

## Examining the Trump Administration's Transgender Service Ban through an International Human Rights Law Framework

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### INTRODUCTION

Six months after his inauguration as President of the United States, in a July 2017 tweet, U.S. President Donald J. Trump announced his administration's plan to ban openly transgender individuals from serving in the United States' Armed Forces (hereinafter the "transgender service ban").<sup>1</sup> This decision reverses a 2016 Obama administration decision permitting openly transgender persons to serve in the U.S. military.<sup>2</sup> Later, Trump formalized his order, issuing a Presidential Memorandum on August 25, 2017.<sup>3</sup> "First, the Memorandum indefinitely extends a prohibition against transgender individuals entering the military, a process formally referred to as "accession" . . . . Second, the Memorandum requires the military to authorize, by no later than March 23, 2018, the discharge of transgender service members."<sup>4</sup> The memorandum singles out the costs of providing healthcare to transgender service members as a primary catalyst of the order, with a specific focus on care related to sexual transition.<sup>5</sup> This memorandum

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1. Complaint at 2, *Karnoski v. Trump* (W.D. Wash. 2017) (No. 2:17-cv-1297), [http://lawprofessors.typepad.com/files/karnoski\\_us\\_20170828\\_complaint.pdf](http://lawprofessors.typepad.com/files/karnoski_us_20170828_complaint.pdf) See also Derek Hawkins, *Trump's Tweets Come Back to Bite Him in Court Again, This Time in Transgender Military Case*, THE WASHINGTON POST (Oct. 31, 2017), [https://www.washingtonpost.com/news/morning-mix/wp/2017/10/31/trumps-tweets-come-back-to-bite-him-in-court-again-this-time-in-transgender-military-case/?utm\\_term=.418a68aadbf3](https://www.washingtonpost.com/news/morning-mix/wp/2017/10/31/trumps-tweets-come-back-to-bite-him-in-court-again-this-time-in-transgender-military-case/?utm_term=.418a68aadbf3); Donald J. Trump (@realDonaldTrump), Twitter (Jul. 26, 2017, 5:55 am), <https://twitter.com/realdonaldtrump/status/890193981585444864?lang=en> ("After consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow . . .); Donald J. Trump (@realDonaldTrump), Twitter (Jul. 26, 2017, 6:04 am), <https://twitter.com/realdonaldtrump/status/890196164313833472?lang=en> (Transgender individuals to serve in any capacity in the U.S. Military.").

2. Complaint at 2, *Karnoski v. Trump* (W.D. Wash. 2017) (No. 2:17-cv-1297).

3. Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security, *Military Service by Transgender Individuals* (Aug. 25, 2017), available at <https://www.whitehouse.gov/the-press-office/2017/08/25/presidential-memorandum-secretary-defense-and-secretary-homeland>. (Note that document was not included in the Federal Register).

4. *Doe 1 v. Trump*, Civil Action No, 17–1597 (CKK), 2017 WL 4873042, 1 (D.D.C. Oct. 30, 2017).

5. See Presidential Memorandum *supra* note 3, §§ 1 & 2(b) ("[T]he previous Administration failed to identify a sufficient basis to conclude that terminating the Departments' longstanding policy and practice would not hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources . . . Accordingly, . . . The Secretary of Defense, and the Secretary of Homeland Security with respect to the U.S. Coast Guard, shall . . . halt all use of DoD or DHS resources to fund sex reassignment

has been challenged in United States Courts, with mixed success.<sup>6</sup> In December 2017, the Trump administration's Department of Justice appealed at least one of the District Court rulings enjoining the transgender service ban and requested an emergency stay on implementation of the court's ruling, which was denied, allowing transgender persons to begin enlisting in the armed forces in January 2018.<sup>7</sup>

As litigation concerning the transgender service ban proceeds in U.S. Federal Courts,<sup>8</sup> it is worth exploring alternate forums within which the ban may be challenged. This is so because of the state of domestic constitutional law in relation to transgender status,<sup>9</sup> and the strength of presidential powers over national security and the military.<sup>10</sup> The international human rights law framework provides advocates with an alternate body of law, and alternate forums, including—most importantly—treaty monitoring bodies [TMBs], through which

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surgical procedures for military personnel, except to the extent necessary to protect the health of an individual who has already begun a course of treatment to reassign his or her sex.”).

6. See *e.g. id.* (granting in part, and denying in part Plaintiffs' motion to preliminarily enjoin the Trump administration's policy, and granting in part, and denying in part the United States Government's motion to dismiss); *Stone v. Trump*, Civil Action No. MJG-17-2459, 2017 WL 5589122 (D. Md. Nov. 21, 2017); see also *Karnoski v. Trump*, Case No. C17-01297MJP, 2017 WL 5668071 (W.D. Wash. Nov. 27, 2017) (granting motion by the State of Washington to intervene). *But see Williamson v. Trump*, 7:17-cv-01490-LSC, 2017 W.L. 4536419 (N.D. Ala. Oct. 11, 2017) (dismissing Plaintiff's claim without prejudice).

7. Chris Johnson, *DOJ Appeals Ruling Against Trump's Transgender Military Ban*, WASHINGTON BLADE (Nov. 21, 2017), <http://www.washingtonblade.com/2017/11/21/doj-appeals-ruling-against-trump/>.

8. On December 22, 2017, the Court of Appeals for the District of Columbia Circuit rejected the Trump administration's emergency request for a stay pending appeal, see *Doe 1 v. Trump*, No. 17-5267, 2017 WL 6553389 (D.C. Cir. Dec. 22, 2017), citing the administration's failure to “satisf[y] the stringent requirements for a stay pending appeal, as the rationale behind the denial. The Department of Defense thereafter refused to appeal the D.C. Circuit's ruling, clearing the way for transgender recruits to enlist in the military in January 2018. See Lawrence Hurley, Idrees Ali, & REUTERS, *US Military to Accept Transgender Recruits after Justice Department Decides not to Appeal Court Ruling*, BUSINESS INSIDER (Dec. 29, 2017), <http://www.businessinsider.com/transgender-recruits-allowed-to-serve-in-military-2017-12>. Media sources report however, that the Trump administration has not entirely given up appealing the original ruling by the District Court holding the ban unconstitutional. *Id.* (quoting “an anonymous Justice Department Official”) (“The Department of Defense has announced that it will be releasing an independent study of these issues in the coming weeks. So rather than litigate this interim appeal before that occurs, the administration has decided to wait for DOD's study and will continue to defend the president's lawful authority in district court in the meantime.”). Therefore, while the administration's refusal to appeal the denial of the emergency stay pending appeal is a positive sign that domestic litigation surrounding the transgender military ban is succeeding, it remains to be seen whether the administration will later continue the appeal of the district court's original decision. In any event, examining alternate fora for advocacy challenging the transgender service ban remains a worthwhile endeavor, if only to raise awareness about the overall status of discrimination against transgender persons in the United States. The transgender service ban serves as a prime example of the type of discrimination faced by transgender people, and using the administration's action as demonstrative of such discrimination may force action on other fronts of discrimination as well.

9. See *infra* notes 11-27.

10. See *infra* notes 28-34.

challenges to the transgender service ban, and other forms of discrimination against the transgender community—of which the transgender service ban is highly exemplary—can be levied.

This paper will examine the applicability of international human rights law to the transgender service ban, with the objective of determining the most effective means of challenging the transgender service ban through the human rights framework. First, I briefly examine United States constitutional law as it has been applied to the transgender community, and law concerning presidential power over military and national security matters. This discussion demonstrates how domestic law, alone, may not be enough to derail the Trump administration's plan to ban transgender service. Second, I examine international human rights law, with specific focus on the conventions, treaties, and customary law most apt to provide for a successful challenge to the military service ban. Third, I examine how international human rights law may be used to challenge the transgender service ban, or other forms of state sanctioned discrimination against the transgender community. Fourth, I conclude with an examination of why advocates should, despite the challenges presented, pursue a challenge to the transgender service ban under international human rights law.

