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HUMAN RIGHTS OF WOMEN AND CHILDREN UNDER INTERNATIONAL LAW—AN INTRODUCTION

VED P. NANDA*

I. INTRODUCTION

The idea of human rights, a powerful idea indeed, has stirred the imagination of people all over the world; it has revolutionized the status of individuals and groups under international law. This is especially evident in the case of women and children, as specific treaties—the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW")[1] and the Convention on the Rights of the Child ("CRC")[2]—are aimed at transforming the status of women and children respectively. These treaties have been widely ratified by states,[3] and thus states have accepted binding obligations to comply with the treaties implementing the rights enumerated in these treaties. Notwithstanding the wider ratification and the broad scope of the rights under these treaties, women and children still suffer severe violations of basic human rights.

II. WOMEN AND CHILDREN HAVE LAGGED BEHIND IN THE ENJOYMENT OF INTERNATIONAL HUMAN RIGHTS

To test the veracity of this statement, a reliable yardstick is to measure achievements in the implementation of the Millennium Development Goals ("MDGs") concerning women and children. It may be recalled that in September 2000, U.N. Member States adopted the Millennium Declaration,[4] in which they resolved that by the year 2015 "children everywhere, boys and girls alike, will be able to complete a full course of primary schooling and that girls and boys will

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1. Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

2. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

3. United Nations, Multilateral Treaties Deposited with the Secretary-General, *Convention on the Elimination of All Forms of Discrimination against Women* (Dec. 18, 1979), *available at* https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en (last visited Aug. 25, 2014) (there are 188 states parties to the CEDAW as of August 25, 2014); United Nations, Multilateral Treaties Deposited with the Secretary-General, *Convention on the Rights of the Child* (Nov. 20, 1989), *available at* https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-11&chapter=4&lang=en (last visited Aug. 25, 2014) (there are 194 states parties to the CRC as of August 25, 2014).

4. United Nations Millennium Declaration, G.A. Res. 55/2, U.N. Doc. A/RES/55/2 (Sept. 8, 2000).

have equal access to all levels of education."[5] By the same date, they resolved, "to have reduced maternal mortality by three quarters, and under-five child mortality by two thirds, of their current rates."[6] Also, by then they undertook to have "halted, and begun to reverse, the spread of HIV/AIDS, the scourge of malaria and other major diseases that afflict humanity."[7] They also resolved "[t]o promote gender equality and the empowerment of women as effective ways to combat poverty, hunger and disease and to stimulate development that is truly sustainable."[8]

The following summer, a group of staff members from the U.N., World Bank, International Monetary Fund, and the Organization of Economic Cooperation and Development drafted a set of goals highlighting key commitments in the Millennium Declaration. The selection criteria included existing established indicators and reasonable data for those indicators. The process resulted in a framework. Aimed at reducing extreme poverty in its many dimensions, this framework, which contained eight human development goals to be reached by the end of 2015, with eighteen targets and forty-eight indicators, became the Millennium Development Goals framework.[9] Although the role of women and children is significant in the achievement of all eight goals, the goals specifically referring to them are:

Goal 2 – Achieve universal primary education

Goal 3 – Promote gender equality and empower women

Goal 4 – Reduce child mortality

Goal 5 – Improve maternal health

Goal 6 – Combat HIV/AIDS, malaria, and other diseases[10]

With a year and a half to go till the end of 2015, the scorecard shows that, while several MDGs have already been met or are within close reach, many for women and children have not.[11] Three recent reports and studies—by the Commission on the Status of Women (March 2014),[12] the Millennium

5. *Id.* ¶ 19.

6. *Id.*

7. *Id.*

8. *Id.* ¶ 20.

9. *What They Are*, U.N. MILLENNIUM PROJECT, http://www.unmillenniumproject.org/goals (last visited Aug. 25, 2014) [hereinafter U.N. MILLENNIUM PROJECT]; *see also Official List of MDG Indicators*, UNITED NATIONS STAT. DIVISION, http://unstats.un.org/unsd/mdg/Host.aspx?Content=Indicators/OfficialList.htm (last updated Jan. 15, 2008).

10. U.N. MILLENNIUM PROJECT, *supra* note 9.

11. *See* U.N. DEP'T OF INT'L ECON. & SOC. AFFAIRS, THE MILLENNIUM DEVELOPMENT GOALS REPORT 2014, at 5 (2014) [hereinafter MDGS REPORT 2014], *available at* http://www.un.org/millenniumgoals/2014%20MDG%20report/MDG%202014%20English%20web.pdf.

12. *Challenges and Achievements in the Implementation of the Millennium Development Goals for Women and Girls*, Comm'n on the Status of Women, 58th Sess., Mar. 10-21, 2014, U.N. Doc. E/CN.6/2014/L.7 (Mar. 25, 2014) [hereinafter Status of Women Report].

Development Goals Report 2014,[13] and the Human Development Report 2014[14]—provide ample evidence. It seems appropriate to discuss them in detail.

The Commission on the Status of Women reported at its 58th session in March 2014 "that almost 15 years after the Millennium Development Goals were adopted, no country has achieved equality for women and girls and significant levels of inequality between women and men persist, although the Goals are important in efforts to eradicate poverty and of key importance to the international community."[15] With regard to Goal 2—achieving universal primary education—the Commission noted

> the lack of progress in closing gender gaps in access to, retention in and completion of secondary education, which has been shown to contribute more strongly than primary school attendance to the achievement of gender equality, the empowerment of women and the human rights of women and girls and several positive social and economic outcomes.[16]

Regarding Goal 3—promoting gender equality and empowering women—the Commission noted that

> progress has been slow, with persistent gender disparities in some regions in secondary and tertiary education enrolment; the lack of economic empowerment, autonomy and independence for women, including a lack of integration into the formal economy, unequal access to full and productive employment and decent work, . . . overrepresentation in low-paid jobs and gender-stereotyped jobs such as domestic and care work, and the lack of equal pay for equal work or work of equal value . . . .[17]

As to Goal 4—reducing child mortality—the Commission noted that "targets are likely to be missed."[18] It further noted

> with deep concern that increasingly, child deaths are concentrated in the poorest regions and in the first month of life, and further expresse[d] concern that children are at greater risk of dying before the age of 5 if they are born in rural and remote areas or to poor households.[19]

Regarding Goal 5—improving maternal health—the Commission noted that "progress towards its two targets, reducing maternal mortality and achieving universal access to reproductive health, has been particularly slow and uneven,

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13. MDGs REPORT 2014, *supra* note 11.

14. UNITED NATIONS DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2014, SUSTAINING HUMAN PROGRESS: REDUCING VULNERABILITIES AND BUILDING RESILIENCE (2014) [HUMAN DEVELOPMENT REPORT 2014], *available at* http://hdr.undp.org/sites/default/files/hdr14-report-en-1.pdf.

15. Status of Women Report, *supra* note 12, ¶ 12.

16. *Id.* ¶ 20.

17. *Id.* ¶ 21.

18. *Id.* ¶ 22.

19. *Id.*

especially for the poorest and rural sectors of the population, within and across countries."[20]

With regards to Goal 6—combating HIV/AIDS, malaria, and other diseases—the Commission said "progress has been limited, with the number of women living with HIV increasing globally since 2001."[21] It also noted "the particular vulnerability to HIV infection of adolescent girls and young women, as well as other women and girls who are at a higher risk," and stressed "that structural gender inequalities and violence against women and girls undermine effective HIV responses and the need to give full attention to increasing the capacity of women and adolescent girls to protect themselves from the risk of HIV infection."[22] It further noted "the challenges faced by women and girls living with HIV and AIDS, including stigma, discrimination and violence."[23] In the Commission's view, "despite increased global and national investments in malaria control, . . . malaria prevention and control efforts, particularly for pregnant women, must rapidly increase in order to achieve the Goals."[24]

While the Commission observed "that the lack of adequate sanitation facilities disproportionately affects women and girls, including their participation rates in the labour force and school, and increases their vulnerability to violence,"[25] it found "the development resources . . . [supporting] gender equality and women's empowerment . . . inadequate to the task."[26] It expressed concern that the MDGs did not adequately address critical issues such as

> violence against women and girls; child, early and forced marriage; women's and girls' disproportionate share of unpaid work, . . . women's access to decent work, the gender wage gap, employment in the informal sector, low-paid and gender-stereotyped work such as domestic and care work; women's equal access to, control and ownership of assets and productive resources, including land, energy and fuel, and women's inheritance rights; women's sexual and reproductive health, and reproductive rights . . . .[27]

The Commission also recognized "that progress on the [MDGs] for women and girls ha[d] been limited owing to the lack of systematic gender mainstreaming and integration of a gender perspective in the design, implementation, monitoring and evaluation of the Goals."[28]

The Commission made several recommendations regarding the realization of women's and girls' full enjoyment of all human rights: strengthening the enabling environment for gender equality and the empowerment of women, maximizing

20. *Id.* ¶ 23.
21. *Id.* ¶ 24.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* ¶ 25.
26. *Id.* ¶ 26.
27. *Id.* ¶ 28.
28. *Id.* ¶ 37.

investment in gender equality and the empowerment of women and strengthening the evidence base for that, ensuring women's participation and leadership at all levels, and strengthening accountability.[29]

In a public statement on the Commission's recommendations, Amnesty International especially welcomed the Commission's call "for a standalone goal on gender equality" for inclusion in the set of development goals to follow the MDGs in the post-2015 development agenda.[30] In its 2013 report, entitled *Rights Should Be Central to Post-2015 Development Agenda*, Human Rights Watch specifically proposed that:

> The post-2015 agenda should promote gender equality and women's rights, including through a requirement on governments to work to end gender discrimination and promote equality in their laws, policies, and practices. It should also require governments to prevent and punish violence against women and ensure adequate services for victims of abuse.[31]

The Millennium Development Goals Report 2014 examined the latest progress toward achieving the MDGs and also pointed to significant gaps and disparities. For example, one in four children under five years of age in the world suffers from inadequate height for her/his age.[32] On the goal of achieving universal primary education, the report concludes that although impressive strides forward were made at the start of the decade, "progress in reducing the number of children out of school has slackened considerably,"[33] and that "[c]hildren in conflict-affected areas, girls from poor rural households and children with disabilities are more likely to be out of school."[34]

As regards the goal of promoting gender equality and empowering women, the report found that gender disparity in the labor market still exists.[35] On the goal of reducing child mortality the report found that although substantial progress has been made, "the world is still falling short of the MDG child mortality target,"[36] and that out of every five deaths of children under age five, four continue to occur in sub-Saharan Africa and Southern Asia.[37] Regarding the goal of improving maternal health, the report found that in 2013 almost 300,000 women died in the

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29. *Id.* at 9-20.

30. Public Statement, Amnesty International, 58th Session of the Commission on the Status of Women: Women and Girls Hold Key to a Successful Post-2015 Development Agenda (March 24, 2014), *available at* http://www.amnesty.org/en/library/asset/IOR41/003/2014/en/1188028b-bc46-4ab6-8f43-271d5fe26e39/ior410032014en.pdf.

31. HUMAN RIGHTS WATCH, RIGHTS SHOULD BE CENTRAL TO POST-2015 DEVELOPMENT AGENDA 14 (2013) [hereinafter HRW, RIGHTS SHOULD BE CENTRAL TO POST-2015 DEVELOPMENT AGENDA], *available at* https://www.hrw.org/sites/default/files/related_material/2013post2015dev-goals.pdf.

32. MDGS REPORT 2014, *supra* note 11, at 8, 14.

33. *Id.* at 16.

34. *Id.* at 17.

35. *Id.* at 21.

36. *Id.* at 24.

37. *Id.*

world due to causes related to pregnancy and childbirth.[38] It also found that while "[c]ontraceptive use had increased . . . gaps persisted in meeting the demand for family planning."[39]

On the goal of combating HIV/AIDS, malaria, and other diseases, the report found that "still too many new cases of HIV infection" are occurring and that in 2012 almost 600 children died daily of AIDS-related causes.[40] It observed that an estimated 2.3 million cases of people of all ages were newly infected in 2012, 70 percent of them in sub-Saharan Africa, and 1.6 million people died from AIDS-related causes.[41] An estimated 35.5 million people were living with HIV worldwide, a new record in 2012,[42] while only 30 percent of people living with HIV are covered by antiretroviral treatment.[43]

The report noted that also "[i]n 2012, about 207 million cases of malaria occurred" worldwide, with "the disease kill[ing] about 627,000 people," 80 percent of whom were children under age five.[44] It found that there were not adequate resources to prevent, diagnose, and treat malaria globally.[45] President Ellen Johnson Sirleaf of Liberia said that Africa's progress on the MDGs remains uneven, and although there has been remarkable progress in some areas,

> there is ample room for more good news. Some areas have been neglected when they should have been put up-front, for example malaria, the number one killer of children in sub-Saharan Africa and many other places in the world. Additionally, the goal for school enrollment did not take into account the need for quality education.[46]

According to the report, the rate of decline in the incidence of tuberculosis was "very slow," and "an estimated 1.3 million died from the disease" in 2012.[47] The report noted that despite good progress, "much more needs to be done. One-third of newly diagnosed tuberculosis patients may not have received proper treatment. Only one-third of the estimated 300,000 multi-drug-resistant cases among notified TB cases in 2012 were diagnosed and treated according to international guidelines."[48] It found bridging the funding gap to be a great challenge.[49]

The Human Development Report 2014 finds that "[v]ulnerability threatens human development—and unless it is systematically addressed, [which can be done] by changing policies and social norms," neither equitable nor sustainable

38. *Id.* at 28.
39. *Id.* at 32.
40. *Id.* at 34.
41. *Id.* at 35.
42. *Id.*
43. *Id.* at 36.
44. *Id.* at 37.
45. *Id.*
46. HUMAN DEVELOPMENT REPORT 2014, *supra* note 14, at 11.
47. MDGs REPORT 2014, *supra* note 11, at 38.
48. *Id.* at 39.
49. *Id.*

progress is possible.[50] In specifically addressing women's human rights, the report states that "[w]omen everywhere experience vulnerability in personal insecurity. Violence violates their rights, and feelings of personal insecurity restrict their agency in both public and private life."[51] The report provides a Gender Inequality Index for 149 countries,[52] which, it says, "reveals the extent to which national achievements in reproductive health, empowerment and labour market participation are eroded by gender inequality."[53] It states, "[g]lobally, women are disadvantaged in national political representation. On average, they occupy 21 percent of seats in national parliaments. In Latin America and the Caribbean they do better, with around 25 percent of seats. In Arab States parliaments they hold less than 14 percent of seats."[54]

The report adds:

> Poor reproductive health services are a major contributor to gender inequality, especially in developing countries. For example, the maternal mortality ratio is 474 deaths per 100,000 live births in Sub-Saharan Africa. Maternal deaths naturally have serious implications for babies and their older siblings left without maternal care, who could be trapped in low human development throughout their life cycle. Adolescent births could also lead to debilitating human development outcomes for young mothers and their babies. In Sub-Saharan Africa there are 110 births per 1,000 women ages 15-19.[55]

The report provides examples from rural Ethiopia and Vietnam as to how gender inequality shapes the school experience. It found that "[i]n rural Ethiopia 15-year-old girls in the lowest wealth quintile scored on average 2.1 of 20 on a math test, whereas 15-year-old boys averaged 7.4. In rural Viet Nam 15-year-old girls averaged 9.4, whereas 15-year-old boys averaged 18.1."[56]

In discussing vulnerability of children the report states:

> Too often, poverty disrupts the normal course of early childhood development—more than one in five children in developing countries lives in absolute income poverty and is vulnerable to malnutrition. In developing countries (where 92 percent of children live) 7 in 100 will not survive beyond age 5, 50 will not have their birth registered, 68 will not receive early childhood education, 17 will never enrol in primary school, 30 will be stunted and 25 will live in poverty. Inadequate food, sanitation facilities and hygiene increase the risk of infections and stunting: close to 156 million children are stunted, a result of

50. HUMAN DEVELOPMENT REPORT 2014, *supra* note 14, at 10 (emphasis omitted).
51. *Id.* at 4.
52. *Id.* at 172-75 tbl.4.
53. *Id.* at 39.
54. *Id.* at 40.
55. *Id.*
56. *Id.* at 64 (citation omitted).

> undernutrition and infection. Undernutrition contributes to 35 percent of deaths due to measles, malaria, pneumonia and diarrhoea.[57]

The report states further that children with disabilities and those who are psychologically or cognitively vulnerable are at special risk of sexual abuse.[58] It adds that "[c]hildren raised in institutions may also suffer profound depravation that damages brain development. Even schools may be sources of insecurity. Indeed, when parents fear for the physical and sexual safety of daughters, they are likely to keep them out of school."[59]

III. SELECTED PROPOSALS REGARDING WOMEN'S AND CHILDREN'S RIGHTS IN THE POST-2015 DEVELOPMENT AGENDA

Among a host of studies on and proposals for the next set of development goals following the target date of the end of 2015 for the completion of the MDGs, only a selected few will be noted here. On the 20th anniversary of the 1992 U.N. Conference on Environment and Development, heads of state and government again met in June 2012 in Rio de Janeiro, Brazil, and issued their final report as the Outcome Document of the conference, *The Future We Want*.[60] It provided a framework for sustainable development with "the highest priority [given] to poverty eradication within the United Nations development agenda [and to] address[] the root causes and challenges of poverty."[61] Specifically addressing gender inequality, the participants recognized "that gender equality and the effective participation of women are important for effective action on all aspects of sustainable development."[62] They also recognized that, "although progress on gender equality has been made in some areas, the potential of women to engage in, contribute to and benefit from sustainable development as leaders, participants and agents of change has not been fully realized, owing to, inter alia, persistent social, economic and political inequalities."[63] They expressed their support for

> prioritizing measures to promote gender equality and the empowerment of women in all spheres of our societies, including the removal of barriers to their full and equal participation in decision-making and management at all levels, and we emphasize the impact of setting specific targets and implementing temporary measures, as appropriate, for substantially increasing the number of women in leadership positions, with the aim of achieving gender parity.[64]

Following the Rio+20 conference, Secretary-General Ban Ki-moon launched several new initiatives on the post-2015 development agenda. One was in July

57. *Id.* at 59 (citations omitted).

58. *Id.* at 61.

59. *Id.* (citations omitted).

60. Rio+20: United Nations Conference on Sustainable Development, Rio de Janeiro, Braz., June 20-22, 2012, *The Future We Want*, U.N. Doc. A/CONF.216/L.1 (June 19, 2012).

61. *Id.* ¶ 106.

62. *Id.* ¶ 242.

63. *Id.* ¶ 237.

64. *Id.*

2012, the establishment of a 27-member High-Level Panel of Eminent Persons co-chaired by the Presidents of Indonesia and Liberia and the Prime Minister of the United Kingdom,[65] which in May 2013 presented its report, *A New Global Partnership: Eradicate Poverty and Transform Economies Through Sustainable Development.*[66] Among twelve universal goals, the report recommended two specifically related to women and children: (1) to empower girls and women and achieve gender equality, and (2) to provide quality education and lifelong learning.[67]

Another of the Secretary-General's initiatives was the establishment of the Sustainable Development Solutions Network ("SDSN"), which was aimed at promoting sustainable development.[68] In its report, last updated in May 2014, *An Action Agenda for Sustainable Development*, SDSN identified ten priority sustainable development challenges that must be addressed at the global, regional, national, and local levels.[69] One of these challenges was to achieve gender equality, social inclusion, and human rights for all; and another was to ensure effective learning for all children and youth for life and livelihood.[70]

In September 2013 the OECD issued a report entitled *Gender Equality and Women's Rights in the Post-2015 Agenda: A Foundation for Sustainable Development.*[71] The report recommended for the post-2015 framework to more specifically focus on seven issues:

1) Addressing girls' completion of a quality education;
2) Women's economic empowerment;
3) Universal access to sexual and reproductive health and rights;
4) Ending violence against women and girls;
5) Women's voice, leadership, and influence;
6) Women's participation in peace and security; and,
7) Women's contributions to environmental sustainability.[72]

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65. *The Secretary-General's High-Level Panel of Eminent Persons on the Post-2015 Development Agenda*, UNITED NATIONS, http://www.un.org/sg/management/hlppost2015.shtml (last visited Aug. 25, 2014).

66. HIGH-LEVEL PANEL OF EMINENT PERSONS ON THE POST-2015 DEV. AGENDA, A NEW GLOBAL PARTNERSHIP: ERADICATE POVERTY AND TRANSFORM ECONOMIES THROUGH SUSTAINABLE DEVELOPMENT (2013), *available at* http://www.un.org/sg/management/pdf/HLP_P2015_Report.pdf.

67. *See id.* at 30-31 (listing all of the goals).

68. *United Nations Secretary-General Announced New Sustainable Development Initiative*, UNITED NATIONS (Aug. 9, 2012), www.un.org/millenniumgoals/pdf/SDSN%20FINAL%20release_9Aug.pdf.

69. SUSTAINABLE DEV. SOLUTIONS NETWORK: A GLOBAL INITIATIVE FOR THE UNITED NATIONS, AN ACTION AGENDA FOR SUSTAINABLE DEVELOPMENT 8-26 (2014), *available at* http://unsdsn.org/wp-content/uploads/2013/06/140505-An-Action-Agenda-for-Sustainable-Development.pdf.

70. *See id.*

71. OECD, GENDER EQUALITY AND WOMEN'S RIGHTS IN THE POST-2015 AGENDA: A FOUNDATION FOR SUSTAINABLE DEVELOPMENT (2013), *available at* http://www.oecd.org/dac/Post-2015%20Gender.pdf.

72. *Id.* at 1.

In January 2013 the U.N. General Assembly established the Open Working Group on Sustainable Development Goals,[73] which, after completing 13 sessions, issued on July 19, 2014, its proposal for a set of goals that consider economic, social, and environmental dimensions to improve people's lives and protect the planet.[74] Introducing the proposal, the Working Group states that these goals, accompanied by targets,

> build on the foundation laid by the MDGs, seek to complete the unfinished business of the MDGs, and respond to new challenges. These goals constitute an integrated, indivisible set of global priorities for sustainable development. Targets are defined as aspirational global targets, with each government setting its own national targets . . . taking into account national circumstances.[75]

Several of these goals relate specifically to women's and children's rights. For example, Goal 2, to end hunger, states: "[B]y 2030 end all forms of malnutrition, including achieving by 2025 the internationally agreed targets on stunting and wasting in children under five years of age, and address the nutritional needs of adolescent girls, pregnant and lactating women, and older persons."[76]

On Goal 3, to ensure healthy lives and promote wellbeing for all, the goal is to "reduce the global maternal mortality ratio to less than 70 per 100,000 live births" by 2030.[77] It also calls for ending "preventable deaths of newborns and under-five children," ending the epidemics of AIDS, tuberculosis, malaria, and other neglected tropical diseases and communicable diseases by 2030, and also by that year to "reduce by one-third pre-mature mortality from non-communicable diseases (NCDs) through prevention and treatment, and promote mental health and wellbeing."[78]

On Goal 4, to ensure inclusive and equitable quality education and promote life-long learning opportunities for all, the goal is to ensure that girls and boys complete primary education, free of charge, by 2030 and that by that date they "have access to quality early childhood development, care and pre-primary education," that there is "equal access for all women and men to affordable quality technical, vocational and tertiary education" and that gender disparities in

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73. U.N. President of the G.A., Draft Decision on an Open Working Group of the General Assembly on Sustainable Development Goals, U.N. Doc. A/67/L.48/Rev.1 (Jan. 15, 2013).

74. OPEN WORKING GROUP FOR SUSTAINABLE DEV. GOALS, OUTCOME DOCUMENT (2014) [hereinafter OUTCOME DOCUMENT], *available at* http://sustainabledevelopment.un.org/content/documents/4518SDGs_FINAL_Proposal%20of%20OWG_19%20July%20at%201320hrsver3.pdf. *See also Outcome Document—Open Working Group on Sustainable Development Goals*, U.N. SUSTAINABLE DEV. KNOWLEDGE PLATFORM, http://sustainabledevelopment.un.org/focussdgs.html (last visited Aug. 26, 2014).

75. OUTCOME DOCUMENT, *supra* note 74, at 4, ¶ 18.

76. *Id.* at 6, Goal 2.2.

77. *Id.* at 7, Goal 3.1.

78. *Id.*, Goals 3.2-3.4.

education be eliminated and "equal access to all levels of education and vocational training for the vulnerable, including . . . children," be ensured.[79]

On Goal 5, to achieve gender equality and empower all women and girls, the Open Working Group calls for ending discrimination and all forms of violence to them, and ending "all harmful practices, such as child, early and forced marriage and female genital mutilations."[80] It also calls for recognizing and valuing unpaid care and domestic work, ensuring women's "full and effective participation and equal opportunities for leadership at all levels of decision-making in political, economic and public life," ensuring "universal access to sexual and reproductive health and reproductive rights," undertaking "reforms to give women equal rights to economic resources" and access to all of "property, financial services, inheritance, and natural resources in accordance with national laws," and adopting and strengthening "sound policies and enforceable legislation for the promotion of gender equality and the empowerment of all women and girls at all levels."[81]

It is worth noting that on Goal 5 there is no targeted date for achieving the goal of gender equality. When the Open Working Group issued the "Zero Draft" of its suggested sustainable development goals and related targets,[82] Human Rights Watch sent a letter to the Group urging the inclusion of target dates. The letter stated: "We are troubled that Goal 5 is the only goal whose targets all lack target dates for completion. We believe this gives the impression of a lack of urgency, and may create an accountability gap for reaching these targets."[83] It also urged the explicit recognition of women's and girls' human rights in Goal 5, as it said that "[e]mpowerment of women may be insufficient if their rights are not fully respected by their own government or within society."[84]

IV. SELECTED WOMEN'S AND CHILDREN'S RIGHTS IN THIS ISSUE OF THE *JOURNAL*

The *Denver Journal of International Law and Policy* makes a valuable contribution to the literature by publishing the four selected articles here, one exclusively on women's rights, two exclusively on children's rights, and one that concerns both women and children. The piece on women's rights studies an issue of grave concern—gender violence. The focus is on migrant victims of domestic violence and their rights. This is a comprehensive survey of the legal and social

79. *Id.* at 8, Goals 4.1-4.3, 4.5.

80. *Id.* at 9, Goals 5.1-5.3.

81. *Id.* at 9-10, Goals 5.4-5.6

82. OPEN WORKING GROUP FOR SUSTAINABLE DEV. GOALS, INTRODUCTION AND PROPOSED GOALS AND TARGETS ON SUSTAINABLE DEVELOPMENT FOR THE POST-2015 DEVELOPMENT AGENDA: ZERO DRAFT 6-7, Goal 5 (2014), *available at* http://sustainabledevelopment.un.org/content/documents/4523zerodraft.pdf.

83. Letter from Iain Levine, Deputy Exec. Director, Human Rights Watch, to the U.N. General Assembly Open Working Group 12 on Sustainable Development Goals ahead of the 12th Session (June 20, 2014), *available at* http://www.hrw.org/print/news/2014/06/20/letter-un-general-assembly-open-working-group-12-sustainable-development-goals-ahead.

84. *Id.*

support systems of the European Union Member ("EU-M") States for this vulnerable group.

The two pieces on children's rights study juvenile justice and child abduction, respectively, and the article concerning both women's and children's rights specifically deals with the Millennium Development Goal No. 6, which is aimed at combating HIV/AIDS, malaria, and other diseases. This article provides a human rights analysis with its focus on Africa.

The first article, entitled *Juvenile Justice in Belligerent Occupation Regimes: Comparing the Coalition Provisional Authority Administration in Iraq with the Israeli Military Government in the Territories Administered by Israel*, discusses the juvenile justice systems unique to occupation regimes. Dr. Hilly Moodrick-Even Khen, a senior lecturer of public international law in Israel, studies first the objectives of juvenile justice systems under both comparative law and international law and then proceeds to examine how these systems operate in occupied territories and the changes occupation regimes experience from "belligerent occupations" to "transformative occupations" and from those lasting short-term to long-term. She then examines how these transformations affect the legal means for meeting the obligations of the occupying power under international humanitarian law, especially "the duty to ensure the safety and the daily life routine of the occupied population."[85] She does this by comparing the system in Iraq under the Coalition Provisional Authority Administration and that under the Israeli occupation in the Administered Territories.

After identifying three central principles in juvenile justice—"diminished responsibility, proportionality and room to reform"[86]—the author discusses changes regarding "justice-based" principles of the late 20th century concerned more with responses to the "deed" of the offense rather than the offender's "need." She also identifies the international law norms applicable to juvenile justice, including international conventions and other non-obligatory international instruments regulating juvenile justice systems. The pertinent conventions, of course, are the International Covenant on Civil and Political Rights[87] and the CRC,[88] and non-binding instruments include the United Nations Standard Minimum Rules for the Administration of Juvenile Justice,[89] the United Nations Rules for the Protection of Juveniles Deprived of their Liberty,[90] the United Nations Guidelines for the Prevention of Juvenile Delinquency,[91] and the United

85. *See* Moodrick-Even Khen, *infra* p. 120.

86. *Id.* at 121 (citing Josine Junger-Tas, *Trends in International Juvenile Justice: What Conclusions can be Drawn?*, *in* INTERNATIONAL HANDBOOK OF JUVENILE JUSTICE 505, 510 (Josine Junger-Tas & Scott. H. Decker eds., 2006)).

87. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

88. Convention on the Rights of the Child, *supra* note 2.

89. G.A. Res. 40/33, Annex, U.N. Doc. A/RES/40/33 (Nov. 29, 1985).

90. G.A. Res. 45/113, Annex, U.N. Doc. A/RES/45/113 (Dec. 14, 1990).

91. G.A. Res. 45/112, Annex, U.N. Doc. A/RES/45/112 (Dec. 14, 1990).

Nations Children's Fund Principles and Guidelines on Children Associated with Armed Forces or Armed Groups.[92]

Before responding to the question of the application of the appropriate legal regime to apply in occupied territories, the author discusses the changes over the last few decades that, in her words, "have witnessed a proliferation of other types of occupation regimes,"[93] in addition to belligerent occupation regimes to which international humanitarian law or the law of war applied. These include long-term occupation regimes such as the one administered by Israel in the Territories and transformative occupation regimes such as in the formerly occupied Iraq and in Afghanistan. The latter are aimed at building new societies "as end goals of intervention and to protect the occupied population as consistent with international norms and human rights law,"[94] and the U.N. typically is involved. Thus the author argues that, "since the aim of transformative regimes is to rebuild the legal infrastructure of the territory they occupy and create a new legal order, the governing laws must allow changes in the existing laws in the occupied territory."[95] On the other hand, she argues that long-term occupation regimes "may not require permission to change existing laws in the occupied area, but they must consider the need for development of the occupied area."[96]

What follows is a comparison of the obligations of occupiers in formerly occupied Iraq and in the Administered Territories. These include both the traditional and the new obligations. After a thorough examination of these regimes and the application of international humanitarian law and international human rights law, the author suggests that "the co-application of human rights law and international humanitarian law, while taking into consideration the security needs of both the occupying power and the protected persons, would create legal standards that would see the application of more protections for minors in criminal procedures."[97] Specifically addressing the Israeli occupation in the Administered Territories, acknowledging that it may not end in the near future, she considers it "crucial to maintain that a belligerent occupying power, including a long-term one, should avoid changes that will render it a sovereign."[98] Her rationale is that although this objective could be justified for a transformative regime, "it works against the purposes of a long-term belligerent occupant."[99]

In the second article, *United Against Gender Violence: Europeans Struggle to Provide Protection for Migrants*, Mimi E. Tsankov, a U.S. immigration judge and adjunct professor of law at both the University of Denver Sturm College of Law

92. UNITED NATIONS CHILDREN FOUND., THE PARIS PRINCIPLES: PRINCIPLES AND GUIDELINES ON CHILDREN ASSOCIATED WITH ARMED FORCES OR ARMED GROUPS 4 (2007), *available at* http://childrenandarmedconflict.un.org/publications/ParisPrinciples_EN.pdf.

93. *See* Moodrick-Even Khen, *infra* p. 127.

94. *Id.*

95. *Id.* at 128.

96. *Id.*

97. *Id.* at 160.

98. *Id.* at 161.

99. *Id.*

and the University of Colorado School of Law, and Nadja Helm, an Attorney Advisor with the U.S. Department of Justice, provide a survey, both wide and deep, of the EU-M States as they struggle to provide legal and social protections to migrant victims of domestic violence. The authors' aim "to present a snapshot of the European Union's journey towards compliance that may enable human rights observers to gauge where individual EU-M States find themselves on this particular metric in comparison to other states given a variety of contextual factors."[100] They provide data regarding each state to assess how it meets its treaty obligations for these vulnerable people. However, they are cognizant of the difficulties in gathering reliable information on monitoring treaty compliance in the context of human rights. Measuring CEDAW compliance is especially hard because (1) member states are required to act with "due diligence in responding to, preventing, and eliminating all forms of violence against women"[101] and (2) appropriate indicators or benchmarks for evaluating due diligence are non-existent.

The authors are, therefore, appropriately cautious and undertake their survey based upon the following four qualitative dimensions: (1) gender equality / inequality; (2) human development; (3) treaty obligations; and (4) domestic legal infrastructure. In each of these categories they have selected the most appropriate measures as contextual tools. They present data as reported by several entities: the EU-M States; the Special Rapporteur on the issue of violence against women appointed by the U.N. Commission on Human Rights in 1994; U.N. specialized agencies; NGO studies; and actual case studies. They have selected a "modest goal" for the article, which is "to summarize (1) the states' international obligations, (2) the legal frameworks providing support to this population, (3) the information that has been reported related to protections for this vulnerable population, and (4) the criticisms that have been lodged."[102] They acknowledge that "[b]ecause states have the prerogative of choosing the timetable under which they implement protections, as well as what they choose to report, a definitive comparison across EU-M States remains elusive."[103]

The authors do not discuss female genital mutilation ("FGM") as it "is not properly considered within a domestic violence analysis, because, while the victim's family is often involved, it is usually a community-based practice."[104] However, the subject is important and thus it is worth noting that the U.N. General Assembly in December 2012 adopted a Resolution entitled *Intensifying Global Efforts for the Elimination of Female Genital Mutilations*.[105] Subsequently, on June 28, 2014, Secretary General Ban Ki-moon remarked at an event in Nairobi on

100. *See* Tsankov & Helm, *infra* p. 166-67.

101. *Id.* at 244.

102. *Id.* at 184.

103. *Id.*

104. *Id.* at 171.

105. Intensifying Global Efforts for the Elimination of Female Genital Mutilations, G.A. Res. 67/146, U.N. Doc. A/RES/67/146 (Dec. 20, 2012). *See also* U.N. Secretary-General, *Ending Female Genital Mutilation: Rep. of the Secretary-General*, Comm'n on the Status of Women, U.N. Doc. E/CN.6/2012/8 (Dec. 5, 2011).

ending maternal mortality: "Some 20 per cent of girls in Kenya are cut, and in Somalia, the proportion is close to 98 per cent. African Governments are united in opposing female genital mutilation, and the United Nations is giving priority to helping all communities abandon this practice."[106]

The authors study Member States' compliance and accountability with the European Convention on Human Rights, the CEDAW, and the Council of Europe. They note implementation compliance concerns and evaluate the actions taken by the various countries "to address these limitations and enhance the rights of migrant female domestic violence victims."[107]

The outcome is a very impressive study outlining the protections Member States have provided in compliance with the ECHR, CEDAW, and Council of Europe mandates. The authors conclude that human rights bodies both at the international and regional levels are developing specific standards to address some of the problems these victims face and states are responding with appropriate changes; however, they find that "the pace of reform is uneven across states, and the development of increasingly specific model systems may serve to bring some states that have heretofore been lagging further into line with the more robust and comprehensive state systems that exist today."[108]

The next article, which relates to both women's and children's rights, is *Millennium Development Goal 6 and the Trifecta of HIV/AIDS, Malaria, and Tuberculosis in Africa: A Human Rights Analysis*, by Dr. Obiajulu Nnamuchi, an assistant professor of law at the University of Nigeria. The article provides a clear understanding of MDG 6, which is aimed at reducing the incidence of these diseases, and thoroughly examines the circumstances responsible for failure in many African countries to combat them effectively. The author's suggestions for remedial measures are designed to ensure that African countries attain this goal in a sustainable fashion and are able to secure the human right to health of each person within its borders. He asserts that it is a human right to have access to necessary interventions to combat these diseases.

Professor Nnamuchi is especially critical that the second prong of the HIV/AIDS-related targets, that is, achieving universal access to treatment for all those in need, by 2010, was not met in the African context. He focuses on special population groups—women, sex workers, and prisoners—who are most vulnerable and who have higher incidence of infection than the rest of the population. He specifically underlines the challenges that many of these countries face in getting universal access to anti-retroviral therapy ("ART"). Giving examples from African countries, he discusses the problem of lack of information about HIV/AIDS and risky sexual behavior as especially responsible for the problem. The section on discrimination against people living with HIV/AIDS is especially

106. U.N. Secretary-General, 'No Woman Should Die While Giving Life,' Secretary-General Says at Event on Ending Maternal Mortality (June 28, 2014), http://www.un.org/News/Press/docs/2014/sgsm15984.doc.htm.

107. *See* Tsankov & Helm, *infra* p. 189.

108. *Id.* at 245.

poignant as he discusses the pertinent human rights instruments and concludes that such discrimination is an affront to human rights. Similarly, he critically analyzes the huge impact of malaria in Africa and how special population groups, especially children, are severely affected. Challenges pertain to all aspects—prevention, control, and treatment.

After conducting a similar analysis on tuberculosis, Professor Nnamuchi convincingly argues that as we analyze the challenges in the human rights context much more is needed than simply access to medicine. He makes two points pertaining to the obligation of governments in Africa regarding these scourges: first, that MDG 6 does not impose substantially new obligations on these governments. Here he refers to several statements by African governments and the obligations imposed by African instruments such as the Africa Charter on Human and Peoples' Rights. The second point is about conceptualization of health, according to which everyone has a right to the enjoyment of the highest attainable standard of physical and mental health. Thus, a medicine-oriented response to problems related to health without more is not enough. He makes a telling point:

> To suggest that human rights should serve as a liberating or emancipating force, freeing vulnerable and other marginalized groups from the cold clutches of poverty, deprivation and other harmful conditions, the consequence of which has been disproportionate burden of HIV/AIDS, malaria, TB, and other largely preventable diseases, is not to reconceptualize the doctrine. Rather, the suggestion merely emphasizes practicalization, the way things ought to be. It is, in reality, about making human rights work to the advantage of its primary subjects, the people who need it most.[109]

In conclusion, the author reminds affluent countries of MDG Goal 8, under which international cooperation is required as a means to achieving the MDGs, asserting that the donor countries must hold poor countries accountable for the way money is spent in those countries. This might "force political leadership in Africa to rethink their insensitivity to massive human suffering in the region."[110] Along with such effort he emphasizes the role of the civil society as a complementary effort which "involves the people ridding themselves of docility and demanding good governance as a right—the key, ultimately, to real freedom from preventable diseases—be it HIV/AIDS, malaria, TB, or anything else."[111]

The final paper in this special issue is by Colin P.A. Jones, a professor at Doshisha Law School, and entitled *Will the Child Abduction Treaty Become More "Asian"? A First Look at the Efforts of Singapore and Japan to Implement the Hague Convention*. Acknowledging that a comparison between Singapore and Japan as two Asian countries does not suffice to ask the question whether an Asian response to international child abduction could develop, the author suggests that

109. *See* Nnamuchi, *infra* p. 281.

110. *Id.* at 285.

111. *Id.* at 285-86 (citation omitted)

the more likely answer now is "no," but that as more countries in the region join the Convention, perhaps in some aspects there might develop an Asian response.

The author begins his analysis by providing an overview of the Hague Convention on the Civil Aspects of Child Abduction ("the Convention").[112] It may be recalled that the Convention assumes that the courts in the jurisdiction where the children have been residing, that is, the jurisdiction of their "habitual residence," should evaluate their interests, rather than a court in a jurisdiction to which they have more recently moved. Thus the Convention deters unilateral action by one parent, with the goal of protecting the children's welfare. If a child is removed in violation of "rights of custody" in the child's jurisdiction of habitual residence, the court must order a return if such rights were being exercised at the time of removal. While almost every country in Europe, North and South America, and Australia and New Zealand, are parties to the Convention, only a handful of African and Asian countries have ratified it.

The author compares and contrasts Singapore and Japan, the former having acceded to the Convention in 2010, while the latter joined it in 2014. He reviews these countries' demographics, international business and finance, and the number of marriages, divorces, and annulments typical in a year in each country. He then reviews the rights of custody, first in Japan and then in Singapore. Japan's family register system has several special features—only Japanese citizens have family registries; the family register performs a function analogous to a real estate title register insofar as it primarily facilitates transactions between a family and government agencies or other third parties.

The author notes that marriage is at the heart of the family register system and it primarily deals with the common consensual family transactions such as marriage, adoption, and most divorces. He then discusses Japan's civil code, under which minor children are under the "parental authority" of their parents, which is jointly exercised by both parents during marriage and solely by one parent after divorce. The civil code provides a vast scope for parental authority. Thus, under the Japanese system, individual families have a large degree of autonomy to manage their internal affairs.

Many Japanese laws and legal institutions are historically based upon Continental European models, contrasted with Singapore's legal system, which is based upon the English system of Common Law and equity. After reviewing Singapore's various laws, which include a separate system of Islamic law and a special court for its Muslim minority community, the author discusses how the role of "custody" is changing and a presumption has arisen that usually joint custody will be in the best interest of children in most cases. He discusses case law of Singapore to conclude that Singapore's courts are interpreting the Convention in light of its peer jurisdictions' approach. And in reviewing Japan's implementing legislation, the author finds that among several reasons for the discrepancies between the Convention and Japanese domestic law, the following are noteworthy:

112. Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89.

systems of family law in Japan, especially family mediation and its consensual nature, and the country's civil law foundation. His conclusion seems apt that perhaps the pertinent inquiry to account for the difference between Singapore's and Japan's approach to the Convention lies not in "Western-ness" and "Asian-ness" but is instead between the common law and civil law traditions.

V. CONCLUSION

The main focus of three of the four papers selected here is a human rights-centered approach to the issues they address. The absence of this approach was indeed seen as a major flaw in the MDG framework[113] and as the post-2015 international development agenda is being formulated it is not simply NGOs, such as Amnesty International[114] and Human Rights Watch[115] that are calling for sustainable development goals to be based on human rights foundations, but even the official proposals regarding the post-2015 development agenda[116] echo the same spirit.

113. *See generally* Ved P. Nanda, *Human Rights Must Be at the Core of the Post-2015 International Development Agenda*, 75 MONT. L. REV. 1 (2014).

114. *See, e.g.*, AMNESTY INT'L, DELIVERING A JUST FUTURE FOR ALL—WHY HUMAN RIGHTS MATTER TO SUSTAINABLE DEVELOPMENT (2014), *available at* http://amnesty.org/en/library/asset/ACT35/008/2014/en/66bf8961-23c3-495d-a7bd-100b71a3bbe5/act350082014en.pdf; Press Release, Amnesty Int'l, Post-2015 Agenda: Human Rights Accountability Key to Progress Amnesty International Tells UN (June 12, 2014), *available at* http://www.amnesty.org/en/for-media/press-releases/post-2015-agenda-human-rights-accountability-key-progress-amnesty-internati.

115. *See, e.g.*, HRW, RIGHTS SHOULD BE CENTRAL TO POST-2015 DEVELOPMENT AGENDA, *supra* note 31; David Mepham, *Putting Development to Rights: A Post-2015 Agenda*, OPEN DEMOCRACY (Jan. 28, 2014), https://www.opendemocracy.net/david-mepham/putting-development-to-rights-post-2015-agenda (David Mepham is the U.K. director of Human Rights Watch).

116. For the various proposals urging the primary role of human rights in achieving sustainable development, see, *supra* Part III.

JUVENILE JUSTICE IN BELLIGERENT OCCUPATION REGIMES: COMPARING THE COALITION PROVISIONAL AUTHORITY ADMINISTRATION IN IRAQ WITH THE ISRAELI MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL

DR. HILLY MOODRICK-EVEN KHEN*

I. INTRODUCTION

Juvenile justice has become a theme of great interest, with the international community showing a growing concern with protecting the rights of children under international law[1]—in times of peace as well as in times of war.[2] This article examines the juvenile justice systems unique to occupation regimes, basing the analysis of this type of system on the case studies of the Israeli occupation in the administered territories and the former Coalition Provisional Authority Administration ("Coalition") in Iraq.[3] We maintain that the changing nature of occupation regimes has bearing on their juvenile justice systems, demanding more protections for the rights of children within these criminal structures. These protections can be awarded either through direct application of human rights law or by amending the specific laws that administer territories under occupation.

In order to determine the most adequate set of international norms for securing the interests of juveniles within the juvenile justice systems in occupied territories, we need to assess the tenets and objectives of juvenile justice in general. This is the object of the second section of this paper, in which we discuss the major goals of juvenile justice both in comparative law and in international law. We address the current trends and characteristics of juvenile justice systems worldwide vis-à-vis the goals of the juvenile justice system as they are reflected in international law, most notably in the International Covenant on Civil and Political

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1. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]. Under international law, the legal definition of a "child" is embedded in the CRC, which stipulates, "a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier." *Id.* art. 1. We shall adhere to this definition in the article.

2. Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 14, 17, 23, 24, 38, 50, 82, 89, 94, 132, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GCIV] (highlighting the rights of children within and during an armed conflict).

3. Several terms are used to describe the territories in the article, such as the "Occupied Palestinian Territories," the "West Bank Territories," and "Judea and Samaria." We have chosen the term that appears in the title, which has, to our mind, no political connotations. We also use a shortened term: the "administered territories."

Rights ("ICCPR"),[4] the International Convention on the Rights of the Child ("CRC"),[5] and subsequent soft law instruments.

As our interest is not simply in the juvenile justice systems that operate within independent states and regimes but more specifically in those that are implemented in occupied territories, we proceed, in the third section, to examine the history of the changes experienced by occupation regimes: from belligerent occupations to transformative occupations and from short-term to long-term ones. We then examine how these transformations affect the legal means for realizing the obligations of the occupying power under the Fourth Geneva Convention (1949)[6] and the Hague Convention and its annexed regulations (1907) ("Hague Regulations"),[7] primarily the duty to ensure the safety and the daily life routine of the occupied population.

In the fourth section, we discuss the mutual application of international humanitarian law and international human rights law in occupied territories through the prism of the objectives of the juvenile justice system in general, and in occupied territories in particular.

We first suggest that the longer an occupier rules in an occupied territory, the more likely that human rights law, rather than humanitarian law, will better serve the interest of the occupied population, as the latter has more limited tools for achieving this goal. Hence, in longer-term occupations, there is more room for the application of human rights law as an interpretative and complementary law. We then return to the conclusions of the second section with regard to the objectives of juvenile justice systems and claim that, given the nature of juvenile justice in general, and in occupied territories in particular, we must see a more extensive application of human rights law in occupation regimes. We substantiate our claims through the analysis of the case study of detention, prosecution, and adjudication of children in formerly occupied Iraq.

In the fifth section, we turn to Israel, discussing the juvenile courts and the legislation of the juvenile justice system in the territories administered by the Israeli army. After addressing the legal views expressed by the Israeli government and the Israeli Supreme Court on the question of the applicability of human rights law in the administered territories, we address the recent developments in juvenile justice in these territories. We propose that the long-term nature of the Israeli occupation in the administered territories demands that Israel keep and strengthen the reform in the juvenile justice system in these territories in order to increase the application of human rights norms. However, in the specific case of Israel, international law is not automatically incorporated within the national legal

4. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, [hereinafter ICCPR] (the relevant articles for this paper will include article 10 and 14).

5. CRC, *supra* note 1.

6. GCIV, *supra* note 2.

7. Convention (IV) Respecting the Laws and Customs of War on Land, with Annex of Regulations, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 [hereinafter Hague Regulations] (also referred to as the Fourth Hague Convention) (in this piece, articles will be referencing the articles in the regulations found in its annex).

system, and furthermore, Israel objects to the application of human rights treaties in the administered territories. These two facts lead us to conclude that the best way to apply human rights norms, found in both formal and soft law instruments, in the occupation regime in the administered territories is by incorporating them into the legislation of the military governance that regulates the administered territories.

II. THE OBJECTIVES OF JUVENILE JUSTICE SYSTEMS

In order to determine the appropriate set of norms for governing juvenile justice systems in general and in occupied territories in particular, we must extrapolate a definition of such systems, clarifying their basic tenets and objectives. The Council of Europe defines a juvenile justice system as:

> [T]he formal component of a wider approach for tackling youth crime. In addition to the youth court, it encompasses official bodies or agencies such as the police, the prosecution service, the legal profession, the probation service and penal institutions. It works closely with related agencies such as health, education, social and welfare services and non-governmental bodies, such as victim and witness support.[8]

The Council states that the principal aims of a juvenile justice system are to "i. prevent offending and re-offending; ii. to (re)socialise and (re)integrate offenders; and iii. to address the needs and interests of victims."[9]

Scholars identify three central principles in juvenile justice: "diminished responsibility, proportionality and room to reform."[10]

> *Diminished responsibility* refers to the question whether children are less culpable then adults for having offended. Children may lack sufficient cognitive abilities to realize what they are exactly doing and in particular what might be the consequences of their acts. Of course the older the juvenile the more he will be responsible for his acts, but even at age 14 and 16 he might be incapable of grasping the full meaning of his actions.
>
> *Proportionality* refers to the mitigation of punishment because of children's lack of development of social and cognitive capacities. . . .
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> *Room to reform* indicates the importance of the kind of punishments that is meted out, considering what we want to achieve with punishment and what we would want to avoid.[11]

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8. Eur. Comm. of Ministers, *Recommendation*, 853rd Meeting, Rec(2003)20 (2003) (this recommendation is for "new ways of dealing with juvenile delinquency and the role of juvenile justice"), *available at* https://wcd.coe.int/ViewDoc.jsp?id=70063.

9. *Id.*

10. Josine Junger-Tas, *Trends in International Juvenile Justice: What Conclusions can be Drawn?*, *in* INTERNATIONAL HANDBOOK OF JUVENILE JUSTICE 505, 510 (Josine Junger-Tas & Scott. H. Decker eds., 2006).

11. *Id.* (citation omitted).

According to this final principle, for example, preference should be given to penal interventions that promote rehabilitation and the growth of young people into responsible citizens.[12]

The above basic principles of juvenile justice are the result of a long process of development of the concepts of juvenile justice in 20th-century Western thought. This ranged from the rhetoric of child protection and "meeting needs" of the 1970s, where justice for juveniles was considered best delivered through community-based interventions, to the series of diverse "justice-based" principles of the late 20th century, which were "more concerned with responding to the 'deed' of the offence rather than the 'need' of the offender."[13] These changes are reflected in the variety of policies in the juvenile justice systems implemented by Western states, which scholars divide into three clusters:

> The first cluster includes the English speaking countries, with the exception of Scotland but including the Netherlands. It is essentially "justice" oriented, characterized by a retributive, sometimes repressive, approach, placing a strong emphasis on the juvenile's accountability, "just desert" principles and parental responsibility for their child's behaviour . . . .
>
> . . . .
>
> The second cluster of countries mainly covering continental Europe is still very much "welfare" oriented . . . .
>
> A third cluster is formed by the Scandinavian countries and Scotland [that combines approaches from "just desert" and "welfare"].[14]

In the third cluster, the "just desert" philosophy gained an important role because of their relationships with Anglo-Saxon states.[15] In practice, these policies

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12. *Id.*

13. John Muncie & Barry Goldson, *States of Transition: Convergence and Diversity in International Youth Justice*, *in* COMPARATIVE YOUTH JUSTICE: CRITICAL ISSUES 197 (John Muncie & Barry Goldson eds., 2006).

14. Junger-Tas, *supra* note 10, at 526-28

> It is clear that the United States represents these characteristics [of the first cluster] in its extreme form . . . . On the other hand most of these countries—while subscribing to the general just desert philosophy—have also introduced on a large scale alternative sanctions (Canada, the UK, and the Netherlands), restorative justice (Northern Ireland) and preventive and diversionary measures (Ireland, the Netherlands, and the UK).
>
> . . . .
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> . . . [The second cluster] is perhaps best represented by the German approach of juveniles and young adults, but one sees a similar approach in many continental European states. Western European states, such as France and Belgium also have a strong welfare legal tradition, although there are pressures to change this and create a more retributive system . . . .
>
> However, this approach is also characteristic for other continental countries, such as Switzerland, Spain, and Greece, as well as the Eastern European states.

Id. at 527-28.

15. *Id.* at 528 (this is traced particularly in Sweden, out of the three Scandinavian states, but there are also some "just desert" innovations in Denmark, for example).

place more emphasis on the offence, on the responsibility of the juveniles for their actions, and on the proportionality principle.[16]

In addition to state-policy rules, juvenile justice is also governed by international law. Three fundamental international conventions and several other non-obligatory instruments regulate juvenile justice systems under international law. The ICCPR guarantees general rights of suspects and accused, such as the rights to avoid arbitrary detention,[17] to be treated "with humanity and with respect for the inherent dignity of the human person,"[18] and to "be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."[19] It also refers specifically to minors' rights by requiring states to provide every child "such measures of protection as are required by his status as a minor"[20] and demanding specifically that "[a]ccused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication."[21] In addition, the ICCPR outlaws capital punishment for those under the age of eighteen.[22] The European Convention for the Protection of Human Rights and Fundamental Freedoms[23] "provides for the due process of law, fairness in trial proceedings, a right to education, a right to privacy and declares that any deprivation of liberty (including curfews, electronic monitoring and community supervision) should not be arbitrary or consist of any degrading treatment."[24]

Yet, the most comprehensive convention regarding juvenile justice is the CRC, which established a near global consensus that "[i]n all actions concerning children . . . the best interests of the child shall be a primary consideration."[25] In addition, it was established that all children have a right to protection,[26] to participation,[27] to personal development,[28] and to basic material provisions.[29] The CRC upholds the following rights for children: "[T]o life, to be protected in armed conflicts, to be safe-guarded from degrading and cruel punishment, to receive special treatment in justice systems," and to be granted "freedom from discrimination, exploitation, and abuse."[30] This "full-fledged Convention, which has increasing importance for Youth protection as well as for Youth Justice . . .

16. *Id.*

17. ICCPR, *supra* note 4, art. 9(1).

18. *Id.* art. 10(1).

19. *Id.* art. 14(1).

20. *Id.* art. 24(1).

21. *Id.* art. 10(2)(b).

22. *Id.* art. 6(5).

23. Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 222.

24. Muncie & Goldson, *supra* note 13, at 211.

25. CRC, *supra* note 1, art. 3(1).

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

27. *Cf. id.* arts. 12, 14-15 (discussing a child's freedom of expression, religion, conscience, thought, association, and peaceful assembly).

28. *Id.* art. 6(2).

29. *Id.* arts. 23-27.

30. Muncie & Goldson, *supra* note 13, at 211.

was adopted in 1989 by the General Assembly and since than has been ratified by 191 countries."[31]

Articles 37, 39, and 40 of the CRC are relevant for juvenile justice. In Article 40, the CRC defines the purposes of juvenile justice to be "promoting the child's reintegration and the child's assuming a constructive role in society."[32] Hence, Article 40 requires that:

> Whenever appropriate . . . [the state shall use] measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected . . . [and shall maintain] [a] variety of dispositions, such as care, guidance and supervision orders; counseling; probation; foster care; education and vocational training programmes and other alternatives to institutional care . . . .[33]

To that end, the CRC requires that a child will be "treated in a manner consistent with the promotion of the child's sense of dignity and worth . . . which takes into account the child's age" and "the needs of persons of his or her age";[34] that detention shall be "used only as a measure of last resort and for the shortest appropriate period of time";[35] that state parties "shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children";[36] and that the child "shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances."[37]

The above basic tenets of juvenile justice are reinforced by several non-binding documents regarding juvenile justice. The United Nations Standard Minimum Rules for the Administration of Juvenile Justice stress the need for special training for the authorities regulating juvenile justice and determine "a minimum training in law, sociology, psychology, criminology and behavioural sciences."[38] The United Nations Rules for the Protection of Juveniles Deprived of their Liberty elaborate on the conditions of detention of minors and reiterate the importance of rehabilitation and return to community.[39] The United Nations Guidelines for the Prevention of Juvenile Delinquency add that youth justice

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31. Junger-Tas, *supra* note 10, at 526. *See also* Muncie & Goldson, *supra* note 13, at 211 ("The only UN member states that have not ratified are Somalia and the USA (Somalia has had no internationally recognised government since 1991, the US has claimed that ratification would undermine parental rights."). South Sudan, since becoming a state in 2011, has also not ratified the CRC. *The Convention on the Rights of the Child: Signatory States and Parties to the Convention*, HUMANIUM, http://www.humanium.org/en/convention/signatory-states (last visited Jan. 29, 2014).

32. CRC, *supra* note 1, art. 40(1).

33. *Id.* arts. 40(3)-(4).

34. *Id.* arts. 37(c), 40(1).

35. *Id.* art. 37(b).

36. *Id.* art. 40(3).

37. *Id.* art. 37(c).

38. G.A. Res. 40/33, Annex, at 211, U.N. Doc. A/RES/40/33 (Nov. 29, 1985) (commenting on Article 22).

39. G.A. Res. 45/113, Annex, ¶¶ 79-80, U.N. Doc. A/RES/45/113 (Dec. 14, 1990).

policy should avoid criminalizing children for minor misdemeanours.[40] Lastly, the United Nations Children's Fund Principles and Guidelines on Children Associated with Armed Forces or Armed Groups ("Paris Principles") deal specifically with children recruited for armed forces during armed conflicts.[41] These principles relate to the mechanism of juvenile justice under these special circumstances and subject them to a "child rights approach" (including the principles of restorative justice and reintegration) and the general principle of the best interests of the child[42] (which is also one of the foundations of the CRC).[43] The Paris Principles also introduce the concept that children who are accused of committing war crimes should be regarded not only as perpetrators but also as victims and treated accordingly.[44]

Collectively, these conventions and rules might be viewed as tantamount to a growing legal global standardization of juvenile justice. Numerous countries "have now used the []CRC to improve protections for children and have appointed special commissioners or ombudspersons to champion children's rights."[45] "A monitoring body—the UN Committee on the Rights of the Child—reports under the Convention and presses governments for reform."[46]

However, the enforcement of children's rights under international law is complicated by the same problems faced by other human rights protected by international human rights law. While the discussion and analysis of these difficulties is beyond the scope of this paper, we note here that the mechanisms of enforcing these laws are relatively weak.[47] The implementation of such rights,

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40. G.A. Res. 45/112, Annex, ¶ 56, U.N. Doc. A/RES/45/112 (Dec. 14, 1990).

41. UNITED NATIONS CHILDREN FOUND., THE PARIS PRINCIPLES: PRINCIPLES AND GUIDELINES ON CHILDREN ASSOCIATED WITH ARMED FORCES OR ARMED GROUPS 4 (2007) [hereinafter PARIS PRINCIPLES], *available at* http://childrenandarmedconflict.un.org/publications/ParisPrinciples_EN.pdf.

42. *Id.* at 8-9.

43. CRC, *supra* note 1, art. 3(1).

44. PARIS PRINCIPLES, *supra* note 41, at 9. For the claim that the special circumstances of children in terrorist groups may turn them from perpetrators into victims, see also Hilly Moodrick-Even Khen, *Child Terrorists: Why and How Should They be Protected by International Law*, *in* INTERNATIONAL LAW AND ARMED CONFLICT: CHALLENGES IN THE 21ST CENTURY 262, 264-72 (Noëlle Quénivet & Shilan Shah-Davis eds., 2010).

45. Muncie & Goldson, *supra* note 13, at 211. The appointment of ombudspersons for children has become so prevalent in Europe that in 1997 a European Network for Ombudspersons for Children was established to connect the independent offices for children in thirty-three countries in Europe. *See European Network of Ombudspersons for Children*, CHILD RIGHTS INT'L NETWORK, http://www.crin.org/enoc (last visited Jan. 30, 2014).

46. Muncie & Goldson, *supra* note 13, at 211.

47. Most human rights law treaties are monitored by monitoring committees whose enforcing authorities are rather limited. JACK DONNELLY, INTERNATIONAL HUMAN RIGHTS 8-10 (4th ed. 2013). They are usually authorized only to make recommendations for the implementation of their respective instruments, while their authority to resolve disputes between states or between individuals and states with regard to the application of the instruments depends on whether the states parties have accepted such authority. *See id. See also* Optional Protocol to the International Covenant on Civil and Political Rights art. 1, Dec. 16, 1966, 999 U.N.T.S. 171 ("A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by

therefore, relies primarily on the good will of the states formally bound by human rights treaties and customary law.[48] In addition, the CRC is not enforced by an international tribunal, but it is rather a committee that monitors its implementation by state parties and this committee is only authorized to "make suggestions and general recommendations . . . [that] shall be transmitted to any State Party concerned and reported to the General Assembly, together with comments, if any, from States Parties."[49] Breaches attract no formal sanction, even though every five years the U.N. Committee on the Rights of the Child tests the measures taken by individual states to implement the convention.[50] Moreover, non-governmental organizations that critically review juvenile justice proceedings,[51] such as Amnesty International and Human Rights Watch, suggest that "implementation has often been half-hearted and piecemeal."[52] A country will give lip service to rights in order to be "granted status as a 'modern developed state' and acceptance into world monetary systems."[53] The pressure to ratify is both moral and economic. While the CRC may be the most ratified of all international human rights directives, it is also the most violated.[54] Indeed, thirty-three countries' ratification

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that State Party of any of the rights set forth in the Covenant."); Convention on the Elimination of All Forms of Discrimination against Women art. 29(1), Dec. 18, 1979, 1249 U.N.T.S. 13 ("Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. [If this is not successful] . . . any one of those parties may refer the dispute to the International Court of Justice . . . ."). However, states often sign human rights treaties with reservations. *See* Elena A. Baylis, *General Comment 24: Confronting the Problem of Reservations to Human Rights Treaties*, 17 BERKELEY J. INT'L L. 277, 277 (1999). In addition, there is no international body that is authorized to make mandatory decisions or to enforce human rights law instruments, except for the U.N. Security Council, which may decide on matters pertaining to human rights law but only as far as these issues are related to the Council's main objective, which is safeguarding international peace and security. *See* DONNELLY, at 87, 162. The Security Council has taken action in response to different human rights violations to different degrees of success. *See id.* at 90-91, 194-95, 198-99, 206-07 (including embargoes against South Africa in response to Apartheid, creating the International Criminal Tribunal for the former Yugoslavia in reaction to violence in the Balkans, sending peacekeepers to Rwanda to enforce the Arusha Accords, and ordering the International Criminal Court to indict Omar al-Bashir for his responsibility for the humanitarian crisis in Darfur).

48. *See* DONNELLY, *supra* note 47, at 8.

49. CRC, *supra* note 1, art. 45(d).

50. *Id.* arts. 44-45.

51. Junger-Tas, *supra* note 10, at 526.

52. Muncie & Goldson, *supra* note 13, at 211.

53. *Id.*

54. According to "Abramson's (2000) analysis of UN observations on the implementation of juvenile justice in 141 countries" there is a "widespread lack of 'sympathetic understanding' necessary for compliance with the []CRC." *Id.* at 212. ("[Abramson] notes that a complete overhaul of juvenile justice is required in [twenty-one] countries and that in others torture, inhumane treatment, lack of separation from adults, police brutality, bad conditions in detention facilities, overcrowding, lack of rehabilitation, failure to develop alternatives to incarceration, inadequate contact between minors and their families, lack of training of judges, police, and prison authorities, lack of speedy trial, no legal assistance, disproportionate sentences, insufficient respect for the rule of law and improper use of the juvenile justice system to tackle other social problems, are of common occurrence.").

is accompanied by reservations.[55] "For example the Netherlands, Canada, and the UK have issued reservations to the requirement to separate children from adults in detention."[56]

Above all, like other human rights law treaties and instruments, the ICCPR and the CRC are general in their character and lack specific detailed regulations for the legal procedures of juvenile justice; among them, regulations of criminal procedures, specific forms of rehabilitation, and limitation periods for offences committed by juveniles. Hence, it is understood that the importance of the CRC and other soft law instruments lies more in the values they represent and their moral appeal to realize these values, and less in their actual application.

Even more complicated, however, is the question of which human rights norms governing juvenile justice systems in independent and democratic regimes could, and should, be applied within occupation regimes. As we shall see in the following section, both the problem and its suggested solutions emerge from the question of which legal regimes should apply in occupied territories.

III. THE CHANGING NATURE OF THE LAW OF OCCUPATION

Traditional, or classic, international law of occupation sets a very constrained framework of rules to govern belligerent occupation regimes, known as belligerent occupation law or international humanitarian law.[57] However, the last decades have witnessed a proliferation of other types of occupation regimes. These include long-term occupation regimes (for example, in the territories administered by Israel) and transformative occupation regimes, also called multilateral regimes (in formerly occupied Iraq and in Afghanistan).[58] The aim of these latter regimes is to build new societies as end goals of intervention and to protect the occupied population as consistent with international norms and human rights law, and they are characterized by the involvement of the U.N.[59]

The changing nature of occupation regimes—in terms of both the period of the occupation and the goals of the regime—will, in our view, inevitably change

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55. *Id.*

56. *Id.*

57. Hans-Peter Gasser, *Protection of the Civilian Population*, *in* THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 237, 270-73 (Dieter Fleck ed., 2d ed. 2008).

58. *See* Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 AM. J. INT'L L. 580, 584, 588-89, 604-05 (2006). A recent report on occupation and other forms of administration of foreign territory prepared by the International Committee of the Red Cross questions the legal basis of transformative occupations and suggest that their mandate relies only in U.N. Security Council decisions and not in international law itself. *See* TRISTAN FERRARO, INT'L COMM. OF THE RED CROSS, OCCUPATION AND OTHER FORMS OF ADMINISTRATION OF FOREIGN TERRITORY 67-71 (2012) [hereinafter ICRC REPORT], *available at* http://www.icrc.org/eng/assets/files/publications/icrc-002-4094.pdf. However, in this article we rather accept the main existence of such forms of occupations (or administration of territory) and hence delineate the duties incumbent on such regimes without questioning their legitimacy under international law.

59. Grant T. Harris, *The Era of Multilateral Occupation*, 24 BERKELEY J. INT'L L. 1, 7-9, 13 (2006) (see figure 1).

the normative legal framework that regulates those regimes and the interpretation of existing traditional laws. In order to enable them to fulfill their purposes, both long-term occupation regimes and transformative (even if short-term) occupation regimes demand changes in the set of rules that govern them. For example, since the aim of transformative regimes is to rebuild the legal infrastructure of the territory they occupy and create a new legal order, the governing laws must allow changes in the existing laws in the occupied territory. Long-term occupation regimes, on the other hand, may not require permission to change existing laws in the occupied area, but they must consider the need for development of the occupied area. In this section, we compare the traditional and the new obligations of occupiers in the administered territories (as long-term occupiers) and in formerly occupied Iraq (as transformative occupiers).

The foundations of the traditional law of occupation are the 1907 fourth Hague Convention[60] and the Fourth Geneva Convention.[61] These instruments, which are considered customary international law,[62] establish the framework of belligerent occupations regimes: that is, their goals, the duties of the occupant, and the rights and privileges of the occupied population. They also seek to create a harmonized system that secures the rights of the occupied population, on the one hand, and the security needs of the occupant, on the other hand.

Article 43 of the Hague Regulations contains the crux of the goals of the occupation regime and the obligations of the occupant:

> The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.[63]

Article 64 of the Fourth Geneva Convention completes the legal framework that enables the occupying power to ensure "public order and safety": "The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention."[64] As one commentator noted, "[t]he main thrust of the international law of occupation is to provide a set of interstitial rules for the administration of territory during an interim period while the fate of the territory is decided."[65]

However, questions arise with regard to the content, the purpose, and the limits of the framework of these rules, especially, as will be discussed further, vis-à-vis the changes that conservative forms of belligerent occupations have

60. Hague Regulations, *supra* note 7.

61. GCIV, *supra* note 2.

62. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 79 (July 8).

63. Hague Regulations, *supra* note 7, art. 43.

64. GCIV, *supra* note 2, art. 64.

65. Harris, *supra* note 59, at 8.

undergone. A recent report prepared by legal experts on behalf of the International Committee of the Red Cross ("ICRC"), aimed at analyzing, clarifying, and developing the laws of occupation, suggested that the obligation to "'restore and ensure public order and safety' contained in the first part of Article 43 of [the Hague Regulations]" would receive a much broader interpretation in terms of the obligations of the occupying power if interpreted according to the authoritative French text, as this version "referred to the restoration and maintenance of '*l'ordre et la vie publics*,'" that is the restoration of "public order and *civil life*."[66] In this interpretation, the occupying power's obligations according to the Hague Regulations "to restore, and ensure, as far as possible, public order and safety" represent a role that is fraught rather than one-dimensional.[67] The occupying power, in this reading, would "no longer be regarded as . . . a disinterested invader but rather . . . a full-fledged administrator."[68]

The above obligations to restore and maintain public order and safety in the occupied territory are realized and performed by the military commander, the incarnation of effective control in the occupied territory. This position has been echoed by the Israeli Supreme Court in several cases:

> As is well known, Article 43 [of the Hague Regulations is a] . . . framework maxim of the belligerent occupation laws, which sets a general framework for the manner by which the military commander exercises its duties and powers in the occupied territory. . . . [T]he commander of the Area must exercise his powers under all circumstances exclusively for the benefit of the Area, while applying only the relevant considerations—the best interest of the protected persons, on the one hand, and the needs of the military, on the other hand.[69]

Thus, when exercising his powers, "the military commander is not allowed to consider the national, economic and social interests of his own state, inasmuch as such interests have no effect on his security interest in the area or the interest of the local population."[70]

However, the ICRC report on occupation suggests that prolonged occupation "call[s] into question some of the underlying principles of occupation law, in particular the provisional character of the occupation and the necessity of preserving the *status quo ante*."[71] Hence, it asserts "[s]ince neither the Hague Regulations nor the Fourth Geneva Convention specifies any lawful deviation from existing law in such circumstances, many have argued that prolonged occupation necessitates specific regulations for guiding responses to the practical problems

66. ICRC REPORT, *supra* note 58, at 56-57 (first emphasis added).

67. Hague Regulations, *supra* note 7, art. 43.

68. ICRC REPORT, *supra* note 58, at 57.

69. HCJ 2164/09 Yesh Din—Volunteers for Human Rights v. Commander of the IDF Forces in the West Bank ¶ 8 [2011] (Isr.).

70. *Id.* (quoting HCJ 393/82 Askaan v. Commander of the IDF Forces in the Area 37(4) PD 785, 794-795 [1983] (Isr.)).

71. ICRC REPORT, *supra* note 58, at 55.

arising from long-term occupation."[72] Indeed, the prolonged nature of the Israeli occupation in the administered territories has generated numerous discussions over the years on the question of how the commander should apply the relevant considerations and exercise his duties. The main question discussed by the Israeli Supreme Court has been how to adjust "the prolonged duration of the occupation, to the continuity of normal life in the Area and to the sustainability of . . . relations between the two authorities—the occupier and the occupied."[73]

These discussions have mainly taken place in the context of securing the rights and freedoms of the occupied population, such as the freedom of movement,[74] the right to property,[75] or the rights of the civilian population in times of armed conflict.[76] These discussions have persisted both when the territories were peacefully administered and when uprisings and even armed conflicts arose.[77]

The Israeli Supreme Court concluded by stating the need for a dynamic view of the duties of the military commander:

> This kind of conception supports the adoption of a *wide and dynamic view* of the duties of the military commander in the [administered territories], which impose upon him, *inter alia*, the responsibility to ensure the development and growth of the Area in numerous and various fields, including the fields of economic infrastructure and its development.[78]

The Supreme Court then quoted a previous ruling: "Thus, a military administration may develop industry, commerce, agriculture, education, health, welfare and other elements regarding good governance, which are required in order to secure the changing needs of a population in an area held in belligerent

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72. *Id.*

73. HCJ 2164/09 *Yesh Din*, ¶ 10 (citing HCJ 393/82 *Askaan* at 800-02; HCJ 9717/03 Naale v. Civil Administration 58(6) PD 97, 103-04 [2004] (Isr.); HCJ 337/71 El-Jamiya v. Minister of Defense 26(1) PD 547, 582 [1972] (Isr.)).

74. HCJ 2150/07 Safiyeh et al. v. Minister of Defense ¶ 32 [2009] (Isr.), *available at* http://elyon1.court.gov.il/files_eng/07/500/021/m19/07021500.m19.pdf.

75. HCJ 2056/04 Beit Sourik Village Council v. Israel 48(5) PD 807, ¶ 8 [2004] (Isr.), *available at* http://elyon1.court.gov.il/Files_ENG/04/560/020/A28/04020560.A28.pdf; *see also* HCJ 7957/04 Mara'abe v. Prime Minister of Israel 60(2) PD 477, ¶ 7 [2005] (Isr.), *available at* http://elyon1.court.gov.il/Files_ENG/04/570/079/A14/04079570.A14.HTM.

76. *See, e.g.*, HCJ 9132/07 Albassioni v. Prime Minister ¶¶ 4-5, 7, 10-11 [2008] (Isr.) (not reported), *available at* http://elyon1.court.gov.il/Files_ENG/07/320/091/n25/07091320.n25.pdf; *see also* HCJ 201/09 Physicians for Human Rights v. Prime Minister ¶ 1 [2009] (Isr.), *available at* http://elyon1.court.gov.il/files_eng/09/010/002/n07/09002010.n07.pdf.

77. *See, e.g.*, HCJ 201/09 *Physicians for Human Rights* ¶¶ 1, 3-4 (discussing IDF activities in Cast Lead operation in 2009); HCJ 4764/04 Physicians for Human Rights v. IDF Commander in Gaza 85(5) PD 385, ¶¶ 1, 3 [2004] (Isr.), *available at* http://elyon1.court.gov.il/files_eng/04/640/047/a03/04047640.a03.pdf (reviewing applications regarding IDF activities in defense operations); HCJ 2936/02 Physicians for Human Rights v. Commander of the IDF Forces in the West Bank 53(3) PD 26 [2002] (Isr.), *available at* http://elyon1.court.gov.il/Files_ENG/02/360/029/L02/02029360.I02.pdf.

78. HCJ 2164/09 *Yesh Din* ¶ 10 (first emphasis added).

occupation."[79] The Israeli Court seems to express a view that is compatible with the authoritative French text of the Hague Regulations. According to this view, the lengthy nature of the Israeli occupation in the administered territories requires that the discretion of the military commander be widened to take into consideration the needs of the restoration and maintenance of the general civil life, as it is his responsibility "to ensure the development and growth of the Area in *numerous and various fields*."[80] In fact, this view supports the concept that the fundamental conservative rules of occupation law should not be interpreted as a general directive to freeze development in occupied territory or leading the territory into a frozen situation.[81]

Yet, it should be clarified that this widened authorization cannot exceed the constraints of the international law of occupation—that is, the Hague Regulations and the Fourth Geneva Convention—which sustain that the interests of the protected persons (the local population living in the occupied territories) must be secured.[82] Therefore, the military commander's discretion may be widened in the administered territories given the prolonged nature of the occupation regime so long as this is done for the benefit of the occupied population: that is, for the protected persons.[83]

The military commander's discretion is also restricted with regard to the occupying power's ability to legislate in the occupied territory. Article 43 of the Hague Regulations orders the occupying power to respect, "unless absolutely prevented, the laws in force in the country."[84] Article 64 of the Fourth Geneva Convention authorizes the occupying power (and hence the military commander) to:

> [S]ubject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfill its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.[85]

This indicates that the occupying power should not engage in attempts to change the fundamental legal framework—that is, the legislation and institutions of the occupied territory—as it is not the permanent sovereign of the territory. As the ICRC report suggests, we must interpret the concept of the necessity to change laws governing the occupied territory folded within Article 43 of the Hague Regulations as encompassing, first, the duty of the occupant to fulfill its

79. *Id.* (quoting HCJ 393/82 Askaan v. Commander of the IDF Forces in the Area 37(4) PD 785, 804 [1983] (Isr.)).

