REGENT UNIVERSITY SCHOOL OF LAW

JOURNAL OF GLOBAL JUSTICE AND PUBLIC POLICY

IN COLLABORATION WITH HANDONG INTERNATIONAL LAW SCHOOL

Volume 9 **Spring 2023**

ARTICLES

HUMAN GERMLINE EDITING AND A CHRISTIAN VIEW OF HUMAN NATURE
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REFUGEE TO GUEST: A DISCUSSION ON THE CONTRACT ADMINISTRATION ISSUES AT DONA ANA VILLAGE
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John Ramming Chappell

SEEKING TRANSITIONAL JUSTICE THROUGH RECONCILIATION IN A TROUBLED TRANSITION: THE LEGITIMACY, PERFORMANCES, AND LIMITS OF THE ETHIOPIAN RECONCILIATION COMMISSION
Kinkino Legide

NOTES

CRACKING THE COMMUNICATIONS DECENCY ACT: CIVIL RELIEF FOR SEX TRAFFICKING VICTIMS AND THE BATTLE TO HOLD BIG TECH LIABLE
Alexa E. Macumber

LYING IN WAIT: THE ABSENCE OF REPATRIATION OF ISIS BRIDES AND CHILDREN FROM AL-HOL REFUGEE CAMP
Leea D. Stacks

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You may also submit correspondence via email at jgjpp@mail.regent.edu.

PRINTED BY THE SHERIDAN PRESS, HANOVER, PENNSYLVANIA

REGENT UNIVERSITY SCHOOL OF LAW

JOURNAL OF GLOBAL JUSTICE AND PUBLIC POLICY

IN COLLABORATION WITH HANDONG INTERNATIONAL LAW SCHOOL

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HUMAN GERMLINE EDITING AND A CHRISTIAN VIEW OF HUMAN NATURE
Jeffrey A. Brauch......1

REFUGEE TO GUEST: A DISCUSSION ON THE CONTRACT ADMINISTRATION ISSUES AT DONA AÑA VILLAGE
Aaron E. Brown......45

HERDING CATS: PRIORITIZING HUMAN RIGHTS IN THE CONVENTIONAL ARMS TRANSFER POLICIES
John Ramming Chappell......73

SEEKING TRANSITIONAL JUSTICE THROUGH RECONCILIATION IN A TROUBLED TRANSITION: THE LEGITIMACY, PERFORMANCES, AND LIMITS OF THE ETHIOPIAN RECONCILIATION COMMISSION
Kinkino Legide......121

NOTES

CRACKING THE COMMUNICATIONS DECENCY ACT: CIVIL RELIEF FOR SEX TRAFFICKING VICTIMS AND THE BATTLE TO HOLD BIG TECH LIABLE
Alexa E. Macumber......217

LYING IN WAIT: THE ABSENCE OF REPATRIATION OF ISIS BRIDES AND CHILDREN FROM AL-HOL REFUGEE CAMP
Leea D. Stacks......249

Introductory Note

In a world that is ever burdened by strife, need, and division, it is the voice of the Church and Christian advocates that should be the loudest—offering hope and representation for the marginalized and the voiceless. The Ninth Edition of the Journal of Global Justice and Public Policy seeks first to honor the Lord and second to encourage the legal profession to fight for the prevention of issues that break the heart of God. May He become greater, and we become less.

Leea D. Stacks, *Editor-in-Chief*

HUMAN GERMLINE EDITING AND A CHRISTIAN VIEW OF HUMAN NATURE

Jeffrey A. Brauch[*]

I. INTRODUCTION

In April 2015, Dr. Junjui Huang and fifteen colleagues stunned the world.[2] They announced they had successfully edited the DNA of human embryos.[3] DNA—deoxyribonucleic acid—is a molecule that serves as the blueprint for organisms; it contains the genetic information that determines how they grow and function.[4] Using a biological system known as CRISPR-Cas9, Huang and his colleagues cut unwanted DNA sections from the embryos and replaced them with new DNA sections.[5]

What made the announcement startling wasn't that Huang had edited human cells; gene editing of ordinary cells had been done before, a technique known as somatic cell editing.[6] It was that he had done it on human embryos.[7] Had the embryos been able to develop and reproduce, the DNA changes made would have been passed on to future generations. Such genetic editing of embryos, sperm, and eggs (which affect reproduction) is called germline editing.[8]

The international response to Huang's announcement—and to human germline editing itself—was mixed. For some, the announcement was one of great joy and promise. Human germline editing holds out the hope that we can not only treat, but completely eradicate genetic diseases such as Tay Sachs, cystic fibrosis, and sickle cell anemia.[9] Others, though,

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[2] Puping Liang et al., *CRISPR/Cas9-Mediated Gene Editing in Human Tripronuclear Zygotes*, 6 PROTEIN & CELL 363, 370 (2015).

[3] David Cyranoski & Sara Reardon, *Chinese Scientists Genetically Modify Human Embryos,* NATURE (Apr. 22, 2015), http://www.nature.com/news/chinese-scientists-genetically-modify-human-embryos-1.17378.

[4] *Deoxyribonucleic Acid (DNA)*, NAT'L HUM. GENOME RSCH. INST., https://www.genome.gov/genetics-glossary/Deoxyribonucleic-Acid (last updated Jan. 28, 2023).

[5] Cyranoski & Reardon, *supra* note 3.

[6] G. Owen Schaefer, *Why Treat Gene Editing Differently in Two Types of Human Cells?*, IFLSCIENCE (Dec. 8, 2015, 5:24 AM), https://www.iflscience.com/why-treat-gene-editing-differently-two-types-human-cells-32568.

[7] Cryanoski & Reardon, *supra* note 3 (noting that Huang's research was "set to reignite the debate on human-embryo editing" because the use of CRISPR/Cas9 on human embryos had not yet appeared in a published study).

[8] Shaefer, *supra* note 6.

[9] Antonio Regalado, *Engineering the Perfect Baby*, MIT TECH. REV. (Mar. 5, 2015), https://www.technologyreview.com/2015/03/05/249167/engineering-the-perfect-baby/; *Editing Humanity*, ECONOMIST, Aug. 22, 2015, at 11.

responded with concern. They warned that editing human embryos could cause unpredictable and possibly dangerous changes to the human genome.[10] Many, including some engaged in genetic research, urged that further human germline editing research halt while the world considers its ethical implications.[11] Leading genetic scientist Edward Lanphier, for example, counseled, "we need to pause this research and make sure we have a broad based discussion about which direction we're going here."[12]

Human germline editing research did not stop. Experiments—approved by national governments—continued both at the Francis Crick Institute in London and the Karolinska Institute in Stockholm.[13] So did other, less official, germline editing efforts.

In November 2018, another Chinese researcher, Dr. He Jiankui, made an announcement perhaps even more startling than Huang's three and a half years earlier. Jiankui revealed on YouTube that he had genetically edited the embryonic DNA of twin girls, Lulu and Nana, who had recently been born.[14] Jiankui had edited their DNA to strengthen their resistance to HIV.[15] Jiankui made his announcement just days before the Second Summit on Human Genome Editing was held in Hong Kong.[16] Jiankui also discussed his work at the Summit, and that work was the subject of much discussion and debate.[17] The Summit ended with a cautionary closing statement from its organizing committee, a group of leading genetic scientists including CRISPR co-developer Jennifer Doudna, "[t]he organizing committee concludes that the scientific understanding and technical requirements for clinical practice remain too uncertain and the risks too great to permit clinical trials of germline editing at this time."[18]

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[10] Regalado, *supra* note 9.

[11] Antonio Regalado, *Years Before CRISPR Babies, This Man Was the First to Edit Human Embryos*, MIT TECH. REV. (Dec. 11, 2018), https://www.technologyreview.com/2018/12/11/138290/years-before-crispr-babies-this-man-was-the-first-to-edit-human-embryos/ ("[T]he scientific community is deeply uncertain and conflicted about how to roll out a technology that will affect humanity's shared gene pool.").

[12] Cyranoski & Reardon, *supra* note 3.

[13] Ewen Callaway, *Gene-Editing Research in Human Embryos Gains Momentum*, NATURE, Apr. 19, 2016, at 298–90.

[14] Owen Dyer, *Researcher Who Edited Babies' Genome Retreats from View as Criticism Mounts*, 363 BRITISH MED. J. k5113, k5113 (2018).

[15] *Id.*

[16] *Id.*

[17] *See* David Cyranoski, *CRISPR-Baby Scientist Fails to Satisfy Critics*, NATURE, Dec. 6, 2018, at 13–14 (Dec. 6, 2018), https://www.nature.com/articles/d41586-018-07573-w (describing how some criticized and condemned Jiankui's work for violating international ethical norms, while others wanted to give him a chance to further explain his actions).

[18] *Statement by the Organizing Committee of the Second International Summit on Human Genome Editing*, NAT'L ACADS. OF SCIS., ENG'G, & MED. (Nov. 28, 2018), https://www.nationalacademies.org/news/2018/11/statement-by-the-organizing-committee-of-the-second-international-summit-on-human-genome-editing [hereinafter *Statement by*

Since 2018, there has been a flurry of debate and activity to decide what can and should happen next. Human germline editing continues at the Francis Crick Institute and Karolinska Institute,[19] though none of the edited embryos are permitted to develop past 14 days or be used to establish a pregnancy.[20] Editing research undoubtedly continues in many other laboratories as well; the CRISPR technology is widely accessible.

On the debate front, voices urge everything from moving to clinical application of human germline editing as quickly as possible to banning the practice altogether. As is often the case, legal responses to germline editing trail both the science and popular debate.

What is clear is that this is a seminal moment for humanity. We are presented with a technique that promises to eliminate diseases that afflict many. But it is also a technique that poses unknown risks to future generations—and a technique that to perfect will require experimentation on and destruction of many human embryos. What path should we take?

Patrick Dixon describes the significance of the moment this way: "[g]enetic engineering has given us the power to alter the very basis of life on earth."[21] Jeremy Rifkin similarly observes, "[w]e are about to remake ourselves as well as the rest of nature."[22] Richard Dawkins says:

> I think it's a very exciting prospect, because as a naturalist, in the philosophical sense, I'm committed to the view that there is nothing mystical or supernatural about life, and therefore in principle, it must be possible to construct life either by chemically, making your own by chemistry, or in a computer, and I find that both exciting and a bit alarming.[23]

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the Organizing Committee].

[19] *See, e.g.*, Gregorio Alanis-Lobato et al., *Frequent Loss of Heterozygosity in CRISPR-Cas9—Edited Early Human Embryos*, 118 PROCS. NAT'L ACAD. SCIS., no. 22, June 2021, at 1, 2 (reporting "unintended genome editing outcomes" resulting from the use of CRISPR-Cas9 to edit human embryos); *see also* Ganna Reint et al., *Rapid Genome Editing by CRISPR-Cas9- POLD3 Fusion*, 10 ELIFE e75415, 2 (2021) (studying the effect of "DNA repair protein-Cas9 fusion on CRISPR genome editing outcomes").

[20] Kathy Niakan, *Human Embryo and Stem Cell Laboratory*, FRANCIS CRICK INST., https://www.crick.ac.uk/research/labs/kathy-niakan/human-embryo-genome-editing-licence (last visited Aug. 13, 2022).

[21] Patrick Dixon, *Genetic Engineering: What Is Genetic Engineering?*, GLOB. CHANGE, https://www.globalchange.com/geneticengin.html (last visited Mar. 13, 2023).

[22] JEREMY RIFKIN, THE BIOTECH CENTURY: HARNESSING THE GENE AND REMAKING THE WORLD 32 (1998).

[23] Carole Cadwalladr, *Richard Dawkins Interview: 'It Must Be Possible to Construct Life Chemically, or in a Computer'*, THE GUARDIAN (Feb. 14, 2018, 4:36 PM), https://www.theguardian.com/science/2015/sep/11/richard-dawkins-interview-twitter-controversy-genetics-god.

These are bold claims. They make clear that decisions about human germline editing—whether scientific, ethical, or legal—are not just matters of technology. They go to the heart of the nature of humanity itself.

Before committing to any path that has such significant implications for the nature of humanity, it is vital to examine what that nature tells us. Unlike germline editing, consideration of human nature has a long history. One of the richest traditions of exploring human nature is found in Christian theology.[24]

This Article explores some of what Christianity says about human nature and its implications for how to approach human germline editing. Section I shares more details about human germline editing and what it promises. Section II examines the current legal and regulatory environment for human germline editing. Section III surveys various legal and ethical approaches to address human germline editing. Section IV explores a Christian view of human nature and concludes that the proper path is to move forward with human somatic cell gene editing but to ban human germline editing.

II. GERMLINE EDITING—ITS PROMISE AND CHALLENGES

As noted above, germline editing involves genetic changes to sperm, egg cells, or embryos.[25] Such changes are "heritable" and can be passed on to descendants.[26] Germline editing is not the only form of genetic editing. Somatic cell editing involves modifying ordinary cells that make up tissue or organs like the heart, brain, or liver.[27]

Human somatic cell gene editing is much less controversial than germline editing. It is done in a single patient to cure disease—and changes made do not alter the human genome for future generations.[28] The genetic changes only affect the individual patient.[29]

Human somatic cell editing has been done with significant success. For example, in December 2015, scientists introduced a gene therapy that modified a patient's prostate cancer cells so that the patient's body attacked and destroyed them.[30] The BBC notes that this technique has

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[24] *See infra* notes 138–169 and accompanying text.

[25] *See* Shaefer, *supra* note 6.

[26] Laura Blackburn et al., *Somatic Genome Editing—An Overview*, PHG FOUND. 1 (2019).

[27] NAT'L ACADS. SCIS. ET AL., HUMAN GENOME EDITING: SCIENCE, ETHICS, AND GOVERNANCE, 3, 115 (2017).

[28] Mary Todd Bergman, *Perspectives on Gene Editing*, HARV. GAZETTE (Jan. 9, 2019), https://news.harvard.edu/gazette/story/2019/01/perspectives-on-gene-editing/.

[29] Rebecca Rodriguez, *Beyond Dr. Frankenstein's Monster: Human Germline Editing and the Implications of Waiting to Regulate*, 38 N. ILL. UNIV. L. REV. 585, 591 (2018).

[30] *'Suicide' Gene Therapy Kills Prostate Cancer Cells*, BBC (Dec. 12, 2015), http://www.bbc.com/news/health-35072747.

improved patient survival by twenty percent.[31] Scientists similarly report using somatic cell editing to successfully treat chronic lymphocytic leukemia, HIV, inherited retinal disease, and beta thalassemia (an inherited blood disease).[32]

The tool used by Huang and He and other scientists performing human germline editing is known as CRISPR-Cas9.[33] "CRISPR" is an acronym for clustered regularly interspaced short palindromic repeats.[34] It is a biological system that performs a cut-and-paste function on DNA.[35] Scientists insert a piece of RNA, "a chemical messenger designed to target a section of DNA," and an enzyme that cuts out the defective gene section and pastes in a new one.[36] Professors Jennifer Doudna and Emmanuelle Charpentier received the 2020 Nobel Prize in Chemistry for developing this gene editing tool.[37]

The enticing promise of human germline editing is that it provides a way to eradicate diseases altogether. Because DNA changes are made to sperm or egg cells or early-developing embryos, they affect every cell in the body. The changes are also passed on to future generations, so somatic cell therapy need not take place each generation.[38] Proponents hope to eliminate certain genetic diseases like Huntington's Disease, Tay Sachs, and cystic fibrosis.[39] Genetic changes could also be made to make individuals less susceptible to Alzheimer's or heart disease.[40]

In addition to curing disease, human germline editing holds out the possibility of enhancing human mental and physical capacity and performance. One could make genetic changes designed to increase

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[31] *Id.* A form of somatic cell gene therapy was used as early as 1990 when Dr. William Anderson modified the white blood cells of a four-year-old patient. Jeffrey Laurence, *Preface* to TRANSLATING GENE THERAPY TO THE CLINIC: TECHNIQUES AND APPROACHES, at xi (Jeffrey Laurence & Michael Franklin eds., 2014). The process was temporarily successful in treating a genetic based immune system disorder. *Id.*

[32] *See, e.g.*, *Gene Therapy Successes*, LEARN.GENETICS, https://learn.genetics.utah.edu/content/genetherapy/success/ (last visited Mar. 16, 2023) (describing the successful gene therapy treatment of beta-Thalassemia through the modification of blood stem cells); Scott J. Schweikart, *Global Regulation of Germline Genome Editing: Ethical Considerations and Application of International Human Rights Law*, 43 LOY. L.A. INT'L & COMP. L. REV. 279, 283 (2020) (explaining that CRISPR gene therapy trials have shown potential to treat HIV "by editing the genomes of immune cells").

[33] Cyranoski & Reardon, *supra* note 3.

[34] Heidi Ledford & Ewen Callaway, *Pioneers of CRISPR Gene Editing Win Chemistry Nobel*, NATURE, Oct. 15, 2020, at 346.

[35] Marla Vacek Broadfoot, *The Gene-Editing Tool CRISPR, Explained*, DISCOVERY'S EDGE (July 24, 2018), https://discoverysedge.mayo.edu/2018/07/24/the-gene-editing-tool-crispr-explained/ ("CRISPR enables researchers to cut and paste DNA sequences.").

[36] *Editing Humanity*, *supra* note 10.

[37] Ledford & Callaway, *supra* note 34.

[38] Rodriguez, *supra* note 29, at 592.

[39] Regalado, *supra* note 9; *Editing Humanity*, *supra* note 9.

[40] Regalado, *supra* note 11.

height, strength, or intelligence.[41] Genetic changes could make "your bones so hard they'll break a surgical drill."[42]

While human germline editing holds out significant possibilities, the technique also poses challenges. Notably, it is not uniformly successful in making the desired genetic alterations—and only those alterations.[43] Not all desired genetic changes occur when using CRISPR.[44] Further, the technique frequently causes unintended, "off-target" changes to other parts of the genome.[45] And sometimes editing efforts cause genetic changes to some but not all cells, an effect known as mosaicism.[46] Each of these is a matter of serious concern, especially since future generations will inherit any genetic changes.

The work done by Huang and He illustrate the problems. Dr. Huang and his team edited eighty-six non-viable embryos (he specifically chose non-viable embryos because they could not be born alive and reproduce).[47] Forty-eight hours after the procedure, seventy-one of the embryos survived.[48] They tested fifty-four of the seventy-one; only a fraction of the fifty-four contained the desired DNA segment.[49]

Huang's team also noted a "surprising number" of "'off-target,'" undesired mutations to other parts of the genome.[50] While certain off-target mutations, described by some as "collateral damage"[51] in the editing process, may be harmless, some may activate genes known to cause cancer.[52] The editing errors caused Huang's team to halt its work. At the time, Huang said, "[i]f you want to do it in normal embryos, you need to be close to 100%. That's why we stopped. We still think it's too immature."[53]

Mosaicism, too, can be a potentially dangerous effect of the editing process. Mosaicism can cause genetic diseases like Down, Klinefelter, and Turner syndromes; it can also cause fatal genetic mutations.[54]

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[41] Regalado, *supra* note 9.

[42] *Id.*

[43] *Id.*

[44] NAT'L ACADS. SCIS. ET AL., HERITABLE HUMAN GENOME EDITING 7 (2020) ("No [genome editing researcher] has demonstrated that it is possible to reliably prevent . . . the formation of undesired products at the intended target site.").

[45] *Id.* at 7, 58.

[46] *Id.* at 69.

[47] Cyranoski & Reardon, *supra* note 3.

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] Morgan Mendicino, *Genetically Customized Generations—A Need for Increased Regulatory Control Over Gene Editing Technology in the United States*, 73 SMU L. REV. 585, 591 (2020).

[52] *Id.*

[53] Cyranoski & Reardon, *supra* note 3.

[54] Fatma Betül Ayanoğlu et al., *Bioethical Issues in Genome Editing by CRISPR-Cas9*

An analysis of Dr. He's research report reveals that his efforts may have caused mosaicism in the twins whose DNA he edited.[55] He edited the girls' DNA to make them less susceptible to HIV, but they may face as of yet unknown dangerous effects resulting from mosaicism.[56]

The failure of human germline editing to consistently make the genetic changes desired without causing unwanted changes or mosaicism is a chief source of opposition to the practice. Section III will explore others.

III. CURRENT LEGAL AND REGULATORY ENVIRONMENT

A. United States

The United States Government has not directly banned or regulated human germline editing.[57] It has exercised authority over the process instead through funding restrictions.[58] In 1996, Congress passed the Dickey-Wicker Amendment to an appropriations bill.[59] The Amendment prohibits using Department of Health and Human Services funds for research in which human embryos are destroyed, discarded, or "knowingly subjected to risk of injury or death greater than that allowed for research on fetuses in utero."[60] This Amendment has appeared in the Health and Human Services appropriations bill every year since, thus prohibiting federal funds from being used in human germline editing research.[61]

In 2016, Congress took an additional step during the budget process to restrict human germline editing research. It enacted a rider to the Consolidated Appropriations Act prohibiting the Food and Drug Administration from approving any application submitted "for an exemption for investigational use of a drug or biological product . . . in

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Technology, 44 TURKISH J. BIOLOGY 110, 115 (2020).

[55] Jon Cohen, *Did CRISPR Help—Or Harm—The First-Ever Gene-Edited Babies?*, SCIENCE (Aug. 1, 2019), https://www.science.org/content/article/did-crispr-help-or-harm-first-ever-gene-edited-babies.

[56] *Id.*

[57] Genetic Literacy Project, *United States:Germline/Embryonic*, GLOB. GENE EDITING REGUL. TRACKER, https://crispr-gene-editing-regs-tracker.geneticliteracyproject.org/united-states-embryonic-germline-gene-editing/ (last visited Apr. 1, 2023) ("[T]here is no federal legislation that dictates protocols or restrictions regarding human genetic engineering. Federal controls exist for allocating government funding of research projects, manipulating human embryos and running gene therapy clinical trials.").

[58] *Id.*

[59] Mendicino, *supra* note 51, at 596.

[60] Balanced Budget Downpayment Act, Pub. L. No. 104–99, 110 Stat. 26, 34 (1996); *see also* Kristina M. Smith, *Germline Editing: Two Steps Forward, One Step Back?*, 21 SMU SCI. & TECH. L. REV. 101, 104 (2018) ("The relevant provision of the statute bans researchers from using public funds to create an embryo solely for research purposes or for any research that subjects an embryo to risk of injury or death.").

[61] Mendicino, *supra* note 51, at 596.

research in which a human embryo is intentionally created or modified to include a heritable genetic modification."[62]

These budgetary and regulatory provisions do not prohibit scientists from conducting human germline editing research. Scientists can seek private funding instead.[63] But it is a restraining influence on human germline editing research in the United States.

In addition to these federal restrictions, individual states can act–and have acted–legislatively in ways that impact human germline editing. Eleven states ban research on human embryos.[64] South Dakota, for example, bans "nontherapeutic research that destroys a human embryo."[65] It also prohibits research that "subjects a human embryo to substantial risk of injury or death."[66]

By contrast, eighteen states allow human embryo research.[67] Illinois both permits and funds embryonic research. The state law provides that "[r]esearch involving the derivation and use of . . . human embryonic germ cells . . . shall be permitted and the ethical and medical implications of this research shall be given full consideration."[68]

Twenty-one states do not have laws explicitly addressing human embryo research; however, twenty-two states ban reproductive cloning.[69]

B. International

Many nations have acted more directly than the United States to ban or regulate human germline editing or other research on human embryos. For example, France considers eugenics and reproductive cloning to be crimes against humanity.[70] They are punishable by imprisonment of up to thirty years and fines up to 7.5 million euros.[71] China prohibits human cloning, research on human embryos fourteen days after fertilization, and

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[62] *Id.* at 597; Consolidated Appropriations Act, 2016, Pub. L. No. 114–113, § 749, 129 Stat. 2242, 2283 (2015).

[63] Genetic Literacy Project, *supra* note 57.

[64] Kirstin R.W. Matthews & Daniel Morali, *Can We Do That Here? An Analysis of U.S. Federal and State Policies Guiding Human Embryo and Embryoid Research*, J.L. & BIOSCIS, June 9, 2022, at 1, 10 (explaining that Arkansas, Kentucky, Louisiana, Minnesota, Nebraska, New Mexico, North Dakota, Oklahoma, Pennsylvania, Rhode Island, and South Dakota have laws that ban human embryo research).

[65] S.D. CODIFIED LAWS § 34-14-16 (2000).

[66] *Id.* § 34-14-17.

[67] Matthews & Morali, *supra* note 64, at 12.

[68] 410 ILL. COMP. STAT. ANN. 110/5(1) (West 2008).

[69] Matthews & Morali, *supra* note 64, at 10, 15 (explaining that the twenty-one states lacking specific laws on human embryo research defer to federal laws on the subject, and twenty-two states ban reproductive human cloning but no federal legislation bans exist).

[70] CODE PÉNAL [C. PÉN.] [Penal Code] arts. 214-2, 511-18-1 (Fr.).

[71] *Id.* art. 214-2.

genetic manipulation of human gametes, zygotes, and embryos for reproductive purposes.[72]

He Jiankui, who edited the DNA of twins Lulu and Nana in 2018, is one of the individuals punished under the Chinese law. In December 2019, Jiankiu was convicted by the Nanshang District Court of "illegal medical practice" because he genetically edited human embryos for reproductive purposes and carried out illegal reproductive medical activity. He was given a three-year prison sentence and fined 3 million RMB (approximately $450,000).[73]

Two surveys done in 2020 give a glimpse into national restrictions worldwide: first, the Center for Genetics and Society reviewed the laws and policies of 106 nations. It found that "[seventy] countries prohibit heritable genome editing, while an additional [five] prohibit it but allow for possible exceptions. The policies in the remaining countries either have no clear stance on the permissibility of heritable genome editing or are silent on the topic. No country explicitly permits it."[74] The Center also reported that "only [eleven] countries allow lab experiments to genetically modify human embryos, while [seventy-five] countries prohibit using genetically altered—including with gene editing—embryos to initiate a pregnancy. No country explicitly permits it."[75] Second, Turkish researchers reported that as of January 2020, twenty-four nations had specifically forbidden genome editing in human embryos by law "and [nine] countries have banned it by guidelines."[76]

The work at the Francis Crick Institute and Karolinska Institute reflects that not all nations stand against research—at least non-clinical research—that edits the human germline. The governments of the United Kingdom and Sweden have specifically approved and regulated the research on human embryos.[77]

Two multi-national international instruments—one a convention and one a declaration—also bear on biotechnology and human germline editing. The first is the Convention on Human Rights and Biomedicine (also known as the Oviedo Convention), produced by the Council of Europe

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[72] Lingqiao Song & Yann Joly, *After He Jianku: China's Biotechnology Regulation Reforms*, 21 MED. L. INT'L 174, 176 (2021).

[73] *Id.*

[74] *New Research Shows that Heritable Genome Editing is Prohibited in Most Countries with Relevant Policies*, CTR. FOR GENETICS & SOC'Y (OCT. 27, 2020), https://www.geneticsandsociety.org/press-statement/new-research-shows-heritable-genome-editing-prohibited-most-countries-relevant.

[75] Megan Molteni, *World Health Organization Advisers Urge Global Effort to Regulate Genome Editing*, STAT (July 12, 2021), https://www.statnews.com/2021/07/12/genome-editing-world-health-organization/.

[76] Ayanoğlu et al., *supra* note 54, at 116.

[77] Callaway, *supra* note 13; Kristin R.W. Matthews & Daniel Morali, *National Human Embryo and Embryoid Research Policies: A Survey of 22 Top Research-Intensive Countries* 15 REGEN. MED. 1905, 1909 (2020).

in 1997.[78] The Convention is "not only the first, but still the only legally binding international treaty in bioethics."[79] It very intentionally grounds its prescriptions on protecting human dignity and rights.[80] Article 13 of the Convention addresses human germline editing by stating that "an intervention seeking to modify the human genome may only be undertaken for preventive, diagnostic[,] or therapeutic purposes and only if its aim is not to introduce any modification in the genome of any descendants."[81] It also prohibits "any modification of germline genes, whether for therapeutic or non-therapeutic aims."[82] Twenty-nine nations have ratified this treaty.[83] Significantly, however, the United Kingdom, Sweden, Germany, Italy, and thirteen other European nations have not.[84]

The 1997 UNESCO Universal Declaration on the Human Genome and Human Rights is the second principal international instrument.[85] "UNESCO" is the United Nations Educational, Scientific and Cultural Organization.[86] It created the declaration to insist on protecting the human genome and—like the Oviedo Convention—human dignity. Article 1 of the Declaration states, "[t]he human genome underlies the fundamental unity of all members of the human family, as well as the recognition of their inherent dignity and diversity. In a symbolic sense, it is the heritage of humanity."[87] The Convention does not mention germline editing specifically; instead, it more generally urges nations to pass laws

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[78] Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, Apr. 4, 1997, E.T.S. No. 164 [hereinafter Oviedo Convention].

[79] Peter Sykora & Arthur Caplan, *The Council of Europe Should Not Reaffirm the Ban on Germline Genome Editing in Humans,* 18 EMBO REP. 1871, 1871 (2017).

[80] Oviedo Convention pmbl. For example, the Preamble states: "[c]onvinced of the need to respect the human being both as an individual and as a member of the human species and recognising the importance of ensuring the dignity of the human being . . . ." Article 1 continues: "[p]arties to this Convention shall protect the dignity and identity of all human beings and guarantee everyone, without discrimination, respect for their integrity and other rights and fundamental freedoms with regard to the application of biology and medicine." *Id.* art 1.

[81] *Id*. art. 13.

[82] Sykora & Caplan, *supra* note 79.

[83] *Chart of Signatures and Ratification of Treaty 164*, COUNCIL OF EUR., https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=164 (last updated Mar. 14, 2023).

[84] *Id.* (signifying that the United Kingdom and Germany are not signatories to the treaty; while Sweden and Italy have signed the treaty, they have yet to ratify it).

[85] UNESCO, 29th Sess., C/Res. 19, at 41 (1997) [hereinafter Universal Declaration on the Human Genome and Human Rights]. The U.N. General Assembly subsequently adopted this resolution two years later. G.A. Res. 152, U.N. GAOR, 53d Sess., U.N. Doc. A/RES/53/152 (1999).

[86] *UNESCO in Brief*, UNESCO, https://www.unesco.org/en/brief (last visited Mar. 17, 2023).

[87] Universal Declaration on the Human Genome and Human Rights art. 1.

that "prohibit those genetic practices that are contrary to human dignity."[88]

Significantly, both documents were created before CRISPR made germline editing such a tangible reality. There is dissatisfaction in some circles with their categorical rejections of research that alters the human genome:

> [N]ow that CRISPR has taken the biotechnology world by storm, these provisions are under increasing pressure. Even the uproar created by He Jiankui's attempts at genetically modifying offspring has not been able to break this trend. Especially, among scientific and medical-professional bodies, academies, and societies, the view is gaining ground that the existing bans should be lifted and that reproductive gene editing should be allowed for therapeutic purposes as soon as the technology is safe for clinical application.[89]

The following Section explores the range of proposals made about how to move forward legally and ethically now that CRISPR and human germline editing are realities.

C. Proposed Paths Forward

The recent breakthroughs in human germline editing have produced much debate and a flurry of proposals for next steps regarding the procedure. This section surveys those proposals and expresses concern over the debate that has led to them.

1. Ban Germline Editing

Some have called for human germline editing to be banned. Such calls are partly motivated by concerns over the procedure's safety in light of the many inaccurate and off-target mutations and mosaicism that it currently

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[88] George J. Annas et al., *Protecting the Endangered Human: Toward an Internationa l Treaty Prohibiting Cloning and Inheritable Alterations*, 28 AM. J.L. & MED. 151, 171–72 (2000). Here, the authors summarize Article 11 of the Universal Declaration on the Human and Genome and Human Rights, part of which invites "States and competent international organizations . . . to co-operate in identifying such practices and in taking, at national or international level, the measures necessary to ensure that the principles set out in this Declaration are respected." Universal Declaration on the Human Genome and Human Rights art. 11.

[89] Britta C. van Beers, *Rewriting the Human Genome, Rewriting Human Rights Law? Human Rights, Human Dignity, and Human Germline Modification in the CRISPR Era*, 7 J.L. & BIOSCIENCES 1, 34 (2020).

produces.[90] Such inaccuracies and unexpected results are particularly concerning given that future generations will inherit the changes.

Others calling for a ban are concerned about misuse of the procedure to enhance human capacity and performance.[91] "The fear is that germ-line engineering is a path toward a dystopia of superpeople and designer babies for those who can afford it. Want a child with blue eyes and blond hair? Why not design a highly intelligent group of people who could be tomorrow's leaders and scientists?"[92] As with the use of steroids or other performance-enhancing substances in sports, some question the physical and ethical wisdom of artificial enhancement of natural human capacities.[93] Marcy Darnovsky, who runs the Center for Genetics and Society, warns,

> [H]owever well intentioned, efforts to allow [genome editing] for "therapy" but not "enhancement" couldn't be expected to hold in the face of commercial pressures. Affluent parents could soon find themselves contemplating fertility clinic ad campaigns for genetically upgraded embryos.
>
> . . . .
>
> CRISPR babies could . . . find a market based on the allure of perceived superiority.[94]

Since enhancements will be available only to those who can afford them, others argue that human germline editing will simply further social inequality.[95]

Related, other commentators have expressed fears that the procedure could be misused in renewed eugenic efforts to purify the human genome and remove those viewed as substandard or defective. At the very least, a new eugenic movement could cause marginalization of and discrimination against those considered as not meeting a certain standard. Christopher Reilly warns,"[u]se of the technology to intentionally alter the human genome (the full array of genetic characteristics of the human species) and to enhance capabilities and features of individuals opens the way to

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[90] *See, e.g.*, Marcy Darnovsky, *Do Not Open the Door*, SW. MED. PERSPS., 2019, at 45, 45.

[91] *Id.*; *see also* Michael J. Sandel, *The Case Against Perfection*, ATL. MONTHLY, Apr. 2004, at 50, 51–62.

[92] Regalado, *supra* note 9.

[93] Sandel, *supra* note 91, at 52.

[94] Darnovsky, *supra* note 90.

[95] *See* Schweikart, *supra* note 32 at 286–87; Sarah Ashley Barnett, *Regulating Human Germline Modification in Light of CRISPR*, 51 U. RICH. L. REV. 553, 570 (2017).

eugenic practices that undermine reverence for the dignity of individual persons who differ from the expected norm."[96]

Still others oppose human germline editing because of its necessary experimentation on and destruction of human embryos.[97] We are far from being ready for widespread clinical application of germline editing. There are too many undesired and unpredictable results from the process. Of course, we will improve our gene editing technique with much more practice and research. But that practice and experimentation will be done on—and cause the death of—many human embryos.[98] Thus, correctly understanding the moral status of embryos (discussed more fully below) is critical to knowing how to evaluate human germline editing from an ethical and legal perspective.

Summarizing the concerns of many, Francis Collins, Director of The National Institutes of Health stated the following in 2015:

> NIH will not fund any use of gene-editing technologies in human embryos. The concept of altering the human germline in embryos for clinical purposes has been debated over many years from many different perspectives, and has been viewed almost universally as a line that should not be crossed. Advances in technology have given us an elegant new way of carrying out genome editing, but the strong arguments against engaging in this activity remain. These include the serious and unquantifiable safety issues, ethical issues presented by altering the germline in a way that affects the next generation without their consent, and a current lack of compelling medical applications justifying the use of CRISPR/Cas9 in embryos.[99]

The call to ban germline editing is strong. But it is a minority view. Most commentators urge moving forward—either expeditiously or with caution.

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[96] Christopher M. Reilly, *A Virtuous Appraisal of Heritable Genome Editing*, 87 LINACRE Q. 223, 223 (2020).

[97] *See e.g.*, Jeffrey R. Botkin, *The Case for Banning Heritable Genome Editing*, 22 GENETICS MED., 487, 488 (2020).

[98] *Id.*

[99] Francis S. Collins, *Statement on NIH Funding of Research Using Gene-Editing Technologies in Human Embryos*, NAT'L INSTS. HEALTH (Apr. 28, 2015), https://www.nih.gov/about-nih/who-we-are/nih-director/statements/statement-nih-funding-research-using-gene-editing-technologies-human-embryos.

2. Move Forward with Expedition

At the other end of the spectrum from those who would ban germline editing are those who believe we should move forward immediately with further research followed by clinical trials as soon as possible.

A strong voice in the full-speed-ahead camp is bioethicist John Harris. He is a professor of bioethics at the University of Manchester and editor of the Journal of Medical Ethics. Harris urges that "[a]ll of us need gene editing to be pursued, and if possible, made safe enough to use in humans . . . . We should be clear that there is no precautionary approach; just as justice delayed is justice denied, so therapy delayed is therapy denied."[100]

Harris dismisses eugenic concerns and fears that we are changing the human genome for generations to come without their consent. Indeed, he views it as a moral imperative that we take the reins of shaping the human genome for good. "If there is a discernible duty here it is surely to create the best possible child."[101] Harris further urges us to replace "natural selection with deliberate selection, Darwinian evolution with 'enhancement evolution.'"[102] He views those who oppose his position "like our imagined ape ancestor who . . . thought evolution had gone far enough . . . ."[103]

Steven Pinker, the Johnstone Family Professor of Psychology at Harvard University, expressed similar sentiments in the wake of Dr. Junjui Huang's 2015 germline editing breakthroughs. In an opinion piece in the Boston Globe, Pinker noted that biomedical research has brought tremendous gains in health, life, and general human flourishing—and promises more.[104] He continued,

> Given this potential bonanza, the primary moral goal for today's bioethics can be summarized in a single sentence. Get out of the way. A truly ethical bioethics should not bog

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[100] John Harris, *Why Human Gene Editing Must Not Be Stopped*, THE GUARDIAN (Dec. 2, 2015, 11:37 AM), https://www.theguardian.com/science/2015/dec/02/why-human-gene-editing-must-not-be-stopped; Julian Savulescu et al., *The Moral Imperative to Continue Gene Editing Research on Human Embryos*, 6 PROTEIN & CELL 476, 476 (2015) (arguing in agreement that "[t]here is a moral imperative" to move forward with human germline editing research and that "[t]o intentionally refrain from engaging in life-saving research is to be morally responsible for the foreseeable, avoidable deaths of those who could have benefitted. Research into gene-editing is not an option, it is a moral necessity.").

[101] Harris, *supra* note 100.

[102] JOHN HARRIS, ENHANCING EVOLUTION: THE ETHICAL CASE FOR MAKING BETTER PEOPLE 4, 11 (2007).

[103] *Id.* at 16.

[104] Stephen Pinker, *The Moral Imperative for Bioethics*, BOS. GLOBE (Aug. 1, 2015, 12:00 AM), https://www.bostonglobe.com/opinion/2015/07/31/the-moral-imperative-for-bioethics/JmEkoyzlTAu9oQV76JrK9N/story.html.

> down research in red tape, moratoria, or threats of prosecution based on nebulous but sweeping principles such as "dignity," "sacredness," or "social justice." Nor should it thwart research that has likely benefits now or in the near future by sowing panic about speculative harms in the distant future.[105]

He rejected the call of some to proceed with caution and to consider the long-term implications of further research before going further,

> First, slowing down research has a massive human cost. Even a one-year delay in implementing an effective treatment could spell death, suffering, or disability for millions of people. Second, technological prediction beyond a horizon of a few years is so futile that any policy based on it is almost certain to do more harm than good. Biomedical advances will always be incremental and hard-won, and foreseeable harms can be dealt with as they arise.[106]

Legal scholar and scientist Paul Enriquez has likewise called for the United States to resist the call for legal bans and to move forward expeditiously to permit research and the use of human germline editing. He calls human germline editing "truly the holy grail of modern-day medicine" capable "sooner rather than later" of eliminating or mitigating many diseases from HIV to obesity and cancer.[107] He expresses concern, though, that the legal landscape is not ready to permit the necessary scientific steps to be taken.[108] He calls for the adoption of what he calls "scientific empiricism."[109] This requires interdisciplinary cooperation

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[105] *Id.*

[106] *Id.*; Mahoney and Siegal agree. Like Pinker, they warn that waiting for governments and leading professional organizations to have "high quality, unhurried deliberations" on how to proceed on germline editing engineering will cause unnecessary delays and lost opportunities. Julia D. Mahoney & Gil Siegal, *Beyond Nature? Genomic Modification and the Future of Humanity*, 81 LAW & CONTEMP. PROBS. 195, 201 (2018). They further argue that

> [H]itting the pause button on human germline editing may not be as viable an option as its proponents assume. There is no way to put individuals and institutions in suspended animation such that, when the resume button is pushed, things are bound to pick up where they left off. Broken momentum means lost opportunities.

Id. at 206.

[107] Paul Enriquez, *Genome Editing and the Jurisprudence of Scientific Empiricism*, 19 VAND. J. ENT. TECH. L. 603, 668–69 (2017).

[108] *Id.* at 608–09.

[109] *Id.* at 672.

among scientists, lawyers, and judges to view scientific questions with precision, rejecting what he terms "deceptive simplicity."[110] Lawyers and scientists must work together to "weld scientific empiricism and jurisprudence" to benefit society.[111] In many ways, he encourages science to take the lead on the way forward.

In a follow-up article, Enriquez addresses why U.S. regulatory and constitutional law need not stand as obstacles to continued research—and ultimately clinical trials—from taking place. First, he proposes a way to view human germline editing that would allow the FDA to take jurisdiction over and approve the process.[112] Second, he uses substantive due process to argue that not only should germline editing be allowed, but individuals have a fundamental right to certain of its uses.[113]

3. Proceed with Caution

The position staked out by most commentators—within both the scientific and legal communities—is that we should move forward with deliberation. We should continue the research but neither ban germline editing research nor move to clinical trials until the technique is improved. Central to most expressing this view is that we should let the science guide us in timing and direction.

An excellent example of this position is found in the concluding statement of the organizing committee at the Second International Summit on Human Genome Editing. The committee noted the great progress in research, but that risks remain.

> The organizing committee concludes that the scientific understanding and technical requirements for clinical practice remain too uncertain and the risks too great to permit clinical trials of germline editing at this time. Progress over the last three years and the discussions at the current summit, however, suggest that it is time to

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[110] *Id.* at 693–94.

[111] *Id.* at 693.

[112] Paul Enriquez, *Editing Humanity: On the Precise Manipulation of DNA in Human Embryos*, 97 N.C.L. REV. 1147, 1181 (2019).

[113] *Id.* at 1202–04 (contending that permanent legislative or administrative bans on select uses of germline gene editing cannot withstand constitutional scrutiny because they impinge on a cognizable fundamental right). *But see* Alexandra L. Foulkes, *Liberty's Limits & Editing Humanity*, 98 N.C. L. REV. 1549, 1559 (2020) (suggesting that a right to use germline gene editing for therapeutic purposes likely falls outside of liberty's substantive reach); Andrew Cunningham, *A Cleaner, CRISPR Constitution: Germline Editing and Fundamental Rights*, 27 WM. & MARY BILL RTS. J. 877, 878 (2019) (arguing that individuals do not retain a fundamental right in using CRISPR/Cas9 germline editing to remove hereditary diseases).

> define a rigorous, responsible translational pathway toward such trials.[114]

In March 2019, a few months after the Summit, a group of eighteen leading scientists and ethicists from seven countries (including Emmanuelle Charpentier, co-Nobel Prize winner for her work in developing CRISPR) called for a moratorium on "heritable genome editing."[115] They insisted that they are not urging a permanent ban. Instead, they called "for the establishment of an international framework in which nations, while retaining the right to make their own decisions, voluntarily commit to not approve any use of clinical germline editing unless certain conditions are met."[116] The group supported continued human gene editing research but urged that no clinical application be allowed yet.[117]

Several groups have heeded the call to develop a framework for appropriate next steps. The American Society of Human Genetics ("ASHG") issued a position statement in 2017 setting forth the following three principles:

> (1) At this time, given the nature and number of unanswered scientific, ethical, and policy questions, it is inappropriate to perform germline gene editing that culminates in human pregnancy.
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> . . . .
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> (2) Currently, there is no reason to prohibit in vitro germline genome editing on human embryos and gametes, with appropriate oversight and consent from donors, to facilitate research on the possible future clinical applications of gene editing. There should be no prohibition on making public funds available to support this research.
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> . . . .
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> (3) Future clinical application of human germline genome editing should not proceed unless, at a minimum, there is (a) a compelling medical rationale, (b) an evidence base that supports its clinical use, (c) an ethical

[114] *Statement by the Organizing Committee*, *supra* note 18.

[115] Eric Lander et al., *Adopt a Moratorium on Heritable Genome Editing*, NATURE, Mar. 13, 2019, at 165, 165.

[116] *Id.*

[117] *Id.* at 166.

> justification, and (d) a transparent public process to solicit and incorporate stakeholder input.[118]

Similarly, the National Academy of Sciences, Engineering, and Medicine issued guidelines in 2017 articulating under what circumstances clinical applications would be allowed.[119] Those guidelines would permit the genetic editing of human embryos only to address mutations causing "serious disease or condition[s]" when "no 'reasonable alternatives' exist."[120]

Legal commentators assessing next steps for germline editing have largely adopted a similar stance to these scientific organizations. The most common position is that we should permit non-clinical human germline editing research with the goal of permitting clinical application (and supporting the live birth of individuals whose genes have been edited) when the technology is ready (and ethical requirements are met).[121]

Commentators differ on the appropriate source and nature of regulation as we navigate the path from current research to ultimate clinical trials. They have proposed regulations at every level, from state to international. At the state level, some have urged that states apply the same regulations governing in vitro fertilization to human germline

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[118] Kelly E. Ormond et al., *Human Germline Genome Editing*, 101 AM. J. HUM. GENETICS 167, 172–73 (2017). The Position Statement also lists the following professional organizations as ones which have endorsed the principles outlined in the ASHG statement:

> [T]he [U.K.] Association of Genetic Nurses and Counsellors, Canadian Association of Genetic Counsellors, International Genetic Epidemiology Society, and U.S. National Society of Genetic Counselors . . . the American Society for Reproductive Medicine, Asia Pacific Society of Human Genetics (APSHG), British Society for Genetic Medicine, Human Genetics Society of Australasia, Professional Society of Genetic Counselors in Asia, and Southern African Society for Human Genetics.

Id. at 167; *see also* NUFFIELD COUNCIL ON BIOETHICS, GENOME EDITING AND HUMAN REPRODUCTION: SOCIAL AND ETHICAL ISSUES 157–62 (2018) (providing similar recommendations to the ASHG in a 183-page report).

[119] NAT'L ACADS. SCIS., ENG'G, & MED., *supra* note 27, at 11–13.

[120] Pam Belluck, *In Breakthrough, Scientists Edit a Dangerous Mutation from Genes in Human Embryos*, N.Y. TIMES (Aug. 2, 2017), https://www.nytimes.com/2017/08/02/science/gene-editing-human-embryos.html.

[121] *See, e.g.*, Rodriguez, *supra* note 29, at 611–13; Barnett, *supra* note 95, 582, 586–88; Smith, *supra* note 60, at 106. Professor Sheetal Soni expresses well the dominant sentiment in the legal literature:

> Gene editing gives people control over human genetics which was previously impossible. It presents the opportunity to remove disease from the human population. The time is ripe to embrace this technology so that it's safe to use in humans and to establish a framework within which it may be applied.

editing.[122] Others recommend a federal regulatory approach.[123] One, embracing the March 2019 call for a moratorium by the eighteen international specialists, advocates for an international governance framework that would "above all emphasize the principle of human dignity . . . as well as identify some of the most pressing controversies and provide guidelines so each state can tailor their regime while maintaining minimum standards."[124]

IV. CONCERNS OVER THE CURRENT DEBATE ON THE FUTURE OF HUMAN GERMLINE EDITING

Two key themes emerge from the many statements and articles regarding how we should approach human germline editing going forward. The first is that scientific—not ethical—issues are currently driving most of the discussion. That is certainly the case for those who urge us to proceed with expedition. But it is also true of many urging a moratorium on human germline editing—whether a permanent or temporary ban. Indeed, most calling for a temporary moratorium (today's dominant position) only do so for clinical trials; they believe research on the technique should proceed. They do so with an expectation that clinical application will ultimately take place—we just must work out the kinks in the science.

Dr. Benjamin Hurlbut, Associate Professor of Biology and Society at Arizona State University, highlights a significant shift between the first and second International Summits on Human Gene Editing. At the end of the 2015 Summit, the organizers said that we should not proceed with human germline editing until two conditions are met: (1) that safety and efficacy are demonstrated; and (2) that there is "broad societal consensus" about the appropriateness of proceeding.[125] But after the second Summit

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Sheetal Soni, *Human Gene Editing: Who Decides the Rules?*, THE CONVERSATION (Jan. 15, 2020, 9:07 A.M.), https://theconversation.com/human-gene-editing-who-decides-the-rules-128434.

[122] *See, e.g.*, Myrisha S. Lewis, *Is Germline Gene Editing Exceptional?*, 51 SETON HALL L. REV. 735, 740 (2021) (arguing that germline gene editing should be treated similarly to IVF, which is subject to state laws, unlike federally regulated medical products); Daniel Malkin, *Germline Editing Using CRISPR: Why a Moratorium Is Not the Solution*, 55 FAM. L.Q. 69, 71 (2021) (urging the use of regulation similar to that of IVF by states and the federal government).

[123] Mendicino, *supra* note 51, at 601–03 (supporting specialized federal regulations like those adopted by China's National Health Commission or India's Ethical Guidelines for Biomedical Research on Human Subjects); Enriquez, *supra* note 111, at 1181 (proposing new FDA regulation); Rodriguez, *supra* note 29, at 585, 612–13 (advocating for federal adoption of ASHG guidelines).

[124] Melanie Hess, *A Call for an International Governance Framework for Human Germline Gene Editing*, 95 NOTRE DAME L. REV. 1369, 1390 (2020).

[125] J. Benjamin Hurlbut, *Human Genome Editing: Ask Whether, Not How*, NATURE, Jan. 10, 2019, at 135.

two years later, there was no talk of the need for societal consensus. Instead, the organizers urged that, though we temporarily halt clinical germline editing trials, we design a "pathway toward such trials."[126] That there will be clinical trials was a foregone conclusion. The science will drive us forward.

Stanford Law Professor Henry Greely summarized the position of the 2018 Summit organizers when he said, "[t]here are a lot of technical things scientists need to figure out before this can be done. The public should have a chance to comment, but they will not make the decisions. We will."[127]

Britta C. van Beers of the University of Amsterdam Faculty of Law notes that this deference to the scientists is now the default position.

> In brief, although the need for public debate and democratic deliberation on the matter is formally recognized, the common tenor within the scientific community is that the main question to be answered is not whether HGGE should be pursued, but how and under which circumstances. Moreover, the general thought seems to be that the answer to the "how question" can also largely be provided by the scientific community itself, for example, through the erection of self-regulating oversight bodies and the development of protocols.[128]

We are in a dangerous place. Yes, there are significant technique-related questions surrounding human germline editing. Researchers continue to struggle with incorrect and off-target mutations as well as mosaicism. But even if we could resolve those technical issues tomorrow, it doesn't mean we should immediately proceed to clinical trials. The biggest and most impactful questions are the ethical ones about whether we should be making changes to the human genome that future generations will inherit. As Hurlbut rightly cautions,

> In calling for standards for producing such 'CRISPR-edited' babies, these leaders have shunted aside a crucial and as-yet-unanswered question: whether it is (or can ever be) acceptable to genetically engineer children by introducing changes that they will pass on to their own offspring. That question belongs not to science, but to all of humanity. We do not yet understand what making

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[126] *Id.*; *Statement by the Organizing Committee*, *supra* note 18.

[127] Henry T. Greely, *How Should Science Respond to CRISPR'd Babies?* ISSUES SCI. & TECH., Spring 2019, at 32, 36.

[128] van Beers, *supra* note 89, at 32.

> heritable genetic alterations will mean for our fundamental relationships—parent to child, physician to patient, state to citizen and society to its members.[129]

Why is there such deference to scientists on this most critical issue? Part of it is our "technical optimism."[130] In general, scientific and medical advancements have benefited society.[131] Another part of it is that we believe science will move forward regardless of our ethical concerns. Technological innovation and change happen rapidly—usually more rapidly than legal regulation can respond. Martin Jinek expressed scientific determinism when he said, "[y]ou can't stop science from progressing . . . . [s]cience is what it is."[132]

Indeed, one commentator goes so far as to argue that since human germline editing will be used worldwide, the United States must not only approve and regulate it, it must fund it. Only then will we be able to shape and restrain the direction of the work. If we don't take charge of human germline editing, much worse things will happen.[133]

The second strong theme from the many statements and articles regarding human germline editing is that they are based on a utilitarian calculus rather than a reliance on foundational moral or ethical principles. We certainly see this in the words of the scientific community. The message of the organizers of the Second International Summit on Human Gene Editing in their concluding observations is that currently the risks of clinical trials are too great. But they call for the creation of a transitional pathway to such trials when our technical knowledge and expertise expand and those risks decrease.[134]

Legal commentators apply a similar risk-benefit approach to prescribe the best way forward. One argues,

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[129] Hurlbut adds:

> To move forward in a positive direction, science must not presume to set the destination for a technology, but should follow the direction that we, the people, provide. Science is—and must be—in the service of the societies of which it is part. Deviating from that principle harms both science and the human future.

Hurlbut, *supra* note 125.

[130] RONALD L. SANDLER, *INTRODUCTION: TECHNOLOGY AND ETHICS* TO ETHICS A ND EMERGING TECHNOLOGIES 1, 5 (RONALD L. SANDLER ed., 2014).

[131] *See id.* (describing specific areas of life that scientific advancements have helped).

[132] Amy Maxmen, *Easy DNA Editing Will Remake the World. Buckle Up*, WIRED (Aug. 2015), https://www.wired.com/2015/07/crispr-dna-editing-2/.

[133] Michael R. Dohn, *Preventing an Era of "New Eugenics": An Argument for Federal Funding and Regulation of Gene Editing Research in Human Embryos*, 25 RICH. J.L. & TECH., no. 2, 2018, at 1, 3. Dohn also speculates that some nations will undoubtedly use this technology for military uses (genetically producing "super soldiers"). *Id.* at 27.

[134] *Statement by the Organizing Committee*, *supra* note 18.

> The use of CRISPR technology in HGM should be permissible only where the benefits of the proposed therapy significantly outweigh the embryo loss and other associated risks. This situation involves performing a cost-benefit analysis of the proposed therapy with the primary goal of minimizing embryonic destruction throughout the research process.[135]

Another commentator breezily disposes of ethical issues involved in risks to future generations and the certain loss of life by many human embryos with this utilitarian calculation: "[t]he benefits of the proposed gene therapy outweigh the possible embryo loss and risks by offering generations without debilitating genetic diseases."[136] She notes the high failure rate in embryo experiments in China but concludes, "[n]o new biomedical technology is 100% safe and reliable. Oftentimes, it is a matter of determining if the benefits outweigh the risks."[137]

Whether to permit the genetic modification of future generations of human beings without their consent cannot simply be a matter of fiat by scientists engaged in the work. And it cannot just be a utilitarian call. This question is central to the very future of humanity. And we should only determine that future in light of a proper understanding of humanity itself. The remainder of the Article will focus on the nature of humanity and what it tells us about how to approach human genome editing ethically and legally.

V. HOW TO APPROACH HUMAN GERMLINE EDITING IN LIGHT OF THE CHRISTIAN VIEW OF HUMAN NATURE

A. Christian View of Human Nature

There is a rich tradition of Christian scholarship regarding human nature. Both scripture and leading thinkers have had much to say on the topic. While a Christian view of human nature is rich and multi-faceted, it contains two overriding tenets: (1) humans are made in the image of God Himself; and (2) humans are fallen.

1. Made in the Image of God

A Christian approach to human nature stands opposed to the materialist view that humans are merely the evolutionary product of time, matter, and chance. Instead, the Christian doctrine of creation insists that God created humans as a matter of will and choice—and in His own

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[135] Barnett, *supra* note 95, at 583.
[136] Rodriguez, *supra* note 29, at 614.
[137] *Id.* at 615.

image.[138] Scripture references this concept in many places,[139] but it is introduced in Genesis 1:26–28. This foundational passage describes the sixth day of creation this way:

> Then God said, "Let us make man in our image, after our likeness. And let them have dominion over the fish of the sea and over the birds of the heavens and over the livestock and over all the earth and over every creeping thing that creeps on the earth." So God created man in His own image, in the image of God He created [H]im; male and female He created them. And God blessed them. And God said to them, "Be fruitful and multiply and fill the earth and subdue it, and have dominion over the fish of the sea and over the birds of the heavens and over every living thing that moves on the earth."[140]

The passage establishes that humans have uniqueness and worth. We are created intentionally; we are not accidental. And we are created in the image of God Himself. Humans hold an honored place. We are distinct from animals and are tasked with stewardship over them and the rest of creation.[141]

The notion of being made in God's very image (the *imago dei*) is a concept that scholars (Jewish and Christian) have discussed for thousands of years. That discussion is rich and varied. But there is broad agreement that the *imago dei* reflects four main themes. First, humans are rational creatures who can think, plan, and be self-reflective. This in some measure mirrors God who, even in creation itself, plans and acts with self-reflection: "Let us make man in our image."[142] Second, humans are creative. Even as God creates, He instructs Adam to be creative too. Humans can know and appreciate beauty, be productive, and build and

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[138] William B. Whitney, *Beginnings: Why the Doctrine of Creation Matters for the Integration of Psychology and Christianity*, 48 J. PSYCH. & THEOLOGY 44, 47 (2020); *Genesis* 1:26–27.

[139] *See, e.g.*, *Genesis* 9:5–6; *Deuteronomy* 1:17; 25:3; *James* 3:8–9.

[140] *Genesis* 1:26–28.

[141] Psalm 8 highlights the same themes. It states, in relevant part:

> [W]hat is man that you are mindful of him, and the son of man that you care for him? Yet you have made him a little lower than the heavenly beings and crowned him with glory and honor. You have given him dominion over the works of your hands; you have put all things under his feet, all sheep and oxen, and also the beasts of the field, the birds of the heavens, and the fish of the sea, whatever passes along the paths of the seas.

Psalm 8:4–8.

[142] *Genesis* 1:26.

enhance things that enrich lives.[143] Third, humans have a prominent role in creation. We are to steward our environment—accountable to God as his "vice-regents"—"to manage and utilize together the created world."[144] This role has significant implications for things like biotechnology. As Anglican theologian J. I. Packer put it, God is honored "when the possibilities of [H]is creation are realized and developed by human enterprise, provided that this is done responsibly, in a way that benefits others."[145] Fourth and finally, humans are designed for relationship. They have a relationship with God Himself. The Catholic Catechism states that man is the only creature (of the "visible creatures") "able to know and love his [C]reator."[146] Indeed, "[o]nly in God will he find the truth and happiness he never stops searching for."[147] But humans also are made to be in relationship and community with others. Even ancient writers recognized this truth.[148]

Christianity posits that God instills great worth in His image bearers. One of the leading ways of describing this is that humans possess dignity.[149] The Catholic Catechism summarizes this concept well: "Being in the image of God the human individual possesses the dignity of a person, who is not just something, but someone."[150] The catechism ties this dignity to the concept that we are made for a relationship with God. "The dignity of man rests above all on the fact that he is called to communion with God."[151]

Indeed, the overriding story of scripture is the length to which God goes to restore His relationship with humans even after sin has broken our relationship with Him. God values humans so much that his son,

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[143] *See Genesis* 1:26; 2:15, 20.

[144] CHARLES SHERLOCK, DOCTRINE OF HUMANITY: CONTOURS OF CHRISTIAN THEOLOGY 37 (1996).

[145] J.I. PACKER, KNOWING MAN 23–24 (1979).

[146] CATECHISM OF THE CATHOLIC CHURCH PARA. 356 (United States Catholic Conference, Inc. trans., 1994).

[147] *Id.* para. 27.

[148] For example, Aristotle declared: "Anyone who cannot form a community with others, or who does not need to because he is self-sufficient, is no part of a city-state—he is either a beast or a god . . . . an impulse toward this sort of community exists by nature in everyone." ARISTOTLE, POLITICS bk. I, sec. 1253a, at 5 (C.D.C. Reeve trans., Hackett Publ'g 1998) (c. 384 B.C.E.).

[149] The concept of human dignity is embraced well beyond Christianity. Indeed, it is the foundational concept for the modern human rights movement. The Charter of the United Nations declares its purpose "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person . . . ." U.N. Charter pmbl. Similarly, the Universal Declaration of Human Rights affirms that "[a]ll human beings are born free and equal in dignity and rights." G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 1 (Dec. 10, 1948). There is great debate today about what that dignity entails. *See* Jeffrey A. Brauch, *Preserving True Human Dignity in Human Rights Law*, 50 CAP. U.L. REV. 115 (2022).

[150] CATECHISM OF THE CATHOLIC CHURCH, *supra* note 146, para. 357.

[151] *Id.* para. 27.

Jesus Christ, became human to take our sin and the punishment for that sin on Himself so that we can receive forgiveness and eternal life. In his letter to the Philippian church, the first century apostle Paul urges Christians to have the same mind that Christ did,

> [W]ho, though He was in the form of God, did not count equality with God a thing to be grasped, but emptied Himself, by taking the form of a servant, being born in the likeness of men. And being found in human form, He humbled Himself by becoming obedient to the point of death, even death on a cross.[152]

This sacrificial act by Jesus Christ had a transformative effect for God's image bearers: "God made Him who had no sin to be sin for us, so that in Him we might become the righteousness of God."[153]

2. Fallen

The truth that humans bear the very image of God Himself is of great significance not just to theology but to ethics, law, and things like human germline engineering, as we will see. Unfortunately, it is not the end of the story. One cannot understand humans and the human condition properly without also recognizing the Christian doctrine of the fall. Sin has profoundly marred the image of God in us.

The book of Genesis, not long after the creation account, also describes sin's introduction into the perfect world God created when the first man and woman, Adam and Eve, chose to disobey God's command not to eat of the tree of knowledge of good and evil.[154] In choosing their own will over God's, they broke communion with Him and suffered severe consequences.[155] Not only were they removed from their home (the Garden of Eden), but sin, decay, and death came into the world.[156] Their sin had implications for all their descendants.[157] Christianity teaches that Adam acted in a representative capacity for all humans.[158] The corruption that

[152] *Philippians* 2:6–8.
[153] 2 *Corinthians* 5:21.
[154] *See Genesis* 3:1–24.
[155] *See id.*
[156] *Id.*; *Romans* 5:12–18.
[157] *Genesis* 3:15–20, 23; *Romans* 5:12–18.
[158] *Romans* 5:12–18; Iain Duguid, *Were Adam and Eve Real People? How History Hangs on Their Story*, DESIRING GOD (May 11, 2020), https://www.desiringgod.org/articles/were-adam-and-eve-real-people.

came with sin came to all his descendants.[159] We are not only made in God's image, but sin, too, has become a part of our nature.[160]

Sin's introduction into the world did not have a minor impact. Sin affects every human—and every part of our lives. Sin corrupts our wills,[161] minds,[162] and emotions.[163] Theologian Louis Berkhof puts it this way: "sin has corrupted every part of [man's] nature and rendered [H]im unable to do any spiritual good . . . . [E]ven his best works are radically defective."[164] John Calvin puts it even more bluntly, "the whole man is overwhelmed—as by a deluge—from head to foot, so that no part is immune from sin and all that proceeds from [H]im is to be imputed to sin."[165] He continues, "whoever is utterly cast down and overwhelmed by the awareness of his calamity, poverty, nakedness, and disgrace has thus advanced farthest in knowledge of [H]imself."[166]

The image of God is not destroyed; it is marred and obscured. As Charles Sherlock explains, "[t]he structures which show the (ontological) reality of being made in God's image remain, but are corrupted, inverted.

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[159] *Romans* 5:12-19; *see also* JONATHAN EDWARDS, THE GREAT CHRISTIAN DOCTRINE OF ORIGINAL SIN DEFENDED (1834), *reprinted* in THE WORKS OF JONATHAN EDWARDS 144, 146 (1974); ADAM CLARKE'S COMMENTARY ON THE HOLY BIBLE 1047 (Ralph Earle ed., Baker Book House 1967).

[160] *Ephesians* 2:1–3 delivers this blunt assessment:

> And you were dead in the trespasses and sins in which you once walked, following the course of this world, following the prince of the power of the air, the spirit that is now at work in the sons of disobedience–among whom we all once lived in the passions of our flesh, carrying out the desires of the body and the mind, and were by nature children of wrath, like the rest of mankind.

The prophet Jeremiah is equally blunt, "[t]he heart is deceitful above all things and desperately sick; who can understand it?" *Jeremiah* 17:9.

[161] *See Romans* 7:18–19 ("For I know that nothing good dwells in me, that is, in my flesh. For I have the desire to do what is right, but not the ability to carry it out. For I do not do the good I want, but the evil I do not want is what I keep on doing.").

[162] Speaking of those who rejected the knowledge of God that is available to all humans, Paul wrote, "[f]or although they knew God, they do not honor [H]im as God or give thanks to [H]im, but they became futile in their thinking, and their foolish hearts were darkened." *Romans* 1:21.

[163] *See Colossians* 3:5–9; *Ephesians* 4:17–24; *Romans* 6:6–13.

[164] LOUIS BERKHOF, A SUMMARY OF CHRISTIAN DOCTRINE 76 (Banner of Truth Trust 1960) (1938). Theologians sometimes describe the effect of sin as total depravity. *Id.* Total depravity does not signify that humans are as bad as we can be. It means that sin has impacted each part of our nature. Scripture supports this conclusion. Isaiah insisted that even our "righteous deeds" are tainted by sin. "We have all become like one who is unclean, and all our righteous deeds are like a polluted garment. We all fade like a leaf, and our iniquities, like the wind, take us away." *Isaiah* 64:6.

[165] JOHN CALVIN, CALVIN: INSTITUTES OF THE CHRISTIAN RELIGION 253 (John T. McNeill ed., Ford Lewis Battles trans., 1960) (1536).

[166] *Id.* at 267.

They work against their intended nature and purpose, dividing where they should unite, cursing where they should bless."[167]

Humans are still capable of acting with kindness, love, and self-sacrifice. But we are also capable of great selfishness, harshness, and cruelty. Very often, motives and actions are mixed. The eighth century B.C. prophet Isaiah observed that sin taints even our "righteousness." "We have all become like one who is unclean, and all our righteous deeds are like a polluted garment. We all fade like a leaf, and our iniquities, like the wind, take us away."[168]

While the image of God inclines us to engage in meaningful relationships, sin damages them:

> [J]ust as the reflection of Christ and of God's being in our humanity is bound up with our relatedness to God and to one another, so it is with our sin. Relationships which in Christ are characterised by love, truthfulness and reverence are replaced by aggression, exploitation, deceit, brokenness and violence.[169]

While we have creativity and the ability to act as stewards of creation and leaders to help build cultures and nations, we do so inconsistently. At times we act ineffectively or even corruptly. We use science for great good and healing. We also cause significant harm to individuals and our environment. We implement laws to counteract the effects of the fall. But we also use laws in ways that are unnecessarily complicated, inconsistently enforced, or even corrupt or unjust. Whether in law or science, we ignore the effects of the fall at our peril.

B. Implications

Both the doctrine of creation and the doctrine of the fall have implications that help guide our response to human gene editing.

1. Humans Bear the Image of God

That humans are made in God's image first should open us to the possibilities of helpful new technologies. Humans, like the God who created us, are creative beings. We have stewardship over nature and have the capacity to harness tools and technology to protect and improve human life and the environment around us.[170]

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[167] SHERLOCK, *supra* note 144, at 43.

[168] *Isaiah* 64:6.

[169] World Council of Churches, *Christian Perspectives on Theological Anthropology*, *in* 199 FAITH AND ORDER PAPER 1, 16 (2005).

[170] *See Genesis* 1:28–30.

People exercising that creative capacity have created disease-ending vaccines and life-saving surgical techniques and medical devices. In the previous three years, brilliant scientists and medical professionals have given us vaccines and treatments to better protect us from COVID-19, a disease that has taken millions of lives worldwide.[171] Similarly, the Human Genome Project of 1990–2003 let us map the entire genetic code of human beings.[172] From it have come better drugs and therapies for cancer and other diseases. With a Christian view of human nature, our default perspective should be "pro-technology." "We have a mandate to engage in genetic research and therapy, when it is directed toward the healing end of medicine."[173]

We should be excited about developments in somatic cell gene editing. Like heart or lung transplants, "transplanting" healthy genes into patients suffering from disease can bring healing and extend lives. And it does so without destroying human embryos or modifying the human genome in unknown ways for generations to come.

Our response to germline editing should be different, however. For several reasons, the Christian understanding that we bear God's image suggests that we should oppose the practice of human germline editing.

i. DESTRUCTION OF HUMAN EMBRYOS

The first reason to oppose human germline editing is that it necessarily involves experimentation on and the destruction of human embryos.

One of the most important implications of being made in God's image is that all humans—without exception—are made in that image. All have dignity and worth that come from God. As Professor Craig Stern notes, recognizing that "all humans equally bear the image of God" contributed significantly to the rule of law and the common law view that all persons should be treated equally under the law.[174] This principle also formed the foundation of the modern human rights movement: "All human beings are born free and equal in dignity and rights."[175]

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[171] Amanda Montañez & Tanya Lewis, *How to Compare COVID Deaths for Vaccinated and Unvaccinated People*, SCI. AM. (June 7, 2022), https://www.scientificamerican.com/article/how-to-compare-covid-deaths-for-vaccinated-and-unvaccinated-people/; Henrik Pettersson et al., *Tracking COVID-19's Global Spread*, CNN, https://www.cnn.com/interactive/2020/health/coronavirus-maps-and-cases/ (last updated Sept. 30, 2022, 9:45 PM).

[172] *The Human Genome Project*, NAT'L HUM. GENOME RSCH. INST., https://www.genome.gov/human-genome-project (last visited Apr. 27, 2023).

[173] Michael McKenzie, *The Christian and Genetic Engineering*, CHRISTIAN RSCH. INST. http://www.equip.org/article/the-christian-and-genetic-engineering/ (last visited Apr. 27, 2022).

[174] Craig A. Stern, *The Common Law and the Religious Foundations of the Rule of Law Before* Casey, 38 U.S.F. L. REV. 499, 514 (2004).

[175] Universal Declaration of Human Rights art. 1.

There are voices today arguing that dignity and worth are not shared equally by all humans. Some insist that one's worth depends on one's condition and capacities. Therefore, those who don't—or don't yet or no longer—have complete cognitive or communication skills, the capacity to feel pain, or the ability to make plans or exercise autonomy do not have dignity or full worth as human beings.[176] This includes human embryos. Embryos don't feel pain; they don't make plans. They are just collections of cells.

But the Christian view of dignity compels a different conclusion. A human embryo has dignity because it is a human life. As Princeton Professor Robert George notes, a human embryo "not only possesses all of the necessary organizational information for maturation, but it has an active disposition to develop itself using that information. The human embryo is, then, a whole (though immature) and distinct human organism—a human being."[177] While an embryo doesn't display autonomy or self-reflection, neither does a three-month-old baby—yet. But both will continue to grow and develop additional capacities if allowed. They are human lives worthy of respect and protection.

Embryos certainly should not be the subject of experimentation. As Leon Kass, Chairman of President George W. Bush's Council on Bioethics urged, "[n]o decent society can afford to treat human life, at whatever stage of development, as a mere natural resource to be mined for the benefit of others."[178] Yet that is precisely what is taking place in ongoing human germline editing research in England,[179] Sweden,[180] and elsewhere. And to do the kind of research necessary to hone germline editing and to bring it to the point of clinical trials would require the creation, experimentation upon, and destruction of human embryos in

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[176] Peter Singer, *Speciesism and Moral Status*, 40 METAPHIL. 567, 575 (2009); Alberto Giubilini & Francesca Minerva, *After-Birth Abortion: Why Should the Baby Live?*, 39 J. MED. ETHICS 261, 261–62 (2013); Marion Hilligan et al., *Superman—Biotechnology's Emerging Impact on the Law*, 24 T.M. COOLEY L. REV. 1, 42 (2007). For a broader discussion of these competing views of dignity see Brauch, *supra* note 149.

[177] Robert P. George, *Embryo Ethics: Justice and Nascent Human Life*, 17 REGENT U. L. REV. 1, 3 (2004).

[178] Leon R. Kass, *A Way Forward on Stem Cells*, WASH. POST (July 7, 2015), http://www.washingtonpost.com/wp-dyn/content/article/2005/07/11/AR2005071101415.html.

[179] Gretchen Vogel, *U.K. Researcher Receives Permission to Edit Genes in Human Embryos*, SCI. (Feb. 1, 2016), https://www.science.org/content/article/uk-researcher-receives-permission-edit-genes-human-embryos#:~:text=Developmental%20biologist%20Kathy%20Niakan%20has,%2FCas9%20gene%2Dediting%20technology.

[180] *See* Jessica Boddy, *Swedish Scientist Edits DNA of Human Embryo*, SCI. (Sept. 22, 2016), https://www.science.org/content/article/swedish-scientist-edits-dna-human-embryo (noting that Swedish scientist Fredrik Lanner "has started to edit healthy human embryos for the first time" in an effort to discover new treatments for infertility using CRISPR-Cas9 gene editing technology).

much greater numbers.[181] The Christian recognition that those embryos are human lives made in the image of God compels the conclusion that human germline editing must halt.[182]

ii. IMPACT ON INDIVIDUALS WITH DISABILITIES

Among the humans who have full dignity and moral worth are those with disabilities. But the practice of human germline editing fits uncomfortably with recognizing this dignity and worth. A second reason to oppose human germline editing is that it tends to diminish the value of the lives of disabled individuals.

With somatic cell editing, doctors treat an individual for a disorder and seek to restore that person to health. But human germline editing is different. It edits the genes of embryos to ensure that only genetically superior people are born. It also sends the powerful message that certain types of persons—again based on their genetic characteristics—ought not to be born. It is a message that marginalizes and devalues. It says to those with disabilities that they are defective and "less than normal."[183]

Calum MacKellar frames the matter well, "for many persons (whether disabled or not), making sure that individuals with a disability do not exist, especially if no extenuating circumstances exist, expresses a deeply discriminatory message that already existing individuals with a similar disability should not have existed."[184]

Disability rights groups recognize the danger and have spoken out strongly against human germline editing. For example, the Autistic Self Advocacy Network ("ASAN") envisions

> [A] world in which all lives—including the lives of people with disabilities—have equal value. Such a world is simply not compatible with the use of technology to prevent the births of people with disabilities. Ubiquitous

[181] Botkin, *supra* note 97 ("[S]uccessfully developing heritable genome editing would entail research involving the creation and destruction of numerous human embryos purely for research purposes.").

[182] Even those uncertain about the ultimate moral status of embryos should acknowledge that they are a form of human life that merits a cautious approach to experimentation and destruction. Bioethicist Gilbert Meilaender puts it this way: "[i]f we are genuinely baffled about how best to describe the moral status of that human subject who is the unimplanted embryo, we should not go forward in a way that peculiarly combines metaphysical bewilderment with practical certitude by approving even such limited cloning for experimental purposes." Gilbert Milaender, *Begetting and Cloning*, 74 FIRST THINGS 41, 43 (1997).

[183] Seema Mohapatra, *Politically Correct Eugenics*, 12 FIU L. REV. 51, 77 (2016).

[184] Calum MacKellar, *Why Human Germline Genome Editing Is Incompatible with Equality in an Inclusive Society*, 27 NEW BIOETHICS, 19, 24 (2021).

> germline genome editing technology would, for instance, allow prospective parents of children with developmental disabilities not only to edit a prospective child's genes in order to attempt to eliminate that disability from existence before their child is even born, but also to eliminate those genes in all subsequent generations. Given the present-day use of prenatal testing to prevent the births of people with Down Syndrome, the possibility of this use is more than likely—it is inevitable.[185]

Some push back and insist that human germline editing can be limited to applications that are therapeutic and eliminate only genetic variations that cause grave diseases.[186] But the line between therapy and enhancement is thin and ultimately untenable. For example, as Britta van Beers questions, on the therapy versus enhancement spectrum, where should we place He Jankui's HIV-resistance modification in the Chinese twins?[187] He was not curing them of disease. But he was trying to strengthen their resistance to disease.[188]

Rebecca Cokley, a little person with the genetic condition Dwarfism, wrote a compelling piece in the Washington Post related to van Beers' point.[189] She noted that "disability" is ubiquitous; perhaps one in five individuals have what could be viewed by others as a disability.[190] Some are differences that are viewed as less desirable—or imperfections—by others. Cokley warns:

> Now think about the message that society's fear of the deviant—that boogeyman of imperfection—says to disabled people: "We don't want you here. We're actively working to make sure that people like you don't exist because we think we know what's best for you." This is ableism. It's denying us our personhood and our right to exist because we don't fit society's ideals.

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[185] *ASAN Comments on the Clinical Use of Human Germline Editing*, AUTISTIC SELF ADVOC. NETWORK (Oct. 8, 2019), https://autisticadvocacy.org/2019/10/asan-comments-on-the-clinical-use-of-human-germline-genome-editing/ [hereinafter *ASAN Comments*].

[186] *See, e.g.*, Ormond, *supra* note 118, at 173; NAT'L ACADS. SCIS., ENG'G, & MED., *supra* note 27, at 11, 13; Belluck *supra* note 120.

[187] van Beers, *supra* note 89, at 22.

[188] *Id.*

[189] *See* Rebecca Cokley, *Please Don't Edit Me Out*, WASH. POST (Aug. 10, 2017), https://www.washingtonpost.com/opinions/if-we-start-editing-genes-people-like-me-might-not-exist/2017/08/10/e9adf206-7d27-11e7-a669-b400c5c7e1cc_story.html?utm_term=.40286d48b939.

[190] *Id.*

> Proponents of genetic engineering deliberately use vague language, such as "prevention of serious diseases," leading many people with disabilities to ask what, in fact, is a serious disease. Where is the line between what society perceives to be a horrible genetic mutation and someone's culture?[191]

Cokley has reason for concern. As discussed in more depth below, we have a long history of eugenic efforts to purify the human gene pool that have done great harm to those viewed as less than perfect or not meeting some societal standard.[192] In such efforts, individuals with disabilities have always faced marginalization, discrimination, and worse.[193] Clinical germline editing efforts would be no exception. Indeed, the British Nuffield Council, in its report on the social and ethical issues surrounding human germline editing, agreed. While the Council supports moving forward with caution on human germline editing, it acknowledged that the practice might pose some dangers to disabled people:

> If there are fewer people with a given range of disabilities, the general level of familiarity with and social acceptance of those conditions may decrease. At the same time, specialist medical expertise or skills are likely to become rarer, and there may be less investment in research or measures to alleviate any specific adverse physical effects of disability or into ameliorative environmental adjustments.[194]

iii. COMMODIFICATION OF HUMAN BEINGS

The Christian doctrine that all humans are made in the image of God suggests a third reason to oppose human germline editing. As many scholars have noted, the very process of determining the genetic characteristics of children (and necessarily their descendants) promotes a more subtle form of dehumanization: commodification.

Human germline editing proponents envision a future where parents, guided by genetic researchers and medical professionals, select genetic characteristics of the children they intend to bring into the world. A market will certainly develop where fertility clinics offer to provide

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[191] *Id.*

[192] *See id.* (discussing media and societal efforts to "frame people with disabilities as takers, beggars[,] and unworthy cost drivers for the rest of the public").

[193] *Id.*

[194] NUFFIELD COUNCIL ON BIOETHICS, *supra* note 118, at 84–85.

parents with genetically superior embryos.[195] Francis Collins, Director of the National Institutes of Health and head of the Human Genome Project, warns, "the application of germline manipulation would change our view of the value of human life. If genomes are being altered to suit parents' preferences, do children become more like commodities than precious gifts?"[196] Leon Kass agrees. Speaking of a similar process of parental control over the genetic future of their children through a cloning process, Kass warns, "[p]rocreation dehumanized into manufacture is further degraded by commodification, no matter how good the product."[197]

Such commodification flies in the face of the idea that humans are made with dignity in God's image. It is dehumanizing. Francis Fukuyama says genetic engineering from a Christian perspective "sees a human being not as a miraculous act of divine creation, but rather as [a] sum of a series of material causes that can be understood and manipulated by human beings. All of this fails to respect human dignity and violates God's will."[198]

Kass points to Aldous Huxley's *Brave New World* as a literary illustration of this dehumanization. In the novel, humans have successfully mastered genetic editing to the point that they have eliminated disease, aggression, war, and emotions like guilt and envy. But Kass notes that "this victory comes at the heavy price of homogenization, mediocrity, trivial pursuits, shallow attachments, debased tastes, spurious contentment, and souls without loves or longings . . . ." Brave New Man is so dehumanized that he does not even recognize what has been lost."[199]

This commodification process has a destructive effect on parents as well. The parental control over the childbirth process fosters hubris and the illusion of mastery over nature and their children's future. Michael

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[195] *See* Darnovsky, *supra* note 90 (explaining that "affluent parents could soon find themselves contemplating fertility clinic ad campaigns for genetically upgraded embryos").

[196] Patrick Skerrett, *A Debate: Should We Edit the Human Germline?*, STAT (Nov. 30, 2015), https://www.statnews.com/2015/11/30/gene-editing-crispr-germline/.

[197] LEON KASS, *Preventing a Brave New World*, HUM. LIFE REV., Summer 2001, at 14, 24; Brandon Foht concurs:

> Gene editing is thought to offer a way for parents to maximize their control over the properties of their offspring, transforming a relationship that should be characterized by unconditional love and acceptance into one in which children are seen as products of their parents' desires and wishes, to be provisionally accepted and molded in accord with parental preferences.

Brandon Foht, *The Case Against Human Gene Editing*, NAT'L REV. (Dec. 4, 2015, 5:00 PM), https://www.nationalreview.com/2015/12/human-genetic-engineering-wrong/.

[198] FRANCIS FUKUYAMA, OUR POSTHUMAN FUTURE: CONSEQUENCES OF THE BIOTECHNOLOGY REVOLUTION 89 (2002).

[199] KASS, *supra* note 197, at 15.

Sandel expresses it well. He says genetic engineering is "the ultimate expression of our resolve to see ourselves astride the world, the masters of our nature. But that promise of mastery is flawed. It threatens to banish our appreciation of life as a gift and to leave us with nothing to affirm or behold outside our own will."[200]

The Christian doctrine of creation resists this notion that we are masters with ultimate control of our world and our descendants' genetic futures. We are made in the image of God and dependent—not independent—creatures.[201]

In all these ways, human gene editing denies the dignity inherent in every human being. It helps explain why the Council of Europe in the Oviedo Convention rooted its ban on human germline editing in protecting human dignity. Its preamble states, "[c]onscious that the misuse of biology and medicine may lead to acts endangering human dignity . . . ."[202] Articles 1 and 2 continue the theme:

> Article 1—Purpose and object
>
> Parties to this Convention shall protect the dignity and identity of all human beings and guarantee everyone, without discrimination, respect for their integrity and other rights and fundamental freedoms with regard to the application of biology and medicine.
>
> . . . .
>
> Article 2—Primacy of the human being
>
> The interests and welfare of the human being shall prevail over the sole interest of society or science.[203]

Based on a Christian view of human nature, the Oviedo Convention had it right. We should oppose human germline editing to protect the inherent dignity of each human being.[204]

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[200] Sandel, *supra* note 91. Kass says this transforms the act of "begetting" into "making." Kass, *supra* note 197, at 24.

[201] Mendicino, *supra* note 51, at 593 ("Human awareness that our genetic makeups—and thus many of our qualities, talents, and abilities—are given and beyond our control instills a degree of meekness in our character.").

[202] Oviedo Convention pmbl.

[203] *Id.* art. 1–2.

[204] Iñigo de Miguel Beriain argues that protecting human dignity supports germline editing. In particular, it protects the individual whose embryo is being edited. Iñigo de Miguel Beriain, *Human Dignity and Gene Editing*, EMBO REP., Sept. 2018, at 1, 1–4. Beriain, however, ignores the necessity that perfecting germline editing will require the experimentation on and destruction of numerous other embryos as well as germline editing's impact on individuals with disabilities and its promotion of commoditization in procreation. *See id.*

2. Humans Are Fallen

It is not just the precept that humans bear the image of God that would support a ban on human germline engineering. That conclusion also flows from the reality that humans are deeply marred by sin.

A recognition of human frailty and a resulting humility do not typically characterize proponents of human germline engineering. It is just the opposite. Supporters are often characterized by a utopian view of what we will accomplish once germline editing becomes a clinical procedure. Here are just some of the expectations expressed:

> We are about to remake ourselves as well as the rest of nature.[205]
>
> The great biotechnical transformation is being accompanied by an equally significant philosophical transformation.[206]
>
> Genetic engineering has given us the power to alter the very basis of life on earth.[207]

The vision is of a world where genetic disease has been eradicated. And it is a world of countless enhancements to physical and mental capacities. One calls this future "the ultimate expression and realization of our humanity."[208]

A Christian view of human nature, though, would urge caution. Fallen human beings don't create utopias. While we are capable of great feats, our flawed nature always taints both our intentions and accomplishments. This is true of germline editing as well. A Christian view of human nature warns that: (1) any germline editing efforts will be flawed, with mixed results and unintended consequences; and (2) germline editing raises the specter of a new and dangerous eugenics movement.

i. Human Germline Editing Flaws

Inevitably, our germline editing efforts will be flawed. We will not perfectly carry out our genetic intentions. And our efforts will have other genetic and medical effects that we don't expect. Some of these won't be known until years later.

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[205] RIFKIN, *supra* note 22, at 32.
[206] *Id.*
[207] Dixon, *supra* note 21.
[208] Gina Maranto, *Deoxyribonucleic Acid Trip*, N.Y. TIMES (Aug. 25, 2002), https://www.nytimes.com/2002/08/25/books/deoxyribonucleic-acid-trip.html.

Human germline editing failures are the main reason many supporters have called for a moratorium on further research—or at least on clinical applications. As noted above, there are several recurring problems with current human germline editing experiments. It is not the case that the process always makes the desired genetic changes to the target area.[209] The process sometimes makes unexpected and unwanted genetic changes away from the target area ("off-target" effects).[210] And the process sometimes results in mosaicism, which can potentially cause diseases like cancer.[211] Section I highlighted these errors in the experiments conducted by Doctor Huang and Doctor He. Those challenges have continued in subsequent research.

In 2021, Francis Crick scientists reported unintended mutations at the target site.[212] Many were small changes, but in 16% of the samples tested, there were "large, unintended mutations" that could cause cancer or other diseases.[213] A year earlier, *Nature* reported similar problems encountered by three teams.[214] In one, Columbia University biologist Deiter Egli sought to use CRISPR-Cas9 to correct a blindness-causing mutation in a particular gene, EYS.[215] He found, though, that "about half of the embryos tested lost large segments of the chromosome—and sometimes the entire chromosome—on which EYS is situated."[216] Summarizing the data in the *Nature* report, Fyodor Urnov a professor at the University of California-Berkeley, says: "[i]f human embryo editing for reproductive purposes, or germline editing, were space flight, the new data are the equivalent of having the rocket explode at the launch pad before take-off."[217]

The Karolinska Institute has also reported unintended consequences from its human gene editing research.[218] In late 2021, it revealed that the gene editing process was activating a particular protein, p53, that could

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[209] *See supra* text accompanying notes 46–49.

[210] *See supra* text accompanying notes 45–52.

[211] *See supra* text accompanying notes 46–56.

[212] Kathy Niakan, *Researchers Call for Greater Awareness of Unintended Consequences of CRISPR Gene Editing*, FRANCIS CRICK INST. (Apr. 9, 2021), https://www.crick.ac.uk/news/2021-04-09_researchers-call-for-greater-awareness-of-unintended-consequences-of-crispr-gene-editing.

[213] *Id.*

[214] *See* Heidi Ledford, *CRISPR Gene Editing in Human Embryos Wreaks Chromosomal Mayhem*, NATURE, July 2, 2020, at 17, 18 (explaining that three separate research groups saw unintentional changes to large segments of chromosomes after embryonic gene editing).

[215] *Id.*

[216] *Id.* at 18.

[217] *Id.*

[218] Felicia Lindberg, *New Findings on the Link Between CRISPR Gene-Editing and Mutated Cancer Cells*, KAROLINSKA INST. (Nov. 18, 2021, 10:00 AM), https://news.ki.se/new-findings-on-the-link-between-crispr-gene-editing-and-mutated-cancer-cells.

potentially cause cancer.[219] Earlier reports, including some from Karolinska had similarly reported that edited cells "have the potential to seed tumors inside a patient."[220] Karolinska researchers noted, "[t]hat could make some CRISPR'd cells ticking time bombs."[221]

The International Commission on Clinical Use of HGGE has summarized the current state of research this way:

> The outcomes of genome editing in human zygotes cannot be adequately controlled. No one has demonstrated that it is possible to reliably prevent (1) the formation of undesired products at the intended target site; (2) the generation of unintentional modifications at off-target sites, and (3) the production of mosaic embryos, in which intended or unintended modifications occur in only a subset of an embryo's cells; the effects of such mosaicism are difficult to predict. An appropriately cautious approach to any initial human uses would include stringent standards for preclinical evidence on each of these points.[222]

Of course, if experiments on embryos are allowed to continue, scientists will become more accomplished and successful. But the successes will never fulfill proponents' highest hopes.

Currently, human germline editing efforts tend to focus on single-gene mutations.[223] But over time, researchers will want to address conditions affected by multiple genes. As Francis Fukuyama points out, "once we move beyond relatively simple single-gene disorders to behavior affected by multiple genes, gene interaction becomes very complex and difficult to predict."[224] Further, "[g]iven that many genes express themselves at different stages of life, it will take years before the full consequences of a particular gene manipulation become clear."[225]

Humans have a mixed record in making changes to complex systems. As Fukuyama notes, "ecosystems are interconnected wholes whose

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[219] *Id.*

[220] Sharon Begley, *A Serious New Hurdle for CRISPR: Edited Cells Might Cause Cancer Two Studies Find*, STAT (June 11, 2018), https://www.statnews.com/2018/06/11/crispr-hurdle-edited-cells-might-cause-cancer/; *see Genome-Editing Tool Could Increase Cancer Risk*, KAROLINSKA INST. (Nov. 6, 2018, 5:01 PM), https://news.ki.se/genome-editing-tool-could-increase-cancer-risk (discussing cancer risks caused by CRISPR-based gene therapies).

[221] Begley, *supra* note 220.

[222] NAT'L ACADS. SCIS. ET AL., *supra* note 44, AT 7.

