



## Reimagining Traditional Approaches to Women Peace and Security

### STUDENT WORKING PAPERS

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Rangita de Silva de Alwis, Associate Dean of International Programs

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*This report is dedicated to those women and men and children on the frontlines of peace.*

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Phumzile Mlambo-Ngcuka

*United Nations Under-Secretary-General and Executive Director of UN Women*

Lakshmi Puri

*Assistant Secretary-General of the United Nations and Deputy Executive Director of UN Women*

Begona Lasagabaster, UN Women Chief of Leadership and Governance Section

Beatrice Duncan, UN Women Policy Advisor, Constitutional and Access to Justice

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## **REIMAGINING TRADITIONAL APPROACHES TO WOMEN PEACE AND SECURITY: INTRODUCTION**

Advancing the Women, Peace, and Security agenda requires rethinking the traditional approaches to peace and security, from the root causes of conflict to the methods of preventing violent extremism. To achieve genuine progress in the security of women and of nations, it is vital to emphasize a more holistic understanding of peace that goes beyond simply ensuring that women are represented at the policy-making table. To achieve genuine progress in the security of women and nations, States must work towards strengthening gender equality priorities in law and policy during peace and after conflict.

The primacy of women's participation in the Women, Peace and Security agenda, memorialized by Resolution 1325 and its progeny, has marked a watershed. Gender equality has been articulated in terms of peace, security, and institution-building, as a means of conflict prevention, protecting women during conflict, and securing equality in post-conflict constitution-building and legal system reform. Research shows that States with gender equality indicators are less likely to engage in military conflicts, States with high fertility rates are nearly twice as likely to experience internal conflict, that gender equality is associated with stronger States' adherence to human rights, that higher level of women's leadership translates to lower levels of violence in a crisis, and that gender equality in representation is associated with lower corruption. In essence, countries that empower women with opportunities to thrive civically, economically, and socially are more stable.

The central theme of our report is that gender equality, in law and in lived reality, is a determinant of peace and security. Gender discrimination and violence against women is an indicator and signifier of extremism, but is often overlooked as an early warning sign of conflict. Yet, gender equality in law-making bolsters national and global security. Our report is cross-cutting and intersectional, syncretizing wide-ranging research efforts from academic scholarship to direct engagement with international bodies and civil society organizations.

Each chapter examines the Women, Peace, and Security law corpus as well as the relevant constitutional and legislative provisions in each of the countries under examination. Historically, crackdowns on women's rights and freedoms have presaged the use of sexual violence as a tactic of war, terrorism and political repression. This underscores the strategic value of gender analysis in all atrocity-prevention efforts and the necessity of governments protecting

women's human rights at all times. In line with 1325's pillars of prevention, protection, participation, and recovery, this report proposes four new pillars for reimagining the multifaceted applications of 1325: applying 1325 outside of conflict, using 1325 to dismantle patriarchal structures and reform political and legal systems, adopting a strong intersectional lens which pushes the traditional boundaries of the Women, Peace and Security agenda, and rethinking normative frameworks and social movement building.

### **Imagining 1325 Outside of Traditional Armed Conflict**

The United Nations Security Council Resolution 1325 has achieved much success within the scope of armed conflict and conflict resolution. However, although one of the core pillars of the resolution is prevention, 1325 has often had a less robust application at the preventative, pre-conflict, and post-conflict stages. The first category of papers reimagines the way the abstract principles and theories that motivate 1325 can be used to promote peace and prevent the escalation of conflict in nations that have not experienced it or exist outside of traditional armed conflict. Most of the writers in this section focus on how the practical life experiences of women outside of conflict can powerfully mimic the life experiences of women within conflict. For those reasons applying 1325 outside of the traditional sphere is important, both to secure nations that may be conflict-prone and to ensure that the needs and rights of women are being protected.

In *Putting the Peace Back into the Peace and Security Agenda: How the Abstract Principles of Security Council Resolution 1325 can Build and Preserve Peace Outside of Conflict*, Teresa Akkara proposes that the distinction between sexual violence during armed conflict and outside of armed conflict is a false dichotomy. Akkara examines the ways in which the foundational structure of 1325 should be operationalized in countries in which women experience significant sexual violence outside of conflict to (1) ensure and promote the agency of women and (2) empower women in cultures that have absorbed gender inequality in order to prevent backlash related to “outsider criticism.” Akkara advocates for the application of the abstract principles of 1325 as a preventative tool, serving to combat the gender inequities that are often a harbinger of violent conflict.

In *Securing National Security through Gender Equality in Religious Family Laws*, Akila Sarathy argues that in order to achieve the goals of 1325 and promote women's participation at the decision-making table, we must first focus on achieving gender equality in the private sphere. To demonstrate this proposition, Sarathy turns her focus to religion-based personal laws in India

to examine (1) the existing infringement that personal laws place on women's rights and the correlated lack of participation in public life, (2) how India's commitment to women's equality in public life is incompatible with a policy of non-interference with respect to personal laws, and (3) the various proposals to reforming personal laws.

In *Using United Nations Resolution 1325 to Reimagine the Commercial Surrogacy Ban in India*, Samantha Licata argues that Resolution 1325 should be used as a framework to promote the security of surrogate women in India. India is one of the largest assisted reproductive technology industries in the world and due to lack of regulation, the industry has been ridden with unethical and exploitative practices. To address these problems, India has introduced a new bill banning commercial surrogacy in its entirety. Licata argues that criminalizing surrogacy opens the door to the creation of a dangerous underground market. She suggests using Resolution 1325 as a tool to prevent future conflict and ensure the security of Indian women by including surrogates directly in the drafting of regulation. With women at the table, using their lived experiences to advocate for their needs, India can effectively regulate the industry while still giving women an opportunity to gain financial independence through the surrogacy industry.

In *Women, Peace, & Security from Peace to Post-Conflict: The Colombia Case Study*, Leah Wong argues that gender inequality and gender-based sexual violence in Colombia was not merely a result of conflict. Gender inequities in Colombia preexisted conflict as a potent indicator of escalation, and prolonged conflict as a powerful aggravating factor. After extensive interviews with organizations committed to Colombia's transitional justice and victim's rights, Wong urges the Colombian government to ensure a commitment to gender perspective leads the implementation of the Peace Accord. If successful, Colombia's post-conflict transition will serve as a powerful case study of how peace and security can and must be reimagined. These papers collectively unite behind the proposition that gender equality is a critically ignored method of promoting peace and security.

### **Transforming Legal, Political, and Economic Patriarchal Culture**

We examine the ways in which 1325 can be used in legal and political system reform, to build institutions, legal and economic, and to transform a patriarchal legal culture. Through qualitative and quantitative analysis, we show that post-conflict employment, as stated by the ILO, "contributes to short term stability, reintegration, socio-economic progress and sustainable peace. In *Using Feminomics as a Tool to Address Gender Inequality in Politics, Society and the*

*Workplace: Arab World Case Study*, Tala Al Jabri argues that there is a strong link between peacebuilding, nation-building, and economic empowerment for women. As a significant part of the peacebuilding process is dedicated to reconstruction—be it of physical institutions or in legal and social doctrines—there is much room to enact change. In utilizing a gender-lens economic development strategy, Tala is able to uncover with data the need to not only integrate women in these efforts but to show that in doing so, all spheres of society—whether political, social, legal and economic—stand to benefit from such an approach.

In *Women's Economic Empowerment and the Peace and Security Agenda: A Case study on Ethiopia*, Eleni Belay also examines the role of women's economic empowerment in conflict prevention and maintenance of peace and security. Economically empowered women are less prone to poverty, which is one of the main causes of conflict. Involving women in the economy of a nation also allows for rapid post conflict recovery. Further, laws and policies that promote the economic empowerment of women bring about larger structural changes, which foster peace and security. However, it is highly imperative to recognize women's economic empowerment as a fundamental human right. An example of a country that has prioritized the economic empowerment of women as a national policy is Ethiopia. Post 1991, following the fall of a military dictatorship regime, Ethiopia introduced various constitutional, legal and policy reforms which have led to a greater economic empowerment of women. These policies, which are aimed at economically empowering women, can further be strengthened by looking at the intersectionality of gender and ethnicity in countries such as Ethiopia with diverse ethnic composition.

Furthermore, traditional approaches to countering Islamic violent extremism are challenged. As Zainab Bangura, Special Rapporteur on Sexual Violence Against Women has said, "The war of conquest of extremist groups is being fought on and fought over the bodies of women and girls generating millions of dollars of revenue." The role of women, specifically Muslim women, is often overlooked in this struggle. In *Islamic State v. Sisters in Islam: Combating Islamic Extremism Through Islamic Feminist Jurisprudence*, Arhama Rushdi argues that Muslim Women are not just victims of Islamic violent extremism but also the solution. Specifically, Rushdi argues that Muslim states with strong Islamic, rather than secular, feminist movements are less vulnerable to Islamic radicalization. Similarly, in *Hijacking Religion & Culture in the Name of "Honor,"* Dana Brody questions the ways in which religion is appropriated to justify

abuses against women by considering the case of honor killings. Brody argues honor crimes are a symptom of patriarchal society—a misinterpretation and misappropriation of women and culture. She hopes that after reading this paper, it will be clear that honor crimes are an indicator of violent extremism, and that by addressing its existence, we can begin countering violent extremism.

In *Peace and Security in South Sudan: The Role of Women in the process of Nation Building*, Victoria Dheilly explores the role of gender equality in building a lasting peace in South Sudan, the youngest country in the world. Peace agreements have failed to include a holistic approach to rebuilding an equal society, by focusing on warmongers' desires rather than civilian needs. Resolution 1325 has been used in South Sudan as a tool to symbolically bring women to the table. Inclusion of women, and making them the voice of the voiceless, is essential in building a strong transitional system and in guaranteeing last peace and security. Revisiting the 2015 Agreement on the Resolution of the Conflict in South Sudan, and essential documents such as the constitution and the penal code, in a gender positive way would provide a strong basis for the future empowerment of women and the betterment of society.

In *Comfort Women, Korea's Legal Responsibility, and the Importance of a Gender-Conscious Legal Framework*, Jennifer Lee explores the importance of a gender-sensitive framework, using the inadequate legal responses to the comfort women debate as a case study. Lee argues that Korea must meet its obligations under CEDAW and Resolution 1325 by enacting gender-sensitive legislation that takes into account civilian rights during times of conflict, and further recommends that such legislation be modeled after the Rome Statute. She further argues that Korea must embrace an educational curriculum that discusses the comfort women issue, as a first step in changing deeply embedded patriarchal attitudes against women and sexuality. Also, utilizing the issue of comfort women as a framework, Irene Hong writes about the power of grass-roots coalition building between women across borders in *Japanese And Korean Women Unite: Building Coalitions To Bring “Comfort Women’s” Voices To The International Peace-Keeping Agenda*. She examines the continued effects of the “comfort women” issue generations after the war between Japan and Korea, such as increased child marriage.

In *Women’s Access to Justice in Post-Conflict Societies: Lessons to be Learned from the Formal Courts and Gacaca Courts in Rwanda*, Brittany Beyer examines some of the obstacles women face accessing justice in post-conflict zones. The paper considers the procedural,

logistical, and substantive aspects of each type of justice system that work for and against women seeking a dispute resolution forum. Beyer argues that merely following the plain language of the CEDAW does not give full effect to its underlying intent and purpose, nor does this approach go far enough to meet the obligations laid out in the Security Council resolutions. It is critical to examine all facets of a legal system when ascertaining that system's ability to accommodate the lived realities of women; a nation's ability to establish long-term, stable peace and security is contingent upon providing effective justice to those victimized during the conflict.

In *Women Leadership in the Frontline of Peace and Security in Southeast Asia – A Case Study from Burma*, Scarlett Ying explores the leadership trajectory of Aung San Suu Kyi, the obstacles she faced as a female politician; the various barriers to women's participation in public life in Burma despite having a strong female leader, and how that affects not only gender equality, but also peace and security within the nation.

Finally, in *Gender Quotas in Uganda's Politics: Affirmative Action and its Relevance to Increasing the Participation of Women in the Women, Peace and Security Agenda*. Amanda Nasinyama examines how gender quotas have been used in Uganda to increase women's participation in politics. Nasinyama argues that by achieving substantive representation of women through such affirmative action measures, countries like Uganda will not only promote gender equality but guarantee the integration of a gender perspective before, during, and after conflicts, forming an important strategy to support inclusive and sustainable peace initiatives throughout various stages of the peace process.

### **Intersectionality in Pushing the Traditional Boundaries of 1325**

We apply an intersectional lens to the evaluation and implementation of the Women, Peace and Security agenda. The category of women is heterogeneous and contains a diverse array of views, identities, and experiences. Women often experience multiple and intersecting forms of discrimination due to the irreducible complexity of overlapping identities. In response, we apply a robust reading of 1325, along with the CEDAW and intersecting human rights treaties, such as the Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities (CRPD). We also look at the idea of gender and sexuality and how their inclusion in understanding the various international human rights framework is important in ensuring peace and security for all women. Reading human rights treaties as mutually reinforcing documents can strengthen the enforcement of any single treaty and

deconstructs the tendency to silo, or relegate the enforcement of treaties to the purview of a specific treaty body or agency. Because the category of women is not homogenous, attempts to apply 1325 must involve and understanding of intersectionality. Papers in this volume consider the ways in which the Women, Peace and Security agenda produced exclusionary practices by failing to incorporate a diverse array of women's perspectives and provide policy proposals for creating a truly inclusive concept of peace and security.

For example, peacekeeping talks are often starved of discussions regarding children's rights- typically not considered a critical issue related to military tactics or peace negotiations. In *Peace and Security Through the Lens of Child Marriage in Mexico*, Kimberly Panian highlights the connection between child marriage and violent extremism through a novel and intersectional perspective. Panian ties traditional studies that associate femicide with drug violence to the issue of child marriage and elaborates on the role it plays in creating an environment rife with conflict and gender-based exploitation. She examines how inequitable enforcement of gender laws reinforce machismo culture, suggesting a stronger call to action focusing on the most vulnerable group of society- children. Recognizing the problem and identifying a bottom-up approach might very well address peacekeeping issues at their core.

Likewise, Samantha Zeluck in *Girls' Education as a Pivotal Instrument of Peace and Security in Turkey* examines education as a symptom of gender discrimination and argues for its repurposing as an instrument of normative change. Zeluck argues that education is the point of convergence for various political, economic, and cultural issues, and consequently gender equality laws should harness its power for social transformation. This lends support to the idea that the Women, Peace and Security agenda should utilize the productive potential of documents like the CRC, as well as the CEDAW.

Our report contributes to a novel rereading of 1325 not only by bringing to light children's rights concerns, but also by deconstructing the category of womanhood itself. When policymakers discuss bringing women to the table, it is important to consider *which* women are being brought to the table and whether or not we are replicating the very exclusions we are seeking to eliminate. Satyasiri Atluri in *Introducing a Transgender Perspective into the Women, Peace, and Security Agenda* brings to focus the understanding of gender in the Women, Peace and Security agenda under Resolution 1325 and the CEDAW and explains how bringing a Transgender perspective to peace-building can ensure sustenance of peace and also ensure

equality and security for women of gender and sexual minorities. Conflict leads to heightened violence against gender and sexual minority women, especially transgender women because of their easy visibility. Atluri emphasizes that the security of transgender women has been neglected in the international security agenda.

Creating a truly inclusive peace and security agenda requires supplementing a gender lens with a disability lens. Heather Swadley in *Women Cannot be at the Table if they Cannot Enter the Building: Disability in the Women, Peace, and Security Agenda* analyzes what might be missed if women with disabilities are not integrated into peacebuilding. Swadley concludes that disability rights are a vital yet consistently overlooked means of maintaining peace and security. Disability is both a cause and consequence of conflict, and therefore, it is crucial to include women with disabilities within the purview of 1325.

Finally, in *The Necessary Voices of Women With Criminal Justice Involvement in Shaping Peace and Security*, Jane Komsky argues that previously incarcerated women must be recruited as agents of peace and be given a seat at the decision-making table. She contends that this will help achieve the transformative justice, and peace building goals of 1325. Komsky explores the unique background incarcerated women have, which allows them to be great advocates for a number of causes. Moreover, she advocates for criminal justice reform to prevent incarcerated women from becoming vulnerable to being recruited as agents of terror by instituting gender sensitive policies and an emphasis on empowering incarcerated women.

### **Rethinking And Challenging The Normative Frameworks And Social Movement Building**

All of the papers urge the global community to rethink and challenge the normative frameworks that lead to conflict and catalysts of social movement. These papers range from unpacking substantive and symbolic models of women's political representation in post-conflict Uganda to critically examining formal and informal transitional justice processes in South Sudan, Sierra Leone, Rwanda, Colombia and their impact of women, to the gender implications of tissue tourism in India. A number of countries we write about have adopted Resolution 1325 into national laws or Action Plans. On the other hand, we critically examine countries that used measures of gender equality, such as women in political participation, but do not have policies that truly reflect equality. National security and prosperity must be about dismantling gender exclusionary policies within normative culture. Combating the legal barriers women face and including them in national law enforcement and security agendas are but some of the measures

needed to address the world's intractable conflicts.

Zainab Bangura also once stated, "When we think terrorism we think of destruction of property, killing, bombing or hostage taking. But we cannot deplore the public violence of terrorism while ignoring the violence terrorists inflict on women and girls behind closed doors." We cannot solely focus on women's status during and post-conflict. We must begin with gender equality as a basis for sustainable peace and conflict prevention. As the Global Study on Resolution 1325 concluded, "there must be an end to the present cycle of militarization." The best way to achieve this goal is to take a holistic approach to legislative measures and to the policy agenda, by bringing a gendered perspective to the table, and not only a symbolic single woman's body to negotiations.

This report seeks to break the Women, Peace and Security agenda out of its confines by integrating it with gender equality law making and using it as a preventative tool—acknowledging gendered forms of violence as early warning signs of conflict. Collectively, these papers assert how women's rights and empowerment must not come after a states' revolution towards peace, security, and prosperity, but be the very revolution itself.

# **WOMEN'S ACCESS TO JUSTICE IN POST-CONFLICT SOCIETIES: LESSONS TO BE LEARNED FROM THE FORMAL COURTS AND GACACA COURTS IN RWANDA**

Brittany Beyer

## **1. Introduction**

One of the utmost priorities for developing nation states emerging from violent and divisive internal conflicts is often to establish a functioning judicial system. Meting out justice in a predictable and organized format not only helps to restore the rule of law in fractured societies, but it also communicates the willingness of a state to take seriously the atrocities that may have been committed during the conflict, and allows communities to begin the healing process. While many discussions and plans of action to construct justice systems in post-conflict societies revolve around establishing national courts and national legal codes, the reality for much of these nation's populations in the developing world is that such legal infrastructure is not easily accessible.

This accessibility problem is magnified for women in particular, whose primary roles in developing countries as wives, mothers, and caretakers do not typically provide them with the necessary schedule flexibility or financial means to travel to the fledgling formal court systems, which are more often than not located only in main urban centers during these post-conflict periods. Even if it were physically possible for women to travel to formal courts, many do not feel comfortable engaging with such a system. In other words, this iteration of a justice system does not accommodate women's needs and lives. Women who are caught up in violent conflict, such as the Rwandan women this paper will examine, often have their rights violated in the most personal of ways – rape and sexual assault were and continue to be common tools used by war criminals to instill fear into the population. If women are not given a proper platform from which they are able to realistically and comfortably receive the justice they seek, then it will be all but impossible for societies torn by war to mend. Thus, women may end up being doubly victimized – once during the conflict, and again when they are not able to receive the justice to which they are legally entitled and morally deserve.

In the absence of formal court systems, many women have chosen to turn to informal, community-based justice systems. While many women who engage with these types of courts have reported feeling safer and more comfortable with the proceedings due to a more pronounced focus on storytelling instead of testifying, and familiar community members being

the arbiters instead of elite judges, there are still numerous procedural and substantive problems when it comes to these courts' ability to consistently hand down appropriate forms of justice in light of the specific circumstances in which many women find themselves in a post-conflict period. Using the case study of the gacaca courts that were established in Rwanda following the 1994 genocide, this paper will highlight the strategic necessity of women's ability to access justice in post-conflict zones for the sake of long-term national security. It will provide an in-depth look at some of the procedural and substantive benefits and pitfalls of both formal and informal systems of justice as they relate to women's lives and their abilities to receive justice, and conclude with recommendations for nations that are rebuilding justice systems in a post-conflict period in light of the legal obligations they may have as per national laws, the CEDAW, or United Nations Security Council Resolutions.

## **2. Gacaca Courts Case Study**

### *2.1 A Brief History*

Although the Rwandan government resurrected the gacaca court system in the early 2000's to help ease the burden on the national courts after the 1994 genocide, gacaca as an informal justice system is deeply embedded in Rwanda's legal history dating back hundreds of years.<sup>1</sup> Traditionally, gacaca courts were not permanent or state-sanctioned institutions, and were only convened by community elders when there was a specific conflict within the community that needed to be addressed, usually between families, and usually in rural areas.<sup>2</sup> The name "gacaca" is derived from the Kinyarwanda words meaning "the lawn" or "the grass" – an apt descriptor given that gacaca hearings were conducted in large, open and outdoor spaces, in full view of the community.<sup>3</sup> Proceedings in gacaca courts were largely based on custom and unwritten laws, as a means of "sanctioning the violation of rules that were shaped by the community, with the sole objective of reconciliation."<sup>4</sup> The prioritization of reconciliation as a solution rather than retributivism, which is the hallmark of most formal justice systems, is rooted in the idea that the family is the most important unit of the social fabric that comprises the greater community. As a result, gacaca punishments traditionally reflected this value set, and

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<sup>1</sup> PHIL CLARK, THE GACACA COURTS, POST-GENOCIDE JUSTICE AND RECONCILIATION IN RWANDA: JUSTICE WITHOUT LAWYERS 3 (2010).

<sup>2</sup> *Id.* at 52.

<sup>3</sup> *Id.* at 3.

<sup>4</sup> *Id.* at 52.

were more focused on reconciliation of family and community than doling out retributive punishments that could exacerbate fissures in the community, rather than heal them.<sup>5</sup>

As recent as the first decades of the twentieth century, gacaca was the main method of ensuring social and civil order in communities across Rwanda. Most cases that came before the gacaca courts were fundamentally uncomplicated matters, principally dealing with issues surrounding land use, livestock, property damage, marriage, and inheritance. The methods employed in hearing these cases were also relatively straightforward from a procedural standpoint. Gacaca tribunals brought conflicting parties before community elders to hear grievances, to allow defendants to respond to any charges, and finally to pass judgments based on the evidence heard. In an ideal gacaca hearing, after some prompting from the “judges,” confess their crimes, express remorse, and ask for forgiveness from those whom they had injured. Gacaca judges would then demand that confessors provide restitution to their victims, and the hearings would culminate in the sharing of beer, wine, or food, usually provided by the guilty party, to symbolize the reconciliation of parties.<sup>6</sup> Notably, women were only permitted to participate in gacaca hearings as claimants or defendants; they were not permitted to serve as judges or witnesses.<sup>7</sup>

The role of gacaca courts as a legal system evolved alongside Rwanda’s political history, particularly during Belgian colonial rule in the 20<sup>th</sup> century. During this time, gacaca began to resemble a formal court system; it became increasingly institutionalized and was integrated into the state justice infrastructure as a parallel court system to the official courts. This in theory allowed Rwandans to forum shop to choose the dispute resolution forum in which they felt most comfortable bringing their case, but in reality only people who lived in rural areas continued to use the gacaca courts, most likely out of necessity.<sup>8</sup> In the period immediately after independence, the gacaca courts then became further integrated and centralized into the state system with the new possibility of appealing a gacaca tribunal decision to the state courts.<sup>9</sup> Gacaca once again took on a new form after the genocide, in which the traditional, community-based elements were merged with hallmarks of modern state court systems.

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<sup>5</sup> *Id.*

<sup>6</sup> Stef Vandeginste, *A Truth and Reconciliation Approach to the Genocide and the Crimes Against Humanity in Rwanda*, 45 (Ctr. for the Study of the Great Lakes Region of Africa, Working Paper May 1998).

<sup>7</sup> CLARK, *supra* note 1, at 53.

<sup>8</sup> *Id.* at 55.

<sup>9</sup> *Id.*

## *2.2 Gacaca After the Genocide*

During the brief 1994 Rwandan Civil War, it is estimated that between 800,000 and one million members of the Tutsi ethnic group and perceived Tutsi sympathizers were systemically sought out and slaughtered by Hutus in three short months.<sup>10</sup> In the immediate aftermath of the genocide, civil society and the Rwandan government were in a state of complete disarray, and its capacity to arrest, charge, and hold trials for accused war criminals was greatly diminished.

Because Hutus in positions of power encouraged ordinary citizens to take part in the genocide of Tutsis, hundreds of thousands of individuals were implicated in the massacre and were wanted for war crimes. As of the late 1990s, Rwandan jails were overflowing with prisoners accused of war crimes, and the national courts and prosecutors' office faced a backlog of over 120,000 cases – an impossible number of cases to prepare well for trial in an acceptable period of time.<sup>11</sup>

This backlog resulted in a severe justice shortage. To ease the burden on the state courts, NGO's and other organizations were working with Rwanda in 1996 and 1997 to aid the government in modernizing the judicial system, which had previously been mired in political quagmires and subject to authoritarian whims. Despite attempts to rapidly train new judges and lawyers to handle cases stemming from the genocide, the fledgling court system could not handle the sheer volume of cases, especially those of a sensitive nature, including those related to accusations of rape or sexual assault.<sup>12</sup> It was during this time that the government recognized the possibility that the traditional gacaca courts could be co-opted for the state's prosecutorial needs. This solution was brought to fruition in the early 2000s, when over 250,000 judges were elected via grassroots elections across eleven different jurisdictions.<sup>13</sup> These laymen cum judges were then tasked with hearing the cases of hundreds of thousands of alleged war criminals. Thus began the “ambitious attempt to involve the entire population in the processes of justice, reconciliation, and post-genocide reconstruction.”<sup>14</sup>

## *2.3 Women and Gacaca*

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<sup>10</sup> BBC Staff, *Rwanda: How the Genocide Happened*, BBC (May 17, 2011), <http://www.bbc.com/news/world-africa-13431486>.

<sup>11</sup> CLARK, *supra* note 1, at 3.

<sup>12</sup> *Id.* at 54.

<sup>13</sup> *Id.* at 3.

<sup>14</sup> *Id.* at 3.

During the genocide, rape and sexual assault were common war tactics used to humiliate and subjugate Tutsi women and their perceived Hutu sympathizers. A 1996 UN Special Rapporteur estimated that at least 250,000 women and girls were raped during the 1994 genocide.<sup>15</sup> In his report, Special Rapporteur Degni-Ségui states that women “may even be regarded as the main victims of the massacres...since they were raped and massacred and subject to other brutalities.”<sup>16</sup>

Rwanda has ratified numerous international treaties and conventions, including CEDAW, ICCPR, and ICESCR, which impose upon the state specific legal obligations to ensure that its population has access to appropriate means of justice. The most important of these treaties for the purposes of this paper is the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW). Article 2 of the CEDAW states that member states “agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women.”<sup>17</sup> CEDAW obliges members to achieve equality between men and women via a number of different legal means, such as through embodying this principle in national constitutions,<sup>18</sup> “repealing national penal provisions which constitute discrimination against women,”<sup>19</sup> and most notably with respect to women and the gacaca courts, establishing “legal protection of the rights of women on an equal basis with men...through competent national tribunals and other public institutions [to] effect protection of women against any act of discrimination.”<sup>20</sup> Essentially, the CEDAW imposes an affirmative legal obligation on Rwanda – and all other member states – to not only provide a remedial forum in which women may bring their grievances, but to ensure that this forum is able to “competently” administer justice and apply law in a manner that puts women on equal footing with men.

However, this provision does not directly address the problem that so often presents itself in post-conflict zones and precedes the equitable administration of justice; the first issue that must be addressed is whether women can realistically access the justice system at the outset, and whether or not the court systems and other forums that are in place are logically and

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<sup>15</sup> René Degni-Ségui (Special Rapporteur of the Commission on Human Rights), *Rep. on the Situation of Human Rights in Rwanda*. U.N. Doc. E/CN.4/1996/68 (Jan. 29, 1996).

<sup>16</sup> *Id.*

<sup>17</sup> Conventional on the Elimination of all Forms of Discrimination Against Women (CEDAW), art. 2, 1979.

<sup>18</sup> CEDAW, art. 2(a).

<sup>19</sup> *Id.* at art. 2(g).

<sup>20</sup> *Id.* at art. 2(c).

procedurally accommodating of some of the unique challenges women may face in bringing their claims. It is only once this hurdle is affirmatively cleared that one can ask whether the substantive justice women are getting puts them on equal footing with men. Thus, Article 2(c) of the CEDAW actually requires us to make a preliminary inquiry before discussions can be had and conclusions reached with respect to the substantive justice being applied.

In addition to the binding legal obligations that the CEDAW imposes with respect to women's access to justice, several United Nations Security Council resolutions urge UN member states to consider this issue in the peace-building and peace restoration process as a matter that is crucial to long term peace and security. UNSC Resolution 1820 is particularly relevant to the Rwandan case study, as it directly addresses the peace and security implications that are brought forth due to sexual violence perpetrated against women in warfare. Firstly, 1820 reaffirms the core message of UNSC Resolution 1325, which explicitly states the correlation of including women in the peace-building process and achieving long term security and harmony in post-conflict societies.<sup>21</sup> Secondly, 1820 recognizes that "sexual violence, when used or commissioned as a tactic to target civilian populations, can significantly exacerbate situations of armed conflict and may impede the restoration of international peace and security."<sup>22</sup> Because of the severe destabilizing effects of sexual violence, the resolution calls for states to categorize rape and other forms of sexual violence as war crimes or crimes against humanity, and "calls upon member states to comply with their obligations for prosecuting persons responsible for such acts, to ensure that all victims of sexual violence, *particularly women and girls*, have equal protection under the law and equal access to justice."<sup>23</sup> It further emphasizes that this obligation is absolutely critical to achieving "sustainable peace, justice, truth, and national reconciliation."<sup>24</sup>

When the CEDAW and UNSC resolutions 1325 and 1820 are read together, it is clear that international law imposes obligations upon states in a post-conflict period to provide accessible and equitable remedies for women who were victims of sexual violence during war. This is necessary for both safeguarding and promoting the importance of women's human rights and for achieving a sustainable reconciliation and long-term peace and security. As it pertains to the Rwandan genocide in particular, heinous war crimes including murder, rape, and other forms

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<sup>21</sup> U.N.S.C. Res. 1325 (Oct. 31, 2000).

<sup>22</sup> U.N.S.C. Res. 1820 at ¶ 1 (June 19, 2008).

<sup>23</sup> *Id.* at ¶ 4.

<sup>24</sup> *Id.*

of sexual violence were committed against Tutsi women by their fellow citizens – often by those who resided in the same villages or even neighbors. Because these atrocities were committed by individuals with whom the women and other victims would have to coexist again after peace was restored, it was imperative to make sure that women were in a position to receive the necessary justice so that the national healing and reconciliation processes could begin on firm footing.

### **3. Rwandan Women’s Access to Formal Courts**

#### *3.1 Logistical and Procedural Access to Justice in the Formal Courts*

This section will examine the preliminary inquiry that I argue is necessary to give full effect to CEDAW art. 2(c); if women’s rights are to receive equal legal protection to that of men in “competent national tribunals and other public institutions,” then it is first necessary to determine if women are able to access these forums of justice at all, and to analyze the obstacles that may stand in the way of doing so. Although the genocide occurred in 1994, it was not until the early 2000s that gacaca courts were established as alternative tribunals to hear genocide-related cases; further, it was not until 2008 that all dockets concerning rape and sexual violence cases were transferred to the gacaca tribunals. Thus, until 2008, most rape and sexual violence cases were heard in the formal, national court system. As discussed previously, the national court system was extremely overburdened and presented serious procedural and logistical accessibility hurdles for many women.

Like in most developing countries, the state court system in Rwanda is mostly located in urban centers, such as the capital, Kigali, or major provincial centers. The genocide wreaked havoc across the entire country, including in Kigali and in rural areas, as authorities in the capital openly encouraged ordinary citizens to attack and kill Tutsis to spread the genocide as geographically far as possible.<sup>25</sup> This led to a situation in which women who lived far from the capital were still required to physically travel there if they wished to bring their claim in the national courts, as it was necessary for them to present for the trial in order to testify and otherwise fully participate in their own quest for justice. Many women who would have needed to travel a great distance to the Kigali or provincial courts simply did not have the physical means to do so. Often times, their roles as wives, mothers, caregivers, and household managers did not permit them the flexibility to leave their homes and families for weeks, or even months, at a

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<sup>25</sup> GERARD PRUNIER, THE RWANDA CRISIS: HISTORY OF A GENOCIDE 247 (1999).

time.<sup>26</sup> Because communities had been decimated by the genocide, it would have been extremely difficult if not impossible for women to find friends or relatives to provide childcare for such an extensive period of time.<sup>27</sup> In short, it was neither logically practical nor feasible for many women to even attempt to travel to Kigali to bring their claims. Moreover, many of these women were widows and had lost not only the logistical support of a husband in the household, but also his financial support.<sup>28</sup> Most would have been without the necessary monetary resources to feed their families, let alone fund a trip to Kigali. Additionally, it is also possible that a woman's relatives would not have permitted her to travel to Kigali alone. These are issues that are essentially exclusive to women's ability to access justice in the state courts, and are largely due to existing structural inequalities and social discrimination. Because these issues disproportionately impact women in a discriminating matter, it is not possible to comply with article 2(c) of the CEDAW when they are widespread. This is because it is not possible to give women's legal rights equal protection to men's if it is not even logically possible for women to physically access the courts. Thus, such pre-existing forces must be properly ascertained and accounted for when nations in post-conflict periods are reconstructing their formal justice systems.

Another procedural hurdle that prevented and discouraged women from accessing the formal courts was their overall lack of familiarity and comfort with the system. Firstly, many women (although not all) lacked confidence in the national court system to handle their cases fairly and competently. Due to the government's actual and perceived role in the genocide, women's general outlook on the state courts was one of skepticism and distrust.<sup>29</sup> Secondly, although many NGO's and others in the international community were working with the Rwandan government to rebuild its court system, in the early years after the genocide, what remained of the judiciary had not undergone sufficient sensitivity training to be able to

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<sup>26</sup> Large numbers of lawyers and judges were either murdered in the genocide or fled Rwanda. As of November 1994, there were only 12 prosecutors and 244 judges in the country, compared to 70 prosecutors and 758 judges before the genocide broke out. NATIONAL SERVICE OF GACACA COURTS: GACACA COURTS IN RWANDA (2012). However, it is likely that even if the system had been operating at full capacity, it still would not have been able to process the hundreds of thousands of cases that would have come before it in a timely manner. Hollie Nyseth Brehm et al., *Genocide, Justice, and Rwanda's Gacaca Courts*, 30(3) J. of Contemporary Criminal Justice 333, 335 (2014).

<sup>27</sup> HUMAN RIGHTS WATCH, STRUGGLING TO SURVIVE: BARRIERS TO JUSTICE FOR RAPE VICTIMS IN RWANDA (2004).

<sup>28</sup> *Gender Justice*, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, <https://www.ictj.org/our-work/transitional-justice-issues/gender-justice>.

<sup>29</sup> HRW, STRUGGLING TO SURVIVE, *supra* note 27.

adequately handle traumatic rape cases.<sup>30</sup> Additionally, many women reported that they only wanted to discuss the facts of their cases with female police officers and female court staff, not with male prosecutors, who women viewed as too adversarial and as potentially unlikely to let them speak freely in court and tell their story in a way that they felt was best.<sup>31</sup> One can hardly fault women for having this concern, as prosecutors and other government officials have gone on the record stating that there were few rape cases brought by adult women in the state courts because actual rape cases were rare, as “an adult woman often participates in her own victimization,” citing instances in which a woman had talked to her rapist at some point before the attack.<sup>32</sup> The prosecutor for Kigali echoed this sentiment.<sup>33</sup>

Even if some women were able to circumvent these procedural issues, they may have faced a good deal of social stigma if they had decided to bring further attention to their rape by filing a claim with the national courts. There are reports are reports of unmarried young women and teenagers who were raped but chose not to bring a claim for fear they would get a reputation of being a “loose girl” and ruin their marriage prospects.<sup>34</sup> Married women also did not want to bring charges against their rapists for fear of having their husbands reject them, or remind them that the rape had occurred, lest they felt “unmanned.”<sup>35</sup>

Because of these procedural and logistical hurdles, as well as the accompanying social stigma, it was all but impossible for women, particularly those who were poor and lived in rural areas, to access the formal courts. If women are not able to first get through the courtroom door, then conducting an analysis of the level of protection women’s rights are receiving in the courts as article 2(c) of the CEDAW mandates is a fruitless exercise. In short, one cannot have a clear idea of how well women’s rights are being protected if a vast majority of women are unable to assert those rights in a court of law. This is why it is necessary to address any procedural and logistical inequities that may exist in judicial systems before turning to the substantive justice women are receiving. Looking at one part of the inquiry without the other can obfuscate the lived realities of discrimination that many women face in the course of receiving justice. If both parts of the inquiry are not thoroughly conducted and analyzed together, then the spirit of the CEDAW is

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<sup>30</sup> *Id.* at 31.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 34.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 27.

<sup>35</sup> *Id.*

violated, and it would be impossible to achieve the reconciliation and sustainable peace in the aftermath of sexual violence that UNSC Resolution 1820 demands.

### *3.2 Women’s Access to Substantive Justice in the Formal Courts*

Despite ratifying the CEDAW, adopting a new constitution in 2003, and modernizing the national civil code in the late 1990s and early 2000s, there was still a wide disconnect between rights Rwandan women legally possessed and those they could successfully assert in a court of law. Historically, women possessed few legal rights, and asserting those minimal rights in a state court was nearly unheard of. When women did bring cases, it was typically with respect to familial disputes or inheritance rights, which would have been handled in local community “courts” such as the pre-genocide iteration of gacaca. The lack of rights women possessed in Rwanda prior to the civil war was indicative of their position in society at large – deriving their entire social standing vis-à-vis their position to men and their communities as a whole. In fact, it was not until 1999 that the Civil Code gave male and female children of a civil marriage equal inheritance rights.<sup>36</sup> Because women’s traditional inferior legal standing to men was deeply entrenched in the national culture – as is the case in many developing countries – simply ratifying the CEDAW and adopting new legal frameworks and norms at elite levels of government did not bring the nation into compliance with article 2(c). Gaps in the Code of Criminal Procedure and the Penal Code, a new and lofty national constitution, lack of sensitivity training for court personnel, as well as women misunderstanding the legal burden they carried in their cases all presented significant, substantive barriers to women’s rights receiving equal protection in the formal courts.

In the haste to remodel certain sections of the Code of Criminal Procedure and the Penal Code after the genocide, gaps, as well as archaic laws held over from previous versions of the code, were left in the laws and adversely impacted women’s ability to bring their sexual violence cases. Rwanda’s Code of Criminal Procedure did not require victims’ names or other identifying information to be redacted from court documents.<sup>37</sup> Human Rights Watch reports that out of 50 transcripts dating from 1997-2003 from cases related to sexual assault that occurred during the genocide, nearly every woman’s name still appeared in the transcript, even after they had been

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<sup>36</sup> *Id.* at 3.

<sup>37</sup> *Id.* at 28.

made public.<sup>38</sup> Because women were reluctant to bring their claims in the first place out of fear of being stigmatized by their communities and families, the fact their names and intimate details about their lives and the attack would be made public further incentivized women to not seek redress in the formal courts. While the Rwandan Penal Code of 1977 prohibited rape and sexual torture, it did not define these terms beyond defining torture as “acts of barbarity.”<sup>39</sup> This led to considerable confusion for both judges and prosecutors and inconsistent verdicts; no judgment on a rape case from the genocide period offered a clear definition of rape.<sup>40</sup> The lack of clarity that existed among legal professionals is not a promising indicator of the level of understanding women likely had when they were trying to bring sexual violence claims. In some instances, the women themselves may not have known what constituted rape, as pre-genocide, there had been reports of women not knowing they possessed the right to refuse sex with their husbands.

Although the post-genocide national constitution, which was ratified in 2003, was explicit in bestowing upon Rwandan women equal rights to men under law under certain articles, it tacitly reinforced the discrimination women have faced under national law in other provisions. Many provisions of the constitution were crafted with the horrific effects of the genocide in mind; for example, article 15 states that “every person has the right to physical and mental integrity. No person shall be subject to torture...or degrading treatment.”<sup>41</sup> Article 16 goes on to state “All human beings are equal before the law, and shall enjoy, without discrimination, equal protection of the law.”<sup>42</sup> Other provisions explicitly ban discrimination based on sex<sup>43</sup>, and establish a Gender Monitoring Office, a permanent institution whose job it is to monitor compliance with gender equality programs and make recommendations for improvements.<sup>44</sup> Additionally, article 187 establishes a National Council of Women.<sup>45</sup> However, there are no

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<sup>38</sup> *Id.*

<sup>39</sup> Rwandan Penal Code (1977), art. 316. In 2012, a new penal code came into force, which included a definition of rape – “Rape means causing another person to engage in a non-consensual sexual intercourse by use of force, threat, or trickery.” Rwandan Penal Code (2012), art. 196. The Code also includes sentencing requirements, which for an individual who rapes another person over 18 years of age, is five to seven years imprisonment. *Id.* at art. 197. While this rape provision is still somewhat vague and imperfect, it is nonetheless an important step in providing a clarifying and publicly available legal definition of the crime.

<sup>40</sup> HRW, *supra* note 29.

<sup>41</sup> CONSTITUTION OF RWANDA 2003, art. 16.

<sup>42</sup> *Id.* at art. 15.

<sup>43</sup> *Id.* at art. 11.

<sup>44</sup> *Id.* at art. 185.

<sup>45</sup> *Id.* at art. 187.

guidelines in the constitution as to how these bodies should function; the constitution merely designates their creation, and stipulates that they are to be a creature of statute and other national legislation. While this is promising rhetoric for Rwanda to include in its constitution, the ability of these institutions to effect real, widespread cultural change is at the mercy of lawmakers, and may be subject to political whims depending on the governing party. Despite giving a legal guarantee that women possess equal rights, other provisions of the constitution reinforce traditional, patriarchal dominance. For example, article 22 states “the private life, family and home...shall not be subjected to arbitrary interference...”<sup>46</sup>; and article 27 requires the state to institute “appropriate legislation and institutions for the protection of the family.”<sup>47</sup> While these provisions seem gender neutral on their face, they are thinly veiled references to the traditional social order, in which the private and family domain was synonymous with women’s domain. Legal guarantees to “protect” the private life and the family are damaging to the enforcement of women’s equal rights, because “traditionally, the private sphere was considered out the ambit of law.”<sup>48</sup> If Rwanda’s constitution – its seminal, post-genocide principal legal framework – does not consistently ensure the protection of women’s rights in all parts of their lives, whether in the private or public spheres, then it will be exceedingly difficult to shift cultural perceptions that women’s rights and bodies deserve to be protected in courts of law, no matter if the violence perpetrated occurred during the genocide or in a peaceful period.

Women also held incorrect beliefs with respect to the burden of proof that the law put on them as complainants. As a result, women were reluctant to bring charges against their attackers, as they were not convinced the cases would ever be tried successfully. Many women believed that they were responsible for meeting the burden of proof and producing the evidence against their rapists, when in reality, this was the state prosecutor’s burden to carry.<sup>49</sup> Women were reluctant to report their rapes to the authorities in the first place, because they did not know the names or current locations of their rapists.<sup>50</sup> Moreover, since many years had passed since the

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<sup>46</sup> *Id.* at art. 22.

<sup>47</sup> *Id.* at art. 27.

<sup>48</sup> Rangita de Silva de Alwis, *Examining Gender Stereotypes in New Work/Family Reconciliation Policies: The Creation of a New Paradigm for Egalitarian Legislation*, 18 DUKE L.J. 305, 310 (2011).

<sup>49</sup> HRW, STRUGGLING TO SURVIVE, *supra* note 27, at 23.

<sup>50</sup> Even if a woman could positively identify her rapist, depending on what his militia affiliation was during the genocide, the government may or may not have made the decision to continue the prosecution. While members of the Interahamwe (the primary Hutu militia) were fervently prosecuted for rape and other war crimes, members of the rebel militia RPF (Rwandan Patriotic Front) – who were backed by the government who took control of the country

rapes occurred, women worried that without any physical evidence the prosecutors would not take their claims seriously.<sup>51</sup> Another concern was women's inability to identify eyewitnesses to the police, as they believed that if they could not supply the names of witnesses, then their cases would not stand up in court when the accused rapist inevitably pled not guilty to the rape. Others were confused about the duties of conduct the law put on them during the attack itself. For instance, one woman did not want to take her case to the formal courts because she had not cried out for help during the rape or tried to resist; when discussing the rape with an interviewer from Human Rights Watch, the anonymous woman said, "Here in Rwanda, if you do not cry out during an attack, you cannot complain later...the man who raped me will say 'why didn't you shout for help?'"<sup>52</sup> The 1977 Penal Code, which was in effect at the time genocide-related sexual assault cases were being heard in the state courts, did not even provide a statutory definition for what constituted rape, much less include any stipulations about any burdens of conduct the victim may carry. Women were also highly skeptical of the formal courts' ability to apply the nation's substantive laws to them because of actual or perceived stereotypes of the system, such as that courts did not always apply the law as written, or that the laws were written to only favor the wealthy and powerful people in society.<sup>53</sup> While women's beliefs about their legal rights, duties, and burdens of proof were unfounded, nevertheless they were pervasive and ultimately impacted the substantive justice that women received in the formal courts. Although the legal norms in Rwanda were beginning to change post-genocide, ordinary women were not educated in or informed of their new rights or what was legally required of them when bringing a claim. Instead, women had no choice but to rely on outdated and fundamentally incorrect conceptions that were still very much mired in a culture that had oppressed their rights and abilities to seek legal recourse, which is violation of the principles of the CEDAW, as well as in direct contravention to UNSC Resolution 1820.

#### **4. Women's Access to Justice in the Gacaca Courts**

##### *4.1 Women's Procedural and Logistical Access to Justice in the Gacaca Courts*

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after the genocidal Hutu government was foisted from power – were also said to have committed rape and other atrocities. The government has since been criticized for not permitting the unfettered prosecution of alleged RPF war criminals. HUMAN RIGHTS WATCH, RWANDA: JUSTICE AFTER GENOCIDE – 20 YEARS ON (2014).

<sup>51</sup> *Id.* at 24.

<sup>52</sup> *Id.* at 29.

<sup>53</sup> International Development Law Organization, *Accessing Justice: Models, Strategies, and Best Practices on Women's Empowerment* (2013) at 16.

When the gacaca courts officially ended in 2012 following the conclusion of their decade-long mission of hearing and handing down punishments in hundreds of thousands of genocide-related cases, the Rwandan government declared that the system had successfully served its purpose of bringing reconciliation focused justice to the Rwandan people. While there may have been fewer procedural and logistical hurdles for women to clear than in the formal courts, the community based approach of gacaca did not solve the problems entirely. In some instances, procuring justice in the gacaca courts created new and different obstacles. While many, including President Paul Kagame, praised the gacaca courts for their ability to heal the nation and mend its social fabric through traditional reconciliatory and restorative justice<sup>54</sup>, the opinions of women who had their cases heard in gacaca courts are split. Additionally, it must be noted that, as discussed previously, the iteration of gacaca courts in the post-genocide period differed in many fundamental ways from the traditional gacaca courts that both improved procedural accessibility for women and hampered it.<sup>55</sup> For example, many women were elected to serve as judges, whereas this was not permitted in traditional gacaca. In many instances, community participation in the trials was legally mandated.<sup>56</sup> Perhaps most importantly, the new gacaca system focused much more heavily on the type of retributive justice that was found in the formal court system, rather than the purely restorative justice that culminated in the sharing of a picnic as in traditional gacaca.<sup>57</sup>

One positive difference for women's logistical accessibility of the courts was that the trials most often occurred locally, thus eliminating the requirement that women travel long distances, which in turn eliminated the financial and childcare strains that a journey to a formal court would have put on a woman's household. Because entire communities were encouraged to attend gacaca hearings, it may not have been necessary for women to find childcare at all; rather, they would have been permitted to bring their children to the hearing, and leave them in the care of a family member or friend who was also in attendance. Gacaca courts operated at three different levels of geographic administration, in order from most to least common/local – the

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<sup>54</sup> In a 2002 speech, President Kagame emphasized the necessity that all Rwandans support and participate in the gacaca courts, stating that “justice that reconciles Rwanda will be a fertile ground for unity and a foundation for development.” President Paul Kagame, Public Address Regarding the Launching of Gacaca Courts (June 18, 2002).

<sup>55</sup> Brehm et. al, *supra* note 26 at 336.

<sup>56</sup> There are reports of fines being levied on adults who did not attend gacaca hearings or participate in the trials. MARC SOMMERS, STUCK: RWANDAN YOUTH AND THE STRUGGLE FOR ADULTHOOD 100 (2012).

<sup>57</sup> *Id.*

cell, sector, and appeal levels. While cell courts were the most common,<sup>58</sup> cases relating to rape and sexual torture were held at the sector level, of which there were 1,545 courts nationwide.<sup>59</sup> While this meant that some women likely did have to travel to have their cases heard, the sector courts would not have been nearly as far as for the formal courts. Additionally, trials in the gacaca courts lasted on average from one to three days, whereas women sometimes had to wait weeks or months before their case could be heard in the formal courts.<sup>60</sup> This eliminated the prohibitive unpredictability of court scheduling that women faced if they had been able to travel to state courts at all; with gacaca there was an essential guarantee that the case would be heard and a judgment handed down in a timely manner.

While some women did not personally mind the necessity of testifying in a formal courtroom in front of male prosecutors and judges, others were taken aback by the adversarial nature of the system, and did not feel like the formal courts functioned in a way that would permit them to tell their story.<sup>61</sup> In other words, some women were not comfortable with hearing prosecutors couch their stories in terms of statutory violations as opposed to framing the discussion in terms of violations of their human rights and bodily integrity. Many women were glad when the state transferred all rape and sexual violence cases to the gacaca courts in beginning in 2008, as they felt that this move permitted them to “speak more freely” while being less focused on unfamiliar formalities.<sup>62</sup> To reduce the adversarial nature of proceedings, there were no lawyers or prosecutors present at gacaca hearings.<sup>63</sup> Instead, during trials, women sat between the gacaca judges,<sup>64</sup> who were dressed in sashes the colors of the Rwandan flag, and the community members present, while the accused across from her on the other side of the room or

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<sup>58</sup> There were 9,013 of them across the country. *Id.*

<sup>59</sup> NATIONAL SERVICE OF GACACA COURTS, *supra* note 26, at 43.

<sup>60</sup> *Id.* at 45.

<sup>61</sup> See generally United Nations Development Programme, UN Women, and UNICEF, *Informal Justice Systems: Charting a Course for Human Rights-Based Engagement* (2013) (recommending that informal justice systems remove or reduce the adversarial proceedings seen in the formal courts to provide more familiar and more reconciliatory forms of justice).

<sup>62</sup> HUMAN RIGHTS WATCH, JUSTICE COMPROMISED: THE LEGACY OF RWANDA’S COMMUNITY-BASED GACACA COURTS (2011).

<sup>63</sup> Some human rights organizations criticized the lack of lawyers as a violation of the accused’s rights, especially given the weight that was afforded to confessions in sentencing. The earlier the accused confessed to committing the crime, the lighter his sentence. Thus, defendants were incentivized or may have been unduly coerced to confessing to a crime they hadn’t committed to avoid further stoking community outrage and longer jail sentences, and may have succumbed to this pressure more easily without an attorney present. Brehm et. al, *supra* note 26, at 338.

<sup>64</sup> Gacaca judges were called *inyangamugayo*.

field.<sup>65</sup> Without prosecutors to create their own narratives of the cases and lead the questioning of witnesses, the gacaca format proceeding in the following way: women were prompted to tell their story in the manner they thought best, and judges would occasionally interrupt to ask questions or prompt victims to discuss certain parts of the story in greater detail. Members of the community were also asked to participate when they had pertinent information about a particular circumstance in the story or had been an eyewitness.<sup>66</sup>

While some women were more comfortable with the gacaca procedural format and found it more easily accessible than the formal courts, a number of women were still reluctant to bring their claims. Gacaca courts had similar confidentiality problems to the formal courts; because gacaca hearings were public – in fact, the whole purpose of gacaca courts was to get the communities involved with justice to promote reconciliation – women were required to testify in front of the public so that they could speak up if needed to support the victim’s story. A large portion of women were reluctant to relive the trauma of their rapes in front of loved ones, acquaintances, and strangers. Although public hearings were meant to help whole communities sympathize with victims and the trauma they experienced, as discussed above, archaic and patriarchal ideas about women who were raped and their responsibility in the rape still ran rampant in traditional communities.<sup>67</sup> Understandably, women did not want to open themselves up to the possibilities of re-traumatization or the ridicule, scorn, and judgment of their communities. Such an outlook would only have served to further divide communities and isolate the victims – quite the opposite results of what gacaca intended to accomplish. Following reforms that were made to the gacaca tribunals by the Organic Law of 2004 to make the courts more procedurally friendly to victims of sexual violence, women were permitted to give testimony to judges in closed-door proceedings if they were not comfortable with a fully public trial.<sup>68</sup>

However, women felt that this did not solve the problem. Because hearings usually took place locally and respected community member served as judges, communities would know when the gacaca judges were in session, and would speculate as to the nature of the trial if it took

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<sup>65</sup> Brehm et. al, *supra* note 26, at 337.

<sup>66</sup> NATIONAL SERVICE OF GACACA COURTS, *supra* note 26, at 46.

<sup>67</sup> HRW, *Justice Compromised*, *supra* note 53.

<sup>68</sup> Shannon E. Powers, *Rwanda’s Gacaca Courts: Implications for International Criminal Law and Transitional Justice*, 15(17) AMERICAN SOC’Y FOR INT’L LAW 2 (2011).

place behind closed doors. Critics of this new closed-door policy complained that gacaca courts derived their legitimacy from public participation, an element that was eradicated when hearings took place in private. They argued that without public participation, gacaca trials consisted only of laymen-judges – who had had no legal training beyond the meager amount that the state had given them prior to the start of the trials – administering their conception of justice without the ability to get input from community members. Furthermore, without public participation and inclusion, community healing could not occur.<sup>69</sup> On a broader level, women were also concerned about the gacaca judges’ ability keep certain facts of their cases confidential, as it was theoretically possible for the judges to be distant relations or friends with the defendant in small communities.<sup>70</sup>

To help combat these concerns, two procedural mechanisms were introduced into the gacaca courts. First, women were permitted to disqualify a judge from sitting on the bench for her hearing or trial, without having to affirmatively prove any bias or conflict of interest. Second, women could choose to write letters to the tribunal instead of appearing in person, and appoint a designated coordinator to read it aloud to the court.<sup>71</sup> Additionally, women were permitted to have a trauma counselor (when one was available) or a close friend or family member sit with them during the trial to help comfort them. None of these procedural tools were available to women in the formal courts. While there were many aspects of gacaca that made the informal system more procedurally and logically accessible to Rwandan women than the formal courts, there were still some problematic elements that dissuaded women from bringing their cases to gacaca, thus dissuading them from fully exercising the rights given to them under Rwandan law and the CEDAW.

#### *4.2 Women’s Substantive Justice in the Gacaca Courts*

While the standard narrative is that women are more comfortable bringing their cases in informal courts than formal courts because of the presence of familiar people, symbols, and

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<sup>69</sup> HRW, *Justice Compromised*, *supra* note 53.

<sup>70</sup> *Id.* The Organic Law of 2004 prohibited judges from serving on panels for trials involving “a person that is his/her spouse or relation up to the second degree, an individual with whom there is a serious dispute or enmity, an individual with whom he/she has friendly relations, or an individual for whom he/she was a guardian.” NATIONAL SERVICE OF GACACA COURTS, *supra* note 26, at 35. Despite this, smaller communities were often close knit, and following this law in its strictest sense may have been impossible in some cases. Therefore, women were often concerned that confidential information from their hearings could become fodder for gossip.

<sup>71</sup> HRW, *Justice Compromised*, *supra* note 53.

applied customary law<sup>72</sup>, the reality is that the customary law traditionally applied in these courts is “the product of the dominance of patriarchal social structures that has historically contributed to women’s subordination and pervasive discrimination against women.”<sup>73</sup> Laws and practices that directly perpetuate inequities such as the “economic dependence of women on men, women’s lack of mobility, their lack of [access] to the public sphere, and their lack of decision-making power within the household and family”<sup>74</sup> have no place in informal courts that are operating in countries that have legal obligations to implement the CEDAW and follow the directives outlined in UNSC Resolutions 1325.<sup>75</sup>

The Rwandan government was aware that the traditional gacaca courts were not equipped to handle cases as serious and as complicated as those related to the genocide, particularly cases relating to rape and sexual violence. To compensate for this, the government supplied the elected gacaca court judges with a written code of possible charges for defendants, definitions of different crimes ranging from murder and sexual violence to property damage, along with corresponding jail sentences and other punishments.<sup>76</sup> Because gacaca judges were elected laypersons, the government invested resources into providing legal training to prepare them for the judicial duties of administering trials, assessing evidence, and applying the new code. While these moves to standardize the substantive justice applied in the gacaca courts was intended to benefit women complainants – and many of the practices and policies implemented were a positive improvement over the customary laws that would have been applied in traditional

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<sup>72</sup> Based on discussions in prior sections of this paper, it is clear that the narrative as to which court system women prefer cannot be generalized, as many women would have preferred to bring their cases in the formal courts as a way for the state to recognize the violations of their rights and legitimize the justice by sanctioning the offender accordingly under national legal codes. Some of these women (along with many critics) felt that handing serious rape cases off to the gacaca courts trivialized the crime. However, other women felt more comfortable in the gacaca courts because of the familiarity that system offered.

<sup>73</sup> 6 Sunila Abeysekera, *Gender Equality and Women’s Human Rights in Conflict Situations: Evolving Perspectives*, in RETHINKING TRANSITIONS: EQUALITY AND SOCIAL JUSTICE IN SOCIETIES EMERGING FROM CONFLICT 47 (Gaby Oré Aguilar & Felipe Gómez Isa eds., 2011). See also IDLO, *Accessing Justice*, *supra* note 53 (arguing that although studies show women in developing countries are more likely to view informal courts as more fair than formal courts, informal courts reinforce practices that are harmful to women, and may not even consider serious offenses committed against women, such as gender-based violence, to be a serious crime.).

<sup>74</sup> *Id.*

<sup>75</sup> As mentioned above, UNSC Res. 1325 encourages all nations to “ensure increased representation if women at all decision-making levels in national, regional and international institutions and mechanisms for the prevention, management, and resolution of conflict.” S.C. Res. 1325, ¶1 (Oct. 31, 2000). This goal cannot occur if the “justice” women are receiving is couched in customary and discriminatory laws that greatly restrict their access to the public sphere and other forums in which conversations concerning peace and security are occurring.

<sup>76</sup> NATIONAL SERVICE OF GACACA COURTS, *supra* note 26, at 41.

gacaca, such as permitting women to serve on the gacaca bench – some of them had unintended consequences that negatively impacted the substantive justice that women received.

One of the most critical ways in which post-genocide gacaca courts differed from traditional gacaca was that the written legal code required tribunals to implement specific punishments for all the crimes the code recognized. Mandated sentences included life imprisonment and the permanent revocation of civil rights for “planners, organizers, and instigators” of the genocidal crimes of murder and rape, with the possibility of reduced jail sentences with a confession made prior to or early in the trial.<sup>77</sup> Punishments were similarly harsh for “accomplices” and those who had committed serious offenses with the intent to cause harm or kill. Nearly every serious offense, particularly rape and sexual torture, carried with it a sentence of length imprisonment. While the Rwandan government made the conscious policy decision that putting those who were responsible for violent crimes during the genocide in jail was the priority for gacaca justice, this sort of retributive punishment was the antithesis to the sort of justice gacaca historically provided. In other words, the government’s ideas of how to punish to achieve reconciliation via community-based justice differed sharply from traditional ideas of how to achieve the same goal. In response to this, it is certainly correct to point out that the crimes traditional gacaca dealt with (e.g. family and property disputes) differed dramatically in scope and scale from the crimes that arose out of the genocide. However, in the traditional model, punishments were meted out at the discretion of the tribunal’s judges and were individualized to both compensate the victim in a way that would make her whole based on her personal circumstances *and* reconcile the community or family after a dispute.

While gacaca courts did manage to blend retributive justice with restorative justice by harnessing traditional elements such as community participation,<sup>78</sup> the sentences handed down did not take into account the individual needs of the victim, and the outcome that would have been most helpful in making her whole again.<sup>79</sup> Some scholars have praised the gacaca courts for being able to hand down sentences that “reflected the severity gradient intended by the basic

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<sup>77</sup> *Id.* at 50.

<sup>78</sup> CLARK, *supra* note 1 at 78.

<sup>79</sup> Of course, it is necessary that sentences for crimes committed during a genocide must meet international standards (which call for imprisonment) and must not be so lenient as to trivialize the crime committed and insult the victim’s right to see her attacker adequately punished. However, I argue there are other means of achieving justice that should be considered in conjunction with imprisonment – means which may help a victim and her family heal and move on with their lives in a more direct way than just imprisoning the criminal.

categorization scheme.”<sup>80</sup> While this may have been so, it is also arguably true that the punishment and sentencing schema in place did not adequately consider other punishments that had been common in non-retributive justice systems. In traditional gacaca, many of the punishments involved the paying of fines to a victim and her family or the giving of gifts to symbolize the restoration of trust between the parties, with monetary reparations being a highly valued solution to help the financial position of the victim’s household.<sup>81</sup>

While it may offend western conceptions of justice to require payment of reparations to a victim after her rape or assault, one of the chief complaints of gacaca punishments was that compensation was not available.<sup>82</sup> Given that a large portion of the Rwandan population earns a living through subsistence farming and is poor, many women viewed reparations afforded to them in traditional gacaca as “a tangible punishment that would recognize their suffering and would help them in their daily lives.”<sup>83</sup> Although there would have been logistical issues because in all likelihood, the perpetrators of the genocide would not have been financially able to pay victims a sum that would have even begun to reflect the atrocities they experienced, this was a main complaint for many women.<sup>84</sup> Additionally, some women expressed concern that if they were to bring their rape cases in the gacaca courts the defendant would be jailed, which would further divide the community, and create malice in and impoverish the defendant’s family, as the primary breadwinner would be lost. Women who held this view felt that such an outcome would not help in reconciling the community, and would only make tensions worse.<sup>85</sup>

For the gacaca tribunals to be effective in meting out consistent and fair substantive justice, the Rwandan government needed to provide extensive training to the laypersons elected

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<sup>80</sup> Brehm et al., *supra* note 26, at 346. The Organic Law that established the gacaca courts categorized perpetrators and crimes committed in the genocide into three categories, the first containing leaders and organizers of the genocide and those who committed rape and sexual torture, the second containing “notorious murderers” who killed or tortured, and the third those who committed property offenses.

<sup>81</sup> Max Rettig, *Truth, Justice, and Reconciliation in Postconflict Rwanda?*, 51(3) AFRICAN STUDIES REV. 25, 47 (2008).

<sup>82</sup> HRW, JUSTICE COMPROMISED, *supra* note 53.

<sup>83</sup> *Id.*

<sup>84</sup> To address this problem, the Rwandan government set up the Fund for the Assistance and Support of Genocide Survivors (FARG), whose premise was to provide money to victims for children’s school fees, medical attention, build houses, and support other income-generating activities. First established in 1998 and then overhauled in 2008, FARG has been significantly hampered due to it constantly being plagued by fraudulent claims. There has also been controversy over who is eligible to receive funds, as eligibility was sharply divided among ethnic lines and it did not consider interpersonal relationships between the groups when awarding funds. HRW, JUSTICE COMPROMISED, *supra* note 53.

<sup>85</sup> *Id.*

as gacaca judges. To be elected to serve as a judge, individuals did not have to have any background or experience with the law; nor did they need to be familiar with the CEDAW, Security Council resolutions or any other of Rwanda's international obligations that required the equal protection of women's rights in courts and their inclusion in peace-making processes. All that was required was to be elected as a gacaca judge was: 1) to be of Rwandan nationality; 2) to have residence in the area where one was running to be judge; 3) to be at least 21 years of age; 4) to be a person of good morals and conduct;<sup>86</sup> 5) to be truthful and characterized by a spirit of speech-sharing; 6) not to have been sentenced to a penalty of more than six months in prison; 7) not to have participated in the genocide; 8) to be free from sectarianism; and 9) to have no history of dismissal for indiscipline.<sup>87</sup> Government policy also stipulated that at least one-third of judges were to be female.<sup>88</sup> While there is debate amongst scholars as to whether establishing quotas for women's participation in the public sphere, whether it is in the legal profession or in the government, is an effective way to combat discrimination against women<sup>89</sup>, it is likely that the physical appearance of women on the bench in the gacaca tribunals helped to put women who had to bring their cases in the courts at ease.<sup>90</sup>

Following their initial election in 2002, all 250,000 judges that had been elected needed to undergo training to equip them to effectively administer gacaca justice. Although the first round of training occurred in 2002, the judges were retrained in 2004 following the implantation of a new Organic Law that updated the justice guidelines. At this time, judges received training in thirteen different areas, including reconciliatory justice, conflict prevention and resolution, how to assist individuals traumatized during the gacaca hearings, and how to assist a victim of

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<sup>86</sup> It is unclear what exactly having "good morals" meant. Did those running for judge interpret this to mean having respect for women's equal rights? Or enforcing traditional social paradigms that had long been the bedrock of their societies (which more often than not did not bestow upon women equal legal rights)?

<sup>87</sup> NATIONAL SERVICE OF GACACA COURTS, *supra* note 26, at 51-52.

<sup>88</sup> Some districts had higher percentages of female judges than this, and others had fewer. UNDP, *Informal Justice Systems*, *supra* note 53, at 104.

<sup>89</sup> In 2009, the CEDAW Committee, in its concluding observations, commended Rwanda for enshrining in its 2003 Constitution quotas for women's representation in Parliament. Out of 80 members of Parliament, the Constitution stipulates that 24 of them must be women (notably, the language does not say "*at least* 24 must be women.") CONSTITUTION OF RWANDA 2003, art. 76. The CEDAW Committee also encouraged the country to apply these same temporary special measures in other areas of civilian life to promote women in leadership roles, such as in academia and "decision-making posts in economic life." CEDAW Committee, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Rwanda*, CEDAW/C/RWA/CO/6\* (Sept. 8, 2009).

<sup>90</sup> *Id.*

rape.<sup>91</sup> Although this sensitivity training was a good start and was touted by the government as a success, the reality is that training periods were extremely brief and only occurred every two or so years, usually lasting from a couple of days to a couple of weeks; multiple presentations had to be packed into this very narrow timeframe, covering a wide variety of topics. This, combined with the fact that many judges had no formal education, their own biases, and the complexity of genocide cases and the ambiguity of gacaca law, makes it difficult to imagine that this training was sufficient for dealing with cases as sensitive as rape.<sup>92</sup> Once rape cases were permanently transferred to gacaca's jurisdiction in 2008, judges again underwent sensitivity training, wherein they were trained in how to handle the procedural aspects of sexual violence cases; they were also trained via role-playing exercises conducted by Rwandan lawyers and trauma counselors for around the country to provide them with more sensitivity training.<sup>93</sup> Women were also permitted to have trauma counselors accompany them to their trials; however, there were not enough counselors to cover the necessary ground. Although the Rwandan government was proud of its efforts to provide gender sensitivity training to its elected judges, the hesitancy and reservations that many women expressed about bringing their sexual violence cases to gacaca courts indicates that these measures to ensure women's legal rights received equal substantives protection did not go far enough.<sup>94</sup>

## 5. Conclusion

The 1994 genocide and preceding civil war decimated Rwanda's judicial infrastructure at a time when access to justice was critical to help the nation begin to reconcile and heal after its population had experienced unimaginable horrors and human rights violations. Rwanda was faced with the daunting task of simultaneously rebuilding its infrastructure and trust between citizens, all of which needed to be accomplished in an efficient, timely manner and be in compliance with Rwanda's international legal obligations under the CEDAW and the United Nations Security Council Resolutions 1325 and 1820. Not only did Rwanda have legal

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<sup>91</sup> NATIONAL SERVICE OF GACACA COURTS, *supra* note 26, at 73-74.

<sup>92</sup> HRW, JUSTICE COMPROMISED, *supra* note 53.

<sup>93</sup> *Id.*

<sup>94</sup> In its concluding observations from 2009, the Committee on the Elimination of Discrimination Against Women commended Rwanda for its inclusive efforts to reconstruct the nation after the genocide, but expressed concern that women's involvement and participation in the nation's post-conflict development was still too limited. It also expressed concern over whether women who had been victims of sexual violence during the genocide were given equal access to justice, and that "appropriate protection and support may not have been guaranteed for all women...within the framework" in which Rwanda was operating. CEDAW Committee, *Concluding Observations*, *supra* note 81, at ¶23.

obligations to meet these benchmarks, but they also needed to be adhered to in both the formal national courts and the informal gacaca courts on a massive scale. The CEDAW's language, particularly in article 2(c), encourages member states to eliminate discrimination against women by giving their rights equal legal protection to that of men in "competent national tribunals," suggests that nations should focus their attentions on the substantive protection of women's rights – such as the rights they legally possess, their ability to successfully assert those rights, and have them protected in consistent and competent ways such that the laws being applied to them are not discriminatory.

However, this is a somewhat narrow view of the work that needs to be done and the questions that need to be asked to truly put women's legal rights on equal footing to that of men. First, there needs to be a preliminary inquiry that assesses women's ability to gain procedural and logistical access to the courts; if women cannot physically access the tribunals, or do not feel comfortable doing so due to procedural shortcomings, then the substantive justice being applied in the courts can never be truly equal, as it will essentially be off limits to a large portion of women. The CEDAW calls for equal legal protection for all women's rights – not just the rights of women who are able to access courts. Second, the substantive remedies that are offered to women must also be taken into account; while punishments for convicted defendants must meet international legal standards, it is also important to consider if those remedies would achieve the restorative justice and reconciliation goals that judicial systems in post-conflict situations value so highly. This is especially true for informal courts like gacaca.

## **6. Recommendations**

There are many lessons to be learned from Rwanda's efforts to bring justice to women who were victims of sexual violence during the genocide. This section will draw on the measures that were undertaken with respect to Rwanda's formal and informal court systems to make normative recommendations for the consideration of other post-conflict societies who aim to restore peace through justice and reconciliation in the wake of widespread sexual violence via formal and informal courts. Implementing policy based on these lessons will go a long way in ensuring long-term peace and security for women and the nation as a whole.<sup>95</sup>

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<sup>95</sup> There are also lessons to be learned from other peace-building processes following the widespread perpetration of sexual violence against women during times of conflict, particularly in Sierra Leone. Following ten years of civil war in the 1990s, a Truth and Reconciliation Committee was established to help identify the human rights violations

Keeping in mind that nations who are signatories to the CEDAW and members of the UN are legally obligated incorporate not only the plain language of CEDAW article 2 and UNSC resolutions 1325 and 1820, but also the spirit, intent and purpose:

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that had been committed against women, and begin conversations as to how to go about reconciling the population. 13 Estelle Zinsstag, *Sexual Violence Against Women in Armed Conflicts and Restorative Justice: An Exploratory Analysis*, in FEMINIST PERSPECTIVES ON TRANSITIONAL JUSTICE: FROM INTERNATIONAL AND CRIMINAL TO ALTERNATIVE FORMS OF JUSTICE 206 (Martha Albertson Fineman & Estelle Zinsstag eds., 2013). The TRC found that women had been subjected to “killing, rape, sexual slavery, trafficking, forced pregnancy” and many other horrific types of sexual violence throughout the duration of the conflict. Truth and Reconciliation Commission, *Sierra Leone, Witness to Truth: Report the Sierra Leone Truth and Reconciliation Commission* 2 (2004). To achieve national reconciliation and give effect to UNSC res. 1325 and 1820, Sierra Leone implemented the National Action Plan (NAP). Although Sierra Leone recognized that women had been victims during the conflict, it also recognized that women’s power could be harnessed as a force for future peace and stability, if they were properly included in different facets of post-conflict society. The NAP took a multipronged approach that included both prosecuting women’s tormentors to the fullest extent of the law, while simultaneously encouraging women’s participation in the public sphere. NAP recognized that although it had a lot of potential to improve Sierra Leone’s peace and stability, one of the major challenges was that its efforts be “sustained by actualized political will, adequate funding, and sheer commitment from all stakeholders to move the process forward.” *The Sierra Leone National Action Plan for the Full Implementation of United Nations Security Council Resolutions 1325 and 1820*, at 35, [http://www.peacewomen.org/sites/default/files/sierra\\_leone\\_nap.pdf](http://www.peacewomen.org/sites/default/files/sierra_leone_nap.pdf). If women’s social and legal status is to be improved, and their vulnerability to being victims in future conflicts minimized, then it is essential for nations to undertake a multipronged approach. Not only must women’s rights be safeguarded, but cultural attitudes towards women must also shift in the long term. Rwanda faced, and continues to face, many of these same obstacles.

There are also lessons to draw upon from peace-building processes in East Timor, which experienced an extended period of violence and conflict around the same time as Sierra Leone and Rwanda, throughout the 1990s. In the wake of the conflict, CAVR (Commission for Reception, Truth, and Reconciliation) was formed. Like in Rwanda’s gacaca courts, East Timor’s goal in establishing CAVR was to encourage national healing via community-based justice. This served dual purposes by providing a platform that gave victims a familiar place in which to tell their stories, and prosecute crimes more quickly than in the formal courts. Patrick Burgess and Galuh Wandita, *Reaching Out to Victims and Communities: The CAVR’s Experience in East Timor*, in TRANSITIONAL JUSTICE, CULTURE, AND SOCIETY 148 (Clara Ramirez-Barat, ed. (2014)). The CAVR also had a specific division to educate victims and communities about CAVR’s mission, facilitate group discussions at a village level, and assist survivors by referring them to appropriate government agencies. *Id.* at 150. CAVR also built partnerships with existing grassroots organizations such as women’s groups, church representatives, youth groups, and local leaders. These relationships were necessary to convey CAVR’s organizational message to as many people as possible via word of mouth, and to convey a sense of familiarity and comfort when asking people to come forward with personal stories of rights violations. *Id.* at 152. This sort of partnering with local influencers was critical in getting people to trust the system and ensuring maximum community participation in the healing process. Integration with existing local groups was something Rwanda could have done better when instituting gacaca courts, and is a lesson that nations who need to rebuild peace, security, and encourage reconciliation should consider in the future.

- First and foremost, include a diverse and critical mass of women<sup>96</sup> at the table when discussions are occurring for how existing state courts will be restructured and how new informal courts will be established in the wake of widespread sexual violence.<sup>97</sup>
- Consider women’s logistical access to justice and their access to substantively equal justice to be of equal importance.
- Make it easier for women who do not live close to formal courts to access them, such as by subsidizing travel costs, providing on-site childcare at the courts, or by instituting traveling circuits of judges to more rural areas.<sup>98</sup>
- Update all procedural and substantive national legal codes to eliminate gaps in order to ensure uniform legal definitions for crimes like rape and to protect victims’ privacy.
- Increase the number of female police officers, female court personnel, and female prosecutors, lawyers, and judges such that women feel more comfortable engaging with what is otherwise an unfamiliar court system and unfamiliar people.
- Reduce the adversarial nature of proceedings in formal courts for sexual violence cases by changing the format of proceedings, such as by permitting women to make uninterrupted statements about their experience.
- Educate women on the rights they legally possess and may assert by sending teams of lawyers and counselors to areas where education and literacy rates for women and girls are low.<sup>99</sup>

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<sup>96</sup> It is critical not to essentialize or tokenize women, as women come from many different walks of life and as a result will have different perspectives and concerns regarding the implementation of justice. These diverse needs will not be reflected if there is not a diverse group of women involved in the conversation. Additionally, there needs to be a critical mass of women or else there is a large risk that the male-dominated forum will influence women’s ability to assert a more progressive agenda, speak up for women’s needs lest they be pigeonholed into the role of only speaking on women’s issues. UNDP, *Informal Justice Systems*, *supra* note 53, at 104.

<sup>97</sup> UNSC Res. 1325 demands women’s participation in post-conflict peace talks to bolster long-standing peace and security; this is even more critical when there have been human rights violations such as those highlighted in UNSC Res. 1820.

<sup>98</sup> This would permit women who do not live close to formal courts to truly be able to forum shop and decide in which forum, formal or informal, they would most like to bring their case.

<sup>99</sup> While educating women on their rights is of vital importance to ensuring access to justice, I would also note that focusing on education alone while not improving accessibility of other aspects of the system would be placing the burden on victims to assert their own rights. An equal, if not greater, burden should be placed on educating judges and other actors who are already within the legal system. Not only is it logically easier to train justice officers than some rather abstract group of women, but it will also serve a dual purpose of alerting justice officers to flaws in the legal code as well as their own personal biases. Education and other systemic reforms must be undertaken simultaneously to have their full effect.

- Provide more thorough sensitivity training to officers of justice, including judges, lawyers, and prosecutors.
- In informal, community-based courts, provide similar sensitivity training to citizens who will be attending the trials to help combat patriarchal and archaic conceptions of women who are raped.
- Ensure that training of layperson judges is as complete and thorough as possible in the relatively short period of time set aside for the training, and that all judges are consistent in their understandings of how to administer trials and apply the legal code they are given.
- Increase the number of trauma counselors available in informal courts.
- Provide informal tribunals with an observer who is a legally trained professional to ensure the women complainants are treated with dignity, citizens in attendance remain orderly, and that judges exhibit the skills and competence in which they were trained.
- Form relationships with existing local support groups, such as women's organizations and churches, to help spread the word about the benefits of community-based justice in achieving reconciliation and to increase victims' levels of comfort and familiarity before sharing their personal stories in the informal courts.
- Allow judicial discretion in informal courts to hand down punishments that are in accordance with traditional ideas of restorative and reconciliatory justice, in addition to retributive punishments mandated by the state.
- Institute national programs that challenge traditional stereotypes of women, and that encourage citizens to realize that women have valuable and necessary voices and perspectives to add to post-conflict development discussions.

**PUTTING THE PEACE BACK INTO THE PEACE AND SECURITY AGENDA:  
HOW THE ABSTRACT PRINCIPLES OF SECURITY COUNCIL RESOLUTION 1325 CAN  
BUILD AND PRESERVE PEACE OUTSIDE CONFLICT**

Teresa Akkara

## **1. Introduction**

On October 31, 2000 the United Nations Security Council adopted Resolution 1325, a resolution that has been appropriately lauded as a milestone in addressing violence against women in armed conflict and in promoting the agency of women during armed conflict. The resolution

“[reaffirm[ed] the important role of women in the prevention and resolution of conflicts and in peace-building, and stress[ed] the importance of their equal participation and full involvement in all efforts for the maintenance and promotion of peace and security, and the need to increase their role in decision-making with regard to conflict prevention and resolution.<sup>1</sup>”

The four pillars of resolution 1325 – prevention, protection, participation, and recovery – have spawned seven subsequent resolutions in promotion of women, peace, and security<sup>2</sup>. Dedicated advocates have ensured that there have been significant successes in the implementation of 1325 and its progeny<sup>3</sup>, and despite the increased visibility of conflict on the international stage, the “actual number of conflicts and the number of civilians affected by conflict has drastically reduced.<sup>4</sup>” Though these successes have increased the visibility of women in situations of armed conflict and peacekeeping, women lack equal agency in all phases of conflict, post-conflict, and conflict-prevention<sup>5</sup>. In fact, despite explicit reference to “conflict prevention and resolution” in the text of the resolution, the principles of 1325 have

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<sup>1</sup> U.N. SCOR, 55th Sess., 4213th mtg. at 1, U.N. Doc. S/RES/1325 (2000).

<sup>2</sup> See U.N. Secretary-General, *Preventing Conflict Transforming Justice Securing the Peace: A Global Study on the Implementation of United Nations Security Council Resolution 1325*, 14, U.N. Doc. S/RES/2122 (2015) (referencing the progeny of UN resolution 1325)

<sup>3</sup> *Id.* at 13 (detailing the increase in the number of peace agreements that explicitly reference women)

<sup>4</sup> *Id.* at 18 (referencing the effect of 1325 statistically)

<sup>5</sup> U.N. Secretary-General, *Preventing Conflict Transforming Justice Securing the Peace: A Global Study on the Implementation of United Nations Security Council Resolution 1325*, U.N. Doc. S/RES/2122 (2015).

predominantly been applied to situations of armed conflict, and have had little operational significance in conflict prevention and maintenance of peace<sup>6</sup>.

This primary focus on situations of violent conflict is evident in the text of the resolution: many of the preambular and operative clauses restrict clausal application to armed conflict in lieu of general application<sup>7</sup>. For example, operative clause 10 “[c]alls on all parties to armed conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse,” thus restricting the applicability of the clause to parties of armed conflict. Similarly, operative clause 11 “[e]mphasizes the responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, and war crimes including those relating to sexual and other violence against women and girls,<sup>8</sup>” which would prevent application of the clause to sexual violence against women and girls outside of war. These examples demonstrate that 1325 prioritizes the resolution of gender-based violence during violent or armed conflict.

Any distinction between sexual violence during armed conflict and outside of armed conflict is a false dichotomy: for women experiencing these forms of violence, the disenfranchisement that results is a difference of degree rather than type. For many women, the trauma of sexual violence continues long after initial act – pregnancy and flashbacks are constant reminders of experienced violations. For this reason, access to reproductive healthcare is an inalienable right for women. Though wars are often fought on the bodies of women during conflict, the effects of gender-based violence extend far beyond the scope of traditional armed conflict. Access to safe abortions and post-abortion care for those who have been subject to sexual violence, both during and outside of armed conflict, is protected by international humanitarian law. According to CEDAW “it is discriminatory for a State party to refuse to legally provide for the performance of certain reproductive health services for women.” The Committee establishes that “laws that criminalize medical procedures only needed by women and that punish women who undergo those procedures” are a barrier to women’s access to health care.