80. *Id.* (emphasis added).

81. *See* ICRC REPORT, *supra* note 58, at 72.

82. *See* HCJ 2164/09 *Yesh Din* ¶ 8.

83. *Id.* ¶ 10.

84. Hague Regulations, *supra* note 7, art. 43.

85. GCIV, *supra* note 2, art. 64.

obligations under Fourth Geneva Convention; second, to maintain orderly government in the occupied territory; and third, preserve its ability to ensure its own security.[86] This is the only justification for the occupying power to change the pre-existing legal system in the occupied territory and issue its own military legislation.[87]

With regard to the role of the occupying power emerging from both the Hague Regulations and the Fourth Geneva Convention, then, we can conclude that, on the one hand, it exceeds the conservative framework of a short-term belligerent occupation regime. The occupying power may "develop industry, commerce, agriculture, education, health, welfare and other elements regarding good governance, which are required in order to secure the changing needs of a population in an area held in belligerent occupation."[88] On the other hand, the role of occupying power does not evolve into that of a complete sovereign that can legitimately and indiscriminately change the laws in the area.

In contrast, in formerly occupied Iraq, a broader mandate in terms of the development of the physical and legal infrastructures of the occupied territory was given to members of the Coalition (mainly the United States and the United Kingdom).[89] Following the invasion of Iraq, the United States established the transitional government of the Coalition Provisional Authority ("CPA") on behalf of the Coalition.[90] The U.N. Security Council gave the Coalition members a mandate to administer Iraq,[91] allowing them to

> advance efforts to restore and establish national and local institutions for representative governance, including by working together to facilitate a process leading to an internationally recognized, representative government of Iraq; . . . [to] promot[e] the protection of human rights; . . . [and to] encourag[e] international efforts to promote legal and judicial reform.[92]

However, while the Security Council referred to the administration of the Coalition members in Iraq as occupation,[93] the CPA did not refer to the administrative regime it created as "an occupation regime," but rather as a

86. *See* ICRC REPORT, *supra* note 58, at 56-59.

87. *Id.* (the experts base their interpretation of the concept of necessity in article 43 of the Hague Regulations).

88. HCJ 2164/09 Yesh Din—Volunteers for Human Rights v. Commander of the IDF Forces in the West Bank ¶ 10 [2011] (Isr.) (quoting HCJ 393/82 Askaan v. Commander of the IDF Forces in the Area 37(4) PD 785, 804 [1983] (Isr.)).

89. *See* S.C Res. 1483, U.N. Doc. S/RES/1483 (May 22, 2003).

90. Sean D. Murphy, Ed., *Coalition Laws and Transition Arrangements During Occupation of Iraq*, 98 AM. J. INT'L L. 601, 601-02 (2004).

91. *See* S.C. Res. 1546, ¶¶ 9-10, U.N. Doc. S/RES/1546 (June 8, 2004); S.C. Res. 1511, ¶¶ 13-14, U.N. Doc. S/RES/1511 (Oct. 16, 2003); S.C. Res. 1483, *supra* note 89, ¶ 4.

92. S.C. Res. 1483, *supra* note 89, ¶ 8.

93. *See id.* pmbl. (referring to the Coalition members as "occupying powers").

"transitional administration"[94] regime that intended to "restore conditions of security and stability, to create conditions in which the Iraqi people can freely determine their own political future, (including by advancing efforts to restore and establish national and local institutions for representative governance) and facilitating economic recovery, sustainable reconstruction and development."[95]

The objectives of the powers in Iraq, accompanied by the involvement of the U.N. Special Representative to Iraq in helping the Iraqi people and members of the Coalition achieve these goals, suggest that "the purposes of the occupation [there] . . . went beyond the confines of the Hague Regulations and the Fourth Geneva Convention,"[96] even though not to such an extent that they completely disregarded the traditional law of occupation. Hence, the mandate to reform the existing legal framework in Iraq gained by the CPA and the U.N. Security Council was much wider than that given to the Israeli occupying power in the administered territories.[97]

The differences between the administered territories and formerly occupied Iraq in the objectives and roles of the occupying powers suggest a difference in the application and interpretation of the legal framework governing these occupied territories, be it the traditional law of occupation, which forms part of international humanitarian law,[98] or international human rights law, which, as will be discussed in the next section, contemporary legal theory of international law claims to apply in occupied territories. We will discuss this difference in the following section.

IV. THE APPLICATION OF HUMAN RIGHTS LAW IN JUVENILE JUSTICE SYSTEMS IN OCCUPIED TERRITORIES

The co-application of international human rights law and international humanitarian law has become a prominent topic of discussion in the last decade, yielding controversies and disagreements over both its mere feasibility and its form or degree.[99] In this section, we examine this co-application specifically through

94. L. ELAINE HALCHIN, CONG. RESEARCH SERV., THE COALITION PROVISIONAL AUTHORITY (CPA): ORIGIN, CHARACTERISTICS, AND INSTITUTIONAL AUTHORITIES 8 (2004) (statement for Maj. Frank A. March).

95. *Id.* at 1 (footnote omitted).

96. Roberts, *supra* note 58, at 613.

97. Yet, it is interesting to note that after the conclusion of the formal mandate of the Coalition and since the insurgents' activities in Iraq demanded the continuing presence of Coalition forces, the administrative regime regained its nature as a traditional form of belligerent occupation, which required the application of traditional Hague and Geneva law. *See id.* 617-18.

98. International humanitarian law includes both the laws of belligerent occupation and the laws governing the conduct of hostilities. ICRC REPORT, *supra* note 58, at 7.

99. There are numerous articles on this issue. *See, e.g.*, INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW (Orna Ben-Naftali ed., 2011) (containing nine essays on the relationship between international humanitarian law and international human rights law); Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AM. J. INT'L L. 119 (2005); Cordula Droege, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, 40 ISR. L. REV. 310 (2007); Hans-Joachim Heintze, *On the Relationship Between Human Rights Law Protection and International Humanitarian Law*, 86 INT'L REV. RED CROSS 789 (2004); Orna Ben-

the prism of norms that apply in the juvenile justice system in occupied territories. We then apply the discussion to the case study of the juvenile justice system in former occupied Iraq.

A. The Mutual Application of International Human Rights Law and International Humanitarian Law

It has been long contested whether human rights law should apply in situations where international humanitarian law traditionally applies, including occupied territories.[100] Some valuable arguments apply against such application, the most significant being that protections provided by international human rights treaties do not normally apply extra-territorially, outside the government-governed relationship.[101] This position is extrapolated from a narrow linguistic interpretation of the "under its jurisdiction" clause of the ICCPR.[102] Others argue that because human rights norms were not drawn up with the circumstances of armed conflict and occupation primarily in mind, the rules of the law of armed conflict regarding military occupations offer more extensive, detailed, and relevant guidance on a wide range of issues than do the general human rights conventions.[103] These two regimes, therefore, are said to mutually exclude each other.[104] Another argument is that "human rights treaty bodies [are not necessarily] competent to find violations of international humanitarian law, or even to evaluate conduct during armed conflicts or military occupation, when the treaties that created these bodies gave them a mandate only to review generally state implementation of obligations under each instrument."[105]

However, contemporary theories of international law and practice do support such co-application.[106] This can be seen, on the one hand, through a direct and

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Naftali & Yuval Shany, *Living In Denial: The Application of Human Rights in the Occupied Territories*, 37 ISR. L. REV. 17 (2003).

100. *See* Dennis, *supra* note 99, at 119-20 (referencing the observation of Jean Pictet, editor of the ICRC commentaries, on the 1949 Geneva Convention).

101. *See id.* at 122-27.

102. *Id.* at 122-23.

103. *E.g.*, Ben-Naftali & Shany, *supra* note 99, at 28.

104. *Id.* at 29; Roberts, *supra* note 58, at 600.

105. Dennis, *supra* note 99, at 121-22.

106. For two of ICJ's core decisions on this subject, *see* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (July 8) and Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 106-113 (July 9) (this case included examining Israel's obligations under the ICCPR in the occupied territories). For recent European Court of Human Rights decisions that support the mutual application of international human rights law and international humanitarian law, see Al-Jedda v. United Kingdom, App. No. 27021/08 (Eur. Ct. H.R., July 7, 2011), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105612 (this and the next case examine the United Kingdom's obligations under the European Convention of Human Rights in their role in the occupation of Iraq); Al-Skeini v. United Kingdom, App. No. 55721/07 (Eur. Ct. H.R., July 07, 2011), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105606; Issa v. Turkey, App. No. 31821/96 (Eur. Ct. H.R., Mar. 3, 2005), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-67460 (this and the next case cases examine Turkey's obligations under the European Convention of Human Rights

independent application of human rights law in occupied territories according to a contemporary interpretation of the obligations entrusted with the occupying power by traditional occupation law (such as Article 43 of the Hague Regulations and Article 64 of the Fourth Geneva Convention),[107] or, on the other hand, by applying a *lex specialis* concept.[108] According to this latter approach, international humanitarian law is the *lex specialis* in occupation regimes, and hence international human rights law serves as a complementary set of norms that should be applied as an interpretative source of the former, serving to solve lacunas in international humanitarian law and validate the legitimacy of the involvement of international supervisory mechanisms in situations of occupation.[109] This co-application of human rights law and international humanitarian law is based on a paradigm that undermines the traditional great divide between the law of war and the law of peace. It is vested in the idea of universality of human rights that embraces "the interpretation of the jurisdictional clauses of the major human rights treaties, substitut[es] the test of effective control for the concept of territory, and revers[es] the presumption in favor of the territorial application of international treaties, insofar as human right treaties are concerned."[110]

Yet, while the above analysis of the co-application of international humanitarian law and human rights law may seem plausible where the occupying power executes law enforcement actions, its feasibility with regard to situations of armed conflict in an occupied territory requires further substantiation. Indeed, this is quite often the situation that occupying powers face even after establishing a stable occupation regime.[111] As the ICRC report on occupation suggests:

> [O]ccupation law is silent on the separation and interaction between law enforcement measures and the use of military force under the 'conduct-of-hostilities' model . . . [and hence, it] leaves unresolved a number of

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in regards to Turkish soldiers in Iraq); Ergi v. Turkey, 1998-IV Eur. Ct. H.R. 1751; Loizidou v. Turkey, 310 Eur. Ct. H.R. (ser. A) (1995) (this case examines Turkey's obligations under the European Convention of Human Rights in regards to its actions in the 1974 Cyprus invasion and the refugees that resulted). For the U.N. position on the universal application of minimum humanitarian standards, see Comm. on Human Rights, Letter Dated 5 January 1995 from the Permanent Representative of Norway and the Chargé d'Affaires of the Permanent Mission of Finland Addressed to the Commission on Human Rights, U.N. Doc. E/CN.4/1995/116 (Jan. 31, 1995) (notifying that the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities decided to transmit the Declaration of Minimum Humanitarian Standards).

107. GCIV, *supra* note 2, art. 64; Hague Regulations, *supra* note 7, art. 43. *See also* Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168, ¶ 178 (Dec. 19).

108. See the cases cited in note 106.

109. ICRC REPORT, *supra* note 58, at 61-66. *See also* Ben-Naftali & Shany, *supra* note 99, at 22.

110. Ben-Naftali & Shany, *supra* note 99, at 100.

111. This was the case between Israel and the Palestinians in Gaza before the disengagement, and partially the case in the administered territories. *See id.* at 19. A similar situation prevailed in formerly occupied Iraq, where continuing insurgent activities have been pitted against the Coalition forces. *See, e.g.*, Seumas Milne, *Insurgents Form Political Front to Plan for US Pullout*, GUARDIAN, July 18, 2007, http://www.theguardian.com/world/2007/jul/19/topstories3.usa.

> issues related to the identification of the legal regime(s) governing the use of force in occupied territory.[112]

The inability to identify the legal regimes that should govern the use of force in occupied territory pertains to a difficulty in determining whether human rights law regimes should apply even to law enforcement missions that the occupying power is to execute under the constraints of an armed conflict, such as detentions, assigning of residence, or issuing of orders that limit movement in the occupied territory.

In scenarios where hostilities arise in the occupied territory, the occupying power may lose, at least to some degree, its effective control. Since the level of effective control needed to apply human rights law is greater than that needed to apply the laws governing the conduct of hostilities, the occupying power may conclude that the latter should prevail over the former.[113] Some have suggested that situations where armed conflict arises infrequently in occupied territories be defined as a mixed conflict,[114] comprising periods where "protracted armed violence between governmental authorities and organized groups" take place and other periods where the occupying power exercises effective control in relatively peaceful circumstances.[115] According to a mixed conflict model, the co-application of human rights law and international humanitarian law is also intelligible, as the occupying power's capacity to exercise some degree of effective control implies its capacity to enforce human rights law in the area.[116]

These assertions regarding the applicability of human rights law in occupied territories are strengthened by the nature of long-term and transformative occupations, discussed above.[117] "[A]n occupant with a transformative project may view human rights norms as constituting part of the beneficent political order being introduced into the territory."[118] A long-term occupant will perhaps be

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112. ICRC REPORT, *supra* note 58, at 109.

113. *See* HCJ 4764/04 Physicians for Human Rights v. IDF Commander in Gaza 85(5) PD 385, ¶ 20 [2004] (Isr.), *available at* http://elyon1.court.gov.il/files_eng/04/640/047/a03/04047640.a03.pdf; HCJ 3239/02 Mar'ab v. IDF Commander in the West Bank ¶ 21 [2002] (Isr.), *available at* http://www.hamoked.org/files/2012/3720_eng.pdf; Yuval Shany, *Israeli Counter-Terrorism Measures: Are They "Kosher" Under International Law?*, *in* TERRORISM AND INTERNATIONAL LAW: CHALLENGES AND RESPONSES 96, 105 (Int'l Inst. of Humanitarian Law ed., 2003), *available at* http://www.iihl.org/iihl/Documents/Terrorism%20and%20IHL.pdf. *See also* Hilly Moodrick Even-Khen, *Can We Now Tell What "Direct Participation in Hostilities" Is?*, 40 ISR. L. REV. 214, 219-31 (2007); *see also* HCJ 769/02 Public Committee Against Torture in Israel v. Israel (2) IsrLR 459, ¶ 16 [2006] (Isr.), *available at* http://elyon1.court.gov.il/Files_ENG/02/690/007/A34/02007690.A34.pdf (citing Israeli Supreme Court's statements in cases dealing with the Israeli Army activities in the territories during the second *Intifada*, that the laws of armed conflict should prevail in those territories).

114. AMICHAI COHEN & YUVAL SHANY, יני מלחמהוקר את עצמו: חקירת חשדות להפרת , צה"ל ח [The IDF and Alleged International Law Violations: Reforming Policies for Self-Investigations] 26-27 (2011) (Isr.), *available at* http://en.idi.org.il/media/230988/pp_93.pdf.

115. Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

116. COHEN & SHANY, *supra* note 114, at 26-27.

117. *See id.*

118. Roberts, *supra* note 58, at 594.

pressured by "the inhabitants, or outside bodies claiming to act on their behalf," to apply standards that secure "the human rights of inhabitants, internees, and others."[119]

Indeed, a long-term belligerent occupant may claim conservatively that international humanitarian law adequately ensures the rights of the occupied population.[120] However, the prototype of belligerent occupations regime that set the model for international humanitarian law, including the laws of belligerent occupation, was of a short-term occupation. This legal framework, most of it intended to expire a year after the commencement of an occupation,[121] was carefully tailored for the purposes of keeping law and order in the occupied territory by imposing limited obligations on the occupant for the rights of the occupied population and by providing the occupant with a confined set of means for derogating from the protected rights of the occupied population.[122] Long-term occupations, which demand the "develop[ment of] industry, commerce, agriculture, education, health, welfare and other elements regarding good governance" are closer in resemblance to sovereign regimes.[123] As the period of occupation extends, they face demands of the civilian population to be protected "from improper exercise of governmental power."[124] The legal framework of human rights law—rather than international humanitarian law—is thus most adequate for fulfilling this mission. Human rights law norms and ideology, which seek to ensure human dignity, are designed to insist that governments provide for the needs of individuals. Hence, as the belligerent occupant exercises most of the powers of the sovereign government—such as "the power to legislate (jurisdiction to prescribe), the power to resolve disputes (jurisdiction to adjudicate), and the

119. *Id. See, e.g.*, NAAMA BAUMGARTEN-SHARON, B'TSELEM, NO MINOR MATTER: VIOLATIONS OF THE RIGHTS OF PALESTINIAN MINORS ARRESTED BY ISRAEL ON SUSPICION OF STONE-THROWING 7-9 (Yael Stein & Maya Johnston eds., Zvi Shulman trans., 2011), *available at* http://www.btselem.org/download/201107_no_minor_matter_eng.pdf (demanding that the Convention on the Rights of the Child be applied by Israel in the occupied territories). For the U.N. Human Rights Committee and the U.N. Economic, Cultural and Social Committee's demands to apply human rights treaties in these territories, see Comm. on Econ., Soc. and Cultural Rights, Rep. on its 22d, 23d, and 24th Sess., Apr. 25-May 12, 2000, Aug. 14-Sept. 1, 2000, Nov. 13-Dec. 1, 2000, ¶ 577, U.N. Doc. E/2001/22; GAOR, 56th Sess., Supp. No. 2 (2001); Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Second Periodic Report, Addendum: Israel, Human Rights Comm., ¶ 8, U.N. Doc. CCPR/C/ISR/2001/2 (Dec. 4, 2001) [hereinafter Human Rights Comm., Considerations of Reports].

120. *See* Human Rights Comm., Consideration of Reports, *supra* note 119, ¶ 8 (detailing Israel's position objecting to the co-application of human rights law and international humanitarian law and claiming that international humanitarian law adequately suffices for the administration of the occupied territory).

121. GCIV, *supra* note 2, art. 6.

122. *See, e.g.*, *id.* arts. 43, 53, 78 (allowing internment, expropriation of property, and assigned residence respectively).

123. HCJ 393/82 Askaan v. Commander of the IDF Forces in the Area 37(4) PD 785, 804 [1983] (Isr.). *See also* Roberts, *supra* note 58, at 601 (indicating specific situations where human rights law should apply).

124. Ben-Naftali & Shany, *supra* note 99, at 61.

power to implement laws and court decisions (jurisdiction to enforce)"[125]—it seems logical that the belligerent occupant apply, *mutatis mutandis*, the apparatus of human rights law in the occupied territory.

The above conclusion connects the argument put forward in this article (namely, that the occupying power's compliance with the obligation to restore and maintain public order and civil life requires certain transformations) to the argument that these transformations are best achieved by the application of human rights law. However, the following questions arise: Does the applicability of human rights law depend only on the occupying power's objectives and obligations in the occupied territory? Or should it also be affected by the willingness of the ousted sovereign's constitutional regime to absorb and apply international human rights law or by the values and goals of the occupied population, if these can be detected? The answer is not immediately clear. It may be argued that the flexibility given to an occupying power "to implement human rights law in occupied territory . . . should not be interpreted as giving it a blank cheque to change legislation and institutions in the name of human rights to make them accord with its own legal and institutional ideas."[126]

Yet, an alternative claim points to the dicta of the International Court of Justice that accepts the applicability of human rights law in occupied territory both as a complementary set of norms and as a direct interpretation and application of belligerent occupation law,[127] and the universality of human rights law and the customary nature of most of its norms. Accordingly, proponents of this view demand the application of human rights law in the occupied territory by the occupying power, and even justify the use of it to make substantial changes in the occupied territory.[128]

Finally, the endorsement of the application of human rights law in occupied territories serves perfectly the interests of securing a legitimate juvenile justice system discussed in the second section of this article. The principal aims of a juvenile justice system—that is "[t]o prevent offending and re-offending; [t]o (re)socialize and (re)integrate offenders; [and] [t]o address the needs and interests of victims" through diminished responsibility, proportionality, and room to reform[129]—are all incorporated both in general human rights instruments and in those specific to children's rights, as was suggested and exemplified above.

In addition, as maintained in this section, international human rights law supplies both the long-term belligerent occupant and the transformative occupant with an additional compatible legal framework to abide by its obligations towards

125. *Id.* at 60-61.

126. ICRC REPORT, *supra* note 58, at 69.

127. See generally the cases in note 106.

128. *See, e.g.*, ICRC REPORT, *supra* note 58, at 70 (noting that "Article 43 of the Hague Regulations and Article 64 of the Fourth Geneva Convention require the suspension or abrogation of oppressive local laws if they hindered the occupying power from discharging its duties under the Fourth Geneva Convention and by extension of this principle, require the occupying power to implement any other obligations derived from international law, in particular human rights law").

129. Junger-Tas, *supra* note 10, at 510-11.

the protected persons in the occupied territory. Therefore, in order to ensure a legitimate juvenile justice system within the occupied territory, the occupying power should be bound both by general human rights law norms and by specific human rights standards that regulate the treatment of children under human rights law.

Having determined the above, we must decide which instruments of international human rights law that substantiate those norms and standards bind the occupying power. As states are bound by their customary and treaty international law obligations, systems of juvenile justice that are established by sovereign states rest, *inter alia*, on general human rights principles such as the prevention of such practices as torture or other cruel, inhuman, or degrading treatment or punishment and prolonged arbitrary detention, considered as customary law,[130] and, secondly, on the rights that are specifically mentioned in the ICCPR regulating standards of legal detention, arrest, and trial for those states that are parties to the Convention.[131] A system of juvenile justice is also compiled of rights and protections specifically tailored to secure the rights of children who are detained, arrested, or tried. These are found in the CRC and in non-binding instruments, such as decisions of U.N. bodies and ICRC documents.

An examination of the applicability of human rights treaty law reveals that a wide interpretation of the "under its jurisdiction" clause of the ICCPR suggests that an occupier has jurisdiction over persons who are under its effective control,[132] which applies when it exercises public powers on the territory of another state.[133] This leads to the conclusion that the ICCPR applies in occupied territories.

However, the case for application of the CRC is more complicated. This convention contains an application clause that determines that "States Parties shall respect and ensure the rights set forth in the . . . Convention to each child *within their jurisdiction*,"[134] and hence has been interpreted by the International Court of Justice to impose a similar obligation on occupying powers to apply this convention in the territory they temporarily administer.[135] However, it may be

130. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 563 (7th ed. 2008); MALCOLM N. SHAW, INTERNATIONAL LAW 256-57 (5th ed. 2003).

131. ICCPR, *supra* note 4, arts. 9, 10, 14.

132. *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 108-11 (July 9).

133. *See, e.g.*, Al-Jedda v. United Kingdom, App. No. 27021/08, ¶¶ 107-10 (Eur. Ct. H.R., July 7, 2011), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105612; Al-Skeini v. United Kingdom, App. No. 55721/07, ¶¶ 131-42 (Eur. Ct. H.R., July 07, 2011), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105606 (noting examples of recent decisions of the European Court of Human Rights, in which the court, in contrast to its former dicta that aimed at limiting the application of the European Convention on Human Rights extraterritorially, ruled that the Convention applied when a state—such as an occupying power—is responsible for maintaining the security of the territory that is under its effective control or when it has the authority to employ governmental authorities); *contra infra* Part V.A (explaining Israel's contrasting position on this issue).

134. CRC, *supra* note 1, art. 2 (emphasis added).

135. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. ¶ 113 ("As regards the Convention on the Rights of the Child of 20 November 1989, that

contended that this convention does not apply in armed conflicts. The specific reference of Article 38 of the CRC to situations of armed conflicts specifies that states "undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child" and "[i]n accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts."[136] This may suggest that the CRC intended to exclude other of its articles in times of armed conflict and occupation.[137] Yet, other non-binding human rights standards referring to juvenile justice[138] can be considered as guiding the occupying power regime in the occupied territory, as a manifestation of the general application of human rights law in these territories.

Hence, the specific human rights law norms that apply in occupied territories are primarily those in the ICCPR that determine the rights of suspects and accused, guaranteeing the right to avoid arbitrary detention,[139] to be treated "with humanity and with respect for the inherent dignity of the human person,"[140] and "to a fair and public hearing by a[n] . . . independent and impartial tribunal established by law."[141] As was indicated in the second section of this article, specific reference to minors' rights is also found within the ICCPR when it requires states to provide every child "such measures of protection as are required by his status as a minor"[142] and demands specifically that "[a]ccused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication."[143]

The CRC—whose applicability in occupied territories, while questionable, is possible—focuses on the importance of securing juvenile justice and adds more obligations for states parties.[144] These include seeking "to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children [in the juvenile justice system],"[145] demanding that detention "shall be used only as a measure of last resort and for the shortest appropriate period of time,"[146] and that the child "shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances."[147] These goals are reinforced by the soft law instruments that refer

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instrument contains an Article 2 according to which 'States Parties shall respect and ensure the rights set forth in the . . . Convention to each child within their jurisdiction . . . .' That Convention is therefore applicable within the Occupied Palestinian Territory.").

136. CRC, *supra* note 1, arts. 38(1), 38(4).

137. Dennis, *supra* note 99, at 129.

138. *See supra* notes 38-44 and accompanying text.

139. *See* ICCPR, *supra* note 4, art. 9.

140. *Id.* art. 10(1).

141. *Id.* art. 14(1).

142. *Id.* art. 24(1).

143. *Id.* art. 10(2)(b).

144. *See* Dennis, *supra* note 99, at 129.

145. CRC, *supra* note 1, art. 40(3).

146. *Id.* art. 37(b).

147. *Id.* art. 37(c).

to the detention and rehabilitation of children in juvenile justice systems, which were discussed in the second section of this article.

In the following sub-section we discuss the co-application of the laws of belligerent occupation and human rights law in the juvenile justice system in formerly occupied Iraq. We examine the standards of human rights law that were formally incorporated into the legal instruments regulating the CPA and discuss the question of whether the administration has lived up to its own standards.

B. The Juvenile Justice System in Formerly Occupied Iraq

As explained above,[148] the Coalition occupation regime in Iraq was approved by the U.N. Security Council and implemented by the CPA memorandum.[149] Those instruments, which approved and provided guidance to the Coalition's occupation, based the regime's legal framework explicitly on the laws of belligerent occupation and implicitly on human rights law. Security Council Resolution 1483 instructed the Coalition forces to abide by and comply fully with their obligations under the laws of belligerent occupation, "including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907."[150] The CPA revised memorandum stipulated that "the relevant and appropriate provisions [of the Fourth Geneva Convention] constitute an appropriate framework consistent with its mandate in continuance of measures previously adopted."[151]

In terms of the application of human rights law, the CPA noted "the deficiencies of the Iraqi Criminal Procedure Code with regard to fundamental standards of human rights,"[152] and intended to "establish[] procedures for applying criminal law in Iraq, recognizing that the effective administration of justice must consider . . . the need to modify aspects of Iraqi law that violate fundamental standards of human rights."[153]

The Security Council addressed the application of human rights law only indirectly by calling upon the Coalition members to act

> consistent[ly] with *the Charter of the United Nations* and *other relevant international law*, to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future.[154]

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148. *See supra* Part III.

149. Memorandum of L. Paul Bremer, Adm'r, Multinational Provisional Auth., Coalition Provisional Auth. Memorandum Number 3 (Revised) (June 27, 2004), *available at* http://www.refworld.org/docid/469cd1b32.html [CPA Memo (Revised)].

150. S.C. Res. 1483, *supra* note 89, ¶ 5.

151. CPA Memo (Revised), *supra* note 149, pmbl.

152. *Id.*

153. *Id.* § 1.

154. S.C. Res. 1483, *supra* note 89, ¶ 4 (emphasis added).

Following the termination of the U.N. mandate for the occupation in Iraq given to the Coalition in 2005, the occupation regime ended,[155] and since the departure of the multinational force from Iraq, the prevailing legal framework has been a subject of debate.[156] According to the United States, after the end of the U.N. mandate, the occupation re-acquired its definition as a belligerent occupation regime in which insurgent activities take place.[157] Under such circumstances, the *lex specialis* is humanitarian law, which is regulated by the Hague and Geneva laws, which generally do not contain specific guarantees for the rights of children detained by the occupying power. However, according to another legal analysis, the completion of the U.N. mandate rendered the *lex specialis* in Iraq human rights law, notwithstanding the armed conflict between dissident forces and the Coalition powers that remained there.[158] In this interpretation, belligerent occupation law lost its relevancy.[159]

However, according to the analysis of this article, both international humanitarian law and human rights law should have applied. International humanitarian law, which includes both the laws of belligerent occupation and the laws of armed conflict, is the *lex specialis*, and human rights law supplies complementary standards of interpretation and resolves situations not satisfactorily regulated by the laws of belligerent occupation or the laws of armed conflict.[160] Juvenile justice seems to be such a situation, requiring co-application of these laws.

The detention and prosecution of children both before the end of the U.N. mandate and afterwards was governed by a legal framework that incorporated general human rights standards only to a very limited extent. "The United States-Iraq status of forces agreement require[d] that juveniles detained by [United States Forces in Iraq] be released, or, if sufficient evidence exist[ed], that they be transferred to the Iraqi justice system for processing."[161] The CPA referred to the detention of children under the age of eighteen only, determining that any person under the age of eighteen interned at any time shall in all cases be released not later than twelve months after the initial date of internment.[162] The CPA formally related only to the basic ICCPR guarantees of the right to freedom[163] and due

155. S.C. Res. 1546, *supra* note 91, ¶ 4(c).

156. *See* Roberts, *supra* note 58, at 617-18; *cf. US: Respect Rights of Child Detainees in Iraq: Children in US Custody Held Without Due Process*, HUMAN RIGHTS WATCH (May 20, 2008), http://www.hrw.org/news/2008/05/19/us-respect-rights-child-detainees-iraq [hereinafter HRW Report].

157. *See* Roberts, *supra* note 58, at 608.

158. *See id.* at 594.

159. HRW Report, *supra* note 156.

160. *See, e.g.*, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 106-113 (July 9); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (July 8).

161. U.N Secretary-General, *Promotion and Protection of the Rights of Children: Children and Armed Conflict*, ¶ 100, U.N. Doc. A/65/820-S/2011/250 (Apr. 23, 2011) [hereinafter Report of SG on Children in Armed Conflicts].

162. CPA Memo (Revised), *supra* note 149, § 6(5).

163. ICCPR, *supra* note 4, art. 9.

process of law,[164] and completely disregarded specific juvenile justice norms under international human rights law, such as taking into consideration the interest of rehabilitation or emphasizing the best interest of the child.[165]

Even more so in practice, not only have the juvenile justice standards been ignored, but the general standards of human rights law have also been abused. According to the report of the U.N. Secretary General to the Security Council in April 2011, the detention of children by United States Forces in Iraq ("USF-I") already ceased before the report was prepared: "As of June 2010, no juveniles remained in USF-I custody."[166]

To date, the United States has not released statistics on the number of children under the age of 18 it has transferred to Iraqi custody for trial. According to the United Nations Assistance Mission for Iraq by December 2007

> 89 children transferred from US to Iraqi custody had been convicted of offenses . . . . Between December 2007 and March 2008, there was a drop of 450 children in U.S. custody, but the United States has not made known whether they were released or transferred to Iraqi custody.[167]

According to unofficial data collected by Human Rights Watch, "[s]ince 2003, the US has detained some 2,400 children in Iraq, including children as young as 10. Detention rates rose drastically in 2007 to an average of 100 children a month from 25 a month in 2006."[168] In early 2008, "US military authorities, operating as the Multinational Forces in Iraq, were . . . holding 513 Iraqi children as 'imperative threats to security,' and have transferred an unknown number of other children to Iraqi custody."[169]

Many of the practices of detention and interrogation were in breach of the ICCPR and the CRC. In violation of the ICCPR,[170] young children were not separated from older ones;[171] and in contradiction to the ICCPR, which demand that suspects be treated "with humanity and with respect for the inherent dignity of the human person,"[172] children were interrogated "over the course of days or weeks by military units in the field before being sent to the main detention centers."[173] In spite of the ICCPR's guarantee of the right of due process and the right to be "entitled to a fair and public hearing by a[n] . . . independent and impartial tribunal established by law,"[174] the children had "no real opportunity to challenge their

164. *Id.* art. 14.

165. CPA Memo (Revised), *supra* note 149 (failing to mention child-specific protections).

166. Report of SG on Children in Armed Conflicts, *supra* note 161, ¶ 100.

167. HRW Report, *supra* note 156.

168. *Id.*

169. *Id.*

170. *See* ICCPR, *supra* note 4, art. 10(2)(b).

171. HRW Report, *supra* note 156 ("US officials earlier this year told Human Rights Watch that they separate children from adults at these facilities but do not separate very young or particularly vulnerable children from other child detainees.").

172. ICCPR, *supra* note 4, art. 10(1).

173. HRW Report, *supra* note 156.

174. ICCPR, *supra* note 4, art. 14.

detention."[175] They were "not provided with lawyers and [did] not attend the one-week or one-month detention reviews after their transfer to [the detention facility at] Camp Cropper."[176] The conditions under which these children were detained entailed physical abuse.[177] In contrast to the CRC's demand that the best interest of the child be preferred, children had very limited contact with their families and no efforts were made to ensure, as both the CRC and the ICCPR instruct, that every child will be entitled to "such measures of protection as are required by his status as a minor."[178]

> While the US [did] assign each child a military "advocate" at the mandatory six-month detention review, [the] advocate[s] ha[d] no training in juvenile justice or child development.
>
> As of February 2008, the reported average length of detention for children was more than 130 days, and some children [were] detained for more than a year without charge or trial, in violation of the Coalition Provisional Authority memorandum on criminal procedures. . . .
>
> . . . .
>
> In August 2007, the United States opened Dar al-Hikmah (House of Wisdom) at Camp Cropper with the stated intention to provide 600 detainees, ranging in age from 11 to 17, with educational services pending release or transfer to Iraqi custody. However, in May 2008, US military officials in Baghdad told Human Rights Watch that only "200 to 300" of the 513 child detainees were enrolled in classes at Dar al-Hikmah.[179]

Under "justice for children" in 2009:

> Four mobile legal teams continued to provide assistance to boys in pre- and post-trial detention in Baghdad and Basra in 2010. Many of these boys were accused of being involved in terrorist activities, which carries a 15-year jail sentence if convicted. Others had been in detention without a formal charge for more than 12 months.[180]

Having discussed the co-application of human rights law with international humanitarian law in occupied territories with regard to juvenile justice and having critically examined the juvenile justice system applied by the United States in formerly occupied Iraq, we now turn to an appraisal of juvenile justice in the administered territories. We will first refer to the general legal framework applied in these territories, and then discuss specifically the juvenile justice system.

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175. HRW Report, *supra* note 156.

176. *Id.*

177. *See id.*

178. ICCPR, *supra* note 4, art. 24; CRC, *supra* note 1, art. 2.

179. HRW Report, *supra* note 156. *See also* CPA Memo (Revised), *supra* note 149, § 6(5) (requiring anyone under the age of 18 to be released no later than 12 months after initial date of detention).

180. Report of SG on Children in Armed Conflicts, *supra* note 161, ¶ 100.

V. JUVENILE JUSTICE: THE ISRAELI CASE

Israel has consistently claimed that international humanitarian law, including both the laws of belligerent occupation and the laws of armed conflict, is the sole legitimate legal regime in the occupied territories.[181] However, this system that was set up under security legislation and operated under military rule is beginning to change. In the last several year, the military administered courts have started to question the strict application of international humanitarian law, and have issued rulings with dicta that have led to the adoption of some human rights principles in regards to the rights of child prisoners. While this has been a positive step, there are still concerns that these principles are not being adequately applied to match the norms of international human rights law.

A. Legal Regimes in the Administered Territories: International Humanitarian Law or International Human Rights Law?

Since Israel has claimed that international humanitarian law applies in the occupied territories, it has objected to the application of human rights treaties in the administered territories.[182] In the most current report submitted to the Committee on Economic, Social, and Cultural Rights in 2011, and taking into consideration the political changes that took place in the area, such as the Israeli disengagement from the Gaza Strip in 2005 and the establishment of Hamas regime there in 2007, Israel maintained the following:

> The applicability of the [International Covenant on Economic, Social and Cultural Rights] to the West Bank or to the Gaza Strip has been the subject of considerable debate in recent years. . . .
>
> . . . *In these circumstances Israel can clearly not be said to have effective control in the Gaza Strip, in the sense envisaged by the Hague Regulations.*
>
> It is against this background that Israel is called-on to consider the relationship between different legal spheres, primarily the Law of Armed Conflict and Warfare and Human Rights Law. . . . For its part, Israel recognizes that there is a profound connection between Human Rights Law and the Law of Armed Conflict . . . . However, in the current state of international law and state-practice worldwide, it is

181. *See* STATE OF ISRAEL, IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN ISRAEL: ISRAEL'S REPLIES TO LIST OF ISSUES TO BE TAKEN UP IN CONNECTION WITH THE CONSIDERATION OF ISRAEL'S THIRD PERIODIC REPORT CONCERNING ARTICLES 1 TO 15 OF THE INTERNATIONAL CONVENT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS (E/C.12/ISR/3) 3-5 (2011) [hereinafter Israel's Replies]. For previous expressions of the Israeli position, see Implementation of the International Covenant on Economic, Social and Cultural Rights: Additional Information Submitted by States Parties to the Covenant Following the Consideration of Their Reports by the Committee on Economic, Social and Cultural Rights, Addendum: Israel, Econ. & Soc. Council, ¶¶ 2-3, U.N. Doc. E/1989/5/Add.14 (May 14, 2001) (containing additional information submitted by Israel to the Council following the consideration of their reports by the Committee on Economic, Social and Cultural Rights); Human Rights Comm., Considerations of Reports, *supra* note 119, ¶ 8.

182. We will explain below that the Israeli Supreme Court has taken a nuanced view in Part V.B.

> Israel's view that these two systems-of-law, which are codified in separate instruments, nevertheless remain distinct and apply in different circumstances.
>
> Furthermore, Israel has never made a specific declaration in which it reserved the right to extend the applicability of the Convention with respect to the West Bank or the Gaza Strip. Clearly . . . in the absence of such a voluntarily-made declaration, the Convention, which is a territorially bound Convention, does not apply, nor was it intended to apply, to areas outside its national territory.[183]

Hence, Israel's position can be summarized as a rejection of the application of treaties in territories that are, according to Israel's interpretation of the "under its jurisdiction" clause, outside its sovereign territory and jurisdiction.[184] Israel's refusal to enact human rights treaties in the administered territories and the lack of effective control in Gaza are used as explanations for its claim that these territories are not under its jurisdiction.[185] Israel also supports its position through its interpretation that human rights law and international humanitarian law are possibly mutually exclusive.[186]

In contrast to the Israeli government position, the Israeli Supreme Court has recently expressed the view that even though human rights law treaties do not directly apply in the occupied territories, human rights law serves as a source for filling in lacunas in the *lex specialis*—that is, international humanitarian law—governing the administered territories.[187] This assertion is compatible with the doctrine of mutual application of human rights law and international humanitarian

183. Israel's Replies, *supra* note 181, at 4-5 (emphasis added). While the ICESCR and ICCPR have different jurisdictional standards, Israel has made similar statements in reference to the applicability of the ICCPR. *Compare* ICCPR, *supra* note 4, art. 2(1) ("Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant . . . ."), *with* International Covenant on Economic, Social and Cultural Rights art. 2(1), Dec. 16, 1966, 993 U.N.T.S. 3 ("Each State Party to the present Covenant undertakes to take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means . . . .").

184. Human Rights Comm., Considerations of Reports, *supra* note 119, ¶ 8 ("Israel has consistently maintained that the [ICCPR] does not apply to areas that are not subject to its sovereign territory and jurisdiction. This position is based on the well-established distinction between human rights and humanitarian law under international law. Accordingly, in Israel's view, the Committee's mandate cannot relate to events in the West Bank and the Gaza Strip, inasmuch as they are part and parcel of the context of armed conflict as distinct from a relationship of human rights."). *See also* Ben-Naftali & Shany, *supra* note 99, at 33-38 (explaining the treaty interpretation argument).

185. Israel's Replies, *supra* note 181, at 3-5. *See also* Ben-Naftali & Shany, *supra* note 99, at 38-40 (explaining the effective control argument).

186. Ben-Naftali & Shany, *supra* note 99, at 27-33.

187. *See* HCJ 769/02 Public Committee Against Torture in Israel v. Israel (2) IsrLR 459, ¶¶ 18-21 [2006] (Isr.), *available at* http://elyon1.court.gov.il/Files_ENG/02/690/007/A34/02007690.A34.pdf; HCJ 2150/07 Abu Safiyeh v. Minister of Defense ¶ 16 [2009] (Isr.), *available at* http://elyon1.court.gov.il/files_eng/07/500/021/m19/07021500.m19.pdf; CrimA (TA) 6659/06 A v. State of Israel ¶ 9 (2008) (Isr.), *available at* http://elyon1.court.gov.il/Files_ENG/06/590/066/n04/06066590.n04.htm.

law that we discussed above and claimed to reflect contemporary international law doctrine on this issue. Moreover, it strengthens the other claim this article maintains: that is, that a long-term belligerent occupying power that is required to increasingly take on the powers of a sovereign government in its relations with the population it controls can best fulfill this role by applying human rights law in addition to belligerent occupation law.

The following subsection examines the current juvenile justice system applied in the administered territories, revealing how a co-application of the laws of belligerent occupation and human rights law solves certain deficiencies in the system and best serves the objectives of a long-term occupation in the territories.

B. The Juvenile Justice System in the Administered Territories

The juvenile justice system in the administered territories is applied under the general legal framework of these territories by the belligerent occupant.[188] This system is composed of security legislation[189] and the laws of belligerent occupation of international law—primarily, the Fourth Geneva Convention and the Hague Regulations[190]—and a judicial system of military courts.[191]

A juvenile justice system in general, and in the administered territories in particular, requires actions such as detention and interrogation to be undertaken by several authorities. The first of these is the enforcing authority, which in the administered territories includes "a network of military bases, interrogation and detention centers and police stations in the West Bank, East Jerusalem, and in Israel."[192] "Palestinians, predominantly from the West Bank, are initially taken to one of these facilities for questioning and temporary detention."[193] Later, the system requires the involvement of the judicial authority in the adjudication process.[194]

In this section, we will focus on the current developments in the judicial authority system in terms of legislation governing its conduct and in terms of its actual practice. We will consider first the significant improvements in the absorption and application of norms that forward the best interest of the child concept prompted by human rights law instruments discussed above. Then we will examine criticism aimed both at the judicial procedures and at the procedures of interrogation and detention.

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188. *See* Order Regarding Security Provisions (Judea and Samaria), 5770-2008, No. 1651, §§ 8, 10 (Isr.), *available at* http://nolegalfrontiers.org/en/military-orders/mil01.

189. Zvi Hadar, *The Military Courts*, *in* 1 MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL 1967-1980: THE LEGAL ASPECTS 171, 177 (Meir Shamgar ed., 1982).

190. David Kretzmer, *The Law of Belligerent Occupation in the Supreme Court of Israel*, 94 INT'L REV. RED CROSS 207, 209-10 (2012).

191. Order Regarding Security Provisions No. 1651, §§ 8-20.

192. DEF. FOR CHILDREN INT'L: PALESTINE, BOUND, BLINDFOLDED AND CONVICTED: CHILDREN HELD IN MILITARY DETENTION 15 (2012) [hereinafter BOUND, BLINDFOLDED AND CONVICTED], *available at* http://www.dci-palestine.org/sites/default/files/report_0.pdf.

193. *Id.*

194. *Id.*

However, before turning to discuss the juvenile justice system applied by the military legislation and courts, we will make a short reference to the Palestinian Authority's legal perception of minors under criminal law.[195] The relevance of such a detour lies in the fact that, as we suggest in Section IV(A) above, the local perception of human rights norms may affect the application of human rights law in occupied territories that is promulgated by this article.

The Palestinian Child Law defines a juvenile as a person who has not yet attained the age of eighteen.[196] The law's objectives are to raise the prestige of the children of Palestine; to promote children's national pride and religious identity; to foster loyalty to Palestine, its land, its history, and its people; to encourage both children's freedom and their responsibility to civil society solidarity; and to create a balance between rights and obligations.[197] Emphasizing the values of justice, equality, tolerance, and democracy, the law aims at protecting children's rights to survive, grow, and enjoy a free, secure, and advanced life.[198] It also aims to raise public awareness of children's rights and to use appropriate measures for achieving this purpose.[199] Finally, the law encourages social involvement of children in their environment according to their age, abilities, and degree of maturity, and aims at fostering their creativity and independence while ensuring they preserve respect for parents and family.[200]

In addition, a draft of Youth Protection Law has been pending since 2011,[201] which the Legislative Council of the Palestinian Authority has not yet signed and ratified. The purpose of the draft law is to expand the legal treatment of juvenile cases in several areas.[202] The guiding principle is respect for children's rights, rehabilitation, and integration in society.[203] This draft forbids the prosecution of any person younger than twelve at the time of committing the criminal offense,[204] and it regulates the methods of punishment of minors under the age of fifteen,[205]

195. *See* Israel-Palestinian Liberation Organization: Interim Agreement on the West Bank and the Gaza Strip, Annex IV, art. 1, Sept. 28, 1995, 36 I.L.M. 551, 635 (stipulating that the Palestinian Authority is authorized to conduct criminal procedures and trials in cases that are not related to the security of the area in which the victim is not Israeli); *see, e.g.*, Agreement on the Gaza Strip and Jericho Area, Isr.-Palestine Liberation Organization, Annex I, arts. 5-7, May 4, 1994, U.N. Doc A/49/180 [hereinafter The Cairo Agreement].

196. Palestinian Child Law No. 7, art. 1 (2004), *available at* http://www.crin.org/Law/instrument.asp?InstID=1476.

197. *Id.* arts. 2(1)-(3).

198. *Id.* art. 2(4).

199. *Id.* art. 2(5).

200. *Id.* art. 2(6).

201. Draft Youth Protection Act 2011 (Palestine). *See also* DEF. FOR CHILDREN INT'L: PALESTINE SECTION, ANNUAL REPORT 2012, at 28 (2013), *available at* http://reliefweb.int/sites/reliefweb.int/files/resources/annualreport2012.pdf (mentioning the Palestinian Juvenile Protection Law Draft approved by the Ministerial Council in October 2011).

202. *See generally* Draft Youth Protection Act 2011 (Palestine).

203. *Id.* art. 1.

204. *Id.* art. 6.

205. *Id.* arts. 38-47.

and the methods of treatment of minors over the age fifteen.[206] It also orders the establishment of juvenile courts and discusses the legal procedures that apply there,[207] such as the manners of processing and control of convicted minors.[208] This law also relates to the establishment of the Center for Child Protection by the Ministry of Social Affairs and Social Services.[209]

What becomes clear from the review of the Palestinian Authority's legal perception of minors in criminal procedures is that their treatment in criminal systems should be guided by specific human rights values that refer to children under the CRC. This concept is consistent with that of the juvenile justice system applied by the military administration discussed below.

As mentioned above, the juvenile justice system in the administered territories is based on the security legislation in the administrated territories and the dicta of the military courts.[210] On "June 7, 1967, the first day of operation of the military government in the West Bank, three proclamations and several orders were published throughout the West Bank and the Gaza Strip."[211] These orders set forth legal procedures in the military courts and defined the offenses and penalties to be imposed upon offenders.[212] "Since then, the [Security Provisions Order ("SPO")] has been the basic enactment regarding military jurisdiction in these Regions."[213] The SPO was amended numerous times up until 2011, when it was issued as a consolidated version containing all the preceding amendments and unifying all remaining valid military orders into one instrument.[214]

The military courts system established by the SPO consists of two courts of first instance, one for the region of Judea and the second for the region of Samaria, as well as an appeals court.[215] The substantive law applied in these courts consists of local statutes and orders issued by the military commander, in his capacity as the sovereign power in the occupied territory under international humanitarian law.[216] The rules of evidence and procedure are similar to those applied in Israel, including legal representation for defendants and the right for a due process of law.[217] The prosecution is conducted by the military prosecutor and the trial is

206. *Id.* art. 48.

207. *Id.* arts. 26-36.

208. *Id.* arts. 49-57.

209. *Id.* art. 65.

210. Order Regarding Security Provisions (Judea and Samaria), 5770-2008, No. 1651, §§ 8-20 (Isr.), *available at* http://nolegalfrontiers.org/en/military-orders/mil01.

211. YESH DIN: VOLUNTEERS FOR HUMAN RIGHTS, BACKYARD PROCEEDINGS: THE IMPLEMENTATION OF DUE PROCESS RIGHTS IN THE MILITARY COURTS IN THE OCCUPIED TERRITORIES 36 (2007), *available at* http://www.yesh-din.org/site/images/BackyardProceedingsEng.pdf.

212. *Id.* at 45-46.

213. Hadar, *supra* note 189, at 177.

214. Since that time, the Order has been amended repeatedly, and constitutes up to 31 amendments at the time of this writing.

215. Order Regarding Security Provisions No. 1651, §§ 9, 10(D).

216. *See* Hague Regulations, *supra* note 7, art. 43.

217. Order Regarding Security Provisions No. 1651, §§ 77, 86, 88.

conducted solely by judges possessing particular legal experience.[218] According to decisions of the Israeli Supreme Court dating from the early days of the military administration, all of the procedures in these courts may be subject to review by the Supreme Court of Israel, in cases when defendants apply to the Supreme Court claiming violation of their rights.[219]

In the past few years, and officially since 2009,[220] the juvenile justice system, governed by the legislative and judicial system described above, has undergone remarkable changes and improvements led by the military courts' dicta.[221] Before 2009, there were no significant differences between criminal procedures for adults and those for minors in the administered territories.[222] If any special attention was given to minors in procedures at the military courts, it was mainly in authorizing the court to close hearings to the public[223] and forbidding the publication of the defendants' names.[224]

However, without a formal legislative foundation and relying on common law judicial legislation, the military courts' dicta have enabled an on-going process of changes aimed at applying higher standards, more in line with human rights law norms, in the juvenile justice system in the administered territories.[225] This venture eventually led to formal changes in the security provisions order.[226] Seeking creative solutions that would focus on rehabilitation instead of retribution at sentencing, the military courts gave considerable weight to the age of the juvenile, stating:

> When sentencing a minor, especially one who just reached the age of criminal liability, a minor without previous convictions, a minor who was lucky enough that his offense did not cause substantial damage to property or to human lives, it is proper to avoid severe punishment and

218. *Id.* §§ 11(A)(1), 11(A)(4), 123(B).

219. *See* Kretzmer, *supra* note 190, at 234.

220. Order Regarding Security Provisions No. 1644 came into force on July 29, 2009. *New Military Order on Juveniles Issued in the West Bank*, DEF. FOR CHILDREN INT'L: PALESTINE (Aug. 25, 2009), http://www.dci-pal.org/english/display.cfm?DocId=1223&CategoryId=1. As it is a temporary order, it has to be annually renewed. Order Regarding Security Provisions (Judea and Samaria), No. 1644 (Amend. No. 109) (Isr.).

221. *See infra* notes 227-33 and accompanying text.

222. STEPHEN SEDLEY ET AL., CHILDREN IN MILITARY CUSTODY 4 (2012), *available at* http://www.childreninmilitarycustody.org/wp-content/uploads/2012/03/Children_in_Military_Custody_Full_Report.pdf. However, younger offenders were able to receive custodial sentences in "an institute of social care." *See* NOAM HOFFSTADTER, PUBLIC COMM. AGAINST TORTURE IN ISR., PERIODIC REPORT: JUNE 2008—NO DEFENSE: SOLDIER VIOLENCE AGAINST PALESTINIAN DETAINEES 14 n.39 (2008), *available at* http://www.stoptorture.org.il/files/No_Defense_Eng.pdf.

223. *See* Order Regarding Security Provisions (Judea and Samaria), 5730-1970, No. 378, § 11 (Isr.), *available at* http://www.israellawresourcecenter.org/israelmilitaryorders/fulltext/mo0378.htm.

224. *See id.*

225. *See infra* notes 227-33 and accompanying text.

226. *See* Order Regarding Security Provisions (Judea and Samaria), No. 1644 (Amend. No. 109) (Isr.); *contra* SEDLEY ET AL., *supra* note 222, at 4 (mentioning that even with the new procedures in 2009, there were still incidences of those under eighteen that were treated as adults).

> give the minor hope and a chance to mend one's ways while he is in his natural environment and surrounded by his family.[227]

The minor's age is also a crucial factor in remand hearings, where minors' age is a strong consideration for release.[228] In addition, the military courts ordered the release of suspects and defendants when they discovered that some of their rights were impaired during the penal procedures, even when these rights were not included in formal legislation but were rather an outcome of judge-made legislation.[229]

All of these *de facto* changes have resulted in *de jure* changes in the military legislation in the administered territories. In 2009, the security order was amended to establish the Military Youth Court.[230] Professional qualification training was given to the judges who were appointed as youth judges and special legislative regulations were made to put more emphasis on the rehabilitation of convicted minors in the area.[231] The main changes in the regulations of the security order were as follows: only youths were to be tried in the Military Youth Court and the indictment against a minor must state the minor's date of birth; the Military Youth Court was authorized to appoint an advocate for the minor if justified by the minor's best interest; the court was enabled to make use of a report prepared by the welfare officer in the civil administration before sentencing; the separation of minors (up to the age of sixteen) and adults in detention facilities was legally determined; the court was authorized to order that the minor's parents be present at all hearings of the case and that they could act in certain instances in their child's name (such as by handling petitions to court or examining witnesses).[232]

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227. Mil. Appeal 58/00 Military Court of Appeals (Judea & Samaria), O. K. v. Military Prosecutor (May 30, 2000), Nevo Legal Database (by subscription) (Isr.) (translated by author).

228. *See Military Court Decisions*, MIL. COURT WATCH, http://militarycourtwatch.org/print.php?id=706zUIAHaTa31383A58dQYNef4o (last visited July 17, 2014).

229. For example, the courts ruled that night-time investigation may lead to release on bail, although at that point such a limitation was not yet mandated to the Security Legislation. *See* Mil. Appeal 2763/09 Military Court of Appeals (Judea & Samaria), A. A. v. Military Prosecutor (Aug. 2, 2009), Nevo Legal Database (by subscription) (Isr.); Mil. Appeal 2912/09 Military Court of Appeals (Judea & Samaria), Military Prosecutor v. A. R. (Aug. 27, 2009), Nevo Legal Database (by subscription) (Isr.) (translated by author). The same was ruled regarding investigation by a person unqualified to investigate minors. Mil. Appeal 2763/09; *cf.* Mil. Appeal 1781/11 Military Court of Appeals (Judea & Samaria), Military Prosecutor v. M. (June 15, 2011), Nevo Legal Database (by subscription) (Isr.) (translated by author) (where the court emphasized that the investigators should allow the detainee reasonable time to sleep and rest; however, the court did not find that a complaint for lack of sleep justified the detainee's release from custody). The courts had also given weight in remand hearings to the infringement of the right of representation. *See* Mil. Appeal 2912/09. Most significantly, there are explicit court rulings determining that prolonged procedures may lead to the release of defendants (and particularly minors) from remand. *See* Mil. Appeal 1411/11 Military Court of Appeals (Judea & Samaria), Military Prosecutor v. D. A. S. (Mar. 22, 2011), Nevo Legal Database (by subscription) (Isr.).

230. Order Regarding Security Provisions (Judea and Samaria), No. 1644 (Amend. No. 109) (Isr.).

231. *See id.*; *see also* BAUMGARTEN-SHARON, *supra* note 119, at 11.

232. Order Regarding Security Provisions, No. 1644. Although the amendment does not refer to remand hearings, the courts are strict about holding public hearings in general and about the presence of

Furthermore, it was determined that in criminal offences a minor would not be indicted for a crime committed one year before the indictment was filed, and in security offences, a minor will not be prosecuted for offences committed more than two years before the indictment without permission from the Chief Military Prosecutor.[233]

In 2011, further amendments were issued by the new consolidated military order that introduced a line of substantial amendments regarding the treatment of minors in the penal procedure.[234] Amendment number ten raised the age of majority from sixteen to eighteen, so that from the date of its entering into force forward all the newly and previously instituted special procedures defined for minors were officially valid for youths under the age of eighteen.[235] In this amendment, all the developments of the 2009 security order regarding juvenile justice were adopted, but this time referring to minors up to the age of eighteen.[236] It established the duty of the police to inform the minors of their right to a legal counsel before interrogation, and to inform parents or other legal guardians about a minor's arrest and interrogation.[237] Finally, the limitation period for indictments of regular criminal offences was shortened to one year, while the limitation period for indictments of national security related offences remained the same (two years).[238]

Amendment number sixteen determined the shortening of the period of detention before judicial review for all detainees.[239] The maximum period of detention before being brought before a judge was set at forty-eight hours for ordinary crimes and ninety-six hours for security offences (with the option of limited extension in special circumstances).[240] If no warrant is issued within these

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parents in particular at remand hearings. *See* ADDAMEER PRISONER SUPPORT & HUMAN RIGHTS ASS'N, EYES ON ISRAELI MILITARY COURT: A COLLECTION OF IMPRESSIONS 5 (2012), *available at* http://www.addameer.org/files/Reports/Eyes%20on%20Israeli%20Military%20Court-%20impressions.pdf (demonstrating that hearings were public as NGOs were able to attend and view them); SEDLEY ET AL., *supra* note 222, at 4 (highlighting that "parents are allowed to participate"). In certain cases, defendants were released because their family members were prevented from being present at the hearings. *See* Mil. Appeal 2912/09 Military Court of Appeals.

233. Order Regarding Security Provisions, No. 1644, art. 46(J).

234. *Compare* Order Regarding Security Provisions, No. 1644, *with* Order Regarding Security Provisions (Judea and Samaria), 5771-2011, No. 1676 (Amend. No. 10) (Isr.), *available at* http://www.dci-palestine.org/sites/default/files/military_order_1676.pdf (unofficial translation).

235. Order Regarding Security Provisions, No. 1676, § 3.

236. *See id.*

237. *Id.* § 4.

238. *Compare id.* § 5, *with* Order Regarding Security Provisions No. 1644, art. 46(J).

239. *See* Order Regarding Security Provisions (Judea and Samaria), No. 1685 (Amend. No. 16) (Isr.) (translated by author). This was established in August 2012. UNITED NATIONS CHILDREN'S FUND., CHILDREN IN ISRAELI MILITARY DETENTION: OBSERVATIONS AND RECOMMENDATIONS 9 (2013) [hereinafter CHILDREN IN ISRAELI MILITARY DETENTION], *available at* http://www.unicef.org/oPt/UNICEF_oPt_Children_in_Israeli_Military_Detention_Observations_and_Recommendations_-_6_March_2013.pdf. *See also DCI-Pal: Children Prosecuted in Israeli Military Courts—Update*, SAMIDOUN (Oct. 2, 2012), http://samidoun.ca/2012/10/dci-pal-children-prosecuted-in-israeli-military-courts-update.

240. *See* Order Regarding Security Provisions, No. 1685.

periods, the suspect is released.[241] The court may not order the detention of a suspect for longer than twenty days, but it may extend a period of detention several times for periods of up to fifteen days each upon further review.[242] A suspect may not be detained for an overall period that exceeds forty days without being indicted.[243]

In amendments twenty five and twenty six, issued a few months later, a reduction of initial detention periods was set specifically for minors so that minors under the age of fourteen are to be brought before a judge within a maximum period of twenty-four hours after their detention with regard to all types of offences (with the option of an extra twenty four hours extension in special circumstances).[244] Minors between the age of fourteen and eighteen are to be brought before a judge within a maximum period of forty-eight hours from their detention, with regard to all types of offences (with the option of an extra forty-eight hours extension in special circumstances).[245] In addition, minors are to be brought before the Military Court of Appeals in cases where they were maintained in custody longer than one year, after filling an indictment without reaching a verdict.[246] Any extension in this concern must be determined by the court every three months.[247]

Amendment number twenty-four refers to the translation of procedures in the military courts from Hebrew to Arabic.[248] The proceedings in the military courts

241. *See id. Contra* SEDLEY ET AL., *supra* note 222, at 29.

242. *See* Order Regarding Security Provisions, No. 1685.

243. *See* Order Regarding Security Provisions (Judea and Samaria), No. 1726 (Amend. No. 40) (translated by author); *see also* DEF. FOR CHILDREN INT'L: PALESTINE, DETENTION BULLETIN: OVERVIEW SEPTEMBER 2013, at 1 (2013), *available at* http://www.dci-palestine.org/sites/default/files/september_2013_detention_bulletin_final_4nov2013.pdf. *But see*, ADDAMER PRISONER SUPPORT & HUM. RTS. ASS'N, DENIAL OF THE RIGHT TO LIFE AND LIBERTY OF A PERSON AS A CRIME OF APARTHEID: TESTIMONY BEFORE THE RUSSELL TRIBUNAL ON PALESTINE 2 (2011), *available at* http://www.addameer.org/userfiles/Addameer%20Testimony%20for%20Russell%20Tribunal%20on%20Palestine%20-%205%20November%202011%5B20111108155735%5D.pdf (stating detention of Palestinians can be renewed up to 180 days).

244. *See* Order Regarding Security Provisions (Judea and Samaria), No. 1711 (Amend. No. 25) (Isr.) (translated by author). *See also* CHILDREN IN ISRAELI MILITARY DETENTION, *supra* note 239, at 9.

245. *See* Order Regarding Security Provisions, No. 1711. *See also* CHILDREN IN ISRAELI MILITARY DETENTION, *supra* note 239, at 9.

246. Order Regarding Security Provisions (Judea and Samaria), No. 1712 (Amend. No. 26) (Isr.) (translated by author).

247. *Id.*

248. *See* Order Regarding Security Provisions (Judea and Samaria), No. 1710 (Amend. No. 24) (Isr.) (translated by author). *See also High Court of Justice Calls Attention to the Obligation to Translate Indictments to Arabic in Cases Before Military Courts (HCJ 2775/11)*, NEWSLETTER (Embassy of Isr., Den Haag, Neth.), Apr. 18, 2013, at 2 [hereinafter Embassy of Isr., NEWSLETTER], *available at* http://embassies.gov.il/hague-en/Departments/Documents/20130418_Newsletter11_ILD.pdf (providing unofficial English translation) ("The general question regarding whether there exists an obligation to translate all military courts decisions [and not just indictments] in order to facilitate the possibility of utilizing them as precedents, has not been sufficiently argued and is not the subject-matter of this petition.").

in the administered territories are conducted mainly in Hebrew and translated to Arabic during the course of the proceedings by court interpreters.[249] Amendment number twenty-four determines that all the indictments must be translated to Arabic.[250]

The above notwithstanding, it is worth considering several critical observations with regard to the procedures undertaken by the judicial authority, including the interrogation and arrest process, and a comparison with the Israeli juvenile justice system. We will first briefly address the criticism of methods of interrogation and detention undertaken by the enforcing authorities—even though these issues venture beyond the scope of this paper.

Several non-governmental organizations have harshly criticized the process of detention and interrogation of Palestinian minors by the Israeli Defense Forces.[251] According to the Defence for Children (Palestine) report of April 2012, over the past eleven years around 7,500 children are estimated to have been detained by the Israeli forces in the administered territories.[252] According to the B'Tselem report of July 2011, between the years 2005 and 2010, more than 800 minors were prosecuted for stone throwing.[253] Some NGO's—basing their findings on interviews with detainees and others who escorted them through detention, interrogation, and imprisonment—report severe violations of the rights of minors.[254] According to Defence for Children International (Palestine), testimonies reveal that most children undergo a coercive interrogation that mixes verbal abuse, threats, and physical violence; approaches torture or inhumane treatment; and usually results in a confession.[255] "The Report also finds that in 29 percent of cases, the children are either shown, or made to sign, documentation written in Hebrew, a language they do not understand."[256]

According to a report of a delegation of British lawyers on the treatment of Palestinian children under Israeli military law, most of the interrogations of children are executed without the presence of a lawyer representing the child—reflecting, according to this delegation, a violation of Military Order 1676.[257] The

249. Embassy of Isr., NEWSLETTER, *supra* note 248, at 2.

250. *See* Order Regarding Security Provisions, No. 1710.

251. *See, e.g.*, BOUND, BLINDFOLDED AND CONVICTED, *supra* note 192, at 22-29, 34-38.

252. *Id.* at 7.

253. BAUMGARTEN-SHARON, *supra* note 119, at 5.

254. *See, e.g.*, BOUND, BLINDFOLDED AND CONVICTED, *supra* note 192, at 22-50; SEDLEY ET AL., *supra* note 222, at 30-31.

255. *See* BOUND, BLINDFOLDED AND CONVICTED, *supra* note 192, at 7.

256. *Id.*

257. *See* SEDLEY ET AL., *supra* note 222, at 18. However, Order No. 1676 provides that children *be notified* of their right to consult with a lawyer and it does not order the lawyer's presence at the investigation. Order Regarding Security Provisions (Judea and Samaria), 5771-2011, No. 1676, § 4 (Amend. No. 10) (Isr.), *available at* http://www.dci-palestine.org/sites/default/files/military_order_1676.pdf (unofficial translation) ("Prior to the investigation of an arrested minor suspect, the investigator will inform a defense attorney named by the minor, detailsregarding [sic] the investigation; without prejudice to the instructions of any law, informing of the defense attorney named by the minor as detailed above, will not delay the

British lawyers' report continues to claim that parents are not present at interrogations,[258] and that the children are generally not informed of their right to remain silent during the interrogation.[259] Children are arrested during night hours with no parental accompaniment and are violently treated by the arresting soldiers.[260] In addition, some children report having been detained in solitary confinement,[261] a practice that according to the United Nations Special Rapporteur on Torture amounts to torture when used against juveniles.[262] Finally, the report points out that periods of detention before and during trial are equal for adults and minors.[263]

Criticism has also been aimed at the procedures in the judicial system.[264] It is important to note that the Military Youth Court functions only in trials and not in interim hearings, bail hearings included,[265] and hence the implications of the reform described above are quite limited. Furthermore, because the practices of the court deviate somewhat from the law, the significant amendments in the military legislation are not always scrupulously followed. Legal practice is full of

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investigation.") (amending article 136(c)). It should be nevertheless mentioned that despite the criticism expressed by the British lawyers delegation of the means of law enforcement and application by law enforcement authorities, the delegation did not criticize the work of the military courts or the military youth courts. *See* SEDLEY ET AL., *supra* note 222, at 30 ("As we have explained, we have been given two radically different accounts of Israeli practice. It is not our role to adjudicate between them. But within them are certain undisputed facts which compel us to conclude that Israel is in breach . . . of the United Nations Convention on the Rights of the Child.").

258. SEDLEY ET AL., *supra* note 222, at 18. However, "Military Order 1676 requires '*notification*' of a parent but does not make provision for the parent's attendance at the interrogation." *Id.*

259. *See id.* at 16.

260. BAUMGARTEN-SHARON, *supra* note 119, at 26-27; SEDLEY ET AL., *supra* note 222, at 17. The criticism of the law enforcement means in the juvenile justice system in the administered territories presented above demands serious consideration and response. However, given that this article focuses on the military youth courts and not on the enforcement means and authorities, we must leave this discussion to another study. Nevertheless, we will mention briefly that the military courts have not disregarded the criticism and many of the changes in formal legislation were perhaps motivated by NGO claims. The B'Tselem report even maintains that the Military Courts are leaders and initiators in bringing about change and protection of minors' rights. *See* BAUMGARTEN-SHARON, *supra* note 119, at 71 ("[O]ne can establish beyond doubt that the Military Courts have initiated and led for changes in the behavioral norms of the enforcement officials in all that concerns the rights of the Minors.").

261. SEDLEY ET AL., *supra* note 222, at 27; *see also* Harriet Sherwood, *The Palestinian Children—Alone and Bewildered—in Israel's Al Jalame Jail*, GUARDIAN, Jan. 22, 2012, http://www.guardian.co.uk/world/2012/jan/22/palestinian-children-detained-jail-israel.

262. *See* Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Interim Rep. of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 77, transmitted by Note of Secretary-General, U.N. Doc. A/66/268 (Aug. 5, 2011) (by Juan E. Méndez); *see also* SEDLEY ET AL., *supra* note 222, at 27.

263. SEDLEY ET AL., *supra* note 222, at 27. This was changed by Amendments 16, 25, and 26 of the Order regarding Security Provisions. *See supra* notes 239-47 and accompanying text.

264. *See* NO LEGAL FRONTIERS, ALL GUILTY!: OBSERVATIONS IN THE MILITARY JUVENILE COURT APRIL 2010-MARCH 2011, at 10 (2011), *available at* http://nolegalfrontiers.org/images/stories/report_2011/report_en.pdf.

265. SEDLEY ET AL., *supra* note 222, at 23 (determining, *inter alia*, the jurisdiction of the youth courts).

examples of these failures, as is demonstrated by a survey of seventy-one cases in the Youth Court conducted by the NGO, No Legal Frontiers.[266] In this survey, it was found that numerous indictments are based on the defendants' confessions or on incriminations of co-partners given to the police during the interrogation;[267] most of the cases conclude with a plea bargain;[268] and, most importantly, actual imprisonment is usually the default sentence and is imposed as a first rather than a last resort, especially in cases where the accused was detained during the whole or part of the legal procedure.[269] This is due to the fact that there are no substantial Palestinian welfare services, and even the military judges expressed frustration at the lack of alternatives to imprisonment:

> The Supreme Court has recently ruled that when punishing minors the following factors should be taken into consideration: the lesser responsibility that should be attributed to a minor whose personality is not yet fully formed, the damage caused to the minor by actual imprisonment, damage that is ultimately against the public interest, and on the other hand the severity of the crime.
>
> The situation in the Region is even worse than in Israel in such cases, because the juvenile court does not have any rehabilitation instruments such as: ordered stays in locked facilities, parole officers and so on. . . . It is clear that creating rehabilitation instruments in the Region is not easy, especially when the crimes in question are often committed for ideological reasons and supported by the community surrounding the minor. In any case, I believe that the legislator in the Region cannot avoid addressing this issue and finding creative ways to allow minors to be treated outside of the framework of actual prison.[270]

Other practices in the juvenile court also attest to the failure of the military legislation regulating the administered territories' juvenile justice system to fully meet the legal standards of juvenile justice vested in human rights law, in spite of

266. NO LEGAL FRONTIERS, *supra* note 264, at 8. It should be noted that this report has been strongly rejected by the IDF Spokesman. *See* Letter from IDF Spokesperson, to Organization Law Without Borders, Response to Report on Military Jurisdiction (Aug. 30, 2011). In a response to the No Legal Frontiers report, the IDF Spokesman raises claims against both its factual determinations and the scientific validity of its statistical methods. *Id.* ¶ 4. With regard to the factual claims, the Spokesman states that contrary to the report, most Palestinian minors are not held in custody until the end of their trials. *Id.* The Spokesman adds that the report disregards major developments in both the security legislation and the military courts dicta, which improved the protections for minors in the criminal procedure in the administered territories. *Id.* ¶ 5. Regarding the report's scientific statistical methods, the Spokesman claims that the report's findings are not based on the basic principles of the science of statistics. *Id.* ¶ 4. In its response, the No Legal Frontiers stated that this report is not a scientific representative sample but rather a representation of the impression of reviewers who observed the procedures. *See* Letter from No Legal Frontiers, answer to the response of the IDF Spokesman to the No Legal Frontiers Report (translated by author).

267. NO LEGAL FRONTIERS, *supra* note 264, at 28.

268. *Id.* at 37-38; SEDLEY ET AL., *supra* note 222, at 22.

269. *See* NO LEGAL FRONTIERS, *supra* note 264, at 44.

270. *Id.* at 44-45 (emphasis and quotations omitted).

the changes that have been made.[271] These standards are motivated primarily to preserve the best interests of the child and promote "the child's sense of dignity and worth . . . and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society."[272] The British lawyers' report states that children are brought into the court in iron shackles, which, while removed on their entering the courtroom, are replaced when they leave.[273] The report mentions that this practice stands in contrast to the United Nations standard minimum rules for the treatment of prisoners:

> Which provide that chains and irons shall not be used as restraints; that any other restraints should only be used as a protection against escape during transfer provided they are removed when the prisoner appears before a judicial authority (or on medical grounds or to prevent injury); and that they should not be applied for any longer period than necessary.[274]

Finally, criticism of the juvenile justice system in the administered territories has been made through a comparison between this system and the juvenile justice system within Israel's borders.[275] Some major examples are the discrepancies between the minimum age for custodial sentences,[276] the right of parents to be present during interrogations,[277] and the maximum periods of detention without

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271. *See* The Youth (Trial, Punishment and Modes of Treatment) Law, 5731-1971, 25 LSI 128 (1970-1971) (Isr.) (demonstrating that Israel has passed a specific law for treatment of its juveniles within its domestic system).

272. CRC, *supra* note 1, art. 40(1).

273. SEDLEY ET AL., *supra* note 222, at 23.

274. *Id. See also* UNITED NATIONS, STANDARD MINIMUM RULES FOR THE TREATMENT OF PRISONERS 5 (1955), *available at* http://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf.

275. The issues relating to days of detention have been brought before the Israeli Supreme Court. Because a new amendment to the security order was to be applied with regard to the case of juveniles, the Court has decided to leave the applications pending until 1/12/2012, when the respondents (i.e., the Minister of Defence and the IDF Commander in Judea and Samaria) were to report to the Court on the application of the order. The applications are still pending until the time of this writing. *See* HCJ 3368/10 Office of the Palestinian Prisoners v. Minister of Defense (Isr.); HCJ 4057/10 The Association of Civil Rights in Israel v. IDF Commander in Judea and Samaria (Isr.). *See also* HUMAN RIGHTS WATCH, SEPARATE AND UNEQUAL: ISRAEL'S DISCRIMINATORY TREATMENT OF PALESTINIANS IN THE OCCUPIED PALESTINIAN TERRITORIES 34 (2010), *available at* http://www.hrw.org/sites/default/files/reports/iopt1210webwcover.pdf.

276. The minimum age for custodial sentencing is fourteen for Israeli youth in Israel and twelve in the administered territories. *Compare* The Youth (Trial, Punishment and Modes of Treatment) Law (Isr.), § 10(c)(2), *with* Order Regarding Security Provisions (Judea and Samaria), 5771-2011, No. 1676 , (Amend. No. 10) (Isr.), *available at* http://www.dci-palestine.org/sites/default/files/military_order_1676.pdf (unofficial translation); *see also* BOUND, BLINDFOLDED AND CONVICTED, *supra* note 192, at 19.