## I. UNITED STATES DOMESTIC LAW

### A. Constitutional Challenges to Transgender Discrimination.

The U.S. Constitution provides legal advocates with tools that can be used to challenge unequal treatment under the law,<sup>11</sup> as well as any denial of liberty or property without due process of law.<sup>12</sup> The Fifth Amendment was first used to prohibit discrimination on the basis of a protected classification in *Bolling v. Sharpe*, which dealt with racial discrimination in education in the District of Columbia.<sup>13</sup> Expanding on the *Brown v. Board* doctrine, the Court, in *Bolling* held that the federal government was required to ensure equal protection under the law, just as states were required to so do under the Fourteenth Amendment.<sup>14</sup> Later, in *Reed v. Reed*, the Court struck down a state statute that discriminated on the basis of sex, holding for the first time that sex-based discrimination violated the equal protection guarantees in the Fourteenth Amendment.<sup>15</sup>

While the Court has never had an opportunity to decide a case challenging a federal statute for discriminating on the basis of sex in violation of Fifth Amendment equal protection guarantees, the Court's decision in the 2015 case *United States v. Windsor*, supports the general proposition that discrimination by the federal government on the basis of sex violates Fifth Amendment equal

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11. U.S. CONST. Amend. V; *see also* *Bolling v. Sharpe*, 347 U.S. 497 (1954).

12. U.S. CONST. Amend. V.

13. *Bolling v. Sharpe*, 347 U.S. 497 (1954) (holding that racial discrimination in schooling within the District of Columbia violated Equal Protection guarantees inherent in the Vth Amendment's Due Process clause, which, as opposed to the XIV Amendment that only restricts actions taken by state governments, applies to the Federal government).

14. *Id.*

15. *Reed v. Reed*, 404 U.S. 71 (1971).

protection and due process guarantees.<sup>16</sup> In *Windsor*, the Court struck down operative sections of the Defense of Marriage Act, which limited the validity of marriage to heterosexual couples regardless of a state's definition of marriage.<sup>17</sup> The Court's decision extends Fifth Amendment protections to same-sex couples and demonstrates that Fifth Amendment equal protection extends beyond protecting members of racial minorities.

However, recent Fourteenth Amendment challenges to state laws restricting access to public facilities on the basis of transgender identity have not been successful. In 2016, the Court effectively dismissed a high profile<sup>18</sup> challenge to a Virginia state school bathroom ordinance, which required that students use school sex-segregated facilities that corresponded to their biological sex assigned at birth.<sup>19</sup> Following a change in executive guidance involving federal anti-discrimination statute Title IX, the Court remanded the challenge to the Fourth Circuit where a preliminary injunction issued by the district court was ultimately vacated.<sup>20</sup> In August 2017, that case, *G.G. v. Gloucester County School Board*, was again before the Fourth Circuit, where the district court's first decision in the case,<sup>21</sup> which reserved decision on the equal protection challenge levied by the plaintiff against the defendant school board, was remanded once more for a determination about whether the entire challenge was rendered moot by the plaintiff's graduation from the defendant school system.<sup>22</sup>

Several district courts have held that heightened scrutiny applies to practices challenged for discriminating against transgender status.<sup>23</sup> But, consensus among authoritative precedent remains elusive. Several U.S. courts of appeals have held that transgender persons are protected from gender identity discrimination under a sex-equality equal protection theory.<sup>24</sup> Evaluating claims under a sex-equality framework would lead to challenged government action being evaluated by courts

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16. *United States v. Windsor*, 133 S.Ct. 2675 (2015).

17. *Id.* at 2695-96 (“The liberty protected by the Fifth Amendment’s Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws. . . . By seeking to displace [state protections] and treating [homosexual] persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment”).

18. See Sheryl Gay Stolberg, *Bathroom Case Puts Transgender Student on National Stage*, N.Y. TIMES (Feb. 23, 2017), <https://www.nytimes.com/2017/02/23/us/gavin-grimm-transgender-rights-bathroom.html>.

19. *G.G. v. Gloucester Cty. Sch. Bd.*, No. 15-2056, 2016 4th Cir., certiorari granted, 137 S.Ct. 369 (2016), summary disposition granted, 137 S.Ct. 1239 (March 6, 2017) (summarily disposing grant of certiorari by vacating and remanding case for reconsideration “in light of the guidance document issued by the Department of Education and Department of Justice on February 22, 2017”).

20. *G.G. v. Gloucester Cty. Sch. Bd.*, 853 F.3d 729 (4th Cir. Apr. 18, 2017) (granting “unopposed motion to vacate preliminary injunction” of district court).

21. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 132 F.Supp.3d 736 (E.D. Va. Sep. 17, 2015).

22. *Grimm v. Gloucester Cty. Sch. Bd.*, 869 F.3d 286 (4th Cir. Aug. 2, 2017).

23. See e.g. *Adkins v. City of New York*, 143 F.Supp.3d 134, 139 (S.D.N.Y. 2016); *Norsworthy v. Beard*, 87 F.Supp.3d 1104 (N.D. Calif. 2015); *Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep’t of Educ.*, 208 F.Supp.3d 850 (S.D. Oh., 2016).

24. See e.g. *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (“[D]iscrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it’s described as being on the basis of sex or gender.”).

under heightened scrutiny.<sup>25</sup> However, given the substantial deference afforded to the executive by courts evaluating decisions involving national security and the military,<sup>26</sup> it is unclear whether an equal protection challenge to the transgender service ban would succeed. This is because hearing courts evaluate not only the discriminatory acts challenged, but also the “important governmental objectives” at play, under heightened scrutiny.<sup>27</sup>

## B. Executive Power Over Matters Involving National Security and the Military

Military policies have historically been afforded a special degree of deference by reviewing courts—noticeably more than that afforded to other policies challenged for violating equal protection guarantees.<sup>28</sup> In matters involving national security and the military, “the Constitution itself requires special deference” be afforded to decisions made by the legislature and the executive.<sup>29</sup> “Aside from the Constitution itself, the need for deference also arises from the unique role that national defense plays in a democracy.”<sup>30</sup> Ultimately, courts will defer to the political branches on matters involving national security and the military because “the imprimatur of the President, the Congress, or both imparts a degree of legitimacy to military decisions that courts cannot hope to confer.”<sup>31</sup> Although this deference does not immunize decisions concerning national security and the military from judicial review,<sup>32</sup> “[t]he operation of a healthy deference to legislative and executive judgments in the area of military affairs is evident” in judicial hesitancy to consider challenges to decisions of the political branches in this space.<sup>33</sup>

25. See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (citations omitted) (“[T]he party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an “exceedingly persuasive justification” for the classification. . . . The burden is met only by showing at least that the classification serves “important governmental objectives and that the discriminatory means employed” are “substantially related to the achievement of those objectives.”).

26. See *infra* notes 28-34.

27. *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980).

28. See *e.g.* *Steffan v. Perry*, 41 F.3d 677, 686 (D.C. Cir. 1994) (while upholding the validity of a military policy banning service by homosexuals, holding: “[t]he special deference we owe the military’s judgment necessarily affects the scope of the court’s inquiry into the rationality of the military’s policy”).

29. *Thomasson v. Perry*, 80 F.3d 915, 927 (4th Cir. 1996) (upholding an equal protection challenge to the military policy banning service by homosexuals). See also *id.* at 925-26 (“National defense decisions not only implicate each citizen in the most profound way. Such decisions also require policy choices, which the legislature is equipped to make and the judiciary is not. . . . While Congress and the President have access to intelligence and testimony on military readiness, the federal judiciary does not. While Congress and the members of the Executive Branch have developed a practiced expertise by virtue of their day-to-day supervision of the military, the federal judiciary has not. The judiciary has no Armed Services Committee, Foreign Relations Committee, Department of Defense, or Department of State.”).

30. *Id.* at 925.

31. *Id.* at 926.

32. *Id.* at 927.

