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Feature Articles

Student Articles

Published semi-annually by Loyola University Chicago School of Law
Loyola University Chicago School of Law
Twenty-Five East Pearson Street
Chicago, IL 60611

Cite as 17 Loy. U. Chi. Int'l L. Rev. __ (2021)

LOYOLA UNIVERSITY CHICAGO INTERNATIONAL LAW REVIEW

Loyola University Chicago School of Law
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Chicago, IL 60611
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International Focus at
Loyola University Chicago School of Law

Curriculum

Loyola University Chicago School of Law provides an environment where a global perspective is respected and encouraged. International and Comparative Law are not only studied in theoretical, abstract terms but also primarily in the context of values-based professional practice. In addition to purely international classes, courses in other disciplines – health law, child and family law, advocacy, business and tax law, antitrust law, and intellectual property law – have strong international and comparative components.

International Centers

The United Nations has designated Loyola University Chicago School of Law as the home of its Children's International Human Rights Initiative. The Children's International Human Rights Initiative promotes the physical, emotional, educational, spiritual, and legal rights of children around the world through a program of interdisciplinary research, teaching, outreach and service. It is part of Loyola's Civitas ChildLaw Center, a program committed to preparing lawyers and other leaders to be effective advocates for children, their families, and their communities.

Study Abroad

Loyola's international curriculum is also expanded through its foreign programs and field-study opportunities:

International Programs

- A four-week annual summer program at Loyola's permanent campus in Rome, Italy – the John Felice Rome Center – focusing on varying aspects of international and comparative law.
- A two-week annual summer program at Loyola's campus at the Beijing Center in Beijing, China focusing on international and comparative law, including a semester long course in the spring in Chicago to educate students on the Chinese legal system.

International Field Study

- 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, where 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 developing country's 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. Recent trips have included Tanzania, India, Thailand, South Africa, and Turkey.

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 aspects 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.

International Moot Court Competition

Students hone their international skills in two moot competitions: the Phillip Jessup Competition, which involves a moot court argument on a problem of public international law, and the Willem C. Vis International Commercial Arbitration Moot, involving a problem under the United Nations Convention on Contracts for the International Sale of Goods. There are two Vis teams that participate each spring – one team participates in Vienna, Austria against approximately 300 law school teams from all over the world, and the other team participates in Hong Kong SAR, China, against approximately 130 global law school teams.

Acknowledgments

We would like to recognize friends and alumni of Loyola who contributed this past year to our international law program by supporting Loyola's Vis Moot Program:

Cara A. Boyle
Karen and John Calhoun
Chicago International Dispute Resolution Association
Chicago Branch of the Chartered Institute of Arbitrators
William Cannon
Ellie Carey
Freddi L. Greenberg
Hanh Diep Meyers
Carol and Terry Moritz
Silvia and Fabio Pettanati
Susan Walker
Margaret Moses
Michael Brandenberg
Mark Calaguas
Shirley Chen
Christina Cotter
Caroline Driscoll and Samuel Barancik
Michael Eurich
William Eveland
Brian Fahrenbach
Sean Farrell
Elisabeth Fiordalisi
Elizabeth Hanford
Kevin Harris
Joshua Heffernan
Chantal Kazay
Elizabeth and Kevin Kearney
Kelsey Leingang
Katherine and Kyle Lennox
Bradley Lorden
Patrick McFadden
Kelly O'Brien
Geoffrey Robilotto
Barry Sullivan
Kristen and Michael Viglione
Erin Wenger
Brandon Wurzinger

Effective Management Of International Aid Through Inter-Governmental Trust Funds

Ilias Bantekas*

Abstract

The past two decades have witnessed the proliferation of funding mechanisms by which to deliver international aid to distressed countries, albeit few aid initiatives paid particular attention to the delivery and management through the bypassing of state machineries. This article sets out to show that the use of inter-governmental trust funds has the potential of transforming the aid (broadly understood) landscape and, while being intrusive, harness local corruption and mismanagement. Effectively, such trust vehicles, would function as oversight, management, and disbursement mechanisms, on the basis of human rights-based approaches to development, and enhance local ownership and democratic values and principles. The Chadian model discussed in this paper is an excellent case study because, although it ultimately failed to live up to its developmental expectations, it was a significant attempt by which to efficiently deliver aid, enhance capacity and self-determination.

1. Introduction

There is by now a considerable body of practice whereby international trust funds are established to channel, deliver and manage international aid-related assets.[1] Trust funds of this nature are based on a tripartite relationship, namely one or more donors, a trustee, and future beneficiaries. The difference with domestic notions of trusts,[2] or the equivalent in the Islamic tradition (*awqaf*),[3] is that the relationship between the donor and trustee is contractual and the beneficiaries have no right of action against the donor or the trustee. The trustee is typically an inter-governmental organisation, such as the World Bank,[4] or the

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[1] *See generally*, Ilias Bantekas, *The Emergence of Intergovernmental Trusts in International Law*, 81 BRITISH Y.B. OF INT'L LAW 224 (2011).

[2] Clearly, inter-governmental trusts have been modeled on their domestic counterparts and are effectively creatures of comparative law as applied to their inter-state context; *See* Maurizio Lupoi, Trusts: A Comparative Study (Simon Dix trans., Cambridge Univ. Press, 2000); Adeline Chong, *The Common Law Choice of Law Rules for Resulting and Constructive Trusts*, 54 Int'l and Comp. L. Q. 855 (2005); Adair Dyer, *International Recognition and Adaptation of Trusts: The Influence of the Hague Convention*, 32 Vand. J. Transnat'l L. 989, 990 (1999).

[3] Haitam Suleiman, *The Islamic Trust Waqf: A Stagnant or Reviving Legal Institution?,* 4 Elec. J. of Islamic and Middle Eastern L. 27 (2016).

[4] World Bank, *Trust Funds Annual Report* (2017), http://documents.worldbank.org/curated/en/428511521809720471/pdf/124547-REVISED-PUBLIC-17045-TF-Annual-Report-web-Apr17.pdf. (The Bank's key instrument for managing trusts is its IBRD Operational Policy (OP) 14,40 (Jan 1997, as revised in 2013) on Trust Funds.)

United Nations, who manages the assets provided by the donors and disburses said assets,[5] as agreed with the donors, to a class of named beneficiaries.[6] Depending on the size of its assets, which may well be replenished through regular donor conferences, the trust fund may require a more elaborate corporate governance mechanism. Several trusts have eventually moved from mere bank accounts of the trustee to fully blown intergovernmental organizations.[7]

For the purposes of anti-corruption, the trust model provides a significant mechanism to avoid corruption in the host state. Typically, foreign aid, or aid-related funding was channeled to the target/host state and it was the latter that was charged with the delivery and implementation of the objectives set out by the donors.[8] This model has proven to be a failure because, in the vast majority of cases, the state mechanism was not only unable to manage the assets, but it was subject to the corrupt practices of senior and mid-level officials. Trust funds are predicated on a different structure altogether. The donors authorize the trustee who, as an international organisation, enjoys privileges and immunities in the target state. If it does not, it can enter into an ad hoc headquarters (HQ) agreement to that effect with the target state. In this manner, the assets under consideration will be inviolable and not subject to the control or manipulation of the target state.[9] The trustee can then get on with the tasks entrusted to it and disburse the trust's assets. The HQ agreement[10] ensures that the trustee will not be accused of interfering in the domestic affairs of the target state, which would otherwise be the case if the trustee were to make random disbursements to beneficiaries without the consent of the target state, on the basis of the principle of local ownership.[11] Where none of the assets pass through the official channels of

[5] *Global Fund Donors Pledge US $14 Billion in Fight to End Epidemics,* THE GLOBAL FUND (Oct. 10, 2019), https://www.theglobalfund.org/en/specials/2019-10-09-global-fund-sixth-replenishment-conference/ (By late 2019 the total amount of funds committed by donors to the Global Fund were USD 14 billion).

[6] Nele Matz, *Environmental Financing: Function and Coherence of Financial Mechanisms in International Environmental Agreements*, 6 MAX PLANCK Y.B. U.N. L. 473 (2002).

[7] Ilias Bantekas, *The Legal Personality of World Bank Funds under International Law*, TULSA L.R. (forthcoming 2021).

[8] In 2016, an updated standardized Administration Agreement template with sixteen of the World Bank's largest donors who provide 90 percent of IBRD/IDA trust fund resources was adopted, including standard provisions on disclosure of information and communication on fiduciary issues. This was supplemented with a series of notes on governance arrangements in trust funds, preferencing arrangements, donor reporting, managing trust funds for results, and indicative budgets. Bhuvan Bhatnagar, et. al., *2017 Trust Fund Annual Report*, WORLD BANK GROUP, 152 (March 3, 2018), http://www.worldbank.org/en/publication/trust-fund-annual-report-2017.

[9] Bantekas, *supra* note 1 at 264.

[10] *Id.* at 267-68.

[11] Section VI(A)(1) – (3) of the Framework Document of the Global Fund for AIDS, TB and Malaria, states that the Fund will base its work on programs that reflect "national ownership and respect country partnership-led formulation and implementation processes. . . . The Fund will promote partnerships among all relevant players within the country, and across all sectors of society. It will build on existing coordination mechanisms and promote new and innovative partnerships where none exist". More importantly, subsection B(1) clarifies that the "Fund will work with a country coordination and partnership mechanism that should include broad representation from governments, NGOs, civil society, multilateral and bilateral agencies and the private sector". Equally, in accordance with subsection B(7)(a), the Fund will consider proposals, among others, from "countries that suppress or have not established part-

the government or institutions of the target state, the risk of corruption at the higher and mid-tier levels of government is necessarily avoided. The trust can also ensure that the beneficiaries are worthy of funding and hence eliminate state actors disguised as beneficiaries. No doubt, the trust model cannot ultimately ensure that the target state will not intimidate or coerce beneficiaries from using assets bestowed upon them; but in the event of such corruption it can freeze the flow of any further funds and set out new conditions.

This article examines effective fiscal management of international aid by looking at the anti-corruption potential of trust funds, followed by an analysis of the impact of trusts on revenue sharing, which has been crucial in disputes between elites and regional communities. The Chadian example, with its highs and lows, will serve as a paradigm about how the trust mechanism can produce positive impact, while at the same time using its negative experiences to highlight particular governance issues. The Chadian case is important, although it was initiated more than a decade ago, for at least two reasons: first, it was and still is one of the few cases where a fiscal issue crucial to the budgetary existence of a state was taken out of its hands almost entirely, thus leading to a significant loss of sovereignty—this is not the case with the vast majority of trust mechanisms; second, this is the only known case study where a large portion of the fiscal affairs of a state were effectively managed by an external entity with the aim of dispensing fundamental human rights in the target state. While other mechanisms, such as participatory budgeting,[12] exist elsewhere, they are wholly local in character, and the central state is by no means bypassed.

2. The Anti-Corruption Potential of Trust Funds

One of the key aims of trust funds is to disengage the dependency of foreign aid and foreign assistance from the clutches of those governments that are not subject to fiscal and other forms of transparency. The entire rationale of the international trust concept is founded around this observation. Indeed, both the IMF and the IBRD, as well as individual donor states, are not only reluctant but in fact, refuse to provide funds to countries without certain fundamental guarantees.[13] For this reason, they enter into agreements with borrowing states, even if they are already members, by which the World Bank, particularly, demands legislative and structural changes to a country's economy and fiscal management. Conditions of this nature were incorporated in the IMF's agreements with Hungary and the Ukraine following their financial downfall in the wake of the 2008

nerships with civil society and NGOs". THE GLOBAL FUND, *The Framework Document*, 94-96 (Feb. 2012); *see also* Andrew Friedman, *Transitional Justice and Local Ownership: A Framework for the Protection of Human Right*s, 46 AKRON L.R. 727, (2013).

[12] *See* BRIAN WAMPLER, PARTICIPATORY BUDGETING IN BRAZIL: CONTESTATION, COOPERATION AND ACCOUNTABILITY (3rd ed. 2010); Aaron Schneider & Ben Goldfrank, *Budgets and Ballots in Brazil: Participatory Budgeting from the City to the State*, INSTITUTE OF DEVELOPMENT STUDIES (2002).

[13] *See* HOSSEIN NABILOU, RECONCEPTUALISING GLOBAL FINANCE AND ITS REGULATION (Ross P. Buckley et al. eds., 2016); *See also* Rosa M. Lastra, GLOBAL FINANCIAL ARCHITECTURE AND HUMAN RIGHTS, IN MAKING SOVEREIGN FINANCING AND HUMAN RIGHTS WORK 129, 137 (Juan Pablo Bohoslavsky & Jernej Letnar Èerniè eds., 2016) (arguing that the IMF could recommend human rights reforms).

global recession and later on Greece.[14] Fiscal transparency breeds governmental transparency and enhances civil society and public participation, thus making government responsible to the people. It is by no means a one-off exercise, but an entrenched cycle. Besides funding for the sake of financial independence, donor states moreover promote a corruption-free state that can develop itself in a sustainable manner.

The Kiribati and Tuvalu trust funds are examples not only of financially dependent States achieving fiscal independence but also of states that have succeeded in attaining transparent governance.[15] Article 20 of the 1987 Agreement Concerning an International Trust Fund for Tuvalu reads as follows:

> 1) The government of Tuvalu shall treat all moneys received by it from the Fund as public moneys of Tuvalu and as such subject to parliamentary appropriation and scrutiny.
>
> 2) The government of Tuvalu shall on request provide full information and documents to the Board and the Advisory Committee of and in relation to Tuvalu's National Budgets and estimates, the annual accounts and the reports of the Auditor-General (including any information or documents which the Auditor-General would be entitled to demand) and financial, social and economic data held by the government of Tuvalu.
>
> 3) The government of Tuvalu shall ensure that the accounts of and [annual audit] reports relating to the Fund . . . are promptly laid before the Parliament of Tuvalu.
>
> 6) The government of Tuvalu shall ensure that legislation is enacted and maintained to give effect to obligations under paragraphs 1 to 3 of this Article.

Articles 21 to 23 of the Agreement further establish a complex procedure for independent audits, bookkeeping, and the furnishing of annual reports. Given that the Fund's governance mechanism involves the participation of all contributing states, a Board, an independent fund manager, an independent auditor, as well as the Parliament of Tuvalu, the chances for corruption are naturally minimal.

Let us now examine three examples of trust funds whereby the lack of transparency through the imposition of a regime of confidentiality, or the lack of an independent trustee, has given rise to accusations of corruption and misappropriation. The aim of this discussion is to determine the institutional shortcomings of these trust funds as opposed to the relatively successful Tuvalu model. The majority of sovereign wealth funds—as well as natural resources stabilisation trust

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[14] *See* Ilias Bantekas & Renaud Vivien, *On the Odiousness of Greek Debt*, 22 EUR. L.J. 539 (2016).

[15] 1536 U.N.T.S. 48. The Tuvalu Trust Fund was founded in 1987, almost a decade following the tiny island's independence, on the basis of a multilateral treaty between Tuvalu, New Zealand, Australia, and the UK, and is expressly given the status of an international organization that of which is administered by a Board of Directors composed of representatives from the four contracting States in an equal capacity, *id.* at 48-50.

funds—in developing States prefer to subject trust funds, and their international contractual relationships, with foreign investors to the regime of private,[16] as opposed to public, law. Were the trust fund and relevant transactions to be amenable to public law, the agreements and budgeting activities would require parliamentary scrutiny and approval and the passing of a public law of some kind, which would have had to be published in the country's official gazette.[17] On the contrary, the privatisation of the State's finances and foreign investment activities (and hence the trust funds into which these moneys are deposited) means that no public discussion or accountability is required.

An often-used justification in these cases relates to the principle of party autonomy in the law of contracts, whereby the parties may subject their contract to a veil of confidentiality, whether absolute or partial.[18] It is often claimed that contracts between State entities and private investors must necessarily be cloaked under private law. A natural consequence following from absolute contract confidentiality relates to the lack of information about those State finances pertinent to the contract. If the government decides by law that revenues are not to be made public, then the next logical step is to avoid incorporating such revenues into the annual State budget. Such revenues would either simply not exist, or because they would not have been officially declared as oil monies (or other types of revenues as the case may be) they could not be channeled into the regular budget, but into an extraordinary budget! Given that there generally exist four types of constitutional budgets, i.e. on the basis of appropriation, vote-on-account, vote-of-credit and supplementary, an extraordinary budget of this kind that would not be adopted publicly by parliament would be clearly unconstitutional. It is equally unconstitutional – or a defiance of fundamental constitutional principles - for parliament to adopt a secret, non-public, budget.[19]

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[16] KINNARI I. BHATT, CONCESSIONAIRES, FINANCIERS AND COMMUNITY: IMPLEMENTING INDIGENOUS PEOPLES' RIGHTS TO LAND IN TRANSNATIONAL DEVELOPMENT PROJECTS, 91-122 (2020). A recurring element is the emphasis on English law the governing law of most concession agreements, as well as the involvement of international financial institutions (IFIs), either as facilitators of the project's finance or guarantors. In any event, the World Bank Group imposes upon the concessionaire its Operational Policy on Indigenous People, which includes catchy phrases derived from UN instruments, while at the same time at the same time the financing aspects of the contract between the concessionaire and the host state are subject to IFC private regulation standards, *id.*

[17] ILIAS BANTEKAS, SOVEREIGN DEBT AND HUMAN RIGHTS: SOVEREIGN DEBT AND SELF-DETERMINATION 267 (Ilias Bantekas & Cephas Lumina eds., 2018).

[18] This is based on the rule of party autonomy. If the parties decided to set up, on the basis of a private contract, an offshore trust or an offshore account, this would be subject to a veil of confidentiality. Indeed, the courts of all offshore jurisdictions (under express statutory terms) have held that such confidentiality extends to the financial details of offshore trusts and that no subpoena request may compel disclosure. *See In re* H (1996) C.I.L.R. 237 (Cayman Is.); Tele-Art Inc. v. Ming Kown Kooh (1997) 1 O.F.L.R. 870 (Virgin Is.). Disclosure is possible only under specified circumstances. Tournier v. Nat'l Provincial Bank, [1924] 1 K.B. 461. These criteria are: that it is ordered under compulsion of the law; a public interest must already be in existence; the disclosure must itself be in the interests of the banker; and that it is performed with the consent of the client, s*ee* ROSE-MARIE ANTOINE, CONFIDENTIALITY IN OFFSHORE FINANCIAL LAW 23 (1st ed. 2002).

[19] IMMANUEL KANT, KANT: POLITICAL WRITINGS 93-130 (Han Reiss ed., 2nd ed. 1991) (citing Kant's advocacy of the principle of publicity, in which all laws must be public so that they can be defensible and serve as a measure of justice); JEREMY BENTHAM, PROMULGATION OF THE LAWS, IN THE WORKS OF JEREMY BENTHAM (John Bowring ed., 1843) (stating that in order for a law to be obeyed it must be

The creation of natural resources trust funds is a possible alternative, but such funds are practically useless in countries like Kazakhstan, where production sharing agreements and joint venture contracts are confidential. The Kazakh National Fund (NF), established by presidential decree in 2000,[20] is both a stabilisation and a savings fund that lacks the fundamental requirements of transparency because the production sharing agreements (PSAs), and joint venture agreements adopted between Kazakhstan and foreign investors are not open to public scrutiny.[21] The State Oil Fund of Azerbaijan (SOFAZ), established by Presidential Decree No. 240 of 29 December 1999, is directed towards sterilising foreign currency earned from oil and gas revenues; but it serves as a savings fund where the primary is invested and not used as a lending pot or as collateral for government debts, in accordance with the Fund's Regulations.[22] According to its Regulations, the Fund is to manage its assets in the interests of the Azeri people and their future generations. This mandate includes also expenditures related to the socio-economic progress of the country, the construction of necessary infrastructure, and other works or projects in respect of 'the most important nation-wide problems'.[23] Despite the existence of these explicit directives, SOFAZ has not formulated a clear policy or criteria as to investment priorities or the promotion of non-oil social development. Decisions are usually adopted on an ad hoc basis and have included expenditures connected to internally displaced persons through the promulgation of presidential decrees.[24] Failure to diversify the local economy, increased reliance on oil revenues, and lack of independent oversight and control have resulted in the usurpation of the Fund's earnings to finance the government's share of the Baku-Tbilisi-Ceyhan oil pipeline. Although the IMF initially disagreed with the use of Fund money to finance an oil-sector project as being contrary to SOFAZ asset management rules, which itself designed and made conditional in order to grant a loan to Azerbaijan through its Enhanced Structural Adjustment Facility (ESAF), it later posed no further problems.[25]

Unlike SOFAZ and the Kazakh National Fund, the Chad trust fund, discussed above in sections 3.1 and 3.3.1, was not designed to be susceptible to the limitations of private law and hence to a regime of confidentiality. Rather, it was meant to be transparent and two independent bodies were established to oversee its operations and fiscal management. Notwithstanding some notable successes, the Chad trust fund failed to deliver its full potential, while its assets were routinely

known); *See also* Bantekas, *supra* note 17 (discussing how the Greek Constitution was effectively bypassed through the adoption of confidential agreements and memoranda of understanding).

[20] Decree No. 402, Aug. 23, 2000 (Kaz).

[21] SVETLANA TSALIK, CASPIAN OIL WINDFALLS: WHO WILL BENEFIT? 127-207 (Robert Ebel ed., 2003).

[22] Decree No. 240, Dec. 29, 1999 (Azer.) (including the addendums and amendments according to the Decrees of the President of the Republic of Azerbaijan No. 849, No. 202, No. 216, No. 473, and No. 477).

[23] *See Id.* at art. 4 ¶ 3.

[24] *See* TSALIK, *supra* note 21 at 112.

[25] *Id.* at 113; *see also,* Ilias Banktekas, *Natural Resource Revenue Sharing Schemes (Trust Funds) in International Law*, 52 NETH. INT'L L. REV. 31 (2005); *see also,* ILIAS BANKTEKAS, INHERENT TENSIONS BETWEEN NATIONAL RESOURCES CONTRACTS AND SUSTAINABLE DEVELOPMENT (2007).

appropriated by the government. Equally, many of the initial targets set out were not at all implemented. Unlike SOFAZ and the Kazakh Fund, the Chad model did involve the active participation of external actors, but only because this was externally imposed on the government. Nonetheless, unlike the Tuvalu model, none of the three other trust funds adhered to the practice of international trust fund law, particularly that contemplating the existence of an independent trustee. In respect of developing States and unstable or undemocratic regimes, the deposit of trust assets in the hands of an independent trustee necessarily entails that said assets will remain in the ownership of the trustee throughout the duration of the trust's life cycle. This means that the incumbent government will be unable to appropriate funds or make unilateral exceptions on the basis of its domestic law or by invoking *force majeure* in order to escape from its contractual obligations with the donors or the World Bank. It may be certainly countered that although the management and disbursement of trust assets by an independent trustee satisfies demands for transparency and extinguishes the possibility of fiscal mismanagement, it, nonetheless, does not promote participatory governance and democratic involvement. This is no doubt a valid observation that should not be overlooked. An ideal trust model in respect of despotic regimes should involve the following elements: a) the trust's assets should be in the ownership of an independent trustee and not the target State; b) the governance structure of the trust fund should involve the participation of the State's public apparatus, the trustee, the contributing States, as well as elements from the opposition and civil society on the basis either of observer status or in respect of the process of participatory budgeting, whichever the parties have agreed; c) the trustee, if an international financial institution, and the contributing States should placate in contractual terms the responsibilities of the target State, as well as set out a number of conditions to be met.[26] In respect of the fund's budget it should be clear that no unilateral amendments are possible; d) an external independent auditors should be appointed and the obligation to produce annual financial reports should be provided for in accordance with strict standards. Whereas the Bank imposes rigid requirements on investors in relation to the environment and the financial portion of the investment, the Bank's disclosure requirements are almost completely non-existent. Only 15% of the World Bank's extractive projects demand full disclosure, while the majority do not. It is thus of little surprise that corruption is particularly rife in the extractive industries, especially because the rich oil-producing States in the developing world are governed by dictatorial or authoritarian regimes. A requirement of full disclosure by the Bank vis-à-vis its investors

[26] This may also include the obligation for the target State to adopt global or regional anti-corruption treaties. *See* OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, 37 I.L.M 1 (1999); *see also* U.N. Convention Against Transnational Organized Crime, Nov. 15, 2000, 40 I.L.M. 334 (2000); *see also* United Nations Convention Against Corruption, Oct. 31, 2003, 43 I.L.M. 37 (2004); *see also* G.A. Res. 3514 (XXX) (Dec. 15, 1974); *see also* G.A. Res. 51/91 (Feb. 21, 1997); *see also* G.A. Res. 51/59 (Jan. 28, 1997); *see also* U.N. Secretary-General, *U.N. Guide for Anti-Corruption Policies, see also* G.A. Res 46/261 ¶16 (Apr. 15, 2002). Relevant are also Inter-American Convention Against Corruption, Mar. 26, 1996, 36 I.L.M. 1039, (1997); *see also* African Union Convention on Preventing and Combating Corruption, July 1, 2003. *See also,* Peter W. Schroth, The African Union Convention on Preventing and Combating Corruption, 49 J. Afr. L. 24 (2005).

would go a long way in eradicating this scourge, and; e) the contributing parties and the trustee must ensure that the target State does not abuse its authority following disbursement of assets to beneficiaries and following the commencement of developmental projects. At this phase, the government may decide to use allocated assets for other purposes in contravention of the relevant disbursement agreements. Hence, contractual terms must be potent enough to oppose infringements, and where they do occur they must provide for resilient action. As a result, it would once again be ideal if the disbursement process is linked to the trust's terms of reference and assessed by an independent auditor under a quantifiable results-based scale. Equally, care should be taken so that disbursements are paid out in tranches and not in the form of a single lump sum. Certainly, from a political point of view, it will not always be feasible to incorporate such restrictive provisions with respect to the disbursement process and this is precisely why the beneficiary must first satisfy that he is able and willing to use the funds for the agreed purposes before a new disbursement is made. Irrespective of these problems, however, it is evident beyond any doubt that a sound application of the international trust model, under the terms identified above, may curb corruption altogether and promote democratic governance.

