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TABLE OF CONTENTS

NOTES

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#MeToo: How to Address Violence and Harassment in the Workplace Through International Law

Lauren Bisogno

Introduction

"#MeToo," a trending hashtag on social media, started as a campaign for victims of sexual violence but has grown into a worldwide movement, shedding light on a global pandemic: violence and harassment in the workplace.[1] The #MeToo movement began in 2006 but the problem of violence and harassment in the workplace was present long before. A 2018 World Bank report concerning legal obstacles women in business face found that out of the 189 economies included in the study 59 lacked legislation regarding sexual harassment in the workplace.[2] While various international legal instruments mention "harassment" and "violence" relating to worker's rights, none contain clear definitions of either term or lay out specific guidelines for how to deal with cases involving these issues.[3] Until we have clear definitions and binding guidelines under international law, the pervading grey areas concerning this human rights issue will continue to affect all workers around the world.

Although women are at a higher risk of experiencing violence and harassment in the workplace, men are also at risk.[4] These behaviors can occur between various office relationships, such as between an employer or supervisor and an employee, between two employees, between employees and clients, or between employees and service providers.[5] Unequal and inhumane treatment in the workplace affects not only the emotional and physical health of workers and employers but also their productivity.[6] Workplace violence, whether psychological or physical,

1. *About: History & Vision*, METOOMVMT, https://metoomvmt.org/about/ (last visited Mar. 7, 2019).

2. The 2018 report was the fifth edition in a series of reports by the World Bank, titled *Women, Business, and the Law*. The report's analysis was based on seven factors: accessing institutions, using property, getting a job, providing incentives to work, going to court, building credit, and protecting women from violence. *See Women, Business and the Law*, WORLD BANK (2018), http://documents.worldbank.org/curated/en/926401524803880673/pdf/125804-PUB-REPLACEMENT-PUBLIC.pdf.

3. See Int'l Labour Conference, 107th Session, Report V(1): Ending Violence and Harassment Against Women and Men in the World of Work, ILC.107/V/1, at 5–6 (2018) (hereinafter ILO Report V(1) 2018).

4. *See* Delegation of the European Union to the U.N. and Other International Organizations in Geneva, *International Labour Conference 107th Session – Comm. on Violence and Harassment in the World of Work* (May 29, 2018), https://eeas.europa.eu/delegations/un-geneva/45441/international-labour-conference-107th-session-committee-violence-and-harassment-world-work_en (hereinafter ILO Conference, 107th Session); *see also* Jody Heymann & Rachel Vogelstein, *Commentary: When Sexual Harassment is Legal*, FORTUNE (Nov. 17, 2017 3:44 PM), http://fortune.com/2017/11/17/sexual-harassment-legal-gaps/ (arguing that laws prohibiting violence and harassment in the workplace need to be enacted in every nation in light of the approximately 2.4 billion women who are at a working age and who are not protected from sexual harassment in their workplace).

5. Minister of Manpower and Transmigration, *Guidelines on Sexual Harassment Prevention at the Workplace*, INT'L LABOUR ORG., No. SE.03/MEN/IV/2011, at 6 (2011), https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-jakarta/documents/publication/wcms_171329.pdf.

6. *See* ILO *Report V(1)* 2018, *supra* note 3, at 1.

leads to a greater amount of days off by employees who feel they are unsafe at their places of employment.[7] These behaviors are violations of international human rights law and threaten "the dignity, security, health, and well-being" of all parties involved.[8] Prior to the Convention on Violence and Harassment in the World of Work (the "Convention"), there was not one single international instrument devoted to addressing violence and harassment in the workplace, though expert interpretations claim that sexual harassment might be included in pre-existing international legal instruments.[9] In order to address the ever-growing and prominent problem of violence and harassment in the workplace, the International Labour Organization ("ILO") proposed the Convention supplemented by a recommendation.[10]

Although the #MeToo movement is a recent phenomenon, the ILO's discussions to combat this issue started forty-four years before the hashtag gained followers and a concrete plan has finally come to fruition.[11] In 2016, representatives from member states at the ILO Meeting of Experts on Violence against Women and Men in the World of Work found that "the issue of violence in the world of work must be tackled as 'a matter of urgency.'"[12] The ILO's international instrument focuses on sexual harassment, gender-related discrimination at work, forced labor and trafficking, and child labor.[13] The instrument was discussed and adopted at the 2019 International Labour Conference.[14]

This Note argues that the ILO's Convention include amendments to its final draft because (1) there is a need for clearer definitions of the terms "harassment" and "violence," as well as the various behaviors those terms encompass; (2) the scope of the "workplace" and the locations that word encompasses must be better defined; and (3) there is a need for more concrete responsibilities when dealing with cases of workplace violence and harassment globally. Though there are a number of countries that have already successfully implemented their own legislation concerning violence and harassment in the workplace, there are still a large number of countries that have not. The implementation of international legislation in this area will help fill in the gaps and enforce legislation in countries that have not yet created their own. Additionally, in some countries that have implemented their own legislation, only women are pro-

7. Eurofound, *Physical and Psychological Violence at the Workplace*, CORNELL UNIV. ILR SCHOOL (2013), https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1346&context=intl.

8. *See Violence and Harassment in the World of Work: What to Do?*, ILO INT'L TRAINING CENTER, https://www.itcilo.org/en/areas-of-expertise/gender-equality-and-diversity/gender-based-violence-in-the-world-of-work-what-to (last visited Mar. 31, 2019).

9. ILO Conference, 107th Session, *supra* note 4; *see also Ending Violence and Harassment at Work*: *The Case for Global Standards*, HUMAN RIGHTS WATCH, (Oct. 2018), https://www.hrw.org/sites/default/files/supporting_resources/2018_ilo_for_japan.pdf; *see* Convention on Violence and Harassment in the World of Work, Jun. 10, 2019 (hereinafter Convention C190).

10. Int'l Labour Conference, 108th Session, *Report V(1): Ending Violence and Harassment Against Women and Men in the World of Work*, ILC.108/V/1 (2019) (hereinafter ILO *Report V(1)* 2019); Convention C190, *supra* note 9.

11. Amy Lieberman, *Q&A: ILO Expert on New Workplace Harassment and Violence Treaty*, DEVEX.COM (Sept. 10, 2018), https://www.devex.com/news/q-a-ilo-expert-on-new-workplace-harassment-and-violence-treaty-93370.

12. *See* ILO *Report V(1)* 2018, *supra* note 3, at 1.

13. Inventory of United Nations Activities to End Violence Against Women, INT'L LABOUR ORG., http://evaw-un-inventory.unwomen.org/en/agencies/ilo?unmeasure=8ac4cf0fe3554299a2b736f5e20843d7.

14. Convention C190, *supra* note 9. However, in order for the Convention to come into force, it must be ratified by at least two states.

tected.[15] International law must protect a wide span of people given the risk of violence and harassment in the workplace to all workers.

Part I of this Note will discuss the history and origins of both international human rights law and the ILO, while also tracking the creation of the right to work under international law. Part II analyzes the ILO's proposed convention and supporting recommendation along with the feedback it has received from member states regarding the final draft. Part III argues that amendments to the Convention are a necessary step in combating workplace violence and harassment on an international level to fill gaps that arise from both a lack of specified international legislation and from countries that have not yet addressed this issue.

It is important to remember that violence and harassment in the workplace is a human rights violation. Similar to many other conventions, treaties, or recommendations, the Convention and supporting recommendation will be put in place to protect human rights because everyone is entitled to a safe workplace under international human rights law.

I. Background

A. International Human Rights Law

"Everyone has the right to work, to free choice of employment, to just and favourable conditions of work, and to protection against unemployment."[16]

In 1948, the United Nations adopted the Universal Declaration of Human Rights ("UDHR"), the first "comprehensive statement of inalienable human rights."[17] The UDHR formed a permanent standard for how all humans should be treated by creating rights, which "are an irreducible minimum applicable under any circumstance."[18] The UDHR became a starting point for all international legal instruments dealing with basic human rights, such as social, civil, political, economic, and cultural rights.[19] Though the UDHR created a strong foundation for international human rights laws, full success can only be achieved if there is a synergy between national and international law.[20]

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15. *See Is Sexual Harassment Explicitly Prohibited in the Workplace?*, WORLD POLICY CENTER, https://www.worldpolicycenter.org/policies/is-sexual-harassment-explicitly-prohibited-in-the-workplace (last visited Mar. 31, 2019).

16. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 23(1) (Dec. 10, 1948) (hereinafter Universal Declaration of Human Rights).

17. *See What is the Universal Declaration of Human Rights?*, AUSTRALIAN HUMANS RIGHTS COMM'N https://www.humanrights.gov.au/publications/what-universal-declaration-human-rights ((last visited Mar. 31, 2019).

18. Juan E. Mendez, *The 60th Anniversary of the UDHR*, 30 U. PA. J. INT'L L. 1157 (2009).

19. *See Human Rights Law*, UNITED NATIONS, http://www.un.org/en/sections/universal-declaration/human-rights-law/index.html (last visited Apr. 1, 2019); *see also Int'l Human Rights Law*, UNITED NATIONS HUMAN RIGHTS: OFFICE OF THE HIGH COMM'R, https://www.ohchr.org/en/professionalinterest/Pages/internationallaw.aspx (last visited Apr. 1, 2019).

20. *See Int'l Human Rights Law*, *supra* note 19.

B. The Right to Work Enshrined in International Law

The international right to work was officially recognized in 1919, when the ILO was created under the Treaty of Versailles.[21] The ILO's initial purpose was to establish safer work conditions for workers around the world.[22] The ILO was created under "the premise that universal, lasting peace can be established only if it is based upon the decent treatment of working people."[23] On May 10, 1944, at its 26th Conference, the ILO adopted the Declaration of Philadelphia to restate and expand its main objectives.[24] The Declaration states in part that the obligation of the ILO is to create programs to achieve "protection for the life and health of workers in all occupations."[25] Today, the ILO, together with its 187 member states, various employers, and workers from around the world, aims to develop international human rights through the right to work.[26] The ILO has become a cornerstone for protecting workers employed in all occupations globally and has the highest authority on defining international workplace standards.

The UDHR mentioned the right to work under international law for the first time, making it an inalienable human right.[27] Article 23(1) of the UDHR states that, "[e]veryone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment."[28] This is a right afforded to all workers, regardless of occupation, gender, age, disability, refugee-status, and salary.[29] All workers are entitled to the right to work under just and favorable conditions.[30] Although the UDHR declares that everyone has a right to just and favorable work conditions, it was not until two decades later that an international instrument, the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), enumerated such conditions.[31]

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21. Int'l Labour Org., *The Labour Provisions of the Peace Treaties*, art. 387 (1920), https://www.ilo.org/public/libdoc/ilo/1920/20B09_18_engl.pdf.

22. *See id.* at intro.

23. Joyce Aspel, *The Right to Work in Dignity: Human Rights and Economic Rights*, NYU, http://www.nyu.edu/projects/mediamosaic/thepriceoffashion/pdf/apsel-joyce.pdf (last visited May 1, 2019) (quoting *About the ILO*, INT'L MONETARY FUND, https://www.imf.org/external/NP/seminars/eng/2010/oslo/ilo.htm (last visited Feb. 28, 2020)).

24. Int'l Labour Org., *Declaration Concerning the Aims and Purposes of the International Labour Organisation* (May 20, 1944), https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-islamabad/documents/policy/wcms_142941.pdf (hereinafter Declaration of Philadelphia); *see also* Eddy Lee, *The Declaration of Philadelphia: Retrospect and Prospect*, 133 INT'L LAB. REV. 467 (1994).

25. *See* Declaration of Philadelphia, *supra* note 24, § 3.

26. *Mission and Impact of the ILO*, INT'L LABOUR ORG., https://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm (last visited May 11, 2019).

27. *See* Universal Declaration of Human Rights, *supra* note 16.

28. *Id.*

29. Committee on Econ., Soc. and Cultural Rights, General Comment No. 23 on the Right to Just and Favorable Conditions of Work, U.N. Doc. E/C.12/GC/23 (2016).

30. *See id.*

31. G.A. Res. 2200A (XXI), Int'l Covenant on Economic, Social and Cultural Rights (Dec. 13, 1966), U.N. GAOR Supp. (No. 16), 993 U.N.T.S. 3 (entered into force Jan. 3, 1967) (hereinafter ICESCR); *see also* Status of Ratification Interactive Dashboard, UNITED NATIONS HUMAN RIGHTS, http://indicators.ohchr.org (last visited Apr. 2, 2019) (listing the 169 Member States that have ratified this treaty and reflecting the United States' status as a signatory).

The ICESCR not only reaffirmed the right to work, but also provided a non-exhaustive list of what types of work conditions qualify as "just" and "favorable," such as "safe and healthy working conditions."[32] Although the ICESCR gives a more comprehensive list of favorable work conditions than any other existing legal instrument dealing with the right to work, Article 7 lacks a clear and detailed list of what "safe and healthy working conditions" may be.[33] There is no question that violence and harassment in the workplace are not considered safe and healthy working conditions; however, the lack of specificity in these documents creates ambiguities and gaps. This provides opportunities for countries to disregard the issue of violence and harassment in the workplace. The gaps created by both the UDHR and the ICESCR further demonstrate the need for an international legal instrument that specifically deals with violence and harassment in the workplace.

Since the UDHR's adoption, the right to work has become recognized under international law through its codification into a number of different international instruments, such as the ICESCR and the Convention. Additionally, the right to work expanded over time to focus on specific issues affecting workers. Prior to the Convention, no document referred to the prevalent issue of violence and harassment in the workplace; many documents only focused on the protection of female workers.[34] In 1958, the ILO adopted Convention No. 111 concerning Discrimination in Respect of Employment and Occupation.[35] To date, 175 countries have ratified Convention No. 111.[36] The convention establishes that distinctions or exclusions made on the basis of sex are, *inter alia*, included under the umbrella term of "discrimination."[37] All workers have the right to equal treatment.[38] Although this specific convention prohibits sex discrimination in the workplace, it does not specifically address sexual harassment as a part of sex discrimination within its text. Thus, it creates another gap in international law regarding violence and harassment in the workplace.

In 1979, the U.N. adopted the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"), which briefly mentions the right to work in Article 11.[39] Similar to the ICESCR, CEDAW's Article 11(f) includes "[t]he right to protection of health and to safety in working conditions."[40] However, nothing in CEDAW discusses what is

32. *See* ICESCR, *supra* note 31.

33. *See id.*; *see also* U.N. Comm'n on Econ., Soc., and Cultural Rights, General Comment No. 18 (Article 6 of the Covenant), 35th Sess., U.N. Doc. E/C.12/GC/186 (Feb. 6, 2006).

34. *Definitions of the Right to Work*, CLAIMING HUMAN RIGHTS (last modified Aug. 12, 2018, 11:44 PM), http://www.claiminghumanrights.org/work_definition.html.

35. Discrimination (Employment and Occupation) Convention, ILO No. 111 (Jun. 25, 1958) (hereinafter Convention No. 111).

36. *Ratifications of C111- Discrimination (Employment and Occupation Convention)*, INT'L LABOUR ORG., https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312256 (last visited Apr. 2, 2019).

37. *See* Convention No. 111, *supra* note 35, art. 1.

38. *See* Minister of Manpower and Transmigration, *supra* note 5, at 3.

39. U.N. Convention on the Elimination of All Forms of Discrimination Against Women, art.11, Dec.18, 1979, 1249 U.N.T.S 3 (entered into force Sept. 3, 1981), https://treaties.un.org/doc/Treaties/1981/09/19810903%2005-18%20AM/Ch_IV_8p.pdf (hereinafter CEDAW).

40. *Id.* at art. 11(f).

required to protect the health and safety of women workers, which, again, creates grey areas which amendments to the Convention could easily clarify.

One of the few international legal instruments that mentions sexual harassment in the workplace is the Declaration on the Elimination of Violence Against Women, adopted by the U.N. General Assembly in 1993.[41] Article 2 states that "[v]iolence against women shall be understood to encompass, but not be limited to, the following: (b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work."[42] Specifically, in addressing sexual harassment against women in the workplace, the Declaration seeks only to define what violence against women may encompass. It does not define sexual harassment but only makes it clear that it is a form of violence against women. The Declaration does not mention men, thereby suggesting that sexual harassment can only be against women, differing from societal ideals today. Additionally, in the 1995 Beijing Declaration and Platform for Action, the U.N. follows the Elimination of Violence Against Women nearly verbatim and notes that violence against women encompasses sexual harassment in the workplace.[43] However, the Beijing Declaration goes one step further by asserting that sexual harassment against women affects their dignity in the workplace and "prevents them from making a contribution commensurate with their abilities" at work.[44] Additionally, the Beijing Declaration urges State governments, as well as international and non-governmental organizations, to enact and enforce laws to reduce the number of instances of sexual harassment against women in the workplace.[45] Furthermore, it advises employers, trade unions, and community organizations to create programs to eliminate sexual harassment and other forms of violence against women in the workplace.[46]

An analysis of these existing international instruments highlights that harassment and violence in the workplace have never before been emphasized when developing international legal instruments. There are no clear and detailed universally accepted definitions of these terms nor is there a universally accepted definition of the term "world of work." Although many of the current international instruments focus on healthy working conditions, none truly elaborate what these conditions should be. Additionally, many, if not all, of these instruments focus specifically on female workers. Yet, the increasing prevalence of sexual harassment and violence in the workplace illustrates that men are likewise victims of this pandemic.

II. The ILO's Convention and Recommendation

Although several pre-existing international instruments refer to violence and harassment in the workplace, a careful analysis reveals that none of those instruments specifically defined

41. G.A. Res. 48/104, Declaration on the Elimination of Violence Against Women (Dec. 20, 1993).

42. *Id.* at art. 2.

43. Beijing Declaration and Platform for Action, Report for the Fourth World Conference on Women, U.N. Doc. A/C.177/20, ¶ 113(b) (Dec. 22, 1995), https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.177_20.pdf (hereinafter Beijing Declaration); *see also* G.A. Res. 50/203, U.N. Doc. A/RES/50/203 (1995) (endorsing and fully implementing the Beijing Declaration).

44. *See id.* at ¶ 161.

45. *Id.* at ¶ 283(a).

46. *Id.* at ¶ 126(a).

these terms or set out universal definitions for these terms. Additionally, there is not one single other international legal instrument that focuses on violence and harassment against men and women in the workplace. Consequently, the ILO proposed the Convention and its supporting recommendation of "[e]nding violence and harassment in the world of work."[47] The proposed text of the Convention was discussed and adopted during the 108th International Labor Conference from June 10 to June 21, 2019.[48]

In 2015, at the ILO's 325th Session, "Violence against women and men in the world of work" was placed on the agenda.[49] One of the first steps in drafting the proposed instrument was a preliminary questionnaire (the "Questionnaire") for ILO member states, employers, and workers to fill out.[50] The Questionnaire was a forty-nine-item document, which asked for one of three different responses: "yes," "no," or "other," to each question, and allowed for comments to be left under each question.[51] The ILO's final report contained the Questionnaire replies, as well as a short summary of the responses and proposed conclusion for each question.[52]

Distributed in 2017, the purpose behind the Questionnaire was to collect the member states' views concerning "the scope and content of the proposed instrument or instruments, after consultation with the most representative organizations of employers and workers."[53] The specific questions and the responses elicited from member states were of great importance, when it came to finalizing the official text of the Convention and supporting recommendation. Ultimately, the ILO received responses from 85 governments, 179 worker organizations, and 29 employer organizations from around the world.[54] Some states included counterarguments and possible issues in the comments section after each question, that they believed may arise when attempting to implement a new international instrument.[55] Ultimately, the proposed conclusions were written based on the responses and comments to the Questionnaire.[56]

A. The Questionnaire: Choosing the Format of the Proposed Instrument

When creating a new international instrument, it is necessary to decide the format of the document, and here, the ILO had to decide between a convention and a recommendation. While conventions are "legally binding international treaties which may be ratified by member

47. *Mission and Impact of the ILO*, *supra* note 26. The process of creating the final text of the Convention took a number of years and deeply involved ILO Member States, as well as employers, and workers from each member state.

48. ILO *Report V(1)* 2019, *supra* note 10, at 1; *see* Convention C190, *supra* note 9.

49. *Id.* at 2.

50. *Mission and Impact of the ILO*, *supra* note 26.

51. Int'l Labour Conference, 107th Session, *Report V(2): Ending Violence and Harassment Against Women and Men in the World of Work*, ILC.108/V/2A, at 105–08 (2018), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_619730.pdf (hereinafter ILO *Report V(2)* 2018).

52. *Id.* at 97.

53. ILO *Report V(1)* 2018, *supra* note 3, at 105.

54. ILO *Report V(2)* 2018, *supra* note 51, at 1.

55. *Id.* at 97.

56. *Id.*

states," recommendations lay out "non-binding guidelines."[57] The second question of the Questionnaire asked whether the instrument should be a convention, a recommendation, or a convention supplemented by a recommendation.[58] Based on the responses, the ILO proposed the Convention with its supporting recommendation.[59] The breakdown of government responses for the second question shows that only two out of the eighty-five questionnaire participants would be willing to support a pure convention, compared to thirty governments favoring a pure recommendation, and forty-eight governments opting for the third option of holding a convention with a supporting recommendation.[60] When reading through the comments that followed the second question, many states felt that a recommendation would be a good baseline for states to follow without having to ratify a convention, that would ultimately be binding.[61] Other states argued that a binding convention is necessary to get member states to follow through with the guidelines it sets forth.[62] Lastly, some member states replied that an instrument comprised of both a recommendation and a convention would be the most effective means for addressing harassment and violence in the workplace.[63] The replies to the third option reflected the states' view that both binding and non-binding provisions were necessary to achieve the desired effect.[64]

A number of states expressed their concern with a binding convention that would result in legislation that may be too rigid and unadaptable.[65] Internally, many states have already implemented their own legislation specifically addressing harassment and violence in the workplace.[66] Member states wanted to ensure that the proposed convention would take into account different states' resources and abilities to implement all of the requirements and regulations that a convention would impose.[67] Many countries with their own legislation in place will want to adopt or ratify this new instrument purely for political reasons, in order to show their cooperation and to avoid being singled out by the international community.

The ILO ultimately settled on a convention with a supporting recommendation after the final proposed text was drafted, due to the fact that the majority of governments and workers were in favor of such a format.[68] Having a majority of governments and worker organizations vote to have part of the proposed instrument be binding serves as proof that such an instrument was necessary and overdue on an international level. A binding document is necessary to

57. *Conventions and Recommendations*, INT'L LABOUR ORG., https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm (last visited Mar. 22, 2019).

58. ILO *Report V(2)* 2018, *supra* note 51, at 7.

59. *Conventions and Recommendations*, *supra* note 57.

60. *Id.*

61. *See id.*

62. *Id.* at 7–8.

63. *Id.*

64. *Id.* at 8.

65. *Id.* at 4.

66. *Id.*

67. *Id.*

68. ILO *Report V(1)* 2019, *supra* note 10, at 1; see Convention C190, *supra* note 9.

truly enforce the proposed guidelines and to hold member states accountable in making a change towards eliminating violence and harassment in the workplace. The fact that a number of states were in favor of having a binding document—not just a recommendation—demonstrates that member states are willing to join the crusade against these unsafe and inhumane work conditions.

B. The Questionnaire: The Content of the Instrument's Final Draft

In addition to asking about the format of the instrument, the Questionnaire also inquired into the content of both the Convention and the recommendation, including definitions, scope, preventive measures, enforcement measures, and means of implementation.[69] Regarding the Preamble of the instrument, the sixth question asked:

> Should the Preamble of the instrument or instruments recall that violence and harassment in the world of work:
>
> (a)is a human rights violation, is unacceptable and is incompatible with decent work; and
>
> (b)affects workplace relations, worker engagement, health, productivity, quality of public and private services and enterprise reputation, and may prevent access to, and remaining and advancing in, the labour market, particularly for women?[70]

The importance of including this question in the Preamble is to emphasize that both violence and harassment are human rights violations and do more than just contribute to unfair and inhumane work conditions. By addressing the severity of the issue in the Preamble and the effects it has on workers around the world, the ILO instrument sets the tone for the rest of the document as it lays out at the onset why the guidelines that follow are so important. A total of 79 governments replied "yes" to this question, with many of them leaving comments.[71]

Part (b) of the sixth question sparked many comments highlighting the fact that men are also victims of violence and harassment in the workplace and suffer from the side effects of such behavior, not only women.[72] For example, Canada proposed that the ILO remove the phrase "men and women" from the title of the proposed instrument and change it to "[e]nding violence and harassment in the world of work."[73] The change in title was meant to eliminate any misconception that the instrument would only focus on women.[74] The ILO Office Commentary and other states agreed with Canada and decided to remove "men and women" from the title of the instrument.[75] Ensuring that men and other gender-nonconforming individuals

69. *See generally* ILO *Report V(2)* 2018, *supra* note 51.

70. *Id.* at 15.

71. *Id.*

72. *Id.*

73. *Id.* at 19.

74. *Id.*

75. *Id.* at 21.

are included in the proposed instrument is a necessary step in taking a more gender-neutral approach in protecting workers' rights.[76] Human Rights Watch concluded that "women workers and gender non-conforming workers are particularly vulnerable to sexual harassment at the workplace."[77] Additionally, member states asked to focus not only on the physical effects of violence and harassment in the workplace but the psychological effects as well.[78]

One of the major issues addressed by the international instrument is the lack of clear definitions of terms such as "harassment" and "violence" in international law. The overall response to the questionnaire showed that a broad definition of violence and harassment relating to the workplace are necessary.[79] To the first question, "[s]hould the International Labour Conference adopt an instrument or instruments concerning violence and harassment in the world of work?," seventy-nine governments responded "yes," while four replied "other."[80] Under the comments section, many states agreed that

> There is a lack of a universally agreed definition of violence and harassment at work. The ILO has a number of instruments which are important for combating violence and harassment in the world of work, but it lacks an instrument which is entirely devoted to this problem and contains a definition thereof.[81]

Questions 9 through 13 of the Questionnaire focused on solidifying definitions for "violence," "harassment," "workers," "employers," and the "world of work."[82] Each of these terms is lacking clear and uniform definitions in international law. Member states, employers, and workers' organizations were able to leave comments about their preferences regarding how the terms should be defined.[83] Question 9 specifically discussed the scope of the definitions of "violence" and "harassment."[84] The ILO proposed that "violence and harassment should be understood as a continuum of unacceptable behaviors." [85] Within Question 9's comments, member states requested that the definitions be clarified to include the specific acts that would constitute either of these terms.[86] One state suggested that there must be separate individual definitions for violence and harassment, showing that there is a need to have the highest level of clarity in the proposed instrument.[87] Additionally, another state requested that "the term 'unac-

76. *Id.* at 16 (noting that a review of past international documents on workers' rights, or on human rights in general, shows that the focus has largely been on women and the impact of workplace harassment, while men are neglected).

77. HUMAN RIGHTS WATCH, *supra* note 9, at 4.

78. ILO *Report V(2)* 2018, *supra* note 51, at 16*; see* Eurofound, *supra* note 7.

79. ILO *Report V(2)* 2018, *supra* note 51, at 4.

80. *Id.*

81. *Id.*

82. *Id.* at 22–32.

83. *Id.*

84. *Id.* at 22.

85. *See id.*

86. *See id.* at 22–34.

87. *See id.* at 22.

ceptable behaviours and practices' be clarified."[88] The ILO's Office Commentary following Question 9 states that an "exhaustive list" of the specific conduct that amounts to violence or harassment carries risks of being "limiting."[89] Additionally, the ILO stated that definitions of "violence" and "harassment" continue to change, and therefore, a list would not account for such changes but many governments around the world have non-exhaustive lists of what violence and harassment may include.[90] More importantly, these governments have been successful in their implementation based on such lists.[91]

The resistance to including specific conduct that constitutes violence and harassment in the workplace negates the progress that is made by adopting this instrument in the first place. If one of the main reasons for introducing an international instrument on violence and harassment in the workplace is to have more clear definitions of the terms and more clear guidelines on how to address the conduct that is covered by these terms, then specific conduct should be laid out within the official definitions.[92] A broad definition of these terms is not strong enough to achieve the necessary results. Instead, "[a] more focused scope could increase the level of protections afforded and facilitate the ratification of the proposed Convention."[93] The purpose of the instrument is to address the "vast disparities in global understanding of what acceptable behaviour and sexual harassment looks like in the workplace."[94]

Lastly, the Questionnaire specifically asked about what should be considered "the world of work" in order to specify when acts of violence and harassment would fall under the guidelines of this instrument based on location.[95] Focusing on a more specific definition of "the world of work" is just another way to achieving complete clarity in the fight against violence and harassment in the world of work. Human Rights Watch states that "a failure to include such language can leave workers exposed to violence and harassment."[96] Question 10 of the Questionnaire was aimed at defining the "world of work."[97] The ILO included places such as the physical workplace, work commutes, work-related trips, places where workers take meals to be included

88. *Id.*

89. *Id.* at 24.

90. *See id.*; *see also This is not Working: Stopping Sexual Harassment in Workplaces Across our Region*, CARE INT'L AUSTRALIA, at 9 (Apr. 2018), https://www.care.org.au/wp-content/uploads/2018/05/000501_ThisIsNotWorking_A4-Report_ONLINE_20180510.pdf (hereinafter *Stopping Sexual Harassment in Workplaces*) (containing the list of behaviors used to describe sexual harassment included in Australia's Sex Discrimination Act).

91. *See* ILO *Report V(2)* 2018, *supra* note 51, at 24; *see also Stopping Sexual Harassment in Workplaces*, *supra* note 90.

92. In response to Question 1 of the questionnaire, Bulgaria, Czech Republic, Ghana, Jamaica, and Slovenia stated that an instrument such as the proposed convention is necessary due to the "lack of a universally agreed definition of violence and harassment at work." ILO *Report V(2)* 2018, *supra* note 51, at 5.

93. Int'l Labour Org., *Provisional Record: Reports of the Standard-Setting Comm. on Violence and Harassment in the World of Work: Summary of Proceedings*, ILC107-PR8B, ¶1420 (Oct. 10, 2018) (hereinafter ILO Provisional Record No. 8B).

94. *Stopping Sexual Harassment in Workplaces*, *supra* note 90.

95. ILO *Report V(2)* 2018, *supra* note 51.

96. *Ending Violence and Harassment at Work*: *The Case for Global Standards*, HUMAN RIGHTS WATCH, at 6 (Oct. 2018), https://www.hrw.org/sites/default/files/supporting_resources/2018_ilo_for_japan.pdf ("An employee who harasses a fellow colleague on the commute to work or in a restroom outside of the physical workplace may not be liable for their actions if the law does not deem it their physical place of work.").

97. *See* ILO *Report V(2)* 2018, *supra* note 51, at 25–26.

in the definition of "world of work."[98] The majority of governments and workers surveyed agreed that the world of work should be defined in detail and include places other than just the physical workplace, while a minority of governments expressed concern that the world of work should only include places that the employer completely controls.[99] A desire to expand and clarify the "world of work" definition by a majority of groups surveyed shows that governments are open to the highest amount of coverage possible to protect their workers from violence and harassment.

The Questionnaire also discussed what should specifically be added to both the proposed convention and the proposed recommendation.[100] The ILO inquired into prevention and implementation methods and methods discussed below. Though a number of member states that voted in favor of this instrument already have their own laws or guidelines regarding this issue, they are open to allowing international law to play a role. Replies to this Questionnaire further the idea that an international instrument was necessary to fully address violence and harassment in the workplace.

C. The Questionnaire: Methods of Implementation

The last section of the ILO's Questionnaire addressed the methods of implementation for the proposed guidelines of the convention and supporting recommendations. Specifically, Question 16 asked if the convention should require that each ILO member state "adopt national laws and regulations prohibiting all forms of violence and harassment in the world of work."[101] The question did not specify any laws or regulations but just asked whether or not member states should have to adopt them.[102] Based on replies to Question 16, the ILO Office Commentary addressed the issue of state discretion because a number of states were concerned with it.[103]

Concern with national discretion and the adaptability of a new instrument seem to be consensual issues and are part of the reason that a supporting recommendation was proposed in the first place. In response to these concerns, the ILO stated that they "seek[ ] to provide a framework for obligations within which there is flexibility to be able to adapt to different national contexts."[104] In fact, ILO's Office Commentary had to address the issue of national discretion multiple times throughout this section of the Questionnaire.[105] Many states expressed concern for legally-binding guidelines being "compatible and adaptable" to their

98. *See id.*

99. *See id.*; *see also World Moves a Step Closer to Ending Violence and Harassment at Work*, CARE INT'L UK (Jun. 8, 2018), https://www.careinternational.org.uk/world-moves-step-closer-ending-violence-and-harassment-work (stating that Care International supports expansion of the definition of "the world of work beyond the physical workplace such as the commute to work, 'the home' when that is a place of work, or the place where the worker takes meals").

100. ILO *Report V(2)* 2018, *supra* note 51.

101. *See* ILO *Report V(2)* 2018, *supra* note 51, at 37.

102. *Id.*

103. *See id.* at 37–38.

104. *Id.*

105. *Id.*

national laws and preserving the ability to address the issues of violence and harassment in the workplace nationally. [106] While understandable, states must be open to these binding guidelines in order to make progress in this area. Adopting and ratifying this instrument would be similar to every other international human rights instrument already adopted by member states, and hesitation towards a new international instrument should be minimal when it comes to addressing such a prevalent issue.

III. Moving Forward: Adopting the Convention and Supporting Recommendation

The lack of clear definitions of "violence," "harassment," and the "world of work" further demonstrate the need for amendments to the Convention and its supporting recommendation, in order to effectively address the problem of violence and harassment in the workplace.

A. Filling the Gaps

Amendments to the Convention are necessary to fill currently existing legislative gaps around the world. Though a number of international instruments touch on violence, harassment, and unsafe working conditions, none specifically focus in great detail on the definitions of this prevalent issue.[107] Although a number of states around the world have implemented their own legislation regarding violence and harassment in the workplace, the Convention is necessary to account for the countries around the world that have not. Involving the international community is a necessary step to ensuring that violence and harassment are considered on a global level. A full reading of both the proposed drafts for the Convention and recommendation shows that the ILO's document seeks to fill many of the gaps and address many of the unanswered questions surrounding this topic.