33. *Rostker v. Goldberg*, 453 U.S. 57, 66 (1981) (upholding Congressional action excluding women

Several of the judicial decisions referenced above may be considered outdated, primarily because they address challenges to the long standing but since repealed, “Don’t Ask, Don’t Tell” policy. “Don’t Ask, Don’t Tell” excluded openly gay persons from serving in the armed forces.<sup>34</sup> While some time has passed since these cases were decided, and the policy at issue has since been repealed, the cases nonetheless reveal the level of judicial deference that would likely be afforded to executive judgments about military service among members of transgender community by reviewing courts. Absent Congressional action nullifying the President’s transgender service ban,<sup>35</sup> judicial review of the ban by appellate courts under an equal protection framework has an acute risk of failure. That risk should caution against an advocacy strategy exclusively focused on litigating the ban in U.S. courts.

## II. INTERNATIONAL HUMAN RIGHTS LAW’S APPLICABILITY TO THE TRANSGENDER SERVICE BAN

### A. Applicability of Core Human Rights Treaties in the United States

The United States has ratified several core human rights conventions that protect individual rights threatened by the transgender service ban. Among them are the International Covenant on Civil and Political Rights [ICCPR],<sup>36</sup> and the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment [CAT].<sup>37</sup>

Additionally, the United States government’s signatures of the International Covenant on Economic, Social and Cultural Rights [ICESCR],<sup>38</sup> and the Convention on the Elimination of All Forms of Discrimination Against Women [CEDAW],<sup>39</sup> impose obligations on the United States to “refrain from acts which would defeat the object and purpose of [those] treat[ies].”<sup>40</sup> While this signatory obligation—to refrain from conduct violative of the object and purpose of a

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from draft registration).

34. “Don’t Ask, Don’t Tell” was ended by Congressional action and executive support in 2010. See 10 U.S.C. § 654, (*repealed by Don’t Ask, Don’t Tell Repeal Act of 2010*, Pub.L. 111-321 § 2(f)(1)(A), Stat. 3516 (Dec. 22, 2010)); see also Elisabeth Bumiller, *Obama Ends ‘Don’t Ask, Don’t Tell’ Policy*, N.Y. TIMES (July 22, 2011), <http://www.nytimes.com/2011/07/23/us/23military.html>.

35. The legislative response to the transgender service ban was swift, but failed just as swiftly. See HUMAN RIGHTS CAMPAIGN, *Transgender Military Service*, (accessed Dec. 10, 2017) (describing a bipartisan amendment introduced in the Senate to protect against transgender troops being discharged, and how Senate Majority Leader Mitch McConnell “ended debate before the amendment was able to receive a vote.” Also discussing bipartisan bills introduced in the Senate and the House of Representatives that would achieve the same end.)

36. International Covenant on Civil and Political Rights, Oct. 5, 1977, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171.

37. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 24 I.L.M. 535.

38. International Covenant on Social, Economic, and Cultural Rights, Oct. 5, 1977, 993 U.N.T.S. 3.

39. Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, S. TREATY DOC. NO. 96-53, 19 I.L.M. 33.

40. Vienna Convention on the Law of Treaties art. 18, May 23, 1969, S. TREATY DOC. NO. 92-1, U.C. Conf. on the L. of Treaties—First and Second Sessions—Official Doc., UN SALES NO. E.70.V.5.

treaty—is established by the Vienna Convention on the Law of Treaties,<sup>41</sup> a convention that remains unratified by the United States,<sup>42</sup> scholars have noted that customary international law norms nonetheless suggest the United States is bound by the Convention’s obligations.<sup>43</sup> “To the extent that Article 18 does reflect customary international law, the signing obligation would apply even to States that have not ratified the Vienna Convention.”<sup>44</sup> For the purposes of the remainder of this work, I will assume that as a matter of customary international law, Article 18 obligations under the Vienna Convention on the Law of Treaties impose on the United States obligations to not infringe upon the object and purpose of treaties to which it is a signatory party.

## B. Substantive Obligations under International Human Rights Instruments

### 1. The International Covenant on Civil and Political Rights

The ICCPR textually imposes negative obligations<sup>45</sup> upon States that have ratified the convention to not discriminate on the basis of “sex . . . or other status,”<sup>46</sup> to ensure freedom from “torture, or . . . cruel, inhuman or degrading treatment,”<sup>47</sup>

41. *Id.*

42. U.S. Dep’t of State, *Vienna Convention on the Law of Treaties* (accessed Dec. 11, 2017), <https://www.state.gov/s/l/treaty/faqs/70139.htm> (noting that while the United States has not ratified the Vienna Convention on the Law of Treaties, “[t]he United States considers many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties.”); see also Curtis A. Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48 HARV. INT’L. L.J. 307, 315 n. 36 (2007) (citing commentary by U.S. government officials acknowledging status of Article 18 as customary international law).

43. See CURTIS A. BRADLEY, *Treaty Signature*, 8 in THE OXFORD GUIDE TO TREATIES (Duncan Hollis, ed., Oxford University Press, 2012), available at [https://scholarship.law.duke.edu/faculty\\_scholarship/2463/](https://scholarship.law.duke.edu/faculty_scholarship/2463/) (citing Curtis A. Bradley *supra* note 40 at 315 n. 36 (citing “statements by U.S. officials suggesting at various times that Article 18 reflects customary international law.”); BOISSON DE CHAZOURNES, ANNE-MARIE LA ROSA, AND MAKANE MOISE MBENGUE, ‘Article 18’ in THE VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY (vol. 1, Oliver Corten and Pierre Klein, eds., Oxford University Press, 2011); Paolo Palchetti, ARTICLE 18 OF THE 1969 VIENNA CONVENTION: A VAGUE AND INEFFECTIVE OBLIGATION OR A USEFUL MEANS OF STRENGTHENING LEGAL COOPERATION? (in THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION, Enzo Cannizzaro, ed., Oxford University Press, 2011); Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff, 2009)) (While noting that “[i]t is not clear to what extent [Article 18] reflects customary international law[, and that s]ome commentators contend that, at least at the time it was included in the [Vienna Convention on the Law of Treaties] VCTL, it reflected progressive development rather than established state practice,” arguing Article 18 and “the VCTL ha[ve] now been in force for many years and ha[ve] been ratified by over 110 States, and even some countries that are not parties to it (such as the United States) appear to accept that the obligation recited in Article 18 is now a matter of customary international law.”).

44. See *id.* at 8.

45. Bryan H. Druzin, *Opening the Machinery of Private Order: Public International Law as a Form of Private Ordering*, 58 ST. LOUIS U. L. J. 423, 429 n. 17 (2014) (“The difference between positive and negative obligations, rather is that one requires inaction (negative obligations) and the other demands action (positive obligations)”).

46. ICCPR, *supra* note 36, art’s. 2 & 26.

47. *Id.*, art. 7.

to ensure “the right to freedom of expression,”<sup>48</sup> “the right to liberty and security of person,”<sup>49</sup> and the right [of every citizen], without any of the distinctions mentioned [in the non-discrimination provision] and without unreasonable restrictions . . . [t]o have access, on general terms equality, to public service in his country.”<sup>50</sup> Additionally, States Parties must ensure access to “an effective remedy” for violations of rights under the convention.<sup>51</sup>

As interpreted in general comments and communication decisions issued by the Human Rights Committee, the rights contained in the ICCPR protect against a wider array of adverse State action than what the text of the provisions alone imply. The rights to be free from discrimination contained in Articles 2 and 26 of the ICCPR include the right of freedom from discrimination on the basis of sexual orientation,<sup>52</sup> and the free-standing discrimination prohibition in Article 26 prohibits discrimination on the basis of gender identity.<sup>53</sup> While sexual orientation and gender identity remain distinct facets of personal identity,<sup>54</sup> the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity has noted that international law is increasingly recognizing the right of individuals to be free from discrimination based on their gender identities.<sup>55</sup> Therefore, Article 2 would likely be interpreted to include a prohibition on discrimination on the basis of gender identity and transgender status, as well.

In General Comment 18, the Human Rights Council further notes that the prohibitions against discrimination contained in ICCPR Articles 2 and 26 differ in

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48. *Id.*, art. 19.

49. *Id.*, art. 9(1).

