
SYRACUSE JOURNAL OF INTERNATIONAL LAW AND COMMERCE

SYRACUSE UNIVERSITY COLLEGE OF LAW

ARTICLES

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Preventive Diplomacy and the Rule of Law

Kitsuron Sangsuvan

STUDENT NOTES

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RESOLVING THE CONFLICT ON THE KOREAN PENINSULA BY PREVENTIVE DIPLOMACY AND THE RULE OF LAW

Kitsuron Sangsuvan

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ABSTRACT

Even though an armistice agreement was signed in 1953, conflict and tension exist on the Korean Peninsula. A situation on the Korean Peninsula has recently made this tension worse. A tension escalates into a serious conflict when North Korea conducts nuclear weapons or ballistic missile tests. The international community is concerned about a serious conflict on the Korean Peninsula. Meanwhile, commentators and scholars are trying to offer new strategies for resolving this conflict and building peace. This article will address and explore how a conflict on the Korean Peninsula can be resolved by preventive diplomacy and the rule of law. This article will analyze and discuss how preventive diplomacy can create negative peace or an absence of war. This article will also address how the rule of law can build positive, or sustainable,

peace in the region. This article will examine how the rule of law can maintain peace and why North Korea should consider the rule of law.

I. INTRODUCTION

Although the Korean War began more than sixty years ago and was suspended by an armistice agreement in 1953, the conflict and tension have still existed on the Korean Peninsula. All parties have tried to protect their security interests through the use of military forces. The United Nations (U.N.) has tried to resolve the conflict and establish peace in the region. Many scholars and commentators have also tried to explore a conflict resolution; yet, there is no conflict resolution on the Korean Peninsula. Recently, the conflict and tension escalated when North Korea conducted nuclear weapons and ballistic missile tests. The international community is concerned that the conflict and tension may lead to a Second Korean War.

In fact, the conflict on the Korean Peninsula can be resolved by preventive diplomacy and the rule of law. Further, both strategies can also be used to build peace in the region. Preventive diplomacy is a first step to resolve the conflict and build peace. Preventive diplomacy can prevent disputes from escalating into conflicts, or prohibit the spread of conflicts. Preventive diplomacy may escalate the conflict or tension which resulted from nuclear weapons and ballistic missile tests. Preventive diplomacy can then create negative peace, or an absence of war. Nevertheless, preventive diplomacy cannot create permanent or sustainable peace on the Korean Peninsula. The rule of law can be used as a second step to build positive, or sustainable, peace in the region. This means that there would be no conflict on the Korean Peninsula. The rule of law can address the root causes of the conflict. The rule of law can also maintain peace or establish peaceful relations between two parties. More importantly, North Korea will probably seek self-sustaining non-violence under the rule of law.

This article will mainly explore and address how preventive diplomacy and the rule of law can resolve the conflict on the Korean Peninsula. Part II of this article will discuss the history of the Korean Peninsula conflict. Part III of this article will examine how preventive diplomacy can prevent the conflict or establish negative peace in the region. In particular, it will address the definition of preventive diplomacy and the role of preventive diplomacy on the Korean Peninsula. This part will also discuss and analyze the new elements of preventive diplomacy, which consist of communication, cooperation, and confidence. Part IV of this article will consider how the rule of law builds positive or sustainable peace in the region. Since the notion of the rule of law

involves regulations, this part will discuss the role of international law on the Korean Peninsula. It will later examine the importance and definition of the rule of law. This part will discuss a difference between the rule of law and North Korea's political ideology. It will also address how North Korea adopts the rule of law to create sustainable peace on the Korean Peninsula.

II. THE HISTORY OF THE KOREAN PENINSULA CONFLICT

In 1910, Korea was occupied by Japan. Korea regained its independence after Japan surrendered to the Allies in World War II. However, after the end of World War II, the Korean Peninsula was occupied by the United States (U.S.) and the Soviet Union.¹ Both countries used the 38th parallel (38 degrees north latitude) as a temporary demarcation line to avoid accidental collisions between themselves. The Korean Peninsula was then divided at the 38th parallel into a northern area and a southern area. The United States occupied a southern area while the Soviet Union occupied a northern area. The northern and southern area each established their administration and claimed jurisdiction over the entire Peninsula. The northern area, supported by the Soviet Union, became the Democratic People's Republic of Korea, or North Korea. The southern area, supported by the United States, became the Republic of Korea, or South Korea. North Korea was a communist state; South Korea, an anticommunist state. Both North Korea and South Korea wanted to eliminate the other's government and unify Korea under their rule.²

The Korean War began on June 25, 1950 when the North Korean army crossed the 38th parallel and invaded South Korea. The North Koreans captured the South Korean capital and advanced to the southern part of the Korean Peninsula. The purpose of the invasion was to unify the Korean Peninsula by force. The United Nations Security Council disagreed with the invasion and established a joint command force to assist South Korea. The United Nations forces, consisting of troops from sixteen member states, were sent to the Korean Peninsula under its command. The United Nations forces responded to North Korea by cutting off its supply lines. The North Korean war machine collapsed, and the country had to retreat across the 38th parallel. The United Nations forces retook South Korea in September 1950. The United Nations also expanded the objective from the preservation of South Korea to reunification of the Korean Peninsula. The United Na-

1. CHRISTOPH BLUTH, *KOREA 1-2* (2008).

2. MATTHEW S. MUEHLBAUER & DAVID J. ULBRICH, *WAYS OF WARS: AMERICAN MILITARY HISTORY FROM THE COLONIAL ERA TO THE TWENTY-FIRST CENTURY* 425 (2014).

tions forces then crossed into North Korea and captured the North Korean capital. By November, the United Nations forces approached the Yalu River, the border of China and North Korea. The Chinese forces, called "volunteers," crossed the border and attacked the United Nations forces. The combined Chinese and North Korean forces recaptured the North Korean capital in December. The United Nations forces retreated below the 38th parallel. On January 4, 1951, the communist forces recaptured the South Korean capital. By March 1951, the United Nations forces pushed communist troops back across the 38th parallel again.

In July 1951, peace negotiations in the Korean Peninsula took place at the communist-controlled city of Kaesong in western South Korea. Both sides argued such issues as the exchange of prisoners of war and the exact location of the truce demarcation line that would become the new border of North and South Korea. Unfortunately, this negotiation collapsed in August 1951. Another negotiation resumed in October 1951 at the village of Panmunjom in southern North Korea. There was no substantial progress in the negotiation because neither side wanted to compromise on those issues.³ Military operations continued in the form of limited attacks, air-to-air battles, and strategic bombing campaigns.⁴ Eventually, peace negotiations proceeded again, resulting in an armistice on July 27, 1953. The armistice ended the Korean War even though it did not establish permanent peace. North and South have also been divided along a Demilitarized Zone, nearly parallel to the original border between the North and the South.⁵ Among other things, both Dulles and Eisenhower claimed that the threat of introducing nuclear weapons had played a major role in completing the agreement that ended the war.⁶ However, it is unclear whether the threat of nuclear retaliation was decisive. The severe losses that North Korea had suffered, the economic hardship in the People's Republic of China, and the expectation of reduced Soviet support in the war effort following Stalin's death seemed to be more influential at the time.⁷ Thus, the armistice ending the Korean War resulted from nonnuclear considerations.

The tension between North and South Korea has existed since 1953. There have been several incidents and clashes triggered by North

3. CARTER MALKASIAN, *THE KOREAN WAR 1950-1953* 7 (2001).

4. *Id.*

5. NAM P. SUH, *COMPLEXITY: THEORY AND APPLICATIONS* 255 (2005).

6. Michael Nacht et al., *Cross-Domain Deterrence in American Foreign Policy*, in *CROSS-DOMAIN DETERRENCE: STRATEGY IN AN ERA OF COMPLEXITY* 38 (Jon R. Lindsay & Erik Gartzke eds., 2019).

7. *Id.*

Korea.⁸ More importantly, North Korea has posed a serious threat to the Peninsula and many countries by developing and testing nuclear weapons.⁹ In fact, the North Korea nuclear development program started in the mid-1950s. North Korea gained access to advanced technologies from Moscow and its Eastern and central European satellite states.¹⁰ This included nuclear technology. In 1956, the Soviets signed an agreement to train North Korean technicians in peaceful uses of nuclear technology at Soviet nuclear research facilities.¹¹ In 1959, the Soviets signed another deal with the North Koreans to provide them with a research reactor, which was completed in 1965.¹² The North Korean nuclear weapons program began in the early 1970s. More particularly, North Korea built several gas-graphite nuclear reactors in the Soviet style to generate electricity.¹³ All produced the by-product plutonium, which could be used to manufacture hydrogen bombs.¹⁴ North Korea also established missile development programs and gained missile-related technology from China. In 1985, the Soviet Union convinced Kim Il Sung to sign the Nonproliferation Treaty (NPT), which required inspections by the U.N. International Atomic Energy Agency (IAEA) to prevent military use of nuclear material.¹⁵ From 1993-1994, North Korea did not cooperate with the IAEA inspecting nuclear facilities under the NPT. Since 2002, North Korea has withdrawn from the NPT and has tested nuclear weapons.

North Korea has developed nuclear weapons and ballistic missile programs which threaten international peace and security. Those have increased the tension between North and South Korea and have worsened the situation on the Korean Peninsula.¹⁶ The United States tried to deter North Korea from developing and testing nuclear weapons and

8. JACOB BERCOVITCH & MIKIO OISHI, *INTERNATIONAL CONFLICT IN THE ASIA-PACIFIC: PATTERNS, CONSEQUENCES AND MANAGEMENT* 17 (2010).

9. *Id.*

10. Joeeun Kim, *Rethinking the Origins of North Korea's Nuclear Program*, in *NUCLEAR SCHOLARS INITIATIVE: A COLLECTION OF PAPERS FROM THE 2014 SCHOLARS INITIATIVE* 74 (Sarah Minot ed., 2015).

11. *Id.*

12. *Id.*

13. PATRICIA BUCKLEY EBREY & ANNE WALTHALL, *MODERN EAST ASIA FROM 1600: A CULTURAL, SOCIAL, AND POLITICAL HISTORY* 498 (3d ed. 2013).

14. *Id.*

15. *Id.*

16. DAVID W. SHIN, *RATIONALITY IN THE NORTH KOREAN REGIME: UNDERSTANDING THE KIMS' STRATEGY OF PROVOCATION* 245 (2018).

other programs.¹⁷ Unfortunately, it was not successful. During 2013 and 2016, North Korea launched missile tests and prepared for new nuclear tests. Those provocations escalated the tension and conflict with five countries – the United States, China, Japan, Russia, and South Korea. However, there have been attempts to reduce the tension and establish peaceful negotiations. Recently, denuclearization negotiations with North Korea have resumed. More particularly, on April 27, 2018, Kim Jong-un, the current supreme leader of North Korea, met Moon Jae-in, the current president of South Korea, in the demilitarized zone which separates North and South Korea. They pledged to convert the armistice that ended the hostilities of the Korean War into a formal peace treaty. They also confirmed the shared goal of achieving a nuclear-free Korean Peninsula. On June 12, 2018, President Donald Trump and Chairman Kim had a meeting in Singapore, where they signaled a desire to change the United States-North Korea relationship. On February 27-28, 2019, President Trump and Kim held a second meeting in Vietnam, but both leaders disagreed over sanctions relief and denuclearization. On June 30, 2019, President Trump and Chairman Kim had a meeting in Panmunjom at the demilitarized zone. Both leaders agreed to restart nuclear negotiations.

III. PREVENTIVE DIPLOMACY

A. *The Definition of Preventive Diplomacy*

In the past, the international community failed to resolve or terminate conflicts among states.¹⁸ International entities and states felt that conflict prevention could be used to maintain international peace and security. After the end of World War II, the principle of conflict prevention was established and developed by the U.N. This principle can be found in paragraph 1 of Article 1 of the U.N. Charter.¹⁹ In 1960, the

17. GREGORY J. MOORE, NORTH KOREAN NUCLEAR OPERATIONALITY: REGIONAL SECURITY & NONPROLIFERATION 32 (2014).

18. Edward C. Luck, *Prevention: Theory and Practice*, in FROM REACTION TO CONFLICT PREVENTION: OPPORTUNITIES FOR THE UN SYSTEM 252 (Fen Osler Hampson & David M. Malone eds., 2002) (“Prevention is hardly a new goal for the United Nations. Its founders had identified conflict prevention as one of its primary purposes, given the failure of the League of Nations to prevent the chain of events that lead to World War II.”).

19. See U.N. Charter art. 1, ¶ 1, stating “The Purposes of the United Nations are: (1) To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace [...]”).

term “preventive diplomacy” was first introduced by Dag Hammarskjöld, former U.N. Secretary-General.²⁰ It was described as an effort to preempt the escalation of superpower proxy wars in Third World countries into global confrontations during the Cold War.²¹ However, after the end of the Cold War, the idea of “preventive diplomacy” was developed.²² Former U.N. Secretary-General Boutros Boutros-Ghali’s 1992 report, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peacekeeping*, outlined suggestions for enabling intergovernmental organizations to respond quickly and effectively to threats to international peace and security in the post-Cold War era.²³ In particular, four major areas of activity were identified: preventive diplomacy, peacemaking, peacekeeping, and peace building.²⁴ Preventive diplomacy is then distinguished from other peace actions. Among other things, preventive diplomacy is defined as an “action to prevent disputes from arising between parties, to prevent existing disputes from escalating into conflict and to limit the spread of the latter when they occur.”²⁵ Boutros-Ghali’s view was not limited to securing peace between the United States and the Soviet Union.²⁶ His definition was much broader and aimed to prevent all types of violent conflict.²⁷ It also stopped dividing the world into two power blocs, but encouraged countries to work together for peace.²⁸

In 2001, former U.N. Secretary-General Kofi Annan proposed that “preventive diplomacy” be renamed “preventive action.”²⁹ In his opin-

20. THE UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION (UNESCO), *LONG WALK OF PEACE: TOWARDS A CULTURE OF PREVENTION* 42 (2018).

21. *Id.*

22. Luck, *supra* note 18, at 252 (“With the end of the Cold War, then, it was a logical progression for the Security Council, meeting at the summit level for the first time in 1992, to ask UN Secretary-General Boutros Boutros-Ghali to prepare an analytical report on “the capacity of the United Nations for preventive diplomacy, for peacemaking and for peacekeeping.”).

23. Tim Murithi, *Peacemaking and African Traditions of Justice and Reconciliation*, in *PEACEMAKING: FROM PRACTICE TO THEORY* 276 (Susan Allen Nan et al., 2011).

24. *Id.*

25. U.N. Secretary-General, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping*, U.N. Doc. A/47/277-S/24111 (June 17, 1992).

26. R.S. KALHA, *THE DYNAMICS OF PREVENTIVE DIPLOMACY* 2 (2014).

27. EMMA J. STEWART, *THE EUROPEAN UNION AND CONFLICT PREVENTION: POLICY EVOLUTION AND OUTCOME* 30 (2006).

28. KALHA, *supra* note 26, at 3.

29. J. Ododa Opiyo, *The Challenges of Preventive Diplomacy: The United Nations’ Post-Cold War Experiences in Africa*, AFR. CTR. FOR THE CONSTRUCTIVE RESOL. OF DISPUTES (2012), available at <http://www.accord.org.za/ajcr-issues/%EF%BF%BCthe-challenges-of-preventive-diplomacy/> (last visited Sept. 29, 2019).

ion, preventive diplomacy was used as a means to prevent human suffering and as an alternative to costly politico-military operations.³⁰ There are also several forms of action that could have useful preventive results. Those may include preventive deployment, preventive disarmament, preventive humanitarian action, and preventive peace building, as well as a wide range of actions in the fields of good governance, human rights, and economic and social development.³¹ Additionally, Kofi Annan emphasized that “preventive action” should be limited mostly to measures stated under Chapter VI of the U.N. Charter, but enforcement action under Chapter VII of the U.N. Charter must remain a legitimate means of last resort to prevent massive violations of fundamental human rights or other serious threats to peace.³²

Former U.N. Secretary-General Ban Ki Moon reconsidered the concept of preventive diplomacy.³³ He established four elements of preventive diplomacy. First, the strengthening of U.N. partnerships with all stakeholders should be emphasized.³⁴ This is because successful preventive diplomacy would require contributions of a range of actors at both the regional and international levels.³⁵ Second, the developments of preventive diplomacy should include the increasing use of international contact groups.³⁶ Progress can merely be accomplished through “partnership,” which results in a combination of influence, impartiality, capacity, and capability.³⁷ Effective preventive actions depend on the willingness of parties in the conflict to engage. Neighboring states and other institutions may contribute or become key allies. Third, the international community should continue to invest in prevention.³⁸ The global economic crisis has put new pressures on resources and responses, when successful, are highly cost-effective. Fourth, women should have a role in preventive diplomacy.³⁹

U.N. Secretary-General Antonio Guterres has focused on preventive diplomacy which has been used to respond to conflicts for decades. He has highlighted conflict prevention as the top priority for the U.N. characterized by, a comprehensive, modern, and effective operation

30. *Id.*

31. *Id.*

32. *Id.*

33. R.P. BARSTON, MODERN DIPLOMACY 248 (4th ed. 2014).

34. Opiyo, *supra* note 29.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

peace architecture, encompassing prevention, conflict resolution, peace-keeping, peace building, and long-term development – the “peace continuum.”⁴⁰ He stressed that prevention must be integrated into the three pillars of the U.N.’s work, urging staff and member states to enhance the interlink-ages between peace and security, development, and human rights.⁴¹ He has also promoted the sustaining peace vision as a new rationale and source of momentum for preventing conflicts.⁴²

However, preventive diplomacy is considered a successful and unsuccessful strategy. For example, in the Cuban Missile Crisis of 1962, preventive diplomacy could deter a nuclear confrontation between the United States and the Soviet Union.⁴³ On the other hand, preventive diplomacy was unable to deter the invasion of Iraq in 2003 and the subsequent disastrous consequences.⁴⁴ Even though the U.N. encourages or supports preventive diplomacy, conflict prevention is less successful. More particularly, there are a number of obstacles to preventive diplomacy. First, it is difficult for third parties to influence or manipulate domestic policies within the countries where a violent conflict is to be prevented.⁴⁵ This is because preventive diplomacy may require third parties to resolve conflicts by intervening in the countries. However, inappropriate intervention may violate countries’ sovereignty.⁴⁶ Second, it is difficult to find the long-term support.⁴⁷ This is because preventive diplomacy is a long, costly, and fragile process that can be easi-

40. *At Security Council, UN Chief Guterres Makes Case for New Efforts to Build and Sustain Peace*, UNITED NATIONS (Jan. 10, 2017), available at <https://www.un.org/sustainabledevelopment/blog/2017/01/at-security-council-un-chief-guterres-makes-case-for-new-efforts-to-build-and-sustain-peace/> (last visited Sept. 29, 2019); Remarks to the General Assembly High-Level Meeting on Peace building and Sustaining Peace, UNITED NATIONS (Apr. 24, 2018), <https://www.un.org/sg/en/content/sg/speeches/2018-04-24/peacebuilding-and-sustaining-peace-remarks-general-assembly> (last visited Sept. 29, 2019).

41. Adriana Erthal Abdenur & Giovanna Kuele, *Can the African Union Innovate in Conflict Prevention? Evidence from Mediation and Preventing and Countering Violent Extremism*, in CONTEMPORARY AFRICA AND THE FORESEEABLE WORLD ORDER 96 (Francis Onditi et al., 2019).

42. *Id.*

43. *Preventive Diplomacy at the United Nations*, UNITED NATIONS CHRON. (n.d.), available at <https://unchronicle.un.org/article/preventive-diplomacy-united-nations> (last visited Sept. 29, 2019).

44. Claude Rakisits, *Summary of “The Gulf Crisis: Failure of Preventive Diplomacy,” BEYOND INTRACTABILITY*, available at <https://www.beyondintractability.org/artsum/rakisits-thegulf> (last visited Sept. 29, 2019).

45. JACOB BERCOVITCH & RICHARD JACKSON, *CONFLICT RESOLUTION IN THE TWENTY-FIRST CENTURY: PRINCIPLES, METHODS, AND APPROACHES* 98 (2009).

46. *Id.*

47. *Id.*

ly derailed, especially if the root causes of the conflicts are not addressed.⁴⁸ Thus, preventive diplomacy is an expensive investment. Third, it is difficult to keep up preventive efforts even though preventive diplomacy is cheaper than massive reconstruction or humanitarian projects.⁴⁹ Preventive efforts may require the development of systematic and coordinated long-term engagement, as well as the integration of political, social, economic, military, and human rights measures.⁵⁰ Such cooperation is difficult to accomplish and costly to maintain. Fourth, it is difficult to determine whether and when preventive diplomacy is no longer needed.⁵¹ Fifth, preventive diplomacy is a lack of political will.⁵² This means that countries do not want to involve other situations or conflicts, but only focus on their interests.

B. The Role of Preventive Diplomacy on the Korean Peninsula

A question arises whether preventive diplomacy should be used on the Korean Peninsula. The situation on the Korean Peninsula is considered a “frozen conflict” that was the result of the Cold War.⁵³ The conflict is deeply complex and affects several countries in the region. The root causes of the conflict involve political ideology, divisions, discrepancy, hostility, military forces, and weapons development. Since the end of the Korean War, the conflict has hung between stalemate and escalation. There has been no peace treaty or international framework for resolving and ending a conflict. More particularly, peace on the Korean Peninsula has mainly been threatened by North Korea. The tension has recently escalated when North Korea conducted nuclear weapons and ballistic missile tests.⁵⁴ Those have posed a direct and serious threat to the peace and stability.⁵⁵ On the other hand, the United States and South Korea have responded to the threat by establishing joint military exercises and missile defense cooperation. North Korea has considered

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 99.

52. *Id.*

53. ROBERT DANIEL WALLACE, *NORTH KOREA AND THE SCIENCE OF PROVOCATION: FIFTY YEARS OF CONFLICT-MAKING* 164 (2016).

54. CHI YOUNG PAK, *KOREA AND THE UNITED NATIONS* 133 (2000).

55. *Id.* (This not only represents a challenge to the international regime of non-proliferation of nuclear weapons, but could also lead to the escalation of an arms race in the Asian region.).

joint military exercises to be the threats, escalating the tension on the Korean Peninsula.⁵⁶

Furthermore, the tension has been escalated by verbal threats or the exchange of words. Generally, verbal threats are often considered costless communication or cheap talk which may not have any effect on behavior.⁵⁷ However, verbal threats may have an effect when they can change people's minds about their goals.⁵⁸ On the Korean Peninsula, verbal threats have been used several times, but they did not escalate the tension or conflict. Until 2017, verbal threats have escalated the tension when they have been used to support their physical actions. Thus, talk is probably not cheap anymore, but it is like pouring gasoline on the fire. For example, in August 2017, the United States and South Korea were conducting annual military drills.⁵⁹ About 17,500 U.S. troops and 50,000 South Korean troops were involved in the exercises.⁶⁰ At the U.N. General Assembly on September 19, 2017, President Trump stated that "[t]he United States has great strength and patience, but if it is forced to defend itself or its allies, we will have no choice but to totally destroy North Korea."⁶¹ He also said, before using a belittling nickname for North Korean leader Kim Jong-un, "Rocket Man is on a suicide mission for himself and for his regime."⁶² Meanwhile, Ri Yongho, North Korea's foreign minister, responded to President Trump's speech, noting that "[t]here is a saying that the marching goes on even when dogs bark⁶³ [...] If he was thinking he could scare us with the sound of a dog barking, that's really a dog dream."⁶⁴ North Korea has

56. Choe Sang-Hun & Austin Ramzy, *South Korea and U.S. Begin Drills as North Wars of Rising Tensions*, N.Y. TIMES (Aug. 21, 2017), available at <https://www.nytimes.com/2017/08/21/world/asia/south-korea-us-joint-exercises.html> (last visited Sept. 29, 2019).

57. Dustin H. Tingley & Barbara F. Walter, *Can Cheap Talk Deter? An Experimental Analysis*, 55 J. CONFLICT RESOL. 994, 998 (2011).

58. *Id.* at 997.

59. *US-South Korea Hold Military Drills Amid Tension*, BBC NEWS (Aug. 21, 2017), available at <https://www.bbc.com/news/world-asia-40957725> (last visited Sept. 30, 2019).

60. *Id.*

61. David Nakamura & Anne Gearan, *In U.N. Speech, Trump Threatens to 'totally destroy North Korea' and calls Kim Jong Un 'Rocket Man,'* WASH. POST (Sept. 19, 2017), available at <https://www.washingtonpost.com/news/post-politics/wp/2017/09/19/in-u-n-speech-trump-warns-that-the-world-faces-great-peril-from-rogue-regimes-in-north-korea-iran/> (last visited Sept. 30, 2019).

62. *Id.*

63. Justin McCurry, *'Sound of A Dog Barking': North Korea Ridicules Trump Threat*, THE GUARDIAN (Sept. 20, 2017), available at <https://www.theguardian.com/world/2017/sep/21/sound-of-a-dog-barking-north-korea-ridicules-trump-threat> (last visited Sept. 30, 2019).

64. *Id.*

also increased its production of nuclear weapons and ballistic missiles. This could increase the tension on the Korean Peninsula.

Preventive diplomacy should be used to resolve the conflict and prevent serious hostilities on the Korean Peninsula. Preventive diplomacy can reduce tensions from escalating into armed violence or war between the United States and North Korea. More importantly, preventive diplomacy can prohibit or halt the nuclear weapons and ballistic missile tests. Peace built by preventive diplomacy is considered "negative" peace. Typically, negative peace refers to the temporary absence of war or direct physical violence.⁶⁵ Preventive diplomacy results in a circumstance in which no military forces and weapon development are taking place. Nevertheless, preventive diplomacy cannot resolve all the problems or build sustainable peace on the Korean Peninsula. The root causes of conflicts such as political ideology and hostility may not be resolved by preventive diplomacy. Preventive diplomacy may merely handle immediate causes which escalate tensions or lead to the conflict in the region. Since preventive diplomacy creates temporary peace, the conflict or tension may erupt again. Thus, preventive diplomacy cannot build positive peace in the region.

C. *The Elements of Preventive Diplomacy*

A question arises how preventive diplomacy can be used to resolve conflicts or prevent tensions on the Korean Peninsula. In *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peacekeeping*, Boutros Boutros-Ghali established a strategy for preventive diplomacy. It required confidence-building measures.⁶⁶ It needed early warning based on information gathering and informal or formal fact-finding.⁶⁷ It also involved preventive deployment of peacekeepers and, in some situations, demilitarized zones.⁶⁸ However, the world has changed. More particularly, the world has become alarmed not because of the North's conventional military forces, but rather because it is pursuing a nuclear weapons program combined with a ballistic missile program.⁶⁹ The classical strategy for preventive diplomacy created by Boutros-Ghali may not resolve the conflict or cease this tension effectively. Perhaps,

65. Eros Desouza et al., *Definitions of Peace and Reconciliation in Latin America*, in INTERNATIONAL HANDBOOK OF PEACE AND RECONCILIATION 99 (Kathleen Malley-Morrison et al. eds., 2013).

66. U.N. Secretary-General, *supra* note 25.

67. *Id.*

68. *Id.*

69. VICTOR D. CHA & DAVID C. KANG, NUCLEAR NORTH KOREA: A DEBATE OF ENGAGEMENT STRATEGIES 58 (2005).

the situation on the Korean Peninsula is more complex, uncertain, and unstable.⁷⁰ Some elements may not be applied to prevent the conflict or discourage hostilities in the region. For example, preventive diplomacy or the deployment of military forces has been applied to deter violence in the region. The Korean demilitarized zone or a prohibited military zone was established between North and South Korea along the 38th parallel.⁷¹ This could prevent provocation and collision between the South and the North. However, tensions have still escalated between North and South Korea. Provocation has taken place near or in the Korean demilitarized zone. For example, on April 4, 1996, North Korea announced that it would give up its demilitarized zone maintenance duties.⁷² North Korean soldiers entered the demilitarized zone and unloaded their mortars, recoilless rifles, and machine guns on their side of the joint security area.⁷³ This could increase the tension and violate the 1953 Armistice Agreement, which mandates that both sides suspend all hostile actions.⁷⁴ Thus, the new strategy for preventive diplomacy is required to resolve the conflict and maintain peace on the Korean Peninsula.

In particular, the new strategy for preventive diplomacy in the Korea Peninsula includes three elements: (1) communication, (2) cooperation, and (3) confidence.

1. Communication

Communication is a process of transferring data, information, opinion, and understanding from one person to another.⁷⁵ Communication has an important role in interaction among people.⁷⁶ Communication also has a vital role in international relations because states interact with each other in various ways. More importantly, communication is a means to resolve international conflicts. Thus, communication should

70. Tsuneo Akaha, *Introduction: Uncertainty, Complexity, and Fluidity on the Korean Peninsula*, in *THE FUTURE OF NORTH KOREA* 1-3 (Tsuneo Akaha ed., 2002).

71. REUEL R. HANKS, *ENCYCLOPEDIA OF GEOGRAPHY TERMS, THEMES, AND CONCEPTS* 42 (2011).

72. JUNGSUP KIM, *INTERNATIONAL POLITICS AND SECURITY IN KOREA* 129 (2007).

73. LARS ASSMANN, *THEATER MISSILE DEFENSE (TMD) IN EAST ASIA: IMPLICATIONS FOR BEIJING AND TOKYO* 224 (2007).

74. KIM, *supra* note 72, at 129.

75. Parissa Haghirian, *International Knowledge Transfer as a Challenge for Communities of Practice*, in *ENCYCLOPEDIA OF COMMUNITIES OF PRACTICE IN INFORMATION AND KNOWLEDGE MANAGEMENT* 234 (Elayne Coakes & Steve Clarke eds., 2005); ARUNA KONERU, *PROFESSIONAL COMMUNICATION* 25-26 (2008).

76. JAMES W. NEULIEP, *INTERCULTURAL COMMUNICATION: A CONTEXTUAL APPROACH* 376 (4th ed., 2009).

be a part of preventive diplomacy. Communication in preventive diplomacy may include negotiation, conciliation, or mediation. Negotiation is a primary process of preventive diplomacy. Negotiation is a tool to resolve conflicts and balance competing interests.⁷⁷ Negotiation is flexible and informal.⁷⁸ It can also involve more than two parties and maintain relationships among parties. Mediation refers to the involvement of a third party in efforts to reach agreement between two or more parties to a dispute.⁷⁹ Mediation could be a good choice when negotiation fails. Conciliation is a process whereby parties are assisted by a conciliator to reach an acceptable solution to the dispute.⁸⁰ A third party may provide an informal communication link between conflicting parties.⁸¹ Conciliation is different from mediation. Conciliation involves an inquiry and an investigation into the facts by a conciliator,⁸² whereas a mediator has no such authority.

On the Korean Peninsula, a negotiation has been used to resolve the conflict between North Korea and its neighbors – South Korea, Japan, China, and Russia, as well as the United States. Negotiations have been in a bilateral or multilateral form. The key objective of negotiations is to halt or dismantle North Korea's nuclear and missile programs. This is because denuclearization can prevent or reduce the escalation of tensions leading to conflicts on the Korean Peninsula. More particularly, the United States engaged in four major sets of formal nuclear and missile negotiations with North Korea: (i) the Bilateral Agreed Framework (1994-2002); (ii) the bilateral missile negotiations (1996-2000); (iii) the multilateral Six-Party Talks (2003-2009); and (iv) the Bilateral Leap Day Deal (2012).⁸³ Additionally, in June 2018, the negotiation between the United States and North Korea resumed in Singapore. However, the negotiation has stalled since the Hanoi Summit in 2019. Among other things, each negotiation has been in a form of ex-

77. BERCOVITCH & JACKSON, *supra* note 45, at 7-8.

78. JULIAN D.M. LEW ET AL., *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 13 (2003).

79. DANIELLE BESWICK & PAUL JACKSON, *CONFLICT, SECURITY AND DEVELOPMENT: AN INTRODUCTION* 100 (2d ed., 2014).

80. Ann Black, *Finding the Equilibrium for Dispute Resolution: How Brunei Darussalam Balances a British Legacy With Its Malay and Islamic Identity*, 8 INT'L TRADE & BUS. L. REV. 185, 195 (2003).

81. A.B. FETHERSTON, *TOWARDS A THEORY OF UNITED NATIONS PEACEKEEPING* 110 (1994).

82. MALCOLM N. SHAW, *INTERNATIONAL LAW* 773 (8th ed., 2017).

83. Mary Beth D. Nikitin et al., *Nuclear Negotiations with North Korea: In Brief*, CONGRESSIONAL RESEARCH SERVICE, available at <https://fas.org/sgp/crs/nuke/R45033.pdf> (last visited Sept. 30, 2019).

change. North Korea would halt its nuclear programs while the United States would provide economic assistance and remove sanctions or restrictions.

Unfortunately, the negotiation between the two countries is the difficult task. The negotiations often broke down because of disagreements or incompatible demands. For example, the Hanoi Summit ended in failure. The two countries had incompatible demands, so an agreement could not be reached. In the United States' version of events, North Korea agreed to dismantle the nuclear and fissile material production facilities at Yongbyon in exchange for complete sanctions relief, but the United States wanted other nuclear facilities, including covert sites, disabled as well.⁸⁴ On the other hand, the North Korean foreign minister, Ri Yong-ho, stated that North Korea had only demanded partial sanctions relief in return for closing Yongbyon.⁸⁵ He also said that the United States had wasted an opportunity that "may not come again," as Pyongyang's position would not change even if the United States sought further talks.⁸⁶ Thus, in order to conclude an agreement, the negotiation between the two countries should be designed to search for a compromise or establish the new element of the agreement which is acceptable to both sides.

The negotiation between two countries has stalled because North Korea has not relied on the negotiation processes. Instead, North Korea has acted against the negotiation process. More particularly, when North Korea was not satisfied with the deals, it conducted nuclear or missile tests during the round of negotiations. This could impede the negotiation process and escalate tensions in the region. For example, on February 29, 2012, the United States and North Korea unveiled an agreement, dubbed the "Leap Day Deal."⁸⁷ North Korea promised a moratorium on nuclear and long-range missile tests and allowed new in-

84. *North Korean Nuclear Negotiations 1985-2019*, COUNCIL ON FOREIGN REL., available at <https://www.cfr.org/timeline/north-korean-nuclear-negotiations> (last visited Sept. 30, 2019).

85. Julian Borger, *Vietnam Summit: North Korea and US Offer Differing Reasons for Failure of Talks*, THE GUARDIAN (Mar. 1, 2019), available at <https://www.theguardian.com/world/2019/feb/28/vietnam-summittrump-and-kim-play-down-hopes-of-quick-results-nuclear-talks> (last visited Sept. 30, 2019).

86. *Id.*

87. Andrew Quinn, *Insight: Obama's North Korea Leap of Faith Falls Short*, REUTERS (Mar. 30, 2012), available at <https://www.reuters.com/article/us-korea-north-usa-leap/insight-obamas-north-korean-leap-of-faith-falls-short-idUSBRE82T06T20120330> (last visited Sept. 30, 2019).

ternational inspections.⁸⁸ The United States also announced that the two countries would hold further talks to finalize details of a “target U.S. program consisting of an initial 240,000 metric tons of nutritional assistance.”⁸⁹ The U.S. statement emphasized a range of issues, including the United States’ continued commitment to the 1953 Armistice Agreement.⁹⁰ However, on March 16, 2012, North Korea announced plans for a new satellite launch in April using ballistic missile technology.⁹¹ In April 2012, North Korea launched an “earth observation satellite,” which violated the U.N. Security Council resolution.⁹² The United States suspended its portion of the Leap Day Deal arrangement because the launch violated the terms of the agreement.⁹³

Furthermore, when North Korea failed to win concessions in the negotiations, it carried on the nuclear test or adopted strategies designed to increase the threat of military aggression.⁹⁴ This would result in the collapse of nuclear deals and increase tensions in the region. For instance, the Six-Party Talks, involving China, Japan, North Korea, Russia, South Korea, and the United States, were launched in August 2003. The talks established the objective of a nuclear-free Korean Peninsula and set in motion the Korean peace process.⁹⁵ The talks went through several rounds. However, negotiations stalled when the U.S. Treasury Department targeted the Banco Delta Asia (BDA) in Macau as a “willing pawn for the North Korean government to engage in corrupt financial activities.”⁹⁶ This also led to the freezing of \$25 million worth of North Korean accounts at the BDA and efforts to shut down its hard

88. Julia Masterson, *Chronology of U.S.-North Korean Nuclear and Missile Diplomacy*, ARMS CONTROL ASS'N, available at <https://www.armscontrol.org/factsheets/dprkchron> (last visited Sept. 30, 2019).

89. Nikitin et al., *supra* note 83.

90. *Id.*

91. IAN JEFFRIES, NORTH KOREA, 2009-2012: A GUIDE TO ECONOMIC AND POLITICAL DEVELOPMENTS 653 (2013).

92. Justin McCurry, *North Korea Rocket Launch: UN Security Council Condemns Latest Violation*, THE GUARDIAN (Feb. 7, 2016), available at <https://www.theguardian.com/world/2016/feb/07/north-korea-launches-long-range-rocket-it-claims-is-carrying-a-satellite> (last visited Sept. 30, 2019).

93. Nikitin et al., *supra* note 83.

94. HEATHER ELKO MCKIBBEN, STATE STRATEGIES IN INTERNATIONAL BARGAINING: PLAY BY THE RULES OR CHANGE THEM? 44 (2015).

95. Seung-Ho Joo, *Russia and the North Korean Nuclear Crisis*, in NORTH KOREA'S SECOND NUCLEAR CRISIS AND NORTHEAST ASIAN SECURITY 137 (Seung-Ho Joo & Tae-Hwan Kwak eds., 2016).

96. Mike Chinoy, *Six Party Talks: The Least Band Alternative*, 38 NORTH (Feb. 10, 2011), available at <https://www.38north.org/2011/02/six-party-talks/> (last visited Sept. 30, 2019).

currency accounts around the world.⁹⁷ On October 9, 2006, North Korea tested a nuclear device for the first time. The Six-Party Talks resumed in February 2007. When negotiations began, North Korea pledged to begin dismantling its nuclear programs in exchange for the resumption of food and fuel aid.⁹⁸ North Korea also received 50,000 tons of fuel in exchange for allowing IAEA inspections of its facilities and shutting down production of fissile materials.⁹⁹ The Six-Party Talks collapsed in 2008 when North Korea did not allow IAEA inspectors to have access to its nuclear facilities, which was followed by a slowing of benefits from other countries.¹⁰⁰ After the collapse of the Six-Party Talks, North Korea shifted its policy away from the Six-Party Talks and toward more concerted effort to develop its nuclear weapons capability.¹⁰¹ On May 25, 2009, North Korea tested its nuclear device.¹⁰² North Korea also announced that it would perform a more powerful nuclear test.

The negotiations on the Korean Peninsula demonstrate a cyclical pattern: (1) North Korean provocation; (2) conflicts or tensions; (3) negotiations and package deals; and (4) the collapse of the nuclear deals.¹⁰³ The international community, especially the United States, is exploring new negotiating strategies. Among other things, the United States still emphasizes that the goal of diplomacy with North Korea is the “complete, verifiable, and irreversible denuclearization of the Korean Peninsula in a peaceful manner.”¹⁰⁴ The negotiations are also based on a basic bargain of economic benefits and sanctions removal in exchange for nuclear weapons and missile dismantlement. However, it is unlikely that North Korea will give up its nuclear weapons or ballistic missile programs easily. This is because nuclear weapons and ballistic

97. *Id.*

98. TOM LANSFORD, HISTORICAL DICTIONARY OF U.S. DIPLOMACY 194 (2007).

99. *Id.*

100. Nikitin et al., *supra* note 83.

101. *Id.*

102. Mimi Dougherty et al., *North Korea's Nuclear Test and its Aftermath: Coping with the Fallout*, NTI (June 25, 2009), available at <https://www.nti.org/analysis/articles/north-koreas-nuclear-test-aftermath/> (last visited Sept. 30, 2019).

103. Bong-Geun Jun, *Cyclical Patterns of North Korean Nuclear Crises and Solution: A South Korean Perspective*, in ASSESSMENT OF THE NUCLEAR PROGRAMS OF IRAN AND NORTH KOREA 63 (Jungmin Kang ed., 2013).

104. *Joint Statement between the United States and the Republic of Korea*, WHITE HOUSE, available at <https://www.whitehouse.gov/briefings-statements/joint-statement-united-states-republic-korea/> (last visited Sept. 30, 2019).

missiles can assure security in its regime.¹⁰⁵ North Korea does not have to rely on Russia and China for its own security. North Korea can use its nuclear weapons and ballistic missiles to protect itself. Nuclear weapons also provide diplomatic leverage for North Korea.¹⁰⁶ More particularly, its nuclear program has been used to extract concessions from the other countries, especially the United States. North Korea believes that its nuclear weapons can help the country to acquire the prestige which comes with the status. Meanwhile, it is unclear whether the United States will insist on joint military exercises as a precondition before the negotiations begin.¹⁰⁷ North Korea would reject dialogue on denuclearization unless joint military exercises do not exist.¹⁰⁸ Recently, the United States and South Korea have conducted joint military drills. Therefore, the negotiation in the Korean Peninsula will be more difficult and take longer time.

The process of the negotiation between the United States and North Korea has also relied on an incorrect approach. Typically, approaches to negotiations include a position-based approach and an interest-based approach. A position-based approach focuses on what each party needs.¹⁰⁹ Each party identifies his position and negotiates from his position.¹¹⁰ Each party also defends his position by using power or influence to win against another party.¹¹¹ Some techniques such as manipulation, threat, or deception are frequently used in this approach. A position-based approach then results in win-lose or lose-lose outcomes.¹¹² On the other hand, an interest-based approach focuses on parties' interests rather than positions.¹¹³ It includes cooperation between parties to identify interests and solve problems together.¹¹⁴ Parties es-

105. YOUNG WHAN KIH & HONG NACK KIM, NORTH KOREA: THE POLITICS OF REGIME SURVIVAL 169 (2014).

106. Siegfried S. Hecker, *Lessons Learned from the North Korean Nuclear Crises*, in THE SURVIVAL OF NORTH KOREA: ESSAYS ON STRATEGY, ECONOMICS, AND INTERNATIONAL RELATIONS 224 (Suk Hi Kim et al. eds., 2011).

107. Nikitin et al., *supra* note 83.

108. *North Korea Launches Two 'projectiles' into the Sea*, DW (June 8, 2019), available at <https://www.dw.com/en/north-korea-launches-two-projectiles-into-the-sea/a-49903822> (last visited Oct. 1, 2019).

109. JUDITH DWYER, COMMUNICATION FOR BUSINESS AND THE PROFESSIONS: STRATEGIES AND SKILLS 83 (5th ed., 2012).

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 85.

114. JOHN JESTON & JOHAN NELIS, BUSINESS PROCESS MANAGEMENT: PRACTICAL GUIDELINES TO SUCCESSFUL IMPLEMENTATIONS 278 (2d ed., 2010).

establish solutions to meet their similar and different interests.¹¹⁵ There also is mutual openness and information sharing to better understand each other's needs and concerns. An interest-based approach thus results in win-win outcomes which bring benefits to both parties.¹¹⁶ On the Korean Peninsula, the negotiations are based on an interest-based approach. Both countries find a creative solution in a problem-solving process. The interests of both countries are also identified or explored. More importantly, both countries exchange their interests to create the win-win situation. In this case, North Korea dismantles its nuclear and missile programs while the United States pledges to lift economic sanctions and provides economic assistance. Win-win outcomes can resolve conflicts and eliminate tensions, leading to peace in the Korean Peninsula. The successful example of the interest-based approach was the 1994 Agreed Framework. It was considered a win-win arrangement which created temporary peace in the region during 1994-2002.

However, the negotiations between the United States and North Korea have switched from an interest-based approach to a position-based approach. Although the exchange of interests is the key element of the negotiations, the two countries focus and hold their position to gain concessions. Their capabilities and interests have also been used as motivation which underpins their position. In particular, since North Korea has been recognized as one of nuclear-weapon states and the world's largest conventional military forces, the country has become more aggressive. North Korea has also been in a stronger position in the negotiations while talks have been in the certain issues for decades. North Korea knows exactly what the United States and other countries want. Discussing the same issues does not work anymore. Recently, despite the pressure of massive economic sanctions, North Korea disagreed with President Donald Trump's "grand bargain" of irreversible and immediate denuclearization for significant relief in the Hanoi Summit.¹¹⁷ After the collapse of the Hanoi Summit, there is no sign of new incentive to change North Korea's strategies. Instead, North Korea has conducted a test of a new type of short-range ballistic missile on August 15, 2019. If North Korea holds its position, the negotiation will result in a lose-lose situation. This means that conflicts and tensions will still exist on the Korean Peninsula. Thus, the United States needs

115. MARTIN A. FREY, *ALTERNATIVE METHODS OF DISPUTE RESOLUTION* 91 (2002).

116. DWYER, *supra* note 109, at 86.

117. Ferial A. Saeed, *A Republican Paradigm Shift on North Korea: Prospects and Implications*, 38 NORTH (July 26, 2019), available at <https://www.38north.org/2019/07/fsaeed072619/> (last visited Oct. 1, 2019).

to change its policy to deal with North Korea. The United States should find new strategies to generate the new negotiation based on an interest-based approach.