Article 9 of the final draft of the Convention requires that all states adopt laws and regulations, provide workers with training on the risks of violence and harassment, identify hazards in the workplace, and implement policies on violence and harassment.[108] Each of these points is novel to the international sphere, further proving that the Convention will be far-reaching and effective by covering areas that have not been discussed in any other international instrument. Countries that lack their own legislation and ratify the Convention will be legally bound to creating effective policies, laws, and regulations regarding workplace harassment and violence.

Additionally, Article 10 of the Convention focuses on enforcement and remedies and proposes that "member states shall take appropriate measures to monitor and enforce national laws and regulations regarding violence and harassment in the world of work."[109] Article 10 also

106. *See id.* at 41.

107. *See* ILO Conference, 107th Sess., *supra* note 4; *see also Ending Violence and Harassment at Work*: *The Case for Global Standards*, HUMAN RIGHTS WATCH, at 1–2 (Oct. 2018), https://www.hrw.org/sites/default/files/supporting_resources/2018_ilo_for_japan.pdf (noting that human rights treaties based on existing international law mention harassment at work as a human rights violation but indicating that there are no existing international laws specifically addressing this issue).

108. *See* ILO *Report V(1)* 2019, *supra* note 10, at 18; Convention C190, *supra* note 9.

109. Convention C190, *supra* note 9.

requires that member states "shall take appropriate measures to" ensure that victims "have easy access to . . . dispute resolution mechanisms in cases of violence and harassment," administer sanctions to the offenders, and ensure that workers can remove themselves from hazardous situations.[110] This instrument addresses not only avoiding violence and harassment in the workplace but also effective remedial efforts if necessary. The ILO has created a highly-flexible and inclusive document so that member states have all the tools necessary to prevent violence and harassment in the workplace effectively.

B. Improving the Solution: Amending the Final Draft

The final draft of the Convention and supporting recommendation was created based on the conclusions from the ILO's 107th Session.[111] The final draft reflects changes prompted by the Questionnaire's replies. The Convention contains a preamble and twelve articles, while the final draft of the proposed recommendation contains a preamble and 20 articles.[112]

Although the current text of the Convention and recommendation does show progress in addressing the pandemic of violence and harassment in the workplace, a number of amendments are needed to make the instrument as effective as possible. One major issue that must be addressed is a more comprehensive and detailed list of what conduct constitutes violence and harassment. In response to the Questionnaire, the ILO Office Commentary voiced its hesitation in including an exhaustive list of actions out of concern that it may become too limiting.[113] Although the meaning of violence and harassment are ever-changing, stating that "violence and harassment should be understood as a continuum of unacceptable behaviors" will not eradicate the grey areas that the ILO is trying to prevent.[114] If clarity is the goal, then stating that violence and harassment are merely "unacceptable behaviors" does not effectively further such goal.

For example, Australia's Sex Discrimination Act of 1984 specifically prohibits sexual harassment in the workplace as a matter of law.[115] The Australian Human Rights Commission enumerated a list of actions and behaviors that can be used to identify sexual harassment.[116] This list includes staring, suggestive comments, taunts of a sexual nature, inappropriate advances, and other offenses.[117] The detailed list of behaviors is applicable to the workplace environment.[118] Similarly, under Germany's Equal Treatment Act, there are two separate definitions for both "violence" and "harassment" in relation to the workplace.[119] Likewise, the U.S.

110. *Id.*

111. *See* ILO *Report V(1)* 2019, *supra* note 10, at 2; *see also* ILO Provisional Record No. 8B, *supra* note 93, at 125.

112. *See* Convention C190, *supra* note 9.

113. ILO *Report V(2)* 2018, *supra* note 51, at 24.

114. *See id.* at 97.

115. *See Sexual Harassment*, AUSTRALIAN HUMAN RIGHTS COMM'N, https://www.humanrights.gov.au/quickguide/12096 (last visited Mar. 5, 2020).

116. See id.

117. *See id.*

118. *See id.*

119. *Workplace Violence and Harassment: A European Picture*, EUROPEAN AGENCY FOR SAFETY AND HEALTH AT WORK (2009), https://osha.europa.eu/en/tools-and-publications/publications/reports/violence-harassment-TERO09010ENC.

Equal Employment Opportunity Commission has interpreted sexual harassment at work to constitute a violation of Title VII of the Civil Rights Act of 1964.[120] United States' law lays out certain actions and behaviors which constitute sexual harassment in the workplace.[121] Countries like Australia, Germany, and the United States are making progress in the fight against violence and harassment in the workplace, and the ILO should follow suit in implementing the successful measures of such member states.

Based on an evaluation of the current domestic laws, the ILO should consider implementing certain changes to the Convention, such as unwelcome sexual advances, requesting sexual favors, offensive remarks regarding someone's sex, inappropriate touching in the workplace or "groping," and telling sexual jokes or comments.[122] The ILO should be doing more than States that have implemented their own national legislation or, in the alternative, at least match those successful laws in other States. This is because, even those States that have already implemented their own laws nevertheless acknowledge that violence and harassment in the workplace is still a prevalent problem. Therefore, if the national legislation that has already been put into place in several states has been only slightly successful in addressing the current problem, then the ILO's instrument should be doing more not less than those states to make the biggest impact possible.

Furthermore, Article 6 of the final draft of the Convention requires member states to "adopt laws, regulations and policies ensuring the right to equality and non-discrimination in employment and occupation, including . . . for workers belonging to one or more vulnerable groups or groups in situations of vulnerability that are disproportionately affected by violence and harassment in the world of work."[123] The ILO Office explains that Article 6 was carefully crafted after numerous discussions out of concern for creating a list of vulnerable groups disproportionately affected by violence and harassment in the workplace.[124] Thus, Article 6 is broad and includes "vulnerable groups or groups in situations of vulnerability," rather than a specific list of "vulnerable groups."[125] The purpose of this instrument was to get rid of any grey areas in international legislation regarding violence and harassment at work. Although the ILO's default to general provisions addresses the concern that such lists may be too exclusive, this results in furthering the grey area internationally. Member states that have not passed their own legislation may not know what groups are considered vulnerable in this realm, and each state may choose to include different groups. The ILO should include a non-exhaustive list of vulnerable groups in Article 6, stressing that groups not included may fall under this section at the states' discretion. The goal is to maximize clarity and minimize vagueness.

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120. *See* 29 C.F.R. § 1604.11(a).

121. *See Facts About Sexual Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/publications/fs-sex.cfm (last visited Mar. 6, 2020).

122. *What Do I Need to Know About Workplace Harassment*, U.S. DEP'T OF LAB., https://www.dol.gov/agencies/oasam/centers-offices/civil-rights-center/internal/policies/workplace-harassment/2012 (last visited Mar. 6, 2020).

123. Convention C190, *supra* note 9.

124. ILO *Report V(2)* 2018, *supra* note 51, at 7–8.

125. *See id.* at 17.

C. Combating Resistance to Adopt

There are currently nine main international human rights instruments in force.[126] Each of these instruments aims to protect our inalienable human rights, and each has been signed, adopted, and/or ratified by a number of states. The new ILO instrument shares in these goals. A safe working environment free of violence and harassment is an inalienable human right. Adopting this new instrument will be similar to adopting any of the previously existing international human rights instruments. Acceptance of this new ILO instrument is necessary to "send out a strong political message [that] violence, and harassment [are] unacceptable."[127]

In response to one of the Questionnaire's prompts, one state observed that, "[g]iven the existing ILO and UN legal framework, the problem of violence and harassment is not a lack of legislation but the implementation of existing instruments."[128] That state's concern seems to be that the instrument will not make any change on an international level because there are already a number of existing international instruments in place that can effectively address this issue. Thus, violence and harassment at work are more of an enforcement problem, not a lack of legislation problem. States that appear resistant toward adopting this new instrument overlook the fact that existing instruments do not specifically address violence and harassment in the workplace, which is a complex and difficult issue.

Although international human rights instruments do touch upon violence and harassment, the lack of uniformity around the world causes differences in definitions, identifying acts of violence or harassment, and in clarifying the scope of the workplace. The new ILO instrument will be solely dedicated to filling these legislative gaps.[129] Member states should want to adopt this new instrument to send a message to offenders, to fill legislative gaps, and to maintain a respectable position in the political world. Research and analysis of current international instruments leads to the conclusion that prevalence of violence and harassment in the workplace is not an enforcement issue but an issue based on the lack of detailed legislation aimed at addressing this human rights problem.

Conclusion

The International Labour Organization's Convention and its supporting recommendation should be adopted with some amendments to its final draft. Currently, 59 out of the 189 States worldwide have no specific legislation protecting workers from harassment and violence in the workplace.[130] In recent years, "#MeToo" has become a trending phrase worldwide and has shed light on the severity and prevalence of the issue of violence and harassment in the workplace.[131]

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126. *The Core International Human Rights Instruments and their Monitoring Bodies*, UNITED NATIONS HUMAN RIGHTS: OFFICE OF THE HIGH COMM'R, https://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx (last visited Mar. 7, 2020).

127. *See* Lieberman, *supra* note 11.

128. *See* ILO *Report V(2)* 2018, *supra* note 51, at 5.

129. *See* Lieberman, *supra* note 11.

130. *See Ending Violence and Harassment at Work*: *The Case for Global Standards*, HUMAN RIGHTS WATCH, at 1 (Oct. 2018), https://www.hrw.org/sites/default/files/supporting_resources/2018_ilo_for_japan.pdf.

131. *See About: History & Vision*, *supra* note 1.

It is evident that the problem of violence and harassment in the workplace stems from a lack of international legislation worldwide.

Adopting the ILO's Convention and supporting recommendations will address the issue of violence and harassment in the workplace as a human rights violation. Adopting amendments that specifically address the issue of violence and harassment in the workplace will help fill in the legislative gaps that have been created through existing international law. Additionally, allowing international law to join the fight against unfair and inhumane work conditions will be beneficial for governments worldwide that have not implemented any of their own legislation regarding this issue.

Violence against and harassment towards workers constitute violations of human rights, and international law can help provide the answer to eliminating this problem.

Women's Rights are Human Rights: Finding the Right to Access an Abortion in International Law

Rebecca Farrar

Introduction

Between 2010 and 2014, approximately fifty-six million induced abortions[1] occurred worldwide every year.[2] The World Health Organization ("WHO") estimates that of these induced abortions, about twenty-five million per year were deemed *less safe* or *least safe*.[3] Thus, the abortions were performed without the presence of a licensed medical professional, using outdated methods, and/or without the proper care guidelines promulgated by the WHO.[4] Around seven million women were hospitalized between 2010 and 2014 for complications resulting from an unsafe abortion.[5] Of the maternal deaths occurring each year, 4.7%-13.2% were the result of unsafe abortions.[6] Most unsafe abortions occurring during this time were in areas of Asia, Latin America, and Africa, where abortion is often highly regulated or even criminalized.[7] In Latin America and Africa, three out of four abortions are deemed unsafe.[8] The WHO concluded that nearly every maternal death resulting from an unsafe abortion during this time could have been prevented through the use of effective contraception, education, safe and legal abortion services, and proper resources to meet post-operative complications.[9] Furthermore, where states had completely banned access to abortion, even where only allowed for a medically necessary reason, the WHO found that only one in four abortions that took place between 2010 and 2014 were being performed under recommended medical conditions.[10]

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1. For the purposes of this note, "abortion" refers to the use of medical procedures to prematurely terminate a pregnancy. One should note, however, that the medical community remains divisive over the often interchanged uses of "abortion" with "miscarriage," as both connote a spontaneous pregnancy loss, and some find the political stigma behind "abortion" to be unnecessarily accusatory in nature. Andrew Moscrop, *'Miscarriage or abortion?' Understanding the Medical Language of Pregnancy Loss in Britain; a Historical Perspective*, 39(2) MED HUMAN., 98, 98–101 (2013).
2. *Induced Abortion Worldwide: Fact Sheet*, GUTTMACHER INSTITUTE (Mar. 2018), https://www.guttmacher.org/fact-sheet/induced-abortion-worldwide.
3. *Worldwide, an Estimated 25 Million Unsafe Abortions Occur Each Year*, WORLD HEALTH ORGANIZATION (Sept. 2017), https://www.who.int/news-room/detail/28-09-2017-worldwide-an-estimated-25-million-unsafe-abortions-occur-each-year.
4. *Id.* (stating proper care guidelines by WHO include medical and sanitation requirements, recognized surgical techniques, and post care facilities for any complications after the procedure).
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*; *see also Induced Abortion Worldwide: Fact Sheet*, *supra* note 2.
9. *Worldwide, an Estimated 25 Million Unsafe Abortions Occur Each Year*, *supra* note 3; *see also Induced Abortion Worldwide: Fact Sheet*, *supra* note 2.
10. *Id.*

Conversely, in states where there were fewer legal restrictions to obtaining abortions, the data shows that nine in ten abortions were safely performed.[11] The resulting pattern shows that the prevalence of unsafe abortions increases where restrictions on access to abortion increase.[12]

As for legal access to an abortion, states fall on a spectrum between outright prohibition and allowing abortion without any restrictions.[13] There are currently four states that prohibit abortion outright under any circumstances, also known as a "blanket ban."[14] States in this category statutorily criminalize abortions, and have actively done so throughout the past decade.[15] Specifically, El Salvador is renowned for having the world's strictest position on abortion access, criminalizing the act in any case, including when the life of the mother is on the line.[16] Between 2000 and 2011, El Salvador prosecuted, through a special division specifically designed to prosecute possible abortion violations, more than 129 women who were suspected of having an abortion, and thirteen of those women remain in prison with decades-long sentences to serve.[17] In contrast, approximately sixty-seven countries provide legal access to abortions upon request, regardless of the reason, with restrictions only on the gestational timeframe in which the individual may receive the abortion.[18] Generally, the states in between provide for legal access to an abortion in "therapeutic" cases, where the life of the mother or the fetus is in danger.[19]

Over the last few decades, UN member-states have promulgated many policy initiatives to attempt to address the problems presented by unsafe abortions and maternal mortality rates. In 1994, at the International Conference on Population and Development in Cairo, states recognized the danger that unsafe abortions posed to reproductive health.[20] Just one year later, at the

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11. *Id.*

12. *Id.*; *see also* Susheela Singh et al., *Abortion Worldwide 2017: Uneven Progress and Unequal Access*, GUTTMACHER INSTITUTE (Mar. 2018), https://www.guttmacher.org/sites/default/files/report_pdf/abortion-worldwide-2017.pdf.

13. Singh, *supra* note 12.

14. *Id.* (Dominican Republic, El Salvador, Malta, and Nicaragua prohibit abortion and do not provide exceptions for preserving the life of the mother, rape, incest, or fetal impairment.).

15. *Id.*; *World's Abortion Laws*, CENTER FOR REPRODUCTIVE RIGHTS, https://reproductiverights.org/worldabortionlaws?category[294]=294 (last visited Apr. 19, 2020) (hereinafter Center for Reproductive Rights).

16. Rachel B. Vogelstein & Rebecca Turkington, *Abortion Law: Global Comparisons*, COUNCIL ON FOREIGN RELATIONS (Oct. 28, 2019), https://www.cfr.org/article/abortion-law-global-comparisons.

17. *Id.*

18. *World's Abortion Laws*, *supra* note 15.

19. *Id.*; *see also* Sameera Kotta et al., *A Cross-Sectional Study of the Psychosocial Problems Following Abortion*, 60(2) INDIAN J. PSYCH. 217–223 (2017) (elective termination, as opposed to medically necessary termination, is an incredibly common procedure amongst women seeking to end their pregnancy. The methods used vary from taking oral medication to surgical techniques); Monica E. Eppigner, *The Health Exception*, 17 GEO. J. GENDER & L., 665, 666 (2016) (The origins of the health exception are difficult to trace and what is definitionally encompassed under the term "therapeutic abortion" is not fixed. However, the consensus is that it encompasses abortions where the mother's health is seriously implicated. In *Roe v. Wade*, this exception was laid out for the first time in American legal doctrine, when the Supreme Court identified two interests involved in states regulating abortion).

20. The Int'l Conf. on Population and Dev., Cairo, (Sept. 5-13, 1994), *Report of the International Conference on Population and Development* ¶ 7.2, 8.19, A/CONF.171/13/Rev.1 (1995) (A significant number of abortions are performed in unsafe conditions, leading to a large fraction of maternal deaths. States are called to create accessible resources to lower these numbers and prevent unsafe abortions).

Beijing Women's Conference, the notion of "reproductive health" was conceptualized to mean "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes."[21] The conference also recognized the negative impact that unsafe abortions had on women's health and laid out a goal to reduce those numbers in the coming years.[22] In more recent statements by the UN Office of the High Commissioner on Human Rights (OHCHR), it was recognized that the lack of access to an abortion often leads to unsafe abortions and is a contributor to high mortality rates among women.[23] Additionally, the OHCHR recognized the personal and social burdens placed on women in states that do not provide safe and legal access to abortion services.[24]

The right to access an abortion is not explicitly mentioned in any binding international agreement, nor have UN member states been able to articulate and agree on exactly what that right would entail.[25] This Note will argue that even though the international community remains divided on what right, if any, individuals have to legal and accessible abortion services (or shortly termed "the right to access an abortion" for the duration of this paper), this right can be claimed through other, less direct, principles and rights recognized in international human rights law. Part I of this paper will analyze the leading human rights instruments, UDHR, ICCPR, ICESCR, and CEDAW, under which individuals could have a valid claim for access to an abortion.[26] Each of these instruments encompasses principles that could support an argument for the right to access an abortion. Additionally, Part I will analyze these principles alongside supplementary interpretative sources, like the General Comments, supporting the conclusion that states have an obligation to allow for and provide abortion access. Part II will

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21. Fourth World Conference on Women, Beijing, (Sept. 4-15, 1995), *Report of the Fourth World Conference on Women*, ¶ 94, U.N. DOC. A/CONF.177/20/Rev.1 (1996).

22. *Id.* ¶¶ 97, 106(i) ((The conference promised to "strengthen and reorient health services, particularly primary healthcare, in order to ensure universal access to quality health services for women and girls; reduce ill health and maternal morbidity and achieve worldwide the agreed-upon goal of reducing maternal mortality by at least 50 per cent of the 1990 levels by the year 2000 and a further one half by the year 2015; ensure that the necessary services are available at each level of the health system and make reproductive health care accessible, through the primary health-care system, to all individuals of appropriate ages as soon as possible and no later than the year 2015.").

23. Press Releases, Off. of the High Comm'r Hum. Rts. International Safe Abortion Day (Sept. 27, 2018), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23644&LangID=E ("Legal frameworks for abortion have typically been designed to control women's decision-making through the use of criminal law. Many legal frameworks generally prohibit abortion and make it legal only on specific grounds that do not capture the range of circumstances in which women and girls may need abortions.").

24. *Id.*

25. Population Research Institute, *Comment on Draft of General Comment No. 36 on Article 6 of the ICCPR—The Right to Life*, Office of the UN High Commissioner for Human Rights, p. 2 (Oct. 6, 2017), https://www.pop.org/wp-content/uploads/2017/10/Policy_Paper_for_United_Nations_Population_Research_Institute_2017-10.pdf.

26. An examination of the regional human rights systems' treatment of abortion is beyond the scope of this paper, but it is important to note that the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (also known as the Maputo Protocol), is the one of the only treaties to mention *abortion* explicitly. Article 14(2)(c) calls for the states to "protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus" and connects it directly to a fundamental health and reproductive rights. Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa art. 14.2(c), Jul. 11, 2003, Assembly of the African Union.

identify the shortcomings in both the international legal system's framework and procedure that inhibit an effective promulgation of the right to access an abortion. Applying feminist legal theory, this section will proffer areas of the international system in most need of reform to protect those made most vulnerable by the deprivation of the right to access an abortion.

I. Status of Abortions in International Law

The right to access an abortion is not explicitly recognized as a human right in any international instrument.[27] Yet, a number of human rights instruments embody principles alongside recognized rights that could support an argument for the right to access an abortion.[28] These principles include sex and gender equality, the right to health, the right to life, the right to privacy, and freedom from cruel and inhumane treatment or torture.[29]

A. The International Bill of Human Rights

The International Bill of Human Rights is made up of the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) with its two Optional Protocols, and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).[30] Currently, these are the leading United Nations authorities on international human rights.[31]

The UDHR, adopted by a General Assembly resolution 217(A) in 1948, which set out for the first time that fundamental human rights should be universally protected,[32] is considered international custom today.[33] The UDHR, although not binding, remains a guiding instrument for understanding the human rights principles in international law.[34]

The ICCPR and ICESCR were both adopted by the UN General Assembly in 1966 and came into force in 1976.[35] Both treaties provide a range of protections for civil and political rights, obligating ratifying states to protect and preserve basic human rights, such as the right to life and human dignity; equality before the law; religious freedom and privacy; and gender equality.[36] Unlike the UDHR, these are legally binding on ratifying states.[37] Both treaties

27. Population Research Institute, *supra* note 25.

28. Fabiola Carrión, *How Women's Organizations Are Changing the Legal Landscape of Reproductive Rights in Latin America*, 19 CUNY L. REV. 37, 40–41 (2015).

29. *Id.* at 39.

30. Frank C. Newman, *Introduction: The United States Bill of Rights, International Bill of Human Rights, and Other "Bills"*, 40 EMORY L.J. 731, 733–34 (1991).

31. PHILLIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS: THE SUCCESSOR to INTERNATIONAL HUMAN RIGHTS in CONTEXT, at 142 (Oxford U. Press ed., 2013).

32. *Id.* at 144, 158.

33. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 19, 1948) (last accessed Mar. 6, 2019) (hereinafter *UDHR*).

34. ALSTON & GOODMAN, *supra* note 31.

35. *Id.*

36. *Id.*

37. *Id.*

widen the scope of subject matter authority by referencing rights that might not be listed in the treaties but could be considered protected human rights anyway.[38] Altogether, the International Bill of Human Rights embodies numerous principles that suggest the right to access an abortion is a protected right in international law.

1. The Principle of Sex and Gender Equality

The UN and its member states have recognized the principle of sex and gender equality in much of their policies since the completion of the International Bill of Human Rights. This principle recognizes that "women's rights are human rights"[39] and that the UN, as well as individual state parties, should "aim to ensure that women and girls are able to access and enjoy, equally with men and boys, their civil, political, economic, social, and cultural rights."[40]

All three instruments in the International Bill of Human Rights explicitly assert the right to equality between the sexes and prohibit gender and sex-based discrimination by states. The UDHR initially asserts in its preamble that the "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family" as "the foundation of freedom, justice and peace in the world."[41] Similarly, the ICCPR and ICESCR assert the right to "self-determination" as well as the right to "freely pursue [one's] economic, social and cultural development."[42] All three instruments prohibit the distinction of sex in the realization of the rights asserted therein.[43] Article 2 of the UDHR clearly recognizes the rights of dignity and equality for people in all jurisdictions without distinction by sex.[44] Both the ICESCR and ICCPR explicitly assert in Article 3 that "[t]he State

Parties to the present Covenant [should] undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present

38. G.A. Res. 2200 (XXI) A, International Covenant on Civil and Political Rights (hereinafter *ICCPR*), art. 5 ¶ 2, (Dec. 16, 1966) ("There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent."); *see also* G.A. Res. 2200 (XXI) A, International Covenant on Economic, Social, and Cultural Rights (hereinafter *ICESCR*), art. 5 ¶ 2 (Dec. 16, 1966) ("No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.").

39. Fourth World Conference on Women, Beijing, *supra* note 21, Annex I ¶ 14.

40. *Id.* ¶ 9.

41. *See* G.A Res 217 (III), *supra* note 33, Preamble.

42. ICCPR Res. 2200, *supra* note 38, art. 1 ¶ 1; *see also* ICESCR Res. 2200, *supra* note 38, art. 1 ¶ 1.

43. *See* ICCPR Res. 2200, *supra* note 38, art. 2 ¶ 1 ("Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."); *see also* art. 3 ("The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant"); *see also* art. 26 ("All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.").

Covenant."[45] Both agreements go on to mandate that non-compliant state parties to the respective instruments put into place appropriate means to achieving the equal realization of rights within the treaties.[46] The right to sex and gender equality is attached to this mandate through Article 2, which has traditionally been read in conjunction with the other articles of the ICCPR and ICESCR.[47] Additionally, the interpretation of Article 2 in both treaties requires states to go beyond just providing financial resources to ensure compliance with their treaty obligations.[48]

Every one of these articles supports a conclusion that the right to access an abortion exists in international law. Women, regardless of their sex, possess these inalienable rights to dignity and equality without exception.[49] Nothing in these instruments suggests that the realization of the right to equality should come second to the biological reproductive differences between males and females, i.e., the right to equality is not suspended or qualified by the fact that, as a woman, she is pregnant or could become pregnant. Furthermore, the data supports the conclusion that pregnancy, especially pregnancy that is unwanted or life-threatening, can interfere with women and girls' lives dramatically and negatively.[50] For example, the data show that pregnant minors, often impregnated by way of sexual violence or child marriages, are directly impacted by pregnancy.[51] A study by UNICEF found that, in Argentina, every three hours, a

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44. G.A. Res. 217 (III), *supra* note 33, art. 2 ("Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional, or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.").

45. ICCPR Res. 2200, *supra* note 41; *see also* ICESCR Res. 2200, *supra* note 38, art. 3 ("The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant."); art. 2 ¶ 2 ("The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.").

46. ICCPR, *supra* note 38, art. 3; *see also* ICESCR, *supra* note 38, art. 3 ("The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant."); art. 2 ¶ 2 ("The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.").

47. Human Rights Comm., Commc'n. No. 1153/2003, K.L. v. Peru, U.N. DOC. CCPR/C/85/D/1153/2003, ¶¶ 6.6–6.8 (Oct. 24, 2005) (The Committee held that Article 2 of the ICCPR is not meant to be read by itself, rather to attach to each article within).

48. Charlotte Bates, *Abortion and a Right to Health in International Law: L.C., v. Peru*, 2(3) CAMBRIDGE J.I.C. INT'L & COMP. L. 640, 645 (2013).

49. G.A. Res. 217 (III), *supra* note 33, art. 1 ("All human beings are born free and equal in dignity and rights.").

50. *See Worldwide, an Estimated 25 Million Unsafe Abortions Occur Each Year*, *supra* note 3; *see also* The Int'l Conf. on Population, *supra* note 20.

51. Erika Guevara-Rosas, *The 11-Year-Old Argentine Girl is Not Alone. Latin America's Abortion Laws Are a Form of Torture,* WASHINGTON POST (Mar. 5, 2019), https://www.washingtonpost.com/opinions/2019/03/05/year-old-argentine-girl-is-not-alone-latin-americas-abortion-laws-are-form-torture/?noredirect=on&utm_term=.d5c03cec22e3 ("According to #NiñasNoMadres, a coalition of nongovernmental organizations including Amnesty International and Planned Parenthood Global, approximately 2 million girls under 15 give birth worldwide every year, often as a result of sexual violence").

girl between the ages of 10 and 14 was giving birth.[52] Pregnancy results in a disruption in the girls' education, health, and prospects, not necessarily present in their male peers.[53] Forcing a woman or a girl to fulfill the gestational period of a pregnancy as an alternative to the timely remedy that a safe and accessible abortion can provide is a suffering unique to women and girls; by definition, discrimination on the basis of sex. Discrimination on the basis of sex is prohibited within the International Bill of Human Rights, and abortion is, in many cases, the most timely and effective remedy to preventing further inequality. Therefore, the right to access an abortion on some level is inherent to the principle of gender and sex equality.

2. The Right to Privacy

The International Bill of Human Rights also asserts a right to privacy. Under Article 12 of the UDHR and Article 17 of the ICCPR, states are prohibited from arbitrarily interfering into a person's privacy and home.[54] More than just recognizing this right, the ICCPR calls for protection by law against violations of an individual's privacy and home.[55] Article 23 of the ICCPR asserts that men and women of marriageable age have the right to choose a spouse and build a family.[56] If the international community recognizes the right for individuals to choose a spouse and create a family, then there is an argument that such a right exists in the negative: women are obliged every day to *not* have children, and those who are unable are certainly not expected to be punished. Essentially, individuals should have just as much of a right *not to* found a family as they do to marry and procreate. Abortion is a pivotal resource for those not wanting to begin or add to a family.

The right to privacy also extends outside the home. In its Concluding Observations, the Human Rights Committee noted the effect that criminalized abortion laws have on a woman's privacy. Concluding Observations are published by the Human Rights Committee when a state has submitted an inquiry about their compliance with a treaty.[57] For example, in an examination of Guatemalan and El Salvadorian Law, the Human Rights Committee found the states' bans and restrictions on abortion under the ICCPR violated women's privacy and freedom from arbitrary detention.[58] Moreover, studies have shown that, where states have crimi-

52. *Id.*

53. *Id.* ("Child pregnancy also reinforces educational and economic gender inequality, with 6 out of 10 pregnant girls in Argentina dropping out of school, thus greatly damaging their career prospects and lifetime earning potential.").

54. G.A. Res. 217(iii), *supra* note 33, art. 12 ("No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."); *see also* ICCPR Res. 2200, *supra* note 38, art. 17 ¶ 1 ("No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.").

55. ICCPR, *supra* note 38, art. 17 ¶ 2.

56. *Id.* art. 23 ¶ 2 ("The right of men and women of marriageable age to marry and to found a family shall be recognized.").

57. Carrión, *supra* note 28, at 41.

58. Angenette Van Lieu-Muños, *Human Rights Approaches to Women's Health Issues: Dignity and The Right To Health In Guat. And El Sal.*, 9 NE. U. L. REV. 347, 366–67 (2017).

nalized abortion, doctors were compelled to breach patients' rights to confidentiality.[59] Doctors in these states faced criminal penalties for not reporting patients who had an abortion or were suspected of having an abortion.[60] Ironically, many of these women were innocent of illegally obtaining an abortion, many had involuntarily lost the fetus through miscarriage but were now facing criminal charges on suspicion alone.[61] These kinds of privacy violations between women and their doctors also triggered a violation of the principle of sex and gender equality. In states where these criminal penalties were exercised, women are not afforded equal healthcare to their male peers. This breach of privacy, unique to women and girls based on their sex, could constitute sex-based discrimination.

The right to privacy, as it relates to the right to access an abortion, arose in cases brought under the Optional Protocols of the ICCPR and the ICESCR. These Optional Protocols permit action by the Human Rights Committee in two ways: either as a complaint submitted by an individual who has suffered or by the state looking for recommendations or conclusions from the Committee in regard to their compliance with the treaty.[62] For example, in *K.L. v. Peru*, a seventeen-year-old girl was denied an abortion when the fetus was diagnosed with anencephaly.[63] The Human Rights Committee found her right to privacy under Article 17 was violated.[64] The Committee agreed that the state violated her right to privacy when it did not give K.L. a legitimate means for obtaining a therapeutic abortion when her choice was disregarded by a doctor.[65]

In another case, *LMR v. Argentina*, a mentally impaired woman was forced to carry her pregnancy to full term despite the consequences that remaining pregnant had on her physical and mental health.[66] The state failed to recognize a law that allowed mentally impaired women who were raped and impregnated to receive therapeutic abortions.[67] Like in *K.L.*, the Committee found a violation of privacy under Article 17 of the Covenant because the State unlawfully and arbitrarily interfered between *LMR* and her doctor, constituting a breach of her privacy.[68]

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59. *See* Amnesty Int'l, *On the Brink of Death: Violence Against Women and the Abortion Ban in El Sal.,* AI Index AMR 29/003/2014 (Sept. 25, 2014) (stating that "[t]he Salvadoran health system, in accordance with national standards and international human rights law, is required to treat women who have complications arising from abortions. Despite this, there is increasing evidence that the complete ban on abortion in El Salvador is obstructing the provision of post-abortion care . . ." since health professionals breach their duties of confidentiality and often report women who come in for post-abortion care to the police).

60. *Id.*

61. *Id.*

62. ALSTON & GOODMAN, *supra* note 31, at 763.

63. Human Rights Comm., Commc'n No. 1153/2003, K.L. v. Peru, ¶ 6.4, U.N. DOC. CCPR/C/85/D/1153/2003, (Oct. 24, 2005) (Anencephaly is the deformation in neural tube development of the fetus which causes a large part of their brain to be missing. Oftentimes, the fetus is stillborn or does not live long past delivery.).

64. Human Rights Comm., Commc'n. No. 1153/2003, K.L. v. Peru, ¶ 6.4, U.N. DOC. CCPR/C/85/D/1153/2003, ¶ 6.4 (Oct. 24, 2005) (This claim was brought under the ICCPR.).

65. *Id.*

66. Human Rights Comm., Commc'n. No. 1608/2007, L.M.R. v. Argentina, ¶ 2.1–2.8, U.N. DOC. CCPR/C/101/D/1608/2007, ¶ 2.1-2.8 (Apr. 28, 2011) (The state already had an existing law in place, but how to be approved for that the abortion was unclear as the power of the doctors and the court was ambiguous and not transparent; this claim was brought under the ICCPR).

67. *Id.*

68. *Id.* ¶ 9.3.

The Committee focused on the arbitrary nature of Argentina's interference. The fact that Argentina had a statute that permitted an individual like *LMR* to receive an abortion, yet interfered with her ability to do so, was an aggravating factor in concluding that her rights were violated.[69]

The right to privacy, as applied to abortion cases, seems to support an argument that the right to access an abortion exists within both the public and private sphere.[70] Abortion can be a remedy for unplanned pregnancies, which are closely related to family planning and reproductive health. If a person's home and family life are included within the scope of the right to privacy, then the right to access an abortion should be included within that same right to privacy. The right to privacy also supports the right to access an abortion within the public sphere, as the decision to have an abortion often involves confidential and sensitive conversations between patients and their doctors. Restrictions on the right to access an abortion, especially where blanket bans and criminalization are concerned, inherently require a violation of a woman's privacy by her own doctor, which, in turn, impacts the quality of healthcare women can receive by community doctors.

3. The Right to Health

The ICESCR is unique in that it recognizes the right to the "highest attainable standard of physical and mental health."[71] While facially Article 12 does not mention the right to access an abortion, the General Comments[72] pertaining to Article 12 make that connection. General Comment 14 states that the right to health includes "the right to control one's health and body, including sexual and reproductive freedom."[73] In addition, General Comment 14 bolsters the argument that Article 12 supports a right to access an abortion when read in conjunction with Articles 2 and 3.[74] The argument is that discrimination between men and women for necessary health services and procedures, i.e. an abortion, is prohibited.[75] The longstanding interpretation of Article 12 has consistently been that the right to health is not *just* receiving necessary medical care, but also the freedom to *be* healthy, a vital part of exercising one's right to cultural and economic self-determination.[76]

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69. *Id.*

70. Ronnie Cohen & Shannon O'Byrne, *"Can You Hear Me Now . . . Good!"® Feminism(s), The Public/Private Divide, And Citizens United v. FEC*, 20 UCLA WOMEN'S L.J. 39, 43–46 (2013) (The public/private sphere distinction is a dichotomy in sociology and politics that divides matters like community, and the market (public sphere) from matters like family or the home (private sphere)).