3. The Role of Trust Funds in Revenue Sharing and Fiscal Management

When international mediators approach rival and warring communities with a view to pacifying the parties and restoring relations they focus on the particular issues that caused the eruption of conflict. Where part, or all, of the problem lies in the delimitation and distribution of natural resources between the various groups, or where such matters may cause future conflicts, the mediators seek ways in which the parties can agree to a fair formula for distribution. The problem becomes even more acute where it is linked to potential secession claims by one of the parties, as is the case with the government of South Sudan and its internationally recognised right and efforts toward external self-determination from the Sudan. The underlying principle that has generally been applied to address such issues has been that of "equitable delimitation". The fundamental tenets of this principle are reflected in numerous international instruments, the unifying theme of which is 'the recognition of rights of the parties to the use and benefits of the international [natural resources] in question that are equal in principle and correlative in their application'.[27] In fact, most contemporary agreements go beyond the principle of equitable delimitation and utilization by providing, in the case of watercourses, for integrated river-based management through the establishment of competent specialized intergovernmental organizations.[28] This represents an excellent model for resolving disputes of this nature, but these models are not susceptible to any form of participatory governance and

[27] *See* G.A. Res. 49/52 (Feb. 17, 1995); *see also* U.N., *Report of the International Law Commission on the Work of its Forty-Sixth Session,* U.N. Doc. A/49/10 (May 2 – July 22, 1994).

[28] *See generally* Agreement for the Establishment of the Organization for the Management and Development of the Kagera River Basin, May 19, 1978, 1089 U.N.T.S. 165; *see also* Act Regarding Navigation and Economic Cooperation Between the States of the Niger Basin, Feb. 1, 1966, 587 U.N.T.S. 9; *see generally* David M. Ong, *Joint Development of Common Offshore Oil and Gas Deposits: Mere State*

once set up usually lack the overriding presence and authority of a trusted and perpetual external actor, as would be the case with a trustee administering a trust fund. This is not to say that the trust model constitutes the best mechanism in every single case, but certainly where democracy in all its manifestations is lacking and corruption is rife, coupled with intense animosity between the parties, a trusted third entity may well act as a good buffer zone.

Fiscal management, unlike revenue sharing in the context of internal conflict, does not generally lend itself to external intervention and in any event, cannot be subjected to the aforementioned model. The overarching principle of fiscal management is that fiscal systems must help manage and mitigate macroeconomic instability and should distribute resources in an equitable and efficient manner. Fiscal management becomes internationalized only where a State requests a significant injection of cash into its national economy, or where it requires a loan from an international financial institution. In both cases, the lender or donor will seek assurances that not only the loan will be repaid, but that, moreover, the target State will agree to implement particular measures related to budgetary management. Depending on circumstances the lender may also demand that the distribution of resources take into consideration specific social projects and groups. In this sense, loans or contributions of this nature entail an element of conditionality.[29] Developing countries have long been, to various degrees, recipients of aid from their developed counterparts, as well as from international organisations. Aid comes in a plethora of forms, such as donations, debt-relief, privileged trade treatment, privileged loans, and others.[30] Apart from those situations where aid is granted as a non-recoverable donation during urgent cases of famine or natural catastrophes, all other forms of aid are contractual and are usually accompanied by the imposition of so-called conditionalities on the recipient states. Such conditionality clauses vary in scope, some requiring minor obligations while others impose severe structural adjustment programs (SAP), which have a significant impact on the recipient country's fiscal, monetary, legislative, and political life, in both its internal and external relations.[31] The vast majority of development and poverty alleviation loans have been provided by the IBRD and IDA (as well as other regional international development banks), while the IMF has entered into stand-by arrangements with IMF member States, which are ex-

Practice or Customary International Law, 93 AM. J. INT'L L. 771 (1999) (an application of such agreements to hydrocarbon resources).

[29] *See* SIGRUN I. SKOGLY, THE HUMAN RIGHTS OBLIGATIONS OF THE WORLD BANK AND THE INTERNATIONAL MONETARY FUND, 23-26 (Cavendish 2001) (distinguishes between economic and political conditionality, arguing that the World Bank's Articles of Agreements preclude it from imposing the latter. The same is not true for the IMF).

[30] There are several indirect forms of debt relief. One of these is enhancing an otherwise heavily indebted state's access to private financial markets through the creation by the World Bank of its Policy-Based Guarantee (PBG) program, that extends the Bank's existing PCG instrument to include sovereign commercial borrowing in support of structural and social policy reforms, Udaibir S. Das, Michael G. Papaioannou & Magdalena Polan, *Strategic Considerations for First-Time Sovereign Bond Issuers* (I.M.F., Working Paper, Nov. 2008); *see also* CARLOS A. PRIMO BRAGA & DÖRTE DÖMELAND, DEBT RELIEF AND BEYOND: LESSONS LEARNED AND CHALLENGES AHEAD 313, 314-17 (World Bank, 2009).

[31] *See* THOMAS STUBBS & ALEXANDER KENTIKELENIS, CONDITIONALITY AND SOVEREIGN DEBT: AN OVERVIEW OF HUMAN RIGHTS IMPLICATIONS (2018); *see supra* note 17 at 359, 369.

pressly non-contractual in nature, or has alternatively made use of the special facilities mentioned elsewhere in this book. Despite the absence of a contractual nature in these arrangements, a significant amount of conditionality is present.[32] With the exception of the IBRD-Chad Agreement whereby an oil loan was made conditional upon the mandatory allocation of oil revenues to social and development projects, no other explicit revenue-sharing agreements have ever been stipulated as a form of conditionality. Joseph Stiglitz, former chief economist of the World Bank, argues that conditions imposed by the IMF cannot succeed because, *inter alia*, they are resented by the local populations, they are designed by bureaucrats under a one-size-fits-all scheme with little concern for immediate social repercussions, and in any event, they defeat the economic notion of 'fungibility'; that is, money going in for one purpose frees up money for another purpose.[33] Certainly, where conditions are imposed in the manner described by Stiglitz they can cause more damage than benefit, but where human rights considerations, such as revenue sharing, can be tangibly assessed and are relatively precise there is no reason why they cannot bring the desired results.

Whereas conditionality arrangements are better known for their incorporation in aid treaties,[34] recent practice demonstrates a trend, albeit marginal, according to which a tacit form of conditionality is encompassed into loan agreements with the World Bank with a specific focus on fiscal management. For this purpose, we shall be examining as a case study the Chad Oil Revenue Management Plan, because the World Bank imposed on the government of Chad the creation of a trust fund with external monitoring in order to better manage and distribute the royalties accruing from its fledgling oil exploration and pipeline transportation.[35]

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[32] *See generally* ERIK DENTERS, LAW AND POLICY OF IMF CONDITIONALITY (Kluwer Law International 1996) (the IMF adopted a new set of Guidelines on Conditionality in 2002. On 8 May 2003 the IMF adopted a note entitled "Operational Guidelines on the New Staff Conditionality Guidelines").

[33] J.E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS, 44–46 (Norton, 2003). The author uses the example of a country that wants to construct a road for rural farmers to carry their produce and another road for the president to travel to his weekend retreat, but money exists for only one of these. *Id*. at 44. The condition imposed by the loan obliges the government to construct the rural road, but this in turn frees local funds in order to construct the presidential road. *Id.*

[34] Partnership Agreement Between the Members of the African, Caribbean and Pacific Group of States of One Part, and the European Community and its Member States, of the Other Part, art. 9, June 23, 2000, 2000 O.J. (L317) [hereinafter Cotonou Agreement]; Karin Arts, *ACP-EU Relations in a New Era: The Cotonou Agreement*, 40 COM. MARK. L. REV. 95 (2003) ("In the context of a political and institutional environment that upholds human rights, democratic principles and the rule of law, good governance is the transparent and accountable management of human, natural, economic and financial resources for the purposes of equitable and sustainable development. It entails clear decision-making procedures at the level of public authorities, transparent and accountable institutions, the primacy of law in the management and distribution of resources and capacity building for elaborating and implementing measures aiming in particular at preventing and combating corruption.").

[35] Co-operation in resource allocation and management is stipulated in Art 24(c) of the Cotonou Agreement, accompanied also by significant safeguards regarding social participation and public consultation. Nonetheless, it does not envision an external monitoring or enforcement mechanism, save from the EC's right to invalidate its contribution (Arts 96 and 97) in those cases where the recipient violates the terms of the Agreement, *id.* at art. 24(c), 96-97.

3.1 Fiscal Management Trust Funds: The World Bank-Imposed Chad Oil Revenue Management Plan

Chad is not a major oil producer by international standards. Yet, the projected $200 US million annual earnings from its oil fields in the Doba Basin – since the Chad-Cameroon pipeline became operational in 2004 – are double the country's current revenues; in the meantime, further explorations revealed the existence of more hydrocarbon deposits. The consortium of oil companies involved in the Chad part of the project was apprehensive about their future image and standing, particularly because the country has been run by a brutal dictatorship since 1990, poverty was and continues to be widespread, corruption is rampant and all sense of government and management were totally absent.[36] They, therefore, turned to the World Bank, firstly in order to secure the appropriate political guarantees before going ahead with the project and secondly because they believed that the Bank possessed the necessary authority to impose a revenue management plan that would avert corruption and misappropriation.[37] The World Bank Group proceeded to provide $115 million towards financing the project, a sum which represents 3% of the entire amount spent, but more importantly, it linked absorption of this money and future project financing, among other conditions, to the development of a successful petroleum revenue management plan through its principal Loan Agreement with the government of Chad.[38] In fact, the Bank approved for this purpose two specific loans: a) a Petroleum Sector Management Capacity Building Project,[39] and b) Management of the Petroleum Economy.[40] Whereas the aim of the former was to strengthen Chad's capacity to manage the development of and increase the use of its petroleum resources in an environmentally and socially sound manner, the Petroleum Economy Credit assisted the borrower, i.e. Chad, 'in building capacity to implement its petroleum revenue management strategy to enable it to effectively absorb and allocate expected oil revenue and thus pursue the poverty-reduction objective of petroleum resources development'.[41] The Loan Agreement envisaged the establishment of two distinct vehicles, one of which was a trust fund, the Future Generations Fund, to which 10 percent of petroleum royalties and dividends were to be deposited and invested in long-term investment instruments with a financial institution, all of which were

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[36] Genoveva Hernandez Uriz, *To Lend or Not to Lend: Oil, Human Rights and the World Bank's Internal Contradictions*, 14 HARV. HUM. RTS. J. 197, 218-222 (2001).

[37] *See* Uriz, *supra* note 36, at 224. (citing Managing Oil Revenues in Chad: Legal Deficiencies and Institutional Weaknesses (Oct. 1999) (unpublished briefing paper)).

[38] Legal Dept of World Bank. 2001. *Conformed Copy - L4558 - Petroleum Development and Pipeline Project - Project Agreement 1 (English).* Washington, D.C.:World Bank Group. [hereinafter *IBRD-Chad Loan Agreement*].

[39] Legal Dept of World Bank. 2000. *Conformed Copy - C3373 - Petroleum Sector Management Capacity-Building Project - Development Credit Agreement (English).* Washington, D.C.:World Bank Group. http://documents.worldbank.org/curated/en/666871468236367788/Conformed-Copy-C3373-Petroleum-Sector-Management-Capacity-Building-Project-Development-Credit-Agreement.

[40] Legal Dept. of World Bank. 2000. *Conformed Copy - C3316 - Management of the Petroleum Economy Project –Development Credit Agreement (English).* Washington, D.C. World Bank Group.

[41] *Id.* at 14.

to be accomplished to the satisfaction of the World Bank itself.[42] The second vehicle was a Special Petroleum Revenue Accounts, which would benefit from 90 percent of royalties and dividends deposited in special accounts in one or more private commercial banks in Chad in the name of Chad's treasury; this arrangement similarly required the World Bank's final approval.[43]

The government of Chad was obliged under the terms of the agreement to invest the assets of the Future Generations Fund in accordance with prudential rules and investment arrangements satisfactory to the World Bank, in long-term investment instruments. Upon liquidation, the proceeds of such investments were to be used to benefit and finance poverty reduction objectives.[44] Money deposited in the Special Petroleum Revenue Accounts, on the other hand, was to be allocated as follows:

> i) 80 percent of royalties and 85 percent of dividends shall be allocated to expenditures, acceptable to the [World] Bank, for the following priority poverty reduction sectors in support of the Borrower's objective of regional balance: health and social affairs, education, infrastructure, rural development (agriculture and livestock) and environment and water resources.
>
> ii) Expenditures to be financed with the royalties and dividends referred to in [the previous paragraph] in these priority poverty reduction sectors shall be incremental to expenditures reflected in the Borrower's budget for fiscal year 2002 in respect of these sectors.
>
> iii) 5 percent of royalties shall be allocated to decentralised authorities in the petroleum-producing region, as a supplement referred to in paragraph 4(b)(i) above, to finance expenditures, acceptable to the Bank, to reduce poverty . . .
>
> iv) Up to and including December 31, 2007, 15 percent of royalties and dividends can be used to finance general recurrent expenditures for the non "sovereign" sectors. After December 31, 2007, this portion shall be used to finance expenditures in priority poverty reduction sectors referred to in paragraph 4(b)(i) above in accordance with the same terms and conditions applicable to expenditures under such paragraph.[45]

Moreover, the taxes collected from the investors were to be used to finance increased development expenditures generally.[46] The poverty reduction sectors were understandably given increased attention and the particular modalities for bringing it about were clearly outlined as follows:

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[42] *IBRD-Chad Loan Agreement*, *supra* note 38, at art.3(a).

[43] *Id.* at art.3(b).

[44] *Id.* at art. 4(a).

[45] *Id.* at art. 4(b).

[46] *Id.* at art. 4(c).

> i) By no later than September 15 each year, the Borrower shall prepare a plan satisfactory to the Bank containing the detailed allocation of resources under paragraph 4(b)(i) from the Special Petroleum Revenue Accounts to the priority poverty reduction sectors referred to in such paragraph; such annual expenditure program shall be reflected in the draft Borrower's budget to be submitted annually for approval to the Borrower's parliament.
>
> ii) In accordance with Article 18 of the Petroleum Revenue Management Law, the independent "Collège de Contrôle et de Surveillance des Resources Pètrolières" (CCSRP) shall authorise and verify the disbursements from the Special Petroleum Revenue Accounts.
>
> iii) Amounts under paragraph 4(b)(i) above which cannot be used for the agreed objectives, or the use of which would jeopardise the Borrower's macroeconomic liability, shall be held in the Special Petroleum Revenue Accounts, under arrangements to be agreed upon by the [World] Bank, for their subsequent use in financing priority poverty reduction sectors referred to in paragraph 4(b)(i) above.[47]

Prior to the adoption of the Loan Agreement, the government of Chad had adopted a Law on Governing the Management of Oil Revenues, as part of its project bid for the World Bank's financial support.[48] Chad agreed to retain this Law without amendments or waivers that may materially or adversely affect the implementation of the petroleum management revenue program.[49] The Law followed the obligations contained in the Loan Agreement and in accordance with Article 2, oil revenues consist of direct and indirect resources; the former include dividends and royalties, whereas the latter are comprised of taxes, fees, and customs duties related to oil exploration. Direct resources are to be allocated to priority sectors; particularly public health, social services, education, infrastructure, rural development, environment, and water,[50] as follows: 80% is earmarked for expenses related to priority sectors; 15% is intended for operating and investment costs of the State for a five year period from the production date, and 5% is intended for decentralised communities of the producing region.[51] In accordance with Article 4 of the Law, all indirect resources shall be directly deposited into the Public Treasury account. To safeguard against corruption, direct resources are to be deposited into special accounts of an international financing institution as offshore escrow accounts.[52]

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[47] *Id.* at art. 5(a).

[48] Loi n°001/PR/99 du 11 janvier 1999 portant gestion des revenus pétroliers [Law no. 001/PR/99 of 11 January 1999 governing management of petroleum revenues] [hereinafter Petroleum Revenue Management Law].

[49] *IBRD-Chad Loan Agreement*, *supra* note 38, Sched. 5, art. .2.

[50] Petroleum Revenue Management Law, *supra* note 48, at art. 7.

[51] *Id.* at art. 8.

[52] *Id.* at art. . 3.

In March 2001, the only parliamentary opposition leader in Chad's Parliament submitted a request for inspection to the World Bank's Inspection Panel. The request alleged that the Pipeline Project constituted a threat to local communities and their natural environment because of the absence or inadequacy of environmental assessment or compensation, further compounded by the lack of proper consultation and disclosure to the affected communities.[53] The Panel observed that institutional and human capacity building was insufficient to meet the project's social and environmental requirements and thus, Management was not in compliance with its obligations.[54] Furthermore, the Panel reached the conclusion that, although consultation with the local population satisfied formalities, it was most often conducted in the presence of security forces and did not address the needs of Chad's illiterate, rural population in the oil-producing fields.[55] The Panel noted that the situation was further exacerbated by the fact that the country lacked democratic governance and structures.[56]

From an oversight point of view, Article 14 of the Law envisages the creation of the CCSRP, with the aim of controlling the use of oil resources. The nine-member CCSRP is headed by the country director of the Bank of Central African States and is composed of an additional five representatives from all three branches of government, as well as four representatives from civil society.[57] According to Article 18 of the Law, the duties of the CCSRP are to verify that the special accounts are in conformity with the Finance Law, and also to authorize and control the disbursement of special accounts and allocation of funds. The World Bank has provided $41 U.S. million in aid to develop a financial management information system, build a poverty database, improve the competence of civil servants, and support the CCSRP.[58] Additionally, the Bank has appointed a six-member independent International Advisory Group (IAG) whose mandate is to advise the Bank and make information relating to poverty alleviation, management of oil revenues, and the involvement of civil society in the relevant projects publicly available.[59]

Despite the fact that this Law and the Loan Agreement constitute radical departures for the right to development and human rights in general, the Law is subject to several limitations. As noted by the World Bank Inspection Panel, the failure of Management to implement adequate institutional capacity building and the lack of democratic governance does not ensure poverty reduction outcomes, thereby requiring further "monitoring, review and assessment by an independent

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[53] World Bank Inspection Panel, *Investigation Report: Chad-Cameroon Petroleum and Pipeline Project (Loan No. 4558-CD); Petroleum Sector Management Capacity Building Project (Credit No. 3373-CD); and Management of the Petroleum Economy (Credit No. 3316-CD)* (July 17, 2002), ix [hereinafter *Chad-Cameroon Pipeline Report*].

[54] *Id.* at 26.

[55] *Id.* at 39-43.

[56] *Id*. at 60-63.

[57] Petroleum Revenue Management Law, *supra* note 48, at art. 16.

[58] SVETLANA TSALIK, CASPIAN OIL WINDFALLS: WHO WILL BENEFIT? 42 (Robert Ebel ed., 2003).

[59] IAG Terms of Reference, http://www.gic-iag.org/doc/iag_tor_en.pdf.

body such as the IAG."[60] This is of particular concern because bonuses and other similar payments do not fall within the ambit of direct resources (and neither do all the oil-producing units in the country). Therefore, they may be appropriated by a unilateral act of the government, as was the case with a $25 U.S. million signing bonus received in April 2000. After increased external pressure, the government disclosed that it had already committed $4.5 U.S. million of that amount for arms expenditures and by October 2000, the Bank and the IMF wrote formally to the government explaining that if the remainder of the bonus was not frozen and the CCSRP was not established immediately, neither of the two institutions would propose debt relief for Chad under the Heavily Indebted Poor Countries Initiative (HIPC). The government took the required corrective measures in April 2001 and in May of that year, adopted a budgetary amendment allocating 100 percent of the remaining bonus funds to priority expenditures under the supervision of the CCSRP.[61]

Other defects have also been cited in regards to Chad's implementation of the trust fund. A significant defect is that the principles and mechanisms for the allocation of five percent of revenues to the oil-producing region are undefined.[62] This is particularly problematic because one of the main causes of Chad's civil strife is rooted in the rivalry between the Muslim North and the predominantly Christian South, where the oil originates.[63] Although revenues should be utilized to decrease poverty in the country as a whole, all case studies demonstrate, where the oil-producing region is not part of the majority ethnic or religious group of the country and, is furthermore not permitted to retain a significant portion of oil revenues, some form of conflict is more than likely to follow. Another significant problem with the Revenue Management Law is the fact that, in accordance with its Article 8(2), the amount allocated to the priority sectors may be modified by decree every five years depending on available resources, needs, and absorption capacity of the region. It will be interesting to see if the government of Chad has any intentions of altering the percentage of revenue allocation in the future and whether the World Bank is inclined to put any pressure on the government in that respect. If the allocation of resources takes place to the detriment of the country's development process, the World Bank's position will significantly determine similar processes in the future. According to credible commentators, since managing to get the project on its feet, the Bank now has no intention of getting involved in ensuring the Revenue Management Law satisfies poverty reduction targets.[64]

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[60] *Chad-Cameroon Pipeline Report*, supra note 53, at 81, 84.

[61] World Bank, the Chad-Cameroon Petroleum Development and Pipeline Project: Note on the Use of the Petroleum Bonus, (June 2001), at 2, available at: <http://www.worldbank.org/afr/ccproj/project/bonus.pdf>.

[62] IAG, Report of Visit to Chad and Cameroon: April 21 to May 10, 2003 18 (2003).

[63] Uriz, *supra* note 36, at 215-219.

[64] *The Chad-Cameroon Pipeline: A New Model for Natural Resource Development: Hearing Before the SubcommitteeSubcomm.Subcommittee on Africa of the CommitteeComm.Committee of InternationalInt'lInternational Relations,* 107th Cong. 37–52 (2002) (statement of Peter Rosenblum, Director, Human Rights Program, Harvard Law School).

3.2. Trust Fund Lessons Learned from the Chad Experience

It is clear that the Revenue Management Law is, in itself, inadequate to address poverty reduction. The Bank, participating States, and private investors must take the same action as they did when they convinced Chad to adopt and adhere to the Law. It is not hard to recognize that the main characteristics of the trust fund model are missing from the vehicles designed by the World Bank and implemented in Chad's domestic law. The undiscerning reader will probably determine that the existence of an independent external entity, endowed with the authority to approve expenditures and revenue allocations, is tantamount to a veto against the government's potential usurpation of the fund's assets. Equally, placing assets in private bank accounts with the belief their investments are in conformity with the World Bank's approval seems to be an additional guaranteeing factor. This, in fact, could not be further from the truth. For one thing, the vehicle and its funding program were premised on a legislative act that was adopted by the borrower, and not on something that could have potentially been imposed by the World Bank, irrespective of the fact that the borrower was not permitted to amend the Law, save where it did not affect the objectives of the poverty reduction program. Secondly, the borrower unilaterally held and administered the assets of the fund. Although natural for future generations, funds held unilaterally by developed States accountable to their local constituencies is wholly problematic for an authoritarian regime that is imbued with corruption and cronyism. When such a borrower has access to the funds, as opposed to the funds being in the ownership of the trustee, the borrower is constantly tempted to appropriate parts of it. This is particularly true if the borrower invokes security concerns and military exigencies. Unlike Chad's government, which made numerous exceptions, if the assets were held by an independent trustee, such as the World Bank, no exception could be made.[65] Thus, the legal nature of the Future Generations Fund of Chad was that of a *sui generis* sovereign wealth fund that was subject to binding contractual, external, conditionalities. The same is equally true regarding the Special Petroleum Revenue Accounts; which, despite its designation as an Account in the Loan Agreement, is clearly an externally-imposed trust fund that is subject to a special regime and intended primarily to tackle poverty.

Besides the signing bonus granted by the government of Chad in 2000, relevant reports demonstrate that the "fund" mechanism set up on the basis of the Loan Agreement did not inhibit the government from appropriating large amounts of money therefrom through a variety of tactics. In January 2006, President Deby adopted significant amendments to the Revenue Management Law, by which he designated military expenditures as a priority sector, invoking urgent security concerns. In the same manner, he increased the share of oil revenues for discretionary government spending to 30 percent and abolished the Future Generations Fund. The World Bank responded by blocking the disbursement of a planned loan of $124 U.S. million and by freezing the assets of the escrow ac-

[65] *See* HANS ERIKSSON & BJÖRN HAGSTRÖMER, CHAD: TOWARDS DEMOCRATISATION OR PETRO-DICTATORSHIP? (2005), (history of the violations in relation to the management of the royalties and dividends).

count in Citibank, London, that held the dividends and royalties of the Special Petroleum Revenue Accounts. Faced with a complete breakdown in bilateral relations and the prospect of abandonment of a major project that was well underway, the World Bank finally entered into a memorandum of understanding with the government of Chad on July 16, 2006. According to the memorandum of understanding, Chad was to commit 70 percent of proceeds to priority poverty reduction programs, in addition to setting aside assets for the purpose of establishing a stabilisation fund. Furthermore, it was agreed that the existing obligation to earmark five percent of proceeds for the oil-producing regions was to remain intact.[66]

The official implementation completion report (ICR) of the World Bank on the management of the petroleum economy project was not favorable,[67] and according to most NGOs monitoring the project, the ICR paints a far more complimentary picture than reality would suggest. In fairness, the World Bank had the right intentions and drew up a powerful agreement, clad with what seems like an efficient oversight mechanism and without surrendering full decision-making authority to the borrower on the use of the trust's contributed assets. Nevertheless, this trust model runs contrary to the basic and foundational characteristics underlying all the trust funds analyzed in this book. First of all, the absence of an independent trustee that actually held the assets in trust ownership meant the borrower could appropriate them at any time; even if it constituted a violation of the terms of the Loan Agreement. Second, the fact that the terms of the trust fund could be amended unilaterally by the borrower, even if not obvious or substantially, meant that they were subject to the borrower's individual circumstances, including *force majeure*. Third, the application in the particular circumstances of an expanded interpretation of the local ownership principle, whereby the borrower was to identify the poverty reduction priority areas, as well as other needs as specified in the agreement, was clearly wrong. The government of Chad should no doubt have been given increased voting power, but this should have been counterweighted by the existence of a decision-making mechanism comprised of the trustee, the oversight committee, representatives of civil society, and perhaps others. If for no other reason, this mechanism would have ensured that the borrower was constrained to act within the parameters of the agreement and that the existence of a precise and active role for civil society would be acknowledged and respected. None of this has taken place. It is safe to say that the Bank's good intentions were simply insufficient.