50. *Id.*, art. 25(c).

51. *Id.*, art. 2(3)(a).

52. Human Rights Committee Communication No. 488/1992, *Toonen v. Australia*, para. 8.7 (Mar. 21, 1994), available in SELECTED DECISIONS OF THE HUMAN RIGHTS COMMITTEE UNDER THE OPTIONAL PROTOCOL (Vol. 5, 2005), [http://www.ohchr.org/documents/publications/sdecisions\\_vol5en.pdf](http://www.ohchr.org/documents/publications/sdecisions_vol5en.pdf).

53. See Human Rights Committee Communication No. 2172/2012, *G. v. Australia*, para. 7.12 (June 28, 2017) (“In this context, the Committee observes that the prohibition against discrimination under article 26 encompasses discrimination on the basis of marital status and gender identity, including transgender status.”).

54. See Human Rights Council, Rep. of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, U.N. Doc. A/HRC/35/36, at 3 (Apr. 19, 2017), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/095/53/PDF/G1709553.pdf?OpenElement> (“Sexual orientation has an external dimension — it indicates a person’s sexual inclination and feelings towards others. Gender identity has an internal dimension — the term refers to how a person self-identifies in regard to his or her own gender, which may be different from the gender assigned at birth.”).

55. See *id.* at 8 (“As evidenced by the wide range of international human rights treaties that are in force, international human rights bodies and procedures — ranging from the human rights treaty bodies, with their general comments and recommendations, to the universal periodic review, to the special procedures’ coverage of sexual orientation and gender identity-related violations, to resolutions and studies — the international human rights system has been strengthening the promotion and protection of human rights without distinction. The protection of persons based on their sexual orientation and gender identity, and the mandate of the Independent Expert, are based on international law, complemented and supplemented by State practice.”).



applicability and the scope of the prohibitions contained within each.<sup>56</sup> While Article 2 of the ICCPR prohibits discrimination with respect to the rights and privileges guaranteed in the remainder of the covenant, Article 26 is a free-standing right, which “prohibits discrimination in law or in fact in any field regulated and protected by public authorities.”<sup>57</sup> Discrimination “should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground . . . and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”<sup>58</sup>

Additionally, the right to be free from torture, or other cruel, inhuman or degrading treatment, contained in ICCPR Article 7 is understood to prohibit “not only acts that cause physical pain but also . . . acts that cause mental suffering.”<sup>59</sup> “The aim of the provisions of article 7 of the [ICCPR] is to protect both the dignity and the physical and mental integrity of the individual.”<sup>60</sup> The right to freedom of expression in Article 19 has been interpreted to include a right of “commentary on one’s own . . . affairs.”<sup>61</sup> Importantly, the right to liberty and security of person in Article 9 is understood to “concern[] freedom from injury to the body and the mind, or bodily and mental integrity,”<sup>62</sup> “proceeding from any governmental or private actors.”<sup>63</sup> The Human Rights Committee notes that this Article 9 guarantee applies to “[e]veryone’ includ[ing], among others, . . . lesbian, gay, bisexual and transgender persons.”<sup>64</sup> Finally, the Human Rights Committee has interpreted that the right of equal access to public service positions in Article 25(c) obligates States to ensure “criteria for appointment . . . be objective and reasonable,” and further imposes on States an affirmative obligation “to ensure that there is equal access to public service for all citizens.”<sup>65</sup>

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56. U.N. Human Rights Committee, *Non-discrimination*, General Comment No. 18 (37th Sess. 1989).

57. *Id.* at 3.

58. *Id.* at 2.

59. U.N. Human Rights Committee, *Article 7 Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment*, General Comment No. 20, at 1 (44th Sess. 1992).

60. *Id.*

61. U.N. Human Rights Committee, *Article 19 Freedoms of opinion and expression*, General Comment No. 34, at 3 (102nd Sess. 2011) (citing Communication No. 1189/2003, *Fernando v. Sri Lanka* (Mar. 31, 2005)).

62. U.N. Human Rights Committee, *Article 9 Liberty and security of person*, General Comment No. 35, at 1 (112th Sess. 2014).

63. *Id.* at 3.

64. *Id.* at 1.

65. U.N. Human Rights Committee, *Article 25 The right to participate in public affairs, voting rights and the right of equal access to public service*, General Comment No. 25, at 1 (57th Sess. 1996). While discrimination on the basis of access to public service seems largely based on political opportunity and participation, in a recent speech to the Commission on the Status of Women, U.N. Secretary General António Guterres stressed the importance of “open[ing] doors of opportunity for women and girls: in classrooms and boardrooms, in military ranks, and at peace talks, in all aspects of productive life.” See UNITED NATIONS, *UN Commission on Status of Women Opens with Calls for More Men to Stand Up for Equality*, UN NEWS CENTRE (Mar. 13, 2017) (emphasis added) (quoting opening remarks by Secretary-General António Guterres), <http://www.un.org/apps/news/story.asp?NewsID=56343#.Wn371-jwaUk>. Because the illegality of discrimination on the basis of sex in the military appears to have at least been

There are significant limitations on the applicability of these principles to the transgender service ban, however, because of the reservations, understandings, and declarations filed by the United States government when it ratified the ICCPR.<sup>66</sup> Despite these concerns, the human rights framework remains important in challenging the transgender service ban because of the alternate forums and methods of challenging the ban's legitimacy that exist because of international human rights law.<sup>67</sup>

Ultimately, the transgender service ban discriminates against a group of individuals on the basis of their status as transgender individuals, in violation of the non-discrimination provisions of the ICCPR.<sup>68</sup> Even absent discrimination on the basis of a substantive civil or political rights protected by the ICCPR, the convention's Article 26 free-standing prohibition on discrimination on any basis, including on the basis of transgender identity,<sup>69</sup> involving "any field regulated . . . by public authorities,"<sup>70</sup> would create an actionable harm under the ICCPR among transgender persons wanting to enlist in the U.S. armed forces. Additionally, given that substantive rights protected by the ICCPR are being violated by the transgender service ban, Article 2's additional prohibition against discrimination is also applicable here.<sup>71</sup>

Among the substantive protections being violated is ICCPR Article 7's prohibition against "torture, and other cruel, inhuman or degrading treatment."<sup>72</sup> Considering the serious impacts of transgender discrimination,<sup>73</sup> the United States government is infringing on its duties under Article 7 to "protect . . . the dignity . . . and the mental integrity of the individual," by actively excluding them from military service<sup>74</sup> Additionally, the transgender service ban infringes upon individuals' rights to "security of person" found in article 9 of the ICCPR.<sup>75</sup> As noted above, security of person "concerns freedom from injury to the . . . the mind . . . and mental integrity,"<sup>76</sup> and applies to all persons, with the Human Rights

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contemplated by high-ranking U.N. officials, and because the U.S. government largely considers voluntary service in the armed forces in the public service, *see generally supra* notes 30-33, Article 25(c) of the ICCPR should not be dismissed as irrelevant to the present analysis.

66. *See* 136 Cong. Rec. S17486 (daily ed. Oct. 27, 1990) (Unanimous-Consent Agreement) (Reserving the applicability of Article 7's prohibition against torture as creating a binding obligation only insofar as treatment falling under the purview of Article 7's prohibitions would also be in violation of Amendments VIII, V, or XIV to the United States Constitution and understanding Articles 2 and 26 to not prohibit discrimination when such discrimination is "at a minimum, rationally related to a legitimate governmental objective.").

67. *See infra* notes 146-58.

68. *See supra* notes 52-58.

69. *See* Human Rights Committee, *supra* note 53.

70. *See* Human Rights Committee, *supra* note 56.

71. *See supra* notes 52-58.

72. ICCPR, *supra* note 36, Art. 7.

73. Katherine Schreiber & Heather Hausenblas, *Why Transgender People Experience More Mental Health Issues*, PSYCHOLOGY TODAY (Dec. 6, 2016), <https://www.psychologytoday.com/blog/the-truth-about-exercise-addiction/201612/why-transgender-people-experience-more-mental-health>.

