

Empirical Analysis of Existing Human Rights Treaties and Prospects for Vulnerable Groups

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I. INTRODUCTION AND ROAD MAP

Since World War II, international human rights law has become a rich tapestry, with individual human rights instruments as the yarns.¹ As with the best of historical tapestries, these yarns are widely varied and skillfully interwoven. Without a clear vision of how the tapestry's strands weave together to create the global human rights system, one cannot sensibly argue for the addition of any new yarns to this tapestry.

It is the purpose of this article to make just such an argument, for the nations of the world are often called upon to protect human rights with greater specificity: to create new, targeted human rights instruments that protect various groups worldwide. My thesis is that, in order to assess whether it is productive to create new instruments, nations should first look at the existing tapestry of human rights instruments and categorize them in a variety of ways, as one might focus on the distinct colors of a tapestry's yarns. There are hard instruments and soft instruments, global instruments and regional instruments, instruments of universal scope and those of limited scope, and instruments focused primarily on forbidden acts and those focused primarily on protected classes of people. Not surprisingly, these categories intersect, so that a particular instrument might be hard, regional, limited, and focused on prohibited acts rather than a protected class, all at the same time.²

¹ CAROLE KING, TAPESTRY (Ode Records 1971). I acknowledge this metaphor's origin in the song "Tapestry" by Carole King, the opening stanza of which goes:

My life has been a tapestry of rich and royal hue
 An everlasting vision of the ever-changing view
 A wondrous woven magic in bits of blue and gold
 A tapestry to feel and see, impossible to hold

It seems apt to refer to international human rights law as an "everlasting vision" that is "wondrous" and yet "impossible to hold."

² See, e.g., The Council of Europe Convention on Action against Trafficking in Human Beings, Council of Eur. Treaty Series 2005-May 15 C.E.T.S. No. 197. This is a binding instrument (thus "hard"), limited in its application to the countries of the Council of Europe ("regional"), focused with particularity on the issue of trafficking ("limited" and "acts"). It is possible to take this process

For purposes of this article, all of these classifications will matter, though in different ways. From the outset, the primary focus of this article will be upon binding international instruments rather than soft law, though we will make occasional references to the latter, especially when there is little or no hard law in the area under discussion. Further, we will be focusing on binding instruments that are both global in reach and limited in scope—those global instruments that seek to refine how we address a particular problem or constellation of human rights problems rather than those that seek to define a broad sweep of human rights principles. Finally, we will narrow the focus to just those global-reach, limited-scope hard law human rights instruments that address the rights of classes of people, rather than address the wrongs of classes of acts.

Through this exercise, I hope to bring better focus to claims for new human rights instruments by comparing candidate groups with those groups who already have obtained focused human rights instruments that have proven successful, at least by measures of adoption and ratification. In terms of my tapestry analogy, this exercise is like comparing a new yarn with the existing yarns of the tapestry to determine whether it is of similar weight and richness of hue. If it is, then we can expect to incorporate it into the existing pattern; if not, this particular yarn must be set aside.

II. A TYPOLOGY OF POST-WAR HUMAN RIGHTS INSTRUMENTS

Before looking at the individual threads, let's take a brief look at the overall design of the tapestry.

A. *Instruments of Global Reach and Universal Scope*

Following the two world wars and their associated human rights atrocities, the world needed to create a strong foundation for a new global human rights system. This resulted in an initial period during which countries crafted human rights instruments of universal application and universal topical coverage, starting with the Universal Declaration of Human Rights [hereinafter UDHR or Universal Declaration], adopted by the United Nations General Assembly in 1948.³ The UDHR, which uses language like “all

of categorization further by noting that this Convention acts both through defining and prohibiting the act of trafficking (“norms”) and creating mechanisms for monitoring and dealing with trafficking (“institutions”), but the norm/institution distinction will be of less significance to this article.

³ G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR].

members of the human family,”⁴ “all human beings,”⁵ and “everyone,”⁶ addresses a very broad range of human rights issues, including human dignity,⁷ slavery,⁸ discrimination,⁹ rights when criminally accused,¹⁰ privacy,¹¹ property rights,¹² and education.¹³ With its broad, inclusive wording, the UDHR bears strong stylistic similarities to Magna Carta and the United States Bill of Rights and was intended to have a similar foundational significance.¹⁴

The UDHR was followed by other international instruments designed to cover a broad range of human rights for all people. Prime among these are twin UN instruments, passed by the General Assembly in 1966. One of these is the International Covenant on Civil and Political Rights¹⁵ with its two related Optional Protocols.^{16,17} The other is the International Covenant on Economic, Cultural and Social Rights¹⁸ [hereinafter ICESCR] and its related Optional

⁴ *Id.*, pmb.; *Id.*, cl. 1.

⁵ *Id.*, art. 1.

⁶ *Id.*, art. 2.

⁷ *Id.*, art. 1.

⁸ UDHR, *supra* note 3, art. 4.

⁹ *Id.*, art. 7.

¹⁰ *Id.*, arts. 9–11.

¹¹ *Id.*, art. 12.

¹² *Id.*, art. 17.

¹³ UDHR, *supra* note 3, art. 26.

¹⁴ Madeline Branch, *10 Inspiring Eleanor Roosevelt Quotes*, UNITED NATIONS FOUND. (Nov. 6, 2015), <https://unfoundation.org/blog/post/10-inspiring-eleanor-roosevelt-quotes/>. Eleanor Roosevelt, who became the first Chair of the United Nations Human Rights Commission in 1946 and was a key figure in the drafting of the Universal Declaration, famously remarked: “We stand today at the threshold of a great event both in the life of the United Nations and the life of all mankind. This declaration may well become the international Magna Carta for all men everywhere.” *Id.*

¹⁵ G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966).

¹⁶ G.A. Res. 2200A (XXI), Optional Protocol to the International Covenant on Civil and Political Rights, (Dec. 16, 1966), [hereinafter ICCPR]. This Optional Protocol is limited to procedural matters and, considered by itself, would fit into a different category of human rights instruments notwithstanding its formal association with the ICESCR.

¹⁷ G.A. Res. 44/128, Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (Dec. 15, 1989). The specificity of the Second Optional Protocol in dealing with just one type of human rights violation is such that, considered by itself, would fit into a different category of human rights instrument notwithstanding its formal association with the ICCPR.

¹⁸ G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966), [hereinafter ICESCR].

Protocol.¹⁹ With the UDHR, the ICCPR and the ICESCR are often referred to, collectively, as the Universal Bill of Human Rights.

In any legal system, foundational documents are necessary but of themselves insufficient to ensure a functioning legal system. Thus, the legal system of the United States built upon the Constitution by creating a vast code of more specific federal and state laws. In a similar fashion, international human rights law that followed the UDHR and, subsequently, the ICCPR and ICESCR developed through the creation of instruments of regional application, on the one hand, and of instruments having more specific topical coverage, on the other. These two approaches of regionalism and topicality are complementary in that they serve somewhat different purposes, but both approaches demonstrate a deepening global commitment to human rights norms and an increasing sophistication of those norms.

B. Instruments of Regional Reach and Universal Scope

The trend towards regionalism began almost immediately with the 1948 American Declaration on the Rights and Duties of Man, also known as the Bogota Declaration,²⁰ which predates the UDHR by a few months. As a declaration, it has never entered into force, but it is viewed by members of the Organization of American States [hereinafter “OAS”] as binding.²¹

Almost simultaneous with the creation and adoption of the UDHR, the push for regional human rights instruments of universal scope began in Europe. These efforts began with the Council of Europe’s 1950 Convention on Human Rights²² [hereinafter “ECHR”] and 1961 European Social Charter.²³ Subsequently, the European Union formally adopted the ECHR by reference in the 1992 Treaty on European Union, more familiarly known as the Treaty of Maastricht.²⁴ Later, the European Union adopted its own universal-scope

¹⁹ G.A. Res. 63/117, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, (June 18, 2008). This Optional Protocol is limited to procedural matters and, considered by itself, would fit into a different category of human rights instruments notwithstanding its formal association with the ICESCR.

²⁰ Organization of American States, American Declaration of the Rights and Duties of Man, (1948).

²¹ Christina M. Cerna, *Reflections on the Normative Status of the American Declaration of the Rights and Duties of Man*, 30 U. PA. J. INT’L L. 1211, 1211 (2008).

²² Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe Treaty Series 1950 E.T.S. No. 5, [hereinafter ECHR].

²³ Council of Europe, European Social Charter, Council of Europe Treaty Series 1961 Oct. 18 E.T.S. No. 35. (Oct. 18, 1961).

²⁴ Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 191) 1.

human rights instrument, the Charter of Fundamental Rights and Liberties,²⁵ with its adoption of the Treaty of Lisbon.²⁶

Eventually, the United Nations encouraged this trend towards developing regional human rights treaties.²⁷ In 1968, the Commission on Human Rights called upon the Secretary-General to consider organizing seminars promoting regional human rights instruments in regions in which such instruments did not yet exist.²⁸ In 1977, the General Assembly appealed to states lacking regional human rights instruments to move towards developing and adopting such regional instruments.²⁹ This resolution also renewed that call for regional seminars in support of the development of human rights instruments.³⁰

Around the world, regional groupings of countries began to adopt their own universal-scope human rights instruments. In the Americas, the OAS produced the 1969 American Convention on Human Rights (also known as the Pact of San José).³¹ In 1981, the Organization of African Unity produced the 1981 African Charter on Human and Peoples' Rights (also known as the Banjul Charter).³² The League of Arab States produced the 2004 Arab Charter on

²⁵ Charter of Fundamental Rights of the European Union, Dec. 7, 2000, 2007 O.J. (C 303) 1. For further information about the Charter, *see generally* WILLIAM B.T. MOCK & GIANMARIO DEMURO, HUMAN RIGHTS IN EUROPE: COMMENTARY ON THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION (William B.T. Mock & Gianmario Demuro, eds., 2010).

²⁶ Treaty of Lisbon, Dec. 13, 2007, 2007 O.J. (C 306) 2 (entered into force Dec. 1, 2009). Incorporation of the Charter of Fundamental Rights and Liberties into EU treaty law occurred in Article 8, which amended Article 6 of the Treaty on European Union. *Id.* art. 8.

²⁷ In the years between the UDHR and the two Covenants, there was substantial opposition expressed at the UN about the rise of regional human rights regimes in Europe and the Americas. That opposition shifted with the promulgation of the ICCPR and the ICESCR in 1966. KAREL VASAK, THE INTERNATIONAL DIMENSION OF HUMAN RIGHTS, 451 (Philip Alston, ed., 1982). *See generally* Christof Heyns & Magnus Killander, *Towards Minimum Standards for Regional Human Rights Systems*, in *ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN* (Mahnoush H. Arsanjani et al. eds., 2011).

²⁸ Comm'n on Human Rights, *Report on the Twenty-Fourth Session, Economic and Social Council Official Records: Forty-Fourth Session*, U.N. Doc. E/CN.4/972, Chapter XVIII (1968). In so doing, the Commission on Human Rights built upon its own *ad hoc* Study Group, whose proceedings and conclusions appear at *id.* ¶¶ 211–45.

²⁹ G.A. Res. 32/127, Regional Arrangements for the Promotion and Protection of Human Rights, ¶ 1 (Dec. 16, 1977). In this provision, the General Assembly appeals to States in areas where regional arrangements in the field of human rights do not yet exist to consider arrangements with a view to the establishment within their respective regions of suitable regional machinery for the promotion and protection of human rights. *Id.*

³⁰ *Id.* ¶ 2.

³¹ Organization of American States, American Convention on Human Rights “Pact of San Jose, Costa Rica”, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

³² Org. of African Unity [OAU], African [Banjul] Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 1520 U.N.T.S. 217 (1982).

Human Rights.³³ Most recently, the Association of South-East Asian Nations produced the 2012 ASEAN Human Rights Declaration.³⁴ Each of these instruments is at least loosely based upon the UDHR, perhaps with consideration also of the ICCPR and the ICESCR, though there has been some dispute about how closely those models were followed with respect to the Arab Charter³⁵ and the ASEAN Declaration.³⁶

C. *Instruments of Limited Scope, Generally*

Before turning to the division of instruments of limited scope into those of global or regional reach, we should add one more level to our analysis, similar to the distinctions I have already made between global v. regional instruments and between universal v. limited-scope instruments. Generally speaking, limited-scope instruments are also topic-specific, defined by whether they focus on people, acts, or institutions, though some instruments combine features of more than one type.

i. People

Limited-scope instruments that focus on people typically start by defining a population that is identified as disadvantaged or vulnerable. Thus, for example, the Preamble to the Disabilities Convention³⁷ expresses as one rationale for the Convention that the State parties were “*Concerned* that, despite [various international human rights instruments], persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world.”³⁸ Similarly, the African Union’s Protocol to the African Charter on Human and

³³ League of Arab States, Arab Charter on Human Rights, May 22, 2004, 12 Int’l Hum. Rts. Rep. 893 (2005).

³⁴ Association of South-East Asian Nations [ASEAN], ASEAN Human Rights Declaration, Nov. 18, 2012, https://www.asean.org/storage/images/ASEAN_RTK_2014/6_AHRD_Booklet.pdf.

³⁵ *Arab Rights Charter Deviates from International Standards, Says UN Official*, UN NEWS (Jan. 30, 2008), <https://news.un.org/en/story/2008/01/247292-arab-rights-charter-deviates-international-standards-says-un-official> (describing a statement by UN High Commissioner for Human Rights, Louise Arbour, in which she expressed concern over aspects of the Arab Charter that deviated substantially from established international human rights norms).

³⁶ *UN Official Welcomes ASEAN Commitment to Human Rights, but Concerned over Declaration Wording*, UN NEWS (Nov. 19, 2012), <https://news.un.org/en/story/2012/11/426012#.UPgVKGckSOI> (describing a statement by UN High Commissioner for Human Rights Navi Pillay in which she expressed concern that aspects of the ASEAN Human Rights Declaration fall short of international standards, both substantively and in the relative lack of involvement of civil society in its development).

³⁷ G.A. Res. 61/106, Convention on the Rights of Persons with Disabilities (Dec. 13, 2006) [hereinafter Disabilities Convention].

³⁸ *Id.* p.mbl.; *Id.* ¶ k.

Peoples' Rights on the Rights of Women in Africa (also known as the Maputo Protocol)³⁹ noted that the State parties were:

CONCERNED that despite the ratification of the African Charter on Human and Peoples' Rights and other international human rights instruments by the majority of States Parties, and their solemn commitment to eliminate all forms of discrimination and harmful practices against women, women in Africa still continue to be victims of discrimination and harmful practices[.]⁴⁰

These people-oriented limited-scope instruments typically use the existing framework of international human rights norms as a scaffolding for the new instrument. Sometimes a protective provision does little more than repeat an existing human rights norm but expresses it by reference to the protected group. Sometimes, the negotiators add more detail and specificity to the existing norm. Compare, for example, these two provisions from the Migrant Workers Convention:⁴¹

- a) "No migrant worker or member of his or her family shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."⁴² This is little more than a restatement of the provision in the Universal Declaration that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."⁴³
- b) "States Parties shall take all appropriate measures to ensure that migrant workers are not deprived of any rights derived from this principle [of national treatment in employment and remuneration] by reason of any irregularity in their stay or employment."⁴⁴ This statement has no exact counterpart in the UDHR, though one can reasonably find its origins in the UDHR statement that "[e]veryone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment."⁴⁵

³⁹ African Union, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, July 11, 2003 CAB/LEG/66.6 [hereinafter Maputo Protocol].

⁴⁰ *Id.* pmb.; *Id.* cl. 12.

⁴¹ G.A. Res. 45/158, annex, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Dec. 18, 1990) (entered into force July 1, 2003) [hereinafter "Migrant Workers Convention"].

⁴² *Id.* art. 10.

⁴³ UDHR, *supra* note 3, art. 10.

⁴⁴ Migrant Workers Convention, *supra* note 41, art. 25, ¶3.

⁴⁵ UDHR, *supra* note 3, art. 23, ¶ 1.

ii. Acts

Limited-scope instruments that focus on acts usually put serious effort into defining a particular act that, in a looser definition, is already prohibited by existing international norms. Consider, for example, that “torture” is referred to in UDHR art. 5, as quoted above, but the term is not defined anywhere in the UDHR. By contrast, consider this passage from the Inter-American Convention to Prevent and Punish Torture:⁴⁶

For the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.

The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article.⁴⁷

Typically, instruments focused on acts do not try to identify or define just who may be the victims of the prohibited acts. After all, anyone could potentially be subjected to torture and the protections of the instrument must extend to all.

iii. Institutions

Limited-scope instruments that focus on institutions do not typically define the people who may be directly or indirectly protected by the instrument, nor do they define the act or acts that are the topic of concern behind the instrument. For example, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment⁴⁸ merely cross-

⁴⁶ Organization of American States, Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, O.A.S.T.S No. 67.

⁴⁷ *Id.* art. 2.

⁴⁸ Council of Europe, European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Feb. 1, 1989, E.T.S. No. 126.

references the ECHR⁴⁹ for any definitions and substantive provisions by using the following language:⁵⁰

Having regard to the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms,

Recalling that, under Article 3 of the same Convention, "no one shall be subjected to torture or to inhuman or degrading treatment or punishment";

Noting that the machinery provided for in that Convention operates in relation to persons who allege that they are victims of violations of Article 3;

Convinced that the protection of persons deprived of their liberty against torture and inhuman or degrading treatment or punishment could be strengthened by non-judicial means of a preventive character based on visits,

Have agreed as follows [. . .].⁵¹

Thereafter, this convention devotes all its provisions to the creation and operations of a European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

The Rome Statute of the International Criminal Court⁵² provides an example of an institution-based human rights treaty that does devote attention to defining the forbidden acts of genocide,⁵³ crimes against humanity,⁵⁴ and war crimes.⁵⁵ However, these represent only three of the Rome Statute's 128 articles, the overwhelming majority of which are devoted to creating and defining aspects of the International Criminal Court.⁵⁶ What's more, the three sections defining forbidden acts are included for purposes of defining the jurisdiction of the ICC, not for purposes of defining and forbidding the acts themselves.⁵⁷

⁴⁹ ECHR, *supra* note 22.

⁵⁰ European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *supra* note 48.

⁵¹ *Id.* pmb1.

⁵² U.N. General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

⁵³ *Id.* art. 6.

⁵⁴ *Id.* art. 7.

⁵⁵ *Id.* art. 8.

⁵⁶ *Id.*

⁵⁷ Rome Statute, *supra* note 52, arts. 6–8.

iv. Mixed-Purpose Limited-Scope Instruments

To be fair, some limited-scope instruments combine aspects of two or even all three of these foci. Thus, for example, the Migrant Workers Convention⁵⁸ has an extensive definitional provision that not only defines “migrant worker” but also defines various sub-types of migrant workers, including “frontier worker,”⁵⁹ “seasonal worker,”⁶⁰ “seafarer,”⁶¹ and several more. The Convention also has extensive infrastructural passages, beginning with provisions establishing a Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families⁶² and describing that Committee’s workings.⁶³ The Migrant Workers Convention thus has aspects both of a people-focused instrument and of an institution-based instrument.

Having paused briefly to discuss this people/act/institution typology of human rights instruments of limited scope, which will prove significant shortly, we will now return to a closer consideration of limited-scope instruments, both regional and global.