4. Conclusion

In its final report on the Chadian mechanism, the World Bank admitted that while the operational aspects of the project were largely successful, the develop-

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[66] John A. Gould & Matthew S. Winters, *An Obsolescing Bargain in Chad: Shifts in Leverage between the Government and the World Bank*, 9 BUS. & POL. 1, 27-28 (2007).

[67] THE WORLD BANK, IMPLEMENTATION COMPLETION REPORT (PPFI-Q1990 IDA-33160) ON A CREDIT IN THE AMOUNT OF SDR 12.6 MILLION TO THE REPUBLIC OF CHAD FOR A MANAGEMENT OF THE PETROLEUM ECONOMY PROJECT, 7 (2006).

mental aims were not.[68] Following the Millennium Summit, the U.N. Secretary-General finalized the text of the eight agreed Millennium Development Goals (MDGs): (1) eradication of extreme poverty and hunger; (2) achievement of universal primary education; (3) promotion of gender equality and empowerment of women; (4) reduction of child mortality; (5) improvement of maternal health; (6) combating HIV/AIDS, malaria and other diseases; (7) ensuring environmental sustainability; and (8) establishment of a global partnership for development. Industrialized states pledged to contribute 0.7 percent of their GDP[69] to meet these targets and, in addition, undertook to support exports from least developed nations, offer debt relief by cancelling all official bilateral debts in return for demonstrable commitments to poverty reduction, and provided generous development assistance.[70] The achievement of the first seven substantive goals is predicated to a large degree on goal eight, which seeks to develop a global partnership for development through the delivery of official development assistance (ODA), debt relief, tariff and quota-free access, and making available essential drugs and new technologies. Thus, ODA, which consists of direct financial assistance, is complementary to other initiatives and requires that the target state is obliged to work towards implementing the targets and indicators of the MDGs. Paragraph 39 of the 2002 Monterrey Consensus[71] makes it clear that ODA is reserved for countries with the least capacity of attracting foreign direct investment. Its purpose is to help achieve:

> adequate levels of domestic resource mobilisation over an appropriate time horizon, while human capital, productive and export capacities are enhanced. ODA can be critical for improving the environment for private sector activity and can thus pave the way for robust growth. ODA is also a crucial instrument for supporting education, health, public infrastructure development, agriculture and rural development and to enhance food security.

It is broadly understood that development financing is the main mechanism to achieve the SDGs. It is therefore imperative that any financing framework possess the following characteristics: be rights-sensitive and considered against human rights' standards and indicators (e.g., removal of tied aid); avoid overly technocratic goals that provide good statistical reading and instead focus on transforming the lives of people by prioritizing human rights in policy choices and resource allocation; aim to empower all people and disrupt unequal power

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[68] The World Bank, The World Bank Group Program of Support for the Chad-Cameroon Petroleum Development and Pipeline Construction, Program Performance Assessment Report (2009).

[69] Int'l Conference on Financing for Dev., Monterrey Consensus on Financing for Development, ¶ 42, U.N. Doc. A/CONF. 198/11 (March 18-22, 2002).

[70] G.A. Res. 55/2, ¶¶ 15–18 (Sept. 18, 2000); U.N. Millennium Declaration Goal 8: Develop a Global Partnership for Dev., https://www.un.org/millenniumgoals/global.shtml.

[71] Int'l Conference on Financing for Dev., *supra* note 69, at ¶ 39. The Monterey Consensus is a political declaration of the highest calibre aimed at mobilising development assistance, international trade as an engine for development and eliminating external debt. It was followed up in 2008 by the Doha Declaration on Financing for Development, *Id.*

relations that thwart development for the masses; and make MDG rights justiciable—not necessarily against the donors, but in respect of the institutions and mechanisms set up by target states.[72] Only independent oversight mechanisms, which bypass official channels of the target state, can ensure that the benefits of aid, through a human rights-based process, can be realized.

Indeed, independent trust funds ensure not only that the process is human rights-based, but that the end outcomes are in line with fundamental human rights and the SDGs. Human rights are now an integral part of the international development finance framework. Human rights are embedded in the new financing for development framework as set out in the third International Conference on Financing for Development in Addis Ababa. Respect for all human rights underlies states' commitments under the Addis Ababa Action Agenda (AAAA)[73]—which pledges to provide a social protection floor for everyone[74] and lays emphasis on development actors' accountability in relation to their financing promises that are subject to review for the first time.[75] Besides, the equitable distribution of resources so that all persons have their most basic needs met, human rights are a key objective for the AAAA[76] which, in this regard, aims to establish an international development financing system that is just, cooperative, transparent, and premised on human rights standards.[77]

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[72] Organisation for Economic Co-operation and Development [OECD], *Action-Oriented Policy Paper on Human Rights and Development*, 3, DCD/DAC/15 (Feb. 15, 2007); Organisation for Economic Co-operation and Development [OECD], DAC Evaluating Development Cooperation: Summary of Key Norms and Standards, 13–14 (2010), https://www.oecd.org/development/evaluation/dcdcdep/41612905.pdf.).

[73] G.A. Res. 69/313, ¶ 1 (July 27, 2015).

[74] *Id.* at ¶ 12.

[75] *Id*. at ¶¶ 130–34.

[76] That human rights considerations should permeate development finance programs was raised by the OHCHR during the third international conference on financing for development and the negotiations of the Addis Ababa Action Agenda (AAAA), its outcome document. It was emphasized that the objective of financing development should be the equitable distribution of resources so that all persons have their most basic needs met and human rights are made a reality for all. SSU.N.*See* Office of the United Nations High Commissioner for Human Rights (OHCHR), Key Messages on Financing for Development and Human Rights (2015), https://www.ohchr.org/Documents/Issues/Development/KeyMessageHRFinancingDevelopment.pdf.

[77] Civil society denies that this holds true. On the same note, civil society expressed skepticism about the new financing framework to achieve Agenda 2030 for sustainable development, stating that although the AAAA promulgates the realignment of financial flows with public goals, the agenda does not tackle the structural injustices in the current economic system and that development finance is not people-centered. *See* Addis Ababa, *Civil Society Response to the Addis Ababa Action Agenda on Financing for Development*, Global Policy Watch (July 16, 2015), https://www.globalpolicywatch.org/wp-content/uploads/2015/07/20150716-CSO-Response-to-FfD-Addis-Ababa-Action-Agenda.pdf.

Establishing A United Nations Convention To Stop Foreign Election Interference

Todd Carney

Introduction

Russia has come under fire for election tampering across the world.[1] While Russia might be most commonly known for interfering in the United States (U.S.), its influence has been found in 27 countries since 2004.[2] This has gone beyond some of the more prominent examples such as France and the U.S., to include countries in Africa such as Madagascar.[3] Russia has financed online advertisements, funneled money to campaigns, hacked databases, and spread doubt over election results in various countries.[4] Russia has pursued this strategy to advance its own interests;[5] their tactics sometimes aim to simply spread chaos in a country while other times it is for electing a specifically preferred candidate or to spread Russia's influence in the country.[6] Regardless, it is clear that Russia has found election interference as a powerful tool, and it is something the international community is taking notice of.[7]

Though Russia's actions may be considered egregious and self-serving, Russia is far from the only nation to have conducted election interference. The U.S. also has a long history of meddling in other nations' elections, including their allies'.[8] Moreover, Germany saw Turkey interfere in its most recent national election, and France is still reeling from Libya's interference in their 2007 presidential election.[9] Though election interference has served a 'greater good' in some instances, such as when the U.S. interfered in Serbia's 2000 election to keep Slobodan Milosevic—who had committed genocide—out of power, other interferences are

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[1] Michael Schwirtz & Gaelle Borgia, *How Russia Meddles Abroad for Profit: Cash, Trolls and a Cult Leader*, N. Y. Times (Nov. 11, 2019), https://www.nytimes.com/2019/11/11/world/africa/russia-madagascar-election.html.

[2] Oren Dorell, *Alleged Russian political meddling documented in 27 countries since 2004*, USA Today (Sept. 7, 2017), https://www.usatoday.com/story/news/world/2017/09/07/alleged-russian-political-meddling-documented-27-countries-since-2004/619056001.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] Margaret L. Taylor, *Combating disinformation and foreign interference in democracies: Lessons from Europe*, Brookings Inst.: TechTank (July 31, 2019), https://www.brookings.edu/blog/techtank/2019/07/31/combating-disinformation-and-foreign-interference-in-democracies-lessons-from-europe/.

[8] *Id.* Toi Staff, *Bill Clinton admits he tried to help Peres beat Netanyahu in 1996 elections*, Times of Isr. (Apr. 4, 2018), https://www.timesofisrael.com/bill-clinton-admits-he-tried-to-help-peres-beat-netanyahu-in-1996-elections/.

[9] Bulent Usta, *Erdogan tells Turks in Germany to vote against Merkel*, Reuters (Aug. 18, 2017), https://www.reuters.com/article/us-germany-turkey/erdogan-tells-turks-in-germany-to-vote-against-merkel-idUSKCN1AY17Z; *Sarkozy to go on trial after final appeal fails*, Euractiv (Jun. 20, 2019), https://www.euractiv.com/section/justice-home-affairs/news/sarkozy-to-go-on-trial-after-final-appeal-fails/.

more problematic.[10] For example, when the U.S. became involved in Guyana during the Cold War, they helped elect Cheddi Yagan, who established a dictatorship. Such intervention threatens the sovereignty of each nation to conduct fair elections that empower individual citizens to decide their own leader.[11]

Recent election interference, particularly by Russia, has brought calls to address election interference within international law.[12] When there have been issues with other pressing international human rights issues such as disabilities, women's rights, and Indigenous rights, a particularly effective tool has been to move to establish a United Nations (UN) Convention or Declaration.[13] In fact, there are 560 UN Conventions.[14] This raises the question of whether a UN Convention could work in regards to election interference. This piece looks at how a UN Convention on election interference would be best established by analyzing the types of election interference that have occurred and their respective impact. The piece then explores what type of interference needs to be curved and how to best prevent this interference. The piece closes by looking at the feasibility of passing a widespread convention and how to best enforce it, arguing that though there would be enforcement and adoption issues it is still important to attempt to establish a convention to increase the conversation in international law over the problem.

Direct Illegal Interference

As mentioned *supra*, election interference has been widespread in many nations. To put an end to such actions it is important to look at the specific types of interference. The first type of interference is a country's government moving to make a direct act of interference that violates the domestic country's law and is likely something that would be considered unethical by the target. Perhaps most notable of late is Russia's role in the hacking of the Democratic National Convention (DNC)'s emails.[15] The hacking of the DNC's emails dates back to

[10] Scott Shane, *Russia Isn't the Only One Meddling in Elections. We Do It, Too,* N.Y. Times (Feb. 17, 2018), https://www.nytimes.com/2018/02/17/sunday-review/russia-isnt-the-only-one-meddling-in-elections-we-do-it-too.html.

[11] Peter Beinart, *The U.S. Needs to Face Up to Its Long History of Election Meddling*, The Atlantic (Jul. 22, 2018), https://www.theatlantic.com/ideas/archive/2018/07/the-us-has-a-long-history-of-election-meddling/565538/.

[12] Duncan B. Hollis, *Russia and the DNC Hack: What Future for a Duty of Non-Intervention?*, Opinio Juris (Jul. 25, 2016), http://opiniojuris.org/2016/07/25/russia-and-the-dnc-hack-a-violation-of-the-duty-of-non-intervention/.

[13] U.N. Convention on the Rights of Persons with Disabilities, *opened for signature* Mar. 30, 2007, 2515 U.N.T.S. (entered into force May 3, 2008); U.N. Convention on the Elimination of All Forms of Discrimination against Women, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. (entered into force Sep. 3, 1981); G.A. Res. 61/295, (Sep. 13, 2007).

[14] *Titles of Multilateral Treaties in the Six Official Languages of the United Nations*, United Nations Treaty Collection, https://treaties.un.org/Pages/Content.aspx?path=DB/titles/page1_en.xml#:~:text=there%20are%20currently%20over%20560,for%20signature%20almost%20every%20year.

[15] Zack Whittaker, *Mueller report sheds new light on how the Russians hacked the DNC and the Clinton campaign*, TechCrunch (Apr. 18, 2019), https://techcrunch.com/2019/04/18/mueller-clinton-arizona-hack/.

2015.[16] In 2015, the Federal Bureau of Investigation's (FBI) repeatedly found that a DNC computer was sending information to Russia.[17] Starting in 2016, the DNC and Hillary Clinton's presidential campaign began to take note of suspicious activity occurring with their emails but, due to miscommunication within the campaign, hackers were able to access Clinton's campaign chief John Podesta's email.[18] Through this and other tactics, hackers had access to 33 DNC computers and were able to steal 30,000 emails.[19] The hackers released the emails on an array of websites, including WikiLeaks.[20] By July of 2016, cyber firms and various outlets in the media were able to tie the hacking to the Russian government.[21] Throughout the rest of the campaign there was wavering between political leaders over whether Russia was responsible for the hacking, but, at a minimum, there was clear evidence that Russia was looking to intervene in the election.[22] By 2019, Robert Mueller's special counsel investigation found clear evidence that the Russian government hacked the DNC's emails.[23] The individuals involved in the hacking faced indictments on cybersecurity law violations, making it clear that those involved did allegedly violate domestic U.S. law.[24] Twelve of the hackers indicted were Russian military officials, connecting the Russian government to an unknown extent.[25] Although the Trump administration downplayed Putin's direct involvement in the hacking[26] there is overwhelming evidence that Putin did order the hacking.[27] Regardless of Putin's involvement, government officials from a foreign government took an action seeking to influence the outcome of the election, violating U.S. law in the process.

This type of action is not unique to Russia. Another recent example involves the alleged Libyan government's involvement in the 2007 French Presidential

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16 *2016 Presidential Campaign Hacking Fast Facts*, CNN (Oct. 28, 2020), https://www.cnn.com/2016/12/26/us/2016-presidential-campaign-hacking-fast-facts/index.html.

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.*

22 *Id.*

23 Eric Geller, *Collusion aside, Mueller found abundant evidence of Russian election plot*, Politico (Apr. 18, 2019), https://www.politico.com/story/2019/04/18/mueller-report-russian-election-plot-1365568; *see* Paul Wagenseil, *How computer hacking laws make you a criminal*, NBC News (Jan. 17, 2013), https://www.nbcnews.com/technolog/how-computer-hacking-laws-make-you-criminal-1B8022563.

24 *Id.*

25 *Id.*

26 Hannah Levintova, *"Russia Says Nothing Exists": A Dozen Times Trump Has Downplayed Hacking*, Mother Jones (Oct. 2018), https://www.motherjones.com/politics/2018/07/donald-trump-russian-hacking-denials/.

27 Cristina Maza, *Putin Ordered Theft Of Clinton's Emails From DNC, Russian Hacker Confesses*, Newsweek (Dec. 12, 2017), https://www.newsweek.com/russian-hacker-stealing-clintons-emailshacking-dnc-putinsfsb-745555.

election.[28] This investigation continues, but there are allegations that the late Libyan dictator Muammar Gaddafi contributed millions of euros to former President Nicolas Sarkozy when he campaigned for and successfully won the presidency in 2007.[29] In 2012, the news site *Mediapart* displayed a letter from a highly-ranked Libyan official claiming that Gaddafi's government approved payment of 50 million euros to help Sarkozy's campaign.[30] Sarkozy, along with officials from his administration, claimed that the document was false, but a French court held that the documents were authentic, allowing French officials to use the documents in an investigation of the matter.[31] From these investigations, authorities uncovered alleged fraud by Claude Guéant, a former official in Sarkozy's administration, who received 500,000 euros from Gaddafi's regime which Guéant claimed came from the sale of two paintings.[32] In 2016, Ziad Takieddine, a French businessman with ties to Gaddafi's regime, told *Mediapart* that he delivered cash from Gaddafi to Sarkozy's campaign.[33] Takeiddine claimed that he made three trips from Tripoli to receive and then deliver the cash from Gaddafi's military chief.[34] A French businessman named Alexandre Djouhri was arrested for funneling money from Gaddafi for Sarkozy's campaign.[35] The allegations reveal the complicated relationship between Sarkozy's and Gaddafi.[36] When Sarkozy won he invited Gaddafi to France and gave him a high-profile welcome; however, in 2011, Sarkozy helped lead North Atlantic Trade Organization (NATO) airstrikes that drove Gaddafi out of power.[37] In that same year, Gaddafi's son Saif al-Islam made an allegation about foreign financing, stating, "Sarkozy has to give back the money he accepted from Libya to finance his electoral campaign. We financed his campaign and we have the proof."[38] In 2018, investigators were able to hold Sarkozy for questioning.[39] Later that year, Sarkozy was formally charged for receiving illegal campaign contributions and for concealing the evidence.[40] Since then, Libya's intelligence chief, Abdulla Senussi, stated in interviews with

[28] Angelique Chrisafis, *Nicolas Sarkozy in police custody over Gaddafi allegations*, GUARDIAN (Mar. 20, 2018), https://www.theguardian.com/world/2018/mar/20/nicolas-sarkozy-police-custody-french-president-campaign-funding-libya.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] Henry Samuel, *Sarkozy charged over Libyan cash for campaign*, THE TELEGRAPH (Mar. 21 2018), https://www.telegraph.co.uk/news/2018/03/21/sarkozy-charged-libyan-cash-campaign/.

French judges that Sarkozy accepted foreign financing from Libya.[41] In 2020 a Sarkozy aid, Thierry Gaubert, was charged for assisting in funneling money from Libya to Sarkozy's campaign.[42] Also in 2020, after a two-year legal battle, French officials successfully extradited Djouhri from Great Britain to stand trial.[43] While Sarkozy and his administration officials have yet to be convicted, there are a lot of charges leveled that the French government strongly believes they can prove.[44] Alleged violations of French law include foreign contribution, exceeding French campaign limits, and concealing evidence.[45]

Although the earlier-cited instances seem horrible and corrupt, there are other instances of election interference that many would likely consider a positive interference. A key example of this can be seen in the 1940's Presidential Election where Great Britain intervened to help re-elect Franklin Delano Roosevelt.[46] The 1940 election was contentious, as World War II became a growing issue, and the U.S. was divided over whether they should be involved.[47] Many in the Republican Party, the opposition party to Roosevelt's Democratic Party, opposed the U.S. getting involved in World War II, and were isolationist in general.[48] Then-British Prime Minister Winston Churchill knew that Great Britain could temporarily hold off Germany, but he was also keenly aware that his country needed the U.S.'s help to win the war.[49] This prompted Churchill's government to get involved in the election by using their intelligence agency, known as British Security Coordination (BSC), along with Canadian and American activists, to influence the public in favor of Roosevelt.[50] Though Great Britain favored the Democrats, they worked behind the scenes to ensure there was still an "interventionist" Republican nominee in case Roosevelt lost.[51] BSC worked to conduct polls to see where Republican delegates were on the issue of intervention and found that a majority actually favored U.S. intervention in the war.[52] Additionally, the Secret Intelligence Service (SIS) utilized a group of businessmen to

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41 *Gaddafi funded Sarkozy's campaign, Libya spy chief tells French judges*, MIDDLE EAST MONITOR (Feb. 20, 2019), https://www.middleeastmonitor.com/20190220-gaddafi-funded-sarkozys-campaign-libya-spy-chief-tells-french-judges/.

42 *France charges Sarkozy aide in Libya funding probe*, THE JAKARTA POST (Feb. 4, 2020), https://www.thejakartapost.com/news/2020/02/04/france-charges-sarkozy-aide-in-libya-funding-probe.html.

43 *UK hands businessman Djouhri, at heart of Sarkozy's Libyan finance scandal, to French authorities*, FRANCE24 (Jan. 31, 2020), https://www.france24.com/en/20200131-united-kingdom-france-libya-alexandre-djouhri-campaign-finance-scandal-nicolas-sarkozy.

44 *Id.*

45 Aurelian Breeden, *Nicolas Sarkozy and the Libya Investigation: The Key Questions*, N.Y. TIMES (Mar. 23, 2018), https://www.nytimes.com/2018/03/23/world/europe/nicolas-sarkozy.html.

46 Steve Usdin, *When a Foreign Government Interfered in a U.S. Election — to Reelect FDR*, POLITICO (Jan. 16, 2017), https://www.politico.com/magazine/story/2017/01/when-a-foreign-government-interfered-in-a-us-electionto-reelect-fdr-214634.

47 *Id.*

48 *Id.*

49 *Id.*

50 *Id.*

51 *Id.*

52 *Id.*

convince Republican candidate Wendell Wilkie to join in a 'gentleman's agreement' not to criticize Roosevelt on the war.[53] The business group organized on behalf of Wilkie, helping him rise from an underdog candidate to the Republican presidential nominee.[54] British officials let Roosevelt know Wilkie would not criticize him over the war, so Roosevelt began further assisting Britain in the presidential campaign.[55] Outside the Presidential race, the BSC also created campaigns to defeat individual isolationist members of Congress, in some races spending more in opposition than the opposition party.[56] The BSC coordinated with pro-intervention candidates and organizations.[57] It worked to plant false news stories, in some cases bribing journalists to run stories.[58] The BSC illegally tapped phones, broke into embassies, and even engaged in the seduction of officials to get classified information and then release it to the press.[59] With the issues of foreign interference, burglary, phone tapping, and espionage, Great Britain broke many laws in the US. It is difficult to determine how much of an influence this had, but opposition to World War II was a pervasive threat within the U.S.[60] Swaying an election is something the World in general recoils at, especially as seen by Russia's intervention in elections; however, the U.S. involvement in World War II was seen as essential for the allied victory, something just about everyone in the World is glad happened.[61] While it is unclear whether Britain's illegal intervention in the U.S. election is what made U.S. involvement possible, simply the chance that it may have caused an intervention makes it a consideration.[62]

Many would argue that conducting illegal activity to intervene in an election is the worst type of interference. After all, if a country has decided that its laws are important, a foreign country breaking both domestic and international law to intervene in an election would be the most severe affront to a country's sovereignty. In a democratic election, there is an expectation that elections are run fairly; therefore, a country breaking the law to help a candidate win constitutes an assault on democracy. However, as mentioned above, if U.S. involvement in World War II can be attributed to Britain's illegal involvement in the U.S. election, then it is reasonable to presume that the international community would welcome Britain's unlawful interference. Regardless of the outlier benefits, there will always be illegal actions that can be seen as 'advancing a greater good.' That does not mean, on the whole, that the act of breaking another country's laws to intervene in an election is a 'good' action.

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[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.*

After a cursory analysis of the examples of election interference described above it is hard to argue that this type of interference is not the most underhanded type of election interference. All of the actions involved deception, invasion of privacy, and bad faith, no matter the impact. There is also a question of determining the impact on a political campaign along with identifying all levels of collusion. In the case of Sarkozy's election, there was a clear level of collusion, so much so that French authorities have been able to charge Sarkozy and several members of his administration. Although it is evident that there was an attempt to sway the election, there is no analysis on whether their intervention made any impact on the actual election. During the 1940 U.S. election, there is some evidence of a coordinated attempt to intervene, but the level of coordination is less clear than the 2007 French election because it cannot be quantified. For the Trump campaign, it is even more apparent, the probe into Russia proved insufficient to charge any Trump campaign officials for colluding with Russia, but many have argued that it does not mean that collusion did not occur.[63] But regardless of if the Trump campaign did engage in collusion, it does not necessarily mean there is less of violation of sovereignty. Additionally, there are still concerns that Russia was able to sway the election by targeting and inflating the Clinton campaign emails. There is a myriad of ways for a country to engage in 'collusion' or 'coordination' but still serving as a threat to a country's sovereignty. The U.S. is infamous for intervening in elections, yet has not been found legally liable and in some cases even praised for their invention.[64] The U.S. is not necessarily in the wrong for these interventions, but it is an issue to be considered.

Legal But Direct Interference

A legal but still direct form of interference is government assistance in traditional election work for a campaign.[65] An example stems from the campaign against war criminal Slobodan Milosevic.[66] The election in question took place in 2000 and followed a horrible conflict in Yugoslavia, where Milosevic had engaged in genocide.[67] The U.S. successfully led a NATO effort to stop the campaign, but there was concern that if Milosevic was re-elected, he would return to past crimes.[68] Moreover, the only perceived alternative, to remove Milosevic, could cause a lot of violence.[69] Given this reality, the U.S. saw the 2000 election

63 Andrew Desiderio & Kyle Cheney, *Mueller refutes Trump's 'no collusion, no obstruction' line*, POLITICO (Jul. 24, 2019), https://www.politico.eu/article/mueller-refutes-trumps-no-collusion-no-obstruction-line/.

64 Shane, *supra* note 10; Beinart, *supra* note 11.

65 *Id.*

66 Michael Dobbs, *U.S. Advice Guided Milosevic Opposition*, THE WASH. POST (Dec. 11, 2000), https://www.washingtonpost.com/archive/politics/2000/12/11/us-advice-guided-milosevic-opposition/ba9e87e5-bdca-45dc-8aad-da6571e89448/.