[223] *See* FUKUYAMA, *supra* note 198, at 92 (discussing that research will shift from single-gene disorders to multiple gene disorders).

[224] *Id.*

[225] *Id.* at 93.

complexity we frequently don't understand; building a dam or introducing a plant monoculture into an area disrupts unseen relationships and destroys the system's balance in totally unanticipated ways."[226]

We have seen many examples of taking steps to solve one problem only to cause other, unexpected ones. Asbestos offered remarkable fire-proofing materials for industrial settings, but it was later found to cause asbestosis, mesothelioma, and lung cancer.[227] Similarly, between 1940 and 1971, doctors regularly prescribed Diethylstilbestrol ("DES") to pregnant women. DES was a synthetic form of estrogen that promised protection from miscarriage and premature labor.[228] Only years later did we learn that DES caused a variety of forms of cancer (breast, pancreatic, cervical, etc.) in the daughters of DES takers who were in utero at the time their mothers took the hormone.[229]

We are sure to see similar unintended consequences with human germline editing. We caught a glimpse of this in He Jiankui's efforts. He may have successfully edited the twins' embryos to provide more robust resistance to HIV. But he may have unintentionally caused mosaicism where some of their cells have genetic mutations, and some do not.[230] This may make them more susceptible to cancer in years to come.

Such unintended changes are inevitable, and we simply don't know the full effect that changes to one part of the complex human genome may have on other parts in the long term.[231]

ii. EUGENICS

Even at our best, we will fall short of our highest intentions in carrying out human germline editing. But our fallen human nature—and history—warn of another danger. Not all intentions will be pure. And gene editing provides a powerful tool to spark a new eugenics movement.

Francis Galton, Charles Darwin's half-cousin, coined the term "eugenics" in 1883.[232] Eugenics is "the selection of desired heritable

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[226] *Id.* at 97.

[227] Daniel King, *History of Asbestos*, ASBESTOS.COM, https://www.asbestos.com/asbestos/history/ (last updated Sept. 15, 2023).

[228] *Diethylstilbestrol (DES) Exposure and Cancer*, NAT'L CANCER INST., https://www.cancer.gov/about-cancer/causes-prevention/risk/hormones/des-fact-sheet (last updated May 24, 2022).

[229] *Id.*

[230] *See* Cohen, *supra* note 55.

[231] *See* Reilly, *supra* note 96 (warning that "[m]odifying human genetics at the embryonic stage, however, can result in both intended and unforeseen consequences that could harm future generations that inherit them").

[232] *See* FRANCIS GALTON, INQUIRIES INTO HUMAN FACULTY AND ITS DEVELOPMENT 24–25 (1883) ("[This book's] intention is to touch on various topics more or less connected with that of the cultivation of race, or, as we might call it, with 'eugenic' questions, and to present the results of several of my own separate investigations."); Philip K. Wilson, *Eugenics*, ENCYC. BRITANNICA, https://www.britannica.com/science/eugenics-genetics (last updated

characteristics in order to improve future generations."[233] Galton saw eugenics as the chance to improve evolution[234] through a system that would allow "the more suitable races or strains of blood a better chance of prevailing speedily over the less suitable."[235]

In the early twentieth century, many states embraced eugenics, especially by sterilizing women deemed unfit physically or psychologically.[236] It is estimated that over 60,000 Americans who had been judicially declared unfit were involuntarily sterilized.[237] One of those Americans was 18-year-old Virginian Carrie Buck, confined to the Virginia Colony for Epileptics and Feebleminded.[238] In 1924, Virginia passed a statute authorizing state officials to sterilize "feebleminded" individuals who were inmates of state institutions like the Virginia Colony.[239] Sadly, the United States Supreme Court approved Buck's involuntary sterilization in the infamous 1927 case *Buck v. Bell*.[240] In an 8-1 decision, the Court held that Virginia's statute was constitutional.[241] The case is perhaps most remembered for Justice Oliver Wendell Holmes' infamous declaration that "three generations of imbeciles are enough."[242]

Nations worldwide likewise involuntarily sterilized hundreds of thousands of women as part of similar eugenic efforts.[243] Not surprisingly, the Nazi regime in Germany embraced eugenics wholeheartedly. It is estimated that the regime involuntarily sterilized over 400,000 Germans.[244] Of those, 200,000 were deemed mentally deficient; 100,000 had mental illness; 60,000 were epileptics; 10,000 were alcoholics; 20,000 had a variety of body deformities; and others had Huntington's, chorea, hereditary blindness, or deafness.[245]

Aug. 17, 2023).

[233] *Id.*

[234] *See* Francis Galton, *Eugenics: Its Definition, Scope, and Aims*, 10 AM. J. SOCIO. 1, 5 (1904) ("What nature does blindly, slowly, and ruthlessly, man may do providently, quickly, and kindly.").

[235] GALTON, supra 232, at, 24–25 n.1 (1883).

[236] Priti Patel, *Forced Sterilization of Women as Discrimination*, PUB. HEALTH REVS., 2017, at 1, 1–2.

[237] Hilligan et al., *supra* note 176, at 54.

[238] *See* Buck v. Bell, 274 U.S. 200, 205 (1927).

[239] H.R.J. Res. 607, Gen. Assemb., Reg. Sess. (Va. 2001); *see aslo Buck*, 274 U.S. at 205 (using language like "feeble minded" as justification for sterilization).

[240] *Buck*, 274 U.S. at 205, 208.

[241] *Id.* at 208 (Butler, J., dissenting).

[242] *Id.* at 207.

[243] *See, e.g.*, David Gems, *Politically Correct Eugenics*, 20 THEORETICAL MED. & BIOETHICS 201, 202 (1999) (explaining a Danish law, for example, that resulted in the sterilization of the "institutionalized mentally handicapped and mentally ill").

[244] Tara Melillo, *Gene Editing and the Rise of Designer Babies*, 50 VAND. J. TRANSNAT'L L. 757, 770 (2017).

[245] *Id.*

The Nazis embraced eugenics in other ways. In 1939, they began exterminating disabled individuals (whom they concluded lived "lives not worthy of life").[246] They killed at least 250,000 people with disabilities before the end of World War II.[247] The Nazis justified such killings on the basis that disabled persons were "empty human husks" and "useless eaters."[248] The Nazis likewise killed "numerous infants born with deformities or brain damage."[249] The full flowering of the Nazi eugenic worldview, of course, took place in the Holocaust, where millions of Jews, LGBTQ individuals, Roma, and others were deemed genetically deficient and useless—and were killed.[250]

Today's proponents of human germline editing insist that there will be no repeat of twentieth-century-style eugenics today.[251] While germline editing by its very nature is inherently eugenic, any germline editing will be a matter of individual choice.[252] Parents—working with medical and scientific professionals—will make genetic decisions for their offspring.[253] Governments will not mandate eugenic choices; this is not the *Brave New World*.[254]

Those embracing a Christian view of human nature will not be satisfied with these assurances. First, it is not at all clear that

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[246] *See* Walter Wright, *Historical Analogies, Slippery Slopes, and the Question of Euthanasia*, 28 J. L., MED. & ETHICS 176, 181, 185 n.37 (2000) (showing how "lives not worthy of life" began with the handicapped and expanded to include numerous other groups).

[247] Maurice R. Berube, *A Spiritual Pilgrimage*, VIRGINIAN-PILOT (Apr. 12, 2015, 12:00 AM), https://www.pilotonline.com/opinion/columns/article_b21873d7-72ce-5396-bd44-6fd37f6b5650.html.

[248] Mark P. Mostert, *Useless Eaters: Disability as Genocidal Marker in Nazi Germany*, 36 J. SPECIAL EDUC. 155, 157 (2002) (noting that two university professors published material which "called for the killing of people with disabilities" on the basis that these individuals' "only societal function" was consuming resources without contributing to the economy in return). This idea was used as the rationale for euthanizing thousands of disabled individuals after a survey showed that even family members were not opposed to killing them. *Id.*

[249] Melillo, *supra* note 244.

[250] Louise Ridley, *The Holocaust's Forgotten Victims: The 5 Million Non-Jewish People Killed by the Nazis*, HUFFPOST (Dec. 6, 2017), https://www.huffpost.com/entry/holocaust-non-jewish-victims_n_6555604.

[251] *See, e.g.*, Calum MacKellar, *Gene Editing and the New Eugenics*, DIGNITAS, Spring 2018, at 3, 5 (noting how American Nobel Prize Laureate and co-discoverer of the structure of the DNA molecule, James Watson, argues against being "held in hostage" to Hitler's evil and rhetorically asks, "if we don't play God, who will?").

[252] *See* Daniel J. Kevles, *The History of Eugenics*, ISSUES SCI. & TECH., Spring 2016, at 45, 48 (theorizing that gene editing would be privatized as family decisions rather than being imposed by the state).

[253] *See* Barnett, *supra* note 95, at 572 (highlighting how parents' desire to care for their children will drive gene editing decisions).

[254] *See* Melillo, *supra* note 244, at 773–74 (stating that there is no government agency regulating private gene editing projects); *see also* Daniel J. Kevles, *Gene Editing and the Rise of Designer Babies*, 32 ISSUES 45, 46 (2021).

governments won't adopt coercive practices to achieve eugenic ends in the twenty-first century, just as they did in the twentieth. The nearly eighty years since World War II have seen governments enforce legal segregation on racial minorities,[255] send hundreds of thousands of individuals from racial and religious minorities to "re-education" concentration camps,[256] and engage in genocide.[257] Recognizing that we live in a fallen world, it is not at all beyond the realm of possibility that corrupt governments will use human germline editing to try to rid their nations of genetic traits or peoples they consider undesirable.

Second, apart from government-sponsored eugenic efforts, the danger for abuse from human germline editing remains. Governments need not mandate eugenic measures. As Professor Seema Mohapatra points out, medical and scientific professionals—and not just governments—played a central role in the eugenic abuses of the twentieth century. "Although eugenics is often thought of as only state sponsored, eugenic idealism went far beyond the government. Eugenic ideals were embraced by medical and professional societies."[258]

In addition, human nature has not changed from a century ago. Yes, we will call our eugenic practices "positive"[259] and a "kinder, gentler eugenics."[260] Indeed, we likely won't use the term. We will just call it health care.[261] But it doesn't mean that there won't be pressure or compulsion.

Sarah Ashley Barnett describes how such pressure might work through social stigma and pressure in a non-government mandated, "positive" eugenic environment,

> If certain genetic characteristics are perceived to be of a lesser quality than others, that stigma, combined with economic pressures from interested third parties—such as

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[255] *See Segregation in the United States*, HISTORY (Jan. 18, 2022), https://www.history.com/topics/black-history/segregation-united-states (explaining how government housing provided for in Truman's Housing Act of 1949 excluded racial minorities); *see also Apartheid*, HISTORY (Mar. 3, 2020), https://www.history.com/topics/africa/apartheid (explaining how the 1913 Land Control Act required black Africans to live in reserves).

[256] Anna Schecter, *New Details of Torture, Cover-Ups in China's Internment Camps Revealed in Amnesty International Report*, NBC NEWS (June 10, 2021, 11:00 AM), https://www.nbcnews.com/news/world/new-details-torture-cover-ups-china-s-internment-camps-revealed-n1270014.

[257] *See* JEFFREY A. BRAUCH, FLAWED PERFECTION: WHAT IT MEANS TO BE HUMAN AND WHY IT MATTERS FOR CULTURE, POLITICS, AND LAW 101 (2017) (ebook) (explaining that between 1973 and 1990, the Chilean Government killed over 3,000 people and tortured as many as 29,000).

[258] Mohapatra, *supra* note 183, at 54.

[259] Barnett, *supra* note 95, at 573.

[260] FUKUYAMA, *supra* note 198, at 87.

[261] *See* Mohapatra, *supra* note 183, at 71 (explaining how no one will openly support eugenics, but that "health" is a more politically correct term for the same ideals).

> insurance companies or drug manufacturers—could lead to greater support for genetic human enhancement for the purpose of making people "better," even where there is no medical necessity. While it is a far cry from the forced sterilization or controlled breeding America experienced in the 1960s, this type of thinking could cause people to associate human "quality" with genetics and make potential parents feel morally obligated to utilize HGM technology—as if doing otherwise would be a disservice to their unborn child and generations to come.[262]

Leon Kass agrees,

> Once it becomes possible, with the aid of human genomics, to produce or to select for what some regard as "better babies"—smarter, prettier, healthier, more athletic—parents will leap at the opportunity to "improve" their offspring. Indeed, not to do so will be socially regarded as a form of child neglect.[263]

It is no wonder that disability rights groups have deep concerns over the future. A view that all lives—including those with disabilities—have equal dignity and worth will face profound challenges when the dominant voices in society call for (and promise) perfect children and lives without limitation and suffering.[264]

Human germline engineering promises a world of medical advance and human enhancement. But it will also produce a world of the haves and have nots. The haves won't just be blessed with more education or greater opportunities. They will be inherently better; their very genetic blueprint will have been enhanced. Others (whose parents choose not to use germline editing for economic, moral, or religious reasons) will be genetically inferior. Their lives, too, will be lesser, in some way defective.

Technology may have changed in the last eighty years, but human nature has not. It is not hard to hear the echo of voices again decrying and resenting useless eaters and lives not worthy of life. Those who don't conform to the accepted standard will always be at risk—for marginalization or worse. "Use of the technology to intentionally alter the human genome (the full array of genetic characteristics of the human

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[262] Barnett, *supra* note 95, at 573.

[263] Kass, *supra* note 197, at 27.

[264] *ASAN Comments*, supra note 185. Alice Wong, a disability rights activist, spoke at Stanford's Medicine X conference and asked this question that is also critical to how we will handle matters of disability in a germline editing world: "In the quest to eliminate suffering and pain, who has the power to decide which mutations warrant human gene editing while others are considered tolerable?" *Id.*

species) and to enhance capabilities and features of individuals opens the way to eugenic practices that undermine reverence for the dignity of individual persons who differ from the expected norm."[265]

> We recognize ourselves, measured against such goals and ideals, to be imperfect creatures. We wish to be more generous, more mathematically able, more musical, more altruistic–less like brutes and more like gods . . . [y]et as noble as our aspirations for shedding our failings might be, our history also suggests that, being flawed as we are, we can never blindly trust our own aspirations to reshape ourselves.[266]

The reality that we are fallen—like the reality that we bear the image of God—warns us of the dangers of engaging in germline editing.

VI. CONCLUSION

Proponents of human germline editing promise a world where genetic diseases are eradicated, and human physical and mental capacities are enhanced. Most scientists, commentators, and observers urge that we move cautiously but steadfastly forward on a path to embrace this world. Their focus is on getting the kinks in the science worked out to the point that we can bring human germline engineering to clinical trials.

Science alone, however, must not determine what path we take. Human germline editing has implications for humanity's future. We must consider humanity's nature before making any decisions that so profoundly affect us and generations to come.

Christianity's account of human nature recognizes that every person has inherent worth and value from God Himself; we are made in His image. We are creative with a tremendous capacity for building, problem-solving, and enhancing life on earth. We should be pro-technology. But we also must protect the dignity of all persons, including those who are most vulnerable, like embryos and those with disabilities.

Christianity also teaches that humans are fallen. We are acutely affected by sin. While we can accomplish much, our best efforts will be flawed. We will fail to carry out our best intentions—and even those intentions will be impaired.

The implications from both aspects of our nature caution us to turn away from the path of embracing human germline engineering. The practice will require the experimentation on and death of many human embryos. And it promotes the marginalization of those with disabilities

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[265] Reilly, *supra* note 96.

[266] CELESTE M. CONDIT, THE MEANINGS OF THE GENE: PUBLIC DEBATES ABOUT HUMAN HEREDITY 245 (1999).

and the commodification of children and childbirth. Human germline editing will also make unintended and potentially dangerous changes to the human genome. And it opens the door to a new form of eugenics that, while different from that of the twentieth century, may be just as dangerous.

In the end, a Christian view of human nature counsels us to walk the path laid out in the Council of Europe's 1997 Oviedo Convention. While we should embrace somatic cell gene editing for therapeutic purposes, we should oppose human germline gene editing. To protect human dignity above all, "an intervention seeking to modify the human genome may only be undertaken for preventive, diagnostic[,] or therapeutic purposes and only if its aim is not to introduce any modification in the genome of any descendants."[267]

[267] Oviedo Convention art. 13.

REFUGEE TO GUEST: A DISCUSSION ON THE CONTRACT ADMINISTRATION ISSUES AT DOÑA ANA VILLAGE

Aaron E. Brown, Esquire[*]

TABLE OF CONTENTS

I. THE WAR IN AFGHANISTAN
- A. *Introduction to Operation Allies Welcome*
- B. *Operation Allies Welcome's Major Role-Players*
- C. *Funding Operation Allies Welcome*

II. CONTRACT ADMINISTRATION ISSUES
- A. *Contract Administration Oversight*
- B. *Educating Stakeholders on Requirements*
- C. *Training and Transitioning Contract Administration Personnel*

III. THE SIGNIFICANCE OF LEGAL COUNSEL
- A. *Scope Determination*
- B. *Proper Use of Appropriated Funds*

IV. THE CONCLUSION OF OPERATION ALLIES WELCOME AT DOÑA ANA VILLAGE
- A. *Descoping the Operation*
- B. *Contract Closeout*

V. CREATING THE BLUEPRINT

VI. CONCLUSION

ABSTRACT

Humanitarian and civic aid refers to practical support provided to people in need. This assistance is typically short-term, aimed at deserving

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populations, and ranging in size. The support is usually mobilized in response to catastrophic events, natural disasters, and other unprecedented circumstances. During such calamities, countries or regions often seek strategic assistance and, most importantly, humanitarian aid from the United States. When disasters strike, prompt support becomes crucial, and the demand for aid is urgent. Consequently, the need for quick planning and preparation to provide assistance can sometimes lead supporting agencies to unintentionally overlook certain contract administration considerations.

In 2021, following the withdrawal of forces from Afghanistan and the rising threat of insurgents in the area, the United States stepped up to provide stateside humanitarian and civic aid to a deserving population at a moment's notice. This Article will discuss how Operation Allies Welcome, which began on July 14, 2021, as Operation Allies Refuge, proved immeasurably successful. More importantly, this Article will address why the United States, and other countries, should review Operation Allies Welcome to develop and identify various contract administration considerations that will continue to appear when rendering humanitarian and civic aid in the future. To accomplish this, this Article will highlight the significance of Operation Allies Welcome and explore how the lessons learned from this endeavor provide a blueprint for countries to use when administering humanitarian and civic aid.

I. THE WAR IN AFGHANISTAN

The War in Afghanistan ("the War") was an armed conflict that lasted from 2001 to 2021.[1] The War itself began almost immediately after the United States was attacked by al-Qaeda, an Islamic fundamentalist group lead by Osama bin Laden in Afghanistan, on September 11, 2001.[2] The War culminated in an international military coalition led by the United States.[3] In fact, the War itself lasted two decades and became the longest war in the history of the United States, narrowly surpassing the duration of the Vietnam War.[4] The Doha Agreement, which was entered into on February 29, 2020, set the stage for the end of the War in Afghanistan, which would come in late 2021.[5] In addition to several covenants

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[1] *See* David Zucchino, *The U.S. War in Afghanistan: How It Started, and How It Ended*, N.Y. TIMES (Oct. 7, 2021), https://www.nytimes.com/article/afghanistan-war-us.html (noting that the United States engaged in armed conflict against the Taliban in Afghanistan from October 2001 to August 2021).

[2] Remarks on the End of United States Military Operations in Afghanistan, 2021 DAILY COMP. PRES. DOC. 1 (Aug. 31, 2021).

[3] *See id.*

[4] *Id.*

[5] Mujib Mashal, *Taliban and U.S. Strike Deal to Withdraw American Troops from*

specifically addressed at preventing terrorist operations by al-Qaeda, the agreement required the withdrawal of military forces from Afghanistan no later than August 31, 2021.[6] The withdrawal itself was rushed and tumultuous, as Taliban insurgents spent most of the summer of 2021 seizing large areas of Afghanistan and forcing the Islamic Republic's former president, Ashraf Ghani, to flee.[7]

With fear of the Taliban's rule sweeping the country and thousands of Afghans facing persecution due to their support of the Islamic Republic and the United States during the twenty-year-long war, many were compelled to seek asylum, particularly in the United States.[8] In response, between July 14 and August 30, 2021, more than 124,000 Afghans were evacuated from Afghanistan.[9] This evacuation operation was initially titled Operation Allies Refuge.[10] A majority of the Afghan refugees, hereafter referred to as "guests," were processed and housed in the United States, primarily on military installations such as Fort Bliss.[11] Given the humanitarian crisis, the influx of personnel, and the need for primary resources, the Department of Defense ("DOD") requested and was subsequently directed by the Secretary of Defense to use specific authorities to aid in the transition of various Afghan guests.[12] With tens

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Afghanistan, N.Y. TIMES, https://www.nytimes.com/2020/02/29/world/asia/us-taliban-deal.html (Aug. 23, 2021).

[6] *See id.*; Zucchino, *supra* note 1 (noting that the Taliban agreed to reduce violence and cut ties with al-Qaeda as part of its 2020 agreement with the U.S. in exchange for a May 1, 2021, withdrawal of U.S. troops, which President Biden would later extend to August 31, 2021).

[7] Anthony Capaccio, *US-Taliban Deal Pushed Afghanistan to Collapse: Watchdog*, BLOOMBERG (May 18, 2022, 2:50 AM), https://www.bloomberg.com/news/articles/2022-05-18/us-taliban-deal-pushed-afghanistan-to-collapse-watchdog-finds.

[8] *See* Anna Nagler, *Operation Allies Welcome: The United States' Plan to Relocate over 65,000 Afghan Asylum Seekers*, 36 GEO. IMMIGR. L.J. 507, 508 (2021).

[9] Press Release, U.S. Dep't of Def., Statement by Secretary of Defense Lloyd J. Austin III (Aug. 31, 2022) (available at https://www.defense.gov/News/Releases/Release/Article/3145780/statement-by-secretary-of-defense-lloyd-j-austin-iii/); Glenn Thrush et al., *Evacuations for Afghans Who Helped U.S. Troops Will Begin This Month*, N.Y. TIMES (July 14, 2021), https://www.nytimes.com/2021/07/14/us/politics/us-afghanistan-evacuations.html (indicating that the Biden Administration expected to begin evacuating Afghan allies, as part of the U.S. military's "Operation Allies Refuge," by mid-to-late July 2021).

[10] Thrush et al., *supra* note 9.

[11] *Operation Allies Welcome,* U.S. DEP'T OF HOMELAND SEC., https://www.dhs.gov/allies welcome?utm_source=hp_slideshow&utm_medium=web&utm_campaign=dhsgov (last updated Mar. 13, 2023). The following U.S.-based military installations supported Operation Allies Welcome by providing temporary housing to evacuees: Marine Corps Base Quantico (Virginia), Fort Pickett (Virginia), Fort Lee (Virginia), Holloman Air Force Base (New Mexico), Fort McCoy (Wisconsin), Fort Bliss (Texas), Joint Base McGuire-Dix-Lakehurst (New Jersey), and Camp Atterbury (Indiana). *Id.*

[12] *See generally DOD Support to Operation Allies Welcome*, U.S. N. COMMAND, https://www.northcom.mil/OAW/ (last visited Apr. 10, 2023) (emphasizing that the Secretary of Defense approved the U.S. Northern Command to provide temporary housing and other forms of support for Afghan Special Immigrant Visa applicants and others who are at risk).

of thousands of Afghan guests now arriving in the United States with no more than the clothes on their backs,[13] detailed guidance was needed to aid the guests' transition to their new home–the United States. As a result, and in a short time, the Secretary of Defense directed the Commander of United States Northern Command and its component commands to provide support to the new foreign guests in the form of housing, sustainment, and support, with particular concern for those pending the processing of Afghan Special Immigrant Visa ("SIV"), principal applicants, their families, and other at-risk refugees.[14] A primary reference point for the support was 10 U.S.C. § 401.[15]

A. *Introduction to Operation Allies Welcome*

United States support for Afghanistan stems from the United States' rich history of supporting impoverished nations.[16] In fact, the general structure of humanitarian and civic assistance dates back as early as the 1980s when the Reagan Administration provided support to Afghanistan, Central America, and South America.[17] Government-sponsored aid typically comes in the form of money, technical and physical assistance, and commodities.[18] Historically, foreign aid is financed by taxpayers and other government revenue sources that Congress appropriates annually through the United States budget process.[19] Over the last century, the United States has had a growing interest in nation-building and supporting allies across the globe during their times of need.[20] Because

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[13] Abigail Hauslohner, *Thousands of Afghans Were Evacuated to the U.S. Will America Let Them Stay?*, WASH. POST (Mar. 29, 2022, 5:00 AM), https://www.washingtonpost.com/national-security/2022/03/29/afghan-resettlement-biden/.

[14] U.S. DEP'T OF DEF. INSPECTOR GEN., DODIG-2022-066, MANAGEMENT ADVISORY ON THE LACK OF MEMORANDUMS OF AGREEMENT FOR DOD SUPPORT FOR THE RELOCATION OF AFGHAN NATIONALS 1 (2022).

[15] 10 U.S.C. § 401 (2013).

[16] *See, e.g.*, Jangrumetta D. Shine, The Military Logistics Support of Humanitarian Relief Efforts During Low-Intensity Conflict (Sept. 1991) (M.S. thesis, Air Force Institute of Technology) (available at https://apps.dtic.mil/sti/pdfs/ADA246907.pdf) (discussing the Reagan Administration's efforts to provide humanitarian assistance to Afghanistan during the Soviet invasion of the country).

[17] *See id.*; *see also* Statement on Humanitarian Assistance for Central America, 1 PUB. PAPERS 1740 (Dec. 23, 1983) (indicating the Reagan Administration's desire to administer humanitarian assistance to meet the "desperate needs of the victims of aggression and oppression").

[18] *See* 10 U.S.C. § 401(e) (2013).

[19] *See* EMILY M. MORGENSTERN & NICK M. BROWN, CONG. RSCH. SERV., R40213, FOREIGN ASSISTANCE: AN INTRODUCTION TO U.S. PROGRAMS AND POLICY 11 (2022) (highlighting that Congress annually designates support to foreign assistance programs in accordance with the authority it derives from the Appropriations Clause of the U.S. Constitution).

[20] *See, e.g.*, Press Release, U.S. Agency of Int'l Dev., United States Provides Nearly $105 Million for Urgent Food, Humanitarian Assistance Amid Worst Drought on Record in

the United States stands as one of the wealthiest nations in the world, it has routinely offered the most aid to countries worldwide.[21] Foreign aid, for the most part, has shared bipartisan support, and there is a general consensus among most Americans regarding involvement in international affairs, particularly in improving people's health, educating children, and providing assistance during natural disasters.[22] Operation Allies Welcome, unique in its own right, now stands as the most recent federal aid initiative offered to a country in desperate need of assistance.[23]

Operation Allies Refuge, which was later renamed Operations Allies Welcome by the Biden administration, was a federal endeavor that began in 2021 and ended on approximately February 19, 2022, when the last Afghan evacuees left their stateside temporary housing and were resettled into new communities across the United States.[24] Operation Allies Welcome's sole purpose was to rescue vulnerable Afghan citizens who actively assisted the United States military during various operations in the Middle East.[25] This monumental effort came because of the sense of fear that developed in response to the withdrawal of United States Armed Forces from Afghanistan.[26] Because of the vast scope of Operation Allies Welcome, the number of people at risk, and the urgency of the support,

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the Horn of Africa (June 13, 2022) (available at https://www.usaid.gov/news-information/press-releases/jun-13-2022-united-states-provides-nearly-105-million-horn-of-africa-assistance) ("The United States is the largest single-country donor of humanitarian assistance to the Horn of Africa, providing more than $507 million across the region since the beginning of the Fiscal Year 2022.").

[21] *Refugee and Humanitarian Assistance*, U.S. DEP'T OF STATE, https://www.state.gov/policy-issues/refugee-and-humanitarian-assistance/ (last visited Apr. 5, 2023) ("The United States is the largest single provider of humanitarian assistance worldwide.").

[22] Charli Carpenter, *Americans Are More Generous on Foreign Aid Than They Realize,* WORLD POL. REV. (June 18, 2021), https://www.worldpoliticsreview.com/public-opinion-supports-an-increased-us-foreign-aid-budget./.

[23] Press Release, U.S. Dep't of Homeland Sec., Operation Allies Welcome Announces Departure of All Afghan Nationals from the National Conference Center Safe Haven in Leesburg, VA (Sept. 27, 2022) (available online at https://www.dhs.gov/news/2022/09/27/operation-allies-welcome-announces-departure-all-afghan-nationals-national) (describing how the Department of Homeland Security coordinated Operation Allies Welcome beginning in August 2021).

[24] *See* JOEL DAVIDOW, AFGHANISTAN EVACUATION BRIEF (2022); *see also DOD Ceases Afghan Evacuee Safe Haven Operations at Joint Base McGuire-Dix-Lakehurst*, U.S. N. COMMAND (Mar. 17, 2022), https://www.northcom.mil/Newsroom/News/Article/Article/2968988/dod-ceases-afghan-evacuee-safe-haven-operations-at-joint-base-mcguire-dix-lakeh/ (noting that by February 19, 2022, all remaining refugees had departed Joint Base McGuire-Dix-Lakehurst, and that on March 15, 2022, U.S. Northern Command closed Operation Allies Welcome). Operation Allies Refuge was a military operation conducted to airlift at-risk Afghan allies, who supported the DD, out of Afghanistan. Operation Allies Welcome was the follow-on effort across the U.S. Government to support Afghan evacuees as they resettled into the United States. U.S. DEP'T OF DEF. INSPECTOR GEN., *supra* note 14, at 1–2.

[25] U.S. DEP'T OF DEF. INSPECTOR GEN., *supra* note 14.

[26] *See* CLAYTON THOMAS, CONG. RSCH. SERV., R46879, U.S. MILITARY WITHDRAWAL AND TALIBAN TAKEOVER IN AFGHANISTAN: FREQUENTLY ASKED QUESTIONS 21 (2021).

the United States Army engaged in a humanitarian effort that stretched its duties in new and creative ways.[27]

Before launching the multi-million dollar support initiative, contracting personnel were assembled to begin planning.[28] Historically, acquisition planning should begin as soon as a need is identified, preferably well before "the fiscal year in which contract award or order placement is necessary."[29] Unfortunately, given the urgency of Operation Allies Welcome, acquisition planning was not conducted as one would envision in routine day-to-day solicitations.[30] Nevertheless, despite the inability to properly plan, as prescribed by the Federal Acquisition Regulation ("FAR") Part 7,[31] Operation Allies Welcome proved to be immeasurably successful and should be analyzed by the United States and other countries to improve disbursements of humanitarian aid that can, and will, be rendered in the future.[32]

B. Operation Allies Welcome's Major Role-Players

This Section highlights an agency that played a significant role in the contracting support element of Operation Allies Welcome. Additionally, this Section will call attention to the military personnel who played a primary operational contracting role in the formation, administration, and closeout of contracts supporting this multi-million-dollar contingency operation. Their support, if not received, could have tremendously endangered this mission.

In order to effectuate this mission, the Commander of United States Northern Command relied upon many players.[33] Each player will be highlighted as having a specific and invaluable role throughout Operation

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[27] *See* Matthew Rivera et al., *Operation Allies Welcome: Immediate Support to America's Largest Non-Combatant Evacuation Operation,* U.S. ARMY (June 1, 2022), https://www.army.mil/article/254992/operation_allies_welcome_immediate_support_to_americas_largest_non_com.

[28] *See id.*; *see also* Brian Stevens, *Fort Lee Chaplains a Key Participant in Operation Allies Welcome*, U.S. ARMY (Sept. 9, 2021), https://www.army.mil/article/250096/fort_lee_chaplains_a_key_participant_in_operation_allies_welcome.

[29] FAR 7.104(a) (2023).

[30] *See* Rivera et al., *supra* note 27.

[31] *See* FAR 7.104(a) (2023) (explaining the necessity of planning an acquisition); *see also* OFF. MGMT., ACQUISITION GUIDE CHAPTER 7.1: ACQUISITION PLANNING 6 (2011) ("Acquisition planning is the most critical part of the acquisition process—if it is not done right, nothing will [be] accomplished smoothly.").

[32] *See* Rivera et al., *supra* note 27.

[33] *See id.* (describing the numerous roles involved in effectuating Operation Allies Welcome); *see also* U.S. Dep't of Homeland Sec. Pub. Affs., *Operation Allies Welcome Announces Departure of Last Afghan Nationals from Fort McCoy, Wisconsin*, U.S. N. COMMAND (Feb. 16, 2022), https://www.northcom.mil/Newsroom/News/Article/Article/2937796/operation-allies-welcome-announces-departure-of-last-afghan-nationals-from-fort/ (discussing the eight task forces assigned to support the Operation).

Allies Welcome.[34] The first key contributor to Operation Allies Welcome was the United States Army Mission and Installation Contracting Command ("MICC").[35] During Operation Allies Welcome, the MICC was the primary entity providing ongoing Operational Contracting Support (i.e., Contract Support Integration, Contracting Support, and Contractor Management) services that enabled the DOD, Army Materiel Command ("AMC"), and Army Contracting Command ("ACC") forces to establish and sustain this domestic, continental United States ("CONUS")-based support.[36] The MICC, its personnel, and their contracting experience provided to support Operation Allies Welcome were invaluable.[37] Here, the MICC's ability to provide the United States Government with global strategic support in acquiring goods and services helped streamline efforts and minimize contractual errors.[38] Moving forward, countries or agencies looking to provide humanitarian and civic aid should consider analyzing and emulating the structure and capabilities of the MICC. Their collaborative effort, contractual support, and capable workforce could serve as a model for providing contractual support during humanitarian missions.[39]

A firm understanding of an area of operation is essential to any military operation or strategic endeavor. In the coming paragraphs, this Article will discuss one of the site locations used for Operation Allies Welcome and highlight how the MICC and its role players played a major role in contract administration during the mission at Fort Bliss's Doña Ana Village.

Doña Ana Village, located in New Mexico, was one of several DOD locations supporting the resettlement of Afghan guests.[40] At its peak,

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[34] *See generally* Rivera et al., *supra* note 27 (highlighting the specific role that many played in the execution of Operation Allies Welcome).

[35] *See* Ben Gonzales, *MICC Provides Contracting Support to Operation Allies Refuge*, U.S. ARMY (Aug. 31, 2021), https://www.army.mil/article/249865/micc_provides_contracting_support_to_operation_allies_refuge (discussing the involvement of the Mission and Installation Contracting Command, ("MICC"), at Fort Lee, Virginia, before Afghan immigrants first began arriving in July 2021).

[36] *See id.*

[37] *See* Daniel P. Elkins, *MICC Contracts Exceed $5.2 Billion in Support of Army Needs*, JBSA NEWS (Oct. 4, 2021), ttps://www.jbsa.mil/News/News/Article/2799224/micc-contracts-exceed-52-billion-in-support-of-army-needs/.

[38] *See* Gonzales, *supra* note 35.

[39] *Operation Allies Welcome: Examining DHS's Efforts to Resettle Vulnerable Afghans: Hearing Before the Subcomm. on Oversight, Mgmt., & Accountability & the Subcomm. on Border Sec., Facilitation, & Operations of the Comm. of Homeland Sec. H. of Reps.*, 117th Cong. 34 (2021) (statement of Naheed Samadi Bahram, U.S. Country Director, Women for Afghan Women).

[40] Lauren Villagran, *A Rare Peek Inside the Fort Bliss Afghan Refugee Camp, 'Doña Ana Village'*, EL PASO TIMES, https://www.elpasotimes.com/story/news/2021/09/10/fort-bliss-afghan-refugees-dona-ana-village-camp/8274111002/ (Sept. 10, 2021, 3:45 PM).

Doña Ana Village housed well over 10,000 Afghan guests.[41] Notably, the MICC was one of the first contracting activities on the ground at Doña Ana Village as a result of the mobilization of elements from various contracting battalions.[42] Here, on a rotating basis, the MICC deployed support elements from its contracting battalions located across the continental United States to support this endeavor.[43] These support elements were called "Contracting Detachments" and included the following personnel: an Administrative Contracting Officer ("ACO"), multiple Contracting Officers ("KO"), several Contracting Officer's Representatives ("COR") (which are Non-Commissioned Officers with military occupational specialties of 51C (Acquisition, Logistics, and Technology), and a Contract and Fiscal Law Judge Advocate ("KJA") to provide contractual support.[44]

The key roles here, the KO, ACO, COR, and KJA, have distinct but overlapping responsibilities.[45] According to the FAR, the KO is responsible for "ensuring [the] performance of all necessary actions for effective contracting, ensuring compliance with the [contract terms], and safeguarding the interests of the United States in its contractual

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Doña Ana Village, also commonly known as the Doña Ana Range Complex, is a barren Army camp that was built in 1960. *Id.*

[41] *Last Group of Afghan Refugees at Fort Bliss Left This Week*, KFOX-TV (Dec. 31, 2021, 6:06 PM), https://kfoxtv.com/news/local/last-group-of-afghan-refugees-at-fort-bliss-left-this-week.

[42] *See* Gonzales, *supra* note 35; *Fact Sheet: Mission and Installation Contracting Command*, U.S. ARMY (Jan. 23, 2020), https://api.army.mil/e2/c/downloads/2021/01/20/89287f78/final-micc-fact-sheet-jan-2020.pdf.

[43] *See, e.g.*, *902nd CBN Soldiers Complete Fort Bliss OAW Support*, U.S. ARMY (Jan. 31, 2022), https://www.army.mil/article/253595/902nd_cbn_soldiers_complete_fort_bliss_oaw_support (indicating that the 902nd Contracting Battalion, which is based out of Joint Base Lewis-McChord in Fort Lewis, Washington, and serves as one of the MICC's forward contracting elements, provided support and contract administration services at Doña Ana Village, which was located outside of Fort Bliss in El Paso, Texas).

[44] *See id.* (detailing the roles of certain contracting officers, administrative contracting officers, and contracting officer representatives sourced out from the 902nd Contracting Battalion); *see also* USAAC, *Military Occupational Specialty 51C, Acquisition, Logistics, and Technology Contracting Noncommissioned Officer*, U.S. ARMY (Apr. 6, 2011), https://www.army.mil/article/54457/military_occupational_specialty_51c_acquisition_logistics_and_technology_contracting_noncommission ("Military Occupational Specialty (MOS) 51C, Acquisition, Logistics, and Technology (AL&T) Contracting Noncommissioned Officer (NCO), is a highly critical career field established in December 2006 to meet the Army's continuously increasing need for contingency contracting officers in the modular force."); *Contracting Detachment Supports National Training Center Rotation*, U.S. ARMY (Oct. 14, 2021), https://www.army.mil/article/251179/contracting_detachment_supports_national_training_center_rotation (referring soldiers from the 902nd Contracting Battalion as Contracting Detachment B); RYAN FISHER ET AL., OPERATIONAL LAW HANDBOOK 294 (Ryan Fisher ed., 2022) (describing the role of a Judge Advocate).

[45] *See* FAR 2.101 (2023) (pinpointing the differences between a contracting officer, an administrative contracting officer, and a contracting officer's representative); FISHER ET AL., *supra* note 44.

relationships."[46] The ACO is responsible for administering contracts, "evaluating subcontracting plans, and . . . monitoring, evaluating, and documenting contractor performance under the clause prescribed in [FAR] 19.708(b) and any subcontracting plan included in the contract."[47] The COR is required to "assist[] in the technical monitoring or administration of a contract" and is also required to "maintain a file for each assigned contract."[48] Last, in a contingency environment, the KJA provides legal counsel and business recommendations; assesses risks; and provides contract and fiscal law advice to the ACO, senior leaders, and stakeholders (e.g., Senior Military Officers) on site.[49] From planning through execution, the KJA plays a vital role by ensuring that humanitarian and civic assistance activities comply with statutory and DOD policy requirements.[50]

During the deployment to Doña Ana Village, the "mission included contract administration services to the United States Army North's Logistics Civil Augmentation Program [("LOGCAP")] task order, a contract implemented to provide basic life support such as essential housing, feeding, medical care, transportation, and translation services to Afghan guests."[51] The ACO, who led the forward contracting detachment, played a chief role in monitoring and overseeing various mission-essential contracts.[52] However, stepping into uncharted territory created various obstacles, which will be addressed further below.[53]

C. Funding Operation Allies Welcome

Operation Allies Welcome was and remains the United States' largest non-combatant evacuation operation.[54] Given the magnitude of the support given to the Afghan guests, various obstacles occurred before, during, and after Operation Allies Welcome.[55] The first obstacle to present itself was identifying, understanding, and correctly interpreting the guidance from senior military leaders on what aid, if any, the United

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[46] FAR 1.602-2 (2022).

[47] FAR 19.706 (2022).

[48] FAR 1.604 (2022).

[49] THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, 2019 CONTRACT ATTORNEYS DESKBOOK 1-6 (2019); *see, e.g.*, U.S. DEP'T OF DEF., INSTR. 2205.3, IMPLEMENTING PROCEDURES FOR THE HUMANITARIAN AND CIVIC ASSISTANCE (HCA) PROGRAM ¶ 4.5 (27 Jan. 1995) [*hereinafter* DODI 2205.3] (requiring the combatant commander's legal staff to review proposed HCA projects to ensure conformance with applicable statutory and DOD policy requirements).

[50] *See* DODI 2205.3, *supra* note 49.

[51] *902nd CBN Soldiers Complete Fort Bliss OAW Support, supra* note 43.

[52] *See* Gonzales, *supra* note 35 (emphasizing the role of the contracting planner in facilitating mission plans).

[53] *See* Rivera et al., *supra* note 27; *see also* Zucchino, *supra* note 1.

[54] Rivera et al., *supra* note 27.

[55] *See id.*

States could provide to the inbound foreign guests.[56] The coming paragraphs will discuss the various challenges and confusion surrounding the type of appropriated funds that could have been used to provide a suitable haven for the guests. There were and remain various limitations and restrictions on using appropriated funds.[57] During Operation Allies Welcome, a primary funding source was an appropriation titled "Overseas Humanitarian, Disaster Assistance, and Civic Aid" ("OHDACA").[58] This fund was explicitly earmarked to aid countries in desperate need of humanitarian and civic assistance and has been historically used in response to catastrophic events and uncontrollable natural disasters.[59] In terms of oversight, the Defense Security Cooperation Agency ("DSCA") managed the OHDACA appropriation.[60] Generally, the DOD utilizes humanitarian assistance, such as OHDACA, "to relieve or reduce endemic conditions such as human suffering, disease, hunger, privation, and the adverse effects of unexploded explosive ordinance ("UXO"), particularly in regions where humanitarian needs may pose [significant] challenges to stability, prosperity, and respect for universal human values."[61]

Historically, OHDACA appropriations have been used to fund activities that "build the capacity of a [P]artner [N]ation government to provide essential humanitarian services to the civilian population and support[] [Partner Nation] efforts to reduce the risk of, prepare for, and respond to humanitarian disasters[,] thereby reducing reliance on international disaster relief assistance."[62] This particular appropriation "is an annual appropriation with a two-year period of availability that supports DOD [Humanitarian Assistance] activities" (e.g., essential

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[56] Memorandum from Jake Sullivan, Nat'l Sec. Advisor of the U.S., to the Heads of Exec. Dep'ts and Agencies, on the Designation of the Department of Homeland Security as Lead Federal Department for Facilitating the Entry of Vulnerable Afghans into the United States (Aug. 29, 2021) (identifying the need to provide Afghan guests with proper immigration processing, COVID-19 testing, and resettlement support).

[57] *See* 10 U.S.C.A. § 401 (2013) (indicating that humanitarian and civic assistance administered under this Section cannot be provided to any individual or group engaged in military activity or to any foreign country); *see also* U.S. DEP'T OF DEF., INSTR. 2205.02, HUMANITARIAN AND CIVIC ASSISTANCE (HCA) ACTIVITIES PROGRAM ¶ 3(b)(2) (June 23, 2014) (prohibiting the provision of humanitarian and civic assistance to individuals or groups engaged in military or paramilitary activity).

[58] *See* 10 U.S.C. § 2561 (2022); *see generally* 10 U.S.C § 401 (noting OHDACA funding allows Combatant Commanders to provide immediate life-saving assistance to countries in their region).

[59] *See* 10 U.S.C. § 401(a)–(b) (suggesting that OHDACA allows for the averting of political and humanitarian crises; s*ee also Office of U.S. Foreign Disaster Assistance*, U.S. AGENCY FOR INT'L DEV., https://www.usaid.gov/office-us-foreign-disaster-assistance (last visited Apr. 11, 2023).

[60] U.S. DEF. SEC. COOP. AGENCY, SECURITY ASSISTANCE MANAGEMENT MANUAL, 5105.38-M, C12.2.1.

[61] *Id*. at C12.1.1.

[62] *Id.*

services) "conducted under specific legislative authorities."[63] Given the nature of the withdrawal of forces from Afghanistan and the rising threat of Taliban insurgents, the Secretary of Defense quickly delegated authority to the Commander of United States Northern Command ("NORTHCOM") to validate and prioritize OHDACA funds–presumably to avoid ambiguity concerning various other funding sources.[64] The main point to be emphasized is that the significant influx of Afghan citizens en route to the United States, compelled the Commander of NORTHCOM, as directed by the Secretary of Defense, to undertake all possible measures to provide adequate care for the Afghan guests.[65]

With funding and command guidance in place, various military installations, such as Fort Bliss, were tapped to identify suitable locations to support SIV processing, temporary housing, life sustainment materials, and various other levels of support to Afghan guests in the United States.[66] For many installations and senior leaders, this was a challenging effort to accomplish.[67] Despite the obstacles faced throughout Operation Allies Welcome, which will be addressed later in this Article, this humanitarian feat successfully resulted in more than 75,000 Afghan nationals being relocated to various parts of the United States.[68] This was accomplished by stateside support from various agencies, services, and military personnel alike.[69] As a result of the considerable strides and accomplishments achieved by those involved in the execution of Operation Allies Welcome, the endeavor should now serve as a blueprint for humanitarian and civic aid efforts to come.[70] Next, this Article will explore

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[63] *Id.* at C12.1.2.

[64] *See* Memorandum from the Sec'y of Def. to Commander, U.S. N. Command, on the Authorization to Provide Support to Department of State Through Provision of Humanitarian Assistance in the United States to Afghan Special Immigrant Visa Applicants, Their Families, and Other Individuals at Risk (Aug. 24, 2021) (granting the Commander of U.S. Northern Command the authority to provide humanitarian assistance to Afghan Special Immigrant Visa applicants and their accompanying family dependents at designated military installations).

[65] *See generally id.* (indicating that NORTHCOM was required to assist in the housing and processing of SIV applicants pursuant to humanitarian requirements identified by the U.S. Department of State); Zucchino, *supra* note 1.

[66] *See Operation Allies Welcome*, *supra* note 11.

[67] *See id.* (highlighting the rigorous demands on members of the U.S. Government to effectuate Operation Allies Welcome).

[68] Press Release, U.S. Dep't of Homeland Sec., Operations Allies Welcome Announces Departure of All Afghan Nationals from U.S. Military Bases (Feb. 19, 2022) (available online at https://www.dhs.gov/news/2022/02/19/operation-allies-welcome-announces-departure-all-afghan-nationals-us-military-bases).

[69] *See id.*

[70] *See* Cindy Huang, *Operation Allies Welcome: A Health Care Success Story*, U.S. DEP'T OF HEALTH & HUM. SERVS. (Jan. 25, 2022), https://www.acf.hhs.gov/orr/blog/2022/01/operation-allies-welcome-health-care-success-story (noting that during Operation Allies Welcome, the Department of Health and Human Services's Office of Refugee Resettlement

three areas of contract administration that had the potential of jeopardizing this large-scale contingency operation had they not been done correctly.

II. CONTRACT ADMINISTRATION ISSUES

Contracts and their resulting task orders, like many other projects, require oversight.[71] Oversight and guidance are necessary to ensure key players (e.g., stakeholders, requiring activity, and senior leaders) remain ethical, avoid legal obstacles, and are on the same page regarding project execution.[72] In the coming paragraphs, this Section will discuss various contractual oversight issues and highlight methods implemented to overcome them.

A. Contract Administration Oversight

The first logistical hurdle the KJA and ACO experienced during Operation Allies Welcome was providing direct and indirect oversight to the LOGCAP prime contractor, Kellogg Brown & Root, Inc. ("KBR"), in its execution of the $600 million task order.[73] This oversight required the ACO and KJA to ensure various task orders were met and aligned to the standards established in the Performance Work Statement ("PWS").[74] The KJA's primary role was to ensure that various requirements were met regarding measurable outcomes rather than utilizing prescriptive methods. For example, several task orders required contractors to install fencing around various parts of Doña Ana Village.[75] Throughout this dilemma, various stakeholders debated the necessity of fencing in areas subjectively determined to be adequately secure; however it was ultimately a condition previously negotiated and not one that could be adjusted unilaterally.[76] In order to remedy any confusion, the KJA and

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provided temporary healthcare, mental health resources, and protection services to Afghan refugees in support of more than 60,000 people).

[71] *See* FAR 42.201(a) (2022); *see also* FAR 43.302(a)–(b) (providing various managerial responsibilities of the contracting officer).

[72] *See generally* U.S. DEP'T OF DEF., CONTRACTING OFFICER'S REPRESENTATIVES GUIDEBOOK 128 (2021) (suggesting that proper contract oversight and monitoring results in successful operations).

[73] *902nd CBN Soldiers Complete Fort Bliss OAW Support*, *supra* note 43.

[74] PWS is a statement of work for performance-based acquisitions that clearly describes the expected performance objectives and standards of the Contractor. *See* FAR 37.602 (a)–(b) (2022).

[75] A task order "means an order for services placed against an established contract or with Government sources." FAR 2.101 (2022).

[76] *See* 48 CFR § 16.505(a)(8)(i)–(iii) (2023); *see also* FAR 43.103(b) (indicating that a unilateral contract modification can only be made by a contracting officer).

ACO needed to explain the complexity involved with modifying or altering contract conditions.[77]

To resolve this particular issue, a significant amount of time was dedicated to educating key stakeholders on the legal consequences resulting from unilateral contract modifications. Once there was an understanding amongst stakeholders, related scenarios were analyzed repetitively to mitigate the reoccurrence of similar issues. Repetition, tangible examples, and contextual overviews of regulatory guidance proved to be the best methods to overcome the contractual oversight hurdle. Once a baseline standard was understood amongst all involved parties, task orders were executed seamlessly and requests for modifications were screened and vetted before submission for approval. These adjustments allowed more time for the ACO to focus on the mission–monitoring and ensuring contract compliance.[78] But, like all things, once one issue was resolved, another developed. The next area this Article will focus on is the efforts the KJA took to advise the customer–the Requiring Activity–and efforts taken to minimize the threat of litigation and liability.

B. Educating Stakeholders on Requirements

A shared understanding and open communication lines are vital in ensuring that contract performance remains viable and is properly recorded.[79] This Article has explained the various parties involved in this humanitarian and civic aid initiative and also discussed contract oversight. Next, it will explore how the KJA interacted with another stakeholder–the Requiring Activity. In the coming paragraphs, this Article will provide an overview of the issues experienced while advising the Requiring Activity, specific issues the KJA had to adjudicate, and will also explore the processes the KJA implemented to reduce the ever-looming threat of litigation.

Ensuring all key leaders and stakeholders were on the same page with contract administration was another concern throughout Operation

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[77] *See generally* FAR 43.103 (2022) (describing the various bilateral and unilateral contract modifications); *see also* FAR 43.104(a) (2022) (requiring the contractor to notify the government of required changes to the contract); FAR 43.105(a) (2022) ("The contracting officer shall not execute a contract modification that causes or will cause an increase in funds without having first obtained a certification of fund availability . . . .").

[78] *See* FAR 42.302(a)(68) (2022) ("The administrative contracting officer is responsible for assisting in evaluating subcontracting plans, and for monitoring, evaluating, and documenting contractor performance under the clause prescribed in 19.708(b) and any subcontracting plan included in the contract.").

[79] *See Guidebook for the Acquisition of Services*, OFF. OF THE ASSISTANT SEC. OF DEF. 7.1, https://www.acq.osd.mil/asda/dpc/cp/cc/docs/corhb/ref/Guidebook_for_Acquisition_of_Services_24March2012.pdf (last visited Mar. 20, 2023).

Allies Welcome.[80] The LOGCAP task order outlined in the existing contract, performance standards, metrics, and reporting requirements.[81] However, given the fluctuating population, evolving seasons, and changeover in stakeholders at the various site locations, the Requiring Activity often felt compelled to make improper unilateral adjustments to stay ahead of the evolving operation.[82] As an example, unilateral requests were made to CORs that deviated from previously established reporting requirements. There were also instances in which Contractors were asked to perform more than they initially contracted to do.[83] Unchecked, either scenario could have resulted in increased fees and possibly litigation due to the impact such changes could have had on competition.[84]

In this instance, the KJA played a significant role in decision-making conversations and supporting the ACO and contracting team on the ground. The KJA accomplished this by insisting that proper reporting procedures be followed and helping hold the supporting units adhere to standards when procedures were falling out of compliance. For example, the KJA was instrumental in explaining the process of submitting task orders to senior leaders and also distinguished between the utilization of unilateral and bilateral modifications.[85] The chief concern that the KJA raised to the Requiring Activity was that deviation from outlined task orders could require the Contractor to complete work above what was

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[80] *See generally* U.S. DEP'T OF DEF. INSPECTOR GEN., DODIG-2022-064, MANAGEMENT ADVISORY: DOD SUPPORT FOR THE RELOCATION OF AFGHAN NATIONALS AT FORT BLISS, TEXAS 21 (2022) (emphasizing the need for interagency partners and the various commands responsible for the relocation of Afghan guests to each be equally aware of the challenges involved in the facilitation of aid to Afghan guests, specifically those evacuated to Fort Bliss).

[81] *See generally 902nd CBN Soldiers Complete Fort Bliss OAW Support*, *supra* note 43 (providing that the U.S. Northern Command's LOGCAP task order specifically provided basic life support to Afghan guests including housing, food services, medical care, transportation, and translation services); *see also* FAR 16.501-1 (defining a task order as "a contract for services that . . . provides for the issuance of orders for the performance of tasks during the period of the contract.").

[82] *See* FAR 43.103(b)(1)–(4)(2023) (outlining the conditions in which a unilateral contract modification are permitted to occur).

[83] *But see* CAR 1352.201-72(b)(2) (2021) ("The COR is not authorized to make any commitments or otherwise obligate the Government or authorize any changes which affect the contract price, terms[,] or conditions.").

[84] *Cf*. Competition in Contracting Act, 41 U.S.C. § 253 (1984). The Competition in Contracting Act "is a public law enacted to encourage competition for the award of all types of government contracts. The purpose was to increase the number of competitors and to increase savings though lower, more competitive pricing." *Competition in Contracting Act (CICA)*, ACQNOTES, https://acqnotes.com/acqnote/careerfields/competition-contracting-act-cica (last visited Apr. 13, 2023).

[85] *See* FAR 16.501-1 (defining a task order as "a contract for services that . . . provides for the issuance of orders for the performance of tasks during the period of the contract."); *see also* FAR 43.103 (2019) (distinguishing between bilateral and unilateral contract modifications).

previously contracted for them to do.[86] These actions could also require Contractors to underperform what was established in the terms and conditions of the respective contract and therefore expose the Government to liability.[87]

Given the varied requests given to the CORS by the Requiring Activity and various other stakeholders, the KJA and ACO found it prudent to step in and provide counsel on the role of CORs and the significance of staying within established reporting requirements.[88] In doing so, the KJA directly explained to an audience that was likely unfamiliar with performance-based contracts that each performance assessment activity has to be documented as it is conducted.[89] The KJA further discussed issues involved with unilaterally adjusting COR surveillance plans.[90] The KJA accomplished this by articulating that though there are standard checklists for contractor observation,[91] the ones in place for Doña Ana Village were unique and tailored specifically to the service of performance. The KJA and ACO also successfully explained that if a particular project is not done correctly, there are methods to address said deficiencies.[92] In certain instances, compliance did become an issue

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[86] *See* FAR 31.201-3(a)–(b) (2019) (suggesting that a cost or action requested to be taken by a contractor and which exceeds his responsibility to the Government or is a "significant deviation from . . . [his] established practices is unreasonable in nature or amount if it exceeds that which he would be expected to incur in the ordinary course of competitive business").

[87] *See generally* FAR 31.2013(a) (noting that the reasonableness of a given contract's anticipated expenses and responsibilities depends upon "a variety of considerations and circumstances.").

[88] *See* FAR 1.602-2(d)(1)–(7) (2019) (specifying the duties and responsibilities of the Contracting Office Representative); *see also* CONTRACTING OFFICER'S REPRESENTATIVES GUIDEBOOK, *supra* note 73 (highlighting that COR's "function as the 'eyes and ears'" of their Commanding Officer and "liaison between the government and contractor when executing . . . technical and administrative functions").

[89] *See* CONTRACTING OFFICER'S REPRESENTATIVES GUIDEBOOK, *supra* note 72 (highlighting the need for CORs to "routinely monitor the contractor's performance" throughout the duration of the contract to ensure that the supplies or services delivered conform to the agreed upon terms).

[90] *See id.* at 104 (disclosing that the federal government may unilaterally alter Quality Assurance Surveillance Plans ("QASP") for service contracts). QASPs are used by CORs to "determine [] if the contractor is meeting the performance standards contained in the contract." *Id.* QASPs may be adjusted throughout the contract depending upon a contractor's ability to carry out its quality control plan. *Id.*

[91] *See id.* at 105 (indicating that checklists for contractor observations should at least (1) provide a schedule for on-site inspections and audits of contractor's billings; (2) identify what will be checked during an inspection; and (3) describe the method used for verifying contract invoices); *see also* FAR 37.601 (2019) (explaining that a standard contract includes a performance work statement, measurable performance standards, and performance incentives).

[92] *See* FAR 46.407 (2019) (indicating that Contracting Officers may reject, or request replacements of, nonconforming supplies or services).

and proper reporting requirements were undertaken. In these situations, each issue was handled individually, and the KJA reviewed non-conformity reports, which, if adjudicated, could impact the contractor's rating in the Contractor Performance Assessment Reporting System.[93] Dialogues, such as the ones discussed here, helped to clarify ambiguity in terms of contractor performance and allowed for consistency in the evaluation of the services on Doña Ana Village. Lastly, and most importantly, these dialogues served as risk mitigation.

Open and direct conversations with leaders and stakeholders, such as the Requiring Activity, were the key to avoiding issues at Doña Ana Village and often served to prevent costly and prolonged litigation.[94] Here, the KJA was able to be proactive rather than reactive, which is extremely important and an often-overlooked aspect of the acquisition process. With the aforementioned in mind, governments interested in developing a humanitarian and civic assistance acquisition team should select and adequately train a Contract and Fiscal Law Judge Advocate to round out their team. As one can see, the involvement of a properly trained attorney on a humanitarian and civic assistance acquisition team can help the team to correctly interpret law and policy and minimize the risk of litigation.

C. Training and Transitioning Contract Administration Personnel

Providing humanitarian and civic assistance in a contingency environment with personnel who need to be trained or equipped with the necessary tools is a quick way to end up in mission failure.[95] Fortunately, despite the steep learning curve, key personnel from the MICC, including the KJA, were able to not only adjust to the austere environment at Doña Ana Village but created tools and systems to ensure that replacement contracting detachments were fully prepared when onboarding. In the next paragraph, this Article will discuss experience and how the lack of the same can impact contract administration in a contingency environment.

Contract administration training and turnover were other obstacles that contracting personnel looked to navigate while operating at Doña

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[93] *See generally* CONTRACTOR PERFORMANCE ASSESSMENT REPORTING SYS., GUIDANCE FOR THE CONTRACTOR PERFORMANCE ASSESSMENT REPORTING SYSTEM (CPARS) 6 (2022) (explaining that CPARS utilizes performance assessment evaluations to ensure that the U.S. Government only conducts business with those contractors who "consistently provide quality, and on-time products and services that conform to contractual requirements").

[94] *See generally* CONTRACTING OFFICER'S REPRESENTATIVES GUIDEBOOK, *supra* note 72, at 52 (emphasizing the need for "open communication between the Contracting Officer in COR" and instructing the COR to "always contact the Contracting Officer for guidance and direction").

[95] *Cf.* DODI 2205.3, *supra* note 49, at ¶ 5(1) (emphasizing that prior to engaging in a major exercise or operation, military forces should receive essential training and support).

Ana Village.[96] A lack of Contract Administration Services (CAS)/LOGCAP experience from the CORS can and will make day-to-day operations more challenging. During any humanitarian initiative, a lack of personnel with the requisite training will force acquisition teams to fill gaps and increase the workloads of those who are appropriately trained.[97] This was not the case in Doña Ana Village, as each acquisition team was adequately trained and equipped to provide real-time and accurate contractual oversight.[98] To accomplish this and prepare personnel for deployment to Doña Ana Village, the Quality Assurance and LOGCAP representatives from the 418th Contracting Support Brigade (901st Contracting Battalion) provided in-person training to both the acquisition team and key stakeholders.[99] This was accomplished through providing desk-side briefs and physical tours of the various site locations in Doña Ana Village. Additionally, time was allocated for personnel to provide feedback on current battle plans while allowing each departing soldier time to work on the development of improved mission standard operating procedures.

The preparation, personal resources, and shared connections were well received, greatly appreciated by the incoming contracting detachments, and made for seamless transitions. Transitions are often challenging and stressful; however, at Doña Ana Village, the process articulated above allowed for inbound contracting detachments to receive and experience immediate and transferrable intel and allowed incoming leaders adequate time to assess the capabilities of the teams on the ground.

III. THE SIGNIFICANCE OF LEGAL COUNSEL

Creating a team of well-prepared and trained personnel is key to establishing a well-functioning humanitarian aid plan.[100] A key team

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[96] *See generally* U.S. DEP'T OF DEF. INSPECTOR GEN., DODIG-2022-114, SPECIAL REPORT: LESSONS LEARNED FROM THE AUDIT OF DOD SUPPORT FOR THE RELOCATION OF AFGHAN NATIONALS 14 (2022) (explaining that the lack of clear communication procedures and particularized responsibilities negatively impacted the administration of Operation Allies Welcome).

[97] *Cf*. FAR 7.103(r) (highlighting that it is the responsibility of agency heads or designees to "[m]ake a determination, prior to the issuance of . . . services involving the analysis and evaluation of proposals . . . that a sufficient number of covered personnel with the training and capability to perform an evaluation . . . are readily available within the agency . . . .").

[98] *See 902nd CBN Soldiers Complete Fort Bliss OAW Support*, supra note 43 (describing the efficiency of Contracting Officers and the contract administration services team in implementing training, oversight, and management at Doña Ana Village).

[99] *See generally id*. (crediting the 418th Contracting Support Brigade with supporting the U.S. Department of State's mission to relocate SIV applicants and indicating that the Brigade provided for the "early integration" of essential contracting support across each of the military installations involved in Operation Allies Welcome).

[100] *See, e.g.*, *Humanitarian Assistance*, SOUTHCOM, https://www.southcom.mil/

member should be a KJA, primarily when operating in a "contingency environment."[101] In the following paragraphs, this Article will examine in detail the KJA's responsibilities and highlight the issues of scope determinations and how this was resolved during their rotation. Last, this Article will discuss what processes the KJA implemented to foster trust and build team cohesion. Ultimately, it will be established how incorporating a KJA into a team of acquisition professionals will benefit any future humanitarian effort and also serve to mitigate risks.

During the deployment to Doña Ana Village, the KJA played a significant role in task order oversight and worked closely with the ACO to enlighten the Requiring Activity on government contracting issues. Another area in which the KJA was instrumental was advising senior leaders on statutory requirements and DOD policies. Here, the KJA briefed stakeholders daily on contract principles, fundamentals of 10 U.S.C. § 401, current and evolving policy, and provided risk assessments to decision-makers. The success of this contingency operation was paramount, and with internal and external scrutiny in play, the focus of many senior leaders remained firmly on accomplishing the mission. In light of the demanding expectations and critical observations of political and public authorities, the primary responsibility of delivering difficult updates regarding contract compliance often fell on the KJA.[102]In the coming paragraphs, this Article will highlight several of these issues adjudicated by the KJA.

A. Scope Determination

The issue of scope determination presented itself frequently during Operation Allies Welcome.[103] A scope determination is an examination of

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Commanders-Priorities/Strengthen-Partnerships/Humanitarian-Assistance/ (last visited Mar. 27, 2023) (emphasizing the need to train and effectively prepare the U.S. Armed Forces and its partners to render humanitarian aid in disaster relief situations).

[101] *See* 10 U.S.C. § 101(a)(13)(A)–(B) (defining a "contingency operation" as a military operation that is designated by the Secretary of Defense . . . in which members of the armed forces are . . . involved in military actions, operations, or hostilities against an enemy of the United States . . . or [which] results in the call . . . on active-duty members of the uniformed services." There are generally considered to be nine major types of contingency operations: (1) show of force and demonstration; (2) noncombatant evacuation operations; (3) rescue and recovery operations; (4) strikes and raids; (5) peacemaking; (6) unconventional warfare; (7) disaster relief; (8) security to assistance surges; and (9) support to U.S. civil authorities. *Chapter 7 Contingency Operations*, GLOB. SEC., https://www.globalsecurity.org/military/library/policy/army/fm/5-71-100/Ch7.htm, (last visited Apr. 14, 2023).

[102] *See generally* CONTRACTING OFFICER'S REPRESENTATIVES GUIDEBOOK, *supra* note 72, at 160 (suggesting that contractors who fail to comply with agreed upon contract terms may violate "Occupational Safety and Health Administration, Environmental Protection Agency, Department of Labor, and other pertinent regulations[.]").

[103] *Zodiac of North America, Inc.*, B-414260 at 5 (2017) (holding that a material difference exists when "the modification substantially changes a contract that the original

a proposed modification, unilateral or bilateral, by the KO to determine if the modification is permissible under the contract.[104] In every such situation, the KJA provided input. For instance, during the operation, requests outside the standard task ordering process were often haphazardly made to contractors, requesting them to perform duties outside the scope of work they were contracted to complete.[105] Some of these requests extended beyond the scope of the initially considered competition. Here, the KJA was able to explain that the Government cannot unilaterally expand the scope of the contract because it violates the Competition in Contracting Act as well as improperly obligates funding in ways not allowed by Congress.[106] Further, the KJA advised of the consequences, which could include protracted and costly litigation, payment of attorney's fees and interest, as well as compounded use of government resources. Adjudication of these issues, like others, took time. However, the KJA found it judicious to advise the acquisition team, senior leaders, and stakeholders on the importance of acting within their authority.[107]

Competent counsel offered by the KJA was appreciated, and ultimately, trust was built and established between the KJA, key stakeholders, and senior leaders. To further develop this rapport, the ACO and KJA implemented and participated in various working groups; took time to explain their various roles and limitations; and provided insight on the damages that may occur if approaches were not permitted within the bounds of the acquisition team's existing contracts. These collaborative working groups also helped to establish a firm understanding of the task ordering process.[108] Ultimately, such working groups proved to be successful and resulted in minimal deviation and improved cohesion amongst senior leaders and stakeholders. This knowledge-sharing process was also offered to the Requiring Activity, which benefitted from a shared understanding of the various aspects of government contracting. In the

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and modified contracts are essentially and materially different").

[104] *See id.* at 4–5.

[105] *See generally Matter of Makro Janitorial Servs., Inc.*, B-282690 (1999) ¶ 7, 12 (indicating that a task order for housekeeping is outside the scope of an IDIQ contract for preventive maintenance).

[106] The Competition in Contracting Act is a public law which was enacted to encourage competition for awarding government contracts. *See* Competition in Contracting Act of 1984, 41 U.S.C. § 253. The purpose was to increase the number of competitors and to increase savings through lower, more competitive pricing. *Id. See also* FAR Subpart 6.1.

[107] *See generally* 31 U.S.C. § 1517 (indicating that it is not permissible for an employee or officer of the U.S. Government from making an "expenditure or obligation" beyond their appointment).

[108] *See generally* FAR 16.505 (2023) (describing, in detail, the task ordering process for individual and multiple-award contracts).

end, this open forum allowed for team cohesion and an opportunity for all to appreciate government contracting.

B. Proper Use of Appropriated Funds

Misunderstanding of the use of appropriate funding sources was a routine issue throughout the administration of Operation Allies Welcome. Appropriations are designated for specific line items, and misuse could result in an Anti-Deficiency Act Violation.[109] In the coming paragraphs, this Article will analyze numerous funding sources and discuss the issues and corresponding answers to problems faced when determining the appropriate methods through which to fund various initiatives in Doña Ana Village.

A reoccurring debate during Operation Allies Welcome arose when distinguishing humanitarian assistance from non-humanitarian requirements.[110] While deployed, the goal was to ensure that the source of funding used was either Operation and Maintenance funds, Presidential Drawdown Authority, Department of State Reimbursement, or OHDACA.[111] In context, support for purchasing winterized jackets,

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[109] Antideficiency Act, 31 U.S.C. § 1341(a)(1); *Antideficiency Act Violation*, BUDGET COUNS., https://budgetcounsel.com/cyclopedia-budgetica/cb-antideficiency-act-violation/#:~:text=The%20Antideficiency%20Act%20prohibits%20Federal,both%20administrative%20and%20criminal%20penalties (last visited Feb. 24, 2023).

[110] *See* 10 U.S.C. § 401(e) (2013) ("In this section, the term 'humanitarian and civic assistance' means any of the following: (1) Medical, surgical, [and] dental . . . care provided in areas of a country that are rural or are underserved by medical, surgical, [and] dental . . . professionals, respectively, including education, training, and technical assistance related to the care provided, (2) Construction of rudimentary surface transportation systems, (3) Well drilling and construction of basic sanitation facilities, and (4) Rudimentary construction and repair of public facilities."); *see also The Most Needed Types of Humanitarian Aid*, LIFE USA (Dec. 9, 2022), https://www.lifeusa.org/post/the-most-needed-types-of-humanitarian-aid.

[111] *See Operations and Maintenance (O&M) Funds*, DEF. ACQUISITION UNIV., https://www.dau.edu/acquipedia/pages/ArticleContent.aspx?itemid=339, (last visited on Apr. 14, 2023) (listing the types of expenses funded by Operations and Maintenance appropriations as including "DD civilian salaries, supplies and materials, maintenance of equipment, certain equipment items, real property maintenance, rental of equipment and facilities, food, clothing, and fuel."); *see also* Memorandum from Joseph R. Biden, U.S. President, to the Secretary of State on the Delegation of Authority Under Section 506(a)(2) of the Foreign Assistance Act of 1961 (July 23, 2021) [hereinafter Memorandum from Joseph R. Biden] (available online at https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/23/memorandum-for-the-secretary-of-state-on-the-delegation-of-authority-under-section-506a2-of-the-foreign-assistance-act-of-1961/) (authorizing the use of the Presidential Drawdown Authority in the amount of $200,000,000 to provide assistance for refugees, victims of conflict, and other at-risk persons in Afghanistan); Global Community Liaison Office, *Evacuation Benefits Overview and Allowances*, U.S. DEP'T. OF STATE, https://www.state.gov/family-liaison-office/crisis-management/evacuation-benefits-allowances (last visited Apr. 14, 2023) (reimbursing Afghan guests for normal family living expenses "to help offset added expenses incurred as a result of . . . their evacuation of Afghanistan); U.S. DEF. SEC. COOP. AGENCY, *supra* note 60, at C12.1.1 ("OCDACA-funded activities are designed to . . . reduce . . . human suffering, disease, hunger, and privation,

temporary housing, and medical supplies can be logically connected to a humanitarian function.[112] In contrast, the need for the internet, civilian law enforcement, and recreational resources may differ.[113] In this instance, for non-humanitarian support the KJA was required to advise the Commander of NORTHCOM through Task Force Iron Horse (2nd Armored Brigade Combat Team, 1st Armored Division, Fort Bliss, Texas) to meet the support requests via the Presidential Drawdown Authority or reimbursable support.[114] Despite the regulatory restrictions and limitations on funding, the KJA was able to confidently and consistently advise on such nuanced issues through established relationships with personnel representing DSCA and a firm understanding of the resettlement support services sought. Given the magnitude of the humanitarian effort, it was logistically impossible to provide oversight on every purchase requested during the Operation's pendency. To obtain a better sight picture and gain more oversight on these issues, the KJA and counsel from the 1st Armored Division legal office enforced continuity of legal advice. Together, they routinely discussed purchase requests and the legality of the same. This uniform approach allowed the legal counsel assisting with the initiative to speak with one voice and prevent unauthorized purchases. A key point to highlight is the significance of avoiding snares such as unauthorized purchases.[115] Unauthorized commitments, if not ratified or corrected, could result in an Anti-Deficiency Act Violation.[116] In such situations, agencies determined to have violated the Anti-Deficiency Act must report the violation to the President, Congress, and simultaneously transmit a copy of the report to the Comptroller General.[117] Even more impactful is the personal financial ability that needs to be assumed.[118]

In sum, determining the appropriate funding source is paramount. Also, avoiding unauthorized expenditures or obligations can have significant consequences, including civil and criminal penalties for government employees, soldiers, and civilians.[119] Moving forward,

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particularly in regions where humanitarian needs [] pose major challenges to stability, prosperity, and respect for universal values.").

[112] *See The Most Needed Types of Humanitarian Aid*, *supra* note 110.

[113] U.S. DEF. SEC. COOP. AGENCY, *supra* note 60, at C12.3.4.1. The DOD interprets "humanitarian assistance" as those directly providing essential human services to relieve or reduce civilian populations' suffering. *Id.* Additionally, the primary purpose of DOD-provided humanitarian assistance is to alleviate human suffering and privation. *Id.*

[114] *See* Memorandum from Joseph R. Biden, *supra* note 111; 22 U.S.C. § 2318(a)(2)(A) (2012).

[115] *See* 31 U.S.C. § 1517(a); 31 U.S.C. § 1341(a)(1)(A).

[116] *Antideficiency Act Violation*, *supra* note 109; 31 U.S.C. § 1517(a); 31 U.S.C. § 1341(a)(1)(A).

[117] 31 U.S.C. § 1517(b).

[118] *See id.*; *see also* 31 U.S.C. § 1349; 31 U.S.C. § 1350.

[119] *See* 31 U.S.C. § 1349; *see also* 31 U.S.C. § 1350.

Operation Allies Welcome should serve as a goalpost, so that future acquisition professionals can understand funding sources and work to avoid the commitment of an unauthorized expenditure and the public scrutiny and personal liability associated with such a mistake.[120]

IV. THE CONCLUSION OF OPERATION ALLIES WELCOME AT DOÑA ANA VILLAGE

As quickly as a Doña Ana Village was established as a haven for thousands of refugees, it was just as quickly shut down.[121] Nevertheless, what seems like the flip of a light switch for most was not as easy for contracting personnel. In government contracting, there are generally two steps involved in concluding a contractual action–descope and contract closeout.[122] Next, this Article will discuss descoping and what that meant for Doña Ana Village and its guests. Then, this Article will explore this multi-million-dollar contingency operation's final administrative closeout operation.[123] Ultimately, given the complexity of this operation, the lessons learned from the closeout and descope of Doña Ana Village should be analyzed further to develop a streamlined approach to use when concluding humanitarian aid efforts.

A. Descoping the Operation

"Descoping" is the process of removing and descaling, partially or totally, some parts from the original awarded "Scope of Work."[124] At Doña Ana Village, and in most instances, the performance work statement, a requirement in performance-based contracts, accounts for descope operations (e.g., provisions directing descope operations were built into the original contract).[125] As descoping was an anticipated action, there was no surprise that Operation Allies Welcome would ultimately end.[126] Here,

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[120] *See* 31 U.S.C. § 1517(a); *see also* 31 U.S.C. § 1341(a)(1)(A), (B).

[121] *Last Group of Afghan Refugees at Fort Bliss Left This Weekend*, *supra* note 41.

[122] *See generally* FAR 4.804-5(a) (specifying the contract administration office's "[p]rocedures for closing out contract files").

[123] Rivera et al., *supra* note 27.

[124] *See* FAR 16.504 (2019); *see also* NSDV Firm, *Descoping of Work*, LINKEDIN (Aug. 4, 2022), https://www.linkedin.com/pulse/descoping-work-nsdvfirm/ ("[D]escoping describes the removal of all or part of the works awarded to a Contractor or Subcontractor, by an Employer or Contractor respectively.").

[125] *See generally* FAR 37.601(b) ("Performance-based contracts for services shall include . . . [a] performance work statement (PWS) . . . [w]hen used, the performance incentives shall correspond to the standards outlined in the contract . . . .").

[126] *Cf.* Press Release, U.S. Dep't. of Homeland Security, Operation Allies Welcome Announces Departure of Last Afghan Nationals from Fort Bliss, Texas (Dec. 31, 2021) (available online at https://www.dhs.gov/news/2021/12/31/operation-allies-welcome-announces-departure-last-afghan-nationals-fort-bliss-texas) (citing that "[t]he end of operations at Fort Bliss marks . . . an important step in [the] mission to safely and successfully resettle our Afghan allies.").

once the Commander of NORTHCOM provided guidance that Doña Ana Village would be receiving no additional Afghan guests, plans commenced to descope and close out this Operation.

In order to accomplish this, roles were established, and work was assigned. Here, the ACO conducted site walks of the areas to be descoped with the stakeholders, senior leaders, and contractors to better understand the magnitude of this endeavor.[127] At the same time, the KJA focused on the appropriate disposition of OHDACA- secured property.[128] While the ACO's role had more discretion, there was more rigidity with the tasks assigned to the KJA. During Operation Allies Welcome, there was a bright line rule: DOD components may not absorb OHDACA-funded equipment or supplies into DD stock.[129] As previously stated, as a matter of law, the DOD is only permitted to use OHDACA funds to provide humanitarian assistance.[130] Improper disposition of the property accumulated in Doña Ana Village could result in a statutory violation.[131] To avoid this snare, the KJA was required to advise the Commander of NORTHCOM on various line items, with the decision point of whether or not a humanitarian purpose for the supplies still existed before declaring the items as excess.[132] Though this was time-consuming, the KJA and contracting detachment were able to properly adjudicate the property and equipment at Doña Ana Village, while keeping the primary goal–the safety of guests and the sustainment of life support systems–at the forefront of the Operation’s closeout.[133]

B. Contract Closeout

A contract closeout occurs when a contract has met all the terms, all administrative actions have been completed, all disputes settled, and final payment has been made.[134] This includes those administrative actions that are contractually required, (i.e., property, security, patents, and royalties).[135]

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[127] *See 902nd CBN Soldiers Complete Fort Bliss OAW Support*, *supra* note 43.

[128] *See generally* U.S. DEF. SEC. COOP. AGENCY, *supra* note 60, at C12.1.2 (outlining OHDACA’s humanitarian assistance programs and funding stipulations).

[129] *See generally id.* at C12.6.3 (noting that any excess OHDACA funds that are no longer required for project execution should be returned to the Defense Security Cooperation Agency as soon as possible for reallotment).

[130] *Id.* at C12.3.4.1 (citing 10 U.S.C. § 2561(a)).

[131] *See* 31 U.S.C. § 1517(b).

[132] *See generally id.* (describing the process of what happens to excess supplies that were made available for humanitarian relief purposes).

[133] *See* Operation Allies Welcome Announces Departure of Last Afghan Nationals from Fort Bliss, Texas, *supra* note 126; *902nd CBN Soldiers Complete Fort Bliss OAW Support*, *supra* note 43.

[134] *See* FAR 4.804-5 (2019).

[135] *Id.*

During the contract closeout stage, an issue that was at the forefront of the acquisition team's mind was that of cost savings.[136] Before receiving any guidance from the KJA or ACO, senior leaders and stakeholders established a plan to summarily delete line items, terminate all the task orders, and order the shutdown of various sites within Doña Ana Village. Though at first blush, this appears to be a prudent and logical approach to pursue during the closeout of a contract, there were serious issues to address prior to making this determination. In this scenario, the KJA and other acquisition team members emphasized to senior leaders and stakeholders that while they might view the complete cessation of a project as a cost-saving measure, it would be better acknowledged as a case of cost avoidance. Here, it was important for the KJA to advise that if the United States Government elected to close the contract out in this manner, it might be forced to assume additional costs and fees.[137] Essentially, costs such as those associated with the immediate removal of personnel, equipment, materials, and fees associated with potential early termination of subcontracts could result in the government not obtaining a value, as it may not have been something initially contemplated in the existing contract.[138] In this scenario, the KJA offered a different viewpoint to contracting professionals, suggesting that they collaborate with the Requiring Activity to assess the mission and remaining requirements. Rather than hastily terminating operations, decisions should be made in line with the terms and conditions of the existing contract, with contract closeout costs considered as part of the overall analysis. The KJA and ACO's opinion was that this was the best way to close-out the mission and realize an actual value. Eventually, this approach was adopted and, in turn, resulted in the United States Government saving hundreds of thousands of dollars.

Descoping an effort and contract closeout is sometimes just as arduous as contract formation. Here, the contract administration team at Doña Ana Village was able, through open lines of communication, hard work, and a commitment to succeed, to ensure that the descope and closeout process was appropriately conducted and in line with the statutory and regulatory authority. This simple and collaborative approach can be adopted when developing plans for future humanitarian and civic aid missions.

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[136] *See generally id.* ("At the outset of this [closeout] process, the contract administration office must review the contract funds status . . . .").

[137] *See* FAR 31.205-42 (2019).

[138] *See generally id.*

V. CREATING THE BLUEPRINT

Acquisition planning is a mandatory prerequisite in government contracting.[139] As a goal, acquisition personnel should strive to think smarter–not harder–and build upon the lessons learned from previous solicitations, contracts, and in this case, humanitarian and civic aid operations. As discussed previously, Operation Allies Welcome was the first and largest non-combatant evacuation and haven operation ever undertaken.[140] While there were many obstacles and pitfalls to overcome throughout the Operation, it ultimately resulted in various lessons learned. This Section will highlight key points for acquisition practitioners planning to support a future humanitarian effort in the following paragraphs. Ultimately, these high-level points should serve as a starting point for creating a government contracting blueprint for humanitarian and civic assistance.

As difficult as it may be, it is imperative to plan as far in advance as possible. However, events that trigger a humanitarian operation will likely happen at a moment's notice. As such, governments should consider establishing a specific contracting department that monitors global phenomena and keeps a watchful eye on market conditions. This will allow for quicker response times, better intelligence on issues involved, and the ability to assist a Requiring Activity or customer in developing their specific needs. The goal of any acquisition is to seek competition so that the government can receive the best value possible. When planning for a humanitarian operation, one should remember the significance of always striving for the best value while maintaining fairness and equity (as for the United States–remember government contracts operate with taxpayer money). Lastly, understand that time will be scarce and resources, from the outset, will be sparse. In order to stay ahead of this, contracting professionals should maintain relationships with various industries that can support a humanitarian operation.[141] This can be accomplished by hosting industry days where stakeholders can discuss scenarios, assess capabilities, or submit requests for information from mission partners to assess proficiency.[142] Ultimately, this will ensure that when the time comes, an agency is appropriately synopsizing requirements, which will result in fruitful competition.[143]

Increase knowledge management. If there is one thing Operation Allies Welcome taught acquisition professionals on the ground, it is that

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[139] FAR 7.102(a) (2019).

[140] Rivera et al., *supra* note 27.

[141] *See generally* FAR 15.201(a)–(c) (2019).

[142] *See generally id.*

[143] *Cf. id.* at 15.201(f) (indicating that the exchange of information among various industries may "avoid creating an unfair competitive advantage").

there is always something to learn. Throughout Operation Allies Welcome, contracting detachments rotated in and out of Doña Ana Village, and at the beginning, information was not equally shared. After this was discovered, each detachment member was required to create logs and contact sheets and also tasked to maintain a database with up-to-date resources to streamline information. Though somewhat time-consuming for the first team on the ground to complete, it became easier as time progressed, and products were further developed. A similar approach can be created and established as a requirement before sending acquisition professionals forward to support a contingency or humanitarian aid effort. If done correctly and in advance, these efforts would create a knowledge management infrastructure that could be shared across platforms, which would work to ensure continuous knowledge transfers.

When the time comes and disaster strikes, strive to define requirements in clear, concise language. Operation Allies Welcome showed the world the capabilities of United States based contractors and acquisition professionals. As such, when developing requirements, Requiring Activities should feel confident in contractors' abilities and thus focus on specific work outcomes and ensure they are measurable to the greatest extent practicable. Contractor performance assessments (the process known as "quality assurance") should focus on outcomes rather than on contractor processes, if operating under a performance-based service contract. Focus on the insight into the Contractor's performance, not necessarily the oversight. Also, governments should establish specific acquisition teams to serve as liaisons to senior leaders, stakeholders, and the Requiring Activity. This particular team would have a similar function as the COR but with different reporting requirements. Another consideration is that this team should be equipped with a practicing Contract and Fiscal Law Judge Advocate. The attorney would play a considerable role in explaining operation conditions and providing advice and counsel on the fundamentals of government contracting. If properly aligned, the attorney's counsel would not only streamline the actual administration stage of the contract but would also work to mitigate risks.

Training is an essential tool used to maximize the success of any given effort. Governments should plan for disasters and stay abreast of evolving contingency contracting laws and regulations. Furthermore, it is pivotal to identify data sharing platforms, and dedicated workstations before a disaster strikes and routinely simulate scenarios to develop multi-functional acquisition teams that are prepared deploy at a moment's notice.

VI. CONCLUSION

Acquisition professionals operating in a contingency environment or supporting a humanitarian mission have the advantage of building upon

existing knowledge and experience rather than starting from scratch when providing humanitarian and civic assistance to countries or regions in need. Instead of reinventing the wheel, endeavors such as Operations Allies Welcome should be carefully analyzed to provide a comprehensive blueprint for future humanitarian efforts, with a particular emphasis on understanding the legal, policy, and procedural requirements stipulated in 10 U.S.C § 401.[144]

This analysis is instrumental in establishing the necessary framework for effectively administering and operating within the realm of humanitarian missions. In addition, the critical role of acquisition professionals, especially the KJA, cannot be overstated. These professionals should receive specialized training to become effective communicators and possess the ability to operate independently. Effective communication plays a vital role in establishing coordination and collaboration among diverse stakeholders involved in humanitarian operations, while the capability to work autonomously empowers acquisition professionals to respond swiftly to rapidly evolving situations and to make informed decisions in time-sensitive environments. By honing these skills, the KJA and other acquisition professionals can enhance their effectiveness and contribute to the successful execution of future humanitarian missions.

As with many areas of practice, meticulous planning and prior preparation are key in humanitarian endeavors. Short-notice missions and unprecedented disasters are inevitable occurrences that require the United States and other nations to remain prepared to render aid and support within any window of time. The ability to mobilize resources, establish logistical frameworks, and implement effective strategies is crucial in addressing humanitarian crises efficiently.

Ultimately, this Article, accompanied by other reputable sources covering Operation Allies Welcome, should serve as a valuable secondary resource, providing a foundational level of understanding for acquisition professionals and stakeholders involved in humanitarian efforts. By leveraging the lessons and insights from such endeavors, acquisition professionals can enhance their capabilities and contribute to the successful execution of future humanitarian missions.

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[144] 10 U.S.C § 401 (dictating the authority of the U.S. military to carry out "[h]umanitarian and civic assistance activities in conjunction with authorized military operations").

HERDING CATS: PRIORITIZING HUMAN RIGHTS IN THE CONVENTIONAL ARMS TRANSFER POLICIES

John Ramming Chappell[*]

POSTSCRIPT

In February 2023, after the writing of this Article but prior to its publication, President Biden released his Conventional Arms Transfer policy in NSM-18. For the author's analysis of the policy, *see* John Chappell & Ari Tolany, *Unpacking Biden's Conventional Arms Transfer Policy*, LAWFARE (Mar. 1, 2023, 1:34 PM), https://www.lawfaremedia.org/article/unpacking-bidens-conventional-arms-transfer-policy (concluding that the policy maintains the traditional structure used since the Reagan Administration, contains stronger human rights provisions than its predecessors, and leaves important questions about implementation). *The author further recommends* Rachel Stohl et al., *Biden's New Policy: Can Human Rights Reshape U.S. Conventional Arms Transfers?*, ARMS CONTROL TODAY (May 2023), https://www.armscontrol.org/act/2023-05/features/bidens-new-policy-human-rights-reshape-us-conventional-arms-transfers. *The Robert Jervis International Studies Forum also published a collection of essays responding to the policy.* ROBERT JERVIS INT'L SEC. STUD. F., H-DIPLO | RJISSF POLICY ROUNDTABLE II-2: BIDEN'S CONVENTIONAL ARMS TRANSFER POLICY (Diane Labrosse et al. eds., 2023).

I. INTRODUCTION

During the Second World War, the United States, under the direction of President Franklin Delano Roosevelt, became a "great arsenal of democracy" for its European allies,[1] building up a formidable armaments industry that has remained a significant factor in U.S. foreign policy.[2]

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[1] *Fireside Chat 16: On the "Arsenal of Democracy"*, UNIV. OF VA. MILLER CTR., at 33:50 (Dec. 29, 1940), https://millercenter.org/the-presidency/presidential-speeches/december-29-1940-fireside-chat-16-arsenal-democracy.

[2] Shana Marshall, *The Defense Industry's Role in Militarizing U.S. Foreign Policy*, *in* 294 MIDDLE E. REP., EXIT EMPIRE–IMAGINING NEW PATHS FOR U.S. POLICY (Waleed Hazbun et al. eds., Spring 2020).

President Roosevelt and his successors have had to carefully consider the consequences of decisions to transfer arms overseas. As President Dwight D. Eisenhower foretold in his 1961 Farewell Address, the new "conjunction of an immense military establishment and a large arms industry" came with "grave implications. Our toil, resources[[,] and livelihood are all involved; so is the very structure of our society."[3] President Eisenhower was primarily concerned with the consequences of the "military-industrial complex" for American society.[4] However, the greatest costs have arguably been borne by those living in the shadow of arms made in the United States and supplied to perpetrators of human rights abuses and war crimes.

Since the end of the Cold War, the United States has consistently been the world's leading arms exporter.[5] From 2017 to 2021, the United States sold more weapons than Russia, France, and China combined.[6] In 2020 alone, U.S. Government-authorized arms exports reached $175 billion.[7] Exporting weapons is a leading way that the United States participates in armed conflict, far more common than direct uses of military force abroad.[8] The United States has directly provided arms to twenty conflicts since 2000, and belligerents use U.S.-manufactured weapons in conflicts around the world.[9]

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[3] Dwight D. Eisenhower, U.S. President, Farewell Address (Jan. 17, 1961), https://www.archives.gov/milestone-documents/president-dwight-d-eisenhowers-farewell-address.