In countries that are not experiencing armed conflict, access to safe abortions, especially for women who have become pregnant as a result of rape, is critical to the advancement of

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<sup>6</sup> *Id.* at 15 (emphasizing the importance of prevention of conflict rather than the use of force)

<sup>7</sup> See U.N. SCOR, 55th Sess., 4213th mtg. at 1, U.N. Doc. S/RES/1325 cl. 10-12 (2000).

<sup>8</sup> *Id.*

female agency, gender equality, and the prevention of conflict. To remedy this void, this paper argues that the abstract principle pillars of 1325 be further deconstructed and operationalized during peacetime to (1) ensure and promote the agency of women during peacetime and (2) empower victimized women in cultures that have absorbed gender inequality in order to prevent backlash related to “outsider criticism.”<sup>9</sup> This paper identifies India as a country ripe for this proposed application, and advocates for a coalescing of top-down and bottom-up methods of women’s rights advocacy in order to promote a “meeting of the minds” between international human rights organizations and the disenfranchised local women that they seek to empower.

The involvement of women in the political, peacekeeping, and conflict-prevention process has been linked to the sustainability of peace: the United Nations Security Council has formally recognized that “peace is inextricably linked with gender equality and women’s leadership<sup>10</sup>.” It is critical that the understanding of this causal relationship be applied to the prevention of conflict in order to ensure the agency of women during all stages of the peacekeeping process and promote the sustainability of peace in conflict-prone arenas. This application is in advancement of the Secretary General’s goal of preventing and countering violent extremism (PVE/CVE) and in keeping with the original United Nations vision of turning “swords into plowshares.” Women advocates of peace globally have “argued that prevention and protection through nonviolent means should be emphasized more by the international system, and more resources should be dedicated to this endeavor.<sup>11</sup>” The deconstruction and operationalization of the principles of 1325 to situations outside of armed conflict, and specifically in the context of reproductive health, is one viable method by which to achieve the goal of the preventative pillar of UN Resolution 1325.

## **2. The Pillars of 1325: Operationalized**

“When resolution 1325 was adopted, the major issues facing women in situations of conflict were the brute force of sexual violence, losing children or loved ones to the conflict,

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<sup>9</sup> The UN has acknowledged that a “one-size-fits-all” policy is inappropriate. The worlds cultures are diverse and any policy applied to a country or state should be tailored to fit the individualized needs of the particular people and society. U.N. Secretary-General, *Preventing Conflict Transforming Justice Securing the Peace: A Global Study on the Implementation of United Nations Security Council Resolution 1325*, 14 U.N. Doc. S/RES/2122 (2015).

<sup>10</sup> See U.N. Secretary-General, *Preventing Conflict Transforming Justice Securing the Peace: A Global Study on the Implementation of United Nations Security Council Resolution 1325*, 4, U.N. Doc. S/RES/2122 (2015). See also Anwarul Chowdhury, High Level Advisory Group for the Global Study, UN Women (2015).

<sup>11</sup> U.N. Secretary-General, *Preventing Conflict Transforming Justice Securing the Peace: A Global Study on the Implementation of United Nations Security Council Resolution 1325*, 25, U.N. Doc. S/RES/2122 (2015)

being forced to or voluntarily becoming a combatant, and/or leaving one's possessions as vulnerable refugees or internally displaced persons.<sup>12</sup>" As such, the pillars of 1325 - prevention, protection, participation, and recovery – were predominantly applied to situations of armed conflict. However, the UN has discovered that pervasive and institutionalized gender inequality is an early warning sign for the development of conflict. The same underlying pillars of 1325 that are used to secure a country experiencing instability and armed conflict can be used to prevent the genesis or escalation conflict – in other words, maintain the *peace* in keeping with the *peace* and security agenda of the United Nations Security Council.

In order to apply these principles to situations outside of armed conflict, it is necessary to shift the framework to a more proactive, operational stance. The restructured principles of resolution 1325 posited in this paper are not unique to United Nations resolutions – various combinations of these principles have cropped up in situations of transformative justice<sup>13</sup>. Notably, 1325 contains the principles of (1) naming/explicit acknowledgement (2) call to action/accountability, (3) disadvantaged party empowerment, (4) prevention, (5) enforcement, and (6) maintenance/cultural shifting. These principles should be operationalized (1) in advancement of female empowerment in all stages of peacekeeping and (2) to combat backlash pertaining to outsider criticism of cultures that have weaponized gender inequality to systemically disenfranchise woman. The following section defines the provisions as identified and constructed by this paper.

*(1) Naming/explicit acknowledgement.*

The first principle, naming or explicit acknowledgement, refers to the identification of the problem or problems defined specifically. Specific identification of the problem, rather than tokenistic references to gender equality has been proven to increase effective resolution of problems rooted in gender inequality.

*(2) Call to action/accountability*

The second principle, call to action/accountability, refers to delegation of duties and acknowledgement of responsibilities. When a country or party actor disavows responsibility for

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<sup>12</sup> *Id.*

<sup>13</sup> See, e.g. *Vishaka and others v. State of Rajasthan* (1997) 2 SCC 746 (India) (demonstrating an instance in which the principles of 1325 have been applied outside of the traditional context of armed conflict in legal reform, aided rather than encumbered by the Indian judiciary).

inflicting or perpetuating gender inequities, little progress can be made. This is a necessary step for sustainable progress towards the empowerment of women.

*(3) Disadvantaged party empowerment*

The third principle, disadvantaged party empowerment, is self-explanatory. After recognizing the problem, and the agents that perpetuate it, it is necessary to empower the victims of gender inequality – women, and girls.

*(4) Prevention*

The fourth principle, prevention, is also related to the sustainability of progress. It is not only necessary to remedy the specific problem being addressed but also other similar problems.

*(5) Enforcement*

The fifth principle, enforcement, is necessary because the manner by which infractions will be dealt with needs to be explicitly defined at the inception to provide clarity and deterrence.

*(6) Maintenance/cultural shifting*

The sixth principle, maintenance/cultural shifting, is perhaps the most amorphous of the principles. In order to achieve sustainable progress towards gender equality, it is necessary that the cultures that have absorbed and weaponized gender inequality shift perspectives and eliminate forms of gender inequity from cultural norms.

### **3. An Argument for Application Part I: The Inconsistencies in the Indian Judiciary's Decisions Regarding Reproductive Rights Legislation**

The principles that create the foundation of resolution 1325 have been proven effective, both when applied by the United Nations through task forces, and when independently utilized by women seeking to empower themselves. Two notable examples demonstrate this efficacy: (1) Women of Liberia Mass Action for Peace and (2) Malaysia's Sisters in Islam.

The first example, the Women of Liberia's Mass Action for Peace, coalesced in response to the violence and conflict perpetuated during the civil war between the government and the rebels<sup>14</sup>. In 2003 Leymah Gbowee brought together the Christian and Muslim women of Liberia to pray and organize for peace<sup>15</sup>. Without prompting by the United Nations, the women of Liberia inadvertently utilized many of the fundamental principles outlined in the operationalized breakdown of 1325 proposed in the previous section<sup>16</sup>. They engaged in naming by clearly

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<sup>14</sup> Pray the Devil Back to Hell (Abigail Disney 2008).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

identifying the problem (war) and the goal (peace, and a meeting of the sides). They engaged in a call to action by forcing then President, Charles Taylor and the rebel troops to acknowledge their accountability by sending messengers to both parties to commence peace talks<sup>17</sup>. They empowered themselves by staging sit-ins at the peace talks and taking it upon themselves to mobilize. They engaged in preventative work and cultural shifting by increasing the agency of women, and establishing the first female head of state, Ellen Johnson Sirleaf<sup>18</sup>. The Women of Liberia's Mass Action for Peace experienced success and put into place sustainable measures for increasing the agency of women.

Similarly, the Sisters in Islam of Malaysia have made great strides towards reinterpreting Islam in a way that establishes female agency and rejects religiously justified discrimination of women<sup>19</sup>. They too, have engaged in the core principles proposed by this paper<sup>20</sup>. SIS sought to take on the specific problem of Quranic verses being used to justify gender discrimination and violence. SIS then called women's groups, and scholars to action to remedy the problem: activism and collaboration among Malaysian women's groups mirrored the coming together of women's groups in Liberia. The stated goal of SIS and the systematic education of women both advance female agency<sup>21</sup>. The Sisters in Islam (SIS) put into place preventative and enforcement mechanisms by providing legal assistance for women suffering due to the male biases of the legal system in cases of divorce and violence. And ultimately, the SIS reinterpretation of Quranic verses consistent with Islam's historical relevance as the religion that "uplifted the status of women" 1400 years ago will create sustainable progress towards a culture that no longer uses religion to justify female oppression. These successes support the thesis that these principles should be independently adopted by countries who subscribe to the goals and principle of 1325. The signatory countries should proactively apply the same goals and principles outside of conflict, to combat escalation of violence and the genesis of violent extremism.

One pervasive violation of international human rights is the restriction of access to abortion or reproductive health care following sexual violence. In – and especially in – countries

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Jaclyn Ling-Chien, *Anti-God, Anti-Islam and Anti-Quran: Expanding the Range of Participants and Parameters in Discourse over Women's Rights and Islam in Malaysia*, 21:20 UCLA PAC. BASIN L.J. 30, 53-54 (2003).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

that have decriminalized abortion or abortion following sexual violence, practically irrelevant decriminalization is problematic because it results in the disenfranchisement of women. The underlying gender inequality which motivates this disenfranchisement is a potent harbinger of conflict<sup>22</sup>. In India, the judiciary's inconsistent interpretations of reproductive rights legislation, like the Medical Termination of Pregnancy Act, reflect male privilege and reinforce stereotypical understandings of female identity. The Indian judiciary's interpretation of the (1) consent and (2) rape exception provisions of the MTPA provide little guidance to law enforcement agencies and the medical panels consulted by courts. This lack of guidance complicates the reproductive health systems for victimized women seeking care.

### *3.1 Consent*

The Indian judiciary's treatment of the consent provision of the MTPA demonstrates a stereotypical understanding of female identity and motherhood as well as male preference. The consent provision, §3(4) of the MTPA reads:

“(a) No pregnancy of a woman, who has not attained the age of 18 years, or, who having attained the age of 18 years, is a mentally ill person, shall be terminated except with the consent of her guardian.

(b) Save as otherwise provided in (a), no pregnancy shall be terminated except with the consent of the pregnant women.”

Laws such as these, containing internal references to prior sections, must be read in a way that renders the law consistent as a whole. As such, because (b) dictates that as otherwise provided in (a) pregnancies may not be terminated except with the consent of the pregnant woman, it follows that (a) and (b) read together indicate that pregnancies may be terminated without the consent of the pregnant person if the pregnant is either a minor or disabled. In those cases, a coherent reading of (a) and (b) indicates that it is the guardian's decision that takes precedence.

Though this is the only truly holistic interpretation of (a) and (b), Courts have traditionally granted the wishes of a pregnant or disabled person who wishes to continue their pregnancy in situations in which the guardian wishes to terminate the pregnancy. Courts adhere

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<sup>22</sup> See U.N. Secretary-General, *Preventing Conflict Transforming Justice Securing the Peace: A Global Study on the Implementation of United Nations Security Council Resolution 1325*, 4, U.N. Doc. S/RES/2122 (2015). See also Anwarul Chowdhury, High Level Advisory Group for the Global Study, UN Women (2015).

to the wishes of the guardian only when the guardian does not consent to the termination of the pregnancy. This dichotomy, where the courts allow autonomy of disabled or minor women when it lines up with stereotypes about women and motherhood, but disallow that same autonomy when the pregnant women or girl attempts to reject those stereotypes demonstrates that the Indian judiciary is enforcing certain deeply engrained beliefs regarding what is appropriately feminine.

Outside of minor girls and disabled women, §3(4)(b) dictates that a medical professional must look to, and only to the pregnant woman for termination consent. Despite this, both medical practitioners and law enforcement officials frequently come to the courts with cases in which husbands, family members, or unrelated figures such as jail superintendents have been asked to consent for the termination of a woman's pregnancy. The Indian judiciary, instead of issuing holdings compatible with the female autonomy that §3(4)(b) calls for, muddled the situation further in *Samar Ghosh v. Jaya Ghosh*<sup>23</sup>. There, the Indian Supreme Court held that when a wife terminates her pregnancy without her husband's consent, it may amount to mental cruelty, which is grounds for divorce<sup>24</sup>. Though this holding does not change the law itself, which is explicit in that it protects the autonomy of a mentally competent and of age women, medical practitioners and law enforcement frequently interpret the holding to require spousal consent, perhaps in part because of the negative stereotypes that exist concerning divorce in Indian culture<sup>25</sup>.

The male preference that is demonstrated in the *Samar Ghosh v. Jaya Ghosh* decision is further emphasized by MTPA provisions that make allowances for married women who have experienced contraceptive failure, but not for unmarried women who have experienced the same<sup>26</sup>. This allowance indicates that the Indian judiciary is inclined to allow more autonomy to a man than a woman.

### 3.2 Rape Exception Provisions

According to the MTPA, rape survivors do not need consent to terminate their pregnancies<sup>27</sup>. Despite this, law enforcement, medical practitioners, and courts frequently ad-hoc

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<sup>23</sup> *Samar Ghosh v. Jaya Ghosh* (2007) 4 SCC 51 (India).

<sup>24</sup> *Id.*

<sup>25</sup> Centre for Health Law, Ethics and Technology, *Abortion Laws in India: A Review of Court Cases*, JINDAL GLOBAL LAW SCHOOL, 11 (2016).

<sup>26</sup> Medical Termination of Pregnancy Act, No. 34 of 1971, INDIA CODE (2010), vol. 15.

<sup>27</sup> *Id.*

other provisions or consent requirements for rape victims seeking to terminate their unwanted pregnancies<sup>28</sup>. These ad-hoc provisions or consent requirements are constructed and enforced in a way that emphasizes the dominance of male bias and reluctance to acknowledge female autonomy in Indian society – even in situations where that female autonomy is explicitly mandated by legislation. Haphazard judicial decisions regarding the Medical Termination of Pregnancy Act further complicate the job of law enforcement and medical practitioners seeking to provide women with legal access to reproductive healthcare<sup>29</sup>.

Courts have consistently interpreted laws incoherently or incorrectly in order to preserve societal male bias or to detract from female autonomy. One such example of this is the decisions of the Delhi High Court. In *X v. State of NCT of Delhi and Others*, the Delhi High Court requested the consent of the *accused* person – that is, the accused rapist – in a flagrant departure from what the female autonomy that the MTPA provides for<sup>30</sup>. Similarly, the court in *Janak Ramsang Hanzariya v. State of Gujarat*, interrogated a rape survivor regarding the benefits and drawbacks of her pregnancy before ultimately granting her an abortion<sup>31</sup>. As the pregnancy in question was under the twenty-week limit, Janak Ramsang Hanzariya should not have been subject to interrogation by the court – her consent is all that is statutorily required for abortion, and her petition to the Court should have been found by the Court to be unnecessary, in keeping with the text of the MTPA. Similarly, in *D. Rajeswari v. State of Tamil*, the Madras High Court required a minor rape victim prove potential harm that would result if the pregnancy was continued<sup>32</sup>. These examples all show that legislative reform that empowers women will not make a difference in the practical lived experience of Indian women unless society, and the women themselves work towards effecting a cultural shift in order to displace the gender inequalities that have been absorbed and weaponized to disenfranchise Indian women.

#### **4. An Argument for Application Part II: Backlash Against Western Feminism**

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<sup>28</sup> Centre for Health Law, Ethics and Technology, *Abortion Laws in India: A Review of Court Cases*, JINDAL GLOBAL LAW SCHOOL, 33 (2016).

<sup>29</sup> See *Kamla Devi v. State of Haryana* (2015) (WP (C) 2007/2015) (India) (holding that law enforcement need not petition the High Court every time a rape survivor requires an abortion prior to twenty weeks: the MTPA specifically provides for this situation.)

<sup>30</sup> See *X v. State of NCT of Delhi and Others* (2013) (WP (CRL) 449/2013) (India). See also Medical Termination of Pregnancy Act, No. 34 of 1971, INDIA CODE (2010), vol. 15.

<sup>31</sup> *Janak Ramsang Hanzariya v. State of Gujarat*, (2010) (India).

<sup>32</sup> See *D. Rajeswari vs State Of Tamil Nadu And Others* (1996) (Crl.O.P.No. 1862/1996) (India).

The Indian feminist movement has faced internal criticism from Indian society for being motivated by westernized ideals – a motivation understood by Indian nationalists as traitorous to the lived experience of an Indian woman<sup>33</sup>. Indeed, the resurgence of the Indian nationalist movement was in part catalyzed by Indian feminists themselves, who, when faced with the potent critique of India’s treatment of women in Katherine Mayo’s *Mother India*, joined the Indian nationalist movement and shared in the general outrage against the perceived imperial propaganda<sup>34</sup>. This instance demonstrates the sensitivity of culture to criticism generated by the “other” and this sensitivity and the related backlash is a motif that has been repeated – albeit with some variation – many times throughout both Indian and international history<sup>35</sup>.

In *Tangled Histories: Indian Feminism and Anglo-American Feminist Criticism*, Ania Loomba discusses the engrained perceptions that lead Indians to identify the terms “Indian” and “Western” with binary ideals, inherently opposed<sup>36</sup>. Loomba argues that despite her scholastic awareness of the feminist canon and feminist theory, she too is in part “shaped by a political ethos where those terms indicate the differences between ‘real people’ and ‘upper class,’ indigenous and colonized.” Unfortunately, Indian feminist thought and activism is “constantly called upon to demonstrate genuine Indian-ness and relevance [to] the lives of ‘real Indian women.’” This reprimand for being influenced by Western modes of thought is problematic, for two reasons. First, it reinforces patriarchal traditions: by criticizing feminist movements as “Western,” the patriarchy and societal male preference self-perpetuates the power structure. Second, the creation of opposed ideals inhibits the ability of outside international bodies, interested in women’s rights, to intervene and make recommendations that will not result in provocation.

This reality is especially problematic when juxtaposed with the reluctance of the Indian judiciary to preserve and protect female autonomy and reject male bias. The solution is a modification of resolution 1325 abstract principle three: Disadvantaged Party Empowerment. This modified application can be found organically in the manner by which the Malaysian

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<sup>33</sup> Mrinalini Sinha, *Refashioning Mother India: Feminism and Nationalism in Late-Colonial India*, FEMINIST STUDIES INC., 623 (2000).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Ania Loomba, *Tangled Histories: Indian Feminism and Anglo-American Feminist Criticism*, Tulsa Studies in Women’s Literature, Vol. 12, No. 2, 271 (1993).

feminist women of the Sisters in Islam have mobilized to combat the patriarchal interpretations of the Quran, in favor of a feminist reinterpretation, in keeping with the ideals of Islam as a peaceful and empowering religion<sup>37</sup>. The same organic application was present in the Women of Liberia's Mass Action for Peace<sup>38</sup>. These women have applied abstract principle three, Disadvantaged-Party-Empowerment, in an altogether unique way by *self-empowering*. Both sets of women effectively turned the victimized woman, the “damsel in distress,” into the “knight-in-shining-armor.” In doing so, the authenticity of both movements is less vulnerable to nationalist criticism because the primary actors, motivators, and orchestrators are the victimized women themselves. Therefore, in countries that have absorbed systemic gender inequality into their culture, it is important that the focus of international human rights advocates is on the empowerment and education of local communities, including victimized women *who themselves should be given primary agency*, in order to catalyze their awareness and social engagement. For these countries, abstract principle three of United Nations Security Council Resolution 1325 is Disadvantaged-Party-*Self*-Empowerment.

#### **4. Conclusion**

The recommendations set forth in the following section are motivated by the arguments in this paper, which seeks to marry abstract principles and narrowly focused empirical evidence. Though United Nations Resolution 1325 has been utilized to great effect in addressing violence against women in armed conflict, the *preventative* pillar of the resolution has seen a less robust application. One of the harbingers of violent conflict is pervasive gender inequality<sup>39</sup>: carefully targeting and eradicating instances of institutionalized gender inequality will further the goals of the preventative pillar of the resolution, in keeping with the Secretary General’s goal of preventing and countering violent extremism (PVE/CVE).

A common forum for gender discrimination is reproductive health. Reproductive healthcare is an inalienable right for women, protected by international humanitarian law. In countries outside of conflict, access to abortion, especially for women who are pregnant as a result of rape, is a critical component of gender equality. This is especially true in countries

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<sup>37</sup> Jaclyn Ling-Chien, *Anti-God, Anti-Islam and Anti-Quran: Expanding the Range of Participants and Parameters in Discourse over Women's Rights and Islam in Malaysia*, 21:20 UCLA PAC. BASIN L.J. 30, 53-54 (2003).

<sup>38</sup> Pray the Devil Back to Hell (Abigail Disney 2008).

<sup>39</sup> U.N. Secretary-General, *Preventing Conflict Transforming Justice Securing the Peace: A Global Study on the Implementation of United Nations Security Council Resolution 1325*, 4, U.N. Doc. S/RES/2122 (2015). See also Anwarul Chowdhury, High Level Advisory Group for the Global Study, UN Women (2015).

where abortion is legal, but women still experience limited access. The theoretical component of this paper advocates for the application of the abstract principles of resolution 1325 in order to advance the *preventative* pillar of the resolution with respect to access to reproductive healthcare. This proposed strategy would (1) promote the agency of women and (2) prevent backlash related to “outsider criticism” in countries which have normalized gender inequality.

The empirical component of this paper focuses on evidence that points to India as a country ripe for the application of these principles. Though India is a country outside of conflict as it is traditionally understood, women suffer sexual violence at heightened rates due to the powerful son preference and male bias of Indian society. This male bias has seeped into the inconsistent decisions of the Indian judiciary regarding reproductive healthcare, rendering it difficult for women to access *legally permitted* procedures, such as abortions. These judicial decisions also reflect stereotypical understandings of female identity and rejection of female agency. To rectify these identified imbalances, it is critical to coalesce the top-down and bottom-up approaches of feminist advocacy. International human rights groups must operationalize the principles of resolution 1325 to empower the disenfranchised women and seek to ensure that the leaders of any call to change are *the victimized women themselves*. This lends necessary legitimacy to social movements within cultures that reject “outsider criticism.”

## **6. Recommendations**

### *6.1 Specific*

- **Pursue Uniform Judicial Decisions Regarding Reproductive Health Care.** The High Courts of each Indian state and the Indian legislature should meet to discuss how to implement a uniform implementation of the Medical Termination of Pregnancy Act.
- **Ensure that law enforcement and medical practitioners are educated as to the requirements and regulations associated with reproductive healthcare legislation.** Unfortunately, the mere legalization of certain medical procedures does not alone ensure that the women who need them will experience ready access. It is necessary to ensure that Indian law enforcement and medical practitioners (often the first point of contact for women seeking reproductive healthcare) are aware of what the Medical Termination of Pregnancy Act allows.
- **Coalesce Bottom-up and Top-down approaches of advocacy.** International human rights bodies and advocacy groups should focus on the education and empowerment of

local women and women's groups in India in order to ensure that they are the leaders at the table of social change.

## 6.2 General

- **Apply the abstract principles of United Nations Resolution 1325 in furtherance of the *preventative* pillar.** The principles of Resolution 1325 provide an organized and operational framework for addressing gender equality issues and effecting social change, but it is important that the *preventative* pillar is robustly applied.
- **Acknowledge that the distinction between sexual violence during and outside of conflict is a false dichotomy.** Sexual violence both during *and* outside of conflict is problematic. In advancing female agency, it is critical that the problem of sexual violence be addressed outside of traditional armed conflict.
- **Recognize that pervasive gender inequality is a potent harbinger of conflict.** Addressing these gender inequality problems *before* the escalation of conflict is in line with the goals of preventing and countering violent extremism (PVE/CVE).
- **Emphasize that access to reproductive healthcare is an inalienable right, protected by international humanitarian law.** It is important to pay particular attention to countries in which abortion is legal, but access is restricted through other means – whether it be through societal standards or inconsistent judicial decisions.

## **SECURING NATIONAL SECURITY THROUGH GENDER EQUALITY IN RELIGIOUS PERSONAL LAWS**

Akila Sarathy

### **1. Introduction**

While governments have historically viewed human rights and national security as mutually exclusive, there is overwhelming evidence that a commitment to human rights in fact strengthens national security<sup>1</sup>. With the adoption of United Nations Security Resolution 1325, we have recognized that women’s rights have a large part to play in this discourse<sup>2</sup>. Resolution 1325 encourages nations to secure national security and prevent conflict by not only protecting women, but by having women participate in the decision-making process<sup>3</sup>. But how exactly do we ensure that women are able to effectively participate in the decision-making process?

I argue that the answer lies not in the public sphere, but rather in the private sphere, for they are inextricably linked. In a speech to the United Nations, Eleanor Roosevelt said that universal rights begin in “small places, close to home<sup>4</sup>.” In this case, we are not looking close to home, but within the home, at women’s rights within the context of family. Many countries have adopted a system where family law is governed not by the state but by religious communities through personal laws. These personal laws often perpetrate subtle but insidious discrimination against women, circumscribe women’s rights at various levels, and prevent women from

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<sup>1</sup> See generally William W. Burke-White, *Human Rights and National Security: The Strategic Correlation*, 17 HARV. HUM. RTS. J. 249 (2004) (asserting that the correlation between human rights and national security is not simply ideological but strategic).

<sup>2</sup> See Valerie M. Hudson and Dara Kay Cohen, *Women’s Rights Are a National Security Issue*, NEW YORK TIMES OP-ED (Dec. 26, 2016) (“Over a decade’s worth of research shows that women’s advancement is critical to stability and to reducing political violence. Countries where women are empowered are vastly more secure, whether the issue is food security, countering violent extremism or resolving disputes with other nations peacefully.”), [https://www.nytimes.com/2016/12/26/opinion/womens-rights-are-a-national-security-issue.html?\\_r=0](https://www.nytimes.com/2016/12/26/opinion/womens-rights-are-a-national-security-issue.html?_r=0).

<sup>3</sup> See S.C. Res. 1325, ¶5 (Oct. 31, 2000) (“Reaffirming the important role of women in the prevention and resolution of conflicts and in peace-building, and stressing the importance of their equal participation and full involvement in all efforts for the maintenance and promotion of peace and security, and the need to increase their role in decision-making with regard to conflict prevention and resolution”).

<sup>4</sup> Eleanor Roosevelt, “The Great Question,” remarks delivered at the United Nations in New York (Mar. 27, 1958) (“Where, after all, do universal rights begin? In small places, close to home – so close and so small that they cannot be seen on any maps of the world...Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerned citizen action to uphold them close to home, we shall look in vain for progress in the larger world.”).

accessing other legal recourse through its rejection of civil marriage<sup>5</sup>. While gender inequality persists in the home, it is extremely difficult, if not impossible, for women to participate fully in public life. Therefore, to facilitate women's effective participation in the decision-making process, we need to address the current policy of non-interference that the law adheres to in response to religious personal laws.

This paper begins to explore how we may use a more discerning eye in examining the link between securing national security and women's rights in the family, as well address the existing gender inequality we find in personal laws, by using India as a case study. India is an ideal country in this endeavor for two reasons. First, India, while a secular state, is a country that is pluralistic in regards to family law<sup>6</sup>. Different communities follow different religious personal laws (RPLs) □ Hindu Law, Muslim Law, and Christian Law<sup>7</sup>. Second, India is a country that has committed itself to women's rights in the public sphere. The Indian Constitution makes extremely strong provisions for gender equality<sup>8</sup>, and on an international level India has demonstrated its intent by ratifying the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)<sup>9</sup>.

The first part of this paper will outline the various instances of gender inequality within India's existing personal laws, and how women's participation in public life has been limited as a result. Part two will juxtapose India's government policy of non-interference toward RPLs with their commitment to gender equality in the public sphere, and evaluate whether the two can truly co-exist. Lastly, part three will examine the different proposals India can use to address personal laws, and evaluate their merit and likelihood of success. Through this paper I aim to show that not only must we secure women's rights within the family to secure national security, but that it is possible to do so.

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<sup>5</sup>Rangita de Silva de Alwis and Indira Jaising, *The Role of Personal Laws in Creating a “Second Sex”*, 48 N.Y.U. J. INT'L L. POL. 1085, 1086-87 (2016).

<sup>6</sup>See generally Archana Parashar, *Gender Inequality and Religious Personal Laws in India*, 14 BROWN J. WORLD AFF. 103 (2008).

<sup>7</sup>*Id.*

<sup>8</sup>INDIA CONST. arts. 14-16. The Constitution of India not only makes a general declaration of equality of the law no matter sex, but goes on to state that this does not “prevent the State from making any special provision for women and children.”

<sup>9</sup>Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 (signed by India Jul. 30, 1980; ratified by India Jul. 9, 1993). India ratified the CEDAW with two declarations concerning art. 5 and 16 and one reservation concerning art. 29.

## **2. The Effects of Gender Inequality within India's Personal Laws**

The goal of this first section is to provide brief insight into the gender equality problems that exist in India today regarding RPLs, and how these instances of gender equality is actually costing India as a country - especially in terms of national security. While the media has often focused on instances of women's rights violations in Muslim Personal Law, India's national security is being threatened by gender inequality in all personal laws<sup>10</sup>. Furthermore, the issue RPLs has become politicized, detracting from an objective understanding of how gender inequality is actually affecting Indian society. Gender inequality weakens a countries security in many areas, including health, defense, and economic prosperity. For example, gender inequality in India been estimated to have reduced the country's annual growth by almost four percent over a ten year period from the years 2003 to 2013<sup>11</sup>. The following vignettes offer a glimpse into the costs that India is has unknowingly paid.

### *2.1 The Failure of Hindu Law Codification to Affect Reform*

Under the Nehru government, Hindu personal law was codified in a series of bills known as the Hindu Code Bills<sup>12</sup>. However, in the process of codification, many crucial women's rights were sacrificed in negotiation. When the Hindu Code Bills were finally enacted between 1952 and 1956, they were ripe with gender inequality, and included the following provisions: 1) the retention of the joint family system, also known at Mitakshara coparenny, 2) the unlimited right to testation, which is the ability to will property away to prevent its devolution to women, 3) the restriction that women can only inherit the father's self-earned property, 4) the exclusion of a married daughter's right to inheritance, 5) the failure to grant women the right to adoption, 6) making the father the natural guardian of their children, and 7) the provision of inadequate

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<sup>10</sup> Flavia Agnes is a prominent scholar on religious personal laws in India. In an interview she discusses how the media has misconstrued the conversation about gender equality in RPLs into a criticism of Muslim Law while ignoring the women's rights issues in other communities. See Shishir Tripathi, *Uniform Civil Code Debate Focuses on Muslim Law but Ignores Other Communities: Flavia Agnes*, FIRSTPOST (Oct. 19, 2016; 18:31 IST), <http://www.firstpost.com/india/uniform-civil-code-debate-focuses-on-muslim-law-but-ignores-other-communities-flavia-agnes-3060730.html> ("This is unfortunate. While the negative aspects of Muslim law are highlighted, the positive rulings and community practices are not given prominence. One can observe this even within the judiciary. When discriminatory practices within Hindu law and cultural practices are discussed they are not framed as "Hindu" but are discussed in general terms as "women's problems.").

<sup>11</sup> Dhruva Jaishankar, *The Huge Cost of India's Discrimination Against Women*, THE ATLANTIC (Mar. 18, 2013), <https://www.theatlantic.com/international/archive/2013/03/the-huge-cost-of-indias-discrimination-against-women/274115/>.

<sup>12</sup> RINA VERMA WILLIAMS, POSTCOLONIAL POLITICS AND PERSONAL LAWS: COLONIAL LEGAL LEGACIES AND THE INDIAN STATE 102 (2006).

maintenance laws<sup>13</sup>. However, gender inequality does not stop with the text of the Hindu Code Bills. Even the advancements made by the Hindu Code Bills have not seen any fruition in real life. For example, while the caste system was abolished, incidents of discrimination still persist<sup>14</sup>. Of particular interest to gender equality is the practice of dowry. While dowry is no longer legal, it is still widely practiced. The practice of dowry creates “pressure to marry off [a] daughter, at any cost, driv[ing] parents to meet the dowry demands of the groom’s family rather than bear the stigma of having an unmarried daughter<sup>15</sup>. ” Despite the illegality, dowry violence and deaths have continued to rise, and a study found that 95% of dowry deaths were among Hindus<sup>16</sup>. Similarly, according to census data India has over 12 million girls married under ten years old, and 84% of these girls are in Hindu marriages<sup>17</sup>.

## 2.2 The Controversy of Triple Talaq in Muslim Personal Law

The practice of Talaq has evolved with time, and today a practice called Triple Talaq allows a husband to divorce his wife by simply saying “I divorce you” three times<sup>18</sup>. Nowadays, some women have reported being divorced over text message or email<sup>19</sup>. The seminal case concerning Triple Talaq is the Shah Bano case. Shah Bano was a 64-year-old women who was thrown out her home by her husband<sup>20</sup>. When Shah Bano went to court to demand maintenance for herself and her children, her husband decided to sever all bonds using Triple Talaq, relieving him from the duty to pay maintenance under Muslim Personal Law<sup>21</sup>. When the Indian Supreme Court ruled that the practice of Triple Talaq did not absolve a husband from paying maintenance, there was a huge outburst of conversation in the Muslim community<sup>22</sup>. Prime Minister Rajiv

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<sup>13</sup> *Id.* at 113.

<sup>14</sup> The Center for Human Rights and Global Justice at NYU Law reports that over 165 million people in India continue to face discrimination, exploitation, and violence because of their caste. CHR&GJ, <http://chrgj.org/clinics/international-human-rights-clinic/caste-discrimination-and-transitional-justice-in-nepal/caste-discrimination-in-india-2/>.

<sup>15</sup> Flavis Agnes, *What Has Hindu Law Ever Done for Women?*, BOOM (Oct. 7, 2016). The survey mentioned was conducted by Majlis Legal Center, and eventually reached the Supreme Court of India.

<sup>16</sup> *Id.*

<sup>17</sup> Ians, *84 Percent of 12 million married children under 10 Are Hindus*, THE NEW INDIAN EXPRESS (Jun. 1, 2016 5:30 PM).

<sup>18</sup> Rama Lakshmi, *In India, Muslim men can end a marriage by saying ‘divorce’ three times. One women wants to stop that.*, THE WASHINGTON POST (Jan. 31 2017) [https://www.washingtonpost.com/world/asia\\_pacific/indian-muslim-men-can-end-a-marriage-by-saying-divorce-three-times-one-woman-wants-to-stop-that/2017/01/30/af0f4f9e-1b32-4e79-8ab3-1e6e89c3ec27\\_story.html?utm\\_term=.961e9b8f2556](https://www.washingtonpost.com/world/asia_pacific/indian-muslim-men-can-end-a-marriage-by-saying-divorce-three-times-one-woman-wants-to-stop-that/2017/01/30/af0f4f9e-1b32-4e79-8ab3-1e6e89c3ec27_story.html?utm_term=.961e9b8f2556).

<sup>19</sup> *Id.*

<sup>20</sup> See De Silva De Alwis, *supra* note 5 at 1093.

<sup>21</sup> *Id.* at 1093-94.

<sup>22</sup> *Id.*

Gandhi, afraid of losing a voting base, sided with the conservative dialogue and pushed the Muslim Women (Protection of Right on Divorce) Act<sup>23</sup>. This legislation effectively rendered the Supreme Court decision useless. The practice of Triple Talaq is not only inequitable in who can use this method to divorce, but the practice serves to create a women's dependence during marriage, as well as hindering her chances of re-building a living after the divorce. Muslim women in India have described the practice of Triple Talaq as a "sword hanging over a women's head"<sup>24</sup>." Many women want to stay in a marriage, unhappy or happy, to avoid destitution, and the threat of Talaq is often used as a weapon in a marriage and can perpetrate domestic violence<sup>25</sup>.

### *2.3 Family as the Basic Unit of Society*

The effect of these provisions curb the ability for women to stand in their own right, and promotes financial dependence on the men in her family. Financially dependent women are less likely to take part in public life. Why is the lack of women participating in public life important? An increase of women in government is correlated with less corruption, and more investment in growth<sup>26</sup>. Women leaders are also more likely to "think about the future" in that they can help broaden the boundaries of acceptable discourse<sup>27</sup>. A plethora of empirical research has linked gender variables, including personal rights, to economic prosperity, and studies have shown that a gender balanced group of decision-makers take less risks and don't engage in a zero-sum game as often as a group of all male decision-makers<sup>28</sup>. In fact, researcher Mary Caprioli found that "higher levels of gender equality make a state less likely to threaten, display, or use force, or go to war once involved in an interstate dispute"<sup>29</sup>." In particular, inequitable family law has been linked to less state peacefulness<sup>30</sup>. The family is the basic unit of society, inequality in the family leads to inequality in broader society.

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<sup>23</sup> *Id.*

<sup>24</sup> Julie McCarthy, *Muslim Women in India Ask Top Court to Ban Instant Divorce*, NPR (Mar. 26, 2017; 7:00 PM) <http://www.npr.org/sections/goatsandsoda/2017/03/26/521362478/muslims-in-india-ask-top-court-to-ban-instant-divorce>.

<sup>25</sup> *Id.*

<sup>26</sup> VALERIE HUDSON ET AL., *SEX & WORLD PEACE* Ch. 2 (Colum. U. Press 2012).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* (summarizing research that shows how women can help economic growth and government policy making).

<sup>29</sup> *Id.* at Ch. 4.

<sup>30</sup> *Id.*

### **3. India's Policy of Non-Interference**

#### *3.1 Textual Commitments to Non-Interference*

The Constitution of India provides that all persons shall receive equality before the law and that “[t]he State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them<sup>31</sup>.<sup>31</sup>” By promising such in the most foundational document of the state, India makes it clear that gender equality is part of the nation’s values. However, through words and actions, it is clear that the government has separated gender equality into two spheres. In the public sphere, India has supported gender equality. In the private sphere, India has adopted a policy of non-interference. This is evident by looking closer at the Constitution of India. Article 16 builds on the more general principles of gender equality and explicitly guarantees that no individual will be discriminated against based on sex in matters of employment or appointment to public office<sup>32</sup>. However, no specific guarantees of gender equality are made in context of the family or other areas deemed to fall within the sphere of private life.

On the international stage, we see a similar divide between India’s commitment to gender equality in the public and private spheres. When India ratified the CEDAW, it did so with the following declaration □ that it shall abide by and ensure the provisions in articles 5(a) and 16, paragraph 1, but only so long as it conformed with “its policy of non-interference in the personal affairs of any community without its initiative and consent<sup>33</sup>.<sup>33</sup>” Both provisions in question relate to women’s rights in private life. Article 5(a) states,

State Parties shall take all appropriate measures:

To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women<sup>34</sup>.<sup>34</sup>

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<sup>31</sup> INDIA CONST. art. 15.

<sup>32</sup> INDIA CONST. art. 16 (“No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.”).

<sup>33</sup> Meeting of State Parties to the Convention on the Elimination of All Forms of Discrimination against Women, *Declarations, reservations, objections and notifications of withdrawal of reservations relating to the Convention of All Forms of Discrimination against Women*, U.N. Doc. CEDAW/SP/2010/2 (June 28, 2010) at 11.

<sup>34</sup> CEDAW *supra* note 8 at art. 5(a).

Article 16, paragraph 1 states, “State Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations,” and goes on to list specific guarantees such as the same right to enter marriage, the same right to guardianship of children, same personal rights to choose a family name and profession, and the same right to property<sup>35</sup>. But at the same time, India has fully committed itself with no reservations to upholding the provisions in the rest of the CEDAW. Many of these provisions have to do with women’s rights in the public sphere, such as the right to vote, to hold public office, equality in career opportunities, and access to education<sup>36</sup>.

### *3.2 Non-Interference in Practice*

The Shah Bano case discussed previously is an example of India’s government extending their policy of non-interference into practice. Although Muslim progressives believed that the Supreme Court decision was in line with Muslim principles, Rajiv Gandhi decided to reverse the actions through legislation to endorse the “sanctity” of personal laws<sup>37</sup>.

Another instance of the government practicing non-interference is in the aftermath of the Nirbhaya case. Nirbhaya was a woman who was brutally gang raped on a bus by six men<sup>38</sup>. The case garnered outrage both in India and internationally and is known in the media as “The Delhi Gang Rape<sup>39</sup>”. In response to public opinion, a committee that was headed by J.S. Verma, a chief justice of India, set out to submit a report that listed recommendations to the criminal law to improve women’s safety<sup>40</sup>. The recommendations addressed topics such as gang rape, acid attacks, honor killings, trafficking, sexual harassment at work, and marital rape<sup>41</sup>. The current law on rape creates an exception when “the woman raped is his own wife and is not under twelve years of age<sup>42</sup>.” The VERMA report however proposed criminalizing marital rape. The proposal

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<sup>35</sup> CEDAW *supra* note 8 at art. 16, ¶1.

<sup>36</sup> See generally, CEDAW *supra* note

<sup>37</sup> WILLIAMS *supra* note 11 at 140-41.

<sup>38</sup> Heather Simmons & Sruthi Gottipati, *Women Dies After Gang Rape That Galvanized India*, NEW YORK TIMES (Dec. 28, 2012) <http://www.nytimes.com/2012/12/29/world/asia/condition-worsens-for-victim-of-gang-rape-in-india.html>.

<sup>39</sup> *Id.* (“Revulsion and anger over the rape have galvanized India, where women regularly face sexual harassment and assault, and where neither the police nor the judicial system is seen as adequately protecting them.”).

<sup>40</sup> See Justice J.S. Verma *et al.*, REPORT OF THE COMMITTEE ON AMENDMENTS TO CRIMINAL LAW (Jan. 23, 2013);

*see also* Aditi Malhotra, Saptarishi Dutta & Tripti Lahiri, *We Poured Over the Verma Report So You Don’t Have To*, THE WASHINGTON POST (Jan. 31, 2013) <https://blogs.wsj.com/indiarealtime/2013/01/31/we-pored-over-the-verma-report-so-you-dont-have-to/>.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

read, “Consent will not be presumed in the event of an existing marital relationship between the complainant and the accused<sup>43</sup>. ” Unfortunately, however, the proposal by the VERMA report was never adopted, and the Modi government issued the following statement:

It is considered that the concept of marital rape, as understood internationally, cannot be suitably applied in the Indian context due to various factors, including level of education, illiteracy, poverty, myriad social customs and values, religious beliefs, mindset of the society to treat the marriage as a sacrament, etc<sup>44</sup>.

This language is eerily similar to the reservation that India made to the CEDAW. It is clear that the Indian government plans on maintain its policy of non-interference, however, it is not sustainable in light of it's commitment to gender equality in public. By refusing to condone marital rape, the government is making a statement about all sexual assault and harassment, including acts that happen in public rather than private. It is also clear that in many of these instances there is never just one opinion, but rather voices that object to gender discrimination that are growing louder. The VERMA report was in response the public outrage, and the Supreme Court decision in the Shah Bano case was well received by progressives and feminists within the Muslim community. If India is serious about it's commitment to gender equality, it has to start with addressing gender equality in the home. The main opposition argument is that religion, custom, and tradition are unbending and unchanging, however, Bikhu Parekh responds by saying, “There is a pervasive tendency among religious people to claim to be in possession of divinely vouchsafed infallible truths which they are not at liberty to compromise. This is a wholly false reading of religion...Its origin and inspiration are divine but human beings determine its meaning and content<sup>45</sup>. ” It is possible for India to continue to respect religion, while at the same time addressing gender inequality.

#### **4. Proposals to Address the Inequality within India’s Personal Laws**

The two most documented proposals concerning reforming RPLs in India are the two extremes. The first proposal is to completely replace the personal laws with a Uniform Civil Code (UCC). The second proposal is to leave reform to happen within the religious communities

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<sup>43</sup> *Id.*

<sup>44</sup> Preetika Rana, *Modi Government’s Reasons Why Marital Rape Is Not a Crime*, THE WALL STREET JOURNAL (Apr. 30, 2015, 12:09 PM IST) <https://blogs.wsj.com/indiarealtime/2015/04/30/modi-governments-reasons-why-marital-rape-is-not-a-crime/>.

<sup>45</sup> Madhavi Sunder, *Piercing the Veil*, 112 Yale L. J. 1399, 1435 (2003).

itself. However, both proposals, laying at the extremes, have drawbacks in merit and likelihood of success.

The proposal to replace personal laws with a UCC looks to Europe as an example of historical success. In most European countries, personal laws originated in religious laws, but today, family laws are all secular<sup>46</sup>. In her essay, Archana Parashar notes that “Nowhere has the existence of modern family laws given rise to the argument that they prevent people from being good Christians. Neither is there a credible argument made that in a Protestant country where divorce is allowed, the Roman Catholics are denied the right to cultural autonomy<sup>47</sup>.” However, it is the very parallel to Europe, despite its success, that makes the likelihood of successfully implementing a UCC low. Fundamentalists, from the Muslim and Hindu community, have argued that women’s rights efforts are “Western<sup>48</sup>. ” It is important to note, that even in the divide that fractured the Muslim community after the Shah Bano case, the “progressives” did not support a UCC either<sup>49</sup>. Similarly, when Prime Minister Nehru led the effort to codify many of the Hindu Laws there were multiple fractures within the community about whether the laws should even be codified let alone replaced with a UCC.<sup>50</sup>

On the other hand, a proposal to allow the various religious communities to reform personal laws by themselves is in essence a continuation of the non-interference policy. One problem with leaving the religious communities to handle reform by themselves is that personal laws across the different communities were drafted by men, and did not involve the participation of women<sup>51</sup>. For example, resistance to the codification of Muslim Law in India did not only stem from a perceived threat to the religion, but also an economic threat to men who would otherwise have to pay maintenance to ex-wives<sup>52</sup>. Further, the men that currently comprised the Muslim Personal Law Board would lose their authority to interpret the law and be stripped of

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<sup>46</sup> Parashar *supra* note 6 at 110.

<sup>47</sup> *Id.*

<sup>48</sup> Madhavi Sunder, *Piercing the Veil*, 112 Yale L. J. 1399, 1435 (2003). It is important to note that the idea of Western ideals encroaching on Indian values holds a powerful resonance with many due to a history of colonialism. Ironically, in truth, the idea that personal laws are part of religion was introduced and fostered by the British.

<sup>49</sup> WILLIAMS *supra* note 11 at 140-41.

<sup>50</sup> *Id.* at 97-113.

<sup>51</sup> See Alwis *supra* note 5 at 1088.

<sup>52</sup> See Williams *supra* note 19 at 142.

their political power<sup>53</sup>. Even today, not a single board member on the Muslim Personal Law Board is a woman<sup>54</sup>.

The non-interference policy of the government is in truth not one of non-interference. In practice, this policy forces the law to acknowledge the most traditional and fundamentalist religious views by default. Once again, the actions taken by the government concerning the Shah Bano case illustrate this practice. When Prime Minister Rajiv Gandhi nullified the Supreme Court ruling by passing the Muslim Women Protection of Rights on Divorce Act of 1986, he chose to affirm the values of the conservative and fundamentalist Muslim views at the expense of progressive and feminist views<sup>55</sup>. This only served to make the notion of religion as fixed and unchanging even stronger. In a similar vein, today the All India Muslim Personal Law Board is seen as the leading voice for the Muslim community and decides whether and how to make changes to the Muslim Law. However, little or not attention is given to the All India Muslim Women Personal Law Board.

When Prime Minister Nehru made the decision to codify parts of Hindu Law, in broad strokes it appears that he adopted the progressives instead of the fundamentalists views, however, a closer look at the who exactly the Hindu Code Bills define as Hindu raise a startling problem. Hindu was defined to include all but those who followed a few other specified religions (mainly Islam and Christianity)<sup>56</sup>. As a result, the Hindu Code Bills ended up inadvertently applying to those who follow Sikhism, Jainism, or Buddhism<sup>57</sup>.

## 5. Conclusion

We have seen that it is important to foster gender equality within the family in order to strengthen national security and prevent conflict. In the end while a UCC approach to reform might be too alienating, it is irresponsible to continue a policy of non-interference that simply defaults to supporting a single faction or viewpoint within the religious communities. By recognizing that within religious communities there are varying viewpoints, each with their own merit, the government can recognize that it is possible to both respect the freedom that personal

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<sup>53</sup> *Id.*

<sup>54</sup> *Board Members*, All India Muslim Personal Law Board (visited Apr. 11, 2017), <http://aimplboard.in/officers.php>.

<sup>55</sup> See Alwis *supra* note 5 at 1095.

<sup>56</sup> See Williams *supra* note 19 at 103.

<sup>57</sup> *Id.*

laws give religious communities to follow their customs, but at the same time guarantee that women's rights are being secured.

## **USING FEMINOMICS AS A TOOL TO ADDRESS GENDER INEQUALITY IN POLITICS, SOCIETY AND THE WORKPLACE: ARAB WORLD CASE STUDY**

Tala Al Jabri

### **1. Introduction**

Periods of post-conflict and reconstruction are tenuous for any society. During this transitional period, nations tread carefully, bringing a diverse set of stakeholders to the peace-making table and employing mechanisms to restore justice to victims of conflict. Often, tribunals are set up and stories are collected through truth and reconciliation commissions with the aim of addressing injustices that took place during conflict.

They also present a seminal moment, when more than ever, the actions of state actors and decision-makers will have a profound impact on the trajectory and progress of post-conflict states. Indeed, it is a time when decision-makers are back at the drawing table, carving out their vision and setting roadmaps, with the goal of maximizing benefit for the nation and its citizens.

Today a central focus of government in post-conflict nations, partly due to pressures by intergovernmental organizations, is to shape the nation's economic agenda. Informing this agenda has wide implications not just on a nation's economic development plans, but more broadly on society at large. Indeed, economic planning influences multiple spheres such as political stability and social progress outcomes. Therefore, in trying to promote gender equality, it is imperative that women play an active role in economic development planning. More specifically, just as international organizations advocate the inclusion of women at the peacemaking table, women from a diversity of backgrounds must also have their voices heard in the national economic discourse. Having a seat at the table is a good starting point, but is insufficient to move the needle in protecting and empowering women. Rather, as women are key economic actors who hold the key to unlocking sustainable economic opportunities and building stronger societies, their visions will need to be elevated and weighed against their expected impact.

Women have long been left out of the economic planning process where actors employ a de-facto male-lens in vision development and planning. This phenomenon is not simply a product of emerging states, but is omnipresent in nearly all nations. It should then come as no

surprise why women are disadvantaged relative to men in their economic participation and benefit. Flawed economic development vision setting and planning does not simply impact women in the economic sphere, but has ramifications on their political agency and social status too. Indeed, gender equality in work is “not achievable without gender equality in society and a shift in attitudes and beliefs about the role of women”.

In undertaking my own proprietary and secondary research, I have found that what is required to address these concerns is a gender-lens approach to economic development planning and strategy-setting, which I call *feminomics*. Employing a *feminomics* framework will not simply result in enhanced opportunities for women, but will generate gains for *all of society*. Moreover, I demonstrate how national competitiveness *cannot* be achieved without gender equality.

Focused on the promotion of gender equality in the Arab World, I address some of the most acute challenges (particularly in Saudi Arabia) facing women. To inform my recommendations, I draw on Tunisia as a case study, detailing the experiences and lessons learned in the post-Ben Ali era.

## **2. Linking economic development to political and social development in a post-conflict setting**

A nation’s economy plays a multi-faceted role that spans beyond the realm of (financial) value creation for its citizens. Indeed, it bears a strong relationship to the social progress outcomes experienced by nations. Nations that rank highly in social progress also rank highly in business performance. Social Progress Index data from the Social Progress Initiative<sup>1</sup>, which tracks several metrics across three dimensions, and data from the World Bank’s Ease of Doing Business Index<sup>2</sup>, which uses metrics from across 10 sub-indices, highlight an incredibly strong correlation (Exhibit 1).

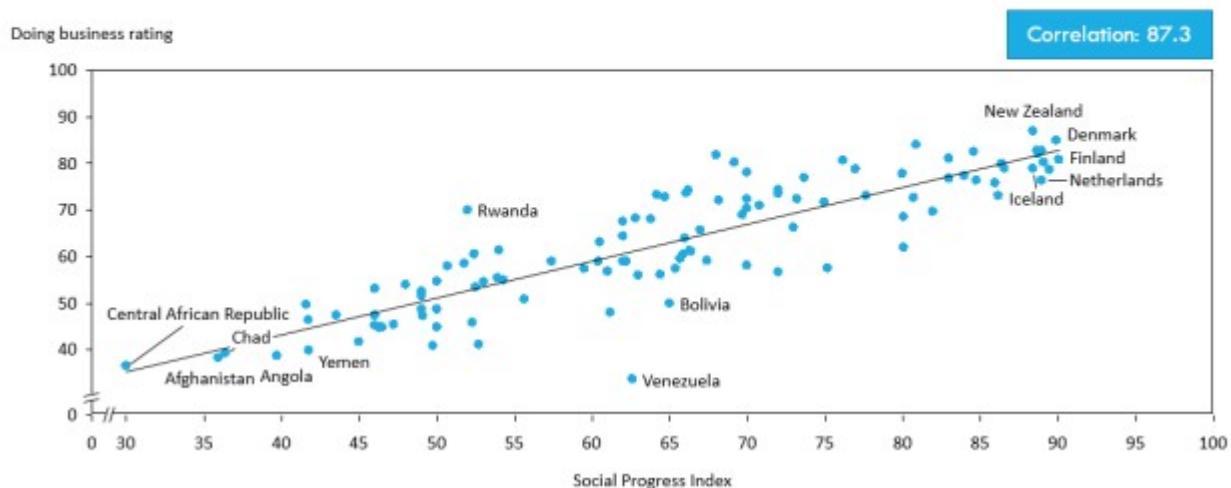
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<sup>1</sup> The Social Progress Index is comprised of three dimensions – Basic human need, foundations of wellbeing, and opportunity – that each measure four separate metrics. Basic human need reviews metrics on nutrition and basic medical care, water and sanitation, shelter, and personal safety. Foundations of wellbeing observes such categories as access to basic knowledge, access to information and communications, health and wellness, and environmental quality. Finally, opportunity encapsulates such measures as personal rights, personal freedom and choice, tolerance and inclusion, and access to advanced education. Read more: <http://www.socialprogressimperative.org/global-index/>

<sup>2</sup> The Doing Business Index is an annual ranking that tracks dozens of indicators across 10 sub-indices: Starting a business, dealing with construction permits, getting electricity, registering property, getting credit, protecting investors, paying taxes, trading across borders, enforcing contracts, and resolving insolvency. Read more: <http://www.doingbusiness.org/rankings>

Exhibit 1: The relationship between social progress and economic performance

**Social progress, which is only possible with peace and security, is linked to economic performance**

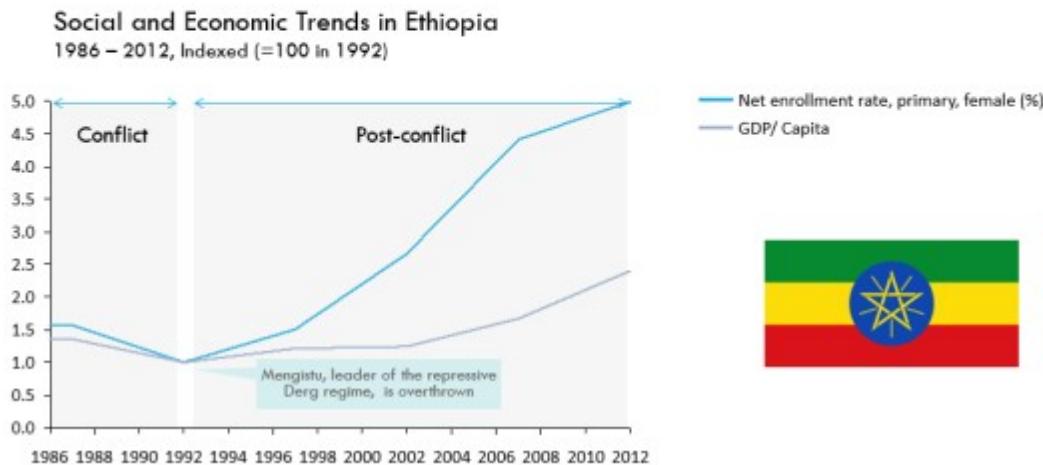


Moreover, it is difficult to accompany strong social progress without a climate that is peaceful and secure for its citizens and residents. This link is best illustrated by patterns of social and economic development in Ethiopia in times of conflict and post-conflict (exhibit 2)<sup>3</sup>. By observing the trends in female primary school enrollment, a benchmark for social progress, and GDP/capita, an indicator for economic performance, it can be quickly observed that both indicators followed a similar pattern.

<sup>3</sup> Data was used from the World Bank Databank. Accessed at: <http://data.worldbank.org/>

## Exhibit 2: Social and Economic Trends in Ethiopia: Conflict vs. Post-conflict

### Ethiopia illustrates the importance of maintain peace to make economic and social progress



Not only did social and economic indicators improve and grow more rapidly after the fall of Mengistu, the Derg regime's leader, but they trended downward in the years just prior. While it is difficult to ascertain the extent to which the political landscape caused drops in social and economic trends (and vice-versa), a clear relationship exists between all the variables in question.

One explanation that offers some insight into the strong positive relationship experienced among political, economic and social outcomes is that the political order is defined, even if in part, by economics. Dating back to the cold war, The US and Soviet Union were not simply competing militarily, but were also engaged in the export of their respective economic ideologies. Today, the world is largely comprised of a market economy, creating wide-reaching implications on populations from every corner of the planet. From globalization to the rise of populism, the economics of who the “winners” and “losers” are is high on the agenda and drives political and social discourse and activism. Therefore, as decision-makers set economic goals, much consideration must be given to the varied intersections with politics and society more broadly.

This is especially important when defining the new legal order in a post-conflict setting. Transitional in nature, states more than ever have the agency, flexibility and power to dictate the

change that will be experienced many years into the future. Moreover, the receptivity of populations to change in this time is high, setting a strong precedent for stakeholders to enact change.

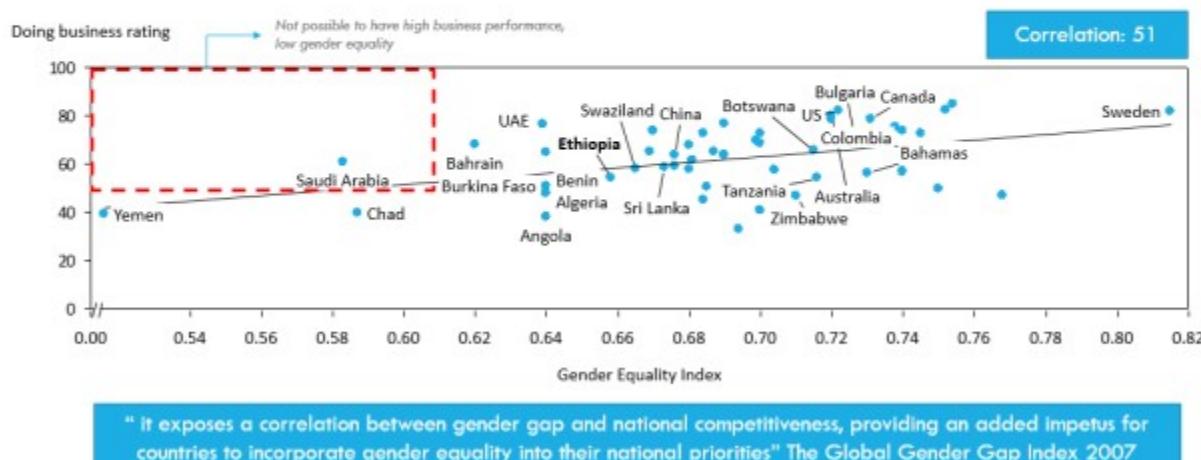
### **3. Economic development as a lever to improve political, economic and social outcomes for women**

Having established a strong interdependence among economic, political and social spheres, next we move to assess how gender equality, if at all, correlates with economic performance.

Like patterns found in section I between social progress and economic performance, gender equality also demonstrates a high level of correlation with economic performance (see exhibit 3)<sup>4</sup>.

Exhibit 3: The relationship between gender equality and economic performance

#### **Women's equality is also correlated to economic health and performance**



A closer look at the individual data points shows that for countries that have low gender equality scores, it is simply not possible to have a high economic performance, with countries falling below the trends line<sup>5</sup>. This observation is illustrated in Exhibit 3 by the red boundary at the

<sup>4</sup> Source for the individual country scores are from the Global Gender Gap Index 2016 report prepared by the World Economic Forum. The highest possible score is 1 (equality) and the lowest possible score is 0 (inequality). The index covers four overall areas of inequality between women and men: 1) Economic participation and opportunity; 2) Educational attainment; 3) Political Empowerment; 4) Health and survival

<sup>5</sup> With the exception of Saudi Arabia

upper left quadrant of the matrix. Therefore, one can safely conclude that, just as with Yemen, you will most certainly have a lower doing business score relative to the average, if you also have a low gender score.

In a similar vein, research conducted by the McKinsey Global Institute (MGI) further reinforces the relationship between economic performance and gender equality. In their report entitled “Power of Parity”, the MGI draws a link between gender equality in society with gender equality in work, claiming that “the latter is *not possible* without the former”. In plotting two variables –gender equality in society and gender equality in the work – on a two-by-two matrix, MGI shows not simply that “gender equality in society tend to be higher than those of gender equality in work for most countries” but more importantly, that “virtually no country has high gender equality in society and low equality in work”.

#### **4. The Case for pursuing a gender-lens economic strategy**

Not only can enhancing female participation and equality in society improve economic performance, but these factors can more specifically determine national competitiveness. Research from The World Economic Forum shows “a correlation between gender gap and national competitiveness, providing an added impetus for countries to incorporate gender equality into their national priorities”.

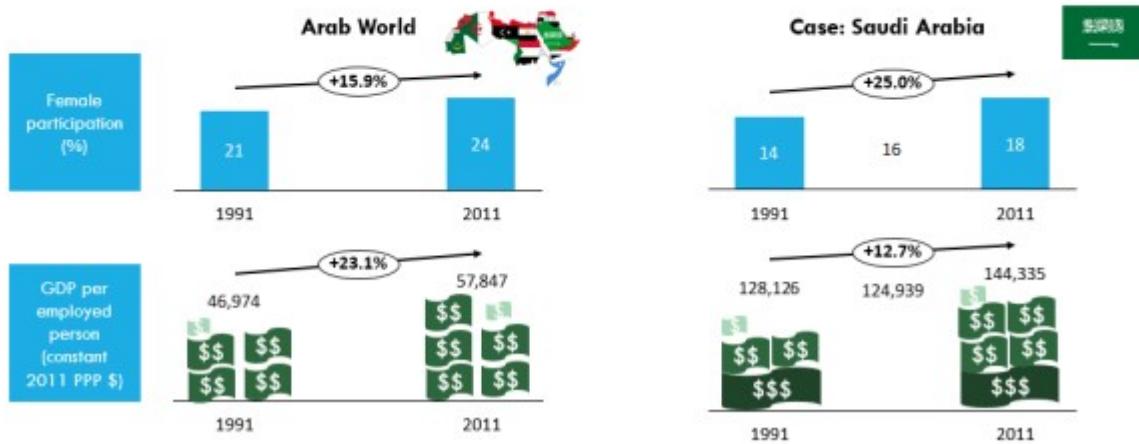
This is most certainly the case in the Arab World. Using economic participation and income indicators, the results show that an increase in female participation over time has resulted in higher income and increased economic productivity (Exhibit 4)<sup>6</sup>.

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<sup>6</sup> Data was used from the World Bank Databank. Accessed at: <http://data.worldbank.org/>

Exhibit 4: The impact of increasing female participation in the workforce

## When women enter the market, incomes increase for EVERYONE



The *increase* in real GDP (Gross Domestic Product<sup>7</sup>; adjusted for inflation) per employed person has grown *in line* with growth in female participation in the Arab World and in Saudi Arabia. The result demonstrates that when women enter the workforce, incomes are higher on a per employed person basis. This is most important to highlight not simply to demonstrate the gains reaped from pursuing a stronger economic inclusion agenda, but to shed false stereotypes about the impact women have had on men in the workplace. In both the Arab World and Saudi Arabia, male participation in the workforce has held steady dropping by less than a percentage point compared to 1991, while unemployment among men *has dropped*. The notion that women are taking jobs *away jobs from men* is simply not backed by data. The insidious nature of the claims, however, have unfortunately further perpetuated gender discrimination.

While participation and employment among women has increased over the past 20 years in the Arab World and in Saudi Arabia, they remain low relative to their male counterparts at 24% and 18% respectively in 2011<sup>8</sup>. In fact, the Arab World has the lowest female participation

<sup>7</sup> Gross Domestic Product, or GDP, is the main benchmark used to quantify a country's national income. Per Investopedia "GDP is the monetary value of all the finished goods and services produced within a country's borders". It is usually calculated on a per annum basis and includes all consumer and government spending, investment, and net exports of a given country

<sup>8</sup> 2016 World Bank and International Labour Organization statistics show female participation is now estimated at 22.4% in the Arab World and 20% in Saudi Arabia

rates on the planet, with thirteen of the fifteen countries with the lowest rates are in the Arab World<sup>9</sup>.

Low participation rates are not the only outcomes that show a clear disparity between women and men. Women more than men, work in lower productivity fields that yield lower wages. This outcome is in stark contrast to trends in education, where women outperform men academically in many parts of the Arab World. According to the World Bank, while “the distribution of academic scores for boys and girls is the same in the region’s most populous countries [...] girls outperform boys in the oil-rich nations of the Gulf, and in Jordan and Palestine<sup>10</sup>. This conclusion is observed evidently when analyzing education attainment and workforce patterns among women in the STEM field. In the Arab States, nearly three-quarters of all graduates in the life sciences are women, much higher than what is observed, for example, in Western Europe<sup>11</sup>. In Saudi Arabia, women do better than men in science and math<sup>12</sup>. However, they are underrepresented in research fields. Women in the Arab World made up only 40% of all researchers in 2014, a low figure given the high level of female graduates. In Saudi Arabia, they accounted for only 4%<sup>13</sup>. While more than ever access to education has been expanded to women, and indeed women are taking full advantage of this, their attainment levels are not translating into equal opportunities for women in the workforce.

Another critical barrier keeping women from contributing their full potential to the formal economy is that they are more likely to be employed on a part-time basis than men. Women working fewer hours than men could be driven in part by either choice or social pressures to be primary caregivers and responsible for home-based chores. This trend is not only observed in the Arab World, but like many trends, is a global phenomenon.

If the gaps in workforce participation, high productivity field representation, and fulltime employment, are to be addressed the world can expect to increase its GDP by an estimated USD 28 Trillion by 2025 (Exhibit 5).

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<sup>9</sup> 2015 Global Gender Gap Report

<sup>10</sup> Equality of Opportunity in Education in the Middle East and North Africa Report. Accessed: <http://www.worldbank.org/en/news/feature/2013/03/14/missing-voices-gender-equality-in-the-arab-world>

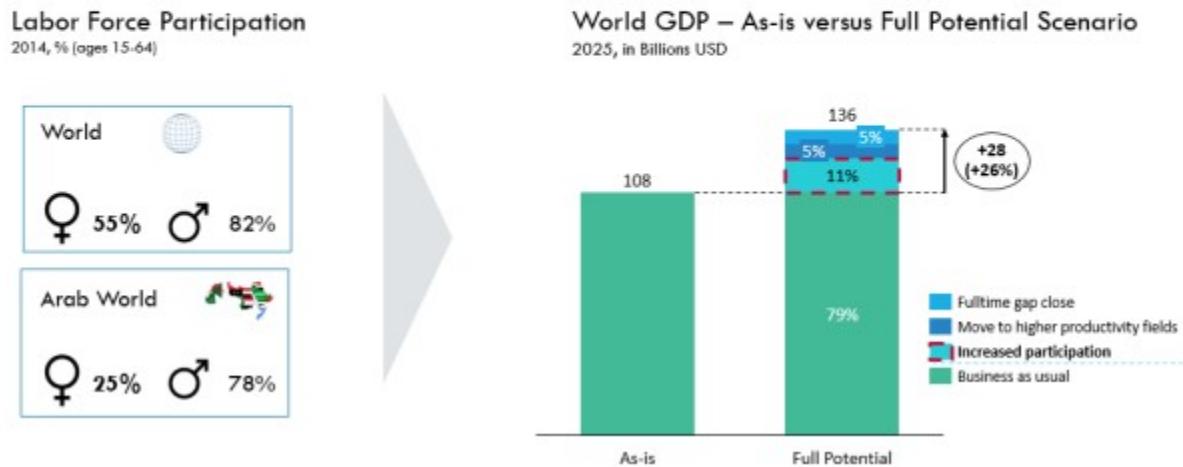
<sup>11</sup> Ibid

<sup>12</sup> Global Education Digest 2010, UNESCO Institute for Statistics

<sup>13</sup> Ibid. Accessed: <http://uis.unesco.org/sites/default/files/documents/fs43-women-in-science-2017-en.pdf>

## Exhibit 5: World GDP Scenarios – As-is versus full potential

### **Women, not men, will drive the economy of the future**



Looking at the Arab World alone, GDP would increase by 46% (or USD 2.7 Trillion), with over 85% of the value being derived from an increase in female participation. Closing the fulltime gap and shifting women to higher productivity fields account for 9% and 6% of the increase in GDP, respectively.

The CEDAW and other international treaties have drawn similar conclusions (see Exhibit 6).

Exhibit 6: Illustrative examples of articles reaffirming the link between peacebuilding and economic empowerment

## There is a strong link between Peacebuilding and economic empowerment

### Important to reaffirm women's rights and their role in prevention of conflict & peacebuilding

The Convention on the Elimination of all Forms of Discrimination Against Women - Article 13

*"States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights"*

UN Peacebuilding commission: Draft declaration Women's economic empowerment for peacebuilding

*"We, have assembled on 26 September 2013, to reaffirm the important role of women in the prevention and resolution of conflicts and in peacebuilding, as outlined in SC resolution 1325 on women, peace and security; and to affirm our commitment to promote the economic empowerment of women for peacebuilding and recognize in this regard the contribution of civil society to national efforts that protect women's rights and facilitate their access to legal services in post-conflict societies"*

### Important for nation-building and integrating women in all spheres of influence

UN Peacebuilding commission: Draft declaration Women's economic empowerment for peacebuilding

*"Emphasize the need to support the capacity-building of Governments in designing and carrying out national peacebuilding strategies that respond to women's economic needs and priorities in post-conflict situations and women's entrepreneurship opportunities"*

*"We recognize that the economic empowerment of women greatly contributes to the effectiveness of post-conflict economic activities and economic growth, and leads to improving the quality and social outcomes of economic recovery measures and policies as well as to sustainable development"*

*"We underscore the importance of integrating, as appropriate, a gender perspective when undertaking post-conflict economic activities"*

The results linking national competitiveness to gender equality, in that the former cannot be achieved without the latter, and the significant value that can be achieved on GDP if gender disparity is to be rectified, highlight that women will be the *key to driving future stability, prosperity, and competitiveness*. The results should not come as a surprise. National economic policies have long been set exclusively through a male-lens, failing to address the needs of women.

### 5. Feminomics: The Gender-lens Economic Framework

Having established the need to employ a gender-lens in economic policy-making, this section details a gender-lens framework that is comprehensive, mutually exclusive, and is actionable to achieve gender equality.

As corroborated by my findings in earlier sections, economics is a variable that is influenced by and that similarly influences multiple spheres – including the political and social. Moreover, given the significance of economics to the world order and in the defining role it plays in the period just following conflict and re-construction – it is a useful lens with which to analyze the baseline landscape, identifying the most critical areas in need of address, and to

monitor and evaluate future progress (or lack thereof). In other words, it is a useful benchmark to apply in evaluating gender parity outcomes<sup>14</sup>.

“Enabling the equal status of girls and women in schools, health services, financial systems, legal institutions, and—perhaps most importantly—families is essential to capturing the economic potential of women.”

**Gender Parity Report 2015, McKinsey Global Institute**

Crafted by MGI, the gender-lens framework is a composite that highlights four broad parameters (Exhibit 7). The four parameters are: legal protection & political voice; physical security & autonomy; equality in work; and essential services and enablers of economic opportunity. Cumulatively, the framework looks at 15 outcome-based indicators<sup>15</sup>. They are described in detail in Exhibit 8.

MGI uses the framework to assign an overall country score and a score for each of the four parameters. It generates scores by calculating the distance countries have travelled toward gender parity. The scoring scale is from 0 to 1, with 1 representing full equality. For most indicators, “low inequality was defined as being within 5 percent of parity, medium between 5 and 25 percent, high inequality between 25 and 50 percent, and extremely high inequality 50 percent or above”<sup>16</sup>. For physical security and autonomy indicators, extremely high inequality was measured a distance that is equal to or greater than 33 percent distance from no prevalence.

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<sup>14</sup> As mentioned in Section II, draws gender equality in work is not possible without gender equality in society

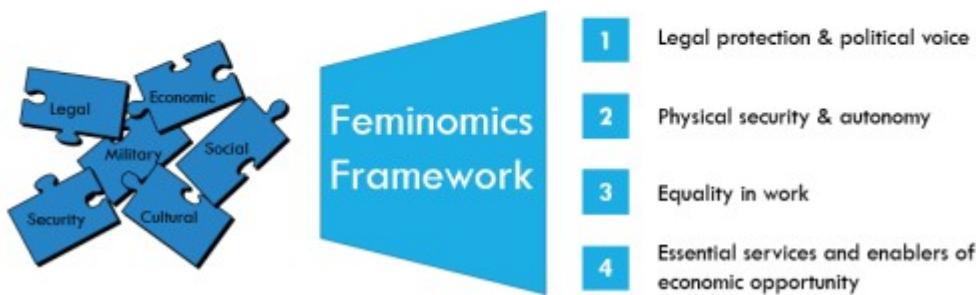
<sup>15</sup> Power of Parity Report (2015) McKinsey Global Institute

<sup>16</sup> Ibid; For example, a female-to-male ratio of 0.4 in labor-force participation rate corresponds to extremely high levels of inequality since the distance from parity, or the gender gap, in labor-participation rates (1.0) is 0.6 or 60 percent.

## Exhibit 7: Feminomics framework summary

**Using economic empowerment as the basis, we are able to address all elements related to the empowerment of women**

McKinsey Global Institute has established gender equality in work is “**not achievable without gender equality in society and a shift in attitudes and beliefs about the role of women**”



The methodology used to generate the framework involved a review of a range of global charters and statements of principle, including the CEDAW, the reaffirmation by the 1994 International Conference on Population and Development in Cairo of the relationship between advancement and fulfillment of rights and gender equality and equity, the Beijing Declaration, and the Millennium Development Goals of 2000. Additionally, the MGI team verified the alignment of the indicators with the 2015 Sustainable Development Goals (SDGs)<sup>17</sup>.

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<sup>17</sup> Ibid

## Exhibit 8: Indicators of Framework by area

MGI uses a holistic framework of 15 outcome-based indicators to assess global gender equality

		Gender equality indicators	
<b>Gender equality in work</b>  Women and men are equal players in the labor markets	<b>Gender equality in work</b>	<b>Labor-force participation rate</b>	Female-to-male ratio of labor-force participation rate
		<b>Professional and technical jobs</b>	Female-to-male ratio of representation in professional and technical jobs
		<b>Perceived wage gap for similar work</b>	Female-to-male ratio of wages for similar work
		<b>Leadership positions</b>	Female-to-male ratio of representation in leadership positions
		<b>Unpaid care work</b>	Male-to-female ratio of time spent on unpaid care work
<b>Gender equality in society</b>  Women and men have equal opportunity to build human capital and progress	<b>Essential services and enablers of economic opportunity</b>	<b>Unmet need for family planning</b>	Percent of married or in-union women aged 15–49 who want to stop or delay childbearing but are not using contraception
		<b>Maternal mortality</b>	Maternal deaths per 100,000 live births
		<b>Education level</b>	Female-to-male composite ratio of adult literacy rate, secondary education enrollment rate, and tertiary education enrollment rate <sup>1</sup>
		<b>Financial inclusion</b>	Female-to-male composite ratio of the rate of account holders at a financial institution, rate of borrowing, and mobile banking rates <sup>1</sup>
		<b>Digital inclusion</b>	Female-to-male composite ratio of the rate of Internet and mobile users <sup>2</sup>
	<b>Legal protection and political voice</b>	<b>Legal protection</b>	Composite index of the extent of protection to women by different legal provisions (e.g., right to inherit, access to jobs) <sup>3</sup>
		<b>Political representation</b>	Female-to-male composite ratio of representation in parliamentary and ministerial positions <sup>2</sup>
	<b>Physical security and autonomy</b>	<b>Sex ratio at birth</b>	Male-to-female ratio of births
		<b>Child marriage</b>	Percent of girls and young women aged 15–19 who are married
		<b>Violence against women</b>	Percent of women who have experienced physical and/or sexual violence from an intimate partner at some time in their lives

1 Composite indicator of three indicators.

2 Composite indicator of two indicators.

3 Composite indicator of 11 indicators.

SOURCE: McKinsey Global Institute analysis

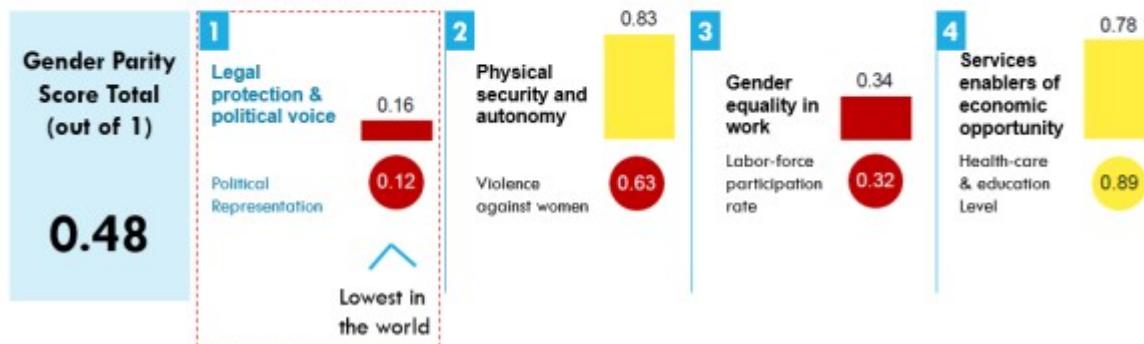
## **IV. Applying Feminomics to the Arab World**

The Arab World's overall score is 0.48, making it the second lowest ranked region in the world just after South Asia (excluding India). Gender parity appears to be most acutely impacted by weak legal protections and political participation for women. In fact, of all the indicators in this parameter, political representation is especially low (Exhibit 9).

Exhibit 9: Gender Parity Score by Area – Arab World<sup>1819</sup>

## Arab countries are suffering from low economic outcomes in large part due to low legal structures

The share of regional output generated by women is only 18% in MENA



The composite legal indicator is based on four elements that were pulled from the Women, Business and the Law database at the World Bank. The indicators are: the existence of laws to protect women against domestic violence and sexual harassment; legal protection for women in accessing the judicial system; institutions that provide national or constitutional recognition, the right to inherit property, and laws that allow women the same access to job opportunities and equal pay for equal work; and laws that accord men and women similar rights in the case of unpaid care work (such as family leave). Arab states perform poorly on nearly all indicators.

To illustrate the extent of gender disparity, exhibit 10 demonstrates some of the restrictions applied on married women. The restrictions that apply to the most number of countries are quite surprising, and while they may be enforced to different degrees it should be a cause of concern for decision makers. In 13 countries of the Arab World, women are technically not allowed to travel outside the home without permission or being accompanied by a male “guardian”, nor can they confer citizenship to their children. Even more alarming, nine countries appear in at least 6 of the categories listed in exhibit 10 implying that the restrictions they impose on women are wide-reaching and not limited to any one area.

<sup>18</sup> Ibid

<sup>19</sup> Gender Parity Scores are measured on scale from 0 to 1, with 1 accounting for no gender disparity

## Exhibit 10: Examples of the most pervasive restrictions on Women in the Arab World

### Illustrative: Legal restrictions on Women in MENA



The low score achieved by Arab States in this area is especially alarming since most have had significant exposure and in some cases, been party, to many of the treaties that prohibit discrimination (see Exhibit 12).

## Exhibit 12: Illustrative treaties with Arab State representation

### Clear contradiction: many MENA countries are signatories/parties to treaties that prohibit discrimination

	Countries who are signatories	Sample clause	Countries who are signatories	Sample clause
<b>UDHR</b> <small>UN Declaration of Human Rights</small>	Iraq, Iran, Egypt, Lebanon, Syria, Saudi Arabia (abstention)	"Whereas the United Nations reaffirmed their faith in the dignity and worth of the human person and in the equal rights of men and women"	<b>ICESCR</b> <small>International Covenant on Economic, Social, &amp; Cultural Rights</small>	Excludes Saudi Arabia "The States Parties undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights"
<b>CEDAW</b> <small>Convention on the Elimination of All Forms of Discrimination on Women</small>	All with the exception of Iran and Sudan	Article 13: "States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, ...equality of men and women"	<b>ICCPR</b> <small>International Covenant on Civil and Political Rights</small>	Excludes Saudi Arabia "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights"
<b>UNSC 1325</b> <small>UN Security Council 1325</small>	Ratified by security council	"We underscore the importance of integrating, as appropriate, a gender perspective when undertaking post-conflict economic activities"		

## **6. Tunisia Case Study: How Women used the re-writing of the constitution to promote gender equality**

As demonstrated in section IV, Arab women have been kept out of decision-making, particularly in the post-colonial period of the earlier 20<sup>th</sup> century. Today, there is no shortage of instability in some countries of the Middle East. The “Arab Spring” period, starting in mid-2011, saw the fall of decades-long regimes in Tunisia, Libya and Egypt. The period however, also ushered in a period of optimism, particularly for marginalized communities like women and youth whose needs were not addressed by the government. It is no surprise then that women took aggressive grassroots action during the revolution, organizing women-only rallies and putting their lives at stake alongside their male counterparts. Despite women’s strong activism and contribution in bringing down regimes, their vision, voices and interests were once again sidelined or limited, as institutional structures began to emerge during the post-conflict period.