67 *Id.*

68 *Id.*

69 *Id.*

as a prime opportunity to help peacefully vote Milosevic out of office.[70] The U.S. felt that it was important to interfere because, though Milosevic was unpopular, his opposition had remained fractured; Milosevic could exploit this opposition to win re-election.[71] The process began in October 1999, when Clinton pollster Doug Schoen called for an "electoral revolution" that could be fully transparent unlike other covert overthrows that the U.S. had supported through the Centrial Intelligence Agency (CIA) in the past, such as in Iran and Guatemala.[72] The U.S. spent $41 million to support electoral tactics to defeat Milosevic.[73] Interestingly, Serbia was aware of the U.S.'s involvement in the election, but there was not as much common public knowledge of what the U.S. specifically did to try to defeat Milosevic.[74] Broadly the tactics included commissioning polls, training activists, organizing voter registration drives, giving out election stickers, and anti-Milosevic graffiti.[75] During the campaign, Milosevic had a 70% unfavorable rating, but many of the opposition figures had high unfavourability ratings, which led the U.S. to curtail some of its tactics to focus on further attacking Milosevic.[76] The U.S. ran focus groups and polls to see what messages were most effective and how to best organize.[77] Milosevic took note of this intervention and put visa restrictions to make it impossible for U.S. officials to go to Serbia.[78] In response, the U.S. then met with Serbian opposition officials in nearby countries of Hungary and Montenegro to allow them to not only learn election tactics but also make them self-sufficient to be able to train other people back in Serbia.[79] Interestingly, the candidate that the U.S. intervention ended up benefitting was Vojislav Kostunica because he was perceived as being the most anti-American since he opposed U.S.-led-NATO bombings and had criticized any U.S. intervention in the election.[80] All candidates in the election feared being too closely associated with the U.S. and some of the ones that were too closely associated with the U.S. did see their poll numbers suffer.[81] Some opposition figures tried to spin U.S. involvement as "atonement" for past U.S. support for its public record that the U.S. Congress earmarked this money for the election and that the State Department directly spent money on the election.[82] The U.S. paid election workers high wages to entice more involvement.[83] Though many people

[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.*

were proud to be involved in the election, then-U.S. President Bill Clinton's administration described the involvement as neutral, trying to ensure that the election was fairly carried out.[84] As a result, Milosevic lost and would go on to face war crime charges, though he would die in jail.[85]

The involvement of the U.S. is in some ways a remarkable success story. If the U.S. was able to remove Saddam Hussein from power through an election rather than through war, thousands of lives would likely have been saved. However, the idea of U.S. intervention in a country that reviles the U.S. is an unpopular one. Though much of the international community views the U.S. intervention in Serbia as the right move, the people of Serbia had their own views and had a right to make their decisions without U.S. interference. Ultimately, by voting Milosevic out of power, they unknowingly cooperated with the plan of the U.S., because it was unclear to the general public how much support the U.S. was giving, therefore some individuals believed they were voting *against* the U.S. interests. Finally, though Serbia has remained stable, a democratically elected leader can become a despot. A prime example is that of Adolf Hitler, infamously democratically elected. Still, others might argue the necessity of election intervention similar to that of armed intervention: war always results in casualties and economic damage, yet it is accepted as necessary for the greater good. Interestingly, this is the only example that seems to show an overt and directly legal intervention in an election. Part of the issue might be that in this election there was a clear "good" side and "bad" side. Though there are critiques of the U.S. tactics in election interference in Serbia, Milosevic was popularly viewed as a bad figure, and the most peaceful method to remove him from power was preferred. In the other cases that will be shown *infra*, other interventions more represent different nations' interests. This does not necessarily make them wrong but rather represents more subjective choices on which side to take in an election.

Indirect Legal Government Interference

Aiding the Incumbent Government

Though governments do not always present an aggressive and overt interference in an election, governments can intervene in elections by seeking to help the current government in power. Leading up to the 1996 Russian election, incumbent President Boris N. Yeltsin was running for re-election.[86] The Clinton administration wanted Yeltsin in power because his views were more pro-West and his opponent was affiliated with communism;[87] however, Yeltsin was unpopular, an

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[84] *Id.*

[85] Peter Beaumont, *Slobodan Milosevic dies alone with history still demanding justice*, THE GUARDIAN (Mar. 11, 2006), https://www.theguardian.com/world/2006/mar/12/warcrimes.milosevictrial#maincontent

[86] Stephen Kinzer, *How to interfere in a foreign election*, BOSTON GLOBE (Aug. 19, 2018), https://www.bostonglobe.com/opinion/2018/08/18/how-interfere-foreign-election/M4JZpgqpqiOsPXbTKPAu5L/story.html.

[87] *Id.*

alcoholic, and had corruption issues.[88] Some argue that the Clinton administration specifically liked these flaws in Yeltsin because they made him easy to control.[89] Regardless, the Clinton administration recognized that part of Yeltsin's unpopularity stemmed from economic troubles, so it secured an International Monetary Fund (IMF) loan of $10.2 billion to Russia to help improve the economy.[90] When the loan was disbursed, Michel Camdessus, director of the IMF, denied that the loan was political and insisted it was supposed to help secure economic reforms that Yeltsin had made.[91] Yeltsin pounced on the loan and proclaimed that it was an example of his great leadership and that he was the only political figure that could secure such a loan to help Russia.[92] Moreover, even though the IMF claimed that the loan was not political, Camedessus said "[i]f a new Government arrives, we think that, when confronted with the hard realities of this country, it will certainly consider this program the best possible for the country. . .[i]f they don't comply with the commitments of Russia established in these documents, our support would be interrupted."[93] Though this was technically given by the IMF, Clinton applied pressure to ensure the loan went through and even endorsed giving the loan while negotiations were still being conducted.[94] Though the Clinton administration was the main force for the loan, other world leaders such as then German Chancellor Helmut Kohl and Japanese Prime Minister Alain Juppe showed their support for Yeltsin and his reform programs.[95] Yeltsin even championed foreign involvement by announcing that he had to get Clinton, Kohl, and then French President Jaques Chirac involved to secure the loan.[96] Yeltsin used this to make the case that he was the only candidate with such an international Rolodex.[97] Before the U.S. intervention, Yeltsin had a six percent approval;[98] however, Yeltsin went on to win the election by 13 points.[99] Interestingly, though the Clinton administration was relatively tight-lipped about explicitly trying to help Yeltsin win re-election; however, several election consultants did help Yeltsin win re-election as well, that openly boasted about it.[100] Despite the Clinton administration adamantly denying that the loan was political, much of the U.S. media said otherwise but believed that it was a

88 *Id.*

89 *Id.*

90 *Id.*

91 Michael R. Gordon, *Russia and I.M.F Agree On A Loan For $10 BILLION*, N.Y. TIMES (Feb. 23, 1996), https://www.nytimes.com/1996/02/23/world/russia-and-imf-agree-on-a-loan-for-10.2-billion.html/.

92 *Id.*

93 *Id.*

94 *Id.*

95 *Id.*

96 *Id.*

97 *Id.*

98 Eleanor Randolph, *Americans Claim Role in Yeltsin Win*, L.A TIMES (Jul. 9, 1996), https://www.latimes.com/archives/la-xpm-1996-07-09-mn-22423-story.html.

99 *Id.*

100 *Id.*

brilliant move.[101] *The Washington Post*, *Time*, and *The New York Times* all celebrated the move.[102] After Yeltsin won re-election, Yeltsin distributed a lot of the money from the IMF to his close associates.[103] Two years after Yeltsin's re-election, Yeltsin instructed his government to devalue the Russian currency, default on debts, and freeze bank accounts.[104] This did not only harm Russia's national assets, but it also destroyed individual Russians' bank accounts.[105] Additionally, Yeltsin and Clinton's relationship fell apart over U.S. involvement in the NATO bombing of Serbia.[106] Yeltsin considered Serbia an ally and wanted to engage in diplomacy rather than escalating the conflict.[107] Clinton refused to engage in further diplomacy and commenced the NATO bombing.[108] Yeltsin responded by escalating his nationalistic rhetoric in Russia and even restarted a war in Chechnya.[109] Additionally, one of Yeltsin's last acts, and certainly the most impactful, was installing unknown former Russian State Security Force (KGB) President Vladimir Putin as President of Russia a year before the 1999 New Year's Eve election; leading to Putin's election and continued power through 2021.[110] Some might argue that the Clinton administration could not have foreseen this outcome; however, before the 1996 election, Yeltsin had engaged in an assault on the Russian parliament by running tanks through and killing 187 people.[111] When the dust settled from this assault, the new parliament became much more deferential to Yeltsin.[112] Yeltsin also commenced a war in Chechnya that lasted from 1994 to 1996 and resulted in tens of thousands of deaths.[113] All of this background information on Yeltsin's reign is to show that though Clinton likely thought he was doing the right thing by preserving Russia from backsliding into Communism, but by doing so he set the stage for the issues that the World deals with today. Moreover, while the election intervention was not deliberate, as with the Serbian election, given that the U.S. government infused billions of dollars into the Russian economy, it might have had a bigger impact than directly spending money on the election while being more covert, as it was not officially earmarked for the election. Finally, it seems that rather than U.S. policy being

101 Kinzer, *supra* note 86.

102 *Id.*

103 Katrina vanden Heuvel, *Yeltsin's (Real) Legacy*, THE NATION (May 2, 2007), https://www.thenation.com/article/archive/yeltsins-real-legacy/.

104 *Id.*

105 *Id.*

106 Masha Gessen, *The Undoing of Bill Clinton and Boris Yeltsin's Friendship, and how it changed both of their Countries*, THE NEW YORKER (Sept. 5, 2018), https://www.newyorker.com/news/our-columnists/the-undoing-of-bill-clinton-and-boris-yeltsin-friendship-and-how-it-changed-both-countries/.

107 *Id.*

108 *Id.*

109 *Id.*

110 Tony Wood, *The Crisis That Created Putin*, JACOBIN MAGAZINE (Aug. 30, 2018), https://www.jacobinmag.com/2018/08/rouble-crash-yeltsin-putin-free-market/.

111 Heuvel, *supra* note 103.

112 *Id.*

113 *Id.*

used to intervene in an election, election interference controlled U.S. policy. Clinton seemingly only pushed for this loan because he wanted Yeltsin to win re-election, which raises the question of whether the loan itself was good economic policy.

The U.S. adopted a similar strategy under the Bush administration with Palestinian elections in 2006.[114] What makes this scenario particularly interesting is that the Bush administration was not only involved in the elections, they actually pushed the Palestinian Authority (PA) to host the elections.[115] In 2006, after Yasser Arafat died, Mahmoud Abbas of the Fatah Party became the leader of the Palestinian authority.[116] The Bush administration found Abbas more "moderate" and conciliatory than Arafat, so they wanted to legitimize him as leader of the Palestinian Authority and allow him to negotiate with Israel.[117] After prodding from the U.S., Abbas agreed to hold an election.[118] In the election itself, the Bush administration danced on the line between direct electoral intervention, like the Clinton administration in Serbia, and indirect intervention, like the Clinton administration with Russia.[119] The U.S. used money from the U.S. Agency for International Development (USAID) to advertise projects that the PA had successfully created.[120] The U.S. also provided funding for street cleaning, distributing free food and water, and providing computers and other materials to Palestinian community centers.[121] The U.S. also funded tree planting ceremonies that had the feel of election rallies as well as advertisements for outreach for citizens' needs.[122] The U.S. maintained that it was not trying to support any particular party;[123] though conceded that it could not support a terrorist organization, which it considered Hamas, the PA's opposition party to be.[124] The U.S. had given the PA $400 million overall but was also seeking to downplay their aid to try to make it appear that the PA itself was responsible for the projects.[125] Despite these efforts, Hamas ultimately won the elections.[126] In response, the Bush administration considered having Abbas and the PA overthrow the Gaza govern-

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114 John B. Judis, *Clueless in Gaza*, THE NEW REPUBLIC (Feb. 18, 2013), https://newrepublic.com/article/112456/george-w-bushs-secret-war-against-hamas/.

115 *Id.*

116 *Id.*

117 *Id.*

118 *Id.*

119 Scott Wilson & Glenn Kessler, *U.S. Funds Enter Fray In Palestinian Elections Bush Administration Uses USAID as Invisible Conduit*, WASHINGTON POST (Jan. 22, 2006), https://www.washingtonpost.com/archive/politics/2006/01/22/us-funds-enter-fray-in-palestinian-elections-spanclassbankheadbush-administration-uses-usaid-as-invisible-conduitspan/3342f760-09d3-400e-9390-2c5d6f51f442/.

120 *Id.*

121 *Id.*

122 *Id.*

123 *Id.*

124 *Id.*

125 *Id.*

126 Suzanne Goldenberg, *US plotted to overthrow Hamas after election victory*, THE GUARDIAN (Mar. 3, 2008), https://www.theguardian.com/world/2008/mar/04/usa.israelandthepalestinians/.

ment.[127] Bush and then-Secretary of State Condoleezza Rice signed off on the plan.[128] However, many officials within the Bush administration opposed the plan and it was not ultimately enacted.[129] Still, the Bush administration opposed any government with Hamas in it, and tried, and failed, to talk Abbas out of doing a unity government with Hamas.[130] It is worth noting that even when Abbas and the PA joined the government, the Bush administration was still prepared to overthrow it and had committed to spending over one billion dollars to train soldiers in nearby Middle Eastern countries to do so.[131] This election interference is the first instance in this paper where a government intervened and unmistakably did not get their preferred candidate. Many of the same issues in other campaigns exist in this one. The U.S. seemed a bit deceptive to Americans and Palestinians about acknowledging the election interference. Moreover, it seemed troubling that the U.S. pushed for the elections and was prepared to undo the results the government did not want. It must be acknowledged that there are complex politics of the Israel-Palestine conflict and a lot of perspectives in this. People who are neutral or more inclined to feel the Palestinians have been wronged may feel that the U.S. to correct action in having elections and ultimately not intervening beyond that. However, some would likely take issue with the fact that the U.S. only pushed the elections to serve their own interests and ran a campaign to try to force their preferred result on the Palestinians and that they were very close to undoing the results. Those more inclined to feel Israel has been wronged would likely either think that the U.S. should have pushed for the elections, or that even when the U.S. did push for the elections, it should have done more to protect the results that the U.S. wanted, even if that escalated to having to overthrow the Hamas government. Additionally, it is important to consider what might have happened had Hamas lost. Abbas may have been more conciliatory with Israel, but there is no guarantee that the deal would have been fair to the Palestinians themselves. The U.S. clearly has a perspective on Israel, that some Palestinians disagree with. As an American, it is easy to think the U.S. was in the right for the outcome it wanted, but there is no guarantee that it would be the fairest outcome.

Interestingly, the U.S. provided both examples of this type of election interference. This is likely in part due to the U.S.'s wealth as well as the fact that the U.S. has been an interventionist country for decades. The examples highlighted do not show anything denounced as blatantly unethical, no crimes were said to have been broken and the resources provided at least some aid to the citizens. Additionally, the U.S.'s actions were based on what they perceived as the greater good. However, such deference does assume that the U.S. always knows what is right. With the case of Yeltsin, it is clear that he was a damaging president for

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] David Rose, *The Gaza Bombshell*, VANITY FAIR (Mar. 3, 2008) https://www.vanityfair.com/news/2008/04/gaza200804.

[131] *Id.*

Russia and the effects of him receiving a second term can still be felt today through Putin's presidency. This does not necessarily mean he should have lost the election. Though the Clinton administration feared that Yeltsin's opponent could take Russia back to the Soviet Union, which had posed a global threat for decades. Ultimately, the result of Yeltsin winning might have been preferred by some, although it is impossible to know. In the case of Palestine, though the world never got to see the desired result, the fact that the U.S. was ready to overturn the election results for which it had advocated means the U.S. may feel that they have the 'final say' in an election no matter the means. Furthermore, there is an ethical issue of whether it is fair to deceive voters the way the U.S. had in these elections. Many citizens likely saw the monetary benefits secured by the U.S. as a direct result of their interference when, in reality, it was simply because the U.S. preferred the incumbent as part of a strategy to achieve a greater good. While those sympathetic to the U.S.'s goals in both instances might excuse this, were the situation reversed, these same people would likely oppose any outside interference in a U.S. election in a similar manner. Additionally, with the rise of the G-7 and G-20, there are more powerful countries able to make their own types of interventions. If multiple countries start doing this, it could make elections even more chaotic.

Intervention Through Third-Party Groups

Another type of indirect intervention concerns countries intervening through third-party groups. One example of this was in the 2004 Ukrainian election when the U.S. and a coalition of countries including Great Britain, the Netherlands, Switzerland, Canada, Norway, Sweden, and Denmark all joined together to provide money to Non-Governmental Organizations (NGOs) that specialized in "democracy promotion." This was to lead to help create a regime change in Ukraine through an election to elect opposition leader Viktor Yushchenko, who would be more pro-U.S. and stand up to Russia.[132] This funding went to an array of NGOs from outside Ukraine and some Ukrainian NGOs.[133] These groups provided much of the support shown in Serbia; they helped organize the opposition, commissioned polls, and trained election workers.[134] In this instance, the U.S. and the other Western countries are following past examples of intervening in an election to accomplish a policy goal. Some might argue, in this instance, that there was some validity to their interference because a coalition of Western countries had all agreed on the policy, and Putin has proven to be a far worse leader since then. This stance, however, presumes that the Western perspective on intervention is always correct; however, countless examples, such as colonialism, contradict this presumption. In terms of farming out the money to international NGOs, one hand, it is better to have independent organizations that are not compromised to make election decisions. But on the other hand, these NGOs may still have com-

[132] *U.S. Spent $65M To Aid Ukrainian Groups*, Fox News (Dec. 10, 2004) https://www.foxnews.com/story/u-s-spent-65m-to-aid-ukrainian-groups.

[133] *Id.*

[134] *Id.*

promised interests and it also allows countries to escape accountability for spending money on elections.

Some of this lack of transparency can create accountability issues. The issue became clear in the 2015 Israeli election, where then-U.S. President Barack Obama provided $349,000 to an Israeli NGO known as OneVoice in 2013.[135] It seems that the intended influence of the money was to set up community events that would bring the Palestinian and Israeli youth together.[136] However, OneVoice partnered with a group called V15 that organized a voter drive against incumbent Prime Minister Benjamin Netanyahu.[137] Ultimately, the Obama administration provided money to a group, who in turn, provided money to an anti-Netanyahu group.[138] This led many conservative critics of the Obama administration to claim that then-President Obama had "meddled" in the election to defeat Netanyahu.[139] This created an issue for the Obama administration because, regardless of Netanyahu's merits, he was the leader of a U.S.-allied country: it created an issue regarding diplomacy and support of an ally.[140] While it seems highly unlikely that the Obama administration purposefully engaged in a campaign to try to defeat Netanyahu, even suspicion of U.S. intervention was problematic for Obama. Moreover, given that the U.S. had carried out these types of tactics with other NGOs, it is not unfathomable that a U.S. administration would try such a tactic. It is also unclear whether the Obama administration did not actually have the goal of trying to defeat Netanyahu, because there is not any clear information over whether the Obama administration had intended for its money to go to the voter drive. Still, if the U.S. did not engage in these kinds of campaigns, then they would not have the issues regarding confusion over what they took part in.

Many of the NGOs funded by the U.S. and other Western countries do have positive goals in terms of promoting democracy and protecting the rule of law.[141] There can be advantages in the U.S. government not taking a direct role both for protecting its own interest, but also preventing partisan officials from being involved in foreign elections. However, as seen with Israel, such intervention can create confusion and prevent accountability within the country that the aid came from and beyond. Additionally, the election intervention being mixed with the issues of providing general democracy promotion and support for reconciliation of different cultures helps obscure the validity and good that comes from the

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135 Jon Greenberg, *Blog claims U.S. funded anti-Netanyahu election effort in Israel*, POLITIFACT (Mar. 25, 2015) https://www.politifact.com/factchecks/2015/mar/25/blog-posting/blog-claims-us-funded-anti-netanyahu-election-effo/.

136 *Id.*

137 *Id.*

138 *Id.*

139 *Id.*

140 *Id.*

141 Michael McFaul, *'Meddling' In Ukraine: Democracy is not an American plot*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (Dec. 21, 2004), https://carnegieendowment.org/2004/12/21/meddling-in-ukraine-democracy-is-not-american-plot-pub-16292.

NGOs. In this instance, it is in the interest of both the international community and the individual countries funneling the money to NGOs today.

Country Intervention Through Political Operations

Countries have also intervened in countries through their government's political operation. During the Clinton administration, President Clinton's political team went to Israel to defeat Netanyahu because he believed Shimon Peres would make a better ally.[142] Clinton's team failed to defeat Netanyahu in that election and Clinton continued to work with Netanyahu.[143] In 1999, Clinton's entire campaign team ran the campaign of Netanyahu's opponent, Ehud Barak.[144] The campaigning consisted of everything from polling to slogan testing to campaign ads.[145] Clinton's team was in and out of involvement in the lead-up to the election.[146] However, Clinton's team faced criticism for not being engaged enough with the Israeli public and its culture.[147] Clinton's team worked on many other campaigns abroad, so it seemed like Israel was just a quick one-off client.[148] Ultimately, Barak won the election, and Clinton's political team tried to distance the victory from themselves and instead credit Barak with winning the campaign himself.[149] The U.S. was again trying to engage in forcing their public policy and opinion on Israel without owning it. Clinton admitted that he attempted to defeat Netanyahu without it being tied back to him.[150] While it could be considered admirable that Clinton did not want his policy goals to disrupt his relationship with Netanyahu, there is still a transparency issue, with the President trying to escape direct accountability in terms of advocating for a new Prime Minister.

Sometimes political teams may partner with official government efforts to intervene in an election. Concerning Serbia, while the U.S. directly financed intervention in the election, a lot of the coordination was completed by Clinton pollster Doug Schoen.[151] Schoen conducted the polling, devised the message, and coordinated the messaging strategy.[152] Schoen organized a political training session of the many political activists in Serbia.[153] This campaign also involved the

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142 Toi Staff, *Bill Clinton admits he tried to help Peres beat Netanyahu in 1996 elections*, TIMES OF ISRAEL (Apr. 4, 2018), https://www.timesofisrael.com/bill-clinton-admits-he-tried-to-help-peres-beat-netanyahu-in-1996-elections/.

143 *Id.*

144 Adam Nagourney, *Sound Bites Over Jerusalem*, N.Y. TIMES (Apr. 25, 1999), https://www.nytimes.com/1999/04/25/magazine/sound-bites-over-jerusalem.html.

145 *Id.*

146 *Id.*

147 *Id.*

148 *Id.*

149 Lauren Stein, *Carville and company credit Barak, not themselves, for win*, JEWISH TELEGRAPHIC AGENCY (May 20, 1999), https://www.jta.org/1999/05/20/lifestyle/behind-the-headlines-carville-and-company-credit-barak-not-themselves-for-win.

150 Staff, s*upra* note 142.

151 Dobbs, s*upra* note 66.

152 *Id.*

153 *Id.*

NGOs mentioned in the previous section, the National Democratic Institute and the International Republican Institute.[154] The CIA was even doing some clandestine activity, but there is no concrete evidence they did anything illegal or clandestine.[155] Still, in this regard, it appears that the U.S. was firing on all cylinders of election interference.[156] This creates some dangers in itself. If a country only funds NGOs, then at least the accountability of the actions can at least be traced by that NGO. But if the country is taking a multifaceted strategy, it becomes more difficult to make those responsible accountable. If the U.S. had some problematic action in the election and NGOs, government workers and political workers are all working together, the idea of who is responsible could get lost. Moreover, it is unlikely that Schoen had the same accountability that State Department officials had despite both using funds from Washington. Again, the election itself was probably one of the most justifiable elections to be involved in. Still, with all of the types of intervention at play in this election, there is a concern of whether the U.S. could truly be held accountable.

Intervening in a foreign election comes with quite a few problems. First, it is difficult to determine who is actually intervening. If a President sends their campaign advisors, those advisors are not officially part of the U.S. government, yet they are engaging in diplomacy of sorts and thus, are performing tasks usually reserved for government officials.[157] This creates an issue in terms of accountability because these campaign officials are likely only held accountable by the president and, as such, face no reasonable oversight. A government official, in contrast, would be subject to oversight. Additionally, there is a question of what happens when the tactic fails. While this can be an issue in any type of election intervention, if a nation's leader is sending their personal advisors, there might be an even tighter connection identified because it is someone the leader has relied upon. There is also an issue of connection to the region. In particular, as seen with Israel, where there is no distinguishable connection to the region these political operatives are exposed to allegations of cultural imperialism.[158]

Political Operations Disconnected from the Government

Although leaders of governments have organized political operations involved in foreign elections, political consultants will sometimes get involved on their own accord. The 2014 British Parliamentary election serves as an example of this.[159] In the run-up to the election, the opposing candidates both hired former President Obama's campaign officials.[160] Then-incumbent Prime Minister, David

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154 *Id.*

155 *Id.*

156 *Id.*

157 *Id.*

158 *Id.*

159 Jason Horowitz, *Once Allies, Ex-Obama Aides Face Off in British Campaign*, N.Y. TIMES, (May 27, 2014), https://www.nytimes.com/2014/05/28/us/politics/obama-crowd-blanches-as-ex-aide-jim-messina-helps-british-conservatives.html.

160 *Id.*

Cameron, hired Obama's campaign manager, Jim Messina.[161] The Labour Party, led by Ed Miliband, hired lead Obama campaign manager David Axelrod.[162] There was an issue with Messina working for Cameron, as he was considered ideologically right-wing for Britain.[163] Some of Cameron's campaign, however, focused on being in favor of stricter government control regarding immigration and austerity measures.[164] At the same time, there were issues with Axelrod working for the Labour Party candidate because Miliband and his platform were much farther to the left of Obama.[165] In both cases, people questioned whether Axelrod and Messina were looking for paydays and greater power.[166] Obama administration officials took issue with Messina working abroad—not because he was working outside of the U.S., but because he was working for a conservative candidate.[167] Cameron defeated Miliband by a large margin.[168] Between Cameron's victory and Obama's re-election, Messina gained a reputation as a successful election and political strategist.[169] As a result of his success, Messina was hired to work on several more international campaigns.[170] However, he did not experience the same success; losing several campaigns including 'Brexit' and a constitutional reform effort in Italy, and winning by a narrow margin while working on British Prime Minister Theresa May's campaign.[171] It may be inferred that U.S. political operatives' work is motivated largely by the financial pay-out in working for candidates abroad. As a result, Americans have been concerned about the ethics and impact of U.S. political consultants working for candidates abroad.[172] The pursuit of the almighty dollar causes U.S. consultants to be indiscriminate with their clients; some by conducting campaigns with a "take no prisoners" approach, without regard for the potential impact the campaign could have on their home country.[173] Other consultants have worked for dictators such as Muammar Gaddafi.[174] Former Trump campaign manager, Paul Manafort, serves

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161 *Id.*

162 *Id.*

163 *Id.*

164 *Id.*

165 *Id.*

166 *Id.*

167 *Id.*

168 Henry Mace, *Former Obama adviser Jim Messina under scrutiny after UK election*, Financial Times ((JuneJun. 12, 2017), https://www.ft.com/content/479aedd0-4f5e-11e7-a1f2-db19572361bb.