74. *See* Human Rights Committee, *supra* notes 60-62.

75. ICCPR, *supra* note 36, Article 9.

76. *See* Human Rights Committee, *supra* note 62.

Committee taking explicit note of its applicability to persons who identify as transgender.<sup>77</sup> Transgender persons who are subject to discrimination experience significant psychological distress,<sup>78</sup> which often has repercussions for their social lives, and abilities to meaningfully contribute to society.<sup>79</sup> The State mandated discrimination required by President Trump's transgender service ban further stigmatizes a segment of the population that already experiences significant harms because of discrimination. The additional harm that this ban imposes violates international obligations under the ICCPR.

Furthermore, the rights to freedom of self-expression,<sup>80</sup> and equal access to public service,<sup>81</sup> are infringed upon by the discriminatory impact of the transgender service ban.<sup>82</sup> The transgender service ban restricts a class of persons from freely expressing their own identities, so long as they want to retain equal access to the opportunity to serve their country in the armed forces. The military's "Don't Ask, Don't Tell" policy, which banned openly gay individuals from serving in the military, had similar ramifications for freedom of expression.<sup>83</sup> Persons may choose to hide their gender identity in order to enlist in the armed services, but would do so at the expense of their rights to freely express themselves, particularly their right to freedom of expression concerning their own affairs.<sup>84</sup> Further, the transgender service ban explicitly prohibits a class of individuals from performing a type of public service which is necessary to the adequate functioning of American society.<sup>85</sup> Prohibiting transgender individuals from enlisting in the military, regardless of the rationale behind the ban, directly contravenes these legal obligations imposed on the United States by the ICCPR.

77. See Human Rights Committee, *supra* notes 62-64.

78. Rebeca Robles, et al., *Removing Transgender Identity from the Classification of Mental Disorders: A Mexican Field Study for ICD-11*, 3 LANCET PSYCHIATRY 850, 856 (2016), <https://www.sciencedirect.com/science/article/pii/S2215036616301651?via%3Dihub>.

79. See *id.* ("Distress and dysfunction can occur in disapproving social environments and that individuals with gender incongruence are at increased risk . . . social isolation, school dropout, loss of employment, homelessness, disrupted interpersonal relationships, physical injuries, social rejection, stigmatisation, victimisation, and violence.").

80. ICCPR, *supra* note 36, Art. 19.

81. ICCPR, *supra* note 36, Art. 25(c).

82. ICCPR, *supra* note 36, Art. 2.

83. See Geoffrey W. Bateman & Claude J. Summers, *Don't Ask, Don't Tell*, glbtq, inc., at 1 (2015), [http://www.glbqtarchive.com/ssh/dont\\_ask\\_S.pdf](http://www.glbqtarchive.com/ssh/dont_ask_S.pdf) ("Don't Ask, Don't Tell" appeared less discriminatory because it did not allow the military to ask recruits about their sexual orientation when they joined, thereby making it possible for closeted gays and lesbians to serve. Yet the moment service members "told," or made statements that remotely suggested they might be gay or lesbian, under "Don't Ask, Don't Tell," the military had grounds to investigate and discharge them for being homosexual or participating in homosexual sex.") Similarly, the transgender service ban would—at least—conceivably allow individuals who don't reveal their sex non-conforming gender identities prior to enlisting in the armed forces, to serve.

84. Human Rights Committee, *supra* note 61.

85. See *Thomasson v. Perry*, 80 F.3d 915, 925 ("The need for deference also arises from the unique role that national defense plays in a democracy."); see also *id.* ("National defense decisions . . . implicate each citizen in the most profound way.").

## 2. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [CAT] prohibits “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official.”<sup>86</sup> In addition, Article 2 of the covenant prohibits “a threat of war,” or any other “exceptional circumstances” from being used “as a justification of torture.”<sup>87</sup> Nor may “[a]n order from a superior officer or a public authority . . . be invoked as a justification for torture.”<sup>88</sup> Importantly, Article 16 of CAT proscribes “treatment or punishment which do[es] not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”<sup>89</sup>

Upon ratification, the United States government filed with the United Nations, an important series of limiting reservations to CAT’s provisions. Specifically, the United States reserved consent to be bound by the CAT Article 16 prohibitions against acts that would constitute “cruel, inhuman or degrading treatment or punishment,” only insofar as such treatment would be prohibited by the Fifth, Eighth, or Fourteenth Amendments to the Constitution.<sup>90</sup>

Several CAT State Parties objected to this reservation,<sup>91</sup> with one even arguing that it is “incompatible with the object and purpose of the Convention.”<sup>92</sup> As established by the Vienna Convention on the Law of Treaties, a reservation made by a State in adopting a treaty is invalid if, among other reasons, it “is incompatible with the object and purpose of the treaty.”<sup>93</sup> However, absent a notable concern that the reservation violates the object and purpose of the treaty, and arguably a pronouncement by the International Court of Justice [ICJ] that the reservation is incompatible,<sup>94</sup> under the Vienna Convention, an objection to a reservation has the

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86. CAT, *supra* note 37, art. 1(1).

87. *Id.* art. 2(1).

88. *Id.* art. 2(3).

89. *Id.*, art. 16.

90. See 136 Cong. Rec. S17486 (daily ed. Oct. 27, 1990) (Unanimous-Consent Agreement).

91. Finland, *With Regard to the Reservations, Understandings and Declarations Made by the United States of America upon Ratification*, filed Feb. 27, 1996; The Netherlands, *With Regard to the Reservations, Understandings and Declarations Made by the United States of America upon Ratification*, filed Feb. 26, 1996; Sweden, *With Regard to the Reservations, Understandings and Declarations Made by the United States of America upon Ratification*, filed Feb. 27, 1996. See also Germany, *notification to the Secretary-General* (Feb. 26, 1996) (“it is the understanding of the Federal Republic of Germany that [the said reservations and understandings] do not touch upon the obligations of the United States of America as a State Party to the Convention.”). These objections are available at [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-9&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&lang=en).

92. The Netherlands, *supra* note 91.

93. Vienna Convention on the Law of Treaties, *supra* note 40, art. 19(c).

94. See THE YALE L. J. COMP. INC., *The Effect of Obligations to Treaty Reservations*, 60 YALE L.J. 728, 734 n. 24 (1951) (arguing that the advisory ICJ opinion procedure should be utilized by the General Assembly when questions concerning the object and purpose of a treaty arise in the context of treaty reservations and objections to reservations.); see also Marko Milanovic & Linos-Alexander Sicilianos,

effect of nullifying the agreement between the disagreeing State Parties to the extent covered by the reservation.<sup>95</sup> Therefore, while the impact of these objections is likely limited, the effects of having called into question the United States' reservations under CAT could have repercussive effects for non-litigation focused advocacy at the Committee Against Torture.

Recently, CAT's treaty monitoring body, the Committee Against Torture, began to recognize laws that impose "preconditions to legal gender recognition" as concerning, considering obligations arising under CAT.<sup>96</sup> Commentators have noted that the Committee's recommendations on the applicability of CAT protections to laws that discriminate against and harm the transgender community, "may have wider implications for human rights litigation . . . [because] the right to be free from torture is more absolute in nature, provides more protection because there is less room for balancing against public interest, and is more universally recognised and applicable."<sup>97</sup> These recommendations were made in the Committee's concluding observations on China's fifth periodic report, adopted in 2016.<sup>98</sup> Specifically, the recommendations call upon China to "[t]ake the necessary legislative, administrative and other measures to guarantee respect for the autonomy and physical and personal integrity of . . . transgender and intersex persons," particularly in the context of forced conversion therapy, and other "abusive treatment."<sup>99</sup> The limited scope of the committee's recommendations might caution against an advocacy strategy focused exclusively on engaging U.N. bodies concerned with the implementation of international norms around the prohibition against torture. It may be prudent, however, to call for expanding the scope of CAT protections to include prohibitions on state sanctioned discriminatory actions that have the effect of producing severe psychological harm similar to that experienced by members of the transgender community as a result of both state-sanctioned and private discrimination. Such an amendment may be timely given the pushback challenges to transgender discrimination face in domestic U.S. courts.