While not without its complications, Tunisia stands as an exception to this rule. This focused case study underlines the critical role of women in preventing conflicts and supporting, participating in and carrying out peacebuilding, as well as actively working towards eliminating gender gaps<sup>20</sup>.

### *6.1 Rewriting the Tunisian Constitution*

Women’s advocacy groups capitalized on the opportunity to promote gender equality in the re-writing of the country’s constitution. Specifically, they influenced the re-writing of the constitution through formal and informal means (the grassroots), maintaining strong ties across both. The Secretary of State for Women Affairs worked closely with several civil society organizations, including Tunisian Association of Democratic Women and UN Women, in reforming the Tunisian legal framework with the new constitution and with international instruments ratified by Tunisia for the protection of women’s rights such as the CEDAW<sup>21</sup>. To bolster support for integrating gender parity into the constitution making process, one high profile activity was led by the Centre for Research, Studies, Documentation and Information on Women (CREDIF) which organized a debate on the integration of the principle of parity in the Constitution. The event brought members of the National Constituent Assembly, policymakers,

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<sup>20</sup> Rangita de Silva de Alwis, Anware Mnasri, and Estee Ward, *Women and the Making of the Tunisian Constitution*, 35 Berkeley J. Int'l Law. 90 (2017). Available at: <http://scholarship.law.berkeley.edu/bjil/vol35/iss1/3>

<sup>21</sup>Ibid

and civil society representatives. To make use of global best practices, the Ministry of Women and Family Affairs and the Wilson Center (Global Women's Leadership Initiative) organized a roundtable on “women’s rights in the making of the Tunisian Constitution” in with 36 participants from a diverse range of stakeholders of countries from the region on integrating gender equality principles in national constitutions. Hafidha Chekir, lawyer and activist who took part in the conference remarked on the importance of ratifying the CEDAW, stating “It is important that, in partnership with civil society, [the UN] continues to encourage the lifting of restrictions as stipulated in the Constitution. Indeed, it is formulating a positive text and confirming the superior legal force of international conventions. This means that the State is obliged to fulfil its international commitments.”

These actions, among many, were responsible for the inclusion of gender equality clauses in the new constitution. Indeed, women’s rights advocates managed to safeguard rights won by Tunisian women in the past and introduce new articles. Adopted on January 27, 2014, the constitution’s hallmark article, article 46, maintained that “The state commits to protect women’s established rights and works to strengthen and develop those rights,” and guarantees “equality of opportunities between women and men to have access to all levels of responsibility and in all domains.”<sup>22</sup> Moreover, article 20, a new article, guarantees equality of rights and responsibilities. Article 20, which was only newly introduced, makes Tunisia one of the few countries in the Arab region with a constitutional obligation to work toward gender parity.

Additional articles that were introduced in the new constitution include giving women an equal right to men to run as presidential candidates and imposes obligations on the state to act to eliminate all forms of violence against women.

Among the most important, and actionable articles introduced relate to women’s economic empowerment. The constitution mandates for example, enforcing affirmative action measures of 50% representation in all elected assemblies<sup>23</sup>. The constitution also made explicit that the state reinforced gender equality in the workplace<sup>24</sup>.

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<sup>22</sup> Tunisia’s New Constitution UN Women <http://www.unwomen.org/en/news/stories/2014/2/tunisia-new-constitution>

<sup>23</sup> Ibid

<sup>24</sup> Rangita de Silva de Alwis, Anware Mnasri, and Estee Ward, *Women and the Making of the Tunisian Constitution*, 35 Berkeley J. Int'l Law. 90 (2017).

Available at: <http://scholarship.law.berkeley.edu/bjil/vol35/iss1/3>

## *6.2 Introducing new laws*

The wide coalition of gender equality activists continued their advocacy even after the passing of the new constitution. In 2015, Tunisia's parliament adopted a new law to allow women to travel with their minor children without getting permission from the children's father<sup>25</sup>.

## *6.3 Issues remain*

Despite the significant progress made, further action is still needed particularly in addressing personal status laws. Examples of existing discrimination include assigning legal guardianship to fathers in custody battles, unequal share of inheritance. Moreover, Tunisia is one of few members of the African Union that did not sign nor ratify, the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol), which sets out additional rights to CEDAW<sup>26</sup>.

## **7. Recommendations**

I employed a two-step process to inform and formulate the appropriate recommendations. First, I developed an understanding of the most pervasive and severe bottlenecks constraining women in the Arab World. Second, in studying a successful case study, like Tunisia, I drew out broader lessons that the Arab World can use, not simply for nations coming out of conflict but also those that are still in their development stage.

Using the insights gained from studying key bottlenecks constraining women's equality, empowerment and development in the Arab World and the case for constitutional re-writing in Tunisia, this will feed our analysis. Note that while this list of recommendations is needed, it is only a *starting point* and is not meant to be comprehensive. More extensive studies, particularly on a country by country basis, are required to develop even more concrete and actionable interventions.

### **Recommendation 1: Formulize women's equality in the legal framework**

- Draw up/amend constitutions that have gender discriminatory clauses as it relates to women's political, economic and social (public and private) spheres, particularly by focusing on those that relate to personal family laws

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<sup>25</sup> Tunisia: A Step Forward for Women's Rights. Human Rights Watch. Accessed: <https://www.hrw.org/news/2015/11/12/tunisia-step-forward-womens-rights>

<sup>26</sup> Ibid

- Use blueprints of established treaties, such as CEDAW, International Covenant on Economic, Social, and Cultural Rights (ICESCR), International Covenant on Civil and Political Rights (ICCPR), the Sustainable Development Goals (SDGs) as a point of departure
- Recognize and act upon the importance of having advocates both at the institutional and grassroots level and maintaining a communications channel that allows them to align on the agenda and reflect the wide-ranging needs of their various stakeholders
  - Like Tunisia, building formalized teams within existing institutions, such as the Arab League, OPEC, and the GCC, will allow for more effective and efficient problem solving and implementation

**Recommendation 2: Promote increased participation for women in the workforce**

- Develop policies that address unpaid care work
  - Mandate enforced paternity leave that is equal to maternity leave in terms of compensation and length
  - Incentivize companies to set up on-site nursery facilities
  - Create and expand the capacity of public nurseries, placing them in locals with a high concentration of commercial activity
- Promote increased participation of women in the workplace
  - Create incentives e.g., tax breaks or grants on training, for employing women (tax breaks and grants will vary based on industry, type of employment and seniority)
  - Develop a penalty system for companies failing to meet a minimum quota for hiring women into their organization
  - Support female entrepreneurs by creating accelerators and funds directed at female-founded businesses
  -

**Recommendation 3: Shift mindsets on gender, particularly on influencing future generations**

- Use existing structures to influence younger generations' conceptions on gender
  - Introduce gender programming into formal education structures

- o Create women focused internship programs within higher education institutions that facilitate the entry of women into the workforce (particularly in the private sector)
- Create new permanent institutions whose work will be to focus on shifting mindsets on women and identifying high impact initiatives to accelerate this process
  - o e.g., Identify and elevate change makers/role models who can help shift cultural attitudes towards women, report directly to head of State and Ministry of Economy
- Develop participatory citizenship platforms to enable open discussions on gender in society to shift cultural attitudes on women
  - o Create open forums/debates to engage citizens e.g., UAE created Happiness Meter Portal to more effectively measure and influence the happiness of its residents and tourists

# **WOMEN'S ECONOMIC EMPOWERMENT AND THE PEACE AND SECURITY AGENDA: A CASE STUDY ON ETHIOPIA**

Eleni Tamerat Belay

## **Introduction**

We are at a particularly interesting and inspiring time in the continent of Africa. With many post-transitional governments in place, the continent has overall gained increased peace and stability. This development, in combination with other factors, has made Africa attractive and suitable for new economic and business opportunities. Very often, marginalized groups, such as women, end up being on the sidelines and do not equally benefit from the prosperity occurring around them. However, empowering women through economic opportunities (1) significantly increases the global wealth<sup>1</sup> and (2) contributes to the prevention of conflict and promotes continued peace and stability<sup>2</sup>.

There is a plethora of research that exists on the topic of gender equity in the context of women's economic empowerment or the lack thereof as an indicator of conflict and determinant of peace and security. This paper aims to synthesis some of the existing research and introduces additional viewpoints by specifically focusing on Ethiopia. The author strives to remain apolitical and presents an overview of gender parity in Ethiopia through the lens of economic empowerment by exploring the current government's policies and actions. In section one of this paper, the author will highlight the various international documents that address the equality of women in the context of economic empowerment and its relationship to peace and security. Women's economic empowerment is a concept that originates from fundamental human rights documents. Oftentimes, mostly in good faith and out of a desire to gain supporters, the issue of women's economic empowerment is accompanied by a business case justification. However, women's economic empowerment is a treasured flower in the garden of human rights. Women's economic empowerment is also a powerful tool in the maintenance of peace and security because it is (1) a woman's shield against poverty and (2) a nation's multifaceted and transformative instrument in

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<sup>1</sup> See, McKinsey & Company, *The Power of Parity: How Advancing Women's Equality can add \$12 Trillion to Global Growth*, MCKINSEY GLOBAL INSTITUTE, Sept. 2015 (discussing how eliminating gender inequality could increase \$12 Trillion to the world's economy by 2025).

<sup>2</sup> See, World Bank Group, *Women, Business and the Law 2016: Getting to Equal*, 20 (stating that there is a negative relationship between women's economic empowerment and women's likelihood to become victim's of violence).

creating structural changes and fostering rapid recovery post conflict<sup>3</sup>. In section two of this paper, the author will examine the policies and legislative and constitutional amendments put forth by the Ethiopian People’s Revolutionary Democratic Front (*EPRDF*) to increase women’s economic engagement, following the overthrow of the *Derg* regime in 1991. The author will provide brief background information on Ethiopia before she proceeds to discuss the various legal and civil reforms and amendments made by the *EPRDF*. In section three, the author will assess the gaps in said policies, legislative and constitutional amendments by the *EPRDF*. In addition to providing an overview of the commonly identified flaws in the *EPRDF*’s approach to the issue of women, the author will introduce two additional issues that require consideration: (1) the practice of grouping issues pertaining to women, children and youth in the same category and (2) the lost opportunity in failing to recognize the intersectionality of gender and ethnicity, especially in a country such as Ethiopia, where ethnic divide has been and continues to be a pervasive issue. The intersectionality of gender and ethnicity is an especially important topic in light of the existing Oromo conflict in Ethiopia. Perhaps, a broad agenda, such as women’s economic empowerment, could serve as a uniting ground and a powerful tool in resolving ethnic divides, which will in turn ensure continued peace and security in Ethiopia. The author plans to further research and expand on this last section in the next academic year. Finally the author will conclude by proposing recommendations that will further strengthen the *EPRDF*’s commitment to women’s economic empowerment.

## **1. International Documents Addressing Women’s Economic Empowerment and the Relationship Between Women’s Economic Empowerment and Peace and Security**

### *2.1 International Documents Addressing Women’s Economic Empowerment*

Various international documents such as the Universal Declaration of Human Rights (“UDHR”), the International Covenant on Economic, Social and Cultural Rights (“ICESCR”), The Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”), the Beijing Declaration and the Beijing Platform for Action (“BPFA”), Protocol to the African Charter on Human and People’s Rights on the Right of Women in Africa, Security Council Resolution 1889, Security Council Resolution 2106 and Security Council Resolution 2122 address women’s

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<sup>3</sup> See Generally, Local Economic Recovery in Post-Conflict: Guidelines (Geneva: International Labour Organization, 2010).

economic empowerment and oblige state parties to take appropriate actions in varying degrees. It is imperative to recognize that women's right to economic empowerment is a fundamental human right embedded in the UDHR<sup>4</sup> and the ICESCR<sup>5</sup>. While the participation of women in the formal economy may lead to favorable outcomes including increased global wealth<sup>6</sup>, such justifications should not replace the human rights argument for women's economic empowerment.

The CEDAW, the international bill of rights for women, specifically in Article 11, 13 and 14 condemns economic discrimination against women. Article 11<sup>7</sup> of the CEDAW urges state parties to eliminate discrimination against women in the context of employment. Article 13<sup>8</sup> of the CEDAW requires state parties to fight discrimination against women in the provision of equal access to credit and other economic and social areas. Article 14<sup>9</sup> of the CEDAW obliges state parties to consider rural women in their fight against economic discrimination of women. In a similar vein, the Beijing Declaration and the BPFA also emphasize the need for legislative and administrative changes to provide women equal access to economic resources<sup>10</sup>. Furthermore, the Protocol to the African Charter on Human and People's Rights on the Right of Women in Africa addresses women's (1) economic and social welfare rights<sup>11</sup>, (2) right to property and land<sup>12</sup>, (3) right to access to credit<sup>13</sup> and (4) right to inheritance<sup>14</sup>. In addition, the Security Council, in

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<sup>4</sup> UN General Assembly, *Universal Declaration of Human Rights*, U.N.G.A Res. 217A (III), U.N. Doc. A/810, art. 23 (Dec. 12, 1948) (stating that “[e]veryone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment).

<sup>5</sup> International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, art. 6. (recognizing everyone's right to work and outlining measures to be taken by state parties) and Article 7 (stating everyone's right to just conditions of working and compensation; art. 7(a)(1) specifically calls out women and enjoins state parties not to discriminate on the basis of gender).

<sup>6</sup> McKinsey & Co., *supra*, at 1.

<sup>7</sup> Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S.13, art. 11.

<sup>8</sup> *Id.* at art.13.

<sup>9</sup> *Id.* at art. 14.

<sup>10</sup> See Beijing Declaration and Beijing Platform for Action, Objective A.2 61 (b), Objective F.1, F.2, F.3, F.4, F.5, F.6.

<sup>11</sup> The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Sept. 13, 2000, OAU Doc. CAB/LEG/66.6, art. 13.

<sup>12</sup> *Id.* at art. 19(c).

<sup>13</sup> *Id.* at art. 19(d).

<sup>14</sup> *Id.* at art. 21.

Resolution 1889<sup>15</sup>, 2106<sup>16</sup> and 2122<sup>17</sup> discusses women's economic empowerment in the context of peace and security.

## *2.2 Women's Economic Empowerment and its Relationship to Peace and Security*

Women's economic empowerment advances the prevention of violence and promotes peace and security. First, economically empowered women are able to escape poverty and thereby better withstand the impacts of conflict. Second, because the economic empowerment of women leads to a multitude of structural changes in a given country, women are not left at a heightened disadvantage during conflict. Third, economically empowering women leads to quicker post conflict recovery and more sustainable peace<sup>18</sup>.

Poverty is one of the root causes of conflict<sup>19</sup>. Research indicates that more women are prone to poverty than men because of their limited access to the economy as a result of gender based discrimination<sup>20</sup>. Women are often engaged in the informal sector of the economy and on average make significantly less than men<sup>21</sup>. Women also often lack equal access to employment and credit institutions<sup>22</sup>. All of these factors place women in a more precarious position than men in times of conflict. Further, the economic empowerment of women could reduce the poverty level and directly contribute to the prevention and reduction of conflict.

Policies, which promote the inclusion of women in business, could bring about structural changes that empower women and make them less vulnerable during conflict. Inclusion of women in business extends beyond having women in the market place. Successful policies that strive to achieve gender parity in economic activities will most likely also (1) increase women's access to education and training; (2) increase women's access to infrastructures such as credit facilities, courts and healthcare; (3) eliminate family and divorce laws which are per se or in effect

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<sup>15</sup> S.C. Res. 1889, preamble (Oct. 5, 2009) (acknowledging that increasing women's empowerment contributes to post conflict peace building).

<sup>16</sup> S.C. Res. 2106, preamble (June 24, 2013) (stating that women's economic empowerment is central to long term efforts to prevent sexual violence).

<sup>17</sup> S.C. Res. 2122, preamble (Oct. 18, 2013) (stating that economic empowerment of women greatly contributes to the stabilization of societies emerging from armed conflict).

<sup>18</sup> Melanne Verveer, *Unleashing Women's Economic Potential to Build Social Stability and Prevent Conflict in WOMEN ON THE FRONTLINES OF PEACE AND SECURITY*, 77-82 (2009).

<sup>19</sup> Plan of Action to Prevent Violent Extremism, G.A. Res. 70/1, ¶ 16, 17, 25, 44(e), U.N. Doc. A/70/674 (Dec. 24, 2015).

<sup>20</sup> UN Women, *The Beijing Declaration and Platform for Action Turns 20*, 10. 2015.

<sup>21</sup> *Id.* at 11.

<sup>22</sup> *Id.*

discriminatory; (4) amend ownership and inheritance laws and practices which may deter women from independently entering or contributing to the economy and (5) increase the representation of women in parliament and other influential positions. Laws and policies that aim to economically empower women also help in eradicating other discriminatory practices against women thereby fostering gender parity in a nation, which would mean that women are less likely to be specifically targeted during conflict.

Women's participation in the economy post conflict also allows for rapid stability in a country<sup>23</sup>. Women account for nearly half of the workforce and as a result could contribute to a more rapid post conflict recovery, peace and stability if given equal opportunities as men. Not involving women in the rebuilding of a nation is a wasted opportunity, especially in African nations where women have a significant role in the preservation of their household.

## **2. Policies and Amendments Introduced by the Ethiopian People's Revolutionary Democratic Front (EPRDF)**

### *2.1 Background on Ethiopia*

With an estimated population size of 102,374,044<sup>24</sup>, Ethiopia is composed of multiple ethnicities. Three of the largest ethnic groups include *Oromo* (34.4 percent), *Amhara* (27 percent) and *Tigray* (6.1 percent)<sup>25</sup>. About 80 percent of the nation's population resides in the rural parts of the country<sup>26</sup>. The sex ratio for the nation is estimated to be 0.99 male/female<sup>27</sup>.

The current government of Ethiopia, *EPRDF*, came to power in 1991 after overthrowing a Marxist Military regime (*Derg*), which controlled the country for 17 years. Immediately following the fall of *Derg*, a transitional government was put in place. In 1994, the *EPRDF* adopted a new constitution. Women were very pivotal in the overthrow the *Derg* regime<sup>28</sup>. It is estimated that one-third of the fighters in the leading group of the movement to overthrow the *Derg* regime were women<sup>29</sup>. In Ethiopia, there are nine ethnically based states (referred to as "regions") and two

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<sup>23</sup> Melanne Verveer, *supra*, at 17.

<sup>24</sup> CIA, *World Fact Book – Ethiopia*, <https://www.cia.gov/library/publications/the-world-factbook/geos/et.html> (last viewed on Apr. 9, 2017).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Gemma Burgess, *A Hidden History: Women's Activism in Ethiopia*, *Journal of International Women Studies*, 14 J. Int'l Women's Studies 3, 101, July, 2013.

<sup>29</sup> *Id.*

self-governing administrations<sup>30</sup>. Ethiopia is a party to numerous international conventions including the CEDAW.

### *2.1 Legal and Civil Reforms and Amendments by the EPRDF*

Beginning with the 1994 Constitutional amendments, the *EPRDF* has demonstrated its commitment to the economic empowerment of Ethiopian women. The government has repealed discriminatory laws that barred women from exercising their full economic rights. Furthermore, the government has enacted various policies that are centered on the promotion of women's rights including economic rights. Most importantly, the government's desire to give women a seat at the table has contributed to the creation of various organizations, both governmental and non-governmental, which strive to advocate for women's economic rights.

The 1994 Ethiopian Constitution introduces a gender lens of looking at individual's rights. Article 35, entitled "Rights of Women", discusses women's economic rights along with other rights that structurally impact the participation of women in business. Article 35 specifically states that: women are entitled to equal protection of the law<sup>31</sup>; men and women are equals in marriage<sup>32</sup>; affirmative action is necessary to rectify past discrimination against women<sup>33</sup>; customs harmful to women are to be eliminated<sup>34</sup>; women are entitled to fully paid maternity leave<sup>35</sup>; women deserve a seat at the table<sup>36</sup>; women have equal rights as men to "acquire, [inherit], administer, control, use and transfer property" including land<sup>37</sup>; women have the right to "equality in employment, promotion, pay and the transfer of pension entitlements"<sup>38</sup> and women have the right to "access family planning family, education, information and capacity."<sup>39</sup> The 1994 Ethiopian Constitution

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<sup>30</sup> *Id.*

<sup>31</sup> CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, 1994, art. 35(1).

<sup>32</sup> *Id.* at art. 35(2).

<sup>33</sup> *Id.* at art. 35(3).

<sup>34</sup> *Id.* at art. 35(4).

<sup>35</sup> *Id.* at art. 35(5).

<sup>36</sup> *Id.* at art. 35(6).

<sup>37</sup> *Id.* at art. 35(7).

<sup>38</sup> *Id.* at art. 35(8).

<sup>39</sup> *Id.* at art. 35(9).

also addresses rights that are relevant to women's economic empowerment in Article 6<sup>40</sup>, Article 7<sup>41</sup>, Article 25<sup>42</sup>, Article 33<sup>43</sup> and Article 34<sup>44</sup>.

In addition, the *EPRDF* has also taken efforts to revise discriminatory legislations that hinder women's economic empowerment. For instance, the government has repealed the Civil Code of 1960 by revising the Family Law in 2000<sup>45</sup>. The repealed Civil Code of 1960 set the minimum age for marriage at 15 and gave husbands the upper hand in a marital relationship<sup>46</sup>. Essentially the old civil code made women properties of their husbands. The revisions carried out in 2000 increased the legal age of marriage to 18 and made husbands and wives equals in marriages<sup>47</sup>. The new family law made it possible for women to seek redress in court for property settlement issues associated with divorce<sup>48</sup>. Furthermore, the new code recognized common law marriage thereby protecting property rights of women who have lived with their significant other for at least three years, but were not in legally recognized marriages<sup>49</sup>. In addition, the law also echoes the values enshrined in the 1994 Ethiopian Constitution in that it protects the citizenship rights of women during marriage and their ability to pass citizenship to their children<sup>50</sup>. Four years later, the *EPRDF* also amended the Penal Code of 1957 to combat violence against women by making harmful practices such as female genital mutilation (FGM) and the abduction of the girl child for marriage punishable by law<sup>51</sup>. Until 2011, Ethiopian women were also denied pensions<sup>52</sup>. However, pursuant to the recent labor law reforms, Ethiopian women can legally enjoy just compensation, pension rights and paid maternity leave<sup>53</sup>.

Perhaps the most influential and popular among the *EPRDF*'s strategic moves to promote women's rights are the various policies that were introduced by the government. Initially

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<sup>40</sup> *Id.* at art. 6 (stating that both genders can transfer nationality to their boy or girl child).

<sup>41</sup> *Id.* at art. 7 (stating that all provisions applicable to the male gender are also applicable to the female gender).

<sup>42</sup> *Id.* at art. 25 (stating that *all persons* are equal before the law).

<sup>43</sup> *Id.* at art. 33 (stating that marriage of either sex shall not rescind nationality).

<sup>44</sup> *Id.* at art. 34 (stating that men and women are equals in marriage and during divorce).

<sup>45</sup> Helina Beyene, *Final Report National Assessment: Ethiopia – Gender Equality and the Knowledge Society, WOMEN IN GLOBAL SCIENCE AND TECHNOLOGY*, 21, December 2015.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

formulated by the Ethiopian transitional government in 1993, the *National Policy on Women* represents the first effort by the government of Ethiopia to combat discrimination against women<sup>54</sup>. The policy repeatedly uses the phrase “enjoyment of fruits of labor”<sup>55</sup> thereby laying the foundation for the economic empowerment of women. In congruence with the CEDAW and the Protocol to the African Charter on Human and People’s Rights on the Right of Women in Africa, the National Policy on Women identifies the challenges of women living in rural areas as opposed to women living in urban areas<sup>56</sup>. Finally the policy calls for the collaboration of all Ethiopians specifically women in advancing women’s rights<sup>57</sup>. The government has also introduced a series of *Growth and Transformation Plans (GTP)*, which are five-year development goals. Currently in its second series, one of the pillars of the plan is to “promote gender and youth empowerment and equity.”<sup>58</sup> Via the *GTPs*, the government has also placed an increased focus on the *micro and small enterprise sector (MSE)*<sup>59</sup>.

The *ERPDF*’s inclusive culture to integrate women into the economy has also fostered the creation of governmental and non-governmental organizations committed to the equity of women. Some of these organizations include the Women’s Affairs Office – the main governmental entity responsible for the creation and implementation of policies that impact women<sup>60</sup>, the Regional Women’s Affairs Sector – the regional equivalent of the Women’s Affairs Office<sup>61</sup>, and the Ethiopian Women Lawyers Association – a non-profit advocacy organization<sup>62</sup>.

### **3. Gaps in the Ethiopian People’s Revolutionary Democratic Front’s (EPRDF) Efforts to Advance the Equality of Women**

#### *3.1 Gaps in the EPRDF’s Efforts to Advance the Equality of Women*

The constitutional and legislative amendments led by the *EPRDF* along with the various policies of the government that were instituted in an effort to rectify the discriminatory laws and

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<sup>54</sup> The Transitional Government of Ethiopia, *National Action Plan*, 1993 Section I, 6.

<sup>55</sup> *Id.* at 4,5,6,12,14.

<sup>56</sup> *Id.* at 15.

<sup>57</sup> *Id.* at 21.

<sup>58</sup> The Federal Democratic Republic of Ethiopia, *The Second Growth and Transformation Plan (GTP II)*, 84, May 2016 [Hereinafter GTP II].

<sup>59</sup> Ermias Engida et al., *The Role of Micro and Small Enterprise in Reducing Unemployment and Poverty in Ethiopia*, PARTNERSHIP FOR ECONOMIC POLICY, 165, Feb. 2017.

<sup>60</sup> Kidist Alemu, *Enforcement of CEDAW in Ethiopia, in light of State Obligations*, UNIVERSITY OF LUND, Dec. 2002.

<sup>61</sup> *Id.*

<sup>62</sup> Gemma Burgess, *supra note* 27, at 102.

practices against women have economically empowered Ethiopian women. For instance, it is estimated that (1) 8.6 million women were beneficiaries of agricultural and non-agricultural activities under the first phase of the *GTP*<sup>63</sup>; (2) 11.11 million women were issued land use certificates<sup>64</sup>; (3) 3.4 million women were given access to resources such as alternative energy, which in turn allowed them to conduct their work efficiently<sup>65</sup>; (4) 6.62 million women and 80,148 women organizations were beneficiaries of better access to credit and saving services<sup>66</sup>. These improved credit and saving services have allowed women to borrow about 2 billion birr and save an estimate of 2.82 billion birr<sup>67</sup>. However, no policy or government action is without flaws and there is still a lot to be done to improve the equality of women in Ethiopia in the economic sphere and other realms.

There are various studies and reports that outline some of the gaps in the *EPRDF*'s laws and policies related to women. All of these identified areas of improvements hinder women's full participation and engagement in the economy and the exercise of women's economic rights. Some of the commonly raised gaps include: (1) the dominance of customary and religious law over family matters such as inheritance and divorce<sup>68</sup> (2) power given to regional governments to legislate family law<sup>69</sup>; (3) lack of proper redress for domestic violence in the 1957 penal code<sup>70</sup>; (4) failure to address sexual harassment and remedies within the labor laws<sup>71</sup>; (5) lack of sufficient funding for governmental entities charged with advancing the interest of women<sup>72</sup> and (5) implementation failure at the local and regional level<sup>73</sup>. The author identifies two additional gaps: (1) The negative consequences of grouping women, children and youth initiatives in the same category and (2) the failure to recognize the intersectionality between ethnicity and gender.

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<sup>63</sup> *GTP II*, *supra* note 57, at 56.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> Gemma Burgess, *supra* note 27, at 102.

<sup>68</sup> Helina Beyene, *supra* note 44, at 20.

<sup>69</sup> *Id.* at 21(stating how polygamy was almost affirmed in Oromiya's family law).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 22.

<sup>72</sup> Gemma Burgess, *supra* note 27, at 102.

<sup>73</sup> Tefera Assefa, *Institutional Capacity of Local Government in Implementing the National Policy on Ethiopian Women (NPEW): The Case of Dilla Town*, ADDIS ABABA UNIVERSITY, 14-16, Nov. 2014.

Understandably, women, children and youth are two focus groups in the *EPRDF*'s Growth and Transformation Plan (*GTP*)<sup>74</sup>. There is untapped potential in all three groups. All three groups have been historically marginalized and deserve empowerment opportunities. While the recognition of such systematic discrimination is appropriate, it is also important to recognize the acute distinction between issues that impact women, children and youth. Grouping women, children and youth in the same category is also an international practice. For Instance, the United Nations, in its *Policy for Post-Conflict Employment Creation, Income Generation and Reintegration* identifies women and youth as beneficiaries of socio-economic opportunities post conflict and makes several mentions of the two groups together as marginalized groups<sup>75</sup>. This grouping practice is very common in Ethiopia. In fact, even before the *EPRDF* came to power, the Revolutionary Ethiopian Women's Association (*REWA*) and the Revolutionary Ethiopian Youth Association (*REYA*) were both established in 1980 with an almost identical governing structure and scholars have argued that this has in turn diluted the participation of women and the promotion of gender issues<sup>76</sup>. The *GTP* makes numerous mentions of women and youth as a category and fails to sufficiently address the distinct issues pertaining to women. Furthermore, at the institutional level, *EPRDF* has established the Ministry of Women, Children and Youth Affairs (*MOWCYA*), which aims to tackle issues that pertain to all three groups<sup>77</sup>. Such practice could have a stigmatizing effect, by putting all three groups in the “other” category. Further, it creates an overtly broad mission and makes the planning and execution of tailored policies very challenging.

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<sup>74</sup> “The main strategies in GTP I with regard to women and youth were strengthening women and youth associations and organizations, increasing their participation and equity in the development and good governance processes, as well as ensuring coordination among these women and youth associations and other actors in the development and political processes of the country. Based on this, the mainstreaming of women and youth agendas in all sectors was to be closely monitored with consequent accountability. Accordingly, during the last five years, women and youth organizations at all levels have witnessed growth in terms of expanded membership, strengthened organizational capacity and leadership. The last five years have also seen the strengthening of the participation of women and youth in the country’s economic development and political affairs.” *GTP II*, *supra* note 57, at 55.

<sup>75</sup> “Peacebuilding processes should improve the rights of the affected population, with particular attention to reducing inequalities towards women and youth and to previously disenfranchised groups, through political, economic and labour market reforms.” United Nations, *Policy for Post-Conflict Employment, Creation, Income Generation & Reintegration*, 10 (2009).

<sup>76</sup> See, CHRISTOPHER CLAPHAM, TRANSFORMATION AND CONTINUITY IN REVOLUTIONARY ETHIOPIA, 138 (1988).

<sup>77</sup> MOWCYA, *Vision, Mission and Objective*, [http://www.mowcya.gov.et/mobile/-/asset\\_publisher/sZJI9cKrQhQAQ/content/vision-mission-and-objectives?redirect=http%3A%2F%2Fwww.mowcya.gov.et%2Fmobile%3Fp\\_p\\_id%3D101\\_INSTANCE\\_sZJI9cKrQhQAQ%26p\\_p\\_lifecycle%3D0%26p\\_p\\_state%3Dnormal%26p\\_p\\_mode%3Dview%26p\\_p\\_col\\_id%3Dcolumn-1%26p\\_p\\_col\\_count%3D3](http://www.mowcya.gov.et/mobile/-/asset_publisher/sZJI9cKrQhQAQ/content/vision-mission-and-objectives?redirect=http%3A%2F%2Fwww.mowcya.gov.et%2Fmobile%3Fp_p_id%3D101_INSTANCE_sZJI9cKrQhQAQ%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn-1%26p_p_col_count%3D3) (last viewed on Apr. 27, 2017).

Ethiopia is an ethnically diverse nation. This gift of ethnic diversity has also been a cause of severe problems for the country for many years. The country is divided into 9 “regions” but it is imperative to note that these regional entities are grouped based on ethnicity. So in actuality, the 9 regions demarcate the ethnic divisions in the country. Most of the legal documents do not acknowledge and name this very issue of ethnic divide, disguised under the term “regions”. This ethnic tension has a role in gender parity as the two concepts intersect. Women’s identity is multifaceted and tackling women’s economic empowerment requires an examination of more than gender alone. Further, the issue of women’s economic empowerment could serve as the structural tool to begin effectively addressing the ethnicity divide in Ethiopia in light of the current *Oromo* conflict.

### **Recommendations**

The economic empowerment of women, a self-standing fundamental human right, is a powerful device in the prevention of conflict and the upkeep of sustainable peace. Women's economic empowerment is also a powerful policy tool, which can be used to impact women's (1) access to education; (2) use of credit facilities, courts and healthcare; (3) treatment under family and divorce laws; (4) property ownership, transfer and inheritance power and (5) engagement at the policy making table. After coming to power in 1991, the *EPRDF* has introduced several reforms in line with its agenda to promote women's equality. These changes have significantly contributed to the economic advancement of women in Ethiopia.

Additional measures that could further strengthen the *EPRDF*'s policy to advance the economic empowerment of women include: (1) Separating issues that solely pertain to women from the women, children and youth agenda. Currently, there is a practice of grouping women, children and the youth in one category as demonstrated in the *GTP*. There is also an agency, *MOWCYA*, which is tasked with overseeing issues that pertain to women, children and the youth. The *EPRDF* should consider a different approach so that issues pertaining solely to women are put forth and satisfactorily addressed. (2) Examining issues such as ethnicity and their intersectionality with gender. In an ethnically diverse country such as Ethiopia, a women's identity is expressed in many ways aside from gender alone. The author believes that the *EPRDF* has not done an outstanding job in addressing the ethnicity issue in Ethiopia. There have been spontaneous outbursts of conflict in the country due to ethnicity related tensions. The *National Policy on Women*, like most other policies fails to recognize the ethnic divide in

Ethiopia. In order to fully achieve gender parity in the context of economic empowerment, the *EPRDF* should consider exploring the intersectionality between gender and ethnicity. The women's economic empowerment agenda could also be an avenue to start tackling the larger ethnicity issue within the country. (3) Ensuring that women are not forced into and discriminated by customary and religious law institutions. Although women now have access to the formal courts to seek adjudication on divorce and inheritance claims, they do not always feel empowered to utilize those infrastructures. This is especially true in the rural parts of the country, where the literacy rate is lower and culture is very influential. Through nonprofit led dissemination of rural-based educational information and the integration of culture and the law, customary and religious law can be made less discriminatory. (4) Strengthening the relationship between the federal and regional and local governments in order to align women's initiatives and share best practices. As a result of the structure of the Ethiopian government, the regions play a key role in achieving women's economic parity. The local governments are even more important because they are the closest touchpoints to each individual women. Hence, better integration of the federal, regional and local governments is pivotal. This issue again touches on the importance of acknowledging the ethnicity tension in the country and tackling the issue head-on. (5) Introducing further legal and civil reforms to protect men and women from work place sexual harassment. As more women start to join the labor force, this reform is necessary to protect the safety of women. Women should not have to sacrifice certain protections in order to exercise their economic rights. It is also important to make sure that these protections are also extended to men. Although not a very common issue in Ethiopia, it is not inconceivable to see men also becoming victims of sexual violence at the work place. Further, extending this protection to both men and women fights the stigmatizing effect of such policies, which could create the impression that women are weak and hence need safeguards and protections in place. (6) Providing sufficient funding to the institutions designed to promote women's rights. Adequate funding is key for agencies to conduct studies, formulate plans and carryout executions.

As articulated by Michelle Bachelet, as she concluded her speech at the one year anniversary of UN Women, "we simply can no longer afford to deny the full potential of one-half of the population. The world needs to tap into the talent and wisdom of women . . . The

participation of women is needed now more than ever<sup>78</sup>." Indeed, Ethiopia and the rest of the continent needs women now more than ever. As economic activities continue to rise within the continent, women should be welcomed and encouraged to actively engage in shaping the economic climate. But most importantly, we simply can no longer afford to deny African women their choice to exercise their fundamental right of economic empowerment.

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<sup>78</sup> *Remarks by Executive Director Michelle Bachelet on First Anniversary of UN Women*, UN Women, Feb 02, 2012, <http://www.unwomen.org/en/news/stories/2012/2/remarks-by-executive-director-michelle-bachelet-on-first-anniversary-of-un-women>.

## **PEACE AND SECURITY IN SOUTH SUDAN: THE ROLE OF WOMEN IN THE PROCESS OF NATION**

### **BUILDING**

Victoria Dheilly

#### **1. Introduction**

South Sudan, the world's youngest country, is still struggling with good governance and peace building, as well as acknowledging the importance of women's rights and women's role in nation building.

Peace and security have been a challenge in South Sudan for the past sixty years. Civil war raged between what is now Sudan and South Sudan during two long periods- 1955-1972 and 1983-2005- and more than 2.5 million people died, mostly civilians, due to violence, starvation and drought. Peace talks led to a Comprehensive Peace Agreement (CPA), signed in January 2005, introducing a six-year autonomy period to be followed by a referendum to seal the final status of South Sudan. Independence for the South gained massive popular support, with a vote of 98 per cent in favor of secession in January 2011, leading to official independence on the 9<sup>th</sup> of July 2011. However, just two short years after self-determination, there was a resurgence of violence with a struggle for power emerging between President Salva Kiir and Dr Riek Machar, then Vice-President, and soon leader of the Sudan People's Liberation Movement/Army-In Opposition (SPLM/A-IO), in the capital, Juba.

The Intergovernmental Authority on Development (IGAD), formed by South Sudan's eight neighboring countries, immediately started working on peace negotiations between the two opposing parties, work that led two years later in August 2015 to the signing of the Agreement on the Resolution of the Conflict in South Sudan (ARCSS). The agreement provided for the establishment and formation of different institutions, notably the Transitional Government of National Unity (TGoNU), the Hybrid Court for South Sudan (HCSS) to provide for accountability for crimes under international law, a Commission on Truth, Reconciliation and Healing (CTRH) and a Compensation and Reparations Authority (CRA). If Dr Machar's return in April 2016 and his appointment as First Vice President seemed to be an important milestone in the implementation of the ARCSS, fighting erupted again in July 2016 forcing him to flee the country to South Africa. Since then conflict has raged again in the country, leading to catastrophic displacement of

population, horrible acts of violence against civilians (especially women), official famine being declared by the United Nations (UN) and threat of a genocide looming.

The recent overwhelming violent history of South Sudan affected mostly civilians, and within the population, women have been particularly targeted, notably through Sexual Gender Based Violence (SGBV). However, as experts have pointed out, SGBV is not new to South Sudan, as the lack of accountability in an environment where the rule of law is nonexistent has led to massive levels of impunity and a certain level of social acceptability for sexualized and gendered forms of violence<sup>1</sup> even though this violence used to be customarily condemned within the society. South Sudanese women also experience various kinds of offences in their daily life, including unequal access to opportunities and education, forced and/or early marriage, domestic and intimate partner violence (IPV) and marital rape<sup>2</sup>, offences that tend to be heightened for internally displaced persons (IDP).

This report supports that the lack of real equality in South Sudan, a country where most of the population is female and where cultural norms undermine women's voices, contributes to an environment prone to conflict. The fact that women have not been included in important numbers in peace talks, transitional governments and post-2011 governing bodies, contrary to the spirit of resolution 1325 and despite their engagement on the ground to stop violence, has contributed to maintaining an unstable environment. Peace talks excluding women have led to limited solutions that are not inclusive enough and do not provide answers to the hardships civilians have faced during conflict.

Part 1 of this analysis provides an overview of how women are perceived in South Sudan and the inequalities they have to face in the public and private sphere (economic, political and social). Part 2 explores the lack of female participation in the peace negotiations, transitional period and constitution drafting, which led to an unsatisfactory status quo in 2011, and laid the foundations for the resurgence of conflict. It also points out the limitations of resolution 1325 and how it can be used to only bring symbolically women to the table. Part 3 explores the resurgence of violence in 2013 and how the violence against civilians has particularly targeted women. Part 4 turns towards the future, and considers potential solutions for long lasting peace, as the international

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<sup>1</sup> Alice Elaine Luedke, Violence begets Violence. Justice and Accountability for Sexual and Gender-Based Offences in South Sudan, Report by Justice Africa in partnership with CEPO and SSWLA, May 2016.

<sup>2</sup> Id. At 298

community has recently pressured both sides to sit at the table again. Finally, this report provides recommendations for the IGAD and the Committee to assist South Sudan in creating long term peace.

## **2. An overview of the situation of women in South Sudan's society**

In preparation of the signing of the Comprehensive Peace Agreement, a Joint Assessment Mission (JAM) was carried out jointly by the World Bank and the United Nations, with the full endorsement, guidance and participation of the Government of Sudan (GOS) and the Sudan People's Liberation Movement<sup>3</sup> between 2004-2005. In combination with other essays, this document provides a good insight in the life of women in Sudan before the CPA was signed.

As many other countries in conflict, women were definitely treated very unequally before 2005. In the employment sector, women earned on average 68 per cent less than men. Forced and/or early marriages were common during the civil war, as underage girls entered into marriages as a protection strategy from sexual assault and/or in order to generate livelihood opportunities for their family through the exchange of bridewealth<sup>4</sup>. Female genital mutilation has been reported as particularly common in several areas. Access to education and health services was particularly bad for women: Southern Sudan had the lowest ratio of female to male primary school enrolment in the world, with three times as many boys as girls attending school, and a youth female illiteracy rate (ages 15-24) of 84 percent<sup>5</sup>. The breakdown of the rule of law has contributed to the reliance on customary law, which tends to discriminate against women, by often not considering them as legal subjects and therefore forbidding them from having economic independence and power, as well as from owning property in their names<sup>6</sup>.

Customary institutions and courts have been dominant in certain areas, to the disfavor of women and girls. These authorities are often male dominated space and sometimes lead to hurtful results for women. For instance, customary solutions to rape dictate that a survivor wed her attacker, in

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<sup>3</sup> Synthesis: Framework for Sustained Peace, Development and Poverty Eradication, Joint Assessment Mission for Sudan, March 18, 2005.

<sup>4</sup> Alice Elaine Luedke, Violence begets Violence. Justice and Accountability for Sexual and Gender-Based Offences in South Sudan, Report by Justice Africa in partnership with CEPO and SSWLA, May 2016.

<sup>5</sup> Synthesis: Framework for Sustained Peace, Development and Poverty Eradication, Joint Assessment Mission for Sudan, March 18, 2005.

<sup>6</sup> Yasmine Sherif, Promoting the rule of law in post-conflict Sudan, Forced Migration Review Volume 24, 2005.

an estimated 90% of cases<sup>7</sup>, with rape leading to forced and/or early marriage and domestic abuse<sup>8</sup>. Although a good aspect of customary law in South Sudan is that rape and sexual violence during conflict are considered abhorrent and completely unacceptable<sup>9</sup>, a downside of this legal system is that courts are often in open public spaces, and women who seek justice and speak out about SGBV are often stigmatized and may expose themselves to more abuse. Additionally, like in countries such as Pakistan, rape and sexual violence are seen not as individual crimes involving only the perpetrator and the survivor but as collective issues affecting the entire tribe. The type and level of justice accessible to survivors is therefore influenced by factors such as the victim's age and marital status, social standing and perceived 'value'. Furthermore, the justice that is available generally takes the form of reparations to be determined between customary elders, rather than individual legal redress for the survivor<sup>10</sup>, which is sub-optimal from a reparative justice perspective. This detrimental environment to women is even more surprising knowing the existing gender imbalance in favor of women, representing 65% of the overall population in the country.

### **3. The lack of women involvement in the peace negotiations, transitional period and constitution drafting**

As the situation was particularly dire for women prior to peace, women groups were hopeful issues would be addressed during the peace process and in constitutional documents to achieve a more equal and fair society in the spirit of the CPA. Evidence has also demonstrated that peace talks involving women have a higher probability to reach an agreement and lead to a stronger peace likely to last longer. However, women were constantly excluded from the peace process between the North and the South, contrary to the spirit of Resolution 1325. Women were prevented from boarding a plane to the Naivasha talks in Kenya by the Government of Sudan, and the women who reached the negotiations were prevented from sitting in the room and had to push their papers with recommendations by pushing them under the closed doors<sup>11</sup>. Even though capable women were present at senior levels of both parties, the lead 6-people negotiating teams did not include even one, and estimates of each side's extended team said there were, at best, five women out of more

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<sup>7</sup> Report of the Secretary General on Conflict-Related violence, United Nations Security Council, April 20, 2016.

<sup>8</sup> Alice Elaine Luedke, Violence begets Violence. Justice and Accountability for Sexual and Gender-Based Offences in South Sudan, Report by Justice Africa in partnership with CEPO and SSWLA, May 2016.

<sup>9</sup> Report: Accountability for Sexual Violence committed by Armed Men in South Sudan, Legal Action Worldwide with the support of the South Sudan Law Society and Commissioned by the Nuhavoniv Foundation, May 2016.

<sup>10</sup> *Id.* At 306

<sup>11</sup> Rogaia Abusharaf, Sudanese women waging peace, Forced Migration Review Volume 24, 2005.

than fifty negotiators<sup>12</sup>. Although the JAM consultations had involved Sudanese women, policy makers, NGOs and donors to bring the voices of women to the table<sup>13</sup> and a gender symposium was held on the eve of the Oslo Donors Conference in April 2005, very few recommendations voiced by women from North, South and Darfur were taken into considerations. Overall, mainstream peace and peace related processes have failed to look at the specific way in which conflict, peace building and post-conflict reconstruction have affected women and men in a gender-specific way. They have not given due consideration to the role of women as peace builders and active participants in post-conflict reconstruction<sup>14</sup>. The transitional period was considered as badly used by both parties to reach good governance and functioning Nation States.

The next step for South Sudan was the drafting of its constitution, and how women's equality and rights could be secured in this fundamental document. The preamble of the Draft Constitutional Constitution of the Republic of South Sudan bears a good sign by mentioning the importance of "upholding values of human dignity and equal rights and duties between men and women". Article 14 also states Equality before the Law "without discrimination as to race, ethnic origin, color, sex, language, religious creed, political opinion, birth, locality or social status." Article 16 is focused solely on the Rights of Women, by stressing once again "full and equal dignity of the person with men", and also tackles the issue of "equal pay for equal work" and the equal participation in public life. Better involvement of women in government was also promised through a quota of 25 per cent of women in parliament "to redress imbalances created by history, customs, and traditions"<sup>15</sup>. It also institutes property rights for women, which was an issue in the past as we've seen before due to the overwhelming influence of customary law in society. The Constitution also briefly mentions that the government will "enact laws to combat harmful customs and traditions which undermine the dignity and status of women", although Article 33 also stresses that "Ethnic and cultural communities shall have the right to freely enjoy and develop their particular cultures. Members of such communities shall have the right to practice their beliefs, use their languages, observe their religions and raise their children within the context of their respective cultures and customs in accordance with this Constitution and the law", therefore

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<sup>12</sup> Jacqueline O'Neil, What North and South Sudan need now: more women at the negotiating table, The Christian Science Monitor, July 18, 2011.

<sup>13</sup> Nyaradzai Gumbonzvanda and Grace Okonji, Sudanese women's role in peace making, Forced Migration Review Volume 24, 2005.

<sup>14</sup> Nada Mustafa M Ali, Endangering peace by ignoring women, Forced Migration Review Volume 24, 2005.

<sup>15</sup> Article 16.4.a, The Draft Transitional Constitution of the Republic of South Sudan.

creating potential conflicts of interpretation. South Sudan also enacted a Child Act in 2008 which set the legal marrying age at 18 years for girls and requires the consent of both parties, in order to protect girls from forced underage marriages. Overall, the Constitutional Draft seemed to deal with some of the major problems identified by women groups (recognition of equality, involvement in public life and access to property). However, the general language about combatting customs unfair to women, while respecting the cultural practices of the country's different communities, does not appear to be enough to define which customs are hurtful to women, and need to be put to a halt, and which ones can be continued. The 25 per cent quota has been also criticized by women scholars as a way to further limit women's involvement in public life. According to Beny Gideon Mabor and Hon. Apuk Ayuel Mayen have pointed out that "this policy is misinterpreted to 25 per cent for women and they cannot compete again in the remaining 75 per cent allegedly calculated for men."<sup>16</sup> There is also no reference to a future commitment to sign the UN Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), which would definitely empower women and send a good signal to women in South Sudan.

To conclude, women's involvement in the peace processes and transitional period seem to have fall short of women's groups expectations and of the spirit of resolution 1325. Officials did not seem to listen to what these women have been warning for years – that their exclusion is a cause of instability, not its cure. Without the involvement of a broad set of Sudanese citizens - particularly women - violence will continue to roil just below the surface, ready to erupt at any time.<sup>17</sup>

#### **4. The resurgence of violence in South Sudan and its focus on women**

These words of warning and the lack of consideration given to the role of women as peace builders and active participants in bringing peace to violence-fueled communities led to the endangering of South Sudan's recovery and reconstruction. Armed conflict erupted again in December 2013, which led to a humanitarian crisis with millions of South Sudanese, mostly women and children, being displaced and exposed to violence and food insecurity.

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<sup>16</sup> Beny Gideon Mabor, Women and Political Leadership in Africa : A demand in South Sudan transition democracy, Sudan Tribune, April 22, 2013.

<sup>17</sup> Jacqueline O'Neil, What North and South Sudan need now: more women at the negotiating table, The Christian Science Monitor, July 18, 2011.

In the context of this new conflict, women have been particularly targeted by violence, and been victims of SGBV by both parties. Because men and boys are more likely to be killed if they come across opposition fighters or government soldiers, women are more often asked to leave the Protection of Civilian (POC) camps and sent out in search of firewood, food and water, knowing that they will likely “only be raped” versus being killed<sup>18</sup>. Interviews of survivors also highlight that soldiers give women the choice between being raped and being killed. As a result, it has been established that around 70 per cent of Women across POC camps in South Sudan have been raped since 2013, which leads to criticism of the UN’s Mission in South Sudan (UNMISS)<sup>19</sup>, even though most of the SGBV occurs when women are asked to leave the camps in search of resources.

As Resolution 2242 in 2015 pointed out, sexual violence is both a tactic of war and terrorism. Within this conflict, sexual abuse has been used as a tool of terror and beyond, with claims that sexual violence has been used as a way to target specific ethnic groups, with threat of a genocide occurring. There are reports of young boys being castrated, and reproduction being limited, as well as radio incitement to rape on an ethically motivated basis<sup>20</sup>. Lydia Stone, a senior adviser to South Sudan's Ministry of Gender, Child, and Social Welfare stated that "Rape and sexual assault are being used on a mass scale as a weapon of war." However, despite common wartime tropes of rape and other-related offences as a “weapon of war,” sexual violence in South Sudan is not *merely* a “terror tactic.”<sup>21</sup> While there is some evidence to suggest that sexual violence has been used as a weapon of war, other instances of rape and other-related offenses appear to be far more indiscriminate, the result of indiscipline and/or a compensation mechanism/recruitment incentive for participating in violence”<sup>22</sup>. The distinction between the two will therefore need to be addressed in potential accountability measures being established post-conflict, in order to give all victims access to justice.

In response to women activists denouncing those attacks and to the report of the UN special representative for the secretary general on women, the government has come out to deny any violence committed against women, which is a grave act of denial. Martin Elia Lomuro, cabinet

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<sup>18</sup> Alice Elaine Luedke, Violence begets Violence. Justice and Accountability for Sexual and Gender-Based Offences in South Sudan, Report by Justice Africa in partnership with CEPO and SSWLA, May 2016.

<sup>19</sup> Ventures Africa, Peacekeepers are not doing enough to protect women in South Sudan, January 17, 2017.

<sup>20</sup> Report of the Secretary General on Conflict-Related violence, United Nations Security Council, April 20, 2016.

<sup>21</sup> Alice Elaine Luedke, Violence begets Violence. Justice and Accountability for Sexual and Gender-Based Offences in South Sudan, Report by Justice Africa in partnership with CEPO and SSWLA, May 2016.

<sup>22</sup> *Id.* At 318

affairs minister, stated that “there is no policy of mistreating women. Those who are depicting the truth falsely have to know that protecting women and preserving their dignity requires not inciting them into illegal practices”. This statement coming from the government seems to also wrongly accuse victims of prostitution (prostitution being an illegal practice in South Sudan), which is a serious attempt at creating an alternative narrative.

Beyond the violence being inflicted on women and its denial by the government, their lack of involvement in ongoing negotiations is worrying. Between December 2013 and August 2015, more than 10 rounds of negotiations were organized to bridge the political and tribal differences to between the warring factions in South Sudan. More than seven ceasefires were breached within that time frame<sup>23</sup>. As Kelly Case, Program Manager for Inclusive Security’s work in South Sudan and Sudan, points out, these negotiation efforts have failed, in part, because women and civil society organizations—the most committed advocates for peace—have had only token representation at the table. The draft text that led to temporary peace between August 2015 and July 2016, put into place for instance a body responsible for overseeing and coordinating the ceasefire, entirely composed of military personnel, therefore excluding the crucial voices of women, youth and broader civil society. The agreement also failed to envision any measures to deal with the huge amount of internally displaced persons. Women groups, like the Taskforce on the Engagement of Women, a cross border coalition of activists from Sudan and South Sudan, have continuously expressed their support to the mediators and belligerents and stated that they are ready to come to the table despite the terrible personal losses they have faced. Overall the ARCSS expressed efforts to include women in the transitional institutions, with the composition of the main bodies, such as the CTRH (Article 2.3.2) and CRA (Article 4.2), requiring at least a representative of the “Women’s bloc” to participate in the functioning of the institution, and with Article 10.5.2 repeating the commitment to women representing 25 per cent of the executive. The content of the ARCSS also made timid steps to recognize the gendered experience of violence, by committing to documenting them (Article 2.1.3; Article 2.2.2.6) and by giving the newly formed jurisdiction, the HCSS, authority over “serious crimes under international law and relevant laws

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<sup>23</sup> Kelly Case, Without Inclusion, no hope for peace in South Sudan, New America- The Weekly Wonk, August 12, 2015.

of the Republic of South Sudan including gender based crimes and sexual violence”<sup>24</sup>). It also included in the description of the ceasefire that the warring parties shall refrain from “Acts and forms of sexual and gender-based violence, including sexual exploitation and harassment”<sup>25</sup>. However, despite an ambitious calendar to put into place these transitional institutions, the TGoNU was only formed on the 29<sup>th</sup> of April 2016, and the resurgence of violence in July 2016 makes it unclear to what point those efforts started to be put into place. It is important to point out however that if peace is reached again, it would be helpful to lead negotiations in the spirit of Resolution 2242, affirming that conflict-resolution and counter-terrorism strategies can no longer be decoupled from efforts to protect and empower women and girls and to combat conflict-related sexual violence<sup>26</sup>. Including in the ARCSS access to education for girls and women, an issue left out of the agreement for now, would be a first step.

## 5. Perspectives for the future

A solution proposed to speed the end of the conflict was a sex strike, a strategy used in other African countries, for instance Liberia and the Ivory Coast, to efficiently motivate men to urge parties to come to the negotiation table. In 2014, a group of female South Sudanese peace activists have appealed to women across the country and in diaspora to consider denying their husbands sex until the conflict is resolved<sup>27</sup>. Former deputy minister for gender, child and social welfare Priscila Nyanyang was one of the leaders in 2014 when the movement first emerged, and even encouraged the wives of the rival leaders of both parties, President Salva Kiir and his former deputy Riek Machar to personally participate in this movement. However, some activists, such as Jane Kane, a US-based women’s rights activist, pointed out that this strategy would not be necessarily effective in South Sudan, where the culture of sexual consent is close to nonexistent<sup>28</sup>. Studies led on this subject indeed showed that there is a general approach of “no means yes”, even in intimate relationships: overall 45 per cent of men and 51 per cent of women think that “if a

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<sup>24</sup> Article 3.2.1.4, Agreement on Resolution of the conflict in the Republic of South Sudan, Intergovernmental Authority on Development.

<sup>25</sup> Article 1.7.2, Agreement on Resolution of the conflict in the Republic of South Sudan, Intergovernmental Authority on Development.

<sup>26</sup> Report of the Secretary General on Conflict-Related violence, United Nations Security Council, April 20, 2016.

<sup>27</sup> South Sudan Women propose sex ban until peace is restored, The Sudan Tribune, October 23, 2014.

<sup>28</sup> *Id.* At 324

woman is married, she should have sex with her husband whenever he wants to, even if she doesn't want to”<sup>29</sup>.

Another essential step for women's empowerment in the future is to make sure girls get access to education. Curriculum and learning materials should make sure to include gender sensitive content and allow full development and reconstruction processes. In conflict or unsafe areas, SGBV can limit girls' access to education, as parents may keep their daughters away from school for fear of attack on the way to and from school<sup>30</sup>. Curving violence and putting into place social norms that make it unthinkable to harass and/or attack girls would allow for girls to get educated and for the female illiteracy rate to decrease in South Sudan. In 2009, the Minister of Gender, Social Welfare HE Mary Kiden Kimbo also highlighted that the lack of boarding schools is “hindering female education and there is an urgent need to build at least one female boarding school per state”<sup>31</sup>. Boarding schools are also an opportunity for students to be exposed to different ethnic communities and backgrounds, while having a safe access to education.

A crucial element to consider for peaceful transition and a civil-war free country is how criminal prosecution will be organized regarding people responsible of conflict-related abuses. A survey carried in the Malakal POC site showed that “in response to an open question about what should be done with perpetrators of conflict-related abuses, a majority of respondents support criminal justice mechanisms including imprisonment (54 per cent) and trials (50 per cent). Similarly, in response to a closed question on whether perpetrators of conflict-related abuses should be prosecuted in courts of law, 85 percent of respondents say ‘Yes’.”<sup>32</sup> The population is therefore in favor of conducting an organized criminal justice process for perpetrators, and as another study conducted shows, a sizeable minority (42 per cent) said that they would not accept amnesties<sup>33</sup>. Such pronounced opposition to amnesties is somewhat surprising in the context of an ongoing conflict, in which people would presumably be more likely to accept amnesty as a necessary concession in order to stop the violence<sup>34</sup>. Considering what sort of combination of

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<sup>29</sup> Scott and al, An assessment of attitudes toward gender inequitable sexual and reproductive health norms in South Sudan: a community-based participatory research approach, *Conflict and Health* 2013 7:24.

<sup>30</sup> Jackie Kirk, Gender, education and peace in Southern Sudan, *Forced Migration Review* Volume 24, 2005.

<sup>31</sup> South Sudan women hold leadership conference, BBC, May 28, 2009.

<sup>32</sup> David K. Deng, Matthew F. Pritchard and Manasi Sharma, *A War Within: Perceptions of Truth, Reconciliation and Healing in Malakal POC*, December 2015.

<sup>33</sup> David K. Deng and Rens Williems, *Expanding the Reach of Justice and Accountability in South Sudan*, April 2016.

<sup>34</sup> *Id.* at 330

compensatory justice mechanisms aimed at social repair and of retributive justice mechanisms (such as prison) aimed at deterrence and discipline would satisfy the population and promote peace the best on the long term is important to create success. An important element to consider is that the rule of law often takes time to build from the ground up again, and that using customary institutions and traditional courts as an alternative to satisfy the search for justice could be an efficient solution in South Sudan. This system has been used in other post-conflict situations, such as Rwanda in 1994. When the formal justice system became flooded with genocide-related cases in Rwanda, the country re-established a traditional court system based on local communities, known as *Gacaca*, to adjudicate genocide cases, which tried more than 1.2 million cases throughout the country until 2012<sup>35</sup>. A risk inherent to these systems is that human rights, especially rights of the defendants, might not be respected, and therefore this system might not foster a long term sustainable justice. However, in the context of SGBV, customary institutions might not be the best platform to determine individual liability and compensation. Customary institutions are often male dominated spaces that marginalize and discriminate women and girls<sup>36</sup> and women are not always comfortable discussing sexual violence within that system. Survey data from the Malakal POC camp shows that women (60 per cent) are more likely to want to avoid talking publicly about abuses that occurred during conflict than men (52 per cent).<sup>37</sup>

A perspective for the future is to consider potential redrafting of essential documents, such as the Constitution or the Penal Code, to make it more gender sensitive. Using these documents to address societal problems, notably the opinion that “no means yes”, would be an essential step to make society more equal. Today, there is no clearly defined element of consent in the penal code<sup>38</sup>, which allows ambiguity around consent and gives judges’ substantial leeway in terms of interpretation. A new definition of consent should be introduced and include considerations, such as violence and coercion, disability status and mental state at the time of the act<sup>39</sup>.

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<sup>35</sup> David K. Deng and Rens Williems, Expanding the Reach of Justice and Accountability in South Sudan, April 2016.

<sup>36</sup> David K. Deng, Matthew F. Pritchard and Manasi Sharma, A War Within: Perceptions of Truth, Reconciliation and Healing in Malakal POC, December 2015.

<sup>37</sup> *Id.* at 333

<sup>38</sup> Alice Elaine Luedke, Violence begets Violence. Justice and Accountability for Sexual and Gender-Based Offences in South Sudan, Report by Justice Africa in partnership with CEPO and SSWLA, May 2016.

<sup>39</sup> *Id.* At 335

Acknowledging the importance of women-led initiative to protect lives during the conflict could finally be a way to leverage women's contribution to peace and involvement in the future. Self-protection led by women has indeed allowed many civilians to survive in the conflict. In parts of South Sudan, local NGOs and women's groups have taken the lead in their own protection, and their considerable achievements have helped change the status of women in their communities. Aerial bombardment has been used in the civil war and hits predominantly civilian targets, including villages, schools and hospitals. Women and children are the most exposed to shrapnel<sup>40</sup>, and reducing risk of injury or death through awareness has become increasingly important. Performing life-saving roles in the community earned the women greater respect among a range of local stakeholders (mosques, community leaders, armed groups, etc). This gives women status and a platform to start addressing more sensitive and challenging issues – such as gender-based violence – within the community<sup>41</sup>. Using this status in post-conflict negotiations and customary institutions could lead to a more gendered and inclusive perspective and equal society. The role of women in the ongoing famine is also likely to play a major role in the country's future.

Resolution 1325 is a powerful tool to recognize that peace is inextricably linked with gender equality and women's leadership. However, the case study of South Sudan shows its biggest limitations. By focusing on the representative aspects of Resolution 1325, South Sudan seems to include symbolically women in its peace process, while cruelly failing at protecting women and girls from gender-based violence and taking into account their special needs, contrary to Articles 8 and 10 of the Resolution. Resolution 1325 needs to be part of a more holistic approach to truly promote lasting peace, which will not happen in South Sudan before women are truly integrated in the nation building process. It needs to be fully exploited in future Peace Agreements to transform the patriarchal societal and customary norms of South Sudan to promote women's empowerment in the political, social and economic spheres.

## **6. Recommendations**

### *Recommendations aimed to the IGAD*

- **Encourage revisiting the ARCSS in a gender positive way.** The agreement reached in 2015, by putting into place a number of transitional institutions where women have a role, took

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<sup>40</sup> Nagwa Musa Konda, Leila Karim Tima Kodi and Nils Cartensen, Women-led self-protection in South Sudan, Forced Migration Review, Issue 53, October 2016.

<sup>41</sup> Nagwa Musa Konda, Leila Karim Tima Kodi and Nils Cartensen, Women-led self-protection in South Sudan, Forced Migration Review, Issue 53, October 2016.

positive steps towards the inclusion of women in peace building in South Sudan. However, this agreement will probably be revisited once parties agree to a ceasefire, and it will be the opportunity to bring more women to the table and include in the agreement issues such as access to water, food security and girls' education. Embracing more fully the spirit of Resolution 1325 in the peace process can only contribute positively to the future of South Sudan. Taking the predicaments of the Resolution in a more holistic way, rather than using token female representations in transitional institutions would allow the ARCSS to be more gender positive.

*Recommendations to the warring parties*

- **Bring women to the table.** Both parties have women within their ranks whose participation in the peace process could benefit the long term stability of the country. Including at least the wives of the two leaders in the negotiations would be a way to empower women overall.
- **Make civilians and communities a priority in post-conflict South Sudan.** Civilians are the ones that have been the most hurt in the conflict over the years. Although it is important in the UGAD to highlight distribution of power between the warring parties, the needs of the civilians must be put forward
- **Make women and girls' education essential** to build a long-lasting peace and prevent the emergence of violence. Education allows for women to feel empowered, to aim for better jobs and leads to a better future for the next generations.

# **ISLAMIC STATE v. SISTERS IN ISLAM: COMBATING ISLAMIC EXTREMISM THROUGH ISLAMIC FEMINIST JURISPRUDENCE**

Arhama Rushdi

## **1. Introduction**

Many scholars argue that Islam is incompatible with human rights, especially women's rights.<sup>1</sup> Furthermore, with the spread of Islamic extremism we are also seeing the rise of discrimination and violence against women in these regions. Phumzile Mlambo-Ngcuka, Director of UN Women, has even gone as far to state that Islamic militant groups specifically target women as a part of their terror campaigns.<sup>2</sup> From ISIS to Boko Haram, these organizations are killing, raping, and selling women and girls into sex slavery.<sup>3</sup> Furthermore, these groups promote practices that the international women's and human rights community has been battling for years, such as child marriages, female genital mutilation (FGM), and banning the education of the girl child.<sup>4</sup>

Women are often seen as the most vulnerable victims of Islamic extremism. Zainab Bangura, UN Special Rapporteur on Sexual Violence in Armed Conflict, has stated that “protecting women must be at the heart of any global counter-terrorism response.”<sup>5</sup> This paper attempts to identify another role played by Muslim women living throughout the Islamic world—one that highlights their significance not as victims of Islamic terror but as the solution. The UN Secretary General’s Plan of Action to Prevent Violent Extremism takes a huge and pivotal leap in the right direction in stating that “societies for which gender equality indicators are higher are less vulnerable to violent extremism.”<sup>6</sup> This plan of action, in coordination with Security Council Resolution 1325, highlights the importance of women’s participation in all areas of peace and security, from conflict prevention to conflict resolution, and peacebuilding.

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<sup>1</sup> See, e.g., Ayaan Hirsi Ali, THE CAGED VIRGIN: AN EMANCIPATION PROCLAMATION FOR WOMEN AND ISLAM (2008); Samuel P. Huntington, *The Clash of Civilizations*, 72 Foreign Aff. 22, 49 (1993).

<sup>2</sup> VOA News. *Violent Extremist Groups Take Special Aim at Women, UN Official Says*, Sept 9, 2016, available at <http://www.voanews.com/a/violent-extremist-groups-target-women-un-official-says/3501319.html>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Fred Strasser, *Women and Violent Extremism: A Growing Threat Demands Concerted Action*, United States Institute of Peace, Aug. 3, 2015, available at <https://www.usip.org/publications/2015/08/women-and-violent-extremism-growing-threat-demands-concerted-action>.

<sup>6</sup> G.A. Rep. of the Sec. Gen. U.N. Doc. A/70/674 (Dec. 24, 2015), available at [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/70/674](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/674)

This paper builds upon the seminal proposition of 1325, and elevates the role of Muslim women, specifically, Islamic feminists, to one of combatting and preventing Islamic extremism.

First, this paper briefly discusses the rise of doctrine-based Islamic fundamentalism and why the current strategy of combatting Islamism, a mix of force and secularism, is not only ineffective but counterproductive. Next, the paper discusses the concept of Islamic feminism generally, its critiques, and highlights some key movements within Islamic feminism. The paper draws upon nation-state case studies to show that Muslim majority countries with strong Islamic feminist movements are less susceptible to Islamic terror organizations than those without Islamic feminist movements and those with secular feminist movements. Finally, the conclusion of the paper discusses a number of concrete recommendations for the international human rights community, national governments, secular feminist groups, and civil society.

## **2. The Rise of Violent Islamic Extremism**

Religious fundamentalism, and violence in the name of religion more generally, is not a novel concept. Fundamental groups have been using the name of Islam to carry out their political agendas for years. What is novel about modern Islamic militant groups such as ISIS and Boko Haram is that unlike their predecessors such as Al-Qaeda and the Taliban, these newer organizations are deeply rooted in their violent (mis)interpretations of Islam. Unlike its predecessors, ISIS differs in its connection to Islam. Every aspect of the organization is deeply rooted in its interpretation of Islam. The ultimate goal of ISIS is not just to gain territory and create a state, but to create *the Islamic state*.<sup>7</sup>

Through both mass media and local outreach, modern day Islamists like ISIS ‘seduce’ Muslims into militancy. The self-appointed leader of the Islamic State, Abu Bakr al-Baghdadi, spreads his message using modern technology, urging Muslims to return to their religious obligations by waging a holy war in the name of Allah. Through their flashy propaganda pieces, ISIS calls on Muslims around the world to fulfil their obligation of *Jihad*. While the term *Jihad* has become increasingly popular, it is regularly misnomered to signify Islamic armed conflict

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<sup>7</sup> Arwa Damon & Holly Yan, *Inside the Mind of an ISIS Fighter*, CNN, Sept. 4, 2014, available at <http://www.cnn.com/2014/09/04/world/meast/isis-inside-look/>; Tim Lister, *ISIS: The First Terror Group to Build an Islamic State?*, CNN, June 12, 2014, available at <http://www.cnn.com/2014/06/12/world/meast/who-is-the-isis/>.

and that alone. The Arabic word *Jihad* is a verb that means to struggle or strive.<sup>8</sup> This struggle (for the sake of *Allah*) takes multiple forms that have been categorized as internal and external *Jihad*, the greater and lesser *Jihad*, *Jihad al nafs/shaytan* (against oneself/satan) and *jihad al munafiqin/kufr* (against hypocrites/disbelievers).<sup>9</sup> ISIS only preaches a violent interpretation of the lesser *Jihad* or *Jihad al munafiqin/kufr*.

Understanding the differences between ISIS and its predecessors is pivotal as it not only helps us understand why the militant group is spreading despite a global effort to stop it but also how best to counteract its message. The growth and recruitment of other Islamic militant groups was based off of socio-economic considerations while ISIS seems to use a mix of socio-economic factors as well as indoctrination. People are joining ISIS not for the payouts, lavish lifestyle, or even a deep rooted hatred of the west—it has been found that ISIS fighters deeply believe that they are doing what is required by them as a part of their faith, as a part of Islam.

### **3. Combatting Violent Islamic Extremism: A Flawed Approach**

The current methods of combatting and preventing violent religious extremism use a combination of force and secularism. This approach treats the symptoms of the disease (violent extremism) rather than curing the disease itself (fundamental ideology). The rise of Islamic extremism and the spread of these organizations through the Islamic world and beyond highlights the failure of this approach.

#### *3.1 Force*

The primary means of combatting Islamic terror is the use of force. Like other military targets, these Islamist groups are perceived as threats to national and international security and are obliterated through the use of drones, missiles, or other means of kinetic warfare. While sometimes necessary, the issue to this approach is twofold. First, these operations and attacks have a huge number of collateral and civilian damage. This loss of innocent life only spreads the anti-western sentiment that fosters the growth of violent Jihadist ideology. Joining Islamist groups becomes a source of revenge and even solace for those who have lost everything as a result of the war on terror. Secondly, force does nothing to combat the deeply rooted ideology

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<sup>8</sup> Jihad: A Misunderstood Concept from Islam - What Jihad is, and is not, Islamicsupremecouncil.org, 2016, available at <http://islamicsupremecouncil.org/understanding-islam/legal-rulings/5-jihad-a-misunderstood-concept-from-islam.html?start=9> (last visited Dec 21, 2016).

<sup>9</sup> See generally Ibn al Qayyim, *Zaad al-Ma'ad*; Ibn Taymiyya, *Against who should we Wage Jihad and Kill and Why?* available at <https://muwahhidmedia.files.wordpress.com/2013/09/translated-fatawa-ibn-taymiyya-on-jihad1.pdf>.

that is the cause of Islamic militancy. Without targeting the spread of this ideology, force might stop one group, but just as quickly, another will rise.

Both Phumzile Mlambo-Ngcuka and Radhika Coomaraswamy have highlighted the significance of moving beyond force when countering extremism. In a Foreign Policy Op-ed they write:

“The struggle against extremism should not and cannot be treated as an entirely, or even predominantly, military exercise. While in some contexts and against some groups the use of force is necessary, it must always take place within the boundaries of international law, and with an objective of securing space for local women themselves to establish and protect their rights and those of their families and communities.”<sup>10</sup>

### 3.2 Secularism

Another means of combatting and preventing violent extremism and fundamentalism is secularism. This is a method employed by western nations (France), Muslim nations (Turkey) as well as the international human rights community. What proponents of secularism overlook is that secularism, like Islamic fundamentalism, is just another ideology. Secularism is worldview just as a violent interpretation of Islam is.<sup>11</sup> For practicing Muslims, ideals of secularism have little resonance. Therefore, instead of promoting secularism, states should promote a moderate interpretation of Islam, as it is the primary source of values and principles for these communities. The answer to violent and fundamental Islam is not secularism but moderate Islam.

## 4. Islamic Feminism

Just as secular or other feminists differ in their approach, there is no cohesive definition of Islamic feminism. Generally, however, Islamic feminism has the same goal as other feminist movements—to seek justice and equality for women, though their interpretations of what constitutes equality may differ. Islamic feminists seek to bring about a necessary paradigm shift within Islamic jurisprudence that has become a male-centric discourse.<sup>12</sup> Using the traditional

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<sup>10</sup> Phumzile Mlambo-Ngcuka and Radhika Coomaraswamy, *Women are the Best Weapon in the War Against Terrorism*, Foreign Policy, Feb. 10, 2015, available at <http://foreignpolicy.com/2015/02/10/women-are-the-best-weapon-in-the-war-against-terrorism/>

<sup>11</sup> John Esposito, *The Islamic Threat: Myth or Reality?* (New York: Oxford University Press, 1999), at 286.

<sup>12</sup> Shazia N. Nagamia, *Islamic Feminism: Unveiling the Western Stigma*, 11 Buff. Women's L.J. 37, 44 (2002-2003) at 34.

sources of Islamic Law—the Quran and Prophetic traditions, Islamic feminists interpret Islamic law to seek equality and justice for women and girls.

#### 4.1 Critiques

One of the main critiques of Islamic feminism is that it is an oxymoron.<sup>13</sup> Islamic teachings are incompatible with notions of gender equality and women's empowerment and thus Islam and feminism are mutually exclusive. Indeed, one can even find statistics that confirm this statement. For example, every year the World Economic Forum released a study on the Global Geber Gap, ranking countries based on various contributors to gender equality. Nineteen of the bottom twenty nations on this list are Islamic nations.<sup>14</sup> While this does not necessarily prove a causation, there is obviously a strong correlation between gender inequality and Muslim majority countries. However, this paper argues, as U.N. Women Executive Director Phumzile Mlambo-Ngcuka has stated, extremism and conservatives—not Islam—are impediments to gender inequality.<sup>15</sup> It is not Islam per se that is the issue in these countries, but the masculine co-option of Islam that leads to an extreme and conservative interpretation of the religion.

### 5. Key Movements

Over the past decade, key movements have emerged within the space of Islamic feminism. These organizations are often NGOs engaged in civil society and grassroots level work. In the United States, *Karamah*, Muslim Women Lawyers for Human Rights, is a non-profit that has taken the mantle for Islamic feminist jurisprudence in the country. The organization engages in Islamic legal education, outreach, and advocacy to disseminate feminist legal interpretations of Islam. Internationally, movements such as Sisters in Islam (SIS), Musawah, Women Living Under Muslim Law (WLUMUL), and Women's Islamic Movement in Spirituality and Equality (WISE) have been doing groundbreaking scholarship, advocacy, and even grassroots level dissemination work. These groups operate under a shared belief of Islamic feminism—that Islam is not inherently biased towards men but that patriarchy within the Muslim world is a result of

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<sup>13</sup> Kent Blore, *A Space for Feminism in Islamic Law - A Theoretical Exploration of Islamic Feminism*, 17 eLaw J. 1, 12 (2010) at 5.

<sup>14</sup> World Economic Forum, *The Global Gender Gap Report 2016*, available at [http://www3.weforum.org/docs/GGGR16/WEF\\_Global\\_Gender\\_Report\\_2016.pdf](http://www3.weforum.org/docs/GGGR16/WEF_Global_Gender_Report_2016.pdf)

<sup>15</sup> Patrick Goodenough, *UN Identifies 'Extremism and Conservatism'--Not Islam--As Impediments to Gender Equality*, March 10, 2015, available at <http://www.cnsnews.com/news/article/patrick-goodenough/un-identifies-extremism-and-conservatism-not-islam-impediments>

the male-centric interpretations of Islamic texts.<sup>16</sup> Thus, these organizations, and Islamic feminism as a whole, empowers women to shape the interpretations, norms and laws that affect their lives, as well as push for legal reform in their respective countries.<sup>17</sup>

## **6. Islamic Feminism has a Chilling Effect on Militant Islamism**

The thesis of this paper is that as Islamic feminism has a chilling effect on violent Islamic extremism and therefore, Muslim women should be perceived as not only the victims of Islamic terror but brought to the center of the women, peace, and security agenda, as the solution of fundamental Islam. This argument is based on the assumption that a feminist interpretation of Islam is also a moderate interpretation of Islam. Furthermore, read as a whole, neither the Quran nor Prophetic traditions justify the atrocities committed by militant groups like ISIS. The issue is that those that are being brainwashed and indoctrinated in to a violent interpretation of Islam have never read or studied Islam themselves. Just as Islamic feminism is necessary to fight the patriarchal and misogynistic reading of Islamic texts, people are a lot less likely to be brainwashed or indoctrinated into fundamentalism if they have strong roots in feminist Islam.

Zainah Answer, the founder of Sisters in Islam (SIS), found that invoking international human rights norms, such as the CEDAW, was not enough to convince women of their rights because it has to resonate to them. Instead, she found that when she used Islam and engaged women with sources of Islamic law to show that Islam in fact supports gender equality, these women felt “duped.”<sup>18</sup> “All these years, they believed that their suffering in the form of abandonment, polygamy and beatings was all in the name of God.”<sup>19</sup> When they learned that this was not true they were more willing and able to speak up, fight against the injustices, and stop the cycle of abuse. This same logic can be applied to those that take up arms, and commit sacrilegious human rights atrocities, in the name of Islam. If they are taught that these actions are not only unsupported by Islamic teaching but condemned by Islam, they are less likely to either continue in such efforts, or join militant groups if they have not already. Furthermore, children that are raised by parents who have an understanding of moderate and feminist Islam are less

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<sup>16</sup> Elizabeth Segran, *The Rise of the Islamic Feminists*, The Nation, Dec. 23, 2013, available at <https://www.thenation.com/article/rise-islamic-feminists/>

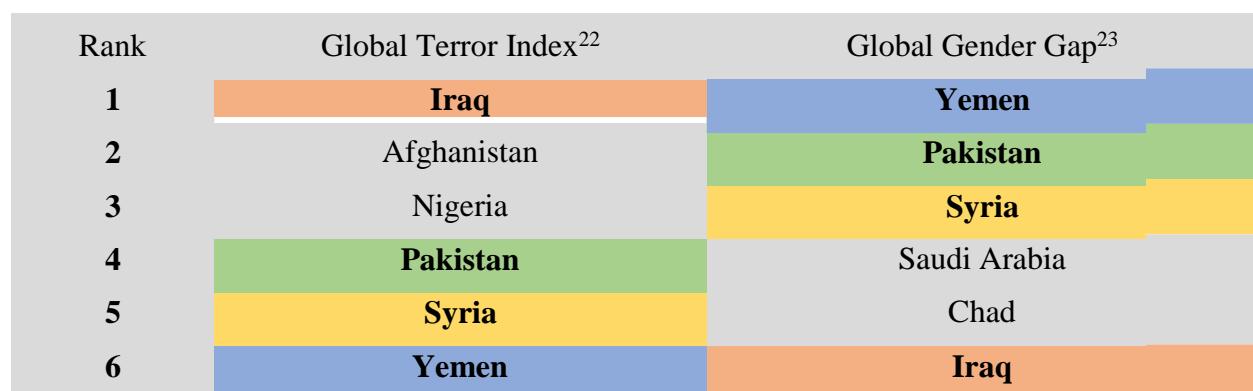
<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

likely to be brainwashed by militants as they know the difference between militant and moderate interpretations of Islam.

While this may work in theory, will it actually have a practical and positive effect in reality? This paper argues that we are already seeing the positive effects of Islamic feminism as well as the dangerous consequences of gender discrimination. For example, figure 5.1 below shows that four of the six countries on the top of the global terror index are also in the bottom six of the global gender gap index.<sup>20</sup> Yemen, Pakistan, Syria, and Iraq have among the worst global gender gaps as well as the highest rates of terrorism in the world.<sup>21</sup> With over 200 nations in the studies, this cannot be a coincidence. There is an obvious and prevalent correlation between terrorism and gender inequality.



**Figure 5.1 Top Six Countries on the Global Terror Index & Bottom Six Countries on the Gender Gap Index**

<sup>20</sup> World Economic Forum, *The Global Gender Gap Report 2016*, available at [http://www3.weforum.org/docs/GGGR16/WEF\\_Global\\_Gender\\_Report\\_2016.pdf](http://www3.weforum.org/docs/GGGR16/WEF_Global_Gender_Report_2016.pdf); Institute for Economics and Peace, *Global Terrorism Index 2016*, available at <http://economicsandpeace.org/wp-content/uploads/2016/11/Global-Terrorism-Index-2016.2.pdf>.

