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– A four-week summer program at Loyola's permanent campus in Rome, Italy, the John Felice Rome Center, focusing on international and comparative law
– A three-week summer program at Loyola's campus at the Beijing Center in Beijing, China focusing on international and comparative law

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

Wing-Tat Lee Lecture Series

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

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

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We would like to recognize friends and alumni of the law school who have contributed within the past year to our international law program at Loyola University Chicago by their support of the Willem C. Vis International Commercial Arbitration Moot Program:

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The Fundamentalism of Liberal Rights: Decoding the Freedom of Expression Under the European Convention for the Protection of Human Rights and Fundamental Freedoms

Moeen Cheema* & Adeel Kamran**

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I. Introduction

On September 30th, 2005, Denmark's leading newspaper, *Jyllands-Posten*, published twelve (12) caricatures of the prophet Muhammed of Islam ("P.B.U.H.") depicting him in a manner blatantly offensive to followers of the Islamic faith.[1] These cartoons also appeared to conflate the categories of religion, race, and terrorism in a manner that implied causal connections between the former and the latter. The publication of the cartoons sparked a seemingly never-ending cycle of protests around the world, culminating in violent demonstrations in several Muslim-majority states.[2] In Europe, however, the publication of the cartoons was staunchly defended on the grounds of freedom of expression, with several other newspapers publishing them in a show of support for the principles

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[1] For a description of the cartoons, please *see* Martin Asser, *What the Muhammad Cartoons Portray*, BBC News, http://news.bbc.co.uk/2/hi/middle_east/4693292.stm (last visited Feb. 9, 2006); *see also* Gwladys Fouche, *Danish Paper Rejected Jesus Cartoons*, The Guardian, http://www.guardian.com/world/2006/feb/03/religion.uk (last visited Feb. 6, 2006). (Earlier, in 2003, the same newspaper refused to publish cartoons of Jesus Christ on the grounds that they would 'provoke an outcry').

[2] *See Arab Ministers Condemn Cartoons*, BBC News, http://news.bbc.co.uk/1/hi/world/middle_east/4668068.stm (last visited Jan. 31, 2006); *see also Appeals for Calm Over Cartoon Row*, CNN, http://edition.cnn.com/2006/WORLD/asiapcf/02/07/cartoon.protests/ (last visited Feb. 8, 2006).

of free speech and democracy.[3] The refusal of European governments to proscribe the publication of the cartoons led to recriminations that this was tantamount to state protection of 'blasphemous' materials and was evidence of covert and overt 'Islamophobia.' The reduction of the defense of the Danish cartoons in the name of freedom of expression to such a strategic façade is clearly problematic because it ignores the troubled history and the complex and dynamic debates that have raged in Europe and the United States over the role of the state in regulating public discourse. The unleashed clash of reductionisms does, however, intuitively grasp deep philosophical tensions between the characterizations of religion and race, between free speech and hate speech, and between the freedoms of expression and of religion.

In this paper we will attempt to deconstruct the free speech defense of the Danish caricatures in order to highlight the tensions enumerated above, focusing particularly on the regulation of expression under the European Convention on Human Rights and Fundamental Freedoms ("ECHR"). A scrutiny of the jurisprudence of the European Court of Human Rights ("ECtHR") reveals the difficulties inherent in defining permissible limits on expression, particularly as it involves the identification and prioritization of interests that are worthy of protection under a state's law. The struggles over the characterization of certain interests as fundamental rights, in turn, raise questions over the 'fundamentalness' of rights and the valuation of foundational social and political values that the rhetoric of rights presumes as incontrovertible. This study seeks to advance the argument that fundamental rights, such as the freedom of expression, are legal constructs whose value is contingent on the ends they are employed to serve in a given socio-political environment. While the contingency of fundamental rights is palpable in debates over their definition and over what they include or exclude, it is most clearly visible in the clash of fundamental rights, in particular the freedoms of expression and religion.

In order to deconstruct the nature of fundamental rights through a case study of the regulation of freedom of expression under the ECHR, we first present a brief overview of the philosophical debates over the nature of rights. In Part I, we also outline the constitutional jurisprudence on freedom of expression in the United States as the prototype of free speech 'absolutism,' which is the kind proclaimed by some of the defenders of the cartoons. In Part II, we compare the

[3] The staunch defense of the Danish cartoons in Europe focuses primarily on the protection of the fundamental right to free speech guaranteed in all European countries. According to this point of view, the freedoms of expression and the press are near-absolute values at the core of European democracies. This argument has two facets: firstly, that European countries hold the freedom of expression very dearly as a primary political value and, secondly, that the European states have no legal basis to prohibit blasphemy against Islam - there is also a clear implication that Islamic (*shari'a*) law and Muslim countries devalue such fundamental freedoms and hence the protests do not deserve serious consideration. For example, Anders Fogh Rasmussen, leader of the Liberal (Venstre) Party, and the Prime Minister of Denmark refused to meet ambassadors from a number of Muslim countries and entertain their protests. The Prime Minister suggested that those who were aggrieved should take the matter to the courts. 'As prime minister, I have no power whatsoever to limit the press - nor do I want such a power. It is a basic principle of our democracy that a prime minister cannot control the press,' he added. *See* Paul Belien, *Europe Criticises Copenhagen over Cartoons*, THE BRUSSELS JOURNAL, http://www.brusselsjournal.com/node/589 (last visited Mar. 11, 2014).

American jurisprudence on freedom of expression, which avows its primacy over other competing rights to equality and freedom of religion, with the 'European' approach. We demonstrate that the domestic laws of many European states and the ECHR allows extensive limitations on the freedom of expression falling under the broad rubric of hate speech. We discuss two specific categories of limitations on expression, which are recognized by the constitutional laws of European states as well as the ECHR, namely: Holocaust denial and blasphemy. We argue that the refusal of European governments to accede to demands to curb the publication of the Danish cartoons was not defensible on the grounds that the applicable human rights law forbade such a limitation on the freedom of expression. We contend in Part III that the defense of the Danish cartoons is rooted in a liberal understanding of fundamental rights that is based upon distinctions between race and religion, between hate speech and blasphemy, and between the freedom of expression and the freedom of religion that are riveted with contradictions. The Danish case thus highlights the veracity of longstanding critiques of the liberal conception of rights. Lastly, we conclude that the defense of the Danish cartoons on the grounds of freedom of expression is inherently political and seeks to provide the cover of fundamental-ness and naturalness to a position that is inherently contingent.

II. Is there such a thing as an Absolute Fundamental Right?: Freedom of Expression and the Regulation of Hate Speech in the U.S.A.

The position taken by many in Europe in the defense of the Danish cartoons appears to rely on the notion of the freedom of expression being a near absolute right. This position also appears to be rooted in a primarily liberal conception of rights wherein fundamental freedoms are designed to primarily protect spheres of private autonomy from governmental interference. In the liberal idea of rights, the evil that fundamental rights shield the citizens against is the evil of a repressive state. Thus, while fundamental rights protect the earmarked areas of private space from state intrusion, they are not structured to protect the individual citizen, or minority groups and communities, from the tyranny of fellow citizens. This state-centric conception of rights is by no means uncontroversial. Heated philosophical debates on the nature and content of rights and fundamental freedoms have taken place on at least three different planes.

On one level, the traditional liberal conception has been criticized for implicitly imbuing culturally and morally relative positions with an aura of naturalness and universality.[4] This is problematic for liberalism as it is an ideology that essentially seeks to provide all humans with the opportunity to pursue their vision of a good life, so long as that pursuit does not interfere with others' visions. In response, the advocates of liberal rights have advanced two strategies. First, a distinction is made between the "'right' and the 'good' - between a framework of basic rights and liberties, and the conception of good that people may choose to

[4] *See* Jeremy Waldron, *Nonsense Upon Stilts? - A Reply*, *in* NONSENSE UPON STILTS: BENTHAM, BURKE AND MARX ON THE RIGHTS OF MAN 166-68 (Jeremy Waldon *ed*., Methuen & Co., 1987).

pursue within that framework."[5] A fair framework of rights thus comes before the liberal pursuit of individual ends. In regards to freedom of expression, for example, "it is one thing to defend the right to free speech so that people may be free to form their own opinions and choose their own ends, but something else to support it on the grounds that a life of political discussion is inherently worthier."[6] In adopting the former justification traditional liberals can claim a certain degree of value neutrality and universality for their position. Secondly, liberals increasingly seek to rely on public morality, or the shared foundations of rights-claims beneath superficial disagreements over the justification for and content of specific rights.[7] Often, it is possible to argue that these shared foundations of public morality are found in constitutional documents, judicial decisions, and/or majoritarian agreement.[8] This becomes problematic where there is a threat of a clash between majoritarian democracy and constitutionally entrenched judicial review mechanisms. In such a scenario, the debate on the nature and justification for rights appears to crystallize around the narrower and more specific issues of constitutional structure and institutional competence, which may dictate whether courts or legislatures are better suited to safeguard the interests and values characterized as fundamental rights.[9]

The second plane on which the liberal conception of rights is critiqued is on account of its negativity. It is alleged that while this conception imposes negative obligations or constraints, it does not entail positive obligations upon the state to create the socio-political conditions necessary for the fulfillment of the interests and values that are classified as fundamental rights.[10] Thus, for example, while the state may be barred from suppressing free speech, it cannot be called upon to stop private individuals or non-state groups from creating an environment which has an indirect chilling effect on others' expression. This negative conception of fundamental rights is motivated by a fear that if the state is granted such a power to interfere with private action, it will abuse that authority to serve its own ends and expand its coercive power. Further, even if the state uses that power benevolently to safeguard one group's freedom, it may be seen as discriminating at the expense of others, thereby sowing the seeds of social discord. The problem for the liberal position, however, is that the social terrain everywhere is marked by enormous disparities in wealth, socio-political power and opportunities for advancement.[11] The state is often the only player capable of challenging the centers of socio-economic power and with the constraints imposed upon it there is little guarantee that these private social and economic networks will not exercise the coercive powers that are being denied to the state.

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[5] Michael J. Sandel, *The Political Theory of the Procedural Republic*, *in* THE RULE OF LAW: IDEAL OR IDEOLOGY? 88 (Hutchinson & Monahan *eds*., Carswell, 1987).

[6] *Id*.

[7] *See* Waldron, *supra* note 4, at 163-66.

[8] *See* Ronald Dworkin, TAKING RIGHTS SERIOUSLY (Harvard Univ. Press, 1977).

[9] *See* Jeremy Waldron, *A Rights-Based Critique of a Bill of Rights*, 13 OJLS 18 (1993).

[10] *See* David P. Forsyth, HUMAN RIGHTS AND WORLD POLITICS 167-172 (Univ. of Nebraska Press, 2d ed. 1989) for a brief overview of the philosophical foundations of the liberal conception of rights.

[11] *Id*. at 169-71.

The third plane on which the liberal conception of rights is critiqued is on account of its allegedly rampant individualism. Communitarian and civic republican critics of the liberal notion of rights argue that it is liberalism itself which, by promoting the idea of humans as atomistic beings, cultivates a fragmented social environment in which discussion of collective aims and ideals becomes secondary: "[r]ights talk, in its absoluteness, promotes unrealistic expectations, heightens social conflict, and inhibits dialogue that might lead towards consensus, accommodation, or at least the discovery of common ground."[12] The problem again for both the liberal and communitarian perspectives, however, is that of the inequalities in the distribution of socio-political power and economic resources. If the state remains withdrawn from the role of an equalizer there is no guarantee that particular social groups, especially those that enjoy a disproportionate share of influence and power, will voluntarily cede that advantage even if communitarian politics flourishes in localized discourses. This will particularly be the case where sub-national groups are constituted along distinct racial, ethnic, religious and/or cultural lines.[13] In an influential advance in liberal thinking, Will Kymlicka argued that liberalism can accommodate the interests of minority groups while also taking on board communitarian insights, but that would require the recognition of an entirely new set of group rights that impose both negative and positive obligations on the state to facilitate the preservation of distinct 'societal cultures' of minority groups.[14]

These controversies are not entirely theoretical. Nowhere are the philosophical tensions inherent in a strong form of liberal rights conception and its dissonance with minority interests more evident than on the issue of hate speech regulation in the leading constitutional democracy in the world: the United States of America. The regulation of hate speech, which may be defined as "epithets conventionally understood to be insulting references to characteristics such as race, gender, nationality, ethnicity, religion, and sexual preference"[15] has been a hotly debated issue in the United States and much has been written on this topic. Arguments in support of hate speech regulation and curtailment of the First Amendment rights usually arise in the context of racist and sexist speech;[16] through constitutional arguments advocating the primacy of the Fourteenth Amendment's guarantee of equal protection before the law over the First Amend-

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[12] Mary Ann Glendon, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 14 (The Free Press, 1991).

[13] Will Kymlicka, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 92 (Clarendon Press, 1995).

[14] *Id.* at 75-115.

[15] Larry Alexander, *Banning Hate Speech and the Sticks and Stones Defense*, 13 CONST. COMM. 71 (1996).

[16] Representative examples of work that discuss hate speech in the context of racist speech include critical race theorists such as Mari J. Matsuda. *See* Mari J. Matsuda, WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (Mari J. Matsuda *et al. eds.,* 1993). *See also* Richard Delgado & Jean Stefancic, MUST WE DEFEND NAZIS? HATE SPEECH, PORNOGRAPHY AND THE NEW FIRST AMENDMENT (New York Univ. Press, 1997); Richard L. Abel, SPEAKING RESPECT, RESPECTING SPEECH (Univ. of Chicago Press, 1998). For a leading example of discussion on hate speech in terms of sexist speech, *see* Catherine MacKinnon, ONLY WORDS (Harv. Univ. Press, 1996).

ment's free speech protection.[17] Such advocacy, however, faces a challenging constitutional obstacle, as the text of the First Amendment of the U.S. Constitution is seemingly absolute on its plain reading:[18]

> Amendment I - Freedom of Religion, Press, Expression: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . .[19]

The weight of judicial opinion in the United States appears to favor a conception of the freedom of expression guaranteed by the First Amendment of the U.S. Constitution as a near-absolute right, which trumps other competing values.[20] This view is rooted in the belief that words cannot harm and free expression can only be beneficial since it fortifies democratic values.[21] As one commentator notes, "[c]onstruing freedom of expression as an absolute right, the view held by many U.S. citizens when issues of freedom of expression arise, is perhaps meant to be captured by the adage: 'Sticks and stones may break my bones, but words will never hurt me.'"[22] Nonetheless, it has been contended that a number of doctrines recognized by the U.S. Supreme Court allow exceptions to the freedom of expression. Notable amongst these are allowances for restrictions based on the threat or likelihood of violence such as for 'clear and present danger' or 'imminent lawless action,'[23] and 'fighting words;'[24] as well as legitimate "time,

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[17] *See* R. George Wright, *Traces Of Violence: Gadamer, Habermas, And The Hate Speech Problem*, 76 CHI.-KENT. L. REV. 991, 994-95 (2000).

[18] *See* Edward J. Eberle, *Cross Burning, Hate Speech, and Free Speech in America*, 36 ARIZ. ST. L.J. 953, 959-70 (2004).

[19] U.S. CONST. amend. I.

[20] *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 256, 258 (1974).

[21] To cite Justice Holmes' famous oft-quoted dissent:

> When men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

Abrams v. United States, 250 U.S. 616, 630 (1919). Academic opinion on this count is also well-entrenched. For representative examples, *see* Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 251-53 (1992); Calvin R. Massey, *Hate Speech, Cultural Diversity, and the Foundational Paradigms of Free Expression*, 40 UCLA L. REV. 103, 116-17 (1992); Steven G. Gey, *The Case Against Postmodern Censorship Theory*, 145 U. PA. L. REV. 193, 195-96 (1996); Nadine Strossen, *Hate Speech and Pornography: Do We Have to Choose Between Freedom of Speech and Equality?* 46 CASE W. RES. L. REV. 449, 454-55 (1996); Alexander, *supra* note 15, at 73; Gary Goodpaster, *Equality and Free Speech: The Case Against Substantive Equality*, 82 IOWA L. REV. 645, 668-70 (1997).

[22] J. Angelo Corlett & Robert Francescotti, *Foundations of a Theory of Hate Speech*, 48 WAYNE L. REV. 1071, 1074 (2002).

[23] For an analysis of the evolution of the incitement to violence categories of permissible restrictions, *see* William B. Fisch, *Hate Speech in the Constitutional Law of the United States*, 50 AM. J. COMP. L. 463, 471-76 (2002); *see also* David G. Barnum, *The Clear and Present Danger Test in Anglo-American and European Law*, 7 SAN DIEGO INT'L L.J. 263, 263-81 (2006).

[24] Fisch, *supra* note 23, at 476-79.

place, and manner restrictions."[25] Expression may also be legitimately suppressed when it is found to be obscene or pornographic,[26] or on grounds of national security.[27] Therefore, one commentator concludes: "[i]t is unarguable that there should be absolute freedom to think what one wants; it does not follow, however – either legally, logically, or philosophically – that one may openly express whatever one thinks, whenever and wherever one desires."[28]

However, while there is no denying that some restrictions on speech are allowed as contended above, a judicious review of the jurisprudence of the U.S. Supreme Court reveals that such limitations on the freedom of expression are very narrowly construed.[29] For example, although at one time the U.S. Supreme Court allowed limits on speech which presented a "clear and present danger" to society, *i.e.* speech that may incite unlawful violence,[30] in *Brandenburg v. Ohio* the court narrowly interpreted this standard, restricting its applicability to speech that was likely to cause or incite *imminent* violence.[31] Similarly, in *Chaplinsky v. New Hampshire*, the Supreme Court laid down the doctrine of "fighting words," making it illegal to "address any offensive, derisive, or annoying word to any person who is lawfully in any street or any public place . . . [or] make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy

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[25] However, "[i]f government regulates the time, place or manner of speech, it must regulate in a way that does not take sides between competing ideas." *See* Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 226, 231 (1992).

[26] *See* Annalisa Siracusa, *Sixth Annual Review Of Gender And Sexuality Law: I. Constitutional Law Chapter: Obscenity*, 6 GEO. J. GENDER & L. 347, 349-51 (2005); Nasoan Sheftel-Gomes, *Your Revolution: The Federal Communications Commission, Obscenity And The Chilling Of Artistic Expression On Radio Airwaves*, 24 CARDOZO ARTS & ENT. L.J. 191, 199-207 (2006); Cara L. Newman, *Eyes Wide Open, Minds Wide Shut: Art, Obscenity, And The First Amendment In Contemporary America*, 53 DEPAUL L. REV. 121, 132-140 (2003). For a critique of restriction of speech on the charge of obscenity and pornography, *see generally* Amy Adler, *What's Left?: Hate Speech, Pornography, and the Problem for Artistic Expression*, 84 CAL. L. REV. 1499 (1996); and Arnold H. Loewy, *Obscenity: An Outdated Concept for the Twenty-First Century*, 10 NEXUS J. OP. 21 (2005). For a critique that the restrictions of speech to counter the harms of pornography do not go far enough, *see* Morrison Torrey, *Thoughts About Why the First Amendment Operates to Stifle the Freedom and Equality of a Subordinated Majority*, 21 WOMEN'S RTS. L. REP. 25 (1999). For a comparison of the U.S. and Canadian approaches towards the regulation of obscene speech, *see* Justin A. Giordano, *The United States Constitution's First Amendment vs. The Canadian Charter Of Rights And Freedoms: A Comparative Analysis Of Obscenity And Pornography As Forms Of Expression*, 26 N.C. CENT. L.J. 71, 72-73 (2004).

[27] *See* Matthew Silverman, *National Security and the First Amendment: A Judicial Role in Maximizing Public Access to Information*, 78 IND. L.J. 1101 (2003); Laura Barandes, *A Helping Hand: Addressing New Implications Of The Espionage Act On Freedom Of The Press*, 29 CARDOZO L. REV. 371 (2007); and *see also* Emily Posner, *The War On Speech In The War On Terror: An Examination Of The Espionage Act Applied To Modern First Amendment Doctrine*, 25 CARDOZO ARTS & ENT. L.J. 717 (2007).

[28] *See* Kenneth Lasson, *Holocaust Denial and the First Amendment: The Quest for Truth in a Free Society,* 6 GEO. MASON L. REV. 35, 68-69 (1997).

[29] *See* Alexander Tsesis, *The Empirical Shortcomings Of First Amendment Jurisprudence: A Historical Perspective On The Power Of Hate Speech,* 40 SANTA CLARA L. REV. 729, 732-39 (2000).

[30] *See* Charles Lewis Nier III, *Racial Hatred: A Comparative Analysis of the Hate Crime Laws of the United States and Germany*, 13 DICK. J. INT'L L. 241, 266 (1995); Friedrich Kübler, *How Much Freedom for Racist Speech?: Transnational Aspects of a Conflict of Human Rights*, 27 HOFSTRA L. REV. 335, 348 (1998).

[31] *See generally* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969); *see also* Fisch, *supra* note 23, at 474-75.

him."[32] However, the court stated that it would hold speech to constitute fighting words only if there were a reasonable risk of violence.[33] This doctrine was further restricted in practice when in *Cohen v. California*, the Court required that the fighting words must be directed at a specific individual.[34] Most recently, in *R.A.V. v. City of St. Paul*, the court declared hate speech legislation to be unconstitutional that proscribed the placing on public or private property of "a symbol, object, appellation characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[35] The Court ruled that the ordinance violated the principle of content neutrality as it targeted specific viewpoints only.

The First Amendment jurisprudence of the U.S. courts thus appears to be based on the liberal conception of fundamental freedoms as negative liberties outlined at the outset. It focuses on state action, and consistently upholds a distinction between public and private domains. As such, the state is barred from interfering in the private domain and may not restrict any expression (or at least the content thereof) by individuals.[36] This is a manifestation of the distrust of government that is at the heart of American constitutional politics.[37] It is further argued that while legislation may be effective in preventing harmful action, hate speech legislation is generally ineffective and any benefits that may be availed from banning hate speech are countered by the risk of the state's abuse of speech regulation to suppress critical expression. This is in essence a 'slippery slope' argument.[38] A similar argument cautions against hate speech laws because of their chilling effect on expression in general. Advocates of this position express concerns that hate speech legislation hinders the establishment of an efficient market for ideas and insist that absolute freedom of speech is in fact beneficial for minority viewpoints.[39] Before we critique this liberal reconstruction of the freedom of expression in U.S. constitutional jurisprudence, it may be helpful to see if this view is shared across the Atlantic.

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[32] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 569 (1942).

[33] *See* Fisch, *supra* note 23, at 478-79; *see also* Dorsett, *supra* note 21, at 266-67.

[34] *See generally* Cohen v. California, 403 U.S. 15 (1971); *see also* Dorsett, *supra* note 21, at 267-68.

[35] R.A.V. v. City of St. Paul, 505 U.S. 377, 380 (1992).

[36] *See* W. Bradley Wendel, *"Certain Fundamental Truths": A Dialectic On Negative And Positive Liberty In Hate-Speech Cases*, 65:2 LAW & CONTEMP. PROBS. 33, 67-68 (2002).

[37] *Id.*

[38] *See* Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 363 (1985); *see also* Kathleen E. Mahoney, *Hate Speech*: Affirmation Or Contradiction Of Freedom Of Expression, 1996 U. ILL. L. REV. 789, 802 (1996).

[39] *See* Donald E. Lively, *Reformist Myopia and the Imperative of Progress: Lessons for the Post-Brown Era*, 46 VAND. L. REV. 865, 898 (1993). For rebuttal, *see* Richard Delgado & Jean Stefancic, *Ten Arguments Against Hate-Speech Regulation: How Valid*?, 23 N. Ky. L. Rev. 475, 479-80 (1996); Jean Stefancic & Richard Delgado, *A Shifting Balance: Freedom of Expression and Hate-Speech Restriction*, 78 IOWA L. REV. 737, 742 (1993); *see also* Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 438 (1990). It is also countered that hate speech regulation detracts from the real task of countering racism itself. *See generally* Dorsett, *supra* note 21.

III. The 'European' Conception of Fundamental Rights: Freedom of Expression under the European Convention on Human Rights

A. Regulation of Hate Speech and Holocaust Denial Laws in Europe

The position adopted by the defenders of the Danish cartoons appears to be very much in line with the status of freedom of expression as a near absolute right in American constitutional law. This has not historically been the European standpoint on the freedom of expression, to the extent an over-arching European agreement or understanding on the freedom of expression exists. European states - despite increasing economic, political, cultural and legal integration - have separate legal systems and have written constitutions that provide for the protection of fundamental rights, with the notable exception of the United Kingdom.[40] However, most European states, including those where the cartoons were published, are parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the 'European Convention' or simply the 'Convention').[41] The Convention was the brainchild of the Council of Europe, a transnational political organization created in the aftermath of the Second World War in 1949 with the aim of creating a common platform for the promotion of democracy, the rule of law and fundamental human rights all over Europe.[42] It came into force in 1953 and presently has forty-six member states, eight hundred million citizens of which have the right of individual petition to the European Court of Human Rights, the adjudicatory body created under the Convention.[43] The Court's judgments are binding on the member states. The Convention may thus be described as representing the "minimum human rights standards" agreed upon by the European states, or the "Basic Law of Europe;" and the Convention system may be considered "the most successful human rights

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[40] In 1998, the United Kingdom finally passed the Human Rights Act, thereby incorporating the European Convention directly into domestic law. This is the U.K.'s statutory Bill of Rights. Human Rights Act, 1998, c. 42 (U.K.).

[41] Council of Europe, Convention For Protection of Human Rights and Fundamental Freedoms, Apr. 11, 1950, CETS No. 005, *available at* http://www.echr.coe.int/Documents/Convention_ENG.pdf. For a list of member states of the Council of Europe that have signed and ratified the agreement, *see* Convention for the Protection of Human Rights and Fundamental Freedoms, COUNCIL OF EUROPE, http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG (last visited Apr. 8, 2014). Specifically, Denmark ratified the Convention on 13th April, 1953; Norway ratified on 15th January, 1952; France ratified on 3rd May, 1974; Germany ratified on 5th December, 1952; Italy ratified on 26th October 1955; and Spain ratified on 4th October, 1979.

[42] *See* The Statute of the Council of Europe, art. 1, May 5, 1949, 87 U.N.T.S. 103, *available at* http://conventions.coe.int/treaty/en/treaties/html/001.htm. For an overview of the debates contextualizing the drafting of the Convention and its approach towards hate speech regulation, *see* Stephanie Farrior, *Molding The Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech*, 14 BERKELEY J. INT'L L. 3, 63 -78 (1996).

[43] *See generally* Lord Woolfe, REVIEW OF THE WORKING METHODS OF THE EUROPEAN COURT OF HUMAN RIGHTS, (Eur. Ct. H. R., 2005). The right of individual petition is provided under Article 34 of the Convention to "any person, non-governmental organisation or group of individuals claiming to be the victim of a violation." Council of Europe, Convention For Protection of Human Rights and Fundamental Freedoms art. 34, Apr. 11, 1950, CETS No. 005, *available at* http://www.echr.coe.int/Documents/Convention_ENG.pdf.

system in the world."[44] The enforcement of the Convention has been further strengthened by its incorporation into European Union law.[45]

Article 10 of the Convention guarantees the freedom of expression to the citizens of all the European states that are a party to the Convention and its Protocols.[46] A plain reading of the above provision indicates that, in sharp contrast to the First Amendment of the U.S. constitution, freedom of expression is subject to limitations on a number of grounds:

> Article 10
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> Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. . . The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.[47]

Given the expansive array of grounds on which free speech may be curtailed, it is not surprising that expression is subject to a number of legal limitations in most European countries that would not be countenanced in American constitutional law.[48] It is also notable that the text of Article 10 of the Convention does not see an inherent tension between such limitations on free speech and democracy.

In contrast to the United States, most European states have laws that forbid hate speech. In fact, the United States appears to be the only Western state that

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[44] *See* Philip Leach, TAKING A CASE TO THE EUROPEAN COURT OF HUMAN RIGHTS 4 (Blackstone, 2001).

[45] *See* Consolidated Version of the Treaty on European Union art. 6, 2010 O.J.C 83/01, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0013:0046:en:PDF; *see also European Convention on Human Rights: Accession of the European Union,* COUNCIL OF EUROPE, http://hub.coe.int/what-we-do/human-rights/eu-accession-to-the-convention (last visited May 5, 2014).

[46] Convention For Protection of Human Rights and Fundamental Freedoms, Apr. 11, 1950, Council of Europe, 213 U.N.T.S. 221, *available at* http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm. (Since the Convention's entry into force, thirteen (13) Protocols have been adopted some of which - Protocols 1, 4, 6, 7, 12 and 13 - have added additional rights and freedoms to the original text. Protocol 11 restructured the enforcement machinery).

[47] *Id*. art. 10.

[48] This difference in the European and American approaches towards the freedom of expression has been attributed to a number of factors, including a greater confidence in America on the outcomes of the battle of ideas, such as during the civil rights era and the Vietnam War protests, as opposed to Europe whose history does not support such optimism. On the flip side, the American public generally does not trust the government and its officials enough to entrust them with such powers of censorship as opposed to Europe where there is greater confidence in the government's ability to provide social direction. *See* Winfried Brugger, *Ban On or Protection of Hate Speech? Some Observations Based on German and American Law*, 17 TUL. EUR. & CIV. L.F. 1, 14 (2002).

allows such extended protection to hate speech.[49] For example, recent legislation in Germany,[50] enacted in response to a rise in neo-Nazi activities, criminalizes attacks on human dignity through incitement to hatred and dissemination of writings aimed at instigating hatred.[51] The law also creates lesser offenses of insult, ridicule, and defamation.[52] This legislation adds to the offence of insult against personal honor, which has been on the statute books since 1871.[53] In the U.K., a state closest to the U.S. in terms of a shared political ideology, incitement to racial hatred is a specific offence under various sections of the Public Order Act, 1986.[54] The Act substituted similar provisions in the Public Order Act of 1936, and the Race Relations Act of 1965, and is in addition to the surviving common law relating to the breach of peace.[55] To give another example, while the freedoms of expression, press, and assembly are constitutionally guaranteed in Sweden, the Instrument of Government also places explicit restrictions on these freedoms.[56] The *Riksdag* (parliament) may restrict free speech but such restric-

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[49] For a comparison between the minimal intervention permissible under US Constitutional jurisprudence and the differing approach in several other Western democratic states, including Canada, UK and Germany, *see* Michel Rosenfeld, *Hate Speech In Constitutional Jurisprudence: A Comparative Analysis,* 24 CARDOZO L. REV. 1523, 1542-54 (2003). For an overview of the historical reasons for the differing approaches, *see* Kevin Boyle, *Hate Speech – The United States Versus the Rest of the World?*, 53 ME. L. REV. 487, 491-93 (2001). It is interesting to note that Canada allows much more stringent regulation of hate speech than is constitutionally permissible in the U.S.A., even though the Canadian Charter of Rights and Freedoms, 1 S.C. V (1982), accords free speech protection in language similar to the First Amendment. Canada has a number of criminal provisions that proscribe advocacy of genocide, incitement of hatred threatening a breach of the peace, and public and willful expression of ideas intended to promote hatred against an identifiable group. *See* Canadian Criminal Code, R.S.C. 1985, c.C-46, § 319. For an overview of the international and Canadian positions on hate speech, *see* Kathleen E. Mahoney, *supra* note 39, at 804-06 (1996). *See also* Roy Leeper, *Keegstra And R.A.V.: A Comparative Analysis Of The Canadian And U.S. Approaches To Hate Speech Legislation*, 5 COMM. L. & POL'Y 295, 308-20 (2000), wherein the author underscores the difference between the communitarian and libertarian traditions underpinning Canadian and American judicial approaches, respectively.

[50] The German Constitution expressly recognizes limitations, *albeit* of a different kind, on the freedom of expression. Art. 5(1) declares that "everybody has the right freely to express and disseminate their opinions orally, in writing or visually" and that "There shall be no censorship." However, this freedom is limited by two important provisions: "limitations embodied in the provisions of general legislation, statutory provisions for the protection of young persons and the citizens' right to personal respect." *See* the GRUDGENSETZ FÜR DIE BUNDESREPUBLIK DUETSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, at Art. 5(1) - (3) (Ger.). For an overview of the German constitutional jurisprudence on hate speech and relevant legislation, *see* Laura R. Palmer, *A Very Clear and Present Danger: Hate Speech, Media Reform, and Post-Conflict Democratization in Kosovo*, 26 YALE J. INT'L L. 179, 200-06 (2001); Brugger, *supra* note 48, at 5-15; and *see also* Bradley A. Appleman, *Hate Speech: A Comparison Of The Approaches Taken By The United States And Germany,* 14 WIS. INT'L L.J. 422, 429-34 (1996).

[51] *See* STRAFGESETZBUCH [StGB] [PENAL CODE], Nov. 13, 1998, FEDERAL LAW GAZETTE 130, (Ger.).

[52] *Id*.

[53] *Id.* § 185. (The offence carries a punishment of imprisonment of up to one year and fine).

[54] Public Order Act, (1986) §§ 18, 19, 23 (U.K.).

[55] *See* for example, Arrowsmith v. United Kingdom, App. No. 7050/75, 3 Eur. H.R. Rep. 218, 219-20, 243 (1978), where a pacifist was arrested and prosecuted for incitement to disaffection after she distributed leaflets to members of the armed forces advocating the abandonment of military service. The European Commission declared her complaint inadmissible holding that the prosecution was a reasonable limitation on her freedom of expression.

[56] *See* REGERINGSFORMEN [RF] [CONSTITUTION] 2:1 (Swed.).

tions "may be imposed only to satisfy a purpose acceptable in a democratic society. The restriction may never exceed what is necessary having regard to the purpose which occasioned it, nor may it be carried so far as to constitute a threat to the free formation of opinion as one of the foundations of democracy."[57] Further, the Swedish Penal Code specifically prohibits racist speech.[58] The most pertinent example, however, is Denmark. The Danish Criminal Code provides a penalty of imprisonment for up to two (2) years, and a fine, for the dissemination of a statement by which a group of people are "threaten[ed], insult[ed], or degrad[ed] on account of their race, colour, national or ethnic origin, religion, or sexual inclination."[59] The fact that the offence is in the nature of propaganda activities shall be considered "an aggravating circumstance" at the sentencing stage.[60]

Many European states also have laws which criminalize the denial of the Holocaust.[61] Many commentators in the United States argued to make the denial of the Holocaust a *per se* category of hate speech, *i.e.* denial of Holocaust should be prohibited whether or not such denial presents a clear and present danger of "imminent lawless action" or constitutes "fighting words."[62] Such arguments have found little favor in American jurisprudence, which is dominated by the primacy of the First Amendment as discussed in the previous section. In contrast to the United States, the denial of the Holocaust is a serious criminal offence in a number of European countries.[63] A British historian, David Irving, was recently convicted and sentenced to a term of three years of imprisonment for the denial of

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[57] *See* REGERINGSFORMEN [RF] [CONSTITUTION] 2:20(1) and 2:22 (Swed.).

