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OIL AND SUSTAINABILITY IN THE ARCTIC CIRCLE

Caroline M. Rixey*

Remaining one of the last untouched environments on Earth, the Arctic Circle is home to a vast number of natural resources and wildlife. Yet as a result of climate change, the unique environment of the Arctic is rapidly shifting, uncovering more and more of the continental shelf as the ice sheets melt away.¹ This melting allows for greater access to the Arctic land beneath, and the resources it provides, that was unavailable before.

One of the largest untapped natural resources of the Arctic is oil. It is estimated that the Arctic Circle, while covering only six percent of the Earth's surface, holds approximately twenty-two percent of the Earth's oil and natural gas reserves.² As the ice sheet covering the Arctic begins to melt, more of the continental shelf is exposed and the possibility of exploiting this resource becomes a feasible possibility.³

This paper sets out to discuss the issues surrounding Arctic oil, the interests of the stakeholders involved, and sustainability challenges of the project. Part I provides a brief background of the Arctic Circle and the presence of unexplored oil reserves. Part II explores the perspectives of the different stakeholders involved in Arctic oil exploration, including the eight Arctic states and different various non-governmental organizations ("NGOs"). Part III discusses the current international agreements governing the Arctic Circle, focusing on the work of the Arctic Council. Part IV discusses sustainability issues surrounding Arctic oil drilling and the preservation of the Arctic environment. Part V provides an analysis of the international framework surrounding Arctic oil exploration, taking into account the different stakeholder opinions, sustainability issues, and the current international framework governing this area. Finally, Part VI draws conclusions on this issue.

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1. Vladimir Isachenkov, *Russia Submits Vast Territorial Claims on Arctic Ocean Shelf to UN*, ALASKA DISPATCH NEWS (Aug. 4, 2015), available at <http://www.adn.com/article/20150804/russia-submits-vast-territorial-claims-arctic-ocean-shelf-un> ("Rivalry for Arctic resources has intensified as shrinking polar ice is opening new opportunities for exploration").

2. *Oil and Natural Gas Resources of the Arctic*, GEOLOGY.COM, <http://geology.com/articles/arctic-oil-and-gas> (last visited May 24, 2015).

3. Isachenkov, *supra* note 1.

I. THE ARCTIC ENVIRONMENT AND OIL RESERVES

Geographically, the Arctic is defined as the region located north of the Arctic Circle.⁴ This area is unique in that sunlight is present or absent for twenty-four continuous hours on the summer and winter solstices.⁵ The Arctic contains the land area of eight states: Canada, Finland, Greenland, Iceland, Norway, the Russian Federation, Sweden, and the United States.⁶ However, only the Russian Federation, Norway, the United States, Canada, and Denmark through their jurisdiction over Greenland, have a territorial right to the Arctic. The other two states do not border the Arctic Ocean.⁷

The most striking feature of the Arctic is the sea ice, which covers approximately eight million square kilometers during the winter months and approximately twice that area during the spring and summer months.⁸ The ice cover extends to most of the continental shelves during a majority of the year.⁹

The Arctic is home to hundreds of plant species that have adapted to live in the harsh tundra environment.¹⁰ Many animal species have adapted to live in the tundra conditions as well, including polar bears, arctic foxes, and caribou.¹¹ These species either hibernate during the winter months and escape the most severe weather conditions of the north or migrate further south until the spring months.¹² In addition, approximately four million people call the Arctic Circle their home.¹³ Most of these people live in a few post-Soviet cities, while the rest are scattered about living in tiny coastal communities.¹⁴

The Arctic is host to a large number of untapped oil reserves. The United States Geological Survey ("USGS") estimates that the oil resources of the Arctic Circle are equal to approximately 412 billion barrels of oil.¹⁵ Arctic oil and natural gas discoveries began in Russia in 1962 at the Tazovskoye Field, and then in the United States in 1967 at the Alaskan Prudhoe Bay Field.¹⁶ Since then, sixty-one

4. *Arctic Oil and Natural Gas Potential*, U.S. ENERGY INFO. ADMIN. (Oct. 19, 2009), available at <http://www.eia.gov/oiaf/analysispaper/arctic>.

5. *Id.*

6. *New Awareness of and Opportunities for UNEP to Address Climate Change in the Arctic*, U.N. ENVTL. PROGRAMME 5 (Feb. 18, 2013).

7. *Arctic Oil and Natural Gas Potential*, *supra* note 4.

8. United Nations Open-Ended Informal Consultative Process on Oceans and the Law of the Seas Meeting, *Protecting the Environment of the Arctic Ecosystem by Olav Orheim*, 2 (June 2, 2003).

9. *Id.*

10. *The Arctic Environment*, NAT'L WILDLIFE FED'N 3, http://niconline.com/downloads/national_wildlife/ecosystems/arctic_environment.pdf.

11. *Id.* at 5.

12. *Id.* at 5.

13. *The Melting North*, THE ECONOMIST (June 16, 2012), available at <http://www.economist.com/node/21556798>.

14. *Id.*

15. *Oil and Natural Gas Resources of the Arctic*, *supra* note 2.

16. *Arctic Oil and Natural Gas Potential*, *supra* note 4.

large oil and natural gas fields have been discovered in Russia, Alaska, Canada, and Norway.¹⁷ The USGS states that the Arctic holds approximately twenty-two percent of the undiscovered oil resources in the world; yet while the Arctic is rich in unexplored oil resources, the fields are concentrated in a few sedimentary provinces.¹⁸

II. STAKEHOLDERS OF THE ARCTIC OIL SUPPLY

The oil resources of the Arctic are limited to a few sedimentary provinces and are not evenly distributed among the Eurasia and North American continents.¹⁹ Of the discovered oil fields in the Arctic, forty-three lie in Russia, eleven in Canada, six in Alaska, and one in Norway.²⁰ This inequality, along with increasing territorial disputes regarding sovereignty over the Arctic Circle and North Pole, will lead to conflict and disagreement among the stakeholders of the Arctic oil supply.

A. State Interest

Under the United Nations Convention on the Law of the Seas (“UNCLOS”),²¹ the territorial seas of the nations extends only twelve nautical miles from shore and those twelve miles are considered the sovereign territory of that state.²² The exclusive economic zone of the state extends from a state’s baseline up to 200 nautical miles and gives states control of the natural resources, including oil and gas, within this area.²³ A state may extend its economic zone beyond this if it can prove that “the underwater ridges of the seafloor are a geological extension of the country’s own continental shelf.”²⁴ This right of sovereignty and control over the natural resources of the oceans has led to many of the Arctic states attempting to gain more territorial control of the Arctic circle, its marine waters, and the resources it holds.

In 2007, a Russian polar expedition planted a titanium Russian tricolor on the seabed beneath the North Pole, claiming the Arctic for Russia.²⁵ On December 15, 2014, Denmark staked a claim for the North Pole as well, through its jurisdiction over Greenland, stating that 900,000 square kilometers of the Arctic Ocean above

17. *Id.*

18. *Id.*

19. *Id.*

20. Uri Friedman, *The Arctic: Where the U.S. and Russia Could Square Off Next*, ATLANTIC (Mar. 28, 2014), available at <http://www.theatlantic.com/international/archive/2014/03/the-arctic-where-the-us-and-russia-could-square-off-next/359543/>.

21. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, 21 I.L.M. 1261 [hereinafter U.N. Convention].

22. *Id.* art. 2-3; *New Awareness of and Opportunities for UNEP*, *supra* note 6, at 5.

23. *New Awareness of and Opportunities for UNEP*, *supra* note 6, at 5.

24. *Id.*

25. *Frozen Conflict*, THE ECONOMIST (Dec. 20, 2014), available at <http://www.economist.com/news/international/21636756-denmark-claims-north-pole-frozen-conflict>.

Greenland, including the North Pole, belonged to it under UNCLOS.²⁶ Canada also intends to assert sovereignty over a portion of the polar continental shelf.²⁷ These territorial claims of sovereignty all conflict with one another and as more Arctic states become involved in staking claims over the Arctic, disputes will arise.²⁸ The claims over the Arctic are based on the desire to declare sovereignty over the vast unexploited resources the Arctic holds, and as the ice sheet continues to melt due to climate change these resources become more readily available and more contested.

The Arctic states hold differing positions with regard to the development of their oil reserves in the Arctic Circle. Russia continues to lead and dominate the development of exploration and extraction of Arctic resources due to its large reserves of oil, gas, and ore in northern Siberia.²⁹ Gazprom Neft, one of Russia's fastest growing companies,³⁰ owns the world's first Arctic oil rig involving a stationary platform on Russia's Prirazlomnaya platform.³¹ Gazprom Neft began production in the Arctic in 2013 and reached a total output of approximately 5,000 barrels per day in 2014.³² Russia has several more projects under development in the Arctic, including Gazprom Neft's Novy Port, Bashneft and Lukoil's Trebs and Titov, as well as Gazprom Neft and Novatek's Severenergia.³³ Russia is likely to continue intensifying exploration of the continental shelf and extend deeper into the Arctic waters as programs are supported by the investments from private Russian oil and gas companies in addition to continuing to extend its territory into

26. *Id.*

27. *Id.*

28. In addition to disputes over territorial claims over the continental shelf, disputes have also arisen due to an opening of trade routes between Europe and Asia. As the ice cap melts over the summer, shipping lanes open up that could rival conventional routes during the summer months. *Id.* A voyage from Shanghai to Hamburg, Germany along the Northern Sea Route shaves roughly 30% off the distance from a similar trip through the Suez Canal. Jonathan Masters, *The Thawing Arctic: Risks and Opportunities*, COUNCIL ON FOREIGN REL. (Dec. 16, 2013), available at <http://www.cfr.org/arctic/thawing-arctic-risks-opportunities/p32082>.

29. Benjamin Bidder, Matthias Schepp, & Gerald Traufetter, "*The Black Plague*": *Russia Plays Game of Arctic Roulette in Oil Exploration*, SPIEGELONLINE (Aug. 24, 2012), available at <http://www.spiegel.de/international/business/russian-oil-exploration-in-arctic-circle-causes-major-environmental-damage-a-851617-druck.html>. "In 2007, Moscow staked a symbolic claim to the Arctic seabed by dropping a canister containing the Russian flag on the ocean floor from a submarine at the North Pole. The Kremlin also has moved to beef up Russian military forces in the Arctic. The effort has included the restoration of a Soviet-era military base on the New Siberian Islands and other military outposts in the Arctic. Earlier this year, the military conducted sweeping maneuvers in the Arctic that involved 38,000 servicemen, more than 50 surface ships and submarines and 110 aircraft. As part of the drills, the military demonstrated its capability to quickly beef up its forces on the Arctic Novaya Zemlya and Franz Josef Land archipelagos." Isachenkov, *supra* note 1.

30. *Gazprom Neft at a Glance*, GAZPROM NEFT, <http://www.gazprom-neft.com/company/> (last visited Mar. 7, 2016).

31. Colin Chilcoat, *Is Russia the King of the Arctic by Default?*, OILPRICE.COM (Oct. 22, 2015), available at <http://oilprice.com/Energy/Crude-Oil/Is-Russia-The-King-Of-Arctic-Oil-By-Default.html>.

32. *Id.*

33. *Id.* Gazprom Neft, Bashneft, Lukoil, and Novatek are Russian oil companies, and Novy Port, Trebs, Titov, and Severenergia are Russian oil fields.

the Arctic.³⁴

In the United States, much of the Arctic's oil and gas resources remain unexplored due to concerns about environmental impact of oil drilling.³⁵ In 2005, the oil in the United States' territory of the Arctic was estimated to be worth \$374 billion.³⁶ However, it was estimated that the oil would not be available for five years and peak output would not be reached until 2025, thus not having a large effect on the domestic oil market.³⁷ Despite these costs and delayed entrance to the domestic oil market, standards on exploratory drilling for oil and gas in United States Arctic waters were proposed in February 2015, which focused on protecting the environment from dangerous oil spills.³⁸

The conflicting state interests of producing oil and spending capital on a project that might not yield enough product to be worthwhile can be clearly seen through the interests of Russia and the United States with regard to Arctic oil. Until recently, remoteness and technical difficulty of drilling through the Arctic tundra, along with low-cost petroleum, have kept exploratory oil drilling to a minimum.³⁹ However, the melting of the ice sheet across the Arctic has made the possibility of such drilling more feasible, and with this the environmental impact of Arctic oil drilling becomes more contested.⁴⁰

B. NGO Interest

As states increase their oil exploration presence in the Arctic Circle, NGOs whose primary focus is on protecting the environment have begun to increase their presence to protect one of the last remaining untouched areas on Earth.⁴¹ The risk

34. *Arctic Oil and Gas*, ERNST & YOUNG 7 (2013), http://www.ourenergypolicy.org/wp-content/uploads/2013/09/Arctic_oil_and_gas.pdf.

35. Bidder, *supra* note 29, at 11.

36. *Current State of Arctic Oil Drilling in the U.S.*, EBSCO HOST CONNECTION, <http://connection.ebscohost.com/science/arctic-drilling/current-state-arctic-oil-drilling-us> (last visited May 24, 2015).

37. *Id.*

38. Timothy Gardner, *U.S. Proposes First Rules for Arctic Oil, Gas Drilling*, THOMSON REUTERS (Feb. 20, 2015), available at <http://sustainability.thomsonreuters.com/2015/02/23/u-s-proposes-first-rules-arctic-oil-gas-drilling/>.

39. Donald L. Gautier et al., *Assessment of Undiscovered Oil and Gas in the Arctic*, 324 SCI. 1175, 1176 (2009).

40. For example, Royal Dutch Shell submitted a plan in 2014 to the United States federal government to explore for oil in the Alaskan Arctic. Environmentalists groups were quick to say they would oppose Shell's plan, as they argue drilling in the Arctic is overly risky. Clifford Krauss, *Shell Submits a Plan for New Exploration of Alaskan Arctic Oil*, N.Y. TIMES (Aug. 28, 2014), available at <http://www.nytimes.com/2014/08/29/business/shell-submits-a-plan-for-new-alaskan-arctic-oil-exploration.html>.

41. In response to Shell oil exploration, a coalition of seventeen conservation groups called on the Obama administration to suspend offshore drilling and oil exploration in the Alaskan Arctic in 2013. Jeremy Hance, *NGOs call on Obama Administration to Suspend Arctic Oil Drilling After Series of Blunders*, MONGABAY (Jan. 10, 2013), available at <http://news.mongabay.com/2013/01/ngos-call-on->

of a devastating spill on the Arctic environment is too great for these groups to allow oil exploration and drilling to continue, as it would be almost impossible to contain and clean up the oil.⁴² An oil spill in the Arctic could contaminate one of the largest freshwater supplies of water on Earth.⁴³ Additionally, oil presence on the surface of ice could cause the ice to melt faster, as the dark surface would absorb more heat.⁴⁴ This could lead to rising sea levels around the world.

Greenpeace International has worked to stop or slow the progress of oil drilling in the Arctic for this reason. In 2011, Greenpeace boarded a vessel carrying the world's second largest oil rig to Greenland that was to drill among the icebergs in an attempt to stop the rig from being put to use.⁴⁵ Since then, Greenpeace has launched Save the Arctic, a project that is aimed at stopping oil drilling in the Arctic to prevent environmental harm.⁴⁶ Similarly, the World Wildlife Foundation ("WWF") has urged that oil exploration and drilling should stop until a stringent prevention and response system is in place.⁴⁷

NGOs like Greenpeace and WWF work to stop or halt the progress of oil exploration in order to address major concerns and shortcomings surrounding Arctic oil exploration. While these groups are working towards awareness of the environmental concerns of Arctic oil drilling, they are also putting the lack of international agreements surrounding the issue to light.

III. THE INTERNATIONAL FRAMEWORK FOR REGULATING ARCTIC OIL

The international framework surrounding Arctic oil drilling focuses on balancing the sovereign interests and rights of states with international environmental protections of the Arctic Circle. While these agreements address broad environmental and territorial concerns, they do little with regard to

obama-administration-to-suspend-arctic-oil-drilling-after-series-of-blunders/.

42. John Vidal, *Activists Occupy Oil Rig in Fight to Prevent Arctic Drilling*, THE GUARDIAN (Apr. 22, 2011), available at <http://www.theguardian.com/environment/2011/apr/22/activists-occupy-arctic-oil-rig>.

43. See generally, *Protecting the Arctic*, WWF, http://wwf.panda.org/about_our_earth/teacher_resources/best_place_species/current_top_10/alaska.cfm?uProjectID=9E0077 (last visited Mar. 7, 2016) ("The Arctic stores the world's largest freshwater reserves in its glaciers.")

44. *Controlled Fires, Chemical Dispersants the Only Solutions*, BLUE PLANET WATER SOLUTIONS, <http://bpws.com/uncategorized/arctic-oil-spills-spell-big-headaches-for-responders-controlled-fires-chemical-dispersants-the-only-solutions/> (last visited Mar. 7, 2016) ("The question of whether a large inadvertent spill of oil into the Arctic Ocean could change the world's climate is of great concern. The perceived danger is that the dark-coloured oil would melt off large areas of sea ice in summer. Although localized in its effect at first, the accident might trigger changes in a complex and perhaps unstable system which could lead to a dramatic reduction or even elimination of Arctic sea ice' The warming effect of summer sunlight on the spilled oil could result in an ice-melt area up to 10 times the size of the actual size of the spill."). *Id.*

45. Vidal, *supra* note 42.

46. See SAVETHEARCTIC, <https://www.savethearctic.org/> (last visited May 24, 2015).

47. Ellen R. Delisio, "Arctic Update" Interview with Steffen Weber in *Nordic Cleantech Review*, ARCTIC F. FOUND., <http://eu-arctic-forum.org/publications/arctic-update-interview-with-steffen-weber-in-nordic-cleantech-review/> (last visited May 24, 2015).

specifically regulating Arctic oil exploration and drilling.

A. UNCLOS

The main international agreement governing marine territory, including the Arctic Ocean, is UNCLOS.⁴⁸ Article 193 gives states the sovereign right to exploit natural resources within their marine territory pursuant to a general obligation of preserving the marine environment.⁴⁹ Thus, the Arctic states have a sovereign right to exploit the oil resources within their territory. However, there are many disputes as to where the marine territory of states ends, as states attempt to expand their territory into the Arctic Ocean through an extension of the continental shelf.⁵⁰

UNCLOS puts an additional requirement on states to protect the marine environment from pollution.⁵¹ This provision is particularly important with regard to oil exploration and drilling. As the risk of an oil spill is extremely dangerous for this environment, states must take necessary measures to prevent pollution to the Arctic marine environment.⁵² However, UNCLOS does not specify the measures that should be taken to prevent such pollution of the Arctic Ocean, but only provides that states themselves should create these regulations.⁵³ Additionally, states are in charge of enforcement of these rules and regulations.⁵⁴ This can lead to inconsistent environmental regulations and procedures across the Arctic Circle, as well as inconsistent enforcement of these rules when the desire for new oil resources is high and enforcement might wane.⁵⁵

While UNCLOS provides broad agreement and international law regarding marine environments, it does not specifically address the unique environment of the Arctic, nor does it provide strict or uniform regulations regarding pollution from states' activities on their seabed.

48. *UNCLOS and CLCS*, RIGHT ARCTIC, <http://arcticcontroversy.weebly.com/unclos-clcs.html> (last visited Mar. 7, 2016).

49. U.N. Convention, *supra* note 21, art. 193.

50. For example, Canada, Denmark, through Greenland, and Russia has each asserted that the Lomonosov Ridge is an extension of their own continental shelf. The United States, however, claims that this Ridge is an oceanic shelf and therefore refutes any claim to its ownership. *Evolution of Arctic Territorial Claims and Agreements: A Timeline (1903-Present)*, STIMSON (Sept. 15, 2013), <http://www.stimson.org/content/evolution-arctic-territorial-claims-and-agreements-timeline-1903-present>.

51. U.N. Convention, *supra* note 21, art. 194, ¶ 1.

52. *The Dangers of Arctic Oil*, GREENPEACE INT'L, <http://www.greenpeace.org/international/en/campaigns/climate-change/arctic-impacts/The-dangers-of-Arctic-oil/> (last visited Mar. 7, 2016); *Responsible Economic and Resource Development in the Arctic*, ARCTIC COUNCIL (Apr. 17, 2015), available at <http://www.arctic-council.org/index.php/en/our-work/2/8-news-and-events/291-responsible-economic-and-resource-development-in-the-arctic>.

53. See U.N. Convention, *supra* note 21, art. 208.

54. *Id.* art. 213–14.

55. Elena Gladun, *Environmental Protection of the Arctic Region: Effective Mechanisms of Legal Regulation*, 3 RUSSIAN L.J. 92, 97–104 (2015) (comparing the environmental regulations surrounding the Arctic region in Russia, Canada, the United States, and Norway).

B. Arctic Council

To address the specific concerns of the Arctic region, the Arctic Council was formed in 1996 as a means of “promoting cooperation, coordination and interaction among the Arctic States, with the involvement of the Arctic Indigenous communities and other Arctic inhabitants on common Arctic issues, in particular issues of sustainable development and environmental protection in the Arctic.”⁵⁶ Member states include Canada, Denmark, Finland, Iceland, Norway, the Russian Federation, Sweden, and the United States.⁵⁷

In 2013, the Arctic Council signed the Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic, an agreement that requires each party to maintain a national system for promptly and effectively responding to oil pollution incidents in the Arctic.⁵⁸ This agreement recognizes the particular challenges responders to oil spills and pollution face due to the harsh Arctic conditions and addresses these specific risks.⁵⁹ While the agreement addresses the aftermath of oil pollution, it does not address or provide regulations for oil exploration or drilling in the Arctic.

The Arctic Council historically relied on soft-law principles to govern and for international cooperation in the Arctic region.⁶⁰ However, with the increased threat from climate change and global warming, the Council has begun to move towards legally binding agreements to govern and protect the area.⁶¹ The Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic, along with one other, are the only two legally binding agreements thus far to specifically protect the Arctic environment.⁶²

IV. SUSTAINABILITY IN THE ARCTIC CIRCLE

With such a unique environment, the Arctic poses many sustainability concerns for any development in the area.⁶³ The two driving sustainability principles regarding Arctic oil exploration are the sustainable use of natural resources and the precautionary approach.⁶⁴ Both of these principles originated

56. *History of the Arctic Council*, ARCTIC COUNCIL (Apr. 7, 2011), available at <http://www.arctic-council.org/index.php/en/about-us/arctic-council/about-arctic-council>.

57. *Member States*, ARCTIC COUNCIL (July 10, 2015), <http://www.arctic-council.org/index.php/en/about-us/member-states>.

58. Press Release, U.S. Dept. of State, Fact Sheet: Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic, Art. 4 (May 15, 2013), <http://www.state.gov/r/pa/prs/ps/2013/05/209406.htm>.

59. Press Release, *supra* note 59.

60. Timo Koivurova, *Increasing Relevance of Treaties: The Case of the Arctic*, AM. SOC. OF INT'L L. (May 6, 2014, 3:03 PM), available at <http://www.asil.org/blogs/increasing-relevance-treaties-case-arctic-agera-end-treaties>.

61. *Id.*

62. *Id.*

63. Francesco Stipo, et al., *The Future of the Arctic: A Key to Global Sustainability*, 1 CADMUS J. 42, 47–48 (2012).

64. Natalia Loukacheva & Matthew D. Garfield, *Sustainable Human Rights and Governance: The Quest of an Arctic Entity in Transition*, 1 Y.B. POLAR L. 283, 293 (2009) (“It also implies a

from the New Delhi Principles of International Law Relating to Sustainable Development, which were presented in 2002.⁶⁵

Principle 1 of the New Delhi Principles states that all states are under a duty to manage their natural resources in a rational, safe, and sustainable way, and the protection, preservation, and enhancement of the natural environment is a common concern for all humankind.⁶⁶ The precautionary approach, Principle 4, states that states are committed to avoid human activity, which may cause significant harm to human health, natural resources, or ecosystems even in the light of scientific uncertainty.⁶⁷

With regard to Arctic oil exploration and drilling, states should proceed in a safe and sustainable manner. This includes ensuring that the potential for oil spills is or is almost nonexistent, a major concern for NGOs and other interested parties, as oil spills are extremely dangerous.⁶⁸ The devastating effects of an oil spill in the Arctic have not been calculated as of yet, but the unique environment of the Arctic suggests that a spill there would be more detrimental to environments and people around the globe than other local oil spills.⁶⁹ Additionally, sustainable oil drilling consists of not expending all of the oil resources available in the Arctic as fast as possible, but preserving some of these resources for future generations that may come to need them in the future.⁷⁰

One of the most pressing sustainability issues of Arctic oil exploration is preserving and protecting the Arctic environment.⁷¹ The Arctic is one of the last untouched areas of the Earth and to contaminate this area that holds much of the freshwater for the planet and that largely controls global climate could be

responsible use of natural resources while maintaining the environmental balance of the Arctic ecosystem and protecting the interests of future generations.”); Melissa A. Verhaag, *NOTE: It Is Not Too Late: The Need for a Comprehensive International Treaty to Protect the Arctic Environment*, 15 *GEO. INT’L ENVTL. L. REV.* 555, 578 (2003) (“The precautionary approach of an international treaty would cause nations on the opposite side of the globe to think before they pollute. And it will aid in saving the pristine Arctic environment from total degradation in the future.”).

65. New Delhi Declaration of Principles of International Law Relating to Sustainable Development, Res. 3/2002, INT’L L. ASSN., (Apr. 6, 2002), <http://cisdl.org/tribunals/pdf/NewDelhiDeclaration.pdf>.

66. *Id.*

67. *Id.* at princ. 4.

68. *The Dangers of Arctic Oil*, *supra* note 53.

69. *Id.*; see also John Vidal, *Why An Oil Spill in Arctic Waters Would be Devastating*, *THE GUARDIAN* (Apr. 22, 2011), <http://www.theguardian.com/world/2011/apr/22/oil-spill-arctic-analysis>.

70. GRO HARLEM BRUNDTLAND, REPORT OF THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT: OUR COMMON FUTURE 16 (1987) (“Sustainable development requires that humanity meets the needs of the present without compromising the ability of future generations to meet their own needs.”).

71. *The Arctic*, OCEAN CONSERVATORY, <http://www.oceanconservancy.org/places/arctic/?referrer=https://www.google.com/> (last visited Mar. 31, 2016).

detrimental.⁷² The species of plants and animals that currently inhabit the Arctic are already being affected by climate change; the effects of oil exploration might result in these species not being able to adapt to the rapidly changing climate or environment quickly enough.⁷³ Thus, following the New Delhi Principles, states and corporations seeking to drill in the Arctic should be aware of these risks and perform extensive environmental impact assessments to account for them.

Taking a precautionary approach to Arctic oil exploration and drilling is critical, as the effects of large-scale disruption to the ice sheet and environment are unknown.⁷⁴ In the event of an oil spill, toxic traces of oil would linger for much longer periods as oil behaves differently in the cold water and cannot be contained under large icebergs.⁷⁵ A precautionary approach is thus necessary for Arctic oil drilling. Companies should take care when drilling deep for oil, disturbing the environment, and placing equipment far below the ice into the marine waters.⁷⁶ A shift in the environment or land structure could occur and bring about unknown, devastating consequences. Therefore, companies and states should participate in clear, advance planning and provide these plans, disaster plans, and environmental impact assessments for transparency of their projects.

The sustainability issues surrounding Arctic oil exploration and drilling focus on the protection and preservation of the unique Arctic environment and using precaution when developing drilling plans and executing them.⁷⁷ Because the Arctic contains so many unknowns as to how it affects the global climate, environment, and population, if states should choose to engage in oil exploration and drilling, it must be in a sustainable manner.

V. ANALYSIS

Is the framework surrounding Arctic oil exploration and drilling effective? Not entirely. Currently there are no uniform requirements or regulations for oil operators in the Arctic.⁷⁸ While the Arctic Council provides a binding agreement regarding oil pollution and response to oil spills, it does not yet have a binding agreement directly addressing oil exploration and drilling.⁷⁹ As there are no other

72. *Id.*

73. Elise Wolf, *Oil and Water: The Arctic Seas Face Irreversible Damage*, EARTH ISLAND J., http://www.earthisland.org/journal/index.php/eij/article/oil_and_water/ (last visited Mar. 7, 2016) (“For Arctic species, changes are occurring too quickly to allow adaptation. Oil and gas exploration and development will only make matters worse.”).

74. COMM. ON EMERGING RESEARCH IN THE ARCTIC ET AL., *THE ARCTIC IN THE ANTHROPOCENE: EMERGING RESEARCH QUESTIONS* 37 (2014).

75. *The Dangers of Arctic Oil*, *supra* note 53.

76. *Arctic Oil and Gas*, WWF, http://wwf.panda.org/what_we_do/where_we_work/arctic/what_we_do/oil_gas/ (last visited Mar. 31, 2016).

77. *See id.*

78. Delisio, *supra* note 48.

79. Ed King, *Arctic Council Decision Leaves Region Open for Oil and Gas Drilling*, CLIMATE HOME (May 15, 2013), available <http://www.climatechangenews.com/2013/05/15/arctic-council-decision-leaves-region-open-for-oil-and-gas-drilling/>.

international treaties addressing this issue⁸⁰, the framework surrounding this issue is ineffective.

As the ice sheet surrounding the Arctic Circle continues to melt due to rising temperatures, more of the continental shelf below is exposed, creating new opportunities for states and corporations to exploit the natural resources below.⁸¹ Additionally, as the oil reserves in other parts of the world continue to be depleted and the demand for oil products continues to increase, the need to find a new oil supply is essential for some states.⁸² These factors alone suggest that an international framework is needed to protect and regulate the oil reserves that are present in the Arctic Circle, especially in light of the territory disputes and commonality of the Arctic Circle that exist.

An international agreement is also needed to address the unique environmental concerns regarding the Arctic and the effects oil exploration and drilling might have. Protection of the environment, including plant and animal species, should be a top priority, as should be protecting the cleanliness of the environment from pollution and manmade objects and intrusions. This environmental agreement should also address the potential impacts deep sea oil mining could have on the continental shelves that intersect at the pole as well as the effects drilling might have on the icebergs and land that is present. The principles of sustainable development of oil drilling and the precautionary approach should be incorporated into an agreement regarding the environmental concerns of this activity, due to the global importance of the Arctic Circle.

In addition to an international framework addressing the environmental concerns of Arctic oil exploration, a regional binding agreement should be put in place addressing regulations for oil exploration and drilling. Even though a state has the sovereign right to exploit their own natural resources,⁸³ the Arctic states as a whole should come together to agree upon not only oil spill responses but also other protections surrounding oil exploration. A uniform approach should be taken with regard to regulations on where on the continental shelf oil drilling can occur, if deep sea mining is allowed, whether oil drilling can continue into the winter months when the land is once again covered in ice, and regulations surrounding the release of toxins and chemicals into the environment. Because the Arctic Circle is

80. Ed Struzik, *As the Far North Melts, Calls Grow for Arctic Treaty*, YALE ENV'T 360 (June 14, 2010), *available at* http://e360.yale.edu/feature/as_the_far_north_melts_calls_grow_for_arctic_treaty/2281/.

81. Isachenkov, *supra* note 1.

82. Andrew Critchlow, *Arctic Drilling is Inevitable: If We Don't Find Oil in the Ice, Then Russia Will*, THE TELEGRAPH (Sept. 7, 2014), *available at* <http://www.telegraph.co.uk/finance/newsbysector/energy/11080635/Arctic-drilling-is-inevitable-if-we-dont-find-oil-in-the-ice-then-Russia-will.html> ("Despite the significant environmental concerns surrounding oil companies drilling offshore in the Arctic, demand for energy and the scarcity of similar opportunities elsewhere oil companies are increasingly prepared to take the risk accessing the region.").

83. U.N. Convention, *supra* note 21, art. 56.

a unique area in which these states come together and surround the North Pole, a regional agreement addressing these areas should be implemented to protect the environment and reduce conflict in the area.

As the current international framework regarding Arctic oil exploration is ineffective, an international framework is needed to address both the environmental concerns the activity would have on the Arctic as well as the regional disputes and potential conflicts surrounding regulations of oil exploration and drilling. These agreements should be binding upon the parties, as preserving and protecting the Arctic environment is essential for the global environment.

VI. CONCLUSION

Oil exploration and drilling in the Arctic Circle raises many sustainability and environmental issues. Because drilling is becoming more feasible due to the ice sheet melting and exposing the continental shelf below, now is the time to put in place binding agreements on the regulation of oil exploration and drilling and the protection of the environment during such activity. The Arctic's untouched resources provide a wealth of opportunities for the Arctic states to exploit them for their gain, however states should put sustainability of the environment first when engaging in these activities. A new international framework should be agreed upon to address the concerns of both the states and NGOs involved and to protect one of the last untouched areas on Earth.

**WHAT DOES CLIMATE JUSTICE LOOK LIKE FOR THE ENVIRONMENTALLY
DISPLACED IN A POST PARIS AGREEMENT ENVIRONMENT? POLITICAL
QUESTIONS AND COURT DEFERENCE TO CLIMATE SCIENCE IN THE *URGENDA*
DECISION**

*Jeremy M. Bellavia**

I. INTRODUCTION

Environmentally induced migration is not new to the pattern of biological migration on earth.¹ Human migration has ebbed and flowed in response to conflict, environmental changes, and resource scarcity throughout time. For generations people moved in search of “better land, milder climate, and easier living conditions.”² Today, communities are continuing this trend.³ What has changed, however, is the human influence from greenhouse gas (“GHG”) emissions on the climate.⁴ Anthropogenic climate change is having an unprecedented and varied effect on the environment leading to slow-onset disasters

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1. Guy Gugliotta, *The Great Human Migration: Why human left their African homeland 80,000 years ago to colonize the world*, SMITHSONIANMAG.COM (July 2008), <http://www.smithsonianmag.com/history/the-great-human-migration-13561/?no-ist>.