D. Instruments of Global Reach and Limited Scope

Shortly after creation of the UDHR and the twin Covenants, international attention began to respond to a growing awareness that some areas of particular human rights concern were either addressed with inadequate specificity in those documents or were not addressed at all. Although the UDHR and the twin Covenants created an excellent framework for defending human rights, their terms are of necessity broad and sweeping. Indeed, if that was a vice in these documents, it was a necessary vice, because the very vagueness of the terms of these three documents was the result of negotiations needed to make these documents palatable to a wide range of countries. Vagueness has its value as a negotiating strategy, and it permitted the post-WWII world to form a framework that later generations could use to build a more comprehensive human rights edifice.

For purposes of this article, it is the global, people-based treaties of limited scope that will capture our attention. Within the “core” international human

⁵⁸ Migrant Workers Convention, *supra* note 411.

⁵⁹ *Id.* art. 2(2)(a).

⁶⁰ *Id.* art. 2(2)(b).

⁶¹ *Id.* art. 2(2)(c).

⁶² *Id.* art. 72.

⁶³ Migrant Workers Convention, *supra* note 411, arts. 72–78.

rights instruments,⁶⁴ there are instruments specifically designed to protect the human rights of:

- 1) Women,⁶⁵
- 2) Children,⁶⁶
- 3) Persons with disabilities,⁶⁷ and
- 4) Migrant workers,⁶⁸

Each of these groups has its own human rights instrument that (a) is tailored to that group's specific human rights needs, (b) was adopted by the U.N. General Assembly, and (c) created a treaty body⁶⁹ that monitors compliance with that treaty. There are, however, two other vulnerable groups who benefit from binding U.N. instruments protecting their human rights. For one group, the U.N. General Assembly adopted that instrument very shortly after World War II, but there is no corresponding treaty body. Nevertheless, we are considering them in this article:

- 5) Refugees and migrants.⁷⁰

Finally, there is one other vulnerable group that is covered by a human rights treaty of global reach and limited scope, which we will also be considering in this article:

⁶⁴ *The Core International Human Rights Instruments and Their Monitoring Bodies*, U.N. HIGH COMMISSIONER ON HUMAN RIGHTS, <https://www.ohchr.org/en/professionalinterest/pages/coreinstruments.aspx> (last visited Dec. 31, 2019). This website lists the nine core international human rights instruments, their optional protocols, and the treaty bodies established to monitor compliance with those instruments.

⁶⁵ G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination against Women (Dec. 18, 1979) [hereinafter CEDAW]. Like many of the other human rights instruments mentioned in this article, CEDAW has optional protocols. However, such protocols will not generally concern us, as the aim of this article is to discuss conditions precedent to the existence of human rights treaties, not the substantive obligations contained in those treaties and related instruments.

⁶⁶ G.A. Res. 44/25, annex, Convention on the Rights of the Child (Nov. 20, 1989) [hereinafter CRC].

⁶⁷ G.A. Res. 61/106, annex, International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (Dec. 13, 2006) [hereinafter CRPD].

⁶⁸ Migrant Workers Convention, annex.

⁶⁹ For further information on these treaty bodies and suggestions for improving them, see Navanethem Pillay (U.N. High Commissioner for Human Rights), *Strengthening the United Nations Human Rights Treaty Body System*, U.N. Doc. A/66/860 (June 26, 2012).

⁷⁰ Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter Refugees Convention].

6) Indigenous and tribal peoples,⁷¹

Reasonable people might disagree about the inclusion of indigenous and tribal peoples in this list of vulnerable groups who have received the special protection of their own global human rights instrument.⁷² The Convention concerning Indigenous and Tribal Peoples in Independent Countries⁷³ differs in two significant ways from the other international instruments referenced in the previous paragraph. First, unlike the other instruments, the Indigenous Peoples Convention did not emanate from the U.N. General Assembly, but from the International Labour Office, which has a more limited scope of authority.⁷⁴ Second, whereas the other instruments under discussion focus on *individual* human rights, the Indigenous Peoples Convention focuses on *collective* human rights—the rights of groups of peoples, tribes, or *gens*—including protections of institutions,⁷⁵ indigenous languages,⁷⁶ traditional dispute resolution mechanisms,⁷⁷ and traditional lands.⁷⁸ One could choose to interpret this focus on collective human rights as sufficient to exclude this convention from the analysis in this article, but I have chosen to err on the side of inclusion. After all, collective human rights remain human rights and too narrow a focus on individual rights over collective rights could reasonably be seen as a cultural imposition on communities not rooted in Western individualism.

One could also argue that both slaves and trafficked persons are also groups protected by human rights treaties, but a closer look reveals that those treaties are targeted more at the acts of enslavement and trafficking than at protecting a pre-existing group of people whose rights are threatened in the context of a larger society. For example, the Slavery Convention,⁷⁹ which

⁷¹ Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169), June 27, 1989, 72 ILO Official Bull. 59 [hereinafter Indigenous Peoples Convention].

⁷² See *infra* note 227 and accompanying text, where Professor Ben Saul argues that there is no specialized treaty on indigenous rights.

⁷³ Indigenous Peoples Convention, *supra* note 711.

⁷⁴ It is interesting to note that the ILO, whose remit is focused on labor and employment law, considers the Indigenous Peoples Convention to be neither a “fundamental” convention nor a “priority” convention. See *Conventions and Recommendations*, INT’L LAB. ORG. (ILO), <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm> (last visited Feb. 25, 2020).

⁷⁵ Indigenous Peoples Convention, *supra* note 711, art. 8(2).

⁷⁶ *Id.* art. 28.

⁷⁷ *Id.* art. 9.

⁷⁸ *Id.* arts. 13–19.

⁷⁹ Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926 (“Slavery Convention”), Sept. 25, 1926, 60 L.N.T.S. 253 (entered into force Mar. 9, 1927, subsequently amended by Protocol amending the Slavery Convention, 182 U.N.T.S. 51, entered into force Dec. 7, 1953).

predates World War II and the UDHR, undertook to abolish the slave trade and bring about the abolition of slavery in all its forms⁸⁰ rather than setting out a series of human rights of enslaved people. Similarly, instruments against trafficking seek to abolish trafficking altogether rather than to enumerate a distinct list of human rights of persons who have been trafficked.⁸¹

Likewise, U.N. employees have a special treaty protecting them.⁸² However, this convention effectively operates more as an act of institution-building than as an instrument protecting the rights of a distinct pre-existing population.

Human rights defenders also have a human rights instrument, but it is non-binding. The Declaration on Human Rights Defenders⁸³ sets forth recommended norms of how States should treat human rights defenders within their jurisdiction.

E. Instruments of Regional Reach and Limited Scope

People-based instruments are also common at the regional level. Thus, there is an African instrument protecting the human rights of children⁸⁴ and inter-American instruments protecting the human rights of persons with disabilities⁸⁵ and older persons.⁸⁶ There is both a non-binding 2007 ASEAN instrument on migrant workers⁸⁷ and a binding 1977 European instrument on migrant workers.⁸⁸ To a great extent, regional instruments of limited scope

⁸⁰ *Id.* art. 2.

⁸¹ *See, e.g.*, Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, *opened for signature March 21, 1950*, 96 U.N.T.S. 271, (entered into force July 25, 1951).

⁸² G.A. Res. 49/59, Convention on the Safety of United Nations and Associated Personnel (Feb. 17, 1995), (entered into force Jan. 15, 1999).

⁸³ G.A. Res. 53/144, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (March 8, 1999).

⁸⁴ Org. of African Unity [OAU] African Charter on the Rights and Welfare of the Child, July 11, 1990, *opened for signature July, 1990*, OAU Doc. CAB/LEG/24.9/49 (1990).

⁸⁵ Org. of American States, Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities, *opened for signature June 7, 1999*, AG/RES. 1608 (XXIX-O/99).

⁸⁶ Org. of American States, Inter-American Convention on Protecting the Rights of Older Persons, *opened for signature June 15, 2015*, T.S. No. A-70, (entered into effect Jan. 11, 2017).

⁸⁷ Association of Southeast Asian Nations [ASEAN], Jan. 13, 2007, Declaration on the Protection and Promotion of the Rights of Migrant Workers.

⁸⁸ Council of Europe, European Convention on the Legal Status of Migrant Workers, *opened for signature (Nov. 24, 1977)*, E.T.S. no. 93, (entered into force May 1, 1983).

parallel global instruments of limited scope and are similarly focused on people, acts, and institutions, or some combination of these primary foci.

III. RATIFICATION OF THE SELECTED INSTRUMENTS

Although this article has identified six groups who have obtained the benefit of global, focused human rights treaties, as well as the six treaties protecting those groups' human rights, not all treaties are greeted equally by the international community. In this section, we will look at these six treaties using two metrics—how long it took for the treaty to go into effect after being offered up for signature, and how many countries have ratified the treaty to date.

The following table provides, for each of the six global, person-oriented human rights treaties that we are considering in this article, information about ratifications (both those needed under the terms of the instrument and those currently in effect) and timing (dates instruments were adopted, dates instruments went into effect, and the number of days elapsed between those two dates).

Table 1. Numbers and Timing of Ratifications

Convention	Ratifications		Dates		Elapsed in days
	<i>Needed</i>	<i>Have</i>	<i>Adopted</i>	<i>Effect</i>	
CEDAW	20 ⁸⁹	189 ⁹⁰	12/18/79 ⁹¹	9/3/81 ⁹²	625
CRC	20 ⁹³	196 ⁹⁴	11/20/89 ⁹⁵	9/2/90 ⁹⁶	286
CRPD	10 ⁹⁷	177 ⁹⁸	12/13/06 ⁹⁹	5/3/08 ¹⁰⁰	507
CMW	20 ¹⁰¹	54 ¹⁰²	12/18/90 ¹⁰³	7/1/03 ¹⁰⁴	4578

⁸⁹ CEDAW, *supra* note 655, art. 27(1).

⁹⁰ U.N. Office of the High Commissioner on Human Rights, Status of Ratification Interactive Dashboard, <http://indicators.ohchr.org/> (last visited Dec. 31, 2019) [hereinafter UN OHCHR Dashboard].

⁹¹ U.N. Office of the High Commissioner on Human Rights, Convention on the Elimination of All Forms of Discrimination Against Women, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx> (last visited Dec. 31, 2019).

⁹² *Id.*

⁹³ CRC, *supra* note 666, art 49(1).

⁹⁴ UN OHCHR Dashboard, *supra* note 900.

⁹⁵ U.N. Office of the High Commissioner on Human Rights, Convention on the Rights of the Child, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx> (last visited Dec. 31, 2019).

⁹⁶ *Id.*

⁹⁷ CRPD, *supra* note 67, art. 45(1).

⁹⁸ UN OHCHR Dashboard, *supra* note 90.

⁹⁹ U.N. Treaty Collection, Depository, Status of Treaties, Chapter IV, 15, Convention on the Rights of Persons with Disabilities, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en (last visited Dec. 31, 2019).

¹⁰⁰ *Id.*

¹⁰¹ Migrant Workers Convention, *supra* note 411, art. 88(1).

¹⁰² UN OHCHR Dashboard, *supra* note 90.

¹⁰³ U.N. Office of the High Commissioner on Human Rights, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CMW.aspx> (last visited Dec. 31, 2019).

¹⁰⁴ U.N. Treaty Collection, Depository, Status of Treaties, Chapter IV, 13, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&lang=en&mtdsg_no=IV-13&src=IND (last visited Dec. 31, 2019).

Refugees	6 ¹⁰⁵	145 ¹⁰⁶	7/28/51 ¹⁰⁷	4/22/54 ¹⁰⁸	1008
Indigenous Peoples	2 ¹⁰⁹	23 ¹¹⁰	6/27/89 ¹¹¹	9/5/91 ¹¹²	800

Based upon this information, it would appear that these instruments lie across a spectrum of international success. On one end, CEDAW, the CRC, and the CRPD all became effective within well under two years. The CRC was the fastest to become effective, with deposit of the twentieth ratification in under one year. CEDAW and the CRPD have roughly comparable statistics on ratification time, given that the CRPD only needed ten ratifications to become effective.¹¹³ In addition, they are all in effect for the overwhelming majority of the world's nations, with the CRPD lagging only slightly behind CEDAW and the CRC. By any of these measures, all three conventions are very successful. In the middle is the Refugee Convention, which took almost three years to come into effect, despite the low threshold of needing only six ratifications.¹¹⁴ However, when looking at these numbers for the Refugee Convention, we must keep in mind that it is by far the earliest of these instruments, adopted in an era when the United Nations was much smaller and only 60 countries were eligible to ratify the convention.¹¹⁵ In addition, the Refugee Convention is in effect for roughly three-quarters of the world's nations.

At the other end of the spectrum we find the other two conventions, which lag far behind both in speed of becoming effective and in numbers of ratifying

¹⁰⁵ Refugees Convention, *supra* note 700, art. 43(1).

¹⁰⁶ UNHCR, States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol, <https://www.unhcr.org/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html> (last visited Dec. 31, 2019).

¹⁰⁷ Refugees Convention, *supra* note 700, art. 38.

¹⁰⁸ UNHCR, States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol, <https://www.unhcr.org/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html> (last visited Dec. 31, 2019).

¹⁰⁹ Indigenous Peoples Convention, *supra* note 711, art. 38(2).

¹¹⁰ International Labour Organization, Ratifications of C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312314 (last visited Dec. 31, 2019).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *See supra* Table 1.

¹¹⁴ *Id.*

¹¹⁵ *Growth in United Nations Membership, 1945-Present*, UNITED NATIONS, <http://www.un.org/en/sections/member-states/growth-united-nations-membership-1945-present/index.html> (last visited Dec. 31, 2019).

countries. The Convention on Migrant Workers required twenty ratifications before it became effect, just as did CEDAW and the CRC.¹¹⁶ However, it took more than twelve years to get those twenty ratifications, by far the longest interval of these six treaties. Even today, roughly 28 years after its adoption, the Migrant Workers Convention has been ratified by only slightly more than one-quarter of the members of the United Nations.¹¹⁷

The Indigenous Peoples Convention, adopted roughly eighteen months before the Convention on Migrant Workers, took more than two years to get the two ratifications needed for it to become effective. By today, almost thirty years after its adoption, the Indigenous Peoples Convention still has only 23 ratifications, which is almost 12% of the membership of the United Nations.¹¹⁸ By these measures, and without any reference to whether the existence of the Indigenous Peoples Convention has proven of value with respect to the protected group in those 23 states, this convention lags far behind the other conventions we are considering in effectiveness.

IV. A CLOSER LOOK AT THE PROTECTED GROUPS

In part II(D) of this article, we identified six groups of people whose human rights have been protected by global human rights treaties of limited, person-oriented focus. To recap, these six groups are women, children, persons with disabilities, migrant workers, indigenous and tribal peoples, and refugees and migrants. In this part of this article, we will attempt to identify characteristics shared among these groups. The purpose of this exercise is to see whether we can construct a set of empirical criteria that might help in explaining why some of the six treaties are more accepted by the world community than others and in identifying likely candidates for future examples of these kinds of instruments.

In terms of the tapestry trope with which this article began, this “Closer Look” can be seen as an effort to understand what good tapestry yarn is like so that we can keep adding to the tapestry. What fiber should be used, what weight should it be, how many strands should it have, and how much should it stretch during the weaving process? If we know these characteristics, we can identify a good new yarn; if not, we will waste our time and could weaken the tapestry.

¹¹⁶ See *supra* Table 1.

¹¹⁷ *Id.*

¹¹⁸ As of this writing, the United Nations has 193 members. *Growth in United Nations Membership, 1945-Present*, UNITED NATIONS, <https://www.un.org/en/sections/member-states/growth-united-nations-membership-1945-present/index.html> (last visited Dec. 31, 2019). Thus, 23 states are almost 12% of the membership.

Once we have a set of reasonably, empirically-based criteria for identifying candidate groups for limited, person-focused international human rights instruments, we will turn in Part V of this article to identifying the most reasonable candidate groups for their own global human rights treaties by applying those criteria as a set of filters.

A. *Shared Characteristics*

So, what do these six groups—women, children, persons with disabilities, migrant workers, indigenous and tribal peoples, and refugees and migrants—have in common?

i. Vulnerability

First, and most obviously, these are all vulnerable populations. Broadly speaking, by “vulnerable populations” I mean groups of people sharing one or more characteristics that make them more susceptible to the kinds of abuses and discriminatory treatment that human rights treaties are designed to prevent or ameliorate. However, we need to do some exploration of the concept of vulnerability in law before this concept will be of use.

In human rights law, civil rights law, and social work, “vulnerability” is a way of defining groups, sub-groups, or individuals in need of some degree of enhanced protection in a particular context.¹¹⁹ For example, the United States National Health Security Strategy declares that “the term ‘at-risk individuals’ means children, pregnant women, senior citizens and other individuals who have access or functional needs in the event of a public health emergency”¹²⁰ Writing of this provision, Professor Sharona Hoffman states:

Vulnerable populations, also called “special needs” populations or “at-risk” populations, are those that are particularly “at risk of poor physical, psychological, or social health” after a disaster. . . . Different groups are traditionally recognized as vulnerable in different contexts. During disasters, several population segments are potentially vulnerable. These include (1) individuals with physical and mental disabilities, (2) elderly persons, (3) pregnant women, (4) children, (5) prisoners, (6)

¹¹⁹ See, e.g., ILENIA RUGGIU, *CULTURE AND THE JUDICIARY: THE ANTHROPOLOGIST JUDGE* 165 (2019).

¹²⁰ 42 U.S.C. § 300hh-1(b)(4)(B).

economically disadvantaged minorities, (7) undocumented workers, and (8) those with language barriers.¹²¹

This conception of vulnerability as being situational—that a vulnerable group is one whose members are vulnerable *to* something, rather than just being generally vulnerable—appears in human rights literature. Thus, in writing of the rise of vulnerability as a concept in court decisions based upon Article 14 of the European Convention on Human Rights,¹²² Professor Oddný Mjöll Arnardóttir refers to the European Court of Human Rights as having an “understanding of group vulnerability [that] is relational/social-contextual.”¹²³ Continuing, she notes that “the vulnerable groups approach under Article 14 draws on specific identity markers that relate to membership in distinct groups of persons, instead of vulnerability being conceptualized as the universal human condition where everyone is potentially vulnerable depending on context.”¹²⁴

This latter concept, of vulnerability as “the universal human condition,” has been advocated by Professor Martha Albertson Fineman, who expresses concern that “[v]ulnerability is typically associated with victimhood, deprivation, dependency, or pathology.”¹²⁵ Instead, Professor Fineman argues that we should anchor vulnerability in the corporeal nature of human beings, “which carries with it the ever-present possibility of harm, injury, and misfortune from mildly adverse to catastrophically devastating events, whether accidental, intentional, or otherwise.”¹²⁶ Similarly, she writes that:

Because we are positioned differently within a web of economic and institutional relationships, our vulnerabilities range in magnitude and potential at the individual level. Undeniably universal, human vulnerability is also particular: it is uniquely experienced by each of us and this experience is greatly influenced by the quality and quantity of resources we possess or can command.¹²⁷

¹²¹ Sharona Hoffman, *Preparing for Disaster: Protecting the Most Vulnerable in Emergencies*, 42 U.C. DAVIS L. REV. 1491, 1498–99 (2009) (citations omitted).

¹²² ECHR, *supra* note 222, art. 14 (stating: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”).

¹²³ Oddný M. Arnardóttir, *Vulnerability under Article 14 of the European Convention on Human Rights: Innovation or Business as Usual?*, 4 OSLO L. REV. 150, 165 (2017).