71. ICESCR, *supra* note 38, art. 12 ¶ 1.

72. Carrión, *supra* note 28, at 41 (At the U.N., committees monitor states' compliance with treaties by issuing "General Comments" or recommendations that guide states' efforts to implement a specific treaty).

73. Committee on Economic, Social and Cultural Rights (CESCR), *Gen. Cmt.* ICESCR, *General Comment No. 14: Art. 12 (The Right to the Highest Attainable Standard of Health)*, ¶ 8, U.N. DOC. E/C.12/2000/4 (Aug. 11, 2000).

74. As mentioned in K.L. v. Peru, Articles 2 and 3 are typically read in conjunction with other articles of the treaty; *see* Human Rights Comm., *supra* note 63, ¶ 5.4 (Article 2 is not a cause of action in and of itself.)

75. ICESCR, *supra* note 38, ¶ 29 (reading Article 12 in conjunction with Article 3, the treaty requires, at minimum, the removal of legal and other obstacles that prevent men and women from accessing and benefiting from health care on a basis of equality); *see also* ICESCR, *Gen. Comment No. 14*, *supra* note 70 (the right to health includes the right to control one's health and body, namely one's sexual and reproductive needs).

76. Van Lieu-Muños, *supra* note 58, at 369.

The ICESCR indisputably recognizes sexual and reproductive health to be included under the right to health. Reproductive and sexual health are a large part of a woman being healthy,[77] and pregnancy directly impacts one's reproductive and sexual health. In cases where the pregnancy puts the mother's life at risk, the right to health is heavily impacted.[78] Therefore, if the standard for the right to health is "the highest attainable" standard of health, and men and women both have the right to be healthy, then the state should make available all appropriate resources in attaining that standard, even if it is a procedure unique to their sex, such as access to an abortion.[79] In cases where pregnancy would need to be terminated for this "highest attainable standard" to be met, as is the case for millions of women around the world, then a procedure like an abortion must be available to comply.[80] The right to access an abortion in compliance with the right to health can be seen in cases like *K.L. v. Peru*, where there was no adequate alternative to the pregnancy that was not only prolonging the suffering of the woman but also that of the fetus.[81] The Committee found that there were no effective means for receiving medical intervention during the period of her pregnancy other than an abortion, and that the remedy given to K.L. was insufficient considering the timeliness of a normal gestational period.[82] The Committee also considered extreme procedural burdens to violate the right to health in cases involving access to an abortion.[83] In *LMR v. Argentina*, the Committee found a violation of Article 2 when read in conjunction with Articles 3, 7, and 17 of the Covenant because it took the young woman three different court proceedings and several weeks of a prolonged, dangerous pregnancy before obtaining relief.[84] Ultimately, the state's actions were the opposite of protective, forcing the woman to obtain an unsafe, illegal abortion.[85] This was not only a threat to *LMR*'s right to health but also discrimination under the law unique to the needs of her sex. Similar to the relationship between privacy and the principle of sex and gender equality, a violation of the right to health should amount to sex-based discrimination where a woman is denied a beneficial health procedure by state-mandated procedures not required of her male peers.

4. The Right to Life and Freedom from Torture

The argument that a right to access an abortion exists in international law is also found within the right to life, a principle found throughout the International Bill of Human Rights. Article 3 of the UDHR asserts the right for every person to "life, liberty, and security of person."[86] Article 6 of the ICCPR also asserts the right to life, prohibiting any state from arbi-

77. *Id.*

78. Bates, *supra* note 48, at 644.

79. *Id.* at 646.

80. Carrión, *supra* note 28.

81. Human Rights Comm., Commc'n. No. 1153/2003, K.L. v. Peru, U.N. DOC. CCPR/C/85/D/1153/2003, ¶¶ 6.6–6.8 (Oct. 24, 2005).

82. *Id.*

83. *See id.* ¶ 9.4; *see also* Human Rights Comm., Commc'n. No. 1608/2007, L.M.R. v. Argentina, U.N. DOC. CCPR/C/101/D/1608/2007, ¶¶ 2.1–2.8 (Apr. 28, 2011).

84. Human Rights Comm., Commc'n. No. 1608/2007, *supra* note 83, ¶¶ 2.6–2.8.

85. *Id.*

86. G.A., *supra* note 33, art. 3.

trarily depriving a person of their life.[87] General Comment 6 of the ICCPR states that the "right to life" is a supreme right from which no derogation is permitted.[88] The ICCPR extends its protections of life, not only prohibiting the arbitrary deprivation of life, but also prohibiting the use of torture or cruel, inhuman, degrading punishment or treatment during the individual's lifetime.[89] Article 7 is not just limited to physical suffering, but extends protection to the mental suffering of the victim as well.[90] According to General Comment 36, states may not regulate access to an abortion to the degree that a woman's life is jeopardized or that the woman is subjected to mental or physical torture; cruel, inhuman treatment; or arbitrary interference in her privacy.[91] Additionally, General Comment 36 clarifies that regulations should not encourage women to obtain unsafe abortions, and the right to access an abortion is especially persuasive in cases where the fetus is not viable, or the woman is a victim of sexual assault and incest.[92] The right to access an abortion is inextricably intertwined with the right to life, especially when access to an abortion can mean life or death for a woman.[93]

The right to be free from torture or cruel, inhuman, and degrading treatment also supports the argument that the right to access an abortion exists in international law. The prohibition against torture and cruel treatment can be found in both Article 5 of the UDHR and Article 7 of the ICCPR.[94] Additionally, in its Concluding Observations, the Human Rights Committee noted that criminalizing abortion is inappropriate, as it adds to the practice of

87. G.A. ICCPR Res. 2200 (XXI) A, *supra* note 38, art. 6, ¶ 1 ("Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.").

88. ICCPR, *Gen. Cmt. No. 6: Art. 6 (Right to Life)*, ¶ 1, U.N. Doc HRI/GEN/1/Rev.6 (Apr. 20, 1982) ("The right to life enunciated in article 6 of the Covenant has been dealt with in all State reports. It is the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation (art. 4). However, the Committee has noted that quite often the information given concerning article 6 was limited to only one or other aspect of this right. It is a right which should not be interpreted narrowly.").

89. G.A. Res. 2200 (XXI) A, *supra* note 38, art. 7 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.").

90. ICCPR, *Gen. Cmt. No. 20: Art. 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment)*, ¶ 5, U.N. Doc. A/44/40 (Mar. 10, 1992) ("The prohibition in article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim.").

91. ICCPR, *Gen. Cmt. No. 36: Art. 6 (Right to Life)*, ¶ 8, U.N. Doc. CCPR/C/GC/36 (Oct. 30, 2018).

92. *Id.*

93. Expert Opinion by Professors J.N. Erdman & R.J. Cook to the Constitutional Court of Chile Regarding the Review to the requirement of unconstitutionality presented by a group of Senators, regarding rules of the bill that regulates the decriminalization of voluntary termination of pregnancy in three grounds, corresponding to bulletin No. 9895-11 at 8, Tribunal Constitucional de Chile [Constitutional Court] STC Rol No. 3729(3751)-17 CPT (Aug. 9, 2017), https://www.law.utoronto.ca/utfl_file/count/documents/reprohealth/brief-chile-erdman-cook-2017-en.pdf.

94. G.A. Res. 2200 (XXI) A, *supra* note 38, art. 7; *see also* G.A. Res. 217 (III) A, *supra* note 33, art. 532.

unsafe abortions and to the suffering of women and unborn fetuses.[95] Therefore, the Committee recommended that states offer access to an abortion at least when the life of the mother is in danger, as well as in cases of rape and incest.[96] Not only has the Committee recommended that states decriminalize or create lesser consequences for woman needing abortions but it has also recognized the more subtle ways in which states regulate abortions, that can amount to a violation under the ICCPR and the ICESCR.[97]

In *K.L. v. Peru*, the Committee found that there had been a violation of Article 7 because the psychological suffering of K.L. could have been prevented, specifically when the fetus was diagnosed with anencephaly, but termination was denied by the hospital.[98] Under the Committee's interpretation of Article 7, it was cruel and degrading treatment to force her to carry to term, watch the baby's health quickly deteriorate over the next four days, and force her to breastfeed until the baby's death.[99] Furthermore, the Committee found these cruel circumstances were aggravated by K.L.'s special needs as a child, which were not met when she was denied the necessary therapeutic abortion, even against other medical opinions.[100] Similarly, in *L.M.R. v. Argentina,* the Committee found that, where the state omitted to guarantee L.M.R.'s right to an abortion under the Argentinian Penal Code and thereby causing her prolonged mental and physical suffering exacerbated by her age and disability, there was a violation under Article 7 of the Covenant.[101]

Opponents to recognizing the right to an abortion as a human right contend that the right to life does not support a right to access an abortion. The first common argument is that the

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95. *See, e.g.,* Human Rights Comm., *Concluding Observations on the Fifth Periodic Rep. of Cameroon*, ¶ 22, U.N. DOC. CCPR/C/CMR/CO/5 (2017) (requirement of court approval for abortion in rape cases needs to be lifted); Human Rights Comm., *Concluding Observations on the Seventh Periodic Rep. of Colombia*, ¶ 21, U.N. DOC. CCPR/C/COL/CO/7 (2016) (lack of proper training of medical personnel is an obstacle to legal abortion); Human Rights Comm., *Concluding Observations on the Sixth Periodic Rep. of Morocco*, ¶ 22, U.N. DOC. CCPR/C/MAR/CO/6 (2016) (obligation to submit proof that legal proceedings have been opened in cases of rape or incest is an excessive requirement); Human Rights Comm., *Concluding Observations of the Human Rights Comm.: Zambia*, ¶ 18, U.N. Doc. CCPR/C/ZMB/CO/3 (2007) (requirement for consent by three physicians is an obstacle to safe and legal abortion); Human Rights Comm., *Concluding Observations on the Situation of Civil and Political Rights in Equatorial Guinea*, ¶ 9, U.N. DOC. CCPR/CO/79/GNQ (2004) (restrictions on family planning services should be removed because they lead to illegal abortions)); *see e.g.*, *Concluding Observations: Equatorial Guinea* (2004).

96. *Id.*; *see also* ICCPR, *Gen. Cmt. No.* 36, *supra* note 91.

97. *See* sources cited *supra* note 93.

98. Human Rights Comm., Commc'n. No. 1153/2003, K.L. v. Peru, U.N. DOC. CCPR/C/85/D/1153/2003, ¶ 6.3 (Oct. 24, 2005) (This claim was brought under the ICCPR) *K.L. v. Peru* ("The omission on the part of the State in not enabling the author to benefit from a therapeutic abortion was, in the Committee's view, the cause of the suffering she experienced. The Committee has pointed out in its General Comment No. 20 that the right set out in article 7 of the Covenant relates not only to physical pain but also to mental suffering, and that the protection is particularly important in the case of minors.").

99. *Id.* ¶ 2.6.

100. *Id.* ¶ 6.5; *see also* ICCPR Res. 2200, *supra* note 38, art. 24, ¶ 1 ("Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.").

101. Human Rights Comm., Commc'n. No. 1608/2007, L.M.R. v. Argentina, U.N. DOC. CCPR/C/101/D/1608/2007, ¶ 9.2 (Apr. 28, 2011).

word "abortion" was intentionally left out of the treaty and other human rights instruments.[102] They argue that there is no support for an abortion through "the right to life" clause because mention of abortion was intentionally left out as a way of getting state parties to sign the treaty.[103] Additionally, opponents use the language of General Comment 36, which does permit states to regulate abortion on some level, to support the argument that restricting access to abortion is not contravening international human rights law.[104] The latter argument is less persuasive considering that the same general comment expressly limits states' ability to restrict, when it impedes on the principles and rights aforementioned.[105] As to the former argument, concerning drafters' intent, opponents accurately state that the word "abortion" neither appears in the ICCPR, nor in conjunction with the mention of the right to life.[106]

However, the absence of the word itself does not support the conclusion that state parties intended to permit restriction of the right to access an abortion, nor that the right to access was not evaluated in conjunction with the right to life. By looking at the *travaux préparatoires*,[107] it is clear that the right to access an abortion was acknowledged.[108] For example, Article 6 of the *travaux préparatoires* shows that state parties first introduced an abortion proposal under the Proposed Draft Bill of Human Rights in 1947.[109] This proposal was rejected on the basis of it being unscientifically founded and going against civilized juridical practices.[110] A decade later, a joint proposal by Belgium, Brazil, El Salvador, Mexico, and Morocco was submitted asserting that the right to life and protection for the unborn starts at the moment of conception, prompting a counter-response from opposing parties.[111] The conception proposal was

102. Andrea Stevens, *Pushing A Right to Abortion Through the Back Door: The Need for Integrity in the U.N. Treaty Monitoring System, and Perhaps a Treaty Amendment*, 6 PENN ST. J. L. & INT'L AFF. 70, 79 (2018).

103. *Id.*

104. *Id.* at 84.

105. *Id.*

106. *Id.*

107. *What are travaux préparatoires and how can I find them?*, DAG HAMMARSKJÖLD LIBRARY (May 14, 2018), http://ask.un.org/faq/14541 (The *travaux préparatoires* are a combination of drafting documents, negotiating history, and preparatory documents that show the exchanges between parties before the signing of the treaties. While not binding, the Vienna Convention on the Law of Treaties is clear that where the meaning of treaty terms are unclear, ambiguity may be addressed by looking for context from the *travaux préparatoires*).

108. International Covenant on Civil and Political Rights (ICCPR), *Report of the Working Party on an International Convention on Human Rights*, ¶ 4(2), U.N. Doc E/CN.4/56 (Dec. 11, 1947) ("It shall be unlawful to procure abortion except in a case in which it is permitted by law and is done in good faith in order to preserve the life of the woman, or on medical advice in order to prevent the birth of a child of unsound mind of parents suffering from mental disease, or in a case where the pregnancy is the result of rape.").

109. *Id.*

110. *Id.*

111. Marc J. Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* 116–17, 121 (Dordrecht and Nijhoff eds., 1987) (The responding abortion proposal argued three points to the conception proposal: a) it was impossible for the State to determine the moment of conception; (b) the proposed clause involved the question of duties for medical professionals; and (c) abortion legislation differed by principle in each country, making it inappropriate to include such a provision in an international instrument).

defeated. If one were to make a conclusion about the intent of the drafters, then the travaux préparatoires clearly show an aversion to using the principle of the right to life to restrict the right to access an abortion.[112]

Opponents also argue that, in modern day medicine, the likelihood of the mother needing an abortion to spare her life is unlikely.[113] For example, in 2012, Dr. Anthony Levantino testified for the United States Congress that common pregnancy complications, such as toxemia and preeclampsia, were able to be addressed through procedures that did not require aborting the unborn to save the life of the woman.[114] Opponents touting the perspectives shared by Dr. Levantino typically fledge from more developed, Western countries.[115] This argument is less persuasive when applying it to the sphere of international human rights law. First, the practices of Western medicine may not be the standard on which to base every state's ability to comply with treaties and/or provide accessible and safe reproductive care. Second, this argument ignores the data showing that most unsafe, criminalized abortions take place in lesser developed states, and communities within those states, where any basic level of medical service is lacking.[116] A woman suffering from toxemia in the United States may have different options at her disposal than a woman in a poorer community in Latin America. The right to access an abortion should not be negated as a right in international law because a privileged subset of the world population has access to more advanced medical care.

B. CEDAW

The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) is an international human rights treaty asserting gender and sex equality that mandates states to realize these rights in a way that guarantees women equal access to political, social, and economic areas of life.[117] The treaty, adopted in 1979, focuses on the civil rights, reproductive rights, and gender relations between the sexes to promote policy that ends discrimination and violence against women.[118] To date, 187 UN member states have ratified the treaty. The United States is one of only seven states that have not done so.[119]

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112. Bates, *supra* note 48, at 650 ("Life at conception" clauses have been rejected from other significant conventions, like the Convention on the Rights of Child for similar reasons. Additionally, the traditional understanding of personhood and inalienable rights, has usually been associated with whether that person has been born. Even the U.S., a prominent common objector to the right to access an abortion in international treaties, does not attach the inalienable rights of the Constitution to the unborn).

113. Stevens, *supra* note 102, at 82–83.

114. Dr. Anthony Levantino, *Abortion as Procedure*, CSPAN (Sept. 7, 2018), https://www.c-span.org/video/?c4748035/dr-anthony-levatino-abortion-procedure.

115. *Id.*

116. *Induced Abortion Worldwide: Fact Sheet*, *supra* note 2.

117. *Convention on the Elimination of All Forms of Discrimination Against Women*, UNITED NATIONS (Mar. 8, 2019, 3:27 PM), http://www.un.org/womenwatch/daw/cedaw/ (hereinafter CEDAW).

118. Mahmoud Masud, *Tackling Gender Inequality: The Challenges Facing the Universal Application of CEDAW Across Ratifying States*, 21(2) COV. L. J. 30, 31 (2016).

119. *Id.*

1. Non-Discrimination and the Principle of Gender Equality

CEDAW was drafted to specifically address discrimination and violence against women. Therefore, the treaty better defines and details discrimination against women than its counterparts, the ICCPR and the ICESCR.[120] The preamble begins by recognizing the changing roles of women in society and the unique obstacles women face because of their sex.[121] CEDAW defines "discrimination against women" as:

> Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.[122]

The language of CEDAW not only encompasses facially discriminatory policies, but it also emphasizes the effect that a seemingly innocuous policy can have on women. States are called on to do more than change the language of their laws: they are also charged with looking at the potentially discriminatory effect their laws can have and subsequently use their resources to fully realize equality for women.[123] By banning, criminalizing, or placing excessive burdens on abortion access, states are participating in policymaking that has the effect of intervening in a woman's self-development and livelihood, especially when a pregnancy can threaten her life or having an abortion could deprive her or her liberty.

2. The Principle of Non-Discrimination and the Right to Health

In addition to providing a more detailed understanding of discrimination against women under international law, CEDAW also establishes a connection between reproductive health, abortion, and the right to healthcare.[124] CEDAW prohibits the targeting of women's reproductive health as a basis for discrimination.[125] In Article 12, CEDAW mandates both formal and

120. CEDAW, *supra* note 117.

121. G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination Against Women (Dec. 18, 1979).

122. *Id.* art. 1.

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

124. *Id.* art. 12, ¶ 1–2 ("States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning [. . .] Notwithstanding the provisions of paragraph I of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.").

125. *Id.* Preamble.

substantive equality for both sexes in healthcare.[126] Services connected to pregnancy are uniquely needed by women and are recognized as vital to their total wellness.[127] CEDAW was the first international treaty to explicitly mention "family planning" in its body.[128] According to CEDAW, women have the same rights as men in deciding the number and frequency of their children, as well as access to information to ensure their ability to freely exercise these rights.[129] General Comment 24 expanded the scope of Article 12 to discourage states from withholding adequate reproductive services, instituting barriers to women seeking necessary reproductive services,[130] and from criminalizing or punishing women who have medical procedures that tend to be needed only by women.[131]

The aforementioned article supports the argument that the right to access an abortion exists in international law. First, if women are owed full, accessible reproductive care, then the right to access an abortion exists at some level. Abortion is a medical procedure that, when medically necessary, is uniquely needed by women.[132] Therefore, not allowing abortions or punishing women who have the procedure runs opposite to the principles of Article 12.

Second, even in cases where an abortion may not be medically necessary, CEDAW asserts that women have the right to create and build their family as they see fit.[133] The power to decide the frequency and number of children supports the argument for access to a variety of reproductive measures that assist women in making these decisions. The family planning argument is, however, less persuasive when one looks at prior U.N. discussions about family plan-

126. Dhrubajyoti Bhattacharya, *Can International Law Secure Women's Health? An Examination of CEDAW and its Optional Protocol*, 103 AM. SOC'Y INT'L L. PROC. 471, 472 (2009) (Substantive equality for women identifies differences amongst the experiences of women that need to be changed for prolonged equality. Formal equality in comparison asserts that the sexes should be treated the same).

127. G.A. Res. 34/180, *supra* note 121, art. 12, ¶ 2.

128. *Id.* art.10(h).

129. *Id.* art. 16, ¶ 1(e) ("States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women . . . (e) [t]he same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights . . . .").

130. For examples on what the Committee has determined to be a barrier to abortion, *see* CEDAW, *Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Slovakia,* ¶ 31(c), (d), (f), U.N. DOC. CEDAW/C/SVK/CO/5-6 (2014) (The Committee recommended that the State's practice of mandatory counselling, 48-hour waiting period, and mandatory reporting duty for doctors were barriers to women's access to abortion); CEDAW, *Concluding Observations on the Combined Eighth and Ninth Periodic Reports of Uruguay*, ¶ 35, U.N. DOC. CEDAW/C/URY/CO/8-9 (2016) ("The widespread use of conscientious objection among medical practitioners limit[s] access to safe abortion services"); CEDAW, *Concluding Observations on the Combined Seventh and Eighth Periodic Reports of Hungary*, ¶ 31(a), (c), (d), U.N. DOC. CEDAW/C/HUN/CO/7-8 (2013) (The Committee urged the State to end all campaigns stigmatizing abortion, end their mandatory waiting and counselling requirement for abortion services, and "establish adequate regulatory framework and monitoring mechanism of the practice of conscientious objection by health professionals ensur[ing] that conscientious objection is accompanied by information to women about existing alternatives.").

131. CEDAW, *Gen. Cmt. No. 24: Art. 12 (Women and Health)*, ¶ 11, 14, U.N. DOC. A/54/38/Rev.1 (1999).

132. For the purposes of this paper I am focusing on "women's rights" as they pertain to abortion access. However, there is merit to the argument that generalizing women as the only ones in need of abortion is detrimental to LGBTQ groups who adopt nonbinary understandings of gender and sex, although that argument is outside the scope of this paper.

133. G.A. Res. 34/180, *supra* note 127.

ning and abortion.[134] In the past, UN Member States have been reluctant to permit family planning to cover or include abortion services.[135] However, despite the drafters' unwillingness to equivocate abortion with family planning, the data support that unsafe abortions come at the tail end of overly restrictive abortion policies.[136] Safe and accessible contraception and education are vital preventive alternatives to unwanted pregnancies. Therefore, the right of women to freely plan their family should not expire because these preventive measures have failed. The international community may not want to substitute abortion access for family planning but the spirit of CEDAW to address discrimination against women in reproductive health supports a right to access an abortion.

CEDAW also provides two mechanisms to ensuring state compliance with the spirit of the convention, the Optional Protocols.[137] Under the Optional Protocol, CEDAW retains exclusive jurisdiction to consider claims brought against a state party to the protocol, serving a quasi-legal function by applying the facts of the complaint to the relevant articles of the convention.[138] One mechanism for this is permitting individual or group complaints concerning violations of CEDAW to be made to the Committee. For example, one of the most prolific cases concerning abortion and CEDAW is *L.C. v. Peru*. In 2013, a young girl unsuccessfully attempted suicide after being raped by her uncle and becoming pregnant.[139] The suicide attempt left her paralyzed and in need of emergency surgery for her to regain any mobility.[140] The operation was denied by the doctors because it would require her to abort the fetus.[141]

The Committee found that Peru had discriminated against L.C. in violation of Article 12 and infringed upon her right to health on several grounds when she was denied access to an abortion.[142] Further, the Committee held that the misconception that the life of the fetus should prevail over the life of the woman was antagonistic to the principle and spirit of CEDAW, specifically the stereotypes addressed in Article 5.[143] Lastly, the Committee found that the remedy available to L.C. was insufficient because it failed to take into account the timeliness issue inherent in pregnancy and also permitted the hospital and court to make arbitrary determinations on what situations the therapeutic abortion law applies to.[144] According

134. Stevens, *supra* note 102, at 92–93; *see also* Fourth World Conference on Women, Beijing, *supra* note 21, at ¶ 106(k) ("In the light of paragraph 8.25 of the Programme of Action of the International Conference on Population and Development, which states: "In no case should abortion be promoted as a method of family planning. All Governments and relevant intergovernmental and non-governmental organizations are urged to strengthen their commitment to women's health, to deal with the health impact of unsafe abortion.").

135. *Id.*

136. *Id.*

137. G.A. Res. 54/4, *Optional Protocol to CEDAW*, art. 1–2 (Oct. 15, 1999).

138. Bhattacharya, *supra* note 126, at 471.

139. CEDAW, Commc'n. No. 22/2009, L.C. v. Peru, U.N. DOC. C/50/D/22/2009, ¶ 2.1 (Oct. 17, 2011).

140. *Id.*

141. *Id.* ¶ 2.3.

142. *Id.* ¶ 8.15.

143. *Id.* ¶ 8.16.

144. *Id.* (The Committee cited violation under Articles 2(c), 2(f), and 3 which required effective remedies for violations and the prohibition of discrimination on the basis of sex).

to the Committee, where a state already permits therapeutic abortions, there should be a reasonable framework in place to make that right exercisable.[145] Without that framework, the right itself is merely illusory and has the similar effect of not being there at all.[146]

In addition to its communications procedure, CEDAW utilizes an inquiry procedure.[147] The inquiry enables the Committee to conduct its own investigation and research regarding grave or systematic violations of women's rights.[148] The Committee's published concluding observations have played a role in comprehending the scope of the Convention relating to the right to access an abortion. For example, the Committee found that, where the state has legalized abortions, the state should also ensure that women have access to that choice and that it is solely their choice to pursue abortion as an option.[149] The Committee encouraged states to legalize abortion, "at least, in cases of rape, incest, severe fetal impairment and risk to the health and/or life of the mother."[150] Additionally, the Committee recommended that states already permitting abortion should take all necessary measures to ensure this existing right is accessible, even if that means going so far as to oversee hospitals and healthcare providers to ensure compliance.[151] Where states have instituted a blanket ban on abortion, the Committee recommended that states amend their penal code to decriminalize abortion.[152]

Today, in the international community, these international instruments are the leading authorities governing human rights, especially women's rights. None of these instruments explicitly mention the word "abortion." However, by examining extrinsic sources, such as the General Comments, *travaux préparatoires*, and the use of their Optional Protocols, as well as the terms of the treaty, the argument that the right to access an abortion is supported by the spirit and principles of each of these instruments. Under these instruments, sex discrimination, freedom from torture and degrading treatment, the arbitrary interference in women's privacy and family life, inequality in healthcare, and the arbitrary deprivation of life are all prohibited. Moreover, the data show that, when women are withheld the right to access safe and legal abor-

145. *Id.* ¶ 8.17.

146. Charles G. Ngwena, *A Commentary on* L.C. v. Peru*: The CEDAW Committee's First Decision on Abortion*, 57(2) J. AFR. A.L. 310, 315–16 (2013).

147. G.A. Res. 54/4, *supra* note 137**,** art. 8.

148. *Id.*

149. Convention on the Elimination of All Forms of Discrimination Against Women CEDAW*, Concluding Observations on the Seventh Periodic Report of Turkey*, ¶ 19(b), ¶ 48(b), U.N.) UN DOC. CEDAW/C/TUR/CO/7 (July 25, 2016) (hereinafter "*Seventh Periodic Report of Turkey*") (urging the State to "make all legal amendments necessary to ensure that abortion up to the tenth week, or up to the twentieth week in the event of rape, are subject to the decision of the pregnant woman or girl alone" and "take all measures necessary to safeguard the existing legal right to abortion and contraception, monitor hospitals and ensure that they respect their legal obligations to terminate pregnancies up to the tenth week, and up to the twentieth week in cases of rape, without imposing any additional conditions.").

150. Convention on the Elimination of All Forms of Discrimination Against Women, *Concluding Observations on the Eighth Periodic Report of Kenya,* ¶ 39(e), U.N.) UN DOC. CEDAW/C/KEN/CO/8 (November 22, 2017) (hereinafter "*Eighth Periodic Report of Kenya*") (determining that the hospital arbitrarily burdened women seeking abortions, especially where under law they were already permitted to obtain one in life-threatening circumstances).

151. *Id.* ¶ 4847(b).

152. *Id.*

tions, both maternal deaths and the number of unsafe abortions increases.[153] Women become socially, physically, and mentally disadvantaged. Young girls are willing to resort to suicide as in *L.C. v. Peru*. Furthermore, in some cases, abortion is the only timely and medically-sufficient remedy available for a woman facing an unwanted or unsafe pregnancy. Keeping this in mind, there is a compelling argument that the right to access an abortion exists in international law, and that compliance requires, at a minimum, decriminalization and access, especially for women in need of a therapeutic abortion.

II. Enforcing the Right to Access an Abortion to Better Protect Women

The conversation of abortion as a human right is undoubtedly one of the most divisive issues in international and domestic legal history.[154] The UN and the concept of state sovereignty recognizes that states do have a level of discretion and interest in regulating access to an abortion within their state lines.[155] Consequentially, the current international system must balance the state's discretion with fulfilling the spirt and purpose of binding agreements.[156] In the case of many states, this level of discretion has been lethal.[157] Studies show that restricting access to an abortion results in higher maternal mortality rates and unsafe abortion procedures.[158] Rather than the preservation of the unborn, there exists a threat to both the woman and the fetus.[159]

This dynamic in the international system can be seen on a microcosmic level. For example, the Supreme Court of the United States determined that a woman's right to privacy protects her right to access an abortion in the first trimester.[160] Beyond the first trimester, states do have different levels of interests in regulating access to an abortion.[161] As a result, individual states have taken their own initiatives in pushing regulations on abortion as far as possible. For

153. *Worldwide, an Estimated 25 Million Unsafe Abortions Occur Each Year*, *supra* note 3.

154. Alfred Yankauer, *Abortion: The Divisive Issue*, 75(7) AM. J. PUBLIC HEALTH 714, 714–15 (1985).

155. ICCPR, *General Comment No. 36*, *supra* note 91, ¶ 8 ("Although States parties may adopt measures designed to regulate voluntary terminations of pregnancy, such measures must not result in violation of the right to life of a pregnant woman or girl, or her other rights under the Covenant.").

156. Masud, *supra* note 118, at 34–38 (explaining that even under a woman-specific treaty like CEDAW, the reality of reservations makes it difficult to enforce values and principles that go to the heart of these treaties. With abortion, the amount of discretion given to states to regulate allows for pretty explicit reservations for state parties).

157. *Worldwide, an Estimated 25 Million Unsafe Abortions Occur Each Year*, *supra* note 3.

158. *Id.*

159. *Id.*

160. Roe v. Wade, 410 U.S. 113, 163 (1973) (holding "with respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now-established medical fact, referred to above at, that, until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health.").

161. *Id.*

example, Alabama and Georgia have sparked national debates when they proposed legislation to ban access to an abortion after six weeks.[162] The same legislation proposed excluding exceptions for victims of rape and incest, even going so far as to hold physicians criminally responsible for performing procedures, with a sentence of up to ten years in prison.[163]

In 2013, Texas passed the HB2 Bill, which implemented ambulatory and admitting privilege requirements for clinics providing abortion services.[164] Just prior to HB2, there were several proposals to cut funding to clinics that offered abortion services throughout Texas. Both of these initiatives had the effect of closing dozens of clinics around the state.[165] While these requirements were later held unconstitutional under *Whole Women's Health v. Hellerstedt*, that was almost two years later.[166] A study done in cooperation with the University of Texas showed that between 100,000 to 240,000 women of reproductive age in Texas tried to abort a pregnancy without medical assistance, also known as a self-induced abortion, after failing to overcome state-implemented burdens to procuring an abortion at a clinic.[167] Self-induced abortion methods included using herbs and medicinal remedies, ingesting excessive amounts of drugs, and blunt force to the abdomen in an effort to achieve a miscarriage.[168] The study also showed that Latina women near the US-Mexico border were overwhelmingly affected by these restrictions, most of whom were more than 200 miles away from the nearest clinic and could not afford the multiple days it would take to procure even the earliest, least-invasive abortion procedure.[169] Despite the fact that these burdens were later deemed unconstitutional, there were

162. Vanessa Romo, *Georgia's Governor Signs 'Fetal Heartbeat' Abortion Law*, NPR (May 7, 2019), https://www.npr.org/2019/05/07/721028329/georgias-governor-signs-fetal-heartbeat-law ("The Living Infants Fairness and Equality Act allows for some exceptions, including in cases of rape or incest if a woman files a police report, or when the life of the pregnant woman is threatened. A woman can also have an abortion if her pregnancy is deemed 'medically futile'); *see* Debbie Elliot, *Alabama Lawmakers Move To Outlaw Abortion In Challenge To Roe v. Wade*, NPR (May 1, 2019), https://www.npr.org/2019/05/01/719096129/alabama-lawmakers-move-to-outlaw-abortion-in-challenge-to-roe-v-wade ("In what would likely become the most restrictive abortion ban in the country, the Alabama House Tuesday passed a bill that would make it a crime for doctors to perform abortions at any stage of a pregnancy, unless a woman's life is threatened. The legislation is part of a broader anti-abortion strategy to prompt the U.S. Supreme Court to reconsider the right to abortion.").

163. H.B. 314, 2019 Leg. Sess. (Ala. 2019).

164. Whole Women's Health v. Hellerstedt, 136 S. Ct. 2292, 2296 (2016).

165. Karen White et al., *Change in Second-Trimester Abortion After Implementation of a Restrictive State Law*, 133(4) OBSTETRICS & GYNECOLOGY 771–79 (2019) (studying the effects of the HB2 bill both on clinic closures and the number of women who attempted self-induced abortions).

166. *Hellerstedt,* 136 S. Ct. at 2296.

167. Ashley Welch, *Study: 100,000 Texas Women Have Tried to Self-Induce Abortion*, CBS News (Nov. 19, 2015, 4:10PM), https://www.cbsnews.com/news/100000-texas-women-have-tried-to-self-induce-abortion/.

168. *Id.* ("The researchers found that the self-induction methods most often used by the women fell into two categories: ineffective home remedies such as herbs, tea and vitamins; and medications to induce abortion bought in bordering Mexico where a prescription isn't needed.").