[4] *Id.*

[5] *Top List TIV Tables*, STOCKHOLM INT'L PEACE RSCH. INST., https://armstrade.sipri.org/armstrade/page/toplist.php (last visited Sept. 16, 2022) (under Step 1, ensure "suppliers" is selected; under Step 2, choose the range from 1991 to 2021; under Step 3, ensure "On screen" is selected, then click "Download").

[6] PIETER D. WEZEMAN ET AL., TRENDS IN INTERNATIONAL ARMS TRANSFERS, 2021, at 2 (2022). The next three largest exporters of major arms from 2017 to 2021 were Russia, France, and China. *Id.* The statistics are based on deliveries completed during the period under consideration, not the entrance of parties into a contract, which is another common measure of arms sale volume. *See Sources and Methods*, STOCKHOLM INT'L PEACE RSCH. INST., https://www.sipri.org/databases/armstransfers/sources-and-methods (last visited May 16, 2023).

[7] U.S. Bureau of Pol.-Mil. Affs., *U.S. Arms Transfers Increased by 2.8 Percent in FY 2020 to $175.08 Billion*, U.S. DEP'T OF STATE (Jan. 20, 2021), https://www.state.gov/u-s-arms-transfers-increased-by-2-8-percent-in-fy-2020-to-175-08-billion/. The cited figure includes both Foreign Military Sales and Direct Commercial Sales. *Id.*

[8] *See* Katherine Arnold, *U.S. Proxy Warfare: Patterns in Middle Eastern Conflicts*, LONDON SCH. OF ECON & POL. SCI. (May 9, 2023), https://blogs.lse.ac.uk/lseih/2019/09/03/u-s-proxy-warfare-patterns-in-middle-eastern-conflicts/ (documenting the U.S. Government's preference to indirectly participate in regional conflicts by exporting arms to its allies).

[9] WORLD PEACE FOUND., *Top Arms Suppliers: United States of America*, WHO ARMS WAR, https://whoarmswar.tufts.edu/supplier/united-states-of-america/ (last visited May 16, 2022).

Arms transfers and security assistance are potent U.S. foreign policy tools. Security assistance strengthens international partnerships.[10] Interoperability of U.S. and partner equipment enhances cooperation and reinforces regional security structures.[11] Arms transfers can facilitate American diplomatic efforts,[12] encouraging governments to engage with U.S. allies.[13] As concerns mount about strategic competition with China,[14] some see arms transfers as a way to shore up support and compete with rising powers as they extend partnerships.[15] Particular administrations emphasize the domestic economic benefits of arms exports,[16] although some analysts argue that economic benefits are exaggerated.[17] When effectively conditioned, arms transfers may provide leverage to incentivize reform and respect for human rights.[18]

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[10] *U.S. Security Assistance in the Middle East: Hearing Before the Subcomm. on Near E., S. Asia, Cent. Asia, & Counterterrorism of the Comm. on Foreign Rels.*, 117th Cong. 7 (2021) (statement of Mira Resnick, Deputy Assistant Secretary for Regional Affairs, Bureau of Political-Military Affairs, U.S. Department of State).

[11] *Id.* at 8 ("Security cooperation—including security agreements, Foreign Military Sales[], exercises, training, and exchanges—are integral components to the overall U.S. regional strategy that improve interoperability with the U.S. partner nations' forces to meet their legitimate external defense needs and deter regional threats.").

[12] *See id.* at 7 ("[S]ecurity cooperation and security assistance are among the many different tools we can use to advance diplomacy.").

[13] *Id.* This was the case with U.S. military aid to Egypt after the Camp David Accords, for example. *See* Duncan L. Clarke, *U.S. Security Assistance to Egypt and Israel: Politically Untouchable?*, 51 MIDDLE E.J. 200, 202 (1997).

[14] Remarks on United States Foreign Policy at the Department of State, 2021 DAILY COMP. PRES. DOC. 1 (Feb. 4, 2021) ("American leadership must meet this new moment of advancing authoritarianism, including the growing ambitions of China to rival the United States . . . ."); Address Before a Joint Session of the Congress, 2021 DAILY COMP. PRES. DOC. 3 (Apr. 28, 2021) ("We're in competition with China and other countries to win the 21st [C]entury. We're at a great inflection point in history.").

[15] *See* Joe Gould, *Pentagon's Arms Sales Chief Retires as Biden Administration Faces Decisions on Transfer Policy*, DEF. NEWS (Oct. 13, 2021), https://www.defensenews.com/digital-show-dailies/ausa/2021/10/13/pentagons-arms-sales-chief-resigns-as-biden-administration-faces-decisions-on-transfer-policy/ ("Grant said America's strategic competition with Russia and China should weigh on U.S. decisions to sell arms to foreign partners . . . . She called strategic competition 'a new lens for us.'").

[16] *See, e.g.*, Glenn Kessler, *Trump's Claim of Jobs from Saudi Deals Grows by Leaps and Bounds*, WASH. POST (Oct. 22, 2018, 3:00 AM), https://www.washingtonpost.com/politics/2018/10/22/trumps-claim-jobs-saudi-deals-grows-by-leaps-bounds/ (demonstrating President Trump's enthusiasm for the economic benefits associated with arms exports).

[17] *See* Jonathan D. Caverley, *Dispelling Myths About U.S. Arms Sales and American Jobs*, CARNEGIE ENDOWMENT FOR INT'L PEACE (May 18, 2021), https://carnegieendowment.org/2021/05/18/dispelling-myths-about-u.s.-arms-sales-and-american-jobs-pub-84521; *see also* A. Trevor Thrall & Caroline Dorminey, *Risky Business: The Role of Arms Sales in U.S. Foreign Policy*, CATO INST., Mar. 13, 2018, at 1 (contending that "[t]he economic benefits of arms sales are dubious . . . .").

[18] *See* MAX BERGMANN & ALEXANDRA SCHMITT, A PLAN TO REFORM U.S. SECURITY ASSISTANCE 32 (2021) (explaining how the U.S. can protect civilians, as well as its own interests, by ensuring its partners enforce proper human rights standards).

However, U.S. arms transfers can also facilitate significant harm, whether by directly enabling abuses or legitimizing groups and individuals that perpetrate harms unrelated to the weapons provided.[19] In Yemen, the human rights organization Mwatana documents that the Saudi-led coalition used U.S.-manufactured weapons in strikes against homes,[20] marketplaces,[21] a school bus,[22] a funeral hall,[23] and a wedding party[24] killing hundreds of civilians. For years, the United States provided equipment, training, and other assistance to units of the Afghan Nation Security Forces accused of child sexual abuse.[25] In May 2021, Israeli airstrikes killed 60 Palestinians in Gaza, at least 129 of whom were civilians, including 66 children.[26] That month, the Biden Administration approved $735 million in precision-guided missiles to the Israeli Government.[27]

It should come as no surprise that arms sales have long been the subject of significant controversy in the United States. For example, in the 1930s, the Special Committee on Investigation of the Munitions Industry, popularly known as the Nye Committee, examined the influence of arms

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[19] *See* MICHAEL T. KLARE, AMERICAN ARMS SUPERMARKET 183–84 (1984) (providing examples of when U.S. arms transfers have negatively impacted diplomatic relations and contributed to repressive regimes).

[20] *Yemen: U.S. Made Bomb Used in Deadly Air Strike on Civilians*, AMNESTY INT'L (Sept. 26, 2019), https://www.amnesty.org/en/latest/press-release/2019/09/yemen-us-made-bomb-used-in-deadly-air-strike-on-civilians/. The Saudi-led coalition treated entire neighborhoods, cities, and regions as military targets, a violation of international humanitarian law. Michael Newton, *An Assessment of the Legality of Arms Sales to the Kingdom of Saudi Arabia in the Context of the Conflict in Yemen* 2 (Vand. Univ. Sch. L., Working Paper No. 17-26, 2022).

[21] *Yemen: U.S. Bombs Used in Deadliest Market Strike*, HUM. RTS. WATCH (Apr. 7, 2016, 10:00 PM), https://www.hrw.org/news/2016/04/08/yemen-us-bombs-used-deadliest-market-strike.

[22] *Yemen: Coalition Bus Bombing Apparent War Crime*, HUM. RTS. WATCH (Sept. 2, 2018, 12:00 AM), https://www.hrw.org/news/2018/09/02/yemen-coalition-bus-bombing-apparent-war-crime.

[23] *Yemen: Saudi-Led Funeral Attack Apparent War Crime*, HUM. RTS. WATCH (Oct. 13, 2016, 12:00 AM), https://www.hrw.org/news/2016/10/13/yemen-saudi-led-funeral-attack-apparent-war-crime.

[24] Aric Toler, *American-Made Bomb Used in Airstrike on Yemen Wedding*, BELLINGCAT (Apr. 27, 2018), https://www.bellingcat.com/news/mena/2018/04/27/american-made-bomb-used-airstrike-yemen-wedding.

[25] Leila Miller, *Pentagon Maintained Aid for Afghans Accused of Rights Abuses, Watchdog Says*, PBS (Jan. 25, 2018), https://www.pbs.org/wgbh/frontline/article/pentagon-maintained-aid-for-afghans-accused-of-rights-abuses-watchdog-says/.

[26] OCHA, RESPONSE TO THE ESCALATION IN THE OPT | SITUATION REPORT NO. 3: (4-10 JUNE 2021), at 1 (June 12, 2021), https://www.ochaopt.org/content/response-escalation-opt-situation-report-no-3-4-10-june-2021.

[27] Jacqueline Alemany et al., *Biden Administration Approves $735 Million Weapons Sale to Israel*, WASH. POST (May 17, 2021, 6:21 PM), https://www.washingtonpost.com/politics/2021/05/17/biden-administration-approves-735-million-weapons-sale-israel/.

manufacturers on the U.S. decision to enter World War I.[28] In the 1980s, the United States armed the Nicaraguan Contras, which sought to overthrow the Nicaraguan Government and committed violations of international humanitarian law ("IHL"), including torture, kidnapping, murder, and sexual assault.[29] In response, Congress passed the Boland Amendment, which prohibited the expenditure of U.S. funds for the purpose of overthrowing the Nicaraguan Government.[30] The Reagan Administration dodged the restriction by selling arms to the embargoed Iranian Government and using the proceeds to fund the Contras.[31] During the Obama and Trump Administrations, arms sales to the governments of Saudi Arabia and the United Arab Emirates facilitated widespread civilian harm and possible war crimes in Yemen.[32] A congressional attempt to block such sales failed when President Trump vetoed a joint resolution of disapproval in 2019.[33]

Amid these controversies, and in light of the consequences of conventional arms proliferation, U.S. presidents have often struggled to manage the costs and benefits of arms transfers. Since the Carter Administration, Conventional Arms Transfer ("CAT") policies have provided a roadmap for arms transfer decision-making in the executive branch.[34]

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[28] *"Merchants of Death* U.S. SENATE, https://www.senate.gov/about/powers-procedures/investigations/merchants-of-death.htm (last visited Oct. 14, 2022) (describing the Nye Committee's investigations into reports that arms manufacturers unduly influenced the U.S. Government's decision to enter World War II).

[29] DONALD T. FOX & MICHAEL J. GLENNON, REPORT TO THE INTERNATIONAL HUMAN RIGHTS LAW GROUP AND THE WASHINGTON OFFICE ON LATIN AMERICA CONCERNING ABUSES AGAINST CIVILIANS BY COUNTERREVOLUTIONARIES OPERATING IN NICARAGUA, at iii, 15, 22, app. 1, (1985), https://www.wola.org/sites/default/files/downloadable/Central%20America/past/1985-Nicaragua-Abuses%20Against%20Civilians%20by%20Counterrevolutionaries%20Operating%20in%20Nicaragua%20PART%201.pdf.

[30] Memorandum from J.R. Scharfen to W. Robert Pearson, Nat'l Sec. Council (Aug. 23, 1985) (available online at https://www.brown.edu/Research/Understanding_the_Iran_Contra_Affair/documents/d-nic-21.pdf); *see Legal Limits on Aid to the Contras*, WASH. POST (May 28, 1987), https://www.washingtonpost.com/archive/politics/1987/05/28/legal-limits-on-aid-to-the-contras/92132e1c-559a-442b-9585-94090c8e9f84/ (outlining the history and context of the Boland Amendment).

[31] Bryan Craig, *The Iran-Contra Affair*, UNIV. OF VA. MILLER CTR. (July 12, 2017), https://millercenter.org/issues-policy/foreign-policy/iran-contra-affair.

[32] Nick Cumming-Bruce, *War Crimes Report on Yemen Accuses Saudi Arabia and U.A.E*, N.Y. TIMES (Aug. 28, 2018), https://www.nytimes.com/2018/08/28/world/middleeast/un-yemen-war-crimes.html; *see* Julian Santos, *U.S. Involvement in Yemen War Crimes*, INST. FOR YOUTH IN POL. (June 21, 2021), https://www.yipinstitute.com/article/u-s-involvement-in-yemen-war-crimes.

[33] 165 CONG. REC. S5053 (daily ed. July 24, 2019) (recording President Trump's veto message, which overrode congressional disapproval of proposed arms transfers to Saudi Arabia, the United Kingdom, Spain, and Italy).

[34] Letter from Elizabeth Field, Acting Dir., Int'l Affs. & Trade, to Robert Menendez, Ranking Member on the Comm. on Foreign Rels., U.S. Senate (Sept. 9, 2019) (available

This Article examines human rights in the CAT policies. Centering the analysis on human rights requires deemphasizing other issues such as strategic competition and economic benefits. Nevertheless, this research fills a gap in current literature, which has not shown how human rights concerns have evolved from one CAT policy to the next in the half-century since the first policy's release. This analysis aims to show how the position of human rights in the CAT policies has changed and then makes recommendations for what a CAT policy that centers on human rights might look like, which may inform how analysts assess human rights in future policies.

While the prominence of human rights concerns has waxed and waned in the CAT over the decades, side-by-side analysis of the policies reveals broader trends. The CAT policies have mostly been evolutionary documents, shifting at the edges while adhering to a form established during the Reagan Administration that centers on case-by-case considerations of multi-factor lists.[35] The CAT policies' format is flexible by design, but the format blunts the policies' ability to affect decision-making. To better prioritize human rights, the CAT policies should move away from the longstanding format and incorporate specific restrictions, including implementing the legally binding prohibition on arms sales to certain countries established in Section 502B of the Foreign Assistance Act. However, the deep-seated flaws in the CAT policies also demonstrate that presidential action alone is insufficient to prioritize human rights. Congress needs to strengthen its oversight of executive arms sales, including by refining the tools at its disposal to hold the President accountable for problematic arms transfers.

Section I of this Article introduces the CAT policies and describes their position relative to U.S. laws regarding arms exports. Situating the CAT policies in the context of other laws and regulations, the Section shows the CAT policies' importance in an area of law characterized by broad delegations of legislative power to the President.

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online at https://www.gao.gvo/assets/gao-19-673r.pdf).

[35] *See* Announcement Concerning a Presidential Directive on United States Conventional Arms Transfer Policy 1 PUB. PAPERS 615, 616 (July 9, 1981) [hereinafter NSDD-5] (announcing President Reagan's CAT policy); *see also* Memorandum from William J. Clinton, U.S. President, on Presidential Decision Directive/NSC-34: U.S. Policy on Conventional Arms Transfer to Members of the Presidential Cabinet (Feb. 10, 1995), available at https://clinton.presidentiallibraries.us/items/show/101150 [hereinafter PDD-34] (prescribing President Clinton's CAT policy); *see also* Directive on United States Conventional Arms Transfer Policy 1 PUB. PAPERS 30, 31–32 (Jan. 15, 2014) [hereinafter PPD-27] (establishing President Obama's CAT policy); *see also* National Security Presidential Memorandum on United States Conventional Arms Transfer Policy, 2018 DAILY COMP. PRES. DOC. 2–4 (Apr. 19, 2018) [hereinafter NSPM-10] (implementing President Trump's CAT policy).

Section II analyzes each of the five CAT policies and discusses President Biden's upcoming policy with a focus on human rights and international humanitarian law. Progressing through the policies of the Carter, Reagan, Bush, Obama, and Trump Administrations, the analysis identifies points of continuity and departure and highlights certain controversial arms sales in each administration. The Section also analyzes early indications from the Biden Administration regarding its forthcoming CAT policy.

Section III assesses overarching trends and key takeaways from the analysis of the CAT policies and argues that the policies could serve as meaningful instruments for human rights promotion despite significant shortcomings in the policies thus far. In particular, the Section argues that the predominant format of the CAT policies—multi-factor lists of considerations that allow for excessive flexibility—does not adequately mitigate the human rights risks posed by some U.S. arms sales.

Section IV offers the President and Congress recommendations to prioritize human rights in arms transfer law and policy. The recommendations should serve as benchmarks for a CAT policy that centers on human rights issues. For the executive branch, the Section recommends introducing specific restrictions on arms sales to recipients that pose particularly high human rights risks. The Section further proposes that the CAT policy implement Section 502B of the Foreign Assistance Act, a legal prohibition on security assistance to certain governments that presidents have neglected since the 1980s. The Section urges the legislative branch to restructure the framework legislation governing the congressional and presidential roles in arms sales. The Section closes with reflections on the importance of arms transfer decisions and the need to prioritize human rights in the laws and policies that structure those decisions.

II. WHAT ARE THE CONVENTIONAL ARMS TRANSFER POLICIES?

A hierarchy of authorities governs U.S. arms sales. The Constitution, U.S. statutes, international law, and administrative regulations together dictate how arms sales take place.[36] Presidential directives like the CAT policies command relatively little authority within that hierarchy and must be consistent with statutory requirements.[37] Nevertheless, the CAT

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[36] *See* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 66 (2d ed. 1996) (explaining the Constitution's effect on congressional power regarding arms sales); *see also* A. Trevor Thrall et al., *Power, Profit, or Prudence? U.S. Arms Sales Since 9/11*, 14 STRATEGIC STUD. Q. 100, 100–03 (2020) (describing the influence of law, executive branch policy, and international treaties on arms sales).

[37] *See* JOHN RAMMING CHAPPELL & BRITTANY BENOWITZ, HUMAN RIGHTS, CIVILIAN HARM, AND ARMS SALES: A PRIMER ON U.S. LAW AND POLICY 3 (2022) (stating that presidential arms transfer authority is delegated from Congress and is subject to

policies play a significant role in how presidents approach arms sale decisions. This Section introduces the CAT policies in the context of relevant U.S. law and policy.

Under the Foreign Commerce Clause of the United States Constitution, Congress has the exclusive and inherent authority to "regulate commerce with foreign nations."[38] Arms exports regulations, including human rights restrictions, are a clear exercise of the foreign commerce power, which encompasses both private sales of arms licensed by the U.S. Government and government sales of arms to foreign purchasers.[39]

Congress may delegate authorities to the executive branch so long as it provides an intelligible principle to which the executive branch must conform in carrying out the delegated authority.[40] The current framework statutes for the arms trade are the Foreign Assistance Act of 1961 ("FAA")[41] and Arms Export Control Act of 1976 ("AECA"),[42] which delegate congressional arms transfer authorities to the President and offer principles to guide the President's exercise of delegated powers. The FAA authorizes the President to "furnish military assistance . . . to any friendly country or international organization" to strengthen the security of the United States and promote world peace.[43] The AECA authorizes the President to "control the import and the export of defense articles and defense services" "[i]n furtherance of world peace and the security and foreign policy of the United States."[44] The Export Control Reform Act of 2018 is also relevant to export controls on firearms and certain dual-use items on the Commerce Control List.[45]

The FAA expressly references human rights issues. Section 502B of the FAA enshrined human rights promotion as "a principal goal of the foreign policy of the United States" for the first time.[46] Section 502B also bans providing security assistance to "any country the government of which engages in a consistent pattern of gross violation of internationally

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Congressional oversight and revocation).

[38] U.S. CONST. art. I, § 8, cl. 3.

[39] *See* HENKIN, *supra* note 36.

[40] J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.").

[41] Foreign Assistance Act, 22 U.S.C. §§ 2151–2450.

[42] Arms Export Control Act, 22 U.S.C. §§ 2751–2799aa-2.

[43] 22 U.S.C. § 2311(a).

[44] 22 U.S.C. § 2778(a)(1).

[45] *See* Expert Control Reform Act, 50 U.S.C. §§ 4801(2), 4811(2)(A)(i)–(ii) (2018).

[46] International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, tit. III, sec. 301(a), § 502B(a)(1), 90 Stat. 729, 748 (codified as amended at 22 U.S.C. § 2304(a)(1)).

recognized human rights."[47] Section 620M, formerly Section 620J, is popularly known as the "Leahy Law" and stipulates that "[n]o assistance shall be furnished under [the FAA or AECA] to any unit of the security forces of a foreign country if the Secretary of State has credible information that such unit has committed a gross violation of human rights."[48]

Although the FAA and AECA asserted some congressional oversight for arms sales, they delegated the bulk of arms sales decision-making to the President.[49] The executive branch decides when the U.S. Government should sell arms, and it licenses arms sales by private companies.[50]

Congress's affirmative approval for individual sales is not required.[51] While Congress can theoretically block specific arms sales with a joint resolution of disapproval under the AECA after a mandatory presidential notification of a major arms sale, it has never done so.[52] After *INS v. Chadha* invalidated the legislative veto, Congress amended the AECA—which then only required a concurrent resolution of disapproval to override an arms sale—to require a joint resolution subject to a presidential veto.[53] Congress has occasionally passed AECA joint resolutions of disapproval but failed to overcome a presidential veto. For example, in 1988 and 2019, Congress passed joint resolutions blocking arms sales to Saudi Arabia, but Presidents Reagan and Trump vetoed the resolutions, and Congress failed to garner enough support to override the vetoes.[54]

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[47] *Id.*

[48] Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, tit. VI, sec. 7034(k), § 620J, 125 Stat. 786, 1216 (codified as amended at 22 U.S.C. § 2378d(a)); Bureau of Democracy, Hum. Rts., & Lab., *About the Leahy Law*, U.S. DEP'T OF STATE (Jan. 20, 2021), https://www.state.gov/key-topics-bureau-of-democracy-human-rights-and-labor/human-rights/leahy-law-fact-sheet/.

[49] Foreign Assistance Act, 22 U.S.C. §§ 2151–2450; Arms Export Control Act, 22 U.S.C. §§ 2751–2799aa-2; s*ee* Bureau of Pol.-Mil. Affs., *U.S. Arms Sales and Defense Trade*, U.S. DEP'T OF STATE (Jan. 20, 2021) (outlining the extensive powers of the President under the AECA and FAA).

[50] Bureau of Pol-Mil. Affs., *supra* note 49.

[51] S*ee id.* (indicating that while the process of selling arms to foreign nations may involve notifying Congress, it does not require congressional approval).

[52] Arms Export Control Act, 22 U.S.C. § 2753; CHAPPELL & BENOWITZ, *supra* note 37, at 5.

[53] Arms Export Control Act, Pub. L. No. 99-247, § 36(b)(3), 100 Stat. 9, 9 (1986) (codified as amended at 22 U.S.C. §§ 2753, 2776, 2796b); *see also* Peter K. Tompa, *The Arms Export Control Act and Congressional Codetermination Over Arms Sales*, 1 AM. UNIV. INT'L L. REV. 291, 292–93 (1986) (discussing the effects of *INS v. Chadha* on the AECA).

[54] Vanessa Patton Sciarra, *Congress and Arms Sales: Tapping the Potential of the Fast-Track Guarantee Procedure*, 97 YALE L.J. 1439, 1448 (1988); Catie Edmondson, *Senate Fails to Override Trump's Veto on Saudi Arms Sales*, N.Y. TIMES (July 29, 2019), https://www.nytimes.com/2019/07/29/us/politics/trump-veto-saudi-arms-sales.html.

Nor has Congress blocked arms sales to a particular country using its authority to do so under the FAA.[55] Only once, in 1976, did Congress request and receive a report on human rights in specified countries under Section 502B(c) of the FAA.[56] Such a report is a prerequisite for an FAA joint resolution of disapproval.[57] Unlike the AECA, Section 502B of the FAA has always required Congress to muster a two-thirds supermajority in each chamber to overcome a presumptive presidential veto.[58] Section 502B's joint resolution of disapproval came as a compromise after President Ford vetoed an earlier bill that would have allowed for a concurrent resolution of disapproval.[59]

Although Congress has occasionally used its power of the purse to restrict security assistance or invoked the foreign commerce power to impose arms embargoes, it has only rarely done so. For example, Congress banned the expenditure of U.S. funds for the purpose of overthrowing the Nicaraguan Government in the Boland Amendment[60] and embargoed arms sales to Chile in the Kennedy Amendment.[61] However, Congress has generally been less assertive in limiting arms sales to partners that commit human rights abuses in recent decades.

Since 1977, five presidents—Carter, Reagan, Clinton, Obama, and Trump—have released CAT policies to guide executive branch decision-making related to arms sales consistent with the requirements of the FAA and AECA.[62] Neither President George H.W. Bush nor President George

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[55] *See* CHAPPELL & BENOWITZ, *supra* note 37, at 8.

[56] *See generally* U.S. DEP'T OF STATE, HUMAN RIGHTS AND U.S. POLICY: ARGENTINA, HAITI, INDONESIA, IRAN, PERU, AND THE PHILIPPINES, H.R. REP. NO. 80-756, at III (1976).

[57] 22 U.S.C. § 2304(c)(4)(A) (2014).

[58] *See* International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, tit. III, sec. 301(a), § 502B, Stat. 729, 749 (codified at 22 U.S.C. § 2304) (amending § 502B(c)(4)(A) to allow Congress to issue a joint resolution, subject to presidential veto, that prohibits arms transfers to certain countries).

[59] David Weissbrodt, *Human Rights Legislation and U.S. Foreign Policy*, 7 GA. J. INT'L & COMPAR. L. 231, 246–48 (1977); *see* Tompa, *supra* note 53, at 299–300; *see also* Veto of the Foreign Assistance Bill, 2 PUB. PAPERS 1482 (May 8, 1976) ("These provisions are incompatible with the express provision in the Constitution that a resolution having the force and effect of law must be presented to the President and, if disapproved, repassed by a two-thirds majority in the Senate and the House of Representatives. They extend to the Congress the power to prohibit specific transactions authorized by law without changing the law–and without following the constitutional process such a change would require.").

[60] *See* Memorandum from J.R. Scharfen to W. Robert Pearson, *supra* note 30.

[61] Richard D. Lyons, *Senate Votes Overhaul of Military Aid*, N.Y. TIMES (Feb. 19, 1976), https://www.nytimes.com/1976/02/19/archives/senate-votes-overhaul-of-military-aid-senate-votes-bill-for.html.

[62] *See* Conventional Arms Transfer Policy: Statement by the President, 1 PUB. PAPERS 931–32 (May 19, 1977) [hereinafter PD-13]; *see also* NSDD-5, *supra* note 35; PDD-34, *supra* note 35; PPD-27, *supra* note 35; NSPM-10, *supra* note 35. At the time of this Article's publication, the Biden Administration has released its CAT policy ("NSM-18") and emphasized the role of human rights considerations in conducting arms transfers. *See*

W. Bush released a new policy, instead relying on the policies of their immediate predecessors.[63] After his inauguration in 2021, President Biden announced a comprehensive review of the Trump Administration's policy on conventional arms transfers,[64] signaling the release of a still-forthcoming sixth CAT policy.

III. HUMAN RIGHTS IN THE CAT POLICIES

Each CAT policy has treated human rights differently. The policies have incorporated human rights issues to varying extents and used different mechanisms to consider arms transfer decisions. The following Section assesses how the prioritization of human rights issues relative to other factors and the express language of the CAT policies have changed from one policy to the next. It analyzes relevant provisions of the CAT policies thus far and then discusses President Biden's anticipated CAT policy.

A. *President Carter, 1977–1981*

President Jimmy Carter's CAT policy grew out of concerns about the proliferation of conventional arms amid a boom in U.S. arms sales in the 1970s that came with the implementation of the Nixon Doctrine.[65] A surge in orders from the Middle East drove total orders to $8.3 billion in 1974, an eightfold increase over the late 1960s.[66] To mitigate conventional arms proliferation, President Carter's CAT policy implemented specific,

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Memorandum from the White House on United States Conventional Arms Transfer Policies, *supra* note 62.

[63] *See* RICHARD F. GRIMMETT, CONG. RSCH. SERV., 95-639 F, CONVENTIONAL ARMS TRANSFERS: PRESIDENT CLINTON'S POLICY DIRECTIVE 1 n.2 (1995) ("The Bush Administration issued no policy statement of guidelines to the public."); *see also* David G. Anderson, *The International Arms Trade: Regulating Conventional Arms Transfers in the Aftermath of the Gulf War*, 7 AM. UNIV. INT'L L. REV. 749, 752 n.8 (1992) (noting that while no policy has been specifically outlined, the Bush Administration did not significantly differ from President Reagan's CAT policy).

[64] Mike Stone & Patricia Zengerle, *Exclusive-Biden Plans Shift in Arms Policy to Add Weight to Human Rights Concerns*, REUTERS (Aug. 4, 2021, 4:35 PM), https://www.reuters.com/world/us/exclusive-biden-plans-shift-arms-export-policy-favor-human-rights-sources-2021-08-04/.

[65] *See* Michael C. Jensen, *U.S. Arms Exports Boom, Particularly to the Mideast*, N.Y. TIMES (Apr. 14, 1975), https://www.nytimes.com/1975/04/14/archives/us-arms-exports-boom-particularly-to-the-mideast-orders-at-record.html; *see also* William D. Hartung, *Nixon's Children: Bill Clinton and the Permanent Arms Bazaar*, 12 WORLD POL'Y J. 25, 29 (1995).

[66] Jensen, *supra* note 65; *see also* Emma Rothschild, *Carter and Arms: No Sale*, N.Y. REV. BOOKS (Sept. 15, 1977), https://www.nybooks.com/articles/1977/09/15/carter-and-arms-no-sale/ ("The boom in [U.S.] military sales began in 1973. But the well-known and spectacular figures reported at the time—$10 billion a year or more of "sales" in 1974 and 1975—measured orders, or agreements to sell military goods and services, rather than actual military exports. What is happening now is that deliveries are catching up with these earlier orders.").

measurable restrictions on U.S. arms transfers.[67] The first president to incorporate human rights issues into U.S. foreign policy in earnest,[68] President Carter included human rights considerations into his CAT policy,[69] although they would occupy a more prominent position in subsequent policies.

1. Origins

The 1970s saw a resurgence of interest in human rights in the United States, which had led to the drafting of the Universal Declaration of Human Rights in the 1940s but since retreated from engagement on human rights issues.[70] Samuel Moyn argues that the second half of the Cold War ushered in a "search for a new moral culture of idealism and activism."[71] The civil rights and antiwar movements helped elevate human rights concerns, as did the establishment of civil society organizations like Amnesty International and Helsinki Watch (later Human Rights Watch).[72] Before long, the human rights revolution reached Capitol Hill.[73]

Long considered a rubber-stamp body for the President's policy, the House Foreign Affairs Committee became a significant vehicle for pressuring the executive branch on human rights issues due to the advocacy of Representative Donald Fraser (D-Minn.).[74] As Chair of the House Foreign Affairs Subcommittee on International Organizations and Movements, Congressman Fraser held a series of hearings on human

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[67] PD-13, *supra* note 62.

[68] Cedric W. Tarr, Jr., *Human Rights and Arms Transfer Policy*, 8 DENVER J. INT'L L. & POL'Y 573, 578 (1979).

[69] PD-13, *supra* note 62, at 932.

[70] *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); *see also* Barbara Keys, *Congress, Kissinger, and the Origins of Human Rights Diplomacy*, 34 DIPLOMATIC HIST. 823, 826 (2010) (describing "the human rights revolution" that occurred during the 1970s).

[71] SAMUEL MOYN, NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD 120 (2018).

[72] *See* BRUCE W. JENTLESON, THE PEACEMAKERS 251–62 (2018) (showing the evolution of Amnesty International and Helsinki Watch from humble beginnings to becoming prominent advocates for human rights); *see also* THOMAS F. JACKSON, FROM CIVIL RIGHTS TO HUMAN RIGHTS: MARTIN LUTHER KING, JR., AND THE STRUGGLE FOR ECONOMIC JUSTICE 244, 324 (2007) (outlining Martin Luther King Jr.'s vision of a human rights movement "sweeping the globe" and his public denouncement of the Vietnam War); *see also* Salar Mohandesi, From Anti-Imperialism to Human Rights: The Vietnam War and Radical Internationalism in the 1960s and 1970s (2017) (Ph.D. dissertation, University of Pennsylvania) (available online at https://repository.upenn.edu/cgi/viewcontent.cgi?article=4264&context=edissertations) (tracing the history of the antiwar movement and how human rights "came to displace anti-imperialism").

[73] *See* Keys, *supra* note 70, at 824–26 (describing the events that led to Congress's renewed focus on human rights).

[74] *Id.* at 830.

rights and U.S. foreign policy starting in 1973.[75] In early 1974, Congressman Fraser issued a fifty-four-page report titled *Human Rights in the World Community: A Call for U.S. Leadership*.[76] The report marked a watershed moment for human rights in U.S. foreign policy, directly resulting in the institutionalization of human rights issues in the State Department bureaucracy.[77]

Georgia Governor Jimmy Carter ran his presidential campaign in the context of a new congressional commitment to human rights, and he pledged to incorporate human rights concerns as a focal point of his foreign policy.[78] Carter also spoke out against excessive arms exports, often saying, "[w]e cannot be both the world's leading champion of peace and the world's leading supplier of weapons of war."[79]

2. President Carter's PD-13

Soon after President Carter's inauguration, he turned to arms sales issues. On May 13, 1977, President Carter issued the first CAT policy, Presidential Directive 13 ("PD-13"), which committed to restraining U.S. arms transfers.[80] Recognizing the leading role of the United States as the world's foremost arms exporter, Carter implemented the policy unilaterally.[81] In his statement, Carter declared, "the United States will henceforth view arms transfers as an exceptional foreign policy

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[75] Stephen B. Cohen, *Conditioning U.S. Security Assistance on Human Rights Practices*, 76 AM. J. INT'L L. 246, 251 (1982); *see* Sarah B. Snyder, *"A Call for U.S. Leadership": Congressional Activism on Human Rights*, 37 DIPLOMATIC HIST. 372, 372–73 (2013) (arguing that Congressman Fraser's hearings precipitated a wave of human rights legislation, formalized human rights as a factor in U.S. foreign policy, and laid the groundwork for President Carter's work on human rights).

[76] DONALD M. FRASER, HUMAN RIGHTS IN THE WORLD COMMUNITY: A CALL FOR U.S. LEADERSHIP, H.R. REP. NO. 29-692, at 3 (1974).

[77] Keys, *supra* note 70, at 832.

[78] *Carter and Human Rights, 1977-1981*, U.S. DEP'T OF STATE: OFF. OF THE HISTORIAN, https://history.state.gov/milestones/1977-1980/human-rights, (last visited February 18, 2023).

[79] *E.g.*, Jimmy Carter, Candidate for U.S. President, Address at a Luncheon of the Foreign Policy Association in New York City, (June 23, 1976) (transcript available online at https://www.presidency.ucsb.edu/documents/address-luncheon-the-foreign-policy-association-new-york-city).

[80] PD-13, *supra* note 62, at 931; *see* Martin Langvandslien, Promising Restraint: The Carter Administration's Arms Transfer Policy 50–51 (2004) (Cand. Philol. thesis, University of Oslo).

[81] PD-13, *supra* note 62, at 931; *see* Jimmy Carter, U.S. President, Address Before the United Nations General Assembly (Mar. 17, 1977) ("We will also seek to establish Soviet willingness to reach agreement with us on mutual military restraint in the Indian Ocean, as well as on such matters as arms exports to the troubled areas of the world."). Conventional arms transfer talks with the Soviet Union began later that year. *See U.S. and Soviet Agree to Hold Regular Talks to Curb Arms Trade*, N.Y. TIMES (May 12, 1978), https://www.nytimes.com/1978/05/12/archives/us-and-soviet-agree-to-hold-regular-talks-to-curb-arms-trade-early.html.

implement, to be used only in instances where it can be clearly demonstrated that the transfer contributes to our national security interests."[82] The statement further stipulated, "in the future the burden of persuasion will be on those who favor a particular arms sale, rather than those who oppose it."[83]

President Carter offered six specific "controls" that applied across the board to implement his policy of arms restraint.[84] Carter committed to decreasing the total dollar volume of new arms sales in 1977 and set the goal of further reducing the dollar value in subsequent years.[85] In two of the policy's controls, PD-13 committed to limiting the proliferation of advanced arms, making specific pledges regarding sales of newly developed weapons systems.[86] The Carter policy prohibited coproduction agreements for "significant weapons, equipment, and major components."[87] In addition to existing legal requirements regarding retransfer of U.S. arms, the CAT policy stated that the United States may stipulate that it would not allow retransfers as a condition for arms sales.[88] The Carter Administration's final control required "policy level [authorization] by the Department of State" for the promotion of arms sales by private companies and stated that U.S. embassies and military elements would not "promote or assist in the promotion of arms sales without specific authorization."[89]

3. A New Role for Human Rights

Although human rights considerations did not appear among President Carter's six controls, human rights considerations appeared elsewhere in his CAT policy. President Carter pledged, "[i]n formulating [a] security assistance program consistent with these controls, we will continue our efforts to promote and advance respect for human rights in recipient countries."[90] Because the Carter Administration drafted the CAT policy early in the human rights revolution, any mention of human rights marked a departure from the Nixon and Ford Administrations, in

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[82] PD-13, *supra* note 62, at 931.
[83] *Id.*
[84] *Id.* at 931–92.
[85] *See id.*
[86] *See id.* at 932.
[87] *Id.*
[88] PD-13, *supra* note 62, at 932.
[89] THE WHITE HOUSE, PRESIDENTIAL DIRECTIVE/NSC–13, at 3 (1977), https://www.jimmycarterlibrary.gov/assets/documents/directives/pd13.pdf. Though President Carter announced his CAT policy to the American public on May 19, 1977, he first instituted a slightly different, classified version on May 13.
[90] PD-13, *supra* note 62, at 932.

which Secretary of State Henry Kissinger typically resisted calls to meaningfully integrate human rights into U.S. foreign policy.[91]

The Carter Administration took significant strides in institutionalizing concern for human rights in U.S. foreign policy.[92] Where the Nixon and Ford Administrations resisted congressional human rights mandates, the Carter Administration committed resources and attention to strengthening the Bureau of Democracy, Human Rights, and Labor, and preparing the annual Country Reports on Human Rights Practices required by Section 502B of the FAA.[93] President Carter also cut off security assistance to eight Latin American partners with poor human rights records.[94]

But the Carter Administration had significant shortcomings in implementation of arms transfer restraint. The sale of sophisticated Airborne Warning and Control Systems ("AWACS") to Iran in 1978 drew criticism for violating the CAT policy.[95] The Carter Administration never restricted security assistance to Indonesia's Government, which held thousands of political prisoners.[96] Nor did President Carter succeed in his goal of reducing the total value of U.S. arms exports, which increased from $12.8 billion in 1977 to $17.1 billion in 1981.[97] One congressional critic said in 1978 that Carter's policy "made a difference in semantics, but no [difference] in practice."[98]

B. President Reagan, 1981–1995

The Reagan Administration's CAT policy directly opposed President Carter's policy.[99] Where Carter used specific restrictions to advance a policy of arms transfer restraint, Reagan offered lists of factors and goals

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[91] *See* Keys, *supra* note 70, at 823–28; *see also* Langvandslien, *supra* note 80, at 76.

[92] *See Carter and Human Rights*, *supra* note 78 (discussing the changes made to the State Department's approach to human rights during the Carter Administration).

[93] *Carter and Human Rights*, *supra* note 78; *see* Keys, *supra* note 70, at 825 n.7 (stating that Presidents Ford and Nixon clashed with Congress when discussing the human rights framework established during this era).

[94] David P. Forsythe, *Congress and Human Rights in U.S. Foreign Policy: The Fate of General Legislation*, 9 HUM. RTS. Q. 382, 383 (1987).

[95] *See* Harold J. Logan, *Bureaucracy Still Struggling to Restrain U.S. Arms Sales*, WASH. POST (Nov. 12, 1977), https://www.washingtonpost.com/archive/politics/1977/11/12/bureaucracy-still-struggling-to-restrain-us-arms-sales/a033ef13-6f62-4e56-b6b1-a7428910902b/.

[96] *See* Forsythe, *supra* note 94, at 384.

[97] William Stueck, *Placing Jimmy Carter's Foreign Policy*, *in* THE CARTER PRESIDENCY: POLICY CHOICES IN THE POST-NEW DEAL ERA 244, 252 (Gary M. Fink & Hugh Davis Graham eds., 1998).

[98] Logan, *supra* note 95.

[99] Randall Fowler, *Art of the Arms Deal: Reagan, AWACS, and the Rhetorical Presidency*, 105 Q.J. SPEECH 273, 289 (2019).

to consider arms sales on a case-by-case basis.[100] President Reagan rejected President Carter's unilateral restraint, instead putting narrowly defined national security interests at the forefront of arms sale decisions.[101]

1. President Reagan's CAT Policy

President Ronald Reagan was critical of his predecessor's approach to arms sales.[102] The Reagan Administration focused on Cold War politics in its weapons sale decisions, arming authoritarian anticommunist partners.[103] Across the board, the Reagan Administration removed arms transfer restrictions that it alleged "substituted theology for a healthy sense of self-preservation" and were part of "an American withdrawal from world responsibilities."[104]

Accordingly, President Reagan's 1981 CAT policy struck a stark contrast from its predecessor. Whereas the Carter CAT policy introduced a presumption against arms transfers as a general matter, the Reagan CAT policy stressed that the U.S. Government would review proposed sales on a case-by-case basis.[105] While Carter called arms transfers an "exceptional foreign policy implement,"[106] Reagan uplifted arms transfers

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[100] *See* Michael Klare, *Carter's Arms Policy*, NACLA (Sept. 25, 2007), https://nacla.org/article/carter%27s-arms-policy (explaining how President Carter reduced the sale of weapons by restricting the total dollar value of U.S. military exports and constraining the advancement of military technology); *see generally* James Reston, *Washington; Reagan's Falkland Test*, N.Y. TIMES, (May 23, 1982), https://www.nytimes.com/1982/05/23/opinion/washington-reagan-s-falkland-test.html (noting that the Reagan Administration indicated that Britain's request for military assistance during the Falkland Islands War would be "evaluated on a case-by-case basis.").

[101] *See* David J. Louscher & Michael D. Salomon, *New Directions and New Problems for Arms Transfers Policy*, 35 NAVAL WAR COLL. REV. 40, 41 (1982) (stating that President Carter arduously campaigned for unilateral initiatives to control arms sales); *cf.* William D. Hartung, *Why Sell Arms? Lessons From the Carter Years*, 10 WORLD POL'Y J. 57, 58 (1993) (excerpting that the Reagan Administration disfavored President Carter's arms-transfer restraint, instead preferred a more laissez-faire approach).

[102] *See* Michael Gordon, *Reagan and Arms Treaty: A Sharp Shift in Policy*, N.Y. TIMES (May 30, 1986), https://www.nytimes.com/1986/05/30/world/reagan-and-arms-treaty-a-sharp-shift-in-policy.html (indicating that President Reagan viewed the Carter Administration's strategic arms treaty as "fatally flawed").

[103] *See* Forsythe, *supra* note 94, at 384–85.

[104] John M. Goshko, *Carter Restraints on Arms Sales to Friends Are Scrapped by Reagan Administration*, WASH. POST (May 22, 1981), https://www.washingtonpost.com/archive/politics/1981/05/22/carter-restraints-on-arms-sales-to-friends-are-scrapped-by-reagan-administration/9222a9d9-a381-445c-b5ac-2301f067aeac/.

[105] *Compare* PD-13, *supra* note 62, at 931 (placing the burden of persuasion on the party favoring a particular arms sale), *with* NSDD-5, *supra* note 35, at 616 ("All requests will be considered on a case-by-case basis.").

[106] PD-13, *supra* note 62, at 931.

as "an essential element of [U.S.] global defense posture and an indispensable component of its foreign policy."[107]

The Reagan Administration scrapped the six Carter-era controls and introduced a list of arms transfer goals and a list of factors to consider in arms transfer decisions.[108] Whereas Carter's controls offered specific, measurable benchmarks, the Reagan Administration's model offered more flexibility in implementation but also ensured that the CAT policy need not affect arms sale outcomes, focusing instead on factors for considering proposed sales.[109] Each subsequent CAT policy has followed President Reagan's model, using multi-factor lists of goals and considerations.[110]

The Reagan Administration's goals and factors emphasized a narrow conception of national security in the Cold War context. The policy stressed that "[t]he United States will evaluate requests primarily in terms of their net contribution to enhanced deterrence and defense. It will accord high priority to requests from its major alliance partners and to those nations with whom it has friendly and cooperative security relationships."[111]

2. Erasing Human Rights

The Reagan Administration's CAT policy made no mention of human rights factors.[112] One criterion required considering "whether any detrimental effects of the transfer are more than counterbalanced by positive contributions to United States interests and objectives." [113] But the Reagan CAT policy did not acknowledge that violations of human rights or international humanitarian law were detrimental effects.[114] As one of Reagan's Administration officials put it:

> We do not necessarily believe that (human rights) should be the sole determinant of relationships entered into for our security . . . [n]or do we believe that a policy which has

[107] NSDD-5, *supra* note 35, at 616.

[108] *See id.* (providing the Reagan Administration's rationale for arms transfer decisions); *see also* PD-13, *supra* note 62, at 931 (explaining the Carter Administration's six controls to "implement a policy of arms restraint.").

[109] *Compare* PD-13, *supra* note 62, at 931–32 (stating unambiguous language, such as "the United States will not" and "will not be permitted"), *with* NSDD-5, *supra* note 35, at 616 (providing more leeway by using ambiguous terms when considering arms transfer decisions, such as "may require" and "any detrimental effects").

[110] *See* PDD-34, *supra* note 35, at 3; PPD-27, *supra* note 35, at 31; NSPM-10, *supra* note 35, at 3–4.

[111] NSDD-5, *supra* note 35, at 616.

[112] *See id.* (showing generally no mention of human rights factors within the policy).

[113] *Id.*

[114] *See id.* (suggesting that the Reagan Administration failed to consider whether human rights violations resulting from a particular arm transfer were a "detrimental effect" to be counterbalanced by the transfer's positive contributions to U.S. interests).

> the effect of isolating us from contacts with other countries necessarily advances our ability to persuade other countries to improve their civil rights conditions.[115]

U.S. security assistance to other countries skyrocketed 300% from 1980 to 1984.[116] Weapon sales to the Global South increased as the Reagan Administration sought to "arm countries seen as threatened by U.S. enemies such as the Soviet Union, Cuba[,] or Libya."[117] In 1983, President Reagan lifted an arms embargo against Guatemala amid an ongoing genocide against Mayan people there.[118] Just weeks after the release of his CAT policy, President Reagan approved the sale of $8.5 billion in AWACS surveillance aircraft to Saudi Arabia.[119] Many in Congress opposed the sale, with 301 representatives and 48 senators voting to block the transfer in a concurrent resolution of disapproval.[120]

C. *President Clinton, 1995–2014*

The Clinton Administration's CAT policy did not significantly depart from the structure of the Reagan policy. However, with Cold-War concerns about the Soviet Union passed, the Clinton policy reintegrated human rights concerns and placed greater emphasis on restraint, echoing Carter's policy.

1. President Clinton's PDD-34

After the Cold War ended, President Bill Clinton developed an updated CAT policy, which he released on February 10, 1995, in Presidential Decision Directive 34 ("PDD-34").[121] The policy balanced Carter's restraint with Reagan's instrumentalization of arms sales as a defense policy tool. In its own words, PDD-34 "promote[d] restraint . . . in transfers of weapons systems that may be destabilizing or dangerous to international peace. At the same time, the policy support[ed] transfers

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[115] Dean Reynolds, *Reagan Nixes Human Rights Considerations in Arms Sales*, UNITED PRESS INT'L (July 10, 1981), https://www.upi.com/Archives/1981/07/10/Reagan-nixes-human-rights-considerations-in-arms-sales/1054363585600/. The statement mischaracterized President Carter's policy, which included human rights as just one factor to be considered when making arms transfer decisions.

[116] *See* Forsythe, *supra* note 94, at 385.

[117] Dan Morgan, *U.S. Policy on Weapons Sales in Third World Is Loosening*, WASH. POST (Aug. 1, 1982), https://www.washingtonpost.com/archive/politics/1982/08/01/us-policy-on-weapons-sales-in-third-world-is-loosening/802b5414-980a-4b1c-847f-1affbd522469/.

[118] Bernard Gwertzman, *U.S. Lifts Embargo on Military Sales to Guatemalans*, N.Y. TIMES (Jan. 8, 1983), https://www.nytimes.com/1983/01/08/world/us-lifts-embargo-on-military-sales-to-guatemalans.html.

[119] Charles Mohr, *Saudi AWACS Deal Passes $8 Billion*, N.Y. TIMES (Aug. 22, 1981), https://www.nytimes.com/1981/08/22/world/saudi-awacs-deal-passes-8-billion.html.

[120] H.R. Con. Res. 194, 97th Cong. (1981).

[121] PDD-34, *supra* note 35, at 1; GRIMMETT, *supra* note 63, at 1.

that [met] legitimate defense requirements of [U.S.] friends and allies, in support of [U.S] national security and foreign[] policy interests."[122]

In structure, however, the operative provisions of the Clinton policy took their cue from the Reagan Administration. Like its direct predecessor, PDD-34 revolves around two lists: the CAT policy's goals and the criteria that "[a]ll arms transfer decisions [took] into account."[123] The policy also declined to adopt President Carter's presumption of denial, saying "the U.S. Government will continue to make arms transfer decisions on a case-by-case basis" as it did during the Reagan Administration.[124] By and large, PDD-34's goals and criteria also bore a strong resemblance to the Reagan Administration's policy. Of the Clinton Administration's five goals, four overlapped significantly with those of the Reagan Administration.[125]

Clinton's CAT policy was the first to emphasize the importance of U.S. economic considerations in arms transfer decision-making.[126] While the Carter policy factored in the economic impact of arms transfers on recipient countries,[127] the Clinton policy stated that it would consider "[t]he impact on U.S. industry and the defense industrial base" in arms transfer decisions.[128] The Reagan policy listed "enhanc[ing] United States defense production capabilities and efficiency" as a goal of arms transfers but did not mention U.S. industry or include defense production as a decision-making criterion.[129]

Between discussing the goals of the CAT policy and listing criteria for consideration of arms sales, the Clinton Administration added two new sections: "Supporting Arms Control and Arms Transfer Restraint"[130] and "Supporting Responsible U.S. Transfers."[131] The former Section included several paragraphs discussing U.S. policy "to promote control, restraint, and transparency of arms transfers"[132] while the latter comprised a

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[122] GRIMMETT, *supra* note 63, at 9.

[123] *Id.* at 11.

[124] *Id.*

[125] *Compare* PDD-34, *supra* note 35, at 3 (promoting military advancement for the U.S. and its allies, international stability, and increased military production), *with* NSDD-5, *supra* note 35, at 616 (promoting military advancement for the U.S. and its allies, international stability, and increased military production).

[126] Lora Lumpe, *Clinton's Conventional Arms Export Policy: So Little Change*, ARMS CONTROL TODAY, May 1995, at 9, 9.

[127] PD-13, *supra* note 62, at 932.

[128] PDD-34, *supra* note 35, at 9.

[129] NSDD-5, *supra* note 35, at 616.

[130] U.S. ARMS CONTROL & DISARMAMENT AGENCY, WORLD MILITARY EXPENDITURES AND ARMS TRANSFERS 32 (Daniel Gallik & Dennis Winstead eds., 24th ed. 1995) [hereinafter WMEAT].

[131] *Id.*

[132] *Id.*

paragraph describing the role of the U.S. Government in supporting approved arms transfers.[133]

2. Reincorporating Human Rights

PDD-34 mentioned human rights as both a goal of arms transfers and a criterion to consider in arms transfer decisions,[134] reincorporating human rights issues into the CAT policy and emphasizing human rights more than the first two policies.

For the first time, President Clinton's CAT policy explicitly listed human rights as one of five conventional arms transfer goals.[135] The Reagan Administration's CAT policy expressed that "[a]pplied judiciously, arms transfers can . . . foster regional and internal stability, thus encouraging peaceful resolution of disputes and evolutionary change."[136] Clinton expanded the goal to include promoting "peaceful conflict resolution and arms control, human rights, democratization, and other U.S. foreign policy objectives."[137]

After the Reagan Administration removed human rights considerations from the arms transfer criteria, the Clinton Administration restored them. In its list of twelve criteria to consider in arms transfer decisions, PDD-34 included "[t]he human rights, terrorism[,] and proliferation record of the recipient and the potential for misuse of the export in question."[138] By including both a prospective recipient's human rights record and the potential for misuse, the Clinton CAT policy required both backward- and forward-looking assessments of human rights issues.

Human rights concerns also appeared in the policy's section on "Supporting Arms Control and Arms Transfer Restraint."[139] Where President Reagan rejected the idea of unilateral restraint, President Clinton's policy expressed that "restraint would be considered on a case-by-case basis in transfers . . . where the transfer of weapons raises issues involving human rights or indiscriminate casualties, such as anti-

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[133] *Id.*

[134] PDD-34, *supra* note 35, at 3, 8–9.

[135] *Id.* at 3. While the Carter Administration included human rights in its CAT policy, the policy did not use the criteria like its successors did. PD-13, *supra* note 62, at 932; *see* Hartung, *supra* note 101, at 59 ("Carter seemed to be setting the stage for an effective reversal of the pro-arms-sales attitude of the Nixon/Ford years.").

[136] NSDD-5, *supra* note 35, at 616.

[137] GRIMMETT, *supra* note 63, at 3.

[138] *Id.* at 11.

[139] *See* WMEAT, *supra* note 130.

personnel landmines."[140] The statement reflected widespread concern about civilian harm from anti-personnel landmines in the mid-1990s.[141]

Nevertheless, President Clinton drew criticism for some of his Administration's arms sales.[142] President Carter expressed his "deep disappointment" when President Clinton ended a twenty-year moratorium on advanced weapons transfers, including fighter jet sales, to Latin America.[143] The Clinton Administration also sold more than $5 billion in arms sales to Turkey even as the Turkish Government escalated human rights abuses and continued repressing its Kurdish minority.[144]

D. President Obama, 2014–2018

President Obama's CAT policy worked within the model established by Presidents Reagan and Clinton, but it also elevated human rights issues to new heights. For the first time since the Carter Administration, the Obama CAT policy included a specific prohibition on certain arms transfers on human rights grounds,[145] marking a departure from the purely case-by-case consideration of listed factors.

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[140] *See* NSDD-5, *supra* note 35, at 617 (showing that President Reagan rejected the idea of unilateral restraint); GRIMMETT, *supra* note 63, at 10.

[141] International activism brought unprecedented attention to the humanitarian consequences of landmines, which raised particular concern for their long-lasting nature and inability to distinguish between civilians and combatants. Four years after the release of President Clinton's CAT policy, the Ottawa Convention, also known as the Mine Ban Treaty, was signed in 1997 and the International Campaign to Ban Landmines received the Nobel Peace Prize the same year. *See* GRIMMETT, *supra* note 63, at 10 (inferring that the U.S. will transfer landmines on a case-by-case basis); *see generally* Steven Lee Myers, *Clinton Agrees to Land-Mine Ban, but Not Yet*, N.Y. TIMES (May 22, 1998), https://www.nytimes.com/1998/05/22/world/clinton-agrees-to-land-mine-ban-but-not-yet.html (showing concern amongst U.S. citizens regarding the use of landmines).

[142] *See* Wade Boese, *Clinton Ends 20-Year Ban on High-Tech Arms to Latin America*, 27 ARMS CONTROL TODAY 21, 21 (1997) (highlighting that U.S. and Latin American military contractors criticized the policy's leniency toward high-tech arms in Latin America).

[143] *Id.*; *see also* Douglas Waller & Jane Knight, *How Washington Works . . . Arms Deals*, TIME, Apr. 14, 1997, at 48 ("President Bill Clinton gave his approval for U.S. defense contractors to market jet fighters to Chile.").

[144] Michelle Ciarrocca, *U.S. Arms for Turkish Abuses*, MOTHER JONES (Nov. 17, 1999), https://www.motherjones.com/politics/1999/11/us-arms-turkish-abuses/; *see also* Hartung, *supra* note 65, at 30 (noting that Turkish Prime Minister Çiller's narrow military approach to the Kurdish problem resulted in the depopulation of over 1,400 villages in southeast Turkey and the deaths of over 15,000 people).

[145] PPD-27, *supra* note 35, at 31 ("Ensuring that arms transfers do not contribute to human rights violations or violations of international humanitarian law.").

1. President Obama's PPD-27

The Arab uprisings of 2011 spurred on the Obama Administration's review of U.S. conventional arms transfer policy.[146] Images of U.S. manufactured teargas canisters used to forcibly disperse protests in Egypt's Tahrir Square reportedly drove U.S. officials to complete their multi-year review.[147] The Obama Administration published its CAT policy on January 15, 2014, in Presidential Policy Directive 27 ("PPD-27"), released nearly two decades after its predecessor.[148]

In format, PPD-27 is nearly identical to PDD-34, with sections on goals, criteria, "Supporting Arms Control and Arms Transfer Restraint," and "Supporting Responsible U.S. Transfers."[149] In the tradition of Presidents Carter and Clinton, President Obama appealed to unilateral restraint while adopting President Reagan's position that decisions to restrain would occur on a case-by-case basis.[150]

Like the Clinton Administration, the Obama Administration framed conventional arms transfer decisions as a balance. PPD-27 recognized conventional weapons as "legitimate instruments for the defense and security policy of responsible nations" and acknowledged their capacity to "exacerbate international tensions, foster instability, inflict substantial

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[146] *See New Rules Tighten Rights, Atrocity Criteria in U.S. Weapons Shipments*, REUTERS (Jan. 15, 2014, 12:22 PM), https://www.reuters.com/article/us-usa-weapons-sales/new-rules-tighten-rights-atrocity-criteria-in-u-s-weapons-shipments-idUSBREA0E16920140115 ("This is an area that has been a challenge for U.S. foreign policy for some time, but it really has been crystallized in the last couple of years with the events in the Middle East.") [hereinafter *Weapons Shipments*].

[147] *See* Rachel Stohl, *Promoting Restraint: Updated Rules for U.S. Arms Transfer Policy*, ARMS CONTROL ASS'N (Mar. 2014), https://www.armscontrol.org/act/2014-03/promoting-restraint-updated-rules-us-arms-transfer-policy.

[148] *See* PPD-27, *supra* note 35, at 30.

[149] *Compare id.* at 32–33 (specifying that two of three categories in Obama's CAT Policy were "Supporting Arms Control and Arms Transfer Restraint" and "Supporting Responsible U.S. Transfers"), *with* GRIMMETT, *supra* note 63, at 9–10 (using identical language as Clinton's CAT policy: "Supporting Arms Control and Arms Transfer Restraint" and "Supporting Responsible U.S. Transfers").

[150] *Compare* PD-13, *supra* note 35, at 932 ("[Criteria for arms restraint policy] will be binding unless extraordinary circumstance[s] necessitate a Presidential exception, or where I determine that countries friendly to the United States must depend on advanced weaponry . . . to maintain a regional balance."), *and* GRIMMETT, *supra* note 63, at 8 ("[T]he United States will exercise unilateral restraint in cases where overriding national security or foreign policy interest require us to do so."), *and* NSDD-5, *supra* note 35, at 616 ("All requests [for weapons] will be considered on a case-by-case basis."), *with* PPD-27, *supra* note 35, at 33 ("[T]he United States will exercise unilateral restraint in the export of arms in cases where such restraint will be effective or is necessitated by overriding national interests. Such restraint will be considered on a case-by-case basis [for specific] transfers . . . .").

damage, enable transnational organized crime, and be used to violate universal human rights."[151]

Most of the content also drew heavily from the Clinton Administration's policy. PPD-27 sets forth ten goals for U.S. arms transfers, eight of which appeared in some form among the five goals in President Clinton's policy.[152] The two entirely new goals focused on counterterrorism, homeland security, and combatting transnational organized crime, reflecting U.S. concerns that intensified amid the War on Terror in the early 2000s.[153] The Obama policy also added two new criteria to Clinton's twelve factors while incorporating one Clinton criterion, consistency with international agreements, into the framing summary directly prior to the list of criteria.[154]

2. Elevating Human Rights

The Obama Administration's CAT policy gave new prominence to human rights and international humanitarian law considerations. As Tom Kelly, the State Department's former Assistant Secretary for Political-Military Affairs, said, "[w]e wanted to make sure that it's very clear that human rights considerations really are at the core of our arms transfer decisions."[155]

PPD-27 dedicated one of its ten conventional arms transfer policy goals to human rights,[156] whereas PDD-34's five goals included one

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[151] PPD-27, *supra* note 35, at 30.

[152] *See* Stohl, *supra* note 147 (stating that Obama's CAT policy expanded on the goals listed in Clinton's CAT policy by adding two more goals); *compare* PDD-34, *supra* note 35, at 3 (ensuring that (1) U.S. military forces will continue to have a technological advantage, (2) stability will be promoted in regions critical to U.S. interest, (3) peaceful conflict resolution will be promoted, (4) allies will be helped in deterring and defending themselves against aggression, and (5) the stability of the U.S. defense industrial base will be enhanced), *with* PPD-27, *supra* note 35, at 31 (ensuring that (1) the U.S. and its allies will continue to enjoy technological superiority, (2) the industrial base will become stronger, (3) the ability of allies and partners to protect themselves against aggression will be promoted, (4) there will be stability in regions critical to U.S. interest, (5) peaceful conflict resolution and arms control will be promoted, (6) the conventional weapons will not be used as delivery systems of weapons of mass destruction, (7) other democratic governance will be supported, and (8) arms transfers will not contribute to human rights violations or violations of international humanitarian law).

[153] *See* Stohl, *supra* note 147.

[154] *Compare* GRIMMETT, *supra* note 63, at 11–12 (providing twelve criteria for all arms transfer decisions, the first one establishing a need for "[c]onsistency with international agreements"), *with* PPD-27, *supra* note 35, at 32 ("[t]he likelihood that the recipient would use the arms to commit human rights abuses or serious violations of international humanitarian law, retransfer the arms to those who would commit [such abuses or violations] . . . or identify the United States with [such abuses or violations] . . .").

[155] *See Weapons Shipments*, *supra* note 146.

[156] PPD-27, *supra* note 35, at 31 ("Ensuring that arms transfers do not contribute to human rights violations or violations of international humanitarian law.").

where human rights appeared alongside "other U.S. foreign policy objectives."[157] The Obama Administration expressed, "[e]nsuring that arms transfers do not contribute to human rights violations or violations of international humanitarian law" would be a goal of its policy.[158] The goal marked the first explicit mention of international humanitarian law in the CAT policies.[159] Clinton's policy alluded to customary international humanitarian law's principle of distinction in considering unilateral restraint for transferring arms that implicate "human rights or *indiscriminate casualties*" but it did not mention other principles of international humanitarian law, such as humanity and proportionality.[160]

Both of the Obama Administration's new criteria for arms control decisions reflected human rights concerns during the Arab uprisings, which saw U.S. arms used in ways U.S. policymakers did not originally intend.[161] PPD-27's criteria included the likelihood that a recipient would use arms to commit human rights abuses or serious violations of humanitarian law, retransfer arms to those who would commit such abuses and violations, or identify the United States with such abuses and violations.[162] The other new factor was "the risk that significant change in the political or security situation of the recipient country could lead to inappropriate end-use or transfer of defense articles."[163] Although the criterion does not explicitly mention human rights, it reflects a concern that political instability or changes in government could result in the misuse of arms, including human rights abuses.

The Obama Administration also slightly expanded upon the Clinton Administration's single criterion related to human rights: while the Clinton Administration required consideration of the recipient's "human rights, terrorism, and proliferation record" and

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[157] PDD-34, *supra* note 35, at 3 ("To promote peaceful conflict resolution and arms control, human rights, democratization, and *other U.S. foreign policy objectives*.") (emphasis added).

[158] PPD-27, *supra* note 35, at 31.

[159] *Id.* ("Ensuring that arms transfers do not contribute to human rights violations or violations of international humanitarian law."). The other CAT policies lack any explicit mention of international humanitarian law. *See* PD-13, *supra* note 62; NSDD-5, *supra* note 35; PDD-34, *supra* note 35.

[160] *See* GRIMMETT, *supra* note 63, at 10. While Clinton's policy alluded to the international humanitarian law principle of considering unilateral restraint for arms transfers that could lead to haphazard casualties, it failed to mention other such principles. *See generally id.* (lacking any mention of international humanitarian law principles of humanity and proportionality).

[161] *See* Stohl, *supra* note 147.

[162] PPD-27, *supra* note 35, at 32.

[163] *Id.*

potential for misuse of the arms in question,[164] the Obama Administration added democratization, counterproliferation, and nonproliferation to the list.[165]

Like the Clinton Administration, the Obama Administration included a section on "Supporting Arms Control and Arms Transfer Restraint" in its CAT policy.[166] Where President Clinton's PDD-34 included just one clause on weapons that raise concerns about human rights or indiscriminate casualties,[167] PPD-27 dedicated a whole paragraph to humanitarian issues,[168] including the strictest human rights measure of any previous CAT policy. Although the Carter Administration's CAT policy also incorporated clear prohibitions on arms transfers in certain circumstances, it did not do so in the context of human rights issues.[169] The Clinton Administration's human rights considerations only factored into PDD-34 as one of many factors. PPD-27, on the other hand, instituted a blanket prohibition on arms transfers where the United States

> has actual knowledge at the time of authorization that the transferred arms will be used to commit: genocide; crimes against humanity; grave breaches of the Geneva Conventions of 1949; serious violations of Common Article 3 of the Geneva Conventions of 1949; attacks directed against civilian objects or civilians who are legally protected from attack or other war crimes as defined in 18 U.S.C. [§] 2441.[170]

PDD-27's language was borrowed directly from the U.S. Government's negotiating position in talks around the Arms Trade Treaty, a multilateral agreement regulating the international trade in conventional arms.[171] Although the Arms Trade Treaty did not enter

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[164] *See* GRIMMETT, *supra* note 63, at 11.

[165] *See* PPD-27, *supra* note 35, at 32.

[166] *Compare* GRIMMETT, *supra* note 63 at 9 (using the language "Supporting Arms Control and Arms Transfer Restraint"), *with id.* (using the language "Supporting Arms and Control and Arms Transfer").

[167] *See* PDD-34, *supra* note 35, at 6.

[168] *See* PPD-27, *supra* note 35, at 33.

[169] *See* PD-13, *supra* note 62, at 931–32 (establishing a set of controls on conventional arms transfers that reduce the dollar value of new arms sales and limit the volume of weapons that are exported, thereby abating the "virtually unrestrained spread of conventional weaponry").

[170] PPD-27, *supra* note 35, at 33.

[171] *Compare id.* (using language that was borrowed directly from the U.S. Government's negotiating position in talks surrounding the Arms Trade Treaty), *with* G.A. Res. 67/234 art. 6(3), The Arms Trade Treaty (Apr. 2, 2013) ("A State Party shall not

into force until December 24, 2014, the Obama Administration participated in negotiations, and President Obama signed the treaty on September 23, 2013.[172]

Despite the prominence of human rights in its CAT policy, the Obama Administration entered into more arms sales agreements than any administration since World War II.[173] Especially concerning Obama-era transfers included sales to Saudi Arabia, which has long repressed activists, political critics, and Shi'a citizens and began a brutal military campaign in Yemen in 2015.[174] The Obama Administration also removed a freeze on arms to Egypt, where an authoritarian leader took power in a military coup in 2013 and soon clamped down on political opposition and the freedom of expression.[175]

E. President Trump, 2018–2022

Although the Trump Administration's CAT policy differed in format from its predecessors, it retained much of the substance. However, the policy elevated economic security more than any CAT policy thus far while eroding human rights considerations.

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authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party.").

[172] Daryl G. Kimball, *The Arms Trade Treaty at a Glance*, ARMS CONTROL ASS'N. (Aug. 2017), https://www.armscontrol.org/factsheets/arms_trade_treaty. The Senate never ratified the treaty. *See* S. Con. Res. 7, 113th Cong. (2013).

[173] William D. Hartung, *The Obama Administration Has Brokered More Weapons Sales than Any Other Administration Since World War II*, THE NATION (July 26, 2016), https://www.thenation.com/article/archive/the-obama-administration-has-sold-more-weapons-than-any-other-administration-since-world-war-ii/.

[174] *See* Yara Bayoumy, *Obama Administration Arms Sales Offers to Saudi Top $115 Billion: Report*, REUTERS (Sept. 7, 2016, 3:24 PM), https://www.reuters.com/article/us-usa-saudi-security/obama-administration-arms-sales-offers-to-saudi-top-115-billion-report-idUSKCN11D2JQ (describing the types of weapons sold to Saudi Arabia during the Obama Administration as "small arms and ammunition to tanks, attach helicopters, air-to-ground missiles, missile defense ships, and warships."); *see* Samih Eloubeidi, *Saudi Arabia Human Rights Violations: Freedom of Religion and Speech*, UAB INST. FOR HUM. RTS. BLOG (Mar. 25, 2020), https://sites.uab.edu/humanrights/2020/03/25/saudi-arabia-human-rights-violations-freedom-of-religion-and-speech/ (describing the hatred and intolerance that Saudi Arabia has toward Shia Muslims); *see also* Thrall et al., *supra* note 36, at 102, 107 (warning about U.S. involvement in the Yemen civil war).

[175] *See* Peter Baker, *Obama Removes Weapons Freeze Against Egypt*, N.Y. TIMES (Apr. 31, 2015), https://www.nytimes.com/2015/04/01/world/middleeast/obama-lifts-arms-freeze-against-egypt.html (stating that Abdel Fattah al-Sisi, a former military general, led a military coup to overthrow Egyptian President Mohamed Morsi and later arrested 40,000 people without providing a full accounting of the detentions).

1. President Trump's NSPM-10

President Donald Trump released his CAT policy on April 19, 2018, in National Security Presidential Memorandum 10 ("NSPM-10"), which replaced President Obama's PPD-27.[176] The Trump Administration's CAT policy followed a different format from its predecessors, resembling a statute where previous policies consisted mainly of narrative text. Nevertheless, the Trump CAT policy preserved much of the Obama Administration's content.

The Trump Administration's framing of the role of conventional arms transfers in U.S. foreign policy harked back to the Reagan era. While Presidents Obama and Clinton balanced between Carter's restraint and Reagan's enthusiasm for arms transfers, the Trump policy favored Reagan's approach. The policy emphasized that defending U.S. interests requires "a strong military, capable allies and partners, and a dynamic defense industrial base, which currently employs more than 1.7 million people. Strategic conventional arms transfers lie at the intersection of these interests and play a critical role in achieving our national, economic security, and foreign policy objectives."[177]

As reflected in NSPM-10's framing of arms transfers, the Trump Administration's CAT policy elevated U.S. economic factors to unprecedented levels.[178] NSPM-10 stated, "[w]hen a proposed transfer is in the national security interest, which includes our economic security, and in our foreign policy interest, the executive branch will advocate strongly on behalf of United States companies."[179] The statement struck a stark contrast with President Carter's outright ban on U.S. Government promotion of private arms sales.[180]

Unlike previous administrations, President Trump's White House worked directly with the defense industry instead of referring industry representatives to relevant bureaus in the Departments of Defense and

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[176] *See* NSPM-10, *supra* note 35, at 1, 4.

[177] *Id.* at 1.

[178] *See id.* at 2, 3. The Trump Administration highlights economic security as a justifi cation to increase the federal government's promotion of arms sales around the word. *See* Thrall et al., *supra* note 36, at 102–03.

[179] NSPM-10, *supra* note 35, at 1.

[180] President Carter's CAT Policy stated that

> An amendment to the international traffic in arms regulations will be issued, requiring policy level authorization by the Department of State for actions by agents of the United States or private manufacturers which might promote the sale of arms abroad. In addition, embassies and military representatives abroad will not promote the sale of arms . . . .

PD-13, *supra* note 62, at 932.

State.[181] President Trump spoke publicly about the economic boons of U.S. arms exports. After a Saudi special operations team murdered the Washington Post journalist Jamal Khashoggi, President Trump resisted calls to halt arms sales to Saudi Arabia, saying,

> [w]ell, I think that would be hurting us . . . . We have a country that's doing probably better economically than it's ever done before . . . Part of that is what we are doing with our defense systems, and everybody is wanting them, and frankly I think that would be a very, very tough pill to swallow for our country.[182]

In defending continued arms sales to Saudi Arabia, President Trump also framed the issue in terms of competition with Russia and China. In a 2018 statement, President Trump said,

> the Kingdom agreed to spend and invest $450 billion in the United States . . . $110 billion will be spent on the purchase of military equipment from Boeing, Lockheed Martin, Raytheon, and many other great U.S. defense contractors. If we foolishly cancel these contracts, Russia and China would be the enormous beneficiaries—and very happy to acquire all of this newfound business.[183]

With the President publicly lauding U.S. arms exports, U.S. foreign military sales agreements exceeded $200 billion during the first three years of the Trump Administration.[184]

2. Eroding Human Rights

President Trump's approach to human rights in his CAT policy undercut the Obama Administration's human rights measures. Although some changes resulted from the Trump Administration's reformatting of

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[181] Josh Kirshner, *Will Biden's Conventional Arms Transfer Policy Be an Evolution or a Revolution?*, BREAKING DEF. (Jan. 14, 2022, 11:16 AM), https://breakingdefense.com/2022/01/will-bidens-conventional-arms-transfer-policy-be-an-evolution-or-a-revolution/.

[182] Joe Gould, *Trump Warns Halting Saudi Arms Sales Would Hurt Economy*, DEF. NEWS (Oct. 11, 2018), https://www.defensenews.com/congress/2018/10/11/trump-warns-halting-saudi-arms-sales-would-hurt-economy/.

[183] Statement on Standing with Saudi Arabia, 2018 DAILY COMP. PRES. DOC. 1 (Nov. 20, 2018). Fact-checkers concluded that President Trump's claims were inflated as Saudi Arabia had signed letters of offer and acceptance for only $14.5 billion. *See* Calvin Woodward & Robert Burns, *AP Fact Check: Trump Inflates Value of Saudi Arms Deal*, AP NEWS (Nov. 21, 2018), https://apnews.com/article/jamal-khashoggi-north-america-donald-trump-economy-politics-2b4799b3d3ca4f6781efe1e70f207392.

[184] Rachel Stohl, *Improving U.S. Conventional Arms Policies*, ARMS CONTROL ASS'N (Jan./Feb. 2021), https://www.armscontrol.org/act/2021-01/features/improving-us-conventional-arms-policies.

the policy, the Administration reduced the number of human rights factors present in the U.S. CAT policy and diluted provisions that it retained from the Obama Administration.[185]

The Trump Administration's CAT policy includes a goal that appears similar to President Obama's prioritization of human rights and international humanitarian law. NSPM-10 stipulated that it would be the policy of the executive branch to "facilitate ally and partner efforts, through United States sales and security cooperation efforts, to reduce the risk of national or coalition operations causing civilian harm."[186] While the provision mentions neither human rights nor international humanitarian law, it does include "civilian harm."[187] Civilian harm is associated with international humanitarian law, but it encompasses all harm to civilian persons and civilian objects rather than harms that solely occur as a result of violations of the law of armed conflict.[188] However, by leaving out human rights law, the Trump policy goal excludes reducing abuses outside of armed conflict, leaving out cases of domestic repression that do not reach the threshold of a non-international armed conflict.[189]

NSPM-10's criteria include two human rights factors,[190] both of which came from the Obama Administration's section on "Supporting Arms Control and Arms Transfer Restraint," which the Trump Administration

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[185] *Compare* NSPM-10, *supra* note 35, at 2–3 (mentioning nothing explicitly about human rights), *with* PPD-27, *supra* note 35, at 31 (explicitly mentioning human rights as a policy goal).

[186] NSPM-10, *supra* note 35, at 2.

[187] *Id.*

[188] *See Civilians Protected Under International Humanitarian Law*, INT'L COMM. OF THE RED CROSS (Oct. 29, 2010), https://www.icrc.org/en/doc/war-and-law/protected-persons/civilians/overview-civilians-protected.htm.

[189] *See generally* NSPM-10, *supra* note 35, at 2 (mentioning civilian harm within its policy considerations but excluding human rights law). Civilian harm is not a meaningful term under international human rights law because civilian status is determined according to international humanitarian law. *See* Cordula Droege, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, 40 ISR. L. REV. 310, 310 (2007) ("International human rights law and international humanitarian law are traditionally two distinct bodies of law. While the first deals with the inherent rights of the person to be protected against abusive powers at all times, the other regulates the conduct of parties to an armed conflict."). International humanitarian law only applies to international and non-international armed conflicts, excluding domestic disturbances, riots, and other forms of violence that do not meet the *Tadić* factors of (1) a certain intensity of armed violence and (2) the actors taking part in violence exhibit a certain degree of organization. *See* Prosecutor v. Tadić, Case No. IT-94-1-l, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995). *Tadić* is the first international war crimes trial since World War II and was held in the recently established United Nations International Criminal Tribunal at the Hague. Michael P. Scharf, *International Decisions*, 91 AM. J. INT'L L. 718, 718 (Bernard H. Oxman ed., 1997).

[190] *See* NSPM-10, *supra* note 35, at 3–4 (listing "human rights" and "international humanitarian law" as executive branch considerations in making arms transfer decisions).

nixed.[191] However, NSPM-10 narrowed the scope of the Obama Administration's prohibition on arms transfers where the United States has actual knowledge at the time of authorization that the transferred arms will be used to commit atrocities. Where the Obama Administration included "attacks directed against civilian objects or civilians who are legally protected from attack,"[192] the Trump Administration qualified such attacks as "*intentionally* directed against civilian objects or civilians."[193]

The other human rights element in PPD-27's "Arms Transfer Restraint" section encouraged considering unilateral restraint where "the transfer of weapons raises concerns about undermining international peace and security, serious violations of human rights law, including serious acts of gender-based violence and serious acts of violence against women and children, serious violations of international humanitarian law, terrorism, transnational organized crime, or indiscriminate use."[194] NSPM-10 repeats the language almost exactly in its criteria section.[195]

Although the "Arms Transfer Decisions" provision of NSPM-10 resembles the "Arms Transfer Restraint" provision of PPD-27, the Trump Administration did not factor in the possibility of *retransfer* facilitating human rights or international humanitarian law abuses.[196] Nor does it consider the possibility that an arms transfer could "identify the United States with human rights abuses or serious violations of international humanitarian law."[197]

In one of the most significant departures from the Obama Administration's policy, NSPM-10 does not require the executive branch to consider the human rights records of prospective arms recipients.[198] The Trump Administration removed the Clinton and Obama

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[191] *Compare* PPD-27, *supra* note 35, at 32–33 (containing a section entitled "Supporting Arms Control and Arms Transfer Restraint"), *with* NSPM-10, *supra* note 35 (containing no such section).

[192] PPD-27, *supra* note 35, at 33.

[193] NSPM-10, *supra* note 35, at 4 (emphasis added).

[194] PPD-27, *supra* note 35, at 33.

[195] *See* NSPM-10, *supra* not 35, at 4 ("The risk that the transfer may be used to undermine international peace and security or contribute to abuses of human rights, including acts of gender-based violence and acts of violence against children, violations of international humanitarian law, terrorism, mass atrocities, or transnational organized crime.").

[196] *See* NSPM-10, *supra* note 35 (making no mention of possible human rights or international humanitarian law violations through the retransfer of weaponry) (emphasis added).

[197] *Compare* PPD-27, *supra* note 35, at 32, *with* NSPM-10, *supra* note 35 (making no mention of whether arms transfers could associate the United States with human rights abuses or violations of international humanitarian law).

[198] *See generally* NSPM-10, *supra* note 35 (making no mention of whether prospective arms recipients are investigated for past human rights abuses).

Administration's criterion that the United States should consider recipients' human rights records and the potential to misuse arms.[199]

The Trump Administration's prioritization of economic benefits and dilution of human rights in the CAT policy coincided with arms sales to countries with concerning human rights records. According to a Cato Institute analysis, "the Trump [A]dministration sold more weapons to a riskier portfolio of clients than either the Bush or Obama [A]dministrations."[200] Even as reports of possible war crimes mounted, the Trump Administration increased weapons sales to Saudi Arabia and the United Arab Emirates, which used the arms in their military campaign in Yemen.[201] The sales met strong congressional opposition.[202] In 2019, Congress came closer to successfully blocking an arms sale with a joint resolution of disapproval under the Arms Export Control Act than it had in over thirty years.[203] President Trump vetoed the resolution, and the Senate failed to override his veto.[204] Arms sales to the Philippines, where the government of President Rodrigo Duterte has extrajudicially killed thousands in its "war on drugs," also drew criticism.[205] Some members of Congress also spoke out against the Trump Administration's arms sales

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[199] *Compare* NSPM-10, *supra* note 35 (making no mention of criteria that human rights records and the potential to misuse arms should be taken into consideration), *with* PDD-34, *supra* note 35, at 9 ("The human rights, terrorism and proliferation record of the recipient and the potential for misuse of the export in question."), and PPD-27, *supra* note 35, at 32 ("The human rights, democratization, counterterrorism, counterproliferation, and nonproliferation record of the recipient, and the potential for misuse of the export in question.").

[200] Jordan Cohen, *Biden's Conventional Arms Transfer Policy Review Could Be a Turning Point*, WAR ON THE ROCKS (Nov. 29, 2021), https://warontherocks.com/2021/11/bidens-conventional-arms-transfer-policy-review-could-be-a-turning-point/ (commenting on how the Trump Administration prioritized economic gain over human rights considerations when it approved arms sales to Saudi Arabia over numerous, blatant objections by Congress).

[201] *See id.* (noting that the Trump Administration overcame congressional effort to prevent arms sales to Saudi Arabia because of the increased destruction of the Saudi war in Yemen, the murder of Jamal Khashoggi, Riyadh's alleged assistance in the 9/11 terrorist attacks, and Saudi Arabia's history of human right violations).

[202] *Id.*

[203] After *INS v. Chadha*, Congress decided in 1986 to amend the veto provision in the Arms Export Control Act to substitute joint resolutions in place of concurrent resolutions thereby weakening congressional control on the executive branch's veto power. *See* Scott R. Anderson, *Untangling the Yemen Arms Sale Debate*, LAWFARE (June 24, 2019, 1:10 PM), https://www.lawfareblog.com/untangling-yemen-arms-sales-debate. During the Saudi arms sales debate in 2019, a joint resolution was passed by Congress with bipartisan support for the first time. S.J. Res. 7, 116th Cong. (2019); *see also Congress and the Trump Administration Spar Over U.S. Arms Sales to the Saudi-Led Coalition in Yemen*, 115 AM. J. INT'L L., 146, 147 (2021).

[204] Edmondson, *supra* note 54.

[205] *See* A. Trevor Thrall & Jordan Cohen, *Don't Sell Arms to the Philippines*, DEFENSE NEWS (Apr. 16, 2021), https://www.defensenews.com/opinion/commentary/2021/04/16/dont-sell-arms-to-the-philippines/.

to Azerbaijan,[206] which faced accusations of war crimes in its conflict with Armenia in the Nagorno-Karabakh region.[207]

F. President Biden's Anticipated CAT Policy

The Biden Administration had reportedly drafted a new CAT policy by August 2021 for expected release as soon as September 2021.[208] However, as of March 2022, the Administration has not released its CAT policy.[209] With U.S. arms transfers surging as the Biden Administration provides lethal aid to Ukraine to stave off a Russian invasion,[210] the announcement of the much-anticipated Biden CAT policy is on hold.

However, the Biden Administration has offered some previews of the CAT policy. Early reporting on a draft policy indicated that it would prioritize human rights more than the Trump Administration's policy.[211] In November 2021, remarks to the Defense Trade Advisory Group, a senior Biden appointee in the State Department's Bureau of Political-Military Affairs shed light on the anticipated CAT policy.[212] The appointee, Tim Betts, explicitly framed the CAT policy in human rights terms. His statement maintained the longstanding approach of considering arms sales on a case-by-case basis factoring in "political, military, economic, arms control, and human rights considerations."[213]

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[206] Joe Gould, *Democrats Urge Halt to Security Aid to Azerbaijan in Armenia Conflict*, DEFENSENEWS (Oct. 6,2020), https://www.defensenews.com/congress/2020/10/06/democrats-urge-halt-to-security-aid-to-azerbaijan-in-armenia-conflict/.

[207] Sheila Paylan, *The U.N. Must Investigate Nagorno-Karabakh War Crimes*, FOREIGN POL'Y (Oct. 7, 2021, 2:39 PM), https://foreignpolicy.com/2021/10/07/the-u-n-must-investigate-nagorno-karabakh-war-crimes/.

[208] *See* Mike Stone & Patricia Zengerle, *Biden Plans Shift in Arms Policy to Add Weight to Human Rights Concerns*, REUTERS (Aug. 4, 2021, 4:35 PM), https://www.reuters.com/world/us/exclusive-biden-plans-shift-arms-export-policy-favor-human-rights-sources-2021-08-04/.

[209] *See* Rachel Stohl, *Why is the Biden Administration Still Silent on Arms Trade Treaty?*, STIMSON (Apr. 27, 2022), https://www.stimson.org/2022/why-is-the-biden-administration-still-silent-on-arms-trade-treaty/ (noting that the Biden Administration has failed "to update U.S. policy towards the Arms Trade Treaty," an agreement that regulates the cross-border transfer of conventional arms). However, on February 23, 2023, the Biden Administration released its CAT policy ("NSM-18") and emphasized the role of human rights considerations in conducting arms transfers. Memorandum from the White House on United States Conventional Arms Transfer Policies to the Sec'y of State et al. (Feb. 23, 2023) (available online at https://www.whitehouse.gov/briefing-room/presidential-actions/2023/02/23/memorandum-on-united-states-conventional-arms-transfer-policy/). Note that this Article was written prior to the Biden Administration's release of NSM-18.

[210] *See* Peter Baker & Michael Levenson, *Biden Digs in on Ukraine Strategy, Seeking $33 Billion More in Aid*, N.Y. TIMES (Apr. 28, 2022), https://www.nytimes.com/2022/04/28/us/politics/ukraine-biden-aid.html.

[211] *See* Cohen, *supra* note 200.

[212] Timothy Alan Betts, *Remarks to the Defense Trade Advisory Group*, U.S. DEP'T OF STATE (Nov. 4, 2021), https://www.state.gov/remarks-to-the-defense-trade-advisory-group/.

[213] *Id.*

However, Betts also said that the Biden Administration was working to update the CAT policy specifically to "ensure it reflects the President's goals of putting diplomacy first, respecting human rights and international humanitarian law, revitalizing and reimaging [sic] alliances, and delivering for the American people."[214] According to Betts, the Biden Administration "seek[s] to elevate human rights, stress the principles of restraint and responsible use, and consider our partners' security sector governance within [its] holistic approach to evaluating proposed arms transfers."[215]

Betts also shared that the Biden Administration would assess three specific considerations related to human rights in arms sale decisions:

> (1) Refrain from arms transfers that could contribute to human rights violations or abuses or violations of international humanitarian law;
>
> (2) Strengthen ally and partner efforts to develop effective security sector governance structures as well as to promote efforts to fulfill obligations under international law and mitigate civilian harm; and
>
> (3) Promote peaceful and responsible conflict resolution, arms control, and nonproliferation.[216]

Betts also expressed that "[t]his Administration will not approve arms transfers where we believe such transfers are not in our national interest because of the risk of diversion, civilian harm, misuse, or contrary to any of the other criteria . . . mentioned."[217]

Although the contents of the CAT policy remain unknown, Betts' statement seems to indicate that the Biden Administration has considered a restoration of explicit human rights goals that the Trump Administration removed and potentially a new focus on empowering allies and partners to comply with human rights and international humanitarian law. An emphasis on security sector governance would also be new in the CAT policies, which have not previously considered the issue.

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[214] *Id.*
[215] *Id.*
[216] *Id.*
[217] *Id.*

Figure: Comparison of Human Rights Provisions in the CAT Policies

	Carter	*Reagan*	*Clinton*	*Obama*	*Trump*
Human rights promotion as a goal			*x*	*x*	
Human rights record/promotion as a criterion	*x*		*x*	*x*	
Likelihood of arms contributing to HR/IHL violations as a criterion				*x*	*x*
Blanket restriction on arms transfers with knowledge they will be used to commit atrocities				*x*	*x*

IV. LESSONS LEARNED

While human rights have become an important part of the CAT policies, some administrations have prioritized them more than others in the texts of their policies. Some trends are discernible among the CAT policies issued thus far with respect to human rights considerations, namely continuity between policies and flexibility of policy frameworks. Although those trends present significant limitations in the CAT policies, this Section argues that the policies nevertheless deserve attention and analysis.

A. Continuity

The CAT policies are, by and large, evolutionary documents.[218] The core content of each CAT policy has usually continued from one policy to the next, although deletions, additions, and format changes can have significant implications for human rights issues.[219]

[218] *See* Kirshner, *supra* note 181.
[219] *See* Cohen, *supra* note 200.

Since the Reagan Administration, the CAT policies have been characterized by continuity.[220] Although Democrats have taken measures to emphasize on human rights factors, the underlying structure of the policies remains consistently reliant on multi-factor lists of goals and criteria for arms transfer decisions.[221] While past CAT policies can provide points of comparison to assess President Biden's policy, they also demonstrate the flaws inherent to the prevailing format.

The content of CAT policies generally evolves gradually from one administration to the next. The notable exception was President Reagan's CAT policy, which reversed almost every operational provision of the Carter policy and, in some cases, directly rebutted President Carter's restraint-based approach.[222] However, preserving most of the language of the immediate predecessor policy has been a common practice since the Clinton Administration.

Each CAT policy except the Reagan policy has somehow incorporated human rights. Human rights promotion appeared as a goal of the Clinton and Obama policies and a criterion for considering arms transfers in the Carter policy.[223] The Clinton and Obama policies included the consideration of a recipient's human rights record as a criterion.[224] The Obama Administration also added a specific prohibition on arms transfers with the knowledge that they would facilitate atrocities and the likelihood of arms transfers contributing to violations of human rights or international
humanitarian law.[225] The Trump Administration maintained both of thos
e considerations.[226]

Of the five presidents who have released CAT policies, each Democrat has added new human rights factors, while each Republican has diluted or removed human rights factors. While no Democrat has operated solely

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[220] *See* Kirshner, *supra* note 181.