¹²⁴ *Id.*

¹²⁵ Martha A. Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 8 (2008).

¹²⁶ *Id.* at 9.

¹²⁷ *Id.* at 10.

Professor Roberto Andorno refers to this as an “ontological understanding of vulnerability”¹²⁸ and, while reminding his readers that “the concept is normally used to refer to particular individuals or groups of individuals,”¹²⁹ acknowledges that precision in definition of “vulnerability” is elusive.¹³⁰ This does not, however, keep him from making the following statement:

In human rights discourse, . . . the term vulnerability is used to indicate a heightened susceptibility of certain individuals or groups to being harmed or wronged by others or by the state. Populations which are particularly prone to being harmed, exploited or discriminated [against] include, among others, children, women, older people, people with disabilities, and members of ethnic or religious minority groups.¹³¹

While acknowledging ontological vulnerability, I am using “vulnerability” in this article in the practical sense of referring to heightened risk of abuse, discrimination, or other violations of fundamental human rights. Similarly, any mention of “vulnerable populations” is intended to refer to groups of people sharing common characteristics that put them, or many of them, at such heightened risk. At the same time, I agree with Professor Fineman that any typology of vulnerability runs the risk of casting those it identifies into the role of victims, at the risk of further exacerbating their vulnerabilities through stereotyping.¹³² To the extent possible, I will attempt to avoid such stereotyping, while at the same time acknowledging the realities of lives as they are lived around the world.

From the field of social work, Professor Silvia Staub-Bernasconi offers a useful distinction between vulnerability from the perspective of the individual and vulnerability from the perspective of society.¹³³ From the standpoint of the individual, vulnerability refers to persons who:

- Have the lowest or even no access to public resources, meaning education, jobs and income which allow a life standard which

¹²⁸ Roberto Andorno, *Is Vulnerability the Foundation of Human Rights*, in HUMAN DIGNITY OF THE VULNERABLE IN THE AGE OF RIGHTS: INTERDISCIPLINARY PERSPECTIVES 257, 257 (Aniceto Masferrer & Emilio Garcia-Sánchez, eds., 2016).

¹²⁹ *Id.* at 257–58.

¹³⁰ *Id.* at 258.

¹³¹ *Id.*

¹³² See generally STEREOTYPES AND HUMAN RIGHTS LAW (Eva Brems & Alexandra Timmer eds., 2016); Fineman, *supra* note 125, at 8.

¹³³ Silvia Staub-Bernasconi, *Social Work and Human Rights—Linking Two Traditions of Human Rights in Social Work*. 1 J. HUM. RTS. & SOC. WORK 40, 44 (2016).

guarantees the satisfaction of their biological, psychic, social and cultural needs[.]

- Have the least psychological and social capabilities to develop their human potential and the sources of well-being[.]
- Have the lowest or no influence upon the conditions of their personal life as well as the conditions of public and political life to give them a direction which is in their favour[, and]
- Have no influence on the distribution of the gross national product and of wealth[.]¹³⁴

In comparison, Professor Staub-Bernasconi notes that, from society's perspective, vulnerability arises under certain conditions:

- Prejudice must already exist against particular individuals or groups before scapegoating develops[.]
- The individuals must appear to be too weak to fight back successfully when attacked[, and]
- Finally, society must sanction (positively) the scapegoating and forms of homophobia, classism, racism, antisemitism, etc. in public or being institutionalised as structural violence in the norms, values and laws of a society. . . .¹³⁵

Thus, vulnerability can be seen as simultaneously (a) universal, group-based, and particular, (b) both empowering and stereotyping or victimizing, (c) capable of being viewed from the perspective of both an oppressed individual and an oppressive society. What is clear, however, is that every society, including global society, has wide disparities in access to wealth, education, political power, and justice. Furthermore, those disparities leave individuals and groups who have less access to those goods in positions where they are less able to enjoy their "official" human rights and where they are more likely to face abuse, poverty, discrimination, and other affronts to their human dignity.

It is these distinctions that give rise to the need for specialized human rights instruments. As Professor Andorno puts it:

Considering the universal nature of human rights, it could be argued that there is no need to pay additional attention to any particular group. However, there are reasons to provide special

¹³⁴ *Id.*

¹³⁵ *Id.* (citations omitted).

protection to those groups that are most vulnerable to abuse or discrimination. This does not mean that these groups are being elevated above others. Characterizing them as ‘vulnerable’ simply reflects the hard reality that these groups are more likely to encounter discrimination or other human rights violations than others. Vulnerable people deserve different treatment than people not belonging to any vulnerable group to enjoy the *same* rights. On the contrary, insisting on equal treatment of persons in unequal situations invariably operates to perpetuate, rather than to eradicate injustices.¹³⁶

The six groups that we have already identified as having the protection of global people-based treaties of limited scope—women, children, persons with disabilities, migrant workers, indigenous and tribal peoples, and refugees and migrants—clearly fall within the definition of vulnerable groups as being those who have, on average, less access to and opportunity to enjoy the benefits of wealth, education, political power, and the machinery of justice than is available to people who do not fall into any of these groups.

Throughout the world, women generally have less economic and political status than men. In the words of CEDAW preamble, the States Parties were:

Concerned . . . that . . . extensive discrimination against women continues to exist, . . .

Concerned that in situations of poverty women have the least access to food, health, education, training and opportunities for employment and other needs, . . .

Bearing in mind the great contribution of women to the welfare of the family and to the development of society, so far not fully recognized . . . should not be a basis for discrimination . . . , [and]

Aware that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women . . .¹³⁷

Similarly, there is language addressing the special vulnerabilities of the protected groups in all of the other person-oriented global human rights treaties mentioned above:

- In the Convention on the Rights of the Child, the States Parties referred to the language of the 1924 Geneva Declaration of the Rights of the Child¹³⁸ and the 1959 United Nations General

¹³⁶ Andorno, *supra* note 128, at 258 (emphasis in the original) (citations omitted).

¹³⁷ CEDAW, *supra* note 655, pmb1.

¹³⁸ CRC, *supra* note 66, pmb1. (referring to Geneva Declaration of the Rights of the Child, League of Nations, Sept. 26, 1924, O.J. Spec. Supp. 21, at 43).

Assembly Declaration of the Rights of the Child¹³⁹ in referring to “the need to extend particular care to the child”¹⁴⁰

- In the Disabilities Convention, the States Parties were “[c]oncerned that . . . persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world”¹⁴¹
- In the Migrant Workers Convention, the States Parties included a specific reference to the concept of vulnerability by acknowledging “the situation of vulnerability in which migrant workers and members of their families frequently find themselves”¹⁴²
- In the Indigenous Peoples Convention, the States Parties do not use the word “vulnerable” but do echo a common definition of vulnerability when they note “that in many parts of the world these peoples are unable to enjoy their fundamental human rights to the same degree as the rest of the population of the States within which they live”¹⁴³
- In the 1954 Refugee Convention, we do not find as explicit a reference to vulnerability as in the later conventions, but the High Contracting Parties noted “that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms”¹⁴⁴

In sum, not only are all six of these protected groups vulnerable, but they were selected for the special protection of a binding, person-oriented, limited-scope global human rights treaty precisely because the contracting parties recognized their vulnerabilities as of special concern.

¹³⁹ *Id.* (referring to G.A. Res. 1386 (XIV), Declaration of the Rights of the Child, (Nov. 20, 1959)).

¹⁴⁰ *Id.*

¹⁴¹ CRPD, *supra* note 67, pmb. (emphasis omitted).

¹⁴² Migrant Workers Convention, *supra* note 68, pmb.

¹⁴³ Indigenous Peoples Convention, *supra* note 711, pmb.

¹⁴⁴ Refugees Convention, *supra* note 700, pmb.

ii. Large Populations

Another characteristic shared among these six groups is that they are all numerous, albeit to varying degrees. The world's human population in 2019¹⁴⁵ is estimated to be approximately 7.7 billion, with that number expected to rise to 9.7 billion by 2050.¹⁴⁶ Given the political challenges of agreeing upon a binding international instrument that will be appealing to a broad range of countries, it is unlikely that a small population will generate sufficient global political drive. This is not, of course, an argument that smaller populations are somehow less deserving of human rights protection—far from it—but rather an observation that the world is more likely to take action with respect to a large population asserting its need for special protection. This is, in short, a pragmatic observation rather than a principle.

Among the groups that have received their own human rights treaties, women are by far the most numerous. As of 2019, statisticians at the United Nations estimate that there are 3.8 billion females in the world, with that number expected to grow to 4.9 billion by 2050.¹⁴⁷ Not surprisingly, both numbers represent approximately half of the respective global populations.

Children are next most numerous. The Convention on the Rights of the Child defines “child” to mean “every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.”¹⁴⁸ Available data from the United Nations Department of Economic and Social Affairs is broken out differently, with age groupings ending at 14 and 19, providing lower and upper limits for how many children are in the world.¹⁴⁹ In 2019, the world's children (to age 18) number between 1.98 billion (to age 14) and 2.58 billion (to age 19).¹⁵⁰ In 2050, the world's children (to age

¹⁴⁵ I have chosen to use the current year as a baseline for population comparisons notwithstanding the fact that the six international instruments were drafted and entered into force across years ranging from the 1950s (the Refugee Convention) to the 2000s (the Disabilities Convention). Although population numbers were different during the years leading up to the respective treaties, the proportions of world population the groups represented were very comparable to today's numbers.

¹⁴⁶ U.N. Dep't of Econ. & Soc. Affairs, Population Division, World Population Prospects: The 2017 Revision, *custom data acquired via website at* <https://population.un.org/wpp/> [hereinafter World Population Prospects] (last visited Dec. 31, 2019). Selections made to obtain the data were (i) Interactive Data; (ii) Total Population by sex; (iii) World (without sublocations); (iv) 2019, 2050; (v) Both sexes combined.

¹⁴⁷ *Id.* Selections made to obtain the data were (i) Interactive Data; (ii) Total Population by sex; (iii) World (without sublocations); (iv) 2019, 2050; (v) Female; (vi) By Years/Periods.

¹⁴⁸ CRC, *supra* note 666, art. 1.

¹⁴⁹ World Population Prospects, *supra* note 1466. Selections made to obtain the data were (i) Interactive Data; (ii) Population by age and sex; (iii) World (without sublocations); (iv) 2019, 2050; (v) Both sexes combined; (vi) 0-4, 5-9, 10-14, 15-19; (vii) By Years/Periods.

¹⁵⁰ *Id.*

18) will number between 2.08 billion (to age 14) and 2.76 billion (to age 19).¹⁵¹ Assuming that there are approximately equal numbers of children across each year of the 15-19 range, it is possible to calculate that the number of people satisfying the definition of “child” under the Convention on the Rights of the Child is approximately 2.46 billion people in 2019 and will be approximately 2.22 billion people in 2050.¹⁵²

According to World Bank and World Health Organization estimates, approximately 15.6% of the world’s population live with disability.¹⁵³ In 2019’s global population of 7.7 billion people, that estimate would mean that approximately 1.2 billion people currently live with disabilities. Although it is reported that “the number of people with disabilities is growing,”¹⁵⁴ it is impossible to estimate how many people will be living with disabilities in 2050, as that number could be influenced by such unknowns as intervening wars and pandemics, advances in medical care, and shifting conceptions of what constitute disabilities.¹⁵⁵

The United Nations’ International Labour Organization (ILO) has estimated that there were 150.3 million migrant workers worldwide in 2013,¹⁵⁶ where “migrant worker” was defined as a person over the age of 14 working or looking for work outside their home country.¹⁵⁷ The ILO further found that migrants represented 3.9% of the global population over the age of 14,¹⁵⁸ and that they had a workplace participation rate of 72.7%,¹⁵⁹ so that migrant workers represented 2.8% of the global population over the age of 14. Applying 2.8% to the global population over age 14 in 2019 and the projected global

¹⁵¹ *Id.*

¹⁵² Calculations were made by adding, for each year: (population aged 0-4) + (population aged 5-9) + (population aged 10-14) + (80%) (population aged 15-19).

¹⁵³ WORLD HEALTH ORG. AND WORLD BANK, WORLD REPORT ON DISABILITY 28 (2011), [hereinafter WORLD REPORT ON DISABILITY].

¹⁵⁴ *Id.* at 262.

¹⁵⁵ Conceptions of whether people with disabilities are a vulnerable population differ as well. Compare WORLD REPORT ON DISABILITY, *supra* note 153, at 262 (stating that “[d]isability disproportionately affects vulnerable populations” implies that disability does not in itself place one into a vulnerable population), with Hoffman, *supra* note 121, at 1498–99 (listing vulnerable segments of the population, implying that disability places one into a vulnerable population).

¹⁵⁶ INT’L LABOUR ORG., ILO GLOBAL ESTIMATES ON MIGRANT WORKERS: RESULTS AND METHODOLOGY xi (2015).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

population over age 14 in 2050 yields estimates of migrant workers worldwide of 160 million in 2019 and 213 million in 2050.¹⁶⁰

A report commissioned by the United Nations High Commissioner for Refugees has calculated that there were approximately 66 million forcibly-displaced persons worldwide in 2016.¹⁶¹ This number includes a broad definition of forcibly-displaced persons that includes refugees, asylum-seekers, internally-displaced persons, returnees, and stateless persons.¹⁶² Such a number is highly dependent upon the rise and fall of conflicts around the world, and the report notes that the current number of 66 million refugees is the highest since World War II, largely driven by conflicts in Syria, Colombia, and Afghanistan.¹⁶³ Without knowing the frequency and severity of future wars, it is impossible to estimate how many people will be covered by the Refugee Convention in 2050.

The World Bank estimated in 2018 that there are approximately 370 million indigenous people around the world, representing about 5% of the world's population.¹⁶⁴ Threats to cultural survival may diminish those numbers in coming decades, but applying that 5% estimate to the projected 2050 global population of 9.7 billion yields an estimate of roughly 500 million indigenous people worldwide by 2050.

The following chart summarizes the findings of this section of this article. It is organized in order of the 2019 population of the six groups under consideration.

¹⁶⁰ For each year, I took the global population (*see supra* note 145 and accompanying text), subtracted the population aged 14 and younger (*see supra* notes 149 and 150 and accompanying text), then multiplied that result by 2.8%.

¹⁶¹ Diego Alburez-Gutierrez & Carlota Segura García, *The UNHCR Demographic Projection Tool: Estimating the Future Size and Composition of Forcibly Displaced Populations*, UNHCR STATISTICS TECHNICAL SERIES 2018/1, 2 (2018), <https://www.unhcr.org/en-us/statistics/unhcrstats/5ae9ee747/unhcr-demographic-projection-too-estimating-future-size-composition-foribly.html>.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Indigenous Peoples: Context*, WORLD BANK (Apr. 2, 2019), <https://www.worldbank.org/en/topic/indigenouspeoples#1>.

Table 2: Global Populations of Protected Groups

Global Populations (millions and %)				
	2019		2050 (est.)	
	Population (millions)	%	Population (millions)	%
World	7700	100	9700	100
Women	3800	49%	4900	51%
Children	2460	32%	2480	27%
Disabled Persons	1200	16%	n/a	n/a
Migrant Workers	160	2%	213	2%
Refugees	66	1%	n/a	n/a
Indigenous Peoples	370	5%	500	5%

Although there are vast differences among the populations of these groups, it is clear that each is a large group, with populations ranging from 1% to 49% of the global population. Any other group seeking to obtain its own global human rights treaty would have to fall in this range, and the higher, the better.

iii. Geographical and Sociological Distribution

Related to the question of how many people would be affected by a global human rights treaty—the size of the protected population—is the question of how the population is distributed worldwide. The answer to this question is not uniform for each of the groups we are now considering but will turn out to be of analytic value.

Women live worldwide. On a country-by-country basis, as of 2017, women were between 25% of the population in Qatar and 54% in Curaçao.¹⁶⁵ Women form less than 45% of the population in only eight countries.¹⁶⁶ Furthermore, women can be found in every socio-economic class. It would be practically impossible for anyone not to know one or more women.

¹⁶⁵ WORLD POPULATION PROSPECTS, *supra* note 1466. Selections made to obtain the data were (i) Interactive Data; (ii) Total Population by sex; (iii) World (with sublocations); (iv) 2019; (v) Both sexes combined, Female.

¹⁶⁶ Qatar, United Arab Emirates, Oman, Bahrain, Kuwait, Saudi Arabia, Maldives, and Equatorial Guinea. *Id.* Given the extreme imbalance in gender ratios in these countries, one must wonder whether there is some sort of systematic undercount of women distorting the statistics.

Children are also widely distributed around the world. On a country-by-country basis, as of 2015, people under the age of 18 represented 16% of the population in Japan to 57% of the population in Niger.¹⁶⁷ Worldwide, higher income countries have lower fertility rates (11%) than middle-income countries (18%) and low income countries (35%),¹⁶⁸ but children are present at all levels of global society and at every socioeconomic level of national societies. Everyone has been a child and almost everyone has known a child after becoming an adult.

Disabled persons live all around the world and in all strata of society. Based on 2004 data, the World Health Organization has found that disabled persons represent from 6.5% of the population in the top wealth quintile of higher-income countries to 22.4% of the population in the bottom wealth quintile of lower-income countries.¹⁶⁹ Although these numbers are highly dependent upon definitions of disability,¹⁷⁰ it is clear that persons with disabilities are spread, albeit unevenly, throughout global society.

In contrast to women, children, and persons with disabilities who are distributed fairly evenly around the world, migrant workers, refugees, and indigenous peoples are very unevenly distributed. This fact both makes these groups less visible and creates the reality that different countries are in different positions with respect to these vulnerable groups.

One way to see the global distribution of migrant workers is to consider their participation in the workforce around the world. According to the International Labour Organization, migrant workers represent between 0.6% of the workforce in Eastern Asia and 35.6% of the workforce in Arab states.¹⁷¹ Overall, the vast majority of migrant workers live and work in high-income countries:

Of the global total of 150.3 million migrant workers, an estimated 112.3 million (74.7 per cent) were in countries classified as high income, 17.5 million (11.7 per cent) in upper-middle income countries and 16.9 million (11.3 per cent) in lower-middle income countries. The lowest number of migrant

¹⁶⁷ WORLD POPULATION PROSPECTS, *supra* note 146. Selections made to obtain the data were (i) Interactive Data; (ii) Percentage of total population by broad age group, both sexes; (iii) World (with sublocations); (iv) 2015; (v) Total, 0-17.

¹⁶⁸ *Id.* Selections made to obtain the data were (i) Interactive Data; (ii) Crude birth rate (births per 1,000 population); (iii) World, High-income countries, Middle-income countries, Low-income countries; (iv) 2015-2020.

¹⁶⁹ WORLD REPORT ON DISABILITY, *supra* note 153, at Table 2.1, 28.

¹⁷⁰ *Id.* at 27.