2. Etienne Piguet, *From “Primitive Migration” to “Climate Refugees”: The Curious Fate of the Natural Environment in Migration Studies*, 103 ANNALS. ASSOC. AM. GEOGRAPHERS. 148-162 (2012), available at <http://www.tandfonline.com/doi/abs/10.1080/00045608.2012.6962> (quoting Ellen Churchill Semple, *Influences of Geographic Environment, on the basis of Ratzel’s system of anthropogeography* (New York : H. Holt and co., 1911)); (for more studies of historical migration due to climate see Ellsworth Huntington, *Civilization and climate* (New Haven, CT: Yale Uni., Press, 1922)).

3. Ellsworth Huntington, *Changes of Climate and History*, 18 AM. HIST. REV. 213 (Jan. 1913), available at <http://www.jstor.org/stable/10.2307/1835325?origin=crossref>, (the relative stability of the earth’s climate over the last 10,000 years has been marked with period “pulses” of instability. This author explains that these “pulses” have enabled the rise and led to the demise of civilizations. e.g., The Maya, Rome, Egypt, Greece); see also U.N. Environment Programme, *Livelihood Security: Climate Change, Migration and Conflict in the Sahel*, 22 (Dennis Hamro-Drotz & United Nations Environment Programme eds., 2011), (motivated by the variable climate of the Sahel region in Africa, herders, farmers, and even laborers have long history of seasonal migration patterns engrained in their culture. Migration in this region is a coping strategy to diversify resource generation in a variable environment).

4. See Stephanie C. Herring et al., *Explaining Extreme Events of 2014 from a Climate Perspective*, supplement to 96 BULL. AMER. METEOR. SOC. SI-SI72 (Dec. 2015), <https://www2.ametsoc.org/ams/index.cfm/publications/bulletin-of-the-american-meteorological-society-bams/explaining-extreme-events-from-a-climate-perspective/table-of-contents/high-resolution-version/>; see also *Causes of Climate Change*, WORLD METEOROLOGICAL ORGANIZATION, https://www.wmo.int/pages/themes/climate/causes_of_climate_change.php, (last visited Apr. 5, 2016) (anthropogenic climate change is human caused climate change).

(e.g., flooding, increased extreme weather events, droughts, rising ocean levels).⁵ The slow-onset environmental degradation caused by climate change disrupts livelihoods, creates food insecurity, and exacerbates resource inequality.⁶

In developing countries and where people are heavily dependent on natural resources for survival, individuals are more vulnerable to climate change because they often lack the resources to successfully adapt.⁷ Small Island Developing States (“SIDS”) are home to some of the most vulnerable individuals, who have nowhere to go in the case of a climate change related disaster.⁸ In other regions where vulnerable individuals have the resources to migrate, the environmentally displaced migrate to urban areas within their home country as a result of the slow-onset effects of climate change.⁹ Increasing migration into urban areas strains local infrastructure and increases competition for natural resources, creating social unrest and political instability.¹⁰ Strict immigration policies accompanying the modern geopolitics of state sovereignty and the growing trend of border externalization¹¹ severely limit legitimate methods of migration. These policies leave those displaced by climate change to the risky channels of irregular migration, crossing sovereign borders illegally.¹²

Developed states are the largest historic contributors to climate change, and are not immune to the effects.¹³ During the Conference of Parties 21 (“COP21”),¹⁴

5. Christopher B. Field et al., *Summary for Policymakers*, in *Climate Change 2014: Impacts, Adaptation, and Vulnerability, Part A: Global and Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change 7* Cambridge Univ. Press, (2014) (Regions will be impacted positively and negatively).

6. Stephane Hallegatte et al., *Bad Seed: Climate Change, Agriculture, and Food Security*, in *Shock Waves: Managing the Impacts of Climate Change on Poverty*, 49, 65 (Nov. 2015), available at <http://elibrary.worldbank.org/doi/book/10.1596/978-1-4648-0673-5>.

7. Thomas Schueneman, *Blog Action Day: Poverty and Climate Change*, GLOBAL WARMING IS REAL, 2 (Oct. 15, 2008), available at <http://globalwarmingisreal.com/2008/10/15/blog-action-day-poverty-and-climate-change/>.

8. Climate Change Secretariat, *Climate Change Small Island Developing States*, U.N. Framework Convention on Climate Change 2 (2005), http://unfccc.int/resource/docs/publications/cc_sids.pdf.

9. Ivan Campbell et al., *Climate change and conflict-Lessons from community conservancies in northern Kenya 7* (Conservation Development Centre, International Institute for Sustainable Development and Saferworld, Nov. 2009).

10. Colin P. Kelley et al., *Climate change in the Fertile Crescent and implications of the recent Syrian drought*, 112 Proc. Nat'l. Acad. Sci. 3241, 3242, 3245 (2015), available at <http://www.pnas.org/content/112/11/3241?tab=author-info>, (referring to a nearly 50% increased urban population in Syria between 2002 and 2010, as a contributor to the country's destabilization).

11. Maribel Casas-Cortes et al., *Changing Borders, Rethinking Sovereignty: Towards A Right to Migrate*, 23 Rev. Interdiscip. Mobil. Hum. 47, 48-9 (2015), available at http://www.scielo.br/scielo.php?pid=S1980-85852015000100047&script=sci_arttext&tlng=es.

12. *Key Migration Terms*, INTERNATIONAL ORGANIZATION FOR MIGRATION, <https://www.iom.int/key-migration-terms#Irregular-migration> (last visited Apr. 5, 2016) (defined as: Movement that takes place outside the regulatory norms of the sending, transit and receiving countries).

13. Edward Cameron, Tara Shine & Wendi Bevins, *Climate Justice: Equity and Justice Informing a New Climate Agreement*, 8 (World Res. Inst & Mary Robinson Foundation-Climate Justice, Working Paper, 2013), http://pdf.wri.org/climate_justice_equity_and_justice_informing_a_new_climate_agreement.pdf

the event that led to the adoption of the Paris Agreement (“PA”), President of the United States Barack Obama said, “[w]e know the truth that many nations have contributed little to climate change but will be the first to feel its most destructive effects.”¹⁵ Developed countries are experiencing the costly market and non-market impacts of climate change, yet they have not taken the lead in drastically reducing emissions.¹⁶ Highly populated coastal cities in the U.S. are experiencing the effects of storm surges, as well as impacts to marine and wetland eco-systems.¹⁷

The efforts of individual states are not enough to stem the negative impact of climate change. Because climate change is global, it requires an international response. Prior to the adoption of the PA, the international treaty governing the stabilization of the climate through reduction of global GHG emissions was the United Nations Framework Convention on Climate Change (“UNFCCC”).¹⁸ The Convention on Climate Change sets forth an overall framework for intergovernmental efforts to tackle the challenge posed by climate change.¹⁹ The UNFCCC recognizes that the climate system is a shared resource whose stability is affected by industrial and other emissions of carbon dioxide and other greenhouse gases.²⁰

The PA was adopted under the UNFCCC in December 2015²¹, and is the first international environmental agreement ever to reference human rights.²² The adoption of the PA followed two decades of capacity building, awareness, and research.²³ The PA was signed by 196 parties and became the first multilateral

(Developed countries contributed 70% of GHG emissions since 1950. Drastic reduction in global GHG emissions are necessary to stabilize climate change).

14. *Parties to the Convention and Observer States*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, http://unfccc.int/parties_and_observers/parties/items/2352.php (the COP represents the decision making body of the United Nations Framework Convention on Climate Change. All 195 countries in the world are either Parties or members to the Convention).

15. Barack Obama, Remarks by President Obama at the First Session of COP21, 4 (Nov. 30, 2015) <https://www.whitehouse.gov/the-press-office/2015/11/30/remarks-president-obama-first-session-cop21> (President Obama expressed support at the opening of the COP21).

16. Robert Mendelsohn, *Climate Change and Economic Growth*, 9 (Comm’n on Growth & Dev., Working Paper No. 60, 2009), <https://environment.yale.edu/files/biblio/YaleFES-00000397.pdf>.

17. *Climate Impacts on Coastal Areas*, U.S. ENVIRONMENTAL PROTECTION AGENCY, <http://www3.epa.gov/climatechange/impacts/coasts.html> (last visited Apr. 5, 2016).

18. U.N. Framework Convention on Climate Change art. 2, May 9, 1992, S. Treaty Doc. 102-38, 1771 U.N.T.S. 107.

19. *The U.N. Framework Convention on Climate Change*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, http://unfccc.int/essential_background/convention/items/2627.php (last visited Apr. 5, 2016).

20. *Id.*

21. U.N. Framework Convention on Climate Change, Conference of the Parties, 21st session, Nov. 30- Dec. 11, 2015, *Adoption of the Paris Agreement*, U.N. Doc. FCCC/CP/2015/L.9/Rev.1 (Dec. 12, 2015) [hereinafter UNFCCC]

22. Annalisa Savaresi, *The Paris Agreement: An Equity Perspective*, BENELEX BLOG, 5 (Jan. 29, 2016), available at <http://www.benelexblog.law.ed.ac.uk/2016/01/29/the-paris-agreement-an-equity-perspective/>.

23. UNFCCC, *supra* note 21, at 1-32.

environmental agreement referencing parties' obligations to human rights.²⁴ Once fifty-five parties responsible for fifty-five percent of global GHG emission ratify the treaty, the agreement will come into force.²⁵ The PA will commit parties to their National Determined Contributions ("NDC").²⁶ NDCs have the goal of keeping global temperatures below two degrees Celsius above pre-industrial levels.²⁷ The PA may bind parties to their voluntary commitments, but there is no enforcement or dispute settlement mechanism in the PA, nor does the PA provide procedural rights.²⁸ Accordingly, while the PA represents a step forward in addressing climate change, it does contain problematic enforcement gaps.

In the 2014 report "Achieving Justice and Human Rights in an Era of Climate Disruption," the International Bar Association ("IBA") made over fifty recommendations to strengthen climate change justice.²⁹ This report was a measure of the global awareness of climate change and provided that "climate justice links human rights and development to achieve a human-centered approach, safeguarding the rights of the most vulnerable people and sharing the burdens and benefits of climate change impacts equitably and fairly."³⁰ The IBA report discussed the role that arbitration can play to fill the enforcement gaps related to the PA and influence international law related to climate change.³¹

Businesses also play an important role in climate change mitigation.³² As such, litigation and arbitration may present important tools in climate change mitigation. The scope of this paper is limited to the state of climate justice generally and the potential role of arbitration.³³ Because domestic legislatures are

24. Savaresi, *supra* note 22, at 5.

25. UNFCCC, *supra* note 21, at art. 21.

26. UNFCCC, *supra* note 21, at art. 4.

27. UNFCCC, *supra* note 21, at art. 2.

28. UNFCCC, *supra* note 21, at art. 23 (NDCs are reviewed every five years and published by the secretariat. Those who violate their obligations are named and shamed).

29. David Estrin & Baroness Helena Kennedy, *Achieving Justice and Human Rights in an Era of Climate Disruption*, Report, INTL. BAR ASS'N TASK FORCE ON CLIMATE CHANGE, JUSTICE & HUMAN RIGHTS 3, 26-31 (July 2014), available at <http://www.ibanet.org/PresidentialTaskForceCCJHR2014.aspx>.

30. *Principles of Climate Justice*, MARY ROBINSON FOUNDATION-CLIMATE JUSTICE 1, <http://www.mrfcj.org/wp-content/uploads/2015/09/Principles-of-Climate-Justice.pdf>.

31. David W. Rivkin & Roger Martella, *COP21: Climate Change Related Disputes: A Role for International Arbitration and ADR*, INTERNATIONAL BAR ASSOCIATION 1-14 (Dec. 7, 2015), available at <http://www.ibanet.org/Document/Default.aspx?DocumentUid=4c321f4e-315b-40be-a553-5b55da513ede> (the President of the IBA said that arbitration can provide certainty of contract with respect to state or industry imposed climate change objectives and targets).

32. Press Release, U.N. Framework Convention on Climate Change, Yale University Report Reveals Rapidly Growing Reality of Climate Action (Dec. 4, 2015) ("Yale analyzed over 10,000 climate commitments made by cities, regions, businesses and investors, many involving the cooperation of national governments, who formally recorded their pledges in the Non-State Actor Zone for Climate Action (NAZCA) and under the banner of the Lima-Paris Action Agenda (LPAA).").

33. Mitigating GHG emissions requires more than creation and enforcement of domestic legislation and arbitration is likely to play an important role. See *COP21: Climate Change Related Disputes: A Role for International Arbitration and ADR*, INTERNATIONAL BAR ASSOCIATION *supra* note 31, at 14. Arbitration provides for a flexible and delocalized (non-national) adjudicative

still slow to respond to the urgent situation presented by climate change, and the PA lacks enforcement mechanisms, litigation can be used to hold countries responsible for their GHG emissions reduction commitments.³⁴ June 2015 marked a potential turning point for climate related litigation.³⁵ In June 2015, in *Urgenda v. Staat*, a Dutch court ruled that the Netherlands has a “systemic responsibility” within its territory to reduce GHG emissions to the established national target, and that it was not on path to meeting that target.³⁶ This decision represents an important contribution to international jurisprudence relating to climate change mitigation.³⁷ The sections below will discuss this decision and others.

This paper discusses the role of climate justice to mitigate climate change following the PA. Section II briefly discusses the effects of climate change on global peace and security and the gaps current international instruments leave in protecting the environmentally displaced. Section III discusses the significance of the *Urgenda* decision and its potential as a model for climate justice in pending and future cases.

mechanism to resolve disputes, and is governed by rules expressed in the parties’ agreement to arbitrate. This flexible dispute resolution mechanism can be designed by the parties to include third parties (e.g., NGOs, and non-parties to the dispute) and can add to the efficacy of climate justice. Akhlaq Choudhury & Khaled Moyeed, *Spotlight on International Arbitration as a Means of Settling Disputes Arising from Climate Change*, KLUWER ARBITRATION BLOG Jan. 26, 2016, <http://klwuarbitrationblog.com/2016/01/26/spotlight-on-international-arbitration-as-a-means-of-settling-disputes-arising-from-climate-change/>. Arbitration can be helpful for private and public actors in mitigating climate change. The UNFCCC anticipated and included for the development of arbitral procedures related to climate disputes in art 14 (b). U.N., UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, art. 14(b), U.N. Docs. FCCC/INFORMAL/84 (1992) (Arbitration procedures have not yet been adopted by the UNFCCC). Arbitration is already being used by the global trade and development sectors and will continue to be used as more low carbon investments are made. See *Investor Network on Climate Risk (INCR)*, CERES, <http://www.ceres.org/investor-network/incr> (last visited July 15, 2016). The INCR comprises of at least 120 institutional investors, managing \$14 trillion committed to invest in low-carbon opportunities. The INCR Policy Working Group engages with domestic policymakers and international investor groups to promote stable economic returns. *Climate and Energy Policy*, CERES, <http://www.ceres.org/investor-network/incr/climate-and-energy-policy> (last visited July 15, 2016). Support for arbitration to resolve multiparty disputes involving investment and commercial claims relating to climate change mitigation is growing, and includes the International Bar Association. International Bar Association Climate Change Justice & Human Rights Task Force Report, *Achieving Justice and Human Rights in an Era of Climate Disruption* 117-153 (2014).

34. The Hague Dist. Ct., The Hague, 24 juni 2015, 7196 m.nt (Urgenda/Staat) (Neth.) (The *Urgenda* decision discussed below was filed by the Urgenda group against the Government of the Netherlands. The lawsuit claimed that the Dutch government failed to effectively reduce GHG emissions to levels necessary to stabilize CO₂ levels. The lawsuit cited multiple international obligations in which the Netherlands committed to this stabilization by GHG emission reduction).

35. *Id.* at 2 (June 2015 is when the *Urgenda* decision was finalized) [hereinafter *Urgenda v. Staat*]

36. *Id.* at 34.

37. Roger Cox, *A Climate Change Litigation Precedent Urgenda v The State of the Netherlands*, CIGI Papers No. 79 1, 13-14 (Nov. 2015), https://www.cigionline.org/sites/default/files/cigi_paper_79.pdf.

II. A. CLIMATE CHANGE IS A THREAT MULTIPLIER, INCREASING POVERTY, AND DESTABILIZING FRAGILE STATES

Before discussing the state of climate justice, it is important to first understand the challenges posed by climate change with respect to global peace and security, and the devastating impact climate change can have on the global population. Climate change strains economic growth, erodes food security, and increases poverty.³⁸ The earth's climate will not stabilize even if anthropogenic emissions of GHG are stopped, the negative effects associated with climate change will continue to affect local populations for centuries.³⁹ Continued global population growth means that an increasing number of people will be vulnerable to climate change, (e.g. more people are living in low lying coastal areas vulnerable to sea level rise).⁴⁰

Policies of colonialism and neoliberal trade created an unequal division of global resources between the wealthy global North and poor South.⁴¹ Because states most responsible for anthropogenic climate change often have more resources than poorer states, they are better suited to reduce risks and adapt.⁴² However, risk reduction and adaptation cannot shield even the wealthiest nations from all climate change related loss.⁴³

Violent conflicts stemming from the effects of climate change, threaten global peace and security.⁴⁴ U.S. Secretary of State John Kerry said, "Make no mistake: The implications here extend well beyond hunger. This isn't only about global food security; it's about global security—period."⁴⁵ Land degradation from

38. Field, *supra* note 5, at 20-22

39. Rajendra K. Pachauri et. al., *Climate Change 2014: Syntheses Report*, IPCC 16 (2015), https://www.ipcc.ch/pdf/assessment-report/ar5/syr/SYR_AR5_FINAL_full.pdf.

40. *Id.* at 16, 20 (population growth also challenge risk management because more people are reliant on available natural resources for survival).

41. Anne McNevin, *Beyond Territoriality: Rethinking Human Mobility, Border Security And Geopolitical Space From the Indonesian Island of Bintan*, 45(3) SECURITY DIALOGUE 295, 299 (2014), <http://sdi.sagepub.com/content/early/2014/04/23/0967010614530458.full.pdf+html> (discussing historical European colonialism, global trade, and exploitation of natural resources).

42. *Hurricane Sandy by the Numbers*, FEMA (recovery and mitigation numbers as of Oct. 9, 2015), http://www.fema.gov/media-library-data/1446042082195-179d93a1d9f3ca512de588ebf4091336/Sandy_anniv3_by_the_numbers.pdf. The Federal government has provided at least \$13 billion to assist victims of the storm. *Additional \$2.5 Billion in Federal Hurricane Sandy Aid Coming*, PRESS OF ATLANTIC CITY (May 23, 2014), available at http://www.pressofatlanticcity.com/news/breaking/additional-billion-in-federal-hurricane-sandy-aid-coming/article_f91bcb6c-e2b8-11e3-9edb-001a4bcf887a.html.

43. Nicholas Stern, *The Economics of Climate Change*, 98 AM. ECON. REV. 5 (2008), available at <https://www.aeaweb.org/articles.php?doi=10.1257/aer.98.2.1> (climate change costs are the equivalent to 5% of global GDP).

44. Clionadh Raleigh et. al., *Assessing the Impact of Climate Change On Migration and Conflict*, at v, 34, 36 (SOC. DIMENSIONS OF CLIMATE CHANGE, WBG, Working Paper, 2008), <http://danida.vnu.edu.vn/cpis/files/References/Climate%20Change/Assessing%20the%20Impact%20of%20Climate%20Change%20on%20Migration%20and%20Conflict.pdf>. [hereinafter Raleigh].

45. Matthew Lee, *Climate Change, Food Security Key to Global Stability, Kerry Says*, ASSOCIATED PRESS (Oct. 17, 2015), available at <http://www.pbs.org/newshour/rundown/climate->

unsustainable land use and extreme weather events lead to food insecurity, disrupts livelihoods, and drives people into urban areas.⁴⁶ Many displaced by climate change relocate within their home state.⁴⁷ Migration into urban areas increases competition for already scarce resources and can challenge already fragile governments.⁴⁸ Conflicts stemming from the symptoms of climate change contribute to large-scale migration from the global South and developing regions, to the North.⁴⁹ At the COP21, President Obama said that the effects of climate change will lead to “[p]olitical disruptions that trigger new conflict, and even more floods of desperate peoples seeking the sanctuary of nations not their own.”⁵⁰ In this way climate change is a “threat multiplier.”⁵¹ President Obama later said:

The reason is because this one trend—climate change—affects all trends. If we let the world keep warming as fast as it is, and sea levels rising as fast as they are, and weather patterns keep shifting in more unexpected ways—then before long, we are going to have to devote more and more and more of our economic and military resources not to growing opportunity for our people, but to adapting to the various consequences of a changing planet. This is an economic and security imperative that we have to tackle now.”⁵²

Climate change is linked to economic and social disruption, which can create environments ripe for recruitment by extremist groups like ISIL, and others.⁵³ Years of severe drought and poor water management in Syria led to total crop failure in the country’s main agricultural region and eighty-five percent loss of livestock.⁵⁴ The loss of livelihoods forced families to migrate to already overcrowded cities, whose presence added to existing grievances with the

change-food-security-key-global-stability-kerry-says/ (writing on about the speech Secretary Kerry gave at the Milan Expo in 2015).

46. *Urgenda v. Staat*, *supra* note 34, at 14, 26.

47. U.N. High Comm’r For Refugees, *UNHCR, the Environment & Climate Change* 8 (Oct. 2015), <http://www.unhcr.org/540854f49.html> [hereinafter UNHCR].

48. Raleigh, *supra* note 44, at 5-6, 34-6 (linking climate migration to urban areas and conflict).

49. *Id.* at 2, 6.

50. *Remarks by President Obama at the First Session of COP21*, *supra* note 15.

51. FINDINGS FROM SELECT FEDERAL REPORTS: THE NATIONAL SECURITY IMPLICATION OF A CHANGING CLIMATE, THE WHITE HOUSE WASHINGTON 8 (May 2015), https://m.whitehouse.gov/sites/default/files/docs/National_Security_Implications_of_Changing_Climate_Final_051915.pdf; see also Statement by the President of the Security Council, U.N. Doc. S/PRST/2011/15 (July 20, 2011), available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PRST/2011/15.

52. Office of the Press Secretary, Press Conference by President Obama, THE WHITE HOUSE (Dec. 1, 2015), available at <https://www.whitehouse.gov/the-press-office/2015/12/01/press-conference-president-obama>.

53. Phillip Dane Warren, *Climate Change and International Peace and Security: Possible Roles for the U.N. Security Council in Addressing Climate Change*, SABIN CENTER FOR CLIMATE CHANGE L., COLUM. L. SCH. 4-5 (July 2015), available at <http://academiccommons.columbia.edu/catalog/ac:187331>.

54. *Case Study Syria*, A NEW CLIMATE FOR PEACE, <https://www.newclimateforpeace.org/case-study/syria> (last visited Apr. 5, 2016).

government.⁵⁵ Without the resources to adapt to a changing environment, many people move into urban areas within their home state.⁵⁶ Urban migration exposes displaced individuals to increased risks and threats to safety and livelihood (e.g., forced labor, human trafficking, and violent conflict).⁵⁷ It also increases competition for natural resources and strains existing public services.⁵⁸ For instance, in Egypt issues of food security related to changes in rainfall patterns added to already existing food insecurity.⁵⁹ Mass protests in Egypt during 2011 were largely driven by public objection to increased poverty, soaring food prices, corruption, and high unemployment.⁶⁰ Egyptians are quite sensitive to food price volatility because the average Egyptian household spends over forty percent⁶¹ of their incomes on food. Water scarcity in the region and low agriculture production has led to soaring food prices.⁶² These protests eventually led to the fall of the thirty-year regime of Hosni Mubarak.⁶³ The situation in Egypt, along with many others, demonstrated that climate change and environmental displacement can and do lead to instability which threatens global peace and security. However, despite the significant issues associated with the migration of persons displaced by climate change, do current international legal instruments recognize the rights of the environmentally displaced? The next part of this section will answer this question.

II. B. GAPS IN PROTECTION, ENVIRONMENTALLY DISPLACED INDIVIDUALS ARE VULNERABLE TO INCREASED RISK OF HARM.

As described above, individuals adapting to a changing climate are more likely to move within their home state.⁶⁴ The Guiding Principles on Internal

55. *Id.*

56. Raleigh, *supra* note 44, at 20.

57. Henrik Urdal, *Demographic Aspects of Climate Change, Environmental Degradation And Armed Conflict* 4-7 (Peace Res. Inst. Oslo, Jan. 2008), http://www.researchgate.net/profile/Henrik_Urdal/publication/228801794_Demographic_aspects_of_climate_change_environmental_degradation_and_armed_conflict/links/0fcfd50b32baa21d89000000.pdf.

58. Colin P. Kelley et. al., *supra* note 10, at 3241-42 (referring to a nearly 50% increased urban population in Syria between 2002 and 2010, as a contributor to the country's destabilization).

59. *Food Security And Nutritional Status In Egypt Worsening Amidst Economic Challenges*, WORLD FOOD PROGRAMME (May 21, 2013), available at <https://www.wfp.org/news/news-release/food-security-and-nutritional-status-egypt-worsening-amidst-economic-challenges>.

60. Case Study Egypt, A NEW CLIMATE FOR PEACE, <https://www.newclimateforpeace.org/case-study/egypt> (last visited Apr. 5, 2016).

61. *Id.*; see also Derek Thompson, *How Families Spend in Brazil, Russia, China, India, Egypt, Turkey, Indonesia, And Saudi Arabia*, THE ATLANTIC (Sept. 28, 2012), available at <http://www.theatlantic.com/business/archive/2012/09/how-families-spend-in-brazil-russia-china-india-egypt-turkey-indonesia-and-saudi-arabia/263023/> (citing 50% of the household income).

62. *Water Scarcity in Egypt: The Urgent Need for Regional Cooperation Among the Nile Basin Countries 2*, GOV'T OF EGYPT MINISTRY OF WATER RES. & IRRIGATION 2 (Feb. 2014), http://www.mfa.gov.eg/SiteCollectionDocuments/Egypt%20Water%20Resources%20Paper_2014.pdf.

63. *Essam Sharaf Named Egypt's New Prime Minister*, THE WORLD POST (Mar. 3, 2011, updated on May 25, 2011), available at http://www.huffingtonpost.com/2011/03/03/essam-sharaf-named-egypts_n_831029.html.

64. INTERNAL DISPLACEMENT MONITORING CTR., Q. UPDATE 3 (July-Sept. 2015), <http://www.internal-displacement.org/assets/publications/2015/IDMC-quarterly-update-2015-QU3.pdf>

Displacement (“GPID”) is a soft law instrument that does not create positive obligations on states for displaced individuals. It recognizes individuals displaced by *human-made* disasters,⁶⁵ but only applies to individuals fleeing from sudden onset disasters without addressing the specific needs of those vulnerable to climate change.⁶⁶ This leaves a gap in protection for those internally displaced from the more common slow onset environmental degradation scenarios related to climate change.⁶⁷

For those displaced individuals who are not fleeing from sudden onset disasters, seeking refugee status may provide some protections. Environmental migrants, who can prove a recognized form of past persecution or well-founded fear of future harm on account of five specific categories, may obtain “refugee” status.⁶⁸ Refugee status might enable the individual to permanently relocate.⁶⁹ Unlike soft instruments such as the GPID, binding international law creates positive obligations on states to protect refugees. However, to be granted refugee status, a person must demonstrate that they were persecuted.⁷⁰ Domestic jurisprudence continues to narrow the scope of the defined categories of persecution, and does not make room for the environmentally displaced.⁷¹ There is a strong nexus between human activity and climate change,⁷² but courts have yet to define the direct impacts of climate change as a form of persecution.⁷³ In addition,

(19.3 million newly displaced people in 2014).

65. U.N. Rep. Secretary-General, *Guiding Principles on Internal Displacement*, at Annex ¶ 2, U.N. Doc. E/CN.4/1998/53/Add.2 (Feb. 11, 1998), available at <http://www.refworld.org/docid/3c3da07f7.html>; see also African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), Art. 1(k), Oct. 22, 2009, 49 I.L.M. 86, available at <http://www.refworld.org/docid/4ae572d82.html> (human-made disasters like wars, industrial accidents, fires).

66. Lauren Nishimura, ‘Climate Change Migrants’: Impediments to a Protection Framework and the Need to Incorporate Migration Into Climate Change Adaptation Strategies, 27 INT’L J. REFUGEE L. 107, 115 (2015), available at <http://ijrl.oxfordjournals.org/content/early/2015/02/11/ijrl.eev002.abstract>.

67. Taylor Ackerman, *Climate Change And Forced Migration: A Gap in Protection*, PEACE PALACE LIBR. (July 31, 2015), available at <http://www.peacepalacelibrary.nl/2015/07/climate-change-and-foreced-migration-a-gap-in-protection/>.

68. Convention Relating to the Status of Refugees, opened for signature July 28, 1951, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954) [hereinafter Convention Relating to the Status of Refugees]; see UNHCR, *supra* note 47, at 9 (state practice under the Convention varies. Individuals trying to establish past persecution on account of the five categories face challenges of changing requirements and continuously evolving jurisprudence that makes proving persecution more and more difficult).

69. Convention Relating to the Status of Refugees, *supra* note 69; Nishimura, *supra* note 67, at 114.

70. Convention Relating to the Status of Refugees, *supra* note 69; Nishimura, *supra* note 67, at 114.

71. William Thomas Worster, *The Evolving Definition of the Refugee in Contemporary International Law*, 30 BERKELEY J. INT’L L. 103-06 (2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1736547.

72. Lisa V. Alexander et. al., *Climate Change 2013 The Physical Science Basis, Summary for policymakers*, IPCC, FIFTH ASSESSMENT REPORT, 14 (2013), https://www.ipcc.ch/pdf/assessment-report/ar5/wg1/WGIAR5_SPM_brochure_en.pdf.

73. Kiribati Family ‘Terrified’ of Going Home, RADIO NEW ZEALAND NEWS (Sept. 22, 2015),

because of the multi-causal and historical nature of climate change, identifying a specific perpetrator is difficult.⁷⁴ GHG emissions, which contribute to climate change, have been increasing since the industrial revolution.⁷⁵ Although it is possible to identify specific modern actors, courts have not yet been willing to assign guilt in cases involving climate change induced displacement.⁷⁶ In addition to the challenge of establishing the element of persecution, courts have also found that climate migrants do not receive protection under the category of a “particular social group.”⁷⁷ Under the 1951 Convention Relating to the Status of Refugees (“Refugee Convention”)⁷⁸ and the Convention Against Torture,⁷⁹ states also have an obligation not to return a person to his or her country of origin where removal would subject the person to serious bodily harm or torture.⁸⁰ Yet many states have failed to protect those persons displaced by climate change, despite the fact that removal to their country of origin could pose serious risks to their well-being and possibly their lives.⁸¹ One of the most significant arguments against broadening the scope of the definition of refugee to include those individuals, who have been displaced as a result of climate change or environmental disasters, is that it would divert attention and resources and weaken existing efforts to protect vulnerable

available at <http://www.radionz.co.nz/news/national/284875/kiribati-family-%27terrified%27-of-going-home> (a recent challenge in New Zealand by a Kiribati family to deportation was denied for not establishing protection under the Refugee Convention).

74. Benedict Blunnie, *Climate Change And Forced Displacement: Conceptual And Legal Issues*, 4 KINGS INNS STUDENT L. REV. 87, 98 (2014), available at <http://heinonline.org/HOL/LandingPage?handle=hein.journals/kingsinslr4&div=11&id=&page=> (studies would require detailed information since the start of the industrial revolution).

75. Pachauri, *supra* note 39, at 124.

76. KELLY BUCHANAN, THE LAW LIBRARY OF CONGRESS, GLOBAL LEGAL RESEARCH CENTER, NEW ZEALAND: “CLIMATE CHANGE REFUGEE” CASE OVERVIEW (July 2015), <https://www.loc.gov/law/help/climate-change-refugee/new-zealand-climate-change-refugee-case.pdf>.

77. *AF (Kiribati)* [2013] NZIPT 800413 at [75] (The court rejected the claim of membership of a “particular social group” because the applicant did not face fear of persecution from a specific actor but from “mother nature.” The court found that there was no evidence that the Government of Kiribati made a choice not to remedy the situation, and the applicant testified that he faced the same poor conditions common to everyone in Kiribati.). The drafters of the Convention Relating to the Status of Refugees (“Refugee Convention”), did not define the category of protection for membership in a particular social group, nor do the *travaux preparatoires* offer interpretive guidance. National courts and legal scholars indicate interpretation guided by the four listed categories of protection: race, religion, nationality, and political opinion. An analysis commissioned by the UNHCR indicates that jurisprudence regarding the interpretation often departs from national legislation and the Refugee Convention itself. See T. Alexander Aleinikoff, “Membership in a Particular Social Group”: *Analysis and Proposed Conclusions.*, <http://www.unhcr.org/3b83b1c54.pdf>.

