued, they have been pending in the Philippine Congress since 2016.[275]

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[265] INTERNATIONAL LABOR ORGANIZATION COMMITTEE ON FREEDOM OF ASSOCIATION (ILO CFA), FREEDOM OF ASSOCIATION: DIGEST OF DECISIONS AND PRINCIPLES OF THE FREEDOM OF ASSOCIATION COMMITTEE OF THE GOVERNING BODY OF THE ILO ¶668 (Fifth revised edition 2006) (hereinafter "ILO CFA DIGEST"), *available at* http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_090632.pdf.

[266] *Id.* at ¶565.

[267] *Id.* at ¶668.

[268] *Id.*

[269] DOLE, Dep't Ord. No. 40-H-13 (Oct. 21, 2013) (hereinafter DOLE Dep't Ord. No 40-H-13), https://www.dole.gov.ph/files/DO%2040H-13(2).pdf.

[270] ILO CFA DIGEST, *supra* note 265, at ¶585.

[271] DOLE Dep't Order No. 40-H-13, *supra* note 269. The National Tripartite Industrial Peace Council is a consultative and advisory mechanism housed at DOLE, which services as a forum for labor, employer and government to consult about the formulation and implementation of labor and employment policies. An Act Strengthening Tripartism, Rep. Act No. 10395 (Mar. 14, 2013) (Phil.), https://blr.dole.gov.ph/news/republic-act-no-10395-an-act-strengthening-tripartism-amending-for-the-purpose-article-275-of-presidential-decree-no-442-as-amended-otherwise-known-as-the-labor-code-of-the-philippines/.

[272] Labor Code at Art. 278(g), fn. 234.

[273] ILO CFA DIGEST, *supra* note 265, at ¶587.

[274] An Act Providing for the Regulation of the Organization and Operations of Banks, Quasi-Banks, Trust Entities, and For Other Purposes, Rep. Act No. 8791, §22 (May 23, 2000), http://www.bsp.gov.ph/downloads/Regulations/gba.pdf.

[275] See, e.g., An Act Rationalizing Government in Labor Disputes by Adopting the Essential Services Criteria in the Exercise of the Assumption of Jurisdiction, H.R. 6431, 16th Cong. (Third Regular Session) (2016) (Phil.) (approved by the Philippine House of Representatives on October 9, 2017, and transmitted to the Philippine Senate on October 11, 2017), http://www.congress.gov.ph/legisdocs/third_16/hbt6431.pdf.

B. *Require Monitoring and Follow-Up Mechanisms for Antiunion Violence*

Despite comprehensive laws protecting the right to organizing and collective bargaining, antiunion harassment and violence are rampant in the Philippines. The International Labor Rights Forum's (ILRF) 2007 petition for review of the Philippines' workers' right under the GSP program was based on this antiunion violence. [276] In its petition, the ILRF detailed how, since 2001, the Philippine government created a climate of impunity by failing to investigate or hold any people accountable for extrajudicial killings and abductions of union leaders and supporters as well as violence related to union activity. [277]

For example, in the Hacienda Luista incident, charges against Noynoy Aquino, other members of the Cojuangco family, the military and the police were all dismissed.[278] The ILRF also contended that the Philippine government encouraged and allowed the use of the AFP and PNP to quell union and collective action.[279]

In 2009, the Philippine government agreed to a high-level ILO mission which had been requested by the ILO based on numerous trade union complaints against the Philippine government for its failure to prevent employers from, or prosecute employers them for, engaging in antiunion harassment and violence.[280] As a result of the mission, the Philippines has taken significant steps to address antiunion harassment and extrajudicial killings.

To address antiunion harassment, the Philippine government started to provide training and capacity building to the PNP and AFP to enable them to pursue their missions without comprising trade union rights.[281] In 2011, the PNP supplemented its operational procedures with written guidelines on human rights-based policing,

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[276] ILRF Request for Review of the Philippines, *supra* note 5.

[277] *Id.* at 5-18, 22-28.

[278] Orejas, Tonette, *No justice yet in Luisita massacre*, Philippine Daily Inquirer, November 17, 2016, http://newsinfo.inquirer.net/844943/no-justice-yet-in-luisita-massacre.

[279] ILRF Request for Review of the Philippines, *supra* note 5, at 5-18, 22-28. UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions Philip Alston explained in his report to the United Nations Human Rights Council after his 2007 visit to the Philippines that a cause of the killings "involves the characterization of most groups on the left of the political spectrum as "front organizations" for the Communist Party of the Philippines (CPP), CPP's armed group, the New People's Army, and its civil society group, the National Democratic Front (NDF). Alston, Phillip, *Preliminary Report on the Visit of the Special Rapporteur, Phillip Alston, to the Philippines (12-21 February 2007)*, at 3-4, United Nations General Assembly, Human Rights Council. Doc. A/HRC/4/20/Add.3 (Mar. 22, 2007). Because the Philippine military's counterinsurgency strategy against the CPP/NPA/NDF focused on dismantling these purported "front organizations," wide swaths of civil society—including labor union organizers, teachers' unions, and agrarian reform advocates—were considered to be legitimate targets. Alston, Phillip, *Report of the Special Rapporteur, Phillip Alston, to the Philippines*, 7-9, United Nations General Assembly, Human Rights Council. A/HRC/8/3/Add.2 (Apr. 16, 2008).

[280] International Labor Conference, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, 63-64, ILC.98/II(Rev.) (2009), *available at* http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_108378.pdf; see also, ILO, *High Level ILO mission to the Philippines on Convention No. 87 Freedom of Association and Right to Organize*, Sept. 17, 2009, http://www.ilo.org/asia/media-centre/news/WCMS_114072/lang--en/index.htm.

[281] ILO Committee of Experts on the Application of Conventions and Recommendations (ILO CEACR), *Observation, Freedom of Association and Protection of the Right to Organize Convention – Philippines*, ILC.100 (2010), http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2328613.

reinforced human rights desks in police stations, and initiated a campaign to dismantle all private armies.[282] DOLE then issued its own internal operational guidelines to be consistent with the PNP's new guidelines.[283]

In 2012, the NTIPC adopted joint guidelines governing the conduct of all personnel of DOLE, PNP, AFP, and other local bodies involved in labor actions.[284] The guidelines set out the rights of workers, prohibited the deployment of military personnel to address labor-related mass actions and disputes unless necessary, and if necessary, set out the procedures for authorizing deployment.[285] The guidelines also set protocol for PNP or AFP conduct when responding to potential or actual labor disputes or union activity, prohibit PNP and AFP anti-insurgency campaigns against trade union rights, and prescribes remedies for violations.[286] Private security personnel and security guards were also subjected to additional licensing under the guidelines.[287]

The issuance of all guidelines was further accompanied by orientation and training for all relevant agencies.[288] AFP leadership issued directives regarding the guidelines, and all agencies involved embarked on six months of nationwide advocacy.[289] Finally, NTIPC members took part in civil society-led oversight initiatives, and produced a national plan of action towards full freedom of association and collective bargaining rights in export processing sectors and zone.[290]

To address extrajudicial killings, in 2013, the Philippine government empowered the NTIPC[291] to follow through with the numerous cases filed against the Philippine government with the ILO.[292] The NTIPC facilitates solutions and recommends appropriate actions, monitors progress on active cases, and gathers the relevant information on new complaints.[293] To do so, the NTIPC set up independent and capacitated case-based tripartite teams (one representative each from DOLE, and the labor and employer sectors) to review and support resolution of the cases.[294] These cases include extrajudicial killings, forced disappearances, torture, harassment and other grave violations committed against union activists.[295]

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[282] *Id.*

[283] ILO CEACR, *Observation, Freedom of Association and Protection of the Right to Organize Convention – Philippines*, ILC.102 (2012), http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3084398.

[284] *Id.*

[285] *Id.*

[286] *Id.*

[287] *Id.*

[288] *Id.*

[289] *Id.*

[290] *Id.*

[291] See note 271.

[292] ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), *Observation, Freedom of Association and Protection of the Right to Organize Convention – Philippines*, ILC.100 (2010), http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2328613.

[293] Dep't of Labor and Employment Bureau of Labor Relations, TIPC Resolution No. 1, series of 2010 (Jan. 20, 2010), https://blr.dole.gov.ph/wp-content/uploads/2017/10/tipcreso_1-2010.pdf.

[294] 2017 Report of the ILO CEACR, supra note 140, at 162.

[295] *Id.*

In addition to the NTIPC teams, the National Monitoring Mechanism (NMM) was set up[296] to act as the coordinative mechanism among government agencies (including DOLE, AFP, PNP, the Department of Justice (DOJ), and the Commission on Human Rights) and civil society organizations.[297] These agencies and organizations all provide services that promote, protect, and address the rights of victims and their family members. The NMM meets regularly and also conducts audits or investigations of labor-related human rights situations.[298]

A special DOJ task force was also created to investigate and prosecute cases involving violence against union activists.[299] In coordination with DOLE's own monitoring mechanisms and activities, the taskforce prepares an inventory of cases, investigates the unsolved ones, monitors and reports on those under investigation, and prosecutes cases.[300] The taskforce also conducted capacity-building activities to aid DOLE in case profiling and reporting, and to strengthen the inter-agency coordination between all agencies tasked with monitoring, documenting and processing reported violations of international labor standards.[301]

The Philippine government's efforts since the ILO high-level mission may have contributed to the United States lifting its review under the GSP program of workers' rights in the Philippines in November 2015.[302] At that time, USTR stated that it closed its review based on the progress the Philippine government had made in addressing its workers' rights issues, including reforms of labor laws and regulations.[303]

Despite these steps to address antiunion violence and extrajudicial killings, the International Trade Union Confederation (ITUC) still ranked the Philippines as one of the ten worst countries for workers.[304] According to the ITUC, union leaders

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[296] The NMM was set up as a component of the EPJUST Programme, a project funded by the European Union that promotes equitable access to justice and efficient enforcement for all citizens, particularly for the poor and disadvantaged. European Union, EU and Justice Sector Coordinating Council launch GOJUST Programme on 23 February (Feb. 23, 2017), https://eeas.europa.eu/headquarters/headquarters-homepage/21223/eu-and-justice-sector-coordinating-council-launch-gojust-programme-23-february_en.

[297] 2017 Report of the ILO CEACR, supra note 140, at 162.

[298] *Id.*

[299] Philippine Dep't of Justice, *Inter-Agency Committee on Extra-Legal Killings and Enforced Disappearance Meet to Adopt Guidelines for Investigation and Prosecution*, Apr. 19, 2013, https://www.doj.gov.ph/news.html?title=Inter-Agency+Committee+on+Extra-Legal+Killings+and+Enforced+Disappearance+Meet+to+Adopt+Guidelines+for+Investigation+and+Prosecution&newsid=178.

[300] *Id.*

[301] *2017 Report of the ILO CEACR*, *supra* note 140, at 162.

[302] Catherine Pillas, USTR review notes gains in PHL compliance with international labor rights, Business Mirror, November 27, 2015, http://www.businessmirror.com.ph/ustr-review-notes-gains-in-phl-compliance-with-international-labor-rights.

[303] *USTR Uses GSP Program to Advance Workers Rights*, *supra* note 3.

[304] INTERNATIONAL TRADE UNION CONFEDERATION (ITUC), 2017 ITUC GLOBAL RIGHTS INDEX: THE WORLD'S WORST COUNTRIES FOR WORKERS 4 (2018), *available at* https://www.ituc-csi.org/IMG/pdf/ituc-global-rights-index-2018-en-final-2.pdf. The ITUC is a confederation of national trade union centers all over the world, with 331 affiliated organizations in 163 countries and territories on all five continents that promotes and defends workers' rights and interests through international advocacy and campaigns. International Trade Union Confederation, *About Us*, https://www.ituc-csi.org/about-us (last visited Aug. 8, 2018). The ITUC creates its Global Rights Index by collecting, compiling, discussing,

continue to be harassed by intimidation, threats, and false criminal charges.[305] They are also suspended, discharged, and murdered for their union activities.[306] The ITUC also points out that past antiunion violence and extrajudicial killings remain unsolved or unpunished.[307]

In 2016, the ILO stated that that the Philippines "should accept a direct contacts mission."[308] Consistent with the ITUC's assessment, the ILO explained that the direct contacts mission was needed to follow up again on numerous allegations of antiunion violence and the lack of progress in the investigation of past antiunion violence.[309] As of this article's publication, there is no indication from the Duterte Administration that it will accept another ILO direct contacts mission.[310]

The Philippines' sustained efforts the past ten years to improve enforcement of its laws protecting the right to organize are commendable. Indeed, they appear to have been sufficient to meet the labor standards under the GSP program.[311] Under the labor standards of the May 10 Agreement, however, the Philippines' efforts could arguably fall short of the requirement "to effectively enforce"[312] its labor rights laws where the steps taken do not appear to have yielded discernible results.

