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THE COMPLEXITIES OF DEMOCRACY, DEVELOPMENT, AND HUMAN
RIGHTS IN
CHINA'S BELT AND ROAD INITIATIVE

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Abstract

China's Belt and Road Initiative (BRI)—a dense network of China-funded multi-year infrastructure projects in over 65 countries from the Western Pacific to the Baltic Sea, collectively aiming to establish China's strategic "Maritime Belt" and "Silk Road" connectivity using an estimated range of USD\$1 Trillion to USD\$8 Trillion²—is as unprecedented phenomenon in sovereign project financing and bilateral investment lending, since the United States' grant of USD \$800 Billion for the Marshall Plan³ was for Europe's post World War II reconstruction. The scale, scope, and terms of BRI projects remain shrouded in relative opacity, with China as of this writing only incrementally disclosing debt sustainability policies and lending terms, largely after there was significant international public clamor for more transparency.⁴

The 2017 formal handover of Hambantota⁵ port in Sri Lanka to China (under a 99-year lease as part of debt repayment due to Sri Lanka's default) raises caution for populations of other BRI debtor states concerned, such as: (1) ensuring accountable democratic sovereignty in bilateral lending agreements with China;⁶ (2) building in transparency as BRI debtor states act in partnership with China to design short-term and long-term development strategies;⁷ and (3) determining Chinese firms operating the BRI projects can be held to observe guaranteed human rights standards in the performance of business activities under the aegis

² Jonathan E. Hillman, *How Big is China's Belt and Road?*, CTR. FOR STRATEGIC & INT'L STUD. (Apr. 3, 2018), <https://www.csis.org/analysis/how-big-chinas-belt-and-road>; Nadège Rolland, *A Concise Guide to the Belt and Road Initiative*, THE NAT'L BUREAU OF ASIAN RES. (Apr. 11, 2019), <https://www.nbr.org/publication/a-guide-to-the-belt-and-road-initiative/>.

³ Benn Steil, *The Marshall Plan and "America First"*, PROJECT SYNDICATE (Aug. 4, 2017), <https://www.project-syndicate.org/onpoint/the-marshall-plan-and-america-first-by-benn-steil-2017-08?barrier=accesspaylog>

⁴ See Amanda Lee, *China Must Ensure Transparency to Boost Credibility of Belt and Road Projects, Former US Diplomat Says*, SOUTH CHINA MORNING POST (July 12, 2019, 7:30 AM), <https://www.scmp.com/economy/china-economy/article/3018185/china-must-ensure-transparency-boost-credibility-belt-and>. See also, Ninon Bulckaert, *Europe Raises Transparency Issues with China's Belt and Road Initiative*, EURACTIV (May 25, 2018), <https://www.euractiv.com/section/china/news/eu-raises-transparency-issue-in-chinas-belt-and-road-initiative/>; Daniel R. Russel & Blake Berger, *Navigating the Belt and Road Initiative*, ASIA SOCIETY POLICY INSTITUTE 16 (2019).

⁵ Maria Abi-Habib, *How China Got Sri Lanka to Cough Up a Port*, N.Y. TIMES (June 25, 2018), <https://www.nytimes.com/2018/06/25/world/asia/china-sri-lanka-port.html>.

⁶ See Nyshka Chandran, *Fears of Excessive Debt Drive More Countries to Cut Down Their Belt and Road Investments*, CNBC (Jan. 18, 2019, 12:10 AM), <https://www.cnbc.com/2019/01/18/countries-are-reducing-belt-and-road-investments-over-financing-fears.html>; Christopher Balding, *Why Democracies are Turning Against Belt and Road: Corruption, Debt, and Backlash*, FOREIGN AFF. (Oct. 24, 2018), <https://www.foreignaffairs.com/articles/china/2018-10-24/why-democracies-are-turning-against-belt-and-road>; Dipanjan Roy Chaudhury, *Africa Cancels a Belt and Road Initiative Project for the First Time*, ECON. TIMES (Oct. 25, 2018, 6:01PM), <https://economictimes.indiatimes.com/news/international/world-news/africa-cancels-a-bri-project-for-the-first-time/articleshow/66363312.cms>.

⁷ See James Crabtree, *China Needs to Make the Belt and Road Initiative More Transparent and Predictable*, CHATHAM HOUSE (Apr. 26, 2019), <https://www.chathamhouse.org/expert/comment/china-needs-make-belt-and-road-initiative-more-transparent-and-predictable>.

of BRI financing.⁸

Part I (*Democracy and the BRI: Choice, Consent, and Consultation in Sovereign Lending*) explores a sample of five publicly documented case studies in Malaysia, Sri Lanka, Pakistan, Kazakhstan, and Laos as to the negotiation of BRI projects in these countries, drawing as well from China's publicly-available BRI documentation (including its most recent document on debt sustainability for the BRI) to examine how these negotiations measure up to the international community's articulated expectations as to responsible sovereign lending in the United Nations Monterrey Consensus on Financing for Development⁹ and the UNCTAD Principles on Promoting Responsible Sovereign Lending and Borrowing.¹⁰ **Part II** (*Development and Human Rights in the BRI: Participation, Transparency, Monitoring, Impacts*) examines several publicly reported human rights impacts as of this writing in relation to the BRI, against China's own professed commitments¹¹ towards the: (1) 1986 Declaration on the Right to Development;¹² (2) UN Guiding Principles on Business and Human Rights;¹³ (3) Sustainable Development Goals;¹⁴ (4) the Paris Agreement on Climate Change;¹⁵ (5) China's own commitment to adhere to environmental and social norms in international financial institutions, such as the Equator Principles and the Environmental Social Framework authored by the World Bank; (6) China's own expressed commitments to respect human rights in its foreign investments;¹⁶ and (7) most importantly, China's significant international obligations as a full treaty party of the International Covenant on Economic, Social and Cultural Rights (including General Comment No. 24 to the ICESCR).¹⁷

Significantly, China has already declared its openness to internalize human rights in its foreign investment activities abroad in other jurisdictions. Since 2014, the Committee on Economic, Social and Cultural Rights (CESCR) has specifically called upon China:

⁸ See Human Rights Watch, *China: 'Belt and Road' Projects Should Respect Rights*, HUM. RTS. WATCH (Apr. 21, 2019, 8:00 PM), <https://www.hrw.org/news/2019/04/21/china-belt-and-road-projects-should-respect-rights#>; Oliver Ward, *Is China Meeting its International Environmental and Human Rights Obligations on BRI?*, ASEAN TODAY (Apr. 23, 2019), <https://www.aseantoday.com/2019/04/is-china-meeting-its-international-environmental-and-human-rights-obligations-on-bri/>.

⁹ See U.N. Int'l Conference on Financing for Development, *Monterrey Consensus on Financing for Development*, U.N. Doc. A/CONF.198/11 (Mar. 2002). See also U.N. INTER-AGENCY TASK FORCE ON FINANCING FOR DEVELOPMENT, *FINANCING FOR SUSTAINABLE DEVELOPMENT REPORT 2019* 117 – 28 (2019).

¹⁰ U.N. Conference on Trade and Development, *Principles on Promoting Responsible Sovereign Lending and Borrowing*, 3 – 13, U.N. Doc. UNCTAD/GDS/DDF/2012/Misc.1 (Jan. 10, 2012).

¹¹ See Juan Pablo Bohoslavsky, *A Human Rights Focus to Upgrade China's International Lending*, 5 CHINESE J. OF GLOBAL GOVERNANCE 69, 71 – 74 (2019).

¹² G.A. Res. 41/128 (Dec. 4, 1986).

¹³ OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER, *GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: IMPLEMENTING THE UNITED NATIONS "PROTECT, RESPECT AND REMEDY" FRAMEWORK*, 1 – 35 (2011).

¹⁴ G.A. Res. 70/1 (Oct. 21, 2015).

¹⁵ Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104.

¹⁶ Press Release, *Colectivo sobre Financiamiento e Inversiones Chinas, Derechos Humanos y Ambiente (CICDHA)*, China Commits to the United Nations Human Rights Council to Respect Human Rights in its Foreign Investments (Mar. 19, 2019).

¹⁷ See International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

to adopt a human rights-based approach to ... international cooperation, by: (a) [u]ndertaking a systematic and independent human rights impact assessment prior to making funding decisions; (b) [e]stablishing an effective monitoring mechanism to regularly assess the human rights impact of its policies and projects in the receiving countries and to take remedial measures when required; [and] (c) [e]nsuring that there is an accessible complaint mechanism for violations of economic, social and cultural rights in the receiving countries.¹⁸

Notably, in its March 2019 Third Universal Periodic Review before the United Nations Human Rights Council, China had accepted and committed to examine and report on specific recommendations that it should, among others, “consider the establishment of a legal framework to guarantee that activities carried out by industries subject to its jurisdiction do not negatively impact human rights abroad... [and] [t]ake further measures on business and human rights in line with its international obligations and ensure that companies operating in high-risk or conflict areas conduct human rights due diligence in line with the Guiding Principles on Business and Human Rights.”¹⁹

The **Conclusion** (*Development IS Human Rights and Human Rights IS Development: Paths Forward for the BRI*) I will address certain “human rights imperialism”²⁰ critiques against the “rights-based approach to development,”²¹ distinguishing the same from the crystallizing “right to development.”²² Human rights-based approaches to development are focused on the centrality of human rights to “legislation, administrative practice, and policy delivery,”²³ but the crystallizing right to development (both as customary norm and in the pending draft Convention on the Right to Development²⁴) goes much further by calling for the internalization of human rights in the processes, outcomes, and assessments of development. While the proliferation of external capital sources is crucial to achieving raw economic growth, no single sovereign—including China—can reject the full application of international labor, environmental, social, and all other human rights obligations in sovereign project financing activities and the long-term implementation of infrastructure connectivity to achieve genuine integral human development. This article provides five paths forward for the negotiation and implementation of BRI projects to ensure consistency with international

¹⁸ Committee on Economic, Social and Cultural Rights, Concluding Observations on the Second Periodic Report of China, including Hong Kong, China, and Macao, China, U.N. Doc. E/C.12/CHN/CO/2 (Jun. 13, 2014).

¹⁹ U.N. Human Rights Council, Rep. of the Working Group on the Universal Periodic Review: China, ¶¶ 28.131, 28.133, U.N. Doc. A/HRC/40/6 (Dec. 26, 2018).

²⁰ See Hannah Miller & Robin Redhead, *Beyond ‘Rights-Based Approaches’? Employing a Process and Outcomes Framework*, 23 INT’L J. HUM. RTS. 699 (2019).

²¹ See Peter Uvin, *From the Right to Development to Rights-Based Approach: How ‘Human Rights’ Entered Development*, 17 DEV. PRAC. 597, 600 – 03 (2007).

²² See Leon E. Irish, *The Right to Development Versus a Rights-Based Approach to Development*, 3 INT’L J. CIV. SOC’Y L. 6 (2005).

²³ See Máire Braniff & Paul Hainsworth, *A HUMAN RIGHTS BASED APPROACH TO DEVELOPMENT* 39 (Gerard McCann & Stephen McCloskey eds., 2015).

²⁴ Draft Convention on the Right to Development, A/HRC/WG.2/21/2, 17 January 2020, full text available at https://www.ohchr.org/Documents/Issues/Development/Session21/3_A_HRC_WG.2_21_2_AdvanceEditedVersion.pdf [last accessed 1 May 2020].

obligations, namely: (1) transparency of BRI negotiations to host State constituencies; (2) joint partnership governance over BRI projects; (3) open monitoring and accountability of BRI projects to all affected stakeholders; (4) publicly available country and community impact assessments; and (5) embedded human rights auditing.

INTRODUCTION: A PROTEAN PARADIGM OF “DEVELOPMENT” THROUGH CHINA’S BELT AND ROAD INITIATIVE (BRI)

The global need for infrastructure—estimated²⁵ thus far at around US\$94 Trillion by 2040 with a further US\$3.5 Trillion required to meet the United Nations Sustainable Development Goals for electricity and water—is spurring the race for cross-border connectivity projects around the world.²⁶ Said projects include the Association of Southeast Asian Nations (ASEAN) Master Plan on Connectivity 2025,²⁷ plans for fiber optic, digital and physical infrastructure connectivity in Africa,²⁸ South Asia plans for infrastructure connectivity,²⁹ the World Bank’s support for the Global Infrastructure Connectivity Alliance (GICA),³⁰ as well as recent European Union initiatives to build climate change adaptation for major infrastructure projects.³¹

Arguably, of the many cross-border infrastructure connectivity projects proliferating throughout the globe in this decade, none might be as staggering in scope, scale, and breadth as the People’s Republic of China’s announcement of its Belt and Road Initiative (BRI) announced in 2013.³² As of this writing, the full contours of financing, projects, partnerships, and contract terms under the BRI are elusive for researchers, lending the impression that this fluidity is both a key strength and at the same time a point of critique. While there is considerable official documentation detailing China’s grand dramatic geopolitical vision for the BRI,³³ it is significant to note that, as of this writing, the BRI does not have an identifiable

²⁵ See *Forecasting Infrastructure Investment Needs and Gaps*, GLOBAL INFRASTRUCTURE OUTLOOK, <https://outlook.gihub.org/> (last visited January 15, 2020).

²⁶ See *Competing Visions*, CTR. FOR STRATEGIC & INT’L STUD., <https://reconnectingasia.csis.org/analysis/competing-visions/> (last visited 15 January 2020).

²⁷ *Master Plan on ASEAN Connectivity 2025*, ASSOCIATION OF SOUTHEAST ASIAN NATIONS [ASEAN] (2016).

²⁸ Ibrahim Mayaki, *Why Infrastructure Development in Africa Matters*, U.N.: AFR. RENEWAL (July 8, 2014), <https://www.un.org/africarenewal/web-features/why-infrastructure-development-africa-matters>: Organization for Economic Co-operation for Development (OECD), *2019 Policy Note on Africa: Infrastructure and Regional Connectivity*, 33 (2019).

²⁹ Darshana M. Baruah, *India’s Answer to the Belt and Road: A Road Map for South Asia*, CARNEGIE INDIA (Aug. 21, 2018), <https://carnegieindia.org/2018/08/21/india-s-answer-to-belt-and-road-road-map-for-south-asia-pub-77071>.

³⁰ *Global Infrastructure Connectivity Alliance*, WORLD BANK (Apr. 12, 2017), <https://www.worldbank.org/en/topic/transport/brief/global-infrastructure-connectivity-alliance>.

³¹ *Climate Change Adaptation of Major Infrastructure Projects*, European Comm’n (May 12, 2018).

³² See *President Xi Jinping Delivers Important Speech and Proposes to Build a Silk Road Economic Belt with Central Asian Countries*, MINISTRY OF FOREIGN AFF. OF CHINA (Sept. 7, 2013), https://www.fmprc.gov.cn/mfa_eng/topics_665678/xjpfwzysiesgjtfhshzzfh_665686/t1076334.shtml. See also, OECD, *China’s Belt and Road Initiative in the Global Trade, Investment, and Finance Landscape*, 3 (2018).

³³ Office of the Leading Grp. for Promoting the Belt and Rd. Initiative, *The Belt and Road Initiative Progress, Contributions and Prospects*, BELT AND ROAD PORTAL (Apr. 22, 2019), <https://eng.yidaiyilu.gov.cn/zchj/qwfb/86739.htm>; Nat’l Dev. and Reform Comm’n and the Gov’t of the H.K.

centralized institution for managing and overseeing the BRI projects,³⁴ with the Chinese Government relying instead on existing institutional cooperative arrangements under bilateral agreements with partner States.³⁵ For such a long-term grand infrastructure, energy,

Special Administrative Region, *Arrangement on Supporting Hong Kong's Participation in the Belt and Road Construction*, BELT AND ROAD PORTAL (Mar. 30, 2018), <https://eng.yidaiyilu.gov.cn/zchj/qwfb/51374.htm>; The State Council Info. Office of the People's Republic of China, *China's Arctic Policy*, BELT AND ROAD PORTAL (Jan. 29, 2018), <https://eng.yidaiyilu.gov.cn/zchj/qwfb/46076.htm>; Office of the Leading Grp. for Promoting the Belt and Rd. Initiative, *Action Plan on Belt and Road Standard Connectivity (2018-2020)*, BELT AND ROAD PORTAL (Jan. 11, 2018), <https://www.yidaiyilu.gov.cn/zchj/qwfb/43480.htm>; The National Development and Reform Commission and the State Oceanic Administration, *Vision for Maritime Cooperation under the Belt and Road Initiative 1 – 15* (2017); Ministry of Commerce of the People's Republic of China, *Initiative on Promoting Unimpeded Trade Cooperation Along the Belt and Road*, BELT AND ROAD PORTAL (May 22, 2017), <https://eng.yidaiyilu.gov.cn/zchj/qwfb/14216.htm>; The Nat'l Dev. and Reform Comm'n, *China Outbound Investment Report 1 – 26* (2017); The Nat'l Dev. and Reform Comm'n & the Nat'l Energy Administration of China, *Vision and Actions on Energy Cooperation in Jointly Building Silk Road Economic Belt and 21st Century Maritime Silk Road*, BELT AND ROAD PORTAL (Mar. 16, 2015), <https://eng.yidaiyilu.gov.cn/zchj/qwfb/13754.htm>; Ministry of Fin. of the People's Republic of China, *Guiding Principles on Financing the Development of the Belt and Road*, BELT AND ROAD PORTAL (May 16, 2017), <https://eng.yidaiyilu.gov.cn/zchj/qwfb/13757.htm>; *Joint Communique of Leaders Roundtable of Belt and Road Forum*, BELT AND ROAD PORTAL (May 16, 2017), <https://eng.yidaiyilu.gov.cn/zchj/qwfb/13694.htm>; The Ministry of Env'tl. Prot. of the People's Republic of China, *The Belt and Road Ecological and Environmental Cooperation Plan*, BELT AND ROAD PORTAL (May 14, 2017), <https://eng.yidaiyilu.gov.cn/zchj/qwfb/13392.htm>; The National Development and Reform Commission, et al., *Vision and Actions on Jointly Building Silk Road Economic Belt and 21st Century Maritime Silk Road*, BELT AND ROAD PORTAL (Mar. 30, 2015), <https://eng.yidaiyilu.gov.cn/qwyw/qwfb/1084.htm>; MINISTRY OF COMMERCE OF THE PEOPLE'S REPUBLIC OF CHINA, REPORT ON DEVELOPMENT OF CHINA'S OUTWARD INVESTMENT AND ECONOMIC COOPERATION I (2016); Ministry of Culture of the People's Republic of China, *Ministry of Culture's Action Plan on Belt and Road Culture Development (2016-20)*, BELT AND ROAD PORTAL (Nov. 11, 2017), <https://eng.yidaiyilu.gov.cn/zchj/qwfb/35973.htm>; CPC Central Committee & the State Council of the People's Republic of China, *Guidance on Promoting Green Belt and Road*, BELT AND ROAD PORTAL (May 8, 2017), <https://eng.yidaiyilu.gov.cn/zchj/qwfb/12479.htm>; Ministry of Education of the People's Republic of China, *Education Action Plan for the Belt and Road Initiative*, BELT AND ROAD PORTAL (Oct. 12, 2017), <https://eng.yidaiyilu.gov.cn/zchj/qwfb/30277.htm>; OFFICE OF THE LEADING GROUP FOR THE BELT AND ROAD INITIATIVE, BUILDING THE BELT AND ROAD: CONCEPT, PRACTICE, AND CHINA'S CONTRIBUTION I (2017); Ministry of Agriculture of the People's Republic of China, et al., *Vision and Action on Jointly Promoting Agricultural Cooperation on the Belt and Road*, BELT AND ROAD PORTAL (Nov. 15, 2017), <https://eng.yidaiyilu.gov.cn/zchj/qwfb/34829.htm>; OFFICE OF THE LEADING GROUP FOR THE BELT AND ROAD INITIATIVE, ACTION PLAN ON BELT AND ROAD CONNECTIVITY (2015-2017) I (2015); OFFICE OF THE LEADING GROUP ON THE CONSTRUCTION OF THE BELT AND ROAD, DEVELOPMENT PLAN OF CHINA-EUROPE FREIGHT TRAIN CONSTRUCTION (2016-2020) I (2016); CHINA NATIONAL TOURISM AND GENERAL ADMINISTRATION OF SPORT OF CHINA, "BELT AND ROAD" SPORTS TOURISM DEVELOPMENT ACTION PLAN (2018-2020) I (2017); Supreme People's Court, *Opinions on the People's Courts Providing Judicial Services and Guarantees for the Construction of the Belt and Road Initiative*, BELT AND ROAD PORTAL (Mar. 16, 2015), <https://www.yidaiyilu.gov.cn/zchj/zcfcg/2401.htm>; THE NATIONAL DEVELOPMENT AND REFORM COMMISSION, GUIDELINES ON THE CONSTRUCTION OF THE CHINA-MONGOLIA-RUSSIA ECONOMIC CORRIDOR I (2016); Ministry of Science and Technology of the People's Republic of China, *Promote the "Belt and Road" Special Plan for Scientific and Technological Innovation Cooperation*, BELT AND ROAD PORTAL (Sept. 20, 2016), <https://www.yidaiyilu.gov.cn/zchj/jggg/326.htm>; General Administration of Quality Supervision, Inspection, and Quarantine of the People's Republic of China, *'The Belt and Road' Vision and Actions for Cooperation in Metrology*, BELT AND ROAD PORTAL (Mar. 31, 2017), <https://eng.yidaiyilu.gov.cn/zchj/qwfb/10477.htm>; ASIAN INFRASTRUCTURE INVESTMENT BANK, ARTICLES OF AGREEMENT I (2015).

³⁴ See Saleh Shahriar, et al., *Institutions of the 'Belt & Road' Initiative: A Systematic Literature Review*, 77 J.L., POL'Y, & GLOBALIZATION I (2018).

³⁵ THE WORLD BANK, BELT AND ROAD ECONOMICS: OPPORTUNITIES AND RISKS OF TRANSPORT CORRIDORS 80 (2019).

mining, IT, transport, and communications development plan under sovereign financing,³⁶ it is likewise surprising that the list of BRI development projects is also frequently in flux.³⁷ From publicly available documentation, the BRI does not appear to have a fixed blueprint template of standard contract terms for project financing.³⁸ So much of the details of the BRI's contractual, legal, and financial arrangements with debtor countries is not standardized (or readily available to the public),³⁹ that the relative opacity alone of the BRI is itself a source of research and policy complexity for scholars and practitioners.⁴⁰ Perhaps much in keeping with Deng Xiaoping's famous *Tao Gang Yang Hui* ("hide brightness and cherish obscurity") foreign policy strategy,⁴¹ the protean nature of the BRI lays it open both to outsiders' optimism and pessimism regarding the BRI's development consequences for debtor countries.

What is readily known about the BRI since the announcement of its creation in 2013, is its massive scope of allegedly available (but not necessarily already earmarked, allocated, or actually distributed or transferred to BRI debtor countries⁴²) funding, estimated at between USD\$1 Trillion to USD\$1.2 Trillion⁴³ and USD\$8 Trillion⁴⁴, and which is to be drawn predominantly from a single sovereign source, the People's Republic of China. (Although it

³⁶ See Zheng Yongnian & Zhang Chi, *The Belt and Road Initiative and China's Grand Diplomacy*, 56 CHINA INT'L STUD. 52, 55 – 63 (2016).

³⁷ See *BRI Projects*, BELT AND ROAD INITIATIVE, <https://www.beltroad-initiative.com/projects/> (last visited Aug. 1, 2019); *Where is the funding for a \$26 Trillion Initiative Coming From?*, CNBC (Mar. 6, 2018), <https://www.cnbc.com/advertorial/2018/03/06/where-is-the-funding-for-a-26-trillion-initiative-coming-from.html>. See also TOM MILLER, GREAT LEAP OUTWARD: CHINESE ODI AND THE BELT & ROAD INITIATIVE 241 – 42 (Jacques deLisle & Avery Goldstein eds., 2019).

³⁸ See DANIEL R. RUSSEL & BLAKE BERGER, NAVIGATING THE BELT AND ROAD INITIATIVE 11 – 15 (2019).

³⁹ As of this writing, neither the Belt and Road initiative website (<https://www.beltroad-initiative.com/projects/>) or the Belt and Road Portal (<https://eng.yidaiyilu.gov.cn/>) contain any copies of contracts executed for BRI projects.

⁴⁰ Many studies note the paucity of verifiable, publicly available data on procedures, practices, contracts, and operational standards for projects listed as part of the BRI. See BAKER MCKENZIE, BELT & ROAD: OPPORTUNITY AND RISK 3 – 26 (2017); PETER CAI, UNDERSTANDING CHINA'S BELT AND ROAD INITIATIVE 3 – 22 (2017); PETERSON INST. FOR INT'L ECON., CHINA'S BELT AND ROAD INITIATIVE: MOTIVES, SCOPE, CHALLENGES 3 – 35 (2016); TANIA GHOSSEIN, ET AL., PUBLIC PROCUREMENT IN THE BELT AND ROAD INITIATIVE 4 – 41 (2018); Guiguo Wang, *Legal Challenges to the Belt and Road Initiative*, 4 J. INT'L & COMP. L. 309 (2017); Guiguo Wang, *Towards A Rule-Based Belt and Road Initiative – Necessity and Directions*, 6 J. INT'L & COMP. L. 29 (2019); Julien Chaisse & Mitsuo Matsushita, *China's 'Belt and Road' Initiative: Mapping the World Trade Normative and Strategic Implications*, 52 J. WORLD TRADE 163 (2018); Gong Hongliu, *The Belt and Road Initiative (BRI): A China-Specific Approach for Global Governance*, 8 J. WTO & CHINA 36 (2018).

⁴¹ See Dingding Chen & Jianwei Wang, *Lying Low No More?: China's New Thinking on the Tao Gang Yang Hui Strategy*, 9 CHINA INT'L J. 195 (2011).

⁴² Jonathan Hillman, *Five Myths About China's Belt and Road Initiative*, WASH. POST (May 31, 2019, 6:00 AM), https://www.washingtonpost.com/outlook/five-myths/five-myths-about-chinas-belt-and-road-initiative/2019/05/30/d6870958-8223-11e9-bce7-40b4105f7ca0_story.html.

⁴³ See *Inside China's Plan to Create a Modern Silk Road*, MORGAN STANLEY (Mar. 14, 2018), <https://www.morganstanley.com/ideas/china-belt-and-road>.

⁴⁴ See Nadège Rolland, *A Concise Guide to the Belt and Road Initiative*, NAT'L BUREAU OF ASIAN RES. (Apr. 11, 2019), <https://www.nbr.org/publication/a-guide-to-the-belt-and-road-initiative/>.

should be noted that there are recent reports⁴⁵ indicating the possibilities of broadening the financing base for BRI projects beyond China.) In his 2017 keynote address at the May 2017 Belt and Road Forum for International Cooperation held in Beijing, China's President Xi Jinping described the BRI as exemplifying China's grand vision for global development, with political, economic, cultural, scientific, and multilateral dimensions built under a China's state-driven development architecture:

First, *we should build the Belt and Road into a road for peace.* The ancient silk routes thrived in times of peace, but lost vigor in times of war. The pursuit of the Belt and Road Initiative requires a peaceful and stable environment. We should foster a new type of international relations featuring win-win cooperation; and we should forge partnerships of dialogue with no confrontation and of friendship rather than alliance. All countries should respect each other's sovereignty, dignity and territorial integrity, each other's development paths and social systems, and each other's core interests and major concerns...Some regions along the ancient Silk Road used to be a land of milk and honey. Yet today, these places are often associated with conflict, turbulence, crisis and challenge. *Such state of affairs should not be allowed to continue.* We should foster the vision of common, comprehensive, cooperative and sustainable security, and create a security environment built and shared by all. We should work to resolve hotspot issues through political means, and promote mediation in the spirit of justice. We should intensify counter-terrorism efforts, address both its symptoms and root causes, and strive to eradicate poverty, backwardness and social injustice.

Second, we should build the Belt and Road into a road of prosperity. Development holds the master key to solving all problems. *In pursuing the Belt and Road Initiative, we should focus on the fundamental issue of development, release the growth potential of various countries and achieve economic integration and interconnected development and deliver benefits to all...We should establish a stable and sustainable financial safeguard system that keeps risks under control, create new models of investment and financing, encourage greater cooperation between government and private capital and build a diversified financing system and a multi-tiered capital market. We should also develop inclusive finance and improve financial services networks...*Infrastructure connectivity is the foundation of development through cooperation. We should promote land, maritime, air and cyberspace connectivity, concentrate our efforts on key passageways, cities and projects and

⁴⁵ See DELOITTE INSIGHTS, CHINA'S BELT AND ROAD INITIATIVE: RECALIBRATION AND NEW OPPORTUNITIES 2 (2019); Evelyn Cheng, *Amid Criticism, China's Xi Says Belt and Road Projects can be 'Shared by the World'*, CNBC (Apr. 27, 2019, 7:47 AM), <https://www.cnbc.com/2019/04/27/belt-and-road-initiative-chinas-xi-concludes-bri-forum-in-beijing.html>.

connect networks of highways, railways and sea ports...Third, we should build the Belt and Road into a road of opening up...*The Belt and Road Initiative should be an open one that will achieve both economic growth and balanced development.* [...]

We should build an open platform of cooperation and uphold and grow an open world economy. We should jointly create an environment that will facilitate opening up and development, establish a fair, equitable and transparent system of international trade and investment rules and boost the orderly flow of production factors, efficient resources allocation and full market integration. We welcome efforts made by other countries to grow open economies based on their national conditions, participate in global governance and provide public goods. Together, we can build a broad community of shared interests. [...]⁴⁶

Despite the above language emphasizing equality of cooperation and joint partnerships not just in BRI projects but for shaping the international economic system as a whole, scholarship in Chinese academic journals themselves superlatively depict the BRI as “a China-specific approach for global governance;”⁴⁷ “China’s grand diplomacy;”⁴⁸ “shaping a shared 21st Century;”⁴⁹ “China’s Exploration in the Construction of International Institutions;”⁵⁰ China creating a “Regional Community of Common Destiny;”⁵¹ “China’s Marshall Plan;”⁵² with China’s vast “potential to redefine international trade governance and the laws that establish its order.”⁵³ There is no official map of the BRI projects. The World

⁴⁶ H.E. Xi Jinping, President, Speech at the Opening Ceremony of The Belt and Road Forum for International Cooperation: Work Together to Build the Silk Road Economic Belt and the 21st Century Maritime Silk Road (May 14, 2017).

⁴⁷ Gong Hongliu, *The Belt and Road Initiative (BRI): A China-Specific Approach for Global Governance*, 8 J. WTO & CHINA 36 (2018).

⁴⁸ Zheng Yongnian & Zhang Chi, *The Belt and Road Initiative and China’s Grand Diplomacy*, 56 CHINA INT’L STUD. 52 (2016).

⁴⁹ Ruan Zongze, *The Belt and Road Initiative is Shaping a Shared 21st Century*, 76 CHINA INT’L STUD. 5 (2019).

⁵⁰ He Zhipeng, *The “Belt and Road” Initiative and China’s Exploration in the Construction of International Institutions*, 7 J. WTO & CHINA 14 (2017).

⁵¹ Zeng Lingliang, *Conceptual Analysis of China’s Belt and Road Initiative: A Road Towards a Regional Community of Common Destiny*, 15 CHINESE J. INT’L L. 517 (2016).

⁵² Jin Ling, *The “New Silk Road” Initiative: China’s Marshall Plan?*, 50 CHINA INT’L STUD. 70 (2015).

⁵³ Malik R. Dahlan, *Dimensions of the New Belt & Road International Order: An Analysis of the Emerging Legal Norms and a Conceptionalisation of the Regulation of Disputes*, 9 BEIJING L. REV. 87 (2018).

Bank used the following graphic to illustrate the 71 economies located in the BRI's transport corridors:⁵⁴



As described by China's National Development and Reform Commission, Ministry of Foreign Affairs, Ministry of Commerce, and State Council, the BRI will:

[R]un through the continents of Asia, Europe, and Africa, connecting the vibrant East Asia economic circle at one end and [the] developed European economic circle at the other, and encompassing countries with huge potential for economic development. The Silk Road Economic Belt focuses on bringing together China, Central Asia, Russia and Europe (the Baltic); linking China with the Persian Gulf and the Mediterranean Sea through Central Asia and West Asia; and connecting China with Southeast Asia, South Asia, and the Indian Ocean. The 21st Century Maritime Silk Road is designed to go from China's coast to Europe through the South China Sea and the Indian Ocean in one route, and from China's coast through the South China Sea to the South Pacific in the other. On land, the Initiative will focus on jointly building a new Eurasian Land Bridge and developing China-Mongolia-Russia, China Central Asia-West Asia and China-Indochina Peninsula economic corridors by taking advantage of international transport routes, relying on core cities along the Belt and Road and using key economic industrial parks as cooperation platforms.

⁵⁴ *Belt and Road Initiative*, WORLD BANK (Mar. 29, 2018), <https://www.worldbank.org/en/topic/regional-integration/brief/belt-and-road-initiative>.

At sea, the Initiative will focus on jointly building smooth, secure, and efficient transport routes connecting major [seaports] along the Belt and Road. The China-Pakistan Economic Corridor and the Bangladesh-China-India-Myanmar Economic Corridor are closely related to the BRI. [...]"⁵⁵

All told, the BRI comprises six land corridors, one maritime corridor, and more recently including “an Arctic ‘Ice Silk Road’...extend[ing] to more than 71 countries, together [comprising] up to 65% of the world’s population and mak[ing] up 40% of global GDP as of 2017.”⁵⁶ The unprecedented scale of these projects run parallel with China’s global drive for resources, that according to an environmental scholar, creates a “dizzying variety of resource extraction, energy, agricultural, and infrastructure projects — roads, railroads, hydropower dams, mines — that are wreaking unprecedented damage to ecosystems and biodiversity.”⁵⁷

The China-centric approach in the vision for the BRI stands in sharp contrast with the United States’ Marshall Plan (the postwar European Recovery Program),⁵⁸ which did not create any American economic corridors in Europe, in the way that China envisions its economic corridors globally for the BRI. Nobel Peace Prize winner General George C. Marshall made it clear that the Marshall Plan was a foreign aid program, largely to be determined by European states based on their own agreement:

[...] It is logical that the United States should do whatever it is able to do to assist in the return of normal economic health in the world, without which there can be no political stability and no assured peace. Our policy is directed not against any country or doctrine but against hunger, poverty, desperation and chaos. Its purpose should be the revival of a working economy in the world so as to permit the emergence of political and social conditions in which free institutions can exist. Such assistance, I am convinced, must not be on a piecemeal basis as various crises develop. Any assistance that this Government may render in the future should provide a cure rather than a mere palliative. Any government that is willing to assist in the task of recovery will find full co-operation I am sure, on the part of the United States Government. Any government which maneuvers to block the recovery of other countries cannot expect help from us. Furthermore, governments, political parties, or groups which seek to

⁵⁵ Press Release, Nat’l Dev. and Reform Comm’n & Ministry of Com. of the People’s Republic of China, Visions and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road (Mar. 28, 2015).

⁵⁶ Michael Amouyal, *The Belt & Road Initiative: Scope of Projects and Financing Issues*, EUROBIZONLINE (Jan. 3, 2019), <https://www.eurobiz.com.cn/the-belt-road-initiative-scope-of-projects-and-financing-issues/>.

⁵⁷ William Laurance, “The Dark Legacy of China’s Drive for Global Resources”, *Yale Environment* 360, 28 March 2017, at <https://e360.yale.edu/features/the-dark-legacy-of-chinas-drive-for-global-resources> [last accessed 1 May 2020].

⁵⁸ See Linda Christenson & Eric Christenson, *The Marshall Plan: “A Short Time to Change the World,”* in *POLITICS AND CULTURES OF LIBERATION: MEDIA, MEMORY, AND PROJECTIONS OF DEMOCRACY* 344 (Hans Bak et al. eds., 2018); David J. Steinberg et al., *Marshall Plan Productivity*, 107 *FOREIGN POL’Y* 174 (1997).

perpetuate human misery in order to profit therefrom politically or otherwise will encounter the opposition of the United States.

It is already evident that, before the United States Government can proceed much further in its efforts to alleviate the situation and help start the European world on its way to recovery, *there must be some agreement among the countries of Europe as to the requirements of the situation and the part those countries themselves will take in order to give proper effect to whatever action might be undertaken by this Government. It would be neither fitting nor efficacious for this Government to undertake to draw up unilaterally a program designed to place Europe on its feet economically. This is the business of the Europeans. The initiative, I think, must come from Europe. The role of this country should consist of friendly aid in the drafting of a European program and of later support of such a program so far as it may be practical for us to do so.* The program should be a joint one, agreed to by a number, if not all European nations.⁵⁹

Comparing the vision for the BRI with that of the Marshall Plan, it is clear that the BRI will not constitute foreign aid but rather creates a global program for financing China's massive investments into infrastructure, energy, mining, telecommunications, and IT projects with strategic partners along the "Belt and Road." The March 2018 Amendment⁶⁰ to the Constitution of the People's Republic of China enshrined the *Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era*,⁶¹ whose 14-point fundamental principles include "a new vision for development."

The 14-point fundamental principles are as follows:

1. Ensuring Party leadership over all work;
2. Committing to a people-centered approach;
3. Continuing to comprehensively deepen reform;
4. Adopting a new vision for development;
5. Seeing that the people run the country;
6. Ensuring every dimension of governance is law-based;
7. Upholding core socialist values;
8. Ensuring and improving living standards through development;
9. Ensuring harmony between humans and nature;
10. Pursuing a holistic approach to national security;
11. Upholding absolute Party leadership over the people's forces;

⁵⁹ George C. Marshall, *The Marshall Plan Speech at Harvard University* (June 5, 1947), <https://www.oecd.org/general/themarshallplanspeechatharvarduniversity5june1947.htm> (last visited Aug. 1, 2019) (Italics added).

⁶⁰ Thirteenth National People's Congress, Xianfa Xiuzheng'an, (The Amendments to the Constitution of the People's Republic of China), 1st Sess., Mar. 11, 2018, http://www.fdi.gov.cn/1800000121_39_4866_0_7.html.

⁶¹ Xiang Bo, *Backgrounder: Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era*, XINHUA (Mar. 17, 2018), http://www.xinhuanet.com/english/2018-03/17/c_137046261.htm.

12. Upholding the principles of ‘one country, two systems’ and promoting national reunification;
13. Promoting the building of a community with a shared future for humanity;
14. Exercising full and rigorous governance over the Party.⁶²

Noting China’s vision for development, the March 2018 Amendment to China’s Constitution specifically amended the seventh paragraph of the Preamble to the Constitution to read as follows:

The victory in China's New-Democratic Revolution and the successes in its socialist cause have been achieved by the Chinese people of all nationalities, under the leadership of the Communist Party of China and the guidance of Marxism-Leninism and Mao Zedong Thought, by upholding truth, correcting errors and surmounting numerous difficulties and hardships. China will be in the primary stage of socialism for a long time to come. The basic task of the nation is to concentrate its effort on socialist modernization along the road of Chinese-style socialism. Under the leadership of the Communist Party of China and the guidance of Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory, the important thought of Three Represents, the Scientific Outlook on Development, and the Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era, *the Chinese people of all nationalities will continue to adhere to the people's democratic dictatorship and the socialist road, persevere in reform and opening to the outside world, steadily improve socialist institutions, develop the socialist market economy, develop socialist democracy, improve the socialist rule of law, implement the new development concept, and work hard and self-reliantly to modernize the country's industry, agriculture, national defense and science and technology step by step and promote the coordinated development of the material, political, spiritual, social, and ecological civilizations, to turn China into a great modern socialist country that is prosperous, powerful, democratic, culturally advanced, harmonious, and beautiful and achieve the rejuvenation of the Chinese nation.*⁶³ (Italics added.)

A May 2019 article of Chinese President Xi Jinping, titled “Deepening Understanding of the New Vision of Development,”⁶⁴ speaks of China’s creation of “development models

⁶² *Id.*

⁶³ Thirteenth National People’s Congress, Xianfa Xiuzheng’an, (The Amendments to the Constitution of the People’s Republic of China), art. 32, 1st Sess., Mar. 11, 2018, http://www.fdi.gov.cn/1800000121_39_4866_0_7.html.

⁶⁴ *Xi’s Article Stresses Deep Understanding of the New Vision of Development*, CHINA DAILY (May 16, 2019), <http://www.chinadaily.com.cn/a/201905/16/WS5cdcd1f8a3104842260bc001.html>.

that give full play to [China's] first-mover advantages."⁶⁵ This gives substance to China's articulated philosophy on the Right to Development,⁶⁶ which is fairly distinct from the definition of the right to development in Article 1 of the 1986 UN General Assembly Declaration on the Right to Development.⁶⁷ To recall, Article 1 of the 1986 UN General Assembly Declaration on the Right to Development defines the right to development as "an inalienable human right by virtue of which every human person and all peoples are entitled to *participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.*"⁶⁸ The same Article 1 goes on to emphasize that the "human right to development also implies *the full realization of the right of peoples to self-determination*, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources."⁶⁹ On the other hand, China defines the right to development largely from material well-being terms and quite distinctly set apart from the full corpus of civil, political, economic, social, and cultural rights themselves: "the right to development is an inalienable human right, symbolizing dignity and honor...a means of eliminating poverty [that] provides the necessary conditions for realizing other human rights...the right to development is incorporated into other human rights, while the latter create the conditions for people to facilitate development and realize the right to development. Safeguarding the right to development is the *precondition* for realizing economic, cultural, social, and environmental rights, and obtaining civil and political rights."⁷⁰

The subtle but significant difference between these two conceptions lies with China's sequenced (and fairly statist) approach to achieving desired material well-being before realizing all other human rights, whereas the 1986 Declaration on the Rights refers to the full corpus of *simultaneous* participation, contribution, and enjoyment rights with respect to economic, social, cultural, and political development in a manner that fully realizes all human rights and fundamental freedoms.⁷¹ In this sense, China's articulated philosophy on the right to development dovetails with another scholar's observations that:

[i]n official Southern discourses, the right to development has mainly been advanced to rationalize and justify national priorities as well as legitimize statist political and economic agendas using the language of rights...it is articulated not so much against the developed West, but as a means of maintaining the status quo and to counter domestic and international

⁶⁵ *Id.*

⁶⁶ *The Right to Development: China's Philosophy, Practice, and Contribution*, STATE COUNCIL INFO. OFFICE OF THE PEOPLE'S REPUBLIC OF CHINA (Dec. 1, 2016), http://english.www.gov.cn/archive/white_paper/2016/12/01/content_281475505407672.htm.

⁶⁷ G.A. Res. 41/128, art. 1, Declaration on the Right to Development (Dec. 4, 1986).

⁶⁸ *Id.* at art. 1(1) (emphasis added).

⁶⁹ *Id.* at art. 1(2) (emphasis added).

⁷⁰ STATE COUNCIL INFO. OFFICE OF THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 66, pmb1. (emphasis added).

⁷¹ Arjun Sengupta, *Right to Development as a Human Right*, 36 ECON. & POL. WKLY. 2527, 2528 (2001); Karin Arts & Atabongawung Tamo, *The Right to Development in International Law: New Momentum Thirty Years Down the Line?*, 63 NETH. INT'L L. REV. 221, 231 (2016).

pressures for political liberalization. While the earlier phase of the discourses on the right to development tended to reflect a polemic of resistance, more recent debates increasingly reflect an international politics of power.

The paradox of the right to development talk coming from the South is that it is at once deployed to demand radical change in the international economic order and to resist change in the national political order. When Chinese officials invoke the right to development to demand more favorable trade terms or when the Ugandan government invokes it to push for more development assistance from the West, the emphasis is often on challenging a hegemonic international economic system with a view to challenging the status quo. Yet, when China invokes the right to development to deflect criticism of its human rights record, or to resist pressure to cap environmental emissions, the intent is clearly to maintain the domestic economic order and preserve the political status quo.⁷²

It is against the backdrop of these conceptual, philosophical, and normative differences on the right to development that this paper examines China's vision, actions, and commitments in its BRI. Clearly, the BRI is "not a selfless venture",⁷³ and it is "not China's Marshall Plan".⁷⁴ Rightly or wrongly, various militaristic, geopolitical, strategic, hegemonic, motives have been ascribed to the BRI,⁷⁵ particularly as the BRI will more predominantly involve China's state-owned enterprises (SOEs) – rather than the Chinese private sector – clearly making the BRI a vehicle for "China's economic statecraft."⁷⁶ It is not the purpose of this paper to engage those particular issues, but rather to take it as a given fact that the BRI is the globalized epitome of Chinese development financing.

Globalizing China's paradigm for sovereign development financing through the BRI⁷⁷ introduces various complexities to questions of democracy, development, and human rights.

⁷² Bonny Ibhawoh, *The Right to Development: The Politics and Polemics of Power and Resistance*, 33 HUM. RTS. Q. 76, 79 (2011). See also Wouter Vandenhole, *The Human Right to Development as a Paradox*, 36 L. & POL. AFR., ASIA & LATIN AMERICA 377 (2003).

⁷³ Sean Kenji Starrs, *Belt and Road Initiative is No Selfless Venture*, FIN. TIMES (Aug. 10, 2018), <https://www.ft.com/content/098d85c4-9a6d-11e8-ab77-f854c65a4465>.

⁷⁴ See Gu Bin, *The Belt and Road Initiative is Not China's Marshall Plan*, FIN. TIMES (Aug. 7, 2018), <https://www.ft.com/content/29dedffe-9a1c-11e8-88de-49c908b1f264>. See also Simon Shen & Wilson Chan, *A Comparative Study of the Belt and Road Initiative and the Marshall Plan*, 4 PALGRAVE COMM. 1 (2018).

⁷⁵ Nyshka Chandran, *Reports of China Using its 'Belt and Road' Program for Military Purposes are 'No Real Surprise'*, CNBC (Dec. 24, 2018), <https://www.cnbc.com/2018/12/24/china-belt-and-road-reported-military-implications.html>; Colin Flint & Cuiping Zhu, *The Geopolitics of Connectivity, Cooperation, and Hegemonic Competition: The Belt and Road Initiative*, 99 GEOFORUM 95, 98 (2019); Shirley Z. Yu, *Belt and Road Initiative: Defining China's Grand Strategy and the Future World Order 1, 2* (Mar. 2018) (unpublished Master's thesis, Harvard University) (on file with Harvard Library, Harvard University).

⁷⁶ Xiaojun Li & Ka Zeng, *To Join or Not to Join? State Ownership, Commercial Interests, and China's Belt and Road Initiative*, 92 PAC. AFF. 5 (2019).

⁷⁷ See David Murphy, *One Belt One Road: International Development Finance with Chinese Characteristics*, in CHINA STORY YEARBOOK 2015: POLLUTION 245 (Gloria Davies et al. eds., 2015).

Other scholars have elaborated on this paradigm, contrasting China's development financing paradigm's differences with Western-backed development finance in terms of: (1) the scale and business model of Chinese finance relative to its Western counterparts; (2) the composition and approach of China's lending portfolio; and (3) the governance of China's development finance institutions.⁷⁸ China's development financing paradigm has been described as follows:

...Chinese national [development finance institutions or DFIs] operating abroad do not have callable capital, they do take deposits, and they issue bonds on both the Chinese and global markets. The [Asian Infrastructure Investment Bank or AIIB] and the [New Development Bank or NDB] do have callable capital, but borrow in both Chinese and global capital markets. Western-led [multilateral development banks or MDBs] have callable and paid-in capital like the AIIB and NDB, but issue bonds in global as well as local currency markets.

In terms of lending practices, China's national DFIs operating abroad tend to lend in extraordinarily large lines of credit and loans for bundles of infrastructure and energy and other overseas national development projects, and do so in a coordinated fashion – with a number of different (Chinese) bank and non-bank corporate actors taking part in creating what we term in this article 'coordinated credit spaces'. The NDB, on a smaller scale, uniquely thus far, on-lends to national development banks in member countries such that the national development banks, in turn, provide financing for a number of loans. The AIIB is more like the Western MDBs, following an individual project finance approach....

Chinese national DFIs lend in both US dollars and in Chinese currency...[a]ll of these DFIs expect to be repaid in the currency that they lend in, with the exception of China's policy banks, which have often required that a certain amount of loans be paid back with commodity sales.

In terms of the composition of lending, all of the DFIs in which China is a key shareholder tend to focus on energy and infrastructure, which is distinct from what the Western DFIs have done until recently...

With respect to governance, China's national DFIs have a single shareholder governance structure...Unlike the Western-led MDBs, none of the Chinese DFIs attach explicit or overt policy conditionalities to their

⁷⁸ Gregory T. Chin & Kevin P. Gallagher, *Coordinated Credit Spaces: The Globalization of Chinese Development Finance*, 50 DEV. & CHANGE 245 (2019).

loans, although there is some evidence that China attaches purchasing and procurement conditions at times at the project level...⁷⁹

The absence of policy conditions to China's development financing has been argued as both an opportunity for borrower governments making wise and prudent investments (and with higher risk tolerances), as well as being itself a moral hazard risk of encouraging developing country governments towards irresponsible and imprudent fiscal decisions.⁸⁰ It was also only in mid-2019 that China announced it would begin to embed anti-graft and anti-corruption officers and joint inspection teams in BRI projects, following reports of alleged corrupt practices occurring in BRI projects.⁸¹ Other researchers have found that Chinese development finance "is indifferent to risk, in particular it is uncorrelated with indices of political stability and rule of law...[s]ome major borrowers from China have encountered debt sustainability problems while other borrowers are in good fiscal shape...Chinese banks have been reluctant to follow international norms for environmental safeguards but seem to be evolving towards those norms."⁸² This model, which blends dimensions of autocratic, authoritarian, pragmatic, and fluid decision-making in sovereign development financing, has been used to emphasize the rise of the "Beijing Consensus,"⁸³ as an alternative to the "Washington Consensus" that forged the International Monetary Fund and the World Bank.