[221] *Id.*

[222] *Compare* NSDD-5, *supra* note 35, at 616 ("The United States must . . . not only strengthen its own military capabilities, but be prepared to help its friends and allies to strengthen theirs through the transfer of conventional arms and other forms of security assistance"), *with* PD-13, *supra* note 62, at 932 ("I am initiating this policy of restraint . . . we will do whatever we can to encourage regional agreements among purchasers to limit arms mports."); *see also Arms Transfers and Trade–Carter and Reagan*, AM. FOREIGN RELS., https://www.americanforeignrelations.com/A-D/Arms-Transfers-and-Trade-Carter-and-reagan.html (last visited Nov. 14, 2022) [hereinafter *Arms Transfers and Trade*].

[223] *See* PDD-34, *supra* note 35, at 3 ("U.S. conventional arms transfer policy will serve [to] avoid[] human rights violations . . . ."); PPD-27, *supra* note 35, at 31 ("Ensuring that arms transfers do not contribute to human rights violations or violations of international humanitarian law."); PD-13, *supra* note 62, at 932 ("[W]e will continue our efforts to promote and advance respect for human rights . . . .").

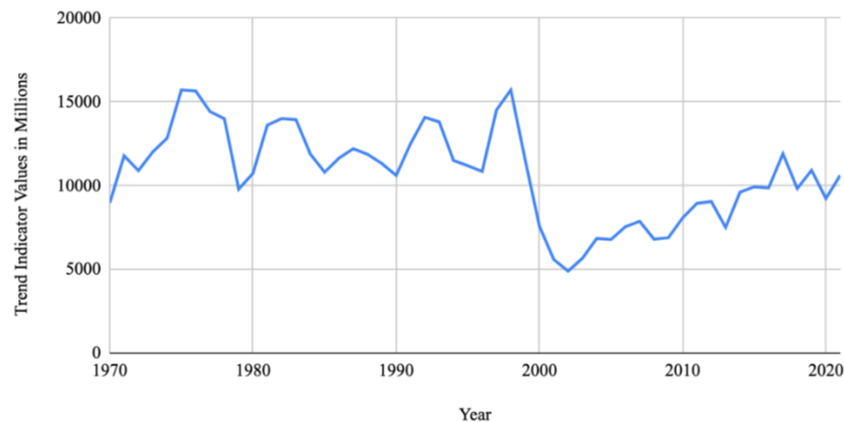
[224] PDD-34, *supra* note 35, at 3; PPD-27, *supra* note 35, at 31.

[225] *See* PPD-27, *supra* note 35, at 33.

[226] NSPM-10, *supra* note 35, at 4.

on a Republican CAT policy (with the exception of President Biden, who is expected to replace President Trump's NSPM-10 soon), two Republicans—President George W. Bush and George H.W. Bush—have operated with Democratic CAT policies intact.

The figure below shows that major changes in the CAT policies do not necessarily map neatly onto the overarching trends in the quantity of U.S. arms exports.[227] For example, the largest reduction in U.S. arms exports occurred in the late 1990s and early 2000s, when there was no new CAT policy implemented. Despite significant changes in the CAT policy from President Obama to President Trump, exports have trended upwards since 2002. Overall trends show that the CAT policies are certainly not the single determinant of the volume of U.S. arms transfers, and significant changes in the policy are not necessarily reflected in overall trends.



B. Flexibility

Since President Reagan, the CAT policies have adhered to a format based on multi-factor lists, which afford executive branch decision-makers a high degree of flexibility. Each subsequent president has based their policy on similar lists. President Carter's model of specific controls only reappeared to a limited extent in the Obama Administration, which added

[227] The figure relies on the Stockholm International Peace Research Institute's Trend Indicator values, which "measures transfers of military capability rather than the financial value of arms transfers." For more information on the methodology, see PAUL HOLTOM ET AL., MEASURING INTERNATIONAL ARMS TRANSFERS 1 (Stockholm Int'l Peace Rsch. Inst. ed., Dec. 2012).

a narrow prohibition on transferring arms with the knowledge that they would be used to commit atrocities.[228]

Even presidents who prioritize human rights in their CAT policy text seem to approve arms sales to recipients who violate human rights and international humanitarian law. While it is easy to highlight problematic arms sales to which every U.S. president has agreed, it is far more difficult to identify specific violations of most CAT policies.[229] The failure of the CAT policies to affect U.S. arms sales outcomes with respect to human rights is rooted in their reliance on multi-factor lists.

The CAT policies' lists of considerations for arms transfers are perhaps their least effective provisions. President Carter's CAT policy consisted mostly of specific prohibitions and benchmarks.[230] The Reagan Administration reversed Carter's policy, instituting the multi-factor lists of goals and criteria that have since characterized every CAT policy.[231] Without clear prioritization, the consideration lists amount to multi-factor tests that reflect a broad range of issues without clarifying how they may relate to each other. As a 2019 report by the Government Accountability Office noted, "the CAT policy does not require State or [the Department of Defense] to evaluate the criteria in any specific way or take any specific actions."[232] While the lists preserve flexibility, they do not necessarily change the outcomes of decisions. So long as an executive branch official can affirm that they have considered human rights, they may approve any arms transfer as they see fit.

C. *Do CAT Policies Matter?*

Examining fifty years of CAT policies invites the question of whether they matter for arms sales outcomes and the protection of human rights. After all, if the policies offer administrations maximal flexibility in their decision-making and typically borrow heavily from their predecessors, how important could the drafting decisions of each administration be? Despite their shortcomings, the CAT policies matter.

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[228] *Compare* PD-13, *supra* note 62, at 931 (broadly construing a set of controls "applicable to all transfers except those to countries with which [the U.S.] ha[s] major defense treaties"), *with* PPD-27, *supra* note 35, at 33 (refusing to authorize "any transfer if [the U.S.] has actual knowledge at the time of the authorization that the transfer will be used to commit . . . crimes against humanity").

[229] The notable exception is President Carter. The specific controls in his CAT policy make it easy to conclude that the Carter Administration did not meet its goals. *See Arms Transfers and Trade*, *supra* note 223.

[230] *See id.*

[231] *See* Kirshner, *supra* note 181.

[232] U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-673R, CONVENTIONAL ARMS TRANSFER POLICY: AGENCY PROCESSES FOR REVIEWING DIRECT COMMERCIAL SALES AND FOREIGN MILITARY SALES ALIGN WITH POLICY CRITERIA 4 (2019).

The CAT policies have an important place among the sources of law and policy that shape U.S. arms transfers. Congress has delegated the bulk of its authority regarding arms sales to the executive branch, and the CAT policies fill in significant gaps in the law to guide civil servants in the Department of State and Department of Defense in arms transfer decisions.[233] Precisely how the CAT policies fill those gaps matters. Administrations can make their CAT policies maximally flexible, but they could also make the CAT policies effective, implementable documents to both guide and constrain future decision-making. Individual arms sales do not typically receive as much thought or attention as CAT policy review processes.[234] The CAT policies could provide an opportunity for administrations to set priorities, enshrine principles, and establish constraints independent from short-term political and economic pressures.

Furthermore, the content of the CAT policies has symbolic and rhetorical value.[235] Presidents rarely make decisions about specific arms sales, which mostly fall to civil servants in the Department of State and Department of Defense.[236] But presidential directives like the CAT policies offer presidents and their appointees opportunities to signal to civil servants about overarching policy priorities.[237] Some presidents go further still, incorporating their CAT policy ideas into major foreign policy speeches and other documents.[238]

The CAT policies shape how external stakeholders engage with the executive branch.[239] For civil society and Congress, the CAT policy can provide a window into how the executive branch thinks about arms transfer policy. The policy review process provides civil advocates and legislators with a chance to engage with executive branch policymakers.[240] Appealing to the CAT policy can help civil society organizations and Congress frame their concerns about particular sales in the executive branch's terms.

The process of drafting the CAT policies also matters. At critical junctures in U.S. foreign policy—during the human rights revolution, after the Cold War, and during the Arab uprisings of 2011—

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[233] *See id.*

[234] Sciarra, *supra* note 54, at 1455, 1456 n.86.

[235] *See Arms Transfers and Trade*, *supra* note 222.

[236] U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 232.

[237] *Id.*

[238] *See, e.g.*, *Arms Transfers and Trade*, *supra* note 222 (noting that President Regan's "pro-sales stance was initially spelled out in a speech by Undersecretary of State James L. Buckley").

[239] *See* Sciarra, *supra* note 54, at 1447–49 (discussing how Congress's role in negotiating with the executive has changed since *Chadha*).

[240] *See* Kevin P. Sheehan, *Executive-Legislative Relations and the U.S. Arms Export Control Regime in the Post-Cold War Era*, 33 COLUM. J. TRANSNAT'L L. 179, 195–96 (1995).

administrations have used the CAT policy review process and the resultant policies to take stock of the status quo and reconsider priorities.[241] In a fast-paced policymaking environment where the urgent can often take precedence over the important, the opportunity for interagency review of decision-making frameworks is valuable.

The CAT policies matter partly because of their enormous potential. The policies could allow presidents to set the tone for arms transfers during their administration with specific, implementable directions from the highest levels of government. With sufficient buy-in, such a CAT policy could be a formidable vehicle for promoting human rights and reducing harm. Unfortunately, no CAT policy thus far has lived up to its potential, but the fact that so much of arms transfer policy falls to presidential direction means that the policies nevertheless deserve attention and study.

V. PRIORITIZING HUMAN RIGHTS

This Section proposes ways that the United States could change its approach to conventional arms transfers—both through the CAT policies and otherwise—to prioritize human rights. Thus, the recommendations do not purport to set forth a perfect policy but rather aim to set benchmarks for how an administration could truly put human rights at the center of their conventional arms transfer decisions.

To be sure, a president can and should strengthen the human rights-related factors and goals in the CAT policies, building on the steps taken during the Clinton and Obama Administrations. But changes that adhere to the overarching CAT policy structure that has predominated since the Reagan era can only go so far. A president who seeks to promote human rights in their CAT policy should go beyond the traditional format and incorporate specific human rights-related prohibitions, including a prohibition implementing Section 502B of the Foreign Assistance Act. Since the executive branch often falls short in defending human rights in arms transfer decisions, Congress also has a significant oversight role in conventional arms transfers and should strengthen existing tools to bolster its oversight capacity.[242]

A. Use Specific Prohibitions and Controls

Lists of considerations provide maximal flexibility for presidential administrations, but they are exceptionally difficult to violate. So long as an administration can claim to have considered human rights factors, it

[241] *See, e.g.*, *id.* at 197 ("The issue of U.S. arms sales to the Middle East, in conjunction with the decline of bipolarism that has accompanied the fall of the Soviet empire, gives fuel to the proponents of substantial new systemic constraints on U.S. arms exports.").

[242] Sheehan, *supra* note 240, at 199.

can make any decision it desires with respect to an arms sale. The CAT policies should serve to constrain a presidential administration and ensure that decision-makers follow through on human rights priorities established during the drafting of the CAT policy. The standard format of the CAT policies since President Reagan focuses on the decision-making process—what factors the administration considers in each proposed sale—without necessarily affecting outcomes.

Specific prohibitions in the CAT policies are more effective than lists of considerations in promoting rights and reducing harm from U.S. arms sales. There are certain circumstances in which the United States should not provide arms, regardless of potential strategic benefits. Presenting arms transfer decisions as a matter of balancing factors, as recent CAT policies have done, is insufficient. From a moral and strategic standpoint, strengthening interoperability cannot outweigh contributing to genocide, for example. The prohibition on arms transfers that will be used to commit atrocities is a welcome acknowledgment of an absolute line that the United States will not cross. The CAT policies need more human rights bright lines. If presidents wish to truly prioritize human rights in their arms transfers, they should identify bright lines and incorporate them into specific, measurable prohibitions alongside more flexible lists of considerations. Such restrictions would help presidents hold their administrations accountable and measure success. The CAT policies could incorporate dollar-value caps or rules that, based on human rights risks, the United States should not transfer arms unless the President certifies the presence of extraordinary circumstances. The precise content of the specific prohibitions and controls would certainly be important, but their specificity and violability would be their most important departures from the status quo.

Even if an administration violates the controls it sets forth in its CAT policy–as the Carter Administration did–the fact that violations are ascertainable is important.[243] The ability of advocates, legislators, and analysts to identify violations of a CAT policy would facilitate advocacy and push the executive branch to improve. Under such circumstances, implementation of the CAT policies would go from a consideration of factors behind closed doors to assessing outcomes accessible to the public. Public accountability would be preferable to the opacity of the status quo.

The CAT policies' specific prohibitions and controls should reduce the risk that U.S. arms transfers will facilitate human rights abuses and violations of international humanitarian law. Unfortunately, the "actual knowledge" requirement of the only express prohibition in PPD-27[244] and

[243] *See Arms Transfers and Trade*, *supra* note 222.

[244] *See* PPD-27, *supra* note 35, at 33 ("The United States will not authorize any transfer if it has *actual knowledge* at the time of authorization . . .") (emphasis added).

NSPM-10[245] sets too high of a standard. Without insight into classified information, there is no indication that either the Obama or Trump Administrations ever had actual knowledge that U.S.-supplied arms would be used to commit atrocities at the time of authorizing a sale. The standard allows decision-makers to remain willfully ignorant of risks without conducting due diligence. For example, it would be difficult to believe that the Trump Administration could not have ascertained that U.S. arms sales to Saudi Arabia would be used to commit war crimes in Yemen. But the actual knowledge standard may allow the Administration to claim ignorance. Thus, the standard should be reduced to require that the United States does not authorize arms sales when it assesses, based on all relevant circumstances and the human rights record of the recipient, that there is a substantial risk the arms would be used to commit the atrocities listed in the policy.

Future administrations could institute presumptions of denial for arms sales that pose particular human rights risks. President Carter's CAT policy noted that "the burden of persuasion will be on those who favor a particular arms sale, rather than those who oppose it."[246] A scoped revival of that principle would be appropriate in instances where arms sales are likely to contribute to violations of human rights or international humanitarian law. For example, the executive branch could implement a quantitative evaluation system similar to the Cato Institute's Arms Sales Risk Index[247] and institute a presumption of denial for sales to countries above a specified risk threshold.

B. Implement Section 502B of the Foreign Assistance Act

A CAT policy that takes human rights seriously should implement Section 502B of the Foreign Assistance Act, which prohibits security assistance, including arms sales,[248] to "any country the government of which engages in a consistent pattern of gross violation of internationally recognized human rights."[249] Congress enacted the precursor to Section 502B in 1973 and gradually strengthened the statute in subsequent years.[250] Only in 1978, after President Carter released his CAT policy, did

[245] NSPM-10 *supra* note 35, at 4 ("In making arms transfer decisions, the executive branch shall account for . . . whether the United States has *actual knowledge* at the time of the authorization . . . .") (emphasis added).

[246] PD-13, *supra* note 62, at 931.

[247] *See* A. Trevor Thrall & Jordan Cohen, *2021 Arms Sales Risk Index*, CATO INST. (Jan. 18, 2022), https://www.cato.org/study/2021-arms-sales-risk-index.

[248] 22 U.S.C. § 2304(a)(2), (d)(2)(B).

[249] *Id.* § 2304(a)(2).

[250] *See* Weissbrodt, *supra* note 59, at 241.

Congress amend Section 502B to make it a binding directive.[251] Nonetheless, no president since Carter has made a significant effort to comply with the law. The State Department has claimed that the law is "overly broad."[252] Each year, the State Department's Country Reports on Human Rights Practices, which Section 502B requires,[253] document gross violations of human rights by governments receiving U.S. security assistance. In some cases, gross violations have continued for five years or more, seemingly amounting to a consistent pattern.[254] Without executive branch commitment to Section 502B, security assistance to such countries continues unabated despite the law's binding prohibition.

Section 502B is similar to the Leahy Laws—both prohibit security assistance to proposed recipients that commit gross violations of human rights.[255] But while teams of civil servants conduct Leahy vetting to prevent violations, no such commitment exists for Section 502B.[256] A commitment to implementing Section 502B in the CAT policies could provide the momentum necessary to create Leahy-like procedures for Section 502B.

Part of the reason for Section 502B's non-implementation is that the statutory term "consistent pattern" remains undefined.[257] In the rare cases when Congress presses executive branch officials on Section 502B implementation, the lack of a definition of "consistent pattern" allows executive branch lawyers to argue that no consistent pattern of gross violations of human rights exists in a particular country.[258] Federal courts have twice heard lawsuits regarding alleged violations of Section 502B

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[251] *See* Cohen, *supra* note 75, at 250.

[252] *See* NINA M. SERAFINO ET AL., CONG. RSCH. SERV., R43361, "LEAHY LAW" HUMAN RIGHTS PROVISIONS AND SECURITY ASSISTANCE: ISSUE OVERVIEW 3 n.8 (2014).

[253] 22 U.S.C. § 2304(b).

[254] This is the case for Saudi Arabia, Egypt, the Philippines, and Nigeria, among other countries. *See* Elisa Epstein, *It's Time for the U.S. to Stop Selling Weapons to Human Rights Abusers*, HUM. RTS WATCH (Jul. 21, 2021, 4:13 PM), https://www.hrw.org/news/2021/07/21/its-time-us-stop-selling-weapons-human-rights-abusers.

[255] *Compare* 22 U.S.C. § 2378d(a) ("No assistance shall be furnished under this Act . . . if the Secretary of State has credible information that such unit has committed a gross violation of human rights."), *with* 22 U.S.C. § 2304(a)(2) ("[N]o security assistance may be provided to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights.").

[256] *See* Daniel R. Mahanty, *The "Leahy Law" Prohibiting U.S. Assistance to Human Rights Abusers: Pulling Back the Curtain*, JUST SEC. (June 27, 2017), https://www.justsecurity.org/42578/leahy-law-prohibiting-assistance-human-rights-abusers-pulling-curtain/.

[257] *See* 22 U.S.C. § 2304(d) (defining other terms used in the statute but not "consistent pattern").

[258] *See, e.g.*, *Defining the Military's Role Towards Foreign Policy: Hearing Before the S. Comm. on Foreign Rels.*, 110th Cong. 36 (2008) (statement of Sen. Russell D. Feingold).

with security assistance to Nicaragua and El Salvador.[259] But the courts dismissed the suits on equitable discretion and standing grounds and did not assess whether gross violations of human rights were consistent.[260]

The other ambiguous definition in Section 502B lies in its characterization of gross violations of human rights. The act defines gross violations of internationally recognized human rights to include: (1) torture or cruel, inhuman, or degrading treatment or punishment; (2) prolonged detention without charges and trial; (3) causing the disappearance of persons by the abduction and clandestine detention of those persons; and (4) other flagrant denial of the right to life, liberty, or the security of person.[261] The final, catch-all clause in the definition would benefit from clarification. Non-binding sources of legal scholarship provide some guidance as to what sorts of violations amount to "other flagrant denial of the right to life, liberty, or the security of person."[262] But an administration could publicly clarify in its CAT policy what it would consider a "flagrant denial of the right to life, liberty, or the security of person." Such a clarification would provide an opportunity for Congress and civil society organizations to engage and advocate for an administration to follow through on its commitments.

Future CAT policies could direct executive branch officials to comply with Section 502B. Specifically, the CAT policy could note the binding authority of Section 502B and define ambiguous terms in the statute such as "consistent pattern" and "other flagrant denial of the right to life, liberty, or the security of person." The president could incorporate Section 502B vetting into existing Leahy vetting procedures and appropriately resource vetting teams. If necessary, the president could use the statute's waiver authority in extraordinary circumstances with a certification to the Chair of the House Foreign Affairs and Senate Foreign Relations Committees, preserving some flexibility while creating an opportunity for congressional oversight.[263]

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[259] *See* Clark v. United States, 609 F. Supp. 1249, 1249 (D. Md. 1985); Crockett v. Reagan, 558 F. Supp. 893, 893 (D.D.C. 1982).

[260] *See Clark*, 609 F. Supp. at 1250. *Contra Crockett*, 558 F. Supp. at 901 ("[I]t is unnecessary to reach the other asserted bases for dismissal, which include standing, equitable discretion[,] and lack of a private right of action.").

[261] 22 U.S.C. § 2304(d)(1).

[262] *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELS. L. § 702 (Am. L. Inst. 1987). Additionally, an expert opinion commissioned by the ABA Center for Human Rights argued that intentional, disproportionate, or indiscriminate attacks in Yemen resulting in the loss of civilian life constitute a "flagrant denial of the right to life" under Section 502B. MICHAEL NEWTON, AN ASSESSMENT OF THE LEGALITY OF ARMS SALES TO THE KINGDOM OF SAUDI ARABIA IN THE CONTEXT OF THE CONFLICT IN YEMEN 7 (2017), https://s3.documentcloud.org/documents/3727674/ABA-CHR-Assessment-of-Arms-Sales-to-Saudi-Arabia.pdf.

[263] *But see* 22 U.S.C. § 2304(a).

C. *Exercise Congressional Oversight*

Although the CAT policies are important parts of U.S. arms transfer law and policy, they are far from the only vehicles available to promote compliance with human rights and international humanitarian law and reduce harm from U.S. arms sales.[264] The structural flaws in the CAT policies demonstrate the need for legislative action. Congress, too, must play a robust role in exercising oversight for executive arms sale decisions. However, the joint resolution of disapproval mechanism upon which Congress relies for oversight does not function as intended.

The joint resolution of disapproval mechanism in the AECA requires affirmative congressional action to gather a supermajority that can block or modify an arms transfer.[265] There has not been a significant overhaul of the U.S. arms sales legal regime since *INS v. Chadha* invalidated the legislative veto in 1983.[266] Before *INS v. Chadha*, lawmakers could pass concurrent resolutions to block arms sales without a presidential signature.[267] Instead of relying on joint resolutions of disapproval, lawmakers should shift the burden to the executive branch, requiring the president to secure congressional approval to carry out major arms sales to countries that are not U.S. allies.[268] A resolution of approval mechanism, which advocates call "flip the script," to replace the resolution of disapproval lowers the barrier to congressional oversight.[269] While Congress currently must rally bicameral supermajorities for a joint resolution of disapproval, it could prevent objectionable arms transfers

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[264] CHAPPELL & BENOWITZ, *supra* note 37, at 9 (suggesting that legislators could draft resolutions approving arms sales contingent upon enhanced end-use monitoring, demonstrated capacity to use the weapon lawfully in realistic circumstances, or agreement to not rely on unverified information for targeting, among other things).

[265] *Id.* at 5.

[266] INS v. Chadha, 462 U.S. 919, 959 (1983). The Court stated, "[t]o accomplish what has been attempted by one House of Congress in this case requires action in conformity with the express procedures of the Constitution's prescription for legislative action: passage by a majority of both Houses and presentment to the President." *Id.* at 958.

[267] *Types of Legislation*, U.S. SENATE, https://www.senate.gov/legislative/common/briefing/leg_laws_acts.htm (last visited Nov. 11, 2022).

[268] Then-Senator Joe Biden recommended such a reform after *INS v. Chadha* became law in 1984, writing, "I believe that the loss of the [legislative veto] will make it difficult for Congress to meet its responsibilities in a limited number of foreign policy areas. My primary concern is foreign policy—especially war powers and arms exports control." Joseph R. Biden, *Who Needs the Legislative Veto?*, 35 SYR. L.J. 685, 685 (1984). Drawing the line at non-allies would leave out some countries that nevertheless have concerning human rights records, but it provides a compromise while shifting the presumption against the majority of the most concerning arms sales.

[269] Dan Mahanty & Annie Shiel, *Time to Flip the Script on Congressional Arms Sales Powers*, HILL (Mar. 15, 2020, 6:00 PM), https://thehill.com/opinion/national-security/487347-time-to-flip-the-script-on-congressional-arms-sales-powers.

with a majority in one chamber under a flip-the-script approach.[270] Congressional mobilization around arms sales to Ukraine demonstrates that legislators can still rally a majority to approve arms transfers they perceive as important to U.S. interests, assuaging concerns that gridlock might block important sales.[271] Instead, such votes would force a debate on controversial major arms sales to countries that are not NATO members or major non-NATO allies. Furthermore, in situations where the prompt transfer of arms is urgent, the President could invoke the drawdown authority, which allows the transfer of up to $200 million in U.S. defense articles or services during unforeseen emergencies.[272] The drawdown authority would not be subject to a joint resolution of approval.

Members of Congress have introduced flip-the-script legislation. In 1986, soon after Congress amended the AECA to require a joint resolution instead of a concurrent resolution in response to *INS v. Chadha*, Congress passed a joint resolution of disapproval prohibiting President Reagan's proposed sale of $354 million in missiles to Saudi Arabia.[273] However, President Reagan vetoed the resolution and convinced thirty-four senators to vote against an override, preventing the Senate from overcoming his veto by just one vote.[274] The 1986 Saudi arms transfer demonstrated the burden placed on Congress after *INS v. Chadha*.[275] Then-Senator Joe Biden (D-Del.) and Congressman Mel Levine (D-Cal.) proposed a bill[276] requiring congressional approval for certain "sensitive sales" to "restore a balance between the executive and legislative branches on foreign arms transfers."[277] In 2019, echoing the events of 1986, Congress failed to override President Trump's veto of another arms sale

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[270] *See* Tompa, *supra* note 53, at 327. Another way to require congressional approval of arms sales would be revoking delegations of authority to the President and creating a fast-track process. A fast-track process is "an expedited legislative procedure, found most prominently in . . . trade laws, whereby Congress authorizes the president to initiate a foreign-affairs action . . . in exchange for a commitment [that] he will submit the product of that action back to Congress for final approval." HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 176 (1990). For discussion of the benefits of a fast-track structure, see *id.* at 176–78; Sciarra, *supra* note 54, at 1449–53.

[271] *See generally* Jeff Abramson et al., *Arms Transfers to Ukraine*, FORUM ON THE ARMS TRADE, https://www.forumarmstrade.org/ukrainearms.html (last updated Nov. 11, 2022).

[272] *See* 22 U.S.C. § 2318(a)(1).

[273] S.J. Res. 316, 99th Cong. (1986); *see also* Edward Walsh, *Senate, 73 to 22, Rejects Sale of Weapons to Saudi Arabia*, WASH. POST, May 7, 1986, at A1.

[274] Sciarra, *supra* note 54. President Reagan vetoed a resolution of disapproval again in 1988, pushing through a $2 billion dollar arms sale to Kuwait. KOH, *supra* note 270, at 51.

[275] Sciarra, *supra* note 54, at 1447–48.

[276] S.J. Res. 316, 99th Cong. (1986).

[277] Joseph Biden & Mel Levine, *Foreign Policy Role for Congress*, N.Y. TIMES, Apr. 2, 1987, at A30.

to Saudi Arabia.[278] Based on the text of Senator Biden's bill, Senator Chris Murphy (D-Conn.) proposed a bill using the "flip the script" approach "where the [A]dministration proposes to sell the most lethal or technologically advanced weapons" to countries other than key allies.[279]

Some have expressed concern that "flipping the script would further burden[] an already overburdened and generally disinterested Congress."[280] Requiring constant votes to require any arms transfer could hinder lawmaking. In his *Chadha* dissent, Justice White expressed similar concern about Congress's options without the legislative veto:

> Congress is faced with a Hobson's choice: either to refrain from delegating the necessary authority, leaving itself with a hopeless task of writing laws with the requisite specificity to cover endless special circumstances across the entire policy landscape, or in the alternative, to abdicate its lawmaking function to the Executive Branch and independent agencies.[281]

A hybrid approach that requires resolutions of approval for only major arms transfers to non-allies addresses concerns about Congress's workload. By limiting resolutions of approval to the riskiest arms transfers, Senator Murphy's proposal limits votes while facilitating oversight of arms transfers that pose the greatest human rights risks.[282] A coalition of civil society organizations estimated that Senator Murphy's legislation, and its House companion, would "only require votes on approximately 60 cases per year, many of which could be packaged together to reduce the number of votes."[283]

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[278] Edmondson, *supra* note 54.

[279] Sen. Chris Murphy, *National Security is Stronger When Congress is Involved. Here's How We Get Back to the Table,* WAR ON THE ROCKS (July 20, 2021), https://warontherocks.com/2021/07/national-security-is-stronger-when-congress-is-involved-heres-how-we-get-back-to-the-table/. The National Security Powers Act, Title II of which incorporates the flip-the-script framework, also includes titles on reasserting congressional oversight in the areas of war powers and national emergencies. *See* S. 2391, 117th Cong. §§ 101–110, 301–306 (2021).

[280] *See* Tompa, *supra* note 53, at 327.

[281] INS v. Chadha, 462 U.S. at 968 (White, J., dissenting).

[282] *CIVIC Welcomes Bipartisan Legislation on U.S. Arms Transfers Oversight*, CTR. FOR CIVILIANS IN CONFLICT (July 20, 2021), https://civiliansinconflict.org/press-releases/nspa-legislation/.

[283] Letter from Arms Control Association et al., to Bob Menendez, Chairman, S. Foreign Rels. Comm. et al. (Oct. 26, 2021), https://civiliansinconflict.org/press-releases/ngo-letter-to-congress-on-arms-transfer-oversight-legislation/.

D. Arsenal of Democracy or Merchant of Death?

Eight decades ago, the United States built an arsenal of democracy that has mutated into a military industrial complex. As the world's leading exporter of weapons, the United States now plays a key role in conflicts around the globe.[284] For many people overseas, munitions emblazoned with "Made in USA" have become the face of U.S. foreign policy. While arms exports can facilitate great harm, they can also yield significant benefits, requiring U.S. decision-makers to carefully consider decisions to approve arms sales abroad.[285]

Congress has delegated many of the most important arms sales authorities to the president.[286] Since 1977, five presidents have promulgated conventional arms transfer policies to guide their administrations' arms sales choices.[287] While President Carter issued a CAT policy based on arms transfer restraint and a series of specific controls, President Reagan soon reversed it and established a pattern in the CAT policies that has lasted to this day: Presidents make conventional arms transfer decisions on a case-by-case basis using lists of considerations that change slightly from one administration to the next.[288]

The longstanding format of the CAT policies affords the executive branch a great deal of flexibility. But that flexibility means that a president can make decisions as they see fit so long as they consider human rights among other factors. Lists of considerations need not have any constraining effect on executive decision-making.

Presidents who seek to promote and protect human rights in their CAT policies should implement specific, measurable restrictions to promote human rights. President Obama included in his CAT policy the first blanket prohibition on arms sales, albeit a narrow one, since the Carter Administration.[289] Other presidents should build on that model,

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[284] William Hartung, *We're #1: The U.S. Government is the World's Largest Arms Dealer*, FORBES (Mar. 18, 2022 12:43 PM), https://www.forbes.com/sites/williamhartung/2022/03/18/were-1-the-us-government-is-the-worlds-largest-arms-dealer/?sh=666b277b5bb9.

[285] *See* Thrall & Dorminey, *supra* note 17.

[286] Sheehan, *supra* note 240, at 190–91.

[287] U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 232, at 1. Note that this Article was written prior to the Biden Administration's release of NSM-18.

[288] *See* Kirshner, *supra* note 181.

[289] *Compare* PPD-27, *supra* note 35, at 31 ("[T]he policy promotes restraint, both by the United States and other suppliers, in transfers of weapons systems that may be destabilizing or dangerous to international peace and security."), *with* PDD-34, *supra* note 35, at 5 (discouraging a blanket policy of restraint), *and* NSDD-5, *supra* note 35, at 616 (making no mention of a prohibition on arms sales), *and* PD-13, *supra* note 62, at 931 ("I have concluded that the United States will henceforth view arms transfers as an exceptional foreign policy implement, to be used only in instances where it can be clearly demonstrated that the transfer contributes to our national security interests.").

identifying human rights lines that they will not cross and committing their administrations to implement specific restrictions.

One particular restriction that the executive branch should implement in the CAT policies is the binding prohibition established in Section 502B of the Foreign Assistance Act: no arms sales shall be made "to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights."[290] Never has a President implemented the provision. By defining key terms and prioritizing implementation procedures in the CAT policy, a President could avoid identifying the United States with the worst human rights abuses, reduce moral complicity in gross violations of human rights, and send a powerful message of commitment to protecting and promoting human rights.

However, Congress, too, must live up to its proper oversight role. Unfortunately, Congress's foremost tool to block arms sales of concern—the AECA's joint resolution of disapproval—has not functioned since 1983.[291] In that year, *INS v. Chadha* invalidated the legislative veto and effectively ensured that Congress would need to muster two-thirds supermajorities in both chambers to overcome a presidential veto and block an arms sale. Congress has never done so.[292] Congress can enhance its ability to influence arms sales by passing legislation to shift to a presumption against the riskiest arms sales.

While conventional arms transfer policy may seem like an obscure area of executive branch decision-making, its consequences are felt around the world, especially where American explosives rain upon cities, where American teargas disperses protests, and where American weapons kill civilians. If the United States seeks to be an arsenal of democracy and a protector of human rights, it needs CAT policies that effectively prioritize human rights concerns. While balancing the diverse considerations associated with arms sales is difficult, this Article has offered guidance for decision-makers who wish to tip the scales in favor of human rights.

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[290] 22 U.S.C. § 2304(a)(2).

[291] KOH, *supra* note 270, at 141.

[292] PAUL K. KERR, CONG RSCH. SERV., RL31675, ARMS SALES: CONGRESSIONAL REVIEW PROCESS 5 (2022).

SEEKING TRANSITIONAL JUSTICE THROUGH RECONCILIATION IN A TROUBLED TRANSITION: THE LEGITIMACY, PERFORMANCES, AND LIMITS OF THE ETHIOPIAN RECONCILIATION COMMISSION

Kinkino Legide[*]

ABSTRACT

The Ethiopian People's Revolutionary Democratic Front ("EPRDF") succeeded the ruthless Marxist Derg regime in May 1991 and ruled Ethiopia for nearly three decades until May 2018. Beginning in 2015, however, the EPRDF regime witnessed the outbreak of unprecedented violent popular protests due to various grievances which profoundly resulted in the ambiguous demise of the regime in 2018. Subsequently, the so-called new "reformist coalition" emerged from within and took some initially commendable political and judicial measures. To address Ethiopia's challenges, which are rooted in its contested past and current troubled political situation, the Ethiopian Reconciliation Commission was established in December 2018, for a three-year term, as a key transitional justice measure through which the country sought to investigate the root causes of past violence and conflicts, probe historical injustices, and ensure peace and reconciliation.

Such Truth and Reconciliation Commissions ("TRCs") have proliferated as a standard global measure for effectively addressing challenges of conflict and post-conflict settings. The role of TRCs is particularly important in reconciling deeply divided societies that have experienced ethnopolitical conflicts. But there is a persistent lack of certainty and empirical assessment about the actual processes and impacts of TRCs, especially in illiberal contexts. When the Ethiopian Reconciliation Commission is viewed by conventional standards, there are serious gaps regarding the manner in which it was established, how its material and

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temporal jurisdiction is determined, and how it maintains its independence and autonomy. Nevertheless, this topic is not treated seriously in light of the comparative experiences of other relatively successful jurisdictions. Therefore, this Article attempts to address how the Ethiopian Reconciliation Commission emerged and fared in Ethiopia's constrained and unstable political environment. Specifically, this Article argues that given Ethiopia's prevailing, precarious political situation, pursuing restorative justice through the Reconciliation Commission was a step in a positive direction. However, a closer assessment reveals that its establishment process was deeply flawed given that it did not involve the participation of important wider actors, has been a hollow process, was implemented in a top-down and exclusionary manner, and was manifestly driven by instrumentalist motives rather than as a reflection of honest political commitment to genuine political and societal reconciliation. Ultimately, these factors culminated in an institution whose legitimacy, credibility, and performance are questioned. This fact became palpable when the Commission was unceremoniously dissolved in March 2022 without achieving any of its declared institutional goals and was replaced with the National Dialogue Commission. Ultimately, this Article recommends that Ethiopia carefully learn from other "successful" TRC experiences and from its own past failure when erecting similar TRC institutions that aim to transform the country from the reigning political abyss to a peaceful, reconciled, and democratic polity. Until TRCs are established based on correct diagnoses of prevailing problems and can be adequately supported by negotiated, inclusive, and genuine political commitments, the proliferation of transitional justice institutions in different names will fail to successfully address Ethiopia's multifarious challenges.

I. INTRODUCTION

> There was a very real risk that the country would stumble down a path of bloody and prolonged conflict, as has been the experience of so many nations struggling to overcome internal divisions. With the eyes of the world on this country . . . the people of South Africa initiated the Truth and Reconciliation Commission, eschewing revenge and violence in favor of truth and forgiveness, and ultimately, the reconstruction of our country. As a result, South Africa today stands as a model of merciful justice; of what can be achieved when enemies choose dialogue over violence.[1]

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[1] Desmond M. Tutu, *Reflections on Moral Accountability*, 1 INT'L J. TRANSNAT'L JUST. 6, 6–7 (2007).

– Archbishop Desmond Tutu,
Chairperson of the South African
Truth and Reconciliation
Commission

The above quote by Archbishop Demond Tutu is about South Africa during its transition into a post-apartheid society. It generally and aptly pinpoints the puzzling challenges and dire political situations many post-conflict or transitioning States face during their transitional political period in the process of the searching for justice and peace. Today, Ethiopia finds itself at a critical juncture like that which Archbishop Desmond Tutu described regarding the South African case which took place before a Truth and Reconciliation Commission three decades ago. However, the situation in Ethiopia differs from those of other contemporaneous transitions in Africa and elsewhere. Specifically, it differs from the rampant abuse perpetrated under South Africa's apartheid regime and the type of transition that took place there.[2] It also differs from the transition which took place after the Rwandan genocide and the subsequent justice measures taken by the Rwandan Government.[3] South Africa's political change towards democracy and transition to a "stable and just society" was mediated through the efforts of its famous institution, the Truth and Reconciliation Commission, which was established in 1995.[4] Despite varying perceptions of what it entails, a democratic government, led by charismatic leader Desmond Tutu, was South Africa's preferred institutional design to respond to its unjust past.[5]

[2] *Compare Transitional Justice in South Africa*, FACING HIST. & OURSELVES (May 12, 2020), https://www.facinghistory.org/resource-library/transitional-justice-south-africa ("[A]fter nearly 50 years of apartheid and hundreds of years of racial violence and oppression, South Africa made a peaceful transition to a more democratically elected government . . . ."), *with Ethiopia is in Transition Defined by No Clear Direction*, ETH. OBSERVER (Jan. 8, 2019), https://www.ethiopiaobserver.com/2019/01/08/ethiopia-is-in-transition-defined-by-no-clear-direction-tsadkan-gebretensae/ (noting that transition in Ethiopia has no direction at all).

[3] *See generally* Kari Costanza, *Rwanda: 20 Years Later*, WORLD VISION (last visited Jan. 21, 2023), https://www.worldvision.org/disaster-relief-news-stories/rwanda-20-years-later (noting that the Rwandan genocide began in 1994 shortly after the murder of Rwanda's president, Juvenal Habyarimana, a Hutu—in the following 100 days, 20% of Rwanda's population, one million Tutus and moderate Hutus, were brutally murdered); *see also* Outreach Programme on the Rwanda Genocide and the United Nations, Background Note on the Justice and Reconciliation Process in Rwanda (Mar. 2012), https://www.un.org/en/preventgenocide/rwanda/pdf/bgjustice.pdf (highlighting that the primary responsibility for reconciliation in Rwanda belongs to the National Unity and Reconciliation Commission which is focused on reconstructing the Rwandan identity and encouraging perpetrators and victims to live side-by-side in peace.

[4] *See* François du Bois & Antje du Bois-Pedain, INTRODUCTION TO JUSTICE AND RECONCILIATION IN POST-APARTHEID SOUTH AFRICA 1, 1 (François du Bois & Antje du Bois-Pedain eds., Cambridge Univ. Press) (2009).

[5] *See* Alma Diamond, *Burying the Past and Building the Future in Post-Apartheid South Africa*, BRITANNICA, https://www.britannica.com/story/burying-the-past-and-

As noted, on the other hand, the nature of the current transition and associated justice measures exhibit some differences from those typical in Africa, as introduced above. The transitional justice measures differ in at least two respects. Firstly, unlike injustice perpetrated by South Africa's colonial Apartheid regime, Ethiopia's political problem is endemic, and thus cannot be attributed to colonial legacies. Secondly, the transition did not come out of clear regime change, and during its early phase, it largely remained a political reform from within. Related to the first factor, Ethiopia boasts itself as one of only two uncolonized African states that heroically preserved its survival as an independent state for the longer part of its history.[6] Ethiopia's current political problem is largely a political predicament that is rooted in its own history. The past exploitation and violence which occurred during the country's long and controversial history of state-building in the 19th Century continues to divide its political elites and haunt its present.[7] Moreover, Ethiopia's tumultuous political climate has also worsened on account of the authoritarian political tradition of successive rulers.[8] Over the years, the violent process of "nation-building,"[9] the over-centralization of political power,[10] an exploitative political and extractive economic system,[11] and

building-the-future-inpost-apartheidsouthafrica (last visited Feb. 8, 2023).

[6] Titus Kivite, *Liberia and Ethiopia; the Never Colonized African Countries*, AFR. GLOB. NEWS (Apr 21, 2019), https://africaglobalnews.com/liberia-and-ethiopia-the-never-colonized-african-countries/. On Ethiopia's preservation of its independence, see SVEN RUBENSON, THE SURVIVAL OF ETHIOPIAN INDEPENDENCE (1976), and HAGAI ERLIKH, ETHIOPIA AND THE CHALLENGE OF INDEPENDENCE (1986).

[7] *See generally* Berihu Asgele Siyum, *Underlying Causes of Conflict in Ethiopia: Historical, Political, and Institutional?*, WORLD CONF. ON SOC. SCIS. STUD., 13, 18–20 (2021) (providing background information into Ethiopia's history with recurring conflict, especially that which is the result of governance by de facto leaders and the presence of divided political and social interests in the nation).

[8] Asafa Jalata, *The Ethiopian State: Authoritarianism, Violence and Clandestine Genocide*, 3 J. PAN AFR. STUD. 160, 180–81 (2010).

[9] *See* Estifanos Balew Liyew, *GERD: A Catalyst for Nation-Building Process in Ethiopia*, QEIOS (Oct. 3, 2022), https://www.qeios.com/read/LJ39BR ("Nation building primarily refers to a domestic process when political elites . . . strive to construct a national identity by bridging existing cultural, ethnic, linguistic, or religious divides."); *see also* Endalcachew Bayeh, *Post-2018 Ethiopia: State Fragility, Failure, or Collapse?*, HUMANS. & SOC. SCIS. COMMC'NS. 1, 2 (2022) (noting that state fragility and failure is common in African countries that have engaged in nation-building as this process has resulted in "unending ethnic conflict.").

[10] Christophe Van der Beken, *Ethiopia: From a Centralised Monarchy to a Federal Republic*, 20 AFRIKA FOCUS 13, 14 (2007).

[11] *See generally* DARON ACEMOGLU & JAMES A. ROBINSON, WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY, AND POVERTY 376 (2012) (discussing how extractive politics paves the way for conflict); *see* Fikremariam Molla Gedefaw, *For Prosperity, Ethiopia Needs Institutional Not Individual Strength*, ETH. INSIGHT (Sept. 15, 2020), https://www.ethiopia-insight.com/2020/09/15/for-prosperity-ethiopia-needs-institutional-not-individual-strength/ (analyzing how extractive institutions played a huge role in tilting Ethiopia's economic playing field).

suppression of diverse identities[12] characterized the Ethiopian State. These widespread ethnic grievances generally gave rise to the emergence of what later came to be regarded as the "nationality question,"[13] whose proponents themselves understand it divergently and provide varying solutions to the issue.[14] After the Derg regime hijacked the 1974 Revolution, it introduced "Scientific Socialism" and attempted to build a socialist state profoundly marked by over-centralization of the Government and the suppression of diverse ethnonational groups.[15] The years of murderous campaigns against intelligentsia and opposition heightened during the rule of the Derg regime, and violent ethno-regional wars finally led to its demise in May 1991, paving the way for a political transition in the context of rebel military victory.[16]

Though the Ethiopian People's Revolutionary Democratic Front ("EPRDF"), a coalition of four ethnonational parties, controlled political power in Ethiopia after the demise of the Marxist Derg regime, the party failed to transform the country towards liberal democracy and decent political order.[17] Unfortunately, the euphoria of the post-1991 transition, which well coincided with the "third wave of democratization,"[18] was simply stifled by political wrongs gradually leading Ethiopia towards the resurgence of (semi-)authoritarianism under the centralized vanguard

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[12] Kidane Mengisteab, *Ethiopia's Ethnic-Based Federalism: 10 Years After*, 29 AFR. ISSUES 20, 21 (2001) (emphasizing the role that the marginalization of ethnic groups in Ethiopia played in exacerbating violence and bloodshed in the country).

[13] S*ee generally* Tefera Assefa, *The Imperial Regimes as a Root of Current Ethnic Based Conflicts in Ethiopia*, 9 J. ETHNIC & CULTURAL STUD. 95, 120–21 (2022) (pinpointing the fact that "the Ethiopian conflict possess[es] a mythically created historical discourse of cultural dominance, still claimed by elites of the ethnic core of imperial regimes.").

[14] Sarah Moody, "Prison of Nations?" An Examination of the Ideological Roots of Contemporary Ethiopia's Nationality Policy (Mar. 21, 2023) (Global Honors Thesis, University of Washington, Tacoma) (Digital Commons) (specifying the various ideological differences between the Eritrean and Tigrayan People's Liberation Fronts' perspectives of the nationality question in post-Derg Ethiopia).

[15] ALÉMÉ ESHÉTE, THE CULTURAL SITUATION IN SOCIALIST ETHIOPIA 19 (1982); Jon Abbink, *The Ethiopian Revolution After 40 Years (1974–2014): Plan B in Progress?*, 31 J. DEV'G SOC'YS. 333, 344 (2015) (discussing how centralization under the Derg stifled the Ethiopian economy); *see* Jacob Wiebel, *Atrocities in Revolutionary Ethiopia, 1974–79: Towards a Comparative Analysis*, 24 J. GENOCIDE RSCH. 134, 135–36 (2022) (explaining how the Derg regime largely targeted multi-ethnic groups during the Red Terror).

[16] Alemseged Abbay, *Diversity and State-Building in Ethiopia*, 103 AFR. AFFS. 593, 606–07 (2004).

[17] *See* Jean-Nicolas Bach, Abyotawi *Democracy: Neither Revolutionary nor Democratic, a Critical Review of EPRDF's Conception of Revolutionary Democracy in Post-1991 Ethiopia*, 5 J.E. AFR. STUD. 641, 642–43 (2011) (noting that though the EPRDF initially announced liberal policies between 1991 and 1995, it ultimately stuck to the ideological line for the rest of its rule).

[18] Larry Diamond, *Is the Third Wave of Democratization Over?* An Empirical Assessment 32 (Helen Kellogg Inst. for Int'l Stud., Working Paper No. 236, 1997).

party of EPRDF.[19] For most of its tenure, the regime was led under what has been infamously called the ideology of "revolutionary democracy," which according to Nicholas Batch, was neither revolutionary nor democratic, and operated as an exact opposite to liberalism.[20] Formal power decentralization through federalism was given effect in the post-1991 period, at least constitutionally speaking.[21] Yet, the old problems of centralized, hegemonic authoritarian rule persisted.[22] Therefore, it is widely recognized that the EPRDF's rule was chiefly characterized by authoritarian repression, human rights violations with impunity, deep-rooted and detestable economic crimes, and the marginalization of diverse people (especially from economic benefits), which resulted in an uneven share of Ethiopia's resources.[23] These and other interrelated factors gradually precipitated political grievances among the wider public.[24] The ultimate political consequence was the eruption of the unprecedented, massive, and violent anti-government protests, which originated in the Oromia Region and later expanded to different parts of the country.[25] Thus, from mid-2015 to April 2018, Ethiopia underwent one of the most violent and destructive political periods in its recent history.[26]

The violent public protest and deadly state response threatened the survival of the country[27] and resulted in an unprecedented–though unascertainable–loss of human lives as extra-judicial killings and forced disappearances occurred with impunity and were justified under the vaguely defined state of emergency laws, which were renewed for an

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[19] ADDIS STANDARD, TRANSITION TO DEMOCRACY IN DEEPLY DIVIDED ETHIOPIA: MISSION IMPOSSIBLE? 2 (2021) (explaining that the Ethiopian People's Democratic Front's transition to power in 1991 led to a de facto authoritarian rule); *see* Alex de Waal, *Ethiopia: Transition to What?*, 9 WORLD POL'Y J. 719, 731 (1992) ("The EPRDF blatantly manipulated the elections . . . ."); *see also* Toni Weis, Vanguard Capitalism: Party, State, and Market in the EPRDF's Ethiopia (2016) (Ph.D. thesis, University of Oxford) (on file with the Oxford University Research Archive).

[20] Bach, *supra* note 17, at 641.

[21] *See* KJETIL TRONVOLL, ETHIOPIA: A NEW START? 18–19 (2000) (explaining that the EPRDF Constitution of 1994 established a federal state, contrary to the unitary state which existed under the two former regimes).

[22] *See generally* Tobias Hagmann & Jon Abbink, *Twenty Years of Revolutionary Democratic Ethiopia, 1991 to 2011*, 5 J.E. AFR. STUD. 579, 582 (2011) (indicating that the "old problems" of Ethiopia's authoritative history include tensions pertaining to land ownership, agrarian policies, violent abuse, and top-down rule).

[23] *See id.*

[24] Mebratu Kelecha, *A Critique of Building a Developmental State in the EPRDF's Ethiopia*, CAN. J. DEV. STUD. 1, 5 (2022).

[25] *Id.* at 14–15.

[26] *See id.*

[27] *See* BERTELSMANN STIFTUNG, BTI 2018 COUNTRY REPORT: ETHIOPIA 34 (2018) (discussing factors which lead to Stiftung's conclusion that "Ethiopia cannot continue to be a stable authoritarian state").

extended period.[28] After the violent security crackdown, the EPRDF's internal political cohesion and a trust among the coalition members– previously maintained by dominant party control–collapsed, intra-party animosity resurged, and party structure succumbed to accept the enforced reform agenda.[29] In its final days, the EPRDF's regime therefore, was forced to pave the way for ambiguous political deals and subsequent reforms, which led Ethiopia to its current political period. The most politically significant measure was the forced resignation of Prime Minster Hailemariam Desalegn.[30] Prime Minister Desalegn was replaced by Abiy Ahmed of the Oromo Democratic Party ("OPDO"), which is affiliated with the EPRDF's coalition.[31] In this regard, Abiy's ascendancy to power from a region home to violent protest, and his initial pacifying and unifying speeches as founding narratives[32] brought about a much-needed hope and 'unguarded' optimism and heralded a moment for real political change towards peaceful democratic rule in Ethiopia.[33]

However, the perplexing questions of how to deal with Ethiopia's violent, abusive, long, and more recent past and how to design a legitimate path to a just and peaceful future remained challenging. The answer to this question differed considerably among the various societal and political groups. And different alternative views were aired from different contending political actors and societal groups.[34] More worryingly, the transition period has not been smooth and rather proved to be a tortuous political journey.[35] Unfortunately, in the post-EPRDF period, Ethiopia's much dreamed political reform was plagued by various complex

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[28] *See id.* at 10, 13; *see also Legal Analysis of Ethiopia's State of Emergency*, HUM. RTS. WATCH (Oct. 30, 2016, 11:00 PM), https://www.hrw.org/news/2016/10/31/legal-analysis-ethiopias-state-emergency#_ftn1.

[29] *See generally* INT'L CRISIS GRP., MANAGING ETHIOPIA'S UNSETTLED TRANSITION i–ii (2019) (providing background information into the frictions and history which resulted in Prime Minister Abiy's assumption of power).

[30] *See* Kelecha, *supra* note 24, at 14; Bach, *supra* note 17, at 649.

[31] Salem Solomon, *Ethiopia's Ruling Coalition Paves Way for Abiy Ahmed as New PM*, VOA NEWS (Mar. 27, 2018, 6:27 PM), https://www.voanews.com/a/ethiopia-ruling-coalition-approves-abiye-ahmed-as-new-prime-minister/4319778.html.

[32] *See* Kim Searcy, *The Ethiopian Civil War in Tigray*, ORIGINS (Oct. 2021), https://origins.osu.edu/article/ethiopian-civil-war-tigray?language_content_entity=en.

[33] Yohannes Gedamu, *A Blessing in Disguise for Ethiopia's Abiy Ahmed*, AL JAZEERA (Apr. 15, 2018), https://www.aljazeera.com/opinions/2018/4/15/a-blessing-in-disguise-for-ethiopias-abiy-ahmed; *see Ethiopia's Abiy Ahmed: The Nobel Prize Winner Who Went to War*, BBC NEWS (Oct. 11, 2021), https://www.bbc.com/news/world-africa-43567007.

[34] *See, e.g.*, Laetitia Bader, *To Heal, Ethiopia Needs to Confront Its Violent Past*, HUM. RTS. WATCH (May 28, 2020), https://www.hrw.org/news/2020/05/28/heal-ethiopia-needs-confront-its-violent-past (discussing how Ethiopians have called for a chance to tell their stories while Prime Minister Abiy has focused on reconciliation to deal with the country's violent past).

[35] Birhanu Bitew & Asabu Sewenet Alamineh, *The Theory and Practice of Political Transition in the Post-2018 Ethiopia*, 67 INNOVATIONS 1727, 1737 (2021).

predicaments, and the country experienced new waves of intercommunal violence.[36] Thus, rather than addressing past wrongs, in the years since the EPRDF was weakened and gradually dissolved, new challenges and complexities have emerged in Ethiopia, which have seemingly doomed the promise of the transitional moment and long-awaited political reforms in the country.[37] To make the matter even worse, the transition process unfolded without a broader transitional justice roadmap and was compounded by political ruptures on diverse flashpoints.[38] The shifting ways in which the contradictory political measures were implemented caused some of them to backfire, ruining peaceful transition.

In many transitioning societies that have undergone prolonged violent conflicts and/or authoritarian repression, key questions of how to address the largescale past abuses and how to transform a society to a peaceful order in a non-violent means remained perplexing.[39] Transitional justice emerged at the end of the Cold War period as a key *lingua franca* of the International Community to provide judicial and non-judicial mechanisms to respond to large-scale human rights violations and to ensure non-reoccurrence of such violations in the future.[40] Historically, it mostly relied on the prosecution of predecessor officials, which, in the end, is a narrow and legalistic mechanism.[41] Gradually, therefore, it came to be understood that only single or narrow approaches may not be successful in redressing the multiple challenges and deep wounds of widespread past human rights violations.[42] Thus, it has been suggested

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[36] Tegbaru Yared, *Conflict Dynamics in Ethiopia: 2019–2020*, INSTIT. FOR SEC. STUD., Dec. 2021, at 1, 4, 10; *see* Allard Duursma, *Non-State Conflicts, Peacekeeping, and the Conclusion of Local Agreements*, 10 PEACEBUILDING 138, 140 (2022) ("Communal conflict involves armed fighting between non-state groups that are organised along a shared communal identity, such as an ethnic or religious identity.").

[37] Kinkino Kia Legide, *Exploring the Challenges and Limits in the Compliance with Transitional Justice Norm in Non-Regime Transitions: The Case of Post-2018 Ethiopia*, 13 J.L. & CONFLICT RESOL. 20, 22 (2022); *see id.* at 1, 14.

[38] *Id.* at 14.

[39] *See* Anna K. Jarstad & Timothy D. Sisk, *Introduction*, *in* FROM WAR TO DEMOCRACY: DILEMMAS OF PEACEBUILDING 1, 1–2 (Anna K. Jarstad & Timothy D. Sisk eds., 2008).

[40] *See* Catherine Turner, *Transitional Justice and Critique*, *in* RESEARCH HANDBOOK ON TRANSITIONAL JUSTICE 52, 52–53, 55, 70 (Cheryl Lawther, et al. eds., 2017).

[41] *See* RENÉE JEFFERY & HUN JOON KIM, TRANSITIONAL JUSTICE IN THE ASIA-PACIFIC 9, 10 (2013) (ebook).

[42] *See* DANIEL PHILPOTT, JUST AND UNJUST PEACE: AN ETHIC OF POLITICAL RECONCILIATION 3, 3 (2012) (discussing how approaches only focusing on truth or justice have been respectively criticized by victims); *see also* Pádraig McAuliffe, *Transitional Justice's Expanding Empire: Reasserting the Value of the Paradigmatic Transition*, J. CONFLICTOLOGY, NOV. 2011 at 32, 33 (explaining how transitional justice incorporates many various disciplines); *see also* Naomi Roht-Arriaza, *The New Landscape of Transitional Justice*, *in* TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE 1, 8–9 (Naomi Roht-Arriaza & Javier Mariezcurrena eds., 2006) (describing how "truth" and "justice" moved to be no-longer considered mutually exclusive).

that this can be mainly achieved through a process of political reconciliation along with other restorative justice mechanisms.[43] Generally, reconciliation has a good reputation in transitional justice of restoring communal peace and ensuring peaceful coexistence, especially in a deeply-divided societies and nations that have experienced ethnonational conflicts.[44] As Catherine Lu observes, in the wake of those political catastrophes, and more commonly–state perpetrated violence–a call for justice and reconciliation has become a widespread phenomenon in contemporary world politics.[45]

From 2018 onwards, Ethiopia has been undergoing a chaotic, complex, and troubled political process, which makes the agenda of justice and reconciliation imperative. But the reconciliation rhetoric only lately became the key policy measure of the new ruling elites in post-2018 transitional period in Ethiopia. The resort to reconciliatory measure seems to arise from the unwelcome experience of the previously used retributive approach following post-1991 transition, whose impact remained largely contested. As a part of the deliberate effort to pacify interparty, inter-communal, and inter-elite antagonism in the post-2018 period, the Ethiopian Government established the Reconciliation Commission with Proclamation No. 1102/2018.[46] The Proclamation's overall mission is to ascertain and identify the nature, causes, and dimensions of repeated gross human rights violations in Ethiopia; to provide for the full protection of human rights in the country; and to achieve durable peace and reconciliation.[47] Thus, the Reconciliation Commission was established as the preferred institutional mechanism through which to address past wrongs by means of a restorative approach.[48] However, a closer examination of the circumstances in which the Commission evolved reveals that it had several inherent institutional deficits. Principally, it only came out of a narrowly designed "top-down" and exclusionary decision pursued by the Ethiopian Government, which,

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[43] *See* PHILPOTT, *supra* note 42, at 9–12.

[44] *See* Martina Fischer, *Transitional Justice and Reconciliation: Theory and Practice*, *in* ADVANCING CONFLICT TRANSFORMATION: THE BERGHOF HANDBOOK II 406, 415 (Beatrix Austin et al. eds., 2011); *see also Transitional Justice and Reconciliation: Thematic Overview*, SIDA, https://cdn.sida.se/app/uploads/2020/12/01125338/transitional-justice-and-reconciliation.pdf (last visited Mar. 7, 2023); Rudolf Schüssler, *Reconciliation, Morality and Moral Compromise*, *in* NEGOTIATING RECONCILIATION IN PEACEMAKING: QUANDARIES OF RELATIONSHIP BUILDING 27 (Valerie Rosoux & Mark Anstey eds., 2017).

[45] CATHERINE LU, JUSTICE AND RECONCILIATION IN WORLD POLITICS, 29, 33 (2017).

[46] Despite its narrow English rendering, the official Amharic phrase "*Erqe-selam* commission" can be broadly translated as "peace and reconciliation" Commission. *See Reconciliation Commission Establishment Proclamation*, Proclamation No. 1102/2018, Fed. Negarit Gazette, Year 25, No. 27 (Eth.) [hereinafter *Reconciliation Commission Establishment Proclamation*, 2018].

[47] *Id.*

[48] *See id.*

in the end, casts doubt on its institutional legitimacy and the government's real intentions.[49] As can be observed, what has transpired over the past couple of years—the continued civil war in the north (previously in Tigray and currently in Amhara though the latter erupted after the Commission's dissolution), widespread inter-communal violence, and multiple flashpoints of prevailing antagonism within and outside the government circles—clearly show that the Reconciliation Commission's efforts have been unsuccessful.[50] To be fair, some of these challenges are beyond the Commission's capacity. As a natural course of events, the Government officially declared the Commission a failure and took another legislative measure to replace it with the new *National Dialogue Commission*, which was established in December 2021.[51] But it is apparent that a series of measures to erect institutional facades without a real diagnosis of what accounted for the reported failure of the previous institutions and how to address them simply does not mend prevalent challenges which required adequate reckoning.

Ultimately, despite Ethiopia's dire political situation, successive institutional failures, and the urgency of peace and justice, the topic does not get adequate academic attention. Moreover, while the contestations and controversies surrounding the emergence, legitimacy, and performance of the Commission remains as highlighted above, a serious academic interrogation of these issues surrounding the Commission is largely absent. But critical analysis of those points is important to understand the challenges giving rise to and also constraining TRC's operation in Ethiopia. Given Ethiopia's current complex predicaments, the study of this kind will help gain new comparative insights in the process of designing future TRCs in the search for accountability and sustainable peace in the country. In light of the low visibility of the topic in the Ethiopian academic debate, this Article deliberately makes a relatively extensive discussion of the available literature, hoping to connect it to the Ethiopian reality and help inform academic and policy debate. Thus, in light of the above, this Article attempts to assess the contested paths to seeking transitional justice in the post-2018 period of troubled transition in Ethiopia and assesses *the legitimacy and operation* of its TRC in light of the accepted standards. Further, this Article will also

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[49] Hagmann & Abbink, *supra* note 22, at 579, 582, 584, 586 (2011).

[50] *See* Center for Preventative Action, *Global Conflict Tracker: War in Ethiopia*, COUNCIL ON FOREIGN RELS., https://www.cfr.org/global-conflict-tracker/conflict/conflict-ethiopia (last updated Mar. 31, 2023); *see also* Moges Zewiddu Teshome, *Confronting Past Atrocities: A Critical Analysis of the Defunct Ethiopian Reconciliation Commission*, L. DEMOCRACY & DEV., 2022, at 342, 358–59.

[51] *See The Ethiopian National Dialogue Commission*, STRATEGIC INITIATIVE FOR WOMEN IN THE HORN OF AFR. (Feb. 23, 2022), https://sihanet.org/the-ethiopian-national-dialogue-commission-2/.

discuss the Commission's formative and operational limits in achieving its overall mandates in a comparative perspective. Additionally, this Article conceives legitimacy of a certain institution as a juridical entity that is generally accepted by the wider public and other contending actors as a credible body capable of achieving its objectives. This Article analyzes the Ethiopian Reconciliation Commission in light of other Truth and Reconciliation Commissions, which have been used to advocate for and advance peace and reconciliation in various conflict-ridden societies. In assessing the legitimacy and performance of the Ethiopian TRC, this Article will employ some of the framework elements such as public participation in the establishment process, greater degrees of authority and independence, a clean break with the past, transparency and accountability during investigations and findings, institutional and financial autonomy, and the selection process of the Commission's members to assess the measures of the Ethiopian TRC. Ultimately, this Article attempts to respond to the following questions. First, what domestic situation necessitated the establishment of the Commission? Second, what are the achievements and limits of the Reconciliation Commission? Third, what legal and extra-legal factors account for contestations over the Commission's legitimacy and its low visibility and performance from comparative experiences? Though comparison with specific TRC cases is not opted, the attempt is made to draw important insights from some relevant TRC cases, including from other African jurisdictions. This Article has nine Sections. Following the Introduction, Section II briefly discusses the conceptual understanding of transitional justice in post-conflict societies. Section III includes a relatively extended discussions on Truth and Reconciliation Commissions as well as reconciliation processes. Section IV generally presents the political transition and emergence of reconciliation narratives in the post-2018 period in Ethiopia. Section V specifically discusses the emergence of the Ethiopian Reconciliation Commission and is followed by Section VI which analyzes the legitimacy of the same. Section VII briefly presents the performance and limitations of the Commission and is followed by Section VIII which discusses the factors responsible for the Commission's poor performance and limitations. The last Section concludes this Article.

II. TRANSITION AND TRANSITIONAL JUSTICE IN POST-CONFLICT SOCIETIES

The world has witnessed turbulent mass violence committed by state and non-state actors over the years.[52] In the words of Bill Kissane, "the [20th] [C]entury was very violent and civil wars have, increasingly, played

[52] *See* BILL KISSANE, NATIONS TORN ASUNDER: THE CHALLENGE OF CIVIL WAR 66 (2016) (ebook).

a large role in that violence, happening in every region of the world at some point, and seemingly growing in destructiveness."[53] The devastation brought about by civil wars is on a scale traditionally associated with international conflicts.[54] According to scholars in the field, at the root of most of these civil conflicts lies political exclusions and economic inequalities that generate deep-rooted grievances wherein a relationship between ethnonationalism, or group identities, and inequalities helps give rise to organized violence and civil wars by ethnic rebels.[55] In some situations, the conflicts perpetuate, and States may be forced to live under "conflict traps," which produce tragic consequences and in which it becomes "harder to distinguish causes from consequences."[56] The atrocities committed during violent conflicts around the world involved the perpetration of serious crimes such as mass murder, forced disappearances, war crimes, mass rape, ethnic cleansing, acts of genocide, and crimes against humanity, among others.[57]

In periods of political transition—which occur after large-scale human rights violations due to state violence, authoritarian repression, or prolonged violent conflicts[58]—there are pressing issues which governments and policymakers must resolve.[59] Such issues include how to deal with, or address, the serious human rights violations committed by the predecessor regime and long-lasting conflicts and how to stop another one from erupting or ensure durable peace and decent civil order in a non-violent means.[60] Thus, according to Colleen Murphy, attempts to deal with these questions are riddled with "prominent and recurring issues" in many post-conflict societies, and although they display some form of similarities, they are also "not identical."[61]

The key response mechanism mainly involves taking transitional justice ("TJ") measures, which emerged at the end of the Cold War period.[62] Generally, transitional justice as a distinct field of inquiry is concerned with addressing the question of how States (1) attempt to deal with the legacies of large-scale past human rights violations and (2)

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[53] *Id.*

[54] *Id.* at 66, 67.

[55] LARS-ERIK CEDERMAN ET AL., INEQUALITY, GRIEVANCES, AND CIVIL WAR 3–4 (2013); ANDREAS WIMMER, WAVES OF WAR: NATIONALISM, STATE FORMATION, AND ETHNIC EXCLUSION IN THE MODERN WORLD 145 (2012).

[56] KISSANE, *supra* note 52, at 171–72.

[57] NEVIN T. AIKEN, IDENTITY, RECONCILIATION AND TRANSITIONAL JUSTICE: OVERCOMING INTRACTABILITY IN DIVIDED SOCIETIES 1 (2013).

[58] KISSANE, *supra* note 52, at 68–69.

[59] AIKEN, *supra* note 57, at 1.

[60] Jarstad & Sisk, *supra* note 39, at 1–2.

[61] COLLEEN MURPHY, THE CONCEPTUAL FOUNDATIONS OF TRANSITIONAL JUSTICE vii (2017).

[62] AIKEN, *supra* note 57, at 1.

transform their nation into a peaceful political order in the wake of political turmoil, violent armed conflicts, or authoritarian repression.[63] Various definitions have been provided for it by scholars, policy makers, and advocacy groups. Ruti Teitel defines transitional justice as "the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes."[64] In his 2004 widely known report, the U.N. Secretary-General Kofi Annan further defines it as:

> [T]he full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice[,] and achieve reconciliation. [This] may include both judicial and non-judicial mechanisms [such as] individual prosecutions, reparations, truth-seeking, institutional reform, vetting[,] and dismissals or a combination thereof.[65]

The International Center for Transitional Justice ("ICTJ") also provides broad definitions for the subject.[66] These above-cited definitions do not garner universal consensus, and thus they may stir debates with respect to the scope, processes, aims, and outcomes of transitional justice. However, the integration of TJ into the United Nations system as a self-standing field signals that transitional justice has made significant progress.[67] According to McAuliffe, it was once thought to be marginally attached only to negotiated transitions and peace mediations as a subsidiary element but now has "moved from the exception to the norm."[68] Some transitional justice theorists, such as Christine Bell, questioned the

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[63] *Id.*; TRICIA D. OLSEN ET AL., TRANSITIONAL JUSTICE IN BALANCE: COMPARING PROCESSES, WEIGHING EFFICACY 11 (2010); *see* RUTI G. TEITEL, *Transitional Justice and the Transformation of Constitutionalism*, *in* GLOBALIZING TRANSITIONAL JUSTICE: CONTEMPORARY ESSAYS 195 (2014).

[64] Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69, 69 (2003).

[65] U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, 4, U.N. Doc. S/2004/616 (Aug. 23, 2004).

[66] REBECCA GIDLEY, ILLIBERAL TRANSITIONAL JUSTICE AND THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA 18–19 (2019). According to the ICTJ, transitional justice involves "the ways countries emerging from periods of conflict and repression address large-scale or systematic human rights violations so numerous and so serious that the normal justice system will not be able to provide an adequate response." Sergio Triana-E et al., *Law and Order: The Evolution of Transitional Justice in Colombia from the Peace Process with the AUC (2003) to the FARC (2015)*, 51 IBEROAMERICANA: NORDIC J. LAT. AM. & CARIBBEAN STUD. 79, 80 (2022).

[67] Cheryl Lawther & Luke Moffett, *Introduction–Researching Transitional Justice: The Highs, the Lows and the Expansion of the Field*, *in* RESEARCH HANDBOOK ON TRANSITIONAL JUSTICE, *supra* note 40, at 1–2.

[68] *See* PADRAIG MCAULIFFE, TRANSFORMATIVE TRANSITIONAL JUSTICE AND THE MALLEABILITY OF POST-CONFLICT STATES 40 (2017).

claim that transitional justice is a separate field of inquiry. Bell argued instead that it "does not constitute a coherent 'field'" but rather involves a set of broader political bargains in response to the past.[69] While those contentions remain, it is clear that TJ has emerged to be a key normative and policy object in post-conflict contexts.

As Leena Grover observes, while the UN gradually accepted TJ's normative prescriptions, the latter's relationship with the international law within the United Nations system has not been linear process. Rather, it has passed through several stages, currently arriving at a stage where TJ commands an obligation of compliance by the States.[70] Today, it is claimed to be a *lingua franca* of the International Community and has been taken as a normative commitment by global policymakers both "as a [] field of study and practice."[71] As such, its wider acceptance emanates from the fact that it involves crucial mechanisms for closure and condemnation of the old violent or authoritarian political order and the opening of a new chapter of rule of law and rights protection. It additionally involves reaching middle ground, which again requires taking measures that comply with national needs and international standards and incorporates notions of restorative and retributive justice. Thus, originating after the Cold War as a narrow measure, TJ has gradually emerged as a field of constant growth and expansion; its meanings and the subjects it pertains to have also expanded considerably over the years.[72]

However, dealing with past wrongs in the post-conflict state in a fragile political context poses serious challenges with respect to issues such as difficulty of exploring the optimum mechanisms and standards to achieve the goal of transition and sustaining the State.[73] According to Nir Eiskovitis, these contestations require exploring and addressing questions like (1) what is the optimum strategy to close past chapters and transition to decent civil order, and (2) what strategies should the parties pursue in this endeavor once the conflict has subsided?[74] Eiskovitis further states that the field of transitional justice "involves the philosophical, legal, and

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[69] Christine Bell, *Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-Field'*, 3 INT'L J. TRANSITIONAL JUST. 5, 6 (2009).

[70] Leena Grover, *Transitional Justice, International Law and the United Nations*, 88 NORDIC J. INT'L L. 359, 361 (2019).

[71] Lawther & Moffett, *supra* note 67, at 1; *see id.* at 392; *see also* PHILIPP KASTNER, LEGAL NORMATIVITY IN THE RESOLUTION OF INTERNAL ARMED CONFLICT 21 (2015).

[72] *See* McAuliffe, *supra* note 42, at 33–34, 38; *see also* Joanna R. Quinn, *The Development of Transitional Justice*, *in* RESEARCH HANDBOOK ON TRANSITIONAL JUSTICE, *supra* note 40, at 11–12, 29.

[73] RENÉE JEFFERY & HUN JOON KIM, TRANSITIONAL JUSTICE IN THE ASIA-PACIFIC 1 (2013) (ebook).

[74] Nir Eisikovits, *Transitional Justice*, STAN. ENCYCLOPEDIA PHIL., https://plato.stanford.edu/entries/justice-transitional/ (last updated Apr. 4, 2014).

political investigation of the aftermath of war."[75] Addressing those issues requires taking not only legal measures but also involves the "questions of ethics, memory[,] and forgiveness that are as old as mankind."[76]

As noted, violent conflicts are accompanied by mass atrocities with which a State has to reckon. Scholars such as Dianne Orentlicher and Naomi Roht-Arriaza contend that under international law, the State has a duty to investigate, prosecute, and provide some kind of redress in the case of serious crimes such as disappearances, systematic summary executions, crimes against humanity, and torture.[77] As such, the central precepts of the State obligation is that there should be mechanisms for ensuring accountability and that the State is prohibited from granting blanket amnesty to perpetrators of violence.[78] Fulfilling the obligation of the State involves taking wide range of measures depending on the particular circumstances of each case.

Prosecution for past abuses has been a dominant redress measure for long. It is one of the oldest mechanisms used to deal with past atrocities as it dates back to at least 14th Century.[79] As Renée Jeffery and Hun Joon Kim noted, from the inception of the discipline of transitional justice in 1980s, transitional states have increasingly relied on criminal accountability as the most important measure for human rights violations.[80] This has been a result of what William Schabas calls the "lasting legacy of the Nuremberg Tribunal" in the post-WWII period.[81] According to its proponents, in transitional justice processes, trials and prosecutions are thought to be the most meaningful and legitimate measures to deal with past atrocities.[82] Cheryl White argues that "[t]he rationale informing the choice of trials as post-conflict justice mechanisms . . . was that of accountability and deterrence of perpetrators."[83] Accordingly, its proponents stress the view that the legitimacy of the new order can only be maintained by disallowing

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[75] *Id.*

[76] KISSANE, *supra* note 52, at 175.

[77] Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2540 (1991); Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CAL. L. REV. 449, 492 (1990).

[78] *See* Roht-Arriaza, *supra* note 42, at 451; *see also* Louise Mallinder, *Peacebuilding, the Rule of Law and the Duty to Prosecute: What Role Remains for Amnesties?*, BLDG. PEACE IN POST-CONFLICT SITUATIONS, June 1, 2012, at 1, 1.

[79] *See* Roht-Arriaza, *supra* note 42, at 2.

[80] *See* JEFFERY & KIM, *supra* note 73.

[81] William Schabas, UNIMAGINABLE ATROCITIES: JUSTICE, POLITICS, AND RIGHTS AT THE WAR CRIMES TRIBUNALS 1 (2012).

[82] *See* James Gallen, *The International Criminal Court: In the Interests of Transitional Justice?*, *in* RESEARCH HANDBOOK ON TRANSITIONAL JUSTICE *supra* note 40, at 305, 306.

[83] CHERYL S. WHITE, BRIDGING DIVIDES IN TRANSITIONAL JUSTICE: THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA 19 (2017).

impunity on the basis of the strict adherence to criminal law provisions and principles. The concept of impunity is defined in a 2005 report by the United Nations Human Rights Commission as:

> [T]he impossibility, *de jure* or *de facto* of bringing the perpetrators of violence to account–whether in criminal, civil, administrative[,] or disciplinary proceedings–since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.[84]

Both impunity and collective condemnation are unjustifiable measures. Thus, a transitioning State is expected to balance between serving justice and at the same time ensure that the process does not lead to other new grievances. The crucial point to be stressed, therefore, is that while collective punishment of the vanquished *en masse* would precipitate discontent and breed the seeds of resentment, individualization of responsibility through judicial courts would "secure in the person punished the conviction of guilt."[85] On the other hand, strict adherence to the requirements of punishment of perpetrators in the context of societies coming out of extended violence may prove difficult partly due to weak judicial institutions or resource shortages.[86] So, in order to address the inherent inadequacies of criminal trials and complex post-conflict challenges of States characterized by weak political and judicial institutions and weak security systems,[87] TJ also gradually incorporated other diverse measures.[88] Thus, the States also increasingly engaged with other holistic measures which involved truth telling; lustration; security sector and judicial reforms including police, reparations, and

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[84] Hum. Rts. Comm'n, Rep. on the Work of Its Sixty-First Session, U.N. Doc. E/CN.4/2005/102/Add.1, at 6 (2005) (emphasis added).

[85] Eisikovits, *supra* note 74. As Abdoueldahab notes, about 85 heads of state have been prosecuted since 1990 and numerous political and military leaders were put on trial in Latin America, Europe, Africa, and Asia for their role in massive human rights violations. NOHA ABDOUELDAHAB, TRANSITIONAL JUSTICE AND THE PROSECUTION OF POLITICAL LEADERS IN THE ARAB REGION: A COMPARATIVE STUDY OF EGYPT, LIBYA, TUNISIA AND YEMEN 8 (2017).

[86] *See* Natalia Szablewska & Sasha-Dominik Bachmann, *Current Issues and Future Challenges in Transitional Justice*, *in* CURRENT ISSUES IN TRANSITIONAL JUSTICE: TOWARDS A MORE HOLISTIC APPROACH 339, 344 (Natalia Szablewska & Sasha-Dominik Bachmann eds., 2015).

[87] U.N. SECRETARY-GENERAL, UNITED NATIONS APPROACH TO TRANSITIONAL JUSTICE: GUIDANCE NOTE BY THE SECRETARY-GENERAL (Mar. 2010), https://digitallibrary.un.org/record/682111?ln=en.

[88] Roht-Arriaza, *supra* note 42, at 9–10.

reconciliations, memorialization; and other traditional processes in an attempt to guarantee non-repetition of the past atrocities.[89]

Generally, among the diverse claims about the mechanisms and outcomes of transitional justice mentioned above, justice (accountability), truth, reparation, and reconciliation are generally seen as the most widely cited measures,[90] or they constitute "the ideal-type [of] transitional justice policy objectives."[91] Moreover, rather than relying on a "one size fits all" approach, which is restrictive, there has been a call for a holistic approach and recognition that there is a need to strike a balance between various measures.[92] As Roht-Arriaza convincingly puts it, "[o]nly by interweaving, sequencing[,] and accommodating multiple pathways to justice could some kind of larger justice in fact emerge."[93] In this way, it is believed that these mechanisms holistically contribute to meaningful change and assist further consolidation of peace and institutions of the rule of law.[94] But it has also been emphasized that some of these measures may contradict each other. It has been held for long that there is an uneasy relationship between criminal prosecution and peace, giving rise to the infamous "peace-justice dilemma." This phenomenon in turn suggests that they have to be implemented with careful strategy, prioritization, and sequencing which are in turn highly contextual and "resist easy generalization."[95] Moreover, taking holistic measures does not designate only using different measures combined, but it also requires paying attention to local realities.[96]

On the other hand, there are several criticisms raised in relation to TJ's measures, approaches, and outcomes. TJ's constant horizontal growth also broadened its scope and the subjects and activities it deals with.[97] It is argued that this fact renders the subject of transitional justice

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[89] *Id.* at 2, 8; *see* Louis N. Bickford, *Entries on Transitional Justice Methods, Processes, and Practices*, *in* 1 ENCYCLOPEDIA OF TRANSITIONAL JUST. 1, 24 (Lavinia Stan & Nadya Nedelsky eds., 2014).

[90] *See* Bickford, *supra* note 89, at 57–58; Elin Skaar, *Reconciliation in a Transitional Justice Perspective*, TRANSITIONAL JUST. REV., Jan. 2013, at 54, 63–64, 68.

[91] STEF VANDEGINSTE, STONES LEFT UNTURNED: LAW AND TRANSITIONAL JUSTICE IN BURUNDI 238 (2010).

[92] *See* TEITEL, *supra* note 63, at 18–19; Fischer, *supra* note 44, at 411.

[93] Roht-Arriaza, *supra* note 42, at 8.

[94] Anja Mihr, *Regime Consolidation Through Transitional Justice in Europe: The Cases of Germany, Spain, and Turkey*, 11 INT'L J. TRANSITIONAL JUST. 113, 113 (2017).

[95] Paul Gready & Simon Robins, *Transitional Justice and Theories of Change: Towards Evaluation as Understanding*, 14 INT'L J. TRANSITIONAL JUST. 280, 289 (2020).

[96] Louis Francis Monroy-Santander, *Bosnia and Herzegovina: The Challenges and Complexities of Transitional Justice*, *in* TRUTH, JUSTICE AND RECONCILIATION IN COLOMBIA: TRANSITIONING FROM VIOLENCE, 220, 220 (Díaz Pabón & Fabio Andrés eds., 2018).

[97] *See* Thomas Obel Hansen, *The Vertical and Horizontal Expansion of Transitional Justice: Explanations and Implications for a Contested Field*, *in* TRANSITIONAL JUSTICE THEORIES 105, 105–106 (Susanne Bucklet-Zistel et al. eds., 2013).

complex and increasingly contested by academics, practitioners, and policymakers.[98] There is also a considerable debate about TJ's main goals, directions, and achievements. As Lars Waldorf observed recently, "[I]t makes promises that will be hard, if not impossible, to meet in the resource-poor environments where most transitional justice takes place . . . ."[99] Criticisms also abound that the process of knowledge, production, and consumption in the field is dominated by the prescriptions from the Global North and that there remains a grassroots contestations and resistance with those prescriptions by the local African consumers.[100] In sum, today, more criticisms are emerging on the theory and practice of transitional justice, and attempts are being made to rectify its "limitations and deformations" through the "the application of the notion of transformative justice."[101]

III. THE TRUTH AND RECONCILIATION COMMISSIONS ("TRCS") IN TRANSITIONING STATES

As highlighted above, violent conflicts are accompanied by mass atrocities–the fact of which obligates States to take certain kinds of measures to aid the victims and to ensure non-repetition of the same in the future. As such, the growing international view is that there should be accountability for deliberate wrongs through prosecutions and that the State should not grant blanket amnesty for perpetrators of violence.[102] Beyond prosecutions, further studies in the field of transitional justice revealed, that a single approach to reckoning with the largescale past wrongs has proved inadequate.[103] Thus, seeking to deal with past wrongs has increasingly been approached through the intermediary of Truth Commissions as an alternative to, or together with, criminal trials.[104] Truth Commissions are one of the many ways in which the broader idea

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[98] Monroy-Santander, *supra* note 96.

[99] Lars Waldorf, *Expanding Transitional Justice*, *in* AN INTRODUCTION TO TRANSITIONAL JUSTICE, 311, 311 (Olivera Simic eds., 2d ed. 2017).

[100] *See* Jasmina Brankovic & Hugo van der Merwe, *Editors' Preface* to ADVOCATING TRANSITIONAL JUSTICE IN AFRICA: THE ROLE OF CIVIL SOCIETY x–xi, xiv (2018).

[101] Matthew Evans, *In, Against, and Beyond Transitional Justice: Themes and Dilemmas for the Field (or Non-Field)*, *in* BEYOND TRANSITIONAL JUSTICE: TRANSFORMATIVE JUSTICE AND THE STATE OF THE FIELD (OR NON-FIELD) 3, 5 (Matthew Evans ed., 2022); Paul Gready, *Introduction*, *in* FROM TRANSITIONAL TO TRANSFORMATIVE JUSTICE 1, 1–2 (Paul Gready & Simon Robins eds., 2019).

[102] *See* Paul Gready, *Introduction*, *in* FROM TRANSITIONAL TO TRANSFORMATIVE JUSTICE, *supra* note 101, at 1–2; Mallinder, *supra* note 78, at 13–14, 23.

[103] Naomi Roht-Arriaza & Javier Mariezcurrena, *Preface* to TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE, *supra* note 42, at i; OLSEN ET AL., *supra* note 63, at 6–7.

[104] *See* OLSEN ET AL., *supra* note 63, at 134.

of transitional justice is put into action.[105] When a conflict lingers for long periods of time—years or even centuries—anger, hatred, resentment, grudges, and grievances permeate into the society, which makes the idea of sustainable peace "elusive and unrealistic."[106] Truth and Reconciliation Commissions assist societies in looking beyond these traumatic pasts and moving toward healing and living together peacefully.[107] According to Priscilla Hayner, Truth Commissions generally refer to "official bodies set up to investigate and report on a pattern of past human rights abuses."[108] They share the following characteristics:

> (1) [T]ruth [C]ommissions focus on the past; (2) they investigate a pattern of abuses over a period of time, rather than a specific event; (3) a [T]ruth [C]ommission is a temporary body, typically in operation for six months to two years, and completing its work with the submission of a report; and (4) these [C]ommissions are officially sanctioned, authorized, or empowered by the [S]tate (and sometimes also by the armed opposition, as in a peace accord).[109]

Over the past three decades, more than forty Truth and Reconciliation Commissions have been established by States undergoing transition from its atrocious past to some form of peaceful future.[110] Such Commissions proliferated as lawyers, scholars, and policymakers grappled with addressing what role law should play when a country transitions from violent conflict to peace or from authoritarian repression to democracy.[111] However, its proliferation cannot be treated separately from the underlying concept of transitional justice as highlighted by the

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[105] JAMIE ROWEN, SEARCHING FOR TRUTH IN THE TRANSITIONAL JUSTICE MOVEMENT 2–3 (2017).

[106] Ani Kalayjian & Raymond F. Paloutzian, *Back Cover Synopsis* of FORGIVENESS AND RECONCILIATION: PSYCHOLOGICAL PATHWAYS TO CONFLICT TRANSFORMATION AND PEACEBUILDING X (Daniel J. Christie ed., 2009).

[107] Paula Green, *Reconciliation and Forgiveness in Divided Societies: A Path of Courage, Compassion and Commitment*, *in* FORGIVENESS AND RECONCILIATION: PSYCHOLOGICAL PATHWAYS TO CONFLICT TRANSFORMATION AND PEACEBUILDING, *supra* note 106, at 251.

[108] PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY 5 (2002).

[109] Quinn, *supra* note 72, at 21 (emphasis omitted).

[110] PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH COMMISSIONS xiv (2d ed. 2010); GABRIELLE LYNCH, PERFORMANCES OF INJUSTICE: THE POLITICS OF TRUTH, JUSTICE AND RECONCILIATION IN KENYA 91 (2018); Bonny Ibhawoh, *Do Truth and Reconciliation Commissions Heal Divided Nations?*, THE CONVERSATION (Jan. 23, 2019, 3:44 PM), https://theconversation.com/do-truth-and-reconciliation-commissions-heal-divided-nations-109925.

[111] ROWEN, *supra* note 105, at 3.

section above.[112] Actors who rally for different goals such as fighting impunity, achieving redress, or knowing truth about what happened to whom, all support the utilization of Truth Commissions, though concerns exist that the use of such Commissions may open new wounds and make reconciliation difficult.[113] Thus, over the years, Truth and Reconciliation Commissions increased in prominence becoming what Rosalind Shaw calls "a standard part of conflict resolution"[114] and represent "the latest example of the globalization of institutions."[115] At any rate, in post-war settings, "[T]ruth [C]ommissions stand out as a very common choice of [S]tates haunted by their own histories."[116] According to William Schabas, even though it has not been clearly stipulated under foundational international human rights instruments, "there is a growing recognition of a fundamental 'right to truth.'"[117] As per the office of the High Commissioner for Human Rights, it is often invoked in the context of serious violations and breaches of international law such as "summary executions, enforced disappearance, torture, sexual violence, and child[] abduction."[118]

Doubts remain as to how or when the TRC first emerged. According to Joanna Quinn, the Ugandan Commission of Inquiry into Disappearance of People, established in 1974, was the first Truth Commission which was authorized to investigate the cases of hundreds of missing people.[119] However, it has also been asserted that the organized attempt for the use of Truth and Reconciliation Commissions as an alternative, or complement, to criminal prosecutions first began in Chile.[120] Chile experienced brutal military repression during the seventeen-year-long dictatorship of Augusto Pinochet until the country peacefully returned to

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[112] *See id.*

[113] *Id.* at 4–5.

[114] ROSALIND SHAW, RETHINKING TRUTH AND RECONCILIATION COMMISSIONS: LESSONS FROM SIERRA LEONE 1 (2005).

[115] Catherine Jenkins, *A Truth Commission for East Timor: Lessons from South Africa?*, 7 J. CONFLICT & SEC. L. 233, 239 (2002).

[116] James L. Gibson, *On Legitimacy Theory and the Effectiveness of Truth Commissions,* 72 L. & CONTEMP. PROBS. 123, 123 (2009).

[117] William A. Schabas, *Time, Justice, and Human Rights: Statutory Limitation on the Right to Truth?*, *in* UNDERSTANDING THE AGE OF TRANSITIONAL JUSTICE: CRIMES, COURTS, COMMISSIONS, AND CHRONICLING 37 (Nanci Adler ed., 2018).

[118] Press Release, Office of the High Commissioner for Human Rights, "The Truth About Gross Rights Violations Must Be Unveiled"–UN Expert Reminds States of Their Obligation (Mar. 24, 2020).

[119] QUINN *supra* note 72, at 22. However, the Ugandan Commission of Inquiry into Disappearance of People was criticized for being an "artificial enterprise from the start" and was obliged to report to the President, who was dubbed a perpetrator. The Commission's work remained a secret and the findings were not disclosed to the public. *Id.*

[120] *See* MELISSA S. WILLIAMS ET AL., TRANSITIONAL JUSTICE 3 (2012).

democracy in 1990.[121] As Hugo Rojas and Miriam Shaftoe observe, the subsequent Chilean presidents remained committed to their famous declaration: "*Nunca Mas"* roughly meaning "[n]ever again will the [S]tate commit human rights abuses against its people."[122] It is reported that the famous South African TRC of 1995 drew a lesson from the Chilean experience.[123] On the other hand, TRCs are less popular within the European States. According to Nico Wouters, "no European country installed a fully-fledged" state-sponsored truth-seeking commission due to the legacy of the "Nuremberg model" wherein the (legal) truth is solely established through the criminal judicial system.[124]

Recourse to TRC measures can be necessitated by various factors. Margaret Popkin and Naomi Roht-Arriaza identify three key factors which persuade governments to choose a Truth and Reconciliation Commission as a centerpiece of its efforts in confronting its repressive past.[125] Firstly, the nature of human rights violations committed under the predecessor regime during the time of conflict is determinant.[126] Violence; massive disappearances of persons by military regimes at unknown places; secrecy and denial of those crimes; and "the shadowy nature of the killings instilled a climate of fear, suspicion, and social withdrawal" and official acknowledgements have not been received with optimism.[127] Secondly, they hold that normal criminal investigations pose difficulties in some situations and TRCs may help "short-cut" those difficulties.[128] Popkin and Roht-Arriaza note, "indeed, if the judiciary had fulfilled its function, an *ad hoc* commission would not be necessary."[129] The third factor, according to Popkin and Roht-Arriaza, is related to political constraints resulting from the continued existence of a powerful presence of predecessor elites in the new fragile order.[130] In these circumstances, "the room to maneuver will be limited by the still powerful presence of those responsible for the violations but in different ways," so Truth Commissions remain an attractive policy option.[131] One may also add that

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[121] HUGO ROJAS & MIRIAM SHAFTOE, HUMAN RIGHTS AND TRANSITIONAL JUSTICE IN CHILE v (2022).