To bridge this gap, the United States should, at minimum, and based on findings of another ILO direct contacts mission, implement a mechanism in a trade agreement to monitor the Philippines' ability to "effectively enforce" its laws against antiunion violence. Moreover, trade privileges should be made conditional based upon meeting benchmarks included in this mechanism.[313]

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and verifying reported violations of workers' rights from its affiliate unions, as well as analyzing national legislation and identifying gaps in workers' rights protections. *Id.* at 48-53.

[305] *Id.* at 25-26.

[306] *Id.*

[307] *Id.*

[308] International Labor Conference, *Report of the Committee on the Application of Standards,* 78, ILC.105/II (2016) (hereinafter "*2016 Report of the ILO CAS*"), http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_489124.pdf.

[309] *Id.*

[310] At the time the request was made, the Philippine representative said it could not commit the new incoming administration. *2016 Report of the ILO CAS*, *supra* note 308, at 78.

[311] 19 U.S.C. at §2462(c)(7).

[312] May 10 Agreement, *supra* note 56.

[313] *See, e.g.,* United States-Viet Nam Plan for the Enhancement of Trade and Labour Relations, §VIII (Feb. 4, 2016), https://ustr.gov/sites/default/files/TPP-Final-Text-Labour-US-VN-Plan-for-Enhancement-of-Trade-and-Labour-Relations.pdf (the United States reserving the right to withhold or suspend tariff reductions on Viet Nam's compliance with certain labor-related reforms). The United States-Viet Nam Plan was part of the 12-country Transpacific Partnership (TPP) Agreement signed by then-President Barack Obama on February 4, 2016. Rebecca Howard, *Trans-Pacific Partnership trade deal signed, but years of negotiation still to come*, Reuters, Feb. 3, 2016, https://www.reuters.com/article/us-trade-tpp-idUSKCN0VD08S. It did not go into effect as it was never approved by the U.S. Congress because President Trump withdrew from it on January 23, 2017. Memorandum Regarding Withdrawal of the United States from the Transpacific Partnership Negotiations and Agreement, Daily Comp. Pres. Docs., 2017 DCPD No. 00064 (Jan. 23, 2017).

C. *Ensure the Right of all Workers to Establish and Join Unions*

The Philippines is a low-coverage country with a unionization rate well below 40%.[314] In the most recent dataset available, about 1,944,905 million people were union members in 2014, just 8.7 percent of the work force.[315] Only about 11% of union members are covered by a collective-bargaining agreement.[316] These low numbers are, in part, due to organizing barriers including gaps in coverage, legal barriers to forming unions, and contractualization. These barriers should be removed to bring the Philippines to full compliance.

1. Eliminate the Restrictions on Joining Unions

Although the public sector can form unions, that right does not extend to firefighters and jail guards.[317] This is in stark contrast to the United States where there are no restrictions on jail guards joining unions,[318] and 67 percent of firefighters are unionized.[319] This is also inconsistent with ILO standards which require the right of workers, without distinction, to establish and join organizations,[320] including firefighters and prison staff.[321]

Furthermore, in contrast to the extension of protections even to undocumented workers in the United States,[322] the Philippines prohibits migrant workers from engaging directly or indirectly in all forms of union activities.[323] Migrant workers with valid working permits issued by DOLE may organize but only if they are nationals of countries which grant the same or similar rights to Filipino workers.[324] This reciprocity requirement is also inconsistent with ILO standards.[325]

Rule II (Coverage of the Right to Organize) in the Amended Rules and Regulations Governing the Exercise of the Right of Government Employees to

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[314] Bitonio, *supra* note 69, at 17-18.

[315] PHILIPPINE STATISTICS AUTHORITY, *2015 YEARBOOK OF LABOR STATISTICS* 345 (2015), *available at* http://psa.gov.ph/sites/default/files/YLS2015.pdf.

[316] Bitonio *supra* note 69, at 17-18.

[317] PHILIPPINE CIVIL SERVICE COMMISSION, AMENDED RULES AND REGULATIONS GOVERNING THE EXERCISE OF THE RIGHT OF GOVERNMENT EMPLOYEES TO ORGANIZE 10 (2005) (hereinafter "AMENDED RULES AND REGULATIONS GOVERNING THE EXERCISE OF THE RIGHT OF GOVERNMENT EMPLOYEES TO ORGANIZE"), *available at* http://www.ilo.ch/dyn/natlex/docs/ELECTRONIC/98925/117871/F-576569000/PHL3709.pdf.

[318] *See* Milla Sanes and John Schmitt, *Regulation of Public Sector Collective Bargaining in the States*, Center for Economic and Policy Research, March 2014, at 12-68 (listing all state regulations covering public sector organizing), *available at* http://cepr.net/documents/state-public-cb-2014-03.pdf

[319] *Id.* at 3, note 1. This high unionization rate holds even if four states do prohibit firefighters from organizing. *Id.* at 5.

[320] ILO CFA DIGEST, *supra* note 265, at ¶¶ 209, 215.

[321] *Id.* at ¶¶231-232.

[322] *Concrete Form Walls, Inc.*, 346 NLRB 831, 833 (2006), enfd. 225 F. App'x 837, 838 (11th Cir 2007) (based on longstanding Board law and the Supreme Court and Congress' explicit approval of that law, undocumented workers are statutory employees under the National Labor Relations Act).

[323] Labor Code at Arts. 284, 287(b).

[324] *Id.*

[325] ILO CFA DIGEST, *supra* note 265, at ¶215.

Organize[326] should be amended to eliminate restrictions on the rights of firefighters and jail guards to join unions. Similarly, Article 284 (Prohibitions Against Aliens) of the Labor Code should be amended to eliminate restrictions on a migrant worker's right to organize.

2. Eliminate the Restrictions on the Formation of Unions

Philippine unions are required to obtain a certificate of registration in order to acquire legal recognition.[327] That legal persona is essential because in order to petition for an election in a workplace where there is no union, the petition must be filed by a "legitimate labor organization.[328] However, to properly register a public sector union, organizers must show that its members comprise at least 30% of the organizational unit.[329] By contrast, the United States has no minimum member requirements.[330]

The ILO does not view minimum membership requirements as incompatible with the Convention on Freedom of Association.[331] However, the minimum requirements must be established "in a reasonable manner so that the establishment of organizations is not hindered."[332] The ILO has pointed out that organizational units in the Philippine public sector are inherently large[333] and a 30% minimum is too high.[334] This high requirement effectively precludes most public sector employees from forming unions because, as the ILO observed, that percentage requirement was calculated as a proportion of all government employees throughout the country.[335] In addition, the Labor Code requires at least ten unions to form a federation,[336] a requirement that does not exist in the United States[337] and also considered excessively high by the ILO.[338]

Accordingly, Rule V, Section 1 (Requirements for registration of employees' organizations) of the Amended Rules and Regulations Governing the Exercise of the Right of Government Employees to Organize should be amended to reduce the minimum requirement to a more reasonable level.[339] In addition, Article 244 of the

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[326] AMENDED RULES AND REGULATIONS GOVERNING THE EXERCISE OF THE RIGHT OF GOVERNMENT EMPLOYEES TO ORGANIZE , *supra* note 317, at 9-10.

[327] Labor Code at Art. 240.

[328] *Id.* at Art. 269.

[329] AMENDED RULES AND REGULATIONS GOVERNING THE EXERCISE OF THE RIGHT OF GOVERNMENT EMPLOYEES TO ORGANIZE , *supra* note 317, at 14.

[330] 29 U.S.C. §431 (2018) (labor organizations' reporting requirement includes details about the organization, such as its constitution, bylaws, names and titles of officers, and member fee requirements, but is silent on minimum membership requirements).

[331] ILO CFA DIGEST, *supra* note 265, at ¶287.

[332] *Id.*

[333] *2017 Report of the ILO CEACR*, *supra* note 140, at 166.

[334] ILO CFA DIGEST, *supra* note 265, at ¶288.

[335] *2016 Report of the ILO CAS*, *supra* note 308, at 74.

[336] Labor Code at Art. 244.

[337] *See supra* note 330. The statute is similarly silent on minimum membership requirements for federations of unions.

[338] *2016 Report of the ILO CAS*, *supra* note 308, at 74.

[339] AMENDED RULES AND REGULATIONS GOVERNING THE EXERCISE OF THE RIGHT OF GOVERNMENT EMPLOYEES TO ORGANIZE , *supra* note 317, at 14

Labor Code should be amended to reduce the number of unions required to form a federation.

3. Effectively Enforce the Prohibition on Illegal Labor-only Contracting

A significant barrier to organizing in the Philippines is the rampant contractualization of employees to deny them the status and benefits of regular employees.[340] The Labor Code requires employers to make an employee a regular employee after six months and entitled to all benefits under the law for regular employees.[341] Instead, employers hire employees on consecutive five-month contracts to avoid making them permanent employees,[342] a scheme which fits squarely into the Labor Code's definition of illegal labor-only contracting.[343]

This lack of enforcement became a campaign issue in the 2016 Presidential elections with all candidates, including current President Duterte, vowing to end the practice.[344] The Duterte Administration did tighten regulations regarding contracting.[345] The new rules made the requirements to be a service contractor—those who provide employees to employers[346]—more stringent.[347] The new rules also removed loopholes, such as the use of good faith and exigencies as grounds to justify otherwise prohibited subcontracting practices.[348]

DOLE claimed that it would strictly enforce the new rules, including deputizing labor group leaders to conduct more inspections together with labor compliance officers and representatives from employers.[349] In May 2018, at Duterte's prodding, DOLE publicized a list of over 3,300 firms engaged in labor-only contracting.[350] The list was the result of an inspection of almost 100,000 establishments from June 2016

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[340] Kristin Bernabe, Penelope P. Endozo, and Sara Isbaelle Pacia, *Worker hired, fired every 5 months*, Philippine Daily Inquirer, May 1, 2014, http://newsinfo.inquirer.net/598582/worker-hired-fired-every-5-months.

[341] Labor Code at Art. 296.

[342] Bernabe et al., *supra* note 340.

[343] Illegal labor-only contracting exists when a person supplying workers to an employer does not have substantial capital or investment such as tools, equipment, machineries, work or premises, and the workers recruited and placed are performing activities which are directly related to the principal business of such employer. DOLE, Dep't Ord. No. 18-A, §6 (Nov. 14, 2001), https://www.dole.gov.ph/fndr/bong/files/DO%20No_%2018-A-11.pdf.

[344] *#Halalan2016 promise: Candidates vow to end "ENDO"*, ABS-CBN News, Apr. 24, 2016, http://news.abs-cbn.com/halalan2016/business/04/24/16/halalan2016-promise-candidates-vow-to-end-endo.

[345] DOLE, Dep't Ord. No. 174 (Mar. 16, 2017), https://www.dole.gov.ph/issuances/view/367.

[346] *Id.* at §3(d).

[347] *Id.* at §§5, 8.

[348] *Id.* at §23.

[349] Vito Barcelo, *DOLE to strictly enforce ban on 'labor-only contracting*, The Manila Standard, Mar. 23, 2017, http://thestandard.com.ph/news/top-stories/232466/dole-to-strictly-enforce-ban-on-labor-only-contracting-.html.