¹⁷¹ ILO GLOBAL ESTIMATES ON MIGRANT WORKERS, *supra* note 156, at 15-16.

workers was in low-income countries, standing at 3.5 million (2.4 per cent).¹⁷²

Thus, different countries in different parts of the world, and having differing levels of economic activity will have very different perspectives on migrant labor. Broadly speaking, higher-income countries will be on the receiving end of migrant labor, while middle and lower-income countries will be countries of origin for migrant labor and recipients of the remittances they send back to their families.¹⁷³ In short, different countries may have very different interest in protecting and regulating migrant workers, which may help account for world's lukewarm reception of the Migrant Workers Convention.¹⁷⁴

Like migrant workers, refugees are neither uniformly sourced nor uniformly distributed around the world. There are large-scale patterns of countries which are net exporters of refugees and others which are net importers of refugees. Currently, the U.N. High Commission on Refugees estimates that there are approximately 25.4 million refugees in the world, with an additional 3.1 million asylum-seekers.¹⁷⁵ More than half of those refugees come from one of only three countries: Syria (3.3 million), Afghanistan (2.6 million), and South Sudan (2.4 million).¹⁷⁶ Roughly one-third of all refugees are housed in one of only five countries: Turkey (3.5 million), Uganda (1.4 million), Pakistan (1.4 million), Lebanon (1.0 million), and Iran (0.98 million).¹⁷⁷ Approximately 87% of the world's refugees are currently sheltered in developing countries,¹⁷⁸ suggesting that different countries will have different levels of concern for the human rights of refugees.

Detailed statistical information about the global distribution of indigenous people is scarce,¹⁷⁹ and definitions of what is meant by "indigenous peoples" or "tribal peoples" are widely diverse and in flux.¹⁸⁰ Both of these issues make it nearly impossible to provide detailed information on the global distribution of

¹⁷² *Id.* at xii.

¹⁷³ In 2018, global remittances from migrants amounted to \$689 billion, of which \$528 billion went to developing countries. *Remittances Data*, KNOMAD, <https://www.knomad.org/data/remittances> (last visited Dec. 31, 2019).

¹⁷⁴ *See supra* Part III.

¹⁷⁵ *Figures at a Glance*, U.N. HIGH COMMISSIONER FOR REFUGEES, <https://www.unhcr.org/en-us/figures-at-a-glance.html> (last visited Dec. 31, 2019).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *See* Richard Madden et al., *Statistics on Indigenous Peoples: International Effort Needed*, 32 *STAT. J. INT'L ASS'N OFFICIAL STAT.* 37 (2016).

¹⁸⁰ Douglas E. Sanders, *Indigenous Peoples: Issues of Definition*, 8 *INT'L J. CULTURAL PROP.* 4 (1999).

indigenous populations across countries, regions, and socioeconomic groups. The World Bank does, however, provide some useful aggregate numbers:

There are approximately 370 million Indigenous Peoples worldwide, in over 90 countries. Although they make up 5 percent of the global population, they account for about 15 percent of the extreme poor.

While Indigenous Peoples own, occupy, or use a quarter of the world's surface area, they safeguard 80 percent of the world's remaining biodiversity. . . .

An estimated 65% of the world's land is under indigenous customary ownership, and yet many governments recognize only a fraction of this land as formally or legally belonging to Indigenous Peoples.¹⁸¹

Indigenous peoples are most heavily concentrated in China, South Asia (including India), and Southeast Asia.¹⁸²

In short, indigenous peoples are found in roughly half of the countries of the world, are concentrated in lower economic strata,¹⁸³ often occupy relatively rural and undeveloped land, and often find themselves in conflict with governments over that land. Unlike the situation with women, children, and persons with disabilities, indigenous peoples are not spread more or less uniformly around the world, but are heavily concentrated in certain countries and regions, finding themselves far from centers of power, both physically and figuratively.¹⁸⁴

Summarizing, we find that the most successful people-oriented human rights treaties—in terms of ratifications—are those whose protected groups are found in every country and every level of society, as with women, children, and persons with disabilities. Ratifications fall sharply when countries find themselves with sharply differing interests in the protected groups, as with refugees and migrant workers, or when the protected groups are concentrated both geographically and sociologically, like refugees, migrant workers, and indigenous peoples. Where the latter pattern exists, there will likely be some countries interested in protecting the rights of such groups, but other countries

¹⁸¹ *Indigenous Peoples: Context*, WORLD BANK, <https://www.worldbank.org/en/topic/indigenouspeoples#1>.

¹⁸² Carolyn Stephens et al., *Indigenous Peoples' Health—Why Are They Behind Everyone, Everywhere?*, 366 LANCET 10 (2005).

¹⁸³ GILLETTE HALL & HARRY PATRINOS, INDIGENOUS PEOPLES, POVERTY AND DEVELOPMENT 5 (draft manuscript 2010), http://siteresources.worldbank.org/EXTINDPEOPLE/Resources/407801-1271860301656/full_report.pdf (last visited Sept. 4, 2019). See also *id.* at Chapter 9.

¹⁸⁴ See Neelmani Jaysawal & Sudeshna Saha, *Marginalisation of Tribal Communities due to Globalization*, 2 INDIAN J. DALIT & TRIBAL STUD. 37 (2014).

that will wish to receive the ongoing benefits of such groups' relative powerlessness, whether that means the inexpensive labor of migrant workers or unbridled access to indigenous lands.

One consequence of these differences in geographical and sociological distribution of the six protected groups bears special mention. Although poverty is more common among women, children, and the disabled than among non-disabled adult men, there are nevertheless women, children, and disabled persons at every level of every society, and it is hard to imagine any human being who has not been exposed to some members of each group. In contrast, it is likely that large portions of the world's population do not know or have never met a migrant worker, a refugee, or an indigenous person, as all of these groups are defined by their isolation from the rest of the population of the countries in which they find themselves. This reality may make it more difficult for these groups to generate the international political energy needed for near-universal adoption of focused human rights treaties.

iv. Involuntary Membership

One interesting aspect of these six groups relates to how voluntary membership in them is. Some of these groups are involuntary, in the sense that they are largely set at birth or relate to the stage of one's life; whereas, some are more the result of life choices or larger socio-economic realities that have placed one in a vulnerable position.

Generally speaking, one is either born a woman or is not. In recent decades, the world has increasingly recognized the existence of transgender and non-binary individuals, but there is as yet little evidence that the numbers of transgender or non-binary people represents a large portion of the world's population.¹⁸⁵

Similarly, the possibility of identification with an indigenous or tribal population is generally determined at birth. It is true that voluntary self-identification is a factor in determining coverage of the Indigenous Peoples

¹⁸⁵ A meta-analysis of statistical data from the United States concludes that the number of transgender people in the U.S. is approximately 390 individuals per 100,000 population, or almost one million individuals. Esther L. Meerwijk & Jae M. Sevelius, *Transgender Population Size in the United States: A Meta-Regression of Population-Based Probability Samples*, 107(2) AM. J. PUB. HEALTH e1 (Feb. 2017). Extrapolating that to the world as a whole, with all the uncertainties such an extrapolation would involve, suggests a global transgender population on the order of 30 million individuals. Given the range of variations in data and how that data was collected, as described in the study, this figure is best understood as indicating an order of magnitude, not a specific number.

Convention,¹⁸⁶ but self-identification is only possible under the convention for those who can trace their ancestry:

Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.¹⁸⁷

Coverage by the Convention on the Rights of the Child is also involuntary, in that, for the purposes of the convention, “a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”¹⁸⁸ One can no more accelerate reaching the age of eighteen than one can refuse to age.¹⁸⁹

Coverage by the Disabilities Convention extends to “those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”¹⁹⁰ Although some voluntary acts might lead to such impairments,¹⁹¹ the impairments themselves should be seen as involuntary in nature.

The definition of “refugee” under the Refugee Convention includes both displacement from one’s country of nationality or country of habitual residence and a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion”¹⁹² Neither facing such persecution nor having a fear of it is a voluntary act.

The only exception to this pattern of involuntariness comes with the Migrant Workers Convention.¹⁹³ Under that convention, “migrant worker” refers to “a person who is to be engaged, is engaged or has been engaged in a

¹⁸⁶ Indigenous Peoples Convention, *supra* note 711, art. 1, ¶ 2: “Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.”

¹⁸⁷ *Id.* art. 1, ¶ 1(b).

¹⁸⁸ CRC, *supra* note 666, art. 1.

¹⁸⁹ *Contra* JAMES M. BARRIE, PETER PAN; OR, THE BOY WHO WOULDN’T GROW UP (1904).

¹⁹⁰ CRPD, *supra* note 677, art. 1, ¶ 2.

¹⁹¹ For example, skiing or motorcycle riding might lead to physical impairments if a bad accident occurs, and recreational drug use might in some cases lead to mental impairments.

¹⁹² Refugees Convention, *supra* note 700, art. 1(A)(2).

¹⁹³ Migrant Workers Convention, *supra* note 68.

remunerated activity in a State of which he or she is not a national.”¹⁹⁴ Although many of the people who fall within this definition are low-paid, seasonal agricultural workers or domestic servants, others may be highly-paid professionals seeking improved opportunities far from home. Many of the former may view migrant labor as a necessity rather than a choice, but the latter are clearly acting voluntarily in becoming migrant workers. This element of at least partial voluntariness in becoming a migrant worker may provide a partial explanation for the comparative shortcoming of the Convention on the Rights of Migrant Workers in attracting significant international support.¹⁹⁵

v. Precursor Instruments

Often, the existence and nature of precursor instruments can reveal something about the binding instrument itself. By precursor instruments, I mean those international instruments that relate topically to a binding human rights instrument and predate it as, for example, the 1954 Convention on the Political Rights of Women¹⁹⁶ related topically to and predated CEDAW, which became effective in 1981.¹⁹⁷ On one level, the fact that there are precursor instruments is a clear indication that the international community was aware of the need to provide targeted human rights protection to a particular group years before developing the collective will to do so. On another level, the number and timing of precursor instruments may reveal information about the collective sense of urgency to act—information that may also be reflected in the number and pattern of ratifications the later, more comprehensive human rights instrument receives.

Thus, we find that CEDAW was preceded by several international instruments that granted some degree of human rights protection to women.¹⁹⁸ The following international instruments related to the human rights of women were all drafted or entered into effect prior to 1981:

¹⁹⁴ *Id.* art. 2, ¶1.

¹⁹⁵ See *supra* Part III.

¹⁹⁶ Convention on the Political Rights of Women, Mar. 31, 1953, 193 U.N.T.S. 135.

¹⁹⁷ CEDAW, *supra* note 65.

¹⁹⁸ In the following lists of precursor instruments, I have made an attempt to provide the most important examples but make no claim that the lists are exhaustive. Both the scope of this article and the vagaries of titles, indexing, and definition would make any attempt to create exhaustive lists foolhardy.

- In 1934, the Inter-American Convention on the Nationality of Women,¹⁹⁹
- In 1949, the Inter-American Convention on the Granting of Civil Rights to Women,²⁰⁰
- In 1949, the Inter-American Convention on the Granting of Political Rights to Women,²⁰¹
- In 1954, the Convention on the Political Rights of Women,²⁰²
- In 1957, the Convention on the Nationality of Married Women.²⁰³
- In 1972, the U.N. proclamation of 1975 as International Women's Year,²⁰⁴ and
- In 1974, the Declaration on the Protection of Women and Children in Emergency and Armed Conflict.²⁰⁵

Taken together, these instruments, with the first following closely after the 1920 ratification of the Nineteenth Amendment to the United States Constitution,²⁰⁶ reveal that the issue of human rights for women was a topic of ongoing discussion in the international community.

Leading up to the coming into effect of the Convention on the Rights of the Child in 1990, the international community produced the following instruments related to the human rights of children and juveniles:

- In 1924, the League of Nations Geneva Declaration of the Rights of the Child,²⁰⁷
- In 1959, the U.N. Declaration of the Rights of the Child,²⁰⁸

¹⁹⁹ Organization of American States, Convention on the Nationality of Women, Dec. 3-26, 1933, O.A.S.T.S. No. 4.

²⁰⁰ Organization of American States, Inter-American Convention on the Granting of Civil Rights to Women, May 2, 1948, O.A.S.T.S. No. 23, 1438 U.N.T.S. 51.

²⁰¹ Organization of American States, Inter-American Convention on the Granting of Political Rights to Women, May 2, 1948, O.A.S.T.S. No. 3, 1438 U.N.T.S. 63.

²⁰² Convention on the Political Rights of Women, Mar. 31, 1953, 193 U.N.T.S. 135.

²⁰³ Convention on the Nationality of Married Women, Feb. 20, 1957, 309 U.N.T.S. 65.

²⁰⁴ G.A. Res. 3010 (XXVII), International Women's Year, (Dec. 18, 1972).

²⁰⁵ G.A. Res. 3318 (XXIX), Declaration on the Protection of Women and Children in Emergency and Armed Conflict, (Dec. 14, 1974).

²⁰⁶ Clause 1 of the Nineteenth Amendment states: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." U.S. CONST. amend XIX, § 1.

²⁰⁷ Geneva Declaration of the Rights of the Child, Sept. 26, 1924, League of Nations O.J. Spec. Supp. 21, at 43.

²⁰⁸ G.A. Res. 1386 (XIV), Declaration of the Rights of the Child (Nov. 20, 1959).

- In 1985, the U.N. Standard Minimum Rules for the Administration of Juvenile Justice (known as “The Beijing Rules”),²⁰⁹ and
- In 1990, the U.N. Rules for the Protection of Juveniles Deprived of their Liberty.²¹⁰

Persons with disabilities also had a rich history of international attention leading up to the 2008 effective date of the Disabilities Convention. Among the pre-2008 instruments related to the human rights of disabled persons, we find the following:

- In 1971, the U.N. Declaration on the Rights of Mentally Retarded Persons,²¹¹
- In 1975, the U.N. Declaration on the Rights of Disabled Persons,²¹²
- In 1976, the U.N. proclamation of 1981 as International Year for Disabled Persons,²¹³
- In 1991, the U.N. Principles for the Protection of Persons with Mental Illnesses and the Improvement of Mental Health Care,²¹⁴
- In 1993, the U.N. Standard Rules on the Equalization of Opportunities for Persons with Disabilities,²¹⁵
- In 1997, the U.N. International Guidelines on HIV/AIDS and Human Rights,²¹⁶ and
- In 1999, the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities.²¹⁷

Prior to and during 1954, refugees benefitted from four international instruments of note:

²⁰⁹ G.A. Res. 40/33, annex, United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Nov. 29, 1985).

²¹⁰ G.A. Res. 45/113, annex, United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Dec. 14, 1990).

²¹¹ G.A. Res. 2856 (XXVI), Declaration of the Rights of Mentally Retarded Persons (Dec. 20, 1971).

²¹² G.A. Res. 3447 (XXX), Declaration on the Rights of Disabled Persons, at 88 (Dec. 9, 1975).

²¹³ G.A. Res. 31/123, International Year for Disabled Persons at 104 (Dec. 16, 1976).

²¹⁴ G.A. Res. 46/119, Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, at 189 (Dec. 17, 1991).

²¹⁵ G.A. Res. 48/96, at 202 (Dec. 20, 1993).

²¹⁶ Commission on Human Rights Res. 1997/33, U.N. Doc. E/CN.4/1997/33 (Nov. 4, 1997).

²¹⁷ Organization of American States, Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities, June 7, 1999, AG/RES. 1608.

- In 1946, the Constitution of the International Refugee Organization and Agreement on Interim Measures to be Taken in Respect of Refugees and Displaced Persons,²¹⁸
- In 1950, the Statute of the Office of the United Nations High Commissioner for Refugees,²¹⁹
- In 1954, the Organization of American States Convention on Diplomatic Asylum,²²⁰ and
- In 1954, the Organization of American States Convention on Territorial Asylum.²²¹

Leading up to 2003, migrant workers received the attention of the international community through international instruments three times:

- In 1939, the original Migration for Employment Convention,²²²
- In 1949, the Migration for Employment Convention,²²³ and
- In 1975, the Migrant Workers (Supplementary Provisions) Convention.²²⁴

Other than the Convention concerning Indigenous and Tribal Peoples in Independent Countries²²⁵ and its now-discredited predecessor, the 1957 Indigenous and Tribal Populations Convention,²²⁶ there is no international instrument that addresses human rights for indigenous peoples. As Professor Ben Saul summarized it in 2016:

²¹⁸ G.A. Res. 62 (I), (Dec. 15, 1946). (The International Refugee Organization was wound up in 1954.)

²¹⁹ G.A. Res. 428 (V), Statute of the Office of the United Nations High Commissioner for Refugees (Dec. 14, 1950).

²²⁰ Organization of American States, Convention on Diplomatic Asylum, Mar. 28, 1954, O.A.S.T.S. No. 18, 1438 U.N.T.S. 104.

²²¹ Organization of American States, Convention on Territorial Asylum, Mar. 28, 1954, O.A.S.T.S. No. 19, 1438 U.N.T.S. 129.

²²² International Labour Organization, Convention concerning the Recruitment, Placing and Conditions of Labour of Migrants for Employment, June 28, 1939, CO66 (withdrawn by decision of the International Labour Conference at its 88th Session (2000)).

²²³ International Labour Organization, Migration for Employment Convention (Revised), July 1, 1949, CO97.

²²⁴ International Labour Organization, Migrant Workers (Supplementary Provisions) Convention, June 24, 1975, C143.

²²⁵ Indigenous Peoples Convention, *supra* note 711.

²²⁶ International Labour Organization, Convention concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries, June 26, 1957, C107, 328 U.N.T.S. 247. This convention encouraged assimilationist policies that treated indigenous and tribal cultures as both more primitive and less worthy than majoritarian cultural contexts. Eventually, reaction to C-107 led to the drafting of the Indigenous Peoples Convention, *supra* note 711.

For a long time indigenous peoples were scarcely mentioned in international human rights law. They appear neither in the Universal Declaration of Human Rights of 1948 nor in most of the major human rights conventions, including those on racial discrimination (1965), civil and political rights (1966), economic, social and cultural rights (1966), women's rights (1979), torture (1986), migrant workers (1990), or enforced disappearances (2007). There is a only a fleeting reference to discrimination on the basis of indigenous origin in the UN Convention on the Rights of Persons with Disabilities 2006, and then only in the preamble. Only the Convention on the Rights of the Child 1989 directly addresses indigenous peoples, in three contexts: media communication in indigenous languages, education in a pluralistic society, and the right to enjoy indigenous culture, religion and language. As yet there is still no specialised treaty on indigenous rights, such as exists for some other vulnerable groups. [citations omitted]²²⁷

Although a long history of international concern over the human rights of a vulnerable group is not in any sense a prerequisite for the creation of a focused human rights treaty, it would appear that such a history is a good indication that the political will has been building to craft such a treaty. If one were to look for likely candidates for the next global human rights treaty focused on the needs of a single group, looking to what instruments already exist that stop short of such a global human rights treaty would be a good place to start.

B. Summary of Shared Characteristics

In the previous section, I have attempted to identify, and to quantify where possible, the characteristics shared by the populations protected by group-specific global human rights instruments. I have done so not out of a belief that those characteristics are definitional in identifying groups who may need special human rights protection, but out of a suspicion that these characteristics could serve as a filter in triaging which vulnerable groups could most reasonably assert a claim to getting that protection in the near term. Thus, although small and localized vulnerable populations have every bit as much claim to having their universal human rights respected as do large, global vulnerable populations, the realities of global politics, national sovereignty, NGO lobbying, and political will at the United Nations all suggest that more visible problems will be addressed first. A full analysis of the

²²⁷ Ben Saul, *Introduction: Indigenous Peoples and Human Rights – Institutions and Influences* 1 SYDNEY L. SCH., Research Paper No. 16/39 (May 2016), <http://ssrn.com/abstract=2778903>.

visibility of human rights concerns is beyond the scope of this article, but the shared characteristics analyzed thus far are a good start.