[58] BROTTSBALKEN [BRB] [PENAL CODE] 16:8 (Swed.).

[59] *See Straffeloven* (Strfl) § 266 b (1).

[60] *Id.* § 266 b (2). For elaboration of these provisions, see the opinions of The Committee on the Elimination of Racial Discrimination in the case of *Kamal Quereshi v. Denmark*, Communication No. 33/2003, U.N. Doc. CERD/C/66/D/33/2003 (2005) *available at* http://www1.umn.edu/humanrts/country/decisions/33-2003.html; and the case of *Mohammed Hassan Gelle v. Denmark*, Communication No. 34/2004, U.N. Doc. CERD/C/68/D/34/2004 (2004), *available at* http://www.unhchr.ch/tbs/doc.nsf/0/6715d3bdbeff3c0dc125714d004f62e0?Opendocument;
and the case of *Ahmad Najaati Sadic v. Denmark*, Communication No. 25/2002, U.N. Doc. CERD/C/62/D/25/2002 (2003), *available at* http://www1.umn.edu/humanrts/country/decisions/25-2002.html.

[61] *See* Peter R. Teachout, *Making Holocaust Denial a Crime: Reflections on European Anti-Negationist Laws from the Perspective of U.S. Constitutional Experience*, 30 VT. L. REV. 655, 657 (2005). For a review of Germany's Holocaust denial laws, *see* Eric Stein, *History Against Free Speech: The New German Law Against the 'Auschwitz' - and Other – 'Lies'*, 85 MICH. L. REV. 277, 285-87 (1986); Lasson, *supra* note 28. In the U.K. the Labour Party proposed the creation of an offence punishable with imprisonment for Holocaust denial before its 1997 election victory. However, the Labour governments of the last decade have not followed through on this proposal. Canadian law also treats Holocaust denial as hate speech *per se*. For example, in the landmark case of R. v. Zundel, [1992] R.C.S. 731, 732 (Can.), the defendant, was charged with violating the Canadian criminal code by publishing false statements 'likely to cause injury or mischief to a public interest' under Canadian Criminal Code R.S.C. 1970, c. C-34, s. 177 (Can.).

[62] Some academics have argued that Holocaust denial should be automatically recognized as a form of hate speech since it results in immediate psychological and emotional harm to the Jews. It is contended that the intended victims of Holocaust denial often fear the onslaught of violence and many suffer from post-traumatic stress disorders as a result. Therefore, some have advocated that the denial of Holocaust should be recognized as a distinct tort since the victims of such actions have been 'grievously hurt' by such speech. *See* Lasson, *supra* note 28, at 70.

[63] *See* Teachout, *supra* note 61, at 657.

the existence of gas chambers at Auschwitz.[64] The European Court of Human Rights has repeatedly held that the existence of Holocaust denial laws is consistent with the freedom of expression protected under Article 10, and falls within the limitations provided within that Article as well as Article 17 of the Convention.[65]

The criminalization of Holocaust denial has been justified on a number of grounds. Memories of the Second World War and Holocaust in Europe are still alive in European consciousness. European states understandably have a particular sensitivity towards any actions which are reminiscent of those dark days.[66] In this view, the criminalization of Holocaust denial is a unique measure designed to curb a unique evil.[67] However, this argument ought to apply to all genocides whose enormity is recognized in European history.[68] Another more universal argument for barring Holocaust denial specifically and racist speech generally is that such speech deliberately seeks to undermine the pluralistic nature of society by making a particular minority feel unwelcome, thereby discouraging them from participating in the political process.[69] Holocaust denial and racist speech has been described as "pure-form discrimination" since it serves no conceivable political function other than offending a specific religious or racial minority.[70] Holocaust denial has also been described as group defamation.[71]

Some academics argue that even if racist speech does not present a 'clear and present danger' of immediate violence against a minority, allowing such speech will invariably lead to structural violence in the long run. The purpose of Holocaust denial is to de-humanize the Jews and inculcate attitudes in society which makes violence against them more acceptable. Therefore, it is argued that there is a causal connection between anti-Semitism and Holocaust denial:

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[64] *See Holocaust Denier Irving is Jailed*, BBC (Feb. 20, 2006, 20:19 GMT), http://news.bbc.co.uk/2/hi/europe/4733820.stm. In 1994, the German constitutional court upheld the ban on a meeting at which David Irving was scheduled to speak, ruling that the so-called "Auschwitz lie" was not covered by the freedom of speech. Similarly in 1995, a state court in Berlin convicted a neo-Nazi leader for Holocaust denial. The German approach towards Holocaust denial may be contrasted from the legal position in the U.S.A. *See* Geri J. Yonover, *Anti-Semitism and Holocaust Denial in the Academy: A Tort Remedy,*101 DICK. L. REV. 71, 74-76 (1996).

[65] *See* Garaudy v. France, 373 Eur. Ct. H.R. 7 (2003), *available at* http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-788339-805233#{%22itemid%22:[%22003-788339-805233%22]}; Marais v. France, App. No. 31159/96 (1996), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{%22fulltext%22:[%22marais%20v%20france%22],%22itemid%22:[%22001-88275%22]}; and Honsik v. Austria, App. No. 31159/96, 184 (1995), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{%22dmdocnumber%22:[%22666524%22],%22itemid%22:[%22001-2362%22]}.

[66] *See* Lasson, *supra* note 28, at 74-76.

[67] *See id.* at 78.

[68] For example, Bernard Lewis, a reputed historian, was prosecuted before a French court after questioning the genocidal status of the massacre of 1.5 million Armenians by the Ottoman Empire. The criminal prosecution under France's Holocaust denial law failed as that statute was held to apply only to the denial of the Nazi genocide of the Jews. A subsequent civil case, however, was successful resulting in a fine of $ 2000. *See id.* at 66.

[69] *See id.* at 70.

[70] *See id.* at 54-55.

[71] *See*, for example, Yonover, *supra* note 64; *see also* Lasson, *supra* note 28, at 70-71.

Rhetoric can often trigger action. Speech can turn into conduct. Words can migrate into 'sticks and stones' which do, indeed, harm us. It is no accident that German narrative depicting Jews as evil preceded and justified the Nazi genocide.[72]

It is pertinent to note that all of the above arguments apply equally to racist as well as blasphemous speech involving the disparagement of a minority religion.[73] If the first argument does not apply to hate speech against a defined group, such as the Muslim, North African, and Arab minorities, it is because there has not yet been a definite history of discrimination and violence against these minorities in Europe. It is a weak argument to hold that 'group defamation' against Muslims will be barred only after discrimination against them has reached a historical threshold of genocide, or at least persecution, when a sufficient number have demonstrably suffered. The alternative is for European Muslims to protest and resort to such violence as to thereby create a 'history' of their own.

B. Freedom of Expression and Blasphemy Laws in Europe

A broad survey of the laws of European states reveals that while there are a number of states which have no blasphemy laws on the statute books, including France, Spain, and Portugal, other European states attach criminal sanctions to blasphemous libel. Austria,[74] Germany, Netherlands, Switzerland, and Italy have blasphemy and/or disparagement of religion laws on the statute books.[75] The prohibition on blasphemy has been explicitly recognized as a limitation on free speech in the Irish Constitution, and the Republic of Ireland has enforced its blasphemy law in the recent past.[76] However, in many of the states that have blasphemy laws, these laws have not been enforced in recent history. For exam-

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[72] Yonover, *supra* note 64, at 78, referring to Michael Blain, *Group Defamation and the Holocaust*, in GROUP DEFAMATION AND FREEDOM OF SPEECH 54 (Monroe H. Freedman & Eric M. Freedman eds., 1995).

[73] *See International Law—Genocide—U.N. Tribunal Finds That Mass Media Hate Speech Constitutes Genocide, Incitement to Genocide, and Crimes Against Humanity*, 117 HARV. L. REV. 2769 (2004) for a discussion of *Prosecutor v. Nahimana, Barayagwiza, and Ngeze* (the Media Case), Case No. ICTR-99-52-T (Int'l Crim. Trib. for Rwanda Trial Chamber I Dec. 3, 2003). Mary J. Matsuda concludes that racist hate speech is "so historically untenable, so dangerous, and so tied to perpetuation of violence and degradation of the very classes of human beings who are least equipped to respond" and is "a mechanism of subordination, reinforcing a historical vertical relationship." *See* Mary J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2357 (1989).

[74] STRAFGESETZBUCH [StGB] [PENAL CODE] § 188 lays down the offence of disparaging religious precepts. This provision was at issue Otto-Preminger Institut v. Austria, 19 Eur. Ct. H.R. 34, 41 (1994). For the text of § 188, see paragraph 25. The section reads:

> Whoever, in circumstances where his behaviour is likely to arouse justified indignation, disparages or insults a person who or an object which is being venerated by a church or religious community established within the country, or a dogma, a legally authorised custom or a legally authorised institution of such a church or religious community, shall be liable to a prison sentence of up to six months or a fine of up to 360 daily rates.

[75] *See Laws Penalizing Blasphemy, Apostasy and Defamation of Religion are Widespread*, PEW RESEARCH, (Nov. 21, 2012), http://www.pewforum.org/2012/11/21/laws-penalizing-blasphemy-apostasy-and-defamation-of-religion-are-widespread/.

[76] *See* IR. CONST., 1937, art. 40.6.I.i. For a history of the blasphemy laws in Ireland *see generally* Paul O'Higgins, *Blasphemy in Irish Law*, 23 MOD. L. REV. 151 (1960).

ple, while the U.K. has non-statutory common law blasphemous libel provisions, it has been pointed out that after the Human Rights Act 1998:

> "it is a reasonable speculation that as a consequence of that legislation any prosecution for blasphemy today . . . would be likely to fail or, if a conviction were secured, would probably be overturned on appeal . . . on grounds either of discrimination, of denial of the right to freedom of expression, or of the absence of certainty. Such an outcome would, in effect, constitute the demise of the law of blasphemy."[77]

Notably, the Human Rights Act was designed to give effect to the ECHR in U.K.'s domestic law.

The application of the blasphemy laws in a number of European countries, especially in U.K., have been challenged on the grounds that these violate the freedom of expression and the freedom of religion protected under the European Convention. However, contrary to the opinion expressed in the Select Committee Report noted above, the European Commission of Human Rights, defunct since 1998, and the European Court of Human Rights, adjudicatory institutions created under the Convention, have consistently ruled that the enforcement of blasphemy laws in European states is a legitimate restriction of the freedom of expression. In *Whitehouse v. Lemon*, for example, the defendant was prosecuted for the common law offence of blasphemy in U.K. after he published an illustrated poem describing certain homosexual acts involving Jesus Christ.[78] He was convicted of publishing a blasphemous libel and both the Court of Appeal and the House of Lords upheld the conviction.[79] The defendant filed an application before the European Commission of Human Rights on the grounds that his freedom of expression and freedom of religion had been violated by the prosecution. The Commission rejected the application as "manifestly ill-founded" and held that the prosecution was a proportionate measure for the protection of the religious sensibilities of others.[80]

Wingrove v. United Kingdom, another case from the U.K., arose from the censorship of the film "Visions of Ecstasy," which depicted the supposed erotic fantasies of St. Teresa.[81] The British Board of Film Classification rejected the application for a classification certificate on the grounds of blasphemy. The producers claimed that this violated their freedom of expression.[82] The case was

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[77] SELECT COMMITTEE ON RELIGIOUS OFFENCES IN ENGLAND AND WALES, FIRST REPORT, 2003, H.L. 79 ¶ 20, *available at* http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldselect/ldrelof/95/9505.htm#a2.

[78] Whitehouse v. Lemon (1979) 1 A.C. 617 (H.L. 1978) (consolidated appeals).

[79] *Id.* at 618.

[80] Gay News Ltd. v. United Kingdom, 5 Eur. Ct. H.R. 123 (1982).

[81] Wingrove v. United Kingdom, 24 Eur. Ct. H.R. 43 (1996), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58080.

[82] *Id.*; *Compare* Yonover, *supra* note 64, at 80-81, where the example of a Model Group Defamation Statute that won first prize in a student contest at Hofstra University was considered. According to the author, ". . .the Model Statute's requirement is chilling. The statute requires a state agency to review films or movies before they can be shown and, if found to be defamatory, the movie shall, by court order sought by the reviewing agency, not be shown."

declared admissible by the Commission, but was rejected by the Court. The aim of the interference, the protection of Christians against serious offence to their beliefs, was held to be fully consonant with the aims of Articles 9 and 10 of the Convention. The Court noted that blasphemy legislations are still in force in various European countries, although these are rarely applied, and ruled that the national authorities were best placed (subject to final supervision by the Court) to decide what restrictions were necessary and appropriate. The Court stated that:

> Strong arguments have been advanced in favour of the abolition of blasphemy laws, for example, that such laws may discriminate against different faiths or denominations - as put forward by the applicant - or that legal mechanisms are inadequate to deal with matters of faith or individual belief . . . However, the fact remains that there is as yet not sufficient common ground in the legal and social orders of the member States of the Council of Europe to conclude that a system whereby a State can impose restrictions on the propagation of material on the basis that it is blasphemous is, in itself, unnecessary in a democratic society and thus incompatible with the Convention."[83]

Article 9 of the European Convention guarantees the freedom of religion to the citizens of Europe.[84] This fundamental freedom is also subject to limitation on various grounds, including "the protection of the rights and freedoms of others," although fewer limitations on the freedom of religion are enumerated as opposed to those on the freedom of expression.[85] In *R v. Chief Metropolitan Magistrate ex parte Choudhury*, the petitioner claimed that the U.K. violated his freedom of religion by allowing him to be subjected to blasphemy.[86] The case arose when the U.K. Court of Appeal turned down a judicial review petition filed by a Muslim citizen against the refusal of the magistrate to issue a summons for blasphemy and seditious libel against Salman Rushdie, for insults to Islam in his book "The Satanic Verses."[87] The Court of Appeal held the Magistrate's decision to be correct since the Common Law offence of blasphemy is limited to

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[83] Wingrove v. United Kingdom, 24 Eur. Ct. H.R. 43 (1996), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58080.

[84] Council of Europe, Convention For Protection of Human Rights and Fundamental Freedoms, Apr. 11, 1950, CETS No. 005, *available at* http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

[85] Convention For Protection of Human Rights and Fundamental Freedoms art. 9(2), Apr. 11, 1950, Council of Europe, 213 U.N.T.S. 221, *available at* http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm.

[86] R. v. Chief Metropolitan Stipendiary Magistrate, *ex parte* Choudhury, 1 All E.R. 306, 313 (Q.B. 1991).

[87] Choudhury v. United Kingdom, App. No. 17439/90, Eur. Comm'n H.R. Dec. & Rep. 12 (1990), *available at* http://echr.ketse.com/doc/17439.90-en-19910305/view/.

attacks on Christianity.[88] The complainant's subsequent application to the European Commission of Human Rights was declared inadmissible.[89] The Commission ruled that there was no violation of Article 9 in the lack of any criminal sanctions against those who publish material offending the religious sensibilities of non-Christians.[90]

The above jurisprudence of the European Commission of Human Rights and the European Court of Human Rights, binding upon all member states in Europe, compels the conclusion that any member state of the European Convention may enact and enforce blasphemy laws. The enactment of blasphemy laws is considered a legitimate and sometimes a desirable limitation on the freedom of expression. However, the freedom of religion guaranteed in Article 9 of Convention does not impose a positive obligation upon the member states to enact blasphemy laws if they do not have such laws already in place. This is so even if, as in the Salman Rushdie case, the blasphemy laws do not provide equal treatment to all religions. The above approach of the European Court is in consonance with traditional rights theory, which holds that it is not a fundamental right of those who believe in a religion, even if they form a majority of the population, to be protected from blasphemy. This would be the case since those who do not believe in the religion blasphemed also have a belief which they have a right to express. This may indeed be true if blasphemy were defined as the expression of an opinion contrary to an established religion, as was the case as recently as the early part of the last century in most countries in Europe. However, the modern legal definition of blasphemy, where such a definition is relevant, focuses on the manner and form, rather than the content of the offending speech, as well the likelihood of such speech to create a hostile environment for those espousing a certain belief.[91]

Another traditional argument against recognizing a right to protection from blasphemy is that it would be tantamount to giving undue preference to the freedom of religion over the freedom of expression.[92] In the case of *Otto-Preminger-Institut v. Austria,* the European Court discussed the legality of the seizure and forfeiture of a movie ("*Das Liebeskonzil*") for attempted violation of §188 of the Austrian penal code, the offence of disparaging religious precept.[93] The Court

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[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] In Whitehouse v. Lemon, Lord Scarman in the House of Lords adopted the definition of blasphemy given in *Stephen's Digest of the Criminal Law*, 9th edition (1950) Article 214:

> Every publication is said to be blasphemous which contains any contemptuous, reviling, scurrilous or ludicrous matter relating to God, Jesus Christ or the Bible, or the formularies of the Church of England as by law established. It is not blasphemous to speak or publish opinions hostile to the Christian religion, or to deny the existence of God, if the publication is couched in decent and temperate language. The test to be applied is as to the manner in which the doctrines are advocated and not to the substance of the doctrines themselves.

Whitehouse v. Lemon, (1979) 1 A.C. 617, 665 (H.L. 1978) (consolidated appeals).

[92] *See*, for example, Nicholas Smith, *The Crime of Blasphemy and the Protection of Fundamental Human Rights*, 116 S. AFRICAN L. J. 162, 169-70 (1999). It has been argued that "if the believer asks to be spared the pain of vigorous disagreement of others, it amounts to asking for special treatment."

[93] Otto-Preminger Institut v. Austria, 19 Eur. Ct. H.R. 34, 37 (1994).

analysed the situation as one which presented a conflict between the freedom of religion and the freedom of artistic expression.[94] The Court, having stressed that in democratic societies the followers of a particular religion, even if the majority religion, must be prepared to face opposing opinions, proceeded to state:

> However, the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 (art. 9) to the holders of those beliefs and doctrines. Indeed, in extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them.[95]

The Court found the film to be an artistic expression that was "gratuitously offensive to others and thus an infringement of their rights."[96] Hence, the censorship was justified.

It is evident that in the Court's view the evil in blasphemy is not the expression of a contrary opinion but rather the manner and form of such expression which interferes with a religious group's ability to practice their religion. The concerns with such speech ought to be heightened when the target religion is the religion of a minority rather than the majority. Legal allowance of blasphemy would then be tantamount to the majority, as distinct from the state, denying the minority their freedom of religion. The liberal view of the freedom of religion and fundamental freedoms generally as negative liberties and the stress upon preventing the state from limiting opportunities of following a particular religion miss the mark in this context: the majority would be allowed to achieve extra-legally what it cannot achieve through an indirect control of state power.

The message that was clearly disseminated by the cartoons was that all Muslims are terrorists. If Muslims in Europe have to look over their shoulders at all times for the fear of being branded as terrorists, then such speech would have a chilling effect on the worship, practice, and observance of their religion. This would be a violation of Article 9 as per the European Court's own analysis, which suggests that all states ought to have a positive obligation to protect their citizens' freedom of religion. Unfortunately, the Court has not yet taken the argument to its logical conclusion by holding that citizens have a right to protection from such gratuitous blasphemy. Blasphemy against a minority's religion is an even more sinister wrong and states should be obliged to prevent such abuse of the freedom of expression.

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[94] The freedom of religion is provided in Article 14 of the Austrian Constitution (Basic Law), whereas artistic freedom is protected under Article 17a. The leading precedent of the Austrian Supreme Court pertained to the censorship of another film. The Supreme Court suggested 'that if a work of art impinges on the freedom of religious and worship guaranteed by Article 14 of the Basic Law, that may constitute an abuse of the freedom of artistic expression and therefore be contrary to the law' (judgment of 19 December 1985, Medien und Recht (Media and Law) 1986, no. 2, p. 15). *See id.* at 41.

[95] *Id.* at 55.

[96] Otto-Preminger Institut v. Austria, 19 Eur. Ct. H.R. 34, 43-44, 57 (1994).

IV. A Clash of Categories?: Race, Religion, and Liberal Fundamental Rights

Another difficulty inherent in permitting blasphemy against a minority's religion is that such acts often conflate the categories of race and religion to such an act that it is impossible to make meaningful distinctions between hate speech and blasphemy, and between the race or ethnicity and the religion of the minority communities whose religious beliefs are the target of abuse. The Danish cartoons provide a quintessential example of such a phenomenon. The main image published by *Jyllands-Posten* depicts a man failing to identify the prophet of Islam in a criminal identity line-up as all the suspects, presumably belonging to different religions and creeds, are dressed up similarly.[97] Ironically, all of the other caricatures published on that page effectively advise on how to identify the Muslim-terrorist in such a line-up in reality. He is a bearded Arab, dressed in a distinctive garb, supports a turban and compels his women to be covered from head to toe. The religion, race and culture of the Muslim-Arab-terrorist are the *leitmotif* of the caricatures. What the cartoons do not inform the viewer is how to distinguish the Muslim terrorist from the Muslim pacifist, or an immigrant citizen of Europe with whom he shares his religion-race-culture. Is this blasphemy or is this hate speech?[98] If the newspaper wished to publish cartoons depicting 'Arab terrorists' in exactly the same manner it would not have to change a thing except the title of the piece. The publication of such cartoons would have been legitimately suppressed as hate speech.

The fine distinction between hate speech and blasphemy against a minority community's religion, especially when that minority community also has distinct racial or ethnic and cultural commonalities, enables the creation of an environment of abuse, ridicule, and social persecution that cannot be achieved directly. The ridicule of religion, only one of the inseparable facets of identity, does not

[97] For an archived image, see Jyllands-Posten, *Muhammad Cartoons Controversy*, WIKIPEDIA http://upload.wikimedia.org/wikipedia/en/7/75/Jyllands-Posten-pg3-article-in-Sept-30-2005-edition-of-KulturWeekend-entitled-Muhammeds-ansigt.png.

[98] In January 2006, the regional public prosecutor for Viborg (*Statsadvokaten i Viborg*) decided not to initiate criminal proceedings against the newspaper under Article 140 of the Danish Criminal Code. Article 140 provides that any person who publicly mocks or scorns the religious doctrines or acts of worship of any lawfully existing religious community may be punished with imprisonment for a term of up to four months. On appeal the Director of Public Prosecutions (*Rigsadvokaten*) upheld the decision in March 2006. The DPP's decision makes for interesting reading. First, in a disingenuous understanding of Islam the DPP held that ridiculing prophet Muhammad (P.B.U.H.) was not tantamount to a mockery of the "religious doctrines or acts of worship" in Islam. Article 140, it was held, did not " encompass religious feelings which are not tied to a community's religious doctrines or acts of worship." Secondly, the DPP stretched logic to breaking point over the analysis of specific cartoons. Specifically, as regards the caricature depicting prophet Muhammad (P.B.U.H.) with a bomb as his turban, the DPP admitted it could also "be taken to depict the Prophet Muhammad as a violent person and as a rather intimidating or frightening figure. . . . This depiction might with good reason be understood as an affront and insult to the Prophet, who represents an ideal for believing Muslims. However, such a depiction is not an expression of mockery or ridicule, and almost certainly not of scorn within the meaning of Article 140 of the Danish Criminal Code. The concept of scorn covers contempt and debasement, which in their usual meaning would not cover situations depicting a figure such as that shown in drawing. . ." *See* Ben el Mahi v. Denmark, App. No. 5853/06, Eur. Ct. H.R. (2006), *available at* http://echr.ketse.com/doc/5853.06-en-20061211/.

render such an attack on the social position of a minority community any less grave than an act of bigotry which focuses on the racial identity markers of that community. In fact, it is arguable that such an act of blasphemy is a particularly sinister form of hate speech or "aggravated discrimination,"[99] and the "conflation of racial, cultural and religious factors" may be "highlighted as one of the central causes of the resurgence of racism and its increasing complexity."[100] In the context of increasing Islamophobia, the aggravated meeting points of racial and religious discrimination are often manifested in the "stereotypical association of Islam with violence and terrorism - an association which is bolstered by intellectual constructs, used in political rhetoric and exaggerated by the media and which has a profound impact on the popular imagination."[101]

The emergent liberalism of the European conception of fundamental rights displayed an inability to deal with the complexities of discrimination against minority communities constituted through overlapping identities of race, religion and culture. The primary defect in the liberal conception of the rights to free speech and religion is its exclusive focus on the state's interference in the minority communities' fundamental rights. The inherent negativity of the liberal conception not only disables the state from discriminating against minority individuals on the basis of religion but also from preventing offensive speech by private individuals that stifles the free exercise of religion by the minority community. However this approach, constructed through the defense of the Danish cartoons, sits uncomfortably with the historically more communitarian ethos the European conception of rights as less fundamental and rigid than recently professed. This communitarian ethos is reflected in the more robust action against hate speech and Holocaust denial that is permissible to states under the ECHR. Such an approach provides a sounder basis for mediating the conflicting values and political aims underlying the freedoms of expression and religion by enabling the state to proscribe ridicule of a minority's religion that amounts to aggravated discrimination and hate speech.

The freedom of expression is not the overarching value in European social construction and the state has certain other responsibilities including the mandate of ensuring the free exercise of religion by minority communities. This may include the suppression of certain expression that creates an environment of hostility towards distinct racial-ethnic-religious communities by non-state actors. Furthermore, Article 17 of the ECHR stipulates that:

> Nothing in [the] Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein

[99] *See* U.N. Secretary-General, *Reports, Studies, and Other Documentation for the Preparatory Committee and the World Conference*, ¶ U.N. Doc. A/CONF.189/PC.1/7 (Apr. 13, 2000).

[100] Human Rights Council Res., Rep. of the Human Rights Council, 7th Sess., 20 Feb. 2008, A/HRC/7/19 at ¶ 54 (20 Feb. 2008).

[101] *Id.* at ¶ 57.

> or at their limitation to a greater extent than is provided for in the Convention.[102]

The ECtHR frequently reads Article 17 in conjunction with other provisions as the basis for the restriction of rights provided in the ECHR. While the ECtHR has held in the past that there that there is neither a positive obligation on the state to protect citizens from blasphemy against their religion nor a right to the equal protection of blasphemy laws, there is indeed an obligation on the state to protect its citizens from hate speech. In *Norwood v. United Kingdom*, the ECtHR declined the protection of Article 10 to a member of the anti-immigration British National Party who had been charged with an aggravated offence under section 5 of the Public Order Act 1986 for "displaying, with hostility towards a racial or religious group, any writing, sign or other visible representation which is threatening, abusive or insulting, within the sight of a person likely to be caused harassment, alarm or distress by it."[103] The applicant displayed a poster with a picture of the Twin Towers in flame and the statement "Islam out of Britain – Protect the British People."[104] The ECtHR held that "the words and images on the poster amounted to a public expression of attack on all Muslims in the United Kingdom. Such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination."[105]

In a more recent case, *Féret v. Belgium*, the ECtHR denied, by a narrow majority of 4:3, the protection of Article 10 to a member of the Belgian parliament who had been disqualified from holding public office pursuant to a conviction for incitement to racial discrimination.[106] The applicant produced leaflets carrying anti-immigration and Islamophobic slogans such as "[s]tand up against the Islamification of Belgium" and "Stop the sham integration policy."[107] Although the majority on the Court did not find a violation of Article 17, the judges found sufficient basis for restricting incitement to discrimination and hatred on the basis of race and ethnic origin in the provisions of Article 10 itself.[108] The only meaningful distinction between the cases mentioned above and that of the Danish cartoons was that in the classification of offending speech. All of these cases conflated religion with race as is evident from the offending statements. How-

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[102] Convention For Protection of Human Rights and Fundamental Freedoms art. 17, Apr. 11, 1950, Council of Europe, 213 U.N.T.S. 221, *available at* http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm.

[103] *See* Norwood v. United Kingdom, App. No. 23131/03, Eur. Ct. H.R. (2004), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-67632#{%22itemid%22:[%22001-67632%22]}.

[104] *Id.*

[105] *Id.*

[106] *See* Féret v. Belgium, 573 Eur. Ct. H.R. (2009), *available at* http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-2800730-3069797#{%22itemid%22:[%22003-2800730-3069797%22]}.

[107] *See* Press Unit, Fact Sheet – Hate Speech, Eur. Ct. H.R. (2013), *available at* http://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf.

[108] *See* Féret v. Belgium, 573 Eur. Ct. H.R. (2009), *available at* http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-2800730-3069797#{%22itemid%22:[%22003-2800730-3069797%22]}.

ever, in *Norwood v. United Kingdom* and *Féret v. Belgium* the state parties classified the offensive statements and actions as hate speech while the Danish cartoons were classified as blasphemy and disparagement of religion. To the extent that gratuitous blasphemy and ridicule of a minority's religion effectively translates into aggravated hate speech, the state should not be allowed to hide behind such artificial distinctions and a newfound liberalism as Denmark chose to do in defense of the caricatures.

Another problem with the liberal conception of fundamental rights highlighted by the free speech defense of the Danish cartoons is the impoverishment of political discourse that may result from over-zealous rights talk.[109] Fundamental rights are all too frequently used in liberal discourse as trumps not only against offending state action but also as trumps against opposing viewpoints, essentially as debate-stoppers. The moment rights are brought up any discussion of conflicting values becomes frivolous, for a right is a right. In the liberal understanding rights are *apriori* and any discussion on political and social values must take place within the framework of rights. The primary justification of rights is that not that they promote certain socio-political goods but rather that they help constitute fair processes within which individuals can choose their own values and aims. As such, in liberal political and legal discourse rights act as trumps to preempt any consideration of values that fall foul of rights as conceived by the defenders of liberal rights. This is regardless of the fact that the advocates of liberal rights "notoriously disagree about what rights are fundamental, and about what political arrangements the ideal of the neutral framework requires."[110] This is essentially problematic in pluralistic societies where distinct racial-religious-cultural minorities are facing demands for integration or assimilation that they are wont to resist. It is self-defeating to adopt a 'take it or leave it' approach, or 'take it or leave' as regards immigrants, when it comes to discussion of overarching political structures and values. An open, inclusive and civil political discourse, with a view to reach a shared understanding on social ordering is the need of the moment, rather than a restrictive reliance on fundamental rights.

V. Conclusion

The free speech defense of the publication advanced by the Danish authorities falters on a number of grounds. The laws of many European states, including those of Denmark, allow substantial limitations on the freedom of expression as regards the prohibition on incitement, hate speech and insult. In addition, it is within the prerogative of European states to limit the freedom of expression in order to ban Holocaust denial, blasphemy and even the disparagement of a minority religion. Therefore, the Danish government could have prosecuted *Jyllands-Posten* for publishing the cartoons under its existing laws, or if the existing laws were held to be inadequate to cover the specific facts of this case, then in the least the Danish government could have enacted laws that would prohibit

[109] *See* Glendon, *supra* note 12, at 12-17.

[110] Sandel, *supra* note 5, at 89.

such publications in the future. The case is stronger against the subsequent publication of the caricatures in Denmark and other European nations. Having been put on notice that the publication of this material causes serious insult and injury to Muslims, and consequently creates a risk of violence, the re-publication of the cartoons was clearly the dissemination of hate speech and those newspapers who indulged in such willful propagation of this speech were clearly guilty of the offences of causing instigation and insult to the religious sentiments of European Muslims. Even if it is accepted that neither the initial nor the subsequent publication fell foul of existing hate speech laws, the failure of the legal case would in no way detract from the strength of the moral argument against the publication of these cartoons. The failure on the part of state parties to prohibit the publication is a gross violation of the letter as well as the spirit of the European Convention of Human Rights.

It is of note that major newspapers in the United States generally refused to follow in the footsteps of European news media, even though the United States accords protections to the freedom of speech similar to those claimed by the defenders of the caricatures in Europe. As has been demonstrated in this paper, contrary to the strenuous assertions of some European leaders and news personalities, such a freedom of expression, absolute in its application and primary amongst other fundamental rights and freedoms, is not a European value. The European conception of the freedom of expression falls far short of absolutism and allows for restrictions in the interest of maintaining social harmony and discouraging racism, sexism and insult to the religious sentiment of the citizens. There is no denying that there is a distinct segment in the European polity that believes that the freedom of expression should be accorded a primary status amongst all fundamental values, but this viewpoint is far from being the consensus position in Europe. The European path towards the goal of creating open, democratic, and multicultural societies has been, in the aftermath of the tragic failures of the World War II era, the path of ensuring that bigotry and hateful speech is censored. Unfortunately, now that the targets of the bigotry are the immigrant Muslim minorities in Europe, the standards appear to be changing.

The success of the free speech defense of the Danish cartoons thus represents an unwelcome development in the European human rights discourse. As Europe becomes ever more diverse and pluralistic the resulting challenges can only be met by solutions devised through open, inclusive, civil, and meaningful engagements. A robust political discourse that is mindful of histories of colonialism and socio-economic deprivation that is at the heart of immigration, as well cultural and religious disagreements underlying social and economic conflicts, is the need of the moment. A political strategy grounded in fundamentalist liberalism that presents choices in 'take it or leave it' terms to minority viewpoints in the new Europe will not only fracture and polarize the debate but also exacerbate these conflicts. If Europe has learned anything from its histories of violence against minority communities, the path of open and inclusionary discourse will be adopted in the hope that humans have the capacity to develop shared foundations of co-existence through such engagement.

Millennium Development Goal 4, Children's Health and Implementation Challenges in Africa: Does a Human Rights Based Approach Suffice?

Obi Nnamuchi*

Every disadvantaged child bears witness to a moral offense: the failure to secure her or his rights to survive, thrive and participate in society. And every excluded child represents a missed opportunity – because when society fails to extend to . . . children the services and protection that would enable them to develop as productive and creative individuals, it loses the social, cultural and economic contributions they could have made.
– Anthony Lake: UNICEF Executive Director

As the 2015 deadline for the Millennium Development Goals draws closer, the challenge for improving . . . newborn health goes beyond meeting the goals; it lies in preventing needless human tragedy. Success will be measured in terms of lives saved and lives improved.
– Ann M. Veneman: Former UNICEF Executive Director

To look into some aspects of the future, we do not need projections by supercomputers. Much of the next millennium can be seen in how we care for our children today. Tomorrow's world may be influenced by science and technology; but more than anything, it is already taking shape in the bodies and minds of our children.
– Kofi A. Anan: Former UN Secretary-General

Abstract

That the state of children's health in Africa is abysmal is incontrovertible. Proof, if there is need for one, is the perennial underperformance of the vast majority of countries in the region in key dimensions of children's health and wellbeing. Nonetheless, the point of interest in health policy literature is not on the underperformance per se but on the underlying causes and possible antidotes – a reason Millennium Development Goal (MDG) 4 (on reducing child mortality) holds special significance for countries in the region. This paper advances scholarship in this very critical area by projecting human rights as holding the key that could unlock the suffocating stranglehold ill-health irrepressibly wields over the lives of millions of children in Africa.