2. Cooperation

According to the Oxford Dictionary, “cooperation” means “the action or process of working together to the same end.”¹¹⁸ Cooperation can also be defined as a situation where parties agree to work together to produce new gains for each of the participants unavailable to them by unilateral action.¹¹⁹ The term “cooperation” has an important role in international relations because it can resolve joint problems or global conflicts. In preventive diplomacy, cooperation is a means of promoting or requiring countries or institutions to work together to resolve conflicts or prevent disputes from escalating into conflicts. In this circumstance, international conflicts exist, and a single country cannot resolve or prevent international conflicts by itself. A group of countries is then required to cooperate and participate in a resolution or prevention. Such cooperation results in peace, stability, security, and good governance. Those benefits are shared among participants and are given to the international community.

Cooperation on preventive diplomacy has been introduced in regionalism. Cooperation could prevent or resolve inter-and intra-state conflicts by peaceful means.¹²⁰ It could also promote peace building in a region. Recently, cooperation on preventive diplomacy has been a part of the broader process of U.N. cooperation with regional and sub-regional organizations.¹²¹ The Security Council has also held meetings to discuss cooperation with regional organization for maintaining international peace and security, including preventive measures.¹²² For instance, at its fourth meeting away from headquarters, held in Nairobi in 2006, the Security Council sought to intensify cooperation with the

118. *Definition of Cooperation in English*, OXFORD DICTIONARY, available at lexico.com/en/definition/cooperation (last visited Oct. 1, 2019).

119. WILLIAM ZARTMAN & SAADIA TOUVAL, INTERNATIONAL COOPERATION: THE EXTENTS AND LIMITS OF MULTILATERALISM 1 (2010).

120. Valery Ferim, *African Solutions to African Problems*, in THE AFRICAN UNION TEN YEARS AFTER: SOLVING AFRICAN PROBLEMS WITH PAN-AFRICANISM AND THE AFRICAN RENAISSANCE 146 (Mammo Muchie et al. eds., 2013) (Regional groupings can be an instrumental path to political stability, economic growth, the consolidation of democracy and hence decrease the propensity for conflict.).

121. BERTRAND G. RAMCHARAN, PREVENTIVE DIPLOMACY AT THE UN 194 (2008).

122. *Id.*

peace and security institutions of the African Union and discuss cooperation between the Union and the U.N. on the situation in Darfur.¹²³

On the Korean Peninsula, cooperation can bring the hostile parties to agreement. Cooperation can resolve conflicts or reduce tensions. Cooperation can also build or strengthen relationships between North Korea and other countries. Relationships based on cooperation help countries work together to bring peace, stability, and security to the region. Cooperation is not limited to denuclearization, as it extends to economic relations. Effective cooperation should be based on agreement rather than enforcement. Effective cooperation should also provide win-win outcomes rather than competition in the region. Furthermore, cooperation consists of several countries – South Korea, Japan, China, Russia, the United States, and North Korea. Bilateral and multilateral cooperation has then been established on the Korean Peninsula. However, bilateral cooperation is more effective than multilateral cooperation. Bilateral cooperation is less complicated than multilateral cooperation, and North Korea prefers bilateral relations or cooperation with the United States.¹²⁴ Perhaps North Korea views the United States as the most important and influential player in the conflict. Dealing with the United States directly and bilaterally would resolve the conflict. More importantly, North Korea would obtain the removal of sanctions and other restrictions on its interactions with the United States.¹²⁵ The normalization of relations with the United States would also help North Korea gain economic assistance or benefits. For example, the Agreed Framework established a road map to improve ties between the United States and North Korea.¹²⁶ The Agreed Framework required the termination of nuclear weapon development in North Korea.¹²⁷ In exchange, the United States offered to move toward normalization of political and economic relations and aid in the construction of two North Korean nuclear power reactors, subject to IAEA safeguards and based on existing Western light-water design.¹²⁸ The Agreed Framework established bilateral political and economic relations or cooperation be-

123. *Id.*

124. Nikitin et al., *supra* note 83.

125. *Id.*

126. CHARLES K. ARMSTRONG, *THE KOREAS* 101 (2d ed., 2013).

127. THOMAS GRAHAM, JR. & DAMIEN J. LAVERA, *CORNERSTONES OF SECURITY: ARMS CONTROL TREATIES IN THE NUCLEAR ERA* 1268 (2003).

128. *Id.*

tween two countries. It also temporarily reduced tensions on the Korean Peninsula.¹²⁹

Unlike bilateral cooperation, multilateral cooperation did not work well on the Korean Peninsula. In fact, countries established multilateral cooperation to deal with North Korea's nuclear challenge through three stages: (i) the Korean Peninsula Energy Development Organization (KEDO); (ii) the Four-Party Talks; and (iii) the Six-Party Talks. The KEDO was created by the United States, Japan, and South Korea.¹³⁰ The KEDO provided for the implementation of other measures required to meet the objectives of the Agreed Framework.¹³¹ The planned aid consisted of the construction of two light-water nuclear reactors (LWRs) and the provisions of 500,000 metric tons of heavy fuel oil annually while the reactors were built.¹³² U.S. contributions covered only heavy fuel oil shipments and KEDO administrative costs.¹³³ The KEDO produced important positive externalities. It also increased security and reduced the threat of proliferation in North Korea for a decade. The KEDO was considered successful cooperation. On the other hand, the Four-Party Talks and the Six-Party Talks failed to create effective cooperation in the region. This may be because each party in the talks had its own objective and found it hard to compromise with one another. More particularly, in the Four-Party Talks, South Korea, China, the United States, and North Korea agreed to reduce tensions on the Korean Peninsula and replace the 1953 Armistice Agreement with a peace treaty.¹³⁴ The Four-Party Talks had six plenary sessions where North Korea repeatedly maintained that the Four-Party Talks deal with the two issues of U.S. troop withdrawal and the conclusion of a peace treaty between the United States and North Korea.¹³⁵ While South Korea maintained that it wanted to discuss those issues that were easily resolved, North Korea insisted that the two issues – the withdrawal of U.S. troops and a Washington-Pyongyang peace treaty – be resolved

129. Amy E. Smithson, *North Korea: A Case in Progress*, in *THE POLITICS OF POSITIVE INCENTIVES IN ARMS CONTROL* 101 (Thomas Bernauer & Dieter Ruloff eds., 1999).

130. ANTHONY DIFILIPPO, *US-JAPAN-NORTH KOREA SECURITY RELATIONS: IRREPRESSIBLE INTERESTS* 24 (2013).

131. CHARLES L. PRITCHARD, *FAILED DIPLOMACY: THE TRAGIC STORY OF HOW NORTH KOREA GOT THE BOMB* 41 (2007).

132. Mark E. Manyin & Mary Beth D. Nikitin, *Foreign Assistance to North Korea*, in *THE NORTH KOREAN THREAT* 81 (Douglas C. Lovelace, Jr. ed., 2017).

133. *Id.*

134. Tae-Hwan Kwak, *The Six-Party Nuclear Talks and the Korean Peninsula Peace Regime Initiative: A Framework for Implementation*, in *THE UNITED STATES AND THE KOREAN PENINSULA IN THE 21ST CENTURY* 36 (Tae-Hwan Kwak & Seung-Ho Joo eds., 2006).

135. *Id.*

first.¹³⁶ Thus, the four participants in the talks failed to agree on agenda items for discussion at the Four-Party Talks.

In some cases, military cooperation can raise tensions, triggering conflicts on the Korean Peninsula. More specifically, a joint military exercise between South Korea and the United States can increase the tension and disturb bilateral relations with North Korea. Typically, the United States and South Korea joint military exercise is cooperation designed to enhance the ability of the two countries to carry out military operations. The joint military exercises may also be used as a strategy to reduce North Korea's aggression or brinkmanship. However, North Korea considers these joint military exercises as a threat or preparation for war.¹³⁷ North Korea has responded to the military drills by conducting armed attacks. For example, South Korea and the United States began the annual Hoguek joint military exercises in November 2010.¹³⁸ North Korea considered the exercise as a preparation for a combined armed attack on the country.¹³⁹ North Korea warned that it would not tolerate firing in what it regarded as its territorial water.¹⁴⁰ South Korea's forces went ahead with live-ammunition military exercises in waters off Baengyeong Island and Yeonpyeong Island within South Korean-held territory below the Northern Limit Line.¹⁴¹ North Korea conducted a rock artillery attack on Yeonpyeong Island.¹⁴² North Korea fired approximately 120 rockets while South Korea responded with eighty rounds of artillery.¹⁴³ This was the first artillery exchange after the end of the Korean War, escalating the tension in the region.¹⁴⁴

Recently, North Korea has responded with missile launches. This could eventually interrupt bilateral cooperation and negotiations between the United States and North Korea. For example, after the collapse of the Hanoi Summit in February 2019, President Trump and Chairman Kim met each other at the inter-Korean border, or the demili-

136. *Id.*

137. Thomas Maresca, *U.S., South Korea Start Military Drills Amid 'Second War' Threats from Pyongyang*, USA TODAY (Aug. 21, 2017), available at <https://www.usatoday.com/story/news/world/2017/08/21/u-s-south-korea-military-drills/585250001/> (last visited Oct. 1, 2019).

138. Tae-Hwan Kwak, *The Denuclearization of the Korean Peninsula through the Six-Party Talks*, in NORTH KOREA AND SECURITY COOPERATION IN NORTHEAST ASIA 13 (Tae-Hwan Kwak & Seung-Ho Joo eds., 2014).

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. WALLACE, *supra* note 53, at 114.

144. *Id.*

tarized zone, in June 2019 and agreed to resume working-level negotiations. However, South Korea and the United States held their annual joint military exercises in August 2019, despite warnings from North Korea that the drills could derail fragile nuclear diplomacy.¹⁴⁵ North Korea was ramping up its weapon tests, including two test firings of a new rocket artillery system in the same month.¹⁴⁶ North Korea also expressed frustration over the continuance of the military drills because the country considered the joint practices as a rehearsal for invasion.¹⁴⁷ This could slow down the pace of nuclear negotiations and the peace processes.¹⁴⁸

3. Confidence

Confidence is an important component of preventive diplomacy. More significantly, preventive diplomacy can be exercised successfully only when there is a strong foundation of trust or confidence among parties involved.¹⁴⁹ However, trust or confidence is difficult to create especially when parties are engaged in conflict and when each side tends to emphasize the differences between itself and the other side.¹⁵⁰ Deception, manipulation, and suspicion are obstacles to create trust or confidence between parties. The term “confidence-building measures” then needs to be established and developed. In fact, the idea of confidence-building measures was first introduced in the European arms control during 1970s.¹⁵¹ Confidence-building measures were implemented in the Helsinki Final Act of 1975.¹⁵² Confidence-building measures also had a critical role in the bilateral arms control agreements between the United States and Russia. This could decrease tensions and improve the relations of the two countries during the Cold War.

In preventive diplomacy, confidence-building measures are designed to lower uncertainty, reduce the anxiety, and eliminate the mis-

145. Kim Tong-Hyung, *US, South Korea Prepare Military Drills Despite North's Ire*, AP NEWS (Aug. 5, 2019), available at <https://www.apnews.com/9833b64b2c944311bf9e296ba3a0dcbd> (last visited Oct. 1, 2019).

146. *Id.*

147. *Id.*

148. *Id.*

149. RAMCHARAN, *supra* note 121, at 202.

150. BERCOVITCH & JACKSON, *supra* note 45, at 94.

151. Emily B. Landau, *Assessing the Relevance of Nuclear CBMs to a WMD Arms Control Process in the Middle East Today*, in *WMD ARMS CONTROL IN THE MIDDLE EAST: PROSPECTS, OBSTACLES AND OPTIONS* 29 (Harald Müller & Daniel Müller eds., 2016).

152. *Id.*

perceptions inherent in any unstable structure.¹⁵³ They also strive to reduce the escalation of tensions between the conflicting parties.¹⁵⁴ When parties have confidence in each other's intentions, various events that could likely trigger the emergence of violent conflict can be prevented from materializing.¹⁵⁵ Therefore, reducing and managing tensions between parties by fostering a relationship of trust or confidence is an important requirement for conflict prevention. Four types of measures can also be adopted: (1) Joint and explicit declaration on an internationally accepted code of conduct (respect for noncombatants, prohibiting the use of chemical and biological weapons, etc.); (2) Agreement on information exchange and increased communication to assuage each party's fears about military intentions and activities; (3) Observations and inspections, through the exchange of military officers or the use of low-orbiting satellites, to ensure genuine transparency of intentions; and (4) Mutual agreement on measures of constraints (each party in a potential conflict binds itself not to use force under some specified circumstances, to ban certain kinds of weapons, or to establish buffer zones).¹⁵⁶ All these measures can prevent the escalation of conflicts or tensions.

Building trust or confidence is a difficult task on the Korean Peninsula. North Korea's relationship with the United States and South Korea has been marked by conflicts and mistrust since 1945. Several confidence-building measures such as communication and constraints have been applied to reduce the escalation of conflicts or tensions. Nevertheless, trust or confidence between the two parties has not taken place. Instead, provocation between the two parties exists in the region. Provocation can result in mistrust and escalate the tension. North Korea has provoked the international community and the United States with nuclear weapons and ballistic missile tests. On the other hand, the United States has provoked North Korea with the joint military drills. This has escalated conflicts or tensions because North Korea believes that the joint military drills are the rehearsal for invasion.¹⁵⁷ North Korea has responded to the joint military drills by firing missiles. Therefore, effective negotiation and trust cannot be created easily when provocation has still been used as a strategy on the Korean Peninsula.

153. BERCOVITCH & JACKSON, *supra* note 45, at 94.

154. *Id.*

155. *Id.*

156. *Id.*

157. Peter Stuble, *North Korea Launches Two Missiles as South Korea and US Military Exercises Begin*, INDEP. (Aug. 6, 2019), available at <https://www.independent.co.uk/news/world/asia/north-korea-missile-us-trump-kim-jong-un-japan-a9040626.html> (last visited Oct. 1, 2019).

Mistrust can result from a negative belief, uncertainty, and self-isolation. Korea has had a long history of self-isolation.¹⁵⁸ After the end of the Korean War, North Korea became one of the most isolated countries in the world, with one of the world's most repressive regimes.¹⁵⁹ The government of North Korea strictly prohibits its citizens from travelling to even the nearest town in the country without permission.¹⁶⁰ North Korea also relies on a self-supporting national economy.¹⁶¹ Since North Korea confronts economic difficulties,¹⁶² it needs assistance from the United States and South Korea.¹⁶³ However, North Korea believes that South Korea and the United States are the enemies that cause problems on the Korean Peninsula.¹⁶⁴ After the collapse of the Soviet Blocs in the 1990s, North Korea was alone.¹⁶⁵ The survival of North Korea as a state is at risk, and the collapse of its regime is possible.¹⁶⁶ Thus, North Korea does not trust South Korea and the United States. In addition, North Korea does not trust foreigners because they may take advantage of its weakness and vulnerability.¹⁶⁷ North Korea establishes a set of practical policy applications to minimize foreign in-

158. Charlotte Alfred, *How North Korea Became So Isolated*, HUFFINGTON POST (Oct. 17, 2014), available at https://www.huffpost.com/entry/north-korea-history-isolation_n_5991000 (last visited Oct. 1, 2019) (The Choson dynasty, which ruled Korea from the 14th to early 20th century, kept the country isolated from the outside world, both as a way to fend off foreign invasions and out of a belief in the superiority of its Confucian culture. Contacts with foreigners and foreign travel were banned, and after a series of invasions, the Choson rulers limited interaction with even neighboring China and Japan.).

159. FRED M. SHELLEY, *NATION SHAPES: THE STORY BEHIND THE WORLD'S BORDERS* 502 (2013).

160. C.H.R. Res. 2005/11, U.N. Doc. E/CN.4/RES/2005/11 (Apr. 14, 2005).

161. ADAM CATHCART ET AL., *CHANGE AND CONTINUITY IN NORTH KOREAN POLITICS* 3 (2016).

162. Steve Hanke, *North Korea's Economic Crisis – What Crisis?*, FORBES (Apr. 4, 2018), available at <https://www.forbes.com/sites/stevehanke/2018/04/24/north-koreas-economic-crisis-what-crisis/#5b3e0373437a> (last visited Oct. 1, 2019).

163. Choe Sang-Hun, *Trump Supports Food Aid for North Korea, South says*, N.Y. TIMES (May 7, 2019), available at <https://www.nytimes.com/2019/05/07/world/asia/trump-north-korea-food-aid.html> (last visited Oct. 1, 2019).

164. Haruki Wada, *Envisioning a Northeast Asian Community: Regional and Domestic Factors to Consider*, in *REGIONAL COOPERATION AND ITS ENEMIES IN NORTHEAST ASIA: THE IMPACT OF DOMESTIC FORCES* 47 (Edward Freidman & Sung Chull Kim eds., 2007) (North Korea has regarded the United States as its main enemy – as the chief threat to its security. During the Cold War era, the United States, the ally of South Korea, was a nuclear superpower. Consequently, North Korea felt that its safety could be secured only under the nuclear umbrella of the Soviet Union.).

165. HOWARD JISOO RYU, *ORDERLY KOREA UNIFICATION: WITH THE GUARANTEE OF STABILITY IN EAST ASIA* 19 (2007).

166. *Id.*

167. KIHl & KIM, *supra* note 105, at 28.

fluence. North Korea limits trade and transportation links with other countries and tightly restricts the circumstances under which foreigners may enter the country and interact with local citizens.¹⁶⁸ Foreigners can expect their communications to be monitored by North Korean officials.¹⁶⁹ This skepticism and distrust toward the outside world is also part of the North Korean attitude and policy toward South Korea.¹⁷⁰ North Korea then pursues a strategy of divide and conquer in the South through its united front campaign involving alliance with North Korean sympathizers and opposition political forces in the South.¹⁷¹

Mistrust also occurs when parties do not act in good faith or do not implement an agreement. Each party may be suspicious of the other. On the Korean Peninsula, the United States found that North Korea often broke agreements or promises to terminate its nuclear and missile programs. A breach of agreements or promises results in mistrust between the two countries. For example, in 1994, North Korea and the United States entered into an Agreed Framework with the goal of freezing and discontinuing North Korea's nuclear programs. However, the Agreed Framework was considered a monument to the highest levels of mistrust between two countries.¹⁷² North Korea used loopholes of the Agreed Framework to develop other weapons and take more advantages from the United States. In August 1998, North Korea tested a long-range ballistic missile over Japan, which undermined the Agreed Framework.¹⁷³ The United States had additional negotiations to end all North Korean nuclear weapons activities and long-range ballistic missile testing, production, deployment and export in exchange for lifting sanctions, normalizing relations, and providing a security guarantee.¹⁷⁴ The Agreed Framework then broke down in December 2002 when the United States determined that North Korea had secretly pursued nuclear weapons.¹⁷⁵ North Korea also said it had a right to build nuclear weapons for defensive purposes.

168. INTERNATIONAL BUSINESS PUBLICATIONS, NORTH KOREA: INVESTMENT AND BUSINESS GUIDE 276 (2002).

169. *Id.*

170. KIHIL & KIM, *supra* note 105, at 28.

171. *Id.*

172. CHARLES LIPSON, RELIABLE PARTNERS: HOW DEMOCRACIES HAVE MADE A SEPARATE PEACE 148 (2013).

173. Nikitin et al., *supra* note 83.

174. *Id.*

175. *Factbox: History of Failure: Efforts to Negotiate on North Korean Disarmament*, REUTERS (Mar. 6, 2018), available at <https://www.reuters.com/article/us-northkorea-missiles-talks-factbox/factbox-history-of-failure-efforts-to-negotiate-on-north-korean-disarmament-idUSKCN1G12PQ> (last visited Oct. 1, 2019).

Since the level of conflicts and mistrust is very high, negotiations may not be successful. More particularly, when both parties would hedge their bets, the process of denuclearization and peace building will not go forward. Instead, the process will move backward and become more difficult. Perhaps, in order to build trust or confidence on the Korean Peninsula, China as a third party is required to participate in the situation. China is North Korea's closest ally while North Korea heavily relies on China.¹⁷⁶ In this case, the United States must communicate with China about building confidence or trust with North Korea. China may convince North Korea that the United States will not transform North Korea's regime, but respect its national sovereignty. The United States and South Korea's joint military exercises should not exist in the region. More importantly, China must convince North Korea to implement or comply with an agreement. Conducting nuclear tests or firing ballistic missiles may not be the right resolution, but instead make the situation worse. Among other things, the role of China is to convince North Korea and build trust between the two countries. China does not have a role in pressuring or influencing North Korea. This is because trust or confidence is based on belief that the other side is trustworthy and is willing to reciprocate cooperation. Pressure or influence does not create trust or confidence between the two parties, but may result in the escalation of the conflict or tension. Thus, peace may not occur in the region.

IV. THE RULE OF LAW

A. The Role of International Law on the Korean Peninsula

After the conflict or tension is terminated by preventive diplomacy, peace will likely exist on the Korean Peninsula. Such peace may be characterized as negative peace or the absence of violence. However, the conflict or tension can erupt again. Peace should then be carried out as an ongoing process even though preventive diplomacy can halt the escalation of the conflict or tension. This means that, in addition to negative peace, positive peace should be established in the region. Positive peace refers to an absence of structural violence and a presence of factors which promote peace.¹⁷⁷ Positive peace can eliminate the root

176. MORSE TAN, NORTH KOREA, INTERNATIONAL LAW AND THE DUAL CRISES: NARRATIVE AND CONSTRUCTIVE ENGAGEMENT 79 (2015).

177. JEAN DE DIEU BASABOSE, ANTI-CORRUPTION EDUCATION AND PEACEBUILDING: THE UBUPFURA PROJECT IN RWANDA 64 (2019); Barbara A. Kidney, *Promoting Peace: Some Perspectives from Counseling Psychology*, in THE PSYCHOLOGY OF PEACE PROMOTION:

causes of the conflict and create peaceful relations between North Korea and the United States.¹⁷⁸ Positive peace can also prevent violence or maintain peace on the Peninsula.

Generally, the peace treaty on the Korean Peninsula would establish the formal end to the Korean War. Although the peace treaty can create peace in the region, it may not be sufficient to build positive or sustainable peace. The peace treaty may not be able to resolve the root causes of the conflict. North Korea may eventually violate the peace treaty. A question may arise how relevant countries and the international community establish positive peace on the Korean Peninsula. In this circumstance, international law, especially the NPT and international humanitarian law, should be used as a tool to create positive peace and maintain peace in the region. International law should also be used together with the peace treaty. In fact, the purpose of international law is to promote or maintain peace and security.¹⁷⁹ International law also consists of rules and principles governing the relations and dealings of nations with each other, as well as the relations between states and individuals, and relations between international organizations.¹⁸⁰ Under international law, countries are required to conduct themselves peacefully in all relations with other countries. Such peaceful relations are considered positive peace. Like general international law, the NPT is regarded as the cornerstone of the global nuclear non-proliferation regime and an essential foundation for the pursuit of nuclear disarmament.¹⁸¹ The NPT is designed to prevent the spread of nuclear weapons, to further the goals of nuclear disarmament and general and complete disarmament, and to promote cooperation in the peaceful

GLOBAL PERSPECTIVES ON PERSONAL PEACE, CHILDREN AND ADOLESCENTS, AND SOCIAL JUSTICE 45 (Mary Gloria C. Njoku et al. eds., 2019).

178. TUBA TURAN, POSITIVE PEACH IN THEORY AND PRACTICE: STRENGTHENING THE UNITED NATIONS'S PRE-CONFLICT PREVENTION ROLE 3-4 (2015) (Positive peace is defined as sustainable intra-state peace. Positive peace can also be defined as a lasting condition of non-violence within a state that is not imposed by force, but which is rather generated and maintained by the intrinsic dynamics of the given society. In other words, positive and sustainable intra-state peace signifies a society that is capable of 'self-sustaining' non-violence and the conditions of peace through its non-coercive internal dynamic and/or through the non-coercive engagements or facilitation efforts of external parties that would not contravene the self-determination of the given population.).

179. CECILIA MARCELA BAILLIET & KJETIL MUJEZINOVIC LARSEN, PROMOTING PEACE THROUGH INTERNATIONAL LAW 1-2 (2015).

180. *International Law*, LEGAL INFO. INST., available at https://www.law.cornell.edu/wex/international_law (last visited Oct. 1, 2019).

181. Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 (entered into force Mar. 5, 1970) [hereinafter NPT].

uses of nuclear energy.¹⁸² International humanitarian law is described as “a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict.”¹⁸³ International humanitarian law limits the use and the threat of use of weapons, including nuclear weapons.¹⁸⁴ International humanitarian law regulates the conduct of hostilities and protects the victims of armed conflicts.¹⁸⁵ Both the NPT and international humanitarian law result in positive or sustainable peace. They can also create peaceful relations among countries and maintain peace in the international community. The violation of the NPT, international humanitarian law, or international law can result in conflicts or violence in the international community.

North Korea is one of 193 member states of the United Nations and is bound by international law. North Korea has signed several treaties and conventions such as the Paris Agreement, the Basel Convention, the Geneva Declaration on Armed Violence and Development, and the Genocide Convention. As such, North Korea has obligations under international treaties and conventions. However, North Korea has violated peace treaties and conventions. For instance, North Korea signed the NPT as a non-nuclear weapon state in December 1985.¹⁸⁶ Although North Korea announced that it withdrew from the NPT, its withdrawal is not complete.¹⁸⁷ The NPT still applies to North Korea. In accordance with Article X of the NPT, a member country can withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country.¹⁸⁸ A member country will have to give notice of such withdrawal to all other member countries to the Treaty and to the United Nations Se-

182. *Id.*

183. *What is International Humanitarian Law?*, INT'L COMMITTEE OF THE RED CROSS (Dec. 31, 2014), available at <https://www.icrc.org/en/document/what-international-humanitarian-law> (last visited Oct. 1, 2019).

184. *Weapons*, INT'L COMMITTEE OF THE RED CROSS (Nov. 30, 2011), available at <https://www.icrc.org/en/document/weapons> (last visited Oct. 1, 2019).

185. *International Law on the Conduct of Hostilities: Overview*, INT'L COMMITTEE OF THE RED CROSS (Oct. 29, 2010), available at <https://www.icrc.org/en/document/conduct-hostilities> (last visited Oct. 1, 2019).

186. JITA MISHRA, *THE NPT AND THE DEVELOPING COUNTRIES* 119 (2008).

187. HALL GARDNER, *AVERTING GLOBAL WAR: REGIONAL CHALLENGES, OVEREXTENSION, AND OPTIONS FOR AMERICAN STRATEGY* 149 (2007) (North Korea announced it would withdraw from the NPT, but it did not offer explanations as to what extraordinary event justified its withdrawal from the treaty without following the requirements of article 10.1.).

188. *See* NPT, *supra* note 181, at art. X, stating “Each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country [...]”

curity Council three months in advance.¹⁸⁹ North Korea has not done this, so the NPT applies to its action.¹⁹⁰ Moreover, Article II of the NPT requires each non-nuclear-weapon state not to manufacture nuclear weapons or other nuclear explosive devices.¹⁹¹ Apparently, North Korea conducted nuclear weapons tests several times. It is unlikely that North Korea tested its nuclear weapons without manufacturing them.¹⁹² Thus, North Korea has violated the NPT.

North Korea is bound by customary international humanitarian law.¹⁹³ Although customary international humanitarian law does not depend on the consent of the country, it is presumed to bind all members of the international community.¹⁹⁴ Customary international humanitarian law is then binding upon armed groups who are not affiliated with any state.¹⁹⁵ Nuclear threats and any use of such weapons can then violate the principles of customary international humanitarian law beyond the NPT.¹⁹⁶ According to the International Court of Justice's advisory opinion, *Legality of the Threat or Use of Nuclear Weapons* (Nuclear Weapons Case), the Court concluded that "[a] threat or use of nuclear weapons should also be compatible with the requirements of international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law."¹⁹⁷ More importantly, the majority of the Court also affirmed "[t]he threat or use of

189. *Id.* Article X of the NPT continues, "[...] It shall give notice of such withdrawal to all other parties to the Treaty and to the United Nations Security Council three months in advance. Such notice shall include a statement of the extraordinary events it regards as having jeopardized its supreme interests."

190. Morse Tan, *International Humanitarian Law and North Korea: Another Angle for Accountability*, 98 MARQ. L. REV. 1147, 1172 (2015).

191. NPT, art. II (Each non-nuclear-weapon State Party to the Treaty undertakes not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapon or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices.).

192. Tan, *supra* note 190, at 1173.

193. Customary international humanitarian law is a set of rules that come from a general practice accepted as law. It is not necessary for a State to formally accept a rule of custom in order to be bound by it, as long as the overall State practice on which the rule is based is widespread, representative and virtually uniform.

194. JONATHAN CROWE & KYLIE WESTON-SCHEUBER, *PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW* 26 (2013).

195. *Id.*

196. Tan, *supra* note 190, at 1174.

197. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226 (July 8).

nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law...”¹⁹⁸ Therefore, North Korea has violated customary international humanitarian law because nuclear weapons and ballistic missile tests are considered the violation of international humanitarian law. This can also affect both negative and positive peace in the international community.

A question may arise why North Korea has not complied with the NPT and international humanitarian law. First, North Korea has violated the NPT and international humanitarian law because its national identity and policy contradict international rules. North Korea has pursued the “military first policy or *Songun*” which gives priority to the military affair.¹⁹⁹ Under *Songun*, North Korea primarily focuses on developing nuclear weapons rather than on improving its citizens’ lives although millions of North Koreans continue to suffer and die from starvation, poverty, and repression of the regime.²⁰⁰ *Songun* then results in the violation of the NPT and international humanitarian law. Second, North Korea may not find interests or benefits from the NPT and international humanitarian law. Unlike national law, international law does not have enforcement mechanism.²⁰¹ Countries comply with international law when they can gain interests or benefits from international law.²⁰² On the other hand, countries may not fully comply with international law when interests or benefits are not sufficient, or countries gain nothing. North Korea has not gained primary interests or benefits from the NPT and international humanitarian law when it complies with them. Instead, North Korea may only gain ancillary interests or secondary benefits such as nonviolence from the NPT and international humanitarian law. Such ancillary interests or secondary benefits may not be able to help the country. North Korea has then chosen to violate international rules to strengthen its potential even though the international community would criticize the country. Nevertheless, North Korea

198. *Id.*

199. Terence Roehrig, *The Roles and Influence of the Military, in* NORTH KOREA IN TRANSITION: POLITICS, ECONOMY, AND SOCIETY 56 (Kyung-Ae Park & Scott Snyder eds., 2013).

200. AHLAM LEE, NORTH KOREAN DEFECTORS IN A NEW AND COMPETITIVE SOCIETY: ISSUES AND CHALLENGES IN RESETTLEMENT, ADJUSTMENT, AND THE LEARNING PROCESS 15 (2016).

201. BONITA MEYERSFELD, DOMESTIC VIOLENCE AND INTERNATIONAL LAW 252 (2010) (International law lacks traditional enforcement mechanisms and there is no international policing authority that can compel states to comply with their international obligations.).

202. Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2632 (1997).

would halt its nuclear development when it gains primary interests or benefits. For example, North Korea conducted nuclear tests in 2006, violating the NPT and international humanitarian law. In February 2007, a nuclear deal was signed in Beijing, under which North Korea – in exchange for heavy fuel oil or equivalent aid – agreed to shut down and seal its nuclear reactors. Third, North Korea has used nuclear weapons to gain international acceptance and recognition. Even though North Korea is an isolated country, it has sought international acceptance and recognition by conducting nuclear weapons tests. North Korea also wants to obtain its status as a nuclear weapon state.²⁰³ Instead, North Korea's actions constitute a threat to international peace and security, violating the NPT and international humanitarian law. North Korea is directly and recklessly challenging the international community.²⁰⁴ More importantly, North Korea increases tensions and undermines stability on the Peninsula. Thus, North Korea does not find international acceptance and recognition, but creates deeper isolation from the rest of the world.

B. The Importance of the Rule of Law

In order to create positive peace or maintain peace on the Korean Peninsula, North Korea will have to comply with the NPT and international humanitarian law. A question may arise as to which instrument should be used to make North Korea comply with the NPT and international humanitarian law. In this case, the rule of law can be used as an important tool to comply with the NPT and international humanitarian law. In fact, the rule of law can build positive peace and maintain peace on the Korean Peninsula. The rule of law also promotes fairness and good governance which may address the root causes of the conflicts between the United States and North Korea.

The rule of law does not have a single agreed definition,²⁰⁵ and its meaning varies.²⁰⁶ Its definitions and principles have been developed

203. Sung Chull Kim, *North Korea's Nuclear Doctrine and Revisionist Strategy*, in ENTERING THE NEW ERA OF DETERRENCE: NORTH KOREA AND NUCLEAR WEAPONS 41 (Sung Chull Kim & Michael D. Cohen eds., 2017).

204. S. MAHMUD ALI, ASIA-PACIFIC SECURITY DYNAMICS IN THE OBAMA ERA: A NEW WORLD EMERGING 28 (2012).

205. CHRISTOPHER MAY, THE RULE OF LAW: THE COMMON SENSE OF GLOBAL POLITICS 33 (2014).

206. Marise Cremona, *Regional Integration and the Rule of Law: Some Issues and Options*, in BRIDGES FOR DEVELOPMENT: POLICIES AND INSTITUTIONS FOR TRADE AND INTEGRATION 137 (Robert Devlin & Antoni Estevadeordal eds., 2003).

by many legal scholars and institutions.²⁰⁷ Among other things, the rule of law can simply mean that government officials and citizens are bound by and abide by the law.²⁰⁸ Recently, the U.N. Secretary-General has also described the rule of law as:

[A] principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure before the law, accountability to the law, fairness in the application of law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.²⁰⁹

This is an important definition of the rule of law. It constitutes the elements of transparency, accountability, equality before the law, an independent judiciary, and protection of human rights. Based on this definition, the rule of law can also establish peace and security in two aspects. First, the rule of law requires all people or governments to be accountable to effective laws. This creates social justice, equality, economic equity, equal protection, and impartial enforcement of law. More importantly, this can bring peace and security to society. Second, the rule of law promotes and protects human rights. When human rights are protected and guaranteed by laws, peace and security occurs in society. Instead, there are no peace and security where human rights are violated. Peace and security are then connected to human rights.

207. See *Rule of Law*, WORLD BANK, available at <http://info.worldbank.org/governance/wgi/pdf/rl.pdf> (last visited Sept. 19, 2019) (the World Bank's definition of the rule of law states that it "captures perceptions of the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence"); see also *What is the Rule of Law?*, WORLD JUST. PROJECT, available at <https://worldjusticeproject.org/about-us/overview/what-rule-law> (last visited Sept. 19, 2019) (describing the rule of law as based on four universal principles: (1) "Accountability: The government as well as private actors are accountable under the law;" (2) "Just Laws: The laws are clear, publicized, and stable; are applied evenly; and protect fundamental rights, including the security of persons and contract, property, and human rights;" (3) "Open Government: The process by which the laws are enacted, administered, and enforced are accessible, fair, and efficient;" and (4) "Accessible Justice: Justice is delivered timely by competent, ethical, and independent representatives and neutrals who are accessible, have adequate resources, and reflect the makeup of the communities they serve.").

208. Brian Z. Tamanaha, *The Rule of Law and Legal Pluralism in Development*, in LEGAL PLURALISM AND DEVELOPMENT: SCHOLARS AND PRACTITIONERS IN DIALOGUE 34 (Brian Z. Tamanaha et al. eds., 2012).

209. *What is the Rule of Law?*, UNITED NATIONS, available at <https://www.un.org/ruleoflaw/what-is-the-rule-of-law/> (last visited Oct. 1, 2019).

This definition should not be limited to national systems but should also apply in international relations. In the U.N. Secretary-General's report *Strengthening and Coordinating United Nations Rule of Law Activities*, the rule of law was given a further definition:

At the international level, the rule of law accords predictability and legitimacy to the actions of States, strengthens their sovereign equality and underpins the responsibility of a State to all individuals within its territory and subject to its jurisdiction. Full implementation of the obligations set forth in the Charter of the United Nations and in other international instruments, including the international human rights framework, is central to collective efforts to maintain international peace and security, effectively address emerging threats and ensure accountability for international crimes.²¹⁰

Like the rule of law, the elements of the international rule of law include compliance, implementation, predictability and transparency, peace and security, the equal application of the law, the protection of human rights, and the settlement of disputes. Those elements can create positive peace or prevent conflicts. They can also strengthen or maintain peaceful relations with other countries. More particularly, compliance is an important element of the international rule of law. This is because international law determines state behavior and establishes state obligations.²¹¹ International law comprises of rules to which all states have consented.²¹² States are then legally bound to comply with the rules.²¹³ In other words, compliance with international law is an observance of obligations. When states comply with international law, peace exists in the international community.

C. North Korea and the Rule of Law

The rule of law is incompatible with North Korea's political ideology. North Korea relies on the *Juche* idea, or the man-centered ideology: "Man is the master of everything and decides everything. It is the man-centered world outlook to materialize the independence of the popular masses and also a political philosophy which elucidates the the-

210. U.N. Secretary-General, *Strengthening and Coordinating United Nations Rule of Law Activities*, ¶ 4, U.N. Doc. A/68/213 (July 29, 2013).

211. HANS Kelsen, *PRINCIPLES OF INTERNATIONAL LAW* 22 (1959); PRUE TAYLOR, *AN ECOLOGICAL APPROACH TO INTERNATIONAL LAW: RESPONDING TO CHALLENGES OF CLIMATE CHANGE* 63-65 (1998).

212. DAVID ARMSTRONG ET AL., *INTERNATIONAL LAW AND INTERNATIONAL RELATIONS* 93 (2d ed., 2012).

213. HERMANN MOSLER, *THE INTERNATIONAL SOCIETY AS A LEGAL COMMUNITY* 67 (1980).

oretical basis of politics that leads the social development correctly.”²¹⁴ Being “the master” means that man rules the world and his own destiny.²¹⁵ “Decide everything” means that man plays the decisive role in transforming the world and in shaping his destiny.²¹⁶ The “popular masses” are the masters of revolution and construction, and they are also the motive forces of revolution and construction.²¹⁷ Under the *Juche* idea, a revolutionary party, government, and army are the most powerful political weapon for guaranteeing a revolutionary cause – its beginning, progress, and victory.²¹⁸ The party ensures the leader’s guidance over the revolution and construction.²¹⁹ It also leads the masses to fulfill their responsibilities and role as the masters of the revolution and construction in loyal support of the party and the leader.²²⁰ Therefore, the *Juche* turns the leader into an absolutist, supreme leader.²²¹ On the other hand, the rule of law is based on the idea: “a free society should be governed by laws rather than men.”²²² The rule of law also connects to liberal democracy and the protection of human rights. The essence of the rule of law is the sovereignty or supremacy of law over man or individual will.²²³ The rule of law insists that every person – irrespective of rank and status in society – be subject to the law.²²⁴ For the citizen, the rule of law is both prescriptive – dictating the conduct required by law – and protective of citizens – demanding that government acts according to law.²²⁵ The rule of law is then the opposition of the rule of power or arbitrary power.²²⁶

214. DERMOT HUDSON, IN DEFENCE OF JUCHE KOREA 42 (2018).

215. Li Yongchun, *North Korea's Guiding Ideology and Its Impact*, in CHINA AND NORTH KOREA: STRATEGIC POLICY PERSPECTIVES FROM A CHANGING CHINA 228 (Carla P. Freeman ed., 2015).

216. *Id.*

217. *Id.*

218. Kim Jong Un, *Comrade Kim Il Sung is the Eternal Leader of Our Party and Our People*, in STUDY OF THE JUCHE IDEA 7 (Int'l Inst. Juche Idea ed., 2013).

219. *Id.*

220. *Id.*

221. James F. Person, *North Korea's Chuch'e Philosophy*, in ROUTLEDGE HANDBOOK OF MODERN KOREAN HISTORY 217 (2016).

222. FRIEDRICH KRATOCHWIL, THE PUZZLES OF POLITICS: INQUIRIES INTO THE GENESIS AND TRANSFORMATION OF INTERNATIONAL RELATIONS 126 (2011).

223. HILAIRE BARNETT, CONSTITUTIONAL & ADMINISTRATIVE LAW 44 (10th ed., 2013).

224. *Id.*

225. *Id.*

226. COLIN TURPIN & ADAM TOMKINS, BRITISH GOVERNMENT AND THE CONSTITUTION: TEXT AND MATERIALS 77 (6th ed., 2007).

In fact, the rule of law is important to North Korea. Even China has applied the rule of law to build the country into a modern socialist country.²²⁷ The rule of law will have a vital role when North Korea wants to pursue economic reform or development. More particularly, the rule of law is a foundation for a market economy, which provides an essential environment for the creation and preservation of wealth, economic security and well-being, and the improvement of the quality of life.²²⁸ The rule of law is essential for economic growth and development.²²⁹ The rule of law creates certainty, confidence, stability, security, and predictability which are necessary for sustainable economic growth and social development.²³⁰ The rule of law also secures property and contract rights – the fundamental building blocks of market economies.²³¹ Thus, if North Korea wants to open up its highly centralized socialist economy or transform its economy into a market economy, the rule of law is a key element in achieving this goal. Further, North Korea is regarded as one of the worst countries for foreign investors.²³² North Korea has poor infrastructure, frequent policy reversals, high potential risks, and a totalitarian regime.²³³ If North Korea wants to attract foreign investors, it will have to establish the rule of law as a new economic policy. The rule of law can eliminate obstacles by creating a guarantee and confidence for foreign investors. Under the rule of law, people or investors can be sure that their benefits will not be lost or stolen.

In international relations, North Korea should rely on the international rule of law by complying with the NPT and international humanitarian law. Compliance with the NPT and international humanitarian law can cause positive or sustainable peace on the Korean Peninsula. In addition to positive peace, the international rule of law may help North Korea normalize relations with other countries. It also helps North Korea gain international acceptance and recognition. When peace exists in

227. LIN LI, *BUILDING THE RULE OF LAW IN CHINA* 1 (2017).

228. Samuel Bufford, *International Rule of Law and the Market Economy – An Outline*, 12 SW. J.L. & TRADE AM. 303 (2006).

229. Gary Goodpaster, *Law Reform in Developing Countries*, in *LAW REFORM IN DEVELOPING AND TRANSITIONAL STATES* 106 (2007).

230. *Id.*

231. Takehiko Nakao, *Economic Development in Asia and Rule of Law*, ASIAN DEV. BANK (June 10, 2013), available at <https://www.adb.org/news/speeches/economic-development-asia-and-rule-law> (last visited Oct. 1, 2019).

232. YEONGSEOP RHEE & PATRICK MESSERLIN, *NORTH KOREA AND ECONOMIC INTEGRATION IN EAST ASIA* 102 (2019).

233. *Id.*

the region, the international community will appreciate and admire North Korea for complying with international law. Countries around the world will be willing to establish relations with North Korea.

V. CONCLUSION

Even though the Armistice Agreement was signed in 1953, there is still conflict on the Korean Peninsula. Recently, a conflict or tension has increased because North Korea has conducted nuclear weapons and ballistic missile tests. The Korean Peninsula has then been considered an area of a serious conflict. The international community raises concerns about a serious conflict which likely leads to war. Indeed, there have been several attempts to resolve the conflict and create peace in this region. Several theories were developed and applied to the Korean Peninsula. Among other things, preventive diplomacy and the rule of law can be used to resolve the conflict and build peace in the region. Preventative diplomacy can reduce the serious conflict and prevent it from spreading. Preventive diplomacy can also create negative peace or an absence of violence. This may not be sufficient for the Korean Peninsula. In addition to preventive diplomacy, the rule of law must be used to build positive peace or maintain peace in the region.

The rule of law is a difficult issue because it contradicts the *Juche* idea or North Korea's political ideology. Nowadays, the rule of law is an essential element in many countries around the world. The rule of law creates certainty, equality, predictability, confidence, and human rights protection. China, for example, has built or improved the rule of law to promote economic growth. More importantly, China has also created a modern socialist country under the rule of law. Like China, North Korea should consider or adopt the rule of law along with the *Juche* idea. The rule of law is an important element if North Korea wants to open up its highly centralized socialist economy. Additionally, the international rule of law can help North Korea gain international acceptance and recognition if the country complies with the NPT and international humanitarian law.

CHINA AND THE UNITED STATES: WHY CHINA SHOULD CONTINUE TO TRADE WITH LOWER BARRIERS

Chitra Dave*

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ABSTRACT

Consumer protection is the enforcement of consumer financial protection laws. It also enforces rules that protect consumers, takes consumer complaints, promotes financial education, researches consumer behavior, and monitors financial markets.

In the United States, consumer protection is enforced by the Federal Trade Commission (“FTC”) at the domestic stage. The FTC works to protect consumers “by preventing anticompetitive, deceptive, and unfair business practices.”¹ This is done through public understanding of the market process and not from burdening any business activity.

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1. *About the FTC*, FED. TRADE COMM’N , available at <https://www.ftc.gov/about-ftc> (last visited Feb. 9, 2020).

The World Trade Organization (“WTO”) plays a role in consumer protection in the United States at an international level. The WTO operates global trade rules, acts as a forum for trade agreements, and clears disputes between countries.² In the United States, the WTO allows the American government to conduct trade with other major countries that boost the American economy by increasing the imports and exports in a larger market such as China.