[350] Leslie Ann Aquino, *DOLE lists 3,377 firms engaged in labor-only contracting*, Manila Bulletin, May 29, 2018, https://news.mb.com.ph/2018/05/28/dole-lists-3377-firms-engaged-in-labor-only-contracting/.

to April 2018, with DOLE planning to inspect more than 900,000 more establishments.[351]

While the Duterte administration's actions appear promising, compliance with DOLE's orders to regularize workers is slow and inconsistent at best. Some of the larger companies on the list, such as PLDT, the largest telecommunications and the digital services company in the Philippines, Philippine Airlines (PAL), and food condiment giant NutriAsia have been cited since 2016, and remain on the list because they have appealed DOLE's orders or have refused to comply.[352]

In addition, other cited employers have been accused of requiring workers to reapply to the positions they hold, or effectively laying off workers by cutting ties with service contractors who do not meet the more stringent requirements.[353] Finally, no government agency was on the list even though lawmakers and employee groups claim that some government agencies are among the worst offenders.[354]

On May 1, 2018, Duterte signed an executive order on prohibiting contracting or subcontracting "undertaken to circumvent the workers' right to security of tenure, self-organization, and collective bargaining and peace concerted activities" (which are already prohibited by the Labor Code and DOLE's new rules).[355] He readily admitted, however, that without penal sanctions, the executive order had "no teeth" and called on Congress to amend the Labor Code to strengthen the prohibitions against illegal labor-only contracting.[356]

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[351] *Id.*

[352] *Labor rights issues intensified under two years of Duterte (Part 1)*, Bulatlat, July 15, 2018, https://bulatlat.com/main/2018/07/15/labor-rights-issues-intensified-two-years-duterte/; *PLDT begins validating employees for regularization*, CNN Philippines, June 2, 2018, http://cnnphilippines.com/news/2018/06/02/PLDT-validating-employees-regularization.html; Tina G. Santos, *Labor chief: PLDT and PAL have been violating labor standards*, Philippine Daily Inquirer, Apr. 19, 2017, http://business.inquirer.net/227983/labor-chief-pldt-and-pal-have-been-violating-labor-standards.

[353] *Labor groups: 'No end to ENDO. Run over by TRAIN,'* Manila Bulletin, July 29, 2018, https://news.mb.com.ph/2018/07/20/labor-groups-no-end-to-endo-run-over-by-train/; *Workers plan to rally vs. gov't failure to end contractualization*, Philippine Daily Inquirer, July 19, 2018, http://newsinfo.inquirer.net/1011834/workers-plan-to-rally-vs-govt-failure-to-end-contractualization; *Jollibee refuses to regularize workers, lays off 400*, Bulatlat, June 29, 2018, http://bulatlat.com/main/2018/06/29/jolibee-refuses-regularize-workers-lays-off-400/; *DOLE reveals Top 20 companies found or suspected to be engaged in labor-only contracting*, CNN Philippines, May 30, 2018, http://cnnphilippines.com/news/2018/05/28/DOLE-labor-only-contracting-companies-contractualization.html; Lara Tan, *DOLE orders NutriAsia to regularize 80 workers of its contracting agency*, CNN Philippines, July 4, 2018, http://cnnphilippines.com/news/2018/07/03/NutriAsia-contractualization-AsiaPro-Multi-Purpose-Cooperative-DOLE.html;

[354] Chito A. Chavez, *Can gov't be penalized for hiring over 720,000 casuals? Manila Bulletin*, May 31, 2018, https://news.mb.com.ph/2018/05/31/can-govt-be-penalized-for-hiring-over-720000-casuals/; Charissa Luci-Atienza, *SBMA's contractualization gets solons' close scrutiny*, Manila Bulletin, May 29, 2018, https://news.mb.com.ph/2018/05/29/sbmas-contractualization-gets-solons-close-scrutiny/;

[355] Lara Tan, *Duterte orders clampdown on illegal contracting and subcontracting of workers*, CNN Philippines, May 2, 2018, http://cnnphilippines.com/news/2018/05/01/Contractualization-endo-Duterte-executive-order.html.

[356] Delfin T. Mallari, Jr., *Duterte admits his executive order on 'endo' has no bite*, Philippine Daily Inquirer, May 4, 2018, http://newsinfo.inquirer.net/987545/duterte-admits-his-executive-order-on-endo-has-no-bite.

In fact, the Security of Tenure and End of Endo[357] Act of 2018 has been introduced in the Senate and aims to strengthen prohibitions against illegal labor-only contracting, including fines and other stiffer penalties against violators[358] that were requested by DOLE.[359] For the Philippines to come into full compliance, the United States should ensure that this legislation is enacted and that the provisions for fines and stiffer penalties are retained.

D. *Prohibit Discrimination Against Women During Hiring*

Although the Philippines has comprehensive legal protections for women in the workplace, the Labor Code does not prohibit discrimination against women during hiring.[360] This is clearly inconsistent with the established protections in the United States against discrimination in hiring on the basis of sex.[361] The ILO has also long urged the Philippines to introduce the necessary legal measures to ensure the protection of women from discrimination in hiring.[362] Accordingly, Article 133 (Discrimination Prohibited) of the Labor Code should be amended to prohibit discrimination against women in hiring.

E. *Require Monitoring and Follow-Up Mechanisms for the Effective Enforcement of Occupational Safety and Health Standards and Laws Against Illegal Labor-Only Contracting*

As discussed above, the Philippines has yet to pass legislation that penalizes the illegal labor-only contracting and which can curb rampant contractualization. In addition, despite the existence of legally mandated OSH standards and the Philippine government's push to hire more LLCOs and conduct more workplace inspections,[363] compliance by employers in OSH standards is also lax. In large part, the lack of compliance is also because of lack of penalties for violations. At most, DOLE Regional Directors may authorize a work stoppage but only in cases of imminent danger.[364]

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[357] In the Philippines, workers victimized by illegal labor-only contracting are more popularly known as end-of-contract workers—or 'endo.' Bernabe et al., *supra* note 340.

[358] An Act Strengthening Workers Right to Security of Tenure, S.B. 1826, 17th Cong. (Third Regular Session) (2018) (Phil.).

[359] Patty Pasion, *DOLE wants stiffer penalties vs contractualization*, Rappler, Oct. 10, 2017, https://www.rappler.com/nation/184814-dole-stiffer-penalty-contractualization.

[360] *See* Labor Code at Art. 133.

[361] 42 U.S.C. §2000e-2(a)(1)(2000).

[362] International Labor Conference, *Report of the Committee of Experts on the Application of Conventions and Recommendations (CEACR)*, 340, ILC.105/III(1A) (2016), *available at* http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_543646.pdf

[363] Leslie Ann G. Aquino, *200 new labor inspectors hired*, Manila Bulletin, June 3, 2018, https://news.mb.com.ph/2018/06/03/200-new-labor-inspectors-hired/.

[364] Revised Rules on Labor Laws Compliance System, *supra* note 172, at Rule VIII.

The ILO has pushed for stiffer penalties and criminalization of violations of OSH standards.[365] Spurred by public pressure after a fire at a mall in Davao City last December that killed 38 workers,[366] the Philippine Congress has recently passed a bill to remedy this lack of penalties.[367] That bill, which includes daily penalties of up to PhP 100,000 (approximately $1,970) for every uncorrected violation and additional penalties of PhP 250,000 to PhP 500,000 (approximately $4,710 to $9,420) or up to six years imprisonment where a death has occurred,[368] was signed by Duterte on August 17, 2018.

Should the Philippines also enact the Security of Tenure and End of Endo Act of 2018, the United States should implement a mechanism in a trade agreement to monitor the Philippines' ability to "effectively enforce" these new penalties, and to increase its compliance rate. Similar to the recommended mechanism to monitor enforcement of the Philippines' laws against antiunion violence, this mechanism should also include benchmarks upon which certain trade privileges are conditioned.

IV. CONSISTENCY IN FOREIGN POLICY: THE CASE FOR A MORE STRINGENT APPLICATION OF THE LABOR STANDARDS IN THE MAY 10 AGREEMENT FOR THE PHILIPPINES

It is clear that the recommendations above to bring the Philippines into "full compliance" would go beyond the recent application of the labor standards in the May 10 Agreement. On February 4, 2016, then-President Barack Obama had signed the TPP Agreement [369] despite strong opposition from the Labor Advisory Committee, [370] which was established to advise, consult with, and make recommendations to the U.S. Secretary of Labor and the USTR on policy matters concerning labor and trade negotiations.[371]

The Committee pointed out that Vietnam—which did not even recognize freedom of association—was given a five to seven-year grace period to comply with internationally recognized workers' rights. [372] The Committee also noted that Malaysia, Brunei, and Mexico had serious labor rights shortcomings.[373] While the

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[365] ILO CEACR, *Observation, Safety and Health in Mines Convention – Philippines*, ILC.106 (2017), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:3302830.

[366] Julliane Love De Jesus, *Lawmakers urge Senate to prioritize safer workplace bill*, Philippine Daily Inquirer, Dec. 28, 2017, http://newsinfo.inquirer.net/955735/lawmakers-urge-senate-to-prioritize-safer-workplace-bill-davao-senate-lawmakers-safe-workplace-nccc-fire-villanueva.

[367] Amita Legaspi, *Senate ratifies bill strengthening occupational safety standards*, GMA News, May 23, 2018, http://www.gmanetwork.com/news/news/nation/654266/senate-ratifies-bill-strengthening-occupational-safety-standards/story/.

[368] An Act Strengthening Compliance with Occupational Safety and Health Standards, Rep. Act No. 11058 (Aug. 17, 2018), http://www.senate.gov.ph/republic_acts/ra%2011058.pdf.

[369] *Trans-Pacific Partnership trade deal signed, but years of negotiation still to come*, *supra* note 313.

[370] The Labor Advisory Committee on Trade Negotiations and Trade Policy, *Report on the Impacts of the Trans-Pacific Partnership* 6-7 (Dec. 2, 2015) (hereinafter "LAC Report on the Impacts of the TPP").

[371] 19 U.S.C § 2155 (2015).

[372] LAC Report on the Impacts of the TPP, *supra* note 370, at 66-67.

[373] *Id.* at 67.

TPP Agreement included side letters requiring Malaysia and Brunei to address their shortcomings, Mexico did not have one.[374]

In addition, the state of workers' rights in the Philippines is either better or equal to the countries that have trade agreements applying the labor standards in the May 10 Agreement—i.e., Peru (2009), Korea (2012), Colombia (2012), Panama (2012). Similar gaps in compliance were also flagged in those countries but were not a barrier to a trade agreement.[375]

Nonetheless, in light of U.S. foreign policy considerations in the Philippines and in Asia, the United States should adhere to this more stringent application if it enters into a trade agreement with the Philippines. With mounting security threats in the Philippines and in Asia,[376] the Philippines' political stability and dependability as a regional ally are crucial to the United States.

Strong labor standards in a trade agreement have the potential to strengthen the labor institutions and processes in the Philippines and promote a politically stable environment.[377] It is also consistent with the United States' other policies towards the Philippines. In the same way that the United States conditions the grant of development and military aid to the Philippines on its human rights record,[378] the

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[374] *Id.* at 67.

[375] For example, unlike the Philippines, Panama was not recognized as having made "Significant Advancement" in the U.S. Labor Department's annual findings on the worst forms of child labor until 2015, three years after its trade agreement went into effect. U.S. Dep't of Labor ILAB, *2015 Findings on the Worst Forms of Child Labor (Panama)*, https://www.dol.gov/sites/default/files/images/ilab/child-labor/Panama.pdf. Significantly, Peru, Panama, Colombia and South Korea all had restrictions on the right to strike which did not meet international standards. Panama had the power to compel the resolution of a labor dispute through arbitration in public services, including services beyond the essential services criteria of the Convention. U.S. Dep't of Labor ILAB, *Republic of Panama Labor Report*, 20 (September 2011), https://www.dol.gov/ilab/reports/pdf/panama_LRR.pdf. Similarly, Colombia banned strikes in services well outside essential services, including social assistance establishments, and the petroleum industry. U.S. Dep't of Labor ILAB, *Republic of Colombia Labor Rights Report*, 13 (September 2011), https://www.dol.gov/ilab/reports/pdf/colombia_LRR.pdf. In South Korea, teachers are not allowed to initiate or participate in an industrial action. U.S. Dep't of Labor ILAB, *Republic of Korea Labor Rights Report*, 22-23 (September 2011), https://www.dol.gov/ilab/reports/pdf/southkorea_lrr.pdf. South Korea also allows criminal "obstruction of business" laws—which carry penalties including heavy fines and imprisonment—to be used against non-violent union activity. *Id.* at 10-11.