The main types of China's financing into the BRI projects have been identified as: (1) syndicated bank loans by the China Development Bank, China Eximbank, and the four biggest state-owned commercial banks; (2) sectoral loans exclusively provided by the China Development Bank and China Eximbank; (3) equity investments by the state-owned Silk Road Fund; and (4) cross-border investments by Chinese (primarily state-owned) enterprises.⁸⁴ However these sources are also changing, inasmuch as the tenor and focus of BRI projects themselves appear to frequently change according to China's pronouncements.⁸⁵ In response to criticisms of the fluidity of this financing framework and concerns raised over the BRI as a 'debt trap' for lower income countries,⁸⁶ China's Ministry

⁷⁹ *Id.* at 247-49.

⁸⁰ Stephen B. Kaplan, *The Rise of Patient Capital: The Political Economy of Chinese Global Finance* (Feb. 1, 2018) (unpublished paper, George Washington University) (on file with Wilson Center).

⁸¹ Don Weiland, *China to Tackle Corruption in Belt and Road Projects*, FIN. TIMES (July 18, 2019), <https://www.ft.com/content/a5815e66-a91b-11e9-984c-fac8325aaa04>.

⁸² David Dollar & John L. Thornton, *Is China's Development Finance a Challenge to the International Order?* 2 (Oct. 2017) (unpublished manuscript) (on file with the Brookings Institution).

⁸³ See THE BEIJING CONSENSUS? HOW CHINA HAS CHANGED WESTERN IDEAS OF LAW AND ECONOMIC DEVELOPMENT (Weitseng Chen ed. 2017); John Williamson, *Is the "Beijing Consensus" Now Dominant?*, 13 ASIA POL'Y 1, 3 (2012); Yasheng Huang, *Debating China's Economic Growth: The Beijing Consensus or The Washington Consensus*, 24 ACAD. MGMT. 31 (2010).

⁸⁴ Lihuan Zhou et al., *Moving the Green Belt and Road Initiative: From Words to Actions 2* (2018).

⁸⁵ See Sitao Xu & Lydia Chen, *China's Belt and Road Initiative: Recalibration and New Opportunities*, DELOITTE INSIGHTS (Aug. 15, 2019), <https://www2.deloitte.com/us/en/insights/economy/asia-pacific/china-belt-and-road-initiative-update.html>.

⁸⁶ See Dylan Gerstel, *It's a (Debt) Trap! Managing China-IMF Cooperation Across the Belt and Road*, NEW PERSP. FOREIGN POL'Y 12 (2017); Lucy Hornby & Archie Zhang, *Belt and Road Debt Trap Accusations Hound China as it Hosts Forum*, FIN. TIMES (Apr. 23, 2019), <https://www.ft.com/content/3e9a0266-6500-11e9-9adc->

of Finance issued its *Debt Sustainability Framework for Participating Countries of the Belt and Road Initiative*,⁸⁷ “with the aim to promote sustainable economic and social development of BRI countries while ensuring debt sustainability.”⁸⁸ However, in the same document, the framework is disavowed immediately by China’s Ministry of Finance as “a non-mandatory policy tool...[since] the financial institutions of China and other BRI countries are encouraged to use this framework to conduct debt sustainability analysis and manage debt risks according to the risk rating results, as an important reference for lending decisions.”⁸⁹ The Ministry of Finance then recommends nine (9) procedures that could be undertaken for debt sustainability analysis: (1) debt coverage; (2) macroeconomic projections; (3) realism tools; (4) country classification and debt carrying capacity; (5) stress tests; (6) risk signals; (7) the use of judgment; (8) the final risk ratings; and (9) the debt sustainability analysis write up.⁹⁰ There is nothing in the text of this document that indicates whether China’s Ministry of Finance will disallow lending for BRI projects that fail this method of debt sustainability analysis, or otherwise provide oversight for the short-term and long-term impacts of the BRI debtor country’s assumption of debt. The document tacitly conveys that the onus falls more on BRI debtor countries to do a sufficient debt sustainability analysis for them as sovereign borrowers, rather than reining in China’s financing for BRI projects that might not meet any of these standards within a satisfactory bandwidth or range consistent with international standards and best practices consistent with both lawful, as well as legitimate, methods for debt sustainability, public debt transparency, or sovereign debt restructuring.⁹¹

The seeming ambiguity of China’s views about its role and responsibility as a sovereign lender to BRI borrower countries stands in sharp contrast with China’s stated commitments during its Third Universal Periodic Review before the Human Rights Council, where China’s Vice-Foreign Minister hailed China’s “human rights achievements, human rights development path, and the country’s determination to promote the human rights situation...China has decided to accept 284 out of 346 recommendations put forward by various parties.”⁹² It is reported that among these recommendations, in particular, are commitments to respect human rights in its foreign investment activities, especially to “promote measures that ensure that development and infrastructure projects inside and

98bfl1d35a056; JOHN HURLEY ET AL., CTR. FOR GLOB. DEV., EXAMINING THE DEBT IMPLICATIONS OF THE BELT AND ROAD INITIATIVE FROM A POLICY PERSPECTIVE (2018); Agatha Kratz, et al., *New Data on the “Debt Trap” Question*, RHODIUM GROUP (Apr. 29, 2019), <https://rhg.com/research/new-data-on-the-debt-trap-question/>; *China’s Belt and Road Initiative: Why the Price is Too High*, WHARTON SCH. OF THE UNIV. OF PA. (Apr. 30, 2019), <https://knowledge.wharton.upenn.edu/article/chinas-belt-and-road-initiative-why-the-price-is-too-high/>.

⁸⁷ MINISTRY OF FIN. OF THE PEOPLE’S REPUBLIC OF CHINA, DEBT SUSTAINABILITY FRAMEWORK FOR PARTICIPATING COUNTRIES OF THE BELT AND ROAD INITIATIVE (2019).

⁸⁸ *Id.* at 1.

⁸⁹ *Id.*

⁹⁰ *Id.* at 1–2.

⁹¹ See, e.g. G.A. Res. 69/313, Addis Ababa Action Agenda (July 27, 2015); IMF & World Bank, *G20 Notes on Strengthening Public Debt Transparency*, Highlights and Work Agenda (June 2018). See also Salvatore Dell’Erba et al., *Debt Levels, Debt Composition, and Sovereign Spreads in Emerging and Advanced Economies*, 29 OXFORD REV. ECON. POL’Y 518 (2013); Shalendra D. Sharma, *Resolving Sovereign Debt: Collective Action Clauses or the Sovereign Debt Restructuring Mechanism*, 38 J. WORLD TRADE 627 (2004); Odette Lienau, *The Challenge of Legitimacy in Sovereign Debt Restructuring*, 57 HARV. INT’L L.J. 151 (2016).

⁹² *China Completes 3rd Universal Periodic Review at UN Human Rights Council*, CHINA DAILY (Mar. 17, 2019), <https://global.chinadaily.com.cn/a/201903/17/WS5c8d82e0a3106c65c34eeff3.html>.

outside of its territory are fully consistent with human rights and respect the environment and natural resource sustainability, in line with national and international law and with the commitments from the 2030 Agenda for Sustainable Development.”⁹³ China is also reported to have committed itself to report to the Human Rights Council on the specific recommendation to “[c]onsider the establishment of a legal framework to guarantee that activities carried out by industries subject to its jurisdiction do not negatively impact human rights abroad...[t]ake further measures on business and human rights in line with its international obligations and ensure that companies operating in high-risk or conflict areas conduct human rights due diligence in line with the Guiding Principles on Business and Human Rights.”⁹⁴ Even assuming some equivocation as to the nature of what China has committed to report on to the Human Rights Council, it nevertheless bears stressing that China’s obligations as a treaty party to the International Covenant on Economic, Social and Cultural Rights (ICESCR) were already called upon by the Committee on Economic, Social and Cultural Rights in 2014 “to adopt a human rights-based approach to international cooperation, by: (a) undertaking a systematic and independent human rights impact assessment prior to making funding decisions; (b) establishing an effective monitoring mechanism to regularly assess the impact of its policies and projects in the receiving countries and to take remedial measures when required; [and] (c) ensuring that there is an accessible complaint mechanism for violations of economic, social and cultural rights in the receiving countries.”⁹⁵

The clamor for transparency and predictability with respect to China’s most massive sovereign foreign investment program through the BRI, therefore, is clearly well-founded under China’s own voluntarily stated commitments to the UN Human Rights Council, as well as in its obligations as a treaty party to the ICESCR. Neither is China unused to transparency norms affecting its foreign investments. China has shown that it can conclude a foreign investment treaty imposing mutual transparency obligations of host States and home States of foreign investment with respect to all laws, regulations, and policies relating to foreign investment.⁹⁶ As observed by another scholar, China has in fact already begun including some provisions recognizing sustainable development, environment, transparency, labour and human rights in China’s international investment agreements.⁹⁷ As a treaty party to the Paris Agreement on Climate Change, China has also assumed the responsibility that “[p]arties shall account for their nationally determined contributions. In accounting for

⁹³ Press Release, CICDHA, “China Commits to the United Nations Human Rights Council to Respect Human Rights in its Foreign Investments” (Mar. 19, 2019).

⁹⁴ Rep. of the Working Group on the Universal Periodic Review: China, Human Rights Council, at 12–13, U.N. Doc. A/HRC/40/6 (2018).

⁹⁵ Econ. and Soc. Council: Comm. on Econ., Soc. and Cultural Rights, Concluding Observations on the Second Periodic Report of China, Including Hong Kong, China, and Macao, China, at 4, U.N. Doc. E/C.12/CHN/CO/2 (2014).

⁹⁶ See, e.g., Agreement Between the Government of Canada and the Government of the People’s Republic of China for the Promotion and Reciprocal Protection of Investments art. 17, Can.-China, Sept. 9, 2012, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3476/download>.

⁹⁷ See Manjiao Chi, *Addressing Sustainable Development Concerns through IIAs: A Preliminary Assessment of Chinese IIAs*, in CHINA’S INTERNATIONAL INVESTMENT STRATEGY: INTERNATIONAL, REGIONAL, AND GLOBAL LAW AND POLICY 100-115 (Julien Chaisse ed., 2019).

anthropogenic emissions and removals corresponding to nationally determined contributions, Parties shall promote environmental integrity, transparency, accuracy, completeness, comparability and consistency....”⁹⁸ Thus, even for purposes of enabling the open determination of the complete environmental and climate change impacts of BRI projects, such open transparency and information access policies are essential.

Furthermore, as summarized from an academic article by the UN Independent Expert on the effects of foreign debt and other international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, China’s own domestic regulations appear to already require such transparency and compliance with environmental and social safeguards as part of China’s external lending and outbound investment activities:

Over the past decade, an increasing number of guidelines relating to business and finance have been adopted by different government bodies. Some relate to human rights, such as the principles of non-discrimination, compensation of losses in case of resettlement and consultation with affected communities.

The Chinese authorities have made efforts to strengthen their regulations for outbound investment in order to avoid negative environmental and social impact. Achieving greater human rights protection would also require ensuring that existing guidelines and policies are more rigorously monitored in their implementation. Most are currently voluntary and lack an accountability and enforcement mechanism. In particular, affected individuals and communities should have access to effective remedies if existing regulations and international norms are not adhered to. The State’s most recent national human rights plan of action (2012–2015) did not address the issue of human rights in the field of business, by for example ensuring that lending and outbound investment complied with international human rights standards. In December 2007, the State-owned Assets Supervision and Administration Council issued a set of guidelines for all central State-owned enterprises on fulfilling corporate social responsibilities. The guidelines require State-owned enterprises to give top priority to work and product safety, the legal interests of employees, compliance with regulations and laws, investment into environmental protection, and non-discrimination on grounds of gender, nationality, religion or age, including equal pay for equal work, and encourage State-owned enterprises to participate in social welfare programmes. In March 2009, the Ministry of Commerce issued Measures for Overseas Investment Management, containing detailed regulations for the approval of overseas investments. According to the regulations, any overseas investment considered likely to violate “any international treaty conducted by China

⁹⁸ Paris Agreement to the United Nations Framework Convention on Climate Change art. 5, Dec. 12, 2015, T.I.A.S. No. 16-1104.

with a foreign party” would not be approved. While in theory this allows for the consideration of obligations from international human rights treaties signed by China and partner countries, the author was not informed during his visit on how the Ministry screens overseas investments that may pose significant human rights risks. The Guidelines on Environmental Protection in Foreign Investment and Cooperation, published by the Ministry of Commerce in March 2013, focus on ensuring environmental protection and promote the sustainable development of foreign investment and cooperation. They also require, however, that enterprises should respect the religious belief, cultural traditions and national customs of community residents of the host country, safeguard the legitimate rights and interests of labourers, offer training, employment and re-employment opportunities to residents in the surrounding areas, promote the harmonious development of the local economy, the environment and the community, and cooperate on the basis of mutual benefit.

China Banking Regulatory Commission’s Green Credit Guidelines apply to all policy and commercial banks. Article 4 of the Guidelines covers “hazards and risks [to] the environment and society that may be brought about by the construction, production and operating activities of banking institutions’ clients and key affiliated parties thereof, including environmental and social issues related to energy consumption, pollution, land, health, safety, resettlement of people, ecological protection [and] climate change”. Article 10 stipulates that Chinese banking institutions are to “establish and constantly improve policies, systems and processes for environmental and social risk management”, while article 11 requires clients facing major environmental and social risks to put in place risk response plans and to establish sufficient, effective stakeholder communication mechanisms, including third-party assessment of such risks. In 2012, an article 21 was included in the Green Credit Guidelines, requiring banking institutions to strengthen explicitly environmental and social risk management for overseas projects for which credit has been granted. It requires Chinese financial institutions to ensure that project sponsors comply with applicable laws and regulations on, inter alia, environmental protection, land, health and safety in the country or jurisdiction hosting the project. In addition, banking institutions are required to pledge publicly that appropriate international practices or international norms will be followed in the implementation of the project so as to ensure alignment with good international practices.

The Green Credit Guidelines provide an opportunity to enhance respect for human rights in Chinese project financing and foreign investment. Yet, doubts remain around the implementation of the Guidelines by Chinese

banking institutions in overseas projects given that the mechanisms for monitoring and enforcing compliance still appear to be weak. While the Guidelines attribute the responsibility to supervise environmental and social risk management, including off-site and on-site examination, to the China Banking Regulatory Commission, the author did not receive any information on any investigations conducted with regard to cases of potential non-compliance of financial institutions when lending for overseas projects. Since 2016 a new set of regulation has been developed by China to be further applicable to international lending and outbound investment. These new norms try to improve the system of risk assessment (including environmental and social risks) and places this assessment as a key aspect to make the final decision on the pertinent project. They also emphasize on the comprehensiveness of that assessment which has to be both *ex ant* and *ex post*. They also reinforce the obligation of Chinese corporations to understand and respect the laws of the countries where they operate. Yet, these initiatives are not legally binding and it remains to be seen how they are operationalized. The new (2017) Environmental Risk Management Initiative for China's Overseas Investment encourages investors to consider environmental, social and governance factors when making and managing investments. This includes disclosing information and then working with environmental groups so that disclosure of information improves project management. It also calls on investors to fully understand Chinese, local and international environmental standards and wherever possible to apply the toughest of those; and to carry out full environmental due diligence. The recently (January 2018) passed Guiding Opinions of the Development and Reform Commission and the Ministry of Commerce on Strengthening the Construction of the Credit System in the Field of Foreign Economic Cooperation establish that Chinese persons and entities participating in international economic cooperation should respect relevant laws and regulations of domestic and cooperating countries and regions, and United Nations resolutions, among other aspects...⁹⁹

It begs explanation, therefore, that as of this writing China has not yet opened the BRI to the fullest transparency and information access to all communities likely to be affected by the environmental, climate change, labor, and human rights impacts of BRI projects. Other regions—such as Europe through its Aarhus Convention,¹⁰⁰ Latin America and the Caribbean through its own Escazú Agreement¹⁰¹—have long recognized the importance of such transparency and information access for infrastructure and other forms of development

⁹⁹ Juan Pablo Bohoslavsky, *A Human Rights Focus to Upgrade China's International Lending*, 5 CHINESE J. GLOBAL GOVERNANCE 69, 82-85 (2019).

¹⁰⁰ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 447.

¹⁰¹ Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean art. 1, Mar. 4, 2018, U.N. Doc. LC/CNP10.9/5 (not yet in force).

projects. As it appears, the most inexplicably elusive feature of the BRI, taken alongside China's articulated philosophy and normative approach to what it asserts as the content of the right to development, is not just the presence of a so-called "rule of law-based" sovereign development financing paradigm,¹⁰² but an actual predictable legal and contractual framework for assessing project responsibility and the assumption of project, operational, political, credit, regulatory, and other types of risks,¹⁰³ regularizing joint sovereign oversight over BRI projects;¹⁰⁴ and ensuring not just timely and apt piecemeal project completion,¹⁰⁵ but the salience of the conceptualization and implementation of BRI projects in full compliance with both domestic and international laws on environment, labor, and other key norms of participation, contribution, enjoyment, and fullest realization of civil, political, economic, social, and cultural rights that comprise the right to development in international law.¹⁰⁶

Close to a decade into the grand speeches and promotional pronouncements,¹⁰⁷ numerous international fora staged,¹⁰⁸ and a growing constellation of lionizing commentaries attesting to the vast potentials of the BRI projects for the future of humanity,¹⁰⁹ what stands more deafening thus far is China's silence on the role of actual binding law to ensure

¹⁰² See Guiguo Wang, *Towards a Rules-Based Belt and Road Initiative – Necessity and Directions*, 6 J. INT'L & COMP. L. 29 (2019).

¹⁰³ See Scott L. Hoffmann, *A Practical Guide to Transactional Project Finance: Basic Concepts, Risk Identification, and Contractual Considerations*, 45 BUS. LAW. 181, 183 (1989); Michael P. Malloy, *International Project Finance: Risk Analysis and Regulatory Concerns*, 18 TRANSNAT'L L. 89, 94 (2004).

¹⁰⁴ See John W. Head et al., *Changing Norms in International Development Finance: Transparency, Accountability, and Mission Creep*, 98 AM. SOC'Y INT'L L. PROC 63 (2004); Nagla Nassar, *Project Finance, Public Utilities, and Public Concerns: A Practitioner's Perspective*, 23 FORDHAM INT'L L.J. S60 (1999).

¹⁰⁵ See Alex He & Anton Malkin, *China Tweaks its Belt and Road Initiative to Avoid Further Backlash*, THE HILL (May 6, 2019, 5:00 PM), <https://thehill.com/opinion/finance/442306-china-tweaks-its-belt-and-road-initiative-to-avoid-backlash>.

¹⁰⁶ See Isabella D. Bunn, *The Right to Development: Implications for International Economic Law*, 15 AM. U. INT'L L. REV. 1425, 1434 (2000); Sheldon Leader, *Project Finance and Human Rights*, in MAKING SOVEREIGN FINANCING AND HUMAN RIGHTS WORK 199 (Juan Pablo Bohoslavsky & Jernej Letnar Čermeč eds., 2014).

¹⁰⁷ See, e.g., *President Xi Jinping Delivers Important Speech and Proposes to Build a Silk Road Economic Belt with Central Asian Countries*, MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE'S REPUBLIC OF CHINA (Sept. 7, 2013), https://www.fmprc.gov.cn/mfa_eng/topics_665678/xjpfwzysiesgjtfhshzzfh_665686/t1076334.shtml; *Full Text of President Xi's Speech at the Opening of Belt and Road Forum*, XINHUANET (May 14, 2017, 11:23 PM), http://www.xinhuanet.com/english/2017-05/14/c_136282982.htm; *Xi Jinping Chairs and Addresses Leaders' Roundtable of the Second Belt and Road Forum for International Cooperation (BRF)*, MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE'S REPUBLIC OF CHINA (Apr. 27, 2019), https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1659377.shtml.

¹⁰⁸ See *Joint Communiqué of the Leaders' Roundtable of the 2nd Belt and Road Forum for International Cooperation*, MINISTRY OF FOREIGN AFFAIRS OF CHINA (Apr. 27, 2019), https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1658766.shtml.

¹⁰⁹ Vladimir Yakunin, *The Belt and Road Initiative as a New Model for Global Inclusive Development and Solidarity* (Apr. 30, 2019), <https://doc-research.org/2019/04/the-belt-and-road-initiative-as-a-new-model-for-global-inclusive-development-and-solidarity/>; *China Focus: Belt and Road Initiative Makes Solid Progress, Embraces Brighter Future: Report*, XINHUANET (Apr. 23, 2019), http://www.xinhuanet.com/english/2019-04/23/c_137999264.htm; Mei Guanqun, *Proposals to Promote the "Belt and Road" Initiative*, 8 J. WORLD TRADE ORG. & CHINA 114 (2018).

transparency and accountability in the supposed ‘win-win cooperation’¹¹⁰ that China seeks to forge with most of the world under the aegis of ‘development’ through the BRI. In April 2019, Chinese President Xi Jinping declared for the first time that the BRI will “adopt widely accepted rules and standards and encourage participating companies to follow general international rules and standards in project development, operation, procurement and tendering and bidding. The laws and regulations of participating countries should also be respected.”¹¹¹ As of this writing, however, it has not been disclosed what precise international rules, operational standards, and international, regional, or local laws Chinese President Xi Jinping made binding or applicable to all BRI Projects. During the COVID-19 pandemic, it has been reported that China has received, and not granted, numerous applications for debt relief from BRI projects, on the reasoning that “the BRI loans are not foreign aid...[China] need[s] to at least recoup principal and a moderate interest.”¹¹²

There is abundant academic literature speculating on various substantive international rules that may or should apply to the BRI,¹¹³ but nothing yet that has been publicly disclosed by China to apply to all the contract language and legal documentation for each BRI Project it has listed in its BRI website. Other documents released in April 2019 along with China’s *Debt Sustainability Framework* (such as the *Beijing Initiative for the Clean Silk Road*,¹¹⁴ the *Cooperation Initiative on Silk Road of Innovation*,¹¹⁵ and the *Green Investment Principles for the Belt and Road*¹¹⁶) all have a similar non-binding tenor and articulate visions and principles, rather than actual hard law applicable to BRI contracts. What is known, is that, as of July 1, 2018, the Supreme People’s Court of China issued its “Regulations on Several Issues Regarding the Establishment of International Commercial Courts” (one in Xian and one in Shenzhen), which will reportedly take jurisdiction over any disputes involving BRI projects.¹¹⁷ There is no equivalent mechanism set up similar to the World Bank Inspection Panel or other compliance and accountability mechanisms in all other development banks

¹¹⁰ See *Working Together to Deliver a Brighter Future for Belt and Road Cooperation*, MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE’S REPUBLIC OF CHINA (Apr. 26, 2019), https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1658424.shtml.

¹¹¹ *Id.*

¹¹² James Kynge and Sun Yu, “China faces wave of calls for debt relief on ‘Belt and Road’ projects”, *The Financial Times*, 30 April 2020, full text at <https://www.ft.com/content/5a3192be-27c6-4fe7-87e7-78d4158bd39b> [last accessed 1 May 2020].

¹¹³ See INTERNATIONAL GOVERNANCE AND THE RULE OF LAW IN CHINA UNDER THE BELT AND ROAD INITIATIVE (Yun Zhao ed., 2018); Heng Wang, *China’s Approach to the Belt and Road Initiative: Scope, Character, and Sustainability*, 22 J. INT’L ECON. L. 29 (2019); Jiangyu Wang, *China’s Governance Approach to the Belt and Road Initiative (BRI): Partnership, Relations, and Law*, 14 GLOBAL TRADE & CUSTOMS J. 222 (2019).

¹¹⁴ *Full Text: Beijing Initiative for the Clean Silk Road*, CHINA DAILY (Apr. 26, 2019, 9:03 PM), <http://www.chinadaily.com.cn/a/201904/26/WS5cc301a6a3104842260b8a24.html>.

¹¹⁵ *Cooperation Initiative on Silk Road of Innovation*, MINISTRY OF SCI. & TECH. OF CHINA (Apr. 25, 2019), http://en.most.gov.cn/eng/pressroom/201904/t20190425_146255.htm.

¹¹⁶ *Green Investment Principles for the Belt and Road*, GREEN FIN. LEADERSHIP PROGRAM, <http://www.gflp.org.cn/public/ueditor/php/upload/file/20181201/1543598660333978.pdf> (last visited Jan. 15, 2020).

¹¹⁷ Freshfields Bruckhaus Deringer, *China Establishes International Commercial Courts to Handle Belt and Road Initiative Disputes*, OXFORD BUS. L. BLOG (Aug. 17, 2018), <https://www.law.ox.ac.uk/business-law-blog/blog/2018/08/china-establishes-international-commercial-courts-handle-belt-and>.

that are part of the Independent Accountability Mechanisms Network,¹¹⁸ which enable local communities to directly raise concerns and complaints about development-financed-projects. Projects may already be in the process of being initiated,¹¹⁹ but all of the stakeholders to BRI projects beyond China and the BRI debtor government—particularly affected local communities—still remain behind an iron curtain as to crucial information on the long-term governance, social, financial, and fiscal consequences, as well as all the human rights impacts, of all of the BRI projects.¹²⁰ As illustrated in five case studies of Malaysia, Pakistan, Sri Lanka, Laos, and Kazakhstan in the following Part I (*Democracy and the BRI: Choice, Consent, and Consultation in Sovereign Lending*), the dearth of hard law and transparent and open information regarding BRI development projects,¹²¹ itself creates significantly problematic deficits in the exercise of informed choice, consultation with local communities, and the process of determining the meaningful consent of all constituencies and stakeholders of BRI development projects.

I. DEMOCRACY AND THE BRI: CHOICE, CONSENT, AND CONSULTATION IN SOVEREIGN LENDING

Project finance refers to a “nonrecourse or limited recourse financing structure in which debt, equity, and credit enhancement are combined for the construction and operation, or the refinancing of a particular facility in a capital-intensive industry, in which lenders base credit appraisals on the projected revenues from the operation of the facility, rather than the general assets or the credit of the sponsor of the facility, and rely on the assets of the facility, including any revenue-producing contracts and other cash flows generated by the facility, as collateral for debt.”¹²² When it is a sovereign state that finances a project in a borrowing state, this introduces even further complexities to the ordinary contractual dynamics of project financing. As Lee Buchheit and Mitu Gulati famously cautioned in 2010:

There are three reasons for attempting to reach a common understanding of the responsibilities of sovereign borrowers and their lenders. First, the flow of capital to sovereign debtors is exceptionally important to the world economy. Industrialized countries rely on it to finance their budget deficits, these days to a breathtaking extent. Developing countries need it to develop. *Misbehavior, either by the sovereign debtors or by the*

¹¹⁸ See Laurence Boisson de Chazournes, *Public Participation in Decision-Making: The World Bank Inspection Panel*, 31 AM. SOC'Y INT'L L. STUD. TRANSNAT'L LEGAL POL'Y, 84, 85 (1999).

¹¹⁹ See Veasna Kong et al., *The Belt and Road Initiative – Six Years On*, MOODY'S ANALYTICS (June 2019), <https://www.moodyanalytics.com/-/media/article/2019/belt-and-road-initiative.pdf>.

¹²⁰ See Abbas Faiz, *Is China's Belt and Road Initiative Undermining Human Rights?*, THE DIPLOMAT (June 7, 2019), <https://thediplomat.com/2019/06/is-chinas-belt-and-road-initiative-undermining-human-rights/>.

¹²¹ See James Crabtree, Opinion, *China Needs to Make BRI More Transparent and Predictable*, FIN. TIMES (Apr. 25, 2019), <https://www.ft.com/content/3c5d6d14-66ac-11e9-b809-6f0d2f5705f6>.

¹²² SCOTT L. HOFFMANN, *THE LAW AND BUSINESS OF INTERNATIONAL PROJECT FINANCE: A RESOURCE FOR GOVERNMENTS, SPONSORS, LAWYERS, AND PROJECT PARTICIPANTS* 4 (Cambridge Univ. Press, 3rd ed. 2007).

creditors, destabilizes this key component of the international financial system, making credit less available and more costly.

Second, *sovereign finance is uniquely unforgiving of mistakes.* Unlike corporate or personal debtors, sovereigns do not have access to a formal bankruptcy process in which insupportable liabilities can be adjusted according to preestablished rules. From a legal standpoint, sovereign debts are therefore ineradicable absent the consent and cooperation of the creditors. Unfortunately, the process by which that consent and cooperation must be sought – sovereign debt restructuring – remains unpredictable and disorderly.

Third, *the human cost of prodigal sovereign borrowing, reckless sovereign lending or incompetent sovereign debt restructuring is incalculable...* A consensus about the responsibilities of sovereign borrowers and lenders, together with improvements in the way in which sovereign loans are planned, executed, documented, and, when necessary, restructured, will directly affect the lives of most of the people that live on this planet.¹²³

The above three reasons make it all the more crucial that there is transparency of information¹²⁴ for all BRI project stakeholders—not just the finance ministry of the borrowing state, but affected local communities, taxpayers, civil society organizations, and all other constituencies impacted by a borrowing state incurring foreign debt through a BRI project.¹²⁵ Because these are long-term and intergenerational commitments by the government of a borrowing BRI state to repay China over time—either through the allocation of infrastructure, energy, mining, communications, or other project revenues, or through China's recovery or repayment of debt from the actual assets and resources comprising the facilities of the project (whether through outright ownership of the assets or enjoyment of other associated long-term property rights such as usufructuary rights, long-term leases, among others over such assets, resources, and facilities)—the civilian populations of BRI borrowing states have a direct stake over the consent that their government ultimately gives to owe debt to China that would be used for the construction of BRI megaprojects.¹²⁶ Since

¹²³ Lee C. Buchheit & G. Mitu Gulati, *Responsible Sovereign Lending and Borrowing*, 73 LAW & CONTEMP. PROBS. 63, 64–65 (2010). Italics added.

¹²⁴ See IMF & IDA, *G-20 Note: Strengthening Public Debt Transparency: The Role of the IMF and the World Bank* (June 13, 2018), <http://documents.worldbank.org/curated/en/991171532695036951/pdf/128725-repl-For-VP-G-20-NOTE-STRENGTHENING-PUBLIC-DEBT-TRANSPARENCY-clean.pdf>.

¹²⁵ See David L. Goldwyn, *Extracting Transparency*, 5 GEO. J. OF INT'L AFF. 5 (2004); Diane Desierto, *China's 'One Belt, One Road' Initiative: Can a Bilaterally-Negotiated 'Globalization 2.0' Internalize Human Rights, Labor, and Environmental Standards?*, BLOG OF THE EUROPEAN JOURNAL OF INT'L LAW: TALK! (May 16, 2017), <https://www.ejiltalk.org/chinas-one-belt-one-road-initiative-can-a-bilaterally-negotiated-globalization-2-0-internalize-human-rights-labor-and-environmental-standards/>.

¹²⁶ See W. Richard Scott & Raymond E. Levitt, *Institutional Challenges and Solutions for Global Megaprojects*, in THE OXFORD HANDBOOK OF MEGAPROJECT MANAGEMENT (Bent Flyvbjerg ed., 2017) (“distinguish ‘megaprojects’ from other large projects in terms of the degree to which managers can reduce

none of the publicly available BRI official documents from China's official websites indicate what China's actual debt repayment terms are, the unfortunate result is an "opaque build-up of debt...[which could cause] risk[s] to the world economy."¹²⁷ The lack of transparency poses problems for measuring the ultimate cost of sovereign debt. Researchers have found that "better fiscal transparency, political trust, and credit ratings are connected with a lower cost of sovereign debt...higher corruption, budget deficits, current account deficits, and unemployment make sovereign rates increase."¹²⁸ Other researchers also affirm that "high debt levels can limit a sovereign government's capacity to provide social services necessary for the well-being of its citizens, and divert resources and energy from the pursuit of long-term development strategies...[and] after a government defaults, the mechanisms for managing the restructuring of sovereign debt usually act slowly, do not return the country to debt sustainability, and often leave the different classes of creditors as well as the people of the indebted country feeling as if they have been treated unfairly."¹²⁹

Genuine, ongoing, and transparent consultations with affected local communities¹³⁰ of BRI development projects are as equally important as securing the informed consent of, and ensuring meaningful choice by, all actual stakeholders and constituencies of BRI debt to China to finance such development projects. The emerging right to development emphasizes *participation*, *contribution*, and *enjoyment* by all persons and peoples in economic, political, social, and cultural development that ensures the realization of all human rights and fundamental freedoms.¹³¹ Even the right to self-determination in Article 1(1) of the International Covenant on Economic, Social, and Cultural Rights (to which China is a treaty party) requires that peoples possess *both* "the right to freely determine their political status *and* freely pursue their economic, social, and cultural development."¹³² The freedom to pursue such development—howsoever envisaged—is undermined when affected communities and peoples do not have transparent access to information about the BRI projects and their likely or anticipated human rights impacts.

Precisely because affected stakeholders, local communities, and wider constituencies in the borrower BRI state stand to absorb all of the impacts, externalities, and consequences of BRI development projects, they cannot be left out of the process of BRI project

overall project coordination costs for handling overall project complexity through partitioning of the project into more or less autonomous subprojects. Further, 'Global Megaprojects' also involve significant levels of cross-institutional complexity because they involve participants and outside groups from multiple countries with differing languages and institutions.").

¹²⁷ Weizhen Tan, *China's Loans to Other Countries are Causing 'Hidden' Debt. That May be a Problem*, CNBC (June 11, 2019, 8:50 PM), <https://www.cnbc.com/2019/06/12/chinas-loans-causing-hidden-debt-risk-to-economies.html>.

¹²⁸ Francisco Bastida et al., *Fiscal Transparency and The Cost of Sovereign Debt*, 83 INT'L REV. ADMIN. SCI. 106, 106 (2015).

¹²⁹ Christian Barry & Lydia Tomitova, *Fairness in Sovereign Debt*, 73 SOC. RES. 649 (2006).

¹³⁰ See Brid Walsh et al., *The Effect of Community Consultation on Perceptions of a Proposed Mine: A Case Study from Southeast Australia*, 51 RESOURCES POL'Y, 163 (2017); James C. N. Paul, *International Development Agencies, Human Rights, and Humane Development Projects*, 17 DENVER J. INT'L LAW & POL'Y 67 (1988); George K. Foster, *Community Participation in Development*, 51 VAND. J. TRANSNAT'L L. 39 (2018).

¹³¹ G.A. Res. 41/128, Declaration on the Right to Development, at art. 1(1) (Dec. 4, 1986).

¹³² G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, at art. 1(1) (Dec. 16, 1966).

conceptualization, execution, implementation, and oversight.¹³³ The World Bank's development finance model, for example, (and however much this model is critiqued),¹³⁴ still ultimately evolved to embed community participation in identifying and assessing project needs, incorporating concerns and experiences over project implementation, and engaging communities for evaluation, monitoring, and impact assessment of development projects.¹³⁵ The World Bank reports that community-driven development (CDD) and service delivery, engaging local communities as partners in development planning and decision-making, has proven more effective and sustainable for its development-financed projects.¹³⁶ The World Bank's CDD programs are committed to operate on "principles of transparency, participation, local empowerment, demand-responsiveness, greater downward accountability, and enhanced local capacity."¹³⁷ In contrast, the publicly available documentation on policies and regulations for BRI development projects¹³⁸ thus far do not indicate any such comparable data on local community engagement, needs assessment, monitoring, and oversight partnerships. Even the publicly available data in the category of "Bilateral Documents" are little more than a collection of vision-driven joint communiqués and statements by the leaders of China and BRI debtor states,¹³⁹ short of actual operational detail on any community consultations, monitoring, oversight, and partnership. The following five case studies of BRI development projects—Malaysia's East Coast Rail Link (ECRL); Sri Lanka's Hambantota Port and Colombo Port; Pakistan's China-Pakistan Economic Corridor (CPEC); Laos' Kunming-Vientiane Railway; and Kazakhstan's Khorgos Gateway—further illustrate some of the democratic deficits in BRI development programming, with respect to the dimensions of meaningful choice and informed consent by the BRI debtor state and all its constituencies and affected stakeholders, and consultations with all affected local communities.

¹³³ See Catherine Buerger & Elizabeth Holzer, *How Does Community Participation Work? Human Rights and the Hidden Labour of Interstitial Elites in Ghana*, 7 J. HUM. RTS. PRAC. 72 (2015).

¹³⁴ See Ngaire Woods, *Making the IMF and World Bank More Accountable*, in REFORMING THE GOVERNANCE OF THE IMF AND THE WORLD BANK 149 (Ariel Buira ed., 2005); Niamh Gaynor, *The Politics of Democracy and the Global Institutions: Lessons and Challenges for Community Development*, in POLITICS, POWER AND COMMUNITY DEVELOPMENT 179 (Rosie R. Meade et al., 2016).

¹³⁵ See SUSAN PARK, WORLD BANK GROUP INTERACTIONS WITH ENVIRONMENTALISTS: CHANGING INTERNATIONAL ORGANISATION IDENTITIES (2010); Sabine Schlemmer-Schulte, *The World Bank and Human Rights*, 4 AUSTRIAN REV. INT'L & EUR. L. 230 (1999).

¹³⁶ *Community-Driven Development and Service Delivery: Engaging Local People Gets Development Projects Rights*, WORLD BANK, <https://www.worldbank.org/en/webarchives/archive?url=httpzxxxweb.worldbank.org/archive/website00518/WEB/OTHER/COMMUNIT.HTM> (last visited Feb. 29, 2020).

¹³⁷ *Results*, WORLD BANK, <https://www.worldbank.org/en/topic/communitydrivendevelopment#3> (last visited Feb. 20, 2020); See also Ben Moxham, *The World Bank's Land of Kiosks: Community Driven Development in Timor-Leste*, 15 DEV. PRAC. 522, 523 (2005); Michael A. Clemens & Michael Kremer, *The New Role for the World Bank*, 30 J. ECON. PERSP. 53, 65 (2016).

¹³⁸ See *Policies and Regulations*, BELT & ROAD PORTAL, https://eng.yidaiyilu.gov.cn/info/iList.jsp?cat_id=10062&cur_page=3 (last visited Feb. 29, 2020).

¹³⁹ See *Bilateral Documents*, BELT & ROAD PORTAL, https://eng.yidaiyilu.gov.cn/info/iList.jsp?cat_id=10061&cur_page=2 (last visited Feb. 29, 2020).

a. Malaysia's East Coast Rail Link (ECRL)

In late 2018, Malaysian Prime Minister, Mahathir Mohamad, announced the cancellation of three BRI infrastructure projects (the East Coast Rail Link connecting the South China Sea with shipping routes in Malaysia's western provinces, and two gas pipeline projects),¹⁴⁰ raising concerns over possible bankruptcy and the terms of repayment to China. The East Coast Rail Link (ECRL) would connect Malaysia's Port Klang on the Strait of Malacca with Kelantan on the Gulf of Thailand.¹⁴¹ After many negotiations over a year, China and Malaysia announced in July 2019 that they are restarting the ECRL railway project, after project costs were reduced by a third, to USD\$10.7 Billion.¹⁴² Malaysia Rail Link will operate the project in a 50:50 joint venture with China Communications Construction Company, subject to the regulatory supervision of Malaysia's Ministry of Transport.¹⁴³ Construction had started in August 2017, and the expected completion date is 2026. The renegotiation of the cost, however, did not affect the terms of the original November 2016 Engineering, Procurement, Construction, and Commissioning (EPCC) Agreement.¹⁴⁴ While the Land Public Transport agency of the Malaysian Government had conducted market consultations with respect to proposed business, technical models, and procurement strategies for this project,¹⁴⁵ the full extent and nature of community consultations conducted for the ECRL is not yet known,¹⁴⁶ even as Malaysia's regional

¹⁴⁰ Amanda Erickson, *Malaysia Cancels Two Big Chinese Projects, Fearing they will Bankrupt the Country*, WASH. POST (Aug. 21, 2018), https://www.washingtonpost.com/world/asia_pacific/malaysia-cancels-two-massive-chinese-projects-fearing-they-will-bankrupt-the-country/2018/08/21/2bd150e0-a515-11e8-b76b-d513a40042f6_story.html; Blake H. Berger, *Malaysia's Canceled Belt and Road Initiative Projects and the Implications for China*, THE DIPLOMAT (Aug. 27, 2018), <https://thediplomat.com/2018/08/malaysias-canceled-belt-and-road-initiative-projects-and-the-implications-for-china/>.

¹⁴¹ Ben Bland, *Malaysia Rethinks \$20B "Belt and Road" Project*, THE MARITIME EXEC. (Jan. 31, 2019), <https://www.maritime-executive.com/editorials/malaysia-rethinks-20b-belt-and-road-project-on-strait-of-malacca>.

¹⁴² *China, Malaysia Restart East Coast Rail Link Project After Year-Long Suspension*, CHANNEL NEWS ASIA (July 25, 2019), <https://www.channelnewsasia.com/news/asia/china-malaysia-restart-belt-road-east-coast-rail-link-11752570>.

¹⁴³ *East Coast Rail Link (ECRL) Project, Malaysia*, RAILWAY TECH., <https://www.railway-technology.com/projects/east-coast-rail-link-ecrl-project/> (last visited Jan. 15, 2020).

¹⁴⁴ *See Malaysia Rail Link: Improved ECRL Deal Driven by Transparency, Accountability*, THE STAR (May 9, 2019), <https://www.thestar.com.my/business/business-news/2019/05/09/malaysia-rail-link-improved-ecrl-deal-driven-by-transparency-accountability>.

¹⁴⁵ *East Coast Rail Line (ECRL) Project*, OFFICIAL PORTAL AGENSI PENGANGKUTAN AWAM DARAT, <http://www.apad.gov.my/en/land-public-transport/rail/east-coast-rail-line-ecrl-project> (last visited Jan. 15, 2020) (Malay.).

¹⁴⁶ *See Terengganu MB: Construction of ECRL Project Puts Local Residents First*, MALAY MAIL (Apr. 24, 2019), <https://www.malaymail.com/news/malaysia/2019/04/24/terengganu-mb-construction-of-ecrl-project-gives-priority-to-local-resident/1746315>.

development policies have changed significantly to confront spatial income inequalities.¹⁴⁷ The following graphic¹⁴⁸ demonstrates the scope of the project:



Malaysia Rail Link (MRL) announced that it would work on a new feasibility study and environmental impact assessment report for the ECRL.¹⁴⁹ Malaysia's Department of Environment declared that it had not yet received the Environmental Impact Assessment (EIA) and no final date had been set thus far for the submission of the report.¹⁵⁰ With the project construction and operation wholly devolved to the joint venture between Malaysia Rail Link and the state-owned China Communications Construction Company, it is well worth examining the existing EIA report dated March 2017.¹⁵¹ The EIA Report did not contain much information on the extent of community participation in the process of

¹⁴⁷ See Francis E. Hutchinson, *Evolving Paradigms in Malaysia's Regional Development Policy*, 34 J. SOUTHEAST ASIAN ECON. 462, 462 (2017).

¹⁴⁸ Tashny Sukumaran, *Future of Malaysia's China-Backed East Coast Rail Link Hinges on Elusive Report*, S. CHINA MORNING POST (Jan. 3, 2019), <https://www.scmp.com/news/asia/southeast-asia/article/2180576/future-massive-china-backed-malaysian-rail-link-hinges>.

¹⁴⁹ Surin Murugiah, *MRL To Work on New EIA For ECRL in 3Q19*, THE EDGE MARKETS (May 9, 2019), <https://www.theedgemarkets.com/article/mrl-work-new-eia-ecrl-3q19>.

¹⁵⁰ *DOE Says Yet to Receive EIA Report on New ECRL Alignment*, MALAY MAIL (Apr. 16, 2019), <https://www.malaymail.com/news/malaysia/2019/04/16/doe-says-yet-to-receive-eia-report-on-new-ecrl-alignment/1743829>.

¹⁵¹ See ERE CONSULTING GROUP, *EAST COAST RAIL LINK PROJECT: ENVIRONMENTAL ASSESSMENT REPORT: VOLUME 1: EXECUTIVE SUMMARY & RINGKASAN EKSEKUTIF* (2017).

environmental impact assessment. The 2017 EIA Report noted that “[l]and and property acquisition is the main impact during the pre-construction phase...people affected by the acquisition could potentially endure problems such as disruption to lives and loss of social cohesion.”¹⁵² Malaysia Rail Link committed to “provide early and adequate information to the affected parties to ensure that they are well-informed about acquisition process and ensure continuous engagement.”¹⁵³ The 2017 EIA Report also specified that potential environmental impacts during the construction phase would include “soil erosion and sedimentation from site clearing and earthworks, flooding due to restriction of waterways, waste and spoil generation from construction activities, geological risks, increased noise and air pollution levels, ecological impacts, disruption to traffic, social impacts, and issues related to public safety.”¹⁵⁴ While the 2017 EIA Report prescribed several mitigation measures for these impacts,¹⁵⁵ the Report said nothing about regularly engaging local communities as actual development partners in ongoing consultations for this multi-province undertaking by Malaysia Rail Link and the China Communications Construction Company. Instead, Malaysia Rail Link committed to “mainstreaming environmental protection into the Project and towards self-regulation to ensure that the quality of the environment is protected during the construction of and operation of ECRL. MRL will ensure organizational commitment to environmental regulatory compliance by all personnel at all levels of the organization, including its consultants, contractors, suppliers, and all other parties involved in the Project implementation. MRL is also committed to continuous communication and engagement with all stakeholders throughout the life of the Project.”¹⁵⁶ Nothing in the 2017 EIA Report indicated that local communities impacted by the East Coast Rail Link project could have direct recourse to ensure the accountability of MRL and all parties involved in the Project’s implementation, for any environmental, social, and human rights impacts.

b. Sri Lanka’s Hambantota Port and Colombo Port

The Hambantota Port Development Project in Sri Lanka forms part of the BRI projects as part of the Maritime Silk Road, with the project antedating the announcement of the BRI (this project was started in 2009).¹⁵⁷ In December 2017, due to non-repayment of BRI debts, the Sri Lankan government turned over the Hambantota port and 15,000 acres of land around it to China for a 99 year-lease, as well as giving China controlling equity over the port.¹⁵⁸ The Hambantota Port is managed by a joint venture company formed by the Sri Lanka Hambantota Port Authority and China Merchant Port Holdings Company, with Sri Lanka’s

¹⁵² *Id.* at ¶ 98.

¹⁵³ *Id.* at ¶ 101.

¹⁵⁴ *Id.* at ¶ 103.

¹⁵⁵ *Id.* at ¶¶ 104-65.

¹⁵⁶ *Id.* at ¶ 184.

¹⁵⁷ See Pabasara Kannangara, *Sri Lanka’s Port Development and the Role of the BRI*, ASIA DIALOGUE (May 24, 2019), <https://theasiadialogue.com/2019/05/24/sri-lankas-port-development-and-the-role-of-the-bri/>.

¹⁵⁸ Maria Abi-Habib, *How China Got Sri Lanka to Cough Up a Port*, N.Y. TIMES (June 25, 2018), <https://www.nytimes.com/2018/06/25/world/asia/china-sri-lanka-port.html>; JONATHAN E. HILLMAN, GAME OF LOANS: HOW CHINA BOUGHT HAMBANTOTA (2018).

Hambantota Port Authority only retaining 20% equity in the joint venture company.¹⁵⁹ Even as Sri Lankan local communities had raised many concerns about the environmental impacts, land losses, and lack of public consultation from the project (along with other China-funded projects),¹⁶⁰ the port had failed various feasibility studies and still opened in 2010 with China funding 85% of the estimated US\$361 Million project costs.¹⁶¹ Researchers had already reported that Sri Lanka's environmental impact assessment (EIA) framework had serious defects due to "lack of environmental, social protection policies and proper post monitoring plan...[as well as problems with the assessment process as to] lack of incorporate[ion] [of] cumulative effects and sustainability concepts in evaluation."¹⁶²

The Hambantota Port Development Project is part of China's seaport-related projects in the Indian Ocean that have been described as "win-win cooperation between China and the developing countries in the Indian Ocean and the Gulf – a China-styled mode of development-oriented governance strategy."¹⁶³ The following graphic¹⁶⁴ situates the Hambantota Port contrasting with the more maritime and shipping traffic-heavy Colombo Port:



¹⁵⁹ D. Godage *Efficient Operation of the Hambantota Port*, SUNDAY TIMES (Jan. 29, 2017), <http://www.sundaytimes.lk/170129/sunday-times-2/efficient-operation-of-the-hambantota-port-226421.html>.

¹⁶⁰ Amantha Perera, *Fears Grow Over Chinese Projects in Sri Lanka*, CHINA DIALOGUE (Dec. 5, 2018), <https://www.chinadialogue.net/article/show/single/en/10954-Fears-grow-over-Chinese-projects-in-Sri-Lanka>.

¹⁶¹ Samira Shackle, *The Cost of China's Belt and Road*, WASH. INT'L TRADE ASS'N (Oct. 16, 2018), <https://wita.org/atp-research/the-cost-of-chinas-belt-and-road/>.

¹⁶² I.M. Gamalath et al., *Environmental Impact Assessment of Transport Infrastructure Projects in Sri Lanka: Way Forward*, 4 J. TROPICAL FORESTRY & ENV'T 85 (2014).

¹⁶³ Degang Sun, *Between Geoeconomics and Geopolitics: China's Participation in the Seaport Constructions in the Indian Ocean and the Gulf*, in THE GULF STATES, ASIA & THE INDIAN OCEAN: ENSURING THE SECURITY OF THE SEA LANES 75 (Tim Niblock et al. eds., 2018).

¹⁶⁴ Kiran Stacey, *China Signs 99-Year Lease on Sri Lanka's Hambantota Port*, FIN. TIMES (Dec. 11, 2017), <https://www.ft.com/content/e150ef0c-de37-11e7-a8a4-0a1e63a52f9c>.