[122] *Id.*

[123] *See* HAYNER *supra* note 108, at 97. But more than its Chilean counterpart, the South African TRC provided a forum for victims and perpetrators to publicly speak out–a feat that no other TRC had yet achieved–which popularized this body. *See id.* at 41, 97, 99, 100.

[124] NICO WOUTERS, TRANSITIONAL JUSTICE AND MEMORY DEVELOPMENT IN EUROPE (1945-2013) 410 (2014).

[125] *See* Margaret Popkin & Naomi Roht-Arriaza, *Truth as Justice: Investigatory Commissions in Latin America*, 20 L. & SOC. INQUIRY 79, 81–83 (1995).

[126] *Id.* at 81.

[127] *Id.* at 81–82.

[128] *Id.* at 82.

[129] *Id.*

[130] *Id.* at 83.

[131] Popkin & Roht-Arriaza, *supra* note 125, at 83.

even if the above challenges are absent, the deep divisions in the polarized society necessitates TRC processes.

TRCs are known by different names in various jurisdictions.[132] However, Truth Commissions generally represent the common name to designate to all of its variants.[133] They can be formed in different ways such as by unilateral decision of the government, through either mere presidential decrees or approval by parliaments, or through peace accords with rebel groups.[134] The only exception is the case of the Canadian Truth and Reconciliation Commission which was established through a court-mediated negotiation process to investigate the so-called "Residential Schools Case."[135] The Commission on the Truth for El Salvador was the first ever TRC created by a negotiated settlement through the brokerage of the United Nations in 1992.[136] It was then followed by the Guatemalan Historical Clarification Commission established under similar circumstances in 1994.[137] The Colombian TRC came after the 2016 peace settlement between the Colombian Government and the Revolutionary Armed Forces of Colombia ("FARC").[138] Beyond the above mechanisms, several Commissions were established by a U.N. Resolution in the exercise of its mandate under the U.N. Charter to maintain international peace and security.[139]

Moreover, States have options about the role to be played by their respective TRCs. TRCs can be established in conjunction with other TJ measures or as a self-standing measure to document the patterns of past violence and ensure reconciliation.[140] For instance, Argentina, Chile, and

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[132] AMNESTY INT'L, LIBERIA: A BRIEF GUIDE TO THE TRUTH AND RECONCILIATION COMMISSION 1 (2006) (ebook); Priscilla B. Hayner, *Fifteen Truth Commissions–1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q. 597, 601–603 (1994).

[133] AMNESTY INT'L, *supra* note 132, at 5.

[134] Agata Fijalkowski, *Truth and Reconciliation Commissions*, *in* AN INTRODUCTION TO TRANSITIONAL JUSTICE, *supra* note 99, at 94–95.

[135] AMNESTY COMM'N OF THE MINISTRY OF JUST. OF BRAZ. ET AL., TRUTH SEEKING: ELEMENTS OF CREATING AN EFFECTIVE TRUTH COMMISSION 10 (Eduardo González and Howard Varney eds., 2013).

[136] Michal Ben-Josef Hirsch et al., *Measuring the Impacts of Truth and Reconciliation Commissions: Placing the Global 'Success' of TRCs in Local Perspective*, 47 COOP. & CONFLICT 386, 400 (2012).

[137] *Id.*

[138] Sergio Triana-E et al., *supra* note 66, at 79, 80, 89.

[139] *See* Catherine Harwood, *Contributions of International Commissions of Inquiry to Transitional Justice*, *in* RESEARCH HANDBOOK ON TRANSITIONAL JUSTICE, *supra* note 40, at 401, 405. These included: "[f]or example, Yugoslavia Commission, [Security Council Resolution] 780 (1992); Commission of Experts concerning Rwanda, [Security Council Resolution] 935 (1994); International Commission of Inquiry concerning Burundi, [Security Council Resolution] 1012 (1995); Darfur Commission, [Security Council Resolution] 1564 (2004); CAR Commission, [Security Council Resolution] 2127 (2013)." *Id.* at 405 n.29.

[140] Anna Triponel & Stephen Pearson, *What Do You Think Should Happen? Public Participation in Transitional Justice*, 22 PACE INT'L L. REV. 102, 104–105 (2010).

Liberia established their TRCs as the only transitional justice measures to reckon with their past, while Sierra Leone, East Timor, and Rwanda, among others, have used TRC methods combined with other trial-type measures.[141]

There are some desirable qualities of Truth and Reconciliation Commissions when compared to other TJ measures. They include that TRCs are less confrontational, do not ignore the violations perpetrated, and make efforts to do something in the form of reparations for the victims.[142] Murphy observes that Truth Commissions "do not focus primarily on individual perpetrators and victims in isolation, but rather on patterns of interaction and structures of institutions that permit, sanction, or promote such patterns."[143] Truth Commissions help to neutralize and mediate the competing contradictions between "forces of denial and acknowledgement."[144] Thus, Truth Commissions are recognized for their contribution which marks the move away from the prosecution model to a wider "effective and necessary component of peacebuilding."[145] According to Rotberg, while the earlier TRCs were more constrained, the later emerging ones, the prime example being the South African TRC, have had wider powers , mandates, and "extensive goals."[146] As Luc Huyse summarizes, therefore, "Truth Commissions should unearth and reveal the whole truth–or as much as is possible to find."[147]

With regard to their composition, tasks and operation, Truth Commissions can be national, international, and hybrids, which may include both national and international staff.[148] The most notable hybrid TRC was the South African Truth and Reconciliation Commission established with Act 34 of 1995.[149] The South African TRC was charged with "establishing as complete a picture as possible of the causes, nature[,] and extent of the gross violations of human rights which were committed during the period from 1 March 1960 to the cut-off date."[150] Moreover, it the South African TRC was mandated with "facilitating the granting of amnesty" and "restoring the human and civil dignity of . . . victims

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[141] *Id.* at 105.

[142] Roht-Arriaza, *supra* note 42, at 3.

[143] COLLEN MURPHY, THE CONCEPTUAL FOUNDATIONS OF TRANSITIONAL JUSTICE 11 (2017).

[144] Cheryl Lawther, *Transitional Justice and Truth Commissions*, *in* RESEARCH HANDBOOK ON TRANSITIONAL JUSTICE, *supra* note 40, at 342.

[145] *Id.*

[146] Robert I. Rotberg, *Truth Commissions and the Provision of Truth*, *in* TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS 3–4 (Robert I. Rotberg & Dennis Thompson eds., 2000).

[147] LUC HUYSE, ALL THINGS PASS EXCEPT THE PAST 189 (2009).

[148] Agata Fijalkowski, *Truth and Reconciliation Commissions, in* AN INTRODUCTION TO TRANSITIONAL JUSTICE, *supra* note 99, at 91, 95, 96.

[149] ANTJE DU BOIS-PEDAIN, TRANSITIONAL AMNESTY IN SOUTH AFRICA 19 (2007).

[150] *Id.*

by . . . recommending reparation measures in respect of them."[151] According to Nir Eiskovitis, the South African TRC was the result of a political compromise meant to avoid both retributive punishment and impunity. The African National Congress's preferred demand for retributive justice was rejected because it was feared that it would derail the "chance for a democratic South Africa."[152]

IV. TOWARDS RECONCILIATION: THE MEANS AND END OF TRANSITIONAL JUSTICE?

Since the mid-1990s, there has been a dramatic increase in the reconciliation endeavors across the world.[153] Numerous States enacted their laws to promote reconciliation and provided it with institutional arrangements particularity through prominent TRCs as discussed above. Reconciliation has also become a part of peace agreements in post-conflict settings.[154] Among diverse claims, as noted, reconciliation also stands out as one of the key policy objectives of transitional justice.[155] It is especially imperative that when the goal of transitional justice is conceived to be leading towards democracy and peaceful political order ("liberalizing transition"),[156] then political reconciliation should be the central component of the whole process.[157] According to the Swedish International Development Cooperation Agency ("SIDA") reconciliation can be viewed as:

> the process of building or rebuilding relationships damaged by violent conflict, between individuals or groups within the society, or between the population and the [S]tate . . . . The reconciliation process can take place within a state as well as outside of the [S]tate's boundaries. The objective of the engagement in reconciliation processes is to prevent the conflict from re-escalating into violence and create sustainable peace and can be viewed as both a long-term goal and a process.[158]

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[151] *Id.*

[152] Eisikovits, *supra* note 74.

[153] ERIN DALY & JEREMY SARKIN, RECONCILIATION IN DIVIDED SOCIETIES: FINDING COMMON GROUND 3 (2010).

[154] *Id.*

[155] *See Reconciliation in a Transitional Justice Perspective*, *supra* note 90, at 54; *see also* VANDEGINSTE, *supra* note 91, at 7.

[156] MCAULIFFE, *supra* note 68, at 180.

[157] Chum Chandarin, *Transitional Justice and Political Reconciliation in Cambodia*, 4 J. HUM. RTS. & PEACE STUD. 35 (2018).

[158] *Transitional Justice and Reconciliation: Thematic Overview*, SIDA, https://cdn.sida.se/app/uploads/2020/12/01125338/transitional-justice-and-reconciliation.pdf (last visited Mar. 7, 2023).

Generally, political reconciliation has long been associated with transitional justice and it is also one of its major goals, but it is a vague and controversial concept.[159] According to Nevin Aiken, there has been an emerging consensus which claims that there exists a causal relationship between transitional justice, reconciliation, and durable peace.[160] This is because transitional justice measures can serve as a tool to "facilitate societal reconciliation by helping those divided by past violence to put aside their antagonisms and to begin to build new, more conciliatory relationships with one another."[161] In a related fashion, Daniel Philpott holds that reconciliation has been widely understood both as a mechanism and the ultimate end of the transitional justice process.[162] It is broadly seen as the ultimate goal towards which other transitional justice measures such as truth finding, trials, amnesties, and other measures should strive to achieve.[163] Ultimately, as Martina Fischer argued, reconciliation is a necessary requirement for lasting peace since it mainly prevents return to violence.[164] According to SIDA, reconciliation is sometimes seen as related to forgiveness, a concept rooted in Judeo-Christian traditions and which is ultimately understood as "reconciliation with God and the 'restoration of . . . dignity.'"[165] Specifically, in local contexts, culture and religion may put great influence on the process of reconciliation.

Despite the crucial role of reconciliation, Aiken argues that the relationship between transitional justice and reconciliation remained undertheorized, partly due to lack of sufficient dialogue between transitional justice scholars and conflict transformation theorists.[166] Much also depends on the respective contexts of given societies. As Paul Seils puts it, the degree to which transitional justice and reconciliation relate

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[159] PAUL SEILS, THE PLACE OF RECONCILIATION IN TRANSITIONAL JUSTICE: CONCEPTIONS AND MISCONCEPTIONS 1 (2017); *see* Skaar, *supra* note 90, at 69–70.

[160] AIKEN, *supra* note 57, at 2.

[161] *Id.*

[162] Daniel Philpott, *An Ethic of Political Reconciliation*, ETHICS & INT'L AFFS., Winter 2009, at 389, 390; SIDA, *supra* note 158.

[163] *See, e.g.*, Skaar, *supra* note 90, at 54.

[164] *See* Martina Fischer, *Advancing Conflict Transformation: The Berghof Handbook II*, *in* TRANSITIONAL JUSTICE AND RECONCILIATION: THEORY AND PRACTICE *supra* note 44, at 405, 406.

[165] Melody Mirzaagha, *Striving Towards a Just and Sustainable Peace: The Role of Reconciliation*, FICHL POL'Y BRIEF SERIES, 2016, at 1, 1. Mirzaagha also notes that "[r]econciliation finds its roots in the non-political domain, in particular the realm of religion and interpersonal relationships." *Id.* Additionally, "[a]lthough rooted in various religious traditions and languages, these conceptions contribute—albeit at an abstract level—to a broader understanding of reconciliation, one that emphasizes the establishment of harmony, the restoration of relationships, or a return to a more complete state." *Id.* at 1–2.

[166] *See* AIKEN, *supra* note 57, at 3.

to each other depends mainly on context.[167] In the light of the above, reconciliation is suggested especially for deeply divided societies or contested societies.[168] Deeply conflicted societies are generally understood as societies that have a "deep-seated and sharp division in the body politic, whether on ethnic, racial, religious, class, or ideological grounds" and such division is "so acute as to have resulted in or threaten[ed] significant political violence . . . ."[169] Furthermore, a "deeply divided society" can also be characterized as a "societ[y] in which there [are] no transcendent democratic principle that enable[] legitimate, collective decisions to be taken on anything like a consistent basis."[170] The need for reconciliation is, therefore, strongly felt in societies that have undergone ethnopolitical conflicts. This is because "these are marked by a loss of trust, intergenerational transmission of trauma and grievances, and negative interdependence."[171]

Over the course of violent history, these societies are marked by violent conflict, repression, injustice, and cleavages which are engrained into its history and which also create a considerable challenge for the actors engaged in reconciliation efforts.[172] The violence in these societies are not linear but "multilayered and multifaceted, making it virtually impossible to determine which wrongs can feasibly be addressed, what this process might entail, and how to prioritize such efforts."[173] Those who have engaged in violent conflict are also bound to live in a closer geographic proximity and live as neighbors, but locked into long-standing cycle of hostile interaction.[174] This makes reconciliation and conflict transformation a necessary endeavor.[175] Failure to achieve this may lead again to what Fischer terms "new spirals of violence" and, therefore, reconciliation serves a necessary role to prevent or reduce "the desire for revenge."[176] Beyond the above contexts, reconciliation also becomes imperative in another related circumstances. For instance, Seils argues that the importance of reconciliation is more sensed "in settings where the previous regime has been removed but significant continuities persist or

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[167] *See* SEILS, *supra* note 159, at 2.

[168] DALY & SARKIN, *supra* note 153, at 225.

[169] *See* Fionnuala Ní Aoláin & Colm Campbell, *The Paradox of Transition in Conflicted Democracies*, 27 HUM. RTS. Q. 172, 176 (2005).

[170] Duncan Morrow, *Breaking Antagonism? Political Leadership in Divided Societies*, *in* POWER SHARING: NEW CHALLENGES FOR DIVIDED SOCIETIES 45, 45 (Ian O'Flynn & David Russell eds., 2005).

[171] Fischer, *supra* note 164, at 415.

[172] SARAH MADDISON, CONFLICT TRANSFORMATION AND RECONCILIATION: MULTI-LEVEL CHALLENGES IN DEEPLY DIVIDED SOCIETIES 21 (2016).

[173] *Id.*

[174] *See* Fischer, *supra* note 164, at 415.

[175] *See id.*

[176] *Id.*

where notions of reconciliation are prominent within the culture."[177] In these contexts, political reconciliation figures prominently as an objective of transitional justice.

While there is no consensus among scholars and practitioners alike about the linear approach to reconciliation, it is well-established fact that there is no single model for it.[178] According to Paul Lederach, it is a "encounter," or meeting place, for individuals and activities, over the concerns of past and future in which the "values of truth, mercy, forgiveness, and peace compete with each other."[179] Thus, it is a complex process largely marked by "paradoxes, tensions, and even contradictions."[180] Karen Brounéus pointed out that reconciliation should be viewed from pragmatic and societal perspectives.[181] It is a pragmatic exercise in which effort is made to find a way to balance competing issues such as truth and justice which, in the end, result in the change of behaviors, attitudes, and relationships among former actors, or enemies, involved in the conflict.[182] Elin Skaar further notes that the reconciliation has "thick" and "thin" conceptions.[183] According to Skaar, the thin side of reconciliation may be simply understood as "nothing more than 'simple coexistence'" between previous enemies who would agree to live together without resorting to killing each other.[184] In the context of deeply divided societies, simple coexistence may be "a sufficient goal to maintain peace and prevent revenge."[185] On the thick side, it includes some wider elements such as forgiveness, a shared and comprehensive vision about the future, processes of mutual healing, and enhancing individual and societal harmony.[186] Ultimately, however, each case is different and one must focus more on deeper contextual factors rather than a "one-size-fits-all" approach.[187] The comprehensive approach to reconciliation efforts must give due consideration to local "connecting tissues" or "social fabrics" that provide various entry points in the process.[188] SIDA, moreover,

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[177] SEILS, *supra* note 159, at 4.

[178] Simon Keyes, *Mapping on Approaches to Reconciliation*, NETWORK FOR RELIGIOUS & TRADITIONAL PEACEMAKERS, March 2019, at 1, 7.

[179] *Id.* at 8; JOHN PAUL LEDERACH, BUILDING PEACE: SUSTAINABLE RECONCILIATION IN DIVIDED SOCIETIES 35 (1997).

[180] Brandon Hamber & Gráinne Kelly, *The Reconciliation Paradox*, INT'L CONFLICT RSCH. INST., June 2018, at 1, 2.

[181] Karen Brounéus, *Reconciliation and Development*, *in* BUILDING A FUTURE ON PEACE AND JUSTICE 203, 203, 205 (Kai Ambos et al. eds., 2009).

[182] *Id.* at 205.

[183] *See* Skaar, *supra* note 90, at 65.

[184] *Id.*

[185] KEYES, *supra* note 178, at 9.

[186] *See* Skaar, *supra* note 90, at 65.

[187] Int'l J. of Transitional Just., *Editorial Note*, 8 INT'L J. TRANSITIONAL JUST. 1, 3 (2014).

[188] SIDA, *supra* note 44.

proposes that the human rights-based approach should be integrated in the reconciliation process, though it should not be imposed on the victims or survivors.[189] According to Philpott, a holistic attempt to achieve reconciliation to address atrocities committed during war, genocide, and authoritarianism should go beyond activities centered on legal mechanisms, human rights, and humanitarian laws.[190] Aiken suggests that a strategy for strong dialogue should be sought as part of transitional institutions which contribute to reducing group antagonisms related to group identifications on ethnonational and racial lines which may incite future violence.[191]

Despite those attempts, as in any other TJ measures, there are serious debates as to the nature and success of reconciliation efforts.[192] Importantly, the relationship between transitional justice and wider goals such as reconciliation remained debatable. This is because some argue that transitional justice has been viewed as a threat to reconciliation as exemplified by the tensions between them.[193] As Audrey Chapman further notes in this regard, "there is little agreement on how to promote reconciliation or on how to conduct research to assess the status of the reconciliation process in deeply divided societies undergoing transitional justice processes."[194] Moreover, Elin Skaar argues that reconciliation still is "one of the most contested concepts on the scholarly debate on [] transitional justice" and its exact contributions are generally held to be "inconclusive."[195] Paul Gready and Simon Robins further argue that the claim that holds that "truth-telling contributes to reconciliation" is a "sweeping claim[]" rather than an empirically rooted assessment. They further argue that the operational compatibilities between truth-telling and reconciliation are not well investigated.[196] In the context of transitional justice, the drawback is that reconciliation is easily invoked and promoted. But scant attention is paid to serious questions such as the complex ways of how reconciliation relates with other measures of transitional justice, its specific frameworks, the possibility of justice after

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[189] *Id.*

[190] Philpott, *supra* note 162, at 390.

[191] *See* AIKEN, *supra* note 57, at 3 (arguing that "theoretical cross-fertilization and interdisciplinary analysis," in addition to other fields of scholarship, should be considered when to addressing ethnicity-based violence).

[192] *See* Ambika Satkunanathan, *The Politics of Reconciliation in Transitional Justice*, 8 INT'L J. TRANSITIONAL JUST. 171, 171 (2014).

[193] *Id.*

[194] Audrey R. Chapman, *Approaches to Studying Reconciliation*, *in* ASSESSING THE IMPACT OF TRANSITIONAL JUSTICE: CHALLENGES FOR EMPIRICAL RESEARCH 143, 143 (Hugo Van Der Merwe et al. eds., 2009).

[195] *See* Skaar, *supra* note 90, at 54–57, 70, 102.

[196] *See* Gready & Robins, *supra* note 95, at 282, 288.

an evil past, and issues about the (re-)distribution of wealth, among others.[197]

Moreover, reconciliation should be understood and approached as a long-term process. As experiences show, it may also take "years or even generations" to materialize.[198] According to Nevin Aiken, the cases of South Africa and Northern Ireland, which are mostly cited as success stories, "serve as cautionary reminders of the fact that post-conflict reconciliation must be understood as a long-term endeavor that can take generations to unfold, and that there are no 'quick fixes' or 'miracle cures' when it comes to repairing relationships between former antagonists in deeply divided societies."[199] To rectify those challenges, other authors suggest that the countries embarking on reconciliations processes should identify the level at which reconciliation is sought, and therefore, such reconciliation should "be well targeted to the specific problems of the society . . . ."[200]

V. SEEKING TRANSITIONAL JUSTICE THROUGH RECONCILIATION IN ETHIOPIA POST-2018

A. The Ethiopian Post-2018 Troubled Transition in Context

After the demise of the Marxist *Derg* regime in 1991,[201] and in the face of the collapsing socialist world, the Ethiopian People's Revolutionary Democratic Front, a coalition of ethno-regional forces, controlled political power in Ethiopia.[202] However, the new EPRDF regime was not successful in transforming the country towards liberal democracy and decent political order.[203] Gradually, the country headed toward authoritarian resurgence under the centralized vanguard party of EPRDF under the ideology of "revolutionary democracy."[204] The post-1991 period succeeded in ending civil wars and decentralizing power through federalism, at least

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[197] *See id.* at 7–8.

[198] DALY & SARKIN, *supra* note 153, at 252.

[199] AIKEN, *supra* note 57, at 195.

[200] DALY & SARKIN, *supra* note 153, at 42.

[201] Abbink, *supra* note 15, at 340.

[202] *See* Jason Burke, *Rise and Fall of Ethiopia's TPLF–From Rebels to Rulers and Back*, THE GUARDIAN (Nov. 20, 2020, 12:00 PM), https://www.theguardian.com/world/2020/nov/25/rise-and-fall-of-ethiopias-tplf-tigray-peoples-liberation-front (discussing how by the end of the 1980s, the TPLF became one of the most effective rebel groups that united under the EPRDF who, with the help of Eritrean forces, seized control of Ethiopia's capital, leaving Meles Zenawi in power).

[203] *See* Emmanuel Yirdaw, *Liberal Democracy is No Liberator*, ETH. INSIGHT (Nov. 3, 2019), https://www.ethiopia-insight.com/2019/11/03/liberal-democracy-is-no-liberator/.

[204] Bach, *supra* note 17, at 646–47.

constitutionally speaking.[205] But as pointed out in the introduction, the old problems of centralized, hegemonic, authoritarian rule persisted,[206] and detestable economic crimes prevailed leading to a political crisis during the EPRDF's final days in power.[207] Declaring poverty as an existential threat, the regime made efforts to oversee impressive but centrally planned, economic development under the developmental state policy introduced from the early 2000s.[208] Thus, Ethiopia has gone through a controversial political period of semi-authoritarianism and of economic growth for nearly three decades in the post-1991 period under the EPRDF.[209] While formal political opposition existed only in name, the EPRDF also battled with ethnic insurgencies from the early days of its rule.[210] However, the unprecedented political opposition against its repressive system came during the first ever democratically contested election of 2005.[211] However, this in turn simply heralded the regime's vulnerability. So, the regime met with frustration for its initial gesture of opening-up the political space, and this episode marked its gradual and deliberate retrenchment towards a "rule by law" state.[212] Following this, the regime returned to its increasingly authoritarian behavior,[213] which

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[205] *See Ethiopian Civil War*, NEW WORLD ENCYC., https://www.newworldencyclopedia.org/entry/Ethiopian_Civil_War (last visited Mar. 24, 2023); *see also* Christopher Clapham, *The Ethiopian Developmental State*, 39 THIRD WORLD Q. 1151, 1154 (2018) (stating that the TPLF created a federal system that eliminated top-down governance).

[206] Hagmann & Abbink, *supra* note 22, at 582.

[207] *See id.* at 582, 588 (questioning the EPRDF's human rights record, mounting corruption, and the country's top-down economic policies); *see also* Alexandra M. Dias & Yared Debebe Yetena, *Anatomies of Protest and the Trajectories of the Actors at Play: Ethiopia 2015-2018*, *in* POPULAR PROTEST, POLITICAL OPPORTUNITIES, AND CHANGE IN AFRICA 181, 181 (Edalina Rodrigues Sanches ed., 2022) (highlighting the political protests that emerged in Ethiopia as a result of the country's economic issues and dissatisfaction with the EPDRF).

[208] Fana Gebresenbet, *Securitisation of Development in Ethiopia: The Discourse and Politics of Developmentalism*, 41 REV. AFR. POL. ECON. 64, 67–68 (2014), *see* Clapham, *supra* note 205, at 1157, 1162 (stating that Ethiopia has successfully implemented "poverty reduction programmes" in an effort to eradicate extreme poverty and reduce child mortality in the country).

[209] *See* Samuel Getachew, *A Controversial Regional Election Win in Ethiopia Has Raised the Stakes for Its Federal System*, QUARTZ (Sept. 12, 2020), https://qz.com/africa/1902614/ethiopia-tigray-tplf-party-wins-controversial-election (indicating that the ERPDF governed Ethiopia for almost three decades and though it has been dismantled since 2019, Ethiopia continues to endure a contentious political period).

[210] *See Ethiopia: A Real New Dawn?*, ALJAZEERA CTR. FOR STUD. (Aug. 26, 2019), https://studies.aljazeera.net/en/reports/2019/08/190826085843635.html; *see also* Hagmann & Abbink, *supra* note 22, at 584 (stating that Ethiopia's political landscape consisted of political polarization and ethnic competition during the EPRDF's political control).

[211] *See* Hagmann & Abbink, *supra* note 22, at 585.

[212] *See* Adem Abebe, *Rule* by *Law in Ethiopia: Rendering Constitutional Limits on Government Power Nonsensical* 5 (Ctr. of Governance & Hum. Rts., Working Paper No. 1, 2012).

[213] Hagmann & Abbink, *supra* note 22, at 585.

again was legitimized by a gradual yet systematic resort to the developmental state policy.[214] This policy shift again arguably gave primacy for socioeconomic development and thereby marginalized the protection for fundamental human rights and basic liberties.[215] And also its compatibility with the principles of federalism, which is in place to safeguard the interests of various ethnonational groups, remained frictional and a political crisis gradually ensued leaving the situation in dilemma.[216] So, numerous deep-rooted and interrelated factors, such as increasingly repressive behavior of the regime, gross human rights violations with impunity, as well as inequitable benefit from economic development, gradually precipitated political grievances among the wider public.[217]

Thus, from mid-2015 to April 2018, Ethiopia underwent one of the most destructive political periods in its recent history.[218] The violent and deadly state response resulted in unprecedented but unascertained loss of human lives, extra-judicial killings, and forced disappearances purposely justified under the vague state of emergency laws which was applied and renewed for an extended period.[219] Moreover, violent popular protests and the regime's deadly response also crucially threatened Ethiopia's continued survival as a State.[220] After the violent security crack-down, the regime's internal political cohesion maintained by dominant party control collapsed, and party structure succumbed to accept enforced reform

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[214] *See* Sarah Vaughan, *Federalism, Revolutionary Democracy and Developmental State*, *1991–1992*, *in* UNDERSTANDING CONTEMPORARY ETHIOPIA: MONARCHY, REVOLUTION AND THE LEGACY OF MELES ZENAWI 283, 303–05 (Gérard Prunier & Éloi Ficquet eds., 2015).

[215] Assefa Fiseha Yeibyio, *Ethiopia: Development with or without Freedom?*, *in* HUMAN RIGHTS AND DEVELOPMENT: LEGAL PERSPECTIVES FROM AND FOR ETHIOPIA 101, 103 (Eva Brems et al. eds., 2015).

[216] *See* Assefa Fiseha, *Federalism and Development: The Ethiopian Dilemma*, 25 INT'L J. ON MINORITY & GRP. RTS. 333, 335–36 (2018) ("[K]ey sources of the emerging political tension in the ideology of the developmental state and its focus on centrally designed state led development that compromised the autonomy of the states in a context of growing ethno-nationalism unleashed by self-rule.").

[217] *See* Jon Abbink, *Ethiopia's Unrest Sparked by Unequal Development Record*, GLOB. OBSERVATORY (Sept. 13, 2016), https://theglobalobservatory.org/2016/09/ethiopia-protests-amhara-oromiya/; René Lefort, *Unrest in Ethiopia: The Ultimate Warning Shot?*, OPENDEMOCRACY (Feb. 2, 2016), https://www.opendemocracy.net/en/unrest-in-ethiopia-ultimate-warning-shot/.

[218] *See* Kelecha, *supra* note 24, at 13–14.

[219] *See* STIFTUNG ET AL., *supra* note 27 at 3–4 (stating that gross human rights violations began after Ethiopia officially declared a state of emergency in response to large-scale protests).

[220] *See id.* at 34 ("Ethiopia cannot continue to be a stable authoritarian state. The [G]overnment needs to take positive steps toward opening up the political system and implementing the [C]onstitution."). *See id.* at 3–4. Large-scale protest, beginning in November 2015, lead to violent confrontations between the Ethiopian Government and local farmers. *See id.*

agenda.[221] It therefore paved the way for ambiguous political deals and subsequent reforms leading towards current political transition operating in a troubled environment. In a beleaguered atmosphere, the most significant measure taken was the forced resignation of then-Prime Minister Hailemariam Desalegn who was replaced by Abiy Ahmed of the OPDO, which is affiliated with the EPRDF coalition.[222] In this regard, Abiy's ascendancy to power, his unifying and pacifying speeches, and promise to ensure lofty goals such as justice, rule of law, and democracy as founding narratives brought about much optimism for real political change towards peaceful democratic rule.[223]

However, the perplexing issue of how to deal with Ethiopia's violent and abusive past and how to design a legitimate path to usher the chaotic present towards a peaceful future remained challenging. The answer to this question differed considerably and different alternative views were aired from different societal and political groups.[224] Amidst the pressure and political uncertainty, the Prime Minister continuously delivered reconciliatory speeches,[225] but he also vowed to bring the members of former officials to the might of justice.[226] Both measures appeared to represent a contradiction during this critical period. Waves of arrests and the vetting of security officials took place swiftly.[227] Some established researchers applauded the Prime Minister's reforms as "unprecedented and highly innovative programmes of reform," which according to them marks a significant departure from the preceding EPRDF's rule.[228]

The current change was brought about by the civilian revolt, which protested violently against authoritarian repression, alienation, and marginalization.[229] But thereafter, a number of new controversies and troubles emerged. Much of the controversy has to do with the nature of the unfinished transition, which has encompassed both changes and continuities. Ultimately, the transition neither came after military

[221] *See* Dias & Yetena, *supra* note 207, at 182.

[222] *See* Kelecha, *supra* note 24, at 14; Bach, supra note 17, at 649.

[223] *See* Gedamu, supra note 33; *see also* Jon Abbink, *Hopes Dashed: Sabotage and Mayhem in Ethiopia*, AFR. STUD. CTR. LEIDEN (Jan. 18, 2021), https://www.ascleiden.nl/content/ascl-blogs/jan-abbink/hopes-dashed-sabotage-and-mayhem-ethiopia.

[224] *See, e.g.*, Bader, supra note 34; *see also* Abbink, *supra* note 223 (noting tension between Prime Minister Abiy Ahmed's policies to reconcile Ethiopia in 2018 and political groups who opposed those policies).

[225] *See* Abbink, *supra* note 223 (discussing how Abiy's tone differed from the previous Prime Minister's in that Abiy encouraged camaraderie and reconciliation rather than conjuring up enemies and using threatening language).

[226] *See* Burke, *supra* note 202 (explaining how Abiy removed top officials from key security posts, arrested generals on graft charges, and introduced new military changes).

[227] *Id.*

[228] Abbink, *supra* note 223.

[229] *See* Dias & Yetena, *supra* note 207, at 186–87 (describing the violent protests that led to Prime Minister Hailemariam Desalegn's resignation).

victory, nor political settlement and it defied the conventional means of regimes changes.[230] Thus, the transition was an ambiguous transition and exhibited new reformist measures, but its unfolding was highly constrained by the pre-existing political-legal atmosphere.[231] Thus, the transition period has not been smooth and has rather proved to be a tortuous political journey. Due to the desire to dominate the transitional political power, the initial solidarity of the so called 'reformist' coalition did not last long as intraparty and interparty rivalries dominated the fluid transitional political moment.[232] After some gestures of the relaxation of the authoritarian grip following the collapse of the party founded on hegemonic centralized rule, it was followed by "outbreaks of violence, mass displacement of people, and other issues that tarnish the hope that has been created by these changes."[233] As the Armed Conflict Location & Event Date Project's *Change and Continuity* report puts it, "Ethiopia can anticipate continued instability."[234] Therefore, in the post-2018 transition period as well, rather than addressing past wrongs, again new challenges and new complexities emerged.

Moreover, the chaotic yet promising transition was further compounded by the acute lack of political settlement among the major contending actors and a serious lack of a transitional justice roadmap.[235] Thus, every political move revolved around the Prime Minister, which the critics have viewed as problematic as it opens the door for a "new dictatorship."[236] These combined factors seemed to overshadow the rare

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[230] *See id.* at 187 (stating that Prime Minister Desalegn voluntarily stepped down in 2018); *see also* Abbink, *supra* note 201, at 334, 339 (referencing the military-led revolution of 1974 and the Red Terror trials which transpired in the wake of the nation's 1991 revolution).

[231] *See* Abbink, *supra* note 223 (providing that Prime Minister Abiy Ahmed's enthusiastic reforms placed large demands on the Ethiopian people who were mostly stuck in "past models of sectarian and eternal grievance politics").

[232] *See* Takele Bekele Bayu, *Fault Lines Within the Ethiopian People Revolutionary Democratic Front (EPRDF): Intraparty Network and Governance System*, 10 INT. J. CONTEMP. RSCH. & REV. 20592, 20592 (2019) (suggesting that some EPRDF intraparty networks have severely limited democratization within the party and throughout the country). One significant result of this power struggle is that Ethiopia is reportedly hosting over two million internally displaced people–the largest in the world. *Over 2 Million People Displaced by Conflict in Ethiopia's Tigray Region–Local Official*, REUTERS, https://www.reuters.com/article/uk-ethiopia-conflict/over-2-million-people-displaced-by-conflict-in-ethiopias-tigray-region-local-official-idUSKBN29B1N7 (last updated Jan. 6, 2021, 8:23 AM).

[233] Logan Cochrane & Bahru Zewde, *Discussing the 2018/19 Changes in Ethiopia: Bahru Zewde*, 1 NOKOKOPOD 1, 11 (2019).

[234] HILARY MATFESS & DAN WATSON, CHANGE AND CONTINUITY IN PROTESTS AND POLITICAL VIOLENCE IN PM ABIY'S ETHIOPIA (2018), https://acleddata.com/2018/10/13/change-and-continuity-in-protests-and-political-violence-pm-abiys-ethiopia/.

[235] *See id.;* Legide, *supra* note 37, at 16–18.

[236] *See* Simon Tisdall, *If Ethiopia Descends into Chaos, It Could Take the Horn of Africa with It*, THE GUARDIAN (Nov. 22, 2020, 12:45 AM), https://www.theguardian.com/commentisfree/2020/nov/22/if-ethiopia-descends-into-chaos-it-could-take-the-horn-of-africa-with-it.

promises of the transitional political reforms in Ethiopia. In this climate, divergent views about the transition and the pertinent justice measures were forwarded severally by different actors.[237] These suggested measures ranged from a mix of restorative and accountability measures to severe retributive measures at the other extreme.[238] These contrasting views indicated the polarized views of elites, and the diverse challenges the vulnerable government faced in reckoning with past wrongs and handling current predicaments.[239] Amidst this troubled period, shifting, inconsistent, and contradictory measures were implemented. Early massive and aggressive lustration, vetting and security sector reforms, and prosecutions of predecessor Tigrayan civilian and security sector officials, were swiftly carried out.[240] This already brewed new discontent and "siege mentality" ultimately led to the violent civil war which has ravaged Ethiopia since November 2020.[241]

B. The Justifications for Adopting Reconciliation Narrative in Contemporary Ethiopia

In the post-2018 period, the new leadership unequivocally acknowledged that there were massive human rights violations, tortures in infamous prison chambers, forced disappearances, and detestable economic crimes.[242] What remained more controversial, as noted, is how to address them in light of the abusive past, tumultuous present, and uncertain future. During his inaugural speech, Prime Minister Abiy Ahmed characterized the acts of the predecessor EPRDF regime as "state terrorism" and he gave a public, official apology.[243] Despite the official rhetoric, however, the Ethiopian Government lacked even rudimentary transitional justice frameworks and policy direction.[244] In his inaugural speech, the Prime Minister said, "[t]he coming time in Ethiopia will be a time of love and forgiveness. We desire our country to be one of justice,

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[237] *See* Legide, *supra* note 37, at 42.

[238] *See id.* at 13.

[239] *See id.* at 4, 13 (indicating that while Ethiopia's transitional justice system initially relied on criminal trials to reckon past wrongs, the nation has gradually incorporated transitional justice measures which focus on accountability, peace, and reconciliation instead).

[240] *Id.* at 16–18.

[241] *See id.* at 3, 19; *see also* Center for Preventive Action, *War in Ethiopia*, COUNCIL ON FOREIGN RELS., https://www.cfr.org/global-conflict-tracker/conflict/conflict-ethiopia (last updated on Mar. 21, 2023).

[242] *See* Legide, *supra* note 37, at 15.

[243] Maggie Fick, *As Forgiveness Sweeps Ethiopia, Some Wonder About Justice*, REUTERS (Aug. 14, 2018, 7:49 AM), https://www.reuters.com/article/us-ethiopia-torture/as-forgiveness-sweeps-ethiopia-some-wonder-about-justice-idUSKBN1KZ19E.

[244] Legide, *supra* note 37, at 14.

peace[,] and freedom and where its citizens are interconnected with the unbreakable chord of humanity and brotherhood."[245]

Thus, the Prime Minister, for reasons of convictions or political pragmatism, officially apologized on behalf of the Ethiopian Government for the past crimes of the State.[246] The rhetoric won the ears of the wider audience along with his lately introduced "philosophy" of "*medeme*r," which is literally understood as "adding together" for better or "synergy." [247] In transitional justice discourse, public apology and acknowledgement of the abuses and acceptance of the responsibility for the human rights violations of the past regime are considered important steps. Traditionally, during times of transition, governments use reconciliatory narratives for the purposes of nation-building, building political legitimacy, and peacebuilding by disallowing a culture of secrecy during the fragile political situation.[248] However, it is held that an official apology is meaningful only when there is "'[v]erification of the facts and full and public disclosure of the truth' and 'guarantees of non-repetition'; [i.e.,] all aspects of a complete and satisfactory apology."[249] Empty and rhetorical apology remains far from producing meaningful outcomes.

According to some commentators, a government's recourse to reconciliation discourse might draw from the search for legitimacy of the new order. According to Lyons, the transition from war to peace three decades ago by Tigray People's Liberation Front ("TPLF")/EPRDF drew its legitimacy from the sacrifices paid in abolishing the old order which gradually faded away and led to a popular protest which started in 2015

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[245] TERRENCE LYONS, THE PUZZLE OF ETHIOPIAN POLITICS 1 (2019). The Prime Minister further urged Ethiopians toward reconciliation in saying, "I call on us all to forgive each other from our hearts–to close the chapters from yesterday, and to forge ahead to the next bright future through national consensus." Bader, *supra* note 34. Nearly six months into his rule, a support rally was organized for Prime Minister Abiy. There, he repeated his earlier restorative speeches and said that "love, forgiveness, unity[,] and harmony [should be taken] as our defining values" which were again presented by the Prime Minister as "the key pathway to prosperity." Abiy Ahmed, Prime Minister of Ethiopia, Speech at the Rally for Forgiveness and Togetherness in Meskel Square (June 23, 2018) (transcript available online at https://www.ethioembassy.org.uk/pm-abiy-meskel-square-full-speech/) [hereinafter Abiy's Inaugural Address].

[246] Legide, *supra* note 37, at 15.

[247] Middle East North Africa Center, *A Changing Ethiopia: Understanding Medemer*, U.S. INST. PEACE, at 09:08 (Feb. 13, 2020), https://www.usip.org/events/changing-ethiopia-understanding-medemer.

[248] Lia Kent, *Beyond 'Pragmatism' Versus 'Principle': Ongoing Justice Debates in East Timor*, *in* TRANSITIONAL JUSTICE IN THE ASIA-PACIFIC 157, 158 (Renée Jeffery & Hun Joon Kim eds., 2014); *cf.* U.N. DEP'T POL. & PEACEBUILDING AFFS., CONSTITUTIONS AND PEACE PROCESSES: A PRIMER 22 (2020) (providing that large scale constitutional changes after violent conflict can build a nationally shared identity that has reconciliatory effects).

[249] Rhoda E. Howard-Hassmann, *Official Apologies*, *in* FACING THE PAST: AMENDING HISTORICAL INJUSTICES THROUGH INSTRUMENTS OF TRANSITIONAL JUSTICE 247, 247 (Peter Malcontent ed., 2016).

and has continued in the current crisis.[250] In the post-2018 new order, there is still a need for new elites to establish legitimacy–albeit on new narratives. In this vein, instead of focusing on a wide range of transitional justice measures, "forgiveness," and rhetoric of reconciliation gradually became a new discourse.[251] Still, it was a hollow and unpredictable measure to many, and which mainly draws from, argues Lyons, the new leadership's want of legitimacy.[252]

As noted, there are also other compelling circumstances for resorting to a reconciliation agenda rather than pursuing other TJ models. Much of the decisions are constrained by the nature of the transition itself. In the words of a prominent historian, the present change in Ethiopia "remains reform from within, rather than change from the outside."[253] Generally, it is acknowledged that attempting to employ transitional justice in the context of absence of fundamental political transition and political settlements produces multiple challenges. As Hansen argues, in these kinds of vulnerable and insecure times, the new regimes may take transitional justice measures as half-hearted attempts.[254] These rationales include attempting to stop ongoing abuses; making some level of governance reforms; revealing and creating a certain image (particularly as to who is responsible for the past abuses) in an attempt to avoid external interference; and targeting power contenders or opponents.[255]

As noted, the post-2018 early political reform period in Ethiopia in which the measures were attempted, the situation was insecure and challenging.[256] Owing to the mode of incomplete transition, the "old guards", the former powerful officials who maintain their stronghold in economy, military, and security were not easily contained and there was continued unpredictability.[257] In the absence of a clean break with the past, the balance of power between the new reformist elite and old EPRDF

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[250] *See* LYONS, *supra* note 245, at 6–7.

[251] Solomon Ayele Dersso, *Ethiopia's Experiment in Reconciliation*, U.S. INST. PEACE (Sept. 23, 2019), https://www.usip.org/publications/2019/09/ethiopias-experiment-reconciliation.

[252] *See* LYONS, *supra* note 245, at 1, 7 (sharing Abiy's desire for forgiveness in Ethiopia and stating that the protest in 2016, which resulted in new leadership in 2018, occurred in part because of a decline in the Government's legitimacy).

[253] Cochrane & Zewde, *supra* note 233, at 7.

[254] Hansen, *supra* note 97, at 225.

[255] *Id.*

[256] *See generally* Worku Dibu & Ephrem Ahadu, *Post 2018 Political Reforms in Ethiopia: Its Achievements and Challenges*, 11(1) INT'L REV. HUMANS. & SOC. SCIS. 439, 445–449 (2020) (discussing the political, economic, and ethnic disunity that challenged Abiy's reforms).

[257] *See* Daniel R. Mekonnen, *Ethiopia's Transitional Justice Process Needs Restoration Work*, ETH. INSIGHT (Feb. 1, 2019), https://www.ethiopia-insight.com/2019/02/01/ethiopias-transitional-justice-process-needs-restoration-work/.

guards remained precarious and marked by contestations, tensions, and attempt to outbid each other.[258] In this unpredictable political environment, the challenge was not linear and deep divisions on ethnic and linguistic lines posed serious additional obstacles. Olsen, Payne, and Reiter demonstrate that countries exhibiting "high ethnic and linguistic fractionalization" and facing challenges of transitional justice choice are less likely to pursue prosecution, Truth Commissions, and reparations.[259] However, it should still be kept in mind that those measures are mostly outcomes of negotiated political settlement, just as they took place in South Africa and Latin America.[260] Ethiopian political observers resent, however, that this negotiated settlement on important political matters is non-existent in Ethiopia's "vicious cycle of authoritarian" political tradition, the tradition of which is rooted in either "domination or submission."[261]

The early political measures were broadly interpreted as a "bold reform effort."[262] However, such hopes were gradually replaced by an ominous environment. Thus, the period was symbolized by significant intraparty competition among the elites from major ethnic groups to assume or dominate top political power among EPRDF-affiliated parties.[263] The founding core members of the ruling EPRDF and their inter-elite relationship was reportedly marked by historical animosities. And it was also marked by heightened hostilities, including those pertaining to territorial claims (specifically among Amhara and Tigrayan elites) and the exchange of old communal grievances which characterized the political affair.[264] The period has thus been marked by explosive

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[258] *See* Abbink, *supra* note 223 (indicating that critics believed that Prime Minister Abiy erred in unconditionally welcoming back all oppositional groups to participate in the governance of Ethiopia).

[259] Legide, *supra* note 37, at 15.

[260] *See generally* Nam Kyu Kim & Mi Hwa Hong, *Politics of Pursuing Justice in the Aftermath of Civil Conflict*, 63(5) J. CONFLICT RESOL. 1165–1992 (2019) (discussing that Truth Commissions tend to occur after negotiated settlements); *see also* Yoseph Badwaza, *Ethiopia: Restoring Peace and Democratic Reforms*, FREEDOM HOUSE (Dec. 3, 2020), https://freedomhouse.org/article/ethiopia-restoring-peace-and-democratic-reforms.

[261] *See* Wallelign Shemsedin, *Peaceful Transition to Democracy in Ethiopia: Why is It So Enigmatic?*, ADDIS STANDARD (Aug. 26, 2020), https://addisstandard.com/op-ed-peaceful-transition-to-democracy-in-ethiopia-why-is-it-so-enigmatic/; *see also* Badwaza, *supra* note 260.

[262] Nizar Manek, *Abiy Ahmed's Reforms Have Unleashed Forces He Can No Longer Control*, FOREIGN POL'Y (July 4, 2019, 11:13 AM), https://foreignpolicy.com/2019/07/04/abiy-ahmeds-reforms-have-unleashed-forces-he-can-no-longer-control-ethiopia-amhara-asaminew-adp-adfm/.

[263] *See id.* (explaining the EPRDF's strategy to appease the "hard-liners" within the Amhara Democratic Party).

[264] *See* Yohannes Y. Gedamu, *Understanding Ethiopia's Survivalist EPRDF Coalition and Recent Political Changes*, 12 INT. J. ETH. STUD. 97, 106–07 (2018) (explaining how the

intercommunal violence and interparty rivalry to dominate the transitional political scene.[265] Thus, contrary to the initial lofty aims, the transitional moment unleashed a "bitter power struggle" within in the coalition and threatened the survival of coalition and constituent units.[266] This was further exacerbated by the invited return of contending armed ethnic rebel groups without prior appropriate steps.[267] The important measures of disarmament, demobilization, and reintegration of the regular and armed forces is "perhaps the single most important precondition for post-war stability . . . . and for more ambitious attempts to facilitate the society's transition from conflict to normalcy and development."[268] Nevertheless, in most cases of transition, the integration of armed groups has materialized following peace accords or agreements arrived prior to integration.[269] Contrary to the above acceptable steps, the massive influx of armed groups who lived in exile in some neighboring countries, such as Eritrea, took place in the absence of clear and carefully crafted programs, including disarmament.[270] The result was chaos as they started to operate and compete in different constituencies rather than working in alliance with the government. To make it worse, the period was additionally marked by high-profile assassinations, including the president of the Amhara regional government and the Chief of Staff of National Armed Forces.[271] The period, therefore, challenged the regime and its stability to the core, and significantly shaped the priority of the regime.[272] Therefore, it spurred fear that given its ethnolinguistic political arrangement, Ethiopia may face the fate of disintegration, like former the Yugoslavia, since times of liberalization turnout to be explosive.[273] This explosive period prompted the International Crisis Group's July 4, 2019

TLPF split after a destructive war over territory that lasted between 1998 and 2000, but the party's ruling elite later consolidated into the newly formed EPRDF).

[265] *See id.* at 113.

[266] Manek, *supra* note 262.

[267] *See* Gedamu, *supra* note 264, at 98–99.

[268] Mats Berdal & David H. Ucko, *Introduction: The Political Reintegration of Armed Groups After War*, *in* REINTEGRATING ARMED GROUPS AFTER CONFLICT: POLITICS, VIOLENCE AND TRANSITION 1, 2 (Mats Berdal & David H. Ucko eds., 2009).

[269] Suzanne Ghais, *Consequences of Excluding Armed Groups from Peace Negotiations: Chad and the Philippines*, 24 INT. NEGOT. 61, 62 (2019).

[270] *See* Ayenat Mersie et al., *Dual Agenda: In Ethiopia's War, Eritrea's Army Exacted Deadly Vengeance on Old Foes*, REUTERS (Nov. 1, 2021, 11:00 AM), https://www.reuters.com/investigates/special-report/ethiopia-conflict-eritrea/.

[271] *See* Manek, *supra* note 262.

[272] *See* Mersie et al., *supra* note 270 (suggesting that the conflict between Tigray and Ethiopia's central government began when roughly 20,000 Eritrean refugees were living in two refugee camps in Ethiopia's Tigray province).

[273] Florian Bieber & Wondemagegn T. Goshu, *Don't Let Ethiopia Become the Next Yugoslavia*, FOREIGN POL'Y (Jan. 15, 2019, 6:25 AM), https://foreignpolicy.com/2019/01/15/dont-let-ethiopia-become-the-next-yugoslavia-abiy-ahmed-balkans-milosevic-ethnic-conflict-federalism/.

report, which warned that while Abiy's role in laying foundations for political reforms has been laudable, "his immediate priority must be restoring security."[274]

Thus, the quest for accountability, though attempted in a 'hit-and-run' style, seems to have been sacrificed because of other equally important, but countervailing, circumstances: those of peace and national integrity imperatives that are at stake. As such, in the situation of continued communal violence and wide-ranging instability, "[a]chieving stability and security may be seen as more pressing needs in such [highly instable] situations."[275] This makes it imperative that the response to human rights abuses may draw on international norms and inspirations, but it is shaped by local contexts and also requires localized solutions.[276] In this kind of situation, there exists a justified ground to give priority to ensure peace and coexistence among diverse peoples in the polity and to ensure the survival of the state before embarking on justice measures or re-establishing the rule of law.[277] Unlike established democracies, no dependable democratic institutions exist in Ethiopia. And according to one commentator, "In no other time than the present is our future together brutally questioned . . . .".[278] This statement tells much about deep desperation.

Restorative measures, such reconciliation, were hoped to help mend those vulnerabilities.[279] Generally, political reconciliation has a good reputation, especially in transitional justice, as it facilitates transitional processes and supposedly helps heal the wounds of victims and social fractures which took place during atrocities.[280] In this way, Rudolf Schussler puts it, "political reconciliation seems to require perpetrators and victims to engage in moral compromise which help[s] them to live together in peace and standoffish cooperation."[281]

On a broader level, Ethiopia also seriously lacked international support in its transitional justice process, whether such process is officially admitted or not.[282] Conventionally, international actors employ both coercive and soft diplomatic pressures on States to ensure compliance

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[274] INT'L CRISIS GRP., TIME FOR ETHIOPIA TO BARGAIN WITH SIDAMA OVER STATEHOOD 11 (2019).

[275] Hansen, *supra* note 97, at 115.

[276] *See* Legide, *supra* note 37, at 6.

[277] *Id.* at 20.

[278] Belachew Mekuria, *Saving Ethiopia from Its Enigmatic Present*, ADDIS STANDARD (Oct. 21, 2019), http://addisstandard.com/oped-saving-ethiopia-from-its-enigmatic-present/.

[279] *See* Legide, *supra* note 37, at 2, 6, 12, 19.

[280] Rudolf Schüssler, *Reconciliation, Morality and Moral Compromise*, *in* NEGOTIATING RECONCILIATION IN PEACEMAKING, *supra* note 44.

[281] *Id.* at 48.

[282] *See* Legide, *supra* note 37, at 21.

with international human rights norms.[283] In the words of one author, despite the large-scale human rights violations which occurred during the TPLF/EPRDF rule, the "[I]nternational [C]ommunity[, including the United States,] has . . . maintained a pointed silence about the TPLF since Abiy took power."[284] The International Community has also been accused by rights groups of being a keen supporter of the past repressive State, in the name of development and stability[285] and their involvement in the past rule, according to one academic, is "negative."[286] Moreover, Ethiopia's transitional justice process acutely lacks the involvement of domestic civil society coalitions, which Jelena Subotić calls justice "true believers,"[287] or its views are not well articulated.

On top of those contestations, justice and political measures were understood diversely, and alternatives are proposed by some and fiercely resisted by others. On the parallel, as noted, there has been a widespread resentment on the part of Tigrayan politicians and the ethnic constituency after the 2018 reform.[288] Their contested interpretation of everyday political processes invited a fierce opposition and resultant powerful resistance.[289] According to news reports, Abiy's reform measures "threaten powerful interests among the old guard."[290] High ranking Tigrayan elites vocally interpreted the process as a political purge, and they believed that despite their positive contributions, the federal government "has made them scapegoats for all of [the] Ethiopia[n] problems."[291] The justice process and related measures were therefore interpreted as a one-sided campaign of prosecution against leading Tigrayans.[292] In this situation, pushing the agenda of ensuring accountability to the extreme point was feared to provoke fierce opposition, which unfortunately happened later.

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[283] *See* Sonia Cardenas, *Norm Collision: Explaining the Effects of International Human Rights Pressure on State Behavior*, 6 INT. STUD. REV. 213, 218, 222 (2004).

[284] Bronwyn Bruton, *Calls for Negotiation Are Driving Ethiopia Deeper into War*, AFRICA SOURCE (Nov. 13, 2020), https://www.atlanticcouncil.org/blogs/africasource/calls-for-negotiation-driving-ethiopia-deeper-into-war/.

[285] *See Development Without Freedom: How Aid Underwrites Repression in Ethiopia*, HUM. RTS. WATCH (Oct. 19, 2010), https://www.hrw.org/report/2010/10/19/development-without-freedom/how-aid-underwrites-repression-ethiopia.

[286] *See* Abbink, *supra* note 223.

[287] JELENA SUBOTIĆ, HIJACKED JUSTICE: DEALING WITH THE PAST IN THE BALKANS 12, 16 (2009).

[288] *See* Legide, *supra* note 37, at 14.

[289] *See Ethiopia's Tigray War: The Short, Medium and Long Story*, BBC NEWS (June 29, 2021), https://www.bbc.com/news/world-africa-54964378.

[290] Legide, *supra* note 37, at 19.

[291] *Voices Critical of PM Abiy Persists in Ethiopia's Tigray Region*, AFRICANEWS (July 10, 2019), https://www.africanews.com/2019/07/10/voices-critical-of-pm-abiy-persists-in-ethiopias-tigray-region/.

[292] *See* INT'L CRISIS GRP., MANAGING ETHIOPIA'S UNSETTLED TRANSITION 18 (2019).

VI. THE ESTABLISHMENT OF THE ETHIOPIAN RECONCILIATION COMMISSION

Since the 1980s and following the "waves" of democratization in Latin America and Africa, there has been an increasing focus on the institutionally addressing the past to create fortune futures.[293] More often than not, countries adopt different families of transitional justice sequentially or together.[294] The persistence of unresolved historical injustices and conflicts necessitates the demand for the establishment of a certain form of Truth and Reconciliation Commissions throughout the world.[295] The wider work of Truth and Reconciliation Commissions typically results in a well-founded public work to "make it part of the permanent, unassailable public record."[296] This is because transitional justice is different from judicial legal records and its narratives which are not to be abided by rules of criminal law, criminal procedure, and evidence.[297] The fact that TRCs do not abide by these rules "allows for a broader perspective on the pattern and causes of "violence."[298] Generally, political reconciliation has a good reputation, especially in transitional justice, as it facilitates transition processes and supposedly helps heal the wounds of victims and social fractures which took place during atrocities.[299] As previously noted, political reconciliation represents the "comprehensive view of transitional justice."[300]

In recent years, Ethiopia is experiencing a highly precarious political situation and is in a deeply divided political state. The deep and controversial scars from past evils and lack of political settlement amongst the inter-elites appear to necessitate restorative justice endeavors through a Truth and Reconciliation Commission to address past wrongs and ensure societal stability in Ethiopia. Given the above discussed predicaments, it is argued that there is an "urgent and unequivocal need for reconciliation" and to come to terms with a brutal past.[301] How that can be achieved remains a serious challenge. Solomon Dersso suggests, for instance, that the Ethiopian transitional justice process should take into account such factors including: (1) the type of

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[293] Nanci Adler, *Introduction: On History, Historians, and Transitional Justice*, *in* UNDERSTANDING THE AGE OF TRANSITIONAL JUSTICE: CRIMES, COURTS, COMMISSIONS, AND CHRONICLING, *supra* note 117.

[294] *See id.*

[295] Ibhawoh, *supra* note 110.

[296] *Id.*

[297] Hirsch et al., *supra* note 136, at 387.

[298] *Id.*

[299] Rudolf Schüssler, *Reconciliation, Morality and Moral Compromise*, *in* NEGOTIATING RECONCILIATION IN PEACEMAKING, *supra* note 44.

[300] Monroy-Santander, *supra* note 96, at 221.

[301] Dawit Yohannes & Fana Gebresenbet, *Dealing with a Difficult Past: Time to Revitalise the Ethiopian Reconciliation Commission?*, 39 E. AFR. REP. 1, 3 (2021).

injustice to be addressed, (2) the temporal scope to be subjected to transitional justice measures, and (3) consideration of various approaches and how to determine the balance between them, among others.[302]

As a positive note, the post-2018 period is perhaps the only significant political period in Ethiopia's recent history in which political reconciliation has been officially sought and provided with legal and institutional arrangements. Previously in the post-1991 period, when the leaders of the transitional government of Ethiopia were asked about the then Transitional Government's approach, then leader, Meles Zenawi said, "[w]e [] didn't think of a [T]ruth and [R]econciliation [C]ommission" adding that doing so would have sent a bad signal to the perpetrators and the wider Ethiopian society.[303] In the subsequent years as well, the EPRDF regime consistently rebuked the call for national reconciliation by simply saying it that it was the shortest means of satisfying envy for political power.[304] The spontaneous demise of the EPRDF's centralized party apparatus has brought with it both optimism towards post-authoritarian democratization,[305] and at the same time, has cultivated a serious fear about the fate of the country due to continued violence and civil war.[306] As noted elsewhere in this Article, until the establishment of the Reconciliation Commission, a range of competing measures were attempted, some of which ruined the reconciliation spirit in Ethiopia.

In this contested political climate, the most noteworthy transitional justice measure in Ethiopia came with the establishment of National Reconciliation Commission eight months after the new leadership took office.[307] The Commission was established by Proclamation No. 1102 /2018.[308] The Commission was established with the stated objective of identifying the root causes of past conflicts, investigating human rights violations, conducting hearings, and contributing to lasting peace and reconciliation.[309] According to the Preamble of the Proclamation, the Commission is officially viewed as a "[f]ree and independent institution that inquire[s] and disclose[s] the truth of the sources[,] causes[,] and extent of conflicts and that takes appropriate measures and initiate[s] recommendation[s] that enable . . . lasting peace and . . . prevent the

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[302] Solomon A. Dersso, *Pursuing Transitional Justice and Reconciliation in Ethiopia's Hybrid Transition*, ADDIS STANDARD (Dec. 14, 2018), http://addisstandard.com/oped-pursuing-transitional-justice-and-reconciliation-in-ethiopias-hybrid-transition/.

[303] Kjetil Tronvoll et al., *The Context of Transitional Justice in Ethiopia*, *in* THE ETHIOPIAN RED TERROR TRIALS 1, 12–13 (Kjetil Tronvoll et al. eds., 2009).

[304] *See id.* at 13; INT'L CRISIS GRP., *supra* note 292, at 7.

[305] *See* INT'L CRISIS GRP., *supra* note 292, at i.

[306] *See id.* at ii.

[307] *See id.* at i, 26.

[308] *Reconciliation Commission Establishment Proclamation*, 2018, *supra* note 46, art. 3, § 1.

[309] *Id.* at para. 1– 4.

future occurrence of . . . conflict."[310] Despite many odds, today, the Reconciliation Commission, which was replaced by a recently introduced National Dialogue Commission, stands out as Ethiopia's preferred transitional justice mechanisms through which the nation has sought to reckon with its contested historical past and transform itself from its deadly and violent present to a peaceful future.[311] Unlike some other TRCs that came only after pressure by the United Nations or the wider International Community, the Ethiopian Commission came after Ethiopia's own precarious search for domestic policy preference.[312] In the following Section, this Article will attempt to assess the legitimacy, capacity, and limits of the Commission in light of some internationally acceptable standards.

VII. ON THE LEGITIMACY OF THE ETHIOPIAN RECONCILIATION COMMISSION

As noted, Truth and Reconciliation Commissions, being independent and non-judicial bodies, play a significant role in efforts to "restore the rule of law in post-authoritarian and post-conflict societies."[313] While many TRCs have been established over the years, the achievements and legitimacy of all or some of them remains debatable.[314]

The legitimacy of such TRCs attracts considerable attention because of their vital influence on a particular matter and because they wield important authority on the issues pertaining to a given society during challenging times.[315] The concept of legitimacy has been understood in different ways. Sometimes, it is presented and understood interchangeability with legality, and according to Bodansky, the Latin root of the term legitimacy meant "lawful."[316] Legitimacy is also defined in the Oxford Dictionary as "[c]onformity to the law, to rules, or to some recognized principle."[317] Bodansky maintains, however, that from the international law perspective, legitimacy is something that is a "much broader concept than legality" and "the criteria of legitimacy and legality

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[310] *Id.* at para. 4.

[311] *See* Hakeem O. Yusuf, *Truth Commissions*, *in* TRANSITIONAL JUSTICE: THEORIES, MECHANISMS AND DEBATES 95, 95 (Hakeem O. Yusuf & Hugo van der Merwe eds., 2022).

[312] *See* Tronvoll et al., *supra* note 303, at 5–6 (describing the extensive, though minimally supported, arrests made by the Derg regime close to the government turnover).

[313] Yusuf, *supra* note 311.

[314] *See id.* at 95, 104, 116–18 (explaining that the findings of TRCs are often ignored by the controlling governments).

[315] *See id.* at 120.

[316] Daniel Bodansky, *The Concept of Legitimacy in International Law*, *in* LEGITIMACY IN INTERNATIONAL LAW 309, 311 (Rüdiger Wolfrum & Volker Röben eds., 2008).

[317] *Legitimacy*, OXFORD ENGLISH DICTIONARY (2023).

are not exactly the same."[318] From the Metacoordination view of institutional legitimacy, Allen Buchanan holds that,

> legitimacy assessments are part of a social practice that aims at achieving consensus on whether an institution is worthy of our moral reason-based support–support that does not depend solely on the fear of coercion or on a perfect fit between our own interests and what the institution demands of us.[319]

Allen Buchanan and Robert Keohane, moreover, argue that the meaning of legitimacy of a certain institution has both normative, or legal, and sociological dimensions.[320] From the normative point of view, an institution is legitimate when it has asserted that it has "the right to rule" through promulgation of rules and a subsequent obligation to comply with those rules with accompanying costs in the case of non-compliance.[321] From the sociological viewpoint, on the other hand, an institution is said to be legitimate when "it is widely believed to have the right to rule."[322] Broadly, the legitimacy of a given institution can be influenced by the political reality.

Specifically, according to the ICTJ, the perception of the legitimacy of Truth Commissions is very important to successfully carry out its mandates.[323] Legitimacy is important to build the public confidence in that the institution is genuine. This again helps to engage diverse actors and secure their cooperation such as victims, witnesses, and the public to participate widely in the provision of information and the facilitation of the Commission's investigative and truth-finding processes. Moreover, legitimacy and public confidence can "protect the [C]ommission from political opponents invested in maintaining silence or denial about past abuse."[324]

Angela Nichols also provides a theoretical lens through which to examine the legitimacy of TRCs.[325] She argues that since TRCs are *ad hoc* institutions that operate in post-conflict environments, they are better positioned to shape the transition process and to create an optimum space where former adversaries and new actors can negotiate as to how to move

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[318] Bodansky, *supra* note 316, at 311.

[319] Allen Buchanan, *Institutional Legitimacy*, *in* 4 OXFORD STUDIES IN POLITICAL PHILOSOPHY 53, 53 (David Sobel et al. eds., 2018) (ebook).

[320] Allen Buchanan & Robert O Keohane, *The Legitimacy of Global Governance Institutions*, *in* LEGITIMACY IN INTERNATIONAL LAW, *supra* note 316, at 25.

[321] *Id.*

[322] *Id.*

[323] AMNESTY COMM'N OF THE MINISTRY OF JUST. OF BRAZ. ET AL., *supra* note 135, at 15.

[324] *Id.*

[325] ANGELA D. NICHOLS, IMPACT, LEGITIMACY, AND LIMITATIONS OF TRUTH COMMISSIONS 25 (2019).

forward to a peaceful future.[326] To play this important role, TRCs should display a certain degree of legitimacy which can be reflected by possession of certain "institutional" features.[327] Furthermore, according to Nichols, these are the "characteristics that send important political signals to the [S]tate and broader society alike."[328] Thus, according to Nichols, TRCs are said to command legitimacy if they signal the following institutional characteristics: (1) "some degree of independence" from both predecessor regime officials and new regimes; (2) fairness in its undertakings, practices and performances; and (3) transparency in its practices, including during investigation of the facts and cases.[329] Accordingly, if TRCs possess these qualities, it can be taken that they enjoy "social and political legitimacy" and can impact a given society during its operation, investigations, and ultimately by its findings.[330] Moreover, it is also imperative that the contribution of those institutions should be that the States adopting them more likely respect human rights and that they experience low levels of violence.[331] According to the ICTJ, moreover, the following yardsticks can be used as a standard to ensure the public perception about the legitimacy of TRCs: (1) the presence of limited, but direct, public participation, or the consultative approach; (2) political and operational independence of the Commission; (3) financial and operational autonomy; and (4) mechanisms and criteria of the selection of Commissioners, among others.[332] The African Union Transitional Justice Policy ("AUTJ" or "AUTJ Policy") similarly requires that TRCs and its Commissioners should be independent, impartial, and that the selection process of its Commissioners "should [also] be open and transparent."[333] From the above, there appears to be a consensus about some of the yardsticks to be used in assessing its legitimacy. Thus, in the following Section, this Article will employ the AU Transition Justice Policy's standards to assess the legitimacy of the Ethiopian Reconciliation Commission.

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[326] *Id.*
[327] *Id.*
[328] *Id.*
[329] *Id.* at 26.
[330] *Id.*
[331] *See generally* NICHOLS, *supra* note 325, at 28.
[332] AMNESTY COMM'N OF THE MINISTRY OF JUST. OF BRAZ. ET AL., *supra* note 135, at 15–17.
[333] African Union, Transitional Justice Policy, Feb. 2019, 11 (available online at https://au.int/sites/default/files/documents/36541-doc-au_tj_policy_eng_web.pdf).

A. Clearly Defined Mandate Concerning Material-Temporal Jurisdiction

Careful design of the mandate of a TRC is an important step in the process. As part of an official government measure, the mandate of a given TRC is determined by legislation or through peace settlements with non-state actors.[334] In the context of an abusive historical past and lack of clear democratic transition, the transitional justice measures and political reconciliation endeavors in Ethiopia require an investigation of the nation's "multi-layered past."[335] And, it should deal with the "multiplicities of violence."[336] It is amidst controversies regarding those matters that Ethiopia's Reconciliation Commission was established. The reasons for the establishment of Commission are provided under the Preamble of Proclamation No. 1102/2018 which lays down broad visions and policy priorities.[337] Accordingly, the Preamble provide that the Commission has the following mandates:

> [(1)] to reconcile based on truth and justice the disagreement that developed among peoples of Ethiopia for years because of different societal and political conflict.
>
> [(2)] to identify and ascertain the nature, cause[,] and dimension of the repeated gross violation of human rights so as to fully respect and implement basic human rights recognized under the [FDRE] constitution, international[,] and continental agreements . . . .
>
> [(3) to] provid[e] victims of gross human rights abuses in different time[s] and historical event[s] with a forum to be heard and perpetrators to disclose and confess their actions as a way of reconciliation and to achieve a lasting peace.[338]

In the context of the Latin American TRCs, Popkin and Roht-Arriaza describe four main goals for Truth Commissions: (1) TRCs help create an authoritative record of what happened in the past; (2) TRCs provide a forum for the victims to tell their stories of abuse and provides them with some form of redress, or reparation; (3) TRCs can recommend different measures such as legislative, structural, and other reforms to ensure nonrecurrence of past abuses in the future; and (3) TRCs can help by authoritatively establishing who the perpetrators were and the level of

[334] *See* Dersso, *supra* note 251.
[335] *See id.*
[336] *Id.*
[337] *See Reconciliation Commission Establishment Proclamation*, 2018, *supra* note 46, para. 1–4.
[338] *Id.* para. 1–3.

their involvement and thus provide mechanisms to ensure their accountability.[339]

As noted elsewhere in this Article, some TRCs have expansive and complex mandates. According to the International Center for Transitional Justice, drafting the mandate of a TRC is a critically important step in the truth and reconciliation process.[340] For instance,

> [a] mandate that is incomplete, obscure, or contradictory to fundamental human rights standards can cripple a [T]ruth [C]ommission in many ways, forcing it to waste valuable time and resources in defining the parameters of its task, causing critical contradictions within the [C]ommission, and diminishing the capacity of key stakeholders to cooperate effectively with the [C]ommission.[341]

As such, it should be "undertaken in a serious, well-thought-out manner" and should conform to international human rights norms.[342] Though much depends on the domestic context of the State, TRC mandates also need to incorporate certain important elements to underline that the [C]ommission is "fair, effective, and objective."[343] Conventionally, determining the mandate of the Commission should address four important focuses of the TRC investigation such as (1) what happened, (2) who is responsible for those acts, (3) what time span is relevant for investigations, and (4) territorial jurisdiction as to what territory is relevant, among others.[344] From them, material and temporal jurisdictions are crucial in TRC work. However, as this Article discusses below, closer scrutiny shows that there are serious gaps in the Ethiopian Reconciliation Establishment Proclamation with respect to demarcating material-temporal jurisdiction.

1. Difficulty of Determining the Material Mandate of the Ethiopian Commission

Material jurisdiction mostly refers to the subject-matter to be dealt with by the Commission.[345] Material jurisdiction is about the acts, crimes in the given conflicts, or historical experiences as happened in a given

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[339] *See* Popkin & Roht-Arriaza, *supra* note 125, at 93, 99–102, 105.

[340] EDUARDO GONZÁLEZ, DRAFTING A TRUTH COMMISSION MANDATE: A PRACTICAL TOOL 1 (2013).

[341] *Id.*

[342] *Id.*

[343] *Id.* at 3.

[344] *Id.* at 9–11.

[345] *See id.* at 9.

society which can also be broad or narrow.[346] In the same vein, it has also been suggested that the objective part of a TRC mandate should be drafted in such a way as to at least establish the truth about the crimes, events, and persons involved; explain the causes of abuses; and provide historical explanations which provide descriptive fact-finding through exhaustive reconstruction of events as well as explanatory accounts about historical, institutional, cultural, and other contextual explanations.[347] The second important objective of the TRC objective concerns "protecting, recognizing[,] and restoring the rights of victims." This can be achieved through a mechanism of dignifying the victims and providing reparation and redress.[348]

As noted, the Preamble of the Proclamation is the place where one can trace the overall goals of the legal instrument which establishes the TRC, understand the intention of the legislature, and get guidance for interpretation.[349] However, the Preamble of the Ethiopian TRC is poorly drafted and imprudently crafted. From the wording of the paragraphs in the Preamble, one can see points like redress for "victims of gross human rights abuses in *different time[s]* and *historical event[s]*."[350] As such, lack of clarity on the types of conflicts, the time of their occurrence, and whether it also concerns the most recent conflicts or only older conflicts affects its operational effectiveness.

a. On Truth Finding

As noted elsewhere, truth-finding is the most important task of TRCs in general. While this goal figures prominently in other successful TRC cases such as in South Africa, it is not clearly incorporated in the material mandate of the Ethiopian Reconciliation Commission. The objectives of the Ethiopian Reconciliation Commission are stated under Article 5 of the establishing law which states, to "maintain peace[,] justice, national unity and consensus[,] and also Reconciliation among Ethiopian Peoples."[351] Its power and duties are further provided under Article 6 of the same law.[352] Moreover, contrary to the experiences of other notable TRCs, the Ethiopian Reconciliation Commission has a less visible role when it comes to the truth-finding process. It is conventional that the TRC needs to make as much of an effort as possible to elicit different kinds of truths: factual,

[346] GONZÁLEZ, *supra* note 340, at 9.
[347] *Id.* at 5–6.
[348] *Id.* at 6.
[349] AMNESTY COMM'N OF THE MINISTRY OF JUST. OF BRAZ. ET AL., *supra* note 135, at 23.
[350] *Reconciliation Commission Establishment Proclamation*, 2018, *supra* note 46, para. 3 (emphasis added).
[351] *Id.* art. 5.
[352] *Id.* art. 6.

social, forensic, and personal.[353] Thus, to be successful, though divergently understood, some argue that the Commission should find ways to articulate "various, and perhaps competing, truths about the past."[354]

b. ON GROSS HUMAN RIGHTS VIOLATIONS

Furthermore, what constitutes "*gross violations of human rights*" is not provided in the Proclamation.[355] Many decisions of the international judicial bodies also fail to establish what constitutes massive or widespread violations of human rights and they also use inconsistent language when referring to the issue of "gross violations" of human rights.[356] The definition is not contained in a binding international treaty, but it can be contained in a soft declaration. According to the World Conference on Human Rights, gross and systematic violation of human rights is defined as

> torture and cruel, inhuman[e] and degrading treatment or punishment, summary and arbitrary executions, disappearances, arbitrary detentions, all forms of racism, racial discrimination and apartheid, foreign occupation and alien domination, xenophobia, poverty, hunger and other denials of economic, social and cultural rights, religious intolerance, terrorism, discrimination against women and lack of the rule of law.[357]

Moreover, according to the United Nations Special Rapporteur, "serious violations of human rights and humanitarian law [include] brutal atrocities such as genocide, crimes against humanity, and war crimes" in which the State has a duty under international human rights law to investigate and prosecute.[358] However, from the mandate of the Ethiopian Commission, it is not clear whether it concerns violation of only civil and political rights or if other economic rights are also conceived.[359] The

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[353] *See* Bert Ingelaere, *Assembling Styles of Truth in Rwanda's* Gacaca *Process*, 2 J. HUMANITARIAN AFFS. 22, 22 (2020).

[354] Solomon Ayele Dersso, *supra* note 251.

[355] *See Reconciliation Commission Establishment Proclamation*, 2018, *supra* note 46, art. 2 (emphasis added).

[356] Roger-Claude Liwanga, *The Meaning of "Gross Violation" of Human Rights: A Focus on International Tribunals' Decisions Over the DRC Conflicts*, 44 DENVER J. INT'L L. & POL'Y 67, 68–70 (2015).

[357] World Conference on Human Rights, *Vienna Declaration and Programme of Action*, ¶ 30, U.N. Doc. A/CONF.157/23 (July 12, 1993).

[358] *Accountability for Gross Violations is an Obligation–U.N. Expert*, U.N. OFF. HIGH COMM'R FOR HUM. RTS. (Oct. 12, 2021), https://www.ohchr.org/en/stories/2021/10/accountability-gross-violations-obligation-un-expert.

[359] *See Reconciliation Commission Establishment Proclamation*, 2018, *supra* note 46,

conventional understanding of transitional justice focuses mostly on the violation of civil and political rights by using the language of human rights.[360] Critics therefore argue that while violation of civil and economic rights is at the forefront of TJ discussions, "issues of equally devastating economic and social justice have received little attention" and, thus, the mandate of the Ethiopian Commission should also be viewed as pertaining to what Dustin Sharp calls economic violence.[361] Moreover, it is becoming increasingly common that mandates of recent TRCs "explicitly mention violations committed against women, children, and other vulnerable groups in order to prevent them from being ignored."[362] Furthermore, the TRC task in Ethiopia shall go beyond narrowly focusing on individual rights and should be construed to encompass the violation of collective rights or identity rights. This is the interpretation of its mandate as indicated by a report of the United Nations Committee on the Elimination of Racial Discrimination.[363] But this later view can also be questioned given its expansive claims. Moreover, since transitional justice is invoked in the context of the violation of more than just ordinary human rights laws,[364] according to the ICTJ, the violation needs to be so serious and widespread that it may not be dealt with by the regular judiciary mechanisms.[365]

c. ON RECONCILIATION

As noted, reconciliation is a prominent objective in many TRCs, but not all of them contain reconciliation as their primary objective. For instance, the mandates of the El Salvadorian and Guatemalan Commissions of 1992 and 1994, respectively, had a very narrow scope which stated only that the "fact-finding process [was] aimed at the

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para. 2–3.

[360] *See* Tine Destrooper, *Neglecting Social and Economic Rights Violations in Transitional Justice: Long-Term Effects on Accountability. Empirical Findings from the Extraordinary Chambers in the Courts of Cambodia*, 37 J. CURRENT SE. ASIAN AFFS. 95, 98 (2018).

[361] Dustin N. Sharp, *Addressing Economic Violence in Times of Transition: Towards a Positive-Peace Paradigm for Transitional Justice*, 35 FORDHAM INT'L L.J. 780, 813 (2012); *see also* Dustin N. Sharp, *Introduction: Addressing Economic Violence in Times of Transition*, *in* JUSTICE AND ECONOMIC VIOLENCE IN TRANSITION 1, 1-3 (Dustin N. Sharp ed., 2014).

[362] GONZÁLEZ, *supra* note 340, at 9.

[363] *See* Kjetil Tronvoll, *Human Rights Violations in Federal Ethiopia: When Ethnic Identity Is a Political Stigma*, 15 INT'L J. MINORITY & GRP. RTS. 49, 50 (2008).

[364] Jens Iverson, *Contrasting the Normative and Historical Foundations of Transitional Justice and* Jus Post Bellum: *Outlining the Matrix of Definitions in Comparative Perspective*, *in* JUS POST BELLUM: MAPPING THE NORMATIVE FOUNDATIONS 80, 89–90 (Casten Stahn et al. eds., 2014).

[365] *What is Transitional Justice*, INT'L CTR. FOR TRANSITIONAL JUST., https://www.ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf (last visited Feb. 8, 2023).

disclosure of previously unknown or suppressed information."[366] Thus, reconciliation was by no means the main goal of these Commissions as reflected by their mandates and reporting. Moreover, some would emphasize its truth-finding role over reconciliation processes. According to Jerome Verdier, the chairman of the Liberian TRC,

> [t]he focus of the TRC will be on the truth more than on reconciliation. Forgiveness is a very personal individual process. The Commission cannot compel anyone to forgive. What Liberia needs to focus on is finding a way to live together as one people in one country. The TRC can help us to live together–it is a step in the right direction.[367]

By this, Chairman Verdier is referring to the "thin" concept of reconciliation in such a way as to enable peaceful coexistence of the people and previous enemies in one polity. Thus, it does not represent a thicker understanding of TRC roles such as reconciliation and healing.

The Proclamation that established the Ethiopian TRC provides, rather. a thicker definition for reconciliation in Article 2(3).[368] Accordingly, "'[r]econciliation' means establishing [the] values of forgiveness for the past, lasting love, solidarity[,] and mutual understanding by identifying reasons of conflict, animosity that . . . occurred due to conflicts, misapprehension, developed disagreement[,] and revenge."[369] While this definition may be helpful in providing some entry points, it is ambiguous and incorporates concepts which are not defined in the law. For instance, questions as to what constitutes "forgiveness," "lasting love," and "mutual understanding" remain unclear—at least for the purpose of legal understanding. While it also provides for identifying reasons for conflicts,[370] the Proclamation does not provide any clues about what types of conflicts it is purportedly pertains to: interethnic, intercommunal, or insurgency wars against the center or those conducted during the older nation-building process. The Ethiopian Commission cannot address this multitude of historically rooted conflicts within its short and constrained mandate, and thus, the law should have clearly stated the key focus of the Commission which can be achieved realistically.

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[366] Hirsch et al., *supra* note 136, at 400 n.1.

[367] AMNESTY INT'L, *supra* note 132, at 7.

[368] *See Reconciliation Commission Establishment Proclamation*, 2018, *supra* note 46, art. 2, § 3.

[369] *Id.*

[370] *Id.*

2. Challenges Regarding the Temporal Jurisdiction of the Commission

The other gap in the Ethiopian TRC concerns the temporal span with which it conducts its truth-finding investigations. The enabling law does not precisely determine the beginning and the ending period of investigation for the purpose of producing its expected authoritative historical record.[371] When one looks at the statutes which establish other TRCs in post-conflict societies, the temporal jurisdiction of the mandates therein are clearly stipulated. For instance, whereas the apartheid abuse and colonization lasted for over 300 years in South Africa,[372] the mandate of its famous TRC was limited to a relatively short period–it had a mandate to investigate human rights abuses committed between 1960 and 1994.[373] Similarly, though gross human rights violations have a long history in East Timor,[374] the mandate of its TRC in 2002 was only framed to deal with abuses committed during the Indonesian Occupation from 1974 until its departure in 1999.[375] A bit differently, the Kenyan TJRC of 2009 also had a mandate to address the human rights violations which were committed as a result of the 2007 electoral violence in the country.[376] But its mandate indirectly extended as far back as crimes committed during the colonial period and thus constituted "the most expansive mandate."[377] The mandate of the TRC of Sierra Leone deals with a period from the outbreak of the civil war in 1991 to the signing of the *Lomé Peace Agreement* in July 1999, though it would also inquire into events which took place prior and subsequent to 1991.[378]

The Ethiopian reconciliation effort should deal with "multiplicities of violence" that may extend into the distant past, and it should consider the violence that was committed in recent decades as well. However, the nature of abuses committed in both the distant past and more recent past are hotly contested. But when one looks at the mandate of the Ethiopian TRC in light of the above challenge, it is poorly drafted and imprudently crafted. It does not clearly specify the temporal span of "the social and political conflicts" it purports to address. From the language of the Preamble, one can see references to redress for "victims of gross human

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[371] *See id.* art. 6, § 4.

[372] *See History*, S. AFR. GOV'T, https://www.gov.za/about-sa/history (last visited Mar. 14, 2023).

[373] *See* Yusuf, *supra* note 311, at 106.

[374] Jenkins, *supra* note 115, at 234.

[375] *Id.*

[376] RONALD C. SLYE, THE KENYAN TJRC: AN OUTSIDER'S VIEW FROM THE INSIDE 57–58 (2018).

[377] *See id.* at 62 n.29.

[378] William A. Schabas, *The Relationship Between Truth Commissions and International Courts: The Case of Sierra Leone*, 25 HUM. RTS. Q. 1035, 1036 (2003).

rights abuses in *different time[s]* and *historical event[s]*."[379] As such, one of the critical challenges for the Ethiopian justice measures, which have been attempted through the Reconciliation Commission, is determining what temporal span of the past should be subjected to its mandate. This kind of question emerged in the transitional justice process in the post-Soviet Union era.[380] Ethiopia's past is highly contested, and the modern history of its making is subjected to contradictory interpretations and narratives, which stokes the country's current upheaval.[381] Nothing explains it more aptly than the Prime Minister Abiy's speech at the Meskel Square rally in June 2018: "[I]n the past one hundred years, hatred has reigned over us; has spread its veil over us; self-absorption, greed[,] and conceit have harmed us a great deal."[382] It remains unclear to what extent TJ processes can be extended back to heal those deep-rooted historical wrongs.

In Ethiopia's case, it has been suggested that important historical episodes would be considered in demarcating temporal jurisdiction of the TRC.[383] This may roughly involve taking stock of ranges of such historically eventful periods including: (1) from the 19th Century violent imperial state building campaign,[384] (2) from the 1931-era of modern written constitution,[385] (3) from the 1974 Revolution until the demise of the Derg in 1991,[386] and (4) from the 1991 change of the Ethiopian Government to present.[387] These, according to this author, are the crucial stocks of historical frame of references from which possible reconciliation endeavors should be taken into consideration in Ethiopia. However, in this climate of contestation of the remote past, there remains a divergent understanding of the present and differing aspirations of different groups about the future. Given these, how to specify the mandate of the defunct, or any other future, Reconciliation Commission and ensure its effectiveness may surely remain a daunting task and needs to be addressed with a careful forward-looking approach.

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[379] *Reconciliation Commission Establishment Proclamation*, *supra* note 308, para. 3 (emphasis added).

[380] Lavinia Stan, *Limited Reckoning in the Former Soviet Union: Some Possible Explanations*, *in* TRANSITIONAL JUSTICE AND THE FORMER SOVIET UNION: REVIEWING THE PAST, LOOKING TOWARD THE FUTURE 19, 40 (Cynthia M. Horne & Lavinia Stan eds., 2018).

[381] *See* Dersso, *supra* note 334.

[382] Abiy's Inaugural Address, *supra* note 245.

[383] *See* Tom Bentley, *A Line Under the Past: Performative Temporal Segregation in Transitional Justice*, 20 J. HUM. RTS. 598, 600 (2021).

[384] Muktar Ismail, *Ethiopian Nation-Building Is Haunted by Its Troubled History*, ETHIOPIA INSIGHT (Jan 22, 2023), https://www.ethiopia-insight.com/2023/01/22/ethiopian-nation-building-is-haunted-by-its-troubled-history/.

[385] *See* Tsegaye Beru & Kirk W. Junker, *Constitutional Review and Customary Dispute Resolution by the People in the Ethiopian Legal System*, 43 N.C. J. INT'L L. 1, 7 (2018).

[386] *See* Tronvoll, *supra* note 363, at 53.

[387] *See id.* at 49.

Generally, in the absence of the determination of temporal jurisdiction of the Reconciliation Commission in the enabling law, two competing views exist in Ethiopia. The first view claims that the mandate of the Commission should extend relatively to the remote historical past.[388] On the other hand, others claim that the past should be glossed over and that the temporal mandate should focus more on the episodes of only the relatively recent past.[389] According to the first view, establishing TRCs to address atrocities of the remote historical past is becoming common in developed democracies.[390] Many western democracies are implementing different transitional justice measures, in the absence of any transition.[391] This is mainly to reckon with their historic infliction of violence and subjugation of the indigenous or oppressed peoples during colonialism.[392] This shows that countries are committed, at least at official level, to address their abusive past despite the case that it happened during the distant past. In this regard, while the above is done, it is important to keep in mind that there is a distinguishing characteristic of the Truth and Reconciliation Commissions from the Parliamentary Commissions of Inquiry. This is due to the fact that the latter tends to focus on single cases or circumstances of a specific event, whereas the former tends to cover relatively longer periods or even decades to "identify historical patterns of violence and systematic violations."[393] In this line, defining the mandate which extends to the relatively remote historical past may be justified though this is not without serious challenges.

In Ethiopia's case, it is often held that the past history of the imperial state building process lies at the root of the current crises and ethnic conflicts.[394] But this view is also countered by others who maintain positive view about the same past. So, it is also a subject of serious political and academic contestations broadly between "pan-Ethiopian nationalists who spare the past evils" and "ethnic nationalists."[395] The latter want adequate reckoning or at least recognition of their pains in the historical past and call for a new social contract. On the other hand, some would opine, however, that it is important to gloss over history and to forget it

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[388] *See* Dersso, *supra* note 334.

[389] *See* Amnesty Int'l et al., *Ethiopia: Extend the Expert Commission's Mandate*, HUM. RTS. WATCH (Sept. 2, 2022, 12:00 AM), https://www.hrw.org/news/2022/09/02/ethiopia-extend-expert-commissions-mandate.

[390] *See* Lawther & Moffett, *supra* note 67.

[391] *See id.*

[392] Australia, USA, Canada, Belgium, among others, established their TRCs and effected official public apology over their colonial legacies and subsequent violence. *See Truth, Reconciliation, and Healing: Toward a Unified Future: Briefing of the Security and Corporation in Europe*, 116th Cong. 8, 32 (2019).

[393] AMNESTY COMM'N OF THE MINISTRY OF JUST. OF BRAZ. ET AL., *supra* note 135, at 11.

[394] Assefa, *supra* note 13, at 95–96.

[395] *Id.* at 96, 110–13.

so that Ethiopia can build a peaceful future.[396] However, this latter view is also problematic in some respects. TRC authorities, such as Hayner, warn that a nation cannot build a peaceful future based on a "blind deni[al and] forgotten history."[397] To this end, Jovanovic adds,

> [h]istory matters. It matters whether we tell the truth about what happened centuries ago, and it matters whether we tell the truth about more recent history. It matters because if we can't, we will never be able to face the present, guaranteeing that our future will be doomed.[398]

Patricia Campbell further expounds this position in saying, "Reconciliation is impossible if a segment of society wants to remain conveniently ignorant about its past while another segment has never had its suffering acknowledged. . . . To ignore it breeds resentment and has the potential to engender revenge violence."[399] Therefore, the glance at the longer past becomes so important in the sense that the roots of the current crisis may be rooted in the past. For instance, in its final report in 2009, the Liberian TRC found out, among others, that "[t]he conflict in Liberia has its origin in the history and founding of the modern Liberian State."[400] Similarly, well-established political historians such as John Markakis argued that the political crisis in Ethiopia is rooted in "the legacy of Ethiopian modern history, inherited from the empire's authoritarian and repressive past."[401] In Ethiopia, therefore, while dwelling in the past is dangerous, and agreement on all historical paths may not be attained, recognizing past pain and suffering and arriving at mutual understanding is still important. As one commentator observed, "it should be approached in a way that past truth is not suppressed, lessons learned from [the] past guide present life and shape . . . the future."[402]

On the contrary, the second view argues that extending the mandate of the Commission to older historical periods or past centuries would cause huge substantive and technical difficulties to the work of the

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[396] HAYNER, *supra* note 108, at 5.