The transgender service ban—at least—implicates CAT prohibitions on "cruel, inhuman, or degrading treatment" contained in Articles 1 and 16 of the Convention. As noted above in the discussion of ICCPR prohibitions on torture, discrimination has a profound effect on the mental health and social functioning

*Reservations to Treaties: An Introduction*, 24 EUROPEAN J. OF INT'L. L. 1055 (2013) (describing the example of reservations and objections to the Genocide Convention, and the ICJ's role in determining the validity of reservations).

95. Vienna Convention on the Law of Treaties, Article 21(1)(a); *see also* THE YALE L. J. COMP. INC., *supra* note 94.

96. Geoffrey Yeung, *Using the Convention Against Torture to Advance Transgender and Intersex Rights*, OXFORD HUMAN RIGHTS HUB (May 26, 2016), <http://ohrh.law.ox.ac.uk/using-the-convention-against-torture-to-advance-transgender-and-intersex-rights/>.

97. *Id.*

98. U.N. Committee Against Torture, *Concluding Observations on the Fifth Periodic Report of China*, CAT/C/SR.1368 and 1371 (Feb. 3, 2016), <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhslEE2YuVt8GA5WKG3GEX%2BZEXqjnsVnWP%2BkQ6f9cmzWcE PJYdFWEXvIFmDTE3WtKbIKZXAKr5OVTwnh86Q4GNZX5mrqMf55xyaMPMcFusW3o2>.

99. *Id.* para. 56(a);(c).

of all persons, in particular members of the transgender community.<sup>100</sup> Under an expanded understanding of treatment prohibited by CAT—particularly “abusive treatment”<sup>101</sup> which has the effect of degrading the “autonomy . . . and personal integrity of . . . transgender . . . persons,”<sup>102</sup> the transgender service ban is in violation of the United States’ CAT obligations. While the reservations to CAT filed by the United States at the time of ratification no doubt complicate matters, under an inclusive advocacy strategy,<sup>103</sup> the CAT, and recent developments around the Convention’s applicability to discrimination against members of the transgender community, has a role to play in challenging the transgender service ban.

### 3. The International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights [ICESCR] imposes positive obligations<sup>104</sup> on State Parties to fulfil the myriad rights guaranteed in the Covenant, including the right to work,<sup>105</sup> “safe and healthy working conditions,”<sup>106</sup> “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health,”<sup>107</sup> and imposes on State Parties the obligation “to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to . . . sex . . . or other status.”<sup>108</sup> ICESCR also contains an independent clause obligating that states “undertake to ensure . . . the equal right of men and women [to] the enjoyment of all economic, social and cultural [ESC] rights set forth in” ICESCR.<sup>109</sup>

The Committee on ESC Rights interprets ICESCR’s non-discrimination provision to protect against discrimination on the basis of gender identity, and notes that transgender persons “often face serious human rights violations, such as harassment in schools or in the workplace.”<sup>110</sup> The Committee takes a strong stance on the conceptual difference between sex and gender in its General Comment number 16, concerning the Article 3 obligation to ensure equality between men and women in the enjoyment of ESC rights.<sup>111</sup>

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100. See *supra* notes 73-79.

101. See U.N. Committee Against Torture, *supra* note 98.

102. *Id.*

103. See *infra* notes 146-58.

104. For an explanation of the difference between positive and negative obligations under international human rights law, see Bryan H. Druzin, *supra* note 45.

105. ICESCR, *supra* note 38, art. 6.

106. *Id.*, art. 7.

107. *Id.*, art. 12.

108. *Id.*, art. 2(2).

109. *Id.*, art. 3.

110. U.N. Committee on Economic, Social, and Cultural Rights, *Non-discrimination in Economic, Social and Cultural Rights* (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), General Comment No. 20, para. 32 (42nd Sess. 2009).

111. U.N. Committee on Economic, Social, and Cultural Rights, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights*, General Comment No. 16, para. 14 (34th Sess. 2005).

Additionally, the Committee interprets ICESCR's Article 4 right to work provision as "affirm[ing] the obligation of States parties to assure individuals their right to freely chosen or accepted work, including the right not to be deprived of work unfairly."<sup>112</sup> States have the obligation to ensure that the "labour market [is] open to everyone under the jurisdiction of the States parties."<sup>113</sup> The Committee on ESC Rights took note of discrimination on the basis of sexual orientation and gender identity in healthcare, in a general comment, concluding:

Non-discrimination, in the context of the right to sexual and reproductive health, also encompasses the right of all persons, including lesbian, gay, bisexual, transgender and intersex persons, to be fully respected for their sexual orientation, gender identity and intersex status. . . . State parties . . . have an obligation to combat homophobia and transphobia, which lead to discrimination, including violation of the right to sexual and reproductive health.<sup>114</sup>

State sanctioned discrimination on the basis of transgender status, in employment and healthcare, clearly violates State Party obligations under ICESCR. However, the United States has not ratified ICESCR, and has only signed the Convention. Thus, an additional interpretive step is required to determine the object and purpose of the Convention and the resulting obligations of signatory parties.

Scholars have noted that determining the object and purpose of a treaty is a complicated task, which often results in significant disagreement among States parties.<sup>115</sup> Further complicating the analysis, determining a treaty's object and purpose requires an understanding of the term "object and purpose" as utilized in international law.<sup>116</sup> Despite the circularity of the framework used to determine a treaty's object and purpose, doing so is critical, especially because holding powerful State signatories (such as the United States) accountable for human

112. U.N. Committee on Economic, Social, and Cultural Rights, *The Right to Work*, General Comment No. 18, para. 4 (35th Sess. 2005).

113. *Id.* para. 12(b).

114. U.N. Committee on Economic, Social and Cultural Rights, *General Comment No. 22 (2016) on the Right to Sexual and Reproductive Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, General Comment No. 22 (2016).

115. See David S. Jonas & Thomas N. Sanders, *The Object and Purpose of a Treaty: Three Interpretive Methods*, 43 VAND. J. OF TRANSNATIONAL L. 565, 567 (2010) (alterations in original) (Arguing "object and purpose is a term of art without a workable definition. Broadly speaking, it refers to a treaty's essential goals, as if a treaty's text could be boiled down to a concentrated broth—the essence of a treaty. Beyond this general idea, scholars have failed to create a definition with adequate clarity and detail to serve lawyers who must apply the term in practice. Those who have attempted to do so admit 'with regret' that it remains an 'enigma' that, '[i]nstead of reducing the potential of future conflicts . . . [,] plants the seed of them.'").

116. See *id.* at 577 (Arguing that Vienna Convention rules regarding the interpretation of treaties, specifically as elaborated upon in Article 31 of the Convention [requiring that treaties be interpreted in light of their texts, contexts, and objects and purposes] requires an interpretation of "object and purpose" under Article 31. Further arguing that, based upon the text, context, and teleology of "object and purpose," "object and purpose" should be understood as a "unitary concept referring to the goals that the drafters of the treaty hoped to achieve." (p. 578)).

rights violations often depends on the construction of an agreement's object and purpose.

Typically, ICESCR's object and purpose is interpreted, at a minimum, to include fulfillment of "core obligations"<sup>117</sup> and ensuring the "progressive realization" of economic, social, and cultural rights.<sup>118</sup> The Committee on ESC Rights' has indicated that States parties to the Convention are bound under the treaty to ensure fulfillment of ICESCR's core obligations.<sup>119</sup> The text of the Convention provides, however, that States parties must ensure the progressive realization of ICESCR obligations.<sup>120</sup> Regardless of what these competing understandings mean for States bound to not take action violative of ICESCR's object and purpose, at a minimum, States parties bound by signatory obligations would be obligated to avoid taking affirmative action to bar equal access to ESC rights for a discrete group protected under ICESCR.