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I. introduction and preliminary background

The adoptions of the United Nations Convention on the Rights of the Child ("CRC") in 1989[1] and the African Charter on the Rights and Welfare of the Child ("ACRWC") the following year[2] were significant achievements in the global protection of the health and wellbeing of children throughout the world. Remarkably, the CRC has received more signatures, ratifications or accessions than any other human rights treaty – a total of 193 countries as of March 2014.[3] The ACRWC has also been widely endorsed in Africa. With 42 of the 54 countries in Africa being signatories to the ACRWC (46 of them ratifying it),[4] it is clear that vulnerability of children and the need for their protection is a commonly shared value in the region.[5] Ratification binds these countries to, among other things, ensure the right of children in their respective jurisdictions to "the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health."[6] As to how this goal would be attained, the CRC mandates States Parties to adopt appropriate legislative and administrative measures to diminish infant and child mortality, ensure the provision of necessary medical assistance and health care for all children, combat disease and malnutrition, and develop preventive care.[7]

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[1] Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GOAR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49, at 167 (Nov. 20, 1989) [hereinafter CRC]. The CRC is unique in more ways than one. Aside from being the most highly ratified human rights instrument, it entered into force sooner following adoption than any other treaty and it set a record in the number of States Parties that participated in the signing ceremony (60) amongst treaties adopted under the auspices of the United Nations. *See* THOKO KAIME, THE AFRICAN CHARTER ON THE RIGHTS & WELFARE OF THE CHILD: A SOCIO-LEGAL PERSPECTIVE 1 & n.2 (2009). *See also* Cynthia Price Cohen, *The United Nations Convention on the Rights of the Child: Implications for Change in the Care and Protection of Refugee Children*, 3 INT'L J. REFUGEE L. 675, 676 (1991).

[2] African Charter on the Rights and Welfare of the Child, July 11, 1990, OAU Doc. CAB/LEG/24.9/49 (entered into force Nov. 29, 1999) [hereinafter ACRWC].

[3] *Status of Convention on the Rights of the Child*, UNITED NATIONS TREATY COLLECTION (Mar. 24, 2014, 8:03 PM), http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en; *see* UNICEF, THE STATE OF THE WORLD'S CHILDREN 2012: CHILDREN IN AN URBAN WORLD 16 (2012) (listing Somalia, South Sudan and the United States of America as the only nations that have not ratified the treaty).

[4] *See* AFRICAN COMM. OF EXPERTS ON THE RIGHTS OF THE CHILD, LIST OF COUNTRIES WHICH HAVE SIGNED, RATIFIED/ACCEDED TO THE AFRICAN UNION CONVENTION ON THE RIGHTS AND WELFARE OF THE CHILD, *available at* http://acerwc.org/wp-content/uploads/2011/03/French-and-English-ACERWC-Updated-Status-of-the-ACRWC.pdf.

[5] ACRWC, *supra* note 2, para. 4, 6 (noting "that the situation of most African children remains critical due to the unique factors of their socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger, and on account of the child's physical and mental immaturity he/she needs special safeguards and care" and recognizing "that the child, due to the needs of his physical and mental development requires particular care with regard to health, physical, mental, moral and social development, and requires legal protection in conditions of freedom, dignity and security.").

[6] Convention on the Rights of the Child, *supra* note 1, art. 24, para. 1; ACRWC, *supra* note 2, art. 14, para. 1.

[7] Convention on the Rights of the Child, *supra* note 1, art. 24, para. 2; ACRWC, *supra* note 2, art. 14, para. 2.

This vital human rights obligation closely mirrors the commitment explicit in Millennium Development Goal ("MDG") 4, to reduce child mortality or, more specifically, to "[r]educe by two-thirds, between 1990 and 2015, the under-five mortality rate" ("U5MR").[8] In fact, it can be said that MDG 4 is encapsulated within the CRC and ACRWC obligations and, on that basis, can be construed as a policy reformulation of extant legal obligations. But there are differences. In contrast to these treaties, there are time constraints and measurable targets attached to MDG 4.[9] Moreover, MDG 8 – to develop a global partnership for development – is a multilateral compact between affluent and low income nations explicitly demanding action from the former to facilitate the latter's progress toward meeting their MDG obligations, making MDG 8 (and other MDGs) unique in international development relations.[10] Strikingly, neither the CRC nor the ACRWC has such financial teeth.

Given this disparity, the question that arises is whether this advantage or the new commitment itself has resulted in better health for children in the region? Or, rather, does MDG 4 hold potential for improving the health of African children? What is the current situation and what are the factors sustaining the status quo? What strategies and initiatives are needed in order to position the region toward meeting the targets and benchmarks of the MDGs? These are some of the critical questions that are confronted in this paper.

This paper consists of five sections. Following the introduction, Part II of this paper considers the state of infant and child health in Africa. By examining recent data on key indicators relating to children's health such as the U5MR, infant mortality rate ("IMR"), and proportion of 1 year-old children immunized against measles, the section shows that the state of health of children in the region is abysmal and in urgent need of remedial measures. In Part III, the paper explores critical challenges militating against securing the health of African children. Its

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[8] U.N. STATISTICS DIV., OFFICIAL LIST OF MDG INDICATORS (2008), *available at* http://unstats.un.org/unsd/mdg/Resources/Attach/Indicators/OfficialList2008.pdf.

[9] *See id.* Aside from the target of reducing by two-thirds, between 1990 and 2015, the U5MR, there are three indicators or benchmarks that were designed to assess country progress (or lack thereof) toward the goal, namely, U5MR, the infant mortality rate, and the proportion of one-year-old children immunized against measles. *See id.* These are the crucial tools that will be employed in determining whether the MDG will be attained in 2015. *See Id.*

[10] WORLD HEALTH ORG., HEALTH AND THE MILLENNIUM DEVELOPMENT GOALS 63 (2005). Subsequent multilateral agreements attest to the obligatory dimension of assistance toward achieving the MDGs. For instance, signatories to The Global Compact for Achieving the Health Millennium Development Goals, adopted under the auspices of the International Health Partnership in 2007, explicitly commit themselves to be held accountable "in implementing this compact" and to hold an annual meeting for the purpose of reviewing progress against the commitments. *See* International Health Partnership, *A Global 'Compact' for Achieving the Health Millennium Development Goals*, WORLD HEALTH ORG. (Sept. 5, 2007), http://www.who.int/healthsystems/IHP_compact.pdf. *See also* 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. 198 (2012); The Accra High Level Forum, *The Accra Agenda for Action on Aid Effectiveness*, (2008), http://www.ppdafrica.org/docs/accra.pdf; Fourth High Level Forum on Aid Effectiveness, *The Busan Partnership for Effective Development Co-operation,* (2011), http://www.oecd.org/dac/effectiveness/49650173.pdf; United Nations High-level Event on the Millennium Development Goals, July 25, 2008, *Committing to Action: Achieving the Millennium Development Goals*, ¶ 1 (Sept. 25, 2008), *available at* http://www.un.org/millenniumgoals/2008highlevel/pdf/commiting.pdf.

focus is on five factors it considers paramount: early or child marriage, maternal illiteracy, parental poverty, dearth of skilled health professionals, and institutional poverty and leadership deficit. The section also enumerates a number of interventions it projects as holding the key to reversing the trend and positioning the region toward attaining MDG 4. While not claiming that the list is exhaustive of the factors militating against health of children in the region, it argues that they are the most vital, and addressing them via the interventions identified is indispensable to success. Part IV casts challenges in the realm of children's health as human rights issues and posits that a human rights based approach is foundational to any sustainable eradication program. Specifically, the section demonstrates the inextricable relationship between human rights and children's health, contending that the indivisibility and interdependence paradigm invites a comprehensive and multifaceted response to the health quandary in Africa. In other words, other needs that are linked with the health of children, such as maternal health and literacy, must receive priority attention in policy frameworks designed to catapult nations in the region toward attaining the objectives of MDG 4. The conclusion – Part V – rejects resource constraints as explanatory of the dismal state of children's health in Africa; instead, it identifies what it calls "political cabalism" as the main culprit. Relying on the pro-poor vision of Pope Francis, it calls upon the citizenry to jettison docility and demand good governance as a human right.

ii. state of infant and child health in Africa

Examining the state of infant and child health in Africa involves making one critical assessment – determining whether progress has been made or is being made on three crucial fronts, namely, (i) U5MR, (ii) IMR and (iii) proportion of 1 year-old children immunized against measles. These are the indicators for monitoring progress toward MDG 4. In other words, the indicators are proxies for assessing the health status of infants and children within particular health systems or jurisdictions. Positive numbers in any of these three areas indicate progress and, of course, the reverse is equally true. So, how are countries in Africa faring?

In all these key areas, sub-Saharan Africa is not on par with other regions. Not only does the region account for 38 percent of neonatal deaths globally and the highest neonatal mortality rate (34 deaths per 1,000 live births in 2010), it remains the region with the least improvement over the last two decades, a record it shares with Oceania.[11] In 2011, there were 24 countries with an U5MR above 100 deaths per 1,000 live births, 23 of them in sub-Saharan Africa.[12] Even worse, one in every nine children born in the region dies before age five.[13] The U5MR in Africa, at 107 deaths per 1,000 live births, is astronomically high in

[11] U.N. Dep't of Econ. & Soc. Affairs, The Millennium Development Goals Report 2013 26, U.N. Sales No. E.13.I.9 (2013), *available at* http://www.un.org/millenniumgoals/pdf/report-2013/mdg-report-2013-english.pdf [hereinafter U.N. MDG Report 2013].

[12] *Id.* at 25.

[13] *Id.*

comparison to other regions; America and Europe suffer just 16 and 13 deaths per 1,000 live births, respectively.[14]

But the region has also witnessed some progress. Although not by any means contained, the region's U5MR is on a downward trend. From 175 per 1,000 live births in 1990, the U5MR declined to 153 in 2000, and even further to its current level of 107.[15] The IMR is also falling; it now stands at 68 deaths per 1,000 live births, compared to 106 in 1990.[16] Disaggregated figures reveal a deep gulf between the performances of individual countries. The U5MR in Botswana plummeted from 53 deaths per 1,000 live births in 1990 to 26 in 2011, and its IMR fell from 41 in 1990 to 20 in 2011.[17] Some nations have fared even better. Liberia has cut its U5MR at least two-thirds since 1990 whereas Ethiopia, Madagascar, Malawi, Niger, and Rwanda have achieved reductions of at least 60 percent.[18] But although Sierra Leone also showed some progress, its U5MR having dropped from 267 in 1990 to 185 in 2011 and IMR declining from 158 in 1990 to 119 in 2011, the numbers are still unacceptably high.[19] High mortality among children in Africa is rooted in several factors, including malnutrition,[20] pneumonia, diarrhea, malaria, under-nutrition, and measles.[21]

A critical issue worth noting is that most of these conditions and pathologies are easily preventable and treatable and yet, inexplicably, have continued to ravage the lives of children in the region. The fact that Africa leads the rest of the world in child morbidity and mortality powerfully demonstrates a lack of capacity to take appropriate remedial actions which, in most cases, is the direct result of unwillingness to commit resources that would strengthen health systems in the region and enable them to swiftly respond to the needs of this vulnerable segment of society.[22] This is a governance issue. It is less taxing to explain malnutrition of children in countries prone to climatic vagaries (droughts in particular) such as Niger[23] and Ethiopia[24] than in the vast majority of countries, which are dissimilarly situated. Still, 31 percent of children less than five years old in Africa were

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[14] World Health Org., World Health Statistics 2013 59 (2013) [hereinafter World Health Statistics 2013].

[15] World Health Statistics 2013, *supra* note 14, at 59.

[16] *Id.*

[17] *Id*. at 51.

[18] U.N. MDG Report 2013, *supra* note 11, at 25.

[19] World Health Statistics 2013, *supra* note 14, at 57.

[20] African Union, *The African Health Strategy: 2007 – 215, Third Session of the African Union Conference of Ministers of Health, Johannesburg, South Africa*, ¶ 9, CAMH/MIN/5(III) (2007) [hereinafter The African Health Strategy] (reporting that in some parts of Africa, malnutrition accounts for as much as 60 percent of deaths of children less than five).

[21] U.N. MDG Report 2013, *supra* note 11, at 26.

[22] U.N. MDG Report 2013, *supra* note 11, at 24 (reporting that one in nine children in sub-Saharan Africa die before age five, more than 16 times the average for developed regions).

[23] *Niger Drought Leaves Millions on the Brink of Starvation,* Huffington Post (June 9, 2010, 2:15 PM), http://www.huffingtonpost.com/2010/06/09/niger-drought-leaves-mill_n_606085.html (reporting that as a result of severe drought in Niger, almost half of the country's population of 15 million are battling malnutrition, three million of them on the brink of starvation).

underweight in 1990; that number marginally improved to 27 percent in 2008.[25] Although recent data shows further decline to 21 percent, the number is still unjustifiably high, as there are 30 million underweight children in sub-Saharan Africa.[26] Thus, like other easily surmountable challenges in Africa, being underweight (the inevitable result of malnutrition or undernourishment) continues to pose a major threat to children's health in the region.[27] The cure is simple – adequate nutrition.[28] It is one that cannot elude any responsible government, in Africa or elsewhere. Yet, in what is best described as an ironic twist of fate, undernourishment remains a stark reality in many households despite the fact that 60 percent of the world's uncultivated arable land is in Africa.[29]

Aside from the high number of underweight children, there is also the problem of measles. Measles are easily and cheaply preventable with timely inoculation but remain a pervasive killer disease in several African countries. Together with Southern Asia, sub-Saharan Africa accounts for 90 percent of all measles deaths globally.[30] And notwithstanding affordability (the cost of measles vaccination is a paltry $1),[31] weak health systems and institutional misprioritization combine to deny this life-saving measure to millions of children in the region. Obviously, accelerating the pace of immunization coverage is possible with stronger political and financial commitment in countries lagging behind.[32] But whether this commitment will be made is a different question altogether. True, the rate of immunization against measles is increasing but not at a fast enough pace to annihilate the menace posed by the disease any time soon.[33]

Measles immunization coverage for one-year-old children in Africa is lower than in any other part of the world, at 75 percent, compared to 92 and 94 percent respectively in the Americas and Europe.[34] There are also wide differences amongst countries. Seven countries in the region – Seychelles, Mauritius, Malawi, Cape Verde, Eritrea, Rwanda, and Swaziland – achieved coverage rates

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[24] Luc Van Kemenade, *Ethiopia: Hunger during Worst Drought in 60 Years*, HUFFINGTON POST (Aug. 17, 2011, 12:03 PM), http://www.huffingtonpost.com/2011/08/17/ethiopia-hunger-drought_n_928989.html (blaming severe drought for rising number of people, up to 700,000, in need of food aid).

[25] U.N. DEP'T OF ECON. & SOC. AFFAIRS, THE MILLENNIUM DEVELOPMENT GOALS REPORT 2010 13, U.N. Sales No. E.10.I.7 (2010), *available at* http://www.un.org/millenniumgoals/pdf/MDG%20Report%202010%20En%20r15%20-low%20res%2020100615%20-.pdf. Only Southern Asia fares worse. *Id.*

[26] U.N. MDG REPORT 2013, *supra* note 11, at 11.

[27] The African Health Strategy, *supra* note 20, ¶ 9.

[28] *See* UNICEF, *State of the World's Children 2009: Maternal and Newborn Health*, at iii, U.N. Sales No. E.09.XX.1 (2009).

[29] J. O'S., *Farming in Africa: Cold Comfort Farms,* THE ECONOMIST (Sept. 4, 2013, 6:10 PM), http://www.economist.com/blogs/baobab/2013/09/farming-africa.

[30] U.N. MDG REPORT 2013, *supra* note 11, at 27.

[31] *Measles Pre-Elimination*, WORLD HEALTH ORG., (http://www.afro.who.int/en/clusters-a-programmes/mte/measles-pre-elimination.html (last visited Mar. 31, 2014).

[32] U.N. MDG REPORT 2013, *supra* note 11, at 27.

[33] *See id.* (noting that as of 2011, 74 percent of children in sub-Saharan Africa had received at least one dose of measles-containing vaccine compared to 53 percent in 2000).

[34] WORLD HEALTH STATISTICS 2013, *supra* note 14, at 104.

of 95 to 99 percent in 2011.[35] Others do not fare as well. Chad, for instance, managed to provide coverage to just 28 percent of children within its territory.[36] Still another menace is malaria. Children can be protected from this disease by increasing ownership and use of insecticide-treated mosquito nets; and where prevention fails, by treatment with appropriate anti-malaria therapy.[37] On these two counts, progress has been slow.[38] But there are other factors obstructing the march toward optimal health for infants and children in Africa.

iii. key challenges and necessary interventions

The abysmal state of infant and child health in the vast majority of countries in Africa is a strident testament to the multifarious nature of the difficulties confronting the region. Akin to maternal health in Africa,[39] there is never a shortage of challenges in the realm of children's health. What is lacking – critically, in some cases – is the means, or rather the will, to surmount these difficulties. Indeed, even in affluent regions of Europe and North America, lingering resource constraints remain the primary bane to complete victory, in the sense of universal access to health care and availability of social health determinants. Nonetheless, the near total inertia in deploying the kind of resources needed to lessen the health burden on the citizenry in Africa is not explained solely on the basis of finite resources. Even amidst scarcity, there are a number of resource-friendly, low cost interventions that could have enormous remedial impact but have, inexplicably, been relegated to the back burner. In many cases, what political leadership in the region unabashedly packages and sells to the global community as "resource constraints" is nothing more than evidentiary of governance vacuum in the region. To put it differently, the atrocious state of the health of children in sub-Saharan Africa is the direct result of the failure of various governments in the region to meet their obligations to children and the rest of the population.

There are, of course, multiple areas of difficulty in protecting children's health in Africa but, for the sake of brevity, this section focuses on the major ones, namely, early marriage, maternal illiteracy, parental poverty, unavailability of skilled health personnel, institutional poverty, and leadership void in the region.

(i) Early Marriage

A statement credited to an organization whose professed mission centers on women empowerment, advancing gender equality, and fighting poverty in the developing world aptly summarizes the circumstances surrounding early or child marriage in many third world countries:

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[35] *Id.* at 95-102.

[36] *Id.* at 96.

[37] Obiajulu Nnamuchi, *Millennium Development Goal 6 and the Trifecta of HIV/AIDS, Malaria and Tuberculosis in Africa: A Human Rights Analysis,* 40 DENV. J. INT'L L. & POL'Y (forthcoming 2014).

[38] *Id.*

[39] *See* Obiajulu Nnamuchi, *Millennium Development Goal 5, Human Rights, and Maternal Health in Africa: Possibilities, Constraints and Future Prospects*, 23 ANNALS HEALTH L. 92, 97 (discussing the challenges Africa is confronting in its effort to attain MDG 5 and suggesting remedial measures).

> Child marriage most often occurs in poor, rural communities. In many regions, parents arrange their daughter's marriage unbeknownst to the girl. That can mean that one day, she may be at home playing with her siblings and the next, she's married off and sent to live in another village with her husband and his family – strangers, essentially. She is pulled out of school. She is separated from her peers. And once married, she is more likely to be a victim of domestic violence and suffer health complications associated with early sexual activity and childbearing.[40]

This is not a uniquely African problem. Instead, it is a challenge confronting many countries in poorer regions of the world. In fact, Africa is not the worst affected. A study on women aged 15 to 24 reveals that in South Asia, 48 percent (equivalent to 9.7 million girls) were married before reaching 18 years old whereas in African and the Caribbean, the figures are 42 and 29 percent respectively.[41] Although the rate is high in Africa, disaggregated figures show that the numbers are unevenly spread amongst countries in the region, ranging from as low as 8 percent in South Africa to as high as 77 percent in Niger.[42]

The geographic prevalence of this practice suggests a causal link with poverty. The regions implicated in this menace are poorer than the rest of the world. In fact, cross country analysis shows the practice to be most prevalent among the poorest 20 percent of the population.[43] Thus, it is no coincidence that the African country in which the practice is most common, Niger,[44] ranks amongst the poorest in the world,[45] as do Chad[46] and Mali,[47] two other nations with high rates of child marriage.[48] A useful way to evaluate the link between poverty and child marriage is to see the latter as a consequence of the former, a symptom of a much deeper social pathology. In every country where early marriage is common, poverty is a perpetuating factor.[49] And just as a therapeutic intervention targeting

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[40] *Child Marriage*, INTERNATIONAL CENTER FOR RESEARCH ON WOMEN, http://www.icrw.org/what-we-do/adolescents/child-marriage (last visited Mar. 31, 2014).

[41] UNICEF, EARLY MARRIAGE: A HARMFUL TRADITIONAL PRACTICE 4 (2005), *available at* http://www.unicef.org/publications/files/Early_Marriage_12.lo.pdf [hereinafter EARLY MARRIAGE: A HARMFUL TRADITIONAL PRACTICE].

[42] *Id.* at 4 (limiting the study to women aged 20–24 married by the exact age of 18).

[43] Early Marriage: A Harmful Traditional Practice, *supra* note 41, at 6, 12.

[44] *Id.* at 4.

[45] UNDP, HUMAN DEVELOPMENT REPORT 2013: THE RISE OF THE SOUTH: HUMAN PROGRESS IN A DIVERSE WORLD 161 (2013) (reporting that 43.6 percent of the population lives below the international poverty line, on less than $1.25 per day).

[46] *See id.* (Reporting that nearly 62 percent of the population lives below the poverty line).

[47] *See id.* (Finding that 50.4 percent of the population lives below the poverty line).

[48] *See* EARLY MARRIAGE: A HARMFUL TRADITIONAL PRACTICE, *supra* note 41, at 4 (reporting that nearly 72 and 66 percent of women aged 20 – 24 in Mali and Chad respectively were married at exact age of 18, third and second worse in Africa, after Niger).

[49] UNICEF Innocenti Research Centre, *Early Marriage: Child Spouses* INNOCENTI DIG. 1, 1 (Mar. 2001), *available at* http://www.unicef-irc.org/publications/pdf/digest7e.pdf [hereinafter *Early Marriage: Child Spouses*] (citing economic considerations as a factor prompting parents to submit their under-age children to marriage and using the term "economic arrangement" to describe the process). *See also* Robert Jensen & Rebecca Thornton, *Early Female Marriage in the Developing World*, 11 GENDER & DEV. 17 (2003) (citing high cost of raising children as a reason parents marry off their daughters quite early).

symptomatic manifestations of an illness, in isolation of the underlying pathology, is bound to fail, efforts at eliminating the menace of early marriage risk failing in the absence of incorporating credible and sustainable antipoverty strategies in eradication frameworks. This is a lesson that needs to be imbibed by countries committed to meeting its MDG obligations relating to child health, in Africa and elsewhere.

Aside from economic difficulties, there are other factors contributing to high rates of child marriage in affected countries, including tradition, family honor, sexual purity, and out-of-wedlock pregnancy protection strategy.[50] There is no gainsaying that these rationales are sensible. Reasonable persons would agree that sexual purity is a moral value parents should desire for their children. The same is true, at least in conservative societies, of the need to protect young girls from premarital pregnancy. Nevertheless, these seemingly well-grounded rationales would quickly evaporate when weighed against the adverse consequences that would inevitably befall these children on account of early marriage.

There are several deleterious consequences resulting from early marriage. These problems may be subsumed under a number of headings such as physical violence, adverse health consequences, psychological, emotional, and human rights abuses. The key to understanding the health risks of early marriage is to pay attention to the end result: early or teenage pregnancy, which in itself is an adverse health factor.[51] The younger a girl is at the time of pregnancy, the greater the health risk for the baby and herself.[52] Teenagers are more likely than adult women to die as a result of childbirth or other pregnancy-related complications.[53] Pregnant girls who are fifteen years or younger are five times more likely to die during childbirth than women in their twenties.[54] Furthermore, children begotten by mothers aged less than eighteen years have a 60 percent greater chance of dying within their first year of birth than those born to mothers who are above eighteen.[55] High rates of mortality resulting from these circumstances demonstrate the seriousness of the challenges posed by child marriage. Alarmingly, despite the fact that of all maternal deaths amongst teenagers fifteen to nineteen years old, 70,000 annually are associated with early pregnancy (the inevitable consequence of early marriage),[56] 42 percent, of the girls in Africa are married before they turn eighteen.[57]

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[50] *Early Marriage: Child Spouses*, *supra* note 49, at 2.

[51] UNICEF, THE STATE OF THE WORLD'S CHILDREN 2009: MATERNAL AND NEWBORN HEALTH, at iii, U.N. Sales No. E.09.XX.1 (2009).

[52] *Id.*

[53] DEP'T OF ECON. & SOC. AFFAIRS OF THE U.N. SECRETARIAT, THE MILLENNIUM DEVELOPMENT GOALS REPORT, at 28, U.N. Sales No. E.09.I.12 (2009), *available at* http://www.un.org/millenniumgoals/pdf/MDG_Report_2009_ENG.pdf.

[54] *Id.*

[55] *Id.*

[56] *Id.*; UNICEF, THE STATE OF THE WORLD'S CHILDREN 2009, *supra* note 51, at iii.

[57] UNICEF, EARLY MARRIAGE A HARMFUL TRADITIONAL PRACTICE 4 (2005), *available at* http://www.unicef.org/publications/files/Early_Marriage_12.lo.pdf.

Obstetric fistula – perforation in a woman's birth canal from prolonged obstructed labor which leaves her incontinent – is yet another harmful consequence of early marriage. Aptly described as "Africa's silent epidemic,"[58] the condition disproportionately affects pregnant girls.[59] Evidence of causal relationship between child marriage and obstetric fistula is provided by the fact that the condition is more prevalent in areas where child marriage is common.[60] In Nigeria, for instance, there is greater prevalence of the condition in the less developed northern part of the country, the same area with the highest number of child marriages.[61] An often glossed over misconception is that there is a causal link between female circumcision and obstetric fistula.[62] This is false. There is a great amount of credible scientific evidence that debunks this claim.[63] Tackling obstetric fistula involves adopting policies aimed at preventing early pregnancy, abolition of harmful traditional practices (such as self-delivery or use of the services of unskilled traditional birth attendants), improving access to prenatal services and promoting access to timely obstetric care.[64]

Another stark reality of early marriage is inter-spousal or domestic violence, "a major contributing factor to the ill-health of women"[65] and one of the most insidious forms of gendered violence.[66] Aside from the degrading nature and cruelty, which are its defining features, the indignity, disability, fatality, and other forms of harm that result when women suffer violence at the hands of their husbands make it a human rights issue.[67] Although domestic violence cuts

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[58] Alan White, *Obstetric Fistula: Africa's Silent Epidemic,* NEWSTATESMAN, (July 4, 2013, 11:08 AM), http://www.newstatesman.com/world-affairs/2013/07/obstetric-fistula-africas-silent-epidemic.

[59] L. Lewis Wall, et al., *The Obstetric Vesicovaginal Fistula: Characteristics of 899 Patients from Jos, Nigeria,* 190 AM. J. OBSTET. GYNECOL. 1011– 1016 (2004); D.P. Ghatak, *A Study of Urinary Fistulae in Sokoto, Nigeria,* 90 J. INDIAN MED. ASSOC. 285-287 (1992).

[60] UNFPA & ENGENDER HEALTH, OBSTETRIC FISTULA NEEDS ASSESSMENT REPORT: FINDINGS FROM NINE AFRICAN COUNTRIES 58 (2003), *available at* http://www.unfpa.org/fistula/docs/fistula-needs-assessment.pdf.

[61] *Id.*

[62] White, *supra* note 58.

[63] Birgitta Essén *et al*., *Is There an Association Between Female Circumcision and Perinatal Death?,* 80 BULL. WORLD HEALTH ORG. 629, 630 (2002) (finding that none of the perinatal deaths in study was related to circumcision); Andrew Browning et al., *The Relationship Between Female Genital Cutting and Obstetric Fistulae*, 115 OBSTET. GYNECOL. 578, 580-82 (2010) (reporting absence of causality between FGR and obstetric fistulae); Amber Peterman & Kiersten Johnson, *Incontinence and Trauma: Sexual Violence, Female Genital Cutting and Proxy Measures of Gynecological Fistula*, 68 SOC. SCI. & MED. 971-79 (2009) (finding that there is no association between genital cutting and fistula formation from obstructed labor).

[64] *10 Facts on Obstetric Fistula*, WORLD HEALTH ORG. (Mar. 2010), http://www.who.int/features/factfiles/obstetric_fistula/en/index.html.

[65] WORLD HEALTH ORG., WHO MULTI-COUNTRY STUDY ON WOMEN'S HEALTH & DOMESTIC VIOLENCE AGAINST WOMEN: INITIAL RESULTS ON PREVALENCE, HEALTH OUTCOMES AND WOMEN'S RESPONSES vi (2005) [hereinafter WHO MULTI-COUNTRY STUDY].

[66] U.N. Comm. on the Elimination of Discrimination Against Women, *General Recommendation 19, Violence Against Women,* 1, U.N. Doc. A/47/38 (1992), *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, 243 ¶ 23, U.N. Doc. HRI/GEN/1/Rev.6 (2003) [hereinafter *General Recommendation 19*].

[67] WHO MULTI-COUNTRY STUDY, *supra* note 65, at 15 (noting the rate of injury amongst women who were ever-abused women in the countries studied as ranging from nineteen to fifty-five percent, with

across all ages, affecting women throughout their life cycle, from birth through death, younger women are disproportionately impacted.[68] Unlike women who were married as adults, child brides are typically much younger than their husbands, in some cases by ten or more years, – the so-called husband-wife age gap.[69] Unequal relationships fostered by such gaps, including a difference in physical strength, means that child brides are more prone to violence than older and invariably more experienced women. Moreover, women who married at younger ages are more likely not only to accept that it is justifiable for a husband to beat his wife, but also to have experienced physical violence.[70] In a recent study, 62 to 67 percent of women who were married before the age of fifteen approve of wife battery by husband under certain circumstances, compared to 36 to 42 percent of women who married between the ages of twenty-six and thirty.[71] This is troubling. According to a WHO study, women who had experienced spousal abuse are more likely to accept the conduct as normal compared to those who had not.[72]

The danger in such widespread acceptance or normalization is that it accentuates the vulnerability of such women by rendering them more susceptible to future physical abuse since one cannot accept a particular conduct as normal and subsequently turn around to challenge it.[73] An informant, who was once herself a victim, seems to be echoing the same point in this response to an interviewer's questions: "I suffered for a long time and swallowed all my pain. That's why I am constantly visiting doctors and using medicines. No one should do this."[74] Obviously, this is an outcome no prudent person would endorse. It is also one that calls for urgent action. For countries interested in tackling this challenge, a productive starting point would be to reexamine their human rights commitments to women.

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some sustaining serious injuries such as broken bones, injuries to ears and eyes and asserting that poor health is more prevalent amongst women who had experienced domestic violence compared to those who had not). *See also* African Comm'n on Human and Peoples' Rights, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, pmbl. ¶ 9, art(s). 1(j), 3, 4, 5(d), 11(3), 22(b), 23(b), Sept. 13, 2000, CAB/LEG/66.6 [hereinafter Maputo Protocol]*, reprinted in* 1 AFR. HUM. RTS. L.J. 40 (calling, in line with the African Platform for Action and the Dakar Declaration of 1994 and the Beijing Platform for Action of 1995, upon States to "take concrete steps to give greater attention to the human rights of women in order to eliminate all forms of discrimination and of gender-based violence against women"). *See also* Convention on the Elimination of All Forms of Discrimination Against Women art(s). 2(f), 3, 5, 6, 10(c), 11, 12, 14, 16, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]; *General Recommendation 19*, *supra* note 66, ¶¶ 1 – 11, 23, 24.

68 WHO MULTI-COUNTRY STUDY, *supra* note 65, at 8 (reporting that girls aged fifteen to nineteen are at higher risk of violence from their partners).

69 Robert Jensen & Rebecca Thornton, *Early Female Marriage in the Developing World,* 11 GENDER DEV. 9, 13 – 14 (2003) (finding that women who marry at a young age are more likely to marry older men).

70 *Id.* at 16.

71 *Id.*

72 WHO MULTI-COUNTRY STUDY, *supra* note 65, at 10.

73 WHO MULTI-COUNTRY STUDY, *supra* note 65, at 19 (finding that twenty-nine to eighty-six percent of respondents in the country studied cited, as the most common reason given for not seeking help, their perception of the violence as normal or not serious).

74 WHO MULTI-COUNTRY STUDY, *supra* note 65, at 16.

Both the Maputo Protocol and the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW"),[75] to which many countries in Africa are States Parties, explicitly prohibit discrimination in all facets of life, including domestic violence, and additionally require the adoption of "appropriate legislative, institutional and other measures" to achieve this purpose.[76] Compliance with these provisions would include awareness campaigns, sensitization on the dangers of domestic violence, swift prosecution and punishment of offenders, and the empowerment of women by effacing obstacles to acquiring education and boosting independent ownership of resources.

Apart from domestic violence, there are still several other human rights issues inhering in children who are imperiled by early marriage. Some of these rights are freedom of association,[77] right to movement,[78] right to education,[79] and freedom of religion.[80] Betrothal and marriage of children infringe upon these rights by fostering inequality in the marital relationship.[81] The age, experience, socioeconomic and other differences between teenage wives and their husbands skew power dynamics to the advantage of husbands, an unfair advantage that is traditionally exploited by the latter.[82] Evidence of this exploitation is found in restrictions imposed upon child-wives regarding their movement,[83] with whom they may associate,[84] denial of educational opportunities (those already in school are usually withdrawn), and forcible adoption of the religion of their husbands.

At the root of all these infractions is a breach of two crucial human rights at the time of the marriage: autonomy[85] and consent.[86] Although parents tend to

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[75] CEDAW, *supra* note 67, art. 2.

[76] *Id.*; Maputo Protocol, *supra* note 67, art. 2(1).

[77] Int'l Covenant on Civil & Political Rts. art. 22(1), Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); Org. of African Unity, African Charter on Hum. & Peoples' Rts. art. 10, OAU Doc. CAB/LEG/67/3 rev. 5 (June 27, 1981) (entered into force Oct. 21, 1986).

[78] Int'l Covenant on Civil & Political Rts., *supra* note 77, art. 12; African Charter on Hum. & Peoples' Rts., *supra* note 77, art. 12.

[79] Int'l Covenant on Econ., Soc. & Cultural Rts. art. 13, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976); African Charter on Hum. & Peoples' Rts., *supra* note 77, art. 17.

[80] Int'l Covenant on Civil & Political Rts., *supra* note 77, art. 18; African Charter on Hum. & Peoples' Rts., *supra,* note 77, art. 8.

[81] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) , art. 16(1) (Dec. 10, 1948) ("Men and women of full age . . . have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.").

[82] Robert Jensen & Rebecca Thornton, *Early Female Marriage in the Developing World,* 11 GENDER DEV. 9, 14 (2003).

[83] *Id.* (noting that seventy percent of women who marry under the age of fifteen in India are required by their husbands to obtain permission before they could go to market, or to visit family or friends).