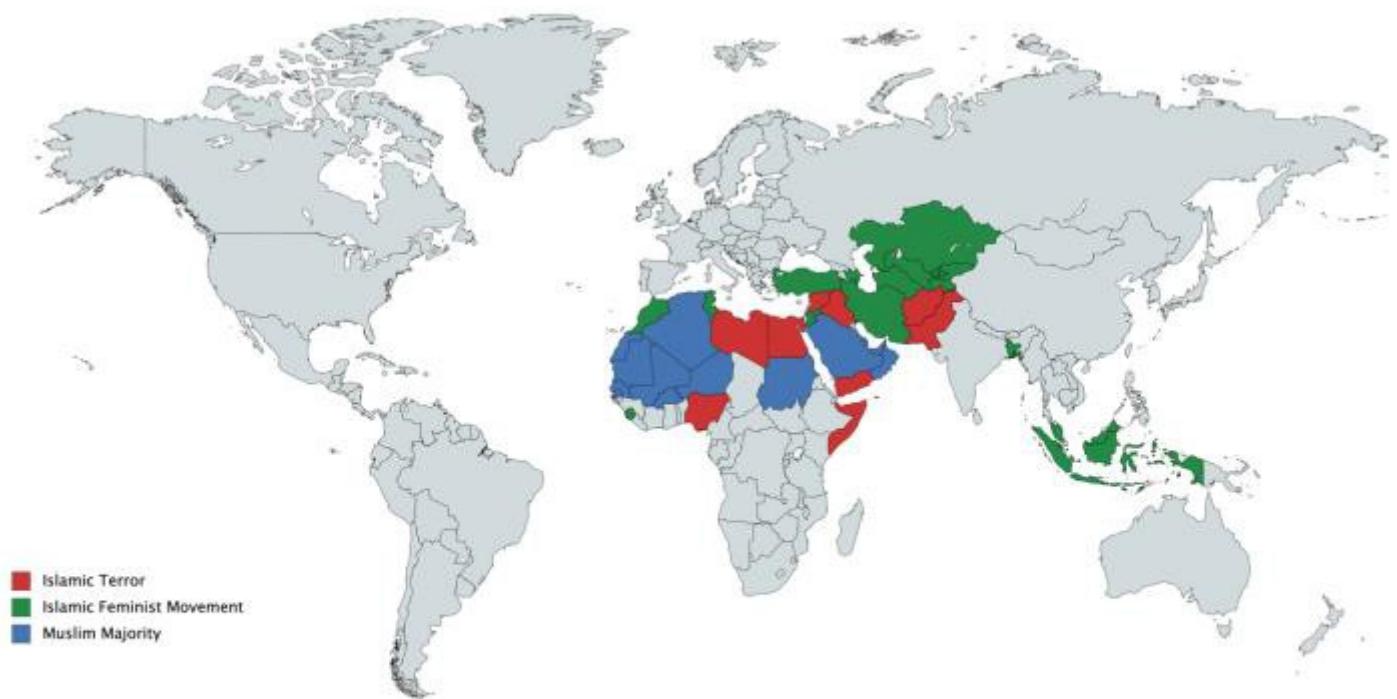
<sup>21</sup> *Id.*

<sup>22</sup> Institute for Economics and Peace, *Global Terrorism Index 2016*, available at <http://economicsandpeace.org/wp-content/uploads/2016/11/Global-Terrorism-Index-2016.2.pdf>.

<sup>23</sup> World Economic Forum, *The Global Gender Gap Report 2016*, available at [http://www3.weforum.org/docs/GGGR16/WEF\\_Global\\_Gender\\_Report\\_2016.pdf](http://www3.weforum.org/docs/GGGR16/WEF_Global_Gender_Report_2016.pdf)

Furthermore, this paper finds that Muslim majority countries that have strong Islamic Feminist movements are less vulnerable to Islamic extremism. Figure 5.2 shows that countries with strong Islamic feminist movement (countries in green) are mutually exclusive from those that rank high on the Global Terror Index (countries in red). In other words, no country that has a strong Islamic feminist movement ranks high on the Global Terror Index and no country that ranks high on the Global Terror Index has a strong Islamic feminist movement.

To further elaborate this point, this paper looks at Malaysia and Morocco as very brief case studies to show that Muslim majority countries with strong Islamic feminist movements are less susceptible to violent Islamic extremism.



### ***Feminist Movements***

## *6.1 Malaysia*

In Malaysia, the Islamic feminist movement, Sisters in Islam (SIS) has actively and successfully challenged Malaysia's Islamic political party's extremist interpretations of Islam by articulating Islamic law interpretations that would abolish polygamy, grant women relatively liberal rights to divorce and maintenance, and include women as *qazis* (judges) in the *shariah* (Islamic) court system, which administers personal and family law.<sup>24</sup> Apart from being a huge victory in gender equality, Sisters in Islam's work has also combatted the spread of Islamic militancy in the country. Through grassroots movements to study Islam and re-read the Quran outside of traditional patriarchal interpretations, the organization is spreading the message of a moderate and peaceful Islam. As a result of this, Muslims in Malaysia are less susceptible to being indoctrinated in a violent interpretation of Islam.

## *6.2 Morocco*

After years of organizing and advocacy, a number of Islamic feminist organizations in Morocco including the Union for Women's Action (AUF), Moroccan Women's Democratic (ADFM), and Association Maghreb Equality Collective 95, were successful in reforming the Mudawana, Morocco's Family Code. The reform used feminist interpretations of Islamic law to raise the legal age of marriage for both men and women to eighteen, grant both spouses status as legal heads of the family, and place severe procedural constraints on men's ability to engage in polygamy.<sup>25</sup> This victory showed the strength of the Islamic feminist movement in Morocco. Years of organizing and advocacy from these groups spread a moderate message of Islam throughout the country. Therefore, as in the case of Malaysia, is it unsurprising that Morocco has not fallen victim to high levels of support of Islamic militancy.

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<sup>24</sup> See Memorandum on Reform of the Islamic Family Laws and the Administration of Justice in the Syariah System in Malaysia from Sisters in Islam to Gov't of Malay. (Jan. 4, 1997), available at <http://www.sistersinislam.org.my/memo/040197.htm>; Memorandum on Reform of the Islamic Family Laws on Polygamy from Sisters in Islam & Ass'n of Women Lawyers to Tun Dr. Mahathir bin Mohamad, Prime Minister, Malay. (Dec. 11, 1996), available at <http://www.sistersinislam.org.my/memo/II 11296.htm>; Nik Noriani Nik Badli Shah, Women as Judges (Sisters in Islam), available at <http://www.sistersinislam.org.my/womenjudgesPartI.doc> (last visited Feb. 27, 2007).

<sup>25</sup> Nusrat Choudhury, *Constrained Spaces for Islamic Feminism: Women's Rights and the 2004 Constitution of Afghanistan*, 19 Yale J.L. & Feminism 155, 200 (2007); Global Rights, The Moroccan Family Code (unofficial English translation) [hereinafter Moroccan Family Code], available at [http://www.globalrights.org/site/DocServer/MoudawanaEnglish\\_Translation.pdf?docID=3106](http://www.globalrights.org/site/DocServer/MoudawanaEnglish_Translation.pdf?docID=3106) (last visited Feb. 27, 2007).

## **7. Secular Feminist Movements**

It may be surprising to see that countries like Pakistan and Egypt are not on the list of states with strong Islamic feminist movements especially as they both have women leaders at the forefront of the women's rights movement. This is because the feminist movements in these countries are secular in nature and while they are making strides in women and girl child empowerment, these movements are ineffective at curbing or preventing Islamic extremism. The rise in Islamic extremism in turn dilutes, or even reverses, the many victories the secular feminist movements achieve. Thus, both Egypt and Pakistan provide strong case studies to show that in Muslim majority countries need *Islamic* feminism not just secular feminism to combat and prevent violent extremism.

In Pakistan, feminist movements have been fighting for reform of Pakistan's Muslim Family Law Ordinance of 1961. They, fairly, argue that the law is blatantly discriminatory and not in line with secular and modern notions of equality and social justice. Despite the fact that this is true, advances have not been made in this ordinance. The victories that do come, arise out of independent judges interpreting the Family Law Ordinance in a way that is more equal, however in doing so, they struggle with conforming the patriarchal interpretations of Islamic family law codified in the ordinance with universal notions of justice.<sup>26</sup> Pakistan's feminist movement can learn from Morocco's success in using feminist Islamic legal theory to reform the Mudawana and as a result also change the general mindset of the nation towards a more moderate and peaceful understanding of Islam.

Egyptian feminism is also suffering through a similar identity crises.<sup>27</sup> Like the country as a whole, the feminist movement in Egypt is struggling to embrace secularism as the way to achieve gender equality. The issue they face however, is that Egypt's legal system is derived from Islamic Law and therefore any secular arguments for interpretation or reform, including the application of the CEDAW, holds little weight. Furthermore, a secular feminist movement is doing little to curb encroachment of violent Islamic extremism we are currently witnessing in Egypt.

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<sup>26</sup> Nadya Haider, *Islamic Legal Reform: The Case of Pakistan and Family Law*, 12 Yale J.L. & Feminism 287, 342 (2000) at 339.

<sup>27</sup> Lama Abu-Odeh, *Egyptian Feminism: Trapped in the Identity Debate*, 16 Yale J.L. & Feminism 145, 192 (2004).

## **8. Conclusion & Recommendations**

This paper argues that there is an obvious and direct connection between Islamic feminism, the girl child's education, and women, peace, and security that is being overlooked. Muslim women are not just the victims of Islamic terror but the solution. There is not only a correlation between gender inequality and Islamic terror but also a correlation between the existence of strong Islamic feminist movements in a country and a lack of violent Islamic fundamentalism in that country. With these findings in mind, the women's peace and security agenda can be improved in the following ways:

- **Reimagine traditional notions of women peace and security** to include Muslim women not only as victims or peacemakers post-conflict but as a source of conflict prevention and resolution as well. Redesign the women, peace, and security mechanisms to not only protect Muslim women, but empower them to protect themselves.
- **Teach Muslim women to re-read the Quran and Prophetic Traditions** so that they understand that Islam is not inherently sexist but that it has been co-opted by men to further their own motives. This also gives them the tools to use the very texts that are being used to oppress them as a source of empowerment.
- **Grassroots education campaign** that is not just secular but religious. Teaching Islam from a feminist interpretation to women and girls and not just men and boys. Women who know the feminist interpretations of Islam can not only stand up for themselves but raise a generation of Muslims that understand the true and moderate teachings of Islam.
- **Secular and Islamic feminist groups must join efforts** especially in Muslim majority countries. Feminists, whether secular or religious, need to work together towards a common goal rather than bringing each other down.
- **Increase funding and resources for Islamic feminist movements** rather than spending all resources on armed force resistance that has proven unsuccessful at curbing Islamic terror time and time again.

# **WOMEN'S LEADERSHIP IN FRONTLINE OF PEACE AND SECURITY IN SOUTHEAST ASIA – A CASE STUDY FROM BURMA**

Mengfei Ying

## **1. Introduction**

A close reading and application of UN Security Council Resolution (UNSCR) 1325 on Women, Peace, Security calls for greater representation of women not only at the peacemaking table, but also in both the political and public hemispheres.<sup>1</sup> The United Nation mandates member states to have a critical mass: a minimum quota of 30% women at the table in political activities and parliament.<sup>2</sup> Many countries have since revised their constitutions and domestic laws to call for a higher number of women in parliaments and local governments, and have produced significant increases in women legislators.<sup>3</sup> Article 7 of the CEDAW (Convention on the Elimination of all Forms of Discrimination against Women) requires governments to eliminate discrimination against women in the political and public sectors of their countries to ensure women have equal rights to eligibility for election to all publicly elected bodies, to hold public office, and to perform all public functions at all levels of government.<sup>4</sup> Temporary special measures and appropriate protocols are also being called for by Articles 4 and 5 of the CEDAW to encourage the realization of a critical mass of women in the political sphere.<sup>5</sup>

The first section of this paper will examine the leadership trajectory of Aung San Suu Kyi, the iconic female head of state of Burma. Through the trajectory of Aung San Suu Kyi's political life as a female politician, the second section of this paper will then explore the various barriers to female participation in the public life of Burma. Finally, by examining the Buddhist Women's Special Marriage Bill (a recent law passed in Burma by a parliament overly underrepresented by women) the third section of this paper will outline the dire consequences of a lack of female participation.

Burma is a country known for its iconic strong female leader, however, the nation has a surprisingly low level of female representations in positions of power: below 30%. This paper

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<sup>1</sup> United Nation Security Council Resolution on Women, Peace, Security, U.N. Doc.S/RES/1325 (Oct. 31, 2000).

<sup>2</sup> Fourth World Conference on Women unanimously signed the Beijing Platform for Action, U.N. (1995).

<sup>3</sup> Tinker, I., *Quotas for women in elected legislatures: Do they really empower women?* Women's Studies International Forum (2004), 531-546.

<sup>4</sup> Convention on the Elimination of all Forms of Discrimination against Women, Article 7.

<sup>5</sup> Convention on the Elimination of all Forms of Discrimination against Women, Article 4, 5.

argues that despite the presence of a strong female leader, the absence of a critical mass of female representation in politics continues to minimize and marginalize the interests of women, exerting profound negative impacts on Burma's domestic law-making. This not only threatens gender equality, but also peace and security of the nations. It is vital for Burma to now focus its attention and energy on breaking down the structural and cultural barriers keeping women from fully participating in politics. Widespread political and social changes are necessary to remove those substantial barriers to women obtaining positions of power in the public sphere.

The next section of this paper will examine Aung San Suu Kyi's struggle through her political life and obstacles she faced as a female politician in Burma.

## **2. Barriers to Presidency**

When Aung San Suu Kyi visited Burma in 1988, she was swept up in pro-democracy protests. She soon rose to prominence as the leader of the opposition to the generals who had ruled Burma with great brutality for far too long. In the 1990 elections, her National League for Democracy party achieved a landslide victory. However, the Burmese military regime refused to accept and hand over their power. Seen as a threat to the governments reign of tyranny, Aung San Suu Kyi was detained and subsequently remained under house arrest for almost 15 years. What the Burmese government did not expect was that Aung San Suu Kyi was a force of nature, who refused to leave the Burmese people during their moment of need. Her resolve was tested to the limit when her husband was diagnosed with cancer and died in 1999 while she remained under house arrest, unable to see him for even a last time.

Even more outrageous was the Burmese authority's scheme to discredit Aung San Suu Kyi with the claim that she was a bogadaw, the wife of a foreigner hailing from Britain, the former colonial power, against whom Aung San Suu Kyi's father had battled.<sup>6</sup>

When Myanmar's opposition leader Aung San Suu Kyi won her parliamentary seat in 2015, normally a win of that magnitude virtually assures that her party will elect the president. However, Aung San Suu Kyi is barred from becoming the president of Burma by a constitutional hurdle introduced by the military junta in 2011 when it handed over power to the first civilian elected government Burma had seen in five decades. Burma's own 2008 constitution prevents Aung San Suu Kyi from becoming the president. According to Chapter 3, Clause 59(f) of the

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<sup>6</sup>The pain of Aung Sun Suu Kyi's sons, parted from their mother for 25 years (Jun. 22, 2012) available at <http://www.telegraph.co.uk/women/mother-tongue/9349279/The-pain-of-Aung-Sun-Suu-Kyis-sons-parted-from-their-mother-for-25-years.html>.

constitution, which was written solely with Aung San Suu Kyi in mind, the spouse and offspring of a prospective president cannot owe their allegiance to a foreign power. They cannot be subject of a foreign power or citizen of a foreign country, or be persons entitled to enjoy the rights and privileges of a subject of a foreign government or citizen of a foreign country.<sup>7</sup> Meaning Aung San Suu Kyi is constitutionally barred from becoming the president because her two sons are British citizens. Until this day, Aung San Suu Kyi can only hold the title Minister of the President's Office, but not the President.

The 2008 constitutional clause 59(f) written solely with Aung San Suu Kyi in mind, openly disrespects the Article 7 of the CEDAW, which requires governments to eliminate discrimination against women in the political and public life of the country and, in particular to ensure they have equal rights to be eligible for election to all publicly elected bodies, hold public office, and perform all public functions at all levels of government.<sup>8</sup> The International Covenant on Civil and Political Rights (ICCPR) also provides that the rights (such as right to sex) shall be recognized without distinction.<sup>9</sup> Similarly, The Vienna Declaration and Program of Action provides that the full and equal participation of women in political, civil, economic, social, and cultural life, at the national, regional and international levels, along with the eradication of all forms of discrimination on grounds of sex are priority objectives of the international community.<sup>10</sup> Not only does the clause blatantly contravene international human rights standards, the despots in Burma seeking to justify the legitimacy of imposing restrictions on the rights of citizens to become the leader of the country, frequently use defending Burma's national interest and sovereignty as a rationale behind the unjust constitutional clause.<sup>11</sup>

Through comparative lens, we see governments around the world ratifying the CEDAW, denouncing all forms of deprivation of equal rights, discrimination against women, and the oppression and subordinated status of women. In particular, governments are condemning laws

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<sup>7</sup> Constitution of the Republic of the Union of Myanmar (2008) Chapter 3, Clause 59(f).

<sup>8</sup> Convention on the Elimination of all Forms of Discrimination against Women Article 7.

<sup>9</sup> International Covenant on Civil and Political Rights, December 16, 1996.

<sup>10</sup> Vienna Declaration and Programme of Action, U.N. World Conference on Human Rights, Vienna 1993, 14 Hum. Rts. L.J. 352 (1993).

<sup>11</sup> Will Aung San Suu Kyi ever become president of Burma? (Feb. 5, 2014) available at <http://www.bbc.com/news/world-asia-26043931>

like clause 59(f) of 2008 constitution which openly defies equal access to position of power for women, disfranchising women's citizenship and their participation in public life.

In 1992, when Unity Dow discovered that the Botswana Citizenship Act of 1984 prohibited her children from acquiring Botswana citizenship, because she was married to an American citizen, she sued the government in Botswana High Court for discrimination against women and violating the equal protection provisions in the Botswana Constitution. Under the Citizenship Act, children of a Botswana woman married to a foreigner were not entitled to citizenship, while children of a man married to a foreigner were. The High Court agreed with Unity Dow when it held that the Citizenship Act was unconstitutional, granting citizenship to her children and all those in similar situations.<sup>12</sup> In reaching this decision, the High Court referenced international instruments substantiating the need for Botswana to invalidate the Act, including the CEDAW, stating it would be difficult to allow Botswana to deliberately discriminate against women in its constitution while concurrently support non-discrimination against women internationally. The Court of Appeal subsequently affirmed the High Court's decision, relying on international commitments Botswana had made to respecting women's rights, and denouncing discrimination against women. The court also noted that the drafting of the Botswana Constitution was influenced by international instruments such as the Universal Declaration of Human Rights. The Botswana Citizenship Act of 1984 was officially amended in 1995, during the process of Botswana ratifying the CEDAW.<sup>13</sup>

In the same year, Sara Longwe won a sex discrimination case against the Intercontinental Hotels Corporation in Zambia, which had policy supposedly to curb prostitution that prohibited any women from entering its premises unaccompanied by a man, for turning her away from one of its hotels. Longwe argued before the High Court of Zambia that the policy discriminated against women and thereby violated the antidiscrimination provisions of the Zambian Constitution, as well as international instruments, such as CEDAW, which Zambia had entered into and ratified without reservation. The High Court found that the hotel's exclusion policy amounted to illegal discrimination, and subsequently declared it unconstitutional.<sup>14</sup>

Comparatively, until this day Burma in its law-making continues to skirt its international obligations under important international conventions including the CEDAW, while hypocritically

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<sup>12</sup> *Attorney General v. Unity Dow* (1992) 103 ILR 128.

<sup>13</sup> Bond, Johanna, *CEDAW in Sub-Saharan Africa: Lessons in Implementation*, 2014 Mich. St. L. Rev. 241 at 249

<sup>14</sup> *Longwe v. Intercontinental Hotels* (1993) 4 LRC 221.

supporting international women's rights and discrimination against women, undoubtedly an unfortunate result of the absence of critical mass of women at the table in Burma's political sphere. The next section of this paper will examine the present status of women's participation in political life in Burma, along with various obstacles still existing presently which hinder women's meaningful and substantial participation.

### **3. Barriers to Political Life**

Burma, which ratified the CEDAW in 1997, has obligation to uphold women's rights and provide accountability when these rights are violated. Including situations when women are prevented from meaningfully participating in politics.<sup>15</sup>

Myanmar has seen major political changes in recent years. But despite the democratic opposition's victory at the elections, which cemented Aung SanSuu Kyi's political position, most women are still excluded from participating substantially and meaningfully in political life. Aung San Suu Kyi once observed that many visitors to Burma have the impression that women have equal rights in society, when it is clearly inaccurate. Women in Burma are greatly underrepresented in the government, with the nation having the lowest level of women's political participation of not within the Southeast Asian region, but also globally.

The country's ruling military force since 1988 has been fighting the leader of the opposition, a woman. Meanwhile, the people who occupy the highest office in the country came almost exclusively from the senior ranks of the armed forces, meaning that women are entirely excluded from politics. Throughout Burma's modern political history, the influence of women has been trivial. While the nation's 2008 constitution embraces a few broad statements about gender equality, it also implemented clauses which clearly oppose that principle. Most notably, it specifies that presidential candidates must be well acquainted with the military affairs,<sup>16</sup> a provision that implicitly but effectively excludes female candidates, since women are non-existent in the senior ranks of the military.

The problem of the absence of women in politics and leadership runs deeper. Like many Southeast Asian countries, deeply entrenched Burmese cultural and social norms, and stereotypes about gender roles greatly inhibit women's entry into political and public life. The nation's poverty and lack of control over resources further hinder women's participation in political life: Burmese

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<sup>15</sup> Committing to Women's Rights During Burma's Peace Process (Jul. 6, 2016) available at <https://www.hrw.org/news/2016/07/06/committing-womens-rights-during-burmas-peace-process>.

<sup>16</sup> Constitution of the Republic of the Union of Myanmar (2008) Chapter 3, Clause 59(d)

women usually lack time and energy to pay attention to political affairs, due to heavy economic and family burdens. Thus, women in Burma have long experienced stark exclusion from public life. Culturally speaking, a country dominated by military forces has the tendency to look down on women, who are deemed physically weaker than men, and not fit for leadership. Women are socially obliged to manage the household, while men are expected to be leaders. This notion is entrenched deeply in Burmese society.<sup>17</sup> Consequently, women have long struggled to secure decision-making positions in the public sphere. Those who enter the public sphere do so at the great risk of ridicule, intimidation, or the threat of violence, especially when speaking out on issues deemed controversial. Military junta often openly attacked Suu Kyi as the foreigner's wife, while sneering at her flowers and dresses.

In 2013, during an international conference of the Konrad•Adenauer•Stiftung Aung San Suu Kyi called for more parliamentary seats and political leadership roles for women. Through the international forum, Aung San Suu Kyi made it clear that without a noticeable progress in the equality of women in politics, democracy will not be possible in the country. From the national assembly to local governments, women need to have a stronger presence and be better prepared to take on more leadership roles.

As Aung San Suu Kyi pointed out, women are as just as qualified for political leadership as men. However, the 2008 Constitution, written by men both from the military and the government, still contains a series of discriminations against women. Both the 2008 Constitution and Burma's domestic laws have been widely criticized for falling well short of its international commitments. To this day, the dire urgency and necessity for women in Burma to enter political sphere cannot be overstated. There are 26 million women in Burma represented by only a tiny group of female legislators. This marginalization of women in Burma is serious and a valid cause for concern. The inferior status held by women in politics is clearly reflected in the meager representation of women in legislature protecting women's rights. It is legal in Burma for a man to beat his wife, or for an employer to sexually harass female employees, while abortion is outlawed, and marital rape is only prohibited if the girl is less than 14 years old.<sup>18</sup> Various forms of discrimination against women continue in all walks of life in the nation. Burma cannot continue to ignore the voices, needs, perspectives or aspirations of half the population. This assault on

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<sup>17</sup> Alliance for Gender Inclusion in the Peace Process, *Women, Peace, and Security Policymaking in Myanmar, Context Analysis and Recommendations*, December 2015.

<sup>18</sup> Jenny Hedström and Johanna Kvist, *Women's Organizations are Key to Equality in Burma*.

women's rights has to stop now. It is high time and crucial for the country's continued democratic development to strengthen women's rights, and increase their political participation. The women of Burma should have bigger roles to play during this exciting time of political transformation and democratization. Far-reaching institutional reform is inevitable to ensure a political environment of true gender equality.

Cambodia, another Southeast Asian country party joining the CEDAW in 1992, has been working to advance gender equality in line with the Convention ever since. According to its constitution, women have constitutional rights to engage in public functions. However, despite the guarantee from the constitution, women participation in the public sector is severely limited. Only 20% of Cambodia's public office is held by women, while only 11.52% of Members of Parliaments are women. There is an average of approximately 10% of women in leadership at local, central and lower levels.<sup>19</sup>

The success of women's participation in political office will depend on various factors, the most important being the national government's commitment to equal rights for women to participate in politics.<sup>20</sup> However, the promise that a constitution or law is effectively realized in practice is dependent more than just a simple text guarantee.<sup>21</sup> The Burma government needs to develop strategies to better address the issue of gender disparities in political leadership,<sup>22</sup> not only through its constitution reform and domestic law-making efforts, but also through deploying temporary special measures and appropriate measures as called for by the Article 4, and 5 of the CEDAW. As temporary special measures, the government of Burma should cultivate a popular commitment in society to ensure women's rights are respected, and discrimination against women is ended, while at the same time implement sanctions for non-compliance with provisions for equality.<sup>23</sup>

Participation is one of the four pillars that supports the goals of Resolution 1325, which

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<sup>19</sup> Initial, Second and Third Report on the Implementation of the International Convention on Elimination of All Forms of Discrimination against Women in Cambodia at 34.

<sup>20</sup> Carolyn A. Dubay, *Beyond Critical Mass: A comparative Perspective on Judicial Design and Gender Equality in Iraq and Afghanistan*, 24 Fla. J. Int'l L. 163.

<sup>21</sup> Mark Tushnet, Some Skepticism About Normative Constitutional Advice, 49 Wm. & Mary L. Rev. 1473, 1481 (2008).

<sup>22</sup> Initial, Second and Third Report on the Implementation of the International Convention on Elimination of All Forms of Discrimination against Women in Cambodia at 39.

<sup>23</sup> *supra* note 20

calls for increased participation of women at all level of decision-makings.<sup>24</sup> The lack of critical mass of women in Burma's political sphere continues to impact their domestic law-making. Its parliament continues to blatantly pass laws like the Buddhist Women's Special Marriage Bill which not only encroaches on women's rights, but threatens the peace and security of the nation, which "not only holds back women but entire communities and countries".<sup>25</sup> The next section of this paper seeks to explore the impacts on women's freedom of choice to marriage and religion, from restraining women's participation in politics and the lack of critical mass of women at the political table in Burma.

#### **4. Barriers to Freedom of Choice to Marriage and Religion**

In 2015, the parliament of Burma adopted the Buddhist Women's Special Marriage Bill, with a majority of 524 to 44. The bill which clearly raises serious basic human rights concerns, is a blatant attempt at impeding Buddhist women's right to marry freely outside their religion, by imposing restrictions on their union.<sup>26</sup> The Buddhist Women's Special Marriage Bill primarily encroaches on Buddhist women's fundamental rights by requiring them to register with the government should they plan on marrying non-Buddhist men. Furthermore, the law mandates the local community to publicly display the couple's intention to marry for 14 days, during which period anyone may express their objections to the union. In the event of an objection being raised, the matter will be subsequently handed over to the local court. Human Rights Watch condemned the proposed laws as encouraging further repression and violence against Muslims and other religious minorities.<sup>27</sup>

The proposed Women's Special Marriage Law not only disrespects international human rights standards, but also flagrantly contravenes, transgresses and run counter to Burma's own human rights treaty obligations under international law. The bill openly violates the Universal Declaration of Human Rights<sup>28</sup>, and the International Covenant on Civil and Political Rights which

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<sup>24</sup> United Nation Security Council Resolution (UNSCR) 1325 (2000) on Women, Peace, Security Understanding the Implications, Fulfilling the Obligations, at 19.

<sup>25</sup> de Silva de Alwis, Rangita, *Why Women's Leadership is the Cause of Our Time*, 18 UCLA J. Int'l L. & For. Aff. 87 (2013) at 91.

<sup>26</sup> Burma's Buddhist women subjected to discriminatory marriage law (Jul. 26, 2015) available at <https://www.internationalwomensinitiative.org/news/2015/7/26/burmas-buddhist-women-subjected-to-discriminatory-marriage-law>.

<sup>27</sup> Burma: Reject Discriminatory Marriage Bill (Jul. 9, 2015) available at <https://www.hrw.org/news/2015/07/09/burma-reject-discriminatory-marriage-bill>.

<sup>28</sup> Universal Declaration of Human Rights Article 16

upholds the right to marry and to found a family without discrimination on religion, race or nationality<sup>29</sup>. The CEDAW, which Burma has ratified in July 1997, requires governments to eliminate discrimination against women in all matters relating to marriage and family relations, and to ensure that men and women have the same rights and responsibilities during marriage, at its dissolution, and with regard to guardianship of children<sup>30</sup>. The proposed law also violates Burma's own 2008 constitution which states in Article 34 that that citizens may freely profess and practice religion subject to public order, morality or health<sup>31</sup>, and Article 348 ensures that the state shall not discriminate against any citizen based on race, birth, religion, official position, status, culture, sex and wealth<sup>32</sup>. Not only does Burma fail to respect international laws and its own constitution, by adopting the Buddhist Women's Special Marriage Bill it also gravely endangers the country's transition towards open democracy and national reconciliation by marginalizing ethnic minority and inciting racial hatred across the nation.

The presence of women in positions of power in Burma is more pivotal than ever to safeguard the interest of its vastly underrepresented female population, and peace, security of its nation.

## 5. Conclusion

Despite having a strong female leader in position of power, and international instruments that are ostensibly agreed upon by Burma, weak female participation in politics remains the norm in Burma. The lack of that critical mass of women in parliament threatens not only gender inequality, but peace and security of the nation. The Secretary General's Plan of Action to Prevent Violent Extremism states that "societies for which gender equality indicators are higher are less vulnerable to violent extremism." By looking at Aung San Suu Kyi, I realize we need women not only as delegates to peace, but as occupants of the highest seats in politics. Women politicians are empowered in advocating for the elimination of legal, social, and economic barriers to achieve full and substantive equity for women.<sup>33</sup> Peace and security of the nation needs Burma to incorporate women's perspectives into politics. In the post conflict world, countries like Burma should go even further and call for concerted effort to help elect more women into some of the highest offices in

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<sup>29</sup> International Covenant on Civil and Political Rights Article 20, 23, 26.

<sup>30</sup> Convention on the Elimination of all Forms of Discrimination against Women Article 16

<sup>31</sup> Constitution of the Republic of the Union of Myanmar (2008) Clause 34.

<sup>32</sup> Constitution of the Republic of the Union of Myanmar (2008) Clause 348.

<sup>33</sup> Carolyn A. Dubay, *Beyond Critical Mass: A comparative Perspective on Judicial Design and Gender Equality in Iraq and Afghanistan*, 24 Fla. J. Int'l L. 163.

the land. Without that critical mass of female representation, Burma will never meet its full obligation under various international instruments like CEDAW. More governments and people should bolster Aung San Suu Kyi's efforts in Burma to promote the presence of women in political participation and public life. More women should rally for elections, enter mainstream politics and attempt to break the glass ceiling. "Unless women have full and equal participation in policymaking, the full promise of development and democracy will never be fulfilled."<sup>34</sup> It is vital that Burma have more female representations in politics to protect the rights of half of the countries' population, and to mobilize women's movements to fight for peace and security. Express guarantee of women's equal rights in constitution is not enough, Burma also needs to develop strategies for women's empowerment through not only through constitutional changes, but also through multi-dimensional approach to ensure entrenchment of women's equal right in politics, and keep the issue of women's equal participation at the forefront of democratization.<sup>35</sup> Therefore, it is high time for Burma to take temporary special measures and appropriate measures highlighted by Article 4 and 5 of the CEDAW and institute widespread social and political changes to eliminate the structural and cultural barriers that have been keeping women from substantially and meaningfully participating in political life.

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<sup>34</sup> de Silva de Alwis, Rangita, *Why Women's Leadership is the Cause of Our Time*, 18 UCLA J. Int'l L. & For. Aff. 87 (2013) at 87.

<sup>35</sup> Spura note 32.

## **HIJACKING RELIGION & CULTURE IN THE NAME OF “HONOR”**

Dana Brody

### **1. Introduction**

Amal, a 17-year old Jordanian girl, was raped and impregnated by her father’s friend.<sup>1</sup> In order to protect the family from dishonor, and to avoid the stigma that would attach as a result of a premarital pregnancy, the family immediately raised money and tried to secure an abortion for Amal.<sup>2</sup> However, when the family failed to find a doctor that would perform an abortion on her, Amal’s father and brother used the money to buy a shotgun and shot her eight times in an attempt to kill her. While luckily she survived, Amal did not see justice served.<sup>3</sup>

Samia Sarwar was a young Pakistani girl who sought divorce from her violently abusive husband.<sup>4</sup> Although her family knew about the abuse, preserving the family honor was more important to them than preserving their daughter’s life.<sup>5</sup> Therefore, Samia’s mother and uncle hired a hitman to kill her in her divorce attorney’s office before she could obtain a divorce that would shame the family name.<sup>6</sup> While Samia’s mother and uncle were obvious accomplices in her murder, they remain free members of society because of the structure of Pakistani law. Further, they had the power to forgive Samia’s murderer because of the existence of Qiyat and Disas ordinances, which essentially allow the very same people who plotted a murder to forgive the murderer.<sup>7</sup>

Qandeel Baloch was a social media star in Pakistan, who viewed herself as an inspiration to women that are treated badly and dominated by society.<sup>8</sup> She had hundreds and thousands of likes on her Facebook page and sought to “change the typical orthodox beliefs of people who

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<sup>1</sup> Kathryn Christine Arnold, *Are the Perpetrators of Honor Crimes Getting Away with Murder?: Article 340 of the Jordanian Penal Code Analyzed Under the Convention of the Elimination of All Forms of Discrimination Against Women*, 16 Am. U. Int’l L. Rev. 1343, 1345 (2001).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Yolanda Asamoah-Wade, *Women’s Human Rights and “Honor Killings” in Islamic Cultures*, 8 Buff. Women’s L.J. 21, 21–22 (1999).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Gharib, Malaka, “*Honor Killings Are a Global Problem—And Often Invisible,*” NPR, (July 19, 2016), <http://www.npr.org/sections/goatsandsoda/2016/07/19/486607329/honor-killings-are-a-global-problem-and-often-invisible>.

don't wan[t] [to] come out of their shells of false beliefs and old practices.<sup>9</sup>" Her brother, Waseem Azeem, did not approve of this message or lifestyle, and felt that Qandeel's actions defied cultural norms in Pakistan. In July 2016, after her final transgression of posting a selfie on Instagram with a member of the clergy, he plotted her murder. Waseem drugged Qandeel and strangled her to death in their family home. In his admission, Waseem said he was proud of his actions because by murdering his sister, he restored honor to the family.<sup>10</sup>

Honor killings are not rare occurrences in Jordan or Pakistan. For many years, honor crimes were invisible and went unpunished because they were considered private family affairs, barring the state from intervening. However, in recent years, both Pakistan and Jordan have begun taking a stand for women's rights and against honor killings. While Amal and Samia suffered tremendously and never saw justice served, hopefully justice will be served in Qandeel's case. As I will discuss below, both Jordan and Pakistan have been taking steps towards punishing those who perpetrate murder in the name of "honor." Hopefully these incidents and the stories of many others who were murdered or attacked in the name of "honor," will encourage governments to continue taking steps in the right direction in order remedy this tremendous problem. It is truly a matter of life and death, and it is imperative that action be taken immediately.

It is important to note that honor crimes do not exclusively occur in Jordan, Pakistan or Muslim societies. Rather, honor crimes are a symptom of a patriarchal society, and a misinterpretation of religion and culture. According to the United Nations Population Fund, approximately five thousand women are killed worldwide every year due to honor killings.<sup>11</sup> In reality, the number is probably greater considering the number of unreported incidents and the willful ignorance of government officials. It is my hope that after reading this paper, it will be clear that honor crimes are an indicator of violent extremism, and that by addressing its existence, we can begin countering violent extremism.

I will begin this paper by defining honor crimes and providing some background information regarding how and why such a practice continues to exist in patriarchal societies.

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> United Nations Population Fund, *UNFPA in the News: Killings in the Name of Honor* (Dec. 11–17, 2004), <http://www.unfpa.org/news/coverage/december11-17-2004.htm>.

Next, I will examine how honor crimes are addressed in Jordan and Pakistan and what steps each of these governments has taken in order to remedy the issue. Lastly, I will provide some recommendations on what can be done to further remedy and hopefully eliminate the practice of honor crimes.

## **2. Background**

### *2.1 Honor Crimes Defined*

According to Human Rights Watch, an honor crime is an “act of violence, usually murder, committed by male family members against [a] female family member[] who [is] perceived to have brought dishonor upon the family.”<sup>12</sup> Honor crimes vary between cultures but always include physical assaults, such as acid attacks, maiming, cutting off organs, rape and murder.<sup>13</sup> Acts that are considered dishonorable and therefore warrant an honor attack include but are not limited to: seeking divorce, committing adultery, engaging in premarital sexual relations, premarital pregnancy or being the victim of a sexual assault or rape.<sup>14</sup>

Moreover, there are a wide range of activities that can trigger suspicion of dishonorable activity and result in an attack. For example, in December of 2002, a sixteen-year-old Pakistani girl joined a dance with other family members at a wedding reception and a young man caught hold of the girl’s hand.<sup>15</sup> Although she quickly snatched her hand away, her male relatives noticed the exchange and found the act dishonorable enough to kill her.<sup>16</sup> Unfortunately, this is not a rare occurrence or an extreme example. Even the mere allegation of female impropriety often triggers an honor attack. Based on data collected in 2001, 90% of honor killings in Jordan occur based on rumor or fabrication, without any concrete evidence.<sup>17</sup>

In a just, democratic society, a woman would be considered a victim if she was assaulted or raped, and would be considered legally innocent if she engaged in premarital sex or accidentally

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<sup>12</sup> Human Rights Watch, *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women and “Honor” Crimes, Intervention Before the 57th Session of the U.N. Commission on Human Rights* (Apr. 6, 2001), [http://www.hrw.org/press/2001/04/un\\_oral12\\_0405.htm](http://www.hrw.org/press/2001/04/un_oral12_0405.htm).

<sup>13</sup> *Id.*

<sup>14</sup> Wendy M. Gonzalez, *Karo Kari: Honor Killing*, 9 Buff. Women’s L.J. 22, 23 (2000).

<sup>15</sup> Owais Tohid, *Pakistan Outlaws “Honor” Killings*, Christian Sci. Monitor, Jan. 20, 2005, available at <http://www.christiansciencemonitor.com/2005/0120/p06s01-wosc.html>.

<sup>16</sup> *Id.*

<sup>17</sup> Arnold, *supra* note 1.

caught hold of a man's hand. Further, a woman would have the freedom to engage in other acts such as seeking a divorce and having premarital sex. While certain behavior may be looked down upon by family members, religious groups or communities, committing any of the above acts never justifies murder. Unfortunately, responding to such actions with murder has become standard behavior in Pakistan and Jordan, due to patriarchal societies and a misinterpretation of religion and culture. The perpetrators of honor killings do not fear being brought to justice, because they confidently hide behind the shield of the Sharia Courts and the loopholes within their national constitutions and penal codes. These legal systems must be amended because they clearly defy justice and violate basic human rights and international law.

## *2.2 Root of the Problem*

It is impossible to treat women with respect in a society in which women are not only treated as unequal members of the family, but are treated on a sub-human level. Below, I will describe the main factors leading to honor killings, with a focus on Jordan and Pakistan. In order to eradicate this trend, we must first understand the root causes of the problem, namely cultural conceptions, economic incentives and tribal conflicts. Economic incentives, backed with the cultural norms in these societies, empower men to feel justified in their actions of disrespecting, attacking and murdering women in the name of so-called "honor."

### Cultural Conceptions

Honor is a deep-rooted traditional notion that originated in pre-Islamic eras in the ancient culture of desert tribes, and has shaped modern day Islamic family law.<sup>18</sup> Today, members in Muslim societies are bound by this honor code and must act in accordance with it.<sup>19</sup> Notably, men and women have different roles in upholding this code. Men in patriarchal societies interpret Sharia law to mean that a woman is a symbolic vessel of a male, rather than possessing her own honor. These men believe that a woman's actions are a reflection upon the male members of her family and that it is a male's duty to protect this honor. Consequently, men believe they have complete control and authority over their women, especially their sexuality.<sup>20</sup>

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<sup>18</sup> Rachel A. Ruane, *Murder in the Name of Honor: Violence Against Women in Jordan and Pakistan*, 14 Emory Int'l L. Rev. 1523, 1530 (2000).

<sup>19</sup> *Id.* at 31.

<sup>20</sup> Arnold, *supra* note 1, at 1358.

Therefore, when a woman takes her sexuality into her own hands, or acts freely in any way that he finds dishonorable, a male family member will take action to re-assert his authority over this “transgressing woman” and will demonstrate the power of his masculinity.<sup>21</sup>

#### Economic Incentives

Financial interests also promote honor killings, effectively creating an “honor killing industry.” Because a woman is viewed as the vessel of a man, property solely flows through the male members of the family.<sup>22</sup> Therefore, property inheritance and the dowry system contribute to the regulation of female family members’ marriages, as men are incentivized to keep the property within the family. A woman who refuses to marry the man chosen by her male family members poses a threat to their property interests, and is therefore viewed as a liability.<sup>23</sup> Additionally, sons of widowed women often prevent her from marrying to maintain the property she has acquired through her marriage. Because of these unequal property rights, women are viewed as liabilities when they don’t comply with their male family members’ requests, and are therefore in risk of being murdered “in the name of honor.”<sup>24</sup>

#### Tribal Conflicts

Honor killings are also committed in order to settle old scores amongst rival tribes.<sup>25</sup> A male member of one tribe may choose to maim, burn, or sexually assault the female family member of a rival tribe, in order to devalue her worth and dishonor her family. Because a women’s worth is determined by her potential to strengthen ties with other tribes and gain property rights or a high dowry, an honor attack would render her worthless to her family members.<sup>26</sup>

### **3 Legal Systems in Pakistan and Jordan Incentivizing Honor Crimes**

The current laws and the way they are interpreted in both Pakistan and Jordan incentivize honor killings. In the Jordanian Penal Code, there are both mitigation and exculpatory clauses for

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<sup>21</sup> Ruane, *supra* note 18, at 1533.

<sup>22</sup> Mazna Hussain, “Take My Riches, Give Me Justice”: A Contextual Analysis of Pakistan’s Honor Crimes Legislation, Harv. J.L & Gender, 224, 228 (2006).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Gonzalez, *supra* note 14 at 23. (2000).

<sup>26</sup> *Id.*

murders committed in the name of “honor.”<sup>27</sup> In Pakistan, Qisas and Diyat, ordinances render the legal system completely null and void, as the legal power of authority is taken away from the government and is handed to the family members of the victim—often the same family members that perpetrated the victim’s murder.<sup>28</sup>

### *3.1 Jordanian Penal Code and Legal System*

Article 340 of the Jordanian Penal Code treats violence against women as a lesser crime, or even as justified behavior, when it is in the name of honor.<sup>29</sup> Section (i) of Article 340 states that: “[h]e who catches his wife, or one of his female mahrams committing adultery with another, and . . . kills, wounds, or injures one or both of them, is exempt from any penalty.” Additionally, section (ii) states “[h]e who catches his wife, or one of his female mahrams with another in an unlawful bed, and he kills or wounds or injures one or both of them, benefits from a reduction of penalty.<sup>30</sup> These clauses allow for a male family member to kill a female family member without having to fear a legitimate penalty, as long as he can prove that she committed adultery, or was in an unlawful bed. However, given the fact that Article 340 requires actually witnessing the sexual intercourse of sexually compromising situation, perpetrators of honor killings often cannot utilize this law for a defense, as the burden of proof is high and the evidence is oftenscarce.<sup>31</sup>

Further, dishonorable acts that render many women victims of honor killings are not limited to adultery or “inappropriate sexual conduct,” forcing perpetrators to find an alternative law to rely on for exoneration or mitigation. Thus, perpetrators of honor killings often rely on Article 98 of the Jordanian Penal Code which states, “[S/he] who commits a crime in a fit of fury caused by an unlawful and dangerous act on the part of the victim benefits from a reduction in penalty.<sup>32</sup>” This is a general provocation statute allowing for a mitigated or exculpatory sentence for crimes committed in the heat of passion. While this is a facially neutral law, in practice t is discriminatorily used to the benefit of males.

Although perpetrators often rely on this “fit of fury” statue for a reduced sentence, most honor crimes are well-planned and premeditated and therefore completely beyond the scope of

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<sup>27</sup> Hussain, *supra* note 22, at 231-33.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 230.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 231-32.

Article 98. Further, many of the acts that honor killings are based upon are not unlawful or dangerous on the part of the victim. Yet, for the last two decades, the Jordanian Court of Cassation has greatly expanded the scope of Article 340 by applying Article 98 of Jordan's Penal Code to honor killings, often accepting trivial challenges to patriarchal authority to fit the definition of the statute.<sup>33</sup> For example, a woman who is raped, clearly did not commit an unlawful act and did not voluntarily engage in dangerous behavior. Yet, such an act is commonly used as a defense by murderers who kill in the name of honor. Not only does this undermine the legitimate claims a victim has, it also classifies the victim's act as unlawful or dangerous.

According to Article 98, if there is an extenuating excuse, such as premeditated murder, a murderer may receive a reduced sentence of minimum one year.<sup>34</sup> For other felonies, a criminal may receive as little as six months and a maximum of two years.<sup>35</sup> Further, juveniles who commit honor crimes receive even shorter sentences and do not gain a criminal record, often encouraging families to choose younger family members as perpetrators of honor crimes.<sup>36</sup> However, if the victim's family waives its right to file a complaint, the murderer may receive a sentence of six months.<sup>37</sup> As is often the case with honor crimes, the murderers are usually family members, or hired by them. Therefore, perpetrators of honor crimes are confident that the family will not file a complaint against them. Such a system incentivizes honor killings, as the murderers often serve very little jail time or serve their time awaiting trial and therefore walk away from any penalty.

In reforming its legal system, Jordan should look towards other countries for guidance who have dealt with similar issues in reforming their penal codes. For example, in 2011, the Lebanese parliament annulled article 562 of the criminal code, which mitigated the sentence of people who claimed they killed or injured their female relative to protect the family.<sup>38</sup> Additionally, in 2009, Syria abolished a law that criminally excused men who killed female

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<sup>33</sup> Arnold, *supra* note 1 at 1366.

<sup>34</sup> Human Rights Watch, *Honoring the Killers, Justice Denied for "Honor Crimes" in Jordan*, (April 19, 2004), <https://www.hrw.org/report/2004/04/19/honoring-killers/justice-denied-honor-crimes-jordan>.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Human Rights Watch, Lebanon: Law Reform Targets 'Honor' Crimes, Lebanese Laws Need Further Overhaul to Curb Gender-Based Violence, (August 11, 2011), <https://www.hrw.org/news/2011/08/11/lebanon-law-reform-targets-honor-crimes>.

family members in the name of honor and replaced it with a minimum two-year sentence.<sup>39</sup>

While there is much room for improvement in Jordan's judicial system, there has been a hopeful shift towards equality on the bench which further strengthens the chances for equality of the law. The appointment of a female Judge, Judge Mohammad Tarawneh to the court of Cassation in Jordan, sets a clear example of what a future for women in Jordan can look like. On March 21<sup>st</sup>, the court of Cassation made it clear in their landmark ruling that killing women in the name of honor will no longer be tolerated or treated differently than murder.<sup>40</sup> The specific case at bar involved two brothers who poisoned and killed their sister in the name of honor because she fled the family home with the man she loved. The court invoked a harsher penalty than normal, which doubled the brothers' original sentences and setting a new precedent. Further, The Iftaa department, which issues religious edicts or "fatwas," declared that honor killings are contrary to Sharia Law and that such killings are heinous crimes.

Many women lack access to justice because a majority of authoritative positions are held by men. If women were more involved, they would feel more confident in the justice system and would therefore be more incentivized to bring claims against their harassers. Further, if women had a say in the way laws are shaped and interpreted, they would ensure women's protection which would ultimately create a shift towards a more equal and fair society. Therefore, such reform is particularly effective in relation to honor crimes. While this is an important step in the fight for equality of women in Jordan and should be applauded as such, there are many more steps that need to be taken in order to ensure the sustainability of women, peace and security. Pakistan must annul the practice of allowing family members to forgive perpetrators of honor crimes and must place the responsibility of bringing claims against such perpetrators solely in the hands of the government.

#### **4 Pakistani Legal System**

##### *4.1 Qisas and Diyat Ordinances*

In Pakistan, the system of Qisas and Diyat ordinances allows the heir of a victim to forgive her murderer in exchange for monetary compensation.<sup>41</sup> This system essentially puts the

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<sup>39</sup> Malaka, *supra* note 8.

<sup>40</sup> Human Rights Watch, *How To End 'Honor' Killings In Jordan*, (April 3, 2017), <https://www.hrw.org/news/2017/04/03/how-end-honor-killings-jordan>.

<sup>41</sup> Asian Centre for Human Rights, *Cultural Cruelties: Confronting Honour Killing* (Oct. 27, 2004), <http://www.achrweb.org/Review/2004/44-04.htm>.

law in the hands of the victim's family and takes away any legal power the justice system has. Often, the family member with the power of forgiving the murderer is the same family member who perpetrated the murder in order to restore the family honor, as was the case in the Samia Sarwar murder.<sup>42</sup>

Further, because honor crimes are considered personal family disputes, family members are often coerced into silence, even if they did not partake in the murder. In other cases, family members will offer their forgiveness in exchange for money because of their difficult economic reality. With a corrupt legal system and slim chances of justice being served, family members often prefer to take the financial compensation rather than walk away empty-handed, inadvertently reinforcing the practice of honor killings.<sup>43</sup>

While Pakistan has attempted to take a step in the right direction and amend its discriminatory legal system, the existence of the Qisas and Diyat Ordinances renders any reform null and void. In 2005, President Musharraf, along with the support of the National Assembly and the Senate, signed the "Honor Killings Bill," which eliminated mitigated sentences for honor killings.<sup>44</sup> This was the first official legislation passed recognizing the rights of women with respect to honor crimes, albeit being met with tremendous opposition. Passing this bill was a huge accomplishment for women's rights facially, but it did not have much effect in practice. Due to the existence of the Qisas and Diyat ordinances, the threat of punishment has no force. Until honor crimes are taken out of the private sphere and given to the jurisdiction of the state, any amendment to the criminal code will have little or no effect.<sup>45</sup> It is of first priority to recognize that the government has the legal right to represent victims of honor crimes and prosecute the perpetrators, rather than allow the family to choose the fate of the criminals.

#### *4.2 Tribal Arbitration & Sharia Courts*

The majority of Pakistani people live in tribal areas, rendering them subjects of the male-only tribal council.<sup>46</sup> While tribal council arbitration is not part of the formal justice system and only possess informal powers of authority, it has tremendous control over disputes arising among its

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Hussain, *supra* note 22, at 239-40.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 233.

people. As a result, the government and the formal judicial system have limited or no control over honor killings occurring in the rural areas of Pakistan.<sup>47</sup>

Further, within the formal judicial system there is tremendous discrimination against women. There are many obstacles preventing women from seeking legal redress and discouraging them from seeking justice. The discrimination exists at phase one of the investigation, during which a woman would have to report her claim to a member of the male-dominated police force. The male-dominated police force often conducts faulty investigations, overlook honor crimes, and even sometimes harass the women complainants.<sup>48</sup>

The few women who do successfully bring a claim to court often feel victimized by the judges and prosecutors who tend to discriminate against female victims of violence. They publicly express their disbelief in the female victims' claim of rape or sexual violence.<sup>49</sup> This sort of bias has true ramifications for women because committing adultery and having extramarital sex are crimes in Islamic law. Therefore, if a woman is unable to prove her case of rape to a court, she faces punishment for partaking in consensual illicit sexual activity.<sup>50</sup> With the tremendous discrimination against women within the legal system, and with the threat of incarceration looming if she cannot prove her case, it is very unlikely that a woman would feel incentivized file a claim. Further, even if a woman ultimately proved her case, there is a high risk that because of mitigating statutes, her attacker will be set free, able to attack and intimidate her and her family.

## 5 Reform

It is of utmost importance that Pakistan and Jordan reform their laws in order to comply with human rights-based international laws which they currently violate. Security Council Resolution 1325 ("UNSCR 1325")<sup>51</sup> and The Convention of the Elimination of all forms of Discrimination Against Women ("CEDAW")<sup>52</sup> require parties involved in a conflict to ensure the protection of women's rights. Further, while The CEDAW lacks a clear provision against

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 240.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 235.

<sup>51</sup> UN Security Council, Security Council resolution 1325 (2000) [on women and peace and security], 31 October 2000, S/RES/1325 (2000), <http://www.refworld.org/docid/3b00f4672e.html>.

<sup>52</sup> See generally Convention on the Elimination of All Forms of Discrimination against Women, United Nations, <http://www.un.org/womenwatch/daw/cedaw/>.

gender-based violence, General Recommendation 19 holds states accountable for both their own and their citizens' discriminatory actions against women. In accordance with this Recommendation, Jordan and Pakistan must "take appropriate and effective measures to overcome all forms of gender-based violence" and "ensure that laws against family violence...give adequate protection to all women and respect their integrity and dignity."<sup>53</sup> In complying with these recommendations, Jordan and Pakistan must:

- Ensure* that women are welcomed into peace negotiations and post-conflict reconstruction and are involved at all levels of decision making—national, regional and international—to ensure that impunity for violence against women is abolished and to sustain peace and stability.
- Implement* awareness-raising activities about the importance of women's participation in decision-making with the aim to eliminate patriarchal attitudes and stereotypes of gender-roles.
- Implement* a specific monitoring and reporting framework that would allow for the collection of data such as: the cause of the honor attack, the relationship between the attacker and the victim, whether a complaint was filed, and the sentences handed down against the killer and any accomplices.
- Establish* mandatory judicial reviews for each claim of violence against women and ensure that reported data be monitored and reviewed to ensure the proper implementation of laws.
- Implement* gender-sensitive training on the special needs of women in conflict for peacekeeping personnel and public officials.
- Provide* protective and support services for victims of gender-based violence and ensure their safety from their attackers.
- Provide* systematic training to judges, prosecutors and lawyers on women's rights, including the Convention, its Optional Protocol and all relevant domestic legislation for women.
- Strengthen* support services for victims of violence such as counseling and rehabilitation services, including medical and psychological services.

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<sup>53</sup> Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 30: On women in conflict prevention, conflict and post-conflict situations, U.N. Doc. CEDAW/C/GC/30 (Oct. 18, 2013).

- Combat* deep-rooted discriminatory attitudes by working with activists, local women's rights organizations, religious and community leaders, police officials, social workers, teachers, and health workers to protect potential victims.
- Educate* and create public-awareness about harmful norms and gender discrimination that drive such violence.
- Repeal* or amend relevant legislation provisions to ensure prohibition of all forms of direct and indirect discrimination against women, including sanctions, in line with article 1 of the Convention.
- Include* in its Constitution and/or in other relevant legislation provisions prohibiting all forms of direct and indirect discrimination against women, including sanctions, in line with article 1 of the Convention.
- Implement* a zero-tolerance policy for any violence committed in the name of honor.

**In complying with the above recommendations as well as the Concluding observations of the Committee on the Elimination of Discrimination against Women to Jordan,<sup>54</sup> the Jordanian Parliament must:**

- Repeal Article 340 of the Jordanian Penal Law.
- Strictly interpret Article 98 to apply only to crimes fitting its definition of “fit and fury” and “unlawful and dangerous act” and should never be applied to crimes committed in the name of honor.
- Amend its Constitution to include specific language condemning honor killings and clarify that an honor killing is equivalent to murder and will be treated as such.
- Prohibit exculpatory provisions or reduced penalties in any and all cases related to “honor” killings regardless of whether the victim’s family calls for leniency.

**In complying with the above recommendations as well as the Concluding observations of the Committee on the Elimination of Discrimination against Women to Pakistan<sup>55</sup>, the Pakistani government must:**

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<sup>54</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding observations of the Committee on the Elimination of Discrimination against Women: Jordan*, 9 March 2012, CEDAW/C/JOR/CO/5.

<sup>55</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding observations of the Committee on the Elimination of Discrimination against Women: Pakistan*, 1 March 2013, CEDAW/C/PAK/CO.

- Repeal the Qisas and Diyat Ordinances provisions that discriminate against women in order to effectively implement the Honor Killings Bill and any future amendments to ensure the protection of women against gender-based violence and discrimination.
- Repeal all provisions under which perpetrators of the so-called honor crimes are allowed to negotiate pardon with victims' families and include language in amendments appointing the government as wali, or heir, of the victim, instead of a relative who easily could have been involved in the crime.
- Ensure the proper implementation of the Prevention of Anti-Women Practices (Criminal Law Amendment) Act of 2011 and other relevant legislation.
- Include language in future amendments that appoints the government as wali, or heir, of the victim, instead of a relative who easily could have been involved in the crime.

## **GENDER QUOTAS IN UGANDA'S POLITICS: AFFIRMATIVE ACTION AND ITS RELEVANCE TO INCREASING THE PARTICIPATION OF WOMEN IN THE WOMEN, PEACE AND SECURITY AGENDA**

Amanda Nasinyama

### **1. Introduction**

In the past three decades, several parts of Uganda, including Northern Uganda, Karamoja region, West Nile, Luweero Triangle and Kasese have experienced violent civil and armed conflicts. In October 2000, the United Nations Security Council passed Resolution (UNSCR) 1325 which provides for the integration of a gender perspective before, during and after conflict during various stages of the peace process, as a vital strategy to support inclusive and sustainable peace initiatives. One of the pillars of 1325 is the participation pillar, which calls for the increased participation of women at all levels of decision-making. In order to implement the women, peace and security agenda under 1325, we must look at a broader picture for peace. Using Uganda as a case study, this paper opines that the increase of substantive representation of women in politics through use of affirmative action measures like quotas, promotes gender equality and further ensures the participation of women in the peace and security agenda. Part I of this paper discusses Uganda's turbulent history after independence and the important role women played in the drafting of its constitution, Part II details the legal context and framework governing the participation of women in politics and the adoption of affirmative action measures, Part III addresses the relevance of affirmative action measures like political quotas to increasing women's participation under the peace and security agenda. Part IV discusses the shortfalls and criticisms of the gender quota in Uganda's politics and Part V provides the conclusion and recommendations to improve the gender quota in politics in Uganda.

### **2. Uganda's turbulent History after independence and the important role women played in the drafting of its constitution**

Uganda has had a history of civil conflict since its independence from the United Kingdom in 1962. Idi Amin Dada led the country through a regime of terror between 1971 and 1979. In 1986, the National Resistance Army (NRA) led by the current president, Yoweri Kaguta Museveni succeeded in overthrowing the regime of Milton Obote, establishing democracy in the country,

after a five-year civil war between the two groups.<sup>1</sup> However, the conflict in Northern Uganda that lasted over two decades has been the longest and most devastating conflict. The conflict was caused by a resistance in Northern Uganda, which opposed the overthrow of Milton Obote's government in 1986. The war in Northern Uganda led to large scale internal displacement of communities, gross human rights violations including the abduction, rape, maiming and killing of civilians, massive recruitment of child soldiers, abduction of girls for sex slavery and widespread sexual violence.

On coming into power, the National Resistance government formed the Uganda Constitutional Commission and gave it the responsibility to start the process of developing a new Constitution in 1988. The Constitutional Commission carried out extensive consultations and education activities throughout the country with special interest groups including women, youth, and people with disabilities in order to draft a constitution based on the views of the people<sup>2</sup>. Women working on proposals for the new constitution referred specifically to the Convention on the Elimination of All Discrimination against Women's (CEDAW) concepts of equality to advocate for inclusion of a number of key provisions in the constitution<sup>3</sup> such as; the principle of non-discrimination on the basis of sex, equal opportunities for women: preferential treatment/affirmative action to redress past inequalities; provision for the establishment of an Equal Opportunities Commission; and the rights in relation to employment, property and the family<sup>4</sup>. The recommendations of the Constitutional Commission were reviewed and voted on by the Constituent Assembly, of which fifty-two (eighteen percent) of the delegates were women who, supported by the women's movement were instrumental in ensuring that these key gender provisions were included in the constitution<sup>5</sup>.

It was the women's caucus that defended the principle of affirmative action amidst objections from the male members in the Constituent Assembly. The drafting the Ugandan Constitution is in itself an example of how substantive representation of women in decision making

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<sup>1</sup> Julie L. Arostegui & Veronica Eragu Bichetero, *Women, Peace and Security; Practical Guidance On Using Law To Empower Women In Post Conflict –Systems, Best Practices and Recommendations From The Great Lakes Region Of Africa*, Women In International Security found at <Http://Wiisglobal.Org/WpContent/Uploads/2015/03/case-studies.Pdf> at 81

<sup>2</sup> id at 34

<sup>3</sup> See id

<sup>4</sup> Anne Marie Goetz, *No Shortcuts to Power: Constraints on Women's Political Effectiveness in Uganda*, 40 No. 4, Journal of Modern African Studies, pp 549-575 (Dec., 2002)

<sup>5</sup> Id at 556

bodies makes a significant contribution to promoting gender equality by ensuring government laws and policy address issues of gender, which will further promote inclusive and sustainable peace initiatives.

### **3. The Legal Context and Framework governing women's political participation and the adoption of Affirmative Action Measures**

Uganda has a strong legal framework in place that promotes the rights of women to participate in politics and decision-making. At the International level, the 1948 Universal Declaration of Human Rights (UDHR) to which Uganda is a signatory, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) which Uganda ratified, constitute the international Bill of Human Rights that apply to all people and contains principles of non-discrimination on the basis of sex. The most comprehensive international instrument on women's rights is the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which Uganda signed and ratified in 1989. Article 4 paragraph 1, of the CEDAW provides for countries to adopt temporary special measures aimed at accelerating defacto equality between men and women which shall be discontinued when the objectives of equality of opportunity and treatment have been achieved. Article 7 further places special importance on the participation of women in public and political life by calling for women's exercise of their political power, in particular their legislative, judicial, executive and administrative powers<sup>6</sup>. The Convention on the Rights of the Child (CRC), which was ratified by Uganda in 1990, provides for the girl child to benefit from the specific protections for children, which are to be respected and ensured by States parties without discrimination of any kind, including on the basis of sex.

The Beijing Platform for Action, adopted at the Fourth World Conference on Women in 1995, defined two strategic objectives in its critical area of concern on women in power and decision-making, that is to ensure women's equal access to and full participation in power structures and decision-making and to increase women's capacity to participate in decision-making

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<sup>6</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 23: Political and Public Life, 1997, A/52/38, available at: <http://www.refworld.org/docid/453882a622.html> [accessed 10 April 2017]

and leadership.<sup>7</sup> The Beijing Platform urges states to achieve a to a 33% target for women in decision making.

In October, 2000, the Security Council in its resolution 1325 on women, peace and security, reaffirmed the important role of women in the prevention, resolution of conflicts and in peacebuilding, and stressed the importance of their equal participation and full involvement in all efforts for the maintenance and promotion of peace and security, as well as the need to increase their role in decision-making. The General Assembly, at its fifty-eighth session in 2003, adopted resolution 58/142 on women and political participation which urged Governments, the UN system, NGOs and other actors to develop a comprehensive set of policies and programs to increase women's participation in decision-making, including in conflict resolution and peace processes by addressing the existing obstacles facing women in their struggle for participation<sup>8</sup>. Following this first UNSCR, the Security Council has adopted seven additional resolutions that have expanded and complemented the first one, turning its content and concepts into reality.<sup>9</sup> UNSCR 2122 adopted in 2013 recognizes the need for greater emphasis on the leadership and participation of women, for addressing the root causes of armed conflicts and of threats to the security of women and girls through an integrated approach to sustainable peace, covering the political dimensions of security, development, human rights — including gender equality — the rule of law and justice.<sup>10</sup>

At the continental level, the adoption of the African Charter on Human and Peoples' Rights in 1981 facilitated the protection of women's human rights. The subsequent Protocol of the African Charter on Human and Peoples Rights and the Rights of Women in Africa, is Africa's own statement of its vision of rights for women. Known as the Maputo Protocol and ratified by Uganda in July 2010 it is a ground breaking legal instrument for women's rights that expands and reinforces the rights provided in CEDAW and other human rights instruments, produced by Africans for African women<sup>11</sup>. The protocol guarantees comprehensive rights to women and contains specific

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<sup>7</sup> Equal Participation of Women and Men in Decision-Making Processes, with Particular Emphasis on Political Participation and Leadership, Report for the Expert Group Meeting Addis-Ababa, Ethiopia, 24-17 October, 2005, Division for the Advancement of Women, Department of Economic and Social Affairs  
<http://www.un.org/womenwatch/daw/egm/eql-men/FinalReport.pdf> at 5

<sup>8</sup> *id* at 6

<sup>9</sup> María Villellas Ariño, *Women Peace and Security 15 years of UN Security Council Resolution 1325, An Assessment Of The Women, Peace And Security Agenda*, Reports 12/2016 Institut Català Internacional per la Pau [http://icip.gencat.cat/web/.content/continguts/publicacions/documents\\_i\\_informes/2016/1325-angles-maquetat.pdf](http://icip.gencat.cat/web/.content/continguts/publicacions/documents_i_informes/2016/1325-angles-maquetat.pdf)

<sup>10</sup> *id* at 10

<sup>11</sup> Arostegui & Bichetero supra note 1 at 25

provisions on the participation of women in peace processes and the protection of women in armed conflicts, including requiring states to ensure the increased participation of women in structures and processes for conflict prevention, management, and resolution at local, national, regional, continental and international levels. Africa is also the only continent that has adopted a regional child's rights instrument, the African Charter on the Rights and Welfare of the Child (ACRWSC) that builds on the same basic principles as in the CRC and highlights issues of specific importance in the African context for example it prohibits the recruitment of children in armed conflict and promotes affirmative action for girls' education.

The Constitution of the Republic of Uganda, 1995 which is the supreme law of the land, provides the broad legal framework for the respect of human and property rights; it provides for equality between men and women (Art. 21); affirmative action in order to address any imbalances (Art. 28), equal opportunities for men and women to realize their full potential (Art. 30 and 32), and the foundation for the establishment of institutions to oversee or otherwise regulate the observance of fundamental rights and principles. To support its legal framework, the Government of Uganda has adopted numerous sectorial policies and strategic plans to remove obstacles that hinder women's full attainment of their legal status and enjoyment of their human rights these include; the Uganda Gender Policy, the National Action Plan for Women for the national implementation of UNSCR 1325, the Decentralization Policy, HIV/ AIDS Policy, and the National Policy for Internally Displaced Persons – which all have a lot of relevance in addressing GBV in the context of armed conflict.

#### **4. Affirmative action and its relevance to increasing the participation of women in Peace and Security in Uganda.**

From Kosovo to Rwanda, societies have witnessed rising discrimination and violence against women as early indicators of conflict<sup>12</sup>. Gender based-violence and women's poverty, illiteracy and lack of health care due to discrimination have serious consequences for development. The fewer women in a society that participate in formal decision making, the less likely it is that the decisions made are working in favor of more gender equality.<sup>13</sup> When women are not broadly

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<sup>12</sup> The United States National Action Plan on Women, Peace, and Security, June 2016, found at <https://www.usaid.gov/sites/default/files/documents/1868/National%20Action%20Plan%20on%20Women%2C%20Peace%2C%20and%20Security.pdf>

<sup>13</sup>Gender Minister Makes Case for Affirmative Action law, Ghana New Agency, Thursday, 13<sup>th</sup> August, 2015 <http://www.ghananewsagency.org/social/gender-minister-makes-case-for-affirmative-action-law--93156>

represented in the senior levels of government or are inadequately or not consulted at all, government policy will not be comprehensive and effective.<sup>14</sup> Women's rights to participate in politics are enshrined in many international treaties and laws as shown in Part II. Yet the adoption of the UNSCR 1325 in October 2000 on Women, Peace and Security was the primary driver for international recognition of women's participation in peace and post-conflict decision-making processes.<sup>15</sup>

One of the ways that governments have sought to redress the problem of women's paucity in decision-making positions is through the introduction of affirmative action programs<sup>16</sup>. In Uganda at the parliamentary level, there is a provision for one woman Member of Parliament (MP) from each district, while the Local Government Act (1997) provides for women councilors to be at least one third of the total number of councilors at all levels from village to the district.<sup>17</sup> Due to the persistence of gender inequalities in representation in Uganda, affirmative action has helped to considerably boost the number of women politicians.

According to the Inter-Parliamentary Union, Uganda currently has four hundred and sixty five MP's. Of these, one hundred and fifty four that is thirty four point three percent are women<sup>18</sup>. Uganda is divided into provinces, with each non Affirmative Action legislator representing a constituency and is called a "Constituency Representative". Constituency Representative Seats are open to both males and females, who can contest freely. Women representatives under the quota system are elected from an all-female list of candidates that both men and women vote for. There is a woman representative for every district and multiple constituency representatives, one for each province. Women representatives therefore represent a significantly larger geographical area than their counterparts elected through the non-affirmative action system (Constituency seats) occupied mostly by males<sup>19</sup>. Finally, there are other Affirmative Action seats reserved for special interest groups including the Uganda People's Defense Forces, Youth, People with Disabilities, and

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<sup>14</sup> supra note 6 at paragraph 27

<sup>15</sup> Arino supra note 9

<sup>16</sup> Tamale Sylvia, *Point of Order, Mr. Speaker': African Women Claiming Their Space in Parliament*, Gender and Development, Vol. 8, No. 3, [Leadership] (Nov., 2000), pp. 8-15. <http://www.jstor.org/stable/4030457>

<sup>17</sup> Security Council Resolution 1325, Civil Society Monitoring Report, Uganda, Global Network of Women Peace Builders, found at [http://www.peacewomen.org/sites/default/files/uganda\\_gnwp\\_monitoring.pdf](http://www.peacewomen.org/sites/default/files/uganda_gnwp_monitoring.pdf)

<sup>18</sup> Statistics obtained from the Inter-Parliamentary Union, [http://www.ipu.org-parline-e/reports/2329\\_A.htm](http://www.ipu.org-parline-e/reports/2329_A.htm)

<sup>19</sup> Mapping the Substantive Representation of Women in the Ugandan Parliament, A Joint Study by the Center for Women in Government and Civil Society, Rockefeller College of Public Affairs and Policy, University of Albany and Nkumba University, found at <http://www.50x50movement.org/sites/default/files/inline-files/Mapping-the-Substantive-Representation-of-Women-in-the-Ugandan-Parliament.pdf>

Workers. There are seats reserved for women within each of these special interest groups. Therefore, a female MP can either be a Constituency Representative, a Woman/District Representative, or a Special Interest representative.

Affirmative action measures like the quota system have enabled Uganda to achieve the thirty three percent target on women representation in decision making as recommended for under the Beijing Platform for Action. Affirmative action has created opportunities for women and other marginalized groups in Uganda to showcase their talents, skills and leadership qualities in an effort to compensate for their historical discrimination. Without affirmative action, they would have remained untapped<sup>20</sup>. In 2003 a constitutional review was completed to deal with some unresolved issues of the 1995 Constitution. Women's groups were consulted during the process and, having seen the workings of CEDAW and further armed with UNSCR 1325, were further able to advocate for women's rights. Thus a key amendment was included that established 18 as the minimum age for marriage and provided that women and men have equal rights at marriage, during marriage and at the dissolution of marriage.<sup>21</sup>

During the 8th Parliament (2006 – 2011) in Uganda, several women-friendly laws were passed, including the Equal Opportunity Commission Act of 2006, the Prohibition of Female Genital Mutilation Act of 2009, the Prevention of Trafficking in Persons in 2009, and the Domestic Violence Act of 2010.<sup>22</sup> However, in the 9th Parliament the Marriage and Divorce Act was “shelved” by the Speaker after widespread popular opposition from within and outside Parliament. The Marriage and Divorce Act portrayed women as equals who should share marital assets built collectively within marriage or cohabitation if and when their relationships end.<sup>23</sup> Additionally, the provision that deemed marital rape illegal flew in the face of men's senses of entitlement to women's bodies.<sup>24</sup> The discussion of contentious issues such as the Marriage and Divorce Bill would never have happened had it not been for the efforts of women representatives in

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<sup>20</sup> Kaimenyi, C., Kinya, E. and Chege, S.M, *An Analysis Of Affirmative Action: The Two-Thirds Gender Rule In Kenya*, International Journal of Business, Humanities and Technology, 3(6), pp.91-97 (2013) at 94

<sup>21</sup> Supra note 1 at 4

<sup>22</sup> supra note 19

<sup>23</sup> supra note 19

<sup>24</sup> Supra note 19

government<sup>25</sup>. Thus, the failure of the Marriage and Divorce Bill only means that substantive representation as a process was present but was never materialized as an outcome.<sup>26</sup>

Affirmative action as mandated by the government normalizes the presence of women politicians<sup>27</sup>. Affirmative action provides role models since successful women encourage and motivate other women to be confident in knowing that excellence can be achieved.<sup>28</sup> Affirmative action promotes diversity and encourages public welfare for common good by increasing opportunities for previously disadvantaged groups, which in turn decreases the potential for conflict as the members of the society find themselves at the same level politically, economically and socially<sup>29</sup>. This will in itself lead to the inclusion of a critical mass of women in international negotiations, peacekeeping activities, all levels of preventive diplomacy, mediation, humanitarian assistance, social reconciliation, peace negotiations and the international criminal justice system, which effectively leads to sustaining peace in Uganda.

## 5. Shortfalls and criticisms of the gender quota in Uganda's politics

Numerical representation does not constitute substantive and strategic representation of women in politics. As the CEDAW Committee noted, a purely formal legal or programmatic approach is not sufficient to achieve women's de facto equality with men, which the Committee interprets as substantive equality.<sup>30</sup> It is not enough to guarantee women treatment that is identical to that of men. Affirmative action does not by itself falter stereotypical perceptions of women's skills and performance or encourage a gender division of responsibility in political institutions.<sup>31</sup> Rather, biological as well as socially and culturally constructed differences between women and men must be taken into account<sup>32</sup>.

In Uganda, women in parliament still face several challenges in working to pass laws that face obstacles due to the patriarchal nature of societies that are deeply entrenched in culture and

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<sup>25</sup> See id

<sup>26</sup> See id

<sup>27</sup> See id

<sup>28</sup> Kaimenyi, Kinya & Chege supra note at 20

<sup>29</sup> Id at 22

<sup>30</sup> supra note 6

<sup>31</sup> Ashild Falch, *Women's Political Participation and Influence in Post-Conflict Burundi and Nepal*, Peace Research Institute Oslo (PRIO), 2010 found at <https://www.prio.org/utility/DownloadFile.ashx?id=394&type=publicationfile>

<sup>32</sup> General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, found at

[http://www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%202025%20\(English\).pdf](http://www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%202025%20(English).pdf)

religion, in addition to the difficulties in gaining support from male members of parliament and funding of their activities.<sup>33</sup> There is a tendency of male politicians to regard the women's quota as a ceiling rather than a floor for women's political representation. This has weakened women's position and credibility as political representatives and has led to a widespread belief that they are 'tokens' rather than agents for change within political parties<sup>34</sup>.

Affirmative action in Uganda is limited in its framing. It is narrowly defined in order to allow women to access parliament with the expectation that once experienced and trained they will contest directly for Constituency seats.<sup>35</sup> It is not designed to improve representation of all women, who have been otherwise underrepresented, by MP's who are best equipped to understand the experiences of women.<sup>36</sup> Without a clear designation of their role as providing substantive representation of women, women MPs feel they must actively water down their advocacy and check their gender at the door, for fear of being judged negatively by colleagues as being biased<sup>37</sup>. The quota system relegates women to separate spaces, while mandating that they serve everyone. As detailed by Sylvia Tamale<sup>38</sup>, it has never been clear whether these women district representatives are supposed to represent women's interests<sup>39</sup>. Women now in these seats profess confusion over who or what they are supposed to represent: women in their wards, or all of the population in their wards<sup>40</sup>.

The quota system imposed from above was introduced without sufficient preparations by the masses. The notion that the introduction of women legislators would improve governance and ultimately lead to social and economic equality in society needed to be nurtured by public awareness campaigns to educate citizens at the grassroots level about why women's equal representation and equal participation matter and why the underdevelopment of women translates into the underdevelopment of the nation<sup>41</sup>. The affirmative action policy has proved to be class-centric, largely benefiting an educated elite minority among Ugandan women. In other words, the

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<sup>33</sup> Arostegui & Bichetero supra note 1 at 39

<sup>34</sup> supra note 19

<sup>35</sup> supra note 19 at 20

<sup>36</sup> See id

<sup>37</sup> id at 333

<sup>38</sup> Sylvia Tamale , *When Hens Begin to Crow: Gender and parliamentary politics in Uganda*, Kampala Fountain Publishers (1999)

<sup>39</sup> Goetz supra note 4 at 558

<sup>40</sup> Tamale supra note 38

<sup>41</sup> supra note 19

political situation of the majority of women who face the brunt of oppression and marginalization, for whom affirmative action was purportedly targeted, largely remains constant<sup>42</sup>.

The screening processes of candidates for these affirmative action positions are substandard and this lowers the standards of performance and delivery because people who have fewer qualifications are given the positions in contention. As a result of longstanding disadvantages and discriminatory practices, women often lack experience and practice with public life and have skill deficits in formal education, public speaking and craft of politics. This reinforces the pervasive notion that politics and political positions are not for women, and that they are better suited for support and service functions.<sup>43</sup>

A result of women's poor representation is that their voices are excluded or underrepresented when priorities and agendas, policies, strategic plans, budgets and action plans are being formulated at all levels of government. Affirmative action would address the problem of numbers and through that begin a process of addressing some of the systematic structural problems identified, some of which need more general policies to tackle. Without tackling these, affirmative action policies would not result in sustainable improvements in the representation of women,<sup>44</sup> hindering their participation under the peace and security agenda.

## **6. Conclusion and Recommendations**

In conclusion, numerous studies have shown that, through their different experiences, insights, approaches and points of view, women can contribute to broadening political debates by redefining political priorities and providing new perspectives on political issues.<sup>45</sup> Without the perspective of women at all levels of decision-making, the goals of equality, development and peace cannot be achieved.<sup>46</sup> The case study of Uganda, a country that is still in transition, illustrates that use of affirmative action measures, such as quotas and reserved seats can be an effective

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<sup>42</sup> Tamale supra note 16

<sup>43</sup> Dzodzi Tsikata, *Affirmative Action and the Prospects for Gender Equality in Ghanaian Politics*, Abantu, Women in Broadcasting and the Friedrich-Ebert-Stiftung (2009) at 16 found at <http://library.fes.de/pdf-files/bueros/ghana/10484.pdf>

<sup>44</sup> *id* at 29

<sup>45</sup> Chinkin, Christine, 'Peace Agreements as a Means for Promoting Gender Equality and Ensuring Participation of Women.' 2003. Paper prepared for the UN Division for the Advancement of Women (DAW) Expert Group Meeting, Ottawa Canada, 10-13 November 2003, pp. 9-10; ISS, 2009. 'Bringing Women into Government.' Strategies for Policymakers No.1 March 2009, p.2; Porter, Elisabeth, 2003. 'Women, Political Decision-making, and Peace-Building.' Global Change, Peace & Security 15(3), p. 250.

<sup>46</sup> Beijing Platform for Action, Para 181

mechanism for accelerating women's representation in formal politics and further achieving their participation in sustaining peace and security. However as discussed in Part IV, while the adoption of a quota system has been an important step, increased representation via affirmative action does not necessarily translate into meaningful participation and enhanced influence for women in politics. Accordingly, this paper provides recommendations below with the aim to overcome the persistent gap between commitments to and de facto gender equality in politics, where broader cultural and institutional changes are required, along with a qualitative increase in women's capabilities.<sup>47</sup>

- **There is need to redefine the goals, objectives, and design of Affirmative Action seats for women.** There is a need to re-conceptualize women's numerical representation as a means to an end of producing gender equity outcomes in the larger society.<sup>48</sup> Women need to feel beholden to the community of women, to have a strong mandate to truly represent the diverse needs of different women, to advocate on their behalf and advance their interests.<sup>49</sup> The “Women’s Agenda” does not need to adopt a uniform view of how women’s interests ought to be addressed<sup>50</sup> but there is a need for Women Representatives to bring their gender-related experiences to the table, provide a woman’s perspective, and emphasize the interests of women.<sup>51</sup>
- **Empowering the communities.** The legal empowerment of women at the grassroots level is critical in operationalizing the women, peace and security agenda, in order to ensure that laws relating to their rights actually reach them and make a difference in their lives. For example women are often leaders in community peace building. It is important to empower them to participate in politics, decision-making and community activities related to peace building. In Northern Uganda, for example, Gulu Women’s Economic Development and Globalization (GWED-G) has been training grass roots women on peace building tools including the 1325 framework and CEDAW and on their role in politics and decision making processes. The concrete results have been election of grass roots women to political positions<sup>52</sup>.