In examining the takeover of the Hambantota Port, several scholars have been quick to assign blame to Sri Lanka's government for mishandling the port project altogether.¹⁶⁵ Significantly, however, neither the Sri Lankan government as the BRI borrower or China as the BRI lender have made any pronouncements in regard to the centrality of local community engagement, transparency to all stakeholders, and engagement with communities as development partners in the Hambantota Port Development Project.¹⁶⁶

The Colombo Port City Development Project is another BRI project undertaken by a Chinese state-owned company, China Communications and Construction Company, creating massive infrastructure through land reclamation near Sri Lanka's capital of Colombo, for the amount of USD\$1.4 Billion.¹⁶⁷ The Colombo Port City Development Project is indicated as a "foreign direct investment (FDI) by CHEC Port City Colombo (Pvt) Ltd (the Project Company), a fully owned subsidiary of China Harbour Engineering Company (CHEC) whose parent company is China Communications and Construction Company (CCCC)...major components of Port City at a glance are: 1) total land area reclaimed 269 hectares..."¹⁶⁸ The December 2015 Environmental Impact Assessment (EIA) Report for this Project indicated consultations with the fishing communities to be impacted by the project,¹⁶⁹ but did not specifically indicate the nature and frequency of community engagement as actual development partners, instead couching the language on impacts to affected communities mainly from a mitigative standpoint. Similarly, the October 2017 EIA did not indicate the nature and contents of the community consultation process, nor the manner by which local communities would be engaged as actual development partners in monitoring the project. The focus of the October 2017 EIA was largely on providing proposed mitigation measures for anticipated impacts on air quality, noise and vibration, water quality, biodiversity, traffic management, water and sewerage management, solid waste management, archaeology and heritage, landscape, energy, and natural as well as man-made disaster management.¹⁷⁰ Even as fishing communities and environmental groups in Sri Lanka continue to object to the ongoing construction of the Colombo Port City metropolis on reclaimed land,¹⁷¹ it is not shown from the project documentation if these communities are even considered as actual

¹⁶⁵ See Ning Shengnan, *Rethinking the External Debt Issue of Sri Lanka: Causes and Implications*, 74 CHINA INT'L STUD. 138 (2019); Bhagya Senaratne, *Enhancing China's Overseas Investment Image through Public Diplomacy*, 72 CHINA INT'L STUD. 166, 173 (2018).

¹⁶⁶ See Patrick Mendis, *Destiny of the Pearl: How Sri Lanka's Colombo Consensus Trumped Beijing and Washington in the Indian Ocean*, 7 YALE J. INT'L AFF. 68, 71 (2012).

¹⁶⁷ Agence France-Presse, *Chinese Firm Completes US\$1.4 Billion Land Reclamation Works for Sri Lanka's Colombo Port City Project*, S. CHINA MORNING POST (JAN. 17, 2019), <https://www.scmp.com/news/asia/south-asia/article/2182461/chinese-firm-completes-14-billion-land-reclamation-works-sri>.

¹⁶⁸ MINISTRY OF MEGAPOLIS & W. DEV., ENVIRONMENTAL IMPACT ASSESSMENT: DEVELOPMENT ACTIVITIES AND INFRASTRUCTURE FACILITIES WITHIN THE RECLAIMED LAND AREA OF PROPOSED COLOMBO PORT CITY DEVELOPMENT PROJECT 2 (2017).

¹⁶⁹ See CTR. ENGINEERING CONSULTANCY BUREAU, PROPOSED COLOMBO PORT CITY DEVELOPMENT PROJECT, COLOMBO, SRI LANKA: SUPPLEMENTARY ENVIRONMENTAL IMPACT ASSESSMENT REPORT 6 (2015).

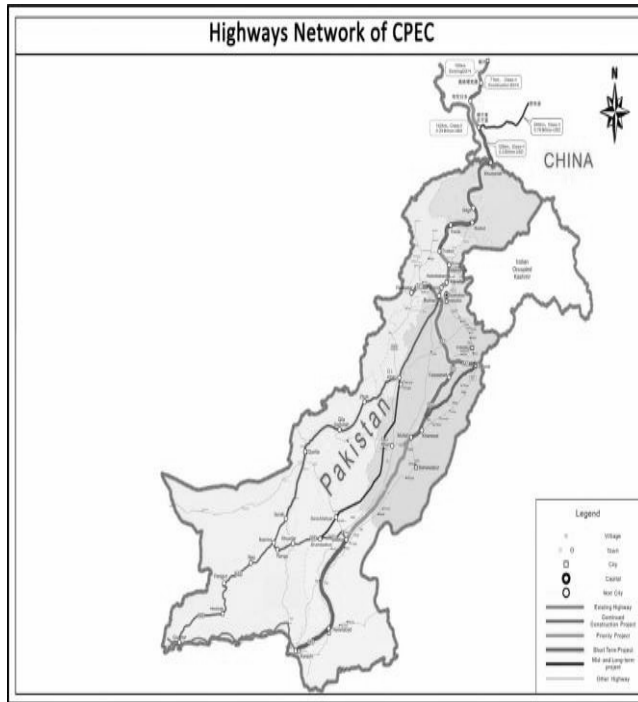
¹⁷⁰ See *Id.*

¹⁷¹ Marcello Rossi, *Next Hambantota? Welcome to the Chinese-funded US \$1.4 billion Port City Colombo in Sri Lanka*, S. CHINA MORNING POST (May 12, 2019), <https://www.scmp.com/week-asia/geopolitics/article/3009731/next-hambantota-welcome-chinese-funded-us14-billion-port-city>.

development partners, or merely seen as immediate recipients of economic mitigation measures and compensation for the project operators.

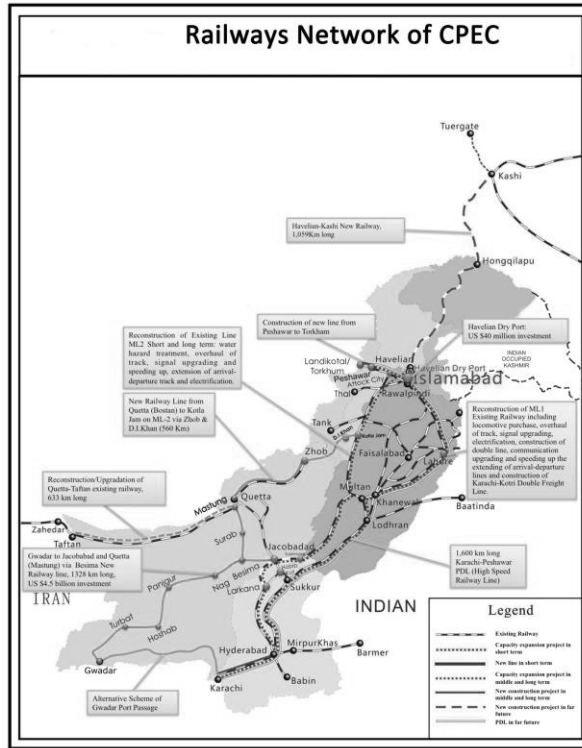
c. China-Pakistan Economic Corridor (CPEC)

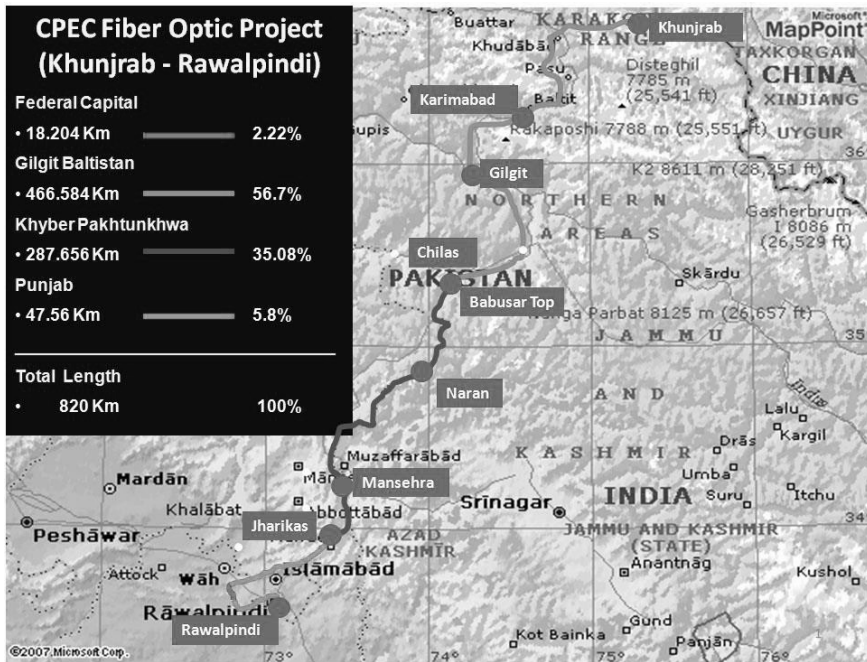
The China-Pakistan Economic Corridor (CPEC) comprises USD\$51 Billion financing for a vast array of regional infrastructure connectivity projects, spanning “integrated transport and [information technology] systems...energy cooperation, spatial layout, functional zones, industries and industrial parks, agricultural development, socio-economic development...tourism cooperation...[livelihood cooperation], financial cooperation, and human resource development.”¹⁷² CPEC combines networks for highways, rail, and fiber optics, as seen below:¹⁷³



¹⁷² China-Pakistan Economic Corridor [CPEC], *CPEC Vision & Mission*, <http://cpec.gov.pk/vision-mission/3> (last visited Jan. 15, 2020).

¹⁷³ Map available at (see <http://cpec.gov.pk>) [last accessed 1 May 2020].





Scholars and practitioners have raised questions on various legal questions with respect to the nature of CPEC,¹⁷⁴ the actual development impacts of CPEC on various regions in Pakistan,¹⁷⁵ labor conditions in CPEC projects,¹⁷⁶ social impacts,¹⁷⁷ environmental impacts,¹⁷⁸ as well as deepening regional cleavages.¹⁷⁹ Concerns have also been raised regarding CPEC's non-participatory nature, tending to exclude Pakistani businesses and other local economic stakeholders,¹⁸⁰ although some have argued beneficial effects on local

¹⁷⁴ See Asif H. Qureshi, *China/Pakistan Economic Corridor: A Critical National and International Law Policy Based Perspective*, 14 CHINESE J. INT'L L. 777 (2015).

¹⁷⁵ See Shirin Lakhani, *The China-Pakistan Economic Corridor: Regional Effects and Recommendations for Sustainable Development and Trade*, 45 DENV. J. INT'L L. & POL'Y 417 (2017).

¹⁷⁶ See Muhammad Azeem, *Theoretical Challenges to TWAII with the Rise of China: Labor Conditions Under Chinese Investment in Pakistan*, 20 OR. REV. INT'L L. 395 (2019).

¹⁷⁷ See Ruilian Zhang et. al., *Social Impact Assessment of Investment Activities in the China-Pakistan Economic Corridor*, 36 Impact Assessment & Project Appraisal 331 (2018).

¹⁷⁸ See Mahmood A, Khwaja et al., *Preliminary Environmental Impact Assessment (ELA) Study of China-Pakistan Economic Corridor (CPEC) Northern Route Road Construction Activities in Khyber Pakhtunkhwa (KPK), Pakistan*, SUSTAINABLE DEV. POL'Y INST. 1 (2018); Shah Meer Baloch, *CPEC's Environmental Toll*, DIPLOMAT (Apr. 18, 2018), <https://thediplomat.com/2018/04/cpecs-environmental-toll/>.

¹⁷⁹ See Maham Hameed, *The Politics of the China-Pakistan Economic Corridor*, 4 PALGRAVE COMM. 64 (2018); Abdur Rehman Shah, *How Does China-Pakistan Economic Corridor Show the Limitations of China's 'One Belt One Road' Model*, 5 ASIA & THE PAC. POL'Y STUD. 2 (2018).

¹⁸⁰ See Hammad Siddiqui & Max Scherzer, *Pakistani Businesses Consider CPEC Projects Non-Participatory*, CTR. FOR INT'L PRIV. ENTERPRISE (July 11, 2019), <https://www.cipe.org/blog/2019/07/11/pakistani-businesses-consider-cpec-projects-non-participatory/>.

Pakistanis' living standards.¹⁸¹ What is clear, at least, from publicly available data from the CPEC website is that there is no document therein indicating the nature and frequency of local community consultations conducted (or if they are even conducted prior to project implementation) for each CPEC project. Neither is there any indication that there is any direct recourse mechanism established for local communities to articulate their concerns in an accountability process involving any environmental, social, labor, and human rights-related impacts arising from any CPEC project.

d. Laos' Kunming-Vientiane Railway

The Kunming-Vientiane Railway project is a 414 kilometer railway line between China's Yunnan provincial capital of Kunming and the Laotian capital of Vientiane, estimated at a project cost of around USD\$7 Billion.¹⁸² This is an extremely significant project cost, since Laos remains "one of Southeast Asia's poorest countries...[with annual Gross Domestic Product of just USD\$16 Billion]...[O]f the [estimated] USD\$6 Billion cost for the China-Laos railway, the Chinese government will pay 70 percent. Laos will pay the remaining 30 percent with loans from Chinese financial institutions."¹⁸³ The Kunming-Vientiane Railway is intended to "connect south to lines in Thailand, Malaysia, and Singapore."¹⁸⁴

The Financial Times reported that this project was "carried out with little public consultation. . . . Laos's government has taken on \$480m of loans from China's Eximbank, on concessional terms. The amount is equivalent to about 2 per cent of Laos's gross domestic product. However, the IMF classifies Laos as a country with an 'elevated' risk of debt distress because of its high existing debt, which amounts to nearly 65 per cent of GDP. The project's backers have not made the business plan public, so little is known about its assumptions of how many passengers will use the train. . . . [T]he main problem is that the high-speed train is driven by a political economy agenda that serves the promoting nation much more than the recipient country. . . . Apart from the debt incurred by Laos, it will also be very difficult for the Lao private sector to gain benefit from this new infrastructure, as they are less competitive than the Chinese-related business ecosystem."¹⁸⁵

¹⁸¹ See Shamsa Kanwal et. al., *China-Pakistan Economic Corridor Projects Development in Pakistan: Local Citizens Benefits Perspective*, 19 J. PUB. AFF. J. 1 (2019); Murad Ali, *The China-Pakistan Economic Corridor: Tapping Potential to Achieve the 2030 Agenda in Pakistan*, 4 CHINA Q. INT'L STRATEGIC STUD. 301 (2018).

¹⁸² Xie Yu, *China's US\$7 Billion Railway Link to Laos is Almost Half Done, on Schedule to Begin Service in 2021*, S. CHINA MORNING POST (Mar. 21, 2019), <https://www.scmp.com/business/banking-finance/article/3002518/chinas-us7-billion-railway-link-laos-almost-half-done>.

¹⁸³ Ashley Westerman, *In Laos, a Chinese-Funded Railway Sparks Hope for Growth – And Fear of Debt*, NPR (Apr. 26, 2019, 5:00 PM), <https://www.npr.org/2019/04/26/707091267/in-laos-a-chinese-funded-railway-sparks-hope-for-growth-and-fears-of-debt>.

¹⁸⁴ Surya Chuen, *Gallery: The China-Built Railway Cutting Through Laos*, CHINA DIALOGUE (Aug. 2, 2019), <https://www.chinadialogue.net/article/show/single/en/11068-Gallery-The-China-built-railway-cutting-through-Laos>.

¹⁸⁵ John Reed and Kathrin Hille, *Laos's Belt and Road Project Sparks Questions Over China Ambitions*, FIN. TIMES (Oct. 29, 2019), <https://www.ft.com/content/a8d0bdae-e5bc-11e9-9743-db5a370481bc>.



A May 2019 policy paper of the Center for Global Development (CGDEV) reported on various deficiencies in the environmental and social safeguards associated with the railway project, its predominant reliance on Chinese workers to the exclusion of local Laotian labor sources, and the stresses on Laos' ability to service foreign debt.¹⁸⁶ As of this writing, the environmental impact assessment and social safeguards assessment for this project does not appear to be publicly available.

e. Kazakhstan's Khorgos Gateway

The Khorgos Gateway has been described as “the biggest dry port in the world...connect(ing) Kazakhstan to China by rail. Khorgos will soon enter the record books as home to the world's biggest dry port. Perhaps appropriately, Khorgos occupies one of the furthest points on Earth from any ocean.”¹⁸⁷

¹⁸⁶ SCOTT MORRIS, THE KUNMING-VIENTIANE RAILWAY: THE ECONOMIC, PROCUREMENT, LABOR, AND SAFEGUARDS DIMENSIONS OF A CHINESE BELT AND ROAD PROJECT I (2019).

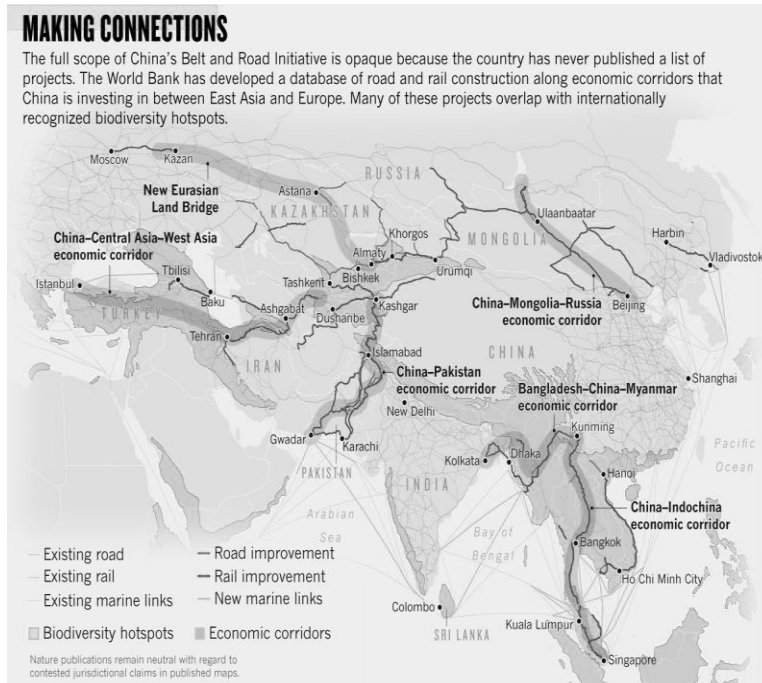
¹⁸⁷ *Khorgos: The Biggest Dry Port in The World: A Visual Explainer*, S. CHINA MORNING POST, <https://multimedia.scmp.com/news/china/article/One-Belt-One-Road/khorgos.html> (last visited Jan. 15, 2020).



The Khorgos Gateway combines a dry port and special economic zone that has been described as a “much less transformative project than its proponents believe...Khorgos is less of a global hub for trade than a regional rail terminal for Chinese goods to Russia and Central Asia.”¹⁸⁸ Beyond the reported economic underperformance of the Khorgos Gateway, scarcely anything has been reported about the environmental impacts of the project, a problematic information deficit, considering that Khorgos falls squarely within biodiversity hotspots identified by the World Bank.¹⁸⁹

¹⁸⁸ Henry Ruehl, *The Khorgos Hype on the Belt and Road*, THE DIPLOMAT (Sept. 27, 2019), <https://thediplomat.com/2019/09/the-khorgos-hype-on-the-belt-and-road/>.

¹⁸⁹ Ehsan Masood, *How China is Redrawing the Map of World Science*, NATURE (May 1, 2019), https://www.nature.com/immersive/d41586-019-01124-7/index.html?fbclid=IwAR173whGJs6FqZJ7THpzP-Wcp3RDdBMH1RrdA_VcqgmL7mEK_r33tJ_TsFQ.



The Carnegie Endowment for International Peace observed that the Khorgos Gateway provokes

deep societal concerns at grassroots level. In Kazakhstan, there is a clear veil of reticence towards the Chinese embrace. It is due to a mix of popular ignorance (no one knows exactly how many Chinese live in Kazakhstan) and disinformation. The availability of new information and direct experience of dealing with the Chinese at different levels and travel contribute to a better sense of goodwill and trust . . . but the picture is diverse, mixed and dynamic, and growing familiarity does not necessarily lead to greater amity and trust. Although there have been few public surveys on the issue, experts and officials during conversations report a palpable anxiety on the part of the locals [with] main fears in the Kazakh society: the first is that there will be an ‘invasion’ of Chinese migrants who will settle and take away local jobs. The second is that China will start questioning the border agreements and suddenly demand more land.”¹⁹⁰

¹⁹⁰ Philippe Le Corre, *Kazakhs Wary of Chinese Embrace as BRI Gathers Steam*, CARNEGIE ENDOWMENT FOR INT’L PEACE (Feb. 28, 2019), <https://carnegieendowment.org/2019/02/28/kazakhs-wary-of-chinese-embrace-as-bri-gathers-steam-pub-78545>.

The absence of transparency of information and open public consultations with all affected local communities as to the environmental, climate change, social, labor, and human rights impacts of Kazakhstan's Khorgos Gateway likewise does not assuage any of the local community anxieties¹⁹¹ over this project.

As the above five case studies demonstrate, BRI projects themselves represent the infusion of China's vast surplus capital on largely non-transparent and information-sparse commercial, operational, debt repayment, and project implementation terms to civilian populations in BRI debtor states. The development model fostered under the BRI relies heavily on state to state interactions, with China largely leaving it to the BRI debtor state to be accountable to its own civilian population. Disputes involving the BRI projects are confidentially negotiated at the highest level of the Chinese government and the BRI debtor state's government, and often beyond the purview of public transparency and third-party scrutiny by civil society organizations. The 'democratic' nature of the BRI is to be seen mainly from the official consent of the BRI debtor government to the terms set by China as the BRI's sovereign lender, on the assumption that BRI debtor governments functionally respond to and consult their own local constituencies and project stakeholders. This lens of 'democracy' in financing development projects is problematic, and does not meet international standards requiring transparency, full stakeholder participation, and the broadest range of due diligence for environmental, social, labor, and other human rights-related impacts from international development projects. The 2002 United Nations Monterrey Consensus on Financing for Development stressed the importance of transparent and accountable systems for mobilizing resources for development, as well as the *shared responsibility* of debtors and creditors for preventing and resolving unsustainable debt situations:

An effective, efficient, transparent, and accountable system for mobilizing public resources and managing their use by Governments is essential. . . . While Governments provide the framework for their operation, businesses, for their part, are expected to engage as reliable and consistent partners in the development process. We urge businesses to take into account not only the economic and financial but also the developmental, social, gender, and environmental implications of their undertakings. . . . Sustainable debt financing is an important element for mobilizing resources for public and private investment. . . . *Debtors and creditors must share responsibility for preventing and resolving unsustainable debt situations.*¹⁹²

The UNCTAD Consolidated Principles on Promoting Responsible Sovereign Lending and Borrowing are also particularly apropos with respect to China's role as the sovereign

¹⁹¹ See Reid Standish, *China's Path Forward is Getting Bumpy*, ATLANTIC (Oct. 1, 2019), <https://www.theatlantic.com/international/archive/2019/10/china-belt-road-initiative-problems-kazakhstan/597853/>.

¹⁹² Emphasis added. International Conference on Financing for Development, *Monterrey Consensus of the International Conference on Financing for Development*, U.N. Doc. A/CONF.198/11, annex I (Mar. 2002).

lender in the BRI, given its current largely “hands-off” approach to how BRI debtor governments incur debt and make fiscal decisions for BRI projects:

Responsibilities of Lenders

1. **Agency:** *Lenders should recognize that government officials involved in sovereign lending and borrowing transactions are responsible for protecting public interest (to the State and citizens for which they are acting as agents). Lenders to sovereign borrowers are dealing with agents (the government officials directly involved in the borrowing process) who owe responsibility to the State to its citizens for which they act. Any attempt by a lender to suborn a government official to breach that duty is wrongful (for example, instances of bribes or corruption).*

2. **Informed Decisions:** *Lenders have a responsibility to provide information to their sovereign customers to assist borrowers in making informed credit decisions. Applicable due diligence standards should be followed by lenders including reasonable steps to ensure that the sovereign understands the risks and benefits of the financial product being offered. The level of financial sophistication among sovereigns differs widely. Some are well informed about markets and financial techniques, others less so. The lender’s responsibility increases when dealing with an unsophisticated sovereign counterparty.*

3. **Due Authorization:** *Lenders have a responsibility to determine, to the best of their abilities, whether the financing has been appropriately authorized and whether the resulting credit agreements are valid and enforceable under relevant jurisdiction(s). A lender has an independent duty to ensure to the best of its ability, that the government officials are authorized under applicable law to enter into the transaction and that the arrangement is otherwise consistent with such law. Should the lender determine that these conditions do not exist, it should desist from concluding the agreement.*

4. **Responsible credit decisions:** *a lender is responsible to make a realistic assessment of the sovereign borrower’s capacity to service a loan based on the best available information and following agreed technical rules on due diligence and national accounts. Lending beyond a borrower’s reasonable capacity to repay not only risks a default on the loan in question, it adversely affects the position of all other creditors of that sovereign debtor. When assessing the borrower’s situation, lenders should consider the broad and real*

financial scenario, including direct and contingent liabilities according to the System of National Accounts adopted by the United Nations Statistical Commission. In a transaction in which a lender is motivated solely by commercial considerations, the lender should have a direct economic interest in assessing the borrower's repayment capacity. Credits extended to sovereign borrowers as a means of enhancing a bilateral lender's geopolitical influence, however, will involve other motivations... The desire to realize such benefits from a financing transaction should not replace a serious assessment of the borrower's repayment capacity. Lending decisions are critically dependent on the willingness of borrowers to provide timely and accurate information.

5. **Project financing:** *Lenders financing a project in the debtor country have a responsibility perform their own ex ante investigation into and, when applicable, post-disbursement monitoring of, the likely effects of the project, including its financial, operational, civil, social, cultural, and environmental implications. This responsibility should be proportional to the technical expertise of the lender and the amount of funds to be lent.* In the context of project financing, a lender carries some of the responsibility for the reasonably foreseeable effects of the project and the host government shares a corresponding responsibility. When applicable, this investigation will normally include post-disbursement monitoring of the use of the proceeds of the loan... This monitoring should be transparent and not affect any sovereign's faculty to decide on its developmental priorities.

6. **International cooperation:** *all lenders have a duty to comply with United Nations sanctions imposed against a governmental regime.* UN sanctions are imposed against a state in order to maintain or restore international peace and security. In instances of serious misconduct where sanctions are deemed to be necessary, lenders should not participate in financial transactions that evade or hamper such sanctions.

7. **Debt restructurings:** *in circumstances where a sovereign is manifestly unable to service its debts, all lenders have a duty to behave in good faith and with cooperative spirit to reach a consensual re-*

*arrangement of those obligations. Creditors should seek a speedy and orderly resolution to the problem.*¹⁹³

Recalling that Chinese President Xi Jinping committed in April 2019 to ensure adoption and implementation of all international rules and standards for BRI projects,¹⁹⁴ greater confidence can be expected from BRI project financing if China internalizes both the Monterrey Consensus and the UNCTAD Consolidated Principles as part of the binding applicable law to its BRI projects. By assuming legal responsibility as potentially the world's largest single sovereign lender for all BRI projects, China could more authentically advance a responsible democratic vision for the BRI premised on the meaningful choices, informed consent, and regular community engagement and consultation with the affected civilian populations and local communities impacted by BRI projects, instead of relying largely on the capacities and political wherewithal of BRI debtor governments. A truly “win-win cooperation” to realize the right to development, as defined in Article 1(1) of the 1986 United Nations Declaration on the Right to Development, would hearken back to the participation, contribution, and enjoyment of all persons and peoples in the economic, political, social, and cultural development that realizes *all* human rights and fundamental freedoms.

The Beijing Consensus could outpace the Washington Consensus in this regard, if China commits to internalizing as hard law for all BRI projects the above international standards and norms ensuring the responsibility of sovereign lenders, as well as international standards of full information transparency and operational accountability to *all* project stakeholders beyond that of a BRI debtor government—affected local communities, civil society organizations, and all other groups absorbing the environmental, social, and human rights impacts of BRI development projects in the short and long run. Transparency and operational accountability, after all, are part and parcel of what China has already committed to as a treaty party to the ICESCR; the Paris Agreement; as part of China's Third Universal Periodic Review commitments to the Human Rights Council; as part of China's own domestic rules and regulations; and most importantly, as the binding pronouncement of Chinese President Xi Jinping to subject the BRI to all applicable international standards to international development projects.

II. DEVELOPMENT AND HUMAN RIGHTS IN THE BRI: PARTICIPATION, TRANSPARENCY, MONITORING, IMPACTS

To reiterate, China is a party to the International Covenant on Economic, Social and Cultural Rights (ICESCR), signing this treaty on October 27, 1997 and ratifying the same on March 27, 2001.¹⁹⁵ This reinforces China's responsibilities to maintain oversight over BRI projects, and particularly to ensure that Chinese state-owned companies and other Chinese firms implementing BRI projects in the territories of BRI debtor states are acting in ways that are fully consistent with the ICESCR. Consistent with the obligations to respect, protect,

¹⁹³ Emphasis added. U.N. Conference on Trade and Development [UNCTAD], *Principles on Promoting Responsible Sovereign Lending and Borrowing*, §§ 1 – 7, U.N. Doc. UNCTAD/GDS/DDF/2012/Misc.1 (Jan. 10, 2012).

¹⁹⁴ See *Id.* at 4.

¹⁹⁵ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S 3.

fulfil, and remedy economic, social, and cultural rights guaranteed under the ICESCR, the Committee on Economic, Social, and Cultural Rights (CESCR) General Comment No. 24 (On State Obligations under the ICESCR in the Context of Business Activities) stresses that “States parties may be held directly responsible for the action or inaction of business entities: (a) if the entity concerned is in fact acting on that State party’s instructions or is under its control or [directly] carrying out the particular conduct at issue, as may be the case in the context of public contracts; (b) when a business entity is empowered under the State party’s legislation to exercise elements of governmental authority or if the circumstances call for such exercise of governmental functions in the absence or default of the official authorities; or (c) if and to the extent that the State party acknowledges and adopts the conduct as its own.”¹⁹⁶ China’s ICESCR obligations may, in these circumstances, apply even for extraterritorial¹⁹⁷ conduct of Chinese state-owned companies and other Chinese firms abroad, all the more so for BRI development projects which are arguably well within the scope of control and oversight by China’s government ministries as seen from the list of official documents for the BRI.

At the very least, well beyond China’s voluminous non-binding documentation on its vision for BRI projects, it should already be requiring human rights due diligence¹⁹⁸ to be conducted by all Chinese state-owned companies and private Chinese firms implementing and operating BRI projects. Human Rights Watch understandably called for transparency and public consultations to ensure that BRI projects fully respect human rights,¹⁹⁹ precisely in a climate where China’s promotion of the BRI does not include complete disclosure of all information enabling public analysis of the human rights impacts of BRI projects. While the China Development Bank and China Export-Import Bank released its January 2016 *Emerging Sustainability Frameworks* document,²⁰⁰ the standards indicated therein for environmental review made no reference to any international environmental treaty commitments of China and the BRI debtor state or actual domestic environmental law, with the document vaguely referring only to China’s possible inclusion of “environmental and social responsibilities...in [a] loan contract.”²⁰¹ In the conduct of environmental impact assessments (EIAs) for overseas projects, the same document refers to the host country’s environmental policies and standards for evaluation, and “[w]hen the host country does not

¹⁹⁶ Comm. on Econ., Soc. and Cultural Rights, UN. Doc. E/C.12/GC/24, at 4 (2017); *See also* Diane A. Desierto, *The ICESCR as a Legal Constraint on State Regulation of Business, Trade, and Investment: Notes from CESCR General Comment No. 24 (August 2017)*, EJIL: TALK! (Sept. 23, 2017), <https://www.ejiltalk.org/the-icescr-as-a-legal-constraint-on-state-regulation-of-business-trade-and-investment-notes-from-cescr-general-comment-no-24-august-2017/>.

¹⁹⁷ *See* Comm. on Econ., Soc. and Cultural Rights, UN. Doc. E/C.12/GC/24, at 8 – 10 (2017); *See also* Fons Coomans, *The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights*, 11 HUM. RTS. L. REV. 1 (2011).

¹⁹⁸ U.N. HUM. RTS.: OFFICE OF THE COMM’R, THE CORPORATE RESPONSIBILITY TO PROTECT HUMAN RIGHTS: AN INTERPRETIVE GUIDE 5 – 6 (2012).

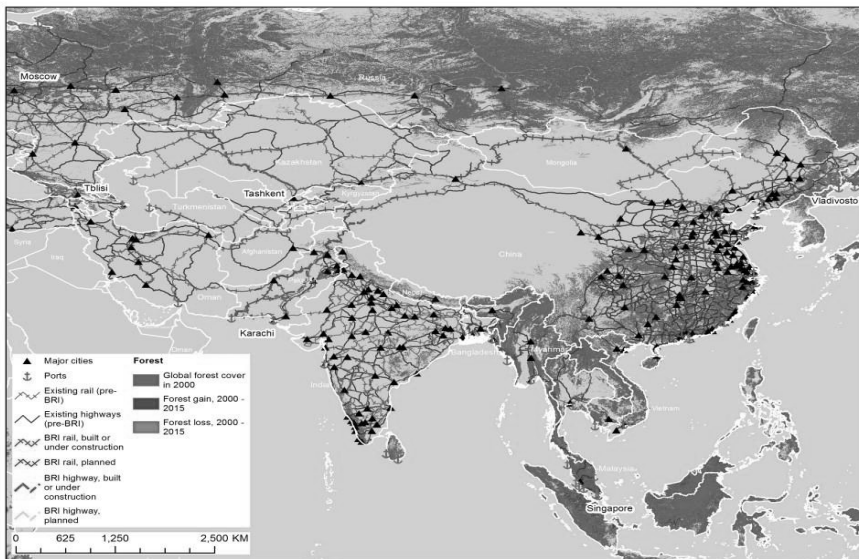
¹⁹⁹ *China: ‘Belt and Road’ Projects Should Respect Rights: Commit to Transparency, Public Consultation at Upcoming Forum*, HUM. RTS. WATCH (Apr. 21, 2019), <https://www.hrw.org/news/2019/04/21/china-belt-and-road-projects-should-respect-rights>.

²⁰⁰ *See* FRIENDS OF THE EARTH (U.S.), EMERGING SUSTAINABILITY FRAMEWORKS: CHINA DEVELOPMENT BANK AND CHINA EXPORT-IMPORT BANK (2016).

²⁰¹ *Id.* at 29.

have a complete environmental protection mechanism or lacks an environmental or social impact assessment policy and standards, *Chinese standards* or international standards should be referred to.”²⁰² The same document also baffles, in that it explicitly draws a caveat that if “a borrowing nation is unable to provide a bank or sovereign guarantee, it is possible that a *natural resource* can be used as a replacement for a sovereign guarantee.”²⁰³

Having a borrowing State actually offer up natural resources—which it merely holds in trust for its entire civilian population—as a sovereign guarantee for debts incurred to China, violates several ICESCR obligations: (1) the obligation under ICESCR Article 1(2) never to deprive any people of its own means of subsistence; (2) the obligation not to endanger a population’s rights to the enjoyment of the highest attainable standard of health under ICESCR Article 12; (3) the ICESCR right to take part in cultural life under ICESCR Article 15 (especially when the natural resource is central to a local community’s identity, culture, and way of life); as well as (4) the rights of the BRI debtor country’s population to an adequate standard of living and the continuous improvement of living conditions under ICESCR Article 11. There is increasing urgency for China to exercise regular institutional oversight over the role of its state-owned companies and other Chinese firms in BRI projects, given reports of various environmental, labor, and human rights impacts. A January 2019 article reported on the increased deforestation risks and associated risks to biodiversity, carbon storage, water provision, and other eco-services, resulting from the massive forest cover change for declared BRI projects, illustrating the estimated forest cover loss below:²⁰⁴



²⁰² *Id.* at 30 (emphasis added).

²⁰³ *Id.* at 31 (emphasis added).

²⁰⁴ Elizabeth Losos et al., *The Deforestation Risks of China’s Belt and Road Initiative*, BROOKINGS (Jan. 28, 2019), <https://www.brookings.edu/blog/future-development/2019/01/28/the-deforestation-risks-of-chinas-belt-and-road-initiative/>.

Some policy practitioners argue that the BRI's threat to human rights and good governance is inherent in the nature of the BRI's model of development financing:

To understand how the Belt and Road Initiative can threaten human rights and good governance, consider first how its projects are financed. Thus far, China has largely favored loans over grants. It is not a member of the Paris Club of major creditor nations, and it has shown little inclination to adhere to internationally recognized norms of debt sustainability, such as the sovereign lending principles issued by the United Nations Conference on Trade and Development. At the same time, many of the recipient countries participating in the project lack the capability to assess the long-term financial consequences of China's loans – or they may simply accept them, assuming the bills will come due on a future government's watch... Ballooning, unsustainable debt is the predictable result. Sri Lanka, where in 2017, some 95 percent of government revenue went to debt repayment, represents the best-known example of Belt and Road's negative impact on a country's balance sheet. But Sri Lanka is only the most prominent case; a recent study by the Center for Global Development identified eight countries — Djibouti, the Maldives, Laos, Montenegro, Mongolia, Tajikistan, Kyrgyzstan, and Pakistan — that are at particular risk of debt distress due to future Belt and Road-related financing.

Naturally, large government-backed loans to foreign countries come with political strings attached. The potentially destructive international economic consequences of failing to make repayments breeds long-term dependence on China and expands Beijing's influence. As a result, recipient countries will find their foreign-policy choices constrained — even if future governments seek to exit Beijing's orbit....

The Belt and Road Initiative provides a vector through which China can exert influence well beyond countries' foreign policy choices. The geographic expanse covered by the initiative includes many nations with high levels of corruption, and with domestic institutions that range from fragile democracies to full-blown autocracies. With Chinese companies being generally less transparent than their international peers, and with Beijing's zeal to curb bribery and corporate malfeasance limited to its domestic economy, a massive influx of Chinese funds into countries with weak governance is likely to exacerbate ongoing corruption problems. And given that some projects are clearly linked to geopolitical objectives — like gaining control over commercial assets with potential military uses — Beijing may well employ graft to ensure that foreign political elites look favourably on its offers.

China's planned development of a "new digital Silk Road has received comparatively less attention than other elements of the initiative but is equally troubling. China's digital blueprint seeks to promote information technology connectivity across the Indian Ocean rim and Eurasia through new fiber optic lines, undersea cables, cloud computing capacity and even artificial intelligence research centers. If realized, this ambitious vision will serve to export elements of Beijing's surveillance regime. Indeed, Chinese technology companies already have a track record of aiding repressive governments. In Ethiopia, likely prior to the advent of Belt and Road, the *Washington Post* reports that China's ZTE Corporation "sold technology and provided training to monitor mobile phones and Internet activity." Today, Chinese tech giant Huawei is partnering with the government of Kenya to construct "safe cities" that leverage thousands of surveillance cameras feeding data into a public security cloud "to keep an eye on what is going on generally" according to the company's promotional materials. Not all elements of China's domestic surveillance regime are exportable, but as the "New Digital Silk Road" takes shape, the public and online spaces of countries along it will become less free.

Beyond fueling corruption and enhancing surveillance, the initiative will stifle free speech, at a minimum by strengthening Beijing's ability to silence criticism. States financially beholden to China will become less willing to call out Beijing's domestic human rights abuses, for instance, and less eager to object to its foreign-policy practices. This dynamic is already playing out within the European Union. In mid-2017, for the first time, the EU failed to issue a joint condemnation of China at the U.N. Human Rights Council. Greece, which had recently received a massive influx of Chinese investment into its Port of Piraeus, scuttled the EU statement. Other cash-strapped democratic governments, when confronting the choice between Belt and Road's immediate – even if one-sided – economic benefits and the need to defend human rights globally, may well follow Greece's example. Similarly, companies dependent on the Chinese market are already acquiescing to Beijing's demands – such as by firing an American employee who "liked" a pro-Tibetan independence tweet – and by self-censoring, as in the efforts by some Hollywood producers to ensure that films contain no lines (supportive of Tibet, say, or critical of Xi Jinping) that might arouse anger within the Chinese Communist Party. As the initiative extends its reach, it is easy to imagine government officials feeling similarly compelled."²⁰⁵

²⁰⁵ Richard Fontaine & Daniel Kliman, *On China's New Silk Road, Democracy Pays a Toll: China's Vast Foreign Investment Program Comes at a Sharp Cost to Human Rights and Good Governance*, FOREIGN POL'Y (May 16, 2018), <https://foreignpolicy.com/2018/05/16/on-chinas-new-silk-road-democracy-pays-a-toll/>.

In contrast, however, United Nations Secretary-General Antonio Guterres declared that the BRI could also be an important platform of opportunity to realize the Sustainable Development Goals and commitments on climate change, remarking that the United Nations is “poised” to support a BRI that is fully aligned with the Sustainable Development Goals:

...China’s leadership on climate action is helping to show the way. New renewable energy jobs in China now outnumber those created in the oil and gas industries. In 2017, China invested over \$125 billion in renewable energy, an increase of at least 25 per cent over the previous year. And China’s new cutting-edge transmission line that sends electricity along a pathway 600 miles longer than anything built to date is a further potential boon for renewables. China also played a pivotal role in building bridges and securing an agreement at last December’s United Nations Climate Conference in Katowice — and will host next year’s second Global Sustainable Transport Conference...

In moving forward, I would point to three very important opportunities that can be seized. First, the world will benefit from a Belt and Road Initiative that accelerates efforts to achieve the Sustainable Development Goals. The five pillars of the Belt and Road — policy coordination, facilities connectivity, unimpeded trade, financial integration and people-to-people exchanges — are intrinsically linked to the 17 Sustainable Development Goals. These are conceptual pillars that can be translated into real-life progress for all people.

United Nations country teams stand ready to support Member States in capacity- and governance-building, and in achieving a harmonious and sustainable integration of the Belt and Road projects in their own economies and societies in accordance with national development plans, anchored in the 2030 Agenda for Sustainable Development.

Second, the world needs to take profit of the Belt and Road Initiative to help close significant financing gaps for achieving the Sustainable Development Goals, especially in the developing world, in particular, the need for about \$1 trillion needed for infrastructure investments in developing countries. This underlines the importance of economic growth that can generate inclusive, sustainable and durable social and environmental gains.

Third, I see the Belt and Road Initiative as an important space where green principles can be reflected in green action. Countries today not only require the physical roads and bridges to connect people and markets; they

need roads and bridges from the unsustainable, fossil-fueled grey economy to a clean, green, low-carbon energy future. Fully expanding our policy options for green and sustainable development backed by green financing instruments must become the new norm. In these three areas and more, the United Nations is poised to support the alignment of the Belt and Road Initiative with the Sustainable Development Goals, to share knowledge, and to make the most of the opportunities of this large-scale initiative for maximum sustainable development dividends. Let us work together to restore trust by making good on the shared promise of the 2030 Agenda and our common commitment to leave no one behind.”²⁰⁶

As of this writing, it is not yet known whether China has required the conduct of human rights impact assessments for all BRI development projects.²⁰⁷ It is also unknown if China has institutionalized human rights due diligence requirements with appropriate, meaningful, and regular consultation and cooperative mechanisms with indigenous peoples and local communities impacted by BRI development projects, taking into account China’s explicit commitments on climate change and commitments to align the BRI with the Sustainable Development Goals.²⁰⁸ Requiring these human rights impact assessments for BRI development projects is arguably well within the purview of China’s treaty obligations to protect all rights under the ICESCR. As the CESCR reminded in General Comment No. 24:

16. The obligation to protect entails *a positive duty to adopt a legal framework requiring business entities to exercise human rights due diligence in order to identify, prevent and mitigate the risks of violations of Covenant rights, to avoid such rights being abused, and to account for the negative impacts caused or contributed to by their decisions and operations and those of entities they control on the enjoyment of Covenant rights.* States should adopt measures such as imposing *due diligence requirements to prevent abuses of Covenant rights in a business entity’s supply chain and by subcontractors, suppliers, franchisees, or other business partners.*

17. States parties should ensure that, where appropriate, the impacts of business activities on indigenous peoples specifically (in particular, actual

²⁰⁶ Press Release, Office of the United Nations Secretary-General, United Nations Poised to Support Alignment of China’s Belt and Road Initiative with Sustainable Development Goals, Secretary-General Says at Opening Ceremony U.N. Press Release SG/SM/19556, (Apr. 26, 2019).

²⁰⁷ See WORLD BANK GROUP & NORDIC FUND, HUMAN RIGHTS IMPACT ASSESSMENTS: A REVIEW OF THE LITERATURE, DIFFERENCES WITH OTHER FORMS OF ASSESSMENTS, AND RELEVANCE FOR DEVELOPMENT (2013) (discussing Human Rights Impact Assessments).

²⁰⁸ See *Jointly Advancing the Belt and Road Initiative to Achieve the SDGs*, UNDP (Feb. 27, 2019), <http://www.cn.undp.org/content/china/en/home/presscenter/pressreleases/2019/jointly-advancing-the-belt-and-road-initiative-to-achieve-the-sd.html>. See also Yuanbo Li & Xufeng Zhu, *The 2030 Agenda for Sustainable Development and China’s Belt and Road Initiative in Latin America and the Caribbean*, 11 SUSTAINABILITY 1 (2019); Ling Jin, *Synergies Between the Belt and Road and the 2030 SDGs: From the Perspective of Development*, 6 ECON. & POL. STUD. 278 (2018).

or potential adverse impacts on indigenous peoples' rights to land, resources, territories, cultural heritage, traditional knowledge and culture) are incorporated into human rights impact assessments. *In exercising human rights due diligence, businesses should consult and cooperate in good faith with the indigenous peoples concerned through indigenous peoples' own representative institutions in order to obtain their free, prior and informed consent before the commencement of activities.* Such consultations should allow for identification of the potentially negative impact of the activities and of the measures to mitigate and compensate for such impact. They should also lead to design mechanisms for sharing the benefits derived from the activities, since companies are bound by their duty to respect indigenous rights to establish mechanisms that ensure that indigenous peoples share in the benefits generated by the activities developed on their traditional territories.

*States would violate their duty to protect Covenant rights, for instance, by failing to prevent or to counter conduct by businesses that leads to such rights being abused, or that has the foreseeable effect of leading to such rights being abused, for instance through lowering the criteria for approving new medicines, by failing to incorporate a requirement linked to reasonable accommodation of persons with disabilities in public contracts, by granting exploration and exploitation permits for natural resources without giving due consideration to the potential adverse impacts of such activities on the individual and on communities' enjoyment of Covenant rights, by exempting certain projects or certain geographical areas from the application of laws that protect Covenant rights, or by failing to regulate the real estate market and the financial actors operating on that market so as to ensure access to affordable and adequate housing for all. Such violations are facilitated where insufficient safeguards exist to address corruption of public officials or private-to-private corruption, or where, as a result of corruption of judges, human rights abuses are left unremedied.*²⁰⁹ (Italics added.)

Thus far, however, China has not released any official documentation showing how it would operationally and legally align all BRI development projects with the Agenda 2030 Sustainable Development Goals or the Paris Agreement on Climate Change. Following from the April 2019 pronouncement of Chinese President Xi Jinping that the BRI would adopt all international laws, rules, and standards for best practices in development-financed projects,²¹⁰ it would be consistent with this pronouncement (and wisely respond to many

²⁰⁹ Comm. On Economic, Social and Cultural Rights, UN. Doc. E/C.12/GC/24, at 5 – 6 (2017).

²¹⁰ See Ben Blanchard, *China says Silk Road not Geopolitical Tool, Understands Concerns*, REUTERS (Apr. 19, 2019), <https://www.reuters.com/article/us-china-silkroad-idUSKCN1RV09F>.

concerns raised about human rights impacts of BRI projects²¹¹) if China was to embed all of these binding legal commitments in international human rights law (especially the International Covenant on Economic, Social and Cultural Rights to which China is a party) as well as climate change treaty law directly into the operational and programmatic contracts for each and every BRI project.

China's ICESCR commitments—which should be implemented domestically by China²¹²—could also be implemented by treating economic, social, and cultural rights under the ICESCR as part of the fabric of domestic “laws, regulations, policies, and standards” that China insists must be complied with by any foreign investment, in order to qualify for protective coverage in China's around 145 international investment agreements thus far.²¹³ These “in accordance with law”²¹⁴ clauses are present in many Chinese international investment agreements,²¹⁵ and would help ensure that before any Chinese state-owned companies or other Chinese firms (financiers, operators, contractors, among others) could resort to investor-State arbitration mechanisms against BRI debtor countries (especially those enforcing their domestic regulatory prerogatives to protect the environment, ensure respect for human rights, and address any labor and social impacts), these Chinese companies and firms must show that their investment indeed qualifies for protection under an existing

²¹¹ See Oliver Ward, *Is China Meeting Its International Environmental and Human Rights Obligations on BRI?*, ASEAN TODAY (Apr. 23, 2019), <https://www.aseantoday.com/2019/04/is-china-meeting-its-international-environmental-and-human-rights-obligations-on-bri/>.

²¹² See Zou Keyuan, *International Law in the Chinese Domestic Context*, 44 VAL. L. REV. 935, 936 (2010).

²¹³ See *International Investment Agreements (China)*, INT'L INV. AGREEMENTS NAVIGATOR, <https://investmentpolicy.unctad.org/international-investment-agreements/countries/42/china> (last visited Jan. 15, 2020).

²¹⁴ See Rahim Moloo & Alex Khachaturian, *The Compliance with the Law Requirement in International Investment Law*, 34 FORDHAM INT'L L.J. 1473 (2011).

²¹⁵ See Agreement Between the Government of the People's Republic of China and the Government of the United Republic of Tanzania Concerning the Promotion and Reciprocal Protection of Investments, China – Tanz., art. I, Mar. 24, 2013, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5488/download>. See also Agreement Between the Government of the People's Republic of China and the Government of the Republic of Uzbekistan on the Promotion and Protection of Investments, China – Uzb., art. I, Nov. 8, 2011, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3357/download>; Bilateral Agreement for the Promotion and Protection of Investments Between the Government of the Republic of Colombia and the Government of the People's Republic of China, China – Colom., art. I, Nov. 22, 2008, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/720/download>; Agreement Between the Government of the United Mexican States and the Government of the People's Republic of China on the Promotion and Reciprocal Protection of Investments, China – Mex., art. I, July 11, 2008, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/759/download>; Agreement Between the Government of the People's Republic of China and the Government of the Republic of Korea on the Promotion and Protection of Investments, China – S. Kor., art. I, Sept. 7, 2007, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3338/download>; Agreement Between the People's Republic of China and the Government of the Republic of Uganda on the Reciprocal Promotion and Protection of Investments, China – Uganda, art. I, May 27, 2004, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/790/download>; Agreement Between the Government of the People's Republic of China and the Government of the Republic of Guyana on the Promotion and Protection of Investments, China – Guy., art. I, Mar. 27, 2003, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/739/download>; Agreement Between the Government of the Republic of Trinidad and Tobago and the Government of the People's Republic of China on the Reciprocal Promotion and Protection of Investments, China – Trin. and Tobago, art. I, July 22, 2002, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/787/download>.