In China, consumer protection on the domestic level is monitored through the State Administration for Industry and Commerce (“SAIC”). The SAIC “maintains market order and protects the rights of businesses and consumers by regulating the market.”³ The SAIC’s responsibilities include but are not limited to regulating the market through administrative enforcement, enforcing antimonopoly laws, and drafting laws and rules.⁴

In China, the WTO came into play on December 11, 2001. After joining the WTO, China quickly grew to the top of the trade market. In 2017, China was ranked first in exporting merchandise and second in importing merchandise and commercial services.⁵ By joining the WTO, China lowered the deficit with the United States, boosting both economies.

With the introduction of the WTO, China began to expand its markets and saw a noticeable difference in its economy. However, China continues to have other restrictions that limit the country from expanding its global reach. The Chinese government and other consumer protection laws do now allow China’s exporters and consumers to purchase nearly as many items as there are in other global markets. If China was to continue trading with countries like the United States, China would have an even more powerful economy because greater numbers of consumers would be purchasing products and more products would be sold internationally. With the introduction of Chinese products in the market, China’s international relationships with other countries would strengthen and form more treaties and acts, resulting in more trade production.

2. *What is the WTO?*, WORLD TRADE ORG., available at https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (last visited Feb. 9, 2020).

3. *SAIC Mission*, STATE ADMIN. FOR INDUS. & COM., available at <http://home.saic.gov.cn/english/aboutus/Mission/index.html> (last visited Sept. 19, 2018).

4. *Id.*

5. *China Trade Profile*, WORLD TRADE ORG., available at https://www.wto.org/english/res_e/statis_e/daily_update_e/trade_profiles/CN_e.pdf (last visited Feb. 9, 2020).

Through the introduction of the consumer protection policies, then the inception of the WTO, the importance of trade between the two countries, and counter arguments to the critics, it will be obvious that China should continue to have open barriers for international trade and continue to trade with the United States.

I. INTERNATIONAL CONSUMER PROTECTION POLICIES IN BOTH COUNTRIES

A. *United States*

Prior to the introduction of the WTO in 1995⁶, the United States and China each had its own domestic consumer protection agencies that regulated trade on the international level.

In the United States, the FTC was the head authority for American trade. The FTC was signed into law in 1914 by Woodrow Wilson.⁷ At the time the Commission was enacted, its sole purpose was to protect consumers and promote competition.⁸ As time continued, the FTC began branching out to reach different levels of trade, including international trade.

The international branch also had the same mission, namely, to protect consumers while maximizing economic benefit and consumer choice.⁹ As America began to open its trade borders, more consumers began to get caught in fraud coming from international scams. Infamous scams in America included foreign lottery and internet enabled fraud emails.¹⁰ The foreign lottery emails falsely informed the recipient that they won the lottery in another country and asked the individual to provide them with their social security and bank account numbers so they can directly deposit the money. The FTC began protecting consumers from frauds like these by regulating trade agreements with countries to ensure that scams like this weren't legal, and that the senders would face consequences when caught.

The FTC International Branch's biggest accomplishment for international trade protection was the start of the US SAFE WEB Act.

6. What is the WTO?, *supra* note 2.

7. *Our History*, FED. TRADE COMM'N, available at <https://www.ftc.gov/about-ftc/our-history> (last visited Nov. 3, 2018).

8. *Id.*

9. *Consumer Protection*, FED. TRADE COMM'N, available at <https://www.ftc.gov/policy/international/international-consumer-protection> (last visited Sept. 18, 2018).

10. *Id.*

The US SAFE WEB Act was enacted in 2006.¹¹ The act strengthened the FTC's authority in: 1) information sharing, 2) investigative assistance, 3) confidentiality, 4) enhanced investigative and litigating tools and 5) enforcement relationships. Information sharing authorized the FTC to share compelled and confidential information with foreign law enforcement agencies.¹² Investigative assistance created the International Antitrust Enforcement Assistance Act of 1994, which allowed the FTC to collect information that was needed as long as the other sided reciprocated and on the urgency of a possibly injury.¹³

The US SAFE WEB Act enables the FTC to obtain confidential information from foreign entities that were previously concerned with disclosure of their information.¹⁴ Cross-border jurisdictional authority was also strengthened through the act and provided enhanced investigative litigation tools.¹⁵ Lastly, the act aimed to strengthen enforcement relationships between foreign countries and the FTC.¹⁶ However, following the introduction of the WTO, the FTC has tightened its international laws.

The International Branch continues to serve as the primary agency that protects American consumers from international scams and the Branch, through the US SAFE WEB Act, has strengthened trade relations with countries globally. The International Branch continues to focus on finding ways to keep American consumers protected and ensure that America is maximizing its economic benefit from international and domestic trade.

B. China

Prior to its adoption of the WTO in 2002, China had two different consumer protection agencies that watched over international trade: the State Administration for Industry and Commerce and the National Development and Reform Commission.

The SAIC was created for the protection and rights of consumers, maintenance of socio-economic order, and promotion of the market

11. *The U.S. Safe Web Act: The First Three Years*, FED. TRADE COMM'N (2009), available at <https://www.ftc.gov/sites/default/files/documents/reports/u.s.safe-web-act-first-three-years-federal-trade-commission-report-congress/p035303safewebact2009.pdf> (last visited Nov. 3, 2018).

12. *Id.*

13. *Id.*

14. *Id.* at 3.

15. *Id.* at 4.

16. *U.S. Safe Web Act*, *supra* note 11.

economy.¹⁷ The SAIC is broken down into two different bureaus that supervise various parts of trade in China: a Consumer Protection Bureau and a Department for International Cooperation.¹⁸ The Consumer Protection Bureau was in charge of overseeing the quality of goods in the market, drafting rules and directions and protecting consumers' rights in the service sector.¹⁹ The Bureau also punished irregularities and handled complaints and appeals from the international networks.²⁰ The Department of International Cooperation carried out international cooperation and undertook management of international affairs.²¹

The SAIC also enacted a law on the Protection of Consumer Rights and Interests. The law was created to ensure that legitimate rights existed and that there was order and development in the market.²² The articles create responsibility for the State to protect rights and interests of consumers and to ensure that consumer purchases are under the protection of the law.²³

The SAIC focuses heavily on the protection of consumer rights. Unlike the FTC, the SAIC does not strengthen relations with other international countries and does not enforce international trade, rather, the SAIC focuses on consumer protection. The SAIC also do not try to benefit the economy or stimulate the marketplace.

The National Development and Reform Commission ("NDRC") is a branch of the consumer protection rights in China that enforces international trade protections.²⁴ The main functions of the NDRC are: 1) formulating and implementing national economic and social development strategies; 2) carrying out research and analysis on economic situations; 3) monitoring social development; and 4) summarizing and analyzing the financial situation.²⁵ Through analysis

17. *SAIC Mission*, *supra* note 3.

18. *Our Organizational Set Up*, STATE ADMIN. FOR INDUS. & COM., available at <http://home.saic.gov.cn/english/aboutus/Departments/index.html> (last visited Nov. 3, 2018).

19. *Id.*

20. *Id.*

21. *Id.*

22. *Law of the People's Republic of China on Protection of Consumer Rights and Interests*, STATE ADMIN. FOR INDUS. & COM., available at <http://english.mofcom.gov.cn/aarticle/lawsdata/chineselaw/200211/20021100053545.html> (last visited Feb. 7, 2020).

23. *Id.*

24. *Main Functions of the NDRC*, NAT'L DEV. & REFORM COMM'N (Dec. 17, 2008), available at https://en.ndrc.gov.cn/mfdic_8235/200812/t20081218_1193946.html (last visited Feb. 7, 2020).

25. *Id.*

of China's financial situation, the NDRC controls and monitors China's foreign debts and promotes economic restructuring.²⁶

The NDRC has an anti-monopoly bureau that controls the countries competition policies.²⁷ The bureau is responsible for drafting documents, anti-monopoly consultations and investigations and providing advice to enterprises that are having trouble overseas.²⁸

The NDRC, just like the SAIC, focuses only on consumer protection rights and obeying the law. The consumer protection agencies in China do not foster relationships with other countries like the FTC does in the United States. In China, the focus is on whether the consumers are being protected and whether the sellers are following the laws. The agencies do not help to simulate the economy; they are not finding new ways to increase trade in China or to create acts or treaties to form trade relations with oversea consumers and sellers.

An appropriate example of the kind of trade agreement that China has formed under the SAIC is China's trade agreement with the FTC. The trade agreement focuses solely on cooperation among the two countries on consumer protection.²⁹ The agreement said that, "[t]he two countries agreed to cooperate on exchanging views on issues of common interest, information on laws, regulations and policies, working together to bring awareness and training in consumer protection, and visits when consumer protection issues arose."³⁰

The agreement had no mention of fostering any relationship to create continuous trade between China and the United States. Rather, it simply stated that they would work together to ensure that any consumer protection policies that arose would be taken care of and that the two countries would ensure that they educated their sellers and consumers on their protections and rights to avoid any future issues.

Without nurturing relationships with countries, China is unable to showcase its market to its full potential, and thus, holding back valuable

26. *Id.*

27. *Bureau of Price Supervision and Anti-Monopoly*, NAT'L DEV. & REFORM COMM'N (Dec. 18, 2008), available at https://en.ndrc.gov.cn/mfod_8236/201207/t20120719_1193957.html (last visited Feb. 8, 2020).

28. *Id.*

29. Memorandum of Understanding on Consumer Protection Matters Between the State Administration for Industry and Commerce of the People's Republic of China and the Federal Trade Commission of the United States of America, June 12, 2007, available at https://www.ftc.gov/system/files/documents/cooperation_agreements/070612chinamou.pdf (last visited Feb. 8, 2020).

30. *Id.*

Chinese exports and imports. It is not until the introduction of the WTO that China's economy got the boost it needed to begin trading on a large-scale market along with countries it was not previously connected to through its agencies.

II. THE INTRODUCTION OF THE WORLD TRADE ORGANIZATION

The WTO was created on January 1, 1995 to cover trade in services and intellectual property on an international level and create new procedures for dispute settlements.³¹ Over time, the WTO expanded its functions to include: administering WTO trade agreements, providing a forum for trade negotiations, handling trade disputes, monitoring national trade policies, technical assistance and training for developing countries, and cooperation with other international organizations.³² The WTO was created to help producers, exporters, and importers conduct their business. The organization continues to expand as the only global international organization among these nations.³³

The WTO has three components: 1) providing a negotiating forum, 2) rulemaking, 3) and dispute resolution. The negotiating forum allows the nations to sort out trade problems including barriers.³⁴ The set of rules is the basis upon which the countries negotiate trades and provided legal framework to allow trade to flow freely.³⁵ The WTO settles disputes through a procedure that is grounded in the legal framework.³⁶

The dispute settlement process provides for a panel of neutral experts that do not favor foreign government or try to make the process more challenging.³⁷

In 2001, the WTO launched the Doha Round.³⁸ The purpose for this agreement was to reform the already existing international trading

31. What is the WTO?, *supra* note 2.

32. *Id.*

33. *World Trade Organization*, U.S. HISTORY, available at <https://www.u-s-history.com/pages/h2002.html> (last visited Nov. 6, 2018).

34. *Id.*

35. *Id.*

36. *Id.*

37. *America and the World Trade Organization*, IATP, available at https://www.iatp.org/sites/default/files/America_and_the_World_Trade_Organization.htm (last visited Feb. 3, 2020).

38. *The Doha Round*, WORLD TRADE ORG., available at https://www.wto.org/english/tratop_e/dda_e/dda_e.htm (last visited Feb. 3, 2020).

system with lower trade barriers and revised trade rules.³⁹ The agreement was also meant to improve the trading prospects of developing countries.⁴⁰

The introduction of the WTO boosted international trade globally. Membership expanded to 164 members that now represent 98% of international trade.⁴¹ The countries involved have benefited greatly. Their economies are thriving, their markets have expanded to increase the production of exports and imports, and more importantly, their relations with other countries have improved. The WTO requires members to lower trade barriers for other members to allow products to flow freely and has foreign agreements already set up between countries to avoid any foreign dispute settlements.

Following the introduction of the WTO in the United States and China, it can be seen that their markets grew exponentially and that their economies benefitted. The Organization helped their international relations as well. Through the WTO the United States has increased treaties and acts with other countries and China has begun trading with nations that it previously did not have relations with.

A. United States and the World Trade Organization

The United States became a member of the WTO in January of 1948.⁴² Upon the introduction of the WTO the United States noticed the growth of its market, exponentially. The United States no longer had barriers and boundaries; sellers were able to sell their marketable items globally. In 2017, the United States was ranked number one in importing merchandise and in exporting and importing commercial services.⁴³ Prior to 2017, the United States consistently ranked in the top ten percentile for imports and exports.

The WTO requires that countries within the Organization keep lower trade barriers for member countries.⁴⁴ As a result, the United

39. *Id.*

40. *Id.*

41. What is the WTO?, *supra* note 2.

42. *United States of America and the WTO*, WORLD TRADE ORG., available at https://www.wto.org/english/thewto_e/countries_e/usa_e.htm (last visited Feb. 3, 2020) [hereinafter *U.S. & WTO*].

43. *United States of America Trade Profile*, WORLD TRADE ORG. (2018), available at https://www.wto.org/english/res_e/statis_e/daily_update_e/trade_profiles/US_e.pdf (last visited Feb. 8, 2020).

44. Bryan Schonfeld, *Why the U.S. needs the World Trade Organization*, WASH. POST (Sept. 20, 2016), available at <https://www.washingtonpost.com/news/monkey-cage/wp/>

States has less trouble trying to sell its products globally.⁴⁵ The more nations that join the WTO the more nations that the United States has access to and the more convenient it is for countries to trade without any other obstacles in the way. Without the WTO, the United States would lose 60% of American trade.⁴⁶ Countries that are not members of the WTO miss the opportunity to reach full potential by not being on the platform that encourages further trade. If China were to back out of the WTO, China would lose a percentile of its trade. While China is a powerhouse for trade, not having the easier access and lower tariffs to the WTO countries would cause a fatal hit to the economy.

Workers and consumers would be greatly affected if the WTO were not in place because the GDP has grown exponentially since it started, rising to 30% in 2015.⁴⁷ From the start of the WTO, the number of jobs for exporters has grown by 1.3 million.⁴⁸ With the growth in the GDP, thousands of jobs are created in the U.S. to produce the goods and services being exported. Jobs created to export goods pay above the average wage by 13-16%.⁴⁹ Additionally, over 80% of American jobs are dedicated to the service sector that include transportation, environmental services and retailing.⁵⁰ The WTO helps to keep those jobs secure for Americans by allowing them a larger platform to sell those services. From 2010 through 2017, American merchandise exports and imports were ranked in third place compared to the remaining members.⁵¹ America's second most exported good was cars for transportation, close to 5% and nearly 10% of all imports for Non-Agricultural Products.⁵² The service sector is now growing, making it the United States' fastest growing sector while providing the most jobs.⁵³

Because of the numerous job opportunities that the WTO brings to the United States, it also raises the living standards for Americans.

2016/09/20/would-the-u-s-be-better-off-without-the-wto-not-when-the-wto-guides-98-percent-of-global-trade/ (last visited Feb. 8, 2020).

45. *Id.*

46. *Id.* ("The United States has free trade agreements with twenty countries, but these agreements cover only 40% of American trade.").

47. *Id.*

48. U.S. HISTORY, *supra* note 33.

49. *Id.*

50. *Id.*

51. U.S. & WTO, *supra* note 42.

52. *Id.*

53. *Id.*

Everyday shopping for groceries, clothes, electronics, and even cars is more affordable because of the lower trade barriers that are required by the WTO. Lower prices generally meant that people are more likely to purchase more, generating more money in the marketplace to keep prices low and allow the economy to grow. Citizens are also not only purchasing American made products but imports from other countries, improving the economy globally. Due to the decrease in prices, by 2005 there was an increase of \$1500-\$3000 in purchasing power for an average American family.⁵⁴

The United States' international relations have also strengthened with the connection of the WTO. Since members already have lower trade barriers for goods, it has also helped to increase the market access for American exporters of services.⁵⁵ The service sectors for foreign services include: finance, accounting, advertising, engineering and construction.⁵⁶ By selling these services, the American economy is boosting itself and these sectors. Through outsourcing companies, the United States can employ citizens from various countries to increase the jobs in other countries which leads to the same generation in their market since more people are spending money.

Imports play a crucial role in the American economy. Americans are allowed a greater variety of foreign items because of the vast market that the WTO promotes. With an increase in imports into the American market, competition causes prices to decrease to allow companies to stay relevant in the market, making it cheaper for Americans to buy foreign goods.⁵⁷ By purchasing foreign products, the United States is helping other countries stabilize their economies. A huge project of the WTO is to stabilize the economies in the third world⁵⁸ and by selling more products overseas, more money is being generated in their economies to create jobs for their citizens.

The WTO also helps to keep piracy levels low in world markets.⁵⁹ Piracy, the act of reproducing the work of someone else, is most common in movies and in material products.⁶⁰

54. *Id.*

55. *U.S. & WTO, supra note 42.*

56. *U.S. HISTORY, supra note 33.*

57. *Id.*

58. *Id.*

59. *Id.*

60. Piracy Definition, MERRIAM WEBSTER DICTIONARY, available at https://www.iatp.org/sites/default/files/America_and_the_World_Trade_Organization.htm (last visited Feb. 10, 2020).

B. China and the World Trade Organization

Unlike the United States, China was late in joining the WTO, officially becoming members in 2001.⁶¹ Prior to joining the WTO, China relied solely on SAIC as its basis for international trade, lacking many of the global connections enjoyed by WTO members. Under the SAIC, China also did not have lower tariff barriers and there were difficulties in trading between countries without legal consideration already in place. Since joining the WTO China's economy has grown immensely, and with a larger marketplace China's exports, income, and positive trade balance have increased.

In 2017, China was ranked first in exporting merchandise, with a 12.77% share in total exports.⁶² It was second in importing merchandise and commercial services, with world total imports of 10.75% and 9.49%, respectively.⁶³ Non-agriculturally, 7% of exports were automatic data processing machines,⁶⁴ and approximately 15% of imports were electronic integrated circuits.⁶⁵

Since China's induction into the WTO, China has followed its rules and become a prominent member. Like other countries, China lowered its barriers to encourage more global trade, and remain supporters of the multilateral trading system.⁶⁶ A multilateral trading system is a "trading system that facilitates the exchange of financial instruments between multiple parties."⁶⁷ China has been a huge contributor to the multilateral system by allowing its trading barriers to be open, transparent, inclusive and non-discriminatory.⁶⁸ For China to participate in the market, it had to restructure its relationship between the government and the market to ensure that all decisions being made were not being directed by the government.⁶⁹ China also reframed a

61. *China Trade Profile*, *supra* note 5.

62. *China*, WORLD TRADE ORG., available at https://www.wto.org/english/res_e/statis_e/daily_update_e/trade_profiles/CN_e.pdf (last visited Feb. 5, 2020).

63. *Id.*

64. *Id.*

65. *Id.*

66. *China and the World Trade Organization*, STATE COUNCIL, CHINA (June 28, 2018), available at http://english.gov.cn/archive/white_paper/2018/06/28/content_281476201898696.htm (last visited Feb. 5, 2020).

67. Tim Smith, *Multilateral Trading Facility (MTF)*, INVESTOPEDIA (Apr. 11, 2019), available at https://www.investopedia.com/terms/m/multilateral_trading_facility.asp (last visited Feb. 9, 2020).

68. *China and the World Trade Organization*, *supra* note 66.

69. *See id.*

legal system that was more aligned to the multilateral trade rules by revising laws and regulations.⁷⁰ In 2004, China recreated a system for foreign trade authorization that increased foreign trade in the private sector and by 2017 that became China's largest export, totaling 46.6% of all goods and services exported.⁷¹ China issued a document in 2014 that required the government to assess the new trade policies and by 2016 it set up a new legal mechanism to enhance its public participation in policy development.⁷²

By joining the WTO, China serves as a template for other transition economies seeking membership.⁷³ Other countries, such as Russia, will see the speed with which China joined the WTO and the hope is that they too will want to become members.⁷⁴ China's involvement in the WTO also helps create a significant role in the agenda for the multilateral trade negotiations.⁷⁵ The size of China's economy could be a strong factor in changing trade negotiations and would be even more important for developing countries.⁷⁶ Developing countries do not have as much power as the developed countries that are members of the WTO and, therefore, with the assistance of a country like China, the developing countries will have more power in the new negotiations. China's membership in the WTO will further help developing countries by requiring adjustments to governing structures.⁷⁷ China has argued that developing countries are underrepresented, and that, by adjusting the government structures, it can gain more power for developing countries in the WTO.⁷⁸

The introduction of the WTO in China had a greater effect on the countries that China is trading with than on the country itself. China is already considered a powerhouse due to the strength of its economy. Further, one of the strongest countries, the United States, is in debt to the China. The countries' membership in the WTO helped to stabilize

70. *Id.*

71. *Id.*

72. *Id.*

73. Nicholas R. Lardy, *U.S.-China Economic Relations: Implications for U.S. Policy*, BROOKINGS (Apr. 25, 2001), available at <https://www.brookings.edu/testimonies/u-s-china-economic-relations-implications-for-u-s-policy/> (last visited Feb. 10, 2019).

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. Lardy, *supra* note 73.

the world economy and allow it to become a driving force.⁷⁹ China focused on opening trade as long as both countries benefitted from the trade. Further, China wanted to make sure it was able to share opportunities and benefits, while also developing its own nation.⁸⁰ China's goal was also to enhance global well-being and common prosperity.⁸¹ Undeniably, the notion of common prosperity squarely fits into the motives of the communist regime.

China's first method of supporting the WTO's goal of strengthening the world economy was through reducing import tariffs. Although every member is required to lower trade barriers, China reduced its rates from 15.3% to 9.8%, and cut its agricultural products far lower than those in other member countries.⁸² China also lowered its unnecessary trade restrictions including import quotas, licenses, and other requirements for machinery and introduced quota authority for agricultural products.⁸³ Along with trade restrictions, China agreed to lift geographical restrictions in certain areas for enterprises in order to enter to increase the flow of foreign direct investment. In 2017, China's flow of foreign direct investment in services totaled 73% of all the foreign direct investment in China.⁸⁴ In order to do this China created 100 sub-sectors committed to the WTO.⁸⁵

Since its induction to the WTO, China has continued to have a two-way investment that benefits all countries. In assurance, China has continuously topped the list of foreign direct investments since it has joined the WTO,⁸⁶ allowing large companies to come in and boost the economy and the companies' country of origin. China's outward investment cooperation also developed upon the introduction of the WTO. When China joined the WTO it was ranked in twenty-sixth place, and by 2017 it reached third place.⁸⁷ This growth was fostered by technology, economic development and improvement to its citizen's lifestyles.⁸⁸

79. *China and the World Trade Organization*, *supra* note 66.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *China and the World Trade Organization*, *supra* note 66.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

Since commencing membership in the WTO, the Chinese government has made substantial efforts to comply with obligations that further the country's economic liberalization. The Chinese government has also made an effort to meet long-term economic goals.⁸⁹ This began with China's Congress amending domestic laws to make provisions consistent with those of the WTO.⁹⁰ Enjoinment has also fostered ideas of globalization for China. China's participation in the new round of trade liberalization has led to ideas for free trade areas in Asia.⁹¹

The WTO has also raised living standards in China. With China accelerating its change in domestic economic reform to comply with the WTO, it has begun to improve living standards for the population.⁹² China is hoping that the increase in the living standards will change the political climate as well. A changing economy can generate pressure on political change, as seen in other Asian countries like Taiwan, South Korea and Thailand.⁹³ China hopes to see a political change that allows it to continue to have more open trade and to help the country flourish. With the change in domestic laws, China is becoming more like the other countries that are in the WTO and the hope is that this progress continues.

The WTO enables China to evaluate the benefits of loosening its trade barriers. By joining the WTO, China allows its economy to grow and allows for its citizens to have a better lifestyle. China has also strengthened its international relations and as members continue to join and more trade markets open up, its economy will flourish as more countries purchase Chinese exports.

III. TRADE BETWEEN THE UNITED STATES AND CHINA

In the current climate, China and the U.S. continue to be major players in the trade industry, especially in achieving their own bilateral trade agreements. China is currently America's largest goods trading partner. It has become the third-largest purchaser of products and services made in the U.S.⁹⁴ In 2018, China was the United States'

89. Lardy, *supra* note 73.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Understanding the U.S.-China Trade Relationship*, OXFORD ECONOMICS (Jan. 2017), available at <https://www.uschina.org/sites/default/files/Oxford%20Economics%20US%20Jobs%20and%20China%20Trade%20Report.pdf> (last visited Feb. 13, 2020).

largest supplier of goods imports and the total between both the countries for trade was approximately 737.1 billion dollars.⁹⁵ Both of the countries rely on each other to have strong economies and due to this, continued trade has benefited both countries.

Since beginning trade with China, the U.S. now has 2.6 million jobs that are dependent on Chinese trade.⁹⁶ Many middle-class workers have taken up jobs that require them to travel to China, selling American made products and performing services. The majority of the products come from large firms and industries, including cars, construction equipment and financial firms that export and outsource to China.⁹⁷ With the middle class growing in the U.S., this growth from the Chinese trade expansion allows for the U.S. to tap into a new customer base to boost further employment and economic growth.⁹⁸ With the help of trade, the U.S. is able to keep consumer prices low in the marketplace which generates more money. If trade continues at this increasing rate, the United States' trade deficit could be reduced by half.⁹⁹ By continuing to trade with China, the United States is improving the lifestyle of its citizens. The more that Americans can afford marketplace items, the more they will continue to spend money and strengthen the economy. American companies also will gain more worldwide experience through this continuous trade because they provide the most essential exports and are making the most money in China. If those firms move to more countries than China, they will continue to generate more money that will come back to the American economy. It is important for the United States to continue to keep trading with China to keep the economy on a steady incline.

The United States is not the only side that is benefitting from this trade arrangement. China's middle class is growing at a steady rate due to the rapid increase of the Chinese market.¹⁰⁰ China has recently begun lowering its trade barriers and is allowing for more international imports and more exports. With the increase of imports, just as in America, more middle-class Chinese citizens can afford marketplace items because there is more competition to keep market prices low. By

95. *The People's Republic of China*, OFFICE OF U.S. TRADE REP., available at <https://ustr.gov/countries-regions/china-mongolia-taiwan/peoples-republic-china> (last visited Feb. 13, 2020).

96. *Understanding the U.S.-China Trade Relationship*, *supra* note 94.

97. *See id.*

98. *See id.*

99. *See id.*

100. *See id.*

allowing more imports, American companies have become major contributors to the development of China's economy.¹⁰¹ Companies such as Jeep, General Motors and Apple have planted roots in China, which are growing expansively, creating new sectors in the Chinese economy. Prior to the introduction of these companies, China did not allow foreign cars into the country and citizens that purchased foreign cars often paid double the price as American consumers. In 2002, only 4% of China's population was referred to as the "middle-class," but by 2022 76% of China's population will be considered middle-class.¹⁰²

With the growth of the middle-class, they expect China's consumption to increase at 9% for every year until 2022.¹⁰³ With this growth, it is important for China to open its doors to foreign countries such as the United States because China can have the largest consumer market, even over all European countries. China is expected to continue to grow with the new influx of a generation of spenders and if it continues to remove market barriers, China will have one of the fastest growing economies.¹⁰⁴

It is important for China to continue to trade with the United States, as described above, due to the interdependent relationship acquired via bilateral China-United States trade relations. If China were to stop trading with the United States, the Chinese economy would suffer a lethal detriment. It would not be selling as many exports and it would be restricting its consumer market. China and the United States have a symbiotic trade relationship. As long as that relationship continues, China's economy will continue to grow and strengthen.

A. Conflicts in Trade between the United States and China

Trade between the United States and China has not always been a smooth ride. Both sides have their critics that are against the constant trade between the two powerhouses because they find that the trade creates rift between the two countries.

Many foreign governments worry that China integrated too quickly and that foreign countries will gain too much control of China's economy. Much of China is growing because of the increase of

101. *Understanding the U.S.-China Trade Relationship*, *supra* note 94.

102. Kim Iskyan, *China's middle class is exploding*, BUS. INSIDER (Aug. 27, 2016), available at <https://www.businessinsider.com/chinas-middle-class-is-exploding-2016-8> (last visited Feb. 13, 2019).

103. *Id.*

104. Lardy, *supra* note 73

consumer consumption that has been powered by American companies like Jeep, Apple and General Motors.¹⁰⁵ Officials from the Chinese government fear that these companies will take over the Chinese economy because of how much power they currently hold. China has focused most of its trade on exporting products to other foreign countries, but because of this it has failed to develop a domestic consumption base.¹⁰⁶ With this type of economy, China has become vulnerable to a downturn in its export markets.¹⁰⁷ The fear of the Chinese officials could be concrete if the major American companies that are in China right now take a sudden fall or become less popular than they are now. Much of the Chinese middle class could go back to not being able to afford marketplace items and the Chinese economy could decline if more citizens generate less money. Jim Huang, a Brooks Fellow, said that “China’s economic development is uneven.”¹⁰⁸ By trading with the United States, China is helping to lower its trade deficit, but, according to Chinese officials, China is not getting anything in return. China’s gross domestic product relies 80% on trade, and that is the biggest warning of the unevenness in the economy.¹⁰⁹ If anything were to go wrong in the trade between China and any of its international traders, China could suffer dramatically by not bringing more products to the marketplace and it would not be able to continue growth.

The introduction of China into the WTO has implications for the United States. There are policies that were in play in the United States that intended to threaten China’s status as a major economic power.¹¹⁰ These policies must be removed if the United States wants to continue trading with China and not cause more tension. The United States also remains the only country that has no systematic technical assistance program that assists the Chinese government in meeting its WTO obligations.¹¹¹ This refusal to help China makes the United States seem like it is more interested in imposing rough conditions on China than its enjoyment in the WTO.¹¹² The United States also should apply highly

105. *Id.*

106. Eben Kaplan, *The Uneasy U.S.-Chinese Trade Relationship*, COUNCIL ON FOREIGN REL. (Apr. 19, 2006), available at <https://www.cfr.org/background/uneasy-us-chinese-trade-relationship> (last visited Feb. 13, 2020).

107. *Id.*

108. *Id.*

109. *Id.*

110. Lardy, *supra* note 73.

111. *Id.*

112. *Id.*

protectionist features that insisted China agree to as conditions for WTO membership.¹¹³

Just as there are problems on the Chinese side of trade, there are also problems on the American side regarding trade. As of 2005, the United States ran a bilateral trade deficit with China of \$202 billion.¹¹⁴

Senator Charles Schumer stated that this should have been a red flag to Congress and the rest of the global economy.¹¹⁵ Americans are now worried that the United States was too dependent on China for its imports.¹¹⁶ The United States relies on imports from China to help keep the cost on other products in the American market lower by increasing competition. Americans worry that if China provides America with less products, less Americans will purchase products and services and the American economy will decline.

Adam Segal of the Council on Foreign Relations said that this trade deficit is a consequence of "China replacing all the Asian producers in the United States used to import from."¹¹⁷ Upon China entering the trade market and joining the WTO, the United States slowly began only trading with China because the imports were cheaper in price and it helped strengthen the international relation. By cutting out other importers, many American officials are concerned that the trade deficit will not be shortened because America cannot continue to grow its economy without trading with China.

Another trade issue between the United States and China is the value of China's currency.¹¹⁸ Critics claim that China is keeping the value of the Yuan 40% below what its value would be on the open market.¹¹⁹ This disparity allows for Chinese goods to be cheaper in the United States, but United States goods to be more expensive in China, deterring Chinese citizens from purchasing American exports.¹²⁰ This also could be a huge cause of the deficit because China is manipulating America into purchasing more products and services from China than the Chinese are purchasing from America. China is allowing America to increase the deficit between the two countries by encouraging more

113. *Id.*

114. Kaplan, *supra* note 106.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. Kaplan, *supra* note 106.

120. *Id.*

Americans to purchase Chinese products and services but not reciprocating.

Intellectual property rights (“IPR”) are also causing issues in the United States and China trade relations. There are issues of IPR violations on products such as DVDs and other counterfeits in pharmaceuticals, automobiles, and airplane parts.¹²¹ While China has imposed anti-counterfeiting laws and special courts, they have had little effect.¹²² Many companies in the United States now have to train their company’s general in-house counsel in Chinese intellectual property laws in order to pursue counterfeiters and enforcement actions.¹²³

By selling counterfeit products on the market, people are more inclined to purchase those because they are sold at a cheaper price and forego the original American made products. As a result of not purchasing the American products, the Chinese are increasing the deficit in the United States and China trade. This is also unfair on American trade because China takes American products and recreates them with lower quality and sells them for a cheaper price. Though the initial product is American, and China steals the idea and mechanics behind it.

China faces implications as it continues to trade with the U.S. in the midst of its trade deficit, because there is a slim chance that the United States is able to reduce the trade if the current trade climate continues. China’s accession was oversold by the administration that wanted to extend permanent trade relations, so China would not be cut off from the benefits of its WTO commitments.¹²⁴ China continues to have open markets and keeps a limited quota on incoming products but does not want to suffer as a result of the open markets. With the introduction of the WTO, China’s rate of exports is not accelerating at the rate of its imports.¹²⁵

With more exports being sold than imports being domestically purchased, China is concerned about the unbalanced growth of the economy and how the WTO will increase the unevenness on this balance. The WTO’s entry conditions do not help to reduce the United

121. *Id.*

122. *Id.*

123. DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS (3d ed. 2015).

124. Lardy, *supra* note 73.

125. *Id.*

States' overall trade deficit.¹²⁶ Due to the terms of the agreement China will continue to benefit from the phase out of quotas that that restricted international trade in certain benefits.¹²⁷ While the United States is not affected by the phase out, China will get the opportunity to increase trade in those products which does not allow the United States to catch up its deficit.¹²⁸ China also will continue to benefit from industries being relocated to Asia.¹²⁹ More technologically-based companies and companies that make toys, footwear and apparel¹³⁰ have shifted to Asia in the past few years and because of the easier access to these industrial sites. As such, China is able to produce more products and for a cheaper price. This ability to create faster at a smaller rate continues to make the gap in the deficit harder for the United States to fill.

Although there will always be critics, the critics are failing to see the benefits that have come from the start of the China-United States trade relation. China's economy may be dependent on foreign exports, but they are also one of the biggest markets in the nation. The United States is also getting closer to paying off its own trade deficit, as long as trade between the two countries continues to thrive. Both countries have also helped their citizens' lives flourish by enhancing their lifestyles and allowing for lower prices on everyday products. The benefits from trade between the two countries outweighs any of the negative effects that may result along the way. China and the United States must continue to trade to strengthen their economies.

B. Current Trade Climate between the United States and China

In the past few months China and the United States have begun having obstacles in their normal trade routines. In 2018, President Donald Trump started what would turn into a full trade war with China. During 2018, President Donald Trump put a tariff on \$50 billion worth of Chinese imports sold in the United States.¹³¹ President Trump enforced the tariffs to urge China to change its unfair practices and

126. *Id.*

127. *Id.*

128. *Id.*

129. Lardy, *supra* note 73.

130. *Id.*

131. Jim Tankersley and Keith Bradsher, *Trump Hits China with Tariffs on \$200 Billion in Goods, Escalating Trade War*, N.Y. TIMES (Sept. 17, 2018), available at <https://www.nytimes.com/2018/09/17/us/politics/trump-china-tariffs-trade.html> (last visited Feb. 10, 2019).

reciprocate fair treatment to American companies.¹³² China has not succumbed to the pressure from the American government. Instead, China continues to enforce its current trade policies and remains unaffected by the American tariffs. Due to Chinese perseverance, President Trump chose to expend the tariff on September 24, 2018 to start at 10% and rise to 25% by January 1, 2019.¹³³ The American government staggered these percentages to ensure that during the holiday seasons Chinese imports would sell less,¹³⁴ while domestic good sales would rise, generating more money into the American economy.

Although China refrains from changing its trade practices, its economy is being affected by the tariffs. China's economy has begun to slow down because more consumers are not purchasing products and the infrastructure spending is declining.¹³⁵ America is taking a financial hit too. Prices are increasing for everyday consumer products such as electronics, food, tools, and housewares.¹³⁶ American companies are also concerned about their futures.¹³⁷ American companies are now unable to hire as many employees as they could when Chinese imports were still coming in and many are unable to produce replacement products for the imports.¹³⁸ If they are unable to produce replacement products and less consumers are purchasing products off the market, the economy is going to begin to slow down. According to a Morgan Stanley researcher, the United States economic growth was reduced by a 0.1% and could worsen if this trade war continues.¹³⁹

America and Chinese international relations have declined as a result of this trade war. The two governments are not on speaking terms and have been threatening their countries largest companies with punishment if they continue to trade. Neither President Trump nor President Xi Jinping are willing to back down from the trade fight. In fact, China is ready to retaliate to President Trump's current plan of increasing tariffs.¹⁴⁰ China has threatened to place a huge tariff on products that are being sold by American companies that are popular in

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. Tankersley and Bradsher, *supra* note 131.

137. *See id.*

138. *See id.*

139. *Id.*

140. *Id.*

China, which would further deter Chinese consumers from purchasing those products.¹⁴¹

The international relations have also had an effect on the European market. Sue Noffke, fund manager in United Kingdom equities said, "Germany is a big exporter so if China slows, Germany slows and if Germany slows, Europe generally slows."¹⁴² If this affects Germany, the United States will have a hard time, especially in the automobile industry. Many German cars are purchased in the United States every year and if those cars are not able to be produced at the current rate, they will become more expensive for Americans to purchase and they will stick to cars that are more accessible and affordable. This will create issues between the United States and European countries.

However, European countries are not the only foreign third parties that are being affected by the China and United States trade dispute. Japan's Prime Minister, Shinzo Abe, revealed that Japan was showing an annual trade deficit for the first time since 2015.¹⁴³ He blames this deficit on the US and China trade tensions.¹⁴⁴ Based on statistics, exports to China only increased by 6.8%, when they increased by 20.5% in 2017 and exports from the United States slowed to 2.3% from 6.9%.¹⁴⁵ If this trade tension continues, more third party countries will be affected by it and more issues will arise for the United States and China. If China and the United States were to stop trading, both countries would have a difficult time trying to replace those products by finding a country that would provide them with products at a similar price.

Many analysts have come to terms with the fact that while the trade tension between China and the United States may come to an end, the tech war will continue. China is five years further ahead in technology than even Japan and the United States. Shenzhen has created a fifth-generation wireless technology that allows them to be able to run more virtual reality apps and play war video games.¹⁴⁶ This

141. Tankersley and Bradsher, *supra* note 131.

142. *Trade Row Chain Reaction Impacts Europe*, BBC (Sept. 18, 2018), available at <https://www.bbc.com/news/topics/cxw7qng7vx8t/china-us-relations> (last visited Feb. 10, 2020).

143. *Id.*

144. *Id.*

145. *Id.*

146. David Dodwell, *Expect the US-China trade war to come to a showy end, but the tech war to continue*, S. CHINA MORNING POST (Jan. 26, 2019), available at <https://www.scmp.com/comment/insight-opinion/united-states/article/2183634/expect-us-china-trade-war-come-showy-end-tech> (last visited Feb. 6, 2020).

five-year gap also allows for China to compete in technology for all major data applications ranging from health care to energy management.¹⁴⁷

This has become a concern for the United States because the country is unable to match the rate at which China is creating technology. China will also produce these products in the open market, making the deficit harder to close for the United States. This comes as an issue to the United States because major companies have denied Chinese companies as being unreliable in the past. Huawei, a Chinese tech company that has created the products to extend the 5G platform, on multiple occasions approached companies like Motorola, but was dismissed for having products that would suit developing countries.¹⁴⁸ The United States' position as the top technical nation is at risk.

However, although they are at odds, they are both suffering as a result of this trade tension. If they were to end this issue, the United States could continue to close the deficit between the countries, and China could continue to flourish and build its trade market. However, with this trade war, both country's major companies are suffering losses because they are being tariffed higher than other everyday products. The trade war must end if both countries want to continue having a strong relationship as they currently do.

IV. CONCLUSION

The United States and China have a long history of upheaval and obstacles but have always served as a crutch to one another's economy.

Without the United States, China would not be able to sell exports at its current rate. Chinese trade barriers would still be in place, and thus, China would not have been able to grow its international trade market as it has over the past few years. The Chinese middle class also would not be growing at the rate that it has reached now. The middle class has grown exponentially due to the ability of more workers to afford American-made exports in China and the job opportunities offered by American companies that are planting factories and firms in China.

China's economy would also falter without the United States. China's imports are the biggest part of its fast-growing economy, but without its biggest consumer market, China's economy would slow down. China's economy already has an uneven export to import ratio

147. *Id.*

148. *Id.*

because many Chinese consumers still choose to purchase Chinese counterfeit products that are cheaper. However, without the strength of their imports, the economy would be unbalanced.

China's trade barriers prevented China from expanding its exports to various international markets including the United States. Since the introduction of the WTO, China's economy sky-rocketed and now holds one of the biggest markets in the world. The introduction of the WTO has allowed China's market to thrive at its full potential.

Without the WTO, China will not be able to grow its economical empire. The country would have to return to its previous market layout which consisted of Chinese products being sold to Chinese consumers. With just Chinese products on the market, the Chinese consumers may not be able to purchase everyday products because there would not be competition to keep prices low. Also, all of China's economy would run on imports, whereas currently, the nation's economy strongly is based off of its exports. With just an import-based economy, China as a country would suffer.

China's international relations have strengthened through the increase in its international trade patterns. The Chinese government did not branch out to other countries before membership in the WTO and did not allow other countries to create firms or set up locations in China. Now that it has joined with other countries, China has strengthened ties with other nations and has better international relations. This is important for China because it can extend its relationships with different countries to create more trade relations.

These arguments indicate that although China holds the largest trading market in the world right now, and it would not be successful if it did not have open borders for international trade. Since the start of its membership with the WTO, China has continued to grow and strengthen its economy. As long as China continues to keep its trade barriers open to international trade, China will continue to have the strongest and fastest growing economy.

**HIDING BEHIND A LEVEL PLAYING FIELD: HOW
THE INTERNATIONAL ASSOCIATION OF
ATHLETICS FEDERATION ATTEMPTS TO
REGULATE THE FEMININE IDEAL BY
PERPETUATING DISCRIMINATORY PRACTICES
AGAINST FEMALE OLYMPIC RUNNERS FROM NON-
WESTERN COUNTRIES**

Davida Micaela Hawkes*

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I. INTRODUCTION

This note concerns the validity of the International Association of Athletics Federations' ("IAAF") Regulations governing Eligibility of Females with Hyperandrogenism to Compete in Women's Competition (the "Hyperandrogenism Regulations"). It will discuss how these discriminatory regulations have halted the careers of non-western rising track and field stars Caster Semenya, and Dutee Chand. Caster Semenya and Dutee Chand had been successful competitors and were singled out for scrutiny because of their success as well as their physical appearances and the status of their countries of origin.

The Hyperandrogenism Regulations place restrictions on the eligibility of female athletes with high levels of naturally occurring testos-

terone to participate in competitive athletics.¹ This note will discuss the new IAAF regulations that govern eligibility of female athletes with hyperandrogenism to compete in women's competition and how these regulations are not only discriminatory on their face but also violate international human rights. Even if argued the regulations are not written in a discriminatory way, the regulations are discriminatory as applied, as they have only severely impacted non-western women runners to date. Therefore, the regulations, which establish a framework for the determination of the eligibility of females with hyperandrogenism to participate in international competitions in the female category, should be declared void.²

A. What Is Hyperandrogenism?

Hyperandrogenism is a medical condition which produces excessive levels of androgens/ testosterone in the female body.³ There are various forms, but the form the IAAF regulations target is hyperandrogenism in intersex women. This condition leads women to have testosterone levels that are much higher than average for females.⁴ Typically, women produce very small levels of testosterone.⁵ The regulations were promulgated due to a belief that this additional testosterone gives these women a competitive advantage.

1. *Dutee Chand v. Athletics Fed'n of India (AFI) & The Int'l Ass'n of Athletics Fed'ns (IAAF)*, Interim Arbitral Award, CAS 2014/A/3759, ¶¶ 41-44 [hereinafter *Chand*].

2. Regulation 1.1 states the regulations establish a "framework for the determination of the eligibility of females with Hyperandrogenism to participate in International Competitions in the female category." The Hyperandrogenism Regulations "replace the IAAF's previous Gender verification Policy and the IAAF has now abandoned all reference to the terminology "gender verification" and "gender policy" in its rules." *Id.*, ¶ 41.

3. LISA DAWN BAVINGTON, REGULATING HYPERANDROGENISM IN ELITE FEMALE ATHLETES: THE HISTORY AND CURRENT POLITICS OF SEX-CONTROL IN WOMEN'S SPORT 4 (Thesis, Doctor of Philosophy, University of Otago, Nov. 8, 2016), available at https://www.researchgate.net/profile/L_Bavington/publication/325828966_Regulating_Hyperandrogenism_in_Elite_Female_Athletes_The_History_and_Current_Politics_of_Sex-Control_in_Women%27s_Sport/links/5b284b3645851509895cb539/Regulating-Hyperandrogenism-in-Elite-Female-Athletes-The-History-and-Current-Politics-of-Sex-Control-in-Womens-Sport.pdf (last visited Jan. 28, 2019).