[397] *Id.*

[398] Dieudonne Nsom Kindong Jr., *Reconciliation in Cameroon*, BEYOND INTRACTABILITY (May 14, 2020), https://www.beyondintractability.org/casestudy/kindong-cameroon.

[399] Patricia J. Campbell, *The Truth and Reconciliation Commission (TRC): Human Rights and State Transitions—The South Africa Model*, 4 AFR. STUD. Q. 41, 49 (2000).

[400] TRUTH & RECONCILIATION COMM'N OF LIBER., FINAL REPORT OF THE TRUTH AND RECONCILIATION COMMISSION OF LIBERIA (TRC) VOLUME I: FINDINGS AND DETERMINATIONS 9 (2009), https://reliefweb.int/report/liberia/liberias-trc-presents-final-report.

[401] *See generally* JOHN MARKAKIS, ETHIOPIA: THE LAST TWO FRONTIERS 1, 3 (2011).

[402] Girma Gadisa, *Reconciliation: Underrated Element in the Transitional Justice Process of Ethiopia*, ADDIS FORTUNE (Jan. 16, 2021), https://addisfortune.news/reconciliation-underrated-element-in-the-transitional-justice-process-of-ethiopia/.

Commission.[403] Moreover, as noted in the preceding sections, arguments can be made that eliciting much historical injustice may open new wounds and exist in tension with the desire for post-conflict stability, which is sometimes in "contradiction with the demands of justice."[404] This tension between peace and justice in the field of transitional justice has been explored and debated by scholars, practitioners, and policymakers.[405] The contestation also arises when the reach of transitional justice is overstretched away from juridical measures and employed into historical narratives. As much attention as is paid to longer periods, so goes the argument, the other possible danger may be that it may become difficult, or impossible, to determine the perpetrators and the victims. That is why scholarship on transitional justice suggests that the investigation by the TRCs in general should extend mostly to the "relatively recent past."[406] Thus, the favored view in this Article is to reconcile these competing views and take the positives from each.

Moreover, the Commission is authorized only to conduct investigations on events that took place before it was established.[407] Thus, it was designed in a way that it takes on a constrained role in resolving the conflicts and violence that erupted after and during its establishment and in the future, which also limits its achievements in ensuring peace in Ethiopia.[408] Generally, TRCs attempt to create certain historical narratives to apply a temporal categorization to past events by connecting the societal ruptures which took place both in the remote and recent past.[409] While closing the book on the State's abusive past is often implored, it is difficult to arrive at "a discernible break from [a] past" that is guilty and at another part that dissociates itself from the past crimes.[410]

Furthermore, as far as its mandate is concerned, the enabling law of the Ethiopian Reconciliation Commission does not address some challenging questions. Some of them include: (1) How is it possible to maintain peace or in what ways? (2) How to ensure justice when the

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[403] *See* Yusuf, *supra* note 311, at 117.

[404] Félix Krawatzek, Book Review, 73 EUR.-ASIA STUD. 410, 411 (2021) (reviewing TRANSITIONAL JUSTICE AND THE FORMER SOVIET UNION, REVIEWING THE PAST, LOOKING TOWARD THE FUTURE (Cynthia M. Horne & Lavinia Stan eds., 2019)).

[405] Louise Mallinder, AMNESTY, HUMAN RIGHTS AND POLITICAL TRANSITIONS: BRIDGING THE PEACE AND JUSTICE DIVIDE 3 (2008); Thomas Obel Hansen, *Transitional Justice: Toward a Differentiated Theory*, 13 OR. REV. INT'L L. 1, 19 (2011).

[406] Seils, *supra* note 159, at 2.

[407] *See Reconciliation Commission Establishment Proclamation*, *supra* note 308, para. 3, §§ 2(3), 6(4); *see also* Dersso, *supra* note 334.

[408] *Transitional Justice Contribution to Sustaining Peace and Realizing SDG 16 in Ethiopia*, ELIZKA RELIEF FOUND., https://www.ohchr.org/sites/default/files/2022-01/Elizka-Relief-Foundation.docx (last visited Mar. 30, 2023).

[409] Zinaida Miller, *Temporal Governance: The Times of Transitional Justice*, 21 INT'L CRIM. L. REV. 848, 848, 875 (2021).

[410] Bentley, *supra* note 383, at 599.

Commission has no power to summon or subpoena perpetrators or witnesses or when it is not authorized to conduct trials or refer the same to the judicial authorities? (3) How do the declarations ensure such ideals as to ensure justice, reconciliation, and consensus among the Ethiopian public can be achieved within the constrained political, transitional, and economic environment? These and other questions make it evident that the mandate of the Ethiopian Reconciliation Commission was not designed in a thoughtful manner. And they foretell the Commission's failure as its mandate begins with everything and ended up with nothing in the end (as will be discussed in the subsequent section).

B. Public Participation and Consultation in its Establishment: The Design Stage

Public participation has been increasingly understood to be one of the most important ingredients of assessing the legitimacy and success of transitional justice processes in a given country.[411] At an operational level, public or community participation "refers to an effort to involve people who have experienced periods of conflict and/or human rights violations, and who are supposed to be the principal beneficiaries of transitional justice strategies, in the design and implementation of those strategies."[412] According to the United Nations Office of the High Commissioner for Human Rights, "[n]ational consultations are a critical element as successful transitional justice programmes necessitate meaningful public participation, particularly of victims."[413] Different mechanisms of transitional justice are in the end political institutions, and these mechanisms, including TRCs, should be formulated based on consultations and political bargaining between different actors who want to maximize their protection.[414] Increasingly, it has also been stressed that public consultation should be undertaken beginning from the early steps in implementing the transitional justice process.[415] As such, public consultation can be equated with local or bottom-up approaches which contrasts with state-driven, top-down, or legalistic approaches in the design and implementation of the proposed transitional justice mechanisms, including TRCs.[416] The famous South African TRC, for instance, "grew out of an elaborate political compromise that rejected the

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[411] Afr. Union, *supra* note 333, at 5.

[412] USAID, COMMUNITY PARTICIPATION IN TRANSITIONAL JUSTICE: A ROLE FOR PARTICIPATORY RESEARCH 1 (2014).

[413] U.N. Off. of High Comm'r for Hum. Rts., *Guidance Note on National Human Rights Institutions and Transitional Justice* (Sept. 27, 2008), http://w02.unssc.org/free_resources/UNDP-OHCHRToolkit/pdf/NHRIs_Guidance_Note_TJ_Oct_08.pdf.

[414] *See* NICHOLS, *supra* note 325, at 2.

[415] Triponel & Pearson, *supra* note 140, at 140.

[416] *See id.* at 131 (suggesting that input from the community can lead to the creation of systems that are fair and respond appropriately to local needs).

outgoing regime's demand for blanket amnesty and no retribution in exchange for a mechanism . . . that could grant amnesty for political acts."[417] Furthermore, in the case of establishment of the South African TRC, its Chairman states,

> The Truth and Reconciliation Commission (TRC) was born [out] of a spirit of public participation, as the new [G]overnment solicited the opinions of South Africans and the [I]nternational [C]ommunity regarding the issue of granting amnesty as well as the issue of accountability in respect to past violations and reparations for victims. Civil society, including human rights lawyers, the religious community, and victims, formed a coalition of more than 50 organizations that participated in a public dialogue on the merits of a [T]ruth [C]ommission. This consultative process lasted a year and culminated in the legislation, the Promotion of National Unity and Reconciliation Act 34 of 1995 (the Act), that established the TRC.[418]

Similarly, the East Timorese Commission for Reception, Truth, and Reconciliation, which echoes the South African TRC, also emerged in the participatory process with the involvement of NGOs, the Catholic Church, and the Office of the United Nations High Commissioner for Human Rights ("OHCHR") where community consultations were conducted between 2000 and 2001 to discover if there was public support for the Commission.[419] In this particular case, the role and influence of NGOs in shaping the trajectory of the TRC measure became very relevant during the period of lobbying the draft TRC legislation.[420] The process generally helps to incorporate the views of the diverse stakeholders in the process. In the case of transitional justice in Burundi, the United Nations, for instance, recommended, that there should be

> a broad-based, genuine[,] and transparent process of consultation . . . with a range of national actors and civil society at large, to ensure that, within the general legal framework for the establishment of judicial and non-judicial accountability mechanisms acceptable to the United Nations and the

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[417] Rotberg, *supra* note 146, at 5.

[418] Desmond Tutu, *Truth and Reconciliation Commission, South Africa*, ENCYC. BRITANNICA, https://www.britannica.com/topic/Truth-and-Reconciliation-Commission-South-Africa (last visited Mar. 22, 2023).

[419] Jenkins, *supra* note 115, at 237.

[420] Hugo Van Der Merwe et al., *Non-Governmental Organizations and the Truth and Reconciliation Commission: An Impact Assessment*, 26 POLITIKON 55, 58–60, 62 (1999).

> Government [of Burundi], the views and wishes of the people of Burundi are taken into account.[421]

Beyond contributing for TJ's legitimacy, the participatory process also has imperative on peace and stability. In a Guidance Note on post-conflict measures, the United Nations Secretary General Kofi Annan emphasized that the maintenance of peace and stability is unthinkable without the due participation of the concerned public in such measures.[422] In his words, peace and reconciliation cannot be achieved in the long run "unless the population is confident that redress for grievances can be obtained through legitimate structures for the peaceful settlement of disputes and the fair administration of justice."[423]

While consultations may be facilitated by different actors, such actors should be those who do not have political stakes in the outcome of the public consultation process. One important body in a better position to conduct public consultations is the well-respected national human rights body (if it exists). But this body should still maintains its independence and "compl[ies] with [the] relevant standards of good practice (the so-called Paris Principles) [which] also provides the reassurance that the process will be conducted on the basis of human rights standards and with respect for the rights and the dignity of the consultees."[424] Depending on the contexts, the United Nations and other regional actors may also be of some help during the design process of the transitional justice alternatives as has occurred in many post-conflict contexts.

Ultimately, the lofty goals of transitional justice, such as providing recognition for victims, fostering interpersonal and intercommunal trust, and strengthening the rule of law institutions, cannot succeed in the absence of the "meaningful" transformative participation of the victims.[425] This "meaningful participation" in the process may take different forms. According to Pablo de Greiff's *First Report on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, it includes active

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[421] U.N. Secretary-General, *Report of the Assessment Mission on the Establishment of an International Judicial Commission of Inquiry for Burundi*, ¶ 75, U.N. Doc S/2005/158 (Mar. 11, 2005). This agreement, known as the Arusha Peace and Reconciliation Agreement for Burundi, was signed in 2000 and recommended the establishment of a truth and reconciliation commission along with international judicial commission of inquiry. Triponel & Pearson, *supra* note 140, at 105.

[422] U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 5, 17, 44, 64(h), U.N. Doc S/2004/616 (Aug. 23, 2004).

[423] *Id.* ¶ 3.

[424] OFF. OF THE U.N. HIGH COMM'R FOR HUM. RTS., RULE OF LAW TOOLS FOR POST-CONFLICT STATES: NATIONAL CONSULTATION ON TRANSITIONAL JUSTICE, at 18, U.N. Doc. HR/PUB/09/2 Sales No. 09.XIV.2 (2009).

[425] Pablo de Greiff (Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence), *First Rep. on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, ¶ 54, U.N. Doc. A/HRC/21/46 (Aug. 9, 2012).

participation of victims and affected communities in truth-seeking and investigative processes, involvement in the design of reparative mechanisms, and the involvement of the public in the institutional reform and design of the TJ mechanisms.[426] Thus, public participation and participation of victims contributes to rectify challenges of possible exclusion of certain groups and remedy for previously prevailing power imbalances. Moreover, it helps garner public support for the effectiveness of TRC's tasks. It has been shown that "[c]ommunities are more likely to support initiatives that they themselves are involved in, lending legitimacy to transitional justice processes. In addition, this approach means that root causes of [] violence are more likely to be addressed, leading to longer-term stability and peace."[427] Moreover, providing opportunities for public participation during the design of transitional justice processes also assures the continued participation of the society during its operation. According to the U.N. Secretary General's 2004 *Report on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, "[T]he most successful transitional justice experiences owe a large part of their success to the quality and quantity of public and victim consultation carried out."[428] In the case of Brazilian TRC of 2011, which was established after a successful parliamentary debate and participation of other actors, one study found that the extended dialogue during its creation and public support from different social actors were "reflected in the strong political legitimacy and positive public opinion now enjoyed by the [C]ommission."[429] Thus, the citizens' deliberation together in an inclusive and bottom-up approach about confronting the legacy of past violence should be highly emphasized. As Diane Orentlicher conclusively observes, "No set of principles could or should displace the quintessentially local project of communal reckoning."[430]

In light of the foregoing, it can be observed that the Ethiopian (disorganized) transitional justice processes in general and the National Reconciliation Commission specifically do not have a track record of even

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[426] *Id.* ¶ 54–55.

[427] JENNIFER TSAI & SIMON ROBINS, STRENGTHENING PARTICIPATION IN LOCAL-LEVEL AND NATIONAL TRANSITIONAL JUSTICE PROCESSES: A GUIDE FOR PRACTITIONERS 9 (Int'l Coal. of Sites of Conscience eds., 2017).

[428] U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, *supra* note 422, ¶ 16. In January 2007, the United Nations High Commissioner for Human Rights, while reporting to the Human Rights Council on the situation in Nepal, also emphasized the importance of consultations. U.N. High Commissioner for Human Rights, *Report of the United Nations High Commissioner for Human Rights on the Human Rights Situation and the Activities of her Office, Including Technical Cooperation, in Nepal*, ¶ 42, U.N. Doc. A/HRC/4/97, (Jan. 17, 2007).

[429] AMNESTY COMM'N OF THE MINISTRY OF JUST. OF BRAZ. ET AL., *supra* note 135, at 15–16.

[430] Diane Orentlicher, *Prologue* to THE UNITED NATIONS PRINCIPLES TO COMBAT IMPUNITY: A COMMENTARY 1, 2 (Frank Haldemann & Thomas Unger eds., 2018).

symbolic public consultation in the process of its creation. While the establishment of the National Reconciliation Commission is a step in the positive direction, much is unknown about how and under what circumstances it emerged. According to one close observer and later its Commissioner, "[q]uestions abound as to whether relevant stakeholders such as victim groups, civil society organizations[,] and the legal community will be afforded the opportunity and platform to take part in the planning and formulation of the transitional justice process and in its monitoring."[431] By considering the general political atmosphere in which the National Reconciliation Commission was erected, it can be argued that it solely emerged from the decision of the central Government. Thus, it never involved public inputs and other stakeholders in the process.

Many of the challenges can be attributed to the constraints posed by the nature of the violent and unfinished transition itself wherein the ruling elites struggled to ensure their survival in power. Some other significant pitfalls and challenges in the design and participation relate to weak or absent civil society in the country. As Jasmina Brankovic and Hugo van der Merwe observed recently, the subject of transitional justice has been a field prominently shaped by the civil society organizations ("CSOs") and they have been key actors behind its development and "dogma."[432] In weak States wrecked by conflicts, normally the civil society participates in drafting legislation, establishing and designing commissions, accessing the victims, and assisting vulnerable communities to seek justice.[433] CSOs are crucial not only for advocating for transitional justice, but also in overseeing the attempt of the political elite to capture the justice process for their own political benefits.[434] In addition to the formative phase, the role of CSOs is also strongly felt in the peacebuilding phase where they help fill gaps by linking high level political negotiations to people at the grassroots level.[435] Though CSOs can have divergent policy preferences, they played a significant role, for instance, in designing the

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[431] Solomon A. Dersso, *Pursuing Transitional Justice and Reconciliation in Ethiopia's Hybrid Transition*, ADDIS STANDARD (Dec. 14, 2018), http://addisstandard.com/oped-pursuing-transitional-justice-and-reconciliation-in-ethiopias-hybrid-transition/.

[432] Makau Mutua, *Foreword* to ADVOCATING TRANSITIONAL JUSTICE IN AFRICA: THE ROLE OF CIVIL SOCIETY v, viii (Jasmina Brankovic & Hugo van der Merwe eds., 2018) [hereinafter ADVOCATING TRANSITIONAL JUSTICE IN AFRICA].

[433] *See id.*

[434] *See* Naomi Roht-Arriaza, *The New Landscape of Transitional Justice*, *in* TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE, *supra* note 42, at 2–3; *see also* VANDEGINSTE, *supra* note 91, at 224–26 (2010).

[435] *See* Raymond Andaya, *Unarmed Civilian Peacekeeping as a Transformative Justice Concept: Civilian Protection and Everyday Justice in the Bangsamoro*, 9 ASIAN J. PEACEBUILDING 279, 288 (2021).

South African TRC[436] and the TRC in Burundi.[437] Moreover, according to Ronald Slye, one of its international Commissioners, the Kenyan TRCJ is mostly crafted by a local CSO.[438] Even in the case of recent transitional justice in North African countries, Noha Aboueldahab notes that "civil society was and continues to be a crucial driving force."[439] In Ethiopia, CSOs are weak due to the culture of closed political space and resultant absence of vibrant civil society. Additionally, CSOs are also repressed and have been decimated by the repressive civil society law passed by Proc. No 621/2009.[440] Thus, the role of CSOs in Ethiopia has been sadly and severely curtailed, which limits their potentially important contributions in the transitional justice process.[441] But some available local assets such as the Inter-Religious Council and prominent traditional elders from different ethnic communities could be used in the effort to foster dialogue and reconciliation, both at the governmental and grassroots level.[442]

In sum, it is worthy to stress that the recent AUTJ Policy of 2019 provides that open and effective public participation in the design and implementation of reconciliation is the single most important factor in the success of transitional justice measures. However, such public participation was not evident in the design and implementation of the Ethiopian TRC on account of the top-down, narrow, government ownership of the transition process which has caused the TRC to lack broad grassroots support. On a more critical note, its establishment simply signaled part of a routine of "political posturing," which makes it susceptible to not achieving its broader tasks.[443] Therefore, the establishment of the Ethiopian reconciliation process lacks legitimacy due to absence of "meaningful" public participation during its formation. Generally, a top-down process, absence of political compromise, lack of good faith negotiations, lack of consultation and consensus among the contending actors in its establishment and its mandate haunt the

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[436] Jasmina Brankovic & Hugo van der Merwe, *Editors' Preface* to ADVOCATING TRANSITIONAL JUSTICE IN AFRICA, *supra* note 100, at vii.

[437] *See* VANDEGINSTE, *supra* note 91, at 213–15.

[438] *See* SLYE, note 376, at 56.

[439] Noha Aboueldahab, *Navigating the Storm: Civil Society and Ambiguous Transitions in Egypt, Libya and Tunisia, in* ADVOCATING TRANSITIONAL JUSTICE IN AFRICA, *supra* note 432, at 183.

[440] *See generally Charities and Societies Proclamation*, Proclamation No. 621/2009, § 7, Fed. Negarit Gazeta, Year 14, No. 25 (Eth.) (regulating civil societies in numerous ways, including the following: compelled production of documents; financial and employment regulations; empowerment to remove or replace officers; suspension or cancelation licenses; dissolution).

[441] *See* Gebre Yntiso, *Reality Checks: The State of Civil Society Organizations in Ethiopia*, 20 AFR. SOCIO. REV. 2, 6 (2016).

[442] INT'L CRISIS GROUP, KEEPING ETHIOPIA'S TRANSITION ON THE RAILS 15 (2019).

[443] Andrew G. Reiter, *Measuring the Success (or Failure) of Transitional Justice, in* AN INTRODUCTION TO TRANSITIONAL JUSTICE, supra note 99, at 269, 276.

Ethiopian Commission's legitimacy and thereby constrain its performance. As such, it did not win the requisite level of legitimacy among the contending actors, civil societies, and wider members of the Ethiopian society, generally. Ultimately, the lack of legitimacy and the TRC's creation through a unilateral government decision partly and critically constrained its success; made its very existence invisible; and made its works, if there is any, questionable.

C. Independence and Financial Autonomy of the Commission

The characteristics of independence and impartiality stand out as one of the most important standards for successful completion of the mandates of TRCs.[444] As the Commission is a non-judicial organ mostly responsible for producing only findings and recommendations, as Harwood argues, a semblance of trust is crucial and any perceived or real bias "can damage credibility and therefore their influence and legitimacy."[445] The impartiality of a given TRC is highly emphasized so that "their investigations [are] even-handed and findings [] rest on objective criteria."[446]

Archbishop Desmond Tutu has a telling story about the experience of independence of the Commission when he was the Chair of the South African TRC. As he briefly narrates in his foreword to Forgiveness and Reconciliation: Religion, Public Policy and Conflict Transformation, there was a concern that one of the Commissioners was implicated in the previous human rights violations which occurred during the Apartheid rule.[447] In short, after the Commission organized to make inquiry into the case and summarily produced its reports to the President, Mandela told the anxious suspect Commissioner that he was exonerated by the Commission.[448] Desmond Tutu was offended by the decision and went to speak to the secretary of the President because he believed the President had interfered in the TRC's work, or that the Chairman of the Commission should have known about the decision first.[449] As Mandela learned about this event, he immediately phoned Desmond Tutu to say "Mpilo, you are quite right. I am sorry." However, Tutu himself believes that such an

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[444] Harwood, *supra* note 139, at 404.

[445] *Id.*

[446] *Id.*

[447] Desmond M. Tutu, *Foreword* to FORGIVENESS AND RECONCILIATION: RELIGION, PUBLIC POLICY AND CONFLICT TRANSFORMATION, at x (Raymond G. Helmick & Lodney L. Petersen eds., 2001).

[448] *Id.*

[449] *Id.*

"exceedingly humbl[e]" apology requires "being [the] kind of person [Mandela] is"[450] and may not be readily available everywhere.

According to Article 13 of the Proclamation, the Ethiopian Commission is independent organ, and it "performs its activities freely and independently."[451] However, the law does not provide a specific set of rules under which the independence of the Commission should be maintained. It neither provides any safeguard mechanisms in any instances where it may not be maintained. Thus, the key challenge is that there is no mechanism to ensure the neutrality and independence of the Commission. Several factors account for questioning its independence.

For one thing, the members draw entirely from domestic nationals most, or all, of whom were handpicked by the Executive without the participation of the public.[452] The appointment of the Commissioners by the Executive, or the Prime Minister of Ethiopia, is not an endemic problem by itself. For instance, the Chairperson and other members of the South African TRC were selected by President Nelson Mandela but with one condition—that they were selected only after public deliberation.[453] But the Commission functioned independently to produce one of the most influential and authoritative texts ever produced by a Truth and Reconciliation Commission. While it is not aimed to romanticize the South African TRC, it is clear that this fortune of independence and impartiality is not to be taken for granted in many post-conflict cases. To make up for this, many States attempt to design different mechanisms to ensure a semblance of independence and neutrality. In the case of the TRC in Burundi, for instance, Stef Vandeginste observes that "to make up for the absence of international Commissioners, it suggests an international consultative council composed of five eminent personalities of high moral standing," though the tasks it is endowed with lack substantive elements and are largely ceremonial.[454] In the case of the Kenyan TJRC, there were three non-Kenyan Commissioners from Zambia, Ethiopia, and the United States to compensate for the vulnerability which arises when TRCs solely rely on domestic Commissioners.[455] It is not claimed here that the presence of international commissioners will guarantee the immunity from political interference, but their presence may play some kind of

[450] *Id.*

[451] *Reconciliation Commission Establishment Proclamation*, 2018, *supra* note 46, art. 13

[452] *See* Tamene Ena Heliso, *Critical Appraisal of the Ethiopian Reconciliation Commission: A Comparative Study*, 11 J.L. & Conflict Resol. 15, 21–22 (2020).

[453] *See* Arvind Kumar Yadav, *Nelson Mandela and the Process of Reconciliation in South Africa*, 63 INDIA Q. 49, 68 (2007).

[454] Stef Vandeginste, *Burundi's Truth and Reconciliation Commission: How to Shed Light on the Past While Standing in the Dark Shadow of Politics?*, 6 INT'L J. TRANSITIONAL JUST. 1, 10 (2012).

[455] *See* SLYE, *supra* note 376, at 9.

balancing role. Despite the claim that the Ethiopian Commission acts independently, its Proclamation does not provide practical, legal, or procedural mechanisms through which to ensure its independence and neutrality. In the absence of those mechanisms, one may be readily tempted to question its legitimacy, processes, and outcomes.

Financial autonomy also stands as one of the important indicators of the success of a given TRC. Generally, transitional justice, as a whole, is a costly political process. For instance, the United Nations allocated billions of dollars for the prosecution of single cases in international tribunals.[456] On the other hand, the South African TRC has had an annual budget of 18 million U.S. Dollars.[457] According to Getahun Tsegaye,

> During its three years in office, the [Ethiopian] [G]overnment allocated millions of birr annually. In the last fiscal year alone, the Commission . . . had a total budget of over ETB 21.4 million. From July 2021 until the end of its term last January, the Commission had spent more than four million ETB on its budget. It is now [ordered by the Parliament] to hand over the remaining budget[, documents and offices to its successor institution, the newly established National] Dialogue Commission. "Accordingly, the Office of the Federal Auditor General [is instructed to] review the account before it is transferred to the new Commission.[458]

The point can be made that it is not only about availability of adequate financial resources, but it is also about the proper use of it. If the Commission is acting vigilantly and actively to maximize its efforts, the budget may be a crucial element of its success or failure. On the other hand, in the context where the Commission is not making vigorous efforts to execute its mandates, budget constraint cannot be invoked as a critical issue.

D. Questions Over Membership in the Commission

Selection of members, their composition, qualification, and political insulation are crucial elements in the success or failure of a TRC. Therefore, the process needs considerable public input. Though there may not be hard and fast rules, it is highly determined by the political condition of a given country. Moreover, its composition should balance the political divides prevailing in the country at the moment. As noted above, before commencing the activities of a given TRC, it is imperative to establish

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[456] *See* Rupert Skilbeck. *Funding Justice: The Price of War Crimes Trials*, 15 HUM. RTS. BRIEF 6, 6 (2008).

[457] U.S. INST. PEACE, TRUTH COMMISSION: SOUTH AFRICA (1995), https://www.usip.org/publications/1995/12/truth-commission-south-africa.

[458] Getahun Tsegaye, *Ethiopian Reconciliation Commission Dissolves*, ADDIS STANDARD (Mar. 1, 2022), https://addisstandard.com/news-ethiopian-reconciliation-commission-dissolves/.

whether there is a public support from CSOs, ordinary members of the society, and survivors of the atrocity in question for such an exercise.[459] Careful and open process of selection of the members of the Commission is crucial in ensuring credibility of the Commission wherein the Commissioners are required to display "excellent moral and professional reputations."[460] TRC formation should reflect a broad range of ideas, diverse perspectives, and affiliations to ensure that no members of the political society feel excluded.[461]

The Ethiopian Reconciliation Commission has been previously criticized in this Article for its several flaws. And it is also criticized in relation to the process of selection and composition of its membership.[462] As it is the case with its establishment, the membership of the Commission was not the result of wider public consultation.[463] More surprisingly, it has been reported that some of the Commissioners learned of their appointment from social media and some complained because they were appointed as Commissioners without their consent or knowledge.[464] In the words of one of its Commissioners, "there was no public participation . . . in the nomination and appointment of the Commission's members. These deficiencies could imperil the [C]ommission's legitimacy."[465] This is a clear departure from the normative requirement in the establishment of TRCs across various jurisdictions. For instance, the process of selection of South African TRC Commissioners came after an open, countrywide consultation and nomination process.[466] As Archbishop Desmond Tutu later explained, independent selection panels were organized which comprised of all existing political parties, civil society, and religious entities in the country.[467] In the case of the Liberian TRC, key Commissioners were appointed "after a comprehensive national vetting process."[468] However, this level of independent selection and nomination process is not visible in all jurisdictions. There are also instances of failed and susceptible processes of the selection of Commissioners. For instance, in the case of the Democratic Republic of the Congo's in 2002, Commissioners were selected and appointed by the Executive even before the enabling act of the TRC was passed and before

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[459] SHAW, *supra* note 114, at 2.
[460] AMNESTY COMM'N OF THE MINISTRY OF JUST. OF BRAZ., *supra* note 429, at 11.
[461] Hayner, *supra* note 132, at 654; MAX DU PLESSIS, TRUTH AND RECONCILIATION PROCESS: LESSONS FROM ZIMBABWE? 7 (2010).
[462] Yohannes & Gebresenbet, *supra* note 301, at 8.
[463] *See id.* at 11, 14.
[464] *Id.* at 11.
[465] Dersso, *supra* note 354.
[466] Tutu, *supra* note 418.
[467] *Id.*
[468] TRUTH & RECONCILIATION COMM'N OF LIBER., *supra* note 400, at 12.

it had its legal personality.[469] This sends an early signal that the Commission is neither independent nor neutral, but that the appointment of the TRC's Commissioners is subject to their political affiliations.[470] Unlike the South African TRC Commissioners and its other counterparts, the Commissioners of Ethiopian Reconciliation Commission were not selected from a countrywide nomination process and no independent body existed to screen their integrity, moral standing, or relevance for the position.[471] There are rare claims that a committee composed of 18 members was involved in selecting and appointing the Commissioners,[472] but that claim has been unsustainable.

1. Too Many Commissioners?

There are 41 Commissioners of the Ethiopian TRC.[473] When the Commission commenced its work, it had internally organized itself into five main standing committees whose Chairs shall, together with the Chair and Vice Chair of the Commission, constitute the Executive Committee of the Reconciliation Commission.[474] The Executive Committee was led by the head of the Ethiopian Catholic Church, Cardinal Berhaneyesus Demerew Souraphiel.[475] This measure appears to emulate the South African TRC as it was led by the South African Anglican Archbishop, Desmond Tutu.[476] As exemplified by Archbishop Desmond Tutu, who is praised for his remarkable and charismatic leadership of the South African TRC, religious non-state actors are crucial in the transitional justice process.[477] According to Philpott, some fifteen

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[469] AMNESTY COMM'N OF THE MINISTRY OF JUST. OF BRAZ., *supra* note 429, at 15.

[470] *See generally id.* at 16–17 (explaining that a transparent and consultive truth commission selection process helps maintain the perception of independence and avoid political biases).

[471] *Compare* Tutu, *supra* note 418, *with* Yohannes & Gebresenbet, *supra* note 301, at 4.

[472] Moges Zewdu Teshome, *Ethiopia Must Give Transitional Justice a Change. The Challenges of Reconciliation in a Deeply Divided Nation*, VIENNA INST. FOR INT'L DIALOGUE & COOP., https://www.vidc.org/en/detail/ethiopia-must-give-transitional-justice-a-chance-the-challenges-of-reconciliation-in-a-deeply-divided-nation (last visited Feb. 27, 2023).

[473] Yohannes & Gebresenbet, *supra* note 301, at 4.

[474] *See generally id.* (explaining that the Ethiopian Reconciliation Commission [ERC] "has five standing committees charged with specific tasks" and that the thirteen member "executive committee" is composed of the ERC chair and deputy chairpersons, the non-voting executive director of the secretariat, and the chair and deputy chairperson of each standing committee).

[475] Di Trapani, *Cardinal Souraphiel, Member of the Congregation of the Mission, Designated President of the Ethiopian Truth and Reconciliation Commission*, FAMVIN (Feb. 18, 2019), https://famvin.org/en/2019/02/18/cardinal-souraphiel-member-of-the-congregation-of-the-mission-designated-president-of-the-ethiopian-truth-and-reconciliation-commission/.

[476] *See* U.S. INST. PEACE, *supra* note 457.

[477] *See* Danile Philipott, *When Faith Meets History: The Influence of Religion on*

transitional justice initiatives saw "strong" to "moderate" involvement of religious non-state actors.[478] The Ethiopian TRC involved key personalities of all religious orders, including Orthodox, Catholic, Protestants, and Muslims, as well as other traditional religions.[479] Thus, the Ethiopian TRC should be added to Philpott's list as transitional justice initiative to involve religious non-state actors. While their involvement in past abuses or their victimization may frustrate transitional justice processes, their presence in a time when state institutions are weak or when state machinery is not trusted helps to increase capacity and to ensure legitimation, beyond reconciliation and forgiveness.[480]

The famous South African TRC was constituted of 17 members organized into three main committees, namely the human rights violations committee, the amnesty committee, and the reparation committees.[481] These Committees had different but interrelated tasks.[482] The Commission as a whole was assisted by 300 support staff.[483] In the case of the Commissioners of Liberian TRC, nine key Commissioners–five men and four women–were appointed in 2005.[484] The TRC of East Timor was composed of seven national Commissioners and led by Aniceto Guterres Lopes, a prominent Timorese human rights activist.[485] In Chile, president Aylwin appointed eight Commissioners by balancing different sides of the political divide.[486] In the Ethiopian case, 41 members are arguably too many for the Commission. While its incorporation of a large

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Transitional Justice, *in* THE RELIGIOUS IN RESPONSES TO MASS ATROCITY: INTERDISCIPLINARY PERSPECTIVES 190 (Thomas Brudholm & Thomas Cushman eds., 2009).

[478] *Id.* at 177–78.

[479] *See* Lulsegged Abebe & Berhanu Mengistu, *National Reconciliation Commission for Ethiopia*, 13 INT'L J. ETH. STUD. 153, 159 (2019) (explaining that the current Ethiopian administration has attempted to establish truth commissions in various forms, including the Inter Religious Council—composed of Orthodox, Catholics, Evangelicals, and Muslims—and the Truth and Reconciliation Commission composed of forty-one Commissioners).

[480] *See* Ioana Cismas, *Reflections on the Presence and Absence of Religious Actors in Transitional Justice Processes: On Legitimacy and Accountability*, *in* JUSTICE MOSAICS: HOW CONTEXT SHAPES TRANSITIONAL JUSTICE IN FRACTURED SOCIETIES 302, 308–09, 328 (Roger Duthie & Paul Seils eds., 2017).

[481] Proclamation of National Unity and Reconciliation Act 1995, GN 1111 of GG 16579 § 2-3(3) (26 July 1995).

[482] The Human Rights Violations Committee was tasked with investigating human rights violations between 1960 and 1994. Their findings were to be referred to the Reparation and Rehabilitation Committee, which was responsible for providing redress for victims and their rehabilitation. Thirdly, the Amnesty Committee was established to review amnesty applicants and ensure that once amnesty is granted (subject to final approval by the president), "the applicant would not be subject to future prosecution" in either criminal or civil courts. *See* Campbell*, supra* note 399.

[483] U.S. INST. PEACE, *supra* note 457, at 2.

[484] U.S. INST. PEACE, TRUTH COMMISSION: LIBERIA (2006).

[485] Jenkins, *supra* note 115, at 233–34.

[486] U.S. INST. PEACE, TRUTH COMMISSION: CHILE 2 (1990).

number of Commissioners can help it to be inclusive of diverse peoples, it may create difficulty from the perspective of expediency.

2. Professional Background

Commissioners are expected to represent a broad range of professional and regional backgrounds. The members of the Ethiopian Commission included people with different backgrounds including politicians, religious leaders, intellectuals, artists, athletes, and others.[487] But all of them work on a voluntary and part-time basis.[488] It has been argued that drawing members from such diverse backgrounds will help the Commission to be representative of "the true face" of Ethiopian diversity.[489] However, as some commentators observe, on the other hand, "commensurate attention was not given to [the] inclusion of individuals with certain technical competencies to fulfill the [Ethiopian Reconciliation Commission's] immensely complex [] mandates."[490] The exercise of reconciliation is complex and concerns more than the issue of "representation" of diversity and requires that people from diverse professions such as law, human rights, justice, and reconciliation be involved in the process. In a tense transition period, the role of lawyers is important, especially when prosecuting perpetrators and granting amnesty.[491] On the other hand, there exists a tension about the role of the legal profession in TRCs as that role is "neither evident nor clear" because "[a TRC is neither] a legal process nor a judicial body that is given the task of dealing with the past."[492]

Thus, post-conflict States include members from diverse professional backgrounds, with a particular preference that Chairs have human-rights-focused exposures. But this is not always a precondition. For instance, the Liberian TRC was led by Jerome Verdier who was "a leading human rights and civil society activist" prior to his appointment.[493] The Liberian TRC was supported by an internal technical support committee, which was composed of three advisors.[494] According to Article 5(8)–(9)(a) of the Liberian TRC's mandate, the Liberian TRC was comprised of a selection committee composed of three representatives from CSOs, two representatives from political parties, one representative from the United

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[487] For the full list of the members and their relevant backgrounds, see *Ethiopia Named Members of National Reconciliation Commission*, BORKENA (Feb. 5, 2019), https://borkena.com/2019/02/05/ethiopia-named-members-of-national-reconciliation-commission/.

[488] Yohannes & Gebresenbet, *supra* note 301, at 10.

[489] *Id.* at 8.

[490] *Id.*

[491] *See* HEIDY ROMBOUTS, THE LEGAL PROFESSION AND THE TRC: A STUDY OF THE TENSE RELATIONSHIP (2002).

[492] *Id.*

[493] TRUTH & RECONCILIATION COMM'N OF LIBER., *supra* note 468.

[494] AMNESTY INT'L, *supra* note 132, at 5.

Nations, and one representative from the Economic Community of West African States ("ECOWAS"), the latter being the selection committee's coordinator.[495] According to Article 5, Section 10 of the mandate of the Liberian TRC, there should also be an International Technical Advisory Committee, composed of two representatives from ECOWAS and one from OHCHR.[496] This appears to be at least a successful attempt to balance professional backgrounds and engage diverse actors in the transitional justice process. However, one cannot see even such modest kinds of efforts being used to balance the reigning imbalance regarding representation in the Ethiopian case. It can be argued that much emphasis has been placed on selecting famous personalities and less attention has been given to those with substantive, professional relevance and technical capabilities, which may implicate the performance of the Commission.

3. Implications in Previous Human Rights Violations and Political Insulation of the Members

Beyond controversies surrounding professional and technical concerns, the Ethiopian Commission comprises of some members with clearly disputed political neutrality.[497] It also incorporated individuals who were still active politicians and largely affiliated with the ruling groups.[498] Moreover, some of them happen to be the former leaders under whose command mass murder and violence occurred.[499] This is one of the critical factors which befell the Kenyan TJRC. As Ronald Slye observed, its Chairman was an individual suspected to some degree of his association with prior human rights violations, political assassinations, and massacres.[500] Emphasizing the importance of the integrity of the TRC's members, Desmond Tutu notes that "even the best-designed institutions are dependent on the character and integrity of those chosen to serve them."[501]

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[495] An Act to Establish the Truth and Reconciliation Commission (TRC) of Liberia (2005) Art. V §§ 8–9(a) (Liber.).

[496] *Id.* § 10.

[497] *See* Yohannes & Gebresenbet, *supra* note 301, at 10–11.

[498] *See id.*; *see also* Moges Zewiddu Teshome, *Confronting Past Atrocities: A Critical Analysis of the Defunct Ethiopian Reconciliation Commission*, 26 L. DEMOCRACY & DEV. 342, 353 (2022).

[499] *See* SLYE, *supra* note 376, at 84, 86–87 (explaining that the chairman of the Kenyan Truth Commission, Ambassador Bethuel Kiplagat, had served under the Moi government official, a de-facto dictatorship in which "numerous gross violations of human rights were committed under the administration of President Jomo Kenyatta").

[500] *Id.* at 84, 90–91.

[501] Archbishop Desmond Tutu, *Foreword* to SLYE, THE KENYAN TJRC, *supra* note 376, at xvii.

It is clear, therefore, that the independence and political insulation of Commissioners is very important in accomplishing their tasks. As noted, in the Ethiopian case, the members' neutrality is contested given, for instance, the secretive means through which the Commissioners were selected.[502] Moreover, the political insulation of such selection was seriously tested during the violent civil war fought with the Tigrayan forces.[503] Inescapably, during this time, the Tigrayan forces complained that the Commissioners have supported the war of "law enforcement" in Tigray.[504] In a video posted on the Commission's social media platform on November 18, 2020, Commissioners chanted the slogan "I will stand for the honor of the Defense Forces," with a headline which read, "the members of the Reconciliation Commission showed their support for the [D]efense [F]orces."[505] Thus, it can be observed that this act may have seriously endangered the credibility of the Commission, especially when viewed from the perspective of the antagonistic parties to the conflict. For instance, the Tigrayan elites already explained their concern that the Commission assisting national reconciliation meant supporting a deadly campaign of violence in the country and involved a divisive narrative.[506] The support for the national cause may not be dismissed simply as political affiliation, but the proponents of such should be ready to accept what consequences it entails.

E. Lack of Prosecutorial, Subpoena Power, and Reparation Scheme

As it is well established, Truth and Reconciliation Commissions have powers of hearing, investigating, and producing final findings and recommendations.[507] Most Truth Commissions have no prosecutorial power, but some may have the power and mandate to refer cases for prosecution.[508] In this process, TRCs may be authorized to employ subpoena power.[509] According to Mark Freeman, the subpoena power of

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[502] Yohannes & Gebresembet, *supra* note 301, at 11.

[503] *Id.* at 9–11.

[504] *Ethiopian Reconciliation Commission Expresses Support for the War on Tigray*, TGHAT (Nov. 18, 2020), https://www.tghat.com/2020/11/18/ethiopian-reconciliation-commission-expresses-support-for-the-war-on-tigray/.

[505] Ethiopian Reconciliation Commission, FACEBOOK (Nov. 18, 2020), https://fb.watch/ePzEq1z_As/ (stating the following caption: "ለመከላከያ ሠራዊት ክብር እቆማለሁ" በሚል መሪ ቃል የዕርቀሰላም ኮሚሽን አባላት ለሠራዊቱ ያላቸውን ድጋፍ አሳይተዋል።, which translates to "[t]he members of the Peace Commission showed their support for the army with the slogan 'I will stand for the honor of the defense army.'").

[506] *Ethiopian Reconciliation Commission Expresses Support for the War on Tigray*, *supra* note 504.

[507] AMNESTY COMM'N OF THE MINISTRY OF JUST. OF BRAZ., *supra* note 429, at 23–24.

[508] *Id.*

[509] Priscilla B. Hayner, *Truth Commission*, ENCYC. BRITANNICA, https://www.britannica.com/topic/truth-commission (last updated Sept. 18, 2008).

Truth Commissions can be understood in two ways. The first understanding is that the subpoena power helps compel giving testimony, and the second understanding is that subpoenas are issued to compel the production of important documents and objects that are in control of a given person.[510] In ordinary cases of court proceedings, "the purpose of a subpoena is . . . to compel the disclosure of evidence 'under penalty' (*subpoena*) for failure to comply."[511] Most of the time, Truth and Reconciliation Commissions may have both powers.[512] For instance, the Liberian TRC has the power to request any documents and records from individuals and state authorities and interview them when needed.[513] Moreover, the TRC has the power to compel, whenever necessary, the production of such information under the risk of penalty when defaulted.[514] In Liberia, a Special Magistrate was established to summon and conduct quasi-judicial inquiries under the guidance of the Commission.[515] According to Freeman, the subpoena power should be referenced in the design stage of the TRC because the TRC cannot create its subpoena power later.[516] The AUTJ Policy of 2019 requires that States should ensure that TJ Commissions should have "appropriate powers enabling them to complete their work, such as powers of subpoena."[517] This may give rise to the usual friction existing between the criminal justice system and TRCs. According to William Schabas, a tension arises where the materials developed by the TRC's processes are reused for subsequent criminal prosecution.[518] If this is to be allowed, it is feared that this process would reduce the status of the TRC to simply that of a pretrial

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[510] MARK FREEMAN, TRUTH COMMISSIONS AND PROCEDURAL FAIRNESS 188 (2006).

[511] *Id.* at 190.

[512] Subpoena power is also known as the power to summon, which is common in most legal systems. According to Freeman, the following TRCs have subpoena power: Uganda, Chad, Sri Lanka, Haiti, South Africa, Nigeria, Grenada, Timor-Leste, Ghana, Sierra Leone, Liberia, and the DRC. *Id.* at 189. The Truth Commission of the Republic of Korea also has a power akin to subpoena power, which is an imposition of a fine on persons who refuse to appear before it. *Id.* The Canadian Truth and Reconciliation Commission has no subpoena power to identify perpetrators or judge whether physical or biological genocide happened in the Indian Residential Schools case. *See* SELEN KYAZAN, YELLOWHEAD INST., RESIDENTIAL SCHOOL GRAVES CANADA'S 'SLOW' GENOCIDE AND THE INTERNATIONAL CRIMINAL COURT 1 (2022), https://yellowheadinstitute.org/2022/05/04/residential-school-graves-canadas-slow-genocide-the-international-criminal-court/.

[513] AMNESTY INT'L, *supra* note 132, at 8.

[514] *Id.*

[515] TRUTH & RECONCILIATION COMM'N OF LIBER., *supra* note 400, at 21.

[516] FREEMAN, *supra* note 510.

[517] AFR. UNION, TRANSITIONAL JUSTICE POLICY 11 (2019).

[518] William A. Schabas, *Introduction* to TRUTH COMMISSIONS AND COURTS: THE TENSION BETWEEN CRIMINAL JUSTICE AND THE SEARCH FOR TRUTH 2, 2 (William A. Schabas & Shane Darcy eds., Kluwer Acad. Publishers 2004).

chamber, devalue the whole exercise, and discourage cooperation with it.[519]

The other matter surrounding the power of TRC relates to reparation schemes. In the transitional justice field, reparation is often hailed as the victim-centered approach which tailors TJ measures with the needs of the victims.[520] According to Hamber, reparations are understood as "things done or given as an attempt to deal with the consequences of political violence."[521] Pablo de Greiff holds that though reparation plays an important role in transitional justice, mainstream TJ studies have given little attention to reparations for victims of human rights violations."[522] However, it plays a more important role than other transitional justice measures because it has at least a direct (positive) impact on the victims.[523] However, the key feature of reparation measures is that they only provide material benefits in the form of compensation "for what in many cases is irreparable harm."[524] Reparation measures vary across transitioning societies in terms of the population or victims covered and the amount of compensation delivered.[525] Disparities exist with respect to the reparations that are implemented by a particular TRC. According to Priscilla Hayner, "it takes a number of years before a reparations program is put into place, and often these years are filled with frustration and even anger from victim communities."[526] Despite these challenges, reparations have an important component in that they "symbolically acknowledge and recognize the individual's suffering . . . [and] help concretize a traumatic event, aid an individual to come to terms with it[,] and help label responsibility."[527] Moreover, there is no formulaic approach for dealing with reparations and, as such, much depends on the socioeconomic context and resources of a given State. But reparations must be conducted through a "remedial human rights approach."[528]

The Ethiopian Reconciliation Commission was designed to have neither prosecutorial nor reparative mandates.[529] Thus, it only serves as a symbolic forum for public hearings,[530] and so, it betrays the causes and

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[519] *Id.*

[520] Lawther & Moffett, *supra* note 67, at 377.

[521] BRANDON HAMBER, TRANSFORMING SOCIETIES AFTER POLITICAL VIOLENCE: TRUTH, RECONCILIATION, AND MENTAL HEALTH 97 (2009).

[522] Pablo de Greiff, *Introduction* to HANDBOOK OF REPARATIONS 1, 1 (Pablo de Greiff ed., 2006).

[523] HAMBER, *supra* note 521, at 98.

[524] MURPHY, *supra* note 143.

[525] De Greiff, *supra* note 522, at 6, 10.

[526] HAYNER, *supra* note 110, at 163.

[527] Brandon Hamber, *Repairing the Irreparable: Dealing with the Double-Binds of Making Reparations for Crimes of the Past*, 5 ETHNICITY & HEALTH 215, 218 (2000).

[528] Lawther & Moffet, *supra* note 67, at 379.

[529] Dersso, *supra* note 251; Teshome, *supra* note 498, at 357.

[530] Teshome, *supra* note 498, at 358–59.

sufferings of the victims. Thus, even assuming that it had never dissolved, the Ethiopian TRC's impacts would have remained far from meaningful.

VIII. AN OVERVIEW OF THE PERFORMANCE AND LIMITATIONS OF THE ETHIOPIAN TRC

Generally, the success and failure of transitional justice mechanisms has stirred debates at academic and policy levels and its real outcome remains unclear. In a later phase, apart from its popularity and ambitious claims, transitional justice has reached what Dustin Sharp calls a "critical turn,"[531] reflecting a tension between its ambitious goals and a growing doubt about its efficacy.[532] In the end, however, its proponents hope that by its balancing, interweaving, sequencing, and designing multiple "pathways to justice" would result in some kind of "larger justice."[533] The holistic approach and the host of measures taken in transitional justice by mutually reinforcing processes can contribute, it is held, to political change and further consolidation of peace and rule of law institution. This approach broadly aims to facilitate rebuilding the trust of citizens in state institutions and augment the rule of law, guaranteeing fundamental human rights, and developing fundamental rights, especially in States committed to liberal democracy.[534]

On the other hand, there are concerns regarding transitional justice measures and their contributions in peacebuilding and conflict transformation. Critics of such transitional justice measures contend that academics and practitioners who support the implementation of such measures have paid "less attention to attempts of institutions themselves in these settings to address contextually defined root causes of conflicts."[535] According to Friedman, while TRCs in many settings have contributed to establishing accountability and the rule of law and addressing structural economic and social problems, a combination of inter-communal violence and contextual social and political realities shape and constrain the success and impact of TRCs on a given society.[536] For transitional justice to become more relevant in the 21st Century, Dustin Sharp recommends, among other things, that "it should strike a

[531] Dustin N. Sharp, *What Would Satisfy Us? Taking Stock of Critical Approaches to Transitional Justice*, 13 INT'L J. TRANSITIONAL JUST. 570, 570 (2019).

[532] McAuliffe, *supra* note 68, at 41, 180.

[533] Roht-Ariazza, *supra* note 42, at 8.

[534] McAuliffe, *supra* note 42, at 32.

[535] REBEKKA FRIEDMAN, COMPETING MEMORIES: TRUTH AND RECONCILIATION IN SIERRA LEONE AND PERU 22 (2017).

[536] *Id.* at 22–23.

better balance between retributive, restorative, and distributive justice . . . ."[537]

Thus, generally, the performance and success of a given TRC has to be viewed from the broader goals of transitional justice, such as contributing to sustainable peace and efforts to prevent the recurrence of violence in the future.[538] TRCs make investigations into the situations surrounding conflicts and mass atrocities and issue findings and recommendations for follow-up actions to be taken by the national governments in their efforts to remedy past violence and prevent the recurrence of the same in the future.[539] However, there is less consensus at the empirical level as to whether TRCs can actually deliver on the promises of societal transformation and political reconciliation in post-conflict settings.[540] While they are truth-finding bodies in theory, "[i]n fact, the truth-seeking capabilities of [Truth Commissions] are constrained by the investigative power or reach determined by [their] mandate[s],"[541] among other factors. Kissane suggests that peace must also to be understood as more than a state of non-violence and must be alternatively explained as conflict resolution.[542] Thus,

> [c]onflict resolution implies that the underlying issues have been resolved; that the parties will tolerate each other's existence and commit to pursuing their goals peacefully. These three elements also require a nurturing environment in which peace can grow over time.[543]

In the light of the foregoing, the efforts and limits of the Ethiopian TRC is presented below.

A. Practical Efforts to Implement Its Mandate

According to Proclamation No. 1102/2018, the life span of the Ethiopian Reconciliation Commission is three years.[544] At the time of this writing, though the Commission has not submitted its final findings and recommendations, it was dissolved by legislation passed in December

[537] DUSTIN N. SHARP, RETHINKING TRANSITIONAL JUSTICE FOR THE TWENTY-FIRST CENTURY: BEYOND THE END OF HISTORY 156 (2018).

[538] Hugo van der Merwe et al., *Measuring Transitional Justice: Impacts and Outcomes*, *in* TRANSITIONAL JUSTICE: THEORIES, MECHANISMS AND DEBATES, *supra* note 311, at 281.

[539] Harwood, *supra* note 139, at 401.

[540] KISSANE, *supra* note 52, at 186.

[541] NICHOLS, *supra* note 325, at 2.

[542] KISSANE, *supra* note 52, 186.

[543] *Id.* at 186–87.

[544] *Reconciliation Commission Establishment Proclamation*, 2018, *supra* note 46, art. 14, § 1.

2021.[545] Until the Commission's final report is available, it will be difficult to provide a complete assessment of its performance from an official perspective. Thus, this Section attempts to provide an assessment of the Commission's work from available sources. Those are viewed against the *raison d'etre* of the Commission's establishment. The reasons for the establishment of Ethiopian Reconciliation Commission are provided under the Preamble of Proclamation No. 1102/2018, which lays down broad visions and policy priorities.[546] Accordingly, it can be summarized that the Commission's performance or achievements must be examined in light of the broader objectives underlying its establishment. Such objectives include identifying causes of the conflicts, identifying the cause and dimensions of past gross human rights violations to ensure reconciliation, and achieving lasting peace.[547] It is not clear from the law or the Commission's practical understanding as to which issues the Commission should prioritize in its investigations. According to available resources, the first year of the Commission was supposed to focus on preparatory works, such as strategic plan development, and the installation of necessary institutional structures.[548] For instance, in some early instances, the Chair of the Commission said that it focuses on studying root causes of the conflicts in Ethiopia.[549] In other instances, especially recently, the Commission expressed to the media its readiness to conduct investigations into human rights violations.[550]

Given the urgent circumstance in which the Commission was established, it announced its "three-year plan" only four months after its establishment in December 2018.[551] In a press conference on April 30, 2019, its chairperson announced that identifying the root causes of the conflict in Ethiopia would be the main focus of the Commission in the coming three years.[552] In his words, "[t]he Commission is making preparation[s] to discharge the responsibilities that the people and government of Ethiopia entrusted to it."[553] The critics were wary that the

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[545] Tsegaye, *supra* note 458.

[546] *Reconciliation Commission Establishment Proclamation*, 2018, *supra* note 46, para. 1–4.

[547] *Id.* para. 2–4.

[548] *Term of Reference for Senior Researcher on Transitional Justice and Reconciliation (National)*, U.N. DEV. PROGRAMME, https://procurement-notices.undp.org/view_file.cfm?doc_id=222531 (last visited Jan. 20, 2023).

[549] *Ethiopian Reconciliation Commission Announces Three-Year Plan*, EZEGA NEWS (Apr. 30, 2019), https://www.ezega.com/News/PrintNews?newsID=7075 [hereinafter *Three-Year Plan*].

[550] *Reconciliation Commission Working to Ensure Transitional Justice, Requests Extension of Term*, ETH. NEWS AGENCY (Jan. 15, 2022), https://www.ena.et/en/?p=32558 [hereinafter *Commission Requests Extension of Term*].

[551] *Three-Year Plan*, *supra* note 549.

[552] *Id.*

[553] *Id.*

Commission had not been seen doing visible activities given the urgent circumstances of the day.[554] The Commission later reported that it had invested its first year in institutionalizing itself and fulfilling necessary staff.[555] Following this, according to the Commission's Chairperson, the Commission planned to invest much of its remaining time to studying the root causes of the conflict in Ethiopia, focusing on the important task of promoting national consensus, and creating a favorable environment for dialogue by engaging a wide range of actors.[556] A Memorandum of Understanding was reportedly signed between State Minister at the Ministry of Peace, Almaz Mekonnen, and Reconciliation Commission Chairperson Cardinal Berhaneyesus Souraphiel to enable the two sides to exchange information and work together in capacity building.[557] Whether those claims were realized in practice remained questionable. Moreover, given that reconciliation has multiple layers,[558] it is not clear where the focus of the Ethiopian Commission is on inter-personal, inter-communal, or reconciliation at a national level. But it can be supposed that the intention of lawmakers seems to be that the TRC focuses on reconciliation at inter-communal and national levels.

Generally, due to different interrelated factors, the Commission has not been able to make its work visible to the wider Ethiopian public.[559] One rare report about the performance of the Commission portrayed its fragile effort to mediate growing political frictions between the Ethiopian central government and defiant Tigrayan regional leaders before the outbreak of a civil war.[560] The Commission's efforts were noted but, whether such mediation efforts fall under its mandates is not clear as Proclamation No. 1008/2018 is silent about the Commission's role in investigating or resolving conflicts that arise after the establishment of the Commission.[561] The Commission disclosed in 2020 that the mediation effort was jeopardized, and the deadly violent conflict broke out, because

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[554] *Id.*

[555] *See generally id.* (reporting that from December 2018 to April 2019, the Ethiopian Reconciliation Commission set up its administrative structure and consulted with stakeholders).

[556] Brad Settelmeyer, *Ethiopia and the Failure of National Dialogue*, REALIST REV. (Sept. 11, 2021), https://realistreview.org/2022/02/02/ethiopia-and-the-failure-of-national-dialogue/.

[557] *Reconciliation Commission, Ministry Agree to Work in Collaboration for Peace*, THE REP. (Aug. 22, 2020), https://www.thereporterethiopia.com/10053/.

[558] *See* LEDERACH, *supra* note 179, at 25–26.

[559] *See Reconciliation Commission Requests Extension of Term*, FANA BROAD. CORP. (Jan. 15, 2022), https://www.fanabc.com/english/reconciliation-commission-requests-extension-of-term/.

[560] Yonas Abiye, *Pre-Conditions Impede Commission's Reconciliatory Efforts*, THE REP. (Oct. 24, 2020), https://www.thereporterethiopia.com/10311/.

[561] *See id.*

both parties were reported to have set their respective, yet insurmountable, preconditions before they got to table for negotiations.[562]

Additionally, one other rare activity of the Commission was an attempt to draw experience from other TRC cases in African countries such as Kenya and South Africa.[563] For example, the Commissioners' trip to Kenya was assisted by Conciliation Resources, a UK-based international peacebuilding forum.[564] On this trip, the Commissioners of the Ethiopian TRC attempted to draw experiences from the Kenyan TJRC by meeting with the Commissioner of Kenya's National Cohesion and Integration Commission ("NCIC"), its CSOs, and other Commissioners.[565] The objective of the meeting was reportedly "to share the Commission's mandate and insights surrounding conflict mitigation and reconciliation mechanisms."[566] The Commission also attempted to learn from its South African counterpart through experience sharing in June 2019.[567] The South African TRC remains an influential mechanism of TJ throughout the African continent and is a resource from which the Ethiopian TRC can important draw lessons.[568] There was also an attempt to ensure executive follow-up to the Commission's work. In February 2020, the Commission reported the work it has conducted, including on such issues as the "development of the strategic plan," forging relations with other stakeholders, and conducting stakeholders consultations.[569] According to information from the Office of the Prime Minister, the Prime Minister "provided direction in how to further strengthen activities by focusing on the capacity [and] potential of the [C]ommission to execute key activities through creating goodwill."[570] Beyond those listed above, there were no clear and significant reports of reconciliation works conducted by the

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[562] According to the Ethiopian newspaper *The Reporter,* the Chairman declined to comment on the details of the position of the respective parties. *Id.*

[563] *Members of Reconciliation Commission Arrive in Kenya to Draw Lessons*, WALTA MEDIA & COMMC'N CORP. (June 11, 2019), https://waltainfo.com/41746/ [hereinafter *Commission in Kenya*].

[564] *Id.*

[565] In the words of its Commission Secretary, Mohamed Hassen, the NCIC is a body that was "created as a peace institution to stand and combat all forms of discrimination . . . as well as inter-community conflicts that end up dividing people and causing violence." *NCIC Hosts the Ethiopian Reconciliation Commission*, NAT'L COHESION & INTEGRATION COMM'N KENYA, https://cohesion.or.ke/index.php/media-center/latest-news/260-ncic-hosts-the-ethiopian-reconciliation-commission (last visited Feb. 5, 2023, 11:56 AM).

[566] *Id.*

[567] *Commission in Kenya*, *supra* note 563.

[568] Jasmina Brankovic & Hugo van der Merwe, *Editors' Preface* to ADVOCATING TRANSITIONAL JUSTICE IN AFRICA, *supra* note 99, at viii.

[569] *Abiy Meets Ethiopian Reconciliation Commission Members*, NEW BUS. ETH. (Feb. 22, 2020), https://newbusinessethiopia.com/politics/abiy-meets-ethiopian-reconciliation-commission-members/.

[570] *Id.*

Commission, which is felt within the wider society. More operational details may emerge if the defunct TRC produces a report in the future.

B. When Do We Say that the Reconciliation Has at Least Succeeded?

"Getting to the truth was hard but getting to reconciliation will be harder."[571]

Though reconciliation in transitional justice is accepted as a fundamental endeavor, debates abound as to the nature and success of reconciliation efforts. According to Elin Skaar, "[r]econciliation is one of the most contested concepts in the scholarly debate on transitional justice" and it is very "difficult to measure empirically."[572] Its exact contributions are generally held to be "inconclusive."[573] To view its success, one must consider the context in which it operates so as to frame any discussion related to the concept. A range of views exist as to when it is possible to say that there has been an effective reconciliation. On the one hand, reconciliation has to be viewed as constituting the re-establishment of relationships between previous adversaries, which implies a coexistence between people who previously considered themselves enemies.[574] It is argued that this concept "is a more realistic goal in countries that are trying to come to terms with mass atrocities, genocide[,] or other highly divisive conflicts."[575] On the other hand, it is held that the above concept mentioned above is insufficient to say that there is an impactful reconciliation. Thus, reconciliation broadly "implies the desire to see relationships transformed from '"resentment and conflict to friendship and harmony."'[576] But Paul Seils cautions that identifying the real context where reconciliation is attempted plays a very crucial role in assessing the processes, aims, and outcomes of reconciliation.[577] So, it has to be assessed on case-by-case basis. Accordingly, "fragile settings may emphasize resilience[,] conflict settings may emphasize peaceful coexistence[,] and massive displacement settings may emphasize return and

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[571] TRUTH & RECONCILIATION COMM'N OF CAN., HONOURING THE TRUTH, RECONCILING FOR THE FUTURE: SUMMARY OF THE FINAL REPORT OF THE TRUTH AND RECONCILIATION COMMISSION OF CANADA vi (2015).

[572] Skaar, *supra* note 90, at 54 (evaluating transitional justice approaches to reconciliation).

[573] *Id.* at 102.

[574] *Id.* at 65; *see also* Melody Mirzaagha, supra note 165, at 1–2 (discussing the interplay of reconciliation and relationships).

[575] Mirzaagha, *supra* note 165.

[576] *Id.* (quoting Hizkias Assefa, *The Meaning of Reconciliation*, *in* PEOPLE BUILDING PEACE 37, 38 (1999).

[577] SEILS, *supra* note 159 (2017).

reintegration."[578] Citing Boraine, Fischer makes the following observation,

> [There is] a need to achieve at least a measure of reconciliation in a deeply divided society by creating a common memory that can be acknowledged by those who created and implemented an unjust system, those who fought against it, and the many more who were in the middle and claimed not to know what was happening in their country.[579]

In Ethiopia's ambiguous transition, the Reconciliation Commission was established as a flagship institution to herald reconciliation and sustainable peace in Ethiopia in certain ways.[580] Provided that the country faces complex political problems, it has been urged that "[i]nstead of separately addressing [] human rights violations, the Commission must put such violations in a historical, political, social[,] and economic context and examine their root causes."[581] As we noted in the preceding Sections, the establishment of the Reconciliation Commission is the step in a positive and restorative direction. However, for some time, the preceding hostile measures, such as prosecution, vetting, lustration, and security reform measures, were taken. While they can be important, they were also in contradiction with or ruined the spirit of forgiveness and reconciliation. According to a commentator, those measures "undermined Abiy's message of love and reconciliation."[582]

Yet, on a general account about its survival for three years, the Ethiopian Reconciliation Commission had a very poor track record of performance due to institutional and external factors. It has not conducted comprehensive investigations into the root causes of the conflict and also has not been seen attempting to bring about reconciliation despite its mandate.[583] Since the establishment of the Ethiopian TRC, except minor public appearance and meager efforts, it has not made its presence felt

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[578] *Id.*

[579] Fischer, *supra* note 44, at 411–412 (quoting Alexander L. Boraine, *Transitional Justice: A Holistic Interpretation*, 60 J. INT'L AFFS. 17, 22 (2006)) (discussing reconciliation and what the process would entail).

[580] *Reconciliation Commission Establishment Proclamation*, 2018, *supra* note 46, art. 5.

[581] Elizka Relief Foundation, Transitional Justice Contribution to Sustaining Peace and Realizing SDG 16 in Ethiopia to the U.N. Office of the High Commissioner for Human Rights, https://www.ohchr.org/sites/default/files/2022-01/Elizka-Relief-Foundation.docx (last updated Jan. 11, 2022) (responding to the OHCHR's Call for Input to assist in the preparation of an HRC-mandated report regarding transitional justice).

[582] Daniel R Mekonnen, *Ethiopia's Transitional Justice Process Needs Restoration Work*, ETH. INSIGHT (Feb. 1, 2019), https://www.ethiopia-insight.com/2019/02/01/ethiopias-transitional-justice-process-needs-restoration-work/.

[583] *See* Tsegaye, *supra* note 458.

among the Ethiopian public.[584] Related to its institutional mandate, as can be viewed from Proclamation 1102/2018, it has neither prosecutorial nor reparative mandates.[585] Thus, it has no mandate of recommending trials and it has no scheme of reparations for victims whose cause remained neglected.[586] As such, it is aimed only to serve as a symbolic forum for public hearings, whose impacts would remain far from meaningful. In his annual report in 2019, the Prime Minister explained to the Ethiopian Parliament that the Commission would play a key role in discovering and resolving both known and untold traumatic histories and an urge for violent revenge and would replace such animosities with forgiveness and trust-building among the public.[587] Prime Minister Abiy also vowed to extend continued support, in a meaningful respect, to the efforts of the Commission in attaining its goals.[588] Whether that promise is implemented in practice cannot be verified. In the end, it became clear that the Commission neither produced nor finalized the reports of its meager work, which became a bitter reality during and after the Commission's dissolution.

Thus, compared to some other successful cases, the Ethiopian TRC's engagement with the public has not been noted. In the end, in January 2022, around which time its mandate neared lapse, the Commission declared that it was not able to achieve its mandate due to different factors.[589] In the words of its Chairperson:

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[584] *See id.*

[585] *See Reconciliation Commission Establishment Proclamation*, 2018, *supra* note 46, art. 6.

[586] *See id.* for a list of the Commission's powers and duties, which notably does not include a responsibility to prosecute perpetrators or provide reparations to victims.

[587] Abiy Ahmed, 2019 Fiscal Year Government Performance Report 6 (2019) (transcript in Amharic on file with author) (explaining that the goals and work of the Commission will be to improve the country and prevent chaos and destruction).

[588] *Id.* at 16 ("We will continue our efforts to strengthen the [C]ommission and bring the appropriate results.").

[589] *Commission Requests Extension of Term, supra* note 550.

> Since March 2019, we have made preliminary steps to resolve conflicts, address significant human rights violations, provide transitional justice, carry out participatory activities, and build national consensus in the future of Ethiopia.
>
> . . . .
>
> [But] [a]s the work is new and developing not only in our country but also in the world, we faced many legal loopholes as well as internal and external challenges such as war, conflict, and the COVID-19 pandemic in our country.[590]

The Chairman also mentioned the Commission's readiness to conduct investigations about serious human abuses in Ethiopia and ensure transitional justice in the country.[591] In the face of such failure, the Commission again called for increased governmental support and extension of the term of the mandates.[592] By this, it is crystal clear that the Commission miserably failed to accomplish even part of its objectives.

C. The Dissolution of the Commission

During the establishment of the Ethiopian Reconciliation Commission, the expectation was both high, given Ethiopia's dire situation, and mild, due to legitimacy concerns and the capacity and commitment of the government.[593] Customarily, the findings of Truth and Reconciliation Commissions are helpful in identifying the scope and breadth of the patterns of abuses, informing to the public, establishing and acknowledging the human rights violations committed by the State that is often denied, and giving recognition and becoming a voice of the victims. By doing so, it is hoped that TRCs "help to give shape to other justice mechanisms that may follow, such as trials or reparations."[594]As one element of "a much broader accountability package" and not taken as an alternative to judicial measures, nor to escape responsibility, TRCs help to achieve a break with the country's abusive and violent past and movement toward a more peaceful political future.[595]

In December 2021, Tesfaye Dhaba, the Ethiopian Government's Cabinet Affairs State Minister appeared on national television to

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[590] *Id.*

[591] *Id.*

[592] *Id.*

[593] *See* Tadesse Simie Metekia, *Ethiopia Urgently Needs a Transitional Justice Policy*, ALLAFR. (Aug. 1, 2022), https://allafrica.com/stories/202208020003.html.

[594] Priscilla Hayner, 55th Annual DPI/NGO Conference Rebuilding Societies Emerging from Conflict: A Shared Responsibility, *Justice in Transition: Challenges and Opportunities* 5 (Sept. 9, 2002).

[595] *Id.* at 6.

announce that the Commission had "failed" to accomplish its tasks.[596] As such, in a move to replace it, the Council of Ministers passed a draft bill to establish the new "National Dialogue Commission" on December 10, 2021.[597] Following this, the National Dialogue Commission was established with Proclamation No. 1265/2021,[598] and thus, replaced the previous TRC. Mentioning numerous internal and external challenges such as war, conflict, and the COVID-19 pandemic, the TRC's Chair requested an extension of its term limit.[599] An extension of a given TRC's term limit is also common across post-conflict societies. For example, Liberia and South Africa, among others, extended the respective term limits of their TRCs.[600] The initial term limit of the South African TRC was only from 1995 to 1998, but its term was extended until 2002.[601] Similarly, the Liberian TRC was extended until 2008.[602] But it appears that the term limit can only be extended when there is a credible ground that a TRC would make reasonable progress to finalize its work. But as can be understood from the foregoing, this is not the case with the Ethiopian TRC. It can be observed that it is due to the poor performance of the Commission over the years that the National Parliament rejected the request by the Commission to extend its term limits.[603] By these latest legislative measures and political decisions, the Commission was dissolved, and was summarily requested to handover offices, equipment,

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[596] Love Addis, *EBC Latest News Special Ethiopian News December. 20.2018 (ETV Live)*, YOUTUBE (Dec. 20, 2018), https://www.youtube.com/watch?v=R62hBKjeHuQ&ab_channel=LoveAddis; Legide, *supra* note 37, at 1, 17 (2022).

[597] *Council of Ministers Approves Draft Proclamation to Form National Dialogue Commission*, ADDIS STANDARD (Dec. 10, 2021), https://addisstandard.com/news-alert-council-of-ministers-approves-draft-proclamation-to-form-national-dialogue-commission/; *see also* Tsegaye, *supra* note 458.

[598] *The Ethiopian National Dialogue Commission Establishment Proclamation*, Proclamation No. 1265/2021, Fed. Negarit Gazette, Year 28, No. 5 (Eth.) [hereinafter *Dialogue Commission Establishment Proclamation*, 2021].

[599] *Reconciliation Commission Requests Extension of Term*, *supra* note 559.

[600] *See* TRUTH COMMISSION: SOUTH AFRICA, *supra* note 457; *Truth or Reconciliation Mechanism: Accra Peace Agreement*, KROC INST. FOR INT'L PEACE STUD., https://peaceaccords.nd.edu/provision/truth-or-reconciliation-mechanism-accra-peace-agreement (last visited Feb. 27, 2023) [hereinafter *Truth or Reconciliation Mechanism*].

[601] TRUTH COMMISSION: SOUTH AFRICA, *supra* note 457.

[602] *Truth or Reconciliation Mechanism*, *supra* note 600.

[603] Local Media reported that:

> [i]n a letter to the Reconciliation Commission in February, the House of Peoples' Representatives stated that the [C]ommission's term in office had expired and urged it to submit a summary of its activities over the past three years . . . . The report by the local radio indicated that the Commission is currently handing over the office to the NDC after it has received a verbal note from the Parliament to hand over not only the office materials but also the budget allocated to it by the [G]overnment.

Tsegaye, *supra* note 458.

and remaining budgets to its successor, the newly established National Dialogue Commission.[604] Still, this latest measure also does not appear to be promising given that the government unilaterally replaces one institution with the other without a serious consideration of factors which led to the failure of the pre-existing one. This is not to undermine the role of the new Commission. Especially in the post-conflict environment, the broader aim of the National Dialogue Commission is to expand the scope of the political negotiations beyond political and military leadership "with the aim of being more inclusive of society in general" and "away from elite-level deal making."[605]

It is true that TRCs generally are *ad hoc* in the sense that they investigate a particular matter and "dissolve upon the presentation of their reports,"[606] but it is very uncommon to dissolve a TRC before the finalization of its investigations.[607] Thus, Ethiopia represents a rare case wherein it dissolved its TRC before the Commission finalized and submitted its truth finding reports. It perhaps marks the Government's dissatisfaction with its works or absent achievements. This is in sharp contrast to the performance of the Special Prosecutor's Office ("SPO"), which was established in 1992 to prosecute Derg regime officials for the crimes they committed during the Red Terror.[608] Though it was not a full-fledged truth-finding body, it established a 441 paged volume in 2010 about its findings, processes, and decisions.[609] Because of SPO's work, the

[604] *Id.* According to the United States Institute of Peace, national dialogue is "a dynamic process of joint inquiry and listening to diverse views, where the intention is to discover, learn[,] and transform relationships in order to address practical and structural problems in a society." Maria Jessop & Alison Milofsky, *Dialogue: Calming Hot Spots Calls for Structure and Skill*, U.S. INST. PEACE (May 1, 2014), https://www.usip.org/publications/2014/05/dialogue-calming-hot-spots-calls-structure-and-skill.

[605] IBRAHIM FRAIHAT, UNFINISHED REVOLUTIONS: YEMEN, LIBYA, AND TUNISIA AFTER THE ARAB SPRING 75 (2016).

[606] Catherine Harwood, *Contributions of International Commissions of Inquiry to Transitional Justice*, *in* RESEARCH HANDBOOK ON TRANSITIONAL JUSTICE, *supra* note 40, at 401, 403.

[607] *See generally* HAYNER, *supra* note 108, at 14 (noting that despite the temporary duration of TRCs, the work of such commissions traditionally culminates in the submission of a report prior to its dissolution).

[608] *Special Public Prosecutor's Office Establishment Proclamation*, Proclamation No. 22/1992, Fed. Negarit Gazette, Year 51, No. 18, art. 6 (Eth.). The Mandate of the SPO was to "conduct investigations and institute proceedings in respect of any person having committed or responsible for the commission of an offense by abusing his position in the party, the [G]overnment or mass organization under the Dergue-WPE regime." *Id.*

[609] MARSHET TADESSE TESSEMA, PROSECUTION OF POLITICIDE IN ETHIOPIA: THE RED TERROR TRIALS 172, n.1 (2018).

world has become better informed about the Derg-era atrocities and crimes of Red Terror in Ethiopia.[610]

While the Ethiopian Reconciliation Commission was mandated to identify the root causes of the conflict, identify perpetrators and victims, and ensure reconciliation and lasting peace as per Proclamation 1102/2018, it ended with the saddest conclusion as explained by its Chair that "the [C]ommission was unable to enter into full implementation activities due to internal and external factors."[611] As such, the Ethiopian Government ordered the handing over of its office, documents, and budget to the newly established National Dialogue Commission.[612] Therefore, according to a commentator, "its term ended without any significant or visible achievement so far."[613] Conventionally, TRCs are expected to submit reports about the performance before their resolution.[614] But it is to be underscored that the failure of the Ethiopian TRC is caused by complex exogenic and endogenic factors, and, hence, the blame should not be wholly attributed to its internal weakness alone, as discussed below.

IX. WHAT FACTORS EXPLAIN THE POOR PERFORMANCE OF THE COMMISSION?

It is argued that the poor performance of the Reconciliation Commission in attaining its grand ambitions should not be treated in isolation from other broader tradition of the political-institutional predicaments in Ethiopia. It simply reveals the wider patterns of the weak and dysfunctional institutional landscape in the country. Some of those political institutions are arguably erected on instrumental motives only for political posturing, and, thus, the requisite political commitment to their actual functionality remains hollow. More paradoxically, in the context of the ongoing violence in a deeply divided state, the incapacitated Reconciliation Commission is already an ill-fated institution. Viewed from this general pattern of fragile political atmosphere, inherent institutional weaknesses and gaps in its mandate and power, among other factors, its success was doubtful from the very beginning. But the challenging time in which it emerged does not wholly justify its miserable failure in achieving at least some of its goals. Prudently implemented TRCs in similar situations have rescued their countries from the risk of

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[610] *See generally id.* (discussing how the Ethiopian Special Prosecutor's report sheds light on the crimes committed by the Derg regime, including genocide, war crimes, unlawful detention, and other abuses of power).

[611] *Reconciliation Commission Requests Extension of Term, supra* note 559.

[612] Tsegaye, *supra* note 458.

[613] *Id.*

[614] Catherine Harwood, *Contributions of International Commissions of Inquiry to Transitional Justice*, *in* RESEARCH HANDBOOK ON TRANSITIONAL JUSTICE, *supra* note 40, at 403.

descending into further chaos and turmoil–the South African one being a prime example–though the contexts of the Ethiopian transition and that of other post-conflict societies differ. Moreover, the government could have acted more reasonably and with a cautious approach to bolster its success and reduce its gaps, detriments, and challenges. At any rate, the Commission has unquestionably fallen short of achieving its policy objectives. Thus, while its mandates lapsed without any achievement, which lead to its dissolution, Ethiopia still finds itself in a desperate political situation and reconciliation remains a distant desire. In the remainder of this Section, this Article will briefly look at some of the factors which constrained the already problematic institution.

A. Delicate Transitional Moment and Ongoing Conflicts

As shown in the introduction, the post-2018 change initially brought hope and optimism so that the country would transition towards a political order of better human rights protections, a prevalence of peace, and societal harmony. Contrary to the optimistic expectations, however, it unfolded in the troubled climate, and Ethiopia descended into unimagined political chaos and violent civil conflict. Therefore, even though the Reconciliation Commission was erected , the current TJ period has been stained with another round of violent conflicts, inter-communal violence in different regions, resulting massive human rights violations.[615] Following the Government crackdown with cruelty in the above cases, many voiced their concerns about authoritarian resurgence and renewed waves of human rights violations.[616] But the Government denies such allegations and insists that human rights conditions in Ethiopia have improved.[617] However, the claims of the Government's critics should not be easily dismissed. Massive displacements, killings, politically motivated attacks, and high profile assassinations were consistently reported and gross violence in the name of security measures has become common practice.[618] Bolstered by the commonly voiced claim of ensuring the rule of law, security forces tend to take excessive measures.[619] Reports of human rights violations abound in regions where the Government conducted anti-

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[615] *See* Bader, *supra* note 34.

[616] *See Ethiopia: Freedom in the World 2021 Country Report*, FREEDOM HOUSE, https://freedomhouse.org/country/ethiopia/freedom-world/2021 (last visited Mar. 11, 2023).

[617] *See* Fred Harter, *Can Ethiopia's Government be Held Accountable for Crimes in the Civil War After Complaint Filed at the A.U.?,* AFR. REP. (Feb. 23, 2022, 3:34 PM), https://www.theafricareport.com/179151/can-ethiopias-government-be-held-accountable-for-crimes-in-the-civil-war-after-complaint-filed-at-the-au/.

[618] *See* HUM. RTS. WATCH, ETHIOPIA: EVENTS OF 2020 (2021), https://www.hrw.org/world-report/2021/country-chapters/ethiopia.

[619] *See* U.S. DEP'T OF STATE, ETHIOPIA 2021 HUMAN RIGHTS REPORT 1–2 (2021).

insurgency operations such as in Western Oromia; Benishangul; Somali; Southern Nations, Nationalities, and People's Region; and Amhara.[620] The war in Tigray, which took place from November 2020 until 2 November 2022, has already produced unprecedented atrocities.[621] Beyond war casualties, this period also saw the widespread operation of a hostile propaganda war on both sides eroding the shared values. According to the Global State of Democracy Initiative, the Ethiopian democratic backsliding mimics the global trend in democratic down-sliding.[622] According to Anthony Oberschall, collective threat propaganda is argued to promote more violence and blocks pathways to reconciliation.[623] Moreover, Lawther notes that "[i]n a context of contested victimhood and an unresolved past, the 'political currency' of victimhood may lead to the domination and embellishment of certain voices and narratives and the concurrent silencing of others."[624]

It is acknowledged that the period of transition in Ethiopia and elsewhere is delicate and challenging. Handling this delicate moment requires "a great deal of principled care, wisdom[,] and [a] sense of responsibility."[625] However, from the beginning, the Commission was bound to face different challenges and, true to the Ethiopian political tradition, authoritarian climate is bequeathed to the new order. As one observer notes,

> [t]o try to do reconciliation under authoritarianism is only to exculpate the very authoritarian regime we are just trying to electorally replace by a democratic regime. This becomes a face, especially when, as we see in . . . [the] Reconciliation Commission, the very people who perpetrated the atrocities are the Commissioners.[626]

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[620] *Id.*

[621] *See* Press Release, Office of the High Commissioner for Human Rights, U.N. Experts Warn of Potential for Further Atrocities Amid Resumption of Conflict in Ethiopia (Sept. 19, 2022), https://www.ohchr.org/en/press-releases/2022/09/un-experts-warn-potential-further-atrocities-amid-resumption-conflict.

[622] *See* INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE & GLOB. STATE OF DEMOCRACY INITIATIVE, GLOBAL STATE OF DEMOCRACY REPORT 2022: FORGING SOCIAL CONTRACTS IN A TIME OF DISCONTENT (2022), https://idea.int/democracytracker/sites/default/files/2022-11/the-global-state-of-democracy-2022.pdf.

[623] *See* ANTHONY OBERSCHALL, CONFLICT AND PEACE BUILDING IN DIVIDED SOCIETIES: RESPONSES TO ETHNIC VIOLENCE 31 (2007).

[624] Cheryl Lawther, *'Let* Me *Tell* You*': Transitional Justice, Victimhood and Dealing with a Contested Past*, 30(6) SOC. & LEGAL STUD. 890, 892 (2021).

[625] Dersso, *supra* note 302.

[626] Tsegaye R. Ararssa, *What Went Wrong, Where? - Making Sense of the Faltering Transition (Part II)*, (Feb. 18, 2019), httpts://www.batipost.com/what-went-wrong-where-making-sense-of-the-faltering-transition-part-ii/.

The Ethiopian Reconciliation Commission came during the time when "the rhetoric of war" were highly militated in the country's transitional political process.[627] It also saw the raging civil war in the northern part of the country. The division, defamation, and collective condemnation of the predecessor elites fundamentally based on ethnic lines meant that the widening of political fragmentation was inevitable.[628] It marked the time when everyone at both sides of the political stages started to perceive others as their "political enemy."[629] As this Article discusses below, in the face of the above realities, many of the reconciliatory efforts and rhetoric ended up without success and made little impact on the political lives of Ethiopians.

B. Lack of Public Involvement in its Design and Operation: The Legitimacy Crisis

The Commission was created in a troubled and uncertain time. Above all, it has been demonstrated above that it was not a result of a wider bargaining among contending actors, and it did not involve the wider consultation of wider actors from the Ethiopian community, civil societies, victims, or international actors, which could have helped the Commission to win public trust and rally support for its much-needed restorative work. There was no critical institutional mechanism designed to maintain the Commission's independence and, beyond mere institutional posturing, crucial political commitment is severely lacking amidst the hostile and faltering political periods. As discussed in the preceding Sections, some of the challenges relate to the institutional domain of the Commission while others relate to the diversity of the interests at stake and the period of the time to be investigated by the Commission. The diverse backgrounds of the members of the Commission are itself a challenge further compounded by the challenges of the outbreak of a new and violent civil war.[630]

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[627] *See Bereft of Popular Mandate, Hard to Keep the State Viable*, ADDIS FORTUNE (May 31, 2020), https://addisfortune.news/bereft-of-popular-mandate-hard-to-keep-the-state-viable.

[628] *See generally* Mekonnen, *supra* note 582 ("[T]he kind of retributive justice in action appears to be selective: picking a certain category of offenders and ignoring other without sufficient explanation," which creates a cause for concern regarding political stability).

[629] *See generally* Declan Walsh & Abdi Latif Dahir, *Why is Ethiopia at War in the Tigray Region?*, N.Y. TIMES (Mar. 16, 2022, 20:21), https://www.nytimes.com/article/ethiopia-tigray-conflict-explained.html (Prime Minister Abiy encouraged ordinary citizens who already harbored grudges and hostility toward various ethnic groups to take up arms saying "[n]othing will stop us. The enemy will be destroyed.").

[630] Abebe & Mengistu, *supra* note 479, at 162–63.

C. Retributive Criminal Justice Ruined the Reconciliation Spirit

Until the establishment of the Reconciliation Commission, a range of competing measures were attempted. Of these measures, some of the prosecution measures mainly against prominent TPLF civil, military, and security officials along with massive vetting and lustration measures were viewed as partial measures and as a part of a politicized retributive campaign.[631] Expectedly, such tensions aroused a serious doubt about the intention of the reform measures and created a "siege mentality" among the Tigrayan politicians and their mobilized ethnic constituency,[632] which already ruined the reconciliation sprit. In transitional justice literature, it has been held that the wisdom of prosecuting the rival predecessor elites while simultaneously attempting to maintain peace is questionable, especially in a "conflict-ridden societ[y]."[633] Some criticize that though the Commission could have played a positive role in mending the precarious political situation, it came late and only after the Government took drastic measures of prosecuting top regime officials and security personnel.[634] This "contradict[s] the spirit of national reconciliation . . . . [and] undermined Abiy's message of love and reconciliation."[635] The peace-justice dilemma required a more robust reckoning than what unfolded.[636] Vetting, lustration, and official condemnation of the predecessor elites and their gradual deliberate abandonment from the new political elites, and processes gave birth to a feeling of exclusion, sentiment, and a "siege mentality" among the Tigrayan elites and their wider public.[637] This confrontation (and also exclusion), which was handled imprudently, led to one of the most deadly conflicts of recent memory–derailing hopes for a reconciled transition.[638] It largely constrained the efforts and prospects of the reconciliation at the time the Commission embarked on its task. Though the Commission was erected as part of the Government's policy, its establishment was not capable of protecting the country from being engulfed by a new spiral of violent civil conflict, mainly with its

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[631] *See Preventing Further Conflict and Fragmentation in Ethiopia*, INT'L CRISIS GRP. (2019), https://www.crisisgroup.org/africa/horn-africa/ethiopia/preventing-further-conflict-and-fragmentation-ethiopia.

[632] Kjetil Tronvoll, *Tigray: Towards a De-Facto State?*, ERITREA HUB (May 14, 2020), https://eritreahub.org/tigray-towards-a-de-facto-state.

[633] Geoff Dancy & Eric Wiebelhaus-Brahm, *The Impact of Criminal Prosecutions During Intrastate Conflict*, 55(1) J. PEACE RSCH. 47, 47 (2018).

[634] Mekonnen, *supra* note 582.

[635] *Id.*

[636] *Id.*

[637] *See* Tronvoll, *supra* note 632.

[638] *See Turning the Pretoria Deal into Lasting Peace in Ethiopia*, INT'L CRISIS GRP. (Nov. 23, 2022), https://www.crisisgroup.org/africa/horn-africa/ethiopia/turning-pretoria-deal-lasting-peace-ethiopia.

predecessor political elites. Thus, the Ethiopian experience suggests that the potential role of an incautious justice process through retributive prosecutions can be an obstacle in ensuring reconciliation. As Luc Huyse observed, "[t]rials have the potential to thwart reconciliation processes."[639] While the reconciliation process has a wider societal role to operate beyond the political rifts between the central government and Tigrayan elites, the conflict between them derailed its success as the country mobilized its available resources for war efforts in the north.

D. Lack of International Support in the Process

Elsewhere, in addition to the State's own transitional justice, external pressures have been instrumental in ensuring compliance with transitional justice norms.[640] The International Community would be a great asset when the domestic political condition is conducive in undertaking transitional justice measures. Peaceful, and at a times, coercive pressure from the Internal Community is important, while also controversial, in "bringing about state compliance with international . . . human rights norms."[641] The role of international actors has also been prominent especially where there is lack of ability or domestic political will in taking measures.[642] Intervention for the protection of human rights may also be informed by political, economic, and geo-strategic imperatives.[643] However,

> [i]n Ethiopia, no visible international pressure was originally exerted to adopt a transitional justice framework. The topic became relevant only after horrendous atrocities were committed in the current escalated war in the Tigray region of northern Ethiopia. However, some international human rights groups claimed that the Government should have given attention to serving justice in response to the massive human rights violations.[644]

Elsewhere, the absence of adequate international justice mechanisms has resulted in creative mechanism of what McEvoy and McGregory called

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[639] Luc Huyse, *Justice*, *in* RECONCILIATION AFTER VIOLENT CONFLICT: A HANDBOOK 97, 97 (David Bloomfield et al. eds., 2003).

[640] Andrew G. Reiter, *External Actors and Transitional Justice in a Reunified Korea*, *in* TRANSITIONAL JUSTICE IN UNIFIED KOREA 35, 35 (Baek Buhm-Suk & Ruti G. Teitel eds., 2015); *see also* SUBOTIĆ, *supra* note 287.

[641] Albrecht Schnabel, *International Efforts to Protect Human Rights in Transition Societies: Right, Duty, or Politics?*, *in* HUMAN RIGHTS AND SOCIETIES IN TRANSITION: CAUSES, CONSEQUENCES, RESPONSES 141, 141 (Shale Horowitz & Albrecht Schnabel eds., 2004).

[642] *See* Hansen, *supra* note 97, at 207, 228; Reiter, *supra* note 640.

[643] Schnabel, *supra* note 641.

[644] Legide, *supra* note 37, at 21.

justice "from below."[645] In those societies where the national justice infrastructure has been weak, corrupt, ineffective, and overwhelmed or simply incapable of adequately responding to the "needs of transition," it is frequently "victims and survivor groups, community and civil society organizations, human rights non-governmental organizations, church bodies[,] and others that has been the engine of change."[646] In Ethiopia, some of these bodies are in short supply. In the absence of strong rights groups and an assertive civil society, the voices seeking justice for victims or pushing towards robust measures remained few.[647] This reflects that the transitional justice effort, if any, remained only associated with the nation's formal institutions and mechanisms, which creates a disconnect between the TJ efforts in Ethiopia and local ownership and thus makes TJ "even more distant."[648] Engaging indigenous mechanisms can also support the process today or in the future, but they are also poorly understood and researched.