Chinese international investment agreement with a BRI debtor country. China can show its readiness to ensure compliance with ICESCR commitments, in line with CESCR General Comment No. 24, by purposely recognizing that the host State's international environmental, labor, and all other human rights treaty commitments forms part of that corpus of host State law to which all foreign investments operated by Chinese firms should comply. The absence of clear legal and operational commitments of China under the BRI thus far on ensuring local communities' participation, access, and transparency with respect to BRI project information, as well as the design of an open monitoring system and system for redress within BRI development projects for the actual stakeholders well beyond the governments that sign the contracts for these projects—such as civil society organizations, local communities, indigenous peoples, among others—is particularly problematic for Chinese President Xi Jinping's articulated April 2019 commitment that all BRI development projects will follow international rules, norms, standards, and best practices, and especially so for China's binding international legal commitments under the ICESCR, the Paris Agreement on Climate Change, China's own domestic regulations governing foreign investment activities and foreign lending, and China's specific voluntary commitments made to the Human Rights Council during its Third Universal Periodic Review.

**CONCLUSION: DEVELOPMENT IS HUMAN RIGHTS AND HUMAN RIGHTS IS
DEVELOPMENT: PATHS FORWARD FOR THE BRI**

The BRI has the potential for progress, and likewise the potential for peril. On the one hand, China's commitment of massive surplus funds as investment or sovereign loans is an opportunity to access much needed capital for over 70 BRI debtor States around the world, in a manner that may or may not be as stringent with conditionalities associated with other types of foreign loans or foreign direct investment from international financial institutions or external capital markets. Thus far, there has not been any focused and detailed research streams comparing the risks of incurring foreign debt and investment from the "Beijing Consensus," as opposed to historically dominant paradigms under the "Washington Consensus." Both models of development financing have to be scrutinized continuously for their actual human rights impacts on a case by case, project by project basis—from the lens of the ultimate constituencies of foreign investment and debt: the affected civilian populations who not only have to assume the burden of repayment years down the line, but who also have to suffer any negative externalities from these development projects in the hope that these projects truly redound to these populations' rights to development. Admittedly, the right to development, as of this writing, remains pending in treaty form with the draft Convention on the Right to Development,²¹⁶ and is, at best, argued as a crystallizing or emerging customary norm. But it should be clear that this emerging right is not in the least simply about the narrower scope of "rights-based *approaches* to development,"²¹⁷ which focus largely on ensuring human rights compliance throughout the process of international

²¹⁶ See Human Rights Council, *Draft Convention on the Right to Development*, A/HRC/Wg.2/21/2 (Jan. 17, 2020).

²¹⁷ See Varun Gauri & Siri Gloppen, *Human Rights-Based Approaches to Development: Concepts, Evidence, and Policy* 485 (Policy Research, Working Paper No. 5938, 2012).

development aid programming decisions. The right to development is squarely applicable to a country's foreign lending and/or foreign investment policies, precisely because it imposes a clear responsibility to ensure that every person and all peoples participate, contribute, and enjoy economic, political, social and cultural development "in which all human rights and fundamental freedoms [are realized]"²¹⁸ or "that is consistent with or based on all human rights and fundamental freedoms."²¹⁹ Either way, the right to development speaks not only to the processes of participation, contribution, and enjoyment of development, but with the *substantive* qualification of human rights and fundamental freedoms as the ultimate premise of development. Soaring skyscrapers, railways, bridges, infrastructure projects, mining projects, energy projects, telecommunications are simply objects of infrastructure, and the employment and economic growth associated with these forms of economic activity cannot be singularly equated with the process and outcomes of human development as contemplated in the right to development.

But would embracing human rights as the premise of the right to development amount to another form of "human rights imperialism" characterized by many scholars²²⁰ critical about a sense of undue privileging of human rights protection throughout all aspects of national and international life? Are human rights scholars, lawyers, defenders, practitioners, researchers simply imposing human rights standards (Western, or otherwise) on around 70 BRI countries that have decided to accept China's vast credit and investment infusions, presumably out of a sense that the governments of the BRI countries know best how to realize the human rights of their own populations?

To ask the question, in my view, is to answer it. The real imperialism lies with instantiating the State—whether through the BRI borrowing nation or China as the sovereign lender or investor—as somehow the sole or primary bearer of human rights or the gatekeeping entity for the protection of individual or group human rights. Human rights were never vested in governments, but are inherent, indivisible, interdependent, and universal on the premise of the ultimate value of the *equal moral worth*²²¹—the actual human dignity—of the individual, his or her relationships and associations and communities, and the whole corpus of individuals, groups, and communities that forms any State's population. Assuming that queries about human rights in State decision-making is somehow 'imperialist' because only the government has the elected mandate of a population is a static conception of that mandate—at no point, in the delegation of power by the governed to the governors, did we as individuals, groups, local communities and populations of States surrender our continuing ability to hold governments to account for the decisions they make. Human rights remains, as it has always been, a residually supreme source of exacting accountability under the social contract. In the age of the Agenda 2030 for Sustainable Development, the Paris Agreement

²¹⁸ G.A. Res. 41/128, Declaration on the Right to Development, at art. 1 (Dec. 4, 1986).

²¹⁹ *Id.* at footnote 24, at article 4 therein.

²²⁰ See Fidèle Ingiyimbere, *Domestication Human Rights: A Reappraisal of their Cultural-Political Critiques and their Imperialistic Use* (April 2016) (unpublished doctoral dissertation, Boston College); BONNY IBHAWOH, *IMPERIALISM AND HUMAN RIGHTS: COLONIAL DISCOURSES OF RIGHTS AND LIBERTIES IN AFRICAN HISTORY* (SUNY Press ed., 2006); MICHAEL IGNATIEFF, *HUMAN RIGHTS AS POLITICS AND IDOLATRY* (Princeton University Press ed., 2001).

²²¹ Paolo G. Carozza, *Human Dignity and Judicial Interpretation of Human Rights: A Reply*, 19 EUR. J. INT'L L. 931, 934 (2008).

on Climate Change, the International Bill of Rights (both the International Covenant on Civil and Political Rights and the ICESCR) and the bulwark of international human rights treaties and legal commitments of all States under international law, it remains a serious phenomenon that neither the “Beijing Consensus,” the “Washington Consensus,” or any other international development lending and investment institutions have given firm answers on whether they do internalize the entirety of international human rights law in development lending and foreign investment financing practices.²²² To a certain extent, international financial institutions and groupings such as the World Bank and the OECD have transparently adopted identifiable standards,²²³ the Equator Principles on social and environmental risk assessment,²²⁴ and other operational directives on environmental and social rights, and created some accountability mechanisms that have been opened for direct access of civilian populations affected by development projects such as through the World Bank Inspection Panel and other compliance ombudsmen. The availability of information access, transparency, and some procedural or institutional recourse in these settings—no matter how much they are often critiqued—has at least enabled open contestations, conversations, and polemics on development with actual affected communities. The BRI development projects thus far do not appear to possess similar transparency and information accessibility, much more actual environmental, social and human rights internalization in the operational rules for project implementation and execution. The absence of this baseline of needed information for affected communities who will have to live with the consequences of the BRI projects concluded by their governments with China, itself hollows out any future meaningful or effective remedy or recourse they might have for their felt and lived experiences of any human rights, climate change, and environmental impacts from the BRI projects.

Taking into account Chinese President Xi Jinping’s April 2019 declaration to align the BRI with all international laws, rules, standards, and best practices for development-financed investment projects, China’s existing treaty commitments under the ICESCR, the Paris Agreement on Climate Change, China’s expressed support for Agenda 2030 for Sustainable Development, as well as China’s voluntary commitments to the Human Rights Council during China’s Third Universal Periodic Review, alongside the emerging or crystallizing right to development, there should be nothing extraordinary about now taking the path of verifying, monitoring, and ensuring international human rights compliance from the negotiation, planning, implementation up to the full operation of the BRI projects. There are many pathways for China to achieve and realize its stated commitments to international human rights and operationalize the same in the BRI in collaboration with the BRI debtor states, the United Nations, and all other affected constituencies of BRI projects. The

²²² See KIRK HERBERTSON ET AL., *A ROADMAP FOR INTEGRATING HUMAN RIGHTS IN THE WORLD BANK GROUP* (2010).

²²³ See ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT & THE WORLD BANK, *INTEGRATING HUMAN RIGHTS INTO DEVELOPMENT: DONOR APPROACHES, EXPERIENCES, AND CHALLENGES*, (2013).

²²⁴ EQUATOR PRINCIPLES, *THE EQUATOR PRINCIPLES JULY 2020* (2020).

following five pathways—each of which can be the object of separate streams of research in sovereign development financing—are sketched for future research:

a. Transparency of BRI negotiations with host constituencies.

The BRI suffers not just from perceived lack of legitimacy in contemporary opinion or commentaries, but from the vacuum on legal accountability to civilian populations in BRI debtor states, largely because the terms of these BRI development projects are negotiated and concluded in considerable secrecy at the intergovernmental or inter-State level. Rather than engaging in any attempt at global media propaganda or publicity campaigns, China could redress the clamor for transparency by practicing the recommendations of the UNCTAD Consolidated Principles on Responsible Sovereign Lending and Borrowing in all of its financing contracts for the BRI, ensuring that China's responsibilities as a sovereign borrower include acknowledging the public interest responsibilities of BRI debtor states' government officials; applying due diligence and transparent information to BRI debtor states' many constituencies (and not just finance ministries) to ensure that the terms of BRI financing are clearly understood by all affected communities; making realistic assessments of the BRI debtor state's ability to pay, based on comprehensive due diligence including meaningful consultations with affected communities from the prospective BRI development project; ensuring responsible ex-ante and post-disbursement investigation and monitoring of all the impacts of BRI development projects.

b. Joint partnership governance over BRI projects.

BRI development projects do not appear to be community-driven, and it is not clear the extent to which affected communities were consulted (if at all) in determining their needs for infrastructure, energy, telecommunications, mining, or all other types of BRI development projects. The long-term nature of BRI development projects makes it clear that China should be partnering not just with BRI debtor governments, but also directly with affected local communities for needs assessment, consultations on project development and implementation, and the monitoring and evaluation of BRI project impacts. It is not enough for China to leave it to a BRI debtor government to ensure that human rights, climate, change, environmental, labor, social and all other commitments are met in a BRI development project. China's ICESCR obligations are treaty commitments that, as elaborated in General Comment No. 24,²²⁵ makes it imperative for a sovereign lender or investor such as China to take an active hand in ensuring that all human rights of affected populations are respected, protected, facilitated or fulfilled, and that any human rights violations committed in a BRI development project could be remedied either under the BRI debtor state's domestic law and institutions or under international human rights law. Treating affected communities equally as local partners in BRI development projects—with full transparency, meaningful

²²⁵ Committee on Economic, Social and Cultural Rights, General Comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social, and Cultural Rights in the context of business activities, paras. 13, 16, 17, 18, 26-28, 32-33, 39, 43-44.

consultations, and the community's shared ownership of oversight for project impacts—would be more consistent with the expectations of participation, contribution, and enjoyment of such economic, cultural, political, and social development and realization of all human rights and fundamental freedoms under the right to development.

c. Open monitoring and accountability of BRI projects to all affected stakeholders

Thus far, there has not been any authoritative mechanism set up for the resolution of any business and human rights disputes under the BRI development projects. While there has been a steady rise in contract-based arbitrations between China and BRI debtor states,²²⁶ China has not announced any direct recourse mechanism for populations that experience human rights, climate change, environmental, labor, or social impacts from BRI development projects. China has announced that Chinese international commercial courts in Xi'an, Shenzhen, and Beijing would adjudicate BRI disputes,²²⁷ these new international commercial courts are wholly composed of judges from China²²⁸ and have been subject to some speculation as to their possible impartiality in cross-border disputes of China with BRI borrower states. Moreover, it is doubtful if the subject-matter jurisdiction of these courts would extend beyond contract claims, into tort claims premised on human rights, environmental, and/or labor violations. China could address this gap by creating a similar accountability mechanism such as the World Bank Inspection Panel (or other compliance procedures within the Independent Accountability Mechanisms Network), or it could create the opportunity for affected individuals or communities' direct recourse in the BRI contracts themselves through adoption of the Hague Rules for Business and Human Rights Arbitration.²²⁹

d. Publicly available country and community impact assessments

China's commitments to realize the Agenda 2030 for Sustainable Development—alongside all its stated commitments under the ICESCR, the Paris Agreement on Climate Change, as well as in its Third Universal Periodic Review at the Human Rights Council—

²²⁶ See Aisha Nadar, *Construction Arbitration in the Context of China's Belt and Road Projects*, GLOB. ARBITRATION REVIEW (Oct. 31, 2019), <https://globalarbitrationreview.com/chapter/1175762/construction-arbitration-in-the-context-of-china%E2%80%99s-belt-and-road-projects>; See also Josephine Ma, *Is this Just the Beginning of 'Belt and Road' Disputes Between China and its Partners?: As Beijing's Ambitious Initiative Turns Five the Time is Ripe for Business Disagreements to Arise*, S. CHINA MORNING POST (Oct. 8, 2018), <https://www.scmp.com/news/china/diplomacy/article/2164105/just-beginning-belt-and-road-disputes-between-china-and-its>.

²²⁷ Matthew S. Erie, *Update on the China International Commercial Court*, OPINIO JURIS (May 13, 2019), <http://opiniojuris.org/2019/05/13/update-on-the-china-international-commercial-court%E2%80%99s>.

²²⁸ Nicolas Groffman, *Meet the 8 Chinese Judges Who'll Sit on Belt and Road Cases*, S. CHINA MORNING POST (Sept. 25, 2018), <https://www.scmp.com/week-asia/economics/article/2165567/meet-8-chinese-judges-wholl-sit-belt-and-road-cases>.

²²⁹ CENTER FOR INTERNATIONAL LEGAL COOPERATION, THE HAGUE RULES ON BUSINESS AND HUMAN RIGHTS ARBITRATION, (2019).

would readily encompass transparency to independent third-party assessment of country and community impacts of BRI development projects. As seen in the five case studies featured in this paper, such reports of environmental and social impact assessments are variably and thinly available. China could centralize data and documentation on the BRI and make the same openly accessible to all BRI debtor States, but also the United Nations and human rights treaty bodies—which could assist in tracking performance of commitments under Agenda 2030, the Paris Agreement on Climate Change, the ICESCR, and international human rights obligations.

e. Embedded human rights auditing

In the long-term, China could foreseeably anticipate any regulatory changes that could occur from BRI debtor states' enforcement of environmental, labor, social, and all other human rights laws to BRI development projects—and especially in a manner that would not adversely affect project risks or anticipated investment returns—if China itself were to deliberately embed comprehensive pre- and post-human right auditing²³⁰ throughout the operation of a BRI development project. This would track not just individualized human rights impacts from project implementation, but from the time of project negotiation all the way to the debt repayment terms and conditions for BRI financing.

China's "Beijing Consensus" model of development financing and investment lending, as exemplified in the BRI, demonstrates a vast gulf thus far between China's articulated commitments (under the Agenda 2030 for Sustainable Development, climate change law, international human rights law, and the right to development, China's domestic regulations on overseas investment, and Chinese President Xi Jinping's April 2019 declaration aligning the BRI with all international norms, standards, rules, and best practices) and the paucity of information about the contractual, legal, technical, environmental, and human rights dimensions of BRI development projects. Whether the gulf is intentional, motivated by geopolitics, a strategy by design, or paradigmatic in the fluidity of the BRI, is not the concern of this paper. China has already declared its commitments to align the BRI with treaties and agreements on international human rights, climate change, sustainable development, alongside all international best practices. Deficits remain in the ability of populations to exercise meaningful democratic choices over development decisions in the BRI; obtain the fullest picture of the development consequences and externalities of BRI projects; and investigate the facts of human rights impacts or situations that are arising (or have arisen or may yet arise) from BRI projects. Likewise, borrower States in the BRI have the counterpart legal obligations towards their populations, to ensure that their assumption of sovereign debts under the terms China sets in the BRI do not in any way impede or imperil the enjoyment, respect, protection, or fulfillment of their civil, political, economic, and social and cultural rights of present and future generations.²³¹ China (whether in its role as creditor) and other States (as borrowers in BRI projects) each have crucial roles to cooperate, coordinate, and

²³⁰ Diane A. Desierto, *Shifting Sands in the International Economic System: "Arbitrage" in International Economic Law and International Human Rights*, 49 *Geo. J. Int'l L.* 1019, 1103–09 (2018).

²³¹ See Cephas Lumina, *Sovereign Debt and Human Rights*, pp. 170-185 in ILIAN BANTEKAS AND CEPHAS LUMINA (EDS.), *SOVEREIGN DEBT AND HUMAN RIGHTS* (Oxford University Press, 2018).

guarantee the realization of international human rights law protections for local communities impacted by BRI projects. If indeed it were to someday internalize such international human rights law protections, the BRI could powerfully realize the authentic right to development of communities around the world.

This paper has sought to identify key deficits, but also to articulate feasible pathways, for operationalizing international human rights law in the BRI, in order to clarify and assist in removing its many complexities for the democracy, development, and human rights of the populations of over 70 BRI states for generations to come. Silence in the face of such glaring complexities would have been the real face of 'imperialism.'



ALL ROADS LEAD TO ROME: A JURISPRUDENTIAL GENEALOGY OF
FEMINISM, SEXUAL AND GENDER-BASED VIOLENCE, AND INTERNATIONAL
CRIMINAL LAW

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“[S]ociety codified by men decrees that woman is inferior: she can only abolish this inferiority by destroying male superiority. . . . All oppression creates a state of war. This particular case is no exception. The existent considered as inessential cannot fail to attempt to reestablish his sovereignty.” —Simone de Beauvoir, *The Second Sex*²

“The concept of mankind’s historical progress cannot be sundered from the concept of its progression through a homogenous, empty time. A critique of the concept of such a progression must underlie any criticism of the concept of progress itself.” —Walter Benjamin, *On the Concept of History*³

Abstract

Sexual and gender-based violence is prevalent in armed conflicts throughout all corners of the world. The elevation—and recognition—of sexual and gender-based violence as violence *qua* violence is an arduous and continual struggle. Although international humanitarian and human rights law purports to proscribe sexual and gender-based violence, the language of the law often minimizes the gravity of this violence and fails to hold perpetrators accountable. This Article argues that to elevate sexual and gender-based violence crimes in the international humanitarian and criminal law hierarchy, there must be a radical reconceptualization of gender under international law. But, in order to envision the future of sexual and gender-based violence prosecutions, it is imperative to critically examine its past.

At its heart, this Article is a jurisprudential genealogy that traces the development of international feminist activism, culminating in the Women’s Caucus for Gender Justice’s language negotiations of the Rome Statute for the International Criminal Court. The Caucus sought to deinstitutionalize legal language from archaic heteropatriarchal norms that classify sexual and gender-based violence as chiefly a harm to honor in favor of language that emphasizes the gravity of the violence itself and actual individualized harm inflicted on victims. This Article further contends that the Caucus uniquely benefitted from the human rights wave of the 1990s and the fortuitous confluence of gender mainstreaming, international criminal tribunals, and the Rome Conference itself. A critical examination of the successes and defeats of the Caucus provides a window into the Rome Statute’s inadequate conceptual dealings with gender and illuminates a way forward to recognizing sexual and gender-based violence as violence *qua* violence.

² SIMONE DE BEAUVOIR, *THE SECOND SEX* 849 (Constance Borde & Sheila Malovany-Chevallier trans., 2009).

³ WALTER BENJAMIN, *On the Concept of History*, in WALTER BENJAMIN: *SELECTED WRITINGS*, VOLUME 4: 1938–1940 394–95 (Howard Eiland & Michael W. Jennings eds., Edmund Jephcott et al. trans., 2003).

INTRODUCTION

Throughout the history of armed conflict, sexual and gender-based violence has been treated as an inevitable consequence of war. Despite the prevalence of this violence, these acts have been relegated to the peripheral backwaters of international humanitarian law. The elevation—and recognition—of sexual and gender-based violence *qua* violence has been an arduous and continual struggle. Much of this can be attributed to the patriarchal domination of legal systems and the relative absence of women at the drafting table.⁴ When sexual and gender-based violence (SGBV) was addressed in international humanitarian law (IHL), it was associated with archaic conceptions of morality that dismiss the individualized violence of the act. With the advent of the *ad hoc* tribunals of the 1990s, SGBV crimes have begun to be incorporated into the law as standalone war crimes and crimes against humanity. Further, these advancements were only achieved as a result of feminist theorists and activists advocating for the elevation of SGBV crimes. The Women’s Caucus for Gender Justice (WCGJ) was formed in preparation for the Rome Conference in order to advocate for principles of gender justice and accountability for SGBV at the International Criminal Court. The progress made by the WCGJ was acutely influenced by a fortuitous confluence of events⁵ in international politics and is the product of the 1990s human rights wave.⁶

The end of the Cold War distinctly altered the relationship between civil society and states: non-governmental organizations (NGOs) operated as tight networks and coupled their activism with legal action. At the same time, the human rights movement adopted anti-impunity measures and sought to prosecute human rights violators. The breakdown of multi-ethnic states and the human rights violations that followed catalyzed widespread acceptance

⁴ DIANE MARIE AMANN, *Politics and Prosecutions, from Katherine Fite to Fatou Bensouda*, in PROCEEDINGS OF THE FIFTH INTERNATIONAL HUMANITARIAN DIALOGS 7 (Elizabeth Anderson & David M. Crane eds., 2012).

⁵ For lack of a better term, the three periods of time discussed in this project will be referred to as “events.” This choice of words is inspired by Michel Foucault’s conception of “events” in his essay *Nietzsche, Genealogy, History*:

An entire historical tradition (theological or rationalistic) aims at dissolving the singular event into an ideal continuity—as a teleological movement or a natural process. “Effective” history, however, deals with events in terms of their most unique characteristics, their most acute manifestations. *An event, consequentially, is not a decision, a treaty, a reign, or a battle, but the reversal of a relationship of forces, the usurpation of power, the appropriation of a vocabulary turned against those who had once used it, a feeble domination that poisons itself as it grows lax, the entry of the masked “other.”* The forces operating in history are not controlled by destiny or regulative mechanisms, but respond to haphazard conflicts. They do not manifest the successive forms of a primordial intention and their attraction is not that of a conclusion, for they always appear through the singular randomness of events. . . . The world we know is not this ultimately simple configuration where the events are reduced to accentuate their final traits, their final meaning, or their initial and final value. On the contrary, it is a profusion of entangled events.

MICHEL FOUCAULT, *Nietzsche, Genealogy, History*, in THE FOUCAULT READER 88–89 (Paul Rabinow, ed., Vintage Books 2010) (emphasis added).

⁶ Author’s term.

of human rights norms⁷ and the anti-impunity model as an attempt to address past wrongs. At the same time, the 1990s were marked by an explosion of international non-governmental organizations.⁸ Transnational advocacy networks, whose goal is to alter the behavior of international actors by “pressuring target[s] . . . to adopt new policies, and by monitoring compliance with international standards,” have become ubiquitous in activism.⁹ While advocacy networks may be traced back to slavery abolition campaigns, the establishment of the United Nations and the rapid growth of NGOs catapulted transnational advocacy networks into the international spotlight during the late twentieth century. The human rights wave is the result of paradigm shifts approaching the new millennium.¹⁰ The transnational women’s network grew from the human rights wave, embracing the normative shift towards anti-impunity with specific regard to SGBV.

As this was unfolding, the transnational women’s network became a powerful force at United Nations conferences and international criminal tribunals. The 1990s brought about a significant shift in human rights norms and canonized anti-impunity as a prevailing mechanism for the human rights movement. The WCGJ fortuitously arose from the confluence of these events and was capable of altering the language of the Rome Statute. Three distinct, yet interdependent, events provided the foundation for the WCGJ: gender mainstreaming at United Nations conferences, the rise of international criminal tribunals, and the Rome Conference itself. The deeply interconnected nature of these events, in conjunction with the normative shifts of the 1990s, made it possible for the transnational women’s network to flourish at this point in time.

There is a wide breadth of literature on the transnational women’s network at the United Nations, international criminal tribunals, and the Women’s Caucus for Gender Justice; however, there is little academic work yoking together these three interconnected “events.”¹¹ This project is at its core a jurisprudential genealogy: it seeks to tell the story of the first modern human rights network and its transformation by the consequences of the epochal ruptures of the 1990s, necessitating thick descriptions of events.¹² This Article will trace the

⁷ See Stefan-Ludwig Hoffmann, *Human Rights and History*, 232 PAST & PRESENT 279, 294 (2016) (stating that a response to the failure of the international community to prevent the “violent, catastrophic civil wars, [led to] the belated embrace of the idea of human rights interventionism. . .”).

⁸ See *The Non-Governmental Order: Will NGOs Democratize, or Merely Disrupt, Global Governance?*, ECONOMIST (Dec. 9, 1999), <https://www.economist.com/special/1999/12/9/the-non-governmental-order> (estimating that international nongovernmental organizations rose from 6,000 in 1990 to 26,000 in 1996).

⁹ MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* 3 (1998).

¹⁰ See Hoffmann, *supra* note 7, at 283 (“[T]he rise of human rights . . . can be understood in part as a result of the fracturing modern time regime.”).

¹¹ Literature that discusses one or two of these three events covered in this project exists. For example, Janet Halley extensively analyzed the *ad hoc* tribunals and the WCGJ at the ICC but did not include a review of the transnational women’s network at United Nations conferences. Janet Halley, *Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law*, 30 MICH. J. INT’L L. 1, 2 (2008). This project aims to weave the three together.

¹² The concept of a jurisprudential genealogy harkens back to Foucault and Nietzsche’s philosophical tradition of genealogy. This form of genealogy questions commonly understood social beliefs and looks toward the conditions of their possibilities, “requir[ing] patience and a knowledge of details, and . . . depends on a vast accumulation of source material.” FOUCAULT, *supra* note 5, at 76. Genealogy is not a description of “objective”

development of international criminal tribunals and their intersection with SGBV and analyze the work of the Women’s Caucus for Gender Justice to infuse feminist language into the Rome Statute to elevate the status of SGBV in the IHL hierarchy before the International Criminal Court.

This Article proceeds in four Parts. Part I will address the theoretical contours of the human rights wave and the conditions that caused its swell: humanitarian interventionism, individuals as subjects of international law, and the justice cascade. Part I will also flesh out what we mean when we talk about SGBV. Part II will examine the influence of the transnational women’s network on international politics, particularly through gender mainstreaming at mid-twentieth century United Nations conferences. Part III will delve into a thick description of the development of international criminal law that endeavors to hold individual actors accountable for human rights abuses, and the evolution of jurisprudence addressing SGBV at the *ad hoc* tribunals. Finally, Part IV will trace the development of the Women’s Caucus for Gender Justice and their successes and downfalls during negotiations over gender and violence, illuminating ideological schisms within the group. Additionally, this Article will argue that the International Criminal Court has largely been ineffective in meaningfully addressing SGBV in prosecutions. This Article will conclude that the conditions for the WCGJ’s successes at Rome were the result of a long genealogy of feminist activism coupled with the fortuitous timing of the human rights wave—monumental paradigm shifts in human rights theory and practice. Without the human rights wave, it is unclear if the Women’s Caucus for Gender Justice would have experienced the same level of acceptance into mainstream international governance discourse.

linear events and “opposes itself to the search for ‘origins’”; rather, it is an exploration of the plural and contradictory past and the deconstruction of truth. *Id.* at 77. These genealogies are a study of the confluence of vicissitudes and accidents at critical times, birthing new epochs and institutions. Nietzsche rejected the pursuit of origin (*Ursprung*) “because this search assumes the existence of immobile forms that precede the external world of accident and succession.” *Id.* at 78. Rather than relying on fictive objectivity created in modernity from the purportedly suprahistorical perspective of historians, genealogy searches for processes of descent (*Herkunf*) and emergence (*Entstehung*), and understands events and contemporary practices through the result of power struggles over domination and meaning: “Genealogy . . . seeks to reestablish the various systems of subjugation: not the anticipatory power of meaning but the hazardous play of dominations.” *Id.* at 83. Emergence, such as the formation of the Women’s Caucus for Gender Justice or of prisons, should not be thought of “as the final term of a historical development,” but rather “merely the current episodes in a series of subjugations” produced by a convergence of forces, “from substitutions, displacements, disguised conquests, and systematic reversals.” *Id.* at 83, 86. “Humanity does not gradually progress from combat to combat until it arrives at universal reciprocity, where the rule of law finally replaces warfare; humanity instills each of its violences in a system of rules and thus proceeds from domination to domination.” *Id.* at 85. This Article is an analysis of the aleatory development of prohibitions against sexual and gender-based violence is thus in part a study of the development of humanity through its history of morals and ideals pertaining to gendered violence. Consequentially, this Article is a search for the “fertile ground,” the place in which the episteme—the historical conditions of a possibility of a certain discourse—changes. In this case, radical shifts in theoretical approaches to sexual and gender-based violence altered institutional discourse on the subject at the Rome Conference. Walter Benjamin’s notion of crystallization aids in understanding places of epistemic shift. See BENJAMIN, *supra* note 3, at 396 (“Material historiography . . . is based on a constructive principle. Thinking involves not only the movement of thoughts, but their arrest as well. Where thinking suddenly comes to a stop in a constellation saturated with tensions, it gives that constellation a shock, by which thinking is crystallized as a monad.”).

I. THEORIZING GENDER, VIOLENCE, AND RIGHTS IN THE *FIN DE SIÈCLE*

a. Defining Sexual and Gender-Based Violence

Phrases such as sexual and gender-based violence, violence against women, and gender violence all carry very different meanings.¹³ By solely referring to certain prohibited acts as “sexual crimes,” “non-sexual attacks on women or men based on their gender-defined roles”¹⁴ are erased. Standard definitions of “sexual violence”¹⁵ have been more readily accepted under international law than “gender-based violence”¹⁶ due to the divisive nature of conceiving gender as anything but “biological sex.” There is no international agreed upon definition of “gender-based violence,”¹⁷ and many definitions may fall victim to biologically essentialist language that excludes cisgender men and gender non-conforming individuals from its purview. “Gender-based violence” must be imagined in an inclusive manner that does not rely on dated conceptions of gender and addresses its socially constructed nature.¹⁸ A similar problem arises with “violence against women”: while its focus on “women” incorporates gender in some form, it is also heteronormative. As for “gender violence,” the term has experienced mild growth from the 1990s to today, consistent with the WCGJ’s attempts to include gender violence in the Rome Statute. “Sexual and gender-based violence” is less popular, but more inclusive, than “sexual violence,” “violence against women,” or “gender violence.” Data shows this: an n-gram graph¹⁹ illustrates the growth of violence

¹³ It is also critical to note that SGBV “including when conflict-related, often has no relation to sexual desire, but is instead linked to power, dominance and abuse of authority.” Gloria Gaggioli, *Sexual Violence in Armed Conflicts: A Violation of International Humanitarian Law and Human Rights Law*, 96 INT’L REV. RED CROSS 503, 504 (2014).

¹⁴ Halley, *supra* note 11, at 83–4 (examples of gender violence include the “impress[ion of women] into maternity. . . a form of gender enslavement. The same is true when women are impressed into providing domestic services whether on a large scale or individualized basis (forced temporary marriage) basis.”).

¹⁵ See Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 688 (Trial Chamber, Sept. 2, 1998); Prosecutor v. Alfred Musema, Case No. ICTR-96-13-A, Judgment, ¶ 220 (Jan. 27, 2000) (“[A]ny act of a sexual nature which is committed on a person under circumstances which are coercive.”); Rome Statute of the International Criminal Court, arts. 7(1), 8(2), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (“Committing rape, sexual slavery, enforced prostitution, enforced pregnancy, as defined in article 7, paragraph 2(f), enforced sterilization, or any other form of violence also constituting a grave breach of the Geneva Conventions.”).

¹⁶ Generally, gender-based violence can be defined as violence inflicted upon a person based on their perceived biological sex or gender identity. Gender-based violence encompasses a broader category of crimes than sexual violence, including domestic violence, rape, sexual exploitation and abuse, forced prostitution, trafficking, forced or early marriage, female genital mutilation, honor killings, and compulsory sterilization or abortion. Gaggioli, *supra* note 13, at 510. For example, the International Committee of the Red Cross defines gender-based violence as an “overall term, including sexual violence and other types of gender-specific [violence that are] not necessarily sexually-based.” *Id.*

¹⁷ *Id.* at 509–10.

¹⁸ “If gender is the cultural meanings that the sexed body assumes, then a gender cannot be said to follow from a sex in any one way. Taken to its logical limit, the sex/gender distinction suggests a radical discontinuity between sexed bodies and culturally constructed genders. Assuming for the moment that the stability of binary sex, it does not follow that the construction of ‘men’ will accrue exclusively to the bodies of males or that ‘women’ will interpret only female bodies. . . . The presumption of a binary gender system implicitly retains the belief in a mimetic relationship of gender to sex whereby gender mirrors sex or is otherwise restricted by it.” JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 6 (2d ed. 1999).

¹⁹ See Appendix, Figure 1.

against women (VAW) and sexual violence in the late 1970s with peaks for VAW in 1995 and 2005, the years of the Beijing and Beijing 10+ conferences. However, the term “sexual and gender-based violence” is beginning to be accepted into the mainstream and represents a more intersectional²⁰ approach to these crimes.

b. The Fall of the Soviet Union and the Rise of the Human Rights Wave

The embrace of individual human rights was uniquely characteristic of the new *fin de siècle*. The human rights wave of the 1990s was vital to the ultimate successes of the Women’s Caucus for Gender Justice at Rome and for the transnational women’s network as a whole. The human rights wave can be identified by the rapid growth of international organizations, the newfound enthusiasm for international criminal law, and the amelioration of past wrongs. Academic work pinning the inception of modern human rights in other time periods, such as the 1970s, often fails to account for the aforementioned attributes of the 1990s.²¹ Locating the swell of the human rights wave in the 1990s is critical to this project’s thesis: without the distinct momentum made in this era, the impact of WCGJ would likely be lessened.

The human rights wave as a post-Cold War phenomenon is aptly identified by Stefan-Ludwig Hoffmann. Hoffmann’s thesis pushes against Moyn’s ascription of human rights as a product of the 1970s and argues that it occurred later, in the 1990s.²² While the human rights lexicon was present in the 1970s and 1980s,²³ it coexisted in conjunction with other “moral and political idioms like ‘solidarity’ and included competing notions of rights, which

²⁰ “Yet intersectionality might be more broadly useful as a way of mediating the tension between assertions of multiple identity and the ongoing necessity of group politics.” Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1296 (1991).

²¹ For example, Samuel Moyn’s *The Last Utopia* argues that the rise of human rights occurred in the 1970s when human rights entered into popular use after the failed uprisings in the Eastern Bloc, such as the 1968 Prague Spring and the 1956 Hungarian Revolution. Prior to the 1970s, “human rights” was too intertwined with notions of citizenship rights of the Enlightenment, and that “[c]ontrary to conventional consumptions, there was no widespread Holocaust consciousness in the postwar era, so human rights could not have been a response to it.” SAMUEL MOYN, *THE LAST UTOPIA* 7 (2010). Moyn bases this classification on the Helsinki Accords, President Carter’s inauguration, and Amnesty International’s Nobel Peace Prize, as well as:

[T]he search for a European identity outside Cold War terms; the reception of Soviet and later East European dissidents by politicians, journalists, and intellectuals; and the American liberal shift in foreign policy in new, moralized terms, after the Vietnamese disaster. Equally significant, but more neglected, were the end of formal colonialism and the crisis of the postcolonial state[.]

Id. at 8. Without the canonization of human rights through President Carter and the détente project of the Helsinki Accords, Moyn argued that human rights would have likely remained in the peripheral backwaters of policy. *See id.* at 149 (“[W]ithout Carter, the phrase itself might never have exploded so spectacularly: even after she placed her op-ed pieces that helped Amnesty International publicize suffering prisoners in 1974, Laber recalled, ‘I did not use the words “human rights” to describe our cause; it was not part of my everyday vocabulary and would have meant little to most people at that time.’”). *Id.*

²² Hoffmann, *supra* note 7, at 282 (arguing that individual human rights as a basic concept developed after the end of the Cold War).

²³ *See id.*, at 287 (“Human rights language itself was still fairly capacious and in flux during the 1970s . . .”).

were in many ways still indebted to the legacies of socialism and anti-colonialism. . . .”²⁴ Individual human rights became a “contested, irreplaceable, and consequential concept in global politics”²⁵ in the 1990s. Between the end of the Second World War and end of the Cold War, humanitarian interventions were not rationalized with human rights language and were instead justified by *realpolitik*.²⁶ The emerging global human rights movement was not “the cause but the consequence of the epochal ruptures of the late twentieth century,”²⁷ including the disintegration of the Soviet Union and Milošević’s Yugoslavia. As the old international order collapsed and a new one emerged, human rights gained legitimacy as a response.²⁸

The 1990s theoretical justification of human rights was distinct from previous eras. While earlier thinkers, such as Kant,²⁹ traced cosmopolitanism to sovereign states and their interests, modern theorists eschewed the nation-state as “the greatest impediment to a global cosmopolitan democracy.”³⁰ The rapid development of international criminal law seeking to hold individuals—not states—accountable for human rights violations is exemplary of this pervasive normative shift in thought. This shift is also evident in the justifications given for military intervention. For example, the Gulf War of 1990–91 was often justified as a defense of international law *vis-à-vis* Iraq’s violation of Kuwait’s sovereignty, while Saddam Hussein’s genocidal abuses against the Kurds was not sufficiently addressed.³¹ However, the Kosovo War of 1998–99 was explicitly justified as a humanitarian intervention.³² Following the intervention of NATO in Kosovo, Jürgen Habermas penned an article on the transformation of international law into a cosmopolitan law of global citizens and “identified the dilemma of human rights politics as having to act as if a fully institutionalized global civic society already existed, even though their very promotion was the objective of the

²⁴ *Id.* at 282.

²⁵ *Id.*

²⁶ Hoffmann argues that this *realpolitik* reasoning includes President Carter and Secretary Kissinger’s adoption of human rights language at Helsinki and in United States foreign policy broadly. *See id.* at 285 (“Between the end of the Second World War and the early 1990s there was not a single humanitarian, political or military intervention that was justified through human rights.”).

²⁷ *Id.* at 282.

²⁸ *Id.* at 290.

²⁹ *Id.* at 285 (“[H]uman rights were closely tied to the idea of sovereignty or, to put this more generally, to the political participation in a democratically constituted polity.”). For example, Kant argued in *Toward Perpetual Peace* for the creation of a league of states whereby states organize for the realization of world peace. *See generally* IMMANUEL KANT, KANT’S PERPETUAL PEACE: A PHILOSOPHICAL PROPOSAL (Helen O’Brien trans., 1927) (positing six preliminary articles that attempt to reduce the likelihood of war).

³⁰ Hoffmann, *supra* note 7, at 290.

³¹ Of course, this was not the only justification for the involvement of the United States. Other economic interests, like oil, were also clearly at play. *See, e.g.,* Hoffmann, *supra* note 7, at 291–92 (“The United States led a multilateral coalition against Iraq, sanctioned by the United Nations after the sovereignty of one of its member states had been violated. This was the immediate justification given for the intervention, as well as clearly identified economic interests (in particular, control over the stability of oil procurement. . . .”); Paul W. Kahn, *Lessons for International Law from the Gulf War*, 45 STAN. L. REV. 425, 425 (1993) (“[The Gulf War] marked one of the few occasions on which there was a deliberate invocation of international law to justify military force.”).

³² *See* Hoffmann, *supra* note 7, at 292 (“[Kosovo] was the first war waged in the name of human rights in order to prevent genocide.”).

military action.”³³ For supporters like Habermas, this military intervention was as much moral as it was legal. Václav Havel invoked a similar argument:

*This war places human rights above the rights of the state. The Federal Republic of Yugoslavia was attacked by the alliance without a direct mandate from the UN. This did not happen irresponsibly, as an act of aggression or out of disrespect for international law. It happened, on the contrary, out of respect for the law, for a law that ranks higher than the law which protects the sovereignty of states. The alliance has acted out of respect for human rights, as both conscience and international legal documents dictate.*³⁴

Thus, the human rights spoken of in the 1990s are distinct through the valuation of individuals’ moral rights over state sovereignty.

A cocktail of factors were responsible for the swell of the human rights wave in the early 1990s: movements for Holocaust remembrance, the violent civil wars in Rwanda and Yugoslavia, the CNN effect, and the Habermasian favoring of individual human rights over state sovereignty.³⁵ In both Rwanda and Srebrenica, the failure of United Nations peacekeeper intervention was an “expression of the United Nations’ political failure and thereby the end of hopes placed in the organization to become more of a world government.”³⁶ This failure to prevent and end wars led to the “belated embrace of the idea of human rights interventionism by the generation of baby boomers and student protesters.”³⁷ The connection of Srebrenica to Holocaust remembrance—genocide to human rights—was historically new.³⁸

As humanitarian intervention entered a new era, so did international human rights law. The atrocities of Rwanda and Yugoslavia also sparked “the emergence of a new international criminal law and its institutions, and possibly the most significant legal accomplishment in human rights of the two decades since Bosnia.”³⁹ Alongside the *ad hoc* tribunals, the Vienna Declaration adopted by the World Conference on Human Rights in 1993 “constituted the resurgence of the debate about the universality of human rights.”⁴⁰ In contrast to the human rights conventions drafted between the 1960s and 1980s, which focused on decolonization, conventions throughout the 1990s distinctly centered on the criminal prosecution of “past wrongs”⁴¹ and anti-impunity measures. This fundamental shift swept up the formation of the

³³ *Id.* at 297.

³⁴ *Id.* at 297–98 (emphasis added); see also Václav Havel, *Kosovo and the End of the Nation-State* (Apr. 29, 1999) in N.Y. REV. BOOKS, (June 10, 1999) (categorizing the Kosovo bombings as an instance in which the human rights of Kosovo Albanians were valued above “national interests”).

³⁵ See Hoffmann, *supra* note 7, at 292–93, 297 (surveying developments in the 1990s that led to the normative acceptance of human rights).

³⁶ *Id.* at 294.

³⁷ *Id.*

³⁸ *Id.* at 295.

³⁹ *Id.* at 298.

⁴⁰ *Id.* at 299.

⁴¹ *Id.*

International Criminal Court in the human rights wave and propelled the Court and anti-impunity to the forefront of human rights discourse.

Kathryn Sikkink identifies the move to prosecute perpetrators of human rights abuses as a development of the early 1990s, aligned with Hoffmann's thesis. Sikkink's "justice cascade" characterizes the "shift in the *legitimacy of the norm* of individual criminal accountability for human rights violations and an increase in criminal prosecutions on behalf of that norm."⁴² Sikkink uses "cascade" to capture "how the idea started as a small stream, but later caught on suddenly, sweeping along many actors in its wake."⁴³ Despite the increased number of human rights treaties, "it began to appear that human rights violations were getting worse, not better."⁴⁴ This was in part due to the failure to prevent human rights abuses and impunity provided to human rights violators, especially high-ranking government officials.⁴⁵ Anti-impunity prosecutions developed to strengthen human rights law: "Human rights prosecutions give teeth to the law because they can put formerly powerful people behind bars. If human rights law didn't work because it lacked strength, this new form of enforcement should help improve compliance."⁴⁶ Sikkink found that before the mid-1980s, prosecutions were stagnant, but "[b]y the early 1990s, the number of such events began a steep increase . . . the rapid diffusion of [the justice cascade] follow[ed] almost immediately after the end of the Cold War and with the fall of the Soviet Union,"⁴⁷ corroborating Hoffmann's argument.

Anti-impunity⁴⁸ is valued by most human rights advocates; however, anti-impunity has not been met without criticism. Karen Engle expressed her concern with the human rights movement's rapid shift towards criminal law, arguing that "the turn to criminal law was not an obvious trajectory for either the human rights movement or international law," and perhaps this embrace "has taken place with little systemic deliberation about the aims of criminal law or about its pitfalls."⁴⁹ The conflation of anti-impunity with human rights advocacy is ultimately harmful, as many view opposition to anti-impunity measures to also mean an opposition to human rights.⁵⁰ The relationship between human rights and anti-impunity has "helped shape the direction of human rights advocacy as well as both international human rights and international criminal law."⁵¹ Anti-impunity may also

⁴² KATHRYN SIKKINK, *THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS* 5–6 (2011).

⁴³ *Id.*

⁴⁴ *Id.* at 20.

⁴⁵ *See id.* ("[S]ome activists argued that as long as individuals were not held personally responsible, there would be no strong incentives for changing behavior.").

⁴⁶ *Id.* at 15.

⁴⁷ *Id.* at 35.

⁴⁸ Commonly seen as the attempt to hold violators of international humanitarian law or human rights law criminally accountable for their actions. *See* KAREN ENGLE, ZINAIDA MILLER & D.M. DAVIS, *ANTI-IMPUNITY AND THE HUMAN RIGHTS AGENDA* 15 (2017) ("[T]he human rights movement has . . . become almost synonymous with the fight against impunity. That is, to support human rights has increasingly meant to favor criminal accountability for those individuals who have violated international human rights or humanitarian law. It has also come to mean opposing amnesty laws that might preclude such accountability.").

⁴⁹ Karen Engle, *Anti-Impunity and the Turn to Criminal Law in Human Rights*, 100 CORNELL L. REV. 1069, 1071 (2015).

⁵⁰ *Id.* at 1119.

⁵¹ *Id.*

“provide[] a way for all sides to avoid overt discussion of distribution, even while deploying in their political struggles the criminal justice system, a potentially potent weapon of which the human rights movement has long been critical.”⁵²

II. WOMEN’S RIGHTS AS HUMAN RIGHTS: GENDER MAINSTREAMING IN GLOBAL GOVERNANCE

a. Gender at the United Nations

Women’s Caucuses are prime examples of a modern activist network. The transnational women’s network⁵³ began to coalesce during the drafting of the Declaration for the Elimination of All Forms of Discrimination Against Women in 1967 and reached its peak during the 1990s at United Nations conferences. Networks are “forms of organization characterized by voluntary, reciprocal, and horizontal patterns of communication and exchange.”⁵⁴ Networks provide sources of reliable information for outsiders: “they are organized to promote causes, principled ideas, and norms, and they often invoke individuals advocating [for] policy changes that cannot be easily linked to a rationalist understanding of their ‘interests.’”⁵⁵ Communication between networks takes place in a “dense web” of formal and informal connections within the group.⁵⁶ While advocacy networks date back to the nineteenth century, contemporary networks are radically different and more far-reaching than their historic counterparts due to technological advancements.⁵⁷ Without the organizing of the transnational women’s network at United Nations conferences, it is unlikely that the WCGJ would have been primed to form at Rome and exert strong influence over gender issues.

The contemporary use of the word “network” originated with the women’s movement in the United States coining the phrase “old boys’ network”⁵⁸ as a critique of sexism. “Women’s network” was later coopted by women’s groups, and entered into popular use around 1975, the year of the First World Conference on Women in Mexico City.⁵⁹ Women’s caucuses were initially limited in scope, but after twenty years, the transnational women’s network wielded considerable influence at conferences.⁶⁰ Violence against Women became

⁵² *Id.* at 1127.

⁵³ Transnational women’s networks in the context of this project refers to the sprawling group of women that organized at the United Nations Conferences (Part III), the *ad hoc* tribunals (Part IV), and at the Rome Conference (Part V).

⁵⁴ KECK & SIKKINK, *supra* note 9, at 8.

⁵⁵ *Id.* at 8–9.

⁵⁶ *Id.* at 9.

⁵⁷ *Id.* at 10, 14.

⁵⁸ *Id.* at 167.

⁵⁹ For example, the International Feminist Network, Latin American and Caribbean Feminist Network against Domestic and Sexual Violence, Asian Women’s Research and Action Network. *See id.* at 167 (noting that many gender equality organizations are named “networks.”).

⁶⁰ The WCGJ was a direct outgrowth of Women’s Caucuses. Women’s Caucus for Gender Justice, *About the Women’s Caucus* (last visited Jan. 4, 2020),

<http://www.iccwomen.org/wigjdraft1/Archives/oldWCGJ/aboutcaucus.html>.

an organizing issue for women's advocacy networks relatively recently.⁶¹ By the mid-1990s, VAW exploded into one of the most discussed international women's issues, as evidenced by its central role in the Platform for Action at the United Nations Conference on Women in Beijing in 1995.⁶² In the same decade, the United Nations Security Council established the International Criminal Tribunal for the former Yugoslavia in 1993 and the International Criminal Tribunal for Rwanda in 1994, both including limited SGBV crimes under their jurisdiction. These strategies developed by the women's network influenced the way the WCGJ advocated for the inclusion of SGBV provisions at the Rome Conference in 1998. The following subsection traces the development of the transnational women's network VAW campaigns at United Nations conferences and the organizing strategies utilized by the transnational women's network to mainstream gender⁶³ into the final documents of the conferences.

b. The Transnational Women's Network at United Nations Conferences (1975–1995)

The influence of women's networks in transnational politics greatly expanded between the early 1970s and mid-1980s. After lobbying by the Women's International Democratic Federation and others, the Commission on the Status of Women recommended that the General Assembly declare 1975 International Women's Year. This resulted in the First World Conference on Women and the United Nations Decade for Women conferences in Copenhagen and Nairobi.⁶⁴ Gender equality groups had a considerable impact on the agenda of both gender-centric conferences and other issue-based conferences.