4. *Hyperandrogenism explained and what it means for athletics*, USA TODAY (Aug. 2, 2016), available at <https://www.usatoday.com/story/sports/olympics/2016/08/02/hyperandrogenism-explained-and-what-it-means-for-athletics/87944968/> (last visited Feb. 1, 2019). The term "Intersex" stands for either a disorder or a difference of sex development. Estimates of the number of intersex people vary widely, ranging from one in 5,000 to one in 60. Ruth Padawer, *The Humiliating Practice of Sex-Testing Female Athletes*, N.Y. TIMES MAGAZINE (June 28, 2016), available at <https://www.nytimes.com/2016/07/03/magazine/the-humiliating-practice-of-sex-testing-female-athletes.html> (last visited Mar. 5, 2019).

5. BAVINGTON, *supra* note 3.

B. Who Are the Players?

The International Association of Athletics Federations is the international governing body for the sport of athletics and track and field.⁶ The IAAF has a total of 215 member federations divided into six area associations.⁷ The Olympic movement includes organizations, athletes and other persons who agree to be guided by the Olympic Charter.⁸ The concerted, organized universal and permanent action, carried out under the authority of the International Olympic Committee (IOC) and all individuals as well as entities involved are committed to upholding the values of Olympism.⁹ The Olympic movement is made up of the IOC, the International Federations (IFS), and the National Olympic Committees.¹⁰ The IOC is a non-profit, international organization.¹¹ It is made up of a Congress, whose members are honorary and whose purpose, or role, is consultative; the Session, or the “supreme organ” of the IOC whose decisions are final; the Executive Board, which generally oversees the affairs of the IOC; and the President, whose duties are to make decisions when the Session cannot make them.¹² International Sports Federations seeking IOC recognition must ensure that their statutes, practice and activities conform with the Olympic Charter.¹³

The IOC has a judicial process in place for disputes that are not resolved through the Session or Executive Board. Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the Code of Sports-Related Arbitration.¹⁴ The Code of Sports Related arbitration and mediation rules is the set of procedural rules which govern CAS procedures.

6. *About The IAAF*, IAAF (2019), available at <https://www.iaaf.org/about-iaaf> (last visited Mar. 2, 2019).

7. *International Association of Athletics Federations (IAAF)*, DUCKSTERS (2019), available at https://www.ducksters.com/sports/track_and_field/iaaf.php (last visited Mar. 5, 2019).

8. *Factsheet: The Olympic Movement*, INTERNATIONAL OLYMPIC COMMITTEE (Apr. 2015), available at https://stillmed.olympic.org/Documents/Reference_documents_Factsheets/The_Olympic_Movement.pdf (last visited Jan. 25, 2019).

9. *See id.*

10. Linda Sheryl Greene, *Mirror, Mirror on the Wall – Gender, Olympic Competition and Persistence of the Feminine Ideal*, 31 WIS. J.L. GENDER & SOC'Y 57 (2016).

11. *Id.*

12. *Id.*

13. *Olympic Charter*, INT'L OLYMPIC COMM. (Sept. 15, 2017), available at <https://olympics.com/ioc/olympic-charter> (last visited Jan. 30, 2018).

14. *See Greene, supra* note 10.

The IOC formed the CAS because of increased disputes in international sports, and because there was no forum to hear the disputes, and no authority to settle them. The CAS is an international arbitral tribunal to provide a forum for the settlement of private disputes that arise in the sport.¹⁵ The rules and regulations of the relevant sport organization which issued the challenged decision is the source of substantive law that is applicable to hearings in the CAS.¹⁶ Where there is a discrepancy related to a regulation, the panel will use the law of the country where the federation that issued the challenged decision is domiciled. Often Swiss law is applied since many of the international federations are established in Switzerland.¹⁷ The Olympic Charter states that the Charter governs and serves as statutes for the IOC, and by being recognized through the IOC, the IAAF is also bound by the terms of the Olympic Charter. Lastly, the IAAF has its own constitution which describes the rules and regulations the IAAF must follow in addition to following the Olympic Charter.

II. HISTORY OF THE IAAF'S FOCUS ON REGULATING THE FEMININE IDEAL

Female athletes have endured discrimination since they were first allowed to compete at the highest level of athletics. It has been theorized that sex testing¹⁸ originally surfaced to guard against men masquerading as women, in an attempt to compete and win women events.¹⁹ While this may well be the source of the regulation, the only documented incident of this happening, was in 1936.²⁰ One can only conclude that their real purpose of such invasive discriminatory techniques was to discourage women or limit participation of women in the sport who defied gender norms. With only one such "masquerading incident," these tests have continued to progress and shifted the focus on targeting

15. Haley K. Olsen-Acre, *The Use of Drug Testing to Police Sex and Gender in the Olympic Games*, 13 MICH. J. GENDER & L. 207 (2007).

16. Louise Reilly, *Introduction to the Court of Arbitration for Sport (CAS) & the Role of National Courts in International Sports Disputes, A Symposium*, 2012 J. DISP. RESOL. 68 (2012).

17. *Id.* at 69.

18. For the purposes of this note "sex testing" and "gender verification" will be used interchangeably. These terms refer to the procedures that sport organizations implement to ensure that only females compete in the designated female events.

19. Olsen-Acre, *supra* note 15.

20. *See id.*

women who do not align with the traditional feminine ideal.²¹ In addition, although men masquerading as women was the stated justification for the implementation of sex testing, these tests were never performed on male athletes.²²

The institution of sport is formally organized around the notion that there are only two sexes, male and female, and sport is nearly solely segregated by binary sex category.²³ As a result, when athletes do not fit into the pre-conceived definitions of what a male or female athlete should be, or should look like, there is simply no place within the institution of competitive organized sport for those athletes.²⁴ Because they cannot fit into these traditional and narrow gender definitions, targeted female athletes are subjected to discriminatory gender tests.²⁵ Society has dictated the terms for who can identify as a man or a woman, and these regulations continue to protect its rigid definition of what a female should be and what characteristics she should possess.

It is easy to think of a list of characteristics that are attached to concepts of the societal norm for male and the norm for female, like testosterone vs. estrogen, or perhaps rational vs. emotional.²⁶ If a woman is associated with too much testosterone, or if she has too much muscle, society passes judgment because she does not fall into one of the rigid categories that society has designed for “normal” men and women. Therefore, those who cross the threshold into the gray area that society has not given much thought to, like transgender, intersex, or hyperandrogenic athletes, are subjected to rigid and embarrassing scrutiny. The discrimination against female athletes dates back to the nineteenth

21. Padawer, *supra* note 4. (“The rationale for decades was to catch male athletes masquerading as women, though they never once discovered an impostor. Instead, the athletes snagged in those efforts have been intersex women – scores of them.”)

22. Olsen-Acre, *supra* note 15.

23. Cheryl Cooky & Shari L. Dworkin, *Policing the Boundaries of Sex: A Critical Examination of Gender Verification and the Caster Semenya Controversy*, 50 J. OF SEX RESEARCH 103 (2013).

24. *Id.* Therefore, historically there has been no formal place within the institution of competitive organized sport for athletes who exist outside of the dichotomous categories of male and female and who subsequently “fail” sex testing.

25. Serena Williams has often been called an “ape” and “gorilla.” It’s common for women athletes – especially when they win – to be derided as something other than women. In any sport in which a woman has to actually train to be a formidable competitor, and has a physique that reflects that, you’ll find discussion of their reputed sexual desirability permeating the conversation. Erika Nicole Kendall, *Female athletes often face the femininity police – especially Serena Williams*, THE GUARDIAN (July 14, 2015), available at <https://www.theguardian.com/commentisfree/2015/jul/14/serena-williams-female-athletes-femininity-police> (last visited Mar. 7, 2019)

26. Olsen-Acre, *supra* note 15.

century when the Olympics were first established.²⁷ The organizers of the early Olympic Games heavily relied on sex or gender testing to disqualify athletes who appeared to have an unfair advantage.²⁸ In the very beginning stages of sex testing, visual and physical examinations of female competitors' genitalia by doctors were employed to verify gender but there was no such evaluation of men. To date, there is still no such evaluation of men. In fact, because men's bodies and sports competition are the "standard," men don't have to prove they are men, but in international competitions since the 1940s women's bodies underwent strict- public scrutiny. Yet, even in its 2019 decision to implement these discriminatory practices against women, the IAAF wants you to believe there is no other alternative and that the policing of women's bodies protects the integrity of the sport in its entirety, though the same checks and balances on men do not exist.²⁹

If an athlete presents with XX chromosomes, the IOC defines her as female, and if the athlete presents with XY chromosomes then he is classified as male.³⁰ However, because of this rigid structure, the IOC does not account for athletes that have genetic anomalies, of which they have no control over, and which often do not provide a competitive advantage.³¹ A female athlete could present with an XY chromosomal configuration, but her body does not properly respond to testosterone, so her body produces female features with very minimal male aspects.³² Nevertheless, she would still be disqualified and humiliated for not fitting into the IOC's definitions of female.³³

While the IOC has abandoned the practice of chromosomal sex testing, they have moved into the realm of disqualifying athletes due to their hormonal levels.³⁴ These tests are highly invasive, shame-

27. *See id.*

28. *Id.*

29. Victoria Jackson, *The Decadelong Humiliation of Caster Semenya*, SLATE (May 1, 2019), available at <https://slate.com/technology/2019/05/caster-semenya-testosterone-gender-appeal-ruling.html> (last visited July 24, 2019.)

30. *Id.*

31. *Id.*

32. *Id.*

33. For example, female athletes who have hyperandrogenism, or androgen insensitive syndrome. Chromosomal disorders are congenital and sometimes hereditary, many do not offer any competitive advantage do people who have them. Interestingly, sex tests that rely on chromosomal analysis fail to recognize some disorders that might actually provide some type of advantage, such as androgen- secreting tumors. Olsen-Acre, *supra* note 15.

34. IAAF introduces new eligibility regulations for female classification, WORLD ATHLETICS (Apr. 26, 2018), available at <https://www.iaaf.org/news/press-release/eligibility-regulations-for-female-classifica> (last visited Mar. 2, 2019).

inducing practices which are historically fueled by discriminatory objectives.

The purpose of the Modern Olympic Games was to simultaneously develop the minds and bodies of young people.³⁵ It was hoped that resurrecting the Olympic Games would bring back the ideals of physical, mental, and spiritual excellence.³⁶ However, these goals were meant solely for male athletes. When the Modern Olympic Games were established in 1896, women were not allowed to compete.³⁷ The beginning stages of integrating women into the sport did not begin until over thirty years later, in 1928.³⁸ The IAAF excluded female athletes for even longer. It did not include female athletics until 1963.³⁹

Since the early days of research into gender and its many facets, a woman's interest in competing in sports caused her femininity to become suspect which made her subject to surveillance and regulation.⁴⁰ The very participation of women in elite-level athletics serves as a highly visible challenge to traditional notions of femininity, as women are supposed to be fragile, petite beings, not muscular forces competing in, and training for similar events that men do.⁴¹ Although Semenya is not the first athlete to have her identity as a woman challenged, she has en-

35. See *The Modern Olympic Games*, SCHOLASTIC (2019), available at <https://www.scholastic.com/teachers/articles/teaching-content/modern-olympic-games/> (last visited Jan. 29, 2019).

36. *Id.*

37. Greene, *supra* note 10.

38. *Id.*

39. Hans Bolling, *The Beginning of the IAAF: A Study of its Background and Foundation*, IAAF (2007), at 5, available at <https://iaafmedia.s3.amazonaws.com/competition/info/9ae4cea1-f84c-44ec-852f-74bb974d0f5a.pdf> (last visited Jan. 28, 2019).

40. Visual observation and gynecological examination had been tried on a trial basis for two years at some competitions leading up to the 1968 Olympic Games, but these invasive and demeaning processes were jettisoned in favor of laboratory-based genetic tests. On-site gender verification has since been found to be highly discriminatory, and the cause of emotional trauma and social stigmatization for many females with problems of intersex who have been screened out from competition. Despite compelling evidence for the lack of scientific merit for chromosome-based screening for gender, as well as its functional and ethical inconsistencies, the IOC persisted in its policy for 30 years. L. J. Elsas, A. Ljungqvist et al., *Gender Verification of Female Athletes*, 2 GENET MED. 249 (2000).

41. See Kristin Wilde, *Women in Sport: Gender Stereotypes in the Past and Present*, available at <http://wgst.athabascau.ca/awards/broberts/forms/Wilde.pdf> (last visited Jan. 29, 2019); see Amanda Nicole Schweinbenz and Alexandria Cronk, *Femininity Control at the Olympic Games*, THIRD SPACE (2010), available at <http://journals.sfu.ca/thirdspace/index.php/journal/article/view/schweinbenzcronk/329> (last visited Jan. 29, 2019); Carlie Minichino *Gender Specific Rules in Sport are Based on an Outdated Idea of Femininity*, (2009) (Honors Theses Paper 471, Colby College), available at <https://pdfs.semanticscholar.org/6d49/344ccfd9e4c831d0140551f0e886068e80a3.pdf> (last visited Jan 29, 2019).

dured this obsession over her eligibility in the women's category longer than any athlete in history.⁴²

Sex and gender testing of female athletes can be seen through much of the twentieth century.⁴³ Testing began in the 1960s and has included various invasive as well as humiliating methods. These include nude parades before a panel of judges, chromosome and DNA analysis, and most recently, testosterone testing.⁴⁴ In 1968, the IOC implemented chromosomal testing, to determine which athletes lacked the ability to process testosterone. This method proved to be imperfect and excluded athletes that should have been allowed to compete.⁴⁵ Following these chromosomal procedures, the IOC permitted invasive gynecological inspections, and now fast forwarding to 2019, the IOC allows the proliferation of regulations requiring invasive inspections of the female body through testosterone testing.⁴⁶

Routine sex testing was done in past Olympic competitions but was dropped only ten years ago because of the continued inaccuracies related to the reliance on a single trait to verify sex. In addition, similar problems arise when relying on testosterone levels alone to determine if an athlete is "too masculine to compete."⁴⁷ Yet, the re-emergence of sex testing for female athletes came in May of 2011 and June of 2012 when the IAAF and the IOC introduced these regulations governing the eligibility of females with hyperandrogenism.⁴⁸ At the center of the current dispute is South African middle-distance runner, Caster Semenya, as well as Indian sprinter Dutee Chand.⁴⁹

42. Jackson, *supra* note 29.

43. See Elsas, *supra* note 40.

44. Alex Hutchinson, *An Imperfect Dividing Line*, NEW YORKER (Mar. 27, 2015) available at <https://www.newyorker.com/sports/sporting-scene/dutee-chand-gender-testing-imperfect-line> (last visited Jan. 29, 2019).

45. *Id.*

46. See Martin Fritz Huber, *The Controversy Around Caster Semenya Explained*, OUTSIDE (July 12, 2017), available at <https://www.outsideonline.com/2198906/caster-semenya-debate> (last visited Jan. 29, 2019). No governing body has so tenaciously tried to determine who counts as a woman for the purpose of sports as the I.A.A.F. and the International Olympic Committee (I.O.C.). Those two influential organizations have spent a half-century vigorously policing gender boundaries.

47. Tracie White, *Media advisory on new Olympics testosterone policy: Stanford expert available to comment on unfair treatment of women athletes*, STAN. MED. (June 25, 2012), available at <http://med.stanford.edu/news/all-news/2012/06/media-advisory-on-new-olympics-testosterone-policy-stanford-expert-available-to-comment-on-unfair-treatment-of-women-athletes.html> (last visited Jan 29, 2019).

48. *Id.*

49. Huber, *supra* note 46.

III. THE IAAF'S INITIAL VICTIM: DUTEE CHAND'S RISING CAREER HALTED BY DISCRIMINATORY REGULATIONS

To enforce its perception of the feminine ideal in sports, the IAAF has implemented two sets of regulations that impose restrictions on female athletes' bodies.⁵⁰ The IAAF first enacted the Hyperandrogenism Regulations in April 2011. These regulations established a framework for the determination of the eligibility of females with hyperandrogenism to participate in international competitions.⁵¹ These regulations are mandatory, and all inclusive, meaning they prohibit female athletes from competing in any event if, when tested, their testosterone levels fell above a certain level.⁵² It is important to note that not all female athletes are tested, and that the initial basis for subjecting women to these tests is subjective, and based on a cursory review of their physical features.

Dutee Chand, now a twenty-two-year-old female athlete of Indian nationality, is a star athlete for India.⁵³ The spotlight has been on Dutee Chand since age eighteen when she rose to fame through her dominance in the women's 100m and 200m races. She has won a number of national junior athletics events in India and is currently a national champion in the women's 100m race.⁵⁴ In 2012, Chand became a national champion in the under-18 category in the 100m event.⁵⁵ In addition, she took bronze in the women's 200m event at the 2013 Asian Athletics Championships.⁵⁶ In the same year, she became a national champion in the 100m and 200m races at the Indian National Senior Athletics Championships. The following year, Chand won two gold medals at the Asian Junior Athletics Championships in 200m and 4x400m relays.⁵⁷ With these prestigious performances, Chand hoped to qualify to represent her country in the 2014 Commonwealth Games.⁵⁸ However, the

50. See *Chand*, *supra* note 1, ¶ 41.

51. *Id.*

52. *Id.*, ¶ 42.

53. *Id.*, ¶ 1.

54. See *Dutee Chand Athlete Profile*, IAAF (2019), available at <https://www.iaaf.org/athletes/india/dutee-chand-275950> (last visited Jan. 29, 2019).

55. *Dutee Chand breaks 100m record*, THE HINDU (July 14, 2012), available at <https://www.thehindu.com/sport/athletics/dutee-chand-breaks-100m-record/article3636513.ece> (last visited Jan. 29, 2019).

56. Greene, *supra* note 10.

57. See *Dutee, relay team clinch gold medals*, DECCAN HERALD (June 15, 2014), available at <https://www.deccanherald.com/content/413832/dutee-relay-team-clinch-gold.html> (last visited Jan. 29, 2019).

58. Padawer, *supra* note 4.

IAAF subjected her to sex testing and declared her ineligible to compete as a female athlete due to the hyperandrogenism policies. She was subsequently dropped from the roster.⁵⁹

The IAAF prohibited Chand from competing in the female category of the 100m and 200m dash. Chand refused to comply with medical interventions to lower her testosterone levels and filed an appeal to the CAS.⁶⁰ In 2015, Chand challenged the regulations which led to a determination by the CAS that the 2011 regulations did discriminate against women and discriminated based on a natural physical trait.

In July 2015, the Court of Arbitration for sport suspended the 2011 IAAF regulations regarding Hyperandrogenism. The CAS held in their decision that the IAAF failed to establish that the hyperandrogenism regulations are necessary and proportionate to pursue the legitimate objective of organizing competitive female athletics to ensure fairness in elite women's competition.⁶¹ The panel concluded that there was not enough scientific evidence to conclude that hyperandrogenic female athletes have a significant performance advantage that is necessary for exclusion or prohibition from competition.⁶² The IAAF, however, did not simply accept this decision and move forward. Instead, the IAAF developed the 2018 Hyperandrogenism regulations as a response to the 2015 CAS ruling.⁶³

*A. The IAAF's Continued Attempts at Discrimination:
the 2018 IAAF Regulations*

The new regulations were largely based on a study published in the *British Journal of Sports Medicine*.⁶⁴ This study was conducted by Stephanie Bermon and Pierre Garnier, who work for the IAAF medical examiners. In addition, their study was jointly commissioned by the

59. See Rohan Sen, *Asian Games 2018: Dutee Chand ends 16-year wait for India with silver in 200m*, INDIA TODAY (Aug. 29, 2018), available at <https://www.indiatoday.in/sports/asian-games-2018/story/asian-games-2018-dutee-chand-ends-16-year-wait-for-india-with-silver-in-200m-1326566-2018-08-29> (last visited Jan. 29, 2019).

60. BAVINGTON, *supra* note 3, at 6.

61. See Chand, *supra* note 1, ¶ 547.

62. Andrew, *New IAAF Testosterone Regulations are Bigoted and Targeted*, VICTORY PRESS (May 2, 2018), available at <https://victorypress.org/2018/05/02/new-iaaf-testosterone-regulations-are-bigoted-and-targeted/> (last visited Jan. 29, 2019).

63. See White, *supra* note 47; see also Mokgadi Caster Semenya, SOUTH AFRICAN HISTORY ONLINE (2019), available at <https://www.sahistory.org.za/people/mokgadi-caster-semenya> (last visited Mar. 2, 2019); see also ELLEN SAMUELS, FANTASIES OF IDENTIFICATION: DISABILITY, GENDER, RACE 199 (Michael Bérube ed., 2014).

64. See Andrew, *supra* note 62.

IAAF.⁶⁵ In this study, when compared with the lowers female ft (free testosterone) tertile, women with the highest ft tertile performed significantly better in 400m, 400m hurdles, 800m, hammer throw, and pole vault.⁶⁶ The IAAF then tailored the 2018 regulations to fit these findings and lowered the acceptable blood testosterone levels for athletes participating in certain women events to no more than 5 nmol/L as opposed to 10 nmol/L which was the amount in the previous regulations.⁶⁷ Though the IAAF relied on the study, scientists in the field disagreed with the findings. These scientists felt that the data and conclusions drawn in the Bermon and Garnier article were so erroneous that they called for a retraction of their findings and demanded the study be performed again.⁶⁸

Some of the errors cited by the experts included duplicated athletes, meaning there was more than one time recorded for an individual. Repeating the same time once or more than once for an individual athlete indicates a clear data error. Finally, sometimes no athlete in the sample could be found with the reported time for that event.⁶⁹ Even in the best of circumstances, the IAAF's reliance on this data to support the enactment of the regulations would be misguided. However, with the IAAF rushing to overcome the 2015 Chand decisions, by relying on scientifically flawed data, the IAAF's true purpose became clear: to target hyperandrogenic females from underrepresented countries and prohibit their participation.⁷⁰

The testing methodology further proves this intent. The sample size of athletes Bermon and Garnier tested only contained women from non-western and developing countries.⁷¹ Thus, strengthening the arguments that these 2018 IAAF regulations are targeting not only women, but women in particular from non-western countries.⁷² As data is not

65. See *id.*; see also Stéphane Bermon and Pierre-Yves Garnier, *Serum androgen levels and their relation to performance in track and field: mass spectrometry results from 2127 observations in male and female elite athletes*, BRIT. J. SPORTS MED. (July 3, 2017), available at <https://bjsm.bmj.com/content/51/17/1309.info> (last visited Jan. 27, 2019).

66. *Id.*

67. *Id.*

68. Roger Pielke Jr., *A Call for Bermon and Garnier (2017) to be Retracted*, SPORTS INTEGRITY INITIATIVE (July 13, 2018), available at <https://www.sportsintegrityinitiative.com/call-bermon-garnier-2017-retracted/> (last visited Jan. 28, 2019).

69. *Id.*

70. Andrew, *supra* note 62.

71. See Chand, *supra* note 1, ¶¶ 22, 355.

72. See WORLD ATHLETICS, *supra* note 34. The new Regulations require any athlete who has a Difference of Sexual Development (DSD) that means her levels of circulating testosterone (in serum) are five (5) nmol/L or above and who is androgen-sensitive to meet

being made public, there is no way for other scientists to verify, analyze, or fact check Bermon and Garnier's conclusions.⁷³ It should be noted that peer review is crucial especially in a scientific field, as this involves subjecting the author's work to the scrutiny of other qualified experts to check its validity.⁷⁴ This is needed to rule out false positives and other errors that could mislead the reader. "Without publicly available raw data, it is not possible to perform all the desired checks on the data."⁷⁵ As a result, it is "reasonably likely" that the connection found here between female athletes having a slight competitive advantage due to hyperandrogenism could have occurred by chance.⁷⁶ The IAAF needed scientific data to confirm that hyperandrogenic females hold an advantage over females with "normal" testosterone levels in order for the amended regulations to be accepted in 2018, and Bermon and Garnier, in a study the IAAF paid for, provided that data.⁷⁷

IV. IAAF DISCRIMINATORY REGULATIONS STRIKE AGAIN, THIS TIME ENTANGLING RISING TRACK AND FIELD POWERHOUSE, CASTER SEMENYA

These new regulations for testosterone testing arose as a result of very speculative and subjective comments that were made regarding a South African runner, Caster Semenya.⁷⁸ Semenya's rise from unknown teenager to world champion catapulted her into sporting infamy and put a direct target on her back.⁷⁹

the following criteria to be eligible to compete in Restricted Events in an International Competition (or set a World Record in a Restricted Event at competition that is not an International Competition):(a) she must be recognized at law either as female or as intersex (or equivalent);(b) she must reduce her blood testosterone level to below five (5) nmol/L for a continuous period of at least six months (e.g., by use of hormonal contraceptives); and(c) thereafter she must maintain her blood testosterone level below five (5) nmol/L continuously (i.e., whether she is in competition or out of competition) for so long as she wishes to remain eligible.

73. Jacalyn Kelly, Tara Sadeghieh & Khosrow Adeli, *Peer Review in Scientific Publications: Benefits, Critiques, & A Survival Guide*, JIFCC (Oct. 24, 2014), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4975196/> (last visited Mar. 7, 2019).

74. *Id.*

75. Andrew, *supra* note 62.

76. *Id.*

77. *IAAF approves new rules on hyperandrogenism*, THE GUARDIAN (Apr. 12, 2011), available at <https://www.theguardian.com/sport/2011/apr/12/iaaf-athletics-rules-hyperandrogenism-caster-semenya> (last visited Jan. 27, 2019).

78. White, *supra* note 47.

79. *IAAF to fight Swiss Court Ruling on Caster Semenya* THE JAPAN TIMES (June 5, 2019) available at <https://www.bbc.com/sport/athletics/48114137> (last visited July 24, 2019)

Mokgadi Caster Semenya, was born in Ga- Masehlong, a village near Polokwane in South Africa.⁸⁰ When Semenya was eighteen, she won both the 800m and 1500m races at the African Junior Championships in 2009 with record breaking times.⁸¹ In August of that same year, she won gold in the 800m at the World Championships setting the fastest time in that event for the year.⁸² Semenya, a trail blazer in the 800m and 1500m races, was receiving international attention for continual progression in these events as she was only eighteen, yet was ranked the number one women's runner in the 800m.⁸³ After Semenya shocked the track world with her win by 2.5 seconds in the 800m at the 2009 World Championship, complaints from her competitors arose relating to her physique.⁸⁴ For example, one of her fellow athletes said that Caster Semenya was "too masculine" and that "these kinds of people should not run with us... For me, she is not a woman. She is a man".⁸⁵ As a result, Semenya was forced to undergo sex testing that ultimately was not kept confidential and left her humiliated.⁸⁶ Furthermore, after her gold medal win at the Olympics in 2016, her opponent stated, "there were 'obvious' athletes with heightened testosterone."⁸⁷ The continued scrutiny and humiliation followed Semenya for years throughout her dominant career.

*A. Newly Restricted Events in the 2018 Regulations
Directly Target Caster Semenya*

After creating a bold presence in the track and field world, the IAAF amended its regulations to prohibit Caster Semenya from contin-

80. SOUTH AFRICAN HISTORY ONLINE, *supra* note 63.

81. *Id.*

82. *Id.* The South African began raising eyebrows when she won the world junior championships in 2008 and the senior world title the following year, with dramatic improvement in her times. As a result, the IAAF made Semenya take a sexual verification test, which was initially kept secret but revealed by the media in 2009. Mitch Phillips, *Athletics: Semenya's reign to be ended by new IAAF gender rule*, REUTERS (Apr. 25, 2018) available at <https://www.reuters.com/article/us-athletics-iaaf-hyperandrogenism/athletics-semenyas-reign-to-be-ended-by-new-iaaf-gender-rule-idUSKBN1HW27R> (last visited Feb. 28, 2019).

83. SOUTH AFRICAN HISTORY ONLINE, *supra* note 63.

84. See White, *supra* note 47; see also SOUTH AFRICAN HISTORY ONLINE, *supra* note 63.

85. *Id.*

86. See *id.*

87. Tom Morgan, *Caster Semenya wins 800m: beaten GB finalist Lynsey Sharp criticizes rule changes over 'obvious' hyperandrogenous women*, TELEGRAPH (Aug. 21, 2016), available at <https://www.telegraph.co.uk/news/2016/08/21/lynsey-sharp-criticises-obvious-hypoadrogenous-women-having-bein/> (last visited July 24, 2019).

ued domination in the sport. The 2018 regulations are more specific than the 2011 IAAF regulations. In fact, the amended regulations that were proposed in 2018 restricted female athletes from competing in the following events if their testosterone level is above 5 nmol/L: 400m races, 400m hurdle races, 800m races, 1500m races, one mile races and all other track events over distances between 400m and one mile.⁸⁸ The scientific evidence the IAAF relied on when determining which events to regulate, stated that pole vaulters and hammer throwers with hyperandrogenism may potentially have an advantage as well.⁸⁹ Interestingly, it has been established that Poland, a western country, dominates the women's hammer throw.⁹⁰ However, these events are not restricted or subjected to this testing.⁹¹

Out of the five events listed in the regulations, Caster Semenya's main event, the 800m, showed the least amount of advantage at 1.78%, technically in the IAAF's own study.⁹² Meaning, athletes with hyperandrogenism competing in the 800m have the least advantage.⁹³ Interestingly enough, the 1500m race, another event Semenya dominates, is subject to this regulation when the IAAF's own study showed no scientific evidence to support a correlation between high testosterone and high performance in the event.⁹⁴ Nevertheless, where women from non-western countries are dominating events, athletes such as Semenya are subjected to regulations such as these which are promulgated to stop their successes. With these facts, it is hard not to conclude that the IAAF is operating not for the betterment of sport, but instead based on discriminatory motives. It does not appear as though the IAAF is concerned with establishing a fair playing field as the organization argued.

88. Andrew, *supra* note 62.

89. Interestingly the IAAF's policy omits hammer throw and pole vault- which the study showed had the highest margins of improved performance and throws. Instead, the policy regulates a range of events from the 400m through 1500m races, all in Semenya's specialty. James Maasdorp, *Commonwealth Games: IAAF rule change could end career of Caster Semenya*, ABC NEWS (Apr. 11, 2018), available at <https://www.abc.net.au/news/2018-04-11/new-iaaf-rules-could-end-the-career-of-caster-semenya/9641160> last visited (Jan. 30, 2019).

90. Martin Bingisser, *Ranking the Best Throwing Nations*, HMMR MEDIA (Oct. 21, 2016), available at <https://www.hmmrmedia.com/2016/10/ranking-the-best-throwing-nations/> (last visited Mar. 7, 2019).

91. But two events — hammer throw and pole vault — didn't make the IAAF's list of Restricted Events despite showing the highest percentage of advantage in the study. At 4.53%, hammer throw is about 1.5% higher than any of the other events flagged as showing a notable difference. See Andrew, *supra* note 62.

92. *Id.*

93. *Id.*

94. Huber, *supra* note 46.

Although the information in the Bermon article has been declared unreliable, the IAAF fully relied on this data when making conclusions regarding hyperandrogenism and accepted the advantage hammer throwers and pole vaulters receive by failing to regulate those events.

V. THE HYPERANDROGENISM REGULATIONS ONLY TARGET WOMEN AND ARE DISCRIMINATORY ON THEIR FACE

Like the 2011 regulations, the 2018 Hyperandrogenism regulations are discriminatory on their face and should therefore be invalidated. When the 2011 Hyperandrogenism regulations were suspended, CAS concluded that the regulations were *prima facie* discriminatory, being that they are a sex-based eligibility rule.⁹⁵ Such discrimination is, unless justified, contrary to the Olympic charter, the IAAF constitution, and the laws of Monaco. If the testosterone regulations cannot be justified as a reasonable and necessary response to a legitimate need, then they should be declared invalid.⁹⁶ “Reasonable and necessary” means there needs to be a rational connection between the regulations and the objectives the regulations are designed to meet, and the regulations should be minimally impairing on any right to freedom they regulate.⁹⁷

The IAAF failed to establish that the 2011 regulations were a necessary and proportionate means of achieving a legitimate objective.⁹⁸ The IAAF still has not met this burden with the 2018 regulations as these regulations are still sex-based eligibility rules and therefore would be classified as *prima facie* discriminatory just as the 2011 regulations were.

In regard to the 2011 regulations, the CAS ruled that the IAAF failed to meet their burden.⁹⁹ CAS gave the IAAF two years to present evidence supporting the 2011 rules, and the IAAF was unable to do so. Because of this, the 2011 ruling still stands and Chand’s events are excluded from the 2018 rules. The two main differences between the 2011 and 2018 regulations are the restricted events and the amount of testosterone that triggers the regulations. Substantively, the regulations are still written in a discriminatory fashion by only targeting women, and as applied, continue to only impact women from non-western coun-

95. *Chand*, *supra* note 1.

96. *Revoke Discriminatory Athletics Gender Regulations*, HRW (July 26, 2018), available at http://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf (last visited Jan 29, 2019)

97. *Id.*

98. *Chand*, *supra* note 1, ¶¶ 536, 547.

99. *Id.*

tries.¹⁰⁰ As a result, the IAAF's new regulations continue to operate under the same discriminatory standards which were struck down by the CAS in the Chand case.¹⁰¹

The 2018 regulations also fail to meet the burden of showing the rational connection between the regulations themselves and the objective they are designed to meet. Here, since the 2018 regulations again prevent female athletes with hyperandrogenism from participating in certain events, the IAAF would need to meet the burden of showing a rational connection between regulating hyperandrogenic females and creating a fair playing field in the sport. The IAAF contends that these regulations are being implemented in order to foster a fair and competitive environment across all events.¹⁰²

If there is a rational connection between sex-based regulations and the objective of protecting competition in sport, surely there must be similar regulations regarding male athletes? However, there are no such regulations that hinder men with higher levels of testosterone or different advantageous immutable traits from participating in any events. This leaves one to conclude either that the IAAF is not concerned with a fair and competitive environment across all events for men, or that the IAAF is simply targeting women. The evidence supports the latter. The organization cannot unilaterally decide to regulate some events where they have discovered disadvantages and not others. This blatantly highlights the IAAF's flawed argument that they are establishing these regulations to create a level playing field, as there is no such level playing field created in the male events.

Gender-based discrimination is a higher suspect class, and any gender-based classification must be substantially tailored to serve an important government interest.¹⁰³ The standard by which this regulation must be analyzed is whether the discriminatory effect of the regulation has a substantial relationship to achieving an important and legitimate government objective.¹⁰⁴ When reviewing such regulations, the CAS

100. *Chand, supra* note 1, ¶¶ 22, 42, 355.

101. *See id.*

102. Alice Dredger, *Redefining the Sexes in Unequal Terms*, N.Y. TIMES (Apr. 23, 2011), available at <https://www.nytimes.com/2011/04/24/sports/24testosterone.html> (last visited Jan. 29, 2019).

103. Letter from Human Rights Watch to Lord Sebastian Coe, President IAAF re: *Eligibility Regulations for The Female Classification* (July 24, 2019), available at https://www.hrw.org/sites/default/files/supporting_resources/hrw_letter_iaaf_femaleclassification_20180724.pdf (last visited Mar. 2, 2019); CAS 2014/A/3759, *supra* note 1; see BAVINGTON, *supra* note 3.

104. *Chand, supra* note 1, ¶¶ 536, 547.

must ask, do the ends justify the means? In other words, does this gender discrimination aimed solely toward women athletes, substantially relate to achieving the goal of preventing scandals and having fair competition? The idea behind this policy is to make a move toward creating the mythical "level playing field."¹⁰⁵ However, the only thing this regulation does is allow men to further regulate the female body of which they know nothing about, as well as put constraints on what classifies as a "gender appropriate" woman in the field of Olympic sports.

This idea of making elite sports a "level playing field" is quite frankly, unrealistic, as fair sporting competitions do not necessarily require that athletes be equal in every imaginable respect.¹⁰⁶ It is impossible to make every athlete equal, as each athlete is subjected to different environments that can contribute to their successes.¹⁰⁷ In fact, scientists and the media credit part of Usain Bolt's success to the very earth in which he was raised.¹⁰⁸ However, we do not see athletes from Usain Bolt's town being excluded from events solely for being born in a place where it has been known to give athletes an advantage. These athletes have no control over where they grow up and are not targeted, yet here, Caster Semenya is being punished for being born differently and not fitting into the begrudgingly accepted athletic feminine ideal. Punished for something of which she has no control over, even though the science suggests that she has very minimal advantage in her running events. There are a plethora of biological, psychological, sociological, and economic factors that influence athletic performance.¹⁰⁹ As a result, sports can never be a truly level playing field as we are not all born the same, thus these regulations implemented with the purpose of making competitions fair completely targets and victimizes many women who are born with naturally higher testosterone levels.¹¹⁰

105. Dredger, *supra* note 102.

106. See Thomas Murray, *Making Sense of Fairness in Sports*, 40 HASTINGS CTR. REP. (2010), available at <https://onlinelibrary.wiley.com/doi/full/10.1353/hcr.0.0241> (last visited Jan. 29, 2019).

107. One could argue to some extent that all elite athletes are freaks of nature – these athletes are in the best handful in the world at what they do, especially when considering a talent pool as large as that of Athletics. See Claire Thomas, *Built for speed: what makes Usain Bolt so fast?*, TELEGRAPH (Aug. 20, 2016), available at <https://www.telegraph.co.uk/usain-bolt-worlds-fastest-man/0/built-for-speed-what-makes-usain-bolt-so-fast/> (last visited Feb. 28, 2019).

108. *Id.*

109. Chand, *supra* note 1, ¶ 116.

110. See Francisco J. Sánchez et al., *The New Policy on Hyperandrogenism in Elite Female Athletes Is Not About "Sex Testing,"* 50 J. SEX RES. (2013); see BAVINGTON, *supra* note 3, at 79.

The options are hard; perhaps even cruel. Either the athletes with hyperandrogenism submit to being made gender “normal” through hormone treatments, or they cannot compete.¹¹¹ Male athletes need not worry.¹¹² It is only women who are being limited in terms of natural biochemical advantage.¹¹³ “There is no perfect solution, one that is reasonably objective universally applicable and universally satisfying.”¹¹⁴ But is requiring an individual to submit to hormone treatments to become “normal” a solution or a punishment? While there may not be a perfect solution, there is surely a solution that respects the individual human and civil rights of athletes while still promoting fairness in sport. Promoting fairness at such a high caliber of sporting events is a legitimate objective, however solely discriminating on one class of people based on their gender substantially prejudices this objective and does not serve to meet this interest.¹¹⁵ The IAAF allows females to compete with certain testosterone levels that they classify as normal, but when women have “too much” testosterone the IAAF steps in and takes females out of the events for not being “female enough,” since testosterone is something that is typically associated with male bodies.¹¹⁶ In fact, the IOC policies in 2012 determined that athletes ineligible to compete in the female categories were eligible to compete in the male categories if they met a high enough testosterone level.¹¹⁷ Based on this, one can clearly conclude that the IAAF believes that female athletes should be classified as ineligible because their testosterone levels are not feminine enough, and are considered to be too masculine to

111. Dredger, *supra* note 102.

112. “The spectrum of identity stretches far beyond the binary, say human rights activists, so shouldn’t Semenya’s physical abilities be celebrated the same way as Usain Bolt’s height and Michael Phelps’s wingspan are? Either way this verdict does not signal the end of the debate.” *Caster Semenya: Olympic 800m champion loses appeal against IAAF testosterone rules*, BBC (May 1, 2019), available at <https://www.bbc.com/sport/athletics/48102479> (last visited July 27, 2019).

113. *See id.* American swimmer Michael Phelps owes his unique genetic endowment to physical traits associated with Marfan Syndrome (e.g., arm span, big feet stature), which contributes to his dominance over the rest of the field. Yet, despite the obvious advantages there are no arguments that they should be excluded from competition against lesser-males. *See* BAVINGTON, *supra* note 3, at 80.

114. *Id.*

115. Chand, *supra* note 1, ¶ 40.

116. *Id.*

117. BAVINGTON, *supra* note 3, at 82; *see generally* IOC Regulations on Female Hyperandrogenism, (IOC) (June 22, 2012), available at https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2012-06-22-IOC-Regulations-on-Female-Hyperandrogenism-eng.pdf (last visited Jan. 29, 2019)

compete in female categories. However, they are also likely not masculine enough to compete in male categories.

With the easily accessible evidence that men have varying testosterone levels and natural traits that provide them with advantages, can we believe that this regulation is trying to serve the greater good of the sport? However, men's bodies are not scrutinized in the same manner as female athletes.¹¹⁸ In addition, when presented with such evidence that there is disparity between male athlete in their testosterone levels, as well as advantages because either genetic or physical traits, the IAAF has concluded that this has no bearing on their competition and has never regulated these known advantages.¹¹⁹ So does this mean that men with lower testosterone levels are not "masculine" enough? Well, no. Since there is a disparity among male athletes' testosterone levels that is not addressed, how concerned really is the IAAF with creating a level playing field?

While the justification may be that these regulations serve to create a level playing field, this is not met when the IAAF is fully banning female athletes with higher than average levels.¹²⁰ Instead, women are allowed to compete with certain levels of testosterone, but if an athlete has what the IAAF arbitrarily determines is too much testosterone, the athlete is essentially not classified as a woman anymore by the IAAF and is instead, subjected to sex testing under this discriminatory regulation.¹²¹ These regulations do not serve a legitimate purpose because they are wholly discriminatory against an entire gender. The regulations target the rights of an already marginalized minority, women from non-western countries, against the alleged need to ensure fair competi-

118. BAVINGTON, *supra* note 3, at 99.

119. Despite the obvious advantages that Phelps and Bolt have over their peers, questions abound why there aren't more athletes like them rather than arguments that they should be excluded from competition against lesser-than males. See BAVINGTON, *supra* note 3, at 79, 97.

120. Since 1928, competition in Athletics has been strictly divided into male and female classification and females have competed in Athletics in a separate category designed to recognize their specific physical aptitude and performance. It is known from experience that there are rare cases of young females competing in Athletics today who are affected by hyperandrogenism which, if the condition remains undiagnosed or neglected, can pose a risk to health. Despite the rarity of such cases, their emergence from time to time at the highest level of women's competition in Athletics has proved to be controversial since the individuals concerned often display masculine traits and have an uncommon athletic capacity in relation to their fellow competitors. See Chand, *supra* note 1, ¶ 4, 116.

121. See *id.*

tion for the majority.¹²² This perceived difference is through no fault of the athletes' own, as they were born with this condition. This stigmatizing and discriminatory paradigm does not belong in the world of sports.

As discussed earlier, the purpose of the Olympic Games was to bring back the ideals of physical, mental and spiritual excellence.¹²³ These women are being penalized for an immutable characteristic, whereas, when men have similar immutable traits, there are no invasive regulations or penalties.¹²⁴ As a result of the discriminatory regulatory scheme, the 2018 IAAF Hyperandrogenism regulations should be invalidated as it does not further the objectives of making the sport fair, and is contrary to the spirit of the sport itself, as well as the Olympic ideal.¹²⁵

A. The 2018 Regulations Are Discriminatory on Their Face and in Effect and Thus Violate Human Rights, the IAAF Constitution and the Olympic Charter.

The IAAF regulations governing the eligibility of females with Hyperandrogenism to compete in women's competition should be declared invalid because the 2018 Hyperandrogenism regulations are sex-based eligibility restrictions and are therefore prima facie discrimination. Furthermore, women are specifically targeted through such regulations and men are not subjected to any such testing or regulations.¹²⁶ If testosterone is a driver of sport performance, the concern about guaranteeing physical equality based on hormonal characteristics should not be limited to female athletes, as not all male athletes have the same testosterone levels and therefore, some men are disadvantaged compared to

122. Andy Bull, *Caster Semenya and Dutee Chand run ragged by IAAF's moving goalposts*, THE GUARDIAN (Jan. 23, 2018), available at <https://www.theguardian.com/sport/2018/jan/23/caster-semenya-dutee-chand-iaaf-hyperandrogenic> (last visited Nov. 7, 2018)

123. SCHOLASTIC, *supra* note 35.

124. Jamaican sprinter Usain Bolt's success centers on a genetic predisposition for known variables that naturally factor into his performance (i.e., height, fast-twitch muscle fibres, etc.). Yet no action is taken to hinder his performance in the sport. BAVINGTON *supra* note 3, at 79.

125. See *Olympic Charter*, *supra* note 13.

126. Even where conditions that result from natural genetic variation have the potential to result in a competitive advantage, it is problematic to disqualify athletes on the basis of these while advantages resulting from the other genetic variations (for example, tallness that runs in one's family) are not cause for exclusion. This seems especially unfair given that sex differentiation among athletes is also surprisingly common: one study found that one in 504 female athletes competing in selected events, including the Olympic Games, between 1972 and 1990, was disqualified for failing the sex chromatin test. See Olsen-Acre, *supra* note 15.

other males based on this criterion. In fact, it has been established that male pole vaulters produce less testosterone than male sprinters.¹²⁷

However, the difference in testosterone levels in the men's category remain unproblematic.¹²⁸ Additionally, the newly proposed regulations by the IAAF that did take effect on November 1, 2018 states that female athletes with testosterone levels above 10 nmol/L are not allowed to compete in the female category.¹²⁹ Women with elevated testosterone must reduce their level for six months, by medical intervention (e.g., by use of hormonal contraceptives) before being eligible to run and must maintain that lowered testosterone level.¹³⁰ A regulation that targets female athletes, more specifically female athletes from non-western countries, contributes to the discriminatory nature of the regulation.