According to the final conclusion of the Commission's Chairman, which is quoted above, Ethiopia has neither achieved reconciliation, nor ensured accountability by checking impunity.[649] Additionally, the Commission did not succeed in achieving sustainable peacebuilding.[650] The 1992 report of the United Nations Secretary General Boutros Gail defined peacebuilding as "action to identify and support structures which will tend to strengthen and solidify peace in order to prevent a relapse into conflict."[651] However, what Ethiopia found itself absorbed in was new conflict. In this circumstance, despite the success or failure of the Commission, some doubt the prudence of entirely relying on reconciliation and setting aside other crucial measures, such as measures to ensure accountability and redress for victims. As Human Rights Watch's Director for East Africa, Laetitia Bader, explained, it is difficult to ask people to

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[645] Kieran McEvoy & Lorna McGregor, *Transitional Justice from Below: An Agenda for Research, Policy and Praxis*, *in* TRANSITIONAL JUSTICE FROM BELOW: GRASSROOTS ACTIVISM AND THE STRUGGLE FOR CHANGE 1, 3 (Kieran McEvoy & Lorna McGregor eds., 2008).

[646] *Id.*

[647] *See generally* Felix Horne, *Moving on from Ethiopia's Torturous Past*, ETH. INSIGHT (July 2, 2019), https://www.ethiopia-insight.com/2019/07/02/moving-on-from-ethiopias-torturous-past/ (noting the lack of resources and organizations focused on seeking justice in Ethiopia, other than the Reconciliation Commission, which beyond rarely met or made an impact for survivors).

[648] Kieran McEvoy, *Letting Go of Legalism: Developing a 'Thicker' Version of Transitional Justice*, *in* TRANSITIONAL JUSTICE FROM BELOW: GRASSROOTS ACTIVISM AND THE STRUGGLE FOR CHANGE *supra* note 645, at 15, 17.

[649] *Reconciliation Commission Requests Extension of Term, supra* note 559 ("[T]he [C]ommission was unable to enter into full implementation activities due to internal and external factors.").

[650] *See id.*

[651] U.N. Secretary-General, *An Agenda for Peace: Preventative Diplomacy, Peacemaking and Peace-Keeping*, ¶ 21, U.N. Doc. A/47/277-S/24111 (June 17, 1992).

simply forgive and move on when they have deep scars from past violence.[652] Bader further emphasized that the quest of citizens for meaningful justice and the nation's attempt to provide them with forums to tell their stories should be carefully addressed.[653] Though it can be argued that a Truth and Reconciliation Commission "could advance important goals . . . it does not replace the need for fair, credible trials before courts of law and does not satisfy victims' rights to have access to justice".[654]

X. CONCLUSION

In this Article, a modest attempt has been made to analyze the transitional justice efforts in Ethiopia, which was approached institutionally through the use of a Reconciliation Commission. This Article aimed to elucidate the political underpinnings surrounding the Commission's establishment, highlight underlying justifications for its creation by disregarding other measures, and assess the Commission's performance and failure in light of other contemporaneous experiments in transitional societies. Hoping to provide sufficient background understanding, it conducted a literature review on such concepts as TJ and TRCs, and it also provided conceptual discussions on reconciliation. It is well accepted that transitional justice has been broadly conceived to involve judicial and non-judicial mechanisms to reckon with an evil past. Despite the proliferation of different transitional justice mechanisms and the expansion of the transitional justice field in post-conflict settings, there is, however, "a persistent lack of certainty" and empirical assessment about the actual impacts of these instruments.[655] Reconciliation stands as one of the key means and ends of transitional justice, but it is also complex, both as a concept and also as a process. While it is broadly taken as a key means to durable peace, it is also a long, complex, and ongoing endeavor which could transcend decades or even generations to materialize while the possibility of recurring violence remains active in the minds of those at home in a divided community.[656] Despite those shortcomings, the establishment of Truth and Reconciliation Commissions represent a standard global justice measure.

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[652] Bader, *supra* note 34.

[653] *Id.*

[654] *Ethiopia: Abiy's First Year as Prime Minister, Review of Accountability and Justice*, HUM. RTS. WATCH (Apr. 8, 2019, 12:00 AM), https://www.hrw.org/news/2019/04/08/ethiopia-abiys-first-year-prime-minister-review-accountability-and-justice.

[655] Elizabeth Bunselmeyer & Philipp Schulz, Abstract, *Quasi-experimental Research Designs as a Tool for Assessing the Impact of Transitional Justice Instruments*, 23 INT'L J. HUM. RTS. 1, 1 (2019).

[656] *See* Antti Pentikäinen, *Foreword* to SIMON KEYES, MAPPING ON APPROACHES TO RECONCILIATION 3, 3 (2019).

But, in order for TRCs to plays their desired role, TRCs should display some crucial requirements to ensure its legitimacy and guarantee their success.

Almost five years after regime change, Ethiopia is still going through a series of complex and troubled political trajectories, such as intercommunal violences and deadly civil war. While the preceding abuses required real reckoning, these latter episodes of conflicts and violences also make the agenda of justice and reconciliation increasingly imperative. The Reconciliation Commission was established as the preferred institutional mechanisms to address past wrongs in a restorative approach away from the narrow retributive justice model. Since numerous political problems in Ethiopia take wider patterns, which are rooted in history, it has been suggested that the Ethiopian TRC's investigation consider the wider historical, political, social, and economic conditions rather than focusing on human rights violations alone. In the context of divided elite politics and the fluid transitional moment, there are deeper cases to be settled in this critical time in Ethiopia.

However, compared to some other successful cases, the Ethiopian TRC's engagement in relation to its mandates and its public expectations remained very minimal due to different constraints. Significant challenges can be attributed to the instable political period and question of its political commitment to its operation with full capacity. It has been argued, therefore, that the Commission was established not in the presence of honest political will. Rather, critics maintain that it was erected mostly in want of the Prime Minister's want of personal, domestic, and international legitimacy to appear as a reformist peacemaker which has led the Government to focus on a rather hollow rhetoric of "forgiveness" and "reconciliation."[657] Moreover, the reconciliation endeavor has not been aligned and synergized with other equally pressing questions of justice, which appear to have been sacrificed. Moreover, this Article identified that there are acute, inherent problems in the institutional choice and design of the mandate of the Reconciliation Commission in addressing Ethiopia's violent and abusive past. These factors are responsible to varying degree for its failure to lead Ethiopia toward a peaceful future. Although reconciliation and forgiveness are preached in rhetoric and although the Reconciliation Commission was erected symbolically, it was not possible to avoid the reigning danger of war and violence in Ethiopia. The subsequent outbreak of civil war between the Ethiopian Government and the Tigrayan forces in early November 2020 and the continuation of violence in other parts of Ethiopia,

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[657] *See generally* LYONS, *supra* note 245 (explaining that the prior regime utilized mass arrests and silencing of dissenters, but in 2018 the new Prime Minister made public statements and actions indicating a focus on peace, love, freedom, and reconciliation).

such as the Western Oromia region, shattered the hope generated by Ethiopia's quasi-transition. But that alone even is not the beginning and the end of the problem itself and there were practical deficits in conceiving the reconciliation process. Available works suggest that a reconciliation effort should be viewed broadly and as a wider political exercise rather than as purely a narrow moral and legal endeavor.[658]

The constraints that led to the poor performance of the Commission have to do with both institution-specific and wider extra-institutional political dimensions. A closer examination of the circumstances in which the Commission evolved reveals that it came only out of a narrowly designed "top-down" decision of the new ruling elite which, in the end, casted doubt on its legitimacy. Moreover, elite intransigence, lack of political compromise on fundamental national issues, and transition roadmap, and a lack of good faith engagement by contending actors on major issues highly constrained the Commission's performance and ability to achieve its expected outcomes. Furthermore, the Commission emerged only after the spirit of reconciliation and forgiveness was largely ruined by the allegedly hostile, drastic preceding political measures such as "selective prosecution," vetting, and lustration, which produced a siege mentality and affected much needed reconciliatory moves.[659]

To be successful and contribute to consolidation of democratic institutions, the transitional justice process should be inclusive. It should include all parties who were involved in the past wrongs in different capacities, as perpetrators, victims, bystanders, and regardless of their ethnic, linguistic, or religious backgrounds with the "aim [of making] politics different and more democratic than the previous regime."[660] In the Ethiopian case, the exclusionary and authoritarian political culture bequeathed from the past–which disregards credible political negotiation–does not provide room for honest engagement on key matters of national political importance. Such a hostile political environment generally "mean[s] that political opponents view each other as enemies that could never be accommodated or tolerated."[661] Ultimately, the

[658] *See generally* CLAIRE MOON, NARRATING POLITICAL RECONCILIATION: SOUTH AFRICA'S TRUTH AND RECONCILIATION COMMISSION 24–25 (2d ed. 2008) ("[A] truth commission is becoming an almost mandatory requirement of any state in transition. It . . . signals to the national and international community that it is incorporating human rights concerns into its political remit and on these grounds attempts to secure recognition and legitimization.").

[659] *See* Mekonnen, *supra* note 582.

[660] Anja Mihr, *An Introduction to Transitional Justice*, *in* AN INTRODUCTION TO TRANSITIONAL JUSTICE, *supra* note 99, at 1, 3.

[661] *This Desperate Moment Calls for Strategic Dialogue for Ethiopia*, ADDIS FORTUNE (Oct. 10, 2020), https://addisfortune.news/this-desperate-moment-calls-for-strategic-dialogue-for-ethiopia/.

Reconciliation Commission played weakly amidst these troubled and unpredictable periods.

Overall, as can be seen, the continued civil war, and multiple flashpoints of prevailing antagonism clearly show that the efforts of the restorative approach expected from the Reconciliation Commission were unsuccessful. Thus, while its mandates lapsed without any achievement leading towards its dissolution, Ethiopia still finds itself in a desperate political situation and reconciliation remains a distant desire. Since the problems lie in the deep-rooted past and present predicaments, the blame should not be disproportionately attributed to the Reconciliation Commission alone. Institutions do not operate in the vacuum, and their performance is highly constrained by the political contexts.

Ultimately, the new Dialogue Commission is said to have fared better, especially in its effort to secure legitimacy given that it emerged through a certain semblance of public participation during its formation and member selection process. However, the unguarded hope that it will succeed in achieving peace, justice, and reconciliation is partly questionable and the recurring gaps shows that Ethiopia should learn do more.

During the writing of this section earlier, the worrying development came with the resumption of a new wave of violent armed conflict between the Ethiopian Government and Tigrayan forces.[662] This latest event shattered the remaining, but slim, optimism that the Dialogue Commission would preside over the transition towards peace and mutual understanding in a way that would engage contending actors in the process. The conflict between the Ethiopian Government and Tigrayan forces halted a after temporary truce was declared in March 2022, which paved the way for a window of opportunity for peace talks.[663] However, the AU-brokered Pretorial Peace Accord was signed between the Ethiopian federal government and TPLF leaders on 2 November 2022, leading to the peaceful culmination of the two-years' deadly conflict.[664] While the majority of Ethiopians and the international community expressed their happiness regarding the peace deal, it also caused distress among the Amhara constituency and its armed militia who fought in Tigray conflict alongside the federal Government. Their grievance emerged in relation to the above peace deal and that their political expectations were not met.

[662] *See* Nosmot Gbadamosi, *Ethiopia's Civil War: As Cease-Fire Collapses, Fighting Resumes in Tigray*, FOREIGN POL'Y (Aug. 31, 2022, 1:00 AM), https://foreignpolicy.com/2022/08/31/ethiopia-tigray-civil-war-abiy-obasanjo-au-us-cease-fire-hunger/.

[663] Alex de Waal, *Ethiopia Civil War: Why Fighting has Resumed in Tigray and Amhara*, BBC (Sept. 1, 2022), https://www.bbc.com/news/world-africa-62717070.

[664] *Turning the Pretoria Deal into Lasting Peace in Ethiopia*, INT'L CRISIS GRP. (Nov. 23, 2022), https://www.crisisgroup.org/africa/horn-africa/ethiopia/turning-pretoria-deal-lasting-peace-ethiopia.

As the violent attack has been launched by armed militia, the federal parliament, upon the regional government, declared the infamous State of Emergency on 14 August 2023.[665]

In this light, contrary to expectations that past wrongs would be addressed, it is clear that Ethiopia continues to face series of violence and instability adding complications to the already prevailing challenges. Ethiopia's political predicament will not come to an end "until the Ethiopian tradition of 'hegemonic control' from the center has finally been replaced by genuine political pluralism."[666] It is only wide-ranging and all-inclusive peaceful dialogues, credible inter-elite negotiated settlements entered into in good faith, with the support of the International Community and civil societies, and above all, the determined commitment of Ethiopians themselves, which will sustain Ethiopia's continued transition toward a reconciled, peaceful, and democratic order. Until such is done, the erection of one institution after another or proliferation of institutions does not serve any meaningful and transformative role. To use the familiar Ethiopian proverb, "The change of stove does not make stew sweeter."

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[665] Sisay Sahlu, *Parliament Approves State of Emergency Following Intense Debate*, REPORTER (Aug. 14, 2023), https://www.thereporterethiopia.com/35979/; *see also Ethiopia Declares a State of Emergency in Amhara amid Increasing Violence*, GUARDIAN (Aug. 4, 2023), https://www.theguardian.com/global-development/2023/aug/04/ethiopia-declares-a-state-of-emergency-in-amhara-amid-increasing-violence.

[666] David Turton, *Introduction* to ETHNIC FEDERALISM: THE ETHIOPIAN EXPERIENCE IN COMPARATIVE PERSPECTIVE 1, 29 (David Turton ed., 2006).

CRACKING THE COMMUNICATIONS DECENCY ACT: CIVIL RELIEF FOR SEX TRAFFICKING VICTIMS AND THE BATTLE TO HOLD BIG TECH LIABLE

ABSTRACT

As technology constantly changes, the law struggles to keep up. One such criticized law is 47 U.S.C. § 230, also known as the Communications Decency Act (the "CDA"). The statute, created in 1996, grants civil immunity to "interactive computer service providers" so long as they demonstrate a good faith effort to restrict obscene material from their websites. The law was never intended to provide legal protection to websites that unlawfully promote, facilitate, and advertise sex trafficking. Yet two decades later, Big Tech continues to avoid accountability by hiding behind this law. In fact, most suits die before ever reaching discovery. Recently, however, some online sex trafficking victims who brought suits against the internet platform that hosted their exploitation have successfully overcome the motion to dismiss phase. But the suit's outcome depends on which level of knowledge the CDA requires victims to plead. If actual knowledge is required, victims must plausibly allege that the platform knew of the trafficking and received a material benefit from the exploitation. But if constructive knowledge is required, victims must only plausibly allege that the platform should have known of the trafficking and should have known that it would receive material benefit from the exploitation. This Note explores the CDA's language and legislative history, analyzes various approaches adopted by the lower courts, and recommends that future cases should be decided under the constructive knowledge pleading standard instead of the more stringent actual knowledge pleading standard.

I. THE HISTORY OF THE COMMUNICATIONS DECENCY ACT

The creation of the World Wide Web in 1989 revolutionized the history of communication.[1] For decades, the internet was mainly used by government groups and scientists, but in 1995, consumers gained commercial internet access for the first time.[2] And for years after that, the internet expanded virtually unregulated.[3] There were several obstacles to government regulation, most notably jurisdictional problems.[4] Because

[1] Max Roser, *The Internet's History Has Just Begun*, OUR WORLD IN DATA (Oct. 3, 2018), https://ourworldindata.org/internet-history-just-begun.

[2] *History of the Internet*, PLUSNET, https://www.plus.net/broadband/discover/history-of-the-internet/ (last visited Aug. 29, 2022).

[3] Navneet Alang, *Welcome to the Last Days of the Unregulated Internet*, GLOBE & MAIL (May 15, 2014), https://www.theglobeandmail.com/technology/digital-culture/welcome-to-the-last-days-of-the-unregulated-internet/article18661001/.

[4] *See What Are Some of the Laws Regarding Internet and Data Security?*, KASPERSKY,

the internet spanned across national borders, enforcement of any regulations posed a major roadblock. But that did not stop many plaintiffs from filing claims against interactive computer service providers ("ICSPs")[5] who were believed to be responsible for committing torts such as defamation and libel.[6]

According to tort law, defamation is the act of harming someone else's reputation by making a statement to a third party.[7] Libel is defamation transmitted via a permanent form of communication such as a writing or an electronic broadcast.[8] To plead a prima facie case of libel, a plaintiff first must demonstrate that the defamatory information was communicated to a third party.[9] Although the most culpable party is obviously the person who authored the harmful remarks, publishers of the remarks could also be liable. Traditional libel defendants included newspapers, radio or television stations, or individual citizens.[10] However, mere distributors—like newsstands, bookstores, and libraries—were not liable for defamation under the theory that they did not draft or edit any information prior to distribution.[11] Yet, the internet created a new problem: who could be held liable for defamatory posts, especially by anonymous users, published on the World Wide Web?

The initial cases addressing this issue arose between 1991 and 1995, prior to the adoption of any statutory regulations. The first reported federal district decision was *Cubby v. CompuServe*.[12] In *Cubby*, the plaintiff claimed that he was libeled in a publication called "Rumorville,"

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https://www.kaspersky.com/resource-center/preemptive-safety/internet-laws (last visited Oct. 27, 2022).

[5] ICSPs are any information services, systems, or access software providers that provide or enable computer access. *See* 47 U.S.C. § 230(f)(2). Common examples include social media platforms (e.g., Facebook and Instagram), messaging systems (e.g., WhatsApp and Kik), search engines (e.g., Google and Yahoo!), or digital marketplaces (e.g., Craigslist and Amazon). KATHLEEN ANN RUANE, CONG. RSCH. SERV., LSB10082, HOW BROAD A SHIELD? A BRIEF OVERVIEW OF SECTION 230 OF THE COMMUNICATIONS DECENCY ACT 2 (2018).

[6] *See, e.g.*, Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 137 (S.D.N.Y. 1991); Stratton Oakmont v. Prodigy Servs. Co., No. 31063/94, 1995 N.Y. Misc. LEXIS 229, at *2 (Sup. Ct. May 24, 1995); Zeran v. Am. Online, Inc., 129 F.3d 327, 328 (4th Cir. 1997).

[7] RESTATEMENT (SECOND) OF TORTS § 559 (AM. L. INST. 1977) ("A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.").

[8] RESTATEMENT (SECOND) OF TORTS § 568 (AM. L. INST. 1977) ("Libel consists of the publication of defamatory matter by written or printed words, by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words.").

[9] RESTATEMENT OF TORTS § 577 cmt. a (AM. L. INST. 1938) ("A publication of the defamatory matter is essential to liability (see § 558). Any act whereby the defamatory matter is intentionally or negligently communicated to a third person is a publication.").

[10] *See* RESTATEMENT (SECOND) OF TORTS § 568 cmt. d (AM. L. INST. 1977).

[11] Cubby, Inc. v. Compuserve, Inc., 776 F. Supp. 135, 139 (S.D.N.Y. 1991).

[12] *Id.* at 138.

a daily newsletter carried by CompuServe's database but written and edited by another party.[13] The court held that CompuServe exercised "little or no editorial control" over Rumorville's content, so it would not be held liable as a publisher.[14] Equating CompuServe to an "electronic, for-profit library," the court noted that although CompuServe could decline to carry certain publications, once it accepted, it had no control over the publications' contents.[15] This conclusion implied that ICSPs must exercise direct editorial control to be held liable for online defamation.

Four years later, in *Stratton Oakmont v. Prodigy Services*, Prodigy—an ICSP—was faced with a libel suit when an anonymous visitor allegedly posted defamatory remarks on an online bulletin board.[16] The court, following the guidelines set forth in *Cubby*, found that Prodigy was "an online service that exercised editorial control over the content of messages posted on its computer bulletin boards."[17] By engaging in editorial conduct, Prodigy had "expressly liken[ed] itself to a newspaper" and could be deemed a publisher for defamation purposes.[18] Additionally, the court relied upon evidence that Prodigy used screening software to check postings for offensive language and appointed "Board Leaders" to enforce content guidelines.[19] Although the court acknowledged that some ICSPs can function as a "library," Prodigy's policies, technology, and staffing decisions mandated a publisher finding.[20]

After *Stratton Oakmont*, ICSPs had no incentive to remove obscene or libelous material from their databases.[21] If any good faith attempt were made to inspect content prior to publication, the online service provider risked liability for any offensive material that it missed.[22] To address this problem, Congress passed the Communications Decency Act ("CDA") in 1996.[23] Included within the CDA is a "Good Samaritan Provision"

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[13] *Id.* at 137.

[14] *Id.* at 140 ("While CompuServe may decline to carry a given publication altogether, in reality, once it does decide to carry a publication, it will have little or no editorial control over that publication's contents. This is especially so when CompuServe carries the publication as part of a forum that is managed by a company unrelated to CompuServe.").

[15] *Id.*

[16] Stratton Oakmont v. Prodigy Servs. Co., No. 31063/94, 1995 N.Y. Misc. LEXIS 229 at *3 (Sup. Ct. May 24, 1995).

[17] *Id.*

[18] *Id.* at *4.

[19] *Id.* at *10.

[20] *Id.* at *13.

[21] Mark Stepanyuk, *Stratton Oakmont v. Prodigy Services: The Case that Spawned Section 230*, WASH. J.L., TECH. & ARTS (Feb. 18, 2022), https://wjlta.com/2022/02/18/stratton-oakmont-v-prodigy-services-the-case-that-spawned-section-230/.

[22] *See* Conor Clarke, *How the Wolf of Wall Street Created the Internet*, SLATE (Jan. 7, 2014, 4:29 PM), https://slate.com/news-and-politics/2014/01/the-wolf-of-wall-street-and-the-stratton-oakmont-ruling-that-helped-write-the-rules-for-the-internet.html.

[23] The CDA, now codified as 47 U.S.C. § 230, was enacted as part of Chapter V (47 U.S.C. (§§ 151–646) of the Telecommunications Act of 1996.

designed to dissuade ICSPs from censoring online speech by assuring ICSPs that they will not be held liable for the content of posts made by third-parties.[24] Specifically, this section shields all ICSPs from liability for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."[25] Additionally, it guarantees that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[26]

Presumably, the statute settled whether ICSPs were publishers or editors. Congress encouraged online providers to voluntarily self-regulate without fear that they would be held accountable for any obscenity or defamation that inadvertently surfaced.[27] Although this may have solved Congress's goal of promoting "political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity" over the internet,[28] it created a new issue. Granting broad-sweeping immunity to all ICSPs seems at odds with the Congressional objective of deterring and punishing child pornography, indecency, and patently offensive speech.[29] Although no provision in the CDA suggests that it should be construed to impair or limit sex trafficking laws, the Good Samaritan Protection provides a significant exception for ICSPs.[30] Just one year after Congress passed the CDA, litigation ensued, resulting in the Supreme Court's 1997 decision of *Reno v. ACLU*.[31]

In that case, the plaintiff challenged the constitutionality of the CDA's prohibition on transmitting "indecent" and "patently offensive" materials to those under eighteen years old.[32] The Court agreed, concluding that the statute was overbroad and violated the First Amendment.[33] Although Congress aimed to curb pornography, the plain language of the statute did not further this interest. The Court reasoned that even though *obscenity* receives no First Amendment protection, "*indecency* has not been defined to exclude works of serious literary, artistic, political[,] or scientific value."[34] Finally, the Court declared that

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[24] 47 U.S.C. § 230(c) (1996).
[25] § 230(c)(2)(A).
[26] § 230(c)(1).
[27] Zeran v. Am. Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997).
[28] § 230(a)(3).
[29] 47 U.S.C. § 223(d)(1)(B) (1996).
[30] 47 U.S.C. § 223(e)(5)(A)–(B).
[31] Reno v. ACLU, 521 U.S. 844, 861 (1997).
[32] § 223(a)(1)(B)(ii), (d)(1)(B) (1996).
[33] *Reno*, 521 U.S. at 864.
[34] *Id.* at 862 (emphasis added).

the internet deserved the highest First Amendment protection.[35] In doing so, the Court commended Congress for trying to protect minors from harmful online material, but ultimately decided that the potential restrictions on free speech outweighed.[36] The Court worried that serious discussion about birth control practices, homosexuality, or the consequences of prison rape across the internet would violate the CDA if anyone found the material "indecent" or "patently offensive."[37] The vagueness of such language could have a chilling effect on free speech that could cause speakers to "remain silent rather than communicate even arguably unlawful words, ideas, and images."[38]

In response to *Reno v. ACLU*, in 1998, Congress passed a different statute: the Child Online Protection Act ("COPA"),[39] which made it a crime to knowingly communicate "for commercial purposes . . . to any minor" material that is "harmful to minors."[40] The statute has since been struck down, but like the CDA, COPA included an immunity provision for ICSPs.[41] Over the next two decades, the legislature and judiciary struggled back and forth to balance the protection of children against the freedom of speech.[42]

In the late 1990s and the early 2000s, it was much easier to balance these concerns because of the internet's limited development. Filtering software was plausible, less restrictive, and available as an alternative means to banning the transmission of certain undefined materials over the internet.[43] Filters seemed like the best compromise to protect children from viewing harmful material while allowing adults to exchange unfettered information. Thus, granting immunity to ICSPs as mere hosts—instead of editors—of information made sense.

But as the internet has evolved, a new era of harmed children has arisen *because of* ICSP immunity.[44] Guaranteeing the "right" to transmit pornography over the internet is not without costs. Freedom of speech for some puts the safety, reputation, and livelihood of others at risk. Several issues have arisen. If the courts cannot protect children from *viewing*

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[35] *Id.* at 863.

[36] *Id.* at 870–72, 874.

[37] *Id.* at 871.

[38] *Id.* at 872.

[39] Child Online Protection Act, Pub. L. No. 105-277, tit. XIV, sec. 1403, § 231, 112 Stat. 2681-1, 2681-736 (codified as amended at 47 U.S.C. § 231), *invalidated by* Ashcroft v. ACLU, 542 U.S. 656, 660 (2004) (holding that COPA violated the First Amendment).

[40] 47 U.S.C. § 231(a)(1).

[41] § 231(b).

[42] *See* Alan E. Garfield, *Protecting Children from Speech*, 57 FLA. L. REV. 565, 570 (2005).

[43] *Ashcroft*, 542 U.S. at 666–67.

[44] Bruce Reed & James P. Steyer, *Why Section 230 Hurts Kids, and What to Do About It*, PROTOCOL (Dec. 8, 2020), https://www.protocol.com/why-section-230-hurts-kids.

harmful material, can it protect children—or adults—who are the *subject* of such harmful materials? Although distributing adult pornography is not a crime,[45] distribution of child pornography is.[46] However, in the age of anonymous internet posts where identifying the perpetrators can be a near impossible task, should ICSPs share liability for allowing such material to be posted and distributed on their platforms? What is a "good faith attempt" to restrict access to such materials? Are algorithms designed to block trafficking hashtags and user-reports enough? What if the ICSP is well aware that its platform is being used to buy and sell human beings? What if the ICSP receives a financial benefit, by ad revenue or page popularity, from downloads of child pornography? What if ICSPs are not active trafficking participants but passive beneficiaries? Should mere algorithms and user-reports still shield them from civil liability under such circumstances?

This Note attempts to answer these questions by exploring cases over the last two decades in which civil liability was imposed on ICSPs for hosting human trafficking on their websites. First, this Note explains key statutes necessary to understand the CDA's progress. Next, this Note explores how courts have ruled on cases brought by trafficking victims against non-internet businesses. Then, this Note discusses how the precedent set in those cases has influenced the district courts' decisions when it comes to ICSPs. Finally, this Note recommends that future courts should adopt the least restrictive pleadings standard to give victims their day in court and hold culpable parties accountable.

II. STATUTORY BACKGROUND: KEY LEGISLATION

Before exploring the cases, it is important to first understand some key pieces of legislation that influenced those decisions. Specifically, there are four statutes that factor into every court's decision: § 230 of the CDA ("§ 230"),[47] the Victims of Trafficking and Violence Protection Act ("§ 1591"),[48] the Trafficking Victims Protection Reauthorization Act ("§ 1595"),[49] and the Allow States and Victims to Fight Online Sex Trafficking Act ("FOSTA").[50]

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[45] Miller v. California, 413 U.S. 15, 27 (1973) (holding that the distribution of pornography will not be prosecuted unless it depicts "patently offensive 'hard core' sexual conduct").

[46] New York v. Ferber, 458 U.S. 747, 764 (1982).

[47] 47 U.S.C. § 230.

[48] Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, sec. 112, § 1591, 114 Stat. 1464, 1487 (codified as amended at 18 U.S.C. § 1591).

[49] Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 1595, 117 Stat. 2875, 2878 (codified as amended at 18 U.S.C. § 1595).

[50] Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, § 2421A, 132 Stat. 1253, 1253 (codified as amended at 18 U.S.C. § 2421A).

A. *The Communications Decency Act and Section 230*

Section 230 of the CDA is the biggest barrier for trafficking victims seeking redress against the internet platforms that hosted their nonconsensual images and videos. Even though the CDA seeks to "ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer,"[51] it also states that the CDA is to have "no effect on sex trafficking law."[52] "Nothing within this section"—other than the Good Samaritan Protection—should "be construed to impair or limit . . . any civil claim . . . brought under Section1595" so long as the conduct "constitutes a violation of Section 1591."[53] But in the age of cyber-sex trafficking, the Good Samaritan Protection does more harm than good. Those immunized from civil liability include "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service"[54] so long as that person or entity acts in good faith to restrict access to materials that are "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable."[55] Thus, the Good Samaritan Protection functionally renders everything else in § 230 moot. As such, the statute protects only "traditional" sex trafficking victims, leaving those who have been defamed, exploited, and abused over the internet without a civil remedy.

B. *Protections for "Traditional" Trafficking Victims*

1. Criminal Law: Victims of Trafficking and Violence Protection Act (§ 1591)

In 2000, Congress passed the Victims of Trafficking and Violence Protection Act, now codified as 18 U.S.C. § 1591.[56] Although § 1591 is a criminal statute, to bring a civil claim under CDA § 230, the conduct underlying the § 230 claim must constitute a violation of § 1591.[57] Section 1591 contains two important provisions. The first provision—(a)(1)—discusses *direct liability*. It reads in relevant part:

> Whoever knowingly . . . recruits, entices, harbors, transports, provides, obtains, advertises, maintains,

[51] § 230(b)(5).
[52] § 230(e)(5).
[53] § 230(e)(5)(A).
[54] § 230(f)(3).
[55] § 230(c)(2)(A).
[56] Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, sec. 112, § 1591, 114 Stat. 1464, 1487 (codified as amended at 18 U.S.C. § 1591).
[57] § 230(e)(5)(A).

> patronizes, or solicits by any means a person . . . or . . . [acts] in reckless disregard of the fact that means of force, threats of force, fraud, or coercion . . . cause[d] the person to engage in a commercial sex act, or that the person has not attained the age of 18 years . . . shall be punished . . . .[58]

The second provision—(a)(2)—discusses *beneficiary liability*:

> Whoever knowingly . . . benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of [(a)](1) . . . or [acts] in reckless disregard of the fact that means of force, threats of force, fraud, or coercion . . . cause[d] the person to engage in a commercial sex act, or that the person has not attained the age of 18 years . . . shall be punished . . . .[59]

In 2018, Congress amended § 1591 by adding a subsection to define "participation in a venture" to mean any group of two or more individuals, associated in fact who knowingly assist, support, or facilitate sex trafficking.[60] In some districts, those who are liable under a direct liability theory are known as "primary violators," and those who are liable under a beneficiary liability theory are known as "secondary participants."[61]

Although § 1591 has always criminalized knowingly "recruit[ing], entic[ing], harbor[ing], transport[ing], provid[ing], or obtain[ing] [a person] by any means,"[62] it was not until 2015 that the statute also criminalized knowingly advertising or soliciting a person.[63] This is especially important in the age of the internet. Equally important is the criminalization of third parties who knowingly benefited from participating in a venture related to human trafficking.[64] Anyone found guilty of violating § 1591 faces a fine and imprisonment for at least ten years to life.[65]

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[58] 18 U.S.C. § 1591(a)(1).

[59] § 1591(a)(2).

[60] Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, sec. 5, § 1591(e)(4), 132 Stat. 1253, 1255 (codified as amended at 18 U.S.C. § 1591(e)).

[61] *See, e.g.*, Doe v. Twitter, Inc., 555 F. Supp. 3d 889, 901 (N.D. Cal. 2021).

[62] Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, sec. 112, § 1591, 114 Stat. 1464, 1487 (codified as amended at 18 U.S.C. § 1591).

[63] Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, tit. I, sec. 109, § 1591, 129 Stat. 227, 239 (codified as amended at 18 U.S.C. 1591(a)(1)–(2)).

[64] § 1591(a)(2).

[65] § 1591(b)(2); *see also* § 1591(b)(1) ("The punishment for an offense under subsection (a) is . . . by fine under this title and imprisonment for any term of years not less than 15 or

2. Civil Law: Trafficking Victims Protection Reauthorization Act (§ 1595)

Clearly, a sex trafficking perpetrator can be federally prosecuted under § 1591. But in the modern era, with millions of anonymous online users and the Good Samaritan Protection, sex trafficking victims struggle to receive monetary relief for the trauma they have endured. In 2003, Congress passed the Trafficking Victims Protection Reauthorization Act, now codified as 18 U.S.C. § 1595, to allow victims of trafficking to bring a civil action against their perpetrators.[66] It reads in relevant part:

> An individual who is a [trafficking] victim . . . may bring a civil action against the perpetrator (or whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in [sex trafficking]) . . . and may recover damages and reasonable attorney fees.[67]

If all the elements of the criminal statute—§ 1591—are met, a trafficking victim can bring a civil action under § 1595 against her perpetrator for direct liability or against a third party for beneficiary liability. There are many similarities between the criminal statute and the civil statute, but the biggest—and most hotly debated—difference comes from the statute's knowledge requirement.[68]

Before 2008, a sex trafficking victim could only recover damages under a theory of direct liability, meaning that the defendant must have had actual knowledge of the trafficking.[69] However, in 2008, Congress amended the statute to allow victims to recover under a theory of beneficiary liability.[70] By adding the words "should have known" to the statute, the victim may now recover by demonstrating that the defendant only had constructive knowledge of the trafficking or received something

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for life . . . .").

[66] Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875, 2878 (codified as amended at 18 U.S.C. § 1595).

[67] 18 U.S.C. § 1595(a). *Compare* § 1595(a) (2003) ("An individual who is a victim of a violation of section 1589, 1590, or *1591* of this chapter may bring a civil action against the perpetrator") (emphasis added), *with* § 1595(a) (2022) ("An individual who is a victim . . . of this chapter may bring a civil action against the perpetrator . . .").

[68] § 1595(a) (providing a civil remedy against those who "should have known" they were violating the law).

[69] *See* Trafficking Victims Protection Reauthorization Act § 1595. Most victims do not know their perpetrators, and most victims do not know who posted their photos and/or videos online. Thus, their only form of recourse would be to sue the platform that allowed their photos and/or videos to be posted on its website.

[70] William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110-457, tit. II, sec. 221(1), § 1595(a)(ii), 122 Stat. 5044, 5067 (2008) (codified as amended at 18 U.S.C. § 1591).

of value from its participation in the venture.[71] This amendment relaxed the *mens rea* requirement so that victims now must only plead that the defendant possessed *either* actual *or* constructive knowledge to survive a motion to dismiss.[72]

C. The Fight Online Sex Trafficking Act (FOSTA)

Despite the strides Congress has made to help "traditional" trafficking victims, cyber sex victims remained categorically excluded from receiving monetary relief from profiting third parties regardless of § 1591 and § 1595.[73] From 1996 to 2018, the Good Samaritan Protection of CDA § 230 forbade victims from holding ICSPs civilly liable even if an ICSP knowingly benefited financially from trafficking, participated in a venture with traffickers, or advertised and solicited victims.[74] The Fight Online Sex Trafficking Act ("FOSTA") of 2017 was enacted to extend protection to cyber victims.[75] The purpose of FOSTA was to clarify that CDA § 230 does not give absolute immunity to ICSPs.[76] Instead, any ICSP that "inten[ds] to promote or facilitate the prostitution of another person . . . [or] acts in reckless disregard of the fact that such conduct contributed to sex trafficking . . . shall be fined . . . [and/or] imprisoned."[77] Additionally, any person injured by prostitution or sex trafficking may "recover damages and reasonable attorneys' fees."[78] Lastly, the statute mandates restitution for any violation, in addition to other civil or criminal penalties authorized by law.[79] In fact, courts are required to order

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[71] *Id.* ("[W]hoever knowingly benefits, *financially* or *by receiving anything of value* from participation in a venture which that person knew or *should have known* has engaged in [trafficking]" (emphasis added)).

[72] *See id.*

[73] *See, e.g.*, Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12, 39 (1st Cir. 2016) (holding that the appellant was not entitled to relief because when Congress "enacted the CDA . . . it chose to grant broad protections to internet publishers").

[74] *Compare* 47 U.S.C. § 230 (providing immunity for internet service providers), *with* Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, sec. 3, § 2421A, 132 Stat. 1253, 1253 (codified as amended at 18 U.S.C. § 1591) (allowing victims to file suit against internet service providers that host sex trafficking content on their websites), *and* 18 U.S.C. § 1595(a) ("[A] victim . . . may bring a civil action against the perpetrator (or whoever knowingly benefits, financially[,] or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in a [trafficking-related] act . . . .)").

[75] Allow States and Victims to Fight Online Sex Trafficking Act § 2421A.

[76] Jeffrey Neuburger, *FOSTA Signed into Law, Amends CDA Section 230 to Allow Enforcement Against Online Providers for Knowingly Facilitating Sex Trafficking*, NEW MEDIA & TECH. L BLOG (Apr. 11, 2018), https://newmedialaw.proskauer.com/2018/04/11/fosta-signed-into-law-amends-cda-section-230-to-allow-enforcement-against-online-providers-for-knowingly-facilitating-sex-trafficking/.

[77] 18 U.S.C. § 2421A(b), (b)(2).

[78] § 2421A(c).

[79] § 2421A(d) ("[I]n addition to any other civil or criminal penalties authorized by law,

restitution if any party acts in reckless disregard of the fact that its conduct contributed to sex trafficking.[80]

Although FOSTA should make it easier for cyber sex victims to obtain a civil remedy from ICSPs, only a handful of plaintiffs have successfully been able to progress past the pleadings stage.[81] In the last decade, every time a trafficking victim has tried to hold an ICSP civilly liable, the ICSP argues immunity under CDA § 230,[82] and that the case should be dismissed under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted.[83] The claimants' success primarily depends on how the courts will interpret FOSTA in light of §§ 230, 1591, and 1595. But before discussing how courts have interpreted those provisions, it is important to understand why conflicting interpretations exist.

III. PARALLEL CASES: NON-ICSP DEFENDANTS

Before addressing the fact that CDA § 230 provides immunity to ICSPs, courts have looked to other third-party beneficiary cases to answer the preliminary question of whether the claim pled by the plaintiff is plausible.[84] A series of cases (the "Hotel Cases") in which sex trafficking victims have sought to impose civil liability against certain hotel chains for their constructive knowledge of the victims' abuse sheds light on the pleading requirements for the same claims in other contexts.[85] In the Hotel Cases, courts have analyzed three factors to determine whether

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the court shall order restitution for any violation of [this statute].").

[80] *Id.*

[81] *Compare* Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12, 21 (1st Cir. 2016) ("[C]ourts have rejected claims that attempt to hold website operators liable for failing to provide sufficient protections to users from harmful content created by others."), *and* Doe v. MySpace, Inc., 528 F.3d 413, 422 (5th Cir. 2008) (holding that the plaintiff's claims against MySpace are barred by the CDA), *and* M.A. v. Wyndham Hotels & Resorts, Inc., 425 F. Supp. 3d 959, 964 (S.D. Ohio 2019) (finding that the plaintiff's allegations were sufficient to show she was a victim of sex trafficking under the TVPRA), *with* Doe v. Mindgeek USA, Inc., 558 F. Supp. 3d 828, 840 (C.D. Cal. 2021) (denying an ICSP's motion to dismiss when the plaintiff successfully alleged that the defendant (1) knowingly participated in a venture, (2) benefitted from its participation, and (3) knew or should have known that plaintiffs were victims of sex trafficking).

[82] *See, e.g.*, Doe v. Twitter, Inc., 555 F. Supp. 3d 889, 925–26 (N.D. Cal. 2021); J.B. v. G6 Hosp., LLC, No. 19-CV-07848, slip op. at 4 (N.D. Cal. Sept. 8, 2021); Doe v. Kik Interactive, Inc., 482 F. Supp. 3d 1242, 1247 (S.D. Fla. 2020).

[83] *Kik Interactive*, 482 F. Supp. 3d at 1251; *see* M.H. v. Omegle.com, LLC, No. 8:21-CV-814-VMC-TGW, slip op. at 7 (M.D. Fla. Jan. 10, 2022).

[84] Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

[85] A.B. v. Hilton Worldwide Holdings, Inc., 484 F. Supp. 3d 921, 936 (D. Or. 2020); *M.A.*, 425 F. Supp. 3d at 970; A.B. v. Marriott Int'l, Inc., 455 F. Supp. 3d 171, 187 (E.D. Pa. 2020); B.M. v. Wyndham Hotels & Resorts, Inc., No. 20-CV-00656-BLF, 2020 WL 4368214, at *4 (N.D. Cal. July 30, 2020).

third-party defendants have beneficiary liability.[86] First, courts have considered whether plaintiffs must plead the defendant's actual or constructive knowledge of the trafficking.[87] Second, courts have considered what must be alleged to show that the defendant participated in a "venture."[88] Lastly, courts have considered what must be alleged to show that the defendant received some benefit from the trafficking venture and that such benefit motivated its conduct.[89]

A. The Plausibility Standard and Failure to State a Claim

At the pleading stage, a complaint must contain a short and plain statement of the claim showing that the plaintiff is entitled to relief.[90] A court must review a complaint in the light most favorable to the plaintiff, and it must generally accept the plaintiff's well-pleaded facts as true.[91] Although Federal Rule of Civil Procedure 8(a) does not require "detailed factual allegations," it requires more than conclusory allegations, unwarranted deductions of facts, or legal conclusions masquerading as facts.[92] "A formulaic recitation of the elements of a cause of action" is also insufficient.[93] If a plaintiff does not meet these requirements, the defendant can file a Rule 12(b)(6) motion to dismiss for failure to state a plausible claim upon which relief can be granted.[94] To survive this motion, the plaintiff must present factual allegations that "raise a right to relief above the speculative level"[95] and are sufficient to state a claim for relief that is "plausible on its face."[96] "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[97] The mere possibility the defendant acted unlawfully is insufficient to survive a motion to dismiss.

In the Hotel Cases, to survive a motion to dismiss, the courts held that the plaintiff must plead that the third-party defendant had the requisite *mens rea*, participated in the sex trafficking venture, and

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[86] *E.g.*, *M.A.*, 425 F. Supp. 3d at 964; *A.B.*, 455 F. Supp. 3d at 181.

[87] *See M.A.*, 425 F. Supp. 3d at 965; C.S. v. Wyndham Hotels & Resorts, Inc., 538 F. Supp. 3d 1284, 1295 (M.D. Fla. 2021); S.Y. v. Naples Hotel, LLC, 476 F. Supp. 3d 1251, 1256 (M.D. Fla. 2020).

[88] *See* E.S. v. Best W. Int'l, Inc., 510 F. Supp. 3d 420, 426 (N.D. Tex. 2021); J.L. v. Best W. Int'l, Inc., 521 F. Supp. 3d 1048, 1060 (D. Colo. 2021).

[89] *See J.L.,* 521 F. Supp. 3d at 1060–61; *S.Y.,* 476 F. Supp. 3d at 1256.

[90] *A.B.*, 484 F. Supp. 3d at 943.

[91] Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

[92] Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.").

[93] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

[94] FED. R. CIV. P. 12(b)(6).

[95] *Twombly*, 550 U.S. at 555.

[96] *Id.* at 570.

[97] *Iqbal*, 556 U.S. at 678.

financially benefited from the venture.[98] So long as the court believed that the assumed facts could lead to a reasonable inference that the defendants acted unlawfully, the case could proceed to discovery.

B. The Three Factor Test

To determine the appropriate pleadings requirement, courts analyze § 1591—the criminal statute focused solely on direct liability—and § 1595—the civil statute focused both on direct and beneficiary liability. While the criminal statute penalizes defendants who had *actual* knowledge of the sex trafficking,[99] the civil statute only penalizes defendants that had *constructive* knowledge of the trafficking.[100] Clearly, defendants try to persuade the court to apply the higher *mens rea* standard—actual knowledge, and plaintiffs try to persuade the court to apply the lower *mens rea* standard—constructive knowledge.[101] But the issue is much more nuanced than merely choosing one standard over the other. Rather, courts must decide whether plaintiffs must allege a violation of the criminal statute as a prerequisite to imposing civil liability.[102] Although § 1591 and § 1595 may seem straightforward, the passage of FOSTA[103] in 2017 complicates this analysis. The CDA states that ICSPs' immunity is abrogated in civil actions brought under § 1595 "if the conduct underlying the claim constitutes a violation of § 1591."[104] However, FOSTA states that ICSPs' immunity is abrogated when they (1) "conspire[] or attempt[] to do so with the intent to promote or facilitate prostitution" and (2) "act[] in reckless disregard of the fact that such conduct contributed to sex trafficking."[105] Wedding the CDA and FOSTA requires courts to decide if plaintiffs must allege intent *and* recklessness or whether alleging recklessness alone is sufficient to state a claim.

1. Mens Rea

In the Hotel Cases, courts emphasized that "the language of § 1591 differs from the language of § 1595" in that the former does not have a "constructive knowledge" element manifested by "should have known"

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[98] A.B. v. Hilton Worldwide Holdings, Inc., 484 F. Supp. 3d 921, 935 (D. Or. 2020); M.A. v. Wyndham Hotels & Resorts, Inc., 425 F. Supp. 3d 959, 964 (S.D. Ohio 2019); A.B. v. Marriott Int'l, Inc., 455 F. Supp. 3d 171, 181 (E.D. Pa. 2020); B.M. v. Wyndham Hotels & Resorts, Inc., No. 20-CV-00656-BLF, 2020 WL 4368214, at *4 (N.D. Cal. July 30, 2020).

[99] 18 U.S.C. § 1591(a).

[100] 18 U.S.C. § 1595(a).

[101] *See e.g.*, Doe v. Kik Interactive, Inc., 482 F. Supp. 3d 1242, 1250–51 (S.D. Fla. 2020).

[102] *See, e.g.*, *M.A.*, 425 F. Supp. 3d at 963; 47 U.S.C. § 230(e)(5)(A).

[103] Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, § 2421A, 132 Stat. 1253 (codified as amended at 18 U.S.C. § 2421A).

[104] § 230(e)(5)(A).

[105] 18 U.S.C. § 2421A(a), (b)(2).

language.[106] In *M.A. v. Wyndham Hotels*, the plaintiff alleged that a hotel chain financially benefited from the rooms rented for her trafficking.[107] She further alleged that the hotel knew or should have known that trafficking was occurring there based on various signs that should have been obvious to hotel staff.[108] The court agreed with the plaintiff and held that the hotel chain benefited from the sex trafficking based on the rental of its rooms.[109] It further held that the plaintiff alleged sufficient facts to show that the hotel "knew or should have known" that the sex trafficking venture was occurring, applying the constructive knowledge requirement of § 1595 rather than the actual knowledge requirement under § 1591.[110] The court believed that the plaintiff provided facts specific to her own sex trafficking that should have been obvious to the hotel staff, as well as the fact that the hotel chain was "on notice about the prevalence of sex trafficking generally at their hotels and failed to take adequate steps to train staff in order to prevent its occurrence."[111]

2. Venture

The second factor required the courts to determine whether the hotels were participating in the sex trafficking "venture" by renting rooms to traffickers. "Participation in a venture" is defined by § 1591(e)(4) as "knowingly assisting, supporting, or facilitating" sex trafficking.[112] The plain language—knowingly—indicates a heightened state of mind. The Sixth Circuit has held that § 1591 requires defendants to actually "participate [in] . . . some 'overt act' that furthers the sex trafficking aspect of the venture."[113] Merely being "associated with the criminal venture"[114] for the purpose of "furthering the sex trafficking"[115] is not enough. Under this interpretation, a defendant cannot be criminalized for "mere negative acquiescence."[116]

However, other courts have held that the definition of "participation in a venture" under § 1591 should not bind the interpretation of "participation in a venture" under § 1595.[117] Although there is a natural

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[106] *M.A.*, 425 F. Supp. 3d at 969; S.Y. v. Naples Hotel, LLC, 476 F. Supp. 3d 1251, 1256 (M.D. Fla. 2020); A.B. v. Marriott Int'l, Inc., 455 F. Supp. 3d 171, 185 (E.D. Pa. 2020).
[107] *M.A.*, 425 F. Supp. 3d at 962.
[108] *Id.* at 965.
[109] *Id.*
[110] *Id.* at 971.
[111] *Id.* at 968.
[112] 18 U.S.C. § 1591(e)(4).
[113] United States v. Afyare, 632 F. App'x 272, 286 (6th Cir. 2016).
[114] *Id.* at 284 (emphasis omitted).
[115] *Id.* at 286.
[116] *Id.* at 282.
[117] M.A. v. Wyndham Hotels & Resorts, Inc., 425 F. Supp. 3d 959, 969 (S.D. Ohio 2019); H.H. v. G6 Hosp., LLC, No. 2:19-CV-755, 2019 WL 6682152, at *4 (S.D. Ohio Dec. 6, 2019);

presumption that identical words are intended to have the same meaning,[118] this presumption "readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed . . . with different intent."[119] Statutory language cannot be construed in a vacuum. Rather, the words of a statute must be read in their context and with a "view to their place in the overall statutory scheme."[120] Without considering the broader context, the "cardinal principle"[121] of statutory construction—that a statute ought to be construed so that "no clause, sentence, or word shall be superfluous, void, or insignificant"[122]—would be violated.

The language of § 1595 allows a sex trafficking victim to bring a civil action against anyone who knowingly benefited financially from participation in a venture which that person *knew or should have known* involved sex trafficking.[123] Thus, a defendant need not have actual knowledge of the trafficking to have participated in the venture. Rather, the defendant's constructive knowledge of the trafficking may be sufficient.[124] The text of § 1591 affirms this statutory interpretation by criminalizing some action taken with *less* than actual knowledge.[125] Directly following the beneficiary liability language, § 1591 notes that whoever acts "in *reckless disregard* of the fact, that . . . force, threats of force, fraud, [and/or] coercion . . . will be used to cause [a] person to engage in a commercial sex act . . . shall be punish[ed]."[126] Thus, requiring a plaintiff to plead that the defendant had actual knowledge of the sex trafficking venture would render the "should have known" language in § 1595 meaningless.[127]

As such, courts have started allowing plaintiffs to only allege the defendant's constructive knowledge in order to overcome a motion to dismiss.[128] To do this, the "[p]laintiff must allege at least a showing of a

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J.B. v. G6 Hosp., LLC, No. 19-CV-07848, slip op. at 14 (N.D. Cal. Sept. 8, 2021).

[118] Pereira v. Sessions, 138 S. Ct. 2105, 2115 (2018).

[119] Roberts v. Sea-Land Servs., 566 U.S. 93, 108 (2012).

[120] *Id.* (quoting Gilbert v. United States Olympic Comm., No. 18-CV-00981-CMA-MEH, 2019 WL 105819, at *11–12 (D. Colo. Mar. 6, 2019)).

[121] Iancu v. Brunetti, 139 S. Ct. 2294, 2318 (2019) (Sotomayor, J., concurring) (quoting NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937)).

[122] *Id.* at 2309.

[123] 18 U.S.C. § 1595(a).

[124] *M.A.*, 425 F. Supp. 3d at 971; A.C. v. Red Roof Inns, Inc., No. 2:19-CV-4965, slip op. at 6 (S.D. Ohio June 16, 2020).

[125] 18 U.S.C. § 1591(a), (a)(2) ("Whoever knowingly [acts] . . . i*n reckless disregard* of the fact, that means of force, threats of force, fraud, coercion . . . will be used to cause the person to engage in a commercial sex act . . . shall be punished . . . .") (emphasis added).

[126] *Id.*

[127] *M.A.*, 425 F. Supp. 3d at 971.

[128] B.M. v. Wyndham Hotels & Resorts, Inc., No. 20-CV-00656-BLF, 2020 WL 4368214, at *4–5 (N.D. Cal. July 30, 2020); *A.C.*, slip op. at 4.

continuous business relationship between the trafficker and the hotels such that it would appear that the trafficker and the hotels have established a pattern of conduct or could be said to have a tacit agreement."[129] In the Hotel Cases, many courts decided that plaintiffs can meet their pleadings burden by alleging that the defendant rented rooms to people it knew or should have known were engaged in sex trafficking.[130]

3. Benefit

The last factor requires courts to consider what must be alleged to show that the defendant received a benefit from the sex trafficking venture. The trafficked plaintiff always alleges that the defendant hotel chains financially benefited from the room rentals. Although defendants argue that merely receiving revenue from room rentals cannot constitute a benefit,[131] most courts agree that § 1595 does not require the defendants to receive the benefit of *sexual services* to be held liable for what occurred.[132] Instead, defendants can be held liable for benefiting financially or by receiving *anything* of value.[133]

IV. TRAFFICKING VICTIMS V. ICSPS: A LOWER COURT SPLIT

Courts often use the Hotel Cases as a reference point when deciding whether to impose beneficiary liability on the ICSPs who are sued by trafficking victims. Cases involving hotel chains are easier to decide because third-party hotel defendants are not subject to statutory immunity. ICSPs, however, enjoy such immunity. There are three elements to a claim of immunity under the CDA.[134] The defendant must

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[129] *M.A.*, 425 F. Supp. 3d at 970; *see also* McGuire v. Lewis, No. 1:12-CV-986, 2014 WL 1276168, at *5 (S.D. Ohio Mar. 27, 2014) (finding allegations sufficient "to identify the individuals alleged to have conspired, to plausibly suggest some joint action among the individuals, and to explain how the purported joint action led to the alleged deprivation of [plaintiff's] rights . . . . [T]hey plausibly show a tacit agreement . . . .").

[130] Ricchio v. McLean, 853 F.3d 553, 556 (1st Cir. 2017); J.C. v. Choice Hotels Int'l, Inc., No. 20-CV-00155-WHO, slip op. at 5 (N.D. Cal. Oct. 28, 2020); *A.C.*, slip op. at 7; S.Y. v. Best W. Int'l, Inc., No. 2:20-CV-616-JES-MRM, slip op. at 4 (M.D. Fla. June 7, 2021); Doe S.W. v. Lorain-Elyria Motel, Inc., No. 2:19-CV-1194, 2020 WL 1244192, at *7 (S.D. Ohio Mar. 16, 2020).

[131] *E.g.*, *M.A.*, 425 F. Supp. 3d at 964.

[132] *Compare* Geiss v. Weinstein Co. Holdings, LLC, 383 F. Supp. 3d 156, 169 (S.D.N.Y. 2019) (holding that plaintiff must show that the trafficker provided benefits to defendants because of defendants' facilitation of the trafficker's sexual misconduct), *with* Gilbert v. U.S. Olympic Comm., 423 F. Supp. 3d 1112, 1137 (D. Colo. 2019) (holding that § 1595 liability does not require the defendant to benefit from the forced labor or services for liability to attach).

[133] 18 U.S.C. § 1595(a); *see Gilbert*, 423 F. Supp. 3d at 1136 (finding that the defendant had received a benefit through "collecting money through sponsorships, licensing, grants, publicity, for medals achieved at competitions, and for recruitment and training").

[134] FTC v. LeadClick Media, LLC, 838 F.3d 158, 173 (2d Cir. 2016).

plead that "(1) [it] is an [ICSP], (2) the claim is based on information provided by another information content provider, and (3) the claim would treat the defendant as the publisher or speaker of that information."[135] Although the elements remain the same, lower courts have reached opposite conclusions when determining whether the ICSP is entitled to immunity.

A. Doe v. Kik Interactive

In *Doe v. Kik Interactive*, the "[d]efendants own[ed] and operate[d] a web-based interactive service known as Kik."[136] The platform was "marketed to teenagers and young adults for purposes of sending messages to other users."[137] The plaintiffs alleged that there were multiple instances of adult Kik users "contact[ing] and solicit[ing] sexual activity with minors, with some . . . contacts resulting in death of the minors."[138] The minor plaintiff further alleged that the ICSP knew "that sexual predators used its service to prey on minors but . . . failed to provide warnings or enact policies to protect minors from such abuses."[139] The minor alleged that numerous adult male Kik users "solicited her and convinced her to take and send them sexually graphic pictures of herself using Kik," and that "these adult males sent her sexually explicit photographs via Kik."[140]

The minor alleged that Kik was a secondary participant and should be held liable for knowingly participating in ventures with traffickers.[141] She claimed that the ICSP violated § 1591 by "benefiting from[] and knowingly facilitating . . . the venture" in which the abusers used the online platform to subject the plaintiff to sex trafficking.[142] She also alleged that Kik knew or was in reckless disregard of the fact that her abusers utilized the platform to furnish harmful materials and subject her to sex trafficking yet continued to market the service to underage users without a sufficient warning or policies to protect them.[143]

Several federal circuits have interpreted the CDA to establish broad "federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service."[144] Usually, for a ICSP defendant to have a successful immunity

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[135] *Id.*
[136] Doe v. Kik Interactive, Inc., 482 F. Supp. 3d 1242, 1244 (S.D. Fla. 2020).
[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] *Id.* at 1244–45.
[142] *Doe*, 482 F. Supp. 3d at 1244–45.
[143] *Id.* at 1245.
[144] *See, e.g.*, Almeida v. Amazon.com, Inc., 456 F.3d 1316, 1321 (11th Cir. 2006) (quoting Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997)).

claim, it must demonstrate that "(1) [it] is an [ICSP], (2) the claim is based on information provided by another information content provider, and (3) the claim would treat [the defendant] as the publisher or speaker of that information."[145] However, FOSTA removed sex trafficking from CDA immunity, permitting civil damages claims to be made against ICSPs under § 1595 if "the conduct underlying the claim constitutes a violation of § 1591."[146] The defendant violates § 1591 if it knowingly benefits financially from participating in a venture that has engaged in recruiting, advertising, or soliciting a person.[147] In this case, the dispute centers on the phrase "participation in a venture," mentioned in both the criminal statute and the civil remedy statute.[148] The criminal statute—requiring actual knowledge—defines "participation in a venture" as "knowingly assisting, supporting, or facilitating" sex trafficking.[149] The civil remedy statute—requiring constructive knowledge—mentions but does not define "participation in a venture."[150]

Kik argued that the minor must demonstrate that Kik had actual knowledge of benefiting from participation in a venture that assisted, supported, or facilitated her trafficking.[151] But the minor argued that "participation in a venture" should not be read as defined in the criminal statute because doing so would render the constructive knowledge requirement in the civil statute meaningless.[152] Instead, to establish civil liability, the minor argued that she must only plead that Kik "knew or should have known" that it was participating in a venture that was engaged in sex trafficking in violation of the criminal statute.[153]

The court reasoned that if Kik were not an ICSP, it would have followed the reasoning of other courts adopting the constructive knowledge standard that applies to non-ICSPs.[154] The court stated that if it were not for FOSTA, Kik would be immune from liability under CDA § 230.[155] However, FOSTA created an additional consideration: a balance between "the needs of protecting children and encouraging 'robust

[145] FTC v. LeadClick Media, LLC, 838 F.3d 158, 173 (2d Cir. 2016).

[146] *Kik Interactive*, 482 F. Supp. 3d at 1247.

[147] 18 U.S.C. § 1591(a)(1)–(2).

[148] *See* § 1591(a)(2); 18 U.S.C. § 1595(a); *Kik Interactive*, 482 F. Supp. 3d at 1249.

[149] § 1591(e)(4).

[150] *See* § 1595(a).

[151] *Kik Interactive*, 482 F. Supp. 3d at 1249, 1251.

[152] *Id.* at 1249.

[153] *Id.*

[154] *Id. Cf., e.g.*, M.A. v. Wyndham Hotels & Resorts, Inc., 425 F. Supp. 3d 959, 969 (S.D. Ohio 2019); J.C. v. Choice Hotels Int'l, Inc., No. 20-CV-00155, slip op. at 1 (N.D. Cal. June 5, 2020); A.B. v. Marriott Int'l, Inc., 455 F. Supp. 3d 171, 174 (E.D. Pa. 2020); Doe S.W. v. Lorain-Elyria Motel, Inc., No. 2:19-CV-1194, 2020 WL 1244192, at *5 (S.D. Ohio Mar. 16, 2020); H.H. v. G6 Hosp., LLC, No. 2:19-CV-755, 2019 WL 6682152, at *3 (S.D. Ohio Dec. 6, 2019).

[155] *Kik Interactive*, 482 F. Supp. 3d at 1250.

Internet communication.'"[156] The minor argued that FOSTA replaced the actual knowledge standard with a constructive knowledge standard when civil recovery is sought under the § 1591 criminal standard.[157] Yet, the court rejected this argument in favor of Congressional history, reasoning that "Congress only intended to create a narrow exception to CDA for 'openly malicious actors such as Backpage where it was plausible for a plaintiff to allege actual knowledge and overt participation.'"[158] Backpage is a website known to overtly advertise "adult services" that has faced multiple lawsuits for "advertising" (sexually exploiting) underaged victims on its platform.[159] Kik tried to distinguish its platform from Backpage by arguing that knowledge of *general* sex trafficking occurring on its platform is insufficient to meet the "knowledge" element required for *each individual victim*.[160]

The court concluded that FOSTA did not abrogate CDA immunity for all claims arising from sex trafficking but only for websites where "the conduct underlying the claim constitutes a violation of § 1591."[161] The minor only alleged that Kik "knew that other sex trafficking incidents occurred" on its platform.[162] She did not allege that Kik knowingly participated in the sex trafficking venture in which she was involved.[163] Thus, the court ruled that the minor failed to plausibly allege that Kik had violated § 1591, and the case was dismissed under Rule 12(b)(6).[164]

B. Doe v. Twitter

In *Doe v. Twitter*, the plaintiffs alleged that when they were thirteen years old, they were solicited and recruited for sex trafficking and manipulated into providing a third-party with pornographic videos of themselves through Snapchat.[165] "A few years later, when the [minors]

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[156] *Id.*

[157] *Id.*

[158] *Id.* at 1250–51.

[159] *See* M.A. v. Vill. Voice Media Holdings, LLC, 809 F. Supp. 2d 1041, 1043–44 (E.D. Mo. 2011); Backpage.com, LLC v. McKenna, 881 F. Supp. 2d 1262, 1266–67 (W.D. Wash. 2012); Backpage.com, LLC v. Cooper, 939 F. Supp. 2d 805, 813 (M.D. Tenn. 2013); Backpage.com, LLC v. Lynch, 216 F. Supp. 3d 96, 99–100 (D.D.C. 2016); Backpage.com, LLC v. Hoffman, No. 13-CV-03952, 2013 U.S. Dist. LEXIS 119811, at *3 (D.N.J. Aug. 20, 2013).

[160] *Kik Interactive*, 482 F. Supp. 3d at 1250 & n.6.

[161] *Id.* at 1247.

[162] *Id.* at 1251.

[163] *Id.*

[164] *Id.* at 1252.

[165] Doe v. Twitter, Inc., 555 F. Supp. 3d 889, 893–94 (N.D. Cal. 2021). "Snapchat is a mobile messaging application used to share photos, videos, text, and drawings." *Explainer: What Is Snapchat?*, WEBWISE, https://www.webwise.ie/parents/explainer-what-is-snapchat-2/ (last visited Oct. 2, 2022). Snapchat differs "from other forms of texting and photo sharing because the messages disappear from the recipient's phone after a few seconds"—unless the recipient of the photo screenshots the image or screen-records the video sent to them. *Id.*

were still in high school, links to the Videos were posted on Twitter."[166] The minors alleged that "when they learned of the posts, they informed law enforcement and urgently requested that Twitter remove them but Twitter initially refused to do so, allowing the posts to remain on Twitter, where they accrued more than 167,000 views and 2,223 retweets."[167]

The minors alleged that Twitter should be held responsible as a secondary participant for benefiting or profiting from the sex trafficking on their platform.[168] To demonstrate beneficiary liability, the minors must have pled that Twitter and Twitter users received something of value for the video depicting their sex acts.[169] The question, however, is whether beneficiary liability should be evaluated under the *mens rea* requirement of § 1591—actual knowledge—or of § 1595—constructive knowledge.

Twitter argued that it was shielded by CDA § 230 immunity, that the FOSTA exception did not apply, and that the minors failed to state a claim under both § 1591 and § 1595.[170] Twitter contended that because all three requirements[171] to implicate CDA § 230 immunity were met, the only question was whether the FOSTA exception abrogated Twitter's immunity.[172] Additionally, Twitter argued that Congress did not intend for FOSTA to be used to sue benevolent online platforms but only for "openly malicious actors" that knowingly facilitate sex trafficking.[173] Twitter asserted that the minors failed to plead (1) that Twitter was either a primary violator or a secondary participant,[174] (2) that Twitter possessed actual knowledge of the trafficking,[175] and (3) that Twitter knowingly received anything of value from participation in the venture.[176]

The court applied the three-factor test from the Hotel Cases analyzing the *mens rea* requirement, the definition of a "venture," and the material benefits, if any, incurred by the secondary participant.[177] In analyzing the differing standards in § 1595 and § 1591, the court held that the plaintiff did not have to plead actual knowledge.[178] The court also held that Twitter had participated in a "venture," noting that "[p]laintiffs are

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[166] *Twitter*, 555 F. Supp. 3d at 894.

[167] *Id.*

[168] *Id.*

[169] *Id.* at 901.

[170] *Id.* at 899–900.

[171] To have CDA § 230 immunity, (1) the defendants must be an ICSP, (2) the plaintiffs must treat the defendant as the publisher or speaker of the content in question, and (3) someone other than the defendant must have provided or created the content. *Twitter*, 555 F. Supp. 3d at 901.

[172] *See id.*

[173] *Id.* at 900.

[174] *Id.* at 901.

[175] *Id.* at 902.

[176] *Id.* at 901.

[177] *Twitter*, 555 F. Supp. 3d at 918.

[178] *Id.* at 922.

not required to allege an 'overt act' of participation in the sex trafficking."[179] Instead, it was sufficient to plead that Twitter maintained a "continuous business relationship" with the trafficker in order to establish "a pattern of conduct" or "a tacit agreement."[180] The court rejected the argument that "benefit" had to "derive directly from, and be knowingly received in exchange for, participating in a sex-trafficking venture."[181] Instead, the plaintiffs merely needed to allege that Twitter knowingly received a financial benefit from having a relationship with the sex trafficker.[182] The court held that Twitter "monetize[ed] content, including [Child Sexual Abuse Material],[183] through advertising, sale of access to its [Application Programming Interface], and data collection."[184] Additionally, "search[ing] for hashtags that are known to relate to [Child Sexual Abuse Material] brings up promoted links and advertisements, offering a screenshot of advertising that appeared in connection with one such hashtag."[185] Specifically, the minor alleged that the videos were monetized by Twitter because they received at least 167,000 views and 2,220 retweets and remained live for another seven days after the minors asked Twitter to remove the videos, resulting in substantially more views and retweets.[186]

V. RESOLUTION OF THE LOWER COURT SPLIT

Doe v. Kik[187] and *Doe v. Twitter*'s[188] differing interpretations of § 1591, § 1595, and FOSTA have resulted in a lower court split across the country.[189] Eventually, a circuit court, and perhaps the Supreme Court,

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[179] *Id.* (citing M.A. v. Wyndham Hotels & Resorts, Inc., 425 F. Supp. 3d 959, 970 (S.D. Ohio 2019)).

[180] *Id.* (quoting *M.A.*, 425 F. Supp. 3d at 970) ("[Plaintiffs] allege[d] that Twitter was specifically alerted that the Videos contained sexual images of children obtained without their consent on several occasions but either failed or refused to take action.").

[181] *Id.* at 923–24 (citing B.M. v. Wyndham Hotels & Resorts, Inc., No. 20-CV-00656-BLF, 2020 WL 4368214, at *4 (N.D. Cal. July 30, 2020)).

[182] *Id.* at 924.

[183] *Twitter*, 555 F. Supp. 3d at 924; *Child Sexual Abuse Material*, NAT'L CTR. FOR MISSING & EXPLOITED CHILD., https://www.missingkids.org/theissues/csam (last visited Apr. 15, 2023) ("United States federal law defines child pornography as any visual depiction of sexually explicit conduct involving a minor . . . . Outside of the legal system, NCMEC chooses to refer to these images as Child Sexual Abuse Material (CSAM).").

[184] *Twitter*, 555 F. Supp. 3d at 924.

[185] *Id.*

[186] *Id.*

[187] Doe v. Kik Interactive, Inc., 482 F. Supp. 3d 1242, 1249 (S.D. Fla. 2020) ("The plain language of the statute removes immunity only for conduct that violates 18 U.S.C. § 1591.").

[188] *See Twitter*, 555 F. Supp. 3d at 920–21 (arguing that Section 230(e)(5)(A) only narrows the types of § 1595 claims that are exempted from CDA immunity).

[189] *Compare* M.L. v. Craigslist, Inc., No. C19-6153 BHS-TLF, 2020 U.S. Dist. LEXIS 166334, at *4 (W.D. Wash. Sept. 11, 2020) (adopting the actual knowledge requirement), *and* Doe v. Reddit, Inc., SACV 21-00768 JVS (KESx), 2021 U.S. Dist. LEXIS 235993, at *19–20

will resolve the dispute. There are good arguments on both sides, but the cases' resolution hinges on each judge's view of the laws' legislative history and statutory language.

A. The Approach Most Favorable to the Victim

1. Statutory Language

In construing a statute, the statute's language should be analyzed first.[190] However, context also matters. Courts should consider not only the meaning of the word but also its "placement and purpose in the statutory scheme."[191] Specifically, remedial statutes must be "liberally construed."[192] FOSTA is a "remedial statute" because it affords a civil remedy to "victims of sex trafficking that otherwise would not have been available."[193] By adopting the most restrictive possible reading of the provision, an equally plausible reading of the plain language of FOSTA is ignored.[194]

CDA § 230(e)(5)(A) provides: "Nothing in this section (other than [the Good Samaritan Provision]) shall be construed to impair or limit—(A) any claim in a civil action brought under section 1595 . . . if the conduct underlying the claim constitutes a violation of section 1591."[195] Victims argue that because FOSTA's second clause modifies its first clause, the court should reject the conclusion that (1) the second clause "limits civil claims that fall outside of CDA § 230 immunity to claims asserted under Section 1591," and (2) § 230 immunity "allows for liability on only a subset of the civil claims that may be brought under § 1595 and § 1591."[196] Reading the statute this way would imply that "a sex trafficking victim who seeks to impose civil liability on an [ICSP] on the basis of beneficiary liability" would face a much higher burden than a victim who seeks to impose the same liability on a different type of defendant.[197] If Congress

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(C.D. Cal. Oct. 7, 2021) (adopting the actual knowledge requirement), *with* Doe v. Mindgeek USA, Inc., 558 F. Supp. 3d 828, 836 (C.D. Cal 2021) (adopting the constructive knowledge requirement).

[190] Bailey v. United States, 516 U.S. 137, 145 (1995).

[191] *Id.* at 145.

[192] Peyton v. Rowe, 391 U.S. 54, 65 (1968).

[193] *Twitter*, 555 F. Supp. 3d at 920.

[194] *Id.*

[195] 47 U.S.C. § 230(e)(5)(A).

[196] *Twitter*, 555 F. Supp. 3d at 920 ("[N]amely, those [civil claims] that can meet the more stringent burden that applies to criminal prosecutions under Section 1591.") (emphasis omitted).

[197] *Id.* For example, a victim who seeks to impose beneficiary liability on a hotel chain would face a much higher burden than a victim who seeks to impose beneficiary liability on an ICSP.

had intended to impose such a limitation on beneficiary liability as applied to ICSPs, it could have clearly stated so, but it did not.[198]

Instead, a more natural reading of "if the conduct underlying the claim constitutes a violation of section 1591"[199] is that it creates an immunity exemption for civil sex trafficking claims under § 1591 as opposed to other sections[200] of Title 18.[201] This reading of the statute makes available to victims the same civil remedies against an ICSP as it would in cases involving other types of defendants who receive indirect benefits. When Congress passed § 1591, it made clear that all parties must comply with the law or face civil liability even if all parties are not direct perpetrators.[202] To bring a cause of action under § 1591, the defendant must be either a direct violator or a knowing beneficiary.[203] Thus, it is arguable that § 1595 was intended to expand the scope of liability beyond § 1591, paving the way for civil suits against online platforms that host child sexual abuse material.[204]

2. Legislative History

During the hearing at which the House of Representatives voted on the passage of FOSTA, the bill's sponsor, Representative Ann Wagner, stated that "FOSTA is centered on the 'reckless disregard' standard."[205] She claimed that the "forward-facing bill" will "provide justice to victims of all bad actor websites, not just Backpage.com."[206] In fact, at the time FOSTA became law,[207] law enforcement had already seized Backpage and

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[198] *Id.*

[199] § 230(e)(5)(A).

[200] *Cf.* 18 U.S.C. § 1581(a) (emphasizing that the prohibition on conduct includes "hold[ing] or return[ing] any person to a condition of peonage"); 18 U.S.C. § 1583 ("[e]nticement into slavery"); 18 U.S.C. § 1589(b) ("benefit[ting], financially or by receiving anything of value, from participation in a venture which has engaged in the providing or obtaining of [forced] labor").

[201] Title 18, Chapter 77 is entitled "Peonage, Slavery, and Trafficking in Persons," and contains §§ 1581–1597. Congress created civil liability for "[a]n individual who is a victim of a violation of [Chapter 77]." 18 U.S.C. § 1595.

[202] William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, tit. II, § 222(b)(5)(A)(ii), § 222(b)(5)(D), 122 Stat. 5044, 5069 (codified as amended at 18 U.S.C. § 1591).

[203] § 1595(a).

[204] Brief of Amici Curiae Anti-Trafficking Orgs. in Support of Plaintiffs' Opposition to Defendant Twitter Inc.'s Motion to Dismiss at 8–9, Doe v. Twitter, 555 F. Supp. 3d 889 (N.D. Cal. 2021) (No. 3:21-CV-00485-JCS) [hereinafter Brief of Amici Curiae].

[205] *The Latest Developments in Combating Online Sex Trafficking: Hearing on H.R. 1865 Before the Subcomm. on Commc'n & Tech.*, 115th Cong. 8 (2017) [hereinafter *FOSTA Hearing*] (statement of Rep. Ann Wagner of Missouri).

[206] *Id.* at 16.

[207] Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (codified as amended at 18 U.S.C. § 2421A). President Trump signed FOSTA into law on April 11, 2018. Elizabeth Dias, *Trump Signs Bill Amid Momentum to*

shut down its marketplace,[208] confirming that Congress saw a broader need for FOSTA than just for targeting Backpage.[209]

In its review of FOSTA, the Senate highlighted the importance of discovery in cases of online sex trafficking.[210] For example, Senator McCaskill stated that internet companies believe that they can "win again in court"[211] and deny victims the opportunity to "look at the underlying evidence that one should always look at in an investigation."[212] Survivors of sex trafficking are usually "vulnerable children, and Congress has unequivocally stated its intention that [child victims] deserve their day in court."[213] Thus, writing FOSTA to grant immunity to ICSPs would undermine the purpose of FOSTA and block victims' access to justice. Shielding powerful internet companies while leaving children unremedied and exploited seems contrary to Congress's goal.[214] Instead, plaintiffs who allege violations of both the direct and beneficiary provisions of the criminal statute should proceed to discovery.

Those who opposed the bill voiced contrary opinions to those of Representative Wagner and Senator McCaskill.[215] Of course, ICSPs clearly cherry-pick favorable lines to demonstrate contrary legislative intent.[216] Regardless of who is right, the Supreme Court has cautioned

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Crack Down on Trafficking, N.Y. TIMES (Apr. 11, 2018), https://www.nytimes.com/2018/04/11/us/backpage-sex-trafficking.html.

[208] Sarah N. Lynch & Lisa Lambert, *Sex Ads Website Backpage Shut Down by U.S. Authorities*, REUTERS (Apr. 6, 2018, 3:55 PM), https://www.reuters.com/article/us-usa-backpage-justice/sex-ads-website-backpage-shut-down-by-u-s-authorities-idUSKCN1HD2QP.

[209] 164 CONG. REC. H1290, H1292 (daily ed. Feb. 27, 2018) (statement of Rep. Shelia Jackson Lee) (indicating that more than 130 websites have been identified as platforms for which "women and children are bought and sold for sex").

[210] *See* 164 CONG. REC. S1827, S1830 (daily ed. Mar. 20, 2018) (statement of Sen. Claire McCaskill).

[211] *Id.*

[212] *Id.*

[213] Brief of Amici Curiae, *supra* note 204, at 12 (citing 164 CONG. REC. S1849, S1851 (daily ed. Mar. 21, 2018) (statement of Sen. Richard Blumenthal)).

[214] *Id.*

[215] Elizabeth Strassner, *Why Some Lawmakers Opposed an Anti-Sex Trafficking Bill*, MEDILL NEWS SERV. (Mar. 23, 2018), https://dc.medill.northwestern.edu/blog/2018/03/23/why-some-lawmakers-opposed-an-anti-sex-trafficking-bill/#sthash.lNtSvALn.dpbs (citing twenty-five congresspeople who voted against FOSTA, among whom include Rep. Justin Amash, R-Mich.; Rep. Paul Gosar, R-Ariz.; Sen. Ron Wyden, D-Ore.; and Sen. Rand Paul, R-Ky.).

[216] *See, e.g.*, J.B. v. G6 Hosp., LLC, No. 19-CV-07848, slip op. at 8 (N.D. Cal. Sept. 8, 2021) (quoting *The Stop Enabling Sex Traffickers Act of 2017: Hearing on S. 1693 Before the S. Comm. on Com., Sci., & Transp.*, 115th Cong. 41–42 (2017) (statement of Sen. Brian Schatz) (stating that Congress wants to "provide space and not deter proactive actions by good actors that are doing the right thing to mitigate sex trafficking on their platforms" and voicing concerns that "big platforms" are "worried that their knowing at all triggers the knowing part of the statute")).

against the use of later legislative history in understanding an earlier-enacted statute.[217] As the Court explained, "even when it would otherwise be useful, subsequent legislative history will rarely override a reasonable interpretation of a statute . . . ."[218] Thus, statutory interpretation primarily controls the statute's construction.

B. The Approach Most Favorable to ICSPs

1. Statutory Language

Most parties do not dispute the ordinary meaning in any of the words in § 230. Rather, the dispute typically centers on whether it is sufficient that *someone* commit a § 1591 violation that underlies the plaintiff's civil claim, or whether the plaintiff must show that the conduct of the civil *defendant* amounts to a criminal violation.[219] Without debating whether the second clause modifies the first clause, this approach asserts that the most straightforward reading of the statute is that it abrogates an ICSP's immunity for a § 1595 claim if the civil defendant's conduct amounts to a violation of § 1591.[220] The courts that adopt this approach reason that "if Congress meant to exempt all claims involving sex trafficking," it could have written the statute to provide "if the claim arises out of a violation of section 1591," or "if the plaintiff is a victim of a violation of section 1591."[221] However, Congress chose not to do so.

Consistent with the remedial nature of the statute, this approach reasons that "the plain language interpretation" squares with FOSTA's "broader context, in that Congress sought to provide victims of sex trafficking access to courts and improve prosecutorial tools against websites that facilitate sex trafficking."[222] Under this reading of the statute's plain language, a plaintiff can bring a claim against either (1) a website whose conduct amounts to a violation of § 1591, including its

[217] Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 117-18 (1980). At the time of the House of Representative's hearing, the bill had yet to be voted on by the Senate, presented to the President, or signed by the President. *See* Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (codified as amended at 18 U.S.C. § 2421A).

[218] *Consumer Prod. Safety Comm'n*, 447 U.S. at 118 n.13.

[219] *J.B.*, slip op. at 5.

[220] *Id.* at 6 (citing Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.")).

[221] *Id.*

[222] *Id.*

beneficiary provision,[223] or (2) a website ineligible for immunity because it created or materially contributed to the content at issue.[224]

This approach analyzes the specific context in which the statutes' language is used, finding that each exemption is predicated on a violation of either § 1591 or FOSTA. In the context of a criminal charge, the underlying conduct refers to the conduct of the criminal defendant. Thus, it is consistent to construe the provisions referencing "the conduct underlying . . . a violation of § 1591" to refer to the conduct of the named defendant.[225] Because Congress included nearly identical language in the same subsection at the same time, this could suggest that it intended to give the "conduct underlying" phrases the same meaning.[226]

Additionally, FOSTA's amendments suggest that Congress chose to focus on providing civil recourse to victims whose perpetrators violated § 1591. Specifically, FOSTA added a provision to § 1595 authorizing state attorney generals to bring civil actions against "any person who violates § 1591."[227] It may seem unreasonable to conclude that Congress would allow state attorney generals to sue only "primary violators" of § 1591, while allowing private plaintiffs to sue civil defendants who only violated § 1595 based on a constructive knowledge standard. Although the approach taken by Congress may not have been the most effective way to combat online sex trafficking,[228] it is not the court's role to discern what interpretation of the statute would lead to the best policy. Rather, the court's role is to apply the legislative judgment of Congress as expressed in the words of the statute.[229]

2. Legislative History

The original purpose of FOSTA was to allow sex trafficking victims to pursue civil cases under federal and state law.[230] However, the Senate's

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[223] *Id.* (stating § 1591's beneficiary standard is "subject to a lower preponderance of the evidence standard of proof for a derivative civil claim"); *see* 18 U.S.C. § 1591(a)(2).

[224] Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1168 (9th Cir. 2008) (holding that "a website helps to develop unlawful content, and thus falls within the exception to [§] 230, if it contributes materially to the alleged illegality of the conduct").

[225] 47 U.S.C. § 230(e)(5)(A)–(B); *see* Powerex Corp. v. Reliant Energy Servs., Inc., 551 U.S. 224, 232 (2007) ("A standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning.").

[226] *Powerex Corp.*, 551 U.S. at 232 (finding the maxim that identical phrases generally have the same meaning "doubly appropriate" where a phrase "was inserted into" two provisions "at the same time").

[227] 18 U.S.C. § 1595(d).

[228] *J.B.*, slip op. at 7 ("As noted . . . during the evolution of FOSTA-SESTA some members of Congress expressed concerns about whether a knowledge-based enforcement scheme would adequately impose accountability on such websites.").

[229] *Id.*

[230] *FOSTA Hearing*, *supra* note 205, at 10 ("I believe that this bill is in many ways the gold standard in addressing online trafficking. . . . [I]t would allow victims of sex trafficking

revised proposal—entitled SESTA—conflicted with much of the original bill.[231] SESTA attempted to resolve whether the phrase "the conduct underlying the claim" referred to the plaintiff's claim against the civil defendant, who would otherwise enjoy immunity, or to the conduct of some other individual who is not a party to the claim.[232] A committee report stated that the amended SESTA would "empower State law enforcement to enforce criminal statutes against websites and introduce new civil liabilities for violations of Federal criminal laws relating to sex trafficking."[233] This statement could suggest that there is a federal carve-out for § 1595 claims which covers only defendants whose own conduct violates § 1591.

Additionally, in contrast to the "reckless disregard" standard proposed by FOSTA, SESTA defined "participation in a venture" as "*knowingly* assisting, supporting, or facilitating a violation of subsection (a)(1)."[234] At the Subcommittee on Communications and Technology, Representative Wagner urged Congress to "find a creative way to maintain the reckless disregard standard or at the very least, not raise the very high bar that victims and prosecutors must already meet in the federal criminal code."[235] She criticized SESTA for creating a "federal civil carve-out" that would be "based on the 'knowingly' *mens rea* standard, which [would] not provide operational recourse to justice for victims . . . and thus may not actually prevent future victimization."[236]

One month later, Representative Walters introduced an amendment to FOSTA that included the enactment of a new federal offense concerning prostitution, but also incorporated elements from SESTA such as the narrowed federal civil sex trafficking carve-out and the definition of "participation in a venture."[237] A committee report summarized Walters's amendment as "[a]llow[ing] enforcement of criminal and civil sex trafficking laws against websites that knowingly facilitate online sex

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and sexual exploitation of children crimes to pursue civil cases under federal and state law.").

[231] *See* Stop Enabling Sex Traffickers Act of 2017, S. 1693, 115th Cong. § 3 (2017) (including, as amended, many of the provisions that would later be incorporated into 18 U.S.C. § 2421A). It provided language nearly identical to 47 U.S.C. § 230(e)(5)(A) under the amended title "[N]o effect on sex trafficking law," stating that "[n]othing in this section (other than subsection (c)(2)(A)) shall be construed to impair or limit—any claim in a civil action brought under section 1595 of title 18, United States Code, if the conduct underlying the claim constitutes a violation of section 1591 of that title."). *Id.*

[232] *See* S. REP. NO. 115–99, at 4 (2018).

[233] *Id.* at 2.

[234] S. 1693, 115th Cong. § 4 (2017) (emphasis added). The same definition appears in 18 U.S.C. § 1591(e)(4).

[235] *FOSTA Hearing*, *supra* note 205, at 14.

[236] *Id.* at 12 n.7 ("I continue to stand in solidarity with victims who are pursuing cases based on state laws and believe Congress should keep working toward a comprehensive solution.").

[237] H.R. REP. NO. 115-583, at 3–4 (2018).

trafficking."[238] On February 26, 2018, the House Rules Committee adopted both amendments.[239] What became known as the FOSTA-SESTA bill-package passed the House on February 27, 2018, and the Senate on March 21, 2018.[240] Although it was admittedly difficult "to find middle ground with the tech industry and the victims' advocates,"[241] Congresswoman Wagner expressed hope that FOSTA, combined with Walter's amendment—SESTA—would provide "better civil justice for victims, more prosecutions of bad actor websites, more convictions, and more predators behind bars."[242] Thus, Congress ultimately passed a bill incorporating the provision that the sponsor of FOSTA described as a "narrowed" "federal civil carve-out" that is "subject to a heightened pleading standard."[243]

C. *The Better Approach*

Since 1996, Congress has passed laws with the clear purpose of protecting children and eradicating sex trafficking.[244] Thus, interpreting laws to shield sex traffickers from liability is counterintuitive. Yet, laws like § 230 continue to protect ICSPs rather than victims. Section 230 provides that no ICSP shall be held liable if it takes *any* voluntary action in "good faith to restrict access to or availability of material that the *provider* . . . [deems to be] objectionable."[245] This means that so long as an ICSP creates a restrictive algorithm to filter whatever *it* deems objectionable, the ICSP has met its burden under the Good Samaritan Protection.

Many website operators know trafficking occurs yet make minor cosmetic changes to fit within the Good Samaritan Protection. One of the most egregious examples, Craigslist, advertised women for sale under its "Erotic Services" category.[246] After trafficking victims accused Craigslist of knowing that these sections were used to sell adults and children for sex, Craigslist renamed its "Erotic Services" subcategory "Adult Services."[247] After receiving complaints again, Craigslist "repositioned the section's illicit and illegal 'Adult' advertisements as 'Personal Ads' and 'Massage Services.'"[248] The plaintiff pleaded that Craigslist reviewed

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[238] *Id.* at 2.
[239] *Id.* at 1.
[240] 164 CONG. REC S1856, S1871 (daily ed. Mar. 21, 2018).
[241] 164 CONG. REC. H1277, H1278 (daily ed. Feb. 27, 2018) (statement of Rep. Ann Wagner).
[242] *Id.*
[243] *FOSTA Hearing*, *supra* note 205, at 12 n.7.
[244] *See* 47 U.S.C. § 230(b)(5).
[245] § 230(c)(2)(A) (emphasis added).
[246] J.B. v. G6 Hosp., LLC, No. 19-CV-07848, slip op. at 1 (N.D. Cal. Sept. 8, 2021).
[247] *Id.*
[248] *Id.*

every posting on its "Adult Services" platform—which included hundreds of advertisements per day for commercial sex, often with children. Keywords like "young and fresh," "virgin," "new girl," and "new to Craigslist" were allegedly well-known code words for "minor."[249] When those phrases were searched on Craigslist, "nude or partially nude photographs . . . of children . . . and explicit offers of sex in exchange for payment" would populate.[250] Lastly, plaintiff alleged that Craigslist received an estimated thirty-six million dollars annually in revenue from traffickers alone.[251] Yet, none of these allegations were well-pleaded enough to overcome § 230's "Good Samaritan Protection" and defeat Craigslist's motion to dismiss.[252] If that is not enough, what is?

More troublesome is the fact that members of Congress explicitly mentioned Craigslist by name during the debates leading up to the passage of the statute. Senator Blumenthal recalled being prevented from pursuing actions against Craigslist and other sites when he served as a state prosecutor because of how courts were interpreting § 230.[253] He expressed that "[c]learly the websites that facilitate . . . and profit[] from sex trafficking, must face repercussions in the courtroom. For law enforcement to succeed in combating sex trafficking, there have to be consequences."[254] Between 2010 and 2015, the National Center for Missing and Exploited Children reported an 840 percent increase, finding the spike "directly correlated to the increased use of the internet to sell children for sex."[255]

Another issue is that the ICSP must only restrict access to materials that the provider deems to be objectionable, "whether or not such material is *constitutionally* protected."[256] Historically, that which the provider deems to be objectionable can range from prohibiting users from sending emails,[257] to deleting churches' videos for promoting a religious belief,[258]

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[249] *Id.* at 2.

[250] *Id.*

[251] *Id.*

[252] *J.B.* at 12. *Cf. M.L. v. Craigslist, Inc.*, 2020 U.S. Dist. LEXIS 166334, at *11 (holding that the plaintiff alleged enough facts to plausibly state a claim that Craigslist was responsible, in whole or in part, for the development or creation of the unlawful advertisements which trafficked the plaintiff).

[253] 164 CONG. REC. S1849, S1851 (daily ed. Mar. 21, 2018) (statement of Sen. Richard Blumenthal).

[254] *Id.*

[255] *Id.*

[256] 47 U.S.C. § 230(c)(2)(A) (emphasis added).

[257] *See* E360insight, LLC v. Comcast Corp., 546 F. Supp. 2d 605, 609 (N.D. Ill. 2008) (holding that the ICSP was immunized for voluntarily filtering and blocking unsolicited and bulk emails because providers have the discretion to deem what is objectionable).