The Mexico City Conference⁶⁵ was fundamental to the development of the international women's movement as the first United Nations conference dedicated solely to women. The participation of NGOs was very limited, "with only two representatives per accredited NGO permitted to participate on a limited basis. . . ."⁶⁶ Mexico City was fertile ground for activists

⁶¹ Prior to VAW's emergence in the 1980s, the women's movement focused primarily on discrimination. The original Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW), drafted throughout the 1970s and adopted in 1979, does not make any reference to VAW. In the early 1980s, VAW was incorporated into social justice discussions and rose to the forefront of United Nations activity in 1985.

⁶² See KECK & SIKKINK *supra* note 9, at 166 ("By the mid-1990s [VAW] had become the most important international women's issue. At the UN Conference on Women in Beijing in 1995, violence against women was a 'centerpiece of the platform,' one of four issues given special prominence.").

⁶³ See, e.g., AMY BARROW, *Women, Peace and Security: Mainstreaming Gender in Transitional Justice Processes*, in *WOMEN AND TRANSITIONAL JUSTICE: THE EXPERIENCE OF WOMEN AS PARTICIPANTS* 37 (Lisa Yarwood ed., 2012):

Gender mainstreaming is the process of assessing the implications of legislation, policies or programmes on both men and women at all stages of design, implementation and monitoring. In contrast with other gender equality initiatives such as equal treatment, the central purpose of gender mainstreaming is to achieve equality of outcome rather than equality of opportunity. . . .

⁶⁴ Elisabeth Jay Friedman, *Gendering the Agenda: The Impact of the Transnational Women's Rights Movement at the UN Conferences of the 1990s*, 26 *WOMEN'S STUD. INT'L F.* 313, 317 (2003).

⁶⁵ This Article refers to United Nations conferences by the city in which they took place.

⁶⁶ Friedman, *supra* note 64, at 317.

to form strong networks, despite these restrictions.⁶⁷ Lucille Mair, the Secretary General of the Copenhagen Conference, reflected: “Mexico City focused on some of the fundamental issues . . . [b]ut it also did something that, while less tangible, may be in some ways more important than anything else: It established a network of concern.”⁶⁸ When Mexico City occurred, domestic violence was still too recent in discourse to become a central focus of the conference.⁶⁹ The next year, “two thousand women from forty countries spoke out on family violence, wife beating, rape, prostitution, female genital mutilation, murder of women, and persecution of lesbians” at the First International Tribune on Crimes against Women.⁷⁰

Keck and Sikkink trace the origins of the network to a series of meetings at the United Nations Women’s Conference in Copenhagen. Charlotte Bunch, a feminist organizer at Copenhagen reflected:

We observed in that two weeks of the forum that the workshops on issues related to violence against women were the most successful . . . they were the workshops where women did not divide along north-south lines, that women felt a sense of commonality and energy in the room . . . you get a chance to deal with difference, and see culture, and race, and class, but in a framework where there was a sense that women were subordinated and subjected to this violence everywhere, and that nobody has the answers. So northern women couldn’t dominate and say we know how to do this, because the northern women were saying: “our country is a mess; we have a very violent society.” So[,] it created a completely different ground for conversation. . . . It wasn’t that we built the network in that moment. It was just the sense of that possibility.⁷¹

This newfound sense of possibility culminated in the first explicit mention of SGBV in an official United Nations document. The Report of the World Conference of the United Nations Decade for Women referenced “domestic and sexual violence against women”⁷² and called for the ratification and implementation of Convention on the Elimination of all Forms

⁶⁷ *About IWTC*, INT’L WOMEN’S TRIB. CTR. <https://www.iwtc.org/63/index.html> (last visited May 13, 2020).

⁶⁸ The International Women’s Tribune Centre (IWTC) was established during Mexico City. After the conference concluded, the IWTC used their mailing list to increase accessibility of information and advocacy tools. In 1998, this mailing list grew to 16,000 individuals and groups representing women from 160 countries. ARVONNE S. FRASER, U.N. DECADE FOR WOMEN: DOCUMENTS AND DIALOGUE 71 (1987).

⁶⁹ Around the time of Mexico City, the first domestic violence shelters opened in London and the United States, and discussion of domestic violence as international issue was featured in Fran Hosken’s *Women’s International Network* in 1975. KECK & SIKKINK, *supra* note 9, at 175.

⁷⁰ *Id.*

⁷¹ *Id.* at 177.

⁷² “Legislation should also be enacted and implemented in order to prevent domestic and sexual violence against Women. All appropriate measures, including legislative ones, should be taken to allow victims to be fairly treated in all criminal procedures.” Rep. of the World Conference of the United Nations Decade for Women: Equality, Development, and Peace, ¶65, U.N. Doc. A/CONF.94/35 (July 30, 1980).

of Discrimination Against Women.⁷³ Similar to Mexico City, a surge of organizing around VAW arose after Copenhagen concluded.⁷⁴

After ten years of development, Violence against Women was on the agenda for the 1985 World Conference on Women in Nairobi. Following trends set by Mexico City and Copenhagen, Nairobi attracted a larger number of women.⁷⁵ At the NGO forum, activists formed the International Network against Violence against Women, a network of communication, and the International Women's Rights Action Watch, a Convention for the Elimination of All Forms of Discrimination Against Women watchdog group.⁷⁶ By Nairobi,

[A]dvances in gender-based critiques of development theory and practice showed how women's oppression can only be understood contextually, by taking into account women and men's positions within specific countries, cultures, and economies. From a focus on identifying oppression (and fighting over its various forms), women moved to strategizing over ways to confront its various manifestations, whatever their original causes.⁷⁷

Governments then adopted the Forward-Looking Strategies for the Advancement of Women, which linked peace to the elimination of VAW in the public and private spheres.⁷⁸ Nairobi served as an important stepping stone for the emergence of networks in the transnational women's movement.⁷⁹ Months after Nairobi, the General Assembly adopted the first resolution addressing domestic violence.⁸⁰

The formidable presence of women at United Nations conferences was not limited to those under the purview of the Decade for Women. In 1992, the Conference on Environment and Development was held in Rio, where women's groups maintained a definitive presence.⁸¹ Activists employed new strategies to advocate for gender issues in the genderless Agenda 21. The Women's Environment and Development Organization (WEDO), founded

⁷³ *Id.* at ¶ 62.

⁷⁴ In 1981, participants at the first Feminist Encounter for Latin America and Caribbean decided to hold the "Day against Violence against Women" on November 25th in memory of three sisters that were murdered by the Trujillo dictatorship. *Id.* at 178. Later, a coalition of Latin American feminist organizations held similar commemorations that contributed to the international "16 Days of Activism against Gender Violence" campaign. The campaign is now an annual event practiced internationally by NGOs and UN Women. United Nations Women, *16 Days of Activism against Gender-Based Violence*,

<https://www.unwomen.org/en/what-we-do/ending-violence-against-women/take-action/16-days-of-activism> (last visited Feb. 25, 2020).

⁷⁵ 14,000 women from 150 nations attended the NGO forum at Nairobi. KECK & SIKKINK, *supra* note 9, at 169.

⁷⁶ *Id.* at 179.

⁷⁷ Friedman, *supra* note 64, at 318.

⁷⁸ United Nations: Division for the Advancement of Women, *Information Note: The United Nations Work on Violence Against Women*, <http://www.un.org/womenwatch/daw/news/unwvaw.html> (last visited Mar. 17, 2020).

⁷⁹ These networks include the International Women's Rights Action Watch, the Latin American Committee for Defense of Women's Rights, the Asia-Pacific Forum on Women, Law and Development, and the Women in Law and Development in Africa.

⁸⁰ G.A. Res. 40/36, U.N. Doc. A/RES/40/36 (Nov. 29, 1985).

⁸¹ The women's tent at the NGO forum, Planeta Femea, was the largest venue at the conference and attracted 1,500 people. Friedman, *supra* note 64, at 320.

by Bella Abzug, sponsored the World Women's Congress for a Healthy Planet. When faced with exclusion, women's groups "creat[ed] their own opportunities for mobilization around the more general opportunity of the conference [and] advocates organized the largest-ever NGO preparatory conference for a UN meeting, with 1,500 participants."⁸² Women used "tribunal[s] to offer public testimony about women's connection to environmental issues" and an "insider/outsider" advocacy strategy, which "simultaneously mobiliz[ed] advocacy networks to bring pressure from outside governmental arenas and coordinat[ed] lobbying inside them."⁸³ In addition to strategical innovations, a Women's Caucus was established as a group to lobby for gender issues throughout the conference.⁸⁴ Precedent setting was a key strategy of the Caucus: when lobbying delegates to include women's rights in Agenda 21, "the Caucus assembled 'precedent setting' information from previous UN documents" that supported the Caucus' mission to demonstrate that their positions were "built on accepted norms within the UN, not new rights."⁸⁵ This strategy, according to Friedman, "was a clear effort to mainstream the women's rights message while countering objections to it."⁸⁶ These efforts were ultimately successful: while the draft Agenda 21 contained only two references to women, by the conclusion of Rio, the chapter, "Global Action for Women Towards Sustainable and Equitable Development," was added with 172 references to women.⁸⁷ Strategies for gender inclusivity, developed by activists, permeated conferences where VAW was the focus and depicts the effect that the transnational women's network can have on conference delegates.

The next year, the World Conference on Human Rights was held in Vienna, and women made up half of the 3,000 NGO participants.⁸⁸ Women's groups prepared meticulously for Vienna with national data generation, media contracts, and governmental lobbying through the coordination of NGOs.⁸⁹ Keck and Sikkink cite this work as an example of "a network's ability to draw attention to issues, set agendas, and influence the discursive positions of both states and international organizations."⁹⁰ Leaders of the community "worked closely with international advocates to insure [sic] the representativeness of the movement and its message[]" in order to ensure the intersectionality of the transnational women's network.⁹¹ The Global Campaign for Women's Human Rights was created to unite ninety NGOs in making the international community focus on VAW in Vienna.⁹²

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Chen writes that the successes of gender mainstreaming can be attributed to the formation of Women's Caucuses, where "[m]embers negotiated with official delegations to ensure that the draft document incorporated women's concerns throughout." Martha Alter Chen, *Engendering World Conferences: The International Women's Movement and the United Nations*, 16 *THIRD WORLD Q.* 477, 486 (1995). Women's Caucuses "provided a bridge between the official deliberations and the parallel NGO deliberations." *Id.* at 482.

⁸⁵ Friedman, *supra* note 64, at 320.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ KECK & SIKKINK, *supra* note 9, at 187.

⁸⁹ NGOs included: the Center for Women's Global Leadership, International Women's Tribune Center, and the International Women's Rights Action Watch. Friedman, *supra* note 64, at 321.

⁹⁰ KECK & SIKKINK, *supra* note 9, at 186.

⁹¹ Friedman, *supra* note 64, at 321.

⁹² *Id.*

Prior to Vienna, the Center for Women's Global Leadership (CWGL) organized an effective petitioning campaign calling for the recognition of women's rights as human rights.⁹³ The petition was sponsored by over 800 groups and garnered 300,000 signatures from 123 countries before the beginning of the conference.⁹⁴ At the same time, the United Nations officially recognized satellite meetings "by holding several international gatherings that issued statements and reports included in the official documentation of the conference."⁹⁵ The CWGL also directly engaged with governments in the preparatory process in order to guarantee the inclusion of women's human rights language in Vienna. The Women's Caucus coordinated lobbying efforts by uniting upwards of 200 participants and made six plenary presentations at the governmental conference to present the demands of gender equality advocates.⁹⁶ The extraordinary engagement efforts by the CWGL had allowed them to have a direct impact on the language of the final document.

The Women's Caucus used the insider/outsider strategy to ally with the United Nations Development Fund for Women (UNIFEM) through Roxanna Carillo, a former CWGL staff member and the head of UNIFEM's women's rights program. Cardillo and the CWGL frequently met during Vienna, ensuring contact between NGOs and delegates.⁹⁷ Like in Rio, the CWGL designed the Tribunal on Violations of Women's Human Rights, which featured testimony by women from all regions of the world on the daily, widespread abuse of women's rights.⁹⁸ The Tribunal was featured in Vienna's NGO forum, where women delivered "personal testimony of devastating human rights abuses to a distinguished panel of judges. Hundreds of spectators observed the day-long Tribunal, and its conclusions were presented as part of the official record of the governmental conferences."⁹⁹ However, the Tribunal also revealed the difficulty in unifying the vast global abuses faced by women in one coherent "frame."¹⁰⁰ At the Tribunal, women suggested that their abuse was caused by a variety of factors: "sexism, religious belief, and poverty—and blamed a range of actors, from husbands to state agents to the structure of global capitalism."¹⁰¹ Fierce debates broke out within NGO workshops over the role that legal remedies and the state should play in the women's rights movement and the protection of women.¹⁰² As a result of the transnational women's network's mainstreaming efforts, the Vienna Declaration and Programme of Action is rife with discussions of women's human rights.¹⁰³ Vienna affirmed the progress

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ The language of Section 1, Paragraph 18 recalls the "women's rights are human rights" mantra and explicitly discussed sexual and gender-based violence:

The human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights. . . . Gender-based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudice and international

made at Rio, which would not have been possible without the strong network of women's advocates at United Nations conferences that had been growing since Mexico City.

Women's rights advocates convened the following year at the International Conference on Population and Development in Cairo. Similar to Rio and Vienna, activists were able to exert influence on the conference in a way that framed the agenda to include gender issues. Advocates linked controlling population growth to reproductive health access. Friedman argues that activists "were responsible for the switch from a framing of population issues as focused on controlling population growth to inextricably tied to the promotion of women's rights, both reproductive and other. . . ." ¹⁰⁴ Gender justice NGOs quickly formed a Women's Caucus before government preparatory processes to add women's rights issues to the conference's agenda ¹⁰⁵ and ran many a number of visibility campaigns. ¹⁰⁶

At Cairo, NGOs were granted a larger level of involvement by the Secretary General. Not only were NGOs allowed to "attend even informal consultations, but [the Secretary General] also gave them leave to intervene during closed door sessions . . . [and] incorporated their written statements in draft governmental documents."¹⁰⁷ In addition to attending the conference separately, NGOs were often a part of governmental delegations. For example, half of the United States' delegates were women's advocates including leading women's health advocates. ¹⁰⁸ This Women's Caucus was the largest yet with approximately 400 to 500 women attending their meetings. ¹⁰⁹ As a result, language was added to the final document that addressed the role of women in population growth. ¹¹⁰ During conference

trafficking, are incompatible with the dignity and worth of the human person, and must be eliminated. This can be achieved by legal measures and through national action and international cooperation in such fields as economic and social development, education, safe maternity and health care, and social support.

World Conference on Human Rights, *Vienna Declaration and Programme of Action*, ¶ 18, U.N. Doc. A/CONF.157/23 (June 25, 1993). The document also addresses the "systematic rape women in war situations," and links systematic rape directly to refugees and displacement. *Id.* at ¶ 28. Similarly, the document expresses concern over "violations of human rights during armed conflicts, affecting the civilian population, especially women[.]" *Id.* ¶ 29. The third section of this document addresses the "equal status and human rights of women" in nine thorough paragraphs, condemning SGBV: "All violations of this kind, including in particular murder, systematic rape, sexual slavery, and forced pregnancy, require a particularly effective response." *Id.* ¶ 38.

¹⁰⁴ Friedman, *supra* note 64, at 322.

¹⁰⁵ *Id.*

¹⁰⁶ In 1992, advocates formed the Women's Voices '94 Alliance and wrote the "Women's Declaration on Population Policies." The International Women's Health Coalition (IWHC) circulated the statement and collected signatures from over 2,200 individuals and organizations amongst 100 countries. *Id.* The IWHC also held the "Declaration of the Reproductive Health and Justice" conference nine months prior to Cairo, which attracted 215 women from seventy-nine countries for an NGO version of the governmental preparatory committee. *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ AMY J. HIGER, *International Women's Activism and the 1994 Cairo Population Conference*, in *GENDER POLITICS IN GLOBAL GOVERNANCE* 137 (Mary K. Meyer & Elizabeth Prügl eds., 1999).

¹⁰⁹ Compare to the "Pro-Life" Caucus, which attracted around fifteen members. Friedman, *supra* note 64, at 323.

¹¹⁰ The fourth of fifteen principles in the final document reads: "Advancing gender equality and equity and the empowerment of women, and the elimination of all kinds of violence against women, and ensuring women's ability to control their own fertility, are cornerstones of population and development related programmes." Rep. of the International Conference on Population and Development, at 12, U.N. Doc. A/CONF.171/13/Rev.1 (1995). The

presentations, “nearly every delegation head mentioned the role of women, women’s empowerment, women’s education, and women’s rights as central to the purpose at hand.”¹¹¹ Organizers at Cairo fundamentally impacted the agenda at a conference on population and development to include provisions on women’s rights and violence against women.

In 1995, the Fourth World Conference on Women convened and attracted an unprecedented 17,000 participants and 30,000 activists.¹¹² Beijing highlighted the rapid growth of the international women’s rights movement in the twenty years since Mexico City. Where discourse on domestic violence was too new to breach Mexico City’s agenda, Beijing delegates found themselves in an intense debate over a wide range of subjects, including VAW. The continuous mainstreaming of gender at United Nations conference had an effect at Beijing: “it was clear that the term ‘gender mainstreaming’ had achieved great popularity. It appeared throughout the lengthy Platform for Action as a strategy to redress women’s unequal position in twelve areas of concern. . . .”¹¹³ However, the conference itself also experienced substantial disagreement amongst delegations in comparison to the first three World Conferences on Women. Martha Alter Chen, writing at the end of the final Preparatory Committee, noted that “on the eve of the Fourth World Conference . . . there were signs of a well-organised and well-financed backlash”¹¹⁴ against the promises made at Rio, Vienna, and Cairo. Chen traces these challenges back to the Preparatory Committees held prior to Beijing.¹¹⁵ NGOs faced accessibility restrictions and the drafting process itself was cumbersome and inefficient.¹¹⁶ After the final Preparatory Committee, thirty-five percent of the Draft Platform of Action was marked with square brackets, each marking a point that at least one state was unwilling to accept and indicated that further negotiations and amendments would occur in Beijing.¹¹⁷ The Draft Platform was also introduced late into the final Preparatory Committee, “leaving little time for delegations to prepare positions” on the text.¹¹⁸ Additionally, “the preparatory process itself [was] sufficiently participatory that minority voices [could] slow down, derail, or obstruct the process.”¹¹⁹ This “disagreement illustrated just how fragile the global consensus around women’s human rights was going into the Beijing meeting.”¹²⁰

Although Beijing was anticipated to be the most contentious women’s conference to date, the transnational women’s network had also developed effective lobbying strategies and organized far beyond Mexico City. NGOs carefully monitored bracketed issues and

fourth chapter of the report is entitled “Gender Equality, Equity, and Empowerment of Women” and VAW is explicitly discussed eight times. *Id.* at 22–27.

¹¹¹ HIGER, *supra* note 108, at 137.

¹¹² United Nations Women, *The Beijing Platform for Action: Inspiration Then and Now*, <http://beijing20.unwomen.org/en/about> (last visited Mar. 17, 2020).

¹¹³ Hilary Charlesworth, *Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations*, 18 HARV. HUM. RTS. J. 1, 3 (2005).

¹¹⁴ Chen, *supra* note 84, at 490.

¹¹⁵ *See id.* (discussing disagreement amongst delegations on the Draft Platform of Action).

¹¹⁶ *See id.* (“The final Beijing PrepCom, held in New York in March 1995, was marred by restrictions on NGO access and accreditation as well as cumbersome, inefficient and divisive drafting processes.”).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ KECK & SIKKINK, *supra* note 9, at 188.

recommended language to government delegations. At times, “government delegations incorporated language suggested by NGOs directly; [at other times] governments consulted with NGOs to shape their positions on issues.”¹²¹ The ultimate goal of Beijing was to “protect[] the gains made against the newly powerful countermovement [and against their agenda], while trying to ensure some implementation for the new frames of the 1990s.”¹²² This countermovement was a coalition of countries with strong Catholic and Islamic leadership that formed after the increased visibility of the women’s network at Vienna and abortion issues at Cairo.¹²³ At Beijing, WEDO coordinated a Linkage Caucus as an attempt to preserve the progress made by the network.¹²⁴ The Linkage Caucus created three advocacy documents: “recommendations on bracketed language; a chart of precedents from other UN documents and conferences legitimating specific NGO demands; and a Pledge for Gender Justice.”¹²⁵ Lobbying occurred informally at coffee breaks and in hallways due to limited NGO access to the government working groups actually negotiating the bracketed language.¹²⁶ Cultivated relationships between advocates and delegates were key to maintaining lines of communication, especially when access to the governmental conference was limited.¹²⁷

The Platform for Action at Beijing was the most contested of all statements of the discussed international conferences.¹²⁸ Similar to the Rome Conference, the two most disputed issues were the use of the word *gender* (as opposed to sex) and perceived “threats” to the family. Catholic states, led by the Holy See, “objected to the feminist use of the word [gender], which distinguishes between biological sex and the roles, expectations, and actions of socialized men and women.”¹²⁹ The progressive use of gender, according to many conservative delegations, opened the floodgates for alternate definitions of gender that operate outside of biologically essentialist norms.¹³⁰ Twenty countries made reservations on parts of the Platform deemed to be incompatible with Islamic law, including issues of reproductive justice, homosexuality, and inheritance.¹³¹ Catholic countries expressed similar reservations on parts of the Platform that challenged the “traditional” nuclear family, homosexuality, and abortion bans.¹³² Catholic and Islamic countries again formed blocs on these issues, which persisted after the conclusion of Beijing at the Rome Conference.

¹²¹ *Id.*

¹²² Friedman, *supra* note 64, at 324.

¹²³ *Id.* at 324.

¹²⁴ *Id.* at 324 (“WEDO coordinated a ‘Linkage Caucus’ to ensure that gains made by women at prior UN conferences would not be lost.”).

¹²⁵ *Id.* at 324.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ SALLY BADEN & ANNE MARIE GOETZ, *Who Needs [Sex] When You Can Have [Gender]? Conflicting Discourses on Gender at Beijing*, in *WOMEN, INTERNATIONAL DEVELOPMENT, AND POLITICS: THE BUREAUCRATIC MIRE* 44 (Kathleen Staudt ed., 1997).

¹²⁹ Friedman, *supra* note 64, at 325.

¹³⁰ *Id.* at 323 (“While claiming to promote an agenda that also supported gender equality, this coalition specifically attacked those rights that threatened the hegemony of a ‘traditional’ conception of gender relations.”).

¹³¹ *Id.* at 326.

¹³² *Id.*

Most feminist issues were preserved, and some were furthered, despite the threat presented by numerous states to the advances made by the women's network in prior conferences. With regard to the use of "gender," Annex IV to the Platform for Action specified, "the word 'gender' as used in the Platform for Action was intended to be interpreted and understood as it was in ordinary, generally accepted usage."¹³³ This vague statement replaced the disputed definition in the draft Platform but allowed for some level of interpretation beyond biological essentialism. The final Platform made notable advancements in the areas of sexual and reproductive health, anti-choice abortion laws, rape as a war crime, and the rights of girls.¹³⁴ WEDO claims that in sum, sixty-seven percent of recommendations made by NGOs on the bracketed text were incorporated into the final Platform for Action.¹³⁵

c. Conclusion

In the span of twenty years, the transnational women's network managed to influence the United Nations far beyond the scope of the World Conferences on Women. In 1975, Mexico City documents made no explicit reference to VAW, but by Beijing in 1995, VAW was a centerpiece of the final document. Mainstreaming VAW would have simply been impossible without the organizing work by the transnational women's network. The success of the women's network in "gendering the agenda" at non-gender centric conferences was due to the development of mainstreaming strategies: specialized women's networks, extensive preparatory work, precedent setting, tribunals, and insider/outsider advocacy. By Beijing, these practices were decisively a part of the women's network repertoire. The advancement of mainstreaming strategies also emboldened the opposition to respond similarly, forcing the two groups into a framing contest. Understanding the development of the transnational women's network at United Nations conferences is pivotal to understanding the role of the Women's Caucus for Gender Justice at the Rome Conference.

¹³³ Rep. of the Fourth World Conference on Women, U.N. Doc. A/CONF.177/20/Add.1 (Oct. 27, 1995).

¹³⁴ Paragraph 96 of the Platform includes "[the] right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence" as a human right of women. *Id.* at ¶ 96. Paragraph 106(k) addresses reproductive rights and urges governments to "consider reviewing laws containing punitive measures against women who have undergone illegal abortions." *Id.* at ¶ 106(k). Section E discusses sexual and gender-based violence in depth. Paragraph 132 declares that "rape, including systematic rape, sexual slavery and forced pregnancy require a particularly effective response." *Id.* at ¶ 132. Paragraph 135 states:

The impact of violence against women and violation of the human rights of women in such situations is experienced by women of all ages ... who are victims of acts of murder, terrorism, torture, involuntary disappearance, sexual slavery, rape, sexual abuse and forced pregnancy in situations of armed conflict, especially as a result of policies of ethnic cleansing and other new and emerging forms of violence. *Id.* at ¶ 135.

Likewise, Paragraph 131 deems rape, including systematic rape in war, "[m]assive violations of human rights ... are abhorrent practices that are strongly condemned and must be stopped immediately, while perpetrators of such crimes must be punished." *Id.* at ¶ 131. The platform links SGBV in conflict to the importance of equity in the peace process and suggests "increas[ing] the participation of women in conflict resolution at the decision-making levels" as a means to alleviating this phenomenon. *Id.* ¶ 141.

¹³⁵ Friedman, *supra* note 64, at 325.

III. SHIFTING PARADIGMS OF SEXUAL AND GENDER-BASED VIOLENCE UNDER INTERNATIONAL LAW

This section delves into a thick description of the justice cascade and the development of international criminal law, culminating in an analysis of landmark cases that impacted how the International Criminal Court has prosecuted SGBV crimes. The formulation of *ad hoc* tribunals, riding the human rights wave of the 1990s, was a key contributing factor to the passage of the Rome Statute. The history of tribunal formation must be parsed out in order to understand both the WCGJ's incorporation of SGBV crimes and the establishment of the Court itself. The rapid development of international criminal tribunals in the 1990s is exemplary of Sikkink's justice cascade and Hoffmann's temporal postulation of the rise of human rights idealism, both necessary for the Women's Caucus for Gender Justice's existence.

a. Rape and the Laws of War: From Cicero to Lincoln

Attempts to regulate wartime behavior have been documented as early as 500 B.C.E.,¹³⁶ but for much of history, SGBV has been sidelined due to the conception of women as property. Even further, rape was often considered a legitimate spoil of war.¹³⁷ By the end of the Middle Ages, the normative legitimacy of wartime rape began to be reconsidered.¹³⁸ In Hugo Grotius' *De Jure Belli ac Pacis*, one of the most substantial contributions to

¹³⁶ KELLY DAWN ASKIN, CRIMES AGAINST WOMEN: PROSECUTION IN INTERNATIONAL WAR CRIMES TRIBUNALS 19 (1997) (discussing informal wartime regulations in Cicero's *Marcus Tullius, Cicero's Three Books of Offices, or Moral Duties*).

¹³⁷ SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN, AND RAPE 33 (1975).

¹³⁸ Both Richard II (1385) and Henry V (1419) introduced bans on wartime rape. Tuba Inal, Development of Global Prohibition Regimes: Pillage and Rape in War (July 2008) (unpublished Ph.D. dissertation, the University of Minnesota) (on file with the University of Minnesota digital conservancy) (citing Richard II's proclamation in 1385 banning rape in army codes); Theodor Meron, *Rape as a Crime Under International Humanitarian Law*, 87 AM. J. INT'L L. 424, 425 (1993). In the fourteenth century, Lucas de Penna advocated for the protection of noncombatants during wartime, including from rape. RICHARD SHELLY HARTIGAN, THE FORGOTTEN VICTIM: A HISTORY OF THE CIVILIAN 50 (1982) ("In war, the belligerents are not at liberty to act without restraint. Soldiers may not be given license to murder, rob, plunder, rape, or constrain civilians; those who do such things should be as severely punished as if the crimes had been committed during peacetime."). A century later, Alberico Gentili reiterated de Penna's sentiments: "It is not lawful to do this wrong [rape], even if it is sometimes lawful to kill women. . . . If a woman fights, why should she not allow war to be made upon her? . . . But there is no reason why she should suffer so signal an insult [as rape]." ASKIN, *supra* note 136, at 22. In fifteenth century England, Gerrard Winstanley, founder of the radical Protestant group known as the Diggers, advocated for rapists to face capital punishment. GERRARD WINSTANLEY, THE WORKS OF GERRARD WINSTANLEY 599 (George H. Sabine ed., 1965) ("If a man lie with a woman forcibly, and she cry out, and give no consent; if this be proved by two Witnesses or the mans confession, he shall be put to death and the woman let go free; it is robbery of a womans bodily Freedom."). Winstanley locates the equality of men and women in the ability of all genders to reason, a radically progressive belief for his time. See GERRARD WINSTANLEY ET AL., THE TRUE LEVELLERS STANDARD 6 (1939) ("In the beginning of Time, the great Creator Reason, made the Earth to be a Common Treasury . . . And the Reason is this, Every single man, Male and Female, is a perfect Creature of himself; and the same Spirit that made the Globe, dwels in man to govern the Globe; so that the flesh of man being subject to Reason, his Maker, hath him to be his Teacher and Ruler within himself, therefore needs not run abroad after any Teacher and Ruler without him, for he needs not that any man should teach him, for the same Anoynting that ruled in the Son of man, teacheth him all things.").

international law, rape was condemned as an “uncivilized act” in civilized nations¹³⁹ that “[does not] contribute to safety or to punishment, and . . . consequentially [rape] [should] not go unpunished in war any more than in peace.”¹⁴⁰ While these statements by philosophers and jurists were certainly a step in the right direction, their words did very little to actually prevent wartime rape, and substantial legal advancements were not made until centuries later.

The eighteenth and nineteenth centuries brought about small, though tangible, advancements in international law that addressed SGBV. In 1863, Columbia Professor Francis Lieber attempted to codify the customary law of war during the American Civil War.¹⁴¹ The Lieber Code, signed into law by President Lincoln, were specific instructions to regulate the conduct of Union soldiers. The Code explicitly referenced sexual violence in Article 44, which prohibits rape as a capital crime.¹⁴² The Lieber Code deeply impacted the international community’s efforts to regulate warfare and was a precursor to the Hague Conventions of 1899 and 1907.

Article 46 of the Hague Convention of 1907 borrowed some of Article 44’s language, but notably eliminated any explicit reference to rape or sexual violence. Instead, Article 46 states: “Family honour and rights, the lives of all persons, and private property, as well as religious convictions and practice, must be respected.”¹⁴³ While Article 46 may be read to include SGBV through the family honor and rights language, the article has rarely been interpreted in this manner.¹⁴⁴ The absorption of SGBV under family and honor rights that tends to emphasize moral notions of chastity and honor over the physical acts of violence and is still pervasive in contemporary international law.¹⁴⁵ The Hague Conventions laid a

¹³⁹ Of course, I must note that the concept of “uncivilized” and “civilized” societies is a racist social construct that harkens back to colonialism and imperialism, whereby the domination and subjugation of non-Western societies was typically “legitimated” by characterizing the colonized as uncivilized and barbaric. For further reading, see generally, FRANTZ FANON, *BLACK SKIN, WHITE MASKS* (Richard Philcox trans., 1952) (considering the project of colonialism and the existential experience of racialized subjectivity); EDWARD W. SAID, *ORIENTALISM* (1978) (applying post-structuralism to scholarship on orientalism); ÉTIENNE BALIBAR & IMMANUEL WALLERSTEIN, *RACE, NATION, CLASS: AMBIGUOUS IDENTITIES* (Verso, 1991) (analyzing the intersection of race, class, and nationalism); ACHILLE MBEMBE, *ON THE POSTCOLONY* (2001) (exploring the relationship between power and subjectivity in postcolonial Africa); GAYATRI C. SPIVAK, *Can the Subaltern Speak?*, in *MARXISM AND THE INTERPRETATION OF CULTURE* 271 (Cary Nelson & Lawrence Grossberg eds., 1988) (criticizing Western academics for making logocentric assumptions about the colonial experience).

¹⁴⁰ 2 HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* 657 (Francis W. Kelsey et al. trans., 1995).

¹⁴¹ Meron, *supra* note 138, at 425.

¹⁴² *Id.* Article 44 states: “All wanton violence committed against persons in the invaded country . . . all rape . . . [is] prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense.” *General Orders No. 100: The Lieber Code*, Instructions for the Government Armies of the United States in the Field art. 44, (Apr. 24, 1863).

¹⁴³ Convention IV: Respecting the Laws and Customs of War on Land art. 46, Oct. 18, 1907, 36 Stat. 2277.

¹⁴⁴ Meron, *supra* note 138, at 425.

¹⁴⁵ See, e.g., Alice M. Miller, *Sexuality, Violence Against Women, and Human Rights: Women Make Demands and Ladies Get Protection*, 7 HEALTH & HUM. RTS 17, 28–29 (2007) (“Historically, the compelling (and sympathetic) image of ‘rape victim’ as an innocent female in need of solace for her destroyed innocence/chastity operates against [the empowerment of survivors as citizens able to participate in policy formation]. Traditional health-based approaches to sexuality—especially female sexuality—have colluded with this paradigm, treating the female body as vessel, not actor.”).

weak foundation for prosecuting SGBV whose vestiges continually deemphasize the gravity of the violence and reinforces dated gender norms.

b. The Post-War Landscape: The IMT, IMTFE, and Geneva Conventions

The atrocities of the First and Second World Wars galvanized the first international criminal tribunals dedicated to post-war justice. The Allied powers began to explore the possibility of prosecuting the Axis Powers in October of 1941.¹⁴⁶ Nearly two years later, the United Nations War Crimes Commission was formed in London and shortly thereafter, the Allied Powers issued the Moscow Declaration, committing to “united action, pledged for the prosecution of the war against their respective enemies, will be continued for the organization and maintenance of peace and security.”¹⁴⁷ On August 8, 1945, the International Military Tribunal (IMT) was created to prosecute prominent members of Nazi Germany. The IMT’s jurisdiction extended to three crimes: crimes against peace, war crimes, and crimes against humanity. Crimes against peace was defined by the Charter as “namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.”¹⁴⁸ Where crimes against peace relate to the waging of a war itself, both war crimes and crimes against humanity refer to the treatment of individuals. The Charter classifies war crimes as violations of customs or laws of war, and clearly lists out a number of several actions that are considered war crimes.¹⁴⁹ Similarly, the Charter defines crimes against humanity as a number of acts committed against a civilian population, without the condition of ongoing war.¹⁵⁰ The Charter leaves room for the inclusion of “other inhumane acts,” but SGBV is absent from the listed crimes and the categories of persecuted groups. In comparison to the Lieber Codes, which preceded the IMT by over eighty years, the Charter did very little to incorporate SGBV crimes. Due to the influence of the Hague Conventions on the Charter, it is unsurprising that SGBV was overlooked at this point in history. SGBV crimes were absent in the Charter and prosecutions, despite ample evidence of these crimes in the concentration camps.¹⁵¹ Although the IMT never pursued SGBV charges, the ability to prosecute these crimes was granted by Control Council Law No. 10 (CCL No. 10). CCL No. 10 was established in 1945,

¹⁴⁶ *From Nuremberg to The Hague: Teaching from the Past - Challenges for the Future*, NUREMBERG ACADEMY, http://www.nurembergacademy.org/fileadmin/media/pdf/From_Nuremberg_to_The_Hague.pdf (last visited Jan. 5, 2020).

¹⁴⁷ Joint Four-Nation Declaration art. 1, Moscow Conference, Oct. 1943.

¹⁴⁸ Charter of the International Military Tribunal art. 6(a), Nuremberg Trial Proceedings Volume 1.

¹⁴⁹ *Id.* at art. 6(b) (“[M]urder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.”).

¹⁵⁰ *Id.* at art. 6(c) (“Murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population . . . or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal[.]”).

¹⁵¹ See NAZI CONCENTRATION CAMPS (National Archives and Records Administration 1945) (documenting concentration camps as they were found upon liberation).

prior to the Nuremberg trials, and empowered the authorities occupying Germany to continue prosecutions of war criminals. CCL No. 10 did not substantially deviate from the Nuremberg Charter, but crimes against humanity was updated to include rape.¹⁵² The formal inclusion of rape in crimes against humanity was a major milestone for the recognition of SGBV as a crime under IHL, regardless of how few perpetrators were prosecuted.

The International Military Tribunal for the Far East (IMTFE) was founded in 1946 as the IMT's Pacific Theater counterpart. Like the IMT, the IMTFE prosecuted three crimes: crimes against peace, war crimes, and crimes against humanity. The IMTFE Charter did not include rape as a crime against peace or crime against humanity. The IMTFE's definition of war crimes departed from the IMT's extensive list and instead simply reads: "namely, the violations of the laws or customs of war."¹⁵³ At the IMTFE, perpetrators were actually charged for SGBV crimes,¹⁵⁴ but rape was deemphasized: survivors did not testify,¹⁵⁵ some perpetrators charged with rape as a war crime were acquitted,¹⁵⁶ and only a single paragraph was dedicated to the Rape of Nanking, in spite of the recognition that 20,000 rapes occurred during the first month of occupation.¹⁵⁷

The Geneva Conventions and Additional Protocols were adopted in the aftermath of the Second World War as an attempt to prevent future atrocities by codifying proscribed acts during war. The four Geneva Conventions, adopted in 1949, protects four classes of people: wounded and sick soldiers on land; wounded and sick soldiers at sea; prisoners of war; and civilians. Common Article 3 to the Geneva Conventions addressed for the first time "situations of non-international armed conflict includ[ing] traditional civil wars, internal armed conflicts that spill over into other States or internal conflicts in which third States or a multinational force intervenes alongside the government."¹⁵⁸ Common Article 3 therefore allows SGBV to be prosecuted in internal conflicts, like the Rwandan Civil War. SGBV is not limited to international armed conflicts and manifests itself in all armed conflict.

¹⁵² "Murder, extermination, enslavement, deportation, imprisonment, torture, *rape*, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated." Nuremberg Trials Final Report Appendix D, Control Council Law No. 10 (Dec. 20, 1945) (emphasis added).

¹⁵³ Special Proclamation: Establishment of an International Military Tribunal for the Far East, art. 5(b), Jan. 19, 1946, T.I.A.S. No. 1589.

¹⁵⁴ See Meron, *supra* note 138, at 426 ("[S]ome Japanese military and civilian officials [were found] guilty of war crimes, including rape, because they failed to carry out their duty to ensure their subordinates complied with international law.").

¹⁵⁵ Richard J. Goldstone & Estelle A. Dehon, *Engendering Accountability: Gender Crimes Under International Criminal Law*, 19 NEW ENG. J. PUB. POL'Y 121, 123 (2003).

¹⁵⁶ William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1, 69 (1973).

¹⁵⁷ Goldstone & Dehon, *supra* note 155, at 123. ("The IMTFE did recognize that '[a]pproximately 20,000 cases of rape occurred within the city [of Nanking] during the first month of occupation,' but it devotes only one paragraph of its judgment to the gender crimes infamously memorialized as the 'Rape of Nanking.' Rape was subsumed under general charges of command responsibility for the atrocities committed in Nanking, and the conviction of General Iwane Matsui for war crimes and crimes against humanity was based in part on evidence of rape committed by his troops. The equally notorious forcing of thousands of 'comfort women' into prostitution in Japanese military brothels was, however, ignored by the IMTFE.").

¹⁵⁸ *The Geneva Conventions of 1949 and their Additional Protocols*, INT'L COMM. RED CROSS (Oct. 29, 2010), <https://www.icrc.org/en/doc/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm>.

The Fourth Geneva Convention and Common Article 3 made progress in addressing SGBV. Under the Fourth Geneva Convention, Article 27 explicitly forbids some SGBV crimes: “Women Shall be especially protected against any *attack on their honour*, in particular against rape, enforced prostitution, or any form of indecent assault.”¹⁵⁹ The First and Second Additional Protocols also address SGBV, but with peculiar language. Article 76 of Protocol I is dedicated to the protection of women as “*object[s] of special respect*.”¹⁶⁰ Likewise, Protocol II prohibits “outrages upon *personal dignity*, in particular . . . rape, enforced prostitution, or any other form of indecent assault. . . .”¹⁶¹ The language of the Geneva Convention provisions related to women relies heavily on notions of “honor” and “dignity” as opposed to the gravity of the violent crimes themselves. This linkage places an undue emphasis on the degradation of honor and distances the violent crime from the perpetrator, minimizes the physical and psychological harms of the crime, and reinforces harmful stereotypes of women. Although some SGBV crimes are enumerated in the Geneva Conventions, they are not considered grave breaches subject to universal jurisdiction. The failure of the Geneva Conventions to incorporate SGBV as a grave breach and the inappropriate focus on SGBV as chiefly a violation of honor in a foundational IHL document burdened future tribunals.

c. The Second Wind: Ad Hoc Tribunals

After the IMT and IMTFE concluded, there was a lull in international tribunals until the 1990s. Throughout the twentieth century, IHL largely disregarded the gravity of SGBV. This was to be expected as “these laws were written by men drawing heavily on the male chivalric tradition and were interpreted by male military lawyers, judges, and governmental experts, in an age when rape was placed on the same footing as plundering, and was considered to be an inevitable consequence of war.”¹⁶² This mentality began to shift with the advent of the International Criminal Tribunals for the former Yugoslavia and Rwanda, which actively sought to prosecute SGBV perpetrators.¹⁶³

The International Criminal Tribunal for the Former Yugoslavia (ICTY) indicated that SGBV would be prosecuted since its inception in 1993.¹⁶⁴ Secretary General Boutros Boutros-Ghali highlighted the “widespread and systematic rape and other forms of sexual assault, including enforced prostitution”¹⁶⁵ in his report on the proposed tribunal. Boutros-

¹⁵⁹ Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War part III art. 27, Aug. 12, 1949, 75 U.N.T.S. 287 (emphasis added).

¹⁶⁰ Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 76(1), June 8, 1977, 1125 U.N.T.S. 3 (emphasis added).

¹⁶¹ Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 4(2)(e), June 8, 1977, 1125 U.N.T.S. 609 (emphasis added).

¹⁶² Goldstone & Dehon, *supra* note 155, at 123.

¹⁶³ Patricia Viseur Sellers & Kaoru Okuizumi, *Intentional Prosecution of Sexual Assaults*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 45, 46–47 (1997).

¹⁶⁴ Prior to the ICTY's formation, the Security Council passed Resolution 798 in 1992 stating that the Council was “[a]ppalled by reports of the massive, organized and systematic detention and rape of women, in particular Muslim women, in Bosnia and Herzegovina.” S.C. Res. 798 (Dec. 18, 1992).

¹⁶⁵ Rep. of the S.C., at ¶ 48, U.N.Doc. 48 S/25704 (May 3, 1993).

Ghali went further than his predecessors when he noted that “the nature of the crimes committed and the sensitivities of victims of rape and sexual assault, due consideration should be given in the appointment of staff to the employment of qualified women”¹⁶⁶ when staffing the Office of the Prosecutor. Rape is explicitly enumerated as a crime against humanity in the ICTY Statute¹⁶⁷ and reiterates the widespread nature of SGBV by expressing “its grave alarm at continuing reports of widespread and flagrant violations of international humanitarian law . . . including reports of . . . massive, organized, and systematic detention and rape of women.”¹⁶⁸

The ICTR Statute emphasized the role of SGBV in armed conflict and built upon the avenues available for prosecuting these crimes. While the ICTY Statute solely listed rape as a crime against humanity, the ICTR Statute includes SGBV as war crimes and crimes against humanity. Article 4 of the ICTR Statute includes “rape, enforced prostitution and any form of indecent assault”¹⁶⁹ as outrages upon personal dignity. However, the ICTR Statute narrowly defines armed conflict in the context of crimes against humanity.¹⁷⁰ By adopting this definition, the ICTR Statute inherently restricted the breadth of SGBV that could be prosecuted.

In addition to the advancements made by the ICTY and ICTR Statutes, each tribunal heard groundbreaking cases that addressed SGBV. These cases aided in defining relationships between SGBV and crimes against humanity, war crimes, genocide, and torture. This section will discuss cases that contributed to the evolving connections between SGBV and international criminal law which, in turn, impacted the prosecution of these crimes at the International Criminal Court.

The indictment in *Prosecutor v. Dragan Nikolić* initially did not address SGBV crimes. Nikolić was the Serbian Commander of the Sušica detention camp, which housed as many as 8,000 Muslim detainees between May and October 1992.¹⁷¹ The decision against investigating SGBV at Sušica was short-lived. When the trial started, “evidence began to emerge that many of the women detained in the camp were subjected to sexual assaults, including rape.”¹⁷² In response to this evidence, the three Trial Chamber judges stated:

The Trial Chamber feels that the Prosecutor may be well-advised to review these statements carefully with a view to ascertaining whether to charge Dragan Nikolić with rape and other forms of sexual assault, either as a

¹⁶⁶ *Id.* at art. 15(B)(88).

¹⁶⁷ Updated Statute of the International Criminal Tribunal for the Former Yugoslavia at 6 (Sept. 2009), https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf (compilation of original U.N. resolutions)

¹⁶⁸ *Id.* at 17.

¹⁶⁹ S.C. Res. 955, art. 4(e) (Nov. 8, 1994).

¹⁷⁰ *See id.* at art. 3 (“[C]ommitted as a part of a widespread or systemic attack against any civilian population on national, political, ethnic, racial or religious grounds. . .”).

¹⁷¹ *Case Information Sheet: ‘Sušica Camp’ (IT-94-2) Dragan Nikolić*, International Criminal Tribunal for the Former Yugoslavia, http://www.icty.org/x/cases/dragan_nikolic/cis/en/cis_nikolic_dragan.pdf (last visited May 9, 2019) [hereinafter *Case Information Sheet: Sušica Camp*].

¹⁷² Goldstone & Dehon, *supra* note 155, at 123–24.

crime against humanity or as grave breaches [of the Geneva Conventions] or as war crimes.¹⁷³

The language of this statement is notable due to its indication that “rape and other forms of sexual assault” could be charged as a grave breach of the Geneva Conventions. While Nikolić was not charged with war crimes, he was convicted of “[p]ersecutions on political, racial and religious grounds, murder, *sexual violence*, [and] torture”¹⁷⁴ as crimes against humanity.

Prosecutor v. Anto Furundžija was the third case completed by the ICTY and was another key case that included SGBV crimes. Furundžija was a local Commander of the Croatian Defense Council (HVO) and faced charges of war crimes as a result of his involvement in the torture, rape, and sexual assault of a woman during HVO interrogation. The sole charge in *Furundžija* was rape as a war crime under Article 4(2)(e) of the Additional Protocol II of the Geneva Conventions, which problematically includes rape as an outrage of personal dignity. In *Furundžija*, and in other cases, women lawyers and judges played a pivotal role in prosecuting SGBV. In particular, Hildegard Uertz-Retzlaff and her all-women prosecuting team were instrumental in aggressively pursuing SGBV charges.¹⁷⁵ The case was brought to the Appeals Chamber in 2000, which stated:

With regard to the issue of the reaffirmation by the International Tribunal of rape as a war crime, the Appeals Chamber finds that the international community has long recognized rape as a war crime. In the *Čelebići* judgment, one of the accused was convicted of torture by means of rape, as a violation of the laws or customs of war. This recognition by the international community of rape as a war crime is also reflected in the Rome Statute where it is designated as a war crime.¹⁷⁶

Goldstone and Dehon argue that based on this statement, “the Appeals Chamber does not consider the finding in *Furundžija* to categorize rape as a subset of outrages against personal dignity.”¹⁷⁷ The Appeals Chamber insinuated that “rape is now considered to be a self-standing war crime”¹⁷⁸ through the direct reference to Article 8(2)(b)(xxii) and Article 8(2)(e)(vi), where forms of SGBV are categorized as free-standing war crimes, independent of “personal dignity.” This decision by the Appeals Chamber is crucial in the elevation of SGBV crimes as it signals a normative acceptance of SGBV as a free-standing war crime.

¹⁷³ Prosecutor v. Nikolić, Case No. IT-94-2-R61, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, ¶ 33 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 20, 1995).

¹⁷⁴ *Case Information Sheet: Sušica Camp*, *supra* note 171, at 1.

¹⁷⁵ Peggy Kuo, *Prosecuting Crimes of Sexual Violence in an International Tribunal*, 34 CASE WESTERN RES. J. INT’L L. 305, 313–14 (2002).

¹⁷⁶ Prosecutor v. Furundžija, IT-95-17/1-A, Judgement, ¶ 210 (Int’l Crim. Trib. for the Former Yugoslavia July 21, 2000).

¹⁷⁷ Goldstone & Dehon, *supra* note 155, at 126.

¹⁷⁸ *Id.* at 127.