[376] Since 2017, Duterte has been dealing with increasing violent extremism in southern Mindanao, including declaring and then extending martial law. Audrey Morallo, *Duterte to fly back to Manila with Mindanao under martial law*, The Philippine Star, May 23, 2017, https://www.philstar.com/headlines/2017/05/23/1703127/duterte-fly-back-manila-mindanao-under-martial-law; Euan McKirdy, *Philippines congress extends martial law in Mindanao*, CNN, December 13, 2017, https://www.cnn.com/2017/12/13/asia/mindanao-martial-law-extension-intl/index.html. Similarly, the United States continues to forge an uncertain path in establishing diplomatic relations with North Korea. David Brunnston, Tim Kelly, and Patricia Zengerle, *Pompeo sees hard road ahead but pursues North Korean denuclearization talks*, Reuters, July 8, 2018, https://reut.rs/2KXPk13

[377] *See generally*, Jeffrey Wheeler, *International Labor Standards in U.S. Development and Foreign Policy* 29-31, Sixty-Fourth Annual Meeting of the Labor and Employment Relations Association, Chicago, IL, Jan. 2012 (discussing the role of international labor rights and standards in promoting good governance, democracy and human rights), http://lerachapters.org/OJS/ojs-2.4.4-1/index.php/PFL/article/view/442/438.

[378] *US House approves bill tying assistance to conduct of PHL's drug war*, BusinessWorld, July 6, 2018, http://www.bworldonline.com/us-house-approves-bill-tying-assistance-to-conduct-of-phls-drug-war/; H. Marcos C. Mordeno, *US Senate asked to restrictions on military aid to PH*, MindaNews, July 2, 2015, http://www.mindanews.com/top-stories/2015/07/us-senate-asked-to-keep-restrictions-on-military-aid-to-ph/.

labor standards recommended here condition trade benefits on the Philippines meeting those standards.

Finally, it is likely that both the United States and the Philippines would be open to accepting this stricter application. It is consistent with the Labor Advisory Committee's recommendations stemming from the TPP Agreement. Specifically, it ensures that the Philippines cannot access the benefits of the trade agreement until it comes into full compliance with its labor laws.[379]

Acknowledging that some legal reforms in the Philippines are at a nascent stage, the more stringent application also requires mechanisms that will monitor the Philippines' ability to effectively enforce these legal reforms.[380] Moreover, such mechanisms will require that continued receipt of preferential trade treatment will depend on meeting established benchmarks.[381] While the recommendations of the Labor Advisory Committee did not sway Obama, there are indications, based on USTR representations, that the Trump Administration would be more amenable to seeking tougher labor provisions in trade agreements.[382]

Furthermore, notwithstanding President Duterte's public statements against the United States,[383] the official actions of the Philippines indicate that it is eager to enter into a trade agreement with the United States. As summarized above, the Philippines had researched the possibility and advocated for a free trade agreement with the United States at least since Duterte withdrew from the TPP Agreement. In practical terms, the economic benefits to the Philippines of a free trade agreement with the United States—its third biggest trade partner[384] and home to 3.4 million Americans who identify as Filipino [385] —is well within Duterte's ambitious economic development plans.[386]

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[379] LAC Report on the Impacts of the TPP, *supra* note 370, at 16 (recommending that parties come into full compliance in law and practice with labor obligations before benefiting from trade agreement).

[380] *Id.* (recommending inclusion of commitments at ensuring effective labor inspections).

[381] *Id.* at 17 (noting that requiring legal reform that excludes implementation and enforcement benchmarks is the "same failed approach" as the Columbia Labor Action Plan and is ineffective).

[382] *See*, *e.g.*, @USTradeRep, TWITTER (Jan. 27, 2018, 12:21 p.m.), https://twitter.com/USTradeRep/status/ 957347864191041536 (tweeting "One of the United States' main objectives is to make NAFTA more fair for American workers"); Lesley Wroughton and Adriana Barrera, *Top NAFTA negotiators join talks as U.S. presents draft text on labor*, Reuters, Sept. 26, 2017 (USTR spokeswoman quoted as saying "With President Trump as one of labor's biggest supporters, the United States has put forward a detailed proposal that replaces the original NAFTA's toothless approach on labor with enforceable provisions to benefit workers across America."), https://www.reuters.com/article/us-trade-nafta/u-s-homes-in-on-labor-investment-as-top-officials-join-talks-idUSKCN1C11S8.

[383] In the fall of 2016, Duterte had borne unrelenting criticism of his anti-drug campaign by the United States. Dharel Placido, *Obama to Duterte: Do war on drugs 'the right way*,*'* ABS-CBN News, Sept. 8, 2016, http://news.abs-cbn.com/news/09/08/16/obama-to-duterte-do-war-on-drugs-the-right-way. In response, Duterte threatened to reconfigure his foreign policy saying: "I will break up with America. I'd rather go to Russia and to China." Buena Bernal and Holly Yan, *Philippines' President says he'll 'break up' with US, tells Obama 'go to hell,'* CNN, Oct. 4, 2016, http://www.cnn.com/2016/10/04/asia/philippines-duterte-us-breakup/index.html

[384] U.S. Dep't of State, Bureau of East Asian and Pacific Affairs, *U.S. Relations With the Philippines* Fact Sheet, https://www.state.gov/r/pa/ei/bgn/2794.htm (last visited July 24, 2018).

[385] Nimfa U. Rueda, *Filipinos 2nd largest Asian group in US, census shows*, Philippine Daily Inquirer, Mar. 25, 2012, http://globalnation.inquirer.net/30477/filipinos-2nd-largest-asian-group-in-us-census-shows.

[386] Duterte's economic plans include expanding economic opportunities by creating more jobs and opportunities for businesses. Philippine Nat'l Economic and Development Authority, PHILIPPINE

It is also important to note that the political efforts for the Philippines to meet the requirements of the more stringent standards will not be significant. Having worked closely with the ILO in the last decade to achieve internationally-recognized workers' rights, the Philippines has already shown its willingness to make the necessary changes. In fact, most of the legislation to enact the needed legal reforms has been written because the Philippine Congress has attempted numerous times to remedy issues raised by the ILO.[387]

CONCLUSION

The Philippines' deep history of workers' rights and engagement with the ILO has helped it achieve substantial compliance with the labor standards in the May 10 Agreement. To come into full compliance, however, will require a more rigorous application of those standards. Their past application indicates that the Philippines' shortcomings may not bar a trade agreement with the United States. Nonetheless, to continue to strengthen its alliance with the Philippines and promote political stability in the country and the region, the United States should be consistent with its policies towards the Philippines. Accordingly, it should only enter into a trade agreement with the Philippines if it implements the necessary legal reforms, and agrees to labor provisions in a trade agreement that can ensure effective enforcement.

Recently, President Duterte evoked nationalist sentiments when he rejected aid from the European Union and said "We are not rich, we are poor. But we do not bargain dignity by accepting money (with) conditionalities that are not really acceptable to us."[388] Entering into a trade agreement with the United States conditioned on meeting labor standards in the May 10 Agreement should be acceptable to the Philippines. Indeed, for the Philippine government, remedying its legal gaps and committing itself to strong labor provisions in a trade agreement is a step in the right direction considering its violent history of labor engagement. To do otherwise—to sacrifice the Filipino people's access to internationally-recognized workers' rights—would be akin to bargaining away their dignity.

DEVELOPMENT PLAN 2017-2022, at 50 (2017), *available at* http://pdp.neda.gov.ph/wp-content/uploads/2017/01/PDP-2017-2022-07-20-2017.pdf. It plans to do so by making the Philippines more globally competitive and strengthening economic ties with other countries, with the hope that this would lead to free trade agreements and other cooperative agreements. *Id.* at 239-242.

[387] *See, e.g.,* An Act Expanding the Prohibition of Discriminatory Acts Against Women on Account of Sex, H.B. 6769, 17th Congress (Second Regular Session) (2017) (Phil.) (pending with the Committee on Rules since Dec. 11, 2017); An Act Allowing Aliens to Exercise their Rights to Self-Organization and Withdrawing Regulation on Foreign Assistance to Trade Unions, H.B. 4448, 17th Cong. (Second Regular Session) (2016) (Phil.) (pending with the Committee on Labor Employment since Nov. 23, 2016); An Act Establishing the Philippine Civil Service Reform Code, S.B. 641, 17th Cong. (Second Regular Session) (2016) (Phil.) (pending with the Committee on Civil Service and Professional Regulation since Aug. 9, 2016); An Act Reducing the Minimum Membership Requirement for Registration of Unions or Federations and Streamlining the Process of Registration, H.B. 1355, 17th Congress (Third Regular Session) (2016) (Phil.) (pending with the Committee on Labor and Employment since Aug. 1, 2016); An Act Allowing Foreign Individuals or Organizations to Engage in Trade Union Activities and to Provide Assistance to Labor Organizations or Groups of Workers, H.B. 1354, 17th Cong. (Second Regular Session) (2016) (Phil.) (pending in the Committee on Labor Employment since Aug. 1, 2016).

[388] Eimor P. Santos, *Duterte rejects EU aid yet again: Forget it, we will survive*, CNN Philippines, Nov. 15, 2017, http://cnnphilippines.com/news/2017/11/15/asean-duterte-rejects-eu-aid-again.html.


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REINSTATEMENT OF REMOVAL AND THE RIGHT TO ASYLUM

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INTRODUCTION

This paper will explore the rationale behind not allowing those who have already tried and failed to enter the country illegally to get a second chance at receiving the benefits of asylum eligibility. It will first give an overview of the three forms of relief that will be discussed, then offer background on the *Chevron* deference standard, explain expedited removal and reinstatement of removal, and address the statutes and cases at issue. Lastly, policy arguments for this interpretation will be discussed along with possible suggestions for policy reform in certain areas.

Two provisions of the Immigration and Nationality Act (INA) enacted on the same day have conflicting language. 8 U.S.C. § 1158(a)(1) allows "any alien" "irrespective of such alien's status" to apply for asylum. On the other hand, 8 U.S.C. § 1231(a)(5) states that an alien subject to a reinstated removal order "is not eligible and may not apply for any relief under this chapter."[1] This conflicting language has led to confusion and issues for people like Yoselin Cazun, a native of Guatemala who illegally entered the United States (U.S.) at the age of fourteen and was ordered removed after failing to convince asylum officers at the border that she had a credible fear of returning to her home country.[2] When Cazun returned to Guatemala, threats she had been receiving prior to her first attempt at escape grew more severe and a gang leader threatened, tortured, and sexually assaulted her. Cazun attempted to re-enter the U.S. again and was detained by border patrol officers. Finding that Cazun had already been ordered removed, the Department of Homeland Security notified Cazun that it intended to reinstate her removal order. Cazun expressed her fear of returning to Guatemala and was granted a reasonable fear interview, which she eventually passed, and she was placed in hearings before an immigration judge to determine whether she was eligible for withholding of removal and Convention Against Torture protection. Though the immigration judge granted her withholding of removal, Cazun wanted asylum. The judge found that she was statutorily barred from receiving it. The Third Circuit Court of Appeals affirmed that decision in denying Cazun eligibility to apply for asylum relief due to her reinstated order of removal. Several other federal circuit courts have held the same way in recent decisions, finding for various reasons that § 1231(a)(5) of the INA applies in these instances—where there is a reinstated order of removal despite the contradictory language of § 1158(a)(1).