Summarizing what we have learned about characteristics shared by women, children, disabled persons, migrant workers, refugees, and indigenous peoples, we find:

- *Vulnerability.* Each of these groups is perceived by the international community as vulnerable to human rights abuses.
- *Large populations.* Each of these groups is large, ranging from 1% of the global population (refugees) to 49% (women).
- *Geographical and Sociological Distribution.* For the most part, these groups are broadly distributed worldwide. Women, children, and the disabled can be found in every country and every stratum of society. This is less true with migrant workers, refugees, and indigenous peoples. These latter groups are globally widespread but very unevenly. Indigenous peoples can be found in almost half the world's countries, but are heavily concentrated in certain areas and are often isolated from their broader national societies. Migrant workers and refugees find nations lining up on opposite sides of the demographics, with the workers' and refugees' countries of origin having different perspectives from those same workers' and refugees' countries of destination. Most people will know women, children, and persons with disabilities, but far fewer will have personal connections with migrant workers, refugees, and indigenous peoples.
- *Involuntary membership.* Gender, age, and disability are not typically matters of choice. Identification as indigenous is largely a matter of genetic and cultural heritage, which is not voluntary, though it is sometimes possible to opt out of identification as indigenous through assimilation. Although becoming a migrant worker or a refugee is at least in part a matter of one's life choices, those choices are often compelled by economic or political realities beyond one's control.
- *Precursor instruments.* Each of these groups was the subject of international diplomatic attention repeatedly in the years leading up to the adoption of group-focused global human rights instruments. Some groups, such as women and children, had received a great deal of prior attention. Others, like migrant workers and indigenous peoples, had received less.

This review of the characteristics shared by women, children, persons with disabilities, migrant workers, refugees, and indigenous peoples provides a practical set of criteria with which to consider other possible candidates for

global, focused human rights treaty coverage. Large, vulnerable populations of involuntary or quasi-voluntary membership, broadly distributed around the world, that have received significant international attention in recent decades will be the groups most appropriate to consider for new human rights treaty coverage. By contrast, vulnerable populations that are less numerous, unevenly distributed among countries, and composed largely of non-citizens or forming socially-segregated underclasses within society will be less likely to get their own human rights treaties or, if such treaties are drafted, they are less likely to attract comparable levels of international support.

Recognizing these criteria as shared among the groups that have received global human rights protection in targeted instruments means that we can use them as a set of filters to help us to identify what other groups might be strong candidates for similar protection. In much the same way that mathematicians use the Sieve of Eratosthenes to eliminate composite numbers and identify prime numbers,²²⁸ we can use these criteria as filters to identify groups who might reasonably be candidates for their own global human rights treaties.

V. WHAT OTHER GROUPS SHOULD BE PROTECTED?

A. *Road Map Redux*

With the foregoing analysis, we have a working list of those characteristics associated with limited-scope human rights instruments likely to attract significant support. In effect, we have now identified aspects of the yarns will fit best into the human rights tapestry: what fibers, weights, and sheen will contribute most meaningfully to the weave. We can now turn to the forward-looking inquiry of determining what groups not already covered by human rights treaties of global application and limited scope best embody these characteristics.

In making that determination, experience with already-extant, global, people-focused human rights treaties tells us that we need to ask the following questions:

- 1) Is the candidate group vulnerable: relatively powerless, disenfranchised, and prone to human rights abuses?
- 2) Does the candidate group represent a significant portion of the world's population, both currently and for the foreseeable future?
- 3) Is the candidate group broadly distributed among the countries of the world and within the sectors of those countries?

²²⁸ See, e.g., The Prime Glossary, PRIMES, <https://primes.utm.edu/glossary/page.php?sort=SieveOfEratosthenes> (last visited Nov 8, 2019); Sieve of Eratosthenes, WIKIPEDIA https://en.m.wikipedia.org/wiki/Sieve_of_Eratosthenes (last visited Feb. 26, 2019).

- 4) Is membership in the candidate group either involuntary or premised upon members' responses to overwhelming economic or political pressures?
- 5) Has the international community been focusing upon the candidate group with either binding instruments falling short of comprehensive, focused human rights treaties, formal declarations, or resolutions indicating ongoing international concern?

This list of questions is not itself normative, in the sense that we should demand that any group seeking human rights treaty coverage must possess these characteristics. Rather, this list is descriptive of those groups that have already obtained focused human rights protection. As such, it is strongly suggestive of what characteristics a candidate group would need to possess in order to have a legitimate claim upon the limited resources of the international human rights community. These five questions tell us what color, weight, and sheen would best match the existing weave.

In considering what groups might be good candidates for their own human rights instrument, this article will now take two steps. The first will be to identify possible candidates for review under the five questions set out immediately above and developed earlier in this article. In doing so, we will use the first element—vulnerability—as an initial guide to picking groups of interest. That analysis will provide us with a number of good candidates, which we may supplement to ensure a good range of reasonable candidates.

The second step will be to assess those candidates according to the entire list of elements, seeing how well these yarns match those already in the tapestry.

Several sources provide us with information about who are considered vulnerable groups. By comparing these sources, which come from a variety of different disciplines, and eliminating those six groups that have already been extended protection of focused human rights instruments, we should be able to identify some other reasonable candidates.

As we saw from our earlier discussion of vulnerability,²²⁹ all six of the groups who have the protection of focused human rights instruments are vulnerable. Others frequently mentioned are prisoners,²³⁰ older persons,²³¹ people with HIV/AIDS, people discriminated against on the basis of sexual

²²⁹ See *supra* Part IV(A)(i).

²³⁰ 45 C.F.R. 46, subpart B; J. ALBERTO DEL REAL ALCALÁ, HUMAN RIGHTS ISSUES AND VULNERABLE GROUPS, VOL. 1 (CURRENT AND FUTURE DEVELOPMENTS IN LAW) (2017); FRANCESCA IPPOLITO & SARA IGLESIAS SÁNCHEZ, PROTECTING VULNERABLE GROUPS: THE EUROPEAN HUMAN RIGHTS FRAMEWORK (2017); JUS GENTIUM: COMPARATIVE PERSPECTIVES ON LAW AND JUSTICE 255, 260 (2016); Andorno, *supra* note 128.

²³¹ IPPOLITO & SÁNCHEZ, *supra* note 230; Andorno, *supra* note 128, at 260.

orientation,²³² and the world's poorest people.²³³ As we will see, other vulnerable groups are slaves, sex workers, and prisoners. We will consider all of these below.

Having identified several vulnerable groups who might be good candidates for new human rights treaties of global application and limited scope, we will now turn to the question of how well these group embody the characteristics we have identified in the most successful instruments. Put another way, what groups other than women, children, the disabled, and migrant workers (in that they have already been addressed by a limited-scope treaty, despite lacking some of these characteristics) are large, globally-distributed groups of vulnerable populations of involuntary membership, present at all socio-economic levels of States' citizen populations? It is among groups with these characteristics that we will find the most likely and most reasonable candidates for further evolution of limited-scope human rights treaties.

There is no official or comprehensive list of groups that are deserving of or under consideration for special human rights treatment, so it will be necessary to construct such a list of candidate groups. The list that follows will be entirely non-canonical, likely guilty of omitting one or more groups that are seen to be or see themselves to be deserving of inclusion, and possibly including groups that others will see as inappropriate for special human rights protection. Nevertheless, the goal of this article is to identify likely candidates for special human rights instruments in light of the shared characteristics of those vulnerable groups that have already received such instruments, which requires that we consider candidate groups.

In compiling the following list, I have looked for distinct groups of people who are:

- Vulnerable and
- Large populations,
- Widely distributed around the world,
- In which membership is largely or effectively involuntary, and
- Which have received prior international legal or diplomatic attention.

In this context, I use the term "distinct" only in the sense that groups have definable membership, not in the sense that the identified groups lack common membership. Indeed, the consequences of dual or multiple vulnerability are highly significant and many people fall into multiple categories of

²³² IPPOLITO & SÁNCHEZ, *supra* note 230.

²³³ *Id.*; DEL REAL ALCALÁ, *supra* note 230; VULNERABLE POPULATIONS AND TRANSFORMATIVE LAW TEACHING: A CRITICAL READER (Society of American Law Teachers (SALT) & Golden Gate University School of Law eds., 2011); Sheila R. Foster, *Vulnerability, Equality, and Environmental Justice: The Potential and Limits of Law*, in HANDBOOK OF ENVIRONMENTAL JUSTICE (Jayajit Chakraborty & Gordon Walker eds., 2017).

vulnerability. For example, ethnic minorities may be rendered stateless through “administrative . . . cleansing” of state records;²³⁴ gay men, intravenous drug users, and sex workers are more at risk of contracting HIV/AIDS;²³⁵ and women and girls represent 99% of those who are trafficked and exploited as sex workers.²³⁶ However, this topic of multiple vulnerability is beyond the scope of this article and deserves strong scholarly attention of its own.

Here, then, are some possible candidate groups which might be appropriate for a special global human rights instrument, based upon the characteristics of those groups which have already been the beneficiaries of such an instrument.

B. Poor Persons

The Office of the United Nations High Commissioner on Human Rights has described the vulnerability of the very poor people of the world in the following words:

Persons living in poverty are confronted by the most severe obstacles—physical, economic, cultural and social—to accessing their rights and entitlements. Consequently, they experience many interrelated and mutually reinforcing deprivations—including dangerous work conditions, unsafe housing, lack of nutritious food, unequal access to justice, lack of political power and limited access to health care—that prevent them from realizing their rights and perpetuate their poverty. Persons experiencing extreme poverty live in a vicious cycle of powerlessness, stigmatization, discrimination, exclusion and material deprivation, which all mutually reinforce one another.²³⁷

With such poverty comes difficulty accessing food, clean water, shelter, and medical care, as well as difficulty avoiding conflict and climate change. The poor are more vulnerable to loss of educational opportunity during economic

²³⁴ David Weissbrodt & Clay Collins, *The Human Rights of Stateless Persons*, 28 HUM. RTS. Q. 245, 264 (2006) (discussing the “Slovenian Erasure”).

²³⁵ *UNAIDS Data 2018*, UNAIDS, 8 (July 26, 2018), <http://www.unaids.org/en/resources/documents/2018/unaids-data-2018>.

²³⁶ *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage*, INT’L LABOUR ORG., 10 (2017), http://un-act.org/wp-content/uploads/2017/10/global_estimates_of_modern_slavery.pdf [hereinafter ILO 2017].

²³⁷ U.N. Human Rights Council, 21st Sess., U.N. Doc A/HRC/21/39, ¶ I.4 (July 18, 2012).

downturns.²³⁸ Poverty puts people significantly more at risk for enslavement.²³⁹ Poverty is often seen as tantamount to societal marginalization.²⁴⁰ In short, poor people are highly vulnerable.

Approximately 736 million people in the world lived in extreme poverty as of 2015, where extreme poverty is defined as living below the International Poverty Level of the equivalent of \$1.90 per day.²⁴¹ That is just under 10% of the world's population, placing the extremely poor between indigenous peoples and disabled persons in population.²⁴² Taking a slightly different definition, Leilani Farha, the U.N. Special Rapporteur on adequate housing, estimated that 883 million people, or approximately 11.5% of the world's population, live in "informal settlements" where the conditions "are often inhumane. . . . Many residents live in overcrowded, insecure dwellings, without water and sanitation, fearful of eviction and subject to preventable life-threatening illnesses."²⁴³

By definition, the poor and especially the extreme poor, are found only at one end of the economic scale of any society. However, they are also distributed unevenly around the world. Extreme poverty is increasingly becoming concentrated in sub-Saharan Africa,²⁴⁴ with 27 of the world's 28 poorest countries located in the area.²⁴⁵ Thus, both in societal and global terms, poverty is highly concentrated, leaving most of the world unfamiliar with anyone suffering from extreme poverty.

Poverty is often multi-generational, with childhood poverty leading to a cycle of lifetime challenges that keep the individual in poverty.²⁴⁶ Since poverty

²³⁸ Gerard Postiglione, *Education Impact Study: The Global Recession and the Capacity of Colleges and Universities to Serve Vulnerable Populations in Asia* (Asian Development Bank [ADB], Working Paper No. 208, 2010), <https://www.adb.org/sites/default/files/publication/156063/adbi-wp208.pdf>.

²³⁹ ILO 2017, *supra* note 236, at 31.

²⁴⁰ See, e.g., U Rodolfo Stavenhagen (Special Rapporteur), *Final Report on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, ¶ 64, U.N. Doc. A/HRC/4/32 (Feb. 27, 2007).

²⁴¹ WORLD BANK GROUP, *POVERTY AND SHARED PROSPERITY 2018: PIECING TOGETHER THE POVERTY PUZZLE 1* (Patricia Katayama & Susan Graham eds., 2018) [hereinafter *WORLD BANK 2018*].

²⁴² See *supra* Table 2.

²⁴³ Leilani Farha (Special Rapporteur), *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context*, ¶1, U.N. Doc. A/73/310/Rev.1 (Sept. 19, 2018).

²⁴⁴ *WORLD BANK 2018*, *supra* note 241, at 2.

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 141.

is also concentrated in poor countries, particularly in sub-Saharan Africa,²⁴⁷ where one is born and lives is also closely correlated with whether one experiences poverty. Poverty is involuntary.

The international community has often addressed poverty, often through reference to “higher” or “adequate” standards of living or to access to food. Among the international instruments that have included expressions of poverty-related concerns are:

- In 1945, the United Nations Charter, art. 55, referred to the importance of higher standards of living.²⁴⁸
- In 1948, the Universal Declaration of Human Rights referred to the importance of adequate standards of living.²⁴⁹
- In 1966, the International Covenant on Economic, Social and Cultural Rights referred both to an adequate standard of living and to access to adequate food.²⁵⁰
- In 1996, the European Social Charter (Revised) referred to the importance of a decent standard of living.²⁵¹
- In 2000, the U.N. General Assembly adopted the Millennium Development Goals, the first of which is to “Eradicate extreme poverty and hunger.”²⁵²
- In 2010, the U.N. General Assembly passed a resolution on “Human rights and extreme poverty.”²⁵³
- In 2015, the U.N. General Assembly adopted the Sustainable Development Goals, the first of which is to “end poverty in all its forms everywhere.”²⁵⁴

²⁴⁷ *Id.* at 2.

²⁴⁸ U.N. Charter art. 55, ¶ 1(a) a.

²⁴⁹ UDHR, *supra* note 3, at 25.

²⁵⁰ ICESCR, *supra* note 188, art. 11.

²⁵¹ Council of Europe, European Social Charter (Revised), *opened for signature* May 3, 1996, E.T.S. 163, art. 4 (entered into force July 1, 1999).

²⁵² G.A. Res. 55/2, United Nations Millennium Declaration (Sept. 18, 2000).

²⁵³ G.A. Res. 65/214 (Dec. 21, 2010).

²⁵⁴ G.A. Res. 70/1 (Sept. 25, 2015).

Older persons are a vulnerable population.²⁵⁵ The WHO estimates that one out of every six older persons worldwide is subjected to abuse annually.²⁵⁶ Older persons are normally included in medical protocols relating to vulnerable people.²⁵⁷

Older persons are a large and growing population. According to the United Nations, people aged 65 and older numbered 612 million people in 2015 and they are expected to grow to 1.55 billion people by 2050.²⁵⁸ This is the fastest-growing major demographic group in the world.²⁵⁹ The U.S. National Institutes of Health refers to the growth of the senior population in the world as “unprecedented.”²⁶⁰

C. Older Persons

Older persons live in every society across the globe in the world, though proportions of the population vary considerably by region. Thus, persons aged 65 and older make up approximately 9.4% of the world’s population, but range from 3.1% in sub-Saharan Africa to 19.3% in Europe.²⁶¹ In general, developed parts of the world have older populations, though growth rates among persons aged 65 and up is faster in the developing world.²⁶²

Achieving a certain age is voluntary only in the sense that one could, either intentionally or by lifestyle choices, die younger. For most people, achieving

²⁵⁵ Cyrus S.H. Ho et al., *Global Prevalence of Elder Abuse: A Meta-analysis and Meta-regression*, 27 E. ASIAN ARCH. PSYCHIATRY 43 (2017); Yongjie Yon et al., *Elder Abuse Prevalence in Community Settings: A Systematic Review and Meta-analysis*, 5 LANCET GLOBAL HEALTH 147 (2017); *ELDER ABUSE*, WHO (JUNE 8, 2018), <https://www.who.int/news-room/fact-sheets/detail/elder-abuse>.

²⁵⁶ *Ageing and Life-course: Elder Abuse*, WHO (June 8, 2018), https://www.who.int/ageing/projects/elder_abuse/en/; *Elder Abuse: The Health Sector Role in Prevention and Response*, WHO, https://www.who.int/ageing/media/infographics/EA_infographic_EN_Jun_18_web.pdf?ua=1 (last visited Oct. 21, 2019).

²⁵⁷ Andorno, *supra* note 128.

²⁵⁸ World Populations Prospects, *supra* note 146, (follow hyperlink; then select “Interactive Data,” select “Population by Age and Sex,” select “World,” select no sublocations, select “next,” select “2015” and “2050,” select “next,” select “Both Sexes Combined,” select “next,” select all ages from 64 and up, select “next,” and select “results”).

²⁵⁹ United Nations Dep’t of Economic & Social Affairs, *World Population Ageing 2017*, U.N. Doc. ST/ESA/SER.A/397, at 7 (2017) [hereinafter *World Population Ageing 2017*].

²⁶⁰ National Institutes of Health, *World’s Older Population Grows Dramatically*, NIH (Mar. 28, 2016), <https://www.nih.gov/news-events/news-releases/worlds-older-population-grows-dramatically>.

²⁶¹ World Population Prospects, *supra* note 146.

²⁶² *World Population Ageing 2017*, *supra* note 259, at 4–5.

the status of being an older person is an aspiration, likely making being an older person the only vulnerable population that people aspire to join.

Older persons have received significant international legal and diplomatic attention, including:

- In 1948, the Universal Declaration of Human Right made a passing reference to age as a factor warranting protection from human rights abuses;²⁶³
- In 1982, the General Assembly endorsed the Vienna International Plan of Action on Aging;²⁶⁴
- In 1991, the General Assembly adopted the United Nations Principles for Older Persons.²⁶⁵
- In 2000, the Charter of Fundamental Rights of the European Union was adopted, Article 25 of which addresses the human rights of older persons;²⁶⁶
- In 2002, the United Nations Second World Assembly on Ageing adopted ²⁶⁷ the Madrid International Plan of Action on Ageing.²⁶⁸
- In 2011, the General Assembly reaffirmed its commitment to the Madrid International Plan of Action on Ageing and created the Open-Ended Working Group on Ageing.²⁶⁹
- In 2012, the U.N. Human Rights Council passed a resolution encouraging member states to take action to support human rights for older persons;²⁷⁰

²⁶³ UDHR, *supra* note 3, art. 25(1): “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, **old age** or other lack of livelihood in circumstances beyond his control.” (emphasis added).

²⁶⁴ G.A. Res. 37/51, (Dec. 3, 1982).

²⁶⁵ G.A. Res. 46/91, (Dec. 16, 1991).

²⁶⁶ Charter of Fundamental Rights of the European Union, *supra* note 255, art. 25. In its entirety, this provision reads: “The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.” *Id.* For further information see Pier Francisco Lotito, *Article 25 – The Rights of the Elderly*, in HUMAN RIGHTS IN EUROPE: COMMENTARY ON THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION (William Mock & Gianmario Demuro eds., 2010).

²⁶⁷ G.A. Res. 57/167, Follow-up to the Second World Assembly on Ageing (Jan. 16, 2003).