The regulations allow for an investigation to be initiated into an athlete's gender, but do not include any scientific standards upon which to base the investigation. More specifically, the regulations allow the IAAF to investigate female athlete's biological autonomy if there are "reasonable grounds for believing" that a female athlete may have hyperandrogenism; however, there is no set procedure to determine which athletes may have this condition, it is based on pure observation and speculation.¹³¹

These new regulations violate internationally protected fundamental rights and discriminate against women on the basis of their sex and their sexual characteristic which violates Articles 2, 3, 5 and 12 of the Universal Declaration of Human Rights, as well as the Olympic charter, and IAAF constitution. It has long been held in matters before the CAS that where a regulation is inconsistent with a higher-ranking legal rule, such as a constitutional principle or the Olympic charter, the CAS must

127. It's been shown in a study that male pole vaulters and hammer throwers had lower testosterone than the male sprinters. That means that the study shows high levels of testosterone was affecting male and female athletes differently, depending on the event. See Eric Niler, *Testosterone Ruling for Athletes Fuels Debate Over 'Natural' Ability*, WIRED (May 1, 2018), available at <https://www.wired.com/story/testosterone-ruling-for-athletes-fuels-debate-over-natural-ability/> (last visited Mar. 6, 2019).

128. BAVINGTON, *supra* note 3, at 97 ("The IAAF Medical Manager may initiate a confidential investigation of any female athletes if he/she has reasonable grounds for believing that a case of hyperandrogenism may exist. The IAAF Medical Manager's reasonable grounds for belief in a case may be derived from any reliable source.").

129. See WORLD ATHLETICS, *supra* note 34.

130. *IAAF Rules to Limit Testosterone Levels for Female Runners*, U.S. NEWS (Apr. 26, 2018), available at <https://www.usnews.com/news/sports/articles/2018-04-26/iaaf-rules-to-limit-testosterone-levels-for-female-runners> (last visited Jan. 29, 2019).

131. BAVINGTON, *supra* note 3, at 84.

declare the regulation invalid.¹³² Here, the arguments that follow discuss how the regulations are in direct violation of the Olympic charter and therefore should be invalidated.

B. The Hyperandrogenism Regulations Violate the Olympic Charter and Should Be Declared Void.

The issue is whether the 2018 IAAF regulations are inconsistent with the Olympic charter, a higher-ranking legal rule. The relevant fundamental principles of Olympism in the Olympic charter provide: the goal of Olympism is to place sport at the service of the harmonious development of humankind, with a view to promoting a peaceful society concerned with the preservation of human dignity; the practice of sport is a human right.¹³³ Every individual must have the possibility of practicing sport, without discrimination of any kind and in the Olympic spirit, which requires mutual understanding with a spirit of friendship, solidarity and fair play; the enjoyment of the rights and freedoms set forth in this Olympic Charter shall be secured without discrimination of any kind, such as race, color, sex, sexual orientation, language religion, political or other opinion, national or social origin, property, birth or other status.¹³⁴

The practice of sport is a human right, yet this right is infringed upon while undergoing investigation by the IAAF. Here, without conclusive evidence of her having done anything wrong, Semenya was banned from further competition for almost a year, simply because her testosterone levels and outward appearance did not fit into society's ideal of feminism.¹³⁵ Therefore, she was denied access to an established human right. In addition, one of the stated goals of the Olympic charter is to preserve human dignity, but the actions taken by the IAAF when handling Semenya's case directly contradict that.¹³⁶ After recording record breaking times at national events, the IAAF made Semenya take a sexual verification test, which in and of itself is already degrading, as

132. See *Football Fed'n Iran (IRIFF) v. Féd'n Int'l de Football Ass'n (FIFA)*, Award, Nov. 4, 2009, CAS 2008/A/1708; see also *United States Olympic Committee (USOC) v. Int'l Olympic Comm. (IOC)*, Award, Oct. 4, 2011, CAS 2011/O/2422.

133. *Olympic Charter*, *supra* note 13.

134. *Id.*

135. The IAAF initially banned Semenya from further competition, and it only cleared Semenya for future competition after an eleven-month ordeal and countless tests intended to provide guidance that would ultimately allow the IAAF to check a single box with satisfaction: female. *Athlete Semenya Cleared to Compete After Gender Test Controversy*, CNN (July 6, 2016), available at <http://www.cnn.com/2010/SPORT/07/06/athletics.semenya.cleared.to.run/> (last visited Feb. 28, 2019).

136. See *Olympic Charter*, *supra* note 13.

your sex is being questioned. Tests such as this are to be kept confidential, nevertheless, this was revealed to the media in 2009.¹³⁷

Furthermore, Caster Semenya is subjected to testing and scrutiny under these regulations, because she is a woman and no such scrutiny, testing, or regulation exists for men.¹³⁸ There is no objective procedure to determine whether an athlete does in fact have hyperandrogenism, these athletes are simply picked out to receive testing if they essentially look suspicious or have a masculine physique. As a result, this directly violates the principles set forth in the Olympic Charter that allow for all athletes to enjoy the freedoms and rights under this charter without discrimination of any kind, as this targets athletes' sex. Therefore, the 2018 regulations are inconsistent with the Olympic charter, a higher-ranking legal rule than an IAAF regulation and should thus be declared void.

C. The Regulations Target Female Athletes and Thus Are Discriminatory and Violate the IAAF Constitution.

Article 3 of the IAAF constitution sets out the objectives of the IAAF.¹³⁹ The applicable objectives in relation to discrimination and equal protection are: (1) to promote the sport of athletics and its ethical values as an educational subject and life affirming and life enhancing activity; (2) to encourage participation in athletics at all levels throughout the world regardless of age, gender, or race (3) to strive to ensure that no gender, race, religious, political or other kind of unfair discrimination exists, continues to exist or is allowed to develop in athletics in any form, and that all may participate in athletics regardless of their gender, race, religious or political views or any other irrelevant factor.¹⁴⁰

Establishing fair competition does not necessarily mean making athletes equal in every imaginable respect. The fact that certain females have higher testosterone levels can be argued as an irrelevant factor, which is stated in number 3 of the IAAF Constitution. All may participate in athletics regardless of their gender it states, unless you are Caster Semenya, a powerful athlete from a non-western country with slightly elevated testosterone levels. Here, Caster Semenya is being targeted

137. Phillips, *supra* note 82.

138. Jeré Longman, *Understanding the Controversy Over Caster Semenya*, N.Y. TIMES (Aug. 18, 2016), available at <https://www.nytimes.com/2016/08/20/sports/caster-semenya-800-meters.html> (last visited Mar. 6, 2019).

139. Chand, *supra* note 1, ¶ 40.

140. *Id.*

because she enjoys a slight advantage from her natural genetic make-up, which should not be viewed differently from other natural advantages derived from exceptional biological variation.¹⁴¹ The 2018 regulations directly permit unfair discrimination against women athletes, as it is known that other male athletes are genetically different due to birth, yet their biological differences are celebrated, while female athletes are scrutinized and punished for being born different.

For example, Usain Bolt, an Olympic sprinter, has a genetic predisposition known as the fast twitch muscle and is significantly taller than all of his opponents.¹⁴² Due to the significant height difference, Bolt takes longer strides. More specifically, he takes 41 steps over an entire 100m race which allows him to leave his opponents, who take 43-50 steps throughout an entire race, in the dust.¹⁴³ Regardless, he is glorified for these differences that are advantageous to his performance, while female athletes like Caster Semenya are vilified as a result of her dominance. In fact, even with these known advantageous physical characteristics, Usain Bolt is classified as arguably the most naturally gifted athlete the world has ever seen.¹⁴⁴ This is due to his dominance in the 100m, 200m, and 4x100m relay race.¹⁴⁵ It is known that both Michael Phelps, a US swimmer, and Usain Bolt have some genetic predisposition that contributed to their success, yet they are celebrated and there are no such regulations that limit their abilities to compete in the sport.¹⁴⁶ In addition, Olympic swimmer Casey Legler admits to having a degenerative condition of connective tissue, which has symptoms such as long arms, big hands and large feet, all of which, coupled with discipline have contributed to her success as an Olympic swimmer. However, this has never been an issue that disallowed her from competition.¹⁴⁷

141. See Chand, *supra* note 1, ¶ 113, 116; see also BAVINGTON, *supra* note 3, at 79.

142. See Murray, *supra* note 106.

143. *Id.*

144. See *Usain Bolt Biography*, available at <http://usainbolt.com/bio/> (last visited Mar. 6, 2019).

145. See *id.*

146. Like other athletes who can slam dunk, play soccer like they are dancing, and win a record-breaking 28 gold medals, Semenya has elevated the bar of speed toward which all women runners can gaze, and hope to one day beat. Casey Legler, *Some Of Us Are Born This Way: Female Athletes and Testosterone Limits*, THE CUT (May 3, 2019), available at <https://www.thecut.com/2019/05/the-hypocritical-policing-of-caster-semenyas-body.html> (last visited July 5, 2019).

147. "These genetic advantages, coupled with discipline and hard work, made me unstoppable in the water. Michael Phelps has a similar naturally occurring advantage, and Ian Thorpe here in Australia was so well known and celebrated for how disproportionately big his feet were that his nickname was 'Flippers.' All of us, even me as an unruly, irreverent

Furthermore, male athletes with testosterone levels notably above the upper limit of the "normal" range of male testosterone are permitted to compete without having to satisfy any medical criteria, undergo any medical examination, or undergo treatment as a precondition to eligibility.¹⁴⁸

Here, however, female athletes exhibiting levels of testosterone that are not "normal" and present minimal advantage, are prohibited from competition by these regulations. As a result, these regulations are contrary to the IAAF constitution, and in no way encourage participation in the sport by females with this condition. In fact, the regulations are the opposite, and specifically discriminate against only woman athletes who uncoincidentally belong to non-western countries, therefore violating the IAAF constitution. The objective of the regulations is to create a level playing field yet, there has not been a rational connection made between the regulations and that objective since men are allowed to have naturally occurring characteristics that provide a competitive advantage without restrictions. Thus, only women athletes are being targeted because of their gender and these regulations are violative of the IAAF constitution and should be declared void.

D. The Regulations Violate Article 2 of the Universal Declaration of Human Rights

Article 2 states,

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.¹⁴⁹

Because there are no objective procedures to determine which athletes to subject to hyperandrogenism testing, this allows the IAAF to target specific female athletes.¹⁵⁰ "This regulation is about targeting and impeding a few exceptional women of color from the global south,

athlete, were celebrated. One difference I cannot help but notice between myself, Phelps, and Thorpe versus Caster, is whiteness." *Id.*

148. *Chand*, *supra* note 1, ¶ 114.

149. Universal Declaration of Human Rights, G.A. RES. 217A (III) U.N. DOC. A/810, AT ART. 2 (1948) (emphasis added).

150. See BAVINGTON, *supra* note 3, 148-49, 158.

especially Caster Semenya.”¹⁵¹ Because of society’s flawed ideal of what a woman should be and what characteristics she should possess, Caster Semenya is de-feminized to the point where the only explanation for her successes is that she is a man.

The IAAF chose to believe Semenya, a female runner from South Africa, could only improve her times as rapidly as she did, with an advantage, and the fact that she trained and worked hard could not be the answer.¹⁵² To the IAAF, these accomplishments by Semenya were so illogical that they jumped to the conclusion that she cannot be a woman and that she needed to undergo sex testing.¹⁵³ This is supported by the IAAF drafting the 2018 regulations to include hyperandrogenism testing and prohibitions on every event Caster Semenya participates in, even if their own flawed study did not concur.

On the other hand, Caucasian female athletes in other competitive sporting events, who dominate events similarly to Semenya, have not been subjected to degrading treatment that Semenya or Chand face. For example, Katie Ledecky, an Olympic swimmer from the U.S who is Caucasian, wins races by a larger margin than Semenya, and even produces times that would be competitive for elite men.¹⁵⁴ But Ledecky’s gender is never being scrutinized on international platforms, and there are no headlines classifying her as too “muscular” or stating “she is not a woman.”¹⁵⁵ Yet, here we are dealing with women from non-western countries dominating in their event similar to Ledecky, but are being heavily regulated and even prohibited from competition. Semenya’s coach John Irven stated in an interview that “as much as she needs athletics, South African Sports need her more,” and of course the IAAF

151. See Katrina Karkazis & Rebecca Jordan-Young, *The treatment of Caster Semenya shows athletics’ bias against women of colour*, THE GUARDIAN (Apr. 26, 2018), available at <https://www.theguardian.com/commentisfree/2018/apr/26/testosterone-ruling-women-athletes-caster-semenya-global-south> (last visited Jan. 29, 2019); see also Huber, *supra* note 46.

152. The decade in the making legal standard announced boils down to Caster Semenya can’t run because she has the characteristics of Caster Semenya. In other words, she’s just too good, so she must be stopped in some way. Dennis Young, *The Only Point Of Track’s Dumb New Testosterone Rules Is To Make It Illegal To Be Caster Semenya*, DEADSPIN (Apr. 26, 2018), available at <https://deadspin.com/the-only-point-of-track-s-dumb-new-testosterone-rules-i-1825546141> (last visited Mar. 3, 2019).

153. SAMUELS, *supra* note 63.

154. Emma Gray, *Stop Attributing The Success Of Women Olympians To Men*, HUFF POST (Aug. 8, 2016), available at https://www.huffingtonpost.com/entry/women-olympians-dont-need-men-to-be-badass_us_57a87489e4b03ba68012ccbb (last visited Mar. 3, 2019).

155. *Id.*

could not have such an athlete from a nonwestern country dominating.¹⁵⁶

The IAAF is no stranger to targeting successful female runners from non-western countries.¹⁵⁷ For example, Dutee Chand, the first runner to challenge these discriminatory regulations, is an Indian runner who grew up below the poverty line, and at age eighteen became the face of India as it related to women's track and field.¹⁵⁸ In addition, Semenya was an unknown runner from a rural village in South Africa which is referred to as "nowhere."¹⁵⁹ She ran with a rural running club that was impoverished and could not provide equipment or even shoes to its runners. Certainly, athletes from countries such as the United States or Germany would not be practicing under these conditions or running into these types of issues. The logical conclusion is that runners from Western countries with access to better opportunities have their athletes come out on top every time, yet these women completely shatter that notion.¹⁶⁰ Nevertheless, within a year of official racing Semenya became a powerhouse and put South African track on the map, by winning a gold medal in the 800m at the 2009 Berlin games.¹⁶¹

Specifically, South African runner Semenya and Indian runner Chand are both female athletes from non-western countries who were chosen to be subjected to these tests through speculative observations. Both runners are young talented women who burst into the international spotlight by winning events that they were not expected to at such a young age, representing countries that are not usually standing on the winning podiums at these competitions.¹⁶² After winning a gold medal

156. Ben Smith, *Caster Semenya: 'What I Dream of is to become Olympic Champion'*, BBC (May 19, 2015), available at <https://www.bbc.com/sport/athletics/32805695> (last visited July 24, 2019).

157. Santhi Soundarajan, was a 25-year-old Track and Field runner from southern India. In 2010, she dominated in the 800m and the media noted her success was even more impressive given her roots as a member of India's impoverished "untouchable caste." The media noted that she wasn't just fast; she also had a deep voice and a flat chest. As a result, the athlete was subjected to a sex testing after her win, and her failed results were leaked to the media. She was subsequently rejected by the local sports federations, stripped of her silver medal, tormented by ongoing scrutiny and unbearably embarrassed, so she attempted suicide. Padawer, *supra* note 4.

158. *Id.*

159. Greene, *supra* note 10.

160. See Wilde, *supra* note 41; see also Schweinbenz, *supra* note 41; see also Minichino, *supra* note 41.

161. Greene, *supra* note 10.

162. Faith Karimi, *South Africa's Semenya makes Olympics debut 3 years after gender firestorm*, CNN (Aug. 8, 2012), available at <https://www.cnn.com/2012/08/08/world/europe/olympics-semenya-debut/index.html> (last visited Mar. 3, 2019).

in the women's 800m at the 2009 world championship, complaints arose regarding Semenya's masculine physique. A comment was also made stating "these kinds of people should not run with us... For me, she is not a woman. She is a man."¹⁶³ This hatred towards female athletes that do not fit into the societal definition of what a woman is, which is perpetuated even by other women, contributes to the stigma that female athletes have to be and look a certain way. This shows that she is being targeted directly because of her gender and possibly because of where she is from, and the IAAF feeds into these stereotypes through subjecting these females to discriminatory regulations.

The area in which Semenya is from is a poor rural community where she would not have access to qualified doctors to enhance her performance by changing her gender identity, nor would they be able to subject her to testing to decrease testosterone and bring it within the range of the IAAF regulations.¹⁶⁴ In addition, when these regulations were first published in 2011, it was reported that the only athletes impacted by these testosterone regulations were four female athletes ages eighteen to twenty-one that were from rural regions developing countries.¹⁶⁵ These women were taken away to France for invasive evaluations.¹⁶⁶

However, the only two women who have challenged these regulations were Chand and Semenya.¹⁶⁷ Semenya and Chand are not the only successful female runners from non-western countries who are experiencing issues because of these discriminatory regulations.¹⁶⁸ Once Chand found out about Semenya she stated, overwhelmed with emo-

163. Ariel Levy, *Either/Or: Sports, sex, and the case of Caster Semenya*, NEW YORKER (Nov. 30, 2009), available at <https://www.newyorker.com/magazine/2009/11/30/eitheror> (last visited Feb. 2, 2019); see White, *supra* note 47.

164. TSHISALIVE, *When I pee, I pee like a woman, says Caster Semenya*, TIMES LIVE (July 25, 2017), available at <https://www.timeslive.co.za/tshisa-live/tshisa-live/2017-07-25-when-i-pee-i-pee-like-a-woman-says-caster-semenya/> (last visited Feb. 3, 2019).

165. *Id.*

166. Juliet Macur, *Fighting for the Body She Was Born With*, N.Y. TIMES (Oct. 6, 2014), available at <https://www.nytimes.com/2014/10/07/sports/sprinter-dutee-chand-fights-ban-over-her-testosterone-level.html> (last visited Feb. 3, 2019).

167. Much of the debate about female athletes and hyperandrogenism has focused on Semenya, winner of the 800m at the 2012 and 2016 Summer Olympics. See Longman, *supra* note 138.

168. Young, *supra* note 152. At the London Olympics, four female athletes all eighteen to twenty-one years old and from rural areas of developing countries, were flagged for high levels of natural testosterone. Each of them subsequently had surgery to remove internal testes, which produce testosterone, as well as procedures such as feminizing vaginoplasty, estrogen replacement therapy and a reduction in size of the clitoris.

tions, "Look, I'm not alone. There are other people like me."¹⁶⁹ Unfortunately, the fact that there are others like Chand seems to be the problem, and the IAAF as well as the IOC stated it as such.¹⁷⁰ They fear that nations will go out and find 'these women' that are like Caster Semenya, muscular and powerful that do not fit in with western societies feminine ideal where women are supposed to be dainty and petite.¹⁷¹ Furthermore, the regulations have only impacted the careers of two female athletes from non-western countries, and the 2018 regulations specifically were drafted to target Caster Semenya, and prevent her from running the 400, 800, and 1500m.¹⁷² As previously stated the science indicates that the category of hammer throw, which is dominated by throwers of a western country, provides the most competitive advantage for females with hyperandrogenism, yet these events are not regulated. On the contrary, here, Semenya's main events show that females with hyperandrogenism have very minimal competitive advantages but are extensively regulated.

These regulations make a distinction between female and male athletes, specifically only targeting female athletes for a naturally occurring difference, as well as target runners succeeding from non-western spaces and thus is violative of Article 2 of the universal declaration of human rights. As a result, the regulation should be declared void.

VI. THE REGULATIONS SUBJECT CASTER SEMENYA TO INHUMAN¹⁷³ AND DEGRADING TREATMENT AND VIOLATE ARTICLE 5 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.¹⁷⁴ To degrade is to cause a loss of self-respect or to humiliate, both of which happened to Dutee Chand as well

169. Macur, *supra* note 166.

170. See Conference on the Eligibility to Participate in Women's Sports, available at https://www.up.ac.za/tukssport/news/post_2723776-invitation-to-a-conference-on-eligibility-to-participate-in-womens-sport (last visited Aug. 1, 2019).

171. See *id.*

172. Niler, *supra* note 127.

173. "I will not allow the IAAF to use my body again. The IAAF used me in the past like a human guinea pig to experiment with how the medication they required me to take would affect my testosterone levels." Kate Seamons, *Caster Semenya: They Used Me Like A 'Guinea Pig.'* NEWSER (June 18, 2019), available at <https://www.newser.com/story/276703/caster-semenya-they-used-me-like-a-guinea-pig.html> (last visited Aug. 1, 2019).

174. Universal Declaration of Human Rights, *supra* note 149.

as Caster Semenya at the hands of the IAAF.¹⁷⁵ For example, news that Semenya was required to take a sex verification test was revealed immediately after she won gold at the World Athletics Championship.¹⁷⁶ The IAAF said it had ordered gender tests because of Semenya's muscular build and rapid improvement in times which prompted doping concerns.¹⁷⁷

The IAAF stated that the tests were required not because of doping concerns but because the sporting body wanted to determine whether she had an "unfair advantage."¹⁷⁸ As a result, instead of attending what is normally the celebratory news conference after such an incredible feat, Semenya was forced into hiding, as fellow athletes, and various commenters on social media had a field day questioning her gender.¹⁷⁹ Because of the leaked test results, Semenya was highly scrutinized and criticized across an international platform. Comments were made regarding her body, muscular physique, her deep voice, her flexed biceps pose, and her choice in wearing long shorts to run in, instead of the sexist bikini shorts traditional women runners are supposed to compete in.¹⁸⁰ Furthermore, media outlets wrote stories with headlines such as "Could This Women's World Champ Be A Man?"¹⁸¹

In addition, after being subjected to invasive sex testing by doctors, Chand faced immense pressure to either change her body to conform to the rules or quit the sport.¹⁸² "I cried for three straight days after reading what people were saying about me. They were saying, 'Dutee: Boy or girl.'"¹⁸³

In turn, this contributes to their athletic experiences' amounting to failures because they didn't conform to traditional notions of femininity that are expected of female athletes.¹⁸⁴ This psychological and physical disturbance all being pushed upon seventeen year-old Chand, a young Olympian simply trying to put her country on the athletic map as well as

175. See Macur, *supra* note 166; see Padawer, *supra* note 4.

176. Padawer, *supra* note 4.

177. *Id.*

178. *See id.*

179. *Id.*

180. *Id.*; Jackson, *supra* note 29.

181. Padawer, *supra* note 4.

182. *See id.*

183. Macur, *supra* note 166.

184. Greene, *supra* note 10.

do what she loves.¹⁸⁵ “It’s been eight years since Caster Semenya was subjected to gender verification tests that made international headlines, but for the athlete, the pain and humiliation is etched in her memory.”¹⁸⁶ In fact, Semenya spoke out and stated during this process that “I have been subjected to unwarranted and invasive scrutiny of the most intimate and private details of my being.”¹⁸⁷ In addition, at the London Olympics in 2012, an opponent of Semenya’s, Mariya Savinova, questioned Semenya’s gender with a dismissive, “[j]ust look at her.”¹⁸⁸

The IAAF regulations regarding hyperandrogenism spell out the process of assessment for hyperandrogenism in meticulous detail, emphasizing confidentiality and professionalism at every step.¹⁸⁹ However, it is clear that from the IAAF’s breach of confidentiality regarding the athletes’ being subjected to sex tests contributed to the loss of respect from their competitors as well as deep humiliation.¹⁹⁰ Furthermore, the degradation did not just stem from Semenya’s competitors, but she was also forced to take heat from commentators who have commented things like she has a “package” swinging between her legs, or even going so far as to call Semenya an “it” or “he.”¹⁹¹ This is extremely cruel and degrading as well as damaging to Semenya’s career.

After it was revealed that Semenya would have to undergo sex testing, media outlets sensationalized this story. Some media outlets tried to “recuperate” Semenya by photoshopping her in more feminine clothes. For example, Semenya was featured in a cover story for the popular South African magazine *You*, in which they photoshopped her in a dress with makeup on and added various quotations regarding fem-

185. *Gender Tests To Remain Private Matter*, ESPN (Nov. 19, 2009), available at <http://www.espn.com/espnw/news-commentary/article/4669920/caster-semenya-keep-gold-gender-tests-remain-confidential> (last visited Feb. 2, 2019).

186. TSHISALIVE, *supra* note 164.

187. Padawer, *supra* note 4.

188. Andrew, *supra* note 62.

189. SAMUELS, *supra* note 63.

190. Semenya’s private life was headlining news for weeks after winning the 800m race in August 2009. She underwent gender-verification tests to prove she is a woman, and medical professionals leaked those results to the public. The International Association of Athletics Federation has invaded her privacy, broken confidentiality, and challenged her identity. Emily Cooper, *Gender Testing in Athletic Competition— Human Rights Violations: Why Michael Phelps is Praised and Caster Semenya is Chastised*, 14 J. GENDER RACE & JUST. 233 (2010-2011).

191. Commentors have declared, “She looks like a bloke, sounds like a bloke, has more muscles than any female runner since the days of the East Germans and even seems to have a package swinging between her legs when ‘she’ runs.” See SAMUELS, *supra* note 63, at 201.

inity that Semenya had supposedly spoken as a reaction to the photo.¹⁹² For example, “I’d like to dress up more often and wear dresses, but I never get the chance; “I’d also like to learn to do my own makeup”; and “Now that I know what I can look like, I’d like to dress like this more often.”¹⁹³

It was never confirmed whether Semenya agreed to this, said any of these things, or actually felt that way, but it can be argued that this was done by a magazine from her home Country to combat the idea of her being a man, and to familiarize the world with a more feminine side of Caster Semenya. Contrarily, other media outlets focused on headlining photos of Semenya in baggy “boys” sporting clothes, no makeup, and cornrows.¹⁹⁴ To have your gender identity and sense of self questioned solely for being born with natural traits is truly degrading, humiliating and disheartening.¹⁹⁵ Even more so when you have to defend your sex on a global scale. In fact, Caster Semenya stated “it felt like the entire world had seen her stripped naked.”¹⁹⁶ All of this treatment, results from the implementation of these discriminatory regulations, and negates the purpose of the sport.

The only way around competing with hyperandrogenism was if they took hormone-suppressing drugs or had surgery to limit the amount of testosterone their bodies produced.¹⁹⁷ In an interview, Caster states “I was born like this and I don’t want any changes,” which makes it clear that these regulations are forcing her to change the way in which she was born.¹⁹⁸ While the Universal Declaration of Human Rights states that “No one shall be subjected to torture or to cruel, inhuman

192. *Id.* at 200.

193. *Id.*

194. Cornrows are an ancient traditional African style of hair grooming, in which the hair is braided very close to the scalp. It is a hairstyle traditionally worn by men, however depending on what part of the country you are in, it’s a style worn by men and women.

195. SAMUELS, *supra* note 63, at 200 (A story in 2009 asserting that leaked medical results showed that Semenya had “male sex organs and no womb or ovaries.”).

196. TSHISALIVE, *supra* note 164.

197. Caster and others have argued that the I.A.A.F.’s rules will force some women to undergo hormone therapy that could adversely affect their health; will be humiliating; will disproportionately affect women from developing nations who do not conform to Western standards of femininity; and will ultimately lead to some elite women quitting the sport.” Jeré Longman, *Track’s New Gender Rules Could Exclude Some Female Athletes*, N.Y. TIMES (Apr. 25, 2018), available at <https://www.nytimes.com/2018/04/25/sports/caster-semenya.html> (last visited Aug. 1, 2019).

198. *Caster Semenya Q & A: Who is she; what is DSD; why is her case important*, BBC (May 1, 2019), available at <https://www.bbc.com/sport/athletics/48114137> (last visited Aug. 1, 2019).

treatment or punishment”, here, the regulations require women who have a naturally occurring blood testosterone level higher than five nmol/L to have medically unnecessary hormone therapy to reduce their testosterone levels if they want to be eligible to compete in the female category.¹⁹⁹

More specifically, female athletes affected must take medication for six months before they can compete, then they must maintain a lower testosterone level.²⁰⁰ If women refuse to be tested or have hormone therapy, the regulations state that they may only compete in the male category or in a hypothetical, not-yet-created intersex category – both of which would expose women’s private sex characteristics to the global public.²⁰¹ Female athletes with elevated testosterone levels will essentially face a “choice of no choice.”²⁰² But to force them to take hormone suppressing drugs infringes on these athlete’s physical integrity, their rights to economic freedoms and goes against the respect that should be had for one’s human dignity.²⁰³ Furthermore, it can potentially be medically unsafe to medicate someone who is not in need of medication. Semenya felt the effects of the unnecessary medication and stated “I was constantly sick” as she was forced to take an avoidable drug that was not needed to function in her everyday life.²⁰⁴ “A medical treatment is only justified when there is a medical need, and the mere existence of an intersex condition, without the person indicating suffering and expressing the desire for an adequate treatment, does not constitute a medical indication.”²⁰⁵ It is ethically, morally and scientifically unacceptable and should be impermissible to force female athletes to alter their bodies with drugs, particularly when drug usage is explicitly banned from the sport.²⁰⁶ It has been declared that the practice of sport is a human right, and being forced to undergo medically invasive treatments in order to participate in this sport, is a violation of Article 5 of

199. Universal Declaration of Human Rights, *supra* note 149.

200. See Laurel Wamsley, *Court Rules Against Caster Semnya, Says She Must Lower Testosterone to Compete*, NPR (May 1, 2019), available at <https://www.npr.org/2019/05/01/719119864/court-rules-against-caster-semenya-says-she-must-lower-testosterone-to-compete> (last visited Aug. 1, 2019).

201. Longman, *supra* note 138.

202. *See id.*

203. *S. African Athlete Semenya Appeals Testosterone Ruling*, VOA (May 29, 2019), available at <https://www.voanews.com/arts-culture/s-african-athlete-semenya-appeals-testosterone-ruling> (last visited Aug. 1, 2019).

204. Seamons, *supra* note 173.

205. *Id.*

206. *See id.*

the universal declaration of human rights.²⁰⁷ As a result, the regulations should be declared void.

A. The IAAF Regulations Arbitrarily Interfered with Caster Semenya's Privacy and Violate Article 12 of the Universal Declaration of Human Rights

The issue is whether 2018 hyperandrogenism regulations violate Article 12 of the universal declaration of human rights. “No one shall be subjected to *arbitrary interference with his privacy*, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks.”²⁰⁸ The IAAF has regulations that allow for its members to subject female athletes to testing based on “reasonable grounds” which leaves the organization free reign to discriminate against these female athletes solely because they are not fitting into society’s requirements of femininity.²⁰⁹ In fact, the IAAF regulations relied on deeply problematic stereotypes such as having a “deep voice” to identify athletes with intersex variations, and the 2018 regulations make no mention of criteria for identifying these athletes.²¹⁰ Women that have hyperandrogenism, which means they have higher testosterone levels, have characteristics that are not socially and culturally accepted as feminine. Although the IAAF wanted the world to believe that Semenya was being tested due to her rapid progression within a short amount of time, it is known that there is a specific ideal for appearance of a female athlete. Drug testing regulations focusing on testosterone levels leave women with high testosterone levels that result in “male like” characteristics as targets of suspicion.²¹¹ Here, complaints were raised regarding Semenya because of her “masculine appearance” and this triggered her being subjected to sex testing that proved she had hyperandrogenism.²¹²

207. See Longman, *supra* note 138; see also *Olympic Charter*, *supra* note 13.

208. Universal Declaration of Human Rights, *supra* note 149 (emphasis added).

209. BAVINGTON *supra* note 3, at 9.

210. *Revoke Discriminatory Athletics Gender Regulations: New Athletics Federation Rules Force Women With Intersex Variations Out of Competition*, HRW (July 26, 2018), available at <https://www.hrw.org/news/2018/07/26/revoke-discriminatory-athletics-gender-regulations> (last visited Mar. 3, 2019).

211. Olsen-Acre, *supra* note 15; see Cooky, *supra* note 23.

212. It was made quite from the outset that Semenya’s “masculine” appearance was the main reason that she was challenged. Press coverage included many pictures of her at competitions, and her “deep voice and masculine physique,” were widely discussed in the media and the blogosphere. Samuels, *supra* note 63; see also White, *supra* note 47.

There is no objective procedure for determining which female athletes to subject to hormone testing. Relying on stereotypes and visual observations to determine which runners should be subjected to these tests is in and of itself arbitrary and violative of Article 12 of the Universal Declaration of Human Rights. In addition, Dutee Chand was pulled from the Commonwealth games at the last minute, because a competitor at the Asian Junior Athletics championship where Chand had won two gold medals requested that she be tested because of her recent success and masculine physique.²¹³

It was only after she was arbitrarily subjected to a blood exam upon many other invasive tests, was it determined that Chand did in fact have hyperandrogenism.²¹⁴ Similarly, here, it was only after Semenya was arbitrarily subjected to testing and gender verification that it was confirmed she had hyperandrogenism. As previously stated, it was leaked that the reason the IAAF had ordered gender tests for Caster Semenya was because of her muscular build.²¹⁵ In fact, details about the testing procedures and purported results were usually reported in the media before they were even communicated to Semenya.²¹⁶ Not only was her identity as a women analyzed and scrutinized on international platforms, but to top it off, while her reputation is being dragged through the mud, communication between the IAAF and Semenya was slim to none, often leaving Semenya's focus glued to the television to determine what was going on with the testing status.²¹⁷ The fact that the information regarding the investigation into her gender identity was made public, especially since the results had not yet concluded, subjected her to public humiliation, and constitutes an arbitrary interference with her privacy, as well as a direct attack on her honor and reputation, as the tests were only requested due to subjective comments made about her.²¹⁸ Therefore, violating Article 12 of the Universal Declaration of Human rights, and the regulations should be declared invalid.

213. See Macur, *supra* note 166.

214. *Id.* Unlike in any previous sex testing, the fact of the testing was made public at the outset, and for the next year Semenya's story unfolded worldwide in excruciating detail. See also SAMUELS, *supra* note 63.

214. *Id.*

215. See Macur, *supra* note 166.

216. The day before the Berlin championship, Semenya was found glued to the television's coverage about the announced sex tests: "and they were talking about her and she's trying to understand what they're saying. Because nobody has spoken to her, to tell her, look this is what these tests might mean.") SAMUELS, *supra* note 63.

217. *Id.*

218. Hutchinson, *supra* note 44; Andrew, *supra* note 62.

VII. THE IAAF SUCCOMBS TO SOCIETAL PRESSURES OF REGULATING THE FEMALE BODY BY ALLOWING FOR THE IMPLEMENTATION OF DISCRIMINATORY PRACTICES²¹⁹

On May 1, 2019 the IAAF ruled that Caster Semenya would have to take hormones that would lower her naturally occurring testosterone levels in order to “ensure fair competition in women’s sports.”²²⁰ If she declines, the suppressants she cannot compete in the 800m race at the Olympics as well as other international competitions. Although CAS ruled in favor of the IAAF, it expressed obvious and significant concerns with the implementation of such an unfair and blatantly discriminatory regulation. CAS conveyed concerns about the practical application of the regulations as the implementation of such discriminatory regulations is on its face unfair. CAS explicitly expressed its worries that athletes might unintentionally break the strict testosterone levels set by the IAAF; questions about the advantage higher testosterone gives athletes over 1500m and the mile and the practicalities for athletes of complying with the new rules.²²¹ In fact, CAS suggested that the IAAF postpone the implementation of the regulations for the 1500m and mile run, as the science the IAAF relied on to pass this regulation is significantly flawed, so flawed other scientists called for the statistics to be retracted.²²² Furthermore, the World Medical Association stands firm against any practice requiring physicians to use their competence and skills for any other purpose than providing medical care in the best interest of their patients and in respect of their dignity,” and is in opposition of these regulations.²²³ As a result of the IAAF’s disregard of the lack of scientific confirmation, and the concerns CAS has expressed regarding the implementation of these regulations, it becomes clear that the IAAF is acting with discriminatory intent and targeting women from non-western countries. The IAAF continues to hide behind the notion that this discrimination is necessary and proportionate to protect fairness in women’s sports, however, in the absence of really compelling evidence, something discriminatory can in no way be justifiable.²²⁴ In ad-

219. Legler, *supra* note 146.

220. *Id.*

221. *See id.*

222. Jackson, *supra* note 29.

223. *Physician Leaders Reaffirm Opposition to IAAF Rules*, WORLD MED. ASS’N (May 15, 2019), available at <https://www.wma.net/news-post/physician-leaders-reaffirm-opposition-to-iaaf-rules/> (last visited July 24, 2019).

224. *AP Explains: Ruling Against Olympian Caster Semenya*, VOA (May 1, 2019) available at <https://www.voanews.com/arts-culture/ap-explains-ruling-against-olympian-caster-semenya> (last visited July 24, 2019).

dition, the makeup of the board determining these decisions suggests that the IAAF is acting based on discriminatory motives. The fact of the matter is the makeup of the council is not representative of the diverse group of athletes the IAAF is making decisions about.²²⁵

A. The IAAF's Discriminatory Regulations Continue to Target Female Runners from Non-Western Countries

Thus far, these hyperandrogenism regulations have only impacted rising female athletes from nonwestern countries. Most recently, Burundi's Francine Niyonsaba, and Kenya's Margaret Wambui have come under scrutiny after winning silver and bronze behind Caster Semenya in the 2016 Olympics.²²⁶ The fact of the matter is, Wambui and Nyonsaba both have hyperandrogenism, but only after their dominating performances are their bodies being scrutinized.²²⁷ Francine Niyonsaba put Burundi on the map, by finishing second behind Caster Semenya's record breaking times in the 800m at the world championships in 2016 and 2017. Niyonsaba's times and dominating performances slate her as Caster Semenya's closest rival.²²⁸ Again the argument that forcing some women with naturally occurring conditions to take medication, or undergo surgery is not done to ensure fairness in sport, but rather is a tactic used to allow blatant discrimination against female runners from non-western countries. Ironically, no Caucasian female athletes have come under scrutiny since the proposal of these hyperandrogenic regulations. Or are there cases that the IAAF has chosen to ignore? The IAAF has records that show numerous athletes who have this condition but has never identified them because confidential medical details are involved. However, we know that the IAAF has made clear that they actually do not care about confidentiality when it comes to medical records, as shown by their actions in leaking Caster Semenya's "confiden-

225. The ruling party of the CAS (the body that litigates grievances brought by athletes to the IAAF and who submitted the final ruling) has 19 members, nine women, only one of whom is a black woman. The majority of the judges are from the global north, almost all of whom have been educated in a former colonial empire like the U.K.

226. Morgan, *supra* note 87.

227. This ruling is very unfair," she said. "I have grown up knowing that I want to do athletics as a career and achieve a lot through it. Why wait for me to establish myself as an 800-meter athlete then tell me that I need to take medication to compete in the same event? *Another female Olympic athlete slams testosterone rules, refuses medication*, NBC (May 22, 2019), available at <https://www.nbcnews.com/news/sports/another-female-olympic-athlete-slams-testosterone-rules-refuses-medication-n1008691> (last visited July 24, 2019).

228. *Burundi's Francine Niyonsaba reveals she has 'hyperandrogenism,' REGION WEEK* (Apr. 18, 2019), available at <https://regionweek.com/burundis-francine-niyonsaba-reveals-she-has-hyperandrogenism/> (last visited Aug. 1, 2019).

tial” medical details. What evidence is there to dispute the clear racial argument to be made here; which is that the IAAF may be keeping these records confidential in order to protect white female runners from western countries? This argument is based on the direct actions of the IAAF which show that leveling the playing field is not the primary concern, and in fact these regulations hold a discriminatory intent.

VIII. RULING SUSPENDED

As a result, on June 3, 2019, the federal supreme court of Switzerland ordered the IAAF to immediately suspend the implementation of the eligibility regulation against Caster Semenya, allowing her to compete without restriction in the female category while her appeal is pending.²²⁹ This temporary ruling will stand until the IAAF makes submissions to the court on why the regulations should be kept in place.²³⁰ Semenya has appealed to the Supreme court to permanently overturn the rules, but there has not yet been a date set for this hearing.²³¹

IX. CONCLUSION: THE 2018 HYPERANDROGENISM REGULATIONS ARE DISCRIMINATORY ON THEIR FACE AND IN EFFECT, AND THUS SHOULD BE INVALIDATED

Because of society’s narrow definition for what is “normal” for the female body, women like Caster Semenya, who do not exhibit characteristics that fit this definition are severely scrutinized. The IAAF intentionally targeted not only Indian runner Dutee Chand in 2015, but also South African 800m runner Caster Semenya for discriminatory reasons focused on their masculine physique as female athletes, as well as the non- western countries they represent.²³² The IAAF relies merely on stereotypes and profiling when identifying which athletes may potentially have hyperandrogenism, and thus in effect, these regulations are discriminatory in nature and a violation of international human rights. Protecting the fairness within the sport is an important and legitimate objective, but it cannot be achieved through the discriminatory means of these regulations the IAAF has implemented. These regulations, as

229. *Caster Semenya IAAF ruling suspended*, eNCA (June 3, 2019), available at <https://www.enca.com/news/caster-semenya-iaaf-ruling-suspended> (last visited Aug. 1, 2019).

230. *Semenya lawyers: IAAF ordered to suspend testosterone rules* (June 3, 2019), available at <https://www.foxnews.com/world/semenya-lawyers-iaaf-ordered-to-suspend-testosterone-rules> (last visited July 31, 2019).

231. *Id.*

232. The questioning of Semenya’s gender is based on stereotypic views of the physical features and abilities attributable to women. Such stereotypes demonstrate the extend of patriarchy within the world’s sporting community. Cooper, *supra* note 190.

written and in application, single out and punish women simply because they were born different; they punish these athletes for something they cannot control and will only allow them to compete if they undergo medically invasive treatment, none of which are fair options. Furthermore, there are no such standards for men, which directly corroborates the IAAF's discriminatory intent to target Caster Semenya, a non-western runner who doesn't fit into society's feminine ideal. As a result, the 2018 Hyperandrogenism regulations are discriminatory and should be declared invalid.

CUSTOMARY INTERNATIONAL LAW AS A CHECK ON PRESS FREEDOM'S STRONGMEN

Natalie Maier*

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ABSTRACT

In today's society, it is almost impossible to go about the day without consuming a single piece of news. We rely on the press to bring us information that informs our decisions, whether it be what to eat or who to vote for. But not everyone is appreciative of these so-called watchdogs. Authoritarian dictators and their regimes have historically presented a threat to the press, undercutting its basic rights in order to cover up human rights abuses and other serious crimes. The force of these anti-press "strongmen" is effective and, thus far, unmatched. If the right to free press is to be protected, violations must be met with opposing force. The only mechanism strong enough to combat the influence of these individual regimes is customary international law. This note proposes that states employ political and economic sanctions against one another to establish the *opinio juris* element of accountability, thereby further crystalizing a free press in customary international law.

I. INTRODUCTION

In 2017, the independent watchdog organization Freedom House released its annual report on the status of international press freedom.¹ The report found that global press freedom had declined to its lowest point in thirteen years in 2016.² Legal analysis of 199 countries and territories included criteria such as constitutional or legal guarantees for freedom of expression, penalties for libel and defamation, the existence and ability to use freedom of information legislation, the independence of judiciary and regulatory bodies, and the ability for media and journalism organizations to operate freely.³ Researchers also looked at the political environment of each country, evaluating the "degree of political

1. Michael J. Abramowitz, *Press Freedom's Dark Horizon*, FREEDOM HOUSE, available at <https://freedomhouse.org/report/freedom-press/2017/press-freedoms-dark-horizon> (last visited Mar. 7, 2019).

2. *Id.*

3. *Methodology, Freedom of the Press 2017*, FREEDOM HOUSE, available at <https://freedomhouse.org/report/freedom-press-2017-methodology> (last visited Mar. 7, 2019).

influence” current administrations have over news outlets.⁴ Collectively, the findings demonstrated that the decline is now occurring not only in authoritarian governments, but also in democracies.⁵ In the thirty-eight years that Freedom House has been monitoring the global press, the United States is more prominent in the global debate on the subject than ever before.⁶ President Donald Trump has used familiar political rhetoric to antagonize the media, resembling that of dictatorships like present-day Philippines, Adolph Hitler’s Nazi Germany, and Joseph Stalin’s Russia. Domestic lawsuits over American journalists’ accessibility to information have made international news.⁷ Recent attacks on journalists overseas, like the murder of *Washington Post* writer Jamal Khashoggi in Istanbul, have positioned the U.S. as complacent toward such offenses after leadership failed to condemn Saudi Arabia for its involvement.⁸

*A. Issue: Absence Of Customary International Law Emboldens
Anti-Press Strongmen*

The biggest threat to press freedom, both today and historically, is the presence of anti-press “strongmen” who use nationalist rhetoric and delegitimization methods to strip the press of legal and social protection.⁹ A lack of binding international law has allowed such actors to go unchecked, empowering them to achieve serious undercuts to an otherwise widespread ideology that freedom of the press is a basic human right. Declarations and treaties have proven unsuccessful because of their lack of enforceability and failure to reach non-party states. The only force more powerful than these seemingly unstoppable individual dictatorships is customary international law. Without requiring any express consent or ratification by parties, customary international law

4. *Id.*

5. Jennifer Dunham, *Press Freedom’s Dark Horizon*, FREEDOM HOUSE, available at <https://freedomhouse.org/report/freedom-press/freedom-press-2017#overview-essay> (last visited Mar. 7, 2019).