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<sup>47</sup> Falch supra note 31

<sup>48</sup> Supra note 19

<sup>49</sup> *id* at 28

<sup>50</sup> See *id*

<sup>51</sup> See *id*

<sup>52</sup> Arostegui & Bichetero supra note 1

- **The government should work to empower and build the capacity of women legislators to advocate for gender equality and women’s right’s principles.** In its concluding observations on Uganda, the CEDAW Committee recommended that the state develop targeted training and mentoring programs for women candidates and women elected to public office, as well as programs on leadership and negotiation skills for current and future women leaders.<sup>53</sup> Numerical representation is not enough; women need to know the international and domestic frameworks related to women, peace and security in order to introduce legal reforms that effectively address gaps in legislation for women.
- **Government should develop programs that ensure that political, economic, and social-cultural factors that impede women participation in public life are addressed.** Campaigns and sensitizations should be strengthened in support of affirmative action for women. The CEDAW Committee in its Concluding Observations to Uganda in 2010 called on the government to implement awareness-raising activities about the importance of women’s participation in decision-making for society as a whole.<sup>54</sup> The government should work proactively and undertake public campaigns to increase the understanding of affirmative action as an integral part of efforts to achieve gender equality and democratic governance, and provide resources to all parties for training of women in skills required.
- **Instituting electoral reforms that introduce voluntary party quotas.** Parties are still sites of gender inequities from conscious to unconscious biases against women. Voluntary party quotas will increase commitment to numerical representation as well as the number of women in Constituency seats<sup>55</sup>.
- **Engage men in order to change power structures and promote gender equality and peace within communities.** Men generally control institutional, governmental and community structures and thus are important allies for women to gain access to power and decision making. Working with men at the grassroots level will also help them to understand the value of treating women as equals and changes perceptions and cultures,<sup>56</sup>

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<sup>53</sup> Concluding Observations of the Committee on the Elimination of Discrimination against Women on Uganda, Forty-seventh session, 4-22 October, 2010,CEDAW/C/UGA/CO/7 at para 30

<sup>54</sup> *id* at para 30

<sup>55</sup> Supra note 19

<sup>56</sup> Arostegui & Bichetero supra note 1

which will have a bottom-up effect in further promoting gender equality and increasing the participation of women in politics.

# **COMFORT WOMEN, KOREA’S LEGAL RESPONSIBILITY, AND THE IMPORTANCE OF A GENDER-CONSCIOUS LEGAL FRAMEWORK**

Jennifer Ji Eun Lee

## **1. Introduction**

In the bustling South Korean port city of Busan sits a statue of a young girl. The girl sits in a chair, with her fists tightly clenched and expression stoic. The statue commemorates and honors the atrocities endured by the so-called “comfort women” during the Japanese military occupation of Korea, women who were drafted from the then-Japanese territories with “varying degrees of coercion and deception” and forced to provide sexual services for Japanese soldiers during the Second World War.<sup>1</sup> Eighty percent of the women so violated were Korean; thus, the issue remains an indelible and painful memory in Korea’s history. Indelible, yet unresolved: when one iteration of the comfort women monument was unveiled in 2011 outside the Japanese embassy in Seoul, it instigated a bitter diplomatic spat between the two countries.<sup>2</sup> The Japanese government has continued to deny responsibility for the comfort women issue, and it has yet to issue an official apology. This paper examines the various domestic and international responses to the comfort women issue, and singles out the lack of response of the Korean government—as well as the lack of an adequate legal or moral framework in Korea for protecting women during times of conflict—as a distinct violation of Korea’s duties under CEDAW and Resolution 1325. The paper recommends that Korea adopt a gender-sensitive legislation that addresses the rights of civilians during conflict, and model such legislation after the Rome Statute of the International Criminal Court to clearly label all forms of sexual violence against women as crimes against humanity. It also recommends that Korea include in its government-issued history textbooks the unveiled truth about comfort women, and move away from using the trivializing term “comfort women” as to be able to change deeply ingrained Korean prejudices about women and sexuality. Although the author recognizes that women from various nations were impacted by Japanese military sexual slavery, this paper focuses on Korea only.

## **2. The Forgotten Story of Comfort Women**

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<sup>1</sup> Kiyoteru Tsutsui, *Redressing Past Human Rights Violations: Global Dimensions of Contemporary Social Movements*, 85 SOCIAL FORCES 331, 331 (2006).

<sup>2</sup> Sol Han, *Why This Statue of a Young Girl Caused a Diplomatic Incident*, CNN (Feb. 10, 2007), <http://www.cnn.com/2017/02/05/asia/south-korea-comfort-women-statue/>.

The history of comfort women represents an extreme form of institutionalized sexual violence wrought against women. During the Second World War, the Japanese Imperial Army set up near battlefields brothels, or “comfort stations”, for the ostensible purpose of preventing rape and sexually transmitted diseases.<sup>3</sup> Many of the women in these brothels had been young women between the ages of twelve and twenty, forcibly abducted and detained from their homes. Japanese Soldiers would relieve their stress and experience “comfort” through sex with the women, who were thereby subjected to systematic rape.<sup>4</sup> Each woman was forced to service “an average of thirty to forty soldiers per day.”<sup>5</sup> It is estimated that fewer than 30 percent of the women so raped survived through the end of the war: after the war, the comfort women were summarily abandoned, forced to find a way home by themselves, often with great difficulty.<sup>6</sup> In some camps, the women were executed, or ordered to commit suicide alongside the defeated Japanese soldiers.<sup>7</sup>

More than half a century later, the details of the ordeal suffered by the comfort women still remain obscure. The exact number of the women drafted remains unknown, although the total number is estimated at over 200,000; only a handful of survivors have been identified.<sup>8</sup> Keeping undocumented potential survivors from coming forward with their story is the stigma surrounding women and sex that still pervades Korea. As of present, a mere 46 Korean women have been identified as survivors of the sexual slavery.<sup>9</sup>

When the International Military Tribunal for the Far East convened in 1946 to try Japanese war criminals, crimes against comfort women were not included, partly due to the fact that rape was not considered a war crime.<sup>10</sup> After almost half a century of silence, movements to redress the issue began to unfold around feminist political activism and bottom-up efforts to raise

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<sup>3</sup> Hayashi Yōko, *Issues Surrounding the Wartime “Comfort Women,”* 11 REV. OF JAPANESE CULTURE AND SOC’Y 54, 54. (1999)

<sup>4</sup> Yōko, *supra* note 2, at 54.

<sup>5</sup> Kazuko Watanabe, *Trafficking in Women’s Bodies, Then and Now: The Issue of Military “Comfort Women,”* 27 WOMEN’S STUD. Q. 19-31

<sup>6</sup> Yōko, *supra* note 2, at 55.

<sup>7</sup> *Id.*

<sup>8</sup> Watanabe, *supra* note 5, at 20.

<sup>9</sup> Merrit Kennedy, ‘Comfort Woman’ Statue Sparks Diplomatic Row Between Japan and South Korea, NATIONAL PUBLIC RADIO (Jan. 6, 2017, 1:33PM), <http://www.npr.org/sections/thetwo-way/2017/01/06/508538196/comfort-woman-statue-sparks-diplomatic-row-between-japan-and-south-korea>.

<sup>10</sup> Kathryn J. Witt, *Comfort Women: The 1946-1948 Tokyo War Crimes Trials and Historical Blindness,* 4 GREAT LAKES J. OF UNDERGRADUATE HIST. 17, 17-34 (2016)

awareness.<sup>11</sup> Feminist activists began pressing for reparations for comfort women in 1990, during the state visit of Korean President Roh Tae Woo to Japan, by issuing a demand that Japan investigate the comfort women issue and apologize for its involvement, among other things.<sup>12</sup> Even as the Japanese Emperor Akihito expressed regret for the sufferings Japanese imperial rule brought to Korea, Japan refused to apologize, maintaining that the wartime comfort stations were private enterprises.<sup>13</sup> Subsequently, several feminist organizations joined forces to form Chongdaehyop, which sought justice and redress for comfort women.<sup>14</sup> In 1991, Kim Hak Soon, a former comfort woman, stepped forward at a press conference and became the first woman to publicly identify herself as a “comfort woman”.<sup>15</sup> Kim’s story and the subsequent press attention it garnered mobilized the contemporary movements for redress, both within Korea and abroad.

### **3. The Inadequacy of Contemporary Responses and Movements for Recognition**

Since the 1991 lawsuit filed by Kim, former comfort women have filed eight lawsuits in Japanese courts; none of them resulted in damage awards.<sup>16</sup> The limited success of movements for redress can, in large part, be attributed to the Japanese government’s staunch refusal to claim responsibility for the hardships endured by comfort women, let alone acknowledge its involvement. Japan acquiesced to the latter and dropped the claim that the comfort stations were operated by private businessmen when a Japanese historian uncovered from the Japanese Defense Agency’s library official documents attesting to the military’s direct role in managing the comfort stations.<sup>17</sup> The Korean government remained remarkably silent on the comfort women issue, further frustrating the possibility of a singular, government-backed initiative to seek redress. Due to the equivocation of the two largest state actors in the issue, the movements for redress have been rather sporadic and loosely organized.

Prodded by petitions filed by non-profit organizations, and the consistent lobbying efforts of feminist activists, the United Nations Human Rights Council addressed the comfort women issue during its August 1992 meeting in Geneva. UNHRC’s Subcommission for the Prevention of

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<sup>11</sup> Chunghee Sarah Soh, 36 Asia Surv. 1226, 1226-1240 (1996)

<sup>12</sup> Soh, *supra note 12*, at 1232.

<sup>13</sup> *Id.*

<sup>14</sup> Soh, *supra note 12*, at 1233.

<sup>15</sup> *Id.*

<sup>16</sup> Maki Arakawa, A New forum for Comfort Women: Fighting Japan in United States Federal Court, 16 BERKELEY J. GENDER L. & JUST. 174 (2001)

<sup>17</sup> Norimitsu Onishi, *In Japan, a Historian Stands by Proof of Wartime Sex Slavery*, N.Y. TIMES (Mar. 31, 2007), <http://www.nytimes.com/2007/03/31/world/asia/31yoshimi.html>.

Discrimination and the Protection of Minorities decried the wartime atrocities against comfort women a crime against humanity in violation of the international agreement prohibiting forced labor, to which Japan was a signatory.<sup>18</sup>

Even after this condemnation, the movements for redress saw little progress, much of which owed to the distorted understanding within elite discourse of the primary demands of former comfort women, as well as frequently shifting public debate on the issue. Government officials and opinion leaders of Korea and Japan seems to have regarded the comfort women redress movement as one primarily seeking economic compensation; they, then, largely ignored the issue of egregious human rights violations suffered by the women, and discounted the importance of a formal apology.<sup>19</sup> Given that this elite discourse was almost exclusively dominated by powerful men, the women's rights dimension of the issue was downplayed.<sup>20</sup> The public discourse, on the other hand, was fractured, calling for a variety of responses including apologies, punishment of those responsible, and compensation.<sup>21</sup> The difficulty of coalescing the numerous, and frequently divergent, activist movements led to fundraising efforts within Korea as a short-term solution, from the proceeds of which some survivors would be compensated.

The Korean government took a notably passive role in the former comfort women's fight for justice, and seems to have simply accepted the aforementioned intra-national movements calling for redress as enough, rather than independently investigating the issue and pressuring the Japanese government. The newly installed Kim Young Sam government announced in March 1993 its plans to demand that the Japanese government investigate the matter and issue an apology; however, the new government also iterated that it would seek no monetary compensation from Japan.<sup>22</sup>

While Korea's seemingly friendly gesture led Japan to finally recognize that recruitment of comfort women had involved some coercion, and that its wartime actions violated international humanitarian laws, Japan did not issue an official apology.<sup>23</sup> Japanese government responded to increasing pressure from the international community by addressing the issue of compensation at

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<sup>18</sup> Alice Y. Chai, *Asian-Pacific Feminist Coalition Politics: The Chongsindae/Jugunianfu ('Comfort Women') Movement*, 17 KOREAN STUD. 67, 67-91 (1993)

<sup>19</sup> Soh, *supra* note 12, at 1235.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Soh, *supra* note 12, at 1236.

<sup>23</sup> Soh, *supra* note 12, at 1237.

an extra-governmental level: it planned to establish the Asian Women's Fund to compensate former comfort women, money from which would also cover issues connected to violence against women.<sup>24</sup> However, because the fund relied mostly on voluntary donations, it fell short of being the sort of official government apology or admission of legal responsibility that many survivors had hoped for.<sup>25</sup> Japan also notably remained silent on the comfort women issue at the UN World Conference on Women in September 1995.<sup>26</sup>

#### **4. Inadequate Responses of the Korean Government**

As of present, the Japanese government has refused to prosecute surviving war criminals, provide governmental compensation to surviving comfort women, or officially acknowledge legal responsibility for its actions.<sup>27</sup> Even so, the Korean government has prioritized maintaining a friendly diplomatic relationship with Japan over redress for the comfort women. Notably, in December 2015 under President Park Geun Hye, the foreign ministers of Korea and Japan announced that both sides reached a “final and irreversible” deal on the comfort women issue, under which Japan would disburse 1 billion yen to the Foundation for Reconciliation and Healing, a non-governmental organization that South Korea would establish in 2016 to assist surviving comfort women as well as the relatives of deceased ones.<sup>28</sup> The agreement also stipulated that going forward, governments of the two countries will “refrain from accusing or criticizing each other regarding this issue in the international community, including at the United Nations.”<sup>29</sup> Among many Koreans, the agreement was seen as a shameful, unsatisfactory compromise, one that completely sidestepped the women’s rights issue in favor of a quick compensatory remedy. Also notable is the fact that the victimized women were not invited to take a part in the discussions leading up to the official compromise. Instead, the compromise was entirely a product of elite discourse, one that was heavily dominated by men: the foreign ministers of two countries, the Korean director-general for Northeast Asian Affairs, and the

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<sup>24</sup> *Id.*

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> Arakawa, *supra* note 18, at 175.

<sup>28</sup> Benjamin Lee, *South Korea-Japan Comfort Women Agreement: Where Do We Go From Here?*, The Diplomat (Sept. 06, 2016), <http://thediplomat.com/2016/09/south-korea-japan-comfort-women-agreement-where-do-we-go-from-here/>

<sup>29</sup> Full Text of Japan & South Korea Statement on Comfort Women, WALL STREET JOURNAL, <https://blogs.wsj.com/japanrealtime/2015/12/28/full-text-japan-south-korea-statement-on-comfort-women> (last visited April 10, 2017)

Japanese director-general of the Asian and Oceanian Affairs Bureau were some of the most prominent architects of the deal, and all were male.<sup>30</sup> As such, the agreement frames the comfort women issue in compensatory terms, rather than considering the larger context of women's rights violations. Where the agreement mentions "psychological wounds" of the former comfort women, the proposed remedies are either "through [the agreement's] budget" or extremely general recommendations, the specifics of which have yet to be formulated.<sup>31</sup>

Even aside from the widely-criticized agreement with Japan, the Korean government has largely avoided discussing the comfort women issue. Much of the progress that has been made, however feeble, is attributable to the efforts of civic groups, such as the one that installed the contentious comfort women statue.

The silence is a testament to Korean society's particular reluctance to openly discuss issues related to sex. This historically engrained attitude is, in large part, to blame for the lackluster response on the part of South Korean government in seeking an adequate remedy for the comfort women issue. Traditional South Korean society has been strictly patriarchal, and has maintained an overt sexual double-standard for men and women. Sexual freedom was "condoned, if not encouraged" for men; many wealthy males openly had concubines, and male infidelity in a marriage was common.<sup>32</sup> Women expressing their sexuality was looked down upon, and a woman's value was very much dependent on their virginity and chastity.<sup>33</sup> Women who lost their virginity prior to marriage were considered unclean, and ostracized by society, sometimes even by their own family members.<sup>34</sup> This held true even in the case of rape, and many historical women who were honored as 'yollyo'—meaning virtuous woman—killed themselves during wartime or otherwise rather than let themselves be raped and hence sullied.<sup>35</sup> Even after Korea's modernization and globalization in the twentieth century brought about a liberalization of attitudes, much of the traditional double-standard in regards to gender and sexuality remains, especially as many Korean women themselves have acceded to and internalized the centuries-old proposition that women are inferior to men.<sup>36</sup> Moreover, Korea did not experience the kind of

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Soh, *supra* note 12, at 1229.

<sup>33</sup> Soh, *supra* note 12, at 1229.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Palley, *supra* note 34, at 1141.

concentrated women's rights movement such as the one experienced by the United States in the 1960s. Women's rights groups in Korea do not necessarily call for a radical shift in women's societal roles, although they generally support political change, which their leaders believe will be the key to individual freedom in Korea.<sup>37</sup> Even these groups have had limited impact, as they are often seen as radical, and their language seen as out of touch with mainstream political mores.<sup>38</sup>

## **5. Korea's Inaction as a Violation of Its Responsibilities Under UN Security Council Resolution 1325 and CEDAW, the Limitation of the Korean Legal Framework, and Proposed Reforms**

Whatever the reasons for its silence, the Korean government is violating the United Nations Security Council Resolution 1325 by its inadequate efforts to address the comfort women issue. As a party to the UN Security Council and having adopted the binding Resolution 1325, Korea has a responsibility to implement its provisions. Resolution 1325 acknowledged the increasing tendency of modern warfare to target civilians, including women.<sup>39</sup> The resolution emphasized the need to implement international humanitarian and human rights law that protects the rights of women during and after conflict.<sup>40</sup> It postulates that “effective institutional arrangements” to guarantee the protection of women during times of armed conflict is crucial to the promotion of international peace and security.<sup>41</sup> Among several other recommendations, the resolution emphasizes the importance of a “gender-sensitive” perspective in conflict resolution.<sup>42</sup>

With its inaction, Korea also violates provisions of the Convention on the Elimination of All forms of Discrimination of Women. Article 2(c) of CEDAW urges state parties to “establish legal protection of the rights of women on an equal basis with men” and to ensure through “public institutions the effective protection of women against any act of discrimination.”<sup>43</sup> Even if Korea refuses to define wartime rape and sexual slavery as acts of discrimination *per se*, the Korean government’s reluctance to pressure Japan to issue an apology or provide more effective

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<sup>37</sup> Palley, *supra* note 34, at 1142.

<sup>38</sup> *Id.*

<sup>39</sup> General Assembly resolution 1325, Women, Peace, and Security, S/RES/1325 (31 Oct. 2000), available from <https://daccess-ods.un.org/TMP/9580551.98192596.html>

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter *CEDAW*].

intra-national support for the former comfort women stands clearly in violation of Article 2(c). Insofar as Korea's reluctance to put a higher priority on the comfort women debate is attributable to its traditional conceptions of female sexuality, the nation also explicitly violates Article 5(a), which calls state parties to "take all appropriate measures" to "modify the social and cultural patterns of conduct of men and women, with a view of achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes."<sup>44</sup> Most directly relevant is Article 6, which urges state parties to "take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women."<sup>45</sup>

Korea's present response to the comfort women issue falls far short of the level of adequacy required by either Resolution 1325 or the CEDAW. Korea's inaction seems to be premised upon the assumption that Japan bears sole and complete responsibility for the comfort women issue. However, regardless of Japan's actions, Korea has discrete responsibilities under Resolution 1325 and CEDAW as a United Nations member state; should the status quo continue, Korea stands actively in violation of its duties.

The Korean constitution is notably inadequate in terms of incorporating a gender-sensitive component. Its most far-reaching provisions speak of equality of the sexes in only the most general of terms: Article 11 of the Korean constitution states that "[a]ll citizens are equal before the law, and there may be no discrimination in political, economic, social, or cultural life on account of sex, religion, or social status."<sup>46</sup> Article 34, on welfare, is the most directly relevant to women's rights: the provision reads that "[t]he State endeavors to promote the welfare and rights of women."<sup>47</sup> Article 34 is one of only two places in the Korean constitution that mentions women at all.<sup>48</sup> Despite the overt prevalence of sexism in Korean society, the constitution does not explicitly recognize that women are frequently disadvantaged, nor identify specific areas in which women's rights could be improved in order to promote the welfare of women.<sup>49</sup>

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<sup>44</sup> CEDAW, Art.5.

<sup>45</sup> CEDAW, Art.6.

<sup>46</sup> HYONBOP [CONSTITUTION] Art. 11 (S. Kor.), English translation available from [http://www.servat.unibe.ch/icl/ks00000\\_.html](http://www.servat.unibe.ch/icl/ks00000_.html)

<sup>47</sup> HYONBOP Art. 34 (S. Kor.)

<sup>48</sup> HYONBOP (S. Kor.)

<sup>49</sup> *Id.*

Among the many legislations the Korean government has passed, few are gender-sensitive. The laws that do take into account the unequal position of the genders in Korean society are almost exclusively focused in the areas of professional development and economic empowerment, such as the Act on Equal Employment and Support for Work-Family Reconciliation, the Act on the Promotion of the Economic Activities of Career-Break Women, Framework Act on Women’s Development, and the Act on Fostering and Supporting Women Scientists and Technicians.<sup>50</sup> Given the efforts in this arena, the Korean government’s failure to address the more fundamental issue of women’s security during times of armed conflict—whether through legislation touching on the topic or through the rectification of the comfort women issue—is unusual and concerning. In fact, the Korean constitution lacks any reference to the rights of civilians during times of conflict.<sup>51</sup> As South Korea is still technically at war with North Korea, with no peace treaty ever having been signed, the protection of civilian rights during wartime is an issue most pressing and relevant to Korea. The parameters of such protection must be codified through legislation.

Specifically, if Korea were to enact any such legislation protecting civilian rights in international armed conflict, it must follow the lead of the Rome Statute of the International Criminal Court in laying out an all-encompassing definition of sexual violence and decrying all such acts as grave crimes against humanity. Article 7 of the Rome Statute broadly labels “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity” as a crime against humanity when “committed as a part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”<sup>52</sup> The Rome Statute is also distinctly gender-sensitive: it recognizes

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<sup>50</sup> Namnyeo Goyong Pyungdeunggwa Il Gajung Yanglip Jiwonae Gwanhan Beobyl [Act on Equal Employment and Support for Work-Family Reconciliation], Act. No. 3989, Dec. 4, 1987 (S. Kor.) <http://www.ilo.org/dyn/travail/docs/1593/Act%20on%20Equal%20Employment%20and%20Support%20for%20Work-Family.pdf>; Gyungryuk Danjeol Yeosung Deungeui Gyeongjae Hwaldong Chokjin Beobyl [Act on the Promotion of the Economic Activities of Career-Break Women], Act. No. 9101, Jun. 5, 2008 (S. Kor.) <http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/86776/98443/F293968292/KOR86776%20Eng.pdf>; Yeoseong Baljun Gibon Beobyl [Framework Act on Women’s Development], Act. No. 5136, Dec. 30, 1995 (S. Kor.) <http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/86777/98445/F-102551376/KOR86777.pdf>; Yeoseong Gwahak Gisool In Yooksung Mit Jiwonae Gwanhan Beobyl [Act on Fostering and Supporting Women Scientists and Technicians], Act. No. 11713, Mar. 23, 2013 (S. Kor.) <http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/95628/112652/F180354970/KOR95628%20Kor.pdf>.

<sup>51</sup> HYONBOP (S. Kor.)

<sup>52</sup> Rome Statute of the international Criminal Court, U.N. Doc. A/CONF.183/9 (1998) [hereinafter Rome Statute] available at <http://www.un.org/law/icc/statute/romefra.htm>.

that women and children are particularly vulnerable to trafficking in persons, and urges the International Criminal Court to include judges who have expertise in the issue of violence against women or children.<sup>53</sup> Had the Rome Statute been in effect during the Second World War, a stronger corrective response would surely have been mounted against the clear crime against humanity that Japan committed against the comfort women.

Aside from lacking a legal framework that specifically decries acts of sexual violence during times of armed conflict and recognizes the particular susceptibility of women to such violence, Korea presently focuses most of its efforts on preventing narrowly-defined sexual trafficking, at the expense of less attention to other forms of sexual violence. In 2004, Korea promulgated the Act on the Prevention of Sexual Traffic and Protection, etc. of Victims Thereof.<sup>54</sup> It is the most comprehensive Korean legislative framework affording protection against sex-related crimes, aside from the Criminal Act: it affords victims access to supporting institutions, and recommends the establishment of counseling centers, among others. The Act, however, focuses only on “victims of sexual traffic and persons who have sex with people in exchange for money.”<sup>55</sup> Comfort women were subjected to coercive and systematic sexual slavery, something that does not neatly fall under this narrow definition. Presumably for this reason, the Korean government had to separately enact in 2008 the Act on Livelihood Stability and Commemorative Projects, etc. For Sexual Slavery Victims Drafted For the Imperial Army Under the Japanese Colonial Rule, under which some livelihood support for former comfort women were provided.<sup>56</sup> However, as a corrective rather than preventative measure, the 2008 Act is backward-looking in nature. The respective limitations of the 2004 and 2008 Acts make it clear that Korea needs a forward-looking legislation that broadly prohibits all sorts of sexual violence against women; such a legislation is imperative, especially in the context of international crises.

## **6. Recommendations for Further Corrective Action: Educational Reform**

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<sup>53</sup> Rome Statute, Art. 36

<sup>54</sup> Seongmaemae Alseon Deung Haengwi Eui Cheobeol Ae Gwanhan Beobyl [Act on the Prevention of Sexual Traffic and Protection, etc. of Victims Thereof], Act. No. 7212, Mar. 22, 2004 (S. Kor.) <http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/86766/98422/F912272643/KOR86766.pdf>.

<sup>55</sup> *Supra* note 57, Art. 1.

<sup>56</sup> Iljae Ha Ilbon Goon Euianbu Pihaeja Ae Daehan Saenghwal Anjung Jiwon Mit Ginyum Saeob Deung Ae Gwanhan Beobyl [Act on Livelihood Stability and Commemorative Projects, etc. For Sexual Slavery Victims Drafted For the Imperial Army Under the Japanese Colonial Rule], Act. No. 8852, Feb. 29, 2008 (S. Kor.) [http://elaw.klri.re.kr/eng\\_mobile/viewer.do?hseq=32488&type=part&key=38](http://elaw.klri.re.kr/eng_mobile/viewer.do?hseq=32488&type=part&key=38).

In March 2016, the expressions “comfort women” and “sex slaves” were deleted from a Korean government-designated social studies textbook for primary school students, and replaced by much more euphemistic descriptions that only mention the “great distress” young women had to suffer in the hands of Japanese military.<sup>57</sup> The Korean government rationalized the move by stating that elementary school students could be shocked and distressed by such content.<sup>58</sup> However, the discussion about comfort women is limited even in textbooks aimed at upper-level students. A search on Naver, Korea’s biggest web portal, reveals countless news articles and editorials criticizing Japanese textbooks’ inclusion of the 2015 comfort women compromise between Japan and Korea, but returns very few results on how the comfort women issue is covered in Korea’s own educational curriculum.<sup>59</sup> This relative apathy is a testament to how little weight is placed upon the violation of the rights of women in Korea owing to ingrained attitudes.

Insofar as the problem is deeply rooted in perceptions and traditions, the most proactive and preventative measure that Korea can take against women’s rights violations is educational reform. Korea has a duty to “take all appropriate measures to eliminate discrimination against women” in the field of education, pursuant to Article 10 of the CEDAW.<sup>60</sup> Euphemizing or altogether refraining from discussing matters of sexual violence against women in state-sponsored education reinforces the patriarchal, Confucian viewpoint that women’s sexuality is somehow taboo. Even at the primary school level, correctly educating young students about the story of the comfort women and identifying the sexual humiliation they were made to suffer as a crime against humanity is crucial. Especially as Korean primary schools have long incorporated basic sex education into their curriculum, the Korean government’s choice to refrain from discussing a historical incident that single-handedly illustrates why such education is necessary is difficult to justify. In order to properly instill in future generations that sexual violence and crimes can have devastating impacts on the victimized women, the Korean government may look to include interviews or personal statements given by former comfort women in primary or upper-level curricula.

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<sup>57</sup> Munenori Inoue, ‘*Comfort Women*’ Removed from South Korean Textbook, The Japan News (Mar. 03, 2016), <http://japan.stripes.com/news/comfort-women-removed-south-korean-textbook#sthash.wfd4vvRE.9x8VsiM1.dpbs>

<sup>58</sup> *Id.*

<sup>59</sup> NAVER, <http://www.naver.com> (last visited April 9, 2017)

<sup>60</sup> CEDAW, Art. 10.

Even the phrase ‘comfort women’ itself trivializes the extent of sexual violence that the women were made to suffer, and a gradual replacement of the term with one which would clarify that the women were subjected to coerced sexual slavery is advisable. Euphemistically or not, there is nothing comfortable about the comfort women situation. The term is a painful reminder of the masculinized discourse around which history has traditionally been written.

## **7. Conclusion**

It is undoubtable that Japan bears full responsibility for the Japanese imperial army’s forced wartime sexual slavery of Korean women. However, the Japanese government has steadily refused to issue an official apology or provide governmental support for the women they victimized. In light of the status quo, the lack of response from the Korean government can only be premised upon the assumption that Japan is the sole bearer of responsibilities for the comfort women issue; this attitude must be challenged and dismantled for women, peace, and security. Moral responsibility aside, Korea bears a distinct duty under the CEDAW to ensure that women are protected against acts of discrimination, and that societal practices premised upon women’s inferiority to men are eliminated. Insofar as the Korean government’s trivialization and avoidance of the comfort women issue derives from Korea’s patriarchal views of gender and traditional suppression of women’s sexuality, Korea fails to meet its responsibilities under the CEDAW, independently and irrespectively of Japan’s responsibilities. Moreover, in order to guard against blatant rights violations like the one endured by comfort women during times of conflict, Korea has pressing duties to establish a legal framework that protects civilian rights in international armed crises. Pursuant to Korea’s duties under Resolution 1325 as well as the CEDAW, any such legal framework must be gender-sensitive; Korea should follow the model of the Rome Statute in broadly defying all forms of sexual violence against civilians as crimes against humanity. So that Korea does not repeat its deafening silence around the comfort women issue, more longer-term responses to eliminate societal discrimination and prejudice against women must be instituted, beginning with educational reform. Any such reform should mandatorily include revising the government-issued textbooks to include full, correct information about the history of the comfort women, and aim to eventually eliminate the trivializing term ‘comfort women.’

**JAPANESE AND KOREAN WOMEN UNITE:  
BUILDING COALITIONS TO BRING “COMFORT WOMEN’S” VOICES TO THE INTERNATIONAL  
PEACE-KEEPING AGENDA**

Irene Hong

## **1. Introduction**

This report will discuss the power of cross-cutting coalitions in combating and addressing sexual violence against women during wartime and post-conflict. It begins with a historical background of the issue of Japanese military sexual slavery and notes the difficulty in determining precisely how many women were affected. During the World War II era, euphemistically termed “comfort women” were systematically “recruited” and coerced into sexual slavery by the Japanese Imperial Army.

The report then details the religious and cultural foundation of Asian societies to better explain why the issue of Japanese military sexual slavery was not widely discussed for nearly half a century. Confucianism, a major contributor to the patriarchal sociopolitical structure of Asian countries, made it much more difficult for surviving “comfort women” who had lost their precious virginity and feminine chastity to reintegrate into post-conflict Korean society.

Next, the report outlines the existing international legal framework and how Japanese military sexual slavery violated these international norms. Namely, *General Recommendation No. 19* provides the critical “missing link” between discrimination against women and gender-based violence and notes that gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms, is discrimination within the meaning of Article 1 of the *Convention on the Elimination of All Forms of Discrimination Against Women*. Further, Ms. Radhika Coomaraswamy’s Report of the Special Rapporteur in 1996 reiterated the international community’s condemnation of the Japanese government’s treatment of “comfort women” and made recommendations that placed additional pressure on the Japanese government to acknowledge its wrongdoing.

The report then details how grassroots coalitions led by Japanese and Korean women, along with the support services they provided for former “comfort women,” helped the international community come to the realization that rape could be used (and was being used) as a weapon of war. Namely, coalitions between Japanese and Korean women’s human rights organizations were

instrumental in shaping the international legal framework surrounding the use of sexual slavery as a weapon of war. From setting up fact-finding hotlines throughout Korea and Japan to lobbying government delegations in attendance at high-profile international human rights conferences, these coalitions were especially adept at advocating for “comfort women” at the grassroots, national, and international levels.

Finally, the report illustrates the modern-day salience of the “comfort women” issue in Japan and Korea, such as the unintended ripple effects of increased child marriage stemming from parents’ efforts to prevent their daughters from being coerced into sexual slavery. The report concludes by offering recommendations to the United Nations, to non-governmental organizations, and to the governments of Japan, South Korea, and other interested nations. Generally, the recommendations urge the government of Japan to work towards full implementation of recommendations in Ms. Coomaraswamy’s Report of the Special Rapporteur and demands set forth by the Korean Council for the Women Drafted for Military Sexual Slavery by Japan.

## **2. Historical Background**

From the early 1930s to the end of World War II in 1945,<sup>1</sup> between 80,000 and 200,000 women were coerced into sexual slavery by the Japanese Imperial Army.<sup>2</sup> These women, euphemistically termed “comfort women,” were systematically recruited by the Japanese forces under the banner of *Chongsindae* (“Women’s Volunteer Labor Corps”) in Korean and *Jugunianfu* (military “comfort women”) in Japanese.<sup>3</sup> Approximately 80 per cent of “comfort women” during this period were ethnically Korean,<sup>4</sup> but the other 20 per cent included women from colonized Taiwan and from the occupied territories of Manchuria, China, the Philippines, Indonesia, Malaysia, Sumatra, the Pacific Islands, and the Japanese islands of Kyushu, Honshu, Hokkaido, and Okinawa.<sup>5</sup>

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<sup>1</sup> Sarah Soh, *The Korean “Comfort Women”: Movement for Redress*, 36 ASIAN SURV. 1226, 1227 (1996).

<sup>2</sup> Mina Chang, *The Politics of an Apology: Japan and Resolving the “Comfort Women” Issue*, 31 HARV. INT’L REV. 34, 34 (2009).

<sup>3</sup> Alice Yun Chai, *Asian-Pacific Feminist Coalition Politics: The “Chōngshindae/Jūgunianfu” (“Comfort Women”) Movement*, 17 KOREAN STUD. 67, 67 (1993).

<sup>4</sup> Chang, *supra* note 2, at 34.

<sup>5</sup> Chai, *supra* note 3, at 70.

The majority of “comfort women” were “recruited” from disadvantaged peasant family backgrounds, primarily recruited from the rural Korean provinces of Kyongsang and Cholla.<sup>6</sup> As the war progressed, however, women were recruited indiscriminately from all regions of Korea.<sup>7</sup> Especially after the highly publicized and internationally condemned rape and murder of tens of thousands of Chinese women in Nanking in 1937, the Japanese army intensified and institutionalized its “recruitment” of Korean “comfort women.”<sup>8</sup> Many women were recruited with the false promise of high compensation for their labor in factories, military bases, and hospitals, in addition to the promise of “three meals of white rice a day.”<sup>9</sup> Others were recruited from farms, schools, marketplaces, restaurants, and even family homes, often persuaded by their families to sacrifice their bodies to save their fathers and brothers from being conscripted into other forms of slave labor in Manchuria and Kyushu, Japan.<sup>10</sup>

At these so-called “comfort centers,” women were dehumanized and referred to as “sanitary public toilets” because of the presumption that young, unmarried women from colonial Korea were virgins and therefore free of venereal diseases.<sup>11</sup> In a culture dedicated to the Confucian ideals of feminine virginity and chastity,<sup>12</sup> the forced conscription of Korean women to “comfort centers” would reduce the spread of venereal disease, provide a sexual outlet for army troops, and minimize civilian rape by soldiers.<sup>13</sup> Today’s sexual trafficking of young girls as prostitutes to protect against the spread of AIDS is reminiscent of this practice.<sup>14</sup>

Ultimately, by exploiting other Asian women’s bodies for sexual pleasure, the Japanese army protected Japanese women’s chastity, urging them to “marry young and bear many children to fulfill ‘the national mission of motherhood.’”<sup>15</sup> In contrast, Korean “comfort women” were referred to *niku-ichi* (“29-to-1”), in reference to the number of soldiers they were expected to

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<sup>6</sup> Chang, *supra* note 2, at 35.

<sup>7</sup> Chai, *supra* note 3, at 70.

<sup>8</sup> Kazuko Watanabe, *Trafficking in Women’s Bodies, Then and Now: The Issue of Military “Comfort Women”*, 27 WOMEN’S STUD. Q. 19, 21 (1999).

<sup>9</sup> Chai, *supra* note 3, at 70.

<sup>10</sup> *Id.* at 70.

<sup>11</sup> Soh, *supra* note 1, at 1228-29; Chai, *supra* note 3, at 71.

<sup>12</sup> Chang, *supra* note 2, at 36; Soh, *supra* note 1, at 1229; Watanabe, *supra* note 8, at 23-24.

<sup>13</sup> Chang, *supra* note 2, at 35.

<sup>14</sup> Watanabe, *supra* note 8, at 21.

<sup>15</sup> Soh, *supra* note 1, at 1228.

service each day.<sup>16</sup> In reality, the number was closer to 40 to 100 men, with one woman stating the expectation reached as high as 300 men each day.<sup>17</sup>

Initially, the most sought-after “recruits” were unmarried women between the ages of 17 and 20. To avoid the possibility of the Japanese “recruitment” effort reaching their own families, fearful Korean parents quickly married their young daughters, often to men of questionable or dubious backgrounds.<sup>18</sup> Towards the end of the war, girls as young as 12 and women as old as 30, including married women and nursing mothers, were forcibly shipped to military camps as “comfort women.”<sup>19</sup> Indeed, by the end of the war, even marriage was not enough to curtail the impermissible “recruitment” efforts by the Japanese Imperial Army.

Notably, there is no way to determine precisely how many women were coerced into compulsory sexual labor by the Japanese Imperial Army, primarily because the Army did not keep and accurate records of the names, identities, or locations of women involved. Rather, these “comfort women” were labeled as “military supplies” in official documents and many were killed or abandoned as the Japanese army retreated.<sup>20</sup> Indeed, many women who became pregnant, contracted sexually transmitted diseases, or attempted to escape their situation were killed.<sup>21</sup> According to some estimates, of the more than 200,000 women coerced into military sexual slavery by the Japanese army, fewer than 30 per cent survived to the end of the war.<sup>22</sup> Ever since survivor Kim Hak-Soon first shared her testimony in 1991, the majority of survivors have passed away. Yet survivors in their old age have, for the past 26 years, continued their weekly Wednesday demonstrations in front of the Japanese Embassy in Seoul, demanding official apology and state accountability from the Japanese government.<sup>23</sup>

### **3. Understanding Fifty Years of Silence**

On August 14, 1990, Kim Hak-soon, a 67 year-old, childless widow and former “comfort woman,” was the first survivor to tell her story of sexual enslavement from nearly fifty years

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<sup>16</sup> Chai, *supra* note 3, at 71.

<sup>17</sup> *Id.*

<sup>18</sup> Chai, *supra* note 3, at 70.

<sup>19</sup> *Id.*

<sup>20</sup> Chai, *supra* note 3, at 71.

<sup>21</sup> *Id.*

<sup>22</sup> Watanabe, *supra* note 8, at 20.

<sup>23</sup> Heisoo Shin, CEDAW and Violence Against Women: Providing the “Missing Link”, IN THE CIRCLE OF EMPOWERMENT: TWENTY-FIVE YEARS OF THE UN COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN 223, 233 (Hanna B. Schöpp-Schilling & Cees Flinterman eds., 2007).

prior.<sup>24</sup> Her courage caused a ripple effect that unleashed an outpouring of angry responses in both Korea and Japan and, on a larger scale, raised public awareness and inspired other living “comfort women” to come out from hiding and share their stories with the world.<sup>25</sup> “I was born as a woman but never lived as a woman,” Kim stated in her public testimony, “I feel sick when I come close to a man. Not just Japanese men but all men—even my own husband, who saved me from the brothel—made me feel this way. I shiver when I see the Japanese flag...Why should I feel ashamed? I don't have to feel ashamed.”<sup>26</sup>

One may ask why it took so long for Kim and other “comfort women” to share their stories, to speak to the trauma they endured and buried within themselves for nearly fifty years. This can be explained in part by Confucianism, which is the basis for the patriarchal sociopolitical structure of Asian countries.<sup>27</sup> In Korean tradition, a woman’s virginity and chaste behavior is inextricably tied to, perhaps more important than, life itself.<sup>28</sup> Stemming from feudal Confucian society’s culture of *namjon yobi* (“respect men, look down on women”),<sup>29</sup> women who lost their virginity before marriage were permanently “damaged goods,” unmarriageable and no longer necessary to Korean society.<sup>30</sup> This patriarchal structure helps explain why victims of sexual violence, including those “comfort women” who were forced into sexual slavery, continued to silently endure their unresolved trauma and anguish.<sup>31</sup>

Ultimately, even if “comfort women” did manage to survive through the end of World War II, the suffering of “comfort women” did not necessarily end with liberation because many were unable to return home.<sup>32</sup> Practically, survivors had few options: remain silent and avoid bringing shame to their families;<sup>33</sup> live a solitary life due to the shame of loss of virginity;<sup>34</sup> commit suicide

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<sup>24</sup> Chai, *supra* note 3, at 79.

<sup>25</sup> Chai, *supra* note 3, at 79-80.

<sup>26</sup> Watanabe, *supra* note 8, at 20.

<sup>27</sup> Chang, *supra* note 2, at 36; Soh, *supra* note 1, at 1229; Pyong Gap Min, “Comfort Women”: The Intersection of Colonial Power, Gender, and Class, 17 GENDER & SOC. 938, 947 (2003); Yamashita Yeong-ae & Sarah Kovner, Nationalism in Korean Women’s Studies: Addressing the Nationalist Discourses Surrounding the “Comfort Women” Issue, 15 U.S.-JAPAN WOMEN’S J. 52, 55-61 (1998).

<sup>28</sup> Chai, *supra* note 3, at 71, 74.

<sup>29</sup> Yamashita & Kovner, *supra* note 27, at 55.

<sup>30</sup> Chai, *supra* note 3, at 74.

<sup>31</sup> *Id.*

<sup>32</sup> Hirofumi Hayashi, *Disputes in Japan over the Japanese Military “Comfort Women” System and Its Perception in History*, 617 THE ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 123, 128 (2008).

<sup>33</sup> Chai, *supra* note 3, at 74.

<sup>34</sup> Watanabe, *supra* note 8, at 24.

as an honorable deed of virtuous women (“yolloo”);<sup>35</sup> or become a prostitute due to the inability to marry and lack of alternative employment opportunities.<sup>36</sup> Indeed, rather than face the humiliation of returning home, many surviving “comfort women” committed suicide aboard ships transporting them to Shimonoseki.<sup>37</sup>

#### **4. International Legal Framework**

The Japanese Imperial Army’s systematic “recruitment” and coercion of women into sexual slavery violates human rights norms as established by international treaties. The Rome Statute of the International Criminal Court includes rape, sexual slavery, and enforced prostitution in its definitions of “crime against humanity” (Article 7) and “war crime” (Article 8).<sup>38</sup> These and other forms of sexual violence, including forced pregnancy and enforced sterilization, constitute a grave breach of the Geneva Conventions.<sup>39</sup>

According to General Recommendation No. 19 adopted by Committee on the Elimination of Discrimination against Women (“CEDAW”), gender-based violence, defined as violence that is directed against a woman because she is a woman or that affects women disproportionately (para. 6), is a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men (para. 1).<sup>40</sup> This understanding of gender-based violence encompasses acts that inflict, or threaten to inflict, various forms of suffering, including physical, mental, and sexual harm (para. 6).<sup>41</sup> Notably, General Recommendation No. 19 provides the critical “missing link” between discrimination against women and gender-based violence, noting that gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms, is discrimination within the meaning of Article 1 of the Convention on the Elimination of All Forms of Discrimination Against Women (para. 7).<sup>42</sup> These human rights and fundamental freedoms include the right to life; the right not to be subject to torture or to cruel,

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<sup>35</sup> Watanabe, *supra* note 8, at 24; Soh, *supra* note 1, at 1229.

<sup>36</sup> Chai, *supra* note 3, at 71.

<sup>37</sup> *Id.*

<sup>38</sup> United Nations, General Assembly, *Declaration on the Elimination of Violence against Women*, A/RES/48/104 (20 December 1993), available from <http://www.un.org/documents/ga/res/48/a48r104.htm>.

<sup>39</sup> *Id.*

<sup>40</sup> United Nations, Committee on the Elimination of Discrimination Against Women, *General recommendation No. 19: Violence against women*, A/47/38 (1992), available from [http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1\\_Global/INT\\_CEDAW\\_GEC\\_3731\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_3731_E.pdf).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*; Shin, *supra* note 23, at 229.

inhuman or degrading treatment or punishment; and the right to liberty and security of person (para. 7).<sup>43</sup>

Recognizing the urgent need for the universal application of these fundamental rights to women, the United Nations General Assembly in 1993 reaffirmed the principles of General Recommendation No. 19 in the Declaration on the Elimination of Violence against Women.<sup>44</sup> In this Declaration, the General Assembly noted the enshrinement of the rights and principles with regard to equality, security, liberty, integrity, and dignity of all human beings in various international instruments, including the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention on the Elimination of All Forms of Discrimination against Women; and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>45</sup>

Indeed, in a 1996 Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy addressed her mission to the Democratic People's Republic of Korea, the Republic of Korea and Japan on the issue of military sexual slavery in wartime.<sup>46</sup> At the outset of her report, Ms. Coomaraswamy stated that she “considers the case of women forced to render sexual services in wartime by and/or for the use of armed forces a practice of military sexual slavery.”<sup>47</sup> Ultimately, she recommended that the Government of Japan should:

- (a) Acknowledge that the system of comfort stations set up by the Japanese Imperial Army during the Second World War was a *violation of its obligations under international law and accept legal responsibility for that violation*; (emphasis added)
- (b) Pay compensation to individual victims of Japanese military sexual slavery according to principles outlined by the Special Rapporteur of the Sub•Commission on Prevention of Discrimination and Protection of Minorities on the right to restitution, compensation and rehabilitation for victims of grave violations of human rights and

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> United Nations, General Assembly, *Declaration on the Elimination of Violence against Women*, A/RES/48/104 (20 December 1993), available from <http://www.un.org/documents/ga/res/48/a48r104.htm>.

<sup>46</sup> United Nations, Commission on Human Rights, *Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, in accordance with Commission on Human Rights resolution 1994/45*, E/CN.4/1996/53/Add.1 (4 January 1996), available from <http://hrlibrary.umn.edu/commission/country52/53-add1.htm>.

<sup>47</sup> *Id.*

fundamental freedoms. A special administrative tribunal for this purpose should be set up with a limited time-frame since many of the victims are of a very advanced age;

(c) Make a full disclosure of documents and materials in its possession with regard to comfort stations and other related activities of the Japanese Imperial Army during the Second World War;

(d) Make a public apology in writing to individual women who have come forward and can be substantiated as women victims of Japanese military sexual slavery;

(e) Raise awareness of these issues by amending educational curricula to reflect historical realities;

(f) Identify and punish, as far as possible, perpetrators involved in the recruitment and institutionalization of comfort stations during the Second World War.<sup>48</sup>

Ultimately, Security Council Resolutions 1325 and 2347 emphasize the critical link between women, peace, and security in situations of conflict and post-conflict. Resolution 1325 reaffirms the important role of women in the prevention and resolution of conflicts and in peace-building, and stresses the importance of their equal participation and full involvement in all efforts for the maintenance and promotion of peace and security.<sup>49</sup> To better achieve this goal of peace-building by actively involving women in the decision-making process, Resolution 1325 emphasizes the need to fully implement international humanitarian and human rights law that protects the rights of women and girls during and after conflict.<sup>50</sup> Further, according to Resolution 2347, which was unanimously adopted by the United Nations Security Council on March 24, 2017, the unlawful destruction of cultural heritage and the attempt to deny historical roots can exacerbate conflict and hamper post-conflict national reconciliation, consequently undermining the security, stability, and governance of the affected nations.<sup>51</sup>

## **5. Building Coalitions to Connect “Comfort Women” to Greater International Human Rights Norms**

### *5.1 Early stages of the “comfort women” movement*

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<sup>48</sup> *Id.*

<sup>49</sup> United Nations, Security Council, *Resolution 1325*, S/RES/1325 (31 October 2000), available from <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N00/720/18/PDF/N0072018.pdf?OpenElement>.

<sup>50</sup> *Id.*

<sup>51</sup> United Nations, Security Council, *Resolution 2347*, S/RES/2347 (24 March 2017), available from <http://unscr.com/en/resolutions/doc/2347>.

Upon hearing of the Korean government's plan to send a representative to Japanese Emperor Hirohito's funeral in 1988, over 200 members of women's groups drafted a protest letter that included a statement on the issue of "comfort women" and launched a nationwide demonstration at Tapkol Park in Korea.<sup>52</sup> These women's groups included various Korean organizations, including Korean Church Women United, the Korean Association of Women Theologians, the Women's Studies Research Committee of Ewha Woman's University, the Advocacy and Research Committee on the Chongshindae Issue, the Federation of University Women Students, the YWCA of Korea, and the Federation of Korean Women's Associations.<sup>53</sup>

In April 1988, the issue of Japanese military sexual slavery was publicly raised at an international conference organized by Korean Church Women United.<sup>54</sup> Just a few months earlier, Professor Yun Chung-ok of Ewha Woman's University and two members of Korean Church Women United had made an investigative exposure trip to Japan, and she gave a presentation that enabled participants from Korea and Japan alike to make the historical connection between sexual slavery during World War II to Japanese sex tourism in South Korea today.<sup>55</sup>

In response to a Japanese government spokesperson's statement that private agencies, rather than the government, were responsible for the recruitment of "comfort women" and establishment of "comfort centers" during World War II, a coalition of thirty-six women's organizations formed under the name of Korean Council for the Women Drafted for Military Sexual Slavery by Japan (hereinafter "Korean Council").<sup>56</sup> Formed in 1990, the Korean Council was created to expose the truth about Japanese military sexual slavery in colonized Korea, and to restore the dignity of victims who had lived in silence and shame for nearly half a century.<sup>57</sup> The Korean Council made seven demands of the Japanese government and continues to advocate for these demands to this day: (1) acknowledge the war crime, (2) reveal the truth in its entirety about the crimes of military sexual slavery, (3) make an official apology, (4) make legal reparations, (5) punish those responsible for the war crime, (6) accurately record the crime in history textbooks, and (7) erect a memorial for the victims of the military sexual slavery and establish a historical

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<sup>52</sup> Chai, *supra* note 3, at 78.

<sup>53</sup> *Id.*

<sup>54</sup> Shin, *supra* note 23, at 225.

<sup>55</sup> Chai, *supra* note 3, at 79.

<sup>56</sup> *Id.*; Shin, *supra* note 23, at 225-26.

<sup>57</sup> Chai, *supra* note 3, at 79.

museum.<sup>58</sup> In addition to providing counseling and medical services to former “comfort women” and operating a shelter for those who are unable to live alone, the Korean Council has held weekly “Wednesday Demonstrations” since January 1992 in front of the Japanese Embassy in Seoul.<sup>59</sup>

### *5.2 Kim Hak-soon’s testimony and the mobilization of women’s human rights organizations around “comfort women”*

Ultimately, the single most important event that created momentum for the “comfort women” movement was Kim Hak-soon’s 1990 public testimony of her personal experience as “comfort woman” herself.<sup>60</sup> Her decision to come forward fifty years later ignited the public consciousness of people around the world and unleashed an outpouring of support in both Korea and Japan.<sup>61</sup> Especially in the wake of the systematic raping of Croatian, Serbian, and Muslim women in Bosnia and Herzegovina, the international community came to the staggering realization that rape could be used (and was being used) as a weapon of war.<sup>62</sup>

Indeed, as Kim Hak-soon’s first-hand narrative as a “comfort woman” first came to light in the early 1990s, Korean society was reeling from the eruption of shocking court cases of violence against women.<sup>63</sup> In 1991, thirty-one year old Kim Bu-nam, who was raped at nine years old, killed her rapist after twenty-one years of suffering from the trauma.<sup>64</sup> In 1992, twenty-one year old Kim Bo-eun and her boyfriend killed her stepfather, who had repeatedly raped Kim since she was nine years old.<sup>65</sup> In 1993, a female research assistant at Seoul National University, one of the nation’s most prestigious and selective universities, brought the nation’s first sexual harassment case against her professor.<sup>66</sup> Acting on numerous cases of violence against women, various feminist organizations in Korea worked to provide legal, financial, and psychological assistance to victims. This included organizing lawyers, collecting funds, and fighting the

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<sup>58</sup> Korean Council for the Women Drafted for Military Sexual Slavery, *Objectives & Activities*, [http://www.womenandwar.net/contents/general/general.asp?page\\_str\\_menu=2101](http://www.womenandwar.net/contents/general/general.asp?page_str_menu=2101).

<sup>59</sup> *Id.*; Shin, *supra* note 23, at 233.

<sup>60</sup> Chai, *supra* note 3, at 79.

<sup>61</sup> *Id.*

<sup>62</sup> Shin, *supra* note 23, at 226.

<sup>63</sup> Shin, *supra* note 23, at 224.

<sup>64</sup> *Id.*; KYUNGJA JUNG, PRACTICING FEMINISM IN SOUTH KOREA: THE WOMEN’S MOVEMENT AGAINST SEXUAL VIOLENCE (2014).

<sup>65</sup> *Id.*

<sup>66</sup> Shin, *supra* note 23, at 224.

patriarchal societal presumption that the victims had somehow invited their attackers' violent acts.<sup>67</sup>

Between January and March 1992, Japanese and Korean women's groups set up hotlines in both nations. The hotline set up in Seoul aimed to encourage former "comfort women" and their relatives to share their stories. During this three-month period, a total of 390 people responded, of whom 155 were either survivors or their relatives. 74 of these 155 callers were former "comfort women" and entered their identities in South Korea's government registry of survivors.<sup>68</sup>

Meanwhile, multiple hotlines were set up in Japan by the Japanese Women's Network Group (a network of sixteen Christian and women's groups in Japan), a coalition of three groups of

Korean women who lived in Japan, and other Japanese grassroots organizations such as the Association for Japan Taking Clear Postwar Responsibility.<sup>69</sup> Of the 230 calls received between March 30-31 on the Osaka hotline alone, 61 callers confessed personal involvement in the Japanese military's "comfort women" system. By focusing on recording the truth, validating "comfort women's" lived experiences, raising public consciousness of the issue, and ultimately pressuring the Japanese governments to accept responsibility for its actions, Japanese and Korean women's organizations were able to gather facts from not only former "comfort women," but also from Japanese soldiers, officials, and citizens who were involved in the nation's sexual slavery system.<sup>70</sup>

Meanwhile, the Japan Women's Christian Temperance Union submitted a petition with 4,150 signatures to Japan's Deputy Chief Cabinet Secretary in support of the demands made by the Korean Council. In addition to showing solidarity with the Korean Council, the Japan Women's Christian Temperance Union and other women's groups undertook fundraising efforts to support a lawsuit previously filed by nine former "comfort women."<sup>71</sup>

When the Japanese government failed to meet the Korean Council's seven demands, especially the most fundamental demand to acknowledge and accurately record the war crime, the "comfort women" issue was brought to the international level.<sup>72</sup> In May 1992, the UN Commission on Human Rights announced in Geneva that it would conduct a fact-finding investigation into the

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<sup>67</sup> Shin, *supra* note 23, at 224-25.

<sup>68</sup> Chai, *supra* note 3, at 81.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> Shin, *supra* note 23, at 226.

“comfort women” issue, and the Commission’s Working Group on Contemporary Forms of Slavery quickly adopted the issue onto its official agenda for its August 1992 session.<sup>73</sup> Three delegates from the Korean Council and one survivor testified at this meeting, which helped create undeniable international pressure on the Japanese government to take a more sympathetic view to the “comfort women” movement.<sup>74</sup> Indeed, the publicity of these proceedings brought about massive media coverage of the issue, spiking again in 1996 when Ms. Coomaraswamy submitted her Report of the Special Rapporteur to the Commission.<sup>75</sup>

Also testifying at the August 1992 session was Heisoo Shin, a Korean activist who, at the time, was Chairperson of the Korean Council’s International Relations Committee and would later become Chairperson of South Korea’s Committee on Gender Policies and Vice Chair of the Committee on the Elimination of Discrimination Against Women (CEDAW).<sup>76</sup> Shin and other members of the Korean Council mobilized the help of several international human rights organizations, including the World Council of Churches, the International Committee of Jurists, and the World Alliance of Reformed Churches. With the help of these organizations, Shin made lobbying efforts targeted at multiple levels of the United Nations system: the UN Commission on Human Rights in Geneva; the UN Sub-Commission on the Promotion and Protection of Human Rights (a subsidiary body of the Commission on Human Rights); and the Working Group on Contemporary Forms of Slavery (a working group under the Sub-Commission).<sup>77</sup>

Meanwhile, in August 1992, nearly one hundred women participants, including nine former “comfort women” from South Korea, and thirty delegates from Korea, Japan, Taiwan, Hong Kong, the Philippines, and Thailand gathered in Seoul to discuss ways they could move the “comfort women’s” movement forward.<sup>78</sup> Together, they formed transnational alliances and founded the Comfort Women Issue—Asian Solidarity Conference, through which participants demanded accountability and action from the Japanese government, other relevant government

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<sup>73</sup> Kiyoteru Tsutsui, *Redressing past Human Rights Violations: Global Dimensions of Contemporary Social Movements*, 85 SOC. FORCES 331, 338 (2006). Chai, *supra* note 3, at 82-83.

<sup>74</sup> Tsutsui, *supra* note 70, at 338.

<sup>75</sup> *Id.*

<sup>76</sup> United Nations, Office of the High Commissioner for Human Rights, *Curriculum Vitae of Heisoo Shin*, [http://www.ohchr.org/Documents/HRBodies/CESCR/Elections2010/CV-REPUBLICOFKOREA\\_HeisooSHIN-ENG.pdf](http://www.ohchr.org/Documents/HRBodies/CESCR/Elections2010/CV-REPUBLICOFKOREA_HeisooSHIN-ENG.pdf).

<sup>77</sup> Shin, *supra* note 23, at 226.

<sup>78</sup> Chai, *supra* note 3, at 82-83.

structures, international and national women's human rights organizations, and the United Nations Human Rights Commission.<sup>79</sup>

In the years following the Korean Council's testimony, Shin and other women's human rights activists continued to raise the issue of Japanese military sexual slavery at the international level.<sup>80</sup> In 1993, Shin raised the issue at Women's Human Rights Tribunal in Vienna and, in 1995, at an NGO forum in Huairou.<sup>81</sup> Utilizing the momentum from the Vienna (1993) and Beijing (1995) world conferences and from special reports published by the United Nations in 1996 and 1998, global women's rights groups aggressively lobbied government delegations to recognize sexual slavery during wartime as a serious violation of women's human rights.<sup>82</sup> As a result of their efforts, the Rome Statute of the International Criminal Court in 1998 incorporated rape, sexual slavery, enforced prostitution, and other forms of sexual violence into its definitions of "crime against humanity" (Article 7) and "war crime" (Article 8).<sup>83</sup>

## **6. The Salience of the "Comfort Women" Issue in Japan and Korea Today**

In August 1993, the government of Japan issued a statement regarding the results of a study it conducted on the issue of wartime "comfort women."<sup>84</sup> In a statement by Chief Cabinet Secretary Yohei Kono, the government stated that the "then Japanese military was, directly or indirectly, involved in the establishment and management of the comfort stations" and that recruitment efforts were "conducted mainly by private recruiters who acted in response to the request of the military."<sup>85</sup> The Japanese government admitted that "in many cases they were recruited against their own will" and that it "extend[s] its sincere apologies and remorse" to the women who "suffered immeasurable pain and incurable physical and psychological wounds as comfort women."<sup>86</sup>

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<sup>79</sup> Chai, *supra* note 3, at 83.

<sup>80</sup> Shin, *supra* note 23, at 226-27.

<sup>81</sup> Shin, *supra* note 23, at 226.

<sup>82</sup> *Id.*

<sup>83</sup> United Nations, General Assembly, *Declaration on the Elimination of Violence against Women*, A/RES/48/104 (20 December 1993), available from <http://www.un.org/documents/ga/res/48/a48r104.htm>.

<sup>84</sup> Ministry of Foreign Affairs of Japan, *Statement by the Chief Cabinet Secretary Yohei Kono on the result of the study on the issue of "comfort women"* (4 August 1993), <http://www.mofa.go.jp/policy/women/fund/state9308.html>.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

The famous Kono statement is criticized by Japanese conservatives and nationalists as a statement drafted under pressure from South Korea.<sup>87</sup> In 2007, Prime Minister Shinzo Abe passed a cabinet resolution stating that the Japanese government had not discovered evidence that directly supported the proposition that its military or authorities had used coercion.<sup>88</sup> China criticized this resolution, calling on the Japanese government to “face up to its history.”<sup>89</sup>

The “comfort women” issue remains one of the most contentious issues in Southeast Asia today, with delegates from Japan, South Korea, and North Korea (hereinafter “DPRK”) continuing to utilize international platforms to express their disagreements.<sup>90</sup> On March 16, 2017, I had the opportunity to participate to the sixty-first session of the Commission on the Status of Women (CSW) at the United Nations Headquarters in New York. Here, the representative from the DPRK criticized the Japanese government for abducting, drafting, and forcing “over 200,000 Korean women and girls to be sex-slaves for the Japanese military in its occupation of Korea.”<sup>91</sup> The DPRK delegation urged the Japanese government to “honestly accept the legal responsibility for its past crimes of the Japanese military’s sexual slavery and forcefully drafting of 8.4 million and the genocidal massacre of 1 million Korean people, and make official apology and compensation without further delay.”<sup>92</sup> In response, the Japanese delegation stated that the claims and figures cited by the DPRK delegation “are groundless and based on erroneous understanding of facts [and that] the expression ‘sex slaves’ contradicts the facts and is therefore inappropriate.”<sup>93</sup> Making use of its right of reply, DPRK stressed that the figures presented are the official figures recognized by the world and by the United Nations and that “there’s no place for Japan to hide from these figures.”<sup>94</sup>

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<sup>87</sup> Toko Sekiguchi, *Japan’s 1993 Comfort Woman Apology Returns To Center Stage*, WALL STREET JOURNAL (26 February 2014), <http://blogs.wsj.com/japanrealtime/2014/02/26/japan-comfort-women-deniers-claim-government-on-their-side/>.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> United Nations, Office of the High Commissioner on Human Rights, *Japan / S. Korea: “The long awaited apology to ‘comfort women’ victims is yet to come” – UN rights experts* (11 March 2016), available from <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17209&LangID=E>.

<sup>91</sup> United Nations, Commission on the Status of Women, *General Discussion (continued) - Commission on the Status of Women (CSW61), 13-24 March 2017, 7th meeting* (16 March 2017), available from <http://webtv.un.org/search/general-discussion-continued-commission-on-the-status-of-women-csw61-13-24-march-2017-7th-meeting/5363048608001?term=csw61&languages=&sort=date#full-text>.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

After the session, I called my parents to tell them about this powerful and salient experience. As a child of South Korean immigrants, the issue of “comfort women” is deeply personal and tied to my ethnic heritage as a Korean. I learned through later conversations with my mother and grandmother that many of my grandmothers’ friends, who during the World War II era were young teenage girls, were quickly married off to men out of fear of being forced into military “comfort camps.”

Through this field research, I began to realize just how nuanced and complex gender, peace, and security-building is in an international diplomacy setting. The experience of seeing representatives from the Japan, the DPRK, and South Korea discuss the issue of “comfort women” in the context of CSW, in a world that continues to use women’s bodies as a tool of war and terrorism, I began to see the issue in an entirely new light. Today, I am incredibly grateful for the opportunity to study of how the “comfort women” issue illustrates critically the interdependency between women, peace, and security-building. Women’s rights are human rights, and as Japanese feminist historian Suzuki Yuko writes, “Japanese women also have an obligation to see justice done for our Korean sisters. Our own liberation is bound together with correcting injustices done to these Korean sisters, thus affirming our own identity as women and as caring human beings.”<sup>95</sup>

## **7. Recommendations**

- The United Nations should work with Japan, South Korea, and other interested countries to bring about a swift resolution of the “comfort women” issue.
- The Government of Japan should work toward full implementation of Article 2(e) of the Convention on the Elimination of All Forms of Discrimination against Women, which requires State parties to “condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end...take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise.”
- The Government of Japan should work toward full implementation of the recommendations set forth in Report of the Special Rapporteur on the issue of military sexual slavery in wartime (E/CN.4/1996/53/Add.1).

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<sup>95</sup> Chai, *supra* note 3, at 85.

- The Government of Japan should work toward full implementation of the seven demands set forth by the Korean Council for the Women Drafted for Military Sexual Slavery by Japan.
- The Government of Japan should work toward full implementation of Security Council Resolution 2347 (“Maintenance of international peace and security: destruction and trafficking of cultural heritage by terrorist groups and in situations of armed conflict”), which was unanimously adopted by the United Nations Security Council on March 24, 2017 (S/RES/2347 (2017)).
- The United Nations should encourage the development of a truth and reconciliation commission. A truth and reconciliation commission would provide a greater opportunity for “comfort women’s” stories to be recorded accurately, and an agreed-upon set of facts would strengthen diplomatic relationships among involved countries in the long-term.
- Non-governmental organizations should continue to collect stories of “comfort women” and related persons for transitional justice purposes. Non-governmental organizations involved in this work should ensure that they use culturally sensitive methods, which account for the stigma and shame that continue to surround rape and sexual violence in the region.
- Non-governmental organizations should offer services, including mental health services, medical care, and housing assistance to surviving “comfort women.”
- Non-governmental organizations should undertake public education campaigns to attempt to shift public stigma surrounding rape, sexual slavery, and other forms of violence against women.

**PEACE AND SECURITY**  
**THROUGH THE LENS OF CHILD MARRIAGE IN MEXICO**

Kimberly Panian

## **1. Introduction**

This paper discusses how violence against women and inequitable gender laws contribute to widespread and systemic violence in Mexico, specifically dealing with child marriage. It utilizes cross-cutting and intersectional research to show how child marriage is a determinant of peace and security, offering a new perspective on studies that associate “*feminicidio*”- the widespread and brutal killing of women because of their gender- with drug violence by linking the practice of child marriage to both of these societal dilemmas and revealing how it is an indicator of deeply-rooted instability. Along the way, this paper examines how child marriage laws reinforce “*machismo*”- otherwise known as patriarchal culture- and perpetuate a cycle of violence through loopholes that allow for parental consent exemptions and laws that do not adequately deter aggressors. After reviewing Women Peace and Security Laws and relevant Mexican statutes, this paper offers recommendations in combatting child marriage, femicide, and the discriminatory and often violent symptoms of machismo. The ultimate goal is to enhance the efficacy of legal instruments and shed light on possible solutions to violent extremism through gender equality.

Extreme violence manifests itself early on against women, long before conflict erupts, serving as an early warning sign of escalating conflict. As a result, countering violent extremism requires a thorough review of the law for signs of impunity towards gender violence, identifying gaps in implementation-lack of enforcement against child marriage being one of them. The law often evokes a gendered perspective that allows for machismo to thrive, such as allowing girls to marry earlier than boys at age 14. If the laws themselves are machista then there is no surprise when a society reflects those values. For this reason, it is important to understand the normative power of the law in spurring cultural change, and the even more powerful role of enforcing it to achieve and sustain peace and stability.

## **2. Child Marriage in Mexico**

One in five girls is married by the age of 18 in Mexico<sup>1</sup>, even though the country passed a minimum age of marriage requirement in 2014.<sup>2</sup> While Mexico requires girls to be 18 years of age to marry, there exists a parental consent exception.<sup>3</sup> With parental consent, boys are allowed to marry at age 16 and girls at age 14.<sup>4</sup> The frequency of religious marriages, although not formally recognized under the law, adds to the above-mentioned figure, since rural areas tend to honor these unions.<sup>5</sup> Tradition and poverty impel many girls to marry young regardless of the minimum age requirement because their parents view their young daughters as social and economic liabilities.<sup>6</sup> Sons are expected to carry the family name and inherit family property, while girls are seen as financial drains.<sup>7</sup> Additionally, family honor often hinges on the sexual purity and virtue of a daughter.<sup>8</sup> Parents, therefore, prefer to marry their daughters to prevent public shame of rape or premarital sex.<sup>9</sup> Not surprisingly, obtaining parental consent is rarely an issue, especially in rural areas where child marriage is encouraged for economic and social concerns.<sup>10</sup>

While many reasons exist for discouraging child marriage, the main reason it receives backlash from the international community is because studies reveal that early child marriage

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<sup>1</sup>GIRLS NOT BRIDES, <http://www.girlsnotbrides.org/child-marriage/mexico/> (last visited Apr. 24, 2017) [hereinafter *Girls Not Brides*].

<sup>2</sup>See, MEXICO LAW, <http://www.mexicolaw.com/Marriage%20in%20Mexico.htm> (last visited Apr. 24, 2017); see also, Ley General de los Derechos de Niñas, Niños, y Adolescentes, vigente desde 2014; *Diario Oficial de la Federación*, [http://www.dof.gob.mx/nota\\_detalle.php?codigo=5374143&fecha=04/12/2014](http://www.dof.gob.mx/nota_detalle.php?codigo=5374143&fecha=04/12/2014); (last visited Apr. 24, 2017); [http://200.33.14.34:1033/archivos/pdfs/lib\\_LeyGralCuidadoInfantil.pdf](http://200.33.14.34:1033/archivos/pdfs/lib_LeyGralCuidadoInfantil.pdf) (last visited Apr. 24, 2017).

<sup>3</sup> *Id.*, see also, Artículo 149 del Código Civil Federal.

<sup>4</sup> *Id.*, see also, Artículo 148 del Código Civil Federal.

<sup>5</sup>TAHIRIH JUSTICE CENTER: FORCED MARRIAGE INITIATIVE, <http://preventforcedmarriage.org/forced-marriage-overseas-mexico/> (last visited Apr. 24, 2017).

<sup>6</sup>See, GIRLS NOT BRIDES, <http://www.girlsnotbrides.org/child-marriage/mexico/> (last visited Apr. 24, 2017); see also, *Ending child marriage, A guide for global policy action*, Int'l Planned Parenthood Fed'n and the Forum on Marriage and the Rights of Women and Girls, 7, (2006), [http://www.musawah.org/sites/default/files/662\\_filename\\_endchildmarriage.pdf](http://www.musawah.org/sites/default/files/662_filename_endchildmarriage.pdf) (last visited Apr. 24, 2017) [hereinafter *Forum on Marriage and the Rights of Women and Girls*].

<sup>7</sup>EARLY MARRIAGE AND POVERTY: EXPLORING LINKS FOR POLICY AND PROGRAMME DEVELOPMENT. LONDON: INTERNATIONAL PLANNED PARENTHOOD FEDERATION AND FORUM ON MARRIAGE AND THE RIGHTS OF WOMEN AND GIRLS (Otoo-Oyortey, N. and Pobi, S., 2003).

<sup>8</sup> *Forum on Marriage and the Rights of Women and Girls* at 7.

<sup>9</sup> *Id.*

<sup>10</sup> *Girls Not Brides*.

drastically effects women's health.<sup>11</sup> Early pregnancy can lead to complicated births and long-term reproductive problems.<sup>12</sup> The worldwide leading cause of death for girls between the ages of 15 and 19 is childbirth.<sup>13</sup> Considering that the spouses of child brides tend to be at least ten years older, the young girls are exposed to high-risk sex and cross-generational sex.<sup>14</sup> As a consequence of their young age and disadvantaged status as women, young girls are not able to "negotiate condom use" with their older partners and prevent unwanted pregnancy and sexually transmitted infections.<sup>15</sup> As a result, young girls between the ages of 15-24 years old are three times more likely to contract HIV than their male counterparts.<sup>16</sup> Young brides are also prone to sexual abuse from other males in the family, increasing the chances of infection and other health complications.<sup>17</sup>

Young brides often lack sexual health education and psychological preparation for sexual activity, pregnancy, and child rearing.<sup>18</sup> They are unaware that the father rather than the mother determines the sex of a child, and are therefore twice as likely to believe that a husband possesses the right to beat his wife if he is not satisfied with the gender of his newborn child.<sup>19</sup> This kind of mentality also breeds violence against other women, including unwanted

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<sup>11</sup> WORLD HEALTH ORGANIZATION & UNITED NATIONS POPULATION FUND, *Married Adolescents*, [http://apps.who.int/iris/bitstream/10665/43369/1/9241593776\\_eng.pdf](http://apps.who.int/iris/bitstream/10665/43369/1/9241593776_eng.pdf) (outlining the various issues pertaining to early child marriage); see also, GUTTMACHER INSTITUTE, *Minimum Marriage Age Laws and the Prevalence of Child Marriage and Adolescent Birth: Evidence from Sub-Saharan Africa* (2015), <https://www.guttmacher.org/journals/ipsrh/2015/07/minimum-marriage-age-laws-and-prevalence-child-marriage-and-adolescent-birth> (last visited Apr. 24, 2017) (providing statistics on child marriage and the health of adolescent girls).

<sup>12</sup>*Id.* (quoting, "Young first time mothers have double the chance of dying during or after childbirth. Very young mothers below the age of 15 have a five-fold chance of death"); see also, *The Facts: Gender Inequality and Violence Against Women and Girls Around the World*, <http://www.advocatesforyouth.org/publications/publications-a-z/1556-the-facts-gender-inequality-and-violence-against-women-and-girls-around-the-world> (last visited Apr. 24, 2017) (quoting, "pregnancy and childbirth have severe consequences for adolescent mothers including complications at birth, obstetric fistula and death, often linked to unsafe abortion").

<sup>13</sup> INTERNATIONAL CENTER FOR RESEARCH ON WOMEN, <https://www.icrw.org/child-marriage-facts-and-figures/> (last visited Apr. 24, 2017).

<sup>14</sup> *Id.* Citing US AID, [http://www.igwg.org/igwg\\_media/crossgensex.pdf](http://www.igwg.org/igwg_media/crossgensex.pdf) (highlighting the gender discriminatory social norms surrounding cross-generational sex, "In many developing countries, it is common for young girls to marry older males, sometimes with large age differences. In some countries, multiple partnerships are accepted for men but not for women. These views of masculinity perpetuate the belief that men need frequent sexual satisfaction and multiple partners, even if they are outside of marriage and with much younger partners. Cross-generational sex may be a symptom of gender imbalances inherent in those societies").

<sup>15</sup> *Id.*

<sup>16</sup> *Id*

<sup>17</sup> NATION AGAINST EARLY MARRIAGE, <http://www.breakthrough.tv/earlymarriage/2013/08/impact-early-marriage-domestic-violence-sexuality/> (last visited Apr. 24, 2017).

<sup>18</sup> *Forum on Marriage and the Rights of Women and Girls* at 7.

<sup>19</sup> NATION AGAINST EARLY MARRIAGE, *supra* note 17.

daughters.<sup>20</sup> Feticide is more common with female pregnancies, causing young girls to seek unsafe abortions.<sup>21</sup>

These issues compound together to stifle the development of young girls at a time crucial for a child's growth.<sup>22</sup> Preventing the girl child from properly developing violates international law that defends the right to early childhood development under the Convention on the Rights of the Child (CRC).<sup>23</sup> Article 6 protects the right of the child to develop to the "maximum extent possible, and Article 27 mandates that, "State Parties recognize the right of every child to a standard of living adequate for the Child's physical, mental, spiritual, moral, and social development".<sup>24</sup> Yet, child marriages continue to occur with frequency, and today a total of 1,282,000 women in Mexico have married before the age of 18.<sup>25</sup>

Child marriage prevents children from reaching their full potential both physically and mentally. Girls are not able to achieve self-actualization since marriage keeps them from obtaining an education.<sup>26</sup> A girl child is not seen as a student but a bride, and therefore it is not shocking that she cannot finish her education for she is not meant to pursue one under the eyes of her family or of the law. Without enforcement of a minimum age requirement, young girls cannot go to school and the benefits of a gender inclusive education are lost to both men and women.

In addition to health and education issues, parental consent does not take into consideration the will of the child bride. In an attempt to save face and money, parents force their daughters to wed against their will.<sup>27</sup> This also violates the individual autonomy mentioned in Article 12 of the CRC.<sup>28</sup> Although, the statute takes into consideration the "age and maturity of

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Why Early Childhood Development?*, [https://www.unicef.org/earlychildhood/index\\_40748.html](https://www.unicef.org/earlychildhood/index_40748.html) (last visited Apr. 24, 2017) (explaining how children who do not receive adequate care fail to reach their full potential).

<sup>23</sup>Convention On The Rights Of The Child, preamble, Nov. 20, 1989, 1577 U.N.T.S. 3.

<sup>24</sup> *Id.*

<sup>25</sup> *Child Marriage in Latin America and the Caribbean*, <http://www.girlsnotbrides.org/wp-content/uploads/2017/01/Child-marriage-in-LAC-01.2017.pdf> (last visited Apr. 24, 2017).

<sup>26</sup> *Forum on Marriage and the Rights of Women and Girls* at 7 (describing how girls are married because parents fear they might be raped on their way to school).

<sup>27</sup> *Child Marriage in Latin America and the Caribbean*, *supra* note 25 (listing drivers of child marriage: poverty and social stigma).

<sup>28</sup>Convention On The Rights Of The Child, preamble, Nov. 20, 1989, 1577 U.N.T.S. 3.

the child”, leaving room for paternalistic interpretation regarding the child’s decision-making purview.

The broader problem with child marriage, and another reason Mexico is urged to adopt stricter laws, is that child marriage represents not only a significant hurdle for women’s rights but it is also linked to wider systemic issues in society that ultimately lead to increased violence and social disorder. Child marriage is linked to low literacy rates, domestic abuse, health issues, reproductive problems, and increased poverty.<sup>29</sup> Turning a blind eye on child marriage severely impacts Mexico and its peace and security on all these grounds.

### **3. The Link Between Child Marriage and Systemic Issues**

There are four main links between child marriage, femicide, drug violence, and wide scale conflict. First off, victims of femicide are often minors, between the ages of 15 and 17. In fact, 72 percent of sexually motivated femicides in Ciudad Juárez from 1993-2001 involved women between the ages of 10-22 and nearly half of the femicides that occurred during that time involved minors between the ages of 10 and 17.<sup>30</sup> I ran a correlation analysis on Excel using the figures provided in this study and calculated a negative correlation rate of -51.34% between age and frequency of femicide in Ciudad Juárez. Meaning that, the likelihood of becoming a victim of femicide decreases substantially with age. These figures are conservative, because the chart only accounts for femicides that involved sexual assault victims and femicides where information was provided. Amnesty International cites a figure of 300 total femicides in Ciudad Juárez during the year 2011, over 30 showing signs of sexual mutilation.<sup>31</sup>

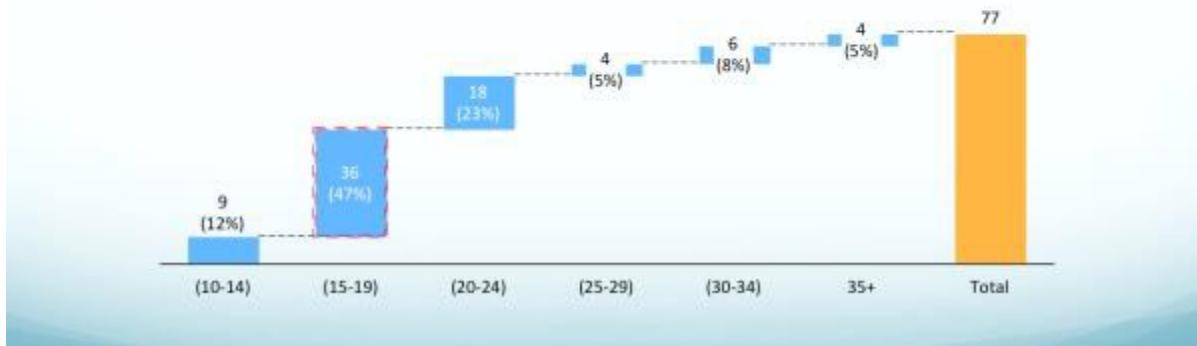
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<sup>29</sup> Girls Not Brides.

<sup>30</sup> FEMINICIDIO SEXUAL SERIAL EN CIUDAD JUÁREZ, 299 (Julia Monárrez Fragoso, 2002).

<sup>31</sup> Annual Report: Mexico, <http://www.amnestyusa.org/research/reports/annual-report-mexico-2011?page=show> (last visited Apr. 24, 2017).

## Nearly 50% of femicides take place in a girl's late teens



The x-axis demonstrates the age groups of victims of femicides involving sexual assault. The y-axis demonstrates the frequency of these attacks. I illustrated the percentages to demonstrate the disproportionate frequency present in the younger age groups, portraying the negative correlation between age and frequency of femicide. More data is needed to strongly support the results yielded in my analysis, as there are only 77 incidences shown above. In the future, I would like to use regression analysis software to calculate the strength of the relationship and the confidence interval of the figure I derived--51.34%.

This phenomenon does not stop here. Around the world, 50 percent of sexual assaults involve girls younger than 15 years of age.<sup>32</sup> Second, victims of femicide often die at the hands of boyfriends, husbands, ex-husbands, or ex-boyfriends.<sup>33</sup> The New York Times defines femicides as, “the gender-based killing of women, often by boyfriends or husbands”<sup>34</sup> Combining the fact that young girls are often victims of femicide and the fact that a majority of femicides are executed by husbands or boyfriends, demonstrates a very plausible correlation between child marriage and femicide.

<sup>32</sup> Gabriela Alvarez and Nadine Gasman, *Gender: Violence Against Women*, <http://www.americasquarterly.org/node/1930> (last visited Apr. 24, 2017).

<sup>33</sup> Uki Goñi, *Argentine Women Call Out Machismo*, N.Y. TIMES (June 15, 2015), [https://www.nytimes.com/2015/06/16/opinion/argentine-women-call-out-machismo.html?\\_r=0](https://www.nytimes.com/2015/06/16/opinion/argentine-women-call-out-machismo.html?_r=0) (explaining how over 70% of women in Argentina are killed by their husband, boyfriend, or exes).