169 *Id.*

170 *Id.*

171 *Id.*

172 Jean MacKenzie, *US political consultants mucking things up abroad*,The GlobalPost (Feb. 3, 2013), https://www.pri.org/stories/2013-02-03/us-political-consultants-mucking-things-abroad.

173 *Id.*

174 *Id.*

as yet another example of the consequences in American political consultants working on campaigns abroad.[175]

At first glance, the involvement of individual consultants in foreign elections does not seem like a big deal. The U.S. has some of the highest-profile elections; it is conceivable why the rest of the political world would want to hire the expertise of American political consultants. Moreover, if a consultant upsets their American party by working for a political party, that is an internal issue and does not impact the other country. However, when issues such as corruption and conflicts of interest come to play, this could be impactful. When two high-profile American political aids are in conflict over a foreign election, it is easy to see how that could mix up political and diplomatic interests. Furthermore, although countries like Great Britain are U.S. allies and do not necessarily represent ill will towards America, it can be a slippery slope for consultants to begin enabling corrupt politicians, as Manafort had. Additionally, determining when a leader is corrupt can become subjective in and of itself. There are also instances of allied countries electing leaders that become despots, so working for despots of a former ally can make relations worse, even though the consultant would be working for a former ally.

Political Leader Involvement

One of the most frequent interventions in elections is leader involvement. This typically is not as convoluted and drawn out as some of the examples *supra*, but instead is a leader making a statement in support or opposition of a candidate. The events ahead of Germany's 2017 Chancellor election serve as an example of this.[176] Turkish President Tayyip Erdoğan called on all Turkish people in Germany to vote against German Chancellor Angela Merkel's party.[177] Erdoğan's endorsement carried some weight because many Turkish migrants in Germany can vote.[178] Merkel and her government decried Erdoğan's involvement and called it "unprecedented."[179] However, the involvement was not truly unprecedented. In 2016, during the Brexit campaign, Cameron, who opposed Brexit, successfully lobbied Obama to campaign against Brexit.[180] Cameron wanted Obama involved because Obama had an 83% favorability rating among all voters and 91% of those undecided on Brexit.[181] Obama and Cameron's side lost, however,

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175 Linda Feldmann & Francine Kiefer, *For American political consultants abroad, Manafort a cautionary tale*, Christian Science Monitor (Oct. 31, 2017), https://www.csmonitor.com/USA/Politics/2017/1031/For-American-political-consultants-abroad-Manafort-a-cautionary-tale.

176 Bulent Usta, *Erdogan tells Turks in Germany to vote against Merkel*, Reuters (Aug. 18, 2017), https://www.reuters.com/article/us-germany-turkey/erdogan-tells-turks-in-germany-to-vote-against-merkel-idUSKCN1AY17Z.

177 *Id.*

178 *Id.*

179 *Id.*

180 Tom McTague & Edward-Isaac Dovere, *How David Cameron got Barack Obama to fight Brexit*, Politico (Apr. 21, 2016), https://www.politico.eu/article/how-barack-obama-came-to-david-camerons-rescue/.

181 *Id.*

and Cameron was forced out of the government, leading to an awkward situation for Obama.[182] Additionally, politicians who are not heads of states have gotten involved in elections. In the 2016 election, European Parliament member and the United Kingdom Independent Party leader Nigel Farage personally campaigned for candidate Trump, despite Trump's views being at odds with the majority of British citizens' personal beliefs.[183] Similarly, on the British parliamentary election day in 2019, Alexandra Ocasio-Cortez endorsed Labour Prime Minister candidate Jeremy Corbyn, even though Corbyn was far outside the U.S. mainstream.[184]

A politician's involvement in an election can make a big impact and attract a lot of press attention, as exemplified by the four cases above. Some might consider a leader's involvement in an election as free speech. It is hard to penalize someone for simply endorsing or advocating for a political candidate. However, in most cases, the person does so for a reason. Erdoğan clearly thought he could have some effect on Turkish Germans, which in turn would benefit him politically. It can be argued that he voted the way he did with that in mind. Moreover, Cameron personally lobbied Obama to get involved in the election because Cameron believed that Obama could have a favorable impact on the election results. Some might see these two examples as different because Erdoğan became involved in the election on his own, while Cameron personally asked Obama to get involved. However, that would seemingly put regular citizens on a lower platform than political leaders. It is conceivable that some Turkish people in Germany wanted to know what Erdoğan felt about the election. Additionally, many of the pro-Brexit people likely took umbrage at President Obama's involvement in the election. While Obama did not break the law, his involvement in the Brexit election was not truly any different than any of the other ways listed above and can pose similar issues. Moreover, because elections do not always result in the expected outcome if a national leader campaigns for someone and the opponent wins instead, that puts the leaders on both sides in an awkward situation. For this reason, it is also bad for individual politicians such as Ocasio-Cortez and Farage to get involved in elections. Whether they like it or not, they are not the political leaders of their country and Ocasio-Cortez and Farage simply create more confusion and tension between countries. Thus, regardless of whether these types of intervention from politicians abroad could effectively be banned, they nevertheless create issues for sovereignty and diplomacy.

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[182] John T. Bennett, *Brexit Decision Deals Another Blow to Obama*, ROLL CALL (June 24, 2016), https://www.rollcall.com/2016/06/24/brexit-decision-deals-another-blow-to-obama/.

[183] Nick Coransaniti, *Trump Calls Clinton a Bigot as British 'Brexit' Leader Stumps for Him*, N.Y. TIMES (Aug. 24, 2016), https://www.nytimes.com/2016/08/25/us/politics/nigel-farage-brexit-donald-trump.html; Shane Croucher, *Is Donald if Popular in Britain? Here's What the Polling Says*, NEWSWEEK (July 11, 2018), https://www.newsweek.com/donald-trump-popular-britain-heres-what-polling-says-1016136.

[184] Shane Savitsky, *AOC urges U.K. voters to back Jeremy Corbyn's Labour Party*, AXIOS (Dec. 12, 2019), https://www.axios.com/alexandria-ocasio-cortez-uk-elections-labour-jeremy-corbyn-28c168ea-b60b-4413-a39c-1bd6431795bf.html; *see also* Katie Glueck & Thomas Kaplan, *Labour's Crushing Loss in Britain Adds to 'Too Far Left?' Debate in U.S.*, N.Y. TIMES (Dec. 13, 2019), https://www.nytimes.com/2019/12/13/us/politics/britain-labour-elections-democrats.html.

Proposal

An International Convention on Elections

As noted *supra*, there have been conventions established to tackle many of the issues at the forefront of society.[185] These conventions have been drafted at the UN and then ratified by individual member nations.[186] The conventions start by listing out principles that the convention believes in and then calls on how member nations can abide by those principles.[187] Typically, the calls to abide by those principles involves taking preventative measures to stop any attacks on those principles and also proactive measures to fight for those principles.[188] In this case, to start with the principles that the convention could support, it could announce that it seeks to preserve democracy, sovereignty, and prevent imperialism. These three principles have been at issue in past interventions. Russia's actions had sought to subvert democracy by cheating in an election.[189] In terms of sovereignty, the very notion of a country getting involved in another country's politics violates its sovereignty. Regarding imperialism, issues such as Gaza could be seen as an imperialistic action of a powerful country like the U.S. trying to get a small country like Palestine to agree to its political agenda.[190] Some might push back against the sovereignty claim because, in instances like the involvement in Ukraine, the West viewed themselves as protecting Ukraine's sovereignty against Russia,[191] arguing that election interference can protect sovereignty. However, that can be subjective when backing a candidate who is in the 'best' position to protect sovereignty. Some in Ukraine might view the West's preferred candidate as kowtowing to the West's controls. In terms of imperialism, critics would point to U.S. involvement in Serbia and claim that America's intervention was not about pushing their agenda and beliefs, but instead, ensuring there was no more bloodshed.[192] While this was true in this particular instance, there have been so many other examples where countries have sought to enforce their own agenda that it is impossible to deny the role of imperialism in this kind of election intervention.

In terms of specific provisions to handle the different types of election intervention, it is important to look at the provisions based on the type of election intervention. In terms of illegal election intervention, the Charter could call on nations to make election intervention in other nations a crime within their borders. Though this would likely have little impact, as it applies after the fact if

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185 *See* U.N. Convention on the Rights of Persons with Disabilities, *supra* note 13; U.N. Convention on the Elimination of All Forms of Discrimination against Women, *supra* note 13; *see also* Titles of Multilateral Treaties in the Six Official Languages of the United Nations, *supra* note 14.

186 *Id.*

187 *Id.*

188 *Id.*

189 *2016 Presidential Campaign Hacking Fast Facts*, *supra* note 16.

190 *See generally* Wilson & Kessler, *supra* note 119 (discussing U.S. involvement in the 2006 Palestinian legislative election).

191 McFaul, *supra* note 141.

192 Dobbs, *supra* note 66.

someone broke the law in one country and then went back to their home country, they could be prosecuted in their home country for it as well. Similarly, there could be a provision for extradition if someone breaks laws to intervene in another country's election. This could help in situations like the Russian election intervention in the U.S. because several of the Russians who intervened fled to Russia to avoid prosecution and, as a result, have been unable to be prosecuted.[193] There could also be a provision for governments to agree not to illegally intervene in elections. If this was passed, then Russia could face further international condemnation and even sanctions over its intervention in the U.S. election.[194] Support for this proposal may bring concern that corrupt countries could fabricate charges to force someone they do not like to be extradited. For example, Russia wanted the U.S. to extradite Michael McFaul, former U.S. Ambassador to Russia, but the U.S. did not comply.[195]

Concerning the issue of countries legally and directly intervening in elections, there could be a provision to direct countries to pass laws that make it illegal for governments to spend money on the elections within other countries. Many countries have passed laws to make it illegal for government money to be spent on services, such as in the U.S. with the ban on government money going to abortion; this could be mimicked regarding election interference.[196] Some might object to this measure because some money is spent by countries in contribution to the Organization for Security and Co-operation in Europe (OSCE), which is used to monitor and ensure elections are carried out fairly.[197] However, the provision could be limited to partisan election spending.

Regarding indirect spending, there could be several provisions to restrict spending around an election. Where money is used to provide aid to boost a government, the provision could call on governments to ban this type of spending. Although a subjective perspective, as in the instance of Clinton's spending to help Yeltsin, Clinton's goal was clear: help Yeltsin win the election.[198] Moreover, Trump was impeached and found to have broken the law when he withheld government aid and elicited intervention from Ukraine in the U.S. election.[199]

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193 Joel Samuels, *If the 12 indicted Russians never face trial in the US, can anything be gained?*, THE CONVERSATION (July 17, 2018), https://theconversation.com/if-the-12-indicted-russians-never-face-trial-in-the-us-can-anything-be-gained-99997.

194 *See* 2016 Presidential Campaign Hacking Fact Facts, *supra* note 16.

195 John Woolfolk, *Interrogation off: White House backs off allowing Russians to question Stanford fellow*, MERCURY NEWS (July 19, 2018), https://www.mercurynews.com/2018/07/19/did-trump-offer-to-let-putin-interrogate-former-diplomat-at-stanford/.

196 *E.g.*, Maggie Astor, *What Is the Hyde Amendment? A Look at Its Impact as Biden Reverses His Stance*, N.Y. TIMES (June 7, 2019), (discussing a condition within the Hyde Amendment which stipulates that Medicaid will not pay for an abortion unless the woman's life is in danger or the pregnancy resulted from rape or incest).

197 *See generally Funding and Budget,* ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE, https://www.osce.org/who/86 (last visited Nov. 15, 2020).

198 Kinzer, *supra* note 84.

199 Emily Cochrane et al., *G.A.O. Report Says Trump Administration Broke Law in Withholding Ukraine Aid*, N.Y. TIMES (Jan. 16, 2020), https://www.nytimes.com/2020/01/16/us/politics/gao-trump-ukraine.html.

There are legitimate reasons that a president would withhold aid; however, since there was evidence that aid was withheld unlawfully, former-President Trump's actions were highly criticized by Congress. There could also be a provision that calls on the government to ban spending to third-party groups that take sides in elections. The biggest obstacle would be third-party groups who give to other third-party groups, as seen in Israel.[200] There could be laws, however, that restrict how the third-party groups spend the money. Had the Israel group spent the money on alcohol and lottery tickets, they would have got in trouble. Spending the money on election groups that participate in partisan intervention could be a similar type of provision related to misappropriating funds. Moreover, if some cases do slip through, it will not be because the initial government was purposefully planning on spending in the other country's election.

For instance, where the election intervention occurs through political consultants or directly ordered by the leader in their home country or indirectly, such as a political consultant planning to work on their own, countries could ban people with citizenship or residency in their country from working in foreign elections. The U.S. is the main country that has people work abroad, therefore such a provision would destroy a bustling industry.[201] This would be the most thorough way to ensure that no intervention directly from the government occurs. In the Netanyahu-Peres Israel election, Clinton attempted to ensure his intervention could not be tied back to him.[202] Similarly, there should be a provision that restricts people who are not a citizen, or at least a resident, of the country from working in the election. The two provisions would require people to only work in the country they are living in. This would prevent them from jumping around from country to country. Axelrod and Messina wanted to continue their involvement in U.S. elections. To require them to have residency and potentially, citizenship, to work in Britain would make doing so far less appealing.[203]

Finally, to handle the issue of leaders and other politicians intervening in elections through endorsements and personal campaigning, the provision could state that leaders of countries will not endorse any campaigns outside of their territory. The U.S. has a somewhat similar law called the "Hatch Act."[204] Although it doesn't concern the president, it does say that other government officials cannot engage in political activity, specifically concerning U.S. elections.[205] When Counselor to the President, Kellyanne Conway endorsed a Senate candidate pub-

[200] *See generally* Greenberg, *supra* note 135 (discussing a blog post which suggested various U.S. financial transactions by the Obama administration were designed to defeat Israeli Prime Minister Benjamin Netanyahu in the 2015 election).

[201] *See generally* MacKenzie, *supra* note 172 (discussing the popularity of American political consultants).

[202] Staff, *supra* note 142.

[203] *See generally* Horowitz, *supra* note 159 (discussing the role of David Axelrod and Jim Messina in USUSU.S. and Great BritainBritainBritain's elections).

[204] Dartunorro Clark, *Government watchdog calls for Kellyanne Conway to be removed from office for violating the Hatch Act*, NBC NEWS (June 13, 2019), https://www.nbcnews.com/politics/white-house/government-watchdog-calls-kellyanne-conway-be-removed-office-violating-hatch-n1017241.

[205] *Id.*

licly, many stated she had violated the Hatch Act.[206] Nevertheless, the fact such a law can exist means that countries should be able to pass a version that applies to all politicians over international elections.

Enforcement

Many people reading this might believe that ,while these suggestions sound like good ideas, ultimately, enforcement is not feasible. Although enforcement would be a challenge, the convention could include enforcement provisions. To start, joining this convention would be considered joining an international treaty, and international treaties are subject to the International Court of Justice (ICJ) jurisdiction.[207] Thus, if a country joined the convention and then violated this convention, the injured party could bring a claim before the ICJ. Countries do at times ignore the ICJ, and for that reason, it cannot be the sole enforcer of the convention.[208] Alternatively, countries could impose sanctions for a violation of a convention either through the UN or unilaterally.[209] The U.S. has already imposed sanctions against Russia for its previous election interference.[210] With a convention in place, the countries would have the necessary justifications to impose sanctions. Finally, the UN could compile reports on whether countries are abiding by the treaty. The UN Human Rights Office of High Commissioner already does this for many other human rights treaties.[211] While these reports do not have a binding effect, they do raise awareness around transgressions that a nation is committing.[212] Therefore, even if countries did ignore the convention that they agreed to, it could still spread awareness about their transgressions and the idea they did not abide by international law.

Even with these enforcement measures, additional difficulties lie with encouraging States to become signatory members of the convention, especially considering the prevalence of election interference from both Russia and the U.S.[213] As such, neither country would likely want to agree to a convention that would restrict their activity so severely. Along those lines, the U.S. has been extremely

206 *Id.*

207 *Uphold International Law*, UNITED NATIONS (Nov. 15, 2020), https://www.un.org/en/sections/what-we-do/uphold-international-law/.

208 *See generally Big nations tend to ignore ICJ verdicts*, THE STANDARD (July 13, 2016), https://www.thestandard.com.hk/section-news/section/11/171532/Big-nations-tend-to-ignore-ICJ-verdicts (discussing China basing its decision to ignore an ICJ ruling in the South China Sea based on the U.S. ignoring an ICJ ruling related to the support of the Nicaraguan contras).

209 Frederic L. Kirgis, *Enforcing International Law*, AM. SOC'Y OF INT'L LAW: INSIGHTS (Jan. 22, 1996), https://www.asil.org/insights/volume/1/issue/1/enforcing-international-law.

210 Allan Smith, *U.S. imposes new Russia-related sanctions, citing election interference, 'other malign activities'*, NBC NEWS (Dec. 19, 2018), https://www.nbcnews.com/politics/politics-news/u-s-imposes-new-russia-related-sanctions-citing-election-interference-n949991.

211 *Monitoring the core international human rights treaties*, UNITED NATIONS HUMAN RIGHTS OFFICE OF HIGH COMM'R, https://www.ohchr.org/EN/HRBodies/Pages/WhatTBDo.aspx (last visited Nov. 15, 2020).

212 *Id.*

213 *See generally* Shane, *supra* note 10 (discussing the history of U.S. and Russian election interventions).

reluctant to join the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the CRC because of concerns over sovereignty, so there might be some opposition to join additional conventions.[214] This raises the question: if the two biggest actors will not join this convention, how effective would any convention be? Regardless, even if it does not have the full effect one would hope it would, it could still have an impact in terms of a country's standing in the world. If Russia and the U.S. refuse to join a convention and then still commit election intervention, this could create further issues for both countries in terms of their standing amongst global leaders. Moreover, Russia and the U.S. have joined at least some international conventions, even if they have not abided by them as much as other countries would like.[215] Even if the convention does not end up functioning as binding law, it is still worth implementing.

Conclusion

There is no sign that foreign election interference is decreasing. Although the U.S. and Russia have been two of the main actors in terms of election interference, there is now concern that China and Iran are also taking part.[216] Many countries are using election interference as a new form of warfare. There have been UN conventions to restrict the type of warfare that is allowed, so it makes sense for there to be a convention that regulates election interference. While the UN does, of course, allow warfare, the reason to completely restrict election interference, in this case, is that it is a lot easier to intervene in an election than it would be to launch a formal war and as a result, it can cause a country to become more detached from the impact of the intervention. This can be seen by U.S. political consultants recklessly interfering in foreign elections.[217] Even if some might think certain types of election interference are valid, almost everyone can agree that some forms of election interference are unacceptable, as was the case with Russia's intervention in 2016.[218] Putting forth a convention on the matter could spur a transparent debate over what types of election interference that the international community finds acceptable. Finally, restricting all nations regarding their intervention could help level the playing field. While few would deny

214 Sophie McBain, *Why is the US so reluctant to sign human rights treaties?*, NEW STATESMAN (Oct. 7, 2013), https://www.newstatesman.com/north-america/2013/10/why-us-so-reluctant-sign-human-rights-treaties.

215 Dave Simcox, Opinion, *Where does the US stand on UN human rights conventions?*, CINCINNATI.COM (Jan. 3, 2018), https://www.cincinnati.com/story/opinion/contributors/2018/01/03/where-does-us-stand-un-human-rights-conventions/972726001/; Philip Remler, *Russia at the United Nations: Law, Sovereignty, and Legitimacy*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Jan. 22, 2020) https://carnegieendowment.org/2020/01/22/russia-at-united-nations-law-sovereignty-and-legitimacy-pub-80753.

216 Jeff Seldin, *US Intelligence Report: Russia, China, Iran Sought to Influence 2018 Elections*, VOICE OF AM. (Dec. 21, 2018), https://www.voanews.com/usa/us-politics/us-intelligence-report-russia-china-iran-sought-influence-2018-elections.

217 *See* MacKenzie, *supra* note 172.

218 *See generally 2016 Presidential Campaign Hacking Fast Facts*, supra note 16 (discussing an executive order issued by President Obama with sanctions against Russia in response to election hacking in 2016).

that Russia's actions have been far more egregious in comparison to others and that Putin's regime is corrupt and a violator of human rights, no nation is completely clean, and if a nation does not face accountability, there is a risk of the nation committing unjust transgressions, no matter what the nation's background is. Even interventions with the best intentions can lead to unintended consequences and violate the citizens' right to elect a government of their choosing. This paper has shown the ways nations can and do intervene in other nations' elections, and potential ways to check these types of intervention. Hopefully, it can, at the very least, spur a conversation of holding accountability for intervention in elections under international law.

Sexual Violence And Human Trafficking In India: Legislation, Enforcement, And Recommendations

Shivani Rishi

Abstract

Violence against women in India is a deeply rooted issue that has been perpetuated for decades due to misguided legislation, beliefs, and oppression. When examining this pervasive concern, a closer look into the existing infrastructure, legislation, and guidelines is necessary. This is the first step in order to drive the crucial transformation that needs to occur throughout India. The most recent major change to legislation surrounding violence against women came after the Delhi Gang Rape of 2012. This attack became a driving force for legal reform and acted as a wake-up call to the Indian Government. As a result of this attack, the Justice Verma Committee was created to gather recommendations around new legislation and country-wide recourses for sexual violence victims. The Criminal Law Amendment Act of 2013 was a major product of this committee and incited revolutionary legislative changes in India. Regrettably, while this was a great step forward, India still has a long road ahead in regard to enforcement of these new laws and transformations of societal mindsets.

Though India banned caste discrimination in 1950, the idea of social stratification remains prevalent throughout the country, especially in rural areas. Because of this, certain subsets of women seem to be at a higher risk. India is also a party to several international covenants including the International Covenant on Civil and Political Rights, The International Covenant on Economic, Social, and Cultural Rights, and a signatory of the U.N. treaty on the Convention on the Elimination of All Forms of Discrimination Against Women. As a party to these treaties, India has an obligation to take all measures necessary to ensure that women's rights are being upheld.

1. Introduction

Violence against women in India is a widespread concern stemming from a lack of judicial enforcement, mistaken mindsets perpetuated by centuries of cultural norms, and pervasive coercion amongst legal entities. In an effort to better understand the steps that need to be taken in order to minimize sexual violence and human trafficking in India, we must examine the laws, international treaties, and infrastructure that are in place. By doing so, we can gain a more comprehensive scope of what has been done and the changes that need to be made moving forward.

A. Violence Against Women in India By the Numbers

The National Crime Records Bureau (hereinafter "NCRB") reported 23,117 rescued victims of trafficking in 2016.[1] Of those individuals, 10,509 victims were exploited in forced labor, 4,980 were victims of sexual exploitation by prostitution, 2,590 were exploited through an unspecified manner of sexual exploitation, and there were a reported 349 victims exploited through forced marriage.[2] That same year, NCRB reported only 15,379 trafficked victims. The disparity in these numbers stems from flawed estimation methods, as well as the various types of trafficking that exist. From debt bondage and domestic servitude to sex trafficking and forced prostitution, trafficking can take many forms. While India abolished bonded labor in 1976, those that relied on this form of trafficking now use forced labor methods where they promise large sums of money to those who live in extreme poverty in exchange for work.[3] Without workplace protections in place, these individuals are often forced to work without protective equipment in a variety of industries such as rice mills, embroidery factories, and horticulture.[4] Human Resources Without Borders reported one victim sustained chemical burns on her skin but was unable to receive any medical care in excess of four U.S. dollars.[5] Unfortunately, forced labor practices are just one category of violence against women in India.

Bride trafficking, the act of purchasing and selling girls and women into domestic slavery, is also extremely prevalent in India. Many blame the disproportionate sex ratio as the cause.[6] This disproportionate sex ratio is due to the gender imbalance seen across the country.[7] According to the most recent census, the Indian population had 37 million more males than females.[8] This disparity has been attributed to bride trafficking and unfortunately, the true scale of bride trafficking continues to be overwhelmingly inaccurate due to low reporting rates.[9] The statistic from the 2016 NCRB report of 349 forced marriage victims is entirely contrary to the findings of other organizations. The Borgen Project, a non-

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[1] National Crime Records Bureau, Crime in India, Ministry of Home Affairs, National Crime Records Bureau, 514 (2016), https://ncrb.gov.in/sites/default/files/Crime%20in%20India%20-%202016%20Complete%20PDF%20291117.pdf.

[2] *Id.* at 517.

[3] Crime in India, *supra* note 1.

[4] Sekhon Geeta, *Forced Labor and Child Trafficking in India's Garment Sector*, THE ASIA FOUND., (Sept. 20, 2017), *https://asiafoundation.org/2017/09/20/forced-labor-child-trafficking-indias-garment-sector/; Reducing Vulnerability to Bondage in India through Promotion of Decent Work*, INT'L LABOUR ORG., (March 31, 2011), https://www.ilo.org/global/topics/forced-labour/WCMS_153951/lang—en/index.htm.