277. According to the Israeli Youth Law, a parent is allowed to be present at all times in circumstances where the child has not been formally arrested, but may not intervene in the interrogation process. The Youth (Trial, Punishment and Modes of Treatment) Law (Isr.), § 9(H). Exceptions are made upon written authorization of an officer and in cases in which the well-being of the child requires that the parent is not present. *Id.* §§ 9(I)-(J). No such right formally exists for Palestinian youth even

having a right to consult a lawyer.[278] An application before the Israeli Supreme Court to make the legal protections of minors in the administered territories equal to those of Israeli minors is now pending.[279]

Any comparison between the Israeli juvenile justice system and that in the administered territories remains untenable unless we take into consideration the differences between the crimes committed by minors in Israel and those committed by juveniles in the administered territories. Many of the latter crimes are perpetrated for ideological reasons with the encouragement of the minor's friends and family and even the support of recruiters for terrorist organizations.[280] Another difference is the absence of welfare services for minors in the administered territories,[281] a situation that is partially the result of transferring the welfare services in the area to the Palestinian Authority according to the Oslo Accords.[282]

All of the above criticism reflects the need to apply a normative framework for the practical application of human rights law in the juvenile justice system in the administered territories. Indeed, security considerations of the occupying power should not be excluded, however analysis of the particular circumstances calls for a co-application of international humanitarian law and human rights law, and not only a reliance upon the latter as the source of international law in occupied territories. The effects of such a normative framework on military legislation and its application by the judicial system will be to promote concepts such as the best interests of the child and the preference of rehabilitation over retribution. It will also strengthen trends in the military legislation and the military courts, discussed earlier in this article. In the words of the Military Court:

> Amendment number fourteen to the Israeli Youth Law . . . has provided the police with special obligations pertaining to the interrogation of minors. *The essence of this amendment was a new conception, in the spirit of the International Convention on the Rights of the Child and in accordance with the Basic Law: Human Dignity and Liberty*. . . . Th[is] amendment has not been incorporated into the military legislation in the area, yet . . . the Military Appeals Court has opined that "it is impossible to ignore the . . . principles at the

though efforts are made to notify parents of their child being interrogated, there is only a right to be notified if there is an arrest. Order Regarding Security Provisions, No. 1676 (Isr.); *see also* BOUND, BLINDFOLDED AND CONVICTED, *supra* note 192, at 18. *See also* Order Regarding Security Provisions (Judea and Samaria), No. 1644, art. 46(L)(b) (Amend. No. 109) (Isr.) (giving parents the right to attend sessions of the military court).

278. *See* BAUMGARTEN-SHARON, *supra* note 119, at 14.

279. *See id.*

280. Moodrick-Even Khen, *supra* note 44, at 269-70 (describing the motivations for children in occupied territories to join armed groups and perpetrate crimes).

281. *See* File No. 3905/10 Military Court (Judea), Military Prosecutor v. Mohammed Omar (Jan. 17, 2011), Nevo Legal Database (by subscription) (Isr.).

282. *See* The Cairo Agreement, *supra* note 195, art. 3.

> foundation of the protection of the minor's rights . . . and the need to emphasize the supra principle of the minor's best interests.[283]

Promoting the best interest of the child and developing an improved welfare system reflect the obligations of a long-term occupying force to promote the interests of the protected persons and to ensure public life and not only public order. However, as long as the Israeli government objects to a direct application of human rights law in the administered territories, the standards and norms of human rights law, including soft law, should be applied in the administered territories through their incorporation within the security legislation in the territories. This solution lacks the advantage of enabling the supervising mechanisms of international bodies, such as the Human Rights Committee or other U.N. treaty and Charter bodies, to monitor Israel's compliance with international human rights treaty standards in the administered territories; nor would it allow these bodies to influence public opinion in Israel and outside.[284] Nevertheless, this solution does demand that human rights standards that are relevant to the juvenile justice system in the administered territories are obligatory upon the governing authorities in these areas, ensuring that their role and function as temporary holders of the territory are adequately fulfilled.

VI. SUMMARY

Long-term belligerent occupations and transformative occupations face new challenges in terms of the occupying forces' relations with the occupied population and their obligations towards the protected persons. Applying a compatible and just juvenile justice system in occupied territories is one such challenge.

We rely on contemporary theory and practice in international law that supports a mutual application of human rights law and international humanitarian law, where one of these branches of international law is the *lex specialis* and the other may serve as a complementary or interpretative legal framework. We suggest that this model is most appropriate for the long-term belligerent occupying force and for the transformative occupying force to fulfill their legal obligations in general, in particular in establishing a juvenile justice system. We applied this claim to the case studies of the juvenile justice system in formerly occupied Iraq and in Israel's administered territories.

In Iraq, the legal framework of the occupation regime was based both on U.N. Security Council resolutions and in the CPA Memorandum, situating it explicitly on the laws of belligerent occupation and implicitly on human rights law.[285] The

283. File No. 1367/11 Military Court (Judea & Samaria), Military Prosecutor v. D. A. (Jan. 9, 2012), Nevo Legal Database (by subscription) (Isr.) (translated by author); *see also* Mil. Youth Court 3905-10, Military Prosecution v. M. A. (Jan. 17, 2011), Nevo Legal Database (by subscription) (Isr.) (translated by author) ("The military courts have often opined that every effort should be made, subject to the special circumstances in the Region, to equalize as much as possible the situation concerning minors in the Region with the situation in Israel.").

284. Ben-Naftali & Shany, *supra* note 99, at 106.

285. *See* S.C. Res. 1483, *supra* note 89, pmbl., ¶ 8(g); CPA Memo (Revised), *supra* note 149, pmbl.

CPA incorporated only the general standards of human rights law,[286] and with regard to human rights law norms that relate to minors' protection, it established only the demand that children be separated from adults while in custody.[287] In practice, even these limited demands have continuously been violated, and this violation persisted after the U.N. mandate for the occupation ended.[288]

In the administered territories, significant progress in both the military legislation and its application by the military courts has taken place since 2009, when the Military Youth Courts were established. Before 2009, there were no significant differences between criminal procedures for adults and those for minors in the administered territories.[289] However, with the support of the military courts' dicta, an on-going process of changes aimed at applying standards more applicable with norms that protect minors in the criminal procedure resulted in the emergence of important changes in the military legislation. Among these was raising the majority age from sixteen to eighteen,[290] separating minors and adults in detention facilities,[291] reducing periods of detention before being brought before a judge,[292] and relying on welfare reports in criminal trials.[293] Nevertheless, criticism of the application of these changes in practice point out that the changes do not encompass remand procedures and that the punishments meted out by the military courts reflect more a consideration of retribution than of rehabilitation.

Finally, we suggest that the co-application of human rights law and international humanitarian law, while taking into consideration the security needs of both the occupying power and the protected persons, would create legal standards that would see the application of more protections for minors in criminal procedures. This proposal is also supported by the local Palestinian Authority Child Law, which promotes a concept of childhood under criminal law adhering to the values and norms of human rights law that are anchored in human rights law treaties, and especially in the CRC.[294] Yet, since Israel objects to a formal application of human rights treaties in the administered territories, the practical application of human rights law in these territories is rather through military legislation that absorbs human rights norms than through the application of human rights treaties.

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286. *See* CPA Memo (Revised), *supra* note 149, § 1(1)(c).

287. ICCPR, *supra* note 4, art. 10(2)(b).

288. HRW Report, *supra* note 156.

289. As opposed to special arrangements regarding sentencing that allow the serving of custodial sentences in *an institute of social care*. Order Regarding the Judgment of Young Offenders (No.132) (Isr.) (translated by author).

290. Order Regarding Security Provisions (Judea and Samaria), 5771-2011, No. 1676, § 3 (Amend. No. 10) (Isr.), *available at* http://www.dci-palestine.org/sites/default/files/military_order_1676.pdf (unofficial translation) (amending article 136 of Order Regarding Security No. 1651).

291. Order Regarding Security Provisions (Judea and Samaria), No. 1644, art. 46(L)(d) (Amend. No. 109) (Isr.) (adding to Order Regarding Security No. 1651).

292. *See* Order Regarding Security Provisions (Judea and Samaria), No. 1685 (Amend. No. 16) (Isr.) (translated by author).

293. Order Regarding Security Provisions, No. 1644 (Isr.), art. 46(L)(c).

294. *See* Draft Youth Protection Act 2011, art. 2 (Palestine); CRC, *supra* note 1, arts. 37, 39, 40.

Nevertheless, and even though it does not seem that the Israeli belligerent occupation in the administered territories will end in the near future, it is crucial to maintain that a belligerent occupying power, including a long-term one, should avoid changes that will render it a sovereign. While this objective is justified for a transformative regime, such as that in Iraq, it works against the purposes of a long-term belligerent occupant. Hence, any changes of legislation made by the occupying power, such as those suggested in this article, must pertain to the basic tenet of belligerent occupation regime, wherein the roles of the occupying power should be limited to maintain the order and safety and the civil life routine of the occupied territory and population.

UNITED AGAINST GENDER VIOLENCE: EUROPEANS STRUGGLE TO PROVIDE PROTECTION FOR MIGRANTS

MIMI E. TSANKOV* AND NADJA T. HELM**

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I. INTRODUCTION

Domestic violence is a worldwide phenomenon, and since the mid-1990's, there has been a coordinated international effort to reduce its pervasiveness.[1] In Europe, statistics suggest that up to one quarter of women will experience domestic violence and up to 10 percent of women will suffer an incident in any given year.[2] Within the domestic violence victim population, there is a subgroup of victims that is uniquely vulnerable.[3] It is comprised of victims that lack legal immigration status. With language and cultural barriers, as well as a lack of knowledge about domestic legal systems, some of these victims may fear that in seeking law enforcement protection they could be removed from their host country.[4]

European Union Member ("EU-M") States are bound by a host of regional and international human rights obligations to strengthen laws and construct networks of resources to combat this problem.[5] This article provides background

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1. COUNCIL OF EUR., COUNCIL OF EUROPE CONVENTION ON PREVENTING AND COMBATING VIOLENCE AGAINST WOMEN AND DOMESTIC VIOLENCE: EXPLANATORY REPORT ¶¶ 1, 5-6, 8 [hereinafter ISTANBUL CONVENTION EXPLANATORY REPORT], *available at* http://www.coe.int/t/dghl/standardsetting/equality/03themes/violence-against-women/Exp_memo_Conv_VAW_en.pdf.

> The Committee on the Elimination of Discrimination [A]gainst Women . . . of the United Nations Convention on the Elimination of All Forms of Discrimination [a]gainst Women . . . in its general recommendation on violence against women No. 19 (1992) helped to ensure the recognition of gender-based violence against women as a form of discrimination against women. The United Nations General Assembly, in 1993, adopted a Declaration on the Elimination of Violence against Women that laid the foundation for international action on violence against women. In 1995, the Beijing Declaration and Platform for Action identified the eradication of violence against women as a strategic objective among other gender equality requirements. In 2006, the UN Secretary-General published his [i]n depth study on all forms of violence against women, in which he identified the manifestations and international legal frameworks relating to violence against women, and also compiled details of 'promising practices' which have shown some success in addressing this issue.

Id. ¶ 5.

2. EUROPEAN COMM'N, DOMESTIC VIOLENCE AGAINST WOMEN REPORT 5 (Special Eurobarometer No. 344, 2010), *available at* http://ec.europa.eu/public_opinion/archives/ebs/ebs_344_en.pdf.

3. ISTANBUL CONVENTION EXPLANATORY REPORT, *supra* note 1, ¶ 87 ("For the purpose of this Convention, persons made vulnerable by particular circumstances include: pregnant women and women with young children, persons with disabilities, including those with mental or cognitive impairments, persons living in rural or remote areas, substance abusers, prostitutes, persons of national or ethnic minority background, migrants—including undocumented migrants and refugees, gay men, lesbian women, bi-sexual and transgender persons as well as HIV-positive persons, homeless persons, children and the elderly.").

4. *Id.* ¶¶ 87, 306.

5. *See* Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence art. 61, Apr. 7, 2011, C.E.T.S. No. 210 [hereinafter Istanbul Convention]. *See also* ISTANBUL CONVENTION EXPLANATORY REPORT, *supra* note 1, ¶¶ 319-22.

> Paragraph 2 [of Article 61] confirms that the obligation to respect the *non-refoulement* principle applies equally to victims of violence against women who are in need of protection complementing in this way the first paragraph. More specifically, paragraph 2 reiterates the

information on the sources of regional and international law mandating these protections.[6] It defines the legal obligations inherent in European Union Membership,[7] the European Convention on Human Rights ("ECHR"),[8] the United Nations Convention on the Elimination of Discrimination against Women ("CEDAW"),[9] and the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence ("Istanbul Convention"),[10] focusing primarily on the CEDAW's specific obligations related to migrant domestic violence victims.

The general consensus has been that although many EU-M States have devised complex internal legal frameworks to support migrant domestic violence victims, success has been elusive in some instances.[11] Thus, this article provides country-specific data to better understand the environments in which these deficits are believed to occur.[12] To be sure, providing adequate legal relief to migrant domestic violence victims is a challenging proposition.[13] Contextual factors can serve to either diminish or heighten the extent to which individual EU-M States are able to meet this human rights obligation.[14] The purpose of this article is to present a snapshot of the European Union's journey towards compliance that may enable human rights observers to gauge where individual EU-M States find themselves on this particular metric in comparison to other states given a variety of contextual

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> obligation for Parties to take the necessary legal or other measures to ensure that victims of violence against women and in need of protection, shall not be returned under any circumstances if there were a real risk, as a result, of arbitrary deprivation of life or torture or inhuman or degrading treatment or punishment. It is important to ensure that these obligations are complied with irrespective of the status or residence of the women concerned. This means that this protection against return applies to all victims of violence against women that have not yet had their asylum claim determined as refugees under the 1951 Convention [relating to the Status of Refugees] regardless of their country of origin or residence status, and who would face gender-based violence amounting to the ill-treatment described above if expelled/deported. Even if their claim for asylum is refused, states should ensure that these persons will not be expelled/deported to a country where there is a real risk to that they will be subject to torture or inhuman or degrading treatment or punishment. This paragraph is not to be read, however, as contradicting the relevant provisions of the 1951 Convention, and in particular does not preclude the application of Article 33, paragraph 2, of that Convention.

Id. ¶ 322.

6. *See infra* Part II.

7. *Conditions for Membership*, EUR. COMMISSION, http://ec.europa.eu/enlargement/policy/conditions-membership/index_en.htm (last visited Jan. 22, 2014).

8. Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 221 [hereinafter ECHR]. *See infra* Part II.A.

9. Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]. *See infra* Part II.B.

10. Istanbul Convention, *supra* note 5. *See infra* Part II.F.

11. *See infra* Part V.

12. *See infra* Part V.

13. *See* ISTANBUL CONVENTION EXPLANATORY REPORT, *supra* note 1, ¶¶ 53, 87, 298-300, 302.

14. *See infra* Parts III, IV.

factors. The article concludes that while each of the EU-M States has made significant strides in supporting domestic violence victims generally, some deficiencies and concerns remain as relates to migrant victims.[15]

II. INTERNATIONAL AND REGIONAL SOURCES OF LAW

A. The European Convention of Human Rights

The foundational legal instrument that provides protection for migrant domestic violence victims in EU-M States is the ECHR.[16] Through the development of that treaty and the articulation of its inherent obligations, the European Union, as a regional body, has voiced support for establishing a variety of explicit and implied protections for migrant domestic violence victims.[17] For example, parties to the ECHR are explicitly bound to uphold Article 3, which guarantees freedom from torture and inhuman treatment.[18] However, parties have the less explicit and more general obligation to perform functions in a manner that is deemed compatible with the states' obligations under the provisions of the ECHR.[19] Thus, many humanitarian and human rights-related requests of EU-M States necessarily implicate standards articulated in the ECHR articles.

B. The United Nations Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW")

A key U.N. human rights objective is the global elimination of discrimination against women.[20] Over the years, this worldwide body has given meaning to this specific objective through the creation of the CEDAW, a legal instrument that codifies obligations ranging from development of greater equality in state laws as they impact men and women, to targeting "culture and tradition as influential forces shaping gender roles and family relations."[21] Pursuant to Articles 3 and 5, the CEDAW enshrines the right of women to enjoy their human rights free of discrimination, and enables the attainment of that right through the modification of social and cultural patterns.[22]

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15. *See infra* Part VI.

16. *See* ECHR, *supra* note 8, art. 14.

17. *E.g.*, *id.* pmbl.

18. *Id.* art. 3.

19. *See* ISTANBUL CONVENTION EXPLANATORY REPORT, *supra* note 1, ¶ 87.

20. FAREDA BANDA, UNITED NATIONS OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS—WOMEN'S RIGHTS AND GENDER UNIT, PROJECT ON A MECHANISM TO ADDRESS LAWS THAT DISCRIMINATE AGAINST WOMEN 18 (2008), *available at* http://www.ohchr.org/Documents/Publications/laws_that_discriminate_against_women.pdf.

21. *Convention on the Elimination of All Forms of Discrimination against Women: Overview of the Convention*, UN WOMEN, http://www.un.org/womenwatch/daw/cedaw (last visited Apr. 21, 2014).

22. CEDAW, *supra* note 9, art. 3 ("States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men."). *Id.* art. 5(a) ("To modify the social and cultural patterns of conduct of men and women, with a view to

Article 2 of the CEDAW explicitly condemns discrimination against women in all its forms, and parties to the treaty are required to undertake measures to end all forms of discrimination against women.[23] The CEDAW mandates that the pace of policy change be pursued diligently, "by all appropriate means and without delay."[24] This treaty envisions the development and/or modification of state constitutions and laws that further this goal and mandates the establishment of legal protections when necessary to ensure the rights of women.[25] The CEDAW requires that state parties submit reports on the legislative, judicial, administrative, and other measures that they have adopted with respect to their obligations under the treaty.[26] Article 22 permits "specialized agencies" ("CEDAW Specialized Agencies") to submit reports ("Shadow Reports") discussing states' implementation efforts.[27] In order to assess progress made in meeting the CEDAW objectives, Article 17 envisioned the establishment of a treaty body in the form of a committee ("CEDAW Committee"), which would articulate interpretative guidance and recommendations, monitor state progress, and release substantive reports.[28] CEDAW Specialized Agencies submit Shadow Reports to the CEDAW Committee to supplemental state provided information about compliance with CEDAW obligations.[29] These are independent reports that examine particular aspects of the state human rights reporting.[30]

Under the CEDAW, states are responsible for their own acts, as well as for private acts if the state fails to act with due diligence to prevent violations of rights.[31] The CEDAW has further clarified that it is the state's responsibility to "respect, protect and fulfil women's right to non-discrimination and to the

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achieving the elimination of prejudices and customary [sic] and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.").

23. *Id.* art. 2.

24. Special Rapporteur on Violence Against Women, *Rep. of the Special Rapporteur on Violence Against Women, its Causes and Consequences*, Human Rights Council, ¶ 24, U.N. Doc. A/HRC/23/49 (May 14, 2013) (by Rashida Manjoo) [hereinafter Manjoo Report]. The CEDAW Committee has described the due diligence standard in its consideration of complaints that allege a failure on the part of states to investigate and prosecute acts of violence against women. *Id.* ¶¶ 11-13.

25. CEDAW, *supra* note 9, arts. 2-3.

26. *Id.* art. 18.

27. *Id.* art. 22.

28. *Id.* arts. 17, 21.

29. *Id.* art. 22 ("The specialized agencies shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their activities. The Committee may invite the specialized agencies to submit reports on the implementation of the Convention in areas falling within the scope of their activities.").

30. *See id.*

31. Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 19: Violence against Women, ¶ 9, U.N. Doc. A/47/38 (1992), *reprinted in* United Nations, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, at 246, U.N. Doc. HRI/GEN/1/Rev.7 (May 12, 2004) [hereinafter CEDAW Committee, General Recommendation No. 19].

enjoyment of equality."[32] Furthermore, states are responsible for investigating and punishing acts of violence and for providing compensation for violations of the CEDAW.[33] Through acquiescence or indifference, inaction provides a "form of encouragement and/or de facto permission," and CEDAW "has applied this principle to States parties' failure to prevent and protect victims from gender-based violence, such as . . . domestic violence."[34]

C. Violence Against Women in the Human Rights Context

In 1994, the U.N. Commission on Human Rights adopted a resolution appointing a Special Rapporteur on the issue of violence against women ("SRVAW") in order to better understand its causes and consequences.[35] That human rights body has called for, among others, the elimination of all forms of gender-based violence in the family.[36] It defines gender-based violence as any act "that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life."[37] Incorporating this general U.N. definition, in part, the CEDAW definition of gender-based violence focuses specially on women who are victims of "physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty."[38]

The U.N. has further elaborated the various forms of violence, dividing them into three categories: (a) family violence; (b) community violence; and (c) violence perpetrated or condoned by the state.[39] Migrant domestic violence victims have fallen within all three categories because migrant women can suffer family violence in the form of domestic violence and honor violence; community violence in the form of female genital mutilation and trafficking; and violence perpetrated or condoned by the state in the form of violence during armed conflict and violence motivated by xenophobia.[40] In 2002, the U.N. High Commissioner for

32. Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 28 on the Core Obligations of States Parties Under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, ¶ 9, U.N. Doc. CEDAW/C/GC/28 (Dec. 16, 2010).

33. *Id.* ¶¶ 19, 32.

34. Manjoo Report, *supra* note 24, ¶ 27.

35. Comm'n on Human Rights Res. 1994/45, Rep. of Comm'n on Human Rights, 15th Sess., Jan. 31-Mar. 11, 1994, U.N. ESCOR, 1994 Sess., Supp. No. 4, E/1994/24, at 143 (Mar. 4, 1994).

36. Comm'n on Human Rights Res. 2003/45, Rep. of Comm'n on Human Rights, 59th Sess., Mar. 17-Apr. 24, 2003, U.N. ESCOR, 2003 Sess., Supp. No. 3, E/2003/23, at 174-75 (Apr. 23, 2003).

37. Declaration on the Elimination of Violence against Women, G.A. Res. 48/104, U.N. Doc. A/RES/48/104 (Dec. 20, 1993) (referencing Article 1 of the Declaration).

38. CEDAW Committee, General Recommendation No. 19, *supra* note 31, ¶ 6.

39. Special Rapporteur on Violence Against Women, *15 Years of the U.N. Special Rapporteur on Violence Against Women, its Causes and Consequences (1994-2009)—A Critical Review*, Human Rights Council, ¶¶ 12, 21, U.N. Doc. A/HRC/11/6/Add.5 (May 27, 2009) (by Yakin Ertürk) [hereinafter Ertürk Report].

40. *See id.* ¶ 65.

Refugees ("UNHCR") issued guidelines on gender-related protection claims.[41] The UNHCR Gender-Related Guidelines acknowledge a particular social group is comprised of individuals that share a common characteristic that is "*innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.*"[42] Further, the guidelines posit that "sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently than men."[43]

This article addresses so-called "honor violence" periodically. So-called honor violence exists solely in the realm of the family and is thus properly considered in a domestic violence analysis.[44] Honor violence comes from the belief that family members, particularly male family members, have a duty to control the female family members' sexuality and reputation in order to preserve the family's honor. "According to this belief, if women transgress, or are seen to transgress, societal gender norms, blemishing their family's 'honour', they should be disciplined, have their movements and life choices constrained, or be harmed or killed."[45] Any family member may perpetrate honor crimes. Honor killing has been described "as the killing of a female, typically by a male perpetrator, because of perceived or actual misconduct of the victim who has dishonored or shamed her family and clan by actually or allegedly committing an indiscretion."[46]

> The act of killing another to restore honor falls under a category of offenses collectively known as "honor crimes." Honor crimes are not limited to murder, but may include other vicious crimes against woman, such as punitive rape or deliberate disfigurement by acid or dismemberment. Victims of honor crimes are almost exclusively female.[47]

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41. United Nations High Comm'r for Refugees, Guidelines on International Protection: Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, U.N. Doc. HCR/GIP/02/01 (May 7, 2002) [hereinafter UNHCR Gender-Related Guidelines], *available at* http://www.unhcr.org/3d58ddef4.html.

42. *Id.* ¶ 29.

43. *Id.* ¶ 30.

44. UNITED NATIONS DIV. FOR THE ADVANCEMENT OF WOMEN & UNITED NATIONS ECON. COMM'N FOR AFR., GOOD PRACTICES IN LEGISLATION ON "HARMFUL PRACTICES" AGAINST WOMEN 17-18 (2009) [hereinafter GOOD PRACTICES IN LEGISLATION ON "HARMFUL PRACTICES"], *available at* http://www.un.org/womenwatch/daw/egm/vaw_legislation_2009/Final%20report%20EGMGPLVAW.pdf. The U.N. uses the term "so-called 'honour' violence . . . to emphasize that this violence, while excused in the name of 'honour', in not honourable and should be condemned as a human rights violation." *Id.* at 10.

45. *Id.* at 18.

46. Lindsey N. Devers & Sarah Bacon, *Interpreting Honor Crimes: The Institutional Disregard Towards Female Victims of Family Violence in the Middle East*, 3 INT'L J. CRIMINOLOGY & SOC. THEORY 359, 360 (2010).

47. Susanne J. Prochazka, Note, *There is No Honor in Honor Killings: Why Women at Risk for Defying Sociosexual Norms Must be Considered a "Particular Social Group" Under Asylum Law*, 34 T. JEFFERSON L. REV. 445, 474-75 (2012) (citations omitted).

Honor violence is often used as a defense or partial defense to crimes committed against women, which has prompted the United Nations to advocate for legislation ensuring that these crimes are punished as severely as other crimes.[48]

Female genital mutilation ("FGM") is not discussed in this article, as it is not traditionally considered domestic violence.[49] The World Health Organization defines FGM as "all procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs for non-medical reasons."[50] FGM is not properly considered within a domestic violence analysis, because, while the victim's family is often involved, it is usually a community-based practice. While domestic violence is confined to the family, FGM most often involves entire communities. As highlighted by the World Health Organization, "local structures of power and authority such as [community] leaders, religious leaders, circumcisers, elders, and even some medical personnel" can contribute to upholding the practice.[51] FGM "is a social norm, buttressed by underlying gender structures and power relations and deeply rooted in tradition. The decision to stop FGM/C must come from within a community; it must be made by women, men and community leaders who together can affect and sustain this profound social change."[52] Accordingly, FGM is better discussed within a broader communal or societal context, rather than the narrow, family-based context of domestic violence.

In furtherance of its mandate, the SRVAW issues annual reports to the U.N. Human Rights Council (previously the U.N. Commission on Human Rights) and the U.N. General Assembly.[53] It has affirmed the duty of states to not only refrain from engaging in violence against women, but to "exercise due diligence to prevent, investigate, prosecute and punish the perpetrators of violence against women."[54] Moreover, it has affirmed the responsibility of states "to take appropriate and effective action concerning acts of violence against women, whether those acts are perpetrated by the State, by private persons or by armed

48. GOOD PRACTICES IN LEGISLATION ON "HARMFUL PRACTICES," *supra* note 44, at 4-5, 17-18. "Experience has shown that without a specific offence for so-called 'honour' crimes, judges will often employ defences such as provocation in order to reduce the sentence of those who have committed such crimes, or perpetrators will not be charged at all." *Id.* at 18.

49. *See* John Gordon Simister, *Domestic Violence and Female Genital Mutilation in Kenya: Effects of Ethnicity and Education*, 25 J. FAM. VIOLENCE 247, 247 (2010).

50. WORLD HEALTH ORG. [WHO] ET AL., ELIMINATING FEMALE GENITAL MUTILATION: AN INTERAGENCY STATEMENT 4 (2008), *available at* http://whqlibdoc.who.int/publications/2008/9789241596442_eng.pdf?ua=1.

51. *Id.* at 6.

52. UNFPA & UNICEF, UNFPA-UNICEF JOINT PROGRAMME ON FEMALE GENITAL MUTILATION/CUTTING: ACCELERATING CHANGE: ANNUAL REPORT 2012, at 18 (2012), *available at* http://www.unfpa.org/webdav/site/global/shared/documents/publications/2013/UNICEF-UNFPA%20Joint%20Programme%20AR_final_v14.pdf (emphasis added).

53. G.A. Res. 65/187, ¶ 25, U.N. Doc. A/RES/65/187 (Dec. 21, 2010); Human Rights Council Res. 16/7, Rep. of the Human Rights Council, 16th Sess., Jan. 25-Mar. 25, 2011, ¶ 5, U.N. Doc. A/HRC/16/2 (Mar. 24, 2011); Comm'n on Human Rights Res. 2003/45, *supra* note 36, ¶ 33.

54. G.A. Res. 65/187, *supra* note 53, ¶ 9.

groups or warring factions, and to provide access to just and effective remedies and specialized, including medical, assistance to victims."[55]

D. CEDAW, Domestic Violence, and Migrants

While the basic CEDAW treaty does not reference domestic violence as a means of discrimination per se, the CEDAW Committee has issued interpretative guidance recommendations that address this issue.[56] General Recommendation No. 12 highlights the obligation of parties to the CEDAW to protect women from "*violence of any kind occurring within the family*, at the workplace or in any other area of social life" under Articles 2, 5, 11, 12, and 16 of the Convention.[57] Moreover, General Recommendation No. 19 incorporates gender-based violence as a specific form of discrimination.[58]

The CEDAW Committee has further clarified that the protection against gender-based violence extends to migrants in General Recommendation No. 26.[59] That recommendation sets forth, in pertinent part, that:

a) "States parties should ensure that linguistically and culturally appropriate gender-sensitive services for women migrant workers are available, including language and skills training programmes, emergency shelters, . . . [and] police services."[60]

b) State services should be "designed especially for isolated women migrant workers, such as domestic workers and others secluded in the home, in addition to victims of domestic violence."[61]

c) "Victims of abuse must be provided with relevant emergency and social services, regardless of their immigration status."[62]

d) "[T]he situation of undocumented women needs specific attention. Regardless of the lack of immigration status of undocumented women migrant workers, States parties have an obligation to protect their basic human rights. Undocumented women migrant workers must have access to legal remedies and justice in cases of risk to life

55. Comm'n on Human Rights Res. 2003/45, *supra* note 36, ¶ 5.

56. CEDAW Committee, General Recommendation No. 19, *supra* note 31, ¶ 1.

57. Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 12: Violence against Women, U.N. Doc. A/44/38 (1989), *reprinted in* United Nations, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, at 240, U.N. Doc. HRI/GEN/1/Rev.7 (May 12, 2004) [hereinafter CEDAW Committee, General Recommendation No. 12] (emphasis added).

58. CEDAW Committee, General Recommendation No. 19, *supra* note 31, ¶ 1.

59. Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 26 on Women and Migrant Workers, U.N. Doc. CEDAW/C/2009/WP.1/R (Dec. 5, 2008) [hereinafter CEDAW Committee, General Recommendation No. 26], *available at* http://www2.ohchr.org/english/bodies/cedaw/docs/GR_26_on_women_migrant_workers_en.pdf.

60. *Id.* ¶ 26(i).

61. *Id.*

62. *Id.*

and of cruel and degrading treatment . . . if they are abused physically or sexually by employers or others."[63]

e) "If they are arrested or detained, the States parties must ensure that undocumented women migrant workers receive humane treatment and have access to due process of the law, including through free legal aid. In that regard, States parties should repeal or amend laws and practices that prevent undocumented women migrant workers from using the courts and other systems of redress. If deportation cannot be avoided, States parties need to treat each case individually, with due consideration to the gender-related circumstances and risks of human rights violations in the country of origin (articles 2 (c), (e) and (f))."[64]

E. The U.N. Model Framework

The CEDAW Committee participated in drafting the *U.N. Handbook for Legislation on Violence Against Women* ("*U.N. Handbook*"), which provides guidance about the types of provisions that should be included in any domestic violence legal framework.[65] These components range from suggesting how violence may be defined and proposing means of prevention and protection, to proposing model structures for investigation, prosecution, and sentencing of perpetrators of domestic violence. A review of the *U.N. Handbook* recommends the following practices that affect migrant domestic violence victims directly:

a) Equal protection without regard to migration status;[66]

b) Specialized services for particular groups of women, including migrant victims;[67]

c) Employing gender-sensitive language acknowledging the historical imbalance in power between men and women with respect to violence;[68]

d) Providing relief for female survivors of violence such that they are not deported or "subjected to other punitive actions related to their immigration status when they report such violence to police or other authorities";[69]

e) Permitting "immigrants who are survivors of violence to confidentially apply for legal immigration status independently of the perpetrator."[70]

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63. *Id.* ¶ 26(*l*).

64. *Id.*

65. U.N. DEP'T OF ECON. & SOC. AFFAIRS, HANDBOOK FOR LEGISLATION ON VIOLENCE AGAINST WOMEN, at iv, U.N. Doc. ST/ESA/329, U.N. Sales No. E.10.IV.2 (2009) [hereinafter HANDBOOK].

66. *Id.* § 3.1.3.

67. *Id.* § 3.6.1.

68. *Id.* § 3.1.4.

69. *Id.* § 3.7.1.

70. *Id.*

Many states have adopted criminal and civil laws relating to gender equality where violence against women is one aspect of the violence equation, or specific laws on violence described as family, domestic, sexual, or intimate partner laws.[71] The *U.N. Handbook* stresses the importance of developing laws that deal specifically with migrant victims. Specifically, it calls for states to acknowledge that "violence against women may constitute persecution and that complainants/survivors of such violence should constitute 'a particular social group' for the purposes of asylum law."[72]

The U.N. surveys of CEDAW parties in Europe reflect that, in general, many of the countries have taken positive steps to sensitize the public about domestic violence and to develop legal protections and institutional mechanisms that support domestic violence victims.[73] These efforts include the creation of civil society organizations to protect victims of family violence through safe houses and other support mechanisms, the development of criminal provisions on domestic violence, protection orders in cases of domestic violence, the delineation of domestic violence as a ground for divorce, the promulgation of specific provisions on marital rape, efforts to improve the social status of the victim, efforts to ensure employment for victims, and the implementation of procedural protections for domestic violence victims.[74]

Occasionally, individuals or groups within a country will consider that a state party has failed to abide by their obligations under the CEDAW.[75] In 1999, the General Assembly adopted the so-called "Optional Protocol" whereby the CEDAW Committee may receive and consider complaints from individuals or groups about violations of CEDAW obligations in states that have ratified the Protocol.[76] Upon review of a complaint, the CEDAW Committee can issue recommendations to the state party.[77] All but three of the EU-M States examined in this article are party to the Optional Protocol.[78]

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71. *See* Ertürk Report, *supra* note 39, ¶ 34.

72. HANDBOOK, *supra* note 65, § 3.14, at 56.

73. Ertürk Report, *supra* note 39, ¶ 34. *See also infra* Part V.

74. *See id.* ¶ 129.

75. Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women art. 2, Oct. 6, 1999, 2131 U.N.T.S. 83 [hereinafter Optional Protocol to CEDAW].

76. G.A. Res. 54/4, U.N. Doc. A/RES/54/4 (Oct. 6, 1999).

77. Optional Protocol to CEDAW, *supra* note 75, art. 5.

78. United Nations, Multilateral Treaties Deposited with the Secretary-General, *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women* (Oct. 6, 1999), https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8-b&chapter=4&lang=en (last visited Apr. 22, 2014). Estonia, Latvia, and Malta have not signed nor ratified the Optional Protocol. *Id.*

F. Council of Europe and the Istanbul Convention

Regional European bodies have also been focused on eliminating violence against women.[79] In 2002, the leading human rights body in Europe, the Council of Europe, adopted Recommendation No. 5 mandating that its member states, among other obligations, "introduce, develop and/or improve where necessary, national policies against violence."[80] It mandated that member states "ensure that all services and legal remedies available for victims of domestic violence are provided to immigrant women upon their request."[81] That body has put in place an intricate system of regional legal responsibilities that EU-M States owe to each other, which include compliance with the European Council directives seeking to harmonize protections and deter asylum applications in multiple EU-M States.[82] The Council of Europe has ordered that member states "consider, where needed, granting immigrant women who have been/are victims of domestic violence an independent right to residence in order to enable them to leave their violent husbands without having to leave the host country."[83]

The Council of Europe has monitored implementation of its directives through studies that examine the prevalence of domestic violence in member states and the apparent wide variability of protections offered from country to country.[84] In 2011, the Council of Europe concluded that more needed to be done to harmonize these divergent systems in its member states in a number of areas, including the treatment of migrant domestic violence victims.[85] This body concluded that:

> [1] Migrant women, including undocumented migrant women, and women asylum-seekers form two subcategories of women that are particularly vulnerable to gender-based violence. [2] Despite their difference in legal status, reasons for leaving their home country and living conditions, both groups are, on the one hand, at increased risk of

79. Council of Eur., Comm. of Ministers, Recommendation Rec(2002)5 of the Comm. of Ministers to Member States on the Protection of Women Against Violence [hereinafter Rec(2002)5].

80. *Id.* app. ¶ 3.

81. *Id.* app. ¶ 24.

82. Council Regulation 343/2003, Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-country National, 2003 O.J. (L 50) 1. *See generally* UNITED NATIONS HIGH COMM'N FOR REFUGEES, COMPARATIVE ANALYSIS OF GENDER-RELATED PERSECUTION IN NATIONAL ASYLUM LEGISLATION AND PRACTICE IN EUROPE (2004), *available at* http://www.unhcr.org/40c071354.html.

83. Rec(2002)5, *supra* note 79, app. ¶ 59; *see also* Ursula Fraser, *The Asylum Procedure*, *in* SANCTUARY IN IRELAND, PERSPECTIVES ON ASYLUM LAW AND POLICY 81, 88-90 (Ursula Fraser & Colin Harvey eds., 2003) (discussing the Council of Europe's efforts to harmonize criteria for application of international human rights laws and standards, as well as asylum procedures, and the criteria for granting of refugee status).

84. ISTANBUL CONVENTION EXPLANATORY REPORT, *supra* note 1, ¶ 2.

85. *See id.* ¶¶ 14, 298.

> experiencing violence against women and, on the other hand, face similar difficulties and structural barriers in overcoming violence.
>
> . . . [3] [Among other suggestions, the Council of Europe] introduces the possibility of granting migrant women who are victims of gender-based violence an independent residence status. [4] Furthermore, it establishes the obligation to recognize gender-based violence against women as a form of persecution and contains the obligation to ensure that a gender-sensitive interpretation be given when establishing refugee status. . . . [5] Finally, it contains provisions pertaining to the respect of the *non-refoulement* principle with regard to victims of violence against women.[86]

Articulating this need for consistent legal standards, the Council of Europe adopted, during an April 2011 meeting in Istanbul, Turkey, the Convention on Preventing and Combating Violence against Women and Domestic Violence ("Istanbul Convention").[87] As of the date of publication, eight EU-M States had ratified this treaty: Austria, Denmark, France, Italy, Malta, Portugal, Spain, and Sweden.[88] The Istanbul Convention discusses minimum standards related to migration and asylum at Chapter VII and requires that states develop legislative and other measures required to meet these standards.[89]

First, Article 59 requires that victims whose residence status depends on that of the spouse or partner as recognized by internal law have the right, upon dissolution of the marriage or the relationship, to an autonomous residence permit irrespective of the duration of the marriage or relationship.[90] Second, domestic violence victims should be able to have their expulsion proceedings suspended if their migration status is dependent upon their spouse and apply for an autonomous residence permit.[91]

Third, residence permits shall be renewable when "necessary," considering the migrant's personal situation and/or where their stay is deemed necessary to further an investigation or criminal proceedings.[92] Fourth, victims of forced marriage should be permitted to regain any lost status.[93] Fifth, gender-based violence against women is to be considered both persecution for purposes of an asylum application and a type of serious harm, such that a domestic violence victim is eligible for subsidiary protection.[94]

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86. *Id.* ¶¶ 298-99.

87. Istanbul Convention, *supra* note 5, art. 62.

88. Council of Europe Treaty Office, *Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence* (Apr. 7, 2011), http://www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=210&CM=&DF=&CL=ENG (last visited June 4, 2014) [Istanbul Convention Treaty Status].

89. Istanbul Convention, *supra* note 5, arts. 59-61.

90. *Id.* art. 59(1).

91. *Id.* art. 59(2).

92. *Id.* art. 59(3).

93. *Id.* art. 59(4).

94. *Id.* art. 60(1).

Sixth, that adjudicators apply gender-sensitive interpretations in evaluating asylum applications.[95] Seventh, that gender-sensitive procedures be employed with respect to reception, support, refugee determination, and consideration of international protection.[96] Eighth, that states offer non-refoulement protection when legally appropriate.[97] Finally, that domestic violence victims not be returned to their home country where their life would be at risk, or they might be subject to torture or inhuman or degrading treatment or punishment.[98]

III. CONCEPTUAL METHODOLOGY AND ANALYTICAL DIMENSIONS

This study offers data regarding each EU-M State to indicate how it is meeting its treaty obligations as relates to migrant domestic violence victims. Additionally, the data provides a basis for comparison of the EU-M States legal frameworks since it describes their specific domestic environments in terms of several key indicators.

Human rights leaders and scholars have long valued comprehensive assessments of treaty obligation compliance.[99] In fact, the U.N.'s mandate often requires the collection of evidence to monitor compliance.[100] However, in the context of human rights treaty compliance monitoring, the means by which one assesses the data has been subject to decades of debate.[101] Since the 1970's, human rights scholars have developed a host of conceptual and methodological tools to compare the extent to which states meet their human rights obligations.[102] Some of these tools aggregate data, develop a composite index, and argue that doing so presents a useful comparison.[103]

A majority of U.N. officials, as well as leading human rights scholars and advocates, have eschewed this effort in the human rights context as both too simplistic given the lack of reliable state-to-state data gathering abilities and

95. *Id.* art. 60(2).

96. *Id.* art. 60(3).

97. *Id.* art. 61(1).

98. *Id.* art. 61(2).

99. *See* Office of the High Comm'r for Human Rights, Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body, ¶ 4, U.N. Doc. HRI/MC/2006/2 (Mar. 22, 2006) [hereinafter Concept Paper].

100. *See id.* ¶ 36.

101. *See id.* ¶ 4.

102. *E.g.*, OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, TRAINING MANUAL ON HUMAN RIGHTS MONITORING, U.N. Doc. HR/P/PT/7, U.N. Sales No. E.01.XIV.2 (Professional Training Ser. No. 7, 2001); David L. Cingranelli & David L. Richards, *The Cingranelli and Richards (CIRI) Human Rights Data Project*, 32 HUM. RTS. Q. 401 (2010); *Datasets*, HUM. RTS. DATA ANALYSIS GROUP, http://hrdag.org/resources/software_projects.shtml (last visited Feb. 12, 2014). *See also* JENNIFER PRESTHOLDT, FAMILIAR TOOLS, EMERGING ISSUES: ADAPTING TRADITIONAL HUMAN RIGHTS MONITORING TO EMERGING ISSUES (Rachel Tschida ed., 2004), *available at* http://www.mnadvocates.org/sites/608a3887-dd53-4796-8904-997a0131ca54/uploads/Familiar_Tools_Emerging_Issues.pdf.

103. *See, e.g.*, Cingranelli & Richards, *supra* note 102, at 403.

fundamentally dangerous from a political standpoint.[104] Compounding this difficulty is the fact that measurement of CEDAW compliance is even more problematic since parties are required "to act with due diligence to prevent violations of rights or to investigate and punish acts of violence"[105] and formal agreements as to appropriate indicators or benchmarks for assessing due diligence have not been developed.[106]

Understanding those limitations, this article, nevertheless, embarks cautiously into such a survey. It proposes four qualitative dimensions through which one can methodologically explore human rights compliance and establish a baseline for support being provided to this population. To the extent that data is not available, the survey identifies how such data would be useful to a better understanding of the dimensions of this issue. The data is focused on four qualitative dimensions: (a) gender equality/inequality; (b) human development; (c) treaty obligations; and (d) domestic legal infrastructure.

A. Gender Equality/Inequality Dimension

In recent years, a number of international organizations have developed gender equality/inequality indices.[107] The United Nations measures gender inequality across states as defined by the loss of achievement due to reproductive health, empowerment, and labor market participation, referred to as the Gender Inequality Index ("GII").[108] However, the United Nations does not have adequate datasets to track gender violence.[109] In June 2013, the European Institute for Gender Equality ("EIGE") released an index that includes gender violence as a factor.[110] However, the EIGE provides no data on gender violence, citing a lack of data at the European Union level.[111] Thus, since this study is focused on compliance with CEDAW, a U.N. treaty, and since these authors are not aware of

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104. *See The Conference—Measuring Impact in Human Rights: How Far Have We Come, and How Far to Go?*, *in* MEASUREMENT AND HUMAN RIGHTS: TRACKING PROGRESS, ASSESSING IMPACT 25, 37-39 (Carr Ctr. for Human Rights Policy ed., 2005) [hereinafter CARR REPORT], *available at* http://www.hks.harvard.edu/cchrp/mhr/publications/documents/Measurement%20and%20Human%20Rights%20Tracking%20Progress,%20Asessing%20Impac%20Report%202005.pdf.

105. CEDAW Committee, General Recommendation No. 19, *supra* note 31, ¶ 9.

106. Michael Ignatieff & Kate Desormeau, *Measurement and Human Rights: Introduction*, *in* CARR REPORT, *supra* note 104, at 1, 4; Kristen Timothy & Marsha Freeman, *The CEDAW Convention and the Beijing Platform for Action: Reinforcing the Promise of the Rights Framework*, INT'L WOMEN'S RTS. ACTION WATCH (Feb. 2000), http://www1.umn.edu/humanrts/iwraw/Freeman-Timothy.html (last visited Apr. 23, 2014).

107. For a list of organizations that have developed gender inequality/equality indexes, see LAURA DE BONFILS ET AL., EUR. INST. FOR GEND. EQUAL., GENDER EQUALITY INDEX REPORT 11 tbl.1.1 (2013) [hereinafter EIGE REPORT], *available at* http://eige.europa.eu/sites/default/files/Gender-Equality-Index-Report.pdf.

108. UNITED NATIONS DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2013, THE RISE OF THE SOUTH: HUMAN PROGRESS IN A DIVERSE WORLD 31 (2013) [HUMAN DEVELOPMENT REPORT 2013], *available at* http://hdr.undp.org/sites/default/files/reports/14/hdr2013_en_complete.pdf.

109. *See* Ignatieff & Desormeau, *supra* note 106, at 1-2.

110. EIGE REPORT, *supra* note 107, at 31.

111. *See id.* at 107.

another equality/inequality index that provides a measure incorporating violence as a dimension, this survey employs the GII measure as a contextual tool. Furthermore, the state survey is organized in descending order, beginning with the EU-M State that has the score reflecting the lowest rate of gender inequality measured thus arguably a reflection of gender inequity.

B. Human Development Dimension

The United Nations measures human development by combining indicators of life expectancy, educational attainment, and income levels into a raw score called the Human Development Index ("HDI").[112] This index can provide a frame of reference for constructive comparisons between states.[113] However, leaders in the human rights community and multidisciplinary scholars have struggled about how to understand and possibly measure the correlation between human development and human rights obligation fulfillment.[114] Leading figures in the human rights community have recommended against using data sets to make these comparisons, arguing that meaningful results would not be possible because data gathering possibilities vary from country to country.[115] In addition, they have argued that the development of country rankings would be politically untenable and would ultimately oversimplify human rights challenges.[116]

In a multi-disciplinary study employing economic principles to study human rights obligation fulfillment, the findings suggest that the human development index varies across countries of similar income levels, which further suggests that human development factors such as life expectancy and education, for example, are not directly correlated to state resource capacity.[117] The study also reveals that human development is an unreliable predictor of human rights obligation fulfillment, since some states fall short of accomplishing what they arguably could achieve given their resource capacities.[118] In fact, there is a wide variance in human development achievement among countries with similar income levels.[119]

Finally, given that human development achievement can differ among countries with similar income levels, this survey provides data on one indicator of resource allocation. It examines the extent to which domestic-violence-shelter

112. *Id.* at 1.

113. *Human Development Index (HDI)*, UNITED NATIONS DEV. PROGRAMME, http://hdr.undp.org/en/statistics/hdi (last visited Feb. 6, 2014).

114. *See* Sakiko Fukuda-Parr et al., *An Index of Economic and Social Rights Fulfillment: Concept and Methodology*, 8 J. HUM. RTS. 195, 197 (2009).

115. *Id.* at 200 ("[I]t is quite difficult to credibly aggregate and to compare state conduct across countries. Assessing conduct would require far more than merely examining official policies or levels of resource expenditures in specific sectors, since paper commitments can mask corruption and other political-economic failures that often prevent policies from being implemented effectively.").

116. *Id.* at 218 n.6.

117. *See id.* at 216-17; *see also Human Development Index (HDI)*, *supra* note 113.

118. *See* Sakiko Fukuda-Parr et al., *supra* note 114, at 216.

119. *Id.* at 216-17.

demand was met in a given year.[120] Admittedly an inadequate representation of total resource allocation, it, nevertheless, provides a barometer of sorts for the purposes of this study.

C. Treaty Obligations Dimension

In this article, the Treaty Obligation Dimension is a function of four qualitative criteria: (i) recency of EU membership; (ii) human rights treaty obligations; (iii) recency of treaty ascension; and (iv) U.N. CEDAW reporting compliance.

1. Recency of EU Membership

EU Membership is conferred only when a candidate country can demonstrate, among other criteria, that its institutions respect the rule of law, respect human rights, and protect minorities.[121] However, the European Commission has admitted that the accession process has become more rigorous and comprehensive over time, specifically with respect to meeting rule of law reforms.[122] The EU recognizes that although some states are EU members, they need to do more to improve the position of women and ensure gender equality and to provide greater protections to minority groups.[123] Thus, this article assumes that countries that were admitted to the EU more recently may have institutions that are not as capable in respecting the rule of law, respecting human rights, and protecting minorities. As such, the article provides EU membership ascension dates as a frame of reference.

2. Human Rights Treaty Obligations

Each EU-M State has a variety of human rights treaty obligations and is thus obligated to create legal environments that support the specific principles embodied in each treaty and to refrain from certain acts that violate the principles

120. *See, e.g.*, Concluding Observations of the Comm. on the Elimination of Discrimination Against Women: Germany, Comm. on the Elimination of Discrimination Against Women, 43d Sess., Jan. 19-Feb. 6, 2009, ¶ 43, U.N. Doc. CEDAW/C/DEU/CO/6 (Feb. 12, 2009); *see also* BARBARA STELMASZEK & HILARY FISHER, WOMEN AGAINST VIOLENCE EUR., COUNTRY REPORT 2012: REALITY CHECK ON DATA COLLECTION AND EUROPEAN SERVICES FOR WOMEN AND CHILDREN SURVIVORS OF VIOLENCE, A RIGHT FOR PROTECTION AND SUPPORT? 116 (2013) [hereinafter WAVE REPORT], *available at* http://www.wave-network.org/sites/default/files/WAVE%20COUNTRY%20REPORT%202012.pdf (displaying a survey Germany prepared with details on the number of women's shelters in Germany).

121. *Communication from the Commission to the European Parliament and the Council: Enlargement Strategy and Main Challenges 2013-2014*, at 1, COM (2013) 700 final (Oct. 16, 2013) [hereinafter *Enlargement Strategy*], *available at* http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/strategy_paper_2013_en.pdf; *see also* Presidency Conclusions, European Council in Copenhagen, at 13 (June 21-22, 1993), *available at* http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/72921.pdf.

122. *Enlargement Strategy*, *supra* note 121, at 2.

123. *Id.* at 9.

of each treaty.[124] Thus, this article identifies the actual legal obligations that each EU-M State bears.

3. Recency of Treaty Ascension

Treaty ascension reflects a recognition that an individual state must meet its treaty obligations. EU-M States are required to enact legal frameworks to support their international obligations with "due diligence."[125] Specifically, CEDAW obligations require that states act with due diligence.[126]

While treaties confer legal obligations, some EU-M States are deficient in creating the legal frameworks that meet these obligations along a timeline that conforms to treaty expectations.[127] Alternatively, some states create broad guarantees in their legal frameworks but fail to implement them in practice.[128] Thus, this article provides treaty ascension dates under the assumption that states that have ascended to a treaty earlier could reasonably be expected to have made greater progress toward meeting their treaty obligations.

4. U.N. CEDAW Reporting Compliance

The CEDAW requires regular reporting on how a state is meeting its treaty obligations.[129] These reports are required to be submitted at regular intervals.[130] Some EU-M States comply with these requirements, while others do not.[131] Reporting data is provided as an indication of both substantive compliance with CEDAW requirements, as well as the willingness and capacity of the EU-M State to report.[132] The survey provides reporting data for contextual purposes.

D. Domestic Legal Infrastructure

Each EU-M State is required to develop a domestic legal infrastructure that meets its treaty obligations.[133] The CEDAW Committee provides recommendations as to what protections each state should provide. These include:

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124. *See* Thomas Hammarberg, Comm'r for Human Rights of the Council of Eur., Progress in Meeting Human Rights Obligations is Too Slow, Speech at the Eur. Movement UK Conference "Are Member States and the EU Meeting Their Human Rights Obligations" (Dec. 12, 2011) [hereinafter London Speech], *available at* https://wcd.coe.int/ViewDoc.jsp?id=1884007.

125. Istanbul Convention, *supra* note 5, art. 5. *See also* Lee Hasselbacher, Note & Comment, *State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence, and International Legal Minimums of Protection*, 8 NW. J. INT'L HUM. RTS. 190, 200 (2010) (tracing the emergence of a "due diligence" standard to assess a state's response to domestic violence).

126. CEDAW Committee, General Recommendation No. 19, *supra* note 31, ¶ 9. *See also* Hasselbacher, *supra* note 125, at 193.

127. London Speech, *supra* note 124.

128. Ertürk Report, *supra* note 39, ¶ 62.

129. CEDAW, *supra* note 9, art. 18.

130. *Id.*

131. Concept Paper, *supra* note 99, ¶ 24.

132. *Id.* ¶ 10.

133. CEDAW, *supra* note 9, art. 2.

(1) equal protection under the law without regard to migration status;[134] (2) specialized services for migrant victims;[135] (3) the use of gender-sensitive language;[136] (4) migration relief for domestic violence victims who report such victimization;[137] and (5) asylum for victims of domestic violence.[138]

Under the Istanbul Convention, EU-M States should further aspire as follows: (1) provide an autonomous residence permit irrespective of the duration of the marriage or relationship, that is renewable depending upon the specific circumstances in the case, and/or whether the victim's presence is deemed necessary to further an investigation or criminal proceedings;[139] (2) provide victims of forced marriage the ability to regain any lost status;[140] and (3) provide subsidiary protection to migrant victims of domestic violence.[141]

This survey provides data about the features of each EU-M State's domestic legal infrastructure in each of the key points identified here.

IV. COMPLIANCE, IMPLEMENTATION, AND ACCOUNTABILITY

State obligations to protect migrant domestic violence victims are defined through their individual treaty responsibilities. Under current European international law, there are three separate layers of protection for migrant domestic violence victims: asylum, non-refoulement, and subsidiary protection. Asylum protection stems from a number of international treaties, including Article 1 of the 1951 Convention Relating to the Status of Refugees ("1951 Refugee Convention").[142] Non-refoulement protection is derived from Article 33(1) of the 1951 Refugee Convention.[143] Subsidiary protection is defined under the Qualification Directive 2004/83 to provide protection to those facing "a real risk of suffering serious harm,"[144] which is defined as "torture or inhuman or degrading treatment or punishment of an applicant in the country of origin."[145] It is notable that the protections against torture as outlined in Article 3 of the ECHR are very wide in scope, encompassing everything from torture to degrading treatment.[146]

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134. HANDBOOK, *supra* note 65, at 14-15.

135. CEDAW Committee, General Recommendation No. 26, *supra* note 59, ¶ 26(i).

136. HANDBOOK, *supra* note 65, at 15; CEDAW Committee, General Recommendation No. 26, *supra* note 59, ¶ 26(i).

137. HANDBOOK, *supra* note 65, at 34.

138. *Id.* at 56.

139. Istanbul Convention, *supra* note 5, arts. 59(1), 59(3).

140. *Id.* art. 59(4).

141. *Id.* art. 60.

142. Convention relating to the Status of Refugees art. 1, July 28, 1951, 189 U.N.T.S. 137.

143. *Id.* art. 33(1).

144. Council Directive 2004/83, arts. 2(e), 15, 2004 O.J. (L 304) 12, 14 (EC).

145. *Id.* art. 15(b). For a discussion of the evolution of the concepts of non-refoulement and subsidiary protection, see Francesco Messineo, Non-Refoulement *Obligations in Public International Law: Towards a New Protection Status?*, *in* THE ASHGATE RESEARCH COMPANION TO MIGRATION LAW, THEORY AND POLICY 129-155 (Satvinder S. Juss ed., 2013).

146. ECHR, *supra* note 8, art. 3.

In this section, the article defines the specific treaty obligations governing the protection of migrant domestic violence victims in EU-M States. It discusses the various systems of protection that have been developed within each country, including legislation addressing violence against women. Using the comparative methodology outlined above, the article presents data as it is reported by the EU-M States, the SRVAW, Specialized Agencies, independent NGO studies, and actual case reviews. The article maps similarities and differences in the various legal regimes, and provides contextual data to better account for variations.[147]

As the individual EU-M State surveys reveal, reform efforts vary from country to country.[148] A complex host of factors likely contribute to these variations.[149] However, a definitive accounting of the precise causes for each of these variations is beyond the scope of this study. In fact, the SRVAW has expressed concern over the inherent limitations on conducting a sufficient interrogation of the information presented by reporting states given the breadth of the mandate and resource limitations in evaluating the efficacy of compliance with existing standards.[150] In spite of the increasing prevalence of domestic violence increasing, the SRVAW reports that this has not "led to the adoption of necessary solutions that are coherent and sustainable, and which would lead to elimination of all forms of violence against all women."[151] Moreover, the SRVAW states: "[I]mpunity for both perpetrators and State officials who fail to protect and prevent violence against women continues to be the norm."[152]

In furtherance of her mandate, the SRVAW recently requested information regarding protections for migrant domestic violence victims, in order to prepare the yearly report to the General Assembly.[153] Only fourteen of the EU-M States responded to the request for information, representing over just 50 percent of them.[154] Moreover, of the responses received, the SRVAW determined that they were not comprehensive in addressing the questions posed.[155] The SRVAW concluded, based on the information provided, that all states, including EU-M States, are deficient in meeting their obligations under the CEDAW.[156]

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147. *See generally* David Kennedy, *The Methods and Politics of Comparative Law*, *in* THE COMMON CORE OF EUROPEAN PRIVATE LAW 131-207 (M. Bussani & U. Mattei eds., 2003) (discussing comparative legal methodologies).

148. *See infra* Part V.

149. *See supra* Part III.

150. Manjoo Report, *supra* note 24, ¶ 43.

151. *Id.*

152. *Id.*

153. *See id.* ¶ 41.

154. *Id.* ¶ 44, n.25 (reflecting that Austria, Bulgaria, Croatia, Czech Republic, Estonia, Germany, Greece, Hungary, Latvia, Lithuania, Romania, Slovenia, Spain, and the United Kingdom responded to the SRVAW questionnaire).

155. *See id.* ¶ 44.

156. *See id.* ("Less than 10 per cent of States articulate their responsibility to act with due diligence as emanating from legally binding international human rights law, despite the widespread ratification of treaties such as the Convention on the Elimination of All Forms of Discrimination against Women.").

Given these inherent challenges, the article's more modest goal is to summarize (1) the states' international obligations, (2) the legal frameworks providing support to this population, (3) the information that has been reported related to protections for this vulnerable population, and (4) the criticisms that have been lodged. Because states have the prerogative of choosing the timetable under which they implement protections, as well as what they choose to report, a definitive comparison across EU-M States remains elusive.

A. European Convention of Human Rights Compliance and Accountability

All EU-M States are parties to the ECHR.[157] Article 3 indicates that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment."[158] Thus, parties must ensure that they provide, in pertinent part, freedom from torture and inhuman treatment, a standard that can be applied to migrant domestic violence victims that fall within their territory. Pursuant to Article 14, states must not engage in discrimination.[159] ECHR violations are enforced through the European Court of Human Rights ("ECtHR").[160] Specific ECtHR cases involving this particular population are discussed within the country reports below.

B. CEDAW Compliance and Accountability

The CEDAW Committee has articulated that parties provide the following protections to migrants within their borders:

a) Equal protection under the law without regard to migration status;[161]
b) Relief that is sensitive to the historical gender-component in domestic violence;[162]
c) Relief from deportation or other punitive immigration action for female survivors of domestic violence "when a worker files a complaint of exploitation or abuse [to the authorities]";[163]
d) The right to confidentially apply for legal immigration status independently of the abuser;[164] and,
e) The right to asylum for individuals that qualify for refugee status.[165]

CEDAW compliance is evaluated through the state reporting system.[166] As parties, all EU-M States[167] are obliged to submit detailed reports to the CEDAW

157. *European Convention on Human Rights: Accession of the European Union*, COUNCIL OF EUR., http://hub.coe.int/what-we-do/human-rights/eu-accession-to-the-convention (last visited May 29, 2014).
158. ECHR, *supra* note 8, art. 3.
159. *Id.* art. 14.
160. *Id.* art. 19.
161. CEDAW Committee, General Recommendation No. 26, *supra* note 59, ¶ 7.
162. *Id.* ¶ 23(a).
163. *Id.* ¶ 26(c)(ii).
164. *Id.* ¶ 26(f).
165. *See id.* ¶ 26(*l*).
166. CEDAW, *supra* note 9, art. 18.

Committee documenting their efforts to eliminate discrimination against women. General compliance with the CEDAW can be accessed through a review of these reports.[168] In addition, with respect to countries that are parties to the CEDAW Optional Protocol, individual complaints of state deficiencies in meeting CEDAW obligations are reviewable.[169]

Finally, the SRVAW receives individual complaints regarding violence against women and communicates with host countries to seek clarification regarding their decision-making and/or appeals processes.[170] The SRVAW can also try to secure protection for a victim.[171]

C. Council of Europe Compliance and Accountability

All EU-M States are members of the Council of Europe.[172] In April 2004, the Council of Europe issued Qualification Directive 2004/83/EC on "minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted"[173] ("Qualification Directive 2004/83"). That document applies to all EU-M States, except Denmark,[174] and attempts to standardize the criteria for international and subsidiary protection for refugees.[175] In addition to setting forth minimum standards for refugees and subsidiary protection meant to harmonize the rules across countries, Qualification Directive 2004/83 seeks to limit the movement of asylum applicants between member states, where they are motivated purely by differences in state legal frameworks.[176]

Qualification Directive 2004/83 articulates the need for a common policy across the European Union.[177] While this Qualification Directive does not set forth

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167. The European Commission reports the 28 European Union Member States and their year of initial membership: Austria (1995); Belgium (1952); Bulgaria (2007); Croatia (2013); Cyprus (2004); Czech Republic (2004); Denmark (1973); Estonia (2004); Finland (1995); France (1952); Germany (1952); Greece (1981); Hungary (2004); Ireland (1973); Italy (1952); Latvia (2004); Lithuania (2004); Luxembourg (1952); Malta (2004); the Netherlands (1952); Poland (2004); Portugal (1986); Romania (2007); Slovakia (2004); Slovenia (2004); Spain (1986); Sweden (1995); and the United Kingdom (1973). *Countries*, EUR. UNION, http://europa.eu/about-eu/countries/index_en.htm (last visited Feb. 10, 2014).

168. CEDAW, *supra* note 9, art. 18.

169. Optional Protocol to CEDAW, *supra* note 75, art. 7.

170. Ertürk Report, *supra* note 39, ¶ 24.

171. *Id.*

172. *See* COUNCIL OF EUR., http://hub.coe.int (last visited Jan. 22, 2014) (follow "47 Countries" hyperlink) (demonstrating that all of the EU-M States are also members of the Council of Europe).

173. Council Directive 2004/83, *supra* note 144; *see also* UNITED NATIONS HIGH COMM'R FOR REFUGEES, ASYLUM IN THE EUROPEAN UNION: A STUDY OF THE IMPLEMENTATION OF THE QUALIFICATION DIRECTIVE (2007) [hereinafter ASYLUM IN THE EUROPEAN UNION], *available at* http://www.unhcr.org/47302b6c2.html.

174. Council Directive 2004/83, *supra* note 144, ¶ 40.

175. *Id.* ¶¶ 1, 6, 24.

176. *Id.* ¶ 7.

177. *Id.* ¶ 1 pmbl. ("A common policy on asylum, including a Common European Asylum System, is a constituent part of the European Union's objective of progressively establishing an area of freedom,

mandates with regard to humanitarian relief,[178] it does provide specific and detailed standards for international and subsidiary protections.[179] Paragraph 21 of the preamble establishes the necessity of introducing a common understanding "of the persecution ground 'membership of a particular social group.'"[180] It mandates that acts of gender-related violence are to be considered persecutory.[181] Paragraph 27 states that family members of a refugee "will normally be vulnerable to acts of persecution in such a manner that could be the basis for refugee status."[182] Actors of persecution are deemed to include state governments, parties controlling a state or territory, and non-state actors in the absence of protection by states or controlling parties.[183] "Protection is generally provided when [states, or parties controlling those states] take reasonable steps to prevent the persecution or suffering of serious harm . . . by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm."[184]

With regard to subsidiary protection, Qualification Directive 2004/83 sets forth standards for protection.[185] It defines serious harm, in pertinent part, as "(a) death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin."[186] It mandates that "Member States shall grant subsidiary protection status to a third country national" who qualifies pursuant to the standards set forth in Qualification Directive 2004/83.[187] Paragraph 29 states that the "family members of beneficiaries of subsidiary protection status . . . [should] be fair in comparison to those enjoyed by beneficiaries of subsidiary protection status."[188]

Qualification Directive 2004/83 addresses the concept of non-refoulement, mandating that international obligations be followed in this regard.[189] Principles of non-refoulement are set forth in several treaties, including the 1951 Refugee Convention[190] and the 1967 Protocol Relating to the Status of Refugees ("1967 Refugee Protocol").[191] Article 33 of the 1951 Refugee Convention mandates that,

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security and justice open to those who, forced by circumstances, legitimately seek protection in the Community.").

178. *Id.* ¶ 9 pmbl.

179. *Id.* chs. II, V.

180. *Id.* ¶ 21 pmbl.

181. *Id.* art. 9(2)(f).

182. *Id.* ¶ 27 pmbl.

183. *Id.* art. 6.

184. *Id.* art. 7.

185. *Id.* ch. V.

186. *Id.* art. 15.

187. *Id.* art. 18.

188. *Id.* ¶ 29 pmbl.

189. *Id.* art. 21.

190. Convention relating to the Status of Refugees, *supra* note 142, art. 33.

191. Protocol relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267. "The States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the

"[n]o Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[192]

Article 23 of Qualification Directive 2004/83 addresses family unity principles and mandates that family unity "be maintained" for refugees and beneficiaries of subsidiary protection permitting family members to apply for residence permits and state benefits to ensure an adequate standard of living.[193]

D. Implementation and Compliance Concerns

Over the past twenty years, the SRVAW has issued a variety of reports on the extent of worldwide progress in eliminating violence against women.[194] In spite of the progress made in strengthening protections for domestic violence victims, the SRVAW has called for more to be done.[195] The SRVAW points out that all of the EU-M States are faced with increasing numbers of migrants, but only some of these states provide gender-specific immigration benefits, such as asylum for victims of gender-based and domestic violence.[196]

Having consistently acknowledged the higher risk of violence faced by migrant domestic violence victims, as well as the barriers to justice due to their illegal status, the SRVAW notes the urgent need to support this vulnerable population.[197] Pointing to the Netherlands, by way of example, the SRVAW recognizes that the state has adopted legislation that permits women to migrate in their individual capacities on humanitarian grounds, where domestic violence is presumably a humanitarian basis.[198] The SRVAW also charges that the real nature of the protection has been aimed at social and cultural integration, which has had the result of further marginalizing this population, and that few of these

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Convention to refugees as hereinafter defined." *Id.* art. 1(1) (reaffirming the obligations from the 1951 Convention including the provisions on non-refoulement).

192. Convention relating to the Status of Refugees, *supra* note 142, art. 33(1).

193. Council Directive 2004/83, *supra* note 144, art. 23.

194. *See, e.g.*, Manjoo Report, *supra* note 24; Ertürk Report, *supra* note 39; Special Rapporteur on Violence Against Women, *Integration of the Human Rights of Women and the Gender Perspective*, Comm'n on Human Rights, ¶ 1514, U.N. Doc. E/CN.4/2003/75/Add.1 (Feb. 27, 2003) (by Radhika Coomaraswamy) [hereinafter Coomaraswamy Report] (these three represent the types of reports that the SRVAW produces). *See also Annual Reports*, UNITED NATIONS HUM. RTS., http://www.ohchr.org/EN/Issues/Women/SRWomen/Pages/AnnualReports.aspx (last visited Jan. 22, 2014) (listing the annual reports released by the SRVAW).

195. Manjoo Report, *supra* note 24, ¶¶ 69-70. The SRVAW states that the impact of restrictive immigration policies is especially burdensome on women whose immigration residency may be dependent upon that of their husbands. Ertürk Report, *supra* note 39, ¶ 41.

196. Coomaraswamy Report, *supra* note 194, ¶ 1514.

197. Ertürk Report, *supra* note 39, ¶ 65.

198. Special Rapporteur on Violence Against Women, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council," Mission to the Netherlands*, Human Rights Council, ¶¶ 56-58, U.N. Doc. A/HRC/4/34/Add.4 (Feb. 7, 2007) (by Yakin Ertürk) [hereinafter Netherlands Report].

humanitarian-based visas have actually been issued.[199] There has been a call for the Netherlands government to release data on the number of humanitarian-based visas that have, in fact, been issued to migrant victims of domestic violence.[200]

Another factor that influences a migrant domestic violence victim's decision to seek assistance is the host country's family reunification policy. When a domestic violence victim's migration status is tied to the principal residence permit holder, the victim may be subject to increased vulnerability to exploitation of her human rights.[201] CEDAW Specialized Agencies in the European Union have criticized family unification policies in many of the EU-M countries.[202] Moreover, the Istanbul Convention provides that migrant domestic violence victims whose residence status is dependent on that of their spouse or partner are able to apply for autonomous legal status "irrespective of the duration of the marriage or the relationship."[203] In 2009, the Council of Europe issued an official recommendation calling upon EU-M States to adopt a variety of protections for migrant domestic violence victims, including "the granting of individual legal status to migrant women who have joined their spouse through family reunion, if possible within one year of the date of arrival."[204]

To the extent that existing policies tie migration status to another family member, dependencies are created. In the case of domestic violence, when there is migration-related dependence between family members, this can impact the extent to which a domestic violence victim will seek support.[205] Before a migrant domestic violence victim has achieved a long-term residence status, her residency security is tied to the family sponsor.[206] Therefore, decisions about whether to seek support from the state government may be influenced according to the power the victim has over her right to remain in the country given her family ties to the abuser.[207]

In sum, while many states have acknowledged that domestic violence against women is the most prevalent human rights violation facing countries,

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199. Ertürk Report, *supra* note 39, ¶ 93 (citing Netherlands Report, *supra* note 198, ¶¶ 16-17).

200. *See* Netherlands Report, *supra* note 198, ¶¶ 58-65 (stating that the Netherlands government has not provided all asylum and residence permit data).

201. *See* CEDAW Committee, General Recommendation No. 26, *supra* note 59, ¶¶ 8, 26(f).

202. *See* INT'L COMM'N OF JURISTS, GREEN PAPER ON THE RIGHT TO FAMILY REUNIFICATION OF THIRD-COUNTRY NATIONALS LIVING IN THE EUROPEAN UNION (DIRECTIVE 2003/86/EC): RESPONSE BY THE INTERNATIONAL COMMISSION OF JURISTS 6 (2012), *available at* http://ec.europa.eu/dgs/home-affairs/what-is-new/public-consultation/2012/pdf/0023/famreun/internationalorganisationssocialpartnersngos/international_commission_of_jurists_-_icj.pdf.

203. Istanbul Convention, *supra* note 5, art. 59(1).

204. EUR. PARL. ASS., *Migrant Women: at Particular Risk from Domestic Violence*, Res. 1697, art. 4.1.1 (Nov. 20, 2009), *available at* http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=17797&Language=EN.

205. *Id.* art. 1.

206. Netherlands Report, *supra* note 198, ¶¶ 56-58.

207. *See id.*

> this acknowledgement has not led to the adoption of necessary solutions that are coherent and sustainable, and which would lead to elimination of all forms of violence against all women. In fact, the view from civil society is that the prevalence rates are increasing and also manifesting in new forms in many parts of the world. Also, that impunity for both perpetrators and State officials who fail to protect and prevent violence against women continues to be the norm.[208]

In the example above, where the Netherlands is progressive, by comparison, in the creation of special protections, the SRVAW points out that most of the countries are lagging in the development of specific immigration protections for migrants.[209]

These limitations have prompted the United Nations to express serious concern that in some countries: (1) the policies are gender-neutral and fail to adequately protect the rights of female migrants;[210] (2) the legal frameworks place migrant females at high risk of refoulement;[211] (3) female migrant victims have uneven access to humanitarian relief in the form of asylum;[212] and (4) there is generally lack of awareness about the availability of social services and legal remedies that ensure protection against migrant domestic violence victimization.[213] This article will conclude by evaluating the steps the various countries are taking to address these limitations and enhance the rights of migrant female domestic violence victims.[214]

For years, CEDAW Specialized Agency organizations have been advancing gender-related relief in the immigration context. The European Council on Refugees and Exiles ("ECRE"), a pan-European alliance of 82 non-governmental organizations advancing the rights of refugees, asylum seekers, and displaced persons, has been advocating since as early as 1997 that:

> Gender-specific violence should not be evaluated differently from other forms of violence that are held to amount to persecution, and the appearance of sexual violence in a claim should never lead the decision-maker to conclude that the alleged harm is an instance of purely personal harm. In particular, where rape has occurred this should be regarded as other forms of serious harm and thus repeated occurrence should not need to be demonstrated in order to prove a well-founded fear of persecution. The fact that violence against women is universal is

208. Manjoo Report, *supra* note 24, ¶ 43.
209. *Id.* ¶¶ 69-77.
210. CEDAW Committee, General Recommendation No. 26, *supra* note 59, ¶ 23(a).
211. *See id.* ¶ 26(f).
212. *See id.* ¶¶ 24(j), 26(a).
213. *Id.* ¶¶ 26(c)(iii), 26(g), 26(i).
214. *See infra* Part V.

> irrelevant when determining whether gender-specific violence amounts to persecution in a particular case.[215]

In response, there have been concerted worldwide and regional programs aimed at harmonizing efforts as relates to asylum and gender-based claims specifically. In 2000, the Council of Europe Parliamentary Assembly passed a recommendation that member states eliminate all gender-related discrimination among refugees.[216] Nevertheless, as of 2008, the Council of Europe was reporting that "[c]urrent legal measures need to be improved in almost all Council of Europe member states and new measures need to be introduced to combat violence and sustain progress."[217] Eurostat statistics reflect that there remains a wide discrepancy in protection rates for the similar groups of asylum-seekers across EU-M States, a claim acknowledged by the Council of Europe.[218] Moreover, the extent to which states have acted with due diligence in implementing these protections is subject to debate.[219]

E. Asylum Claims Generally

In 2012, there were 335,365 requests for asylum made to EU-M States.[220] This represents approximately 44 percent of the total number of requests for

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215. EUROPEAN COUNCIL ON REFUGEES & EXILES, POSITION ON ASYLUM SEEKING AND REFUGEE WOMEN, ¶ 8 (1997), *available at* http://www.ecre.org/component/downloads/downloads/156.html.