78. Convention Relating to the Status of Refugees, *supra* note 69.

79. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/RES/39/46, opened for signature Dec. 10, 1984, 1465 U.N.T.S. 85, <https://treaties.un.org/doc/Publication/UNTS/Volume%201465/volume-1465-I-24841-English.pdf>.

80. Janc McAdam, International Dialogue on Migration 2011 the Future of Migration: Building Capacities for Change Intersessional Workshop on *Climate Change, Environmental Degradation and Migration* (Mar. 29-30, 2011) (Human rights law has helped expand traditional protection).

81. *Id.*

individuals currently covered by the Refugee Convention.⁸²

Binding international law instruments require parties to develop domestic policies that originate from a state's commitment to the agreement.⁸³ Once international agreements are in place, domestic practice and implementation varies.⁸⁴ States find ways to avoid international obligations by externalizing border security.⁸⁵ Border externalization diverts people away from safety and undermines the spirit and purpose of the refugee convention.⁸⁶ The European migration "crisis" provides an example of this. The EU and Turkey are currently developing an agreement that would provide incentives to Turkey to prevent millions of migrants from conflict areas from entering the EU from its territory.⁸⁷

Climate displaced persons who are not likely to fit into an existing category of protection often do not have an opportunity for legal migration when adapting to environmental degradation across international borders.⁸⁸ Without an opportunity to migrate legally, displaced individuals become vulnerable to exploitation, increased poverty, political exclusion, and violence.⁸⁹ Many who seek resources and opportunities for a better life across international borders outside the regulatory norms migrate irregularly.⁹⁰ Irregular migrants are more likely to face political and social exclusion and discrimination because of their lack of proper documentation, and are therefore more susceptible to exploitation.⁹¹ Because irregular migrants have limited options for work they are also more likely to be preyed upon by smugglers and employers who can capitalize on their

82. Elizabeth Burleson, *Climate Change Displacement to Refuge*, 25 J ENVTL. L. LITIG. 19, 21 (2010), available at <https://scholarsbank.uoregon.edu/xmlui/bitstream/handle/1794/10643/Burleson.pdf?sequence=1&isAllowed=y>.

83. Vienna Convention on the Law of Treaties, art. 26, *opened for signature* May 23, 1969, U.N. Doc. A/Conf.39/27, 1155 U.N.T.S. 331, <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>.

84. BRIAN GORLICK, IMPROVING DECISION-MAKING IN ASYLUM DETERMINATION, NEW ISSUES IN REFUGEE RESEARCH PAPER 7 (2005), available at http://papers.ssm.com/sol3/papers.cfm?abstract_id=2331704.

85. Maribel Casas-Cortes et al., *supra* note 11.

86. Maribel Casas-Cortes et al., *supra* note 11, at 55 (Memorandums of Understanding (MOUs) with neighboring states and third parties, essentially redefines political borders).

87. Jennifer Rankin, *Turkey outlines "one for one" plan to tackle Syrian refugee crisis*, THE GUARDIAN (2016), <http://www.theguardian.com/world/2016/mar/07/eu-offers-another-3bn-to-turkey-at-emergency-migration-summit> (last visited Apr. 5, 2016).

88. Benoit Mayer, *The International Legal Challenges of Climate-Induced Migration: Proposal for an International Legal Framework*, 357 COLO. J. INT'L ENVTL. L. & POL'Y, 380–388 (2011), <http://www.colorado.edu/law/sites/default/files/Mayer%20%28Corrected%29-S.pdf>.

89. GLOBAL MIGRATION GROUP, *supra* note 89, at 28–32 (migrants without proper documents to stay in a country, are much more likely than regular migrants to face increasing poverty, forced labor, political exclusion, and human trafficking).

90. *Key Migration Terms*, *supra* note 12.

91. BEATE ANDREES, FORCED LABOUR AND TRAFFICKING IN EUROPE: HOW PEOPLE ARE TRAPPED IN, LIVE THROUGH AND COME OUT (International Labour Office Geneva 2008), http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_090548.pdf.

vulnerability.⁹² Exploitation of irregular migrants can occur through debt bondage, where individuals become indebted to a smuggler or successive holder of the debt.⁹³ Forced labor, sexual slavery, and violence are also likely outcomes for irregular migrants exploited by smugglers or employers.⁹⁴

For many environmentally displaced individuals there is a risk of becoming stateless.⁹⁵ The Convention Relating to the Status of Stateless Persons, although not developed with this type of tragedy in mind, may provide assistance to the environmentally displaced.⁹⁶ A person who is stateless is no longer recognized as a national by the government.⁹⁷ In the context of climate change, a person becomes stateless when an individual's country of birth disappears or the individual otherwise becomes marginalized and no longer recognized by a state.⁹⁸ The challenges posed by statelessness are particularly acute for SIDS, where rising ocean levels encroach on low lying coastal areas, and in some cases threaten to inundate whole countries.⁹⁹ For example, many people who live in Kiribati, whose existence has been threatened by climate change, have relocated to Fiji.¹⁰⁰ However, the Kiribati government still recognizes those individuals as I-Kiribati nationals although they are living in Fiji.¹⁰¹ Because these persons are still identified as nationals of their government they cannot be defined as stateless, and therefore cannot receive any protections afforded to stateless persons under international law.¹⁰² As certain states' existences are threatened by climate change,

92. *Id.* at 32.

93. *Id.* at 23.

94. UNODC, COMBATING VIOLENCE AGAINST MIGRANTS 1 (2015), https://www.unodc.org/documents/justice-and-prison-reform/UNODC_Combating_Violence_against_Migrants.pdf.

95. Chelsea Dixon, *The Modern Atlantis: 21st Century Solutions To A Legendary Problem*, VT. L. REV., available at <http://lawreview.vermontlaw.edu/staff-note-the-modern-atlantis-21st-century-solutions-to-a-legendary-problem/>.

96. U.N. Convention Relating to the Status of Stateless Persons, June 6, 1960, 360 U.N.T.S. 117, available at https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-3&chapter=5&Temp=mtdsg2&lang=en.

97. *Id.* art. 1.

98. U.N. High Commissioner for Refugees (UNHCR), Climate Change and Statelessness: An Overview 2 (May 15, 2009), available at <http://www.refworld.org/docid/4a2d189d3.html>.

99. *Id.* at 1; see also U.N. Convention on the Reduction of Statelessness, 989 U.N.T.S. 175 (Dec. 13, 1975).

100. Per Liljas, *The People of Kiribati Have Been Offered a Home in Fiji if Rising Seas Swamp Their Islands*, TIMES, (Feb. 12, 2014) available at <http://world.time.com/2014/02/12/kiribati-new-home-in-fiji/>.

101. *Fiji Willing to Help Kiribati From Climate Change Fallout – Bainimarama*, RADIO N.Z. (Dec. 7, 2013), available at <http://www.radionz.co.nz/international/pacific-news/230116/fiji-willing-to-help-kiribati-from-climate-change-fallout-bainimarama>.

102. U.N. Human Rights Council, Universal Periodic Review of the Republic of Kiribati, (2014), http://www.ccig-iccg.org/wp-content/uploads/2014/07/Kiribati_21_session_UPR_submission_ERI_FI_WCC.pdf, (referring to the difficulty for the I-Kiribati to be recognized as a stateless person, because the definition requires the stateless person to no longer be considered a national of the state. Thus, requiring an inquiry into when a state ceases to exist).

the potential for an increase in stateless persons globally has dire implications.

Climate change has a direct impact on human rights.¹⁰³ The International Covenant on Economic, Social and Cultural Rights¹⁰⁴ and The International Covenant on Civil and Political Rights,¹⁰⁵ among others provide for rights directly related to climate change (e.g., improvement of environmental and industrial hygiene, life, work, culture). Environmental degradation caused by climate change affects people's ability to exercise these rights. In litigation however, courts have taken differing positions on whether climate change directly impacts the enjoyment of human rights and what the appropriate remedy should be. A 2014 decision by a New Zealand court acknowledged that climate change likely impacts the enjoyment of human rights.¹⁰⁶ It declined to reach the question of granting immigration visas to a family from Tuvalu on the basis of these impacts.¹⁰⁷ In 2015, the Lahore High Court Green Bench in Pakistan, however, found that domestic legislation did protect the fundamental rights from further delay of the country's implementation of its National Climate Policy and Framework.¹⁰⁸

The International Court of Justice ("ICJ") could also provide guidance in relation to the damage caused by climate change and human rights. Petitions by the governments of Palau, Maldives, and others are requesting the United Nations General Assembly ("UNGA") to request the ICJ to issue an advisory opinion on states' and other actors' obligations to future generations regarding climate change.¹⁰⁹ The ICJ has issued an advisory opinion in the past regarding threats to human safety, in its opinion on the "Legality of the Threat or Use of Nuclear Weapons."¹¹⁰ The state's request to the UNGA still stands.¹¹¹ ICJ advisory opinions are not binding,¹¹² but the ICJ explains:

103. Center for International Environmental Law [CIEL], *Climate Change & Human Rights: A Primer* (2011), http://www.ciel.org/Publications/CC_HRE_23May11.pdf.

104. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force 1976), <http://www.ohchr.org/Documents/ProfessionalInterest/cescr.pdf>.

105. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, (entered into force 1976), <https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf>.

106. *AD (Tuvalu)*, [2014] NZIPT 501370-371, https://forms.justice.govt.nz/search/IPT/Documents/Deportation/pdf/rem_20140604_501370.pdf.

107. *Id.*

108. *Leghari v. Federation of Pakistan* (2015), Case No WP No 255012015 (Pak.) <http://edigest.elaw.org/sites/default/files/pk.leghari.091415.pdf>.

109. DOUGLAS A. KYSAR, CLIMATE CHANGE & THE INTERNATIONAL COURT OF JUSTICE 9-18, (Yale Center for Envtl. L. & Pol'y, 2013), *available at* http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2309943 (explaining that the UNGA is empowered to request the ICJ to issue advisory opinions).

110. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. GL No 95 (Jul. 8, 1996), <http://www.icj-cij.org/doCKET/files/95/7495.pdf>.

111. Phillip Sands, *Climate Change and The Rule of Law: Adjudicating the Future in International Law*, <https://www.supremecourt.uk/docs/professor-sands-lecture-on-climate-change-and-the-rule-of-law.pdf> (stating that Professor Sands supports the UNGA to make an official request to the ICJ).

112. *Advisory Jurisdiction*, I.C.J., <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=2> (last visited Apr. 25, 2016).

Although without binding effect, the advisory opinions of the Court nevertheless carry great legal weight and moral authority. They are often an instrument of preventive diplomacy and have peace-keeping virtues. Advisory opinions also, in their way, contribute to the elucidation and development of international law and thereby to the strengthening of peaceful relations between States. [The ICJ's, decisions could have a lasting effect on climate justice].¹¹³

International and domestic courts have in many cases declined to address climate change related claims because of "political questions" contained therein.¹¹⁴ One such case is one in which, the Ninth Circuit Court of Appeals dismissed a claim by a Native American village, who were alleging global warming, caused by fossil fuel companies, harmed them.¹¹⁵ The claim was dismissed because to "adjudicate its claims, the Ninth Circuit would have to determine the point at which greenhouse gas emissions become excessive without guidance from the political branches."¹¹⁶ The Ninth Circuit also found that the petitioner did not have standing because they could not produce facts linking the petitioner's injuries to the actions of the defendants who were fossil fuel companies.¹¹⁷ The U.S. Supreme Court also later denied certiorari.¹¹⁸

Momentum within the international legal community is shifting, however, as courts begin to address climate justice directly.¹¹⁹ Global awareness of the dangers of climate change is widespread as indicated by the 24,000 government and non-governmental observers who participated at COP21.¹²⁰ The 196 parties who voluntarily committed to reducing GHG emissions indicates global consensus on that single issue.¹²¹ If deferred to by domestic and international judicial bodies, climate science produced by the Intergovernmental Panel on Climate Change ("IPCC") and others scientific bodies would relieve the courts of having to make factual findings related to climate change attribution.¹²² The Fifth Assessment Report of the IPCC stressed that the "Human influence on the climate system is

113. *Id.*

114. *Native Village of Kivalina v. ExxonMobil*, 696 F.3d 849, 857 (9th Cir. 2013).

115. *See id.*

116. *Id.* at 854.

117. *Id.* at 855.

118. *Native Village of Kivalina v. ExxonMobil*, 696 F.3d 849 (9th Cir. 2013), *cert. denied*, 81 U.S.L.W. 3649 (U.S. May 20, 2013) (No. 12-1072).

119. *See generally Achieving Justice and Human Rights in an Era of Climate Disruption: Climate Change Justice and Human Rights Task Force Report*, INT'L BAR ASS'N (Sept. 22, 2014), available at <http://www.ibanet.org/Document/Default.aspx?DocumentUid=A25BC045-B6F9-4E05-BD17-E2E9FB14EAD9> (the International Bar Association supports climate change justice, for example, through the International Court of Justice, and other arbitral bodies).

120. *See Participation and Accreditation*, U.N., (April 8, 2015, 5:20 PM), <http://newsroom.unfccc.int/cop21parisinformationhub/cop-21cmp-11-information-hub-participation-and-accreditation/> (last visited Apr. 25, 2016).

121. *Historic Pairs Agreement on Climate Change*, UNITED NATIONS, (April 8, 2015, 5:20 PM), available at <http://newsroom.unfccc.int/unfccc-newsroom/finale-cop21/>.

122. Field, *supra* note 5, at 12.

clear.”¹²³ Because of the nexus between human actors and climate change, it is important for courts to start holding actors responsible for climate change accountable. A notable case that illustrates this very outcome is discussed in the proceeding section.

III. A. A POLITICAL QUESTION ANSWERED, WHERE THE LEGISLATURE HAS BEEN TOO SLOW TO ACT ON THE URGENCY OF CLIMATE CHANGE

Where governments fail to act on agreed emissions targets or fail to act on climate change in spite of public support, states become ruled by diktat and not democracy.¹²⁴ Some recent climate justice cases reflect that the global judiciary has declined to address climate justice claims either by invoking the political question doctrine or out of fear of opening the floodgates to litigation.¹²⁵ But the global judiciary represents a critical role in addressing climate change because the judiciary has a long history of significant contributions aimed at creating policy change in other areas that affect human rights.¹²⁶ Climate change as a human rights issue¹²⁷ is not different from social and political movements in the past. Consider the evolution of the Civil Rights Movement in the United States. During the Civil Rights Movements, elected officials in the federal government stalled in taking action to address policies of racial segregation and inequality in the face of social unrest and overwhelming public want. The Supreme Court’s 1954 ruling *Brown v. Board of Education*¹²⁸ preceded the civil rights bills of 1957¹²⁹ and 1960.¹³⁰ The Supreme Court decision¹³¹ against the Defense of Marriage Act¹³² reflected the growing social support for marriage equality against the will of the legislature. Writing on the topic of judicial activism, Peter Irons performed a historical survey of cases where the U.S. judiciary in fact responded to political questions with an answer, not a dismissal.¹³³ He wrote, “functional flaws in the

123. *Id.*

124. Rebecca Lowe, *Climate Justice: Lawyers Make a Stand*, INT’L BAR ASS’N (Oct. 15, 2015) (NGO ClientEarth CEO James Thornton explains his organization’s argument in suit against the European Union (EU) for missing its targets on nitrogen dioxide. “Our argument is, if the government can just choose whether it abides by laws or not then we no longer have a democracy under the rule of law. It’s rule by threat and diktat.”), available at <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=B34332B6-8310-42BB-A3AD-9D39320D8AFF>.

125. See generally *id.*; see also, e.g., *Native Village of Kivalina*, *supra* note 115.

126. See Matt Grossmann & Brendon Swedlow, *Judicial Contributions to US National Policy Change since 1945*, 3 JOURNAL OF LAW AND COURTS 1–35, 17 (2015) (arguing US courts have had a significant indirect and direct effect on policy making in all branches of the government), <http://matthewg.org/judicialcontrib.pdf>.

127. CIEL, *supra* note 104.

128. *Brown v. Board of Education of Topeka*, 348 U.S. 886, 886 (1954).

129. The Civil Rights Act of 1957, 42 U.S.C. § 1975 (2012).

130. The Civil Rights Act of 1960, 52 U.S.C. § 10101 (2012).

131. *United States v. Windsor*, 133 S. Ct. 2675, 2682–720 (2013).

132. The Defense of Marriage Act, 1 U.S.C. § 1 (1996).

133. Peter H. Irons, *Making Law: The Case for Judicial Activism*, 23 VAL. UNIV. L. REV. 35–52, 39 (1988) (referring to civil rights cases, where the legislature failed to respond to public momentum to

political system leads me to argue that judicial activism is an essential antidote to some of the toxins that have poisoned that system.”¹³⁴ The urgency to address the problems posed by climate change compels the same level of judicial activism.

Climate change litigation in U.S. domestic courts and international courts has so far involved claims such as the common-law tort claim of nuisance,¹³⁵ duty of care,¹³⁶ and public trust doctrine.¹³⁷ Until recently, climate justice claims brought in the U.S. have been dismissed.¹³⁸ The section below will first discuss a recent decision by a Dutch court finding in favor of the petitioner against the Dutch government’s failure to maintain the duty of care prescribed for by the Constitution of the Netherlands.¹³⁹ It will then discuss pending lawsuits filed in the U.S. states of Oregon and Washington.

III. B. THE *URGENDA* CASE

In *Urgenda*, the Urgenda Foundation and nearly 900 co-plaintiffs filed suit against the Dutch government for not taking sufficient action to reduce its GHG emissions, alleging that the Dutch government knew that inaction would cause harm to its current and future citizens.¹⁴⁰ The plaintiffs did not ask for damages, but rather asked for the government to reduce its GHG emissions to forty percent below the 1990 levels by 2020.¹⁴¹

The court in *Urgenda* considered three main questions: (1) the severity of alleged danger of climate change, and what reductions are necessary to avert the danger; (2) whether the Netherlands has a legal obligation to the Urgenda Foundation and co-plaintiffs to take further reductions measures in the face of the danger posed; and (3) is the court the appropriate institution to decide this issue.¹⁴²

The Dutch government did not dispute the attribution science and the scientific findings by the IPCC and other international organizations (i.e., United Nations Environment Programme (“UNEP”) and the International Energy Agency (“IEA”)). Nor did the state dispute findings by Dutch national agencies.¹⁴³ This

end segregation), available at <http://scholar.valpo.edu/cgi/viewcontent.cgi?article=2033&context=vulr>.

134. *Id.*

135. *An Overview of Nuisance*, LAWS.COM, (April 8, 2015, 11:45 PM) (nuisance is harm arising from one’s use of property), available at <http://tort.laws.com/nuisance>.

136. Roger Cox, CENTER FOR INTERNATIONAL GOVERNANCE INNOVATION, *A Climate Change Litigation Precedent: Urgenda Foundation v The State of the Netherlands* 4, (Nov. 2015), https://www.cigionline.org/sites/default/files/cigi_paper_79.pdf.

137. *Public Trust Doctrine*, LEGAL INFO. INST., (Nov. 7, 2015), available at https://www.law.cornell.edu/wex/public_trust_doctrine.

138. See generally *U.S. Climate Change Litigation Chart*, SABIN CTR. FOR CLIMATE CHANGE COLUMBIA LAW SCH., (Sept. 11, 2015), available at <http://web.law.columbia.edu/climate-change/resources/us-climate-change-litigation-chart>.

139. *Urgenda v. Staat*, *supra* note 34.

140. *Climate Case*, URGENDA, (April 9, 2015, 12:17 AM), available at <http://www.urgenda.nl/en/climate-case/>.

141. *Id.*

142. Cox, *supra* note 137, at 6.

143. *Urgenda v. Staat*, *supra* note 34.

allowed the court to defer to the attribution science to respond to the first question. The scientific findings make clear that if global warming exceeds two degrees Celsius to preindustrial levels, the environment will be highly hazardous to humans.¹⁴⁴ The court found that it is necessary to stabilize GHG emissions by reducing human GHG emissions, and that the government's current policy of seventeen percent reduction was not sufficient to avoid the danger.¹⁴⁵ The court found that at least a twenty-five to forty percent reduction of 1990 emissions levels were necessary by 2020.¹⁴⁶

Responding to the duty of care owed to the *Urgenda* plaintiffs, the court did not find that the State owed a duty of care to the *Urgenda* plaintiffs based on the Dutch Constitution¹⁴⁷ or the European Convention on Human Rights¹⁴⁸ ("ECHR").¹⁴⁹ However, the court did find that the as a signatory to the UNFCCC, the Netherlands and other signatories' reductions targets were "insufficient to realize the two degrees Celsius target."¹⁵⁰ This insufficiency could have dangerous consequences to both humans and the environment.¹⁵¹ Because the government is crucial in the transition to a "more sustainable society," it has a significant responsibility to establish an adequate and effective statutory and instrumental framework to reduce GHG emission in the Netherlands.¹⁵² Considering the principle of fairness and costs associated with further reductions or maintaining the current policy, the court found that taking immediate action on further reductions are far more cost effective.¹⁵³ The court did not apply a traditional "but for" causation analysis, but found a "sufficient causal link" between the GHG emissions from the Netherlands and global climate change.¹⁵⁴ The fact that Dutch emissions are limited on a global scale does not change that Dutch emissions contribute to climate change.¹⁵⁵

As to the third question, the court decided its own role in climate policy. While the state argued that climate policy was political and did not belong to the court, the court found that its role is to provide legal protection and settles legal disputes.¹⁵⁶ Because *Urgenda*'s claim concerns the legal protection provided by the state, "it therefore requires a judicial review."¹⁵⁷ The political power of the state is not diminished by the court's decision, because the state retains full power

144. IPCC, *supra* note 38, at 12.

145. *Urgenda v. Staat*, *supra* note 34.

146. *Id.*

147. Gw. [Constitution].

148. European Convention on Human Rights, art. 2, art. 8, Sept. 3, 1953, C.E.T.S. 149.

149. *Id.*

150. *Urgenda v. Staat*, *supra* note 34.

151. Cox, *supra* note 137, at 11.

152. *Urgenda v. Staat*, *supra* note 34, at 4.66, 4.74.

153. Cox, *supra* note 137, at 11.

154. *Urgenda v. Staat*, *supra* note 34, at 4.90.

155. *Id.* at 4.79, 4.90.

156. *Id.* at 4.98.

157. *Id.* at 4.98.

to decide how to comply with the order.¹⁵⁸ The court found that it was necessary for the State to reduce emissions at a minimum of twenty-five percent of 1990 levels by 2020.¹⁵⁹ Although the Dutch government is appealing the decision based on the court's decision on the State's duty of care, it is complying with the reduction order.¹⁶⁰

This case is significant in that it could provide a model for future climate justice cases deciding a state's obligation to its citizens in relation to its international obligations.¹⁶¹ Attribution science played a major role in the court's decision of the risk of danger to human from increasing global temperatures.¹⁶² Also significant is the duty of care owed by the state in such cases. In the *Urgenda* decision, the court looked to the Dutch Constitution as well as, other international agreements.¹⁶³ Finding a duty of care from the international law "no harm" principle, and from the State's individual commitment under the UNFCCC and Treaty on the Functioning of the European Union ("TFEU").¹⁶⁴

Because states have not adequately responded to climate change, the judiciary's role in mitigating climate change is becoming more important.¹⁶⁵ A case based on similar claims is currently pending against Belgium in The Court of First Instance in Brussels.¹⁶⁶ In the U.S. state of Washington, eight youths petitioned the King County Superior Court and the Washington Department of Ecology to write carbon emissions rules that would protect the atmosphere and the future generations.¹⁶⁷ As of November 2015, the Judge in the court ordered the Washington Department of Ecology to write such rules because "very survival depends upon the will of their elders to act now, decisively and unequivocally, to stem the tide of global warming."¹⁶⁸ In late 2015, Greenpeace Southeast Asia and Philippine Rural Reconstruction Movement filed a petition asking the Philippines Human Rights Commission ("CHR") to investigate and acknowledge the complicity of fifty investor-owned fossil fuel companies in causing extreme weather events.¹⁶⁹

158. *Id.* at 4.101.

159. *Id.* at 4.93.

160. *Cabinet Begins Implementation of Urgenda Ruling but will File Appeal*, GOVERNMENT OF THE NETHERLANDS (2015), <https://www.government.nl/latest/news/2015/09/01/cabinet-begins-implementation-of-urgenda-ruling-but-will-file-appeal> (the appeal is not available at the time of this writing).

161. Cox, *supra* note 137, at 14.

162. *Id.* at 6, 7.

163. *Urgenda v. Staat*, *supra* note 34, at 3.2.

164. Consolidated Version of the Treaty on the Functioning of the European Union, Oct. 26, 2012, O.J. (C 326) 49.

165. Cox, *supra* note 137, at 14.

166. Une Action En Justice Pour L'Avenir [Future Legal Action], *available at* <http://klimaatzaak.eu/fr/> (the case is pending and litigation documents are not yet available).

167. *Washington Legal Updates*, OUR CHILDREN'S TRUST (2015), *available at* <http://ourchildrenstrust.org/state/Washington>.

168. *Id.*

169. Kumi Naidoo, *Exxon set to be investigated in the Philippines as well as New York*, GREENPEACE INT'L (Nov. 9, 2015), *available at*

The President of the IBA said during the COP21 that arbitration would play an increasingly important role “in encouraging business and government commitments on climate change and sustainability by providing an effective mechanism to resolve disputes.”¹⁷⁰ The effect arbitration will have on climate justice is highly dependent on the arbitration clause contained within the agreement being interpreted by an arbitral tribunal.¹⁷¹ Agreements to arbitrate will guide the tribunal’s analysis and likely include the specific remedies available. For instance, a claim was brought by an investor against Barbados under the Canada-Barbados Bilateral Trade Agreement (“BIT”), which limits the tribunal to award money damages or restitution due to expropriation,¹⁷² for failing to implement and enforce environmental protections under its domestic and international obligations.¹⁷³ The claims concern the state’s obligations to an international treaty and its own domestic law.¹⁷⁴ This particular agreement does not give the tribunal authority to force Barbados to implement or enforce environmental regulations.¹⁷⁵ Because international arbitration typically involves violations of international law under relevant treaties, tribunals can advance climate change mitigation through interpretation of the relevant law.

III. C. THE FUTURE OF CLIMATE JUSTICE

Climate change is an urgent global problem that will continue to have a severe impact on the environment, people, economies, and governments. The impact of climate change is not limited to the most vulnerable people who live in low lying coastal zones¹⁷⁶ or who directly depend on natural resources for livelihoods.¹⁷⁷ Climate change has a widespread impact globally, and disrupts

<http://www.greenpeace.org/international/en/news/Blogs/makingwaves/Climate-Justice-Philippines-Human-Rights-Commission-Exxon/blog/54690/> (a copy of the Complaint can be found here <http://www.greenpeace.org/seasia/ph/PageFiles/105904/Climate-Change-and-Human-Rights-Complaint.pdf>).

170. *Arbitration has a Greater Role to Play in Climate Change Disputes, Says IBA President*, INTERNATIONAL BAR ASSOCIATION (Dec. 7, 2015), available at <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=5bac3a2d-de37-4d69-992a-aa974fb4fabb>.

171. See generally Annette Magnusson, *How the Investment protection regime can contribute to a better environment*, ATTRIBUTION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE (May 29, 2015), <http://isdsblog.com/wp-content/uploads/sites/2/2015/08/Magnusson-Warsaw-29-May-2015.pdf> (Annette Magnusson is the SCC Secretary General).

172. Agreement Between the Government of Canada and the Government of Barbados for the Reciprocal Promotion and Protection of Investments, Can.- Barb., arts. VIII, XIII, May 29, 1996, WORLD INTELL. PROP. ORG., available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/280>.

173. Allard v. Barbados (Can. v. Bar.), Case No. 2012-06 (Perm. Ct. Arb. 2010), available at <http://investmentpolicyhub.unctad.org/ISDS/Details/505> (pending).

174. Convention on Wetlands of International Importance Especially as Waterfowl Habitat, Feb. 2, 1971, 996 U.N.T.S. 245, http://www.ramsar.org/sites/default/files/documents/library/scan_certified_e.pdf.

175. Allard v. Barbados, *supra* note 174.

176. *Poverty and Climate Change: Reducing the Vulnerability of the Poor Through Adaptation*, OECD IX, <http://www.oecd.org/env/cc/2502872.pdf>.

177. *Id.* at V.

agricultural production, forces people from their homes, and compounds civil and political strife.¹⁷⁸ These conditions affect the price of food and threaten global peace and security.¹⁷⁹

Prior to the *Urgenda* decision, courts were reluctant to address climate change in any real way.¹⁸⁰ To ensure continued functioning of global systems, such as global trade, a concerted approach to climate justice is required. International response to mitigating climate change should not simply be left in the hands of the politicians and business leaders alone. Climate justice and the rule of law can speed up regulatory measures and put pressure on legislatures and private actors for higher GHG emissions reductions. Climate justice can also add to new and developing ways of improving global environmental uses and human rights.

The international legal community is taking an increasingly active role to initiate policy change with climate justice.¹⁸¹ Another example of this active role comes from the drafting of The Oslo Principles on Global Climate Change Obligations (“Principles”) released in March of 2015.¹⁸² The Principles were drafted by international attorneys, jurists, and academics, which identify existing law and provide legal means to compel countries and non-state actors to limit GHG emissions.¹⁸³ These Principles and other documents (e.g., the IBA Climate Task Force Report, the PA) contribute to enhance the knowledge of international and domestic courts and tribunals about climate justice and the importance of their role in achieving it. The *Urgenda* decision adds the evolving international jurisprudence and is a sign that blanket dismissals of climate related claims are becoming a thing of the past. The political question doctrine as applied to climate justice is likely to fall out of use as judiciaries become more exposed to science and the claims science supports.

Legal systems continue to evolve to the changing needs of the people and environment they serve. The goals of the civil rights movement were not achieved by a single case. Given the scope of the damages presented by climate change, we cannot expect that a favorable ruling in a single climate justice case will result in the recognition and protection of the rights of the environmentally displaced and the protection of natural resources for future generations. Still, the decision in *Urgenda* presents an important step forward. In *Urgenda*, the state did not dispute

178. *Id.* at 6, 8.

179. *Id.* at IX, 8.

180. *The Urgenda Judgment: A “Victory” for the Climate that is Likely to Backfire*, ENERGYPOST (Sept. 9, 2015), available at <http://www.energypost.eu/urgenda-judgment-victory-climate-likely-backfire/>.

181. See generally *Principles of Climate Change*, MARY ROBINSON FOUNDATION CLIMATE JUSTICE, <http://www.mrfcj.org/principles-of-climate-justice/> (last visited Nov. 5, 2015); *Presidential Task Force on Climate Change and Human Rights*, INTERNATIONAL BAR ASSOCIATION (2014), <http://www.ibanet.org/PresidentialTaskForceCCJHR2014.aspx>; see generally Roger Cox, *supra* note 137.

182. Antonio Benjamin et al., *Oslo Principles on Global Climate Change Obligations*, GLOBAL JUSTICE PROGRAMS (2015), <https://www.socialeurope.eu/wp-content/uploads/2015/10/OP8-final.pdf>.

183. *Id.*

the science submitted by the IPCC and relied on by the UNFCCC.¹⁸⁴ This made it easier for the court to defer to the science presented by the IPCC without having to make a lengthy finding of fact or dismissing the claim on political question issue.¹⁸⁵ Additionally, *Urgenda* did not seek damages, which alleviated the court of the need to attribute harm to a specific perpetrator.¹⁸⁶ Relying on international commitments to reduce GHG emissions and the Netherlands' Constitution, the court was able to find that the Dutch government had a duty of care.¹⁸⁷ Following *Urgenda*, a lawsuit was filed against the U.S. Federal Government in the U.S. state of Oregon in the U.S. District Court of Oregon, against the federal government for its failure to protect their constitutional rights of life, liberty, and property by promoting the development and use of fossil fuels and for failing to protect the public trust.¹⁸⁸ The court is currently hearing oral arguments by fossil fuel company representatives to dismiss the claims.¹⁸⁹ These cases are significant in carrying the momentum for climate justice, as they all carry the potential of mitigating climate change while recognizing human and constitutional rights provided domestically and internationally.

Existing international investment agreements (“IIAs”) should also be reviewed by the parties to make sure the IIAs contain language that both allows states to regulate environmental matters necessary to mitigate climate change while respecting human rights. IIAs should also allow for investors to request arbitral proceedings to hold states accountable for failing to implement environmental and human rights protections. The overwhelming participation by international leaders and non-governmental observers during the COP21 indicate that more people than ever, are concerned with mitigating climate change. This momentum is likely to strengthen climate justice litigation and arbitration claims, because the world supports climate justice.

184. *Urgenda v. Staat*, *supra* note 34.

185. *Id.*; *see generally* NATIVE VILLAGE OF KIVALINA ET AL. V. EXXONMOBIL CORP. ET AL., *supra* note 115.

186. *Urgenda v. Staat*, *supra* note 34,

187. *Id.* at 4.65, 4.73, 4.83.

188. *Pending Federal Climate Change Lawsuit*, OUR CHILDREN'S TRUST, available at <http://ourchildrenstrust.org/us/federal-lawsuit>; *see generally* Summary of Constitutional Climate Change Lawsuit Against the United States Government, OUR CHILDREN'S TRUST, <http://ourchildrenstrust.org/sites/default/files/Summary-ConstitutionalClimateChangeLawsuit.pdf> (summary of the complaint).