[258] *See* Domen v. Vimeo, Inc., 991 F.3d 66, 72 (2d Cir. 2021) (holding that the ICSP—Vimeo—was immunized from claims arising from its deletion of a church's account for violating Vimeo's policy barring promotion of sexual orientation change efforts), *vacated,*

to suspending the social media accounts of unpopular political figures.[259] Thus, if an ICSP finds pornography[260] unobjectionable, it has the discretion to let it remain on the internet no matter how much the victim asks the provider to take it down.[261]

Remedial statutes must be liberally construed. The courts that adopt the strictest interpretation of FOSTA and § 230 concede that they "do[] not find [the victims'] interpretation . . . wholly implausible, particularly because there arguably is some tension between the [c]ourt's reading of the statute and the constructive knowledge standard set out in § 1595."[262] Further, those courts "do[] not find that the plain language interpretation, in context, produces an absurd or unreasonable result" either.[263] If remedial statutes are to be construed liberally, the constructive knowledge standard supports beneficiary liability, and the plain language leads to a reasonable result protecting victims, why have courts refused to establish such a standard?

Supreme Court Justice Clarence Thomas recently lamented that § 230 is still being used to prevent claims from proceeding to discovery and implored courts to stop "reading extra immunity into statutes where it does not belong."[264] Justice Thomas expressed concern that extending CDA § 230 immunity beyond the natural reading of the text can have serious consequences.[265] He warned that before giving companies immunity from civil claims for knowingly hosting illegal child pornography, or for race discrimination, the Court should be "certain that is what the law demands."[266] Additionally, Justice Thomas expressed that

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withdrawn, reh'g granted, Domen v. Vimeo, Inc., No. 20-616-CV, 2 F.4th 1002 (2d Cir. July 15, 2021), *and aff'd on other grounds*, Domen v. Vimeo, Inc., No. 20-616-CV, 2021 U.S. App. LEXIS 28995, at *2 & n.1 (2d Cir. Sept. 21, 2021).

[259] Zimmerman v. Facebook Inc., No. 19-CV-04591-VC, 2020 U.S. Dist. LEXIS 183323, at *4 (N.D. Cal. Oct. 2, 2020) (holding that "a social media site's decision to delete or block access to a user's individual profile falls squarely within [§ 230] immunity"); *see* Danny Cevallos, *Trump Sues Facebook, Google and Twitter in Class-Action Lawsuits Sure to Fail*, NBC NEWS (July 7, 2021, 7:00 PM), https://www.nbcnews.com/think/opinion/trump-sues-facebook-google-twitter-class-action-lawsuits-sure-fail-ncna1273289.

[260] This does not include child pornography, because that is illegal. However, adult pornography is legal.

[261] *See* Doe v. Twitter, Inc., 555 F. Supp. 3d 889, 894 (N.D. Cal. 2021) ("[I]t wasn't until the mother of one of the boys contacted an agent of the Department of Homeland Security, who initiated contact with Twitter and requested the removal of the material, that Twitter finally took down the posts, nine days later.").

[262] J.B. v. G6 Hosp., LLC, No. 19-CV-07848, slip op. at 7 (N.D. Cal. Sept. 8, 2021).

[263] *Id.*

[264] Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC, 141 S. Ct. 13, 15 (2020) (Thomas, J., concurring).

[265] *Id.* at 18.

[266] *Id.*; *see* Doe v. Bates, No. 5:05-CV-91-DF-CMC, 2006 U.S. Dist. LEXIS 93348, at *2, *9 (E.D. Tex. Dec. 27, 2006) (granting immunity to Yahoo!, Inc. for knowingly hosting illegal child pornography and claim was dismissed); Sikhs for Justice, Inc. v. Facebook, Inc., 697 F.

if Congress has the power to demand that telephone companies operate as common carriers, it can ask the same of digital platforms.[267] Because today's major internet platforms did not exist at the time Congress enacted § 230, it is problematic that the provision has never been interpreted in the two and a half decades of its existence.[268] Because of this, Justice Thomas suggested that, in the right case, the Court may be willing to address the issue.[269]

CONCLUSION

How §§ 230, 1591, 1595, and FOSTA should be properly interpreted is still up for debate. While some courts have ensured justice for victims, others—caught in a semantics battle—have failed to hold ICSPs accountable for constructively knowing about and financially profiting from victims' sexual trauma. Justice Thomas dispelled the fear that ICSPs would go out of business from hundreds of unfounded lawsuits.[270] Instead, it would merely give plaintiffs the chance to "raise their claims in the first place."[271] Undoubtedly, "[p]laintiffs still must prove the merits of their cases, and some claims will . . . fail."[272] It is difficult to believe that trafficking victims can recover damages against a hotel for its constructive knowledge and participation in a trafficking venture, but not against an ICSP. Ultimately, Congress should amend the statutes to clarify its intent to provide full protection to victims, or the Supreme Court should interpret the statutes to protect those who are defamed, exploited, and abused online. Until significant change is made, confusion, conflict, and injustice will continue.

Alexa E. Macumber[*]

App'x 526, 526 (9th Cir. 2017) (granting immunity to Facebook, Inc. and racial discrimination claim was dismissed).

[267] Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220, 1226 (2021) (Thomas, J., concurring).

[268] *Malwarebytes*, 141 S. Ct. at 13 (Thomas, J., concurring).

[269] *Id.* at 14 ("I write to explain why, in an appropriate case, we should consider whether the text of this increasingly important statute aligns with the current state of immunity enjoyed by internet platforms.").

[270] *Id.* at 18 ("Paring back the sweeping immunity courts have read into § 230 would not necessarily render defendants liable for online misconduct.").

[271] *Id.*

[272] *Id.*

[*] J.D., Regent University School of Law, Class of 2023. Special thanks to Professor Michael Hernandez, whose advice and assistance was invaluable in the production and editing of this Note. Thanks also to my husband, Josiah, who relentlessly encouraged me throughout the writing process and pushes me daily to be the best version of myself.

LYING IN WAIT: THE ABSENCE OF REPATRIATION OF ISIS BRIDES AND CHILDREN FROM AL-HOL REFUGEE CAMP

ABSTRACT

Initially established by the United Nations High Commissioner for Refugees ("UNHCR") as a place of refuge for those displaced by the 1991 Gulf War, al-Hol Refugee Camp, situated near the Syria-Iraq border, now houses thousands of foreign fighters, their wives, and children who left their States of Origin to join the Islamic State in various capacities. Since the fall of ISIS in 2018, States and international organizations have called for the repatriation of foreign-born ISIS wives and children to their States of Origin. This global call to action has resulted in an ever-deepening divide among nations concerning repatriation policies.

Generally, repatriation policies fall into two camps. For example, the policy approaches of nations like Great Britain and Jordan include stripping the individual of their citizenship and denying any chance of repatriation. In contrast, nations like the United States and Kazakhstan have successfully repatriated many of their respective citizens that allegedly joined ISIS. Upon a finding of criminal liability for involvement with the Islamic State, the policies of the United States and Kazakhstan require the repatriation and subsequent prosecution of their citizens on terrorism charges, including charges that concern aiding, abetting, and financing of the terrorist group. Both camps contend that their policy provisions are the best and most efficient means of ensuring national security.

This Note provides a comprehensive and comparative analysis of global policies and case studies to determine whether repatriation laws requiring the return of foreign ISIS fighters, wives, and children are the best and most efficient means of balancing the interests of justice and national security. As a result of that analysis, this Note proposes two approaches to repatriation that the International Community should adopt: (1) repatriation, rehabilitation, and reintegration; and (2) the formation of an international criminal tribunal for the investigation and prosecution of those affiliated with ISIS. Ultimately, this Note concludes that repatriation laws that obligate the repatriation, prosecution, and rehabilitation of foreign-born ISIS brides and their children are the best and most efficient means of balancing the interests of justice, dignity, and national security.

I. INTRODUCTION

Sharing a border with the Mediterranean Sea and some of the most volatile nations in the world, Syria is home to some of the oldest and richest history on Earth.[1] Unfortunately, since 2013, the place where life began has been riddled with death and desperation.[2] In 2015, news headlines worldwide were flooded with graphic descriptions of the Syrian Civil War.[3] In the United States, Americans were horrified by a picture of a Syrian child who died on a beach shore while fleeing from the violence taking root in his country.[4] While Syrians fled their homeland to prevent imminent death and the assured destruction of their homes, foreign fighters rushed to Syria to take up arms for Islamic State ("ISIS," "Islamic State of Iraq and Syria," or "Islamic Caliphate").[5]

At the time of this writing, four years have passed since the fall of the Islamic State.[6] Persons and their families identified as foreign fighters who left countries including the United States, Kazakhstan, Great Britain, and Jordan now sit idly in al-Hol Refugee Camp in northeastern Syria, a territory controlled by the Syrian Democratic Forces ("SDF").[7] Many foreign-born ISIS brides have requested to be repatriated to their States of Origin, but their requests have largely been denied.[8] Such

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[1] Joshua J. Mark, *Ancient Syria*, WORLD HIST. ENCYC. (June 17, 2014), https://www.worldhistory.org/syria/.

[2] *See Timeline: The Rise, Spread, and Fall of the Islamic State*, WILSON CTR. (Oct. 28, 2019), https://wilsoncenter.org/article/timeline-the-rise-spread-and-fall-the-islamic-state.

[3] *See, e.g.*, Divers, *More Than Four Million Syrians Have Now Fled War and Persecution*, U.N. REFUGEE AGENCY (July 9, 2015), https://www.unhcr.org/en-us/news/latest/2015/7/559d648a9/four-million-syrians-fled-war-persecution.html; Zack Beauchamp, *Syria's Civil War: A Brief History*, VOX (Oct. 2, 2015, 10:09 AM), https://www.vox.com/2015/9/14/9319293/syrian-refugees-civil-war.

[4] Ishaan Tharoor, *Death of Drowned Syrian Toddler Aylan Kurdi Jolts World Leaders*, WASH. POST (Sept. 3, 2015), https://www.washingtonpost.com/news/worldviews/wp/2015/09/03/image-of-drowned-syrian-toddler-aylan-kurdi-jolts-world-leaders/.

[5] *See ISIS and the Threat from Foreign Fighters: Hearing Before the Subcomm. on Terrorism, Nonproliferation, and Trade and the Subcomm. on the Middle East and N. Africa of the H. Comm. on Foreign Affs.*, 113th Cong. 4, 12, 42 (2014) (statements of Rep. Ted Poe, Chairman, H. Subcomm. on Terrorism, Nonproliferation, and Trade, and Rep. Lois Frankel, Member, H. Comm. on Foreign Affairs) (discussing foreign fighters entering Syria at an alarming rate and fleeing peoples from foreign countries surrounding Syria).

[6] *See* WILSON CTR., *supra* note 2.

[7] Vera Mironova, *Life Inside Syra's al-Hol Camp*, MIDDLE E. INST. (July 9, 2020), https://www.mei.edu/publications/life-inside-syrias-al-hol-camp; *The Bittersweet Taste of Home: Former ISIL Wife Returns to Kazakhstan*, U.N. NEWS (Feb. 13, 2022), https://news.un.org/en/story/2022/02/1111552; Tanya Mehra, *European Counties Are Being Challenged in Court to Repatriate Their Foreign Fighters and Families*, INT'L CTR. FOR COUNTER-TERRORISM (Nov. 7, 2019), https://www.icct.nl/publication/european-countries-are-being-challenged-court-repatriate-their-foreign-fighters-and.

[8] *See* Nicolas Pinault, *Jihadist Women's Demands Come at Crucial Time for France*, VOICE AM. (Mar. 1, 2021, 9:19 AM), https://www.voanews.com/a/europe_jihadist-womens-demands-come-crucial-time-france/6202702.html.

denials seem demonstrative of the International Community's unwillingness to repatriate foreign fighters and their families for fear of jeopardizing the national security of repatriating nations.[9] Thus, this Note seeks to determine whether repatriation laws requiring the return of foreign ISIS fighters, wives, and children are the best and most efficient means of balancing the interests of justice and national security when requests to do so are denied.

Section II provides background information necessary to understand the current state of repatriation from al-Hol and similar refugee camps. Specifically, it focuses on the formation of ISIS; how countries, including the United States, responded to the terrorist group's widespread campaign of brutality; and the squalid living conditions at al-Hol.[10] Section III examines the existing United Nations ("UN") Security Council Resolutions and acknowledges repatriation as a right.[11] Section IV analyzes the policies of two nations that repatriate foreign born ISIS brides and of two nations that do not.[12] Section IV also highlights several significant cases and explains conflicting holdings where necessary.[13] Finally, Section V proposes a repatriation policy for the International Community to adopt that preserves the dignity of repatriates, respects the rule of law and an individual's right to due process, and protects international and national security.[14]

II. BACKGROUND TO THE CRISIS

Formed from the crumbling remnants of al-Qaeda in Iraq in 2004, ISIS emerged in 2011, adding to the strife and instability in Syria, Iraq, Israel, and Jordan, or what is known as "the Levant."[15] According to the Carnegie Endowment for International Peace, "[t]he Islamic State presents itself as the representative of authentic Islam," or what is known as "Wahhabism."[16] Associated with violence from its founding, Wahhabism is "known as an intolerant and aggressive form of [Sunni]

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[9] TEUTA AVDIMETAJ & JULIE COLEMAN, WHAT EU MEMBER STATES CAN LEARN FROM KOSOVO'S EXPERIENCE IN REPATRIATING FORMER FOREIGN FIGHTERS AND THEIR FAMILIES 1, 6 (2020), https://www.clingendael.org/sites/default/files/2020-06/Policy_Brief_Kosovo_experience_repatriating_former_foreign_fighters_May_2020.pdf.

[10] *See infra* Section II.

[11] *See infra* Section III.

[12] *See infra* Section IV.

[13] *See infra* Section IV

[14] *See infra* Section V.

[15] WILSON CTR., *supra* note 2; *Levant*, ENCYC. BRITANNIICA (July 20, 2021), https://www.britannica.com/place/Levant.

[16] Hassan Hassan, *The Sectarianism of the Islamic State: Ideological Roots and Political Context*, CARNEGIE ENDOWMENT FOR INT'L PEACE (June 13, 2016), https://carnegieendowment.org/2016/06/13/sectarianism-of-islamic-state-ideological-roots-and-political-context-pub-63746.

Islam" that is aimed at purifying the Islamic faith through reasserting monotheism and reliance on the Quran and hadiths.[17]

In 2013, the group formally named itself the "Islamic State of Iraq and Syria" or "ISIS."[18] From 2013 to 2014, ISIS, led by Abu Bakr al-Baghdadi, began to form a caliphate in the region.[19] The Islamic Caliphate sought to "remain and expand" and "overthrow the Westphalian nation-state model and the post-World War II American international system."[20] To achieve this goal at the peak of its expansion, ISIS exercised a theology of beheadings, rape, systematic sexual slavery, and forced conversions.[21] In tandem with the Islamic State's policy of brutality, the group employed strategic recruiting efforts that captivated the attention of those who would eventually become foreign fighters. Primarily, ISIS claimed that foreign men and women who left their homes to join the Caliphate, whether to fight against the infidel or to provide spousal support, would be given great earthly and eternal rewards.[22] These recruitment efforts largely took place on social media and "mobilized an estimated 40,000 foreign nationals from 110 countries to join the group."[23]

In response to the brutality of the Islamic State, the U.S. Department of State announced the formation of a Global Coalition to defeat ISIS in adherence to the counterterrorism principles set forth by U.N. Security Council Resolution 2170.[24] The Global Coalition was designed to combat ISIS through five means: "(1) [p]roviding military support to . . . partners; (2) [i]mpeding the flow of foreign fighters; (3) [s]topping financing and

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[17] *Wahhabism: What Is It and Why Does It Matter?*, THE WK. U.K. (Aug. 17, 2017), https://www.theweek.co.uk/87832/wahhabism-what-is-it-and-why-does-it-matter; *see Wahhābī*, ENCYC. BRITANNIICA (Feb. 15, 2023), https://www.britannica.com/topic/Wahhabi; *see also* Henri Laoust, *Ibn Taymiyyah*, ENCYC. BRITANNIICA (Jan 1, 2023), https://www.britannica.com/biography/Ibn-Taymiyyah.

[18] Ctr. for Int'l Sec. & Coop., *The Islamic State*, FREEMAN SPOGLI INST. FOR INT'L STUD. https://cisac.fsi.stanford.edu/mappingmilitants/profiles/islamic-state (Apr. 2021).

[19] *Id.*

[20] Aaron Y. Zelin, *Colonial Caliphate: The Ambitions of the 'Islamic State,'* WASH. INST. FOR NEAR E. POL'Y (July 8, 2014), https://www.washingtoninstitute.org/policy-analysis/colonial-caliphate-ambitions-islamic-state.

[21] *See* Liam Stack, *How ISIS Expanded Its Threat*, N.Y. TIMES (Nov. 14, 2015), https://www.nytimes.com/interactive/2015/11/14/world/middleeast/isis-expansion.html?mtrref=google.com&gwh=0ADF377B9DCA60707246E1A91375C18E&gwt=pay&assetType=PAYWALL; *see also Iraq: Forced Marriage, Conversion for Yezidis,* HUM. RTS. WATCH (Oct. 11, 2014, 11:45 PM), https://www.hrw.org/news/2014/10/11/iraq-forced-marriage-conversion-yezidis.

[22] *See* Suleyman Ozeren et al., *An Analysis of ISIS Propaganda and Recruitment Activities Targeting the Turkish-Speaking Population*, 56 INT'L ANNALS OF CRIMINOLOGY 105, 114, 115, 116 (2018).

[23] Antonia Ward, *ISIS's Use of Social Media Still Poses a Threat to Stability in the Middle East and Africa*, RAND BLOG (Dec. 11, 2018), https://www.rand.org/blog/2018/12/isiss-use-of-social-media-still-poses-a-threat-to-stability.html.

[24] *See About Us–The Global Coalition to Defeat ISIS*, U.S. DEP'T OF STATE, https://www.state.gov/about-us-the-global-coalition-to-defeat-isis/ (last visited Nov. 5, 2021).

funding; (4) [a]ddressing humanitarian crises in the region; and (5) [e]xposing [ISIS's] true nature."[25] In December 2018, after four years of intense fighting, former President Donald J. Trump announced that the United States had defeated ISIS in Syria.[26] After the collapse of the Islamic State, foreign fighters and their families were housed in camps in northeastern Syria, a territory controlled by the SDF.[27] One of those camps is al-Hol.

Established by the United Nations to house refugees who left Iraq during the Gulf War, al-Hol is used by the SDF to shelter the brides and children of ISIS.[28] Now, four years after the fall of ISIS, al-Hol is "home" to nearly 62,000 residents, 7,000 of whom are children, making it the "largest camp for displaced people in Syria."[29] Since 2019, the condition of the camp has been in a state of constant deterioration: babies die of exposure, foreign nationals die due to the squalid conditions, fires kill and injure children, and targeted murders are a daily occurrence.[30] Additionally, the threat of radicalization—or re-radicalization in most instances—is the greatest threat of all as it jeopardizes the stability of international security.

As a result of these conditions, many foreign-born ISIS brides and their children seek repatriation.[31] Those cries for repatriation have been supported by international organizations, including the Human Rights Watch ("HRW") and the United Nations International Children's Emergency Fund ("UNICEF").[32] Additionally, the global cry for repatriation from al-Hol has heightened after the successful use of similar

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[25] *Id.*

[26] *Trump Claims U.S. Has Defeated ISIS in Syria*, REUTERS (Dec. 19, 2018, 9:40 AM), https://www.reuters.com/article/us-usa-trump-syria-isis/trump-claims-u-s-has-defeated-isis-in-syria-idUSKBN1OI1OA.

[27] *See* Mironova, *supra* note 7.

[28] Christian Vianna de Azevedo, *ISIS Resurgence in Al Hawl Camp and Human Smuggling Enterprises in Syria*, 14 PERSPS. ON TERRORISM 43, 43 (2020).

[29] *UNICEF Urges Repatriation of All Children in Syria's Al-Hol Camp Following Deadly Fire*, U.N. NEWS (Feb. 28, 2021), https://news.un.org/en/story/2021/02/1085982.

[30] Zana Omer & Sirwan Kajjo, *Iraqi Refugees Alarmed at Increasing Violence at Syria's Al-Hol Camp*, VOICE OF AM. (Aug. 11, 2021, 6:44 AM), https://www.voanews.com/a/extremism-watch_iraqi-refugees-alarmed-increasing-violence-syrias-al-hol-camp/6209399.html; *see also* U.N. NEWS, *supra* note 29.; *Violence, Displacement Continue, as 29 Babies Die of Cold in Northeast Syria Camp*, U.N. NEWS (Jan. 31, 2019), https://news.un.org/en/audio/2019/01/1031772.

[31] Janet Walker, *Beltway Insider: Trump Nat'l Emergency, Israeli PM Election, Venezuela Erupts, El Chapo Jury, Kraft Shocker, Isis Brides, Bernie Sanders*, HAUTE-LIFESTYLE (Feb. 24, 2019, 2:10 PM), https://www.haute-lifestyle.com/haute-lifestyle-news/beltway-insider/3895-beltway-insider-trump-nat-l-emergency-israeli-pm-election-venezuela-erupts-el-chapo-jury-kraft-shocker-isis-brides-bernie-sanders.html.

[32] *Syria: Dire Conditions for ISIS Suspects' Families*, HUM. RTS. WATCH (July 23, 2019, 12:01 AM), https://www.hrw.org/news/2019/07/23/syria-dire-conditions-isis-suspects-families#; *see* U.N. NEWS, *supra* note 29.

policies to assist those impacted by conflict in Guatemala, Cambodia, the Balkans, and Afghanistan.[33] Thus, as indicated by the Brookings Institute, these experiences "indicate that identifying the [S]tate of [O]rigin's responsibilities to returnees and ensuring these duties are met is integral to safe and sustainable repatriation and peacebuilding processes and, in turn, a stable political future."[34]

Ultimately, though repatriation has been historically successful, a global consensus is yet to be reached about the best repatriation policy. Most of the world has a policy of non-repatriation due to concerns regarding national security and the lack of sufficient evidence to prosecute ISIS affiliates.[35] For example, the policy approaches of nations like Great Britain and Jordan strip ISIS affiliates of their citizenship and deny them any chance of repatriation.[36] Conversely, nations like the United States repatriate and prosecute ISIS affiliates but do not help those individuals reintegrate into society.[37] The remaining nations, including Kazakhstan, repatriate and rehabilitate foreign-born ISIS fighters and their families but do not hold them criminally liable for their actions.[38] Each of the repatriation camps contend that their policy provisions are the best and most efficient means of ensuring national security.

III. THE RIGHT TO REPATRIATE

To begin, this Section will provide a comprehensive overview of the meaning and elements of repatriation. In the next Section, this Note will provide a comparative analysis of the statutes, case law, and statistics of four nations regarding their repatriation policies. The four nations include the United States, Great Britain, Kazakhstan, and Jordan.

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[33] *See* MEGAN BRADLEY, REFUGEE REPATRIATION: JUSTICE, RESPONSIBILITY AND REDRESS 1 (2013).

[34] *Id.*

[35] *See* Aïssata Athie, *The Children of ISIS Foreign Fighters: Are Protection and National Security in Opposition?*, INT'L PEACE INST. GLOB. OBSERVATORY (Dec. 18, 2018), https://theglobalobservatory.org/2018/12/children-isis-foreign-fighters-protection-national-security-opposition/.

[36] *See* Megan Specia, *U.K. Court Upholds Ruling Stripping Shamima Begum's Citizenship*, N.Y. TIMES (Feb. 22, 2023), https://www.nytimes.com/2023/02/22/world/europe/shamima-begum-uk-citizenship-isis.html (stating that an immigration court upheld the British government's decision to strip three individuals of their British citizenship when they traveled to Syria to join ISIS); Lila Hassan, *Repatriating ISIS Foreign Fighters is Key to Stemming Radicalization, Experts Say, but Many Countries Don't Want Their Citizens Back*, PBS (Apr. 6, 2021), https://www.pbs.org/wgbh/frontline/article/repatriating-isis-foreign-fighters-key-to-stemming-radicalization-experts-say-but-many-countries-dont-want-citizens-back/.

[37] *See* VERA MIRONOVA, MIDDLE E. INST., THE CHALLENGE OF FOREIGN FIGHTERS: REPATRIATING AND PROSECUTING ISIS DETAINEES 2–3 (2021).

[38] Andrew E. Kramer, *Kazakhstan Welcomes Women Back from the Islamic State, Warily*, N.Y. TIMES (Aug. 10, 2019), https://www.nytimes.com/2019/08/10/world/europe/kazakhstan-women-islamic-state-deradicalization.html.

According to the International Organization for Migration's ("IOM") *Glossary on Migration*, repatriation is "[t]he personal right of a prisoner of war, civil detainee, refugee, or of a civilian to return to his or her country of nationality under specific conditions laid down in various international instruments[,] . . . [human-rights] instruments, . . . [and] customary international law."[39] It is the responsibility of the United Nations High Commissioner for Refugees ("UNHCR") to ensure that repatriations are voluntary.[40] Repatriation that occurs involuntarily is deemed to be a forced return and is not a repatriation at all.[41] The UNHCR additionally requires that repatriation be done in a dignified manner and that the returnees be returned safely.[42] Thus, when considering the deteriorating conditions of camps like al-Hol, it is quite easy to understand how "the free and voluntary return to one's country of origin in safety and dignity[] is the solution of choice for a vast majority of refugees."[43] Additionally, the individuals seeking repatriation need a just return accomplished through legal means and measures. Pursuant to Article 12.4 of the International Covenant on Civil and Political Rights, "[n]o one shall be arbitrarily deprived of the right to enter his own country."[44] Similarly, Article 13(2) of the Universal Declaration of Human Rights indicates that "[e]veryone has the right to leave any country, including his own, and to return to his country."[45]

In addition to these express statements by international treaties and declarations that indicate that repatriation is a right, the U.N. Security Council, "(UNSC"), has passed several resolutions focusing on the treatment and repatriation of suspected terrorists and their accompanying family members. Passed in 2017, Security Council Resolution 2396 "[c]alls on Member States . . . to take appropriate action regarding" ISIS affiliates and their accompanying families "by considering appropriate prosecution, rehabilitation, and reintegration measures . . . in compliance with domestic and international law."[46] Similarly, Security Council Resolution 2427 requires that Member States be cognizant of their international commitments to take actions to protect children

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[39] INT'L ORG. FOR MIGRATION, GLOSSARY ON MIGRATION 182 (2019).

[40] *The Practical Guide to Humanitarian Law: Repatriation*, DRS. WITHOUT BORDERS, https://guide-humanitarian-law.org/content/article/3/repatriation/ (last visited Apr. 6, 2023).

[41] *Id.*

[42] *Id.*

[43] U.N. HIGH COMM'R FOR REFUGEES, HANDBOOK FOR REPATRIATION AND REINTEGRATION ACTIVITIES 2 (2004).

[44] International Covenant on Civil and Political Rights art. 12(4), Dec. 19, 1966, 999 U.N.T.S. 171.

[45] G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 13(2) (Dec. 10, 1948).

[46] S.C. Res. 2396, ¶ 29 (Dec. 21, 2017).

affected by armed conflict.[47] For example, Member States should protect children in conflict areas by repatriating them with their mothers so as not to violate the Convention on the Rights of the Child.[48] Furthermore, repatriation is also addressed by Security Council Resolution 2178, which requires countries to prevent suspected foreign terrorist fighters from entering hostile nations or territories controlled by groups like ISIS.[49] Pursuant to Resolution 2178, Member States are required to share information about known foreign terrorist fighters in effort to implement laws that target and prosecute such persons.[50]

IV. COMPETING APPROACHES

A. *Repatriation with Process*

According to a report by Arab Weekly, as of November 2022, most major European countries have repatriated "at least a handful of their citizens" from camps like al-Hol.[51] However, though these nations have agreed to repatriate their citizens, they largely disagree as to what the repatriation should look like. The following subsections will analyze the process-based repatriation offered by the United States and Kazakhstan.[52]

1. The United States

While the United States has a fewer number of potential repatriates than most other Western nations, it leads the West in repatriation and has successfully repatriated "all Americans held by the Syrian Democratic Forces [] against whom criminal charges have been lodged for offenses relating to their support for ISIS."[53] According to the Wall Street Journal, the Trump Administration "facilitated the return of wives and children. This was America at its best: offering the children of terrorists a shot at a normal life while giving even the most repulsive citizens their day in court."[54] Generally, such individuals were prosecuted under 18 U.S.C. §

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[47] S.C. Res. 2427, ¶ 1 (July 9, 2018).

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

[49] S.C. Res. 2178, ¶ 2–4 (Sept. 24, 2014).

[50] *Id.*

[51] Faisal Al Yafi, *Spanish Decision Shows Tide Turning on Repatriating ISIS Brides*, ARAB WKLY. (Nov. 25, 2022), https://thearabweekly.com/spanish-decision-shows-tide-turning-repatriating-isis-brides.

[52] The United States and Kazakhstan have allowed repatriation of foreign fighters sent to Syria, of which Kazakhstan sent an estimated 1,136-1,236 foreign fighters. Hassan, *supra* note 36.

[53] Press Release, U.S. Dep't of Just., The United States Has Repatriated 27 Americans from Syria and Iraq Including Ten Charged with Terrorism-Related Offenses for Their Support to ISIS (Oct. 1, 2020).

[54] Adam O'Neal, *When ISIS Families Come Home: Kazakhstan's Efforts at Rehabitation and Reintegrations Put Europe to Shame*, WALL ST. J. (June 10, 2021, 6:08 PM), https://www.wsj.com/articles/when-isis-families-come-home-11623362925.

2339A, "Providing Material Support to Terrorists," and 18 U.S.C. § 2339B, "Providing Material Support or Resources to Designated Foreign Terrorist Organizations."[55]

Though the United States's repatriation laws are not comprehensively codified, the nation's repatriation policies are embodied by the U.S. Repatriation Program, which was established in 1935 "to provide temporary assistance to private U.S. citizens and their dependents who have been identified as having returned . . . from a foreign country . . . because of destruction, illness, war, threat of war, or a similar crisis, . . . [and] without resources immediately available."[56] Ultimately, the United States's repatriation policies are best understood when one delves into relevant U.S. case law. For example, the case of *United States v. Elhassani* is particularly illustrative of the United States's successful repatriation of American-born ISIS brides.[57]

i. SAMANTHA ELHASSANI

Samantha Elhassani, or Sam Sally, is one of the most widely known American-born ISIS brides. In fact, her story is so well known that Frontline PBS released two one-hour documentaries about her life under ISIS and her repatriation to the United States.[58] In 2020, Elhassani, a resident of Elkhart, Indiana, pled guilty to financing terrorism.[59] In July 2018, Elhassani and her children were held in SDF-controlled camps, like al-Hol, until they were extradited to the United States.[60] According to the Government's Response to the Defendant's Motion for Release, Elhassani, her husband, and her two minor children traveled to Syria to join ISIS somewhere between April and July 2015.[61] Like in many ISIS families,

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[55] 18 U.S.C. §§ 2339(A)–2339(B).

[56] *Repatriation*, OFF. HUM. SERV. EMERGENCY PREPAREDNESS & RESPONSE, https://www.acf.hhs.gov/ohsepr/programs/repatriation (Feb. 1, 2023).

[57] *See* Government's Response to Defendant's Motion for Release at 1–2, *United States v. Elhassani*, No. 2:18-cr-33 PPS/JEM, 2020 WL 7232420 (N.D. Ind. Nov. 9, 2020).

[58] FRONTLINE PBS, *An American Mom Who Lived Under ISIS Rule Speaks Out*, YOUTUBE (Apr. 11, 2018) [hereinafter *An American Mom Who Lived Under ISIS Rule Speaks Out*], https://www.youtube.com/watch?v=Kd71Q31sDHk; FRONTLINE PBS, *Return from ISIS*, YOUTUBE (Dec. 15, 2020) [hereinafter *Return from ISIS*], https://www.youtube.com/watch?v=3uvipYMuHeQ.

[59] Press Release, U.S. Dep't of Just., Former Elkhart, Indiana Resident Sentenced to Over Six Years in Prison for Financing of Terrorism (Nov. 9, 2020).

[60] Aimee Ambrose, *Sentence Delayed for Woman Who Admitted to Helping Husband in Terrorism Case*, GOSHEN NEWS (Aug. 27, 2020), https://www.goshennews.com/news/sentence-delayed-for-woman-who-admitted-to-helping-husband-in-terrorism-case/article_678effae-e8d6-11ea-a79e-efa8d6963052.html.

[61] Government's Response to Defendant's Motion for Release, *supra* note 57, at 1.

Elhassani's husband was killed in an airstrike in 2017.[62] The record indicates that Elhassani aided her husband and his brother in their plan to join ISIS and "laid the groundwork for [the implementation of] their plan."[63] Rather than being used solely as a proxy case against the Elhassani brothers, Elhassani was charged for her own willful participation in the plot to join ISIS.[64] Disturbingly, the record also notes that Elhassani's decision to join ISIS not only endangered the lives of her children but also endangered the lives of others, particularly those of Yazidi women whom she purchased and supervised as her slaves.[65] As noted in *Elhassani*,

> [t]he Yazidis are a religious minority indigenous to a region in northern Iraq, northern Syria[,] and southeastern Turkey. The United Nations has recognized ISIS as a perpetrator of genocide against the Yazidis. Among other atrocities, ISIS abducted and enslaved thousands of Yazidi wom[e]n and girls and sold them at auction to ISIS families.[66]

Additionally, Elhassani allowed her young children to become radicalized. Most notably, Elhassani "facilitated the use of her son as a trainee and propaganda tool for" ISIS.[67] In Frontline's documentary "Return From ISIS," Elhassani's son is asked a question about what he would do if an American helicopter approached him and his mother. While assembling a suicide bomb, the boy responds and says,

> I am going to hide it [the suicide bomb] under my shirt. I'm going to walk out and say "Come save me! Come save me! My name is Matthew. I'm American. Come save me! Come save me!" And, as soon as the helicopter comes on the ground, I'm going to pull my pin.[68]

In *Elhassani*, the Government noted that as a part of the repatriation law and charges facing Elhassani, she had a burden "to produce . . . evidence to show that she w[ould] not constitute a danger to the public or a serious

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[62] Aimee Ambrose, *No Release for Elkhart Widow Charged with Aiding ISIS*, GOSHEN NEWS (Dec. 20, 2018), https://www.goshennews.com/news/local_news/no-release-for-elkhart-widow-charged-with-aiding-isis/article_52423328-40d0-59c1-af3f-4db58383dce3.html.

[63] Ambrose, *supra* note 60.

[64] *Id.*

[65] *See id.*

[66] Government's Response to Defendant's Motion for Release, *supra* note 57, at 2 n.1.

[67] *Id.* at 2; *see also* Katie Zavadski, *ISIS Uses American Boy to Threaten Trump in New Video*, DAILY BEAST, https://www.thedailybeast.com/isis-uses-american-boy-to-threaten-trump-in-new-video (Sept. 12, 2017, 1:29 PM).

[68] *Return From ISIS*, *supra* note 58, at 3:01 to 3:23.

risk of flight."[69] Ultimately, while Elhassani was permitted to keep her citizenship, she was sentenced to 78 months in prison and three years of supervised release.[70] In addressing Elhassani's repatriation, John Demers, the Assistant Attorney General for National Security, stated, "[w]e repatriated Elhassani from Syria because every nation is responsible for holding its citizens accountable and addressing the future threat they may pose."[71] In 2018, Elhassani's children were repatriated—nearly without their mother.[72] Since 2018, Elhassani's children have been under "the care of the Indiana Department of Child Services."[73] Ultimately, Elhassani's repatriation demonstrates the United States's successful repatriation and subsequent prosecution of a foreign-born ISIS bride and should serve as an example of repatriation to the rest of the world.

ii. DANIELA GREENE AND SHANNON CONLEY

The United States' repatriation policies have also been demonstrated in the cases of *United States v. Greene* and *United States v. Conley*. Daniela Greene worked as a linguist for the FBI and fell in love with a wanted terrorist and ISIS leader in Syria, Denis Cuspert, who was under federal investigation.[74] Greene traveled to Syria, married Cuspert, and allegedly warned him of the FBI's inquiries into his terror-related activities.[75] Ultimately, upon Greene's volitional return to the United States, she was arrested and pled guilty to 18 U.S.C. § 1001, "False Statements, Concealment," for the false statements she made involving international terrorism.[76] According to the Detroit Free Press, Greene served two years in prison and is now on supervised release.[77] While Daniela Greene returned to the United States on her own and was not

[69] Government's Response to Defendant's Motion for Release, *supra* note 57, at 8.

[70] U.S. Dep't of Just., *supra* note 59.

[71] *Id.*

[72] Anne Speckhard, *Can Case of Samantha Elhassani Be a Positive Example for Repatriation of Other ISIS Wives?*, HOMELAND SEC. TODAY (Nov. 16, 2020), https://www.hstoday.us/subject-matter-areas/counterterrorism/can-case-of-samantha-elhassani-be-a-positive-example-for-repatriation-of-other-isis-wives/.

[73] Jeff Seldin, *American Mom Who Joined IS Sentenced to More Than 6 1/2 Years in Prison*, VOICES AM. (Nov. 10, 2020, 3:33 AM), https://www.voanews.com/a/usa_american-mom-who-joined-sentenced-more-6-12-years-prison/6198171.html.

[74] Affidavit in Support of Criminal Complaint at 5, 7, United States v. Greene, 1:14-CR–00230 (D.D.C. August 1, 2014), https://www.investigativeproject.org/case_docs/us-v-greene/3313/criminal-affidavit.pdf; Tresa Baldas, *FBI Translator in Detroit Secretly Married ISIS Leader*, DETROIT FREE PRESS (May 2, 2017, 9:45 PM), https://www.freep.com/story/news/local/michigan/detroit/2017/05/02/fbi-translator-detroit-married-isis/101201764/.

[75] Baldas, *supra* note 74.

[76] Governments Proffer of Proof in Support of Defendant's Plea of Guilty at 7, 11, 13, 14, United States v. Greene, No. 14–CR–00230 (D.D.C. Dec. 12, 2014).

[77] Baldas, *supra* note 74.

repatriated by the United States, her case demonstrates the U.S. Government's policy of encouraging the return and prosecution of "all Americans . . . against whom criminal charges have been lodged for offenses relating to their support for ISIS."[78] Additionally, Greene's case illustrates that when Americans, against whom criminal charges have been filed for offenses relating to their support of ISIS cooperate with prosecutorial authorities, such cooperation may result in reduced penalties even when their "conduct skirt[s] a line dangerously close to other more serious charges."[79]

Similarly, Shannon Conley was arrested in April 2014 prior to her departure to join ISIS in Syria.[80] Like the previously mentioned women, Conley was engaged to an ISIS jihadi fighter who encouraged her to join him in Syria and pick up arms for the cause of ISIS if necessary.[81] Ultimately, Conley was arrested pursuant to 18 U.S.C. § 2339B.[82] In 2014, Conley pled guilty to conspiring to provide material support to a designated foreign terrorist organization.[83] While Conley was arrested before her departure on a flight to Turkey, her criminal conviction demonstrates the U.S. Government's pursuit and preservation of national security.

Rather than allowing American citizens to languish in squalid conditions and radicalize those around them, the United States repatriates and prosecutes those who either attempted to or successfully joined the Islamic State and provided support to the Caliphate. Thus, the U.S. Government's repatriation policies should be used as a model for the International Community. The U.S. Government's repatriation policy protects global security, dignifies both victims and repatriates, and holds American-born ISIS brides criminally liable for their involvement in and support of ISIS. However, repatriation and prosecution alone do not resolve the risk of re-radicalization.

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[78] *Id.*; U.S. Dep't of Just., *supra* note 53.

[79] Scott Glover, *The FBI Translator Who Went Rogue and Married an ISIS Terrorist*, CNN (May 1, 2017, 11:40 PM), https://www.cnn.com/2017/05/01/politics/investigates-fbi-syria-greene.

[80] Press Release, U.S. Dep't of Just., Arvada Woman Pleads Guilty to Conspiracy to Provide Material Support to a Designated Foreign Terrorist Org. (Sept. 10, 2014), https://www.justice.gov/opa/pr/arvada-woman-pleads-guilty-conspiracy-provide-material-support-designated-foreign-terrorist.

[81] *Id*.

[82] Criminal Complaint at 19, 22, United States v. Conley, No. 14-MJ-01045-KLM (D. Colo. April 9, 2014).

[83] Plea Agreement and Statement of Facts Relevant to Sentencing at I, United States v. Conley, No. 14-CR-00163-RM (D. Colo. Sept. 10, 2014).

2. Kazakhstan

As part of the Former Eastern Bloc, Kazakhstan has a rich history and a predominantly Muslim population.[84] Bordered by Russia, China, Kyrgyzstan, Uzbekistan, and Turkmenistan, Kazakhstan is in a volatile region, as evidenced by the nine terrorist attacks endured by the country between 2008 and 2018.[85] It is with this background in mind that Kazakhstan's repatriation policies can be best understood.

According to a study conducted by the International Centre for the Study of Radicalisation, researchers found that of the Kazakh citizens who left Kazakhstan to join ISIS, 25-30% were women.[86] As the home of a large number of female ISIS fighters, Kazakhstan took action to become the first nation to repatriate a large number of its citizens from Syria.[87] Through Operation Zhusan, the Government of Kazakhstan repatriated 157 women and 413 children.[88] Upon successful repatriation, Kazakhstan places repatriates in rehabilitation centers where they undergo a long process to help them reintegrate into society.[89] Kazakhstan's repatriation and societal rehabilitation of Kazakh-ISIS fighters and their families has been praised by the United Nations.[90] In fact, high-ranking United Nations officials have noted that Kazakhstan's successful repatriation and reintegration policies demonstrate "a positive implementation of Kazakhstan's international obligations under Security Council [R]esolution 2178."[91] Additionally, Kazakhstan's repatriation efforts adhere to the Constitution of Kazakhstan, which grants the citizens of Kazakhstan the right to return to their home country (although that right can be restricted).[92] In addition to repatriation fulfilling the nation's international and domestic obligations, "[r]epatriation is seen as

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[84] *World Factbook: Kazakhstan*, CENT. INTEL. AGENCY (Oct. 2021), https://www.cia.gov/the-world-factbook/static/0b9c0d6fd3fb9bdfbd1c22cd0f8b6d62/KZ-summary.pdf.

[85] EDWARD LEMON, WILSON CTR., TALKING UP TERRORISM IN CENTRAL ASIA (2018), https://www.wilsoncenter.org/sites/default/files/media/documents/publication/kennan_cable_38.pdf.

[86] *See* JOANA COOK & GINA VALE, FROM DAESH TO 'DIASPORA': TRACING THE WOMEN AND MINORS OF ISLAMIC STATE 17 (2018).

[87] O'Neal, *supra* note 54.

[88] *Id.*

[89] *Id.*

[90] Shahida Yakub et al., *'Such Despair': Widows, Children of Islamic State Fighters Given Second Chance in Kazakhstan*, RADIO FREE EUR. (June 26, 2021, 4:18 PM), https://www.rferl.org/a/such-despair-widows-children-of-islamic-state-fighters-given-second-chance-in-kazakhstan/31327679.html.

[91] Fionnuala Ni Aoláin, *Time to Bring Women and Children Home from Iraq and Syria*, JUST SEC. (June 4, 2019), https://www.justsecurity.org/64402/time-to-bring-women-and-children-home-from-iraq-and-syria/.

[92] *Kazakhstan's Constitution of 1995 with Amendments Through 2017*, CONSTITUTE PROJECT (Apr. 27, 2022, 1:23 PM), https://www.constituteproject.org/constitution/Kazakhstan_2017.pdf?lang=en.

Kazakhstan's contribution to international efforts to eliminate the risk of militants escaping responsibility and involving themselves in terrorist activities."[93]

As such, Kazakhstan has implemented a policy that focuses on the deradicalization of repatriates.[94] According to a report published by the United States Institute of Peace ("USIP"), "Kazakhstan's aspirational deradicalization approach relies on theological, psychological, and social interventions to transform harmful, ideologically driven behavior and to support reintegration into communities."[95] Furthermore, the USIP notes that the Government of Kazakhstan has dedicated itself to ensuring that its repatriates do not commit terrorist attacks or spread their radicalized ideology.[96] Under this policy of deradicalization, Kazakhstan has adopted a three-staged approach to repatriation: (1) adaptation, (2) rehabilitation, and (3) reintegration.[97]

Under the adaptation stage, repatriates spend one month in an adaptation center undergoing medical treatment and criminal investigation.[98] As of 2020, Human Rights Watch reports that twelve Kazakh women have been convicted of participating in ISIS-related hostilities or propaganda operations.[99] Unfortunately, the details of the convictions are under seal by the Government of Kazakhstan, and information detailing the criminal investigations of Kazakhstan's repatriates are known only to the Kazakh Secret Services.[100] However, one detail that is known indicates that during their detainment, repatriates who are convicted of assisting ISIS "undergo psychological and theological interventions for deradicalization . . . ."[101]

As has already been identified, the second stage of Kazakhstan's repatriation policy is rehabilitation, which is still ongoing as of 2021.[102] During this stage, repatriates are provided legal, psychological, and social

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[93] WILLIAM B. FARRELL ET AL., U.S. INST. OF PEACE, SPECIAL REPORT NO. 498, PROCESS OF REINTEGRATING CENTRAL ASIAN RETURNEES FROM SYRIA AND IRAQ 5 (2021), https://www.usip.org/sites/default/files/2021-07/sr_498-processes_of_reintegrating_central_asian_returnees_from_syria_and_iraq.pdf.

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] Press Release, Embassy of the Republic of Kaz. in the U.S., Zhusan Humanitarian Operation: Kazakhstan's Repatriation of Foreign Fighters & Their Families (Jan. 8, 2021) (on file with author).

[98] FARRELL ET AL., *supra* note 93, at 7.

[99] *Kazakhstan Events of 2020*, HUM. RTS. WATCH (2021), https://www.hrw.org/world-report/2021/country-chapters/kazakhstan#.

[100] FARRELL ET AL., *supra* note 93, at 21.

[101] *Id.* at 7.

[102] YULIA SHAPOVAL, KAZAKHSTAN'S APPROACH AND EXPERIENCE IN REHABILITATION AND REINTEGRATION OF REPATRIATES 6 (2021), https://www.sfcg.org/wp-content/uploads/2021/08/KZ-approach-and-experience-in-rehabilitation-of-repatriates-EN.pdf.

rehabilitation.[103] Additionally, repatriates are given medical examinations, and children are prepared to enter the Kazakh school system.[104] Unfortunately, as noted by Yulia Shapoval, a professor of the Department of Religious Studies at the Eurasian National University, the rehabilitation stage "leaves unsettled the question of further measures for reaching repatriates' children."[105]

The third stage is reintegration.[106] During reintegration, individual plans are created for each repatriate to determine how best to reintegrate them into Kazakh society.[107] Unfortunately, during this stage, repatriates have been provided with uneven access to support and services, which has rendered them frustrated with their respective situations.[108] Sadly, this uneven distribution of resources is exacerbated by the constant monitoring of returnees that distances the repatriates from the greater Kazakh community.[109]

Thus, although Kazakhstan statistically leads the world for the number of citizens successfully repatriated from Syria, the nation's program has not received full support from the Kazakh public.[110] As a result, Kazakhstan often experiences serious challenges in maintaining its repatriation policies. Primarily, the USIP indicates that the Government of Kazakhstan has failed to provide a clear explanation to its citizens as to why it has chosen to repatriate those who joined ISIS.[111] Additionally, the USIP identifies that Kazakhstan's efforts to deradicalize the repatriates have focused on outward expression and adherence to radical Islam rather than on the repatriates' underlying beliefs.[112] However, the Government of Kazakhstan seems to be shifting its focus to fighting a long-term battle "for [the] hearts and minds of" its repatriates.[113] Furthermore, the USIP report criticizes the Kazakh Government's lack of preparation, coordination, and funding.[114] The USIP suggests that the Kazakh Government can resolve the issues mentioned above by encouraging the communication and interaction between repatriates and the greater Kazakh community.[115] This dialogue will allow local citizens to become involved in the resettlement process, which

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[103] FARRELL ET AL., *supra* note 93, at 8.
[104] *Id.*
[105] SHAPOVAL, *supra* note 102, at 7–8.
[106] FARRELL ET AL., *supra* note 93, at 7.
[107] *Id.* at 8.
[108] *Id.* at 8.
[109] *See id.* at 9.
[110] *See* Embassy of the Republic of Kaz. in the U.S., *supra* note 97.
[111] FARRELL ET AL., *supra* note 93, at 9.
[112] *Id.* at 10.
[113] *See* Embassy of the Republic of Kaz. in the U.S., *supra* note 97.
[114] FARRELL ET AL., *supra* note 93, at 10.
[115] *Id.* at 11.

will minimize both the stigmatization and glorification of repatriates in a Muslim majority society.[116]

Despite the criticisms presented by the USIP report, Kazakhstan's practical approach to repatriation and societal reintegration has exemplified that

> [a]ll levels of government in Kazakhstan are engaged in a continuous dialogue to find the optimum approach to address the challenges related to returning its foreign fighters and their families. The country has demonstrated how to optimize partnerships with other countries and international entities in tracing, identifying[,] and delivering the practical means to extract individuals from territories under the control of non-state actors and ensure their safe return to home countries.[117]

Ultimately, Kazakhstan's repatriation policies should be used as a model for the International Community.[118] Kazakhstan's repatriation policy focuses on the deradicalization and societal reintegration of repatriates.[119] The nation sets forth a clearly delineated repatriation plan for Kazakh-ISIS brides and their families: (1) adaptation, (2) rehabilitation, and (3) reintegration.[120] This process protects global and national security, dignifies repatriates, and resolves the risk of re-radicalization. Unfortunately, when Kazakhstan welcomes Kazakh-ISIS brides and their families, the nation only enters them into deradicalization programs rather than arresting them.[121] When male repatriates return to Kazakhstan, "they face immediate arrest and the prospect of a 10-year prison term."[122]

B. No Repatriation

Although many countries are slowly beginning to repatriate ISIS affiliates, others remain reluctant to open their borders to such citizens, citing national security concerns.[123] The subsections below provide an overview of the non-repatriation policies of Great Britain and Jordan.[124]

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[116] *Id.*

[117] Aoláin, *supra* note 91.

[118] *See* Press Release, Embassy of the Republic of Kaz. in the U.S., *supra* note 97.

[119] *See* FARRELL ET AL., *supra* note 93, at 1, 5.

[120] *Id.* at 7.

[121] Kramer, *supra* note 38.

[122] *Id.*

[123] *See* H.J. Mai, *Why European Countries Are Reluctant to Repatriate Citizens Who Are ISIS Fighters*, NPR (Dec. 10, 2019, 4:58 PM), https://www.npr.org/2019/12/10/783369673/europe-remains-reluctant-to-repatriate-its-isis-fighters-here-s-why.

[124] *See* Efraim Benmelech & Esteban F. Klor, *What Explains the Flow of Foreign Fighters to ISIS?* 4 (Nat'l Bureau of Econ. Rsch., Working Paper No. 22190, 2016).

1. Great Britain

Unlike the United States and Kazakhstan, Great Britain has denied its responsibility to repatriate its citizens who traveled to join ISIS in Syria.[125] In doing so, Great Britain has adopted a policy that strips British citizens of their citizenship, leaving them "stateless and vulnerable to frequent desperation in overcrowded camps."[126] According to a publication by the Soufan Center, founded by former FBI special agent and counterterrorism expert Ali Soufan,[127] "[t]he denial of citizenship . . . will bolster [a] sense of being . . . citizens of the Islamic State, potentially preparing them to form the core of a future resurgence."[128] Despite this warning, Great Britain and most of the International Community continue to refuse to repatriate their citizens.[129] According to the International Centre for the Study of Radicalisation, of the 425 foreign fighters who have returned to the United Kingdom, only two women and four children have been successfully repatriated.[130] In order to best understand Great Britain's policy of non-repatriation, it is essential to possess a comprehensive understanding of the facts and law behind *Begum v. Home Secretary*.[131]

i. SHAMIMA BEGUM

The case of Shamima Begum stands in contrast to that of Samantha Elhassani. According to the factual background provided in *Begum v. Home Secretary*, Begum was born in the United Kingdom but had dual citizenship in the United Kingdom and Bangladesh.[132] In early 2015, Begum left the United Kingdom with two of her friends to travel to Syria

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[125] *U.K.'s Refusal to Repatriate Citizens from Syria 'Morally Reprehensible'*, TRT WORLD (Feb. 10, 2022), https://www.trtworld.com/magazine/uk-s-refusal-to-repatriate-citizens-from-syria-morally-reprehensible-54590. This Note was completed December 31, 2021. Any changes to repatriation conducted by Great Britain in the months and years since the time of this writing have not been included.

[126] Chris Bosley, *To End ISIS, We Must Find Futures for Its Survivors*, U.S. INST. PEACE (Sept. 2, 2020), https://www.usip.org/publications/2020/09/end-isis-we-must-find-futures-its-survivors.

[127] *About*, SOUFAN CTR., https://thesoufancenter.org/about/ (last visited Dec. 23, 2021).

[128] Javed Ali et al., *Open Letter from National Security Professionals to Western Governments: Unless We Act Now, the Islamic State Will Rise Again*, SOUFAN CTR. (Sept. 11, 2019), https://thesoufancenter.org/open-letter-from-national-security-professionals-to-western-governments-unless-we-act-now-the-islamic-state-will-rise-again/.

[129] TRT WORLD, *supra* note 125; ADAM HOFFMAN & MARTA FURLAN, CHALLENGES POSED BY RETURNING FOREIGN FIGHTERS 3 (2020).

[130] COOK & VALE, *supra* note 86.

[131] Begum v. Secretary of State for the Home Department [2021] UKSC (appeal taken from [2020] EWCA Civ 918).

[132] *Id.*

and join ISIS.[133] The case record indicates that Begum married an ISIS fighter and subsequently had three children, all of whom died.[134] As of February 2019, Begum was "located" in al-Hol Refugee Camp.[135]

On February 19, 2019, the Home Secretary, serving as the Secretary of State, notified Begum that her British citizenship was effectively deprived pursuant to Sections 40(5) and 40(2) of the British Nationality Act of 1981.[136] The Secretary noted that Begum's deprivation of citizenship occurred because her affiliation with the Islamic State in the Levant ("ISIL") made her a national security threat to the United Kingdom.[137] Under British law, a person's citizenship can be legally deprived for three reasons: (1) "[i]t is for the public good and would not make them stateless;" (2) "the person obtained citizenship through fraud;" and (3) their actions could harm the interests of the United Kingdom, and they can claim citizenship elsewhere.[138] The British Government's revocation of Begum's citizenship is legal under British law because it was done to protect the public good.[139]

Pursuant to British law, the deprivation of Begum's British citizenship on security grounds is an appealable decision.[140] Accordingly, Begum appealed the Home Secretary's decision to deprive her of her citizenship.[141] At the Court of Appeals, it was decided that Begum should be allowed to return to the United Kingdom to present her case.[142] However, the Home Office forbade her return due to the perceived national security risks that would accompany her homecoming.[143] Ultimately, a special tribunal affirmed the Home Secretary's decision to revoke Begum's citizenship because of her dual citizenship in Bangladesh by descent.[144] However, Bangladesh denied Begum's Bangladeshi

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[133] Josh Baker, *Shamima Begum: Spy for Canada Smuggled Schoolgirl to Syria*, BBC NEWS (Aug. 31, 2022), https://www.bbc.com/news/uk-62726954.

[134] *Begum*, [2021] UKSC 7.

[135] Elian Peltier, *Shamima Begum, Who Joined ISIS in Syria, Can Return to U.K., Court Says*, N.Y. TIMES (Feb. 26, 2021), https://www.nytimes.com/2020/07/16/world/europe/shamima-begum-isis-uk.html.

[136] *Begum*, [2021] UKSC 1.

[137] *Id.* at 16.

[138] *Shamima Begum: How Can You Lose Your Citizenship?*, BBC NEWS (Jan. 11, 2023), https://www.bbc.com/news/explainers-53428191.

[139] *Begum*, [2021] UKSC 1.

[140] British Nationality Act 1981, c. 61, § 40(5)(c) (UK).

[141] *IS Bride Shamima Begum's Appeal to Restore UK Citizenship to Begin in London Court*, SKY NEWS (Nov. 21, 2022, 5:38 AM), https://news.sky.com/story/is-bride-shamima-begums-appeal-to-restore-uk-citizenship-to-begin-in-london-court-12752158.

[142] *Shamima Begum Cannot Return to UK, Supreme Court Rules*, BBC NEWS (Feb. 26, 2021), https://www.bbc.com/news/uk-56209007.

[143] *Id.*

[144] Peltier, *supra* note 135.

citizenship, and claimed that Begum would not be allowed to enter the country.[145]

In February 2021, the British Supreme Court ruled on the question of whether the Government was entitled to prevent Begum's return to the United Kingdom to advocate for her case.[146] Ultimately, the Court held that Begum's rights were not breached when her application for permission to return to the United Kingdom to fight her case was denied.[147] Specifically, Lord Reed argued that the Court of Appeals was mistaken in its belief that "when an individual's right to have a fair hearing . . . c[o]me[s] into conflict with the requirements of national security, her right to a fair hearing must prevail."[148] Instead, Lord Reed suggested that "the right to a fair hearing did 'not trump all other considerations such as the safety of the public.'"[149]

With this decision, the British Supreme Court has forced the debate over the revocation of Begum's citizenship to be paused until she can return to the United Kingdom,[150] which is unlikely to occur. As a result, Shamima Begum lives in a state of legal limbo with no right to return to her home under British law. As noted by Liberty, the human rights group which intervened in Begum's case, "[t]he right to a fair trial is not something democratic governments should take away on a whim, and nor is someone's British citizenship. If a government is allowed to wield extreme powers like banishment without the basic safeguards of a fair trial[,] it sets an extremely dangerous precedent."[151]

ii. NICOLE JACK

While not as widely known as Shamima Begum, the case of Nicole Jack is also representative of Great Britain's policy of non-repatriation. In 2015, Jack and her husband left Great Britain to join ISIS in Syria.[152] Stranded in Syria and inspired by Begum's plea for the British public's forgiveness, Jack issued an appeal to be allowed to return to the United Kingdom because "there was 'no evidence' she was a key player in preparing terrorist acts."[153] Jack and her three daughters are currently

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[145] *Id.*

[146] BBC NEWS, *supra* note 138.

[147] BBC NEWS, *supra* note 142.

[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] *ISIS Bride Who Fled as Teen to Syria Loses Bid to Return to U.K.*, CBS NEWS (Feb. 26, 2021, 9:16 AM), https://www.cbsnews.com/news/shamima-begum-isis-bride-loses-bid-return-uk-supreme-court/.

[152] Tom Batchelor, *ISIS Mother Stranded in Syria with Her Children Pleads for Return to UK*, INDEP. (Oct. 7, 2021, 1:48 PM), https://www.independent.co.uk/news/uk/home-news/isis-syria-camp-uk-nicole-jack-b1934033.html.

[153] *Id.*

detained at the same Syrian camp as Shamima Begum.[154] Jack's mother has demanded her daughter's return and claims that her grandchildren "are 'languishing' in their Kurdish-run Syrian detention camp."[155]

According to a report published by the Independent, a spokesperson for the British Government commented on the nation's stance on repatriating Western-born women and children, stating, "[t]hose who remain in Syria include dangerous individuals who chose to . . . support a group that committed atrocious crimes including butchering and beheading innocent civilians. It is important that we do not make judgments about the national security risk someone poses based on their gender or age."[156] Ultimately, while the British Government has not issued a decision regarding whether Jack and her children will be repatriated, this statement and Great Britain's history of non-repatriation seems to indicate that their repatriation from al-Hol is unlikely.

iii. TAREENA SHAKIL

In addition to the cases of Shamima Begum and Nicole Jack, it is also essential to understand Tareena Shakil's criminal liability for her role in the Islamic State. In 2014, Shakil and her son left Great Britain and flew to Turkey before crossing the Syrian border.[157] Three months after her arrival in Syria, Shakil returned to Great Britain.[158] While the details of her arrest are not readily available, Shakil was sentenced to six years in prison for traveling to Syria with the intention of living under the Caliphate's rule.[159]

Great Britain's policies should not be used as a model for the International Community because it poses a significant risk of re-radicalization, which threatens global stability. Radicalization and re-radicalization frequently occur in camps like al-Hol because refugees are often "prohibited from working outside the camps and . . . become

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[154] David Rose, *Nicole Jack, an ISIS Bride Being Held in a Syrian Detention Camp, Pleads for Return to Britain*, TIMES (Oct. 7, 2021, 10:45 AM), https://www.thetimes.co.uk/article/nicole-jack-an-isis-bride-being-held-in-a-syrian-detention-camp-pleads-for-return-to-britain-pgk702v0k.

[155] Chris Hughes & Ryan Fahey, *Mum of ISIS Bride Who Worked at Pizza Hut Wants Her Back in UK to 'Face Consequences'*, MIRROR (Oct. 7, 2021, 5:47 PM), https://www.mirror.co.uk/news/uk-news/mum-isis-bride-who-worked-25162102.

[156] Batchelor, *supra* note 152.

[157] *U.K. Woman Jailed for Bringing Son to Live Under ISIS Rule*, CBS NEWS (Feb. 3, 2016, 12:50 PM), https://www.cbsnews.com/news/uk-tareena-shakil-isis-syria-toddler-son-sentenced-to-prison/.

[158] *Id.*

[159] *Id.*; *see* Asma Afsaruddin, *Caliphate*, ENCYC. BRITANNICA, https://www.britannica.com/summary/Caliphate (Dec. 10, 2022) (defining caliphate as a "political-religious state comprising the Muslim community and the lands and peoples under its dominion in the centuries following the death . . . of the Prophet Muhammad").

dependent on relief aid for their daily needs."[160] Unfortunately, "[w]here armed militants control the flow of both aid and information[,] . . . refugees fall prey to radicalizers"[161] for the benefit of their families. Great Britain's policies also fail to provide justice to the victims of terrorist attacks planned, organized, and supported by foreign-born ISIS brides.

2. Jordan

The final country analyzed n this Note is the Kingdom of Jordan. Sharing a 225 mile-long border with Syria, approximately 2,000 to 2,500 Jordanians traveled to Syria to join ISIS.[162] Due to the high number of Jordanians that joined ISIS, the Center for American Progress has identified Jordan as the largest source of ISIS foreign fighters per capita.[163] In an attempt to protect Jordan's national security, the Jordanian Government instituted a strict closure of the Jordan-Syria border and refused to accept refugees and repatriates.[164] According to Saud Al-Sharafat, the official public position in Jordan categorizes repatriates as a security and military matter rather than a humanitarian one.[165] Generally, this antagonism toward repatriating and prosecuting Jordanians is rooted in a strong national conviction arising from Jordan's rocky history with terrorism. Many Jordanians fear that the "rebirth" of terrorist organizations in Jordan would be "inevitable" should these fighters return.[166] Al-Sharafat also notes that foreign fighters who choose to return to Jordan of their own volition can only return through specific legal channels and are generally directed to the State Security Court to be prosecuted for their crimes.[167]

Thus, while Jordan does not repatriate its citizens, it allows them to voluntarily return and holds them criminally liable for their support and organization of terror-related activities.[168] Voluntary return and the subsequent prosecution of such returnees are required by Jordan's leading

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[160] Barbara H. Sude, *Prevention of Radicalization to Terrorism in Refugee Camps and Asylum Centers*, *in* HANDBOOK OF TERRORISM PREVENTION AND PREPAREDNESS 238, 243 (Alex P. Schmid ed., 2021).

[161] *Id.*

[162] HARDIN LANG & MUATH AL WARI, CTR. FOR AM. PROGRESS, THE FLOW OF FOREIGN FIGHTERS TO THE ISLAMIC STATE 11 (2016); *see* Nabih Bulos, *Jordan's Military Kills 27 Suspected Drug Smugglers in Border Shootout*, CHRONICLE (Jan. 27,2022, 12:31 PM), https://www.chronline.com/stories/jordans-military-kills-27-suspected-drug-smugglers-in-border-shootout,283435.

[163] LANG & WARI, *supra* note 162.

[164] *See id.*

[165] Saud Al-Sharafat, *How Jordan Can Deal with Jordanian ISIS Fighters Still in Syria*, WASH. INST. FOR NEAR E. POL'Y: FIKRA F. (Aug. 9, 2019), https://www.washingtoninstitute.org/policy-analysis/how-jordan-can-deal-jordanian-isis-fighters-still-syria.

[166] *Id.*

[167] *Id.*

[168] Hassan, *supra* note 36.

antiterrorism policy—Counterterrorism Law No. 18 of 2014.[169] Counterterrorism Law No. 18 ensures the voluntary returnee's deradicalization and entry into a reintegration program upon their conviction by the State Security Court.[170] Unfortunately, this law is riddled with issues. First, the law does not provide a framework through which Jordanian-ISIS members and their families can be repatriated together and subsequently held criminally liable for their actions, when necessary.[171] Second, many figures in the International Community, including King Abdullah II of Jordan, argue that the Counterterrorism Law threatens freedom of expression.[172] A report published by Freedom House in 2015 notes that "[s]ince the passage of the amended antiterrorism law in 2014, a growing number of citizens have faced charges before the military-dominated State Security Court for their online activities, particularly on Facebook."[173] This has been the unfortunate result of an amendment that broadened the definition of terrorism to include speech-related offenses.[174]

It should be noted that Jordan's policy of non-repatriation is unfortunately ironic. While the Jordanian Government will not repatriate Jordanian-ISIS fighters and their families from Syrian refugee camps, the nation is home to Zaatari Refugee Camp—the largest Syrian refugee camp in the world.[175] Including the refugees living at Zaatari, approximately 1.4 million Syrian refugees are living in Jordan.[176] While Jordan has refused to repatriate its citizens from camps like al-Hol on account of national security and counterterrorism concerns, the Jordanian Government has not taken measures to facilitate the repatriation and rehabilitation of the Syrian refugees at Zaatari, even though Zaatari is known as a hub of radicalization for ISIS.[177] Though Jordan "has publicly announced that it

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[169] Al-Sharafat, *supra* note 165.

[170] *See id.*

[171] *Id.*

[172] *See* Comm'r for Hum. Rts., *Misuse of Anti-Terror Legislation Threatens Freedom of Expression*, COUNCIL OF EUR. (Apr. 12, 2018), https://www.coe.int/en/web/commissioner/-/misuse-of-anti-terror-legislation-threatens-freedom-of-expression; *see also Jordan: Terrorism Amendments Threaten Rights*, HUM. RTS. WATCH (May 17, 2014, 11:50 PM), https://www.hrw.org/node/253697/printable/print; *see also Jordan: Government Crushes Civic Space*, HUM. RTS. WATCH (Sept. 18, 2022, 12:01 AM), https://www.hrw.org/node/382262/printable/print.

[173] FREEDOM HOUSE, JORDAN 9 (2015).

[174] U.S. DEP'T OF STATE, BUREAU OF COUNTERTERRORISM, COUNTRY REPS. ON TERRORISM 2016 (2017).

[175] Julia Morris, *The Politics of Return from Jordan to Syria*, FORCED MIGRATION REV., Oct. 2019, at 31, 32; Lilly Carlisle, *Jordan's Za'atari Refugee Camp: 10 Facts at 10 Years*, U.N. REFUGEE AGENCY (July 29, 2022), https://www.unhcr.org/en-us/news/stories/2022/7/62e2a95d4/jordans-zaatari-refugee-camp-10-facts-10-years.html.

[176] Morris, *supra* note 175.

[177] *See* Al-Sharafat, *supra* note 165; *see also* Natalia Paszkiewicz, *Syrian Refugees in Jordan's Camps Should Live in Dignity No Matter How Long They Stay*, MIDDLE E. EYE

does not support Syrians returning at the present time,"[178] it is, in effect, welcoming the same risk of terrorism into its borders that its national policies claim to stand against. Here, it is essential to note that the risks associated with the volitional return of Syrian refugees to Syria are well-understood.[179] However, as previously noted, although the Jordanian Government classifies the repatriation of Jordanians affiliated with ISIS as a military and security matter,[180] it views Zaatari and its Syrian residents as a humanitarian matter. In reality, *both* situations should be classified as a security *and* humanitarian concern. Security and humanitarian matters are not mutually exclusive.

Regarding the Jordanians who traveled to join ISIS in Syria, the Jordanian Government only offers "hard security approaches" to resolve the issue and fails to consider that detainees at camps like al-Hol cannot return to Jordan on their own volition without acquiring sponsorship and undergoing security clearance by the SDF.[181] As a result, the volitional return of Jordanians from Syria is nearly non-existent.[182] This is especially true for the families of Jordanian ISIS fighters because Jordan does not have a clear approach for the wives and children who return.[183] Thus, Jordanian ISIS affiliates, their wives, and children are left to languish, and Jordanian victims are denied justice. Ultimately, Jordan cannot respond to the threat of radical Islamization through hard approaches alone. As Professor Beverley Milton-Edwards writes, "[m]ight is not right," and it can spur radicalization and terror attacks against a nation rather than successfully discouraging them.[184]

Thus, Jordan's policies should not be used as a model for the International Community because it poses a threat of re-radicalization, refuses to grant potential repatriates dignity, and denies the repatriates' victims the opportunity to have their day in court. While Jordan allows for the voluntary return of Jordanians who traveled to join ISIS in Syria, the nation's national security laws do not provide a pathway through which Jordanian ISIS brides and their children can be repatriated.

(Jan. 2, 2018, 2:21 PM), https://www.middleeasteye.net/opinion/syrian-refugees-jordans-camps-should-live-dignity-no-matter-how-long-they-stay; Salim Abbadi, *Jordan in the Shadow of ISIS*, 7 COUNTER TERRORIST TRENDS & ANALYSIS 8, 10 (2015).

[178] Morris, *supra* note 175.

[179] *"Our Lives Are Like Death": Syrian Refugee Returns from Lebanon and Jordan*, HUM. RTS. WATCH (Oct. 20, 2021), https://www.hrw.org/report/2021/10/20/our-lives-are-death/syrian-refugee-returns-lebanon-and-jordan.

[180] Al-Sharafat, *supra* note 165.

[181] BEVERLEY MILTON-EDWARDS, GRAPPLING WITH ISLAMISM: ASSESSING JORDAN'S EVOLVING APPROACH 22 (2017).

[182] *See* Omer Karasapan, *Syrian Refugees in Jordan: A Decade and Counting*, BROOKINGS INST. (Jan. 27, 2022), https://www.brookings.edu/blog/future-development/2022/01/27/syrian-refugees-in-jordan-a-decade-and-counting/.

[183] Al-Sharafat, *supra* note 165.

[184] MILTON-EDWARDS, *supra* note 181.

V. SOLUTION

With many conflicting approaches to repatriation around the world, it is of tremendous importance to determine which policy is the best to protect global security, ensure justice, and maintain the dignity of repatriates. The goal of the International Community should be to preserve global stability and prosecute those held criminally liable for their involvement in, and support of, terrorism-related activities. As such, the International Community should adopt a two-fold repatriation policy. However, before detailing the repatriation policy proposed by this Note, it should be noted that none of the repatriation policies analyzed above are wholly sufficient to achieve international security, justice, and dignity. Ultimately, to achieve a repatriation policy that attains these global goals, two steps must be taken. First, the repatriation policies of the United States and Kazakhstan must be combined so that upon their successful repatriation, returnees are prosecuted and given the resources necessary to reintegrate into society. Second, an international criminal tribunal should be created that focuses on the repatriation and prosecution of ISIS affiliates and their families.

In executing these policies, the nations and organizations involved must ensure that the return of repatriates to their home countries is volitional according to the 1951 Convention Relating to the Status of Refugees.[185] Volitional repatriation occurs when two components are present: (1) freedom of choice and (2) informed decision-making.[186] Additionally, nations and organizations involved in implementing these policies must remain cognizant of a given State's sovereignty in decision-making. Just as a refugee cannot be forced to return to his home, a given nation cannot be forced to receive its citizens back, especially in the presence of national security concerns. It is for the preservation of state sovereignty and a recognition of the disproportionality of access to justice around the world that this Note proposes the formation of an international criminal tribunal to investigate and prosecute the cases of individual repatriates.

A. *Repatriation, Prosecution, and Rehabilitation*

A combination of the repatriation policies of the United States and Kazakhstan results in a policy that welcomes repatriation, prosecutes repatriates for crimes conducted as a result of their affiliation with the Islamic State, and mandates rehabilitation of repatriates before they are

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[185] Convention and Protocol Relating to the Status of Refugees, Apr. 22, 1954, art. I, 189 U.N.T.S. 137; *see* MEDECINS SANS FRONTIERES, https://guide-humanitarian-law.org/content/article/3/repatriation/ (last visited Nov. 5, 2021).

[186] Daniel Mathew, *Voluntary Repatriation and State Sovereignty: Seeking an Acceptable Balance,* 8 ISIL Y.B. INT'L HUMANITARIAN & REFUGEE L. 144, 153 (2008).

permitted to re-enter society. As stated by United States Marine Corps General Kenneth McKenzie, "[n]ations need to bring back their citizens, reintegrate them, de-radicalize them if necessary and make them productive elements of society."[187]

For this repatriation policy to succeed, it must be implemented at the domestic level of countries that have adequate judicial systems–in other words, where the court system is not biased and overwhelmed by its caseload. Countries that implement this policy must have sufficient resources to ensure that justice is achievable. Additionally, such resources must enable national judiciaries to accomplish the investigation and prosecution of repatriates "in a manner consistent with judiciary core values."[188] However, the prosecution of repatriates is only half of the necessary repatriation process.

During a given national judiciary's investigation into allegations of war crimes committed by a particular repatriate, the repatriate should be placed in a state-run rehabilitation program like that implemented by the Government of Kazakhstan. Through this program, domestic governments will be able to "offer [repatriates] mental health care, family support, housing, education[,] and job opportunities."[189] Additionally, national governments should provide immigration assistance to repatriated children born in ISIS territories so that they can become naturalized citizens in nations where *jus sanguinis*, the legal principle that citizenship is determined by the nationality of one or both of the child's parents,[190] is not the law. It should be noted that according to the Convention on the Rights of the Child, children cannot be repatriated without their mothers.[191] However, if a given child is a known orphan, the child *must* be repatriated alone.[192] In all instances, non-radicalized family members must be an essential part of reintegrating repatriates into society.

In addition to re-establishing familial ties, the rehabilitation process in countries like Kazakhstan is made possible through the support of other

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[187] Luis Martinez, *Repatriating Refugees at Syrian Camp Could Stem ISIS Resurgence: U.S. General*, ABC NEWS (May 22, 2021, 6:39 PM), https://abcnews.go.com/Politics/repatriating-refugees-syrian-camp-stem-isis-resurgence-us/story?id=77811334.

[188] JUD. CONF. OF THE U.S., STRATEGIC PLAN FOR THE FEDERAL JUDICIARY 6 (2020).

[189] Talgat Kaliyev, *Kazakh Efforts to Repatriate ISIL Fighters Should Be Replicated*, AL-JAZEERA (July 7, 2021), https://www.aljazeera.com/opinions/2021/7/7/kazakh-efforts-to-repatriate-isil-fighters-should-be-replicated.

[190] *Jus Sanguinis*, ENCYC. BRITANNICA, https://www.britannica.com/topic/jus-sanguinis (last visited Mar. 4, 2023).

[191] *See generally* Convention on the Rights of the Child, art. IX, ¶ 1, Sept. 2, 1990, 1577 U.N.T.S. 3.

[192] *See* Anne Speckhard & Molly Ellenberg, *Rescued American Girl, 8, Says She Was Beaten and Abused in ISIS Camp*, DAILY BEAST (Aug. 5, 2021, 10:26 AM), https://www.thedailybeast.com/rescued-american-girl-8-says-she-was-beaten-in-isis-camp.

repatriating nations and partnerships with organizations, including UNICEF and the International Committee of the Red Cross.[193] Ultimately, this repatriation policy obligates the volitional return of foreign-born ISIS brides and their children, and it is the most efficient means of balancing the interests of dignity and national security. Furthermore, unlike policies of non-repatriation and policies that only implement criminalization or rehabilitation, the policy proposed here reduces the risk for a potential ISIS resurgence due to its deradicalization efforts. Additionally, this policy provides children born to ISIS fighters with an opportunity to have a normal and safe childhood and ensures that victims are given the justice they deserve. Finally, if the International Community adopts this repatriation policy, the strain placed on countries that host some of the world's largest refugee camps will be drastically alleviated.

B. Formation of an International Tribunal

As aforementioned, nations that have the resources to repatriate, prosecute, and rehabilitate foreign-born ISIS brides and their children should do so to demonstrate their compliance with the policy proposed above. Currently, however, many nations are reluctant to repatriate citizens for a host of reasons, including, but certainly not limited to, domestic unpopularity, insufficient evidence to support convictions, and a perception that rehabilitation efforts have a poor rate of success.[194] Additionally, many nations that are home to the largest number of foreign fighters do not have adequate resources to prosecute and reintegrate those individuals back into society.[195] Thus, as of 2019, the International Community has circulated the idea of establishing an international criminal tribunal, like those in Rwanda and the Former Yugoslavia, to prosecute ISIS fighters.[196] Unfortunately, as noted by Roger Lu Phillips, the Legal Director for the Syria Justice and Accountability Centre, the formation of an *ad hoc* tribunal for Syria may experience some turbulence given Russia's propensity to veto the creation of similar tribunals proposed to the United Nations Security Council.[197] Ultimately, how and where the tribunal should be established—whether through a

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[193] Kaliyev, *supra* note 189.

[194] Roger Lu Phillips, *A Tribunal for ISIS Fighters–A National Security and Human Rights Emergency*, JUST SEC. (Mar. 30, 2021), https://www.justsecurity.org/75544/a-tribunal-for-isis-fighters-a-national-security-and-human-rights-emergency/.

[195] Tanya Mehra & Christophe Paulussen, *The Repatriation of Foreign Fighters and Their Families: Options, Obligations, Morality, and Long-Term Thinking*, INT'L CTR. FOR COUNTER-TERRORISM (Mar. 6, 2019), https://www.icct.nl/publication/repatriation-foreign-fighters-and-their-families-options-obligations-morality-and-long.

[196] Phillips, *supra* note 194.

[197] *Id.*

multilateral treaty or UNSC vote—is outside the scope of this Note.[198] Instead, this Note seeks to describe how the tribunal should function. However, it should be noted that the proposal of an international criminal tribunal to address ISIS-related crimes and repatriation is not unique to this Note. Rather, international organizations, including the United Nations, have said that "countries should take responsibility for their own citizens unless they are to be prosecuted in Syria [or Iraq] in accordance with international standards."[199]

At the time of this writing, the International Community has acted irresponsibly in its failure to prosecute known ISIS members for their war crimes.[200] For example, until November 30, 2021, not a single ISIS member had been convicted of genocide against the Yazidis.[201] While many trials are underway or in the investigatory stage, it is likely that most have yet to occur because of the large number of nations that have either refused to, or do not have sufficient resources to, repatriate foreign-born ISIS affiliates. Thus, an international criminal tribunal should be created to focus on the criminal prosecution of ISIS members, including foreign-born ISIS fighters and their wives. For example, though Great Britain and Jordan have the resources to repatriate, both nations have strong national security policies that forbid such action from occurring. Upon the formation of an international criminal tribunal for ISIS fighters, such nations would be able to preserve their policies of non-repatriation while simultaneously ensuring that justice is done.

However, nations that either (1) do not have the resources to repatriate and prosecute or (2) are unwilling to repatriate for fear of the counterterrorism risks associated with such an action will be required to send a minimum of one legal expert to assist in the investigation and prosecution of its citizens. Specifically, such legal experts will help establish the tribunal, hear cases, and help gather evidence relevant to cases involving their fellow citizens. If a nation fails to repatriate its citizens and refuses to send a legal expert to assist the tribunal with its proceedings, the nation will be deemed complicit in the ongoing humanitarian crisis and unlawful detention of ISIS affiliates and their families. For example, suppose a country like Great Britain refuses to repatriate its citizens who left the country to join ISIS in Syria and does

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[198] For more information about how and where an international tribunal for the prosecution of ISIS-related war crimes should be established, see *id.*

[199] Reality Check, *Islamic State: Who Is Taking Back Foreigners Who Joined?*, BBC NEWS (Oct. 10, 2019), https://www.bbc.com/news/world-middle-east-49959338.

[200] *See* Seth J. Frantzman, *Global Irresponsibility: The Lack of ISIS War Crimes Trials*, JERUSALEM POST (Aug. 23, 2019, 3:53 PM), https://www.jpost.com/middle-east/global-irresponsibility-the-lack-of-isis-war-crimes-trials-599453.

[201] *Yazidi Genocide: IS Member Found Guilty in German Landmark Trial*, BBC NEWS (Nov. 30, 2021), https://www.bbc.com/news/world-europe-59474616.

not send a legal expert to help the tribunal investigate and prosecute the citizens that it does not repatriate. In that case, it will be deemed by the tribunal and the International Community as exacerbating the ongoing humanitarian crisis and detention of British citizens. Additionally, upon the tribunal's reasonable determination that a given country's citizen did not commit crimes during his or her affiliation with ISIS and is not a security risk, the State of Origin will be asked to reconsider repatriating the individual because the risk to national security no longer outweighs the individual's right to return.

C. Policy Rationales

1. Global Security

The proposed policy solutions presented in this Note ensure the preservation of global and national security. When foreign-born ISIS brides and their children are not repatriated from camps like al-Hol, they statistically become more likely to be radicalized or re-radicalized. Unfortunately, al-Hol and similar refugee camps are known as fertile soil for the radicalization of children.[202] In fact, as of March 2021, the Danish Security and Intelligence Services reported that ISIS militants kidnapped at least thirty children from such camps with the intention of training them to commit terrorist attacks against their home countries.[203] However, children are not the only ones susceptible to radicalization during their detainment at SDF-operated refugee camps. Publications by news outlets like the Wall Street Journal have addressed the role of female ISIS leaders and their nurturing of radical Islamist ideology, which helps to keep the insurgency alive.[204]

Unfortunately, the risk of radicalization at al-Hol is comparable to that exhibited by Abu Ghraib, one of the most infamous prisons in the world. Initially, Saddam Hussein used Abu Gharib as a torture chamber.[205] Then, the brutal prison "was a U.S. Army detention center for captured Iraqis from 2003 to 2006."[206] Abu Ghraib served as "a prime

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[202] *See* John Saleh, *The Women of ISIS and the Al-Hol Camp*, WASH. INST. FOR NEAR E. POL'Y: FIKRA F. (Aug. 2, 2021), https://www.washingtoninstitute.org/policy-analysis/women-isis-and-al-hol-camp.

[203] Beatrice Eriksson, *A Visit to Northeast Syria Shows the Urgency for Governments to Repatriate Their Citizens, Many of Them Children, to Thwart ISIS*, JUST SEC. (Sept. 2, 2021), https://www.justsecurity.org/78064/a-visit-to-northeast-syria-shows-the-urgency-for-governments-to-repatriate-their-citizens-many-of-them-children-to-thwart-isis/.

[204] Isabel Coles & Benoit Faucon, *Refugee Camp for Families of Islamic State Fighters Nourishes Insurgency*, WALL ST. J. (June 9, 2021, 12:06 PM), https://www.wsj.com/articles/refugee-camp-for-families-of-islamic-state-fighters-nourishes-insurgency-11623254778.

[205] *Chronology of Abu Ghraib*, WASH. POST (Feb. 17, 2006), https://www.washingtonpost.com/wp-srv/world/iraq/abughraib/timeline.html.

[206] *Iraq Prison Abuse Scandal Fast Facts*, CNN, https://www.cnn.com/2013/10/30/world/meast/iraq-prison-abuse-scandal-fast-facts/index.html (Mar. 10, 2021, 3:23 PM).

breeding ground[] for radical[ization], where militants could expand their networks with other terror groups."[207] Further, Abu Ghraib, a place where due process seemed like a child's fairytale, is the place where an Iraqi—who was a religious scholar and soccer fan—became radicalized and founded ISIS.[208] That man was none other than Abu Bakr-al Baghdadi. Ultimately, the longer that foreign fighters are required to lay in wait in camps like al-Hol, the greater the risk posed to global security in the future. Fortunately, the two policy solutions proposed in the subsections listed above aim to preserve international and national security in ensuring that detainees are deradicalized and become productive members of society upon satisfaction of their prison sentences.

2. Need for Due Process

Additionally, the repatriation policies proposed here will ensure that those foreign-born ISIS brides whose cases are prosecuted by the Kurdish and Iraqi Governments are granted due process. According to the Louisiana Second Circuit Court of Appeal in *Pettit v. Penn*, due process means that "[n]o person shall be deprived of life, liberty, property, or *of any right granted him by statute*, unless the matter involved first shall have been adjudicated against him upon trial conducted according to established rules regulating judicial proceedings."[209] At the time of this writing, cases tried in Iraq and Syria are not conducted in accordance with established standards that regulate international legal proceedings.[210] Instead, those affiliated with ISIS are convicted for allegedly aiding the terrorist group without proper evidentiary support to prove such claims beyond a reasonable doubt.[211] For example, in Iraq, Westerners alleged to be ISIS fighters have been sentenced to death without due process.[212] Additionally, the Syrian and Iraqi Governments struggle to administer justice to foreign ISIS fighters and their families due to the number of cases faced by the Kurds.[213]

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[207] Janine Di Giovanni, *The Case for Repatriating ISIS Families in Syrian Camps*, NAT'L NEWS, https://www.thenationalnews.com/opinion/comment/the-case-for-repatriating-isis-families-in-syrian-camps-1.1237331 (last visited Nov. 30, 2022).

[208] *Id.*

[209] Pettit v. Penn, 180 So. 2d 66, 69 (La. Ct. App. 1965) (emphasis added) (citing Dupuy v. Tedora, 15 So. 2d 886, 890 (La. 1943)).

[210] Tanya Mehra & Matthew Wentworth, *New Kid on the Block: Prosecution of ISIS Fighters by the Autonomous Administration of North and East Syria*, INT'L CTR. FOR COUNTER-TERRORISM (Mar. 16, 2021), https://www.icct.nl/publication/new-kid-block-prosecution-isis-fighters-autonomous-administration-north-and-east-syria.

[211] *See* ERIC OEHLERICH ET AL., JANNAH OR JAHANNAM OPTIONS FOR DEALING WITH ISIS DETAINEES 7 (2020).

[212] Jane Arraf, *Iraq Sentences 4 French ISIS Fighters to Death*, NPR (May 28, 2019, 5:00 AM), https://www.npr.org/2019/05/28/727460028/iraq-sentences-4-french-isis-fighters-to-death.

[213] Mehra & Wentworth, *supra* note 210.

The repatriation policies proposed in this Note promote due process and provide access to justice for victims and perpetrators alike. For example, the proposed policies ensure that repatriating nations have adequate court facilities and judiciaries that are free of judicial bias. If a nation does not have sufficient resources to repatriate its citizens who traveled to join ISIS in Syria, that nation's citizens will have access to the international criminal tribunal through which their crimes can be investigated and prosecuted, when necessary.

3. Preservation of Dignity

Furthermore, the policy solutions proposed by this Note preserve the dignity of those living in camps like al-Hol in ways that existing repatriation policies do not. First, repatriation from al-Hol protects detainees from malnutrition, accidental fires, and illnesses arising from exposure to the elements.[214] Repatriation from al-Hol also protects foreign-born ISIS brides and their children by removing them from an environment known for extreme violence, including robberies, murders, and beheadings.[215] Further, the repatriation, prosecution, and rehabilitation of ISIS brides from al-Hol Refugee Camp protects and preserves the dignity of the sex-trafficked Yazidis, like those abused by Samantha Elhassani.[216] Only when their captors are successfully repatriated to, and prosecuted in, their States of Origin will survivors of ISIS's human trafficking operations have complete access to justice and restoration.

VI. CONCLUSION

The purpose of this Note was to determine whether repatriation laws that obligate the return of foreign ISIS fighters, wives, and children are the best and most efficient means of balancing the interests of dignity and national security. To determine this question, this Note examined the repatriation policies of the United States, Great Britain, Kazakhstan, and Jordan. Ultimately, case studies from these nations reveal several lessons

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[214] FIONNUALA NÍ AOLÁIN, ABANDONED TO TORTURE: DEHUMANISING RIGHTS VIOLATIONS AGAINST CHILDREN AND WOMEN IN NORTHEAST SYRIA 5–6 (2021).

[215] Wladimir van Wilgenburg, *20 People Killed in Northeastern Syria's al-Hol Camp in January: RIC Report*, KURDISTAN 24 (Feb. 8, 2021, 2:08 PM), https://www.kurdistan24.net/en/story/23908-20-people-killed-in-northeastern-Syria's-al-Hol-camp-in-January:-RIC-report.

[216] *Al-Hol Camp is Hell for Yazidi Women: There Is an International Agreement to Dismantle the Al-Hol Camp in Syria*, YAZIDIS.INFO (Oct. 5, 2022, 12:30 PM), https://yazidis.info/en/news/4222/al-hol-camp-is-hell-for-yazidi-women-there-is-an-international-agreement-to-dismantle-the-al-hol-camp-in-syria; *see* FREE YEZIDI FOUND., THE CASE OF SAMANTHA ELHASSANI AKA UM YUSUF 6 (2019). *Yazidi* may alternatively be spelled as *Yezidi*. *Yazidi*, DICTIONARY.COM, https://www.dictionary.com/browse/yazidi (emphasis added) (last visited Apr. 3, 2023).

that the International Community must take away. Specifically, the International Community must recognize that the willingness of countries like the United States and Kazakhstan to repatriate and prosecute foreign-born ISIS brides ensures justice for their victims, lowers the risk of re-radicalization, and reaffirms human dignity. Additionally, repatriation policies that involve adaptation, rehabilitation, and reintegration ensure that repatriated ISIS brides can return to a normal life after serving their prison sentences.

The policies of Great Britain and Jordan stand in contrast to those proposed by this Note. Unfortunately, the approaches employed by the British and Jordanian Governments illustrate the potential dangers of non-repatriation—victims of foreign terrorism are denied justice, and ISIS affiliates and their families endure squalid conditions in foreign camps while remaining susceptible to re-radicalization. Thus, to protect international security, grant due process, and preserve the dignity of repatriates and their victims, the International Community should consider adopting the repatriation policies proposed in this Note.

Ultimately, repatriation laws that obligate the repatriation, prosecution, and rehabilitation of foreign-born ISIS brides and their children are the best and most efficient means of balancing the interests of justice, dignity, and national security.

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[*] J.D., Regent University School of Law, Class of 2023. Special thanks to Professor Lynne Marie Kohm and Professor Jeffrey Brauch for their insights and encouragement; their impact on my personal and professional life means more than words can explain. Also, special thanks to my husband, Elijah, for whose helpfulness, kindness, and love I thank the Lord.

JOURNAL OF GLOBAL JUSTICE AND PUBLIC POLICY
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