6. Michael J. Abramowitz, *Hobbling a Champion of Press Freedom*, FREEDOM HOUSE, available at <https://freedomhouse.org/report/freedom-press/freedom-press-2017#overview-essay> (last visited Mar. 7, 2019).

7. *CNN v. Trump, Knight Foundation v. Trump*, 302 F.Supp.3d 541 (2018).

8. Grace Sparks, *CNN Poll: Majority say US response to Khashoggi’s murder hasn’t been tough enough*, CNN (Dec. 13, 2018), available at <https://www.cnn.com/2018/12/13/politics/poll-khashoggi-response/index.html> (last visited Mar. 7, 2019).

9. *The Global slump in press freedom*, THE ECONOMIST (July 23, 2018), available at <https://www.economist.com/graphic-detail/2018/07/23/the-global-slump-in-press-freedom> (last visited Mar. 7, 2019).

would bind any actor that violates the understood right. In order for the right to exercise free press to fully crystalize as customary international law, there must be a widespread state practice of an established right, and a subjective understanding by the states that they are bound by a duty to enforce the law in question (known as "*opinio juris*"). While widespread state practice of a free press already exists via declarations and treaties, the second element of *opinio juris* is not fulfilled due to current gaps in legal framework. Therefore, this note proposes that states employ political and economic sanctions against one another in response to violations of press freedom, in order to establish the element of *opinio juris* and crystalize customary international law of press freedom. Because of deteriorating state of press freedom on a global scale, many scholars feel that the right to a free press is now a luxury limited to the west. Therefore, with an urgent need for customary international law, the responsibility is heavily on western powerhouses like the United States to be a leader in solidifying the global right to a free press.¹⁰

Part I of this note has briefly outlined the context leading to a call for crystalized customary international law of free press. Part II of this note looks back at the historical development of the right to a free press and explores the current state of press freedom by region. Additionally, Part II reviews the extensive body of United States common law that demonstrates the country's long-lasting appreciation for the right to a free press. Part III takes an extensive look at press freedom's biggest offenders of past and present – Adolph Hitler, Joseph Stalin, Vladimir Lenin, Rodrigo Duterte, Mohammed Bin Salman, and Donald Trump. This note will analyze how these "strongmen" have used common tactics to chip away at press protections, given a lack of counterbalance from effective international protections for press freedom. Finally, Part IV of this note will propose that states employ political and economic sanctions in response to violations of press protections, thereby fulfilling the *opinio juris* requirement necessary to crystalize customary international law of a free press. This note will review the existence of the first element, widespread state practice, via declarations and treaties speaking to the desire for a free press. Further, this note will explain how gaps in current legal framework have left the second element unfulfilled, ultimately allowing anti-press regimes to be an unmatched force.

10. *Id.*

II. HISTORY OF A RIGHT TO A FREE PRESS

The struggle to establish and support free press internationally is not new. The United Nations has called journalism one of the most dangerous professions in the world.¹¹ But it was centuries ago that efforts first began to legislate and codify laws to establish a free press, amidst pressure to protect the free and independent dissemination and receipt of information.¹²

In 1644, British poet John Milton published his pamphlet *Areopagitica*, in response to a law that the parliament had passed requiring the government to approve of and license all books for publication.¹³ In the pamphlet, Milton advocated that the free circulation of ideas was essential to moral and intellectual development.¹⁴ The piece was one of the first to address the government's influence on people's dissemination of information.¹⁵

One hundred years later, in Sweden, parliament narrowly passed the Freedom of the Press Act, now recognized as the world's first law supporting press freedom.¹⁶ The law, passed in 1766, abolished the Swedish government's role as a censor of printed matter, and it allowed for the official activities of the government to be made public.¹⁷

Around that same time, in the United States, Massachusetts Chief Justice William Cushing felt the newly-established America needed legislation of its own to codify protections for the press.¹⁸ On February 18, 1789, Cushing wrote a detailed letter to John Adams concerning the "liberty of the press."¹⁹ At the time, Article XVI of the Massachusetts Declaration of Human Rights read that "the liberty of the press is essen-

11. Natalia Mazotte, *UN names journalism one of the most dangerous professions in the world*, KNIGHT CTR. FOR JOURNALISM IN THE AMERICAS, available at <https://knightcenter.utexas.edu/blog/un-names-journalism-one-most-dangerous-professions-world> (last visited Mar. 7, 2019).

12. Lennart Weibull, *Freedom of the Press Act of 1766*, ENCYCLOPEDIA BRITANNICA, available at <https://www.britannica.com/topic/Freedom-of-the-Press-Act-of-1766> (last visited Mar. 7, 2019).

13. Jay Black, *Areopagitica in the Information Age*, 9 J. MASS MEDIA ETHICS 131 (1994).

14. See generally JOHN MILTON, *AREOPAGITICA* (1644).

15. Kathleen Kuiper, *Areopagitica*, ENCYCLOPEDIA BRITANNICA, available at <https://www.britannica.com/topic/Areopagitica> (last visited Mar. 7, 2019).

16. Weibull, *supra* note 12.

17. *Id.*

18. Original draft of letter from William Cushing, Chief Justice, to John Adams (Feb. 18, 1789) in Mass. L.Q. (Oct. 1942) at 12 [hereinafter Cushing Letter].

19. *Id.*

tial to the security of freedom in a state: it ought not, therefore, to be restrained by this commonwealth."²⁰ Cushing wondered whether a libel directed against public officeholders could be punishable under the clause.²¹ He wrote, "suppressing this liberty by penal laws will it not more endanger freedom than do good to government?"²²

Adams' reply conveyed a larger constitutional purpose for the press.²³ The exchange as a whole illuminated that the founding generation approached liberty of the press as a crucial instrument to the success of the American public.²⁴

Sure enough, just two years later, the United States codified the concept in its First Amendment, asserting, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."²⁵

But protections under the First Amendment would not effectively vest until centuries later, with the development of common law. History has shown the tensions between these ideological protections and the reality of lacking security for journalists.

Global codification did not occur until 1948, when the United Nations attempted to establish an international standard of press freedom in Article 19 of the Universal Declaration of Human Rights.

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.²⁶

Many countries have adopted laws similar to the United States' First Amendment. But, even in countries where a free press is constitutionally protected, anti-media leadership threatens the legal security of today's journalists.

20. Mass. Const. art. XVI (annulled 1948).

21. Cushing Letter, *supra* note 18.

22. *Id.*

23. Patrick J. Charles and Kevin Francis O'Neill, *Saving the Press Clause from Ruin: The Customary Origins of a "Free Press" as Interface to the Present and Future*, UTAH L. REV. 1691, 1694 (2012).

24. *Id.* at 1695.

25. U.S. CONST. amend. I.

26. G.A. Res. 19, Universal Declaration of Human Rights (Dec. 10, 1948).

A. Freedom of Press by Country

According to Freedom House's 2017 report, only 13% of the world enjoys a free press.²⁷

1. Africa

Eritrea and Egypt have both landed on the Reporters Without Borders (RSF) list of worst offenders of press freedom.²⁸ Eritrea has not allowed any independent media since President Isaias Afwerki shut it down in 2001.²⁹ As of December 2018, there were sixteen journalists imprisoned in Eritrea – more than any other sub-Saharan country.³⁰ It is unclear whether some of the imprisoned journalists are even still alive.³¹ In Egypt, twenty-five journalists are currently imprisoned, with more than twenty of those cases occurring in the six months leading up to the country's presidential election in March 2018.³² Rights groups believe the surge in arrests was a part of a campaign to silence dissenting voices before elections.³³ President Abdel Fattah el-Sisi has suggested that speaking against the government or police is high treason, and he has opened up telephone lines for citizens to report “false news.” The government has also increased online censorship, blocking over 496 websites between May 2017 and February 2018. In Tunisia, despite press freedom being enshrined in the 2014 constitution, the country's government uses much older penal codes against the press to target those in the media who criticize of the government.³⁴ Rights groups are concerned that the country's democracy is at risk considering the rollback

27. Abramowitz, *supra* note 1.

28. 2018 World Press Freedom Index, REPS. WITHOUT BORDERS, available at <https://rsf.org/en/ranking> (last visited Mar. 7, 2019) [hereinafter *2018 World Press Freedom Index*].

29. Elana Beiser, *Hundreds of Journalists jailed globally becomes the new normal*, COMMITTEE TO PROTECT JOURNALISTS (Dec. 13, 2018), available at <https://cpj.org/reports/2018/12/journalists-jailed-imprisoned-turkey-china-egypt-saudi-arabia.php> (last visited Mar. 7, 2019).

30. *Id.*

31. *Id.*

32. Egypt's jailed journalists: in numbers, ALJAZEERA (May 3, 2018), available at <https://www.aljazeera.com/news/2018/05/egypt-jailed-journalists-numbers-180502195324128.html> (last visited Mar. 7, 2019).

33. *Id.*

34. Dokhi Fassihian, *Democratic Backsliding in Tunisia: The Case of Renewed International Attention*, FREEDOM HOUSE, available at <https://freedomhouse.org/report/special-reports/democratic-backsliding-tunisia-case-renewed-international-attention> (last visited Mar. 7, 2019).

of press liberties as another election cycle approaches.³⁵ In Liberia, investigative journalist Rodney Sieh was sentenced to 5000 years in prison under an egregious libel charge in 2013.³⁶ At the intense trial before the Liberian Supreme Court, Sieh told the Justices that they were “behaving like dictators.”³⁷ Overall, the status of press freedom varies considerably by country across the African continent.³⁸ There are more African countries in the bottom half of RSF’s index than in the top, and Africa’s largest states by population are all ranked in the bottom half.³⁹

2. *Asia and the Middle East*

Many Asian countries have also adopted legislation formally guaranteeing freedom of speech, but enforcement appears lacking in many instances involving the press. In Burma, Cambodia, Vietnam, and Thailand, blogging journalists are censored for dissenting opinions.⁴⁰ In Singapore and Malaysia, libel and internal security laws are used against journalists.⁴¹ In the Philippines, under the regime of Rodrigo Duterte, journalists have been imprisoned and killed.⁴² In China, many media outlets are owned by the communist-party-led-government.⁴³ Despite the Constitution of the People’s Republic of China reading that its citizens “enjoy freedom...of the press,” many outlets are banned from using social media.⁴⁴ Chinese writer and activist Liu Xiaobo was

35. *Id.*

36. RODNEY SIEH, JOURNALIST ON TRIAL (2018).

37. *Id.*

38. John Campbell, *Press Freedom Varies Considerably Across Africa*, COUNCIL ON FOREIGN REL. (Apr. 26, 2018), available at <https://www.cfr.org/blog/press-freedom-varies-considerably-across-africa> (last visited Mar. 7, 2019).

39. *Id.*

40. Freedom Plummets in Cambodia, RADIO FREE ASIA (Jan. 13, 2011), available at <https://www.rfa.org/english/news/cambodia/freedom-01132011155053.html> (last visited Mar. 7, 2019); see also Mike Nizza, *Burmese Government Clamps Down on the Internet*, N.Y. TIMES (Sept. 28, 2007), available at <https://thelede.blogs.nytimes.com/2007/09/28/burmese-government-clamps-down-on-internet/> (last visited Mar. 7, 2019).

41. Ahmad Masum & Md Rejab Md Desa, *Media and the Libel Law: The Malaysian Experience*, INT’L CONF. ON COMM. & MEDIA (Oct. 18, 2014), available at <https://cyberleninka.org/article/n/211400> (last visited Mar. 7, 2019).

42. *Case Files: The 12 Journalists Killed under the Duterte Administration*, PHILIPPINE CTR. FOR INVESTIGATIVE JOURNALISM (Nov. 23, 2018), available at <https://pcij.org/stories/case-files-the-12-journalists-killed-under-the-duterte-administration/> (last visited Mar. 7, 2019).

43. Beina Xu and Eleanor Albert, *Media Censorship in China*, COUNCIL ON FOREIGN REL. (Feb. 17, 2017), available at <https://www.cfr.org/background/under/media-censorship-china> (last visited Mar. 7, 2019).

44. *Id.*

incarcerated repeatedly throughout his lifetime for his writing advocating for an end to the communist party.⁴⁵

Press freedom advocacy groups have repeatedly listed Myanmar as one of the worst countries in the world for journalists.⁴⁶ In 2018, the country made international news for its imprisonment of Reuters journalists Wa Lone and Kyaw Soe Oo.⁴⁷ Despite the country moving from a military dictatorship to an electoral democracy, the government in Myanmar still maintains vigilant control over the media via old and oppressive laws, which it shows no intention of amending.⁴⁸ Arrests have under a new telecommunications law that prosecutes peaceful speech.⁴⁹ The government's main premise for controlling the media has been to discourage coverage of the crisis in the Rakhine state, where hundreds of thousands of Rohingya Muslims have fled due to mass genocide.⁵⁰

South Korea's constitution also guarantees free press, but the country has strict laws that go into effect approaching an election.⁵¹ The law prohibits speech that supports or criticizes any candidate from either party in the upcoming election.⁵² The United Nations Human Rights Commission has expressed concern about the country's deterioration of free speech online.⁵³

The Middle East is by far one of the worst regions for journalists.⁵⁴ In Iran, an estimated 860 journalists have been imprisoned in the three

45. Chris Buckley, *Liu Xiaobo, Chinese Dissident Who Won Nobel While Jailed, Dies at 61*, N.Y. TIMES (July 13, 2017), available at <https://www.nytimes.com/2017/07/13/world/asia/liu-xiaobo-dead.html> (last visited Mar. 7, 2019).

46. *RSF Warns Myanmar about threat to world press freedom index ranking*, REPS. WITHOUT BORDERS (Oct. 1, 2018), available at <https://rsf.org/en/news/rsf-warns-myanmar-about-threat-world-press-freedom-index-ranking> (last visited Mar. 7, 2019).

47. John Chalmers, *Special Report: How Myanmar punished two reporters for uncovering an atrocity*, REUTERS (Sept. 3, 2018), available at <https://www.reuters.com/article/us-myanmar-journalists-trial-specialrepo/special-report-how-myanmar-punished-two-reporters-for-uncovering-an-atrocity-idUSKCN1LJ167> (last visited Mar. 7, 2019).

48. *Dashed Hopes: The Criminalization of Peaceful Expression in Myanmar*, HUM. RTS. WATCH (Jan. 31, 2019), available at <https://www.hrw.org/report/2019/01/31/dashed-hopes/criminalization-peaceful-expression-myanmar> (last visited Mar. 7, 2019).

49. *Id.*

50. Chalmers, *supra* note 47.

51. Stephan Haggard & You Jong-Sung, *Freedom of Expression in South Korea*, 45 J. CONTEMP. ASIA 167 (2014).

52. *Id.*

53. *Id.*

54. *Middle East most dangerous region for journalism*, MIDDLE EAST MONITOR (Apr. 26, 2018), available at <https://www.middleeastmonitor.com/20180426-middle-east-most-dangerous-region-for-journalism/> (last visited Mar. 7, 2019) [hereinafter MIDDLE EAST MONITOR].

decades since the 1979 Iranian Revolution.⁵⁵ At least four of those journalists were killed.⁵⁶ *Washington Post* reporter and former Tehran bureau chief Jason Rezaian is suing the country's government after being imprisoned for 544 days under charges of espionage.⁵⁷ In Turkey, most mainstream media is owned by relatives or allies of President Erdogan, which means negative news about the country almost never reaches its citizens.⁵⁸ Critical journalists are fined or jailed, and many have been forced into self-censorship.⁵⁹ On October 2, 2018, *Washington Post* writer Jamal Khashoggi was brutally tortured and killed inside the Saudi consulate in Istanbul.⁶⁰ Khashoggi, who once lived in Saudi Arabia, had published various criticisms of the new regime under Crown Prince Mohammed Bin Salman.⁶¹ Intelligence officials in the United States and Turkey later linked the murder directly to Bin Salman.⁶² In the kingdom, blasphemy is illegal and punishable by death.⁶³ Of the twenty worst-ranked countries for press freedom in 2018, all but four were in the Middle East, Asia, or North Africa.⁶⁴

3. Australia

Australia does not explicitly protect freedom of the press in its constitution, but the country's common law recognized freedom of

55. *Iran jailed hundreds of journalists after 1979 revolution: RSF*, AL JAZEERA (Feb. 7, 2019), available at <https://www.aljazeera.com/news/2019/02/iran-jailed-hundreds-journalists-1979-revolution-rsf-190207135401749.html> (last visited Mar. 7, 2019).

56. *Id.*

57. Rick Gladstone, *Jason Rezaian, Washington Post Reporter, Sues Iran over Imprisonment*, N.Y. TIMES (Oct. 3, 2016), available at <https://www.nytimes.com/2016/10/04/world/middleeast/iran-jason-rezaian.html> (last visited Mar. 7, 2019).

58. Zia Weise, *How Did Things Get So Bad for Turkey's Journalists?*, THE ATLANTIC (Aug. 23, 2018), available at <https://www.theatlantic.com/international/archive/2018/08/destroying-free-press-erdogan-turkey/568402/> (last visited Mar. 7, 2019).

59. *Id.*

60. *Jamal Khashoggi: all you need to know about the Saudi journalist's death*, BBC (Dec. 11, 2018), available at <https://www.bbc.com/news/world-europe-45812399> (last visited Mar. 7, 2019) [hereinafter *Khashoggi*].

61. *Id.*

62. *Jamal Khashoggi: CIA 'blames Saudi prince for murder'*, BBC (Nov. 17, 2018), available at <https://www.bbc.com/news/world-middle-east-46245167> (last visited Mar. 7, 2019).

63. *National Laws on Blasphemy: Saudi Arabia* (n.d.), GEO. U. BERKLEY CTR. FOR RELIGION, PEACE & WORLD AFF. (n.d.), available at <https://berkeleycenter.georgetown.edu/essays/national-laws-on-blasphemy-saudi-arabia> (last visited Mar. 7, 2019).

64. *2018 World Press Freedom Index*, *supra* note 28; see also MIDDLE EAST MONITOR, *supra* note 54.

speech in *Lange v. Australian Broadcasting Company*.⁶⁵ Yet the government has been known to issue gag orders on reporters for covering corruption cases involving Australian parties.⁶⁶ Most recently, the country has been at the center of controversy on metadata reform, after journalists' private sources were infiltrated and exposed as a result of lax metadata law.⁶⁷

4. Europe

In RSF's press freedom index, Europe had the most countries in the top half of rankings than any other region.⁶⁸ Of the top twenty best countries in the world for press freedom, thirteen are in Europe. The European Convention on Human Rights (in conjunction with the European Court of Human Rights) regulates many of the member countries on issues such as press freedom.⁶⁹ For example, recently the court found that extended prison sentences for criminal defamation are disproportionate and have a "chilling effect" on public discussion.⁷⁰

Despite Europe being the continent where press freedom is the safest, it is also the region where press freedom has declined the most in the past year.⁷¹ In democracies like Poland and Hungary, political leaders used influence over public broadcast to shape the media's coverage.⁷² In 2016, one of Hungary's most notable newspapers, *Népszabadság*,

65. *Lange v Australian Broad. Co.* (1997) 189 CLR 520 (Austl.).

66. In 2014 the Supreme Court of Victoria issued a blanket media gag order on the reporting of a high-profile international corruption case regarding bribes presented to high-ranking officials of Malaysia, Indonesia and Vietnam by senior executives of the Reserve Bank of Australia in order to secure the adoption of the Australian invented and produced polymer banknote technology. See Robert Booth & Rob Evans, *Australian court's gagging order condemned as 'abuse of legal process,'* THE GUARDIAN (July 30, 2014), available at <https://www.theguardian.com/world/2014/jul/30/australian-court-gagging-order-abuse-legal-process> (last visited Mar. 7, 2019).

67. Melissa Clarke, *Metadata laws under fire as 'authority creep' has more agencies accessing your information*, ABC (Oct. 19, 2018), available at <https://www.abc.net.au/news/2018-10-19/authority-creep-has-more-agencies-accessing-your-metadata/10398348> (last visited Mar. 7, 2019).

68. *2018 World Press Freedom Index*, *supra* note 28.

69. Abramowitz, *supra* note 1.

70. *Paraskevopoulos v. Greece*, COLUM. U. GLOBAL FREEDOM EXPRESSION (2018), available at <https://globalfreedomofexpression.columbia.edu/cases/paraskevopoulos-v-greece/> (last visited Mar. 7, 2019).

71. *2018 World Press Freedom Index*, *supra* note 28.

72. Bartosz T. Wielinski & *Gazeta Wyborcza*, *Polish government continues efforts to stifle free media*, EURACTIV (May 11, 2018), available at <https://www.euractiv.com/>

closed and was subsequently sold, along with many other outlets, in murky deals that were suspected to have government ties.⁷³ Four of the five biggest falls in RSF index were European countries: Malta, Czech Republic, Serbia, and Slovakia.⁷⁴

5. South America

In 2018, Mexico became the world's second deadliest country for journalists, second only to Syria.⁷⁵ Eleven journalists were killed, some for their coverage of local politicians' involvement in organized crime.⁷⁶ During a referendum vote on Cuba's constitution in February 2019, the Cuban government blocked citizen's access to multiple news websites.⁷⁷ The country currently employs a constitutional ban on private ownership of news outlets, thereby enabling total state ownership of media and earning the title of the Western Hemisphere's worst-ranked country for press freedom.⁷⁸ In Venezuela, authoritarian president Nicholas Maduro has caused press freedom in the country to significantly decline. Journalists are often targeted and arbitrarily arrested in attempts to minimize their reporting on the economic crisis. In Bolivia, the government prosecutes journalists under charges of "sedition" and "political violence," even driving some to exile. Jamaica is one of the best countries in the region, and even the world, for press freedom. But a proposed data protection act would broadly protect "personal data," including political opinions that are often the subject of reporting.⁷⁹

section/freedom-of-thought/news/polish-government-continues-efforts-to-stifle-free-media/ (last visited Mar. 7, 2019).

73. Abramowitz, *supra* note 1.

74. *RSF Index 2018: Hatred of Journalism threatens democracies*, REPS. WITHOUT BORDERS, available at <https://rsf.org/en/rsf-index-2018-hatred-journalism-threatens-democracies> (last visited Mar. 7, 2019).

75. *RSF Index 2018: Mixed performance in Latin America*, REPS. WITHOUT BORDERS, available at <https://rsf.org/en/rsf-index-2018-mixed-performance-latin-america> (last visited Mar. 7, 2019).

76. *Id.*

77. *Critical news cites blocked during referendum vote*, COMMITTEE TO PROTECT JOURNALISTS (Feb. 25, 2019), available at <https://cpj.org/2019/02/cuba-referendum-news-website-internet-blocked.php> (last visited Mar. 7, 2019).

78. *2018 World Press Freedom Index*, *supra* note 28.

79. *Jamaica - RSF concerned over proposed Data Protection Act's potentially 'chilling effect' on press freedom*, REPS. WITHOUT BORDERS (May 17, 2018), available at <https://rsf.org/en/news/jamaica-rsf-concerned-over-proposed-data-protection-acts-potentially-chilling-effect-press-freedom> (last visited Mar. 7, 2019).

Across the region, poor economic conditions, violent crime, and populist governments present serious threats to the press.⁸⁰

B. The United States as an Established Leader

Often regarded as “the country with the First Amendment,”⁸¹ the United States has historically been considered a leader in free speech legislation and promotion of free press. The press has been regarded as the fourth pillar of democracy, alongside the three branches of government.

1. A Rich Body of Common Law

Decades of common law have solidified support for a liberal press. The United States Supreme Court’s rulings on First Amendment issues have consistently recognized the press and its functions as a vital organ of the democracy.⁸² Three of the most important rulings came in *Near v. Minnesota*, *New York Times v. Sullivan* and *United States v. New York Times*.

In June 1931, the United States Supreme Court addressed a Minnesota gag law that had the effect of censoring local newspapers for content that might otherwise be out of reach under libel or defamation laws.⁸³ The statute provided that any person “engaged in the business” of regularly publishing or circulating an “obscene, lewd, and lascivious” or a “malicious, scandalous and defamatory” newspaper or periodical was guilty of a nuisance, and could be enjoined for continuing with the activity.⁸⁴ The court held that the chief purpose of the guaranty of a free press under the First Amendment was to prevent such restraints on upon publication. In a victory for the Minnesota newspaper, Chief Justice Hughes wrote that under the free press clause of the First Amendment, and with limited exception, government may not censor or prohibit a publication in advance. The liberty of a free press, essential to

80. *Americas*, FREEDOM HOUSE, available at <https://freedomhouse.org/regions/Americas> (last visited Mar. 7, 2019).

81. See Hadas Gold, *Annapolis Shooting: a day newsrooms have feared*, CNN BUS. (June 29, 2018), available at <https://money.cnn.com/2018/06/29/media/capital-gazette-newsroom-safety/index.html> (last visited Mar. 7, 2019).

82. *Neb. Press Ass’n v. Stewart*, 427 U.S. 539 (1976) (Chief Justice Burger noted the important role the press played in the system of checks against public officials, police officers, and courts during criminal trials. The court characterized the press as “the handmaiden of effective judicial administration ... in the criminal process.”).

83. *Near v. Minnesota*, 283 U.S. 697 (1931).

84. *Id.*

the nature of a free state, required protection from prior restraint rather than freedom from censure after publication.⁸⁵ Furthermore, the court made clear that the right of a free press was safe from invasion by state action under the due process clause of the fourteenth amendment. The *Near* decision has been called one of the court's first great press cases,⁸⁶ and served as a key precedent in the subsequent *Times v. Sullivan* ruling.⁸⁷

While *Near* prohibited proactive censorship of certain publications, citizens who found themselves at the center of a defamatory or libelous story still had a private cause of action after the story had been published. In 1964, the court established a standard that would filter such libel suits, requiring that a public official show that the information was published with actual malice.⁸⁸ The court said that the higher standard was employed in light of a "profound national commitment" to debate on public issues and transparency of public officials.⁸⁹ The actual malice standard still serves to protect the press from endless libel suits in their critical coverage of public officials. In 1966, the court agreed to extend the reach of the *Sullivan* ruling to public figures, business tycoons and celebrities.⁹⁰

One of the most crucial First Amendment questions that has come before the court has been the balance of protecting press freedom during times of national security. In 1971, in the midst of America's involvement in the Vietnam War, the *New York Times* obtained a copy of an internal Department of Defense report, detailing critical information about the war.⁹¹ These confidential papers would later become known as the "Pentagon Papers."⁹² The government sought a temporary injunction

85. *Id.* at 713.

86. ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* 90 (1991).

87. *See* *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

88. *Id.* During the heat of the Civil Rights movement, The *New York Times* ran a full-page ad for donations to defend Martin Luther King, Jr., on perjury charges. The ad, which contained several minor factual inaccuracies, was critical of the city's police force and their motivation to arrest King. Montgomery city police chief, L.B. Sullivan, brought libel charges against the *Times*, claiming that criticism of the police force reflected on him, personally. In a unanimous decision, Justice Brennan ruled that the target of an allegedly libelous statement must prove that it was made with knowledge or reckless disregard for its falsity.

89. *Id.* at 375.

90. *Curtis Publ'g v. Butts*, 388 U.S. 130 (1967).

91. *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

92. *Id.*

ordering the *Times* not to publish the documents, claiming that the release of the information contained in the papers would endanger national security. But the Supreme Court held that the government had not overcome the “heavy presumption against” any form of prior restraint of the press. Justices Black and Douglas criticized the vague use of “security” in instances of attempts to infringe on the constitutional protections awarded to journalists via the First Amendment. Without an inevitable, direct, and immediate event imperiling the safety of American forces, prior restraint was not justified. The effect of this particular decision would appear to separate the United States from many other countries where journalists are regularly sanctioned, and even imprisoned, under the guise of “national security.”

With a rich body of common law in place, nevertheless the 2016 presidential election marked a shift in climate for the country’s media. In the Trump era, landmark press freedom legislation faces the possibility of repeal.⁹³ Justice Clarence Thomas has suggested revisiting *Sullivan* and opening up libel laws.⁹⁴ This new legal vulnerability is one of many results of decades of anti-press ploys by anti-watchdog authoritarian regimes.⁹⁵

III. PRESS FREEDOM’S BIGGEST OFFENDERS AND THEIR COMMONALITIES; NATIONALIST RHETORIC, DELEGIMIZATION, AND ANTI-WATCHDOG MOTIVATION

The world’s most notable anti-press strongmen have used two common methods to construct an enemy out of the press, all for one ultimately common goal.⁹⁶ First, leaders often use nationalist rhetoric to characterize the media as threat to the state, against which government action must be taken in order to protect the people.⁹⁷ Second, leaders use both rhetoric and law to delegitimize the media, usually coming in the form of denied access.⁹⁸ This delegitimization signals to the public

93. Hadas Gold, *Donald Trump: we’re going to ‘open up’ libel laws*, POLITICO (Feb. 26, 2016), available at <https://www.politico.com/blogs/on-media/2016/02/donald-trump-libel-laws-219866> (last visited Mar. 7, 2019).

94. Adam Liptak, *Justice Clarence Thomas Calls for Reconsideration of Landmark Libel Ruling*, N.Y. TIMES (Feb. 19, 2019), available at <https://www.nytimes.com/2019/02/19/us/politics/clarence-thomas-first-amendment-libel.html> (last visited Mar. 7, 2019).

95. Charles & O’Neill, *supra* note 24.

96. *Id.*

97. RonNell Andersen Jones & Lisa Grow Sun, *Enemy Construction and the Press*, 49 ARIZ. ST. L.J. 1301 (2017).

98. Charles & O’Neill, *supra* note 24.

that the media are “outsiders,” unworthy of constitutional protection.⁹⁹ These attempts to construct an enemy of the media and disable press freedom are ultimately motivated by the need to cover up crime or corruption, most often taking the form of actual human rights abuses.¹⁰⁰ With the press limited in their role as a “watchdog,” such evils are more likely to succeed.

Six notable leaders who have used these common tactics to undercut the press are Adolph Hitler, circa Nazi Germany; Joseph Stalin and Vladimir Putin, in the Soviet Union and modern-day Russia; Rodrigo Duterte in the Philippines; Mohammed Bin Salman in Saudi Arabia; and Donald Trump in the United States.¹⁰¹ The following portion of this note outlines how each of these leaders have used nationalist rhetoric and signaled delegitimization to infringe upon press freedom in their respective countries. Ultimately, as I will go on to explain, a lack of crystalized customary international law of free press has enabled them all to go unchecked.

A. Adolph Hitler, WWII Nazi Germany

Adolph Hitler and his Nazi regime used some of the most powerful political rhetoric in history, despite its horrific consequences.¹⁰² The press in Germany was a strategic target of such rhetoric. *Lügenpresse*, or “lying press,” was a term appropriated by Hitler and the Nazis to weaken opposition to the regime, mostly accusing Jews, communists, and the foreign press of disseminating false news. The Nazi party also tightly controlled interpretation and access to alternative sources.¹⁰³ The use of such propaganda was crucial in “defining the enemy,” and establishing the press as a threat to the security of the state.¹⁰⁴ This ideology that the press was the enemy of the people has led free press scholars to identify *lügenpresse* as the predecessor to Trump’s modern-day “fake news.”¹⁰⁵

99. *Id.*

100. *Id.*

101. *Id.*

102. KLAUS FISHER, NAZI GERMANY: A NEW HISTORY 141 (1995).

103. *The Press in the Third Reich*, U.S. HOLOCAUST MEMORIAL MUSEUM, available at <https://encyclopedia.ushmm.org/content/en/article/the-press-in-the-third-reich> (Mar. 7, 2019) [hereinafter *Third Reich Press*].

104. *Id.*

105. Alexander Griffing, *A Brief History of ‘Lügenpresse,’ the Nazi era predecessor to Trump’s ‘Fake News,’* HAARETZ (Oct. 8, 2017), available at <https://www.haaretz.com/us->

Hitler also used legal methods to delegitimize the press in Germany. Shortly after coming to power, he established the Propaganda Ministry, in an effort to consolidate control over all forms of mass media.¹⁰⁶ Via the new agency, censorship laws worked to diminish the publication of opposing viewpoints.¹⁰⁷ The Ministry took control of the Reich Association of German Press, which regulated entry into the profession.¹⁰⁸ The new Editor's Law of October 4, 1933, "Schriftleitergesetz," excluded "non-Aryans" from working as journalists.¹⁰⁹ The law also enforced a prior restraint on publication of anything "calculated to weaken the strength" of the regime.¹¹⁰ Journalists or editors who failed to follow detailed content regulations from the Propaganda Ministry could be seen as "acting with intent to harm the Nazi party," and consequently sent to concentration camps.¹¹¹

Hitler's control of the German press was inarguably a fundamental piece in his strategy to achieve the systematic mass murders of millions of Jews during the Holocaust.¹¹² For Hitler, the carrying out of a genocidal operation, especially of such magnitude, required the submission and obedience of all citizens of the state.¹¹³ With the press being a so-called watchdog over such atrocities, the media in Nazi Germany be-

news/the-ominous-nazi-era-precedent-to-trump-s-fake-news-attacks-1.5438960 (last visited Mar. 7, 2019).

106. *Third Reich Press*, *supra* note 103. When Adolph Hitler took power in Germany in 1933, the Nazi party controlled less than three percent of the country's 4700 newspapers. By 1944, only 1100 of those 4700 papers remained. Of those 1100, only half were still in the hands of private or institutional owners, who operated in strict compliance with German press regulations. The Propaganda Ministry subsidized the production of the "People's Radio," designed with few dial positions and a limited range so as not to allow certain censored broadcasts. This way, Hitler's speeches were broadcast over the air, rather than covered by independent newspapers. By 1941, an estimated fifteen million radios had been sold in Germany. *See also Propaganda*, U.S. HOLOCAUST MEMORIAL MUSEUM, available at <https://www.ushmm.org/propaganda/transcripts/people-radio.html> (last visited Mar. 7, 2019).

107. *Control and opposition in Nazi Germany*, BBC, available at <https://www.bbc.com/bitesize/guides/z2p3k2p/revision/4> (last visited Mar. 7, 2019).

108. *Third Reich Press*, *supra* note 103.

109. *Editor's Law*, U.S. HOLOCAUST MEMORIAL MUSEUM, available at <https://www.ushmm.org/learn/timeline-of-events/1933-1938/editors-law> (last visited Mar. 7, 2019).

110. *Third Reich Press*, *supra* note 103.

111. *Id.*

112. *See* RON ROSENBAUM, *EXPLAINING HITLER: THE SEARCH FOR THE ORIGINS OF HIS EVIL* (1998).

113. ALAN BULLOCK, *HITLER AND STALIN: PARALLEL LIVES 325* (New York: Alfred A. Knopf, 1992).

came an obvious target in the effort to cover up one of the greatest human rights violations in world history.

*B. Joseph Stalin, Soviet Union; Vladimir Putin,
Modern-Day Russia*

Restrictions on free press in Russia date back to the beginning of the Soviet Union.¹¹⁴ Both Vladimir Lenin and Joseph Stalin employed nationalist rhetoric and legal delegitimization to undercut the press and coverage of the country's human rights issues.¹¹⁵ Under Vladimir Lenin in 1917, the Soviet Union passed the Decree on Press, which outlawed the publication of views that opposed the revolution.¹¹⁶ At the time, the Communist Party of the Soviet Union (CPSU) controlled appointment to media jobs, based on political and ideological considerations, not unlike the Nazi party in World War II Germany.¹¹⁷ Both leaders used the term *vrag naroda*, meaning "enemy of the people," to refer to anyone who disagreed with the ideology of the state, including the press.¹¹⁸ But Stalin took matters further by codifying such rhetoric into the country's penal code.¹¹⁹ Under Article 58.10, "anti-Soviet agitation and propaganda," the activity of spreading any anti-Soviet idea amongst the masses, was seen as a counter-revolutionary crime punishable by law.¹²⁰ Because of the broad definition of the crime, any opposition could be made to fall under its reach. Increased numbers of prosecutions under

114. *From Revolution to Glasnost: Soviet Press from 1917-1984*, MIAMI U. HAVIGHURST CTR. FOR RUSSIAN & POST-SOVIET STUD., available at <https://miamioh.edu/cas/academics/centers/havighurst/cultural-academic-resources/havighurst-special-programing/journalism-under-fire/journalism-history/index.html> (last visited Mar. 7, 2019) [hereinafter *From Revolution to Glasnost*].

115. See TIMOTHY SNYDER, *BLOODLANDS: EUROPE BETWEEN HITLER AND STALIN* (2010). Stalin has been condemned for allegations of genocide under his rule. Between widespread famine, ordered executions, and ethnic cleansing, one American historian credits Stalin as being ultimately responsible for nine million deaths in the Soviet Union. Nevertheless, and perhaps as a result of his control of the press during his rule, he is still revered by many Russian nationalists. See also ROBERT SERVICE, *STALIN: A BIOGRAPHY* (2004).

116. *Revolution to Glasnost*, *supra* note 114.

117. *Id.*

118. Veronika Bondarenko, *Trump keeps saying 'enemy of the people' – but the phrase has a very ugly history*, BUS. INSIDER (Feb. 22, 2017), available at <https://www.businessinsider.com/history-of-president-trumps-phrase-an-enemy-of-the-people-2017-2> (last visited Mar. 7, 2019).

119. Sarah Davies, *The Crime of "Anti-Soviet Agitation" in the Soviet Union in the 1930s*, 39 *CHAIERS DU MONDE RUSSE* 149 (1998).

120. *Id.*

the code correlated with periods of increased political and social repression in the country.

In modern-day Russia, nationalist rhetoric is regularly employed to stifle the press. Despite the Russian constitution providing for a free press, the country's current political climate has created a corrupt judicial system that enables authorities to harass journalists who expose abuses of power. Recently, officials have been using Russia's broad "anti-extremism" laws to suppress criticism of the country's involvement in Ukraine.¹²¹ Under the guise of concerns about "extremism," the government has blocked over 30,000 independent and opposition websites.¹²² On May 2, 2015, just a day before World Press Freedom Day, Vladimir Putin increased the maximum fine on Russian news organizations accused of inciting extremism.¹²³ With the same nationalist rhetoric, Putin passed a stringent law requiring non-governmental organizations to re-register with the government, subjecting themselves to stricter oversight.¹²⁴ The 2006 NGO law enabled authorities to deny registration to any organization whose activities "create a threat to the sovereignty, political independence, territorial integrity, national unity, unique character, cultural heritage, and national interests of the Russian Federation."¹²⁵ As a result, outside organizations like Human Rights Watch and Committee to Protect Journalists now have increased difficulty fighting for press rights within the country.¹²⁶

The Russian government has worked to delegitimize opposition media by monopolizing the country's major media outlets under state

121. *FSB Increasingly Involved in Misuse of 'Anti-Extremism' Laws, SOVA Says*, THE INTERPRETER (Mar. 29, 2015), available at <http://www.interpretermag.com/fsb-increasingly-involved-in-misuse-of-anti-extremism-laws-sova-says/> (last visited Mar. 7, 2019).

122. *Russia Profile*, FREEDOM HOUSE, available at <https://freedomhouse.org/report/freedom-press/2017/Russia> (last visited Mar. 7, 2019).

123. Howard Amos, *Putin Raises 'Extremism' Fines for Russian Media Tenfold*, THE MOSCOW TIMES (May 4, 2015), available at <https://themoscowtimes.com/articles/putin-raises-extremism-fines-for-russian-media-tenfold-46297> (last visited Mar. 7, 2019).

124. Saskia Brechenmacher, *Delegitimization and Division in Russia*, CARNEGIE ENDOWMENT FOR INT'L PEACE (May 18, 2017), available at <https://carnegieendowment.org/2017/05/18/delegitimization-and-division-in-russia-pub-69958> (last visited Mar. 7, 2019).

125. Katherin Machalek, *Factsheet: Russia's NGO Laws*, FREEDOM HOUSE (Feb. 6, 2013), available at https://freedomhouse.org/sites/default/files/2020-02/SR_Contending_with_Putins_Russia_PDF.pdf (last visited Aug. 2, 2019).

126. *History of Russian Journalism*, MIAMI U. HAVIGHURST CTR. FOR RUSSIAN & POST-SOVIET STUD., available at <https://miamioh.edu/cas/academics/centers/havighurst/cultural-academic-resources/havighurst-special-programing/journalism-under-fire/journalism-history/index.html> (last visited Aug. 1, 2019).

control and abusing defamation laws.¹²⁷ Difficult economic conditions have given the state a major financial advantage over small, privately-owned newspapers. The television networks with the largest audiences (NTV, First Channel, and RTR) are now under state control.¹²⁸ As a result of the high punitive damage awards and prison sentences associated with defamation laws, many journalists in the country have taken to self-censorship.

Putin's anti-watchdog motivation results from the country's involvement in a number of human right violations.¹²⁹ In 2014 the Russian military invaded Ukraine, and annexed Crimea. The UN believes that over 10,000 people have been killed in the Ukraine since the invasion.¹³⁰ Abroad, Putin has backed Bashar al-Assad's genocide in Syria.¹³¹ The Kremlin's regime has conducted tens of thousands of airstrikes targeting civilian populations in Syria and has been accused of committing war crimes in Aleppo.¹³² The Russian government has also persecuted its own citizens for religious beliefs and sexual orientation.¹³³ In Chechnya, security officials detained and tortured dozens of gay male citizens as a part of an anti-gay "purge."¹³⁴ And the press is arguably a targeted minority itself. Journalism is a dangerous trade in Russia.¹³⁵ It is estimated that more than thirty-four Russian journalists have been killed since 2000, with questionable causes of death such as falling out windows or allegations of suicide.¹³⁶ Putin's track record of human rights violations makes for an obvious agenda against the media who seek to hold his regime accountable.

127. *Id.*

128. *Id.*

129. *Helsinki Summit: A Review of Vladimir Putin's Record of Human Rights Violations and Attacks on Democratic Institutions*, HUM. RTS. FIRST, available at <https://www.humanrightsfirst.org/sites/default/files/factsheet-Putin-July-2018.pdf> (last visited Aug. 1, 2019).

130. *Id.*

131. *Id.*

132. *Id.*

133. *Russia, Events of 2017*, HUM. RTS. WATCH, available at <https://www.hrw.org/world-report/2018/country-chapters/Russia> (last visited Aug. 1, 2017).

134. *Id.*

135. Scott Simon, *Why Do Russian Journalists Keep Falling?*, NPR (Apr. 21, 2018), available at <https://www.npr.org/2018/04/21/604497554/why-do-russian-journalists-keep-falling> (last visited Aug. 1, 2019).

136. *Id.*

C. Rodrigo Duterte, Philippines

In 2016, Rodrigo Duterte was elected as President of the Philippines after a promising campaign to end the country's rampant drug crimes.¹³⁷ During his two years in office, the country's media outlets have worked to document Duterte's brutal war on drugs as the government has released very little information about the number of killings, under the premise of national security.¹³⁸ In his own form of nationalist rhetoric, he has called opposition reporters "traitors," claiming that they are not "true Filipinos."¹³⁹ The environment has become so hostile that Duterte has said that "corrupt" journalists "are not exempt from assassination."¹⁴⁰ As a result of such rhetoric, violent attacks against journalists, including two murders in 2016, usually go unpunished.¹⁴¹

Since Duterte took power, the government has used a three predominant methods to delegitimize the media in the Philippines; verbal assaults, social media attacks, and threats to revoke groups' licenses or invade their commercial interests.¹⁴² While Duterte perpetuates accusations of "fake news," his own campaign reportedly spent \$200,000 on internet "trolls" to attack critics and spread pro-government propaganda that appears as legitimate news.¹⁴³ Police have been known to make unexpected stops into reporting bureaus, such as Reuters, to check reporters' credentials.¹⁴⁴ Duterte has also targeted certain outlets, such as Rappler, and banned its journalists from reporting at the presidential palace.¹⁴⁵

137. Austin Ramzy, *Philippines' New President, Rodrigo Duterte, Vows Tough Stance on Crime*, N.Y. TIMES (June 30, 2016), available at <https://www.nytimes.com/2016/07/01/world/asia/philippines-duterte.html?searchResultPosition=87> (last visited Aug. 1, 2019).

138. Shawn Crispin, *Mission Journal: Duterte leads tri-pronged attack on press amid condemnation of controversial policies*, COMMITTEE TO PROTECT JOURNALISTS (July 5, 2018), available at <https://cpj.org/blog/2018/07/mission-journal-duterte-leads-tri-pronged-attack-o.php> (last visited Aug. 1, 2019).

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. Nyshka Chandran, *'Fake news' can be very dangerous, and events this year in Asia proved it*, CNBC (Dec. 25, 2017), available at <https://www.cnbc.com/2017/12/25/fake-news-was-a-weapon-in-asia-in-2017.html> (last visited Aug. 1, 2019).