169. *Id.*

thousands of women who were not able to achieve an adequate remedy in the interim. Moreover, even after the bill was struck down, clinics took years to recover and restore services to women in Texas.[170]

The impact of a state's discretion in restricting access to an abortion extends far beyond the boundaries of their own state. For example, in January 2017, US President Donald Trump signed a Memorandum that suspended United States funding to organizations or programs that provide, advocate, or make referrals for abortions.[171] Before the end of the fiscal year, the effect of the policy was notable: funds that had already been issued but not spent were revoked.[172] Clinics, mostly in Africa, began closing.[173] By May 2018, Family Health Options Kenya (FHOK), the oldest reproductive services provider in Kenya, had lost more than $2 million in funding previously reserved by the U.S. for health and AIDs initiatives in the state.[174] Clinics in some of the poorest neighborhoods of Africa were projected to close in a matter of months.[175] In just one year, FHOK estimated that more than 76,000 women and girls were affected by the cut of outreach programs.[176] Services completely unrelated to abortion, like vaccinations for children, HIV/AIDs treatment, postnatal care, and cancer screenings for reproductive organs, were also negatively impacted.[177] Studies conducted around similar policies in prior presidential administrations did not indicate a lesser need for abortion services.[178] Instead, women sought alternatives, like "curtain clinics," which are underground clinics where the abortion is performed by someone with no medical certification, and at-home methods, like piercing the womb with a needle or other sharp object.[179]

170. *Id.* ("The Supreme Court's ruling in *Whole Woman's Health v. Hellerstedt* struck down the two major provisions of Texas' restrictive law in June 2016, requirements that abortion providers have admitting privileges at a local hospital and that abortion clinics meet the standards of ambulatory surgical centers. However, Texas still has just half the number of facilities it had before the law was passed in July 2013, which means that its effects are still impacting access to abortion care in Texas today."); *Later Abortion Increased in Texas Due to Restrictive Law Creating Barriers to Care*, UNIV. OF TEX.: TEX. POL'Y EVALUATION PROJECT, https://liberalarts.utexas.edu/txpep/releases/later-abortion-release.php (last visited Feb. 20, 2020).

171. *See* Memorandum from President Donald J. Trump to The Secretary of State, The Secretary of Health and Human Services, and The Administrator of the United States Agency for International Development (Jan. 23, 2017) (on file with the Federal Register), https://www.whitehouse.gov/presidential-actions/presidential-memorandum-regarding-mexico-city-policy/ ("I further direct the Secretary of State to take all necessary actions, to the extent permitted by law, to ensure that U.S. taxpayer dollars do not fund organizations or programs that support or participate in the management of a program of coercive abortion or involuntary sterilization.").

172. Sasha Ingber, *Kenyan Clinic Rejects Trump Abortion Policy, Loses $2 Million In U.S. Aid*, NPR (May 2, 2018, 10:00 AM), https://www.npr.org/sections/goatsandsoda/2018/05/02/604425181/kenyan-clinic-rejects-trump-abortion-policy-loses-2-million-in-u-s-aid.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. Eran Bendavid et al., *United States Aid Policy and Induced Abortion in Said Policy And Induced Abortion In Sub-Saharan Africa*, WORLD HEALTH ORGANIZATION (Aug. 16, 2011), https://www.who.int/bulletin/volumes/89/12/11-091660/en/ ("Our study found robust empirical patterns suggesting that the Mexico City Policy is associated with increases in abortion rates in sub-Saharan African countries.").

179. Ingber, *supra* note 172.

There are consistent data showing the effect of abortion regulations on women's health or maternal mortality rates.[180] However, the right to access an abortion has yet to be sufficiently articulated, making it difficult for individuals to hold states accountable. The remedies provided by the current international legal system are not effective or timely, leading to several proposals for reform.[181]

A. Remedies Through Feminist Legal Theory

Feminist jurisprudence, preferentially known as feminist legal theory, is the analysis of the law through the lens of women's experiences and perspectives.[182] Feminist legal theory criticizes the current legal framework as one steeped in patriarchal assumptions lacking consciousness on the individualized and systemic oppression of women.[183] The term "feminist legal theory" is misleading because it is not just one theory.[184] There are two broad theories that provide relevant criticism of the current international legal framework relating to the right to access an abortion as a human right: "liberal feminist theory" and "differences feminist theory."[185] Liberal feminist theory, or "sameness feminism," adopts the irrelevance of the differences of sex and gender, asking that men and women receive equal treatment.[186] "Differences feminism" is another umbrella term for a number of other theories that essentially argue "that universalism cannot be achieved without attention to difference."[187] For the purposes of this paper, I will focus on the critiques and strategies purported by the differences feminist legal theory as it is the theory that offers the most notable, and arguably the most workable, reconceptualization of how the international system articulates and enforces human rights.[188]

One major criticism of international law is that it insufficiently addresses gender disparities.[189] The dominant view of the rights-bearer in international human rights law is that of an individual, genderless and disembodied.[190] However, this framework disregards a number of women's human rights violations that are sex-specific.[191] The right to access an abortion and reproductive health are not genderless concepts, they are inherently sex-specific.[192] Additionally, the international system prioritizes state sovereignty and promotes cooperation and inclu-

180. *Induced Abortion Worldwide: Fact Sheet*, *supra* note 2.

181. *See* Charles G. Ngwena, *Taking Women's Rights Seriously: Using Human Rights to Require State Implementation of Domestic Abortion Laws in African Countries with Reference to Uganda*, 60(1) J. AFR. L. 110, 138 (2016).

182. Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4(2) Berkley WOMEN'S L. J. 191, 193–94 (1989).

183. *Id.*

184. Ivana Radicic, *Feminism and Human Rights: The Inclusive Approach to Interpreting International Human Rights Law*, 14 U. C. LONDON JURIS. REV. 238, 264–65 (2008).

185. *Id.*

186. *Id.*

187. *Id*. at 265.

188. *Id.*

189. Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. M.J. INT'L. I.L. 613, 614 (1991).

190. Radicic, *supra* note 184, at 240.

191. *Id*. at 240.

192. *See* Charlesworth et al., *supra* note 189, at 635.

sivity of member states.[193] As a result, states are given ample discretion when determining their obligations under international law in areas that implicate public morality or culture.[194] This discretion is only contingent upon whether the measures being used by the state are appropriate and effective for purposes of the treaty to which the state has signed on.[195]

Women's sexual and reproductive health often falls under the umbrella of public morality and culture, which consequently limits the assessment of these measures.[196] Recognizing sex-specific rights like accessing an abortion is further limited where the obligations are tied to a gender-neutral agreement. The chances of ensuring more gender-conscious compliance regarding reproductive health are more likely under a treaty like CEDAW than other human rights instruments, that are far more gender neutral.[197] The solution proposed by some feminist scholars is to include more gender and sex specific language within other mainstream human rights treaties.[198] Essentially, there should not be only one treaty defining "sex discrimination"[199] and "indirect sex discrimination," when more than one treaty seeks to impose civil rights obligations on states.

Another feminist critique of international law is that "mainstream" human rights law gives preference to "classical forms of abuse of civil and political rights by state agents" rather than the violations that occur within the private sphere, where abuses against women have typically taken place.[200] For example, the discussion of the right to life has typically focused on the prohibition of state actors arbitrarily depriving individuals of their life. Until recently, the "right to life" had not been associated with private or individual violators, such as domestic violence abusers or the death of a woman who was denied access to an abortion.[201]

Even as organizations have increased awareness of the inequalities faced by women all over the world, there is no mechanism to push states to effectively deconstruct their own patriarchal structures, which serve to subordinate women.[202] Feminist jurisprudence scrutinizes what can be considered one of the larger failures of human rights law, the failure to give issues unique to women the attention and priority they need.[203]

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193. *See* Radicic, *supra* note 184, at 252–53.

194. *Id.* ("Despite the availability of the wide-ranging measures indicated by General Comments of the UN treaty-monitoring bodies, the focus is usually on legislative measures, especially in individual cases. In addition, states are often given a wide discretion in respect of implementing their obligations in areas which implicate public morality, socio-economic policies of the state, or where there is no consensus, which precludes the proper assessment of the appropriateness of the undertaken measure.").

195. *Id*. at 252.

196. *Id.*

197. Cain, *supra* note 182, at 193–94.

198. *Id.* at 195.

199. *See* CEDAW, *supra* note 117.

200. Radicic, *supra* note 184.

201. *Id*. at 243.

202. Dhrubajyoti Bhattacharya, *The Perils of Simultaneous Adjudication and Consultation: Using the Optional Protocol to CEDAW to Secure Women's Health,* 31 WOMEN'S RTS. L. REP. 42, 102 (2009).

203. ALSTON & GOODMAN, *supra* note 31, at 166.

However, specifying women's issues can lead to the most common downfall of feminist legal scholarship. First, by moving towards a more sex-specific framework under the differences theory, there is a danger of reinforcing binary sex and gender roles, which could be detrimental to LGBTQ+ communities.[204] By only connecting "women" with "pregnancy" or "abortion," some critics fear less room for non-binary or transgender rights.[205] This reconceptualization could be an obstacle for advocates who want to integrate the narrative that not just "women" deal with pregnancy or the need for access to safe and legal abortion services.

In addition to the obstacle of incorporating LGBTQ+ experiences in reproductive rights, feminist legal theory also struggles with "gender essentialism."[206] The issue of gender essentialism suggests that by hyper-focusing on the issue of gender and sex, other significant personal identifiers (race, nationality, culture, religion, etc.) get pushed aside.[207] For example, the idea of abortion being inextricably tied to women's substantive and formal equality is a heavily Western feminist agenda.[208] Abortion is not necessarily a high priority for states where women have been subjected to forced abortions or the realities of population control policies.[209] If the ultimate goal of the feminist perspective is to include the diverse voices of non-white and non-Western women, then developing the right to access an abortion in international law could be difficult.

However, articulating and enforcing human rights through the differences theory would be less detrimental than the status quo. Under the current international framework, the right to access an abortion is inhibited by a patriarchal system. The current system deprioritizes non-masculine concepts of rights, such as LGBTQ+ and reproductive rights. The right to access an abortion is just one aspect of reproductive rights, and, through proper representation and focus on intersectionalism,[210] it is possible to avoid the gender essentialism problem. The focus is not just on abortion *per se*, it is on autonomy over reproductive options, including where the government forces abortions. By deconstructing the patriarchal framework that limits reproductive related rights, there will be room to maintain diverse narratives and include the underrepresented narrative of reproductive rights.

Applying the feminist jurisprudential doctrines discussed, the idea would be to reconceptualize a system made by men for men. There are a number of strategies that could effectuate this restructuring: dramatically increasing representation of women's voices in international law; implementing a way to more accurately interpret and draft human rights provisions to

204. Pia Huittinen, *Eliminating Essentialisms: Towards a Global Feminist Perspective*, 9 UCL JURIS. REV. 160, 161–63 (2002).

205. *Id.* at 164.

206. *Id.*

207. *Id.*

208. Charlesworth et al., *supra* note 189, at 619.

209. *Id.*

210. How women's rights intersect with identities of race, socioeconomic status, etc.

achieve substantive equality for women; being assertive and intentional in language (e.g., going so far as to put "the right to access an abortion" in the texts); and fighting against the public and private distinctions made in international law.[211]

Feminist legal reform might also involve adopting a treaty amendment to the current conventions that fail to properly communicate the unique rights of women relative to that treaty or, more dramatically, an amendment explicitly recognizing a woman's right to access an abortion with a comprehensive list of state obligations.[212] Realistically, feminist legal reform may be an uphill battle, especially when it involves assertive changes to international instruments. However, by deliberately and explicitly integrating women's narratives in all parts of international human rights law, it is possible to slowly change the way reproductive rights, such as the right to access an abortion, are approached. In the short term these changes could be most effective in influencing areas like customary law where changing gender biases through sensitization and education is more accessible.[213]

B. Procedural Remedies

Related to the proposals by feminist legal theorists, some scholars have criticized the lack of procedural safeguards that make timely and effective remedies possible.[214] For example, the ICCPR puts no real time constraint on states to fulfill their obligations or investigate complaints of violations made by individuals or groups.[215] In fact, individuals must overcome the burden of showing that "all available domestic remedies" have been exhausted, except where the application of the remedies is unreasonably prolonged.[216] This largely precludes the Human Rights Committee from examining whether the available domestic remedies are adequate or overly burdensome *before* the individual has to navigate through them.[217] Considering that each passing week a woman becomes further along in her pregnancy is critical, this timeliness obstacle is problematic. Yet the ICCPR and ICESCR fail to effectively overcome it.

The model that should be looked to for compensating for these deficiencies is the enactment of CEDAW. The Optional Protocol of CEDAW permits bypassing the exhaustion of the remedies requirement, when the state unreasonably prolongs application *and* when the domestic remedies would not likely bring effective relief.[218] In addition, CEDAW's Optional Protocol

211. Cohen & O'Byrne, *supra* note 70 (the public/private argument made by feminist scholars is that international conventions largely predicate articles on what takes place in public, committed by a public official, leaving private matters of criminal conduct to domestic legal systems. On paper this appears gender neutral, but in the feminist reality, women's discrimination is most perpetuated in private. In reality, most women are victims of random attacks of war and private acts of violence in the home.); *see also* ALSTON & GOODMAN, *supra* note 31, at 191–92.

212. *Id.* at 633.

213. ALSTON & GOODMAN, *supra* note 31, at 175.

214. Bhattacharya, *supra* note 202.

215. *Id.*

216. *Id.*

217. *Id.*

218. G.A. Res. 54/4, Optional Protocol to CEDAW, art. 1–2, (Oct. 15, 1999).

provides "interim measures" where a threat to the woman's health is immediate.[219] It even requires that the state submit a "written response" within six months to report on the state's strategy to address the recommendations of the Committee based on the totality of the circumstances.[220] By implementing a similar model to CEDAW, all human rights treaties could have the same level of protection for victims of human rights violations, especially where the violations are as timely and complex as reproductive issues.

Organizations such as WHO have also proposed prong-like approaches to states trying to comply with the conventions, especially with regard to therapeutic abortions.[221] For states where therapeutic abortions are legal but not necessarily accessible, WHO suggests that "states promote and review their relevant laws amongst physicians . . . and the general public; design and implement policies to ensure effective access to abortion to the extent that the law allows and remove unnecessary regulative and administrative barriers to access."[222] Additionally, WHO suggests that "states operate a mandatory referral scheme, where doctors who conscientiously object to the procedure refer women to another doctor who is willing to perform abortions."[223] A similar model would enforce a transparent and fixed expectation for states to implement a streamlined process to procure the legal abortion. There would also be supplemental procedures to avoid the obstacle of uncooperative physicians or healthcare providers.

Conclusion

While there are no international human rights instruments that explicitly articulate a right to access an abortion in international law, each of the four leading instruments on human rights, the UDHR, ICCPR, ICESCR, and CEDAW, embody principles that support the right to access an abortion. The principles of gender and sexual equality, the right to privacy, the right to health, the right to life, and freedom from cruel and degrading treatment all support the argument that the right to access an abortion exists as a means of ensuring equality and the holistic health and wellness of women around the world. However, despite these principles and data showing the negative effects of abortion restrictions, the international community remains reluctant to explicitly assert the right to access an abortion under international law.

The reform proposals promulgated by feminist legal theorists and organizations like WHO could make the international system more apt to recognizing the right to access an abortion by changing the substantive approaches to articulating and enforcing human rights. Additionally, modeling future protocols after those in CEDAW could help rectify the deficiencies in aiding victims of these violations where timeliness is key and remedies are limited, as reproductive-related violations often are. Finally, with transparent, streamlined procedures, such as those suggested by WHO, the international system can better hold states accountable for dangerously restricting access to abortion services.

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219. *Id.*

220. Bhattacharya, *supra* note 202.

221. Bates, *supra* note 48, at 654–55.

222. *Id.*

223. *Id.*

Toward A Safer Society: Guatemalan Responses to Femicide

Rachel Phillips[1]

"People say, 'it's only a woman who died,' as if they were flies."

– Marion Lloyd[2]

"He will kill me if he sees me again."[3] Josefina Nieto fled Guatemala after nearly thirty years of sexual, physical, and emotional abuse from her husband.[4] The police refused to arrest her husband after she was hospitalized due to drinking a cup of coffee that he laced with poison.[5] She was not offered protection upon returning home.[6] Out of options, she fled to Mexico with her youngest son.[7] Josefina is not alone. One in three Central American women interviewed by the United Nations Human Rights Council ("UNHRC") on the southern border of Mexico last year were fleeing from gender-based violence[8] in their countries of origin.[9]

Guatemala has some of the highest instances of violence against women in the world. Due to international pressure for Guatemala to comply with its international treaty obligations, Guatemala has begun to implement legislation addressing the issue of impunity for perpetrators of femicide in recent years with little progress. In contrast, Colombia, a country with similarly high instances of violence against women, has successfully implemented legislation, which holds perpetrators accountable for their violent actions.

This Article argues that Guatemala should implement legislation similar to Colombia's current femicide law in order to prevent femicide, comply with its international obligations, and to correct the current culture of impunity that exists for perpetrators of these crimes.[10] Spe-

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1. J.D. anticipated 2020, B.U. School of Law. My thanks to Julie Dahlstrom, Clinical Associate Professor of Law at B.U., who was instrumental to the development of this Article.
2. Marion Lloyd, *Guatemala Activists Seek Justice as Women Die*, BOSTON (Jun. 14, 2004), http://archive.boston.com/news/world/articles/2004/06/14/guatemala_activists_seek_justice_as_women_die/.
3. Nina Lakhani, *Women's Rights and Gender Equality*, Gender Development, THE GUARDIAN (Jun. 7, 2017), https://www.theguardian.com/global-development/2017/jun/07/women-refugees-domestic-violence-mexico.
4. *Id.*
5. *Id.*
6. Id.
7. Id.
8. Gender-based violence refers to "any act that is perpetrated against a person's will and is based on gender norms and unequal power relationships." *Sexual and Gender Based Violence*, UNITED NATIONS HIGH COMMISSION OF REFUGEES, https://www.unhcr.org/en-us/sexual-and-gender-based-violence.html (last visited Apr. 17, 2020).
9. Lakhani, *supra* note 3.
10. Colombia's legislation has proven successful in responding to femicides. *See* Elly Darkin, *Making Femicide Visible*, BOGOTA POST (Mar. 10, 2017), https://thebogotapost.com/making-femicide-visible/20310/ (This law affords the state broad power to intervene and prevent gender-based violence. However, it does not offer restorative approaches for survivors of violence or fully address the additional challenges which indigenous women face in seeking justice. Thus, Colombia's legislation offers useful guidance but should not be adopted without careful attention to how to best assist vulnerable populations.).

cifically, Guatemala should follow Colombia's lead by incorporating femicide and domestic violence provisions into existing criminal law and should afford women additional avenues for seeking protection from violence.[11] A comparison between Guatemala and Colombia proves useful because both countries' high rates of violence against women can be attributed to similarities in cultural contexts and civil strife. Also, both Guatemala and Colombia are parties to the same regional and international treaties, that are driving changes in legislation.

During the last few decades, violence against women and femicides in particular, have occurred in epidemic proportions in Latin America.[12] In 2013, Ojeda tweeted her take on violence perpetrated against women in the region, stating simply "[t]hey're killing us."[13] Femicide, defined as the "killing of a woman because she is a woman,"[14] is the most serious form of violence against women.[1516] Thirteen of the twenty-five countries with the highest rates of femicide in the world are in Latin America.[17] In Latin America, there are twelve femicides a day.[18] Femicide rates are high across the world – approximately 66,000 women and girls are killed every year through crimes motivated by gender.[19] Other countries with notably high rates of femicide include South Africa (roughly 9.5 femicides per 100,000 people in 2014), Azerbaijan (7.5 per 100,000), and Latvia (5.2 per 100,000).[20]

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11. L. 1761, julio 6, 2015, PRESIDENCIA DE LA REPUBLICA DE COLOMBIA.

12. I do not want to suggest that these high rates of violence are due to greater prominence of violence by Latinx individuals. The killing of women because of their gender exists in every culture and has existed throughout all societies. Nadera Shalhoub-Kevorkian, *Femicide an the Palestinian Criminal Justice System: Seeds of Change in the Context of State Building?*, 36 LAW & SOC'Y REV. 577, 580 (2002) (Violence against women is a problem around the world, however the recent prevalence of violence against Latinx women requires special attention and study). In 2008, a committee of experts met following up on the Implementation of the Convention of Belem do Para, in order to formally declare that "femicide is the most serious manifestation of discrimination and violence against women" in Latin America and the Caribbean. COMMITTEE OF EXPERTS OF THE FOLLOW-UP MECHANISM OF AMERICAN STATES INTER-AMERICAN COMMISSION OF WOMEN, *Declaration on Femicide, Committee of Experts of the Follow-Up Mechanism to the Belem do Para Convention,* OEA/Ser.L/II.7.10 (Aug. 15, 2008), https://www.oas.org/en/mesecvi/docs/DeclaracionFemicidio-EN.pdf (Ever since this pronouncement, this Committee, the UN, and various human rights organizations have expressed concerns about the current high rates of femicide in this region, as will be elaborated upon below.).

13. Uki Goni, *Argentine Women Call Out Machismo*, N.Y. TIMES (Jun. 15, 2015), http://www.nytimes.com/2015/06/16/opinion/argentine-women-call-out-machismo.html.

14. "Woman" is undefined in the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW") and the Convention of Belem do Para, the two primary international laws on which this Article relies. It is also undefined in existing Guatemalan and Colombian domestic law concerning femicide. This Article uses the word "woman" especially in the context of protecting victims of violence and vulnerable groups, defined broadly, to be inclusive of individuals who identify as women, in order to both provide the most accurate definition, and protect especially vulnerable populations, like transwomen.

15. Noelle Jolin, Comment, *Gender-Based Violence in Colombia: New Legislation Targets Femicides and Acid Attacks*, 91 TUL. L. REV. 371, 373 (2016).

16. This Article will discuss femicide in greater detail *infra*, beginning on page 4.

17. Jolin, *supra* note 15, at 373.

18. *See* Patricia M. Hernandez, *The Myth of Machismo: An Everyday Reality for Latin American Women*, 15 ST. THOMAS L. REV. 859, 866 (2003) (data not including Brazil because unavailable).

19. Matthias Nowak, *Femicide: A Global Problem*, SMALL ARMS SURVEY RESEARCH NOTES, (Feb. 2012), http://www.smallarmssurvey.org/fileadmin/docs/H-Research_Notes/SAS-Research-Note-14.pdf.

20. *Id.*

Further, the Northern Triangle, comprised of El Salvador, Honduras, and Guatemala, is recognized as the "most violent region in the world outside of an active war zone."[21] For many years, Colombia had the highest rates of femicide in the world.[22] As of 2003, Guatemala has the highest rates with 123 femicides per million women,[23] with Colombia as the runner up with 70 femicides per million.[24] This high rate of femicide has continued in Guatemala in more recent years as well, as Guatemala has had either the highest rates of femicide in the world or the second highest, behind El Salvador, over the past 10 years.[25] In 2006, two women were murdered each day in Guatemala.[26] In 2014, Guatemala had a rate of 9.7 femicides per 100,000 people. [27]

Gender-based violence in Guatemala will continue to culminate in femicide through the government's failure to correct the systemic impunity that exists for its perpetrators. Part I of this Article discusses violence against women, defining femicide and its relationship to structural failures of the government to protect women from violence. Part II examines femicide in Guatemala, including an assessment of Guatemala's international and regional obligations to prevent femicide. Part III offers an analysis of Guatemala's current domestic law. Part IV explains why international obligations are important to driving domestic change. Additionally, this part draws comparisons with Colombia. Finally, Part IV discusses two specific enhancements of Guatemalan law in order to protect women: (1) criminalizing domestic violence; and (2) incorporating existing femicide legislation into the criminal code.

I. Femicide

Violence against women is defined by the United Nations Declaration on the Elimination of Violence Against Women ("DEVAW") as "any act of gender-based violence that results in, or is likely to result in, physical sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life."[28] When DEVAW was unanimously adopted in 1993, it defined violence against women as a violation of international human rights and a state responsibility, meaning that countries like Guatemala and Colombia are required to take steps to prevent and punish these types of violence.[29] Similarly, The Organization of American States ("OAS") has defined violence against women as "any act or conduct, based on gender, which causes death or physical,

21. Dr. Thomas Boerman, *The Socio-Political Context of Violence in El Salvador, Honduras, and Guatemala*, 18-10 IMMIGRA. BRIEFINGS 1, 1 (2018).

22. Jolin, *supra* note 15, at 373.

23. Nadine Gasman & Gabriela Alvarez, *Gender: Violence Against Women*, THE AMERICAS QUARTERLY, https://www.americasquarterly.org/node/1930 (last visited Nov. 27, 2018).

24. *Id.*

25. Janice Joseph, *Victims of Femicide in Latin America: Legal and Criminal Justice Responses*, 20 TEMIDA 3, 3 (2017); *see also* Jolin, *supra* note 15.

26. Gasman, *supra* note 23.

27. UN Women, *Guatemala, Americas and the Caribbean*, http://lac.unwomen.org/en/donde-estamos/guatemala (last visited Oct. 12, 2019).

28. G.A. Res 48/104, art. 1–4 (Dec. 20, 1993).

29. *See* Barbara Stark, *Symposium on Integrating Responses to Domestic Violence: Domestic Violence and International Law: Good-Bye Earl (Hans, Pedro, Gen, Chou, Etc.)*, 47 LOY. L. REV. 255, 266 (2001).

sexual or psychological suffering to women, whether in the public or the private sphere."[30] As both Guatemala and Colombia are members of the OAS, they are bound by this definition.[31]

Violence against women is distinguished from more general violence because it consists of abuse and aggression perpetrated against women specifically because of their gender. This includes sexual, physical, psychological, and financial abuse. Men and boys can be, and frequently are, survivors of violence and violence based on gender. However, women and girls comprise an overwhelming majority of victims of gender-based violence. This is especially true in Guatemala.[32] Violence against women tends to be patterned, sexualized, and misogynistic in nature.[33] Holding perpetrators of violence against women "accountable in the justice system is a fundamental measure" for preventing femicide.[34]

Violence against women has been defined as violence that is directed towards women and tends to be patterned, sexualized, and misogynistic[35] in nature.[36] This targeted, misogynistic focus is the central factor that distinguishes femicide from violence that is general in nature and unrelated to gender. Femicide is the most extreme form of violence against women.[37] Defined as the "killing of a woman because she is a woman, [femicide] is distinguishable from homicide and calls attention to the motivations frequently underlying such killings, including misogyny, jealousy, and control."[38]

The term "femicide" was first publicly used in the 1970s by feminist scholar Diana E.H. Russell, stating, "We must realize that a lot of homicide is in fact femicide. We must recognize the sexual politics of murder."[39] Defined in this way, when men murder women or girls, the power dynamics of misogyny and/or sexism are almost always involved; as such, femicides are lethal hate crimes.[40] Russell's focus on men killing women as a political statement brought

30. Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, Jun. 9, 1994, 33 I.L.M. 1534 (hereinafter Convention of Belem Do Para).

31. *Member States, Organization of American States*, http://www.oas.org/en/member_states/default.asp (last visited May 10, 2020) (showing that both Guatemala and Colombia have ratified the OAS Charter and Convention of Belem do Para and are Member States of the OAS).

32. *See* Katharine Ruhl, *Guatemala's Femicides and the Ongoing Struggle For Women's Human Rights: Update to CGRS'S 2005 Report Getting Away With Murder,* 18 HASTINGS WOMEN'S L.J. 199, 206 (2007).

33. *See* Rangita de Silva de Alwis, *Freedom from Violence and The Law: A Global Perspective in Light of the Chinese Domestic Violence Law*, 37 U. PA. J. INT'L L. 1, 7–8 (2015).

34. Office of the United Nations High Commissioner for Human Rights, *Latin American Model Protocol for the Investigation of Gender-Related Killings of Women*, ISBN 978-9962-5559-0-2, http://www.oacnudh.org/wp-content/uploads/2015/10/modelo_protocolo-latinoamericano_investigacion_genero.pdf (hereinafter Latin American Model Protocol).

35. Misogynistic is traditionally defined as "feeling, showing, or characterized by hatred of women." *Misogynistic,* MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/misogynistic (last visited Nov. 27, 2018).

36. De Silva de Alwis, *supra* note 33, at 8.

37. Jolin, *supra* note 15, at 383; *see also* Anastasia Moloney, *Colombia confronts femicide, the most extreme form of violence against women*, REUTERS WORLD NEWS (Aug. 20, 2015), https://www.reuters.com/article/us-colombia-women-murder/colombia-confronts-femicide-the-most-extreme-form-of-violence-against-women-idUSKCN0QP0CM20150820.

38. Jolin, *supra* note 15.

39. *See* DIANA E.H. RUSSELL, INTRODUCTION: THE POLITICS OF FEMICIDE, IN FEMICIDE IN GLOBAL PERSPECTIVE 3 (2001).

these murders into the public eye and worked to negate the popular conception that intimate partner killings were private matters into which the state should not intrude.[41]

In discussing femicide, I will be using the definition from the Latin American Model Protocol for the investigation of gender-related killings of women, promulgated by The Committee on the Elimination of all Forms of Discrimination Against Women ("CEDAW"),[42] which defines femicide as "the murder of women because they are women," and typically carried out with extreme brutality.[43] As both Guatemala and Colombia have ratified CEDAW, this is the definition they are implementing into domestic law.[44]

For a murder to be defined as femicide, the overriding consideration is that killing be motivated by gender.[45] This is included in the definitions of femicide in CEDAW[46] and the Latin American Model Protocol for the Investigation of Gender-Related Killings of Women.[47] Femicide typically has a number of factors that differentiate it from other forms of homicide.[48] These can include: the savagery and sexual nature of attacks; the deliberate destruction of identifying features and female specific body parts; the ritualization of the crime; and the political significance or message of the murders.[49] Additionally, a frequent occurrence in femicides is destroying or hiding a victim's body in order to prevent it from being identified.[50] This includes deliberate modification of the body, such as obliterating the face and genitals, burning, the use of acid, or dismemberment.[51] Not all of these factors are required for a murder to classify as a femicide, although all of them are probative of intent.[52] Femicide also includes the killing of women because they are women: it includes killings, like widow burning, female infanticide, and killing women for adultery, where their male partners are not punished.[53]

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40. *Id.* at 4.

41. *Id.*

42. The Committee on the Elimination of all Forms of Discrimination Against Women, implementing The Convention on the Elimination of All Forms of Discrimination against Women, OHCHR, 1249 U.N.T.S. 13 (1981), *infra* note 104.

43. Office of the United Nations High Commissioner for Human Rights, *Latin American Model Protocol for the Investigation of Gender-Related Killings of Women*, ISBN 978-9962-5559-0-2, http://www.oacnudh.org/wp-content/uploads/2015/10/modelo_protocolo-latinoamericano_investigacion_genero.pdf.

44. Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), Sept. 3, 1981, 1249 U.N.T.S. 13 (hereinafter CEDAW) (Guatemala signed CEDAW on June 8, 1981, and ratified it on August 12, 1982. Colombia signed the treaty on July 17, 1980 and it was ratified on January 19, 1982.).

45. *See* RUSSELL, *supra* note 40, at 4; *see also* Julieta Lemaitre, *Violence*, 24 IUS GENTIUM 177, 186 (2013).

46. G.A. Res. 54/4, (Oct. 15, 1999).

47. Latin American Model Protocol, *supra* note 34.

48. Boerman, *supra* note 21, at 1.

49. *Id.*

50. CENTRAL AMERICAN WOMEN'S NETWORK (CAWN), FEMICIDE AND OTHER FORMS OF VIOLENCE AGAINST WOMEN, CONTEXT AND REALITIES 2 (2009), http://www.cawn.org/html/spring09%20version%20website.pdf.

51. Latin American Model Protocol, *supra* note 34, at 89.

52. *Id.*

53. *See* Rossella Selmini & Suzy McElrath, *Violent Female Victimization Trends across Europe, Canada, and the United States*, 43 CRIME & JUST. 367, 376 (2014).

The violent killing of any person is a tragedy. However, femicide, unlike non-gendered murder, highlights the gendered motives behind these violent deaths: "attempts to control [women's] lives, their bodies and/or their sexuality, to the point of punishing through death those women that do not accept that submission."[54] As a result, femicide has greater societal implications, which the state has an obligation to correct.[55] Although the state has an obligation to prevent and investigate any form of homicide, the state has a greater obligation to intervene in femicide, due to the greater level of violence these murders typically exhibit, as well as the overall history of state failure to protect women in their jurisdiction from violence.[56] Perpetrators of femicide are often the current or former partners of the victims, and the victims frequently have a long history of abuse leading up to the final, most violent act.[57] This means that the state often has many opportunities to intervene in an abusive relationship before a femicide occurs.[58]

Guatemala has one of the highest rates of femicide in the world, with a culture that has allowed most perpetrators to escape punishment for their crimes.[59] The state has an obligation to its female residents under existing international and domestic law to prevent femicide. Interestingly, violence against women has increased in Guatemala in past years, compared to violence against men, which has not.[60] Additionally, the murders of women are distinct for their misogynistic nature, including distinctive aspects like the mutilation of women's faces and genitals.[61]

Establishing laws to prevent and protect against femicide can lead to positive social change. According to a Small Arms Survey, femicides account for almost 20% of all homicides globally.[62] This adds up to the killings of roughly 66,000 women annually.[63] Even though existing homicide laws do provide some protection for women, the rationale behind implementing femicide laws is that women deserve greater protections due to gender-based vulnerabilities that contribute to femicide. Therefore, by using the term femicide and defining it to adequately reflect the phenomenon of gender-motivated killings, feminist scholars and activists hope to shed light on a crime that has often been shrouded in silence or met with indifference.

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54. Organization of American States Inter-American Commission of Women, *Declaration on Femicide, Committee of Experts of the Follow-Up Mechanism to the Belem do Para Convention*, U.N. Doc. MESECVI/CEVI/DEC. /08, 3 (2008).

55. Latin American Model Protocol, *supra* note 34, at 70.

56. *Id.*

57. *See* Jessica Marsden, *Domestic Violence Asylum After Matter of L-R-*, 123 YALE L.J. ONLINE 2512, 2519 (2014); *see also* Moloney, *supra note* 38.

58. *Id.*

59. Serena Cosgrove & Kristi Lee, *Persistence and Resistance: Women's Leadership and Ending Gender-Based Violence in Guatemala*, 14 SEATTLE J. SOC. JUST. 309, 314 (2015); Allison W. Reimann, *Hope For The Future? The Asylum Claims of Women Fleeing Sexual Violence in Guatemala*, 157 U. PA. L. REV. 1199, 1207, (2009).