[84] *Id.*

[85] Jensen & Thornton, *supra* note 82 (reporting, as an instance of greater susceptibility to breach of autonomy, that forty-three percent of women who marry before the age of fifteen and thirty-five percent of those marrying before twenty, are not allowed to keep money, compared to only twenty-one to twenty-five percent of those who marry when they are twenty-one or older).

[86] Universal Declaration of Hum. Rts., *supra* note 81, art. 16(2) ("Marriage shall be entered into only with the free and full consent of the intending spouses"); Convention on Consent to Marriage, Minimum Age for Marriage & Registration of Marriages art. 1, Dec. 9, 1964, 521 U.N.T.S. 231 (stating that "no marriage shall be legally entered into without the full and free consent of both parties. . ."); Int'l Cove-

arrogate to themselves the power of proxy consent in child marriage, this is legally as well as ethically wrong. It is an illegitimate usurpation of the right of the child. Even though surrogacy powers generally inhere in parents in circumstances where the child lacks capacity to understand the nature and consequences of the act in question, such proxy powers must be exercised to advance the interests of the child. The power is nullified when its exercise, as in child marriage, jeopardizes the health and wellbeing of the child.[87] Moreover, as argued elsewhere:

> While, for very good reasons, parents enjoy wide latitude in determining and pursuing interests they consider congruent with the well-being and security of their children, they are, nonetheless, not at liberty to make decisions that would detrimentally impact the children . . . Under normal circumstances, the court would step in to protect the right of parents to raise their children according to the dictates of their. . . conscience . . . The best interest of the children is always the guiding principle . . .On the other hand, where there is evidence that this right has been or is at the risk of being abused, the court will step in to protect the children . . . In other words, the right of parents to raise their children is not absolute . . . It may be abridged where non-intervention by the State will expose the child to unnecessary risk or harm.[88]

Since marriage contracted in absence of true consent harbors deleterious consequences for teenage wives, it may be argued, following the reasoning in *Prince v. Massachusetts,*[89] that parental consent obtained in such cases is suspect and should be abrogated. The exposure to or potential for harm is the critical and decisive consideration. In this sense, child marriage, regardless of the so-called parental consent, is tantamount to forced marriage, which is a breach of autonomy.

One of the dark sides of this kind of marriage is that it strips the wife of decision-making powers, even those that are health-related, and vests the same

nant on Econ., Soc. & Cultural Rts., *supra* note 79, art. 13; African Charter on Hum. & Peoples' Rts., *supra* note 77, art(s). 17, 23 (stipulating that "[m]arriage must be entered into with the free consent of the intending spouses."); CEDAW, *supra* note 67, art. 16 (recognizing equality in men and women in respect to entering into marriage with free and full consent as well as the same rights and responsibilities in marriage and dissolution).

[87] Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery art. 1, Apr. 30, 1957, 226 U.N.T.S. 3 ("Each of the States Parties to this Convention shall take all practicable and necessary legislative and other measures to bring about progressively and as soon as possible the complete abolition or abandonment of . . .(c) Any institution or practice whereby: (i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group.") *See also* CEDAW, *supra* note 67, art. 16(2) (prohibiting child marriage and requiring States Parties to specify a minimum age); ACRWC, *supra* note 2, art. 21(2) (barring child marriage but requiring States Parties to specify eighteen years as the minimum age of marriage and make registration of marriages in an official registry compulsory).

[88] Obiajulu Nnamuchi, *Harm or Benefit? Hate or Affection? Is Parental Consent to Female Genital Ritual Ever Defensible?*, 8 J. HEALTH BIOMEDICAL L. 377, 418 (2013).

[89] Prince v. Massachusetts, 321 U.S. 158, 166-67 (1944) (ruling that parental rights are not absolute and may be abridged where its exercise is inconsistent with the welfare and best interests of the child).

powers in the husband whose interests may not be the same as the wife's. Sadly, of the thirty countries reported by UNICEF in 2009 as countries where women have no say in their own healthcare needs, only twelve were non-African.[90] The problem with having health decisions made by husbands, particularly amongst women who married at an early age as opposed to those married as adults,[91] is that it goes against the principle of individual empowerment or, in public health language, "health promotion", which is defined as a "process of enabling people to increase control over, and to improve, their health."[92] Health promotion (as a form of individual empowerment) is a public health tool predicated on making each individual responsible for his or her own health.[93] Its importance lies in enabling the individual to reduce exposure to conditions or circumstances, such as the denial of access to reproductive services, for instance,[94] that results in illness, thereby protecting her against the pain, suffering and other losses which she may have otherwise suffered.[95]

(ii) Maternal Illiteracy

The fact that international law recognizes universal education as a fundamental human right is incontrovertible.[96] The foremost international human rights instrument on socioeconomic rights – ICESCR (31 articles in all) – mentions the word "education" at least 18 times.[97] Similarly, CEDAW employ the word 14 times[98] and there are at least 20 uses of it in the CRC.[99] For countries in Africa, regional treaties incorporate comparable provisions. In the context of child health and education, the regional women-centered human rights instrument adopted in July 2003 is particularly striking.[100] Article 12(2) of the Maputo Protocol mandates States Parties to: (a) promote literacy among women; (b) promote education and training for women at all levels and in all disciplines, particularly in the fields of science and technology; and, (c) promote the enrolment and reten-

[90] UNICEF, *supra* note 28, at 40.

[91] UNICEF, EARLY MARRIAGE: A HARMFUL TRADITIONAL PRACTICE 24 (2005), *available at* http://www.unicef.org/publications/files/Early_Marriage_12.lo.pdf.

[92] WHO, *The Ottawa Charter for Health Promotion: First Int'l Conference on Health Promotion*, (Nov. 21, 1986).

[93] Obiajulu Nnamuchi, *Health and Millennium Development Goals in Africa: Deconstructing the Thorny Path to Success*, *in* THE RIGHT TO HEALTH: A MULTI-COUNTRY STUD. OF L., POL'Y & PRAC. (Obiajulu Nnamuchi et al., eds., forthcoming, 2014).

[94] CEDAW, *supra* note 67, art. 10(h) (vesting in wives and husbands the same rights pertaining to family planning and access to reproductive health services).

[95] Nnamuchi, *Health and Millennium Development Goals in Africa*, *supra* note 93.

[96] Universal Declaration of Hum. Rts., *supra* note 81, art. 26; Int'l Covenant on Econ., Soc. & Cultural Rts., *supra* note 79, art. 13; CEDAW, *supra* note 67, art. 10; CRC, *supra* note 1, art. 28.

[97] Int'l Covenant on Econ., Soc. & Cultural Rts., *supra* note 79, art(s). 10(1), 13(1), 13(2)(a), 13(2)(b), 13(2)(c), 13(2)(d), 13(3),13(4), 14.

[98] CEDAW, *supra* note 67, pmbl. ¶ 8, art(s). 5(b), 10 (¶ 1), 10(a), 10(c), 10(e), 10(g), 10(h), 14(2)(d), 16(e).

[99] CRC, *supra* note 1, art(s). 19(1), 23(3), 23(4), 24(2)(e), 24(2)(f),28(1), 28(1)(a), 28(1)(b),28(1)(c), 28(1)(d), 28(3), 29(1), 29(2), 32(1), 32(2), 33, 40(3)(b).

[100] Maputo Protocol, *supra* note 67, art. 12(2).

tion of girls in schools and other training institutions and the organization of programs for women who leave school prematurely. Obviously literacy is important to all human demographics, but is even more so for children considering their vulnerability and dependence on others, particularly mothers, for their survival.

Titling this subsection "maternal illiteracy" speaks to the danger that awaits children born to illiterate mothers and the sense of urgency that should guide strategies for curative measures. As to why this is important, this author explains, in a related context:

> A key reason maternal health should occupy center stage in health policy formulation is that its neglect often has drastic domino-like consequences – consequences that extend far beyond the corridors of maternal wards to affect other segments of the population, particularly children. This is particularly true in the realm of literacy or illiteracy amongst women.[101]

The best way to understand these domino-like consequences and the link between maternal literacy (or illiteracy) and the health of their children is to think of education in terms of empowerment. An empowered individual is one who knows how to attend to life challenges even if, despite her best efforts, she is unable to conquer them. In its most elementary form, being empowered connotes knowledge as to navigating the complexities of life; that is, the capacity to surmount challenges to human wellbeing, and knowing how to overcome obstacles that are in the path to acquiring basic needs. It is in this box that we must place unempowered or illiterate women in order to fully appreciate the insidious role this factor plays in their children's health and wellbeing. The maxim *nemo dat quod non habet* is apposite here: a woman who is unempowered or illiterate in the sense that she cannot, for instance, navigate the health system for her own benefit cannot reasonably be expected to attend to the health needs of her child. As argued elsewhere:

> The kernel of individual empowerment is that it reduces exposure to [health] problems, saving the individual from the pain, suffering and expenses to which he could have otherwise been exposed. But there are two challenges that must be overcome to harness this benefit, namely, educating individuals about health promotion or preventive care, and creating access to resources that would make it possible for them to put the knowledge to productive use.[102]

Thus situated, it becomes easy to understand how illiteracy can transform mothers into risk factors for the healthy development of their children. To put this in proper perspective, children whose mothers are uneducated have about a

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[101] Nnamuchi, *Millennium Development Goal 5, Human Rights and Maternal Health in Africa*, *supra* note 39, at 110.

[102] Nnamuchi, *Health and Millennium Development Goals in Africa, supra* note 93.

2.5 times higher risk of death than those born to mothers that have acquired secondary school or higher level of education.[103]

Since the health of children is intimately intertwined with the health and well-being of their mothers and the health of the latter is, aside from genetic factors, a product of her level of knowledge or education, it follows that there is a strong correlation between academic attainment of mothers and the health of their children. The two critical predictors of the likelihood of giving birth to a healthy baby are a willingness to adopt necessary lifestyle changes and the ability to access reproductive health services, including antenatal and prenatal care. Greater compliance with these measures is more likely to be found amongst educated women than uneducated ones. In fact, studies show that women who are literate are more likely to seek reproductive health and family planning services than uneducated ones[104] – meaning that the higher the level of maternal education, the better for the health of the child. This realization, perhaps, explains the stance of the ICESCR, in mandating compulsory and free primary education and progressive (gradual introduction of free tuition) availability of secondary and tertiary education to everyone.[105] For countries interested in protecting the health and wellbeing of their children, this is an obligation that should be taken seriously.

The inclusion of education as one of the MDGs[106] makes this point abundantly clear, by bringing to the forefront the interdependence, indivisibility, and interconnectedness of human rights. One human right, to achieve universal primary education (MDG 2), leads directly to the attainment of a number of other human rights, namely, to eradicate poverty and hunger (MDG 1), to promote gender equality and empower women (MDG 3), to reduce child mortality (MDG 4), to reduce maternal mortality (MDG 5), and to combat HIV/AIDS, malaria, and other diseases (MDG 6).[107] This is not to project education as an all-encompassing cure for everything. Instead, the argument merely suggests that acquiring education (an empowering factor) greatly enhances one's chances of surmounting the obstacles targeted by the mentioned MDGs.

UNICEF sums it up quite succinctly, "[e]ducating girls and young women is one of the most powerful ways of breaking the poverty trap and creating a sup-

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[103] WORLD HEALTH ORG., THE WORLD HEALTH REPORT 2005: MAKE EVERY MOTHER AND CHILD COUNT 26 (2005) (reporting specifically on Nigeria, although there is no reason the result would be any different in countries similarly placed; that is, in terms of comparable level of socioeconomic development).

[104] *See generally* Chryssa McAlister & Thomas F. Baskett, *Female Education and Maternal Mortality: A Worldwide Survey*, 28 J. OBSTET. GYNECOL. CAN. 983 (2006); Saffron Karlsen et al., *The Relationship between Maternal Education and Mortality Among Women Giving Birth in Health Care Institutions: Analysis of the Cross Sectional WHO Global Survey on Maternal and Perinatal Health*, 11:606 BMC PUBLIC HEALTH 1 (2011), http://www.biomedcentral.com/content/pdf/1471-2458-11-606.pdf; Jose Luis Alvarez et al., *Factors Associated with Maternal Mortality in Sub-Saharan Africa: An Ecological Study*, 9:462 BMC PUBLIC HEALTH 1 (2009), http://www.biomedcentral.com/content/pdf/1471-2458-9-462.pdf; Sarah McTavish et al., *National Female Literacy, Individual Socio-Economic Status, and Maternal Health Care Use in Sub-Saharan Africa*, 71 SOC. SCI. & MED. 1958 (2010).

[105] Int'l Covenant on Econ., Soc. & Cultural Rts., *supra* note 79, art. 13(2).

[106] *See* U.N. STATISTICS DIV., *supra* note 8, at MDG 2.

[107] *See generally id.*

portive environment for maternal and newborn health."[108] The reverse is equally true. When girls marry early or suffer early pregnancies, HIV/AIDS, sexual violence, and other abuses, then the risk of dropping out of school escalates (lack of education equals disempowerment).[109] The inevitable result will be a "vicious cycle of gender discrimination, poverty and high rates of maternal and neonatal mortality."[110] This link, clearly evident in the MDG philosophy, is a pointer to the importance of solving global problems via a human rights approach – a theme developed more fully in Part IV of this discourse. It is one that strongly commends itself to countries in Africa.

(iii) Parental Poverty

To fully appreciate resource deficit as a significant factor in health woes of children in Africa, one must think of poverty as "marginalization" or "social exclusion," the ultimate determinant of who gets what or, in the tragic context of Africa, who lives or dies. Incapacity on the part of parents to provide necessary care for their children, or vital social conditions (underlying health determinants) such as adequate nutrition and shelter, dooms such children to a bleakly uncertain future. Namibia is a typical illustration. Although like the rest of the region, Namibia is still struggling to attain the objectives of MDG 4, virtually all births (98 percent) of the wealthiest 20 percent of the population in that country are attended by skilled health professionals, compared to just 60 percent for the poorest 20 percent.[111] The result of this wide parental poverty gap is unmistakable – substantially lower U5MR amongst the wealthiest 20 percent of the country.[112] For the remainder of the children under the age of five, as well as their parents, this is social exclusion of the worst kind. It is decisively disempowering. But Namibia is hardly atypical. Parental poverty and its destructive force on the well-being of children throughout Africa evidence quite strongly the inextricable relationship between different kinds of human rights, a concept explored previously in this article.

This relationship becomes even more glaring when one considers household poverty in the context of health and individual empowerment. Certainly education is empowering, but it is not in itself a sufficient panacea to the numerous health challenges that might arise during a woman's reproductive years or the pre-adult years of her children. More is needed in order for the knowledge or awareness to be of material benefit to the mother or her children. Indeed, as argued elsewhere:

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[108] UNICEF, *supra* note 28, at iii.

[109] *Id.*

[110] *Id.*

[111] Special Rapporteur on Extreme Poverty and Human Rights, *On Her Mission to Namibia from 1 to 8 October 2012*, U.N. Human Rights Council, ¶ 62, A/HRC/23/36/Add.1 (May 17, 2013) (by Magdalena Sepúlveda Carmona), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/137/27/PDF/G1313727.pdf?OpenElement.

[112] *Id.* (citing World Health Org., Namibia: Health Profile, Apr. 4, 2011).

> [The] success of individual empowerment goes beyond knowledge transfer [education] to include material resources needed for attending to underlying health determinants. Knowing how to protect oneself . . . is a good start but, to be an effective public health tool, the knowledge must be coupled with access to [vital goods and services]. . .[113]

And this is the paradox of global health. The very region with the greatest burden of childhood diseases and illnesses[114] is also where resources needed for health or related projects are in most dire shortage.[115] Atrocious health indices in Africa, including in the realm of child and maternal health, are directly traceable to overwhelming resource deficit in the vast majority of households in the region.[116]

The health of children is particularly unique in that its protection hinges crucially on the health of another demographic, namely, mothers. Akin to a pendulum which must swing in a consistent manner, the health of children swings up and down in tandem with that of their mothers, meaning that both must be addressed simultaneously to record a positive and sustainable outcome for children. This synergistic relationship may be illustrated with antenatal care – a basic element of child health. It is a common knowledge that attendance at antenatal clinics is a surefire way not only to guard against pregnancy and childbirth complications, but also to shield the child from preventable morbidities, and even death. This dual dimension advantage underscores the requirement by UNICEF and WHO of at least four antenatal visits by pregnant women.[117] Yet, as current data (2000 to 2010) indicates, only 44 percent of pregnant women in African met this threshold, the worst globally.[118] The reason is not far-fetched.

Despite regional attempts at embracing an insurance-based system of health care financing, access to health services, including antenatal care, remains largely dependent on cash in most countries in the region. Given the high poverty rates, coupled with the escalating cost of services and competing household needs, funds available for health services, antenatal or otherwise, range from little to nothing. Perhaps in a bid to cushion the impact of this burden, a handful of

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113 Nnamuchi, *Health and Millennium Development Goals in Africa, supra* note 93.

114 U.N., MDG Report 2013, *supra* note 11, at 25 (reporting that the poorest regions of the world account for the majority of child deaths, with sub-Saharan Africa and Southern Asia responsible for 5.7 million of the 6.9 million deaths of children under the age of five worldwide or 83 percent of the global total in 2011).

115 Africa suffers 24 percent of the disease burden in the world but commands less than 1 percent of global health expenditure compared, for instance, to the region of Americas which shoulders just 10 percent share of the global diseases but accounts for more than 50 percent of the world's health financing. *See* World Health Org., The World Health Report 2006: Working Together for Health xviii – xix (2006) [hereinafter The World Health Report 2006].

116 UNDP, Human Development Report 2009: Overcoming Barriers: Human Mobility and Development Table I1 (2009); UNDP, Human Development Report 2013: The Rise of the South: Human Progress in a Diverse World 27 (2013) (showing larger proportion of people living below poverty line, on less than $1.25/day, in countries in Africa than anywhere else).

117 U.N., MDG Report 2009, *supra* note 53, at 27.

118 World Health Org., World Health Statistics 2011 100 (2011). Eastern Mediterranean region shares the same record. *Id.*

countries in the region have introduced free or subsidized care for pregnant women and children.[119] This strategy is laudable for two critical reasons. First, it recognizes the peculiar vulnerability of this demographic. Physiological and anatomical immaturity renders infants and children susceptible to a greater number of diseases than adults,[120] as does diminished immunity in respect to pregnant women.[121] Second, by targeting the health care needs of particularly at-risk groups, such as women and children, the strategy adds to the improvement of the health of the entire population.[122]

It is noteworthy that although mothers are usually the primary care givers, the overall health and well-being of children are not their exclusive responsibility. Particularly in communal social units, as in African societies, fathers as well as extended family members do play significant roles. Therefore, domestic or regional measures aimed at mitigating maternal poverty as a factor in the poor health of African children must move beyond the specific needs of women to also efface obstacles confronting other household members in their struggles to extricate themselves from the cold clutches of poverty.[123] There must be a recognition of inter-household resource differentials as key contributors to disparities in the health of children, within and across countries. Children born to parents on the lowest income percentile are nearly twice as likely to die before age five as those born to parents on the highest income bracket.[124]

Resource constraint at the household level is visible throughout the region, more so than anywhere else, and its elimination must be seen in the context of the holistic approach of human rights.[125] Remarkably, this point was not lost on the experts that crafted the MDGs in 2000. The very first objective ("MDG 1") is

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[119] Nnamuchi, *Millennium Development Goal 5, Human Rights and Maternal Health in Africa, supra* note 39, at 112.

[120] *Children and Infant,* FLU.GOV, http://www.flu.gov/at-risk/children/ (last visited Mar. 31, 2014) (explaining, in reference to flu, that children are more susceptible to the virus because their immune systems are still developing).

[121] *People at High Risk of Developing Flu–Related Complications*, Centers for Disease Control & Prevention, http://www.cdc.gov/flu/about/disease/high_risk.htm (last updated Mar. 31, 2014) (listing children and pregnant women at higher risk of flu than the general population).

[122] The problem with a user fee system is that it is regressive. Even where payment is pegged at what the average person considers low, this does not necessarily mean affordability by everyone. The very poor might still be unable to pay the sum, especially when added to the cost of transportation, drug costs, et al that would be involved in accessing care. *See* Special Rapporteur on Extreme Poverty, *supra* note 111, ¶ 62 (finding that even though the user fees payable in the public health care system of Namibia seems to be low (between 4 – 8 Namibia dollars), the fee might still pose an insurmountable barrier to accessing health care services for those on the lowest income quintile).

[123] UNICEF, *supra* note 28, at 58 (noting that the vital role played by families or household members in ensuring the health and wellbeing of children cannot be ignored by health systems). Moreover, the Kangaroo mother care (KMC) for low-birth weight babies, an innovative system introduced in Colombia in 1979 by Drs. Hector Martinez and Edgar Rey, and now adopted by many developing countries, identifies provision of support for the mother and other household members caring for the baby as one its four components. *Id*. at 62.

[124] U.N., MDG REPORT 2013, *supra* note 11, at 26.

[125] Mfonobong Nsehe, *The African Billionaires 2013,* FORBES (Mar. 6, 2013), http://www.forbes.com/sites/mfonobongnsehe/2013/03/06/the-african-billionaires-2013/ (reporting that of the 1,426 billionaires who made it to FORBES' annual ranking of the world's richest people, African billionaires occupied just a little over one percent of the positions on the list).

aimed at eradicating extreme poverty, the kind that wreaks havoc in the lives of Africans and the most important factor stunting development in the region – in health as well as in other sectors.[126] This premier positioning is not merely coincidental. It recognizes that in order to effectively address the health needs of children in the severest resource-deficit region in the world, one of the more potent underlying causes, namely poverty, must also be expurgated. By echoing the indivisibility and interdependence of the needs of human beings as well as the challenges to addressing them, this international policy document validates a core principle of human rights, that human needs should be tackled as an indivisible, not an isolated, unit. It is a principle that should inform national responses and strategies throughout the region.

(iv) Dearth of Skilled Health Personnel

A major cause of the deteriorating state of children's health throughout Africa is the shortage of adequately trained health professionals. Starting from conception, through birth, and continuing after birth, the survival of children depends on the quality of care that the health system offers. A health system that is bereft of the right mix of physicians, nurses, and other ancillary staff is a failing health system. Not surprisingly, this is the state of most health systems in the region. Indeed, as revealed in the 2000 edition of the World Health Report, which compared the performance and attainment of health systems in the world, most African countries ranked in the bottom 30 percent of the nations surveyed.[127] Unavailability of physicians, as well as nurses and midwives in hospitals, coupled with high cost of services force parents into making unhealthy choices.

In contrast to other regions of the world, pregnancy is still a formidable risk in Africa. Poverty forces women in the region who are pregnant to either resort to home delivery, more than 60 percent,[128] or risk the services of traditional birth attendants.[129] Recent data (2005 to 2012) positions Africa as the region with the least proportion of births attended by skilled health personnel – at 49 percent compared to, for instance, Europe, which recorded 98 percent.[130] There are two major reasons for the situation. Medical and nursing training programs in virtually all sub-Saharan Africa nations do not graduate enough physician and nurses to fill positions in their respective hospitals and clinics. The consequence is that even where resources (drugs, equipment et al.) are available, there might not be adequate manpower to actually employ the resources to productive use. Manuel

[126] The Targets of this goal (MDG 1) are (a) to halve, between 1990 and 2015, the proportion of people whose income is less than one dollar a day; (b) achieve full and productive employment and decent work for all, including women and young people; and (c) halve, between 1990 and 2015, the proportion of people who suffer from hunger. *See* U.N. STATISTICS DIV., *supra* note 8, at MDG 1 (to eradicate extreme poverty and hunger).

[127] WORLD HEALTH ORG., THE WORLD HEALTH REPORT 2000: HEALTH SYSTEMS: IMPROVING PERFORMANCE 152 – 54 (2000) [hereinafter WORLD HEALTH REPORT 2000].

[128] UNICEF, supra note 28, at 58.

[129] *Id.* at 2 (noting that most deliveries in poor countries are at home, unassisted by skilled health professionals).

[130] WORLD HEALTH STATISTICS 2013, *supra* note 14, at 104.

Dayrit, a senior WHO official, was quite on point, "[e]ven if you have the medicine, the vaccines, and the bed nets, you need the health workers to deliver the service."[131] Indeed, there have been cases where, although resources were available, care was not dispensed on account of manpower deficit.[132] And the situation is likely to worsen. As a recent study documents, not only is the existing manpower level insufficient to meet current needs, the training capacity in half of the countries surveyed is inadequate to maintain the current workforce level.[133]

Aside from the low number of available training spots for physicians and nurses, another factor responsible for the deficit of skilled health professionals in Africa is the substantial number of those who succeed in graduating from these schools quickly fleeing to Western countries in search of greener pastures. For instance, Angola has just 881 physicians but 168 of them are working in eight OECD countries as do 22 of Mozambique's 514 doctors.[134] Overall, 22 percent of physicians trained in Africa are employed outside the region five years following graduation.[135]

The same bleak picture is repeated in the realm of nursing services. For instance, despite dire shortages in their respective national health systems, 18 percent of nurses trained in Lesotho and 34 percent of Zimbabwean nurses are employed in seven OECD countries.[136] Remarkably, these are some of the countries with the worst health indices in the world. In 2011, the U5MR in the two countries were 67[137] and 86[138] deaths per 1000 live births respectively, amongst the worst worldwide. With such large efflux from an already depleted workforce, it stands to reason that these countries will certainly continue to experience a manpower shortage into the foreseeable future. The proportion of births attended by skilled health personnel in Zimbabwe is 66 percent[139] and 62 percent in Lesotho, respectively.[140]

Although health worker shortage is a worldwide phenomena, in no other region is the brunt felt worse than in Africa. Whereas the densities of physician and nurses/midwives in Europe are 33.3 and 84.2 per a population of 10,000, the

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131 Pooja Kumar, *Providing the Providers — Remedying Africa's Shortage of Health Care Workers*, 356 NEW ENG. J. MED. , 2564, 2564 (2007).

132 *Id.* (quoting a frustrated WHO official, "[w]ith the experience of the last few years, where you have had huge global funds move into an activity to provide resources . . . we've found that the bottleneck is really the delivery").

133 Yohannes Kinfu, et al., *The Health Worker Shortage in Africa: Are Enough Physicians and Nurses being Trained?*, 87 BULL. WORLD HEALTH ORG. 225, 227 (2009).

134 WORLD HEALTH REPORT 2006, *supra* note 115, at 100.

135 Fitzhugh Mullan et al., *Medical Schools in Sub-Saharan Africa*, 377 LANCET 1113, 1117 (2011), http://download.thelancet.com/pdfs/journals/lancet/PIIS0140673610619617.pdf.

136 WORLD HEALTH REPORT 2006, *supra* note 115, at 100.

137 WORLD HEALTH STATISTICS 2013, *supra* note 14, at 57.

138 *Id.* at 53.

139 *Id.* at 102.

140 *Id.* at 98.

figures in Africa are 2.5 and 9.1, the worst globally.[141] Obviously, reversing the trend is vital to positioning the region on a sustainable track toward meeting its obligation under MDG 4. However, to be successful, the strategy must be situated within the context of the two major problems identified above, by increasing capacity in the region's medical and nursing/midwifery programs as well as by addressing the so-called push factors, particularly remuneration, job security and equipment.

(v) Institutional Poverty and Leadership Void

Bemoaning poverty as a reason for the current paralytic stupor in virtually all sectors in most African countries is not uncommon amongst the political class in the region. Whether at national or international fora, Africa's problems are cleverly packaged by its leaders as easily surmountable only if they had access to adequate resources. As often as the message has been preached, it is not without some factual basis. Each year, the World Bank ranks global economies on the strength of gross national income ("GNI") per capita in each country –in descending order – high income, upper middle income, lower middle income and low income.[142] Although there are just 36 countries categorized in the latest report as low income countries ($1,035 GNI or less), 27 of them are in Africa.[143] Of the 49 nations classified as "least developed," only 15 are not in Africa.[144] With a GNI per capita of $760, a life expectancy of 61 years at birth and a 64 percent primary education completion rate, these countries represent the poorest group in the world.[145] Pragmatism dictates against expecting these same countries to respond to the health or any other challenges in their respective territories with the same vigor as their high income ($12,616 GNI or more) counterparts.[146] On this basis, therefore, it is unsurprising that the region with the worst poverty indices also lags behind the rest of the world in attending to the health of its population, including children.

Making inroads into child health challenges in Africa must start with identifying the factors that cumulatively create and sustain the problem. Aside from the factors previously identified, namely, child marriage, maternal illiteracy, parental poverty and deficit of skilled health personnel, there are other no-less difficult problems that would need to be vanquished. Direct causes such as malnutrition and preventable diseases like malaria, acute respiratory infections, diarrhea, and measles are responsible for 70 percent of child mortality in the region.[147] Mea-

[141] WORLD HEALTH STATISTICS 2013, *supra* note 14, at 128.

[142] *New Country Classifications*, THE WORLD BANK (July 2, 2013, 12:42 AM), http://data.worldbank.org/news/new-country-classifications.

[143] *Country and Lending Groups*, THE WORLD BANK, http://data.worldbank.org/about/country-classifications/country-and-lending-groups (last visited Oct. 21, 2013).

[144] *Least Developed Countries: UN Classification*, THE WORLD BANK, http://data.worldbank.org/region/LDC (last visited Oct. 21, 2013).

[145] *Id.*

[146] *New Country Classifications, supra* note 142.

[147] WORLD HEALTH ORG., CHILD SURVIVAL: A STRATEGY FOR THE AFRICAN REGION ¶ 12 (2007).

sles is a particularly worrisome menace, wrecking havoc in the lives of children in Africa. Although the disease can be easily prevented by administering two doses of a safe and inexpensive vaccine, outbreaks continue to occur in many countries in the region.[148] In 2011, 90 percent of all measles deaths occurred in sub-Saharan Africa and Southern Asia.[149]

There is a reason the enumerated diseases are known collectively as "diseases of the poor" – the causes are deeply rooted in, and disproportionately suffered by, people living in poverty. This means that appropriate remedial measures must go deeper than the diseases or the illnesses they are meant to cure in order to address the underlying conditions that made people susceptible to it in the first place. Not only is lack of funds responsible for millions of childhood deaths in Africa, it is also the reason parents submit their children to early marriage. It is equally the reason teenage wives resign themselves to violence and other forms of cruel and harsh treatment by their husbands and their families. This implicates the responsibility of governments in the region.

Whilst undeniable that resource deficit hampers, to an extent, the capability of various governments in the region to adopt the kind of institutional responses needed to prevent unnecessary childhood morbidities and mortalities, this does not explain the almost hands-off approach in many of these countries. Malaria is illustrative. Although the disease is inexpensive to prevent (mosquito nets cost approximately $5),[150] easily diagnosable (pyrexia is a common symptom), and treatable for next to nothing ($1.50 to 2.40 for adults and $0.40 to 0.90 for children),[151] it continues to be a major cause of outpatient morbidity and a major contributor to high mortality in the region. In 2008, Africa accounted for 768,070 deaths or 89 percent of the global malaria mortality.[152] "This has little or nothing to do with resources. It is simply a question of misallocation and misalignment of resources with need."[153]

When the 2001 African Summit on HIV/AIDS, TB, and Other Related Infectious Diseases resulted in a commitment by African leaders to allocate at least 15 percent of their annual budgets to the health sector,[154] the international health community applauded. But the optimism that heralded this commitment is gradually giving way to frustration as only six countries – Rwanda, Botswana, Niger, Malawi, Zambia, and Burkina Faso – have met the benchmark.[155] Why is this

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148 U.N., MDG Report 2013, *supra* note 11, at 27.

149 *Id.*

150 *See* Project Mosquito Net, http://www.projectmosquitonet.org/ (last visited Oct. 21, 2013).

151 *Malaria - Facts and Figures*, Médecins Sans Frontières (Apr. 25, 2004), http://www.msf.org/article/malaria-facts-and-figures.

152 WHO, World Malaria Report 2009 27 (2009).

153 Nnamuchi, *Health and Millennium Development Goals in Africa, supra* note 93.

154 Organisation of African Unity, Abuja Declaration on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases ¶ 26, Apr. 24-27, 2001, OAU/SPS/ABUJA/3, *available at* http://www.un.org/ga/aids/pdf/abuja_declaration.pdf.

155 *2010 Africa Health Financing Scorecard*, Africa Public Health Alliance, *available at* http://www.who.int/pmnch/events/2010/ausummit_2010healthfinancingscorecard.pdf (last visited Mar. 12, 2013).

important? Non-fulfillment of this pledge is proof that lackluster performance of the health sector in Africa is not resource oriented, that poverty is not explanatory of the high number of children whose health and lives are continually compromised by the region's political leadership. Because there was no monetary figure demanded of any of the countries in the region, non-availability of funds cannot be an exculpatory factor.

What was required was a rearrangement of national priorities such that important sectors, like health, receive a defined proportion of the overall government expenditure. Even so, the vast majority of African leaders failed, demonstrating that irresponsible governance, not poverty, is the real culprit. A statement on the launching of the 2012 African Human development Report is quite helpful:

> This report is a damming condemnation of decades of governance in the Sub-Sahara Africa . . . It tells us what we know, that the poverty of Africa is the making of African leaders over the years. African leaders have made the option of taking us along the path of poverty. We don't need to be told.[156]

This statement, credited to a notable figure in the region, Olusegun Obasanjo, speaks volumes. As president of Nigeria in 2001, Obasanjo was the host of the African Summit where the pledge by African leaders to commit at least 15 percent of their national budgets to health was made. Yet, throughout his tenure, Nigeria never came close to meeting this benchmark even though he remained in office until 2007. Subsequent administrations have fared no better. But despite the shortcomings of his administration, his conclusion is one that should resonate with those seriously committed to improving the health and wellbeing of children in Africa. "[L]et us be the change that we desire. We can do it and we must do it."[157]

iv. human rights and children's health/well-being

Human rights regimes governing children's right to health may be categorized into two distinct but related groups, namely, general and child-specific treaties. The first group consists of treaties that impose obligations on authorities to respect, protect and fulfill the right to health of the general population while the second category comprises regimes that specifically target the health and well-being of children. An exception to this rule is the Universal Declaration of Human Rights which, in addition to recognizing the right to health of all and sundry, specifically carves out special protection for children. Art. 25 stipulates:

> Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in

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156 Onyinye Nwachukwu, *Obasanjo Blames African Leaders for Poverty on the Continent,* BUSINESSDAY (May 22, 2012), http://www.businessdayonline.com/NG/index.php/news/284-breaking-news/38135-obasanjo-blames-african-leaders-for-poverty-on-the-continent.

157 *Id.*

> the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Singling out children and mothers for "special care and assistance" speaks to the vulnerability of this demographic.[158] Aside from typically occupying the lowest rung of socioeconomic ladder, children and pregnant women not only bear a greater burden from disease than the rest of the population but are also disproportionately impacted by access barriers and negative social determinants of health.