216. EUR. PARL. ASS., *Violence Against Women in Europe*, Res. 1450 (Apr. 3, 2000), *available at* http://assembly.coe.int/Main.asp?link=http%3A%2F%2Fassembly.coe.int%2FDocuments%2FAdoptedText%2Fta00%2FEREC1450.htm.

217. COUNCIL OF EUR., FINAL ACTIVITY REPORT: TASK FORCE TO COMBAT VIOLENCE AGAINST WOMEN, INCLUDING DOMESTIC VIOLENCE 82 (2008), *available at* http://www.coe.int/t/dg2/equality/domesticviolencecampaign/Source/Final_Activity_Report.pdf.

218. *See* ADVISORY COMM. ON EQUAL OPPORTUNITIES FOR WOMEN AND MEN, OPINION ON THE GENDER DIMENSION OF INTEGRATION OF MIGRANTS 3 (2011), *available* at http://ec.europa.eu/justice/gender-equality/files/opinions_advisory_committee/opinion_integration_migrants_en.pdf; *Respect for the Rights and Dignity of Migrants*, COUNCIL OF EUR., http://hub.coe.int/what-we-do/society/migration (last visited May 29, 2013) ("The issues connected with migratory movements and migrants require a comprehensive approach involving all the Council of Europe's bodies: Parliamentary Assembly, Congress of Local and Regional Authorities of Europe and Conference of International Non-Governmental Organisations, as well as the representatives of governments, who meet to prepare and co-ordinate their work.").

219. *See* Hasselbacher, *supra* note 125, at 191 (highlighting that the ECtHR has found that states have not met the "due diligence" standard). Article 29 of the Istanbul Convention requires that states ensure that civil law remedies permit victims to seek justice and compensation against state authorities, if they have failed in their duty to diligently take preventive and protective measures. Istanbul Convention, *supra* note 5, art. 29.

220. EUROPEAN ASYLUM SUPPORT OFFICE, ANNUAL REPORT ON THE SITUATION OF ASYLUM IN THE EUROPEAN UNION 2012, at 13 (2013) (asylum requests increased 11 percent from 2011), *available at* http://www.europarl.europa.eu/document/activities/cont/201310/20131028ATT73533/20131028ATT73533EN.pdf.

asylum worldwide.[221] By way of comparison, the United States received approximately 11 percent of the total worldwide requests.[222] Germany, France, and Sweden received the greatest percentage of total requests, at approximately 23, 18, and 13 percent, respectively.[223] Belgium and the United Kingdom received significant requests as well, at approximately 8 percent each.[224] The remaining EU-M States received, collectively, approximately 28 percent of the applications—representing almost 96,000 requests.[225] Austria, Italy, the Netherlands, and Poland all received between 10,000 and 18,000 requests.[226]

Asylum flows vary across years and across states, with shifting geopolitical conflicts influencing the flows. In 2012, the majority of the asylum requests across the EU were from Afghani, Russian, and Syrian refugees.[227] By way of comparison, in 2010, most asylum-seekers in the EU were from Afghanistan, Russia, Serbia, Iraq, and Somalia.[228] With the advent of the civil war in Syria beginning in March 2011, for example, neighboring Bulgaria has witnessed a three-fold increase in the number of refugee requests it received in 2013.[229]

Presumably some percentage of these individuals seeking asylum are fleeing persecution based on their gender. Asylum claims, including gender-based asylum claims, are evaluated under individual state systems that enshrine international principles articulated in the 1951 Refugee Convention and the 1967 Refugee Protocol.[230] The states' definitions of the term refugee are all modeled on the 1951 Refugee Convention, which defines a refugee as one, who, "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country."[231]

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221. UNITED NATIONS HIGH COMM'R FOR REFUGEES, 2012 STATISTICAL YEARBOOK: TOP POPULATION OUTFLOWS BY ORIGINS, REFUGEES VS. ASYLUM-SEEKERS 7 (2013) (highlighting that there were 752,700 initial applications filed worldwide during 2012).

222. UNITED NATIONS HIGH COMM'R FOR REFUGEES, ASYLUM TRENDS 2012: LEVELS AND TRENDS IN INDUSTRIALIZED COUNTRIES 3 (2013), *available at* http://www.tagesschau.de/ausland/unhcr108.pdf (stating that the United States received an estimated 83,400 applications).

223. EUROPEAN ASYLUM SUPPORT OFFICE, *supra* note 220, at 13.

224. *Id.*

225. *See id.*

226. *Id.* at 18 fig.3.

227. *See id.* at 29 fig.13.

228. *Communication from the Commission to the European Parliament and the Council, Annual Report on Immigration and Asylum (2010)*, at 5, COM (2011) 291 final (May 24, 2011) [hereinafter *2010 Annual Report on Immigration and Asylum*], *available at* http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0291:FIN:EN:PDF.

229. *See* UNITED NATIONS HIGH COMM'R FOR REFUGEES, BULGARIA AS A COUNTRY OF ASYLUM: UNHCR OBSERVATIONS ON THE CURRENT SITUATION OF ASYLUM IN BULGARIA 4 (2014).

230. Convention relating to the Status of Refugees, *supra* note 142; Protocol relating to the Status of Refugees, *supra* note 191.

231. Convention relating to the Status of Refugees, *supra* note 142, art. 1(A)(2).

One aspect of this definition that is significant in the context of gender-based violence is the meaning of "particular social group." It is within this part of the definition that claims to asylum based on domestic violence are typically considered.[232]

Some individuals claim that they have been persecuted by their family or community on account of their gender and that, due to social and cultural conditions, they are unable to seek support from their state governments.[233] Under international principles, harm related to domestic violence is held to be gender-specific, and when states fail to provide adequate support, in some instances, a claim to asylum based on membership in a particular social group may prevail.[234]

V. EUROPEAN UNION MEMBER STATE PROTECTION SURVEY

The degree to which a state meets its treaty obligations in practice is sometimes a matter of dispute between worldwide and regional human rights bodies, CEDAW Specialized Agencies, individual state governments, and individuals who seek to avail themselves of human rights protections.[235] Some states have developed robust systems of protection that include a range of legal protections and safety structures, including asylum, non-refoulement, subsidiary protections, humanitarian relief, family unity provisions, migration-related protections for victims that are not tied to an abusive spouse, shelters, hotlines, legal assistance, interpretation assistance, work permits, and injunctive relief in the form of protection orders.[236] Other states are in various stages of the process of developing these structures.[237] Below, we will provide a general overview of the legal protection and related frameworks currently in place to protect migrant domestic violence victims, recognizing that many states are in mid-stream in developing these structures.

A. The Netherlands

The Netherlands ratified the ECHR in August 1954.[238] It ratified the CEDAW in July 1991,[239] as well as the CEDAW Optional Protocol in May

232. Guy S. Goodwin-Gill, *Judicial Reasoning and 'Social Group' After* Islam *and* Shah, 11 J. INT'L REFUGEE L. 537, 537 (1999); Sue Kirvan, *Women and Asylum: A Particular Social Group*, 7 FEMINIST LEGAL STUD. 333, 335 (1999) (these two articles reviewed *Islam v. Secretary of State for the Home Department; R v. Immigration Appeal Tribunal and Another ex parte Shah*, [1999] 2 W.L.R. 1015 (H.L.) (appeals taken together)).

233. *See infra* Part IV.

234. *See supra* Part II.

235. *See supra* Part II.

236. *See infra* Part V.

237. *See infra* Part V.

238. Council of Eur. Treaty Office, *Convention for the Protection of Human Rights and Fundamental Freedoms* (Nov. 4, 1950), http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=8&DF=&CL=ENG (last visited Jan. 22, 2014) [hereinafter ECHR Treaty Status].

239. United Nations, Multilateral Treaties Deposited with the Secretary-General, *Convention on the Elimination of All Forms of Discrimination against Women* (Dec. 18, 1979),

2002.[240] The Netherlands signed the Istanbul Convention in November 2012, but has not yet ratified it.[241] It has submitted five party reports to the CEDAW Committee, with a sixth report expected in February 2014.[242]

Since 2002, the Netherlands has been implementing a country-wide policy on combating domestic violence, with a 2010 evaluation showing significant progress on this front.[243] Working with local and professional partners, the government is developing an approach for violence, with a specific focus on women and girls of non-Dutch heritage.[244] The Dutch CEDAW Network, however, highlighted the problem of formulating policies to combat and prevent domestic violence that exclude women of minority backgrounds from the process because "[t]his results in solutions that are offered to them, but not developed with them."[245]

Asylum is available for immigrants who claim to be victims of domestic violence, when they can prove that their own government is unable or unwilling to provide them with protection.[246] Furthermore, "[t]he Aliens Act Implementation Guidelines specifically mention domestic violence as a ground of asylum for immigrants from certain countries where there is a link between domestic violence and honour-related violence, discrimination against women or the absence of

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https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en (last visited Feb. 18, 2014) [hereinafter CEDAW Treaty Status].

240. United Nations, Multilateral Treaties Deposited with the Secretary-General, *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women* (Oct.. 6, 1999), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8-b&chapter=4&lang=en (last visited Feb. 18, 2014) [hereinafter CEDAW Optional Protocol Treaty Status].

241. Istanbul Convention Treaty Status, *supra* note 88.

242. Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Fifth Periodic Reports of States Parties: The Netherlands, Comm. on the Elimination of Discrimination Against Women, 45th Sess., Jan. 18-Feb. 5, 2010, at 2, 8 n.1, U.N. Doc. CEDAW/C/NLD/5 (Nov. 24, 2008) [hereinafter Netherland's Fifth Periodic Report] (the initial report was submitted in 1992 (U.N. Doc. CEDAW/C/NET/1), the second in 1998 (U.N. Doc. CEDAW/C/NET/2), the third in 2000 (U.N. Doc. CEDAW/C/NET/3), and the fourth in 2005 (U.N. Doc. CEDAW/C/NET/4)). *See also Human Rights Bodies*, OFF. HIGH COMMISSIONER HUM. RTS., http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx (select "The Netherlands" from drop-box, select "CEDAW" hyperlink) (last visited May 28, 2014).

243. Concluding Observations of the Comm. on the Elimination of Discrimination Against Women: The Netherlands, Comm. on the Elimination of Discrimination Against Women, 45th Sess., Jan. 18-Feb. 5, 2010, ¶ 5, U.N. Doc. CEDAW/C/NLD/CO/5 (Feb. 5, 2010).

244. Netherland's Fifth Periodic Report, *supra* note 242, at 25-26.

245. LEONTINE BIJLEVELD & LINDA MANS, NETWERK VN-VROUWENVERDRAG (DUTCH CEDAW NETWORK), WOMEN'S RIGHTS SOME PROGRESS, MANY GAPS: SHADOW REPORT BY DUTCH NGOS; AN EXAMINATION OF THE FIFTH REPORT BY THE GOVERNMENT OF THE NETHERLANDS ON THE IMPLEMENTATION OF THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW), 2005-2008, at 19 (2009) [hereinafter Dutch CEDAW Network], *available at* http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/DutchNetwork_Netherlands45.pdf.

246. Responses to the List of Issues and Questions with Regard to the Consideration of the Fifth Periodic Report: The Netherlands, Comm. on the Elimination of Discrimination Against Women, 45th Sess., Jan. 18-Feb. 5, 2010, at 15, U.N. Doc. CEDAW/C/NLD/Q/5/Add.1 (Oct. 19, 2009) [hereinafter Netherlands: Response to List of Issues].

protection by the local authorities."[247] As noted above, however, the Dutch CEDAW Network reported that the government has failed to provide statistics on the number of women granted refugee status on grounds of domestic violence.[248]

In 2007, the Regulation on provisions for certain categories of foreign nationals became available to victims of domestic violence without a residence permit.[249] This change means, essentially, that victims of domestic violence "may be eligible for financial support and health insurance, on the condition that they submit an application for a residence permit (which gives them lawful residence) and reside in a women's shelter."[250] The Netherlands affords essentially the same rights to beneficiaries of subsidiary protection as it does to beneficiaries of refugee status, including family reunification benefits.[251]

The CEDAW Committee expressed concern about the Netherland's asylum policy and how it might exclude victims of domestic violence.[252] Specifically, the Committee Against Torture and the SRVAW note the need for "adopting gender-sensitive asylum procedures and recognizing gender-related persecution as a ground for asylum."[253] The Committee noted that the so-called "accelerated [asylum] procedure" could lead to refoulement of women who cannot relate traumatic incidents of sexual or domestic violence.[254] In response to this concern, the government stated that the accelerated forty-eight hour procedure was going to be replaced by an eight-day procedure, providing more time for them to seek legal assistance.[255] The government also assured the CEDAW Committee that the Dutch asylum process is gender-sensitive, and that asylum status may be granted to victims of domestic violence if their country of origin is unable or unwilling to protect them.[256]

While the government repeatedly highlighted humanitarian-based resident status for victims of domestic violence, honor-related violence, and trafficking,[257] the CEDAW Committee noted, however, that "the humanitarian grounds mechanism had rarely been used: fewer than 10 residence permits had been

247. *Id.*

248. BIJLEVELD & MANS, *supra* note 245, at 59.

249. Netherland's Fifth Periodic Report, *supra* note 242, at 24.

250. *Id.*

251. EUROPEAN COUNCIL ON REFUGEES & EXILES, THE IMPACT OF THE EU QUALIFICATION DIRECTIVE ON INTERNATIONAL PROTECTION 33 (2008) [hereinafter THE IMPACT OF THE EU QUALIFICATION DIRECTIVE], *available at* http://cmr.jur.ru.nl/cmr/docs/ECRE_QD_study_full.pdf.

252. Comm. on the Elimination of Discrimination Against Women, 45th Sess., 916th mtg. ¶ 53, U.N. Doc. CEDAW/C/SR.916 (Jan. 27, 2010) [hereinafter 916th mtg. Summary Record].

253. List of Issues and Questions with Regard to the Consideration of Periodic Reports: The Netherlands, Comm. on the Elimination of Discrimination Against Women, 45th Sess., Jan. 18-Feb. 5, 2010, ¶ 22, U.N. Doc. CEDAW/C/NLD/Q/5 (Mar. 13, 2009).

254. *Id.*

255. Netherlands: Response to List of Issues, *supra* note 246, at 25.

256. *Id.* at 15, 25.

257. *Id.* at 15 ("Victims who are resident illegally can apply for legal residence either by invoking specific arrangements for victims or on humanitarian grounds, and those resident legally can apply for continued residence, if necessary also on humanitarian grounds.").

granted."[258] The SRVAW noted that the humanitarian residence permit only applies to victims who were granted temporary residence due to their cooperation with the police.[259] The Committee thus considered the recommendation that the government provide protection to trafficking victims regardless of their level of cooperation in legal proceedings as "partially implemented."[260]

Throughout the asylum procedure, the asylum-seeker may have legal representation by a lawyer, which is provided by the Legal Aid Board.[261] The asylum-seeker is to be heard in a language that it may reasonably be assumed she is able to understand.[262] This means that in all cases, an interpreter has to be present during the interviews.

The Netherlands's 2012 HDI worldwide ranking is fourth.[263] Its 2012 GII worldwide ranking is first.[264] While the state did not have in place a national women's hotline as of 2012,[265] its vast shelter system served nearly 100 percent of the reported need.[266]

B. Sweden

Sweden ratified the ECHR in February 1952.[267] It ratified the CEDAW in July 1980,[268] and the CEDAW Optional Protocol in April 2003.[269] It ratified the Istanbul Convention in July 2014.[270] Sweden issued its initial report pursuant to its obligations under CEDAW in October 1982,[271] and submitted five periodic reports thereafter, with the latest in September 2006.[272] Its next report is due September 3, 2014.[273]

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258. 916th mtg. Summary Record, *supra* note 252, ¶ 60. The low number is especially significant when compared to residence permits and permanent residence permits issued to "cooperating" victims of violence and trafficking. *Id.* ("In 2008 and 2009, residence permits had been issued to 230 and 200 cooperating victims respectively, with permanent residence permits granted to 100 and 40 victims respectively.").

259. Letter from Barbara Bailey, Rapporteur on Follow-up, Comm. on the Elimination of Discrimination Against Women, to the Netherlands, at 3-4 (Nov. 26, 2012), *available at* http://www.vrouwenverdrag.nl/_documenten/vv/doc/2012/CEDAWfollow-up_Netherlands.pdf.

260. *Id.* (emphasis removed).

261. *Id.* at 2.

262. *Id.* at 3 (NGOs assist individuals from different cultures).

263. HUMAN DEVELOPMENT REPORT 2013, *supra* note 108, at 151 tbl.3.

264. *Id.* at 156 tbl.4.

265. WAVE REPORT, *supra* note 120, at 13.

266. *Id.* at 14-15.

267. ECHR Treaty Status, *supra* note 238.

268. CEDAW Treaty Status, *supra* note 239.

269. CEDAW Optional Protocol Treaty Status, *supra* note 240.

270. Istanbul Convention Treaty Status, *supra* note 88.

271. Consideration of Reports Submitted by States Parties Under Article 18 of the Convention, Initial Reports of State Parties: Sweden, Comm. on the Elimination of Discrimination Against Women, 2d Sess., Aug. 1-12, 1983, at 1, U.N. Doc. CEDAW/C/5/Add.8 (Dec. 15, 1982).

272. Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Combined Sixth and Seventh Periodic Report of States Parties: Sweden, Comm. on the Elimination of Discrimination Against Women, at 1,

Swedish law governing migrants is set forth in the Aliens Act.[274] According to Chapter 4, Section 1, of the Aliens Act, the term "refugee" includes a gender-related particular social group.[275] Protection is available irrespective of whether the persecution is at the hands of the authorities of the country, or against whom the authorities cannot be expected to offer protection.[276] In 2005, the Aliens Act was amended to permit asylum on the basis of gender-based persecution.[277] The State Migration Board has issued review guidelines on refugee women.[278] Sweden also provides subsidiary relief when there are substantial grounds for assuming that the alien would run a risk of "suffering the death penalty or being subjected to corporal punishment, torture or other inhuman or degrading treatment or punishment."[279] Swedish law also permits the granting of residence permits to persons who face "exceptionally distressing circumstances" as stated in Chapter 5, Section 6 of the Aliens Act.[280]

If a residence permit cannot be awarded on other grounds, a permit may be granted to an alien if, based upon an overall assessment of the alien's situation, there are found to be such exceptionally distressing circumstances that he or she should be allowed to stay in Sweden.[281] Sweden affords "essentially the same rights to beneficiaries of subsidiary protection" as it does to beneficiaries of refugee status, including family reunification benefits.[282]

In recent years, Sweden has experienced a series of highly publicized honor killings.[283] As a consequence, in February 2002, the Swedish Minister for Integration adopted a strategy on how to protect girls living in vulnerable situations.[284] Since then, the ECtHR has issued decisions granting threatened honor killing victims relief under ECHR Article 3, prohibiting return of individuals to their home country where they risk torture as defined therein.[285] One such case involved an Afghani women, and the ECtHR determined that "women are at

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U.N. Doc. CEDAW/C/SWE/7 (Sept. 14, 2006) (the second report was submitted in 1987 (U.N. Doc. CEDAW/C/13/Add.6), the third in 1990 (U.N. Doc. CEDAW/C/18/Add.1), the fourth in 1996 (U.N. Doc. CEDAW/C/SWE/4), and the fifth in 2000 (U.N. Doc. CEDAW/C/SWE/5)).

273. *See Human Rights Bodies*, OFF. HIGH COMMISSIONER HUM. RTS., http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx (select "Sweden" from drop-box, select "CEDAW" hyperlink) (last visited May 28, 2014).

274. 1 ch. 1 § Utlänningslag (Svensk författningssamling [SFS] 2005:716) (Swed.) (Aliens Act).

275. 4 ch. 1 § Utlänningslag (SFS 2005:716) (Swed.) (Aliens Act).

276. *Id.*

277. *Id.*

278. *See* SWEDISH MIGRATION BD., GENDER-BASED PERSECUTION: GUIDELINES FOR INVESTIGATION AND EVALUATION OF THE NEEDS OF WOMEN FOR PROTECTION (2001).

279. 4 ch. 2 § Utlänningslag (SFS 2005:716) (Swed.) (Aliens Act).

280. 5 ch. 6 § Utlänningslag (SFS 2005:716) (Swed.) (Aliens Act).

281. *Id.*

282. THE IMPACT OF THE EU QUALIFICATION DIRECTIVE, *supra* note 251, at 33.

283. Coomaraswamy Report, *supra* note 194, ¶ 1797.

284. *Id.* ¶¶ 1797, 1802.

285. N. v. Sweden, App. No. 23505/09, ¶ 62 (Eur. Ct. H.R., July 10, 2010), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-99992.

particular risk of ill-treatment in Afghanistan if perceived as not conforming to the gender roles ascribed to them by society, tradition and even the legal system."[286] Individuals who are granted refugee status or are deemed to be "in need of protection" based on an overall assessment of the victim's situation, are entitled to a residence permit in Sweden.[287] The CEDAW Committee has commended Sweden for its gender-related protection.[288] Sweden created guides on various aspects of gender-related persecution that are binding on decision-makers at the Migration Board and the migration courts.[289]

Sweden's 2012 HDI worldwide ranking is seventh.[290] Its 2012 GII worldwide ranking is second.[291] Sweden has in place a national women's hotline that is staffed twenty-four hours a day, offers free long distance calling, and provides translation services.[292] As of 2012, Sweden had in place 184 shelters, addressing about 66 percent of the reported need.[293]

C. Denmark

Denmark ratified the ECHR in April 1953,[294] the CEDAW in April 1983,[295] and the CEDAW Optional Protocol in May 2000.[296] It signed the Istanbul Convention in October 2013, and ratified it in April 2014.[297] Denmark reported on its obligations under the CEDAW through an initial report in 1984,[298] and seven periodic reports thereafter, with the most recent report submitted in 2008.[299]

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286. *Id.* ¶ 55.

287. 5 ch. 2 § Utlänningslag (Svensk författningssamling [SFS] 2005:716) (Swed.) (Aliens Act) (finding, based on Chapter 12, Section 18, of the Aliens Act, where new circumstances have emerged that mean there are reasonable grounds for believing, inter alia, that an enforcement would put the alien in danger of being subjected to capital or corporal punishment, torture or other inhuman or degrading treatment or punishment or there are medical or other special reasons why the order should not be enforced).

288. Rep. of the Comm. on the Elimination of Discrimination Against Women, 24th & 25th Sess., Jan. 15-Feb. 2, 2001, July 2-20, 2001, at 78, U.N. Doc. A/56/38; GAOR, 56th Sess., Supp. No. 38 (2001).

289. *See* SWEDISH MIGRATION BD., *supra* note 278, at 1.

290. HUMAN DEVELOPMENT REPORT 2013, *supra* note 108, at 151 tbl.3.

291. *Id.* at 156 tbl.4.

292. WAVE REPORT, *supra* note 120, at 13.

293. *Id.* at 14-15.

294. ECHR Treaty Status, *supra* note 238.

295. CEDAW Treaty Status, *supra* note 239.

296. CEDAW Optional Protocol Treaty Status, *supra* note 240.

297. Istanbul Convention Treaty Status, *supra* note 88.

298. Rep. of the Comm. on the Elimination of Discrimination Against Women, 5th Sess., Mar. 10-21, 1986, at 6-10, U.N. Doc. A/41/45; GAOR, 41st Sess., Supp. No. 45 (1986).

299. Consideration of Reports Submitted by States Parties Under Article 18 of the Convention, Eighth Periodic Reports of States Parties Due in 2013: Denmark, Comm. on the Elimination of Discrimination Against Women, 60th Session, Feb. 9-27, 2015, at 1, U.N. Doc. CEDAW/C/DNK/8 (Sept. 11, 2013) [hereinafter Denmark's Eighth Periodic Report] (the second report was submitted in 1988 (U.N. Doc. CEDAW/C/13/Add.14), the third in 1993 (U.N. Doc. CEDAW/C/DEN/3), the fourth in 1997 (U.N. Doc. CEDAW/C/DEN/4), the fifth in 2000 (U.N. Doc. CEDAW/C/DEN/5), the sixth in 2004 (U.N. Doc. CEDAW/C/DEN/6), and the seventh in 2008 (U.N. Doc. CEDAW/C/DEN/7)). *See*

The country implemented comprehensive immigration and asylum rules in mid-2002, including increasing the required number of years of residence from three to seven before a permanent residence permit may be obtained.[300] Humanitarian residence permits may also be issued when significant humanitarian considerations warrant it, "for example if the said person suffers from a serious physical or psychological illness. [A] [r]esidence permit can also be granted, if exceptional reasons make it appropriate."[301]

Denmark reports that asylum applications alleging gender-related abuse or violence are considered in the same manner as all other applications for protection, and that these assessments are made on a case by case basis after examining the individual circumstances in the case at hand.[302] In spite of these protections, the SRVAW has expressed concern "about the situation of migrant, refugee, and minority women in Denmark, [specifically as it relates to] gender-based discrimination and violence that they experience."[303]

Denmark's 2012 HDI worldwide ranking is fifteenth.[304] Its 2012 GII worldwide ranking is third.[305] It is one of only a few countries that has in place a national program to provide safety to domestic violence victims, including permitting all women access to shelters and "psychological, social and judicial services, health treatment and labour market support."[306] There is a nationally organized women's hotline that provides services twenty-four hours a day, with language interpretation.[307] Women in shelters who are caring for children are provided with additional support including rehabilitation, schooling, and housing.[308] The judicial system provides support in connection with protection order enforcement.[309]

There is some indication, however, that demand exceeds resource supply. By 2005, 32 percent of women staying in the shelters were migrant domestic violence victims.[310] As a consequence, between 2005 and 2008, Denmark focused on a

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also Human Rights Bodies, OFF. HIGH COMMISSIONER HUM. RTS., http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx (select "Denmark" from drop-box, select "CEDAW" hyperlink) (last visited May 28, 2014).

300. Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Sixth Periodic Reports of States Parties: Denmark, Comm. on the Elimination of Discrimination Against Women, 36th Sess., Aug. 7-25, 2006, at 58, U.N. Doc. CEDAW/C/DNK/6 (Oct. 4, 2004).

301. Denmark's Eighth Periodic Report, *supra* note 299, at 12.

302. *Id.* at 12-13.

303. Coomaraswamy, *supra* note 194, ¶ 1597.

304. HUMAN DEVELOPMENT REPORT 2013, *supra* note 108, at 151 tbl.3.

305. *Id.* at 156 tbl.4.

306. Denmark's Eighth Periodic Report, *supra* note 299, at 28.

307. WAVE REPORT, *supra* note 120, at 13, 91.

308. *See id.* at 91.

309. *See id.* at 90.

310. Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Seventh Periodic Report of States

national action plan to combat domestic violence against women and children.[311] Following the institution of the national action plan, the number of migrant domestic violence victims in shelters in 2006 had declined to 27 percent.[312] By 2012, the number of shelters had climbed to forty-five,[313] meeting 78 percent of the need.[314]

D. Finland

Finland ratified the ECHR in May 1990.[315] It ratified the CEDAW in September 1986,[316] and the CEDAW Optional Protocol in December 2000.[317] It signed the Istanbul Convention in May 2011, but has not yet ratified it.[318] Finland reported on its obligations under the CEDAW through an initial report in February 1988,[319] and five periodic reports thereafter, with the latest report in May 2012.[320]

Finland's history of developing systems to protect not only domestic violence victims, but migrants who suffer from this abuse, began in 1995.[321] Prior to that time, Finland reported that not only was violence against women considered a "taboo" subject,[322] but that "the legislation in force contain[ed] rules that [were] *de facto* discriminatory against women."[323] However, as of 1995, Finland reported

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Parties: Denmark, Comm. on the Elimination of Discrimination Against Women, 44th Sess., July 20-Aug. 7, 2009, at 73, U.N. Doc. CEDAW/C/Den/7 (July 21, 2008).

311. *Id.* at 71-72.

312. *Id.* at 73.

313. *See* WAVE REPORT, *supra* note 120, at 91.

314. *Id.* at 14-15.

315. ECHR Treaty Status, *supra* note 238.

316. CEDAW Treaty Status, *supra* note 239.

317. CEDAW Optional Protocol Treaty Status, *supra* note 240.

318. Istanbul Convention Treaty Status, *supra* note 88.

319. Rep. of the Comm. on the Elimination of Discrimination Against Women, 8th Sess., Feb. 20-Mar. 3, 1989, ¶¶ 213-65, U.N. Doc. A/44/38; GAOR, 44th Sess., Supp. No. 38 (1990).

320. Consideration of Reports Submitted by States Parties Under Article 18 of the Convention, Seventh Periodic Reports of States Parties: Finland, Comm. on the Elimination of Discrimination Against Women, 57th Sess., Feb. 10-28, 2014, at 3, U.N. Doc. CEDAW/C/FIN/7 (Feb. 18, 2013) (the second report was submitted in 1993 (U.N. Doc. CEDAW/C/FIN/2), the third in 1997 (U.N. Doc. CEDAW/C/FIN/3), the fourth in 1999 (U.N. Doc. CEDAW/C/FIN/4), the fifth in 2004 (U.N. Doc. CEDAW/C/FIN/5), and the sixth in 2007 (U.N. Doc. CEDAW/C/FIN/6)). *See also Human Rights Bodies*, OFF. HIGH COMMISSIONER HUM. RTS., http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx (select "Finland" from drop-box, select "CEDAW" hyperlink) (last visited May 28, 2014).

321. Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Third Periodic Report of States Parties: Finland, Comm. on the Elimination of Discrimination Against Women, 24th Sess., Jan. 15-Feb. 2, 2001, at 7, U.N. Doc. CEDAW/C/FIN/3 (Feb. 11, 1997) [hereinafter Finland's Third Periodic Report].

322. Consideration of Reports Submitted by States Parties Under Article 18 of the Convention, Second Periodic Reports of States Parties: Finland, Comm. on the Elimination of Discrimination Against Women, 14th Sess., Jan. 17-Feb. 4, 1994, at 13, U.N. Doc. CEDAW/C/FIN/2 (Apr. 8, 1993).

323. *Id.* at 16.

that assault, battery, and rape were criminalized in the Penal Code even when they occurred within the confines of a domestic relationship.[324]

By 2001, Finland reported that it had amplified its domestic legislation to include restraining order protections,[325] was providing free legal assistance to victims,[326] and had developed an integrated asylum system to better meet the needs of the growing immigrant population through the enactment of the 1999 Act on the Integration of Immigrants and Reception of Asylum Seekers.[327] Seven years later, Finland reported that despite its efforts, violence against women had remained constant.[328] As a result, the Ministry of Social Affairs and Health enhanced its victim support services, and was working to reduce violence in intimate relationships.[329] While some gender-based immigration relief was available in the context of "honor crimes" and female genital mutilation,[330] the Finnish jurisprudence still did not recognize immigration relief based on domestic violence. In July 2010, the Finnish NGO's Parallel Report to CEDAW Committee called for Finland to recognize gender-based asylum in the context of domestic violence.[331] As of 2013, Finland was not reporting that it had granted asylum in this context.[332]

The European Network of Migrant Women and the European Women's Lobby have argued that the Finnish system does not offer access to autonomous residence permits in the case of domestic violence, which "puts many migrant women experiencing domestic violence in a precarious situation. The migrant women in question are inclined to endure domestic abuse longer, as they are threatened with the possibility of becoming undocumented, homeless and without means of support."[333]

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324. Finland's Third Periodic Report, *supra* note 321, at 12-13.

325. Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Fourth Periodic Report of States Parties: Finland, Comm. on the Elimination of Discrimination Against Women, 24th Sess., Jan. 15-Feb. 2, 2001, at 10, U.N. Doc. CEDAW/C/Fin/4 (Feb. 11, 2000).

326. *Id.* at 10-11.

327. *Id.* at 13-14.

328. Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Sixth Periodic Report of States Parties: Finland, Comm. on the Elimination of Discrimination Against Women, 41st Sess., June 30-July 18, 2008, ¶ 59, U.N. Doc. CEDAW/C/Fin/6 (Nov. 8, 2007).

329. *Id.* ¶ 78.

330. *Id.* ¶ 86.

331. FINNISH NGOS, PARALLEL REPORT TO U.N.'S COMMITTEE MONITORING THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN 15-16 (2010), *available at* http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/FIN/INT_CEDAW_NGS_FIN_11942_E.pdf.

332. *See* List of Issues and Questions in Relation to the Seventh Periodic Report of Finland, Comm. on the Elimination of Discrimination Against Women, 57th Sess., Feb. 10-28, 2014, ¶¶ 6, 8, U.N. Doc. CEDAW/C/FIN/Q/7 (Aug. 2, 2013).

333. Thomas Huddleston, *Finland Studies Neighbours' Policies to Limit Family Reunions*, MIGRANT INTEGRATION POL'Y INDEX (Oct. 28, 2011, 3:00 PM), http://www.mipex.eu/blog/finland-studies-neighbours-policies-to-limit-family-reunions.

If asylum is not warranted, the Finnish Immigration Service considers whether there are any other grounds for granting residence in Finland related to family ties, work, residence considerations, or other humanitarian grounds.[334] Finland's 2012 HDI worldwide ranking is twenty-first.[335] Its 2012 GII worldwide ranking is sixth.[336] Finland provides some services to victims in the form of a national women's hotline that offers translation services.[337] However, as of 2012, Finland had only two shelters, and was therefore able to meet only about 3 percent of the reported need.[338]

E. Germany

The Federal Republic of Germany ratified the ECHR in December 1952.[339] It ratified the CEDAW in July 1985.[340] It ratified the CEDAW Optional Protocol on January 15, 2002.[341] It signed the Istanbul Convention in May 2011, but has not ratified it.[342]

The government submitted its initial CEDAW report in September 1988.[343] In October 2007, Germany issued its sixth periodic report to the Committee,[344] with a follow-up report issued in September 2011.[345] It is important to note, however, that the follow-up report from September 2011 did not contain any information relating to domestic violence in the migrant community.[346] The most

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334. *Residence Permit on Other Grounds*, MAAHANMUUTTOVIRASTO: THE FINNISH IMMIGRATION SERVICE, http://www.migri.fi/asylum_in_finland/applying_for_asylum/decision/residence_permit_on_other_grounds (last visited Apr. 28. 2014).

335. HUMAN DEVELOPMENT REPORT 2013, *supra* note 108, at 151 tbl.3.

336. *Id.* at 156 tbl.4.

337. WAVE REPORT, *supra* note 120, at 13, 100.

338. *Id.* at 14-15.

339. ECHR Treaty Status, *supra* note 238.

340. CEDAW Treaty Status, *supra* note 239.

341. CEDAW Optional Protocol Treaty Status, *supra* note 240.

342. Istanbul Convention Treaty Status, *supra* note 88.

343. Rep. of the Comm. on the Elimination of Discrimination Against Women, 9th Sess., Jan. 22-Feb. 2 1990, ¶¶ 51-92, U.N. Doc. A/45/38; GAOR, 45th Sess., Supp. No. 38 (1990).

344. Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Sixth Periodic Report of States Parties: Germany, Comm. on the Elimination of Discrimination Against Women, 43d Sess., Jan. 19-Feb. 6, 2009, at 6, U.N. Doc. CEDAW/C/DEU/6 (Oct. 22, 2007) [hereinafter Germany's Sixth Periodic Report] (the combined second and third report was submitted in 1996 (U.N. Doc. CEDAW/C/DEU/2-3), the fourth in 1998 (U.N. Doc. CEDAW/C/DEU/4), and the fifth in 2003 (U.N. Doc. CEDAW/C/DEU/5)). *See also Human Rights Bodies*, OFF. HIGH COMMISSIONER HUM. RTS., http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx (select "Germany" from drop-box, select "CEDAW" hyperlink) (last visited May 28, 2014).

345. Response to Follow-up Recommendations Contained in the Concluding Observations of the Comm. Pursuant to the Examination of the Sixth Periodic Report of the State Party on 2 February 2009: Germany, Comm. on the Elimination of Discrimination Against Women, 50th Sess., Oct. 3-21, 2011, U.N. Doc. CEDAW/C/DEU/CO/6/Add.1 (Sept. 9, 2011) [hereinafter CEDAW, Germany's Follow-Up Report].

346. *See id.*

recent information provided by Germany on domestic violence in general, and within the migrant community in particular, is from 2007.[347]

In December 1999, the German government passed a plan of action for combating violence against women.[348] As part of the plan, the government conducted a study of 10,000 women in Germany between ages sixteen and eighty-five, about their experiences with violence.[349] Findings in the study were published in 2004, reflecting that German women had a "median to high level of experience with violence" in an international context.[350] The government then interviewed an additional 250 Turkish women and 250 women from countries in the former Soviet Union and Eastern Europe, representing the two largest immigrant populations in Germany.[351] Significantly, the migrant women suffered a higher rate of violence, with more incidents connected to injury than other women in Germany.[352] Refugee women experienced violence with even higher frequency.[353]

Specifically addressing domestic violence, the Government noted:

> With regard to violence among couples, the high incidence experienced by Turkish women is most noticeable; it far exceeded the average for the female population in Germany. . . . It also became obvious that female Turkish migrants were not only more often affected by physical violence, but also by more serious forms and manifestations of physical violence.[354]

The Committee expressed great concerns about the heightened figures among immigrant groups.[355] It urged the government to make immigrants, refugees, and asylum-seekers aware of their rights, and the social services and legal remedies available to them.[356] The Committee asked the German government whether it has researched the reasons for the high level of violence in these particular communities, and if so, whether the government has undertaken any measures to combat domestic violence within the migrant community.[357] The government failed to respond to the Committee's specific inquiry regarding efforts to

347. Germany's Sixth Periodic Report, *supra* note 344, at 9, 11, 20, 27-28, 56, 62, 65-66, 68, 77-79.

348. *Id.* at 19.

349. *Id.* at 19-20.

350. *Id.* at 20.

351. *Id.*

352. *Id.* at 20, 78.

353. *Id.* at 78.

354. *Id.* at 20.

355. Concluding Observations of the Comm. on the Elimination of Discrimination Against Women: Germany, Comm. on the Elimination of Discrimination Against Women, 43d Sess., Jan. 19-Feb. 6, 2009, ¶ 41, U.N. Doc. CEDAW/C/DEU/CO/6 (Feb. 12, 2009).

356. *Id.* ¶ 60.

357. List of Issues and Questions with Regard to the Consideration of the Periodic Reports: Germany, Comm. on the Elimination of Discrimination Against Women, 43d Sess., Jan. 19-Feb. 6, 2009, ¶ 17, U.N. Doc. CEDAW/C/DEU/Q/6 (Aug. 12, 2008).

understand or combat the high levels of violence within migrant communities.[358] Rather, it noted that "a secondary analysis of the representative study . . . is available," which focused on "the relationship between health, violence and migration."[359]

The Committee was pleased with "Germany's efforts to compile disaggregated data on asylum-seeking and refugee women and girls[,] its adoption of the Second Action Plan to Combat Violence against Women[,] . . . [and] the German Residence Act [provision] making it possible for women threatened by gender-related discrimination to be granted refugee status."[360]

Germany's 2012 HDI worldwide ranking is fifth.[361] Its 2012 GII worldwide ranking is sixth.[362] Female victims of violence are accepted into shelters "regardless of their residence status."[363] The woman's status is determined later, and the Asylum-Seekers' Benefits Act will cover her stay at the shelter if the shelter "had been chosen for security reasons."[364] Under the Asylum-Seekers' Benefits Act, asylum-seekers, refugees, and other "tolerated" foreign nationals receive basic benefits, including food, accommodation, heating, clothing, healthcare, and toiletries.[365] There have been, however, some limits on admission or long-term residence for some migrant women because of the "difficulty in determining which authorities are responsible for the reimbursement of the costs for their housing and care."[366] The law also restricts asylum-seekers' area of residence to distribute them among the communities and not overburden specific local administrations.[367] These asylum-seekers, however, can receive "permission to leave the assigned residence area if they would otherwise suffer undue hardship, as in the case of women threatened with violence."[368]

358. Responses to the List of Issues and Questions with Regard to the Consideration of the Sixth Periodic Report: Germany, Comm. on the Elimination of Discrimination Against Women, 43d Sess., Jan. 19-Feb. 6, 2009, ¶ 17, U.N. Doc. CEDAW/C/DEU/Q/6/Add.1 (Nov. 25, 2008) [hereinafter Germany's Response to List of Issues and Questions].

359. *Id.*

360. Comm. on the Elimination of Discrimination Against Women, 43d Sess., 880th mtg. ¶ 22, U.N. Doc. CEDAW/C/SR.880 (Feb. 2, 2009) [hereinafter 880th mtg. Summary Record].

361. HUMAN DEVELOPMENT REPORT 2013, *supra* note 108, at 151 tbl.3.

362. *Id.* at 156 tbl.4.

363. 880th mtg. Summary Record, *supra* note 360, ¶ 44. *See also* Germany's Response to List of Issues and Questions, *supra* note 358, ¶ 23 ("[W]omen's shelters grant admission to the shelter without making it contingent upon a clarification of residence permit status . . . instead the clarification of individual claims is undertaken . . . only after admission to the women's shelter.").

364. 880th mtg. Summary Record, *supra* note 360, ¶ 44.

365. Asylbewerberleistungsgesetz [AsylbLG] [Asylum Seekers Benefits Act], June 30, 1993, BGBL. I at 2022 (Ger.), as amended by Gesetz [g], Nov. 22, 2011, BGBL. I at 2258, art. 3 (Ger.).

366. Germany's Response to List of Issues and Questions, *supra* note 358, ¶ 23.

367. 880th mtg. Summary Record, *supra* note 360, ¶ 43.

368. *Id.*

Germany offers other forms of protection to migrant domestic violence victims. In the form of "Prohibition of Deportation"[369] the state offers subsidiary protection pursuant to Article 15 of the Qualification Directive.[370] The state also offers protection to individuals that can establish that they would be subject to "substantial concrete danger [to] life and limb or liberty."[371]

In a 2010 case, a German administrative court considered the case of a single woman from Nigeria.[372] Her case involved severe domestic violence, as well as FGM and forced marriage.[373] She had applied for asylum and protection from deportation due to a threat of FGM and forced marriage under Section 60(7) sentence (1) of the Residence Act.[374] The asylum claim was denied under German law on the grounds that her claims under FGM and forced marriage were not sufficient to be considered political persecution.[375] The court did not base its decision on her social group in any context.[376] The applicant was found eligible for protection from deportation under Section 60(7) sentence (1) of the Residence Act.[377] The German court reasoned that there was "a high likelihood that she would be in extreme danger, due to her personal circumstances" and "the risk of falling victim to violent attacks and threats by her father, who is willing to return the applicant by use of force to the man to whom she is committed to by marriage. Furthermore, the applicant is at risk of falling victim to circumcision."[378]

Similarly, in a 2008 case, the administrative courts considered the case of an Iraqi woman who feared that she would be the victim of an "honor" killing by members of her clan.[379] During the proceedings, the asylum-seeker stated that she was subject to violence and threats by her family members living in Kirkuk.[380] The court affirmed the denial of the asylum application for failure to establish a nexus to a protected ground, and provided no relief to this individual.[381]

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369. Aufenthaltsgesetz [AufenthG] [Residence Act], July 30, 2004, BGBL. I at 1950, as amended BGBL. I at 1970 (amended by the Act on Implementation of Residence and Asylum-Related Directives of the European Union of 19 August 2007) (Ger.).

370. Council Directive 2004/83, *supra* note 144, art. 15.

371. AufenthG [Residence Act] (Ger.).

372. Verwaltungsgericht Münster [VG] [Administrative Court Münster] Mar. 15, 2010, 11 K 413/09.A, 2010 (Ger.), *available at* http://openjur.de/u/456682.html.

373. *Germany—Administrative Court Münster, 11 K 413/09.A, 15 March 2010*, EUR. DATABASE ASYLUM L., http://www.asylumlawdatabase.eu/en/case-law/germany-administratvive-court-münster-11-k-41309a-15-march-2010#content (last visited May 30, 2014).

374. *Id.*

375. *Id.*

376. *Id.*

377. *Id.*

378. *Id.*

379. Verwaltungsgericht München [VG] [Administrative Court München] Dec. 10, 2008, M 8 K 07.51028 (Ger.).

380. *Germany—Administrative Court München, 10 December 2008, M 8 K 07.51028*, EUR. DATABASE ASYLUM L., http://www.asylumlawdatabase.eu/en/case-law/germany-administrative-court-m%C3%BCnchen-10-december-2008-m-8-k-0751028 (last visited May 30, 2014).

381. *Id.*

On the other hand, a similar case decided in 2009, had a different outcome.[382] Case 3 A 2966/09 involved an Algerian asylum-seeker who had applied for relief claiming severe ill-treatment by her uncles with whom she lived, and who were attempting to force her into an arranged marriage.[383] She had defied them under threat of death.[384] The German appellate court found that "[t]he risk of persecution by her uncles also constitutes relevant persecution by non-state actors since the state, parties or organisations which control the state or a substantial part of the state's territory, are not able to protect her from persecution."[385]

F. Slovenia

Slovenia ratified the ECHR in June 1994.[386] It ratified the CEDAW in July 1992,[387] and the CEDAW Optional Protocol in September 2004.[388] It signed the Istanbul Convention in September 2011, but has not yet ratified it.[389] Slovenia issued its first CEDAW report in November 1993,[390] and three periodic reports thereafter, the latest being in May 2007.[391] It was obliged to issue a report on May 1, 2013, but has not yet done so.[392]

Slovenia's asylum law is found in two pieces of legislation[393]: the 2000 Asylum Act[394] and the 2007 Aliens Act.[395] Article 48 of Slovenia's Constitution

382. Verwaltungsgericht Oldenburg [VG] [Administrative Court Oldenburg] Apr. 13, 2011, 3 A 2966/09 (Ger.), *available at* http://www.asylumlawdatabase.eu/en/case-law/germany-administrative-court-oldenburg-13-april-2011-3-296609.

383. *Germany—Administrative Court of Oldenburg München, 13 April 2011, 3 A 2966*, EUR. DATABASE ASYLUM L., http://www.asylumlawdatabase.eu/en/case-law/germany-administrative-court-oldenburg-13-april-2011-3-296609 (last visited May 31, 2014).

384. *Id.*

385. *Id.*

386. ECHR Treaty Status, *supra* note 238.

387. CEDAW Treaty Status, *supra* note 239.

388. CEDAW Optional Protocol Treaty Status, *supra* note 240.

389. Istanbul Convention Treaty Status, *supra* note 88.

390. *See* Consideration of Reports Submitted by States Parties Under Article 18 of the Convention, Initial Reports of States Parties: Slovenia, Comm. on the Elimination of Discrimination Against Women, 16th Sess., Jan. 13-Jan. 31, 1997, U.N. Doc. CEDAW/C/SVN/1 (Sept. 26, 1995).

391. Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Fourth Periodic Report of States Parties: Slovenia, Comm. on the Elimination of Discrimination Against Women, 42d Sess., Oct. 20-Nov. 7, 2008, at 1, U.N. Doc. CEDAW/C/SVN/4 (May 8, 2007) (the second report was submitted in 1999 (U.N. Doc. CEDAW/C/SVN/2) and the third in 2002 (U.N. Doc. CEDAW/C/SVN/3)).

392. *See Human Rights Bodies*, OFF. HIGH COMMISSIONER HUM. RTS., http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx (select "Slovenia" from drop-box, select "CEDAW" hyperlink) (last visited May 28, 2014).

393. UNHCR REPRESENTATION IN SLOVN., BACKGROUND NOTE ON THE PROTECTION OF ASYLUM SEEKERS AND REFUGEES IN SLOVENIA 1 (2004), *available at* http://www.refworld.org/pdfid/4326f9534.pdf [hereinafter UNHCR, BACKGROUND NOTE ON SLOVENIA].

394. Law on Asylum (LoA), 2003, Official Gazette of RS, No. 61/1999, *available at* http://www.legislationline.org/topics/country/3/topic/10.

guarantees "the right to asylum shall be recognised to foreign nationals and stateless persons who are subject to persecution for their commitment to human rights and fundamental freedoms."[396] Slovenia only gained its independence in 1991.[397] As such, the UNHCR has provided greater oversight and assistance in the form of commenting on its legislation.[398] The UNHCR has thus had a direct impact on the lives of refugees and asylum-seekers within Slovenia.[399]

While Slovenia affords essentially the same rights to beneficiaries of subsidiary protection as it does to beneficiaries of refugee status, including family reunification benefits,[400] the safety infrastructure is evolving.[401] Slovenia's 2012 HDI worldwide ranking is twenty-first.[402] Its 2012 GII worldwide ranking is eighth.[403] It has in place a national women's hotline, but it is not staffed twenty-four hours a day, nor are translation services provided.[404] As of 2012, Slovenia had in place eighteen shelters, addressing almost 100 percent of the reported need.[405]

G. France

France ratified the ECHR in May 1974.[406] It ratified the CEDAW in December 1983[407] and the CEDAW Optional Protocol in June 2000.[408] It signed the Istanbul Convention in May 2011, and ratified it July 2014.[409] France reported on its obligations under CEDAW through an initial report in February 1986,[410] and four periodic reports thereafter, with the latest report in April 2006.[411] France was

395. Aliens Act, Sept. 7, 2007, Official Gazette of RS, No. 79/2006, *available at* http://www.legislationline.org/topics/country/3/topic/10.

396. CONSTITUTION OF THE REPUBLIC OF SLOVENIA, June 25, 1991, *available at* http://www.legislationline.org/documents/section/constitutions/country/3.

397. *Id.*

398. *See* UNHCR, BACKGROUND NOTE ON SLOVENIA, *supra* note 393.

399. *Slovenia*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, http://www.unhcr-centraleurope.org/en/where-we-work/operations-in-central-europe/slovenia.html (last visited Jan. 22, 2014).

400. THE IMPACT OF THE EU QUALIFICATION DIRECTIVE, *supra* note 251, at 231.

401. WAVE REPORT, *supra* note 120, at 244-49.

402. HUMAN DEVELOPMENT REPORT 2013, *supra* note 108, at 151 tbl.3.

403. *Id.* at 156 tbl.4.

404. WAVE REPORT, *supra* note 120, at 13, 248.

405. *Id.* at 14-15.

406. ECHR Treaty Status, *supra* note 238.

407. CEDAW Treaty Status, *supra* note 239.

408. CEDAW Optional Protocol Treaty Status, *supra* note 240.

409. Istanbul Convention Treaty Status, *supra* note 88.

410. Consideration of Reports Submitted by States Parties Under Article 18 of the Convention, Initial Reports of States Parties: France, Comm. on the Elimination of Discrimination Against Women, 6th Sess., Mar. 30-Apr. 10, 1987, at 1, U.N. Doc. CEDAW/C/5/Add.33 (May 7, 1986).

411. Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Sixth Periodic Report of States Parties: France, Comm. on the Elimination of Discrimination Against Women, 40th Sess., Jan. 14-Feb. 1, 2008, at 1, U.N. Doc. CEDAW/C/FRA/6 (Apr. 6, 2006) (the second report was submitted in 1990 (U.N. Doc.

obliged to submit another periodic report on January 13, 2013, which was submitted in February 2014.[412]

The right of asylum in France has been subject to many changes in recent years.[413] Since July 25, 1952, it has been amended several times.[414] Significant amendments were introduced by the Asylum Act adopted on December 10, 2003, which entered into force on January 1, 2004.[415] France recognizes relief based on membership in a "particular social group."[416] In a recent study of nine EU-M States, and the protection that they provide in migrant gender-based protection claims, France was identified as a country that despite its assertions to the contrary neither employed the UNHCR Gender-Based Guidelines in its asylum adjudications, nor developed gender-based guidelines of its own.[417] France's 2012 HDI worldwide ranking is twentieth.[418] Its 2012 GII worldwide ranking is ninth.[419]

In general, domestic violence claims in France often lead to a grant of subsidiary protection, especially in the context of "forced marriage or opposition to social mores."[420] Subsidiary protection is available for a single year, to those "who can prove that they would be exposed in their country of origin to serious threats of capital punishment, torture or inhuman treatment or punishment, or a serious threat to life as a result of indiscriminate violence due to internal or international armed conflict."[421] The protection must be renewed annually to determine whether the conditions that necessitated protection continue to exist.[422] France affords

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CEDAW/C/FRA/2), the third and fourth in 1999 (U.N. Doc. CEDAW/C/FRA/3-4), and the fifth in 2002 (U.N. Doc. CEDAW/C/FRA/5)).

412. *See Human Rights Bodies*, OFF. HIGH COMMISSIONER HUM. RTS., http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx (select "France" from drop-box, select "CEDAW" hyperlink) (last visited May 28, 2014).

413. *EDAL Country Overview—France*, EUR. DATABASE OF ASYLUM L. (Jan. 1, 2012), http://www.asylumlawdatabase.eu/en/content/edal-country-overview-france.

414. *See* Loi 2003-1176 du 10 décembre 2003 modifiant la loi 52-89 du 25 juillet 1952 relative au droit d'asile [Law 2003-1176 of December 10th, 2003 amending the law 52-893 of July 25th, 1952 relating to the right of asylum], Journal Officiel de la République Française [J.O.] [Official Gazette of France], Dec. 11, 2003, p. 21080.

415. *Id.*

416. Maryellen Fullerton, *A Comparative Look at Refugee Status Based on Persecution Due to the Membership of a Particular Social Group*, 26 CORNELL INT'L L.J. 505, 510 (1993) ("In France, national legislation defines refugees using the precise terms of the [1951 Refugee] Convention definition.").

417. HANA CHEIKH ALI ET AL., GENDER-RELATED ASYLUM CLAIMS IN EUROPE: A COMPARATIVE ANALYSIS OF LAW, POLICIES AND PRACTICE FOCUSING ON WOMEN IN NINE EU MEMBER STATES 32 (2012).

418. HUMAN DEVELOPMENT REPORT 2013, *supra* note 108, at 151 tbl.3.

419. *Id.* at 156 tbl.4.

420. CHEIKH ALI ET AL., *supra* note 417, at 46.

421. HUMAN RIGHTS RESEARCH & EDUC. CTR., UNIV. OF OTTAWA, FRANCE'S ASYLUM SYSTEM 2 (2014), *available at* http://www.cdp-hrc.uottawa.ca/projects/refugee-forum/projects/systems/documents/FranceAsylumSystem.pdf.

422. *Id.*

essentially the same rights to beneficiaries of subsidiary protection as it does to beneficiaries of refugee status, including family reunification benefits.[423]

H. Italy

Italy ratified the ECHR in October 1955.[424] It ratified the CEDAW in June 1985,[425] as well as the CEDAW Optional Protocol in September 2000.[426] It ratified the Istanbul Convention in September 2013.[427] It reported on its obligations under CEDAW through an initial report in October 1989,[428] and submitted four periodic reports thereafter, with its most recent in December 2009.[429] It is obliged to issue its next report on July 1, 2015.[430]

First, Italy offers refugee status for victims of acts of persecution as understood by Article 1 of the 1951 Refugee Convention.[431] The nature of the harm must be sufficiently serious to constitute a severe violation of basic human rights, "in particular rights from which derogation cannot be made under the [ECHR]."[432] Acts of persecution can include "acts of physical or mental violence, including sexual violence," as well as "acts directed specifically against one gender."[433] Italian jurisprudence recognizes claims based on particular social group as "defined by an innate and unchanging characteristic or by the perception of the surrounding society or sexual orientation," including gender.[434] Italy does not require an asylum applicant to seek home-country protection before fleeing persecution from non-state actors.[435]

Under Italian legislation, subsidiary protection is available to a foreign citizen who does not qualify as a refugee but who demonstrates a real risk of suffering

423. *Id.*

424. ECHR Treaty Status, *supra* note 238.

425. CEDAW Treaty Status, *supra* note 239.

426. CEDAW Optional Protocol Treaty Status, *supra* note 240.

427. Istanbul Convention Treaty Status, *supra* note 88.

428. Rep. of the Comm. on the Elimination of Discrimination Against Women, 10th Sess., Jan. 10-Feb. 1, 1991, ¶¶ 43-83, U.N. Doc. A/46/38; GAOR, 46th Sess., Supp. No. 38 (1992).

429. Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Sixth Periodic Report of States Parties: Italy, Comm. on the Elimination of Discrimination Against Women, 49th Sess., July 11-29, 2011, at 1, U.N. Doc. CEDAW/C/ITA/6 (May 19, 2010) (the second report was submitted in 1994 (U.N. Doc. CEDAW/C/ITA/2), the third in 1997 (U.N. Doc. CEDAW/C/ITA/3), and the fourth and fifth in 2003 (U.N. Doc. CEDAW/C/ITA/4-5)).

430. *See Human Rights Bodies*, OFF. HIGH COMMISSIONER HUM. RTS., http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx (select "Italy" from drop-box, select "CEDAW" hyperlink) (last visited May 28, 2014).

431. Hakan G. Sicakkan, *The Rights of Refugees*, *in* HANDBOOK OF HUMAN RIGHTS 359, 361 (Thomas Cushman ed., 2012). *See also EDAL Country Overview—Italy*, EUR. DATABASE OF ASYLUM L. (Nov. 19, 2013), http://www.asylumlawdatabase.eu/en/content/edal-country-overview-italy#Refugee%20status%202 [hereinafter *EDAL Country Overview—Italy*].

432. *EDAL Country Overview—Italy*, *supra* note 431.

433. *Id.*

434. CHEIKH ALI ET AL., *supra* note 417, at 61.

435. *Id.* at 53.

serious harm and who is unable or, owing to such risk, unwilling to avail himself or herself of the protection of that country.[436] Serious harm is defined as ranging from being subject to the death penalty to degrading treatment in the country of origin.[437] Italy also recognizes humanitarian relief when there are serious humanitarian concerns relating to the asylum applicant that make it necessary for them to stay in the country.[438]

Italy's 2012 HDI worldwide ranking is twenty-fifth.[439] Its 2012 GII worldwide ranking is eleventh.[440] Asylum-seekers may request state-funded legal aid.[441] France also administers a national women's hotline that is available twenty-four hours a day, offers free long distance service, and provides translation services.[442] However, as of 2012, shelters were scarce with only 25 percent of the need met.[443]

I. Belgium

Belgium ratified the ECHR in June 1955.[444] It ratified the CEDAW in July 1985[445] and the CEDAW Optional Protocol in June 2004.[446] Belgium signed the Istanbul Convention on September 11, 2012, but has not yet ratified it.[447] It reported on its obligations under the CEDAW through an initial report in July 1987,[448] and four periodic reports thereafter, with the most recent report in October 2012.[449]

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436. Decreto Legislativo 25 luglio 1998, n. 286, in G.U. 18 agosto 1998, n. 191 (It). *See also* CHEIKH ALI ET AL., *supra* note 417, at 46, 78.

437. *EDAL Country Overview—Italy*, EUR. DATABASE ASYLUM L. (Nov. 19, 2013), http://www.asylumlawdatabase.eu/en/content/edal-country-overview-italy.

438. Decreto Legislativo 25 luglio 1998, n. 286, in G.U. 18 agosto 1998, n. 191 (It). *See also* CHEIKH ALI ET AL., *supra* note 417, at 78.

439. HUMAN DEVELOPMENT REPORT 2013, *supra* note 108, at 151 tbl.3.

440. *Id.* at 156 tbl.4.

441. EUROPEAN COMM'N & EUR. MIGRATION NETWORK, AD-HOC QUERY ON EARLY LEGAL ADVICE FOR ASYLUM SEEKERS 8-9 (2012), *available at* http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/protection/419_emn_ad-hoc_query_early_legal_advice_for_asylum_seekers_24aug2012_(wider_dissemination).pdf.

442. WAVE REPORT, *supra* note 120, at 13, 148.

443. *Id.* at 14-15.

444. ECHR Treaty Status, *supra* note 238.

445. CEDAW Treaty Status, *supra* note 239.

446. CEDAW Optional Protocol Treaty Status, *supra* note 240.

447. Istanbul Convention Treaty Status, *supra* note 88.

448. Rep. of the Comm. on the Elimination of Discrimination Against Women, 8th Sess., Feb. 20-Mar. 3, 1989, ¶¶ 266-312, U.N. Doc. A/44/38; GAOR, 44th Sess., Supp. No. 38 (1990).

449. Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Seventh Periodic Report of States Parties due in 2012: Belgium, Comm. on the Elimination of Discrimination Against Women, 59th Sess., Oct. 20-Nov. 7, 2014, at 1, U.N. Doc. CEDAW/C/BEL/7 (Feb. 19, 2013) (the second report was submitted in 1993 (U.N. Doc. CEDAW/C/BEL/2), the third and fourth in 1998 (U.N. Doc. CEDAW/C/BEL/3-4), and the 5th and 6th in 2007 (U.N. Doc. CEDAW/C/BEL/6)). *See also Human Rights Bodies*, OFF. HIGH COMMISSIONER HUM. RTS.,

The evolution of Belgian human rights jurisprudence on asylum for migrant domestic violence victims is reflected in a case involving a Russian national of Tatar origin who was a victim of sustained domestic violence in Russia.[450] In this case, the applicant had been subject to repeated domestic violence at the hands of her spouse while in Russia, and was unable to either relocate or seek assistance from authorities.[451] When the Belgian trial court examined the case in 2007, in spite of the evidence of severe physical abuse, and police inaction, the Belgian Office of the Commissioner General for Refugees and Stateless Persons rejected the applicant's claim on the grounds that the violence had been private in nature and that there was a lack of evidence that the authorities would not provide protection.[452]

In 2008, however, on appellate review before the Belgian Council for Alien Law Litigation, it was determined that domestic violence was considered persecution under the both the 1951 Refugee Convention and Belgian law since it involved "acts of physical or mental violence" and "acts of a gender specific nature."[453] Additionally, the appellate body invoked the protections afforded under Article 3 of the ECHR to find that the applicant was eligible for relief, and determined that gender-related persecution claims could be supported as a membership in a particular social group claim, when the harm was deemed "serious."[454] As the jurisprudence in this area has further developed, Belgian courts have made clear that there is no requirement that an applicant seek state protection in the home country prior to making the claim in Belgium.[455] The CEDAW Committee has acknowledged the new and "simplified procedure for the consideration of asylum requests provided for specific treatment of cases involving sexual violence, gender-based persecution and violence against children."[456] As a

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http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx (select "Belgium" from drop-box, select "CEDAW" hyperlink) (last visited May 28, 2014).

450. Conseil du Contentieux des Etrangers [Council for Alien Law Litigation] July 9, 2008, 149 E-RGDC 351 (2008), No. 13.874 (Belg.), *available at* http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/Belgium_008%20decision.pdf. For a case summary in English, see *Belgium—Council for Alien Law Litigation, 9 July 2008, Nr. 13.874*, EUR. DATABASE ASYLUM L., http://www.asylumlawdatabase.eu/en/case-law/belgium-council-alien-law-litigation-9-july-2008-nr-13874 (last visited Apr. 30, 2014) [hereinafter *Belgium—Council for Alien Law Litigation, 9 July 2008, Nr. 13.874*].

451. Council for Alien Law Litigation (Belg.), ¶ 1.1.

452. *Id.*

453. *Id.* ¶ 6.1.5. *See also* Loi sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers [Alien Act] of Dec. 15, 1980, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Dec. 31, 1980, 14584, art. 48/3 §2 (Belg.).

454. Council for Alien Law Litigation (Belg.), ¶¶ 6.1.5, 6.1.6 (highlighting that the Standing Committee of Appeal of Refugees has found that domestic violence is persecution under the ECHR); *see also* Coomaraswamy Report, *supra* note 194, ¶ 1573.

455. *See Belgium—Council for Alien Law Litigation, 9 July 2008, Nr. 13.874*, *supra* note 450.

456. Comm. on the Elimination of Discrimination Against Women, 42d Sess., 852d mtg. ¶ 5, U.N. Doc. CEDAW/C/SR.852 (Oct. 21, 2008).

practical matter, authorities distribute copies of the UNHCR Gender-Based Guidelines to adjudicating officials.[457]

Belgium provides subsidiary protection status to foreign nationals who are not able to establish eligibility for refugee status, but who the state finds "would face a real risk of suffering serious harm" in their home country, and who are therefore unable to seek protection from the home country.[458] Subsidiary protection status affords the migrant a residence permit that can be either temporary or permanent, and offers work permit authorization and family reunification benefits.[459]

The Belgian legal structure permits non-refoulement relief to migrant domestic violence victims such that they will not be removed forcibly but rather permitted to remain legally, but devoid of many rights.[460] In the alternative, Belgium may decide that for humanitarian reasons, it will provide a residence permit.[461]

Belgium's 2012 HDI worldwide ranking is seventeenth.[462] Its 2012 GII worldwide ranking is twelfth.[463] It offers a variety of safety protections to domestic violence victims. In 2012, Belgium met 43 percent of the reported shelter demand.[464] That year, it reported having ten women's centers for migrant domestic violence victims.[465] However, as of 2012, Belgium did not maintain a national women's helpline.[466]

J. Austria

Austria ratified the ECHR in September 1958.[467] It signed the CEDAW in July 1980, and later ratified it in March 1982.[468] It ratified the CEDAW Optional Protocol in September 2000,[469] as well as the Istanbul Convention in November 2013.[470] Austria reported on its obligations under the CEDAW through an initial report in October 1983,[471] and five periodic reports thereafter, with the most recent report issued in May 2011.[472]

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457. CHEIKH ALI ET AL., *supra* note 417, at 32.

458. Alien Act (Belg.), art. 48/4.

459. *Id.* arts. 61/18, 61/23, 61/29.

460. *Id.* art. 74/17.

461. *Id.* art. 74/12.

462. HUMAN DEVELOPMENT REPORT 2013, *supra* note 108, at 151 tbl.3.

463. *Id.* at 156 tbl.4.

464. WAVE REPORT, *supra* note 120, at 14-15.

465. *Id.*

466. *Id.* at 13.

467. ECHR Treaty Status, *supra* note 238.

468. CEDAW Treaty Status, *supra* note 239.

469. CEDAW Optional Protocol Treaty Status, *supra* note 240.

470. Istanbul Convention Treaty Status, *supra* note 88.

471. Consideration of Reports Submitted by States Parties Under Article 18 of the Convention, Initial Reports of States Parties: Austria, Comm. on the Elimination of Discrimination Against Women, 4th Sess., Jan. 21-Feb. 1, 1985, at 1, U.N. Doc. CEDAW/C/5/Add.17 (submitted Oct. 21, 1983).

472. Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Combined Seventh and Eighth

Asylum protection in Austria is governed by Article 3 of the Federal Law Concerning the Granting of Asylum, and tracks the refugee definition articulated in the 1951 Refugee Convention.[473] However, with regard to relief under asylum law, particular social group claims based on domestic violence and gender do not yet appear to have been recognized under current legal jurisprudence, although it has been reported that such claims may be possible.[474] State reporting under the CEDAW reflects that Austria believes that the law enables migrant female domestic violence victims to receive work permits so that they can gain more independence and earn a living;[475] and permits the review of asylum claims in an environment sensitized to the "special needs of women refugees."[476]

The Aliens' Police Act governs deferral of deportation protections if a deportation would violate non-refoulement obligations.[477] Subsidiary protections are governed by Article 8 of the Federal Law Concerning the Granting of Asylum, which supports a limited right of residence valid for one year that can be extended upon application.[478] Humanitarian relief is available pursuant to the Residence Act of 2005.[479] Austria reports that it has in place a system for granting migrant women who have come to the country through family reunification an independent residence permit to protect them from domestic violence.[480] Under current law, if

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Periodic Reports of States Parties: Austria, Comm. on the Elimination of Discrimination Against Women, 54th Sess., Feb. 11-Mar. 1, 2013, at 1, U.N. Doc. CEDAW/C/AUT/7-8 (June 9, 2011) (the second report was submitted in 1989 (U.N. Doc. CEDAW/C/13/Add.27), the third and fourth in 1997 (U.N. Doc. CEDAW/C/AUT/3-4), the fifth in 1999 (U.N. Doc. CEDAW/C/AUT/5), and the sixth in 2004 (U.N. Doc. CEDAW/C/AUT/6)). *See also Human Rights Bodies*, OFF. HIGH COMMISSIONER HUM. RTS., http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx (select "Austria" from drop-box, select "CEDAW" hyperlink) (last visited May 28, 2014).

473. Bundesgesetz über die Gewährung von Asyl [Asylgesetz 2005] [Federal Act Concerning the Granting of Asylum] BUNDESGESETZBLATT I [BGBL I] No. 100/2005, as amended by BGBL I No. 75/2007, BGBL I No. 2/2008 and BGBL I No. 4/2008, § 3 (Austria).

474. *Report by Nils Muižnieks Commissioner for Human Rights of the Council of Europe Following His Visit to Austria from 4 to 6 June 2012*, CommDH (2012) 28 ¶ 41 (Sept. 11, 2012) [hereinafter *Report by Nils Muižnieks*] ("Austrian legislation provides for the possibility of granting migrant women who have come to the country because of family reunification a separate residence permit to protect them from violence. The residence in Austria of victims of domestic violence or forced marriages has also been eased through the possibility of waiving the burden of proof regarding residence criteria, and granting a residence permit irrespective of them not yet being legally resident in Austria. Measures have been taken to address harmful practices, such as forced marriage and female genital mutilation.").

475. Coomaraswamy Report, *supra* note 194, ¶ 1559.

476. *Id.* ¶ 1565.

477. Bundesgesetz über die Ausübung der Fremdenpolizei, die Ausstellung von Dokumenten für Fremde und die Erteilung von Einreisetitel 2005 [Fremdenpolizeigesetz 2005] [Aliens' Police Act] BUNDESGESETZBLATT I [BGBL I] No. 100/2005, as amended by BGBL I No. 157/2005,§ 50 (Austria).

478. Asylgesetz 2005, § 8 (Austria).

479. Bundesgesetz über die Niederlassung und den Aufenthalt in Österreich [Niederlassungs-und Aufenthaltsgesetz] [Settlement and Residence Act] BUNDESGESETZBLATT I [BGBL I] No. 100/2005, as amended by BGBL I No. 157/2005, §§ 72-74 (Austria).

480. *See* ALEXANDRA KÖNIG & ALBERT KRALER, EUR. COMM'N, FAMILY REUNIFICATION REQUIREMENTS: A BARRIER OR FACILITATOR TO INTEGRATION?, AUSTRIA COUNTRY REPORT

the family member of a person with subsidiary status is outside Austria, that person is granted entry only following the first extension of the limited right of residence of the family member who enjoys subsidiary protection.[481] Thus, the legal status of the family member depends on the legal status of the sponsor.[482] Austria reports that the legal system includes a procedure to reduce the burden of proof regarding criteria for migrant applicants who are victims of domestic violence.[483]

Austria's 2012 HDI worldwide ranking is eighteenth.[484] Its 2012 GII worldwide ranking is fourteenth.[485] Austria reports that it strives to provide effective and timely safety protections to victims of domestic violence.[486] It maintains a national helpline with multi-lingual support.[487] There were thirty women's shelters in place in 2012, meeting approximately 90 percent of the reported need.[488] Stakeholders have called for improved public safety measures such as the enforcement of injunctive relief[489] and the creation of geographically dispersed shelters.[490]

In February 2013, the CEDAW Committee requested that Austria provide further information about measures being taken to address "violence against women in migrant communities," and "the negative impact of increasing xenophobia in the media on women from migrant communities, particularly Muslim women."[491] With regard to residence permits issued to victims of violence, the CEDAW Committee "expressed concern that they were issued for one year only," and that they were "subject to strict criteria," requesting information about the process for extension.[492]

K. Spain

Spain ratified the ECHR in October 1979.[493] It ratified the CEDAW in January 1984,[494] as well as the Optional Protocol in June 2001.[495] It signed the

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SUMMARY 2 (2013), *available at* http://familyreunification.eu/wp-content/uploads/2013/02/Summary_Austria_29-01-2013_final-_3_.pdf. *See also Report by Nils Muižnieks*, *supra* note 474, ¶ 37 (highlighting that Austria still has progress to make).

481. Asylgesetz 2005, § 35(2) (Austria).

482. KÖNIG & KRALER, *supra* note 480, at 2.

483. *Id.* at 3.

484. HUMAN DEVELOPMENT REPORT 2013, *supra* note 108, at 151 tbl.3.

485. *Id.* at 156 tbl.4.

486. ALBIN DEARING, FED. MINISTRY OF THE INTERIOR, AUSTRIA, THE AUSTRIAN ACT ON THE PROTECTION AGAINST DOMESTIC VIOLENCE: THE CORE ELEMENT OF THE COMPREHENSIVE REFORM REGARDING THE RESPONSE TO DOMESTIC VIOLENCE WITH SPECIAL EMPHASIS ON THE ROLE OF THE LAW ENFORCEMENT POLICE 21 (2002), *available at* http://www.weisser-ring.at/GeSCHG2002_eng.pdf.

487. WAVE REPORT, *supra* note 120, at 13, 47.

488. *Id.* at 14-15.

489. *See id.* at 47.

490. *See id.* at 48.

491. Comm. on the Elimination of Discrimination Against Women, 54th Sess., 1103d mtg. ¶ 30, U.N. Doc. CEDAW/C/SR.1103 (Feb. 13, 2013).

492. *Id.*

493. ECHR Treaty Status, *supra* note 238.

Istanbul Convention in May 2011, and ratified it in April 2014.[496] Spain issued its first CEDAW report in August 1985,[497] and six periodic reports thereafter, with the latest in September 2013.[498]

During the most recent reporting period, Spain's policies "focused almost exclusively on combating violence against women committed by men who are or have been their spouse or partner."[499] With a view to enabling victims to pursue both civil and criminal law avenues of redress and settling all related legal matters such as divorce, custody, and property questions, the Spanish Integrated Protection Measures against Gender Violence Act set up specific "gender violence" courts.[500] These courts, a special branch of the criminal courts with investigating judges, are granted the power to rule on criminal cases involving violence against women as well as any related civil law cases.[501] Consequently, both are dealt with in the first instance by the same bench. This relieves women going to court and costly bureaucratic hurdles.

Similar to many other EU-M States, foreign women suffer more abuse than Spanish women of the same age in Spain.[502] Specifically, "7 [percent] of foreign women declared that they had been victims of abuse during the last year, double the figure for Spanish women (3.5 [percent]). In the case of 'technical abuse', these differences again appear (17.3 [percent] versus 9.3 [percent])."[503] Royal Decree 2393/2004 attempts to address these figures by allowing victims who have protection orders to request temporary residence.[504] Between the third quarter of

494. CEDAW Treaty Status, *supra* note 239.

495. CEDAW Optional Protocol Treaty Status, *supra* note 240.

496. Istanbul Convention Treaty Status, *supra* note 88.

497. *See* Rep. of the Comm. on the Elimination of Discrimination Against Women, 6th Sess., Mar. 30-Apr. 10, 1987, ¶¶ 238-304, U.N. Doc. A/42/38; GAOR, 42d Sess., Supp. No. 38 (1987).