144. Crispin, *supra* note 138.

145. *Id.*

Rappler, an online news site, has become a prominent source of information for the readers in the Philippines.¹⁴⁶ The cite is known for its vigilant reporting on the death toll of Duterte's drug war, and so Duterte has gone to extreme legal lengths to silence the company.¹⁴⁷ In late 2018, Rappler CEO Maria Ressa was formally indicted on multiple counts of tax evasion.¹⁴⁸ Earlier in that same year, the Philippines Securities and Exchange commission revoked the outlet's registration on the basis that it had violated foreign-ownership rules.¹⁴⁹ Under the constitution, media companies in the Philippines cannot be owned by a foreign entity.¹⁵⁰ The charges against Rappler and Ressa appear to be politically motivated, in an attempt to send a message to the outlet to stop reporting on the war.

The International Criminal Court has begun a preliminary investigation into whether Duterte's drug war has resulted in crimes against humanity.¹⁵¹

D. Mohammed Bin Salman, Saudi Arabia

While the Kingdom of Saudi Arabia currently considers itself to be experiencing a modernizing revolution, press freedom has taken hits as new Crown Prince Mohammed Bin Salman cracks down on coverage that conflicts with the narrative of a new, less repressive state.¹⁵² The Kingdom is one of the most restrictive press environments in the world, landing at number 169 of 180 countries on the RSF press freedom in-

146. John Geddie & Martin Perry, *INSIGHT - The Philippine journalists taking the rap in Duterte's latest war*, REUTERS (Mar. 28, 2019), available at <https://www.reuters.com/article/philippines-media/insight-the-philippine-journalists-taking-the-rap-in-dutertes-latest-war-idUSL8N21607C> (last visited Aug. 1, 2019).

147. *Id.* See also Julia Webster, *Libel Trial Opens Of Maria Ressa, Philippine Journalist Critical of President Duterte*, TIME (July 23, 2019), available at <https://time.com/5632472/maria-ressa-duterte-philippines/> (last visited Aug. 1, 2019).

148. Joshua Berlinger, *Maria Ressa, Rappler formally indicted by the Philippines on tax evasion charges*, CNN (Nov. 29, 2018), available at <https://www.cnn.com/2018/11/29/asia/maria-ressa-rappler-intl/index.html> (last visited Aug. 1, 2019).

149. Darryl Coote, *Rappler CEO and Duterte critic arrested over foreign ownership charges*, UPI (Mar. 29, 2019), available at https://www.upi.com/Top_News/World-News/2019/03/29/Rappler-CEO-and-Duterte-critic-arrested-over-foreign-ownership-charges/6461553831214/ (last visited Aug. 1, 2019).

150. *Id.*

151. *Id.*

152. Editorial Board et. al., *Saudi Arabia's attacks on free press continue*, THE BLADE (Oct. 15, 2018), available at <https://www.toledoblade.com/opinion/editorials/2018/10/15/saudi-arabia-journalists-marwan-al-mureisi-prince-salman/stories/20181015011> (last visited Aug. 1, 2019).

dex.¹⁵³ Despite its already restrictive environment, arrests and disappearances of journalists have increased under Bin Salman.¹⁵⁴ In October 2018, the country made international headlines when ex-Saudi insider and contributing *Washington Post* columnist Jamal Khashoggi was murdered inside the Saudi consulate in Istanbul.¹⁵⁵ Khashoggi was notorious for his critical coverage of the new regime.¹⁵⁶ The United States' Central Intelligence Committee obtained phone calls in which Crown Prince Mohammed Bin Salman ordered to "silence the journalist as soon as possible."¹⁵⁷ Khashoggi had been critical of the new regime under Salman, making him an obvious target of the Crown Prince.¹⁵⁸

In common with other authoritarian leaders, Mohammed Bin Salman's crackdown on the media seems motivated by the pressure to cover up human rights violations. Human rights advocacy groups have accused the Crown Prince of violations of international law related to the country's involvement in the armed conflict in Yemen.¹⁵⁹ The Saudi-led coalition has launched numerous airstrikes on Yemeni civilians, hitting homes, schools, mosques, and markets, and amounting to possible war crimes.¹⁶⁰ Rights groups allege that Saudi authorities have also committed abuses against their own citizens, like detaining and torturing Saudi female activists. Since 2017, Saudi officials under Bin Salman have made a sweep of arrests targeting critics in an effort to shift control of the country's narrative and attract foreign investors.¹⁶¹

153. 2018 *World Press Freedom Index*, *supra* note 28.

154. *Id.*

155. *Khashoggi*, *supra* note 60.

156. *Id.*

157. *Saudi Prince 'ordered Jamal Khashoggi be silenced' in call heard by CIA*, NEWS CORP. AUSTL. NETWORK (Nov. 23, 2018), available at <https://www.news.com.au/world/europe/saudi-prince-ordered-jamal-khashoggi-be-silenced-in-call-heard-by-cia/news-story/23e4ca113604dac96f921420c52df183> (last visited Aug. 2, 2019).

158. *Id.*

159. *G20: Saudi Crown Prince Faces Legal Scrutiny*, HUM. RTS. WATCH (Nov. 26, 2018), available at <https://www.hrw.org/news/2018/11/26/g20-saudi-crown-prince-faces-legal-scrutiny> (last visited Aug. 2, 2019).

160. *Id.*

161. Ishaan Tharoor, *Don't be fooled by the comforting rhetoric coming from Saudi Arabia's Crown Prince*, WASH. POST (Nov. 8, 2017), available at https://www.washingtonpost.com/news/made-by-history/wp/2017/11/08/dont-be-fooled-by-the-comforting-rhetoric-coming-from-saudi-arabias-crown-prince/?utm_term=.d44d1f23360c (last visited Aug. 1, 2019).

F. Donald Trump, United States

Although Trump's offenses certainly do not rise to the level of human rights violations, the horizon of press freedom in America looks dark. In the aftermath of the election of Donald Trump in 2016, the United States slid from thirty-seven to forty-five on the list of 180 countries and their relative statuses of press freedom.¹⁶² Historians and free press advocates have expressed concerns that his attitudes toward the media, and strategies to delegitimize them, resemble those of infamous dictators such as Hitler and Stalin.¹⁶³

But the tumultuous relationship between the President and the media in the United States predates Trump. John F. Kennedy regularly pushed back at the press, stating that national security was his "primary obligation," and so warranted significant limitations on what the government shared with the press.¹⁶⁴ Lyndon B. Johnson was "obsessed" with the media's coverage of the Vietnam War, with three televisions in the oval office, one tuned to each of the major broadcast networks.¹⁶⁵ He took critical coverage of the war so personally that he once accused CBS anchor Walter Cronkite of being out to get him.¹⁶⁶ He worked tirelessly to "manipulate, punish, and seduce" the media for its coverage of Vietnam so that more Americans would have a positive outlook on the country's involvement.¹⁶⁷ Richard Nixon used war and enemy terminology to characterize the press, writing in his memoir that he "considered the influential majority of the news media to be part of my political opposition" and that he "was prepared to have to do combat with the media."¹⁶⁸ He regularly referred to the press as the "enemy," and

162. 2016 *World Press Freedom Index*, REPS. WITHOUT BORDERS, available at <https://rsf.org/en/ranking> (last visited Aug. 1, 2019).

163. Jones & Sun, *supra* note 97.

164. John F. Kennedy, Address to the American Association of Newspaper Editors (Apr. 20, 1961) (recording archived at the University of Virginia's Miller Center), available at <https://millercenter.org/the-presidency/presidential-speeches/april-20-1961-address-american-association-newspaper-editors> (last visited Aug. 2, 2019).

165. Chester Pach, *Lyndon Johnson's Living Room War*, N.Y. TIMES (May 30, 2017), available at <https://www.nytimes.com/2017/05/30/opinion/lyndon-johnson-vietnam-war.html> (last visited Aug. 3, 2019).

166. *Id.*

167. BRIGITTE LEBENS NACOS, THE PRESS, PRESIDENTS, AND CRISES 82 (1990); see also JOHN TEBBEL & SARAH MILES WATTS, THE PRESS AND THE PRESIDENCY 489 (1985) (noting that Johnson's behavior toward the press left "scarcely one redeeming feature to permit a charitable conclusion.").

168. Debra Gersh Hernandez, *Nixon and the Press*, 127 EDITOR & PUBLISHER 82, 86 (1994).

went so far as to remove reporters out of the west wing of the White House and into different quarters to impede their observations.¹⁶⁹ Gerald Ford restricted access to the media, opting only to answer certain questions of his choosing.¹⁷⁰ Jimmy Carter's administration was known for overtly lying to the press about the president's whereabouts.¹⁷¹ Ronald Reagan's staff imposed bans on certain questions and restricted press access to appearances, which were also explicitly limited.¹⁷² George W. Bush called the media an "unrepresentative, irresponsible interest group."¹⁷³ But it was Barack Obama who pursued more criminal charges against whistleblowers than all previous presidents combined. The Obama administration seized records of over twenty Associated Press phone lines and was highly critical of major outlets' use of confidential, anonymous sources.¹⁷⁴

Yet it is Donald Trump's relationship with the media that seems to have risen to a new extreme. Unlike the seemingly petty antics of past presidencies, Trump's tactics more closely resemble the two major themes anti-press dictators around the globe. First, Trump has used extreme nationalist rhetoric to demonize the media, repeatedly referring to journalists as the "enemy of the people." He has infamously coined the phrase "fake news," and incites animosity toward media coverage at his events, often pointing to reporters and calling them various insults. At rallies, his supporters have been heard yelling "*lugenpresse*," a derogatory anti-media phrase originally used by Hitler and the Nazis during World War II.¹⁷⁵ Trump has accused mainstream media outlets, such as

169. WILLIAM E. PORTER, *ASSAULT ON THE MEDIA: THE NIXON YEARS* 65 (1976).

170. JOSEPH C. SPEAR, *PRESIDENTS AND THE PRESS: THE NIXON LEGACY* 4 (1984).

171. *Id.* at 3 (describing how Carter's staff lied to the media by claiming Carter "was at the executive mansion when he was in fact at the opera" and how Carter had Secret Service lead the press "on wild goose chases in Carter's car while Carter sped off in the opposite direction in a different vehicle.").

172. *Id.* at 4-5, 10 (describing administration efforts to have "known friendlies" at news conferences and to drown out questions by starting the engine of the presidential helicopter before the President appeared).

173. Jon Marshall, *Nixon Is Gone, but His Media Strategy Lives On*, *THE ATLANTIC* (Aug. 4, 2014), available at <http://www.theatlantic.com/politics/archive/2014/08/nixons-revenge-his-media-strategy-triumphs-40-years-after-resignation/375274/> (last visited Aug. 1, 2019); see also Ken Auletta, *Fortress Bush*, *NEW YORKER* (Jan. 19, 2004), available at <https://www.newyorker.com/magazine/2004/01/19/fortress-bush> (last visited Aug. 1, 2019) (discussing the distance that the George W. Bush Administration maintained with the press because of Bush's view that the press was not on his side).

174. Marshall, *supra* note 173.

175. *Id.*

the *New York Times*, of working against the security of the nation.¹⁷⁶ In the wake of the September 11th attacks on the World Trade Center, “national security” was used as a mechanism to compromise other basic liberties, including but not limited to press access and release of government information. The courts have been willing to accept the argument that national security requires some exceptions to basic liberties. With the media at a historically weak point, it is increasingly likely that the courts would accept the argument when assessing freedom of the press. In further attempts to paint the enemy as a threat that needs to be held accountable, his administration has sent out a “Mainstream Media Accountability Survey,” which asked participants to answer loaded questions, such as whether the media reports “unfairly” or spreads “false stories.”¹⁷⁷ Efforts like this are more passive-aggressive, yet could pose a larger threat than mere use of anti-press rhetoric, because they ask the public to engage in the anti-press narrative.¹⁷⁸

Second, by branding the press as the enemy of the people, Donald Trump has positioned American society to accept the stripping of legal and constitutional protections that the press currently enjoys. Since being elected, he has made clear his intentions to open up libel laws, which would make it easier to sue journalists and publications.¹⁷⁹ This would require altering the court’s actual malice standard from *Sullivan*. Of course, the executive cannot do this unilaterally. But the threat exists, as Supreme Court Justice Clarence Thomas recently called for the Court to revisit the standard in *Sullivan*, claiming that it has no basis in the constitution as it was understood by the original framers of the document.¹⁸⁰ In a concurring opinion on appeal involving a libel claim against a public figure,¹⁸¹ Thomas wrote that discretion should be left to

176. See Peter Baker, *Trump Says He Has ‘Complete Power’ to Pardon*, N.Y. TIMES (July 22, 2017), available at <https://www.nytimes.com/2017/07/22/us/politics/donald-trump-jeff-sessions.html> (last visited Aug. 2, 2019) (In a tweet posted July 22, 2017, Trump accused the “failing *New York Times*” of foiling an attempt to capture wanted terrorist Al-Baghdadi, claiming that the paper had a “sick agenda over national security.”).

177. *Mainstream Media Accountability Survey*, GOP, available at <https://gop.com/mainstream-media-accountability-survey/> (last visited Jan. 31, 2019).

178. Jones & Sun, *supra* note 97.

179. Gold, *supra* note 93; see generally CHARLES J. GLASSER JR., INTERNATIONAL LIBEL AND PRIVACY HANDBOOK (Bloomberg Press, New York, 2009).

180. Liptak, *supra* note 94.

181. Patricia Montemurri, *Bill Cosby accuser from Detroit takes defamation suit to supreme court*, DETROIT FREE PRESS (May 4, 2018), available at <https://www.freep.com/story/news/2018/05/04/detroit-bill-cosby-accuser-kathy-mckee-supreme-court/577468002/> (last visited Mar. 7, 2019).

the states to decide an “acceptable balance between encouraging robust public discourse and providing a meaningful remedy for reputational harm” – a suggestion that severely conflicts with the high standard currently employed via *Sullivan*.¹⁸² Trump himself has been more specific about his intentions for the standard. At a campaign rally in Fort Worth, Texas, he said: “I’m going to open up our libel laws so when they write purposely negative and horrible and false articles, we can sue them and win lots of money.”¹⁸³ Ironically, what the President describes as desirable would require no change to current law. Any publication involving a legitimate reckless disregard for the truth would be successfully sued under current defamation standards.¹⁸⁴ Trump has been a party in fourteen such defamation cases to date,¹⁸⁵ but he has never been able to successfully meet the actual malice standard in a public trial court.¹⁸⁶ His seemingly personal agenda to loosen libel and defamation laws has earned him a reputation as a “libel bully.”¹⁸⁷ Whether or not he will actually achieve change, his ideology is a signal of delegitimization in itself, suggesting that current laws are too lax and allow journalists to get away with more than they should.¹⁸⁸

While the loosening of libel standards remains hypothetical, the consequences of high damages in Trump-era defamation suits are all too real. In 2016, Terry Bollea, known by his wrestling alias “Hulk Hogan,” sued Gawker Media for defamation, seeking a whopping \$100 million in damages.¹⁸⁹ The Gawker team had suspicions about the mo-

182. *Id.*

183. Gold, *supra* note 93.

184. Jonathan Turley, *Trump’s not being defamed. If he was, he wouldn’t need to change the libel laws.*, USA TODAY (Jan. 11, 2018), available at <https://www.usatoday.com/story/opinion/2018/01/11/trumps-not-being-defamed-if-he-wouldnt-change-libel-laws-michael-wolff-jonathan-turley-column/1021999001/> (last visited Mar. 7, 2019).

185. Nick Penzenstadler et al., *Donald Trump: Three decades, 4,095 lawsuits*, USA TODAY, available at <https://www.usatoday.com/pages/interactives/trump-lawsuits/> (last visited Mar. 3, 2019).

186. Susan E. Seager, *Donald Trump Is A Libel Bully But Also A Libel Loser*, MEDIA L. RESOURCE CTR., available at <https://www.medialaw.org/component/k2/item/3470-donald-j-trump-is-a-libel-bully-but-also-a-libel-loser> (last visited Mar. 3, 2019).

187. *Id.*

188. Charlie Savage & Eileen Sullivan, *Leak Investigations Triple Under Trump, Sessions Say*, N.Y. TIMES (Aug. 4, 2017), available at <https://www.nytimes.com/2017/08/04/us/politics/jeff-sessions-trump-leaks-attorney-general.html> (last visited Mar. 3, 2019) (under President Trump, Department of Justice investigations into leaked information have tripled.).

189. Andrew Ross Sorkin, *Peter Thiel, Tech Billionaire, Reveals Secret War With Gawker*, N.Y. TIMES (May 25, 2016), available at <https://www.nytimes.com/2016/05/26/>

tives behind the suit, particularly after Bollea selectively dropped claims of Intentional Infliction of Emotional Distress, thereby preventing Gawker's insurance company from paying any of the damages.¹⁹⁰ It became clear that the lawsuit was a blatant attempt to bring down the media company and its executives – an agenda of Silicon Valley mogul Peter Thiel's ever since Gawker had published articles outing Thiel of being gay. It was later revealed that Thiel had paid all of Bollea's legal fees – and not for nothing. The jury sided with Bollea and the Florida State Court judge ordered Gawker and its executives to pay over \$140 million in damages.¹⁹¹ The outlet was forced to file for bankruptcy and was later bought by Univision Communications.

Many in the journalism community felt the judgement had a chilling effect on freedom of the press. First Amendment Attorney Floyd Abrams felt Gawker would be the first of many:

The reason to save Gawker is not because Gawker was worth saving. The reason to save it is that we don't pick and choose which sort of publications are permissible. Because once we do, it empowers the government to limit speech in a way that ought to be impermissible even the most disagreeable speech is, as a general matter, fully protected by the First Amendment.¹⁹²

Abrams' floodgate suggestion proved to be right, as defamation cases seeking egregiously high damages awards remain a popular tactic in silencing media outlets. In early 2019, Covington Catholic High School teen Nicholas Sandmann brought charges against the *Washington Post*, seeking \$250 million in damages.¹⁹³ Sandmann's legal team say the total is the same amount that Amazon founder Jeff Bezos paid for the paper in 2013. Although many such lawsuits are a longshot, the potential consequences for defendant media outlets are detrimental. And in a perfect storm, the current economic situation in the United States has further prevented journalists from pursuing First Amendment claims as they have in the past. A recent survey of editors at the na-

business/dealbook/peter-thiel-tech-billionaire-reveals-secret-war-with-gawker.html (last visited Mar. 3, 2019).

190. *Gawker Media, LLC v. Bollea*, 129 So. 3d 1196 (Fla. Dist. Ct. App. 2014); *Gawker Media, LLC v. Bollea*, 170 So. 3d 125 (Fla. Dist. Ct. App. 2015).

191. *Id.*

192. *NOBODY SPEAK: TRIALS OF A FREE PRESS* (Netflix & First Look Media 2017).

193. Sophia Barnes, *Nick Sandmann's Lawyers Sue Washington Post for \$250 Million*, NBC WASH. (Feb. 20, 2019), available at <https://www.nbcwashington.com/news/local/Nick-Sandmanns-Lawyers-Sue-Washington-Post-for-250M-506091181.html> (last visited Mar. 3, 2019).

tion's major news organization showed that more than half felt that news organizations are no longer prepared to go to court to preserve First Amendment freedoms.¹⁹⁴

Trump has also expressed opposition to current laws that prevent large media mergers. As have anti-press leaders of other regimes, Trump seems to idealize the possibility of consolidating networks, particularly conservative ones that are more likely to promote positive coverage of his administration.¹⁹⁵

During his presidency, Trump has limited individual reporters' access to White House press briefings, blacklisting multiple outlets including the *Washington Post*, *Des Moines Register*, *Buzzfeed*, and *Politico* from getting press credentials.¹⁹⁶ In November 2018, CNN finally sued the President after the White House revoked a reporter's press pass.¹⁹⁷ Several media companies filed amicus briefs, including Fox News, NBC, and the Associated Press.¹⁹⁸ Presiding Judge and Trump-appointed Jim Kelly avoided the substantive First Amendment question, ruling instead on due process in favor of CNN.¹⁹⁹ He did, however, make a point during arguments to suggest that subjectively banning certain reporters from the press room was not likely to survive the First

194. Eric Newton, *A News Industry 'Less Able' to Defend Freedom*, JOHN S. & JAMES L. KNIGHT FOUND. (Apr. 21, 2016), available at <https://www.knightfoundation.org/articles/news-industry-less-able-defend-freedom> (last visited Aug. 1, 2019).

195. Scott Nover, *The Sudden Demise of Sinclair's Merger with Tribune*, *The Atlantic* (July 25, 2018), available at <https://www.theatlantic.com/politics/archive/2018/07/the-sudden-demise-of-sinclairs-merger-with-tribune/566099/> (last visited Mar. 2, 2019) (Media giants like the conservative Sinclair Broadcasting group have expressed intent to buy out other, smaller networks like Tribune Media. The FCC was skeptical of a Sinclair deal, which involved plans for the company to control certain stations via sidecar agreements, in some instances, without even owning them. The deal was ultimately prevented by the Communication Act, a 1934 piece of legislation put in place to limit control of smaller affiliation stations by large broadcasting entities. The localism principle at the heart of the Act aimed to assure that small licensees would serve their local communities. President Trump expressed his disappointment when the deal fell through, tweeting that it would have been "a great and much needed conservative voice for and of the people.").

196. Paul Farhi, *CNN, New York Times, Other Media Barred from White House Briefing*, *WASH. POST* (Feb. 24, 2017), available at https://www.washingtonpost.com/lifestyle/style/cnn-new-york-times-other-media-barred-from-white-house-briefing/2017/02/24/4c22f542-fad5-11e6-be05-1a3817ac21a5_story.html?utm_term=.1df8da46c5fd (last visited Mar. 2, 2019).

197. *Cable News Network, Inc. v. Trump*, No. 1:18-cv-02610-TJK (D.C.C. Nov. 13, 2018).

198. *Id.*

199. *Id.*

Amendment.²⁰⁰ In response to the ruling, the Trump White House released a list of four rules for press room reporters;²⁰¹ (1) reporters will ask a single question and then will yield the floor to the other journalists, (2) follow-up questions will be permitted at the discretion of the president or other white house officials taking questions, (3) “yielding the floor” is defined as “physically surrendering” the microphone (4) failure to abide by any of the rules may result in suspension or revocation of the journalists’ hard pass.²⁰²

Unlike the presidents before him, Donald Trump has a unique and relatively new tool that has further helped him to perpetuate anti-press attitudes – social media. With access to Twitter, which he frequently uses, the President no longer has to rely on the media to speak to the people. There is no incentive to maintain a positive working relationship with the press, because the President can speak to the people directly and unfiltered; vice versa, because citizens no longer have to rely on the media to hear from the President and other leaders, the media is much more susceptible to enemy construction than in the past.²⁰³

While other anti-press totalitarian leaders have employed these strategies in an effort to cover up human rights violations, it appears that Trump’s motivations may be linked to his involvement in white collar crimes. The President has taken especially poorly to the media’s hunt for his tax returns, and interviews with ex-insiders such as former FBI Director James Comey. The media has broken controversial stories like child internment camps at the southern border, and even personal affairs such as Trump’s extramarital relationship with porn star Stormy Daniels.

These offenses are inarguably less serious than the human rights violations of leaders such as Hitler, Stalin, and Bin Salman. But many feel that Trump’s anti-media crusade is a test. If he can successfully construct an enemy of the media and strip constitutional protections from journalists without check, minorities like Muslims and Mexican immigrants, or even the American judiciary could be future targets. The tactic of delegitimization could be applied to a number of other crucial

200. *Id.*

201. Cheyenne Haslett, *White House drops effort to suspend press pass for CNN’s Jim Acosta; outlines rules to reporters*, ABC NEWS (Nov. 19, 2018), available at <https://abcnews.go.com/Politics/white-house-jim-acostas-press-pass-cnn-seeks/story?id=59291734> (last visited Mar. 2, 2019).

202. *Id.*

203. *Id.*

democratic mechanisms. Trump's attacks on the press ultimately interfere with the security of the democracy itself, which is dependent upon the strength of the media in providing citizens with information about their government.²⁰⁴ The decline of press freedom in the United States has shifted the country away from its position as a leader of press freedom, and magnified similarities to anti-media dictatorships. If the United States fails to safeguard its own democracy, the backsliding of democracy and press freedom on a global scale could only worsen.

IV. A CHECK TO POWER: CUSTOMARY INTERNATIONAL LAW AS A PILLAR OF PRESS FREEDOM

A. *A Human Rights Crisis*

As of 2018, 251 journalists remain imprisoned, internationally.²⁰⁵ Some of the highest numbers of incarcerations come from Turkey, China, Eritrea, Egypt, and North Korea.

In Malta, blogger Daphne Caruana Galizia was killed by a car bomb after her coverage of ties between government officials and big businesses amounting to corrupt concentrations of wealth.²⁰⁶ The investigation into the order of her killing is being done by the same officials that Galizia wrote about and criticized. In response to the murder, European Commission spokesman Margaritis Schinas called for journalists' rights to "ask uncomfortable questions and report effectively" to be "guaranteed at all times."²⁰⁷

Victoria Marinova, a Bulgarian journalist who had been reporting on corruption involving European union funds, was raped and murdered in the town of Ruse in early October.²⁰⁸ The European Federation of

204. See Emily Howie, *Protecting the human right to freedom of expression in international law*, 20 INT'L J. SPEECH-LANGUAGE PATHOLOGY 12, 12-15 (2018).

205. *Imprisoned 2018*, Committee to Protect Journalists (n.d.), available at https://cpj.org/data/imprisoned/2018/?status=Imprisoned&start_year=2018&end_year=2018&group_by=location (last visited Mar. 3, 2019).

206. Joanna Kakissis, *Who Ordered The Car Bomb That Killed Matlese Journalist Daphne Caruana Galizia?*, NPR (July 22, 2018), available at <https://www.npr.org/2018/07/22/630866527/mastermind-behind-malta-journalist-killing-remains-a-mystery> (last visited Mar. 2, 2019); see also INVICTA: THE LIFE AND WORK OF DAPHNE CARUANA GALIZIA (Joseph A. Debono & Caroline Muscat eds. 2017).

207. Kakissis, *supra* note 206.

208. *Bulgarian journalist Viktoria Marinova killed in Ruse*, BBC (Oct. 8, 2018), available at <https://www.bbc.com/news/world-europe-457779482> (last visited Mar. 2, 2019).

Journalists is now calling for increased protections for journalists, as they think the attack was an attempt to silence those in the profession.²⁰⁹

In Somalia, radio reporter Abdirizak Said Osman was stabbed to death after leaving his radio station on September 18.²¹⁰ Osman had recently done several reports for his radio show, *Voice of Peace*, about the decline in the security situation in the region, alluding to the terrorist methods used by the Islamist rebel group Al-Shabaab.²¹¹ UNESCO's Director-General condemned the attack and called for the perpetrators to be held accountable to assure that "others do not feel emboldened to attack the media."²¹²

After *Washington Post* writer Jamal Khashoggi was murdered in Istanbul, many countries did what they could to send a message to Saudi Arabia by pulling out of trade deals. Countries like Germany and Denmark banned weapon sales to Saudi Arabia in a statement against the murder.²¹³

As journalists around the globe are harassed, imprisoned, tortured, and even killed, it is clear that the current state of press freedom is violative of the basic ideology of human rights. The preamble of the Universal Declaration on Human Rights speaks to these ideals:

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law [...]

209. *Id.*

210. *Radio reporter stabbed to death in central Somalia*, REPORTERS WITHOUT BORDERS (Sept. 20, 2018), available at <https://rsf.org/en/news/radio-reporter-stabbed-death-central-somalia> (last visited Mar. 2, 2019).

211. *Id.*

212. *Director-General condemns attack on radio reporter Abdirizak Said Osman in Somalia*, UNESCO (Sept. 20, 2018), available at <https://en.unesco.org/news/director-general-condemns-attack-radio-reporter-abdirizak-said-osman-somalia> (last visited Mar. 2, 2019).

213. Darin Graham, *Denmark suspends arms sales to Saudi Arabia – but which European countries continue to supply it?*, EURONEWS (Nov. 23, 2018), available at <https://www.euronews.com/2018/11/22/denmark-suspends-arms-sales-to-saudi-arabia-but-which-european-countries-continue-to-suppl> (last visited Mar. 2, 2019).

[...] Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom [...]²¹⁴

B. Customary International Law as a Mechanism

Press freedom's biggest offenders, both past and present, have gone unchecked due to gaps in international law and lack of enforceability. If the international community wishes to protect a free press, there must be international law stronger than the force of individual anti-press strongmen. Current declarations are non-binding, and treaties fall short of implicating numerous offending countries. Therefore, we must turn to custom as a source of international law that would serve to protect press freedom.²¹⁵

1. UDHR and ICCPR as Widespread State Practice

The first element of any customary international law is widespread state practice. Some legal scholars would argue that widespread state practice of freedom of expression already exists, supported by recognition in the Universal Declaration on Human Rights, and implemented via the International Covenant on Civil and Political Rights.²¹⁶

Indeed, the UDHR does seemingly recognize the right to a free press in Article 19. But the declaration is exactly that – a declaration. The Declaration is not a legal instrument, and it would be a far cry to characterize some of its provisions as representative of legal rules. Alternatively, some of its provisions either constitute general legal principles or represent fundamental humanitarian considerations.²¹⁷

There is no force of law behind the protected rights outlined in the UDHR, and so it can hardly be said that those rights are protected at all.

214. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR].

215. Michael Akehurst, *Custom as a Source of International Law*, 47 BRITISH Y.B. INT'L L. 1, 1-53 (1976).

216. *Freedom of Expression as a Human Right*, CTR. FOR L. & DEMOCRACY (2015), available at <http://www.law-democracy.org/live/wp-content/uploads/2015/02/foe-briefing-notes-1.pdf> (last visited Mar. 1, 2019). See also Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195; Convention on the Rights of a Child, G.A. Res. 44/25, U.N. GAOR (1989); and Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, G.A. Res. 61/106, 76th plen. mtg., U.N. Doc A/RES/61/106, each of which outlines freedom of expression.

217. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 570 (1990).

Because the declaration is not a treaty, it does not imply any legal obligation. While member nations appear to recognize the right to a free press, the provisions are open to interpretation, which often allows offenders of press freedom to justify “necessary exceptions.” A common example of this is the use of “national security” concerns to justify censorship and imprisonment of journalists. And, under Article 2, any nation’s use of national security concerns as an instrument to infringe on journalists’ rights would be out of reach of a UN tribunal’s jurisdiction.²¹⁸ The UDHR, alone, does not serve as legitimate legislation protecting press freedom. However, the declaration of freedom of expression as a human right under Article 19 supports the idea that respect of a free press is a widespread state practice.

Slightly stronger than the UDHR is the International Covenant on Civil and Political Rights. Today, over 172 countries are party to the multilateral treaty, which outlines the right to a free press in Article 19, Section 2:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.²¹⁹

A treaty such as the ICCPR is stronger than a declaration with regard to enforceability.²²⁰ However, it is only binding on the countries that are a party to the resolution.²²¹ Two notable offenders of press freedom – Myanmar and Saudi Arabia – are not parties to the ICCPR.²²² Furthermore, under Article 2 of the resolution, the parties are ultimately responsible for assuring that any violation of the treaty receives an “effective” remedy, determined by “competent” judicial, administrative, or legislative authorities.²²³ It is safe to assume that, even where a country is a party, the treaty may fall short of its desired effect because of this

218. UDHR, *supra* note 214, at art. 2, § 7 (“Nothing contained in the present charter should authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state [. . .]”).

219. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, entered into force Mar. 23, 1976 [hereinafter ICCPR].

220. Kaiutan Venerando et al., *Enhancing access to justice through the concert between formal and informal justice*, JUSTICA ENQUANTO RESPONSABILIDADE (2014), available at <http://sinus.org.br/2014/wp-content/uploads/2013/11/AU.pdf> (last visited Mar. 2, 2019).

221. Malcolm Shaw, *Treaty*, ENCYCLOPEDIA BRITANNICA, available at <https://www.britannica.com/topic/treaty> (last visited Mar. 2, 2019).

222. ICCPR, *supra* note 219.

223. *Id.* at art. 2.

discretion. Nevertheless, Article 19 of the ICCPR supplements the UDHR in demonstrating a widespread acceptance of press freedom as a human right.²²⁴

2. *Opinio Juris in the Form of Political and Economic Influence*

The second element necessary to establish customary international law is *opinio juris*, or the subjective belief on behalf of a state that it is bound to the law in question.²²⁵

Under traditional theory, *opinio juris* would come in the form of a rule or a law. A state in violation would be subject to judicial decision by a court of law. In application, there are such legal avenues for persons charging states with violating the principles of press freedom. But as a whole, the international legal framework protecting the press presents noticeable gaps. For example, treaties allow plaintiffs to bring suit before a relative tribunal. But, as we have seen with the ICCPR, treaties may only reach the parties who ratify them. This is a problem for journalists like Wa Lone and Kyaw Soe Oo, the two Reuters journalists currently serving a 7-year prison sentence in Myanmar. As ideal plaintiffs, they cannot utilize the ICCPR's Article 19 or bring charges against Myanmar because the country is not a party to the treaty and has not consented to suit.²²⁶ As another legal avenue, many states fall under the jurisdiction of a regional human rights court. Plaintiffs may bring press freedom challenges to the appropriate court of their region. However, some countries and territories fall outside of any regional court jurisdiction. A glaring example of this is the lack of a human rights court or commission for the region of Asia.²²⁷ Lastly, even where a regional court may take the case and issue a decision, these courts are often lame in application of scrutiny and lack methods of enforceability. For example, the European Court on Human Rights actively handles defamation cases, including those coming out of Russia. But its failure to closely circumscribe "national security" exceptions has left gaping deference to the state.²²⁸ If any of the courts, international or domestic, with jurisdiction over libel, defamation, or other anti-press mechanism

224. See generally Howie, *supra* note 204.

225. Jo Lynn Slama, *Opinio Juris in Customary International Law*, 15 OKLA. CITY U. L. REV. 603, 606.

226. *Id.*

227. *Id.*

228. Convention for the Protection of Human Rights and Fundamental Freedoms, Apr. 11, 1950, E.T.S. No. 5, 213 U.N.T.S. 221, entered into force Mar. 9, 1953 [hereinafter European Convention on Human Rights].

cases accept vague “national security” exceptions with no standard to meet, the current dilution of press freedoms will continue to occur. Furthermore, Russia recently indicated that it was considering withdrawing from the ECHR, citing that many of the court’s decisions conflicted with the country’s interests.²²⁹ Recognizing these gaps, the current legal avenues for press freedom litigation are not sufficient to fulfill the *opinio juris* element, and so they have fallen short of establishing customary international law.

Because existing legal framework has failed to establish any real understanding of accountability among offenders, we should instead look to the states to exercise political and economic force in the wake of violations of press freedom. As we saw with the brutal murder of Jamal Khashoggi, dictatorships like Saudi Arabia are currently enabled to act with impunity without consequence from political or economic allies, like the U.S. In the Trump era, the U.S. has tilted away from holding other nations accountable, and instead remains silent or even seemingly endorses the behavior of anti-press regimes. The President refrained from commenting on Crown Prince Mohammed Bin Salman’s involvement in ordering the journalist’s killing. The Trump administration has also expressed strong support for Russia. The President has made it a priority to mend relations between the two countries, despite a series of disappearances of prominent critics of the Russian government, blatant attacks on its citizens, and alleged interference in the 2016 United States presidential election. In fall of 2018, Russia sued the *New York Times* for failing to disclose financial information under its “Foreign Agents” law.²³⁰ Trump has waged numerous Twitter wars with the *Times*,²³¹ but did not comment on the Russian suit. As the leader of the free world, the President’s failure to respond to these offenses sends the message to authoritarian governments that the U.S. does not value a global right to free press.²³²

229. Andrew Griffin, *Russia could withdraw from European Convention on Human Rights, state news agency RIA reports*, THE INDEP. (Mar. 1, 2018), available at <https://www.independent.co.uk/news/world/europe/russia-echr-human-rights-european-convention-putin-kremlin-eu-a8234086.html> (last visited Mar. 3, 2019).

230. *Russia uses ‘foreign agents’ law to hit independent outlet with massive fine*, COMMITTEE TO PROTECT JOURNALISTS (Oct. 29, 2018), available at [https://cpj.org/2018/10/russia-uses-foreign-agents-law-to-hit-independent- php](https://cpj.org/2018/10/russia-uses-foreign-agents-law-to-hit-independent-.php) (last visited Aug. 2, 2019).

231. Trump’s Twitter history with the *New York Times* is extensive.

232. John McCain, *Opinion, Mr. President, Stop Attacking the Press*, WASH. POST (Jan. 16, 2018), available at https://www.washingtonpost.com/opinions/mr-president-stop-attacking-the-press/2018/01/16/9438c0ac-faf0-11e7-a46b-a3614530bd87_story.html?utm_term=.ba6de8f0376f (last visited Aug. 2, 2019).

Therefore, it must be understood that the individual right to press freedom only exists as a counterpart and a product of the duties of the states.²³³ Where a state is in clear violation of the widespread state practice of a free press, powerhouse countries like the U.S. should retaliate with economic or political sanctions. This system would have a two-fold effect. First, the possibility of sanction would serve to deter offending countries from continuing to act with impunity. An offender like Saudi Arabia could anticipate economic backlash, such as the U.S. pulling out of the Mutual Defense Agreement.²³⁴ Second, the implementation of sanctions on the world stage would further support a common global understanding that states have a binding duty to respect a free press. Imminent sanction would force offending countries to weigh any motivation behind individual violations with the magnitude of retaliatory political and economic consequence. Countries that regularly violate journalists' rights would be forced to curb their offensive behaviors, or at least legitimize necessary charges against those journalists actually involved in criminal activity, to avoid the possibility of intervention by outside forces. The establishment of accountability would fulfil the *opinio juris* element, crystalizing customary international law of a free press and thereby creating a force stronger than offensive regimes.

V. CONCLUSION

In the United States, trust and confidence in the media peaked during the Watergate era, a pinnacle of investigative journalism.²³⁵ This correlation shows that confidence in the media, and a value for press freedom, are at their highest when the media is able to do its job to the fullest extent and produce illuminating results. This is true of journalism on a global scale. In America and many other countries, current press freedoms come from "non-legal safeguards," and a sort of abstract societal understanding that press freedom is important. Lack of a binding, counteractive force of law has allowed the world's anti-press strongmen to achieve major undercuts to the freedoms that the press need enjoy. It has long been understood that sovereign states are at lib-

233. *Id.*

234. Mutual Defense Agreement, Jan. 30 & Feb. 9, 1951, 2 U.S.T. 1499, T.I.A.S. No. 2293, 132 U.N.T.S. 273.

235. Art Swift, *Americans' Trust in Mass Media Sinks to New Low*, GALLUP (Sept. 14, 2016), available at <https://news.gallup.com/poll/195542/americans-trust-mass-media-sinks-new-low.aspx> (last visited May 1, 2020).

erty to employ “exceptions,” stripping legal and constitutional protections from an “enemy” at their discretion.²³⁶ A force stronger than state sovereignty is therefore necessary if we are ever to protect a globally recognized right to a free press from discretionary attacks by individual regimes. With the widespread state understanding of free press already in effect, the *opinio juris* element remains necessary to crystalize customary international law of a free press. And where traditional legal framework falls short, we must instead rely on political and economic diplomacy between states to deter offenders from continuing to act with impunity. As with any other blatant abuse of human rights, strongmen and their respective states that offend the universally understood principle of a necessarily free press, should expect consequences.

236. CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY (2005).

**PAYING THEIR FAIR SHARE: THE RELATIONSHIP
BETWEEN FUNDING AND MUTUAL DEFENSE
OBLIGATIONS IN NATO**

Richard Pado*

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ABSTRACT

The North Atlantic Treaty Organization (NATO) has been the bedrock of western foreign policy since the beginning of the Cold War. While many Americans might not think of NATO on a regular basis, the military Alliance is an imposing force that sends a message to the enemies of the United States and its allies. At the heart of the Alliance is the central tenet that an attack on one member of the Alliance is an attack on all members of the Alliance. No member needs to fight alone if they are attacked. While there will always be some tension between allies, tension between the United States and other members of NATO has recently come to the forefront of media attention and has thus been subsequently called to the consciousness of many Americans. Many have likely heard President Trump declare that it is “not fair” that the other members of NATO are not “paying their fair share.”¹ This disparity has greatly frustrated President Trump and, in his characteristic style, he had no issues with publicly airing his grievances.² President Trump even went so far as to publicly question whether it was worth abiding by the mutual defense obligations created in the North Atlantic Treaty (Treaty).³ This begs the question: If the other countries that are a party to the Treaty did not pay their “fair share,” would the United States still be obligated to abide by the mutual defense obligations in NATO?

This is not merely a theoretical question, as President Trump reportedly secretly discussed withdrawing from NATO,⁴ though it should be noted that President Trump has publicly stated that American ties to

1. Alexander Mallin & Meridith McGraw, *Trump Blasts NATO Allies for not Paying Fair Share*, ABC NEWS (May 25, 2017), available at <https://abcnews.go.com/International/trump-blasts-nato-allies-paying-fair-share/story?id=47608155> (last visited Jan. 28, 2019); Nahal Toosi, *Trump Demands Other NATO Members Pay Their Fair Share*, POLITICO (Feb. 28, 2017), available at <https://www.politico.com/story/2017/02/donald-trump-congress-speech-nato-235543> (last visited Jan. 28, 2019).

2. See Mallin & McGraw, *supra* note 1.

3. When asked by an interviewer why American soldiers should die to defend Montenegro from attack, President Trump replied that he had asked the same question before. President Trump then described Montenegro as “aggressive,” and said that Montenegro’s aggression could start World War III. Eileen Sullivan, *Trump Questions the Core of NATO: Mutual Defense, Including Montenegro*, N.Y. TIMES (July 18, 2018), available at <https://www.nytimes.com/2018/07/18/world/europe/trump-nato-self-defense-montenegro.html> (last visited Jan. 28, 2019).

4. Julian E. Barnes & Helene Cooper, *Trump Discussed Pulling U.S. From NATO, Aides Say Amid New Concerns Over Russia*, N.Y. TIMES (Jan. 14, 2019), available at <https://www.nytimes.com/2019/01/14/us/politics/nato-president-trump.html> (last visited Jan. 28, 2019).

NATO are very strong and that they remain strong.⁵ Questions of whether President Trump was right to push NATO allies to spend more, or if it was right for President Trump to question mutual defense in NATO, or even whether the United States should withdraw from NATO are all irrelevant to the question at hand. Instead, this article will simply examine whether insufficient funding on the part of NATO allies would allow members of NATO to have an immediate right to renounce any mutual defense obligations invoked under Article 5 of the North Atlantic Treaty.

While President Trump's appeal to NATO member countries may have received considerable coverage in the news, he is not the first American president to criticize NATO members for "not paying their fair share."⁶ President George W. Bush and President Obama had both requested more NATO spending, which shows that the issue has had bipartisan concern.⁷ This also shows that President Trump is not breaking precedent or acting in a manner wholly inconsistent with past presidents.

There are two main types of funding which Alliance members are required to provide: direct and indirect. Direct funding is what would commonly be thought of as "funding." Direct funding consists of direct payments to the NATO, which are used by the Alliance to maintain its infrastructure and fund projects. This type of funding, while relevant to the discussion, is not what has been causing controversy recently. The source of recent controversy has been indirect funding. Indirect funding benefits NATO, but it is not given directly to NATO to spend as it chooses. Instead, indirect funding is money that each member country's government spends on its own national defense. While it may not be obvious at first, NATO indirect funding is important as it contributes the health of the Alliance more than the direct funding itself. As NATO is based on the idea of mutual defense, members of the Alliance must maintain their militaries to a level where they could easily be utilized to defend a member of the Alliance from an attack if such an instance were to arise. If members of the Alliance did not maintain their militaries sufficiently, NATO would provide a benefit to weak member countries only, by binding the stronger members to protect them.

5. Louis Nelson, *Trump Says U.S. Ties to NATO 'Very Strong,'* POLITICO (July 12, 2018), available at <https://www.politico.com/story/2018/07/12/trump-nato-spending-714976> (last visited Jan. 28, 2019).

6. Peter Baker, *Trump Says NATO Allies Don't Pay Their Share. Is That True?*, N.Y. TIMES (May 26, 2017), available at <https://www.nytimes.com/2017/05/26/world/europe/nato-trump-spending.html> (last visited Oct. 21, 2018).

7. *Id.*

A failure to properly meet a funding guideline under NATO does not allow other members of NATO to immediately renounce their mutual defense obligations. First, failure to provide the requested amount of direct funding to NATO for its own infrastructure does not allow this to happen under international treaty law. As direct funding is not mentioned in the North Atlantic Treaty, failure to provide it does not constitute a material breach which would justify a renunciation in the purpose of the Charter. Despite this, failure to meet the funding requirement could give a member the political will to withdraw from the treaty, which would be allowed, though it would require one year's notice. This would mean that parties to the treaty would still need to engage in any Article 5 invocations before one year passed after announcing withdrawal, and therefore, would not be immediate. In terms of the 2% funding figure, neither the 2006 implementation of the guideline or the 2014 guideline are legally binding on the members. The 2006 implementation was specifically stated to be a non-binding target, and the 2014 reaffirmation of that target was specifically chosen to place political pressure on members of NATO without applying legal pressure. Under international treaty law, members of NATO would have to be unable to uphold their own ability to defend themselves and other members before members of the Alliance would be able to immediately suspend their mutual defense obligations. Members who wished to do so would also have to take action promptly, as conduct that could be viewed as acquiescing to the situation could potentially cause them to forfeit their ability to renounce their mutual defense obligations under international treaty law. Due to the high level to constitute a material breach worthy to suspend a treaty under international law though, simply failing to meet the 2% guideline would not give a member of NATO the ability to renounce their mutual defense obligations.