Amongst human rights frameworks pertaining specifically to children, the most important are the CRC and, for African children, the African Charter on the Rights and Welfare of the Child ("ACRWC"). The CRC, as pointed out in the introductory section, is the most ratified human rights treaty. Except for Somalia and newly-independent Southern Sudan, all African countries are States Parties to the treaty.[159] Art. 6 (2) commits States Parties to "ensure to the maximum extent possible the survival and development of the child."[160] The language, "maximum extent possible," signifies a cosmopolitan approach to implementing the obligations of the treaty. Nations are required to channel as many resources as it can muster toward ensuring the rights of all children within their jurisdictions. This is made more explicit regarding health in Art. 24(1). The provision recognizes the right children have to the "enjoyment of the highest attainable standard of health and facilities for the treatment of illness and rehabilitation of health." Discernible from Art. 6(2) and 24(1) is the proposition that the highest attainable standard of health is an impossible feat in absence of optimal effort in the nature of deployment of maximum resources, human and material, toward the goal. This, as will become evident shortly, is consistent with the holistic approach of human rights to health and well-being.

The CRC is all-inclusive, requiring States Parties to "ensure that no child is deprived of his or her right of access to . . . health care services."[161] The implication is that socioeconomic circumstances, status of birth (biological or adopted, legitimacy issues) or other differentials will not be a bar to equal access for all

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[158] *See, e.g.*, UNICEF, MALARIA AND CHILDREN: PROGRESS IN INTERVENTION COVERAGE 8 (2007), *available at* http://www.unicef.org/health/files/Malaria_Oct6_for_web(1).pdf (explaining that as a result of not-yet-developed and reduced immunity children and pregnant women respectively are more susceptible to malaria than the general population).

[159] *UN Treaty Collection: Status of Treaties, Status as at April 28, 2014*, UNICEF, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (last visited Apr. 28, 2014).

[160] "Development of the child" is an omnibus term encompassing the physical, mental, moral, spiritual and social dimensions of development of children. This requires eliminating factors that threaten the life, survival, growth and development of the child through designing and implementing appropriate mechanisms that address social health determinants. *See* CRC, *supra* note 1, art. 6; Committee on the Rights of the Child, General Comment No. 15 on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health, 62d Sess., art. 24 ¶ 16, U.N. Doc. CRC/C/GC/15 (2013) [hereinafter Committee on the Rights of the Child: General Comment No. 15].

[161] Convention on the Rights of the Child, *supra* note 1, art. 24(1).

children.[162] In fact, as the Committee on the Rights of the Child[163] subsequently explains, "all children have the right to opportunities to survive, grow and develop, within the context of physical, emotional and social well-being, to each child's full potential."[164] This authoritative exposition places children's right to health within the broader context of other dimensions of well-being, not just health. In other words, for a State Party to be in full compliance with its obligation under the CRC, it must not only design and implement a health system that ensures "timely and appropriate prevention, health promotion, curative, rehabilitative and palliative services" for children in its territory, it must also incorporate "programmes that address the underlying determinants of health" in its national policy.[165]

Underlying or social determinants of health consist of conditions or circumstances that influence the health of individuals or communities, positively or otherwise. Interestingly, there has been a tendency in some quarters to conceptualize underlying health determinants solely in terms of provision of facilities (goods and services) that aid in healthy life. This is probably as a result of a description of the term by the U.N. Committee on Economic, Social and Cultural Rights ("Committee on ESCR") in 2000.[166] The Committee on ESCR

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[162] This is critical because some health systems tend to apportion health coverage on the basis of considerations which violate their international law obligations. *See*, e.g., Obiajulu Nnamuchi, *The Nigerian Social Health Insurance System and the Challenges of Access to Health Care: An Antidote or a White Elephant?,* 28 MED. L. 139, 139-40 (2009) (criticizing Nigeria's National Health Insurance Scheme for denying coverage to non-biological children of covered parents as a blatant violation of §42 of the Constitution which prohibits discrimination based on circumstances of birth). This kind of restriction on dependant coverage runs afoul of Art. 2 of the Convention on the Rights of the Child which enjoins States Parties to respect and ensure the rights set forth in the Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. *See also* Committee on the Rights of the Child, General Comment No. 15, *supra* note 160, ¶ 8.

[163] Established under Art. 43(1) of the Convention on the Rights of the Child, the Committee on the Rights of the Child consists of independent experts charged with monitoring the implementation of the CRC as well as the two optional protocols to the Convention, on involvement of children in armed conflict and on sale of children, child prostitution and child pornography. In addition, the Committee is responsible for examining reports submitted by States Parties on how the rights are being implemented in their respective territories. An important function of the Committee is issuance of general comments or interpretation of the human rights obligations resulting from the CRC and its optional protocols. *See* Arts. 43 – 45. General comments are aimed at providing guidance and support to States Parties and other duty bearers as to the right strategies and mechanisms to be adopted in implementing their duty regarding respecting, protecting and fulfilling children's right to the enjoyment of the highest attainable standard of health. *See Committee on the Rights of the Child, General Comment No. 15*, *supra* note 160*,* ¶ 1. For a detailed analysis of the work of the Committee as a human rights implementation body, *see* David Weissbrodt, Joseph C. Hansen & Nathaniel H. Nesbitt, *The Role of the Committee on the Rights of the Child in Interpreting and Developing International Humanitarian Law,* 24 HARVARD HUM. RTS. L. J. 115 (2011); Cynthia Price Cohen & Susan Kilbourne, *Jurisprudence of the Committee on the Rights of the Child: A Guide for Research and Analysis,* 19 MICH. J. INT'L L. 633 (1998).

[164] Committee on the Rights of the Child, General Comment No. 15, *supra* note 160, ¶ 1.

[165] *Id.* ¶ 2.

[166] U.N. Econ. & Soc. Council, Committee on Econ., Soc. & Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health, ¶ 11, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000), *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies 85, U.N. Doc. HRI/GEN/1/Rev.6 (2003) [hereinafter Committee on Econ., Soc. & Cultural Rights: General Comment No. 14]. The Committee on ESCR consists of independent

describes social or underlying health determinants as including access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health, in addition to facilitating the participation of the population in all health-related decision-making at the community, national, and international levels.[167] This positively-couched characterization is likely responsible for the understanding. But this is wrong. Adverse factors or circumstances impacting health, such as lack of access to safe water supply or good schools, poor living conditions, hunger, starvation, poverty, etc., come within the definition of underlying determinants of health. In fact, in its final report to WHO, the Commission on Social Determinants of Health makes it quite explicit that it takes a broad view of underlying or social determinants of health.[168]

The Commission defines social determinants of health as comprising "the structural determinants and conditions of daily life."[169] These "structural determinants" encapsulate circumstances impacting upon "people's lives – their access to health care, schools, and education, their conditions of work and leisure, their homes, communities, towns, or cities" as well as "their chances of leading a flourishing life."[170] The implication, therefore, is that social health determinants comprise positive and adverse circumstances that impact health. When the conditions or circumstances promote health, they are positive social determinants. Otherwise, they are negative. Attending to these determinants requires innovations that although are not primarily health-oriented, nonetheless, contribute to good health. Examples include improving education and employment opportunities.

This broad conceptualization is consistent with the jurisprudence of the Committee on the Rights of Children. The Committee favors a holistic approach, placing the obligations imposed by the CRC "within the broader framework of

experts charged with the duty of monitoring the implementation of the International Covenant on Economic, Social and Cultural Rights by States Parties. Established under ECOSOC Resolution 1985/17 of May 28, 1985, the Committee undertakes monitoring functions assigned to the Economic and Social Council in Part IV of the International Covenant on Economic, Social and Cultural Rights. States Parties to the treaty are required to submit regular reports (within two years of ratification of, or accession to, the treaty and every five years thereafter) to the Committee which, in turn, examines the reports and issues "concluding observations," outlining its concerns and recommendations. Furthermore, since the entry into force of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on May 5, 2013, the Committee has gained competence to receive and consider communications from individuals claiming violation of their rights under the ICESCR. The Committee is empowered, under certain circumstances, to investigate allegations of grave or systematic violations of ECOSOC rights of the ICESCR. In addition, inter-state complaints are also entertained by the Committee. *See* Committee on Economic, Social and Cultural Rights: Monitoring the Economic, Social and Cultural Rights, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, *available at* http://www2.ohchr.org/english/bodies/cescr/ (last visited Oct. 28, 2013).

[167] Committee on Econ., Soc. & Cultural Rights: General Comment No. 14, *supra* note 166.

[168] THE COMMISSION ON SOC. DETERMINANTS OF HEALTH, CLOSING THE GAP IN A GENERATION: HEALTH EQUITY THROUGH ACTION ON THE SOCIAL DETERMINANTS OF HEALTH 1(2008).

[169] THE COMMISSION ON SOC. DETERMINANTS OF HEALTH, *supra* note 168.

[170] THE COMMISSION ON SOC. DETERMINANTS OF HEALTH, *supra* note 168.

international human rights obligations."[171] In essence, realizing the right children have to health requires the consideration of other human rights as well. A child's right to health cannot be secured unless those other rights, such as the right to shelter or to adequate nutrition, are also respected. Seen in this light, it becomes clear why the Committee on the Rights of the Child enumerates a gamut of factors touching on other human rights as social determinants that are critical to actualizing the right to health.[172] These factors are comprised of age, sex, educational attainment, socioeconomic status, and domicile; determinants at work in the immediate environment of families, peers, teachers, and service providers, notably the violence that threatens the life and survival of children as part of their immediate environment; and structural determinants including policies, administrative structures and systems, and social and cultural values and norms.[173] For States Parties to the CRC, this interpretation could be construed as requiring that productive attention to social determinants of health with respect to children incorporate attention to the needs of mothers also. This evokes some important concepts.

Aside from children being the most vulnerable, as previously stated, the vulnerability of mothers has a direct bearing on the well-being of their children. For instance, a mother who is in a violent relationship constitutes a risk for the health and well-being of the child. Moreover, a significant number of infant deaths occur during the neonatal period, related to the poor health of the mother prior to, and during the pregnancy and the immediate post-partum period, as well as to suboptimal breastfeeding practices.[174] Therefore, since the health and health-related behaviors of mothers and other significant adults have a major impact on children's health,[175] attending to social determinants of health in respect to children must also address the needs of their mothers and other caregivers. This dual responsibility (to the mother and other caregivers on account of the dependence or needs of the child) brings to the forefront the significance of interdependence, interconnectedness and indivisibility of human rights, core human rights values.[176] Ideally, the implementation of one human right leads (or ought to lead) to the actualization of one or more other human rights. This is an important lesson for States Parties to the CRC as well as other human rights treaties. In structur-

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171 Committee on the Rights of the Child, General Comment No. 15, *supra* note 160, ¶ 2.

172 *Id.* ¶ 17.

173 *Id.*

174 *We Can End Poverty: Millennium Development Goals and Beyond 2015 Factsheet*, UNITED NATIONS, 1 (Sept. 2013), http://www.un.org/millenniumgoals/pdf/Goal_4_fs.pdf (reporting that 45 percent of all U5MR is blamable on undernutrition and that for the first six months of life, exclusively breastfed children are 14 times more likely to survive than children who were not breastfed).

175 Committee on the Rights of the Child, General Comment No. 15, *supra* note 160, ¶ 18.

176 *See* the Maastricht Guidelines on Violations of Econ., Soc. & Cultural Rts., ¶ 4, *reprinted in* 20 HUM. RTS. Q. 691–705 (1998) [hereinafter Maastricht Guidelines]; Limburg Principles on the Implementation of the Int'l Covenant on Econ., Soc. & Cultural Rts. ¶ 3, U.N. Doc E/CN.4/1987/17, *reprinted in* 9 HUM. RTS. Q. 122–35 (1987); 37 INT'L. COMM. JURISTS REV. 43–55 (1986) [hereinafter Limburg Principles]; Committee on the Rights of the Child, General Comment No. 15, *supra* note 160, ¶ 7; Obiajulu Nnamuchi, *Kleptocracy and its Many Faces: The Challenges of Justiciability of the Right to Health Care in Nigeria,* 52 J. AFR. L. 3 (2008).

ing a response to one or more needs predicated on a particular human right, the impact on other needs or human rights should be carefully reflected upon and taken into consideration as a basis of action.

Remarkably, the CRC shares a striking similarity with MDG 4. Akin to MDG 4, the aim of which is to "reduce child mortality" and "under-five mortality rate,"[177] Art. 24(2)(a) of the CRC mandates States Parties to pursue full implementation of children's right to health and, in particular, take appropriate measures to "diminish infant and child mortality."[178] This link or similarity is critical and is subject to a number of interpretations. As of 2000, when the Millennium Declaration was adopted,[179] the international community had already subscribed to the obligation to reduce child mortality – by virtue of the CRC (adopted in 1989).[180] For this reason, it is arguable that MDG 4 does not impose novel obligations since these obligations were already binding upon the vast majority of these same nations by the force of international law to which they voluntarily subscribed. Moreover, the thrust of an even older international policy document, the "Global Strategy Health for All by the Year 2000," was to the same effect.[181] The Global Strategy was adopted under the aegis of WHO in 1979 and specified its goal as the attainment by all people of the world by the year 2000 of a level of health that would permit them to lead socially and economically productive lives.[182] The goal of attaining health for all is obviously broad enough to incorporate reduction of child mortality envisaged by MDG 4 and the CRC. To this extent, MDG 4 represents a fresh attempt at remedying a problem that has failed to be addressed by previous international legal and policy instruments.

Aside from the child-specific legal frameworks considered above, there are several general human rights that also address the health of children, notably the ICESCR[183] and the African Charter on Human and Peoples' Rights.[184] Article 12 of the ICESCR not only recognizes the "right of everyone to the enjoyment of the highest attainable standard of physical and mental health," it mandates that

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[177] *See* U.N. STATISTICS DIV., *supra* note 8.

[178] Interventions that could be pursued in attaining this goal include attention to still-births, pre-term birth complications, birth asphyxia, low birth weight, mother-to-child transmission of HIV and other sexually transmitted infections. Additional strategies consist of addressing neonatal infections, pneumonia, diarrhea, measles, under- and mal- nutrition, malaria, accidents, violence, suicide and adolescent maternal morbidity and mortality. Health systems need to be strengthened to be responsive to the needs of children. *See* Committee on the Rights of the Child, General Comment No. 15, *supra* note 160, ¶¶ 34 –35.

[179] G.A. Res. 53/202, U.N. Doc. A/RES/53/202 (Feb. 12, 1999).

[180] CRC, *supra* note 1.

[181] Although the project was launched in 1979 at the 32nd World Health Assembly by virtue of resolution WHA32.30, the original idea for a united global effort at achieving health for all by the year 2000 was a product of the 30th World Health Assembly in 1977 (WHA 30.43). *See* WORLD HEALTH ORG., GLOBAL STRATEGY FOR HEALTH FOR ALL BY THE YEAR 2000 7 – 18 (1981) [hereinafter GLOBAL STRATEGY FOR HEALTH]. See also DON A. FRANCO, POVERTY AND THE CONTINUING GLOBAL HEALTH CRISIS 63 (2009) (describing the MDGs as 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 . . .").

[182] GLOBAL STRATEGY FOR HEALTH, *supra* note 181.

[183] Int'l Covenant on Econ., Soc. & Cultural Rts., *supra* note 79, art. 12.

[184] African Charter on Hum. & Peoples' Rts., *supra* note 77.

States Parties adopt a "provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child."[185] Article 12 also mandates the "creation of conditions which would assure to all medical service and medical attention in the event of sickness."[186] Here, again, there is an explicit link with MDG 4. The African Charter on Human and Peoples' Rights imposes similar obligations on States Parties to the Charter.[187]

The relatedness of this genre of frameworks with child-specific human rights treaties is that although they are more cosmopolitan, they also recognize children's right to health as part and parcel of the general population. Their recognition of the right to health of the general population also includes children. Moreover, child-specific and general human rights treaties share close affinity with the MDGs. As the Millennium Development Project acknowledges, "human rights (economic, social, and cultural rights) already encompass many of the Goals, such as those for poverty, hunger, education, health, and the environment."[188] This means that MDG4 does not, as pointed out earlier, impose new obligations. These very African nations now struggling to attain the requisite targets by 2015 are also States Parties to human rights treaties which, for several decades, demanded compliance with the same obligations. No matter how States Parties package their reasons, the issue is that they have not taken concrete measures to meet the health needs of the people within their respective jurisdictions. Had adequate resources been deployed toward ensuring compliance with their human rights obligations, there would certainly have been no need for MDG 4.

The question, then, becomes would international health policy (MDG project) succeed where international law (in the nature of human rights treaties) has failed? The answer is neither here nor there. Perhaps MDG 8, which requires affluent Western countries to support developing ones in their efforts toward attaining the various benchmarks of the MDGs, might be the clincher.[189] But the extent to which this goal would be realized depends on the seriousness of wealthy countries in terms of doling out funds to support struggling health systems in the global South. But is resource really the issue? Hardly. This concern is not new and has, for several years, been expounded by the Committee on ESCR.

Particularly relevant is the Committee's articulation of a standard it referred to as "minimum core obligations" in 1990.[190] General Comment No. 3 was the first attempt by the Committee on ECSR to interpret the nature of the obligation (its precise contours and boundaries) States Parties assumed under Art. 2(1) of the

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[185] Int'l Covenant on Econ., Soc. & Cultural Rts., *supra* note 79, art. 12(2)(a).

[186] *Id.* art. 12(2)(d).

[187] African Charter on Hum. & Peoples' Rts., *supra* note 77, art. 16.

[188] U.N. MILLENNIUM PROJECT, INVESTING IN DEVELOPMENT: A PRACTICAL PLAN TO ACHIEVE THE MILLENNIUM DEVELOPMENT GOALS 119 (2005).

[189] MDG requires affluent countries to assist poor countries that has committed to good governance, development and poverty reduction. *See* U.N. STATISTICS DIV., *supra* note 8.

[190] U.N. Econ. & Soc. Council, Committee on Econ., Soc. & Cultural Rights General Comment No. 3: The Nature of States Parties' Obligations, 5th Sess., ¶ 10, U.N. Doc. E/1991/23 (1991) [hereinafter Committee on Econ., Soc. & Cultural Rights: General Comment No. 3].

ICESCR.[191] According to the Committee on ESCR, "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights [contained in the Covenant] is incumbent upon every State party."[192] As to how exactly this standard relates to the obligation of States Parties, the Committee explains, "a State party in which any significant number of individuals is deprived of . . . essential primary health care . . . is, prima facie, failing to discharge its obligations under the Covenant."[193] The Committee emphasizes the importance of the standard in stating, "[i]f the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d'être."[194] This means that underlying the ICESCR itself is a critical requirement, namely, that even if the rights of the Covenant cannot be optimally guaranteed, a basic threshold must be met, otherwise the State Party risks being considered non-compliant with its obligations.

In a subsequent interpretive instrument, adopted in 2000, the Committee on ESCR elaborated the standard, particularly in its specific application to the right to health under Art. 12 of the ICESCR.[195] In General Comment No.14, the Committee defines minimum core as imposing at least the obligations to:[196]

(a) ensure access to health facilities and related goods and services;
(b) ensure access to the minimum amount of essential food;
(c) ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water;
(d) provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs;[197]
(e) ensure equitable distribution of all health facilities, goods and services;

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[191] Int'l Covenant on Econ., Soc. & Cultural Rts., *supra* note 79, art. 13.

[192] *Id.*

[193] *Id.*

[194] *Id.*

[195] *See generally* Committee on Econ., Soc. & Cultural Rights: General Comment No. 14, *supra* note 166.

[196] *Id.* ¶ 43.

[197] *See generally Model List of Essential Medicine*, WORLD HEALTH ORG. (Apr. 2013), http://www.who.int/medicines/publications/essentialmedicines/en/index.html; *see also*, WORLD HEALTH ORG., MODEL LIST OF ESSENTIAL MEDICINES FOR CHILDREN: 3RD LIST (March 2011), *available at* http://whqlibdoc.who.int/hq/2011/a95054_eng.pdf. (WHO describes "essential medicines" as those that satisfy the priority health care needs of the population and are selected with due regard to public health relevance, evidence on efficacy and safety, and comparative cost-effectiveness. Essential medicines are intended to be available within the context of functioning health systems at all times in adequate amounts, in the appropriate dosage forms, with assured quality and adequate information, and at a price the individual and the community can afford. The WHO Model Lists of Essential Medicines has been updated every two years since 1977. The current versions are the 17th WHO Essential Medicines List and the 3rd WHO Essential Medicines List for Children updated in March 2011. The flexibility allowed countries in tailoring the list to meet their public health priorities recognizes the differences in health challenges each country faces. Endemic diseases in Africa, such as malaria, should receive consideration in configuring the list in African countries but would have no relevance to countries in Europe and North America, which have virtually no incidence of the disease).

(f) adopt and implement a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population.

In addition, the Committee specifies a number of other obligations, which it projects as having "comparable priority," including the obligation to:[198]

(a) ensure reproductive, maternal (pre-natal as well as post-natal) and child health care;

(b) provide immunization against the major infectious diseases occurring in the community;

(c) take measures to prevent, treat and control epidemic and endemic diseases;

(d) provide education and access to information concerning the main health problems in the community;

(e) provide appropriate training for health personnel, including education on health and human rights.

Each of these obligations speaks powerfully to the challenges presently encountered in the area of child health, particularly in the developing world, and which MDG 4, depending on seriousness of implementation in each country, is poised to vanquish. For instance, paragraph (b) above, to "provide immunization against the major infectious diseases occurring in the community," is strikingly similar to a key indicator of MDG 4, namely, "proportion of 1 year-old children immunised against measles."[199]

So, how are these obligations different from the general obligations imposed in respect to other aspects of the ICESCR or even in regard to the right to health under Art. 12? Because fulfilling the obligations imposed by the ICESCR is predicated on availability of resources (goods and services needed to actualize the right), States Parties are allowed some flexibility in pacing their march toward ensuring the rights of the Covenant for their respective populations.[200] This flexibility recognizes that poor nations would not be in the same position as affluent ones in terms of resources needed for adequate response to the economic and social needs or rights of their peoples. The expectation is that States Parties "progressively," as dictated by economic circumstances, achieve the realization of the rights – in a sense, recognizing the interface between resources and ability to protect the rights.[201] So long as a country has deployed the "maximum of its available resources" toward fulfilling its obligations under the Covenant, it cannot be held to have breached its obligations, even if the resources are inade-

[198] Committee on Econ., Soc. & Cultural Rights: General Comment No. 14, *supra* note 166, ¶ 44.

[199] U.N. STATISTICS DIV., *supra* note 8; Committee on Econ., Soc. & Cultural Rights: General Comment No. 14, *supra* note 166, ¶ 44.

[200] Int'l Covenant on Econ., Soc. & Cultural Rts., *supra* note 79, art. 2(1); Committee on Econ., Soc. & Cultural Rights: General Comment No. 14, *supra* note 166, ¶¶ 30 – 31.

[201] Int'l Covenant on Econ., Soc. & Cultural Rts., *supra* note 79, art. 2(1); Committee on Econ., Soc. & Cultural Rights: General Comment No. 14, *supra* note 166, ¶¶ 30 – 31.

quate.[202] Regarding minimum core obligations, however, the position is different.

Although, as explained above, resource constraints could operate as an exculpatory factor, as a shield against non-compliance with country obligations under the ICESCR, the position is not the same in respect to those specific elements designated as minimum core obligations or of comparable priority. These latter obligations are non-derogatory, and non-compliance cannot be justified by any circumstances, including paucity of resources.[203] This non-derogability characterization of minimum core obligations represents a marked divergence and a laudable improvement over the previous interpretation (General Comment No. 3), which excused performance on the basis of resource constraints.[204] The Maastricht Guidelines is quite emphatic: "[s]uch minimum core obligations apply irrespective of the availability of resources of the country concerned or any other factors and difficulties."[205] This is consistent with an earlier document, the Limburg Principles, which mandated State Parties, regardless of the level of economic development, to ensure respect for minimum subsistence (meaning, minimum core or threshold) rights for all.[206]

Justification for non-derogation rests on the notion that the resource implication of compliance, given the very basic nature (affordability) of the requisite goods and services, will not overwhelm natural resources. Indeed, it is recognized that governments can meet these obligations "with relative ease, and without significant resource implications."[207] Non-derogability is premised on the idea that no sovereign nation is so impecunious as to be incapable of providing basic goods and services, the kind that is needed to satisfy the minimum core obligations.[208] Significantly, in determining the amount of resources at the disposal of each country, consideration is given to both the national resources and those sourced externally through international cooperation and assistance,[209] including support obtained within the context of MDG 8 from wealthy nations – official development assistance ("ODA").[210]

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[202] Int'l Covenant on Econ., Soc. & Cultural Rts., *supra* note 79, art. 2(1).

[203] Committee on Econ., Soc. & Cultural Rights: General Comment No. 14, *supra* note 166, ¶ 47.

[204] Committee on Econ., Soc. & Cultural Rights: General Comment No. 3, *supra* note 190, ¶ 10.

[205] Maastricht Guidelines, *supra* note 176, ¶ 9 (The Maastricht Guidelines have been recognized by the U.N. and published as an official U.N. Document with the following reference: E/C.12/2000/13).

[206] Limburg Principles, *supra* note 176, ¶ 25.

[207] Maastricht Guidelines, *supra* note 176, ¶ 10.

[208] Obiajulu Nnamuchi, *Kleptocracy and its Many Faces: The Challenges of Justiciability of the Right to Health Care in Nigeria,* 52 J. AFR. L. 1, 33 (2008).

[209] Limburg Princicples, *supra* note 176, ¶ 26.

[210] *See* U.N. STATISTICS DIV., *supra* note 8.

v. conclusion

Solutions don't have to be complicated. There are inexpensive and simple responses that save children's lives, by preventing and by treating illnesses. These interventions must be made available to those who need them the most.
– U.N., We can End Poverty: Millennium Development Goals and Beyond 2015

Having fleshed out the numbers, the question that must necessarily be unearthed is whether Africa is on track to meet the benchmark of MDG 4 – to reduce its U5MR by two-third or 66 percent in 2015, relative to 1990 level. All available data suggest that this is very unlikely. Since the U5MR in 1990 was 175 deaths per 1000 live births,[211] meeting the target would require reducing the number to 59.5.[212] This is not an easy feat to accomplish, especially considering the current figure of 107,[213] less than two years before the deadline. The latest MDG report affirms this difficulty as sub-Saharan Africa has achieved reductions of just 39 percent.[214] Despite this bleakness, however, there are several innovative changes that countries in the region could embrace in order to advance themselves toward the goal of reducing child morbidity and mortality in their respective territories. Factors identified in this paper as key challenges such as early marriage, maternal illiteracy, poverty on the part of parents, death of skilled health personnel, as well as institutional poverty and leadership deficit must be expeditiously and completely annihilated. As elaborately discussed in Parts III and IV, these are human rights violations and would need to be addressed as such.

Implementation strategies and initiatives targeting diseases and illnesses as well as conditions or circumstances that combine to produce them (negative socioeconomic environment or adverse social determinants of health) should be mainstreamed into national and regional policies and adequately funded. This echoes the thinking of the Committee on the Rights of the Child, that "most mortality, morbidity and disabilities among children could be prevented if there were political commitment and sufficient allocation of resources directed towards the application of available knowledge and technologies for prevention, treatment and care."[215] This, precisely, is the problem – whether African leaders are seriously committed to the health and wellbeing of children under their stewardship. Starkly presented, the question is whether Africa is so poverty-stricken that, despite its best efforts, it is simply incapable of responding to the needs of its people, health or otherwise. Development economists who have investigated this question, notably Dambisa Moyo[216] and William Easterly[217] project corruption,

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[211] World Health Statistics 2013, *supra* note 14, at 59.

[212] *Id.* (Figure derived by subtracting 66 percent or two-thirds from the 1990 figure (175) – which equals 115.5).

[213] World Health Statistics 2013, *supra* note 14, at 59.

[214] U.N. MDG Report 2013, *supra* note 11, at 25.

[215] Committee on the Rights of the Child, General Comment No. 15, *supra* note 160, ¶ 1.

[216] *See generally* Dambisa Mayo, Dead Aid: Why Aid is Not Working and How There is a Better Way For Africa 48 – 97 (2009).

not finite resources, as the culprit for the stagnation in the region's socioeconomic fundamentals. But beyond corruption, an emerging menace that is more consequential in the damage it inflicts upon health and wellbeing in Africa is political cabalism.

Perhaps as an inoculation against charges of kleptocracy, political elites in various countries in the region have fashioned another disingenuous, albeit legal, scheme of siphoning public resources into their individual pockets: bloated perquisites. A typical example is Africa's most populous and petroleum-rich nation, Nigeria. Its health system ranks 187th in the world, out of 191 countries surveyed.[218] The under-five mortality rate in the country—124 deaths per 1000 live births[219] – is 14th worst globally.[220] Yet, its political class is the most remunerated (calculated as a ratio of GDP per capita) worldwide.[221] This is not to suggest that Nigeria is an oddity, sort of pariah, in the region. To the contrary, in a recent study of basic salary of lawmakers throughout the world, two other African nations, Kenya and Ghana, ranked second and third respectively.[222] Paradoxically, these are amongst the countries with the worst health indicators in the world,[223] the same countries who are on the threshold of not meeting their MDG4 obligations on account of imaginary resource constraints.

To put this into perspective, the political class in Nigeria, including elite public servants (numbering just 18,000), is paid N1.26trn in salaries and allowances or 23 percent of the 2013 budget (N4.9trn).[224] A distraught chairman of a government panel constituted to review and harmonize all the reform processes in the country's federal public service was quite explicit, "it is certainly not morally defensible from the perspective of social justice or any known moral criterion that such a huge sum of public fund is consumed by an infinitesimal fraction of the people."[225] Indeed, to allow 18,000 people out of a population of 167 million[226] to pocket 23 percent of the national resources is indefensible on any account. Worse, when you add an estimated average of $4 to $8 billion annually

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217 *See generally* WILLIAM EASTERLY, THE WHITE MAN'S BURDEN: WHY THE WEST'S EFFORTS TO AID THE REST HAVE DONE SO MUCH ILL AND SO LITTLE GOOD 42-44 (2006).

218 WORLD HEALTH REPORT 2000, *supra* note 127, at 154.

219 WORLD HEALTH STATISTICS 2013, *supra* note 14, at 55 (Countries faring worse than oil-rich Nigeria are those considered amongst the poorest in the world: Niger, Mali, Guinea, Guinea Bissau, Angola, Burkina Faso, Burundi, Cameroon, Chad, Central Africa Republic, Congo, Sierra Leone and Somalia); *see also* WORLD HEALTH REPORT 2000, *supra* note 127, at 55.

220 WORLD HEALTH STATISTICS 2013, *supra* note 14, at 50 – 57.

221 J.S., I.B., & L.P., *Rewarding Work: A Comparison of Lawmakers' Pay*, THE ECONOMIST (July 15, 2013, 2:54 PM), http://www.economist.com/blogs/graphicdetail/2013/07/daily-chart-12.

222 *Id.*

223 WORLD HEALTH REPORT 2000, *supra* note 127, at 153 – 54 (ranking the health systems of Ghana and Kenya as 135th and 140th globally).

224 Adebolu Arowolo, *Lecturers Too Deserve Good Pay,* DAILY INDEPENDENT (Aug. 16, 2013), http://dailyindependentnig.com/2013/08/lecturers-too-deserve-good-pay-2/.

225 *Id.*

226 *Id.*

during the eight years of Obasanjo administration (1999 to 2007)[227] that evaporated into offshore bank accounts of these same leaders, it becomes easy to understand why the health of children in the country flounders. There are simply not enough funds left for legitimate business of the people, health or otherwise. The story is much the same throughout sub-Saharan Africa. It is a story of governance gone amok. In 2010, Nigeria allocated a measly 5.7 percent of its national budget to health.[228] So, what is there to be done?

Western governments might invoke accountability mechanisms imbedded in MDG 8 to compel desired action on the part of political leadership in the region[229] but unless citizens themselves rise *en masse* to demand good governance, no meaningful progress is possible in the realm of health or on any other front in the region. The Committee on the Rights of the Child was quite emphatic, the CRC imposes obligation upon States Parties to render appropriate assistance to parents in the performance of their child-rearing responsibilities, including assisting them in providing appropriate living conditions for the healthy development of their children.[230] Therefore, failure on the part of governments in the region to discharge this duty foists upon the citizenry an obligation to stand up for their rights, to demand attention to their needs.

When, in the last quarter of 2013, news reached the Vatican that Franz-Peter Tebartz-van Elst, then Bishop of Limburg, Germany, had spent $43 million in renovating his residence, he was hurriedly summoned to Rome.[231] Aside from his luxurious residence, Tebartz-van Elst– dubbed the "Bishop of Bling" by the media to emphasize his extravagance – is notorious for wasting church funds on expensive automobiles and trips.[232] A statement credited to the Vatican in explanation of Tebartz-van Elst's unspecified leave, is quite telling, "a situation has been created in which the bishop can no longer exercise his episcopal duties."[233] This is not an insignificant statement. It echoes most provocatively the pro-poor

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[227] *Criminal Politics: Violence, "Godfathers", and Corruption in Nigeria*," HUMAN RIGHTS WATCH 31-32 (Oct. 2007), http://www.hrw.org/reports/2007/nigeria1007/nigeria1007/webwcover.pdf.

[228] WORLD HEALTH STATISTICS 2013, *supra* note 14, at 136.

[229] *See* Nnamuchi & Ortuanya, *supra* note 10 (This means that MDG 8 (to develop a global partnership for development) requires wealthy nations whose development assistance fuels much of the abuse in Africa to hold erring governments accountable, for instance, by denying further assistance in absence of clear demonstration of good governance. *See also Paris Declaration on Aid Effectiveness*, *supra* note 10, ¶ 4(v) (stipulating that donors and recipients of development assistance commit themselves to tackling the remaining challenges in the path to development of third world countries, including, "[c]orruption and lack of transparency, which erode public support, impede effective resource mobile[z]ation and allocation and divert resources away from activities that are vital for poverty reduction and sustainable economic development . . .").

[230] U.N. Committee on the Rights of the Child, General Comment No. 7: Implementing Child Rights in Early Childhood, ¶ 20, U.N. Doc.CRC/C/GC/7/Rev.1 (2006).

[231] Nicole Winfield & Geir Moulson, *Pope Expels German 'Luxury Bishop' from Diocese*, MSN NEWS (Oct. 23, 2013), *available at* http://news.msn.com/world/pope-expels-german-luxury-bishop-from-diocese.

[232] Carol J. Williams, *Suspended 'Bishop of Bling' was Bound to Irk Austere Pope Francis,* L.A. TIMES (Oct. 23, 2013), *available* at http://www.latimes.com/world/worldnow/la-fg-wn-german-bishop-bling-suspended-pope-20131023,0,6762660.story#axzz2ihL4q3Um.