498. Consideration of Reports Submitted by States Parties Under Article 18 of the Convention, Combined Seventh and Eighth Periodic Reports of States Parties to be Presented in 2013: Spain, Comm. on the Elimination of Discrimination Against Women, 61st Sess., June 29-July 17, 2015, at 1, U.N. Doc. CEDAW/C/ESP/7-8 (Dec. 17, 2013) (the second report was submitted in 1989 (U.N. Doc. CEDAW/C/13/Add.19), the third in 1996 (U.N. Doc. CEDAW/C/ESP/3), the fourth in 1998 (U.N. Doc. CEDAW/C/ESP/4), the fifth in 2003 (U.N. Doc. CEDAW/C/ESP/5), and the sixth in 2008 (U.N. Doc. CEDAW/C/ESP/6)). *See also Human Rights Bodies*, OFF. HIGH COMMISSIONER HUM. RTS., http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx (select "Spain" from drop-box, select "CEDAW" hyperlink) (last visited May 28, 2014).

499. Consideration of Reports Submitted by States Parties Under Art. 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Sixth Periodic Report of State Parties: Spain, Comm. on the Elimination of Discrimination Against Women, 44th Sess., July 20-Aug. 7, 2009, ¶ 355, U.N. Doc. CEDAW/C/ESP/6 (Apr. 23, 2008) [hereinafter Spain's Sixth Periodic Report].

500. Organic Act 1/2004 of 28 December on Integrated Protection Measures against Gender Violence art. 44 (B.O.E. 2004, 313) (Spain). *See also* Spain's Sixth Periodic Report, *supra* note 499, ¶¶ 369-73.

501. Integrated Protection Measures against Gender Violence Act, art. 44(1)-(3) (Spain).

502. Spain's Sixth Periodic Report, *supra* note 499, ¶ 359.

503. *Id.* Technical abuse is where a woman responds to survey questions in a way that suggests she is a victim of abuse, regardless of whether she considers herself to be a victim. *Id.* ¶ 358.

504. *Id.* ¶ 368.

2005 and the second quarter of 2008, between 29.4 percent and 36.9 percent of foreign women were granted protection orders.[505] These women have the ability to apply for a residence permit on account of exceptional circumstances.[506] The CEDAW Committee noted that, while this statistic indicates victims' greater access to justice, it also indicates that there has not been a reduction in gender-based violence.[507]

The general rights of asylum seekers and migrants are guaranteed by the Spanish Constitution, and are further guaranteed through supplemental legislation.[508] The Spanish Asylum Law provides for subsidiary protection and expands gender-based refugee relief.[509] Asylum-seekers, like all arriving migrants, have a right to free legal assistance.[510] "The Spanish Asylum Act stipulates that legal aid is mandatory when claims for asylum are made at the border."[511] Spanish law also guarantees the right to an interpreter.[512]

Spain's asylum legislation includes, as part of their particular social group definition, "people that flee from their country of origin, due to the prevailing circumstances in those countries, because of a well-founded fear of persecution or for reasons of gender and/or age."[513] The interpretation of this article has developed to include sexual assault victims as a particular social group.[514] The legislation further declares that either state actors or non-state actors under certain circumstances, may carry out such persecution.[515] As a practical matter, authorities cite to the UNHCR Gender-Based Guidelines in adjudicating cases.[516] Spain's highest appellate body affirmed this through case 1528/2007, involving an Algerian applicant who claimed relief based on domestic violence.[517] The claim involved gender-based persecution in the form of physical and mental abuse

505. Responses to the List of Issues and Questions with Regard to the Consideration of the Sixth Periodic Report: Spain, Comm. on the Elimination of Discrimination Against Women, 44th Sess., Jul. 20-Aug. 7, 2009, at 17, U.N. Doc. CEDAW/C/ESP/Q/6/Add.1 (Mar. 23, 2009).

506. *Id.*

507. Comm. on the Elimination of Discrimination Against Women, 44th Sess., 888th mtg. ¶ 39, U.N. Doc. CEDAW/C/SR.888 (A) (July 22, 2009).

508. CONSTITUCIÓN ESPAÑOLA, B.O.E. n. 311, Dec. 29, 1978 (Spain) (asylum is included in Part I, Ch. 1, Sec. 13). Organic Law 2/2009 of 11 December, amending the Organic Law 4/2000 of January on the Rights and Freedoms of Foreigners in Spain and their Social Integration (B.O.E. 2009, 299); Law 12/2009 of 30 October, Regulating the Right of Asylum and Subsidiary Protection (B.O.E. 2009, 263) (Spain) [hereinafter Spanish Asylum Law].

509. Spanish Asylum Law, *supra* note 508, arts. 7(1)(e), 36.

510. *Id.* arts. 16(2), 18(1)(b).

511. *EDAL Country Overview—Spain*, EUR. DATABASE OF ASYLUM L. n.1 (Jan. 1, 2012), http://www.asylumlawdatabase.eu/en/content/edal-country-overview-spain.

512. Spanish Asylum Law, *supra* note 508, art. 18(1)(b).

513. *Id.* art. 7(1) (translated by authors).

514. *Id.* art. 46(1).

515. *Id.* art. 13.

516. CHEIKH ALI ET AL., *supra* note 417, at 33.

517. S.A.N, Jan. 13, 2009 (vLex, No. 1528/2007) (Spain).

inflicted on the asylum-seeker, and her children, by her husband.[518] When the claim was initially examined, refugee status was denied, but a residence permit was granted on humanitarian grounds.[519] The National High Court issued its ruling in January 2009, concluding that, "[s]exually violent acts, domestic and family violence, that cause deep physical and mental harm constitute grounds upon which persecution can be claimed."[520] The decision affirmed that when non-state actors commit serious acts of discrimination and other offences, which "are deliberately tolerated by State authorities" who fail to provide effective protection, asylum can be granted.[521]

The Special Rapporteur on the rights of non-citizens has expressed concern about the situation of foreign women workers in domestic service, asylum-seekers, and women who may otherwise be living clandestinely in Spain.[522] These women may lack adequate protection from violence and abuse. Spain's 2012 HDI worldwide ranking is twenty-third.[523] Its 2012 GII worldwide ranking is fifteenth.[524] Spain does, however, have a national women's hotline, that is staffed twenty-four hours a day, offers free long distance calling, and provides translation services.[525] As of 2012, Spain had in place 148 shelters, addressing about 98 percent of the reported need.[526]

L. Portugal

Portugal ratified the ECHR on November 1978.[527] It ratified the CEDAW on July 30, 1980,[528] as well as the Optional Protocol to the Convention on April 26, 2002.[529] It ratified the Istanbul Convention in February 2013.[530] Portugal issued its first report under its CEDAW obligations in July 1983,[531] and submitted seven periodic reports thereafter.[532] In its most recent submission, Portugal reports that

518. *Spain—High National Court, 13 January 2009, 1528/2007*, EUR. DATABASE OF ASYLUM L., http://www.asylumlawdatabase.eu/en/case-law/spain-high-national-court-13-january-2009-15282007 (last visited May 20, 2014) (translated summary of case).

519. *Id.*

520. *Id.*

521. *Id.*

522. Comm'n on Human Rights, Subcomm'n on the Promotion and Protection of Human Rights, Prevention of Discrimination and Protection of Indigenous Peoples and Minorities, 53d Sess., ¶ 72, U.N. Doc. E/CN.4/Sub.2/2001/20 (June 6, 2001).

523. HUMAN DEVELOPMENT REPORT 2013, *supra* note 108, at 151 tbl.3.

524. *Id.* at 156 tbl.4.

525. WAVE REPORT, *supra* note 120, at 13, 253.

526. *Id.* at 14.

527. ECHR Treaty Status, *supra* note 238.

528. CEDAW Treaty Status, *supra* note 239.

529. CEDAW Optional Protocol Treaty Status, *supra* note 240.

530. Istanbul Convention Treaty Status, *supra* note 88.

531. Rep. of the Comm. on the Elimination of Discrimination Against Women, 5th Sess., Mar. 10-21, 1986, ¶¶ 111-48, U.N. Doc. A/41/45; GAOR, 41th Sess., Supp. No. 45 (1986).

532. Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Seventh Periodic Report of States Parties: Portugal, Comm. on the Elimination of Discrimination Against Women, 42d Sess., Oct. 20-

pursuant to Law 29/2012, an exception now exists "for granting an autonomous residence permit to family members of a holder of a residence permit before the expiration of the normal time limit [] if the individual is 'indicted by prosecutors for committing the crime of domestic violence.'"[533] Previously, the law required that the individual be convicted of a crime of domestic violence.[534]

Portugal's 2012 HDI worldwide ranking is forty-third.[535] Its 2012 GII worldwide ranking is sixteenth.[536] As of 2012, Portugal did not have in place a national women's hotline,[537] and, it had thirty-seven shelters that met 59 percent of the reported need.[538]

M. Ireland

Ireland ratified the ECHR in February 1953.[539] It ratified the CEDAW in December 1985,[540] as well as the Optional Protocol in September 2000.[541] It has neither signed nor ratified the Istanbul Convention.[542] Ireland reported on its obligations under the CEDAW through an initial report in February 1987,[543] and submitted two reports thereafter with the latest in June 2003.[544] Ireland was obliged to submit a periodic report on January 22, 2007, but has not yet done so.[545]

Nov. 7, 2008, at 1, U.N. Doc. CEDAW/C/PRT/7 (Jan. 29, 2008) (the second report was submitted in 1989 (U.N. Doc. CEDAW/C/13/Add.22), the third in 1990 (U.N. Doc. CEDAW/C/18/Add.3), the fourth in 1999 (U.N. Doc. CEDAW/C/PRT/4), the fifth in 2001 (U.N. Doc. CEDAW/C/PRT/5), and the sixth in 2006 (U.N. Doc. CEDAW/C/PRT/6)). *See also Human Rights Bodies*, OFF. HIGH COMMISSIONER HUM. RTS., http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx (select "Portugal" from drop-box, select "CEDAW" hyperlink) (last visited May 28, 2014).

533. Consideration of Reports Submitted by States Parties Under Article 18 of the Convention, Eighth and Ninth Periodic Reports of States Parties Due in 2013: Portugal, Comm. on the Elimination of Discrimination Against Women, ¶ 55, U.N. Doc. CEDAW/C/PRT/8-9 (Dec. 17, 2013).

534. *Id.*

535. HUMAN DEVELOPMENT REPORT 2013, *supra* note 108, at 151 tbl.3.

536. *Id.* at 156 tbl.4.

537. WAVE REPORT, *supra* note 120, at 13.

538. *Id.* at 14-15.

539. ECHR Treaty Status, *supra* note 238.

540. CEDAW Treaty Status, *supra* note 239.

541. CEDAW Optional Protocol Treaty Status, *supra* note 240.

542. Istanbul Convention Treaty Status, *supra* note 88.

543. Rep. on the Comm. on the Elimination of Discrimination Against Women, 8th Sess., Feb. 20-Mar. 3, 1989, ¶¶ 63-131, U.N. Doc. A/44/38; GAOR, 44th Sess., Supp. No. 38 (1990).

544. Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Combined Fourth and Fifth Periodic Reports of States Parties: Ireland, Comm. on the Elimination of Discrimination Against Women, 33d Sess., July 5-22, 2005, at 1, U.N. Doc. CEDAW/C/IRL/4-5 (June 10, 2003) (the second and third report was submitted in 1997 (U.N. Doc. CEDAW/C/IRL/2-3)).

545. *See Human Rights Bodies*, OFF. HIGH COMMISSIONER HUM. RTS., http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx (select "Ireland" from drop-box, select "CEDAW" hyperlink) (last visited May 28, 2014).

Ireland confers refugee status on successful asylum seekers.[546] If an asylum-seeker is unsuccessful, following any appeals, she may pursue voluntary departure, subsidiary protection, or humanitarian leave to remain.[547] Subsidiary protection is provided when an individual can demonstrate by "substantial grounds" that she would face a real risk of suffering serious harm.[548] This protection comports with principles of non-refoulement. Furthermore, the individual must be "unable or, owing to such risk, unwilling to avail himself or herself of the protection of that country."[549] Serious harm is defined as ranging from being subject to the death penalty to degrading treatment in the country of origin.[550] Those granted subsidiary protection receive temporary residence permits, employment access, health care, and sponsored housing.[551]

In 2012, Ireland considered the case of a Nigerian woman who had applied for asylum and subsequently for subsidiary protection.[552] She demonstrated credibly that she suffered "serious ill-treatment, rape, and . . . torture at the hands of her husband and his associates," and continued to suffer the ill-effects of such treatment.[553] She was refused asylum because internal host-country protection was found to be available to her.[554] She applied for subsidiary protection in the alternative, and was found not to have suffered serious harm on the grounds that non-state actors can only meet this definition when the state is deemed to be unable or unwilling to offer protection.[555]

Ireland provides access to employment and education benefits to recipients of refugee and subsidiary protection at the same level as Irish citizens.[556] Its 2012 HDI worldwide ranking is seventh.[557] Its 2012 GII worldwide ranking is nineteenth.[558] While Ireland offers a national women's hotline, it does not provide

546. Refugee Act 1996, § 2 (Act. No. 17/1996) (Ir.), *available at* http://www.inis.gov.ie/en/INIS/RefugeeAmended.pdf/Files/RefugeeAmended.pdf. The definition is taken directly from the 1951 Refugee Convention. *See* Convention relating to the Status of Refugees, *supra* note 142, art. 1 (defining the term refugee).

547. European Union (Subsidiary Protections) Regulations 2013 (S.I. No. 426/2013) (Ir.), *available at* http://www.inis.gov.ie/en/INIS/SI%20426%20of%202013.pdf/Files/SI%20426%20of%202013.pdf.

548. *Id.*

549. *Id.* at 3.

550. *Id.* at 3-4.

551. U.S. DEP'T OF STATE, IRELAND 2013 HUMAN RIGHTS REPORT 8 (2014), *available at* http://www.state.gov/documents/organization/220501.pdf.

552. J.T.M. v. Minister for Justice and Equality [2012] I.E.H.C. 99, ¶¶ 2, 5 (H. Ct.) (Ir.), *available at* http://courts.ie/Judgments.nsf/09859e7a3f34669680256ef3004a27de/73115215189e255680257a0f004e31c4?OpenDocument.

553. *Id.* ¶¶ 2-3.

554. *See id.* ¶ 5.

555. *See id.* ¶ 1.

556. European Union (Subsidiary Protections) Regulations 2013, at 22 (S.I. No. 426/2013) (Ir.).

557. HUMAN DEVELOPMENT REPORT 2013, *supra* note 108, at 151 tbl.3.

558. *Id.* at 156 tbl.4.

service at all times.[559] During 2012, it met only about 31 percent of its shelter demand.[560]

N. Czech Republic

The Czech Republic ratified the ECHR in March 1992,[561] the CEDAW in February 1993,[562] and the Optional Protocol in February 2001.[563] It has neither signed nor ratified the Istanbul Convention.[564] It reported on its obligations under the CEDAW through an initial report in October 1995,[565] and three periodic reports thereafter, with the final report submitted in April 2009.[566]

The Czech Charter of Fundamental Rights and Basic Freedoms set forth that the state "shall grant asylum to aliens who are being persecuted for the assertion of their political rights and freedoms. Asylum may be denied to a person who has acted contrary to fundamental human rights and freedoms."[567] Asylum applications are governed by the Residence of Foreign Aliens in the Territory of the Czech Republic.[568] The Asylum Act, in Section 12, envisions particular social group claims.[569]

The Czech Republic can grant humanitarian asylum in accordance with Section 14 of the Asylum Act when circumstances permit.[570] In addition, the Act

559. WAVE REPORT, *supra* note 120, at 13.

560. *Id.* at 14-15.

561. ECHR Treaty Status, *supra* note 238.

562. CEDAW Treaty Status, *supra* note 239.

563. CEDAW Optional Protocol Treaty Status, *supra* note 240.

564. Istanbul Convention Treaty Status, *supra* note 88.

565. Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Initial Report of States Parties: Czech Republic, Comm. on the Elimination of Discrimination Against Women, 18th Sess., Jan. 19-Feb. 6, 1998, at 1, U.N. Doc. CEDAW/C/CZE/1 (Oct. 15, 1996).

566. Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Combined Fourth and Fifth Periodic Report of States Parties: Czech Republic, Comm. on the Elimination of Discrimination Against Women, 47th Sess., Oct. 4-22, 2010, at 1, U.N. Doc. CEDAW/C/CZE/5 (May 22, 2009) (the second report was submitted in 2000 (U.N. Doc. CEDAW/C/CZE/2) and the third in 2004 (U.N. Doc. CEDAW/C/CZE/3)). *See also Human Rights Bodies*, OFF. HIGH COMMISSIONER HUM. RTS., http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx (select "Czech Republic" from drop-box, select "CEDAW" hyperlink) (last visited May 28, 2014).

567. Ústavní zákon § 3, č 1/1993 Sb., Ústava České Republiky [Constitution of the Czech Republic], Listiny Základních Práv a Svobod, art. 43 [Charter of Fundamental Rights and Freedoms], Dec. 16, 1992, *available at* http://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/prilohy/Listina_English_version.pdf (English translation).

568. Zákon č. 326/1999 Sb. (Czech) (translated as Act No. 326/1999 Coll., on the Residence of Foreign Nationals in the Territory of the Czech Republic), *available at* http://www.mvcr.cz/soubor/act-on-the-residence-of-foreign-nationals-pdf.aspx.

569. Zákon č. 325/1999, § 12, Sb. (Czech) (translated as Act No. 325/1999 Coll., of 1999 on Asylum and Amendment to Act No. 283/1991 Coll., on the Police of the Czech Republic, as amended (the Asylum Act)), *available at* http://www.refworld.org/docid/4a7a97bfc33.html.

570. *Id.* § 14.

permits a grant of subsidiary protection in accordance with Sections 14(a) and (b) to an applicant, and her qualifying family members, who has established that there is an actual risk of serious harm upon return to the state of origin.[571] Serious harm is defined in the act as follows: "a) imposition or enforcement of capital punishment, b) torture or inhuman or degrading treatment or punishment of an applicant for international protection, [or] c) serious threat to life or human dignity by reason of malicious violence in situations of international or internal armed conflict."[572] Subsidiary protection is issued for a specific duration, and is renewable, as long as the actual risk of serious harm still persists.[573] In the Czech Republic, refugees are afforded essentially the same rights as beneficiaries of subsidiary protection, including family reunification benefits.[574]

In 2011, the Supreme Administrative Court of the Czech Republic[575] considered a case involving an Uzbeki national from Kyrgystan that had been forced into a polygamous marriage, and feared that if she tried to change her religion, which was her will, that she would be subject to domestic violence.[576] The trial court denied her claim to relief, and the appellate reviewing body dismissed the appeal.[577] On further appeal, the Czech Republic Supreme Administrative Court held that forced marriage or being forced to remain in a marriage could be considered "persecution in concurrence with other violations of human rights (for example domestic violence) and according to the situation in the country of origin."[578] The court focused its inquiry on whether the home country authorities could or should offer protection in assessing eligibility.[579]

The Czech Republic's 2012 HDI worldwide ranking is twenty-eighth.[580] Its 2012 GII worldwide ranking is twentieth.[581] As of 2012, there were twenty-six women's centers in the Czech Republic, most of which provided "counseling, information and advice, intervention safety support, legal advice and court accompaniment, among other services and activities."[582]

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571. *Id.* §§ 14a-b.

572. *Id.* § 14a(2).

573. *Id.* § 53a(1).

574. THE IMPACT OF THE EU QUALIFICATION DIRECTIVE, *supra* note 251, at 31.

575. Rozsudek Nejvyššího správního soudu ze dne 25.01.2011 (NSS) [Decision of the Supreme Administrative Court of Jan. 25, 2011], čj. 6 Azs 36/2010-274 (Czech).

576. *Czech Republic—Supreme Administrative Court, 25 January 2011, R.S. v Ministry of Interior, 6 Azs 36/2010-274*, EUR. DATABASE OF ASYLUM L., http://www.asylumlawdatabase.eu/en/case-law/czech-republic-supreme-administrative-court-25-january-2011-rs-v-ministry-interior-6-azs (last visited May, 21, 2014) (case summary in English).

577. *See id.*

578. *Id.*

579. *Id.*

580. HUMAN DEVELOPMENT REPORT 2013, *supra* note 108, at 151 tbl.3.

581. *Id.* at 156 tbl.4.

582. WAVE REPORT, *supra* note 120, at 85.

O. Cyprus

Cyprus ratified the ECHR in October 1962.[583] It ratified the CEDAW in 1985[584] and the Optional Protocol in April 2002.[585] It has not signed the Istanbul Convention.[586] Cyprus has submitted three state reports to the CEDAW committee, beginning with the first report issued in February 1994,[587] the second report on March 2004,[588] and the third report in May 2011.[589]

As of 2006, Cyprus reported to the CEDAW Committee that it did not yet have in place a system of protections for migrant domestic violence victims.[590] Going forward, Cyprus indicated that it planned to implement a comprehensive action plan on gender mainstreaming including providing support for the special needs of vulnerable groups, such as migrants.[591] The CEDAW Committee acknowledged that Cyprus was working on the issue,[592] but noted that it could improve its data collection methods to document the frequency of domestic violence abuses, the level of reporting, the extent to which prosecutions and convictions followed incidents of domestic violence, and whether police training was being implemented.[593] The CEDAW Committee "further requested information on the number of female immigrants entering Cyprus, either illegally or as asylum-seekers, and . . . whether national law contained gender-specific asylum provisions."[594] Cyprus reported "that national law contained gender-

583. ECHR Treaty Status, *supra* note 238.

584. CEDAW Treaty Status, *supra* note 239.

585. CEDAW Optional Protocol Treaty Status, *supra* note 240.

586. Istanbul Convention Treaty Status, *supra* note 88.

587. Consideration of Reports Submitted by States Parties Under Article 18 of the Convention, Initial and Second Periodic Reports of States Parties: Cyprus, Comm. on the Elimination of Discrimination Against Women, 15th Sess., Jan. 15-Feb. 2, 1996, at 1, U.N. Doc. CEDAW/C/CYP/1-2 (May 4, 1995).

588. Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Combined Third, Fourth, and Fifth Periodic Reports of States Parties: Cyprus, Comm. on the Elimination of Discrimination Against Women, 35th Sess., May 15-June 2, 2006, at 1, U.N. Doc. CEDAW/C/CYP/3-5 (Aug. 6, 2004).

589. Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Combined Sixth and Seventh Periodic Reports of States Parties: Cyprus, Comm. on the Elimination of Discrimination Against Women, 54th Sess., Feb. 11-Mar. 1, 2013, at 1, U.N. Doc. CEDAW/C/CYP/6-7 (Sept. 21, 2011) [hereinafter Cyprus' Sixth and Seventh Periodic Report]. *See also Human Rights Bodies*, OFF. HIGH COMMISSIONER HUM. RTS., http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx (select "Cyprus" from drop-box, select "CEDAW" hyperlink) (last visited May 28, 2014).

590. *See* Comm. on the Elimination of Discrimination Against Women, 35th Sess., 733d mtg. ¶ 7, U.N. Doc. CEDAW/C/SR.733 (May 25, 2006).

591. *Id.*

592. *Id.* ¶ 12.

593. *Id.* ¶ 27.

594. Comm. on the Elimination of Discrimination Against Women, 35th Sess., 734th mtg. ¶ 26, U.N. Doc. CEDAW/C/SR.734 (May 25, 2006).

specific asylum provisions and that women could be granted asylum in their own right."[595]

Cyprus modified its refugee law in 2007 and 2009,[596] and in 2011, it reported to the CEDAW Committee that in its present form, its refugee law expressly prohibited discrimination and provided refugee protection to persons persecuted because they belong to a particular social group, in other words, women.[597] Cyprus provides subsidiary protection, if the applicant does not qualify as a refugee, as long as substantial grounds have been shown for believing that, the migrant victim would suffer serious harm if sent back to their country of origin.[598] Cyprus further reports that it affords asylum-seekers who are single women, or who have been subject to degrading treatment or punishment to have priority access to shelter, medical care, and psychological, social, and other types of support.[599]

Cyprus' 2012 HDI worldwide ranking is thirty-first.[600] Its 2012 GII worldwide ranking is twenty-second.[601] While Cyprus has in place a national women's helpline, it does not provide twenty-four hour assistance.[602] In 2012, Cyprus reported that it had one shelter in the country, which was able to meet approximately 15 percent of the demand for shelter services.[603] Recipients of asylum and subsidiary relief have access to employment in restricted areas.[604] Cyprus also provides residency on humanitarian grounds.[605] Cyprus provides family unification protections to recipients of asylum and subsidiary relief.[606]

In a 2013 NGO Shadow Report issued to the CEDAW Committee regarding Cyprus' 2011 report to the CEDAW Committee, a group of organizations charged that Cyprus had provided no research or data on the issue of gender-based violence within migrant communities.[607] Moreover, despite the protections articulated by Cyprus, the United States has reported that Cyprus has a poor record with respect

595. *Id.* ¶ 27.

596. *See* Refugee Law (Law No. 112(I)/2007) (Cyprus); Refugee Law (Law No. 112(I)/2009) (Cyprus).

597. Cyprus' Sixth and Seventh Periodic Report, *supra* note 589, ¶ 142.

598. *Id.* ¶ 144.

599. *Id.* ¶¶ 118, 146.

600. HUMAN DEVELOPMENT REPORT 2013, *supra* note 108, at 151 tbl.3.

601. *Id.* at 156 tbl.4.

602. WAVE REPORT, *supra* note 120, at 13.

603. *Id.* at 14-15.

604. Refugee Law of 2000 § 9 (Law No. 6(I)/2000) (Cyprus).

605. *Id.* § 19a.

606. *Id.* § 20I.

607. ASS'N FOR THE PREVENTION & HANDLING OF VIOLENCE IN THE FAMILY ET AL., CONVENTION FOR THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN 54TH SESSION—CYPRUS: SHADOW REPORT 10 (2013), *available at* http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/CYP/INT_CEDAW_NGO_CYP_13225_E.pdf.

to its treatment of migrants.[608] The U.S. Department of State reports that, with few exceptions, "'authorities' generally treated asylum seekers as illegal immigrants and either deported or denied them entry. Since no 'law' or mechanism . . . protects the right of asylum seekers, no identification or protection is available."[609] Amnesty International has condemned Cyprus' practice of detaining all illegal migrants seeking asylum.[610] Cypriot law criminalizes irregular entry or stay in Cyprus, but no longer imposes a punishment of imprisonment.[611]

In February 2013, the CEDAW Committee asked for information on current provisions governing the right of asylum, particularly with regard to female asylum-seekers, citing a charge from Amnesty International that "female asylum seekers were [not] treated . . . in accordance with international standards."[612] CEDAW Committee member, Ms. Neubauer, acknowledged the progress that Cyprus had made during the previous twenty-seven years, but found the "party's efforts with regard to its obligations under the Convention . . . had been insufficient."[613] The CEDAW Committee expressed concern

> about the lack of information on the implementation of the National Action Plan on Prevention and Handling of Family Violence (2010-2013), the insufficient gender perspective and lack of inclusion of migrant women and ethnic minorities in [Cyprus' programs] and policies regarding domestic violence, as well as the limited assistance provided by the only shelter run by a non-governmental organization in the [country].[614]

The CEDAW Committee has requested that future reports provide enhanced "data collection systems to include all forms of violence against women, protection measures, prosecutions and sentences imposed on perpetrators, [as well as] surveys to assess the prevalence of violence experienced by women, including migrant women and women belonging to ethnic minorities."[615]

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608. U.S. DEP'T OF STATE, CYPRUS 2013 HUMAN RIGHTS REPORT 39-41 (2014), *available at* http://www.state.gov/documents/organization/220477.pdf.

609. *Id.* at 39.

610. AMNESTY INT'L, PUNISHMENT WITHOUT A CRIME: DETENTION OF MIGRANTS AND ASYLUM-SEEKERS IN CYPRUS 25 (2012), *available at* http://www.amnesty.org/fr/library/asset/EUR17/001/2012/en/36f06387-9ce6-43df-9734-a4550fa413d6/eur170012012en.pdf.

611. Until November 2011, these offences were punishable by imprisonment or a fine or both. Aliens and Immigration Law Chapter 105 of the Law § 19(2) (Cap. 105/1959) (Cyprus). The current law that reversed this is codified in Law No. 153(I)/2011. M.A. v. Cyprus, App. No. 41872/10, ¶ 65 (Eur. Ct. H.R., Oct. 23, 2013), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-122889.

612. Comm. on the Elimination of Discrimination Against Women, 54th Sess., 1107th mtg. ¶ 47, U.N. Doc. CEDAW/C/SR.1107 (Feb. 15, 2013).

613. *Id.* ¶ 48.

614. Concluding Observations on the Combined Sixth and Seventh Periodic Reports of Cyprus, Adopted by the Committee, Comm. on the Elimination of Discrimination Against Women, 54th Sess., Feb. 11-Mar. 1, 2013, ¶ 17 UN Doc. CEDAW/C/CYP/CO/6-7 (Mar. 25, 2013).

615. *Id.* ¶ 18.

P. Poland

Poland ratified the ECHR in January 1993.[616] It ratified the CEDAW in July 1980,[617] and the CEDAW Optional Protocol in December 2003.[618] It signed the Istanbul Convention in December 2012, but has not yet ratified it.[619] Poland issued its first report to the CEDAW Committee in October 1985[620] and five reports thereafter, with the latest in November 2012.[621]

Polish law provides for the granting of asylum or refugee status pursuant to the Aliens Act of June 13, 2003,[622] and the Act of July 14, 2006 on the Entry into, Residence in and Exit from the Republic of Poland of Nationals of the European Union Member States and Their Family Members.[623] Poland complies with its ECHR responsibilities by offering refugee status to successful asylum-seekers,[624] and subsidiary protection to meet its ECHR non-refoulement obligations.[625] Additionally, Poland offers a tolerated stay permit where a return to the country of origin "would constitute a threat to his/her life, freedom and personal safety, when in the country of origin he/she could be subjected to torture, inhuman or degrading treatment or punishment."[626]

Access to employment, education, social welfare, healthcare, and integration programs are provided to both refugee and subsidiary beneficiaries under the same

616. ECHR Treaty Status, *supra* note 238.

617. CEDAW Treaty Status, *supra* note 239.

618. CEDAW Optional Protocol Treaty Status, *supra* note 240.

619. Istanbul Convention Treaty Status, *supra* note 88.

620. Comm. on the Elimination of Discrimination Against Women, Rep. on its 6th Sess., Mar. 30-Apr. 10, 1987, at 6-10, U.N. Doc. A/42/38; GAOR, 42d Sess., Supp. No. 38 (1987).

621. Consideration of Reports Submitted by States Parties Under Article 18 of the Convention, Combined Seventh and Eighth Periodic Reports of States Parties Due in 2010: Poland, Comm. on the Elimination of Discrimination Against Women, 59th Sess., Oct. 20-Nov. 7, 2014, at 1, U.N. Doc. CEDAW/C/POL/7-8 (Mar. 11, 2013) (the second report was submitted in 1988 (U.N. Doc. CEDAW/C/13/Add.16), the third in 1990 (U.N. Doc. CEDAW/C/18/Add.2), the fourth and fifth in 2004 (U.N. Doc. CEDAW/C/POL/4-5), and the sixth also in 2004 (U.N. Doc. CEDAW/C/POL/6)). *See also Human Rights Bodies*, OFF. HIGH COMMISSIONER HUM. RTS., http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx (select "Poland" from drop-box, select "CEDAW" hyperlink) (last visited May 28, 2014).

622. Act on Aliens of 13 June 2003, 128 JOURNAL OF LAWS, item 1175 (Pol.), *available at* http://www.udsc.gov.pl/files/old_file/44e9bdd07d1b8_1-44043372d9359_cudzoziemcy.pdf.

623. Act of 14 July 2006 on the Entry into, Residence in and Exit from the Republic of Poland of Nationals of the European Union Member States and Their Family Members, 144 JOURNAL OF LAWS item 1043 (Pol.), *available at* http://www.udsc.gov.pl/files/old_file/44e9bdd07d1b8_3-UdSRiC_74_2006_pl_en_en%5B1%5D.doc.

624. U.S. DEP'T OF STATE, POLAND 2013 HUMAN RIGHTS REPORT 12 (2014), *available at* http://www.state.gov/documents/organization/220529.pdf.

625. U.S. DEP'T OF STATE, POLAND 2012 HUMAN RIGHTS REPORT 13-14 (2013) [hereinafter POLAND 2012 HUMAN RIGHTS REPORT], *available at* http://photos.state.gov/libraries/poland/788/pdfs/204536.pdf.

626. HELSINKI FOUND. FOR HUMAN RIGHTS, DUBLIN II: NATIONAL ASYLUM PROCEDURE IN POLAND 1 (2010).

conditions.[627] Poland's 2012 HDI worldwide ranking is thirty-ninth.[628] Its 2012 GII worldwide ranking is twenty-fourth.[629] As of 2012, Poland did not have a national women's helpline,[630] and it had in place a single shelter that was unable to meet even 1 percent of the reported need.[631]

Q. Luxembourg

Luxembourg is a founding member of the EU,[632] and ratified the ECHR in 1989.[633] It ratified the CEDAW in January 1989[634] and the Optional Protocol to the Convention in July 2003.[635] It signed the Istanbul Convention in May 2011, but has not yet ratified it.[636] It issued its first report pursuant to the CEDAW in November 1996,[637] and has issued four periodic reports thereafter, with the latest in May 2006.[638]

Luxembourg law provides for equal protection based on gender in the application of its criminal code,[639] but in the domestic violence context it does so in a gender-neutral format.[640] Its CEDAW state reporting does not reference migration status as a pre-condition for invoking such rights.[641] As of January

627. *See* POLAND 2012 HUMAN RIGHTS REPORT, *supra* note 625, at 13-14 (while basic services were provided, there are improvements that could be made).

628. HUMAN DEVELOPMENT REPORT 2013, *supra* note 108, at 151 tbl.3.

629. *Id.* at 156 tbl.4.

630. WAVE REPORT, *supra* note 120, at 13.

631. *Id.* at 14-15.

632. Bernard Cook, *Grand Duchy of Luxembourg*, *in* II EUROPE SINCE 1945: AN ENCYCLOPEDIA 800, 801(Bernard A. Cook ed., 2001)

633. ECHR Treaty Status, *supra* note 238.

634. CEDAW Treaty Status, *supra* note 239.

635. CEDAW Optional Protocol Treaty Status, *supra* note 240.

636. Istanbul Convention Treaty Status, *supra* note 88.

637. Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Initial Reports of States Parties: Luxembourg, Comm. on the Elimination of Discrimination Against Women, 17th Sess., July 7-25, 1997, at 1, U.N. Doc. CEDAW/C/LUX/1 (Dec. 18, 1996).

638. Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Fifth Periodic Reports of States Parties: Luxembourg, Comm. on the Elimination of Discrimination Against Women, 40th Sess., Jan. 14-Feb. 1, 2008, at 1, U.N. Doc. CEDAW/C/LUX/5 (May 8, 2006) [hereinafter Luxembourg's Fifth Periodic Report] (the second report was submitted in 1997 (U.N. Doc. CEDAW/C/LUX/2), the third in 1998 (U.N. Doc. CEDAW/C/LUX/3), and the fourth in 2002 (U.N. Doc. CEDAW/C/LUX/4)). *See also Human Rights Bodies*, OFF. HIGH COMMISSIONER HUM. RTS., http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx (select "Luxembourg" from drop-box, select "CEDAW" hyperlink) (last visited May 28, 2014).

639. *See* Rep. of the Comm. on the Elimination of Discrimination Against Women, 28th and 29th Sess., Jan. 13-31, June 30-July 18, 2003, at 48, U.N. Doc. A/58/38; GAOR, 58th Sess., Supp. No. 38 (2003).

640. *See id. See also* CEDAW Committee, General Recommendation No. 19, *supra* note 31 ("The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately.").

641. *See* Luxembourg's Fifth Periodic Report, *supra* note 638.

2000, the CEDAW Committee was concerned that Luxembourg had not yet issued national legislation addressing domestic violence.[642] However, in September 2003, Luxembourg enacted legislation on domestic violence that authorized "the removal of a perpetrator of domestic violence from the family home."[643] Luxembourg offers assistance to domestic violence victims, which includes providing information about bringing charges against the perpetrator or requesting a protection order.[644] However, as of 2008, "[n]o population-based survey on violence against women [had] been conducted."[645]

Luxembourg's 2012 HDI worldwide ranking is twenty-sixth.[646] Its 2012 GII worldwide ranking is also twenty-sixth.[647] Luxembourg has in place a national women's hotline,[648] and as of 2012, it had nine shelters that were able to meet all the reported need.[649]

R. Lithuania

Lithuania ratified the ECHR in June 1995.[650] It ratified the CEDAW in January 1994,[651] and the Optional Protocol to the Convention in August 2004.[652] It signed the Istanbul Convention in June 2013, but has not ratified it.[653] Lithuania issued its first report pursuant to the CEDAW in June 1998,[654] and has issued three periodic reports thereafter, with the latest in June 2011.[655]

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642. Comm. on the Elimination of Discrimination Against Women, 22d Sess., 447th mtg. ¶ 39, U.N. Doc. CEDAW/C/SR.447 (Jan. 19, 2000).

643. Luxembourg's Fifth Periodic Report, supra note 638, ¶ 19.

644. *Id.* ¶ 53.

645. Responses to the List of Issues and Questions with Regard to the Consideration of the Fifth Periodic Report: Luxembourg, Comm. on the Elimination of Discrimination Against Women, 14th Sess., Jan. 14-Feb. 1, 2008, at 14, U.N. Doc. CEDAW/C/LUX/Q/5/Add.1 (Oct. 15, 2007).

646. HUMAN DEVELOPMENT REPORT 2013, *supra* note 108, at 151 tbl.3.

647. *Id.* at 156 tbl.4.

648. WAVE REPORT, *supra* note 120, at 13.

649. *Id.* at 14-15.

650. ECHR Treaty Status, *supra* note 238.

651. CEDAW Treaty Status, *supra* note 239.

652. CEDAW Optional Protocol Treaty Status, *supra* note 240.

653. Istanbul Convention Treaty Status, *supra* note 88.

654. Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Initial Reports of States Parties: Lithuania, Comm. on the Elimination of Discrimination Against Women, 23d Sess., June 12-30, 2000, at 1, U.N. Doc. CEDAW/C/LTU/1 (Aug. 27, 1998).

655. Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Fifth Periodic Reports of States Parties: Lithuania, Comm. on the Elimination of Discrimination Against Women, 58th Sess., at 1, U.N. Doc. CEDAW/C/LTU/5 (Dec. 21, 2011) (the second report was submitted in 1998 (U.N. Doc. CEDAW/C/LTU/2) and the third in 2004 (U.N. Doc. CEDAW/C/LTU/3) with an addendum (U.N. Doc. CEDAW/C/LTU/4)). *See Human Rights Bodies*, OFF. HIGH COMMISSIONER HUM. RTS., http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx (select "Lithuania" from drop-box, select "CEDAW" hyperlink) (last visited May 28, 2014).

In May 2011, Lithuania adopted the Law on Protection Against Domestic Violence, which defines all forms of domestic violence more clearly and makes it easier to prosecute perpetrators as well as provide support to victims and institute preventative measures.[656] The U.S. Department of State reports that Lithuania continues to fail to "permit asylum seekers coming from 'safe' countries of transit to enter the country."[657] The Lithuanian government returns these "asylum seekers to the country of transit without reviewing the substantive merits of their applications."[658] The Lithuanian Migration Department reported that it "did not have a list of safe countries" but, rather, defined them as countries where "the person's life or liberty would not be threatened on account of membership in one of the categories specified in the 1951 [R]efugee [C]onvention and associated instruments and from which the individual would not be sent to another country in contravention of his or her rights under these agreements."[659]

Lithuania also offers protection in the form of "'temporary protection' to groups of persons in . . . mass influx," but individuals are not permitted this type of relief.[660] Lithuania offers "'subsidiary protection' to individuals who do not qualify as refugees but who cannot return to their countries of origin because of fear of torture or because . . . systematic violations of human rights in that country would endanger their basic rights or fundamental freedoms."[661] Lithuania's 2012 HDI worldwide ranking is forty-first.[662] Its 2012 GII worldwide ranking is twenty-eighth.[663] While Lithuania has in place a national women's hotline,[664] as of 2012, it had no shelters to serve victims of violence.[665]

S. Greece

Greece ratified the ECHR in November 1974,[666] the CEDAW in June 1983,[667] and the Optional Protocol in January 2002.[668] It signed the Istanbul Convention in May 2011, but has not ratified it.[669] It reported on its obligations under the

656. Law on Protection Against Domestic Violence (No. XI-1425) (May 26, 2011) (Lith.), *available at* http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=410975. See *also* REPLY OF LITHUANIA ON VIOLENCE AGAINST WOMEN AND DISABILITY 2 (2011), *available at* http://www2.ohchr.org/english/issues/women/docs/VAWHRC20/Governments/Lithuania.doc.

657. U.S. DEP'T OF STATE, LITHUANIA 2013 HUMAN RIGHTS REPORT 10 (2014), *available at* http://www.state.gov/documents/organization/220511.pdf.

658. *Id.*

659. *Id.*

660. *Id.*

661. *Id.*

662. HUMAN DEVELOPMENT REPORT 2013, *supra* note 108, at 151 tbl.3.

663. *Id.* at 156 tbl.4.

664. WAVE REPORT, *supra* note 120, at 13.

665. *Id.* at 14-15.

666. ECHR Treaty Status, *supra* note 238.

667. CEDAW Treaty Status, *supra* note 239.

668. CEDAW Optional Protocol Treaty Status, *supra* note 240.

669. Istanbul Convention Treaty Status, *supra* note 88.

CEDAW through an initial report in April 1985,[670] and four periodic reports thereafter, with the most recent report in December 2010.[671]

Greek law provides for two types of protections: refugee status and subsidiary protection.[672] Until June 7, 2013, Greece offered humanitarian-based relief, as well.[673] Applications that were filed before that date were eligible for humanitarian-based consideration, where a grantee may remain in Greece "for up to two years, with the option to apply for renewal."[674] In 2011, a new legal framework reforming the asylum system was adopted in 2011.[675] Under that system, any person not meeting the criteria for refugee status, may be granted subsidiary protection if she substantiates that, if returned to the country of origin, she runs the risk of being subjected to serious harm, as defined in Article 15 of Presidential Decree 96.[676] Under the current system, when an asylum claim is rejected, but authorities believe that humanitarian relief should be forthcoming, the case is referred to the Ministry of Internal Affairs and is examined according to immigration procedures under the provisions of Law 3386/2005, on Entry, Residence and Social Integration of Third-Country Nationals in the Hellenic Territory.[677] Greece has in place a procedure for prioritizing case reviews of matters involving persons belonging to vulnerable groups.[678]

Greece's 2012 HDI worldwide ranking is twenty-ninth.[679] Its 2012 GII worldwide ranking is twenty-third.[680] Greece offers a twenty-four hour national

670. Rep. of the Comm. on the Elimination of Discrimination Against Women, Rep. on its 6th Sess., Mar. 30-Apr. 10 1987, ¶¶ 65-129, U.N. Doc. A/42/38; GAOR, 42d Sess., Supp. No. 38 (1987).

671. Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Seventh Periodic Reports of States Parties: Greece, Comm. on the Elimination of Discrimination Against Women, 54th Sess., Feb. 11-Mar. 1, 2013, at 1, U.N. Doc. CEDAW/C/GRC/7 (Mar. 14, 20111) (the second and third report was submitted in 1996 (U.N. Doc. CEDAW/C/GRC/2-3), the fourth and fifth in 2001 (U.N. Doc. CEDAW/C/GRC/4-5), and the sixth in 2005 (U.N. Doc. CEDAW/C/CRC/6)). *See also Human Rights Bodies*, OFF. HIGH COMMISSIONER HUM. RTS., http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx (select "Greece" from drop-box, select "CEDAW" hyperlink) (last visited May 28, 2014).

672. *EDAL Country Overview—Greece*, EUR. DATABASE OF ASYLUM L. (Nov. 19, 2013), http://www.asylumlawdatabase.eu/en/content/edal-country-overview-greece.

673. *Id.*

674. *Id.*

675. *Id.*

676. Diatagma (2013:113) Demiourgia Mias Eniaias Diadikasias gia te Choregise tou Prosfyga e tes Epikourikes Dikaioucho Prostasia Stous Allodapous e Anithageneis Atoma, Symfona me to Symvoullio Odegia 2005/85/EK [Establishment of a Single Procedure for Granting the Status of Refugee or of Subsidiary Protection Beneficiary to Aliens or to Stateless Individuals in Conformity with Council Directive 2005/85/EC "on minimum standards on procedures in Member States for granting and withdrawing refugee status" (L326/13.12.2005) and Other Provisions], EPHEMERIS TES KYVERNESEOS TES HELLENIKES DEMOKRATIAS [E.K.E.D.] 2013, art. 35(1)(b) (Greece).

677. *Id.* art. 33.

678. *Id.* art. 35(1)(g).

679. HUMAN DEVELOPMENT REPORT 2013, *supra* note 108, at 151 tbl.3.

680. *Id.* at 156 tbl.4.

women's hotline.[681] However, shelter services are vastly under supported with only about 9 percent of the need met in 2012.[682] Greece offers no right to free legal representation, but will provide it to eligible low-income individuals.[683] The SRVAW has recommended that all law enforcement personnel be given appropriate gender-sensitive training in order to effectively respond to cases of rape and other forms of sexual violence against women, including violence occurring within the family.[684] Moreover, she suggests that the law be revised in such a manner that victims of rape and other forms of sexual violence cannot be put under pressure to stop the prosecution of the case.[685]

T. Estonia

Estonia ratified the ECHR in April 1996.[686] It ratified the CEDAW in October 1991,[687] but has not signed the Optional Protocol.[688] It has neither signed nor ratified the Istanbul Convention.[689] Estonia reported on its obligations under the CEDAW through an initial report in June 2001,[690] and a second periodic report in October 2005.[691] Its latest reported was due on November 20, 2012, but has not yet been submitted.[692]

Estonia has developed a number of systems to address domestic violence, including the creation of governmental organizations and training of police officials and medical workers in the victim support services.[693] In 2002, the

681. WAVE REPORT, *supra* note 120, at 13.

682. *Id.* at 14-15.

683. Nomos (2004:3226) Paroche Nomikes Voetheias se Polites Chamelou Eisodematos kai alles Diatakseis [Legal Aid to Citizens of Low Income and Other Provisions], EPHEMERIS TES KYVERNESEOS TES HELLENIKES DEMOKRATIAS [E.K.E.D.] 2004, A:24 (Greece).

684. *See* Special Rapporteur on Violence Against Women, *Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of Work of the Commission: Alternative Approaches and Ways and Means Within the United Nations System for Improving the Effective Enjoyment of Human Rights and Fundamental Freedom*, Comm'n on Human Rights, ¶ 122, U.N. Doc. E/CN.4/1996/53 (Feb. 5, 1996) (by Radhika Coomaraswamy).

685. *Id.* ¶ 123.

686. ECHR Treaty Status, *supra* note 238.

687. CEDAW Ratification Treat Status, *supra* note 239.

688. CEDAW Optional Protocol Treaty Status, *supra* note 240.

689. Istanbul Convention Treaty Status, *supra* note 88.

690. Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Combined Initial, Second and Third Periodic Reports of States Parties: Estonia, Comm. on the Elimination of Discrimination Against Women, 26th Sess., Jan. 14-Feb. 1, 2002, at 1, U.N. Doc. CEDAW/C/EST/1-3 (Aug. 21, 2001).

691. Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Fourth Periodic Report of States Parties: Estonia, Comm. on the Elimination of Discrimination Against Women, 39th Sess., July 23-Aug. 10, 2007, at 1, U.N. Doc. CEDAW/C/EST/4 (Oct. 6, 2005).

692. *See Human Rights Bodies*, OFF. HIGH COMMISSIONER HUM. RTS., http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx (select "Estonia" from drop-box, select "CEDAW" hyperlink) (last visited May 28, 2014).

693. Rep. of the Comm. on the Elimination of Discrimination Against Women, Rep. on its 26th Sess., Jan. 14-Feb. 1, 2002, ¶ 97, U.N. Doc. A/57/38; GAOR, 57th Sess., Supp. No. 38 (2002).

CEDAW Committee urged Estonia to meet its obligations under international law and to place a high priority on establishing comprehensive measures to address domestic violence.[694] In response, Estonia created such a system that provides asylum protection to refugees.[695] Authorities have reported that they have granted interviews to all individual asylum seekers.[696] The UNHCR, however, has expressed concern about the low numbers of registered asylum seekers at the border, which indicates that individuals might be turned away at the border without being afforded an opportunity to claim asylum or other fear-based relief.[697]

Estonia's 2012 HDI worldwide ranking is thirty-third.[698] Its 2012 GII worldwide ranking is twenty-ninth.[699] While Estonia has in place some resources to provide safety to women, the demand for shelters is almost twice what is available.[700] Estonia has in place a national women's hotline that provides language services, but it does not provide twenty-four hour service or free long distance calls.[701] In 2012, the ten nationwide shelters were able to serve 51 percent of the need.[702] Some limited free legal aid is available.[703] However, reforms in the criminal justice system to hold perpetrators accountable are criticized as providing weak enforcement.[704]

U. Slovakia

Slovakia ratified the ECHR in March 1992.[705] It ratified the CEDAW in May 1993,[706] and signed the CEDAW Optional Protocol in November 2000.[707] It signed the Istanbul Convention in May 2011, but has not yet ratified it.[708] Slovakia

694. *Id.* ¶ 98.

695. *See* Act on Granting International Protection to Aliens, RT I 2006, 2, 3 (2005) (Est.).

696. EUROPEAN MIGRATION NETWORK, THE PRACTICES IN ESTONIA CONCERNING THE GRANTING OF NON-EU HARMONISED PROTECTION STATUSES 12 (2009), *available at* http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/emn-studies/non-eu-harmonised-protection-status/07._estonia_national_report_non_eu_harmonised_protection_statuses_final_version_28sept09_en.pdf.

697. *See Estonia: 2014 UNHCR Regional Operations Profile: Northern, Western, Central and Southern Europe*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e48dcd6&submit=GO (last visited June 1, 2014).

698. HUMAN DEVELOPMENT REPORT 2013, *supra* note 108, at 151 tbl.3.

699. *Id.* at 156 tbl.4.

700. WAVE REPORT, *supra* note 120, at 14-15.

701. *Id.* at 13, 96.

702. *Id.* at 14-15.

703. *Id.* at 95.

704. *Id.*

705. ECHR Treaty Status, *supra* note 238.

706. CEDAW Treaty Status, *supra* note 239.

707. CEDAW Optional Protocol Treaty Status, *supra* note 240.

708. Istanbul Convention Treaty Status, *supra* note 88.

issued its first report in April 1996[709] and a second periodic report in May 2007.[710] It is due to issue its next report June 27, 2014.[711]

In 2007, the European Court of Human Rights considered *Kontrová v. Slovakia*, a case involving egregious domestic violence in the form of psychological and physical abuse by a male Slovak against his female spouse within Slovakia.[712] The abusive conduct included the murder of the couple's two children.[713] The court held unanimously that there had been violations of the ECHR involving Article 2, the right to life, and Article 13, the right to an effective remedy.[714] The ECtHR notes that "[t]he situation in the applicant's family was known to the local police department [given among other things] . . . . the criminal complaint of 2 November 2002 and the emergency phone calls of the night of 26 to 27 December 2002."[715] The ECtHR agreed with the domestic courts, finding that the tragedy was a direct consequence of the police officers' failure to act to help the victims.[716] While this case does not involve domestic violence in the migrant context, it may be illustrative of the current state of limited protections for victims in Slovakia.

Slovakia's 2012 HDI worldwide ranking is thirty-fifth.[717] Its 2012 GII worldwide ranking is thirty-second.[718] While Slovakia has in place a national women's hotline, it is not staffed twenty-four hours a day, and there is no information available on translation services.[719] As of 2012, Slovakia had in place two shelters, addressing about 5 percent of the reported need.[720]

V. Croatia

Croatia ratified the ECHR on November 1997,[721] the CEDAW in September 1992,[722] and the CEDAW Optional Protocol in March 2001.[723] It signed the

709. Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Initial Report Periodic Report of States Parties: Slovakia, Comm. on the Elimination of Discrimination Against Women, 19th Sess., June 22-July 10, 1998, at 1, U.N. Doc. CEDAW/C/SVK/1 (July 20, 1996).

710. Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Combined Second, Third and Fourth Periodic Reports of States Parties: Slovakia, Comm. on the Elimination of Discrimination Against Women, 41st Sess., June 30-July 18, 2008, at 1, U.N. Doc. CEDAW/C/SVK/4 (May 11, 2007).

711. *See Human Rights Bodies*, OFF. HIGH COMMISSIONER HUM. RTS., http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx (select "Slovakia" from drop-box, select "CEDAW" hyperlink) (last visited May 28, 2014).

712. Kontrová v. Slovakia, App. No. 7510/04, ¶¶ 7-8 (Eur. Ct. H.R. Sept. 24, 2007), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-80696.

713. *Id.* ¶ 14.

714. *Id.* at 16.

715. *Id.* ¶ 52.

716. *Id.* ¶¶ 54-55.

717. HUMAN DEVELOPMENT REPORT 2013, *supra* note 108, at 151 tbl.3.

718. *Id.* at 156 tbl.4.

719. WAVE REPORT, *supra* note 120, at 13.

720. *Id.* at 14-15, 240.

721. ECHR Treaty Status, *supra* note 238.

Istanbul Convention in January 2013, but has not yet ratified it.[724] It reported on its obligations under the CEDAW through an initial report in January 1995,[725] and two periodic reports thereafter, with the latest in September 2013.[726] Croatia's legislation provides for asylum and subsidiary protections.[727] The domestic legal structure provides for a system of safety measures such as shelters, legal assistance, interpretation assistance, work permits, and support in connection with injunctive relief.[728] However, as of 2012, Croatia did not offer a national women's helpline,[729] but its nineteen shelters provided shelter for 77 percent of the needed population.[730] Croatia's 2012 HDI worldwide ranking is forty-seventh.[731] Its 2012 GII worldwide ranking is thirty-third.[732]

At the time that Croatia ratified the CEDAW (September 1992), the country was in the midst of a civil war, during which widespread human rights abuses against women were recorded in a variety of contexts.[733] While its first report to the CEDAW Committee in 1994 recounted the widespread nature of the human rights abuses during the previous years,[734] by 2003, its second report reflected marked changes in the protections available to female victims of violence in general.[735] Croatia adopted a Law on Gender Equality in 2008,[736] as well as a Law on Protection from Domestic Violence in 2003.[737]

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722. CEDAW Treaty Status, *supra* note 239.

723. CEDAW Optional Protocol Treaty Status, *supra* note 240.

724. Istanbul Convention Treaty Status, *supra* note 88.

725. Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Initial Reports of States Parties: Croatia, Comm. on the Elimination of Discrimination Against Women, 18th Sess., Jan. 19-Feb. 6, 1998, at 1, U.N. Doc. CEDAW/C/CRO/1 (Feb. 15, 1995). Prior to its initial report, Croatia issued a "[r]eport on an exceptional basis." Consideration of Reports Submitted by States Parties Under Article 18 of the Convention, Reports of States Parties: Croatia, Report on an Exception Basis, Comm. on the Elimination of Discrimination Against Women, 14th Sess., Jan. 16-Feb. 3 1995, at 1, U.N. Doc. CEDAW/C/CRO/SP.1 (Dec. 6, 1994) [hereinafter Croatia's Report on Exceptional Basis].

726. Consideration of Reports Submitted by States Parties Under Article 18 of the Convention, Fourth and Fifth Periodic Reports of States Parties Due in 2009: Croatia, Comm. on the Elimination of Discrimination Against Women, 61st Sess., at 1, U.N. Doc. CEDAW/C/HRV/4-5 (Dec. 13, 2013) [Croatia's Fourth and Fifth Periodic Report] (the second and third report was submitted in 2003 (U.N. Doc. CEDAW/C/CRO/2-3)). *See also Human Rights Bodies*, OFF. HIGH COMMISSIONER HUM. RTS., http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx (select "Croatia" from drop-box, select "CEDAW" hyperlink) (last visited May 28, 2014).

727. Asylum Act, art. 1 (O.G. No. 79/07 and 88/10) (Croat.), *available at* http://www.mup.hr/UserDocsImages/engleska%20verzija/2013/asylum_act.pdf.

728. *See* WAVE REPORT, *supra* note 120, at 75-77.

729. *Id.* at 11.

730. *Id.* at 14-15.

731. HUMAN DEVELOPMENT REPORT 2013, *supra* note 108, at 151 tbl.3.

732. *Id.* at 156 tbl.4.

733. Croatia's Report on Exceptional Basis, *supra* note 725, at 5-7.

734. *Id.*

735. Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Combined Second and Third Periodic Reports of States Parties: Croatia, Comm. on the Elimination of Discrimination Against Women, 32d

During the period from 2008 through 2010, Croatia implemented an official national strategy,[738] which helped it harmonize its legislation with its responsibilities under international law. Croatia's efforts have been aimed at creating a social and legal structure to provide support to domestic violence victims.[739] While the governing law envisions particular social group claims to protection,[740] the authors are not aware of a published case to date in which a gender-related claim to asylum in Croatia has been accepted. There is no right to free legal aid or interpreters in connection with the initial filing of an asylum application,[741] but some victims may receive some assistance in appeals.[742] Under the law, agents of persecution may be state bodies, parties, or non-state actors where the state is unable or unwilling to provide protection from persecution or serious harm.[743]

In 2012, Croatia created an Administrative Court with responsibility for appeals of asylum claims.[744] During 2013, the UNHCR anticipated working with Croatia to support the growth in asylum-seekers and improve the quality of the asylum system.[745] It planned to work with Croatia to improve programs for vulnerable groups.[746] Overall, only sixty-four individuals have been granted either asylum or subsidiary protection since 2004 in Croatia, despite the vast growth in the number of asylum claims made beginning in 2012.[747] Subsidiary protection is available when, in pertinent part, there is a "real risk of suffering serious harm" such as the "death penalty or execution, torture, inhuman or degrading treatment or punishment."[748] The protections include the right of non-refoulement where a

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Sess., Jan. 10-28, 2005, at 6-16, U.N. Doc. CEDAW/C/CRO/2-3 (Oct. 27, 2003) [hereinafter Croatia's Second and Third Periodic Report] (highlighting the numerous laws that have been passed in regards to discrimination against women).

736. Croatia's Fourth and Fifth Periodic Report, *supra* note 726, at 4.

737. Croatia's Second and Third Periodic Report, *supra* note 735, at 14.

738. WAVE REPORT, *supra* note 120, at 74.

739. Croatia's Second and Third Periodic Report, *supra* note 735, at 4-5.

740. *Id.* at 18-21.

741. HUMAN RIGHTS WATCH, WORLD REPORT 2013: EVENTS OF 2012, at 421 (2013) [hereinafter HRW, WORLD REPORT 2013], *available at* http://www.hrw.org/sites/default/files/wr2013_web.pdf.

742. *Id.*

743. *See* Asylum Act, art. 5(2) (O.G. No. 79/07 and 88/10) (Croat.), *available at* http://www.mup.hr/UserDocsImages/engleska%20verzija/2013/asylum_act.pdf.

744. EUR. COMM'N AGAINST RACISM & INTOLERANCE, ECRI REPORT ON CROATIA: FOURTH MONITORING CYCLE 7 (2012), *available at* http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Croatia/HRV-CbC-IV-2012-045-ENG.pdf.

745. *2014 UNHCR Regional Operations Profile: South-Eastern Europe*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e48d7d6 (last visited Jan. 22, 2014).

746. *Id.*

747. HRW, WORLD REPORT 2013, *supra* note 741, at 421.

748. Asylum Act, arts. 2, 7 (O.G. No. 79/07 and 88/10) (Croat.), *available at* http://www.mup.hr/UserDocsImages/engleska%20verzija/2013/asylum_act.pdf.

victim "could be exposed to torture, inhuman or degrading treatment or punishment."[749]

W. United Kingdom of Great Britain and Northern Ireland

The United Kingdom ratified the ECHR in March 1951.[750] It ratified the CEDAW in April 1986[751] and ratified the Optional Protocol in December 2004.[752] It signed the Istanbul Convention in June 2012, but has not yet ratified it.[753] The United Kingdom issued its initial report under the CEDAW in June 1987,[754] and six reports thereafter, with the latest in June 2011.[755]

The United Kingdom offers several types of protection to victims of domestic violence. First, a domestic violence victim who is the spouse or partner of a British citizen or person settled in the United Kingdom is able to apply for an indefinite leave to remain, a permanent status.[756] For those who are victims pursuant to non-British, or non-U.K.-settled perpetrators, the United Kingdom offers asylum protection through a particular social group-based claim,[757] as well as humanitarian protection when there are "substantial grounds . . . for believing that the person concerned, if he returned to the country of return, would face a real risk of suffering serious harm and is unable, or, owing to such risk, unwilling to avail himself of the protection of that country."[758] Some have argued that in practice, domestic violence is often interpreted as a form of serious harm leading to the grant of subsidiary protection, rather than asylum.[759] Without a comprehensive

749. *Id.* art. 3.

750. ECHR Treaty Status, *supra* note 238.

751. CEDAW Treaty Status, *supra* note 239.

752. CEDAW Optional Protocol Treaty Status, *supra* note 240.

753. Istanbul Convention Treaty Status, *supra* note 88.

754. Comm. on the Elimination of Discrimination Against Women, Rep. on its 9th Sess., Jan. 22-Feb. 2, 1990, ¶¶ 167-213, U.N. Doc. A/45/38; GAOR, 45th Sess., Supp. No. 38 (1990).

755. Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Seventh Periodic Reports of States Parties: United Kingdom of Great Britain and Northern Ireland, Comm. on the Elimination of Discrimination Against Women, 55th Sess., July 8-26, 2013, at 1, U.N. Doc. CEDAW/C/GBR/7 (Aug. 11, 2011) (the second report was submitted in 1991 (U.N. Doc. CEDAW/C/UK/2), the third in 1995 (U.N. Doc. CEDAW/C/UK/3), the fourth in 1999 (U.N. Doc. CEDAW/C/UK/4), the fifth in 2003 (U.N. Doc. CEDAW/C/UK/5), and the sixth in 2007 (U.N. Doc. CEDAW/C/UK/6)). *See also Human Rights Bodies*, OFF. HIGH COMMISSIONER HUM. RTS., http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx (select "United Kingdom of Great Britain and Northern Ireland" from drop-box, select "CEDAW" hyperlink) (last visited May 28, 2014).

756. Immigration Rules, 2014, pt. 8, ¶¶ 289A-D (U.K.), *available at* https://www.gov.uk/government/collections/immigration-rules (follow "Immigration Rules part 8: family members" hyperlink].

757. *Id.* pt. 11, ¶ 334(v).

758. *Id.* ¶ 339C(iii).

759. Siobhán Mullally, *Gender Asylum Law: Providing Transformative Remedies*, *in* CONTEMPORARY ISSUES IN REFUGEE LAW 196, 202-04 (Satvinder Singh Juss & Colin Harvey eds., 2013).

accounting of government adjudications, this is difficult to verify. Moreover, as a practical matter, some authorities rely on and cite to the UNHCR Gender-Based Guidelines in adjudicating cases, while others assert that they are of little assistance.[760]

The SRVAW expressed concern "about the absence of a national strategy on the prevention and elimination of violence against women."[761] In particular the SRVAW was concerned about "[d]ifferent regimes . . . being established in Wales, Scotland, and Northern Ireland with responsibility for women's equality issues, including legislative and administrative provisions and mechanisms."[762]

The United Kingdom's 2012 HDI worldwide ranking is twenty-sixth.[763] Its 2012 GII worldwide ranking is thirty-fourth.[764] The United Kingdom has in place a national women's hotline that is staffed twenty-four hours a day, offers free long distance calling, and provides translation services.[765] As of 2012, the United Kingdom had in place 1,105 shelters, addressing about 87 percent of the reported need.[766]

X. Latvia

Latvia ratified the ECHR in June 1997.[767] It ratified the CEDAW in April 1992.[768] It has not signed nor ratified the Optional Protocol.[769] Additionally, it has neither signed nor ratified the Istanbul Convention.[770] Latvia issued its first report to the CEDAW Committee in June 2003.[771] While it was obliged to issue a periodic report on May 14, 2005, it has not yet done so.[772]

Latvia provides asylum relief and a subsequent permanent residence permit,[773] as well as subsidiary relief in the form of an annually renewable temporary residence permit, which embodies the principles of non-refoulement to

760. CHEIKH ALI ET AL., *supra* note 417, at 33-34.

761. Coomaraswamy Report, *supra* note 194, ¶ 1849.

762. *Id.*

763. HUMAN DEVELOPMENT REPORT 2013, *supra* note 108, at 151 tbl.3.

764. *Id.* at 156 tbl.4.

765. WAVE REPORT, *supra* note 120, at 13, 284.

766. *Id.* at 14-15.

767. ECHR Treaty Status, *supra* note 238.

768. CEDAW Treaty Status, *supra* note 239.

769. CEDAW Optional Protocol Treaty Status, *supra* note 240.

770. Istanbul Convention Treaty Status, *supra* note 88.

771. Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Combined Initial, Second and Third Periodic Report of States Parties: Latvia, Comm. on the Elimination of Discrimination Against Women, 31st Sess., July 6-23, 2004, at 1, U.N. Doc. CEDAW/C/LVA/1-3 (June 16, 2003) [hereinafter Latvia's Initial, Second and Third Periodic Report].

772. *See Human Rights Bodies*, OFF. HIGH COMMISSIONER HUM. RTS., http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx (select "Latvia" from drop-box, select "CEDAW" hyperlink) (last visited May 28, 2014).

773. Asylum Law § 27 (Jan. 20, 2005) (Lat.), *available at* http://www.legislationline.org/documents/id/3815.

migrants seeking the state's protection.[774] Subsidiary relief is offered when, in pertinent part, an individual "is under threat of the death penalty, corporal punishment, torture, inhuman or degrading treatment, or degrading punishment in the country of his or her citizenship."[775] In some circumstances, Latvia provides humanitarian relief.[776] The protection offers employment eligibility[777] and family unity protections.

Latvia's 2012 HDI worldwide ranking is forty-fourth.[778] Its 2012 GII worldwide ranking is thirty-sixth.[779] Latvia provides free legal assistance for asylum appeals only.[780] However, it does provide translation for all interviews.[781] Family unity protection is afforded to successful asylum-seekers.[782] As of 2012, Latvia had neither a national women's hotline, nor any shelters.[783] The Latvian National Human Rights office reported in 2003, that although the law provides for criminal liability for physical violence, "law enforcement institutions do not pay sufficient attention to manifestations of physical violence in families if bodily injury sustained by the woman cannot be regarded as serious or at least moderate."[784] "Moreover, the laws did not recognize psychological violence" for purposes of criminal liability.[785]

Y. Bulgaria

Bulgaria ratified the ECHR in September 1992.[786] It ratified the CEDAW in February 1982[787] and the Optional Protocol in September 2006.[788] It has neither signed nor ratified the Istanbul Convention.[789] It reported on its obligations under the CEDAW through an initial report in June 1983,[790] and two periodic reports

774. *Id.* § 2.

775. *Id.* § 35(1)(1).

776. *Id.* § 35(1)(2). *See also* LATVIAN CENTRE FOR HUMAN RIGHTS & UNITED NATIONS HIGH COMM'R FOR REFUGEES, SEEKING ASYLUM IN LATVIA: GUIDE FOR ASYLUM-SEEKERS 10, *available at* http://www.rs.gov.lv/doc_upl/SeekingAsylum-inLatvia.pdf.

777. Asylum Law, §§ 37, 40 (Lat.).

778. HUMAN DEVELOPMENT REPORT 2013, *supra* note 108, at 151 tbl.3.

779. *Id.* at 156 tbl.4.

780. EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, COUNTRY FACTSHEET: LATVIA 5 (2010), *available at* http://fra.europa.eu/sites/default/files/fra_uploads/1035-asylum_factsheet_Latvia_en.pdf.

781. Asylum Law, § 9 (Lat.).

782. *Id.*

783. WAVE REPORT, *supra* note 120, at 13-15.

784. Latvia's Initial, Second and Third Periodic Report, *supra* note 771, ¶ 33.

785. Comm. on the Elimination of Discrimination Against Women, 31st Sess., 657th mtg. ¶ 11, U.N. Doc. CEDAW/C/SR.657 (July 14, 2004).

786. ECHR Treaty Status, *supra* note 238.

787. CEDAW Treaty Status, *supra* note 239.

788. CEDAW Optional Protocol Treaty Status, *supra* note 240.

789. Istanbul Convention Treaty Status, *supra* note 88.

790. Rep. of the Comm. on the Elimination of Discrimination Against Women, Rep. on its 4th Sess., Jan. 21-Feb. 1, 1985, ¶¶ 74-126, U.N. Doc. A/40/45; GAOR, 40th Sess., Supp. No. 45 (1985).

thereafter, with the latest report in September 2010.[791] It is obliged to issue its next report on July 30, 2016.[792]

Bulgarian asylum law is governed by the Law for Asylum and Refugees, and its subsequent amendments.[793] It enacted protections for victims of domestic violence with the passage of the Protection from Domestic Violence Act ("DVA").[794] These protections include the right to seek police protection; to obtain a protection order; to prosecute criminal protection order violations in criminal court; to obtain legal aid in the form of services of a lawyer free of charge during proceedings; to have an interpreter during proceedings; to submit applications for custody or for divorce to the courts; and to undertake all other relevant actions relating to family issues and protection from domestic violence.[795] The statutory framework that flowed from the passage of the DVA contains no reference to migration status as a pre-condition for invoking rights thereunder.[796] Shelter services were provided to less than 8 percent of the reported demand, in 2012.[797] Bulgaria's 2012 HDI worldwide ranking is fifty-seventh.[798] Its 2012 GII worldwide ranking is thirty-eighth.[799]

Article 2 of the DVA recognizes an expansive definition of domestic violence, which include physical, sexual, mental, emotional, psychological, and economic forms of violence, in the context of heterosexual relationships.[800] However, domestic violence in Bulgaria is still regarded as a private matter with actions being brought by victims against their aggressors in a private prosecution.[801] Domestic violence is prosecuted as a criminal matter only in

791. Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Combined Fourth, Fifth, Sixth and Seventh Periodic Reports of States Parties: Bulgaria, Comm. on the Elimination of Discrimination Against Women, 52d Sess., July 9-27, 2012, at 1, U.N. Doc. CEDAW/C/BGR/4-7 (Jan. 7, 2011) (the second and third report was submitted in 1994 (U.N. Doc. CEDAW/C/BGR/2-3)).

792. *See Human Rights Bodies*, OFF. HIGH COMMISSIONER HUM. RTS., http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx (select "Bulgaria" from drop-box, select "CEDAW" hyperlink) (last visited May 28, 2014).

793. Law for the Asylum and the Refugees, Prom. SG. 54/31 May 2002, amend. SG. 31/8 Apr. 2005, amend. SG. 30/11 Apr. 2006, amend. SG. 52/29 Jun 2007, amend. SG. 109/20 Dec. 2007, amend. SG. 82/16 Oct. 2009, amend. SG. 39/20 May 2011, amend. SG. 15/15 Feb. 2013 (Bulg.), *available at* http://www.aref.government.bg/ebf/docs/Law%20for%20the%20Asylum%20and%20the%20Refugees EN.pdf.

794. Protection Against Domestic Violence Act, Prom. SG. 27/29 Mar. 2005, amend. SG. 82/10 Oct. 2006, amend. SG. 102/22 Dec. 2009, art. 1 (Bulg.), *available at* http://www.stopvaw.org/uploads/lpfdv.pdf.

795. *See id.* arts. 6(7)(2), 20, 21.

796. *See id.*

797. WAVE REPORT, *supra* note 120, at 14-15.

798. HUMAN DEVELOPMENT REPORT 2013, *supra* note 108, at 151 tbl.3.

799. *Id.* at 156 tbl.4.

800. Protection Against Domestic Violence Act, arts. 2-3 (Bulg.).

801. ADVOCATES FOR HUMAN RIGHTS, BULGARIA: CHALLENGES WITH ADDRESSING DOMESTIC VIOLENCE IN COMPLIANCE WITH INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 102ND

exceptional circumstances and where substantial injury is involved, and the victim is unable to bring a private prosecution by him or herself.[802]

Migrant domestic violence victims do not have the right to seek financial compensation from their abusers under the Crime Victim Assistance and Financial Compensation Act as this right flows only to foreign nationals legally residing in the territory of Bulgaria.[803] A recent study of thirty cases reviewed by the State Agency for Refugees reflects that this adjudicatory body does not recognize gender-based relief or gender-based asylum claims.[804] Of the cases reviewed in this study, most of the asylum applications filed by women contained claims to membership in a gender-based social group and to domestic violence persecution.[805] Relief was not forthcoming in any of these cases.

In November 2010, the CEDAW Committee considered a claim in which a migrant claimed she had been subjected to domestic violence and that the procedures in place in Bulgaria failed to provide support as required under the CEDAW.[806] Brought by two domestic violence victims, Gambian national Isatou Jallow and her Bulgarian minor daughter, they claimed that Bulgaria had breached its responsibilities under the CEDAW.[807] Over the next two years, the CEDAW Committee reviewed the claim, and issued its finding in July 2012.[808] The CEDAW Committee found that in September 2008, Ms. Jallow and her minor daughter arrived in Bulgaria and began living with Ms. Jallow's husband, who was also the father of her minor daughter.[809] Specifically, he repeatedly abused both Ms. Jallow and her daughter, sexually, physically, and emotionally, and used Ms. Jallow's migrant status as a tool to further abuse her in that, "[h]e constantly told her that her stay in Bulgaria depended on him and threatened that, if she resisted, he could have her imprisoned, confined to a mental institution or deported to the Gambia, without her daughter."[810] She sought assistance from local authorities in November 2008, who recommended that she "stay away from her husband" and initiated an investigation into the claimed domestic violence.[811] During a

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SESSION OF THE UNITED NATIONS HUMAN RIGHTS COMMITTEE ¶ 10 (2011), *available at* http://www2.ohchr.org/english/bodies/hrc/docs/ngo/AHR_Bulgaria_HRC102.doc.

802. CODE CRIMINAL [C. CRIM.] art. 161 ("[For bodily injury . . . inflicted on a relative . . . [such as] a spouse . . . the penal prosecution shall be instituted on the basis of complaint by the victim.").

803. Crime Victim Assistance and Financial Compensation Act, SG. 105/22 Dec. 2006, art. 27(1) (Bulg.), *available at* http://ec.europa.eu/justice_home/judicialatlascivil/html/pdf/national_law_cv_bul_en.pdf.

804. Memorandum from Maria Nikolova, Bulgarian Human Rights Advocate (November 26, 2013) (on file with the authors).

805. *Id.*

806. Comm. on the Elimination of Discrimination Against Women, Isatou Jallow v. Bulgaria, Comm. No. 32/2011, ¶ 1, U.N. Doc. CEDAW/C/52/D/32/2011 (2011), *available at* http://www.un.org/en/ga/search/view_doc.asp?symbol=CEDAW/C/52/D/32/2011.

807. *Id.*

808. *Id.*

809. *Id.* ¶ 2.1.

810. *Id.* ¶ 2.2.