[5] *Id.*

[6] Jillian Baxter, *Causes of Human Trafficking in India*, The Borgen Project (Feb. 3, 2019), https://borgenproject.org/causes-of-human-trafficking-in-india/.

[7] Simon Denyer & Annie Gowen, *Too Many Men: China and India Battle with the Consequences of Gender Imbalance*, POST MAGAZINE, Apr. 24, 2018, https://www.scmp.com/magazines/post-magazine/long-reads/article/2142658/too-many-men-china-and-india-battle-consequences.

[8] *Id.*

[9] Virginia M. Kendall Et Al., CHILD EXPLOITATION AND TRAFFICKING: EXAMINING GLOBAL ENFORCEMENT AND SUPPLY CHAIN CHALLENGES AND U.S. RESPONSES (2016).

profit organization whose mission is centered around fighting poverty, found that more than 90 percent of married women in the rural Northern states of India were sold into marriage, many of whom become brides as early as age eleven and twelve.[10] Underreporting is a significant issue in human trafficking as many victims do not self-identify as victims.[11] Unfortunately, data reporting on human trafficking often fails to encompass the magnitude of the global problem.[12] Underreporting occurs because victims don't self-identify as victims.[13] Many girls who are sold into marriages fail to realize help is available to them, as literacy and education levels among these girls are critically low.[14] Victims often suppress their emotions in order to protect themselves from trauma.[15] They frequently feel as though they aren't worth being rescued and believing they brought it upon themselves.[16]

2. Background

To fully understand the scope of this problem in India, it is important to take a look at the laws, regulations, and international policies currently in place within the country and the evolution of sexual violence and trafficking legislation. With some similarities to the United States, the Indian Constitution is the foundational law throughout the country with other laws enacted by Parliament and additional legislation that is passed individually by each state.

A. Legislative History in India

The Indian Constitution and the Indian Penal Code ("IPC") are key in understanding existing legislation around sexual violence against women. Exploitation and human trafficking are prohibited under Articles 23 and 24 of the Indian Constitution.[17] Article 23 of the Indian Constitution contains a "right against exploitation," which prohibits human trafficking, including by states.[18] Article 24 protects children age 14 and under from hazardous working conditions.[19] The IPC also has various provisions focused on trafficking issues[20] For example, Section 36 prohibits inducing or kidnapping a woman into marriage.[21] Section 374

[10] Denyer & Gowen, *supra* note 7.

[11] Kendall, *supra* note 9.

[12] *Id.*

[13] *Id.*

[14] Krishna Gupta, *Bride Buying in Haryana – A Case Study*, ROUND TABLE INDIA (Feb.11, 2019), http://roundtableindia.co.in/index.php?option=com_content&view=article&id=9573:bride-buying-in-haryana-a-case-study&catid=119:feature&Itemid=132.

[15] *Id.*

[16] Gupta, *supra* note 14.

[17] INDIA CONST. art. 23-24.

[18] *Id.*

[19] INDIA CONST. art. 24.

[20] All India Reporter Manual (6th ed.), PEN. CODE 366 & 374

[21] *Id.* at 366.

of the IPC states that any person found guilty of compelling another person to labor against their will can be punished.[22] Finally, the Immoral Traffic (Prevention) Act of 1956 was the first legislation related specifically to the sexual exploitation of women and girls but does not specifically highlight trafficking as an offense.[23]

Prior to 2012, sexual violence laws in India only took acts of penile-vaginal intercourse into account when determining whether a rape occurred.[24] Additionally, the law had no explicit provision stating that the absence of physical violence does not equal consent.[25] The first paramount change to the IPC in regard to sexual violence came after 1972 when a brutal and publicized rape took place in a small rural Indian town.[26] Mathura, a young teenage girl, was raped by two policemen in March of 1972.[27] Despite the oppressive landscape that she faced, Mathura decided to take her case to court; an unprecedented decision at the time.[28] Her case rose to the Supreme Court where the Court overturned the ruling from the Bombay High Court, and Mathura's attackers were acquitted.[29] In his opinion, Supreme Court Justice Koshal stated that the Court refused "to take the girl at her word," as she did not show fear of "death or hurt." The Supreme Court held that, because there were no physical marks on her body, and because she had sexual intercourse prior to the attack, there was a possibility that she might have incited the cops to have intercourse with her.[30] This outrageous decision led to protests and marches across the country where activist groups demanded changes in the law. As a result, the Criminal Law Amendment Act of 1983 was enacted; making custodial rape punishable by law.[31] This amendment offered protections to victims by banning the publication of a victim's identity.[32] Additionally, a more recent amendment in 2002 was enacted to prohibit the cross-examination of a rape victim after women came forward stating that this tactic often prevented them from coming forward out of fear that they would be publicly shamed.[33]

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[22] *Id.* at 374.

[23] The Immoral Traffic (Prevention) Act, No. 104 of 1956, INDIA CODE, http://indiacode.nic.in.

[24] WTD News, The Evolution of Anti-Rape Laws in India Since 1860, YOUTH KI AWAAZ (Aug. 9, 2018), https://www.youthkiawaaz.com/2018/08/indias-anti-rape-laws-the-evolution/.

[25] *Id.*

[26] *Id; see also* Moni Basu, *The Girl Whose Rape Changed a Country*, CNN Int'l, http://edition.cnn.com/interactive/2013/11/world/india-rape/ (The victim has been referred to as "The Girl whose Rape Changed a Country.").

[27] The Evolution of Anti-Rape Laws in India Since 1860, *supra* note 24.

[28] *Id.*

[29] Tuka Ram and ANR v. State of Maharashtra, (1978), 1 SCR 810 (India).

[30] The Evolution of Anti-Rape Laws in India Since 1860, *supra* note 24.

[31] *Id.*

[32] *Id.*

[33] *Id.*

B. Delhi Gang Rape of 2012

The most recent driving force for legal reform around violence against women came following the Delhi Gang Rape of 2012; a tragedy that prompted the Indian Government to consider making necessary changes. In 2012, Jyoti Singh, a 23-year-old medical student in Delhi, was brutally gang-raped for over an hour on a private bus.[34] Singh's attackers used an iron bar on her; causing extreme internal injuries that resulted in her death two weeks after the attack.[35] This assault sparked huge public outcries to change the system and as a result, the government formed the Justice Verma Committee.[36] The Justice Verma Committee's intended purpose was to take public suggestions for possible amendments.[37] By studying and considering these public suggestions, the judicial committee's principal focus was to discern how the country could best change existing laws, as well as how to provide quicker investigation and prosecution of sex offenders.[38] The Justice Verma Committee received approximately 80,000 recommendations, held wide consultations with subject-matter experts, and referred to laws around the world related to violence against women.[39] As a result of this Committee, the Indian Parliament passed the Criminal Law Amendment Act of 2013.[40] The Act expanded the definition of rape to explicitly state that the absence of physical violence does not equal consent.

The Criminal Law Amendment Act, 2013; Section 375:

> "Consent means an unequivocal voluntary agreement when the woman by words, gestures, or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act: Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity."[41]

The law also considered rape beyond penile-vaginal intercourse by including forcible acts of penetration of the vagina, mouth, or anus of a woman or forcing her to do the above acts with another person without her consent.[42] The amendment increased the length of prison sentences and introduced the death penalty.[43] Additionally, the government created fast-track courts for pending rape cases.[44]

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[34] INDIA'S DAUGHTER (Assassin Films 2015).

[35] *Id.*

[36] *Id.*

[37] Tom Wright, *A Short History of Indian Rape-Law Reforms*, WALL ST. J., https://blogs.wsj.com/indiarealtime/2013/01/09/a-short-history-of-indian-rape-law-reforms/.

[38] *Id.*

[39] Everyone Blames Me, HUMAN RIGHTS WATCH (November 8, 2017), https://www.hrw.org/report/2017/11/08/everyone-blames-me/barriers-justice-and-support-services-sexual-assault-survivors#.

[40] *Id.*

[41] Criminal Law Amendment Act, No. 13 of 2013, INDIA CODE, http://indiacode.nic.in.

[42] WTD News, *supra* note 24.

[43] *Id.*

[44] *Id.*

The government also introduced a minimum mandatory sentencing of seven years for rape and included new offenses in the Act, such as stalking, sexual harassment, and forcible disrobing.[45] The right of victims of rape and acid attacks to receive medical treatment was recognized through a statutory obligation on doctors to provide free and immediate medical treatment, and doctors' refusal to comply was made a punishable offense. The Ministry of Health and Family Welfare issued guidelines for medico-legal care for survivors of sexual violence to standardize examinations and treatment of victims. While the Act is primarily focused on sexual violence and expanding the definition of rape, Section 370 also expands the definition of "trafficking."[46] The new legislation reads:

> [W]hoever for the purpose of exploitation, recruits, transports, transfer receives a person by using threat or force or by fraud or deception or by abuse of power and by inducement, including the giving or the receiving of payment or benefit in order to achieved the consent of any person having control over the person, recruited transport harbored transferor receiver, commit trafficking.[47]

The United States Department of State, however, declared that this new provision differs from international law insofar as it requires a demonstration of force, fraud, or coercion to constitute an offense of child sex trafficking.[48] The new provision did, nevertheless, criminalize child exploitation through prostitution without the use of force, which can address this concern by the State Department.[49] Despite this new provision, there has been minimal progress related to human trafficking in India.[50] While reporting rates are higher, the government has failed to report any sentences for convictions and the data that has been provided fails to reflect the true severity of the problem throughout the country.[51]

3. Discussion

Gender discrimination in India is painfully apparent. While there has been improvement in bridging the gap of gender discrimination across the country, the mindsets of individuals have been engrained in society for centuries. In 2011, the Thomas Reuters foundation conducted a study to find the five most dangerous countries for women, with Afghanistan, Congo, and Pakistan at the top of the list.[52] In an effort to determine whether the situation for women had changed, the foundation led a subsequent study in 2018 where India moved from the fourth

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[45] Everyone Blames Me, *supra* note 39.

[46] INDIA CODE, *supra* note 41.

[47] *Id.*

[48] U.S. Dep't of State, Trafficking In Persons Report (2018), https://www.state.gov/reports/2018-trafficking-in-persons-report/india/.

[49] Criminal Law (Amendment) Act, 2013, §370.

[50] TRAFFICKING IN PERSONS REPORT, *supra* note 48.

[51] *Id.*

[52] *The World's Most Dangerous Countries for Women*, THOMAS REUTERS FOUND. (2018), http://poll2018.trust.org/country/?id=India.

most dangerous country to the first.[53] The foundation interviewed policymakers, journalists, health workers, academics, and other development professionals in an effort to obtain a broad representative sample of people based on their expertise.[54] In the study, the researchers asked questions focused on six key areas: healthcare, discrimination, cultural traditions, sexual violence, non-sexual violence, and human trafficking.[55] India ranked the most dangerous in three areas: the risk of sexual violence and harassment against women; the danger women face from cultural, tribal, and traditional practices; and the country where women are most in danger of human trafficking including forced labor, sex slavery, and domestic servitude.[56] It is vital that victims of sexual violence and human trafficking have knowledge of the legal assistance available to them, as well as the ability to navigate the system in order to protect their rights. Larger cities have programs like the Delhi Commission for Women where they operate rape crisis centers and coordinate with police stations and offer legal assistance; however, that system fails due to corrupt police forces and a lack of uniformity across departments.[57] India has not seen examinations like the "two-finger test"; a vaginal medical test used to determine if a victim is sexually active, be fully eradicated due to the fact that healthcare remains a state matter meaning state and local governments are not required to adopt the central government's guidelines.[58]

A. The Caste System

While sexual violence can affect all individuals, one specific subset of victims seems to be at a higher risk in India. Although India banned caste discrimination in 1950, social stratification remains prevalent throughout the country, especially in rural areas.[59] Dalit women are regarded by many as the lowest caste in India; they were formerly referred to as "untouchable" and are still regarded as such in many areas of the country to this day.[60] They are the most susceptible to human trafficking, with approximately 80 percent of Dalit women living below the poverty line and a vast majority of these women are forced into trafficking rings.[61] "98[percent] of those forced into the dehumanizing work of manual scavenging, removing human waste by hand, are also Dalit women."[62] Additionally, Rashida Manjoo, the U.N. Special Rapporteur on violence against women, has stated that

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[53] *Id*; Everyone Blames Me*, supra* note 39.

[54] *The World's Most Dangerous Countries for Women*, *supra* note 52.

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] Everyone Blames Me, *supra* note 39.

[59] Bina B. Hanchinamani, *Human Rights Abuses of Dalit in India*, 8 AM. UNIV. COLL. OF L. HUM. RTS. BRIEF 15, 15 (2001).

[60] *Id.*

[61] Dalit Women, WOMANKIND, *https://www.womankind.org.uk/dalit-women.*

[62] *Caste and Gender Justice: Delivering on the UN Global Goals for Dalit Women and Girl*, INT'L DALIT SOLIDARITY NETWORK (2019), https://idsn.org/key-issues/dalit-women/.

Dalit women face rape by state actors and powerful members of dominant cases to inflict political lessons within the community.[63] Police forces often deny Dalit women their right to legal aid and often harass these victims as a method of intimidation.[64] As a consequence of the caste system "[v]iolence and inhuman treatment, such as sexual assault, rape, and naked parading, serve as a social mechanism to maintain Dalit women's subordinate position in society. They are targeted by dominant castes as a way of humiliating entire Dalit communities."[65] Many Dalit women do not come forward due to fear of retaliation by higher caste members.[66] While the Prevention of Atrocities Act was introduced in order to stop the commission of offenses against members of Scheduled Tribes and Scheduled Castes, the law is not frequently upheld.[67] In fact, just last year, the Supreme Court ruled that no immediate arrests would be made for any complaints against those who have committed an atrocity against the Dalits.[68] They now require that an extrajudicial trial occur before a complaint can be acted on, making it all the more difficult for Dalit women to take action against their assailants.[69]

B. Devadasi Women

Dalit women are often forced into sex trafficking as a "Devadasi."[70] The Devadasi tradition dates back to the 6th century A.D.[71] When the practice was first originated, Devadasi girls were viewed as a high-class group who played an important role in the temple.[72] Devadasi translates to "Servant of God" and these women and girls were considered to be married to God.[73] Many of these women never engaged in any domestic partnership outside of their "marriage" and their primary duty was to be present at sacred religious rituals in Hindu temples across the country.[74] They performed traditional dances and participated in music celebrations; Devadasis were viewed as high-class individuals and sex played no part

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63 *Id.*

64 *Id.*

65 *The Situation of Dalit Rural Women: Submission to Discussion on CEDAW*, OFFICE OF THE U.N. HIGH COMM'R ON HUMAN RIGHTS, https://www.ohchr.org/Documents/HRBodies/CEDAW/RuralWomen/FEDONavsarjanTrustIDS.pdf.

66 Hanchinamani, *supra* note 59.

67 *Scheduled Castes and Scheduled Tribes*, UNITED NATIONS: U.N. IN INDIA, https://in.one.un.org/task-teams/scheduled-castes-and-scheduled-tribes/.

68 Alok Prasanna Kumar, *Supreme Court judgment on SC/ST Atrocities Act represents overreach, betrays Constitution itself*, FIRST POST (April 3, 2018), https://www.firstpost.com/india/supreme-court-judgment-on-scst-atrocities-act-represents-overreach-betrays-constitution-itself-4416087.html.

69 *Id.*

70 Umeshwari Dkhar, Devadasi: A Sex Trafficking (Nov. 30, 2015) (PhD, North Eastern Hill University) (on file with SSRN).

71 *Id.*

72 *Id.*

73 Krithiha Rajam, *How Devadasis went from having high social status to being sex slaves and child prostitutes*, YOURSTORY (Apr. 24, 2017), https://yourstory.com/2017/04/devadasis-india.

74 Kumar, *supra* note 68.

in their role.[75] Although this traditional practice was made formally illegal in 1988, the Devadasi system still exists in India.[76] Today, however, Devadasis are simply viewed as child prostitutes and sex slaves.[77] Many of these girls are forced into this practice from a young age as the only source of income for their families.[78] One article referred to them as "Prostitutes of God."[79] There is little religious link to the practice today and despite the laws in place to prohibit the system, a reported 450,000 women in India identified as a Devadasi in 2013.[80] One of the first bills prohibiting the buying, hiring, or obtaining possession of a minor for purposes of prostitution was introduced in 1860.[81] In the early 1927s, the city of Mysore enacted a law that criminalized the Devadasi system; this was the first city to do this.[82] Other states followed Mysore's lead, by enacting, provisions that criminalized the dedication of women and girls to temples.[83] Although there is legislation preventing this abuse, the culture and mentality around these issues won't begin to change if those in positions of power continue to ignore the existence of this legislation.

4. Analysis

The Palermo Protocol was adopted by the U.N. General Assembly as a supplement to the Convention against Transnational Organized Crime in 2000.[84] The Convention, also known as the Palermo Convention, is the primary international mechanism created to combat transnational organized crime.[85] By fostering international cooperation through ratification of the instrument, the U.N. requires all Member States that ratify the Convention to adopt new measures that would (i) establish human trafficking as a crime within their domestic law, (ii) create frameworks for extradition, (iii) promote law enforcement cooperation, and (iv) advance training for national authorities on the matter.[86] To create a culture of accountability, the U.S. Department of State ("Department") designed a ranking too, with four tiers, to rate countries by their progress in collaboration with the Trafficking Victims Protection Act (TVPA).[87] A country that is designated at the

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] Krithiha Rajam, *How Devadasis went from having high social status to being sex slaves and child prostitutes*, YourStory (Apr. 24, 2017), https://yourstory.com/2017/04/devadasis-india.

[79] Matilda Battersby, *Prostitutes of God*, The Independent (Sept. 20, 2010), https://www.independent.co.uk/news/world/asia/prostitutes-of-god-2082290.html.

[80] Kumar, *supra* note 68.

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *U.N. Convention against Transnational Organized Crime and the Protocols Thereto*, U.N., https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html.

[85] *Id.*

[86] *U.N Convention against Transnational Organized Crime and the Protocols Thereto*, *supra* note 84; U.S. Dep't of State, *supra* note 48.

[87] Trafficking In Persons Report, *supra* note 48.

highest tier, "Tier 1" signifies that a country made significant efforts to address its trafficking problem to meet the TVPA's standards.[88] The TVPA standards are generally in line with the Palermo Protocol. Each country's annual Trafficking in Persons Report determines whether the country enforced its newly enacted statutes and prosecuted those who violated them.[89] All signatories to the Palermo Protocol are required to inform their citizens of their sexual violence laws, educate law enforcement on the agreement, and most importantly, protect victims and document how they are working to do so.[90] In 2018, the Department stated that India remained a "Tier 2" country on their Trafficking In Persons Report.[91] The U.N. Refugee Agency noted that, while India did not meet the minimum requirements necessary to eliminate trafficking, they have made substantial strides in doing so.[92] They increased their budget to help women and child trafficking victims obtain shelter and the Indian border force held numerous awareness events on trafficking victims within the communities they live.[93] It should be noted that this report referenced the previously discussed NCRB report from 2016.[94] The report praised the government for increasing its efforts, noting that it identified three times the number of victims identified in 2016.[95] Despite the important changes India has made, efforts towards increased victim protection and higher conviction rates for forced labor remain stagnant. The Thomas Reuters Foundation reported that fewer than two in five trafficking cases in India end in a conviction.[96] The statement came after a report of a rare success in 2017 where an Indian court sentenced 39 people to 10 years in prison for the trafficking of girls in the state of Karnataka.[97]

A. Trafficking of Persons Bill of 2018

India's highly contentious Trafficking of Persons (Prevention, Protection, and Rehabilitation) Bill ("Bill") of 2018 was approved by the Indian Parliament on July 26, 2019.[98] While the Bill attempts to address trafficking using mechanisms to rescue, protect, and rehabilitate victims, it has been subject to criticisms.[99] The

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[88] *Id.*

[89] *Id*.

[90] *Id.*

[91] *Id.* at 221-22.

[92] *Id.*

[93] *Id.* at 222.

[94] *Id.*

[95] *Id.*

[96] Anuradha Nagaraj, *Nearly 40 traffickers jailed in southern India in rare success for prosecutors*, Thomson Reuters Found., (Jan. 27, 2017), https://fr.reuters.com/article/us-india-trafficking-verdict-id USKBN1512NK.

[97] *Id.*

[98] Maneka Gandhi, *Why I pushed for passage of the anti-trafficking bill*, Times of India, (Jul. 30, 2018), https://timesofindia.indiatimes.com/india/why-i-pushed-for-passage-of-the-anti-trafficking-bill/articleshow/65190751.cms.

[99] Himanshu Pabreja Ankit Sharama, The Indian Anti-Trafficking Bill, 2018: A Misguided Attempt to Resolve the Human Trafficking Crisis in India, Oxford Hum. Rts. Hub (Jan. 15, 2019), https://

U.N. Special Rapporteur on Trafficking in Persons, Maria Giammarinaro, and the U.N. Special Rapporteur on Contemporary Forms of Slavery Urmila Boola, released a statement expressing their tremendous shared concern.[100] They criticized the language of the Bill as "over-broad and vague."[101] Specifically, the Special Rapporteurs stated that any legal framework centered around the trafficking of persons should be consistent with a human rights approach in order to ensure victims are correctly identified and given appropriate aid and protection services.[102] The Oxford Human Rights Hub notes that the Bill fails to incorporate a victim-centered approach—a shortcoming that could potentially harm these individuals further.[103] While the Bill provides immunity to victims for crimes committed under coercion, the Hub notes that the burden of proof falls on the victim, and petty crimes are afforded no immunity.[104] Essentially, the Bill only protects victims where the punishment equals ten years of imprisonment or more.[105] The Bill also does not consider consent to be material to the definition of sex trafficking (an outdated definition from Section 370 of the Indian Penal Code), which creates a problem that could lead to police punishing unconsenting sex workers as if they themselves were traffickers. This is especially concerning when one considers the high rates of official corruption in India.[106]

While there is certainly strong opposition to the Bill, there are aspects of the legislation that have the potential to influence positive change around the issue of human trafficking in India. For instance, the passage of the Bill creates a national anti-trafficking bureau, formed specifically to serve as an investigative agency for trafficking issues throughout the country.[107] This centralized body will serve as a structured solution to combat trafficking on a higher level.[108] Those who supported the Bill state that, instead of criminalizing voluntary sex work, it will safeguard sex workers against possible prosecution and provide long term support for the victims.[109]

Even with the benefits created with the passage of the Bill, the system needs major reforms, as evidenced by corrupt law enforcement and inconsistencies across departments.[110] As a result of such inconsistencies, state and local governments are not required to adopt the central government's guidelines.[111] Further,

ohrh.law.ox.ac.uk/the-indian-anti-trafficking-bill-2018-a-misguided-attempt-to-resolve-the-human-trafficking-crisis-in-india/.

100 *UN experts urge India to align new anti-trafficking bill with human rights law*, UN NEWS (July 23, 2018), https://news.un.org/en/story/2018/07/1015352.

101 *Id.*

102 *Id.*

103 Sharama, *supra* at 99.

104 *Id.*

105 *Id.*

106 TRAFFICKING IN PERSONS REPORT, *supra* note 48, at 223.

107 Gandhi, *supra* note 98.

108 *Id.*

109 *Id.*

110 TRAFFICKING IN PERSONS REPORT *supra* note 48, at 222-23.

111 UN News, *supra* note 90.

adding to the difficulty, the number of government officials who are complicit in crimes across the country is alarming. The Crime in India report in 2016 stated that 4,764 individuals were charged under the corruption act.[112] Officials were sometimes complicit in trafficking and sex trafficking schemes by protecting brothel owners, receiving sexual services, and informing traffickers of any upcoming raids.[113] The culture and mentality around these issues will not begin to change if those in positions of power continue to be allowed to ignore the existence of these laws.

B. International Covenants

India is also a party to several relevant international agreements. It is a signatory to the International Covenant on Civil and Political Rights, which states that no person can be subjected to cruel, inhuman, or degrading treatment;[114] it is a signatory to the International Covenant on Economic, Social, and Cultural Rights, which guarantees the right to the highest attainable standard of health;[115] and it is a party to the U.N. Convention on the Elimination of All Forms of Discrimination Against Women.[116] While contracting States to international covenants are legally bound to their agreements, there are no concrete enforcement methods in place.[117] As a party to these treaties, India still has an obligation to take all measures necessary to ensure that women's rights are being upheld.[118] In 2017, 33 U.N. member countries raised concerns over violence against women in India.[119] The Indian government responded by citing specific laws and policies addressing this violence.[120] While it is important to recognize the progress India has made by creating and passing this legislation, the government needs to take all measures necessary — through actual enforcement of new amendments and legislation—[121] to ensure that they are upholding their commitments as a signatory to these treaties.

C. Developments and Progress

While the Indian Government has enacted great initiatives that are surely a step in the right direction, there has been little progress towards implementation

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[112] TRAFFICKING IN PERSONS REPORT, *supra* note 48, at 223.

[113] *Id.*

[114] International Covenant on Civil and Political Rights, pt. III, art. 7, Dec. 19, 1966, 999 U.N.T.S. 171.

[115] International Covenant on Economic, Social, and Cultural Rights, pt. III, art. 12, Dec 16, 1966, 993 U.N.T.S. 3.

[116] Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

[117] *International Law and Justice*, UNITED NATIONS, https://www.un.org/en/sections/issues-depth/international-law-and-justice/index.html.

[118] *Id.*

[119] Everyone Blames Me, *supra* note 39.