[233] *Id.*

vision of Pope Francis, that lavish and ostentatious lifestyle by church hierarchy should give way to Christian humility and service to the poor, the true symbol of leadership.[234] This statement is particularly poignant when one considers that children at risk "tend to be among the poorest and the most marginalized in society,"[235] the "wretched of the earth", to borrow the title of a 1963 classic by psychiatrist/philosopher Frantz Fanon.[236] Secularly translated, the papal pro-poor vision means that avarice, apathy and ostentatious lifestyles of the political class in Africa, projected in this paper as responsible for the health quandary in the region, must yield to responsible governance. It is a vision that should be co-opted by the citizenry in Africa.[237] It is also one that is powerfully consistent with a human rights approach to health.

[234] *Pope Francis Urges Church to Focus on Helping Poor,* BBC NEWS EUROPE (Oct. 4, 2013), *available* at http://www.bbc.co.uk/news/world-europe-24391800 (Citing Pope Francis as saying the "Roman Catholic Church must strip itself of all 'vanity, arrogance and pride' and humbly serve the poorest in society" – in other words, for the Church to be transformed as the "Church of the poor").

[235] *We Can End Poverty: Millennium Development Goals and Beyond 2015 Factsheet 1*, UNITED NATIONS (2013), http://www.un.org/millenniumgoals/pdf/Goal_4_fs.pdf.

[236] FRANZ FANON, THE WRETCHED OF THE EARTH, TRANSL. Richard Philcox (1963).

[237] *We Can End Poverty*, *supra* note 235 (The fact that resource strapped countries in Africa such as Ethiopia, Malawi, Tanzania and even war-torn Liberia have been able to lower the U5MR in their respective territories by two-thirds or more since 1990 signals that the task is attainable: is a question, ultimately, of commitment of the leadership of the various countries in Africa to responsible governance).

Understanding the Decline in Transnational Adoption Channels: Whether the Children in Families First Act is an Effective Response to the Exploitation of Orphans

Jade Gary*

I. Introduction

In less than ten years, the number of transnational adoptions throughout the world has plummeted by fifty percent.[1] What could explain such a rapid decline in transnational adoptions? Perhaps a low demand from prospective parents seeking children? Not likely. During the 1990s, the opening of transnational adoption proceedings in China and Russia alone caused a dramatic surge in transnational adoptions that lasted well into the 21st century.[2] Could the recent decline in transnational adoptions be due to a decreasing number of available orphans? Again, this is unlikely. In fact, many developing nations have experienced a rise in the number of children living without families or permanent homes.[3]

The decline stems from the indefinite suspension of transnational adoptions in several developing nations.[4] These adoption moratoriums are implemented in an effort to encourage adoption reform in impoverished countries; however, they

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[1] Peter Selman, *The Rise and Fall of Intercountry Adoptions in the 21st Century*, 52 Int'l Soc. Work 575, 578 (2009) [hereinafter Selman 2009]; *see also* Peter Selman, Key Tables for Intercountry Adoption: Receiving States 2003-2012, *available at* http://www.hcch.net/upload/selmanstats33.pdf (A survey by Newcastle University of the top 23 nations that adopt children from abroad reported approximately 23,601 transnational adoptions in 2011, a decline from the recorded 45,299 in 2004).

[2] Peter Selman, *Global Trends in Intercountry Adoption: 2001-2010*, 44 Adoption Advoc. 1, 4 (2012) (Between 2000 and 2010, citizens from 27 countries adopted more than 400,000 children, the highest number for any decade).

[3] Kevin Voigt et al., *International Adoptions Decline as Number of Orphans Grows*, CNN (2013), http://www.cnn.com/2013/09/16/world/international-adoption-main-story-decline/ (An increase in the number of orphans is evident in developing nations experiencing political or societal instability such as Russia, following the break-up of the Soviet Union, and China, where the nation's One-Child Policy left a surplus of abandoned infant girls. Since 2004, the number of children in Chinese orphanages has risen nearly fifty percent).

[4] Selman, *supra* note 2, at 14 (For example, the decline of transnational adoptions to the United States in the 21st century is largely due to the continuing moratorium on adoptions from Guatemala); *see also* Selman 2009, *supra* note 1, at 590 (Transnational adoptions from countries like Romania, Bulgaria, Russia, and Belarus rapidly decreased for many western nations partially due to pressures from the European Union as well as an overall reaction in the global community to nations following poorly controlled adoption practices).

usually have no such effect.[5] Instead, most orphaned children remain in subpar foster-care facilities, waiting years for adoption suspensions to be lifted.[6] Others become homeless, forced out of orphanages once they surpass the legal age to qualify for adoption.[7] These children are not only susceptible to exploitation but are also influenced by crime in their environment.[8]

This Comment will address whether the proposed Children in Families First Act ("CHIFF") will effectively counter the decline in transnational adoption channels, address corrupt transnational adoption practices, and accelerate the transnational adoption process for deserving families. In addition, this Comment will determine if the Act serves as an effective model for further transnational adoption reform. While the issue of regulating transnational adoption practices is complex, it is an important initiative to address because providing a safe environment for orphaned children will require a global effort that extends beyond the legal realm.

Part II – Background of this Comment will detail the landscape of transnational adoption and how foreign adoptions rose in popularity in the United States.

Part III – Around the World will explore how the industry has spawned a black market consisting of child exploitation and commodification, through examining adoption issues in various countries around the world.

Part IV – Transnational Adoption Legislation will examine current adoption legislation, which serves as the foundation for future reform and the impact current policy has had on the transnational adoption arena.

Part V – The Breakdown of CHIFF will look at the CHIFF bill and describe its provisions that are most relevant to transnational adoption reform.

Part VI – Analysis will provide an analysis of the impact CHIFF will have on transnational adoptions and the global community in implementing social and policy reform.

Part VII – Proposal will recommend necessary changes to legislation and social norms that will address corrupt adoption practices and enable the reopening of adoption channels.

Part VIII – Conclusion will close by emphasizing that while CHIFF sets forth effective legislative measures to address child exploitation and the decline in transnational adoption channels, additional steps are necessary to produce long-lasting change.

II. Background

The demand for transnational adoptions is directly correlated with domestic living conditions and international relations, such as periods of war and civil

[5] *See* Yemm, *infra* notes 113 and accompanying text.

[6] *See* National Council for Adoption, *infra* note 112 and accompanying text.

[7] *See* Thompson, *infra* note 9, at 451.

[8] *Id.* at 450.

unrest.[9] Often, these periods leave impoverished nations in turmoil and families dismantled.[10] As a reoccurring and long-standing trend, war-torn nations typically experience an increase in the number of children left homeless and parentless.[11] Fortunately, transnational adoption acts as an avenue for outside nations to provide assistance to these children.[12] The aftermath of World War II left numerous Belgian, Polish, German, Greek, and Italian children displaced, resulting in the first major wave of transnational adoptions.[13] In the years following the Korean War, specifically between 1953 and 1981, a second wave ensued as many Korean children were products of interracial relationships between United States soldiers and Korean natives.[14] In the past few decades, transnational adoptions have continued to grow in popularity, particularly among American families.[15]

Acts of child exploitation, such as prostitution, trafficking, and kidnapping, plague the current landscape of transnational adoptions as nations try to meet high demands.[16] Commodification of human beings, specifically within the sex trade, is a rapidly growing industry that generates billions of dollars in profit worldwide.[17] Understanding the current landscape of transnational adoption is imperative in order to facilitate effective change that could potentially address the wide range of concerns various nations have.

III. Around the World

In recent years, the detection of corrupt practices in transnational adoption has prompted legislative reform by political leaders seeking to promote domestic adoption efforts in their countries over the interests of foreign adoptive parents.[18] In examining the landscape of transnational adoption, this Comment will first explore the transnational adoption programs in the parts of the world that are most plagued by corrupt adoption practices.

Asia

Today, China is the world's largest provider of orphans for transnational adoption, and American families have adopted approximately 80% of the nation's

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[9] Notesong-Srisopark Thompson, *Hague is Enough?: A Call For More Protective, Uniform Law Guiding International Adoptions*, 22 WIS. INT'L L.J. 441, 441 (2004).

[10] *Id.*

[11] *Id.*

[12] *Id.* at 442.

[13] *Id.* at 445.

[14] Thompson, *supra* note 9, at 445.

[15] *Id.* at 444.

[16] *Id.* at 448.

[17] Richard Poulin, *Globalization and the Sex Trade: Trafficking and the Commodification of Women and Children*, 22 CANADIAN WOMAN STUD./ LES CAHIERS DE LA FEMME 34, 38 (2003).

[18] Jorge L. Carro, *Regulation of Intercountry Adoption: Can the Abuses Come to an End?*, 18 HASTINGS INT'L & COMP. L. REV. 121, 133 (1994).

adoptees since China instituted its adoption program in the 1990s.[19] In 2013 alone, American families adopted 2,306 Chinese children.[20] China's efforts to control its population growth caused many families to abandon their children during the nation's "One-Child Policy," which limited urban families to one child in order to avoid harsh fines by the Chinese government.[21] In addition, the nation's societal preference for birthing boys resulted in an overwhelming amount of orphaned girls.[22] This deluge of orphans has been the primary factor in the government's history of promoting foreign adoptions.[23]

In 2005, the Chinese government uncovered a baby trafficking ring involving six orphanages of the Hunan province in what became known as the Hunan Baby-Trafficking Scandal.[24] These orphanages matched thousands of Western adoptive parents with children procured from traffickers, and while it is unknown exactly how the traffickers obtained the children, abduction is a common method.[25] Traffickers often target poor, migrant workers and offer to purchase their children for meager compensation.[26] The Hunan Baby-Trafficking Scandal resulted in the prosecution and conviction of nine known traffickers and the suspension of all Hunan Province adoptions for several months.[27] Since the incident, media outlets have reported numerous cases of baby-buying and abduction in the Chinese transnational adoption program.[28]

Cambodia's adoption system is substantially more anarchic than that of China. A 2006 End Child Prostitution, Child Pornography and Trafficking ("ECPAT") International report identified children living within the seven provinces of Cambodia as particularly vulnerable to adult predators due to cultural and sociological factors.[29] The country has been subjected to decades of societal turmoil and political unrest stemming specifically from a period known as the Khmer Rouge.[30] From 1975 to 1979, the Cambodian government committed a nationwide genocide of two million people leading to the systematic destruction of all religious,

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[19] Patricia J. Meier & Xiaole Zhang, *Sold Into Adoption: The Hunan Baby Trafficking Scandal Exposes Vulnerabilities in Chinese Adoptions to the United States*, 39 CUMB. L. REV. 87, 93 (2008-2009).

[20] *Adoption Statistics,* BUREAU OF CONSULAR AFFAIRS, U.S. DEPARTMENT OF STATE (2013) http://adoption.state.gov/about_us/statistics.php (last visited Sept. 30, 2013).

[21] *Id.* at 95.

[22] *Id*.

[23] *Id*. at 97.

[24] Meier, *supra* note 19, at 88.

[25] *Id*. at 90, 97.

[26] *Id*. at 109.

[27] *Id*. at 89.

[28] *Id*. at 90.

[29] ECPAT GLOBAL MONITORING REPORT ON THE STATUS OF ACTION AGAINST COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN: CAMBODIA, ECPAT INTERNATIONAL 11 (2006), *available at* http://resources.ecpat.net/A4A_2005/PDF/EAP/Global_Monitoring_Report-CAMBODIA.pdf (ECPAT or End Child Prostitution, Child Pornography and Trafficking, is a global non-profit organization dedicated to protecting children from all forms of commercial sexual exploitation).

[30] Tim Hunn, *Child Sex Trafficking: Why Cambodia?*, CNN (Dec. 12, 2013), http://www.cnn.com/2013/12/09/world/asia/cambodia-cfr-why-history-child-sex-trafficking/index.html?iref=allsearch.

educational, and social structures, including the family unit.[31] With this deterioration, the country has essentially lost and not yet recovered the moral compass that Buddhism once provided.[32] The instability left many children and families vulnerable to black market sellers.[33] Such widespread baby trafficking, child prostitution, and adoption fraud led the United States to halt all adoption proceedings with Cambodia in 2001.[34]

The International Human Services ("INS") reported that adoption services and orphan visa petitions for the children of Cambodia would remain suspended until the country partook in more transparent practices that were consistent with transnational adoption standards.[35] Twelve years after the moratorium was initially issued, Cambodian adoptions remain banned in the United States and the country is still subject to lengthy adoption investigations.[36] Furthermore, Cambodian law prohibits children over the age of eight from being adopted, forcing many orphans to care for themselves in substandard living conditions after they have outgrown their right to be adopted.[37]

Latin America

In Latin America, particularly Guatemala, parental-consented and non-consented child commodification is common.[38] Typically, when children are sold for a profit to orphanages, the facilities falsify birth documentation to depict a legitimate adoption to prospective parents.[39] Similar to the predicament in countries like China and Cambodia, years of civil unrest in Guatemala have resulted in widespread poverty and an increased number of orphaned children.[40] The average Guatemalan woman bears six children in her lifetime and in recent years, transnational adoption has been a means to fulfill the needs of many of these children who are eventually abandoned.[41] Initially, Guatemala's adoption system was comprised mostly of private adoptions negotiated by facilitators, attorneys, and government actors, which made the process quick for prospective parents.[42] The system consisted of unregulated foster care providers who lacked any train-

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[31] *Id.*

[32] *Id.*

[33] Thompson, *supra* note 9, at 448 (Black market sellers that partake in selling orphaned children typically operate by persuading desperate families to sell their children for a profit).

[34] *Id.* at 448-49.

[35] *Id.* at 449.

[36] *Id.*

[37] *Id.* at 451.

[38] Lisa M. Yemm, *International Adoption and the "Best Interests" of the Child: Reality and Reactionism in Romania and Guatemala*, 9 WASH. U. GLOBAL STUD. L. REV. 555, 569-570 (2010).

[39] Karen Smith Rotabi et al., *Intercountry Adoption Reform Based on the Hague Convention on Intercountry Adoption: An Update on Guatemala in 2008*, SOCMAG NEWS MAG. (Nov. 29, 2008), http://www.socmag.net/?p=435.

[40] Yemm, *supra* note 38, at 568.

[41] *Id.*

[42] *Id.* at 568-69.

ing or standards of care.[43] Providers were recruited and paid by private attorneys who often failed to report the number of children in care, information about the caregiver, or the amount of money exchanged for services.[44] This laxity in Guatemala's system fostered an environment for baby trafficking, and in 2000 the United Nations concluded:

> [L]egal adoption appears to be the exception rather than the rule. . .The child has become an object of commerce rather than the focus of the law. It would seem that in the majority of cases, transnational adoption involves a variety of criminal offenses including the buying and selling of children, the falsifying of documents, [and] the kidnapping of children.[45]

The United States has since halted all adoptions from Guatemala.[46] In 2008, Guatemala formed a central adoption authority and began taking steps to reform its system by complying with transnational adoption standards.[47] The moratorium left thousands of adoption cases pending.[48] Like most countries, Guatemala only recently took legislative measures to combat child commodification.[49]

Not until 1990 did Brazil impose legal restrictions aimed specifically at the practice of baby selling, which was deep-rooted in many of its transnational adoptions.[50] Under Brazil's Statute of the Child, prospective parents must obtain approval for adoptions through the juvenile court system and must live with the child in Brazil following approval for a period of fifteen to thirty days depending on the child's age.[51] In addition, the statute eliminates all involvement of attorneys and other middlemen to ensure that all requirements are met and that the process is free of corruption.[52] Furthermore, priority for adopting is given to Brazilian citizens.[53] While these measures are aimed at the right concerns, im-

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[43] Rotabi et al., *supra* note 39.

[44] *Id.*

[45] U.N. Commission on Human Rights, *Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, Ofelia Calcetas-Santos*, E/CN.4/2000/73/Add.2 (Jan. 27, 2000), *available at* http://www.refworld.org/docid/3ae6b0fe0.html (Ms. Calcetas-Santos has since admitted she could not substantiate her assertion that "legal adoption appears to be the exception rather than the rule" with any statistical evidence).

[46] Yemm, *supra* note 38, at 571.

[47] *Id.* at 572.

[48] *Id.* at 571.

[49] Rotabi et al., *supra* note 39 (In 2006, the Guatemalan government established a pilot foster care program, which recruited, trained, and monitored foster caregivers using clear professional standards. In addition, all childcare institutions were required to complete an accreditation process and undergo monitoring by government authorities. By 2008, the Guatemalan government overhauled its adoption laws and the U.S. suspended all new adoptions from Guatemala while the nation worked to clean up its adoption proceedings).

[50] Carro, *supra* note 18, at 133.

[51] *Id.*

[52] *Id.*

[53] *Id.*

plementation of the statute has proven to be unsuccessful as enforcement of its provisions is weak.[54]

Europe

In some countries, such as Romania, child abandonment and child commodification is a socially acceptable cultural practice to which parents resort when they can no longer care for their children.[55] This practice has led to a constantly growing pool of orphaned children living as outcasts in society.[56] In 1991, transnational adoptions were suspended in Romania following the discovery of a baby trafficking scandal that lasted for more than 25 years.[57] During this period, referred to as the Romanian Baby Bazaar, the Romanian government banned contraception and legal abortions in an effort to increase the nation's population.[58] As a result, approximately 100,000 children were left abandoned in orphanages and other institutions, some of which included inhumane warehouses.[59] Birth parents were willing to sell their children to the highest bidder, and even worse, desperate adoptive parents were willing to pay any price to black marketers and baby brokers.[60]

In 1990, the Romanian government passed an inter-country law to help ensure that there was proper authorization for adoptions of Romanian children.[61] The legislation made it mandatory for parties to obtain consent from the child's natural parents, guardian, or legal custodian prior to adoption.[62] However, due to a lack of international guidelines to abide by, the law failed to have any lasting impact or serve its intended purpose.[63] In 1991, the Romanian government passed legislation that required the Romanian Adoption Commission to process all adoptions.[64] Furthermore, under the new law, children were only eligible for transnational adoption if, after six months, attempts to place the child in Romania proved unsuccessful.[65] The new law's intended purpose was to establish an organized, government-run adoption system and encourage domestic adoptions.[66] However since its enforcement, Romania has placed severe limitations on transnational adoptions.[67] Countries seeking Romanian orphans are now restricted to

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[54] *Id.*

[55] Carro, *supra* note 18, at 137.

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.* at 138.

[61] Carro, *supra* note 18, at 137.

[62] Carro, *supra* note 18, at 138.

[63] *Id.*

[64] *Id.* at 139.

[65] *Id.* at 139-40.

[66] *Id.*

[67] *Id.*

no more than five pending adoption applications at any one time.[68] In addition, family size and age restrictions are placed on prospective parents seeking to adopt from the country.[69]

Similar to Romania, the black market for transnational adoptions has long thrived in Russia.[70] Following the overthrow of communism, Russia's economy suffered great instability with many of its people living below the poverty line.[71] As a result, many families surrendered their children for adoption.[72] However, Russia's government lacked the resources and funds required to care for its growing population of orphaned children.[73] Today, Russia aims to limit transnational adoption to those children who cannot be successfully placed with families through domestic adoption.[74] However in many cases, Russian adoptive parents wait years for their adoption applications to be approved, while foreign applications are approved within a few months.[75] This discrepancy may be largely due to the fact that Russia's desperate economy benefits more from the fees associated with transnational adoptions when wealthy foreigners seek to adopt.[76] Foreign adoptions in Russia typically cost between USD 10,000 and USD 26,000 and require a donation to the local orphanage ranging between USD 1000 and USD 3000.[77] Russia has yet to create any significant safeguards or barriers for transnational adoption because for each child adopted, the nation's financial burden decreases.[78] Some of these same facilities partake in the black market baby trade by seeking out bribes and kickbacks from foreign parents to pay local bureaucrats who process the adoption.[79] Unfortunately, a lack of stringent law prevents the Russian government from monitoring illegal activities and effectively controlling the high costs of transnational adoptions.[80]

IV. Transnational Adoption Legislation

While global legislative efforts have continuously been taken to regulate transnational adoption, they are often ineffective in directly addressing child exploita-

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[68] *Id.*

[69] *Id.*

[70] Carro, *supra* note 18, at 141.

[71] Kimberly A. Chadwick, *The Politics and Economics of Intercountry Adoption in Eastern Europe*, 4 J. Int'l Legal Stud. 113, 131 (1999).

[72] *Id.*

[73] *Id.*

[74] Carro, *supra* note 18, at 141.

[75] *Id.* at 142.

[76] Chadwick, *supra* note 71, at 132.

[77] Chadwick, *supra* note 71, at 130.

[78] *Id.* at 132.

[79] Shannon Thompson, *The 1998 Russian Federation Family Code Provisions on Intercountry Adoption Break the Hague Convention Ratification Gridlock: What Next? An Analysis of Post-Ratification Ramifications on Securing a Uniform Process of International Adoption*, 9 Transnat'l L. & Contemp. Probs. 703, 725 (1999); *see also* Chadwick, *supra* note 71, at 121.

[80] *Id.* at 718.

tion and corrupt adoption practices. Common frustrations surrounding current adoption legislation include vagueness in the language of most policies and a lack of concrete measures that combat corruption.[81]

The Hague Adoption Convention

The Hague Adoption Convention on the Protection of Children and Cooperation in Respect of International Adoption ("Hague Convention") serves as the cornerstone for transnational adoption policy.[82] The Hague Convention, implemented on May 1, 1995, is a multilateral treaty that serves as a blueprint for the transnational adoption process.[83] As of October 2013, ninety countries have ratified the Hague Convention, including the United States.[84] In addition, to help interpret and implement the Hague Convention, the United States adopted the International Adoption Act of 2000 ("IAA").[85]

The main objectives of the Hague Convention are to ensure that transnational adoption is sought only if it is in the child's best interest, to form and uphold a system of global cooperation in an effort to curtail child exploitation, and to ensure recognition of transnational adoptions that abide by the Convention's rules.[86] In addition, the Convention acts as a safeguard to ensure that transnational adoptions are conducted in the best interests of the children involved with respect to their fundamental rights as set out in international law.[87] Furthermore, it aims to establish cooperation among contracting states to prevent child abduction, sale, and trafficking.[88] A nation need not ratify the Convention, however, to be recognized as a cooperating state.[89] Signing the treaty signals intent to eventually ratify the Hague Convention and prohibits the signatory from acting contrary to the Convention's guidelines.[90]

While the Hague Convention has proven to provide a foundational structure for regulating transnational adoptions and facilitating global cooperation between participating countries, it fails to provide a uniform system that can realistically grapple with the negative by-products of a rising demand for transnational adoptions.[91] The Hague Convention functions as a set of guidelines and is only appli-

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[81] *See infra* notes 86 and 88.

[82] Thompson, *supra* note 9, at 442.

[83] *Id.*

[84] *Hague Adoption Process,* Bureau of Consular Affairs, http://adoption.state.gov/adoption_process/how_to_adopt/hague.php (last updated Oct. 2013).

[85] Intercountry Adoption Act of 2000, 42 U.S.C. §14901 (2000).

[86] Intercountry Adoption Act of 2000, 42 U.S.C. §14901 (2000).

[87] Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption, May 29, 1993, *available at* http://www.hcch.net/index_en.php?act=conventions.text&cid=69.

[88] *Id.*

[89] Thompson, *supra* note 9, at 457.

[90] *Id.*

[91] Thompson, *supra* note 9, at 443 (Critics of the Hague Convention contend that the treaty "fails to provide a uniform standard which can be applied efficiently, realistically, and safely" and "lacks any kind of evaluation process for participating states to rely on to ensure that internationally adopted children are adequately protected").

cable to those nations that affirmatively ratify the treaty.[92] It attempts to extend its reach to non-signatories by granting participants the means to enforce its principles against non-participants who formally accede to it.[93] However, the Convention lacks any specific enforcement mechanisms, such as an evaluation process to help participants determine whether adoption agencies are taking illegal measures to secure children.[94] While the IAA intends to aid in effectuating the Hague Convention, it sets out incredibly vague standards and applies strictly to the United States, similar to other adoption legislation.[95]

The Immigration and Nationality Act

To deal with countries that operate outside of the Hague Convention, the United States employs The Immigration and Nationality Act ("INA"), which provides procedural guidelines for carrying out some of the same international policies articulated in the Hague Convention.[96] Currently, the INA is the only federal law governing transnational adoptions between the United States and non-signatories to the Hague Convention.[97] Unfortunately, the INA's exceptionally vague provisions invite misinterpretation and poor execution.[98] For example, the INA fails to define terms such as "reasonable expenses."[99] This is problematic because coercion and financial incentives plague the transnational adoption arena.[100] This type of vagueness in regulation prevents government officials from identifying illegal activities and holding parties accountable for perpetuating exploitative adoption practices.[101] In addition, the INA sets an unrealistically high burden for proving immoral practices.[102] It requires concrete evidence or an admission of guilt to prove child buying.[103] This high standard of evidence renders enforcement of the INA exceptionally difficult and acts as a "barrier preventing the INA from deterring child trafficking or any other unethical practices associated with transnational adoption."[104]

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92 Thompson, *supra* note 9, at 461, 466.

93 *Id.* at 459.

94 *Id.* at 466.

95 Katherine Herrmann, *Reestablishing the Humanitarian Approach to Adoption: The Legal and Social Change Necessary to End the Commodification of Children*, 44 FAM.L.Q. 409, 426 (2010).

96 Herrmann, *supra* note 95, at 425.

97 *Id.*

98 *Id.*

99 *Id.* at 426.

100 *Id.*

101 *Id.* at 422, 427.

102 *Id.* at 427.

103 *Id.*

104 *Id.*

The United Nations' International Convention on the Rights of the Child

The United Nations' International Convention on the Rights of the Child ("CRC") is as vague as The Hague Convention and the INA. The United Nations intended the CRC to regulate several steps of the adoption process to meet the best interests of the child involved.[105] The treaty was entered into force in 1990 as the first instrument addressing the full range of children's rights, including civil, cultural, economic, political, and social rights.[106] Currently, the 193 signatories to the CRC include all United Nations member states except Somalia and the United States, which have merely signed the treaty and expressed an intention to ratify it.[107] The United Nations Committee on the Rights of the Child monitors the practices of all signatory nations to ensure compliance with international law.[108]

A unique initiative under the treaty is its proposal to monitor the process by which adults surrender children for adoption. Articles 9 and 10 of the CRC delegate the responsibility of ensuring that a child is not unwillingly separated from his or her birth parents to the parties involved in the adoption proceeding.[109] Addressing this stage of the adoption process is critical because parents who are living in poverty and are desperate for income often relinquish their children for meager financial gain to individuals who exploit the adoption market.[110] While the CRC's approach is necessary to ensure that an adoption does not stem from a circumstance of kidnapping or coercion, critics of the CRC emphasize that it lacks an effective enforcement mechanism.[111]

The Impact of Current Transnational Adoption Legislation

The collective effort by developed countries to halt child exploitation in the transnational adoption process has often had negative effects.[112] Currently, transnational adoption legislation promotes moratoriums on transnational adoption in nations where human rights violations are common in the adoption pro-

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105 Yemm, *supra* note 38, at 560.

106 *Convention on the Rights of the Child: Frequently Asked Questions,* AMNESTY INT'L USA (2007), http://www.amnestyusa.org/our-work/issues/children-s-rights/convention-on-the-rights-of-the-child-0 [hereinafter AMNESTY INT'L USA].

107 AMNESTY INT'L USA, *supra* note 106; *see also* Convention on the Rights of the Child, G.A. Res. 44/25, 1577 U.N.T.S. 3, art. 9-10 (Nov. 20, 1989) [hereinafter Convention on the Rights of the Child].

108 AMNESTY INT'L USA, *supra* note 106.

109 Convention on the Rights of the Child, *supra* note 107.

110 Thompson, *supra* note 9, at 448.

111 Herrmann, *supra* note 95, at 424.

112 Yemm, *supra* note 38, at 563 (There is considerable debate as to whether international mechanisms and adoption legislation, intended to support the best interests of children, have instead hindered those interests by requiring expensive and time-consuming systems, such as effectuating moratoriums on transnational adoptions); *see also* Thompson, *supra* note 9, at 449-450 (When moratoriums are in place, children must wait for an indefinite time frame until suspension is lifted and endure subpar living conditions. In Cambodia, since the suspension of transnational adoption services in 2001, the mortality rate of orphans under the age of five has consistently increased as children suffer from malnutrition and other illnesses related to the conditions of their environment).

cess.[113] Moratoriums that result from the implementation of the Hague Convention, the INA, and the CRC, are intended to encourage nations to "develop the appropriate administrative structures and capacity"[114] to ensure that adoption functions in the best interests of the children involved. However, "in reality, compliance with the Hague and other adoption reforms seems to do little to serve the best interests of children and more to improve international perception of the sending country."[115] For example, implementation of the Hague Convention stalled all transnational adoption proceedings between participants of the Convention and Guatemala.[116] The freeze of adoptions from Guatemala became effective in 2007.[117] While the Guatemalan government made significant reforms in its legislation, including taking steps to conform to the Hague Convention, five years passed before the United States lifted the moratorium.[118] Throughout this process, the international community offered no solutions to the conditions, nor did it make any efforts to help Guatemala expedite legislative reform.[119]

Similarly, the United States and several other nations suspended Cambodian adoption proceedings in 2001 due to allegations of fraud and child trafficking.[120] In 2013, the U.S. Department of State Bureau of Consular Affairs made an official statement on its website stating that concerns were still high regarding Cambodia's implementation and enforcement of the Convention's ethical guidelines despite Cambodia's adoption of the Hague Convention and attempts to reform its child welfare system.[121]

Freezing transnational adoption proceedings is often detrimental to the well-being of the child.[122] Stalling adoption proceedings leave orphans vulnerable to countless risks in their native countries including crime, drug abuse, and child prostitution.[123] For example, thousands of adoption cases remained pending due to the temporary hold on adoption programs during the five-year moratorium

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113 Yemm, *supra* note 38, at 562; *see also* National Council for Adoption*, Country Updates*, https://www.adoptioncouncil.org/intercountry-adoption/country-updates.html (last visited Feb. 11, 2014) (To date, several countries have suspended all intercountry adoptions until further notice due to non-compliance with transnational adoption laws. These include Bhutan, Cambodia, Ghana, Russia, Rwanda, Vietnam, Guatemala, Haiti, Kazakhstan, Kyrgyzstan and Montenegro).

114 COMMISSION OF THE EUROPEAN COMMUNITIES, 2001 REGULAR REPORT ON ROMANIA'S PROGRESS TOWARDS ACCESSION 24-25 (2001), *available at* http://ec.europa.eu/enlargement/archives/pdf/key_documents/2001/ro_en.pdf.

115 Yemm, *supra* note 38, at 563.

116 *Id.* at 562.

117 *Id.* at 571.

118 *Id.*

119 *Id.* at 572.

120 Thompson, *supra* note 9, at 448-49.

121 *Cambodia — Intercountry Adoption,* BUREAU OF CONSULAR AFF., U.S. DEPARTMENT OF STATE (Oct. 2009) http://adoption.state.gov/country_information/country_specific_info.php?country-select=cambodia (last visited Jan. 2, 2013).

122 Thompson, *supra* note 9, at 451.

123 *Id.* at 448.

imposed on Guatemala.[124] Without any concrete timeline, children wait for suspensions to be lifted with the risk that they may not qualify for adoption by the time the moratoriums are removed.[125] For example, Cambodia's domestic law prohibits the adoption of children over the age of eight.[126] Therefore, while a Cambodian child may satisfy the age requirement for adoption today, his chance of finding a new family is ruined if he is too old for adoption once the moratorium is lifted. Such laws complicate the adoption process even further and only harm the children involved. In addition, children are left to live in sometimes violent and corrupt environments, deprived of the necessary and deserved care.[127] Given that these children usually originate from impoverished regions of the world, they experience poor hygiene, unsanitary water supply, low quality medical treatment, and malnutrition, leaving them susceptible to disease and infection including malaria, dengue fever, acute respiratory infection, typhoid, tuberculosis, and anemia.[128] For these reasons, the mortality rate of Cambodian children has risen since the moratorium was instituted in Cambodia.[129]

V. The Breakdown of CHIFF

In September 2013, United States Senators Mary Landrieu and Roy Blunt introduced the Children in Families First Act ("CHIFF") to the United States Senate and in October 2013, United States Representatives Kay Granger and Karen Bass introduced the bill to the United States House of Representatives.[130] While Congress has not yet voted on the bill, Senator Landrieu and her supporters continue to garner co-sponsorship.[131] CHIFF's primary goal is to timely match children in need of homes with adoptive parents.[132] The Act further stresses the importance of providing children with safe homes and relieving them of the subpar conditions often associated with their current environment.[133] In addition, it strengthens transnational adoption within the United States and around the world to ensure that it becomes a viable and fully developed option for families.[134]

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124 Yemm, *supra* note 38, at 572.

125 *Id.*

126 Thompson, *supra* note 9, at 451.

127 Poulin, *supra* note 17, at 39-40 (Millions of teenagers and children are brought into the sex trade annually and live in the red-light districts of urban metropolises in their own countries or those nearby including the Philippines, Indonesia, India, Malaysia, Vietnam, Poland and Germany. These environments are plagued with acts of violence, kidnapping, and rape); *see also infra* note 156 ("Every day, all over the world, more children find themselves living without families – on the streets, in orphanages, in refugee camps").

128 Thompson, *supra* note 9, at 450.

129 *Id.* at 449.

130 Children in Families First Act of 2013, H.R. 3323, 113th Cong. (2013) [hereinafter CHIFF]; *see also Support CHIFF- Get Involved*, Children in Families First, http://childreninfamiliesfirst.org/support-chiff-get-involved/.

131 *Legislation: Children in Families First Act*, Children in Families First (Apr. 8, 2014), *available* at http://childreninfamiliesfirst.org/legislation-chiff/.

132 CHIFF, *supra* note 130, at 6.

133 *Id.* at 1.

134 *Id.*

Specifically, CHIFF proposes various measures to achieve its goals through realignment of certain international child welfare responsibilities and functions (Title I), annual reporting (Title II), promotion of a comprehensive approach for children in adversity (Title III), and funding and effective dates (Title IV).[135]

Within Titles I, II, and IV of CHIFF seven sections pertain specifically to transnational adoption.[136]

Title I – Realignment of Certain International Child Welfare Responsibilities and Functions

- Section 101 of Title I establishes a Bureau of Vulnerable Children and Family Security in the Department of State, which develops and implements child welfare laws, regulations, and policies in foreign nations.[137] The Bureau also creates policies to ensure that children involved in both domestic and transnational adoptions are provided with permanent family care in a timely manner.[138]
- Section 102 of Title I briefly lays out the responsibilities of the United States Citizenship and Immigration Services ("USCIS") for the accreditation of adoption service providers.[139] The accreditation process is adopted from the IAA and the responsibilities assigned to the USCIS include, in part, working with the Secretary of State to operate a publically accessible database of adoption service providers.[140] Under the provision, the database must include detailed information regarding international and domestic adoption agencies, including the accreditation status of an agency, descriptions of any sanctions filed against the agency, and the number of applications filed, denied, and approved at the agency.[141]
- Section 104 of Title I addresses the responsibilities of the Director of the USCIS for adoption-related case processing.[142] This includes the responsibility to make case-specific decisions on all transnational adoption cases prior to the application process for the adopted child's immigrant visa.[143] In addition, the Director of the USCIS ensures that each child is eligible to immigrate to the United States before the adoption or grant of legal custody is issued and prior to the removal of the child from his or her country of origin.[144] Section 104 also ad-

135 *Legislation: Children in Families First Act*, *supra* note 131, at 2.