Cazun's case is not unique. Many people apprehended at the border, who are found to not have a credible fear[3] of returning to their home country, and are summarily deported from the U.S., attempt to re-enter the U.S. after circumstances

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[1] Cazun v. Attorney General United States, 856 F.3d 249, 254 (3d Cir. 2017).
[2] *Id.*
[3] Immigration and Nationality Act, 8 U.S.C. § 235(b)(1)(B)(v) ("'credible fear of persecution' means that there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 208."); *See also* U.S. CITIZENSHIP AND IMMIGRATION SERVICES, ASYLUM DIVISION OFFICER TRAINING COURSE, CREDIBLE FEAR OF PERSECUTION AND TORTURE DETERMINATIONS 12-13 (2017) (provides the function of credible fear screening and the definition of a credible fear of persecution).

in their home country deteriorate. It is unfortunate that conditions in these people's countries deteriorates to a point where they are forced to seek asylum and then found ineligible. However, for those in this position, there are adequate opportunities to remain in the United States while the threat in their home country remains. While not as beneficial a status as asylum, withholding of removal grants and Convention Against Torture protection still allow for a sufficient degree of protection. These avenues are also bolstered by a longstanding policy against allowing a "second bite at the apple" for those who enter the country through illegal means.

I. ASYLUM, WITHHOLDING OF REMOVAL, AND THE CONVENTION AGAINST TORTURE

A. *Asylum*

The United Nations 1951 Convention Relating to the Status of Refugees, and 1967 Protocol, define a refugee as a person who is unable or unwilling to return to his or her home country, and who cannot obtain protection in that country due to past persecution or a well-founded fear of being persecuted on account of one of five protected grounds. Those protected grounds are established as race, religion, nationality, membership in a particular social group, or political opinion.[4] The U.S. incorporated this definition into its immigration law when Congress passed the Refugee Act of 1980.[5] Asylum is protection granted to someone who meets the international definition of a refugee and is already in the U.S. or at the border with the U.S.[6] It is important to note that the Attorney General is not required to grant asylum to everyone who meets the definition of a refugee—such designation is a matter of discretion.[7]

Once granted asylum, an asylee is granted work authorization, may obtain a social security card, can travel overseas, and can petition to bring certain family members to the U.S. as well as apply for lawful permanent residency status one year after being granted asylum.[8]

There are a few different avenues through which someone seeking asylum can apply for it. One of the ways is through a process called expedited removal. Expedited removal is a proceeding that speeds up the removal process for foreign nationals caught within 100 miles of the border who cannot prove that they have been in the country for longer than 14 days.[9] Under normal removal procedures, if a foreign national without legal immigration status is caught by an Immigration and Customs Enforcement (ICE) officer, he is served with a charging document called the Notice to Appear, which gets filed into immigration court and initiates removal

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[4] *See* United Nations Convention Relating to the Status of Refugees art. 2(A)(1), July 28, 1951.
[5] Refugee Act of 1980, 8 U.S.C. § 1101(a)(42).
[6] AMERICAN IMMIGRATION COUNCIL, ASYLUM IN THE UNITED STATES 1 (2018).
[7] I.N.S. v. Cardoza-Fonesca, 480 U.S. 421, 428 n.5 (1987).
[8] AMERICAN IMMIGRATION COUNCIL, *supra* note 6 at 2.
[9] Bernice Yeung & Andrew Becker, *How Trump is Expanding the Government's Secret Weapon,* REVEAL (Oct. 26, 2017), https://www.revealnews.org/article/how-trump-is-expanding-the-governments-secret-deportation-weapon/.

proceedings (formally referred to as deportation proceedings) against the Respondent, the foreign national. In expedited removal proceedings however, a foreign national does not have an automatic right to a hearing in front of an immigration judge.[10] Once in expedited removal proceedings, foreign nationals have the ability to tell a Customs and Border Protection (CBP) officer that they fear returning to their country and are referred to a United States Citizenship and Immigration Services (USCIS) Asylum Officer for a credible fear interview.[11] During the interview, if the USCIS officer determines that the foreign national does in fact have a credible fear of returning to his or her home country, then the individual is referred to immigration court and proceeds with the asylum process, in which they are given the opportunity to have their case heard before an immigration judge.[12] The foreign national is detained throughout this entire process pending determination by the immigration judge.[13] Expedited removal was introduced as an immigration policy in 1996 with the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 ("IIRIRA").[14] The scope of expedited removal has been expanded greatly since its enactment. Since 2004, immigration officials have used expedited removal to deport individuals who arrive at the border without proper documents, as well as those who entered without authorization, if they were apprehended within fourteen days of arriving and within 100 miles of the Mexican or Canadian border.[15] In 2013, about 193,000 people were deported from the U.S. through expedited removal, a figure which represents 44 percent of the 438,000 removals that year.[16]

If a foreign national has already attempted to enter the U.S. and was previously ordered removed, their previous order of removal is reinstated, a process called reinstatement of removal. If, at this stage, an individual expresses fear of returning to his or her home country, they are entitled to a *reasonable* fear interview rather than a *credible* fear interview.[17] The standard for passing a reasonable fear interview is higher than that of a credible fear interview.[18] If the individual passes this interview, the foreign national's case is referred to an immigration court, where they are eligible for relief under withholding of removal and the Convention Against Torture. If the officer conducting the reasonable fear interview determines that the person does not have a reasonable fear of future persecution, they are ordered removed without ever seeing an immigration judge.[19]

B. *Withholding of Removal*

To receive withholding of removal, a person must demonstrate that there is more than a 50 percent chance that they will be persecuted in their home country on

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[10] INA, 8 U.S.C. § 239(a); *see also* INA, 8 U.S.C. § 240 (a); 8 C.F.R. § 235.3.
[11] 8 C.F.R § 235.3; *see also* AMERICAN IMMIGRATION COUNCIL, *supra* note 6, at 2.
[12] AMERICAN IMMIGRATION COUNCIL, *supra* note 6, at 3; *see also* 8 C.F.R § 235.3.
[13] 8 C.F.R § 235.3.
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*

account of one of the five protected grounds.[20] This is a higher burden of proof than that required for asylum. Withholding of removal also confers fewer benefits than asylum.[21] A person granted withholding of removal, like a person granted asylum, is protected from being deported to their home country where they would be persecuted. However, someone granted withholding of removal does not have the ability to obtain lawful permanent residency and subsequently naturalize.[22] They also cannot travel outside the U.S. The government retains the right to deport a beneficiary of withholding of removal to a third country where they would be safe.[23] While this type of removal is rare, recipients of withholding may be subject to deportation to their home country if conditions in their country improve such that the threat of persecution they once faced no longer exists.[24] Withholding of removal, unlike asylum, is not discretionary in nature. Therefore, if an applicant proves that they are eligible for withholding, a judge must grant that application.[25]

Withholding of Removal has language based on Article 33 of the 1951 United Nations Convention Relating to the Status of Refugees. Article 33(1) of the Convention states: "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[26] This principle is known as that of *non-refoulement*.[27]

C. *Convention Against Torture*

Convention Against Torture (CAT) claims grant relief to applicants who show that there exists a clear probability that they would be tortured in their home country. CAT protection was born from the 1984 United Nations Convention against Torture and Other Cruel Inhuman or Degrading Punishment. Convention Against Torture relief is like withholding of removal in that it is non-discretionary and must be granted by a judge if it is determined that the applicant is eligible.[28] If granted CAT relief, the government cannot return the recipient to the country in which they would be tortured.[29] While the standard of proof is like that of withholding of removal, CAT claims must also show that he or she would be tortured under the CAT definition.[30]

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[20] 8 C.F.R. § 208.16; INA, 8 U.S.C. § 241(b)(3); *see also Withholding of Removal and CAT*, IMMIGRATION EQUALITY (2015), https://www.immigrationequality.org/get-legal-help/our-legal-resources/asylum/withholding-of-removal-and-cat/#.WmUaMEtG1sM.
[21] 8 C.F.R. § 208.16; INA, 8 U.S.C. § 241(b)(3).
[22] 8 C.F.R. § 208.16; INA, 8 U.S.C. § 241(b)(3).
[23] 8 C.F.R. § 208.16; INA, 8 U.S.C. § 241(b)(3).
[24] 8 C.F.R. § 208.16; INA, 8 U.S.C. § 241(b)(3).
[25] 8 C.F.R. § 208.16; INA, 8 U.S.C. § 241(b)(3).
[26] United Nations Convention Relating to the Status of Refugees, art. 33(1), July 28, 1951.
[27] *Id.*
[28] 8 C.F.R. § 208.16-208.18; *see also* Dagmar R. Myslinska, *Which Should I Apply For: Asylum, Withholding of Removal, and/or Protection Against Convention Against Torture?,* NOLO, https://www.nolo.com/legal-encyclopedia/differences-asylum-withholding-removal-protection-convention-against-torture.html.
[29] Immigration Equality, *supra* note 20.
[30] Myslinska, *supra* note 28.

The torture does not, however, have to be on the basis of one of the five protected grounds.[31]

II. CHEVRON DEFERENCE

In *Chevron v. Natural Resources Defense Council*, the Supreme Court established a two-step process for statutory interpretation. In the first step of the *Chevron* analysis, when reviewing an agency's construction of a statute, the reviewing court must determine whether Congress has "directly spoken to the precise question at issue." [32] If the intent of Congress is clear, that is the end of the analysis and the court and agency must follow the expressed intent of Congress. If the court determines that Congress has not spoken to the precise question at issue in a direct manner, the court must move to the second step of the analysis. Under the second step, the court must look to the agency's interpretation of the statute and determine whether the agency's interpretation is a "permissible construction of the statute."[33]

III. *Circuit Court Cases Addressing the Issue*

A. *Garcia v. Sessions (7th Circuit)*

In Garcia v. Sessions,[34] a native citizen of Honduras was subject to a reinstated order of removal because of an *in abstentia* order of removal in 2003, from which he eventually was deported in 2005.[35] Between his return to Honduras and his re-entry into the U.S. in 2014, Garcia claimed he encountered persecution because of his unpopular political view of opposition to deforestation.[36] Garcia claimed he was kidnapped and beaten based on his views, and expressed a fear of persecution and torture in Honduras once apprehended in the U.S. by a Border Patrol agent.[37]

Because he had already been deported, Garcia was subject to a reasonable fear interview and was given a positive reasonable fear determination by the Chicago Asylum Office.[38] He was thereafter referred to an immigration judge for proceedings where he was only eligible for withholding of removal relief under 8 C.F.R. § 208.31(e). [39] The immigration judge granted Garcia statutory withholding of removal, finding that he had been persecuted in the past and that it was more likely than not that he would be persecuted again if he returned to Honduras. Garcia

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[31] *Id.*
[32] Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).
[33] *Id.* at 843.
[34] Garcia v. Sessions, 873 F.3d 553 (7th Cir. 2017).
[35] *Id.* at 555.
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] Stating in relevant part, "If an asylum officer determines that an alien described in this section has a reasonable fear of persecution or torture, the officer shall so inform the alien and issue a Form I–863, Notice of Referral to the Immigration Judge, for full consideration of the request for withholding of removal only."

appealed to the Board of Immigration Appeals (BIA) claiming that he had a statutory right to seek asylum under 8 U.S.C. §1158(a).[40] The BIA dismissed the appeal and the petition to the Seventh Circuit followed, where the Court took up the question of whether a noncitizen with a reinstated order of removal may apply for asylum. The Seventh Circuit found that the text of § 1231(a)(5) is dispositive, and its plain text prohibits Garcia from applying for asylum.[41] It held that while that the general asylum statute, § 1158(a), says that any alien irrespective of status may apply for asylum, the general statement is followed by numerous exceptions, and that § 1231(a)(5) should be read as another limitation on the right to apply for asylum.[42] The Seventh Circuit found that the regulation has unambiguously declared that noncitizens in Garcia's position are ineligible to apply for asylum.[43] In its holding, the Seventh Circuit joined the Second, Fourth, Fifth and Eleventh circuits in their reasoning for upholding the asylum bar for noncitizens with reinstated orders of removal.