The transgender service ban is a violation of the United States' obligations as an ICESCR signatory party. Under international law, signatory State parties to ICESCR have the obligation to not take action that would "defeat"<sup>121</sup> ICESCR's object and purpose. The transgender service ban constitutes state action that defeats any iteration of ICESCR's object and purpose. The ban is intended to arbitrarily prevent members of a marginalized group, who are protected by ICESCR's non-discrimination provision, from accessing employment and healthcare—two rights unequivocally guaranteed by ICESCR—because of their membership in that group. Military service is employment.<sup>122</sup> Additionally, active duty military personnel, and U.S. veterans are typically eligible to receive fairly comprehensive healthcare benefits.<sup>123</sup> The transgender service ban not only restricts access to "freely chosen" employment opportunities, but more importantly, unfairly deprives transgender persons of access to an entire career path.<sup>124</sup> Additionally, the stated rationale for the ban explicitly revolves around the cost of providing adequate healthcare to transgender persons.<sup>125</sup> Such a rationale and rule deprive transgender persons of access to adequate healthcare, in further violation of ICESCR obligations.<sup>126</sup> Ultimately, whether the object or purpose of

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117. Kerstin Mechlem, *Treaty Bodies and the Interpretation of Human Rights*, 42 VAND. J. OF TRANSNATIONAL L. 905, 940 (2009).

118. *Id.* at 942.

119. *Id.* at 940.

120. *See id.* at 943 ("Where the implementation of an obligation depends on a considerable amount of resources, as do some of the proposed core obligations, the text of Article 2(1) does not lend itself to an interpretation that turns such an obligation into an immediate one.").

121. *See* Vienna Convention on the Law of Treaties, *supra* note 40, art. 18.

122. *See* *Pay*, DEPARTMENT OF DEFENSE: MILITARY COMPENSATION (accessed Dec. 14, 2017), <http://militarypay.defense.gov/Pay/> (describing types of salary received by members of the armed forces); *Careers and Jobs*, U.S. ARMY (accessed Dec. 14, 2017), <https://www.goarmy.com/careers-and-jobs.html> (referring to the various "career paths" enlistees in the Army can pursue as "active duty Soldier[s]").

123. *Health Benefits*, U.S. DEP'T OF VETERANS AFFAIRS (accessed Dec. 14, 2017), [https://www.va.gov/HEALTHBENEFITS/apply/active\\_duty.asp](https://www.va.gov/HEALTHBENEFITS/apply/active_duty.asp).

124. *See* U.N. Committee on Economic, Social, and Cultural Rights, *supra* note 112.

125. *See* Presidential Memorandum, *supra* note 5.

126. *See* U.N. Committee on Economic, Social, and Cultural Rights, *supra* note 114.



ICESCR is understood to require immediate fulfillment of minimum core obligations,<sup>127</sup> or progressive realization,<sup>128</sup> the transgender service ban—a state action that affirmatively restricts access to at least two ICESCR core rights—derogates from the object and purpose of ICESCR, and constitutes a violation of United States ICESCR obligations as a signatory party.

#### 4. The Convention on the Elimination of All Forms of Discrimination Against Women.

The Convention on the Elimination of All Forms of Discrimination Against Women [CEDAW] mandates States parties to the convention “condemn all forms of discrimination against women”<sup>129</sup>—defined as—

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women . . . on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.<sup>130</sup>

CEDAW obligates States parties “[t]o take all appropriate measures, including legislation,” to eliminate discrimination against women,<sup>131</sup> and “ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.”<sup>132</sup> Additionally, States parties are obliged to take measures “[t]o modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotypes roles for men and women.”<sup>133</sup>

Despite CEDAW’s apparent focus on sex discrimination, CEDAW’s TMB, the Committee on the Elimination of Discrimination against Women, has interpreted CEDAW’s provisions to cover gender-based discrimination as well.<sup>134</sup> The Committee, while noting that “[i]ntersectionality is a basic concept for understanding the scope of general obligations of States parties,” concluded that discrimination against women arises from a multiplicity of identity factors, including, *inter alia*, gender identity.<sup>135</sup> As a result, States parties to CEDAW have the obligation to take measures to eliminate intersectional discrimination against women,<sup>136</sup>

127. See Mechlem, *supra* note 117 at 941.

128. See *id.* at 942.

129. CEDAW, *supra* note 39, art. 2.

130. *Id.*, art. 1.

131. *Id.*, art. 2.

132. *Id.*, art. 3.

133. *Id.*, art. 5.

134. U.N. Committee on the Elimination of Discrimination against Women, *General Comment No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, General Comment No. 28 (2010).

135. *Id.* at 5, para. 18.

136. *Id.*

Similar to ICESCR, the United States has not ratified CEDAW, but signed the Convention on July 17, 1980.<sup>137</sup> Again, as a signing party, the United States has an obligation under international law to refrain from taking action that would “defeat”<sup>138</sup> the object and purpose of CEDAW. Scholars has noted that “CEDAW’s object and purpose is likely twofold: the ‘elimination of all forms of discrimination against women’ and gender equality.”<sup>139</sup> Assuming based upon CEDAW’s language, and interpretations of the Convention’s text by the Committee on the Elimination of Discrimination against Women, that CEDAW’s purpose expands beyond mere protection of women against discrimination on the basis of sex, and extends to protecting women—including women who experience intersectional discrimination because of their gender identities—from gender and sex non-conforming gender identity based discrimination, the transgender service ban would clearly erode the object and purpose of CEDAW, in violation of the United States’ commitments under the Convention as a signing party.

Even assuming a limited construction of CEDAW’s object and purpose—one that does not stretch the Convention to include among its recognized forms of prohibited discrimination, discrimination against members of the transgender community,<sup>140</sup> generally—the transgender service ban still has the effect of discriminating against women who identify as transgender. In theory, application of the transgender service ban to individuals who identify as women, but were assigned male sex at birth (meaning their gender is female), and individuals who identify as men, but were assigned the female sex at birth and have not had sex reassignment surgery violates CEDAW’s object and purpose. As discussed above in relation to the United States’ commitments under ICESCR,<sup>141</sup> any affirmative state action mandating discrimination against women because of their sexual or gender identities as women, in light of the object and purpose of the Convention, would necessarily violate a signing party’s obligation to refrain from taking action that would violate the object and purpose of the Convention. This is true regardless of whether the object and purpose is defined comprehensively or narrowly. The transgender service ban is clearly an affirmative government act, which discriminates against a group of persons, within which women are included—namely women who identify as transgender (regardless of their biological sex). Therefore, it violates the United States’ commitments as a signatory party to CEDAW.

In addition, the transgender service ban is arguably rooted in stereotyped reasoning about the ways in which men and women should behave—or, gender stereotypes.<sup>142</sup> “By excluding an entire category of people on this characteristic

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137. UNITED NATIONS TREATY COLLECTION, *Status of Treaties*, (accessed Dec. 21, 2017) [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=_en).

138. Vienna Convention on the Law of Treaties, *supra* note 40, art. 18.

139. Elise Mayer, *Designing Women: The Definition of “Woman” in the Convention on the Elimination of All Forms of Discrimination Against Women*, 16 CHI. J. UNT’L. L. 533, 579 (2016).

140. For an additional and comprehensive discussion of CEDAW’s general applicability to the transgender community, *see id.*

141. *See supra* notes 121-28.

142. *See Doe 1 v. Trump*, Civil Action No. 17–1597 (CKK), 2017 WL 4873042, at 28 (D.D.C. Oct. 30, 2017); *see also* Zack Ford, *Federal Judge Suspends Trump’s Transgender Military Ban*, THINKPROGRESS (Oct. 30, 2017), <https://thinkprogress.org/trans-military-injunction-be6139-c6f3e9/>.

alone, the Accession and Retention Directives punish individuals for failing to adhere to gender stereotypes.”<sup>143</sup> Therefore, if the object and purpose of CEDAW were formulated more broadly to include fostering “gender equality,”<sup>144</sup> the transgender service ban, which is rooted in stereotyped reasoning<sup>145</sup> and promotes gender inequality, would directly contravene the object of fostering equality between men and women. As a result, a comprehensive human rights based advocacy strategy should incorporate CEDAW principles and examine potential advocacy channels, available as a result of CEDAW.