Further, this indicates a broader recognition of the Rome Statute's more progressive definition of SGBV as a free-standing war crime.¹⁷⁹

Rape as free-standing a war crime was affirmed in *Prosecutor v. Dragoljub Kunarac, et al. Kunarac* was "the first indictment in the history of international war crimes prosecutions with charges based solely on crimes of sexual violence against women."¹⁸⁰ Over the course of the trial, the charges were repeatedly amended. Initially, the sixteen counts of rape were listed as crimes against humanity and, "[i]n line with prosecutorial strategy at that stage, when rape was the basis for war crimes charges, it was subsumed under torture and outrages against personal dignity."¹⁸¹ The indictment was amended to add six counts of rape as a violation of the laws or customs of war in addition to the two existing personal dignity charges.¹⁸² The charges were again amended to include seven counts of rape as a war crime.¹⁸³ *Kunarac* expanded the definition of rape to include all instances in which consent is not voluntarily given¹⁸⁴ and held for the first time that sexual slavery is a crime against humanity.¹⁸⁵ Again, these charges were the result of the efforts of Uertz-Retzlaff and other women, who "sought to charge sexual violence under different criminal headings, including enslavement, to reflect the diverse nature of sexual violence. . . ."¹⁸⁶

The ICTY also made history in *Prosecutor v. Zejnil Delalić* by prosecuting rape as a form of torture. In this case, the Office of the Prosecutor "began to take imaginative steps to prosecute gender crimes as war crimes and grave breaches of the Geneva Conventions."¹⁸⁷ Goldstone and Dehon argue that the most successful strategy in elevating SGBV crimes to grave breaches of the Geneva Conventions has been to use these crimes as evidence of *actus reus* for recognized grave breaches.¹⁸⁸ Under this approach, SGBV is charged as a constituent crime to a recognized grave breach. An SGBV crime is dependent on the commission of an enumerated grave breach and thus limited to instances of SGBV that occurs concurrently with a grave breach. Instead, a new category inclusive of SGBV crimes as free-standing grave breaches should be created.

Strategically charging SGBV as a constituent crime was piloted in *Delalić*, where repeated incidents of rape were charged as torture. The Trial Chamber accepted this logic, ruling that "the rape of any person [is] a despicable act which strikes at the very core of human dignity and physical integrity."¹⁸⁹ The Trial Chamber held that rape constituted a form of torture because the rapes were "committed with an intent to discriminate against

¹⁷⁹ See *infra* Part V.B.

¹⁸⁰ Rosalind Dixon, *Rape as a Crime in International Humanitarian Law: Where to from Here?*, 13 EUR. J. INT'L L. 697, 697 (2002).

¹⁸¹ Goldstone & Dehon, *supra* note 155, at 127.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ Dixon, *supra* note 180, at 700.

¹⁸⁵ Goldstone & Dehon, *supra* note 155, at 129.

¹⁸⁶ MICHELLE JARVIS & NAJWA NABTI, *Policies and Institutional Strategies for Successful Sexual Violence Prosecutions*, in PROSECUTING CONFLICT-RELATED SEXUAL VIOLENCE AT THE ICTY 77 (Serge Brammertz & Michelle J. Jarvis eds., 2016).

¹⁸⁷ Goldstone & Dehon, *supra* note 155, at 125.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

‘Muslims in general’ and ‘the victim in particular.’”¹⁹⁰ Goldstone and Dehon highlight the relationship between SGBV and torture:

Rape specifically was not enumerated in the list of grave breaches, possibly because it was not considered to be a crime of violence of the type deserving of the greatest liability under the Conventions gender crimes recognized as grave breaches are subject to universal jurisdiction. This development allows for gender crimes to be prosecuted by domestic courts, which could facilitate the domestic implementation of the substantive and procedural advances made by the Tribunals in their analysis and prosecution of gender crimes.¹⁹¹

The recognition of rape as torture by the ICTY paved the way for SGBV crimes to be charged as a constituent element to a grave breach, thus elevating SGBV by association. This recognition is significant because “it reverses the dismissive attitude toward crimes perpetuated mostly against women that resulted in none of the provisions specific to women in the Geneva Conventions being designated as ‘grave breaches.’”¹⁹²

The roundabout manner of charging rape as a constituent grave breach, while a major advancement, does not go far enough in elevating SGBV. SGBV should be enumerated as free-standing grave breaches, thereby including more forms of violence and subjecting perpetrators to universal jurisdiction. Further, the fact that the torture in *Delalić* took the form of rape suggests that the victim was also discriminated against based on her gender identity. Gender discrimination was explicitly dismissed when the ICTY “held that complainants were ‘taken out’ to be raped ‘on the basis *only* of their Muslim ethnicity,’ and that the Muslim men and women in Foca were ‘killed, raped or severely beaten’ and the ‘*sole reason* for this treatment was their Muslim ethnicity.’”¹⁹³ This ruling highlights the ongoing need for a more intersectional approach to SGBV. By “oscillat[ing] between essentialisms of gender and race,”¹⁹⁴ the ICTY failed to encapsulate the complex identities of the victims, whose experiences were informed by race *and* gender. The ICTY chose to identify the “Muslim civilian population” as the general victims of these gendered attacks instead of recognizing that SGBV was committed against Muslim women because of their dual identities.¹⁹⁵

¹⁹⁰ Dixon, *supra* note 179, at 702.

¹⁹¹ Goldstone & Dehon, *supra* note 155, at 126.

¹⁹² *Id.* at 125–26.

¹⁹³ Dixon, *supra* note 180, at 701.

¹⁹⁴ *Id.* Biological essentialism denies the unique interaction multiple, intersectional identities that individuals possess in favor of viewing identities as monolithic and discrete. Angela Harris articulates this in her critique of Catharine MacKinnon’s “gender essentialism—the notion that a unitary, ‘essential’ women’s experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience.” Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990). Harris argued that when feminist legal theorists proffered a unified “women’s experience” “in the attempt to extract an essential female self and voice from the diversity of women’s experience, the experience of women perceived as ‘different’ are ignored or treated as variations on the (white) norm.” *Id.* at 615.

¹⁹⁵ Dixon, *supra* note 180, at 701.

*Prosecutor v. Jean-Paul Akayesu*¹⁹⁶ at the ICTR affirmed for the first time that SGBV crimes may constitute genocide. Like *Nikolić*, *Akayesu* did not initially include charges of SGBV crimes,¹⁹⁷ which were only added when witness testimonies that indicated the pervasive presence of SGBV in the commune where Akayesu was the mayor and supported the commission of these crimes.¹⁹⁸ Judge Navantham Pillay, the only woman judge at the ICTR at the time, advocated for the indictment to be amended to include SGBV charges.¹⁹⁹ Like many of the prior SGBV cases, the ICTR relied on the outdated “outrages upon personal dignity” language, but also recognized that “rape committed with the aid of a public official is torture.”²⁰⁰ This decision was monumental because any form of SGBV had yet to be held as constituting genocide.²⁰¹

For the first time in history, an international war crimes tribunal successfully convicted a defendant guilty of genocide where SGBV was a critical component of the genocide charge.²⁰² Askin outlines just how monumental the *Akayesu* decision was for the prosecution of SGBV:

(1) the trial chamber recognized sexual violence as an integral part of the genocide in Rwanda, and found the accused guilty of genocide for crimes that included sexual violence; (2) the chamber recognized rape and other forms of sexual violence as independent crimes constituting crimes against humanity; and (3) the chamber enunciated a broad, progressive international definition of both rape and sexual violence.²⁰³

The international criminal tribunals made significant progress in bringing substantial prosecutions of SGBV crimes to the fore. Patricia Viseur Sellers reflects, “[t]he *ad hoc* [tribunals] by trying and convicting perpetrators [of SGBV crimes] fomented a legal climate beyond [its] jurisdiction that [made it conducive to draft] several sex-based crimes [into] the Rome Statute of the ICC.”²⁰⁴ As the ICTY and ICTR were unfolding, momentum for a permanent international criminal court grew, and the drafting process for the Rome Statute ran concurrently to some prosecutions at both tribunals.²⁰⁵ Due to the involvement of WCGJ members in the *ad hoc* tribunals, many of the arguments used at Rome reflect the *ad hoc*

¹⁹⁶ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (Int’l Crim. Trib. for Rwanda Sept. 2, 1998).

¹⁹⁷ Goldstone & Dehon, *supra* note 155, at 124.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ Diane Marie Amann, *Prosecutor v. Akayesu. Case ICTR-96-4-T*, 93 AM. J. INT’L L. 195, 197 (1999).

²⁰¹ “With regard, particularly, to . . . rape and sexual violence, the Chamber wishes to underscore the fact that in its opinion, they constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such.” *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 731 (Int’l Crim. Trib. for Rwanda Sept. 2, 1998).

²⁰² See Kelly D. Askin, *Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status*, 93 AM. J. INT’L L. 97, 105–110 (1999) (surveying the indictment, trial, and judgment of Jean-Paul Akayesu).

²⁰³ *Id.* at 107.

²⁰⁴ PATRICIA VISEUR SELLERS, *Individual(s’) Liability for Collective Sexual Violence*, in GENDER AND HUMAN RIGHTS 163 (Karen Knop ed., 2004).

²⁰⁵ Halley, *supra* note 11, at 9.

drafting process outcomes. For example, the WCGJ borrowed lines from *Čelebići* when advocating for the admission of rape in the Rome Statute's list of grave breaches.²⁰⁶ The WCGJ's ability to take hold of the anti-impunity momentum that spurred the creation of the *ad hoc* tribunals was necessary to their overall success at Rome. As a result, the Court was influenced by the advances—and downfalls—of the tribunals and, in turn, some *ad hoc* tribunal cases were influenced by the Rome Statute's more progressive SGBV provisions. The timing of the justice cascade and the preeminence of the transnational women's network by the United Nations conferences of the 1990s was not a coincidence. Both events were the result of the "epochal ruptures of the late twentieth century"²⁰⁷ and, without these events, it is unlikely that the WCGJ would have been able to impact the Rome Statute's language on SGBV so deeply.

IV. FROM PERIPHERAL BACKWATERS TO THE FORE: FEMINIST ACTIVISM IN ROME

This Part is a critical examination of the Women's Caucus for Gender Justice's role in the foundation of the International Criminal Court. The WCGJ was founded as a direct outgrowth of the transnational women's network after its successes at United Nations conferences. This piece of the story was the fortuitous confluence of three events brought about by the human rights wave: gender mainstreaming, the justice cascade, and the creation of the International Criminal Court. Like the Parts before, it is essential to tell the story of becoming, that is, engage deeply with the temporally and legally complex events that aided in the establishment of the Court through thick description. The issues that the WCGJ fought for at negotiations were wide-sweeping, and for the sake of brevity, this Part will focus on language modifications that sought to fundamentally alter how the law conceptualizes SGBV.²⁰⁸

a. Establishing an International Criminal Court: A Short History

The concept of an international criminal court was far from new by the time that Trinidad and Tobago proposed its creation to the United Nations General Assembly in 1989, with direct efforts in recent history spanning as early as 1899 with the First Hague Convention for the Settlement of International Disputes.²⁰⁹ Almost a hundred years after the First Hague

²⁰⁶ See *id.* at 12, 67 (noting the strategy of referencing ICTY and ICTR decisions when negotiating the Rome Statute).

²⁰⁷ Hoffmann, *supra* note 7, at 282.

²⁰⁸ The Women's Caucus for Gender Justice also impacted procedural issues involving gender, but those issues are not the subject of this project. See, e.g., Halley, *supra* note 11, at 36, 107–08 (surveying various procedural initiatives undertaken by the WCGJ); Goldstone & Dehon, *supra* note 155, at 136–37 (discussing WCGJ's gender mainstreaming efforts on the Rules and Procedures of Evidence of the ICC).

²⁰⁹ In 1907, the Second Hague Convention dealt with obligatory arbitration and received support from major world powers, including the United States, Great Britain, and Russia. During the interwar period, the League of Nations sought to establish the Permanent Court of International Justice with proposals from Allied powers "containing various international rules of individual culpability for human rights abuses and aggression." STEVEN C. ROACH, *POLITICIZING THE INTERNATIONAL CRIMINAL COURT: THE CONVERGENCE OF POLITICS, ETHICS, AND LAW* 21 (2006).

Convention, the International Law Commission produced a draft statute for the International Criminal Court.²¹⁰ Throughout 1995 and 1997, preparatory committees met six times to write the draft statute, and in June of 1998, 168 state delegations and several delegates from international organizations met in Rome to negotiate the document.²¹¹ When the conference began, the draft statute was riddled with over 1,700 square brackets, each marking points of disagreement between states.²¹²

During the conference, progressive states formed the Like-Minded Group (LMG), “an ad hoc group of states [that] work[ed] on the draft and advance[d] the idea of a permanent court.”²¹³ The Like-Minded Group was largely comprised of “middle powers that were not directly involved in any conflicts, and had relatively little historical baggage to compromise the credibility of their search for humanitarian solutions.”²¹⁴ The LMG

conceived of themselves as depoliticized in an important sense: they lacked strong political interests and strategic entanglements in many parts of the world. Because they were not global powers, they thought of themselves as more able to construct international architecture that would be perceived as fair and legitimate by the rest of the world . . . [and] powerful states with complex interests had limited ability to advance impartial international justice.²¹⁵

The Permanent Five (P5), however, remained wary of the statute and sought to preserve their Security Council privileges.²¹⁶ In response, the P5 suggested that the Security Council should control the new court as an effort to insulate their citizens from criminal accountability and were met with great resistance.²¹⁷ William Pace, the leader of the Coalition for the International Criminal Court, warned that “some countries . . . want the court to be controlled by the Security Council, reducing the ICC to a sham status of a ‘permanent’ *ad hoc* tribunal; one which would dispense international criminal justice only to the small and weak countries, never to violators in powerful nations.”²¹⁸ In the summer of 1997, Singaporean diplomats offered an important compromise between P5 nations and the LMG: The Council could possess limited powers over the Court, and if the Council agrees that a particular inquiry would be counterproductive, they could halt investigation for a certain period of time.²¹⁹ The Security Council could refer cases to the Court, but P5

²¹⁰ *Id.* at 33.

²¹¹ *Id.* at 32–33.

²¹² ANNA-KARIN LINDBLOM, NON-GOVERNMENTAL ORGANISATIONS IN INTERNATIONAL LAW 463 (2005) (“[T]he draft Statute which was before the conference was far from a finalised text, containing around 1,700 square brackets representing points of disagreement and different alternatives for the wording of provisions.”).

²¹³ DAVID BOSCO, ROUGH JUSTICE: THE INTERNATIONAL CRIMINAL COURT IN A WORLD OF POWER POLITICS 38–39 (2014).

²¹⁴ Philippe Kirsch & John T. Holmes, *The Birth of the International Criminal Court: The 1998 Rome Conference*, 36 CAN. Y.B. INT'L. L. 8 (1999)

²¹⁵ BOSCO, *supra* note 213, at 39.

²¹⁶ *Id.* at 40–41.

²¹⁷ *Id.* at 41.

²¹⁸ *Id.*

²¹⁹ *Id.* at 42–43.

members could not block cases on their own.²²⁰ In response, the P5 proposed a second compromise with language “prevent[ing] the court from exercising jurisdiction over the ‘official actions’ of nonmember states and would include a broad opt-out provision.”²²¹

Elections in P5 nations conveniently strengthened the possibility for the Court’s success: President Clinton was reelected; Britain’s Labour Party won a landslide majority, and the French Pluralist Left won a majority in the National Assembly.²²² Soon after, Britain joined the LMG, and France decided that it “had to end up on the ‘right’ side of negotiations, but that the concerns of the military had to be addressed.”²²³ Despite hopes of American cooperation accompanying the reelection of President Clinton, most advocates were aware that major powers would not support the Court. Richard Dicker of Human Rights Watch recalled:

There was at least an implicit recognition that a number of heavyweights were going to remain outside the court and that the imperative was to push the negotiation across the finish line . . . and even with the disadvantage of several heavyweights on the outside, rely on the momentum that the like-minded group would provide, rely on that quantitative mass and the sense of momentum, to pull along those heavyweights who were not so favorably disposed.²²⁴

On July 17, 1998, the Rome Statute was adopted in a vote of 120-7 with 21 abstentions.²²⁵ The final version of the Rome Statute reflected the compromises, “requiring the ICC to obtain Security Council permission to proceed and precluding the Security Council from any ability to stop investigations.”²²⁶ This allows the Security Council to perform its Chapter VII duties while preventing the P5 from unilaterally abusing their veto power to halt investigations.²²⁷ Almost fifty years after the International Military Tribunals, “the most powerful states were losing their grip on the mechanisms of international justice.”²²⁸

b. The Road to Rome: Negotiating Sex, Gender, and Violence

By the mid-1990s, NGOs became an integral component of United Nations negotiations. During the first Preparatory Committee (PrepCom1), the Coalition for the International

²²⁰ *Id.*

²²¹ *Id.* at 49–50.

²²² *Id.* at 43.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ FANNY BENEDETTI, KARINE BONNEAU & JOHN L. WASHBURN, *NEGOTIATING THE INTERNATIONAL CRIMINAL COURT: NEW YORK TO ROME, 1994–1998* 142 (2013).

²²⁶ CHRISTOPHER C. JOYNER, *INTERNATIONAL LAW IN THE 21ST CENTURY: RULES FOR GLOBAL GOVERNANCE* 157 (2005).

²²⁷ ROACH, *supra* note 209, at 32.

²²⁸ BOSCO, *supra* note 213, at 51.

Criminal Court (CICC) was founded as a network to coordinate pro-ICC NGOs.²²⁹ In addition to advocating for the creation of the Court, the CICC worked to include NGOs in preparatory committees and the conference itself. Throughout the preparatory committees, the CICC found allies in the LMG and, at the third meeting of PrepCom1, NGOs were permitted to register for all informal and formal meetings.²³⁰ By the Rome conference, the United Nations allowed the participation of NGOs, and NGO input became valued as expert information as opposed to lobbying.

The reputation that NGOs earned as reliable and knowledgeable sources of information, prepared to engage in a professional way about the subject matter of ICC issues, greatly contributed to the receptiveness of states to their positions and assisted the good working relationships that evolved between many NGOs and state delegations.²³¹

The 316 NGO members of the CICC split into four working groups, including one on gender issues: the Women's Caucus for Gender Justice.²³²

The Women's Caucus for Gender Justice was a direct outgrowth of the transnational women's network solidified at UN conferences. At Rome, the Women's Caucus for Gender Justice emerged as the leading feminist group credited for incorporating a "stronger gender perspective throughout . . . [the Rome Statute's] text"²³³ and advocated for feminist reform.²³⁴ The WCGJ was an officially recognized coalition of over 300 NGOs, human rights activists, and lawyers that lobbied for feminist issues, including the expansion of language surrounding SGBV.²³⁵ Many of the activists on the WCGJ were legal scholars that actively documented their work in law review articles, providing a unique window into the movement's *modus operandi*.²³⁶ Bedont and Hall-Martinez credit the WCGJ's success to their "persistent lobbying efforts,"²³⁷ and that "[w]omen's rights activists viewed the negotiations for the ICC as a historic opportunity to address the failures of earlier international treaties and tribunals to properly delineate, investigate, and prosecute wartime violence against women."²³⁸ Within

²²⁹ Fanny Benedetti & John L. Washburn, *Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterward on the Rome Diplomatic Conference*, 5 GLOBAL GOVERNANCE 1, 8–9 (1999).

²³⁰ *Id.* at 23.

²³¹ Zoe Pearson, *Non-Governmental Organizations and the International Criminal Court: Changing Landscapes of International Law*, 39 CORNELL INT'L L. J. 243, 272 (2006).

²³² Halley, *supra* note 11, at 21.

²³³ Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 396 n.73 (2000).

²³⁴ Halley, *supra* note 11, at 23 ("[The WCGJ] consolidated a coherent platform for feminist reform and lobbied hard in the Rome Statute negotiations."). Many of the core members of the WCGJ, such as Rhonda Copelon, Hillary Charlesworth, Barbara Bedont, Katherine Hall-Martinez, Valerie Oosterveld, among others, are academics that meticulously documented their experiences and strategies in law review articles. *Id.* at 42. Some WCGJ members were also members of their state's delegation, like Canadian lawyer Valerie Oosterveld, and were able to influence state support of their issues from the inside. *Id.* at 105.

²³⁵ Nicole Eva Erb, *Gender-Based Crimes Under the Draft Statute for the Permanent International Criminal Court*, 29 COLUM. HUM. RTS. L. REV. 401, 425 (1998).

²³⁶ Halley, *supra* note 11, at 23.

²³⁷ Barbara Bedont & Katherine Hall-Martinez, *Ending Impunity for Gender Crimes Under the International Criminal Court*, 6 BROWN J. WORLD AFF. 65, 69 (1999).

²³⁸ *Id.* at 66.

the scope of SGBV, the WCGJ had two goals: elevate SGBV crimes in the international humanitarian law hierarchy and influence the language of the Rome Statute itself to embrace a progressive understanding of gender.²³⁹ The following subsection will begin by exploring the goals of the WCGJ throughout Rome and conclude with an analysis of how these goals have been realized in practice.

i. Defining Gender and Gender Violence

The WCGJ started at the proverbial drawing board for their first major language negotiation: defining “gender” and “gender violence.” Bedont and Hall-Martinez stated their rationale for the use of “gender” over “sex” in the Rome Statute:

The Women’s Caucus pushed for the term “gender” as opposed to “sex” because the latter is restricted to the biological differences between men and women, whereas gender includes differences between men and women because of their socially constructed roles. Similarly, “gender crimes” is preferable to “sexual violence” because it includes crimes which are targeted at men or women because of their gender roles which may not have a sexual element.²⁴⁰

“Gender violence” subsumes “sexual violence,” as “sexual violence” cannot encompass the expansive forms of violence that people face as a result of social constructs surrounding gender.²⁴¹ The inclusion of “gender violence” into the Rome Statute also addresses actions that affect men and LGBTQ+ people. For example, men face gender-based persecution “when young boys are either killed to prevent their becoming soldiers or coerced and humiliated into becoming killers.”²⁴² The United Nations has generally experienced great difficulty in negotiating mutually agreed upon definitions of gender,²⁴³ and the Rome conference was not an exception.

The strife associated with negotiating gender issues is not unique to the Rome Statute. For example, in Elisabeth Friedman’s survey of gender mainstreaming at United Nations conferences, she found that an alliance is often formed between states with strong religious leadership.²⁴⁴ These states tend to rally against language “that could be seen as promoting

²³⁹ “[T]hey wanted authoritative enumeration of sexual crimes in their own terms. They wanted to establish that rape, sexual violence, and sexual slavery are IHL/ICL crimes. They wanted these sexual crimes to be lodged as high up in the hierarchy of IHL/ICL codification as they could get them, and in terms that derive from their shared feminist understanding of them.” Halley, *supra* note 11, at 49–50.

²⁴⁰ Bedont & Hall-Martinez, *supra* note 237, at 68.

²⁴¹ Halley, *supra* note 11, at 82. An example of gender violence could include the “impress[ion of women] into maternity a form of gender enslavement. The same is true when women are impressed into providing domestic services whether on a large scale or individualized basis (forced temporary marriage).” *Id.* at 84.

²⁴² *Id.* at 84.

²⁴³ See *supra* Part III.

²⁴⁴ See Friedman, *supra* note 64, at 323 (“Led by the Vatican, a coalition of countries and conservative NGOs engaged the transnational women’s rights movement in a framing contest on women’s rights. While claiming to

legal abortion or harming the traditional family structure.”²⁴⁵ The WCGJ and more progressive states struggled against those that wished to further a more traditional understanding of “gender” (defining “gender” in a manner that would equate it to “sex”). As a result, a “peculiar and circular”²⁴⁶ definition of “gender” was drafted: “For the purposes of this Statute, it is understood that the term ‘gender’ refers to the *two sexes*, male and female, *within the context of society*.”²⁴⁷ The resulting quixotic article both emphasizes a biologically essentialist conception of “gender” and infers that this biologically essentialist conception of gender can be analyzed through social constructs. Oosterveld asserts that the United Nations has avoided defining gender due to the lack of consensus over the meaning of gender,²⁴⁸ and Article 7(3) demonstrates that gender “is undertheorized in international law.”²⁴⁹ The WCGJ’s structural feminist²⁵⁰ definition of gender was unpopular, especially with conservative states. As a result, other WCGJ agenda items were at risk: “The dispute regarding terminology [of gender] threatened the inclusion of certain gender crimes, of a non-discrimination clause, and of special protective measures under the procedural provisions.”²⁵¹

ii. Honor, Dignity, and the Geneva Conventions

The pervasive language surrounding SGBV as a crime against the “honor” and “dignity” of a woman was another target for the WCGJ, who sought to elevate these crimes to a grave breach. The CUNY Clinic Memorandum²⁵² outlined a feminist project for a new court, which argued for the inclusion of SGBV crimes as a grave breach²⁵³ *vis-à-vis* torture, as seen in *Delalić*:

promote an agenda that also supported gender equality, this coalition specifically attacked those rights that threatened the hegemony of a ‘traditional’ conception of gender relations.”)

²⁴⁵ *Id.*

²⁴⁶ Rhonda Copelon, *Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law*, 46 MCGILL L. J. 217, 236 (2000).

²⁴⁷ Rome Statute, *supra* note 15, at art. 7(3) (emphasis added).

²⁴⁸ Valerie Oosterveld, *The Definition of “Gender” in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?*, 18 HARV. HUM. RTS. J. 55, 66 (2005).

²⁴⁹ *Id.* at 82.

²⁵⁰ “Sexual violence, whether directed against women or men, is usually a form of gender violence, since it is an attacked [sic] based on and intended to destroy one’s gender identity, whether masculine or feminine. That is, women are raped ... to control and destroy them as women and to signal male ownership over them as property; men are raped to humiliate them though [sic] forcing them to experience the position of women and, thereby, rendering them, according to the prevailing stereotypes, weak and inferior.” Halley, *supra* note 11, at 85–86 (quoting a recommendation by the WCGJ). For example, the WCGJ offered a distinctly structural interpretation of the *Tadić* case: “[A] man was tortured when another prisoner was forced to bite off his testicle. The sexual organs of the man were targeted in order to take away his male identity and to make him like a woman.” *Id.* at 86.

²⁵¹ Bedont & Hall-Martinez, *supra* note 237, at 68.

²⁵² Jennifer Green et al., *Affecting the Rules for the Prosecution of Rape and Other Gender-Based Violence Before the International Criminal Tribunal for the Former Yugoslavia: A Feminist Proposal and Critique*, 5 HASTINGS WOMEN’S L.J. 171 (1994).

²⁵³ *See id.* at 237 (“Every act of rape in war—whether a consequence of indiscipline, retaliation, or genocidal policies—is a ‘grave breach,’ a principle that has been recently reaffirmed by international scholars at the International Committee of the Red Cross.”).

Within the framework of “grave breaches” against the civilian population recognized by the Fourth Geneva Convention, rape, forced prostitution and forced pregnancy are not simply crimes against “honor,” but also crimes of violence. They constitute forms of “willful torture and inhumane treatment” and they “willfully caus[e] great suffering or serious injury to body or health.”²⁵⁴

Further, SGBV should also be charged as a grave breach in order to individualize the crime as opposed to a crime against humanity, which implies that the crime was predominantly a harm suffered by society.²⁵⁵ Categorizing SGBV as an honor crime divorces the physical and psychological violence inflicted on victims and reorients the focus to an abstract conception of honor. This approach deemphasizes the actual violence of the crimes and distances the perpetrator from the crime: “[t]he outdated and potentially harmful message that these violent, physical crimes were to be evaluated based on the harm done to the victims’ honour, modesty, or chastity”²⁵⁶ is detrimental to a true rebuke of SGBV. The WCGJ sought to send the “radical” message that sexual violence is *violence*: SGBV “is a sexual *assault*; it is *violent* and *physical*; it causes *physical and emotional (or physical and psychological) harm*; it is *painful*.”²⁵⁷ Whereas the current IHL lexicon “assume[d] that women should be protected from sexual crimes because they implicate a woman’s honor, reinforcing the notion of women as men’s property rather than because they constitute violence.”²⁵⁸

The WCGJ was only partially successful in their endeavor. The Rome Statute incorporated “outrages upon personal dignity,” but removed both SGBV and “honor” from the provision. Article 8(2)(b)(xxi) is dedicated to personal dignity violations as a war crime, but does not explicitly mention any act of SGBV.²⁵⁹ Article 8(2)(b)(xxii) is devoted entirely to SGBV: “rape, sexual slavery, enforced prostitution, forced pregnancy ... enforced sterilization, or any other form of sexual violence also constituting a grave breach” may be prosecuted by the Court.²⁶⁰ This development, while certainly not ideal for the WCGJ, “[t]his characterization of sexual violence is . . . important to the ICC’s capacity to indict sexual violence crimes in multiple ways.”²⁶¹ For the first time, SGBV crimes were delinked from antiquated notions of morality.

²⁵⁴ *Id.*

²⁵⁵ HILLARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS* 315–21 (2000).

²⁵⁶ Valerie Oosterveld, *Sexual Slavery and the International Criminal Court: Advancing International Law*, 25 MICH. J. INT’L L. 605, 613 (2004).

²⁵⁷ Halley, *supra* note 11, at 59.

²⁵⁸ Hilary Charlesworth, *Feminist Methods in International Law*, 93 AM. J. INT’L L. 379, 386 (1999).

²⁵⁹ Rome Statute, *supra* note 15, art. 8(2)(b)(xxi).

²⁶⁰ *Id.* at art. 8(2)(b)(xxii).

²⁶¹ Bedont & Hall-Martinez, *supra* note 237, at 72.

iii. (En)forced Pregnancy

The idea to introduce forced pregnancy as a SGBV crime likely originated from feminist activists.²⁶² The WCGJ's recommendation to include forced pregnancy as a crime launched the WCGJ into conflict with the Holy See who "sought to delete enforced pregnancy from the draft statute on the ground that it threatened to criminalize enforcement of national laws discouraging or criminalizing abortion."²⁶³ To quell tension in order for forced pregnancy to move forward, the WCGJ sought to limit the scope of the crime.²⁶⁴ First, the WCGJ specified that "forced pregnancy" is "a violent crime, committed with a violent intent."²⁶⁵ Second, the WCGJ narrowed its scope: "rape or other sexual abuse carried out with the intent or having the effect of making a woman pregnant and/or confining, controlling, or coercing a pregnant woman because she is pregnant."²⁶⁶ The final definition reads: "the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy."²⁶⁷ While this is weaker than the original proposal by the WCGJ, as it focuses solely on confinement (spatial-based) and excludes coercion and control (power-based), the language still represents a step forward in recognizing forced pregnancy as a crime against humanity.

iv. Enforced Prostitution and Sexual Slavery: The Consent Schism

Reforms involving enforced prostitution and sexual slavery, unlike previous objectives, illuminate the ideological rift between structuralist and liberal feminists. Structuralist feminists tended to support the view that all sex work, regardless of consent, constitutes sexual slavery and often conflate enforced prostitution, trafficking, and sexual slavery, denying the agency of sex workers to consent to commercial sex.²⁶⁸ On the other hand, liberal

²⁶² Halley, *supra* note 11, at 88.

²⁶³ *Id.* at 89.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ Rome Statute, *supra* note 15, at art. 7(2)(f).

²⁶⁸ See Halley, *supra* note 11, at 90–91 ("[B]y structuralist I mean that a commitment to the view that the subordination of women is coextensive with male/female relations is their *structure*. In a fully structuralist feminist view of sexuality, no sexual interaction between a man and a woman is free from the effects of male domination."). The conflation of sex trafficking with slavery dates back to the moral campaigns of the nineteenth century. Similar claims were made by second wave feminists, who often improperly forged links between chattel slavery and sex work. See, e.g., Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335, 338–39 n. 7 (2006) (summarizing different ideological approaches to sex work); TERESA BILLINGTON-GREIG, *THE TRUTH ABOUT WHITE SLAVERY* 429, 443 (1913) (disputing the historical existence of white slavery as "an epidemic of terrible rumours ... a campaign of sedulously cultivated sexual hysterics."); CAROLE PATEMAN, *THE SEXUAL CONTRACT* 203–04 (1988) (comparing sex work to slavery); KATHLEEN BARRY, *FEMALE SEXUAL SLAVERY* 40 (1979) ("Female sexual slavery is present in ALL situations where women or girls cannot change the immediate conditions of their existence; where regardless of how they got into those conditions they cannot get out; and where they are subject to sexual violence and exploitation."); Catherine A. MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER & L. 13, 22 (1993) (arguing for the application of the Thirteenth Amendment to sex work).

feminists differentiated between consensual sex work and enforced prostitution.²⁶⁹ The schism between the two ideologies is evident in Oosterveld's²⁷⁰ "Sexual Slavery and the International Criminal Court," which documents the effort by structural feminists to retire "enforced prostitution" in favor of "sexual slavery": some felt "that sexual slavery is a broader, more sensitive—and therefore more useful—term that encompasses or replaces enforced prostitution,"²⁷¹ whereas "[o]thers argue that both sexual slavery and enforced prostitution are different terms with different elements, and that enforced prostitution should not be considered to be subsumed within sexual slavery."²⁷² Because the WCGJ was composed of both structuralist and liberal feminists, the group was often prevented from endorsing language due to a lack of consensus on terminology.²⁷³ In this instance, the

²⁶⁹ See Halley, *supra* note 11, at 92 ("There is a sharp divide between feminists who see 'sexual slavery' and those who see 'bargained-for exchange' when a woman accepts money or some other benefit in exchange for having sex . . . [the latter] seek reforms that limit criminalization of the pimp's and John's activities to instances in which the woman is coerced, and leave open the category of 'nonforced prostitution.'"). Thomas described the structuralist approach to consensual sex work as follows:

Structuralists called for a definition that included all commercial sex automatically within the ambit of sex trafficking—an explicit finding of coercion would not be necessary since, according to the structuralist approach, all commercial sex was necessarily coercive. The structuralist proposal also called for an explicit statement disregarding any manifestation of apparent consent by the trafficking victim. Just as one cannot legally consent to one's own enslavement, consent could not be a basis for validating commercial sex since it was "female sexual slavery."

Halley et al., *supra* note 268, at 98.

²⁷⁰ Who, according to Halley, was "one of the Rome process's liberal feminists," but "she supported structuralist reforms in structuralist terms. She argued for a shift to autonomy that would strengthen the liberal feminist variant." Halley, *supra* note 11, at 100.

²⁷¹ Oosterveld, *supra* note 256, at 618 (2004) (summarizing the liberal feminist approach to sexual slavery and enforced prostitution). For example, Askin argued that "while '(en)forced prostitution' is usually the term used when women are forced into sexual servitude during wartime, the term 'sexual slavery' more accurately identifies the prohibited conduct[.]" KELLY D. ASKIN, *Women and International Humanitarian Law*, in 1 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 41, 48 n. 29 (Kelly D. Askin & Dorean M. Koenig eds., 1999).

²⁷² Oosterveld, *supra* note 256, at 618.

²⁷³ The December 1997 Recommendations used language to describe trafficking without explicitly using the word: "enslavement and slavery-like practices in all their forms, including by sale, deception, coercion, or threat." Halley, *supra* note 11, at 93. At the March 1998 Preparatory Committee, the WCGJ actively opposed using the term trafficking "[b]ecause of the need for review of the international definition of trafficking, the Women's Caucus suggest[ed] instead that the crime be described as 'trade in and coercive or deceptive transportation of persons.'" *Id.* The ideological struggle between liberal and structural feminists is painfully evident in the December 1997 Recommendations, which attempted to incorporate both ideologies without adequately mediating between the diametrically opposed positions on sex work:

[S]exual enslavement has been diminished by calling it only "enforced prostitution."

The term "enforced prostitution" muffles the degree of violence, coercion and control that is *characteristic of sexual slavery*. It suggests that sexual services are provided as part of an exchange albeit one coerced by the circumstances. When, as in the Geneva Conventions, forced prostitution is equated within the "performance" of degrading acts, the term also suggests that sexual services are offered rather than brutally exacted. It hides the fact that *this is rape*, serial rape, physically invasive and psychologically debilitating in the extreme, and

resulting language used a blend of structural and liberal approaches to enforced prostitution and sexual slavery, highlighting the tension between the two in the Caucus.²⁷⁴ But, curiously, these ideological disagreements were more muted than those on trafficking, where disagreements within the WCGJ were very public.²⁷⁵ Ultimately, the Women's Caucus for Gender Justice adopted a more structural approach to the debate, arguing that enforced prostitution and sexual slavery have, in the past, been conflated and that the same should not be codified in the Rome Statute.²⁷⁶ Articles 7 and 8 include both sexual slavery and enforced prostitution as enumerated crimes against humanity and war crimes. Structural feminists experienced some defeats with regard to sexual slavery: the phrase "trafficking in persons, in particular women and children" was employed to define "enslavement" under Article 7(2)(c), which the WCGJ actually actively opposed throughout the drafting process.²⁷⁷ Similarly, enforced prostitution is still featured in both Article 7 and 8 alongside sexual slavery, despite structuralist WCGJ efforts to retire the phrase. However, the inclusion of sexual slavery alongside enforced prostitution was a net gain for the WCGJ.²⁷⁸

that women are reduced to and sexually bludgeoned as property, and that they are completely under the control of the perpetrator.

History has taught us that *most* so-called "forced prostitution" during armed conflict constitutes sexual slavery.

Id. at 95. Halley writes: "In denouncing enforced prostitution *as* sexual slavery, identifying it with rape, and insisting that women participate in it 'completely under the control' of male attackers, the WCGJ merges enforced prostitution *into* rape and sexual slavery." *Id.* But, however, the recommendations "proceed to a conclusion that *most* forced prostitution is sexual slavery [and] open up the possibility that *some* acts of forced prostitution are *not* enslaving or the equivalent of rape." *Id.* This contradictory statement attempts to advance both liberal and structural positions without meaningfully remediating ideological conflict.

²⁷⁴ Halley notes this is evident in a WCGJ report, *Gender Justice and the ICC*:

The Caucus' [sic] structure has been fundamental to creating a document that reflects the consensus of participants in the Women's Caucus who have attended the Preparatory Committee meetings, and many others, throughout the world, who participated in inspiring [sic], developing, vetting or subscribing to the recommendations. This means that on particular points, some individuals or groups may differ with the Caucus's position but, on the whole, the Core Principles which form part of these recommendations, are supported by thousands of men and women around the world

Id. at 97 n. 351.

²⁷⁵ In the enforced pregnancy versus sexual slavery debate, documents like *Gender Justice and the ICC* alluded at disagreement within the Caucus but, according to Halley, "[w]hat is so striking is how muted these disagreements were. In the context of trafficking, opposed camps exist and are willing to go public with their disagreements." *Id.* at 97.

²⁷⁶ See Oosterveld, *supra* note 256, at 620–22 (outlining the arguments made by the WCGJ favoring the use of "sexual slavery" over "enforced prostitution").

²⁷⁷ See Halley, *supra* note 11, at 93 ("[T]he WCGJ at first advocated alternative language and then actually *opposed* the inclusion of trafficking in the statute.").

²⁷⁸ "[Sexual slavery] can be charged as a war crime in international and internal conflicts as a crime against humanity. It remains to be seen how feminists inside the ICC and those putting pressure on it from the outside will manage the structuralist/[liberal] tension in the WCGJ's interpretations of this crime." *Id.* at 108.

v. Application and Conclusion

The negotiations over SGBV terminology undertaken by the WCGJ were key to shifting the normative perception of gender at the Court. One method of recognizing gender justice is through the enumeration of crimes²⁷⁹ with language affirming the gravity of SGBV. Recognizing gender inequities involves “changing the gender status order, deinstitutionalizing sexist value patterns and replacing them with patterns that express equal respect for women.”²⁸⁰ The WCGJ sought to dismantle heteropatriarchal institutions by redefining war crimes, crimes against humanity, and genocide in a manner that dispels of archaic conceptions of gender, while elevating SGBV in the criminal hierarchy. Prior to the involvement of feminist activists in international criminal tribunals, the “existing formal codes either ignored the sexual and gender dimensions of international crimes altogether or diminished their seriousness by categorizing them as acts related to ‘honour and dignity’ rather than grave breaches of international law[.]”²⁸¹ The WCGJ was partially successful in language-shifting: SGBV may be prosecuted as standalone crimes; honor and dignity language has been divorced from SGBV; and SGBV crimes have been enumerated as an act of war crimes,²⁸² crimes against humanity,²⁸³ and genocide.²⁸⁴

In practice, adherence to the formal rules of the International Criminal Court with regard to SGBV has been far from perfect. During its first decade, the Court went without prosecuting any SGBV crimes. In *Prosecutor v. Thomas Lubanga Dyilo*, the OTP was presented with the opportunity to prosecute SGBV crimes perpetuated against child soldiers. Despite the testimony of thirty-one eyewitnesses “that sexual violence appeared to be an integral component of the attacks against the civilian population,”²⁸⁵ the OTP refused to add SGBV charges. The OTP conceded that SGBV was committed, but did not believe that it reached the threshold of a pattern or policy.²⁸⁶ In *Prosecutor v. Germain Katanga*, the OTP for the first time charged SGBV as crimes against humanity and war crimes, including rape and sexual slavery.²⁸⁷ The Trial Chambers acquitted Katanga of rape and sexual slavery, but ultimately found him guilty of other war crimes and crimes against humanity.²⁸⁸ While advocates for gender justice have made strides in altering the language of SGBV and elevating its gravity in the Rome Statute, in practice, the Court has been much less progressive in applying these normative shifts to international humanitarian law language.²⁸⁹

²⁷⁹ LOUISE CHAPPELL, *THE POLITICS OF GENDER JUSTICE AT THE INTERNATIONAL CRIMINAL COURT* 87 (2016).

²⁸⁰ NANCY FRASER, *Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation*, in *REDISTRIBUTION OR RECOGNITION: A POLITICAL-PHILOSOPHICAL EXCHANGE* 21 (Nancy Fraser et al. eds., 2003).

²⁸¹ CHAPPELL, *supra* note 279, at 92.

²⁸² Rome Statute, *supra* note 15, at art. 8.

²⁸³ *Id.* at art. 7.

²⁸⁴ *Id.* at art. 6.

²⁸⁵ CHAPPELL, *supra* note 279, at 111 (quoting Brigid Inder).

²⁸⁶ *Id.* at 111–12.

²⁸⁷ *Id.* at 119.

²⁸⁸ *Id.* at 119–20.

²⁸⁹ *Id.* at 103–29 (surveying progress, or lack thereof, of SGBV prosecutions before the ICC).

V. CONCLUSION

For the majority of international humanitarian jurisprudence, the gravity of SGBV has been relegated to the peripheral backwaters of international criminal prosecutions. During the post-war international military tribunals, widespread SGBV crimes were barely addressed, and when they were, the actual, individualized harm and extent of the crimes were minimized. SGBV has historically been linked to outdated “family honor” provisions in foundational IHL documents, which emphasize moral transgressions over the physical and psychological harm inflicted on victims. This characterization of SGBV as principally a damage to honor additionally reinforces harmful gender stereotypes and distances the perpetrator from the violent crime itself. Moreover, the failure of the Geneva Conventions to explicitly enumerate any act of SGBV as a grave breach signals that these crimes are lower on the IHL hierarchy and are not subject to universal jurisdiction.

Women lawyers and jurists led the process of elevating SGBV in the international criminal tribunals by prosecuting perpetrators for SGBV as free-standing crimes against humanity and war crimes, and as components of genocide. Most notably, the strategy of using SGBV to prove the *actus reus* of grave breaches and subsequently charging SGBV as a constituent crime was developed at the tribunals. This has been vital in the mission to enumerate SGBV as free-standing crimes and elevate these crimes in the IHL hierarchy. At the Rome Conference, feminist lawyers and activists formed the WCGJ and embarked on the radical endeavor to expand the language surrounding SGBV and deinstitutionalize the language from its patriarchal roots. Their endeavor was partially successful: SGBV was effectively delinked from honor provisions and a more expansive list of SGBV crimes are under the purview of the Court. However, the Rome Statute’s definition of gender is circular and tainted by biological essentialism and much of the feminist language was diluted in favor of a more moderate approach.

The story of the Women’s Caucus for Gender Justice is a fascinating study of the state of human rights in the 1990s: a unique confluence of events in international governance provided the WCGJ with a fortuitous opportunity to institutionalize gender into the Rome Statute with a surprising level of success. The WCGJ benefitted from the paradigmatic furor of the human rights wave, the product of distinct epochal ruptures of the *fin de siècle*. This era can be characterized by the valuation of individual human rights over state sovereignty and anti-impunity as an “explanatory framework for understanding what had just happened.”²⁹⁰ In the rush to salvage the international community’s failures to prevent genocide, the prosecution of past wrongs was ingrained in international criminal law as a model, first at the *ad hoc* tribunals and then at the International Criminal Court. A new thirst for prosecution materialized, and the Women’s Caucus for Gender Justice seized that opportunity to infuse more progressive language on gender into the Rome Statute.

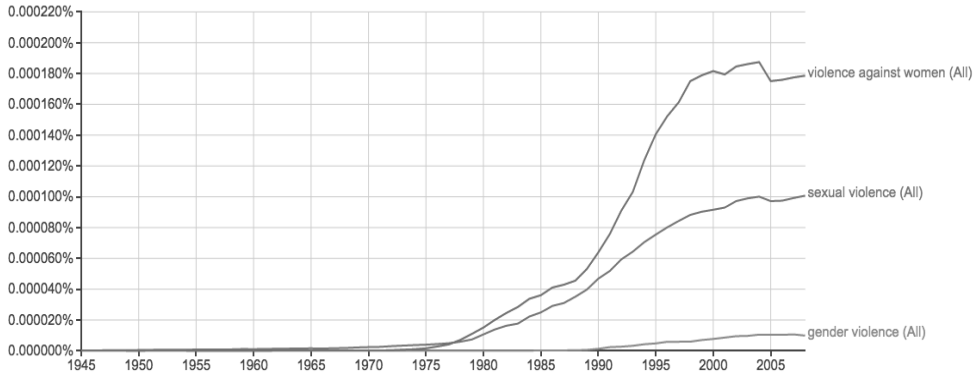
In order to fully elevate the status of SGBV, there must be a considerable normative shift in the language used to conceptualize SGBV. It is imperative to unequivocally and authoritatively affirm SGBV as free-standing grave breaches of the Geneva Conventions. This need can only be fully achieved by a dramatic reconceptualization of SGBV and gender under IHL. While this goal is lofty, it may be achieved in a variety of ways. First, existing

²⁹⁰ Hoffmann, *supra* note 7, at 282.

treaties may be amended to modernize language and enumerate SGBV as a grave breach. Second, criminal tribunals such as the International Criminal Court may broaden SGBV interpretations through its case law, as witnessed at the international criminal tribunals. Third, more progressive language on SGBV may be drafted into new bodies of IHL, such as the new convention on crimes against humanity currently being drafted by the International Law Commission. Finally, and most radically, an entirely new treaty that adopts WCGJ language on gender and SGBV could be constructed. Given the divisive debates over language related to gender in the relatively recent negotiation of the Rome Statute, this is the least practical option. Proponents of gender justice must make continual legal strides to elevate SGBV, eliminate archaic language linking SGBV to honor, embrace an intersectional definition of gender, and recognize sexual and gender-based violence as violence *qua* violence.

APPENDIX

Figure 1



This n-gram illustrates the increasing popularity of terms related to sexual violence. Both “sexual violence” and “violence against women” take off in use in the late 1970s, shortly after the Mexico City Conference, which failed to adequately address VAW. The use of VAW then rapidly increases beginning around 1987, during the apex of talks regarding VAW at United Nations conferences, particularly at Beijing, and briefly dips at 2000. Sexual violence is comparatively less popular, but steadily grows in use overtime. Gender violence, on the other hand, is used very infrequently and only begins to leave the x-axis after 1990, and slowly gains in usage throughout the 1990s and 2000s. SGBV all together was so unused that it could not be graphed.

Figure 2

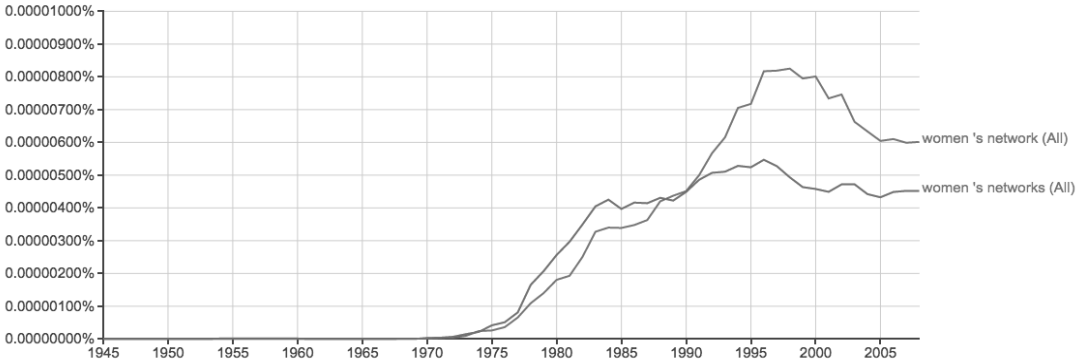


Figure 2 conveys the steady rise in the term “women’s network(s).” The two are graphed separately in order to allow for variation between the singular and plural. In the early 1970s, the term enters use and experiences a sharp incline after 1975, the year of Mexico City. “Women’s network” (singular) continues to rise and peaks in 1996, a year after Beijing. “Women’s networks” (plural) is used less than its singular form, but still experiences growth until 1996. After which, the usage of “women’s network(s)” tends to wane.



HOW TO CLOSE THE GENDER PAY GAP: TRANSPARENCY IN DATA REGARDING COMPENSATION IS THE KEY

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INTRODUCTION

The gender pay gap is usually referred to as the average difference in earnings between men and women.² Most research will express the gap as a ratio, which is calculated by subtracting the amount women earn for every dollar paid to men from 100 percent.³ One of the earliest examples of women earning less than men stems from World War II. In 1940, about 28% of women in the United States participated in the labor force.⁴ However, World War II required about sixteen million men to join the armed forces, which meant women had to play a more active role in the labor force by securing jobs traditionally held by men.⁵ This allowed some women to shift from low-paying service or retail jobs into higher-wage durable goods manufacturing jobs.⁶ Even though women started earning more money,⁷ the wage effects related to increases in the female labor supply were uniformly more negative for women than men.⁸

Since World War II, there has been a series of legislative efforts to address the gender pay gap. New laws have helped narrow the gender pay gap, but the gap still exists and explaining the causes of the gap is still a big challenge. Data suggests that there continues to be a systematic undervaluing of the work performed by women in comparison to substantially similar work performed by men. There is no doubt that men, as a whole, earn higher wages than women; however, there is considerable debate as to whether the wage differences are based on gender discrimination or other factors. More transparency in wage rate reporting is required to properly assess whether gender discrimination is the root cause of the wage gap and, if so, how best to close the gap.