B. *Garcia v. Sessions (1st Circuit)*

Victor Garcia, a native and citizen of Guatemala, was a member of Guatemala's indigenous Mayan community and spoke an indigenous language called K'iche.[44] The Guatemalan State committed acts of genocide against groups of Mayan people in four regions of the country, including in Garcia's home region of Zacualpa, Quiche.[45] As a child, Garcia and his family were forced to flee into the mountains when the army swept through their village because such sweeps often resulted in executions and beatings.[46] Garcia's family was subject to particularly poor treatment because they were leaders in their community of indigenous people and in their local Catholic church.[47] Garcia's family also started a campaign against the government to seek justice, and as a result, the government's armed group, the Ladino, retaliated and attacked Garcia on one occasion with a knife. Garcia was unable to walk for 15 days following that incident.[48] Garcia fled for his life in early 2004, joining one of his brothers who lived in Massachusetts. There, he lived in an underground community with other Mayans who had fled Guatemala and joined a local Catholic church and indigenous organization.

Garcia never applied for asylum during that period because he remained traumatized by his persecution and spoke only minimal Spanish and no English.[49] Garcia was picked up by Immigration and Customs Enforcement (ICE) during a raid in 2007, in a factory at which he had been working.[50] He was not given the

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[40] Garcia, 873 F.3d, at 555.
[41] *Id.* at 557.
[42] *Id.*
[43] *Id.*
[44] Garcia v. Sessions, 856 F.3d 27, 44 (1st Cir. 2017).
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.* at 45.

opportunity to consult with an attorney and was transferred to a detention facility in Texas.

He then was afforded a group hearing conducted in Spanish in an immigration court in Texas, where a removal order was entered against him and he did not reserve his right to an appeal.[51] Garcia did not have access to an attorney during these proceedings and there was no K'iche interpreter available.[52] Shortly after his hearing, a group of attorneys met with Garcia and, through the assistance of an interpreter, spoke with him about his hearing, seeking to reopen the appeal.[53] The BIA rejected the appeal, stating that the immigration judge had explained to Garcia and the others at the hearing their rights, including their right to counsel in Spanish.[54] At no point during the decision did the BIA note that Garcia did not speak Spanish.[55] Garcia was removed to Guatemala but returned to try to enter the U.S. unlawfully for the second time in 2015.[56]

After his 2007 removal order was reinstated, Garcia retained counsel and expressed a fear of return to Guatemala on account of his ethnicity, family membership, and religious beliefs and was referred to an asylum officer for a reasonable fear interview.[57] The asylum officer found that Garcia had a reasonable fear, and his case was referred to an immigration judge for withholding of removal only proceedings. The judge found Garcia credible and found that he met his burden of showing that further persecution in Guatemala was more likely than not to befall him.[58] Garcia argued that he was eligible to seek asylum and the immigration judge ruled that he was not. Garcia then appealed to the BIA, who also found that Garcia was ineligible for asylum.[59]

The First Circuit heard the case on appeal and applied the principles of deference described in *Chevron*,[60] determining that Garcia's right to apply for asylum under § 1158(a)(1) turned on questions which implicated an agency's construction of the statute it administers. [61] Garcia contended that § 1158(a)(1) granted him an unambiguous right to seek asylum, winning at *Chevron's* first step.[62] The first circuit did not agree, finding that the difference in language in the statutes before and after the enactment of the IIRIRA – "an alien" before the passage of the IIRIRA compared to "any alien" post IIRIRA enactment – did not actually change Congress's intention that § 1158(a)(1) trumps the bar that § 1231(a)(5) imposes.[63]

The Court then moved on from the first step of *Chevron* analysis to see if Garcia could win at the second step.[64] The Court found that the agency's choice in the case

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[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.* at 34.
[58] *Id.*
[59] *Id.*
[60] Chevron v. Nat'l Resources Defense Council, Inc., 467 U.S. 837 (1984).
[61] Garcia, 856 F.3d, at 35.
[62] *Id.*
[63] *Id.* at 36.
[64] *Id.* at 38.

was one that it must accept because the agency regulations reasonably balanced the various statutory provisions by establishing a new screening process to rapidly identify and assess claims for withholding of removal and protection under CAT without disrupting the removal process as it applied to aliens subject to reinstated orders of removal.[65] The Court found that it was not unreasonable to distinguish between asylum and withholding of removal for purposes of applying the bar.[66] It also found that the agency's choice to treat asylum, but not withholding of removal, as subject to the bar for applying for relief as set out by statute, was in compliance with the relevant legislative history, even if it was not compelled by it.[67]

Circuit Judge Stahl dissented in the case, arguing that the majority mechanically applied the *Chevron* analysis while ignoring the fact that Garcia was denied due process during his initial removal proceeding. The due process concerns came from the fact that Garcia was given an entire hearing and read his rights entirely in Spanish—a language he did not understand—and that no K'iche interpreter was available.[68] Judge Stahl also reasoned that the majority's decision put the U.S. in violation of international law and went against the Charming Betsy[69] doctrine.[70]

C. *Mejia v. Sessions*

Calla Mejia had been threatened, brutally beaten, and raped by her husband for several years in her native country of Peru.[71] When she reported this abuse to the police in Peru, they failed to investigate her claims after discovering that her husband was a police officer.[72] Mejia waded across the Rio Grande from Mexico to enter the U.S. in 2017, where she was apprehended by CBP officers. She told her story to the officer, who concluded that she had a credible fear and referred her to an immigration judge for a hearing.

At the Master Calendar hearing—typically the first hearing before an immigration judge in removal proceedings—Mejia, who appeared *pro se*, was advised by the judge that she had a credibility problem because of two separate statements she had provided to immigration officials, one stating that she intended to come to New York to live and work, and the other citing the torture and abuse she faced on account of her husband.[73] Mejia decided to decline to apply for relief and was ordered removed. After returning to Peru, her husband learned of her whereabouts, attacked her, and raped her.[74] Mejia fled to the U.S. a second time, where she was immediately apprehended and her order of removal was reinstated.[75]

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[65] *Id.*
[66] *Id.* at 40.
[67] *Id.*
[68] *Id.* at 45.
[69] Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804) ("An Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.").
[70] Garcia, 856 F.3d, at 43.
[71] Mejia v. Sessions, 866 F.3d 573, 576 (4th Cir. 2017).
[72] *Id.*
[73] *Id.* at 577.
[74] *Id.*
[75] *Id.* at 578.

After expressing fear of returning to Peru, Mejia passed her reasonable fear interview and was placed in withholding-only removal proceedings where withholding of removal and CAT protection were her only means of relief.[76] Her application for withholding of removal was granted, and though she applied for asylum relief represented this time by counsel, the immigration judge held that Mejia was ineligible due to her reinstated removal order and that the immigration judge lacked the authority to consider her asylum application.[77]

In its review, the Fourth Circuit examined Mejia's claim that she was eligible to seek asylum despite her reinstated removal order by looking at the relationship between 8 U.S.C. § 1158 and 8 U.S.C. § 1231(a)(5).[78] The Court also analyzed the enactment by IIRIRA in 1996 of § 1231(a)(5) and the Act's governance of reinstatement of removal orders. The Court noted the frustration of Congress with the duplicative nature of the prior process of illegal re-entrants being placed in the same removal proceeding as they had been in before, which afforded them more time before an immigration judge.[79] The new reinstatement of removal rules took away the ability for the order to be reopened or reviewed and the ability to apply for relief in the form of asylum.[80]

The Court looked to resolve the issue of statutory construction by applying the two-step framework prescribed by *Chevron*.[81] The Court first looked to the statute's plain language without giving any weight to the agency's position.[82] The Court found no ambiguity in the relationship between the two statutes, and found it clear that by enacting the reinstatement bar, Congress intended to preclude individuals subject to reinstatement of removal orders from applying for asylum.[83] It then determined whether the provision was a general or specific one, and found that the reinstatement bar was more specific than the asylum provision. The Court then turned to legislative intent, and determined that Congress intended that aliens that are subject to reinstated orders of removal be precluded from applying for asylum.[84]

The Fourth Circuit also found that Congress did not conflict with international treaty obligations when it barred illegal reentrants from applying for asylum relief because withholding of removal and CAT protection were still both available.[85]

D. *Perez-Guzman v. Lynch*

Perez, a native and citizen of Guatemala was struck by a stray bullet fired by members of a gang extorting a local businessman.[86] After the gang members were released from jail, they visited Perez's house while he was away and Perez

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[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.* at 580.
[80] *Id.*
[81] Chevron v. Nat'l Resources Defense Council, Inc., 467 U.S. 837 (1984).
[82] Mejia, 866 F.3d, at 583.
[83] *Id.* at 584.
[84] *Id.* at 587.
[85] *Id.* at 588.
[86] Perez-Guzman v. Lynch, 835 F.3d 1066 (9th Cir. 2016).

discovered that his name appeared on a "death squad kill list" compiled by a group of police officers and soldiers.[87] Other people who had also been listed were soon killed, including Perez's cousin. Soon after his cousin was murdered, Perez fled his hometown and was abducted by persons pretending to be Guatemalan police officers. They blindfolded Perez, tied him to a chair, and beat him, but realized that they had abducted the wrong man.[88] His kidnappers considered killing Perez but released him instead, threatening to kill him if he reported the attack. Perez entered the U.S. in June 2011 but was apprehended by border patrol officers. Perez did not tell the officers he feared returning to Guatemala and was removed in July 2011. Perez tried re-entering a second time in January 2012 and had his order of removal reinstated. This time, Perez expressed a fear of returning to Guatemala and was referred to an immigration judge after an asylum officer found he had a reasonable fear of persecution and torture.[89] Perez sought asylum, withholding of removal, and CAT relief but the immigration judge found he was ineligible for asylum relief because of the reinstatement of removal order bar. The Court denied his applications for withholding of removal and CAT protection because it found Perez had not established that it was more likely than not that he would be persecuted on a protected ground or tortured with government consent or acquiescence if he went back to Guatemala.[90]

The Ninth Circuit concluded that Perez was not entitled to asylum relief as he claimed.[91] The Court answered the statutory interpretation question by following the *Chevron* framework, determining first that Congress had not spoken directly about this issue and then looking to the implementing agency's construction.[92] The Court also looked more closely at the language of § 1158(a)(1) and how Congress intended to harmonize it with § 1231(a)(5).[93] The Court noted that normally when two statutes come into conflict, courts assume Congress intended specific provisions to prevail over more general ones under rules of statutory construction. However, in Perez's case, the Ninth Circuit found difficulty in determining which statute was general and which was specific.[94] The Court also found that the legislative history in this matter was silent on the precise issue before the Court.[95] The Court therefore proceeded to the second step of the *Chevron* analysis to determine the reasonableness of the agency's determination. The Court found that the agency's judgment that § 1231(a)(5) is the more specific provision was reasonable, and that the agency's interpretation is a reasonable construction of the legislative history. The Court also found that had Congress intended to include a carve out for asylum relief, it could have done so when it drafted § 1231(a)(5) or revised § 1158.[96] The Ninth Circuit held that 8 C.F.R. §1208.31(e) is a reasonable interpretation of the interplay between

[87] *Id.* at 1070.
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.* at 1073
[92] *Id.*
[93] *Id.* at 1075.
[94] *Id.*
[95] *Id.* at 1076.
[96] *Id.*

§ 1158 and § 1231 and that the Court must defer to it under *Chevron*, thereby barring Perez from asylum relief eligibility because of his reinstated removal order.