189. *Id.*

CSR BEST PRACTICE FOR ABOLISHING CHILD LABOR IN THE TRAVEL AND TOURISM INDUSTRY

*Jeremy S Goldstein**

I. INTRODUCTION

[Who has not met someone like them – the little boys who try to sell souvenirs to tourists on the beach, the young girls who sell postcards and trinkets, the bell-boys and porters, the shoeshine boys, street vendors, and self-styled guides] – “all eager to offer their services to foreigners? Children and young people all over the world contribute greatly to the success of millions of holidaymakers’ ‘most precious days of the year.’”¹

Any tourist who has travelled outside of the developed world has likely seen, interacted with, or purchased a good or service from a child like the ones that Christine Plüss describes. However, “this may be merely the tip of the iceberg[.]” she explains, as “[m]uch less visible are the girls and boys who work behind the scenes. Often in hiding because they are working illegally, they wash dishes, prepare vegetables, fetch water, and stack laundry, toiling from dawn to dusk.”² As a result of their participation in the workforce, many of these children face impediments to their education and personal development, experience unanticipated health problems, and find drastically fewer opportunities for career advancement when they reach adult age.³ Businesses across the world have adopted self-regulating corporate social responsibility (“CSR”) policies designed to reduce the negative impact their operations have on people and the environment, often with highly defined child labor prohibitions.⁴ CSR can be an effective tool for reducing the incidence of child labor in the Travel and Tourism (“T&T”)

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1. CHRISTINE PLÜSS, QUICK MONEY - EASY MONEY? A REPORT ON CHILD LABOUR IN TOURISM 6, 13 (Anne B. Zimmermann & Theodore Wachs trans. 1999) (Quote is adapted from the Executive Summary and section 1.1 of this article).

2. *Id.* at 13.

3. *See infra* Section III.

4. *See* RACHEL DODDS & MARION JOPPE, CSR IN THE TOURISM INDUSTRY? THE STATUS OF AND POTENTIAL FOR CERTIFICATION, CODES OF CONDUCT AND GUIDELINES 8, 11 (2005).

industry as well, but most T&T businesses have been slow to adopt policies in line with international standards.⁵ As the WTO explains, “[a]lthough it is widely recognised that tourism is not the [sole] cause of child exploitation, it can aggravate the problem when parts of its infrastructure, such as transport networks and accommodation facilities, are exploited by child abusers for nefarious ends.”⁶ However, “while tourism infrastructure can be misused for illicit ends, it can also be reclaimed as a force to fight this same exploitation.”⁷

This analysis argues that due to the nature and size of the T&T industry, businesses operating therein have a unique ability, and specific duty, to adopt robust CSR policies with a pre-eminent focus on people that aim to reduce the incidence of child labor and effectively abolish the worst forms of child labor throughout the tourism value chain. This article will discuss a sampling of the tools available as guidance to T&T businesses in developing their CSR policies in order to effectively satisfy this duty, and highlight industry leaders who exemplify corporate best practice. In support of this aim this article will discuss: the international standards on child rights and child labor; the current status of child labor worldwide and in the T&T industry; the fundamental principles of CSR; CSR as it relates to child labor; and CSR in the T&T industry.

Calls for the effective abolition of child labor are timely.⁸ In response to the global child labor crisis, the U.N. has followed up on its millennium commitment to “ensure that globalization becomes a positive force for all the world’s people[,]”⁹ by calling for a prohibition on child labor in the 2030 Agenda for

5. See *id.* at 4, 6-7. Also, while some MNE’s in the hotel and transportation industry have voluntarily enacted self-regulating CSR policies, no airlines, transport companies, or tour companies are ranked in the CSR REPTRAK 100 rankings. Marriott, Starwoods, Wyndham, Hilton, and Intercontinental hotels are listed in the 2015 ‘top 100’ in the bottom 50, and only Marriott made the top 100 prior to 2014. While no airlines are ranked, airplane makers Boeing and Airbus are listed. See REPUTATION INSTITUTE, 2015 GLOBAL CSR REPTRAK 100: THE GLOBAL CSR REPUTATION RANKING OF THE 100 MOST REPUTABLE FIRMS BY THE GENERAL PUBLIC ACROSS 15 COUNTRIES, <https://www.reputationinstitute.com/CMSPages/GetAzureFile.aspx?path=~/5Cmedia/5Cmedia/5Cd ocuments/5C2015-global-csr-reptrak-results.pdf&hash=f375854351576541ae88db1e043e7417e9f057f83955bb3768454dd8e0417353&ext=.pdf>.

6. U.N. WORLD TOURISM ORG., 15 YEARS OF THE UNWTO WORLD TOURISM NETWORK ON CHILD PROTECTION: A COMPILATION OF GOOD PRACTICES, 4 (2014) [hereinafter UNWTO, COMPILATION OF GOOD PRACTICES].

7. *Id.*

8. The results of crowdsourced studies by scientists show that the public sees child labor as one of the top fifteen emerging issues in sustainable development on which decision-makers should consider taking immediate action. UNITED NATIONS ET AL., GLOBAL SUSTAINABLE DEVELOPMENT REPORT 132 (2015 ed., advance unedited version), <https://sustainabledevelopment.un.org/content/documents/1758GSDR%202015%20Advance%20Unedited%20Version.pdf> (crowdsourcing was conducted in 2014 by the United Nations for the Prototype Global Sustainable Development Report). Crowdsourcing is “the practice of obtaining needed services, ideas, or content by soliciting contributions from a large group of people and especially from the online community rather than from traditional employees or suppliers.” *Crowdsourcing*, Merriam-Webster Dictionary (last visited Apr. 4, 2016).

9. G.A. Res. A/55/L.2, I(5), United Nations Millennium Declaration (Sept. 6-8, 2000).

Sustainable Development (2030 Agenda).¹⁰ The 2030 Agenda was adopted by the UN in September of 2015 and includes 17 goals and 169 targets for sustainable development – the Sustainable Development Goals (“SDGs”).¹¹ Therein, the UN Secretary General wrote that the SDGs aim to “[t]ake immediate and effective measures to . . . secure the prohibition and elimination of the worst forms of child labour . . . and by 2025 end child labour in all its forms.”¹² Prohibiting child labor, however, does not entail stopping all work performed by children; complete elimination is not entirely realistic. “International labour standards allow the distinction to be made between what constitutes acceptable and unacceptable forms of work for children at different ages and stages of development[,]”¹³ or more simply put, there is a distinction between ‘child work’ and ‘child labor’.

There are no reliable figures estimating the total number of children employed in the T&T industry, but over one-quarter of the world’s child laborers are employed in the services sector,¹⁴ which includes hotel employees and tour operators, transportation workers and porters, and a host of other service providers, many of whom directly or indirectly work for tourists.¹⁵ In developing nations where T&T accounts for a large percentage of GDP, the incidence of child labor in the services sector within the tourism value chain is even higher.¹⁶ T&T also contributes to child labor through product supply chain. The T&T industry accounts for a large percentage of consumer goods purchased in tourism dependent developing nations, some of which may be manufactured or sold with the use of child labor.¹⁷

On the other hand, the T&T industry is a major driver of economic development, specifically in developing nations and small-island developing states (“SIDS”).¹⁸ In many nations tourism and related development directly and

10. G.A. Res. A/Res/70/1, ¶¶ 27, 8.7, Transforming Our World: The 2030 Agenda for Sustainable Development (Sept. 25, 2015) [hereinafter 2030 Agenda]. The SDGs make up a portion of this document.

11. *Id.* ¶ 18.

12. *Id.* ¶ 8.7.

13. ILO, INFOCUS PROGRAMME ON PROMOTING THE DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK: EFFECTIVE ABOLITION OF CHILD LABOUR, http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_095898.pdf.

14. YACOUBA DIALLO, ALEX ETIENNE, & FARHAD MEHRAN, INT’L LABOUR OFFICE, GLOBAL CHILD LABOUR TRENDS 2008 TO 2012, xi (2013).

15. See ILO, MARKING PROGRESS AGAINST CHILD LABOUR: GLOBAL ESTIMATES AND TRENDS 2000-2012, 7 n.12 (2013) [hereinafter GLOBAL ESTIMATES].

16. The value chain is similar to the supply chain from the perspective of the consumer and includes goods and services purchased from a range of businesses, including international airline carriers, cruise lines, global tour operators, and multinational hotel brands, who are often the lead types of firms in the global tourism value chain. MICHELLE CHRISTIAN, KARINA FERNANDEZ-STARK, GHADA AHMED, & GARY GEREFFI, DUKE CENTER ON GLOBALIZATION, GOVERNANCE & COMPETITIVENESS, THE TOURISM GLOBAL VALUE CHAIN, ECONOMIC UPGRADING AND WORKFORCE DEVELOPMENT 7 (Nov. 2011), http://www.cggc.duke.edu/pdfs/2011-11-11_CGGC_Tourism-Global-Value-Chain.pdf.

17. See *id.* at 10 n.10.

18. Sustainable Development Knowledge Platform, *Small Island Development States*,

substantially contributes to the alleviation of poverty, provides educational opportunities, encourages stability in foreign current markets, enables cross-cultural exchange, and carries numerous other benefits for host countries and their citizens.¹⁹ The T&T industry is inherently driven by businesses; both multinational enterprises (“MNE’s”) and small and medium enterprises (“SME’s”) are active in the industry.²⁰ Historically, businesses have defined their success only in terms of profit, positing that shareholders are amoral and only concerned with economic performance.²¹ The purely profit-driven model, however, is fading into history, primarily as a result of investors, corporate management, and consumers coming to recognize the unrealized positive effect that business can have on the communities in which they operate, and the enormous toll that business activities currently place on people and the planet.²²

The United Nations Guiding Principles on Business and Human Rights (“UNGP”) states that “business enterprises should respect human rights[,]” and that “[t]he responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate.”²³ An effective CSR program which ensures that corporate activities respect human rights can have a significant positive impact on the way a corporation interacts with its customers, the communities in which it operates, its investors, and other stakeholders.²⁴ CSR requires that corporations adopt policies, plan initiatives, and regulate their corporate environment in a manner which utilizes a triple bottom-line approach that considers the impact its business activities have on people and planet, not just profit.²⁵ It requires that corporate policy be drafted in adherence to available codes of conduct, and include reliable certification and transparent reporting.²⁶ It also requires that corporations take action to remedy violations of their internal policy.²⁷ CSR policies which enumerate prohibitions on child labor throughout the supply chain, consistent, at minimum, with international standards, can be “invaluable weaponry in the battle against the exploitation of children.”²⁸

<https://sustainabledevelopment.un.org/topics/sids> (last visited June 26, 2016).

19. See generally CHRISTIAN, *supra* note 16, at 22-42.

20. See CHRISTIAN, *supra* note 16, at 7, 10.

21. Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES, Sept. 13, 1970, available at <http://www.colorado.edu/studentgroups/libertarians/issues/friedman-soc-resp-business.html>.

22. See *id.*

23. Guiding Principles on Bus. & Human Rights, HR/PUB/11/04, princ. 11 (2011) [hereinafter UNGP] (Authored by Special Representative to the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises John Ruggie (SRSG), this is the fundamental international document which asserts that corporations have a responsibility beyond profits).

24. See CSR Blog, *Six Reasons Companies Should Embrace CSR*, FORBES.COM, Feb. 21, 2012, available at <http://www.forbes.com/sites/csr/2012/02/21/six-reasons-companies-should-embrace-csr/#53cf71f54c03>.

25. See generally *infra* Section IV.

26. See *supra* text accompanying note 23.

27. See *supra* text accompanying note 23.

28. UNWTO, COMPILATION OF GOOD PRACTICES, *supra* note 6.

Following this introduction, section II discusses the fundamental rights of children and the international standards for child labor rights, and presents relevant statistics on child labor worldwide, paying particular attention to developing nations with a significant tourism sector. It highlights the fundamental consequences associated with child labor, including the short-term and long-term effects on child laborers' health, wellbeing, and livelihoods. Section III discusses the T&T industry, highlighting its contribution to development, international co-operation, and education, and the negative impact it has on people and planet. It discusses the impact of T&T on child labor rights and presents available statistics on child labor in the industry, the types of jobs performed by child laborers in the industry, and the economic, cultural, and environmental impacts of tourism which affect children. Section IV discusses CSR in detail, including its definitions and international founding documents, focusing on guidelines with child labor protections and documents with specific guidance for the T&T industry. Section V presents examples of best practice CSR initiatives and policies in the T&T industry, paying specific attention to policies and initiatives directly addressing child labor, including the CSR policies of industry leaders Accor hotels, Marriott hotels, and Intrepid Travel. Section VI concludes with the authors' opinion and a call for awareness and action.

II. CHILD RIGHTS AND CHILD LABOR

A. *Rights of the Child and International Child Labor Standards*

Children enjoy the same human rights accorded to all people. But, lacking the knowledge, experience or physical development of adults and the power to defend their own interests in an adult world, children also have distinct rights to protection by virtue of their age. One of these is protection from economic exploitation and from work that is dangerous to the health and morals of children or which hampers the child's development.²⁹

The UNSG, in the 2030 Agenda document, expresses as a discrete goal ending "child labour in all its forms."³⁰ SDG Target 8.7 recommends that we "[t]ake immediate and effective measures to . . . secure the prohibition and elimination of the worst forms of child labour . . . and by 2025 end child labour in all its forms."³¹ The United Nations Convention on the Rights of the Child ("CRC") is the foundational document in the international bill of rights that addresses the rights of children.³² The CRC defines a child as any person "below

29. ILO, *Effective Abolition of Child Labour*, ILO.ORG, <http://www.ilo.org/declaration/principles/abolitionofchildlabour/lang—en/index.htm> (last visited Apr. 7, 2016).

30. 2030 Agenda, *supra* note 10, ¶ 27.

31. *Id.* ¶ 8.7.

32. G.A. Res. A/Res/44/25, U.N. Convention on the Rights of the Child (Nov. 20, 1989) [hereinafter CRC]. Nearly every nation in the world is a party to the CRC, which entered into force in September of 1990, and is open for signature by all states at the Headquarters of the United Nations in

the age of eighteen years unless, under the law applicable to the child, majority is attained earlier[.]”³³ and requires that the “best interests of the child” be a primary consideration in all actions concerning children.³⁴ Article 32 of the CRC states that parties recognize the “right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development.”³⁵ It also requires that states domestically legislate a minimum work age, appropriately regulate work hours and conditions, and effectively penalize those who offend child labor laws.³⁶

Prior the introduction of the CRC, the ILO had been regulating child labor, and developed sector-specific conventions relating to child labor, beginning with the Minimum Age (industry) Convention in 1919.³⁷ The 1998 ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (“ILO Declaration”) requires that all members of the ILO “respect, [] promote, and [] realize in good faith . . . the principles concerning . . . the effective abolition of child labour.”³⁸ The ILO describes the effective abolition of child labor as a “core labour principle[] endorsed by the international community[.]” and considers it one of four main areas a “social floor” should be created in international labor law.³⁹ In 1976, ILO Convention No. 138, the Minimum Age Convention (MAC), entered into force and combined ten previous sector-specific conventions.⁴⁰ This convention, along with ILO Convention No. 182, the Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (“ILO 182”),⁴¹ define international law on child labor. The conventions are well-recognized and the obligations are generally accepted,⁴² and as such, some portions of the CRC, MAC, and ILO 182 are likely now considered customary international law (CIL).⁴³

The MAC places structural obligations on states, namely that they must

New York. The United States has not ratified.

33. *Id.* art. 1.

34. *Id.* art. 3.1.

35. *Id.* art. 32.1.

36. *Id.* art. 32.2.

37. ILO, Convention no. 5, Minimum Age (Industry) Convention (1919).

38. ILO, Declaration on Fundamental Principles and Rights at Work and its Follow-up, art. 2 (1998) [hereinafter ILO Declaration].

39. ILO, THE INTERNATIONAL LABOUR ORGANIZATION’S FUNDAMENTAL CONVENTIONS 7 (2002), http://www.ilo.org/wcmsp5/groups/public/—ed_norm/—declaration/documents/publication/wcms_095895.pdf.

40. ILO, Convention no. 138, Minimum Age Convention (1973) [hereinafter MAC].

41. ILO, Worst Forms of Child Labour Convention (No. 182) (1999) [hereinafter ILO 182].

42. 168 states have ratified the MAC and 180 states have ratified ILO 182. ILO list of Ratifications of the MAC, available at http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312283; ILO list of Ratifications of ILO 182, http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312327.

43. ADAM MCBETH, INTERNATIONAL ECONOMIC ACTORS AND HUMAN RIGHTS 35 (2009).

“undertake[] to pursue a national policy designed to ensure the effective abolition of child labour[,]”⁴⁴ and specify a minimum age of employment under which no child may work in any occupation which “shall not be less than the age of completion of compulsory schooling and . . . shall not be less than 15 years.”⁴⁵ It also defines what types of child work are not considered to be child labor, including work done in schools or in approved places of business for general, vocational, or technical education or training.⁴⁶ The purpose of a distinction between ‘child work’ and child labor is to encourage children to participate in beneficial work which may not carry the same consequences as child labor. Otherwise defined, permissible ‘child work’ is that which “does not prevent the child from attending school or having time to play[,]” and “does not stand in the way of the child’s developmental needs and abilities.”⁴⁷ Alternatively, ‘child labor’ is work which is hour intensive, exposes the child to danger, creates severe pressure, includes significant responsibility, does not pay a fair wage, precludes time for education, undermines self-esteem, and stands in the way of development.⁴⁸ The MAC states that, at minimum, it is applicable to work performed in mining and quarrying, manufacturing, construction, transport, storage and communication, plantations, and sanitary services industries, in addition to any illegal or sexual work.⁴⁹

The MAC defines three categories of child work, which require different minimum age requirements. The ‘basic minimum age’ is fifteen years old, or at the end of compulsory schooling, applicable to the most common jobs.⁵⁰ The convention does, however, permit children ages thirteen and older to participate in a second category, “light work which is . . . not likely to be harmful to their health or development” and in a manner which does not “prejudice their attendance at school[,]” as defined in national legislation.⁵¹ It also restricts work of a third category, ‘hazardous work’, which “by its nature or the circumstances in which it is carried out is likely to jeopardise the health, safety or morals of young persons[,]” to persons over the age of eighteen, or conditionally those sixteen and over, if specially approved.⁵² In recognizing that different states are at different levels of development, the convention allows exceptions for developing nations to adjust the minimum age requirements applicable to two of the enumerated categories in order to satisfy developmental needs.⁵³

44. MAC, *supra* note 40, art. 1.

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

46. *Id.* art. 6.

47. Emilie Hagedoorn, *Child Labour and Tourism: How travel companies can reduce child labour in tourism destinations*, THE INTERNATIONAL CENTRE FOR RESPONSIBLE TOURISM 7 (2013), <http://www.icrtourism.org/wp-content/uploads/2012/03/OP26.pdf>.

48. *Id.*

49. MAC, *supra* note 40, art. 5(3).

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

51. *Id.* art. 7(1).

52. *Id.* art. 3(1).

53. *Id.* art. 7 (The basic minimum age drops from 15 years to 14 years, and the minimum age for light work drops from 13 years to 12 years. There is, however, no reduction in the age allowed for

States are generally free to define the types of jobs which comprise each category, with few exceptions.⁵⁴ ILO Recommendation No. 146, a document implementing the MAC, explains that when states are determining which types of jobs would fall into the hazardous work category “full account should be taken of relevant international labour standards, such as those concerning dangerous substances, agents or processes (including ionising radiations), the lifting of heavy weights and underground work.”⁵⁵ When determining which types of jobs are ‘light work’ available to those under fifteen years, states should give special attention to: fair remuneration practices; strict limits on hours of work in a day and a week; allowances for holidays, leisure time, weekly off-days, and twelve hours of rest per night; coverage by social security and workers insurance schemes; and the maintenance of safety standards.⁵⁶ Notably, the recommendation also presents suggestions for domestication and enforcement of the MAC.⁵⁷

ILO 182 identifies a fourth category of child labor; the ‘worst forms of child labor’.⁵⁸ ILO 182 encourages states to “take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency[,]” and has four distinguishable features that clarify previous declarations.⁵⁹ First, it applies to any person under the age of eighteen,⁶⁰ and implicitly states that there are no circumstances where jobs referenced in the convention would be acceptable for a person under eighteen.⁶¹ Second, it defines the ‘worst forms of child labour’ as comprising: “all forms of slavery . . . trafficking of children, debt bondage and serfdom and forced or compulsory labour, including . . . recruitment of children for use in armed conflict”; child prostitution or pornography; use of children for illicit activities, such as the sale or manufacturing of drugs; and work which “by its nature or the circumstances . . . is likely to harm the health, safety or morals of children.”⁶² Third, it lays out procedures with which States must comply in order to ensure effective implementation, monitoring, and enforcement.⁶³ Fourth, it highlights the intrinsic connection between education and child labor, recognizing that not only does child labor reduce opportunities for children to participate in school, but that the relationship is mutually re-enforcing in that a lack of opportunities for education can lead children into the workforce.⁶⁴ As a result, Article 7 requires states to

hazardous work in developing nations).

54. See, e.g., *id.* art. 3(2) (“The types of employment or work to which paragraph 1 of this Article applies shall be determined by national laws or regulations or by the competent authority, after consultation with the organisations of employers and workers concerned, where such exist.”).

55. ILO, Recommendation no. 146, ¶ 10 (1973).

56. *Id.* ¶ 13.

57. *Id. passim.*

58. See ILO 182, *supra* note 41.

59. *Id.* art. 1.

60. *Id.* art. 2.

61. *Id.*

62. *Id.* art. 3.

63. *Id.* art. 4-8.

64. See *id.* art. 7.

“ensure access to free basic education . . . for all children removed from the worst forms of child labour[.]” to reduce recidivism rates of children rescued from child labor.⁶⁵ This article also recognizes the special situation of girls who come out of the most horrific child labor conditions.⁶⁶

ILO Recommendation No. 190, suggesting strategy for implementation of ILO 182, directs parties to develop programs identifying and preventing the worst forms of child labor, giving special attention to younger children, girls, hidden work situations, and children with special needs or vulnerabilities.⁶⁷ The recommendation provides that when states are determining which jobs qualify as the worst forms of child labor, special consideration should be given to: work which exposes children to abuse; “work underground, under water, at dangerous heights or in confined spaces”; work with dangerous machinery, equipment or tools; work in an unhealthy environment, including hazardous substances, temperatures, noise, or strong vibrations; and work under difficult conditions, long hours, at night, or unreasonably confined to a particular location.⁶⁸ It also highlights a dozen potential measures which can be implemented by states in order to fulfill obligations under ILO 182.⁶⁹

Another ILO document, the Roadmap for Achieving the Elimination of the Worst Forms of Child Labour (“ILO Roadmap”), calls for the “international community to substantially increase its efforts” to meet the goal of “*eliminating* the worst forms of child labour by 2016[.]” and highlights specific steps that State and non-state actors can take to implement the ILO conventions.⁷⁰ The ILO Roadmap is effectively inapplicable to this discussion as it distinctly eliminates business entities and individuals from its target audience, stating that “[g]overnments have the primary responsibility for enforcing the . . . elimination of the worst forms of child labour[.]” and that “social partners and other civil society organizations, and international organizations have important roles in [merely] promoting and supporting such action.”⁷¹ There are, however, indirectly applicable provisions such as 8.4.4, which recommends “[c]reating an environment, together with social partners, that aims to combat child labour in supply chains.”⁷² This environment

65. *Id.*

66. *Id.*

67. ILO, Recommendation no. 190, ¶ 2 (1999).

68. *Id.* ¶ 3.

69. These include involving and training employers’ and workers’ organizations and civic organizations, monitoring and giving publicity to best practices on the elimination of child labor, and “providing for the prosecution in their own country of the Member’s nationals who commit offences under its national provisions for the prohibition and immediate elimination of the worst forms of child labour even when these offences are committed in another country.” *Id.* ¶ 15.

70. Hague Global Child Labour Conference 2010: Towards a World without Child Labour – Mapping the Road to 2016, *Roadmap for Achieving the Elimination of the Worst Forms of Child Labour* by 2016, pmb. xi (May 11, 2010), available at <http://www.ilo.org/ipecinfo/product/viewProduct.do?productId=13453> (emphasis added) [hereinafter ILO Roadmap].

71. *Id.* princ. 1.

72. *Id.* ¶ 8.4.4.

could materialize as a multi-stakeholder non-profit entity comprised of business, government, and civil society leaders, which assists businesses in developing comprehensive CSR policies, and most crucially, highlights the need for additional focus on child labor within supply chains.

Other sources of international law which enumerate prohibitions on child labor include, most notably, two CRC optional protocols, one on armed conflict⁷³ and another on the sale of children, child prostitution and child pornography,⁷⁴ and the Palermo Protocol on Trafficking in Persons.⁷⁵ In the United States, as in most other nations, domestic laws implement these fundamental principles.⁷⁶ The U.S. President can affect child labor laws in other nations through negotiation of child labor guarantees in trade agreements, as was seen in the Trans Pacific Partnership.⁷⁷ Congress has also created incentives for other nations to take action on child labor; The Trade Act of 1974 prohibits the president from designating as a special beneficiary of a trade tariff reduction, a state that “has not implemented its commitments to eliminate the worst forms of child labor.”⁷⁸ In the Trade and Development Act of 2000⁷⁹ Congress amended the 1974 Act to include the ILO enumerated definition for worst forms of child labor, and to require an annual report “including the findings of the Secretary of Labor with respect to the beneficiary country’s implementation of its international commitments to eliminate the worst forms of child labor.”⁸⁰

73. G.A. Res. A/Res/54/263, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (Feb. 12, 2002).

74. G.A. Res. A/Res/54/263, Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (Jan. 18, 2002).

75. U.N. Convention against Transnational Organized Crime and the Protocols thereto (2004) (including G.A. Res. A/Res/55/25 (Nov. 15, 2000) and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime).

76. U.S. DEP’T OF LABOR, <https://www.dol.gov/general/topic/youthlabor> (last visited Apr. 9, 2016).

77. Trans-Pacific Partnership Agreement, Feb. 4, 2016, ch. 19.3, *available at* UNITED STATES TRADE REPRESENTATIVE, *Trans-Pacific Partnership*, <https://ustr.gov/tpp/#text>. For example, chapter 19 requires that each party enact laws which enumerate internationally recognized labor rights, including “the effective abolition of child labour and, for the purposes of this agreement, a prohibition on the worst forms of child labour[.]” *Id.* The United States representatives have also engaged in separate agreements, called ‘consistency plans’, with Malaysia, Brunei, and Vietnam which expressly define the specific steps that each nation needs to take to bring their labor rights laws in line with international standards. *See, e.g.,* MY-US Labour Consistency Plan, <https://ustr.gov/sites/default/files/TPP-Final-Text-Labour-US-MY-Labor-Consistency-Plan.pdf>.

78. 19 U.S.C. § 2462(b)(2)(H) (2012).

79. Trade and Development Act of 2000, 106 enacted H.R. 434, 106 Pub. L. No. 106-200, 114 Stat. 251 (codified as amended in scattered sections of 19 U.S.C.) [hereinafter Trade and Development Act].

80. *Id.* § 412(c). This statute has been interpreted to require a highly-detailed statistical and analytical annual report on the worst forms of child labor worldwide. The most recent version published by the Bureau of International Labor Affairs, the “2014 Findings on the Worst Forms of Child Labor”, was over 1,000 pages with an index covering 141 countries. *See* BUREAU OF INT’L LABOR AFFAIRS, FINDINGS ON THE WORST FORMS OF CHILD LABOR, xii-xiv (2014),

B. *The Global Child Labor Problem*

[D]espite important progress there are still 168 million children worldwide trapped in child labour, accounting for almost 11 per cent of the overall child population. Children in hazardous work that directly harms their health, safety or moral development make up more than half of all child labourers, numbering 85 million in absolute terms.⁸¹

168 million children ages five to seventeen are engaged in all forms of child labor globally.⁸² Of these, 85.3 million children, 5.4% of all children globally, are engaged in various types of harmful, dangerous, or hazardous work, “including some who dig and drill for 24-hour shifts in gold mines, spray toxic pesticides on crops, or pick up trash on the streets.”⁸³ Regionally, Sub-Saharan Africa has the highest incidence of child labor as a percentage of population, where nearly 21.4% of children ages five to seventeen are victims.⁸⁴ The ‘Asia and the Pacific’ region shows a 9.3% incidence rate with an estimated 77.7 million child labor victims in 2012.⁸⁵

The ILO Roadmap notes that “over the past decade action against the worst forms of child labour has been implemented in all parts of the world and that this has led to significant progress.”⁸⁶ The Roadmap further presumes “that this demonstrates that the fight against child labour can be won with sound policy choices and substantial national and international resource commitments, and when capitalizing on new opportunities[.]”⁸⁷ Even though many state and non-state actors have taken the first step in the fight against the worst forms of child labor in alignment with ILO 182,⁸⁸ the ultimate goal of the ILO Roadmap as discussed above is highly unlikely to be met in the near future,⁸⁹ without drastic change.

Of the 168 million children engaged in child labor, 73 million ‘young children’ ages five to eleven are child laborers, accounting for 8.5% of all children those ages globally.⁹⁰ These young children comprise 44% of all child laborers.⁹¹

<http://www.dol.gov/ilab/reports/child-labor/findings/2014TDA/2014TDA.pdf> [hereinafter TDA Report].

81. ILO, WORLD REPORT ON CHILD LABOUR 2015: PAVING THE WAY TO DECENT WORK FOR YOUNG PEOPLE 1 (2015), <http://www.ilo.org/ipecinfo/product/download.do?type=document&id=26977>.

82. *Id.* In regards to terminology, these children comprise the ‘all forms of child labor’ category.

83. TDA Report, *supra* note 80, at xxi. These jobs, among others, are those which comprise the ‘hazardous work’ category, as covered in the MAC. See Recommendation no. 146, *supra* note 55, ¶ 10 (referring to types of work in Article 3 of MAC).

84. GLOBAL ESTIMATES, *supra* note 15, at 17.

85. *Id.*

86. ILO Roadmap, *supra* note 70, pmbi. vi.

87. *Id.*

88. See ILO 182 *supra* note 41.

89. The total number of children engaged in the worst forms of child labor is not publicly agreed under the ILO 182 standard, however it is estimated that 6 million children are engaged in forced labor or child slavery alone, statistics which do not include the full range children in this category. TDA Report, *supra* note 80, at viii.

90. GLOBAL ESTIMATES, *supra* note 15, at 6, 21.

Of these young children, approximately 18.5 million are engaged in hazardous work.⁹² In general, boys are more likely to be victims of child labor than girls, and much more likely to be engaged in hazardous work.⁹³ Girls, while less likely to be victims in adolescence, are statistically more common among the 'young child' laborer age group.⁹⁴

'Adolescent children' ages fifteen to seventeen engaged in hazardous work make up the largest percentage of child laborers.⁹⁵ On global and national levels, "adolescents in hazardous work constitute a substantial share of the overall child labour population in many contexts[;]"⁹⁶ Globally they make up 28% of the total child labor population, and a larger share of child laborers outside of Sub-Saharan Africa.⁹⁷ This category has been growing as a percentage of total child labor, indicating that the reductions in incidences of *other* forms of child labor seen in *other* age groups has not translated to adolescents in hazardous working conditions.⁹⁸ In some countries, adolescent child laborers employed in hazardous jobs comprise a majority of the total employed population in the age group,⁹⁹ indicating that for many adolescents a dangerous job is the only available option. In relation to the T&T industry, available data shows that, in almost every country studied, between 20% and 80% of adolescents in hazardous work are employed in the services sector,¹⁰⁰ a portion of whom directly and indirectly provide services to tourists.¹⁰¹

On the other hand, as the ILO has stated, progress has been made,¹⁰² great success in reducing all forms child labor over the past ten years is evident. In 2000, 245.5 million children, 16% of children worldwide, were trapped in child labor.¹⁰³ This number is down to 168 million today.¹⁰⁴ There has been a substantial decline in the incidence of hazardous work.¹⁰⁵ This is true for non-adolescent children ages five to fourteen, starting from 9.3% in 2000 down to 3.1%

91. *Id.* at 6.

92. *Id.* at 6, 21.

93. *Id.* at 15, 18.

94. *Id.* at 18-19, Young girls, 5-11 years of age, are some of the most vulnerable, and the most targeted, children for child labor, particularly forced labor. It should be noted, delicately, that in some regions of the world this statistic is a result of adolescent girls ages 15-17 being married and beginning lives as young mothers, removing them from the work force statistical review, but this should not be taken as an indication that these girls have migrated back into the educational system.

95. WORLD REPORT ON CHILD LABOUR 2015, *supra* note 81, at 48.

96. *Id.*

97. *Id.* at xx.