[120] *Id.*

[121] *Id.*

and enforcement. The Delhi Gang Rape was the only case out of the 706 filed in New Delhi to lead to a conviction in 2012.[122] In 2013, the Indian Supreme Court ruled that the "two-finger test", an archaic and ineffective medical examination, was an invasion of the right to privacy.[123] As a result, in 2014, the Ministry of Health and Welfare declared the test both irrelevant and inaccurate to identify cases of rape.[124] Nevertheless, a 2018 report revealed that as of November 2017, only nine out of the 29 Indian states had adopted these 2014 guidelines and the majority of states were still using this test when examining victims of sexual violence.[125]

The Delhi Commission for Women ("DCW") is one initiative focused on human trafficking that is already in effect.[126] Created in 1994, the Commission is a statutory body dedicated to the safety of women in the city. DCW maintains a dedicated helpline for women and girls, and over the past few years, there have been reports of drastically increased call numbers.[127] This is a positive sign of increased awareness and serves as a step in the right direction. One report told the story of a 13-year-old girl who called the helpline because her grandparents were forcing her into a marriage with an older man.[128] The DCW was able to remove the girl from this toxic environment and place her in a women's shelter.[129] One major concern, however, is whether the shelters are truly safe.[130] Often times, women and girls are kidnapped from the shelters specifically for purposes of human trafficking.[131] In December of last year, nine girls went missing from Sanskar Ashram, a shelter home in Delhi.[132] These girls had been placed in the home after being rescued from the red-light district just one year

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122 Sunny Hundal, *Delhi Rape: One Year On, Has Anything rape: one year on, has anything changed for India's women?*, THE GUARDIAN (December 10, 2013), https://www.theguardian.com/world/2013/dec/10/delhi-rape-one-year-anything-changed-india-women.

123 Everyone Blames Me, *supra* note 39

124 *Id.*

125 Roli Srivastava, *Indian Rape Survivors Still rape survivors still subjected to Intrusive, Illegal intrusive, illegal tests*, THOMAS REUTERS FOUND. (January 10, 2018), https://www.reuters.com/article/us-india-sexcrimes-justice/indian-rape-survivors-still-subjected-to-intrusive-illegal-tests-idUSKBN1EZ0PX.

126 Sanskriti Talwar, *Distress calls to DCW Mobile Helpline mobile helpline up 75%*, THE NEW INDIAN EXPRESS (September 23, 2018), http://www.newindianexpress.com/thesundaystandard/2018/sep/23/distress-calls-to-dcw-mobile-helpline-up-75-1875819.html.

127 *Id.*

128 Ram K. Singh, *Delhi Commission for Women Helpline rescues 13-year-old girl from Getting Married off*, INDIA TODAY (April 5, 2019), https://www.indiatoday.in/india/story/delhi-commission-for-women-helpline-rescues-13-year-old-girl-from-getting-married-off-1495081-2019-04-05.

129 *Id.*

130 Preksha Malu, *How Did Shelter Homes in India Become Criminal hotspots?*, SABRANG (October 1, 2018), https://sabrangindia.in/article/how-did-shelter-homes-india-become-criminal-hotspots.

131 *Id.*

132 *Girl Who Went Missing from Delhi's Sanskar Ashram Rescued from Sonagachi in Kolkata*, BUSINESS STANDARD (Apr. 30, 2019), *https://www.business-standard.com/article/pti-stories/girl-who-went-missing-from-delhi-s-sanskar-ashram-rescued-from-sonagachi-in-kolkata-119043001438_1.html* [hereinafter *Girl Who Went Missing*].

prior.[133] This is unacceptable; training and safety measures should already be in place to prevent this type of kidnapping from occurring.

Over the last five years, there has been monumental development around sexual violence initiatives in India. In January 2020, a court in New Delhi ordered the execution of the four men convicted in the 2012 Delhi Gang Rape.[134] Because capital punishment is rare in India, this will mark the first execution in the country since 2015.[135] Although it is increasingly evident that India is making an effort to address human trafficking concerns, widespread transformation has yet to occur. Despite the changes to legislation and policies, sexual violence in India is still a pervasive issue. The Hyderabad Gang-Rape from November 2019 is the most recent example of this endemic.[136] The case involves a horrific gang-rape and murder of a 27-year-old woman in Hyderabad, Telangana, which is the capital of the southern Indian state.[137] The victim's body was set ablaze and sparked major protests across the country and the world in hopes of swift justice against her rapists.[138] While this attack comes nearly seven years after the Delhi Gang Rape, it is clear that the changes included in the 2012 sexual violence legislation have yet to prove effective.

D. The Nirbhaya Fund

Examining recent changes and implementation efforts across the country can be helpful when formulating targeted recommendations around human trafficking and sexual violence. The government introduced a minimum mandatory sentencing of seven years for rape, and the Act included new offenses such as stalking, sexual harassment, and forcible disrobing.[139] Rape and acid attack victims now have a right to free and immediate medical treatment; and if a doctor refuses to comply, it is a punishable offense.[140]In addition, the Ministry of Health and Family Welfare issued guidelines for medico-legal care for survivors of sexual violence to standardize examinations and treatments of victims.[141]

As a result of the Delhi Gang Rape, the government established The Nirbhaya Fund, which allocated about $450 million US dollars to programs aimed at

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[133] *Id.*

[134] Bradford Betz, *India Court Orders Execution of Convicts in 2012 Deadly Rape,* Fox News (January 7, 2020), https://www.foxnews.com/world/india-execution-convicts-deadly-rape.

[135] Joanna Slater, *Four Men Convicted in 2012 Indian Gang Rape and Murder to be Executed Jan. 22.*, The Washington Post (Jan. 7, 2020), https://www.washingtonpost.com/world/asia_pacific/four-men-convicted-in-2012-indian-gang-rape-and-murder-case-to-be-executed-on-jan-22/2020/01/07/6af10694-3150-11ea-898f-eb846b7e9feb_story.html.

[136] Swati Gupta, *A Shocking Gang-Rape and Murder of a Woman is Raising Familiar Tough Questions for India*, CNN World (Dec. 3, 2019), https://www.cnn.com/2019/12/03/asia/india-hyderabad-rape-intl-hnk/index.html.

[137] *Girl Who Went Missing*, *supra* note 132.

[138] *Id.*

[139] Everyone Blames Me, *supra* note 39.

[140] *Id.*

[141] *Id.*

preventing, protecting, and rehabilitating victims.[142] The programs created approximately 151 one-stop centers across the country in order to provide legal and medical aid, as well as counseling services for sexual assault survivors.[143] A news report from April 2020 stated that thirteen states are currently being set up for both DNA testing facilities and cyber forensic laboratories to accommodate the growing number of reported crimes against women.[144] The project is being implemented thanks to the Nirbhaya fund, and the report states that a total of 3,664 personnel, including 410 public prosecutors and judicial officers, have been trained for this project.[145] Another recent report stated that 16 states have joined the network of a single emergency helpline number "112" for anyone who may be in distress.[146] This Emergency Response Support System will be integrating three separate numbers that are used for police, fire, and women, and it is also being implemented under the Nirbhaya fund.[147] Additionally, the Investigation Tracking System for Sexual Offenses ("ITSSO") is currently being implemented in eight states as the first phase of the project.[148] The ITSSO is an online module available to law enforcement at all levels in an effort to investigate and prosecute rape cases in a more timely manner across the country.[149] The hope is that these "safe city implementation monitoring portals" will create a sense of security for women in cities throughout India.[150] These initiatives serve as important steps towards combatting sexual violence against women; and moving forward, they should be extended to include training for human trafficking focused victim identification and aid.

5. Proposal

The Palermo Protocol ("The Protocol") was created with the intention of reforming society's perspective on human trafficking on a large scale.[151] The Protocol was designed to prevent, suppress, and punish the trafficking of persons, specifically women, and children, through the United Nations Convention.[152] By creating an internationally accepted definition of human trafficking, the Palermo

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[142] *Id.*

[143] *Id.*

[144] *States to Soon Have Cyber Forensics Labs to Check Crimes Against Women*, NDTV (Apr. 20, 2019), *https://www.ndtv.com/india-news/states-to-have-cyber-forensic-labs-to-check-crimes-against-women-under-nirbhaya-fund-2026000.*

[145] *Id.*

[146] *Single Emergency Helpline '112' launched in 16 states*, TIMES OF INDIA (Febr. 20, 2019), https://timesofindia.indiatimes.com/india/single-emergency-helpline-112-launched-in-16-states-uts/articleshow/68074212.cms.

[147] *Id.*

[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] KENDALL ET AL., *supra* note 9.

[152] Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, S. TREATY DOC. NO. 108-16, 2237 U.N.T.S. 319 (*entered into force* Dec.25, 2003).

Protocol obliged India, as a signatory to the Convention, to create and implement safeguards that protect their women and children from human trafficking and sexual violence. The psychological control that trafficking victims endure is extensive, and the staff at the 151 one-stop centers around the country need to be trained to provide support for women and girls who have been identified as trafficking victims. These centers should be equipped to recognize signs of coercion and intimidation. Unfortunately, the Human Rights Watch reported that a lack of both coordination and public awareness of the existence of such centers makes it difficult to streamline internal processes.[153] In spite of the difficulties, Emergency Helpline Response teams should be prepared to intake information on trafficking rings, and the ITSSO should be further developed to investigate human trafficking.

Human Rights Watch has also proposed a standard operating procedure that is statutorily binding for the police, forensic experts, and the judiciary.[154] This would help ensure uniformity in the application of existing laws and policies around sexual violence. The operating procedure could also be reformed to specifically target both human trafficking and sexual violence—it has the potential to make a difference for Dalit women who face harassment by their local police when they choose to come forward.[155] Additionally, in their 2018 Trafficking of Persons report, the Department suggested that India establish anti-human trafficking units across the country and provide funding for states to establish fast-track courts exclusively for trafficking cases.[156] Fast-track courts have already been established in India for sexual violence cases and funding should be allocated for victims of trafficking as well.[157] India must create a national plan of action to combat trafficking and sexual violence, as a whole, throughout the country.[158] Although some states throughout the country have established their own action plans with task forces and awareness strategies, these plans must be initiated and enforced on a greater scale.[159]

The issue of sexual violence in India is widespread and extensive; change must begin somewhere. From violence prevention to victim protection, we must not draw attention to India's pattern of response only after a publicized attack. When looking at the legislative history of sexual violence laws in India, improvements and advancements have certainly been made; however, new legislation needs to be drafted before the public outcry at the expense of yet another victim of sexual violence. The central, state, and local governments need to begin enforcing the Criminal Law Amendment Act of 2013. Although these laws are in place, the culture and mentality around these issues will not begin to change if

153 Everyone Blames Me, *supra.* note 39.

154 KENDALL ET AL., *supra* note 9.

155 *Id.*

156 TRAFFICKING IN PERSONS REPORT, *supra* note 48.

157 WTD News, *supra* note 24.

158 Everyone Blames Me, *supra* note 39.

159 TRAFFICKING IN PERSONS REPORT, *supra* note 48.

those in positions of power continue to ignore the existence of these amendments.

6. Conclusion

From an international perspective, the U.N. has voiced concerns regarding the issues of sexual violence and human trafficking in India but more can be done—members of the U.N. need to come forward and ensure that India meets its obligations under international treaties. While much of the problem is in the implementation of these laws, countries can voice their concerns through media in order to shine a light on the issues facing victims. The conversation around sexual violence, and the power dynamic between men and women in India, has certainly improved over the years; but in order to see this improvement reflected in statistics, we need to raise awareness on the prevalence of this issue. Although the creation of protective legislation was a necessary phase in ensuring the safety of all women in India, recent publicized attacks such as the Bangalore Gang-Rape prove that the mindsets of many individuals across the country have yet to improve. India's Central Government has made great strides in the amendment and introduction of laws in order to help victims of trafficking and violence, but ensuring enforcement of these laws is the most important next step.

The International Communities' Ineffective Response Towards The Fight Against Female Genital Mutilation

Fernanda Magalhães Santos

Introduction

In November of 2018, the Honorable Judge Bernard A. Friedman presided over *U.S. v. Nagarwala, et al*, the first and only criminal case in the United States concerning the Female Genital Mutilation Act of 1996 ("FGM Statute").[1] The FGM Statute made any form of female genital mutilation ("FGM") procedure on any person below the age of 18 a federal criminal offense.[2] In what would have been the seminal case in the United States' fight towards eliminating this practice, Judge Friedman hastily granted the defendant's Motion to Dismiss and ruled that the FGM Statute was unconstitutional.[3]

The case concerned eight defendants (including the doctor that performed the procedure and several of the victims' parents who brought the victims to the doctor's clinic) that participated in the performance of the FGM procedure to nine girls in Livonia, Michigan.[4] The defendants argued that the various charges relating to the FGM Statute were unconstitutional because the Necessary and Proper Clause of the Constitution, the only applicable source of Congressional power for this law, had not granted Congress power to do so.[5] In finding the FGM Statute unconstitutional, Judge Friedman agreed with the defendants that Congress lacked the authority to pass the FGM Statute because the Necessary and Proper Clause, as well as the Commerce Clause, did not grant Congress the authority to prohibit the practice.[6] Judge Friedman rejected the government's argument, which maintained that the FGM Statute was "necessary to effectuate [the International Covenant on Civil and Political Rights ("ICCPR")]," on the grounds that the "ICCPR" had too tenuous of a relationship with the FGM Statute.[7] Judge Friedman further concluded that outside of the Necessary and Proper Clause, he had federalism concerns because U.S. constitutional balance gives

[1] Pam Belluck, *Federal Ban on Female Genital Mutilation Ruled Unconstitutional by Judge*, New York Times (Nov. 21, 2018), https://www.nytimes.com/2018/11/21/health/fgm-female-genital-mutilation-law.html.

[2] Female Genital Mutilation Act, 18 U.S.C §§116 (2013) [hereinafter "FGM Act"]; Female Genital Mutilation is also known as Female Genital Cutting or Female Circumcision depending on the region.

[3] Belluck, *supra* note 1.

[4] U.S. v. Nagarwala, et al., 350 F. Supp. 3d, 613, 615-16 (E.D. Mich. 2018).

[5] *Id.* at 616.

[6] *Id.* at 617-18.

[7] *Nagarwala*, 350 F. Supp. 3d at 617-18.

States the primary authority to define and enforce criminal law.[8] At the time, Michigan did not have a state law criminalizing female genital mutilation.[9] Thus, the court deemed the statute unconstitutional and six of the eight counts against Dr. Jumana Nagarwala and the other defendants were dismissed.[10]

Following decades of individual domestic efforts, FGM was brought to the international arena in 1997 when the World Health Organization ("WHO"), along with the United Nations Children's Fund ("UNICEF") and the United Nations Population Fund ("UNFPA"), released a joint statement ("1997 Joint Statement") regarding FGM, in which they condemned the practice.[11] Since then, 44 countries have banned and criminalized the practice either in part or in its entirety.[12] Over time, many countries that have criminalized FGM have seen a decrease in the practice; however, many of these nations have had little success in prosecuting those that promote or perform the procedure. Then, in 2012, the General Assembly signed a resolution ("2012 GA Resolution"), co-sponsored by two-thirds of the Assembly, to ban FGM worldwide. The 2012 GA Resolution condemned the practice and encouraged all signatories to continue the fight against FGM.[13] Both the 1997 WHO Statement and 2012 GA Resolution, along with other UN initiatives, have referenced conventions such as the ICCPR, the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Convention on the Rights of the Child, to name a few.[14]

Since the 1997 Joint Statement and the 2012 GA Resolution, various UN organizations, NGOs, and NPOs have released reports and statements in an effort to eliminate the practice. Despite these efforts, treaties, and joint statements, there is no international *legal* framework in place, nor do enforceable conventions or resolutions specifically mention FGM as a practice. These initiatives have largely been focused on supporting the efforts of local governments.

This commentary will look at the strategies the international community has adopted in its attempts to combat FGM and how states have responded at the domestic level. More specifically, it will examine how the 2012 GA Resolution condemning the practice is insufficient to establish an effective adjudicative strategy in either regulating or eliminating the procedure. Further, this commentary will look to how domestic governments have responded to the international con-

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[8] *Id.* at 619.

[9] Belluck, s*upra* note 1.

[10] *Id.*

[11] World Health Organization (WHO), *Female Genital Mutilation: A Fact Sheet*, (Feb. 2012), www.who.int/news-room/fact-sheets/detail/female-genital-mutilation.

[12] *Id.*

[13] *UN General Assembly Adopts Worldwide Ban on Female Genital Mutilation,* No Peace Without Justice (Dec. 20, 2012), http://www.npwj.org/FGM/UN-General-Assembly-Adopts-Worldwide-Ban-Female-Genital-Mutilation.html.

[14] World Health Organization (WHO), U.N. Population Fund (UNFPA), U.N. Children's Fund (UNICEF), *Female Genital Mutilation: a joint WHO/UNICEF/UNFPA statement,* at 2, (1997) [hereinafter *joint statement*]; *see also* G.A. Res. 48/104, (I), Declaration on the Elimination of Violence Against Women (Dec. 20, 1993).

demnation of FGM to determine whether a binding international response, such as a treaty, would be more effective in eliminating the practice at the domestic level. In making this determination, this commentary will look at regions and states that are regulating certain forms of FGM procedures and criminalizing others, as well as regions that have criminalized the entire FGM practice. It will then examine how criminalization has affected the prevalence of the practice and the success of the legal system in holding people accountable. Finally, this commentary will evaluate initiatives from outside organizations and communities—outside of regulations—and whether they have found any success.

Given the complexity of FGM within its cultural and religious framework, along with its prominence in matters relating to migration, this analysis will focus solely on international activity and domestic governmental responses to those activities. This commentary will not focus on FGM in relation to asylum and immigration cases, as these cases are within a larger immigration framework and are outside of the scope of this analysis. Further, the debate on FGM as a religious and cultural right, and whether or not it is "gender discrimination" or a human rights issue will not be analyzed. This comment is based on the UN, WHO, and other international organization's classifications of FGM.

Background

Defining Female Genital Mutilation

Female Genital Mutilation ("FGM") or Female Genital Cutting ("FGC") encompasses all procedures that involve the partial or total removal of the external female genitalia or other injury to the female genital organs for non-medical purposes.[15] The 1997 Joint Statement, released by WHO, UNICEF, and UNFPA, classified the various procedures, with some ambiguity, into four separate types: Type I- Clitoridectomy, Type II- Excision, Type III- Infibulation, and Type IV- any other harmful procedures to the external female genitalia for non-medical purposes.[16] As the procedure moves from Type I to Type IV, the procedure becomes more and more invasive. The first three classifications range from only the partial or complete removal of the clitoris (Clitoridectomy) to the cutting and stitching of the labia minor and major (Infibulation).[17] WHO currently estimates that Type I, Type II, and Type IV account for 90% of FGM cases, with 10% being Type III.[18] Most FGM's are performed by either local or traditional circumcisers.[19] In very uncommon circumstances, FGM's are performed by trained

[15] World Health Organization (WHO), *Sexual and Reproductive Health: Classification of female genital mutilation*, https://www.who.int/health-topics/female-genital-mutilation#tab=tab_1.

[16] *Joint statement*, *supra* note 14 at 3.

[17] *Female Genital Mutilation: A Fact Sheet*, *supra* note 11.

[18] World Health Organization, *Prevalence of female genital mutilation*, https://www.who.int/reproductivehealth/topics/fgm/prevalence/en/.

[19] *Id.*

medical professionals.[20] This procedure is typically performed on girls between birth and 16 years of age.[21]

As FGM removes or damages normal female tissue, it interferes with the "natural functions of girl's and women's bodies."[22] Serious health complications can arise from FGM, such as chronic pain and discomfort, infections, shock, excessive bleeding, and death.[23] The procedure is often performed without sterile instruments or anesthesia, and the use of un-hygienic salves and ointments increases the risk of health complications.[24] Type III Infibulation causes the most severe issues, such as serious complications during childbirth and even death in extreme cases. However, most forms of the procedure can result in, at minimum, "severe physical discomfort" or psychological trauma.[25]

Prevalence Of Fgm

Although the exact number of cases is unknown, it is estimated that over 200 million girls and women in 30 countries have undergone some form of FGM/C with an estimated 3 million girls at risk of undergoing the procedure each year.[26] In UNICEF's most recent report from 2016, of the 200 million women affected, it is estimated that 44 million are below the age of 15.[27] Within the 30 countries that have reported cases of FGM, most are located in Africa, the Middle East, and Asia, with more than half the cases presented originating from Egypt, Ethiopia, and Indonesia.[28] In a June 2018 independent report, approximately 87% of women between the ages of 15 and 49 have experienced some type of FGM procedure.[29] However, as migration from practicing countries continues, cases of FGM have also been found in the U.K., with 170,000 cases being reported, and the U.S. where 500,000 girls and women are living with the consequences of this procedure.[30]

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[20] *Id.; see also* Preeti Jha, *Southeast Asia's Hidden Female Genital Mutilation Challenge*, THE DIPLOMAT (Aug. 21, 2019), https://thediplomat.com/2019/08/southeast-asias-hidden-female-genital-mutilation-challenge/.

[21] *Female Genital Mutilation: A Fact Sheet*, *supra* note 11.

[22] *Id.*

[23] *Id.*

[24] Sana Loue, *Sex, Sexuality, and Gender Issues in Immigration Law: Gender Related Issues*, 07-06 IMMIGBRIF 1 (2007) (citing Sandra D. Lane & Robert A. Rubenstein, *Judging the Other: Responding to Traditional Female Surgeries*, 26 Hasting Ctr. Rep. 31 (1996)).

[25] *Id.*

[26] UNICEF, *Female Genital Mutilation/Cutting: A Global Concern,* (2016), www.unicef.org/media/files/FGMC_2016_brochure_final_UNICEF_SPREAD.pdf.

[27] *Id.*

[28] *Id*.

[29] 28 Too Many: *The Law and FGM*, 2 THOMSON REUTERS FOUNDATION (June 2018), [hereinafter Egypt: *The Law and FGM*], (Data was collected by the Ministry of Health and Population of Egypt, along with El-Zanaty and Associates and ICF International in 2015).

[30] *Female Genital Mutilation/Cutting: A Global Concern*, *supra* note 26.

One of the root causes for the persistence of this practice is its cultural and religious significance.[31] In the Muslim community, FGM is frequently seen as a requirement of the Islamic faith.[32] In countries such as Ethiopia, Indonesia, and Malaysia the practice is connected with religious teachings.[33] In regions within Africa and Asia, where FGM is attributed to cultural norms and cultural identity, FGM is seen as a sign that a woman is eligible for marriage.[34] Members of the woman's extended family typically make the decision for her to undergo an FGM procedure.[35] The practice can be attached to "coming-of-age" rituals or ceremonies welcoming girls into "women's secret society."[36] This makes it more desirable for girls to seek out the procedure or to accept when their families have made the decision for them.[37] Growing migration and displacement has also created an increase in the practice as FGM has been associated as an attempt to preserve ethnic identity, mark a distinction from others, or join the culture if they enter a practicing region.[38]

Steps Taken By The International Community

In the mid-1990s, a series of international conferences were organized to address FGM and other violence against women, including the 1993 United Nations World Conference on Human Rights and the 1994 International Conference on Population and Development in Cairo.[39] In 1994, during its 48th session, the U.N. General Assembly signed a Declaration of the Elimination of Violence Against Women, where "violence against women" was defined as any form of gender-based violence that would result in psychological, physical, or sexual violence to women.[40] By establishing a universal definition and principle for what "violence against women" and "gender-based violence" is, the 2012 GA Resolution became a valuable tool to combat violence against women,[41] as it declared that FGM is considered a form of violence against women.[42]

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[31] World Health Organization (WHO), *Eliminating Female Genital Mutilation: An Interagency Statement*, 5-6 (2008), https://apps.who.int/iris/bitstream/handle/10665/43839/9789241596442_eng.pdf;jsessionid=871C070FDBCF02BD0C4F52485EE1D236?sequence=1 [hereinafter *Eliminating Female Genital Mutilation*].

[32] WHO, U.N. Population Fund, UNICEF, *Female Genital Mutilation: A Joint WHO/UNICEF/UNFPA Statement,* at 4, (1997).

[33] *Id.*

[34] Sana Loue, *Sex, Sexuality, and Gender Issues in Immigration Law: Gender Related Issues*, 07-06 IMMIGBRIF 1 (2007).

[35] *Eliminating Female Genital Mutilation*, *supra* note 31.

[36] *Id.* at 5-6.

[37] *Id.* at 9.

[38] *Id.* at 7.

[39] Ontario Human Rights Comm'n, FGM: An Internationally Recognized Human Rights Issue, [hereinafter Ontario Human Rights Comm'n], http://www.ohrc.on.ca/en/policy-female-genital-mutilation-fgm/3-fgm-internationally-recognized-human-rights-issue.

[40] G.A. Res. 48/104, (I), Declaration on the Elimination of Violence Against Women (Feb. 23, 1994).

[41] *Id.;* G.A. Res. 67/146, Intensification of efforts to eliminate all forms of violence against women, 146 (Dec. 20, 2012).

[42] *Id.* at 2.

In 1997, WHO along with UNFPA and UNICEF released the 1997 Joint Statement declaring FGM a violation of several basic and well-established human rights, including the right to the integrity of the person and the "highest attainable level of physical and mental health.[43] Since 1997, FGM in any form has been regarded by the international community as a harmful practice and a violation of several human rights including gender discrimination and children's rights violations.[44] The 1997 Joint Statement took a "zero tolerance" stance condemning the practice, citing international human rights covenants and UN members' obligations to "respect and ensure the protection and promotion of human rights, including the rights to non-discrimination, to the integrity of the person and to the highest attainable standard of physical and mental health".[45] The 1997 Joint Statement, when condemning the practice, cited several international treaties that most member-states had signed such as the *Universal Declaration of Human Rights* ("UDHR") in 1948, the *International Covenants on Civil and Political Rights* ("ICCPR") in 1966, the *Convention on the Elimination of All Forms of Discrimination against Women* in 1979, the 1993 *Vienna Declaration*.[46]

In 2008, WHO released another statement, again condemning the practice and declaring FGM a human rights violation.[47] In the newest statement, along with the already recognized international treaties, WHO also recognized regional treaties such as the *African Charter on Human Rights and Peoples' Rights and its Protocol on the Rights of Women in Africa* and the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.[48] Many of the committees that have been formed within the UN also cite these international and regional treaties whenever releasing their reports or recommendations.[49] The 2008 statement, unlike its predecessor, discussed, at length different options available to local governments and organizations in the hopes of eliminating FGM.[50] Although initiatives, such as community-led education and empowerment education programs, and coordinated media, justice, and financial attention, are crucial in stopping these practices these must also be a connection to more robust legislation and criminalization of the practice.[51]

Discussion

As FGM gains more international attention, more countries have responded to these concerns through various domestic policies seeking to either eliminate or regulate the practice. Further, non-profits and NGOs that have been working in

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[43] *Joint statement, supra* note 14, at 2.