60. Katharine Ruhl, *Guatemala's Femicides and the Ongoing Struggle For Women's Human Rights: Update to CGRS'S 2005 Report Getting Away With Murder,* 18 HASTINGS WOMEN'S L.J. 199, 206 (2007).

61. *Id.*

62. *Femicide: A Global Problem*, *supra* note 19.

63. *Id.*

A. Feminist Theory

It is important to discuss femicide from a lens of intersectional feminist theory, similar to those scholars who use the term "feminicide." This allows advocates, governments, and lawyers to acknowledge the role of the state in facilitating or allowing femicide to continue.[64] Contemporary feminist authors would likely reject the views offered in this Article as essentialist. However, this Article hopes to incorporate an intersectional view of feminist issues while still grappling with the structural issues that allow violence to focus on women and paternalistic attitudes to continue. Although a typical third-wave feminist approach[65] would reject the dominance of gender and warn against adopting one-size-fits-all approaches to violence against women, it is possible to both highlight violence against women and incorporate intersectional approaches that allow for tailored solutions.

Intersectional feminist theory offers a focus on social and legal hierarchies that contribute to inequality, rather than simply discussing individual sources of bias. Intersectional feminists regard law and legal rights as "important means by which those disadvantaged by the current social and legal order may resist and challenge the conditions of their subordination."[66] Additionally, intersectional feminists often are concerned about the role played by "both sexual violence and gendered notions of economic worth in maintaining a system of gender subordination."[67] Viewing femicide in Guatemala through this framework is important because of the structural and cultural issues that contribute to the epidemic of femicide in the country. It is important to emphasize the public nature of these issues, and thus, the Guatemalan government's active obligation to provide protection for its female citizens.

The UN has recognized that gender-motivated killings are linked to a system of structural discrimination against women and girls.[68] Thus, in order to prevent femicide, countries must implement a holistic approach to address the social and political factors that perpetuate discrimination and violence. An important aspect of this is acknowledging that, in homicide statutes, "crimes of passion" are often used as a mitigating factor, when a man kills his intimate

64. Within an intersectional framework it is important to acknowledge the issues of race, class, and sex that can play into bias and inequality. Gender as a source of discrimination does not exist in a void, but rather operates within a complex network of other identities which can compound inequality, or alleviate it.

65. Third-wave feminism defines feminism broadly and represents an intersectional agenda that seeks social, economic, and environmental justice simultaneously. Kathleen Kelly Janus, *Finding Common Feminist Ground: The Role of the Next Generation in Shaping Feminist Legal Theory*, 20 DUKE J. GENDER L. & POL'Y 255, 258 (2013) (One of the main arguments for third-wave feminists is that it "is counterproductive to isolate gender as a single variable.").

66. *See e.g.,* Rosalind Dixon, *Feminist Disagreement (Comparatively) Recast,* 31 HARV. J.L. & GENDER 277, 283 (2008). However, third-wave feminism is at its heart a re-centering of theory and action around intersectionality. As feminist scholar bell hooks defined feminism, it is a "commitment to eradicating the ideology of domination" which permeates society through sex, race, class, and other structural delineations. precedence." *See* BELL HOOKS, AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM 194–95 (1981). As such, this Article seeks to focus on culture, wealth, and structural barriers in addition to gender, and therefore, this approach is not as oppositional to third-wave feminism as one might initially suspect.

67. Dixon, *supra* note 66, at 301.

68. Office of the United Nations High Commissioner for Human Rights, *Gender-Related Killings of Women And Girls* (Aug.2013),https://www.ohchr.org/Documents/Issues/Women/WRGS/OnePagers/Gender_motivated_killings.pdf.

partner.[69] However, femicide statutes recognize that the killing of women and girls is often due to structural and pervasive discrimination, and therefore, statutes generally do not offer exceptions for passion.[70] This creates a necessary level of state and perpetrator accountability for gender-motivated murder.

B. Feminicide

Femicide is not the only term that exists to describe the politicized killing of women because they are women. A term which has gained traction in Central America in recent years is "feminicide."[71] Feminicide is a political term that seeks to hold institutions responsible for not protecting women's integrity.[72] Feminicide is defined as femicide that results in systemic impunity and normalization of violence as a social relation.[73] This term "encompasses more than femicide because it holds responsible not only the male perpetrators but also the state and judicial structures that normalize misogyny."[74] Feminicidal violence is "produced by the patriarchal, hierarchical, and social organization of gender."[75] Thus, it recognizes the inextricable role of the state in normalizing and perpetuating violence against women.[76]

Due to historic and ongoing lack of state protection for women who experience domestic violence and femicide in many countries, the concept behind feminicide works to clearly place an obligation on the state to prevent and punish violence against women, in addition to an obligation on individuals to not harm their partners.[77] This responsibility is integral to combating gender-based violence because it holds state actors accountable for their failure to prevent and punish a public crime, and thus, makes it harder for opponents to argue that femicide is merely an individual, private act.[78] Feminicide, thus, is a "state crime," referring to the state's failure to prevent and prosecute these crimes.[79] While the term femicide is more commonly used in Colombia and Guatemala to refer to these acts, when discussing feminicide it is important to highlight the structural and institutional nature of these acts and to encourage

69. *Id.*

70. *See* Inter-American Model Law on the Prevention, Punishment and Eradication of the Gender-Related Killing of Women and Girls (Femicide/Feminicide), OAS, [Approved at the XV Meeting of the Committee of Experts of the MESECVI, held on December 3, 4 and 5, 2018 in Washington, D.C.] (OAS. Documentos oficiales; OEA/Ser.L/II.6.21), (2018), at 11 (stating that "violent emotion" should not be used to mitigate the responsibilities of those who commit femicide).

71. *See* Joseph, *supra* note 25, at 3; United Nations Development Project, *UN Women, From Commitment to Action: Policies to End Violence Against Women in Latin America and The Caribbean, Regional Analysis Document* (2017), http://www.latinamerica.undp.org/content/dam/rblac/docs/Research%20and%20Publications/Empoderamiento%20de%20la%20Mujer/UNDP-RBLAC-ReportVCMEnglish.pdf; Lorena Arroyo, *Femicide: The Scourge that kills 12 women a day in Latin America*, UNIVISION (Mar. 7, 2012), https://www.univision.com/univision-news/latin-america/femicide-the-scourge-that-kills-12-women-a-day-in-latin-america.

72. Cosgrove, *supra* note 59, at 314.

73. *Id.*

74. *Id.* at 316.

75. Jolin, *supra* note 15, at 382.

76. *Id.*

77. Arroyo, *supra* note 71.

78. *Id.*

79. Latin American Model Protocol, *supra* note 34, at 36.

state responses in all of Latin America.[80] As a result, from this viewpoint, reformation of the state has a vital impact on both punishing the perpetrators of femicide and rectifying the state's original role in perpetuating violence.[81] This Article, therefore, discusses feminicide with this intent: to acknowledge the role of the state in allowing femicide to occur and to suggest that solving the problem of femicide requires state accountability and reform.

II. Femicide in Guatemala

Guatemala faces epidemic levels of gender-based violence. A significant and fundamental problem in discussing violence against women in Guatemala is that there is no standardized system for collecting evidence about violence against women in the country.[82] Further, many of these crimes go unreported, as victims either fear reprisal if they report, or they do not think reporting would lead to any constructive results, like an investigation or protection from their abuser.[83] However, while statistics may be hard to find, it is clear that the rate at which women in Guatemala are killed continues to rise.[84] Guatemala has historically had the highest rates of femicide in the world.[85] Six hundred sixty-five women were murdered in 2005, according to the Centro De Reportes Informativos Sobre Guatemala (CERIGUA).[86] According to Advocates for Human Rights, "[i]n 2013, there were 31,836 reports of violence against women and 198 reports of femicide in Guatemala."[87] In the first ten months of 2017, the Guatemalan Public ministry received 51,742 reports of violence against women, and 10,963 reports of sexual violence against women and girls.[88]

A. Background

Although violence against both men and women is endemic in Guatemala, the murders of women are distinct "both for their misogynistic nature, and for the disproportionate rate at which they are increasing."[89] One investigation showed the rate of increase of women killed rose 56 percent between 2002 and 2004.[90] In contrast, the rate of increase of men killed during

80. Id.

81. *See Guatemala: No Protection, No Justice: Killings of Women (An Update)*, AMNESTY INTERNATIONAL, https://www.amnestyusa.org/reports/guatemala-no-protection-no-justice-killings-of-women-an-update/ (last visited Apr. 17, 2020); *see also Sexual and Gender Based Violence (SGBV) & Migration Fact Sheet,* LATIN AMERICA WORKING GROUP, at 3 (Apr. 2018), https://supportkind.org/wp-content/uploads/2018/05/SGBV-Fact-sheet.-April-2018.pdf.

82. Ruhl*, supra* note 32, at 205.

83. *Id.* at 206.

84. *Guatemala, Americas and the Caribbean*, *supra* note 27.

85. Cosgrove, *supra* note 59, at 314.

86. *See* Ruhl, *supra* note 32, at 205–06.

87. *Guatemala, Submission to the Human Rights Committee for the 115th Session* (Information For Adoption of List of Issues Prior to Reporting), THE ADVOCATES FOR HUMAN RIGHTS, at 1 (Aug. 2015), https://www.theadvocatesforhumanrights.org/uploads/guatemala_hrc_loipr_august_2015.pdf.

88. *Sexual and Gender Based Violence (SGBV) & Migration Fact Sheet*, *supra* note 81, at 2.

89. Ruhl, *supra* note 32, at 206.

90. *Id.*

the same period was 36 percent.[91] Further, the majority of murders of women in Guatemala include rape and mutilation, where the killings of men commonly do not.[92]

An Amnesty International report released in 2005 showed the number of women murdered from 2002 to 2004 almost tripled, going from at least 163 women in 2002 to over 527 in 2004.[93] A United Nations Development Program for Guatemala report released in 2007 based on the Amnesty International report showed the numbers of murdered women in Guatemala in 2005 and 2006 were 518 and 603, respectively.[94] It is clear from these statistics that femicide is a rampant problem in Guatemala and has been for quite some time. As one commentator has described the situation, "someone has declared war on women."[95]

A major cause of the high rates of femicide in Guatemala is the lack of effective government-led efforts to prevent or punish violence against women. With respect to women's rights in Guatemala, politics, power, and culture are all highly interrelated.[96] Guatemala has structural problems in its legal system, which result in the failure to effectively investigate, prosecute, and punish femicide, which in turn results in a failure to protect women who live in Guatemala.[97]

One of the contributing factors leading to Guatemala's high rates of femicide is its failure to adequately prevent, criminalize, or penalize domestic violence.[98] Domestic violence is a common problem in Guatemala.[99] Reports suggest at least 36 percent of Guatemalan women living with a male partner experience domestic abuse.[100] Roughly a quarter of all Guatemalan women killed die as a result of domestic violence.[101] In 2011, one-third of all women killed in

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91. Yakin Erturk, *Integration of the Human Right of Women and the Gender Perspective, Report of the Special Rapporteur on Violence against Women*, U.N. E/CN.4/2005/72/Add.3, at 2 (Feb. 10, 2005).

92. *See* Ruhl, s*upra* note 32, at 207.

93. *See* Paula Godoy-Paiz, *Women in Guatemala's Metropolitan Area: Violence, Law, and Social Justice*, 2 STUDIES SOC. JUST.1, 27 (Jan. 27, 2009).

94. *Id.* at 30.

95. *See* Christine Toomey, *Beasts of Prey*, SUNDAY TIMES 42 (Aug. 28, 2005), http://www.christinetoomey.com/pdfs/Guatemala_Murders_Beasts_of_Prey.pdf.

96. *Guatemala: No Protection, No Justice: Killings of Women (An Update)*, AMNESTY INTERNATIONAL, https://www.amnestyusa.org/reports/guatemala-no-protection-no-justice-killings-of-women-an-update/ (last visited Nov. 27, 2018); *see also Sexual and Gender Based Violence (SGBV) & Migration Fact Sheet*, LATIN AMERICA WORKING GROUP, https://supportkind.org/wp-content/uploads/2018/05/SGBV-Fact-sheet.-April-2018.pdf (last visited Apr. 17, 2020); *see* Hector Ruiz, *No Justice for Guatemalan Women: An Update Twenty Years After Guatemalan's First Violence Against Women Law*, HASTINGS WOMEN'S L. J., 101, 104 (2017).

97. *See Why Does Guatemala Have Some of the Highest Rates of Femicide in the World*, AMNESTY INTERNATIONAL, https://www.amnestyusa.org/why-does-guatemala-have-one-of-the-highest-rates-of-femicide-in-the-world/ (last visited Apr. 17, 2020); Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, A/HRC/17/26/Add.2.

98. Ruiz, *supra* note 96, at 104; *see also Why Does Guatemala Have Some of the Highest Rates of Femicide in the World*, *supra* note 97.

99. *Guatemala: No Protection, No Justice: Killings of Women (An Update)*, *supra note* 96; *see also Sexual and Gender Based Violence (SGBV) & Migration Fact Sheet*, *supra* note 81.

100. Reimann, *supra* note 59, at 1207–08.

101. *Guatemala, Submission to the Human Rights Committee for the 115th Session, supra* note 87.

Guatemala had previously reported experiencing domestic violence.[102] However, domestic violence is rarely prosecuted in the country, meaning that few women are able to access criminal or civil protections. Domestic violence is prosecuted only if "signs of injury are still apparent ten days later, which ignores psychological harm and acts of violence that result in less visible injury."[103] This approach means that only women who have injuries so grave that physical marks are visible for ten days can bring a claim. It also blatantly ignores other forms of domestic violence, like psychological and verbal abuse. This decreases the possibility for penal or judicial intervention at a time when it could be most effective at preventing femicide.

B. Guatemala's International Obligations

In failing to effectively respond to reports of violence against women, including domestic violence and femicide, Guatemala has violated its international obligation to protect women under the international conventions to which it is a state party. Guatemala has recently faced international pressure to come more into conformity with its international obligations. Colombia faced similar pressure prior to the implementation of its femicide laws and is a good example of a country that has successfully implemented compliance measures with CEDAW and Belem do Para, which suggests that Guatemala could have a similar success.[104]

Guatemala is party to international human rights regimes that require the protection of women and that are intended to improve women's overall well-being. These regional and international obligations are driving the pressure for the Guatemalan government to implement legislative change. In part, this is because under the Guatemalan Constitution, international law is on parity with domestic law, which means that when the Guatemalan government ratifies international law, it has an obligation to implement such rights.[105] Additionally, international pressure for states to follow-through on their treaty obligations has previously been effective in creating policy change.[106]

In failing to effectively respond to reports of violence against women, including domestic violence and femicide, Guatemala fails to comply with its international obligations.[107] Guatemala has voluntarily undertaken several international obligations for the protection of women's rights and implemented them into domestic law. These obligations include ratifying

102. *Id.*

103. *Id.* at 1214.

104. CEDAW, *Ninth periodic report of Colombia under article 18 of the Convention*, CEDAW/C/COL/9, (Dec. 4, 2017).

105. *From the Household to the Factory: Sex Discrimination in the Guatemalan Labor Force*, HUMAN RIGHTS WATCH, (Jan. 2002), https://www.hrw.org/report/2002/02/12/household-factory/sex-discrimination-guatemalan-labor-force.

106. *Guatemala, Submission to the Human Rights Committee for the 115th Session, supra* note 87; *see also* Karen Musalo & Blaine Bookey, *Crimes Without Punishment: An Update on Violence Against Women and Impunity in Guatemala*, 10 HASTINGS RACE & POVERTY L.J. 265, 266 (2013).

107. CEDAW, *supra* note 44; Convention of Belem do Para, *supra* note 30.

CEDAW[108] and its optional protocol,[109] and ratifying the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (Convention of Belem do Para).[110] Countries that have ratified CEDAW and the Convention of Belem do Para, like Guatemala, are legally bound to implement their requirements.[111] These treaties matter because they specify what Guatemala is required to do under international law in order to prevent and prosecute femicide. Therefore, Guatemala is currently in violation of the international human rights norms requiring each State to provide effective judicial investigation, prosecution, and punishment of femicide.[112] Violence against women is a violation of fundamental human rights that are protected under international law to which Guatemala is a state party.[113]

C. CEDAW

This was further embodied in international law when Guatemala ratified the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW") and General Recommendation 19 to CEDAW.[114] CEDAW prohibits discrimination against women, including violence against women. The main focus of CEDAW is implementing positive measures as a means of assuring substantive, rather than merely formal equality.[115] A prohibition against violence against women was explicitly incorporated into CEDAW's jurisprudence in 1992, due to the adoption of General Recommendation 19, which "expressly confirmed that femicide impedes gender equality."[116] This Recommendation also broadened the definition of violence to include "acts that inflict physical, mental, or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty," whether occurring in public or private life.[117]

Because Guatemala has ratified CEDAW and adopted it into domestic law, preventing femicide is an obligation of the Guatemalan government. This idea of state responsibility is explicitly addressed in Article 4 of CEDAW, which states, "[s]tates should condemn violence against women . . . and pursue by all appropriate means and without delay a policy of eliminat-

108. CEDAW, *supra* note 44 (Formally, CEDAW refers to the Committee charged with maintaining the Convention but this acronym also has become used commonly to refer to the Convention itself.).

109. United Nations Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 54/4, U.N. Doc A/Res/54/4 (Oct. 15, 1999).

110. Convention of Belem Do Para, *supra* note 30.

111. UN Women, *Overview of the Convention*, https://www.un.org/womenwatch/daw/cedaw/ (last visited Nov. 27, 2018).

112. *See* CEDAW General Recommendation No. 19 at 2–3 (declaring this is an international norm, based on CEDAW and other widely accepted UN provisions); *see also Velasquez Rodriguez Case, Case 9*, Inter-Am. Ct. H.R. 123, 184, OEA/ser.C./No.4, para. 166 (1988) (Under the American Convention, States have an affirmative duty to investigate, prosecute, and punish human rights violators; this duty must be carried out by the judicial organs of the State.).

113. Ruhl, *supra* note 32, at 216; *see also* CEDAW, *supra* note 44; Convention of Belem do Para, *supra* note 30.

114. CEDAW, *supra* note 44; CEDAW General Recommendation No. 19 *supra* note 112.

115. *See* Martha Morgan, *Taking Machismo to Court: The Gender Jurisprudence of the Colombian Constitutional Court*, 30 U. MIAMI INTER-AM. L. REV. 253, 269 (1999).

116. CEDAW General Recommendation No. 19, *supra* note 112; *see also* Angelica Feldmann, Note, *Cross-Border Domestic Violence: The Global Pandemic and The Call For Uniform Enforcement of Civil Protection Orders*, 40 SUFFOLK TRANSAT'S L. REV. 35, 45 (2017).

117. CEDAW General Recommendation No. 19, *supra* note 112.

ing violence against women."[118] CEDAW is based on the principle of state obligation.[119] This convention "mandates both legal and development policy measures to guarantee the rights of women."[120] The emphasis of this international treaty is that there must be a practical realization of rights for women living within the State Parties. As such, CEDAW establishes that it is the obligation of the state to guarantee the availability of "adequate, effective remedies that are proportional to the rights violated and the gravity of the harm suffered; the inclusion of compensation to be included; and remedies for civil damages and criminal sanctions."[121]

Given such state responsibility, Guatemala must take action "preventing, investigating and punishing violence against women, whether on the part of the state or private persons, and modifying social and cultural conduct based on stereotyped roles."[122] CEDAW calls on states to "exercise due diligence to prevent, investigate and in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons."[123] Due to the development of this due diligence principle, a government is responsible for the actions of its own agents, and also has a responsibility to protect women from violence inflicted by private actors.[124] A government that "fails to take such measures can be held to have breached its due diligence duties and therefore complicit in human rights abuse."[125] In 2006, the UN Special Rapporteurs affirmed that this standard of State due diligence and responsibility for eliminating violence against women is universal, as well as a rule of customary international law.[126]

D. Guatemala's Regional Obligations

On a more regional level, Guatemala also has obligations to prevent and punish violence against women under the Convention of Belem do Para.[127] On June 9, 1994, the Organization of American States adopted the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, also known as the Convention of Belem do Para.[128] Guatemala ratified the Convention of Belem do Para in 1995.[129] The Convention of Belem do Para is a regional instrument in Latin American and the Caribbean that functions as

118. CEDAW, *supra* note 44.

119. *Id.* article 2.

120. *See* Anu Saksensa, *CEDAW: Mandate for Substantive Equality,* 13 INDIAN J. GENDER STUD. 481, 483 (2007).

121. *See* Natalia Gherardi, *Violence Against Women in Latin America*, 24 INT'L. J. HUM. RTS. 1, 4 (2017).

122. *Id.*

123. Declaration on the Elimination of Violence against Women, U.N. Doc. A/RES/48/104 (Dec. 20, 1993).

124. De Silva de Alwis, *supra* note 33, at 16.

125. *Id.*

126. *Id.*

127. Convention of Belem do Para, *supra* note 30.

128. *See* Meredith Kimelblatt, Note, *Reducing Harmful Effects of Machismo Culture on Latin American Domestic Violence Laws: Amending the Convention of Belem do Para to Resemble the Istanbul Convention*, 49 GEO. WASH. INT'L L. REV. 405, 405 (2016).

129. *See* Hector Ruiz, *No Justice for Guatemalan Women: An Update Twenty Years After Guatemala's First Violence Against Women Law*, 29 HASTINGS WOMEN'S L.J. 101, 102 (2018).

a legally binding mandate for the ratifying states.[130] This Convention is notable for being the first binding instrument to specifically acknowledge the issue of violence against women and call on states to ensure women's rights to live free from violence. Under Article 1, the Convention defines violence against women as a human rights violation consisting of "any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or private sphere."[131] Similarly to how UN Conventions have been effective in creating incremental policy change, so too has this Convention pushed State parties to change legislation.[132]

III. Guatemalan Domestic Law

In response to this civic and treaty-body pressure, the Guatemalan legislation has taken steps in recent years to make its criminal and legal codes more in line with the international treaties it has ratified. A few of the most notable changes have been ones to improve protections for women and girls. For example, the government recently reformed parts of the Civil Code to remove explicitly discriminatory provisions, like the idea that a man convicted of rape could be pardoned if he married his victim.[133] Additionally, the legislature in 2001 implemented a new law raising the age of marriage to eighteen.[134] Formerly, it was fourteen for girls, which violated prohibitions in CEDAW against child brides.[135] After international condemnation, the Guatemalan government reformed the law.[136] This is an important step towards compliance with CEDAW and also highlights Guatemala's willingness to seek compliance with important international conventions. Further, this shows the importance of international human rights treaties. The institutionalization of global human rights can have a direct and positive impact on state practices, as the states work to come into conformity with their commitments.[137]

As a party to CEDAW and Belem do Para, Guatemala has regional and international obligations to prevent femicide and provide effective remedies for those who experience violence.[138] However, their responses up to this point have not been satisfactory because there are high rates of impunity for perpetrators of femicide, due to lack of jurisdiction, established law, and effective means of enforcement. Guatemala should work to abide by its treaty obligations and fully protect women who face actual or threatened violence, by incorporating femicide into existing criminal law and creating protections for survivors of domestic violence.

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130. *Id.*

131. *Id.*

132. *See* Gherardi, *supra* note 121, at 4.

133. *See* Natalie Jo Velasco, *The Guatemalan Femicide: An Epidemic of Impunity*, 14 L. & BUS. REV. AM. 397, 412 (2008).

134. *See* Justin Behravesh, *Guatemala's Ban On Child Marriage: A Step Toward Compliance With CEDAW*, 41 FORDHAM INT'L L.J. 53, 54 (2017).

135. *Id.* at 56.

136. Id.

137. *See* Emilie Hafner Burton, *Human Rights in a Globalizing World: The Paradox of Empty Promises,* 110 AM. J. SOC. 1373, 1390 (2005).

138. *See* CEDAW ratification status, *supra* note 44, and Belem do Para ratification status, *supra* note 31.

Guatemala has enacted three laws to address violence against women: the Ley para Prevenir, Sancionar y Erradicar la Violencia Intrafamiliar (Law to Prevent, Sanction, and Eradicate Violence within the Family) in 1996;[139] the Ley de Dignificación y Promoción Integral de la Mujer (Law for the Dignification and Integral Promotion of Women) in 1999;[140] and, most recently, the Ley Contra el Femicidio y Otras Formas de Violencia Contra la Mujer (Law Against Femicide and Other Forms of Violence Against Women), which was implemented in 2008.[141]

A. The 1996 & 1998 Laws

The Law Against Interfamilial Violence was enacted in 1996. This law did not criminalize violence against women[142] but was preventative in nature and created legal pathways for women to seek protective orders, and thus, legal protection from future abuse.[143] At the time of implementation, this was the sole law in Guatemala addressing violence against women.[144] Although the primary goal of this law was to prevent intra-familial violence, this law lacks a mechanism which could punish those who inflicted violence or rehabilitate those who experienced violence.[145] Guatemala enacted this law immediately after its ratification to the Convention of Belem do Para in a clear attempt to conform with its obligations under the Convention as signatory.[146]

The 1999 Law for the Dignity and Integral Promotion of Women brought Guatemalan domestic law more in line with its international requirements but similarly failed to fully protect its subject populations.

The 1996 and 1999 laws both fail to explicitly address domestic violence or femicide.[147] Rather, their focus is on the family and address to a very limited extent the concept of intrafamily violence.[148] The 1999 Law did aim to prevent and sanction private violence,[149] specifically

139. Ley para Prevenir, Sancionar y Erradicar la Violencia Intrafamiliar, DIARIO DE CENTRO AMÉRICA. Gobierno de Guatemala (1996), Accessed via Global Database on Violence Against Women, UN Women, http://evaw-global-database.unwomen.org/en/countries/americas/guatemala/1996/ley-para-prevenir-sancionar-y-erradicar-la-violencia-intrafamiliar.

140. Ley de Dignificación y Promoción Integral de la Mujer, Decreto Numero 7-99, El Congreso De La Republica De Guatemala (1999), http://extwprlegs1.fao.org/docs/pdf/gua134317.pdf.

141. Ley contra el Femicidio y otras Formas de Violencia Contra la Mujer, Decreto Numero 22-2008, El Congreso de la Republica De Guatemala (2008), https://www.oas.org/dil/esp/Ley_contra_el_Femicidio_y_otras_Formas_de_Violencia_Contra_la_Mujer_Guatemala.pdf (hereinafter Femicide Law).

142. Velasco, *supra* note 133, at 413.

143. Ruiz, *supra* note 96, at 102.

144. Musalo & Bookey, *supra* note 106, at 273.

145. *See* Karen Musalo, *Crimes Without Punishment: Violence Against Women in Guatemala*, 21 HASTINGS WOMEN'S L. J. 161, 195 (2010).

146. Id.

147. Ley para Prevenir, Sancionar y Erradicar la Violencia Intrafamiliar, *supra* note 139; Ley de Dignificación y Promoción Integral de la Mujer, *supra* note 140.

148. Ley para Prevenir, Sancionar y Erradicar la Violencia Intrafamiliar, *supra* note 139; Ley de Dignificación y Promoción Integral de la Mujer, *supra* note 140.

149. Ley de Dignificación y Promoción Integral de la Mujer, *supra* note 140.

addressing violence against women in accordance with the Convention of Belem do Para.[150] However, this law does not functionally work to prevent or punish violence, contrary to its stated aims. Rather, it requires the registration of cases, collection of statistics, and development of public policies.[151]

Due to the limited scope of these laws in addressing violence against women, until 2008, the Guatemalan penal and judicial system did not recognize many forms of violence in the lives of Guatemalan women as violence, and criminalized even fewer.[152] The judicial system contributed to "normalizing violence in the lives of women."[153]

Some scholars do argue that Guatemala does not need more laws criminalizing the killings of women, but rather the political will to enforce existing law.[154] However, homicide laws in the Guatemalan Criminal Code have been ineffective in addressing the problems of femicide in Guatemala due to the frequent dismissals of cases of domestic violence and of killing of female partners by men as being "private matters," as well as to the gender bias which permeates the investigative and judicial process, resulting in impunity for perpetrators.[155] Changes to the existing femicide law could prevent this by affording judges and prosecutors a clearer way to pursue these cases, as well as allowing women to seek protection before femicide occurs.

B. The 2008 Femicide Law

In contrast to the 1996 and 1999 Laws, the 2008 Law Against Femicide has the explicit aim of preventing femicide. The objective of this law is to "guarantee the life, liberty, integrity, dignity, protection, and equality of all women, and to promote and implement laws to eradicate physical, psychological, sexual, or any other type of coercion against women."[156]

Under the 2008 Femicide Law, killing of a woman for being a woman under the following circumstances within the framework of unequal relations of power between men and women is a crime of femicide:

> (1) having tried unsuccessfully to establish or re-establish a couple's or intimate relationship with the victim or to maintain family, marriage, cohabitation, intimate, courtship, friendship, companionship, or employment relations with the victim during the time at which the act was perpetrated, or having maintained such relations with the victim;

150. Velasco, *supra* note 133, at 414.

151. *Id.*

152. Ley para Prevenir, Sancionar y Erradicar la Violencia Intrafamiliar, *supra* note 139; Ley de Dignificación y Promoción Integral de la Mujer, *supra* note 140.

153. *See* Cecilia Menjivar & Shannon Drysdale Walsh, *Subverting Justice: Socio-Legal Determinants of Impunity For Violence Against Women in Guatemala*, MDPI (2016), https://www.mdpi.com/2075-471X/5/3/31/htm.

154. *See* Yakin Ertürk, *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women, Mission to Guatemala, Economic and Social Council*, E/CN.4/2005/72/Add.3 (Feb. 10, 2005).

155. *Guatemala, Submission to the Human Rights Committee for the 115th Session, supra* note 87.

156. Musalo, *supra* note 145, at 195.

> (2) as the result of a repeated expression of violence against the victim;
>
> (3) as a result of group rituals whether or not using weapons of any kind;
>
> (4) disregarding the body of the victim to satisfy sexual instincts, or committing acts of genital mutilation or any other type of mutilation;
>
> (5) out of misogyny;
>
> (6) in the presence of the victim's children.[157]

However, the 2008 Femicide Law has faced problems in enforcement. This law is not a part of the Civil or Criminal Codes, creating confusion as to how it relates to existing laws,[158] as well as which courts have the jurisdiction to apply its provisions.[159] Many of the provisions of the Femicide Law are in conflict with the current Criminal Code.[160] Many murders that meet the criteria of femicide may not be charged as such because the Criminal Code does not offer femicide as an aggravating factor to murder.[161] As a result, courts do not recognize or properly handle femicide because much of the Femicide Law is not applicable in criminal courts.[162] For example, Article 200 of the Criminal Code allowed a person who committed rape to escape prosecution if they married their victim.[163] Although this was struck down by Guatemala's Constitutional Court in 2005, it continues to apply to cases initiated prior to 2005.[164] Accordingly, while the Femicide Law criminalizes femicide and a range of acts of violence, femicide cannot be charged as such within the criminal system because it is not included in Guatemala's Criminal Code.[165]

Additionally, the Femicide Law also fails to explicitly mention domestic violence, though it offers penalties of five- to eight-year prison sentences for physical violence, and murder motivated by gender.[166]

The Femicide Law is a symbolic success and a good first step at establishing protections for Guatemalan women from violence. "For the first time, Guatemalan women had codified legal protection from harm, violence, and death."[167] Nevertheless, the actual impact has been limited. The law itself is confusing and unclear with significant gaps where women are not able

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157. *Guatemala: Domestic Violence, Including Legislation, State Protection, and Services Available to Victims*, CANADA: IMMIGRATION AND REFUGEE BOARD, (May 14 2012), https://www.refworld.org/docid/4fc4aa872.html.

158. *Id.*

159. Musalo, *supra* note 145, at 195.

160. *Id.; see also Guatemala, Submission to the Human Rights Committee for the 115th Session, supra* note 87.

161. Musalo, *supra* note 145, at 197 (citing Decreto No. 17-73, del Congreso de la Republica. Art. 200).

162. Id.

163. *See* CERIGUA, *Un avance en la búsqueda de la justicia a favor de las mujeres* [An advance in women's favor in the search for justice] (Dec. 6, 2005), http://www.cerigua.org/portal/modules.php? op=modload&name=News&file=article&sid=2411&mode=thread&order=0&thold=0.

164. *Id.*

165. Musalo, *supra* note 145, at 275.

166. *Id.* at 273.

167. Cosgrove, *supra* note 59, at 318.

to access protection from violence.[168] The Guatemalan Penal Code currently lacks provisions to prevent and punish domestic violence or rehabilitate survivors of violence.[169] While Guatemala's Minister of National Security recently affirmed the connection between femicide and domestic violence, the Guatemalan Penal Code still treats domestic violence as a "minor offense," and the 2008 Femicide Law failed to address this.[170]

In the first six months of 2007, the Guatemalan government reported receiving more than 6,228 complaints of violence against women.[171] The state opened cases against the alleged perpetrators of violence in these cases in 1,768, only roughly a quarter of these cases,[172] and only two of these cases opened resulted in a conviction,[173] at a conviction rate of 0.11 percent. Additionally, since the implementation of the Femicide Law, and the subsequent killings of over 1,500 women, as of 2016,[174] there have been only 14 successful prosecutions.[175] As it is clear from the above statistics, violence against women is met with impunity in Guatemala and authorities do not investigate allegations or prosecute and subsequently punish perpetrators. As a result, "the absence of a rule of law fosters a continuum of violent acts against women, including murder, rape, domestic violence, and sexual harassment."[176]

IV. International Pressure as a Driver for Change

Human rights bodies, other States, and NGOs have effectively pressured Guatemala to offer better protection from violence against women and to fall in line with its international obligations under CEDAW and Belem do Para. These actors are in consensus that Guatemala has a serious problem of violence against women but has not effectively addressed it. The Human Rights Committee, in reviewing Guatemala in 2012, noted the ineffectiveness of the current Femicide Law, due to the "persistence of very high levels of violence against women."[177] Additionally, the CEDAW Committee has expressed concerns that despite the 2008 Femicide Law, there continues to exist a "climate of impunity" for domestic violence and femicide that has not been eradicated.[178] On a more regional level, in May of 2012, the Inter-American

168. *Id.*

169. Id.

170. Ruhl, *supra* note 32, at 217.

171. Musalo, *supra* note 145, at 167.

172. Ruhl, *supra* note 32, at 208.

173. *See* U.S. Dep't of State, 2007 Country Reports on Human Rights Practices - Guatemala (2008), https://2009-2017.state.gov/j/drl/rls/hrrpt/2007/100641.htm.