136 CHIFF, *supra* note 130, at 2.

137 *Id.* at 12.

138 *Id.* at 16.

139 *Id.* at 22.

140 *Id.* at 24, 27.

141 *Id.* at 28.

142 CHIFF, *supra* note 130, at 41.

143 *Id.*

144 *Id.* at 42.

dresses steps the United States would take in cooperating with foreign governments, specifically non-Hague Convention countries.[145] The Act specifies that the Department of Homeland Security may accept adoption petitions on behalf of children living in a non-Convention country, but the Department may only interact directly with that country's central adoption authority in conducting adoption affairs.[146]

Title II – Annual Reporting

- Sections 201 of Title II delegates the Secretary of State and Director of the United States Agency for International Development with the task of creating detailed annual reports pertaining to children living without families and countries where severe forms of child trafficking is prevalent.[147] These reports are submitted to Congress for review and later discussed between the parties in more detail.[148] The reports covered by Section 201 include a vast range of information including child nationality, living conditions, documentation type, parental status, the average time required for completion of immigration proceedings, and the range of adoption fees associated with transnational adoptions.[149] The Agency for International Development is responsible for reviewing trends to determine the highest areas of concern for parentless children and for proposing programs to address these areas.[150] The Act lays out a very specific timeline as to when the reports will be submitted, as well as when all parties will meet to discuss their contents.[151]
- Section 202 of Title II aligns itself with provisions previously set out in the Foreign Assistance Act of 1961 ("FAA") and further requires an in depth trafficking report that details specific steps foreign governments have taken in reducing the number of orphaned, abused, neglected, and exploited children of those countries.[152]

Title IV – Funding and Effective Dates

Sections 401 and 402 of Title IV provide proposals for financial funding and programming to help newly orphaned children.[153] This includes the

[145] *Id.* at 45.
[146] CHIFF, *supra* note 130, at 45.
[147] *Id.* at 56, 61.
[148] *Id.*
[149] *Id.* at 57-60.
[150] *Id.* at 58.
[151] *Id.* at 56.
[152] CHIFF, *supra* note 130, at 61.
[153] *Id.* at 71.

establishment of an emergency fund for children in adversity.[154] These funds are intended to address situations of civil unrest and disaster in foreign countries with rapid impact programs.[155]

VI. Analysis

CHIFF will likely be an effective mechanism to advance the transnational adoption process. However, additional reform is critical to create lasting change for many countries. CHIFF takes unprecedented steps toward creating material change by addressing the risks associated with transnational adoption such as child commodification, adoption fraud, and the prolonged adoption process.[156]

Legislative Reform Stemming from CHIFF

Resolving the issue of prolonged transnational adoption proceedings extends beyond reforming domestic government procedures.[157] Two methods are necessary toward reforming the transnational adoption arena. The first is facilitating change in the law and policy of nations from which adoptees originate. Parties must ensure that investigative measures are taken to verify the legitimacy of transnational adoptions. The second step consists of changing the law and policy of the United States and nations that are accepting adoptees. These nations have a duty to provide a second opportunity for verifying the legality and legitimacy of adoption proceedings in foreign nations.

CHIFF works to detail program initiatives, set project deadlines for these initiatives, delegate the tasks and procedures laid out it its provisions to specific government roles, and establish concrete budget restrictions.[158]

CHIFF sets out a plan to establish model programs for developing nations that aim to integrate health, nutrition, developmental protection, and caregiving support for vulnerable children and families.[159] The government's role in providing assistance to these programs will manifest through international, nongovernmental, and faith-based organizations.[160] Furthermore, CHIFF provides adoption re-

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[154] *Id.* at 71-2.

[155] CHIFF, *supra* note 130, at 71-2.

[156] *Legislation as Part of the Solution,* Children in Families First – CHIFF (2014), *available at* http://childreninfamiliesfirst.org/wp-content/uploads/2014/03/Children-in-Families-First-one-pager-2014-03-18.pdf (CHIFF focuses on streamlining, simplifying, and consolidating responsibilities involved in transnational adoptions for a more efficient process and implements a plan aimed specifically at children living in adversity that provides authority and oversight of resources).

[157] Richard Carlson, *Seeking the Better Interests of Children with a New International Law of Adoption*, 55 N.Y.L. Sch. L. Rev. 733 (2010).

[158] *Legislation: Children in Families First Act*, *supra* note 131, at 2 (Titles I through IV of CHIFF set out steps for realigning certain international child welfare responsibilities and functions, reporting of the transnational adoption landscape annually, generating funding to implement CHIFF's goals, and establishing project time-frames (i.e. effective dates)).

[159] Carlson, *supra* note 157.

[160] CHIFF, *supra* note 130, at 65.

form in low-income nations it considers target countries.[161] In an effort to ensure long-term assistance, CHIFF facilitates measures for the Administrator of the United States Agency for International Development and Secretary of State to carry out action plans for a minimum of five years in at least six countries that the government classifies as priority nations.[162]

The Act works as a model for global reform by establishing specific programs and initiatives in developing nations that need guidance (i.e. priority nations).[163] In addition to setting up international programs, the Act gathers information on foreign orphanages and orphaned children from annual reports and data.[164] The Act acknowledges that while many governments in other countries seek models that promote child placement, they often "lack the resources or infrastructure to adequately address this need."[165] In addition, the Act provides very specific proposals, budgeted costs, and timelines unlike previous legislation that consists of ambiguous language.[166]

Social Reform and Global Outreach Efforts Stemming from CHIFF

Transnational adoption is often viewed as a nuisance rather than a solution for orphaned children as evidenced in countries like Romania and Russia, which push for domestic over foreign adoptions.[167] Furthermore, issuing moratoriums tends to strain relationships between nations, especially because members of the global community often refuse to help developing nations reform once an adoption moratorium is in place.[168] However, orphaned children suffer indefinitely when nations issue moratoriums and refuse to permit adoptions from a foreign nation.[169] Once adoption is no longer an option, orphans return to a life of poverty and become vulnerable to exploitation.[170] Efforts to aid developing countries in adoption reform will enable the global community to keep adoption channels open and ensure that orphaned children are afforded the right to a family. To achieve transnational adoption reform, the global community must implement strategies that promote comity between nations and make transnational adoption an appealing and safe option. The implementation of CHIFF would act as a catalyst for this reform, encouraging other nations to clarify ambiguous language in adoption legislation and turn policy into tangible results. By simplifying the domestic procedure for screening the legitimacy of transnational

[161] Kathryn Whetten, *What's Wrong with the Children in Families First Act*, DUKE GLOBAL HEALTH INST. (Nov. 1, 2013), https://globalhealth.duke.edu/media/news/whats-wrong-children-families-first-act.

[162] CHIFF, *supra* note 130, at 69.

[163] CHIFF, *supra* note 130, at 69.

[164] *Id.* at 28.

[165] *Id.* at 3.

[166] CHIFF, *supra* notes 130 and 149.

[167] Carro, *supra* note 18, at 134, 140-41.

[168] Yemm, *supra* note 38, at 572.

[169] Thompson, *supra* note 9, at 448.

[170] *Id.*

adoptions, CHIFF has the potential to strengthen transnational adoption domestically and globally.[171]

Efforts to address corruption in transnational adoption have traditionally consisted of penalizing those nations that violate international human rights by implementing moratoriums.[172] However, this approach has continuously failed to address underlying issues of corruption and as a result, orphaned children in these nations suffer more than their offenders.[173] It often takes decades for countries with moratoriums in effect to effectuate and fully implement policies that abide by international standards because they are usually working alone with no assistance or guidance from the global community.[174] Children remain in orphanages with inferior living conditions indefinitely, eventually growing beyond the legal age requirement to qualify for adoption.[175]

Promoting uniform and unambiguous adoption legislation, as well as encouraging the global community to assist developing nations in adoption reform, is essential to create diplomacy between nations. Creating a supportive environment for nations that need adoption reform is crucial to ensure nations cooperate and abide by transnational adoption standards. There is no doubt that CHIFF will be a more efficient mechanism than the current adoption policy in providing homes for children in need. However, further government efforts are necessary, in countries sending and receiving adoptees, to address the underlying issue of corrupt adoption practices.

VII. Proposal

Current adoption policy lacks consistency and demonstrates a need for uniformity amongst various transnational adoption laws to ensure that nations are held accountable for regulating adoption practices and promoting ethical norms.[176] Developing uniform standards "involves a fusion of international norms of human rights with different domestic, political and social policies [because] adoption, although a legal process, is dependent in many ways on the cultural aspects of a country's population."[177]

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171 *Legislation as Part of the Solution, supra* note 156 and accompanying text.

172 Yemm, *supra* note 38, at 563; *see also* National Council for Adoption, *supra* note 113 (Indefinite suspension of transnational adoptions is a common response from the global community when a nation violates transnational adoption laws).

173 *See* Poulin, *supra* note 127 and accompanying text.

174 Yemm, *supra* note 38, at 571-72 (Reforms led by the Hague Convention require poverty-stricken countries, like Guatemala, to revamp their adoption systems without the financial means to do so. In attempting to comply with transnational adoption standards, the Guatemalan Department of Social Welfare started building a foster care system; but as of 2010 it had only recruited 45 domestic foster families in a country of 13 million. In addition, the Guatemalan National Council on Adoptions notified the U.S. of its desire to launch a "limited two-year pilot adoption program". While expressing a desire for Guatemala to expedite reforms, the U.S. government and State Department have not offered any solutions to remedy the conditions).

175 Thompson, *supra* note 9, at 451.

176 *See* Thompson, *supra* note 91 and accompanying text.

177 Stephanie Zeppa, *"Let Me In, Immigration Man": An Overview of Intercountry Adoption and the Role of the Immigration and Nationality Act*, 22 HASTINGS INT'L & COMP. L. REV. 161, 163 (1998).

Changing Legislation

Fortunately, CHIFF will implement several procedures necessary to bring about effective change where previous global legislation has failed, including providing clarifications for vague language to help participants better interpret and implement adoption practices. However, further measures, beyond those set out in CHIFF, are necessary to accomplish lasting reform. For example, legislation should require mandatory licensing to establish foreign facilitators as employees of adoption agencies for international and domestic accountability. Furthermore, establishing a routine review process is essential for nations and organizations to uphold the standards set by adoption policies. Such a review process will also ensure conformity because all parties will be held equally accountable for their efforts in implementing ethical practices. In addition, legislation must institute a concrete and consistent system of enforcement mechanisms to address parties partaking in immoral practices at every level of the adoption process, without sabotaging adoption proceedings nationwide whenever discrepancies are discovered. In addition to subjecting violators to constant close monitoring, these methods should include enforcing monetary sanctions on specific agencies that violate transnational adoption law.

Changing Social Norms

Community outreach is an essential component in resolving underlying human rights violations in adoption. While legislation like CHIFF is a step toward addressing the human rights issues surrounding transnational adoptions, policy reform alone will never be a solution to such a complex global crisis. Instead, policy makers must consciously link new adoption reform with efforts to improve living conditions for children being adopted, as well as their birth parents.[178] In many impoverished nations, there is widespread acceptance of disregarding orphans' well-being in exchange for compensation.[179] One of the only ways to counteract this mindset is to remove financial incentives associated with transnational adoption, which fuels corrupt practices. It is just as important for adoption agencies to educate prospective adoptive parents on the importance of giving back to their child's birth country. Not only will doing so help familiarize adoptive parents with the customs of their child's birth country, but it will help improve the living conditions of other families and children experiencing severe hardship. Lastly, agencies must educate parents on how to recognize signs of corrupt practices in transnational adoption proceedings and take steps toward reporting this activity.

[178] Elizabeth Bartholet, *International Adoption: Thoughts on the Human Rights Issues*, 13 BUFF. HUM. RTS. L. REV. 151, 196 (2007).

[179] Kevin Voigt, *International Adoption: Saving Orphans or Child Trafficking*, CNN (2013), *available at* http://www.cnn.com/2013/09/16/world/international-adoption-saving-orphans-child-trafficking/ (Brokers, who source children for adoption agencies, typically earn as much as 5000 USD per child that they deliver, substantially more than they would otherwise earn. As a result, whole economies tend to emerge when transnational adoption starts to thrive in a developing nation and many individuals see adoption as a lucrative business).

Due to the rise in child commodification, there is a need for continued community outreach in addition to legislative policy that takes measures to change societal attitudes regarding transnational adoption. Only by addressing each nation's underlying human rights issues in transnational adoption can adoption channels be safely reopened. The United States government should ratify CHIFF because the Act is an effective mechanism in regulating transnational adoption practices.

VIII. Conclusion

Both community outreach efforts and legislative reform are critical toward effectively addressing issues of child commodification and reopening transnational adoption channels for prospective parents. To date, the global community has used international laws and policies to combat human rights violations in adoption by penalizing developing countries. However, this approach fails to result in permanent transformational change.

To ensure global cooperation, nations must work to build supportive environments that consist of providing necessary aid to other nations instead of severing ties. Nations must stop resorting to moratoriums as a default response to child exploitation and adoption fraud without taking initiative to proactively aid in reform. The process of reopening adoption channels is prolonged when developing countries must navigate without any outside assistance. As a result, orphaned children remain without a permanent home and family. Assisting nations with a long history of corrupt adoption practices will not only promote comity, but it will also encourage uniformity in policy and procedure.

The legislative aspect of adoption reform is equally important in addressing corruption. Aside from uniformity in policy, nations must work together to achieve more unambiguous laws that are easy to interpret and produce concrete results. Reforming legislative efforts is crucial in mitigating child commodification and reopens transnational adoption channels, making transnational adoption more accessible for families.

If enacted, CHIFF will operate as a guide for future adoption legislation that provides specific initiatives, goals, and measures for globally effectuating reform. However, adopting the Children in Families First Act will not alone eradicate the many injustices in inter-country adoptions. Global commitment to reforming societal standards within developing nations is a critical component in mitigating the commodification of orphans and reopening transnational adoption channels.

Olympic-sized Opportunity: Examining the IOC's Past Neglect of Human Rights in Host Cities and the Chance to Encourage Reform on a Global Scale

Chad Nold*

I. Introduction

The XXII Winter Olympiad officially began with the opening ceremony on February 7, 2014, in Sochi, Russia.[1] The International Olympic Committee ("IOC")[2] awarded Sochi the Games over PyeongChang, South Korea, and Salzburg, Austria, at the 119th IOC Session on July 4, 2007.[3] The Sochi Olympics, which cost an estimated $50 billion to prepare for, featured 2,850 athletes from 89 different countries.[4] 1,300 medals were manufactured for the Games, to be awarded across 98 different events.[5] However, these numbers pale in comparison to the 2,000 families that were evicted from their homes in order to stage the Games.[6] In Beijing in 2008, there were reports of Beijing cracking down on political dissidents leading up to the Games – including several people who were jailed for their dissent.[7]

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1 Sochi 2014 Olympics Games, Olympic Movement, http://www.olympic.org/sochi-2014-winter-olympics (last visited Jan. 13, 2014) [hereinafter Olympic Movement]. However, the first event, ladies' moguls qualifying, actually started on February 6, 2014, but the opening ceremonies are generally recognized as the start of the Games.

2 The IOC is in charge of overseeing the Olympic Movement pursuant to the Olympic Charter. *See generally, Olympic Charter*, Int'l Olympic Comm. (Feb. 11, 2010), http://www.olympic.org/Assets/Sport_for_all/olympic_charter.pdf; *see infra* Part II.B [hereinafter Int'l Olympic Comm.].

3 Olympic Movement, *supra* note 1. PyeongChang was eventually awarded the honor to host the 2018 Winter Olympics. *See generally 2018 Host City Election*, Olympic Movement, http://www.olympic.org/content/the-ioc/bidding-for-the-games/past-bid-processes/election-of-the-2018-host-city/ (last visited Jan. 13, 2014).

4 Richard Allen Greene, *Sochi 2014: Winter Olympics by the numbers*, CNN (Jan. 10, 2014, 11:30 AM), http://edition.cnn.com/2014/01/08/world/europe/russia-sochi-numbers/?hpt=isp_t2.

5 *Id.*; *Sochi 2014 Unveils Olympic Medals*, Olympic Movement (May 30, 2013), http://www.olympic.org/news/sochi-2014-unveils-olympic-medals/199839.

6 *Russia's Olympian Abuses*, Human Rights Watch, http://www.hrw.org/russias-olympian-abuses (last visited Jan. 13, 2014) [hereinafter Human Rights Watch]; *see generally* Jessica Blumert, Note, *Home Games: Legal Issues Concerning the Displacement of Property Owners at the Site of Olympic Venues*, 21 Cardozo J. Int'l & Comp. L. 153 (2012).

7 Leading up to the Games, it was reported that China's government stepped up efforts to silence those who spoke out against unreported human rights abuses in the country. Jim Yardley, *Dissident's Arrest Hints at Olympic Crackdown*, N.Y. Times (Jan. 30, 2008), http://www.nytimes.com/2008/01/30/world/asia/30dissident.html?pagewanted=all&_r=0.

IOC's Past Neglect of Human Rights in Host Cities

Human rights abuses are not new to the Olympic landscape, and at the center of these controversies is the IOC, which is in charge of every aspect of the Olympic Games, including choosing the host cities.[8] Although the IOC historically tries to avoid political controversies,[9] it has been at the center of reform and improvement in the past. Most notably, the IOC played a role in helping end apartheid in South Africa.[10] In 1994, the IOC officially recognized the importance of two more political issues – sustainable development and the environment.[11] Furthermore, the IOC is in a unique position to be at the center of furthering respect and compliance with another political issue in the future: human rights laws.

This Comment proposes that the IOC should use its power to amend the Olympic Charter and require that a nation's human rights record play a role in the Olympic host city selection. The IOC should require that all countries seeking to host the Olympic Games submit a report to the IOC Working Group during the first phase of the host city selection process. The report should detail each country's human rights legislation and initiatives that show support for international human rights laws.

Part II of this Comment will address the idea of human rights from a broad scope. It will examine the Olympic movement and the purpose, structure, and goals of the IOC. Finally, the history of human rights abuses for Olympic host cities will be discussed in detail. Part III of this Comment will discuss the IOC's position on human rights and the historical use of the Olympics as a means to combat human rights abuses. In addition, Part III will also examine the Olympic site selection process. Part IV of this Comment will highlight competing arguments on what the IOC's role should be with regard to Olympic host cities and the selection process in general, and will analyze the problems associated with the current site selection process. Part V of this Comment suggests that the IOC should utilize its influence in selecting the host city for each Olympics to require bidding cities to discuss its stance and practices regarding the protection of basic human rights. Further, the feasibility of this proposal will be examined, and the benefits of the proposal on a global scale to demonstrate why the IOC should consider human rights.

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[8] Int'l Olympic Comm., *supra* note 2, at 68.

[9] *See infra* Part III.

[10] *See infra* Part III.B.

[11] *Factsheet: The Environment and Sustainable Development*, Int'l Olympic Comm. (Jan. 2014), http://www.olympic.org/documents/reference_documents_factsheets/environment_and_substainable_developement.pdf. The IOC's commitment to a sustainable future was officially included in the Olympic Charter in 1996, requiring that the IOC "encourage and support a responsible concern for environmental issues, to promote sustainable development in sport and to require that the Olympic Games are held accordingly." *See also* Int'l Olympic Comm., *supra* note 2, at 15.

II. Human Rights and the Olymic Structure

A. International Human Rights in General

The United Nations Universal Declaration of Human Rights ("UDHR"), which recognizes "the inherent dignity and . . . the equal and inalienable rights of all members of the human family,"[12] is generally considered the foundation of international human rights law.[13] The UDHR serves as a baseline to measure a state's respect for and compliance with international human rights standards.[14] The IOC, which the United Nations recognizes as an international organization having legal status within the United Nations framework,[15] could also utilize the UDHR as its own standard in evaluating the human rights situation of member states.

B. Overview of the Olympic Structure

The dominant institutional framework within the process of international sports law is the Olympic movement.[16] "The Olympic Movement is the concerted, organised, universal and permanent action, carried out under the supreme authority of the IOC, of all individuals and entities who are inspired by the values of Olympism."[17] The goal of Olympism[18] is to "place sport at the service of the harmonious development of humankind"[19] and to promote a peaceful society focused on preserving human dignity.[20]

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[12] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), at Preamble (Dec. 10, 1948) [hereinafter G.A. Res. 217 (III) A].

[13] *Fact Sheet No.2 (Rev.1), The International Bill of Human Rights*, UNITED NATIONS (June 1946), http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf. The UDHR was adopted in 1948 as a common standard to teach, promote, and secure respect for the universal rights and freedoms of all people. It was the first time that the international community made a declaration of human rights and fundamental freedoms. The UDHR has been at the foundation of more than 80 international human rights treaties and declarations. *See also* The Foundation of International Human Rights Law, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS LAW, http://www.un.org/en/documents/udhr/hr_law.shtml (last visited Jan. 13, 2014).

[14] While by no means an exhaustive list, other sources for international human rights in addition to the Universal Declaration of Human Rights that make up the "International Bill of Human Rights" include: International Covenant on Economic, Social and Cultural Rights; International Covenant on Civil and Political Rights and its two Optional Protocols. UNITED NATIONS, *supra* note 13.

[15] Paul Mastrocola, Note, *The Lord of the Rings: The Role of Olympic Site Selection as a Weapon Against Human Rights Abuses: China's Bid for the 2000 Olympics*, 15 B.C. THIRD WORLD L.J. 141, 147 n.48 (1995).

[16] JAMES A.R. NAFZIGER, INTERNATIONAL SPORTS LAW 2 (Transnational Publishers, Inc., 2d ed. 2004).

[17] INT'L OLYMPIC COMM., *supra* note 2, at 15. Further, the Olympic Movement "encompasses organisations, athletes and other persons that agree to be guided by the Olympic Charter."

[18] Olympism is defined as a philosophy of life blending sport with culture and education that "seeks to create a way of life based on the joy of effort, the educational value of good example, social responsibility and respect for universal fundamental ethical principles." INT'L OLYMPIC COMM., supra note 2, at 11.

[19] INT'L OLYMPIC COMM., *supra* note 2, at 11.

[20] *Id.*

The Olympic Charter[21] sets forth objectives and governs the organization, action and operation of the Olympic Movement.[22] The main goal of the Olympic Movement "is to contribute to building a peaceful and better world by educating youth through sport practised in accordance with Olympism and its values."[23] The IOC is in charge of implementing the Olympic Charter, and in turn overseeing the Olympic Movement.[24]

The IOC is the "central organ" of the Olympic system.[25] It is bound by the statutes set forth in the Olympic Charter.[26] It is a non-profit, non-governmental organization ("NGO"), consisting of 110 individuals.[27] The IOC has sixteen functions, including coordinating, organizing, and developing sport and sporting competitions; taking measures to strengthen the Olympic Movement; and overseeing the regular celebration of the Olympic Games.[28] In addition, the IOC is in charge of selecting a host city for each Olympic Games.[29] Further, the IOC must ensure that neither it, nor any of its member organizations, "act[s] against any form of discrimination affecting the Olympic Movement."[30] Ultimately, the IOC's most fundamental role is "to ensure the respect and interpretation of the Olympic Charter."[31]

In addition to the IOC, there are two main constituents of the Olympic Movement: International Sports Federations ("IFs") and National Olympic Committees ("NOCs").[32] Further, Organizing Committees of the Olympic Games ("OCOGs"), national associations, clubs and persons belonging to the IFs and NOCs – specifically, athletes – and judges, referees, coaches or other sports officials fall under the umbrella of the Olympic Movement.[33] Belonging to the Olympic Movement requires compliance with the provisions of the Olympic Charter and acceptance and recognition of all IOC decisions.[34] Therefore, every entity that falls under the Olympic Charter must follow the rules and regulations

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[21] The Olympic Charter is the "codification of the Fundamental Principles of Olympism, Rules and By-Laws adopted by the International Olympic Committee." INT'L OLYMPIC COMM., *supra* note 2, at 9.

[22] *Id.*

[23] *Id.* at 15.

[24] *Id*.

[25] Mastrocola, *supra* note 15, at 143.

[26] INT'L OLYMPIC COMM., supra note 2, at 9.

[27] *Id.* at 29. The IOC is an international NGO based in Lausanne, Switzerland, the Olympic Capital. *Id.* There are currently 107 members, 31 honorary members and one honour member. *IOC Members*, OLYMPIC MOVEMENT, http://www.olympic.org/ioc-members-list (last visited Jan. 13, 2014). The maximum number of members may not exceed 115. *Id.* at 30. Members are elected during the IOC Session, discussed *infra* at note 84, pursuant to Rule 16 of the Olympic Charter. *Id. See also* Mastrocola, *supra* note 15, at 144.

[28] INT'L OLYMPIC COMM., *supra* note 2, at 14; *see also* NAFZIGER, *supra* note 16, at 19.

[29] INT'L OLYMPIC COMM., *supra* note 2, at 68; *see infra* Part III.C.

[30] INT'L OLYMPIC COMM., *supra* note 2, at 16.

[31] NAFZIGER, *supra* note 16, at 19.

[32] INT'L OLYMPIC COMM., *supra* note 2, at 15.

[33] *Id.*

[34] *Id.* at 16.

promulgated by the IOC. For individual states, the NOCs bear the responsibility of ensuring that their respective states act in accordance with the Olympic Charter.[35] Furthermore, all IOC decisions must be made to advance the Olympic ideal of creating a better and more peaceful world.[36]

C. Human Rights and the Olympic Host Cities

Despite the fact that states normally follow the rules and practices of the Olympic legal framework[37] – as dictated by the IOC – the IOC has not made the respect for human rights a central tenet of the Olympic Charter.[38] However, there are various sections of the Olympic Charter that suggest that the protection and furtherance of basic human rights is in conformity with the Olympic ideals.[39] Nevertheless, there is an unfortunate history of human rights abuses occurring at Olympic host cities before, during, and after the conclusion of the Games.

Human rights violations in the context of the Olympics take on several different forms.[40] While each Olympic Games faces its own unique challenges, one of the most prevalent human rights abuses that have occurred during the lead up to recent Olympic Games is the forced evictions of local citizens to build infrastructure for use in the Games.[41] The right to adequate housing[42] was first established as an international human right in the UDHR.[43] The IOC has not addressed this right in the Olympic Charter, but the right is nevertheless implicated in the con-

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35 NAFZIGER, *supra* note 16, at 23. The Olympic Charter states that: "The mission of the NOCs is to develop, promote and protect the Olympic Movement in their respective countries, in accordance with the Olympic Charter." INT'L OLYMPIC COMM., *supra* note 2, at 61.

36 Mastrocola, *supra* note 15, at 145.

37 Mastrocola, *supra* note 15, at 147 n.43.

38 *See generally* INT'L OLYMPIC COMM., *supra* note 2.

39 INT'L OLYMPIC COMM., *supra* note 2, at 12 ("Any form of discrimination with regard to a country or a person on grounds of race, religion, politics, gender or otherwise is incompatible with belonging to the Olympic Movement"). The Olympic Charter also makes the practice of sport a human right. *Id.* at 11. Moreover, furthering human rights in general is arguably consistent with the goals set forth in the Olympic Movement.

40 Since the concept of human rights is so expansive, for purposes of this section only, the primary focus will be on issues related to the right to adequate housing and forced evictions, which nearly always arise during the lead up to the Olympics. However, there are several other ways human rights violations occur leading up to and during the Olympics that are not discussed in this Comment. For more insight into the right to adequate housing, *see generally* Blumert, *supra* note 6.

41 Blumert, *supra* note 6, at 176. In Seoul in 1988, 15% of the population was forcibly evicted; in Atlanta in 1996, approximately 15,000 low-income residents were forced to leave the city, 1,200 affordable housing units were destroyed, and homelessness was made illegal; and in Beijing in 2008, over 1.25 million people were displaced.

42 The right to "adequate housing" includes: legal security and tenure; adequate services, materials, and infrastructure; affordability; habitability; accessibility; location; and cultural adequacy. United Nations, Comm. On Econ., Soc. and Cultural Rights, General Comment No. 4: The Right to Adequate Housing, U.N. Doc. E/1992/23 (Dec. 13, 1991).

43 G.A. Res. 217 (III) A, *supra* note 12, at art. 25 (The UDHR states that all people have "The right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.").

text of the Olympics because host cities need to construct facilities and villages for the purpose of staging the Games, which involves site clearance and the likely displacement of people.[44] Even though host cities often build the Olympic villages for the purpose of creating social housing after the Games are over, issues can arise if the new facilities don't live up to the standards of adequacy that international human rights law requires.[45] This happened following the Vancouver Olympics in 2010, where the Vancouver Olympic organizers originally promised 1,000 social housing units, but only delivered 126 units after the Games.[46]

The right to adequate housing is not the only human right violated in recent Olympics.[47] Forced evictions in Sochi have not been Russia's only issue.[48] Once it was awarded the Games, Russia became involved in numerous international human rights controversies, including the passage of an anti-LGBT propaganda law,[49] restricted press freedom, and migrant worker abuses.[50] Similarly, leading up to the 2008 Summer Olympics in Beijing, there were widespread reports about China's poor human rights record, including abuse of migrant workers who built the Olympic infrastructure, restrictions on media freedom, and increased efforts to silence citizens who spoke out about the conditions leading up to the Games.[51]

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[44] Blumert, *supra* note 6, at 167.

[45] Blumert, *supra* note 6, at 163.

[46] *Id*. at 164. The promise was originally for the entire 1,100-unit Olympic Village to be committed to social housing. Then the promise was cut back to 252 units, but political problems and high construction costs forced the city council to eventually halve that number to the 126 units that were ultimately provided. *Vancouver cuts Olympic Village social housing*, CBC NEWS (Apr. 23, 2010, 8:19 AM), http://www.cbc.ca/news/canada/british-columbia/vancouver-cuts-olympic-village-social-housing-1.882070.

[47] Minky Worden, *The Olympics' Leadership Mess*, N.Y. TIMES (Aug. 12, 2013), http://www.nytimes.com/2013/08/13/opinion/the-olympics-leadership-mess.html?_r=1& (criticizing the 12-year term of then IOC president Jacques Rogge, calling attention to "the glaring contradiction" between the IOC's role as outlined in the Olympic Charter and two Olympics during his tenure – Beijing in 2008 and Sochi in 2014 – with extensive human rights violations).

[48] HUMAN RIGHTS WATCH, *supra* note 6.

[49] The law passed in August 2013 essentially banned the public discussion of gay rights and relationships anywhere that children might hear it. Laura Smith-Spark, *Why Russia's Sochi Olympics are now a battleground for gay rights*, CNN (Aug. 10, 2013, 9:59 PM), http://edition.cnn.com/2013/08/10/world/europe/russia-gay-rights-controversy/index.html. Specifically, the law makes it illegal to tell minors that "traditional" and "non-traditional" sexual relationships are socially equal. Kathy Lally, *Russian law isolates gay teenagers*, WASHINGTON POST (Sept. 6, 2013, 6:00 AM), http://www.washingtonpost.com/world/russias-gay-law-isolates-lgbt-teenagers/2013/09/01/9eec54fc-0c19-11e3-89fe-abb4a5067014_story.html. All Out, a New York-based organization that advocates for equality around the world, collected more than 300,000 signatures on a statement that urged the IOC to criticize the law. Kathy Lally, *IOC: No grounds to challenge Russian anti-gay law as Sochi Olympic Games approach*, WASHINGTON POST (Sept. 26, 2013), http://www.washingtonpost.com/world/europe/ioc-backs-off-on-russian-anti-gay-law/2013/09/26/38b39266-269c-11e3-9372-92606241ae9c_story.html. The IOC has stated that it is satisfied that the law does not conflict with the Olympic Charter. *Id.*

[50] *See generally* HUMAN RIGHTS WATCH, *supra* note 6.

[51] *See China: Olympics Harm Key Human Rights*, HUMAN RIGHTS WATCH (Aug. 7, 2008), http://www.hrw.org/news/2008/08/04/china-olympics-harm-key-human-rights. *See also Olympics Host China Comes Under Fire for Human Rights Concerns*, PBS (Aug. 5, 2008), http://www.pbs.org/newshour/extra/features/world/july-dec08/china_8-05.html. Nevertheless, IOC supported its decision, arguing that Beijing hosting the Olympics has put the spotlight on the country's human rights record, which in turn

Ultimately, the IOC is responsible for choosing the host city for each Olympic Games.[52] As such, the most powerful entity in the international sports law arena[53] will forever be associated with human rights abuses that occur on the most global of stages.[54] But why would the IOC, whose primary role is to "contribute to building a peaceful and better world"[55] through sport, continue to be a party to the abuses of basic, fundamental human rights? In order to make sense of this apparent paradox, it is necessary to first understand the relationship between sports, politics, and the IOC's role in Olympic site selection.

III. IOC's Position pon Human Rights and Its Impact on Olympic Site Selection

A. The IOC Avoids Politics. . .to an Extent

The modern Olympic Games were originally envisioned to be part of an international sports arena that is mutually exclusive of political currents.[56] One of the main goals of the Olympics, and sport in general, is to provide an arena where political differences and disputes are secondary to the ideals of sport.[57] Despite these grand ideals, politics has always been intertwined with the Olympic Games.[58]

The IOC, however, has historically avoided making political decisions.[59] The Olympic Charter prohibits any form of discrimination against a country or individual on political grounds.[60] Reading the Olympic Charter literally, the IOC has

led to improved conditions. *IOC backs China human rights push*, BBC SPORT (Feb. 26, 2008, 8:30 PM), http://news.bbc.co.uk/sport2/hi/olympics/7265593.stm.

52 INT'L OLYMPIC COMM., *supra* note 2, at 68.

53 The Olympic Movement, set forth in the Olympic Charter, is considered the "dominant institutional framework" in international sports law. NAFZIGER, *supra* note 16, at 3-4. The IOC, which is the "supreme authority" of the Olympic Charter, therefore oversees the "dominant institutional framework" in international sports law. *Id.* Further, the IOC's unusual influence on the legal process as an NGO is akin to the International Committee of the Red Cross, which implements "the humanitarian rules of the laws of war." *Id.* at n.12.

54 The opening ceremony at the 2012 London Olympics was watched by an estimated 900 million people around the world, while the opening ceremony for the 2008 Beijing Olympics was watched by 1.2 billion people. Avril Ormsby, *London 2012 opening ceremony draws 900 million viewers*, REUTERS (Aug. 7, 2012, 4:43 PM), http://uk.reuters.com/article/2012/08/07/uk-oly-ratings-day-idUKBRE8760V82 0120807.