98. *Id.*

99. TDA Report, *supra* note 80.

100. See ILO, WORLD REPORT ON CHILD LABOUR 2015, *supra* note 81, at 53; TDA Report, *supra* note 80, *passim*.

101. ILO, WORLD REPORT ON CHILD LABOUR 2015, *supra* note 81.

102. ILO Roadmap, *supra* note 70, at 1.

103. GLOBAL ESTIMATES, *supra* note 15, at 3.

104. *Id.*

105. *Id.* at 3, 6.

in 2012, and for all children, from 11.1% in 2000 down to 5.4% in 2012.¹⁰⁶ Of the 140 nations studied by the Bureau of International Labor Affairs, more than 70% made moderate or significant advancement in eradicating the worst forms of child labor each year from 2013 to 2015.¹⁰⁷ Expected patterns emerge from this data; there is a higher incidence of child labor in developing nations with underdeveloped legal frameworks or weak enforcement of laws and lower opportunities for education.¹⁰⁸ In some form or another, incidence of child labor occurs in more than half of the nations in the world, and there are enormous social costs and significant long-term consequences on children.

C. *The Consequences of Child Labor*

A wealth of evidence has been accumulated showing how child labour can seriously endanger children's immediate and long-term health and safety, as well as their ability to enroll in and benefit from schooling . . . Children whose education is denied or impeded by child labour enter adolescence much less likely to have the competencies and skills needed for securing decent work, and much more likely to be vulnerable to joblessness or to low paid, or insecure work in hazardous conditions.¹⁰⁹

The consequences of child labor, while now well-defined, are highly alarming and difficult to quantify.¹¹⁰ For many children child labor means hard work, long hours, and low wages.¹¹¹ The greatest short-term harms to child laborers are: fatigue from working long hours; physical harm from environmental, human, and other harms exposed to at work; illness related to work, particularly in the sex trade; and impaired physical, mental and emotional growth.¹¹² Additionally, concerns arise that through child labor children may be exposed to drugs, alcohol, sex, violence, and other adult behavior.¹¹³ Child laborers also have a higher risk of developing low self-esteem when they fail to advance intellectually alongside their peers, and consequently may become marginalized from society.¹¹⁴ These consequences arise as a result of the conditions placed on children, and are often cited as factors which define a particular type of work as exploitive child labor. This includes work which binds a child to one place of work for many hours,

106. *Id.*

107. TDA Report, *supra* note 80. As an example, the TDA Report highlights meaningful efforts made by nations in Asia and the Pacific in strengthening punishments for crimes involving the worst forms of child labor, increasing the number of enforcement personnel, and increasing funding for educational programs targeting rescued children. TDA Report, *supra* note 80, at xxvii.

108. *See id.* at xxii.

109. ILO, WORLD REPORT ON CHILD LABOUR 2015, *supra* note 81, at 1, 6.

110. *Id.* at 1-2.

111. Christine Plüss identifies examples of underage Thai and Pilipino waitresses working 14 or more hours per day, Turkish 'apprentices' who work seven days per week, young Vietnamese postcard vendors working past midnight, and Nepalese and Malaysian children working in dangerous restaurant conditions for little or no money. PLÜSS, *supra* note 1, at 58.

112. Emilie Hagedoorn, *supra* note 47, at 12.

113. *See id.*

114. *Id.*

exposes the child to dangerous situations, burdens a child with too much responsibility, does not pay a fair wage, undermines self-esteem, and/or stands in the way of social, educational, physical, or psychological development.¹¹⁵

The consequences on children who engage in hazardous labor stem from a number of sources, primarily that “[c]hildren are not simply smaller adults [but] . . . are physically and mentally different.”¹¹⁶ The negative effects of hazardous work are exponentially multiplied in young people. Children, in comparison to adults, have thinner skin which absorbs toxins faster, breathe faster which increases inhalation of airborne toxins and dust, dehydrate faster, absorb and retain heavy metals in the brain faster, use more energy when growing, require more sleep, and have more sensitive thermoregulatory systems which make them more susceptible to heat and cold.¹¹⁷ Hazardous work environments have a particularly distinct negative effect on children’s immediate health and wellbeing.¹¹⁸

In addition to health and safety risks all forms of child labor hinder children’s ability to obtain education. “The long working hours . . . alone often make it impossible for children to continue attending school, even when their hope is to use their earnings to buy books and clothes for school.”¹¹⁹ This problem extends beyond the fact that when child laborers are working they are not at school or engaged in other productive educational activities. Child laborers, especially those who are engaged in hazardous work, are also more likely to make the transition from school to full-time work earlier, which “appears to constrain the ability of adolescents to acquire the education necessary to eventually escape from hazardous work.”¹²⁰ These effects extend into the long-term; the ILO found that “prior involvement in child labour is associated with lower educational attainment and with jobs that fail to meet basic decent work criteria.”¹²¹ The correlation between child labor and the attainment of jobs which fail to provide a living source of income is expected, since there is also a negative correlation between leaving school early and upward mobility.¹²²

The negative impacts of child labor must be addressed by focusing on the root causes of child labor. The availability of jobs, some of which become occupied by child laborers, often results from economic development, and in the T&T industry not all of the consequences of development are detrimental.

115. *Id.*

116. ILO, WORLD REPORT ON CHILD LABOUR 2015, *supra* note 81, at 50.

117. *Id.*

118. This is primarily evidenced by an across the board higher rate of work-related injury or illness among employed adolescents in hazardous work as compared to ordinary types of work performed by the same age groups, in the 12 country’s studied by the ILO. *Id.* at 55.

119. PLÜSS, *supra* note 1, at 64.

120. ILO, WORLD REPORT ON CHILD LABOUR 2015, *supra* note 81, at 55-56.

121. *Id.* at xiv.

122. *Id.* at 28.

III. TRAVEL & TOURISM

A. *A Stable Industry and Driver of Growth*

With over 1.1 billion tourists taking an international trip every year, tourism continues to be an unstoppable force and a key driver of the global economic recovery. Yet tourism's record growth is not merely absolute numbers. Tourism's continued progress and expansion represents an effective solution for many of the world's greatest challenges. Indeed, few sectors are as strategically positioned as tourism to contribute decisively to job creation, poverty alleviation, environmental protection and multicultural peace and understanding.¹²³

SDG 8.9 is to, "[b]y 2030, devise and implement policies to promote sustainable tourism that creates jobs and promotes local culture and products."¹²⁴ The 1.135 billion tourists who took an international trip in 2014 spent a combined total of US \$1.245 trillion.¹²⁵ Revenues in the T&T industry represent 9% of global GDP,¹²⁶ and the industry is generally seen as the largest in the world.¹²⁷ Exponentially greater growth is expected over the next few years in both total T&T expenditures and total international arrivals, particularly due to increases in international travel by citizens of emerging economies.¹²⁸ According to the World Economic Forum, "a family trip is the second-highest priority for the booming [global] middle classes, after buying a car."¹²⁹ Businesses in the T&T industry are as diverse as the tourists themselves. There is no universal mold for the industry,

123. *UNWTO Annual Report 2014*, WORLD TOURISM ORGANIZATION 2 (2014), http://cf.cdn.unwto.org/sites/all/files/pdf/unwto_annual_report_2014.pdf [hereinafter *UNWTO Annual Report 2014*].

124. 2030 Agenda, *supra* note 10, at 20. (The UN SDG Indicator Framework plans to measure this goal's progress based on tourism direct GDP (as % of total GDP and in growth rate), and number of jobs in tourism industries (as % total jobs and growth rate of jobs, by gender). *Results of the list of indicators reviewed at the second IAEG-SDG meeting*, IAEG-SDG 23 (2015), <http://unstats.un.org/sdgs/files/meetings/iaeg-sdgs-meeting-02/Outcomes/Agenda%20Item%204%20-%20Review%20of%20proposed%20indicators%20-%20Nov%202015.pdf>.

125. *The Travel & Tourism Competitiveness Report 2015: Growth Through Shocks*, WORLD ECONOMIC FORUM 2 - 4 (2015), http://www3.weforum.org/docs/TT15/WEF_Global_Travel&Tourism_Report_2015.pdf [hereinafter *WEF T&T Report*].

126. *WEF T&T Report*, *supra* note 125, at 3.

127. Frederico Neto, *Discussion Paper of the United Nations Department of Economic and Social Affairs, A New Approach to Sustainable Tourism Development: Moving Beyond Environmental Protection 2* (Mar. 2003), <http://www.un.org/esa/esa03dp29.pdf>.

128. *WEF T&T Report*, *supra* note 125, at 25.

129. *Id.* at 27. Arguing that increases in international tourist departures from emerging economies will continue to increase due to the importance of travel to the average member of the 'new' middle-class in these economies. The assumed stability should hold despite expected a projected drop in the annual percent increase in GDP. Emerging and developing Asia is seen as the largest producer of 'new tourists', and although growth in GDP is expected to slow in the region to around 6.5% over the coming years, the region should continue to produce exponentially more tourists each year. *See also World Economic Outlook*, INTERNATIONAL MONETARY FUND 174 (2015), <http://www.imf.org/external/pubs/ft/weo/2015/01/pdf/text.pdf>.

and many travelers purchase portions of their holiday experiences from across more than one of these different types of enterprises. Independent eco-resorts, large hotel chains, transportation companies, family-run restaurants, late night bars, and other legal and illegal business in the formal and informal economy compete to earn tourists' money. The T&T industry reaches through every sector of the economy.¹³⁰

Globally, growth in the T&T industry has been stable and resilient in the face of natural, political, and economic shocks to the sector.¹³¹ Recent shocks include sluggish economic growth in Asia, Europe and the Americas after the 2007-2008 global recession; conflicts across Asia, Europe, and Africa; security threats in developed nations due to terrorist activity; the Ebola outbreak in West Africa; and the 2015 earthquake in Nepal.¹³² While the number of incoming tourists in an affected nation or region may lag due to a shock, many tourists simply shift travel plans to a different region or nation, limiting the impact on the industry globally. Global growth in international tourist arrivals has continuously exceeded the UNWTO's long-term annual projection of 3.5%, recently reaching 4.4% year-to-year growth from 2013 to 2014.¹³³ Since tourists are undeterred by general shocks to the market, and since tourism is a major driver of the global economy, businesses in the T&T industry are well positioned to take full advantage of the economic benefits that follow from low-risk development in sustainable tourism infrastructure and CSR implementation.

B. *The Benefits of Travel & Tourism*

[T]hrough the direct, spontaneous and non-mediatized contacts it engenders between men and women of different cultures and lifestyles, tourism represents a vital force for peace and a factor of friendship and understanding among the peoples of the world.¹³⁴

Beyond merely the intangible benefits of peace and friendship, the World Economic Forum explains that "developing the T&T sector provides growth opportunities for all countries, regardless of their wealth, and offers job opportunities at all skill levels."¹³⁵ The T&T industry is a key driver of development.¹³⁶ It helps to lift people out of extreme poverty; it creates opportunities for families to end the cycle of non-education of children; it provides stable income for food, shelter, and books; and it creates real-world educational experiences through interactions with foreigners.

130. See PLÜSS, *supra* note 1.

131. For example, China's international tourist departures more than doubled in 8 years; from 34.5 million in 2006 to 98.2 Million in 2013. World Bank Data, Economic Indicators; China's growth in International outbound travel spending rose 8.84% annually over this time, more than twice the international average. *WEF T&T Report*, *supra* note 125, at 120.

132. See *UNWTO Annual Report 2014*, *supra* note 123, at 2.

133. *Id.*

134. G.A Res. 406(XIII), Global Code of Ethics for Tourism, at pmb1. (Oct. 1, 1999).

135. *WEF T&T Report*, *supra* note 125, at 27.

136. *Id.*

T&T offers viable development solutions, “being a key driver of world trade” and a “leading employment sector.”¹³⁷ The 2014 UN Conference on SIDS in Samoa highlighted sustainable tourism as an “important driver of sustainable economic growth and decent job creation.”¹³⁸ Tourism is an economically sustainable development solution, creating a source of foreign currency exchange earnings¹³⁹ and generating a significant share of government tax revenues in many SIDSs and T&T dependent developing nations.¹⁴⁰ There are additional spillover benefits to citizens and local businesses in states investing in an expected increase in annual tourist arrivals, including from infrastructure development such as the building of new roads, trains, airports, hospitals, water and sewage facilities, and telecommunications.¹⁴¹

Jobs created by the T&T industry also frequently employ women and unskilled workers, and therefore have the potential to empower the most vulnerable and alleviate extreme poverty.¹⁴² Tourism can also positively impact both tourists and local citizens through cross-cultural benefits resulting from the exploration of, and interaction with, another culture. In many ways, without travel and tourism, this conversation, and many like it, would not be possible. There are, however, some intrinsic and extrinsic harms caused by T&T activities.

C. Harms Caused by Travel & Tourism

Generally, [the T&T] sector is characterised by low wages and seasonal employment. The jobs are considered relatively unstable and low status. Moreover, at times, the tourism industry may be blamed for its negative influences on environmental degradation, displacement of local people, inflation, crime and the dilution of culture.¹⁴³

Nobel-prize winning economist Joseph Stiglitz wrote, “for all the benefits they bring, multinationals have been vilified – and often for good reason[;]”¹⁴⁴ and this holds true in the T&T industry. Tourism can “generate a volume of flows higher than the destination carrying capacity and then produce negative impacts on the economic, social and natural environment.”¹⁴⁵ Jobs in hotels and catering tend

137. *UNWTO Annual Report 2014*, *supra* note 123, at 42.

138. G.A. Res. 69/15, SIDS Accelerated Modalities of Action (SAMOA) Pathway, at ¶ 30 (Nov. 14, 2014).

139. *UNWTO Annual Report 2014*, *supra* note 123, at 42.

140. Neto, *supra* note 127, at 4.

141. *Id. See, e.g.*, Myanmar Centre for Responsible Business, MYANMAR TOURISM SECTOR WIDE IMPACT ASSESSMENT 80-84 (2015) (explaining that the massive rapid increase in tourism has encouraged infrastructure development which “can benefit the Myanmar economy and the local population.”) [hereinafter Myanmar Tourism SWIA].

142. Neto, *supra* note 127, at 4.

143. Mark Camilleri, *Advancing the Sustainable Tourism Agenda Through Strategic CSR Perspectives*, in TOURISM PLANNING & DEVELOPMENT 42-56, 43 (2014).

144. Joseph E. Stiglitz, *Multinational Corporations: Balancing Rights and Responsibilities*, 101 AM. SOC’Y INT’L L. PROC. 3 (2007).

145. *See* Mara Manente, et al., *Responsible Tourism and CSR – Assessment Systems for Sustainable Development of SME’s in Tourism*, SPRINGER 3 (2014).

to pay less than other socially comparable occupations.¹⁴⁶ Regional shocks to the industry may have little impact on global trends, but the impact can be devastating on local communities reliant on income from tourists who shift travel plans to a different region. Communities who increasingly rely on tourism in lieu of other diversified sources of income are even more vulnerable to the “seasonal aspects of tourism[,] and to shocks, such as, natural disasters, regional wars and other unexpected events.”¹⁴⁷

One such example is in Egypt, where international arrivals in 2010 exceeded fourteen million people before sinking almost 40% after the Arab Spring uprisings began late that year.¹⁴⁸ Prior to 2010 the T&T industry accounted for 13% of Egypt’s GDP and directly or indirectly employed one in seven workers, but this is no longer the case.¹⁴⁹ In economies heavily reliant on tourism, a sharp downturn due to a shock of this type has the effect of causing severe hardship on employees, entrepreneurs, and family businesses, and as a result can cause distress throughout the economy.

The T&T industry also has a negative impact on the natural environment. In addition to the increase in carbon-based transportation used in international tourism, the industry places added pressure on natural resources and causes damage to ecosystems.¹⁵⁰ Over time, as a result of both government and consumer pressure, some T&T businesses have become more concerned with the environmental impact of their operations, and have begun to respond.¹⁵¹ For example, most of the existing declarations, guidelines, and initiatives which encourage sustainable tourism focus primarily on the environmental effects of tourism.¹⁵²

146. Neto, *supra* note 127, at 4.

147. *Id.*

148. *See International arrivals 2010-2014 Egypt*, WORLD BANK DATA EXPLORER, available at <http://data.worldbank.org/indicator/ST.INT.ARVL?page=2>. International expenditures dropped from a high of US\$ 475 million to a decade-low US\$ 372 million in 2011, a 20% drop, indicating that not only are fewer tourists coming, but that some are staying for even shorter periods of time. *See id.* A 20% drop in revenues indicates a larger disparity over a 1-year period than a 40% drop in arrivals does, because the cost of access to Egypt, in the wake up the regional crisis and the loss of overall tourists, has risen at a higher rate than inflation since 2010. *International tourism, expenditures for passenger transport items*, WORLD BANK DATA EXPLORER, available at http://data.worldbank.org/indicator/ST.INT.TRNX.CD__. This is additionally mitigated by continued increases in tourists to the beach resorts of the Saini particularly Sharm-al-Shiek and Hurgurda. *Arab Spring Break*, THE ECONOMIST (May 4, 2013), available at <http://www.economist.com/news/business/21577089-turmoil-has-scared-all-rugged-and-russians-arab-spring-break>.

149. Since 2010, hotel occupancy rates have averaged barely 15% in Cairo and below 5% in the Valley of the Kings. The Valley of the kings is where the tomb of Tutankhamun, the famous Egyptian boy king, is buried, and is one of the most visited ancient cites in Egypt, but is located near the modern city of Luxor, 1000km down the Nile from Cairo, and is considered less safe than the large metropolis, resulting in a significantly greater reduction in tourist arrivals. *Arab Spring Break*, *supra* note 148.

150. Neto, *supra* note 127, at 4.

151. *Id.* at 6.

152. *See infra* note 134, 311-12. The Davos Declaration, Djerba Declaration, and Global Code of

T&T industry, and businesses which supply the industry, also harm people, particularly in developing nations. T&T development impacts local cultures negatively, carrying the risks of hegemonic domination of culture¹⁵³ and global monoculturalism.¹⁵⁴ While cultures are often strengthened by interaction with foreign ideas, the behavior of tourists in culturally traditional areas can have negative social impacts when tourists show a lack of respect for local traditions, consume alcohol or drugs, or participate in exploitive tourist activities.¹⁵⁵ Additionally, while corruption may be viewed as a primarily economic problem, most corrupt activities have a negative effect on human rights, and several aspects of the tourism value chain have a high potential for corruption.¹⁵⁶

D. *Child Labor in the Travel & Tourism Industry*

Children are omnipresent in tourism. Historical narratives testify that this has been the case ever since this particular form of travel began to develop at the end of the eighteenth century.¹⁵⁷

The most pertinent negative impact of T&T to this analysis is the existence of child labor within the tourism value chain, in particular hazardous labor and the worst forms of child labor. Globally, 25.4% of child laborers are employed in the non-domestic services sector,¹⁵⁸ and a portion of these children are engaged in child labor in direct or indirect service of foreign tourists. There are no publicly agreed statistics on how many child laborers work in the T&T industry because the industry is large and complex, employment is fluid, and the scope is hard to define. For example, according to official statistics from the U.S. Department of Trade “about 13 million children are engaged in [the] tourism industry” in India, but many scholars believe this is not remotely accurate, as “unofficial estimates vary

Ethics in Tourism generally have more over all protections and enumerated provisions aimed at mitigating environmental impacts than relating to human rights.

153. See generally Steven Jacobs, *Rebel Music from Trenchtown to Oaktown: the Lyrics of Bob Marley and Tupac Shakur as Counter-Hegemonic Cultural* (2009) (on file with the University of Florida Library) (explaining that there is a fear that American, Western, Japanese, or Chinese culture may prevail in societies whose economies are dependent on tourism from those locations, principally the developing world, due to their tourists demanding more ‘at home’ conditions). For more on Cultural Hegemony see Clarabelle Ferguson, *The Relationship between American Media Exposure and Trinidadian Female Adolescents’ Body Image Satisfaction* (2011) (on file with the University of South Florida Library); see also Meg Spohn Bertoni, *The U.S. Imperial Jugger-not: Saturation Points and Cultural Globalization*, 6 INTEGRAL REVIEW 1 (March 2010).

154. The threat of global monoculturalism is the idea that powerful individuals, countries, and companies have plans, policies, and actions intended to direct marketing campaigns which are threatening cultural diversity. One such complaint focuses around American popular culture values becoming the preferences of youth around the world. Anthony J. Marsella, ‘Hegemonic’ Globalization and Cultural Diversity: The Risks of Global Monoculturalism, 11 AUSTRALIAN MOSAIC 13, 15-16 (2005), <http://www.humiliationstudies.org/documents/MarsellaHegemonicGlobalizationAustralianMosaic.pdf>.

155. See Myanmar Tourism SWIA, *supra* 141, at 87.

156. *Id.* at 82.

157. PLÜSS, *supra* note 1, at 13.

158. GLOBAL ESTIMATES, *supra* note 15, at 22.

between 60-100 million.”¹⁵⁹ While some nations in the developing world which rely heavily on the T&T industry as a major economic driver strictly enforce progressive child labor standards,¹⁶⁰ many popular tourist destinations do not.

In Thailand, one of the world's most popular tourist destinations,¹⁶¹ the T&T industry directly contributed 9% of GDP in 2014.¹⁶² While growth in tourism has catalyzed a doubling of Thailand's purchasing power parity (PPP) GDP since 1990,¹⁶³ its child labor protections have failed to follow suit. In 2014, 13% of children ages five to fourteen were engaged in child labor.¹⁶⁴ Hazardous child labor in Thailand exists within the tourism value chain in a number of ways, particularly in the form of child Muay Thai fighters, a popular sport in the vein of kickboxing which is advertised to tourists nation-wide.¹⁶⁵ Children also work in karaoke bars, restaurants, hotels, and vending; examples of the worst forms of child labor include sex tourism, and forced begging and vending.¹⁶⁶

Zimbabwe, one of Africa's leading tourist destinations, received over 1.8 million international visitors in 2014 and its travel industry comprises roughly 5.6% of GDP.¹⁶⁷ Yet the Zimbabwean government has made minimal progress in developing child labor policies.¹⁶⁸ National statistics are not available on the number of children engaged in child labor, and there is evidence of children in the work force, including in hazardous working conditions, throughout the country.¹⁶⁹ This is particularly true in the services sector, and the worst forms of child labor exist as evidenced by child drug trafficking, forced begging, and sexual exploitation.¹⁷⁰ The US Department of Labor speaks to a need for additional

159. Dr. Anupama Sharma et al, *Child Labour – An Ugly Face of Travel and Hospitality Industry*, 4 J. BUS. & MGMT. 8, 10 (Sept. – Oct. 2012).

160. For example, in Costa Rica, a nation which hosts over 2.4 million international tourists annually accounting for almost 5% of its total GDP, the government has enacted and is beginning to enforce strict laws on child labor not only in the T&T sector, but across the entire economy, and they have reduced child labor incidence among children ages 5 to 14 by 35% to a 2014 low of 4.4%, through strong policing, numerous guiding policies, and governmental and social programs. See TDA Report, *supra* note 80, at 238-42. In Grenada, a Caribbean country where total contribution of the T&T sector to the overall GDP of the nation is over 20% and forecast to rise to over 25% by 2024, there is no incidence of any child labor, including the worst forms of child labor, due to strong enforcement of international treaties obligations. See *id.* at 360-62.

161. Thailand has over 25 million international visitors annually. International tourism, number of arrivals, Thailand, WORLD BANK DATA EXPLORER, <http://data.worldbank.org/indicator/ST.INT.ARVL>.

162. WEF T&T Report, *supra* note 125, at 324 (discussing the overall competitiveness of each nation in the industry).

163. World Bank Development indicators, GDP per capita, PPP, WORLD BANK, available at https://www.google.com/publicdata/explore?ds=d5bncppjof8f9_#!ctype=l&strail=false&bcs=d&nselm=h&met_y=ny_gdp_pcap_pp_kd&scale_y=lin&ind_y=false&rdim=region&idim=country:THA&ifdim=region&hl=en_US&dl=en_US&ind=false (last visited May 29, 2016).

164. TDA Report, *supra* note 80, at 835.

165. *Id.* at 836.

166. *Id.*

167. WEF T&T Report, *supra* note 125, at 350.

168. TDA Report, *supra* note 80, at 948-51.

169. *Id.* at 948.

170. *Id.*

governmental intervention, the adoption of sound laws, and better enforcement.¹⁷¹

Indonesia is a nation which has made moderate advancement over the past ten years in enforcing child labor laws through diligent policing, but still has a relatively high number of child laborers.¹⁷² 3.7% of children ages ten to fourteen are engaged in child labor, and the government has failed to gather reliable statistics on the number of young children in the workforce.¹⁷³ Indonesian children engage in work in the tourism value chain through work on the streets, vending, and as restaurant workers.¹⁷⁴ They also may engage directly or indirectly with tourists in the worst forms of child labor through drug sales or trafficking, and through sexual exploitation.¹⁷⁵ At under 4%, Indonesia may have a lower rate of incidence of child labor than many other developing nations, but with a population of over 250 million people, the fourth largest in the world, Indonesia has a high total number of child laborers.¹⁷⁶ Just short of ten million international tourists came to Indonesia in 2014 and the T&T industry accounted for around 3% of GDP.¹⁷⁷ The T&T industry in Indonesia is likely an employer of child labor.¹⁷⁸ Indonesia has robust rule of law which strictly enumerates prohibitions in line with international standards, has relatively efficient enforcement, and numerous governmental and social programs addressing child labor,¹⁷⁹ yet its ability to effectively enforce has not been fully realized.

Child labor is also prevalent in developed nations. Mexico, one of the top-ten countries in the world in international tourist arrivals with almost thirty million annual visitors, receives around 6% of its GDP from tourism.¹⁸⁰ Child labor in Mexico is rampant,¹⁸¹ with an estimated 6.8% of children ages seven to fourteen engaged in some form of child work.¹⁸² In 2013 there were 870,000 young

171. *Id.* at 951-52.

172. *Id.* at 425.

173. TDA Report, *supra* note 80, at 425.

174. *Id.* at 425-26.

175. *Id.*

176. Population Total, Indonesia, WORLD BANK DATA EXPLORER, <http://data.worldbank.org/indicator/SP.POP.TOTL> (last visited May 29, 2016).

177. *UNWTO Tourism Highlights*, WORLD TOURISM ORG. 1, 9 (2015), available at <http://www.e-unwto.org/doi/pdf/10.18111/9789284416899>.

178. *WEF T&T Report*, *supra* note 125, at 425-26

179. *Id.* at 429-32.

180. *UNWTO Tourism Highlights*, *supra* note 177, at 6, 10; *WEF T&T Report*, *supra* note 125, at 368.

181. *Children at work in Mexico, Still a Major Issue*, WORLD BANK (Jan. 18, 2013), available at <http://www.worldbank.org/en/news/feature/2013/01/18/children-at-work-in-mexico-still-a-major-issue>.

182. Child labor in this case is defined as “[c]hildren in employment are children involved in any economic activity for at least one hour in the reference week of the survey. Work only refers to children who are employed and not attending school”, which does not necessary mean all of them are child laborers. World Bank Development Indicators 2011, https://www.google.com/publicdata/explore?ds=d5bncppjof8f9_#!ctype=l&strail=false&bcs=d&nselem=h&met_y=children_at_work&scale_y=lin&ind_y=false&rdim=region&idim=country:ZWE:MEX&ifdim=region&hl=en_US&dl=en_US&ind=false.

children, ages five to thirteen, engaged in child labor in Mexico.¹⁸³ Similarly, child labor is prevalent in Turkey, where 39.8 million international visitors in 2014¹⁸⁴ brought in almost US \$30 billion accounting for 4.6% of GDP.¹⁸⁵ 2.6% of Turkish children ages six to fourteen are engaged in some form of child labor, many involved in street work in tourist locations, and there is evidence of child sexual exploitation in the tourism industry.¹⁸⁶ The U.S. Department of Labor recommends that Turkey update its domestic laws to comply with international standards, increase enforcement of existing laws, and increase funding for educational programs.¹⁸⁷

In nations where child labor exists, children are engaged with the tourism value chain through work in all branches of the tourism industry, and across diverse working conditions.¹⁸⁸ They work for entrepreneurial businesses, family enterprises, and larger companies.¹⁸⁹ Some end up as independent contractors in agricultural work, or as forced laborers for gangs.¹⁹⁰ Even outside of the forced labor context child laborers working in the tourism value chain are not always paid for their work, particularly when working for a family enterprise, such as a hotel or a restaurant.

One bright spot, thanks to effective CSR policies, is that nearly all large multinational hotel and tour operations companies have taken steps to abolish the direct hiring of child labor.¹⁹¹ This, however, neglects a large portion of child laborers, such as those who provide indirect labor or third-party labor to those companies, and those children working in the informal tourist sector or for SME's.¹⁹² Additionally, large hotels and tour operators still employ children indirectly through laundry, cleaning, and other services that they subcontract,¹⁹³ though some are now beginning to address supply chain labor issues.¹⁹⁴

Children working in the accommodations sector generally occupy jobs as receptionists, baggage haulers/attendants, bell-boys, lift-boys, chambermaids, room-boys, domestic servants, grooms, porters, garden hands, cleaners, or launderers.¹⁹⁵ In the food and beverage sector, children are often employed as general kitchen helpers, dishwashers, water-carriers, cleaners, servers, delivery

183. *Children at work in Mexico, Still a Major Issue*, WORLD BANK (Jan. 18, 2013), <http://www.worldbank.org/en/news/feature/2013/01/18/children-at-work-in-mexico-still-a-major-issue>.

184. UNWTO Tourism Highlights 2015, *supra* note 177, at 6.

185. *WEF T&T Report*, *supra* note 125, at 368.

186. *TDA Report*, *supra* note 80, at 875.

187. *Id.* at 880.

188. PLÜSS, *supra* note 1, at 23.

189. *Id.*

190. *Id.*

191. *Id.* at 24. This statement does not presuppose that all CSR is effective or that there are no companies in these groups which employ child laborers.

192. *Id.*

193. PLÜSS, *supra* note 1, at 24.

194. *See infra*, sect. V.

195. PLÜSS, *supra* note 1, at 25.

boys, and vendors of fruit or snacks.¹⁹⁶ Work in hotels and restaurants can be particularly damaging to child welfare as it often has demanding physical safety conditions such as the use of knives, hot oils, and other kitchen equipment, a high likelihood of workplace injury such as slips and falls, and can be physically demanding.¹⁹⁷ It often involves loud noise and hot temperatures, high workload and workplace stress, the potential for exposure to adult behavior such as exposure to violence and harassment, and long, overtime, or night shift hours.¹⁹⁸

In addition to work in accommodations and restaurants, other sectors within the T&T industry have a high risk perception for child labor, including the catering and food and beverage sector; in excursions, recreational activities, and the entertainment industry; in tour operations and transport; and in the selling of souvenirs.¹⁹⁹ Dozens of jobs comprise other categories, including tour guides, flower girls, beach cleaners, trash haulers, errand-boys, deck-hands, car-washers, bus attendants, porters, drivers, vendors, and prostitutes.²⁰⁰ Each of these jobs has its own challenges, and the consequences on child welfare vary depending on the job and within each position dependent on the conditions.

In many nations children participate in some of the worst forms of child labor in the T&T industry, including prostitution and sexual exploitation.²⁰¹ The heightened risk perception is not solely a result of the inherent consequences of child labor, but because work that involves interactions with adult tourists creates the potential for additional sexual or other adult type interaction.²⁰² These types of exploitation are accompanied by the worst consequences for children, especially girls. The greatest concerns are economic exploitation by protectors, physical injury from abusers and protectors, and illness including HIV and AIDS, in addition to all of the other consequences generally expected for any child laborer.²⁰³

“[C]hild labor occurs for many reasons, the most common being poverty.”²⁰⁴ Additionally, “limited social protection has forced many vulnerable households to resort to child labour as a coping strategy, and pushed many vulnerable youth into serious poverty.”²⁰⁵ Migration, trafficking, and other forms of criminal exploitation also lead children to work in tourism, often against their will.²⁰⁶ Family distress, traditional or cultural customs, desire for consumer goods, lack of

196. *Id.*

197. Yoshie Noguchi, Senior Legal Officer, Slide Presentation at the International Programme on the Elimination of Child Labour: Accelerating Action against Child Labour in Tourism, 22.

198. *Id.*

199. Hagedoorn, *supra* note 47, at 11.

200. PLÜSS, *supra* note 1, at 25.

201. *See id.*

202. *See* Hagedoorn, *supra* note 47, at 11

203. Erika R. George & Scarlet R. Smith, *In Good Company: How Corporate Social Responsibility Can Protect Rights and Aid Efforts to End Child Sex Trafficking and Modern Slavery*, 46 N.Y.U. J. Int'l L. & Pol. 55, passim (2013); PLÜSS, *supra* note 1, at 6.

204. TDA Report, *supra* note 80, at xxii.

205. ILO 2015 World Report on Child Labour, *supra* note 81, at 3.

206. Hagedoorn, *supra* note 47, at 10.

legislation, lack of opportunity for education, lack of decent work for parents, and lack of social protections are factors identified as 'push' factors, forcing children into work in the T&T industry.²⁰⁷

Not all forms of child labor in T&T are forced or exploitive. 'Pull factors', those which lure children to work willingly, such as the opportunity for quick money, contact with foreigners, and a wider range of job opportunities, also encourage child labor.²⁰⁸ It is unlikely that these pull factors would overcome the 'pull' of proper educational opportunities if they were readily available. Push factors often outweigh pull factors, and therefore, the stakeholders in the best position to reduce child labor in the T&T industry are T&T businesses. In order to do this, they are likely to employ CSR.