One of the most influential federal laws that addressed the United States' gender pay gap is the Equal Pay Act of 1963 (the "Equal Pay Act), which was signed into law by President Kennedy.⁹ The Equal Pay Act prohibits an employer from discriminating against an employee on the basis of sex.¹⁰ This means that employers cannot pay one employee a lower rate than that paid to an employee of the opposite sex in the same establishment if both employees are performing equal or similar work.¹¹ However, employment decisions that create differences in pay rates between employees can be justified if they are based on a

² See *Gender Pay Gap*, CAMBRIDGE BUSINESS ENGLISH DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/gender-pay-gap> (last visited Mar. 21, 2020). See also KEVIN MILLER & DEBORAH J. VAGINS, *THE SIMPLE TRUTH ABOUT THE GENDER PAY GAP* 7 (2018) [hereinafter AAUW]; *Gender Wage Gap*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/gender-wage-gap> (last visited Mar. 21, 2020).

³ *Gender Wage Gap*, ECON. POL'Y INST., <https://www.epi.org/data/#?subject=wagegap-mf> (last visited Feb. 20, 2020) [hereinafter EPI].

⁴ Daron Acemoglu et al., *Women, War and Wages: The Effect of Female Labor Supply on the Wage Structure at Mid-Century* 1–2 (Nat'l Bureau of Econ. Research, Working Paper No. 9013, 2002).

⁵ *Id.* at 1.

⁶ Mark Aldrich, *The Gender Gap in Earnings During World War II: New Evidence*, 42 INDUS. & LAB. REL. REV. 415, 420 (1989).

⁷ See *id.* at 423.

⁸ Acemoglu et al., *supra* note 4, at 30.

⁹ 29 U.S.C. § 206(d) (2018).

¹⁰ *Id.* at § 206(d)(1).

¹¹ *Id.*

seniority or merit system, the quality or quantity of work, and any other differentials that are based on a “factor other than sex.”¹²

Since the time it was enacted, courts have expanded the scope of the Equal Pay Act to provide uniform interpretations. For example, the Third Circuit Court of Appeals clarified that work only needs to be “substantially equal,” rather than identical, to fit within the protections of the Equal Pay Act.¹³ In *Schultz v. Wheaton Glass Company*, the Secretary of Labor brought an action against Wheaton Glass Company, claiming that female employees were being discriminated against because they were paid 10% less than male employees who had the same job title.¹⁴ The district court ruled that the differences in pay were justified because male employees were able to perform more tasks than women.¹⁵ The Third Circuit, however, rejected this conclusion because there was no logical justification for men to receive 21½ cents per hour more than their female counterparts when the additional tasks performed by men only paid two cents more than what was paid to women performing the same tasks.¹⁶ Moreover, Congress intended the Equal Pay Act to act as a “broad charter of women’s rights in the economic field.”¹⁷ To construe it narrowly, such as requiring the jobs to be identical, would destroy the remedial purposes intended.¹⁸

Several other federal laws have been passed to provide more protections to women in the workforce, such as Title VII of the Civil Rights Act of 1964.¹⁹ Nevertheless, women today continue to earn less than men do in nearly every occupation.²⁰ Although the gap has narrowed since 1963, it has remained relatively unchanged the past ten years.²¹ In 2018, women in the United States were paid about 80 cents for every dollar paid to men.²² That disparity in wage rates suggests that women earned about \$513 billion less than they would have earned had they received the rates paid to their male counterparts.²³ Despite the enacted equal pay laws, it is believed that pay parity between women and men in the United States will not be reached until 2059.²⁴

Concerns about the gender pay gap exist outside of the United States as well. Korea, Estonia, Japan, Latvia, Chile, Canada, and the United Kingdom also have significant national

¹² *Id.*

¹³ *Schultz v. Wheaton Glass Co.*, 421 F.2d 259, 265 (3d Cir. 1970) (“...Congress in prescribing ‘equal’ work did not require that the jobs be identical, but only that they must be substantially equal.”).

¹⁴ *Id.* at 261.

¹⁵ *Id.* at 262–63.

¹⁶ *Id.* at 263.

¹⁷ *Id.* at 265.

¹⁸ *Id.*; *Coming Glass Works v. Brennan*, 417 U.S. 188, 208 (1974).

¹⁹ 42 U.S.C. § 2000e (2018).

²⁰ LISA MAATZ & ANNE HEDGEPEETH, *WOMEN AND WORK: 50 YEARS OF CHANGE SINCE THE AMERICAN WOMEN REPORT 6* (2014).

²¹ Nikki Graf et al., *The Narrowing, but Persistent Gender Gap in Pay*, PEW RES. CTR. (Mar. 22, 2019), <http://www.pewresearch.org/fact-tank/2018/04/09/gender-pay-gap-facts/> (citing to data from the U.S. Census Bureau).

²² AAUW, *supra* note 2, at 5; EPI, *supra* note 3; Charisse Jones, *Women Lose \$513 Billion a Year in Wages Due to Gender Pay Gap and Math is Worse for Some*, USA TODAY (Oct. 23, 2018), <https://www.usatoday.com/story/money/2018/10/23/women-lose-500-billion-year-because-stubborn-gender-pay-gap/1728870002/>.

²³ Jones, *supra* note 22.

²⁴ INSTITUTE FOR WOMEN’S POLICY RESEARCH, *WOMEN’S MEDIAN EARNINGS AS A PERCENT OF MEN’S MEDIAN EARNINGS* (2018) [hereinafter IWPR].

gender pay gaps.²⁵ For example, in 2018, the gender pay gap in the United Kingdom was as large as 17.9%.²⁶ In addition, it is reported that women, globally, are paid about 63 cents for every dollar paid to men.²⁷ If the gender pay gap is occurring in every country of the world and every state in the United States, it begs the question—what is driving this pay difference? There is no simple answer, because the gender pay gap may be a result of many different factors. Although not an exhaustive list, such factors include education, age, experience, familial responsibilities, and workplace choices like demand for overtime.

The fact that multiple factors may influence pay rate disparities between men and women does not mean that discrimination does not exist within the workplace, or that discrimination is not a contributing factor when certain compensation decisions are made. Instead, it reveals the importance of trying to figure out which factors contribute the most to the gender pay gap, and, more importantly, why those factors exist. With so many factors at play, the ability to identify and examine wage rate differences across business sectors is critical. The countries that have made the most progress in closing the gender pay gap are those that have increased transparency regarding compensation between employees within the same establishment.

This Article will look at the problem of unequal pay and will argue that transparency regarding compensation of men and women must be increased before any decision can be made as to why the gender pay gap exists. This Article proceeds in three parts. Part I provides a comprehensive discussion of existing equal pay laws in the United States that prohibit pay discrimination by sex and an analysis of the most up-to-date data on the current gender pay gap in the United States. It also examines theories as to why or why not there is a pay gap and how clarity can be provided by increasing transparency. Part II provides a comprehensive discussion of the new equal pay laws in the United Kingdom. It also provides an analysis of how the United Kingdom has reduced its gender pay gap by increasing transparency and how these laws can provide a road map for improving the pay gap in the United States. Lastly, Part III provides an analysis of the gender pay gap worldwide and how other countries have addressed the gender pay gap by increasing transparency.

In order to close the gender pay gap, countries need to amend current equal pay laws or pass new laws to require increased transparency of employer data. Increasing transparency of wage data in the workplace will better highlight the factors that need to be addressed in order to close the gender pay gap, and it is clear that laws aimed at increasing transparency need to have teeth to ensure compliance. By doing so, employees and regulators will also be able to more accurately determine whether women are being compensated fairly and whether pay rate disparities between men and women are the result of gender discrimination

²⁵ Devon Delfino, *12 Countries Where Men Earn Significantly More than Women*, BUS. INSIDER (Aug. 17, 2018), <https://www.businessinsider.com/countries-with-the-gender-pay-gap-2018-8>. See also INT'L LABOUR ORG., GLOBAL WAGE REPORT 2018/19: WHAT LIES BEHIND GENDER PAY GAPS 24–25 (2018) [hereinafter ILO].

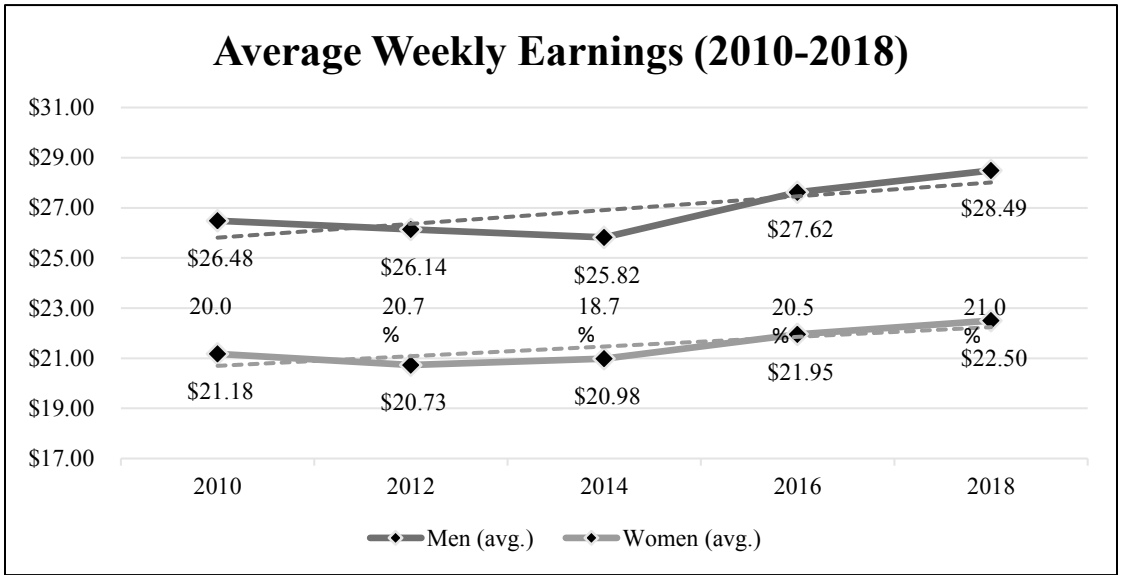
²⁶ OFFICE FOR NAT'L STATISTICS, GENDER PAY GAP IN THE UK: 2018 3 (2018) [hereinafter ONS]. See Brigid Francis-Devine & Doug Pyper, *The Gender Pay Gap* 3 (House of Commons Library, Briefing Paper No. 7068, 2020) [hereinafter Briefing Paper 7068].

²⁷ Rupert Neate, *Global Pay Gap Will Take 202 Years to Close, says World Economic Forum*, GUARDIAN (Dec. 18, 2018), <https://www.theguardian.com/world/2018/dec/18/global-gender-pay-gap-will-take-202-years-to-close-says-world-economic-forum>.

or other factors. Without this data, it is impossible to know whether and to what extent gender discrimination factors into the pay differential between men and women.

I. THE GENDER PAY GAP IN THE UNITED STATES

The enactment of federal and state legislation has, at times, helped narrow the gender pay gap in the United States; however, the country has in no way achieved pay parity. Although the gap was reduced significantly toward the end of the 1990s, the gap has remained mostly unchanged since.²⁸ For example, from 2010 to 2018, the difference in pay between men and women in the United States hardly improved and even increased at times.²⁹



This chart shows the average weekly earnings for men and women from 2010 to 2018. The percentages represent the gender pay gap for each year. According to the data, the gender pay gap varies year-to-year.

Source: Economic Policy Institute³⁰

According to data, it appears that the gender pay gap is going to remain reasonably stable unless changes are made, either through new legislation or a societal shift in the way women are viewed in the workplace. The starting point to understanding how best to close the gender pay gap is to ascertain how the gender pay gap has increased or decreased over time, in light of federal legislation and other protections that have been put in place. The corollary to that

²⁸ EPI, *supra* note 3.

²⁹ *Id.*

³⁰ *Id.*

is to understand how external factors influence the gender pay gap notwithstanding the passage of laws that were aimed at closing the gap. Only then can informed decisions be made on whether the gender pay gap can, in fact, be closed, and if so, how best to accomplish this goal.

a. Current Equal Pay Laws that Address Wage Discrimination

One of the first laws implemented to close the gender pay gap in the United States was the Equal Pay Act, which was signed into law by President Kennedy on June 10, 1963.³¹ The springboard for the Equal Pay Act was the National War Labor Board, which, in 1942, called for “equal pay for equal work.”³² Once the Equal Pay Act was enacted, employers engaged in commerce or in the production of goods for commerce were prohibited from gender-based discrimination in the payment of employee wages.³³ The scope of what constituted gender-based discrimination was thereafter molded by the court.

One of the first higher courts to interpret the Equal Pay Act was the Third Circuit, which held that comparative jobs need only be “substantially equal” and not identical to determine whether there was gender-based discrimination in the pay received by men and women working in those jobs.³⁴ In *Schultz v. Wheaton Glass Company*, the Third Circuit explained that whether a job is “substantially equal” is determined by the content of a job rather than the title of a job.³⁵ If a job requires substantially equal skills, effort and responsibility, and is performed under similar working conditions, an employer is prohibited from paying unequal wages to men and women.³⁶ Skill takes into account experience, ability, education, and training required to perform a job.³⁷ Effort refers to the amount of physical or mental exertion needed to perform a job.³⁸ Responsibility is the degree of accountability required to perform a job.³⁹ In addition, wage discrimination is only prohibited between jobs within a single establishment (i.e., a distinct physical place of business) and not within a business as a whole.⁴⁰ The only exception is when unusual circumstances are demonstrated.⁴¹

Initially, Congress had considered implementing the “equal pay for comparable worth” doctrine, rather than using the term “substantially equal.”⁴² Under the comparable-worth doctrine, sex-based wage discrimination exists if employees in job classifications occupied primarily by women are paid less than employees in job classifications filled primarily by

³¹ 29 U.S.C. § 206(d) (2018).

³² Charlotte Alter, *Here's the History of the Battle for Equal Pay for American Women*, TIME (Apr. 14, 2015), <https://time.com/3774661/equal-pay-history/>.

³³ 29 U.S.C. § 206(a).

³⁴ *Schultz v. Wheaton Glass Co.*, 421 F.2d 259, 265 (3d Cir. 1970).

³⁵ *Id.*

³⁶ *Id.* at 261.

³⁷ *EEOC v. Universal Underwriters Ins. Co.*, 653 F.2d 1243, 1245 (8th Cir. 1981).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ 29 C.F.R. § 1620.9(a) (2020).

⁴¹ *E.g. Marshall v. Dallas Indep. Sch. Dist.*, 605 F.2d 191, 194 (5th Cir. 1993) (finding entire school district is a single establishment for Equal Pay Act purposes).

⁴² *See Schultz v. Wheaton Glass Co.*, 421 F.2d 259, 265 (3d Cir. 1970).

men and the jobs are of equal value to the employer.⁴³ However, the comparable-worth doctrine was rejected by Congress for two reasons.⁴⁴ First, Congress believed the doctrine ignored the economic realities of supply and demand.⁴⁵ Second, Congress thought the doctrine would place an impossible task of determining the worth of comparable work on government agencies and on courts.⁴⁶

The Equal Pay Act was not overly rigid in its application, and exempted certain wage inequalities if they were based on seniority, merit, quantity or quality of production, or a factor other than sex.⁴⁷ One issue that arose was the failure of the Equal Pay Act to define the “factor other than sex” defense. Although courts have not been consistent interpreting this defense, an example of a factor that can be considered by employers is market forces. In *Spaulding v. University of Washington*, the Ninth Circuit held that pay differences can be justified if employers are constrained by market forces to set salaries under prevailing wage rates for different job classifications.⁴⁸ The Ninth Circuit has stated that the rationale is that reliance on a free market system in which employees in male-dominated jobs are compensated at higher rate than employees in dissimilar female-dominated jobs is not in and of itself discriminatory.⁴⁹

A year after the Equal Pay Act, Title VII of the Civil Rights Act of 1964 was enacted to provide further prohibitions against pay discrimination in the workforce.⁵⁰ Under Title VII, employers are prohibited from discriminating against any individual with respect to his or her compensation because of the individual’s race, color, religion, sex, or national origin.⁵¹ This is similar to the Equal Pay Act, and someone who has an Equal Pay Act claim may also have a claim under Title VII. Moreover, Title VII prohibits employers from steering women into lower-paying jobs, unfairly denying women promotions, and otherwise impacting compensation based on gender-based discrimination.⁵² Unlike the Equal Pay Act, however, Title VII only applies if an employer has more than 15 employees.⁵³

One of the most important similarities between the Equal Pay Act and Title VII is that the affirmative defenses set in the Equal Pay Act are applicable to Title VII actions for sex-based wage discrimination.⁵⁴ This was made clear by the Bennett Amendment to Title VII, which provides that it shall not be an unlawful employment practice for an employer to differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the Equal

⁴³ AFSCME v. Washington, 770 F.2d 1401, 1404 (9th Cir. 1985).

⁴⁴ *Cty. of Washington v. Gunther*, 452 U.S. 161, 184–88 (1981) (discussing why Congress rejected comparable-worth doctrine).

⁴⁵ *Id.* at 184.

⁴⁶ *Id.*

⁴⁷ 29 U.S.C. § 206(d)(1) (2018).

⁴⁸ *Spaulding v. Univ. of Wash.*, 740 F.2d 686, 708 (9th Cir. 1984) (providing an example of a “factor other than sex” that employers can consider when making compensation decisions).

⁴⁹ AFSCME v. Washington, 770 F.2d 1401, 1408 (9th Cir. 1985).

⁵⁰ 42 U.S.C. §§ 2000e–2000e-3 (2018).

⁵¹ 42 U.S.C. § 2000e-2(a)(1) (2018).

⁵² *Id.* at § 2000e-2(a).

⁵³ 42 U.S.C. § 2000e(b) (2018).

⁵⁴ *See* 42 U.S.C. § 2000e-2(h) (2018); *see also* 29 U.S.C. § 206(d)(1) (2018).

Pay Act.⁵⁵ Similar to the Equal Pay Act, therefore, wage-based discrimination under Title VII is justified if the employment decision is based on a seniority or merit system, on earnings by quantity or quality of production, and a differential based on any other factor other than sex.⁵⁶ Moreover, the Supreme Court explained that the Bennett Amendment was offered to be a “technical amendment” designed to resolve any potential conflicts between Title VII and the Equal Pay Act.⁵⁷

Notwithstanding certain similarities, there are significant differences between the Equal Pay Act and Title VII. One difference is the requirement to show that there was an intent to discriminate under Title VII. Under the Equal Pay Act, a plaintiff can recover by proving that she received lower pay for substantially equal work.⁵⁸ In contrast, Title VII claims typically require proof of an intent to discriminate.⁵⁹ Intent to discriminate is not needed under Title VII, however, if an employee can meet the requirements of a disparate impact claim or prove that sex was a motivating factor for a compensation decision.⁶⁰

Another difference between the Equal Pay Act and Title VII is the burden-shifting structures. Claims based on Title VII follow the *McDonnell-Douglas* framework, which is a three-step burden-shifting structure.⁶¹ Under this structure, the plaintiff must first establish a prima facie case of discrimination.⁶² If able to do so, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the alleged discriminatory action.⁶³ If the employer is successful, then the burden shifts back to the plaintiff to show that the legitimate, nondiscriminatory reason is in fact pretext.⁶⁴

In contrast, claims based on the Equal Pay Act follow a two-step structure. In *Stanziale v. Jargowsky*, the Third Circuit Court of Appeals explained that claims based on the Equal Pay Act require the plaintiff to first establish a prima facie case by demonstrating that employees of the opposite sex were paid differently for performing substantially “equal work.”⁶⁵ If able to do so, the burden of persuasion then shifts to the employer to demonstrate the applicability of one of the affirmative defenses.⁶⁶ Unlike Title VII claims, plaintiffs are not given another opportunity to prevail and will not be successful if an affirmative defense is applicable.

⁵⁵ 42 U.S.C. § 2000e-2(h) (2018).

⁵⁶ 29 U.S.C. § 206(d)(1) (2018).

⁵⁷ *Cty. of Washington v. Gunther*, 452 U.S. 161, 170 (1981) (discussing how Bennett Amendment made affirmative defenses of Equal Pay Act applicable to Title VII).

⁵⁸ *See* 29 U.S.C. § 206(d)(1) (2018).

⁵⁹ 42 U.S.C. § 2000e-2(k) (2018).

⁶⁰ *Id.* at § 2000e-2(k)(1)(A).

⁶¹ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04 (1973) (discussing burdens for employees and employers under Title VII).

⁶² *Id.* at 802.

⁶³ *Id.*

⁶⁴ *Id.* at 804.

⁶⁵ *Stanziale v. Jargowsky*, 200 F.3d 101, 107–08 (3d Cir. 2000) (discussing burdens for employees and employers under the Equal Pay Act).

⁶⁶ *Id.*

To be sure, both the Equal Pay Act and Title VII helped reduce the gender pay gap. In 1963, the gender pay gap was 41%.⁶⁷ In 2018, it was about 20%.⁶⁸ That measure of improvement is significant, and yet a significant gap remains. It seems logical that additional legislation could help narrow the gender pay gap further, and even President Kennedy acknowledged that the Equal Pay Act was only the “first step” and that “much remains to be done to achieve full equality of economic opportunity.”⁶⁹

b. Whether Discrimination Explains the Gender Pay Gap

Before considering how the gender pay gap can be further reduced, it is important to examine other reasons why the gap exists or is misrepresented. Individuals who support the belief that the gap is misrepresented or does not exist have argued that the gap can be explained by factors other than discrimination, such as the choices women make at the workplace and responsibilities women have outside of the workplace.⁷⁰ In contrast, individuals who believe that the gender pay gap is a direct result of discrimination have argued that data explicitly shows that the earnings of women are less than men when considering certain aspects of the workplace and achievements.⁷¹ Whichever side you support, it is beyond peradventure that women are generally being paid less than men. Even if the pay gap is not a direct result of gender-based wage discrimination, men generally make more than women at all ages, education levels, and within all occupations.⁷²

As for the gender pay gap between men and women of certain ages, it is clear that women make less than men no matter how old they are. Additionally, the gap tends to widen drastically for women once they turn 35.⁷³ Those that believe the gap does not exist or is misrepresented will try to rely on the fact that women tend to demand less hours or more flexible schedules in the workplace as they get older.⁷⁴ This can be explained by several facts.

⁶⁷ Lynda Robinson, *Here's how The Washington Post relegated JFK signing the landmark Equal Pay Act to the women's page*, WASHINGTON POST (Apr. 4, 2017), <https://www.washingtonpost.com/news/retropolis/wp/2017/04/04/on-equal-pay-day-heres-how-the-washington-post-relegated-the-equal-pay-act-signed-by-kennedy-to-the-womens-page/>.

⁶⁸ EPI, *supra* note 3.

⁶⁹ See Robinson, *supra* note 67.

⁷⁰ See e.g., John Phelan, *Harvard Study: “Gender Wage Gap” Explained Entirely by Work Choices of Men and Women*, FOUND. FOR ECON. EDUC. (Dec. 10, 2018), <https://fee.org/articles/harvard-study-gender-pay-gap-explained-entirely-by-work-choices-of-men-and-women/>; Valentin Bolotnyy & Natalia Emanuel, *Why Do Women Earn Less Than Men? Evidence from Bus and Train Operators* 2 (June 5, 2019) (unpublished manuscript) (on file with the Harvard University Department of Economics); Christina Hoff Sommers, *Wage Gap Myth Exposed – By Feminists*, HUFFPOST (Jan. 23, 2014), https://www.huffpost.com/entry/wage-gap_b_2073804; Lisa Annese, *Dispelling the Myths: Why the Gender Pay Gap Does Not Reflect the “Choices” Women Make*, GUARDIAN (Nov. 7, 2016), <https://www.theguardian.com/sustainable-business/2016/nov/08/dispelling-the-myths-why-the-gender-pay-gap-does-not-reflect-the-choices-women-make>; CHRISTIANNE CORBETT & CATHERINE HILL, GRADUATING TO A PAY GAP: THE EARNINGS OF WOMEN AND MEN ONE YEAR AFTER COLLEGE GRADUATION 2–3 (2012).

⁷¹ See e.g., Stephanie Bornstein, *Equal Work*, 77 MD. L. REV. 581, 588–94 (2018). See also AAUW, *supra* note 1.

⁷² News Release, U.S. Dep’t of Labor, Usual Weekly Earnings of Wage and Salary Workers Fourth Quarter 2019 (Jan. 17, 2020) (data is available at Table 3 and Table 9) [hereinafter 2019 News Release]; ROSA CHO & ABAGAIL KRAMER, EVERYTHING YOU NEED TO KNOW ABOUT THE EQUAL PAY ACT 7 (2016).

⁷³ 2019 News Release, *supra* note 72.

⁷⁴ Bolotnyy & Emanuel, *supra* note 70, at 3.

First, women either get married or have children around the age of 35 and about 75% of single mothers are the sole provider for their family.⁷⁵ Thus, the gap in pay for women after the age of 35 appears to be misrepresented. Second, employed women living with a child under the age of 6 generally work an average of 4.3 hours per day.⁷⁶ This means that these mothers only work about 30 hours per week, which can explain why women demand less overtime compensation.⁷⁷ Third, of the workers who take time off, such as for parental, family or medical leave, women are twice as likely to experience a negative impact on their job or career than men.⁷⁸ In 2011, it was reported that 60% of men had access to paid leave, while only 57% of women had access.⁷⁹ This means that women were less likely than men to have access to paid leave, which would result in women being more likely to take leave without pay. Consequently, this data reveals that factors unrelated to discrimination can help explain why women generally earn less than their male counterparts.

Although there are explanations as to why the gap is the widest for women over the age of 35 and for women with children, it does not explain the gender pay gap for women of all ages with different types of responsibilities. For example, the median weekly earnings for women that were 24 or younger was \$558, while the median weekly earnings for the men in this same age bracket was \$624.⁸⁰ Similarly, the median weekly earnings for women that were 34 or younger was \$763, while the median weekly earnings for the men of this age bracket was \$877.⁸¹ Thus, women under the age 35 earn about 90% of what men earn.⁸²

⁷⁵ WOMEN'S BUREAU, *Overview of Working Women Today*, U.S. DEP'T OF LABOR, <https://www.dol.gov/wb/overview.htm> (last visited Mar. 26, 2019); WOMEN'S BUREAU, *Mothers and Families*, U.S. DEP'T OF LABOR., https://www.dol.gov/wb/stats/mother_families-text.htm#LFPMarital-Age (last visited Mar. 30, 2019).

⁷⁶ News Release, U.S. Dep't of Labor, *American Time Use Survey – 2017 Results* (June 28, 2018).

⁷⁷ *Id.*

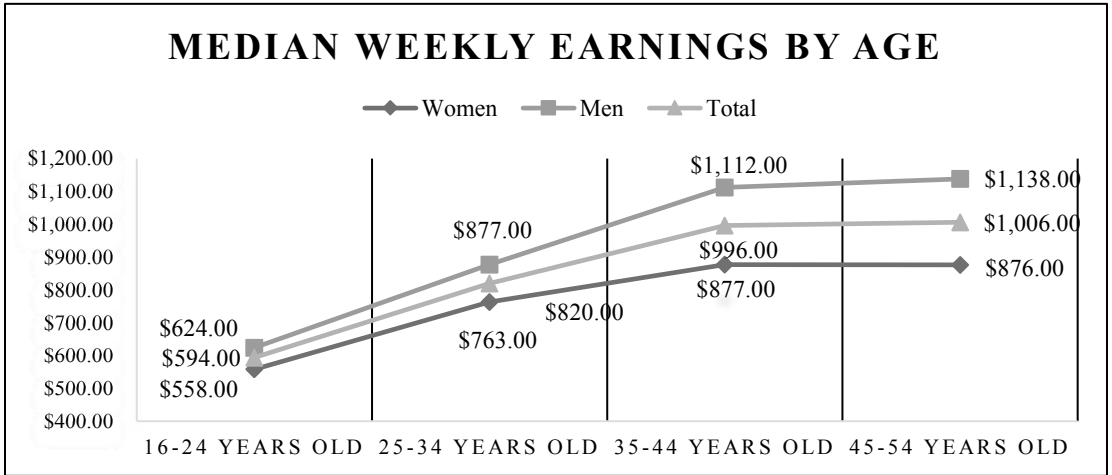
⁷⁸ Juliana Menasce Horowitz et al., *Americans Widely Support Paid Family and Medical Leave, but Differ Over Specific Policies*, PEW RES. CTR. (Mar. 23, 2017), <https://www.pewsocialtrends.org/2017/03/23/americans-widely-support-paid-family-and-medical-leave-but-differ-over-specific-policies/>.

⁷⁹ COUNCIL OF ECONOMIC ADVISERS, *ECONOMIC REPORT OF THE PRESIDENT 182* (Feb. 2015) [hereinafter CEA].

⁸⁰ 2019 News Release, *supra* note 72, at Table 3.

⁸¹ *Id.*

⁸² See Shawn M. Carter, *The Gender Pay Gap in the US is Still 20 Percent – but Millennial Women are Closing in on Men*, CNBC (Aug. 7, 2017), <https://www.cnbc.com/2017/08/07/gender-pay-gap-is-still-20-percent-but-millennial-women-are-closing-in.html>; see also Graf, *supra* note 21.



This chart shows the median weekly earnings for certain age brackets in 2019. According to the data, the difference in pay between men and women significantly increases once women turn the age of 25.

Source: U.S. Department of Labor, Bureau of Labor Statistics⁸³

Similar to the gap in pay for women of different ages, there is also a gap between men and women at every level of education. The general idea behind achieving another degree is that earnings increase for both men and women as years of education increase. Accordingly, this might suggest that an increase in education will actually reduce the gender pay gap.⁸⁴ Although the earnings of women do increase as they pursue higher levels of education, the gender pay gap does not decrease.⁸⁵

Individuals that believe the gender pay gap does not exist or is misrepresented have argued that the gap regarding education can be explained by other factors, such as the types of degrees pursued by women in college.⁸⁶ However, according to the different earnings men and women receive at each educational level, women must obtain one more degree than men in order to receive similar compensation. For example, the median weekly earnings for women with a high school degree is only \$9 more than the median weekly earnings for men with less than a high school diploma.⁸⁷ Moreover, men experience a larger increase in earnings than women do when an advanced degree is obtained. The median weekly earnings

⁸³ 2019 News Release, *supra* note 72, at Table 3.

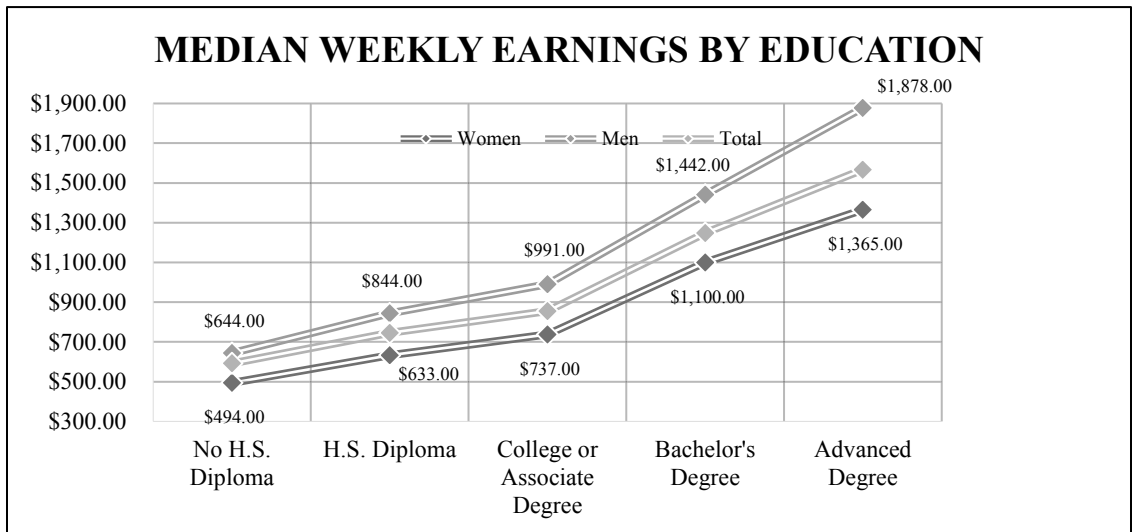
⁸⁴ Tanya Tarr, *How This Study Misses the Mark on Equal Pay and the Pay Gap*, FORBES (Nov. 30, 2018), <https://www.forbes.com/sites/tanyatarr/2018/11/30/how-this-study-misses-the-mark-on-equal-pay-and-the-pay-gap/#4ddf8d0b42c1>.

⁸⁵ See MAATZ & HEDGEPEETH, *supra* note 20, at 8–9. See also 2019 News Release, *supra* note 72, at Table 9.

⁸⁶ CORBETT & HILL, *supra* note 70, at 1–3.

⁸⁷ 2019 News Release, *supra* note 72, at Table 9.

for men goes from \$1,442 to \$1,878 when an advanced degree is achieved.⁸⁸ In contrast, the median weekly earnings for women who obtain an advanced degree only increases from \$1,100 to \$1,365.⁸⁹ Although both experience an increase in earnings when such a degree is obtained, men experience an increase of about \$108 more than women do. Although the types of degrees pursued in college may explain the pay gap for some women, this does not explain the gender pay gap for women of all educational levels with different types of degrees and achievements.



This chart shows data from 2019 regarding differences in pay between men and women with certain educational levels. According to the data, women must obtain at least one more degree than men in order to have similar earnings.

Source: U.S. Department of Labor, Bureau of Labor Statistics⁹⁰

Lastly, there is a difference in pay between men and women in nearly all occupations. Skeptics about the realities of gender-based wage discrimination have explained this fact in a variety of ways. The first argument is that the gap within an occupation can be explained by the fact that women make different choices in the workplace than men do, which leads to women being paid less.⁹¹ For example, a group of Harvard professors have asserted that the pay differences of employees working at the Massachusetts Bay Transportation Authority

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ See e.g., Phelan, *supra* note 70; Annese, *supra* note 70; Bolotnyy & Emanuel, *supra* note 70.

(“MBTA”) can be explained by women valuing workplace flexibility more than men and women having a lower demand for overtime work hours than men.⁹² This argument is based in part on the belief that women have other responsibilities outside of the workforce, such as taking care of children. However, according to the President’s 2015 Economic Report, workplace flexibility policies can actually help families meet both their family and professional goals, while also benefitting women and the economy.⁹³

The second argument is that pay differentials occur within an occupation because men and women tend to gravitate toward different industries.⁹⁴ However, the gap does not change drastically whether a certain occupation or industry employs more women than men. In those occupations where women represented 50% or more of the workforce, the average gender pay gap was still 87.24%, meaning that men were still being compensated at a higher level.⁹⁵ Similarly, in the occupations where women represented less than 50% of the workforce, the average gender pay gap was 81.27%.⁹⁶ Moreover, in 2018, it was reported that the median weekly earnings of men are higher than the median weekly earnings of women across almost every occupation.⁹⁷ Certain occupations may have higher or lower gaps than others, but there is no tangible correlation between the percentage of women in a specific occupation or industry and the gender pay gap.

	Median Weekly Earnings for All Employees	Median Weekly Earnings for Men	Median Weekly Earnings for Women	Gender Pay Gap
Occupations that Women Represent ≤ 50% of All Employees	\$895	\$995	\$845	87.24%
Occupations that Women Represent > 50% of All Employees	\$1,099	\$1,183	\$952	81.27%

This chart shows data from 2018 regarding the percentage of women in a certain occupation. All data above reflects the average. According to the data, women in both groups of occupations are paid less than their male counterparts.

⁹² Bolotnyy & Emanuel, *supra* note 70, at 3.

⁹³ CEA, *supra* note 79.

⁹⁴ Avik Roy, *It’s Time That We End the Equal Pay Myth*, FORBES (Apr. 16, 2012), <https://www.forbes.com/sites/realspin/2012/04/16/its-time-that-we-end-the-equal-pay-myth/#6775b0851408>.

⁹⁵ *Labor Force Statistics from the Current Population*, U.S. DEP’T OF LABOR, <https://www.bls.gov/cps/cpsaat39.pdf> (last visited Mar. 30, 2019) [hereinafter BLS].

⁹⁶ *Id.*

⁹⁷ *Id.*

Source: U.S. Department of Labor, Bureau of Labor Statistics⁹⁸

Industry	Median Weekly Earnings for All Employees (Average)	Median Weekly Earnings for Men (Average)	Median Weekly Earnings for Women (Average)	Gender Pay Gap (Average)
Management	\$1,429	\$1,585	\$1,236	77.98%
Business & Financial Operations	\$1,216	\$1,383	\$1,105	79.90%
Computer & Mathematical	\$1,539	\$1,604	\$1,345	83.85%
Life, Physical, & Social Sciences	\$1,270	\$1,357	\$1,156	85.19%
Community & Social Service	\$913	\$984	\$886	90.04%
Legal	\$1,467	\$1,910	\$1,243	65.08%
Education, Training, & Library	\$1,002	\$1,235	\$934	75.63%
Healthcare Practitioners	\$1,140	\$1,383	\$1,078	77.95%
Food Preparation	\$501	\$533	\$473	88.74%
Cleaning & Maintenance	\$551	\$604	\$407	78.97%
Personal Care & Service	\$544	\$638	\$517	81.03%
Sales	\$742	\$846	\$696	82.27%
Administrative Support	\$717	\$738	\$711	96.34%
Transportation & Material Moving	\$689	\$724	\$538	74.31%

This chart shows data from 2018 regarding differences in pay between men and women of certain industries. According to the data, women in each industry are paid less than their male counterparts.

Source: U.S. Department of Labor, Bureau of Labor Statistics⁹⁹

⁹⁸ *Id.*

⁹⁹ *Id.*

The last argument by gender pay gap skeptics is that the gap within occupations actually reflects the fact that men are more attracted to higher-paying jobs than women.¹⁰⁰ However, a gap is found in both low-paying and high-paying occupations.¹⁰¹ Of the 172 occupations that provided sufficient data to the Bureau of Labor Statistics in 2018, only 16% of the occupations showed a gender pay gap of 10% or less.¹⁰² Moreover, the most significant gaps were found in the higher-paying occupations.¹⁰³ For example, the gender pay gaps for physicians and surgeons, chief executives, pharmacists, and lawyers were all higher than the average pay gap of the United States.¹⁰⁴

High-Paying Occupations for women	Percentage of Female Workers in Occupation (%)	Gender Pay Gap (%)	Difference in Women’s Earnings for Every Dollar Earned by Male Counterpart
Total, full-time wage and salary workers	44.5	81.09	- \$0.19
Physicians and Surgeons	42.5	66.7	- \$0.333
Chief Executives	27.9	69.7	- \$0.303
Pharmacists	62.7	83.2	- \$0.268
Personal Financial Advisors	35.2	73.2	- \$0.268
Marketing and Sales Managers	46.4	73.5	- \$0.265
Lawyers	40.3	80.0	- \$0.200
Computer & Information System Managers	25.4	89.9	- \$0.101

This chart shows data from several of the highest-paying jobs for full-time workers in 2018. According to the data, women are more likely than men to earn significantly less for the highest-paying occupations.

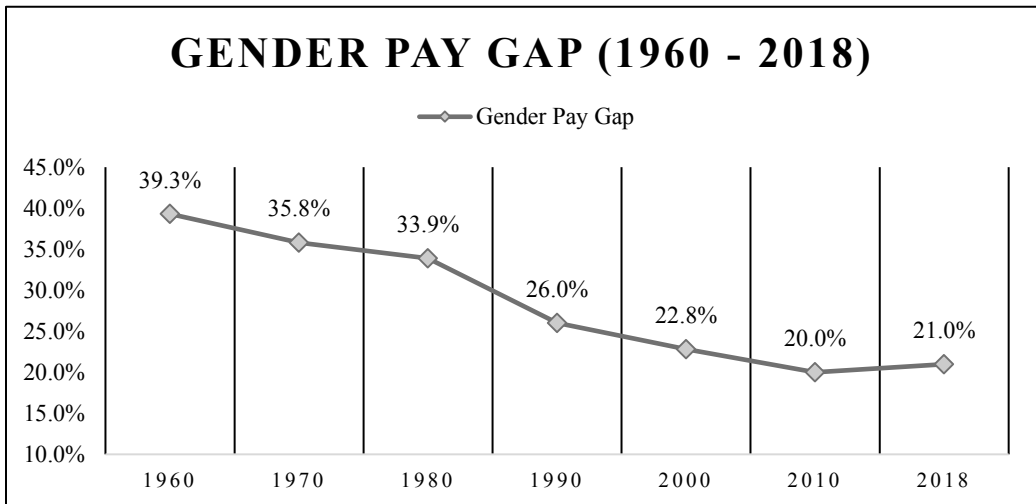
Source: U.S. Department of Labor, Bureau of Labor Statistics¹⁰⁵

c. Solutions to Increase Transparency Regarding the Gender Pay Gap

¹⁰⁰ Roy, *supra* note 94; CORBETT & HILL, *supra* note 70, at 2.
¹⁰¹ See BLS, *supra* note 95.
¹⁰² *Id.*
¹⁰³ *Id.*
¹⁰⁴ *Id.*
¹⁰⁵ *Id.*

The inquiry regarding what creates the gender pay gap is without a doubt a contentious topic. Although data reveals that women are generally being paid less than men, the presence of alternative methods to measure the gap can create skepticism that analyzing data is a reliable method to measure the gap.¹⁰⁶ No matter how you measure the gender pay gap, it is clear that there is a difference in pay between men and women. Since it is believed that pay parity will not be reached until 2059,¹⁰⁷ the United States needs to consider additional approaches to figure out what is causing pay inequalities.

This can be done by examining aspects of the labor market and how social norms of women have changed over time. However, this could lead to conflicting reports, similar to how arguments based on gender pay gap data are perceived. Instead, the United States should consider several proposed laws and systems that could help increase transparency regarding compensation between men and women within the workforce. Although passing new laws over the past 60 years has not eliminated gender pay differences, there does seem to be a correlation between new laws and a closing of the gender pay gap.



This chart shows the average gender pay gap from 1963 to 2018. According to the data, the gender pay gap tends to be reduced after an equal pay law is enacted.

Sources: Economic Policy Institute and National Women's Law Center¹⁰⁸

¹⁰⁶ ELISE GOULD ET AL., ECON. POLICY INST., WHAT IS THE GENDER PAY GAP AND IS IT REAL? THE COMPLETE GUIDE TO HOW WOMEN ARE PAID LESS THAN MEN AND WHY IT CAN'T BE EXPLAINED AWAY I (2016) ("The presence of alternative ways to measure the gap can create a misconception that data on the gender wage gap are unreliable. However, the data on the gender wage gap are remarkably clear and (unfortunately) consistent about the scale of the gap.").

¹⁰⁷ IWPR, *supra* note 24.

¹⁰⁸ EPI, *supra* note 3. See also Abby Lane et al., *The Wage Gap Over Time*, NAT'L WOMEN'S L. CTR. (May 3, 2012), <https://nwlc.org/blog/wage-gap-over-time/>.

i. The Paycheck Fairness Act

One piece of proposed legislation that should be considered is the Paycheck Fairness Act (the “PFA”).¹⁰⁹ The intended purpose of the PFA is to “amend the Fair Labor Standards Act of 1938 to provide more effective remedies to [women discriminated against] in the payment of wages on the basis of sex.”¹¹⁰ The PFA also would provide procedural protections to the Equal Pay Act.¹¹¹ The rationale for introducing the bill was because Congress determined that, despite the enactment of the Equal Pay Act, many women continue to earn significantly lower pay than men for equal work, which suggests that pay disparities must be the result of continued intentional discrimination or the lingering effects of past discrimination.¹¹²

The first benefit of enacting the PFA would be to update the definition of a work “establishment” under the Equal Pay Act.¹¹³ Under the Equal Pay Act, a determination of wage discrimination is based on the comparison of the earnings between a male and female employee who perform “substantially equal” jobs and work within the same “establishment.”¹¹⁴ If the PFA is passed, the legal definition of “establishment” would be broadened. According to the PFA, wage comparisons may be made between employees who perform substantially equal jobs at any of the employer’s places of business that are located in the same country or political subdivision.¹¹⁵ This is essential because many businesses today operate of out multiple offices in the same area.

The second potential benefit of the PFA would be to clarify the “factor other than sex” defense in the Equal Pay Act.¹¹⁶ Under the Equal Pay Act, an employer will not be liable if the employer can show that a pay differential is based on a seniority or merit system, the quality or quantity of production, or a factor other than sex.¹¹⁷ However, the Equal Pay Act does not explain what constitutes a “factor other than sex.” The PFA would provide guidance as to what qualifies as a “factor other than sex,” which would result in more consistent interpretations by courts. According to the PFA, a “factor other than sex” defense must be based on a bona fide, job-related factor, such as education, training, or experience that is consistent with business necessity.¹¹⁸ In addition, a factor will not qualify as an affirmative defense if the employee can show that the employer refused to implement an existing

¹⁰⁹ Paycheck Fairness Act, S. 862, 114th Cong. (2015).

¹¹⁰ *Id.*

¹¹¹ Compare Paycheck Fairness Act, S. 270, 114th Cong. at § 2(4)(B) (2015), with Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2018).

¹¹² Paycheck Fairness Act, S. 862, 114th Cong. § 2(2) (2015).

¹¹³ See *id.* at § 3(a)(C).

¹¹⁴ Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) (2018). See also *Schultz v. Wheaton Glass Co.*, 421 F.2d 259, 261–63 (3d Cir. 1970).

¹¹⁵ Paycheck Fairness Act, S. 862, 114th Cong. § 3(a)(C) (2015).

¹¹⁶ *Id.*

¹¹⁷ 29 U.S.C. § 206(d)(1) (2018).

¹¹⁸ Paycheck Fairness Act, S. 862, 114th Cong. §§ 3(a)(B)(i)–(ii) (2015).

alternative employment practice that would have the same business purpose but not produce a pay differential.¹¹⁹ This is similar to the business necessity standard under Title VII.¹²⁰

The third potential benefit of the PFA would be to improve the remedies available under the Equal Pay Act.¹²¹ Under the Equal Pay Act, the available remedies are back-pay and sometimes liquidated damages.¹²² However, these remedies usually provide inadequate compensation and are insufficient to deter future violations of the law by employers who view them as a cost of doing business. According to the PFA, prevailing plaintiffs could recover both compensatory and punitive damages.¹²³

The last potential benefit of the PFA would be to prohibit employers from retaliating against employees for sharing salary information with coworkers.¹²⁴ This would increase transparency regarding wage discrimination because employees would be able to learn about wage disparities and evaluate whether they are being discriminated against. Under the Equal Pay Act, employers are prohibited from retaliating against an employee who asserts his or her rights under the Act, but it does not address situations involving salary discussions.¹²⁵ According to the PFA, employers would not be able to retaliate against employees for either seeking redress or inquiring about the wage practices of the employer.¹²⁶ Allowing transparency of wage differences without the fear of retaliation is critical to providing societal-based factors to work alongside legislation to address the gender pay gap.

Although the PFA has been struck down on numerous occasions, it was recently reintroduced by House Speaker Nancy Pelosi in January 2019.¹²⁷ Since the Republicans currently control the Senate it is possible that the PFA may be struck down a fifth time.

ii. The Fair Pay Act

Another introduced law that should be considered is the Fair Pay Act (the “FPA”).¹²⁸ According to the bill, the purpose of the FPA is to “amend the Fair Labor Standards Act of 1938 to prohibit discrimination in the payment of wages on account of sex, race, or national origin, and for other purposes.”¹²⁹ The FPA would also amend certain aspects of the Equal Pay Act. However, the last time it was introduced it was struck down.¹³⁰

The first potential benefit of the FPA would be to expand the current protections of the Equal Pay Act to additional women in the workforce. Under the Equal Pay Act, gender-based wage discrimination is prohibited only between workers performing “substantially” the same

¹¹⁹ See *id.* at §§ 3(a)(B)(iv).

¹²⁰ 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2018).

¹²¹ Paycheck Fairness Act, S. 862, 114th Cong. § 3(c)(1) (2015).

¹²² 29 U.S.C. § 206(d)(3) (2018).

¹²³ Paycheck Fairness Act, S. 862, 114th Cong. § 3(c)(1) (2015).

¹²⁴ *Id.* at § 3(b).

¹²⁵ See 29 U.S.C. § 215(a)(3) (2018). See also 29 U.S.C. § 206(d)(1) (2018).

¹²⁶ Paycheck Fairness Act, S. 862, 114th Cong. § 3(b) (2015).

¹²⁷ Emma Newburger, *Nancy Pelosi and Democratic Lawmakers Unveil the Paycheck Fairness Act in an Effort to Close the Gender Wage Gap*, CNBC (Jan. 30, 2019 12:56 PM), <https://www.cnbc.com/2019/01/30/nancy-pelosi-unveils-the-paycheck-fairness-act-to-close-the-pay-gap.html>.

¹²⁸ Fair Pay Act of 2017, H.R. 2095, 115th Cong. (2017).