²⁶⁸ *Political Declaration and Madrid International Plan of Action on Ageing, Second World Assembly on Ageing* (Apr. 8–12, 2002), UNITED NATIONS, https://www.un.org/en/events/pastevents/pdfs/Madrid_plan.pdf.

²⁶⁹ G.A. Res. 65/182, Follow-up to the Second World Assembly on Ageing (Feb. 4, 2011).

²⁷⁰ U.N. Human Rights Council Res. 21/23, The Human Rights of Older Persons (Oct. 17, 2012).

- In 2013, the U.N. Human Rights Council adopted a resolution on the human rights of older persons;²⁷¹
- In 2015, the Organization of American States adopted the Inter-American Convention on Protecting the Human Rights of Older Persons.²⁷²

D. LGBTQ Persons

LGBTQ persons are highly vulnerable to social ostracism, physical assault, economic disempowerment, and other forms of abuse.²⁷³ It is a capital offense to be homosexual or to engage in homosexual sex in many countries. In Africa, this community is especially threatened,²⁷⁴ but they are at risk in richer countries, too.²⁷⁵ It was only in 1973 that the American Psychological Association removed homosexuality from its Diagnostic and Statistical Manual,²⁷⁶ but the Association now recognizes LGBTQ individuals as being especially vulnerable to socioeconomic disadvantages.²⁷⁷

It is very difficult to determine the global size or distribution of a population that, in many countries, faces serious, even capital, punishment and that many national leaders around the world deny the existence of in their own countries.²⁷⁸ One approach is to estimate the size of the LGBTQ

²⁷¹ U.N. Human Rights Council Res. 24/20, *The Human Rights of Older Persons* (Oct. 8, 2013).

²⁷² *Inter-American Convention on Protecting the Human Rights of Older Persons*, June 15, 2015, O.A.S.T.S. No. A-70, http://www.oas.org/en/sla/dil/inter_american_treaties_A-70_human_rights_older_persons.asp.

²⁷³ Sandy James et. al., *Injustice at Every Turn: A Report of the [2015] National Transgender Discrimination Survey*, NAT'L CTR. FOR TRANSGENDER EQUALITY (Dec. 2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>; *State-Sponsored Homophobia Report*, ILGA WORLD, <https://ilga.org/state-sponsored-homophobia-report> (last visited Sept. 19, 2019).

²⁷⁴ Abadir M. Ibrahim, *LGBT Rights in Africa and the Discursive Role of International Human Rights Law*, 15 AFR. HUM. RTS. L.J. 263 (2015); see also Elisabeth Reichert, *Human Rights and Vulnerable Groups*, in UNDERSTANDING HUMAN RIGHTS: AN EXERCISE BOOK (2006).

²⁷⁵ Oddny Mjöll Arnardóttir, *Vulnerability under Article 14 of the European Convention on Human Rights: Innovation or Business as Usual?*, 4 OSLO L. REV. 150, 163 (2017); UNITED STATES DEPT OF STATE, *The Vulnerability of LGBTI Individuals to Human Trafficking* (June 27, 2017), <https://www.state.gov/j/tip/rls/fs/2017/272724.htm>.

²⁷⁶ Jack Drescher, *Out of DSM: Depathologizing Homosexuality*, 5 BEHAV. SCI. 565 (2015).

²⁷⁷ *Lesbian, Gay, Bisexual and Transgender Persons & Socioeconomic Status*, AM. PSYCHOL. ASS'N, <https://www.apa.org/pi/ses/resources/publications/lgbt> (last visited Sept. 5, 2019).

²⁷⁸ *State-Sponsored Homophobia: A World Survey of Sexual Orientation Laws: Criminalisation, Protection and Recognition*, INT'L LESBIAN & GAY ALLIANCE [ILGA] (2017), <https://ilga.org/state-sponsored-homophobia-report> (identifying that 72 nations criminalize homosexuality or homosexual acts); see also A. Carroll & L.R. Mendos, *State-Sponsored Homophobia 2017: A World Survey of Sexual Orientation Laws: Criminalisation*,

community in countries that have decriminalized homosexuality and homosexual activity, then extrapolate to the rest of the world. Studies and estimates for the percentage of LGBTQ individuals in Western societies range: 3.8% of adults in the U.S. in 2011,²⁷⁹ 4.5% of adults in the U.S. in 2017,²⁸⁰ between 1.9% and 5.8% of adults in the U.K.,²⁸¹ and either 5.9% of adults in Western and Central Europe if presented with a binary choice or 10% of adults if asked to place themselves along a spectrum.²⁸² Taken together, these numbers would suggest that LGBTQ persons may constitute something on the order of 4% to 10% of the population, depending upon what questions are asked and how once considers refusals to answer. Taking a conservative estimate of 4% to 6% as a basis, that would suggest that there are roughly 300-500 million LGBTQ individuals in the world.²⁸³

Similarly, it is difficult to make any definitive statements about how evenly distributed LGBTQ individuals are around the world or within particular societies. Given the many barriers that LGBTQ people face within even relatively accepting societies, it is likely that there is some degree of downward socio-economic drift. On the other hand, given that sexuality appears likely to be substantially involuntary and biochemical, there is no reason to suppose that LGBTQ people are not widely distributed throughout every society.

Available scientific evidence indicates that one's sexuality is neither binary nor a simple matter of choice²⁸⁴ and there is a high likelihood that homosexuality has genetic or epigenetic roots in individuals.²⁸⁵ Although

Protection and Recognition, INT'L LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX ASS'N, Graph 1 (2017), <https://ilga.org/maps-sexual-orientation-laws>.

²⁷⁹ Gary J. Gates, *How Many People are Lesbian, Gay, Bisexual, and Transgender?*, THE WILLIAMS INSTITUTE (April 2011), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf>.

²⁸⁰ Frank Newport, *In U.S., Estimate of LGBT Population Rises to 4.5%*, GALLUP NEWS (May 22, 2018), <https://news.gallup.com/poll/234863/estimate-lgbt-population-rise.aspx>.

²⁸¹ Theodore Joloza et al., *Measuring Sexual Identity: An Evaluation Report*, U.K. OFF. FOR NAT'L STAT. (Sept. 2010), (Revised: Mar. 31, 2011), <https://webarchive.nationalarchives.gov.uk/20151014015853/http://www.ons.gov.uk/ons/re/ethnicity/measuring-sexual-identity---evaluation-report/2010/index.html> (acknowledging that 94.2% of respondents self-identified as heterosexual, although only 1.9% self-identified as gay/lesbian, bisexual, or other).

²⁸² Athena Lam, *Counting the LGBT Population: 6% of Europeans Identify as LGBT*, DALIA RESEARCH BLOG (Oct. 18, 2016), <https://daliaresearch.com/counting-the-lgbt-population-6-of-europeans-identify-as-lgbt/>.

²⁸³ For a similar estimate see Amin Ghaziani, *The Closet*, CONTEXTS (Sept. 27, 2019), <https://contexts.org/articles/counting-the-closet/> (estimating the U.S. gay and lesbian population at "somewhere under 5%" but noting the problem of estimating the size of the closeted population).

²⁸⁴ Robert Epstein, *Do Gays Have a Choice?*, SCI. AM. MIND (Mar. 2016), <https://www.scientificamerican.com/article/do-gays-have-a-choice1>.

²⁸⁵ Tuck C. Ngun & Eric Vilain, *The Biological Basis of Human Sexual Orientation: Is There a Role for Epigenetics?*, 86 ADVANCES IN GENETICS 167 (2014); William R. Rice, Urban Friberg, & Sergey

debate is ongoing and one could argue that choice should not be the issue in ensuring rights to LGBTQ people,²⁸⁶ it would appear that voluntariness is not at the core of homosexuality.

Although the international community has been active in focusing on HIV/AIDS since the late 1980s, it is only recently that issues of rights for LGBTQ people have come to the forefront, largely before the U.N. Human Rights Council. Among the relevant international actions have been:

- From 2003 to 2015, the General Assembly passed a series of seven resolutions, all entitled “Extrajudicial, summary or arbitrary executions,” in which violence based upon sexual orientation is included as a cause for concern and investigation.²⁸⁷
- In 2011, the Human Rights Council passed a resolution commissioning a study of “discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity. . . .”²⁸⁸
- Also in 2011, the United Nations High Commissioner for Human Rights issued a report pursuant to the previous Human Rights Council resolution;²⁸⁹
- In 2014, the Human Rights Council requested that the High Commissioner update the report for the Council;²⁹⁰

Gavrilets, *Homosexuality as a Consequence of Epigenetically Canalized Sexual Development*, 87 Q. REV. BIOL. 343 (2012); see also Debra W. Son, *Cross-Cultural Evidence for the Genetics of Homosexuality: Mexico’s Third Gender Sheds Light on the Biological Correlates of Sexual Orientation*, SCI. AM. (Apr. 25, 2017), <https://www.scientificamerican.com/article/cross-cultural-evidence-for-the-genetics-of-homosexuality/>; see also Meerwijk & Sevelius, *supra* note 185, at 1.

²⁸⁶ Nancy J. Knauer, *Science, Identity, and the Construction of the Gay Political Narrative*, 12 L. & SEXUALITY 1 (2003).

²⁸⁷ G.A. Res. 57/214, ¶ 6 (Feb. 25, 2003) (referencing in ¶ 6 “all killings committed for any discriminatory reason, including sexual orientation”); G.A. Res. 59/197, ¶ 8(c) (Mar. 10, 2005) (using the same language that appears in ¶ 8(c)); G.A. Res. 61/173, ¶ 5(b) (Mar. 1, 2007) (using the same language that appears in ¶ 5(b)); G.A. Res. 63/182, ¶ 6(b) (Mar. 16, 2009) (using the same language that appears in ¶ 6(b)); G.A. Res. 65/208, ¶ 6(b) (Mar. 30, 2011) (using language in ¶ 6(b) that relates to “killings of persons . . . because of their sexual orientation”); G.A. Res. 67/168, ¶ 6(b) (Mar. 15, 2013) (using related language that appears in ¶ 6(b) as “killings of persons . . . because of their sexual orientation or gender identity”); G.A. Res. 69/182, ¶ 6(b) (Jan. 30, 2015) (using the same language about “sexual orientation or gender identity” that appears in ¶ 6(b)).

²⁸⁸ G.A. Res. 17/19, (July 14, 2011). The vote was 23 to 19, with 3 abstentions—suggesting that this was an unusually divisive subject. *Id.*

²⁸⁹ U.N. High Commissioner for Human Rights, *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, U.N. Doc. A/HRC/19/41 (Nov. 17, 2011).

²⁹⁰ U.N. Human Rights Council, U.N. Doc. A/HRC/RES/27/32, Human Rights, Sexual Orientation and Gender Identity (Oct. 2, 2014).

- In 2016, the Human Rights Council appointed “an Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity. . . .”²⁹¹

E. Slaves and Trafficked Persons

There can be no question that slaves²⁹² and trafficked persons²⁹³ are vulnerable. As we have already seen, to be vulnerable means to be at risk to the possibility of harm and abuse, to be susceptible to natural and society dangers, including exploitation.²⁹⁴ Slaves are not only vulnerable but are already suffering from harm, abuse, and exploitation.

The International Labour Organization estimates that there were 40.3 million people in slavery in 2016.²⁹⁵ That number is broken into two major groups, with 24.9 million people caught in forced labor and 15.4 million caught in forced marriages.²⁹⁶ The combined number of people living in slave conditions constitutes approximately 0.5% of the global population.²⁹⁷ Furthermore, the ILO estimates that 89 million people, amounting to almost 1.2% of the world’s population, “experienced some form of modern slavery for periods of time ranging from a few days to the whole five years.”²⁹⁸

Because slavery has been recognized as a global evil for so long,²⁹⁹ even to the point of being recognized as a crime *erga omnes*,³⁰⁰ it operates in the

²⁹¹ U.N. Human Rights Council, U.N. Doc. A/HRC/RES/32/2, Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity (July 15, 2016) (The vote was 23 to 18, with 6 abstentions.).

²⁹² Karen E. Bravo, *Exploring the Analogy Between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade*, 25 B.U. INT’L L.J. 207, 266 ff. (2007). Weighing in on these definitional disputes is beyond the scope of this article and, in any event, does not significantly change the analysis. See generally Kevin Bales & Peter T. Robbins, *No One Shall be Held in Slavery or Servitude: A Critical Analysis of International Slavery Conventions*, 2 HUMAN RTS. REV. 18, 20 (2001).

²⁹³ Bravo, *supra* note 292, at 266 ff.

²⁹⁴ *Supra* part IV(A)(i).

²⁹⁵ ILO 2017, *supra* note 236, at 9; see also Pablo Diego-Rosell & Jacqueline Joudo Larsen, *Estimating the Risk of Modern Slavery in 2018*, GALLUP METHODOLOGY BLOG, <https://news.gallup.com/opinion/methodology/237281/estimating-risk-modern-slavery-2018.aspx> (last visited Oct. 21, 2019).

²⁹⁶ ILO 2017, *supra* note 236, at 9–10.

²⁹⁷ *Id.* at 9; see also Diego-Rosell & Joudo Larsen, *supra* note 295.

²⁹⁸ ILO 2017, *supra* note 236, at 10.

²⁹⁹ Long before slavery was ended in the United States as a result of the Civil War, there were international instruments against the slave trade. See, e.g., Declaration of the Eight Courts, Relative to the Universal Abolition of the Slave-trade (Annex XV of the Treaty of Vienna), 63 Consol. T.S. 473 (Feb. 8, 1815).

³⁰⁰ MAURIZIO RAGAZZI, THE CONCEPT OF INTERNATIONAL OBLIGATIONS ERGA OMNES, § 6 (2000).

shadows, making it difficult to obtain socio-economic data on slaves and those who might know them. However, we have some data from the International Labour Organization:

Modern slavery was most prevalent in Africa (7.6 per 1,000 people), followed by Asia and the Pacific (6.1 per 1,000) then Europe and Central Asia (3.9 per 1,000). These results should be interpreted cautiously due to lack of available data in some regions, notably the Arab States and the Americas.

For forced labour specifically, the prevalence is highest in Asia and the Pacific, where four out of every 1,000 people were victims, followed by Europe and Central Asia (3.6 per 1,000), Africa (2.8 per 1,000), the Arab States (2.2 per 1,000) and the Americas (1.3 per 1,000).

While noting limits of the data in key regions, particularly the Arab States, the data suggests a prevalence of forced marriage is highest in Africa (4.8 per 1,000), followed by Asia and the Pacific (2.0 per 1,000).³⁰¹

Thus, slavery is distributed around the entire world, though it is more prevalent in some parts than in others. Of the nearly 25 million people in forced labor, roughly 16 million work in the private sector, where about 8 million people are kept in debt bondage.³⁰² Along with those in forced marriages, those caught in forced labor will be largely invisible to higher socio-economic classes, and those who are aware of these slaves may even be benefitting from the system of enslavement.

It is significant that the International Labour Organization divides its statistics on slavery into two categories, *forced* labor and *forced* marriages. People do not voluntarily become enslaved.

The community of nations has a long history of dealing with slavery in international instruments. Among the more notable are:

- Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926, Sept. 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253, adopted 25 September 1926, entered into force 9 March 1927;
- Protocol Amending the Slavery Convention, Dec. 7, 1953, 7 U.S.T. 479, 182 U.N.T.S. 51;

³⁰¹ ILO 2017, *supra* note 236, at 10.

³⁰² *Id.* at 10–11.

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- Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 226 U.N.T.S. 3;
- UN GA Res 73-165 prohibits slavery of rural people.

In addition, there are a number of international instruments that address trafficking, which is often seen as a type of slavery:³⁰³

- International Agreement for the Suppression of White Slave Traffic, May 18, 1904, 35 Stat. 1979, 1 L.N.T.S. 83;
- International Convention for the Suppression of the White Slave Traffic, May 4, 1910, 211 Consol. T.S. 45;
- International Convention for the Suppression of the Traffic in Women and Children, Sept. 30, 1921, 9 L.N.T.S. 416, amended by the Protocol to Amend the Convention for the Suppression of the Traffic in Women and Children;
- Convention for the Suppression of the Traffic in Women of Full Age, Oct. 11, 1933, 150 L.N.T.S. 431;
- Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Mar. 21, 1950, 96 U.N.T.S. 271.

Slavery is addressed in the following articles of international human rights instruments:

- Universal Declaration of Human Rights, art. 4;
- The American Convention on Human Rights provision on slavery (art 6) is one of the non-derogable provisions;
- ASEAN Human Rights Declaration, art. 13.

Slavery was also addressed by the international community in the context of the global fight against South African apartheid, which was recognized as a form of slavery.³⁰⁴

Clearly, there is no shortage of international instruments, many of them binding, dealing with slavery. However, these instruments operate by prohibiting the practice of slavery, not by guaranteeing the rights of those who have been enslaved with the same kind of granularity that focused human rights instruments do for women, children, and persons with disabilities. Clearly, this is because the international initiative is to abolish slavery, not to regulate it. Any person who has been enslaved should be freed immediately, not informed of their “slave’s bill of rights.”

³⁰³ CENTERS FOR DISEASE CONTROL & PREVENTION, AIDS & OPPORTUNISTIC INFECTIONS (2019).

³⁰⁴ U.N. Secretary-General, *Question of Slavery and the Slave Trade in all Their Practices and Manifestations Including the Slavery-Like Practices of Apartheid and Colonialism*, U.N. Doc. E/4475, E/CN.4/972 (1968).

This does not mean, however, that there is no logic to creating a focused human rights treaty for slaves. In 1931, “Scarface” Al Capone, a notorious mob boss, was brought to justice on charges of tax evasion, not murder, racketeering, or any of the other gang-related activities in which he was involved.³⁰⁵ In the same manner, a treaty guaranteeing human rights to people living in conditions of slavery might be a useful tool in the fight to abolish slavery. The international community has not thus far chosen to pursue this approach.

F. Persons in Need of Palliative Care

The World Health Organization describes palliative care in this way:

Palliative care is an approach that improves the quality of life of patients and their families facing the problem associated with life-threatening illness, through the prevention and relief of suffering by means of early identification and impeccable assessment and treatment of pain and other problems, physical, psychosocial and spiritual.³⁰⁶

It is inherent in this definition that persons needing palliative care are vulnerable, for they are facing life-threatening illness, suffering, and pain. Often, those who need palliative care are also vulnerable in other ways, being, for example, children, older persons, prisoners, or people with developmental disabilities.³⁰⁷ It is also clear that needing palliative care is involuntary.

The World Health Organization estimates that approximately 40 million people, or approximately 0.5% of the world’s population, need palliative care each year.³⁰⁸ Although people are living with or dying from painful diseases, including various types of cancer and HIV/AIDS, around the world, there is a great imbalance in the need for additional palliative care. The large majority (78%) of people needing palliative care are in low- and middle-income countries, where the overwhelming majority of children (98%) needing such care will also be found, with almost half of those children to be found in Africa.³⁰⁹ It is estimated that:

³⁰⁵ FED. BUREAU OF INVESTIGATION, AL CAPONE (lasted visited Sept. 7, 2019).

³⁰⁶ WHO *Definition of Palliative Care*, WORLD HEALTH ORG., <https://www.who.int/cancer/palliative/definition/en/> (last visited Sept. 9, 2019).

³⁰⁷ *Using the UN Human Rights System to Advocate for Access to Palliative Care and Pain Relief* at 68, OPEN SOC’Y FOUND. (2017), <https://www.opensocietyfoundations.org/sites/default/files/using-the-human-rights-system-to-advocate-for-access-to-palliative-care-and-pain-relief-20171012.pdf>.