E. *Ramirez-Majia v. Lynch*

Fany Jackeline Ramirez-Mejia, a native and citizen of Honduras, was apprehended while entering the U.S. illegally and removed from the country.[97] She returned to the U.S. the next month and was arrested for theft.[98] Her order of removal was reinstated and, when questioned by an immigration officer, she expressed a fear of returning to Honduras, explaining that she feared being killed by the same individuals who killed her brother.[99] Ramirez-Mejia was referred to an immigration judge who did not find her testimony plausible but accepted it as credible.[100] Regardless, the immigration judge concluded that Ramirez-Mejia was ineligible for withholding of removal or protection under CAT because she had not demonstrated persecution based on membership in a protected class.[101] In February 2012, she was removed once again to Honduras. One month later, Ramirez-Mejia tried to reopen her case because of discovery of previously unavailable evidence.[102] The BIA granted her motion to reopen and remanded the case to the immigration judge to determine her eligibility for withholding of removal and CAT protection.[103] She was paroled into the country so she could be present for her case, and testified about her fear in light of the new evidence. The immigration judge once again denied withholding of removal and CAT protection, finding her credible but not belonging to a protected group and not targeted on the basis of her familial status.[104] The BIA dismissed her appeal and the Fifth Circuit took up the case for review subsequent to Ramirez-Mejia's filing a petition.[105]

Before the Fifth Circuit, Ramirez-Mejia claimed she was eligible for asylum, arguing that the BIA erred in concluding that § 1231(a)(5) bars her from applying for asylum with her reinstated order of removal because asylum is not a form of "relief" under the statute.[106] The Court looked to the definition of "relief" in Black's Law Dictionary[107] since it was not defined by the immigration statutes, and found that it disagreed with Ramirez-Mejia, noting that in light of the definition, the statute read plainly broadly denies all forms of redress from removal, including asylum.[108]

Ramirez-Mejia then argued that this interpretation of § 1231(a)(5) conflicted with § 1158.[109] The Fifth Circuit disagreed. The Court found that § 1158 was

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[97] Ramirez-Mejia v. Lynch, 794 F.3d 485, 487 (5th Cir. 2015).
[98] *Id.*
[99] *Id.*
[100] *Id.* at 488.
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.* at 489.
[106] *Id.*
[107] *See* Relief Definition, *Black's Law Dictionary* (10th ed. 2014), *available at Westlaw*.
[108] Ramirez-Mejia, 794 F.3d, at 489.
[109] *Id.* at 490.

intended to be amenable to limitation by regulation and the exercise of discretion.[110] The Court applied only step one of the *Chevron* analysis and looked to § 1231(a)(5)'s plain language, relevant regulations and analogous case law in making its decision.[111]

F. *R-S-C v. Sessions*

R-S-C-, an indigenous Guatemalan woman tried to enter the U.S. three times to escape persecution in her home country.[112] In Guatemala she was raped several times, sodomized, physically beaten and strangled, kidnapped and extorted without the help of local law enforcement in preventing the abuse. She suffered the persecution largely because she was an indigenous woman, and mistreatment of indigenous women in Guatemala was common and routinely encouraged.[113] When she first fled to the U.S., she claims border officials did not believe she had a fear and accused all Guatemalans of being liars, deporting her without giving her the opportunity to have her case heard in front of an asylum officer. [114]

After returning to Guatemala R-S-C- was drugged, raped and left for dead on a riverbank.[115] She fled to the U.S. again, and upon being apprehended, pleaded with immigration officials to help her because she was fearful of returning to her country. The officer whom she encountered called her a liar because she had failed to bring her children with her to the U.S. This officer also did not refer her to an asylum officer for an interview, and she was removed to Guatemala.

R-S-C- faced violent threats and extortion upon her second return to Guatemala and fled to the U.S. for a third time with her eight-year-old son. This time when she expressed a fear of returning to Guatemala, she was referred to an asylum officer for a reasonable fear interview.[116] Though the asylum officer did not find that she had a reasonable fear, an immigration judge vacated the asylum officer's decision and placed her in withholding only proceedings. Though R-S-C- also asked for asylum, the judge did not grant her asylum request, granting her withholding of removal only. R-S-C- appealed to the BIA which dismissed the appeal. The Tenth Circuit examined the case, specifically analyzing the conflict between § 1158(a)(1) and § 1231 (a)(5), and found that she was in fact barred from asylum application eligibility.[117] The Court looked to the *Chevron* two-step framework in making this determination.[118] Finding difficulty in determining which provision was more specific than the other, and making the determination that Congress had not specifically addressed the issue before the Court, the Court determined that the statutory text itself did not resolve the presented question.[119] Turning to the second step of the *Chevron* analysis, the Court found that the Attorney General had reasonably interpreted the ambiguous

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[110] *Id.*
[111] *Id.* at 491.
[112] R-S-C v. Sessions, 869 F.3d 1176, 1180 (10th Cir. 2017).
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.* at 1181.
[117] *Id.*
[118] *Id.* at 1183.
[119] *Id.* at 1185.

statutory scheme in concluding that a noncitizen such as R-S-C- was not eligible for asylum relief, thereby denying her request for review of the original decision.[120]

IV. WHY THOSE WITH REINSTATED ORDERS OF REMOVAL SHOULD BE INELIGIBLE FOR ASYLUM

A. *Withholding of Removal and the Convention Against Torture Provide Adequate Protection*

While withholding of removal grants and relief under CAT do not provide the kinds of long-term opportunities and benefits as asylum does, they do usually provide the person who receives its benefits the opportunity to reside in the U.S. as a safe-haven until it is safe to return to the person's home country. Those who receive a grant of withholding of removal are also eligible for work authorization like asylum seekers.[121] Additionally, while in theory, ICE can reopen proceedings for a non-citizen granted withholding of removal and revoke it if conditions in the country of origin improve significantly, as a practical matter, this happens very rarely.[122] In addition, those with withholding status are eligible to receive public assistance including, Medicaid, Supplemental Security Income, and Food Stamps, as well as certain government housing subsidies, and are eligible for Legal Services Corporation-funded legal services.[123] Having the ability to obtain a social security card and work legally in the U.S. as well as entitlement to certain government benefits is a great deal better than remaining undocumented or detained in the country with little to no rights. It is also far superior to being sent back to one's country of origin if that country of origin would engage in torture or persecution, potentially ending the non-citizen's life.[124]

Protection under CAT similarly provides limited benefits; but, if someone who tried to unsuccessfully enter the country once before illegally has a genuine credible and reasonable fear of torture in his or her home country, protection under CAT will prohibit the U.S. Government from sending that non-citizen back to the home country. The Government can send that non-citizen back to the home country only if and when the case is reopened by the Department of Homeland Security (DHS) because conditions in that home country have been found to improve such that a threat to the non-citizen no longer applies. CAT protection also grants a non-citizen

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[120] *Id.* at 1189.

[121] *Withholding Status*, IMMIGRATION EQUALITY (2015), https://www.immigrationequality.org/get-legal-help/our-legal-resources/immigration-equality-asylum-manual/withholding-status/#.WsAIoMgh1TY.

[122] *Id.*

[123] *Id.*

[124] Sara Ashley O'Brien, *Spouse of Skilled-Visa Holder: Working 'Changed My Life'*, CNN (Mar. 10, 2017), http://money.cnn.com/2017/03/10/technology/h4-work-permits-trump/index.html (Noting a case of an immigrant who was granted work authorization and how it changed her life. Noting also that immigrants living in the United States want to contribute to the United States economy, and often come with skilled backgrounds from their home country but are restricted from being able to work. While the article speaks mainly about spouses of H1-B visa holders who were until recently not authorized to work in the United States, the same feeling can be applied to non-citizens granted withholding of removal who have the life-changing ability to work, earn money, and contribute to the economy.).

the ability to apply for work authorization through ICE. While CAT, like withholding of removal, does not provide a permanent pathway to citizenship in the U.S., it is still a valid option and complies with the humanitarian and international concept of *non-refouelment*.[125]

B. *Allowing Those with Reinstated Orders of Removal the Ability to Apply for Asylum Would Increase the Backlog on the Already Heavily Burdened Immigration Courts*

Immigration courts across the country already face a tremendous backlog. As of 2017, more than 600,000 cases were pending in immigration courts nationwide, with only 334 judges to hear them.[126] An immigration judge interviewed in San Francisco had about 3,000 pending cases in front of him alone, with it taking as long as four or five years to have a case heard by him and a decision made on the merits.[127] The tremendous backlog is problematic for those who have valid claims they need processed. Many times, evidence in these cases becomes stale, qualifying relatives for certain petitions to obtain immigration benefits for applicants become ill or pass away during the waiting period, and memory of details of persecution that took place can weaken.[128]

The backlog is foreseeably set to continue for the near future. In June 2016, it was estimated that 39 percent of immigration judges across the country were eligible to retire which would cause an even larger shortage of judges to adjudicate the hundreds of thousands of pending cases because the hiring process is relatively slow.[129] In addition, more judges are being brought to adjudicate the high volume of cases in courts near the Mexican border, but this disrupts the adjudication of cases in the home courts of these judges.[130] Lastly, with the Trump Administration threatening to end programs such as Deferred Action for Early Childhood Arrivals (DACA), which is currently in use by an estimated 700,000 to 800,000 individuals, a reopening of even a fraction of those cases would add even more stress to the already strained system.[131]

If those with reinstated orders of removal were found eligible to also apply for asylum instead of being placed in withholding only proceedings, it would only add to the immense backlog affecting so many individuals in the country. It would be unfair to those people who are already waiting in line for their cases to be brought before an immigration judge.

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[125] Notably, withholding of removal and relief under CAT do not provide a travel document to the beneficiary which does not comply with the Refugee Convention which requires that such a document be made available to a refugee. For more discussion of this issue, see Judge Stahl's dissent in the First Circuit case Garcia v. Sessions, 856 F.3d, at 43-61.

[126] William Brangham, *How a 'Dire' Immigration Court Backlog Affects Lives*, PBS (Sep. 18, 2017), https://www.pbs.org/newshour/show/dire-immigration-court-backlog-affects-lives.

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] *Id.*

C. *The Current Laws Provide a Fair Initial Opportunity for Adjudication of Asylum Claims*

The current laws, when applied correctly, provide ample opportunity for someone who comes to the border and has a real fear of returning to his home country because of persecution or torture to seek relief in the U.S. If someone comes to the U.S. with a fabricated asylum claim to try and gain admission to the country and is ordered deported as a result, they do not deserve another chance at applying for the same relief and benefits. If there are changed circumstances in the person's country between when they first attempted, and failed, in entering the U.S. with an asylum claim, such individuals should not be offered the same opportunities as someone who only comes to the U.S. without first seeking admission because they have a genuine fear of return and valid asylum claim.

If the law was changed to allow those with reinstated orders of removal to apply for asylum and receive its benefits, it would be difficult to draw the line for how many attempts an individual can make to gain entry into the U.S. and remain with an asylum application. This could potentially open the door to people attempting to be eligible for asylum multiple times, which would cause an undue burden on the strained system and favor those who are trying to manipulate the system, rather than be fair to those who follow the rules and only present applications for asylum within the limits set by the law.

D. *This is Not the Only Class of Persons Ineligible for Asylum*

There are several other reasons for which non-citizens who come to the U.S. without a reinstated order of removal may be ineligible to apply for asylum. An applicant may be trying to file his asylum application more than one year after entering the country, which would render him ineligible for asylum relief absent certain exceptional changed circumstances as determined by an immigration judge.[132] An applicant may also be ineligible if they had a previous asylum application denied by an immigration judge or the BIA.[133] Additional bars for asylum include if an applicant can be removed to a safe third country under a two-party or multi-party agreement between the U.S. and other countries.[134] These bars to asylum can be overcome with the changed or extraordinary circumstances exceptions defined in the asylum statute.[135]

Other bars to asylum that have no such exceptions include participating in persecution of any individual in one's past on account of one of the protected grounds; having been convicted of a particularly serious crime; having committed a serious nonpolitical crime outside of the U.S.; posing a danger to the U.S.; and having been firmly resettled in another country prior to coming to the U.S.[136] If an

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[132] *Asylum Bars*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (2011), https://www.uscis.gov/humanitarian/refugees-asylum/asylum/asylum-bars.
[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] *Id.*

applicant is inadmissible for reasons such as engaging in a terrorist activity in any way, they will also be deemed ineligible to apply for asylum.[137]

It follows that barring those with reinstated orders of removal from asylum eligibility would not be unfairly prejudicing them or making them the only such class ineligible. Those with reinstated orders have in most cases already had the benefit of trying to receive the asylum relief they seek upon their subsequent attempt at arrival to the U.S. There are valid policy reasons to not allow those with reinstated orders of removal a "second bite at the apple" with their asylum applications, and the fact that there are other groups of people who also cannot apply for asylum shows that the government has an interest in only allowing those who meet the criteria set out by statute for asylum relief to actually receive it.