174. When this data was last reported. *See Guatemala, Submission to the Human Rights Committee for the 115th Session, supra* note 87.

175. *Id.* at 208.

176. Yakin Ertürk, *supra* note 154.

177. *Guatemala, Submission to the Human Rights Committee for the 115th Session, supra* note 87.

178. *Id.*

Commission on Human Rights sent a Guatemalan femicide case to the Inter-American Court of Human Rights, due to the Guatemalan government's creation of an "environment conducive to the chronic repetition of acts of violence against women."[179]

While the most effective pressure brought to bear against the Guatemalan government regarding its responses to femicide, Guatemala-based NGOs echo these concerns as well. For example, in a recent report analyzing the Guatemalan government's implementation of the 2008 Femicide Law, the Procuraduira de los Derechos Humanos (Human Rights Ombudsman) "lamented that rates of femicide have continued to increase despite the passage of the law."[180] The Center For Gender and Refugee Studies and Amnesty International have both partnered with NGOs within Guatemala and studied issues of gender-based violence, culminating in recommendations that the Guatemalan government "bring its legislation in line with international standards on violence against women, emphasizing the need to establish criminal penalties for domestic violence."[181]

A. Regional Comparisons

At present, fourteen Latin American countries, including Colombia, have passed laws criminalizing femicide as a distinct crime, typically with increased penalties in comparison to homicide in recognition of the gender implications underlying femicide.[182] Six other countries, including Guatemala, have implemented femicide legislation outside of the criminal code.[183]

In recent years, what has been effective in combatting the structural concerns of Latin American women have been campaigns to improve their legal protections.[184] For example, the Chilean women's movement in the 1990s resulted in the Chilean Intrafamily Violence Act, which enacted "[s]ubstantive legal remedies to combat domestic violence and defend women's fundamental human rights."[185]

Guatemala, Colombia, and El Salvador had the highest rates of femicide for the past roughly 20 years.[186] This Part compares Colombia and Guatemala due to their similar histories and experiences with machismo as well as similar dates in implementing femicide legislation.

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179. *See* Musalo & Bookey, *supra* note 106, at 266.

180. *Id.* at 273.

181. Ruhl, *supra* note 32, at 215–16.

182. *See* Fabiana Frayssinet, *Latin American Resets Its Strategy against Femicides*, INTER PRESS SERVICE NEWS AGENCY (Apr. 4, 2019), http://www.ipsnews.net/2019/04/latin-america-resets-strategy-femicides/.

183. *Id.*

184. *Id.*

185. UNHCR, *Women's Rights are Human Rights*, HR/PUB/14/2, at 18 (2014).

186. José Sanmartín *Second International Report Statistics and Legislation Partner Violence against Women*; Queen Sofía Center for the Study of Violence, (2006) (from 2000 to 2006, Guatemala had the highest rates of femicide in the world); *see also* GENEVA DECLARATION ON ARMED VIOLENCE AND DEV., GLOBAL BURDEN OF ARMED VIOLENCE 2015: EVERY BODY COUNTS 89 (May 8, 2015), http://www.genevadeclaration.org/measurability/global-burden-of-armed-violence/global-burden-of-armed-violence-2015.html (finding that El Salvador had the highest rates of femicide in the world from 2007 to 2012, with Guatemala having the third highest rates).

B. Why Compare Guatemala and Colombia

Comparing Guatemala's responses to femicides to those of Colombia is useful. Both countries implemented femicide laws in the same year, making it easy to measure their rates of success against each other.[187] The shared histories of these two countries, as well as the common ways in which femicide have occurred and been responded to in these two countries offers useful comparisons.[188] Additionally, both countries are parties to CEDAW and Belem do Para, meaning they are under the same international and regional obligations to prevent violence against women.

There are a few key differences between these countries that could make a difference in the effectiveness of this legislation, including the disparate economic situations at play in these two countries: Colombia has nearly three times the population of Guatemala, and close to four times the annual GDP of Guatemala.[189] However, the GDP per capita in both countries and the unemployment rates are both quite similar.[190] This shows that although at first glance these countries are in quite different economic positions, when controlling for different population sizes, they are both quite similar, another reason why this comparison is effective.

1. Machismo

There are many factors at play which contribute to these high incidences of violence in Colombia and Guatemala. One is the historical and cultural influence of machismo,[191] which is prevalent in Latin America.[192] In Latin America, machismo is often considered an important cultural variable.[193] It can refer to "a family provider who has a strong work ethic and lives up to his responsibilities," including providing for his family.[194]

However, machismo can also foster an expectation of deference to men by women, leading to physical violence, and, in the extreme, femicide.[195] In Latin America, machismo "fosters an exaggerated importance of maleness, sexual prowess, and expectation of deference to men by

187. Femicide Law, *supra* note 141, and Jolin, *supra* note 15, respectively.

188. *See* Daniela Kravetz, *Promoting Domestic Accountability for Conflict-Related Sexual Violence: The Cases of Guatemala, Peru, and Colombia*, 32 AM. U. INT'L L. REV. 707, 762 (2017).

189. *See* World Bank, *Country Comparison*, COUNTRY ECONOMY, https://countryeconomy.com/countries/compare/colombia/guatemala (last visited Jul. 10, 2019).

190. *Id.*

191. While machismo is not inherently a bad thing and does have many positive elements, it is difficult to find a definition of machismo that does not define men by their treatment of women. *See, e.g.*, Jolin, *supra* note 15, at 383; Kimelblatt, *supra* note 128, at 405.

192. *See, e.g.*, Jolin, *supra* note 15, at 383; Kimelblatt, *supra* note 128, at 405.

193. Hernandez, *supra* note 18, at 859.

194. *Country Comparison*, *supra* note 189.

195. *Id.*

women."[196] Taken to the extreme, machismo can justify rape, torture, and beatings of female intimate partners as being a man's right.[197] This is justified by the belief that "a man should be able to control a wife or girlfriend by any means as he sees fit."[198]

In discussing machismo, this Article clarifies that misogyny and paternalism have resulted in violence against women across all cultures. Machismo is a factor in femicide, especially when coupled with a country's history of violence, but in many instances and in many countries, machismo does not lead to violence. Most of the barriers to ending violence against women are structural in nature, not cultural. Further, critiquing the use of violence against women in machismo is not a critique of Latinx culture. It is a critique of violence which has been grounded in structural views of women and lack of government accountability.

2. Recent History of Civil Strife

Another factor that contributes to high incidences of violence against women in both countries is a history of internal strife.[199] There has been a causal link established between countries being immersed in civil turmoil and increased incidents of sexual violence.[200] Specifically, there is a strong rise in domestic violence and sex trafficking in post-conflict areas.[201]

Guatemala and Colombia both have recent histories of civil strife that led to high rates of conflict-related sexual violence.[202] The current concerns regarding violence against women in both countries are rooted in this history of conflict and its legacy of inequality, poverty, and exclusion.[203] Femicide represents layers of gendered social practice and relations of violence; it

196. *See* Lynne Duffy, *Viewing Gendered Violence In Guatemala Through Photovoice* (Jun. 6, 2017), https://journals-sagepub-com.ezproxy.bu.edu/doi/10.1177/1077801217708058 (quoting Weidel J. J., Provencio-Vasquez E., Watson S. D., Gonzalez-Guarda R., *Cultural considerations for intimate partner violence and HIV risk in Hispanics*, 19 J. ASS'N. NURSES AIDS CARE, 240, 247–51 (2008)).

197. *Id.*

198. *See* Amanda Blanck, Note, *Domestic Violence as a Basis for Asylum Status: A Human Rights Based Approach*, 22 WOMEN'S RTS., L. REP. 47, 50 (2000).

199. A historical analysis of each country's civil discord is outside the scope of this paper. However, in examining violence against women, it is necessary to discuss this recent history of conflict. Guatemala has a legacy of conflict-related sexual violence during its recent 36-year civil war. During the conflict, women were "used as a weapon of war." *See* Julie Guinan, *Nearly 20 years after peace pact, Guatemala's women relive violence* (Apr. 7, 2015), https://www.cnn.com/2015/04/02/world/iyw-guatemala-gender-violence/index.html. Although a ceasefire was reached in 1996, a culture of impunity remains for the military and paramilitary groups which committed barbaric acts during the war. Menjivar, *supra* note 154, at 7. The civil war, and subsequent conflict-related sexual violence has routinized violence within Guatemalan communities. *Id.*

200. *See* Rashida Manjoo, *Gender-based Violence and Justice in Conflict and Post-Conflict Areas*, 44 CORNELL INT'L L.J. 11, 32 (2011).

201. According to Medecins Sans Frontieres, "sexual violence in post-conflict areas has long been seen as the collateral damage of fighting, practiced and accepted by different warring parties. The disruption of society and generalised violence help create an environment where sexual violence thrives." Medecins Sans Frontieres, *Shattered Lives: Immediate Medical Care Vital for Sexual Violence Victims* 9 (2009), http://doctorswithoutborders.org/publications/reports/2009/MSF_Shattered-Lives_Sexual-Violence.pdf; *see* Manjoo, *supra* note 200, at 32.

202. *See* Mejivar, *supra* note 153, at 7; *See also* Guinan, *supra* note 200; Manjoo, *supra* note 200.

203. Manjoo, *supra* note 200, at 32.

goes far beyond individual acts of violence. Looking at historical reactions to violence demonstrates why women are killed in Guatemala, and more importantly, how this killing has thus far occurred with impunity.

C. Colombia and Femicide

Colombia endured decades of conflict which resulted in high instances of forced internal displacement and sexual violence,[204] shaping the ongoing treatment of women in the country. However, the Colombian government has acknowledged and addressed the post-conflict sexual violence which has impacted women in this country.[205] The government developed a framework for addressing conflict-related sexual violence through cases brought to the Constitutional Court and by establishing investigational protocol for the Office of the Attorney General.[206] Although these measures alone are not enough, when combined with other measures to fight domestic violence and femicide, Colombia has growing bodies of legislation and judicial decisions seeking to support women and prevent femicide.

Violence against women is a problem in Colombia. According to recent statistics, in Colombia a woman is killed by her male partner every four days.[207] From 2009 to 2014, "more than 8000 women were murdered in Colombia, of which over 20% were killed by a current or ex-partner."[208] Martha Ordonez, Colombia's presidential adviser on women's rights, said victims of femicide "often have a long history of domestic violence, and perpetrators are often current or former partners."[209] Colombia's history of violence civil conflict and culture of machismo offers a partial answer to why so many Colombian women are murdered by current or former partners.[210]

1. International and Regional Obligations

Comparing Guatemalan and Colombian responses to femicide offers a stark view of what has been successful and what has failed to prevent the continued killing of women by their intimate partners. Both countries have the same international obligations, as both are states parties

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204. In 2016, Colombia entered into a peace accord with the Fuerzas Armada Revolucionarias de Colombia-Ejercito del Pueblo (FARC-EP), a guerilla movement which has been engaged in conflict with the Government of Colombia for the last 50 years. Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict, U.N. S/2018/250, issued on Apr. 16, 2018, https://www.un.org/sexualviolenceinconflict/countries/colombia/.

    Sexual violence was widespread and systematic during this conflict. During the conflict, women and girls were seen as "rewards and trophies of war." Colombia Operation update March 2012, The Office of the United Nations High Commissioner for Refugees, La Agencia de la ONU para los Refugiados, Update on Sexual Based Violence, accessed February 13, 2019, at 2. Between 2001 and 2009, 489,687 women stated they were victims of sexual violence from both the guerillas and governmental troops. *Id.*

205. International Office for Human Rights Action on Colombia, UN S.C., *Gender-Based Violence is Still a Major Challenge for Colombia*, S/2017/249 (Apr. 15, 2017).

206. *Id.*

207. Jolin, *supra* note 15, at 375.

208. *Id.*

209. *Id.* at 401.

210. *Id.* at 375.

to CEDAW and to the Convention of Belem do Para.[211] The Convention of Belem do Para affirms that women have a right to be free from violence and holds the state accountable to "prevent, punish and eradicate violence against women, incorporating a due diligence standard."[212] Due diligence is an important strand of jurisprudence that holds governments accountable to prevent, investigate, and punish acts of violence against women.[213] Under these treaties, both countries have an affirmative obligation to respond to femicide.

2. Domestic Law

First, Colombian law concerning femicide is distinctive in two important aspects that Guatemala should adopt: femicide is a part of the Criminal Code, and domestic violence is criminalized. Second, the Colombian Constitution has offered important rights access to Colombian women.

a. Femicide as Part of the Criminal Code

Similar to Guatemala, Colombia implemented a femicide law in 2008.[214] This law added femicide to the Criminal Code as an aggravating circumstance to homicide[215] with a minimum jail sentence of 20 years if convicted.[216] The legislation offered no chance of reducing sentences once they are decided.[217] So far, sentences of 40 years or more have been handed down to over 40 men since this law has been implemented.[218] Strengthening this femicide legislation, in 2015, the Colombian Legislature classified femicide as a distinct crime.[219] This establishes femicide as an autonomous crime to "guarantee the investigation and punishment of violence against women that are motivated by gender and discrimination and carries an increased penalty for those who commit such crimes against women."[220] This most recent implementation to the Criminal Code makes femicide more serious than murder,[221] mandating a 250-500 month sentence for femicide.[222] This law also requires that all crimes motivated by "gender and discrimination" be investigated and punished and has abolished a statute of limitations on gender-based crimes, meaning that a case can be brought at any point.[223] Colombia offers a very

211. CEDAW, *supra* note 44; Belem do Para, s*upra* note 30.

212. De Silva de Alwis, *supra* note 33, at 11.

213. *Id.* at 16.

214. Joseph, *supra* note 25, at 14.

215. *Colombia Faces Challenges Enforcing New Femicide Law,* TELESUR (Aug. 20, 2015), https://www.telesurenglish.net/news/Colombia-faces-challenges-enforcing-new-femicide-law-20150820-0005.html.

216. Joseph, *supra* note 25.

217. *Id.*

218. *See* Christopher Outlaw, *Outrage Over Femicide*, THE BOGOTA POST (May 12, 2017), https://thebogotapost.com/outrage-over-femicide/21320/.

219. *Id.*

220. Jolin, *supra* note 15, at 390.

221. *Id.*

222. *Id.* at 393.

223. Jean Friedman-Rudovsky, *The Invisible Army of Women Fighting Sexual Violence in Colombia*, COSMOPOLITAN (2016), https://www.cosmopolitan.com/politics/a5278013/domestic-violence-sexual-abuse-colombia/.

inclusive view of violence against women, defining it as "any action or omission that causes a woman death, pain, or physical, sexual, psychological, economic, or patrimonial suffering," including threats or coercion.[224]

b. Constitutional Protection

While Colombia has criminalized violence against women through legislation, the Colombian Constitution formally guarantees women's rights since its implementation in 1991,[225] affording women an additional avenue to seek protection from violence before the court. The Colombian Constitution grants a broad array of rights to women through the use of "seven women's protection clauses," including Articles 13 (equality), 40 (political participation), 42 (women's status in the family), and 43 (equal rights and nondiscrimination).[226] The Constitution also guarantees fair treatment and equal protection through a few more specific provisions in these articles. Article 13 of the Constitution provides that the "State will promote conditions so that equality will be real and effective and will adopt measures in favor of groups discriminated against or marginalized,"[227] while Article 43 "bans any type of discrimination against women."[228]

The new Constitution changed Colombians' views of their rights and the role of the court. This combined with the ability to claim immediate protection of these rights with a writ of protection offered access to the courts for women and marginalized groups.[229] These provisions are not just a pro forma guarantee: the Colombian Constitution also created a Constitutional Court with enforcement duties and board judicial review powers over legislation and public action.[230] The enforcement duties of the Constitutional Court "ensure that these broad new protections did not remain merely paper guarantees."[231] Again, this combined with the ability to claim immediate protection of these rights with a writ of protection offered access to the courts for women and marginalized groups.[232]

A constitutional right and an enforcement mechanism mean there is an ability for victims to practically realize rights and protections the Constitution offers. The Constitutional Court offers an opportunity for victims of domestic violence to seek immediate judicial protection of their fundamental constitutional rights, as well as the idea that the right to freedom from violence is a fundamental constitutional right.[233] The Colombian Constitutional Court recognized that "physical or psychological violence against women violates their fundamental rights

224. *Colombia Faces Challenges Enforcing New Femicide Law, supra* note 215.

225. Morgan, *supra* note 115, at 269.

226. *See* Laura Lucas, Note, *Does Gender Specificity in Constitutions Matter?*, 20 DUKE J. COMP. & INT'L L. 133, 143 (2009).

227. Morgan, *supra* note 115, at 269.

228. Lucas, *supra* note 226.

229. *See* Morgan, *supra* note 115, at 262.

230. *Id.* at 144.

231. Lucas, *supra* note 226.

232. *See* Morgan, *supra* note 115, at 262.

233. *Id.*

to personal integrity, health, and life."[234] The Constitutional Court system has effectively been used to ensure protection against domestic violence, holding "that protection against domestic violence is one of the fundamentals of all domestic-liberal constitutional legal systems."[235]

c. Judicial Support

The support of the judiciary has also validated and enforced the implementation of Colombia's femicide laws.[236] Colombia's highest court, the Corte Supreme de Justicia (Supreme Court of Justice), ruled that the fatal stabbing of a woman was a femicide just six months after the 2008 law was put into place.[237] In this case, the Supreme Court decided that the aggravating factor of femicide applies in the contexts of jealousy, control, and intimidation by an intimate partner.[238] The Supreme Court also reviewed an explanatory memorandum issued when the femicide law was initially implemented as an aggravating factor to homicide.[239] According to the memorandum, the purpose of the femicide law was to recognize that violence was not the "product of chance or a matter of the private sphere, but was closely connected to unequal relationships of power between men and women."[240] This memorandum clarified that the Colombian Legislature considered femicide to "include murders committed in the context of female subordination."[241] In another femicide case, the Supreme Court set a precedent for the legislature to classify femicide as a distinct crime in addition to an aggravating factor to femicide.[242]

Importantly, the Colombian femicide law and the Colombian Court officially acknowledged the widespread phenomenon of abusive relationships leading to femicide, and consequently criminalized domestic violence in an attempt to prevent femicide.[243] Due to deeply rooted cultural beliefs about women and violence, how countries respond to domestic violence will continue to affect how femicide laws are enforced.[244] What is clear is that femicide laws alone are not enough, and additional legislation preventing and punishing domestic violence is also required.

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234. *Id.* at 281–82.

235. *Id.* at 283.

236. *See* U.S. Dep't of State, Country Reports on Human Rights Practices for 2015, https://2009-2017.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper (2-15).

237. Jolin, *supra* note 15, at 387.

238. *Id.* at 388.

239. Id.

240. *Id.* at 390.

241. *Id.*

242. *See* Jorge L. Esquirol, *Can International Law Help? An Analysis of the Colombian Peace Process*, 16 CONN. J. INT'L L. 23, 34 (2000).

243. Outlaw, *supra* note 218.

244. Jolin, s*upra* note 15, at 390.

d. Criminalizing Domestic Violence

Sanctions for domestic violence in Colombia are significant. Criminal trials for domestic violence can result in prison sentences up to six years.[245] These changes are in line with the recommendations of the Inter-American Convention of Belem do Para, which recommends that "states adopt their penal codes to impose penalties for violence against women, and adopt measures that prevent perpetrators from harassing, intimidating, or threatening victims."[246]

The Colombian government has made a concerted effort to address, prevent, and punish femicide due to international pressure to come into conformity with Colombia's international obligations under CEDAW and Belem do Para. What is clear is that femicide laws alone are not enough. Due to deeply rooted cultural beliefs about women and violence, how countries respond to domestic violence will continue to affect how femicide laws are enforced.[247]

3. Political Support

In recent years, Colombia has worked to address violence against women.[248] Gender based killings are a distinct and legally defined crime in Colombia with jail sentences of up to 40 years.[249] The country has worked to prevent such cases from being viewed as simple homicides and instead acknowledged the escalation of violent and abusive relationships that lead to these acts.[250]

One important and fundamental difference that should be acknowledged between Colombia and Guatemala is the political culture surrounding violence against women. In addition to the strong stances of the Colombian legislature and judiciary branches in favor of protecting women, multiple people of powerful positions in Colombia have explicitly acknowledged violence against women as a problem the country is facing. Martha Ordoñez, Colombia's presidential adviser on women's rights, said "[f]emicide represents the most extreme form of violence and discrimination against women. It's quite a concern in Colombia."[251] General Oscar Naranjo, the retired leader of the Colombian police force, has demanded action regarding violence against women, stating that the country is called to end the mistreatment of women.[252] Additionally, after the Supreme Court decision that Sandra Patricia Correa's death was a femicide, Martha Lucia Sanchez, the Women's Secretariat in Bogota announced that the holding was "an unparalleled decision that makes it clear that what happened to Correa and other women is not a crime of passion… but is a crime based on gender."[253]

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245. *See* Friedemann Sanchez & Margaret Grieve, *General Background on Colombian Laws on Violence Against Women, Orders of Protection, and Shelters* (University of Minnesota), www.ohchr.org/Documents/Issues/Women/SR/Shelters/FriedemannSanchezGrieve.pdf (last visited May 7, 2020).

246. Gasman, *supra* note 23.

247. *Id.*

248. Moloney, *supra* note 37.

249. *Id.*

250. Joseph, *supra* note 25, at 17.

251. Hernandez, *supra* note 18, at 870–71.

252. *Id.*

253. Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Pen. marzo 4, 2015, M.P: P. Salazar Cuellar, Radicacion 41457 (p. 2-3) (Colom.).

V. Recommendations for Guatemala: Femicide Law as Part of the Criminal Code and Criminalization of Domestic Violence

The Colombian response to femicide and domestic violence is not perfect. Violence against women remains a prevalent issue in the country and Colombia has not addressed all of these issues and effectively ended the problems of femicide and domestic violence. Nevertheless, women have greater access to protective measures and are actually able to utilize them.

The effort to eliminate femicide must be multifaceted and sustained. A femicide law alone is not a solution. A proper response to femicide requires support at every level of government, through enforcement, training, funding, and political follow-through.

Currently in Guatemala, the structure and application of the laws contribute to widespread impunity, judges resist issuing restraining orders and police refuse to apply them because they do not want to violate perpetrators' property rights.[254] This is an issue because it ignores the social conditions that give rise to ongoing treatment of women.[255] The Colombian law has been successful because there has been clear political and legislative support behind it. In stark contrast, Guatemalan executive and legislative branches as well as politically powerful people in the country have been largely silent on issues of violence against women.

The Colombian response offers a realistic view of a way forward for the Guatemalan government. One study found that only 17 femicide convictions have been handed down in the two years since this law was introduced.[256] Colombia continues to struggle to convict killers of women.[257] According to a 2017 report by the Presidential Counselor for the Equality of Women (Consejera Presidencial para la Equidad de la Mujer) to Colombia's Congress, in 2015 there was a 24% conviction rate for violence against women.[258] While these numbers are not as high as one might wish, they are still far better than the conviction rates in Guatemala, where the lowest rate of convictions was 2% in 2011, and the highest was 15% in 2015.[259] Colombia's recent responses to femicide offer a realistic and sustainable view of what the Guatemalan government could do to improve its current efforts to respond to femicide. As Colombia and Guatemala face similar cultures and histories of violence which add to their high femicide rates, it seems clear that what is effective in one country will likely also be effective in the other.

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254. Menjivar, *supra* note 153.

255. *Id.*

256. *Colombia Struggles to Convict Killers of Women, Experts Say*, VOICE OF AMERICA (Nov. 22, 2018), https://www.voanews.com/a/colombia-struggles-to-convict-killers-of-women-experts-say/4670623.html.

257. *Id.*

258. NGO Parallel Report on Colombia's Ninth Report on the Implementation of the Convention on the Elimination of All Forms of Discrimination Against Women, Submitted to the UN Committee on the Elimination of Discrimination against Women for consideration in the formulation of the Concluding Observations and Recommendations during the 72nd Pre-Sessional Working Group (23-27 Jul. 2018), at 18, https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/COL/INT_CEDAW_ICO_COL_31355_E.pdf.

259. *Id.*

In order to align with its international obligations and to fully protect the women living within Guatemala, the Guatemalan government should adopt two specific approaches that have been effective in Colombia: legislation of femicide as part of the Criminal Code, and criminalization of domestic violence. Making positive changes in law that would proactively affirm the rights of women in Guatemala would go a long way to combat the current epidemic of violence so many women in the country experience. It is important to note that neither Guatemala nor Colombia's existing law includes additional protections for indigenous women, a community especially vulnerable to violence.[260] These same factors also lead to governmental inattention to these powerless communities.[261] Additionally, the focus of Colombia's current law is largely on the punishment of killers.[262] In order for a femicide law to fully address and protect women, there should also be psychological, legal and economic support for the survivors of violence.[263]

Given the complex nature of violence against women, effective change must come from within Guatemala and involve long-term change for women and vulnerable groups. Gender-based violence will continue to culminate in femicide when the government fails to correct the systemic impunity that exists in Guatemala for perpetrators of femicide.

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260. Daniela Kravetz, *Promoting Domestic Accountability for Conflict-Related Sexual Violence; The Cases of Guatemala, Peru, and Colombia*, 32 AM. U. INT'L L. REV. 707, 709 (2016).

261. *Id.* at 710.

262. *From Commitment to Action: Policies to End Violence Against Women in Latin America and the Caribbean, Regional Analysis Document*, *supra*, note 71, at 36.

263. *Id.*

Nike, Inc. v. Wu

2020 U.S. Dist. LEXIS 9102 (S.D.N.Y., Jan. 17, 2020)

The United States District Court for the Southern District of New York denied Respondents' reimbursement motion because Respondents did not demonstrate that their expenses were reasonable. Petitioner's contempt motion was denied because Petitioner did not meet the legal standard. Petitioner's turnover motion was denied because Petitioner did not comply with New York procedures. In addition, this Court denied, without prejudice, Respondents' conditional motion because, having denied the contempt motion, this motion was rendered moot.

I. Holding

Recently in *Nike, Inc. v. Wu*,[1] the Southern District of New York denied all of Next Investments, LLC ("Petitioner" or "Assignee") and Bank of China, Agricultural Bank of China, Bank of Communications, China Construction Bank, China Merchants Bank, and Industrial and Commercial Bank of China Limited (collectively "Respondents" or "Banks") motions. First, the court held that the Banks' efforts were ineffective and duplicative, their failure to address each of Assignee's requests undercut their claim, and their convoluted production process was unnecessary.[2] Second, the court held that (1) it was not clear and unambiguous that the Banks failed to comply with the Final Order; (2) the proof given for noncompliance was not clear and convincing; and (3) the Banks did attempt to comply in a reasonable manner.[3]

Additionally, the court held that although Assignee's turnover order complied with CPLR and Rule 69 of the Federal Rules of Civil Procedure, the separate entity rule prevented the court from issuing a Rule 69 execution order for cross-border attachment of assets.[4] Moreover, the court held that, since the turnover motion was denied, the conditional order was to be denied without prejudice as moot.[5]

II. Facts and Procedure

Originally, this case was based on Nike and Converse's (collectively "Plaintiffs") claim to recover damages from 636 counterfeiters who, in violation of the Lanham Act, sold fake Nike, Inc. ("Nike") and Converse Inc. ("Converse") products in China.[6] Between 2013 and 2015, Plaintiffs were granted a temporary restraining order ("TRO"), four preliminary injunctions ("PI"), and a default judgment which found Defendants (now "Debtors") liable for trademark infringement.[7] The TRO stated, "Defendants," and all people "acting in concert or in partici-

1. Nike, Inc. v. Wu, No. 13 Civ. 8012 (CM), 2020 U.S. Dist. LEXIS 9102 (S.D.N.Y. Jan. 17, 2020).
2. *See id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* at 2.
7. *Id.* at 2–3.

pation, including any third parties are temporarily restrained and enjoined" from doing anything with their money, "regardless of whether such money or assets are held in the U.S. or abroad."[8] Upon 10 days receipt of the PI order, "third party financial service providers" were to provide Plaintiffs' counsel all documents in their custody relating to the Debtors' assets.[9]

Then, Plaintiffs served actual notice of both Orders to the New York branches.[10] On December 16, 2013, the Banks objected via letter.[11] In their letter, the Banks argued that discovery was unenforceable pursuant to both Orders because of a jurisdictional issue and the international law principle of comity.[12] The Banks produced no documents; Plaintiffs did not file a motion to compel compliance because both sides agreed to wait to proceed until the Second Circuit ruled on two pending appeals in *Gucci Am. Inc. v. Bank of China* and *Tiffany (NJ) LLC v. China Merchs. Bank*.[13] In September 2014, *Gucci* and *Tiffany* were decided; the Second Circuit vacated an asset restraint and a civil contempt order.[14] The court concluded that a district court cannot exercise personal jurisdiction over the Bank[s] based on branches in the forum.[15] Continuing with their review, Plaintiffs would notify the Banks of any new developments.[16] The Banks maintained that they were not obligated to freeze or turn over documents to China.[17] On June 29, 2015, Plaintiffs moved for a default judgment and on August 20, 2015 it was granted.[18] Applying *Gucci*, the court determined that an analysis into jurisdiction and comity were not required until Plaintiffs sought an order to compel compliance.[19]

Next, on January 31, 2017, Plaintiffs assigned their over $1.8 million default judgment to Next Investments, LLP ("Assignee").[20] On October 20, 2017, a Final Order was granted in favor of Assignee.[21] On November 30, 2017, Assignee issued third-party subpoenas to the Banks, all located in China.[22] The Banks complied regarding their New York branches.[23] On February 14, 2017, the Banks moved this Court to (1) quash the subpoenas, and (2) modify

8. *Id.* at 6.

9. *Id.* The PI order contained identical language to the TRO.

10. *Id.* "Plaintiffs highlighted the asset restraints and the discovery deadline." Although the Orders listed hundreds of email addresses and infringing websites, only two bank account numbers were provided.

11. *Id.*

12. *Id.* at 7.

13. *Id.* at 8–9. These were two other trademark infringement cases involving Chinese Banks who were currently challenging enforceability court orders; 786 F.3d 122 (2d Cir. 2014); 589 F. App'x 550 (2d Cir. 2014).

14. *Id.* at 9. Vacated on the ground that the district court had improperly analyzed personal jurisdiction to compel the Bank's compliance with its orders; 786 F.3d 122 (2d Cir. 2014); 589 F. App'x 550 (2d Cir. 2014).

15. *Id.* at 10.

16. *Id.* at 10–11.

17. *Id.* at 11.

18. *Id.* at 11–13. Plaintiffs requested accounting profits.

19. *Id.* at 14; 786 F.3d 122 (2d Cir. 2014).

20. *Id.* at 3.

21. *Id.* at 15. Court found the Debtors in contempt of court and applied the Default Judgment to the newly identified websites and accounts.

22. *Id.* at 17. Assignee requested documents in both the foreign and domestic branches.

23. *Id.* Again, the Banks noted their position that they were not legally obligated to produce document for information located outside of New York.

the Final Order; however, their attempt failed.[24] The Banks filed two more objections in 2018 but they also failed.[25] Finally, the Banks responded but on June 20, 2019, the Banks (with the exception of Agricultural Bank of China, "Moving Banks") moved for $1.22 million in attorneys' fees, costs, and other expenses associated with complying with Assignee's subpoenas.[26]

Pursuant to the Moving Banks' motion, Assignee then filed a contempt motion seeking $150 million in damages against the Moving Banks for asset restraints and discovery orders.[27] Moreover, Assignee filed a turnover motion for the remaining funds in the Judgment Debtor's accounts for the Moving Banks failure to freeze the assets.[28] In response to Assignee's contempt motion, the Moving Banks filed a conditional motion for discovery and an evidentiary hearing.[29]

III. Discussion

A. Motion for Reimbursement

1. Legal Standard for Awarding Third-Party Discovery Costs and Expenses

First, Federal Rule of Civil Procedure 45(d)(1) requires litigants who are issuing subpoenas on nonparties to take "reasonable steps to avoid undue burden or expense."[30] Next, this Court considered cost-shifting based on three factors: (1) "whether the nonparty actually has an interest in the outcome of the case, (2) whether the nonparty can more readily bear the costs than the requesting party, and (3) whether the litigation is of public importance."[31]

2. Analysis of Federal Rule of Civil Procedure 45

Here, the Moving Banks' efforts were considered to be the opposite of reasonable, rather, "inefficient and duplicative." The multitude of hours the Moving Banks' employees spent on

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24. *Id.* at 18–19. The Banks presented the same arguments prior to the entry of the Default Judgment: (1) the Court had yet to find personal jurisdiction over the Banks' Chinese branches, (2) the separate entity rule barred enforcement of this Court's orders against those branches, and, (3) even if jurisdiction were proper, principles of international comity weighed against issuing a discovery order in conflict with Chinese law.

25. *Id.* at 22. This Court found that requiring the banks to respond to the subpoenas was consistent with fair play and substantial justice.

26. *Id.* at 4, 25. For example, all responsive documents had to be collected from China, the Moving Banks searched records of numerous subsidiaries, Debtors using Romanized Chinese characters was not searchable on the Moving Banks' computer systems. The Moving Banks estimate compliance with the subpoenas costed $439,000 of internal costs, multiplied by the total number of hours, plus other expenses. *Id.* at 27. A production vendor was contacted and costed $95, 484; total costs excluding production vendor's fees to be $687, 537.51. *Id.*

27. *Id.* at 4, 31. "Moving Banks' failure to comply constituted 'active concert and participation' with the Judgment Debtors' defiance of this Court's judgment, making the [Moving] Banks liable under Federal Rule of Civil Procedure 65(d)(2)."

28. *Id.* at 28.

29. *Id.*

30. *Id.* at 32. This does not mean the requesting party must bear the entire cost of compliance, only reasonable costs are compensable.