¹²⁹ *Id.*

¹³⁰ *Id.*

jobs.¹³¹ The FPA would require employers to pay equal wages to employees as long as they perform “equivalent jobs.”¹³² This includes taking into account skills, effort, responsibility, and working conditions.¹³³

The second potential benefit of the FPA would be to improve the remedies available under the Equal Pay Act.¹³⁴ Under the Equal Pay Act, the available remedies are back-pay and sometimes liquidated damages.¹³⁵ Much like the PFA, under the FPA, prevailing plaintiffs could recover both compensatory and punitive damages.¹³⁶

The third potential benefit of the FPA would be to clarify the “factor other than sex” defense.¹³⁷ Under the Equal Pay Act, an employer will not be liable if the employer can show that a pay differential is based on a seniority or merit system, the quality or quantity of production, or a factor other than sex.¹³⁸ According to the FPA, differences in pay are justified if the payment is made pursuant to a seniority or merit system, a system that measures earnings by quantity or quality of production, or “a differential based on a bona fide factor other than sex, race, or national origin.”¹³⁹ The bona fide factor may be based on education, training, or experience.¹⁴⁰ In addition, the FPA specifies that a factor will not qualify as an affirmative defense if the employer cannot demonstrate that the factor is job-related or furthers a legitimate business purpose.¹⁴¹ An employee can also rebut this if they can prove that an alternative employment practice exists that would serve the same business purpose without producing such differential and the employer refused to adopt the practice, which is also seen in the PFA and Title VII.¹⁴²

iii. Revised EEO-1

Since neither the Paycheck Fairness Act nor the Fair Pay Act has been passed, it is unclear whether these bills would actually further reduce the gender pay gap. Thus, the United States needs to consider solutions other than amending the current equal pay laws. Since it is unclear what factors contribute the most to the gender pay gap, the United States should consider increasing transparency regarding compensation between men and women employees. For example, transparency can be increased by collecting pay data from employers concerning pay for both men and women, including based on job titles, education levels and work experience. This allows data to be used to focus efforts on certain industries

¹³¹ See *Schultz v. Wheaton Glass Co.*, 421 F.2d 259, 265 (3d Cir. 1970). See also 29 U.S.C. § 206(d)(1) (2018).

¹³² Fair Pay Act of 2017, H.R. 2095, 115th Cong. § 3(a) (2017).

¹³³ *Id.*

¹³⁴ *Id.* at § 5(a)(1).

¹³⁵ 29 U.S.C. § 206(d)(3) (2018).

¹³⁶ Fair Pay Act of 2017, H.R. 2095, 115th Cong. § 5(a)(1) (2017).

¹³⁷ *Id.* at § 3(a)(iv).

¹³⁸ 29 U.S.C. § 206(d)(1) (2018).

¹³⁹ Fair Pay Act of 2017, H.R. 2095, 115th Cong. § 3(a) (2017).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² See Paycheck Fairness Act, S. 862, 114th Cong. § 3(a) (2015). See also 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2018).

and employers. This kind of data collection system has been successfully implemented by many countries, such as the United Kingdom, Australia, Germany, and Iceland.¹⁴³

More importantly, the Equal Employment Opportunity Commission (“EEOC”) has already taken the initiative to implement such a system in the United States.¹⁴⁴ In 2010, the EEOC and other agencies were asked by President Obama to identify ways to improve enforcement of federal laws prohibiting pay discrimination.¹⁴⁵ This led to the idea of collecting data from certain employers in order to analyze the correlation between employee gender and compensation.¹⁴⁶ The idea of collecting data is not novel. Since 1966, the EEOC has required employers with 100 or more employees to file a report, an EEO-1, that describes the number of individuals employed by a job category, i.e., sex, race, and ethnicity.¹⁴⁷

However, the EEOC would like to make revisions to EEO-1 so more data can be gathered and analyzed, which hopefully can better explain the gender pay gap. On July 14, 2016, the EEOC sought approval from the Office of Management and Budget (“OMB”) to revise the EEO-1 data collection system by including two new components.¹⁴⁸ The first component collects the same data that is gathered by the currently approved EEO-1, but includes data about an employee’s ethnicity, race, and sex regarding a job category.¹⁴⁹ The second component collects data on employees’ W-2 earnings and hours worked, which EEO-1 filers are already required to maintain in the “ordinary course of business.”¹⁵⁰ This data would then be formatted into twelve pay bands for the ten EEO-1 job categories.¹⁵¹ Both components would apply to filers, both private sector businesses and Federal contractors, who have 100 or more employees.¹⁵² However, contractors with 50 to 99 employees would only need to submit data required under the first component.¹⁵³

Although OMB approved of the first component, they believed the second component violated the Paperwork Reduction Act of 1995.¹⁵⁴ Under this Act, an agency that proposes to collect information must first conduct its own evaluation of the need for the collection of this information and what types of burdens this would create.¹⁵⁵ Upon completion of this

¹⁴³ See *infra* Parts II.C & III.

¹⁴⁴ Press Release, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, EEOC Announces Proposed Addition of Pay Data to Annual EEO-1 Reports (Jan. 29, 2016).

¹⁴⁵ Agency Information Collection Activities: Revision of the Employer Information Report (EEO-1) and Comment Request, 81 Fed. Reg. 5113, 5114 (Feb. 1, 2016).

¹⁴⁶ *Id.*

¹⁴⁷ 29 C.F.R. § 1602.7 (2020) (requiring all businesses subject to Title VII of the 1964 Civil Rights Act that have 100 or more employees to report data concerning the racial and ethnic composition of their employees).

¹⁴⁸ Agency Information Collection Activities; Notice of Submission for OMB Review, Final Comment Request: Revision of the Employer Information Report (EEO-1), 81 Fed. Reg. 45479 (July 14, 2016).

¹⁴⁹ Agency Information Collection Activities: Revision of the Employer Information Report (EEO-1) and Comment Request, 81 Fed. Reg. 5113.

¹⁵⁰ *Id.*; 42 U.S.C. § 2000e-8(e)(1)-(3) (2018).

¹⁵¹ Agency Information Collection Activities: Revision of the Employer Information Report (EEO-1) and Comment Request, 81 Fed. Reg. 5113, 5117.

¹⁵² *Id.* at 5119.

¹⁵³ *Id.* at 5119.

¹⁵⁴ Memorandum from Neomi Rao, Admin’r, Office of Info. & Regulatory Affairs, Office of Mgmt. & Budget, to Victoria Lipnic, Acting Chair, Equal Emp’t. Opportunity Comm’n (Aug. 29, 2017). See also Stay the Effectiveness of the EEO-1 Pay Data Collection, 82 Fed. Reg. 43362 (Sept. 15, 2017).

¹⁵⁵ 44 U.S.C. § 3506(c)(1) (2018).

review, OMB makes a determination regarding how to proceed.¹⁵⁶ In this case, OMB initially approved of the data collection system, but later changed its decision for two reasons.¹⁵⁷ First, OMB felt that the continued collection of this information was contrary to the standards of the Paperwork Reduction Act.¹⁵⁸ Second, OMB was concerned that these reporting requirements would place too large of a burden on businesses and that the EEOC did not adequately address privacy and confidentiality issues.¹⁵⁹

Accordingly, the National Women’s Law Center and others sued, alleging that OMB violated the Paperwork Reduction Act, that it exceeded its statutory authority in reviewing and staying the collection of pay data, and that the notice disapproving the revisions was a nullity.¹⁶⁰ On March 4, 2019, the court granted summary judgment for the plaintiffs since OMB’s stay of EEOC’s pay data collection was illegal.¹⁶¹ The rationale for the court’s decision was that the government’s position was based on “hyper-technical formatting changes that have no real consequences for employers.”¹⁶² Although formatting changes can be burdensome, the government failed to demonstrate why the data specifications of the revised EEO-1 would increase the burden on employers.¹⁶³

Unless this judgment is appealed, the United States will have successfully taken the first step at increasing transparency. By requiring certain data from employers on gender and earnings, compensation decisions of certain employers will be brought to light. It will also help determine whether there is true discrimination in certain workforces, and whether other factors are being considered during compensation decisions. More importantly, these reports will be available to the public. Publicization of the reports may lead to public embarrassment or criticism for some employers, but this may incentivize employers to change their policies in order to report more favorable data the following year.

II. THE GENDER PAY GAP IN THE UNITED KINGDOM

The gender pay gap is not only a problem in the United States. According to a 2018-2019 global wage analysis conducted by the International Labour Organization (“ILO”), the median gender pay gap in the United States is 18.4% (using hourly wages) and 25.7% (using monthly earnings).¹⁶⁴ Although these numbers are large, the United States is not considered to have one of the largest gender pay gaps when compared to the other 73 countries that provided relevant data.¹⁶⁵ According to the ILO’s analysis, one country with a larger gender pay gap than the United States is the United Kingdom.¹⁶⁶

¹⁵⁶ *Id.*

¹⁵⁷ Nat’l Women’s Law Ctr. v. OMB, 358 F. Supp. 3d 66, 74–75 (D.D.C. 2019).

¹⁵⁸ *Id.* at 75.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 76.

¹⁶¹ *Id.* at 92.

¹⁶² *Id.* at 92.

¹⁶³ *Id.* at 92.

¹⁶⁴ ILO, *supra* note 25, at 24–25.

¹⁶⁵ *See id.*

¹⁶⁶ *Id.*; Briefing Paper 7068, *supra* note 26, at 6. *See also* Adrián Francisco Varela, *These are the Countries with the Worst Gender Pay Gaps*, BUS. INSIDER (Dec. 2, 2018).

a. The U.K. Equal Pay Act 1970

The United Kingdom did not address issues regarding the gender pay gap until the 1960s. At that time, it had been common practice in the private sector, and parts of the public sector, to have separate and lower rates of pay for women.¹⁶⁷ On June 7, 1968, women at a Ford factory in the United Kingdom discovered that they were being paid about 15% less than men doing the same work.¹⁶⁸ Ford refused to amend its compensation policies, and a strike was organized.¹⁶⁹ This eventually led to the United Kingdom enacting the Equal Pay Act 1970 (the “U.K. Equal Pay Act”), which was designed to prevent discrimination between men and women concerning terms and conditions of employment.¹⁷⁰ In addition, the U.K. Equal Pay Act introduced an implied equality clause into all employment contracts, which eliminated separate and lower rates of pay.¹⁷¹

Although the U.K. Equal Pay Act was designed to provide equal pay for men and women performing equivalent work, employers were still able to figure out ways to pay men and women differently.¹⁷² Even though the U.K. Equal Pay Act was enacted in 1970, it was not implemented until 1975.¹⁷³ This provided employers time to discover methods to avoid complying with the Act. For example, employers re-graded jobs and changed job titles of employees, which justified pay differences between men and women even if both were performing equivalent work. In addition, the term “equivalent” was not clear.¹⁷⁴ For example, an employer could raise women pay rates to the lowest pay rates of men. Thus, even if the jobs of women were more demanding than the jobs of men the terms and conditions for women were still “not less favourable” than those of men.

b. The U.K. Equality Act 2010

Since pay inequalities still existed after the U.K. Equal Pay Act, the United Kingdom decided to replace several of its equal pay laws. This led to the enactment of the Equality Act 2010 (the “U.K. Equality Act”), which was designed to ensure that men and women, full-time or part-time, were given equal pay.¹⁷⁵ The U.K. Equality Act was also able to provide more protections to women in the workforce by changing certain provisions of the U.K. Equal Pay Act.

One important change that was made under the U.K. Equality Act was that employers could not discriminate regarding pay, benefits, terms and conditions if men and women are performing “equal work,” as opposed to “equivalent work.”¹⁷⁶ Another change was that

¹⁶⁷ *Equal Pay & the Equal Pay Act 1970*, NAT'L EDUC. UNION, <https://www.teachers.org.uk/women/equal-pay-equal-pay-act-1970> (last visited Feb. 26, 2019).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ Equal Pay Act 1970, c. 41 (Eng.).

¹⁷¹ *Id.* at § 2(1).

¹⁷² *Id.* at § 1.

¹⁷³ *Id.* at § 9(1).

¹⁷⁴ *Id.* at § 1(1)(b).

¹⁷⁵ Equality Act 2010, c. 15 (Eng.).

¹⁷⁶ Compare Equal Pay Act 1970, c. 41, § 1(1) (Eng.), with Equality Act 2010, c. 15, Ch. 3, §§ 65–70 (Eng.).

discrimination was prohibited outside of the workplace. While the U.K. Equal Pay Act only prohibited discrimination in the workplace,¹⁷⁷ the U.K. Equality Act expanded protection against discrimination in society as a whole.¹⁷⁸ The type of discrimination prohibited was also expanded. The U.K. Equal Pay Act requires discrimination to be based on a protected characteristic.¹⁷⁹ Whereas the U.K. Equality Act prohibited direct and indirect discrimination, which means a woman does not need to prove they are being paid less than a man in order to bring a claim.¹⁸⁰ For example, with the changes under the U.K. Equality Act, a woman could bring a claim against an employer simply because a provision, criterion, or practice of an employer particularly disadvantaged her.

c. The Equality Act 2010 Regulations 2017

Although the U.K. Equality Act provided more protections to women in the workforce, the gender pay gap still remained an issue in the United Kingdom. In 2010, it was reported that the United Kingdom gender pay gap was still 19.8%.¹⁸¹ Moreover, it was reported that, even with the new laws, it could still take almost a century before pay parity was achieved.¹⁸² Instead of enacting additional laws that were similar to the U.K. Equality Act, the United Kingdom decided to take a new approach – to increase transparency within the workforce.

The first time the United Kingdom tried to address pay inequalities by increasing transparency was in 2011. The Government Equalities Office implemented the *Think, Act, Report* initiative, which asked employers to publish any gender pay gap information that could help achieve gender equality.¹⁸³ The biggest downfall of this initiative, however, was that compliance was voluntary for employers.¹⁸⁴ Accordingly, the United Kingdom decided that it needed to legally require employers to comply with this reporting system and provide guidelines as to what information needed to be reported. In 2017, the United Kingdom amended the U.K. Equality Act by implementing two regulations: the Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 (SI 2017/172) (the “2017/172 Regulations”); and the Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017 (SI 2017/353) (the “2017/353 Regulations”) (collectively, the “Regulations”).¹⁸⁵

¹⁷⁷ Equal Pay Act 1970, c. 41, § 1(1) (Eng.).

¹⁷⁸ Equality Act 2010, c. 15, Ch. 2 (Eng.).

¹⁷⁹ Equal Pay Act 1970 c. 41, § 1(1)(a) (Eng.).

¹⁸⁰ Equality Act 2010, c. 15, Ch. 2, §§ 13, 19 (Eng.).

¹⁸¹ OFFICE FOR NAT'L STATISTICS, GENDER PAY GAP IN THE UK: 2018 (2018).

¹⁸² Amie Tsang, *British Companies Must Reveal How They Pay Women vs. Men*, N.Y. Times (Apr. 6, 2017), <https://www.nytimes.com/2017/04/06/business/britain-salary-gender-gap.html>.

¹⁸³ GOV'T EQUALITIES OFFICE., THINK, ACT, REPORT: ONE YEAR ON 11 (2012).

¹⁸⁴ *Id.*

¹⁸⁵ See Equality Act 2010 (Gender Pay Gap Information) Regulations 2017, SI 2017/172 (Eng.). See also Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017, SI 2017/353 (Eng.).

i. General Application of the Regulations

The 2017/172 Regulations came into force on April 6, 2017.¹⁸⁶ According to the 2017/172 Regulations, private and voluntary sector employers with 250 or more employees are required to publish and report specific data regarding its gender pay gap annually.¹⁸⁷ Any employer who fits within this criteria is referred to as a “relevant employer.”¹⁸⁸ In addition, relevant employers are required to provide details on gaps related to average bonuses paid and the proportion of men and women who received bonuses.¹⁸⁹

The term “relevant employer” includes both private and public sectors. Private sector organizations that are part of a group must report individually if they are relevant employers, and this information must be reported by April 5th each year.¹⁹⁰ Originally, the Regulations did not consider public or government authorities as a “relevant employer.”¹⁹¹ However, the United Kingdom included public sector employers under the Regulations by enacting the 2017/353 Regulations, which came into force on March 31, 2017.¹⁹² Relevant employers in the public sector include government departments, the armed forces, local authorities, NHA bodies, and most schools.¹⁹³ As for the requirements of relevant employers, these employers must do two things. First, relevant employers must publish specific gender pay gap data and a written statement on its website.¹⁹⁴ This data must be kept on the website for at least three years.¹⁹⁵ Second, relevant employers must also publish this data on a government website,¹⁹⁶ which is designated by the Secretary of State and must be published by March 30th each year.

The Regulations increase transparency by making gender pay gap information available to the public. However, the United Kingdom also made sure that the required information covered a broad range of topics that could impact pay inequalities in the workplace. Pursuant to the Regulations, a relevant employer is required to publish the following information each year:

- 1.) The difference between both the mean and median hourly rate of pay for women and men that are full-time employees;
- 2.) The difference between both the mean and median bonus pay for women and men;
- 3.) The proportions of female and male employees who were paid bonus pay; and

¹⁸⁶ Equality Act 2010 (Gender Pay Gap Information) Regulations 2017, SI 2017/172, § 1(1) (Eng.).

¹⁸⁷ *Id.* at Explanatory Notes ¶ 1.

¹⁸⁸ *Id.* at § 1(2).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at § 1(6).

¹⁹² Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017, SI 2017/353, § 1(1) (Eng.).

¹⁹³ *See id.* at §§ 2(3)–(5).

¹⁹⁴ Equality Act 2010 (Gender Pay Gap Information) Regulations 2017, SI 2017/172, § 15(1)(a) (Eng.).

¹⁹⁵ *Id.* at § 15(1)(b).

¹⁹⁶ *Id.* at § 15(2).

4.) The proportions of female and male full-pay employees in the lower, low middle, upper middle, and upper quartile pay bands.¹⁹⁷

ii. The Results After Implementing the Regulations

The goal of the Regulations was to shine a light on the pay practices of employers and what factors could stall career advancements of women. By requiring relevant employers to publish and report gender pay gap information, the United Kingdom anticipated these reports would incentivize employers to avoid or respond to negative results, which would then reduce pay inequalities within the workforce.

The Regulations came into force on April 6, 2017, and more than 10,000 employers publicly reported their gender pay gap data the following year.¹⁹⁸ It was clear that the reports were going to produce embarrassing and uncomfortable results for several large employers. The data indicated that more than 78% of all relevant employers paid men more than women and that the median pay gap was around 9.7%.¹⁹⁹ Moreover, the data produced significant results for certain industries, particularly banks, airlines, and soccer clubs. Goldman Sachs' Britain office reported that women were paid an average of 56% less than men.²⁰⁰ WIPP, a British advertising company, reported that women received about 25% less than their male counterparts.²⁰¹ In addition, Stoke City Football Club reported women earned about 30.5% less than their male counterparts regarding mean hourly earnings.²⁰²

Furthermore, the Regulations induced employers to address current compensation policies. For example, EasyJet, the United Kingdom's busiest discount airline, reported that men earned about 52% more than women.²⁰³ After reporting and publishing this data, a male executive of EasyJet took a 4.6% pay cut to match the salary of his female predecessor and pledged to more than triple the wages of its female pilots.²⁰⁴ In addition, some companies tried to weaken the negative results of reports by providing its own interpretation of the data. In 2018, it was reported that PwC (U.K.) had the largest gap among the "Big Four" accounting firms with a gender pay gap of 43.8%.²⁰⁵ Instead of remaining silent after publishing its report, PwC (U.K.) addressed its gender pay gap report from 2018 by publishing a supplemental report. Although PwC (U.K.) was considered to have the highest gap amongst its peers, it was evident that the mean gender pay gap decreased 0.6% from

¹⁹⁷ *Id.* at §§ 2(1)(a)–(f).

¹⁹⁸ *See id.* at § 1(1). *See also* Jennifer Calfas, *Almost 80% of U.K. Companies Pay Women Less Than Men*, TIME (Apr. 5, 2018), <http://time.com/5229228/gender-wage-gap-uk/>; Andrew Powell, *Women and the Economy* 4 (House of Commons Library, Briefing Paper No. CBP06838, 2019) [hereinafter Briefing Paper CBP06838].

¹⁹⁹ *See* Calfas, *supra* note 198.

²⁰⁰ Liz Alderman, *Britain Aims to Close Gender Pay Gap with Transparency and Shame*, N.Y. TIMES (Apr. 4, 2018), <https://www.nytimes.com/2018/04/04/business/britain-gender-pay-gap.html>.

²⁰¹ *See id.*

²⁰² *See* Calfas, *supra* note 198.

²⁰³ *See* Alderman, *supra* note 200.

²⁰⁴ *See id.*

²⁰⁵ Stephanie Wix, *PwC has the Highest Gender Pay Gap Among the Big Four at 43.8%*, INT'L ACCT. BULL. (Mar. 16, 2018), <http://www.internationalaccountingbulletin.com/News/pwc-uk-has-the-highest-gender-pay-gap-among-the-big-four-of-438-6085850>.

2017.²⁰⁶ In addition, PwC (U.K.) published a five-point action plan to further lower its divide.²⁰⁷

Even if executives in the United Kingdom did not feel internal pressure to make changes to their existing corporate structure, pressure also was applied by external sources. For example, Mills & Reeve LLP, a British law firm, determined that it was paying women 32% less than men.²⁰⁸ Even though executives and partners of the firm did not feel obliged to make changes to improve their pay gap, large clients of the firm requested more female representation from the firm.²⁰⁹ Thus, it is clear that the Regulations are having an impact on employers, and data has shown that the Regulations have impacted the overall gender pay gap in the United Kingdom. From 2017 to 2018, the gender pay gap for all employees dropped from 18.4% to 17.9%.²¹⁰

More importantly, the Regulations increased transparency as to which factors contributed significantly to the gender pay gap. After receiving data from relevant employers for the first time, it was reported that the overall pay gap was higher than the pay gap of part-time employees.²¹¹ This is presumably because part-time workers tend to earn less than full-time workers, and women are more likely to have part-time jobs. In addition, this could be because women are less likely to drop out of the labor market around the time they have their first child and are more likely to stay in paid work in the years following.²¹² The Regulations provided the necessary data to further support these presumptions. After the Regulations were enforced, it was reported that 39% of all women employed were part-time, while only 12% of all men employed were part-time.²¹³ In addition, the pay gap widened substantially for women after the birth of their first child.²¹⁴ Based on the data collected, the United Kingdom can now justify implementing additional measures that focus on specific groups of employees, such as women with children.

iii. Problems that Remain After the Regulations

The rationale for enacting the Regulations in the United Kingdom was to increase transparency regarding the gender pay gap. Under the Regulations, women are able to discover whether men in similar positions are being paid more or less, which allows the public to know whether discrimination is a factor.²¹⁵ Although transparency is improved, there are several problems with the Regulations.

²⁰⁶ See PwC, DIVERSITY PAY REPORT 2018 3 (2018).

²⁰⁷ See *id.* at 2.

²⁰⁸ Alderman, *supra* note 200.

²⁰⁹ *Id.*

²¹⁰ Briefing Paper 7068, *supra* note 26, at 7.

²¹¹ See *id.* at 6.

²¹² BARRA ROANTREE & KARTIK VIRA, INST. FOR FISCAL STUD., BRIEFING NOTE 234: THE RISE AND RISE OF WOMEN'S EMPLOYMENT IN THE UK 2 (2018).

²¹³ See Briefing Paper CBP06838, *supra* note 198, at 3. See also Briefing Paper 7068, *supra* note 26, at 6.

²¹⁴ See Briefing Paper 7068, *supra* note 26, at 9.

²¹⁵ See Equality Act 2010 (Gender Pay Gap Information) Regulations 2017, SI 2017/172, Explanatory Notes

One problem is that it is unclear which department, agency, or public body has the power to enforce the Regulations for relevant employers in the private sector. Unlike the private sector, it is evident that the Equality and Human Rights Commission (the “EHRC”) is responsible for monitoring and enforcing the reporting requirements of relevant employers in the public sector. Based on the explanatory memorandum of the 2017/353 Regulations, “[t]he [EHRC] is responsible for monitoring how public authorities are complying with the specific duties and can take enforcement action.”²¹⁶ In addition, the EHRC has published an enforcement policy that encourages relevant employers to meet the requirements of the Regulations.²¹⁷ The enforcement policy states that the EHRC has the ability to investigate non-compliant businesses and issue public sector duty compliance notices for failure to comply with reporting duties.²¹⁸ Thus, the text of the enforcement policy and of the Regulations makes it clear that the EHRC can enforce the reporting requirements in the public sector.²¹⁹

On the other hand, it is unclear whether the same holds true for the private sector. Under the explanatory memorandum of the 2017/172 Regulations, “[f]ailure to comply with these Regulations would be an unlawful act...and would fall within the existing enforcement powers of the [EHRC].”²²⁰ Unlike the 2017/353 Regulations, the 2017/172 Regulations do not explicitly state who has the authority to monitor relevant employers in the private sector. Instead of stating that the EHRC is “responsible” and “can take enforcement action,” the 2017/172 Regulations only say that it “would fall within the existing powers of the [EHRC].”²²¹ Moreover, the enforcement policy of the EHRC does not mention private sector employers.²²²

It could be argued that the Government intended for the EHRC to monitor private sector employees. Under the 2017/172 Regulations, “[f]ailure to comply with an obligation imposed by these Regulations constitutes an ‘unlawful act’ within the meaning of section 34 of the Equality Act 2006 (c. 3), which empowers the [EHRC] to take enforcement action.”²²³ The problem is that this statement is only found in the explanatory notes and not in the actual text. Moreover, the 2017/172 Regulations are issued under section 78 of the U.K. Equality Act.²²⁴ According to section 78, “[t]he regulations may make provision for a failure to comply with the regulations—(a) to be an offense punishable on summary conviction by a fine not exceeding level 5 on the standard scale; (b) to be enforced, otherwise than as an

²¹⁶ See Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017, SI 2017/353, Explanatory Memorandum ¶ 7.16.

²¹⁷ EQUALITY & HUMAN RIGHTS COMM’N, CLOSING THE GAP: ENFORCING THE GENDER PAY GAP REGULATIONS (2018) [hereinafter EHRC].

²¹⁸ See *id.* at 1–3.

²¹⁹ See *id.*

²²⁰ See Equality Act 2010 (Gender Pay Gap Information) Regulations 2017, SI 2017/172, Explanatory Memorandum ¶ 7.12.

²²¹ Compare *id.*, with Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017, SI 2017/353, *supra* note 216, at ¶ 7.16.

²²² EHRC, *supra* note 217.

²²³ See Equality Act 2010 (Gender Pay Gap Information) Regulations 2017, SI 2017/172, Explanatory Notes ¶ 13 (Eng.).

²²⁴ See Equality Act 2010, c. 15, pt. 5, Ch. 3, § 78 (Eng.).

offence, by such means as are prescribed.”²²⁵ However, neither section 78 nor the 2017/172 Regulations state which department, agency, or public body has the responsibility to enforce compliance of these requirements.

It seems that Parliament intended explicitly for enforcement policies of the 2017/172 Regulations to be stated in the regulation itself. Parliament could have stated that failure to comply with the Regulations would be considered an unlawful act within the meaning of the U.K. Equality Act of 2006, but it did not.

It is also possible that the EHRC will apply its enforcement powers to the private sector even though it is not required to. However, such a belief is misleading because the EHRC does not have the resources to monitor relevant employers in both sectors. During the first year the Regulations were enforced, it was reported that over 10,000 employers reported gender pay gap data.²²⁶ Accordingly, it is unlikely that the EHRC will be able to monitor and take action against relevant employers of both sectors who fail to comply with the Regulations.

Another issue related to enforcement is the inability to monitor relevant employers in both the private and public sectors, because the Regulations do not impose civil or criminal penalties if relevant employers fail to comply with the reporting requirements. Under the Regulations, relevant employers are prohibited from evading the reporting requirements unless a specific exception applies. The first exception applies when an employee is employed under a contract personally to do work.²²⁷ The second exception applies when an employer does not possess data on an employee, or when it is not reasonably practicable for an employer to obtain data on an employee.²²⁸ Although the affirmative defenses of the Regulations are clearer than those of the U.K. Equality Act, there is no civil or criminal penalty for relevant employers if they fail to comply with the reporting requirements altogether. The only penalty an employer may experience is reputational damage, which may result in higher societal pressure to change.

A second problem with the Regulations is the number of relevant employers in the private sector that are required to report data. Relevant employers in the private sector only account for about 0.1% of all businesses.²²⁹ In 2018, it was reported that about 8,000 private sector businesses qualified as relevant employers or were required to comply with the reporting requirements.²³⁰ This means that the Regulations only cover about 33% of all employees in the United Kingdom.²³¹

Therefore, the United Kingdom should consider expanding the definition of “relevant employer” to include small and medium sized enterprises (“SMEs”), which refers to

²²⁵ See *id.* at §§ 78(5)(a)–(b).

²²⁶ *What is the Gender Pay Gap at Your Company?*, BBC (Apr. 5, 2018), <https://www.bbc.com/news/business-43632763>.

²²⁷ Equality Act 2010 (Gender Pay Gap Information) Regulations 2017, SI 2017/172, § 2(3)(a) (Eng.).

²²⁸ *Id.* at § 2(3)(b).

²²⁹ Chris Rhodes, *Business Statistics 5*, (House of Commons Library Briefing Paper No. 06152, 2019) [hereinafter Briefing Paper 06152].

²³⁰ *Id.*

²³¹ See *id.*; Angela Henshall, *What Iceland can Teach the World about Gender Pay Gaps*, BBC (Feb. 10, 2018), <http://www.bbc.com/capital/story/20180209-what-iceland-can-teach-the-world-about-gender-pay-gaps>.

employers with fewer than 250 employees.²³² In 2018, it was reported that there were about 5.7 million SMEs in the United Kingdom, which accounted for over 99% of all businesses.²³³ Instead of including all SMEs, the United Kingdom could expand the Regulations to only medium-sized businesses, which refers to employers with 50 to 249 employees. If able to do so, about 35,000 additional private sector employers would be required to report gender pay gap information.²³⁴ This would quadruple the total number of private sector employers that must comply with the Regulations.

Business Sizes (Private Sector)	# of Businesses	Percentage of All Businesses In Private Sector	Employment Percentage
SMEs (0-250 employees)	5,660,000	99.8%	60%
Micro (0-9 employees)	5,416,000	95.5%	33%
Small (10-49 employees)	210,000	3.7%	15%
Medium (50-249 employees)	35,000	0.6%	13%
Large (250+ employees)	8,000	0.1%	40%
Total (All Businesses):	5,668,000	100%	100%

This chart shows data regarding the size of private sector businesses in the United Kingdom in 2018. According to the data, if the reporting requirements of the Regulations were expanded to medium-sized businesses then about 35,000 companies would be added to the list of companies that are required to report gender pay gap information.

Source: BEIS, Business Population Estimates²³⁵

Nevertheless, expanding the definition of “relevant employer” to employers with fewer employees is only beneficial if the United Kingdom can improve enforcement or make relevant employers comply with the Regulations. This is because it is clear that current relevant employers are taking advantage of the unclear language in the Regulations. Even though it was revealed that 78% of all the relevant employers paid men more than women, some relevant employers simply entered zeroes in every field, reported mathematically

²³² See Briefing Paper 06152, *supra* note 229, at 5.

²³³ See *id.*

²³⁴ See *id.*

²³⁵ See *id.*

impossible numbers, and/or removed certain employees from calculations.²³⁶ Also, about 1,500 relevant employers, or about 10%, missed the reporting deadline altogether.²³⁷ It is clear that external public pressure is not enough, and the only way to make real progress in reducing the pay gap is to impose civil or criminal sanctions for noncompliance with the Regulations.

The United Kingdom must do more than increase transparency in order to close the gender pay gap. Nevertheless, the first step of resolving any issue is to realize that there is an issue. Without the Regulations, companies and regulators seeking to enforce equal pay laws would have scarce evidence that a gap existed and there would also be less pressure to close the gap. Unlike the United States, the United Kingdom has taken the first step and is in a better position to implement additional effective measures to close the gender pay gap. The United Kingdom should first try to resolve enforcement issues by providing clarity as to which department, agency, or public body has authority to enforce compliance and by implementing penalties if relevant employers fail to comply. If successful, the United Kingdom should then try to expand the number of employers that must report and publish gender pay gap information.

III. THE GENDER PAY GAP WORLDWIDE

The gender pay gap is a global concern that expands beyond the United States and the United Kingdom. As of 2018, it was reported that women globally were paid 63 cents for every dollar paid to men.²³⁸ In order to reduce the global gender pay gap, several international organizations have tried to track the gender pay gap among countries. The rationale is that having this information available to the public will raise global awareness of the global gender pay gap and put pressure on countries to close the gender pay gap.²³⁹

One organization that has been collecting global gender gap information since 2006 is the World Economic Forum (the “WEF”). In addition to tracking this data, the WEF also created the Global Gender Gap Index, which is an annual global report based on information from 149 countries.²⁴⁰ According to the 2018 Global Gender Gap Report, there are two important takeaways about pay between men and women globally. First, on average, women make 68% of what men earn.²⁴¹ Second, based on current trends, it is projected that it will take 108 years to close the global gender pay gap.²⁴²

Most equal pay laws make it illegal to pay women less than men. However, if it is illegal to pay women less than men, then why are countries not able to close the global pay gap?

²³⁶ See Briefing Paper 7068, *supra* note 26, at 8. See also Alexandra Topping et al., *Gender Pay Gap: Multiple Firms Submit Questionable Data*, GUARDIAN (Mar. 29, 2018), <https://www.theguardian.com/news/2018/mar/29/gender-pay-gap-several-firms-submit-questionable-data>.

²³⁷ 1,500 Companies Miss Gender Pay Deadline, BBC (Apr. 5, 2018), <https://www.bbc.com/news/business-43651780>.

²³⁸ Rupert Neate, *Global Pay Gap Will Take 202 Years to Close, Says World Economic Forum*, GUARDIAN (Dec. 18, 2018), <https://www.theguardian.com/world/2018/dec/18/global-gender-pay-gap-will-take-202-years-to-close-says-world-economic-forum>.

²³⁹ See WORLD ECONOMIC FORUM, THE GLOBAL GENDER GAP REPORT 2018 (2018).

²⁴⁰ *Id.* at vii.

²⁴¹ *Id.* at 7.

²⁴² See *id.* at viii.

More importantly, what is the correct method to close the gender pay gap? The United States has relied on current equal pay laws and tried to implement a data collection system. On the other hand, the United Kingdom has successfully implemented a data reporting system that relies on public transparency and accountability but has experienced issues enforcing the requirements of the system.

a. Attempts by Other Countries to Close the Gap Through Transparency

Although the global pay gap is extremely high, some countries have implemented certain measures that are more impactful than measures of other countries. Similar to the United Kingdom, Germany has used transparency to close its pay gap. In 2017, Germany passed the Remuneration Transparency Act (the “RTA”).²⁴³ The purpose of enacting the RTA was to promote and enforce equal pay between women and men performing equal or equivalent work.²⁴⁴

In order to promote and enforce pay equality, the RTA prohibits direct and indirect remuneration discrimination based on gender.²⁴⁵ Direct remuneration discrimination exists if an employee earns less based on his or her gender than what an employee of the other gender receives, has received, or will receive for equal work or work of equal value.²⁴⁶ In addition, direct discrimination can exist if a woman earns less because of reasons related to pregnancy or maternity.²⁴⁷ Indirect remuneration discrimination exists where apparently neutral provisions, criteria or practices would, on the grounds of gender, put employees at a particular disadvantage compared to employees of the other gender.²⁴⁸ However, such provisions, criteria, or practices may be objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.²⁴⁹ For example, criteria related to the labor market, performance, and work results can justify differences in pay between men and women.²⁵⁰

Pursuant to the RTA, employees of an employer with over 200 workers have a right to review compensation information so they can compare their remuneration with the pay of colleagues of the opposite sex that perform equal or equivalent work.²⁵¹ Although this does not allow employees to review the exact pay of other employees, it does allow employees of both genders to examine criteria and procedures used for wage-setting.²⁵² Employees are also able to inspect the average gross monthly salary of a comparison group, which consists of at least six employees.²⁵³ If employers fail to comply with these requests then an employer may

²⁴³ Entgelttransparenzgesetz [EntgTranspG] [Transparency in Wage Structures Act], June 30, 2017, Bundesgesetzblatt [BGBl I] (Ger.), http://www.gesetze-im-internet.de/englisch_entgtranspg/englisch_entgtranspg.pdf.

²⁴⁴ *Id.* at § 1.

²⁴⁵ *Id.* at § 3(1).

²⁴⁶ *Id.* at § 3(2).

²⁴⁷ *Id.*

²⁴⁸ *Id.* at § 3(3).

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.* at §§ 10–11.

²⁵² *Id.*

²⁵³ *Id.* at § 10(1).

be required to provide evidence in court to show principles of the RTA were not violated.²⁵⁴ Furthermore, if an employer has more than 500 workers they are legally obligated to provide a report that illustrates the employer's pay structure and gender equality.²⁵⁵ This report must explain how the measures adopted by a company will promote gender equality and equal pay, and must also describe the impact these measures will have on the workforce.²⁵⁶

The assumption is that the RTA will increase transparency, which will increase demands by women for higher pay. These demands will then help close the gender pay gap. This is very similar to the United Kingdom's rationale for enacting the Regulations. In order to create greater transparency, the RTA allows employees to discover the median remuneration of a group of colleagues of the opposite sex that perform equal or equivalent work.²⁵⁷ The issues with the RTA are very similar to the issues of the Regulations. The RTA does not allow women to discover the exact wages men earn and does not impose sanctions for non-compliance.²⁵⁸ However, unlike the Regulations, the RTA expands the number of employers required to comply by covering employers with over 200 employees.

Another country that has tried to reduce its gender pay gap by increasing transparency is Australia. Although this is similar to the United Kingdom and Germany, Australia's equal pay laws contain more stringent requirements. Since 1998, Australia has required publicly-listed companies to report the wages of senior executives.²⁵⁹ In 2012, Australia enacted the Workplace Gender Equality Act (the "WGEA"), which was designed to require certain employers to promote gender equality in the workplace.²⁶⁰ The WGEA also established the Workplace Gender Equality Agency in order to promote and improve gender equality in Australia.²⁶¹ Under the WGEA, private sector employers with over 100 employees are required to report information regarding gender pay gaps.²⁶² If any employer has over 500 employees then they also must have a formal policy or strategy in place that improves gender pay issues.²⁶³

The equal pay laws of Germany and Australia are very similar. Both countries require smaller employers to comply and employers with over 500 employees are held to a higher standard. Unlike the RTA, however, the WGEA also places a legal obligation on employers to report information and implement strategies and has expanded the requirements for certain industries.²⁶⁴ For example, financial institutions have additional reporting requirements,

²⁵⁴ *Id.* at § 15(5).

²⁵⁵ *Id.* at § 21.

²⁵⁶ *Id.*

²⁵⁷ *Id.* at § 3.

²⁵⁸ *Id.* at § 11(3).

²⁵⁹ Brian Jebb & Sarah Henchoz, *INSIGHT: Governments are Increasingly Turning to Pay Disclosure Requirements in an Attempt to Even the Corporate Playing Field*, BLOOMBERG L.: DAILY LABOR REPORT (June 29, 2018), <https://news.bloomberglaw.com/daily-labor-report/insight-governments-are-increasingly-turning-to-pay-disclosure-requirements-in-an-attempt-to-even-the-corporate-playing-field>.

²⁶⁰ *Workplace Gender Equality Act 2012* (Cth) pt 1 s 2A (Austl.).

²⁶¹ *Id.* at pt III.

²⁶² *Id.* at pt 1 ss 3(1).

²⁶³ *See id.* at pt 1 s 3, pt IV s 13, pt IVA s 19.

²⁶⁴ *Id.* at pt 1 ss 5 sub-divs (7)–(8).

which are enforced by the Banking Executive Accountability Regime.²⁶⁵ Again, however, the WGEA suffers from the same flaws seen in most of these laws: the inability to enforce these laws because of the lack of civil or criminal penalties if employers fail to comply.²⁶⁶

b. How One Country May Close the Gap by 2022

It is clear that the greatest issue encountered when closing the gender pay gap is the ability to require companies to actually comply with the laws. Accordingly, transparency and public embarrassment are not enough to force employers to change compensation policies that negatively affect women. A majority of the current policies in place fail to close or reduce the gap because companies lack an incentive to do so if they know they will not be penalized. However, one country that has resolved this obstacle is Iceland.

Iceland has stated its commitment to closing the gender pay gap by 2022.²⁶⁷ Although the WEF reported that Iceland was the top country regarding gender parity for the past nine years, Iceland's gender pay gap still remains between 14% and 18%.²⁶⁸ So, is the 2022 goal feasible? The answer is uncertain, but Iceland is the first country to take gender pay gap issues to the next level. On January 1, 2018, Iceland became the first country in the world to legally enforce equal pay by adopting the Equal Pay Standard (the "EPS").²⁶⁹

Pursuant to the EPS, all companies and institutions, public or private, with 25 or more employees are required to annually obtain a "certificate" that illustrates pay equality between men and women in the workplace.²⁷⁰ In order to obtain this certificate, employers must implement an equal pay management system that follows the guidelines of the EPS.²⁷¹ The system must also be approved by an accredited auditor or regulator, who must determine whether the system establishes that women and men are being paid equally.²⁷²

The overall goal of the EPS is to reduce gender-based wage discrimination and to promote greater equality in wages between women and men.²⁷³ However, many countries have had the same goal and failed to close the gap. So, what makes the EPS different from other equal pay laws? First, Iceland has acknowledged that this goal cannot be achieved overnight so employers must be treated differently based on size. Under the EPS, large firms and institutions that have a workforce of more than 250 employees must become certified by

²⁶⁵ See Explanatory Memorandum, Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Bill 2017 (Cth) ch 1 ss 1.20, 1.21. (Austl.).

²⁶⁶ See *Workplace Gender Equality Act 2012* (Cth) pt IVA s 19D (Austl.).

²⁶⁷ Jebb & Henchoz, *supra* note 259.

²⁶⁸ See Emma Charlton, *Women in Iceland Have Walked out of Work to Dispute the Gender Pay Gap*, WORLD ECON. F. (Oct. 25, 2018), <https://www.weforum.org/agenda/2018/10/women-in-iceland-have-walked-out-of-work-to-dispute-the-gender-pay-gap/>. See also Tara John, *Iceland Makes Equal Pay the Law*, TIME (Jan. 4, 2018), <http://time.com/5087354/iceland-makes-equal-pay-the-law/>.

²⁶⁹ *New Icelandic Law on Equal Pay Certification Entered into Force on January 1, 2018*, MINISTRY OF SOC. AFF. (Ice.) (Jan. 4, 2018), <https://www.government.is/news/article/2018/01/04/New-Icelandic-law-on-Equal-Pay-Certification-entered-into-force-on-January-1-2018/>.

²⁷⁰ See Act on Equal Status and Equal Rights of Women and Men, No. 10/2008, as amended by Act No. 162/2010, No. 126/2011, No. 62/2014, No. 79/2015, No. 117/2016, and No. 56/2017 s. 3 art. 18 (Ice.).

²⁷¹ See *id.*

²⁷² See *id.* at s. 2 art. 13.

²⁷³ See *id.* at s. 1 art. 1.

the end of 2018, while smaller employers are given more time to receive the certification.²⁷⁴ For example, employers with a workforce between 90 to 149 must become certified by 2020, while employers with a workforce between 25 to 90 must become certified by 2021.²⁷⁵ Thus, all companies and institutions with 25 or more employees must become certified by January 1, 2021.

Second, Iceland has differentiated themselves from most countries in the area of enforcement. Similar to the United Kingdom, Iceland does rely on public embarrassment to force employers to change. However, Iceland took the next step by enforcing civil penalties if an employer fails to receive the certificate on time or violates any provision of the EPS. An employer who fails to comply with the EPS can be fined up to 50,000 ISK, about €350 or \$500, per day of noncompliance.²⁷⁶ In addition, employees can receive compensation for financial and non-financial losses from employers.²⁷⁷

In the end, Iceland is able to do the very thing the United Kingdom, Germany, and Australia failed to do when enacting their equal pay laws: having the ability to actually enforce the laws. Although the EPS only applies to about 1,180 employers and 147,000 employees, this represents about 80% of the entire labor force in Iceland.²⁷⁸ To put things into perspective, if the language of the EPS was incorporated into the Regulations about 245,000 additional private sector employers in the United Kingdom would be required to comply with the reporting requirements.²⁷⁹ In addition, about 7 million additional employees in the United Kingdom would be covered.²⁸⁰ Altogether, the EPS covers almost 46% more of Iceland's labor force than the Regulations do in the United Kingdom.²⁸¹

It seems plausible that Iceland will become the first country to close the gap, and it might do so by 2022. In 2018, Reykjavik Energy, one of the largest energy providers in Iceland, reported that 51% of management positions are filled by women and that there was no notable gender pay gap among employees.²⁸² Whereas, it was reported that electricity and gas companies in the United Kingdom have an average gender pay gap of about 15.2%.²⁸³ More specifically, British Gas Services Limited (U.K.), which is a subsidiary of one of the largest energy and home services companies in the United Kingdom, reported that women

²⁷⁴ *Looking for Information About Equal Pay in Iceland? All About the Equal Pay Standard*, KVENRÉTTINDAFÉLAG ISLANDS (Apr. 1, 2018), <http://kvenrettindafelag.is/2018/looking-for-information-about-equal-pay-in-iceland-all-about-the-equal-pay-standard/>.

²⁷⁵ *See id.*

²⁷⁶ Act on Equal Status and Equal Rights of Women and Men, No. 10/2008, as amended by Act No. 162/2010, No. 126/2011, No. 62/2014, No. 79/2015, No. 117/2016, and No. 56/2017 s. 3 art. 18 (Ice.).

²⁷⁷ *See id.* at s. 5 art. 31.

²⁷⁸ Ministry of Finance & Economic Affairs, *Equal Pay Certificate*, GOVERNMENT OF ICELAND, <https://www.government.is/topics/human-rights-and-equality/equal-pay-certification/> (last visited Feb. 26, 2020) (discusses which companies and institutions must obtain the certification in question 5 of the Q&A section).

²⁷⁹ *See* Briefing Paper 06152, *supra* note 229, at 5.

²⁸⁰ *See id.*

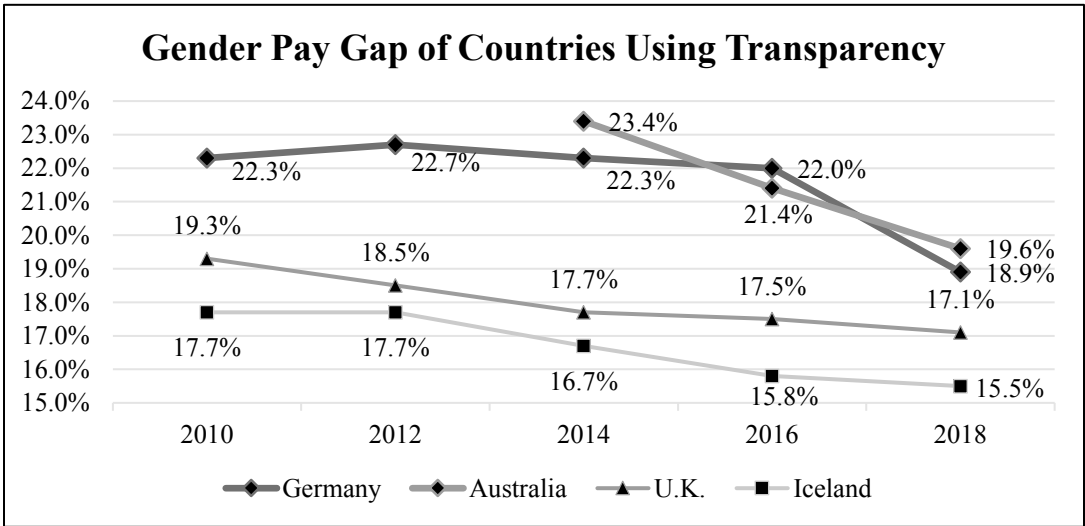
²⁸¹ *See* Henshall, *supra* note 231.

²⁸² *Strength Through Diversity: Meet the Women in Geothermal*, SEEQUENT (Dec. 13, 2018), <https://www.sequent.com/blog/2018/12/11/investing-in-the-future>.

²⁸³ *Fixing the Gender Pay Gap in the Energy Industry*, ENGERATI (May 7, 2018), <https://www.engerati.com/energy-management/article/energy-development/fixing-gender-pay-gap-energy-industry>.

earn a little more than half of what a typical male employee earns.²⁸⁴ As seen in British Gas Services Limited’s 2017 gender pay report, the median gender pay gap between men and women in the company is 37.5%.²⁸⁵

Greater transparency of pay discrepancies affords women the knowledge needed to influence employers to make changes. It is difficult for female workers to complain about pay inequalities if they are not aware that they are being paid differently. In addition, greater transparency will allow more information to be revealed about what factors truly impact the gender pay gap. Although countries have tried to increase transparency, it is clear more is needed to close pay gaps, such as civil penalties. Accordingly, it is not only essential that countries trying to increase transparency provide effective data reporting systems, but also provide for civil and/or criminal penalties for noncompliance with reporting requirements.



This chart shows the average gender pay gap regarding hourly earnings for all employees from 2010 to 2018.

Sources: Economic Policy Institute; Office for National Statistics; Eurostat; and WGEA²⁸⁶

CONCLUSION

Every country is facing pressure to close the pay gap between men and women. No country has achieved pay parity; however, data suggests that the countries having the most

²⁸⁴ See *id.*

²⁸⁵ GOVERNMENT EQUALITIES OFFICE, BRITISH GAS SERVICES LIMITED GENDER PAY GAP REPORT (2017).

²⁸⁶ EPI, *supra* note 3; ONS, *supra* note 26 ; EUROSTAT, EUROPEAN COMMISSION, GENDER PAY GAP STATISTICS (2019), https://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=sdg_05_20&plugin=1; WORKPLACE GENDER EQUALITY AGENCY (AUSTL.), PAY EQUITY (Apr. 1, 2019), http://data.wgea.gov.au/industries/1#pay_equity_content.

success in closing the gender pay gap have done so through increased transparency in employer wage data. Increasing transparency of wage data in the workplace will better highlight the factors that need to be addressed in order to close the gender pay gap, and it is clear that laws aimed at increasing transparency need to have teeth to ensure compliance. To better understand the root causes of pay disparity between men and women, we need to examine employer wage data. Without this data, it is impossible to know whether and to what extent gender discrimination factors into the pay differential between men and women. Without proper enforcement mechanisms, we cannot know if there has been compliance with data reporting requirements.

There is a push, worldwide, to close the gender pay gap. Most of the laws enacted have not closed the gap as quickly as expected, and the laws that appear to be having the most success focus first on transparency of employer wage data. Transparency is the key to understanding the causes and extent of the pay disparity between men and women, and it is a critical first step therefore in closing the pay gap.

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