³⁰⁸ Felicia M. Knaul et al., *Closing the Divide: The Harvard Global Equity Initiative-Lancet Commission on Global Access to Pain Control and Palliative Care*, 386 LANCET 723 (2015).

³⁰⁹ *Id.*

High-income countries account for less than 15% of the world's population and 94% of global morphine consumption. In the poorest 10% of the world's countries, a patient with pain who dies from AIDS or cancer has access to on average 200 mg of oral morphine (or equivalents); in the richest 10% of countries, the average morphine consumption per death in pain from AIDS or cancer is 99 000 mg.³¹⁰

On a number of occasions, the international community has expressed its concern over lack of access to adequate health resources and care, including palliative care. Some scholars find the legal origins of a right to palliative care in fundamental human rights documents.³¹¹ Consider the following:

- The ICESCR states that everyone is entitled “to the enjoyment of the highest attainable standard of physical and mental health.”³¹²
- The importance of palliative care arises in the General Comments to the International Covenant on Economic, Social and Cultural Rights.³¹³
- In the Ninth Working Session of the U.N. Open-Ended Working Group on Ageing, one day was devoted to consideration of “long-term and palliative care” as a component of a possible international human rights treaty for older persons.³¹⁴
- In its follow-up to the Second World Assembly on Ageing, the U.N. General Assembly expressed its concern “that many health systems are not sufficiently prepared to respond to the

³¹⁰ *Id.*

³¹¹ William Breitbart, *Palliative Care as a Human Right: Update*, 9 PALLIATIVE & SUPPORTIVE CARE 345, 345–46 (2011); Frank Brennan, *Palliative Care as an International Human Right*, 33 J. PAIN & SYMPTOM MGMT. 494 (2007); Liz Gwyther et al., *Advancing Palliative Care as a Human Right*, 38 J. PAIN & SYMPTOM MGMT. 767 (2009); see, e.g., Tamar Ezer et al., *Palliative Care and Human Rights: A Decade of Evolution in Standards*, 55 J. PAIN & SYMPTOM MGMT. S163 (2018).

³¹² ICESCR, *supra* note 18, art. 12.1.

³¹³ U.N. Econ. Soc. Council, *Substantive Issues arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment No. 14*, ¶ 34, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000), <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSm1BEDzFEovLCuW1AVC1NkPsgUedPIF1vfPMJ2c7ey6PAz2qaojTzDjMCOy%2b9t%2bsAtGDNzdEqA6SuP2r0w%2f6sVBGTpvTSCbiOr4XVFTqhQY65auTFbQRPWNDxL> (“In particular, States are under the obligation to respect the right to health by, *inter alia*, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services . . .”).

³¹⁴ U.N. Open-ended Working Group on Ageing Ninth Working Session, *Proposed Organization of Work*, Day 3 (July 23, 2019), https://social.un.org/ageing-working-group/documents/ninth/FINAL_PoW_OEWG9_20July2018.pdf.

needs of the rapidly ageing population, including the need for preventive, curative, palliative and specialized care.”³¹⁵

- Palliative care is guaranteed by various provisions of the Inter-American Convention on Protecting the Human Rights of Older Persons.³¹⁶

A right to palliative care was considered for inclusion when drafting the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Older Persons in Africa,³¹⁷ but was dropped due to possible conflation of palliative care with euthanasia.³¹⁸

Although the global community has yet to craft an international instrument that specifically recognizes palliative rights as a binding human right, these expressions of concern, including a binding regional instrument, suggest that the international community sees palliative care as an element, a component right, of focused international instruments³¹⁹ rather than defining people in need of palliative care as a group warranting separate coverage with an instrument of their own.

G. People with HIV/AIDS

It is estimated that 36.9 million people are currently living with HIV/AIDS.³²⁰ Of those 36.9 million people, more than half, 19.6 million people, live in southern or eastern Africa.³²¹ By contrast, western and central Europe and North America have a combined total of only 2.2 million people living with HIV/AIDS.³²²

³¹⁵ G.A. Res. 71/164, Follow-up to the Second World Assembly on Ageing (Jan. 20, 2017).

³¹⁶ Inter-American Convention on Protecting the Rights of Older Persons, *supra* note 272, arts. 2, 6, 11, 12, 19.

³¹⁷ African Union, Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Older Persons in Africa (adopted Jan. 31, 2016, not yet entered into effect), https://au.int/sites/default/files/pages/32900-file-protocol_on_the_rights_of_older_persons_e.pdf.

³¹⁸ Katherine Irene Pettus, *Towards a Binding Convention on the Rights of Older Persons*, EHOSPICE (July 23, 2015), https://ehospice.com/international_posts/towards-a-binding-convention-on-the-rights-of-older-persons/; see also Francesco Seatzu, *Constructing a Right to Palliative Care: The Inter-American Convention on the Rights of Older Persons*, 1 IUS ET SCIENTIA 25 (2015), http://institucional.us.es/revistas/Ius_Et_Scientia/VOL_1_N%C2%BA_1/Art_3.pdf.

³¹⁹ *Proposed Organization of Work*, *supra* note 314; Disabilities Convention, *supra* note 377 (Palliative care is not mentioned in the Disabilities Convention.).

³²⁰ UNAIDS, UNAIDS Data 2018, at 4 (2018).

³²¹ *Id.* at 20.

³²² *Id.*

Similarly, HIV/AIDS is strongly concentrated among certain at-risk populations, particularly outside of sub-Saharan Africa. Those at-risk populations include men who have sex with other men, people who inject drugs, and sex workers.³²³ In sub-Saharan Africa, where the disease is more widespread, these at-risk groups account for a much smaller proportion of people living with the disease.³²⁴

People living with HIV/AIDS are highly vulnerable, not only to this disease, but also to opportunistic diseases that arise because of somatic vulnerability.³²⁵ As one example, the World Health Organization estimates that people living with HIV/AIDS are 16 to 27 times more likely to contract tuberculosis than people not living with HIV/AIDS.³²⁶ Furthermore, many people living with HIV/AIDS are already vulnerable as members of the most common at-risk groups of gay men, intravenous drug users, and sex workers. People do not choose to make themselves HIV/AIDS-positive. Membership in this group is involuntary.

Categorically, the issue of human rights for people with major illnesses is a matter of concern to the international community. For example, leprosy has been addressed by the international community, with the U.N. Human Rights Council appointing a Special Rapporteur “on the elimination of discrimination against persons affected by leprosy and their family members.”³²⁷ There were fewer than a quarter-million new cases of leprosy reported worldwide in 2014,³²⁸ far below the UNAIDS estimate of 1.8 million new HIV infections worldwide in 2017.³²⁹

With specific respect to HIV/AIDS, the international community has shown considerable interest.³³⁰ The Danish Institute for Human Rights calculated that the U.N. treaty bodies gave 127 distinct country-specific

³²³ *Id.* at 8.

³²⁴ *Id.*

³²⁵ *AIDS and Opportunistic Infections*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/hiv/basics/livingwithhiv/opportunisticinfections.html> (last visited Oct. 21, 2019).

³²⁶ *HIV/AIDS: Tuberculosis and HIV*, WORLD HEALTH ORG., <https://www.who.int/hiv/topics/tb/en/> (last visited Oct. 21, 2019).

³²⁷ Human Rights Council Res. 35/9, U.N. Doc. A/HRC/RES/35/9, at 2 (June 22, 2017).

³²⁸ World Health Org., *Global Leprosy Strategy 2016–2020*, at 5 (2016).

³²⁹ *Global HIV and AIDS Statistics–2019 Fact Sheet*, UNAIDS, <http://www.unaids.org/en/resources/fact-sheet> (last visited Oct 21, 2019).

³³⁰ An excellent summary of high-level U.N. actions relating to HIV/AIDS may be found in the United Nations’ *AskDAG* website: Dag Hammarskjöld Library, *What Actions Has the UN Taken Against HIV/AIDS?*, U.N., <http://ask.un.org/faq/108572> (last visited Oct. 21, 2019).

reports addressing HIV/AIDS from 2005 to 2010.³³¹ The U.N. High Commissioner for Human Rights has grounded human rights protection for people with HIV/AIDS in a plethora of other rights commonly found in binding international instruments:

States' obligations to promote and protect HIV-related human rights are defined in existing international treaties. HIV/AIDS-related human rights include the right to life; the right to liberty and security of the person; the right to the highest attainable standard of mental and physical health; the right to non-discrimination, equal protection and equality before the law; the right to freedom of movement; the right to seek and enjoy asylum; the right to privacy; the right to freedom of expression and opinion and the right to freely receive and impart information; the right to freedom of association; the right to marry and found a family; the right to work; the right to equal access to education; the right to an adequate standard of living; the right to social security, assistance and welfare; the right to share in scientific advancement and its benefits; the right to participate in public and cultural life; and the right to be free from torture and other cruel, inhuman or degrading treatment or punishment.³³²

Among the many actions taken by the international community with respect to HIV/AIDS have been the following:

- In 1987, the U.N. General Assembly adopted a resolution on “[p]revention and control of acquired immunodeficiency syndrome (AIDS)”;³³³
- In 1988, the General Assembly declared the importance of observing World AIDS Day;³³⁴
- In 1994, the U.N. created a Joint United Nations Programme on HIV/AIDS,” coordinated among several U.N. agencies;³³⁵
- In 2000, the Security Council took note of the impact of HIV/AIDS on peace and security in Africa;³³⁶

³³¹ Danish Inst. for Human Rts., *HIV/AIDS and the International Human Rights Treaty Bodies, 2005–2010*, at 7 (June 2010).

³³² *HIV/AIDS and Human Rights*, U.N. HUMAN RIGHTS OFFICE HIGH COMM’R, <https://www.ohchr.org/en/issues/hiv/pages/hivindex.aspx> (last visited Sept. 5, 2019).

³³³ G.A. Res. 42/8 (Oct. 26, 1987).

³³⁴ G.A. Res. 43/15, ¶ 3 (Oct. 27, 1988).

³³⁵ See, e.g., Economic and Social Council Res. 1994/24, (July 26, 1994).

³³⁶ S.C. Res. 1308 (July 17, 2000).

- In 2000, the U.N. Millennium Goals listed stopping AIDS as Goal 6;³³⁷
- In 2011, the Security Council returned to the topic of the impact of HIV/AIDS upon conflict and post-conflict situations;³³⁸ and
- In 2015, the General Assembly adopted the Sustainable Development Goals, of which Goal 3 includes eradication of AIDS and certain other diseases.³³⁹
-

H. Sex Workers

Sex work is notoriously dangerous and sex workers are particularly vulnerable.³⁴⁰ In addition, many sex workers come from vulnerable backgrounds.³⁴¹

It is very difficult to find consensus on the number of sex workers in the world.³⁴² A U.N. study of 76 countries—not including China, the Russian

³³⁷ *Millennium Development Goals (MDGs)*, WORLD HEALTH ORG., https://www.who.int/topics/millennium_development_goals/about/en/ (last visited Sept. 5, 2019). G.A. Res. 55/2 (Sept. 8, 2000) (Millennium Development Goals derived from the United Nations Millennium Declaration).

³³⁸ S.C. Res. 1983, ¶ 1 (June 7, 2011).

³³⁹ G.A. Res. 70/1, goal 3.3 (Sept. 25, 2015).

³⁴⁰ Michel Forst (Special Rapporteur), Rep. of the Special Rapporteur on the Situation of Human Rights Defenders on its Fortieth Session, Feb. 25–Mar. 22, 2019, ¶ 83, U.N. Doc. A/HRC/40/60 (Jan. 10, 2019).

Sex workers are often stigmatized and treated as if they are not deserving of rights. Some sex workers who have sought help from the police for crimes perpetrated against them have been ignored, mistreated and subjected to sexual violence. Women who defend sex workers' rights have also endured smear campaigns, threats and attacks. *Id.*

³⁴¹ Committee on the Elimination of Discrimination Against Women, General Recommendation No. 19: Violence Against Women, U.N. Doc. CEDAW/A/47/38 (1992), <https://www.refworld.org/docid/52d920c54.html> [hereinafter CEDAW Violence Against Women]. Art. 6, ¶ 14: “Poverty and unemployment increase opportunities for trafficking in women.”; art. 6, ¶ 15: “Poverty and unemployment force many women, including young girls, into prostitution.”; see also FONDATION SCELLES, PROSTITUTION: EXPLOITATION, PERSECUTION, REPRESSION 13 (4th Global Report) (Economica 2016).

³⁴² J. Vandepitte et al., *Estimates of the Number of Female Sex Workers in Different Regions of the World*, SEXUALLY TRANSMITTED INFECTIONS, 82 (Supp. III) iii18, iii23 (June 2006):

[S]tatistics reported by different sources may be very misleading. Antiprostitution organisations may produce inaccurate figures, as they will tend to overestimate the numbers of sex workers. Governments may tend to underestimate the numbers because of a more restrictive view of sex work and may therefore fail to enumerate indirect and part time sex workers. Results from epidemiological research, using surveys and questionnaires, may be biased as they will not always reveal the “truth”: sex workers or women in

Federation, or the United States—yielded a total of 7.6 million sex workers in 2014.³⁴³ The commonly-cited number of 42 million sex workers in the world³⁴⁴ relies upon data published by Fondation Scelles, an openly-abolitionist French NGO.³⁴⁵ In contrast, a carefully-researched study of the number of female sex workers in the world reaches a number roughly half as large in the context of reviewing medical responses to the HIV/AIDS pandemic and relying upon data from 1997 to 2004. This study concluded that sex workers represented between 0.1% and 7.4% of the female population, with more than half the countries in the study calculated as having rates between 0.3% and 0.6%.³⁴⁶ Extrapolating that to the world as a whole would suggest that there are roughly 15 to 20 million female sex workers in the world. Taking all these numbers into account, recognizing that sex work is often a clandestine business, and taking into account that the 15 to 20 million estimate does not include male sex workers,³⁴⁷ it is reasonable to estimate that there are a few tens of millions of sex workers in the world. If so, that would put sex workers at roughly 0.3% to 0.5% of the world's population.

Whatever official statistics may be, sex work is undoubtedly practiced in every country of the world. Because of the wide range of legal approaches to sex work, ranging from legalization and regulation to severe criminal penalties,³⁴⁸ it is very difficult to compare prevalence to get a sense of how uneven the distribution of sex workers may be across countries. It is equally difficult to get good statistical information about the distribution of sex workers across the socio-economic classes within societies. However, a combination of factors—the prevalence of poverty as a cause of entering sex work,³⁴⁹ the significant numbers of women and girls trafficked into sex

general may not wish to give accurate descriptions of their lives, work, and sexual behaviour, for reasons of pride, fear, or shame. *Id.*

³⁴³ *Sex Workers: Population Size Estimate*, UNDATA (Oct. 21, 2015), <http://data.un.org/Data.aspx?q=sex+workers&d=UNAIDS&f=inID%3a111>.

³⁴⁴ See, e.g., *Prostitution Statistics by Country*, WIKIPEDIA (Aug. 29, 2019), https://en.wikipedia.org/wiki/Prostitution_statistics_by_country; Gus Lubin, *There Are 42 Million Prostitutes in the World, and Here's Where They Live*, BUSINESS INSIDER (Jan. 17, 2012, 1:55 PM), <https://www.businessinsider.com/there-are-42-million-prostitutes-in-the-world-and-heres-where-they-live-2012-1>. Although the Lubin article cites a Fondation Scelles study as the source of the 42 million statement, that study reaches a conclusion that there are approximately 30 million prostitutes in the world. See FOUNDATION SCELLES, *supra* note 341.

³⁴⁵ See FOUNDATION SCELLES, *supra* note 341.

³⁴⁶ Vandepitte, *supra* note 342, at iii18.

³⁴⁷ Given the uncertainty of these statistics, the number of male sex workers in the world is unlikely to alter any of this paragraph's analysis. "[W]omen and girls represent 99 per cent of victims of forced labour in the commercial sex industry." ILO 2017, *supra* note 236, at 10.

³⁴⁸ See *100 Countries and Their Prostitution Policies*, PROCON (Apr. 23, 2018, 10:21:03 AM), <https://prostitution.procon.org/view.resource.php?resourceID=000772>.

³⁴⁹ CEDAW Violence Against Women, *supra* note 341, art. 6.

work,³⁵⁰ the correlation of sex work and HIV/AIDS status,³⁵¹ and the illegality of sex work in much of the world³⁵²—suggest that sex workers are more likely to be found in more vulnerable, lower-status parts of society.

Even if the political will were to coalesce about protecting and promoting the human rights of sex workers, there exists no consensus about whether that would involve continued criminalization, regulation, or decriminalization of sex work, just as there is no consensus about whether and to what degree sex work is voluntary.³⁵³ What is clear is that being trafficked for sex work is involuntary,³⁵⁴ and that sex work is often a highly constrained choice,³⁵⁵ but some argue that sex work can also be simply a work choice.³⁵⁶ Against this background, there have been calls for greater involvement of sex workers and their representatives in international discussions about sex work.³⁵⁷

The international community has done little with respect to sex work itself, as opposed to the rights of women or children, generally, or the “white slave” trade or trafficking in women and children. For example, consider:

- In 1949, the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others;³⁵⁸

³⁵⁰ Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children of the United Nations Convention on Transnational Organised Crime (UNTOC) (Nov. 15, 2000).

³⁵¹ Vandepitte, *supra* note 342, at iii 18.

³⁵² *100 Countries and Their Prostitution Policies*, PROCON (Apr. 23, 2018, 10:21:03 AM), <https://prostitution.procon.org/view.resource.php?resourceID=000772>.

³⁵³ *See id.*; *see also* United Nations Action for Cooperation Against Trafficking in Persons, Sex Work and Human Trafficking: The Case for Agency and Empowerment, <http://un-act.org/forums/topic/sex-work-human-trafficking-case-agency-empowerment/> (last visited Oct. 21, 2019). Compare FONDATION SCELLES, *supra* note 341, with Thaddeus Blanchette & Ana Paula da Silva, *Classy Whores: Intersections of Class, Gender, and Sex Work in the Ideologies of the Putafeminista Movement in Brazil*, 40(3) CONTEXTO INTERNACIONAL 549 (Sept./Dec. 2018).

³⁵⁴ Jonathan Todres, *Law, Otherness, and Human Trafficking*, 49 SANTA CLARA L. REV. 605 (2009).

³⁵⁵ Human Rights Watch, *Policy Paralysis: A Call for Action on HIV/AIDS-Related Human Rights Abuses Against Women and Girls in Africa*, 4 (Dec. 2003) (“Girls and women in households touched by AIDS and by poverty frequently find their choices and possibilities so diminished that they have to turn for survival to the sex trade . . .”).

³⁵⁶ *Prostitution: A Personal Choice*, ECONOMIST (Aug. 9, 2014).

³⁵⁷ *See, e.g., Call for UN Women to Meaningfully Consult Sex Workers*, AWID [Association for Women’s Rights in Development], <https://www.awid.org/get-involved/call-un-women-meaningfully-consult-sex-workers> (last visited Sept. 5, 2019) (describing an effort by the Global Network of Sex Work Projects, representing 263 sex-worker-led organizations from 78 countries to have a meaningful voice in U.N. discussions about sex work).

³⁵⁸ G.A. Res. 317 (IV), Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (Dec. 2, 1949).