V. PROBLEMS WITH THE CURRENT SYSTEM

While the intent of expedited removal and reinstatement of removal proceedings was to make the system fairer and more expedient in not burdening it with cases of people who had already shown that they did not have a credible fear of returning to their country of origin, it has led to some sad and unintended results. For one, there is no guarantee that someone fleeing persecution who is apprehended at the border will even be asked by a border patrol officer if the individual has a fear of returning to their home country, though they are required to do so. Cases have been reported, also, of issues arising with border officials accidently deporting U.S. citizens who are not afforded a hearing because of the nature of expedited removal. For example, in 2000, a developmentally disabled woman was unable to convince immigration officials that she had a real American passport. She was shackled, detained and sent back to Jamaica where she had been visiting relatives.[138] Border inspectors have also turned away entrants with valid visas if they thought they were lying about why they came to the country.[139] The most frightening part of these deportations under the expedited removal system is that they can take place quickly and without a chance to have one's case heard in front of a tribunal.[140]

Additionally, as the USCIS officer training manual notes, a reasonable fear interview often takes place in a very different setting than that of an affirmative asylum interview.[141] Reasonable fear interviews are often conducted in a jail, or other detention facilities, with the applicant handcuffed or shackled: This treatment can present an especially traumatic situation for a survivor of persecution or torture.[142] A USCIS officer is instructed to maintain a non-adversarial tone and

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[137] *Id.*
[138] Yeung & Becker, *supra* note 9.
[139] *Id.*
[140] *Id.*
[141] U.S. CITIZENSHIP AND IMMIGRATION SERVICES, ASYLUM DIVISION OFFICER TRAINING COURSE, REASONABLE FEAR OF PERSECUTION AND TORTURE DETERMINATIONS 43 (2017).
[142] *Id.*

atmosphere during reasonable fear interviews.[143] Unfortunately, this has not always happened.[144]

For asylum seekers, the system has been flawed as well. Once deported due to a number of possible reasons, asylum seekers have been reported to face even more violence and torture at the hands of their persecutors upon their return; and if they try to re-enter the U.S., they are only given the options of withholding of removal or CAT relief.[145] For many of these asylum seekers, the circumstances which led them to flee their country of origin in the first place may become significantly worse upon their return and reach to the level of torture warranting relief.

VI. SUGGESTIONS FOR POLICY REFORMS

A. *Recommendations for Congress*

In the especially tragic instances of asylum seekers who attempted entry and were never granted an opportunity to present their case before an asylum officer during a credible fear interview, or not questioned about their fear of return at all, there should be an exception to the reinstatement bar. While withholding of removal and CAT relief are sufficient forms of relief for someone who went through the system the first time—that is, those who had a credible fear interview and a merits hearing in front of an immigration judge—the relief is not sufficient for those who were deprived of their right to have been asked whether they had a reasonable fear of returning to their home country in the first place. It is not the applicant's fault in any way in those instances, and the burden should fall on the government in those cases to attempt to rectify their previous mistake by allowing this narrow class of asylum seekers with reinstated orders of removal the opportunity to apply for and receive asylum.

This would not be easy to implement. of course, as it can be incredibly difficult to ascertain exactly what conversations did or did not take place at the border with an immigration official. Often, all one has to rely on are documents that have been signed and the conflicting testimonies of officials and applicants.[146] Even if the applicant had the documents read and translated to him or her in a native language, there is a great possibility that what is being presented will be misunderstood, and that documents will be signed without full knowledge of to what is being solemnly sworn. The reliability of these documents and testimony, therefore, is precarious but unfortunately, it is often the only piece of evidence available to make such a determination.[147] In one instance, a conversation that allegedly took place between a

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[143] *Id.*

[144] *See* Amicus Brief for the American Immigration Lawyers Association as Amicus Curiae, Matter of M-R-R, BIA (2015) [hereinafter Amicus Brief].

[145] Yeung & Becker, *supra* note 9.

[146] Amicus Brief, *supra* note 144, at 3-5 (describing an incident in which a lengthy interview was transcribed by a CBP officer and documented but which could not be accurate because the interviewee was three years old).

[147] *See* Espinoza v. I.N.S., 45 F.3d 308, 310 (9th Cir. 1995) (stating that "information on an authenticated immigration form is presumed to be reliable in the absence of evidence to the contrary presented by the

CBP officer and a Spanish speaker, who had recently presented himself at the border, was memorialized in writing. The conversation includes the CBP officer asking this individual about the reason why he left his home country, and the individual telling the officer through a Spanish translator that he came to the U.S. to look for work.[148] The alleged conversation was written in a first-person question and answer format which made it appear as though it was the exact transcript of the conversation that took place.[149] The writings were sworn to by the officer who held the conversation and another officer who signed off as having witnessed the interrogation.[150] Despite the apparent following of procedures during this interview, one key fact severely undermined the conversation's existence and veracity—the person being interviewed was three years old at the time of the interview.[151] A recent BIA decision addressed this issue of reliability of border interviews, in part, and noted that when making a credibility determination, an immigration judge should assess the reliability of a border interview based on the totality of the circumstances.[152] However, time will tell whether this ruling alone helps in giving less weight to border interviews which may not be entirely accurate. In the meantime, Congress should codify the requirement that immigration judges consider totality of the circumstances to help give these often-unreliable documents from border interviews less weight in immigration proceedings.

In addition, Congress should fund a study to see how many non-citizens who are sent back to their home country after receiving a reinstatement of removal order face persecution or torture upon their return. This would give a better estimate of the number of people who come to the U.S. with a genuine fear of returning to their home country and who are not granted a positive credible fear determination or asylum grant before facing persecution and attempting to re-enter the U.S. If the numbers are significant, it would suggest a need for reform in the way CBP officers are trained, the reinstatement of removal provision, and the relief available to those in immigration proceedings with reinstated orders of removal.

B. *Recommendations for CBP*

In order to help reduce the number of expedited removal processing interviews that do not meet the standard required of CBP officers and to provide greater accountability, all such interviews should be video recorded.[153] This would prevent instances such as that of the three-year-old who CBP claimed had a full interview at the border.[154] This would also ensure that those in CBP custody are being asked about whether they have a fear of returning to their country regardless of whether they have been deported once, twice, or several times before, preventing a situation

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alien").
[148] Amicus Brief, *supra* note 144, at 3-5.
[149] *Id.*
[150] *Id.*
[151] *Id.*
[152] Matter of J-C-H-F-, 27 I&N Dec. 211 (BIA 2018).
[153] U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, BARRIERS TO PROTECTION, THE TREATMENT OF ASYLUM SEEKERS IN EXPEDITED REMOVAL 4 (2016).
[154] *See* Amicus Brief, *supra* note 83, at 3-5.

where someone with a credible fear of returning to their home country is never asked by CBP officials when they first arrive, is deported; and then comes back to the U.S., where it is determined that there is a credible fear, only for that individual to be placed in withholding of removal proceedings and to be found ineligible for asylum. These video recordings should be periodically reviewed by supervisors so that those officers who are not performing at the standard required of them face appropriate disciplinary action. Additionally, these video recordings should be available to immigration judges and attorneys representing those who are placed in front of an immigration judge for their asylum or withholding of removal only proceedings.

Regular training and re-training of CBP officers about the heightened sensitive nature of interviews with those who have undergone persecution or torture is also necessary.[155] Not being sensitive to the needs of those who are being interviewed creates an environment of discomfort and fear which does not facilitate conversation with those being interviewed. If they do not feel safe or comfortable in telling their story to a CBP officer, they may forfeit their chance at fleeing from the persecution or torture they faced in their home country and starting a new life in the U.S. Retraining or periodic review of these officers will help ensure that these interviews are fairer, and that factors that are typical of an interviewee who has faced persecution or torture in the past are not held against them by the officer conducting their interview. Additionally, officers need to be reminded of their obligations to inform those who come into CBP custody of the expedited removal process, their right to request a private interview, and to have that interview in a language that they understand.[156]

C. *Recommendations for ICE*

ICE is responsible for detaining individuals, including asylum seekers and those with reinstated orders of removals. Oftentimes those who are detained are housed in prisons with those who have committed other crimes, and the conditions in these places can sometimes be worse than those of state prisons.[157] Immigrants can also be

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[155] *See* U.S. DEP'T OF HOMELAND SEC., U.S. CUSTOMS & BORDER PROTECTION, INSPECTOR'S FIELD MANUAL § 17.15(b)(1) (rev. 2006), which notes:

> [I]f the alien indicates in any fashion . . . that he or she has a fear of persecution, or that he or she has suffered or [might] suffer torture, you are required to refer the alien to an asylum officer for a credible fear determination. . . . [T]he inspecting officer has a responsibility to ensure that anyone who indicates a fear of persecution . . . is referred to an asylum officer for a credible fear determination. Inspectors should consider verbal as well as non-verbal cues given by the alien. . . . . Do not ask detailed questions on the nature of the alien's fear of persecution or torture: leave that for the asylum officer. In determining whether to refer the alien, inspectors should not make eligibility determinations or weigh the strength of the claims, nor should they make credibility determinations . . . . The inspector should err on the side of caution, apply the criteria generously, and refer to the asylum officer any questionable cases . . . . Do not make any evaluation as to the merits of such fear; that is the responsibility of the asylum officer.

(Despite this language in the field manual, issues have been widely reported regarding the manner in which these guidelines are applied and the fairness of the interview process.).

[156] U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, *supra* note 153.

[157] Amicus Brief, *supra* note 83, at 2, 5, and 6; Jennings v. Rodriguez, 138 S. Ct. 830 (2018).

detained for lengthy periods, even if they have a valid asylum claim.[158] Additionally, women and children are often also detained if they came together across the border. The facilities in which these immigrants are housed do not have adequate facilities for the care of these vulnerable populations, especially pregnant women.[159] ICE should have separate facilities for women and children that do not house other criminal populations. The conditions in these detention facilities should be furnished to reflect a facility for long term detention of people who are not criminals. They should have a wide array of medical and mental health services available to those detained, especially considering the heightened needs of trauma and torture survivors that often make up the detained immigrant population. ICE should not house pregnant women in its detention facility if possible, but if it must, it should have extra care and facilities available to them. There should also be a way of reconciling the fact that once a pregnant woman in detention has her child, her child will be a U.S. citizen and have absolutely no reason to be detained. The child should not be separated from its mother but should also certainly not have to remain in detention, especially if the mother ends up having to remain in detention for a prolonged period of time. At times, detainees have had to remain in detention for up to 831 days, almost three years.[160] This would be an unacceptable amount of time in the case of a pregnant woman in any situation but is especially unacceptable in the case of a pregnant woman who gives birth to a U.S. citizen child while in detention.

CONCLUSION

While expedited removal and reinstatement of removal are grounded in policy concerns that are valid, they have led to confusion about whether they allow for asylum seekers who sought asylum in a first attempt at entry, or did not seek relief in the form of asylum at their first entry, the ability to apply for asylum again because of the conflicting language in the two INA statutes. The federal circuit courts having reviewed this issue in recent cases have all come to the conclusion that an asylum seeker is barred from seeking asylum and its benefits if they have a reinstated order of removal. Though each of the courts had a slightly different reason for why they reached this conclusion, the outcome still stands and has effect for those seeking relief from persecution in their home country.

Unfortunately, no exception currently exists for those who were denied their right to be asked about their fear of returning to their home country or those who expressed a fear of returning but were ignored, and not granted a credible fear interview with an asylum officer. Hopefully future policy reform will make an exception for those who have suffered at the hands of the U.S. government in this

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[158] *Id.* at 860 (noting that detained non-citizens have been held for as long as 831 days and on average for 346 days each).

[159] Maria Sacchetti, *Trump Administration Ends Automatic Release from Immigration Detention for Pregnant Women*, WASH. POST (Mar. 29, 2018), https://www.washingtonpost.com/local/immigration/trump-administration-ends-automatic-release-from-detention-for-pregnant-women/2018/03/29/8b6b1bc0-3365-11e8-8abc-22a366b72f2d_story.html?utm_term=.5fc5b6af96e9.

[160] Amicus Brief, *supra* note 83, at 9.

way, but until then, their only relief will be withholding of removal and CAT, like the thousands of others with reinstated orders of removal.

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