### III. A COMPREHENSIVE ADVOCACY STRATEGY TARGETING THE TRANSGENDER SERVICE BAN

Given the limitations of an advocacy strategy focused exclusively on domestic litigation<sup>146</sup> and legislative change,<sup>147</sup> advocacy challenging the transgender service ban, and other forms of discrimination against the transgender community, should incorporate applicable international human rights law instruments and doctrine, as well as efforts directed at international human rights fora, including relevant treaty monitoring bodies.

First, utilizing an international human rights law framework renders accessible additional fora through which advocacy may be directed. Most importantly among these fora are two of the relevant treaty monitoring bodies discussed above, and specifically the Human Rights Committee. While the United States has not consented to have individual complaints brought against it in these bodies,<sup>148</sup> the U.S. is obliged to comply with monitoring requirements, which include taking part in periodic compliance assessments.<sup>149</sup> In part, the purpose of “the reporting process [is to] create[] a basis for constructive dialogue between States and treaty bodies . . . in fostering effective national implementation of the international human rights instruments.”<sup>150</sup> The reporting process is also designed to provide States with opportunities to review their compliance with human rights treaties, and to “facilitate, at the national level, public scrutiny of government policies and constructive engagement with relevant actors of civil society.”<sup>151</sup>

143. *Id.*

144. See Mayer, *supra* note 139.

145. *Doe 1 v. Trump*, 2017 WL 4873042, at 28.

146. See *supra* notes 11-34.

147. See *supra* note 35.

148. UNITED NATIONS, *Multilateral Treaties Deposited with the Secretary-General*, Optional Protocol to the International Covenant on Civil and Political Rights (accessed Dec. 21, 2017), [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-5&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&clang=_en); *Optional Protocol to the convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, (accessed Dec. 21, 2017), [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-9b&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9b&chapter=4&clang=_en).

149. United Nations Rep. of the Secretary-General, *Compilation of Guidelines on the Form and Content of Reports to be Submitted by States Parties to the International Human Rights Treaties*, U.N. Doc. HRI/GEN/2/Rev.6 (Jun. 3, 2009).

150. *Id.* at 5, para. 11.

151. *Id.* para. 10.

During recent periodic assessments, civil society groups played an important role in addressing shortcomings of treaty compliance by the United States.<sup>152</sup>

[T]hey participate in the preparation of the government's own reports, lobby at review sessions, and monitor domestic Convention implementation. CSOs make their most significant contribution to the review process through the submission of "shadow reports," which augment and contextualize the United States' formal reports by detailing areas where the United States allegedly has failed to meet its Convention obligations, shedding light on "what is actually happening on a daily basis to communities of color across the U.S."<sup>153</sup>

The United States is due to complete its fourth periodic review under the ICCPR in 2019.<sup>154</sup> This is particularly important given the timing of U.S. political cycles, and the anticipated Presidential election in 2020. Completed reports by civil society organizations and findings by the Human Rights Committee addressing human rights non-compliance in the United States may encourage officials to adopt policies aimed at complying with human rights obligations. In particular, given the relatively high publicity the transgender service ban received,<sup>155</sup> explicitly linking the ban to non-compliance with international obligations may galvanize efforts challenging the Executive Order, and other forms of state sanctioned discrimination against the transgender community.

Besides advocacy focused on highlighting treaty obligations and non-compliance in treaty monitoring bodies, applying the international human rights law framework to the transgender service ban has the potential to provide United Nations' special procedures mandate holders with a framework for addressing how the transgender service ban violates international obligations, and how it relates to more wide-spread discrimination against the transgender community.<sup>156</sup> Special procedures "are independent human rights experts with mandates to report and advise on human rights from a thematic or country-specific perspective."<sup>157</sup> Simply calling the transgender service ban a violation of international law, and demonstrating how the ban implicates international obligations, may attract attention to the more widespread attacks on transgender

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152. See generally Bradley Silverman, *The Role of Civil Society Organizations in the United States' Recently-Concluded CERD Review*, 40 YALE J. OF INT'L L. 199 (2015) (describing the role played by civil society groups during the United States' Convention on the Elimination of All Forms of Racial Discrimination [CERD] periodic review, including the submission of shadow reports on particular areas of concern for particular groups.)

153. *Id.* at 200 (citations omitted).

154. UNITED NATIONS, *Reporting Status for the United States of America* (accessed Dec. 21, 2017), [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/countries.aspx?CountryCode=USA&Lang=EN](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/countries.aspx?CountryCode=USA&Lang=EN).

155. Chase Strangio, *The Fight for Open Transgender Military Service is Only Beginning*, ACLU (Dec. 15, 2017), <https://www.aclu.org/blog/lgbt-rights/transgender-rights/fight-open-transgender-military-service-only-beginning>.

156. See Scott Skinner-Thomson, *How Trump May Inadvertently Advance Transgender Rights*, SLATE.COM (Nov. 30, 2017), [http://www.slate.com/blogs/outward/2017/11/30/how\\_trump\\_is\\_inadvertently\\_advancing\\_transgender\\_rights.html](http://www.slate.com/blogs/outward/2017/11/30/how_trump_is_inadvertently_advancing_transgender_rights.html) (Discussing the widespread attacks on transgender rights by the Trump administration during Donald Trump's first year in office.)

157. UNITED NATIONS, *Special Procedures of the Human Rights Council* (accessed Dec. 21, 2017), <http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcompage.aspx>.

rights within the United States,<sup>158</sup> and lead to an examination of the status of transgender persons in the United States by independent experts.

Finally, and perhaps most importantly, by utilizing an international human rights framework, advocates provide victims of discrimination with additional opportunities for their voices to be heard and to participate in efforts challenging the victimization they experience.<sup>159</sup> As a central tenant of the human rights framework, participation ensures that “[p]eople have a right to participate in how decisions are made regarding protection of their rights.”<sup>160</sup> For groups experiencing discrimination at the hands of their governments, including the transgender community in the United States, participation guarantees that marginalized groups are provided with a platform for challenging discrimination they face, and provides members of the group with a voice to impact changes in policies effecting them.<sup>161</sup> Therefore, utilizing the international human rights law framework to challenge transgender discrimination provides victims of human rights violations with an additional benefit, through enabling them to participate in advocacy and decision-making concerning the rights violations they experience.

#### IV. CONCLUSION

The international human rights law framework provides advocates challenging the Trump administration’s discriminatory policies with additional tools, particularly the core human rights treaties, as well as additional fora, including most importantly the Human Rights Committee, through which advocacy may be directed. These additional opportunities for challenging the ban—or challenging broader discrimination faced by the transgender community using the transgender service ban as an example of the kind of discrimination faced by members of the transgender community—are of particular importance considering the unfavorable state of U.S. law as related to transgender rights, and U.S. legislative capacity to undo executive action. Additionally, the international human rights law framework encourages participation in advocacy efforts by victims of rights violations. Therefore, by challenging transgender discrimination under the international human rights law framework, victims of gender identity discrimination will be empowered to direct advocacy against policies threatening their abilities to equally participate in society. While potential gains under the human rights framework may be modest and indirect, using human rights law as a complement to domestic U.S. advocacy strategies challenging transgender

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158. See Skinner-Thomson, *supra* note 154.

159. NATIONAL ECONOMIC & SOCIAL RIGHTS INITIATIVE, *What are the Basic Principles of the Human Rights Framework?*, <https://www.nesri.org/programs/what-are-the-basic-principles-of-the-human-rights-framework> (accessed Dec. 21, 2017).

160. *Id.*

161. United Nations Human Rights Council: Rep. of the Expert Mechanism on the Rights of Indigenous Peoples, *Progress report on the study on indigenous peoples and the Right to Participate in Decision-Making*, A/HRC/15/25 (Aug. 23, 2010) (discussing the role of participation in international human rights law instruments, including the Universal Declaration of Human Rights, and how the right to participation entails collective and personal participation, as well as general and specific forms of participation in decision-making).

discrimination will undoubtedly lead to at least modest gains—and modest gains are gains nonetheless.