IV. CSR

A. *The Corporate Responsibility to Respect Human Rights*

[I]n an increasingly interconnected world with closer scrutiny of corporate impact on people and communities, more businesses are coming to realize their legal, moral and commercial need to do so within their activities and business relationships. Beyond the minimum responsibility to respect human rights, companies are also finding that voluntary actions which support social development – such as creating diverse and inclusive workplaces, investing in communities and public policy advocacy, and engaging stakeholders – have business benefits as well.²⁰⁹

Globalization has catalyzed a rise in the scope of impact of the operations of the world's largest MNE's and other international corporations.²¹⁰ The UNGP represents a response to this rise, and as a result there has been a call for standards and practices to govern the conduct, responsibility, and accountability of corporations in relation to the impact their activities have on people and the planet.²¹¹ Corporations are now commonly turning to voluntary self-regulation to curb the negative impact their operations have on human rights, particularly in relation to child labor.²¹² The SRSG wrote that "respecting rights is not an

207. *Id.*

208. *Id.* at 9-10.

209. United Nations Global Compact, *Guide to Corporate Sustainability: Shaping a Sustainable Future* 13 (2015), https://www.unglobalcompact.org/docs/publications/UN_Global_Compact_Guide_to_Corporate_Sustainability.pdf.

210. See Elisa Westfield, *Globalization, Governance, and Multinational Enterprise Responsibility: Corporate Codes of Conduct in the 21st Century*, 42 VA. J. INT'L L. 1075, 1080 (2002).

211. See Jean-Marie Kamatahi, *The New Guiding Principles on Business and Human Rights' Contribution in Ending the Divisive Debate over Human Rights Responsibilities of Companies: Is It Time for an ICJ Opinion?* 20 CARDOZO K. INT'L & COMP. L. 437, 442 (2012).

212. The purpose of this paper is not to determine the root impetus for CSR initiatives in companies, but it has been opined that "most CSR initiatives currently implemented in the private sector are a direct response to the demand for greater social responsibility from international trade

obligation that current international human rights law generally imposes directly on companies,²¹³ indicating that difficulty exists in applying existing international human rights instruments to corporate activity. It is increasingly recognized, however, that companies have a responsibility to respect human rights, namely to avoid infringing on the rights of others and to remediate negative impacts they cause.²¹⁴ Voluntary self-regulation in the form of robust CSR policies may be the most effective tool corporations can employ in order reduce their negative impact on the human rights of people in the communities they operate.

B. *The Fundamental Principles of CSR*

[O]ne of the major issues pertaining to CSR is the lack of a universally accepted definition[.]²¹⁵

CSR exists as a plethora of voluntary and mandatory statutes, codes of conduct, guidelines, policies, and concepts which guide corporate governance, structure, and actions, and varies not only by sector, but also by region and nation. The United Nations Industrial Development Organization (UNIDO) defines CSR as “a management concept whereby companies integrate social and environmental concerns in their business operations and interactions with their stakeholders[.]”²¹⁶ It is generally understood “as being the way through which a company achieves a balance of economic, environmental and social imperatives (‘Triple-Bottom-Line Approach’), while at the same time addressing the expectations of shareholders and stakeholders.”²¹⁷ Typically, CSR initiatives are considered “an explicit and voluntary implementation of environmentally, ethically, and socially conscious standards of conduct[.]”²¹⁸ requiring that corporations adopt a triple-bottom-line approach, focusing on not just profit, but also on people and planet, and be aware of and responsible for the “economic, social and environmental impacts they produce with their activities.”²¹⁹

unions, nongovernment organizations, human rights organizations, and environmental groups[.]” not to mention consumers. See Erika R. George & Scarlet R. Smith, *In Good Company: How Corporate Social Responsibility Can Protect Rights and Aid Efforts to End Child Sex Trafficking and Modern Slavery*, 46 N.Y.U. J. INT’L L. & POL. 55, 94 (2013).

213. Special Rep. of the Secretary-General on the Issue of Hum. Rights and Transnat’l Corps. and Other Bus. Enterprises, John Ruggie, *Business and Human Rights: Further Steps Toward the Operationalization of the ‘Protect, Respect and Remedy’ Framework*, 55, U.N. Doc. A/HRC/14/27 (Apr. 9, 2010).

214. International Labour Organization [ILO], *Production of a Guidance Tool on “How to do Business with Respect for Children’s Right to be Free from Child Labour”*, 1, Brochure (Mar. 13, 2013), available at http://www.ilo.org/ipec/Informationresources/WCMS_IPEC_PUB_21578/lang-en/index.htm.

215. Arjya B. Majumdar, *India’s Journey With Corporate Social Responsibility—What Next?* J. L. & COM. 169 (2015).

216. UNIDO, *What We Do*, <http://www.unido.org/what-we-do/advancing-economic-competitiveness/competitive-trade-capacities-and-corporate-responsibility/csr/what-is-csr.html> (last visited Apr. 2, 2016).

217. *Id.*

218. George & Smith, *supra* note 214, at 94.

219. Manente, et al., *supra* note 145, at 16.

The UNGP is not merely another set of voluntary standards but the “authoritative UN Standards around which the articulated expectations of many public and private institutions have already converged.”²²⁰ These principles, while often criticized for failing to enumerate an international legal duty on corporations to take action in regards to human rights,²²¹ are not meant to progress CSR principles beyond accepted international standards. They are designed to recognize and enumerate existing fundamental principles which give rise to CSR. The UNGP rests on three fundamental pillars. First, the state duty to fulfill its human rights obligations and protect its citizens against human rights abuses by all parties, including businesses; second, the corporate responsibility to respect human rights; and third, greater access by victims to effective remedy.²²² UNGP 11 expresses that the responsibility for corporations to respect human rights is wide in scope; requiring that businesses “avoid infringing on the human rights of others[,]” and “address adverse human rights impacts with which they are involved.”²²³ The Special Representative stresses that this responsibility “exists over and above compliance with national laws and regulations[,]”²²⁴ and that human rights are to be understood, at minimum, “as those expressed in the International Bill of Human Rights[.]”²²⁵

UNGP 13 explains that the ‘responsibility to respect’ requires that businesses “avoid causing or contributing to adverse human rights impacts through their *own* activities, and address such impacts when they occur.”²²⁶ Businesses are additionally required to “[s]eek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services *by their business relationships*, even if they have not contributed to those impacts.”²²⁷ This principle is cited as expressing that corporations have a responsibility to enforce their own human rights policy throughout their supply chains.²²⁸ Additionally, UNGP 14 expresses application to all businesses, regardless of their size, bringing into the scope of the recommendation’s intended audience many of the SME’s operating in the T&T industry.²²⁹

The UNGP mandates that corporate policies and processes be appropriate to

220. Sarah A. Altschuller, *Business and Human Rights: A Convergence of Expectations*, FOLEY HOAG: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW (Dec. 19, 2011), <http://www.csrandthelaw.com/2011/12/articles/human-rights/business-and-human-rights-a-convergence-of-expectations> (quoting John Ruggie).

221. See, DODDS & JOPPE, *supra* note 4, at 11.

222. See UNGP, *supra* note 23, at 4-5.

223. See UNGP, *supra* note 23, at 13.

224. See UNGP, *supra* note 23, at 13.

225. *Id.* (including at minimum the CRC, which is a part of the International Bill of Human Rights, and the ILO Declaration, but may not expressly include the MAC or ILO 182, outside of those provisions which can be argued to have fallen into CIL).

226. UNGP, *supra* note 23, at 14 (emphasis added).

227. *Id.*

228. See OXFAM INTERNATIONAL, BUSINESS AND HUMAN RIGHTS: AN OXFAM PERSPECTIVE ON THE UN GUIDING PRINCIPLES 4 (June 2013).

229. UNGP, *supra* note 23, at 15 (explaining that all business enterprises may employ child labor).

the size of the industry, including: a policy commitment to meet the corporation's responsibility to respect human rights; a human rights due diligence process to identify, prevent, mitigate and account for how the company addresses their impacts on human rights; and processes for remediation of any adverse impacts they cause.²³⁰ This principle encourages accountability throughout the corporation and requires communication of a human rights policy to all relevant parties.

The OECD Guidelines for Multinational Enterprises ("OEC Guidelines") and the UN Global Compact provide detailed guidance on the development and implementation of CSR policies. The OECD Guidelines are recommendations from adhering OECD countries to multinational enterprises which "provide non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognised standards."²³¹ These guidelines are principally intended for MNE's, but some portions of the code are also applicable to SME's.²³² They are vitally important to the development of CSR policies because they are the "only multilaterally agreed and comprehensive code of responsible business conduct that governments have committed to promoting."²³³ The guidelines aim to promote contributions by business to economic, environmental, and social progress worldwide, and it includes a human rights chapter which is consistent with the UNGP Protect, Respect and Remedy Framework.²³⁴

In addition to reiterating the UNGP framework, the OECD Guidelines elaborate on the corporate responsibility to respect human rights.²³⁵ Under the OECD guidelines, when a state fails to either enact laws consistent with international standards or to enforce existing laws, enterprises are not freed from their obligation to respect human rights.²³⁶ When domestic laws are in conflict with internationally recognized human rights standards, enterprises should seek to honor their CSR commitments to the fullest extent which does not place them in violation of domestic laws,²³⁷ and may need to consider additional standards when dealing with particularly vulnerable groups, including children.²³⁸ The OECD clarifies that the business activities considered should include corporate acts and

230. UNGP, *supra* note 23, at 14-15; *see also* UNGP, *supra* note 23, at 16-17 (recommending that a statement of policy should be: Approved at the most senior level; informed by relevant internal and/or external expertise; stipulates the enterprise's human rights expectations or personnel, business partners, and other parties directly linked to its operations, products or services; publicly available and communicated internally and externally to all personnel, partners, and other relevant parties; and reflected in policies and procedures necessary to embed it throughout the business enterprise).

231. Org. for Econ. Co-operation and Dev. [OECD], *OECD Guidelines for Multinational Corporations*, at 3, <http://www.oecd.org/daf/inv/mne/48004323.pdf>.

232. *Id.*

233. *Id.*

234. *Id.*

235. *See id.* at 31.

236. *Id.* at 32.

237. *Id.*

238. Org. for Econ. Co-operation and Dev. [OECD], *OECD Guidelines for Multinational Corporations*, at 32, <http://www.oecd.org/daf/inv/mne/48004323.pdf>.

omissions to act, as both have human rights implications, and prohibits businesses from escaping responsibility by simply turning a blind-eye.²³⁹ Enterprises are also encouraged to adopt policies which allow managers to leverage relationships in order to alleviate human rights impacts of other businesses.²⁴⁰ Most importantly, the OECD codifies due diligence core criteria as including legitimacy, accessibility, predictability, equitability, compatibility with the guidelines, and transparency.²⁴¹

The OECD guidelines recommend that enterprises “[c]ontribute to the effective abolition of child labour, and take *immediate and effective measures* to secure the prohibition and elimination of the worst forms of child labour *as a matter of urgency*.”²⁴² This recently adopted language is crucial as it stems from ILO 182 and ILO 190, and is increasingly being incorporated into other newly developed codes of conduct prohibiting the worst forms of child labor.²⁴³ It encourages businesses to treat the worst forms of child labor as a distinct issue, which, while related to other forms of child labor, must be addressed through direct examination.

The Global Compact is the world’s largest corporate sustainability initiative with a mission to create a “sustainable and inclusive global economy that delivers lasting benefits to people, communities, and markets.”²⁴⁴ Through its five defining features, the Global Compact supports corporate efforts to do business more responsibly.²⁴⁵ It recommends that corporations align their strategies and operations with the ‘Ten Principles’ of the compact and take strategic actions to advance broader societal goals, such as the SDG’s.²⁴⁶ While some Global Compact partners have been removed due to lack of implementation of initiatives or due to evidence of ‘greenwashing’,²⁴⁷ currently 8,402 companies and 162 countries participate in the initiative, who, through the compact, have published over 35,000 reports.²⁴⁸ Of the Ten Principles fundamental to the global compact,

239. *Id.* at 33.

240. *See id.*

241. *Id.* at 34.

242. *Id.* at 35 (emphasis added).

243. *See* Int’l Labour Org. [ILO], *Worst Forms of Child Labour Convention* No. 182, 190 (Jun. 17, 1999), [available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C182](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C182).

244. UNITED NATIONS GLOBAL COMPACT, *Our Mission*, <https://www.unglobalcompact.org/what-is-gc/mission> (last visited Apr. 2, 2016).

245. UNITED NATIONS GLOBAL COMPACT, *Our Strategy*, <https://www.unglobalcompact.org/what-is-gc/strategy> (last visited Apr. 2, 2016).

246. UNITED NATIONS GLOBAL COMPACT, *supra* note 247.

247. Jo Confino, *Cleaning up the Global Compact: Dealing with Corporate Free Riders*, THE GUARDIAN: BUSINESS ON THE ROAD TO RIO (Mar. 26, 2012), [available at http://www.theguardian.com/sustainable-business/cleaning-up-un-global-compact-green-wash](http://www.theguardian.com/sustainable-business/cleaning-up-un-global-compact-green-wash).

(explaining that greenwashing generally refers to corporate efforts to make their operations look like they are complying with environmental or sustainability standards while not actually acting to enforce those standards, or where a corporations publicly advertised standards may seem to the public to be sustainable where in reality they do not meet international requirements.

248. United Nations Global Compact, <https://www.unglobalcompact.org/> (last visited Apr. 4,

Principle 1, which states that “businesses should support and respect the protection of international proclaimed human rights[,]” and Principle 5, which calls for the “effective abolition of child labour[,]”²⁴⁹ are especially relevant. The initiative helps companies “navigate a range of challenges through resources, ranging from guidance documents, webinars and online forums, to special initiatives on the rights of groups – such as women, children, indigenous peoples and persons with disabilities.”²⁵⁰

C. CSR and Child Labor

Companies are increasingly concerned with child labour in their supply chains. They view it as inconsistent with company values, a threat to their image and ability to recruit and retain top employees, as well as to the sustainability of their supply chain.²⁵¹

Child labor isn’t just morally wrong, it costs money, increases risk, and reduces the long-term stability of a corporation. Corporations also occupy an advantageous position relative to other stakeholders in their ability to affect positive change in regards to child labor. For example, the private sector is particularly well situated to contribute to ending the practice of child sex trafficking, as “the business community occupies an especially advantageous position in its ability to put pressure on the bottom line of an illicit business that has benefited from being overlooked and misunderstood.”²⁵² The global community has responded. The ILO, UNWTO, UN Global Compact, and other national and international organizations publish and update CSR guides and recommendations specifically aimed at combating child labor through a host of programs and initiatives.²⁵³

The ILO and the International Organization of Employers embarked on a project (ILO-IOE project) that aims to provide companies with the tools and know-how they need to tackle the challenge of child labor.²⁵⁴ Their assessment process has been praised by a number of large corporations, including the Coca-Cola Company, for providing “expert” analysis which led to improvements in policies and due diligence systems.²⁵⁵ The project is led by experts on child labor and human rights and “engages select companies in an assessment process that provides them with expert insight on the alignment of existing policies and

2016).

249. UN Global Compact, *supra* note 211, at 11.

250. *Id.* at 13.

251. Int’l Labour Org. [ILO], *Corporate Social Responsibility (CSR) and Child Labour*, available at <http://www.ilo.org/ipecc/Action/CSR/lang-en/index.htm>.

252. George & Smith, *supra* note 214, at 58.

253. See generally Int’l Labour Org., *supra* note 254; UNWTO, *supra* note 123; UN Global Compact, *supra* note 211.

254. Int’l Labour Org. [ILO], *Guidance Tool on “How to do Business with Respect for Children’s Right to be Free From Child Labour”*, <http://www.ilo.org/ipecc/projects/global/protect-respect-remedy/lang-en/index.htm>.

255. *Id.*

processes in this area with the UN Guiding Principles and ILO standards, and, if relevant, where improvements could be made.”²⁵⁶

The ILO also published *Eliminating Child Labor: Guides for Employers – How employers can eliminate child labor*²⁵⁷ as a guideline for companies who seek to develop a child labor CSR policy. The publication includes eight concrete and detailed steps, beholden to 4 guiding principles,²⁵⁸ that companies can take to end child labor within their organizations and supply chains through voluntary CSR.²⁵⁹ Step 1 recommends that companies analyze their current situation through research on domestic laws, buyer requirements, and the current status of child laborers within the country and industry.²⁶⁰ Step 2 guides the development of strategy and internal policies for eliminating child labor, of which the eight steps enumerated in the document should be principle elements.²⁶¹ It recommends that states consult internal and external sources while drafting, communicate the finalized policy throughout the company supply and buyer chains, and implement the elements of the policy according to the specified timeline.²⁶² Step 3 recommends an immediate cease on the hiring of children, the elimination of hazardous work by children, and a reduction of hours for children currently employed.²⁶³ It does not suggest that all child laborers be instantly removed from the workforce, for fear of creating an economic shock.²⁶⁴

Step 4 highlights the importance of transitional activities during this period, encouraging policies which reduce the impact of the loss of income on families in the communities in which they operate.²⁶⁵ It is vital that corporations cooperate with labor reduction programs which compensate for the loss of a child's wage and facilitate re-entry into the educational system.²⁶⁶ Steps 5 and 6 direct companies on how to eliminate the need for children within their organization, how to steadily eliminate the use of children in operations, and how to eliminate incidences of child labor thereafter throughout the supply chain.²⁶⁷ Step 7 recommends companies adopt an internal code of conduct to which they may be held

256. *Id.*

257. Int'l Labour Org. [ILO], *Eliminating Child Labour: Guides for Employers – Guide Two: How Employers can Eliminate Child Labor*, ACT/EMP 55 (2007), http://www.ilo.org/public/english/dialogue/actemp/downloads/projects/child_guide2_en.pdf.

258. *Id.* at 5-6 (Listing principles, including: 1) Understanding the consequences of actions, 2) being proactive rather than reactive, 3) Cooperating with Others, Working to have an effect on your spheres of influence).

259. Int'l Labour Org., *supra* note 260.

260. *Id.* at 7-13.

261. *Id.* at 14-17.

262. *Id.*

263. *Id.* at 18-20.

264. *See* Int'l Labour Org., *supra* note 260, at 18-20 (referencing the shock felt in the Bangladeshi economy after 40-50,000 child laborers were let go instantly, mostly as a result of the lack of tracking for children, lack of support for child laborer families, and lack of other opportunities for recently liberated children).

265. Int'l Labour Org., *supra* note 260, at 21-28.

266. *See id.*

267. *Id.* at 29-38.

accountable.²⁶⁸ Developing a code of conduct is an excellent way for companies to mandate internal standards to which they can be held accountable, and are fundamental to an effective CSR policy. Step 8 presents recommendations for auditing, monitoring, and certification, essential tools in the fight against child labor.²⁶⁹ Effective auditing and monitoring procedures ensure that companies are held to the standards they set.²⁷⁰ Businesses can outsource their auditing and monitoring to third-party certification entities, and reputable certification can be attractive to customers and investors.²⁷¹

The Global Compact, in collaboration with UNICEF and Save the Children, has developed the Children's Rights and Business Principles (CRBPs), which address a full range of actions companies can take to respect and support children rights.²⁷² These 10 principles do not create new substantive rights, but merely enumerate rights consistent with a host of internationally recognized documents, including the CRC, the UNGP, the MAC, and ILO 182.²⁷³ Principle 2 calls for the abolition of child labor.²⁷⁴ It also guides businesses on how to identify and prevent child labor and how to cooperate with government, social partners, and others to promote education and sustainable solutions to the root causes of child labor.²⁷⁵ The CRBPs encourage businesses to "seek to concentrate production in the formal economy and avoid informal working arrangements that may contribute to child labor."²⁷⁶ The Global Compact takes steps to implement Principle 5, in joint coordination with the ILO, through the Child Labor Platform.²⁷⁷

In order to implement the MAC and Declaration 182, the ILO developed the International Programme on the Elimination of Child Labour (IPEC), which aims to progressively eliminate child labor by "strengthening the capacity of countries to deal with the problem and promoting a worldwide movement to combat child labour."²⁷⁸ IPEC currently operates in 88 countries and has partnered with intergovernmental and governmental agencies, businesses and corporations, workers unions, NGOs, governmental officials, universities, and others, to promote the elimination of the worst forms of child labor worldwide.²⁷⁹ The IPEC collects

268. *Id.* at 39-45.

269. *Id.* at 46-52.

270. *See id.* at 46.

271. *See* Int'l Labour Org., *supra* note 260, at 46.

272. UN Global Compact, *supra* note 211, at 15.

273. United Nations Children's Fund [UNICEF], *Children's Rights and Business Principles*, at 12-13, https://www.unglobalcompact.org/docs/issues_doc/human_rights/CRBP/Childrens_Rights_and_Business_Principles.pdf (last visited Apr. 4, 2016).

274. *Id.* at 18-19.

275. *Id.* at 18-19.

276. *Id.* at 19 (emphasis in original).

277. UN Global Compact, *supra* note 211, at 17.

278. Int'l Labour Org. [ILO], *About the International Programme on the Elimination of Child Labour*, <http://www.ilo.org/ipec/programme/lang—en/index.htm> (last visited Apr. 4, 2016) (emphasis added).

279. *Id.*

data on child labor, tracks and reports on progress, provides education on child labor issues, and provides advice to businesses on implementing CSR initiatives.²⁸⁰ Numerous other programs, guidelines, and initiatives exist within the Global Compact, and many more have been produced by other UN and civil society organizations, governments, and businesses.

D. CSR in Travel & Tourism: Responsible Tourism Terms of Art

Responsible tourism goes beyond fancy packaging and eco-certification. It also goes far beyond simplistic internal hotel policies of washing sheets and towels, or accommodations simply being located in natural jungle or forest areas. Responsible tourism has to do with an everyday lifestyle that promotes cultural and biological diversity, and promotes environmental and natural resources conservation, at home and while travelling.²⁸¹

The size and scope of the T&T industry is enormous, and there is great diversity in economic activities and available certification programs.²⁸² There is a widespread call for a more universal certification program, code of conduct, or guideline aimed at aiding T&T businesses in developing CSR policies.²⁸³ Currently, there are many certification schemes and guiding documents available to businesses, but they are not well organized.²⁸⁴ There are dozens of terms of art referring to the different types of tourism generally described as responsible, which are poorly delineated, weakly defined, and may be confusing at first glance.²⁸⁵ One of these is 'Responsible Tourism'.²⁸⁶ CSR programs may be carried out in response to responsible tourism declarations or initiatives, and companies often advertise their CSR policy as being in line with specific responsible tourism recommendations. However, responsible tourism is a broad concept that carries no accepted definition.²⁸⁷

There are other correlated forms of tourism "characterised by an overlapping of concepts and contributions[.]"²⁸⁸ such as eco-tourism, sustainable tourism, pro-poor tourism, and the like.²⁸⁹ All describe different but related types of tourism

280. *See id.*

281. Manente, et al., *supra* note 145, at 4-5.

282. Certification programs available are innumerable, and include regional, national, industry specific, and international programs. *See, e.g.*, SUSTAINABLETOURISM.NET, *Sustainable Tourism | Tourism Accreditation & Certification*, <http://www.sustainabletourism.net/sustainable-tourism/sustainable-tourism-resource/tourism-accreditation-and-certification> (last visited June 6, 2016).

283. *See generally*, DODDS & JOPPE, *supra* note 4.

284. *See* Manente, et al., *supra* note 145, at 29.

285. *See id.* at 10.

286. *See id.* at 7.

287. *See id.*

288. *Id.*

289. Other common forms of certified tourism include: Pro-Poor tourism, Developmental tourism, Fair-Trade tourism, Rural-tourism, Voluntourism, Conscientious tourism, Agro-tourism, and others. All of these forms have some overlapping features with responsible tourism and sustainable tourism, but they are not one in the same. *See Manente, supra* 145.

rooted in the same foundational principles recognizing the potential developmental benefit and negative impact that T&T can have, and seek to advance development through tourism while preventing negative effects on people and/or the environment.

Responsible tourism is a broad term encompassing actions by individuals, businesses, and societies as a whole, and there is a plethora of interpretations of what it requires. The South African Responsible Tourism handbook explains that “[r]esponsible [t]ourism is a tourism management strategy embracing planning, management, product development and marketing to bring about positive economic, social, cultural, and environmental impacts.”²⁹⁰ The Cape Town Declaration on Responsible Tourism in Destinations, the founding international agreement on responsible tourism, recognized that while “[r]esponsible [t]ourism takes many forms, [and] different destinations and stakeholders will have different priorities[,]” that certain characteristics are inherent.²⁹¹ The declaration also expresses, among others, two principles for social responsibility which affect child labor; that companies should “[a]dopt equitable business practices, pay and charge fair prices, and build partnerships in ways in which risk is minimised and shared, and recruit and employ staff *recognising international labour standards*[,]”²⁹² and “combat the sexual exploitation of human beings, particularly the exploitation of children.”²⁹³

The National Responsible Tourism Development Guidelines for South Africa instructs businesses on operating as a responsible tourism entity.²⁹⁴ It presents guiding principles under a triple-bottom line approach and each prong includes requirements, including but not limited to impact assessments, strategic planning, and involvement from the local community.²⁹⁵ Most relevant is guiding principle 2.1.4(L) which states that “[t]he exploitation of human beings in any form, particularly sexual and when applied to women and children, should be energetically combated with the co-operation of all concerned.”²⁹⁶ Ultimately, the most widely accepted descriptive statement of responsible tourism is that it “is

290. Ministry of Environmental Affairs and Tourism, South Africa, *Responsible Tourism Handbook* (2003), http://www.fundacionglobalnature.org/proyectos/tuismo_y_ma/Tourism%20handbook.pdf

291. *Cape Town Conference on Responsible Tourism in Destinations*, RESPONSIBLE TOURISM, <http://responsibletourismpartnership.org/cape-town-declaration-on-responsible-tourism> (last visited Mar. 31, 2016). This declaration was developed by a group from the world summit in Johannesburg in 2002 and is an agreement between tour operators, emerging entrepreneurs in the tourism industry, and national parks. Among other things, these characteristics include: minimize negative economic and social impacts; generate economic benefits for locals and enhance host communities; and improve working conditions and industry access.

292. *Id.* (emphasis added).

293. *Id.*

294. See Dep’t of Env’tl. Affairs and Tourism, *National Responsible Tourism Development Guidelines For South Africa* (2002), <http://www.tourism.gov.za/CurrentProjects/ResponsibleTourism/Responsible%20Tourism/Responsible%20Guidelines.pdf>.

295. *See id.*

296. *Id.* at 2.1.4(l).

about 'making better places for people to live in and better places for people to visit.' Responsible tourism requires that operators, hoteliers, governments, local people and tourists take responsibility, take action to make tourism more sustainable."²⁹⁷

Sustainable tourism is another broadly defined 'umbrella' category related to responsible tourism, and is a term of art used by many certification, compliance, reporting, auditing, and other governmental and non-state initiatives. In many ways, this term of art is the most interchangeable with responsible tourism. It is defined by the United Nations Environment Programme (UNEP) as tourism development which "meets the needs of the present tourists and host regions while protecting and enhancing the opportunity for the future."²⁹⁸ Similar to responsible tourism, "sustainable tourism development guidelines and management practices are applicable to all forms of tourism in all types of destinations, including mass tourism and the various niche tourism segments."²⁹⁹ The Global Sustainable Tourism Council (GSTC) provides the minimum criteria which business, government, and destinations should achieve to approach social, environmental, cultural and economic sustainability in two sets; one for hotel and tour operators, and another for destinations.³⁰⁰ As an example, GSTC criteria B6 requires organizations to implement "a policy against commercial, sexual or any other form of exploitation and harassment, particularly of children, adolescents, women and minorities[.]" and B7 requires that the organization "restrain child labor."³⁰¹

Eco-tourism, more correctly classified as "ecologically sound tourism", is responsible tourism in natural areas that conserves the environment and improves the well-being of local people.³⁰² Unlike responsible tourism and sustainable tourism, eco-tourism is a more narrowly defined category which, while it does have category-specific certification programs,³⁰³ is not considered an 'umbrella'

297. *What is Responsible Tourism*, RESPONSIBLE TOURISM, <http://responsibletourismpartnership.org/what-is-responsible-tourism> (last visited Mar. 31, 2016) (quoting the Cape Town Declaration in which the statement provided by the Responsible Tourism Partnership, an organization which supports the development of responsible tourism businesses and initiatives through workshops, training, consultancy, auditing, and reporting, has been echoed by many other responsible tourism initiatives in one form or another).

298. Mara Manente & Valeria Minghetti, *Overview of Methodologies or The Analysis of Responsible Tourism And of Corporate Social Responsibility (CSR) and Proposal For a Common EU Responsibility Label*, Ciset 7, https://earthresponsible.files.wordpress.com/2013/03/ciset_csrfinal-report_161210.pdf.

299. UNEP, *FACTS AND FIGURES ABOUT TOURISM*, available at <http://www.unep.org/resourceefficiency/Business/SectoralActivities/Tourism/FactsandFiguresaboutTourism/Definitions/tabid/78773/Default.aspx>.

300. GLOBAL SUSTAINABLE TOURISM COUNCIL, *Global Sustainable Tourism Council Criteria*, available at <https://www.gstcouncil.org/en/gstc-criteria/sustainable-tourism-gstc-criteria.html>. (Each of these criteria sets are organized in 4 pillars, focusing on sustainable management, socioeconomic impacts, cultural impacts, and environmental impacts).

301. *Id.* at *Global Sustainable Tourism for Hotels and Tour Operators*, <https://www.gstcouncil.org/en/gstc-criteria/criteria-for-hotels-and-tour-operators.html>.

302. Manente, *supra* note 301, at 8.

303. See e.g., *Certification Standards*, THE INTERNATIONAL ECOTOURISM SOCIETY,

terminology.³⁰⁴ It is inherent that eco-tourism operations provide for environmental conservation, include community participation, and are profitable.³⁰⁵ At one point in time eco-tourism was heralded by the UN as the “key to eradicating poverty and protecting environment.”³⁰⁶

E. CSR in Travel & Tourism: Declarations and Guidelines

[T]he world tourism industry as a whole has much to gain by operating in an environment that favours the market economy, private enterprise and free trade and that serves to optimize its beneficial effects on the creation of wealth and employment . . . [and] provided a number of principles and a certain number of rules are observed, responsible and sustainable tourism is by no means incompatible with the growing liberalization of the conditions governing trade in services and under whose aegis the enterprises of this sector operate and that it is possible to reconcile in this sector economy and ecology, environment and development, openness to international trade and protection of social and cultural identities[.]³⁰⁷

The Djerba³⁰⁸ and Davos³⁰⁹ Declarations of the International Conferences on Climate Change and Tourism have profound influence on responsible tourism initiatives. The Djerba Declaration directly calls on operators in the T&T industry to “adjust activities, using more energy-efficient and cleaner technologies and logistics” in order to minimize climate change.³¹⁰ The Davos Declaration expands on this concept, recommending that tourism industry and destinations implement “concrete measures in order to mitigate climate change *throughout the tourism value chain[.]*” to promote energy efficient tourism programs, and to raise awareness of consumers to tourism related environmental concerns.³¹¹ These declarations were, however, focused on mitigating the environmental impacts of T&T, and not as concerned with the impacts tourism has on human rights or child-

<https://www.ecotourism.org/certification-and-standards> (last visited Apr. 2, 2016).

304. *Ecotourism and Protected Areas*, UNWTO, <http://sdt.unwto.org/en/content/ecotourism-and-protected-areas> (last visited Apr. 2, 2016), (classifying eco-tourism as: All “nature-based forms of tourism” with a main purpose of observing nature and traditional cultures found in natural settings; which contains educational and interpretation features; often organized for small groups by local tour operators; minimizes negative impact on natural and socio-cultural environment; and supports the natural areas through economic benefits to host communities resulting from increased employment opportunities, and through increasing awareness to towards conservation).

305. See Manente, *supra* note 301, at 8.

306. UNWTO, *UN: General Assembly: ecotourism key to eradicating poverty and protecting environment*, <http://media.unwto.org/press-release/2013-01-03/un-general-assembly-ecotourism-key-eradicating-poverty-and-protecting-envir> (last visited Apr. 2, 2016).

307. Global Code of Ethics for Tourism, *supra* note 134, at 3.

308. *Djerba Declaration*, UNWTO (Apr. 11, 2003), <http://sdt.unwto.org/sites/all/files/docpdf/decladjerbae.pdf>.

309. *Davos Declaration*, UNWTO (Oct. 3, 2007), <http://sdt.unwto.org/sites/all/files/docpdf/decladavose.pdf>.

310. *Djerba Declaration*, *supra* note 311, at 2.