I. WHAT IS NATO?

NATO was originally conceived by Western countries as a counterbalance to potential communist expansion.⁸ NATO was created on April 4th, 1949 with the signing of the North Atlantic Treaty in Washington D.C.⁹ Initially comprised of twelve member countries,¹⁰ NATO

8. *NATO*, HIST. (Aug. 21, 2018), available at <https://www.history.com/topics/cold-war/formation-of-nato-and-warsaw-pact> (last visited Oct. 26, 2018).

9. *What is NATO?*, NATO, available at <https://www.nato.int/nato-welcome/index.html> (last visited Oct. 26, 2018).

10. The twelve countries that were the original members of NATO at the time of its founding are: Belgium, Canada, Denmark, France, Iceland, Italy, Luxembourg, Netherlands, Norway, Portugal, the United Kingdom, and the United States of America. *Id.*

currently has twenty-nine member countries.¹¹ NATO states the goals of the Alliance in the North Atlantic Treaty. The preamble of the charter establishes a commitment to pre-existing obligations of each of the individual members of the Alliance by stating, “The Parties to this Treaty reaffirm their faith in the purposes and principles of the Charter of the United Nations and their desire to live in peace with all peoples and all governments.”¹² This sentence served to allay the fears of potential Alliance members or other interested parties that NATO could potentially usurp the United Nations or become an imperialist organization. The next sentence of the North Atlantic Treaty preamble was then meant to paint the Alliance as a force for good by stating, “[t]hey are determined to safeguard the freedom, common heritage and civilization of their peoples, founded on the principles of democracy, individual liberty and the rule of law.”¹³ The drafters of the North Atlantic Treaty then decided to reiterate the geographic area on which the treaty was most focused by stating, “They seek to promote stability and well-being in the North Atlantic area.”¹⁴ The preamble then stated the primary purpose of the Alliance by providing the phrase, “[t]hey are resolved to unite their efforts for collective defense and for the preservation of peace and security.”¹⁵

To shed light on the historical period in which the formation of NATO took place, World War II had just concluded, and the Soviet Union had shown signs that they did not intend to evacuate formerly Nazi held territory that they had conquered during the war. In June 1948, the year before NATO was formed, the Soviets attempted to force Western nations outside of the Allied-controlled parts of Berlin by closing all of the transportation routes into the city from Allied-controlled Western Germany.¹⁶ The Western governments brought in humanitarian supplies by air to Berlin until the Soviets, then led by Joseph Stalin, abandoned the plan and reopened the transportation routes in what would

11. The current countries that are members of NATO are: Albania, Belgium, Bulgaria, Canada, Croatia, Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Lithuania, Luxembourg, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Turkey, the United Kingdom, and the United States of America. *Id.*

12. North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243 [hereinafter Treaty].

13. *Id.*

14. *Id.*

15. *Id.*

16. *Berlin Airlift*, HIST. (Sept. 12, 2018), available at <https://www.history.com/topics/cold-war/berlin-airlift> (last visited Oct. 26, 2018).

become to be known as the Berlin Airlift.¹⁷ It is also strongly believed that this event led to the creation of NATO as a military Alliance to combat Soviet attempts to spread communism around the globe.¹⁸

The principle of mutual defense is at the heart of the NATO Alliance.¹⁹ Mutual defense is meant to guarantee that if one member of the organization is attacked, the other members of that organization will react to protect the member that was attacked. This principle provides safety as well as a deterrent for potential aggressors, as a war against one country could potentially mean a war against all countries that are a party to the Alliance. The principle of mutual defense was set forth in Article 5 of the North Atlantic Treaty.²⁰ Article 5 of the North Atlantic Treaty starts by stating, "The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all" and that the other NATO countries shall act together for collective defense.²¹ The charter justifies the mutual defense in Article 5 by invoking the "right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations."²² Article 51 of the United Nations Charter allows a member of the United Nations the right to exercise individual or collective self-defense until the United Nations Security Council takes steps to re-establish international peace and security.²³ These same references to the United Nations Security Council are in the North Atlantic Treaty,²⁴ which demonstrated that NATO does not intend to challenge the supremacy or authority of the United Nations' charter, or the Security Council.²⁵

Throughout the history of NATO, the invocation of Article 5 for collective defense has been quite rare. This is surprising considering

17. *Id.*

18. *Id.*

19. *Collective Defence - Article 5*, NATO (June 12, 2018), available at https://www.nato.int/cps/en/natohq/topics_110496.htm (last visited Oct. 26, 2018).

20. Treaty, *supra* note 12.

21. *Id.*

22. *Id.*

23. U.N. Charter art. 51.

24. *What is NATO?*, *supra* note 4.

25. It should be noted that NATO is not underrepresented in the Security Council. The United Nations Security Council has fifteen members, with ten of the members serving a term in a term in temporary position before switching with another member country. There are five permanent members that never rotate, and they hold a large amount of power on the Security Council. Among these powers is a veto to any Security Council resolutions. Three of the five permanent Security Council members are NATO members, those being the United Kingdom, France, and the United States. *Id.*

that NATO describes the mutual defense as “at the very heart of NATO’s founding treaty” and saying that it “remains a unique and enduring principle that binds its members together.”²⁶ Despite all of the military conflicts that NATO members have been involved in over the year, such as the Wars in Vietnam and Korea, Article 5 has only been invoked a single time in the history of NATO.²⁷ Article 5 was invoked for the first time by the United States in response to the terrorist attacks on September 11, 2001.²⁸ The likely reason that Article 5 has only been invoked once is because Article 5 is grounded in self-defense, while many actions by NATO members are pre-emptive or humanitarian. These are cases when Article 5 could not necessarily be invoked since no NATO member would have actually been attacked in those scenarios.

Though the United States was indisputably attacked, the fact that the attackers were part of a terrorist organization, and not a traditional state actor, makes the invocation of Article 5 a little more curious. To begin with, terrorism was not new to NATO, as the Alliance’s 1999 Strategic Concept identified terrorism as a threat to the security of NATO.²⁹ On September 12, 2001, the allies made the decision to invoke Article 5, and the NATO Secretary General informed the UN Secretary-General of the Alliance’s decision.³⁰ The North Atlantic Council, NATO’s principal decision-making body, decided that the September 11th attacks were an attack from abroad that was directed at the United States, which meant that it was covered under Article 5 and NATO commenced its first anti-terror operations to defend the United States.³¹

II. FAILURE TO MEET NATO DIRECT FUNDING GOALS DOES NOT PROVIDE A RIGHT TO IMMEDIATELY RENOUNCE NATO MUTUAL DEFENSE OBLIGATIONS. IT IS NOT MENTIONED IN THE NORTH ATLANTIC TREATY, AND THEREFORE DOES NOT CONSTITUTE MATERIAL BREACH UNDER INTERNATIONAL TREATY LAW.

While NATO indirect funding is the more commonly discussed in the media, a discussion of NATO funding would be incomplete without

26. *Collective Defence - Article 5*, NATO (June 12, 2018), available at https://www.nato.int/cps/en/natohq/topics_110496.htm (last visited Oct. 30, 2018).

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Collective Defence - Article 5*, *supra* note 26.

discussing NATO direct funding. NATO direct funding are direct contributions to NATO that are made to finance the infrastructure of NATO that are utilized by all twenty-nine members.³² The NATO direct contributions are not the responsibility of any single member, and the costs are born collectively, often by utilizing a common funding principle.³³ NATO-wide air defense, and command and control systems are examples of programs that are funded by direct contributions from NATO member countries.³⁴ When utilizing the principle of common funding, “all 29 members contribute according to an agreed cost-share formula, based on Gross National Income, which represents a small percentage of each member’s defence budget.”³⁵ The common funding arrangement is used to fund NATO’s principal budgets.³⁶ These principal budgets include: the military budget, which funds the costs of the integrated command structure; the civil budget, which funds the NATO headquarters running costs; and the NATO security investment program, which funds military capabilities.³⁷ NATO direct contributions mostly come in the forms of joint funding or common funding, but they can also come in the form of “trust funds, contributions in kind, *ad hoc* sharing arrangements and donations.”³⁸

Joint funding arrangements were described by NATO sources as “structured forms of multinational funding within the terms of an agreed NATO charter.”³⁹ When projects are funded jointly the countries participating can “identify the requirements, the priorities and the funding arrangements,” though NATO has political and financial oversight.⁴⁰ Joint funding arrangements can vary in the number of participating countries, cost-share arrangements and management structures.⁴¹ Since NATO member countries are not forced to participate and the cost and management of such programs is variable, it is unlikely that joint funding arrangements could raise serious questions about a member country’s commitments to NATO, as such programs are variable, and a

32. *Funding NATO*, NATO (June 27, 2018), available at https://www.nato.int/cps/en/natohq/topics_67655.htm (last visited Nov. 2, 2018) [hereinafter *Funding NATO*].

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Funding NATO*, *supra* note 32.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

member country that does not wish to participate would not be required to.

The amount of direct funding that each country gives to NATO is organized by the Alliance. When the need for an expenditure is identified, authorities in NATO decide if the expenditure in question will benefit all members of the Alliance.⁴² If the aforementioned authority determines that the expenditure would benefit all of the members, the principle of common funding is applied, as it is believed that all members should share in the cost of the program.⁴³ Common funding contributions by each individual member country are determined in accordance with a cost-sharing formula as determined by Gross National Income.⁴⁴ This means that each NATO member country pays in accordance with the size of their respective economies. The United States has the highest percentage of the cost, as the United States is expected to fund over 22% of all common funding arrangements.⁴⁵ France and the United Kingdom both have the next highest amount of common funding required, which is over 10% for both countries.⁴⁶ Montenegro has the lowest amount of common funding required, with less than 0.03% as based on the cost-sharing formula utilized by NATO.⁴⁷

There are international sources of law that govern treaties and whether they are binding, and under which conditions they can be withdrawn from. The Vienna Conventions on the Law of Treaties (VCLT) is one such source of international law. While the United States has signed the VCLT, the Senate has not given its advice and consent to the treaty, which means that the United States is not officially a party to the treaty.⁴⁸ Despite this, the U.S. Department of State officially recognizes that the United States considers many parts of the VCLT to be customary international law.⁴⁹ Customary international law is considered a very important primary source of international law,⁵⁰ and is therefore binding on members of NATO.

42. *Funding NATO*, *supra* note 32.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Funding NATO*, *supra* note 32.

48. *Vienna Convention on the Law of Treaties FAQs*, U.S. DEPT. OF STATE, available at <https://www.state.gov/s/l/treaty/faqs/70139.htm> (last visited Jan. 31, 2019).

49. *Id.*

50. MICHAEL BYERS, *CUSTOM, POWER AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW* 166 (1999).

Article 44 of the Vienna Conventions on the Law of Treaties creates law that governs the separability of treaty provisions as it relates to selective withdrawal from specific provisions.⁵¹ Article 44 provides that separability of treaty provisions cannot be accomplished if the treaty does not provide for it.⁵² Article 44 states that, "to denounce, withdraw from or suspend the operation of the treaty may be exercised only with respect to the whole treaty."⁵³ As a result, the United States, or any other member of NATO, cannot selectively refuse to engage in Article 5 actions of collective defense under the North Atlantic Treaty without withdrawing from the entire treaty, as the North Atlantic Treaty does not provide a right to refuse participating in an invocation of Article 5.⁵⁴

VCLT Article 57 provides that a treaty which contains provisions regarding withdrawal or denunciation of the treaty can have its operation suspending in accordance with its provisions.⁵⁵ The North Atlantic Treaty is an example of a treaty with such a provision.⁵⁶ Article 13 of the North Atlantic Treaty provides that, "[a]fter the Treaty has been in force for twenty years, any Party may cease to be a Party one year after its notice of denunciation has been given to the Government of the United States of America, which will inform the Governments of the other Parties of the deposit of each notice of denunciation."⁵⁷ This provision would apply to the United States as it has been more than twenty years since the United States founded NATO. This provision does allow the United States to withdraw from NATO, though it requires a notice of one year before any party to the treaty can cease to be a party.⁵⁸ A member of NATO would likely not have notice of over one year before an attack that is eligible for the invocation of Article 5, which means that Article 13 of the North Atlantic Treaty could not be invoked to refuse mutual defense obligation unless such obligations could be predicted a year in advance. The United States, or other members of NATO, could withdraw from NATO, but such an act would require one-year notice and would eliminate all obligations on the part of NATO to the withdrawn country. This would differ from a scenario

51. Vienna Convention on the Law of Treaties art. 44, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

52. *Id.*

53. *Id.*

54. Treaty, *supra* note 12.

55. VCLT, *supra* note 51, art. 57.

56. Treaty, *supra* note 12.

57. *Id.*

58. *Id.*

where a country refused a select instance of mutual defense while still remaining a part of NATO.

Article 60 of the Vienna Conventions on the Law of Treaties could potentially allow a country to refuse mutual defense obligations under NATO.⁵⁹ Article 60 governs the termination or suspension of the operation of a treaty as a consequence of its breach.⁶⁰ According to Article 60, a material breach of a multilateral treaty entitles:

any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.⁶¹

Article 60 also gives a definition of material breach to determine if a failure on the part of other member to give the appropriate amount of funding to NATO would constitute a “material breach.”⁶² According to VCLT Article 60, a material breach is “a repudiation of the treaty not sanctioned by the present Convention; or the violation of a provision essential to the accomplishment of the object or purpose of the treaty.”⁶³ A failure to give NATO direct funding could not fall under either of these definitions of material breach under the convention.

A failure to provide direct funding to NATO for the organization to fund its infrastructure can neither be a repudiation of the treaty, nor can it be a violation of a provision essential to the treaty. The reason behind this is simple: NATO direct funding is not established in NATO’s founding charter.⁶⁴ The closest that the charter gets to mentioning NATO direct funding is in Article 3, which states: “In order to more effectively achieve the objectives of this Treaty, the Parties, separately and jointly, by means of continuous and effective self-help and mutual aid, will maintain and develop their individual and collective capacity to resist armed attack.”⁶⁵ The term “mutual aid” could be interpreted as applying to funding for NATO infrastructure, though in the context of that clause, mutual aid refers to members of NATO aiding each other to ensure that their militaries are ready to mobilize, as opposed to funding

59. VCLT, *supra* note 51, art. 60.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. Treaty, *supra* note 12.

65. *Id.*

for NATO infrastructure. Funding for NATO infrastructure is not mutual aid, it is instead the creation of ancillary organizations to manage NATO. Since NATO direct funding is not mentioned in the North Atlantic Treaty, it cannot constitute a material breach of the treaty and therefore would not justify a renunciation of the mutual defense obligations in the North Atlantic Treaty.

III. NATO INDIRECT FUNDING: THE ARTICLE 5 MUTUAL DEFENSE OBLIGATIONS IN THE NORTH ATLANTIC TREATY ARE NOT DISMISSED SIMPLY BECAUSE ALLIANCE MEMBERS FAIL TO SPEND 2% OF THEIR GDP ON NATIONAL DEFENSE ANNUALLY

NATO members' failure to spend 2% of their GDP on their national defense does not create an immediately exercisable option to renounce mutual defense obligations in NATO. Indirect funding is the type of NATO funding that has received more controversy recently. Indirect funding is not funding that goes directly to NATO for NATO itself to fund its operational infrastructure.⁶⁶ Instead, indirect funding to NATO actually refers to the amount of funding that NATO member countries spend on their own defense by investing money in their own military and domestic defense infrastructure.⁶⁷ At first it may not seem to matter how much NATO member countries spend on their defense, as domestic spending does not affect the funds that NATO is receiving as an organization to cover the organization's operating costs.⁶⁸ The reason for this is actually based on the mutual defense principle that is present in the founding charter of NATO.⁶⁹ Since an attack on one NATO country is meant to be considered an attack on all of NATO, NATO members countries are supposed to rush to the defense of the country that was attacked, and the indirect funding goals are meant to ensure that the NATO member countries have a military that would be properly fit to fight a defensive war.⁷⁰ While funding may not always directly correlate to military prowess, military funding is easy to measure with

66. Millie Dent, *NATO: Everything You Need to Know About the Alliance Donald Trump Says Is 'Obsolete'*, YAHOO! FIN. (Apr. 24, 2016), available at <https://finance.yahoo.com/news/nato-everything-know-Alliance-donald-213500967.html> (last visited Oct. 31, 2018).

67. *Id.*

68. Ivana Kottasová, *How NATO is Funded and Who Pays What*, CNN (May 25, 2017), available at <https://money.cnn.com/2017/05/25/news/nato-funding-explained-trump/index.html> (last visited Oct. 31, 2018).

69. *Id.*

70. *Id.*

objective tests, and it is most probable that a properly funded military will have a better ability to defend any members of the Alliance.⁷¹

IV. ESTABLISHMENT OF THE 2006 INDIRECT FUNDING GUIDELINE DID NOT CREATE A BINDING COMMITMENT, THEREFORE FAILURE TO MEET THE GUIDELINE DOES NOT ALTER MEMBERS' COMMITMENT TO MUTUAL DEFENSE

After understanding what indirect funding of NATO is, we must examine the origins of the funding guideline to further understand the nature of the indirect funding guideline and how it may affect the NATO of mutual defense. Currently, NATO member countries are required to spend 2% of their gross domestic product (GDP)⁷² on defense spending.⁷³ Currently, the majority of NATO members do not meet this requirement.⁷⁴ Only five of the Alliance's members currently meet the 2% guideline for defense spending in 2017.⁷⁵ Even though some NATO member countries meet the funding guidelines, NATO funding is still widely disproportionate when one compares American defense spending to the defense spending of other allies.⁷⁶ American defense spending is actually twice the amount that all other twenty-eight NATO member countries are spending on their defense combined.⁷⁷ This figure actually became more disproportionate after the September 11th attacks, at which point the United States further increased its defense spending.⁷⁸ Those countries reaching the 2% figure were: The United States, The United Kingdom, Poland, Greece, and Estonia.⁷⁹ The 2%

71. *See id.*

72. Gross domestic product is the measure of the monetary value of all goods and services that are produced within a country's borders during a specific period of time. *Gross Domestic Product – GDP*, INVESTOPEDIA, available at <https://www.investopedia.com/terms/g/gdp.asp> (last visited Nov. 2, 2018). GDP is usually calculated annually, though it can be calculated in different time increments, such as quarterly. *Id.* To summarize it generally, GDP is a measure of the total economic output of a country. *Id.*

73. *Funding NATO*, *supra* note 32.

74. Ian Bremmer, *The Only 5 Countries That Meet NATO's Defense Spending Requirements*, TIME (Feb. 24, 2017), available at <http://time.com/4680885/nato-defense-spending-budget-trump/> (last visited Nov. 2, 2018).

75. These countries are the United States, the United Kingdom, Poland, Greece, and Estonia. Niall McCarthy, *Defense Expenditures of NATO Members Visualized [Infographic]*, FORBES (July 10, 2018), available at <https://www.forbes.com/sites/niallmccarthy/2018/07/10/defense-expenditure-of-nato-members-visualized-infographic/#1760f72a14cf> (last visited Nov. 2, 2018).

76. *Funding NATO*, *supra* note 32.

77. *Id.*

78. *Id.*

79. *Id.*

figure can best be described as an “arbitrary figure,” but a figure that did have “symbolic value” nonetheless.⁸⁰ According to NATO itself, “[t]his guideline principally serves as an indicator of a country’s political will to contribute to the Alliance’s common defence efforts.”⁸¹

The 2% guideline was originally created in 2006.⁸² The number was established at a meeting of NATO defense ministers at NATO headquarters in Brussels, and the number was unveiled to the press on June 8 of that year.⁸³ The introduction of the 2% figure is rather complex, and it was rolled out in a more indirect manner.

First, to understand the origin of the 2% figure, we have to first understand the origin and purpose of the NATO Comprehensive Political Guidance.⁸⁴ The NATO Comprehensive Political Guidance was a document that set out the “framework and priorities for all Alliance capability issues, planning disciplines, and intelligence” for the succeeding ten to fifteen years.⁸⁵ The Comprehensive Political Guidance “set out the kinds of operations the Alliance had to be able to perform in light of the Alliance’s 1999 Strategic Concept and the kinds of capabilities the Alliance would need.”⁸⁶ This document does address the issue of sufficient funding in NATO, though it does not provide specific numbers to analyze the funding.⁸⁷

The comprehensive Political Guidance starts off with a statement describing the necessity of sufficient funding by stating that, “[t]he development of capabilities will not be possible without the commitment of sufficient resources.”⁸⁸ The Comprehensive Political Guidance then reiterates the need to effectively spend the funds dedicated to defense, by stating that, “it will remain critically important that resources that Al-

80. *NATO 2% Defence Spending Target Should Be Met, MPs Say*, BBC NEWS (Mar. 12, 2015), available at <https://www.bbc.com/news/uk-politics-31857044> (last visited Nov. 2, 2018).

81. *Funding NATO*, *supra* note 32.

82. *Funding NATO*, *supra* note 32.

83. James Appathurai, *Press Briefing*, NATO (June 8, 2006), available at <https://www.nato.int/docu/speech/2006/s060608m.htm> (last visited Nov. 3, 2018).

84. See Paul Saveroux, *The Comprehensive Political Guidance: A primer*, NATO (Jan. 1, 2007), available at https://www.nato.int/docu/review//2007/Reviewing_Riga/Comprehensive_political_guidance/EN/index.htm (last visited Dec. 29, 2018).

85. *Comprehensive Political Guidance (Archived)*, NATO (June 1, 2015), available at https://www.nato.int/cps/en/natolive/topics_49176.htm (last visited Dec. 29, 2018).

86. *Id.*

87. *See id.*

88. *Comprehensive Political Guidance (Full Text)*, NATO (July 13, 2009), available at https://www.nato.int/cps/en/natohq/official_texts_56425.htm (last visited Dec. 30, 2018) [hereinafter *Political Guidance*].

lies make available for defence, whether nationally, through multinational projects, or through NATO mechanisms, are used as effectively as possible and are focused on priority areas for investment.”⁸⁹ The Comprehensive Political Guidance then provides guidelines on how to determine if national defense funds are being spent properly, without providing specific guidance on how they should be spent by stating that, “[i]ncreased investment in key capabilities will require nations to consider reprioritisation, and the more effective use of resources, including through pooling and other forms of bilateral or multilateral cooperation.”⁹⁰ The Comprehensive guideline then commands NATO member countries to follow the previous guidelines by declaring that, “NATO’s defence planning should support these activities.”⁹¹

The Comprehensive Political Guidance then describes readiness standards that NATO member countries should aspire to abide by, though those guidelines are qualitative and do not provide specific numeric targets for NATO member countries.⁹² The 2% figure is not specifically established in the Comprehensive Political Guidance.⁹³ Despite this, the adoption of the Comprehensive Political Guidance was necessary for the genesis of the 2% figure, even if it did not directly create it.

The Comprehensive Political Guidance was fully adopted by NATO. According to NATO, the Comprehensive Political Guidance was agreed to by NATO defense ministers at their June 2006 meeting at the NATO headquarters in Brussels.⁹⁴ At the highest political level, the NATO heads of state and government agreed to the Comprehensive Political Guidance in November 2006 at the Riga Summit.⁹⁵ Agreement to the terms of the Comprehensive Political Guidance was also agreement to supplementary documents that would provide additional terms that NATO member countries should abide by. While this may seem strange at first, the purpose of this becomes clearer as one comes to understand the purpose of the Comprehensive Political Guidance itself.

NATO itself describes the Comprehensive Political Guidance as a “high-level guidance document which provides a framework and politi-

89. *Id.*

90. *Id.*

91. *Id.*

92. *Political Guidance, supra* note 88.

93. *See id.*

94. *Political Guidance, supra* note 88.

95. *Id.*

cal direction” for NATO’s future.⁹⁶ Ultimately, the Comprehensive Political Guidance “provides the agreed vision and priorities for NATO’s ongoing transformation.”⁹⁷ The Comprehensive Political Guidance attempted to predict the future strategic landscape for NATO, though it also simultaneously acknowledges the possibility that this strategic vision could change.⁹⁸ Due in part to this, the NATO Comprehensive Political Guidance expressed the kind of strategic capabilities that NATO would have to be able to perform, the specific manner in which these capabilities would have to be fulfilled was intentionally left open.⁹⁹ These specifics were meant to be determined both individually by nations and collectively by NATO.¹⁰⁰ The Comprehensive Political Guidance “does not delve into sufficient detail to give exhaustive guidance for each specific planning discipline and other capability-related bodies;” therefore, a requirement for “lower level guidance still remains.”¹⁰¹ The Comprehensive Political Guidance did not contain quantitative information on what allies expected NATO to be able to do.¹⁰²

It appears that the 2% of GDP towards defense spending figure was first unveiled in a document that would be considered lower-level guidance. NATO sources explicitly stated this: “For force planning, this is done in a subordinate, classified document (Ministerial Guidance 2006), which is based on the CPG and was agreed by the nations concerned in June 2006.”¹⁰³ This appears to be the document in which the 2% figure was initially introduced to NATO member countries. We have some clues that suggest that this is the case. When NATO spokesman James Appathurai first unveiled the 2% figure to the media, the press briefing took place on June 8, 2006,¹⁰⁴ which is the same time period within which the primer stated that the Ministerial Guidance was created.¹⁰⁵ The press briefing was also described as taking place after “the meeting of the North Atlantic Council at the level of Defence Ministers.”¹⁰⁶

96. Savereux, *supra* note 84.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. Savereux, *supra* note 84.

102. *Id.*

103. *Id.*

104. Appathurai, *supra* note 83.

105. Savereux, *supra* note 84.

106. Appathurai, *supra* note 83.

Why is it important to establish that the 2% figure was first unveiled in the NATO Ministerial Guidance? The Ministerial Guidance is classified.¹⁰⁷ Due to this, it is not possible to review the document in which the 2% figure was originally introduced.¹⁰⁸ Instead, the most direct source we have is the contemporary press briefing by NATO Spokesman James Appathurai, in which he educates members of the media on the 2% and describes the expectations surrounding it.¹⁰⁹

In the meeting, Appathurai told the press that NATO member countries, “through the comprehensive political guidance have committed to endeavour, to meet the 2% target of GDP devoted to defence spending.”¹¹⁰ He also stated, “[l]et me be clear, this is not a hard commitment that they will do it. But it is a commitment to work towards it.”¹¹¹ The NATO spokesman also stated that the 2% was the first attempt by NATO to put forward a specific commitment for NATO member countries to work towards.¹¹² Furthermore, as Appathurai answered a question, he referred to the 2% figure as a “target”, not a requirement or other similar language, and stated that he believes that seven NATO member countries were meeting the deadline at that time, without speaking of any way that the remaining non-compliant members may be forced to reach the 2% mark, and he also fails to give any type of deadline.¹¹³ In 2005, the last year of information that the NATO spokesman would have had available to him, supports this claim.¹¹⁴ The countries that met the 2% mark were: Bulgaria, France, Greece, Romania, Turkey, the United Kingdom, and the United States.¹¹⁵ As a reference for compliance in other years, NATO data shows that six Alliance members made the 2% target in 2006.¹¹⁶ All of the same member

107. Savereux, *supra* note 84.

108. As I was unable to find the NATO Ministerial Guidance, it appears that the document is still classified. This is likely so that NATO’s true capabilities will be hidden, which would prevent enemies of NATO from properly preparing for and anticipating a conflict from NATO, thus preserving the element of surprise for NATO member countries in the event of an armed conflict.

109. Appathurai, *supra* note 83.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. Press Release, NATO, *NATO-Russia Compendium of Financial and Economic Data Relating to Defence* (Dec. 20, 2007), available at https://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2007_12/20090327_p07-141.pdf (last visited Nov. 8, 2018) [hereinafter *Compendium*].

115. *Id.*

116. *Id.*

countries made the target, except for Romania, which was not in compliance.¹¹⁷ Based on Appathurai's words, when the 2% guideline was originally created, it was not intended to be a binding commitment with specific consequences for failing to meet the deadline. Appathurai referred to the 2% figure as a "target" and he explicitly said that it was not a hard commitment.¹¹⁸ Additionally, the lack of specific consequences that were not set up by NATO defense ministers at the time of the drafting of this specific guideline further supports this point.

When looking at the circumstances surrounding the introduction of the 2% figure in 2006, we can come to no other conclusion except that the guideline was not intended to be legally binding at the time. Official NATO sources even described the figure "as not a hard commitment," and that the figure was instead a "target."¹¹⁹ There were also no specific consequences set for NATO member countries who failed to meet the funding goals, which would likely have been created if the target was meant to affect the status of NATO member countries. While the guideline was first unveiled in 2006, the analysis cannot stop as the guideline continue has received further attention, including in 2014 when the guideline was recommitted to by NATO member countries.

V. THOUGH POLITICALLY PERSUASIVE, MEMBERS' 2014 RECOMMITMENT TO 2% GDP DEFENSE SPENDING IS NOT LEGALLY BINDING

While it appears that the 2% guideline was not originally intended to be legally binding on the members of the Alliance, the analysis cannot stop there and rest on that conclusion. The 2006 meeting at the NATO headquarters was not the only time that the guideline was specifically laid out, nor was it the only time that members of the Alliance agreed to try to reach it. NATO countries actually agreed to commit themselves to make the 2% guideline in the year 2014.¹²⁰ This recommitment to the target was likely caused by the perceived need on the part of NATO officials to try to gain compliance on the part of Alliance members. Military spending at that time had actually decreased, and more countries had fallen out of compliance with the 2% guideline since

117. *Id.*

118. Appathurai, *supra* note 83.

119. *Id.*

120. Jan Techau, *The Politics of 2 Percent: NATO and the Security Vacuum in Europe*, CARNEGIE EUR. (Sept. 2, 2015), available at <http://carnegieeurope.eu/2015/09/02/politics-of-2-percent-nato-and-security-vacuum-in-europe-pub-61139> (last visited Nov. 9, 2018).

the original target was created in 2006, despite what an observer would assume.¹²¹ In 2013 – the last year that NATO officials would have had data for, as 2014 was not yet complete – there were only three members of the Alliance that actually reached the 2% threshold.¹²² The only three Alliance members that actually complied with the 2% figure were Greece, the United Kingdom, and the United States.¹²³ For NATO officials, this was likely an alarming sign, as three countries complying is less than half of the seven countries complying in 2005 before the 2% target was even introduced.¹²⁴

In 2014, the eyes of the world were on Newport in the United Kingdom, where all twenty-eight NATO member countries¹²⁵ were represented, and many world leaders were converging to discuss the business and future of NATO moving forward.¹²⁶ At the Wales Summit, national leaders of the NATO member countries agreed to commit themselves to spending goals.¹²⁷ The text of the Wales Summit Declaration (Declaration) is expansive and covers many issues discussed and decided on at the Summit.¹²⁸ There was clear intent on the part of the drafters of the Wales Summit Declaration to show that assent to the declaration was given by officials at the top level of the respective governments of each country, as opposed to the many ministerial, or bureaucratic-type decisions that are made in NATO.¹²⁹ The opening sentence of the Declaration states, “We, the Heads of State and Government of the member countries of the North Atlantic Alliance, have gathered in Wales at a pivotal moment in Euro-Atlantic security.”¹³⁰

121. Press Release, NATO, *Defence Expenditures of NATO Countries (2008-2015)* (Jan. 28, 2016), available at https://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2016_01/20160129_160128-pr-2016-11-eng.pdf (last visited Nov. 9, 2018).

122. *Id.*

123. *Id.*

124. *Compendium, supra* note 114.

125. At the time of the Wales Summit in 2014, there were only twenty-eight countries that comprised NATO, as Montenegro only joined the Alliance in 2017. See *Montenegro Ratifies NATO Membership in Historic Shift to Western Alliance*, THE GUARDIAN (Apr. 28, 2017), available at <https://www.theguardian.com/world/2017/apr/28/montenegro-ratifies-nato-membership-in-historic-shift-to-western-alliance> (last visited Nov. 9, 2018).

126. See *World Comes to Wales for 2014 NATO Summit in Newport*, BBC NEWS (Sept. 4, 2014), available at <https://www.bbc.com/news/uk-wales-29053052> (last visited Nov. 9, 2018).

127. *2014 NATO Summit in Wales*, RT (Sept. 4, 2014), available at <https://www.rt.com/uk/184944-nato-summit-live-updates/> (last visited Nov. 9, 2018).

128. Press Release, NATO, *Wales Summit Declaration* (Sept. 5, 2014) [hereinafter *Wales Summit Declaration*].

129. *Id.*

130. *Id.*

This signals that consent for the policies and positions within the declaration have received approval at the highest levels of government.

The Declaration then reiterates NATO's fundamental principles and goals, and gets into the discussion of funding. The discussion of funding in paragraph fourteen by stating, "We agree to reverse the trend of declining defence budgets, to make the most effective use of our funds and to further a more balanced sharing of costs and responsibilities."¹³¹ The Declaration also states that any countries that were currently meeting the 2% minimum for defense spending would continue to do so.¹³² The Declaration also has a stipulation that any countries that were currently spending twenty percent of their defense budget on major equipment, which included research and development, would continue to do so as well.¹³³ This stipulation is used as a way to guarantee that the 2% of GDP being used on defense spending is not being wasted on other types of funding that may not be as effective in creating a readily mobile and deployable national defense force.

To address the situation where certain NATO member countries were not meeting their domestic defense spending goals for NATO, the Declaration then goes on to lay out three different directives for countries that were currently failing to meet the 2% of GDP funding for defense spending target.¹³⁴ First, they are to "halt any decline in defence expenditure" as a starting point.¹³⁵ Second, those countries out of compliance are to "aim to increase defence expenditure in real terms as GDP grows," which means that countries should continue to increase their defense spending as their GDP increases.¹³⁶ The third goal sets a deadline for the defense spending to comply with the "aim to move towards the 2% guideline within a decade with a view to meeting their NATO Capability Targets and filling NATO's capability shortfalls."¹³⁷ The Declaration also specifies that any countries that "spend less than 20% of their annual defence spending on major new equipment, including related Research & Development, will aim, within a decade, to increase their annual investments to 20% or more of total defence expenditures."¹³⁸ In an attempt to reiterate the general purpose of the funding,

131. *Id.*

132. *Id.*

133. Wales Summit Declaration, *supra* note 128.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. Wales Summit Declaration, *supra* note 128.

so as not to make the discussion solely about the amount of funding, the Declaration required all allies to “ensure that their land, air and maritime forces meet NATO agreed guidelines for deployability and sustainability and other agreed output metrics,” and it also requires them to “ensure that their armed forces can operate together effectively, including through the implementation of agreed NATO standards and doctrines.”¹³⁹ The discussion of the funding is finished with a reminder that the progress would be reviewed annually.¹⁴⁰

The nature of the Wales Summit Declaration, and even the document’s name itself, can help us answer whether or not this commitment was meant to be binding. While it is certainly persuasive to members of the Alliance, the Declaration does not appear to be politically binding. According to United Nations sources, a declaration is not binding by its nature.¹⁴¹ According to the United Nations Educational, Scientific, and Cultural Organization, a “Declaration and a Recommendation is generally a document of intent, and, in most cases, does not create a legally binding obligation on the countries which have signed it.”¹⁴² As a result, a declaration is a document that cannot be ratified.¹⁴³ The term “declaration” is “often deliberately chosen to indicate that the parties do not intend to create binding obligations but merely want to declare certain aspirations.”¹⁴⁴ Accordingly, it would appear that the creators of the Wales Summit Declaration intentionally chose to make it a declaration, as opposed to some other title for the document which would suggest that it was meant to be binding, such as a treaty.

While the name of the Wales Summit Declaration is suggestive that the document was meant to be non-binding, it is not a strict rule that all declarations are not binding on signatories. Though declarations are often not binding, it is possible that they could “be treaties in the generic sense intended to be binding at international law.”¹⁴⁵ This determination, though, has to be done by looking at the original intent of the people who drafted the Declaration.¹⁴⁶ In this case, it appears unlikely that

139. *Id.*

140. *Id.*

141. *Declaration*, UNESCO, available at <https://wayback.archive-it.org/10611/20171126022619/http://www.unesco.org/new/en/social-and-human-sciences/themes/international-migration/glossary/declaration/> (last visited Nov. 11, 2018) [hereinafter *Declaration (definition)*].

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Declaration (definition)*, *supra* note 141.

this was the intent. Originally, when the guideline was first drafted, the guideline was explicitly intended to be non-binding on the members of the Alliance.¹⁴⁷ Since the 2% figure was originally intended to be non-binding, it stands to reason that there would have to be a clear intention on the part of the drafters of the Wales Summit Declaration that the recommitment to the figure was meant to be binding, as it would be changing the nature of the 2% target. Throughout the Wales Summit Declaration, there does not appear to be any indication of intent on the part of the drafters of the declaration to turn the 2% target into a legally-binding target.¹⁴⁸ The Declaration does not explicitly state that the 2% figure was to become binding.¹⁴⁹ Similarly, it did not establish any type of consequences for countries that failed to meet the 2% target.¹⁵⁰ Since it is “therefore necessary to establish in each individual case whether the parties intended to create binding obligation,”¹⁵¹ it must be concluded that the Wales Summit Declaration did not bind the members of NATO to the 2% target for defense spending, as there was no language in the Wales Summit Declaration to suggest that it would.¹⁵²

After examining the history of the figure, it does not appear that any NATO member countries can renounce NATO mutual defense obligations simply because other members of the Alliance do not apply 2% of their GDP on their domestic defense budget. Instead, the figure is merely suggestive and a failure to meet the figure is not meant to have real consequences on the Alliance.

VI. INTERNATIONAL TREATY LAW LETS NATO MEMBERS
RENOUNCE MUTUAL DEFENSE OBLIGATIONS IF ANOTHER
NATO MEMBER CANNOT UPHOLD ITS OWN. FAILURE TO
MEET THE 2% GUIDELINE ALONE IS INSUFFICIENT TO
SUSPEND SUCH OBLIGATIONS

It appears that members of NATO are not legally bound to the 2% figure for defense spending. Since the target is persuasive and not legally binding, failing to meet that guideline would not cause the mutual defense described in Article 5 of the North Atlantic Treaty to be affected.¹⁵³ The 2% target for NATO funding is simply just that: a target. It

147. Appathurai, *supra* note 83.

148. *See* Wales Summit Declaration, *supra* note 128.

149. *See id.*

150. *See id.*

151. *Declaration (definition)*, *supra* note 141.

152. Wales Summit Declaration, *supra* note 128.

153. *See* Treaty, *supra* note 12.

is an aspiration and a goal for NATO member countries to try to achieve, it is not a necessary part of remaining a member of NATO. It is not a prerequisite which allows the other members of the Alliance to ignore the mutual defense principle of NATO if they fail to make the target of 2% of their GDP dedicated to defense spending. There were not treaties that enforced the 2% target, and it was both implicitly and explicitly stated that the target was not meant to be binding.

Though the 2% figure does not specifically bind NATO members, that does not mean that members of the Alliance are not legally bound to have a military that can readily be used for conflict. While spending is not totally determinative of the health of a military, it certainly can affect it. The North Atlantic Treaty, which created NATO and therefore binds NATO and controls its conduct, creates an obligation for members of the Alliance to maintain a competent military.¹⁵⁴

There are sources of international law that regulate treaties between countries in the international system. A prominent source of such laws is the Vienna Convention on the Law of Treaties. It should be noted that the United States is not officially a party to the Vienna Convention on the Law of Treaties, though the United States signed the Vienna Convention on the Law of Treaties.¹⁵⁵ Despite the United States not being a party to the convention, the State Department has stated that it is the position of the United States that many parts of the Vienna Conventions on the Law of Treaties are considered customary international law.¹⁵⁶ Customary international law is considered a very important primary source of international law,¹⁵⁷ and it is therefore binding on members of NATO.

Article 60 of the Vienna Convention of the Law of Treaties states that “[a] material breach of a multilateral treaty” by one of the parties entitles

any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.¹⁵⁸

154. *Id.*

155. *Vienna Convention on the Law of Treaties FAQs*, *supra* note 48.

156. *Id.*

157. Byers, *supra* note 50.

158. VCLT, *supra* note 51, art. 60.

Article 60 defines a material breach as “(a) a repudiation of the treaty not sanctioned by the present Convention; or (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.”¹⁵⁹ If members of NATO do not sufficiently fund their military forces, it could potentially be considered a material breach under Article 60 which could allow a member of NATO to suspend their involvement in the treaty.

Article 3 of the North Atlantic Treaty states, “In order more effectively to achieve the objectives of this Treaty, the Parties, separately and jointly, by means of continuous and effective self-help and mutual aid, will maintain and develop their individual and collective capacity to resist armed attack.”¹⁶⁰ Article 3 of the North Atlantic Treaty requires that members of NATO maintain their armed forces to a degree where they can resist armed attack. This is a necessary for the mutual defense requirements in NATO to be effective, as members of the Alliance would need to the ability to assist militarily if mutual defense was to be effective. If members of NATO could not resist armed attack, this would violate a provision essential to the purpose of NATO, which was a mutual defense organization.

Though Article 60 of the Vienna Convention on the Law of Treaties could allow members of NATO to withdraw from the treaty if members of NATO did not have the capacity to resist armed attack, countries not meeting the 2% of funding figure would not immediately be such a material breach. Garrett Martin and Balazs Martonffy both believe that the 2% figure is flawed and should be abandoned in favor of a better way to measure NATO spending.¹⁶¹ The authors state that the 2% figure was originally chosen because staff at the NATO headquarters in Brussel determined that the median defense spending of NATO member countries from 1991-2003 was approximately at 2%, so that figure was adopted.¹⁶² They also believe that the figure provides issue as each country can decide what they consider defense spending with a different criteria from each other.¹⁶³ The authors also believe that the figure focuses too much on inputs and no the outputs, meaning that even though Greece met the guideline, it still had trouble projecting

159. *Id.*

160. Treaty, *supra* note 12.

161. Garrett Martin & Balazs Martonffy, *Abandon the 2 Percent Obsession: A New Rating for Pulling Your Weight in NATO*, WAR ON THE ROCKS (May 19, 2017), available at <https://warontherocks.com/2017/05/abandon-the-2-percent-obsession-a-new-rating-for-pulling-your-weight-in-nato/> (last visited Nov. 2, 2018).

162. *Id.*

163. *Id.*

its power abroad, though Denmark failed to meet the guideline and boasts a military that can be easily deployed abroad at any time.¹⁶⁴ Discussion of the military readiness is outside of the scope of this article, and would be more in the realm of military experts. Without evaluating the military preparedness of every member of NATO though, it is still safe to conclude that countries failing to meet the 2% of GDP for defense spending guideline would not constitute a material breach that would allow members of NATO to immediately renounce mutual defense obligations under NATO.

Additionally, Article 45 of the Vienna Convention on the Law of Treaty states that a party may no longer invoke a ground for suspending a treaty under Article 60, after becoming aware of the facts, "it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be."¹⁶⁵ This could mean that a member could lose its ability to withdraw from NATO, if knowing that another member of NATO did not have the ability to resist armed attack, that member of NATO continued to support abide by its mutual defense obligations.

International treaty law provides the possibility that a member of NATO could suspend its mutual defense obligations if other members of NATO did not have the ability to resist armed attack, though it does not allow members of NATO to do that simply because other members of NATO failed to spend 2% of their GDP on defense spending. While it is possible, it is still unlikely to occur. A material breach in Article 60 is a rather high standard in terms of NATO. It would not allow the mutual defense obligations to be renounced simply because a military was not as powerful as it should be. Instead, a country would need to provide no assistance whatsoever militarily to constitute a material breach. Additionally, if a country was aware of the breach, if it did not act timely enough, other members of NATO could be considered to have acquiesced to that conduct, and suspension would not be allowed at that point.

VII. CONCLUSION

A failure on the part of a NATO member country to spend 2% of its GDP on national defense spending would not allow another member of NATO to suspend its mutual defense obligations to NATO immediately. Under international treaty law, a member of NATO may be able to suspend its mutual defense obligations to NATO when other mem-

164. *Id.*

165. VCLT, *supra* note 51, art. 45.

bers are unable to assist in the repelling of an armed attack. This is somewhat unlikely to happen, however, as such an inability to uphold its own defense obligations under the North Atlantic Treaty is unlikely to occur. The standard for that would be quite high, and relative weakness of a military would not constitute a material breach. Additionally, members of NATO could be perceived as acquiescing to such arrangement, which would also remove their ability to suspend their mutual defense obligations. A failure to give the requisite amount of direct funding to NATO would also not allow for a country to suspend its mutual defense obligations under international treaty law.

While a failure on the part of some countries to meet the 2% funding guideline may be frustrating to the members of NATO that meet it, it does not trigger an immediate right to renounce mutual defense obligations under the treaty. Instead, if members of NATO wish to be released from their mutual defense obligations, they need to withdraw from NATO by giving one-year notice. Without taking such action, it appears likely that the central focus of NATO will continue to bind its members as the Alliance moves forward into the future.