811. *Id.* ¶¶ 2.3-2.4.

protracted period in which she lived alternately in a women's shelter, and in the family apartment, the Bulgarian judicial system considered the case, and ultimately dropped it without interviewing Ms. Jallow.[812] In July 2009, she received a Bulgarian residence permit.[813] With the escalating domestic violence, however, she contemplated pursuing a divorce.[814]

Soon thereafter, Ms. Jallow's husband sought assistance from the state authorities claiming that, in fact, it was him and his daughter that had been subject to psychological and physical violence as well as death threats at the hands of Ms. Jallow.[815] The Bulgarian authorities issued a restraining order against Ms. Jallow, and placed the child under the care and custody of her husband.[816] Soon thereafter, he instituted divorce proceedings against Ms. Jallow, and sought custody of their daughter.[817]

Ms. Jallow brought a claim under the CEDAW Optional Protocol claiming that Bulgarian state officials had violated a number of the CEDAW provisions ranging from discriminatory treatment of women to a complete failure to both recognize and protect against domestic gender-based violence and to sanction the perpetrator.[818] She argued that due to language barriers she had extremely limited access to the institutions that are charged with addressing gender-based violence.[819] Furthermore, she asserted that the authorities separated her from her daughter and failed to provide her with information during the separation, in spite of a history of sexual abuse by the father of the daughter.[820] As a legal remedy, she sought:

a) Fair compensation;
b) Child support and legal assistance;
c) Reparations for the physical and mental harm caused to her and her daughter; and,
d) Effective measures to provide for her future security.[821]

From a systemic viewpoint, she requested that Bulgaria institute legal measures to provide for effective protection for women victims of gender-based violence, including training of judges and free translation and legal services.[822]

The CEDAW Committee agreed that Ms. Jallow and her daughter had suffered damage given Ms. Jallow's vulnerable situation and that the Bulgarian government did not provide adequate protection as required under the CEDAW.[823]

812. *Id.* ¶¶ 2.4-2.5.
813. *Id.* ¶ 2.6.
814. *Id.*
815. *Id.* ¶ 2.7.
816. *Id.* ¶ 2.8.
817. *Id.* ¶ 2.12.
818. *Id.* ¶ 3.1.
819. *Id.* ¶ 3.4.
820. *Id.* ¶¶ 3.4, 3.6.
821. *Id.* ¶ 3.7.
822. *Id.* ¶ 3.8.
823. *Id.* ¶ 8.2.

The CEDAW Committee ordered that Bulgaria take measures, including legislative and policy steps

> to ensure that women victims of domestic violence, in particular migrant women, have effective access to services related to protection against domestic violence and to justice, including interpretation or translation of documents, and that the manner in which domestic courts apply the law is consistent with the State party's obligations under the Convention.[824]

The CEDAW Committee's most recent state report was issued in 2012, and fails to discuss relief specific for migrant domestic violence victims.[825]

Z. Malta

Malta ratified the ECHR in January 1967.[826] It ratified the CEDAW in March 1991,[827] but has not signed the CEDAW Optional Protocol.[828] It signed the Istanbul Convention in May 2012, and ratified it in July 2014.[829] Malta issued its first report to the CEDAW Committee in August 2002[830] and a second periodic report in May 2009.[831] It is not scheduled to issue another report until October 31, 2014.[832]

Malta provides relief in the form of asylum for, among others, members of a particular social group.[833] To be considered a particular social group, there must be both an immutable characteristic and the group must be perceived as being different from the rest of society.[834] "[T]here is no requirement *per se* to seek state protection in the country of origin before fleeing persecution from non-State actors."[835] The government consistently provided non-refoulement protections

824. *Id.* ¶ 8.8.

825. Concluding Observations of the Comm. on the Elimination of Discrimination Against Women: Bulgaria, Comm. on the Elimination of Discrimination Against Women, 52d Sess., July 9-27, 2012, U.N. Doc. CEDAW/C/BGR/CO/4-7 (Aug. 7, 2012).

826. ECHR Treaty Status, *supra* note 238.

827. CEDAW Treaty Status, *supra* note 239.

828. CEDAW Optional Protocol Treaty Status, *supra* note 240.

829. Istanbul Convention Treaty Status, *supra* note 88.

830. Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Combined Initial, Second and Third Periodic Report of States Parties: Malta, Comm. on the Elimination of Discrimination Against Women, 31st Sess., July 6-23, 2004, at 1, U.N. Doc. CEDAW/C/MLT/1-3 (Dec. 18, 2002).

831. Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Fourth Periodic Report of States Parties: Malta, Comm. on the Elimination of Discrimination Against Women, 47th Sess., Oct. 4-22, 2010, at 1, U.N. Doc. CEDAW/C/MLT/4 (June 4, 2009).

832. *See Human Rights Bodies*, OFF. HIGH COMMISSIONER HUM. RTS., http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx (select "Malta" from drop-box, select "CEDAW" hyperlink) (last visited May 28, 2014).

833. U.S. DEP'T OF STATE, MALTA 2013 HUMAN RIGHTS REPORT 9 (2014) [hereinafter MALTA 2013 HUMAN RIGHTS REPORT], *available at* http://www.state.gov/documents/organization/220518.pdf.

834. CHEIKH ALI ET AL., *supra* note 417, at 50.

835. *Id.* at 43.

where migrants who did not qualify as refugees could be granted subsidiary protection, which permits them to remain in the country on a year-to-year, renewable basis.[836]

Beneficiaries of subsidiary protection, and their dependents, were entitled to remain in the country, and received a variety of benefits including accommodations, integration programs, public education and training, and essential medical care.[837] Malta also provides for temporary protection to individuals who have a real risk of serious harm if they were to return to their home countries.[838]

Malta's 2012 HDI worldwide ranking is thirty-second.[839] Its 2012 GII worldwide ranking is thirty-ninth.[840] While Malta does not have in place a national women's hotline,[841] as of 2012, it had in place three shelters, addressing all of the reported need.[842]

AA. Hungary

Hungary ratified the ECHR in November 1992,[843] the CEDAW in December 1980,[844] and signed the Optional Protocol in December 2000.[845] It signed the Istanbul Convention in March 2014, but has not ratified it.[846] Hungary reported on its obligations under the CEDAW through an initial report in September 1982,[847] and submitted five periodic reports culminating with its most recent in June 2011.[848] It was obliged to submit a periodic report on March 30, 2013, but that report has not yet been submitted.[849]

Hungary recognizes three types of protection: (1) refugee protection; (2) subsidiary protection; and (3) "tolerated stay" protection encompassing the concept

836. MALTA 2013 HUMAN RIGHTS REPORT, *supra* note 833, at 9.

837. *Id.* at 8-9.

838. *See id.* at 7-8.

839. HUMAN DEVELOPMENT REPORT 2013, *supra* note 108, at 151 tbl.3.

840. *Id.* at 156 tbl.4.

841. WAVE REPORT, *supra* note 120, at 13.

842. *Id.* at 14-15, 181.

843. ECHR Treaty Status, *supra* note 238.

844. CEDAW Treaty Status, *supra* note 239.

845. CEDAW Optional Protocol Treaty Status, *supra* note 240.

846. Istanbul Convention Treaty Status, *supra* note 88.

847. Rep. of the Comm. on the Elimination of Discrimination Against Women, 12th Sess., Jan. 18-Feb. 5, 1993, ¶¶ 144-98, U.N. Doc. A/48/38; GAOR, 48th Sess., Supp. No. 38 (1993).

848. Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Combined Seventh and Eighth Periodic Reports of States Parties: Hungary, Comm. on the Elimination of Discrimination Against Women, 54th Sess., Feb. 11-Mar. 1, 2013, at 1, U.N. Doc. CEDAW/C/HUN/7-8 (Sept. 22, 2011) (the second report was submitted in 1986 (U.N. Doc. CEDAW/C/13/Add.1), the third in 1991 (U.N. Doc. CEDAW/C/HUN/3), the fourth and fifth in 2000 (U.N. Doc. CEDAW/C/HUN/4-5), and the sixth in 2006 (U.N. Doc. CEDAW/C/HUN/6)).

849. *See Human Rights Bodies*, OFF. HIGH COMMISSIONER HUM. RTS., http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx (select "Hungary" from drop-box, select "CEDAW" hyperlink) (last visited May 28, 2014).

of non-refoulement.[850] Refugee protection is indefinite.[851] Subsidiary protection is offered to "[a] person who is at a real risk of suffering" the death penalty, torture, inhuman or degrading treatment or punishment, or serious threat to her life or person because of indiscriminate violence in an armed conflict.[852] Tolerated stay status can be granted to individuals who have a "well-founded fear of persecution, torture, inhuman or degrading treatment or [the] death penalty, but who cannot benefit from refugee status or subsidiary protection."[853] Tolerated stay status is valid for one year, but can be withdrawn at any time or renewed upon expiration.[854]

Hungary's 2012 HDI worldwide ranking is thirty-seventh.[855] Its 2012 GII worldwide ranking is forty-second.[856] In 2012, Hungary provided no shelter services, and was unable to provide support to the more than 1,000 individuals that needed assistance.[857] All asylum seekers are eligible for free legal aid.[858] Hungary affords essentially the same rights to beneficiaries of subsidiary protection as it does to beneficiaries of refugee status, including family reunification benefits.[859]

Hungary recognizes in law and practice that gender-related claims may warrant specific considerations.[860] Despite these protections, the SRVAW has expressed concern about the "prevalence of violence against women and girls, including domestic violence," and the lack of work that has been "done to raise awareness of the subject in the public opinion, in the media and in education."[861] "The Special Rapporteur is particularly concerned that no specific legislation has been enacted to combat domestic violence and sexual harassment and that no protection or exclusion orders or shelters exist for the immediate protection of women victims of domestic violence."[862]

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850. *See* UNITED NATIONS HIGH COMM'R FOR REFUGEES, HUNGARY AS A COUNTRY OF ASYLUM: OBSERVATIONS ON THE SITUATION OF ASYLUM-SEEKERS AND REFUGEES IN HUNGARY ¶ 7 (2012), *available at* http://www.refworld.org/pdfid/4f9167db2.pdf.

851. *The Refugee Situation in Hungary*, HUNGARIAN RED CROSS, http://www.voroskereszt.hu/menekueltuegy/english/1144-the-refugee-situation-in-hungary.html (last visited May 29, 2014).

852. *EDAL Country Overview—Hungary*, EUR. DATABASE OF ASYLUM L. (Feb. 14, 2014), http://www.asylumlawdatabase.eu/en/content/edal-country-overview-hungary.

853. *Id.*

854. *Id.*

855. HUMAN DEVELOPMENT REPORT 2013, *supra* note 108, at 151 tbl.3.

856. *Id.* at 156 tbl.4.

857. WAVE REPORT, *supra* note 120, at 13, 131.

858. 2003. évi LXXX. törvény a Jogi Segítségnyújtásról (Act LXXX of 2003 on Legal Aid) (Hung.), *available at* http://ec.europa.eu/ewsi/UDRW/images/items/docl_15650_294267511.pdf. *See also EDAL Country Overview—Hungary*, *supra* note 852.

859. THE IMPACT OF THE EU QUALIFICATION DIRECTIVE, *supra* note 251, at 31.

860. *See* CHEIKH ALI ET AL., *supra* note 417, at 42.

861. Coomaraswamy Report, *supra* note 194, ¶ 2005.

862. *Id.* ¶ 2006.

BB. Romania

Romania ratified the ECHR in June 1994.[863] It ratified the CEDAW in January 1982,[864] and ratified the Optional Protocol to the CEDAW in August 2003.[865] It has neither signed nor ratified the Istanbul Convention.[866] Romania issued its first report in January 1987[867] and three periodic reports thereafter with the latest in December 2003.[868] It was obliged to issue a report on February 1, 2011, but that report has not yet been submitted.[869]

Romania offers asylum or refugee status pursuant to comprehensive asylum legislation passed in 2006.[870] Romania complies with its ECHR responsibilities by offering refugee status to successful asylum-seekers, pursuant to Article 14 of the Law of Asylum in Romania.[871] Romania offers subsidiary protection to meet its ECHR non-refoulement obligations, pursuant to Article 6.[872] Relief under either asylum or subsidiary protection affords essentially the same rights including family reunification benefits.[873]

Romania's 2012 HDI worldwide ranking is fifty-sixth.[874] Its 2012 GII worldwide ranking is fifty-fifth.[875] As of 2012, Romania did not have a national women's hotline.[876] As of 2012, Romania had in place thirty-five shelters, addressing about 37 percent of the reported need.[877]

VI. CONCLUSIONS

Despite years of international focus on eradicating domestic violence, the problem has not abated. Migrant domestic violence victims that lack legal immigration status are extremely vulnerable in this climate. Recognizing that

863. ECHR Treaty Status, *supra* note 238.

864. CEDAW Treaty Status, *supra* note 239.

865. CEDAW Optional Protocol Treaty Status, *supra* note 240.

866. Istanbul Convention Treaty Status, *supra* note 88.

867. Rep. of the Comm. on the Elimination of Discrimination Against Women, 12th Sess., Jan. 18-Feb. 5, 1993, ¶¶ 144-98, U.N. Doc. A/48/38; GAOR, 48th Sess., Supp. No. 38 (1993).

868. Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Sixth Periodic Report of States Parties: Romania, Comm. on the Elimination of Discrimination Against Women, 35th Sess., May 15-June 2, 2006, at 1, U.N. Doc. CEDAW/C/ROM/6 (Dec. 15, 2003) (the second and third report was submitted in 1992 (U.N. Doc. CEDAW/C/ROM/2-3) and the fourth and fifth in 1998 (U.N. Doc. CEDAW/C/ROM/4-5)).

869. *See Human Rights Bodies*, OFF. HIGH COMMISSIONER HUM. RTS., http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx (select "Romania" from drop-box, select "CEDAW" hyperlink) (last visited May 28, 2014).

870. Law No. 122/2006 on Asylum in Romania, OFFICIAL GAZETTE No. 428/18.05.2006.

871. *Id.* art. 14.

872. *Id.* art. 6.

873. *Id.* arts. 20, 24, 27.

874. HUMAN DEVELOPMENT REPORT 2013, *supra* note 108, at 151 tbl.3.

875. *Id.* at 156 tbl.4.

876. WAVE REPORT, *supra* note 120, at 13.

877. *Id.* at 14-15.

vulnerability, one state, the United Kingdom, developed a sophisticated protection system that includes offering permanent legal immigration status when the perpetrator of the domestic violence is the victim's spouse or partner, and is also a British citizen or U.K.-settled resident.[878] This type of relief, however, is an anomaly. The majority of domestic violence victims who have no legal immigration status suffer at the hands of perpetrators, and in most cases, pursue asylum, subsidiary protection, or humanitarian relief. In practice, the application of asylum law has met with incongruities across states, especially in the context of particular social group gender-based claims.

Many states have in place protections that are ECHR and CEDAW compliant. Moreover, many states are enacting systems that comply with Council of Europe mandates. Nevertheless, the U.N. system that monitors and evaluates compliance of state implementation efforts is somewhat ineffective.[879] In May 2013, the United Nations stated that some states do not provide requested information, and when information is provided it is, occasionally, lacking in quality.[880] Additionally, while most states have in place legal frameworks that strive for compliance, a strong argument can be made that implementation and enforcement efforts are lacking.

The SRVAW points to the lack of a legally binding instrument to monitor state responsibility to act with due diligence in responding to, preventing, and eliminating all forms of violence against women.[881] Realizing the implications that such disparities have in an interconnected system, the regional human rights bodies have sought to develop model systems that would create effective protections for this population, and which not only harmonize relief across this legally and geographically interconnected set of states, but mandate compliance. Based on the above survey, it seems that many states have been successful in strengthening their laws and constructing networks of resources to combat this problem as it relates to domestic violence generally. However, treaty obligations under the CEDAW require that states go further if they are to achieve the mandate, which includes eliminating violence against women, including protection for migrant domestic violence victims.

The development of the Istanbul Convention seems a positive corollary step toward harmonizing somewhat discordant systems, specifically as it relates to gender-based asylum claims. Article 60 obligates parties to implement gender-based asylum protection to further eradicate violence against women and domestic violence.[882] Article 61 reiterates non-refoulement principles for this purpose, as well.[883] However, to date, only eight EU-M States have ratified the Convention,[884]

878. *See supra* note 756 and accompanying text.
879. *See* Manjoo Report, *supra* note 24, ¶¶ 42, 69-70.
880. *Id.* ¶ 42.
881. *Id.*
882. Istanbul Convention, *supra* note 5, art. 60.
883. *Id.* art. 61.
884. Istanbul Convention Treaty Status, *supra* note 88.

and like the CEDAW, the Istanbul Convention monitors compliance through a reporting and review mechanism that is premised on the due diligence of states in meeting their international obligations.[885]

There is strong evidence to suggest that worldwide and regional human rights bodies are becoming more adept at developing specific standards that address some of the problems migrant domestic violence victims encounter. States have responded, and the changes are evident. However, the pace of reform is uneven across states, and the development of increasingly specific model systems may serve to bring some states that have heretofore been lagging further into line with the more robust and comprehensive state systems that exist today.

885. Istanbul Convention, *supra* note 5, art. 68.

MILLENNIUM DEVELOPMENT GOAL 6 AND THE TRIFECTA OF HIV/AIDS, MALARIA, AND TUBERCULOSIS IN AFRICA: A HUMAN RIGHTS ANALYSIS

DR. OBIAJULU NNAMUCHI*

I. INTRODUCTION AND PRELIMINARY BACKGROUND

At the Millennium Summit, convened as a key part of the Millennium Assembly of the United Nations,[1] in September 2000, participating world leaders unanimously ratified the Millennium Declaration—a set of objectives grounding the Millennium Development Goals ("MDGs" or "Goals").[2] The MDGs consist of the commitment by the global community to pursue a number of objectively and quantitatively verifiable Targets, with the deadline for reaching most of these Targets set at 2015.[3] Strikingly, of the eight Goals to which each country aspires to attain within the specified time frame, one—MDG 6—is devoted to combating HIV/AIDS, malaria, and other diseases.[4] Considering the devastation these diseases have inflicted, and continue to inflict, upon the lives and wellbeing of Africans, it is clear that this Goal holds special significance for people in the region. But whether the benchmarks of MDG 6 would actually be attained, come 2015, is mired in controversy as pessimism remains rife about Africa's capability to achieve this or any of the other Goals.

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1. G.A. Res. 53/202, ¶ 2, U.N Doc. A/RES/53/202 (Dec. 17, 1998).

2. United Nations Millennium Declaration, G.A. Res. 55/2, U.N. Doc. A/RES/55/2 (Sept. 8, 2000) (stating the objectives as being values and principles; peace, security, and disarmament; development and poverty eradication; protecting the environment; human rights, democracy, and good governance; protecting the vulnerable; meeting the special needs of Africa; and, strengthening the U.N.).

3. *Id.*; 2005 World Summit Outcome, G.A. Res. 60/1, U.N. Doc. A/RES/60/1 (Sept. 16, 2005); *see also Official List of MDG Indicators*, UNITED NATIONS STAT. DIVISION, http://unstats.un.org/unsd/mdg/Host.aspx?Content=Indicators/OfficialList.htm (last updated Jan. 15, 2008) [hereinafter *MDG Indicators*].

4. The remaining MDGs are to: eradicate extreme poverty and hunger, achieve universal primary education, promote gender equality and empower women, reduce child mortality, improve maternal health, ensure environmental sustainability, and develop a global partnership for development. *MDG Indicators*, *supra* note 3.

The African Union Conference of Health Ministers was quite categorical, "Africa is still not on track to meet the health Millennium Declaration Targets and the prevailing population trends could undermine progress made."[5] More recently, New York University professor of economics William Easterly documents other instances[6] including, inter alia, a statement by the U.N. Department of Public Information, "[a]t the midway point between their adoption in 2000 and the 2015 target date for achieving the [MDGs], sub-Saharan Africa is not on track to achieve any of the Goals."[7] But Professor Easterly vehemently disagrees with the conclusion, blaming the bleak picture on "poorly and arbitrarily" designed MDGs, the effect of which, in his view, has been widespread and misguided portrayal of Africa in a worse light than the true circumstances warrant.[8] Other scholars identify the "overly-ambitious" nature of the Goals themselves as the culprit.[9]

But regardless of design flaws or the overly-ambitious nature of the MDGs, evidence is beginning to percolate indicating that whilst challenges abound, there are bright spots in several countries in the region. Even in nations seriously lagging behind, new initiatives continue to be rolled out, aimed at bridging the gap between current realities and the MDGs. The political leadership is adamant about its commitment to achieving the Goals. Speaking at the 2008 World Economic Forum in Davos, Switzerland, Umaru Yar'Adua, the late president of Nigeria, echoed the regional attitude, "[f]or us in Africa, the achievement of the MDGs is our sacred duty."[10] This is quite an encouraging proclamation; nonetheless, whether this rhetoric is being or will be acted upon by authorities in the region, and if the strategies would be sufficient to pull the region out of its present doldrums, will begin to unfold as the various benchmarks specified in Goal 6, the focus of this discourse, are examined and will become even clearer as the 2015 deadline draws nigh. A critical aspect of this paper is its identification of what it calls "special population groups" (the most vulnerable groups in relation to the diseases) as worthy of being put "in front of the line," so to speak, in terms of receiving necessary interventions. Prioritizing the interest of vulnerable groups in the overall scheme of attending to population-wide challenges is a key requirement of human rights. It is a catechism forcefully advanced in this discourse.

This paper consists of six sections. Following the introduction, Part II examines global attempts to get a handle on the scourge of HIV/AIDS as well as

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5. African Union Conference of Ministers of Health, *African Health Strategy: 2007-2015*, at 2, AU Doc. CAMH/MIN/5(III) (Apr. 13, 2007), *available at* http://www.nepad.org/system/files/AFRICA_HEALTH_STRATEGY(health).pdf.

6. William Easterly, *How the Millennium Development Goals are Unfair to Africa*, 37 WORLD DEV. 26, 26 (2009).

7. UNITED NATIONS, AFRICA AND THE MILLENNIUM DEVELOPMENT GOALS: 2007 UPDATE 1 (2007), *available at* http://www.unicnairobi.org/Africa_and_MDGs_07_final.pdf.

8. Easterly, *supra* note 6, at 26.

9. *See* MICHAEL CLEMENS & TODD MOSS, CTR. FOR GLOBAL DEV., CGD BRIEF: WHAT'S WRONG WITH THE MILLENNIUM DEVELOPMENT GOALS? 1-2 (2005), *available at* www.cgdev.org/files/3940_file_WWMGD.pdf.

10. *World Leaders Issue Call to Action on MDGs*, PAMBAZUKA NEWS (Jan. 28, 2008), http://pambazuka.org/en/category/development/45713.

factors standing in the path to success in Africa. It also identifies measures that hold prospect for reversing the *status quo*. Part III continues this theme, albeit with a different focus, by interrogating efforts to control malaria in the region. The section analyzes the wide disparities between countries in the region in terms of incidence and resulting mortalities and proffers suggestions on how to bridge the divide—a necessity for attaining Goal 6. In Part IV, the paper zeroes in on the prevalence of TB in Africa and the adoption of the World Health Organization's ("WHO") directly observed treatment short course ("DOTS") as part of the Stop TB Strategy, which was recommended by the WHO as the cornerstone of national anti-TB strategies. The section argues that although this approach has resulted in significant improvement in the control and management of TB, a lot more still needs to be done, including scaling up a range of critical interventions via increases in budgetary allocation to TB. Part V seeks a human rights solution to the tragedy resulting from the trifecta of HIV/AIDS, malaria, and TB. Its central argument is that while health care-based interventions are certainly critical to making inroads into the situation, it must be strengthened with deploying resources to the conditions that combined to subject people to these diseases and conditions in the first place. The section projects underlying or social determinants of health as holding the key to freedom from the stranglehold that these diseases hold on human lives and, borrowing from liberation theology, calls for prioritizing the needs of vulnerable groups. The conclusion—Part VI—is that operationalizing the human rights-based recommendation of the paper is fundamental not only to consigning HIV/AIDS, malaria, and TB in Africa to the abyss of history, but also to positioning the region on a sustainable path toward attaining Goal 6.

II. HIV/AIDS

A. Impact and Relevant Benchmarks

There are two HIV/AIDS-related Targets: (i) to "[h]ave halted by 2015 and begun to reverse the spread of HIV/AIDS;" and (ii) "[a]chieve, by 2010, universal access to treatment for HIV/AIDS for all those who need it."[11] Definitionally, at least, the first arm of the Target appears to have been met in most regions of the world, including Africa.[12] The most recent data shows a decline in the number of new infections globally. A total number of 2.5 million people (including adults and children) were infected in 2011, 20 percent less than 2001.[13] There have been dramatic changes in infection pattern and incidence in the last decade. The incidence of HIV infection declined amongst adults by more than 25 percent in

11. *MDG Indicators*, *supra* note 3 (referencing Goal 6).

12. JOINT UNITED NATIONS PROGRAMME ON HIV/AIDS, GLOBAL REPORT: UNAIDS REPORT ON THE GLOBAL AIDS EPIDEMIC 2010, at 7 (2010), *available at* http://www.unaids.org/globalreport/documents/20101123_GlobalReport_full_en.pdf.

13. JOINT UNITED NATIONS PROGRAMME ON HIV/AIDS, GLOBAL REPORT: UNAIDS REPORT ON THE GLOBAL AIDS EPIDEMIC 2012, at 8 (2012) [hereinafter UNAIDS REPORT 2012], *available at* http://www.unaids.org/en/media/unaids/contentassets/documents/epidemiology/2012/gr2012/20121120_UNAIDS_Global_Report_2012_with_annexes_en.pdf.

thirty-nine countries, twenty-three of them in sub-Sahara Africa.[14] In fact, sub-Sahara Africa ranks second only to the Caribbean in reduction level, at 25 percent.[15] Despite these improvements, however, the region, comprising just 12 percent of the global population, bears the worst brunt of the pandemic,[16] accounting for nearly 70 percent of the global population of people living with HIV/AIDS ("PLWHA"), nearly one in every twenty adults (4.9 percent of people in the region).[17]

In 2011, deaths resulting from AIDS-related causes totaled 1.7 million globally, representing a 24 percent decline in AIDS-related mortality in comparison to 2005 when the number was 2.3 million.[18] Although the number of people dying from AIDS-related causes in sub-Sahara Africa declined by 32 percent from 2005 to 2011, the region was still responsible for 70 percent of such deaths in 2011.[19] Of the 17.1 million children around the world who were estimated to have lost one or both parents to AIDS in 2009, 15 million of them lived in sub-Saharan Africa.[20] Although the number of PLWHA is growing, the growth represents an increase in longevity due to improved access to treatment and other support services.[21]

The second arm of the Target, obligating countries to provide universal access to treatment for all those who need it by the year 2010,[22] appears to be more problematic as the deadline has passed and yet, except for Western countries, no other region met the Target.[23] Nevertheless, recent data indicate significant progress even in some of the worst affected countries. In fact, some dramatic result could have been recorded had it not been for the WHO's new recommendation on when antiretroviral therapy ("ART") should be initiated (CD4 count of or below 350 cells/mm3 in contrast to the previous criterion of CD4 count of or below 200 cells/mm3).[24] This change and its result notwithstanding, 2011 represents huge advances in scaling up access to ART. For the first time ever, a majority (54 percent) of those in need of treatment in low and middle-income

14. *Id.* at 11.

15. *Id.* at 8.

16. U.N. DEP'T OF ECON. & SOC. AFFAIRS, THE MILLENNIUM DEVELOPMENT GOALS REPORT 2012, at 39, U.N. Sales No. E.12.I.4 (2012) [hereinafter MDGS REPORT 2012], *available at* http://mdgs.un.org/unsd/mdg/Resources/Static/Products/Progress2012/English2012.pdf.

17. UNAIDS REPORT 2012, *supra* note 13, at 8.

18. *Id.* at 12.

19. *Id.*

20. MDGS REPORT 2012, *supra* note 16, at 41.

21. UNAIDS REPORT 2012, *supra* note 13, at 12.

22. *See id.* at 51-55.

23. *See* U.N. DEP'T OF ECON. & SOC. AFFAIRS, THE MILLENNIUM DEVELOPMENT GOALS REPORT 2010, at 45, U.N. Sales No. E.10.I.7 (2010) [hereinafter MDGS REPORT 2010], *available at* http://www.un.org/millenniumgoals/pdf/MDG%20Report%202010%20En%20r15%20-low%20res%2020100615%20-.pdf.

24. WORLD HEALTH ORG. [WHO] ET AL., TOWARDS UNIVERSAL ACCESS: SCALING UP PRIORITY HIV/AIDS INTERVENTIONS IN THE HEALTH SECTOR: PROGRESS REPORT 2010, at 6 (2010), *available at* http://whqlibdoc.who.int/publications/2010/9789241500395_eng.pdf?ua=1.

countries actually received it.[25] Even sub-Sahara Africa was not left behind. The region attained 56 percent coverage within the same period.[26] To grasp the real impact of this growth in the number of eligible people receiving ART, one has to see it in economic terms, in the sense of the effect on economic productivity (as mentioned in the abstract) in affected countries. At the end of 2011, 8 million people were receiving ART, representing "a 20-fold increase since 2003."[27] The availability of this life-saving intervention in low and middle-income countries has had dramatic impact, adding 14 million lived-years in these countries, including 9 million in sub-Sahara Africa.[28]

The WHO defines "universal access" as the existence of "an environment in which HIV prevention, treatment, care and support interventions are available, accessible and affordable to all who need them."[29] A critical element of this definition is that achieving universal access does not necessarily mean that everyone in need receives ART, for even if treatment is available, accessible and affordable, there is no guarantee that some people would not, for whatever reason, decide against treatment. Given this consideration, one could surmise that the obligation incumbent on countries is to create conditions that are conducive for the "participation" of affected individuals in the "planning and implementation of their health care," including ensuring that cost does not constitute an obstacle to treatment.[30] What constitutes "participation," in terms of health care implementation would vary according to the socioeconomic circumstances of those seeking treatment—meaning that for some individuals, free or subsidized coverage would be provided but not for others. Therefore, it is possible to achieve universal access in the sense indicated above, by removing obstacles to accessing treatment, even though 100 percent coverage is not reached. In fact, the WHO's specific parameter for achieving universal access to ART is achieving at least 80 percent coverage of those in need.[31] So, how does Africa fare? At the end of 2010 three countries, namely, Botswana, Namibia, and Rwanda achieved universal access to ART, whereas Swaziland and Zambia are not far off, having achieved an estimated coverage of 70-79 percent.[32]

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25. UNAIDS REPORT 2012, *supra* note 13, at 51.

26. *Id.*

27. *Id.* at 50.

28. *Id.*

29. WHO, PRIORITY INTERVENTIONS: HIV/AIDS PREVENTION, TREATMENT AND CARE IN THE HEALTH SECTOR 1 (2009), *available at* http://www.who.int/hiv/pub/priority_interventions_web.pdf.

30. International Conference on Primary Health Care, Alma-Ata, USSR, Sept. 6-12 1978, The Declaration of Alma-Ata, art. IV, *available at* http://whqlibdoc.who.int/publications/9241800011.pdf.

31. WHO ET AL., GLOBAL HIV/AIDS RESPONSE: EPIDEMIC UPDATE AND HEALTH SECTOR PROGRESS TOWARDS UNIVERSAL ACCESS: PROGRESS REPORT 2011, at 89 (2011) [hereinafter HIV/AIDS RESPONSE PROGRESS REPORT 2011], *available at* http://whqlibdoc.who.int/publications/2011/9789241502986_eng.pdf.

32. *Id.* at 90.

B. Special Population Groups

Although HIV/AIDS is no respecter of persons or territories, affecting every demography throughout Africa, the impact is disproportionately felt by certain population groups, namely, women, sex workers, and prisoners.[33] True, illness produces vulnerability, but even amongst the sick, some are more vulnerable than others. For this reason, arresting the spread of HIV/AIDS must start with identifying and attending to the special needs of these especially at-risk vulnerable groups.

There is a higher incidence of infection amongst women in Africa than men.[34] Over the last few years, HIV infection has stabilized everywhere else in the world, affecting both genders equally, except in sub-Saharan Africa and the Caribbean, where the rate of infection amongst women stand at 59 and 53 percent respectively of all people living with HIV.[35] This is a major problem; it not only touches on MDG 6, it also affects meeting the obligation of countries in sub-Sahara Africa regarding MDG 5 (reducing maternal mortality) and MDG 4 (reducing child mortality).[36] This is especially critical given that latest figures indicate that not only did the region record the largest proportion of maternal deaths attributable to HIV (10 percent), it was also responsible for 17,000, or 91 percent, of the 19,000 worldwide deaths formally known as "AIDS related indirect maternal deaths."[37] Failure to stem the tide of HIV amongst women in Africa has a domino-like impact on children and negatively impacts the ability of countries in the region to reduce child mortality as required under MDG 4.[38] This is because pregnancy for women living with HIV poses a real risk to their unborn children. Intrapartum transmission of HIV is common in most countries in the region due to massive drug unavailability and even where availability is not a problem, high cost

33. *E.g.*, MDGS REPORT 2012, *supra* note 16, at 39; UNAIDS REPORT 2012, *supra* note 13, at 70; WHO, INTEGRATING GENDER INTO HIV/AIDS PROGRAMMES IN THE HEALTH SECTOR, at xi-xii (2009) [hereinafter INTEGRATING GENDER], *available at* http://whqlibdoc.who.int/publications/2009/9789241597197_eng.pdf?ua=1 (reporting that although 50 percent of global HIV population are women, in Africa, the percentage is 60 percent); Stefan Baral et al., *Burden of HIV Among Female Sex Workers in Low-Income and Middle-Income Countries: A Systematic Review and Meta-Analysis*, 12 LANCET INFECTIOUS DISEASES 538 (2012); *Tuberculosis in Prisons*, WHO, http://www.who.int/tb/challenges/prisons/story_1/en/index.html (last visited Feb. 17, 2014) (reporting that HIV and TB are more common amongst prisoners).

34. INTEGRATING GENDER, *supra* note 33, at xi.

35. MDGS REPORT 2012, *supra* note 16, at 39; UNAIDS REPORT 2012, *supra* note 13, at 70 (putting the figure for sub-Sahara Africa at 58 percent).

36. *See* UNITED NATIONS DEV. GROUP, THEMATIC PAPER ON MDG 4: REDUCE CHILD MORTALITY, THEMATIC PAPER ON MDG 5: IMPROVE MATERNAL HEALTH, THEMATIC PAPER ON MDG 6: COMBAT HIV/AIDS, MALARIA AND OTHER DISEASES 4 (2010), *available at* http://www.undg.org/docs/11421/MDG4-6_1954-UNDG-MDG456-LR.pdf.

37. MDGS REPORT 2012, *supra* note 16, at 31.

38. United Nations Millennium Declaration, G.A. Res. 55/2, ¶ 19, U.N. Doc. A/RES/55/2 (Sept. 8, 2000) (MDG 4: reduction of child mortality).

effectively keeps the door shut for most women in those countries.[39] The complexity and interconnectedness of these problems threaten the ability of Africa to meet the Targets of the health-MDGs. It is essential, therefore, in order to make meaningful headway, that policy makers pay special attention to women, particularly maternal health, in formulation of strategies to deal with HIV pandemic in their respective jurisdictions.

The second vulnerable group in need of special protection is female sex workers. There are two reasons why taking concrete steps to deal with this group of HIV-infected women is very important to the entire MDGs project. First, akin to the multidimensional nature of the problems implicated in the case of pregnant women who are HIV positive (in terms of being a source of infection to the child and, therefore, touching on MDGs 4 and 5), paying particular attention to the special needs of female sex workers living with HIV/AIDS also impacts MDG 1 (poverty eradication). As more fully argued in Part V, prostitution is not a choice. Trading oneself for money is not a vocation one chooses upon careful reflection on its suitability or otherwise to the individual's aptitude and future wellbeing. It is not a source of individual fulfillment; instead, it is the direct result of a combination of circumstances in respect to which the individual lacks any real control. HIV/AIDS is symptomatic of the gruesome conditions under which these women must survive; it is not the root cause. Therefore, HIV/AIDS-related therapeutic interventions in isolation of sustainable strategies capable of expurgating the circumstances that makes sex work attractive in the first place is a move in the wrong direction.[40]

Countries seriously committed to solving HIV/AIDS problems amongst female sex workers must also be prepared to meet their obligation to efface poverty amongst its population, prostitute or otherwise.[41] Poverty breeds prostitution and vice versa, as evidenced by the high incidence of deprivation and want amongst this population.[42] Both set their victims on a path to HIV/AIDS. A resolution adopted by the U.N. captures this nexus and the need for synergistic response: "Recognizing that poverty, underdevelopment and illiteracy are among the principal contributing factors to the spread of HIV/AIDS, and noting with grave concern that HIV/AIDS is compounding poverty and is now reversing or

39. *See* JAMES MCINTYRE, UNAIDS, HIV IN PREGNANCY: A REVIEW 9-10 (1998), *available at* http://www.unaids.org/en/media/unaids/contentassets/dataimport/publications/irc-pub01/jc151-hiv-in-pregnancy_en.pdf.

40. *See* G.A. Res 65/277, ¶ 25, U.N. Doc. A/RES/65/277 (June 10, 2011).

41. *See MDG Indicators*, *supra* note 3 (describing the message of MDG 1 as demonstrating the linkages amongst the various MDGs and inviting countries to eradicate extreme poverty and hunger in their territories).

42. *See* JOINT UNITED NATIONS PROGRAMME ON HIV/AIDS, UNAIDS GUIDANCE NOTE ON HIV AND SEX WORK 18 (2012), *available at* http://www.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2009/JC2306_UNAIDS-guidance-note-HIV-sex-work_en.pdf.

impeding development in many countries and should therefore be addressed in an integrated manner."[43]

Another undergirding rationale for taking seriously the uniquely different circumstances of this vulnerable population is the consequence of inaction on others. More than any other demography, female sex workers constitute the most formidable source of HIV infection.[44] The rate of infection amongst them is staggering, up to 76.6 percent in some studies,[45] although a more recent large cohort study (involving the review of 102 articles and surveillance reports and covering nearly 100,000 female sex workers in fifty countries) found the overall prevalence rate to be near 12 percent; or, to put it differently, this population group is 13.5 times more likely to contract HIV than other women.[46] Direct cause of high infection rate amongst this population is the very low rate of condom use. A study of sexual behavior of female sex workers conducted in Guangzhou province, China, found consistent condom use—100 percent—with clients only amongst 30 percent of the women.[47] Of those who reported having a steady partner in the last twelve months, 41 percent of them, of which only 8 percent reported always using condom, and more than half, 53 percent, never did.[48] Worse still, their reported knowledge of prevention of sexually transmitted diseases/HIV and self-efficacy for condoms use was abysmally low.[49] A study describes male clients of these female sex workers as forming "a 'bridging population' for HIV/STD transmission" in that upon infection, they become a risk not only to female sex workers but also to the general population of females, particularly their regular partners.[50] Apparent from these studies is the high risk female sex workers pose to the general public, making their situation a case of utmost importance.[51]

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43. Declaration of Commitment on HIV/AIDS, G.A. Res S-26/2, ¶ 11, U.N. Doc. A/RES/S-26/2 (June 27, 2001).

44. Baral et al., *supra* note 33, at 543.

45. Geneviève Deceuninck et al., *Improvement of Clinical Algorithms for the Diagnosis of* Neisseria Gonorrhoeae *and* Chlamydia Trachomatis *by the Use of Gram-Stained Smears Among Female Sex Workers in Accra, Ghana*, 27 SEXUALLY TRANSMITTED DISEASES 401, 401 (2000).

46. Barel et al., *supra* note 33, at 538.

47. Anneke van den Hoek et al., *High Prevalence of Syphilis and Other Sexually Transmitted Diseases Among Sex Workers in China: Potential for Fast Spread of HIV*, 15 AIDS 753, 755 (2001).

48. *Id.* at 756.

49. *Id.* Note that although the rate of HIV infection in this study was very low (1.4 percent), and although other sexually transmitted diseases such as chlamydia (32 percent) were high, this is explicable on the basis that most of the women are new entrants to the sex work labor force. *See id.* at 756, 758.

50. Catherine M. Lowndes et al., *Management of Sexually Transmitted Diseases and HIV Prevention in Men at High Risk: Targeting Clients and Non-Paying Sexual Partners of Female Sex Workers in Benin*, 14 AIDS 2523, 2523 (2000).

51. *Id.* at 2524. Countries are beginning to scale up coverage of HIV prevention programs among sex workers within their territories. *See* UNAIDS REPORT 2012, *supra* note 13, at 21-22. Amongst the sub-Saharan African countries reporting in 2012, only Nigeria recorded less than 25 percent coverage. *Id.* at 24. Seven countries in the region recorded 75-100 percent coverage. *Id.* Nevertheless, the fact that African's largest country (Nigeria) performed poorly is worrisome given the high number of its HIV population. *HIV & AIDS in Nigeria*, AVERT, http://www.avert.org/hiv-aids-nigeria.htm#footnote3_pxmp1gn (last visited Feb. 18, 2014).

Related to female sex workers, although a distinct category in itself, are men who have sex with other men. Amongst this group, akin to female sex workers, condom use is quite low. Of ninety-six countries that reported on the use of condoms amongst men who have sex with men during their last episode of sex, only in thirteen was more than 75 percent compliance rate achieved.[52] Even more alarming is the low number of this population that gets tested for HIV infection. Current data indicates that amongst men who have sex with men, the median proportion of those who underwent test for HIV virus in the last twelve months is 38 percent.[53] This is problematic. Knowing one's status is a necessary first step in the prevention of the disease, especially among high risk groups such as men who have sex with men, an opportunity that is missed by refusal or neglect to submit to necessary screening.

On a positive note, countries in sub-Sahara Africa have shown considerable policy shift in the way it deals with this vulnerable group.[54] Rather than pretend that these people do not exist, sort of wish them away, their presence has gradually been publicly acknowledged in various countries in the region.[55] In 2012, twenty-two African nations reported on men who have sex with men in their territories, up from eleven in 2010.[56] This is significant because acknowledging their existence is a crucial preliminary step in recognizing the challenge, a necessary condition for dealing with the special needs of this marginalized population. Nonetheless, national expenditures on preventive strategies do not reflect this importance. Although funding levels for HIV programs for men who have sex with men has increased, the funds are mostly provided from foreign donors.[57] Of all the funds available for HIV programs for men who have sex with men in 2010-2011, 92 percent was provided by foreign donors.[58] This is a worrisome development not only on sustainability concerns but also on ownership of the programs.

Although prisoners "comprise one of the least represented populations in national HIV strategies,"[59] they are a significant vulnerable group in respect to which special intervention is urgently needed in order to meet the obligations imposed by MDG 6.[60] This is because infection rate amongst prisoners in most countries in sub-Sahara Africa far exceeds that of the general population. Consider these alarming statistics: in South Africa, an estimated 40 percent of its prison population is HIV-positive compared to 25 percent amongst the general population;[61] infection in Cameroonian and Ivorian prisons is 12 and 28 percent

52. UNAIDS REPORT 2012, *supra* note 13, at 28.

53. *Id.*

54. *See id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. UNITED NATIONS OFFICE ON DRUGS AND CRIMES ET AL., HIV AND PRISONS IN SUB-SAHARAN AFRICA: OPPORTUNITIES FOR ACTION 5 (2007), *available at* http://www.unodc.org/documents/hiv-aids/Africa%20HIV_Prison_Paper_Oct-23-07-en.pdf [hereinafter HIV AND PRISONS].

60. *See id.* at 21.

61. *Id.*

respectively, double or triple the HIV prevalence outside the prisons in these countries;[62] and at 5 percent, Mauritius' prisoner HIV prevalence is almost 50 times more than that of the adult general population.[63] This is worrisome on two levels. First, homosexual activity—a major transmission mode—is not uncommon in prisons in the region,[64] the implication being that the level of infection is likely to worsen overtime. Second, reintegration into the community upon release from prison would result in transmission to unsuspecting members of the public, causing a rise in the number of PLWHA[65] and making the task of meeting the obligations of MDG 6 even more daunting.

C. *Challenges and Key Interventions*

Treatment is difficult to come by in most parts of the region, even in countries with large HIV-positive population.[66] The reason nearly half of those in need of ART are not receiving it is, simply, cost.[67] Not many people in Africa can afford the cost of treatment, neither are the respective governments in the region in a position to provide *gratis* coverage.[68] With very few exceptions, resources allocated to HIV/AIDS interventions in most African countries, even those that are relatively well-off, are generally low. Take Nigeria, as an example. The proportion of its HIV population receiving ART is only 21 percent, leaving out more than three-quarters without any form of access.[69] The country's total allocation to HIV/AIDS in 2008 was $395 million, out of which 7.6 percent was contributed by the government, with the rest coming from external sources.[70] This

62. *Id.*

63. *Id.*

64. *Id.* at 16.

65. Rucker C. Johnson & Steven Raphael, *The Effects of Male Incarceration Dynamics on Acquired Immune Deficiency Syndrome Infection Rates Among African American Women and Men*, 52 J.L. & Econ. 251, 251-52 (2009) (finding a link between the exponential rise in the 1980s in African-American AIDS patients, particularly amongst African-American women—19 times at greater risk of being diagnosed with the virus than white women—with the surge in number of incarnated African-American men within the same period).

66. *See* WHO ET AL., GLOBAL UPDATE ON HIV TREATMENT 2013: RESULTS, IMPACT AND OPPORTUNITY 97 (2013) [hereinafter GLOBAL UPDATE ON HIV TREATMENT 2013], *available at* http://apps.who.int/iris/bitstream/10665/85326/1/9789241505734_eng.pdf.

67. The cost of ART treatments in South Africa are estimated to be between $500 and $900 per person per year. Brandon Bryn, *Science: Antiretroviral Therapy for HIV Worth the Price*, ADVANCING SCI., SERVING SOC'Y (Feb. 21, 2013), http://www.aaas.org/news/science-antiretroviral-therapy-hiv-worth-price.

68. GLOBAL UPDATE ON HIV TREATMENT 2013, *supra* note 66, at 96-97.

69. WHO, WORLD HEALTH STATISTICS 2011, at 96-97 (2011) [WORLD HEALTH STATISTICS 2011], *available at* http://www.who.int/whosis/whostat/EN_WHS2011_Full.pdf?ua=1; *see also* UNAIDS REPORT 2012, *supra* note 13, at 57 (putting the figure between 20 and 39 percent at the end of 2011).

70. NATIONAL AGENCY FOR THE CONTROL OF AIDS ET AL., FEDERAL REPUBLIC OF NIGERIA, NATIONAL AIDS SPENDING ASSESSMENT (NASA) FOR THE PERIOD 2007-2008: LEVEL AND FLOW OF RESOURCES AND EXPENDITURES OF THE NATIONAL HIV AND AIDS RESPONSE 20 (2010), *available at* http://www.unaids.org/en/media/unaids/contentassets/dataimport/pub/report/2008/NASA_Nigeria_2007-2008_en.pdf.

level of dependence on foreign funds raises questions about the sustainability of the advances, albeit minimal, that have been made.

The unpredictability of donor funding ought to be a source of concern to policy makers in the region, especially, given—as is the case in several countries such as Nigeria—low internal budgetary allocation to HIV/AIDS programs.[71] There is no guarantee of continued availability of external resources to take the place of deficits in internally generated resources of affected countries. Still, whether universal access to ART becomes a reality in sub-Sahara Africa anytime soon will hinge on the ability of each country to drastically narrow the gap between ART availability and need for treatment—and this, in turn, is dependent on monumental scaling up of HIV/AIDS budgets. The fact that only three countries (Botswana, Namibia, and Rwanda) in the region have been able to achieve universal access to ART is worrisome.[72] Halting the spread of HIV is indubitably a great achievement but it represents just one side of the equation that would need to be crunched in order to gain an upper hand against a disease that has cut short millions of productive lives in the region and created millions of widows and orphans. Sub-Sahara Africa alone is responsible for 70 percent of AIDS-related deaths globally.[73] Scaling up access to ART is urgently needed to reverse this atrocity.

The aphorism "prevention is better than cure" is one with which public health experts are quite familiar. The notion is that preventing the onset of illness is vastly more beneficial than having to subsequently expend scare resources upon falling ill—a notion that is defensible on the ground that adopting the former approach spares the individual the agony and suffering that could result from pain, discomfort, and even death as well as the financial resources involved in physician and hospital services.[74] Nowhere is this principle truer than in cases of illnesses for which there is no known cure such as HIV/AIDS. For the vast majority of people in Africa, the onset of HIV signals doom ahead since, as indicated previously, ART is in very limited supply in virtually all the countries in the region. This makes knowledge of ways to shield oneself from contracting the disease very critical. Yet, on this count, the region lags seriously behind others. Gender-desegregated data shows the number of males aged 15-24 years with comprehensive correct knowledge of HIV/AIDS in Africa to be 33 percent, with some countries such as Niger and Madagascar recording as low as 16 percent.[75]

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71. *Id.* at xvi.

72. HIV/AIDS RESPONSE PROGRESS REPORT 2011, *supra* note 31, at 90.

73. UNAIDS REPORT 2012, *supra* note 13, at 12.

74. Note that although for ages preventive health services have generally been considered more cost effective than curative care, a recent study disputes whether the difference is really significant. *See* Joshua T. Cohen et al., *Does Preventive Care Save Money? Health Economics and the Presidential Candidates*, 358 NEW ENG. J. MED. 661, 661 (2008).

75. WORLD HEALTH STATISTICS 2011, *supra* note 69, at 33 ("This [data refers to] the percentage of males who correctly identify the two major ways of preventing the sexual transmission of HIV, who reject the two most-common local misconceptions about HIV transmission and who know that a healthy-looking person can transmit HIV."). *See also* MDGS REPORT 2012, *supra* note 16, at 40.

Females fare even worse. Just 25 percent of females between the ages of 15 and 24 in Africa have comprehensive correct knowledge of HIV/AIDS.[76] This huge knowledge deficit portends trouble for policy makers in affected countries, an issue that will be discussed shortly.

Related to the problem of lack of information about HIV/AIDS is risky sexual behavior. There are two ways to analyze this problem, namely, as (a) deriving from lack of knowledge about safe sexual practices, or (b) refusal or neglect to apply already acquired knowledge. Taboos, myths, politics, and misconceptions surrounding sex and sexual activities militate against appropriate sexual practices.[77] This is among the principal reasons for the high rate of HIV/AIDS in Africa, particularly if one considers that the prevalence of condom use by adults aged 15-49 years during higher risk sex in most countries in the region is the lowest anywhere in the world. For instance, the prevalence rate of condom use, for males and females respectively, in Madagascar, Niger, and Ethiopia, between 2000 and 2009 was 9:2 percent,[78] 7:8 percent,[79] and 9:11 percent.[80] Regardless of one's opinion as to the appropriate means of protecting oneself against infection—abstinence (official policy of the Bush administration and the Catholic Church)[81] or condom use—the key is that unprotected sex among high-risk population, such as female sex workers, derives from ignorance.

Ignorance, in the form of lack of comprehensive knowledge of HIV/AIDS or how to protect oneself against infection, implicates the responsibility of policy makers in this very critical area. This is particularly true in the case of young people initiating sex very early in life; that is, males and females 15-24 years old having sex before attaining 15 years.[82] There is no denying that campaigns have been mounted in various countries, via multiple outlets, to educate the citizenry on these issues.[83] Nonetheless, the data recited above indicates gaps and ineffectiveness, either with the message itself or its delivery. Innovative strategies, designed with the most-at-risk populations in contemplation would go a long way in turning things around. The introduction of sex education in school curricula of

76. WORLD HEALTH STATISTICS 2011, *supra* note 69, at 34. *See also* MDGS REPORT 2012, *supra* note 16, at 40.

77. Charbel Ragy, *HIV/AIDS: Tackling Taboos in Africa*, U.N. WORKS FOR PEOPLE AND THE PLANET, http://wayback.archive.org/web/20090206084408/http://www.un.org/works/sub3.asp?lang=en&id=57 (last visited Sept. 20, 2013); *see generally* Shereen El Feki, *Middle-Eastern AIDS Efforts are Starting to Tackle Taboos*, 367 LANCET 975, 976 (2006).

78. WORLD HEALTH STATISTICS 2011, *supra* note 69, at 108-09.

79. *Id.*

80. *Id.*

81. Elaine Unterhalter et al., *Essentialism, Equality, and Empowerment: Concepts of Gender and Schooling in the HIV and Aids Epidemic*, *in* GENDER EQUALITY, HIV, AND AIDS: A CHALLENGE FOR THE EDUCATION SECTOR 11, 26 (Shelia Aikman et al. eds., 2008); Cynthia Dailard, *Abstinence Promotion and Teen Family Planning: The Misguided Drive for Equal Funding*, GUTTMACHER REP. ON PUB. POL'Y, Feb. 2002, at 1, 1.

82. UNAIDS REPORT 2012, *supra* note 13, at 17.

83. MDGS REPORT 2012, *supra* note 16, at 40.

many countries is a step in the right direction.[84] But to serve as an effective tool in the campaign against HIV/AIDS, the curricula should be regularly modified and revised in tandem with emerging public health threats, amongst which now includes comprehensive knowledge about HIV/AIDS and preventive measures against infection. Furthermore, the method of communicating the message should mirror the communication tendencies of the target population, such that where the intended recipient of the message is adolescents, movies, drama, and cartoon characters (featuring people within relatively similar age and experience bracket) should be part of the project.[85] Another strategy worth pursuing is employing credible voices in the campaign such as religious, civic, and youth leaders as well as other respectable figures in the community.

Another area where appropriate intervention could yield dramatic dividend in reducing HIV infection is male circumcision in countries where the procedure is not routine. This recognition underscored the WHO's endorsement of the procedure as an "efficacious intervention for HIV prevention in countries and regions with heterosexual epidemics, high HIV and low male circumcision prevalence," citing, as evidence, approximately 60 percent reduction in heterosexual infection resulting from the procedure.[86] Although most countries in which male circumcision has been recommended have adopted the intervention and adopted necessary implementation schemes, actual operationalization in several countries has been lethargic, at best. By the end of 2011, six countries—Malawi, Mozambique, Namibia, Rwanda, Uganda, and Zimbabwe—have managed to circumcise fewer than 5 percent of the target population.[87] These are also amongst the countries with the highest proportion of HIV/AIDS population; and, for these countries to woefully fail to appropriately scale up its intervention strategy in an area, such as this, requiring minimal deployment of resources is a source of serious concern:

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84. Obiajulu Nnamuchi, The Right to Health in Nigeria 11 (2007) (Draft Report, 'Right to health in the Middle East' project, Law School, University of Aberdeen), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1622874 (noting, in respect to Nigeria, the government's approval of the introduction of Family Life and HIV Education (FLHE) curriculum (formerly National Sexuality Education Curriculum) for implementation at the state and local government levels and use in teaching reproductive sex education at secondary schools, in addition to a national campaign promoting the use of contraceptives).

85. *See* MDGS REPORT 2012, *supra* note 16, at 40-41 (reporting, against the backdrop of targeted media campaign on behavior change amongst adolescents, the widely positive impact of dramatizing the experiences relating to HIV/AIDS in Kenya, Zambia, Trinidad and Tobago, and Ukraine in terms of not only watching and learning from the program but discussing the issues raised (need to get tested, avoidance of risky behavior, stigma, safe sex and so forth) with friends, thus spreading the message).

86. *Male Circumcision for HIV Prevention*, WHO, http://www.who.int/hiv/topics/malecircumcision/en (last visited Oct. 3 2013). *Contra* Maria J. Wawer et al., *Circumcision in HIV-Infected Men and its Effect on HIV Transmission to Female Partners in Rakai, Uganda: A Randomized Controlled Trial*, 374 LANCET 229, 229 (2009) (finding, in contrast to the previous studies, that male circumcision does not reduce vaginal-penile HIV infection and recommending use of condom, even after circumcision, as a more effective prevention method).

87. UNAIDS REPORT 2012, *supra* note 13, at 21.

> The unit cost of voluntary medical male circumcision is relatively low, and unlike most other prevention or treatment efforts, requires only one-time rather than lifelong expenditure. Nevertheless, countries have allocated relatively few resources towards scaling up this intervention, with less than 2 [percent] of total HIV expenditure allocated to voluntary medical male circumcision in 6 of the 14 priority countries with data available (Botswana, Kenya, Lesotho, Namibia, Rwanda and Swaziland).[88]

Although some of these countries (Botswana, Kenya, Namibia, and Swaziland) have infused more resources into their national expenditure for "rolling out" male circumcision,[89] the question which continues to resurface remains: what about lives that could have been saved or human suffering that could have been avoided had the urgency of the situation been a prime consideration? An appropriate response to this question may never come. In the final analysis, making headway in regional efforts at meeting the relevant benchmarks of MDG 6 must involve scaling up initiatives aimed at inducing behavior change, access to condoms, encouraging male circumcision, programs specifically focused on sex workers and men who sex with men, and access to ART.[90]

D. Discrimination Against People Living With HIV/AIDS: An Affront to Human Rights

The central question this sub-section grapples with is whether the prohibition of international human rights law on discrimination against PLWHA has any relevance to meeting the various benchmarks of MDG 6. This question is necessary because in many cases, the worst aspect of the injury suffered by PLWHA is not rooted in the physiological consequences of the disease itself but the way society treats them, the social loss that would follow them everywhere they go on account of their HIV/AIDS status. Meeting the relevant benchmarks of MDG 6, particularly universal access to ART, hinges most profoundly on how society treats its HIV/AIDS population. The heinous nature of discrimination and the importance the international community attaches to its elimination, particularly in the realm of health, is underscored by the requirement in the foremost international instrument on health—the International Covenant on Economic, Social and Cultural Rights ("ICESCR")[91]—for immediate implementation, not subject to progressive realization.[92]

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88. *Id.*

89. *Id.*

90. *Id.* at 16.

91. International Covenant on Economic, Social and Cultural Rights art. 12, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

92. United Nations, Comm. on Econ., Soc. & Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (article 12 of the International Covenant on Economic, Social and Cultural Rights), ¶ 30, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000), *reprinted in* United Nations, Compilation of General Comments and General Recommendations Adopted by Human

The major international human rights instruments—Universal Declaration of Human Rights,[93] the International Covenant on Civil and Political Rights ("ICCPR"),[94] and the ICESCR[95]—protect individuals, including PLWHA, against being subjected to discrimination. In addition, virtually all modern constitutions and major international and regional treaties on human rights contain similar provision.[96] Prohibition against discrimination is a legal as well as an ethical issue. Two ethical principles are critical here. The first, principle of beneficence, or the moral obligation to act for the benefit of other, demands that vulnerable populations, such as PLWHA, should be treated humanely, compassionately, and with respect.[97] The second ethical principle, nonmaleficence, proscribes actions that would harm others, captured most eloquently in the maxim *primum non nocere* (first do no harm).[98]

What would count as discrimination? Instances abound but discrimination is typically manifested in verbal abuse,[99] physical assault,[100] denial[101] or termination of employment,[102] denial or revocation of tenancy or other accommodation rights,[103] denial of medical services,[104] and so forth. Many of these breaches of human rights arise out of ignorance; yet, in others, the act was purposeful. The

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Rights Treaty Bodies, at 94, U.N. Doc. HRI/GEN/1/Rev.7 (May 12, 2004) [hereinafter General Comment No. 14].

93. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 2, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) ("Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.").

94. International Covenant on Civil and Political Rights arts. 2, 26, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

95. ICESCR, *supra* note 91, art. 2(2).

96. *See, e.g.*, S. AFR. CONST. 1996, ch. 2, § 9; Convention on the Rights of the Child art. 2, Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990); Convention on the Elimination of All Forms of Discrimination against Women arts. 1, 2, Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981); International Convention on the Elimination of All Forms of Racial Discrimination arts. 1, 2, Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969); African Charter on Human and Peoples' Rights arts. 18(3), 28, June 27, 1981, 1520 U.N.T.S. 217; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa art. 2, July 11, 2003, OAU Doc. CAB/LEG/66.6, *reprinted in* 1 AFR. HUM. RTS. L.J. 40, 53-63 (2001) (entered into force Nov. 25, 2005) [hereinafter Maputo Protocol]; African Charter on the Rights and Welfare of the Child art. 3, July 11, 1990, OAU Doc. CAB/LEG/24.9/49 (entered into force Nov. 29, 1990).

97. *See* TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 166 (5th ed. 2001).

98. *See id.* at 113.

99. UNAIDS REPORT 2012, *supra* note 13, at 79 tbl.8.1 (reporting that 56 percent, or more than half of PLWHA in Kenya, have been verbally abused as a result of their HIV status).

100. *Id.* (reporting that 28 percent of PLWHA in Nigeria have been victims of physical assault on account of their HIV status).

101. *Id.* (reporting that 37 percent of PLWHA in Rwanda were denied employment as a result of their HIV status).

102. *Id.* (reporting that 65 percent of PLWHA in Rwanda lost their jobs due to their HIV status).

103. *See id.*

104. *Id.* (reporting that 21 percent of PLWHA in Nigeria were denied health services as a result of their HIV status).

case of *Georgina Ahamefule v. Imperial Medical Center & Dr. Alex Molokwu* is quite illustrative.[105] The plaintiff, who lost her job as a nurse on account of her HIV status, was barred from entering the courtroom in which her lawsuit was being heard because of fear that her presence would expose others in the courtroom to risk of infection.[106] Whether the presiding judge acted purposefully or out of ignorance is yet to be determined. What is important is the harsh tenor of the decision handed down by Judge Idowu, to whom the case was subsequently transferred, "that the purported termination of the Plaintiff's employment is illegal, unlawful and actuated by malice and extreme bad faith";[107] in other words, the termination was blatantly discriminatory. The ethical implication of discrimination is critical both for PLWHA and those whose professional lives would involve dealing with them, individuals upon whom PLWA would rely for therapeutic and legal protection. There are two prongs to this problem. First, fear of discrimination, particularly by health professionals, would dampen the motivation to get tested. Knowing one's HIV/AIDS status is a necessary first step to therapeutic intervention and this could be defeated by the way individuals perceive their treatment options. An argument that has been advanced by gay rights activists is that "fear that test result might be released to people that could stigmatize or in some other ways negatively treat the individual would hardly incentivize testing."[108] This could have a domino-like effect on the health of the community.

The second problem is related to the first. Upon knowing their status, would PLWHA be open to receiving treatment if they fear negative consequences on account of their newly-discovered status? The answer is clearly negative. One may seek to undermine the critical nature of this second concern by pointing out the number of PLWHA in various countries who are eager to receive ART but cannot find any.[109] True, the number in some countries is quite staggering, but what nobody knows for certain is the number of people who, out of fear of possible

105. Ahamefule v. Imperial Med. Centre & Dr. Alex Molokwu, [2012] (unreported) Suit No. ID/1627/2000 (Nigeria), *available at* http://www.escr-net.org/sites/default/files/Mrs%20Georgina%20Ahamefule%20v.%20Imperial%20Medical%20Centre%20%26%20Alex%20Molukwu.pdf.

106. *Id.* at 1; *see also* Ebenezer Durojaye, *So Sweet, So Sour: A Commentary on the Nigerian High Court's Decision in the* Georgina Ahamefule v Imperial Hospital & Another *Relating to the Rights of Persons Living with HIV*, 13 AFR. HUM. RTS. L.J. 464, 466 (2013).

107. *Ahamefule*, Suit No. ID/1627/2000, at 22 (Nigeria).

108. Obiajulu Nnamuchi & Remigius N. Nwabueze, *Duty to Warn of the Risks of HIV/AIDS Infection in Africa: An Appropriate Legal Response?*, 22 ANNALS HEALTH L. 386, 399 (2013), *referencing* Martha Swartz, *Is There a Duty to Warn?: Does Safety Ever Warrant Releasing Confidential Information About HIV-infected People?*, HUM. RTS., Spring 1990, at 40, 45.

109. This claim is defensible on the ground that in virtually all the countries in Africa the need for ART far outstrips supply, and this is true even in countries that are said to have achieved universal access. *See* Sydney Rosen et al., *Rationing Antiretroviral Therapy for HIV/AIDS in Africa: Choices and Consequences*, 2 PLOS MED. 1098, 1098-99 (2005) (discussing rationing ART because demand outweighs supply).

negative repercussions, should their status become known, are dying in silence.[110] This number is usually not accounted for in official statistics because these people typically disappear, never, in some cases, to be heard from or seen by anyone in a position to document their need or attend to it. This, clearly, does not advance the march toward attaining the target of universal access to ART, a key component of MDG 6.

An obvious response to discriminatory attitudes toward PLWHA is to establish prohibitory legal and policy frameworks especially in countries where the vice is substantial. Because this suggestion is in tune with not only logic but common sense, one would assume universal existence of such frameworks. Yet, in 2012, only 61 percent of countries report the existence of such laws in their territories; meaning, as UNAIDS laments, "in the epidemic's fourth decade, nearly 4 in 10 countries worldwide still lack any specific legal provisions to prevent or address HIV-related discrimination."[111] But merely having such laws in national criminal codes or in some other legislative regime does not automatically ensure protection for PLWHA. For such result to materialize, two things are necessary. First is awareness. PLWHA need to be educated about the existence of such laws and how they protect their interests. A knowledge gap in this area has meant that, as attested to in surveys conducted in more than forty countries, very few of those that have been victims of HIV-related discrimination knew where or how to access legal remedy.[112] Second, the effectiveness of any legislative regime is measured by the rate of compliance; and the compliance level itself is a product of consciousness about the rationales undergirding the framework. Establishing a punitive legal regime without laying the necessary background for attitudinal changes in the desired direction would amount to an exercise in futility. Many of the negative treatments received by PLWHA in sub-Sahara Africa are products of ignorance or misperception of the state of affairs by the general public. The case of *Ahamefule* above is illustrative.[113] Sensitization campaigns aimed at educating the people about the disease and the true risk posed by sufferers would go a long

110. *See, e.g.*, Bradford McIntyre, *Understanding HIV/AIDS*, POSITIVELY POSITIVE (Dec. 2001), http://www.positivelypositive.ca/articles/aids.html (explaining the fear that people have about revealing their disease and the consequences involved, including the lack of proper treatment).

111. UNAIDS REPORT 2012, *supra* note 13, at 80. But this conclusion should be approached with caution. Apart from the fact that the numbers were derived from submissions by NGOs, some of which, presumably, might not represent the most credible sources of that kind of information, absence of HIV-specific anti-discrimination legal regime does not necessarily translate to non-protection for PLWHA. *See id.* at 81. For instance, Nigeria was amongst the countries represented as lacking an HIV-specific anti-discrimination statute, yet as the case of *Ahamefule*, discussed previously, shows the country has a robust framework that adequately protects PLWHA. *Id.* fig.8.2.

112. *Id.*

113. *See* notes 105-08 and accompanying text; *see also* Nnamuchi, The Right to Health in Nigeria, *supra* note 84, at 11, 13-15 (suggesting that increasing the public's awareness and knowledge regarding reproductive health information and services are crucial to PLWHA).

way in ensuring optimal protection of the interests of PLWHA in all aspects of living.[114]

III. MALARIA

> *Behind the statistics and graphs lies a great and needless tragedy: malaria—an entirely preventable and treatable disease—still takes the life of an African child every minute. The most vulnerable communities in the world continue to lack sufficient access to long-lasting insecticidal nets, indoor residual spraying, diagnostic testing, and artemisinin-based combination therapies.*[115]
>
> – Margaret Chan, WHO Director-General

A. Impact and Relevant Benchmarks

Target 6C—to have halted and begun to reverse the incidence of malaria by 2015—is of special relevance to Africa.[116] Because Africa shoulders the greatest burden of the disease, it stands to reap greater benefit than any other region from reduction in its occurrence. In 2011, an estimated 3.3 billion people were at the risk of malaria worldwide, with the highest number of cases (80 percent) in sub-Sahara Africa.[117] The region also leads the rest of the world in the number of malaria-related deaths, accounting for 90 percent of all mortalities reported within the same period.[118] As high as 25-35 percent of outpatient visits, 20-45 percent of hospital admissions, and 15-35 percent of hospital deaths are attributable to

114. Dividends inevitable from this type of intervention, resulting from attitudinal changes, are already evident in countries seriously committed to improving the socioeconomic circumstances of PLWHA. *See* UNAIDS REPORT 2012, *supra* note 13, at 84 (reporting that an overwhelming majority of people in Lesotho, 80 percent of the population, would accept as teachers people who are HIV positive and would buy farm produce from an HIV infected vendor, and in Haiti, a community-based, anti-stigma campaign resulted in significant growth in the number of people submitting to screening for HIV and TB).

115. Margaret Chan, *Foreword* to WHO, WORLD MALARIA REPORT 2012, at v, v (2012) [hereinafter WORLD MALARIA REPORT 2012], *available at* http://www.who.int/malaria/publications/world_malaria_report_2012/report/en.

116. More ambitious targets have since been adopted. *See, e.g.*, World Health Assembly Res. 58.2, Rep. of the World Health Assembly, 58th Sess., May 16-25, 2005, WHA58/2005/REC/1, at 4-5 (May 23, 2005) (setting a new target of reducing malaria cases and mortalities by 75 percent by 2015 from 2000 levels); ROLL BACK MALARIA, REFINED/UPDATED GMAP OBJECTIVES, TARGETS, MILESTONES AND PRIORITIES BEYOND 2011, at 1 (stating the retention of the target of achieving a 75 percent reduction in malaria cases by 2015, like the WHA Resolution, but adding an objective of reducing malaria mortalities to near zero by the end of 2015). The two new targets were established in 2005 and 2011 respectively. *See* WORLD MALARIA REPORT 2012, *supra* note 115, at 13.

117. WORLD MALARIA REPORT 2012, *supra* note 115, at 1.

118. *Id.*

malaria in high-burden African countries ("HBCs") (that is, the top twenty two countries ranked in terms of absolute number of cases).[119]

There is also an economic dimension to this problem. Annually, malaria slows economic growth in the region by 1.3 percent,[120] resulting in 32 percent lower regional GDP than would have been the case without the occurrence of the disease.[121] The huge toll exacted by malaria on Africans is such that countries in the region have made its eradication a centerpiece of regional health strategies.[122] Thus, even before the MDGs, these countries have joined forces to mitigate the impact of the disease amongst their respective populations. The Abuja Declaration on Roll Back Malaria in Africa, adopted by African heads of state and government in April 2000, set a target of halving malaria mortality in Africa by 2010, by ensuring that by 2005 at least 60 percent of those suffering from, or at the risk of, malaria have timely access to appropriate preventive or curative measures.[123]

B. Special Population Groups

Pregnant women and children are particularly vulnerable to malaria attack. Due to reduced immunity during pregnancy and low immunity in the case of children, they are more susceptible to malaria than the general population.[124] Although other regions are also affected, the situation is worst in Africa. For instance, the post-neonatal child death rate attributable to malaria in 2010 was 7 percent globally but 15 percent in Africa.[125] The good news is that countries are increasingly becoming cognizant of the special risk category of these vulnerable segments of the population, explaining, for instance, the creative ways being adopted in the distribution of insecticide-treated bed nets ("ITNs"). In Africa, thirty-three of the forty countries that distribute ITNs free of charge do so through antenatal clinics whereas twenty-seven countries distribute them through children's immunization clinics.[126] For these two groups, intermittent preventive malaria ("IPT") therapy is recommended.[127]

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119. ROLL BACK MALARIA, WHO & UNICEF, WORLD MALARIA REPORT 2005, at xvii, 21 (2005) [hereinafter WORLD MALARIA REPORT 2005], *available at* http://whqlibdoc.who.int/publications/2005/9241593199_eng.pdf?ua=1.

120. ROLL BACK MALARIA & WHO, THE ABUJA DECLARATION AND THE PLAN OF ACTION 1 (2003) [hereinafter THE ABUJA DECLARATION], *available at* http://sa.au.int/en/sites/default/files/Abuja_Declaration_2000.pdf.

121. *Id.*

122. *E.g.*, *id.*

123. *Id.* at 4-5.

124. Julianna Schantz-Dunn & Nawal M. Nour, *Malaria and Pregnancy: A Global Health Perspective*, 2 REVIEWS IN OBSTETRICS & GYNECOLOGY 186, 188-90 (2009); *Lives at Risk*, WHO (Apr. 25, 2003), http://www.who.int/features/2003/04b/en.

125. WORLD MALARIA REPORT 2012, *supra* note 115, at 13 (citing Li Liu et al., *Global, Regional, and National Causes of Child Mortality: An Updated Systematic Analysis for 2010 with Time Trends Since 2000*, 379 LANCET 2151, 2156 (2012)).

126. WORLD MALARIA REPORT 2012, *supra* note 115, at 23.

127. *Id.* at 6 (defining IPT as the "administration of a full course of an effective antimalarial treatment at specified time points to a defined population at risk of malaria, regardless of whether they are parasitaemic, with the objective of reducing the malaria burden in the specific target population").

C. *Prevention, Control, and Treatment Challenges*

> *Defeating malaria will require a high level of political commitment, strengthened regional cooperation, and the engagement of a number of sectors outside of health, including finance, education, defence, environment, mining, industry and tourism. The fight against this disease needs to be integrated into the overall development agenda in all endemic countries.*[128]
>
> – Margaret Chan, WHO Director-General

The Abuja Declaration on Rollback Malaria is strikingly similar to the commitment explicit in Target 6C.[129] Both are aimed at arresting the incidence of, and mortality associated with malaria through a set of preventive, management, and curative interventions.[130] The availability of these interventions to children under five is a proxy for the likelihood of attaining the Target since children in this age group are at the greatest risk of developing and dying from malaria.[131] MDG 6 specifies two relevant indicators for gauging country progress: (i) the proportion of children under five sleeping under ITNs; and (ii) those with fever that are treated with appropriate anti-malarial drugs.[132] On these two fronts, African countries have historically lagged behind—the reason, in part, for the high mortality associated with the disease in the region. But recent changes in strategy are beginning to bear fruits. Owing to increased funding, global distribution of mosquito nets by manufacturers has witnessed an astronomical growth, rising from 6 million in 2004 to 145 million in 2010.[133] This has resulted in the delivery of about 326 million nets by manufacturers from 2009 to 2011—a significant achievement, although to reach universal coverage, a total of about 450 million are needed.[134]

See also id. at 31-34. As of 2011, 34 of the 43 countries in Africa described as "endemic countries/areas with ongoing transmission of *P. falciparum*" have adopted policies for IPT for Pregnant Women (IPTp). *Id.* at 32. Regarding IPT for infants (IPTi), only Burkina Faso has incorporated the strategy in its antimalarial policy, although plans are underway in several countries to follow suit. *Id.*

128. Margaret Chan, *Foreword* to WORLD MALARIA REPORT 2012, *supra* note 115, at v.

129. *Compare* THE ABUJA DECLARATION, *supra* note 120, at 4 ("Halve the malaria mortality for Africa's people by 2010 . . . ."), *with MDG Indicators*, *supra* note 3, Target 6.C ("Have halted by 2015 and begun to reverse the incidence of malaria . . . .").

130. THE ABUJA DECLARATION, *supra* note 120, at 4-5; *MDG Indicators*, *supra* note 3.

131. *See* WORLD MALARIA REPORT 2012, *supra* note 115, at 1.

132. *MDG Indicators*, *supra* note 3, Indicators 6.7, 6.8.