311. *Davos Declaration*, *supra* note 312, at 2 (emphasis added).

labor.³¹²

The UN Global Code of Ethics for Tourism is a wide-ranging non-binding code which sets standards for tourists, governments, non-state actors, and businesses in the T&T Industry.³¹³ The preamble recommends that obligations under the CRC, MAC, and ILO 182 be complemented by a set of “interdependent principles for their interpretation and application on which the stakeholders in tourism development should model their conduct[.]”³¹⁴ The Global Code of Ethics mandates that “[t]he exploitation of human beings in any form, particularly sexual, especially when applied to children, conflicts with the fundamental aims of tourism and is the negation of tourism[.]”³¹⁵ It recommends that exploitation should be “energetically combatted with the cooperation of all the States concerned and penalized without concession by the national legislation of both the countries visited and the countries of the perpetrators of these acts, even when they are carried out abroad.”³¹⁶ Article 9.1 requires that the fundamental rights of workers be guaranteed under national laws, in compliance with internationally recognized work standards, including the international recognized rights of children under the CRC, MAC and ILO 182.³¹⁷

The UNWTO’s World Tourism Network on Child Protection, which holds annual meetings at international T&T fairs, “serves as a platform for key actors to exchange experiences and best practices, present awareness-raising materials and capacity building tools, and promote the adoption of professional codes of conduct or other responsible practices in line with the UNWTO Global Code of Ethics for Tourism.”³¹⁸ In particular, the objectives of the organization are to support efforts to protect children from all forms of exploitation in tourism, particularly to protect minors against sexual exploitation.³¹⁹ It has an established network of published contact persons in many national tourism administrations, provides related information on local and national hotlines for tourists to call to report suspected child exploitation, and publishes information on the laws of many nations relating to tourism and child exploitation.³²⁰ Most importantly, the network is a multi-stakeholder initiative, made up of private sector, public sector, and civil society participants, and encourages the T&T industry to engage in ethical practices through adoption of CSR codes of conduct.³²¹

312. See generally *Djerba Declaration*, *supra* note 311; see also *Davos Declaration*, *supra* note 312.

313. *Global Code of Ethics for Tourism*, *supra* note 134.

314. *Id.* at 3.

315. *Id.* art. 2.3.

316. *Id.*

317. See *id.* art. 9.1.

318. UNWTO, *World Tourism Network Child Protection*, <http://ethics.unwto.org/content/world-tourism-network-child-protection>. (last visited Apr. 2, 2016).

319. *Id.*

320. See *id.*

321. See *id.*

V. BEST PRACTICE IN THE TRAVEL & TOURISM INDUSTRY

A. *Best Practice Initiatives and Certifications*

Certification can be described as the process of assuring consumers and industry that the company being assessed has met a set of minimum standards . . . [and] the purpose of certification [is] to achieve voluntary standards of performance which meet or exceed baseline standards or legislation.³²²

In addition to conforming CSR policy and procedure to the guidelines and declarations examined in the preceding section, best-practice policy aimed at abolishing child labor in the T&T industry requires that businesses are cognizant of existing governmental and civil society initiatives and certification programs, and take steps to utilize them. Some states have developed national action plans, modified legal requirements, enhanced enforcement, financed programs, and introduced initiatives to assist T&T businesses in developing CSR policies which incorporate best practices. In other nations, improvements were made by simply requiring a minimum age on employment in additional sectors or by requiring transparent reporting on employees.³²³

The Government of El Salvador, in coordination with the ministries of labor from Nicaragua and Guatemala, implemented *Primero Aprendo en Centroamerica* (First I Learn), a program designed to provide training to businesses in the tourism sector on commercial and sexual child exploitation, and help them to develop a manual for workers on the prevention and eradication of child labor, which eventually went on to help over 1,000 at risk children across the three countries.³²⁴ Kenya developed their own National Plan of Action for the Elimination of Child Labor and for the Elimination of Sexual Exploitation in Children which directly emphasizes the important role of tourism companies and employees in ending child labor practices in the T&T industry.³²⁵ In a similar vein, the popular tourist destination Sri Lanka³²⁶ has a child labor problem, and the government is moving to remedy it through the development of quinquennial roadmap documents seeking to end the worst forms of child labor, including commercial labor in the tourism industry.³²⁷

322. DODDS & JOPPE, *supra* note 4, at 16.

323. *TDA Report*, *supra* note 80, at 162 (such as in Cambodia, where in the May 2014 Sub-decree on the management of Tourism Entertainment-Tourism Centers for Adults (METCA), which is designed to fight against child sexual exploitation in the tourism sector through explicit fines for children working in adult entertainment facilities).

324. *TDA Report*, *supra* note 80, at 300; *see also*, Care (Nicaragua). *Proyectos: Primero Aprendo en Centroamerica*. Care.org (January 12, 2015) available at <http://www.care.org.ni/proyectos/?proyecto=3>.

325. *TDA Report*, *supra* note 80, at 467.

326. SRI LANKA TRAVEL, Home, <http://srilanka.travel/index.php?route=common/home> (last visited Apr. 2, 2016) (*discussing* that Sri Lanka, recently embroiled in civil war, is now a rapidly growing tourist destination with beautiful beaches and a 'golden triangle' of world heritage sites).

327. *TDA Report*, *supra* note 80, at 808; *see also*, UNICEF Sri Lanka Roadmap, http://www.unicef.org/srilanka/2003_UNICEF_Roadmap_wcms_149650.pdf. The Sri Lanka roadmap

International organizations, including international and regional associations, international law enforcement, NGO's, and IGO's, have contributed by developing programs aimed to combat child labor in the tourism industry. The Code of Ethics against the Sexual Exploitation of Children and Adolescents ("the code") is one of the most effective initiatives aimed at eliminating incidence of child sex work and child trafficking within major hotel and tourism chains.³²⁸ Through their work with over 1,300 members, The Code has found that "encouraging hotels, hospitality works, and other tourism businesses to implement a zero tolerance policy against sex trafficking and educating the business community on identifying child trafficking may significantly contribute to disrupt the demand side of the trade."³²⁹ In committing to join The Code, a tourism company commits to six criteria to help protect children, steps derived from general CSR recommendations of founding international documents adapted specifically for use by tourism companies seeking to end child sexual exploitation.³³⁰ Fair Trade in Tourism in South Africa (FTTSA), the local implementation of The Code in South Africa, requires that enterprises in the T&T industry take measures to protect children and young workers from exploitation of all forms in order to receive certification.³³¹

Many of these initiatives, codes, programs, and certification schemes have been effective, and show that the stakeholders in the most advantageous position to eradicate child labor are those in the private sector. Enterprises look to these initiatives as both guidance for their own CSR policy development, and as potential initiatives which they themselves may join in implementing their policies. In other situations, programs involve direct coordination with national governments.³³²

document is particularly relevant because it contains some broadly defined but easy to implement recommendations, created distinctly for T&T entities, to bring their processes in line with accepted CSR recommendations. Sri Lanka is a country with a high percentage of SME's operating in the tourism sector and a rapidly growing rate of increase in annual international visitors. The roadmap merely recommends; an assessment, informational campaigns, improved processes for identification of victims, utilizing CSR program's developed by larger corporations, and support for community awareness building. For some nations this roadmap may seem simplistic, but for the small business entrepreneurs in Sri Lanka it may be a perfect introduction to international child labor laws.

328. *The Code of Ethics against the Sexual Exploitation of Children and Adolescents*, THE CODE.ORG, <http://www.thecode.org/> (last visited Apr. 2, 2016).

329. *Id.*

330. *Id.* Namely, these steps are to 1) establish policy and procedures, 2) train employees to prevent, detect, and report, 3) include a clause in contracts throughout the value chain stating a zero tolerance policy, 4) provide information to travelers on the laws, how to prevent, and report, 5) support, collaborate & engage stakeholders, and 6) report annually on implementation.

331. *Id.*; *Fair Trade Tourism*, available at <https://fairtradetourism.wordpress.com/> (Mar. 25, 2013).

332. For example, In Jordan, a trilateral project between UNESCO, the ILO, and the City of Petra operates a non-formal education center and provides services to children at risk of becoming laborers in the local tourism dominated communities surrounding the World Heritage Site and Wadi-Rum historical sites. *TDA Report*, *supra* note 80, at 454.

B. *CSR Best Practice in the Travel & Tourism Industry*

“Leadership gives us a number of rights, but more importantly, it entails certain corresponding duties towards our employees, guests, partners and, naturally, our host communities around the world.” – Accor Hotels CSR Charter³³³

As a result of these developments, companies are increasingly adopting internal policies and procedures consistent with CSR guidelines which regulate the way they treat child labor in their organizations and throughout their supply chains.³³⁴ For over a decade Accor hotel group has been recognized as leading the CSR movement in the accommodations sector.³³⁵ In a study conducted for a 2005 Dodds & Joppe report, Accor’s codes of conduct were found to be the most progressive in the industry, mandating actions in all five measured categories, including the human rights/labor category and the social/community category.³³⁶ Accor hotel group operates over 3,700 hotels in 92 countries, including the Ibis and Adagio brands and luxury brands Pullman, Sofitel, and Grand Mercure, and had EU €5.454 billion in revenues in 2014.³³⁷ As a world leader in CSR, Accor proudly claims that they employ over 180,000 people, fund the world’s leading hotel school, Academie Accor, support 200,000 beneficiaries through the Solidarity Accor endowment fund, and plant 2,000 trees per day.³³⁸ Accor also proudly boasts in their 2014 Business Review that they are “committed and responsible” to their duty as a socially responsible corporation which creates social, environmental, and societal value for every stakeholder in the Accor ecosystem.³³⁹ Since the launch of the company in 1985, they have been promoting policies, processes, and programs, many a mix of CSR and corporate philanthropy, which implement their socially responsible strategic vision.³⁴⁰

Today, Accor’s Ethics and Corporate Social Responsibility Charter is the primary guiding document which mandates policies and procedures throughout the corporation.³⁴¹ In 2014 Accor created an internal ethics and CSR committee tasked with monitoring, auditing, and updating the CSR policies to ensure that

333. *Accor Ethics and Corporate Social Responsibility Charter 3*, http://www.accorhotels-group.com/fileadmin/user_upload/Contentus_Accor/Commun/pdf/EN/accor_ethics_csr_charter_2014.pdf [hereinafter Accor CSR Charter].

334. See *Corporate Social Responsibility (CSR) and child labour*, ILO-IPEC, <http://www.ilo.org/ipec/Action/CSR/lang—en/index.htm> (last visited Apr. 2, 2016).

335. See Jacqui Boardman & Candida Barbato, *Review of socially responsible HR and labour relations practice in international hotel chains* 16 (2008), http://www.ilo.org/wcmsp5/groups/public/—ed_dialogue/—sector/documents/publication/wcms_162286.pdf.

336. DODDS & JOPPE, *supra* note 4, at 46.

337. ACCOR, *Enhancing your Hotel Experience: 2014 Business Review 1*, http://www.accorhotels-group.com/fileadmin/user_upload/Contentus_Accor/Finance/Documentation/2014/UK/accor_br_en_2014.pdf. [hereinafter Accor Business Review]

338. *Id.* at 2-4.

339. *Id.* at 75-76.

340. See *id.* at 77-79.

341. See generally Accor CSR Charter, *supra* note 336.

Accor is the world leader in this area for many years to come.³⁴² Accor implements a triple-bottom line approach in their CSR Charter that reaches through all levels of the corporation.³⁴³ All members of the board, management, and employees are responsible to uphold its principles.³⁴⁴ The company prohibits the use of children in work which would violate national laws in each country they operate, and have a company-wide ban on employing children under the age of 14.³⁴⁵ Additionally, the charter requires that the company be extremely vigilant in choosing suppliers or service providers, and vows to refuse to work with, or immediately suspend work with, any business that violates child labor laws.³⁴⁶ The refusal to do business with any company engaging in unlawful child labor is a best practice which enumerates child labor protections throughout the tourism value chain.³⁴⁷

Accor acknowledges that it has a moral obligation to protect children from abuse, and does so through partnership with the ECPAT International, an NGO which aims to end the sexual exploitation of children.³⁴⁸ Accor has pledged to train and inform its employees and guests in protecting children from abuse, train employees on how to detect and report abuse, and integrate suppliers and partners into the detection process.³⁴⁹ The Accor Group is a major corporate partner of the COP21 climate summit in Paris, and in preparation for that summit developed a program which is open for all hotel operators to join.³⁵⁰

Planet 21 is structured around twenty-one commitments backed by quantifiable objectives, and provides information and guidance to other hotel operators.³⁵¹ One of these policy commitments, "to protect children from abuse", is measured by their goal of seeking 70% of hotels in countries in which they also operate to commit to protecting children as outlined in the Accor CSR Charter.³⁵² The process of setting goals, measuring internal success on an annual basis, and then opening those measurements to the industry as a standard which they should seek to attain is best practice in the industry. The WATCH program oversees the implementation of this goal and measured 48% compliance in 2014.³⁵³

342. Accor Business Review, *supra* note 340, at 77.

343. See Accor CSR Charter, *supra* note 336, at 6-9.

344. See *id.*

345. *Id.* at 11.

346. *Id.*

347. *Id.* at 28. In implementing this, Accor vows to fulfill its commitments to the Global Compact by paying careful attention to the employment practices of its suppliers and service providers in an effective and transparent manner in order to eliminate the use of child labor throughout its supply chain.

348. *Id.* at 30; see generally ECPAT INTERNATIONAL, <http://www.ecpat.net> (last visited Apr. 3, 2016).

349. Accor CSR Charter, *supra* note 336, at 30.

350. *Sustainable Development*, ACCOR HOTELS, <http://www.accorhotels-group.com/en/sustainable-development.html> (visited Apr. 3, 2016).

351. *Id.*

352. *7 Pillars of Planet 21*, ACCOR HOTELS, <http://www.accorhotels-group.com/en/sustainable-development/the-7-pillars-of-planet-21/local.html> (visited Apr. 3, 2016).

353. *Enhancing your Hotel Experience: Registration Document and Annual Financial Report 58* (2014), ACCOR, <http://www.accorhotels->

Additionally, Accor recognizes that a social license to operate exists, and they strive to ensure that, through corporate philanthropy aimed at aiding host communities, they can maintain local support for their business ventures.³⁵⁴ Financial donations through the corporate philanthropy program are a minimum of 0.1% of annual gross revenues, in 2014 totaling almost US\$ 1.5 million.³⁵⁵

Another MNE hotel chain with a heralded CSR policy is Marriott hotels.³⁵⁶ Marriott owns eighteen brands operating more than 4,100 hotels in 79 countries and reported nearly US \$14 billion in gross revenues in 2013.³⁵⁷ Marriott's CSR policies are guided by an overarching CSR policy which includes multiple levels of activity specific documents laying out principles in five distinct categories, including human rights, the environment, and employment.³⁵⁸ This comprehensive set of policies and principles prohibits Marriott from using any forms of prohibited child labor,³⁵⁹ and states that Marriott "will work to raise awareness concerning [child sexual exploitation], and will cooperate with law enforcement authorities to address any such instances . . . in which the company becomes aware."³⁶⁰ In regards to sexual exploitation, Marriott publishes a training manual and communicates it throughout the corporation and to all suppliers, provides training to their over 200,000 employees to recognize and report sexual exploitation of children, actively cooperates with global safety and security partners, and conducts surveys regularly to gauge the scope and sources of issues.³⁶¹ In response to the corporate philanthropy mandate recently initiated in India which requires 2% of average net profits to be spent in CSR initiatives,³⁶² Marriott updated its India CSR policy to include an explicit provision requiring that the board "[e]nsure the CSR spending every financial year of at least 2% of average net profits made during immediately preceding 3 financial years, in accordance with the Act."³⁶³

group.com/fileadmin/user_upload/Contenus_Accor/Developpement_Durable/pdf/PLANET_21/EN/accor_drf2014_uk_csr.pdf.

354. *See id.* at 24.

355. *Id.*

356. *See generally Corporate Responsibility*, MARRIOTT, <http://www.marriott.com/corporate-social-responsibility/corporate-responsibility.mi> (last visited Apr. 3, 2016).

357. MARRIOTT, <http://news.marriott.com/new-hotels/> (last visited Apr. 3, 2016).

358. *Responsible Business Principles*, MARRIOTT, <http://www.marriott.com/corporate-social-responsibility/corporate-values.mi> (last visited Apr. 3, 2016).

359. *Global Employment Principles*, MARRIOTT, http://www.marriott.com/Multimedia/PDF/CorporateResponsibility/Marriott_Global_Employment_Principles.pdf.

360. *Human Rights Policy Statement*, MARRIOTT, <http://www.marriott.com/Multimedia/PDF/Corporate/HumanRightsStatement.pdf>.

361. *Our Commitment to Human Rights*, MARRIOTT, <http://www.marriott.com/Multimedia/PDF/Corporate/HumanRightsCommitment.pdf>.

362. The Companies Act, 2013, para. 135(5), THE GAZETTE OF INDIA, <http://www.mca.gov.in/Ministry/pdf/CompaniesAct2013.pdf> (requiring that companies allocate 2% of their average net profits to pursue their CSR policy).

363. *Corporate Social Responsibility ("CSR") Policy For Marriott Hotels India Private Limited ("MHIPL")* app. 2, 1, 4, MARRIOTT, http://www.marriott.com/Multimedia/PDF/CorporateResponsibility/CSR_Policy_India.pdf.

One of the great successes of Marriott's CSR program is their contribution to the Youth Career Initiative (YCI). Through YCI underprivileged youth who are vulnerable to human trafficking and exploitation are invited to a six month educational experience which serves to place them in safe and secure employment on completion.³⁶⁴ 85% of YCI participants join the workforce or enroll in further education after the program.³⁶⁵ The YCI program is an example of best practice in training-oriented programs, and helps to eradicate child labor by supplying educational opportunities to those children most vulnerable to falling into child labor conditions. In addition, Marriott's sustainability reports and targets, represent another CSR best practice because thorough reports are a fundamental element of a tangible, high impact, and measurable CSR program.³⁶⁶ Much of Marriott's comprehensive policy, unfortunately, does not specify how the policies are implemented, and there is no express inclusion of a triple-bottom line approach, though it is implied.

The accommodations sector is not the only portion of the T&T Industry in which businesses exhibit best practice CSR policies. Tour operators like Intrepid Travel, a boutique tour provider with over 1,000 employees offering small group responsible travel in adventurous destinations, enumerates a robust CSR policy designed to minimize the harm their operations have on people and the planet.³⁶⁷ Intrepid employs a detailed CSR strategy, operating in a responsible manner by "incorporating the principles of sustainable development in the way we provide our travelers with real life experiences."³⁶⁸ Intrepid expects staff and travelers to demonstrate the principles of responsible travel, respecting people, cultures, and local environments.³⁶⁹

Intrepid developed its policies on the three pillars of responsibility; environmental, economic, and social.³⁷⁰ Within each pillar Intrepid defines their commitments, steps for implementation, and how they incorporate those commitments into their trips, scheduled transportation, and their corporate structure.³⁷¹ They publish an independent travel code of conduct, information on 'voluntourism' opportunities, and responsible travel tips.³⁷² They communicate detailed targets and goals throughout the organization, monitor progress through surveys at all levels of the company, and produce transparent annual reports that

364. 2014 *Sustainability Report* 13, MARRIOTT, http://www.marriott.com/Multimedia/PDF/CorporateResponsibility/2014SustainRpt_FNL_lr.pdf.

365. *Id.*

366. UNWTO *A Compilation of Good Practices*, *supra* note 6, at 23.

367. *About*, INTREPID TRAVEL, <http://www.intrepidtravel.com/about> (last visited Apr. 3, 2016).

368. *Responsible Business*, INTREPID TRAVEL, <http://www.intrepidtravel.com/about/responsible-business> (last visited Apr. 3, 2016).

369. *Id.*

370. *Id.*

371. *See id.*

372. *See generally Travel Responsible Travel Code of Conduct*, INTREPID TRAVEL, http://www.intrepidtravel.com/sites/default/files/images/Responsible_Travel_Code-of-conduct.pdf; *see also Voluntourism and Intrepid*, INTREPID TRAVEL, http://www.intrepidtravel.com/sites/default/files/images/Voluntourism_and_Intrepid.pdf.

specifically address adverse human rights and environmental impacts, labor standards, and anti-corruption efforts.³⁷³

Intrepid makes a commitment to “protect human rights within [their] sphere of influence and to ensure that all parties impacted by [their] business including staff, travelers, suppliers, local communities and other stakeholders, are treated with fairness and respect.”³⁷⁴ The company re-publishes on their website the ChildSafe Network recommendations for protecting children in tourism,³⁷⁵ and notes that they are working with ECPAT, ChildWise, and ChildSafe Asia, to help protect children in the destinations they service.³⁷⁶ They also commit to support the principles of human rights contained in the UNDHR, acknowledge their responsibilities under the UNGP, and are members of the Global Compact.³⁷⁷

Nonetheless, Intrepid does not expressly dictate that all employees or third-party independent contractors they hire meet their countries’ minimum age requirements. This is likely because this type of guarantee from a services company operating in the developing world is just not possible. Instead, Intrepid publishes a policy which guarantees that all porters hired for trekking, hiking, or other expeditions, and for transportation, are over the age of 18.³⁷⁸ Work as a porter is hazardous, and Intrepid acknowledges this, guaranteeing that all porters are ages 18 to 55, well trained, and provided with adequate medical care.³⁷⁹ Intrepid has a strong CSR policy, enumerates procedures for implementation, sets strict goals, and transparently reports on their progress.³⁸⁰ The only shortcoming is that while Intrepid does have programs and policies aimed at improving the lives of the young and vulnerable, and they aim to meet all requirements of the UNGP in regards to their operations and throughout their sphere of influence, the company could do more to expressly address child labor by developing initiatives aimed at abolishing the worst forms of child labor in the destinations they service.

VI. CONCLUSION AND A CALL FOR AWARENESS:

That so many children and young people work in [T&T] is a fact virtually incompatible with the positive images people generally associate with tourism: happy memories and the anticipated pleasure of the next holiday; the hope of getting a job, of good business, or of better living conditions in the case of people in areas dependent on tourism. So

373. See, e.g., *Communication Progress Report 2014*, UN GLOBAL COMPACT, <https://www.unglobalcompact.org/participation/report/cop> (last visited Apr. 3, 2016).

374. *Responsible Business*, *supra* note 361.

375. See *7 better ways to Protect Children around the World*, CHILD SAFE NETWORK, http://d3oxn90f3yphmd.cloudfront.net/sites/default/files/intrepid_campaign/7%20Tips%20Internat%20A4%20summary.pdf.

376. *Responsible Business*, *supra* note 361.

377. *Id.*

378. *Porter Policy*, INTREPID TRAVEL, <http://www.intrepidtravel.com/porter-policy> (last visited Apr. 3, 2016).

379. *Id.*

380. *Responsible Business*, *supra* note 361 .

many positive expectations almost overshadow the darker sides of tourism.³⁸¹

It is for this reason, and those highlighted herein, that MNE's and SME's in the T&T industry have not only a particular opportunity, but also a distinct duty, to take action to drastically reduce all forms of child labor and effectively abolish the worst forms of child labor throughout the tourism value chain. Companies large and small should immediately take the necessary steps to implement best practice CSR policies which acknowledge their responsibility to respect human rights consistent at minimum with UNGP recommendations. Guided by recommendations highlighted herein from the Global Compact, OECD, and others, companies should enumerate the methodology through which they plan to take action in policies drafted in consultation with all relevant stakeholders. The policies should include independent auditing, consistent monitoring, and transparent reporting procedures.

Child laborers who provide services either directly or indirectly to tourists are those whose lives will be most rapidly improved as a result of the adoption of comprehensive CSR policies by T&T businesses. Without elsewhere to go, however, there is a risk that children who lose desperately needed income from a boost in enforcement of robust CSR policies in the T&T industry will turn to work in other industries, leading to recidivism, and may increase the number of children in hazardous work conditions. For this reason, the most effective CSR initiatives are those coupled with proper opportunities for children to transition to education after being removed from the workforce, financial support for laborers' families, and policies which generally alleviate poverty and other root causes of child labor. This is where corporate philanthropy programs aimed at reducing the overall burden of poverty and increasing opportunities for education can be of great assistance.

The T&T industry can, and should, reach far beyond seeking to abolish child labor in the services portion of their operations, towards abolishing child labor throughout the tourism value chain. Jobs in services are often where child laborers are most visible to tourists, and hence, where companies are likely to begin the elimination process. However, child labor also exists in the production and distribution of goods purchased by tourists, particularly in developing nations. T&T businesses should develop and enforce policies which call for the abolition of the worst forms of child labor throughout their supply chains.

The T&T industry is diverse; it includes MNE's and SME's, global and local brands, and the tourist value chain effectively stretches across all sectors of the economy. These variables complicate the development and enforcement of CSR policies aimed at reducing child labor in the industry. It is also exactly these variables that make the T&T industry a major driver of development; entrepreneurs, eco-tours, and mass-tourism operations all compete for the same visitors, and consumers tend to purchase goods and services in any given holiday

381. PLÜSS, *supra* note 1, at 15.

from a balance of all types of companies. Therefore, if the largest MNE's take sustainable operations seriously, they can drive the debate surrounding CSR policies and place the plight of child laborers at the forefront of the conversation.

There is no guarantee that even the most robust CSR policies will entirely eliminate child labor; as hopeful as the SDG's are, complete eradication of forced child labor is not possible on a global scale. The SDG's merely strive for *effective* eradication, particularly in regards to the worst forms of child labor as defined by ILO 182. It *is* possible, however, to bring the number of child laborers infinitely closer to zero, and there is a huge gap between 168 million and *zero*. In order to catalyze this change, additional investment in capacity building is required, and there is a distinct need "for public-private sector cooperation with a view to establishing policies, strategies and regulations relative to sustainable tourism development."³⁸² However, recommendations relating to CSR policy development need to be just an appetizer. The T&T industry requires additional guidance from the UNTWO, civil society, states, IGO's, and other initiatives in the form of industry wide and entity-specific guidelines on policy implementation and enforcement, certification, reporting, and dispute remedy.

"Nor should tourists become silent accomplices in child exploitation."³⁸³ In order to accomplish our common goals, governments should legislate and enforce laws effectively, and provide additional incentives to businesses that demonstrate compliance; non-state actors should effectively study, suggest, monitor, and advise stakeholders; and consumers should make their voices heard and encourage responsible tourism through their purchasing power. States and tourists should follow the Global Code of Ethics for tourism. Tourists can be made more aware of the likelihood that their 'comparatively inexpensive' trip to a developing nation may only be so 'inexpensive' because it is supported by child labor. Tourists should look for reliable information when planning travel in order to select the most responsible forms of travel and accommodation available. Governments and civil society organizations should provide tourists with access and information on planning sustainable travel.

All of these recommendations, however, are responsive in nature; tourists and governments only react to what is available and reasonably accessible in the market. This is why corporations must lead the way by providing a greater range of options for consumers to engage in responsible tourism. The T&T industry is deeply reliant on great societies, past and present, as inherent to its function and purpose, and therefore T&T businesses have a distinct responsibility to protect the people who make up the future of those great societies, the children.

382. Final Report, WORLD ECOTOURISM SUMMIT 87 (2002), <http://www.gdrc.org/uem/ecotour/Final-Report-WES-Eng.pdf>.

383. PLÜSS, *supra* note 1, at Exec. Summary.

THE SUBMISSION OF THE SOVEREIGN: AN EXAMINATION OF THE COMPATIBILITY OF SOVEREIGNTY AND INTERNATIONAL LAW

*Cameron Oren Hunter**

I. INTRODUCTION

One of the perennial concerns with international law is that it exists merely as a legal fiction. While there are many considerable problems that plague the coherence of international law and its prospects for success (including questions of enforceability, democracy, and unity), the focus of this paper is narrower. Specifically, the primary inquiry of this paper is whether the notion of sovereignty is compatible with the limitations imposed by treaties and international laws. At the core of this issue is the apparent paradox of freedom. This paradox is illustrated by the question of whether an entity can maintain freedom and simultaneously retain the ability to become bound. On the one hand, if an entity becomes bound, through submission to treaties for example, it suffers a loss of freedom. On the other hand, if an entity is prohibited from becoming so bound, this prohibition also functions as an impediment to freedom. In this paper, I examine these questions in the context of the sovereign state vis-à-vis international laws and treaties, and recommend a potential reconciliation to the paradox. This reconciliation lies in a simple reformulation of the concepts of autonomy and sovereignty, relying on the connection drawn between the two by Timothy Endicott. This reformulation consists of the recognition that the truest manifestations of autonomy and sovereignty include the possibility of the abdication of that power. In line with the thinking of Immanuel Kant, true freedom, and the fullest expression of sovereignty, is contained within the ability to self-legislate, and to accept and remain subject to limitation.

Having suggested a potential answer to the problem, I briefly survey contemporary international law through the lens of the International Court of Justice and its operations, to see if it comports with the solution articulated herein. The question will then be raised as to whether a sovereign state, having bound itself through submission to either international law or to the terms of a treaty, can step outside of the bounds of its obligation and engage in a kind of civil disobedience on the international stage, while simultaneously remaining sovereign. With the foregoing in place, I conclude with an examination of what it means for a

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sovereign state to truly become bound. This will aid in determining the precise extent to which a sovereign may bind itself, and correspondingly, just how free a sovereign state is.

II. THE PARADOX

In order to explore the paradox of freedom, Jean L. Cohen articulates a useful definition of sovereignty:

It . . . has an internal and external dimension. Internally, sovereignty involves supremacy: a claim to unified comprehensive, supreme, exclusive, and direct authority within a territory over its inhabitants construed as members of a polity. The correlative external dimension involves a claim to autonomy from outside powers. External sovereignty entails independence and impermeability of the territorial state to jurisdictional claims or political control by foreign authorities.¹

Sovereignty thus carries with it requirements relating to both the domestic and the foreign. In this paper I will focus on an examination of sovereignty in the external, foreign context.

In framing the paradox to which this paper responds, Timothy Endicott writes: “[t]o be free is not to be bound. In a sense, then, a state is not free if it is bound by treaties. Yet a state would be constrained by a severe disability if it lacked the capacity to pursue its purposes by entering into treaties.”² The paradox of freedom for the sovereign is whether the sovereign is so mighty as to be incapable of becoming bound, or so mighty as to be able to bind itself completely.³ To avoid the appearance of a false dilemma, utter inalienability and complete capitulation are not the only two options argued for by legal philosophers. Endicott draws an excellent parallel between the autonomous individual and the sovereign state, in an effort to more effectively understand and engage the

1. JEAN L. COHEN, SOVEREIGNTY IN THE CONTEXT OF GLOBALIZATION: RETHINKING LEGALITY, LEGITIMACY, AND CONSTITUTIONALISM 26-27 (2010), <https://mgnyunt.files.wordpress.com/2015/02/globalization-sovereignty.pdf>.

2. Timothy Endicott, *The Logic of Freedom and Power*, in THE PHIL. OF INT'L LAW 245, 246 (Samantha Besson & John Tasioulas, eds., 2010), <https://iuristebi.files.wordpress.com/2011/07/the-philosophy-of-international-law.pdf>.

3. *Id.* at 246, note 3 (citing Henry Shue, *Limiting Sovereignty*, in 16 HUMANITARIAN INTERVENTION & INT'L REL. (Jennifer M. Welsh, ed., 2003)). Endicott notes that other legal philosophers, and specifically Henry Shue, argue that sovereignty is necessarily limited because sovereignty, as a right, implies duties to other states, and that the principle of non-intervention presents a limitation to all sovereign states. However, this seems to be a practical objection, rather than a conceptual one. Surely, it is possible to envision an international theater in which only one state is sovereign and all others enjoy only limited freedom in deference to the sovereign state. Therefore, the notion of sovereignty does not appear to be threatened by the concerns raised by Shue. The conception of sovereignty advocated herein also allows for limits, but these limits must be voluntarily undertaken. A sovereign is limited by the sovereignty of another state only to the extent that it willingly refrains from imposing upon that state's sovereignty.

problem.⁴ This autonomous person analogue demonstrates an effort to carve out a middle ground. John Locke, while having a robust sense of property and self-ownership, argued that this self-governance ended at the threshold of selling oneself into slavery.⁵ For Locke, complete forfeiture of autonomy constitutes a violation of autonomy.⁶ Therefore, on his view, not only can autonomy be restrained in this way and yet retain its autonomous status, it is *required* that this restraint be placed upon autonomy, lest it violate itself. However, this middle ground is far from uncontested territory. Robert Nozick insists that this ownership of self is absolute, arguing that logical consistency demands a freedom to do with oneself as one pleases, up to and including the complete abdication of autonomy.⁷

In approaching this problem, Endicott draws upon what he views as an inconsistency in the work of John Stuart Mill. He argues that Mill adopts an absolutist approach to human autonomy pursuant to Mill's insistence that harm to others is the only acceptable basis for limiting autonomy.⁸ Yet, as Endicott points out, Mill claims that slavery, even when voluntarily entered into, violates this autonomy,⁹ seemingly because such would constitute the ultimate relinquishment of autonomy. Mill writes, "by selling himself for a slave, he abdicates his liberty; he foregoes any future use of it beyond that single act."¹⁰ Voluntary abdication of autonomy for Mill, as for Locke, is impermissible.¹¹ But, Endicott inquires, what of contracts? Concerning Mill's favorable view of the enforceability of contracts,¹² Endicott protests that under such a view, "I am allowed to alienate my freedom to use my car."¹³ He continues:

If we do have liberty to regulate our affairs by mutual agreement, and the regulation to be enforceable against my will, why are we not to have the liberty to regulate our affairs by agreeing that I will be your slave? If

4. *Id.* at 252. Throughout this paper, the hypothetical sovereign state will be treated anthropomorphically in order to retain the analogy between the state and the individual, and to serve as a heuristic for the inner-workings of a state, including its government and its citizens.

5. JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 10 (Jonathan Bennett ed., 2008) (1689), <http://www.earlymoderntexts.com/assets/pdfs/locke1689a.pdf>.