55 INT'L OLYMPIC COMM., *supra* note 2, at 15.

56 NAFZIGER, *supra* note 16, at 195. Baron Pierre de Coubertin, the father of the modern Games, believed that international competition among elite amateur athletes could help promote global harmony. *Id.* at 190.

57 Juneau Gary & Neal S. Rubin, *The Olympic Truce: Sport promoting peace, development and international cooperation*, AMERICAN PSYCHOLOGICAL ASSOCIATION, http://www.apa.org/international/ pi/2012/10/un-matters.aspx (last visited Jan. 13, 2014) (Sports offer "a brief respite through which to level the metaphorical playing field.").

58 NAFZIGER, *supra* note 16, at 196.

59 *Id.* at 195. Indeed, the IOC has actually been remarkably successful at refraining from political decision-making.

60 INT'L OLYMPIC COMM., *supra* note 2, at 12. The Olympic Charter also prohibits discrimination against a country or person on the grounds of "race, religion . . . gender or otherwise."

no room to take into account political considerations.[61] However, the issue of human rights creates a conflict between furthering the ideals of the Olympic Movement – which includes promoting and protecting human rights – and making politically-motivated decisions.[62] Thus, while the IOC will generally avoid inserting itself into most political controversies, the limited use of sport to enhance human rights is justified if accomplished within United Nations framework.[63]

B. Olympic Ban Helps End Apartheid in South Africa

The most notable example of the IOC taking action to protect human rights was as part of the international effort to end apartheid in South Africa. South Africa's National ruling party originally banned interracial sport in competition with foreign athletes in 1956, thus implicating the Olympics.[64] The IOC ultimately rescinded its invitation to South Africa for the 1964 Tokyo Olympics after the South Africa National Olympic Committee ("South Africa NOC") did not commit to allowing black athletes to participate in the Games.[65]

Leading up to the 1968 Mexico City Olympics, the IOC sent an investigation commission to determine if South Africa enacted appropriate reforms to comply with the Olympic Charter.[66] At the time, South Africa had adopted a non-discriminatory policy for training, selecting and lodging Olympic athletes.[67] However, South Africa still insisted on segregated trials[68] The IOC originally concluded that this reform was enough to put the South Africa NOC in compliance with the Olympic Charter.[69] However, after 32 nations threatened to boycott the Olympics if South Africa participated, the IOC excluded South Africa from the 1968 Games.[70]

At the conclusion of the 1968 Games, the United Nations requested all states and organizations, including those under the Olympic umbrella, to cease domes-

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[61] Mastrocola, *supra* note 15, at 157; *see also* NAFZIGER, *supra* note 16, at 223.

[62] Mastrocola, *supra* note 15, at 157 n.132. Human rights are a serious issue within the Olympic Movement.

[63] Mastrocola, *supra* note 15, at 159. The IOC's greater recognition and subsequent consideration of human rights laws seems to stem from the combination of a growing body of international human rights laws and increased United Nations efforts to protect against human rights abuses during the 1970s.

[64] Julie H. Liu, Note and Comment, *Lighting the Torch of Human Rights: the Olympic Games as a Vehicle for Human Rights Reform*, 5 NW U. J. INT'L HUM. RTS. 213, 218 (2007). Importantly, this policy was arguably in contravention of the 1978 International Charter of Physical Education and Sport, which states that the right to sport is a human right; South Africa's prohibition against black South African's was a denial of that human right. *Id.* at 219.

[65] *Id.* at 220. In response to IOC's decision to ban them from the Games, South Africa reaffirmed its policies against "competition between the races."

[66] Liu, *supra* note 64, at 220. In its instructions to the investigation commission, IOC President Avery Brundage stated that the IOC "must not become involved in political issues nor permit the Olympic Games to be used as a tool or as a weapon for an extraneous task."

[67] NAFZIGER, *supra* note 16, at 224.

[68] *Id.*

[69] *Id.*

[70] *Id.*; *see also* Liu, *supra* note 64, at 220.

tic sports competitions with South Africa and any organizations and institutions within South Africa that practiced apartheid.[71] Following the United Nations resolution, the IOC voted to exclude both South African competitors from the 1972 Olympics and the South Africa NOC from the Olympic Movement.[72] It wasn't until the 1992 Barcelona Games that South Africa was allowed to participate again.[73] Ultimately, it is impossible to quantify how big a role the IOC boycott of South Africa has actually played in ending apartheid.[74]

It is important to note that the IOC only acted to oppose apartheid under the threat of a mass boycott.[75] Prior to that, it had on multiple occasions demonstrated a willingness to continue to include South Africa in the Olympics pursuant to the idea that no country was to be excluded from the Olympics for political reasons.[76] This overwhelming reluctance to make politically-influenced decisions largely explains the IOC's track-record of selecting host cities with poor human rights records.[77]

C. The IOC has Complete Authority in the Host City Selection Process

The Olympic Charter, which serves as the primary rationale for the IOC's stance on political issues, also grants the IOC the power to select the host city for each Olympic Games.[78] The selection process consists of two phases: the Applicant City Phase and the Candidate City Phase.[79] The first part of the bidding process to host the Games is essentially a screening phase, where each applicant city submits an application to the IOC.[80] The IOC Executive Board appoints a

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[71] NAFZIGER, *supra* note 16, at 225.

[72] *Id.*

[73] Liu, *supra* note 64, at 220.

[74] *Id.* At the very least, excluding South Africa from the most important global stage in sports "sent a powerful message and was an effective resource to induce human rights reform." *Id.* Conversely, Nafziger hypothesized in the alternative, wondering if social change could have been effected more rapidly had governments and sports organizations accepted the "half-loaf of considerable sports integration" South Africa accomplished instead of taking the all-or-nothing approach to ending apartheid that they chose. NAFZIGER, *supra* note 16, at 229.

[75] NAFZIGER, *supra* note 16, at 224-25. The IOC President argued that excluding South African athletes from the Games would harm South Africa's black athletes more than anyone else. The IOC President was quoted as saying, "if participation in sport is to be stopped every time the laws of humanity are violated, there will never be any international contests."

[76] Liu, *supra* note 64, at 218. In addition to originally inviting South Africa to the 1968 Olympics, the IOC was also initially reluctant to take action in 1958 when Norway first proposed excluding South Africa from the Olympics.

[77] Jennifer Gustafson, Comment, *Bronze, Silver, or Gold: Does the International Olympic Committee Deserve a Medal for Combating Human Trafficking in Connection with the Olympic Games?*, 41 CAL. W. INT'L L.J. 433, 459 (2011).

[78] INT'L OLYMPIC COMM., *supra* note 2, at 68.

[79] *All about the bid process*, OLYMPIC MOVEMENT, http://www.olympic.org/content/the-ioc/bidding-for-the-games/all-about-the-bid-process/ (last visited Jan. 13, 2014) [hereinfter OLYMPIC MOVEMENT].

[80] The competent public authorities for the applicant city must submit its bid to the IOC with the approval of the city's NOC. INT'L OLYMPIC COMM., *supra* note 2, at 68. Once the bid is submitted, the city and its respective NOC immediately become jointly responsible to the IOC for its actions and conduct. *Id.* at 69. This has the effect of binding all potential host cities to the Olympic ideals throughout the selection process, but not before the bid is placed. For the eventual host city, if there is a conflict

Working Group to evaluate the applications and make recommendations to the IOC Executive Board on which cities should be considered as candidates to host.[81] Phase II of the bidding process is the Candidate City Phase, where each candidate city fills out a detailed IOC candidate questionnaire and submits it to the IOC for the city's candidature file to be reviewed.[82] Once all bids are submitted, the IOC President appoints an Evaluation Commission to review the candidatures for all candidate cities.[83] The Evaluation Commission then submits a report to the IOC Executive Board, which draws up a final list of candidates to be voted on by all IOC members at the IOC Session for election.[84]

During the Candidate City Phase, the most important part of the candidature file is the IOC's Candidate Procedure and Questionnaire ("Candidate Questionnaire") that each applicant city must fill out.[85] The Candidate Questionnaire is structured into three parts: Candidate Procedure, IOC Questionnaire, and Instructions.[86] The Candidate Questionnaire is one of the principal tools used by the IOC to evaluate each candidate city.[87] An examination of the 2012 Candidate Questionnaire shows that the questionnaire touched on several aspects of each candidate's city bid, including, but not limited to: the principal motivation for hosting the Games; the expected benefits and post-Olympic use of key Olympic infrastructures; the guarantees to the IOC; political support and legal structure in

between the provisions in the Candidate Procedure and the host city contract, the host city contract shall prevail. *2012 Candidate Procedure and Questionnaire: Games of the XXX Olympiad in 2012,* INT'L OLYMPIC COMM. 26 http://www.olympic.org/Documents/Reports/EN/en_report_810.pdf (last visited Jan. 13, 2014) [hereinafter *2012 Candidate Procedure and Questionnaire*].

[81] OLYMPIC MOVEMENT, *supra* note 79. The Working Group submits its conclusions to the IOC Executive Committee, which ultimately selects which cities will be included in the Candidate City Phase of the bidding process. *See also* INT'L OLYMPIC COMM., *supra* note 2, at 69 (stating that the "IOC Executive Board shall decide which cities will be accepted as candidate cities). Further, not every city that wishes to host the Olympics makes it to the Candidate City Phase of the bid process. *2012 Candidate Procedure and Questionnaire*, *supra* note 80.

[82] Mastrocola, *supra* note 15, at 145 (In general, the candidate questionnaire addresses topics such as respect for IOC rules, general and cultural information about the applicant city, organizational matters, and electronic media issues.).

[83] INT'L OLYMPIC COMM., *supra* note 2, at 68-69. The Evaluation Commission is composed of IOC members, representatives of the IFs, the NOCs, the Athletes' Commission and the International Paralympic Committee. Nationals of candidate cities' countries are not eligible. Moreover, the Evaluation Commission may be assisted by experts.

[84] INT'L OLYMPIC COMM., *supra* note 2, at 69. The IOC Session is the general meeting of the members of the IOC. *Id.* at 41. The Olympic Charter grants the Session the authority to elect the host city for each Olympic Games.

[85] Mastrocola, *supra* note 16, at 145. The Candidate Questionnaire also contains explanations about each step of the candidature before the host city is elected. *2012 Candidate Procedure and Questionnaire*, *supra* note 80, at 19.

[86] *2012 Candidate Procedure and Questionnaire*, *supra* note 80, at 19. Part 1 outlines what is required of each candidate city during the second phase of the bid process, and it contains procedures, rules and deadlines. *Id.* The Candidate Procedure once again reaffirms the candidate cities' and their NOC's acceptance of the rules. *Id.* at 29. Part 2 is the IOC questionnaire. *Id.* at 19. Part 3 contains instructions on the candidate city's presentation and submission of the Candidate Questionnaire. *Id.*

[87] *2012 Candidate Procedure and Questionnaire*, *supra* note 80, at 33. The IOC stresses in the Candidate Questionnaire that the information must "accurately reflect the current situation of the city." Further, the candidate city's answers to the Candidate Questionnaire are legally binding on the Candidate City and its NOC.

general; and existing laws.[88] However, any consideration of human rights is notably absent.[89]

Once each candidate city submits the Candidate Questionnaire, the Evaluation Commission must study all aspects of each city's application.[90] When the Evaluation Commission completes its review of each candidate city, the Evaluation Commission prepares a report for the IOC.[91] The IOC Executive Board then screens the candidate cities for a second time to determine which candidate cities are up for election at the IOC Session.[92] At the IOC Session, each candidate city makes a presentation, hoping to convince the IOC members to select their city as the host city.[93] After the presentations, the IOC Evaluation Commission makes a report to the IOC Session.[94] The IOC members then vote in a secret ballot to determine which city will be named the host.[95] Finally, once a city is elected, the host city and its NOC immediately sign the host city contract with the IOC, becoming legally bound to comply with and uphold the Olympic Charter.[96]

Although the host city contract requires the host city to comply with the Olympic Charter from the moment it submits its bid, the host city is under no official obligation to comply with international human rights laws.[97] Therefore, once the host city is awarded the Games, even though it is bound by the host city contract, there are no official requirements that the host city and country abide by

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[88] *IOC 2012 Bid Questionnaire*, GAMESBIDS, http://web.archive.org/web/20061020040126/http://www.gamesbids.com/cgi-bin/news/viewnews.cgi?category=3&id=1074191005 (last visited Jan. 13, 2014).

[89] *Id.*

[90] INT'L OLYMPIC COMM., supra note 2, at 69.

[91] INT'L OLYMPIC COMM., supra note 2, at 69. The report must be submitted to all IOC members at least one month before the start of the Session that will elect the host city. *Id.* The purpose of the report is to help the IOC members elect a host city that is capable of staging the Olympics. *2012 Candidate Procedure and Questionnaire*, *supra* note 80, at 36. Therefore, the report includes information regarding the challenges each city could face in the seven years leading up to and including the Games. *Id.*

[92] INT'L OLYMPIC COMM., supra note 2, at 70 ("[T]he IOC Executive Board shall draw up the final list of candidate cities retained by the IOC Executive Board in order to be submitted to the vote by the Session for election."). But ultimately, the election of the host city is the "prerogative of the Session." *Id.* at 68. *See also 2012 Candidate Procedure and Questionnaire*, *supra* note 80, at 37.

[93] *2012 Candidate Procedure and Questionnaire*, *supra* note 80, at 38. The presentations are followed by questions from IOC members. In addition, all Candidate City statements made during the presentation are binding on the cities and their NOC.

[94] *2012 Candidate Procedure and Questionnaire*, *supra* note 80, at 39.

[95] INT'L OLYMPIC COMM., supra note 2, at 70. The vote occurs only after the Session has considered the Evaluation Commission report. *Id.* The voting occurs in rounds, with as many rounds taking place as necessary for one city to gain an absolute majority of votes. *2012 Candidate Procedure and Questionnaire*, *supra* note 80, at 39. After each round, the city with the least number of votes is eliminated. *Id.*

[96] INT'L OLYMPIC COMM., supra note 2, at 68. The host city contract is a legally binding instrument that reaffirms that the host city, the NOC and the country's public authorities will comply with and uphold the Olympic Charter. *Id.* Further, the host city contract allows the IOC to create a set of standards that the host country must adhere to leading up to and during the Olympics. Blumert, *supra* note 6, at 173-74. The host city contract is effective from the date of execution. *2012 Candidate Procedure and Questionnaire*, *supra* note 80, at 26. Therefore, the host city contract allows the IOC to tailor the requirements for hosting based on the specific requirements of the host city.

[97] The Olympic Charter does not mention human rights, discussed *supra*. The bidding process also does not mention human rights.

international human rights laws and norms.[98] This lack of official human rights policies both within the Olympic Charter and as part of the selection process further explains the history of human rights abuses associated with the Olympics.

IV. Analyzing the Host City Selection Process within the Context of Human Rights

The IOC has the power and ability to positively impact human rights conditions on a global scale through the host city selection process.[99] Notwithstanding the Olympic Charter's prohibition on political action, as the most powerful international sports organization in the world and the arbiter of the Olympic Games, the IOC has the ability to effect change if it so chooses.[100] Most importantly, the Olympics provide an opportunity to create reform in a way that is widely visible.[101] The IOC's role in ending apartheid is instructive: the Olympic Games' conversion from the biggest international sports competition to "a politically involved instrument of human rights may prove to be one of [the Olympics'] most significant contributions to world order."[102]

With the IOC's connection to human rights abuses at host cities, and the IOC's power over the selection process, the IOC should consider a different approach to human rights in choosing host cities. First and foremost, the IOC's primary duty is to promote the goals of the Olympic Movement as set forth in the Olympic Charter.[103] The selection of the host city is the primary IOC decision that projects the Olympic ideals.[104]

In addition, hosting the Olympic Games offers the host nation a chance to showcase itself to the entire world.[105] Awarding the hosting responsibility of the Olympic Games to a country with a poor human rights record essentially validates that country's egregious behavior.[106] This concern was largely behind the United States' actions to block Beijing's bid for hosting the 2000 Summer

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98 *Russia: IOC Should Address Deteriorating Rights Climate*, HUMAN RIGHTS WATCH (Oct. 11, 2012), http://www.hrw.org/news/2012/10/11/russia-ioc-should-address-deteriorating-rights-climate (Instead of dealing with human rights issues directly, the IOC chooses not to interfere with the host country's internal affairs, allowing local governments to handle human rights issues on their own.).

99 INT'L OLYMPIC COMM., supra note 2, at 17. The Olympic Charter requires that the IOC effect positive change when it can; Rule 2.14 of the Olympic Charter states that one of the IOC's goals is to "promote a positive legacy from the Olympic Games to the host cities and host countries." Along those lines, the IOC's history of selecting host cities with human rights concerns is arguably counter to the Olympic ideals set forth in the Olympic Charter.

100 NAFZIGER, *supra* note 16, at 25. Although the IOC is technically an NGO with limited competence outside the Olympic arena, states acquiesce in its decisions and conduct diplomacy with it.

101 Liu, *supra* note 64, at 220.

102 NAFZIGER, *supra* note 16, at 230.

103 *See supra* Part II.A.; *see also* Mastrocola, *supra* note 15, at 145.

104 Mastrocola, *supra* note 15, at 146.

105 Liu, *supra* note 64, at 224. Not only is it a chance for the host nation to showcase itself in front of the world, but a successful hosting is an obvious platform to gaining international prestige as well.

106 Liu, *supra* note 64, at 223. One of the benefits that goes with hosting the Games is a chance to validate national achievement. Awarding the Games to a country with a poor human rights record essentially justifies that poor record.

Games.[107] The host city for the 2000 Summer Games was voted on in 1993, just four years after the 1989 Tiananmen Square massacre.[108] Nevertheless, China was expected to win the bid at the IOC Session but was dealt a "major political setback" when the IOC selected Sydney, Australia, instead.[109] While the honor to host the Games ultimately was bestowed upon Sydney,[110] Beijing's bid arguably should not have been up for consideration in the first place.

Alternatively, there is a competing view that the Olympic Games can and should be used as a "vehicle for human rights reform."[111] The argument is that the Olympics provide the opportunity for a nation to undergo a complete transformation more rapidly and improve its human rights record in the process.[112] The most notable example in recent history was the 1988 Summer Olympics in Seoul, South Korea.[113] The 1988 Games proved to be a major catalyst in South Korea's transition to a democratic government and helped showcase that Seoul could overcome its history of human rights abuses.[114] Beijing's bid for the 2008 Games followed a similar model to Seoul, marketing its opportunity to host the games as an "opening to the outside world."[115]

The problem with both approaches – either do not award the bid to a human rights violator or use the bid to promote change in human rights policies in the host country – is that they do not take into account the human rights practices of every other country that is part of the Olympic Movement.[116] The Olympic Games are a global event held twice every four years, which means only one country every two years is given the chance to showcase the Games. Because the Olympic Charter is notably silent on human rights, members of the Olympic

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[107] *See generally* Mastrocola, *supra* note 15 (discussing China's human rights record from the standpoint of determining whether the United States was legally justified for opposing China's bid to host the 2000 Summer Games).

[108] Seth Doane, *Tiananmen Square: "Great Firewall" All but Hides the 24th Anniversary of China Massacre*, CBS NEWS (June 4, 2013, 10:51 AM), http://www.cbsnews.com/news/tiananmen-square-great-firewall-all-but-hides-the-24th-anniversary-of-china-massacre/. The Tiananmen Square Massacre was the brutal massacre of pro-democracy student protesters that were set up in Tiananmen Square in the middle of Beijing. Details of the massacre, which occurred on June 4, 1989, are still "shrouded in mystery," as the Chinese government censors virtually all information about it online.

[109] Alan Riding, *2000 Olympics Go to Sydney in Surprise Setback for China*, N.Y. TIMES (Sept. 24, 1993), http://www.nytimes.com/1993/09/24/sports/olympics-2000-olympics-go-to-sydney-in-surprise-setback-for-china.html?pagewanted=all&src=pm.

[110] *Id.*

[111] Liu, *supra* note 64, at 235 (suggesting that, in the context of the 2008 Games in Beijing, the combination of China's own self-interest, the international spotlight the Games provide, and the authority and influence of the IOC could serve as a vehicle to improve the human rights conditions in China).

[112] *See generally* Liu, *supra* note 64.

[113] *Id.* at 221. The Seoul Olympics contributed to an "awakening to democracy" for the Korean people.

[114] Liu, *supra* note 64, at 222.

[115] *Id.* at 228.

[116] *National Olympic Committees*, OLYMPIC MOVEMENT, http://www.olympic.org/national-olympic-committees (last visited Jan. 13, 2014). There are 204 NOCs that the IOC has recognized as part of the Olympic Movement.

Movement are under no obligation to conform their policies to match international human rights laws.[117]

The requirements to comply with the Olympic Charter are arguably heightened for those countries involved in the site selection process through their legally binding commitment to uphold the Charter.[118] However, only those countries that are actually awarded a bid are held to its promises throughout the staging of the Olympic Games.[119] Even then, the host city is not necessarily obligated to comply with international human rights laws because the Olympic Charter and bidding process are mute on the issue. While the selection process and host city contract give the IOC more control over the host city to ensure compliance with the Charter in staging the Games,[120] once the bid is awarded, there is little the IOC can do to ensure compliance with the Olympic Charter if the host city goes rogue in violation of the host city contract.[121] Thus, when Sochi passed its anti-gay propaganda law, the IOC had no choice but to reiterate the company line that it is not a political body and does not interfere with decisions that do not impact the Olympic Charter.[122] The IOC could better avoid the issues that arose in Sochi if it brought attention to a country's human rights record in the bidding process.[123]

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[117] *See supra* Part II.C.

[118] *See supra* Parts III.C., IV.

[119] *Id.*

[120] The IOC does have more control over the host city – the IOC does take certain assurances beyond the IOC Executive Committee screening the candidates. Part of the questionnaire in Phase II requires the candidate city to obtain third party guarantees that protect the IOC, and in turn, put added pressure on the host city to appease the third party guarantors in its staging of the Games. *2012 Candidate Procedure and Questionnaire*, *supra* note 80. However, the IOC does not have complete control – as the media restrictions imposed in Beijing violated the promises China made to the IOC when bidding on the 2008 Olympics. *See* David Batty, *Media Face Web Censorship at Beijing Olympics*, THE GUARDIAN (July 30, 2008, 6:24 PM), http://www.theguardian.com/world/2008/jul/30/china.olympicgames2008.

[121] Richard W. Pound, *The Future of the Olympic Movement: Promised Land or Train Wreck* 16, http://library.la84.org/SportsLibrary/ISOR/isor2008d.pdf (last visited Jan. 13, 2014). Once the Games are awarded, it is almost impossible to cancel or postpone them if the host city commits violations that go against the Olympic spirit. *Id.* This scenario arose in Beijing in 2008 when China backed out of the promise to provide "complete media freedom" to international media covering the Games, which it made to the IOC when bidding to host the Olympics. Batty, *supra* note 120. However, the day after the broken promise was first announced though, China's government did an unexpected about face and lifted the censorship on many internet sites, including human rights sites Amnesty International and Human Rights Watch. Tania Branigan, *China Relaxes Internet Censorship for Olympics*, THE GUARDIAN (Aug. 1, 2008, 5:24 PM), http://www.theguardian.com/world/2008/aug/01/china.olympics. Nevertheless, the move still did not create the complete media freedom that was promised. *Id.*

[122] Lally, *supra* note 49. IOC Chairman Jean-Claude Killy said that the IOC was satisfied leading up to the Sochi Games as long as the Olympic Charter was also satisfied, "The IOC doesn't really have the right to discuss the laws in the country where the Olympic Games are organized. As long as the Olympic Charter is respected, we are satisfied, and that is the case." Similarly, the United States Olympic Committee wrote a letter to athletes indicating that while it believed laws restricting the right to speak in support of the LGBT community are inconsistent with the fundamental principles of the Olympic Movement, it reiterated that it was a sports organization only.

[123] *See* Mastrocola, *supra* note 15, at 146 n.37. While there are indications that IOC members consider a nation's human rights record in voting on the host city, the IOC Evaluation Commission makes no reference to human rights and does not expressly take into consideration the issue.

V. Human Rights Should be Considered at Start of Bidding Process

A. Outlining a New Approach

One way to choose bid cities with stronger human rights records without violating the existing Olympic Charter would be to require each city interested in hosting the Games to submit a report[124] detailing the country's existing legislation in support of international human rights laws as part of the initial application to bid on hosting the Games.[125] The report would also include the country's current and previous efforts to further the basic human rights of all citizens, foreign and domestic. The standard of "international human rights laws" would be the UDHR.[126] The report would then be reviewed by the IOC-appointed Working Group and included in the final report sent to the IOC Executive Committee, which is used to determine whether or not a city should be allowed to continue to Phase II of the bid process pursuant to the existing criteria set forth in the Olympic Charter.[127]

B. This Approach is Consistent with the Olympic Charter

This proposal – aside from the fact that human rights are considered a political issue[128] – is feasible within the existing framework of the Olympic Charter. First, requiring each city wishing to host the Games to detail its own human rights record at the start of the bidding process would not lead to the oft-argued result that no countries would then be eligible to host the Games.[129] Under the proposed framework, every country that has legislation in support of human rights would likely pass the IOC Executive Committee review, at least on the grounds of human rights considerations.[130] In addition, the report submitted by each country outlining its past and present efforts taken to improve its policies on

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[124] This report would specifically require that each bid city outline any legislation the state has in place that supports human rights. In addition, each report would include a section on current and past reforms or initiatives undertaken to improve human rights conditions. The sufficiency of reforms or legislation outlined in each report would be evaluated on a country-by-country basis so as to take into account special considerations where the current human rights record in a country would not automatically prevent a city from hosting the Games.

[125] The report would officially be part of Phase I of the bidding, the Applicant City Phase, discussed *supra* Part III.C.

[126] *See supra* Part II.A.

[127] INT'L OLYMPIC COMM., *supra* note 2, at 69. The Working Group already details its conclusions in a report that is sent to the IOC Executive Committee, which has the power to determine which cities are allowed to bid to host the Games. *See also supra* Part III.C. Therefore, implementing this change from an administrative standpoint would not be difficult.

[128] Discussed *supra* Part III.A.

[129] Mastrocola, *supra* note 15, at 146 n.37. Anita DeFrantz, the American IOC member of the IOC that chose the 2000 Olympic site stated: "[I]f we begin to exclude cities solely because of complaints about human rights violations, then there would be few countries where the Games could be held – including the United States."

[130] The purpose of including a human rights element is to encourage more reform from more countries, not to prevent countries who have taken positive steps towards reform from hosting the Olympics.

human rights would be binding on the bid city and its respective NOC.[131] Finally, requiring each city desiring to submit a bid to include a report on its human rights record is not without precedent.[132] The IOC utilized similar investigatory measures when it evaluated whether South Africa should be allowed to attend the 1968 Olympics during the apartheid era.[133] Specifically, the IOC commissioned an investigation of the changes that the South Africa NOC instituted between 1964 and 1968 to end segregation in sport.[134] Therefore, requiring a report on human rights to be submitted at the start of the bidding process would not impose a substantial administrative burden on any potential bid city.

Instituting such a change is also not in violation of the Olympic Charter. The IOC's reluctance to make political decisions, discussed herein, is rooted in the Olympic Charter's requirement that there shall be no discrimination against any person or country on the basis of politics.[135] First, the political use of international sports is a legitimate tool to further human rights.[136] Beyond that, imposing the same requirement on every country who wishes to submit a bid is not automatically discriminatory.[137] More importantly, hosting the Olympics is a privilege, not a right.[138] The additional bidding requirement would in no way impact a country's eligibility to participate in the Olympic Games;[139] it would only have an adverse impact on a country that is unable or unwilling to show that it has initiated some steps towards instituting human rights reform in order to satisfy the proposed human rights report.[140]

C. An Incentive for Greater Reform

Not only is it within the IOC's existing rights to include a human rights element in the bidding process, but the potential impact of such a change could be immense. Under the current election process only one city hosts an Olympic

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131 *See generally* INT'L OLYMPIC COMM., *supra* note 2, at 68. This is consistent with the Olympic Charter, which provides that all statements and actions made during the bid process are legally binding.

132 The entire bidding process, which imposes a significant – and justifiable – burden on bid cities, including a detailed Candidate Questionnaire, site visits, a presentation, and finally a question-and-answer period, is itself an exploratory mission.

133 *See supra* Part III.B.

134 *See supra* Part III.B.

135 INT'L OLYMPIC COMM., *supra* note 2, at 12 ("Any form of discrimination with regard to a country or a person on grounds of race, religion, politics, gender or otherwise is incompatible with belonging to the Olympic Movement."); *see also supra* Part III.

136 Mastrocola, *supra* note 15, at 158. This is true so long as the IOC, or any other NGO, complies with United Nations mandates and international human rights law.

137 Discrimination is defined as "the practice of unfairly treating a person or group of people differently from other people or groups of people." *Discrimination Definition*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/discrimination (last visited Jan. 13, 2014). Imposing a human rights requirement in the bid process would likely favor one class of entities over another class of entities, but the level of support for human rights that would need to be shown would be assessed on a country-by-country basis, thus minimizing any perceived biases.

138 INT'L OLYMPIC COMM., *supra* note 2, at 67. The Olympic Charter characterizes the opportunity to host the Games as an "honour and responsibility."

139 *Id.* at 77. Rule 40 of the Olympic Charter governs eligibility to participate in the Olympic Games.

140 *See supra* note 124, discussing what the report entails.

Games every two years.[141] Therefore, while the Olympics can expedite human rights reform in the host country, such reform is limited exclusively to host countries.[142] The remaining NOCs that wish to host the Games have no such incentive[143] to undergo similar reforms as the host country. In addition, there are no existing requirements for the host country to continue its hopefully improved compliance with international human rights laws after the Olympics are over.

If human rights were made a part of the initial bid process, countries with existing human rights issues that might not meet the requirements necessary to bid to host the Olympics will be incentivized to enact greater reforms at a more rapid pace than they otherwise would.[144] These incentives are rooted in the tremendous benefits hosting the Olympics provides to the host city and country, including economic development and modernization.[145] In addition, although it is impossible to truly quantify, one of the most notable benefits that comes with hosting the Olympics is the global spotlight placed on the host country, which allows the host country to present a new public image to the international community and highlight the strongest aspects of the nation's people, culture, industry, and tourism.[146] Ultimately, the benefits associated with hosting the Olympic Games is why twenty-four cities have sought to host the Olympics in the four most recent host city elections.[147] Moreover, this proposal could conceivably have improved the human rights conditions in the twenty countries that did not earn a bid between 2005 and 2011,[148] instead of just in the four countries that did.

The role of sport across the world also suggests that a country would not be dissuaded from bidding on the Games.[149] In addition to their importance in many countries in terms of the national prestige associated with it, sports are

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[141] *See supra* Parts III.C., IV.

[142] *See generally* Liu, *supra* note 64. The most recent example of expedited reform occurred in Beijing, discussed *supra*, which was awarded the 2008 Summer Games in 2001. Although Beijing's human rights abuses were well-documented leading up to the Olympics, there is a school of thought that the reform that did occur in China during that time likely would not have happened if Beijing wasn't named the host city.

[143] Incentive here refers only to the incentive created by the chance to host the Olympics. Each country may have other incentives to institute human rights changes that extend beyond sport.

[144] Blumert, *supra* note 6, at 157. Indeed, cities interested in bidding on the Games are encouraged to adopt regulations mandated in the Olympic Charter to improve their chances of securing the winning bid.

[145] Blumert, *supra* note 6, at 154-55.

[146] *Id.* at 156; *see also* Liu, *supra* note 64, at 224.

[147] *Bidding for the Games*, Olympic Movement, http://www.olympic.org/content/the-ioc/bidding-for-the-games/past-bid-processes/ (last visited Jan. 13, 2014). Based on applications submitted: nine cities bid to host the 2012 Summer Games; seven cities bid to host the 2014 Winter Games; seven cities bid to host the 2016 Summer games; and three cities bid to host the 2018 Winter Games. Note that Rio de Janeiro bid on both the 2012 and 2016 Summer Olympics, while PyeongChang bid on both the 2014 and 2018 Winter Olympics.

[148] *Id.* The host city for the 2012 Summer Games was awarded in 2005, while the host city for the 2018 Winter Olympics was awarded in 2011.

[149] The Olympic Games are the premier international sporting event that is known for creating national heroes. Liu, *supra* note 64, at 223. For example, sport played a role in helping to end apartheid in South Africa. Blumert, *supra* note 6, at 156 n.20.

already considered a strong developmental tool for promoting human rights compliance.[150] Ultimately, the IOC can use the popularity of sport as a tool to enact human rights change.[151]

D. Summary

By imposing an obligation on potential host cities to discuss their human rights record as a threshold requirement to bidding on the Games, the IOC could spur broader human rights reform across the world. Countries that currently do not meet the requirements would have the incentive to improve their human rights conditions in order to earn the honor of hosting the Games. Because more countries would be impacted by this additional requirement than just one country every two years, and the Olympic ideals would not be compromised, the IOC should implement a change that could significantly increase support for international human rights laws around the world.

VI. Conclusion

There is a troubling connection between the most prestigious international sporting event in the world and the repeated human rights abuses that occur within the borders of the cities and states that host it. The IOC, the organization charged with overseeing all aspects of the Olympics including choosing the host city, continues to stand pat while atrocities occur under its watchful eye. Despite its commitment to keep sport and politics separate, the IOC is in the position, and arguably has the obligation, to enact change to combat human rights abuses in the nations it chooses to host the biannual Olympic Games. Specifically, the IOC should require each city to explain its human rights record as the first step in bidding to host the Olympics. This change would not increase the administrative burden on the IOC in choosing the host city, nor would it violate the IOC's prohibition against discrimination on the basis of politics. Moreover, the IOC could achieve rapid and widespread international human rights reform consistent with the goals of the Olympic movement to use sport in a way that promotes "a peaceful society concerned with the preservation of human dignity."[152]

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[150] A U.N. Task Force Report argued that sports should play a strong role in promoting the UN Millennium Development Goals, which include human rights compliance. U.N. Inter-Agency Task Force on Sport for Development and Peace, *Sport as a Tool for Development and Peace: Towards Achieving the United Nations Millennium Development Goals*, http://www.un.org/sport2005/resources/task_force.pdf (last visited Jan. 13, 2014). In addition, sport is also a "compelling symbol for peace." *Id.* at 15. For example, the Olympic Truce, *supra* note 57, provides for the safe passage of athletes and spectators to and from the Olympic Games. *Id.* Specifically, for seven days before and seven days after the Games, participating countries agree to cease all conflicts with other participating countries in the spirit of peaceful cooperation. *Id.*

[151] Liu, *supra* note 64, at 217.

[152] Int'l Olympic Comm., *supra* note 2, at 11.