[44] World Health Organization (WHO), *supra* note 31, at 8.

[45] *joint statement*, *supra* note 14.

[46] *Id.* at 10-12.

[47] World Health Organization (WHO), *supra* note 31, at 8.

[48] *Id.*

[49] *Id.* (UN committees include: The Committee on the Elimination of All Forms of Discrimination against Women, the Committee on the Rights of the Child and the Human Rights Committee).

[50] *Id.* at 13.

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

countries where FGM is most prevalent, have seen more support and resources in large part to this attention.

Relevant International Covenants, Resolutions, And Treaties

As previously stated, many countries and international organizations have cited various covenants and resolutions as the basis for most of the arguments against FGM and the push for its elimination worldwide. The original covenants that many countries, including Egypt, the U.K., and the U.S., have cited include the *Universal Declaration of Human Rights* ("UDHR") as well as the ICCPR.[52] Although neither covenant expressly mentions FGM, other international entities refer to these Covenants when addressing FGM within the international legal framework. For example, Articles 1 and 3 of the UDHR, along with Article 9 of the ICCPR, refer to the idea of the "right to life, liberty, and security of a person".[53] In addition, because FGM is statistically most likely to occur in women under the age of 18, many also refer to the *Covenant on the Rights of Children* ("CRC"), which places the responsibility on protecting the rights of children ultimately on the government.[54]

In 2012, during its 67th Session, the General Assembly signed the resolution intensifying global efforts for the elimination of female genital mutilations.[55] The 2012 GA Resolution built upon the previous decades of treaties, covenants, regional consensuses, and research.[56] It concluded that FGM is "a harmful practice that constitutes a serious threat to the health of women and girls, including their psychological, sexual and reproductive health."[57] It further recognized the discriminatory nature of the practice and encouraged member-states to honor their obligations under the CRC, the *Convention on the Elimination of All Forms of Discrimination against Women*, and the *Declaration on the Elimination of Violence Against Women* by enacting legislation banning all forms of FGM establish programs raising awareness of FGM, and allocate resources to protect all women from FGM.[58] The 2012 GA Resolution was also the first recognition by the UN General Assembly of the worldwide goal to eliminate FGM and has been used by

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[52] *Sources of International Human Rights Law on Female Genital Mutilation*, U.N WOMEN VIRTUAL KNOWLEDGE CENTRE TO END VIOLENCE AGAINST WOMEN AND GIRLS (Feb. 25, 2011), https://www.endvawnow.org/en/articles/645-sources-of-international-human-rights-law-on-female-genital-mutilation.html, (citing U.N. Human Rights, Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), U.N.H.R. art. 1, Sept. 3, 1981).

[53] G.A. Res. 217 (III), 1 & 3, Universal Declaration of Human Rights (Dec. 10, 1948); see also G.A. Res, Convention on the Rights of the Child (Nov. 20, 1989).

[54] G.A Res. 44/25, Convention on the Rights of the Child (Nov. 20, 1989).

[55] G.A. Res. 67/146, at 2 (Dec. 20, 2012). .

[56] *Id.*

[57] *Id.* at 2.

[58] *Id.*

other non-governmental organizations and local governments in their campaigns to enact and enforce national legislation against FGM.[59]

Domestic Criminalization of FGM

Prior to FGM gaining international attention, several countries in which a large percentage of their female population had undergone the procedure had already criminalized it in some form or the entire practice. In 1946, Sudan became the first African nation to criminalize FGM.[60] In Burkina-Faso and Egypt, ministers of health signed resolutions in 1959 that recommended restrictions that would permit only partial clitoridectomies and suggested that these procedures should only be performed by medical professionals.[61] In 1978, Somalia also agreed to establish a commission to abolish infibulation.[62] NGOs, advocates, and the international community regarded many of these initial steps as relatively ineffective and as a result, largely ignored them.[63] With the advent of Sharia Law in 1986, Sudan even removed its law prohibiting infibulation.[64]

In response to recent attention on FGM, several countries have enacted more comprehensive legislation, begun enforcing existing legislation, and created educational programs.[65] The U.S., with over 500,000 girls having undergone or at risk of FGM, enacted the FGM Statute in 1996 and criminalized the practice unless deemed medically necessary.[66] The FGM Statute states that cultural or religious practices are not considered "medically necessary."[67] Aside from the Statute, only 35 states have implemented their own varying laws criminalizing FGM, with 11 of those states enacting legislation in 2019.[68]

One of the major concerns in the U.S.'s efforts to eliminate the practice came in the case of *U.S. v. Nagarwala*, where Dr. Jumana Nagarwala, Dr. Fakhruddin Attar, Farida Attar, and Tahera Shafiq, along with the mothers of the minors who underwent the procedure, were charged with conspiracy to commit FGM, aiding and abetting, and five counts of committing, FGM.[69] The defendants had claimed that the FGM Statute was unconstitutional, as Congress lacked the authority to

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[59] *UN General Assembly Adopts Worldwide Ban on Female Genital Mutilation,* NO PEACE WITHOUT JUSTICE, (Dec. 20, 2012), http://www.npwj.org/FGM/UN-General-Assembly-Adopts-Worldwide-Ban-Female-Genital-Mutilation.html.

[60] ONTARIO HUMAN RIGHTS COMM'N, *supra* note 39.

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *28 Too Many*, SUDAN: THE LAW AND FGM 9 (2018).

[65] U.N. CHILDREN'S FUND, FEMALE GENITAL MUTILATION/CUTTING: A STATISTICAL OVERVIEW AND EXPLORATION OF THE DYNAMICS OF CHANGE 8 (2013).

[66] Female Genital Mutilation Act, 18 U.S.C §116 (2011).

[67] *Id.*

[68] AMANDA PARKER & GEORGE ZARUBIN, AHA FOUNDATION, WHY WE HESITATE TO PROTECT GIRLS FROM FGM IN THE UNITED STATES 8 (2019), https://www.theahafoundation.org/wp-content/uploads/2019/09/MEDIA-REPORT_RGB_REVISED9.11.19.pdf.).

[69] U.S. v. Nagarwala, 350 F. Supp. 3d 613, 616 (E.D. Mich. 2018).

impose restrictions on FGM to all states.[70] The government argued that their authority came from the Necessary and Proper Clause, which permits Congress to impose restrictions to be in compliance with the U.S.'s obligations under the ICCPR.[71] The Court agreed with the defendants and concluded that the connections drawn by the government between the FGM Statute and the ICCPR were too attenuated.[72] As Michigan was one of the states that had previously relied on the federal statutes, the majority of the charges brought against the doctors and parents of the victims were dismissed.[73] Following the court's decision, the Department of Justice decided not to pursue an appeal citing federalism issues and urged Congress to introduce new legislation instead.[74] Because not all states have specific FGM legislation, those states that would have depended on the FGM statute would likely face similar constitutional challenges.

Like the disparate legislation and prosecution within the U.S., states that are party to the European Union ("EU") face similar issues. The EU has established several commissions focused on the elimination of FGM, along with providing support to non-governmental organizations that combat FGM.[75] Each country, however, is responsible for establishing its own anti-FGM strategies. For example, in the United Kingdom ("U.K."), the Prohibition of Female Circumcision Act of 1985 criminalized FGM.[76] The law was then replaced by the Female Genital Mutilation Act of 2003, which provides that any person who seeks or performs FGM in the U.K. or on a U.K. national outside of the U.K. will face penalties of up to 14 years.[77]

Although anti-FGM legislation has been well-established in the U.K., there have only been three reported charges brought under either act, as well as another case in which charges were brought under child cruelty laws.[78] Of those cases, the U.K. saw its first conviction in February 2019, where a 37-year old mother was charged under the FGM Act.[79] No other U.K. cases resulted in convictions.[80]

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[70] *Id.*

[71] *Id.*

[72] *Id.* at 618-19.

[73] *Id.*

[74] Parker & Zarubin, *supra* note 68.

[75] European Commission, *Eliminating female genital mutilation,* https://ec.europa.eu/info/policies/justice-and-fundamental-rights/gender-equality/gender-based-violence/eliminating-female-genital-mutilation_en.

[76] Prohibition of Female Circumcision Act, 1985 c. 38, § 1.

[77] Female Genital Mutilation Act 2003, 2003 c. 31, § 1. (UK territory did not include Scotland, which enacted the Female Genital Mutilation Act 2005 with much of the same language as the UK version.).

[78] Emma Batha, *London Lawyer Cleared of Forcing Daughter to Undergo FGM,* EACH OTHER (Mar. 16, 2018), https://eachother.org.uk/london-lawyer-cleared-forcing-daughter-undergo-fgm/.

[79] *FGM: Mother guilty of genital mutilation of daughter,* BRITISH BROADCASTING CORPORATION (Feb. 1, 2019), https://www.bbc.com/news/uk-england-47094707.

[80] *Id.; see also R v. A2*, [2015] NSWSC 1221 (2015). (In the first case in 2015, a doctor was acquitted of charges that he had performed FGM while treating a women who had given birthe, the second case was in 2018 where a lawyer from London was accused of having forced his daughter to undergo FGM was also acquitted).

The lack of prosecution of FGM cases in the U.K. generally results from a lack of evidence.[81] Under the Children Act of 1989, genital examinations are only permitted once a "care order" has been issued; however "care orders" require suspicion of abuse, which could be difficult to detect in cases of FGM without a physical examination.[82]

Meanwhile, France has had 29 FGM-related trials and 100 convictions as of 2013 without any FGM statutes.[83] Unlike the U.K. and the U.S., France does not specifically penalize FGM, but the practice is actionable under their penal code for violence against children.[84] France largely attributes their steady conviction rate to the "non-invasive genital health check" that all children, between the ages of zero and six must undergo.[85]

Egypt is considered a high-risk region for FGM, where recent surveys conducted by the Ministry of Health have concluded that FGM is prevalent in approximately 87% of all women between the ages of 15 and 49.[86] This statistic becomes much higher in rural Egypt.[87] Despite the prevalence of FGM, Egypt attempted to regulate the practice as early as 1959 and criminalized FGM in 2008.[88] Under Egyptian national law, any person requesting or seeking any act of FGM without medical justification is subject to penalties, such as fines and imprisonment of up to 15 years.[89] Their national law also criminalizes "cross-border" FGM and requires health practitioners to report injuries or suspicions.[90]

The two most high-profile FGM cases in Egypt came in 2015 and 2017. In the first case, Dr. Raslan Fadl, the doctor who performed the FGM procedure, and the victim's father were convicted under FGM laws after the victim died from an allergic reaction during the procedure.[91] The prosecution and conviction were the first in Egypt since it criminalized FGM in 2008.[92] In the nation's second case, four people, including both of the victim's parents, were found guilty of violating

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[81] John Lichfield, *The French Way: a Better Approach to Fighting FGM?*, INDEPENDENT (Dec. 15, 2013), www.independent.co.uk/news/world/europe/the-french-way-a-better-approach-to-fighting-fgm-9006369.html.

[82] Children Act 1989, 1989 c. 41 § 31.

[83] Lichfield, *supra* note 81.

[84] *R v. A2*, [2015] NSWSC at 188.

[85] Abby Selden, *Compulsory health checks, female genital mutilation and rights balancing at the European Court of Human Rights, 5* E.H.R.L.R. 480, 481 (2017); *see also* Lichfield, *supra* note 81.

[86] Egypt: *The Law and FGM*, *supra* note 29, at 1.

[87] *Id.*

[88] *Id.* at 3 (Article 242-bis and Article 242-bis(A) of Law no. 58 of 1937 were used to amend the Law No. 78 of the Penal Code).

[89] *Id.* at 3-5.

[90] *Id.* at 4.

[91] ASWAT MASRIYA, *Court Sentence Doctor to 2 Years Hard Labour for FGM Charges* (Jan. 26, 2015), http://en.aswatmasriya.com/news/details/6258.

[92] *Id.* (Dr. Fadl also faced manslaughter charges and was sentenced to two-years of hard labor, his clinic was closed for a year, and he was subject to fines; he did not lose his medical license; victim's father faced a three-month suspended sentence).

FGM laws and were given suspended sentences in 2017.[93] The most recent report in Egypt found that only two cases of FGM were brought to court and six convictions were made in 2016.[94]

When analyzing each state's domestic laws, many NGO's and other non-profit organizations repeatedly cite to each nation's international obligations, most of which have signed the Covenants and Treaties mentioned earlier; however, there are still a number of countries that, although they are signatories to covenants and multilateral treaties, have failed to enact legislation that reflects the international community's aggressive stance against FGM.[95] Even more concerning are the statistics regarding the low levels of prosecution and conviction in countries that have enacted anti-FGM legislation.

Analysis

While there has been a steady decline in the number of women undergoing any form of FGM, the practice is still very common in many regions due to the lack of resources necessary for enforcement, insufficient national legislation, and non-binding international agreements expressly targeting FGM.

Enactment And Enforcement Of FGM Legislation

Prosecution and enforcement under FGM statutes have posed a challenge to most states across the globe. Many of the issues generally stem from either a state's inability to enforce its current FGM statutes or the insufficiency of the legislation.

Egypt's FGM legislation was incorporated into its Penal Code as an amendment to the Child Act of 1996.[96] Under Article 242-*bis,* the performance of FGM or seeking FGM are criminal offenses punishable with imprisonment between five and seven years.[97] If the procedure results in death or permanent disability, the imprisonment increases to between five and fifteen years.[98] The Child Act No.12 of 1996 prohibits FGM on minors, and Article 7-*bis* and 7-*bis*(a) speaks to the right of children to healthy and clean environments, as well as prohibits exposure to harmful practices that are considered illegitimate.[99] However, this legislation fails to address punishment for aiding and abetting the practice or create a cause of action for medical malpractice for FGM performed by medical professionals.[100]

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[93] Grace Shutti, *Egyptian judge gives four people suspended sentences over FGM death*, THE GUARDIAN (Jan. 2016), www.theguardian.com/world/2017/jan/18/egyptian-judge-gives-four-people-suspended-sentences-over-fgm-death.

[94] UNFPA–UNICEF, *2016 Annual Report of the UNFPA–UNICEF Joint Programme on Female Genital Mutilation/Cutting: Accelerating Change by the Numbers*, at 30 (July 2017).

[95] *Sudan: The Law and FGM, supra note 64, at* 7.7.

[96] Egypt*: The Law and FGM*, *supra* note 29, at 3.

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.* at 9.

Following the *Nagarwala* case, both the House of Representatives and the Senate in the 116th Congressional Session introduced bills seeking to amend the previous FGM statute.[101] The amendments to the FGM statute, although constitutional, would limit the scope of the law to only FGM cases involving interstate commerce.[102] Both bills were introduced in the summer of 2019 and are still in their committees with no further recorded action since mid-July 2019,[103] leaving a major hole in FGM legislation. In response to the Court's holding in the *Nagarwala* case, Michigan has enacted comprehensive legislation, making FGM a felony punishable by up to 15 years, along with revoking the medical licenses of any defendants involved and allowing defendants to be punished for multiple felonies.[104] Other states have also amended their FGM laws to include mandatory state reports on FGM by practitioners.[105] Furthermore, many states have added additional language to their statutes, including prosecuting parents/guardians, revoking medical licenses, and providing cultural defense provisions.[106] There are, however, still 15 states that have no anti-FGM legislation,[107] and even states with such legislation, have disparate penalties and scopes.[108]

Medicalization and Regulation of FGM

One of the growing concerns within the international community is the medicalization of FGM.[109] Outside of countries that are attempting to adhere to the hardline stance established by the international community, there has been a shift from traditional methods of FGM to FGM being performed by health professionals.[110] Individuals in countries such as Ethiopia and Egypt, take advantage of gaps within current FGM laws that fail to address the practice of FGM by health professionals.[111]

Other countries, such as Malaysia, have used medicalization as a form of regulating FGM, as opposed to criminalizing the practice.[112] The medicalization of FGM as a form of regulation has become a growing concern for those seeking its criminalization.[113] As opposed to eradicating the practice, current FGM legislation simply created a shift from traditional practitioners to health professionals

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101 H.R. 3583, 16th Cong. §§ 1-3 (2019); S. 2017, 16th Cong. (2019).

102 *Id.*

103 *Id.*

104 MICH. COMP. LAWS ANN. § 750.136 (Westlaw through P.A. 2020, No. 375).

105 Parker & Zarubin, *supra* note 68, at 7-9.

106 *Id.*

107 *Id.*

108 *Id*.

109 G.A. Res. 67/146, *supra* note 55, ¶ 1.

110 Egypt*: The Law and FGM*, *supra* note 29, at 3; *see also Sudan: The Law and FGM, supra* note 64, at 9.

111 Egypt: *The Law and FGM*, *supra* note 29.

112 *Id.*

113 *Id.*

such as doctors, nurses, and trained midwives.[114] In Egypt, approximately 74% of women in rural areas reported that FGM incidents were medicalized.[115] Similarly, in Sudan, 77.9% of women in urban areas and 56.7% of women in rural areas had a medicalized form of FGM.[116] Although the 2012 GA Resolution by the UN General Assembly states that the medicalization of FGM is a violation of basic human rights, Egypt has yet to provide legislation or amend current policies to sufficiently address this practice.[117] One of the key concerns regarding the medicalization of the practice is that it only helps to address the medical concerns without addressing the social norms and "self-enforcing belief" associated with FGM.[118]

The Child Act has defined FGM as any unnecessary removal of external female genital organs without medical justification. However, the Child Act failed to define what would constitute medical justifications.[119] Further, Egyptian law does not address medical malpractice or FGM performed by health professionals at either public or private hospitals, clinics, or private residences.[120]

There have been several Ministerial Resolutions by Egypt's Ministry of Health and Population ("MOHP") requiring physicians to notify authorities of any injuries and accidents that are "criminally suspicious," including suspected FGM, and prohibiting health professionals from performing FGM either in hospitals or any other location.[121] Although these Ministerial Resolutions are very persuasive, they do not have enforcement power as they are not considered legislation and have not been added to the Penal Code.[122] According to a recent analysis of Egyptian FGM law, the current laws have not been adequately implemented or enforced as evidenced by the low conviction rate and lenient sentences for those convicted.[123] The 2015 FGM case serves as an example of this. As referenced earlier, Dr. Fadl was convicted of involuntary manslaughter when he performed an FGM procedure on 13-year old Sohair al-Bata'a that resulted in her death.[124]

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[114] *Id.; see also Sudan: The Law and FGM, supra* note 64, at 10.

[115] *Egypt: The Law and FGM*, *supra* note 29, at 3.

[116] *Sudan: The Law and FGM, supra* note 64, at 10.

[117] G.A. Res. 67/146, *supra* note 55.

[118] *Id.; see also* Gerry Mackie & John LeJeune, *Social Dynamics of Abandonment of Harmful Practices: A New Look at the Theory*, Innocenti Working Paper No. 2009-06, 14 (2009).Social norm is defined as "a social rule of behavior that members of a community follow in the belief that others expect them to follow suit. Compliance with a social rule is motivated by expectations of social rewards for adherence to the rule and social sanctions for non-adherence.").

[119] *Egypt: The Law and FGM*, *supra* note 29, at 3-4.

[120] *Id.* at 9.

[121] *Id.* at 4.

[122] *Id.*

[123] *Id.*

[124] Ruth Michaelson, *First Doctor Convicted of FGM Death in Egypt only Spent Three Months in Jail,* The Guardian (Aug. 2, 2016), https://www.theguardian.com/world/2016/aug/02/egyptian-doctor-convicted-of-fgm-death-serves-three-months-in-jail.

Dr. Fadl was sentenced to two years and three months in prison. However, he only served three months of that sentence.[125]

Proposal

As it stands, the international community's lack of clear codification to criminalize any form of FGM has created disparate practices with mixed results and only slowly reduced FGM rates. The General Assembly resolution, along with attempting to link FGM to already standing Conventions, has not created a binding international obligation, and national legislation alone is ineffective in promoting the abandonment of FGM.[126] This section will propose that a more binding international obligation, such as a convention, should be created. This binding agreement would detail and codify the expectation for member-states, specify the commitment that the signing parties are making, and create international cooperation to share resources to enact effective new national legislation, strengthen FGM legal framework, and promote the enforcement of those laws. Along with the creation of a convention, non-profit and non-governmental community-based programs that focus on the social dynamic of FGM should continue to be emphasized and utilized as a re-education tool.

Enacting a Binding International Obligation

Although there have been many covenants and treaties that have indirectly addressed FGM, there has not been a codification of the international community's obligation to the abandonment of FGM, and this has created a breakdown within states on proper legislation and enforcement. The UN General Assembly Resolution that explicitly addresses FGM addressed the most important concerns and strategies necessary to combat FGM. However, it is not a binding obligation and therefore, creates room for countries to implement some or none of the 2012 GA Resolution. Without a treaty obligation, countries such as the U.S. have encountered difficulties enacting national legislation,[127] countries such as Sudan can remove their FGM legislation without breaching their international obligations, and several countries can enact ineffective and insufficient FGM legislation.[128] Creating a covenant or convention based on the same language of the General Assembly Resolution would create the obligation based on existing agreed-upon principles.

Changing Customary Rules of Behavior

In conjunction with establishing a binding international obligation, there must be more work within practicing communities to alter the social and cultural

[125] *Id.*

[126] G.A. Res. 67/146, *supra* note 55.

[127] Nagarwala, 350 F. Supp. 3d at 613.

[128] U.N. Children's Fund (UNICEF) Innocenti Research Centre, *The Dynamics of Social Change Towards the Abandonment of Female Genital Mutilation/Cutting in Five African Countries*, 41 (October 2010) [hereinafter *Dynamics of Social Change*].

norms surrounding the practice. Community-based programs have made great strides by creating targeted approaches based on the norms and culture of each community.[129] The general goal, however, would be to use these programs to introduce an alternative form of thinking that breaks down these societal norms.[130] As mentioned earlier, FGM can be deeply ingrained into the traditions, customs, and religious beliefs within those communities that still perform FGM. Therefore, to properly combat FGM there must be re-education programs spearheaded by members of the community to help the community understand the inhumane and discriminatory nature of the practice.

Alternatively, education programs that are directly connected with community members through their local values and daily lives have seen great success in impacting the traditional societal beliefs regarding FGM.[131] For example, in communities that attach FGM to rites of passage, religion, or marriageability, families believe in the moral norm, "do what is best for your child," which means believing that forcing or encouraging the procedure is what is best for their child.[132] These education and community-based programs would work within the community to change the social or religious context of FGM, which in turn shifts the moral norm "do what is best for your child" to cause families to abandon the practice.[133]

Examples of community-based programs that have seen positive results are NGOs like Kembatti-Metti-Gezimma ("KMG") and Rohi-Weddu in Ethiopia that work with local communities to encourage education and community dialogues regarding FGM.[134] For the successful abandonment of this practice, the communities need to be aware and trust the intentions of those around them.[135] Rohi-Weddu focused its intervention efforts in the Gewane District, targeting seven villages for a four-month period.[136] Their methods included frequent community dialogues with clan members, elders, and religious leaders serving as facilitators, as well as screening films in the Afari language, where they highlighted the risks associated with the practice.[137] These discussions with community members removed the stigma of discussing FGM outside of the home and introduced alternative practices that were not FGM.[138] At the end of the four-month period, six of the seven villages created a "collective agreement" to stop FGM practices within

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[129] *Id.* at 8.

[130] *Id.*

[131] *Id.* at 47.

[132] *Id.*

[133] *Id.*

[134] *The Girl Who Convinced the Maasai to Stop FGM*, BBC NEWS (Mar. 12, 2018), https://www.bbc.com/news/av/world-africa-43349594/the-girl-who-convinced-the-maasai-to-stop-fgm.

[135] *Dynamics of Social Change, supra* note 128, at 8.

[136] *Id.* at 27.

[137] *Id.* at 27-29. (Afari language is the language of the Gewane District in Ethiopia).

[138] *Id.* at 29.

their villages.[139] The agreement was then sealed with religious leaders performing a special prayer to bind the communities' decision.[140]

Similar to Rohi-Weddu, KMG focused on the Kembatta Tembaro Zone, starting as early as 1999.[141] The KMG focused on education creating "school-based adolescent reproductive health programmes" and awareness activities and celebrations for girls who had not undergone FGM.[142] By engaging with the female and adolescent community, they were able to introduce an incentive for an alternative to FGM and break the social norms attached with the practice.[143]

Conclusion

FGM is regarded by the international community as a human rights violation because the practice is associated with severe emotional and physical health risks and women's inequality.[144] The international community has taken great strides in its campaign to eliminate the practice. Ultimately, FGM is slowly declining in many regions, and the number of those that have died or contracted infections and/or disease from the practice has substantially decreased.[145] To create an even more effective international strategy to combat this practice, a binding international obligation should be created. Along with the codification of the laws of FGM, organizations such as UNICEF and UNFPA and more regionally-based organizations should continue re-education strategies to combat the customary rules and behaviors that ares entrenched in the very practice of FGM. Without creating a standard that both criminalizes the practice, and also provides the resources to explain to communities why FGM is a violation of so many basic human rights, it will never be eliminated.

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139 *Id.*

140 *Id.*

141 *Id.*

142 *Id.*

143 *Id.* at 30.

144 U.N. Population Fund (UNFPA) - U.N. Children's Fund (UNICEF) Joint Programme, *Female Genital Mutilation/Cutting: Accelerating Change Summary Report of Phase 1,* 1, (2014).

145 *Id.*