<sup>34</sup> Alice Robb, *Inside the Femicide Epidemic Plaguing Mexico and Other Latin American Countries*, N.Y. TIMES (June 19, 2015), <http://nytlive.nytimes.com/womenintheworld/2015/06/19/inside-the-femicide-epidemic-plaguing-mexico-and-other-latin-american-nations/>

Third, several studies demonstrate a link between femicide and drug violence.<sup>35</sup> This is the more traditional link between women's rights and violent extremism. Border towns are hubs for drug violence and femicide, where women are killed and used by drug cartels to claim territory- another example of how machismo culture uses women for power.<sup>36</sup> Attributing the same motives to terrorists, the UN Security Council Report of the Secretary General on conflict-related sexual violence recognizes how terrorists also use women, "as part of the systems of punishment and reward through which they consolidate power"- more reason to take drug violence against women seriously.<sup>37</sup>

One particularly gruesome example involves the disappearance of 50 women in the city of Xalapa during a span of three days in 2011, a time when the drug cartel called Los Zetas began losing control of the region.<sup>38</sup> These losses represent a small fragment of the mounting figure of femicides. Compared to the previous decade, an almost 50% increase of femicides occurred between 2007 and 2015 when 20,000 women were killed in Mexico.<sup>39</sup> The issue has become so rampant a Mexican anthropologist, Estela Casados, states, "the number and way women are killed serves as a thermometer of violence and impunity".<sup>40</sup> The grotesque manner women's bodies are left on display after being tortured and decapitated adds to the audacity of these murders. Yet, the government fails to address this form of violent extremism, allowing corruption to embed itself into the fabric of its society.

The final, and probably most meaningful, link between child marriage and systemic violence is that child marriage increases during times of conflict; studies show that countries with the least stability are the same countries with the highest rates of child marriage.<sup>41</sup> Parents

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<sup>35</sup> NECROPOLITICS, NARCOPOLITICS, AND FEMICIDE: GENDERED VIOLENCE ON THE MEXICO-U.S. BORDER (Melissa W. Wright, 2011); *see also*, COUNCIL ON HEMISPHERIC AFFAIRS, *The Rise of Femicide and Women in Drug Trafficking*, <http://www.coha.org/the-rise-of-femicide-and-women-in-drug-trafficking/>; <http://www.reuters.com/article/us-mexico-violence-women-idUSBREA2608F20140307> (last visited Apr. 24, 2017).

<sup>36</sup> *How Mexico's Drug War Fuels Violence Against Women*, <http://securityassistance.org/blog/how-mexicos-drug-war-fuels-violence-against-women> (last visited Apr. 24, 2017) (linking machismo to femicide and drug violence).

<sup>37</sup> Rep. of the S.C., at intro., U.N. Doc. S/2016/361 (2016), available at, [http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s\\_2016\\_361.pdf](http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2016_361.pdf)

<sup>38</sup> Nina Lakhani, *Impunit has Consequences: The Women Lost to Mexico's Drug War*, <https://www.theguardian.com/world/2016/dec/08/mexico-drug-war-cartels-women-killed> (last visited Apr. 24, 2017).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Chloe Canetti, *The Syrian Conflict and the Rise of Child Marriage* (Mar. 16, 2016), <http://hrbrief.org/2016/03/the-syrian-conflict-and-the-rise-of-child-marriage/> (showing increased child marriage in Syria); *see also*, *Guidelines for*

give their young daughters up for marriage out of fear of rape and social stigma.<sup>42</sup> However, marrying a girl to prevent rape is not the solution, it only furthers the mentality that women are commodities during times of conflict. Child marriage is not linked with stability; it is linked with fragility.<sup>43</sup> Intersectional research reveals the correlation between statelessness and child marriage, as women and girls flee highly unstable regions choosing statelessness over violence and oppression- including forced marriage.<sup>44</sup> Another study explains how women suffer the long-term impact of civil unrest disproportionately to men, such as young girls in The Democratic Republic of the Congo who make up 3,748 of the 3,827 sexually assaulted children according to UNICEF's 2014 report of the country.<sup>45</sup> The correlation between conflict, violence against women, and rising rates of child marriage, suggests that Mexico should reconsider the importance of enforcing child marriage laws as a matter of peace and security.

There is an overarching issue here. Child marriages, femicide, drug violence all have one thing in common- machismo culture.<sup>46</sup> While all of these problems occur in other countries, it is machismo culture that allows these issues to flourish in Mexico. Failure to provide legal avenues for victims and lack of adequate protection for young women create an environment of impunity,

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*Gender Based Violence Interventions in Humanitarian Settings*, 1 (2002) <http://www.unhcr.org/453492294.pdf> (explaining how armed conflict destabilizes a nation and how child marriage is an indicator of peace and security); GIRLS NOT BRIDES, <http://www.girlsnotbrides.org/fragile-states-fragile-lives-child-marriage-amid-disaster-conflict/> (explaining how, “Weakened institutions, lack of economic opportunity, and increased occurrence of sexual violence and assault—already identified as drivers of child marriage—are exacerbated during armed conflict and natural disaster”) (last visited Apr. 24, 2017); Mohammed Al Qalisi, *Child Marriages on the Rise Amid Yemen Conflict*, THE NAT'L (Feb. 6, 2017), <http://www.thenational.ae/world/middle-east/child-marriages-on-the-rise-amid-yemeni-conflict> (documenting the rise of conflict along with child marriage in Yemen).

<sup>42</sup> GIRLS NOT BRIDES, <http://www.girlsnotbrides.org/fragile-states-fragile-lives-child-marriage-amid-disaster-conflict/> (describing how child marriage is seen as preventative action) (last visited Apr. 24, 2017).

<sup>43</sup> *Id.* (explaining how, “Nine of the ten countries with the highest rates of child marriage appear on the OECD list of fragile states. Three of the top ten countries on the Fund For Peace’s Failed States Index have child marriage rates well over fifty percent. And nine of the bottom eleven countries on UNDP’s Human Development Index have child marriage rates greater than forty percent”).

<sup>44</sup> Sheila Menz ,*Stateless and Child Marriage as Intersectional Phenomena: Instability, Inequality, and the Role of the International Community*, CA LAW REVIEW, article 5, vol. 104, issue 2, 4-1-2016.

<sup>45</sup> Gayle Tzemach Lemmon, *Fragile States, Fragile Lives Child Marriage Amid Disaster and Conflict*, 4 (Working Paper June, 2014); citing UN CHILDREN’S FUND, *Democratic Republic of the Congo - UNICEF Humanitarian Action for Children 2014*, <http://reliefweb.int/report/democratic-republic-congo/democratic-republic-congo-unicef-humanitarian-action-children-2014> (providing data on the effects of long term conflict in The Democratic Republic of the Congo).

<sup>46</sup> Uki Goñi, *supra* note 33 (showing how women’s movement are blaming machismo for spree of gender-based murders in Latin America); *see also*, Alice Robb, *supra* note 35 (attributing machismo to femicide).

cultivating a climate ripe for gender based crimes and exploitation.<sup>47</sup> Police often fail to investigate incidences of femicide, justifying the behavior by inculpating the victim, if not participating in it.<sup>48</sup> Politicians fail to recognize the gravity of femicide, let alone child marriage. The current president of Mexico has pledged to combat drug violence but has remained silent on the issue of femicide despite the fact that the rate of femicide substantially increased from 2005-2011 during his time as governor of the state of Mexico.<sup>49</sup> If the government cannot identify femicide as a problem, how is it going to identify the issue of child marriage?

#### **4. Recommendations**

The following lists legal recommendations in regards to child marriage in Mexico followed by general guidance.

##### *Mexican Legal Corpus*

###### — **Ley General de los Derechos de Niñas, Niños y Adolescentes<sup>50</sup>:**

- **Incorporating The Minimum Age Requirement In Every State:** Every state in Mexico<sup>51</sup> needs to adopt the same age requirement for purposes of consistency and for there to be any meaningful impact.<sup>52</sup> After all, Article 45, states that all states should adopt a minimum requirement of 18 years of age.<sup>53</sup> Cultural standards and economics should not be taken into consideration in determining the capacity of a state to implement change. The law should be uniform in enforcing sanctions against child marriage.
- **Eliminating Parental Consent Exceptions:** These provisions need to be removed in order for the law to adequately protect young girls from child

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<sup>47</sup> *Reforming the legislation on the age of marriage: Successful experiences and lessons learned from Latin America and the Caribbean*, 9-10, [https://www.unicef.org/lac/child\\_marriage\\_finalversion\\_23092016.pdf](https://www.unicef.org/lac/child_marriage_finalversion_23092016.pdf) (last visited Apr. 24, 2017) (describing how the persistence of a chauvinistic culture leads to inadequate protection of human rights).

<sup>48</sup> Alice Robb, *supra* note 35 (explaining how officials often label femicides suicides rather than investigate the possibility of murder).

<sup>49</sup> Judith Matloff, *Six women murdered each day as femicide in Mexico nears a pandemic*, ALJAZEERA (Jan. 4, 2015), <http://america.aljazeera.com/multimedia/2015/1/mexico-s-pandemicfemicides.html>

<sup>50</sup> Ley General de los Derechos de Niñas, Niños, y Adolescentes, vigente desde 2014

<sup>51</sup> Darío Martínez Brooks, *Una Nueva Ley Limita Los Matrimonios Arreglados De Niñas En Oaxaca*, CNNMÉXICO (Nov. 4, 2013), <http://expansion.mx/nacional/2013/11/04/una-nueva-ley-limita-los-matrimonios-arreglados-de-ninas-en-oaxaca> (demonstrating how only certain states, like the state of Oaxaca, have adopted strict marriage requirements).

<sup>52</sup> *Girls Not Brides* (explaining the normative and practical power of a minimum age requirement for marriage set at 18).

<sup>53</sup> Ley General de los Derechos de Niñas, Niños, y Adolescentes, vigente desde 2014

marriage. With these loopholes in place, the purpose of the minimum age requirement is rendered void.<sup>54</sup> Permitting exceptions does not help the girl child, as is currently the case in Bangladesh where the law allows underage girls to marry their rapists since it is viewed to be in their best interest.<sup>55</sup>

— **Actively Investigating Femicide and Other Acts of Violence Against Women:**

Impunity allows perpetrators to commit crime without fear of persecution, and without accountability there is no deterrence.<sup>56</sup> Femicide needs to be taken as seriously as human trafficking, which is targeted as a perpetrator of insecurity and instability under Resolution 2331.<sup>57</sup> The Security Council acknowledged the power of human trafficking in spurring violent extremism; the next step is acknowledging the problem of femicide and the role child marriage has to play in normalizing violence against women.

— **Improved Access to Justice:** Other countries such as Guatemala, implement specialized prosecutor units and tribunals to combat femicide and gender violence.<sup>58</sup> Mexico should further work with the UN and OHCHR on a regional level to adopt protocol that helps set guidelines and mechanisms on how to properly investigate gender based crimes and gather evidence that will lead to the conviction of these criminals. Currently, the UN offers technical assistance on improving data collection and analysis of femicides, but as Michelle Bachelet, former Executive Director of UN Women, advised Mexico needs to commit to actively enforcing the law.<sup>59</sup> Without enforcement, the laws of Mexico have no teeth.

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<sup>54</sup> *Setting The Age Of Marriage At 18 Can Have A Huge Impact On Child Marriage*, <http://www.girlsnotbrides.org/three-laws-that-countries-can-adopt-to-address-child-marriage/> (last visited Apr. 24, 2017) (giving examples of how loopholes deprive the law of any substance).

<sup>55</sup> Ruma Paul and Nita Bhalla, *Bangladesh law allowing child brides may legitimize rape: charities*, <http://www.reuters.com/article/us-bangladesh-child-marriage-idUSKBN168551> (last visited Apr. 24, 2017); see also, Maher Sattar and Ellen Barry, *Bangladesh Weakens Longstanding Law Against Underage Marriage*, N.Y. TIMES (Feb. 27, 2017),

<https://www.nytimes.com/2017/02/27/world/asia/bangladesh-underage-marriage-law.html>

<sup>56</sup> Judith Matloff, *supra* note 49 (quoting, “Impunity is the main motor of gender crime, Güezmes says, as well as social norms that allow the violence to be ignored or accepted as a normal part of life”).

<sup>57</sup> Rep. of the S.C., U.N. Doc. SC/12647 (2016), available at <https://www.un.org/press/en/2016/sc12647.doc.htm>

<sup>58</sup> *Femicide in Latin America*, <http://www.unwomen.org/en/news/stories/2013/4/femicide-in-latin-america> (last visited Apr. 24, 2017) (describing how the gender motivated crimes in Ciudad Juárez motivated international efforts, in El Salvador, Nicaragua, and Guatemala to curb female violence and implement special task forces).

<sup>59</sup> Michelle Bachelet, EXEC. DIRECTOR OF UN WOMEN, Speech on “*Gender-Motivated Killings of Women, Including Femicide*” at a CSW57 Side Event (Mar. 8, 2013) available at,

*UN Legal Corpus*

- **Convention on the Rights of the Child (CRC):** Nowhere in the convention is child marriage mentioned.<sup>60</sup> This needs to change if all children are to enjoy the right to physical, mental, spiritual, moral and social development outlined in Article 27 and the right to education outlined in Article 28 which early child marriage deprives young women of.<sup>61</sup> Also, there is no provision on individual autonomy. Article 12 mentions that the age and maturity of a child should be taken into consideration when allowing a child to decide what is in his or her best interest.<sup>62</sup> Initially this appeared to be a strong provision that could protect young girls, but the caveat on maturity renders it powerless. There is no mention of sexual identity, foreseeably impacting LGBT children who are forced into heterosexual marriages.
  - **Strong Suits of the CRC:** In particular, Section 24.3 dictates that states should abolish traditional values detrimental to the girl child and Section 29 promotes the understanding of tolerance between both sexes.<sup>63</sup> In combination, these provisions should be used by Mexico to seriously address the issue of child marriage.
- **The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW):** Article 16 prohibits child marriage and urges states to take action, however the CEDAW fails to delineate what it means to be a “child”.<sup>64</sup> There is no specific age mentioned in the document, leaving wide discretion for the state to determine an age it deems appropriate. Without specifying that a child is anyone under the age of 18, there is no protection against child marriage or parental consent provisions. Similar to the CRC, the CEDAW does not mention sexual identity, also failing to address the issues of the LGBT community and promoting the false image of a monolithic woman.

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<http://www.unwomen.org/en/news/stories/2013/3/speech-by-michelle-bachelet-on-gender-motivated-killings-of-women-including-femicide> (Dictating recommendations for Mexico in regards to gender-based violence).

<sup>60</sup> Convention On The Rights Of The Child, preamble, Nov. 20, 1989, 1577 U.N.T.S. 3.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> U.N. Doc. CEDAW/C/34/D/8/2005, article 16, para.. 2, available at, <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>

- **Strong Suits of CEDAW:** CEDAW is the first international manifesto in support of a global agenda towards a better tomorrow for women around the world.<sup>65</sup> The language within this document is revolutionary in the way it targets conduct once thought outside the purview of national governments- gender violence within the home.<sup>66</sup> Although CEDAW leaves ambiguity in its wake, it also provides a blueprint for women's rights around the world, which should not be overlooked.<sup>67</sup> Because of this, there is still an important role for CEDAW to play in eliminating child marriage and femicide. While the specifics need amending, the core pillars of CEDAW remain poignant, making the document a relevant source of guidance.

#### *General Recommendations*

- **Furthering Research on Women's Issues:** Data on basic women's rights issues, data everyone should have access to, is not the most accessible.<sup>68</sup> Up to date and crosscutting statistics on literacy rates, violence, femicide, and child marriage is practically nonexistent. Promoting studies that shed light on the impact of child marriages will facilitate the peacekeeping process, because it will be easier to identify fundamental issues.<sup>69</sup> Although the minimum age requirement is relatively new in Mexico, data about its effects from 2014 onward should be readily available.
- **Encouraging Women Leaders:** Mexico needs female leaders to offer a different perspective and to talk about the issues being sidelined.<sup>70</sup> Women's rights are often considered less pressing than talks concerning war and conflict negotiations.<sup>71</sup> The

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<sup>65</sup> Rangita de Silva de Alwis, “International Women’s Rights” (lecture taught at the University of Pennsylvania Law School on 10 Jan. 2017) (explaining how CEDAW is a wellspring for women’s rights).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* (discussing criticisms of CEDAW).

<sup>68</sup> Kara Castillo, *Exigen Banco Estatal De Datos Sobre Feminicidios Y Desapariciones*, E-CONSULTA.COM (Mar. 27, 2016)

<http://www.e-consulta.com/nota/2016-03-27/seguridad/exigen-banco-estatal-de-datos-sobre-feminicidios-y-desapariciones> (identifying the lack of statistical data on femicides in Mexico, “The Committee of Free and Wise Women demanded that the State Attorney General’s Office (FGE) create a State Data Bank on femicide violence in the state, as required by the General Law on Women’s Access to a Life Free of Violence”)

<sup>69</sup> Gayle Tzemach Lemmon, *supra* note 45 (reiterating the importance of studies on child marriage).

<sup>70</sup> Anaiz Zamora Márquez, *Para Peña Nieto El Feminicidio No Existe*, CIMACNOTICIAS (Feb. 9, 2015), <http://www.cimacnoticias.com.mx/node/70556> (describing how Mexican President, Enrique Peña Nieto, refuses to consider the eradication of femicide a priority); *see also*, Rangita de Silva de Alwis, “International Women’s Rights” (lecture taught at the University of Pennsylvania Law School on 10 Jan. 2017) (describing how, “women’s empowerment is seen as a charity issue, not as a national or international issue instrumental to peace and security”).

<sup>71</sup> *Id.*; *see also*, PRAY THE DEVIL BACK TO HELL (Fork Films 2008).

government needs to understand that championing women's rights addresses concerns of peace and security.<sup>72</sup>

- **Increasing Public Awareness:** The country needs women at the table to identify the problem of child marriage, to further the education of the girl child, and to clear the path for future female leaders. Mexico needs to give a voice to the several protesting against violence.<sup>73</sup> The government should support more programs that mobilize coalitions and provide information to benefit women's rights movements.<sup>74</sup>
- **Promoting Education:** There are health benefits to teaching children early on about reproductive health, and societal benefits about teaching young boys and girls to work together and respect each other.<sup>75</sup> Requiring girls to finish school is an important approach in showing that women and young girls are more than simply brides.<sup>76</sup> Through education, young boys learn to view their female classmates as equals.<sup>77</sup> Men learn to work alongside women while becoming aware of the issues facing both genders. An early, gender-inclusive education prevents the negative side effects of machismo in the long run. To quote the proverb, “educate a woman and you educate a family, educate a family and you educate a nation”, femicide, drug violence, domestic abuse, human

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<sup>72</sup> *Id.*

<sup>73</sup> Andres Sanchez Nolasco, *Son 58 feminicidios en 2016: Comité de Mujeres Libres y Presentes*, PUEBLA TRES PUNTO ZERO (Aug. 29, 2016), <http://pueblatrespuntocero.com/archivos/26893> (describing a march in Puebla where protestors carried 58 pink crosses to signify the women killed in the city in 2014); *see also*, *The Pink Cross: Resisting Feminicide In Ciudad Juárez*, <https://nicholemflores.com/2011/03/31/the-pink-cross-resisting-femicide-in-ciudad-juarez/> (last visited Apr. 24, 2017) (depicting another protest in Ciudad Juárez commemorating the 600 women lost to femicide since 1993 to 2011 where family members posted pink crosses for their lost loved ones); Jenavieve Hatch, *27 Powerful Images Of Women Protesting Against Femicide In Latin America*, THE HUFFINGTON POST (Jan. 3, 2017) [http://www.huffingtonpost.com/entry/28-powerful-images-of-women-protesting-against-femicide-in-latin-america\\_us\\_5807cd67e4b0b994d4c3856e](http://www.huffingtonpost.com/entry/28-powerful-images-of-women-protesting-against-femicide-in-latin-america_us_5807cd67e4b0b994d4c3856e) (posting pictures of women's protests and the “Ni Una Menos” movement that has gained momentum throughout Latin America).

<sup>74</sup> *See, e.g.*, OBSERVATORIO CIUDADANO NACIONAL DEL FEMINICIDIO, <http://observatoriofeminicidio.blogspot.mx/> (last visited Apr. 24, 2017) (showing an example of site monitoring femicide in Mexico); *see also*, SAVE THE CHILDREN, [http://www.savethechildren.org/site/c.8rKLIXMGIpI4E/b.6115947/k.B143/Official\\_USA\\_Site.htm](http://www.savethechildren.org/site/c.8rKLIXMGIpI4E/b.6115947/k.B143/Official_USA_Site.htm) (last visited Apr. 24, 2017) (providing another example of an organization that seeks to benefit children and eliminate child marriage).

<sup>75</sup> Michelle Bachelet, *supra* note at 59 (describing the benefits of education in curtailing violence).

<sup>76</sup> INTERNATIONAL CENTER FOR RESEARCH ON WOMEN, *supra* note 13 (showing how, “Girls with higher levels of schooling are less likely to marry as children” and pointing out that, “Educating adolescent girls has been a critical factor in increasing the age of marriage in a number of developing countries, including Indonesia, Sri Lanka, Taiwan and Thailand”).

<sup>77</sup> Rangita de Silva de Alwis, “International Women’s Rights” (lecture taught at the University of Pennsylvania Law School on 17 Jan. 2017) (Explaining why girl’s education has been under attack, “Girls that are educated are seen as a threat to violent extremism and radicalization”).

trafficking can be prevented if young boys learn that women are not brides but classmates.<sup>78</sup>

- **Enlisting the Support of Men:** It is crucial for men to acknowledge women's rights issues.<sup>79</sup> Mexico needs politicians that address child marriage, domestic abuse, and discrimination, because the first step is recognizing that these problems exist.
- **Combatting Poverty:** As mentioned earlier, rural areas plagued with poverty are often deprived of education and are areas rife with gender discrimination: early child marriage, domestic abuse, and health issues.<sup>80</sup> During times of poverty, women are seen as economic burdens, prompting families to resort to child marriage as a solution.<sup>81</sup> Young girls from poor families are twice as likely to be forced into marriage as girls from higher income families.<sup>82</sup> Bringing education, medical information and resources, and applying the rule of law in these rural areas will help combat all of the issues discussed.<sup>83</sup>
- **Providing Public Resources:** Organizations that help women undergoing forced marriages need the support of the government. Mexico should help women and young girls who do not have the economic or social capital to advocate for their safety and personal autonomy.<sup>84</sup>
- **Recognizing the Importance of Promoting Support for Women:** Women's rights should be addressed before, during, and after conflict.<sup>85</sup> After times of conflict, women's rights are often ignored even though it is women's rights that are key to nation-building and stability.<sup>86</sup> During times of conflict, violence against women exacerbates. Before

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<sup>78</sup> NATION AGAINST EARLY MARRIAGE, *supra* note 17.

<sup>79</sup> Michelle Bachelet, *supra* note at 59 (explaining how the support of men is crucial for the women's rights movement); *see also*, Girls Not Brides (listing poverty and other drivers of child marriage in Mexico).

<sup>80</sup> INTERNATIONAL CENTER FOR RESEARCH ON WOMEN, *supra* note 13.

<sup>81</sup> *The Facts: Gender Inequality and Violence Against Women and Girls Around the World*, <http://www.advocatesforyouth.org/publications/publications-a-z/1556-the-facts-gender-inequality-and-violence-against-women-and-girls-around-the-world> (last visited Apr. 24, 2017) (explaining how families prefer boys for economic reasons).

<sup>82</sup> NATION AGAINST EARLY MARRIAGE, *supra* note 17.

<sup>83</sup> Michelle Bachelet, *supra* note at 59 (emphasizing the importance of education); *see also*, MACHEQUITY <http://machequity.com/> (providing statistics on the benefits to women's right from decreasing poverty).

<sup>84</sup> See, e.g., TAHIRIH JUSTICE CENTER: FORCED MARRIAGE INITIATIVE, <http://preventforcedmarriage.org/newsite/get-help/> (last visited Apr. 24, 2017) (giving an example of an anti-forced marriage initiative).

<sup>85</sup> Rangita de Silva de Alwis, "International Women's Rights" (lecture taught at the University of Pennsylvania Law School on 17 Jan. 2017) (explaining how, "gender inequality is a cause and consequence of conflict").

<sup>86</sup> Gayle Tzemach Lemmon, *supra* note 45 (providing further recommendations on how to combat child marriage).

times of conflict, violence and discrimination against women serves as an indicator of instability and a determinant of peace and security.

## 5. Conclusion

I hope that my research sparks further discussion of the negative consequences of machismo culture and inspires policy change protecting young girls from early child marriage. To bolster the values outlined in the Declaration of Violence against Women<sup>87</sup> I urge Mexico to dismantle gender-based discrimination from the bottom up and foster the participation of women in the peacekeeping process as recommended by Resolution 1325.<sup>88</sup> Through the data and evidence presented in this paper, I seek to curtail violence by speaking to the core of a nation's conscience.

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<sup>87</sup> General Assembly resolution 48/104, *Declaration on the Elimination of Violence against Women*, A/RES/48/104 (20 Dec. 1993), available from, <http://www.un.org/documents/ga/res/48/a48r104.htm>

<sup>88</sup> General Assembly resolution 1325, *Women, Peace, and Security*, S/RES/1325 (31 Oct. 2000), available from <https://daccess-ods.un.org/TMP/9580551.98192596.html>

## **THE POWER OF A PENCIL: GIRLS’ EDUCATION AS A PIVOTAL INSTRUMENT OF PEACE AND SECURITY IN TURKEY**

Samantha Zeluck

### **1. Introduction**

In 2002, Katarina Tomaševski, the United Nations Special Rapporteur on the Right to Education, undertook a mission to Turkey to assess the nation’s progress in its mission to induct the right to education for all. One of the guiding principles of her report was that “non-discrimination should constitute the pillar of education, human rights and development,” a claim that was clearly being violated in the case of gender relations.<sup>1</sup> The Special Rapporteur was assured numerous times that discrimination against women and girls was forbidden in Turkey. Yet in reality, the “mere prohibition of discrimination was often deemed to constitute full compliance with governmental human rights obligations,” thus ensuring that while gender equality was promised in name, it was largely absent in practice.<sup>2</sup> Plainly, the quest to provide fair and equal treatment for women and girls in education would in itself require further education – on human rights, and “women’s rights as human rights” – to shatter the comforting but false notion of Turkish policymakers: that prohibition guarantees elimination.<sup>3</sup>

Fifteen years later, gender equality remains a source of contention within the realm of schooling in Turkey. As recently as 2014, President Erdoğan of Turkey publicly stated, “You cannot put women and men on an equal footing. It is against nature.”<sup>4</sup> This unabashed declaration from the nation’s leader demonstrates the profundity of prevailing patriarchal stereotypes. It is just one of several examples of public statements made by officials that contradict the language and spirit of the *Convention on the Elimination of All Forms of Discrimination Against Women* (“CEDAW”), of which Turkey has been a signatory since 1985.<sup>5</sup> These dangerous remarks have not gone unnoticed by the international community; conspicuously, in the concluding observations

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<sup>1</sup> Special Rapporteur on the Right to Education, *Third Rep. on Economic, Social and Cultural Rights: Mission to Turk.*, Comm’n on Human Rights, U.N. Doc. E/CN.4/2002/60/Add.2 (Mar. 27, 2002) (by Katarina Tomaševski)

<sup>2</sup> *Id.*

<sup>3</sup> Charlotte Bunch, *Women’s Rights as Human Rights: Toward a Re-vision of Human Rights*, 12 HUM. RTS. Q. 486, 498 (1990).

<sup>4</sup> Turkey: Shadow Report Summary for the 64<sup>th</sup> Pre-Sessional Working Group of the Comm. on the Elimination of All Forms of Discrimination against Women, submitted by the Executive Comm. For NGO Forum on CEDAW – Turk. (2015) (by Ezgi Koçak)

<sup>5</sup> Meltem Müftüler-Baç, European Parliament Directorate-General for Internal Policies, Policy Dep’t on Citizens’ Rights and Constitutional Affairs, Gender Equality in Turkey 1-16 (2012).

of CEDAW's seventh periodic report on Turkey ("Concluding Observations"), "the Committee note[d] with concern that high-level representatives of the Government have, on several occasions, made discriminatory and demeaning statements about women who do not adhere to traditional roles."<sup>6</sup> Such statements have had a trickle-down effect, making permissible graver acts of discrimination, even violence, against women and girls in Turkey.

This paper calls for reform in the access to, and opportunity and treatment of, women and girls at schools and universities, supported by normative change to prevailing patriarchal attitudes that stymie gender equality in all arenas of life in Turkey. The country is currently at a crossroads, given the attempted coup against the government in July 2016, which led to this year's Turkish constitutional referendum on April 16, and the ongoing Syrian emergency that has prompted the influx of over two and a half million refugees. In light of these crises, the paper argues that it is even more imperative now to protect the rights of women and girls.<sup>7</sup> The state of a society's education system is emblematic of the state of that society itself, not least because the children upon whom this system is practiced will grow to replicate that which they have always known. Hence, when there is a breakdown in education, there is a breakdown in law and order.

In Part I of this analysis, an overview of Turkey's legislative history will be discussed, with attention to the country's Constitution and Civil Code, and the international human rights treaties it has ratified. Part II will explain current issues of concern within Turkish schools and universities, and how these issues touch upon other facets of society, including political decision-making, employment and the economy, and domestic violence. This section will thus make the case for gender equality in education as a foundation to nation-building during a time of insecurity. Lastly, Part III provides recommendations for the elimination of gender discrimination in education and emphasizes its necessity as an instrument of peace and security at the national level.

## **2. Legislative History**

### *2.1 The Right to Education within the International Human Rights Framework*

In its bid to obtain membership to the European Union ("EU"), Turkey has made substantial effort to commit to the principal international human rights treaties that prioritize gender equality. Foremost among these is CEDAW, for which Turkey also signed the Additional

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<sup>6</sup> U.N. Committee on the Elimination of Discrimination against Women, Concluding observations on the seventh periodic report of Turkey, 7, U.N. Doc. CEDAW/C/TUR/CO/7 (Jul. 25, 2016)

<sup>7</sup> *Id.* at 3.

Protocol in 2000 that crucially requires that “State Parties shall accord to women equality with men before the law,” and the Optional Protocol in 2002, which vests in individuals the right to petition to the Convention’s Committee in case of violations.<sup>8</sup> Deference to the more comprehensive provisions for women in CEDAW also compelled an amendment to the Turkish Constitution in 2004 to ensure that CEDAW takes precedence in situations where it comes in conflict with national law, “thus making CEDAW superior to national law in gender policy.”<sup>9</sup>

CEDAW shares significant intersectionality with the 1990 *Convention on the Rights of the Child* (“CRC”) in its affirmation of the rights of the girl child. Article 28 “recognizes the right of the child [irrespective of gender] to education...with a view to achieving this right progressively and on the basis of equal opportunity.”<sup>10</sup> Further, Article 29 1(d) calls for “the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, [and] equality of sexes.”<sup>11</sup> These provisions confirm and complement similar provisions in CEDAW.

Article 10 of CEDAW asks State Parties to “take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education,” and consequently, to provide women with equal access to school-related resources, vocational and career training, and to remove gendered stereotyping from teaching and curricula.<sup>12</sup>

Other treaties enshrining the right to education include, but are not limited to, the *International Covenant on Economic, Social and Cultural Rights* (“ICESCR”), the *Convention against Discrimination in Education* (“CDE”), and the *International Convention on the Elimination of All Forms of Racial Discrimination* (“CERD”). The last has particular salience, in light of well-documented racial tensions in the country. The ongoing Kurdish-Turkish conflict has led to the “persistent disadvantaged situation of Kurdish women that is exacerbated by prejudice against their ethnic and linguistic identity.”<sup>13</sup> Likewise, refugee and asylum-seeking women in Turkey, whose numbers are rising, are subsisting under “precarious and insecure living conditions...both inside and outside the refugee camps,” and are often “deprived of basic services and essential goods, education, economic opportunities...and are at heightened risk of sexual and

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<sup>8</sup> Müftüler-Baç, *supra* at 4.

<sup>9</sup> Müftüler-Baç, *supra* at 5.

<sup>10</sup> Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., at art. 28(1) (1989).

<sup>11</sup> C.R.C., G.A. Res. 44/25, U.N. GAOR, 44th Sess., at art. 29(1) (1989).

<sup>12</sup> Convention on the Elimination of All Forms of Discrimination Against Women, 1249 UNTS 13 (18 December 1979) [hereinafter CEDAW].

<sup>13</sup> Concluding observations on the seventh periodic report of Turkey, *supra* at 3.

other forms of violence.”<sup>14</sup> Gender equality in education must therefore take into account the disparate and cross-sectional groups of women and girls whose fundamental rights are being denied, and seek equal and all-encompassing protection for them all.

#### *Implicit Rights, Implied Gaps*

The right to education is also implicit in *Security Council Resolution 1325* (2000), which establishes the part women have to play in peacemaking and security efforts. Importantly, Resolution 1325 reaffirms the crucial “role of women in the prevention and resolution of conflicts and in peace-building, and stress[es] the importance of...the need to increase their role in decision-making with regard to conflict prevention and resolution.”<sup>15</sup> Although education is not overtly stated within the document, embedded in the above avowal is a basic necessity: for women to be not only educated in the crafts of diplomacy and policymaking, but also recognized by their male counterparts as having a rightful place at the peace table. Crucially, the latter will require a process of normative infiltration that must begin in the home and schoolroom.

Revealingly, education was not mentioned in thematic resolutions succeeding Resolution 1325 until the advent of *Security Council Resolution 2242* (2015), indicating the newness of the view that education is an indicator, and indeed condition, of peace and security. Therein, “the differential impact on the human rights of women and girls of terrorism and violent extremism”<sup>16</sup> was recognized, with emphasis on its effect in educational contexts. Article 15 of Resolution 2242 encourages female empowerment “through capacity-building efforts” such as education and economic activity, indicating progress in the perspective on women’s rights in international discourses.<sup>17</sup>

Self-interest is a powerful motivator, and thus, deliberately characterizing gender equality in education as a root cause of national stability is critical to providing ground upon which effective advocacy can stand. This tactic is most clearly articulated in former UN Secretary-General Ban Ki-Moon’s December 2015 report, *Plan of Action to Prevent Violent Extremism*, in which he wrote that, “considering education a particular threat to the spread of their ideologies, terrorists have

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<sup>14</sup> *Id.*

<sup>15</sup> U.N. Security Council, Security Council resolution 1325 (2000) [on women and peace and security], 31 October 2000, S/RES/1325 (2000), <http://www.refworld.org/docid/3b00f4672e.html>.

<sup>16</sup> U.N. Security Council, Security Council resolution 2242 (2015) [on women and peace and security], 13 October 2015, S/RES/2242 (2015), <http://www.refworld.org/docid/562097f44.html>.

<sup>17</sup> *Id.*

targeted young people, in particular girls, for their pursuit of a modern education as the path to a better life for themselves and their families and better societies.”<sup>18</sup> If girls’ education is believed to endanger the propagation of violent extremism, it becomes all the more necessary to place it at the forefront of the women, peace and security agenda. The report also noted the low educational attainment level of most members of violent extremist organizations, thus implying education’s value in safeguarding vulnerable individuals against indoctrination.

Girls’ education must be protected at all costs, as it is nearly always the first facet of society to be sacrificed during times of conflict. In war-torn countries, the rights of women and girls are too easily violated, whether through “sexual enslavement, or forced marriages and encroachment on their rights to education and participation in public life.”<sup>19</sup> Consequently, as Turkey is facing a time of civil and political crisis, drastic preemptive steps must be taken to defend the right of girls to education. Failure to do so would threaten the security of all.

## *2.2 Women, the Turkish Constitution, and the Civil Code*

At the time of the writing of this paper, Turkey has been embroiled in a course-altering constitutional amendment bill (“the referendum”) that, if passed, will give “sweeping powers to the country’s powerful but divisive President Erdogan.”<sup>20</sup> While the ‘yes’ faction has been reported to have captured 51 percent of the vote, the official results are still pending, with the opposition having called for a recount of approximately 37 percent of the votes. The referendum entails an 18-article reform package that would in sum transform the current parliamentary system to a presidential system, wherein the President will hold executor powers and will appoint five out of a reduced 13 Supreme Court Members, as compared with four out of 22 previously.<sup>21</sup>

While it is too early to see the effects of the referendum on gender equality in education, at present, “although the definition of ‘discrimination against women’ is not included in the Constitution...equality between women and men is among the main principles.”<sup>22</sup> Article 42 of the Turkish Constitution also states, “No one shall be deprived of the right of education;”

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<sup>18</sup> U.N. General Assembly, Plan of Action to Prevent Violent Extremism: Report of the Secretary-General, 70, U.N. Doc. A/70/674 (Dec. 24, 2015).

<sup>19</sup> *Id.*

<sup>20</sup> Mark Lowen, *Why Did Turkey Hold a Referendum?*, B.B.C., Apr. 16, 2017, <http://www.bbc.com/news/world-europe-38883556>.

<sup>21</sup> Kara Fox, Elliott C. McLaughlin & James Masters, *Turkey Referendum: Erdogan Declares Victory*, C.N.N., Apr. 17, 2017, <http://www.cnn.com/2017/04/16/europe/turkey-referendum-results-erdogan/>.

<sup>22</sup> U.N. Committee on the Elimination of Discrimination against Women, Seventh periodic report of State parties due in 2014: Turkey, 7, UN Doc. CEDAW/C/TUR/7 (Dec. 9, 2014)

moreover, “primary education is compulsory for all citizens of both sexes and is free in state schools.”<sup>23</sup> However, although these rights exist on paper and are protected by the law, their implementation has been uneven and contentious, as proven by President Erdoğan’s public remarks.

The Turkish Civil Code underwent extensive transformation in 2001, propelled forward by a broad campaign that brought together upper-class elite women and non-governmental organizations from all corners of the country. The revised Code includes reforms that have raised the age of legal marriage to 17 for all, dismantled rules requiring women to receive permission from men in their family to engage in a profession, and equalized men and women’s marriage rights.<sup>24</sup> However, one topic that is still conspicuously absent from the Code is education, which clearly lacks strict legislature to ensure it meets standards of gender equality; it is simply not a priority, nor viewed as an area of civil life that has the power to revolutionize societal norms. This perspective must be changed so that a woman’s access to a fair and high-quality education is deemed as important to the society’s wellbeing as is her position of equality in marriage.

### **3. The Case for Gender Equality in Education**

#### *3.1 Women in the Political Sphere*

Former UN Secretary-General Ban Ki-Moon wrote in his annual report on the implementation of Resolution 1325 in September 2016, “I am concerned about continued threats and attacks against, and the persecution of, those who do not conform to gender norms, whether they be women political leaders, journalists or human rights defenders, women justice personnel [and] civil society leaders.”<sup>25</sup> In Turkey, central to these attacks is the continued stifling of women and girls’ equal access to education. Without an education, women are barred from entering the highest echelons of public service; to illustrate this point, the Turkish Constitution makes clear that the President of the Republic must have completed higher education.<sup>26</sup> Compounding this requirement is the stipulation that the President must be over forty years of age. This mechanism further limits the pool of eligible females for the role, particularly given how recently gender

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<sup>23</sup> CONSTITUTION OF THE REPUBLIC OF TURKEY. Nov. 7, 1982, art. 42.

<sup>24</sup> Rangita de Silva de Alwis, *Rabat Roundtable and Platform of Action: Introduction*, 2 Women Leading Change: Rabat Roundtable Papers, May 2011, at 10.

<sup>25</sup> U.N. Security Council, Report of the Secretary-General on women and peace and security, 16, U.N. Doc. S/2016/822 (Sep. 29, 2016).

<sup>26</sup> CONSTITUTION OF THE REPUBLIC OF TURKEY. Nov. 7, 1982, art. 101.

equality was formalized in the nation – the Constitution was only amended in 2004 to explicitly state the equal rights of men and women, and women’s organizations were unsuccessful in pushing for the adoption of positive discrimination measures in 2010.<sup>27</sup> Hence, it is likely that a significant proportion of women currently surpassing the age barrier will not have had the necessary education background to qualify them for office.

The pursuit of higher education is also complicated by Article 130 of the Constitution, which states that “University presidents shall be elected and appointed by the President of the Republic.”<sup>28</sup> As mentioned early on in this paper, President Erdoğan has publicly indicated his disapproval of women who fail to comply with gender norms, and various ministers have also espoused rhetoric that grants women one job only: motherhood.<sup>29</sup> Under these circumstance, it is easy to see that a woman’s path to public service is fraught with difficult, and sometimes insurmountable barriers.

In the most recent Parliamentary elections of June 2015, more women were elected to Parliament than ever before, although they still constituted only 18 percent of the total. A mere five months later, a round of snap elections reduced the proportion of female parliamentarians to 15 percent.<sup>30</sup> Several factors led to this decrease. First, the Justice and Development Party (“AKP”), the largest political party in the nation and formerly led by President Erdoğan, saw a five percent drop in female representatives, despite a nine percent rise in vote share. Al-Monitor, a news source specializing in the Middle East, reported that the AKP “deliberately reduced the number of female candidates because it did not believe they would rally constituents,”<sup>31</sup> citing interviews with senior AKP members and pro-AKP professors as evidence. In addition, the pro-Kurdish People’s Democratic Party (“HDP”) and the Nationalist Action Party (“MHP”) had reduced female representation, due to significant drops in their shares of the vote.

Looking forward, the Turkish Referendum, if successfully passed, will increase the number of members of parliament from 550 to 600, prompting snap elections yet again.<sup>32</sup> While it is

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<sup>27</sup> Müftüler-Baç, *supra* at 5.

<sup>28</sup> CONSTITUTION OF THE REPUBLIC OF TURKEY. Nov. 7, 1982, art. 130.

<sup>29</sup> Zia Weise, *Turkey’s New Curriculum: More Erdogan, More Islam*, Politico, Feb. 13, 2017, <http://www.politico.eu/article/erdogan-turkey-education-news-coup-analysis-curriculum-history-istanbul/>.

<sup>30</sup> Pinar Tremblay, *Women Were Big Losers in Turkey’s Elections*, Al-Monitor, Nov. 23, 2015, <http://www.al-monitor.com/pulse/originals/2015/11/turkey-women-are-losers-turkish-elections-akp.html#ixzz4cdBW1vEW>.

<sup>31</sup> *Id.*

<sup>32</sup> Mark Lowen, *Why Did Turkey Hold a Referendum?*, B.B.C., Apr. 16, 2017, <http://www.bbc.com/news/world-europe-38883556>.

impossible to predict the effects, the outlook is bleak for female political representation. As Hatice Kapusuz, a female activist working with the Association for the Support of Women Candidates, expressed after the last elections, “The critical threshold for women’s representation is 33%. We have met this criterion only in 16 provinces [out of 81]. Women are represented in civil society organizations at a mere 5%. Crucial legislation addressing women’s needs is simply ignored.”<sup>33</sup>

More than ever, women must be empowered to run for office, particularly in a period of political uncertainty, and during the present window for enhanced parliamentary representation. Women can be potent agents of change if they raise their voices. In January 2017, female lawmaker Aylin Nazliaka made headlines when, in a parliamentary debate, she handcuffed herself to a microphone to peacefully protest the referendum and called on “female members of the opposition to support her.”<sup>34</sup> The protest turned violent as members of the AKP and HDP became embroiled in the conflict, with one female lawmaker later being hospitalized after sustaining injuries. These narratives capture the danger to women in lawmaking, but also represent hope. In sum, they are exactly the types of stories that should be represented in Turkish curricula and disseminated in media outlets to inspire girls to fight for justice and aspire to political representation.

### *3.2 The Politicization of Pedagogy*

In the July 2016 Concluding Observations, the Committee wrote, “discriminatory stereotypes portraying women as mothers and housewives and men as active participants in economic and public life remain present in some textbooks, in particular textbooks for refugees.”<sup>35</sup> Such education materials have a dual effect of preventing girls from aspiring to lives outside of the domestic sphere and instilling in boys the belief that only they are deserving of political and economic participation. Teachers, too, often undermine girls at school, whether through verbal abuse, deliberate lack of attention, or the questioning of girls’ intellectual capabilities; as authority figures, their denigration is all the more harmful.<sup>36</sup> Oftentimes, these behaviors reflect and reinforce those taught to children at home by their parents, perpetuating patriarchal norms that discourage girls from pursuing their education, especially as they transition into womanhood. As

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<sup>33</sup> Pinar Tremblay, *supra*.

<sup>34</sup> Kara Fox, *Female Lawmakers Brawl in Turkish Parliament*, C.N.N., Jan. 20, 2017, <http://www.cnn.com/2017/01/20/europe/turkey-parliament-brawl/>.

<sup>35</sup> Concluding observations on the seventh periodic report of Turkey, *supra* at 13.

<sup>36</sup> Firdevs M. Cin & Melanie Walker, *Reconsidering Girls’ Education in Turkey From a Capabilities and Feminist Perspective*, 49 INT’L J. EDUC. DEV. 134, 140 (2016).

of 2014, eleven percent of girls of primary school age were not attending school; in contrast, among girls of secondary school age, 45 percent were out of school.<sup>37</sup> To put this data into perspective, five percent of boys are out of primary school, and 29 percent are out of secondary school. Indisputably, gender bias is having a pronounced effect on school attendance, and will continue to do so as long as the school curriculum continues to fail the girl child.

While the constitutional referendum continues to reverberate around the nation, Turkey's Ministry of National Education ("MoNE") has also been instituting changes to public schooling that highlight the political nature of education. In January 2017, it announced a draft curriculum that opposing parliamentarians fear overemphasize Turkish culture and Sunni Islam and thus will undermine the country's constitutional secularism. These changes were preceded by a dramatic protest in 2014 from parents decrying education reforms that enrolled up to 40,000 students in state-run religious schools, called *imam-hatip*, against the wishes of their families.<sup>38</sup> Attendance of these schools has swelled from 63,000 to one million in the years since the AKP came into power in 2002. In addition, the ministry has prescribed a new class for students on the topic of the 2016 failed coup, which one history teacher has pronounced as a tactic by the government to "present Erdoğan as a hero" while portraying the plotters as terrorists.<sup>39</sup> The teacher requested anonymity, explaining that thousands of teachers had been suspended in the wake of the coup attempt, but unequivocally stated, "In Turkey, teaching is political."<sup>40</sup>

The erasure of Kurdish language, history and culture from the curriculum has also lead to unrest in classrooms, particularly in Eastern Turkey, where the Kurdish-Turkish conflict is most prevalent. In Kurd-dominated schools, "this can take the form of political pressure on girls applied by boys;" for example, one teacher reported, "I face students indoctrinated with separatist ideas by parents. This reaction comes only from boys and they force girls to agree and pressure them to reject Turkish Republican ideas and nationalism. Girls are usually reserved and bear ideological bullying."<sup>41</sup> With teachers unequipped to defuse these types of disputes in the classroom, such racial tensions flourish unabated. It is clear that the government both values and fears education as a weapon – one that must be controlled to enable the consolidation of power, but also kept out of

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<sup>37</sup> FHI 360 Education Policy and Data Center, *Turkey: National Education Profile 2014 Update*, [http://www.epdc.org/sites/default/files/documents/EPDC%20NEP\\_Turkey.pdf](http://www.epdc.org/sites/default/files/documents/EPDC%20NEP_Turkey.pdf) (last visited Apr.25, 2017)

<sup>38</sup> Zia Weise, *supra*.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Cin & Walker, *supra* at 141.

the hands of women. Consequently, at present, “education fails to create a peace-making and reconciliation process,” a reality that must be reversed.

### *3.3 Women in the Economy*

Despite the legal basis for gender equality in the workplace, women’s participation in Turkey’s workforce is the lowest among all OECD countries. Only 23 percent of women work, with 26 percent of those women working in the agriculture sector as part of the family workforce without pay. Even among female university graduates, participation in the labor market is still low; as of 2015, only 28 percent of university professors and eight percent of rectors were women.<sup>42</sup> Why must this change? Women’s equal participation in the economy is crucial to economic growth. There is a wealth of scholarly literature that indicates that investing in a women’s education is equivalent to investing in a family’s education. Moreover, “econometric analysis has proven a long-term relationship between the sex ratio of higher education, elementary and high school graduates, and GDP in Turkey.”<sup>43</sup> In sum, eliminating gender inequality in education will have a significant beneficial impact on both men and women, and on the nation’s economic wellbeing.

However, revealingly, this positive correlation can be weakened by political instability – the same study found evidence of fractures in the relationship “especially in the periods before and after the 1980 military intervention.”<sup>44</sup> Once again, it is apparent how violence can undermine crucial trends of societal progress. Consequently, women must be given equal opportunities in education, not only for the general improvement of the economy, but also because when women, and by extension, national peace and security, are under threat, the economy is diminished as well.

### *3.4 Violence Against Women*

In 2012, Turkey ratified the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence and adopted Law No. 6284 on the Prevention of Violence against Women, demonstrating its commitment to eliminating such practices within the nation.<sup>45</sup> However, as noted in CEDAW’s 2016 Concluding Observations, “the law does not criminalize domestic violence as such, and includes no provision relating to the prosecution or

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<sup>42</sup> Müftüler-Baç, *supra* at 12.

<sup>43</sup> Ibrahim G. Yumusak, Mahmut Bilen & Hamza Ates, *The Impacts of Gender Inequality in Education on Economic Growth in Turkey*, 103 SOC. & BEHAV. SCI. 1093, 1102 (2013).

<sup>44</sup> *Id.*

<sup>45</sup> Concluding observations on the seventh periodic report of Turkey, *supra* at 2.

punishment of perpetrators.”<sup>46</sup> Consequently, a significant number of women are still murdered by their partners, husbands, or family members, and protection against rampant verbal and physical abuse and sexual assault is minimal. Such acts of violence are also widely underreported “owing to stigmatization, fear of reprisals, economic dependence on the perpetrator, legal illiteracy, and/or lack of trust in law enforcement authorities.”<sup>47</sup> Hence, violence against women remains an endemic problem, with troubling ramifications for women and girls in education.

Empirical results from a recent study suggest that within the compulsory schooling age group in Turkey, the daughters of mothers who suffer from domestic violence are less likely to be enrolled in school than are the daughters of mothers who are not subject to abuse. In contrast, male children’s schooling outcomes are not correlated with their mothers’ experiences with violence.<sup>48</sup> These findings suggest both that abused mothers may prioritize schooling differently for boys and girls, and that parents of violent households may transfer discriminatory values to their daughters. Consequently, daughters “may internalize norms that fail to evaluate” the importance of education.<sup>49</sup>

In Turkey, the concept of ‘honor’ is closely associated with sexual purity, and hence “control over a woman’s body and sexuality accounts for not only protecting the honor of that woman but also that of her family and its male members.”<sup>50</sup> In extreme cases, perceived loss of honor leads men to commit various crimes, including women slayings, to restore the family’s honor. These ‘honor killings’ are rarely prosecuted in court and are insufficiently monitored.<sup>51</sup> Fearing the loss of their daughters’ honor, parents often respond to the threat of unsafe school conditions, harassment, and temptation by keeping girls from leaving their homes. One girl stated in an interview, “Men stare at me when I pass; or sometimes the boys of the village say some shameful words to me...I told this to one of my woman teachers and she promised not to tell my parents because they wouldn’t send me to school anymore.”<sup>52</sup>

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<sup>46</sup> *Id.* at 8.

<sup>47</sup> *Id.*

<sup>48</sup> Sevinc Rende, *The Relationship Between a Mother’s Attitude Toward Domestic Violence and Children’s Schooling Outcomes in Turkey*, 29 J. INTERPERS. VIOLENCE, 2548, 2565 (2014).

<sup>49</sup> *Id.* at 2566.

<sup>50</sup> Elif Gursoy, William McCool, Serap Sahinoglu & Yasemin Y. Genc, *Views of Women’s Sexuality and Violence Against Women in Turkey: A Cross-Sectional Investigation Among University Students*, 27 J. TRANSCULTURAL NURSING, 189, 189 (2014).

<sup>51</sup> Concluding observations on the seventh periodic report of Turkey, *supra* at 10.

<sup>52</sup> Cin & Walker, *supra* at 139.

In times of conflict and social disorder, the threat of loss of honor is all the greater for women, thus making their access to schooling even less viable. To illustrate, Syrian refugee girls and young women experience high rates of sexual violence in and outside of refugee camps, and so are often forced into marriages with Turkish men for protection purposes.<sup>53</sup> Schools, and transportation to them, must be made safe for girls, and importantly, must represent places where boys and young men learn that violence against women is unacceptable. Until then, girls' attendance will remain low, and parents can continue to hide behind the excuse of 'honor' to prevent their daughters from accessing their rightful education.

### *3.5 The Power and Potential of Education*

As the UN Special Rapporteur on the right to education, Kishore Singh, wrote in his 2013 report, *Justiciability of the Right to Education*, "The majority of those deprived of education are girls and women. They are prevented by parents who see no value in educating daughters, or by religious extremists threatening them. Violence against women and girls impairs their right to education."<sup>54</sup> This paper shows that education is the lodestone that attracts all other prevalent issues in a country, and a revealing microcosm of the society itself. It has the potential to, and should, be the first stage upon which girls can practice public participation and leadership, and the arena where boys learn to accept and promote girls as their equals, regardless of what they see practiced at home. Consequently, policies directed towards education must be holistic and connect it with the other areas of Turkish life it will inevitably touch upon.

Gender equality in education means integrating into all levels of schooling a respect for women's rights, and as a safeguard, giving women and girls access to legal literacy programs so that they know how to seek recourse for violations. Legislation must also emphasize the importance of providing women with access to justice, the role of men and boys as advocates and stakeholders of gender equality, and the crucial function of women in facilitating peace and security. As former Secretary General Ban Ki-Moon wrote, "one means of addressing drivers of violent extremism will be to align national development policies with the Sustainable Development Goals, specifically...ensuring inclusive and equitable quality education...for all [and] achieving gender equality and empowering all women and girls."<sup>55</sup> The ongoing Turkish

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<sup>53</sup> Concluding observations on the seventh periodic report of Turkey, *supra* at 3.

<sup>54</sup> U.N. General Assembly, Report of the Special Rapporteur on the Right to Education, Kishore Singh: Justiciability of the Right to Education, 23, U.N. Doc. A/HRC/23/35 (May 10, 2013).

<sup>55</sup> Plan of Action to Prevent Violent Extremism: Report of the Secretary-General, *supra* at 12.

referendum marks a time of crisis in Turkey, where the pillars of democracy are under duress and ongoing conflicts have pitted various factions against one another. Yet periods of upheaval can also be leveraged as windows of opportunity. The movement for achieving gender equality in education faces challenges that are growing daily – thus, so too must the will of its constituents.

#### **4. Recommendations**

- **Amend the Turkish Civil Code to address gender equality in education.** Turkey needs to recognize education as a fundamental component of civil life and a means of eliminating gender discrimination in the broader society. Currently, education is entirely absent from the Civil Code, and no framework exists to protect women and girls from familial gender biases that seek to prevent their attendance of schools. Comprehensive articles must address gender equality through means such as appropriate teaching materials, capacity-building programs for all teachers, and mandatory primary and secondary school attendance for girls and boys. Steps must be taken to ensure that such legislation is backed by effective implementation.
- **Implement a strategy to dismantle patriarchal attitudes at all levels of society.** In line with the provisions of CEDAW, the State must provide community education on the harms of discriminatory stereotypes against women, and encourage public officials to lead by example.
- **Adopt a policy of affirmative action for girls in higher education.** “In line with Sustainable Development Goal 4.3,” girls must be encouraged to enter and have access to protection in the traditionally male-dominated arena of higher education.<sup>56</sup>
- **Develop programs for women and girls of ethnic and linguistic minority groups to address their specific educational disadvantages.** The current monocentric nature of the Turkish curriculum has alienated women and girls of Kurdish, Syrian and other backgrounds. Revisions to schooling must include multilingual education, inclusive history classes, and targeted regional agendas to rectify the difficulties of minority groups. Referencing the Special Rapporteur on Education’s 2011 report on Kazakhstan, which applauds their Constitution’s guaranteeing of “all Kazakh citizens the right to education in one’s native language,”<sup>57</sup> the Turkish Constitution must undergo similar reform, as it currently states, “No language other than Turkish shall be taught as a mother tongue to citizens at any institution of education.”<sup>58</sup>

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<sup>56</sup> Concluding observations on the seventh periodic report of Turkey, *supra* at 14.

<sup>57</sup> U.N. General Assembly, Report of the Special Rapporteur on the Right to Education, Kishore Singh: Mission to Kazakhstan, 20, U.N. Doc. A/HRC/20/21/Add.1 (May 11, 2012).

<sup>58</sup> CONSTITUTION OF THE REPUBLIC OF TURKEY. Nov. 7, 1982, art. 42.

- **Enforce temporary special measures to achieve substantive gender equality in political representation.** In keeping with article 4 of CEDAW, women must be given proportionate representation in public life. To achieve this, current and aspiring officials should also undergo training to understand these special measures and the role of women in public service.
- **Revise Law No. 6284 on the Prevention of Violence against Women.** The law must criminalize domestic violence and provide women with sufficient avenues for recourse. Women must also have access to legal literacy workshops so that they understand their rights.

# **USING UNITED NATIONS RESOLUTION 1325 TO REIMAGINE THE COMMERCIAL SURROGACY BAN IN INDIA**

Samantha Licata

## **1. Introduction**

The surrogacy industry in India is currently exceeding 2 billion dollars, effectively making India one of the largest reproductive industries in the world. Due to the serious lack of regulation in this private industry, exploitative practices and unethical engagements have become all too common between fertility establishments and Indian surrogates. At the same time, the industry has also given many women a chance to gain financial independence and provide for their families, as the compensation can be upwards of five times their annual income. In an attempt to eliminate exploitation and abuse of surrogates, the government has proposed a bill that will effectively ban and criminalize all forms of commercial surrogacy in India. Because the demand for surrogacy is not expected to decline, India is risking the formation of an underground market that will threaten and imperil the women whom the ban was aiming to protect. This paper will argue for the extension of United Nations Resolution 1325 principals of women's participation in peacekeeping beyond its original scope of armed conflict and post-conflict. By stretching Resolution 1325 beyond the issues of armed conflict and violent extremism, it can be used as a framework to advocate and promote the security of women before conflict arises. Including surrogate women directly in the drafting of surrogacy regulation will adhere to the calls of Resolution 1325 by bringing a gender perspective to the peacekeeping table, and thereby effectively promoting women's peace and security in India.

I will begin by giving a background on India's surrogacy industry and explore both the exploitative practices and the advantageous nature of the industry that many Indian women welcome. Part III will discuss the current legal status of surrogacy in India and examine in depth the new Surrogacy Bill of 2016 that proposes a complete ban on the industry. Lastly, Part IV will detail how the proposed bill violates numerous United Nations conventions and argue for the use of Resolution 1325 as a framework for including women in the drafting of the bill to prevent future conflict and ensure women's peace and security.

## **2. Surrogacy's Exploitative and Advantageous Realms**

Surrogacy in India has been a booming industry since around 2002 when it became one of the few countries that allowed commercial surrogacy. Commercial surrogacy indicates that the

surrogate, usually anonymous, is being paid by intended parents for her services of carrying a child via in-vitro fertilization. In comparison to the costs of surrogacy in the US, which can climb as high as \$100,000<sup>1</sup>, surrogacy in India costs intended parents a fraction of that.<sup>2</sup> This has been largely due to the Indian government adopting specific measures, such as special incentives to hospitals that treat foreign patients and the implementation of a medical visa scheme, to “promote the country as a ‘global health destination.’”<sup>3</sup> This has made India a preferred destination for fertility tourism, or what is often called “tissue tourism.”<sup>4</sup> A United Nations backed study from 2012 projected the industry to be worth over 400 million dollars a year, and today, surrogacy in India is estimated to be a \$2 billion industry<sup>5</sup> with over 3000 clinics spread across the country.<sup>6</sup>

Because the industry was largely left to the private sector and free from government regulation, exploitative practices emerged that have led to a series of unethical practices by clinics, doctors, intended parents, and even local participants. Surrogates in India generally come from lower caste or poor rural areas. These women are promised compensation ranging from 2-6500 dollars for their services, but many surrogates compensation is drastically cut due to the fee, which can be half of their earnings, that is given to local rickshaw drivers who deliver these

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<sup>1</sup> Amrita Pande, *Global reproductive inequalities, neo-eugenics and commercial surrogacy in India*, 64 CURRENT SOCIOLOGY MONOGRAPH 244, 246 (2015).

<sup>2</sup> For example, IVF India, an ICRM Registered ART clinic, estimates their costs at about US\$18,000. Available at <http://ivfindia.in/cost-of-surrogacy-in-india>. See also Julie McCarthy, *Why Some of India’s Surrogate Mom’s are Full of Regret*, goats and soda: NPR (Sept. 18, 2016) audio transcript available at <http://www.npr.org/sections/goatsandsoda/2016/09/18/494451674/why-some-of-indias-surrogate-moms-are-full-of-regret> (reporting an estimate of \$14,000 in costs).

<sup>3</sup> Normann Witzleb and Anurag Chawla, *Surrogacy in India: Strong Demand, Weak Law*, IN SURROGACY, LAW AND HUMAN RIGHTS 170 (Paula Gerber and Katie O’Byrne ed., 2015).

<sup>4</sup> See Nita Bhalla & Mansi Thapliyal, *Foreigners are Flocking to India to Rent Wombs and Grow Surrogate Babies*, Reuters Business Insider (Sept. 30 2013), available at <http://www.businessinsider.com/india-surrogate-mother-industry-2013-9>.

<sup>5</sup> Exact figures are unclear. See Nirmala George, *India Plan Surrogacy Ban for Foreigners, Unmarried Couples*, The Associated Press (Aug. 24, 2016), available at <http://www.ctvnews.ca/world/india-plans-surrogacy-ban-for-foreigners-unmarried-couples-1.3041710>. (Reporting \$1Billion industry); Julie Bindel, *Outsourcing pregnancy: a visit to India’s surrogacy clinics*, Global Development, The Guardian (Apr. 1, 2016) available at <http://www.theguardian.com/global-development/2016/apr/01/outsourcing-pregnancy-india-surrogacy-clinics-julie-bindel>. (Reporting a \$1Billion industry); *India: Impending Surrogacy Ban Provokes Surge in Demand*, Asian Correspondent (Jan. 19, 2017), available at <https://asiancorrespondent.com/2017/01/india-impending-surrogacy-ban-provokes-surge-demand/#3Cxtc xmYdZKeqo5z.97> (Reporting a \$2.3Billion industry); Pande, *supra* note 1, at p. 246 (Reporting a \$2Billion industry).

<sup>6</sup> Pande, *supra* note 1, at 246; Aarti Dhar, *India to Ban Rent-a-Wombs, Limited Surrogacy Allowed, Not for Single Women, Gays*, The Wire (Aug. 24, 2016), available at <https://thewire.in/61555/india-is-looking-to-ban-commercial-surrogacy/> (reports an estimate of 2000 clinics spread across the country).

women to hospitals and clinics.<sup>7</sup> Once these women become pregnant, many are housed at local “surrogacy homes” which are funded by the IVF clinics so that the women can be closely monitored during their pregnancies.<sup>8</sup> Surrogates can be promised and deceived about many of the procedures that their pregnancy will entail. For instance, many women undergo cesarean sections when promised natural births, most surrogates are given medication that prevents lactation, and surrogates are rarely permitted to see the baby immediately after birth.<sup>9</sup> Additionally, the doctor’s financial incentive of ensuring a viable pregnancy for intended parents has led to serious issues regarding informed consent. Many intended parents will commission more than one surrogate to carry an embryo and whichever embryo is less viable will be aborted via an abortion pill.<sup>10</sup> The surrogate is usually given the pill unknowingly and in some instances is even told that it was due to her own carelessness.<sup>11</sup> Similarly, to increase the chances of pregnancy, some couples will implant multiple embryos into their surrogate and abort if more than one embryo took hold.<sup>12</sup> Further, most surrogates are not provided any coverage for post-delivery complications or follow-up care.<sup>13</sup>

Without diminishing the exploitative nature of the industry, surrogacy remains to be a necessary and advantageous technological advancement of modern society. The practice not only allows for couples and individuals to “enjoy the otherwise unattainable privilege of parenthood with genetic link to the child,”<sup>14</sup> it also gives Indian women an opportunity to improve their livelihood by using their reproductive abilities. It is vital to note how this aspect of commercial surrogacy, amounting value to women’s bodies, is a powerful challenge to traditional gender

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<sup>7</sup> See generally Katherine Voskoboinik, *Clipping the Stork’s Wings: Commercial Surrogacy Regulation and Its Impact on Fertility Tourism*, 26 IND. INT’L & COMP. L. REV. 336, 347 (2016).

<sup>8</sup> Pande, *supra* note 1, at 247. This monitoring includes constant surveillance of food, medicines, and daily activities.

<sup>9</sup> Julie Bindel, *Outsourcing pregnancy: a visit to India’s surrogacy clinics*, Global Development, The Guardian (Apr. 1, 2016) available at <http://www.theguardian.com/global-development/2016/apr/01/outsourcing-pregnancy-india-surrogacy-clinics-julie-bindel>.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* See also Julie McCarthy, *Why Some of India’s Surrogate Mom’s are Full of Regret*, goats and soda: NPR (Sept. 18, 2016) audio transcript available at <http://www.npr.org/sections/goatsandsoda/2016/09/18/494451674/why-some-of-indias-surrogate-moms-are-full-of-regret>.

<sup>12</sup> Bindel, *supra* note 9.

<sup>13</sup> Bhalla, *supra* note 4.

<sup>14</sup> Normann Witzleb and Anurag Chawla, *Surrogacy in India: Strong Demand, Weak Law*, IN SURROGACY, LAW AND HUMAN RIGHTS 170 (Paula Gerber and Katie O’Byrne ed., 2015).

norms because we finally see women's "reproductive capacities [being] valued and monetized outside of the so-called private sphere."<sup>15</sup>

Many Indian women welcome the industry because it gives them opportunities to provide for themselves and their family in a way that wouldn't be possible without it. In many cases, surrogacy can lift a family from poverty, as the compensation is sometimes equivalent to five or even fifteen times their (or their husband's) annual income.<sup>16</sup> Women are able to buy homes, pay for their children's education, or gain independence. Amrita Pande, who completed a fieldwork study in India for seven years, found that the median income of the surrogates was about RS2500 per month, which is the equivalent of US\$50. The surrogates she interviewed made earnings that were worth five years of familial income. The women she interviewed had a range of reasons for involving themselves in this type of work, but many of them shared the appreciation that surrogacy was helping them gain financial independence. For example, Dipali, a surrogate woman hired by a couple from South Africa, planned on using her earnings to finally move out of her brothers home (which she had been living in for the last five years) by purchasing a plot of land for herself.<sup>17</sup> She plans on placing the rest of the money in a savings account for her children's education.<sup>18</sup> Dipali explained, "this kind of pain to the body I am willing to take- it will not be wasted- it will give me enough money to make me self-sufficient."<sup>19</sup>

Another surrogate (not involved in Pande's study), a 24-year-old single mother, hopes to start her own beauty parlor, and another surrogate "wondered why work that earns her respect and money would be made illegal."<sup>20</sup> Ruby Kumari, a 35-year-old Indian surrogate felt that surrogacy allowed her to escape the oppressive and abusive factory job she held prior to being a

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<sup>15</sup> Amrita Pande, *Global reproductive inequalities, neo-eugenics and commercial surrogacy in India*, 64 CURRENT SOCIOLOGY MONOGRAPH 244, 255 (2015). This author also notes the paradox of this realization. While not explored in this paper, I still believe it is important to include. "But just as commercial surrogates subvert these gendered dichotomies, it simultaneously reifies them. When reproductive bodies of women become the only source, requirement and product of a labor market, and fertility becomes the only asset women can use to earn wages, women essentially get reduced to their reproductive capacities, ultimately reifying their historically constructed role in the gender division of labor."

<sup>16</sup> Witzleb, *supra* note 3.

<sup>17</sup> Pande, *supra* note 13, at 249.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *India: Impending Surrogacy Ban Provokes Surge in Demand*, Asian Correspondent (Jan. 19, 2017), available at <https://asiancorrespondent.com/2017/01/india-impending-surrogacy-ban-provokes-surge-demand/#3CxtxmYdZKeqo5z.97>.

surrogate.<sup>21</sup> There she was forced to work exhaustive hours, stitch up to 70 garments in a single day, and earned only 450 rupees a day.<sup>22</sup> Escaping that and deciding to be a surrogate allowed her to enroll her daughter into an “English-medium” school and she was even gifted 50,000 rupees in addition to her fee by the intended parents.<sup>23</sup> These examples illustrate that surrogacy, while subject to unethical practices, still has strong advantages that can benefit Indian women.

### **3. The Surrogacy Bill of 2016**

The country’s lack of regulation in such a booming industry led the government to introduce different legislation and policies that would govern clinics, doctors, intended parents, as well as surrogates. This was a welcome first step in ensuring that profit interests of fertility clinics and agencies weren’t “outweigh[ing] public health interests, ethical concerns, and human rights norms.”<sup>24</sup> This began with the release of nonbinding national guidelines on ARTs (Assisted Reproductive Technologies) from the Indian Council of Medical Research (ICMR) in 2005 and again in 2006.<sup>25</sup> A more detailed rule came later in 2008 with the Assisted Reproductive Technology (regulation) Bill that was drafted by a committee of experts from the government and medical profession and later updated in 2010.<sup>26</sup> In 2012, the Indian Ministry of Home Affairs began to issue new restrictions on visas that barred single, unmarried, or gay couples from commissioning surrogates in India if traveling on a medical visa.<sup>27</sup> A year later, the Ministry of Health and Family Welfare updated the ART Bill from 2010 with amendments and a fully drafted bill was proposed in 2014.<sup>28</sup> The Surrogacy (Regulation) Bill of 2014 was the first to restrict surrogacy to only married Indian couples and the Surrogacy Bill of 2016 (herein after

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Witzleb, *supra* note 3.

<sup>25</sup> Tariq Ahmed, *India: Draft Legislation Regulating Assisted Reproductive Technology Published*, The Law Library of Congress, Global Legal Monitor (Nov. 2, 2015) available at <http://www.loc.gov/law/foreign-news/article/india-draft-legislation-regulating-assisted-reproductive-technology-published/>. See also Witzleb, *supra* note 3, at 175.

<sup>26</sup> Witzleb, *supra* note 3, at 184.

<sup>27</sup> Tariq Ahmed, *India: Draft Legislation Regulating Assisted Reproductive Technology Published*, The Law Library of Congress, Global Legal Monitor (Nov. 2, 2015) available at <http://www.loc.gov/law/foreign-news/article/india-draft-legislation-regulating-assisted-reproductive-technology-published/>.

<sup>28</sup> Draft Assisted Reproductive Technology (Regulation) Bill, 2014, Ministry of Health and Family Welfare, available at [http://www.prsindia.org/uploads/media/draft/Draft%20Assisted%20Reproductive%20Technology%20\(Regulation\)%20Bill,%202014.pdf](http://www.prsindia.org/uploads/media/draft/Draft%20Assisted%20Reproductive%20Technology%20(Regulation)%20Bill,%202014.pdf).

“the bill”) bans commercial surrogacy in its entirety.<sup>29</sup> The 2016 Bill was passed by India’s Union Cabinet in August of 2016 and is currently pending.<sup>30</sup> It is expected to be introduced to Parliament sometime in the near future.<sup>31</sup>

In essence, the bill puts a total and complete ban on commercial surrogacy. It states that no clinical establishment or person can undertake commercial surrogacy in any form or “run a racket or an organized group to empanel or select surrogate mothers or use individual brokers or intermediaries to arrange for surrogate mothers and for surrogacy procedures.”<sup>32</sup> The prohibition hopes to eliminate the exploitative practices in clinics and between the middlemen who profit off promoting and transferring women from rural villages to fertility establishments.<sup>33</sup> The bill only allows for “altruistic surrogacy” which means that the surrogate will receive “no charges, expenses, fees, remuneration or monetary incentive of whatever nature, except the medical expenses incurred on the surrogate mother.”<sup>34</sup> The surrogate *must* be a close relative of the intended parents and she must be a married woman who already has a child of her own.<sup>35</sup> Banning of commercial surrogacy will prohibit all surrogacy clinics and medical practitioners from promoting or advertising anything that is aimed at inducing a woman to act as a surrogate, promoting a surrogacy clinic for commercial surrogacy, implying a woman is willing to become a surrogate mother, and also does not allow for clinics to store any embryos or gametes for the purpose of surrogacy.<sup>36</sup> Any person in the field who renders professional services in violation of the Act will be punishable with imprisonment for a term, which shall not be less than five years, and with a fine that may extend to ten lakh rupees (US\$150,000).<sup>37</sup>

While attempting to eliminate problematic practices, the bill does much, much more. The bill places further restrictive regulations on the assisted reproductive technology industry with regulations that make it difficult for even Indian citizens to proceed with altruistic surrogacy.

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<sup>29</sup> *Id.*; The Surrogacy (Regulation) Bill, 2016, Ministry of Health and Family Welfare, available at <http://www.prsindia.org/uploads/media/Surrogacy%20%28Regulation%29%20Bill,%202016.pdf>.

<sup>30</sup> PRS Legislative Research, Pending Bills, The Surrogacy (Regulation) Bill 2016, available at [www.prsindia.org/billtrack/the-surrogacy-regulation-bill-2016-4470/](http://www.prsindia.org/billtrack/the-surrogacy-regulation-bill-2016-4470/).

<sup>31</sup> *Id.*

<sup>32</sup> Sec. 35(1)(a), The Surrogacy (Regulation) Bill, 2016, Ministry of Health and Family Welfare.

<sup>33</sup> Sec. 35(1)(a) and (d), The Surrogacy (Regulation) Bill, 2016, Ministry of Health and Family Welfare.

<sup>34</sup> Sec. 2(b), The Surrogacy (Regulation) Bill, 2016, Ministry of Health and Family Welfare.

<sup>35</sup> Sec. 4(iii)(b)(I), (II), and (III), The Surrogacy (Regulation) Bill, 2016, Ministry of Health and Family Welfare.

<sup>36</sup> Sec. 3(v) and (vii), The Surrogacy (Regulation) Bill, 2016, Ministry of Health and Family Welfare.

<sup>37</sup> Sec. 35(2), The Surrogacy (Regulation) Bill, 2016, Ministry of Health and Family Welfare.

Altruistic surrogacy is only available to heterosexual Indian citizens who have been married for at least five years and who can find a “close relative” who would be willing to act as a surrogate that meets the bill’s other conditions and requirements.<sup>38</sup> The couple must be able to prove that they have been trying to conceive for a full five years before gaining access to surrogacy services.<sup>39</sup> Altruistic surrogacy is, in no circumstances, available for foreign citizens,<sup>40</sup> and absolutely no compensation may be given to the close relative chosen to carry the intended parent’s child.<sup>41</sup> The surrogate must be married, have a child of her own, and pass physical and psychological testing.<sup>42</sup> Linking the bill to marriage effectively will close all doors for citizens of India who are single parents hoping to conceive, to same-sex couples, to LGBT individuals, to divorced or judicially separated couples. And, in an attempt to stop unethical practices of intended parents abandoning or aborting children with defects or disabilities, any clinic or practitioner that engages in prenatal genetic testing will be jailed or fined.<sup>43</sup> Further, certain essential practices in the surrogacy industry, such as the intended parent’s right to visit the surrogate mother or take possession of the child within 72 hours, are not present in the bill.<sup>44</sup> The bill is also void of any terms and conditions involving the breach of surrogacy contracts between the parties.<sup>45</sup>

#### **4. The Use of 1325 and the Need for Regulation**

##### *4.1 How the Banning of Surrogacy Violates UN Recommendations*

As it stands, the Surrogacy Bill of 2016, if passed through Parliament and made into Indian Law, would violate numerous conventions, recommendations, and resolutions of the United Nations. As I will argue below, the bill, designed to protect women from exploitation, is instead amounting them to passive victims or targets, unable to make autonomous choices with their

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<sup>38</sup>Sec. 4 (iii)(b)(I) and (II), Sec. 2(g), The Surrogacy (Regulation) Bill, 2016, Ministry of Health and Family Welfare. See also Dr. Aneesh V. Pillai, *The Surrogacy (Regulation) Bill, 2016: A Critical Appraisal*, LiveLaw (Jan. 22, 2017), available at <http://www.livelaw.in/surrogacy-regulation-bill-2016-critical-appraisal/>.

<sup>39</sup> Sec. 4 (iii)(a)(I), and Sec. 2(p), The Surrogacy (Regulation) Bill, 2016, Ministry of Health and Family Welfare.

<sup>40</sup> Sec. 4 (iii)(c)(II), Sec. 2(g), The Surrogacy (Regulation) Bill, 2016, Ministry of Health and Family Welfare.

<sup>41</sup> Sec. 2(b), The Surrogacy (Regulation) Bill, 2016, Ministry of Health and Family Welfare.

<sup>42</sup> Sec. 4 (iii)(b) (I) and (IV). The Surrogacy (Regulation) Bill, 2016, Ministry of Health and Family Welfare.

<sup>43</sup> Pre-conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, India, 1994, available at <http://pndt.gov.in/writereaddata/mainlinkfile/File53.pdf>. See also Sec. 6(m), The Surrogacy (Regulation) Bill, 2016, Ministry of Health and Welfare; Sec. 65, Draft Assisted Reproductive Technology (Regulation) Bill, 2014, Ministry of Health and Family Welfare.

<sup>44</sup> Dr. Aneesh V. Pillai, *The Surrogacy (Regulation) Bill, 2016: A Critical Appraisal*, LiveLaw (Jan. 22, 2017), available at <http://www.livelaw.in/surrogacy-regulation-bill-2016-critical-appraisal/>.

<sup>45</sup> *Id.*

bodies and fulfill their right to livelihood. Before arguing for the extension of Resolution 1325 beyond its scope of armed conflicts, it is important to see how the bill, and the way in which it was drafted, violates many human rights principals that the United Nations deems essential.

The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) is premised around the idea in the preamble that for full and complete development of a country, the maximum participation of women on equal terms with men is required.<sup>46</sup> This means that women, in their entirety, need not just participate, but must *have* the same rights that men are entitled to. Citizens of India are entitled to a constitutional right to livelihood.<sup>47</sup> Banning the opportunity to engage in surrogacy to earn money would take away this fundamental right for Indian women. It was also violate CEDAW by taking away Indian women's right to access economic opportunities through self- employment.<sup>48</sup> Additionally, the CEDAW grants the right in safeguarding the function of reproduction and the ability to make reproductive choices.<sup>49</sup> The choice to engage in surrogacy, a reproductive choice, is directly tied to fundamental human rights of personal autonomy and the right to privacy.<sup>50</sup> Eliminating this opportunity for women is a step back in human rights progress by amounting women to victims rather than autonomous persons capable of making their own choices.

Moreover, the Universal Declaration of Human Rights, in article 27, states that all persons should be entitled to equally share in the scientific advancements of their society.<sup>51</sup> This is a right that is also declared in the International Covenant of Economic, Social and Cultural Rights that state that all persons have a right to enjoy their society's technological progresses.<sup>52</sup> Not only would this ban cause potential surrogates to be unable to engage in a service that is a product of medicinal and technological advancements, it also takes away this right for intended parents who do not fit the stringent standards that the bill puts forth. Indian couples or individuals who are not

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<sup>46</sup> *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*. 18 December 1979, *United Nations Treaty Series*, vol. 1249, No. 20378, at Preamble.

<sup>47</sup> Constitution of India, 1950, art. 21.

<sup>48</sup> *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*. 18 December 1979, *United Nations Treaty Series*, vol. 1249, No. 20378, at art. 14(e).

<sup>49</sup> *Id.* at art. 11(f).

<sup>50</sup> Pillai, *supra* note 44.

<sup>51</sup> *Universal Declaration of Human Rights*, General Assembly Resolution. 217A (III), U.N. Doc. A/810 (1948), at art. 27.

<sup>52</sup> *International Covenant on Economic, Social and Cultural Rights*, 3 January 1976, *United Nations Treaty Series*, vol. 993, p.3, at art. 15.

heterosexual, married, citizens of India cannot partake in this facet of the ever-changing assisted reproductive technology industry. And, even if a couple does fit the standards of the bill, if they are unable to find a “close relative” willing to do this without compensation, then they too are unable to share in this specific scientific advancement.

The CEDAW specifically calls for all state parties to take appropriate measures, including legislation that ensures the full development and advancement of women.<sup>53</sup> Taking away these rights through the banning of surrogacy does just the opposite. Instead, the bill places women on unequal footing with men, unable to engage in scientific advancements, the ability to make reproductive choices, and the inability to take advantage of economic opportunities through self-employment.<sup>54</sup> Rather, the bill and any further legislation should aim to guarantee women the ability to exercise and enjoy human rights and fundamental freedoms on a basis of equality with men.<sup>55</sup>

#### *4.2 1325 as a calling for Women’s Leadership and Inclusion in the Drafting of Surrogacy*

##### *Regulation*

The United Nation Security Counsel Resolution of 1325 was a pivotal document adopted in October of 2000. The resolution calls upon countries to involve women directly in the peace making process while engaging with peace and security issues. This paper will argue for the extension of United Nations Resolution 1325 beyond its original scope of peace making and security in places of armed conflict. Because the demand for surrogacy will not falter, even with the proposed ban, India is risking pushing the industry underground. The potential for a black-market of surrogacy will endanger the women who the law seeks to originally protect.<sup>56</sup> Middlemen would continue “to reap the benefits and women would lose income and access to adequate prenatal care.”<sup>57</sup> By stretching Resolution 1325 beyond the issues of armed conflict and violent extremism, we can use it as a framework for advocating for a gendered perspective in the

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<sup>53</sup> CEDAW, *supra* note 46, at art. 3.

<sup>54</sup> See generally The Surrogacy (Regulation) Bill, 2016, Ministry of Health and Family Welfare.