133. WORLD MALARIA REPORT 2012, *supra* note 115, at 23-24. There has been a steady annual upsurge in the level of "[i]nternational disbursements to malaria-endemic countries [that have] increased . . . from less than US$ 100 million in 2000 to US$ 1.71 billion in 2010 and were estimated to be US$ 1.66 billion in 2011 and US$ 1.84 billion in 2012." *Id.* at 15. Most of the funds disbursed to malaria endemic countries for malaria control came from the Global Fund to Fight AIDS, Tuberculosis and Malaria, which accounted for 39 percent and 40 percent of estimated disbursed funds in 2011 and 2012 respectively. *Id.* Other major sources of funding are "the US President's Malaria Initiative (PMI) and the United Kingdom's Department for International Development (DFID), which accounted for 31% and 11% respectively of estimated disbursements in 2011-2012." *Id.*

134. *Id.* at 23-24.

Despite this apparent gap, the huge increase in net production and distribution has boosted the number of children sleeping under ITNs, from 2 percent in 2000 to 22 percent in 2008 in twenty-six African countries for which data is available (representing 71 percent of children less than five in the region).[135] More recent data indicates that the proportion of children sleeping under ITNs in Africa has risen to 39 percent in 2010.[136] This is quite an encouraging development but the proportion of children covered is still far from adequate, especially when viewed in light of more concrete targets such as 60 percent access to ITNs for children less than five by 2005 set by the Abuja Declaration.[137] Parental poverty is to blame for the low coverage rate as evident in a finding showing that children under five in wealthier households are more likely than their counterparts in poorer families to sleep under ITNs.[138] While most countries in the region subscribe to the WHO's policy of providing ITNs free of charge or at subsidized rates,[139] dwindling resources has constrained full operationalization of the measure.[140]

The second of the two indicators noted above is the proportion of children under five with fever who are treated with appropriate anti-malarial drugs. The standard treatment, as recommended by the WHO, for treating *P. falciparum* malaria—the most common in Africa—is artemisinin-based combination therapies ("ACTs").[141] This was in response to growing resistance of *P. falciparum parasites* to "conventional antimalarial drugs such as chloroquine and sulfadoxine-pyrimethamine."[142] Similar to ITNs, rising levels of funding led to increased procurement of anti-malarial drugs but the need for ACTs was not met in any country for which data is available, the most recent derived from a 2008 survey.[143] The survey (covering 10 countries) shows that just 32 percent of children with fever in the two weeks preceding the survey received any anti-malarial treatment.[144] An even lower number (16 percent) of children with fever received any ACT, although only seven countries submitted data.[145] Again, as with low

135. MDGS REPORT 2010, *supra* note 23, at 47-48.

136. MDGS REPORT 2012, *supra* note 16, at 43.

137. THE ABUJA DECLARATION, *supra* note 120, at 5.

138. MDGS REPORT 2010, *supra* note 23, at 48; *see also* WORLD MALARIA REPORT 2012, *supra* note 115, at 26 fig.4.1b.

139. WHO, WORLD MALARIA REPORT 2011, at 27 (2011), *available at* http://apps.who.int/iris/bitstream/10665/44792/2/9789241564403_eng_full.pdf [hereinafter WORLD MALARIA REPORT 2011].

140. Notwithstanding resource constraints, Africa leads the rest of the world in the number of ITNs distributed free of charge (thirty-eight of eighty-nine countries) and ITNs sold at subsidized rates (twenty-one of twenty-four countries). *See* WORLD MALARIA REPORT 2012, *supra* note 115, at 23 tbl.4.1.

141. WORLD MALARIA REPORT 2005, *supra* note 119, at 14.

142. *Id.*

143. WHO, WORLD HEALTH STATISTICS 2010, at 16 (2010), *available at* http://www.who.int/whosis/whostat/EN_WHS10_Full.pdf.

144. WHO, WORLD MALARIA REPORT 2009, at 20 (2009) [hereinafter WORLD MALARIA REPORT 2009], *available at* http://whqlibdoc.who.int/publications/2009/9789241563901_eng.pdf.

145. *Id.*

ITNs coverage, resource constraints are to blame for limited access to anti-malarial medicine.

Against the background of low ownership of mosquito nets and inadequate access to anti-malarial therapy, one might ask whether it is not quite unrealistic to expect that malaria incidence in Africa will have been halted and in decline by 2015, as required by Target 6C. To be sure, there has been large-scale infusion of resources, especially from external sources, to national malaria control strategies in the region.[146] But the investments have been insufficient to make up for the deficits in national strategies. According to the 2008 Global Malaria Action Plan, the amount of resources required annually between 2011 and 2015 for global malaria control will exceed $5.1 billion annually[147] and in Africa alone, an estimated $2.3 billion will be required every year within the same period.[148] Yet, the total amount of funds (from domestic and international sources) in 2011 was estimated to be $2.3 billion, leaving a whopping deficit of $2.8 billion in the global budget.[149] And, to make matters worse, current projection indicates no respite any time soon; in fact, total funding package will stagnate at less than $2.7 billion annually between 2013 and 2015.[150] Considering that many African countries are dependent on foreign support for major portions of their malaria budgets[151] (and, therefore, cannot look inward), the implication of this resource gap is that unless funds are sourced elsewhere, this shortfall might mean the difference between progress, or lack thereof, in the fight against malaria in the region.

Indeed, there appears to be a strong correlation between external funding and incidence of malaria. Evidence is beginning to emerge showing that increased receipt of external funding leads to a decrease in malaria burden.[152] Amongst countries receiving more than $7 per person at risk, 60 percent reported a decline in malaria cases since 2000, versus only 26 percent of those receiving $7 or less.[153] But the exact impact on countries is unclear as other factors such as the capacity of individual countries to produce funds internally in order to offset decline in external support cannot be discounted and can affect the overall picture, positively or otherwise. This might explain why the result is mixed, even amongst endemic countries, some of which are highly aid-dependent. Uganda's malaria cases declined by more than 3 million in 2006 from its 2005 level (16 million); Tanzania reported 11.5 million cases in 2005 but improved to 10.5 million the following year; and, in Nigeria, there were around 3.5 and 3 million episodes of malaria in 2005 and 2007 respectively, a reduction of one-half million cases in just two

146. *Id.* at 58 (reporting that funding for malaria control has gone up fivefold from $0.3 billion per year in 2003 to $1.7 billion in 2009); WORLD MALARIA REPORT 2012, *supra* note 115, at 17.

147. WORLD MALARIA REPORT 2012, *supra* note 115, at 17.

148. *Id.*

149. *Id.*

150. *Id.*

151. ROLL BACK MALARIA, THE GLOBAL MALARIA ACTION PLAN: FOR A MALARIA-FREE WORLD 36 (2008), *available at* http://www.rollbackmalaria.org/gmap/gmap.pdf.

152. WORLD MALARIA REPORT 2009, *supra* note 144, at 65.

153. *Id.*

years.[154] On the other hand, in Niger, cases skyrocketed from nearly 900,000 in 2006, to 1.3 million the following year, and in Malawi, the number rose from 3.7 million cases in 2005 to 4.2 million in 2007.[155] Is there any lesson to draw from these disparities?

What the disparities demonstrate quite starkly is that the paramount determinant of whether Africa would succeed in its fight against malaria is the capacity of governments in the region to scale up the key elements of national anti-malaria strategies. And this finds support in recent experiences in some countries. In Eritrea, the distribution of more than a million mosquito nets between 2000 and 2006 forced a decline in malaria cases and mortality by more than 70 percent.[156] The strategy has been replicated in South Africa. Following the introduction of ACTs and better mosquito control in response to increasing resistance to drugs and insecticides in the country, its number of cases and mortality plummeted by 80 percent between 2000 and 2006.[157]

IV. OTHER DISEASES (TUBERCULOSIS)

A. Impact and Relevant Benchmarks

Though the term "other diseases" in MDG 6 is not defined, scholars have focused on TB as the most critical of the diseases.[158] TB is considered the most critical for three reasons: (i) high prevalence in several countries; (ii) high mortality (second after HIV); and (iii) close association with HIV/AIDS (they drive and reinforce one another),[159] the reason the two are sometimes referred to as "co-epidemics" or "dual epidemics."[160] The Target committed to by countries regarding TB is to have halted and begun to reverse its incidence by 2015.[161] This obligation is measurable by the incidence ("number of new and relapse cases of TB arising in a given time period, usually one year or absolute numbers"),[162]

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154. WHO, WORLD MALARIA REPORT 2008, at 146 (2008) [hereinafter WORLD MALARIA REPORT 2008], *available at* http://whqlibdoc.who.int/publications/2008/9789241563697_eng.pdf. *See also supra* note 140.

155. WORLD MALARIA REPORT 2008, *supra* note 154, at 146.

156. U.N. DEP'T OF ECON. & SOC. AFFAIRS, THE MILLENNIUM DEVELOPMENT GOALS REPORT 2008, at 31-32, U.N. Sales No. E.08.I.18 (2008) [hereinafter MDGS REPORT 2008], *available at* http://www.un.org/millenniumgoals/2008highlevel/pdf/newsroom/mdg%20reports/MDG_Report_2008_ENGLISH.pdf.

157. *Id.* at 32.

158. *See, e.g.*, David H. Molyneux, *Combating the "Other Diseases" of MDG 6: Changing the Paradigm to Achieve Equity and Poverty Reduction?*, 102 TRANSACTIONS ROYAL SOC'Y TROPICAL MED. & HYGIENE 509, 510 (2008).

159. MDGS REPORT 2010, *supra* note 23, at 50; WHO, GLOBAL TUBERCULOSIS REPORT 2012, at 3 box.1.1 (2012) [hereinafter GLOBAL TUBERCULOSIS REPORT 2012], *available at* http://apps.who.int/iris/bitstream/10665/75938/1/9789241564502_eng.pdf.

160. WHO, WHO POLICY ON COLLABORATIVE TB/HIV ACTIVITIES: GUIDELINES FOR NATIONAL PROGRAMMES AND OTHER STAKEHOLDERS 10 (2012), *available at* http://whqlibdoc.who.int/publications/2012/9789241503006_eng.pdf?ua=1.

161. *MDG Indicators*, *supra* note 3.

162. GLOBAL TUBERCULOSIS REPORT 2012, *supra* note 159, at 8.

prevalence ("number of cases of TB at a given point in time" or rate of occurrence),[163] and death rates, as well as proportion of cases detected and cured under directly observed treatment short course ("DOTS").[164] In 2006, two additional targets, linked to the MDGs, were added by the Stop TB Partnership's Global Plan to Stop TB[165]—to halve TB prevalence and death rates by 2015, using 1990 as a baseline; and by 2050, eliminate TB as a public health threat.[166] The original Target, to have halted and begun to reverse the incidence of TB by 2015, has already been achieved.[167] The TB incidence has been declining globally for some years and between 2010 and 2011 declined at 2 percent.[168] TB-related mortality rate has also been declining in all regions, 41 percent since 1990 (excluding deaths amongst HIV-positive people).[169] Despite this positive development, however, TB remains a critical public health challenge. In 2011, there were an estimated 8.7 million incidences of TB (13 percent co-infected with HIV) and 1.4 million TB-related deaths.[170]

Most cases of TB infection (raw number) occur in South-East Asia and Western Pacific regions (60 percent), and although Africa accounts for 24 percent of the global burden, the region shoulders the highest rates of cases and mortalities per capita.[171] It also leads the rest of the world in terms of proportion of TB cases co-infected with HIV, at 39 percent.[172] Of the twenty-two countries classified by the WHO as HBCs, nine or nearly half are in Africa, with South Africa, Zimbabwe, and Mozambique listed as the top three countries in total incident cases (per 100,000) reported in 2011.[173]

In terms of global prevalence, there were an estimated 12 million cases in 2011 or 170 cases per 100,000 population.[174] The prevalence rate has been

163. *Id.*

164. *MDG Indicators*, *supra* note 3, Indicators 6.9, 6.10.

165. This is the second Global Plan to Stop TB (effective 2006-2015). STOP TB PARTNERSHIP, THE GLOBAL PLAN TO STOP TB: 2006–2015, at 24-25 (2006) [hereinafter GLOBAL PLAN TO STOP TB], *available at* http://www.stoptb.org/assets/documents/global/plan/GlobalPlanFinal.pdf. The first covered the period 2001-2005. *Id.* The Plan (a WHO initiative) is a funding program that was launched at the World Economic Forum in Davos, Switzerland, on January 26, 2006, under the auspices of Stop TB Partnership. *See* WORLD ECON. FORUM, ANNUAL REPORT 2005/06, at 27 (2006), *available at* http://www.weforum.org/pdf/AnnualReport/2006/annual_report.pdf. Designed to bridge funding gaps in global TB prevention and treatment, the Plan aims to raise and spend $56 billion between 2006 and 2015 on: ensuring that TB-related MDG Target is met, saving 14 million lives, providing universal access to treatment, and developing new diagnostic tests, new drugs and vaccines. GLOBAL PLAN TO STOP TB, at 49.

166. STOP TB PARTNERSHIP & WHO, THE STOP TB STRATEGY: BUILDING ON AND ENHANCING DOTS TO MEET THE TB-RELATED MILLENNIUM DEVELOPMENT GOALS 8 (2006) [hereinafter THE STOP TB STRATEGY], *available at* http://www.who.int/tb/publications/2006/stop_tb_strategy.pdf.

167. GLOBAL TUBERCULOSIS REPORT 2012, *supra* note 159, at 8.

168. *Id.* at 8.

169. *Id.* at 8, 17.

170. *Id.* at 8-9.

171. *Id.* at 2.

172. *Id.* at 11.

173. *Id.* at 11 tbl.2.2.

174. *Id.* at 16.

declining since 1990 in all regions, including Africa, although the rate of decline varies widely around the world.[175] This regional variation suggests that the Stop TB Partnership's target of cutting the TB prevalence by half by 2015 from its 1990 level will not be met worldwide.[176] Whereas in some regions, such as the Americas, where the target has been attained, and in Europe and South-East Asia, where the target appears feasible, Africa is off track.[177] Globally, an estimated 990,000 deaths (14 per 100,000 population) occurred in 2011 among incident TB cases who were HIV-negative and an estimated 0.43 million deaths among those that were HIV-positive.[178] The Stop TB Partnership's target of halving TB deaths by 2015 compared to its 1990 level appears likely to be met in all regions except two, including Africa.[179]

B. Special Population Groups

No population group stands at greater risk of TB infection than HIV patients. This is because decreased immunity resulting from HIV infection renders the person more susceptible to contracting TB.[180] This explains why many HIV-positive individuals are also TB-positive, the reason as indicated above, the two are sometimes referred to as dual or co-epidemics. In 2011, 23 percent of people living with TB who were screened for HIV tested positive.[181] Mortality amongst this population, although falling, is still very high. TB-related deaths amongst people living with HIV have declined by 25 percent globally since 2004, and in sub-Sahara Africa—home to nearly 80 percent of all people living with both TB and HIV—by 28 percent.[182]

For this vulnerable population group, a somewhat different intervention protocol is warranted by their special circumstances. Access to ART for people living with HIV, especially from the onset of the infection, is needed to prevent them from subsequently acquiring and dying from TB.[183] As a recent study shows, prompt access to ART resulted in 65 percent reduction in risk of TB illness amongst people living with HIV.[184] In sharp contrast to the general population, for people living with HIV and TB, it is recommended that ART should be initiated as early as possible irrespective of their CD4 count,[185] the idea being to protect them against contracting TB. Yet, in 2011, just 46 percent of people living with both

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 17.

179. *Id.* at 17-19.

180. CTRS. FOR DISEASE CONTROL, TUBERCULOSIS: THE CONNECTION BETWEEN TB AND HIV (THE AIDS VIRUS) (2012), *available at* http://www.cdc.gov/tb/publications/pamphlets/TB-HIVEng.PDF.

181. UNAIDS REPORT 2012, *supra* note 13, at 58.

182. *Id.*; GLOBAL TUBERCULOSIS REPORT 2012, *supra* note 159, at 2.

183. UNAIDS REPORT 2012, *supra* note 13, at 59.

184. *Id.* (citing Amitabh B. Suthar et al., *Antiretroviral Therapy for Prevention of Tuberculosis in Adults with HIV: A Systematic Review and Meta-Analysis*, PLOS MED., July 2012, at 1, 11).

185. *Id.*

HIV and TB in sub-Sahara Africa received ART.[186] But aside from early initiation of treatment, TB testing should also be integrated into national HIV prevention and management strategies, and vice versa. In that case, a positive test to HIV automatically triggers TB screening and vice versa. Knowledge of one's status, TB or HIV, is a necessary first step in initiating treatment and protecting oneself from preventable morbidity and even death.

A subset of this special population or vulnerable group is pregnant women living with HIV. Their vulnerability is striking because apart from reduced immunity to a multitude of pathogenic conditions, including TB, ordinarily occasioned by pregnancy, for those living with HIV, the risk of developing TB is more than ten times higher than amongst HIV-negative pregnant women.[187] As in all cases involving maternal health, a prime consideration is the unborn child. In the case of TB, there has been a number of adverse obstetric and perinatal outcomes identified, including a very high risk of mother-to-child transmission of HIV and increased risk of maternal as well as infant mortalities.[188] To reduce these risks, it is recommended that (since, as noted above, ART reduces the risk of TB by 65 percent irrespective of CD4 level) early ART should be combined with regular TB screening at prenatal clinics to ensure that the women receive isoniazid preventive therapy[189] or early treatment for active TB.[190]

C. Prevention, Control, and Treatment Challenges

To achieve the 2015 global targets, the WHO recommends that every country adopt the Stop TB Strategy.[191] The major components of the Stop TB Strategy are to: (i) pursue high quality DOTS expansion and enhancement; (ii) address TB/HIV, multidrug resistant TB (MDR-TB), and the needs of poor and vulnerable populations; (iii) contribute to health system strengthening based on primary health care; (iv) engage all care providers; (v) empower people with TB and communities through partnership; and (vi) enable and promote research.[192] Among these six components, the most critical is the DOTS protocol.[193] This is because success in eradicating TB hinges most crucially on early detection and effective treatment, both of which are the pillars of DOTS.[194] The introduction of DOTS by the WHO in the mid-1990s led to significant strides in the international effort to control and manage TB.[195] The DOTS protocol is multipronged, involving scaling up of TB financing, appropriate diagnosis of TB, standardized treatment, continuous access

186. *Id.* at 60.

187. *Id.* at 47.

188. UNAIDS REPORT 2012, *supra* note 13, at 47 (citing Haileyesus Getahun et al., *Prevention, Diagnosis, and Treatment of Tuberculosis in Children and Mothers: Evidence for Action for Maternal, Neonatal, and Child Health Services*, 205 J. INFECTIOUS DISEASES S216, S216-27 (2012)).

189. GLOBAL TUBERCULOSIS REPORT 2012, *supra* note 159, at 3.

190. UNAIDS REPORT 2012, *supra* note 13, at 47.

191. *See* GLOBAL PLAN TO STOP TB, *supra* note 165, at 16.

192. GLOBAL TUBERCULOSIS REPORT 2012, *supra* note 159, at 4 box.1.2.

193. THE STOP TB STRATEGY, *supra* note 166, at 9.

194. *Id.* at 4.

195. *Id.*

to high quality anti-TB drugs, and tracking treatment outcomes.[196] DOTS has been adopted by virtually every country as the foundation of national TB control programs, and the result has been successes on multiple fronts.[197] The case detection rate for new smear-positive cases is on the rise globally,[198] although the least improvement was reported in Africa (at around 60 percent).[199] Likewise, the treatment success rate for new smear-positive cases has steadily increased since 1995[200] and now stands at 87 percent (based on 2010 data).[201] Despite Africa's failure to attain 85 percent treatment success rate, which was the benchmark set by the World Health Assembly in 1991, the region fared well compared to other regions, at 82 percent compared to 77 percent in the region of the Americas and 67 percent in Europe.[202]

The positive development across the globe can be traced to growing investment in TB control programs in the 22 HBCs, which began in 2002 and has consistently gone up each year.[203] Despite increased funding, however, gaps still remain. The National TB control program ("NTP") budgets in most African countries have fallen prey to this deficit, resulting in scaling back of a range of critical interventions. Funding deficit projected for 2013 among HBCs in Africa ranges from $36 million (NTP budget of $51 million) in Kenya to $5.2 million ($14 million NTP budget) in the Democratic Republic of Congo.[204] The huge gap between NTP budgets in these countries and available funds does not bode well for scaling up of interventions that are vital to reaching the various global TB targets enumerated above.

Each component of the Stop TB Strategy, particular DOTS, requires huge capital outlay, without which progress cannot be assured. Not surprisingly, the result is mixed. As to incidence of TB (Target 6C), the rate is declining in Africa (3.1 percent between 2010 and 2011), as in the rest of the regions of the world.[205] The second (and more important) target set by the Stop TB Partnership's Global

196. *Id.* at 9-11.

197. *Id.* at 4.

198. GLOBAL TUBERCULOSIS REPORT 2012, *supra* note 159, at 35 (reporting that the attainment of 66 percent, a significant improvement from 53-59 percent in 2005 and 38-43 percent in 1995).

199. *Id.* (meaning that Africa failed to meet the first Global Plan (2000-2005) Target of detecting by 2005, at least 70 percent of new sputum smear-positive cases—that is, three years past the Target deadline).

200. *Id.* at 36 (reporting that regarding the latest year for which data was available (2010) treatment success rate of 87 percent was achieved, marking the fourth consecutive year that the target of 85 percent, which was set by the World Health Assembly in 1991, was met or exceeded worldwide); *see also* WHO, GLOBAL TUBERCULOSIS CONTROL: A SHORT UPDATE TO THE 2009 REPORT 11 tbl.5 (2009) [hereinafter GLOBAL TUBERCULOSIS CONTROL], *available at* http://reliefweb.int/sites/reliefweb.int/files/resources/34D6472DD50D01F94925768C00245048-WHO_Dec09.pdf (charting out the treatment success rates among new smear-positive cases between 1994-2007).

201. GLOBAL TUBERCULOSIS REPORT 2012, *supra* note 159, at 36.

202. *Id.*

203. GLOBAL TUBERCULOSIS CONTROL, *supra* note 200, at 20.

204. GLOBAL TUBERCULOSIS REPORT 2012, *supra* note 159, at 55.

205. *Id.* at 11-12.

Plan to Stop TB—halving the 1990 TB prevalence and mortality rates by 2015[206]—is more problematic for African countries. Since TB prevalence rate (including HIV-positive population) in the region was 300 cases per 100,000 population in 1990, achieving the target requires reducing the number of cases to 150 by 2015,[207] a herculean task considering that prevalence rate in the region is going in the opposite direction, rising to 490 cases per 100,000 population in 2008.[208] The WHO notes that the target has been achieved in one region and within reach in others, but not in Africa and one other region.[209] The mortality rate remains equally grave. The 2010 TB mortality rate of 30 deaths per 100,000 population (excluding HIV-positive people) is just slightly less than the 1990 level (37 deaths),[210] indicating significant progress has not been accomplished. These troubling statistics led the WHO to conclude, rather trenchantly, that reaching these targets by 2015 "appears impossible in African countries."[211] So what to do?

V. HUMAN RIGHTS ANALYSIS: MORE THAN ACCESS TO MEDICINE

An apt point to initiate a discussion on a human rights-driven analysis of the obligation of governments in Africa in respect to the scourge of HIV/AIDS, malaria, and TB is to emphasize two crucial points that are essential to properly contextualize the issues. First, is to note that neither MDG 6 nor any of the other health-MDGs imposes substantially novel obligations on the governments in the region or, for that matter, anywhere else. Previous global or regional legal and policy frameworks have sought to address these problems by targeting specific diseases[212] or seeking their elimination through a broader umbrella, the health-as-a-human right approach.[213] An instance of the former is the Abuja Declaration which commits African countries to "[h]alve the malaria mortality for Africa's people by 2010."[214] This commitment is remarkably similar to Target 6C of MDG 6 (to "[h]ave halted by 2015 and begun to reverse the incidence of malaria"), the only difference being a five year interval in the deadlines.[215] The Abuja Declaration was adopted four months earlier than the MDGs.[216]

An international policy document that espoused a more cosmopolitan approach is the WHO's *Global Strategy for Health for All by the Year 2000*, which was adopted in 1979, with the goal of attainment by all people of the world by the

206. THE STOP TB STRATEGY, *supra* note 166, at 8.

207. *See* MDGS REPORT 2010, *supra* note 23, at 51.

208. *Id.*

209. GLOBAL TUBERCULOSIS REPORT 2012, *supra* note 159, at 16.

210. MDGS REPORT 2012, *supra* note 16, at 44.

211. GLOBAL TUBERCULOSIS CONTROL, *supra* note 200, at 26.

212. *See MDG Indicators*, *supra* note 3.

213. *See* WHO, GLOBAL STRATEGY FOR HEALTH FOR ALL BY THE YEAR 2000, at 7, 15 (1981) [hereinafter GLOBAL STRATEGY FOR HEALTH], *available at* http://whqlibdoc.who.int/publications/9241800038.pdf.

214. THE ABUJA DECLARATION, *supra* note 120, at 4.

215. *MGD Indicators*, *supra* note 3.

216. THE ABUJA DECLARATION, *supra* note 120, at 4 (the Abuja Declaration was adopted in April 2000 while the MDGs were adopted in September 2000).

year 2000 of a level of health that would permit them to lead socially and economically productive lives.[217] The year set aside for achieving the goal of the strategy has come and gone, and yet the world remains as far off from achieving health for all as when the thirty-second World Health Assembly adopted the original resolution establishing the strategy. This important global policy framework shares several similarities with the MDGs project, particularly in terms of the end goal and associated programs. Had this previous attempt by the WHO at radically improving global health succeeded, there would certainly have been no need for the health MDGs. Moreover, as recognized in the Millennium Development Project, "human rights (economic, social, and cultural rights) already encompass many of the Goals, such as those for poverty, hunger, education, health, and the environment."[218] This means the existence of extant obligations on those African countries (the vast majority) that have ratified the foremost international bill on economic, social and cultural rights—the ICESCR.[219] Will international health policy succeed where international human rights legal framework failed? Only time will tell.

The second point worthy of note (and very critical to positioning human rights as a key contributor to attaining Goal 6) relates to how to conceptualize health. A recent explanation was quite on point:

> Diseases and illnesses do not just reveal a subpar performance of the physiological and biochemical functioning of the human system; they represent something more sinister. Morbidities (and human suffering that accompanies it) are manifestations of a much deeper socioeconomic and political pathology: the factors responsible for excess exposure or susceptibility to circumstances that combine to create the need for therapeutic intervention in the first place. More than anything else, including improving access to health services, reversing the *status quo* requires sustainable and unwavering action on multiple fronts . . . . This

217. GLOBAL STRATEGY FOR HEALTH, *supra* note 213, at 7, 15. The Global Strategy was launched in 1979 at the 32nd World Health Assembly via resolution WHA32.30, although the original idea for global pursuit of health for all by the year 2000 was conceived at the 30th World Health Assembly in 1977 (WHA 30.43). World Health Assembly Res. 32.30, Rep. of the World Health Assembly, 32nd Sess., May 7-25, 1979, WHA32/1979/REC/1, at 56 (May 25,1979); *see generally* DON A. FRANCO, POVERTY AND THE CONTINUING GLOBAL HEALTH CRISIS 63 (2009) (analyzing the link between the Global Strategy and the MDGs) (where in the author's opinion, the MDGs constitute a "sequel to one of the most ambitious commitments of the twentieth century to health through the objectives outlined in Health for All by the Year 2000").

218. U.N. MILLENNIUM PROJECT, INVESTING IN DEVELOPMENT: A PRACTICAL PLAN TO ACHIEVE THE MILLENNIUM DEVELOPMENT GOALS 119 (2005), *available at* http://www.unmillenniumproject.org/documents/MainReportComplete-lowres.pdf.

219. United Nations, Multilateral Treaties Deposited with the Secretary-General, *International Covenant on Economic, Social and Cultural Rights* (Dec. 16, 1966), http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en (last visited Apr. 10, 2014) (showing that only three countries in Africa—South Africa, Comoros, and Sao Tome and Principe—are yet to ratify the treaty).

> is the real antidote to the paralytic performance that has dogged health systems in Africa for decades.[220]

This statement speaks to a broader conceptualization of health, one that is more intimately aligned with the WHO's definition of health as achieving "a state of complete physical, mental and social well-being."[221] This is the prism from which the various obligations undertaken by countries in Africa regarding the health of the population should be evaluated, despite the seemingly parochial constriction of the terms of specific legal provisions. By becoming parties to the treaty, these countries obligate themselves to, inter alia, "recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."[222] An almost identical, although somewhat broader, obligation is imposed by the Africa Charter on Human and Peoples' Rights.[223] In addition to recognizing the right to health, countries in Africa voluntarily took the additional step of committing themselves to "take . . . necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick."[224] Would the various governments in the region be in compliance with their treaty obligations were they to successfully scale up access to preventive, life-saving, or curative health services for individuals suffering HIV/AIDS, malaria, or TB? Regarding HIV/AIDS, for instance, would countries such as Botswana, Namibia, and Rwanda, that have achieved universal access to ART, be said to have fulfilled their obligation regarding the right to health as far as that specific population is concerned?

Medicine-oriented response to health problems, without more, is not enough. Access to therapy, while undeniably crucial, is just one of the essential elements needed to ensure optimal health, or as a U.N. General Assembly resolution puts it, in the context of HIV/AIDS, "medication . . . is one of the fundamental elements to achieve progressively the full realization of the right of everyone to . . . health."[225] The implication, then, is that in order to be in full compliance with the right of the population to health, more is needed. Of greater importance is the condition under which people live and work, the socioeconomic and regulatory conditions, or factors that operate to facilitate or constrain human flourishing. Where people are born and raised, also taking into consideration their life circumstances, not the availability of health services per se, are responsible for health outcomes. When these conditions are positive, population health flourishes and vice versa. These conditions, known as underlying or social health determinants, are the major

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220. Obiajulu Nnamuchi, *Health and Millennium Development Goals in Africa: Deconstructing the Thorny Path to Success*, *in* THE RIGHT TO HEALTH: A MULTI-COUNTRY STUDY OF LAW, POLICY AND PRACTICE (Obiajulu Nnamuchi et al. eds., forthcoming 2014).

221. WHO, BASIC DOCUMENTS 1 (47th ed. 2009) (quoting the preamble of WHO's Constitution) (entered into force Apr. 7, 1948).

222. ICESCR, *supra* note 91, art. 12(1).

223. African Charter on Human and Peoples' Rights, *supra* note 96, art. 16(1).

224. *Id.* art. 16(2).

225. Declaration of Commitment on HIV/AIDS, G.A. Res. S-26/2, ¶15, U.N. Doc. A/RES/S-26/2 (June 27, 2001).

drivers of health and consist of, inter alia, "food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment."[226] Availability or lack thereof is responsible for health disparities within and amongst nations. The WHO Commission for Social Health Determinants helpfully puts it this way, "[a]t all levels of income, health and illness follow a social gradient: the lower the socioeconomic position, the worse the health."[227] The Commission continues:

> The poor health of poor people, the social gradient in health within countries, and the substantial health inequities between countries are caused by the unequal distribution of power, income, goods, and services, globally and nationally, the consequent unfairness in the immediate, visible circumstances of people's lives—their access to health care and education, their conditions of work and leisure, their homes, communities, towns, or cities—and their chances of leading a flourishing life. This unequal distribution of health-damaging experiences is not in any sense a natural phenomenon but is the result of a combination of poor social policies and programmes, unfair economic arrangements, and bad politics. Together, the structural determinants and conditions of daily life constitute the social determinants of health and cause much of the health inequity between and within countries.[228]

This can be seen as a restatement or an elucidation of the right to health.[229] As to what precisely needs to be done to establish this right in people's lives, this author has argued, in a related context:

> Health policy decisions should be based on the principle that social determinants of health such as food, housing, *et al* are, *stricto sensu*, not within the mandate of a Ministry of Health but, even so, their availability and equitable distribution are crucial to . . . improving overall health and wellbeing. This is the crux of multisectoral dimension of health and has two critical implications for Africa. First, health sector reform must be operationalized in tandem with strengthening other sectors (agriculture, industries, housing and so forth) connected with providing or creating an enabling environment for availability of goods or conditions that promote good health. Second, multisectoral interventions must not only be harnessed, it must also be harmonized and streamlined to achieve a common goal: improving health. The leadership role of the Ministry of Health must involve active cooperation and collaboration with other sectors, including

226. General Comment No. 14, *supra* note 92, ¶ 4.

227. Michael Marmot et al., *Closing the Gap in a Generation: Health Equity Through Action on the Social Determinants of Health*, 372 LANCET 1661, 1661 (2008).

228. *Id.* at 1661.

229. General Comment No. 14, *supra* note 92, ¶¶ 4, 11, 12, 36; *see also id.* ¶ 12(b) n.6 (providing that in absence of an explicit contrary provision, references in the General Comment "to health facilities, goods and services" should be read as including "the underlying determinants of health" outlined in ¶¶ 11 and 12(a) of the General Comment).

> bilateral and multilateral partners, to find cost-effective and sustainable solutions to the numerous health challenges facing the region.[230]

Short of a multipronged and holistic approach to solving Africa's health woes, all the investments toward restoring the health of people suffering from any of the diseases under consideration, particularly in respect to vulnerable populations, would amount to naught. In fact, deploying resources toward access to the "socio-economic [goods] that promote conditions in which people can lead a healthy life" is an important indicator of the commitment of countries to the health of its citizenry.[231] Proof, if there is need for one, is that countries in which these goods are reasonably (even if not abundantly) available are also those, as a WHO Report makes quite clear, with better overall health outcomes—and the reverse is equally true.[232] Even stronger proof that access to health care does not (alone) translate to optimal health is provided by health outcomes in the United States. In 2000, the U.S. led the world in health spending (medical care);[233] still, its overall health system performance and attainment was ranked 37th globally, worse than even some third-world countries such as United Arab Emirates.[234] A notable distinction between the United States and other affluent countries is that the latter invest heavily in underlying health determinants for its vulnerable populations (in form of welfare packages).[235] Attempts could be made to weaken this point by claiming that investment in underlying health determinants was not among the indicators used in the 2000 ranking of global health systems.[236] That is true; nonetheless, it is

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230. Nnamuchi, *Health and Millennium Development Goals in Africa: Deconstructing the Thorny Path to Success*, *supra* note 220.

231. General Comment No. 14, *supra* note 92, ¶ 4.

232. WHO, THE WORLD HEALTH REPORT 2000: HEALTH SYSTEMS: IMPROVING PERFORMANCE 152-55 (2000) [hereinafter WORLD HEALTH REPORT 2000], *available at* http://www.who.int/whr/2000/en/whr00_en.pdf (showing that poorer nations, as a group, fared worse than affluent ones, invariably where the basic and super structures of decent lives are more easily available).

233. David A. Squires, *Explaining High Health Care Spending in the United States: An International Comparison of Supply, Utilization, Prices, and Quality*, COMMONWEALTH FUND, May 2012, at 1, 2, 9-10, *available at* http://www.commonwealthfund.org/~/media/Files/Publications/Issue%20Brief/2012/May/1595_Squires_explaining_high_hlt_care_spending_intl_brief.pdf (finding that the United States far outspends other countries in healthcare and yet does not reap commensurate dividend).

234. WORLD HEALTH REPORT 2000, *supra* note 232, at 155.

235. *See, e.g.*, Social Welfare, UAE INTERACT, http://www.uaeinteract.com/society/welfare.asp (last visited June 4, 2014) (official government source describes the social welfare system in United Arab Emirates) ("Despite the UAE's economic success there are, inevitably, individuals who are not in a position to benefit directly from the country's good fortune. Therefore, a social welfare network has been put in place to assist these vulnerable members of society. This takes the form of social security benefits administered by the Ministry of Labour and Social Affairs, in addition to the practical help offered by the network of Ministry-supported social centres run by the General Women's Union, and the government-supported social welfare and rehabilitation centres providing assistance to the disabled.").

236. WHO & COMM'N ON SOC. DETERMINANTS OF HEALTH, CLOSING THE GAP IN A GENERATION: HEALTH EQUITY THROUGH ACTION ON THE SOCIAL DETERMINANTS OF HEALTH 185 (2008), *available at* http://whqlibdoc.who.int/publications/2008/9789241563703_eng.pdf ("As part of global and national

argued that the result would be the same had health determinants been one of the parameters of measurement. In Glasgow, Scotland, although everyone is entitled to health care provided by the United Kingdom's National Health Service (NHS), there is a wide gulf in life expectancies between poor and affluent males in that city, fifty-four years compared to eighty-two.[237] This disparity is inexplicable on any other ground except greater access to underlying health determinants such as housing, proper nutrition, education, and so forth by the latter group.

Attending to social health determinants becomes even more critical when inertia accentuates the vulnerability of an already susceptible population as has historically been the case. It is in this context that the special circumstances of those most affected by HIV/AIDS, malaria, and TB become the burden of human rights. Take HIV/AIDS, as an illustration. More than any other segment of the population, sex workers stand out, as shown previously, as disproportionately impacted by the disease. Sex workers deserve to be singled out because no amount of intervention would be successful in absence of fundamental restructuring of their life circumstances in terms of provision of, for instance, access to education and employment. The link is simple and straightforward. At the root of sex trade is adverse socioeconomic circumstances on the part of its victims, the sex workers. Securing better remunerating and less risky employment, a possibility best offered by acquiring education, provides an escape route from poverty and want—a key element in instilling the kind of attitudinal change needed for exodus from the hazards of the dark world of sex trade.[238] It is one thing to create awareness of the hazardous nature of an enterprise but quite a different challenge to equip the proselytized person with the means with which to escape the hazard. The latter, more difficult because it involves deployment of resources, is where serious efforts should be concentrated.

Dehumanizing and debasing one's prized possession via prostitution is hardly a product of volition; instead, and this is very important, it starkly illustrates an instance of the consequences of what has been described as "structural violence."[239] This is not the sort of violence or harm perpetrated with guns or knives; its reach and tentacles are far more damaging and deadly.[240] It is quite a

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surveillance systems, data on health inequities and determinants should be made publicly available and accessible and disseminated widely for advocacy purposes and to support coherent policy-making.").

237. Gail R. Wilensky & David Satcher, *Don't Forget About the Social Determinants of Health*, 28 HEALTH AFFAIRS w194, w195 (2009).

238. *See, e.g.*, G.A. Res 65/277, ¶ 25, U.N. Doc. A/RES/65/277 (June 10, 2011); KIMBERLY A. MCCABE, THE TRAFFICKING OF PERSONS 35 (2008).

239. Johan Galtung, *Violence, Peace, and Peace Research*, 6 J. PEACE RES. 167, 170-71 (1969).

240. *See id.* at 171 ("There may not be any person who directly harms another person in the structure. The violence is built into the structure . . . ."); *see also* Gernot Köhler & Norman Alcock, *An Empirical Table of Structural Violence*, 13 J. PEACE RES. 343 (1976). Structural violence is also a concern of liberation theology. *See* LEONARDO BOFF & CLODOVIS BOFF, INTRODUCING LIBERATION THEOLOGY 24-27 (Paul Burns trans., 1987). In fact the movement against the evil of structural violence has a lot in common with liberation theology. Both reject vice (laziness, ignorance, or human wickedness) and backwardness as explanatory of poverty; and see poverty as a manifestation or consequence of oppression. *Id.* at 25-27 (defining poverty as oppression; meaning that poverty is the

different kind of attack on social equilibrium. The violence is termed "structural" because the circumstances or factors that cause and sustain harm are embedded in the structure of the society.[241] It manifests itself as "unequal power and consequently as unequal life chances" for its victims.[242] Although he might not have known it, an informant in Zimbabwe alludes to this kind of violence when he points out, in a recent interview, that massive poverty in his country leaves parents with no choice than to "force their children to go out and prostitute themselves" or force them into "early marriages at the age of 10 and 11."[243] A similar explanation is given by a sex worker in Swaziland: "Here in Swaziland there are no jobs . . . . I have no choice to be a sex worker, whether I like it or not, I must do that."[244] As to how this really impacts her life, she continues, "[r]ight now I don't feel that I am a human being . . . . Right now I am scared to greet my family because if I say that I am a prostitute all of the people will just say that I am a prostitute."[245] Despite this shame, rejection, isolation, and, as would likely be her fate, premature death (likely from HIV/AIDS),[246] she remains a sex worker—thanks to overwhelming combination of forces that, over the years, insidiously succeeded in stripping her of any sense of real freedom. These invisible forces are continually at work, holding her and others like her in suffocating bondage, all the while wrecking havoc in their lives and that of the general population (by being a source of infection, with all that it entails). But sex workers are not alone. A similar argument could be advanced regarding other diseases, including malaria and TB.[247]

The Biblical statement, "[t]hey that are whole need not a physician; but they that are sick" is not only a theological admonition with canonical significance,[248] it is also a powerful human rights catechism. It is trite that human rights inhere in human beings equally but in practice, they make more meaning to the downtrodden, the poor and destitute, those whose daily existence are structured and constrained by forces outside their control which, in turn, render them susceptible to "high levels of illness and premature mortality."[249] It is particularly

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"product of the economic organization of society itself, which *exploits* some—the workers—and *excludes* others from the production process—the underemployed, unemployed, and all those marginalized on one way or another").

241. Paul E. Farmer et al., *Structural Violence and Clinical Medicine*, 3 PLOS MED. 1686, 1686 (2006).

242. Galtung, *supra* note 239, at 171.

243. *Poor People's Testimony: Living on a Dollar a Day in Zimbabwe*, VATICAN RADIO (Nov. 29, 2012), http://en.radiovaticana.va/articolo.asp?id=642566.

244. Victoria Eastwood, *Sex Worker: I Sleep with Five Men a Day Just to Eat*, CNN (Oct. 19, 2012), http://edition.cnn.com/2012/10/18/world/africa/swaziland-sex-unemployment-economy/index.html.

245. *Id.*

246. Swaziland leads the world in the proportion of its population infected with HIV (25.9 percent). WORLD HEALTH STATISTICS 2011, *supra* note 69, at 72.

247. Malaria and TB are diseases of the poor, and this fact is unaltered by geography. *Id.* at 76. Whether in rural villages in Africa or behind the walls of a Russian prison, Malaria and TB disproportionately impact those lower on the socioeconomic ladder. *See id.*

248. *Luke* 5:31 (King James).

249. Marmot et al., *supra* note 227, at 1661.

for the benefit of these people, their welfare and fulfillment, that human rights really exist. Yet, for the vast majority of them, forces set in motion by others, by and large, determine their life chances even, in some cases, before birth. "One of the worst things," laments an unemployed 25-year old man in Zimbabwe, "is you're not involved in any key decision-making in life."[250] This type of disempowerment or disenfranchisement represents the worst abuse of human rights, a grave infraction on individual autonomy (the cornerstone of human rights) and it has significant implication for health. As more forcefully argued elsewhere, the importance of individual empowerment—in the sense of enabling individuals to take charge of their own affairs, particularly health—cannot be ignored in any health policy framework.[251]

> The obvious advantage . . . is the element of democracy it embodies. But this sort of democracy has a somewhat different appeal in the sense that the interest of those on the higher end of socioeconomic ladder is not, as often is the case in developing countries, taken as representative of the entire population.[252]

It is this sort of democracy that is the task of human rights. Rather than maintain the *status quo*, the way things have always been done, it calls for prioritizing the needs and interest of the poor, including soliciting their views as to how best to meet their needs. This is human rights pragmatism borne out of solidarity with the people whose needs and exposure to diseases and illnesses is greater vis-à-vis the general population. The productivity of human rights is at its peak, much like liberation theology, when it is "on the side of the poor" and "struggle[s] alongside them against the poverty that has been unjustly created and forced on them."[253] To suggest that human rights should serve as a liberating or emancipating force, freeing vulnerable and other marginalized groups from the cold clutches of poverty, deprivation and other harmful conditions, the consequence of which has been disproportionate burden of HIV/AIDS, malaria, TB, and other largely preventable diseases, is not to reconceptualize the doctrine. Rather, the suggestion merely emphasizes practicalization, the way things ought to be. It is, in reality, about making human rights work to the advantage of its primary subjects, the people who need it most.

VI. CONCLUSION

When, in 1962, Angelo Giuseppe Roncalli, better known as Pope John XXIII, proclaimed what he perceived as the appropriate role of the Church in her dealings with underdeveloped countries, that the Church not only "present herself as she is," but also "as she wants to be—as the Church of all men and especially the Church

250. VATICAN RADIO, *supra* note 243.

251. Nnamuchi, *Health and Millennium Development Goals in Africa: Deconstructing the Thorny Path to Success*, *supra* note 220.

252. *Id.*

253. BOFF & BOFF, *supra* note 240, at 4.

of the poor," his overarching concern was theological pragmatism.[254] But he might as well have been speaking about human rights and related obligation of the international community. The beloved Pontiff was suggesting that although the mission of the Church is centrally cosmopolitan—in other words, service to the entire world, a special ministry deserves to be carved out for those on the fringes of society, individuals whose lives are constrained by daily struggles against misery, want and deprivation, the "wretched of the earth", as psychiatrist/philosopher Frantz Fanon aptly describes them.[255] This adjuration, on particularizing the plight and needs of the poor, is a strong moral imperative whose reach transcends theology howsoever reconceptualized. It has also a very powerful secular resonance.

The role of human rights can be summed up as improving the wellbeing of each and every individual. This is indeed true, and human rights does (at least in principle) have a special outreach, a kind of special treatment—if you will—for individuals or groups who are disadvantaged in some material respect vis–à–vis the general population.[256] Proof is General Comment No. 14, arguably the most important interpretive document on the right to health, which uses the term "vulnerable" and/or "marginalized" population at least eleven times to emphasize countries' obligation to prioritize the needs of the poor.[257] But theory often differs (vastly, in some cases) from practice and this is at the core of the plight of marginalized and vulnerable populations in the realm of health as well as in other dimensions of wellbeing.

This dissonance (between theory and practice) is visible in the grotesquely disproportionate burden of diseases suffered by people in sub-Sahara Africa. Within this long-suffering population, some distinct groups—identified in the paper as "special population groups"—are at greater risk than the rest of the general population. Unjustifiable disproportionality, most especially of adverse outcomes, represents one of the most brazenly ubiquitous forms of inequity. When confronted with inequity, the task of human rights is remediation, to expurgate the inequity as comprehensively and expeditiously as possible.[258] This is the thrust of

254. GUSTAVO GUTIÉRREZ, A THEOLOGY OF LIBERATION: HISTORY, POLITICS AND SALVATION 287 n.2 (Sister Caridad Inda & John Eagleson trans., 1973) (citing *Radio Message Sept. 11, 1962*, 8 POPE SPEAKS 396 (1963)).

255. *See generally* FRANTZ FANON, THE WRETCHED OF THE EARTH (Richard Philcox trans., 2004).

256. It is no coincidence that MDG 8 was formulated solely for the benefit of the Global South, to uplift countries in that part of the world. *See* MDG GAP TASK FORCE, MILLENNIUM DEVELOPMENT GOAL 8: THE GLOBAL PARTNERSHIP FOR DEVELOPMENT: MAKING RHETORIC A REALITY 1 (2012) [hereinafter MILLENNIUM DEVELOPMENT GOAL 8], *available at* http://www.un.org/millenniumgoals/2012_Gap_Report/MDG_2012Gap_Task_Force_report.pdf. The idea behind the goal was to cushion the effect of impoverishment on the lives of people in targeted countries, to bridge the ever-widening gap between the two worlds. *See id.*

257. General Comment No. 14, *supra* note 92, ¶¶ 12(b)(i), 12(b)(ii), 18, 35, 37, 40, 43(a), 43(f), 52, 62, 65.

258. *See* JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 7-8 (2d ed. 2003) (explaining that human rights are entitlements that allow humans to make certain claims if these rights are threatened or denied).

the human rights bent of this paper, in examining the ravages on human lives brought about by the trifecta of HIV/AIDS, malaria, and TB, particularly on those most vulnerable to these diseases in the vast majority of countries in Africa. Strategies, initiatives, and overall efforts in attacking these diseases must go beyond the general population to attend to the people most at risk of infection (sex workers, for instance, in the case of HIV/AIDS). Greater attention (in the nature of deployment of resources) to prevention, treatment, and caring for these individuals is not only in consonance with the catechism of human rights, it also has practical benefits. The best health strategy is one that is aimed squarely at the source of the problem (in this case, most-at-risk population), and that is also the most effective way to reduce infection and thereby begin to get a firm grip on the problem.

A secondary level solution to the problem involves addressing population-wide needs as elucidated in the fifth section of this discourse. Meeting the needs of the sick is, of course, very important; yet, of more importance is preemptive action, radically rearranging the socioeconomic dynamics in such a way that exposure to the conditions that result in diseases and illnesses are, to the extent sustainable by available resources, banished. Attending to underlying health determinants is the key to rescuing people in Africa from countless and ever-rising morbidities and mortalities that have come to define life in that part of the world. Numbers are powerful in that they (where negative) are silent indictments of affected persons or institutions. That key health indicators in Africa are overwhelmingly negative is not explicable on the basis of resource constraints. Otherwise how does one explain strikingly similar health outcomes in Nigeria as in Somalia, Ethiopia, and elsewhere (countries on different tiers of socioeconomic development)? In fact, in some cases, resource poor nations have fared better than wealthier ones.[259] Yet, all these countries solemnly pledged to commit themselves to protecting and promoting the right to health.[260] Had these commitments been taken seriously, the health situation in the region would surely have been different. The latest UNDP Human Development Report is aptly titled *Sustainability and Equity: A Better Future for All.*[261] Of the forty-four countries classified as having "low human development" (worst category) only eight are not African.[262] In Niger, 64 percent of the population lack access to clean water as does 89 percent who lack improved sanitation.[263] Other countries in the region are not far behind. Does the future really hold any better health prospects for people in Africa? Would

259. For example, see *supra* note 235 and accompanying text.

260. African Charter on Human and Peoples' Rights, *supra* note 96, art. 16. *See also supra* notes 218-19 and accompanying text.

261. UNITED NATIONS DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2011: SUSTAINABILITY AND EQUITY: A BETTER FUTURE FOR ALL (2011) *available at* http://www.us.undp.org/content/dam/undp/library/corporate/HDR/2011%20Global%20HDR/English/HDR_2011_EN_Complete.pdf [hereinafter HUMAN DEVELOPMENT REPORT 2011]. The Report identifies "the right of future generations everywhere to live healthy and fulfilling lives" as the "great development challenge of the 21st century." Helen Clark, *Foreword* to HUMAN DEVELOPMENT REPORT 2011, at iv, iv. This challenge is, beyond doubt, greatest in Africa.

262. *Id.* at 144-145 tbl.5.

263. *Id.* at 145 tbl.5.

people in the region be able to claim victory over HIV/AIDS, Malaria, and TB any time soon? These are critical human rights questions whose unraveling hinges on a number of issues, some of which were addressed in preceding sections.

In his book, *Pathologies of Power*, physician/human rights advocate Paul Farmer explains: "Human rights violations are not accidents; they are not random in distribution or effect. Rights violations are, rather, symptoms of deeper pathologies of power and are linked intimately to the social conditions that so often determine who will suffer abuse and who will be shielded from harm."[264] In other words, lack of access to basic goods that make life worthwhile and, in most cases, protect people from unnecessary pain, suffering and death, such as potable water and improved sanitation (basic essentials of life), is not the result of some combination of circumstances over which authorities in the region lack control. It was the 19th century English jurist and legal scholar Frederick William Maitland who wrote, "[t]he forms of action we have buried, but they still rule us from their graves."[265] In like manner as archaic rules of common law still rear their ugly heads in procedural and substantive law, centuries after they have been thought to have been consigned to oblivion, institutional insensitivity to human rights, which ought to have been buried with the demise of military dictatorships in Africa, remains an inescapable part of African polity, even unto this day.

Despite obeisance at the altar of democracy, leaders in the vast majority of countries in the region retain the mold of their predecessors in military garbs, the old ways of doing things. Avarice, kleptocracy, and other, no less odious, forms of malgovernance still hold sway. Opulence has become the reward for governance—indeed, the two now go hand in hand, sort of bounty for winning (often rigged) election—even as a large chunk of the governed miserably strives to survive. Here is an illustration. Although, by their own national count, nearly half (46 percent) of Kenyans and 55 percent of Nigerians subsist in poverty,[266] legislators in the two countries are the best remunerated worldwide, at $175,000 annual compensation package for parliamentarians in Kenya[267] and over $100,000 monthly salary for senators in Nigeria.[268] To put this in proper perspective,

264. PAUL FARMER, PATHOLOGIES OF POWER: HEALTH, HUMAN RIGHTS, AND THE NEW WAR ON THE POOR 7 (2003).

265. F. W. MAITLAND, THE FORMS OF ACTION AT COMMON LAW: A COURSE OF LECTURES 2 (A. H. Chaytor & W. J. Whittaker eds., 1936).

266. HUMAN DEVELOPMENT REPORT 2011, *supra* note 261, at 144 tbl.5.

267. Jason Straziuso, *Kenya Outraged Over Parliament's $175K Pay Vote*, BOSTON.COM (July 2, 2010), http://www.boston.com/news/world/africa/articles/2010/07/02/kenya_outraged_over_parliaments_175k_pay_vote (reporting that in mid-2010, legislators in Kenya voted themselves an annual pay package of $175,000, covering compensation for housing, entertainment, transportation, parliamentary meeting attendance, constituency allowance, and a miscellaneous allowance).

268. Denrele Animasaun, *Nigerian Lawmakers are the Highest Paid in the World*, VANGUARD (Aug. 25, 2013, 12:03 AM), http://www.vanguardngr.com/2013/08/nigerian-lawmakers-are-the-highest-paid-in-the-world ("A senator in Nigeria earns 240 million naira (about 1.7 million US dollars) in salaries and allowances and a member of the House of Representatives earns 204 million naira (about

senators in the United States will be paid $174,000 in total annual compensation package this year[269] compared to $1.7 million for their counterparts in Nigeria (in just salaries, exclusive of other benefits). The latter is notoriously a third-world country, its health system ranks 187th in the world (amongst 191 countries surveyed),[270] the corruption perception index ("CPI") in the country places it 139th out of 174 countries,[271] and its human development index ("HDI") rank is 156th (out of 181 countries);[272] still, its leaders are compensated multiple times above the earnings of their peers anywhere in the world. An outrage indeed, but that, nonetheless, is governance—African style, explaining why Zambian economist Dambisa Moyo wants to end foreign aid to the region.[273]

Moyo certainly has a great point, but another worthwhile solution might be found in the MDGs themselves. Goal 8—which explicitly requires international cooperation as a means to achieving the MDGs—carves out a special role for affluent countries, to hold poor countries accountable for the way received aid is spent.[274] And this critical obligation, especially considering that "he who pays the piper dictates the tune," might be what is needed to force political leadership in Africa to rethink their insensitivity to massive human suffering in the region. But even this path would fall short of a sustainable panacea in absence of serious complementary effort on the part of the citizenry. The complementarity envisaged here involves the people ridding themselves of docility and demanding good

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1.45 million US dollars) per annum. It definitely rubs insult to injury for the average Civil servant who earns about 46 to 120 US dollars per month.").

269. *Senate Salaries Since 1789*, U.S. SENATE http://www.senate.gov/artandhistory/history/common/briefing/senate_salaries.htm (last visited Apr. 11, 2014).

270. THE WORLD HEALTH REPORT 2000, *supra* note 232, at 152-55 tbl.1. Strikingly, the only countries that fared worse than Nigeria are countries involved (at the time of the report) in civil war or other forms of armed conflicts, namely, Democratic Republic of Congo (188th), Central African Republic (189th), Myanmar (Burma, 190th), and Sierra Leone (191st). *Id.*

271. TRANSPARENCY INT'L, CORRUPTION PERCEPTIONS INDEX 2012, at 3-5 (2012), *available at* http://issuu.com/transparencyinternational/docs/cpi_2012_report/1?e=2496456/2010281 (defining CPI as an index which ranks countries and territories based on how corrupt their public sector is perceived to be).

272. HUMAN DEVELOPMENT REPORT 2011, *supra* note 261, at 126. The HDI measures wellbeing in a country using the following three basic dimensions of human development: health, education, and income. *Id.* at 23.

273. DAMBISA MOYO, DEAD AID: WHY AID IS NOT WORKING AND HOW THERE IS A BETTER WAY FOR AFRICA 48-68 (2009).

274. Obiajulu Nnamuchi & Simon Ortuanya, *The Human Right to Health in Africa and its Challenges: A Critical Analysis of Millennium Development Goal 8*, 12 AFR. HUM. RTS. L.J. 178, 181 (2012) (analyzing the role of MDG 8 as a means to overcoming poverty (on an individual and institutional level) and corruption in Africa and, consequently, positioning the region on a path to achieving the MDGs).

governance as a right[275]—the key, ultimately, to real freedom from preventable diseases—be it HIV/AIDS, malaria, TB, or anything else.

275. *Id.* at 190-91 (defining "docility" as "acquiescence to misappropriation of public resources" which "arises when people go about their business as if looting the treasury is somehow an unavoidable reward for holding a political position" and arguing that it is a "common feature of developing economies and, lamentably, a powerful factor that sustains treating public resources as *res nullius* in many . . . countries").

WILL THE CHILD ABDUCTION TREATY BECOME MORE "ASIAN"? A FIRST LOOK AT THE EFFORTS OF SINGAPORE AND JAPAN TO IMPLEMENT THE HAGUE CONVENTION

COLIN P.A. JONES*

I. OVERVIEW

The Hague Convention on the Civil Aspects of International Child Abduction[1] (the "Convention") provides a mechanism for locating and returning children "wrongfully" removed from or retained outside of their jurisdiction of habitual residence, a problem that most commonly arises in the breakdown of an "international" marriage. The Convention seeks to protect the welfare of the children involved by deterring and remedying unilateral action by one parent. Put simply, the treaty is based on the assumption that the interests of children should be evaluated by courts in the jurisdiction where they have been residing, rather than the one in which they may have just gotten off a plane. As noted in one early gloss,

> the problem with which the Convention deals—together with all the drama implicit in the fact that it is concerned with the protection of children in international relations—derives all of its legal importance from the possibility of individuals establishing legal and jurisdictional links which are more or less artificial. In fact, resorting to this expedient, an individual can change the applicable law and obtain a [favorable] judicial decision . . . .[2]

In order to protect disruptions to the lives of children by preventing this type of forum shopping, the Convention "places at the head of its objectives the restoration of the *status quo*, by means of 'the prompt return of children wrongfully removed to or retained in any Contracting State.'"[3]

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1. Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89 [hereinafter Convention].

2. Elisa Pérez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention*, *in* HCCH PUBLICATIONS, ACTS AND DOCUMENTS OF THE FOURTEENTH SESSION (1980), TOME III: CHILD ABDUCTION 426, 429 (1982), *available at* http://www.hcch.net/upload/expl28.pdf.

3. *Id.*

A country that joins the Convention commits to establishing a central authority to facilitate the return of abducted children and providing a prompt judicial process for realizing their return.[4] In principle, a return must be ordered if a child has been removed in violation of "rights of custody" in the child's jurisdiction of habitual residence if those rights were being exercised at the time of removal.[5] Under the Convention, parties must also facilitate the exercise of rights of access between contracting states.[6] Most academic and professional interest in the treaty, however, appears focused on rights of custody and the return process, as will be the case in this article too.

A map of the world showing Convention ratifying nations as of the end of the first decade of the 21st century would portray a very "Western" treaty regime.[7] At the time of writing, virtually every country and territory in Europe, North and South America as well as Australia and New Zealand had ratified the Convention.[8] By contrast only a handful of African nations had done so.[9] Asian countries seem particularly under-represented, given their importance in terms of population and economic development. Of the small number of Asian jurisdictions that were parties to the Convention as of 2009, two (Hong Kong and Macao) achieved their contracting status due to colonial legacies.[10] The two other Asian "early adopters"—Sri Lanka and Thailand (acceding in 2001 and 2002)—are still both developing nations that have not yet been able to establish treaty relations with all of the other parties.[11]

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4. Convention, *supra* note 1, arts. 1, 6, 7.

5. *Id.* art. 12.

6. *Id.* art. 21.

7. The author is cognizant that terms such as "Western" and "Asian" are problematic both in terms of generating subjective associations and being geographically imprecise, particularly with respect to nations such as Turkey or Israel. Nonetheless, a detailed exposition of such semantic issues, however, is beyond the scope of this article.

8. *See Status Table: Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, HAGUE CONF. ON PRIVATE INT'L L., http://www.hcch.net/index_en.php?act=conventions.status&cid=24 (last updated Mar. 10, 2014) [hereinafter *Status Table*] (listing current status of countries contracting with the Convention).

9. *Id.* As of February 2014, the only African jurisdictions that had become contracting states were: Burkina Faso, Morocco, South Africa, Gabon, Guinea, Lesotho, Mauritius, Seychelles, and Zimbabwe. *Id.*

10. Hong Kong and Macao have been parties to the Convention in their capacities as Special Administrative Regions of China since 1997 and 1999, respectively, pursuant to continuation arrangements put in place when they ceased being colonies of the United Kingdom and Portugal, respectively. *Id.* (scroll down to China in Status Table, follow "D, N" hyperlink in last column of row for China).

11. *Id.* By its terms, the Convention is open to signature between states that were members to the Hague Conference on Private International Law at the time of its Fourteenth Session in 1980 when the Convention was adopted. Convention, *supra* note 1, art. 37. Other states may join, but their accession must be accepted by other contracting states for treaty relations to arise between those two states. *Id.* art. 38. Japan was a member of the Hague Conference in 1980 while Singapore remains a non-member. *See Status Table*, *supra* note 8 (listing Japan as a member and Singapore as a non-member).

Having acceded in 2010,[12] Singapore could be described as the first "advanced" or "developed" Asian nation to have independently joined the Convention. It was followed by Korea in 2012 and Japan in 2014.[13] Japan's ratification comes after years of high-level lobbying by Western governments and media condemnation of its status as a "black hole" for parental child abduction from which no child has ever been returned through the Japanese judicial process.[14]

With more countries in Asia joining the Convention the time may be ripe to consider whether they will cause it to become more "Asian" (whatever that means) in the way it is implemented and interpreted. This article will briefly compare and contrast the implementation regimes of Japan and Singapore as well as the relevant features of the two country's family law systems before suggesting a preliminary, highly tentative conclusion.

II. JAPAN AND SINGAPORE COMPARED AND CONTRASTED

Japan is one of Asia's largest countries in terms of both GDP (almost $6 trillion) and population (almost 128 million as of 2010).[15] Compared to many neighboring countries its population is highly heterogeneous in terms of ethnicity, country of birth, language, educational background, and other elements of cultural identity.[16] The Japanese practice a variety of religions including various forms of Buddhism, Shintoism, and Christianity, all of which coexist peacefully.[17] Such minority populations as do exist in Japan represent a very small percentage of the population overall.[18]

Of the 700,214 marriages recorded in Japan in 2010, 30,207 (4 percent) were between Japanese and foreign nationals.[19] Of the 1.071 million children born in that year, almost 21,966 (2 percent) were born in households with one non-

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12. *Id.*

13. *Id.* (listing the ratification date for Japan as Jan. 24, 2014, and Korea as Dec. 13, 2012).

14. *See, e.g.*, Daphne Bramham, *Japan is Black Hole for Abducted Children*, VANCOUVER SUN, Aug. 17, 2013, http://www.vancouversun.com/news/Daphne+Bramham+Japan+black+hole+abducted+children/8799583/story.html; Mark Willacy, *Japan Vows to Close Child Abduction Black Hole*, AUSTL. BROADCASTING CORP. NEWS (May 22, 2012), http://www.abc.net.au/news/2012-05-22/japan-child-abductions/4025242.

15. *Data: Japan*, WORLD BANK, http://data.worldbank.org/country/japan (last visited June 2, 2014).

16. *The World Factbook: Japan*, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/ja.html (last updated May 30, 2014).

17. *See id.*

18. At the end of 2011 there were slightly over 2 million registered foreign residents in Japan. Press Release, For Number of Foreign Residents in the 2011 Year-End Current (Preliminary), Japan Ministry of Justice Immigration Bureau (Feb. 22, 2012), *available at* http://www.moj.go.jp/nyuukokukanri/kouhou/nyuukokukanri04_00015.html. Chinese, Filipinos, and Koreans accounted for over two thirds of this number. *Id.*

19. *Statistic Tables*, JAPAN MINISTRY OF HEALTH, LAB. & WELFARE (Dec. 1, 2011), http://www.mhlw.go.jp/toukei/saikin/hw/jinkou/suii10 (follow hyperlink for 婚姻 or "Marriage" PDF).

Japanese parent.[20] In total, 252,617 children in Japan experienced the divorce of their parents in 2010.[21] Of 251,378 divorces in the same year, 18,968 (7.5 percent) were "international," with one spouse being non-Japanese.[22] As these statistics make clear, most instances of divorce or other forms of parental separation in Japan are strictly "domestic," with those involving a non-Japanese spouse or parent being a very small minority.

Although economically Japan's peer—the seventh richest country in the world on a GDP per capita basis—Singapore is quite small in terms of territory (697 km^2) and population (5.46 million in 2013).[23] Furthermore for historical reasons it is demographically more complex than Japan, with an ethnic Chinese majority (approximately 74.2 percent) as well as significant minorities of Malay and Indian extraction (13.3 percent and 9.2 percent respectively).[24] This complexity is reflected in the nation's four official languages (English, Mandarin, Malay, and Tamil).[25] Singapore's culture also encompasses a variety of very different religious traditions and includes a significant Muslim community for which a formally recognized separate system of family justice exists, as discussed later.[26]

As a center of international business and finance, a significant proportion of Singapore's population consists of transient "expats" and other categories of temporary workers.[27] Of Singapore's population of almost 5.4 million in 2013, 3.31 million were citizens and a further 0.53 million were permanent residents.[28] The remaining 1.55 million—28 per cent of the total—were classified as "non-residents," a category comprising foreigners working, studying, or living in Singapore but not having permanent residence (and excluding tourists and short-term visitors).[29]

In 2012 Singapore recorded 27,936 marriages and 7,237 divorces and annulments.[30] Twenty-one percent of marriages[31] and 12.9 percent of divorces in that year were characterized as "inter-ethnic".[32] The same year saw 42,663 live

20. *Id.* (follow hyperlink for 出生 or "Births" PDF).

21. *Id.* (follow hyperlink for 離婚 or "Divorce" PDF).

22. *Id.*

23. *The World Factbook: Singapore*, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/sn.html (last updated May 30, 2014).

24. *Id.*

25. *Id.*

26. *See infra* note 92 and accompanying text.

27. *See* DEP'T OF STATISTICS SING., POPULATION TRENDS: 2013, at 1 (2013) [hereinafter SING. POPULATION TRENDS: 2013], *available at* http://www.singstat.gov.sg/publications/publications_and_papers/population_and_population_structure/population2013.pdf.

28. *Id.* at 1 tbl.1.1.

29. *Id.* at 1.

30. DEP'T OF STATISTICS SING., STATISTICS ON MARRIAGES AND DIVORCES: REFERENCE YEAR 2013, at xi (2014) [hereinafter SING., STATISTICS ON MARRIAGES AND DIVORCES].

31. *Id.* at 8.

32. *Id.* at xi (672 divorces under the Women's Charter and 268 under the Muslim Law Act). Note that because of Singapore's colonial legacy, it has a complex make-up of ethnic groups—primarily

births.[33] Of the marriages in 2011, a full 39.4 percent were between a Singaporean citizen and a non-citizen, with 31.1 percent of children being born to such couples.[34]

Because of the demographic complexity of its population and families, Singapore courts are well-acquainted with cases involving an international component. In fact, *CX v CY* (discussed later), one of the Singapore Court of Appeal's most important custody cases, involved a dispute between a father, a Dutch national, and a mother, a Singapore national.[35]

In connection with the Convention, Singapore may prove to be special in primarily being a source of outbound cases. As of March 2013, Singapore's Central Authority had dealt with four outbound cases against one inbound.[36] This ratio is consistent with research by Professor Debbie Ong on pre-Convention international cases, which identified twenty-two outbound cases to only four inbound.[37] By May of 2013, Singapore's High Court had decided an appeal in the first litigated instance of a return order, the case of *BDU v BDT*, which is discussed in more detail below.[38]

At the time of writing, Japan had ratified the Convention with the implementing legislation (discussed below) going into effect April 1, 2014.[39] At least one pre-ratification legislative analysis of the Convention points out that most outbound cases from Japan would likely involve Asian wives of Japanese men returning to their home countries (i.e., non-signatory states such as China or the Philippines), cases in which Japan's status as a party would be of little benefit.[40]

III. RIGHTS OF CUSTODY IN JAPAN AND SINGAPORE

Having explored the statistics, let us turn to law. Under the Convention, an abduction or retention is "wrongful" (and therefore likely subject to return proceedings) if it is "in breach of rights of custody" in the child's country of

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Chinese, Malay, and South Asian—that remain clearly defined. *See supra* note 25 and accompanying text. Statistics describing marriages as "inter-ethnic" would thus pick up marriages between members of these ethnic groups in addition to "international" unions between (for example) a Caucasian husband and a Singaporean wife of any ethnicity. SING., STATISTICS ON MARRIAGES AND DIVORCES, at 106.

33. SING. POPULATION TRENDS: 2013, *supra* note 27, at vi.

34. PRIME MINISTER'S OFFICE, MARRIAGE AND PARENTHOOD TRENDS IN SINGAPORE 5 (2012), *available at* http://www.nptd.gov.sg/content/dam/nptd/Occasional%20Paper%20on%20MP%20Trends%20_For%20Media%20Briefing%2028%20Jun%202012_w%20annex.pdf.

35. *See infra* notes 122-28 and accompanying text.

36. These numbers are derived from a presentation given to the author by the Central Authority of Singapore in March 2013.

37. Debbie S. L. Ong, *Parental Child Abduction in Singapore: The Experience of a Non-Convention Country*, 21 INT'L J.L. POL'Y & FAM. 220, 223 (2007).

38. *See infra* Part IV.A.2.

39. *Status Table*, *supra* note 8. For information about the Japanese implementing statute for the Convention, see *infra* note 186 and Part IV.B of this paper.

40. Ryota Kaji, "Shinkokuka suru kokusaiteki na ko no tsuresari mondai to hāgu jōyaku" 326 Rippō to Chōsa 51, 60 (2012) (published by the secretariat of the House of Councilors, one of the houses of the Japanese parliament).

habitual residence, if such rights were being exercised at the time.[41] This section will focus on trying to develop an understanding of what "rights of custody" might mean within the context of Japanese and Singaporean family law.

A. Japan: Parental Authority and the Family Register System

1. The Family Register System

Before discussing concepts such as "custody" it is necessary to first understand a system that forms the basic framework of Japanese family law, the *koseki seido* or family (or "household") registration system—a nationwide register of family units.[42] Unlike many countries where an official document certifying a particular event (e.g., a birth or marriage certificate or court decree) is used as evidence of a legally-significant family relationship, in Japan this would be established by submitting an official extract of the family register instead.[43] Rather than merely being a record of a specific event, the family register presents a snapshot of familial relationships at the time the extract was produced.[44] It thus shows not only a marriage and the birth of children, but a subsequent divorce as well. An extract will thus show whether a child has been born out of wedlock. Through its interaction with the rules of the Civil Code, the locus of parental authority will also be readily apparent from the register. Since the locus of parental authority (discussed below) is inexorably linked with marital status, a family register extract may be important for purposes of proving authority to take legal acts on a child's behalf (such as when applying for a passport).

Several features of the family registration bear noting. First, it is inherently nationalistic: only Japanese citizens have family registries.[45] A foreign spouse or parent will be recorded in the register of their Japanese spouse or children, but non-Japanese residents of Japan do not themselves have a family register.[46] Thus, while procedures have been developed to deal with non-Japanese family members,

41. Convention, *supra* note 1, art. 3.

42. KOSEKI HŌ [Family Register Act], Act No. 224 of 1947 (Japan).

43. *Japan's Family Registry System*, EMBASSY OF THE UNITED STATES: TOKYO, JAPAN, http://japan.usembassy.gov/e/acs/tacs-family-registry.html (last visited Feb. 11, 2014).

44. *Id.*

45. Japanese citizenship is based primarily on parentage rather than place of birth. KOKUSEKI HŌ [Nationality Law], Act No. 147 of 1950, art. 2, http://www.moj.go.jp/ENGLISH/information/tnl-01.html (Japan). The family register shows parentage and thus is a source of proof of citizenship, though this gives rise to a chicken-egg type problem because it is only proof of citizenship if non-Japanese citizens are excluded. There is no language in the Family Register Act specifically limiting it to Japanese citizens, yet this becomes apparent from Articles 6 and 16 of the Act which mandate the preparation of a register for each married couple and their children except in the case of people who marry foreign nationals, in which case the Japanese spouse is to be registered in the same manner as an unmarried individual. Family Register Act, arts. 6, 16 (Japan).

46. *Id.* art. 49, para. 2, no. 3 (mandating special indications when registering a child having a foreign parent). KOSEKIHŌ SHIKŌ KISOKU [Ordinance for the Enforcement of the Family Register Act], Jud. Order No. 94 of 1947, art. 36(2) (Japan) (requiring the nationality of a foreign spouse to be indicated in the notations section of a Japanese person's family register).

they are essentially a "work-around" for an overall system that assumes a family composed of Japanese citizens.

Second, in its historical context the family register is probably best understood as existing primarily to facilitate dealings between a family on the one hand, and government agencies or other third party actors on the other.[47] It may thus be helpful to think of the family register as performing a function analogous to a real estate title register, which discloses legally pertinent information about a particular tract of land for the benefit of people who might wish to transact in connection with it. In fact, a person's family register was once essentially a public document that could be seen by and accessed without their knowledge or consent, until access was significantly restricted through a 1976 amendment to the Family Register Act.[48] Official family register extracts remain a basic form of identity document.

Just as with a title registry, the family register only contains a limited number of data fields, and since one of the purposes is to clarify the state of family relationships for the benefit of third parties, ambiguity is kept to a minimum. Just as a title register reflects the details of a piece of land, and whether it is subject to a

47. As described by Shūhei Ninomiya, one of Japan's leading scholars of family law, the first national family register system established in 1871 primarily as a means of implementing taxation, conscription, and peacekeeping rather than a system of identification. Shūhei Ninomiya, *Kojijōhō no hogo to koseki kōkai gensoku no kentō* [The protection of personal information and the public family register principle], 304 RITSUMEI HŌGAKU 238, 240 (2006). In fact, the current system has its roots in the traditional "*ie*" (household) system that was formalized in the Meiji-era Civil Code and continued to define a basic feature of Japanese society until the family law portions of the Civil Code (and corresponding parts of the Family Register Act) were heavily amended during the post-war American occupation. *See* MIKIHIKO WADA, IE SEIDO NO HAISHI [The abolition of the household system] 129 *passim* (2010) (referencing characterizations of the *ie* system as a component of the militarist state). Prior to these reforms, family and society were organized around "households" rather than individuals, and would typically be more extensive than the nuclear family. *See id.* Under this system the head of the household was a legally-recognized status usually accorded only to men and in which was vested a broad range rights and duties, including control over household property and the ability to veto marriages by junior members of the household. *See id.* The register system would thus identify not only who had the authority to dispose of family property, but also who was responsible for the junior members and could be the person responsible for implementing government policy (such as the household) within the household. In this last respect in particular, the *ie* system has been characterized as forming the base of the pyramid of the pre-war militaristic state, at the apex of which was the emperor. *See id. See also* MINPŌ [MINPŌ] [CIV. C.] 1896, arts. 732-65 (Japan), *translated in Civil Code (Part IV and Part V)*, JAPANESE L. TRANSLATION, http://www.japaneselawtranslation.go.jp/law/detail/?id=2058&vm=04&re=02&new=1 (last visited June 10, 2014) (provisions defining the rights and duties of the head of the household that are no longer present in the current Civil Code). Needless to say, this system of family ordering was inherently discriminatory, with heads of households having superior legal status over junior family members and males generally being given precedence over females in various respects. The *ie* system that was thus incompatible with the gender equality and other equal protection mandates included in the post-war Japanese constitution and was essentially deleted from the Civil Code and the Family Register Act. *See* MIKIHIKO WADA. Nonetheless, remnants of the system remain in the current system, including the register system, which remains based on married couples (a smaller "household") rather than individuals.