6. *Id.*

7. ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 58 (1974); see also J. Philmore, *The Libertarian Case for Slavery*, in 14 *THE PHILOSOPHICAL FORUM* NO. 1, 43, 43 (1982), available at <http://cog.kent.edu/lib/Philmore1/Philmore1.htm> ("[p]eople are only allowed the temporary security afforded by capitalizing a portion of their earning power (i.e., by renting or hiring themselves out for a specified time period), but are denied the freedom of obtaining a maximum of security by selling all of their human capital").

8. Endicott, *supra* note 2, at 247-49; JOHN STUART MILL, *ON LIBERTY* 13, 69-70, 76 (1859), <http://socserv.mcmaster.ca/econ/ugcm/3113/mill/liberty.pdf>.

9. Endicott, *supra* note 2, at 247-49; MILL, *supra* note 8, at 94-96.

10. MILL, *supra* note 8, at 94-96.

11. *Id.*; LOCKE, *supra* note 5.

12. MILL, *supra* note 8, at 89 ("[i]t is usual and right that the law, when a contract is entered into, should require. . . that certain formalities should be observed. . . in case of subsequent dispute, [that] there may be evidence to prove that the contract was really entered into").

13. Endicott, *supra* note 2, at 248.

it is freedom to be able to bind myself to deliver my car to the purchaser (with the resultant loss of freedom after I agree), why is it not freedom to be allowed to bind myself to be a slave (with the resultant loss of freedom after I agree)?¹⁴

As Mill purports to allow for the voluntary surrender of some freedom (as in the forfeiture of the freedom to use some commodity that is sold to another), Endicott wonders what prevents the autonomous individual from surrendering all of that freedom, as in the case of slavery.¹⁵ The prohibition placed on the total abdication of autonomy seems somewhat arbitrary. Endicott suggests that the solution to this paradox lies in the denial of an absolute autonomy.¹⁶ However, Endicott is perhaps too quick to abandon the absolutist conception.

III. RECONCILIATIONS

In his attempts to resolve the paradox of whether a sovereign is so powerful that it cannot bind itself, or so powerful that it can subject itself to any degree of restriction, Endicott writes that “[t]he solutions in the two cases [of state and person] demand an understanding of what it takes for a person to lead a good life, and for a state to be a good state.”¹⁷ Endicott’s solution is to introduce an additional principle by which to adjudicate between the two prongs of the paradox. He appeals to the good of the state as this guiding principle,¹⁸ and declares that

State sovereignty is a complex of various forms of power and independence that is complete for the purposes of states. In the case of states, the resolution of the paradox of freedom lies in an identification of those powers and forms of independence. The purposes of states are identical with the purposes that a good state actually pursues. So the content of sovereignty is determined by the powers and forms of independence that a state needs *in order to be a good state*.¹⁹

However, such a third principle is unnecessary, for one need not look beyond the two options contemplated within the paradox itself for a solution. The paradox arises from the misunderstanding that neither of the two competing options is coherent, and thus that there is need of some third consideration. However, this understanding is incorrect, as a coherent defense *can* be given for one of the two competing conceptions of sovereignty: the conception of sovereignty as the ability to surrender sovereign power. If such a defense is possible, then Endicott’s move beyond the paradox by appealing to an additional principle, the good of the state, is an unnecessary one, as the paradox is resolved through a closer examination of sovereignty and the notion of what it means to become bound. Endicott’s solution

14. *Id.*

15. *Id.* at 247-49.

16. *Id.* at 252.

17. *Id.* at 247.

18. The “good” here is understood in the normative sense.

19. Endicott, *supra* note 2, at 252.

to the problem perhaps possesses pragmatic utility, in that it can provide guidance as to *which* limitations a state should become bound. But in doing so, his solution abandons the quest to resolve the initial paradox of whether true freedom consists of the ability or the inability to surrender the freedom that makes it sovereign. Therefore, Endicott's "solution" to the paradox of freedom proves to be no solution at all.

Endicott is therefore overly hasty in his desertion of absolute autonomy, and it is this premature rejection that causes him to look beyond the mark while grappling with the problem. The concept of absolute autonomy coheres with the concept of sovereignty far better than a watered down account of freedom. The notion of sovereignty denotes supreme power and authority,²⁰ a definition saturated with absolutism. Supreme power must be accompanied by absolute autonomy, or it simply fails to be supreme. Something less than this complete autonomy implies some constraint, some impediment to total power, some threat to true sovereignty. The disposal of an absolute conception of autonomy necessitates the disposal of sovereignty itself, as something less than supreme power and authority will be represented by the diminished conception. For this reason, the legal philosopher must be cautious in rejecting absolute autonomy, lest she inadvertently do away with the entirety of the concept of sovereignty. Endicott's arguments must be closely scrutinized in order to determine if the abandonment of absolute autonomy, and, by extension, sovereignty itself, is the only way to escape the paradox. I suggest that it is not.

Rather than a wholesale rejection of absolute autonomy, one must simply bite one of the two bullets of the paradox.²¹ In the affirmation of an absolute concept of autonomy, one must accept either that an autonomous individual may become bound to the point of a complete eradication of autonomy, or that the individual is limited from engaging in activities that would be detrimental to her autonomy, which is itself a limit to autonomy. The question, then, is which of these appears to better exemplify autonomy.

A potential answer regarding which bullet to bite lies within the writings of Immanuel Kant. Kant suggests that true autonomy consists of the ability to self-legislate, or of the imposition of bounds upon oneself.²² It appears then, that Kant accepts the first of the two paradoxical bullets enumerated above: an autonomous individual *is* capable of binding herself out of her autonomy. Kant articulates both a negative and a positive definition of autonomy. His negative definition consists

20. *Sovereignty*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/sovereignty> (last visited Mar. 5, 2016).

21. *Bite the Bullet*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/bite%20the%20bullet> (last visited Mar. 5, 2016). As used here, to bite one of two bullets is to do one of two unpleasant or painful things because it is necessary, even though one would prefer to avoid doing so.

22. IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 45 (Mary Gregor trans., 1997) (1785), <http://blog.nus.edu.sg/acerwei/files/2012/12/Kant-Groundwork-ng0pby.pdf>.

of being free from alien restraints, free from heteronomy.²³ His positive definition is illustrated by the being who selects her own ends.²⁴ The counterargument to the position Kant elucidates, and to the position this paper endorses, is that any bounds, even self-selected bounds, are an impediment to autonomy and freedom. However, the response to this objection lies in the fact that all action necessarily binds or limits autonomy. In opting for and pursuing one course, one is no longer free to choose and pursue an alternative course that she might have pursued. She is free to course-correct, but in choosing course *a* at time *x*, and in following up with the actions consistent with that choice, she is no longer free to choose course *b* at time *x*, because she selected course *a* and acted upon that decision. The selection and pursuit of any action necessarily precludes the pursuit of other, incompatible actions. One is often free to change courses later, but in choosing and following through with some action, an agent loses out on other courses of action she might have initially pursued. Since it is impossible to completely refrain from action, all autonomous creatures are constantly acting.²⁵ All creatures are thus at any given moment either acting under alien influence, or acting under their own will. If the above objection (that any bounds, even those that are self-selected, hinder autonomy) is a valid objection, it would follow that no creature could possibly be autonomous, as all creatures, through making decisions and taking action, are constantly precluding other routes they might have taken, and are thus constantly imposing bounds upon themselves. Therefore, if a coherent understanding of autonomy is to be retained, partial forfeiture of autonomy by an autonomous choice must be possible. Without this understanding, autonomy is impossible, as all agents are constantly forfeiting partial autonomy by acting, thereby precluding other actions. And if partial forfeiture of autonomy is compatible with autonomy, so too is complete forfeiture, absent a compelling limiting principle. Endicott, Mill, and Locke fail to provide such a limiting principle. It is in this sense then that autonomy is absolute: it allows such a robust and radical self-ownership that even its complete abdication is possible.²⁶ In spite of his opposition to the absolute notion of autonomy, Endicott beautifully describes how this radical conception would look were he to affirm it: "the choice to pursue a course that will deprive me of all freedom—leaving me a hostage, a prisoner for life, a slave. . . can be a true expression of my own independence and autonomy. . . . Then, it would be vicious to interfere with my freedom to sacrifice my freedom."²⁷ Far from limiting autonomy, the ability to exercise autonomy until its own obliteration constitutes a

23. *Id.* at 50.

24. *Id.* at 45.

25. The instance of the comatose patient, and other situations in which an individual is incapable of action or intention, are admittedly instances of a person who is not an autonomous agent, and are thus precluded from this discussion.

26. See MILL, *supra* note 8, at 13. This is not to say however, that there are not other principles that might serve to limit autonomy. John Stuart Mill's harm principle, which limits autonomy when it threatens others, might be one such example.

27. Endicott, *supra* note 2, at 250.

full consummation of freedom. This is perhaps what Endicott is onto when he writes: “[b]eing bound. . . is an aspect of a normative ordering of our lives that enhances my autonomy. My life is more my own to live, because of my ability to bind myself to perform agreements.”²⁸

The absolutist view then takes on a reconstructed form, as an understanding of autonomy as a condition absolutely free of any and all limitation is incoherent. This reformulation is reminiscent of the move made to defend the omnipotence of God. The paradigmatic charge against God’s omnipotence was that it was a logical inconsistency to say that His omnipotence meant that He possessed the power to bring about “any state of affairs whatsoever.”²⁹ Examples of the problems with such an understanding include the charges that God would be unable to create a rock so large that He could not lift it, and that He would be unable to alter the necessary truths of logic and mathematics. In response, omnipotence was not done away with, but merely reformulated. A common contemporary interpretation of this trait is that it refers to “maximal power,” or that a being is omnipotent “provided that its overall power is not possibly exceeded by any [other] being.”³⁰ With this re-defining of the term, the notion of God as omnipotent remains intact.³¹ A similar move is proposed here with the notion of autonomy. To say that autonomy means freedom to do any and all things, but simultaneously that autonomous acts cannot lead to a reduction in autonomy, is not logically coherent. Therefore, a differing conception is requisite, if the term is to survive. As I have suggested, this reconceptualization consists of autonomy as radical self-ownership, such that any and all actions may be engaged in, up to and including the complete forfeiture of autonomy itself.

IV. APPLICATION TO THE SOVEREIGN

The previous section was devoted to a rejection of Endicott’s non-absolutist concept of sovereignty, and to exploring personal autonomy in light of the connection Endicott made between autonomy and sovereignty. Emerging from the question of autonomy, the task is now to see whether the parameters of autonomy translate into guiding principles for state sovereignty. I have explored a robust conception of autonomy, and suggested that it overcomes the logical tension Endicott elucidated. The same tension exists for sovereignty, and I suggest that it is resolved in the same way. Sovereignty also appears threatened by the possibility of a diminished power of self-governance.³² However, that is because the concept of sovereignty, as that which is absolutely free from any kind of limitation, is incoherent. A reformulation of sovereignty, one that recognizes that its fullest expression lies in the possibility of its permanent renunciation, breathes fresh life

28. *Id.* at 248.

29. Joshua Hoffman & Gary Rosenkrantz, *Omnipotence*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Jan. 12, 2012), available at <http://plato.stanford.edu/entries/omnipotence/#2>.

30. *Id.*

31. *See id.*

32. Endicott, *supra* note 2.

into the concept, and allows for an intelligible discussion of sovereignty and its limits.

Kant's view of self-legislation as the ultimate exemplification of freedom informs the proper conception of the sovereign.³³ As the fullest manifestation of autonomy is the ability to abdicate that very autonomy, so too is sovereignty fully realized in the ability to yield that sovereign power. A concept of sovereignty, like a concept of autonomy, which espouses the view that the presence of any constraint is incompatible with that power, is itself nonsensical. States, like individuals, engage in actions. As discussed above, actions necessarily preclude other actions, and therefore, by acting, a state limits what it is free to do. A notion of sovereignty that calls for an absolute bar to any and all limits is unintelligible, and is therefore to be rejected. Sovereignty, properly understood as allowing, and in fact requiring, the ability to surrender either some or all sovereign power, is a concept that is plausible in the international theater.

However, these limits, acceptable under this understanding of sovereignty, must be self-imposed limits. Heteronomy, or resultant action caused due to influences external to the individual or state, is incompatible with and antithetical to autonomy,³⁴ and, by extension, to sovereignty. Therefore, international law has but one recourse to legitimacy: the voluntary self-binding of each state to the good of the global community.³⁵ Sovereignty is thus compatible with international law only insofar as nations voluntarily assent to it. Legitimacy is attained only when states willingly bind themselves to each other, and any heteronomous means, compulsory or otherwise, threaten to dismantle this international project. Coercion invalidates the system and undue influence threatens the entirety of the enterprise. Sovereignty only finds its actualization in the ability to *willingly* surrender that power.

V. REFLECTIONS ON THE GROUND

To have legitimate international law, it is not enough for it to be conceptually possible. The practices must mirror the theory. More specifically, articulating a legitimate conception of international law does not automatically legitimize the system currently in place. The system must be consistent with the conception in order for it to achieve the articulated legitimacy. It must then be asked: is this conception of sovereignty reflected in how international law currently operates? Does it reflect how things are on the ground? To answer these questions, an examination of the current international theater is warranted in order to determine whether the stage is set in a manner conducive to the kind of sovereignty contemplated within this paper.

The International Court of Justice (ICJ) may serve as the paradigm and representative for contemporary international law. If there is anywhere to look for

33. KANT, *supra* note 22.

34. *Id.* at 41.

35. *See id.*

answers in this inquiry, it is the United Nations (UN).³⁶ The ICJ is “principle judicial organ” of the UN, and is thus ideally situated for an examination of the current practices of international law.³⁷ The ICJ handles two kinds of cases: legal disputes between states that have been submitted to the court by the states (contentious cases) and requests for advisory opinions.³⁸ In line with the theory of sovereignty articulated above, the ICJ’s authority is limited to those states that have consented to its jurisdiction.³⁹ This comports well with Kant’s account of self-legislation.⁴⁰ If freedom is realized in acts of voluntary self-binding, and if sovereignty can be preserved in only this way, then this is just the kind of system needed to allow for states to engage in self-legislation, a system without compulsion.⁴¹ Such a system free of coercion is necessary, as such pressure would invalidate the legitimacy of the endeavor.

A state may consent to the authority of the ICJ in three different ways: agreeing to submit a dispute to the ICJ; the triggering of a clause contained within a treaty which grants the ICJ authority to resolve an issue; or through general declarations to be bound to the authority of ICJ in the event of a dispute with a state which has a similar declaration.⁴² All three of these methods appear to align with the above elucidation of sovereignty: it consists in the freedom of states to voluntarily bind themselves, and to become subject to the authority of an external entity.

Two cases will serve initially to demonstrate whether the ICJ functions, or at least whether it can function, in a way conducive to state sovereignty with those cases that it entertains. The first example that I consider of the ICJ exercising this authority is *Nicaragua v. Costa Rica*, a contentious case submitted to the ICJ for adjudication.⁴³ In this case, Costa Rica sought relief from the ICJ on the grounds that Nicaragua had occupied a portion of its territory with its army and had intentionally harmed Costa Rica’s rainforests and wetlands in its construction of a canal.⁴⁴ The ICJ took on the case only in light of the fact that Costa Rica invoked the American Treaty on Pacific Settlement, which Costa Rica and Nicaragua had both signed and ratified.⁴⁵ Article XXXI of the Treaty provides that the ICJ shall

36. *What We Do*, U.N., <http://www.un.org/en/sections/what-we-do/index.html> (last visited Mar. 5, 2016) (Formed shortly after World War II, the U.N. is an international coalition tasked with “the maintenance of international peace and security.”).

37. *The Court*, I.C.J., <http://www.icj-cij.org/court/index.php?p1=1> (last visited Dec. 31, 2015).

38. *How the Court Works*, I.C.J., <http://www.icj-cij.org/court/index.php?p1=1&p2=6> (last visited Dec. 31, 2015) [hereinafter ICJ].

39. *Id.*

40. KANT, *supra* note 22.

41. *Id.*

42. ICJ, *supra* note 38.

43. *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.)*, Application Instituting Proceedings (Nov. 18, 2010), <http://www.icj-cij.org/docket/files/150/16279.pdf>.

44. *Id.*

45. American Treaty on Pacific Settlement (“Pact of Bogota”) art. 31, Apr. 30, 1948, 30 U.N.T.S. 449.

have jurisdiction over disputes between the parties to the treaty.⁴⁶ The ICJ takes special care to state precisely how it possessed jurisdiction over the case, and this stringent adherence to its limits is conducive to the conception of sovereignty articulated in this paper.⁴⁷

The second example is that of *Australia v. Japan*, another contentious case submitted to the ICJ.⁴⁸ Australia brought this action against Japan claiming that Japan's whaling practices constituted a breach of the International Convention for the Regulation of Whaling.⁴⁹ The ICJ accepted jurisdiction over the matter due to declarations made by the parties that the ICJ should have jurisdiction should such a dispute arise, Australia having made its declaration on March 22, 2002, and Japan having made its declaration on July 9, 2007.⁵⁰ That the ICJ's acceptance of this case was contingent upon the declarations made by the states involved again demonstrates a commitment on the part of the ICJ to accept jurisdiction only over states that have agreed to such.⁵¹

But perhaps even more important than those cases the ICJ entertains are the cases it does not entertain. Whether the ICJ does in fact limit its jurisdiction to those cases over which it gains jurisdiction through one of the three methods described above is perhaps the truest test of its respect for, and deference to, state sovereignty. Whether the ICJ actually declines to hear any cases is one way this can be demonstrated. One such case is that of *Yugoslavia v. United States of America*.⁵² This case arose when Yugoslavia instituted proceedings against the United States, alleging that the United States had violated its obligation not to use force against Yugoslavia by bombing Yugoslav territory.⁵³ Yugoslavia argued that jurisdiction was proper pursuant to Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide,⁵⁴ to which both Yugoslavia and the United States were parties.⁵⁵ The convention provided that disputes between the parties to the convention regarding the "interpretation, application or fulfillment" of the convention were to be submitted to the ICJ.⁵⁶ The court did not dispute the

46. *Id.*

47. Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.), Application Instituting Proceedings (Nov. 18, 2010), <http://www.icj-cij.org/docket/files/150/16279.pdf>.

48. Whaling in the Antarctic (Austl. v. Japan: N.Z. intervening), Application Instituting Proceedings (May 31, 2009), <http://www.icj-cij.org/docket/files/148/15951.pdf>.

49. See International Convention for the Regulation of Whaling, Dec. 2, 1946, 161 U.N.T.S. 72.

50. Whaling in the Antarctic (Austl. v. Japan: N.Z. intervening), Application Instituting Proceedings (May 31, 2009), <http://www.icj-cij.org/docket/files/148/15951.pdf>.

51. *Id.*

52. Legality of Use of Force (Yugoslavia v. U.S.), Application Instituting Proceedings, 1999 I.C.J. (June 2, 1999), <http://www.icj-cij.org/docket/files/114/14129.pdf>.

53. *Id.*

54. Convention on the Prevention and Punishment of the Crime of Genocide, art. 9, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

55. Legality of Use of Force (Yugoslavia v. U.S.), Application Instituting Proceedings, 1999 I.C.J. (June 2, 1999), <http://www.icj-cij.org/docket/files/114/14129.pdf>.

56. Genocide Convention, *supra* note 54, art. IX.

existence of the convention, nor the fact that both countries were parties to that convention, but it pointed out that the United States ratified the convention with a reservation.⁵⁷ This reservation provided that, regarding Article IX of the convention, before the United States could be properly made a party to any action under the jurisdiction of the ICJ, its specific consent was required.⁵⁸ This reservation was not prohibited by the convention, nor was it objected to by Yugoslavia.⁵⁹ The court observed that the United States had not provided its consent, and that it had indicated that it would not do so.⁶⁰ Therefore, the court held that it did not have jurisdiction over the case.⁶¹

This case is an important illustration of the ICJ's refusal to entertain cases over which it does not have jurisdiction, even in the weightiest of circumstances. The court noted that it was "deeply concerned with the human tragedy, the loss of life, and the enormous suffering in Kosovo" that had preceded this action, and further articulated its concern "with the continuing loss of life and human suffering in all parts of Yugoslavia."⁶² In spite of the enormity of the circumstances surrounding the action, the ICJ declined to hear a case over which it did not have jurisdiction. In refusing to hear the case, the court stated that it "does not automatically have jurisdiction over legal disputes between States," and further, that "one of the fundamental principles of [the Court] is that it cannot decide a dispute between States without the consent of those States to its jurisdiction."⁶³ The rejection of this case is encouraging in terms of the court's determination to adhere to the principles of sovereignty, and its refusal to overstep its bounds. The acceptance of this case might have allowed the court to exert tremendous political influence, and yet it refused, recognizing that it did not have jurisdiction. These cases, when considered together, indicate that the requisite freedom, or at least an encouraging start, is provided by current international law, such that states can recognize and exercise the kind of sovereignty articulated in this paper.

VI. CIVIL DISOBEDIENCE OF THE SOVEREIGN

It therefore appears that the notions of sovereignty and international law are at least conceptually compatible, as the fullest expression of sovereignty requires the ability to willingly abrogate that sovereign power (one example of which would be conformity to international law). It appears further that one of the paradigm examples of the current status international law, the ICJ, comports with this conceptual theory, as the court only exercises its power over those sovereign states

57. Legality of Use of Force (Yugoslavia v. U.S.), Order, 1999 I.C.J. (June 2, 1999), <http://www.icj-cij.org/docket/files/114/14129.pdf>.

58. *Id.* ¶ 21.

59. *Id.* ¶ 24.

60. *Id.* ¶ 27.

61. *Id.* ¶ 28.

62. *Id.* ¶ 15.

63. Legality of Use of Force (Yugoslavia v. U.S.), Order, 1999 I.C.J., ¶ 19 (June 2, 1999), <http://www.icj-cij.org/docket/files/114/14129.pdf>.

that voluntary acquiesce to its jurisdiction. But can a state violate an agreement to which it has voluntarily bound itself? Assuming it is for noble and not merely self-serving reasons, can a state engage in a kind of international civil disobedience? Generally, civil disobedience refers to an act of a citizen, rather than a state, in which she disobeys the laws of her nation, in an effort to see the law altered.⁶⁴ However, the question is pertinent here, as the subject of consideration is that of becoming bound. May a sovereign state breach a self-imposed bound if it appears that its breach will serve purposes similar to the aims of the citizen who engages in civil disobedience?

Civil disobedience on the domestic scale is perhaps more complicated than this kind of "civil disobedience" might be in an international arena. For the individual defying the laws of her country, one of the central questions that arises is whether the individual is bound by those laws in the first place.⁶⁵ It must then be determined where this obligation arises from, be it grounded in the citizen's consent, actions invoking the principle of fairness, or some other source.⁶⁶ Only then can the question of civil disobedience itself be engaged. In the international context, with the articulation of sovereignty as something that allows for its own alienation, the question is similar: from what source does an international obligation arise, provided there is such an obligation? If the only valid enactment of international law consists in the voluntary binding of states to each other, then the source of the obligation is obvious: it rests on a clear expression of consent by the sovereign state.⁶⁷

As a preliminary matter, an articulation of civil disobedience is required. Four generally accepted criteria for civil disobedience include: conscientiousness, communication, publicity, and non-violence.⁶⁸ Generally, conscientiousness refers to an intentional breach of the law.⁶⁹ Communication refers to an explicit attempt both to reject the law then on the books and to call for change.⁷⁰ Publicity requires that the disobedience be public, as a violation that went unnoticed would have little chance at changing the law.⁷¹ Finally, civil disobedience generally consists of activity that is non-violent.⁷² This concept of civil disobedience must be understood before the question of whether states can engage in an international civil disobedience can be addressed.

64. Kimberly Brownlee, *Civil Disobedience*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, (last updated Dec. 20, 2013), available at <http://plato.stanford.edu/entries/civil-disobedience/#FeaCivDis> [hereinafter *Civil Disobedience*].

65. *Id.*

66. *Id.*

67. In a *moral* context, the notion of consent is somewhat problematic. However, many of these problems arise when consent is claimed to be the basis of *moral* obligation. This question of morality is undoubtedly beyond the scope of this paper. Consent is presented here as the basis for *legal* obligation.

68. *Civil Disobedience*, *supra* note 64.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

As the term “civil disobedience” does not necessarily refer to anything states do (as states do not think and act in the same way individuals do), it is important to understand how this question would even arise for the sovereign in an international context.⁷³ Just as a citizen engages in civil disobedience when conscientiously, communicatively, publicly, and peacefully violating the law, so too does a state engage in a similar act when it defies international law in this way. The question then is: can a state engage in such an action? Or more specifically, can a state engage in such an action in a manner compatible with its sovereignty? Again, the object of this examination is the state that has voluntarily submitted to the jurisdiction of an external authority, such as the ICJ, and has thus become bound to one of its decrees, or voluntarily become bound to some agreement with another state, or voluntarily become bound in some other way. With this framework, the inquiry is whether a state can violate the bounds to which it has subjected itself, even for reasons perceived to be noble.

The abdication of sovereignty at this point appears less troublesome than the abdication of autonomy, as there are many issues bound up with autonomy that are absent for the issue of sovereignty. As Endicott noted: “[u]nlike a slavery contract, a treaty of confederation could be a legitimate act of sovereignty, even if it terminates a nation’s sovereignty. A free state might exercise its sovereignty well for the purposes of a good state, precisely in building a new nation along with other states.”⁷⁴ The implicit assumption by Endicott is that there is no situation in which slavery would enhance a person’s good, in a moral sense. Moreover, civil disobedience itself almost always entails additional moral considerations.⁷⁵ The same may be said for any kind of promise. Consider the individual who voluntarily makes the promise that she will not cross a certain chalk line that encircles her, until some event comes to pass (e.g., permission from the promisee, or the passage of a certain amount of time). Is that individual obligated to remain within the chalk parameters until death from hunger or thirst overtakes her? This question comes down to a collision between the values of honesty/integrity and the sanctity of life. However, the aim of this paper is not to adjudicate between these two competing goods, nor is its ambition moral analysis. Rather, the question is one of freedom, and specifically the freedom of the state. While the state, if it were to cease to exist, would not necessarily result in the loss of life, certainly it is possible to craft an example in which a state finds itself having to decide in between honoring an agreement, and the potential for loss of life. Such an example might include the instance in which a state upholds a treaty knowing it will lead to war. But again, in this paper I avoid addressing the question of integrity versus life, and consider the problem descriptively and modally, not normatively. In other words, the question presented here is not what the sovereign state *should* do, but what it *can* do. The articulation of sovereignty adopted herein

73. *Id.*

74. Endicott, *supra* note 2, at 259.

75. These considerations may also take other forms, including legal or procedural concerns.

is that sovereign states have the ability to bind themselves, even to the abdication of sovereignty itself. Therefore, the question is whether a sovereign state, having bound itself in this way, has the *ability* to defy a decree to which it has become bound and yet remain sovereign. Can a sovereign state engage in international civil disobedience by defying bounds it has taken upon itself? With this understanding of sovereignty, the question must be answered in the negative.

If the question were answered in the affirmative, what would this say of the sovereignty of that state? If bounds can be broken any time a state wills it, was the state really bound at all? And if the state lacks the ability to bind itself, what does *this* say of its sovereignty? Even if a state follows the generally accepted criteria for civil disobedience, breaching an obligation conscientiously, communicatively, publicly, and peacefully, and does so for noble reasons, such a breach of a self-imposed bound runs contrary to the conception of sovereignty adopted in this paper. The state which violates a decree to which it is bound, discovers that it was never actually bound, and encounters the startling epiphany that it might be incapable of such self-binding.

VII. TO BE BOUND

To be bound means to become limited, confined, or restricted,⁷⁶ with the connotation, in the strongest sense of the term “bound,” suggesting that such restriction is inescapable. To be bound, in this sense, has a different connotation than the binding contemplated in contract law, which generally refers to an obligation adhered to under pain of some negative consequence.⁷⁷ More clearly stated, the bounds brought on through contractual obligation are binding *only insofar as* a party wishes to avoid the negative consequences associated with the breach of that contract. To become bound to the extent contemplated herein implicates a stronger meaning of the word. The word “bound” can be used to denote any general obligation, but it can also be used to denote a limit.⁷⁸ This kind of limit involves an amount of finality, or a threshold that cannot be crossed. It is not, as with contract law, a limit that may be surpassed as long as a party is willing to accept the ramifications of that action.⁷⁹ Rather, this kind of limit is akin to an individual confined by bonds, whose movement is thus restricted. For this individual, it is not some monetary penalty or severed business relation which forms the boundary of possible action, but the constraints placed upon her. In this example, the constraints are physical, and may consist of handcuffs, chains, rope, or some other physical impediment. The constraint called for in the case of the sovereign is less tangible, but no less real. It consists of the power of the sovereign state to constrain itself through its will. The truly sovereign state will possess the

76. *Bound*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/bound> (last visited Mar. 5, 2016) [hereinafter *Bound*].

77. *Contract*, BLACK'S LAW DICTIONARY (10th ed., 2014) [hereinafter BLACK'S LAW DICTIONARY].

78. *Bound*, *supra* note 76.

79. BLACK'S LAW DICTIONARY, *supra* note 77.

requisite control over itself to become bound in the same way the captive is bound: it is not simply obligated to refrain from some action; rather, a truly sovereign state *will not* engage in that action. In a sense, the sovereign state *cannot* violate such bounds, for it will then cease to be sovereign in the robust sense understood herein. For the purposes of this paper, “cannot” and “will not” amount to the same result: a bar to action. In the case of the captive, this inaction is involuntary. For the sovereign state, it is necessarily voluntary.

If a state ostensibly claims to bind itself, but later rescinds its agreements, then there was an escape from the professed binding, and thus the state was never truly bound at all, having possessed the same means of escaping its obligations from the moment those obligations were incurred. If the captive is placed in bonds, and, upon her first attempt to escape, discovers that the ropes placed around her arms were never tied, it turns out she was not bound, and that she is free to flee. To adopt a weaker understanding of what it is to be bound is to weaken the conception of sovereignty, as to do so would suggest that sovereign states are not the kinds of things capable of binding themselves in this strongest sense.⁸⁰ The state that willingly breaks these types of covenants discovers it lacks the ability to truly bind itself, or at the very least, that it failed to bind itself on that occasion. Such a failure is illustrative of a state’s *inability* to bind itself, or, of a state’s inability to bind itself every time it purports to do so. That state therefore reveals that it does not truly have the power ascribed to a sovereign. Consider the state that enters into a treaty with another state, but which later violates the terms of that treaty. With this violation comes the revelation that the restraint on the part of the violating party was only a product of what the state deemed best or convenient at the time the treaty was entered into. If the state violates its own agreements every time such a violation is beneficial, then the state demonstrates an inability to bind itself beyond its own passing whims. Thus it illustrates the low grade of its sovereignty, as it lacks the power to bind itself beyond the shifting sands of its own interests and concerns.

Therefore, the question of whether a truly sovereign state can violate decrees to which it has bound itself is answered in the negative. A *sovereign* state binds itself beyond repudiation. Only a state of lesser caliber can coherently violate that to which it has bound itself. Civil disobedience on an international scale is thus incompatible with sovereignty.

What then does this mean for an international rostrum in which many of the main actors can be said to have violated their agreements? Is it the case that, under this conception, sovereignty is relegated to the theoretical? Sovereignty is viable

80. The obvious difficulty with this understanding of being bound is that it cannot become true, or at least, cannot be proven to be true, until the time for which the state has agreed to be bound has passed. However, this epistemological limitation does not alter the reality that the state which violates its agreements *will* be known to have failed in its endeavors to bind itself, and thus to have failed to exercise true sovereign power. Perhaps this limitation simply means that there can only be a presumption in favor of a state’s sovereignty until it commits a breach of this kind.

on a practical level, but whether it is present will depend on a case-by-case analysis. As the demarcation between colors on a color spectrum is blurred, so too may be the line that separates the sovereign from the subjugated. It may simply be that no case fits neatly within either of these conceptual expressions, but that each merely falls nearer to one or the other. In the case of sovereignty, the concepts articulated herein merely serve to establish a metric that aids in the understanding of whether a certain state falls nearer to or further from sovereignty.

VIII. CONCLUSION

The successful implementation of international law is a contemporary problem whose elusive solutions have appeared to be particularly fickle. Both conceptual and practical concerns form barriers to its execution. However, in this paper I have endeavored to show that one such conceptual problem, that of the tension between international law and sovereignty, is a problem that dissipates once the concept of sovereignty is reformulated and properly understood. I then surveyed current applications of international law in order to determine whether they comport with this understanding of sovereignty, and whether there is room for this expression of the freedom of the state. In my examination of the ICJ, I determined that its current practices do in fact align with the proper understanding of state sovereignty, and allow for states to exercise their sovereignty. Finally, I explored whether a sovereign state can engage in a kind of international civil disobedience by defying a decree to which it has bound itself. In light of the conceptualization of sovereignty adopted herein, a sovereign state does not have this ability. Only a state with a power less than sovereign may back out of its obligations, as a truly sovereign state has the ability to bind itself beyond contravention. The insights of Kant, Endicott, and others reveal sovereignty in its potent and absolute form, and demonstrate the compatibility of sovereignty and international law. The favorable environment of the current international theater exposes the reality that the burden remains on individual states to recognize their own sovereignty, and to act upon that recognition.