<sup>55</sup> CEDAW, *supra* note 51.

<sup>56</sup> Arijit Paladhi, *India’s Commercial Surrogacy Ban Could Spawn a Thriving Black Market*, LiveMint (Nov. 22, 2016), available at <http://www.livemint.com/Opinion/H8ruZUyF594O05poCs4quK/Indias-commercial-surrogacy-ban-could-spawn-a-thriving-blac.html>.

<sup>57</sup> *India Considers Legislation to Ban Commercial Surrogacy*, FSRN Free Speech Radio News, Audio News Segment (Sept. 12, 2016), available at <https://fsrn.org/2016/09/india-considers-legislation-to-ban-commercial-surrogacy/>.

drafting of surrogacy regulation in India. By having women at the peacekeeping table in this sense, India can effectively promote the security of women *before* conflict arises.

Resolution 1325 reaffirms the important role of women in the prevention and resolution of conflicts and stresses the importance of their “equal participation and full involvement in all efforts for the maintenance and promotion of peace and security.”<sup>58</sup> The resolution also stresses the need to increase women’s roles in the decision-making process in conflict prevention and resolution.<sup>59</sup> While the resolution is focused on parties to armed conflict and in regards to forms of violence in situations of armed conflict,<sup>60</sup> I argue that the resolution’s framework can be extended to including women in the process from the beginning and *prior* to conflict. With this early action, we will achieve conflict prevention. By applying the calls of 1325 to India’s surrogacy industry, we can promote the security of women before an underground market emerges. Resolution 1325 demands that state parties *decide to remain actively seized of the matter*, and India can do just that by addressing the issues of these women before conflict arises.<sup>61</sup>

The resolution expresses a deep willingness to incorporate a gender perspective into peacekeeping operation.<sup>62</sup> Involving Indian women in the process of drafting protective regulation for surrogacy could ensure protection of surrogate’s interests and the surrogate child. The policies surrounding this issue need to better respond to women’s individual lived experiences, for “ignoring women’s experiences and views [will keep] society further away from the common solutions so badly needed.”<sup>63</sup> The problem is that India is proposing a ban in hopes of protecting surrogate women from exploitation, but is not considering what these women actually may want or what will realistically protect their interests. Incorporating a gendered perspective means that government committees need to hear directly from the women whose bodies are effected before making any decision about regulating surrogacy. Karuna Nundy, an attorney who practices before the Supreme Court of India, explains that if “we ask

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<sup>58</sup> Security Counsel Resolution 1325, S/RES/1325 (31 October 2000), available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N00/720/18/PDF/N0072018.pdf?OpenElement>.

<sup>59</sup> UN Security Resolution 1325, *supra* note 58.

<sup>60</sup> UN Security Resolution 1325, *supra* note 58, at art. 10.

<sup>61</sup> UN Security Resolution 1325, *supra* note 58, at art. 18.

<sup>62</sup> UN Security Resolution 1325, *supra* note 58, at art. 5.

<sup>63</sup> Charlotte Bunch, *Transforming Human Rights from a Feminist Perspective IN WOMEN’S RIGHTS HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES* 6 (Julie Peters and Andrea Wolper, ed., 1995).

disempowered women what they want, we start to see them as whole people, we start to ask them what they want as citizens. [...] If you have a bunch of commercial surrogates who say ‘No, I want to do this, but it’s not fair, I need more money,’ then that points to a regulated industry.”<sup>64</sup>

By bringing women into the drafting of these regulations, India will likely also ensure that the policies and rules do not violate other aspects of UN recommendations. Resolution 1325 requires that member states adopt gender perspectives to ensure the protection of women particularly as they relate to the constitution.<sup>65</sup> The right to livelihood is a fundamental right in India’s constitution, and incorporating the needs of surrogates (including the desire to participate in the industry) will allow for that right to not be usurped.<sup>66</sup> Further, we can anticipate that other convention requirements, such as CEDAW’s article 11, which gives women the right to protection and safety, will be met because surrogate women will be able to provide perspectives about what specific health safety protocols are necessary.<sup>67</sup> This can be best understood from women’s lived experiences.

The Surrogacy Bill will require that the Central Government constitute a Board, to be known as the National Surrogacy Board, which will exercise the powers of the Act.<sup>68</sup> The functions of the Board will include advising the government on policy matters relating to surrogacy, reviewing and monitoring the implementation of the Act, and laying down codes of conduct for persons working at surrogacy clinics.<sup>69</sup> The Board will consist of a variety of officials such as the Minister of Health and Family Welfare, Director General of Health Services, and medical geneticists, gynecologists, and social scientists.<sup>70</sup> Resolution 1325 urges member states to ensure increased representation of women at all decision-making level (including regional institutions)<sup>71</sup> and expresses its willingness to ensure that Security Counsel missions consult with local women’s groups.<sup>72</sup> Using this framework of Resolution 1325, India can and should, include

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<sup>64</sup> Julie McCarthy, *Why Some of India’s Surrogate Mom’s are Full of Regret*, goats and soda: NPR (Sept. 18, 2016) audio transcript available at <http://www.npr.org/sections/goatsandsoda/2016/09/18/494451674/why-some-of-indias-surrogate-moms-are-full-of-regret>.

<sup>65</sup> UN Security Resolution 1325, *supra* note 58, at art. 8.

<sup>66</sup> Constitution of India, 1950, art 21.

<sup>67</sup> CEDAW, *supra* note 46, at art. 11.

<sup>68</sup> Sec. 14, The Surrogacy (Regulation) Bill, 2016, Ministry of Health and Family Welfare.

<sup>69</sup> Sec. 22, The Surrogacy (Regulation) Bill, 2016, Ministry of Health and Family Welfare.

<sup>70</sup> Sec. 14(2), The Surrogacy (Regulation) Bill, 2016, Ministry of Health and Family Welfare.

<sup>71</sup> UN Security Resolution 1325, *supra* note 58, at art. 1.

<sup>72</sup> UN Security Resolution 1325, *supra* note 58, at art. 15.

local women, specifically from areas where clinics frequently draw from, in the decision-making levels of discussion pertaining to this industry. While the Bill does require three women members of Parliament to be on the National Surrogacy Board, this does not adequately represent and account for the lived experiences of surrogate women from rural parts of the country. The women of Parliament are highly educated and likely live an exceedingly more privileged life than surrogates. These women likely do not have real insight into the health and safety needs of surrogate women, and including them on the Board is not an adequate solution. UN Security Recommendation No. 30 recognizes that women are not a homogenous group and their experiences of conflict and specific needs in post conflict contexts are diverse.<sup>73</sup> Taking this realization into account, India would benefit from the recommendation of 1325 by including local surrogate women in the drafting of regulation that will directly their health, safety, and livelihood.

## 5. Conclusion

India's multi-billion dollar surrogacy industry is not expected to wane anytime soon, even with the introduction of a Surrogacy Ban with the Surrogacy Bill of 2016. Taking into consideration the requirements of United Nations international law, India must reimagine their approach in attempting to eliminate exploitation and unethical practices in the Assisted Reproductive Technology industry. A strict ban on commercial surrogacy, that only allows surrogacy for Indian heterosexual couples that fit stringent standards, will no doubt move the surrogacy industry underground, creating a dangerous black-market that will further exploit the women that this bill aims to protect. Using UN Resolution 1325 as a framework for reimaging surrogacy legislation will allow for proper and effective regulations that eliminate unethical practices and ensure the safety and security of Indian women surrogates. Incorporating the recommendations of Resolution 1325 will bring surrogate women directly to the table in drafting these protections and will effectively *prevent* conflict before it arises.

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<sup>73</sup> General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations, CEDAW/C/GC/30 (18 October 2013), available at <http://www.ohchr.org/documents/hrbodies/cedaw/gcomments/cedaw.c.cg.30.pdf>.

## **INTRODUCING A TRANSGENDER PERSPECTIVE INTO THE WOMEN, PEACE, AND SECURITY AGENDA**

Satyasiri Atluri

### **1. Introduction**

On 31<sup>st</sup> October, 2000, the United Nations Security Council passed Security Council Resolution 1325 (UNSCR 1325), on “Women and Peace and Security” (WPS)<sup>1</sup>. This was the first resolution that brought attention to gender issues and experiences of women and girls in conflict; it recognized women not just as victims but called for their inclusion as equal participants in peace building processes, underscoring their importance for creating a culture of peace. It was the first resolution to consider the gendered experiences of war, by recognizing the specific ways in which violence against women is used to perpetuate violence and conflict. However, the gendered expression of violence became limited to violence against women and the violence experienced by transgender women because of their gender and sexual orientation largely remained ignored by the international peace and security community.

The Women, Peace and Security agenda of Security Resolution 1325 is expansive and ambitious. But still, as the researcher shows in this paper, the Women, Peace and Security agenda has a much-noted gap between its ambitions and current realities. The researcher also shows that this is not merely due to imperfect implementation; rather it hits the heart of what the Women, Peace and Security Agenda is and what it should be.

In this paper, the researcher explores the implementation of the Women, Peace and Security under the Security Council Resolutions, the artificial limitations placed on the interpretation of the Resolutions, and the dynamics of its applicability to transgender women. To do this, this researcher in the first section looks at the violence perpetrated on transgender women in normal situations. In the next section, the researcher explores how that violence is exacerbated in conflict times. In the same section, the researcher also observes the treatment of transgender women in emergency relief works to understand the problems faced by them when displaced in conflict zones and as refugees. In the following section, the researcher examines how the present framework of women's, peace and security under Security Resolution 1325 allows for the inclusion of transgender women as a

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<sup>1</sup> U.N.S.C. Res. 1325 (Oct. 31, 2000)

part of the framework. In addition, the researcher makes a normative claim for inclusion of transgender women in the peace and security agenda as well as argues for their inclusion in Transitional Justice mechanism and constitutional making for ensuring sustainable peacebuilding in post-conflict regions. Before concluding, the researcher reports and observes the case study of Columbia for inclusion of LGBTQ groups in its peace agreement to make a case for inclusion of transgender perspective in the international framework for peace and security. The researcher concludes by giving recommendations for the inclusion of transgender women in the Women's, Peace and Security framework.

In this paper, the researcher uses transgender as a broad umbrella adjective intended to capture the multiple forms of sex and gender identities that are taken by their practitioners. The researcher uses transgender women to describe anyone who lives as a woman that they were not perinatally assigned or as women who are gender non-confirming. Transgender women may be known through different names that are based in local culture.

Though this paper focusses on transgender women, the argument made applies to lesbians, bi-sexual women and queer women; who are gender and sexuality non-confirming. The reason the researcher focuses on transgenders in this paper is because of the unique challenges faced by transgender women in accessing the rights under CEDAW and the Security Council Resolutions as they not considered “women” by large parts even of the international community and radical feminists. Transgender women are also easy targets to the perpetrators of violence against them due to their easy visibility compared to other gender and sexual minority women.

## **2. Violence against Transgender Women**

Gender based violence is recognized as violence against women and persons who do not confirm to the social norm of gender binary.<sup>2</sup> Violence against LGBT persons is recorded in all regions of the world.<sup>3</sup> Transgender women in particular are often severely marginalized and are susceptible to violence due to their easy visibility. They are frequently targets of violence in the forms of physical violence including assaults, murder, rape, sexual assaults and kidnapping and

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<sup>2</sup>They are recognized in the terminology of lesbians, gays, bisexuals and transgender (LGBT) in the international community. However, there is a growing recognition for fluidity of gender and sexuality and the restrictions of such labels on identity.

<sup>3</sup>U.N, Report of the Office of the United Nations High Commissioner for Human Rights, Discrimination and violence against individuals based on their sexual orientation and gender identity, 29<sup>th</sup> Sess., U.N.Doc. A/HRC/29/23 (4<sup>th</sup> May, 2015).

psychological violence including harassment and discrimination. The Trans Murder Monitoring Project reported that between 2008 and 2016, there have been about 2115 killings of trans and gender diverse persons in 65 countries worldwide.<sup>4</sup> This number is not representative of all the killings of Transgender persons as it includes only the ones found on the internet and reported by activists. This number may be very underestimated as there were 25 reported murders of transgender women in the United States alone in 2016. It is also important to note that transgender women are more susceptible to violence due to their easy visibility. It is seen from the 2016 records from the United States that almost all the deaths were of transgender women, and only 3 out of the 25 murders were of transgender men.<sup>5</sup> Transgender women are also greatly at risk of sexual assault and rape which is not recognized as rape in a lot of countries as they are not considered women.<sup>6</sup>

Discrimination by the state and non-state actors excludes transgender women from access to education and employment, which leads them to engage in begging and survival sex work. This puts transgender women at further risk of abuse as the sex work is conducted in especially precarious conditions. Discrimination by state manifests not only in the actions of the state actors and law enforcement but also by the laws criminalizing persons based on gender and sexual orientation. Nearly 76 countries still criminalize consensual same-sex relationships between adults<sup>7</sup> which also affects transgender women due to their survival sex work. Such laws legitimize community violence and abuse of power by law enforcement. Criminalization and laws that do not recognize their identified gender as women further makes transgender women vulnerable to sexual abuse as they cannot make a complaint or seek justice for the violence against them.

The next section shows that Transgender women face exacerbated violence in conflict regions.

### **3. Exacerbated Violence Against Transgender Women In Conflict**

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<sup>4</sup> Trans Murder Monitoring Project, (April. 2, 2017, 2:05 AM) <http://transrespect.org/en/research/trans-murder-monitoring/>

<sup>5</sup> News report, Human Rights Campaign, Violence Against the Transgender Community in 2016 (March. 16, 2017. 11:20 AM) <http://www.hrc.org/resources/violence-against-the-transgender-community-in-2016>

<sup>6</sup> Lara Stemple, Male Rape and Human Rights, (April. 2, 2017, 3:40 AM) [http://scienceblogs.de/geograffitico/wp-content/blogs.dir/70/files/2012/07/i-e76e350f9e3d50b6ce07403e0a3d35fe-Stemple\\_60-HLJ-605.pdf](http://scienceblogs.de/geograffitico/wp-content/blogs.dir/70/files/2012/07/i-e76e350f9e3d50b6ce07403e0a3d35fe-Stemple_60-HLJ-605.pdf)

<sup>7</sup> OHCHR Fact sheet on Criminalization (April 3, 2017, 10:30 AM) [https://www.unfe.org/system/unfe-43-UN\\_Fact\\_Sheets\\_-\\_FINAL\\_-\\_Criminalization\\_\(1\).pdf](https://www.unfe.org/system/unfe-43-UN_Fact_Sheets_-_FINAL_-_Criminalization_(1).pdf)

Conflict heightens pre-existing inequalities and prejudices, including those against transgender women.<sup>8</sup> Prior to conflict, transgender women like other LGBTQ and marginalized people find ways of navigating the discrimination and violence.<sup>9</sup> Transgender women create safe spaces for themselves by living in communities of transgender women. Conflict scatters these safe zones and communities that transgender women create for themselves. Disruption of these safe zones and community support puts them at heightened risk of violence.

Due to the discrimination by laws and community, transgender women are also not in a position to seek help as other displaced persons and refugees. There is very limited data about transgender women in conflict situations as they are absent in the current women, peace and security monitoring. However, research reports on how sexual and gender minorities experience discrimination in receiving humanitarian relief work in emergencies caused by natural disasters show the kind of problems transgender women face in conflict regions too in receiving relief. Transgender people (should be read as transgender women as they are the ones immediately identifiable by their clothing) reported that they were denied entry to IDP camps after the floods in Pakistan because their government ID's did not match their appearance. Transgender women in Nepal<sup>10</sup> reported discrimination in quantity of food received by them, abuse and neglect in the aftermath of floods.<sup>11</sup> Transgender women also face discrimination and continued problems in rehabilitation in post-emergency situations as seen in the state of Tamil Nadu in India after the Tsunami in 2004. They faced homelessness and were denied access to health care and basic services like food due to the fact that their identity documents did not correspond with their identified gender.<sup>12</sup>

Transgender women also face acute problems in receiving safe shelter in refugee camps. In most regions, they do not pass as women and so are forced to stay in the same shelter as men,

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<sup>8</sup> U.N, Report of the Office of the United Nations High Commissioner for Human Rights, Discrimination and violence against individuals based on their sexual orientation and gender identity, 29<sup>th</sup> Sess., U.N.Doc. A/HRC/29/23 (4<sup>th</sup> May, 2015).

<sup>9</sup> Steeve Laguerre, Cary Alan Johnson, Samara Fox, Reginald Dupont and Marcelo Ferreyra, The Impact of the Earthquake, and Relief and Recovery Programs on Haitian LGBT People (March 25, 2017, 3:00PM), <https://www.outrightinternational.org/sites/default/files/504-1.pdf>

<sup>10</sup> Male bodied-feminine transgenders known as Natuwas

<sup>11</sup> Kyle Knight and Courtney Welton-Mitchell, Gender identity and disaster response in Nepal- FMIR report. (March 25, 2017, 3:10PM) <http://www.fmreview.org/sites/fmr/files/FMRdownloads/en/sogi/knight-weltonmitchell.pdf>

<sup>12</sup> Jennifer Rumbach and Kyle Knight, Sexual and Gender Minorities in Humanitarian Emergencies 33-74, (Larry W. Roeder. Jr., Issues of Gender and Sexual Orientation in Humanitarian Emergencies: Risks and Risk Reduction, 2014)

increasing their risk of assault, harassment and abuse.<sup>13</sup> In 2010, the Special Rapporteur to the OHCHR noted that, there was a strict hierarchy in detention facilities and transgenders persons were at the bottom of the hierarchy and faced double or triple discrimination. It also highlighted that transgender women were likely to face physical and sexual abuse in general prisons.<sup>14</sup> A 2015 UNHCR report on “Protecting Persons with Diverse Sexual Orientations and Gender Identities” recognized that there was a very low degree of acceptance, and high level of abuse and exploitation of LGBTQ persons in the accommodation facilities in refugee camps by both, detention officers and inmates.<sup>15</sup> The report released a training tool on LGBTQ issues in refugee work of the UNHCR. However, there is no focused or clear approach in the WPS agenda for tackling targeted violence against transgender women and remains largely ignored through all the 8 resolutions of the Security council’s resolutions on women’s, peace and security.<sup>16</sup>

The next section looks at how transgender women are excluded from the Peace and Security agenda and how their inclusion is not only necessary for their security but also for ensuring security of all women as their inclusions works towards gender mainstreaming.

#### **4. Inclusion of Transgender perspective in the dialogue on peace and security**

Women and gender are often used interchangeably in the different Security Council’s Resolutions on Peace and Security. This framing of the Resolutions brings the question of which women get included in the framework of Women’s, Peace and Security. While Resolution 1325 draws attention to the issue of gender based violence in conflict, it restricts the definition of gender and limits the scope of its application to cisgender women. This eliminates women who do not confirm to the gender binary created by social norms. Transgender women are extremely vulnerable to targeted violence for this non-conformity. However, this differentiation is unwarranted as the nature and causes of violence against transgender women is not unlike the violence against women. As Carol Cohn notes that gender is “*at heart, a structural power*

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<sup>13</sup> Supra, Note. 11.

<sup>14</sup> U.N, Report of the Office of the United Nations High Commissioner for Human Rights, Discrimination and violence against individuals based on their sexual orientation and gender identity, 29<sup>th</sup> Sess., U.N.Doc. A/HRC/29/23 (4<sup>th</sup> May, 2015).

<sup>15</sup> Nishin Nathwani, Protecting persons with diverse sexual orientations and gender identities, A Global Report on UNHCR’s Efforts to Protect Lesbian, Gay, Bisexual, Transgender, and Intersex Asylum-Seekers and Refugees, December 2015.

<sup>16</sup> U.N. Security Council, Res. 1325 (Oct. 2000), Res. 1820 (June 2008), Res. 1888 (Sept. 2009), Res. 1889 (Oct. 2009), Res. 1960 (Dec. 2010), Res. 2106 (June 2013), Res. 2122 (Oct. 2013) and Res. 2242 (Oct. 2015)

*relation*”<sup>17</sup>. This hierarchy of masculine over feminine is caused due to the patriarchal creation of a gender binary and hegemony of masculinity. Transgender women transgress the strict confines of the gender binary and are ‘punished’ for it by using the systematic means of violence and rape to maintain existing gender power structures. Human Rights Watch reported that in Iraq “*Fear of “feminized” men reveals only hatred of women.*”<sup>18</sup> To resolve the present gender dynamics and oppressions that transgender women face, it is important to understand and recognize the multiple levels of intersectionality among women having a different gender and sexual orientation. Their identity is central to their experiences of violence and remains unexamined for most part in the international peace and security framework. The limiting of the security council resolutions’ for peace and security to only heterosexual cisgender women in the understanding of gender, eliminates transgender women that face multiples levels of oppression due to their intersectionality based on their gender identity and sexual orientation. Whereas, women who face intersectionality based on race or other factors are included within the WPS framework. This is in contravention of the understanding of equality for all women written in the Convention of the Elimination of All Forms of Discrimination Against Women (CEDAW).

In spite of the adoption of resolution 1325 and the hopes it generated to advance gender equality at the UN, its interpretation is not understood in the same way as it should be under the CEDAW. As Cynthia Enloe wrote, “*Perhaps what was not grasped [following the adoption of 1325], and is still not absorbed by the members of the delegations or by the thousands of officials worldwide who found 1325 lying in their inboxes, was the genuinely radical understanding that informed the feminist analysis undergirding 1325.*”<sup>19</sup> In its essence, Security Council Resolution 1325 is reflective of the gender equality formally entrenched in Article 2 CEDAW. The CEDAW recognizes the dynamics of sex and gender discrimination and tries to continuously advance gender rights by addressing newly identified issues. In General Recommendation No.28, the CEDAW committee observing that intersectionality approach should be used in understanding Article 2, clarified that “*The discrimination of women based on sex and gender is inextricably linked with*

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<sup>17</sup> Carol Cohn, ‘Women and wars: toward a conceptual framework’, in Carol Cohn, ed., *Women and wars* (Cambridge: Polity, 2013), p. 4.

<sup>18</sup> Human Rights Watch, They want us exterminated, (April 3, 2017, 9:10 PM), <https://www.hrw.org/sites/default/files/reports/iraq0809webwcover.pdf>

<sup>19</sup> Enloe, What Is Patriarchy Is “the Big Picture”? An Afterword, (Dyan Mazurana, Angela Raven-Roberts and Jane Parpart (eds), *Gender, Conflict and Peackeeping*, Lanham, MD: Rowman & Littlefield, 2005) p.281.

*other factors that affect women, such as race, ethnicity, religion or belief , health, status, age, class, caste, and sexual orientation and gender identity.”* Resolution 1325 and subsequent resolutions should therefore be understood in its spirit rather than the restrictive interpretation being given to gender as equating with heterogeneous cisgender women in order to promote the security of all women, regardless of their gender identity and sexual orientation.

It may be argued that violence against transgender women is in small numbers and does not need to be addressed. Then again, lack of data leaves this argument unverifiable. This lack of data on sexual and gender based violence against transgender women itself shows serious lapses in the monitoring and implementation and of the WPS agenda for protection and prevention of violence against transgender women in conflict zones.

The question of whether transgender women are included in women’s advocacy has been highly contested in feminist literature. However, including the stories of lesbian, bisexual and especially transgender women in the conversation about WPS provides a more complete picture of how gender matters to women in conflict. Sexual orientation and gender identity is an important dimension of conflict for everyone. Some, like Dubravka Zarkov argue that including a more intersectional approach to understanding sexuality will reveal that it is not only women who are victims of sexual violence in conflict.<sup>20</sup> Such an approach is essential for understanding the nature and causes of violence in conflict regions. Peace and security provisions today assume that everyone is cisgender or heterosexual and fail to take trans perspective into account. Including Transgender perspective brings into the women’s peace and security agenda, a more gender responsive approach that works towards achieving gender mainstreaming in the WPS agenda. In fact, inclusion of a transgender perspective to women’s peace and security agenda is a pre-requisite for mainstreaming gender in all aspects of the peace processes.

The next section talks of another important aspect of the peace process - truth commissions, transitional justice mechanisms and how the period of transition provides for an opportunity to create a peaceful, just and equal society by including transgender women in the peace negotiations.

## **5. Inclusion of Transgender women in Transitional Justice mechanisms and peace processes for a peaceful and just society**

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<sup>20</sup> Dubravka Zarkov, The body of the other man: sexual violence and the construction of masculinity, sexuality and ethnicity in Croatian media, (Caroline Moser and Fiona Clark, eds, Victims, perpetrators or actors? Gender, armed conflict, and political violence, 2001) p. 73

Truth-seeking commissions are the ideal platform for bringing to the fore the ignored violence against Transgender women. Fobear points to the fact that LGBTQ people have never been included in truth seeking commissions to address the years of systemic violence they were subjected to.<sup>21</sup> The goal of the truth commissions is to create accurate narratives that are inclusive of all violence especially the marginalized and tortured communities. It presents an opportunity for the disenfranchised groups like the Transgender women to voice their stories and create their own space in the society. Inclusion of their stories gives recognition of the complex experiences and offers a comprehensive approach to “*reveal the truth of history and thereby bringing a more democratic truth to the forefront.*”<sup>22</sup> Accordingly, in addition to creating a more inclusive framework that benefits transgender women, inclusive truth commissions also uphold the international right to truth recognized under various international principles.<sup>23</sup>

Post-conflict reconstitution and reorganization is a complex process. Inclusion of transgender women in peace processes including constitutional making is important as Simmons notes that societies “while in transition, are more conducive for the conception of new legal norms”.<sup>24</sup> Over time, these legal norms will result in internalization as social norms.<sup>25</sup> Issues related to sexual and gender based violence faced by transgender women are more likely to be recognized during peace processes and subsequent institution-building if they are present and able to make their contribution to the negotiation and planning of the society’s norms for peace in post- conflict. Hence, widening the women’s, peace and security framework to include all marginalized communities including transgender women in all institutions of peacebuilding including the reformation of institutions is imperative for ensuring equality and non-discrimination in line with the International principles also included in the CEDAW.

The next section analyses the Colombian peace process where the LGBTQ community were for the first time officially involved in the negotiation of the peace agreement.

## **6. Inclusion of LGBTI in the Colombian peace process: A case study**

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<sup>21</sup> Katherine Fobear, Queering Truth Commissions, *Journal of Human Rights Practice*, (June 2013) 1-18. (April 6, 2017, 11:05 PM). doi: 10.1093/jhuman/hut004.

<sup>22</sup> *Id. Pg. 53*

<sup>23</sup> Reports of the UN High Commissioner for Human Rights, U.N. Docs. A/HRC/5/7 (2007), A/HRC/12/19 (2009), A/HRC/15/33 (2010).

<sup>24</sup> Simmons, Mobilizing for Human Rights (Moravcsik, ‘Origins of Human Rights Regimes Democratic, Delegation in Postwar Europe, 54(2) INTL ORG. 217 (2000)).

<sup>25</sup> Finnemore, Martha, and Kathryn Sikkink. “International Norm Dynamics and Political Change.” *International Organization*, vol. 52, no. 4, 1998, pp. 887–917

The Colombian Peace Agreements marked the first time where lesbian, gay, bisexual and transgender communities were included in the official peace process for voicing the violence against them in the conflict period and collaborating on the contents of the peace agreement. A gender sub-committee was constituted to ensure that the agreement had “adequate gender focus.”<sup>26</sup> This sub-commission was to represent the interests of women and LGBTQ communities. There was opposition to the inclusion of LGBTQ communities from conservative groups who argued that ensuring rights to LGBTQ would lead to degradation of Columbian family values. This is considered to be one of the factors for the failure of the referendum on the peace agreement. Even then, the rights ensured to LGBTQ communities remained in the peace agreement due to the strength of the community groups. Columbia serves as a precedent for women’s gender and sexual orientation to become a part of the peace process.<sup>27</sup> However, the opposition shows that there is a long way to go and we need a bold and loud support for local LGBTQ groups and Transgender groups in particular for encountering the opposition and engaging of voices of Transgender women and gender non-confirming women in the International Peace and Security Agenda.

The next section concludes this paper with recommendations for better inclusion of transgender women in International Women’s Peace and Security agenda.

## **7. Conclusion and Recommendations**

Across the world, transgender women face discrimination and abuse from the state and the society. The levels of physical and sexual violence that is perpetrated on them is ignored in peace intervention projects and post-conflict peacebuilding. Their exclusion from the Women’s Peace and Security operations that uses the WPS architecture causes further harm to transgender women who are already subjected to extreme violence. A critical gender perspective in women’s peace and security agenda is required to address transphobic violence in conflict regions. Inclusion of transgender perspective also promotes gender mainstreaming for ensuring equality to all women by breaking the gender binary. As the CEDAW guarantees equality irrespective of gender and sexual orientation; accordingly, the following recommendations are respectfully submitted for consideration for ensuring security of all women including transgender women in conflict and

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<sup>26</sup> Maier, Nicole, "Queering Colombia's Peace Process: A case study of LGBTI inclusion", Capstone Collection. Paper 2886. 2016.

<sup>27</sup> *Id.*

inclusion of transgender women for instituting constitutional systems based on equality and non-discrimination.

- ***Make clear that gender includes transgender women.*** Women and gender are used interchangeably in the Security Council's Resolutions on peace and security. To include transgender women, it is important to use gender in a way that is inclusive of transgender women.
- ***Include transgender women in developing the women's, peace and security projects.*** Including only cisgender women in the developing, implementing and monitoring of WPS projects does not address the unique challenges faced by transgender women. It must also be remembered that transgender population varies from region to region and so the challenges faced by them are also different. Efforts to achieve gender equality and mainstreaming will remain inadequate unless local transgender women are included in the peace processes.
- ***Women's, Peace and Security stakeholders should make efforts for proper reporting of transgender women in conflict.*** It becomes impossible to respond to the situation of transgender women in conflict without having proper data on their presence in conflict areas and the violence faced by them. Civil society organizations and other bodies reporting to the WPS body should make reports inclusive of transgender women living in violence.
- ***Should make reports on best practices for addressing the needs of Transgender women in conflict.*** It is difficult to immediately respond to the issues of transgender women in conflict regions in emergency situation. There should be a set of best practices developed for identifying and responding to the issues faced by transgender women. One important aspect of the best practices should be to develop quick, transparent and accessible procedures based on self-determination for changing the name and registered sex of a transgender person on birth certificates, identity cards, passports, educational certificates and other similar documents for persons who do not possess any identity document that corresponds with their identified gender.
- ***Establish safe spaces for Transgender women in displacement.*** Many transgender women are placed in male shelters and become victims of further violence in displacement and refugee camps with only a male-female segregation shelters. It is important to not put them in male shelters but ensure safe spaces for them.

- ***There should be targeted programs for Transgender women.*** Transgender women are not only subject to sexual and physical assault because of their gender identity, but they may also be refused services available to other cisgender women survivors. Therefore, there is a need to identify and provide targeted programs for their rescue and rehabilitation.

# **WOMEN CANNOT BE AT THE TABLE IF THEY CANNOT ENTER THE BUILDING: DISABILITY IN THE WOMEN, PEACE, AND SECURITY AGENDA**

*Heather Swadley*

## **1. Introduction**

In 2000, the UN Security Council passed the landmark Resolution 1325,<sup>1</sup> which formally codified the international community's commitment to the Women, Peace and Security agenda. The resolution not only highlights the disproportionate effects of armed violence on women, but also recognizes the forgotten role women play in peacebuilding processes. Despite the vital role women have played in creating and sustaining peace and mounting evidence suggesting that peace agreements are more stable when women are at the table,<sup>2</sup> women are rarely involved in formal peace agreements. Since the passage of Resolution 1325,<sup>3</sup> specific references to women's concerns in formal peace agreements have increased dramatically. 67 per cent of all power-sharing agreements now mention quotas for women's political participation.<sup>4</sup> The number of peace processes that included women in senior positions increased from 36 per cent in 2011 to 75 per cent in 2014, and women played key roles in recent formal conflict resolution processes in Colombia and the Philippines.<sup>5</sup> That said, much work has yet to be done.

Despite the inclusive aims of the Women, Peace and Security agenda, the voices of many women who experience multiple and intersecting forms of discrimination are often forgotten. This paper focuses on women with disabilities. Disability is not mentioned in Resolution 1325, or the three subsequent resolutions on the subject: 1820,<sup>6</sup> 1888,<sup>7</sup> and 1889.<sup>8</sup> Resolutions 1894<sup>9</sup>

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<sup>1</sup> Security Council resolution 1325, *Women, Peace, and Security*, S/RES/1325 (31 Oct. 2000), available from <https://daccess-ods.un.org/TMP/9580551.98192596.html> [hereinafter *Res. 1325*]

<sup>2</sup> UN Women, PREVENTING CONFLICT, TRANSFORMING JUSTICE, SECURING THE PEACE: A GLOBAL STUDY ON THE IMPLEMENTATION OF UN SECURITY COUNCIL RESOLUTION 1325, <http://wps.unwomen.org/en> (last visited Apr 27, 2017). [hereinafter *Preventing Conflict*]

<sup>3</sup> RES 1325

<sup>4</sup> PREVENTING CONFLICT

<sup>5</sup> PREVENTING CONFLICT

<sup>6</sup> Security Council resolution 1820, *Women, Peace and Security*, S/RES/1820 (19 June 2008), available from <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/CAC%20S%20RES%201820.pdf> [hereinafter *Res. 1820*]

<sup>7</sup> Security Council resolution 1888, Women, Peace and Security, S/RES/1888 (30 Sept. 2009), available from [www.securitycouncilreport.org/atf/cf/%7B65BFCF9B.../WPS%20SRES%201888.pdf](http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B.../WPS%20SRES%201888.pdf) [hereinafter *Res. 1888*]

<sup>8</sup> Security Council resolution 1889, Women, Peace and Security, S/RES/1889 (5 October 2009), available from [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/1889\(2009\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1889(2009)) [hereinafter *Res. 1889*]

<sup>9</sup> Security Council resolution 1894, on Protection of Civilians in Armed Conflict (11 November 2009), available from <http://www.un.org/ruleoflaw/files/Security%20Council%20Resolution%201894.pdf> [hereinafter *Res. 1894*]

and 1960<sup>10</sup> were the first resolutions concerning the women, peace, and security agenda to mention disability; however, these resolutions primarily emphasize the importance of *protecting* women with disabilities rather than viewing them as active participants in the peace-building process.<sup>11</sup> Women with disabilities are even less likely than women without disabilities to be included in formal peace agreements; although, the overall participation rate is difficult to quantify, as women with ‘invisible disabilities’ and psycho-social disabilities may be reluctant to self-identify. Furthermore, disaggregated data on the subject simply has yet to be collected.

The failure to include women with disabilities in the Women, Peace and Security agenda has adverse consequences for the rights and dignity of disabled women. Women with disabilities experience multiple forms of discrimination, both in armed conflict and peace agreements.

Violence and poverty are both causes and consequences of disability.<sup>12</sup> Women are more likely to become disabled as the result of armed conflicts, and women with disabilities are more prone to violence, especially sexual and gender-based violence, during episodes of armed conflict.<sup>13</sup> Women with disabilities also frequently lack access to justice and rehabilitation programs post-conflict due to the inaccessibility of many transitional justice mechanisms.<sup>14</sup> Moreover, society tends to treat women with disabilities, especially intellectual or psycho-social disabilities, as hapless victims who need protection. Their voices and expressed preferences are frequently discounted, their contributions to public life devalued. It is for this reason that the United Nations Convention on the Rights of Persons with Disabilities (CRPD)<sup>15</sup> advocates for supportive and empowering decision-making processes, rather than protective substitute decision-making. For these reasons, it is important to consider the unique experiences and perspectives that women with disabilities can bring to the table if empowered to participate in formal peace processes.

This paper contends that we do not merely have a human rights obligation to include women with disabilities in peace processes—there are also strong practical arguments for more

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<sup>10</sup> Security Resolution 1960, Women, Peace and Security (16 December 2010), available from [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/1960\(2010\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1960(2010)) [hereinafter Res. 1960]

<sup>11</sup> Stephanie Ortoleva, *Women with Disabilities: the Forgotten Peace Builders*, LOYOLA LA INT'L AND COMP LAW REVIEW (2010). [hereinafter Ortoleva 2010]

<sup>12</sup> Rangita De Silva de Alwis, *Mining the Intersections: Advancing the Rights of Women and Children with Disabilities Within an Interrelated Web of Human Rights*, PAC RIM L & POL'Y JOURNAL (2009).

<sup>13</sup> ORTOLEVA (2010).

<sup>14</sup> Pearl Gottschalk, “‘How Are We in This World Now?’ Examining the Experiences of Persons Disabled by War in the Peace Processes of Sierra Leone,” 2007.

<sup>15</sup> UN GENERAL ASSEMBLY, *Convention on the Rights of Persons with Disabilities* (24 Jan. 2007), available at <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx>.

inclusive peace processes. Robust data documenting women with disabilities' impact on peace agreements does not exist, primarily because women with disabilities have been routinely excluded from peace processes. However, anecdotal evidence, paired with a qualitative analysis of existing peace agreements suggests that mainstreaming disability by treating women with disabilities as integral parts of the peace-building process can both avert violent conflict and create more sustainable peace. Section I outlines the legal and human rights framework for including women with disabilities in peacebuilding. Section II performs a quantitative and qualitative analysis of Comprehensive Peace Agreements (CPAs) to assess the ways in which disability is currently addressed in formal peace processes. Section III draws a link between including a disability lens in peacebuilding and the sustainability of formal peace agreements. Section IV highlights Uganda's peace process as an international example of best practice, while acknowledging potential for progress. Section V concludes with a series of policy recommendations aimed at enhancing the accessibility of formal peace processes and adopting a disability lens when talking about women, peace and security.

## **2. Finding a Basis for Intersectionality in International Human Rights Law**

Including women with disabilities in formal peace processes fulfils human rights goals and contributes to the broader goal of creating sustainable peace. Mainstreaming, or embedding the goals of the CEDAW and CRPD into all aspects of policy-making, requires attention to the unique concerns of women with disabilities. Resolution 1325 seeks to mainstream gender into the peace and security agenda by promoting representation for women at all levels of decision-making; however, the resolution fails to account for heterogeneity within the category of women. This paper contends that women with disabilities have unique needs and experiences that must be taken into account throughout the peacebuilding process. There is a tendency to silo the enforcement and implementation of the CRPD,<sup>16</sup> CRC,<sup>17</sup> and even the CEDAW,<sup>18</sup> despite the productive potential of reading these treaties in tandem.<sup>19</sup> In order to ensure the integration of

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<sup>16</sup> Id.

<sup>17</sup> UN GENERAL ASSEMBLY, *Convention on the Rights of the Child* (20 Nov. 1989), available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>.

<sup>18</sup> UN GENERAL ASSEMBLY, *Convention on the Elimination of All Forms of Discrimination Against Women* (18 Dec. 1979), available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx>.

<sup>19</sup> Rangita de Silva de Alwis suggests reading the CEDAW, CRPD and CRC together can strengthen the implementation of all three treaties, as well as fill in gaps created by reading any one of them in isolation. For example, the CRC focuses on risk factors that may lead to or compound disabilities, such as child marriage or inequalities in health care provision. Moreover, if each body responds to multiple and intersectional forms

disability rights into conventional human rights law and practice, it is vital to consider the CRPD as a guiding principle in all matters of policy.<sup>20</sup> Excluding the specific needs and experiences of women with disabilities from the women, peace, and security agenda constitutes a grave oversight.

Representation is a human rights concern. Article 4, paragraph 1 of the CEDAW requires both a *de jure* and *de facto* equality between women and men. In General Recommendation No. 25, the CEDAW Committee interprets this requirement to mean that, “States parties should aim to accelerate the equal participation of women in the political, economic, social, cultural, civil, or any other field” and further notes that women who face multiple and intersecting forms of discrimination, such as women with disabilities, may need special temporary measures to ensure their equal access to public life.<sup>21</sup> The General Recommendation suggests that States parties are obligated to take special temporary measures, including the implementation of numerical quotas, to remedy systematic underrepresentation. The CRPD Committee also expresses concerns about the representation of women and girls with disabilities in General Comment No. 3, stating that “the voices of women and girls with disabilities have historically been silenced, which is why they are disproportionately underrepresented in public decision-making.”<sup>22</sup> In General Comment No. 1, which relates to equality before the law, the CRPD Committee states unequivocally that persons with disabilities should be supported and enabled to participate in public life, including holding public office.<sup>23</sup> Reading the CRPD in tandem with the CEDAW therefore suggests that states ought to take special temporary measures to ensure the full and equal participation of

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discrimination in its individual communications and jurisprudence, enforcement mechanisms for all three treaties will be enhanced.

<sup>20</sup> Skarstad, Kjersti and Stein, Michael Ashley, *Mainstreaming Disability in the United Nations Treaty Bodies* (August 12, 2016). JOURNAL OF HUMAN RIGHTS, Forthcoming, available at SSRN: <https://ssrn.com/abstract=2822264>

<sup>21</sup>United Nations, CEDAW Committee, *General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures* (2004), available at:

[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT/CEDAW/GEC/3733&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT/CEDAW/GEC/3733&Lang=en).

<sup>22</sup>United Nations, CRPD Committee, *General Comment No. 3 on Women and Girls with Disabilities* (11 Apr. 2014), available at

[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/3&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/3&Lang=en).<sup>23</sup>

United Nations, CRPD Committee, *General Comment No. 1 on Equal Recognition Before the Law* (26 Aug. 2016), available at

[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/1&Lang=en).

women with disabilities in public life, which if mainstreamed, would necessarily extend to the women, peace, and security agenda.

Representation of women and girls with disabilities in political life, including formal peace processes, is a clear human rights imperative; however, including women with disabilities in formal peace processes also has the potential to enhance security, peace, and stability, which will be articulated in the sections that follow. Resolution 1325 notes “the importance of [women’s] equal participation and full involvement in all efforts for the maintenance and promotion of peace and security, and the need to increase their role in decision-making with regard to conflict prevention and resolution,” and specifically implies that international human rights law protecting women and girls is more likely to be implemented if women are at the table. It would therefore logically follow that measures that protect the rights of women and girls with disabilities are more likely to be taken seriously if women with disabilities are included in formal peace processes. Moreover, mounting evidence from post-conflict contexts suggests that failure to take the needs of women with disabilities into account foments conflict, disrupting efforts to create sustainable peace. The section that follows performs an analysis of previous comprehensive peace agreements (CPAs) to establish the potential benefits of including women with disabilities in peace processes.

### **3. Missing Voices: An Analysis of Women with Disabilities in Formal Peace Agreements**

With the human rights justification for adopting an intersectional approach to transitional justice that includes women with disabilities established, it is important to ask: what is the practical import of including women with disabilities in the peace process? To answer this question, it is necessary to first analyze the ways in which disability has historically been treated in formal peace processes. As previously stated, most available evidence about the participation of women with disabilities in peacebuilding is anecdotal and speculative, because women with disabilities simply have not been included in formal peace processes to date. However, an analysis of agreements reached without women with disabilities may itself yield important insights into the importance of representation. This section expands upon existing research about women with disabilities in the women, peace, and security agenda by performing a quantitative and qualitative analysis of comprehensive peace agreements (CPAs) reached between 1989 and 2012. The dataset used was the Notre Dame Peace Accord Matrix (NDPAM),<sup>24</sup> which performs

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<sup>24</sup> NOTRE DAME PEACE ACCORD MATRIX, available at <https://peaceaccords.nd.edu/>.

both qualitative and quantitative analysis about the content and implementation of 34 CPAs, which they define as agreements which (1) include all major parties to the conflict and (2) seek to address the underlying issues which caused the conflict. While numerous peace agreement datasets exist, CPAs seemed to be the fairest and most relevant units of analysis, as CPAs tend to address issues of substantive policy and constitutional provisions more thoroughly than do less comprehensive agreements, such as partial peace agreements or ceasefires.<sup>25</sup>

The CPAs in the dataset were coded first to search for disability-specific terms, including: disability, disabled, disabilities, handicap, handicapped, impair, and impairment. Then, a secondary search was conducted for terms that might indicate a disability-specific provision, such as rehabilitation or health. Mentions of rehabilitation or health were analyzed on an individual basis to determine whether the provision would substantially affect persons with disabilities, such as disabled ex-combatants. Out of the 34 peace agreement texts surveyed, 13 specifically referenced persons with disabilities, meaning that 38 per cent mention persons with disabilities. A further four treaties contained provisions that might substantially impact persons with disabilities, such as provisions about rehabilitation of ex-combatants and health provisions. There was not enough data to establish whether there was a statistically significant increase in the number of disability-specific provisions after the passage of the CRPD; however, I would expect such a correlation to exist. One interesting observation is that there is a much higher incidence of disability-specific provisions in peace agreements reached in geographical areas where disability was either used as a tactic of war, or landmines caused significant disabilities. This, while expected, suggests that there may be a strong correlation between civil society activity and public concern about disability and the inclusion of disability-specific provisions; although, further analysis would be required to establish this.

Of the agreements that mention persons with disabilities, nine mention disability in a disability-specific provision, meaning that a provision is specifically tailored to increase

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<sup>25</sup> For example, Uppsala University's UCDP Peace Agreement Project was initially considered as a relevant dataset. While the dataset spans the longest time period, does not overly restrict what constitutes a peace agreement, and includes more observations per peace agreement, the Notre Dame Peace Accord Matrix (NDPAM) was ultimately utilized. This is because CPAs are more likely to result in concrete, substantive policy changes and outline disability-specific provisions than other types of peace agreements. Therefore, use of the UCDP dataset might have biased the results, because a smaller number of those agreements would have considered substantive policy and constitutional provisions that would have the largest effects for women with disabilities. Moreover, it seemed most prudent to use peace agreements reached near or after the conclusion of the Cold War for the purposes of this analysis.

accessibility or provide specific services for persons with disabilities. Of these, none contain provisions specific to women with disabilities. The other four peace agreements mention disability in a general sense, meaning that persons with disabilities are mentioned in a blanket list of vulnerable groups or groups who have suffered human rights violations, or in a more general provision against discrimination. For example, Sierra Leone's Abidjan Peace Plan<sup>26</sup> states, "special attention shall be given to rural and urban poor areas, war victims, disabled persons and other vulnerable groups," and South Africa's Interim Constitutional Accord<sup>27</sup> contains a general antidiscrimination clause that includes persons with disabilities as a protected category.

The overarching themes revealed by this analysis indicate that women and other persons with disabilities, are inconsistently mentioned in formal peace agreements, and their specific needs are considered with even less frequency. It is worthwhile to note again that none of the CPAs contained references specific to women with disabilities, who it has been established experience multiple and intersecting forms of discrimination during violent conflict. No CPA contains more than two disability-specific provisions, and the provisions aimed at rehabilitation of persons with disabilities, specifically disabled ex-combatants seem partial and piecemeal at best. For example, Rwanda's Arusha Accord<sup>28</sup> mentions disabled ex-combatants but only to exempt them from future military service. The Arusha Peace and Reconciliation Agreement for Burundi<sup>29</sup> promisingly implicates violence in causing disability, but otherwise mentions persons with disabilities in larger, blanket list of vulnerable groups to be demobilized. Several of the CPAs have provisions specifically aimed at rehabilitating those who were disabled as a result of war; however, many of them do not specify particular measures that need to be taken to achieve this goal.

Several promising provisions seem not to have been implemented, or to have been implemented without directly benefitting persons with disabilities. For example, Guatemala's Accord for a Firm and Lasting Peace<sup>30</sup> provides for a special subprogramme for persons with disabilities; however, there is no evidence to suggest that such a subprogramme was ever created.

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<sup>26</sup> ABIDJAN PEACE PLAN (30 November 1996), available at <https://peaceaccords.nd.edu>.

<sup>27</sup> SOUTH AFRICA INTERIM CONSTITUTIONAL ACCORD (17 November 1993), available at <https://peaceaccords.nd.edu>.

<sup>28</sup> ARUSHA ACCORD (4 Aug. 1993), available at <https://peaceaccords.nd.edu>.

<sup>29</sup> ARUSHA PEACE AND RECONCILIATION AGREEMENT FOR BURUNDI (28 Aug. 2000), available at <https://peaceaccords.nd.edu>.

<sup>30</sup> ACCORD FOR A FIRM AND LASTING PEACE (29 Dec. 1996), available at <https://peaceaccords.nd.edu>.

The Phillipines' Mindanao Final Agreement<sup>31</sup> stipulates that 15 per cent of the national Legislative Assembly ought to come from previously underrepresented groups, including persons with disabilities; however, persons with disabilities have struggled to actually achieve political participation within Filipino politics. Disability-specific parties have historically failed to garner an adequate share of the vote to ensure political representation and did not achieve a minimum vote threshold in 2016 to gain any seats in the House of Representatives. The one exception to this general observation is the Northern Ireland Disability Council established by the Good Friday Agreement.<sup>32</sup> This was implemented through the establishment of the Northern Ireland Equality Commission, which became operational in 1999.<sup>33</sup>

Although, many treaties did not directly mention persons with disabilities, they did include provisions likely to directly impact the lives of women and other persons with disabilities. For example, Sierra Leone's Lomé Peace Agreement<sup>34</sup> contains a number of stipulations to assist with the rehabilitation of people who were subject to human rights abuses, which would have far-reaching implications for the number of people disabled by civil war within the country. Likewise, the Agreement on Ending Hostilities in the Republic of Congo<sup>35</sup> contains provisions directed at rehabilitating ex-combatants, many of whom were likely to have been disabled by war. It is important to take note of such provisions, because women and persons with disabilities more generally are less likely to have access to appropriate rehabilitation and health resources post-conflict. Therefore, provisions making these kinds of services more widely available have the potential to drastically alter the lives and well-being of persons with disabilities.

The qualitative and quantitative analysis of these 34 CPAs reveals a number of insights, which are listed below.

- **Disability is mentioned relatively frequently** (at least compared to other marginalized groups) within CPAs, even those reached before the CRPD was ratified. This is promising.

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<sup>31</sup> MINDANAO FINAL AGREEMENT (9 February 1996), available at <https://peaceaccords.nd.edu>.

<sup>32</sup> GOOD FRIDAY AGREEMENT (10 April 1998), available at <https://peaceaccords.nd.edu>.

<sup>33</sup> NDPAM (accessed 4 Apr. 2017), available at <https://peaceaccords.nd.edu>.

<sup>34</sup> LOMÉ PEACE AGREEMENT (7 July 1999), available at <https://peaceaccords.nd.edu>.

<sup>35</sup> AGREEMENT ON ENDING HOSTILITIES IN THE REPUBLIC OF CONGO (29 Dec. 1999), available at <https://peaceaccords.nd.edu>.

- However, **disability is not treated in a uniform or comprehensive way throughout peace treaties.** This is likely due to variation in political pressures and civil society activity during the peace process. While rhetorically, it is powerful that disability is mentioned with a relatively high frequency, politically-speaking, provisions regarding persons with disabilities have a relatively limited reach and therefore might not make a substantial difference in the lives of persons with disabilities.
- Even when disability-specific provisions are included in peace treaties, **failure to implement these provisions is common.**
- **The specific needs of women with disabilities are not taken into account** in any of the CPAs studied, suggesting that an intersectional lens is completely missing from formal peace processes. In the haste to bring women to the table, there has been relatively little reflection on *which* women are included at the table, which risks reproducing patterns of privilege.

In the section that follows, this paper considers what the potential implications of these findings are for the Women, Peace and Security agenda. What might we miss when women with disabilities are excluded? This paper finds that there is a strong correlation between absence of persons with disabilities in peace processes and increased instability in post-conflict settings. Of course, these conclusions are necessarily speculative, as they are based on primarily anecdotal evidence; however, they provide a *prima facie* case for adopting both a gender and disability lens in the Women, Peace and Security framework.

#### **4. Beyond Empowerment: What might we lose when we exclude women with disabilities?**

What perspectives are lost if women with disabilities are excluded from formal peace processes? It has been widely documented that increasing women's participation in peace processes creates more lasting peace. Women's involvement in the peace process increases the likelihood of reaching a peace agreement, and a study conducted by Paffenholz et al. established that, "When controlling for other variables, peace processes that included women as witnesses, signatories, mediators, and/or negotiators demonstrated a 20 per cent increase in the probability of a peace agreement lasting at least two years."<sup>36</sup>

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<sup>36</sup>Paffenholz et al., qtd. in: PREVENTING CONFLICT

The data on participation of persons with disabilities, specifically women with disabilities, in formal peace processes (or even peacebuilding more generally) is scarce and primarily anecdotal. This is, in part, due to the systematic exclusion of women with disabilities from formal peace processes, and the inaccessibility of transitional justice mechanisms more generally. The results of this analysis will therefore necessarily be speculative; however, anecdotal evidence suggests that when persons with disabilities are not represented in formal peace processes, they simultaneously feel alienated from these processes, and their needs are not met.

Pearl Gottschalk conducted one of the only extensive studies about the inclusion of persons with disabilities in peacebuilding in 2007,<sup>37</sup> focusing on the experiences of persons with disabilities affected by Sierra Leone's peace process. Participants largely felt ostracized from the peacebuilding process, expressing discontent about the structure of Truth and Reconciliation Commissions (TRCs), which were designed without consulting persons with disabilities. Peace conferences likewise were frequently held with limited or no participation for people with disabilities, specifically people who had been disabled during conflict. Oftentimes, persons with disabilities could not even access the buildings in which TRC hearings or peace conferences were held. The participants in Gottschalk's study viewed themselves as agents of peace but felt alienated from formal peace processes. Coalitions of persons with disabilities worked to create their own peace and reconciliation initiatives but received no donor funding or public recognition—this funding went to other civil society groups. Moreover, the needs of persons with disabilities were relegated to the sidelines during the formal peace process, with the majority of persons disabled by war failing to receive vital reparations or governmental assistance. This led to widespread dissatisfaction among persons with disabilities with the peacemaking process. Most participants agreed that non-inclusive peace processes had the potential to reignite and exacerbate conflict due to lack of public buy-in. Gottschalk concludes that persons with disabilities should be consulted during transitional justice processes as a matter of good practice.

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<sup>37</sup> Pearl Gottschalk & Patricia Anne MacKenzie, “*How are we in this world now? examining the experiences of persons disabled by war in the peace processes of Sierra Leone*, 2007.

Moreover, anecdotal evidence assembled by Lord and Stein demonstrates that the reintegration of ex-combatants with disabilities is a necessary but often forgotten component of creating peace and stability in post-conflict situations.<sup>38</sup> Both formal peace agreements and scholarship on conflict resolution fail to address the complex needs of ex-combatants with disabilities, and more specifically women and children who fall into this category. Little to no research exists about reintegration of disabled, women ex-combatants, who are disproportionately likely to develop psycho-social disabilities. However, women may face heightened barriers to reintegration due to stigma. For example, in the Palestinian Intifada, male ex-combatants with disabilities were valorized, while women were stigmatized for failing to conform to ideals of womanhood.

Denying ex-combatants with disabilities access to necessary rehabilitation and integration programs undercuts peace initiatives, fomenting discontent and conflict. Lord and Stein document several instances in which this appears to be the case. For example, in Mozambique, groups of ex-combatants with disabilities engaged in violent land-grabbing as a response to perceived governmental failure to address their needs. Begging bands of ex-combatants with disabilities routinely contribute to street crime, as was the case in Liberia. Failure to successfully reintegrate ex-combatants with disabilities in Sierra Leone led to a violent attack on the minister of defense in 2012. In El Salvador, failure to properly resource an agreed-upon reintegration program for ex-combatants was cited as a major obstacle to the implementation of a 1992 UN-brokered peace agreement. While these examples may be anecdotal, they are representative of a well-documented phenomenon: ex-combatants with disabilities routinely turn to violence as a means of meeting their basic needs when peace agreements do not adequately meet those needs through a thorough disarmament, demobilization, and reintegration (DDR) process. This suggests that engaging persons with disabilities, specifically ex-combatants with disabilities is vital to creating durable peace agreements. When previously excluded groups are included in negotiations, it is possible to create a more robust understanding of that group's needs, which can then be reflected in the results of the peace process. This creates wider social buy-in and reduces the probability that ex-combatants will need to resort to violent means to meet their needs.

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<sup>38</sup> Janet E Lord and Michael Ashley Stein (9 June 2015), *Peacebuilding and Reintegrating Ex-Combatants with Disabilities*, THE INTERNATIONAL JOURNAL OF HUMAN RIGHTS 19, no. 3, 277-92.

## **5. Uganda: An Example of Best Practice?**

Although they have been excluded from formal peace processes, women on have made tremendous strides toward achieving peace and security through grassroots organizing in many conflict regions. This suggests that when women organize, they are powerful agents of change. Women with disabilities likewise can be powerful agents of peace; however, all too often, they are portrayed as hapless victims, in need of protection but not formal representation. Women with disabilities, however, have been powerful advocates for change in their local communities, and including the voices of women with disabilities in transitional justice initiatives has led to improved outcomes for both the disability community and society writ large. This section focuses on Uganda as both an example of best practice regarding inclusion for persons with disabilities and as a conflict zone in which women with disabilities have organized to voice their needs, thereby claiming rights that had been previously denied to them.

Throughout Uganda's civil war between the Museveni Government and the Lord's Resistance Army (LRA) in Northern Uganda, women with disabilities have been subjected to multiple and intersecting forms of discrimination and targeted human rights abuses. As people in Northern Uganda are working toward rebuilding their lives after prolonged conflict, women with disabilities are being left behind. A Human Rights Watch report entitled "*As if We Weren't Human*": *Discrimination and Violence against Women with Disabilities in Northern Uganda* describes numerous obstacles faced by women with disabilities who seek to leave camps for internally displaced persons and begin new lives. Approximately 20 per cent of Ugandans have a disability, and the numbers (although difficult to quantify) are likely to be much higher in Northern Uganda, where infliction of disability was used as a deliberate tactic of war. Countless women were disabled by war, and women who identified as disabled before the conflict often lacked access to vital health services and assistance. Women with disabilities are frequently abandoned by family members and their overall communities due to stigma. Many who would like to move out of camps are physically unable to. Cultural norms depict persons with disabilities, and in particular women, as being incapable of living independently, which exacerbates the barriers they face in accessing services and establishing new lives post-conflict.

Women with disabilities also face difficulties in accessing formal and informal justice mechanisms, health services, and legal services.<sup>39</sup>

Policy responses to these problems have been limited, vague, and largely ineffectual. Most humanitarian aid organizations do not treat disability as a cross-cutting issue, and the vast majority of organizations do not properly educate their staff about disability. Some organizations even express public skepticism about treating women with disabilities as having a unique set of needs. Most organizations also fail to conduct a thorough needs assessment for persons with disabilities that would allow them to orchestrate more effective service provision.<sup>40</sup> On a governmental level, there is legislation in place which might be of assistance to women with disabilities; however, the language of these provisions is vague, and they are inconsistently enforced. For example, the Government's Peace, Recovery and Redevelopment Plan (PRDP) mentions persons with disabilities but does not articulate clear governmental obligations or plans of action regarding persons with disabilities, and even though the government has promised special grants for localities to support people with disabilities with generating income, these grants are not reaching rural women.<sup>41</sup> There is a general consensus that the Ugandan government's support for community-based rehabilitation in Northern Uganda has been lukewarm at best.

Despite these obstacles, women with disabilities in Northern Uganda have been powerful advocates for reform. With the support of UN Women, the Gulu Union of Women with Disabilities (GUWODU) created the Human Rights Disability Platform, which requires representatives from bodies such as the police, district magistrates, and army officials to attend monthly meetings focused on cases relevant to women with disabilities.<sup>42</sup> This platform is an important monitoring tool and has served to make local authorities more compliant with the demands of women with disabilities. Civil society organizations comprised of women who were disabled by conflict also played an active role in the Ugandan government's passage of a

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<sup>39</sup> Human Rights Watch, 'AS IF WE WEREN'T HUMAN': DISCRIMINATION AND VIOLENCE AGAINST WOMEN WITH DISABILITIES IN NORTHERN UGANDA, <https://www.hrw.org/report/2010/08/26/if-we-werent-human/discrimination-and-violence-against-women-disabilities-northern> (last visited Apr 27, 2017). [hereinafter *Human Rights Watch*]

<sup>40</sup> HUMAN RIGHTS WATCH.

<sup>41</sup> HUMAN RIGHTS WATCH.

<sup>42</sup> *Ugandan Parliament adopts resolution to address needs of war-affected women*, UN WOMEN, April 23, 2014, available at <http://africa.unwomen.org/en/news-and-events/stories/2014/04/ugandan-parliament-adopts-resolution-to-address-needs-of-war-affected-women>.

resolution calling for reparations and special programs dedicated to people who were victims of the LRA in Northern Uganda. What is notable about this legislation is that it seeks to adopt both a gender and disability lens—it is stipulated that the programs must benefit both women and men with disabilities.<sup>43</sup> The work of civil society groups comprised of women with disabilities and survivors of conflict, specifically the International Centre for Transitional Justice (ICTJ) and the Women's Initiatives for Gender Justice (WIGJ) was integral to pressuring the government to adopt this resolution. This resolution affirms the Government's commitment to monitor and improve outcomes for women with disabilities who were victims of the conflict with the LRA.<sup>44</sup> These examples suggest that even if women with disabilities have not been afforded a voice at the table, they have been powerful advocates for change in their own communities.

Despite numerous problems with implementation, the Ugandan Government is simultaneously an example of best practice that shows the potential for positive change in transitional justice contexts. The Agreement on Comprehensive Solutions Between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement<sup>45</sup> contains multiple disability-specific provisions, namely that the Government will implement affirmative action programs targeted at ensuring equal opportunity to persons with disabilities and provide special assistance to persons with disabilities.<sup>46</sup> This translated into constitutional protections, as well as Parliamentary quotas for persons with disabilities (Article 21). As per the Local Government Act (1997) and the Parliamentary Elections Statute (1996) all levels of government in Uganda, including the local level, a certain number of spots must be reserved for persons with disabilities, and frequently this includes women with disabilities. Numerous pieces of national legislation exist to protect the rights and interests of persons with disabilities, and the Government officially adopted a human rights framework in 2006.<sup>47</sup>

One may draw the following conclusions from this analysis.

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<sup>43</sup> HUMAN RIGHTS WATCH.

<sup>44</sup> *Ugandan Parliament adopts resolution to address needs of war-affected women*, UN WOMEN, April 23, 2014, available at <http://africa.unwomen.org/en/news-and-events/stories/2014/04/ugandan-parliament-adopts-resolution-to-address-needs-of-war-affected-women>.

<sup>45</sup> THE AGREEMENT ON COMPREHENSIVE SOLUTIONS BETWEEN THE GOVERNMENT OF THE REPUBLIC OF UGANDA AND THE LORD'S RESISTANCE ARMY/MOVEMENT (2 May 2007), available at [www.ucdp.uu.se/downloads/fullpeace/Uga%2020070502.pdf](http://www.ucdp.uu.se/downloads/fullpeace/Uga%2020070502.pdf).

<sup>46</sup> CONSTITUTION OF THE REPUBLIC OF UGANDA (1995), available at [www.ulii.org/node/23824](http://www.ulii.org/node/23824).

<sup>47</sup> HUMAN RIGHTS WATCH.

- Women with disabilities have proven that they can be powerful self-advocates and agents of peace and constitutional change more generally.
- Transitional justice contexts offer unique windows within which to create meaningful constitutional change that addresses human rights abuses and discrimination against marginalized groups; however, if those groups are not included in the formal peace process, it is likely that implementation and framing of these pieces of legislation will be severely weakened.

This paper endorses the CRPD Committee’s comments about Uganda in their Concluding Observations. The CRPD Committee suggests that they “[welcome] the measures taken by the State party to promote the rights of persons with disabilities, including the reservation of five seats in Parliament to persons with disabilities, and the provision of a special grant for persons with disabilities to support income-generating activities for persons with disabilities” yet express concerns about the accessibility of services and the implementation of these laws.<sup>48</sup> Much more work clearly needs to be done to ensure the rights and well-being of women with disabilities in Uganda; however, this case study lends support to the idea that women must be represented throughout the peacebuilding process, not only through informal but also formal transitional justice mechanisms.

## **6. Policy Recommendations**

With the importance of including a disability lens in the Women, Peace and Security agenda established, this paper suggests a series of policy implications of taking the concerns of women with disabilities seriously. These recommendations logically flow from the empirical findings of this paper.

- **Legal literacy initiatives:** Studies conducted about women with disabilities in conflict regions have suggested that these women have a higher need for state-sponsored services but a comparatively low rate of legal literacy, which impedes their ability to access these services.<sup>49</sup> For example, in Uganda, Human Rights Watch found that women were often not aware of services available to them and

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<sup>48</sup> United Nations, CRPD Committee, *Concluding observations on the initial report of Uganda* (12 May 2016), available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fUGA%2fCO%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fUGA%2fCO%2f1&Lang=en).

<sup>49</sup> Dinesha Samaratne, *Inclusions and Exclusions in Law: Experiences of Women with Disabilities in Rural and War-Affected Areas of Sri Lanka*, 30 DISABILITY & SOCIETY (2015).

were often denied special assistance due to technicalities in navigating bureaucratic processes. HRW found that women with disabilities tried to receive special assistance from the World Food Programme on the basis that they were “extremely vulnerable individuals” but were denied such assistance without explanation.<sup>50</sup> Increasing access to legal services, as well as basic legal literacy about the rights of women with disabilities is a necessary first step toward making service provision and justice systems accessible. It does not matter how good benefits frameworks and justice systems are if women do not have the legal literacy to use these services.

- **Expanded data collection:** Part of the problem with creating evidence-based policy targeting women with disabilities is that data is simply not uniformly collected or disaggregated in conflict zones. There are conflict datasets that disaggregate based on gender, fewer that disaggregate disability as a relevant category, and even fewer that disaggregate the data to make meaningful claims about *women with disabilities*. Without this type of data, it is impossible to make empirically verifiable claims about women with disabilities before, during, and after conflict or to devise evidence-based policy that specifically targets their needs. While it is commendable that the UN is disaggregating data about women more generally,<sup>51</sup> it would be useful to construct these data gathering processes to include disability as a relevant category.
- **Extend the mandate of 1325 to include women with disabilities:** When we discuss quotas, etc., it is important to acknowledge that ‘women’ is not a homogenous category and that there are hierarchies of privilege within this category. It is important to bring not only women but also women who experience multiple and intersecting forms of discrimination to the table. Disability must be mainstreamed into the mandates of 1325, and further resolutions must begin to treat women with disabilities as agents of peace, rather than including them in blanket categories of vulnerable groups or treating them as hapless victims. We

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<sup>50</sup> HUMAN RIGHTS WATCH.

<sup>51</sup> UN EVIDENCE AND DATA FOR GENDER EQUALITY PROJECT, more information available at <https://unstats.un.org/edge/>.

would urge the Security Council to adopt a resolution to explicitly include a disability lens within the purview of Resolution 1325 and the Women, Peace and Security agenda as a whole.

- **Make peace processes accessible:** As mentioned previously, peace processes are notoriously inaccessible. Oftentimes, peace talks and truth and reconciliation commissions are conducted in buildings that are inaccessible to persons with disabilities. There are not accommodations made for people with psychosocial disabilities who may be triggered by graphic discussions of violence. When individuals with disabilities band together to form civil society groups, they often do not receive the same funding or attention from NGOs. This suggests that the design of transitional justice mechanisms is as important as the adoption of provisions to protect people with disabilities. It is also important to adopt a gendered perspective to accessibility, as the burden of caring may fall disproportionately on women with disabilities who wish to participate in peace processes. Therefore, accessibility is both a disability-specific and a gendered concept. Ultimately, accessibility is the most important facet of making sure that the voices of women with disabilities are included, because women cannot be brought to the table if they cannot get into the building.

Resolution 1325 has made tremendous strides toward including women in peacebuilding processes; however, much work remains. During the process of improving upon and reconceiving the Women, Peace and Security agenda, it is important to acknowledge that women are not monoliths—it is not enough to include some, privileged women at the table. It is important to simultaneously acknowledge multiple and intersecting forms of discrimination faced by women who fall into other marginalized groups. This paper has established a tentative link between including women with disabilities in formal peace processes and maintaining peace and security. Including a disability lens has the potential both to prevent future conflict and to make peace agreements themselves more robust and sustainable.

# THE NECESSARY VOICES OF WOMEN WITH CRIMINAL JUSTICE INVOLVEMENT IN SHAPING PEACE AND SECURITY

Jane Komsky

## 1. Introduction

Nation-states can help prevent violence and militarization through expanding women's participation in the peace and security agenda. Women's empowerment needs to be expanded to include incarcerated women, a group that is often marginalized. Neither the Convention on the Elimination of Discrimination Against Women (CEDAW)<sup>966</sup>, nor Resolution 1325's progeny accurately address incarceration.<sup>967</sup> Incarcerated women can be victims of conflict, or agents of conflict, therefore, governments should intervene and include them as agents of peace. These women can help prevent violence, resistance, drug abuse and a variety of other issues that many of these women have witnessed or experienced, and often lead to conflict. Currently, the peace and security agenda and CEDAW look at migrant women, ethnic minorities, and indigent women, but make no references to incarcerated women. For such a commonly marginalized group, they are conspicuously absent. Especially since economic and social marginalization is known to be a driver of violent extremism.<sup>968</sup>

Resolution 1325 urges member states to ensure increased representation of women at all decision-making levels in national, regional, and international institutions and mechanisms for the prevention, management, and resolution of conflict. The UN can improve the implementation of one of Resolution 1325's key goals of "equal participation and full involvement of women in all efforts for maintaining and promoting peace and security,"<sup>969</sup> through expanding women's empowerment to include incarcerated women.

This report argues that nation-states can use the prison system for peace building instead of conflict building. States should give previously incarcerated women a representative at the table and a voice in the discussion of how to best maintain peace and security in their regions. In

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<sup>966</sup> See generally Convention on the Elimination of All Forms of Discrimination against Women, United Nations, <http://www.un.org/womenwatch/daw/cedaw/>.

<sup>967</sup> UN Security Council, Security Council resolution 1325 (2000), 31 October 2000, S/RES/1325 (2000), <http://www.refworld.org/docid/3b00f4672e.html>; The Security Council adopted additional resolutions between 2000 and 2015 on Women, Peace and Security agenda, including Resolutions 1820 (2008); 1888 (2009); 1889 (2009); 1960 (2010); 2106 (2013); and 2122 (2013).

<sup>968</sup> Marta Sparago, Terrorist Recruitment The Crucial Case of Al Qaeda's Global Jihad Terror Network, <http://www.scps.nyu.edu/export/sites/scps/pdf/global-affairs/marta-sparago.pdf> (last visited Apr 17, 2017).

<sup>969</sup> Radhika Coomaraswamy, Preventing Conflict, Transforming Justice Securing Peace: A Global Study on the Implementation of United Nations Security Council Resolution 1325, 1 (New York: UN Women, 2015)

section two, I discuss the importance of the criminal justice system in the peace and security agenda, I argue that women previously incarcerated have a unique perspective; they have likely experienced violence, or come from indigent backgrounds, or both. This background makes them vulnerable to being recruited as agents of terror. Therefore, the United Nations, in line with CEDAW, should make changes to the justice system to prevent the disproportionately negative impact, and also recruit these women as agents of peace. In section three, I discuss preventing violence and militarization, and further develop how previously incarcerated women can contribute to promoting Resolution 1325's goal of promoting non-violent and peaceful solutions. Because most incarcerated women have experienced or been exposed to violence and use of force, they understand the need to limit how force is used, even as a solution. In section four, I discuss how states can transform the way justice is achieved through reforming the current justice system from a strictly penalization approach to add a rehabilitative element. I note and explain some of gaps in Resolution 1325 and Resolution 2122's focus on transformative justice, including how the criminal justice system, as per CEDAW guidelines, must consider the unique impact on women and girls. I elaborate on this in subsections which discuss women's unique problems in prison, as well as women's unique problems when they reenter society. I conclude by offering a number of specific recommendations that the United Nations and specific states should consider when discussing the peace and security agenda.

## **2. The Importance of Criminal Justice in the Peace and Security Agenda**

Women who were incarcerated have a unique perspective which makes them great advocates for a variety of social issues. The Security Council expressed in Resolution 2122, its goal to "increase its attention to women, peace and security issues in all relevant thematic areas."<sup>970</sup> Previously incarcerated women likely have been victims of, or know people who have been victims of domestic abuse, drug abuse, resistance movements, and other marginalized behavior. Therefore, they should be included to advocate for two main goals. First, preventing violence and militarization, a named goal of Resolution 1325. As women who were involuntarily detained and who likely witnessed abuse the system, they can be strong advocates of the idea that if force is used, even for the protection of civilians, there must be clarity and clear, attainable objectives. Second, previously incarcerated women are in a unique position to advocate for criminal justice reform and this should be a topic in the discussion regarding maintaining peace

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<sup>970</sup> Res. 2122, U.N. Security Council, Oct. 18, 2013.

and security. A country's choice as to who it locks up, and how it treats prisoners is a microcosm for what that state stands for and generally what that state's largest problems are. Therefore, allowing women, who have experience with crime and incarceration, to discuss how to better the system can potentially help prevent future conflict and social issues.

Giving incarcerated women a voice in the discussion of maintaining peace and security will naturally bring criticism and controversy. These women are marginalized and stigmatized for the crimes they have committed, and the idea of empowering them makes people uncomfortable, given the many other groups of marginalize women who are on a surface level more worthy of empowerment. However, as Cynthia Enloe, a professor at Clark University said, "1325 is not being effectively implemented."<sup>971</sup> Resolution 1325 is not having the desired effect; and for real change to happen, Enloe says, 1325 must be reviewed in a way that "makes people nervous."<sup>972</sup> Women who were previously incarcerated and successfully integrated back into society can serve as microcosms for conflict and resolution in the greater society. The importance of hearing the voice and story of a previously incarcerated woman cannot be stressed enough: who she was before she committed her crime; the obstacles she faced; the circumstances surrounding when she committed her crime; if she even committed a crime; her experience in prison; and how she successfully turned her life around after she reintegrated into society, can open the door to understanding some of society's greatest problem and reveal how to systemically fix problems that lead to conflict in society at large. These women must be brought to the table and listened to.

Also, a state's decision regarding who to imprison can be viewed as a microcosm of that state's biggest social problems. Both the United States and Afghanistan offer clear examples of this. As of February 2017, 46 percent of the United States prison population was made up of drug offenders.<sup>973</sup> Focusing on just the United States' female prison population, the rate is even higher; 59 percent of women prisoners were serving sentences for drug offenses;<sup>974</sup> even though women are rarely major players in the drug trade. In Afghanistan, Human Rights Watch reported

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<sup>971</sup> A Global Study *supra* note 4 at 27

<sup>972</sup> A Global Study *supra* note 4 at 27

<sup>973</sup> Federal Bureau of Prison, Offenses Report, (Feb 25, 2017),  
[https://www.bop.gov/about/statistics/statistics\\_inmate\\_offenses.jsp](https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp)

<sup>974</sup> E. Ann Carson, PhD, and Elizabeth Anderson. *Prisoners In 2015*. Washington, DC: US Dept. of Justice Bureau of Justice Statistics, Dec. 2016, NCJ250229, p. 14 (state) and p. 15 (federal)

that approximately 51 percent of women were arbitrarily arrested, detained and prosecuted for “so-called moral crimes,” including being outside the home in the presence of nonrelated men, or because they deemed it unsafe for the woman to return home.<sup>975</sup> Allowing half the prison population to be locked up for a non-violent crimes signals there is an issue in society that must be dealt with better. Women who first handedly experience these issues, should be included in creating a solution. Also, the United Nations should encourage member states to remove incarceration as a punishment for moral crimes.

United Nations Peace Keeping devotes a section on its website to the importance of the criminal justice system in a post-conflict area and how it impacts peace and security.<sup>976</sup> The main contention is that because prisons are often the lowest priority in post conflict environments, prisoners often suffer from extreme overcrowding, lack of food, absence of adequate medical care and poor sanitations, poor management and security, as well as political interferences and non-existent oversight mechanisms.<sup>977</sup> Specifically, the UN worries that “if the above problems are not effectively addressed, the result can be starvation, ill-health and other abuses of detainees, increasing the likelihood of riots and mass escapes. This can have an adverse impact on an already fragile peace.”<sup>978</sup> While there is certainly truth to this position, there are many other issues which must be mentioned and addressed.

The UN must take a stronger interest in the process of criminal justice because without uniformity and oversight, the criminal justice system becomes a vicious cycle of recidivism. In other words, prisoners, especially women, are released, and reintegrate into the society and communities that were a factor leading to their crimes in the first place. Often, within six months more than 50 percent end up committing the same crime and going back to prison. In other circumstances, which are unfortunately common, women who are incarcerated are recruited as agents of terror and extremism while in prison.<sup>979</sup> The Secretary General explains that economic

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<sup>975</sup> AFGHANISTAN 2015 HUMAN RIGHTS REPORT, 2016 WL 2770310

<sup>976</sup> Corrections. United Nations Peacekeeping, UN Corrections, <http://www.un.org/en/peacekeeping/issues/ruleoflaw/corrections.shtml> (last visited Apr 10, 2017).

<sup>977</sup> *Id.*

<sup>978</sup> *Id.*

<sup>979</sup> See Ian M. Cuthbertson, “Prisons and the Education of Terrorists,” *World Policy Journal* 21, no. 3 (Fall 2004), 18. (explaining that an unintended consequence of prison is that women imprisoned for petty theft, for selling drug are angry and impressionable women and become vulnerable for extremist philosophy)

and social marginalization is a driver of violent extremism and radicalization; the animosity these women feel about their circumstances makes them vulnerable to recruitment for terror.<sup>980</sup>

The UN must help states create a system that does not end with strictly punishment and marginalization. The criminal justice system should add an element of rehabilitation and preparation for reintegration. Isolating women in prison who committed non-violent crimes and came from a background of domestic abuse and violence does not give them the tools to go back into that same community and thrive. Often, prisons have the “unintended consequence of teaching and fostering the crimes they seek to deter,” including terrorism.<sup>981</sup> There needs to be a different emphasis on the importance of corrections; not a focus that emphasizes that if prisons continue to treat prisoners poorly enough they will revolt and cause havoc, but rather an emphasis that if country’s want to prevent some of the biggest social injustices, there needs to be an emphasis on changing the current system’s cycle of incarcerate, then release, then recede or turn to more violence. Thus, the United Nations should encourage the inclusion of previously incarcerated women at the peacemaking table and process, to help prevent this cycle of violence.

### **3. Preventing Violence and Militarization**

“Non-violence is the weapon of the strong, not the weak.”<sup>982</sup> When it comes to issues of peace and security, women hold a strong voice on the international stage against militarization.<sup>983</sup> Women generally, and importantly, advocate one of the key goals of Resolution 1325—promoting non-violent forms of conflict resolution, and fostering cultures of peace.<sup>984</sup> Use of force by the military, peacekeepers, and other armed groups will likely continue to play a major role in the peace and security agenda.<sup>985</sup> However, it is vital to give women, who have experienced or been exposed to violence and use of force, a voice in structuring and limiting how force is used, even as a solution. Women who were previously incarcerated are uniquely situated to offer that voice because most during their time before or during prison experienced violence and are passionate about prevent it. Therefore, previously incarcerated women should be recruited and utilized as agents of peace. Preventing or limiting the unlawful violence women are

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<sup>980</sup> *Id.*

<sup>981</sup> Sparago *supra* note 3

<sup>982</sup> SGI Quarterly, *Betty Williams Delivers Culture of Peace Lecture*, available at <http://guides.libraries.uc.edu/c.php?g=222561&p=1472886>

<sup>983</sup> A Global Study Review *supra* note 4 at 134

<sup>984</sup> *Id.*

<sup>985</sup> *Id.* at 135

subject to during their time in the criminal justice system can result in preemptively preventing them from being recruited as agents of terror.<sup>986</sup>

A significant number of women, irrespective of their geographic region, who have been or who are currently incarcerated have at some point in their lives experienced some form of violence or sexual abuse.<sup>987</sup> This threat and risk of violence continues once women are incarcerated. The Fourth United Nations Conference on Women acknowledged that women are vulnerable to violence from police prison officials and security forces.<sup>988</sup> Sexual violence and the threat of violence is widespread throughout prisons in all countries.<sup>989</sup> This phenomenon of threatening violence, is effectively ignored by the system; and in some cases, it is even condoned as a reality of prisoner life.<sup>990</sup> Guards use physical assaults, threats of stopping visitations by children and other family members, and sentence extensions in order to retaliate against and deter women from reporting abuse.<sup>991</sup>

Violence against women in prison is not limited to any specific geographic region. Radhika Coomeraswamy, who was the special rapporteur for violence against women, issued a report after visiting a number of prisons in the U.S. harshly criticizing the treatment of women in prisons and expressing a particular concern about staff sexual misconduct.<sup>992</sup> In Brazil, the law explicitly prohibits women's prisons from using male guards, yet several women reported to Human Rights Watch researchers that they witnessed the same male guard grope women.<sup>993</sup> In Afghanistan, human rights watch reported that the police did not prevent or respond to violence and, in some cases, arrested women who reported crimes committed against them, such as rape.

Incarcerated women suffer disproportionately from treatment and policies in prison.

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<sup>986</sup> Cuthbertson, *supra* note 14

<sup>987</sup> Jenni Gainsborough, *Women in Prison: International Problems and Human Rights Based Approaches to Reform*, Wm. & Mary J. Women & L. 271, 279 (2008); See, e.g. Bureau of Justice Statistics. (2000). Women offenders. Retrieved January 4, 2007 from: <http://www.ojp.usdoj.gov/bjs/pub/pdf/wo.pdf> (Citing statistics showing that more than half of the women in United States prisons have been abused, more specifically 47% physically abused and 39% sexually abused and many have experience both.)

<sup>988</sup> See Beijing Declaration and Platform for Action, adopted by the Fourth World Conference on Women, Beijing, 15 September 1995, paras. 121, 124(g), and 232(i), available at <http://www.un.org/womenwatch/daw/beijing/platform/> (last visited 9 April 2017) (calling for gender-sensitive education and training for police prison officials and security forces to promote actively protecting women's rights).