31. *Id.* at 33.

collection and review of documents was not justified.[32] The Moving Banks did not explain why so many people worked over 6,800 hours to produce only 409 documents.[33] The Court found it unacceptable and unreasonable under Rule 45 for the Moving Banks to try to "pass along expenses that w[ere] unnecessary or could have been done less expensively."[34] In addition, the Moving Banks did not conduct some of the most "cumbersome searches."[35] Therefore, they failed to comply with the subpoena requests and, in turn, failed to address all of Assignee's requests, thus, "undercut[ing] their claim."[36] The Moving Banks were not entitled to create obstacles and collect fees from them.[37] Therefore, they failed to provide this Court with evidence to conclude that their costs and expenses pursuant to the Subpoenas were reasonable.[38]

3. Analysis for Cost-Shifting

Although the Moving Banks did not win their motion for reimbursement, they could have received reimbursement for a reasonable subset of their costs.[39] However, the equities did not favor cost-shifting in this case.[40] Here, factor one was found in favor of the Moving Banks because there was no allegation that the Moving Banks were involved with the Debtors' conduct.[41] Second, the Moving Banks were in a better position to bear the cost.[42] Because each of the Moving Banks is a large financial institution, with "billions of dollars of revenue and trillions of dollars in assets," they can bear the burden.[43] The court compared each Moving Banks' annual revenue to the $1.22 million in attorneys' fees, costs, and other expenses, in favor of cost-shifting.[44] Third, it was in the public interest for the Moving Banks to pay their own costs.[45] It is well established that a litigation involving a purely private dispute favors cost-shifting.[46] The public's interest in a "third party's subpoena compliance is substantially less than its interest in enjoining actual infringement," suggesting that the Moving Banks pay their own costs.[47] The Court considered other equitable factors and found against cost-shifting.[48] For

32. *Id.* at 34.

33. *Id.* at 35.

34. *Id.* at 36.

35. *Id.* at 37.

36. *Id.* at 37–38.

37. *Id.* at 39. Counsel "devise[d] a document production process," then each Moving Bank reviewed the documents – despite the fact that counsel already reviewed every document before sending them.

38. *Id.* at 42.

39. *Id.*

40. *Id.*

41. *Id.* at 43.

42. *Id.*

43. *Id.*

44. *Id.* at 43–44.

45. *Id.* at 44.

46. *Id.* This was a purely private dispute.

47. *Id.*

48. *Id.* Moving Banks received notice from Assignee with updates and chose to do nothing for years, and declined to take proactive measures to bear the burden of the Subpoenas. *Id.* at 44–47.

almost four years, the Moving Banks chose to do nothing.[49] Also, the "Moving Banks declined to take proactive measures that would have limited the burdens imposed."[50] Thus, the Moving Banks' motion of reimbursement was denied.

B. Motion for Contempt

1. Legal Standard for Contempt Order

To obtain a contempt order, the moving party must establish: "(1) the order the contemnor failed to comply with is clear and unambiguous, (2) the proof of noncompliance is clear and convincing, and (3) the contemnor has not diligently attempted to comply in a reasonable manner."[51]

2. Analysis

Here, the Moving Banks were not in contempt of asset restrains.[52] Assignee argued that the Moving Banks "collectively violated the Asset Freeze provisions 36,000 times – all individual acts of contempt – totaling $69,000,000."[53] However, this was an incorrect calculation that "neither the law nor the record" supported.[54] Pursuant to factor one, this Court was unable to find that the Orders met the clear and unambiguous standard because, "the injunctions contain[ed] no language" that "prohibited the Chinese branches from continuing service of their customers' accounts."[55] Second, Assignee failed to establish by clear and convincing evidence that the Moving Banks did not comply with the discovery orders.[56] In contrast to Assignee's contention, the Moving Banks actually made "diligent and energetic efforts to comply in a reasonable manner," therefore, they could not be held in contempt.[57] The Moving Banks substantially complied with this Court's Discovery Orders.[58] For example, they "searched numerous branches and databases for the information demanded."[59] The court did not agree with Assignee's contention that "'substantial compliance' mean[t] perfect compliance."[60] There was no clear and convincing evidence that the Moving Banks withheld any information.[61] In addi-

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49. *Id.* at 45.
50. *Id.* at 46.
51. *Id.* at 49–50.
52. *Id.* at 50.
53. *Id.*
54. *Id.* This calculation assumed the Moving Banks' when the New York branches received notice of the Orders, the Chinese branches were bound by the asset restraints.
55. *Id.* at 51.
56. *Id.* at 76.
57. *Id.* Reasonable diligence did not require the Moving Banks to "exhaust all means available to them."
58. *Id.* at 77. The Moving Banks produced more than 7,000 documents, searched numerous branches and databases for the information demanded in the subpoenas.
59. *Id.*
60. *Id.* at 77–78.
61. *Id.* at 78.

tion, the Moving Banks responded to Assignee's concerns over nine months.[62] Although the Moving Banks acted diligently regarding information requested via subpoena, Judge McMahon could not say the same for the Moving Banks' decision to "withhold reports related to the Debtors' accounts."[63] The international law principle of comity did not allow for the Moving Banks to shield their discovery responsibilities.[64] However, that was a limited instance of non-compliance; thus, Assignee's motion of contempt for the Discovery Order was denied.

3. Contempt Sanctions

This Court found compensatory sanctions to be inappropriate because Assignee failed to meet his burden of clear and convincing evidence, that the Moving Banks' compliance efforts were not "reasonably diligent."[65] Since this Court did not find willful, contumacious conduct, or other evidence of bad faith, an award for fees or costs would have been inappropriate.[66] Thus, Assignee's motion for attorney's fees was denied.[67]

C. Motion for Turnover and Motion for Conditional Hearing

1. Legal Standard to Obtain Turnover Order

There are two obstacles in obtaining a turnover order. CPLR § 5225(b) states that, in a proceeding commenced by an interested judgment creditor with superior rights to the transferee against a person in possession of money, the court shall require payment to the creditor. If the amount does not satisfy the judgment, the court may permit the debtor to intervene in the proceeding.[68] Federal Rule of Civil Procedure 69 states, "the procedure in proceedings in aid of judgment must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies."[69] Thus, Assignee's motion for a turnover order complied with CPLR and Rule 69.[70]

2. Separate Entity Rule

Although Assignee complied with CPLR and Rule 69, no court could grant Assignee's turnover order because, it would not comply with the procedure of New York State.[71] However,

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62. *Id.*

63. *Id.* at 80.

64. *Id.*

65. *Id.* at 83.

66. *Id.* A party who is unsuccessful in their contempt motion cannot recover fees incurred due to preparation for that motion.

67. *Id.*

68. *Id.* at 84–85. Courts in this Circuit do not require judgment creditors to file a new complaint to comply with CPLR § 5225.

69. *Id.* at 84.

70. *Id.* at 85.

71. *Id.* at 86; Fed. R. Civ. P. 69(a)(1). The writ of the sheriff of New York County does not run to China. *Id.* at 86.

Assignee could attempt to collect from judgment debtors in China's courts, or other courts with jurisdiction over them.[72]

3. Motion for Conditional Hearing

Since this Court denied the motion of contempt, the Conditional Motion was denied as moot.

IV. Conclusion

Both Assignee and the Moving Banks' motions allowed this court to rule in accordance with two Second Circuit cases, *Gucci* and *Tiffany*, which were previously decided.[73] The Southern District clarified that in order to successfully cost-shift to obtain a reimbursement motion, three factors must be decided in the nonparty's favor. In addition, the court clarified that to satisfy a motion for contempt, failure must be clear and unambiguous, proof must be clear and convincing, and the contemnor did not diligently comply. Lastly, when a turnover order is denied, a conditional motion is also denied. Both Assignee and the Moving Banks failed to meet their burdens. All motions were denied and the dockets were closed.

Gia Fernicola

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72. *Id.*

73. 786 F.3d 122 (2d Cir. 2014); 589 F. App'x 550 (2d Cir. 2014).

United States v. Ali Sadr Hashemi Nejad

No. 18-cr-224(AJN), 2019 U.S. Dist. LEXIS 211911 (S.D.N.Y. Dec. 6. 2019)

The United States District Court for the Southern District of New York denied defendant's pretrial motions because (1) the processing services were indirectly exported to Iran since the benefits were received by an Iranian entity; (2) the transactions were not authorized under the Iranian Transactions and Sanctions Regulations ("ITSR"); (3) the validity of the *Klein* theory of conspiracy has been reaffirmed and is not unconstitutionally vague; (4) the International Emergency Economic Powers Act ("IEEPA) is not an unconstitutional delegation of legislative authority; (5) Congress' failure to meet periodically under the IEEPA regulations does not terminate the state of emergency against Iran; (6) the bank fraud charges adequately alleged that Sadr deprived U.S. banks of valuable information; (7) dismissal of multiplicitous counts is premature; (8) the indictment tracks the language of the statute and contains the time and place of the alleged crime; (9) the indictment is specific enough for a bill of particulars not to be needed, and Defendant can prepare himself for trial; and (10) it is too premature to grant a motion to strike surplusage of the categories not resolved.

I. Holding

Recently, in *United States v. Ali Sadr Hashemi Nejad*,[1] the Southern District of New York denied all of Ali Sadr Hashimi Nejad's ("Defendant") pre-trial motions. First, the court held that the indictment alleged that Sadr violated § 560.204 because services were indirectly exported to Iran.[2] Second, the court held that the transactions were not authorized under the ITSR because they were commercial transactions and unlike non-commercial remittance.[3] Third, the court denied Defendant's motion to dismiss Count One as unconstitutionally vague because the Second Circuit previously reaffirmed the validity of the *Klein* theory of conspiracy.[4] Fourth, the court held that the IEEPA is not an unconstitutional delegation of legislative authority.[5] Fifth, the court adopted the reasoning of the Third Circuit and held that Congress' failure to meet under the IEEPA regulations did not terminate the state of emergency in Iran.[6] Sixth, the court denied Defendant's motion to dismiss Counts Three, Four, and parts of Counts Five and Six because the indictment adequately alleged that the Defendant committed bank fraud by depriving the U.S. banks of valuable information.[7]

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1. United States v. Ali Sadr Hashimi Nejad, No. 18-cr-224(AJN), 2019 U.S. Dist. LEXIS 211911 (S.D.N.Y Dec. 6, 2019).
2. *Id.* at 12.
3. *Id.* at 18–19.
4. *Id.* at 29.
5. *Id.* at 30.
6. *Id.* at 39.
7. *Id.* at 47.

Next, the court denied Defendant's motion to dismiss the multiplicitous counts as premature.[8] Eighth, the court denied Defendant's motion to dismiss all counts for lack of specificity. The court denied the motion because the indictment contained the specific acts that Defendant allegedly committed and the indictment specifically informed the Defendant of the charges against him.[9] Ninth, the court denied Defendant's motion for a bill of particulars because the indictment was specific and allowed the Defendant to prepare for trial.[10] Last, the court denied Defendant's motion to strike surplusages because it was too premature.[11]

II. Facts and Procedure

In December 2005, Venezuela and Iran came to an agreement to construct housing units in Venezuela.[12] The construction of housing units was led by the Iranian conglomerate Stratus Group, which was controlled and operated by Sadr and his family members.[13] Around December 2006, Stratus Group incorporated the Iranian International Housing Corporation in Tehran ("IIHC").[14] The IIHC was allegedly incorporated to manage the housing construction project. In July 2007, the IIHC entered into an agreement with a subsidiary of a Venezuelan state-owned energy company to construct housing units in Venezuela.[15] In 2009, Stratus Group created the Venezuela Project Executive Committee to oversee the housing construction project and Sadr was a member of the Executive Committee in charge of the project's finances.[16]

In 2010, Sadr and an unindicted coconspirator incorporated Clarity Trade and Finance ("Clarity") in Switzerland and Stratus International Contracting ("Stratus Turkey") in Turkey.[17] Both of these entities were owned and controlled by Sadr and his family members.[18] Sadr is alleged to have directed the Venezuelan state-owned energy company to make payments to the IIHC through the Swiss and Turkish entities on 15 separate occasions between April 2011 and November 2013.[19] The payments totaled approximately $115 million and were routed through United States banks, which provided processing services and the funds to Clarity or Stratus Turkey's Swiss bank accounts.[20]

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8. *Id.* at 49.
9. *Id.* at 50–51.
10. *Id.* at 55.
11. *Id.* at 57.
12. *Id.* at 2.
13. *Id.* at 3.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 3–4.
19. *Id.* at 4.
20. *Id.*

All of the following six counts in the indictment arise out of these transactions.[21] Counts One and Two charge Sadr with conspiring to defraud the United States and to violate IEEPA respectively.[22] Counts Three and Four charge Sadr with bank fraud and conspiracy to commit bank fraud.[23] Counts Five and Six charge Sadr with money laundering and conspiracy to commit money laundering.[24] The IEEPA confers upon the president "broad authority to issue regulations that restrict or prohibit international trade where he declares a 'national emergency' with respect to an 'unusual and extraordinary' foreign policy or national security threat."[25] Since 1979, trade with Iran has been restricted under the IEEPA.[26]

III. Discussion

A. Defendant's Motion to Dismiss Counts One, Two, Five and Six for Failure to State an Offense

1. Legal Standard for Failure to State an Offense

According to the Federal Rules of Criminal Procedure 12(b)(3)(B), a party may raise a pretrial motion to dismiss on the grounds that the indictment fails to state an offense.[27] Since "federal crimes are solely creatures of statute, a federal indictment can be challenged on the ground that it fails to allege a crime within the terms of the applicable statute."[28] Additionally, the defendant's standard in seeking to dismiss an indictment is high.[29] Under the Federal Rules of Criminal Procedure 7(c)(1), an indictment "must be a plain, concise, and definite written statement of the essential facts constituting the offense charged."[30] However, to meet this standard, an indictment simply needs to track the language of the statute charged and state the time and place of the alleged crime.[31]

2. Analysis of Defendant's Motion to Dismiss Counts One, Two, Five and Six

Here, Defendant argued that the transactions did not violate the ITSR because no services were exported to Iran.[32] Alternatively, he argued that the transactions did not violate the ITSR because they were expressly authorized.[33]

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21. *Id.* at 2.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at 4.
26. *Id.* at 5.
27. FED. R. CRIM. P. 12(b)(3)(B).
28. *Ali Sadr Hashimi Nejad,* 2019 U.S. Dist. LEXIS 211911, at *7.
29. *Id.*
30. FED. R. CRIM. P. 7(c)(1).
31. *Ali Sadr Hashimi Nejad,* 2019 U.S. Dist. LEXIS 211911, at *7.
32. *Id.* at 8.
33. *Id.*

a. Services Were Indirectly Exported to Iran

The court disagreed with Defendant's first argument because § 560.24 prohibits exportation "directly or indirect[ly]" from the United States any "goods, technology, or services to Iran."[34] As established by the Second Circuit, U.S. banks of international financial transactions constitute a service under the ITSR.[35] The court noted that the indictment does not allege that Sadr directly exported services to Iran.[36] Instead, focusing on the word "indirectly," it means "deviating from a direct line or course," "roundabout," or "not going straight to the point."[37] Tangible goods could be indirectly exported to Iran through a middleman in a third country; however, a service cannot be shipped through a "middleman."[38]

Instead, a service is performed on behalf of a "middleman," when the benefit is received by another person other than the one for whom the service was performed.[39] Here, the indictment alleged that the processing services from the U.S. banks were indirectly exported to Iran because the banks processed payments due to IIHC but transferred them to the "middleman" shell companies, Clarity and Stratus Turkey.[40] The IIHC, incorporated in Iran, stood to benefit from the processing series.[41] The court rejected Defendant's argument that the services were exported to Switzerland because it ignored the allegation that they indirectly exported to Iran due to IIHC receiving the benefits of the services.[42]

b. Defendant's Transactions Were Not Authorized by the ITSR

The court also rejected Defendant's second argument that his transactions were authorized by the ITSR.[43] The court discussed the legislative history of § 560.516, which authorizes certain transfers of funds to Iran.[44] The alleged transactions occurred between 2011 and 2013, when the authorization for "U-turn"[45] transactions was eliminated from § 560.516.[46] The court noted that the U-Turn authorization would allow the transactions at issue.[47] Defendant argued that the 2008 version of § 560.516(a)(2) preserved authorizations for U-turn transactions because they were not prohibited by the ITSR.[48]

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34. *Id.*
35. *Id.* at 9.
36. *Id.*
37. *Id.* at 10.
38. *Id.*
39. *Id.*
40. *Id.* at 11.
41. *Id.*
42. *Id.* at 12.
43. *Id.* at 28.
44. *Id.* at 19.
45. The Court defined U-turning as transactions that involve foreign countries and use U.S. banks as a middleman in processing funds.
46. *Ali Sadr Hashimi Nejad,* 2019 U.S. Dist. LEXIS 211911, at *23.
47. *Id.*
48. *Id.*

Section 560.516(a)(2) allows banks to process transfers "to and from Iran . . . if the transfer . . . arises from an underlying transaction that is not prohibited by this part, such as a noncommercial remittance to or from Iran."[49] In applying the doctrine of *noscitur a sociis*,[50] the court found that § 560.516(a)(2) only authorizes processing of transfer funds similar to noncommercial remittance.[51] Because the transactions involved here were commercial and unlike those expressly authorized by the 2008 version of § 560.516(a)(2), the court held that the transactions were not authorized.[52] As to the 2012 version of § 560.516(a)(2), the court held that it only authorizes transactions authorized elsewhere by specific or general licenses.[53] Because there was no specific or general license, neither the 2008 nor the 2012 version of the ITSR authorized the transactions at issue.[54]

B. Defendant's Motion to Dismiss Count One as Unconstitutionally Vague

Defendant's second pretrial motion argued that Count One should be dismissed because it failed to allege that Sadr's conduct deprived the United States of money or property.[55] Alternatively, Defendant argued that Count One should be dismissed as an unconstitutionally vague application of 18 U.S.C § 371, that failed to provide Sadr with fair notice of his conduct being criminal.[56] The court denied Defendant's arguments because it was foreclosed by *United States v. Coplan*, which reaffirmed the validity of the *Klein* theory of conspiracy.[57]

C. Defendant's Motion to Dismiss IEEPA-Based Counts Because the Iran Sanctions Regime Exceeds Constitutional Authority and the IEEPA is an Unconstitutional Delegation of Legislative Authority

1. The Iran Sanctions Regime Does Not Exceed Constitutional Authority

Defendant moved to dismiss Counts One and Two and the money laundering charges under Counts Five and Six alleging that the IEEPA exceeds constitutional authority.[58] In *United States v. Dhafir,* the court rejected the same nondelegation doctrine argument and held that the IEEPA is a constitutional delegation of power.[59] Based on this Second Circuit precedent, the court denied Defendant's argument that the IEEPA is an unconstitutional delegation of legislative authority.[60]

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49. 31 C.F.R § 560.516(a)(2) (2008).
50. The statutory interpretation doctrine where the interpretation of an ambiguous or unclear word depends on the words around it.
51. *Ali Sadr Hashimi Nejad,* 2019 U.S. Dist. LEXIS 211911, at *24–25.
52. *Id.* at 28.
53. *Id.*
54. *Id.*
55. *Id.* at 29.
56. *Id.*
57. *Id.*
58. *Id.* at 30.
59. 461 F.3d 211 (2d Cir. 2006).
60. *Ali Sadr Hashimi Nejad*, 2019 U.S. Dist. LEXIS 211911, at *30.

2. The Iran Sanctions Regime Does Not Exceed Constitutional Authority and Is Not Ultra Vires

Defendant's second argument is that his prosecution is an *ultra vires* act because (1) the IEEPA does not authorize an ongoing state of emergency against Iran because it was intended to reign in abuse of the sanctions power; and (2) the regulations under the IEEPA are not authorized because neither the president nor Congress have followed the procedural requirements.[61]

a. The IEEPA's Statutory History

The IEEPA is derived from § 5(b) of the Trading with the Enemy Act ("TWEA") of 1917, which granted the president authority to regulate international trade during wartime and times of national emergency.[62] Presidents would keep the emergency declarations active even after the threat or emergency was over.[63] As a result, IEEPA was enacted "to serve as a locus of executive economic authority during national-emergency situations," while TWEA was amended to apply only in times of war.[64] IEEPA contained several procedural limitations that required the president to consult with Congress, submit a report to Congress, and required Congress to meet "every six months to determine whether the national emergency shall be terminated."[65]

b. Defendant's Prosecution Is Not Ultra Vires

When reviewing a declaration of national emergency, a court proceeds with caution.[66] As a result, the court noted that the statute grants Congress the power to terminate a national emergency.[67] Congress has not chosen to terminate the national emergency, and thus, the court declined to challenge Congress.[68]

Additionally, the court disagreed with Defendant's argument that the president and Congress' failure to comply with the IEEPA's procedural requirement renders the regulations unauthorized.[69] Defendant conceded that the government does not have the burden to prove compliance with the statute's requirements and he himself pointed out that six presidents have successively renewed the Iran national emergency for nearly forty years.[70]

As to Congress' failure to meet its obligation and vote to determine whether the national emergency against Iran should be terminated, the court held that it does not terminate the state

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61. *Id.* at 30–31.
62. *Id.* at 31.
63. Id.
64. *Id.* at 32.
65. *Id.* at 32–33.
66. *Id.* at 33.
67. *Id.* at 34.
68. *Id.* at 35.
69. *Id.*
70. *Id.* at 36.

of emergency.[71] In *United States v. Amirnazmi,* the Third Circuit held that Congress' failure to fulfill the procedural requirement did not terminate the emergency against Iran because § 1622(d) explicitly provides for automatic termination if the president fails to extend it but § 1622(b) did not contain the same provision.[72] The court adopted the reasoning of the Third Circuit, that failure to meet periodically pursuant to § 1622(b) does not terminate the state of emergency against Iran.[73]

D. Defendant's Motion to Dismiss Counts Three to Six for Failure to State an Offense

Defendant moved to dismiss Counts Three and Four for failure to state an offense alleging that the counts failed to allege that he made any misrepresentations to any U.S. banks or that he intended to defraud a U.S. bank by exposing it to a risk of tangible economic harm.[74] Additionally, he moved to dismiss the money laundering charges in Count Five and Six that rely on the bank fraud charges.[75] Under the federal bank statute, it is a crime to "knowingly execute[], or attempt[] to execute, a scheme or artifice (1) to defraud a financial institution; or (2) to obtain any of the moneys . . . by means of false or fraudulent pretenses, representations, or promises."[76]

As to Defendant's argument that the counts fail to allege any misrepresentations, the court noted that other courts have only required proof of misrepresentations under § 1344(2).[77] Additionally, "an indictment may sufficiently allege a violation of this provision where a check or wire transfer order is accompanied by additional circumstances from which an implied misrepresentation may arise."[78] The court held that the indictment sufficiently alleges that Sadr and a coconspirator incorporated two entities, which received payments due to the IIHC.[79] Furthermore, the indictment alleges that Sadr communicated to the coconspirator that using the abbreviated name IIHC instead of Iranian International Housing Corporation was crucial since the Swiss and Turkish entities were receiving payments in U.S. dollars.[80]

The court also rejected Defendant's argument that the indictment cannot allege bank fraud because the Venezuelan subsidiary willingly transferred its own funds on the basis that this argument was rejected by the Second Circuit.[81] In *United States v. Lebedev,* the court found that the defendant's scheme was one to obtain funds in the bank's customers' accounts, which

71. *Id.* at 37–38.

72. 645 F.3d 564, 578 (3d Cir. 2011).

73. *Ali Sadr Hashimi Nejad*, 2019 U.S. Dist. LEXIS 211911, at *38.

74. *Id.* at 39.

75. *Id.*

76. 18 U.S.C. § 1344.

77. *Ali Sadr Hashimi Nejad*, 2019 U.S. Dist. LEXIS 211911, at *41.

78. *Id.*

79. *Id.* at 42.

80. *Id.*

81. *Id.* at 44.

were under the custody and control of the bank.[82] Similarly, the indictment alleged that a scheme to obtain funds in the Venezuelan subsidiary's account.[83] Lastly, the court disagreed with Defendant's last argument that the indictment failed to allege a scheme to defraud involving intent to cause tangible economic harm.[84] The court noted that the scheme "must be one to deceive the bank and deprive it of something of value."[85]

Here, the indictment used the right-to-control theory and alleged that the banks were deprived of the right to control their assets.[86] Under this theory, a bank fraud charge can be asserted by showing that the defendant withheld or inaccurately reported information that would impact economic decisions (deprivation of valuable economic information).[87] The court held that the indictment adequately alleged that Sadr disguised the transaction and deprived U.S. banks of valuable information as to who were the true beneficiaries of the bank's processing services.[88]

E. Defendant's Motion to Dismiss Multiplicitous Counts

Defendant moved to dismiss Counts One, Two and Six as multiplicitous counts because they all charged the same conspiracy based on the same conduct under a different statutory provision. A motion to dismiss multiplicitous counts derives from the Fifth Amendment's prohibition against double jeopardy.[89] However, double jeopardy only prohibits duplicative punishment not simultaneous prosecutions for the same offense.[90] As a result, the court dismissed Defendant's motion to dismiss multiplicitous counts.[91]

F. Defendant's Motion to Dismiss All Counts for Failure to State an Offense and Lack of Specificity or, in the Alternative, for a Bill of Particulars

1. Failure to State an Offense and Lack of Specificity

Under the Federal Rules of Criminal Procedure 12(b)(3)(B)(iii), an indictment can be challenged on the grounds that it lacks the required specificity.[92] According to Federal Rules of Criminal Procedure 7(c)(1), an indictment "must be a plain, concise, and definite written statement of the essential facts constituting the offense charged."[93] To satisfy Rule 7(c)(1), an indictment must do little more than track the charged statute's language and state the time and

82. 932 F.3d 40 (2d Cir. 2019).

83. *Ali Sadr Hashimi Nejad*, 2019 U.S. Dist. LEXIS 211911, at *44.

84. *Id.* at 45.

85. *Id.*

86. *Id.* at 46.

87. *Id.*

88. *Id.* at 47.

89. *Id.* at 48.

90. *Id.* at 49.

91. *Id.*

92. FED. R. CRIM. P. 12(b)(3)(B)(iii).

93. FED. R. CRIM. P. 7(c)(1).

place of the alleged crime.[94] Additionally, courts have refused to dismiss charges in an indictment for lack of specificity when the charges in an indictment stated the elements of the offense and provided even minimal protection against double jeopardy.[95]

Here, the court noted that each count of the indictment tracked the language of the statute charges and stated the time and place of the alleged crimes.[96] Additionally, the 34-page indictment contained 54 overt acts alleged in furtherance of the conspiracies alleged.[97] The court also held that Sadr's arguments were rendered moot by its previous pre-trial decisions.[98] Lastly, the court denied Defendant's motion to dismiss because the indictment fairly informed the Defendant of the charges and allowed him to plead acquittal or conviction in bar of future prosecutions of the same offense.[99]

2. Motion for Bill of Particulars

Under the Federal Rules of Criminal Procedure 7(f), a defendant may move for a bill of particulars.[100] This is done so that a defendant may "identify with sufficient particularity the nature of the charge pending against him."[101] A bill of particulars is used to "enable a defendant to prepare for trial, prevent surprise, and to interpose a plea of double jeopardy should he be prosecuted a second time for the same offense."[102] However, a bill of particulars is only required when the "charges of the indictment [are] so general that they do not advise the defendants of the specific acts of which he is accused."[103] Thus, a court must consider the "totality of information available to the defendant" to determine whether to grant a motion for bill of particulars.[104] The test is "whether the bill of particulars is necessary for the defense, not whether it would aid the defendant in his preparation."[105]

Here, Defendant sought a bill of particulars to identify: (1) the alleged co-conspirators and other actors involved; and (2) alleged transactions and false misstatements.[106] The court exercised its discretion to deny Defendant's first request because the allegations in the indictment were specific and Defendant could adequately prepare himself with the discovery provided by the government.[107] The court denied Defendant's second request because the

94. *Ali Sadr Hashimi Nejad*, 2019 U.S. Dist. LEXIS 211911, at *50.
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* at 50–51.
99. *Id.* at 51.
100. FED. R. CRIM. P. 7(f).
101. *Ali Sadr Hashimi Nejad*, 2019 U.S. Dist. LEXIS 211911, at *51–52.
102. *Id.* at 52.
103. *Id.*
104. *Id.*
105. *Id.* at 53.
106. *Id.*
107. *Id.*

government already identified the transactions at issue.[108] Additionally, the court held that the indictment need not set out every act committed by the conspirators in furtherance of the conspiracy.[109] Lastly, the court noted that despite the indictment not specifying the precise regulations Defendant allegedly conspired to violate, the government already communicated this information at oral arguments.[110]

G. Defendant's Motion to Strike Surplusage

According to Federal Rules of Criminal Procedure 7(d), a court may grant a motion to strike a surplusage from the indictment.[111] These motions will only be granted "where the challenged are not relevant to the crime charged and are inflammatory and prejudicial."[112] Evidence of the allegation may not be stricken, regardless of any prejudicial language, if it is admissible and relevant to the charge.[113]

Here, Sadr sought to strike five categories of surplusages.[114] As to categories 3, 4, and 5, the court held that they were moot because parties had already resolved them at the time of filing of the motion.[115] As to categories 1 and 2, the court was skeptical that Sadr satisfied the standards for striking surplusage but decided to deny the motion without prejudice to allow Sadr to renew this motion at trial. [116]

IV. Conclusion

The court denied all of Defendant's seven pre-trial motions. In doing so, the court held that the indictment specifically alleged that the Defendant indirectly exported services to Iran because the beneficiary of the bank's processing services was the Iranian International Housing Corporation. Also, the indictment alleged that Defendant engaged in bank fraud by withholding and depriving U.S. banks of this information from the U.S. banks. The court denied Defendant's other arguments based on the court's precedent such as its previous decisions reaffirming validity of the *Klein* theory.

Ruben Huertero

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108. *Id.* at 54.

109. *Id.*

110. *Id.* at 55.

111. FED. R. CRIM. P. 7(d).

112. *Ali Sadr Hashimi Nejad*, 2019 U.S. Dist. LEXIS 211911, at *56.

113. *Id.*

114. *Id.*

115. *Id.* at 57.

116. *Id.* at 57–58.

Manning v. Erhardt + Leimer, Inc. and Erhardt + Leimer GmBH

17-CV-348, 2020 WL 759656 (W.D.N.Y. Feb. 7, 2020)

The United States District Court for the Western District of New York denied Defendant E+L GmBH's motion to dismiss under Rule 12(b)(2) because the court established personal jurisdiction over Plaintiff Manning's age discrimination claim. This Court converted defendant E+L GmBH's motion to dismiss under Rule 12(b)(6) into a motion for summary judgment under Rule 56, to provide parties with the opportunity for greater discovery and to encourage judicial economy.

I. Holding

Recently, in *Manning v. Erhardt + Leimer,*[1] the Western District of New York denied Defendant Erhardt + Leimer GmBH ("E+L GmBH")'s Rule 12(b)(2) motion. Defendant's motion to dismiss was denied because the court relied on New York's long-arm statute and constitutional due process to establish personal jurisdiction over Plaintiff Ignatius Manning ("Manning")'s Age Discrimination in Employment Act ("ADEA") claim. The Western District of New York also converted Defendant E+L GmBH's Rule 12(b)(6) motion into a Rule 56 motion to give both parties an adequate opportunity to assert whether E+L GmBH is an integrated enterprise under the ADEA.

II. Facts and Procedure

Plaintiff Manning was employed by Defendant E+L GmBH beginning in 1978.[2] E+L GmBH is a German corporation with a subsidiary in the United States, Erhardt + Leimer USA ("E+L USA").[3] Manning left E+L GmBH in 1996 because he would not relocate his family to South Carolina for the job.[4] In December 2011, E+L re-recruited Manning for his industry expertise.[5] Effective February 20, 2012, Manning was hired as Technical Outside Sales Manager for Sales Division 4; he worked out of his home.[6] Manning was 60 years old at the time of his hiring.[7]

E+L transferred Maulik Desai ("Desai"), a male in his 30s, to the position of Sales Division 4 Manager in Spring 2014.[8] That position was previously divided into two positions, one of which was held by Manning.[9] Manning's direct supervisor told him that he was unsure how

1. Manning v. Erhardt + Leimer, Inc., 17-CV-348, 2020 WL 759656 (W.D.N.Y. Feb. 7, 2020).
2. Complaint, Manning v. Erhardt + Leimer, Inc., 17-CV-348 (W.D.N.Y. Apr. 24, 2017).
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*

Desai's transfer would affect his job.[10] In August 2014, E+L USA reduced Manning's sales territory by approximately 80% because it was given to Desai.[11] Manning was reassigned as Technical Sales Manager for Sales Division 3 for the Northeast territory.[12] E+L USA did not have a developed customer base for Sales Division 3, a declining area of the business.[13] Manning did not receive any support for his new division.[14] E+L USA's Vice President of Sales and Operations told Manning not to attend the Annual Sales meeting scheduled for August 2014.[15]

E+L USA terminated Manning's employment on June 5, 2015.[16] At the time of his termination, Manning was 62 years old.[17] E+L USA advised Manning that his termination was a result of a reduction in their workforce.[18] Desai received Manning's duties following his termination.[19]

A. The Magistrate Court's Report and Recommendation

Manning filed suit under the ADEA and the New York Human Rights Law in federal district court on April 24, 2017.[20] Manning alleged he was terminated due to age discrimination, and that his job was given to younger employees.[21] E+L GmBH moved to dismiss for lack of subject matter jurisdiction or lack of personal jurisdiction on January 3, 2018.[22] More specifically, E+L GmBH moved to dismiss on the grounds that it is not covered by the ADEA as it is a foreign corporation.[23]

On April 20, 2018, Magistrate Judge Hugh B. Scott issued a recommendation that E+L GmBH's motion be granted on both jurisdictional grounds.[24] Judge Scott found that the court did not have subject matter or personal jurisdiction over E+L GmBH because the ADEA did not apply to the foreign parent company of a domestic subsidiary.[25] The court also declined to exercise supplemental jurisdiction under the NYHRL.[26] Manning objected to the Magistrate's findings.[27] Following his objections, the case was sent to United States District Court Judge Lawrence J. Vilardo for review of Judge Scott's Report and Recommendation.[28]

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10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Manning*, 2020 WL 759656, at *1.
21. Complaint, *supra* note 2.
22. *Manning*, 2020 WL 759656, at *1.
23. *Id.*
24. *Id.*
25. Report & Recommendation, *Manning*, 17-CV-348 (W.D.N.Y. Apr. 20, 2018).
26. *Id.*
27. *Manning*, 2020 WL 759656, at *1.
28. *Id.*

III. Discussion

A. Pleadings

On a 12(b)(6) motion where matters outside the pleadings are presented and not excluded by the court, the motion must be treated as one of summary judgment under Rule 56.[29] All parties must be given a reasonable opportunity to present all material that is pertinent to their motion.[30] The district court analyzed Section 623(h)(2) of the ADEA as material pertinent to Plaintiff's motion. The relevant section provides that the ADEA "shall not apply where the employer is a foreign person not controlled by an American employer."[31] Under Section 630(f) of the ADEA, the definition of 'employee' includes "any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country." [32]

1. E+L GmBH is Liable Under the ADEA Because *Morelli* is not Persuasive Authority

The district court found the Second Circuit's reasoning in *Morelli v. Cedel* unpersuasive, and thus, compelling the finding that E+L GmBH is liable under the ADEA.[33] The *Morelli* court initially observed that a literal reading of Section 623(h)(2) may suggest that it "does not apply to the *domestic* operations of foreign employers- unless there is an American employer behind the scenes."[34] Subsequently, the *Morelli* court noted that such reading may be inconsistent with Congress' legislative intent to "limit the reach of a [separate] extraterritorial amendment adopted as part of the same legislation."[35] The Second Circuit ultimately held that Section 623(h)(2) "generally applies to foreign firms operating on U.S. soil."[36]

The court held that it had jurisdiction over Manning's claim "[b]ecause the ADEA does not otherwise prescribe a federal court's jurisdiction over claims brought under its provisions."[37] The court reached this conclusion by demonstrating the weakness of *Morelli* and implying that courts look elsewhere to determine the ADEA's scope. Judge Vilardo explained that "the scope of the ADEA is a definitional question" [38] and defining who an employer or employee is under the ADEA "is simply an element of a plaintiff's claim for material relief."[39] Judge Vilardo set out to diminish *Morelli*'s precedent, pointing out that *Morelli* addressed the ADEA's scope as a jurisdictional issue but its framing was not determinative; *Morelli* merely

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29. FED. R. CIV. P. 12(B)(6).
30. *Id.*
31. 29 U.S.C. § 623(h)(2).
32. 29 U.S.C. § 630(f).
33. Morelli v. Cedel, 141 F.3d 39, 41 (2d Cir. 1998) (discussing whether the ADEA covers a U.S. branch of a foreign employer).
34. *Id.* at 42 (original emphasis).
35. *Id.*
36. *Id.* at 44.
37. *Manning*, 2020 WL 759656, at *3.
38. *Id.*
39. Arbaugh v. Y&H Corp., 546 U.S. 500, 509 (2006).

served as dicta.[40] Further, Judge Vilardo expressed that since the *Morelli* decision, the Supreme Court "tried . . . to bring some discipline to the use of the term jurisdiction."[41] Because the ADEA is not explicit about a federal court's jurisdiction over claims brought under it, the court said it had jurisdiction to adjudicate Manning's claim under 28 U.S.C. § 1331.[42] Thus, E+L GmBH was held liable under the ADEA.