48. Shūhei Ninomiya, *supra* note 47, at 239.

mortgage or other encumbrances or conditions that are legally significant to potential buyers or lenders, but does not show whether the house is in good condition, has a nice view, or is occupied by rent-paying tenants; the family register would show that a man and woman are legally married and have children but not the fact that they have not cohabitated for years and may already be in other relationships.

The most important feature of the family register for purposes of this article, however, is that the locus of parental authority over a child is readily evident from the family register, whereas care and control, access rights, maintenance obligations, and other matters commonly decided in the course of a divorce, are not.[49] Moreover, the courts may approach disputes of a type that potentially affect the relationship between the family and the rest of society (divorces and other changes in personal status that would appear in the family register) differently from those which only involve the people within a family relationship (who the children live with and so forth).[50]

Third, the family register is based primarily on the common *consensual* family transactions such as marriage, most divorces, and even adoptions. Marriage is at the heart of the system; even if celebrated at an elaborate ceremony with many witnesses, a marriage does not take legal effect unless it has been registered at the appropriate local government office.[51] Doing so results in a new family register being established in the name of one of the newlyweds.[52] Marriage in Japan is thus quite easy—it simply involves filing paperwork with a local government office.[53]

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49. Family Register Act, arts. 76-85 (Japan) (provisions on registrations relating to divorce, parental authority, and adoption of minor children).

50. For example, Professor Noriko Mizuno gives a very good description of the high degree of autonomy traditionally accorded to family units and the minimal degree to which the law has intervened in internal family affairs, even after postwar reforms and even in order to protect weaker family members from stronger ones. Noriko Mizuno, Kōkenryoku ni yoru kazoku he no kainyū [Intervention in families by state power], *in* Shakaihōsei, Kazoku hōsei ni okeru kokka no kainyū [Intervention by state power in systems of social security law and family law] 159, 164-70 (Noriko Mizuno ed., 2013). She describes Japan as having a "powerless" family law system. *Id.* at 169. In other spheres Japan's Supreme Court has traditionally been reluctant to see the exercise of judicial power being extended to resolving disputes between members of "social sub-units" (*bubun shakai*), such as religious organizations and universities. For example, in considered a leading constitutional case on the subject of the judicial power, the Supreme Court declined to resolve a financial dispute between a religious organization and its members that sprang from the provenance of a religious artifact. Saikō Saibansho [Sup. Ct.] Apr. 7, 1981, 35 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1369 (Japan), *available at* http://www.courts.go.jp/english/judgments/text/1981.4.7-1976.-O-.No..749.html. Similarly, the court refused to become involved in a dispute over a university's decision not to award credits to students for a class, since the dispute did not have any significant relationship to the "general legal order of civil society." Saikō Saibansho [Sup. Ct.] Mar. 15, 1977, 31 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 234 (Japan).

51. MINPŌ [MINPŌ] [CIV. C.] art. 739 (Japan). For a translation for the familial section of the code see *Book IV Relatives*, YALE L. SCH., http://www.law.yale.edu/rcw/rcw/jurisdictions/ase/japan/japan_civ_code.htm (last visited June 5, 2014).

52. MINPŌ [MINPŌ] [CIV. C.] art. 750 (Japan). Note that because the family register is tied to nationality rather than location, it is possible for Japanese persons to get married anywhere in the world

It is similarly easy to get a consensual divorce. In fact, Japan may be one of the easiest places in the world to get a divorce if both spouses want it.[54] Such a divorce can be accomplished merely by submitting paperwork in the same manner as a marriage.[55] Approximately 90 percent of divorces in Japan are accomplished this way.[56] Having children does not complicate the process, since all that is required is for the parties to indicate in the paperwork which one of them will have parental authority over which children after divorce.[57] These arrangements are reflected in the family register.[58] In 2011, amendments to Article 766 of the Civil Code added a requirement that divorcing parents must make arrangements for child support and access, but this is only reflected in the divorce paperwork through the addition of a "check-box" asking whether such arrangements have been made.[59] The authorities accepting such a filing do not look at the substance of such arrangements and they are outside the scope of the register system in any case.

Together with Singapore and practically every other country on Earth, Japan is a party to the U.N. Convention of the Rights of the Child ("CRC").[60] Under Article 3(1) of the CRC, the best interests of children must be a primary consideration in all actions concerning children taken by the governments of contracting states.[61] Whether this mandate is being satisfied in Japan, through a system by which the great majority of divorces are given effect by the government

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(for Japanese law purposes) by filing the necessary paperwork with consular officials in the country where they reside. The same is true of consensual divorces.

53. In fact, it is so easy that local governments have had to develop an *ad hoc* method of preventing fraudulent divorces (particularly easy in a country where most legal documents are executed with a seal rather than a signature) by allowing spouses to file a notice requesting that divorce filings not be accepted without the notice being withdrawn by the filing party in person. Mikiko Otani, Fujuri Todoke: *A Valuable Insurance Policy if Your Marriage is on the Rocks*, JAPAN TIMES, Apr. 23, 2013, http://www.japantimes.co.jp/community/2013/04/23/how-tos/fujuri-todoke-a-valuable-insurance-policy-if-your-marriage-is-on-the-rocks.

54. *Id.*

55. MINPŌ [MINPŌ] [CIV. C.] art. 763 (Japan).

56. *Annual Changes in Divorce*, JAPAN MINISTRY OF HEALTH, LAB. & WELFARE, http://www.mhlw.go.jp/toukei/saikin/hw/jinkou/tokusyu/rikon10/01.html (last visited Feb. 13, 2014) [hereinafter *Annual Changes in Divorce*].

57. MINPŌ [MINPŌ] [CIV. C.] art. 819 (Japan); KOSEKI HŌ [Family Register Act], Act No. 224 of 1947, art. 76 (Japan).

58. Family Register Act, arts. 76-77 (Japan).

59. *See, e.g.*, Mainichi Shinbun, Kaisei minpō rikongo no yōikuhi, oyako menkai torikeme nakutemo todokede juri [New Civil Code: Filings being accepted with no agreement on post-divorce child support and visitation] (2012). Notwithstanding the introduction of this system, many divorcing parents have been submitting paperwork without checking the box and local government offices have been accepting them. *Id.*

60. United Nations, Multilateral Treaties Deposited with the Secretary-General, *Convention on the Rights of the Child* (Nov. 20, 1989), https://treaties.un.org/pages/ShowMTDSGDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=IV-11&chapter=4&lang=en#Participants (last visited June 3, 2014) (Somalia, South Sudan, and the United States being the only states not to ratify the convention).

61. Convention on the Rights of the Child art. 3(1), Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

without any supervision of the post-divorce arrangements, for the children affected is debatable.

Only when one of the persons in a marriage does not want to get a divorce, or the couple is unable to agree upon the terms (the most important of which may often be who "gets" the children), would proceedings be brought in a family court.[62] However, Japanese family courts operate on a "mediation first" principle for divorce and child custody proceedings, meaning that the parents may be required to participate in a number of court-sponsored mediation sessions before they are allowed to proceed on to seek a judicial divorce.[63] The majority of cases brought to court are resolved through this process, yet the end result is still based on whatever the parties can be convinced to agree upon, including arrangements relating to children.[64] Put another way, even in most of the cases in which courts do get involved, they do so by providing a forum for mediation (or "conciliation"), meaning their primary objective is to "broker a deal" rather than furthering any particular policies or clearly-defined rules of law (such as the desirability of preserving parent-child contact after divorce).

Article 770 of Japan's Civil Code only provides limited grounds for granting a judicial divorce.[65] Courts have traditionally interpreted them as requiring one party (and not the party bringing the action) to be culpable, meaning that failure to agree upon a mediated divorce can mean years of litigation.[66] Since most parties settle before the proceedings reach this point, judicial resolutions in which a judge makes the final decision regarding divorce and the allocation of parental authority thus represent a very small percentage, approximately 1 percent of the total.[67]

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62. *See* MINPŌ [MINPŌ] [CIV. C.] art. 766 (Japan).

63. KAJI JIKEN TETUZUKIHŌ [Family Case Procedure Act], Act No. 252 of 2011, art. 277 (Japan) (mandates that certain types of family disputes be submitted first to family court mediation before more formal proceedings). This mediation process is also sometimes called "conciliation" since interactions between the parties are intermediated by the court, with a judge resolving many issues (though not the divorce and allocation of parental authority) through a decree if the mediation is unsuccessful. SUPREME COURT OF JAPAN, GUIDE TO THE FAMILY COURT OF JAPAN 17 (2013), *available at* http://www.courts.go.jp/english/vcms_lf/20130807-1.pdf. *See also Domestic Relations Cases*, SUPREME CT. JAPAN, http://www.courts.go.jp/english/judicial_sys/domestic_relations/domestic_index/index.html#01 (last visited Feb. 7, 2013).

64. According to Ministry of Health, Labour and Welfare statistics (the most recent year for which official statistics on types of divorce appear to be available), approximately 88 percent of divorce were cooperative with the remainder resolved through court involvement. *Annual Changes in Divorce*, *supra* note 56. However, of those that were brought to court, the great majority were resolved either through mediation (conciliation) before the commencement of formal litigation or settlement afterwards (9.7 percent and 1.4 percent respectively). *Id.*

65. MINPŌ [MINPŌ] [CIV.C.] art. 770 (Japan).

66. Until 1987 Japanese courts effectively refused to grant divorces in suits initiated by the party "at fault" (for example, a spouse leaving the marital home to be with a lover). Since a Supreme Court ruling in that year signaled a change of direction, courts have moved towards granting divorces if the marriage has irretrievably broken down. *See* Taichi Kajimura, *Dai 770 jō* [Article 770], in KIHONHŌ KOMENTĀRU—SHINZOKU [Basic Law Commentaries—Relatives] 110-113 (Ichiro Shimazu & Tadaki Matsukawa eds., 2008).

67. *Annual Changes in Divorce*, *supra* note 56.

Finally, even if a divorce and determination of parental authority does result from court involvement, whether through mediation, settlement, or judgment, the results are ultimately reflected in the family register by filing with the register authorities.[68] This is a feature of the Japanese system that is easily overlooked yet potentially important in cross-border custody disputes. Foreign courts may attach great importance to whether their decrees will be given effect in Japan. However, because of the family register system, there is unlikely to be any need for a Japanese parent to ever produce a divorce or custody decree in the course of raising a child in Japan, since who has parental authority is readily apparent from a family register extract.

2. Parental Authority and Custody

Under Japan's Civil Code, minor children are subject to the "parental authority" (*shinken*) of their parents.[69] Parental authority is exercised jointly by both parents during marriage and solely by one parent after divorce, or in the case of children born and raised out of wedlock, in which case the mother has parental authority by default.[70]

Parental authority has a number of components that are set forth over several articles of the Civil Code. These include: the right and duty to care for and educate the child (Article 820), the authority to determine where the child should reside (Article 821), the right to reasonably discipline the child (Article 822), and the right to permit the child to work and manage his or her property (Articles 823 and 824).[71] Article 825 makes it clear that the objection of one parent having parental authority to legal acts on behalf of the child conducted by the other have no effect on the validity of such acts.[72]

Under the Civil Code, joint parental authority is *only* possible during marriage: only one parent may be vested with it after divorce.[73] A corollary of this requirement is that a husband and wife both nominally retain parental authority until a divorce takes place, even if they have been separated for many years, during which time one parent may not even be able to see their child if the other parent does not allow it.

As noted above, divorcing parents are now also required to make arrangements for who should have "custody" over the child and other matters relating to child custody (including access) and to take the best interests of their children into account when doing so, with a court making such determination if the parents are unable to agree.[74] The term "custody" is taken from the Japanese government's official translation of the Civil Code but should be treated with

68. KOSEKI HŌ [Family Register Act], Law No. 224 of 1947, art. 76 (Japan).
69. MINPŌ [MINPŌ] [CIV. C.] art. 818 (Japan). The age of majority in Japan is 20. *Id.* art. 4.
70. *Id.* arts. 818-19.
71. *Id.* arts. 820-24.
72. *Id.* art. 825.
73. *Id.* art. 819.
74. *See* CRC, *supra* note 61, art. 3.

caution. The Japanese term is *kango*, which is also rendered as "care" in the Japanese government's translation of Article 820 of the code.[75] This article describes parental authority as including the right and duty to care for and educate children. Although the Civil Code clearly defines parental authority in terms of parental rights and duties, academic theory and court practice has moved in the direction of interpreting these provisions in terms of parental responsibilities rather than rights.[76]

Possibly because of the length of judicial divorce proceedings, during the pendency of which parental authority nominally remains with both parents, courts have developed a practice of making pre-divorce determinations relating to the custody of the children,[77] notwithstanding the fact that title of Article 766 clearly refers to custody matters *after* divorce.[78] Such dispositions might include designating one parent as sole custodian and ordering child support and access (or, as is often the case, explaining why no access has been ordered).[79] In this way, the court essentially allocates some of the components of parental authority to one parent, while leaving both parents jointly vested with the remainder until divorce.[80] Although based on the wording of the Civil Code, custody (*kango*) is but one of a number of enumerated components of parental authority. A parent who is awarded sole custody effectively gains almost exclusive decision making authority over all aspects of the child's life, including where the child will live and go to school and even whether the other parent will be excluded from their life.[81] Custody arrangements are not reflected in the family register. What is meant by "rights of custody" under Japanese law for purposes of the Hague Convention is not immediately clear, as is discussed in more detail below.

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75. MINPŌ [MINPŌ] [CIV. C.] art. 820 (Japan).

76. *E.g.*, COLIN P.A. JONES, KODOMO NO TSURESARI MONDAI [THE CHILD ABDUCTION PROBLEM] (2011). This is consistent with the trend in many other jurisdictions—including Singapore—which have moved away from conceptualizing "custody" in terms of parents' rights, as discussed below.

77. Colin P.A. Jones, *In the Best Interest of the Court: What American Lawyers Need to Know About Child Custody and Visitation in Japan*, 8 ASIAN-PAC. L. & POL'Y J. 166, 215-18 (2007) [hereinafter Jones, *In the Best Interest of the Court*].

78. MINPŌ [MINPŌ] [CIV. C.] art. 766 (Japan).

79. *See* Jones, *In the Best Interest of the Court*, *supra* note 77, at 216-17, 227-39. Note, however, that almost everything written about family court procedure—including the preceding works by the author—predates the new Family Case Proceeding Act which took effect on January 1, 2013. *See, e.g.*, *Kaji jiken tetuzuki hō no sekō wo mukaete* [*About the Implementation of the Family Case Proceeding Act*], SUPREME CT. JAPAN, http://www.courts.go.jp/vcms_lf/2412kouhou.pdf (last visited Feb. 8, 2014) (undated explanatory memo published on the Japanese court website). While it is too early to evaluate the effect of this new procedural regime, it is expected to provide greater procedural protections than existed before.

80. It is possible to "split" parental authority after divorce, with one parent receiving "custody" and the other having parental authority (such as having the child remain on the family registry and retaining sole authority to manage property and take legal acts on the child's behalf). Jones, *In the Best Interest of the Court*, *supra* note 77, at 215-18. This is a fairly rare compromise that is occasionally ordered by courts, but typically only when both parties agree to it. *Id.*

81. *See* MINPŌ [MINPŌ] [CIV. C.] arts. 820-25 (Japan).

3. Parental Authority and the Courts

Both the family register system and the Civil Code predate the current Japanese Constitution, though the family law provisions of the Code were heavily updated during the American occupation to render them consistent with the new charter.[82] Furthermore, the judiciary in modern (post-Meiji) Japan can be said to have played a much more limited role in family affairs than it has in common-law systems such as Singapore. For example, Japanese courts do not appear to exercise broad wardship jurisdiction over children of the type that has long been inherent to common law courts (see discussion of Singapore below).

Furthermore, as is suggested by the system of consensual divorces described above, together with a similar consensual system of establishing and terminating adoptive relationships, the Japanese system has long accorded a broad degree of autonomy to individual families in managing their internal affairs, treating the family as a single legal social unit for many legal purposes.[83] As a result, for much of its history the Japanese judiciary has refrained from interfering in internal family matters.[84] This may be changing, yet is a reflection of the much more limited understanding of "the judicial power" in Japan, with courts declining to become involved in disputes taking place within identifiable units of society, whether religious organizations, academic institutions, or family units. If one thinks of the courts as simply one part of a governance structure that is charged with "keeping the peace" and the courts perform their role by resolving disputes between members of society, it is arguably more efficient to limit coverage to disputes that effect relationships between components rather than between individuals.[85]

B. Complex Simplicity—Singapore's "Law of Parenthood"

Unlike Japan, which has historically based many of its laws and legal institutions on continental European models, Singapore has inherited a legal

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82. *Compare* KOSEKI HŌ [Family Register Act], Act No. 224 of 1947 (Japan), *and* MINPŌ [MINPŌ] [CIV. C.] (Japan), *with* NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION] (Japan), *translated in The Constitution of Japan*, PRIME MINISTER & HIS CABINET, http://www.kantei.go.jp/foreign/constitution_and_government_of_japan/constitution_e.html (last visited Feb. 8, 2014).

83. This can be traced back to the broad powers granted to the head of the household under the old Civil Code before the *ie* system was excised from it. *See* discussion *supra* note 47.

84. *See, e.g.*, Noriko Mizuno, *supra* note 50, at 164-69. Mizuno refers to the broad discretion granted to heads of household under the system and notes that the Supreme Court played an important role in protecting the weaker party (usually the wife) in post-war families through its policy of refusing to grant judicial divorces to the party at fault. *Id.* Note, however, that even this protective role was performed primarily by judicial inaction rather than assertive intervention.

85. As was recently explained to the author by a veteran Japanese lawyer, the problem for implementing the Convention in Japan is that its family law is based on the principle that in marriage $1+1=1$. By contrast, in Western nations the equation is $1+1=2$. By this he meant that the legal systems in those countries are better equipped for dealing with claims between family members since the law still treats them as individual legal units compared to Japanese family law, which is set up to deal only with whole numbers. *See* discussion *supra* note 47.

system deeply rooted in the English system of common law and equity. Long before Singapore's independence in 1965, it was established that the English law of guardianship of infants applied in the territory, and that the Singapore courts were vested with the same equitable powers of the Court of Chancery in connection with the welfare of children.[86] Singapore courts continue to refer to English and other common law precedents, including certain Acts of Parliament that remain through the Application of English Law Act.[87] The Women's Charter,[88] one of Singapore's principal family law statutes, has "*its origins in English law, particularly the UK Matrimonial Causes Act 1973.*"[89] As we shall see, the High Court of Singapore referenced appellate court rulings in the United Kingdom, Australia, and New Zealand in issuing its first decision under the Convention.[90]

This is not to say that Singapore has slavishly followed English practice, particularly in the field of family law where modifications were required to reflect local conditions. In the past, common law rules of inheritance rooted in monogamy and English notions of legitimacy had to be reevaluated in light of the various forms of polygamy recognized under the customary laws of some of the territory's principal ethnic communities.[91] While these customary rules have been mostly eliminated, today, Singapore still retains a separate system of Islamic law and a Syariah Court (and board of appeals) for its Muslim minority community under the Administration of Muslim Law Act ("AMLA").[92]

To consider what "rights of custody" mean in Singapore, it is necessary to look at the country's laws of custody and guardianship. Unfortunately, this area of the country's jurisprudence has been described as a "maze"[93] and being in a state of "confusion."[94] The description of Professor Debbie Ong may be a bit more accurate: "The law on custody of children is both simple and complex."[95]

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86. *In re Sinyak Rayoon & Anor* [1885-1890] 04 K.Y. 329 (Sing.), *discussed in* CASES HEARD AND DETERMINED IN HER MAJESTY'S SUPREME COURT OF THE STRAITS SETTLEMENTS (1808-1890) 726 (James William Norton Kyshe ed., Sing. & Straits Printing Office, 1890); *In re the Intended Marriage between Lee Keng Gin & Catherine Wong Kim Lan* [1935] SSLR 7, *microfilmed on Christian Chinese Couple May Now Marry*, SING. FREE PRESS, July 19, 1935, at 3.

87. *See* Application of English Law Act (Cap. 7A, 1994 Rev. Ed. Sing.) §§ 2-3.

88. Women's Charter (Cap. 353, 2009 Rev. Ed. Sing.) § 3.

89. *Compare id.*, *with* Matrimonial Causes Act, 1973, c. 18 (Eng.).

90. *See infra* Part IV.A.2.

91. *See, e.g.*, LEONG WAI KUM, PRINCIPLES OF FAMILY LAW IN SINGAPORE 87-148 (1997) [hereinafter PRINCIPLES OF FAMILY LAW IN SINGAPORE] (discussing Chinese, Hindu, and Christian customary law in pre-independence Singapore; in particular note the discussion at 87-88 of the famous *Six Widows Case* of 1867 in which a Singapore court had to reconcile Chinese polygamy with monogamy-based common law principles of legitimacy and inheritance).

92. Admin. of Muslim Law Act (Cap. 3, 2009 Rev. Ed. Sing.).

93. 11 HALSBURY'S LAWS OF SINGAPORE ¶ 130.463 (2006).

94. Leong Wai Kum, *Restatement of the Law of Guardianship and Custody in Singapore*, 1999 SING. J. LEGAL STUD. 432, 432 (1999).

95. Debbie Ong Siew Ling, *The Next Step in Post-Divorce Parenting*, 17 SING. ACAD. L.J. 648, 648 (2005).

First, the complexity: at the time of writing Singapore had not adopted a comprehensive statute governing children and the parent-child relationship comparable to the U.K.'s Children Act 1989. The primary source of statutory law governing the parent-child relationship remains the Guardianship of Infants Act[96] (the "GOIA"), which has its origins in a colonial-era ordinance.[97] Because the GOIA speaks primarily in terms of "guardianship," it seems common to refer to guardianship and custody together. To avoid confusion, however, this article will refer only to "custody".

The GOIA is effectively supplemented by the Women's Charter, and the AMLA, which provide rules for child custody determinations in connection with marital actions for non-Muslims and Muslims, respectively.[98] Due to the limits on the powers of the Syariah Court, however, it is both possible and common for Muslims to seek orders from the secular family court under the Women's Charter in parallel with divorce proceedings in the Syariah Court.[99] Unlike these two statutes, which are concerned primarily with marriage, annulment, and divorce, the GOIA applies to all children in Singapore regardless of the faith or marital status of their parents or the pendency of marital proceedings.[100] Thus, while the Women's Charter taken in isolation appears to only anticipate courts making dispositions regarding children ancillary to marital proceedings, other custody actions come within the ambit of the GOIA.[101]

The term "custody" is not defined in any Singapore statute and its meaning in case law has changed over time, generally moving away from a "rights based" concept. The Women's Charter is said to have been highly progressive, both in declaring mothers and fathers to be equal as parents, but also in espousing the "modern idea of a parent owing responsibility towards his or her child necessarily [that] rendered obsolete the old common law idea of a parent having rights over the child."[102] This primacy of parental responsibility rather than parental rights has been built upon by Singapore's courts and now applies throughout Singapore law.[103] As described by Professor Wai Kum Leong, one of Singapore's leading family law scholars:

> From the 1960s, the law in Singapore expects married, unmarried, separated or divorced parents (a) to view their child as someone towards whom they owe responsibility, (b) the responsibility should be

96. Guardianship of Infants Act (Cap. 122, 1985 Rev. Ed. Sing.) §§ 3-8.

97. PRINCIPLES OF FAMILY LAW IN SINGAPORE, *supra* note 91, at 542.

98. Women's Charter (Cap. 353, 2009 Rev. Ed. Sing.) § 125; Admin. of Muslim Law Act (Cap. 3, 2009 Rev. Ed. Sing.) §§ 52(3)(c), 53(2)(b).

99. Admin. of Muslim Law Act § 35A(1)-(2) (Sing.); *see also* Ahmad Nizam bin Abbas, *The Islamic Legal System in Singapore*, 21 PAC. RIM L. & POL'Y J. 163, 175 (2012).

100. *See* Guardianship of Infants Act §§ 3, 8 (Sing.).

101. *Id.* §§ 7(4), 14.

102. Wai Kum Leong, *A Communitarian Effort in Guardianship and Custody of Child After Parents' Divorce*, *in* THE INTERNATIONAL SURVEY OF FAMILY LAW 375, 378 (Andrew Bainham & Barthazar A. Rwezaura eds., 2006).

103. *Id.*

> discharged co-operatively with the other parent and/or guardian and (c) for the purpose of achieving the welfare of the child.[104]

Thus, even the statutory provisions of the GOIA, the Women's Charter, and the AMLA relating to custody should be regarded as being based on a "moral view" of parenthood. As posited by Professor Leong:

> It is not the law that bestows authority on a parent over his or her child. A parent naturally, from the way society is organized around family units, possesses and exercises authority over his or her child. The law accepts that parental authority is unlimited in scope. A parent must be able to do everything necessary to discharge his or her responsibility to care for and nurture the child. The law merely recognizes a parent's authority so that his or her exercise of it is lawful.[105]

Accordingly, even the law of guardianship is considered as being limited to court interventions that do not directly undermine parental authority or, to use the more modern term, parental responsibility.[106] According to Professor Leong, the law of custody in Singapore should be viewed as something separate from what she refers to as the much greater "law of parenthood." "It bears noting that the law of parenthood that regulates the parent-child relationship contains all the principles necessary for optimal regulation [of the upbringing of a child by her parents]. It is this area of law, rather than the law of guardianship and custody . . . that should . . . regulate . . . parents."[107]

Thus, although the term "custody" is still used in Singapore, it is in many ways an outdated notion that is of only secondary importance to a court charged with advancing the welfare of children. Here we can turn to the simplicity in Singapore's law of custody: everything that is done by a court or other government institutions must advance the child's welfare. In other words, "[c]oncern for the welfare of the child is ubiquitous in the law in Singapore relating to children."[108]

As already noted, the paramountcy of the welfare of children is a basic principle of the CRC.[109] Both the Women's Charter and the GOIA also contain provisions regarding the application of this principle in court proceedings.[110] Most recently a 2011 amendment to the Children and Young Persons Act added a general declaration that "the parents or guardian of a child . . . are primarily

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104. Leong Wai Kum, *Parental Responsibility as the Core Principle in Legal Regulation of the Parent-Child Relationship*, *in* SAL CONFERENCE 2011: DEVELOPMENTS IN SINGAPORE LAW BETWEEN 2006 & 2010, at 244, 246 (Yeo Tiong Min et al. eds., 2011) [hereinafter Leong Wai Kum, *Parental Responsibility*].

105. LEONG WAI KUM, ELEMENTS OF FAMILY LAW IN SINGAPORE 259 (2007) [hereinafter ELEMENTS OF FAMILY LAW IN SINGAPORE].

106. Leong Wai Kum, *Parental Responsibility*, *supra* note 104, at 249-50.

107. ELEMENTS OF FAMILY LAW IN SINGAPORE, *supra* note 105, at 341.

108. *Id.* at 255.

109. CRC, *supra* note 61, pmbl., art. 3.

110. Women's Charter (Cap. 353, 2009 Rev. Ed. Sing.) § 124; Guardianship of Infants Act (Cap. 122, 1985 Rev. Ed. Sing.) § 3.

responsible for the care and welfare of the child . . . and they should discharge their responsibilities to promote the welfare of the child . . . ."[111]

However, insofar as Singapore's law of guardianship is founded in the equitable powers of English courts to intervene when doing so is in the best interests of a child, the paramountcy principle could thus be said to predate any ordinance, statute, or treaty on the subject.[112] Moreover, unlike Japan, the principle supersedes even the agreement of both parents, as noted in a recent article by two Singapore family court judges:

> The paramount concern of the Court in family disputes cases or in cases involving children directly or indirectly is the welfare and best interests of the child and this consideration is entrenched in the laws of Singapore and cannot be circumvented by the desires of the parties under any situation.[113]

The judicial focus on children is further reflected by Singapore family court practices such as requiring non-adversarial mediation and family counseling so that all divorcing parents can be made aware of the potential impact on their children.[114]

The shift away from common law "rights-based" notions of custody towards a welfare-based "law of parenthood" has been reflected in the fact that Singapore courts no longer treat custody as a form of judicial empowerment of one parent at the expense of the other. This was illustrated by *L v L*, a leading case from 1997 in which the court held that a mother who had been awarded sole custody over her

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111. Children and Young Persons Act (Cap. 38, 2001 Rev. Ed. Sing.) § 3A(a). A similar mandate directed at parents in general was added to Art. 820 of Japan's Civil Code in 2011. Colin P.A. Jones, *Upcoming Legal Reforms: A Plus for Children or* plus ca change*?*, JAPAN TIMES (Aug. 9, 2011), http://www.japantimes.co.jp/community/2011/08/09/issues/upcoming-legal-reforms-a-plus-for-children-or-plus-ca-change/#.UvQRWSTn_IU. In the case of Japan, however, there are no statutory provisions that can be said to be positively implementing provisions of the CRC relevant to the subject of custody, including Articles 7, 8, 9, and 11.

112. *See* ELEMENTS OF FAMILY LAW IN SINGAPORE, *supra* note 105, at 352. For example, in a 1935 judgment a Singapore court overruled a father who had refused to give his consent to the marriage of his minor daughter because he did so for reasons related to his own faith rather than his daughter's best interest. *In re the Intended Marriage between Lee Keng Gin & Catherine Wong Kim Lan* [1935] SSLR 7, *microfilmed on Christian Chinese Couple May Now Marry*, SING. FREE PRESS, July 19, 1935, at 3.

113. RICHARD MAGNUS & WONG LI TEIN, THE ROLE OF JUDICIAL PROCESS IN CHILD PROTECTION: A SINGAPORE PERSPECTIVE 6 (2005), *available at* http://app.subcourts.gov.sg/Data/Files/File/eJustice/Archives/ISPCAN_Paper.pdf.

114. *See Children's Issues*, STATE CTS. SING., https://app.subcourts.gov.sg/family/page.aspx?pageid=6432 (last updated Mar. 8, 2014) (general disclosure on child custody and related proceedings showing counseling and resolution conferences as part of the process); *The Child Programme*, SUBORDINATE CTS. SING., https://app.subcourts.gov.sg/family/page.aspx?pageid=45944 (last updated Oct. 15, 2010) (a new, child focused resolution process with a heavy focus on counseling and non-adversarial proceedings). Among other things, Article 50(3A) of the Women's Charter requires a court to order mediation and/or counseling in connection with divorce proceedings. Ellen Lee, *The First Meetings and Overview of Matrimonial Proceedings*, *in* THE ART OF FAMILY LAWYERING 6, 10 (Michelle Woodworth Cordeiro ed., 2013).

child was nonetheless not free to unilaterally change the child's surname without the knowledge or consent of the father.[115]

There is also now a presumption that joint custody will usually be in the best interests of children in most cases.[116] This has gone beyond a mere system of "permissive" joint custody, in which courts allowed it if the parents appear cooperative, to one where courts have even ordered it notwithstanding "tremendous bitterness and hatred between" the parents.[117] Under current practice, an order of sole custody is only deemed appropriate when it is found to be in the child's best interests that the non-custodial parent be excluded from his or her life.[118]

That "custody" may have become unimportant is further illustrated by the comparatively recent practice of courts sometimes not issuing any custody order at all. In the groundbreaking case of *Re Aliya Aziz Tayabali*, the High Court declined to issue any custody order—a so-called "no custody order"—despite competing petitions from both sides.[119] In the absence of a formal custody decree, both parents "continue to be regulated by the default law, *ie*, the law regulating parenthood."[120] The "no custody order" approach has been both recommended and praised by academics and would be consistent with the approach adopted by the U.K.'s Children Act 1989, Section 1(5), which declares that courts should not make orders unless doing so will be better for the child, rather than not making any order at all.[121] As discussed below, however, how a Singapore "no custody order"

115. *See L v L* [1996] 2 SLR (R) [529], [530] (Sing.).

116. ELEMENTS OF FAMILY LAW IN SINGAPORE, *supra* note 105, at 354; Michelle Woodworth et al., *Custody, Care and Control and Access*, *in* THE ART OF FAMILY LAWYERING, *supra* note 114, at 44, 47.

117. *See ALJ v ALK* [2010] SGHC [255], ¶ 28 (Sing.), *available at* http://www.commonlii.org/sg/cases/SGHC/2010/255.html (discussed in Leong Wai Kum, *Parental Responsibility*, *supra* note 104, at 237); *CX v CY* [2005] 3 SLR (R) [690], [2005] SGCA [37], ¶ 38 (Sing.), *available at* http://www.singaporelaw.sg/sglaw/laws-of-singapore/case-law/free-law/court-of-appeal-judgments/12650-cx-v-cy-minor-custody-and-access-2005-3-slr-690-2005-sgca-37 ("We would emphasise [sic] that recent decisions have been inclined towards making joint or no custody orders due to the need to ensure that the child becomes attached to both parents. The idea behind joint or no custody order is to ensure that neither parent has a better right over the child and that both have a responsibility to bring the child up in the best way possible. Similarly, the child has a right to the guidance of both his parents.").

118. Woodworth et al., *Custody, Care and Control and Access*, *supra* note 116, at 46-47 ("Such an order [of sole custody] is the exception to the rule (even when the child's parents have an acrimonious relationship), because it unnecessarily deprives the child of one parent's involvement in the major aspects of his or her life. Sole custody orders are only made in exceptional circumstances; for instance, where one parent physically, sexually or emotionally abuses the child, or where the relationship of the parties is such that co-operation is totally impossible and the lack thereof is harmful to the child." (citing *CX v CY* [2005] 3 SLR (R) at [24], [29], [38] (Sing.))).

119. *See Re Aliya Aziz Tayabali* [1992] 3 SLR (R) [894], [894-95] (Sing.).

120. LEONG WAI KUM, ELEMENTS OF FAMILY LAW IN SINGAPORE 311 (2d ed. 2012).

121. *See, e.g.*, Debbie S. L. Ong, *Making No Custody Order:* Re G (Guardianship of an Infant), 2003 SING. J. LEGAL STUD. 583, 583 (2003) (referring to the issuance of no custody order as "brilliantly sensible"); ELEMENTS OF FAMILY LAW IN SINGAPORE, *supra* note 105, at 338 (praising the use of "no custody orders").

should be interpreted in connection with "rights of custody" under the Convention does not yet appear to have been addressed.

In 2005, the Court of Appeal of Singapore issued its decision in the case of *CX v CY*,[122] which has become one of the most important Singapore cases on the subject of child custody.[123] In it, the court confirmed that the idea of joint parental responsibility is "deeply rooted in [its] family law jurisprudence."[124] More importantly, it used the case as an opportunity to announce a new direction: "[I]n line with the outlook that parental responsibility is for life, the time was right for us to expressly endorse the concept of joint parenting. We believe that, generally, joint or no custody orders should be made, with sole custody orders being an exception to the rule."[125]

In expressing a preference for joint parenting while declining to favor joint custody or no custody, the Court of Appeal noted that "the practical effects of a 'no custody order' and a 'joint custody order' are similar where a 'care and control order' has been made."[126] As to when joint custody should be awarded as opposed to no custody, the Court of Appeal indicated that the latter result would be preferred "where there is no actual dispute between the parents over any serious matters relating to the child's upbringing."[127]

Shortly after *CX v CY* was decided, it was also endorsed by the Appeal Board of the Syariah Court, which declared that

> we are of the view that the Muslim law on custody of children as administered under the [*AMLA*] is no different from that set out in *CX v CY*. We say this because under both Muslim and the civil law the interest or welfare of the child is the paramount consideration.[128]

Therefore, Singapore's laws of custody can essentially be considered uniform regardless of the faith involved.

A slightly cynical interpretation of these developments might be that courts have merely redefined custody so that it means less. It is generally accepted that in Singapore today the "battlefield" has moved from custody to care and control and access.[129] "Care and control" refers to which parent the child should live with, and

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122. *CX v CY* [2005] 3 SLR [690] (Sing.).

123. *See, e.g.*, ELEMENTS OF FAMILY LAW IN SINGAPORE, *supra* note 105, at 359 (describing the decision as "significant").

124. *CX v CY* [2005] 3 SLR ¶ 26.

125. *Id.* ¶ 24.

126. *Id.* ¶ 18.

127. *Id.*

128. LEONG WAI KUM, ELEMENTS OF FAMILY LAW IN SINGAPORE 316 (2d ed. 2012) (citing Zaini bin Ibrahim v Rafidah binte Abdul Rahman (Appeal Case No. 26/2006)). *See also* Ahmad Nizam bin Abbas, *supra* note 99, at 175 n.93.

129. Debbie Ong, *Family Law*, 12 SING. ACAD. L. ANN. REV. SING. CASES 298, 301 (2011). "Our development now mirrors more closely that in England where, although custody or 'parental responsibility' is no longer an arena for parental disputes, the contests for residential order and contact orders continue to be tricky." Debbie Ong & Valerie Thean, *Family Law*, 8 SING. ACAD. L. ANN. REV. SING. CASES 229, 235 (2007).

which parent "*make[s] the small decisions that are needed for daily living.*"[130] In this sense it is similar to "custody" as used in the Japanese Civil Code.

However, care and control is different from Japanese custody and from Singaporean notions of custody in that it does not empower a parent to make major decisions about the child without involving the other parent.[131] Unlike custody, with respect to which courts can order joint custody or refrain from making a custody order at all, a care and control order in favor of one parent is generally required when they divorce or separate.[132] Furthermore, joint care and control orders are still rare, though one scholar has identified a recent trend towards their increase.[133] At the time of writing it was reportedly common for both parents to have joint (or "no") custody and thus be expected to participate and cooperate in all major decisions in the child's life, while only one parent would have care and control with the other having access.[134]

In regards to access in Singapore, little needs to be said other than that "convincing evidence" is required before a court will deny a parent reasonable access to his or her child.[135] To the extent cross border access is also considered in the best interest of the child, courts can generally be expected to allow it also.[136]

With Singapore having moved away from "custody" as a primary concern in judicial determinations, particularly in the sense of being a "rights-based" notion, one might reasonably wonder what "rights of custody" means for purposes of the Convention. On this point it may actually be useful to look at the country's criminal law for further guidance.

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130. ELEMENTS OF FAMILY LAW IN SINGAPORE, *supra* note 105, at 354 (emphasis added).

131. *Id.*

132. *Id.*

133. *See, e.g.*, Ong, *Family Law* (2011), *supra* note 129, at 301.

134. *See* Woodworth et al., *Custody, Care and Control and Access*, *supra* note 116, at 48.

135. 11 HALSBURY'S LAWS OF SINGAPORE ¶ 130.515 (2006), citing *Tay Ah Hoe (mw) v Kwek Lye Seng* (unreported), Div Pet No 3080 of 1995 (Sing.). "*[Within the law of guardianship and custody] a parent [who] does not live with . . . her child, it has become common to expect that . . . she will get an order that gives reasonable access to the child.*" ELEMENTS OF FAMILY LAW IN SINGAPORE, *supra* note 105, at 355 (emphasis added). *See also* Debbie Ong Siew Ling & Valerie Thean, *Family Law*, 2 SING. ACAD. L. ANN. REV. SING. CASES 224, 236 (2002) ("In *Sumathi d/o Boominathan v Kathiravan* (Divorce Petition 6009977/2001, DC, unreported dated 30.4.2002), a father was given overnight access to his four-year-old daughter despite the mother's fears that the child may be exposed to violence and fears that being apart from the mother overnight may cause the young child some trauma.").

136. *See BG v BF* [2007] 3 SLR (R) [233], [2007] SGCA [32] (Sing.), *available at* http://www.singaporelaw.sg/sglaw/laws-of-singapore/case-law/free-law/court-of-appeal-judgments/13189-bg-v-bf-2007-3-slr-233-2007-sgca-32 (concerning a dispute between two non-Singapore parents). One area for further research would be the question of whether Singapore's geographical condition has any impact on child custody resolutions. Given its small size, in cases involving parents who both reside in Singapore, the determination of which parent has care and control is unlikely to greatly impact the frequency with which the other parent is able to exercise rights of access. Thus, the type of dispute which might arise in a strictly domestic case in a much larger jurisdiction (Texas, or Japan, for example) may only arise in Singapore in cases involving a prospective international relocation by one parent.

Unlike in some other states that are party to the Hague Convention, such as the United States or Canada, Singapore does not have provisions in its Penal Code or other statues making it a crime for a parent to abduct his or her own child internationally or domestically. As explained by one scholar writing on the subject in 1999, "[*u*]*nder the Singapore Penal Code, then, a parent cannot kidnap his or her child.*"[137] Joining the Convention has not changed anything in this respect: as of March 2013 the home page of Singapore's Central Authority clearly stated that "[*i*]n *Singapore, parental child abduction is not considered a criminal issue but is viewed as a civil matter.*"[138]

There is one exception: a 1996 amendment to Section 126 of the Women's Charter makes it an offense for any person to remove a child *subject to a custody order* from Singapore for more than one month without the consent of both parents or the leave of the court.[139] The proscription applies even to a parent vested with sole custody and thus amounts to a prohibition on unilateral relocations abroad without the consent of the other parent or the leave of the court.

For Hague Convention purposes, therefore, any parent of a child in Singapore subject to a custody order under the Women's Charter (whether or not the order gives them custody) appears to have a statutory *ne exeat* right—essentially the right of one parent to veto the removal of the child from the jurisdiction of residence by the other parent, even when the other parent has full (sole) custody rights. Courts in some states parties to the convention, including the U.S. Supreme Court, have found *ne exeat* rights to constitute "rights of custody" under the Hague Convention, insofar as they necessarily give the parent holding them the "right to determine the child's place of residence."[140]

On its face, the above provision of Section 126 of the Women's Charter does not apply in cases where a custody ruling has not yet been made (as is often the case of abductions that take place before any court proceedings have been commenced).[141] Furthermore, it is not clear whether a "no custody order" qualifies as a "custody order" for purposes of applying this provision. It seems inconceivable, however, that a parent who has full parenthood under the "law of parenthood," before any restrictions are applied by courts through the Women's Charter in the form of a custody order, would *not* be found to have a right to participate in decisions regarding his or her child's residence when a parent who had lost custody would, merely because of the mechanistic operation of Section 126. In addition, insofar as Singapore courts have held that non-custodial parents should be consulted about important matters such as a change of name, the same requirement would seem likely to apply to a change of residence.

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137. Leong Wai Kum, *International Co-operation in Child Abduction Across Borders*, 11 SING. ACAD. L.J. 409, 418 (1999) (emphasis added) (citations omitted).

138. *Frequently Asked Questions*, MINISTRY SOC. & FAM. DEV., http://app.msf.gov.sg/SingaporeCentralAuthority/FAQ.aspx (follow "5. Is parental child abduction a crime in Singapore?" hyperlink to show answer) (last visited May 31, 2013).

139. Women's Charter (Cap. 353, 2009 Rev. Ed. Sing.) § 126.

140. *See e.g.*, Abbott v. Abbott, 560 U.S. 1, 11 (2010).

141. *See* Women's Charter § 126 (Sing.).

The author's conclusion is thus that between the Women's Charter and the "law of parenthood" described above, virtually all parents in Singapore have "rights of custody" for purposes of the Hague Convention. In most cases originating from Singapore, therefore, the inquiry would seem likely to focus not on whether the left-behind parent had rights of custody, but whether they were actually being exercised at the time.

IV. IMPLEMENTING THE CONVENTION

A. Singapore

1. The International Child Abduction Act of 2010

The International Child Abduction Act ("ICAA"), Singapore's implementing legislation for the Convention can be seen as a natural extension of the legal regime described above. Singapore courts have often dealt with international custody disputes, including in abduction-type situations, before the country joined the Convention.[142] In at least one reported judgment, a Singapore court even referred specifically to the principles of the Convention in resolving such a case.[143] Doing so can be seen as a natural extension of the principle of the paramountcy of the welfare of the child, a principle in which the Convention itself is also rooted.

The ICAA is a comparatively short statute, containing just 24 sections that cover the basic aspects of implementation.[144] First, it establishes Singapore's Central Authority within the Ministry of Social and Family Development.[145] Second, the ICAA establishes the basic procedural framework for court involvement in ingoing and outgoing cases arising under the Convention.[146] More detailed procedural rules have been left to the rule-making authority of the Supreme Court, which has used this authority to transfer Convention cases to the family division.[147]

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142. For example, the seminal case of *CX v CY* [2005] 3 SLR (R) [690], [2005] SGCA [37], ¶ 38 (Sing.), discussed above, involved a Dutch national living in Thailand and a Singapore mother. *See also* ELEMENTS OF FAMILY LAW IN SINGAPORE, *supra* note 105, at 302-304.

143. In *AB v AC*, a case decided in 2004 and involving a Norwegian man and a Singaporean woman who had been residing in Norway with their child after their divorce, the Singapore court awarded custody to the father for purposes of returning the child to Norway after the mother brought the child to Singapore in violation of the Norwegian court order. *AB v AC* [2004] SGDC [6] (Sing.). *See also* Debbie Ong & Valerie Thean, *Family Law*, 5 SING. ACAD. L. ANN. REV. SING. CASES 281, 281-83 (2004). Interestingly, the court also based its ruling in part on Section 126(5) of the Women's Charter, noting that since the provision made it an offense to do what the mother had done *leaving* Singapore, permitting similar behavior in the opposite direction would create a double standard. *Id.*

144. International Child Abduction Act (Cap. 143C, 2011 Rev. Ed. Sing.), *available at* http://statutes.agc.gov.sg/aol/search/display/view.w3p;page=0;query=DocId%3A%2251e460e9-31f7-4792-ae18-86190cf04b6b%22%20Status%3Ainforce%20Depth%3A0;rec=0.

145. *See id.* §§ 5-7.

146. *See id.* §§ 8-20.

147. *See* Supreme Court of Judicature (Transfer of Matrimonial, Divorce and Guardianship of Infants Proceedings to District Court) Order 2007 (Cap. 322, 2007 Rev. Ed. Sing.), *available at* http://statutes.agc.gov.sg/aol/search/display/view.w3p;page=0;query=CompId%3Aadb39909-4294-

The ICAA also addresses legal aid and certain other miscellaneous matters relating to implementation. Under Section 14(1), an application under Article 15 of the Convention may be made for a court declaration that the removal of a child from Singapore violated rights of custody in Singapore.[148]

Much of the Convention's implementation is accomplished through Section 3 of the ICAA, which accords most of the treaty (including the Article 5 definition of "rights of custody") the force of domestic Singaporean law, the relevant articles being attached as an appendix.[149] Since the ICAA is readily available online, in English,[150] and accomplishes implementation through adoption of the Convention provisions as they are written, the preceding brief summary should suffice for purposes of this article.

2. The Convention in Singapore Courts: *BDU v BDT*

Despite the comparatively small number of inbound cases recorded in Singapore since its accession went into effect in 2011, by the following year a Singapore court was deciding its first return order case—that of *BDU v BDT*, which culminated in a high court opinion issued May 15, 2013.[151]

BDU v BDT was what an English court of appeals judge would likely call "a very standard Hague case."[152] A German man and a Singaporean woman became acquainted over the Internet.[153] After meeting in person she became pregnant.[154] They married and set up a household in Germany where the child at issue was born in 2010.[155] The marriage went sour and, after returning temporarily to Singapore in January of 2012 to celebrate the Chinese New Year, the mother, pregnant again, remained in Singapore, apparently refusing to return to Germany.[156] The father had already dealt with a similar situation the previous year at which time he had procured from a German court an order temporarily vesting in him the sole right to

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4bc1-95b8-ccb1a8fbe41e%20ValidTime%3A20140611000000%20TransactionTime%3A20140611000000;rec=0. Note that the Syariah Court has no role in proceedings under the ICAA.

148. International Child Abduction Act § 14(1) (Sing.).

149. *See id.* § 3.

150. *See* International Child Abduction Act (Sing.), *supra* note 144 (website at the end of citation)

151. *BDU v BDT* [2013] SGHC [106] (Sing.), *available at* http://www.singaporelaw.sg/sglaw/laws-of-singapore/case-law/free-law/high-court-judgments/15217-bdu-v-bdt-2013-sghc-106.

152. E (Children) (FC), [2011] UKSC 27, [2012] 1 AC 144 (S.C.) ¶ 11 (appeal taken from EWCA) (U.K.) (quoting the description of the case by LJ Thorpe of the Court of Appeal) (involving an English woman who brought her children to England from Norway to escape alleged psychological abuse from her Norwegian husband and resulted in the return order made by the trial judge being upheld).

153. *BDU v BDT* [2013] SGHC ¶ 6 (Sing.).

154. *Id.*

155. *Id.*

156. *See id.* ¶¶ 8, 11-13 (indicating that the second child was not subject to any court proceedings in Singapore).

determine the child's place of abode.[157] The order was vacated after she returned to Germany.[158]

In February of 2012, after the second instance of her refusing to leave Singapore with the child, the father returned alone to Germany and immediately commenced proceedings in a court there.[159] He promptly obtained an order transferring parental authority to him and ordering the mother to return the child to the father in Germany.[160] This was followed by a request for return filed with the Central Authority in Germany and a request for assistance filed with the Singapore Central Authority.[161] The mother commenced proceedings under the GOIA in April 2012 seeking sole custody and care and control over the child, but these proceedings were stayed under the ICAA by the father's commencement of an application for return.[162]

The proceedings were prompt. The Singapore district court Judge issued a decision ordering the return of the child to Germany on August 21, 2012.[163] The mother appealed almost immediately and the Singapore High Court issued a very thorough judgment affirming the order less than a year later.[164] The High Court was no doubt cognizant of the importance of this—its first decision under the Convention.

The German father acted well within the one year period mandated by the Convention[165] and there was never any dispute about his objections to the child's retention in Singapore or efforts to exercise his rights of custody.[166] This meant that the defenses to a return order under Article 13(a) of the Convention were not available.[167] The case was thus essentially about the applicability of Article 13(b), which states that convention members do not have to return a child if the party opposing it establishes that "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."[168]

At the district court level, the mother claimed that she had been psychologically abused by her in-laws and physically abused by the father.[169] Her Article 13(b) defense was thus essentially that returning her to Germany would

157. *Id.* ¶ 9.
158. *See id.* ¶ 10.
159. *See id.* ¶¶ 11-12.
160. *Id.* ¶ 12.
161. *Id.*
162. *Id.* ¶ 13.
163. *Id.* ¶ 37.
164. *See id.* ¶¶ 49-107.
165. *Id.* ¶ 18.
166. *Id.*
167. *See* Convention, *supra* note 1, art. 13. Hague Convention, Article 13 states, in part, that a return does not need to be ordered if "a) the person, institution or other body having the care of the person of the child *was not actually exercising the custody rights at the time of removal or retention*, or had *consented to or subsequently acquiesced in the removal or retention*." *Id.* (emphasis added).
168. *Id.*
169. *BDU v BDT* [2013] SGHC ¶¶ 44-48 (Sing.).

subject her to further physical and emotional harm and thus expose *E*, their child, to grave psychological harm. Upon appeal, this claim was bolstered with affidavits and a psychological report suggesting that being forced to return to Germany might render the mother suicidal and that the undertakings and protective measures were manifestly inadequate and unsatisfactory.[170]

On appeal, the High Court surveyed how courts in several "peer" jurisdictions, the United Kingdom, Australia, and New Zealand, had dealt with the 13(b) defense.[171] First the court looked at two recent cases of the U.K. Supreme Court to find the position in the United Kingdom "less than clear cut."[172] As interpreted by the Singapore Court of Appeal, in the 2011 case *In re E*, the U.K. Supreme Court essentially discounted the subjective, often unsubstantiated claims of mental harm by abducting mothers and focused on the objects of the Convention as being to deter parents taking the law into their own hands and restoring children as soon as possible to their home country.[173] By contrast, however, in a case decided the following year, *In re S*, the U.K. Supreme Court seemed to step back and endorse a highly subjective version of the 13(b) defense:

> The critical question is what will happen if, with the mother, the child is returned. If the court concludes that, on return, the mother will suffer such anxieties that their effect on her mental health will create a situation that is intolerable for the child, then the child should not be returned. *It matters not whether the mother's anxieties will be reasonable or unreasonable.*[174]

The High Court then turned to Australia, where the position set forth in *DP Commonwealth Authority* and *JLM v Director General NSW Department of Community Services* rendered the position in that country "quite certain."[175] Essentially the court found this case to stand for that 13(b) defenses were rarely applied without clear and compelling evidence.

Next the High Court looked to New Zealand, first referencing *A v Central Authority for New Zealand*, which it found to stand for the proposition that "the issue of whether the child will be put in an intolerable situation will not even arise if the legal system of the country of habitual residence is capable of protecting (the best interests of) the child."[176] This would appear to call for an exceptionally narrow reading of the 13(b) defense.

Yet the court ultimately settled on part of an analytical method developed in a conflicting New Zealand authority emphasized by the appellant mother, *El Sayed v*

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170. *See id.* ¶¶ 51, 62.

171. *Id.* ¶¶ 21-36.

172. *Id.* ¶¶ 28-30.

173. *Id.* ¶¶ 26-28 (citing *In re* E (Children) (FC), [2011] UKSC 27, [2012] 1 AC 144 (appeal taken from EWCA) (U.K.)).

174. *Id.* ¶ 29 (citing *In re* S (A Child), [2012] UKSC 10, [2012] 2 AC 257 [34] (U.K.) (emphasis added)).

175. *Id.* ¶ 30. (citing *DP v Commonwealth Central Authority* (2001) 206 CLR 401 (Austl.); *JLM v Director-General NSW Department of Community Services* [2001] HCA 39 (Austl.)).

176. *Id.* ¶¶ 31-32 (citing *A v Central Authority of New Zealand* [1996] 2 NZLR 517 (CA)).

Secretary for Justice ("*El Sayed*").[177] In that case the court held, *inter alia*, that the 13(b) exception required

> (a) the identification of [a] specific harm to the child; (b) of a requisite character; (c) that the harm must be demonstrated to be of a grave character; (d) by clear and compelling evidence; and (e) if [the] harm of that kind was established, the trial Court had a wide discretion as to how the return dilemma is to be addressed.[178]

Singapore's High Court found (a) through (d) of the *El Sayed* test to be useful guidelines and, noting them to be consistent with the ruling of the U.K. Supreme Court in *In re E*, used them to resolve the case at bar.[179] The court discounted much of the assertions and noted numerous discrepancies in the assertions made by the mother and her psychiatric expert witness.[180] The court concluded that most of the mother's assertions about the "intolerable harm" that would result from a return would spring from the child being separated from her, though she had failed to articulate any reason why such separation was necessary (the father having offered various arrangements whereby she could continue to live in Germany).[181] Since this harm would only result if the mother refused to return to Germany, and she had failed to submit adequate evidence that doing so would be intolerable for her beyond mere assertions and psychological evidence developed primarily after the proceedings commenced,[182] the court concluded that the four elements it had taken from *El Sayed* were not present and upheld the return order.[183]

BDU v BDT shows that from the outset Singapore's courts have adopted an approach to interpreting the Convention that looks to what they consider to be its peer jurisdictions. While there are differences in approach and interpretation between these jurisdictions, this case shows that the nation's courts can be expected to interpret the Convention similar to other common law jurisdictions, but also consistently with Singapore's domestic laws of custody and guardianship.

B. Japan's Implementing Act

Before discussing Japan's implementing legislation, two points should be noted. First, as in the case of Singapore, when committed by a parent, child abduction is generally not considered a criminal offense in Japan. However, there have been occasional arrests and convictions of parents snatching their own children, though they have typically also involved some element of "disturbing the peace."[184] Nothing about Japan's implementing legislation is expected to change the criminal aspects of child abduction (or lack thereof).

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177. *Id.* ¶ 33. (citing *El Sayed v Secretary for Justice* [2003] 1 NZLR 349 (N.Z.)).
178. *Id.*
179. *Id.* ¶¶ 89.
180. *Id.* ¶¶ 100, 104-105.
181. *Id.* ¶ 97.
182. *Id.*
183. *Id.* ¶ 107.
184. *Possible Criminal Penalties in Japan for Parental Abduction to Japan*, JAPAN CHILD. RTS. NETWORK, http://www.crnjapan.net/The_Japan_Childrens_Rights_Network/res-criminalpen.html (last

Second, with Japan's implementing legislation just coming into effect April 1, 2014, there have been no cases arising under the Convention in Japan.[185] It should be noted, however, that Japanese courts have had an exceptionally bad track record in returning children removed from another country in violation of a custody order in that country.[186] It is commonly said that the return of a child to another country has never been realized through the court system in Japan, a state of affairs that is a reflection of the Japanese legal system's limited capability to remedy abductions even in strictly domestic cases.[187]

A great deal of the diplomatic pressure on Japan to join the Convention can thus be said to have been on the expectation that doing so would result in Japanese courts acting differently. At the same time, however, it has also resulted in a portrayal in the Japanese media of the Convention as something Japan "must" sign

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visited Feb. 6, 2014). Here again, the Family Registry plays a subtle role. Japanese police are generally reluctant to become involved in civil disputes. However, after divorce a parent who has lost parental authority is for family register purposes in the same position as a stranger, making it more likely that police will regard a post-divorce abduction as potentially criminal. *Id.*

185. *Japan Finally Signs Hague Convention Governing International Child Custody Disputes*, ASAHI SHIMBUN, Jan. 25, 2014, http://ajw.asahi.com/article/behind_news/AJ201401250061.

186. As already noted, this poor record is one of the factors in the severe criticism and diplomatic pressure that has been directed at Japan to sign the convention. *See, e.g.*, H.R. Res. 1326, 111th Cong. (2010) (calling on Japan to resolve outstanding cases of abduction of children from the United States and to promptly join the Hague Convention); Press Release, Joint Statement by the Ambassadors of Australia, Belgium, Canada, Colombia, France, Germany, Hungary, Italy, New Zealand, Spain, the United Kingdom and the United States, and the Head of the Delegation of the European Union to Japan, Australian Embassy, Tokyo (Oct. 22, 2010), *available at* http://www.australia.or.jp/en/pressreleases/?id=80 (expressing concern over child abduction problem in Japan and urging the country to join the Hague Convention: "Japan is the only G-7 nation that has not signed the Convention. Currently the left-behind parents of children abducted to or from Japan have little hope of having their children returned and encounter great difficulties in obtaining access to their children and exercising their parental rights and responsibilities."); Lucy Birmingham, *How Did Japan Become a Haven for Child Abductions?*, TIME (Mar. 7, 2011), http://www.time.com/time/world/article/0,8599,2056454,00.html. This author has also written a number of articles critical of Japan's failure to join the Convention or modify its domestic law and practices to suitably address the problem of parental child abduction. *See, e.g.*, Colin P.A Jones, *Expectations Low as Hague Signing Approaches*, JAPAN TIMES (Feb. 21, 2012), http://www.japantimes.co.jp/community/2012/02/21/issues/expectations-low-as-hague-signing-approaches/#.UvQSJSTn_IU; Colin P.A. Jones, *Upcoming Legal Reforms: A Plus for Children or* plus ca change*?*, JAPAN TIMES (Aug. 9, 2011), http://www.japantimes.co.jp/community/2011/08/09/issues/upcoming-legal-reforms-a-plus-for-children-or-plus-ca-change/#.UvQRWSTn_IU. As an aside, the author believes one of the problems that likely lurks at the heart of Japan's Hague Convention implementing regime is that the primary expectation on the part of foreign critics is that joining the treaty will lead to different results from Japanese courts, while on the other the primary expectation on the part of those Japanese involved in implementation may be that joining the treaty alone will cause foreign criticism to cease!

187. *See* Jones, *In the Best Interest of the Court*, *supra* note 77, at 258-264 (this work no longer reflects current Japanese law—including a recent wholesale amendment of the family court procedural statute—or judicial practice, though the institutional factors described still apply).

because of foreign pressure rather than for reasons relating to the welfare of children.[188]

Against this background, Japan's law for implementing the Convention, the "Act in connection with the implementation of the convention on the civil aspects of international child abduction" ("the Act"),[189] presents a stark contrast to the ICAA. Submitted to Japan's Diet in March 2013, which quickly approved it, the Act was promulgated on June 19 and came into effect April 1, 2014.[190] The Act contains a total of 153 articles (not including supplementary provisions) and fills 110 A-4 sized pages.[191] Further procedural details will come in the form of rules to be established by Japan's Supreme Court.

Longtime observers of Japan's international abduction problem might be tempted to conclude that such a baroque statute evidences a desire to make it difficult to actually achieve the return of a child from Japan. Much of the Act (Articles 32-143) is devoted to establishing an entire procedural regime for handling return requests, including detailed rules governing applications, initial trials, mediation, appeals, retrials, and enforcement.[192] Each step of the process established in the Act seems to present an opportunity for a disposition either preventing or delaying return.

Some cynicism may be justified. For example, going so far as to allow a losing party to apply for a retrial *after* appeals have been exhausted (Articles 119-120)[193] seems inconsistent with the Convention mandate that return cases be handled expeditiously.[194] Not to mention the Hague Convention best practices calling for the minimization of opportunities for further delay once a judgment has become final.[195]

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188. *See, e.g.*, *Hāgu jōyaku, kodomo no tame ni taisei tsukuri isoge* [*Hague Joyaku—Need to make a system for children quickly*], YOMIURI SHIMBUN, Apr. 30, 2013, at 3. If anything, the welfare of children has come up in public debate in Japan over joining the Hague Convention primarily in the context of how to protect Japanese mothers and their children fleeing from abusive foreign fathers. *Id.* This has resulted in a spate of vaguely-tautological editorials that support Japan joining the Convention while calling for it to be implemented in a manner that protects the interests of children. *Id.*

189. KOKUSAITEKINA KODOMO NO DASSHU NO MINJIJO NO SOKUMEN NIKANSURU JOYAKU NO JISSHINI KANSURU HORITSU [Act for Implementation of the Convention on the Civil Aspects of International Child Abduction], Act No. 48 of 2013 (Japan), *available at* http://www.moj.go.jp/content/000121368.pdf.

190. *Process Toward Conclusion of the Hague Convention*, MINISTRY OF FOREIGN AFF. OF JAPAN (Mar. 7, 2014), http://www.mofa.go.jp/fp/hr_ha/page22e_000251.html.

191. Act for Implementation the Convention on the Civil Aspects of International Child Abduction (Japan).

192. *Id.* arts. 32-143.

193. *Id.* arts. 119-20.

194. *See* Convention, *supra* note 1, arts. 1-2.

195. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW [HCCH], GUIDE TO GOOD PRACTICE UNDER THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION: PART II—IMPLEMENTING MEASURES, 36-37 (2003), *available at* http://www.hcch.net/upload/abdguide2_e.pdf. A motion for a new trial may result in enforcement of a return order being suspended, and can be requested for any of the reasons set forth in Art. 338 of the

Initial cynicism aside, other factors may be at work in the Japanese approach to implementation. First, for linguistic reasons it is unlikely that Japan could simply emulate Singapore by adopting convention provisions "as is" into Japanese law. This would likely involve complex translation issues (including conformity with domestic legal usages) and has never been Japan's practice with treaties.

Second, and perhaps more importantly, Japan's judicial system is based on continental models and lacks many of the inherent powers that have come to be exercised by common law judges.[196] Japanese judges can only exercise those powers given to them by the law and lack the many vaguely defined "inherent powers" of their common law counterparts (including the broad wardship jurisdiction that courts in common law systems have long exercised over children).[197] This difference is illustrated by Article 73(2) of the Act which empowers judges hearing return cases to allow parties to speak, as well as prohibit them from speaking,[198] a power most common law judges likely take for granted. In a similar vein, the Act gives a court hearing a return case the authority to issue orders prohibiting the removal of an abducted child from Japan (Articles 122 and 123), a power, which to the author's knowledge, has never been used by Japanese courts in pre-Convention cases.[199]

Thus, insofar as the Convention expects Japanese judges to act in a particular way (expeditiously and adjudicating only a limited range of issues) in specific types of cases (requests for return orders), it may not have been possible to accomplish this by merely modifying existing procedures and expecting judges to take the lead in implementation. This seems particularly likely when one recalls that the existing system of child custody litigation is based primarily on mediation aimed at producing consensual result which, if unsuccessful may require years of judicial proceedings before a final result is reached. The fact that Japan has chosen to have cases arising under the Convention handled in just two designated family courts (in Tokyo and Osaka) further necessitates a procedural regime different from the existing system rules designed for a nationwide network of family courts.[200]

Another source of skepticism might be the gatekeeper role the Act accords to the Minister of Foreign Affairs (who under Article 3 of the Act is designated as Japan's Central Authority)[201] in rejecting defective applications for returns and

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Code of Civil Procedure, which include: "There was an omission in a determination with regard to material matters that should have affected a judgment." MINPŌ [MINPŌ] [CIV. C.] art. 338 (Japan).

196. JOHN HALEY, AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX 118 (1991).

197. *See, e.g.*, PRINCIPLES OF FAMILY LAW IN SINGAPORE, *supra* note 91, 424-426 (describing English law background to Singapore law of wardship and judge's inherent powers to make rulings).

198. Act for Implementation of the Convention on the Civil Aspects of International Child Abduction, art. 73, para. 2 (Japan).

199. *Id.* arts. 122-123. Note that Art. 22 of the Japanese Constitution guarantees the freedom to "move to a foreign country." NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 22 (Japan).

200. Act for Implementation of the Convention on the Civil Aspects of International Child Abduction, art. 32 (Japan).

201. *Id.* art. 3.

access assistance.[202] While Singapore's ICAA merely empowers its Central Authority to reject incoming applications which do meet formal requirements, Japan's Act (Articles 7 and 18) goes into significant detail as to when the Minister is required to reject applications, including instances when doing so might involve performing a quasi-judicial function.[203] For example, under Article 7(1)(6) of the Act, the Minister must reject a return application if "it is clear" that the applicant did not have or was not exercising "rights of custody" under the laws of child's jurisdiction of habitual residence.[204] The ability of Japan's Central Authority to make decisions about law and fact in "clear cases" seems inconsistent with Hague Convention best practices, which state that: "Central Authorities must exercise extreme caution before rejecting an application, especially where there is a difference of opinion between Central Authorities concerning habitual residence or rights of custody, as these issues will require judicial determination."[205]

One of the Act's most contentious features may prove to be its implementation of the Convention exceptions to the return principle. Under Convention Article 13(b), a child does not have to be returned if "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."[206] This exception is replicated in Article 28(1)(4) of the Act, but in paragraph 2 of the same article, judges hearing return cases are authorized to take into account a wide variety of factors in evaluating whether an exception is applicable, including the risk of violence (defined as including verbal behavior) to the taking parent or the child.[207] Another factor that can be considered is whether there are circumstances that would make it difficult for the taking parent, *or the requesting parent*, to care for the child after a return.[208] Such a provision seems to authorize something close to an evaluation of both parents' custodial capacities, a determination that is essentially prohibited by Article 19 of the Convention.

A final reason for the Act's baroqueness may be because, rather than building upon a pre-existing foundation of compatible domestic law and practice as in the case of Singapore's ICAA, the Act essentially reflects an effort to graft a treaty onto a system of family law that is arguably inconsistent with it. The Convention is rooted in widely-accepted notions of what is in the best interests of children (not being abducted and having their welfare decided in their jurisdiction of habitual residence),[209] while Japanese family law can be understood as based primarily

202. *See id.* arts. 7-18.

203. *Id.*

204. *Id.* art. 7, para. 1, no. 6.

205. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW [HCCH], GUIDE TO GOOD PRACTICE UNDER THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION: PART I—CENTRAL AUTHORITY PRACTICE 47 (2003), *available at* http://www.hcch.net/upload/abdguide_e.pdf.

206. Convention, *supra* note 1, art. 13(b).

207. Act for Implementation of the Convention on the Civil Aspects of International Child Abduction, art. 28 (Japan).

208. *Id.* art. 28, para. 2, no. 3.

209. Convention, *supra* note 1, at arts. 1-2.

upon consensual arrangements in which the government performs a largely administrative function (processing paperwork) without any supervision over the welfare of the children affected by them.

For example, the Act uses the term "*kango no kenri*" ("rights of custody") but does not include a definition, just as with the Convention itself.[210] However, the term "*kango*" (care, custody) is also used in Articles 766 and 820 of Japan's Civil Code but there is no attempt to reconcile the two terms, even if only to clarify what "*kango no kenri*" means in the context of Japanese law for purposes of understanding when a child taken *from* Japan should be returned under the Conventions.[211] As already noted, the "right to determine the child's residence" is not only part of the Convention definition of "rights of custody" but also identified as a component of parental authority in the Japanese Civil Code.[212] The lack of concordance between "rights of custody" in the Convention and the Act and "parental authority" under the Civil Code may result in discrepancies between how Japanese law treats international cases and domestic cases. This will become more apparent as cases develop. Under the Convention, a Japanese parent can request and probably achieve the return of a child taken to a foreign country based on having joint parental authority over the child during marriage.[213] In the same scenario taking place domestically, the Japanese parent may not even be able to see the child, let alone expect a Japanese family court to realize a return to the *status quo ante*.[214]

The discrepancies between the Convention and Japanese domestic law become most apparent in connection with access rights. Under Article 16 of the Act, a parent may seek the Minister's assistance in facilitating contact with a child in Japan based on access rights recognized in another Convention country.[215] Such an application must include documents establishing that the applicant is entitled to access rights under the laws of the child's habitual residence.[216] If one were to file an application from a hypothetical country that had exactly the same laws as Japan, however, the author has no idea what such documents would be! Japanese law contains no clear statements regarding access (a term that did not even appear in the Civil Code until 2011) nor is the author aware of any judicial precedents declaring access to be assumed because it is in the best interests of children absent special circumstances. Finally, even in cases where courts get involved in access disputes, mediation is required first, and access itself may be the subject of

210. *See* Act for Implementation of the Convention on the Civil Aspects of International Child Abduction, art. 2 (Japan) (rights of custody is not defined in the definition article).

211. *See* Minpō [Minpō] [Civ. C.] art. 766, 820 (Japan).

212. *Id.* art. 821.

213. *Convention*, *supra* note 1, art. 3.

214. Minpō [Minpō] [Civ. C.] art. 819 (Japan).

215. Act for Implementation of the Convention on the Civil Aspects of International Child Abduction, art. 16 (Japan).

216. *Id.*

mediation.[217] As a result, it is not uncommon for parents to go for extended periods with no access despite court involvement through mediation.

The Act appears to have been drafted with full cognizance of the deficiencies of Japanese law on the subject of access. In Article 21, a provision that to an extent mirrors Article 16 of the Convention, and by which parents *in Japan* can seek assistance in exercising rights of access with respect to children taken to another contracting state, there is no reference to rights of access "under Japanese law"—only a generic reference to the "law of habitual residence."[218] Here again, the author suspects that a clear reference to "rights of access under Japanese law" would invite unwelcome inquiries about what that means in the context of strictly domestic cases.

V. SYNTHESIS

With these brief comparisons behind us, we can now return to the question posited at the beginning of this article: is there anything about the two implementation regimes presaging the development of an "Asian" version of the Convention in practice? Accepting that this is a very limited comparison, and one that can only truly be properly done with a greater range of samples (including the implementation regimes of "Western" Convention parties), the author would nonetheless suggest the answer is likely to be "no."

As this article has hopefully made clear, the systems of family law and manner of implementing the Convention in Japan and Singapore are very different—even the two countries' motivations for joining the treaty may be quite different. Moreover, the author believes that many of the differences between Japan and Singapore described in this article are likely to be attributable primarily to the differences in the underlying common law and continental systems in which their respective legal systems are based. Despite having a population comprised of a variety of Asian ethnic and religious groups, the manner in which Singapore's courts handle child custody-related matters seems quite familiar to a common law-trained lawyer such as the author. The Japanese system would likely seem quite different—and in some respects (the role of the family register, for example) unique, even.

At the same time, however, many of the features of the Japanese system that may seem different may be so as much because of their continental European heritage as because of "Japanese-ness." For example, a widely identified problem with Japanese family courts in custody and access cases has long been lack of enforceability.[219] Yet Germany, a country on which many features of the Japanese

217. *Domestic Relations Cases*, SUPREME CT. JAPAN, http://www.courts.go.jp/english/judicial_sys/domestic_relations/domestic_index/index.html#01 (last visited June 5, 2014).

218. *Compare* Act for Implementation of the Convention on the Civil Aspects of International Child Abduction, art. 21 (Japan), *with* Convention, *supra* note 1, art. 16.

219. Until a few years ago the U.S. State Department website included the following description of the situation: "compliance with [Japanese] Family Court rulings is essentially voluntary, which renders

civil justice system is modeled, was identified by the U.S. State Department as a country showing "patterns of non-compliance" with the Convention as recently as 2008 for essentially the same reason.[220] In fact, a review of U.S. State Department annual reports on compliance with the Convention shows that the countries identified as having compliance issues, particularly with respect to enforcement, tend to overwhelmingly be those with civil law, rather than common law systems.[221]

The United States government's view of Convention compliance is not conclusive of anything, of course. However, it may be the case that, as more Asian countries do come to join the Convention, the inquiry should be as much on the differences between the two main sources of Western legal tradition as between more vaguely-defined "Western-ness" and "Asian-ness."

Finally, if there is one area where more detailed scrutiny as to possible differences between "Asian" and "Western" modalities of resolving disputes may be merited, the author would suggest it may be in the area of family mediation. However, this is a subject that must be left to future research.

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any ruling unenforceable unless both parents agree." Reproduced in Jones, *In the Best Interest of the Court*, *supra* note 77, at 247 n.317.

220. *See* U.S. DEP'T OF STATE, REPORT ON COMPLIANCE WITH THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION, 14 (2008).

> American parents often obtain favorable court judgments regarding access and visitation, but the German courts' decisions can remain unenforced for years. Since physical force . . . to enforce court orders and legal sanctions [is] rare, taking parents can and do avoid allowing court-ordered access. As a result, a number of U.S. parents still face problems obtaining access to and maintaining a meaningful parent-child relationship with their children who remain in Germany.

Id. With the exception of the first sentence, the above would also serve as an accurate description of the situation in Japanese courts. Jones, *In the Best Interest of the Court*, *supra* note 77, at 247 n.317.

221. U.S. DEP'T OF STATE, REPORTS ON COMPLIANCE WITH THE HAGUE ABDUCTION CONVENTION 6 (2013), *available at* http://travel.state.gov/content/dam/childabduction/complianceReports/2013.pdf (listing Argentina, Australia, France, Mexico, the Netherlands, and Romania as countries with enforcement concerns). Each of these countries, with the exception of Australia, are based on civil law systems. *See The World Factbook: Legal Systems*, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/fields/2100.html (last visited June 4, 2014).

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