<sup>989</sup> Amnesty International. (1999). *Not part of my sentence: Violation of the human rights of women in custody: Sexual abuse and women in prison*. Retrieved January 4, 2007 from: <http://www.amnestyusa.org/node/57783>.

<sup>990</sup> Id.

<sup>991</sup> Id.

<sup>992</sup> Gainsborough *supra* note 21 at 14

<sup>993</sup> Maria Laura Canineu, Brazil's Illegal Treatment of Women in Prison, FOLHA DE SAO PAULO, Mar 6, 2017 available at <https://www.hrw.org/news/2017/03/06/brazils-illegal-treatment-women-prison>

Therefore, in order to stop this violence against women the United Nations should adopt a CEDAW general recommendation on incarcerated women that includes a gender sensitive framework in the minimum standards of treatment of prisoners. Similar to Brazil's law which mandates prisons to have women prison officers, there should be gender specific rules and requirements for women's prisons. Unlike in Brazil however, these rules should be adhered to and monitored. The United Nations should suggest that states institute gender sensitive training for their prison guards that focuses on the backgrounds of women who are commonly found in jail. This can help prevent a pattern of violence that leaves women vulnerable to being recruited into extremist and terror groups.

#### **4. Transforming Justice through Reforming the Justice System**

Resolution 1325 emphasizes transformative justice, and Resolution 2122 (2013), expands on this idea "recognizing more must be done to ensure that transitional justice measures address the full range of violations and abuses of women's human rights, and the differentiated impacts on women and girls of these violations and abuses."<sup>994</sup> Resolution 2122, taken together with Resolution 1889 addresses a number of necessary concerns, including its focus on women's exclusion from peacebuilding and the lack of attention to women's needs in post-conflict recovery; and the need for women's empowerment and "full participation in post conflict reconstruction, including elections; demobilization, disarmament and reintegration programs; and security sector and judicial reforms."<sup>995</sup> However, there is a concerning gap. Although Resolution 1889 mentions the necessary focus on the security sector (which should be read to include the prison system) and reintegration, in most, if not all countries, there are grave abuses in the criminal justice system. Equally as important, there is a conspicuous absence of state programs set up to help provide a successful reintegration—and word commonly known and used interchangeably with reentry.

The prison system is a starting point to begin fixing these problems of security and reintegration locally. There has been a historic and consistent problem with imprisonment and reintegration after prisoner's sentences are over.<sup>996</sup> Also, looking at the United States prison

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<sup>994</sup> A Global Study *supra* note 4 at 101

<sup>995</sup> A Global Study *supra* note 4 at 39

<sup>996</sup> See Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010, NCJ 244205 (April 22, 2014), <https://www.bjs.gov/index.cfm?ty=pb&detail&iid=4986> (stating that two-thirds or 68 percent of prisoners released were arrested for a new crime within three years of release from prison, and three-quarters or 77 percent

system through the lens of CEDAW,<sup>997</sup> which allows for analysis based on disproportionate impact, women are seemingly more disadvantaged by the system than men:

For example, women in state prisons in 2003 were more likely than men to be incarcerated for a drug offense (29% vs. 19%) or property offense (30% vs. 20%); in 1997, 65% of women in state prisons were parents of minor children, compared to 55% of men; approximately 37% of women and 28% of men in prison had monthly incomes of less than \$600 prior to their arrest.<sup>998</sup>

Women seem to be disproportionately impacted in the rates of incarceration, especially given that in many countries, the majority of female prisoners have been convicted of drug-related offences, and yet women are rarely major players in the drugs trade.<sup>999</sup> Additionally, imprisonment and reintegration are particularly difficult for women due to their unique needs.<sup>1000</sup> The following two subsections will expand on these unique needs.

## 5. Women's Unique Problems in Prison

“States have a positive obligation to ensure detainees’ enjoyment of their rights subject only to the restrictions that are unavoidable in a closed environment.”<sup>1001</sup> Prison regulations are rarely gender sensitive, which often negatively impacts women. Women in detention, mostly come from impoverished and marginalized parts of society; and they tend to have backgrounds of physical and emotional abuse, mental health problems, and alcohol or drugs dependency.<sup>1002</sup> Particularly mothers, have unique physical, vocational, social, legal, and psychological needs different from those of men.<sup>1003</sup> Therefore, conditions of detention need to take into account the

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were arrested within five years); Proven Reoffending Statistics Quarterly Bulletin, April 2014 to March 2015 (January 26, 2017), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/585908/proven-reoffending-quarterly-bulletin.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/585908/proven-reoffending-quarterly-bulletin.pdf) (stating that 45 percent of prisoners released go back to prison within the first 12 months released)

<sup>997</sup> CEDAW *supra* 1

<sup>998</sup> Judith Grant, Incarcerated Women and Drug Abuse: An International Perspective, 2007 J. Inst. Just. Int'l Stud. 129, 134 (2007)

<sup>999</sup> Julie Ashdown and Mel James, *Women in Detention*, International Review of the Red Cross, Mar 2010, 123 available at <https://www.icrc.org/eng/assets/files/other/irrc-877-ashdown-james.pdf>

<sup>1000</sup> *Id.*

<sup>1001</sup> *Id.* at 127

<sup>1002</sup> Penal Reform International, Penal Reform Briefing No. 3: Women in Prison – Incarcerated in a Man’s World, London, 2008, p. 2.

<sup>1003</sup> Ashdown and James, *supra* note 33 at 125

special needs of women to prevent a disproportionately negative effect. These problems begin immediately upon women's sentences when the system classifies and places women within the prison without considering issues such as history or domestic violence, sexual abuse, parental responsibility and mental disorders.<sup>1004</sup> Incarcerated women are much more likely to suffer from mental health issues than men, often because of their history with domestic, physical, and sexual violence. "Women's health is likely to deteriorate in prison's that are overcrowded, where appropriate classification and placement systems are not implemented, and where prisoner programs are either non-existent or inadequate to address the specific needs of women."<sup>1005</sup> Especially during and post-conflict women are likely to be misclassified; often placing women involved with an armed conflict with those detained for ordinary crimes.<sup>1006</sup> Unfortunately, women are often overly restricted based on their incorrect classification, and are consequently barred from substance abuse, and other programs which could increase the likelihood of successful reintegration post sentence.<sup>1007</sup>

Beyond issues of classification, there are issues of management that often create unsafe environments for women. In order to protect women, "women prisoners should be kept under the responsibility of a woman officer who has custody of the keys for that part of the institution and should be attended only by women officers."<sup>1008</sup> However, this rule is often not respected. As previously stated, in Brazil, where the law explicitly prohibits women's prisons from using male guards, several women reported to Human Rights Watch researchers that they witnessed the same male guard grope women.<sup>1009</sup> While it is not always possible to only have women officers, prisons should develop clear policies and procedures to prevent the likelihood of female prisoner being abused or ill-treated.<sup>1010</sup> The UN and states should develop clear standards and enforcement mechanisms as well as ensure oversight that these standards are being followed. Previously incarcerated women would likely be the best advocates for developing these types of standards and making sure the standards are practical and realistic to create the best chance of the standards being followed. Thus, previously incarcerated women should be included in the

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<sup>1004</sup> Ashdown and James, *supra* 33 at 130

<sup>1005</sup> Ashdown and James, *supra* 33 at 134.

<sup>1006</sup> Ashdown and James, *supra* 33 at 134.

<sup>1007</sup> *Id.*

<sup>1008</sup> *Id.* at 131 citing Standard Minimum Rules, Art 53(1)

<sup>1009</sup> Maria Laura Canineu, Brazil's Illegal Treatment of Women In Prison, FOLHA DE SAO PAULO, Mar 6, 2017 available at <https://www.hrw.org/news/2017/03/06/brazils-illegal-treatment-women-prison>

<sup>1010</sup> *Id.* at 132

discussions pertaining to transformative justice, especially regarding reforming the justice system.,

## 6. Women's Unique Problems in Reentry

The problems that women face upon reentry that often lead to recidivism are widely misunderstood and conflated with those that men face. For example, Australian criminologist John Braithwaite advocates that in order to achieve a lower rate of recidivism, society must properly shame the acts labeled as criminal and the criminal must feel proper shame before reintegrating.<sup>1011</sup> This notion completely overlooks the problem with the criminal justice process at every stage. Beginning with what is considered a crime. As mentioned previously, in Afghanistan women are incarcerated for moral crimes, including being outside the home in the presence of nonrelated men.<sup>1012</sup> If country's like Afghanistan were to adopt Braithwaite's reintegration model, the first step of reintegration would be making sure women were properly shamed for having the audacity to be outside the home in the presence of nonrelated men. This model would truly make women even more inferior than they already are made to feel and treated in the criminal justice system. While shame should be associated for violent crimes like rape or murder, adopting a widespread acceptance of this shame model would lead to disproportionately devastating results for women.

The Australian Institute of Criminology published an article on why women commit crimes and what types of crimes they commit that showed that women are more likely than men to commit non-violent crimes, such as drug offenses.<sup>1013</sup> The women found in prison generally experience a much wider level of sexual, physical and emotional victimization than women in the wider community.<sup>1014</sup> "Australian research indicates that as many as 85 percent of female inmates have been subject to sexual abuse, while the number of women physically and emotionally abused may be higher."<sup>1015</sup> While research shows there is no single reason why women commit crime, there are general patterns associated with women's involvement in

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<sup>1011</sup> Stacey Hannem Kish, Crime Shame and Integration, <https://marisluste.files.wordpress.com/2010/11/crime-same-and-reintegration.pdf> last visited (Apr 10, 2017).

<sup>1012</sup> AFGHANISTAN 2015 HUMAN RIGHTS REPORT, *supra* note 10

<sup>1013</sup> Katie Willis & Catherine Rushforth, The female criminal: an overview of women's drug use and offending behaviour (2003), <http://www.aic.gov.au/publications/current%20series/tandi/261-280/tandi264.html> (last visited Apr 10, 2017).

<sup>1014</sup> *Id.*

<sup>1015</sup> *Id.*

criminal behavior including connection with the illicit drug economy and prostitution, with the goal of obtaining access to drugs for personal use and to generate income.<sup>1016</sup> These women face plenty of shame throughout their lives and do not need to be further shamed upon release. There must be a very different emphasis placed on reentry in order to ensure these women do not recede to old patterns.

Empowerment must be expanded to include women released from prison. Different individuals and groups have created programs to address the need to empower women as a solution to keeping them out of prison, and solving various other problems including drug addiction, escaping domestic abuse, and other circumstances that make women likely to fail at reintegrating.<sup>1017</sup> However, these programs are generally not well known, and are not widely available due to lack of funding; in some cases these types of programs even fail because of it.<sup>1018</sup> Therefore the United Nations should create a fund that helps these programs succeed and become available to a wider audience. The United Nations should create a committee that looks into the different programs currently available and researches which ones have the highest success rates and recommend member states implement similar types of programs.

## 7. Recommendations

The information presented in this report highlights the need for nation-states to use the prison system for peace building instead of conflict building. Giving previously incarcerated women a representative at the table, and empowering them, can have a great impact on maintaining peace and security. Reforming the current justice system is an important starting point in achieving transformative justice, and peace and security. Previously incarcerated women, most of whom were victims of violence, are uniquely situated to promote solutions to this agenda, as well as promote limiting the use of violence and force as a solution. The following recommendations outline ways to support this initiative to empower previously incarcerated women:

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<sup>1016</sup> *Id.*

<sup>1017</sup> There are various non-profits committed to this cause, but for this paper Project Liberation best articulates the cause and issues associated with its commitment to providing “a space for women at all stages of criminal justice involvement to feel safe, supported, empowered, and part of a community again” See Coaching the Global Village, Project Liberation: Re-Writing the Story. Re-Rerighting the System, <http://coachingtheglobalvillage.org/project-liberation/>

<sup>1018</sup> See Walker, Lorenn, You’re Gonna Make It: Reentry Planning at a Hawai’i Women’s Prison (2010). Working with Female Offenders: A Gender-Sensitive Approach, p. 178, K. Van Wormer, ed., Wiley, 2010. Available at SSRN: <https://ssrn.com/abstract=2137969> (a group committed to having a positive impact on reentry, but failed due to lack of funding).

The United Nations should encourage the inclusion of previously incarcerated women at the peacemaking table and peace process. This can be accomplished through adopting a CEDAW general recommendation on incarcerated women. Also, women who are and who have previously been incarcerated suffer disproportionately from treatment and policies in prison. Therefore, the United Nations should create a Committee to research and develop gender sensitive training for prison guards focusing on the backgrounds of women and properly categorizing them. This Committee should adopt a gender sensitive framework to the minimum standards of treatment of prisoners.

Additionally, the United Nations should allocate funds to projects that address the empowerment of women with criminal justice involvement. Resolution 2242 and Resolution 2178 emphasized the need for measures to address violent extremism, and encouraged States to engage relevant local communities in such policies, including through empowering women. Women with criminal justice involvement are vulnerable and easily recruited as agents of terror. By taking proactive steps or measures to engage and empower women locally this will help prevent these women from being recruited as agents of terror. Lastly the United Nations should encourage member states to remove incarceration as a punishment for moral crimes.

## **WOMEN, PEACE, & SECURITY FROM PEACE TO POST-CONFLICT: THE COLOMBIA CASE STUDY**

Leah Wong

### **1. Introduction**

When the people of Colombia voted against peace in the summer of 2016, the world was shocked. Noted as another embodiment of the global rise of right-wing extremism, ideology that is radically resistant to equality, progress, and globalization, the rejection of the Colombian Peace Accord left the country unclear on how to proceed. However, the government, civil society organizations, and cooperative armed actors persisted and were able to pass an amended Peace Accord that refused to compromise on its commitment to gender and sexuality equality advancement. In this moment, the Colombian conflict and ongoing peace process is manifesting itself to be one of the most illuminating and revealing case studies of women, peace, and security in history.

The inclusion of women in the Colombian peace process is not only a powerful model for the international community to acknowledge, but also truly learn from. However, academic research often overlooks how gender inequality within Colombia served as early indicators of the conflict as well as caused its continuation. The oppression and discrimination of women was ultimately not just a result, but a driver of the Colombian conflict. Therefore, it is not enough that women were at the table drafting the terms of Peace Accord, but that they lead the implementation of the Peace in Colombia. Most importantly, implementation must dismantle the deeply-rooted patriarchal structures to secure lasting peace.

Through a combination of academic scholarship review and field research derived from an International Human Rights Advocate visit to Bogota, Colombia, I will present case study of women in the Colombian conflict and peace process. First, the paper will address how gender inequality and oppression of women served as early indicators of the armed conflict and its continuation. Second, it will address the disparate impact the internal armed conflict has had on women, including sexual violence on the battlefield as well as within the home. Third, the paper will review international guiding principles and mandates for Colombia, the transformative grassroots work of the women's movement, and Colombia's own domestic legal reform. Then

the paper will conclude with an analysis of the current state of the Peace Accord implementation and recommendations for the Government in transition towards a more sustainable peace.

### *1.1 The Conflict & its Early Indicators*

In 2016, the Secretary-General presented an appeal for “concerted action by the international community” in the form of the Plan of Action to Prevent Violent Extremism, urging Member States to recognize that in countries where “gender equality indicators are higher are less vulnerable to violent extremism”.<sup>1019</sup> The Plan of Action is integral to reframing the way women, peace, and security should be viewed as the Secretary-General calls on all states to recognize gender equality across all domestic laws and policies are determinants as well as solutions for any country maintaining or seeking peace and security. Civil society organizations have also posited for years that control of women and their sexuality by the family, community, and state leads to violence and discrimination against women all over the world.<sup>1020</sup> Statistical studies have shown that when gender equality is prevalent in a society, the country is less likely to be involved in conflict internally and externally.<sup>1021</sup> Some scholars even argue that it is not democracy or wealth as the main drivers of sustainable peace in a State, but the level of physical security afforded to women by their government.<sup>1022</sup>

The Colombian conflict is the world’s longest continuous war, involving narcotics cartels, rightwing paramilitaries, the leftist guerrilla Revolutionary Armed Forces of Colombia (FARC), and the government.<sup>1023</sup> Spanning five decades, the conflict has resulted in an estimated 220,000 people dead, 25,000 disappeared, and 5.7 million displaced.<sup>1024</sup> Due to a lack of strong central government, insurgency groups began to dominate as a response to rampant

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<sup>1019</sup> United Nations Counter-Terrorism Implementation Task Force, *Plan of Action to Prevent Violence Extremism*, United Nations Press Release, <https://www.un.org/counterterrorism/ctitf/en/plan-action-prevent-violent-extremism>. <sup>1020</sup> See Amnesty Report AI Index ACT 77/001/2004

<sup>1021</sup> Mary Caprioli, *Primed for Violence: The Role of Gender Inequality in Predicting Internal Conflict*, 161-178 INTERNATIONAL STUDIES QUARTERLY, 49 (2005).

<sup>1022</sup> Valerie M. Husdon, Bonnie Ballif-Spanvill, Mary Caprioli, Chad Emmett, *Sex & World Peace*, NEW YORK: COLUMBIA PRESS (2012).

<sup>1023</sup> Ed Vulliamy, *Colombia: is the end in sight to the world’s longest war?*, The Guardian (Mar. 15, 2015), <https://www.theguardian.com/world/2015/mar/15/colombia-end-in-sight-longest-running-conflict>.

<sup>1024</sup> Danielle Renwick, Claire Felter, *Colombia’s Civil Conflict*, COUNCIL ON FOREIGN RELATIONS, (2017), available at <http://www.cfr.org/colombia/colombias-civil-conflict/p9272>.

socioeconomic inequality stemming from rural neglect and intense poverty. Layering this legacy of conflict is Colombia's involvement with the international drug economy, much of which funds both the left-wing and right-wing armed groups. This ongoing conflict has disproportionately affected already marginalized populations such as Afro-Colombians, indigenous populations, the rural countryside, and women. But the international community has focused so intensely on contest of territory and drugs as the cause of the Colombian conflict, it has failed to see other drivers, and thus necessary solutions, to ensure the conflict truly comes to an end.

### *Machismo*

Machismo culture has existed within Latin America dating back to at least the 18th century and has become the custom in the region for generations. The culture assumes and maintains that men have legitimate power over women, with a right to exercise this power in countless forms. Inherent in machismo culture is male superiority and the necessity to protect this source of pride for men. This culture has futhered the notion that females are held to high historically-Catholic standards of sexual purity, be modest, kind, and subordinate.

It is important to note that machismo is not unique to just Latin America. It is simply a Spanish term to describe the patriarchal culture and dominance of masculinity in most parts of the world. However, coupled with Latin America's history with drug trade, gang culture, and socioeconomic inequality, this corrosive understanding of masculinity has only promoted and exacerbated existing tensions. Along with global forces, such as few opportunities, war, or migration, men felt the constant pressure to assert their masculinity and power, resulting in increased rates of violence and domestic abuse. In Colombia, where men controlled the government, armed actors, and domestic households, contest for power and exaggerated masculinity were the expectation, rather than a prioritization of peace and cooperation.

### *Economic Inequality*

The same institutional weakness within Colombia's government that allowed socioeconomic equality to fester also allowed sexism and gender-based violence to metastasize in Colombia. The Colombian High Chancellor for Equality of Women Nigera Renteria Lozano firmly stated that the violence against women is a "multi-causal phenomenon". Although data on physical and sexual violence has only slowly become available in recent years, economic and

patrimonial violence is even less statistically reported on but plays a large part in the oppression of women. Machismo culture advances the notion that women should stay home with little economic independence and ultimately social autonomy.<sup>1025</sup> Casa de la Mujer, a civil society organization dedicated to women's rights in Bogota, has addressed that the lack of economic freedom excludes women from politics and business. This enforced economic inequality between men and women lead to disproportionate levels of representation in all levels of society, ensuring that decisions regarding peace and security continue to be made by men.

Furthermore, if economic distress was a main driver of the Colombian conflict, disenfranchising half the workforce directly disabled the government's ability to ever improve its economy. If only husbands and boyfriends as main wage earners, the practicality of this culture norm is that it cuts every family's ability to earn more and stunts national economic growth. It has been proven time and time again that when more women work, economies grow.<sup>1026</sup> Evidence also shows that increasing the share of household income controlled by women, either through more cash transfers from husband to wife or an ability to earn, lead to health, education, and cognitive benefits for children.<sup>1027</sup> Allowing women to be heads of households or equal partners economically, dismantles harmful examples of machismo being passed down to the next generation. The correlation between gender inequality and stunted development is clear: continued inequality diminishes a country's ability to perform internationally, particularly if the country specializes industries where both men and women workers are equally capable of contributing.<sup>1028</sup> Therefore, gender inequality not only lead to economic distress in Colombia, but it also lead to tension that comes with economic distress within the country, and ultimately the conflict.

Within the greater discussion of gender inequality serving as an early warning sign of conflict, there must also be a discussion of it continuing the conflict and sustaining the conflict.

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<sup>1025</sup> Philipp Zwehl, *Violence against women in Colombia fueled by machismo culture and 'institutional weakness'*, Colombia Reports (Jan. 29, 2014), <http://colombiareports.com/violence-women-colombia-fueled-machismo-culture-institutional-weakness/>.

<sup>1026</sup> Organization for Economic Cooperation and Development (OECD), *Gender Equality in Education, Employment and Entrepreneurship: Final Report to the MCM*, 17, (2012), <http://www.oecd.org/employment/50423364.pdf>.

<sup>1027</sup> See The World Bank, 2012, World Development Report: Gender Equality and Development, p. 5.

<sup>1028</sup> *Id.*

Machismo culture's insistence on the nuclear family as the ideal family structure across all levels of society serves also lead to women joining insurgency groups in hoards and why the No Campaign was so successful. Both the continued recruitment of women into FARC and the No Campaign serve as strong examples of how gender inequality continued the generations long conflict in Colombia.

### *Guerilla Membership*

The Revolutionary Armed Forces of Colombia (FARC) is Colombia's largest rebel group, founded to overturn what it perceived as Colombia's systemic social inequality. Although FARC reports that their fighters joined voluntarily, human rights activists have accused FARC of forcibly recruiting people from poor, rural communities, many of which are women.<sup>1029</sup> FARC, however, has stated their opposition to forced recruitment, believing that their insurgency group thrives on people joining because they see it as a completely new lifestyle and political ideology. Within FARC, all members must live according to the same socioeconomic principles that it endorses for the rest of society, such as no fixed salaries, material incentives, and ultimately, action that would deter combatants from fulfilling their duties.

Women constitute as much of 40% of the group's combat force, fighting alongside men and enduring the same hardships.<sup>1030</sup> Interviews with female ex-combatants have divulged a series of reasons why women joined FARC and insurgency groups in numbers.<sup>1031</sup> In conversations with civil society organizations, many stated that women who joined FARC saw it as an opportunity to escape the oppression they are under in mainstream Colombian society. Internal FARC regulations state that women are equal to men and expected to perform all the same duties.<sup>1032</sup> The women who join the guerilla groups often come from poor areas, are escaping domestic abuse, and perhaps general traditional roles at home. The alternative way of life seems appealing to women who otherwise would be sanctioned within the private sphere,

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<sup>1029</sup> BBC Latin America & Caribbean Staff, *Who are the Farc?*, BBC (Nov. 24, 2016), <http://www.bbc.com/news/world-latin-america-36605769>

<sup>1030</sup> Megan Alpert, *To Be a Guerrilla, and a Woman, in Colombia*, The Atlantic (Sept. 28, 2016), <https://www.theatlantic.com/international/archive/2016/09/farc-deal-female-fighters/501644/>.

<sup>1031</sup> *Id.*

<sup>1032</sup> Council on Hemispheric Affairs, *FARC- Rebels with a Cause?*, Council on Hemispheric Affairs (July 6, 2010), <http://www.coha.org/farc---rebels-with-a-cause/>.

with little opportunity to advance in the public sphere. The membership numbers of women within FARC should indicate a boiling point that had been reached by women in troves, women who sought more agency and freedom along with physical skills that protected them from the culture of sexual violence.

However, the injustices that women faced within FARC should not be ignored. FARC's policy insists women utilize contraception and get forced abortion to stay within the troops, because pregnancy is rejected within FARC.<sup>1033</sup> Only women who were partners of guerrilla commanders were exceptions to this policy. In one study, out of 244 demobilized female fighters, 43 reported they had been forced to have abortions to keep their rank or advance in the armed group. Women were forced to leave their children behind, not allowed to have relationships outside of FARC, and at times forced into prostitution to spy for the organization.<sup>1034</sup> Nonetheless, FARC continued to draw many female members seeking to escape subordination of women in traditional households. To them, serving in the insurgency groups were a "liberation of sorts from traditional obligations and a recognition of their broader capacities as women."<sup>1035</sup> If gender inequality and the culture of machismo was not the cultural norm, it is hard to imagine a FARC that could have recruited just as many members as it did.

### *No Campaign*

The main drivers of the No Campaign stemmed from outrage and discontent that the guerilla members would not be punished as harshly and that Colombia would be pushed towards "socialism".<sup>1036</sup> In interviews conducted with civil society organizations, the organizations reported that rhetoric stemming from the No Campaign's had strong messaging of social progress that older generations of Colombians were not keen towards. An analysis of the

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<sup>1033</sup> ABColombia, Sisma Mujer, and U.S. Office on Colombia, *Colombia: Women, Conflict-Related Sexual Violence and the Peace Process*, London, U.K., (Nov. 2013).

<sup>1034</sup> Council on Hemispheric Affairs, *FARC- Rebels with a Cause?*, Council on Hemispheric Affairs (July 6, 2010),

<http://www.coha.org/farc---rebels-with-a-cause/>.

<sup>1035</sup> Terry Gibbs, *Women and the Struggle for Social Change in Colombia*, CETRI (2007), <http://www.cetri.be/Women-and-the-Struggle-for-Social?lang=fr>.

<sup>1036</sup> teleSUR Latin America, *Who in Colombia is Campaigning for 'No' to Peace?*, teleSUR (Oct. 2, 2016), <http://www.telesurtv.net/english/news/Who-in-Colombia-is-Campaigning-for-No-to-Peace-20161001-0009.html>.

messaging of the No Campaign reveals swaths of Colombian society opposed to the gender provisions of the Peace Accords, explicitly against the new rights provided for women and the LGBTI community. It is important to note that the No Campaign was not representative of all Colombians, as only 40% voted in the plebiscite.

Yet former Colombian President and current Senator Alvaro Uribe led the campaign with a strong platform of “preserving the family order”, stoking fears that the peace accord would disrupt the machismo culture that maintained the nuclear family and oppression of women in Colombia. Uribe and supporters intensely critiqued the Minister of Education Gina Parody, who was an openly lesbian woman. The Colombian government had released a manual for teachers in public schools that sought to educate about gender identity and sexuality to prevent discrimination against LGBTI students. This added to the No Campaign’s fear that the peace accord would promote a “confused gender ideology”. The National Movement of the Family gained traction in its objective to ““fight in favor of God’s original design for the family and thus for the moral bases that allow us to construct our society.”<sup>1037</sup>

During the campaign, Uribe frequently spoke of the need to defend the “traditional family,” with No Campaign pamphlets that contained language such as: ““Colombia is in danger! Of falling under the control of a communist dictatorship and the imminent passage of a gender ideology.” In recent years, the United Nations itself has recognized that protecting historically marginalized groups, such as women, includes protecting LGBTI individuals as well. The No Campaign’s resistance to LGBT equality undermined goals of gender equity as well, as homophobia is not only about sexuality but also about sexism.<sup>1038</sup> Homophobia and “traditional” gender ideology seeks to normalize gender stereotypes and maintaining the historical structures that continue to oppress women.

The Yes Campaign was driven by the people’s will to compromise and find peace, so that no more lives would be at stake. The Peace Accord prioritized reconciliation of truth and

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<sup>1037</sup> Roxanne Krstalli and Kimberly Theidon, *Here’s how attention to gender affected Colombia’s peace process*, The Washington Post (Oct. 9, 2016), [https://www.washingtonpost.com/news/monkey-cage/wp/2016/10/09/heres-how-attention-to-gender-affected-colombias-peace-process/?utm\\_term=.be4792c553f6](https://www.washingtonpost.com/news/monkey-cage/wp/2016/10/09/heres-how-attention-to-gender-affected-colombias-peace-process/?utm_term=.be4792c553f6).

<sup>1038</sup> American Association of University Women, *Why LGBT Rights Matter for Gender Equity*, AAUW (Mar. 24 2014), <http://www.aauw.org/2014/03/24/lgbt-rights-are-civil-rights/>.

punishments that would truly restore the lives of victims. Furthermore, many of the ex-combatants of FARC were women and minors who were coerced into joining. The No Campaign, unwavering for its harsh punishments standards and refusal of the Peace Accord, thereby sought to prolong the lack of resources and escape for the combatants within FARC. This refusal of the deal also meant that the No Campaign, a large part of the country, wanted to refuse the deal's attempts to achieve gender equality, restorative justice for women, and the involvement of women in the deal.

### *1.2 Why the Early Indicators Matter*

The Centro de Prevención de la Violencia (CERPREV), a NGO focused on the multiple causes and consequences of violence, has stated that the various factors such as a weak economy, war, migration, and machismo, in Latin America can lead to a “pressure-cooker effect”.<sup>1039</sup> Addressing machismo, its social constructs of violence and power, along with advancing a democratic, rather than authoritarian family structure, are ways to lessen the chance of this “pressure-cooker” from exploding. In the case of Colombia, it could have been a shorter period of conflict or the opportunity to prevent conflict from ever happening again in the country. But that outcome depends greatly on how Colombia will implement the Peace Accord. The following years are crucial in not only working on ensuring justice for victims of the widespread sexual violence detailed in the next section, but also integrating gender perspectives and dismantling traditional forms of machismo in service of the country as a whole.

## **2. The Disparate Impact and Oppression**

United Nations women has powerfully asserted that, “Sexual violence challenges conventional notions of what constitutes a security threat...[it is] cheaper than bullets, it requires no weapons system other than physical intimidation, making it low cost, yet high impact.”<sup>1040</sup> Women and girls’ bodies became a brutalized battleground in the Colombian conflict, as the multi-generational war created a culture of sexual violence both within the armed groups and

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<sup>1039</sup> The Americas, *A Lethal Culture*, The Economist (Dec. 11, 2014), <http://www.economist.com/news/americas/21636052-drugs-and-machismo-are-dangerous-mix-lethal-culture>. <sup>1040</sup> UNIFEM, UN Dept. of Peacekeeping Operations, UN Action against Sexual Violence in Conflict, *Addressing Conflict-Related Sexual Violence: An Analytical Inventory of Peacekeeping Practice*, UN WOMEN, 10 (Oct. 2012).

civilian life. With so numerous actors vying for control, women's bodies, along with territory and political power, became yet another tool for all the groups to exploit and manipulate as a weapon and collateral of war.

### *2.1 Sexual Violence as a Weapon of War*

Studies from the National Center for Historical Memory, the state agency in charge of memorializing the violations committed during the Colombian conflict, expose gender-based violence against women was utilized as an official strategy of political and territorial control during the conflict. The Center has documented 50 years of forced disappearance, murder, extra-judicial executions, kidnappings, torture and various forms of sexual and gender-based violence, including rape. Sexual violence was used to create terror in communities for military control to be more easily imposed; it forced people to flee their homes; to accomplish revenge on adversaries; to accumulate "trophies of war", and create sexual slaves during the conflict.<sup>1041</sup> The dehumanization of women was used to humiliate and wound men. Women would be forced by paramilitaries to strip naked, dance in front of their husbands, raped in front of their husbands.<sup>1042</sup>

Gender-based violence was and is continued to be utilized for social control of women within the paramilitary groups. The female members have specific codes of conduct imposed upon them.<sup>1043</sup> All the armed factions in Colombia have been charged with using rape or sexual abuse to penalize those who break rules, to humiliate women members of rival groups, or to punish perceived enemy sympathizers.<sup>1044</sup> In meetings with the National Center of Historical Memory, victim's advocates shared that the very Security Forces meant to protect the civilian population from armed actors are often the perpetrators of sexual violence against women. A

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<sup>1041</sup> See Amnesty International, *Colombia: "Scarred bodies, hidden crimes": Sexual Violence against women in the armed conflict*, Amnesty International (Oct. 2004), AMR 23/040/2004, available at: <http://www.refworld.org/docid/42ae98540.html>

<sup>1042</sup> Centro Nacional de Memoria Histórica, *;Basta Ya! Colombia: Memorias de Guerra y Dignidad*, 2013.

<sup>1043</sup> ABColombia, Sisma Mujer, and U.S. Office on Colombia, *Colombia: Women, Conflict-Related Sexual Violence and the Peace Process*, London, U.K., (Nov. 2013).

<sup>1044</sup> Jean Friedman-Rudovsky, The Invisible Army of Women Fighting Sexual Violence in Colombia, Cosmopolitan (Oct. 24, 2016), <http://www.cosmopolitan.com/politics/a5278013/domestic-violence-sexual-abuse-colombia/>.

professor running a victim's clinic at the Javeriana University shared with me that authorities often colluded with the local courts in securing their own impunity, leaving women with nowhere to turn to for protection or access to justice. It is not uncommon for women, especially indigenous women in rural Colombia, to be raped by army soldiers close to their barracks. These heinous crimes demonstrated the lack of fear or shame soldiers have in being discovered by fellow soldiers or authorities.<sup>1045</sup>

## *2.2 Sexual Violence as a Civilian Norm*

Because the conflict and its violence lasted for so many generations, experts say that generations have grown accustomed to resolving conflict with force.<sup>1046</sup> For many civilians, there is no separation of the conflict, its impacts, and everyday life. The political, economic, and physical results of conflict, including violence against women, inevitably became internalized within the home, increasingly a norm in relationships between men and women. Armed actors employed sexual violence of wives to emasculate their husbands, leaving generations of men equating power and social control with sexual violence.<sup>1047</sup> Civil society organizations lament that the perverse connection between social control and sexual violence against women remained so pervasive as an instrument of the conflict, despite "peace" in Colombia, there is a normalized culture of sexual violence within civilian culture that may take another generation to absolve. The gender inequality that was a driver of conflict manifested itself within the conflict in the form of disparate violence towards women, and then ultimately created reverberating effects across society.

The 2000 UNDP Human Development Report estimated that 60-70% of women in Colombia had been the victims of some form of violence (physical, psychological, or sexual). By 2012, it was reported that over 1,400 Colombian women are victims of violence each month and that one Colombian woman is murdered every three days.<sup>1048</sup> The most recent UNDP Human Development Report with data between 2005 and 2015 stated that 37.4% of Colombian women

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<sup>1045</sup> Amnesty International, *Annual Report: Colombia 2013*, Amnesty International USA (2013).

<sup>1046</sup> Friedman-Rudovsky, *supra* note 26.

<sup>1047</sup> *Id.*

<sup>1048</sup> *Id.*

reported have experienced violence by an intimate partner. Updated numbers for the violence experienced by non-intimate partners are only now being gathered by the post-conflict agencies.

### *2.3 Impunity*

Not only is sexual violence rampant, but impunity is flagrant in Colombia. Because machismo culture also sanctions violence against women, there are generations of women apathetic of the physical and emotional abuse they suffer. Women are not aware of their right to resist against this injustice, let alone feel empowered to utilize the legislative safeguards that the government slowly enacted. Furthermore, the government fails at truly implementing the laws that sought to help women in abusive situations by not adequately providing spaces in which women can report the crimes committed against them. There are enormous obstacles in obtaining justice for women survivors of sexual violence. There are patterns of engrained discrimination by administration and law enforcement, the lack of protection and safeguards for women who do end up reporting, the absence of reliable records of cases, and lack of healthcare and psycho-social support.<sup>1049</sup> Women are often stigmatized and victimized all over again when they do decide to report domestic violence or sexual violence.

Oxfam released a study in 2009 that reported that between 2001 and 2009, less than 18% reported incidents of sexual violence in Colombia.<sup>1050</sup> The impunity rate was ultimately more than 98% because of the reported cases, only 2 in 100 are likely to result in a sentence.<sup>1051</sup> The Colombian government's Justice and Peace process offered reduced sentences to demobilized paramilitary members if they confessed to their crimes. Of the 39,546 acts that were confessed, only 96 were related to sexual violence despite sexual violence being used as a weapon in the conflict. The lack of confessions showcase the lack of acknowledgement from paramilitaries that sexual violence was a serious human rights violation that they had committed.

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<sup>1049</sup> Sisma Mujer, *Access to justice for Women victims of sexual violence: fourth follow-up report to Auto 092 of the Colombian Constitutional Court*, WORKING GROUP TO MONITOR COMPLIANCE WITH AUTO 092 OF 2008 OF THE COLOMBIAN CONSTITUTIONAL COURT (May 2011).

<sup>1050</sup> Oxfam, *Sexual Violence in Colombia: Instrument of War*, Oxfam Briefing Paper (Sept. 2009), <https://www.oxfam.org/sites/www.oxfam.org/files/bp-sexual-violence-colombia.pdf>.

<sup>1051</sup> *Id.*

Only in 2012, were Colombian army officers begun to be sentenced for sex crimes. A junior army officer named Raul Munoz was sentenced to 60 years for the rape and murder of a 14-year old girl and her two brothers.<sup>1052</sup> Although the conviction was considered one of the first examples sexual violations by the security forces and paramilitaries were addressed in the court, local authorities refused to search for the murdered children, recover the remains of their bodies. Furthermore, countless threats were directed at the family of the children, forcing them to flee the region. The lengthy process of arriving at justice for such a heinous crime demonstrated the novelty of accountability for sex crimes in Colombia.<sup>1053</sup>

### **3. The Women Build Peace**

Female presidential candidate Aida Avella said that for women to lead Colombia, a country that has been historically patriarchal, it would require a “force of social revolution”. In 2013, the Inter-Parliamentary Union ranked Colombia 118th out of 140 countries for inclusion of women in political entities.<sup>1054</sup> Compared to other Latin American countries such as Brazil and Chile, Colombia has never had a female president or vice-president. When women, such as Regina Betancourt de Liska or Noemi Sanin, did attempt to run for president, they were captured or kidnapped by warring groups and barred from the election. In the section, we review the legal and social impetuses and principles empowering the women’s rights movement in Colombia.

#### *3.1 International Human Rights Law*

While Colombia rebuilds itself as a new nation, international human rights law can and must serve as guiding principles for the country to create sustainable peace and security.

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<sup>1052</sup> *Id.*

<sup>1053</sup> Nicole Thompson, *Colombian Senate Passes Law to Protect Victims of Sexual Violence*, Latin Post (May 2014), <http://www.latinpost.com/articles/13663/20140529/colombian-senate-passes-law-protect-victims-sexual-violence.htm>.

<sup>1054</sup> <http://colombiareports.com/women-peace/>

### *CEDAW & Concluding Observations*

The *Convention on the Elimination of All Forms of Discrimination Against Women* (*CEDAW*) serves as a tactical blueprint for universal gender equality and human rights, specifically on how to achieve progress and overcome barriers of discrimination against women and girls.<sup>1055</sup> Each of the articles serve as guidelines for countries to implement as they see fit. Addressing the machismo culture within the home, the Colombian government can look to Articles 13 and 16. The two articles advocate for the equal rights of women within the economic and social life, as well as within the marriage and family. There must be reforms in place to ensure that women can be the equal partners or truly heads of households, rather pure subordinates to their husband. Allowing women more agency within the home will translate into more agency outside of the home.

Article 7 states that gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of Article 1 of the Convention. Furthermore, General Recommendation 19 of CEDAW states that “gender based violence is a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men.”<sup>1056</sup> The Committee details that “traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion”, particularly such as family violence and abuse. They emphasize that these “may justify gender- based violence as a form of protection or control of women.” Therefore, to actually address the pandemic violence against women in Colombian society, the Colombian government must find innovative reforms to truly address oppression of women within the home. These measures should achieve prevention of sexual violence as a cultural norm and not just retributive action after the violence has already happened.

Article 2(e) of the CEDAW revolutionized international law by bringing non-state actors, such as private individuals, into the ambit of international law.<sup>1057</sup> By stating “by any person,

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<sup>1055</sup> Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Dec. 18, 1979

<sup>1056</sup> Comm. on the Elimination of Discrimination Against Women (CEDAW Committee), General Recommendation No. 19 – Violence Against Women, Para. 7, 11th Sess., U.N. Doc. A/47/38 (Jan. 29, 1992).

<sup>1057</sup> CEDAW, art. 2(e).

organization, or enterprise”, Article 2(e) made any act of oppression or violence against women a public matter, even if it happened within the intimate sphere of the home. This article is particularly relevant to Colombia’s conflict, in which so many different actors were responsible for the injustices towards women. This provision also requires the Government to act on the prevalence and normalization of sexual violence in society.

Article 5(a) also serves as a radical, powerful provision in CEDAW, because it calls on states to take the appropriate measures to go into the private sphere and truly make systemic changes.<sup>1058</sup> The Colombian government has focused much of its peace talks and provisions on restoring justice to the conflict victims. But to truly eradicate sexual violence as a weapon of war or bring justice for those who have been victims of this weapon, the government must seek to dismantle the culture of sexual assault and rape within the civilian community as well. So far, the government of Colombia has effectuated laws prioritizing gender issues and equality, which is important in resetting the normative. Article 5(b) of CEDAW also calls on states to fix their own complicity in the structures of discrimination and violence towards women, asking each government to conduct due diligence in the advancement of genuine gender equality.

The Colombian government’s inclusion of women and women’s rights civil society organizations at the peace talks is an example of how Article 7 and Article 4 of CEDAW can be read with one another.<sup>1059</sup> Article 4 states the need for temporary special measures (TSMs) to accelerate gender equality. These TSMs are not to be framed as “charity” or “goodwill: but as actual rights given by the Universal Declaration of Human Rights and not means to reinforce subordination.<sup>1060</sup> To achieve compliance with other Articles in CEDAW, Article 4 must be wielded. The Colombian government, in acknowledging the lack of women who have ascended the ranks of political leadership, has set actual quotas for the membership of different decision-making commissions for the transitional justice period. The provisions afforded women the equal right to truly participate in civil society and hold important positions that direct the future of the country forward in a manner seeking to truly vindicate the rights of those marginalized both during and afterconflict.

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<sup>1058</sup> CEDAW, art. 5(b).

<sup>1059</sup> CEDAW, art. 4 & art 7.

<sup>1060</sup> *Id.* at art. 4.

Because CEDAW is broad, concluding observations and general recommendations serve as useful interpretive tools. In CEDAW’s concluding observations of India, the committee acknowledged that the only way to address conflict violence is by addressing the day-to-day violence.<sup>1061</sup> The committee reviewing India also concluded that although the state may not be responsible for the bus-gang rape that galvanized the modern Indian women’s rights movement, the state was responsible for not doing enough in legislation and criminal justice to prevent such atrocities from happening.<sup>1062</sup> Colombia would also be wise to note that the Indian government turned sexual violence into a strictly law and order issue, which is not reform that properly puts the victim first and foremost. States must be rigorous in elevating women’s issues to the “public good” without instrumentalizing or transactionalizing the advancement of gender equality. CEDAW properly amplifies and augments women’s movement from being not only victims but actual agents of their own change in the transitional justice phase.

#### *UN Security Council Resolutions*

The Government of Colombia should be acknowledged for its inclusion of women creating measures to restore peace and security in Colombia. Having acknowledged that women and girls suffered unique harms and violence during the generations long conflict, the Government’s incorporation of women’s voices during the Peace Accord talks fall squarely in line with the charge of UN Security Council Resolution 1325.<sup>1063</sup> However, the resolution emphasizes the “urgent need to mainstream a gender perspective into peacekeeping operations.”<sup>1064</sup> The Government will need to ensure that the gender perspective is actually “mainstream” and not just a line item during the implementation of the Peace Accord. Resolution 1325 also calls on governments to “take special measures to protect women and girls from gender-based violence”.<sup>1065</sup> This charge requires the Colombian government not only do retroactively compensate victims of gender-based violence, but to implement new laws and

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<sup>1061</sup> CEDAW, *Concluding observations on the combined fourth and fifth periodic reports of India*, United Nations (July 18, 2014), CEDAW/C/IND/CO/4-5.

<sup>1062</sup> *Id.*

<sup>1063</sup> See S.C. Res. 1325, U.N. Doc. S/RES/1325 (Oct. 31, 2000).

<sup>1064</sup> *Id.*

<sup>1065</sup> *Id.*

reforms to prevent this violence. Similar to CEDAW Article 7, special measures can and may start with continuing to give women impactful roles in the implementation process.

The importance of women participating and leading peace and security efforts are reaffirmed in subsequent resolutions after Resolution 1325.<sup>1066</sup> Although CEDAW can be used to maintain normative changes to society for the benefit of women, the Security Council Resolutions provide direct action items for states to undertake. Just in 2015, UN Security Council Resolution 2242 reaffirmed the United Nation's call to action for states to engage women in the resolution of violent extremism and conflict.<sup>1067</sup> UN Security Council Resolution 2122 also stressed the need for women to participate in all phases of conflict prevention, resolution and recovery, with the onus on governments to effectively prosecute international crimes against women.<sup>1068</sup> The Government must reform Colombia's judicial system—currently wrought with bureaucratic inefficiencies and collusion with illegal armed groups. Because of the disproportionate impact the judicial system has on survivors of sexual violence and the rampant impunity it perpetuates, the resolutions directly requires states to reform their prosecution and criminal justice system as a resolution of the conflict and transition into peace.

A post-conflict period for any country provides enormous opportunity for meaningful reform of both laws and customs. As a country goes through transition in its government institutions and in society, women must participate in directing both the political and cultural agenda. Even if the Colombian Government has enacted formal laws to restore justice to victims of gender-based violence, women need to be at the table to ensure that customary laws equally support general equality. The Security Council utilized its Chapter VII Authorization to mandate Member States to address conditions that contributed to the spread of violence extremism and conflict by promoting gender equality and empowering women.<sup>1069</sup> Combined with General Recommendation 30, both the Security Council and CEDAW committee have put forth a unified

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<sup>1066</sup> The Security Council adopted additional resolutions between 2000 and 2015 on Women, Peace and Security agenda, including resolutions 1820 (2008); 1888 (2009); 1889 (2009); 1960 (2010); 2106 (2013); and 2122 (2013).

<sup>1067</sup> Res. 2242, United Nations Security Council, Oct. 13, 2015, S/RES/2242.

<sup>1068</sup> Res. 2122, United Nations Security Council, Oct. 18, 2013, S/RES/2122.

<sup>1069</sup> Res. 2178, United Nations Security Council, Sept. 24, 2014, Para. 16 S/RES/2178.

women, peace, and security agenda that Member States should aspire and adhere to.<sup>1070</sup>

### *Intersectional Human Rights Violations*

Colombia's courts have recognized that diverse characteristics regarding ethnic origin, age, disability, sexual orientation or gender identity can lead to diverse vulnerabilities.<sup>1071</sup> In addition to factors impacting on all women, indigenous and afro-Colombian women deal with a history of slavery and racism that ties to a perception of ownership of their bodies.<sup>1072</sup> In 2011, the Colombia Constitutional Court declared that 34 indigenous communities were at risk of physical or cultural extinction.<sup>1073</sup> The Court also acknowledged that indigenous and afro-descendent women are the population with the highest exposure rates for sexual violence, with a specific and disproportionate impact on these women and their communities. Often cases facing this population group are committed by state Security Forces.<sup>1074</sup> Civil society organizations lament that most of their resources are concentrated in Bogota and the urban centers, making access to justice for these women even less available. Despite acknowledging the disparity between justice for women along race and class divides, the Colombian government has yet to incorporate an intersectional approach in its response yet. CEDAW in conjunction with the *International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)* requires the government to create access to justice for all women.

Colombia has the largest population of internally displaced people (IDPs) in the world.<sup>1075</sup> In meetings with Cáritas Colombiana, a non-profit dedicated to supporting IDPs, refugees, and asylum seekers in Colombia, the advocates expressed how displaced and refugee women suffer unique dangers. There are several international treaties that provide obligations and commitments of Member States to protect refugees, migrants, and internally displaced

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<sup>1070</sup> Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 30: On women in conflict prevention, conflict and post-conflict situations, U.N. Doc. CEDAW/C/GC/30 (Oct. 18, 2013).

<sup>1071</sup> ABColombia, Sisma Mujer, and U.S. Office on Colombia, *Colombia: Women, Conflict-Related Sexual Violence and the Peace Process*, London, U.K., (Nov. 2013).

<sup>1072</sup> *Id.*

<sup>1073</sup> Gay McDougall, *Report of the Independent Expert on Minority Issues*, United Nations Mission to Colombia, para. 44, (Jan. 25, 2011).

<sup>1074</sup> Office of the Prosecutor General of the Nation, *Report from the National Office on Analysis and Context (DINAC)*, Auto 092 of 2008, 85, (April 2015).

<sup>1075</sup> Adrian Alsema, *Colombia has More Internally Displaced Persons than Syria*, Colombia Reports (June 20, 2016), <http://colombiareports.com/colombia-internally-displaced-syria/>.

people. These treaties include the *ICERD*, the *International Covenant on Civil and Political Rights (ICCPR)*, the 1951 Refugee Convention and the Outcome Document of the Durban Review Conference. Although CEDAW recognizes that women suffer disproportionately from the adverse effects of gender discrimination, an intersection with other treaties underscore the need for governments to address the compounded discrimination migrant women and refugees face because of sexism and xenophobia. CEDAW “requires full protection of women’s equality” in issues related to race, ethnicity, and nationality and operates simultaneously with the laws related to refugees and internally displaced people.<sup>1076</sup>

The 2030 Agenda for Sustainable Development (SDG) advances the need for interplay between multiple goals for all of them to be accomplished.<sup>1077</sup> SDG Goal 5 requires Member States to empower women and girls to reach their “full potential” with several specific recommendations. The Goal reiterates the imperative of having women in leadership positions at all levels of decision marking in the “political, economic, and public life”.<sup>1078</sup> The SDG also expressly states the importance of giving women equal rights to economic resources, ownership of land and other forms of property, and financial services. Goal 9 seeks to reduce the inequality within countries by through building resilient infrastructure, industrialization for economic growth, and innovation. Goal 16 requires Member States to provide “effective, accountable, and inclusive institutions at all levels”. These Goals together demonstrate can be used by civil society organizations to urge the Government in reaching populations in rural parts of Colombia as well as providing economic agency to women everywhere. The SDG Agenda focuses the discourse on poverty, inequality, sustainability with women’s empowerment as a pre-condition for the success of these goals. Gender equality is not only an objective but a part of the solution when it comes to developing sustainable countries.

The Latin American countries have also signed the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belem do Para"), which affirmed the regions to the principles undergirding CEDAW with specific

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<sup>1076</sup> See generally CEDAW (1979)

<sup>1077</sup> U.N. Secretary-General, *Preventing Conflict Transforming Justice Securing the Peace: A Global Study on the Implementation of United Nations Security Council Resolution 1325*, U.N. Doc. S/RES/2122 (2015).

<sup>1078</sup> *Id.*

measures unique to their countries.<sup>1079</sup> The Convention requires countries to pass laws that protect women from violence, but to also educate their citizens about women's rights. The Convention specifies the need for States to "modify, through educational programs, social and cultural patterns of conduct of men and women and prejudices, and customs and stereotypes based on the idea of the inferiority and superiority of the sexes", which is a critical provision in dismantling harmful identities of machismo in Latin America.<sup>1080</sup> Although, the Convention cannot restrict domestic law, it is explicit in its recommendations to States on how to comprehensively support women and advance gender equality. The Government should adhere to this international human rights instrument moving forward. Ultimately, the underpinnings of human rights are not only indivisible and unalienable, they are also intersectional and must be approached in synergy with one another.

### **3.3 Grassroots Women's Movement**

Along with international guiding principles, the grassroots women's movement and work of civil society organizations in Colombia were transformative in achieving the domestic legal reforms in Colombia. In 2012, the issue of pervasive violence against women in the war as a weapon and in society as a cultural norm was placed in the national spotlight after the rape and murder of Rosa Elvira Cely. The woman was attacked, raped, and murdered by a fellow student she trusted in a public park in Bogota. She was found half-naked at the park after delayed response from authorities. Found inside her was a branch that had been entered into her body through her anus, ultimately leading to fatal internal infection. The brutality of her attack and criticism of the authorities' response brought thousands of people to the streets in protest of the laws imposing weak sentences for hate crimes against women, leading to the country's first bill criminalizing femicide being passed.<sup>1081</sup>

Despite the growing body of research that suggested inclusion of women and civil society groups in peace negotiations makes the resulting agreement 64% less likely to fail and 35% more

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<sup>1079</sup> Organization of American States (OAS), *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belem do Para")*, (June 9, 1994)

<sup>1080</sup> *Id.*

<sup>1081</sup> <http://www.bbc.com/news/world-latin-america-32990533>

likely to last at least 15 years, the status quo in post-conflict transition periods does not actively include women.<sup>1082</sup> Because women made up over 60% of the Colombian conflict's victims, they marched themselves to the Delegation of Victims at Havana in order to ensure that they would indeed be a part of the peace talks and discussions. Pressure from the women's groups resulted in a creation of the Sub-Commission on Gender that would analyze the Peace Accord line by line in order to ensure women's perspectives were included and presented. Women's groups also fought to ensure that LGBTI issues would be included in the Peace Accord, the first Peace Accord likely to include sexuality as a transitional issue. Even small victories such as including the word "women" every time the word "men" was included in the Accord embodied the Accord's commitment to policies that would give both genders equal standing.<sup>1083</sup> By the year 2014, the state of Antioquia in Colombia had created the campaign, "Peace, a women's word," in which government bodies such as Medellin's Town Hall created events and rallies to give women both a voice and the power to instigate change regarding the ongoing peace process.<sup>1084</sup> This concept of women as transmitters of peace in post-conflict Colombia began to spread. Ultimately, women made up a third of the peace talks and were responsible for the monumental gender-based legal reforms during Colombia's post-conflict period thus far.

### **3.4 Domestic Legal Reform**

In speaking to women's rights activists in Bogota, many of the activists credited the Constitution and the Constitutional Court for giving legal and institutional teeth to the women's rights movement, beyond the social, grassroots organizing. The Colombian Constitution of 1991 was monumental in establishing certain rights for women such as: the right to bodily integrity and autonomy, to vote, to hold public office, to work, to fair wages or equal pay, to own property; to receive an education; to serve in the military in certain duties; to enter into legal

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<sup>1082</sup> How Women's Participation in Conflict Prevention and Resolution Advances U.S. Interests, Jamille Biglo and Rachel Vogelstein, Council on Foreign Relations, <http://www.cfr.org/peacekeeping/womens-participation-conflict-prevention-resolution-advances-us-interests/p38416>

<sup>1083</sup> Ana Campoy, *Colombian women made sure gender equality was at the center of a groundbreaking peace deal with the FARC*, Quartz (Aug. 29, 2016), <https://qz.com/768092/colombian-women-made-sure-gender-equality-was-at-the-center-of-a-groundbreaking-peace-deal-with-the-farc/>.

<sup>1084</sup> *Id.*

contracts; and to have marital, parental and religious rights.<sup>1085</sup> The Constitution of 1991 spurred subsequent legislation since the early 20th century in the following decades sought to develop gender equality within the Colombian government.

### *The Constitutional Court & Other Courts*

The Constitutional Court has become one of the most progressive institutions in Colombia, protecting the rights of the most marginalized through rulings and decrees. The Court has also played a significant role in declaring sexual violence crimes as a serious issue the country must address. The Court passed a landmark decision in 2008, titled Auto 092, which many women's rights activists in Colombia use as an instrument for implementation of women's rights reforms. The writ acknowledged that those most affected by conflict's wide displacement of people were women and that displaced women faced higher risk of sexual violence. In that ruling, the Court emphasized that sexual violence, abuse, and exploitation of women is "a habitual, extended, systematic and invisible practice in the Colombian armed conflict."<sup>1086</sup> The ruling gave significant support for demands that women be incorporated into the spaces where policies directed at population are defined.

Other courts have also made significant strides in recognizing, spotlighting, and upholding justice regarding sexual violence crimes. As stated above, demobilizing paramilitaries seeking impunity under the Justice and Peace Law did not report sexual violence as crimes when they confessed. However, In September 2014, the regional Barranquilla Tribunal ruled that a former paramilitary leader would not benefit from the Justice and Peace Law because he failed to disclose the truth about the rapes he was charged with.<sup>1087</sup> In November 2014, the Bogota High Tribunal charged the AUC, a paramilitary group, with 175 incidents of sexual and gender-based violence against both female and male victims. The court found that AUC utilized rap, enforced

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<sup>1085</sup> Constitute Project, *Colombia's Constitution of 1991 with Amendments through 2013*, OXFORD UNIVERSITY PRESS (Mar. 2017).

<sup>1086</sup> International Center for Transitional Justice, *In Colombia, Women Affected by Conflict are Agents of Social Change*, ICTJ (2014), <https://www.ictj.org/news/colombia-women-affected-conflict-are-agents-social-change>.

<sup>1087</sup> ABColombia, Sisma Mujer, and U.S. Office on Colombia, *Colombia: Women, Conflict-Related Sexual Violence and the Peace Process*, London, U.K., (Nov. 2013).

prostitution, forced sterilization, and forced abortions in order to gain control, intimidate civils, and “destroy the social fabric of communities”.<sup>1088</sup>

The Colombian courts are also turning to international jurisprudence in sexual violence cases. The Criminal Chamber of the Supreme Court found that rape was indeed a war crime by relying on the International Criminal Tribunal for the former Yugoslavia as one of its sources.<sup>1089</sup> In January of 2015, the Constitutional Court issued another important order, titled Auto 009. This order urged authorities not to only address sexual violence as a serious form of gender inequality, but to prevent and ensure these crimes would not be repeated. Furthermore, it stressed that all parties to the conflict, not just the perpetrators, are responsible for the endemic of sexual violence in Colombia. These rulings have been monumental in not only changing the culture of impunity, but ensuring that all of Colombia acknowledges the gender-based violence in the conflict and transition to peace.

#### *National Policy for Gender Equality*

The Colombian Government has not formally adopted a National Action Plan pursuant to the Secretary-General’s National Action Plan, but it did adopt a National Policy for Gender Equality in 2012 to promote policies, agencies, and a comprehensive plan to ensure a “life free of violence for women”.<sup>1090</sup> The policy created a National Commission for Gender Equality, which is charged to “coordinate and execute a comprehensive plan”.<sup>1091</sup> The Commission is to monitor the technical and operational aspects of the National Policy; provide guidance on how to effectively implement their plan to national and regional levels; design a system that will monitor the completion of intended goals and outcomes, providing guidelines for investment, management and execution of co-financing proposals, and producing annual reports tracking National Policy on Gender Equity.<sup>1092</sup> The UN Women has credited the government for utilizing

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<sup>1088</sup> *Id.*

<sup>1089</sup> *Colombia Prosecutor v Niño Balaguera et al.*, Case No. 39392, Criminal Chamber of the Supreme Court (Colombia), Judgment (Nov. 14, 2014)

<sup>1090</sup> Daniel Freeman, *Colombia adopts national policy for gender equality*, Colombia Reports (Sept. 2013), <http://colombiareports.com/colombia-adopts-national-policy-gender-equality/>.

<sup>1091</sup> *Id.*

<sup>1092</sup> *Id.*

the policy to coordinate across sectors to reform laws and public policies for women. However, discourse on this National Policy is sparse, perhaps pointing to a lack of use.

Colombian President Juan Manuel Santos began peace talks with FARC to resolve the internal armed conflict because a peace settlement was best for all parties rather than continuing to fight. President Santos was not constitutionally or legally obligated to put the peace deal to a popular referendum, but he chose to because he wanted the nation's people to decide. This inevitably gave both men and women more agency over the direction of the country. If the Santos administration had negotiated and signed the agreement on its own, there'd be a lot less voices heard from civil society organizations and women in general, as women are severely underrepresented in the government. However, FARC was worried that a plebiscite would actually exclude historically marginalized groups again, since access to polling booths is harder for campesinos, Afro-Colombians, Indigenous peoples, and women.<sup>1093</sup>

#### *Victims and Land Restitution Law 2011*

A defining piece of legislation that came out of the peace process was the Victims and Land Restitution Law passed in 2011, pledging the country's commitment to advance truth, justice and reparations for victims. The Colombian peace process is the first in the world that placed the victims and their rights at the center of transition.<sup>1094</sup> On February 10, 2015, the Historical Commission on the Conflict and Its Victims released an 800-page report on the origins, causes, and consequences of the Colombian armed conflict. The report by 12 Colombian historians (half selected by the FARC and half selected by the government) and two rapporteurs was submitted to the negotiating teams to help craft agreements to better address the rights and needs of conflict victims.

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<sup>1093</sup> teleSUR Latin America, *Colombia Constitutional Court Approves Plebiscite on Peace Deal*, teleSUR (July 18, 2016), <http://www.telesurtv.net/english/news/Colombia-Constitutional-Court-Approves-Plebiscite-on-Peace-Deal-20160718-0028.html>.

<sup>1094</sup> Juan Manuel Santos, *Nobel Peace Prize Lecture 2016*, Oslo (Dec. 10, 2016), [https://www.nobelprize.org/nobel\\_prizes/peace/laureates/2016/santos-lecture\\_en.html](https://www.nobelprize.org/nobel_prizes/peace/laureates/2016/santos-lecture_en.html).

Therefore, from the beginning of the negotiations, the government recognized the need for the peace process to be as inclusive as possible. But even so, it took almost two years to truly include women at the table.<sup>1095</sup> It was only after 450 women lobbied at the 2014 National Summit of Women and Peace in Bogota, did President Santos appoint two women with greater decision-making power on behalf of the Government at the talks. The political parties recognized the “important role of women in conflict-prevention, conflict-resolution and peacebuilding.”<sup>1096</sup> With the support of UN Women, women’s rights activists worked to incorporate gender perspective into this comprehensive law-- ultimately securing more than 25 articles on gender issues. Provisions within the law includes a woman’s right to live free from violence, psychosocial care to survivors of sexual violence, mandatory representation for women survivors, privileges for women on land restitution, organizing rights training, and economic empowerment initiatives for women.<sup>1097</sup>

The Government of Colombia established four units for survivors of the war: the Unit for Integral Attention and Reparation of Victims, the Protection Unit, Land Restitution, and the Center of Historic Memory.<sup>1098</sup> The Unit for Integral Attention and Reparation of Victims is the key agency in charge of implementing this important piece of legislation. In July 2012, UN Women signed a Memorandum of Understanding with the agency to ensure that there would be special emphasis on sexual and gender-based violence in implementation.<sup>1099</sup> The law also mandates the Attorney General’s Office to design and implement a protocol in investigating sexual violence cases with more rigor. However, civil society organizations say that while the

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<sup>1095</sup> Un Women, *Women take the reins to build peace in Colombia*, UN Women (May 29, 2015), <http://www.unwomen.org/en/news/stories/2015/5/women-build-peace-in-colombia>.

<sup>1096</sup> *Id.*

<sup>1097</sup> UN Women, *Truth, justice, and reparation for women survivors of Colombia’s battles*, UN Women (Sep. 12, 2012), <http://www.unwomen.org/en/news/stories/2012/9/truth-justice-and-reparation-for-women-survivors-of-colombia-s-battles>.

<sup>1098</sup> *Id.*

<sup>1099</sup> *Id.*

law provides prioritization of economic opportunities and elimination of discrimination, it does not address historical gender inequalities in a transformative matter.<sup>1100</sup>

### *The National Center for Historical Memory*

The Penn Law International Human Rights Advocates had the privilege of also meeting with one of the most important and innovative institutional reforms that the Colombian government has implemented is the Centro Nacional de Memoria Historica, the National Center of Historical Memory. An independent, government-supported organization, the Center's main charge is to work on documenting the crimes and victims that happened in Colombia's generations-long conflict to inform the work anticipated by the post-conflicted truth commission and special courts. The effort to collect and exhibit the real-live and real-time stories of victims not only breaks the taboo in Colombia on speaking about those most affected by the conflict, but also places the victims in the center of peace discussions and country re-building. The spotlighting of victims, including the lives of women and their unique suffering during the conflict, paves the way for direct participation of the victims in the reconciliation efforts. The historical record is also important to paint an honest picture of the country's social and civil climate for all vulnerable populations, that many of their documented sufferings are not just historical but ongoing and must be addressed.

The Center has also been integral in ensuring that the implementation of gender equality into the transitional justice is not only a quota game, but a cultural shift in the understanding of women's struggles and oppression. President Santos noted in his Nobel Peace Prize acceptance speech, "Victims want justice, but most of all they want to know the truth, and they – in a spirit of generosity – desire that no new victims should suffer as they did."<sup>1101</sup>

## **4. The Ongoing Case Study & Implementation of Justice**

Although, the Colombian women's movement has made enormous strides for both gender equality in the country and peace for the country, the sustainability of both this equality and peace remains to be seen. When the former UN Special Rapporteur on Sexual Violence in

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<sup>1100</sup> ABColombia, Sisma Mujer, and U.S. Office on Colombia, *Colombia: Women, Conflict-Related Sexual Violence and the Peace Process*, London, U.K., (Nov. 2013).

<sup>1101</sup> *supra* n. 76.

Conflict, Margo Wallstrom, visited Colombia in 2012, she said “I understand that the country as a whole wants to look to the future, instead of dwelling on the past, but there can be no lasting peace without security and peace for women”.<sup>1102</sup> Experts say that often, it is during post-conflict times, that gender-based violence can become worse. Those who are demobilizing and handing power back over can feel emasculated, turning to violence against women as a response.

Furthermore, there is ongoing distrust of government, because of its history colluding with illegal authorities responsible for the violence.

When I met with Liliana Sanchez at Javerina University in Bogota, she was en route to a meeting with the Ombudsman’s office. In Colombia, the Ombudsman is considered one of the most highly regarded government institutions because of its distance from cartels and commitment to crimes against women. Yet, most civil society organizations I met with Bogota believe that there are serious gaps between new regulations enacted and actual practice. Despite, the Constitutional Court finding ongoing protection obstacles that prevented women from reporting sexual violence, the Prosecutor General Office has been slow to remove these obstacles in practice. New policies are vague and unclear amongst bureaucratic red tape.<sup>1103</sup> The Working Group to monitor compliance with Auto 092 of the Colombian Constitutional Court put out a report that highlights the overemphasis placed on testimonial or physical evidence when Courts decide whether there is sufficient evidence for prosecution. This is likely from the slow transformation of normative stands as well as continued stereotyping of women. But a result of this approach is that it has closed many cases prematurely without searching anymore for circumstantial evidence.<sup>1104</sup> Of the sexual violence cases that have been increasingly reported, most take place in isolation at the helm of regional prosecutors. The dispersed nature of these investigations means that the conflict-related sexual violence crimes may not be contextualized and seen only as stand-alone events, rather than a systemic pattern of abuses.

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<sup>1102</sup> UN News Service, *Colombia must fight impunity for sexual violence crimes*, UN Official (May 21, 2012).

<sup>1103</sup> Sisma Mujer, *Access to justice for Women victims of sexual violence: Sixth follow-up report to Auto 009 of the Colombian Constitutional Court*, WORKING GROUP TO MONITOR COMPLIANCE WITH AUTO 009 OF 2015 OF THE COLOMBIAN CONSTITUTIONAL COURT (May 2016).

<sup>1104</sup> Sisma Mujer, *Access to justice for Women victims of sexual violence: fourth follow-up report to Auto 092 of the Colombian Constitutional Court*, WORKING GROUP TO MONITOR COMPLIANCE WITH AUTO 092 OF 2008 OF THE COLOMBIAN CONSTITUTIONAL COURT (May 2011).

It remains to be seen how the other government offices will incorporate the gender-based issues into their actions forward. It will not only take monetary compensation to the victims of sexual violence to truly arrive at justice, but a cultural transformation. In meetings with Casa de la Mujer, they spoke of the workshops they hosted for women. These workshops are aimed at supporting women and helping them understand what sexual violence even is. Because machismo is the culture and assault has been commonplace for so many decades, sexual violence and other forms of oppression are normalized to women. There is no way to achieve justice for these victims and prevent the cycle of violence from happening again, without changing everyone's normative thinking on gender-based violence.

#### *4.1 Women Implementing the Accord*

If the women are continued to be at the table in implementing the Peace Accord, Colombia would serve as a monumental case study in which women were not only the victims, but also the leaders of the peace process and implementation of security. However, when peace processes simply “add women and stir”, women’s concerns remain unfunded and ignored.<sup>1105</sup> Recently, the Office of the High Commissioner of Human Rights (OHCHR) expressed concern about the slow pace of the government’s Peace Accord implementation thus far.<sup>1106</sup> The OHCHR Annual Report released in March acknowledges Colombia’s efforts in addressing the historic inequality of women and the LGBT community as well as recently integrating efforts regarding indigenous and Afro-descendant populations. The Colombian government also formally excluded any and all possibility for amnesty or pardon for sexual violence crimes. However, the report notes that the transitional justice system still needs “legal, institutional, budgetary, and cultural changes”. It further calls on Colombia to ensure that public participation is a cross-cutting principle of all phases of implementation and that staff should include communities affected by the conflict.

Interviews with civil society organizations and academics have revealed continued but cautious optimism that the government will continue to engage with women and women’s rights

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<sup>1105</sup> Fionnuala Ní Aoláin, *The Relationship of Political Settlement Analysis to Peacebuilding from a Feminist Perspective*, UNIVERSITY OF MINNESOTA LAW SCHOOL, 151-156, Jan. 12, 2016).

<sup>1106</sup> UN High Commissioner of Human Rights, *Annual Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Colombia*, Human Rights Council (March 2017), A/HRC/34/3/Add.3.

groups in implementing the Peace Accord. Although there is few formal record of these engagements, advocates at the Casa de la Mujer relayed that they have been diligently representing the different voices of women they work with in working groups. One implementation working group specifies membership to three women's organizations at the domestic level, three women's organizations at the international level, three FARC representatives, and three government representatives.

#### *4.2 National Liberation Army Peace Talks*

In April 2017, peace talks with Colombia's second largest guerrilla group, the National Liberation Army (ELN) have officially began. The joint statement on the negotiations have prioritized the perspectives of civil society and community actors. The agenda will cover: participation of society in constructing peace, democracy for peace, transformations for peace, victims, the end of armed conflict, and implementation. It will be critical that the already agreed-upon elements of justice, reparation, non-repetition, and truth in the FARC Peace Accord will be repeated in the ELN Peace Accord.<sup>1107</sup>

#### *4.3 The Culture Change*

Although the Colombian government has taken steps to incorporate gender perspectives into the post-conflict transition, it has the potential to do more and lead on reform in one important area: dismantling traditional machismo. It is not enough to simply "protect women" and gain justice for victims of sexual violence that way, but to cure the original problem that served as early warning signs of conflict and continued conflict in the first place. Because the Colombian government has already incorporated addressing gender-based issues within its legal and institutional reforms, there is room to be even more aggressive, targeted, and specific about where the gender-based issues derive from. Otherwise, the country risks continued gender inequality. And if this paper's proposition that gender inequality is not a result of conflict, but a

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<sup>1107</sup> Geoff Ramsey & Sebastian Bernal, *Colombia's ELN Peace Talks Explained*, Washington Office on Latin America (Feb. 7, 2017), <https://www.wola.org/analysis/colombias-eln-peace-talks-explained/>.

cause of it, then the no matter what reforms the Colombian government enacts on the books or in person may secure the chance of sustainable peace.

CEPREV has focused on tackling machismo as the primary goal of reform in other Latin American countries such as Nicaragua.<sup>1108</sup> Between 2012-2013, the organization's social workers spent six months working with young men in gangs on their perspectives of machismo, their self-esteem, as well as personal issues such as their broken families. The social workers focused on educating the men as well as law enforcement on the direct results of machismo. According to police statistics, CEPREV cites that crimes such as mugging, theft, and sexual harassment more than halved after its intervention, while a neighboring town where CEPREV had not conducted its intervention on machismo rose in crime by 16%.<sup>1109</sup> Although the CEPREV cannot ultimately prove that their gender-based work alone caused the drop in crime, the head of gender issues at the Inter-American Development Bank believes the results are nonetheless promising and could be expanded into crime-prevention efforts by governments. Although grown men are generally considered lost causes, counselling children on the perils of traditional machismo and providing different attitudes of "masculinity" may not be.<sup>1110</sup> In a recent report by the World Bank on stopping violence in Latin America, researches stated that the adolescent age group is a "pivotal target for any policy aimed at violence prevention", because the rates of illegal behavior soar during teen life.<sup>1111</sup> Therefore, it is critical that dismantling gender constructs as a means to long term peace and security must happen with the newest generation, so that another multi-generational civil conflict may never happen in Colombia again.

In his Nobel Peace Prize lecture, President Santos said, "And we can now ask the bold question: if war can come to an end in one hemisphere, why not one day in both hemispheres? Perhaps more than ever before, we can now dare to imagine a world without war. The impossible is becoming possible."<sup>1112</sup> A world without war is a world with inclusive and sustainable peace

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<sup>1108</sup> *Supra* at n. 21.

<sup>1109</sup> *Id.*

<sup>1110</sup> *Id.*

<sup>1111</sup> See generally Laura Chioda, *Stop the Violence in Latin America: A Look at Prevention from Cradle to Adulthood*, Latin American Development Forum, THE WORLD BANK GROUP (2016)

<sup>1112</sup> *Supra* at n. 76.

and security for all. A world with inclusive and sustainable peace and security must be a world with genuine gender equality and universal human rights for all people. The Colombian government is posed to demonstrate the power of this seemingly lofty, but necessary ideal of peace and security. It can and should take that charge.

## 5. General Recommendations

- **Require** all levels and institutions within the Colombian government to act decisively and proactively in eradicating root causes of sexual violence within the armed conflict and the home.
- **Mandate** a deadline in months for the Ombudsman Office and the Prosecutor General's Office to fully comply with Constitutional Court Autos 092 and 009 in effectively investigating and prosecuting sexual violence cases currently under investigation. Retroactively consider cases that were ruled under the period of time that allowed amnesty for sexual violence as a war crime.
- **Staff and hire** women from every race, ethnicity, sexuality, class, and background into the agencies directing victims restitution and post-conflict transition.
- **Formulate** a specialized team to streamline all agencies, institutions, and prosecution offices within the government to adhere to the Constitutional Court Autos 092 and 009 with uniform standards and mechanisms regarding access to justice for victims nation-wide.
- **Guarantee** that the transition process continues to be a safe space for the voices of women to be heard, as well as providing a comprehensive support system that offers psychosocial treatment for female victims, reparations on equal terms with men, and leadership opportunities for implementation.
- **Formalize** a women's commission for the implementation of the Peace Accord, that has committees representing women in each region of the country.
- **Establish** a presumption of connection between increased sexual violence and race and ethnicity in cases of Afro-Colombian women, indigenous women, and rural women. Provide unique strategic planning and resources to these women to ensure their access to justice for their incidents of sexual violence.

- ***Engage and listen to*** women at the table in peace talks with National Liberation Party (ELN).
- ***Ensure*** that the needs of female combatants are taken into account for the design and implementation of the demobilization, disarmament, and reintegration process. Re-integrate female combatants in spaces that are unique to their needs.
- ***Destigmatize*** stereotypes assigned to female ex-combatants demobilizing, rape and sexual violence victims, and domestic abuse victims.
- ***Protect*** women who participate and lead in the Peace Accord process, with special care for human rights defenders and victims.
- ***Set up*** specialized police stations for women to make it easier for them to report crimes, offer medical care, psychological counselling and legal aid.
- ***Incorporate*** “gender perspectives” into the national curriculum, train teachers on dismantling gendered stereotypes, and relay new conceptions of masculinity to students from primary school.
- ***Work*** with all communities within the public in order to ensure that the necessary systemic and sociological change in Colombia is inclusive and that progress is not resisted or reversed.
- ***Preserve*** the memories of all victims and actors in the Colombian conflict so that history will not repeat itself.
- ***Record*** all truth, reconciliation, and peace processes in order to promote a case study for other countries to emulate if successful.

## BIOGRAPHIES

### **TERESA AKKARA, J.D. 2018**

Teresa Akkara is a J.D. candidate at the University of Pennsylvania Law School and is interested in reproductive rights legislation in both the domestic and international context. Prior to beginning law school, she co-founded her undergraduate chapter of the ACLU and completed degrees in both Philosophy and English at The College of New Jersey.

### **TALA AL JABRI, THE WHARTON SCHOOL 2018**

Originally from Saudi Arabia, Tala has spent her 5 year career focused on national sustainable growth strategy and human capital development, working in six countries across the Middle East and East Africa. She is currently pursuing her MBA at the Wharton School and MPA at the Harvard Kennedy School.

### **SATYASIRI ATLURI, L.L.M. 2017**

Satyasiri Atluri is an L.L.M. Candidate at the University of Pennsylvania Law School. She is licensed to practice law in India and practiced in the areas of Administrative Law and Constitutional Law. She graduated with B.A.LL.B (Hons.) from NALSAR University of Law, India. Atluri is a pro bono counsel for the 'Telangana Hijra Transgender Samiti', a collective of hijra and transgender people in the state of Telangana in India and works towards realization of LGBTQI+ rights.

### **ELENI TAMERAT BELAY, J.D. 2018**

Eleni Belay is born and raised in Ethiopia. She is passionate about women's fundamental rights and women's economic empowerment.

### **BRITTANY BEYER, J.D. 2018**

Brittany Beyer is a JD Candidate at the University of Pennsylvania Law School. She graduated from Syracuse University in 2015 with a BA in International Relations and European History. For Summer 2017, Brittany will be joining the global law firm of Allen & Overy in their New York City office as a summer associate.

### **DANA A. BRODY, J.D. 2017**

Dana A. Brody is a 3L at the University of Pennsylvania Law School. She is currently pursuing a certificate in global human rights to enrich her understanding of different perspectives in the human rights arena. Throughout her legal education she has been involved with various human rights activities, serving as the President of Penn Law Students for Israel and the Vice-President of the Louis D. Brandeis Law Society. Upon graduation, Dana is looking forward to beginning her legal career at Kasowitz Benson Torres LLP in New York.

### **VICTORIA DHEILLY, L.L.M. 2017**

Victoria Dheilly is an L.L.M. student from France, focusing on corporate law and real estate finance. Prior to studying at the University of Pennsylvania Law School, she attended Sciences Po Paris, where she completed a Bachelor in Social Sciences and a Masters in Finance.

### **IRENE HONG, J.D./MS IN SOCIAL POLICY 2018**

Irene Hong is a J.D. candidate at the University of Pennsylvania Law School and a master's degree candidate at the University of Pennsylvania School of Social Policy & Practice in Philadelphia. From January to April 2017, Irene was a Legal Research Intern at UN Women's headquarters in New York City.

### **JANE KOMSKY, J.D. 2018**

Jane Komsky is a J.D. candidate with a passion for criminal justice reform. Prior to law school, she volunteered at the Women's Prison Association, where she worked on a project devoted to empowering women as they begin to reenter their communities after serving time.

**JENNIFER JI EUN LEE, J.D. 2018**

Jennifer Lee is a second-year international student at Penn Law, born and raised in Seoul, South Korea. Prior to law school, she completed a Bachelor's Degree in History at New York University, focusing on early modern Europe.

**SAMANTHA LICATA, J.D./MBE 2018**

Samantha Licata is a Juris Doctor candidate at the University of Pennsylvania as well as a Masters of Bioethics student at the Perelman School of Medicine.

**AMANDA NASINYAMA, L.L.M. 2017**

Amanda Nasinyama is a social justice advocate with a passion to promote and protect the rights of vulnerable and indigent persons in Uganda. Amanda has experience working with the UNHCR Representation in Uganda and HIAS to protect the rights of refugees particularly refugee women and children. Amanda is the 2017 Penn Law Human Rights Scholar.

**KIMBERLY ELAINE PANIAN, J.D. 2018**

In addition to pursing her JD as a second year law student at Penn, Kimberly Panian runs the Penn Law Immigrant Rights Project (PLIRP), a student run group aimed at supporting the immigrant community through clinic-based work. Before law school, Kimberly studied Anthropology at the University of California San Diego, focusing on Mayan and Andean Archeology.

**ARHAMA RUSHDI, J.D. 2018**

Arhama Rushdi is a rising 3L at Penn Law, focusing on International Human Rights Law, specifically the intersections of human rights, sharia, and Islamic feminism. She was an extern at UN Women where she worked on gender equality and women's empowerment laws, focusing on the MENA region.

**AKILA SARATHY, J.D. 2018**

Akila Sarathy is the daughter of two loving parents who immigrated to the United States from India. She studied English at Vanderbilt University where she explored "hyphenated" cultural identity through her writing. Akila is now working towards her J.D. and plans on practicing litigation.

**HEATHER SWADLEY, PHD IN POLITICAL SCIENCE**

Heather Swadley is a first-year PhD student in the Political Science department, focusing on questions of disability in Political Theory and Public Law. Prior to beginning her PhD, she worked as a researcher and caseworker in the UK House of Commons and completed MSc degrees at the London School of Economics and Political Science and SOAS, University of London.

**LEAH WONG, J.D. 2018**

Leah Wong has worked to address barriers for marginalized communities from the local government level to the international level. She has served in the capacity as an AmeriCorps VISTA and Office of the High Commissioner Office for Human Rights intern in Geneva, San Diego. She currently co-directs the Penn Law International Human Rights Advocate pro bono project.

**MENGFEI YING, J.D. 2018**

Mengfei Ying is a second year JD student at University of Pennsylvania Law School. Prior to beginning her JD, she worked as a research assistant in the law faculty at the University of Oxford.

**SAMANTHA ZELUCK, INTERNATIONAL EDUCATIONAL DEVELOPMENT PROGRAM, GSE, 2017**

Samantha Zeluck is a Master's student in International Educational Development at the University of Pennsylvania. She is passionate about promoting gender equality in education and innovation in learning and development. Samantha graduated from Princeton University in 2013 and spent three years in the Investment Banking division at Barclays in Hong Kong before coming to Penn.