2. Motion to Dismiss for Lack of Personal Jurisdiction

a. Legal Standard for Challenging Personal Jurisdiction

A defendant may challenge a plaintiff's assertion that a court has personal jurisdiction over a defendant by a Rule 12(b)(2) motion to dismiss, which assumes the truth of plaintiff's factual allegations and challenges their sufficiency.[43] If a defendant solely challenges the sufficiency of a plaintiff's factual allegations, the plaintiff need only persuade the court that its factual allegations constitute a *prima facie* showing of jurisdiction.[44] To determine personal jurisdiction over a non-domiciliary in a case involving a federal question, courts apply the forum state's long-arm statute.[45] If the long-arm statute permits personal jurisdiction, the court analyzes whether personal jurisdiction comports with constitutional due process protections.[46]

b. New York Long-Arm Jurisdiction

i. Domestic Subsidiary Jurisdiction

For New York courts to have personal jurisdiction over foreign parent companies for the actions of their domestic subsidiaries, the subsidiary must be an 'agent' or a 'mere department' of the foreign parent.[47] Where a subsidiary is a separate incorporated entity of a foreign corporation, the subsidiary's activities will be attributed to the foreign parent to determine the parent's amenability to personal jurisdiction in New York.[48] To establish a subsidiary as an agent of its parent, a plaintiff must show that the subsidiary does business which the parent could do if it were in New York.[49] To determine whether a subsidiary is a "mere department" of the parent, courts consider four factors: (1) "common ownership;" (2) "financial dependency of the subsidiary on the parent;" (3) the degree to which the parent "interferes in the selection and

40. *Manning*, 2020 WL 759656, at *2.

41. *Id.* (quoting Sebelius v. Auburn Reg'l Med. Ctr., 568 U.S. 145, 153 (2013)).

42. *Id.* at *3; *see* 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

43. *Id.* (citing Ball v. Metallurgie Hoboken-Overpelt, S.A., 902 F.2d 194, 197 (2d Cir. 1990)).

44. *Id.*

45. *Id.* at *4 (citing Chloé v. Queen Bee of Beverly Hills, 616 F.3d 158, 163 (2d Cir. 2010)).

46. *Id.*

47. *Id.* (citing Jazini v. Nissan Motor Co., 148 F.3d 181, 184 (2d Cir. 1998)).

48. *Id.* (citing Canterbury Belts Ltd. v. Lane Walker Rudkin, Ltd., 869 F.2d 34, 40 (2d Cir. 1989)).

49. *Id. (*citing *Jazini*, 148 F.3d at 184).

assignment of the subsidiary's executive personnel and fails to observe corporate formalities;" and (4) "the degree of control over the marketing and operational policies of the subsidiary exercised by the parent."[50]

ii. Section 302(a)(1) Long-Arm Jurisdiction

Under New York's CPLR § 302(a)(1), a court may exercise jurisdiction over a non-domiciliary that "transacts any business within the state or contracts anywhere to supply goods or services in the state."[51] To establish jurisdiction under this section, "two requirements must be met: (1) [t]he defendant must have transacted business within the state; and (2) the claim asserted must arise from that business activity."[52] "[P]roof of one transaction in New York is sufficient to invoke jurisdiction . . . so long as the defendant's activities [] were purposeful and there is a substantial relationship between the transaction and the claim asserted."[53] Purposeful activities are those where a defendant avails itself of the privilege of conducting activities in New York, thus, invoking the benefits and protections of its laws.[54] In an action between an employee and employer, a plaintiff's employment within the forum state is sufficient to show the defendant employer transacted business there.[55] When the alleged injury is discrimination in the course of employment, the plaintiff adequately alleged a "substantial relationship between the transaction and the claim asserted."[56]

c. Constitutional Jurisdiction

The court discussed establishing federal personal jurisdiction, which has different requirements from a forum state establishing personal jurisdiction. To establish such jurisdiction, a plaintiff must allege that (1) the defendant has minimum contacts with the relevant forum, and (2) the exercise of jurisdiction is reasonable.[57] Minimum contacts exist where a "defendant purposefully availed itself of the privilege of doing business in the forum and could foresee being haled into court there."[58] If the court finds the plaintiff established minimum contacts, the burden shifts to the defendant to "present a compelling case that the presence of some other considerations would render jurisdiction unreasonable."[59] Exercise of personal jurisdiction is reasonable if it comports "with fair play and substantial justice."[60]

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50. *Id.* at *5 (quoting Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp., 751 F.2d 117, 121–22 (2d Cir. 1984)).
51. N.Y. CPLR 302(a)(1).
52. *Manning*, 2020 WL 759656, at *7 (quoting Licci ex rel. Licci v. Lebanese Canadian Bank, SAL, 732 F.3d 161, 168 (2d Cir. 2013)).
53. *Id.* (quoting *Chloé*, 616 F.3d at 170).
54. *Id.* (quoting Fischbarg v. Doucet, 9 N.Y.3d 875, 380 (2007)).
55. *Id.*
56. *Id.* (citing *Chloé*, 616 F.3d at 170).
57. *Id.* at *8.
58. *Id.*
59. *Id.* (quoting *Licci,* 732 F.3d at 173).
60. *Licci*, 732 F.3d at 170.

3. Manning Made a *Prima Facie* Showing of This Court's Jurisdiction Over E+L GmBH

a. Analysis of New York Long-Arm Jurisdiction

The court determined that E+L GmBH was amenable to personal jurisdiction in New York by relying on the four factors laid out in *Jazini v. Nissan Motor*.[61] E+L USA is a wholly owned subsidiary of E+L GmBH, demonstrating the first factor: "common ownership."[62] The court explained that Manning adequately alleged the third factor because he demonstrated that E+L GmBH significantly interfered in the selection of executive personnel.[63] Specifically, "E+L GmBH was the driving force behind his 1996 relocation, his 2011 recruitment and hiring, his 2014 assignment, and his 2015 termination."[64] Further, Manning alleged that E+L GmBH acted without input from E+L USA.[65] Finally, Manning alleged that E+L GmBH's Chief Sales Officer was directly involved in his hiring and reassignment at E+L USA.[66] As such, Manning adequately met the third factor.

Regarding the fourth factor, Manning demonstrated E+L GmBH had control over the marketing and operation policies of E+L USA.[67] E+L GmBH described E+L USA as one of its branch offices and that it is represented by E+L USA in the American market.[68] On E+L USA's website, it lists its headquarters as E+L GmBH's Germany address.[69] Although Manning provided no facts related to the second factor, the court determined that E+L USA is a 'mere department' of its parent, E+L GmBH.[70] Therefore, the court attributed E+L USA's activities to E+L GmBH for purposes of determining whether E+L GmBH was amenable to personal jurisdiction in New York.

Manning's claims arose from E+L USA's business transactions occurring in New York, establishing this court's jurisdiction over E+L USA and E+L GmBH under CPLR § 302(a)(1). Manning argued that the Western District of New York has jurisdiction under two provisions of the forum state's long-arm statute: the "transacting business" provision[71] and the "tortious

61. *Manning*, 2020 WL 759656, at *6.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *See* N.Y. CPLR 302(a)(1) (exercising personal jurisdiction over a non-domiciliary who "transacts any business within the state or contracts anywhere to supply goods or services in the state").

act" provision.[72] There was no dispute the defendants transacted business in New York. Manning alleged he was employed by E+L USA and they discriminated against him during his employment there; this allegation meets the CPLR's tortious act provision.[73]

Manning asserted that the court had jurisdiction over E+L GmBH because of actions undertaken directly by its wholly-owned subsidiary company, E+L USA. The court discussed how E+L GmBH was on notice that they could be brought into court in New York: E+L GmBH knew "that Manning was unwilling to relocate from his home in New York to the firm's South Carolina branch office."[74] Additionally, E+L GmBH "chose to allow [Manning] to work from his home in New York for three-and-a-half years, during which time the firm frequently sent communications into and out of the state."[75] Together, the court found these facts to sufficiently demonstrate that Manning's claims arose from the defendants' activities in New York. As a result, the court concluded that E+L USA and E+L GmBH are within its jurisdiction.

b. Analysis of Constitutional Jurisdiction

Manning made a *prima facie* showing that the Western District of New York has personal jurisdiction over E+L USA and E+L GmBH. From facts previously discussed, the court determined that E+L GmBH purposefully availed itself of doing business in New York and could foresee being brought into court there.[76] The court found that exercising personal jurisdiction over the defendants would not be unreasonable and comports with substantial justice.[77] Through its analysis of jurisdiction under the CPLR and federal case law, the court denied defendants' motion to dismiss under Rule 12(b)(2).

4. Motion to Dismiss for Failure to State a Claim

a. Legal Standard for Failure to State a Claim

Federal Rule of Civil Procedure 12(b)(6) states that if, on a motion, "matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56."[78] If a court is presented with matters outside of the pleadings, Rule 12(b)(6) provides two options: (1) the court may exclude extrinsic documents; or (2) if the court elects not to do so, it must convert the motion to one for summary judgment and give parties the opportunity to conduct discovery and submit additional supporting material contemplated by Rule 56.[79]

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72. *Manning*, 2020 WL 759656, at *4; *see* N.Y. CPLR 302(a)(3) (exercising personal jurisdiction over a non-domiciliary who "commits a tortious act without the state causing injury to person or property within the state").

73. *Manning*, 2020 WL 759656, at *7.

74. *Id.* at *8.

75. *Id.*

76. *Id.* at *9.

77. *Id.*

78. FED. R. CIV. P. 12(B)(6).

79. *Manning*, 2020 WL 759656, at *9 (citing Chambers v. Time Warner, Inc., 282 F.3d 147, 154 (2d Cir. 2002)).

5. The Integrated Enterprise Doctrine and Extrinsic Materials

For a plaintiff to prevail in an ADEA claim, they must establish a *prima facie* case by demonstrating the following elements: "membership in a protected class, qualification for the position, an adverse employment action, and circumstances that give at least minimal support to an inference of discrimination."[80] In order to prevail in an employment action against a defendant who is not the plaintiff's direct employer, the plaintiff must establish that the defendant is part of an integrated enterprise with his employer.[81] If the plaintiff is successful in proving such claim, the defendant will be liable for the employer's illegal acts and vice versa.[82] In other words, the court must determine whether an employee of one entity was assigned work in a matter that justifies a conclusion that an employee is simultaneously employed by another entity.[83]

B. Analysis for Failure to State a Claim

Manning easily met the factors demonstrating a prima facie ADEA claim. He is a member of a protected class: he is an employee under the ADEA's definition. Manning was qualified for his position at E+L USA; he was rehired by E+L GmBH because of his expertise and experience in the tire industry. Manning's termination was the adverse employment action that E+L GmBH took against him. Finally, Manning alleged that E+L GmBH hired Desai to replace Manning.

Manning may rely on the integrated enterprise doctrine to bring his claim under the ADEA. E+L GmBH pointed to § 623(h)(2) of the ADEA to illustrate that Manning could not bring his claim.[84] However, Judge Vilardo noted that the Second Circuit already established that § 623(h)(2) does not exclude "the *domestic* operations of employers."[85] The Second Circuit also cautioned in *Brown v. Daikin America* that "[w]hether two related entities are sufficiently integrated to be treated as a single employer is generally a question of fact not suitable to resolution on a motion to dismiss."[86] Between this caution in *Brown* and reasons discussed above in context of personal jurisdiction, this court found that a reasonable jury could conclude that E+L GmBH exercised sufficient control over the terms and conditions of Manning's employment to qualify as his employer for purposes of the discrimination claim.[87] Yet, the court also recognized "that E + L GmBH [] submitted voluminous materials contradicting Manning's assertions about the existence of an integrated enterprise, and that, if those assertions are true, E + L GmBH might avoid the considerable expense of defending itself abroad."[88] For this reason, the court converted "E+L GmBH's motion to dismiss under Rule

80. *Id.* at *9 (quoting Fagan v. N.Y. Elec. & Gas Corp., 186 F.3d 127, 132 & n.1 (2d Cir. 1999)).

81. *Id.* (citing Brown v. Daikin Am. Inc., 756 F.3d 219, 226 (2d Cir. 2014)).

82. *Id.*

83. *Id.*

84. *Id.* at *10.

85. *Id.* (quoting *Morelli*, 141 F.3d at 42).

86. *Brown*, 756 F.3d at 226.

87. *Manning*, 2020 WL 759656, at *10.

88. *Id.*

12(b)(6) into a motion for summary judgment under Rule 56."[89] The court ruled in this manner to give the parties "an opportunity to conduct appropriate discovery and submit the additional supporting material contemplated by Rule 56."[90]

IV. Conclusion

Defendant E+L GmBH's motion to dismiss under Rule 12(b)(2) provided the court with the opportunity to expand their judicial authority over foreign employers in domestic age discrimination claims. In doing so, the Western District of New York rebuked the Second Circuit's precedent in *Morelli* and attempted to illustrate a more specific definition of jurisdiction for when federal district courts adjudicate age discrimination claims. Although the court leaned in the employee's favor in ruling on the Rule 12(b)(2) motion to dismiss, it maintained its fair nature in converting the Rule 12(b)(6) motion to a motion for summary judgment. This order gives both parties an opportunity to discover information that may bolster their claims in regard to whether Defendant E+L GmBH is an integrated enterprise under the ADEA. The court was correct in the way it ruled on both motions, yet this created law may change if the case is appealed to the Second Circuit.

Ellie Sage Sheinwald

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89. *Id.*

90. *Id.* (quoting *Chambers*, 282 F.3d at 154).

United States v. Balde

943 F.3d 73 (2d Cir. Nov. 13, 2019)

The United States Court of Appeals for the Second Circuit rejected Balde's arguments that (1) "in" as used in 18 U.S.C. § 922(g)(5)(A) should be interpreted as "entered;" (2) he was not "illegally or unlawfully" in the United States; and (3) that failure to state the knowledge of illegal status requirement announced by the Supreme Court in *Rehaif v. United States* in an indictment was a jurisdictional failure preventing federal courts from having jurisdiction over Balde, but nevertheless granted Balde's petition for rehearing and vacated his conviction because, when Balde entered a guilty plea, he was not aware of the knowledge of illegal status requirement for 18 U.S.C. § 922(g)(5)(A) convictions.

I. Holding

Recently in *United States v. Balde*,[1] the United States Court of Appeals for the Second Circuit granted Balde's petition for rehearing, vacated his conviction of unlawful possession of a firearm by an alien illegally present in the United States, and remanded the case for further proceedings. First, the court rejected Balde's argument that "in" within 18 U.S.C. §§ 922(g)(5)(A) and 924(a)(2) should be interpreted as "entered" within the context of immigration causing the statutes to not apply to Balde. The court then rejected Balde's argument that because his supervised release was incorrectly granted he was released on parole and therefore not "illegally" in the United States, within the meaning of the statutes he was convicted under.

Balde also argued that the recent Supreme Court decision in *Rehaif v. United States*,[2] which announced that for a conviction under 18 U.S.C. §§ 922(g)(5)(A) and 924(a)(2) the prosecution must prove that the defendant knew he or she was in the category of people "illegally" in the United States under the statute, invalidated his conviction. The court rejected Balde's argument that a failure to directly state this knowledge requirement in the indictment made jurisdiction over his case unlawful. However, it accepted Balde's argument that he would not have entered a guilty plea if he had been informed of the knowledge of illegal status requirement. The government argued that Balde waived the right to argue the knowledge of legal status by entering a guilty plea but the court rejected that argument because Balde was able to meet the plain error standard for invalidating a plea.

II. Facts and Procedure

Souleymane Balde, a citizen of Guinea, arrived in the United States as a child without lawful immigration status, and tried to adjust his status to become a lawful permanent resident in May 2005.[3] This process required a USCIS interview, which was originally scheduled for

1. United States v. Balde, 943 F.3d 73 (2d Cir. Nov. 13, 2019).
2. Rehaif v. United States, 139 S. Ct. 2191 (2019).
3. *Balde*, 943 F.3d at 78.

December 1, 2005.[4] A few months after applying, Balde found out that his mother was gravely ill.[5] He asked his attorney to postpone his interview so that he could visit her in Guinea and applied for advance parole status, which would allow him to travel without changing his immigration status.[6] USCIS granted Balde advance parole status but did not postpone the interview, and on January 26, 2006, while Balde was in Guinea, it denied his application for adjustment of status because he did not attend his interview and revoked his advance parole status.[7]

When Balde returned to the U.S. on March 17, 2006, after his mother's death, he was informed for the first time that his advance parole status was revoked, and Customs and Border Protection detained him.[8] An immigration judge issued an order of removal against Balde, which he appealed to the Board of Immigration Appeals (BIA) and then to the Second Circuit, which stayed his removal pending decision.[9] The United States Immigration and Customs Enforcement Agency (ICE) then granted Balde's request for supervised release from detention and notified him that his release would be under the Intensive Supervision Appearance Program designed for aliens under final order of removal.[10] Balde's order of removal was subsequently made final on December 19, 2008 but the government was unable to deport him because his Guinean passport had expired.[11] Balde was still under supervised release and he did not receive legal status at any time.[12]

On December 14, 2015, Balde pulled out a firearm and pointed it at others during an altercation at a deli in the Bronx.[13] He left the deli but later drove back and fired a single shot into the air from the passenger's side of a car.[14] The New York City Police apprehended him with cartridges in his pocket and a revolver under his car seat.[15] A grand jury indicted him on one count of possession of a firearm in violation of 18 U.S.C. § 922(g)(5)(A).

Balde moved to dismiss the indictment, and pled guilty under an agreement that preserved his right to appeal the denial of his motion to dismiss, when the district court denied his motion.[16] Balde appealed arguing that he was not "illegally or unlawfully" in the United States within the meaning of the statute he was convicted under, and the Second Circuit affirmed his conviction.[17] The Supreme Court decided *Rehaif v. United States*, holding that the knowledge requirement of 18 U.S.C. §§ 922(g)(5)(A) and 924(a)(2) also applied to the illegal or unlawful

4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* at 78–79.
8. *Id.* at 79.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at 80.

status of the defendant before Balde's time to seek rehearing expired, and Balde petitioned for rehearing in light of *Rehaif*.[18]

III. Discussion

In his original appellate brief, Balde argued that he was not "in" the United States under the meaning of 18 U.S.C. § 922(g)(5)(A) and that he was not in the United States "illegally or unlawfully" within the meaning of the statute.[19] In his petition for rehearing, Balde additionally argued that the *Rehaif* announcement of a knowledge of illegal status requirement caused his indictment to fail to create federal court jurisdiction.[20] He alternatively argued that his guilty plea should be invalidated because the district court did not inform him of the requirement announced in *Rehaif*.[21]

The Second Circuit granted the petition for rehearing because it agreed with Balde's final argument regarding the validity of his plea in light of the requirements in *Rehaif*.[22]

A. "In the United States"

1. Legal Standard for "In the United States"

18 U.S.C. § 922(g)(5)(A) prohibits illegal aliens "in the United States" from possessing a firearm.[23] Balde argues that the statute does not apply to him because he never 'entered' the United States as a matter of immigration law, and that "in" should be interpreted as 'entered.'[24] The Second Circuit rejected that argument in its decision regarding Balde's original appeal, and reaffirmed its decision here.[25]

2. Analysis of "In the United States"

The court began its analysis of "in the United States" by looking at the plain meaning of the words. The court determined that the plain meaning of the phrase "in the United States" meant within the geographic borders of the United States.[26] Because the court found that the plain meaning of "in" as used in the statute was unambiguous, it ended its analysis there but went on to expand upon the reasons it rejected Balde's argument about the correct interpretation of "in."[27]

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18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 81.
23. 18 U.S.C. § 922(g)(5)(A).
24. *Balde*, 943 F.3d at 81.
25. *Id.* at 80–81.
26. *Id.* at 81.
27. *Id.*

Balde argued that the word "in" should be interpreted within 18 U.S.C. § 922(g)(5)(A) to mean "has entered the United States."[28] The court rejected this interpretation for four reasons.[29] First, the court rejected Balde's argument because Congress chose to use "in" in the statute rather than "entered."[30] Second, it rejected Balde's argument because it would change the statute and prevent it from applying from certain groups of illegal aliens, including people who entered lawfully but overstayed their visas.[31] Third, the court rejected Balde's argument because Balde's interpretation used technical terminology from immigration statutes and the statute at issue was a criminal statute not an immigration statute.[32] Fourth, the court rejected Balde's argument because Congress knows how to use technical immigration language but chose not to do so here.[33]

Finally, the court noted that the main authority Balde used to advance his argument, *United States v. Lopez-Perera*,[34] did not truly support Balde's argument. In *Lopez-Perera*, the Ninth Circuit held that § 922(g)(5)(A) was inapplicable because the defendant had not entered the United States but, in that case, the defendant had not left the Port of Entry, and was therefore not in the United States, when he was arrested.[35] Additionally, the Ninth Circuit's holding cited a regulation by the Bureau of Alcohol, Tobacco and Firearms (ATF), which defined aliens illegally or unlawfully in the United States to include all aliens who entered the United States without authorization or parole status.[36] The court asserted that this regulation would not help Balde, as it would not apply to him because he was not authorized or on parole.[37] The court also noted that even if the ATF regulation used in *Lopez-Perera* did apply to Balde, it was not required to rely on administrative regulations when interpreting criminal statutes.[38]

For these reasons, the court rejected Balde's argument and adopted a plain meaning interpretation of "in the United States" as used in 18 U.S.C. § 922(g)(5)(A).

B. "Illegally or Unlawfully" Present

1. Legal Standard for "Illegally or Unlawfully" Present

18 U.S.C. § 922(g)(5)(A) criminalizes possession of a firearm by aliens who are present "illegally or unlawfully" in the U.S.[39] Aliens who have been granted parole are not "illegally or unlawfully" present in the United States because the Attorney General has authorized their

28. *Id.*
29. *Id.* at 82.
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. United States v. Lopez-Perera, 438 F.3d 932 (9th Cir. 2006).
35. *Id.* at 933–36.
36. *Balde*, 943 F.3d at 83.
37. *Id.*
38. *Id.*
39. 18 U.S.C. § 922(g)(5)(A).

presence by granting parole, thereby giving them lawful status.[40] The court rejected Balde's argument that he must have been on parole because he was not eligible for supervised release at the time he was discharged, finding that Balde was not paroled, and therefore did not have a legal status.[41]

2. Analysis of "Illegally or Unlawfully" Present

In rejecting Balde's argument, the court first examined the procedures for granting parole and supervised release.[42] Parole can be granted for "urgent humanitarian reasons or a significant public benefit."[43] Supervised release may be granted at the end of the removal period, if the alien has still not been removed.[44] Balde argued that because he was granted supervised release before his removal order was final, and therefore before the removal period even began, his release must have been parole.[45] However, because there was no indication that Balde was released on humanitarian grounds or for a significant public benefit, the court found that he was granted supervised release.[46] Instead, even if Balde was not eligible for supervised release, the fact that ICE granted supervised release is indicative of an administrative error, not a grant of parole.[47]

The court also noted that, although Balde did not advance this argument, release on supervision does not give someone lawful immigration status.[48] Supervised release merely makes it lawful for that person to be outside of jail.[49] The court concluded that the key inquiry about someone's legal status for purposes of 18 U.S.C. § 922(g)(5)(A) is whether they were lawfully present at the time they possessed a firearm, and that because a final removal ordered had been issued for Balde, and he was not on parole at the time of the incident, he was not lawfully present in the United States.[50]

C. *Rehaif* and Knowledge of Unlawful Status

Shortly after the Second Circuit issued its opinion on Balde's initial appeal, the Supreme Court decided *Rehaif*.[51] In that case, the Court concluded that in a prosecution under 18 U.S.C. §§ 922(g) and 924(a)(2) the government must prove that the defendant had knowledge that his presence in the United States was illegal or unlawful.[52] Balde first asserted that *Rehaif*'s

40. *Balde*, 943 F.3d at 84.
41. *Id.*
42. *Id.*
43. 8 U.S.C. § 1182(d)(5)(A).
44. *Balde*, 943 F.3d at 85.
45. *Id.*
46. *Id.*
47. *Id.* at 86.
48. *Id.*
49. *Id.*
50. *Id.* at 86–87.
51. *Id.* at 87.
52. *Id.*

knowledge requirement is an essential element and, because it was not alleged in his indictment, the indictment does not charge a federal crime and therefore the district court did not have jurisdiction to convict Balde.[53] Balde then argued alternatively that his guilty plea is invalid because he was not made aware of the knowledge of illegal status requirement of the crime.[54] The government did not contest Balde's second argument, but instead argued that Balde waived this argument by entering a guilty plea.[55] The court first rejected Balde's jurisdictional argument, then rejected the government's waiver argument, and finally accepted Balde's argument about the invalidity of his guilty plea because there was a plain error.[56]

1. Jurisdictional Challenge

a. Legal Standard for Jurisdictional Challenges

When a defendant enters a guilty plea, they waive challenges to their prosecution, except jurisdictional challenges.[57] Federal courts have jurisdiction over indictments that allege violations of United States criminal statutes.[58] In order to successfully allege a federal crime, an indictment needs only state the time and place of the alleged crime and invoke an appropriate federal criminal statute.[59] Here, the court found that because the indictment used the language of the appropriate federal criminal statute, it did sufficiently allege a federal crime so as to create federal jurisdiction.[60]

b. Analysis for Jurisdictional Challenges

The court found that Balde's indictment clearly alleged a violation of a federal criminal statute so as to give the district court jurisdiction. The court first noted that Balde's indictment followed the wording of the relevant federal statute, including the language that the Supreme Court had interpreted in *Rehaif*, and therefore, alleged that a federal law had been violated.[61] The court then looked to a variety of prior decisions to reinforce its determination that Balde's indictment was not jurisdictionally deficient.

The court first looked to its previous decision in *United States v. Prado*[62] holding that the requirement that conduct must occur on a covered vessel is a merits question, and not a jurisdictional question.[63] It then noted that failure to assert certain elements, like the value of prop-

53. *Id.* at 88.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at 89.
60. *Id.*
61. *Id.*
62. United States v. Prado, 933 F.3d 121 (2d Cir. 2019).
63. *Balde*, 943 F.3d at 90.

erty in *United States v. Lee*[64] or the quantity of drugs in *United States v. Cotton*[65] in an indictment was not a jurisdictional defect.[66] Finally, the court noted that in *Rehaif*, the Supreme Court did not vacate and remand with directions to dismiss as it would have had to, if the failure to show knowledge of illegal presence had been jurisdictional.[67]

Because the indictment tracked the language from 18 U.S.C. § 922(g)(5)(A) and because case law indicated that a failure to fully allege one element in an indictment is not a jurisdictional failure, the court rejected Balde's jurisdictional argument.

2. Waiver

a. Legal Standard for Waiver

The government argued that Balde waived any non-jurisdictional challenges to his conviction by pleading guilty.[68] When a defendant knowingly and voluntarily enters a guilty plea, they waive all non-jurisdictional complaints about the prior proceedings.[69] Balde's plea agreement also explicitly waived all non-jurisdictional appeals.[70] The government argued that because of the implicit waiver in any plea deal and the explicit waiver in Balde's plea agreement, Balde waived his right to bring a *Rehaif* challenge to his conviction.[71] However, under Rule 11 of Federal Criminal Procedure, a defendant must be informed of the nature of the charge to which they are pleading, and the court must determine that there is a factual basis for the plea.[72] Here, the court found that because Balde was not aware of the element of knowledge of unlawful status, when he entered his plea deal, and because the court had not made a finding about the factual basis for that element, he had not waived that argument.[73]

b. Analysis for Waiver

In its analysis of the government's waiver argument, the court first noted that in many cases, including *Prado*, it had declined to enforce a waiver of appeal when the defendant was unaware of a critical requirement at the time the defendant entered a plea agreement.[74] It then looked to the Transcript of Plea Proceedings ("Transcript") and confirmed that Balde had not been informed of the mens rea requirement for his illegal status.[75] The court then looked to the Transcript for a factual basis for the mens rea requirement of Balde's immigration status, but

64. United States v. Lee, 833 F.3d 56 (2d Cir. 2016).
65. United States v. Cotton, 535 U.S. 625 (2002).
66. *Balde*, 943 F.3d at 91–92.
67. *Id.* at 92.
68. *Id.* at 93.
69. *Id.*
70. *Id.*
71. *Id.*
72. Fed. R. Crim. P. 11(b)(1)(G), (b)(3).
73. *Balde*, 943 F.3d at 95.
74. *Id.* at 94.
75. *Id.*

found none.[76] The defendant's knowledge of the elements of a crime, and the factual basis for a guilty plea are critical to the plea process, and a failure to meet both of these critical requirements is not a harmless error.[77] For these reasons, the court found that Balde could not have waived his right to assert an argument under *Rehaif*.[78]

3. Plain Error of Conviction

It is uncontested that the first time Balde asserted any argument under *Rehaif* was on his petition for rehearing.[79] Here, the court held that the applicable standard for an argument that was not raised below is plain error.[80]

a. Legal Standard for Plain Error

In order to show plain error, a defendant must show that (1) there was an error; (2) the error is clear; (3) the appellant's substantial rights were affected by the error; and (4) the fairness, integrity, or public reputation of the proceedings were seriously affected by the error.[81] In plea proceedings, the defendant must also show that but for the error, there is a reasonable probability that the defendant would not have entered into the plea agreement.[82] In this case, the court found that all four prongs of plain error were met.[83]

b. Analysis of Plain Error

The court found that all prongs of the plain error analysis were met in Balde's case.[84] It first rejected the government's argument that a lack of knowledge of immigration status requirement would amount to a mistake of law, and therefore would not be an error.[85] The court rejected this argument and held that failing to inform the defendant of the mens rea requirement was an error, and therefore, the first prong of the plain error analysis is fulfilled.[86]

The court then moved to the second prong and noted that the obviousness of the error is assessed at the time of appeal.[87] The court found that the error in this case was obvious because the defendant was not informed of the mens rea element announced by *Rehaif*, when he entered his plea.[88]

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76. *Id.* at 95.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* at 96.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.* at 97.
88. *Id.*

In analyzing the third prong, the court looked to the proceedings below to find a likelihood that Balde would not have entered the plea if the error had not occurred.[89] The court found that Balde had hotly contested the nature of his status, and frequently asserted that he believed he had been granted parole and therefore had lawful status throughout the proceeding.[90] The court further noted that what Balde actually believed about his status when he was charged for possession is a factual question for a jury but that Balde had demonstrated a reasonable probability that he would not have entered the plea but for the error.[91]

As to the fourth prong, the court found that allowing a defendant to plead guilty when he was not aware of an element of the crime was in error, and the government did not prove that element risked the fairness and integrity of the judicial proceeding because the defendant might actually be innocent.[92]

Because all four prongs of the plain error analysis were met, the court held that Balde's guilty plea must be vacated and his case remanded in light of the *Rehaif* decision by the Supreme Court.[93]

IV. Conclusion

United States v. Balde provided the Second Circuit with the opportunity to clarify one of the intersections between criminal law and immigration law. First, the court correctly clarified that immigration law definitions generally do not apply to criminal statutes, and that incorrect grants of supervised release do not amount to grants of parole or legal status. The court then correctly confirmed that a mistake about immigration status in relation to the criminalization of conduct is not a mistake of law and can prevent a defendant from having the requisite mens rea about their immigration status necessary for a criminal conviction. The court additionally correctly applied the elements of 18 U.S.C. § 922(g)(5)(A) as announced in *Rehaif* by finding that the defendant did not waive his right to appeal under *Rehaif* and that there was a plain error, despite the district court being unaware of the requisite elements at the time of the error.

Heidi Simpson

89. *Id.*
90. *Id.*
91. *Id.* at 97–98.
92. *Id.* at 98.
93. *Id.*