- Various reports on the 1949 Convention;³⁵⁹
- Various associated General Assembly resolutions.³⁶⁰

I. Prisoners

Prisoners are a highly vulnerable population, as they are by definition incarcerated and unable to escape from threatening conditions and situations.³⁶¹ Indeed, they are seen as so vulnerable that other vulnerable groups sometimes use prisoners as a yardstick of their own vulnerability, remarking that their own conditions are so bad that they “feel like prisoners.”³⁶² In many instances, they were used as unwitting and unwilling subjects of harmful medical experimentation,³⁶³ including in the United States.³⁶⁴ Prisoners who are also members of another vulnerable group are particularly at risk.³⁶⁵

³⁵⁹ *E.g.*, U.N. Secretary-General, *Combatting the Traffic in Persons and the Exploitation of the Prostitution of Others: Report of the Secretary-General*, U.N. Doc. A/37/412 (Sept. 10, 1982), <https://digitallibrary.un.org/record/33797>.

³⁶⁰ *E.g.*, G.A. Res. 40/103, Prevention of Prostitution (Dec. 13, 1985); G.A. Res. 38/107, Prevention of Prostitution (Dec. 16, 1983).

³⁶¹ Sharona Hoffman, *Preparing for Disaster: Protecting the Most Vulnerable in Emergencies*, 42 U.C. DAVIS L. REV. 1491 (2009); Andorno, *supra* note 128.

³⁶² World Health Org. & World Bank, *World Report On Disability*, 100 (2011) (stating in box 4.3 that people with disabilities referred to themselves as prisoners before being afforded the benefits of adaptive housing.); Dr. Shashi Nath Mandal, *Protection of Human Rights of Oldage Person: A Dynamic Perspective* 5 (2011), <http://ssrn.com/abstract=1707583> (quoting a witness to elder abuse: “An eighty four year old women living with her son and daughter-in-law, she was ill treated by her family members putting her in the corridor of the house and she cannot go anywhere just like prisoner she was treated and also she was forced to do all the work of the house.”).

³⁶³ *See generally* Michele Goodwin, *Vulnerable Subjects: Why Does Informed Consent Matter?*, 44 J.L. MED. & ETHICS 371 (2016).

³⁶⁴ *Id.* at 373–74 (recounting numerous examples at the Tuskegee medical trial and at the University of Cincinnati among others).

³⁶⁵ One study of the palliative care needs of prisoners and detainees remarked:

Incarcerated populations rely fully on resource-restricted care provided in closed settings and have limited ability to advocate for additional pain relief. Many inmates spend the majority of their lives in prison, and many acquire terminal conditions over the course of their incarceration. Given many countries’ emphasis on the prison system as a punitive mechanism, prisoners and detainees are highly vulnerable to gaps in care coverage.

DUNCAN WILSON & GABRIELA B. DE LUCA, USING THE UN HUMAN RIGHTS SYSTEM TO ADVOCATE FOR ACCESS TO PALLIATIVE CARE AND PAIN RELIEF 68 (2017); *see also* Tina Maschi et al., *Analysis of US Compassionate and Geriatric Release Laws: Applying a Human Rights Framework to Global Prison Health*, 1 J. HUMAN RTS. & SOC. WORK 165, 166 (2016).

There are approximately 10.8 million prisoners in the world, but they remain a very small percentage of the world's population.³⁶⁶ In a global population of approximately 7.7 billion people,³⁶⁷ that represents only 0.14% of humanity, a number that places prisoners far below any of the populations who have a dedicated human rights treaty.³⁶⁸

Furthermore, prisoners are far from evenly distributed around the world, with almost 20% of prisoners found in the United States, more than half found in only five countries, and only 16 countries accounting for more than 70% of the world's prisoners.³⁶⁹ Furthermore, there is a strong correlation between childhood poverty and the likelihood that a person will become a prisoner,³⁷⁰ just as there is between being a member of a racial minority³⁷¹ or being undereducated and being incarcerated.³⁷²

Although the underlying acts that lead to a person's time in prison are often voluntary, being imprisoned cannot itself be considered voluntary in any way. It is the very nature of taking away a person's freedom that is imprisonment.

Finally, there are a number of international instruments that relate, in one way or another, to prisoners,³⁷³ though none rise to the level of an international instrument protecting a broad swathe of their human rights. Among these are:

- the 1955 Standard Minimum Rules for the Treatment of Prisoners,³⁷⁴ subsequently revised and updated by the 2015

³⁶⁶ ROY WALMSLEY, WORLD PRISON POPULATION LIST (12th ed. 2018), http://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_12.pdf; WORLD PRISON BRIEF, *Highest to Lowers—Prison Population Total*, www.prisonstudies.org/highest-to-lowest/prison-population-total (last visited Oct. 19, 2019). In order to get the global number from World Prison Brief, one must add up all the individual country numbers, as by copying them into a spreadsheet first.

³⁶⁷ World Population Prospects, *supra* note 146.

³⁶⁸ Table 2, *supra* in Part IV(A)(ii).

³⁶⁹ WORLD PRISON BRIEF, *supra* note 366. More specifically, the United States alone accounts for 19.6% of the world's prisoners, the top five countries (the United States, China, the Russian Federation, Brazil, and India) account for 50.5%, and the top 16 countries account for 70.4%. *Id.*

³⁷⁰ Adam Looney & Nicholas Turner, *Work and Opportunity Before and After Incarceration*, Economic Studies at Brookings, 2 (Mar. 2018).

³⁷¹ Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, DÆDALUS J. AM. ACAD. ARTS & SCI. 8 (Summer 2010).

³⁷² BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (2006).

³⁷³ See generally NIGEL RODLEY & MATT POLLARD, THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW (3rd ed. 2011).

³⁷⁴ G.A. Res. 70/175, The United Nations Standard Minimum Rules for the Treatment of Prisoners, "The Mandela Rules" (Aug. 30, 1955).

Revised Standard Minimum Rules for the Treatment of Prisoners (“the Mandela Rules”);³⁷⁵

- the 1982 Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;³⁷⁶
- the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment;³⁷⁷
- the 1990 Basic Principles for the Treatment of Prisoners;³⁷⁸
- the 2010 United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders [Bangkok Rules]³⁷⁹
- and, in the Americas, the Inter-American Commission on Human Rights’s 2008 Principles and Best Practices on the Protection of Persons Deprived of their Liberty in the Americas.³⁸⁰

VI. COMPARISONS

Now that we have looked closely at a number of vulnerable groups—the world’s poor, older persons, LGBTQ people, slaves, people in need of palliative care, people with HIV/AIDS, sex workers, and prisoners—how do they compare to the six groups who already have their own focused human rights instruments? Which of these yarns is most similar to those we have already woven into our human rights tapestry?

All of these groups are vulnerable, probably highly so. This is not a basis for distinguishing these candidate groups in any way. Indeed, it is a basis for arguing that each of these groups needs further protection through a global, focused human rights instrument. However, as we have seen, some of the existing global, focused human rights instruments have been highly successful in terms of global acceptance (as measured by ratifications and time between promulgation and coming into effect). Which of our candidate groups is more

³⁷⁵ G.A. Res. 70/175, Revised Standard Minimum Rules for the Treatment of Prisoners (Dec. 17, 2015).

³⁷⁶ G.A. Res. 37/194, Principles of Medical Ethics Relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, at 211 (1982).

³⁷⁷ G.A. Res. 43/173, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, at 298 (1988).

³⁷⁸ G.A. Res. 45/111, Basic Principles for the Treatment of Prisoners, at 200 (1990).

³⁷⁹ G.A. Res. 65/229, United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (July 22, 2010) [“Bangkok Rules”].

³⁸⁰ Inter-American Comm’n on Human Rights [IACHR], Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (Mar. 2008).

like women, children, people with disabilities, and perhaps indigenous peoples and less like migrant workers and refugees, whose instruments have yet to capture high levels of international acceptance?

Looking at populations of all these groups, both those who already have their own instruments and those who don't, we find the following (with groups that already have focused human rights treaties indicated in **bold**):

Table 3: Populations of Both Covered and Candidate Groups

	Estimated current population	% of global population
Women	3800	49.4%
Children	2460	31.9%
Disabled Persons	1120	14.5%
Extreme Poor	800	10.4%
Older Persons	612	7.9%
LGBTQ	400	5.2%
Indigenous Peoples	370	4.8%
Migrant Workers	160	2.1%
Slaves	89	1.2%
Refugees	66	0.9%
Palliative Care	40	0.5%
HIV/AIDS	37	0.5%
Sex Workers	30	0.4%
Prisoners	11	0.1%

Based upon the sorting in this table, it already appears that four of the candidate groups—persons in need of palliative care, persons with HIV/AIDS, and sex workers—are unlikely candidates for the next focused human rights instrument, based upon the small fraction they represent of the world's population. This is not to suggest that the international community either should or is likely to abandon the human rights causes that these groups represent. It does, however, suggest that these groups will likely need to await the development of a more granular global approach to human rights

instruments. In the meantime, they may have to rely upon smaller instruments addressing particular issues, cross-group alliances on shared concerns³⁸¹ and political lobbying to remind countries that general human rights instruments like the UDHR apply with equal force to all people, including members of these groups.

Three of these groups—the world’s extreme poor, older persons, and LGBTQ persons—each form a sufficiently large portion of the world’s population to have a claim for instrumental human rights attention comparable to those groups that have already obtained their own focused instruments. Slaves occupy a middle ground between the most populous candidate groups and those too small to be likely candidates for their own focused instruments in the near term.

As we have already discussed, the distribution of a population may matter as much as its absolute size. The more widely a group’s population is distributed around the world and the more evenly that population is distributed through socioeconomic strata, the more likely it is that political will may exist to provide broad-spectrum human rights protection for that group. We have seen that women, children, and persons with disabilities, all of whom can be found in every country and at every socio-economic level, have received the strongest support for focused human rights instruments. Indigenous peoples, migrant workers, and refugees tend to be more clustered in particular countries, regions, or economic strata, making it far easier for political attention to be diverted elsewhere. In effect, arguments for protecting groups are more mainstream when everyone knows members of those groups and more niche when members of those groups can be characterized as somehow being “other.”³⁸²

Recapping my earlier findings about global distributions of the candidate groups, there are three candidate groups whose members seem to be broadly and fairly evenly distributed, both around the world and within societies. Those are older persons, persons in need of palliative care, and—though many countries and cultures may deny it—LGBTQ people. To some extent, all three groups suffer from a degree of social invisibility in cultures dominated by narratives of young, healthy, straight life. Nevertheless, most people would be aware of having older people, people in need of palliative care and LGBTQ people, in their lives, however peripherally.

³⁸¹ It is worth noting that both prisoners and sex workers are at greater risk of contracting HIV/AIDS than the general population. Likewise, people suffering from late-stage AIDS may find themselves in need of palliative care. These observations create the possibility of alliances based upon crafting targeted, smaller-scale international norms addressing particular aspects of shared concern. This article, however, focuses on global human rights treaties focused on declaring a broad range of human rights for particular vulnerable groups and will save further discussion of these possibilities for another day.

³⁸² Jonathan Todres, *Law, Otherness, and Human Trafficking*, 49 SANTA CLARA L. REV. 605 (2009).

By contrast, distribution patterns globally or within societies make the other candidate groups far less familiar to most people. Either by definition or in practice, the world's extreme poor, its slaves, its sex workers, and its prisoners are relatively isolated groups relegated to "other" status. Likewise, persons with HIV/AIDS, though present in every society and every social class, are often portrayed as "other" by association with gay men, intravenous drug users, and sub-Saharan Africa. As a result, all five of these groups become politically easier to ignore than are the other three candidate groups discussed in the article.

Involuntary membership in a candidate group is another factor common to the groups that have received the benefit of focused human rights treaties, probably because involuntariness signifies blamelessness. If someone is suffering because of something beyond their control, that may be perceived as unfair. However, suffering caused by one's own choice may be perceived as somehow earned and thus less worthy of intervention by others. This is, of course, a form of "blaming the victim," but real nonetheless.

Among our candidate groups, voluntariness and public perceptions of voluntariness vary widely. On the one hand, older persons clearly have no viable choice. On the other, prisoners can easily be seen as having become incarcerated by reason of their own bad choices. A significant part of the debate over biological origins of sexuality appears to derive from the question of whether it is just to assign blame, perhaps of Biblical proportions, to people who are LGBTQ. Similarly, much of the early debate over HIV/AIDS was whether to describe it as a "lifestyle disease." It is unjust that both LGBTQ people and people with HIV/AIDS may often be perceived as less worthy for international human rights protection because of ill-informed debates about voluntariness and blame, but this suggests an ongoing need for global public education rather than the likelihood of action towards an international human rights instrument. If we look to this question of whether membership in a candidate group is involuntary as an indication of likely support for a focused global human rights treaty, older persons, the extreme poor, those in need of palliative care, and slaves are probably the groups best positioned for international action.

The final factor we have discussed is the degree to which the international community has already taken note of the candidate group and the human rights challenges it faces. The international community has already given considerable attention to the issues faced by poor people, older persons, slaves, prisoners, and people with HIV/AIDS. It has done so to a significantly lower degree with LGBTQ people, people in need of palliative care, and sex workers.

Charting all of this will help to clarify this article's findings. In Table 4, I summarize how each of the candidate groups matches the characteristics that we found to be shared among those groups that have already received focused, global human rights instruments. Reasonable people could differ with the

characterizations made in this table, and many (including myself) could argue that these identified characteristics should not be the core criteria for determining who is worthy or needful of a specialized human rights treaty. Nevertheless, as I indicated earlier, these characteristics are descriptive, not normative, and appear to indicate which groups are most likely to obtain the international support needed for creation of a new global treaty.

Here, then, is my summary of what we have found about how each of our candidate groups matches the five criteria of vulnerability, large populations, broadly-distributed populations (both globally and within societies), involuntary membership, and the existence of precursor instruments:³⁸³

For each of these five candidacy factors, I rank the candidate groups from High to Low, as follows:

- A. **Vulnerability Factor (“Vulner”** in the column heading): “High” means the candidate group is highly vulnerable.
- B. **Population Factor (“Populat”**): “High” means the candidate group has a large global population.
- C. **Distribution Factor (“Distrib”**): “High” means the candidate group is broadly distributed around the world, both geographically and sociologically.
- D. **Voluntariness Factor (“Volunt”**): “High” means the candidate group is one that people do not join or belong to voluntarily.
- E. **Precursors Factor (“Precur”**): “High” means that the international community has addressed protection of the candidate group on several prior occasions.

Table 4: Summary of Candidate Group Factors

³⁸³ This table’s entries of “High,” “Medium,” and “Low” refer to the group’s perceived qualification for that factor, as compared to the six groups that have already obtained focused human rights treaties. Thus, an entry of “High” under voluntariness is an indication that there is a high level of similarity between the candidate group’s level of voluntary membership and the levels of voluntary membership of the six groups that have already received specialized treaty protection.

Candidacy Factors					
	<i>Vulner</i>	<i>Populat</i>	<i>Distrib</i>	<i>Volunt</i>	<i>Precur</i>
Extreme Poor	High	High	Low	High	High
Older Persons	High	High	High	High	High
LGBTQ	High	High	Middle ³⁸⁴	Middle ³⁸⁵	Low
Slaves	High	Middle	Low	High	High
Palliative Care	High	Low	High	High	Low
HIV/AIDS	High	Low	Low	Middle ³⁸⁶	High
Sex Workers	High	Low	Low	Middle	Low
Prisoners	High	Low	Low	Low	High

As a group, older persons are the most similar to those groups that have received focused, global human rights protection, matching those groups by every criterion we have identified. This point does not appear to be lost upon the United Nations, at which the work of the Open-Ended Working Group on Ageing is directed to the very question of whether to draft a new human rights treaty for older persons worldwide.

The world's poorest people match those groups closely, except in that they are not distributed evenly around the globe or within societies. This suggests that the greatest barrier to providing the world's poorest with a specialized human rights treaty will be the difficulty that many people may have identifying with them and keeping their plights in mind. It may also be that the best approach will be to address specific needs as universal rights that warrant further explication. This would include the rights to food, shelter, education, and health care.

People who are LGBTQ appear to have a good claim on the world's attention, with a reasonably high global population that appears to be broadly

³⁸⁴ This entry takes into account that despite evidence that LGBTQ individuals are broadly spread throughout the world, including all socioeconomic levels of every society, there are many societies that deny the presence of such individuals or view them as aberrant or criminal, effectively closeting or isolating members of this group.

³⁸⁵ This entry takes into account the current debate over scientific evidence about genetic or epigenetic origins of human sexuality.

³⁸⁶ This entry reflects the debate over whether HIV/AIDS is a "lifestyle disease," which featured prominently in the early years of the pandemic and continues to influence public discussion to some degree.

distributed by country and socio-economic class and membership that increasingly appears to be biological rather than choice-based. Unfortunately, disputes continue around these issues of population size, distribution, and the element of choice, suggesting that ongoing research, data collection, and scientific inquiry will likely be needed before we are likely to see a significant international effort to craft a global, focused human rights treaty. The lack of a significant body of precursor instruments testifies to this point.

As a group, slaves are not as numerous as some of the other candidate groups, nor are they as broadly distributed. Both factors make it more difficult to muster the international political will to protect the human rights of slaves with a dedicated instrument. In addition, it is the fact of being enslaved that is itself the most egregious violation of human rights, so the focus of the international community is best placed upon efforts to eliminate slavery, rather than efforts to protect the other human rights of people while they remain enslaved. The history of precursor instruments, all of which seek to abolish slavery and acts of enslavement, suggests that the international community agrees.

The other groups—people in need of palliative care, people with HIV/AIDS, sex workers, and prisoners—are all relatively few in number globally. Other than people in need of palliative care, all of these groups are also relatively isolated or invisible within their societies. As a result, however serious the human rights problems of these groups are, they are unlikely to generate the kind of political energy that will lead to the creation of a new, focused human rights instrument dedicated to any one of these. Realistically, the best opportunity to advance the human rights of these groups will come by including these groups in other instruments in a way that addresses core concerns. One example of that is the inclusion of palliative care in current U.N. discussions about drafting a human rights instrument for older persons.³⁸⁷

VII. CONCLUSION

In this article, we have taken five analytic steps:

1. Beginning with an overview of modern human rights treaty law, we narrowed our attention to global human rights instruments that are focused on defining and protecting the human rights of one vulnerable group or another, within the broader context of international human rights law generally.
2. Next, we identified the six groups who have received such focused attention in an international instrument: women, children, people with disabilities, migrant workers, indigenous peoples, and refugees. Of these, women, children, and people

³⁸⁷ See U.N. Open-ended Working Group on Ageing Ninth Working Session, *supra* note 314.

- with disabilities have been most successful in obtaining international support for their human rights instruments.
3. Third, we compared these six groups and their instruments in an effort to describe what characteristics they shared that might help us to identify other candidate groups for the protection of their own international human rights instrument. The characteristics we found were vulnerability, population, distribution, involuntary membership, and the existence of significant precursor instruments.
 4. Fourth, we identified eight candidate groups for comparison with these five characteristics. The candidate groups were the world's extreme poor, older persons, LGBTQ persons, slaves, persons in need of palliative care, persons with HIV/AIDS, sex workers, and prisoners.
 5. Finally, after reviewing the characteristics of these eight candidate groups and comparing them both with each other and with the six groups that already have their own instruments, we reached conclusions about which of the candidate groups appeared most similar to those groups that have already received a global human rights instrument.

As a result of this analysis, we have concluded that older persons are, as a group, the most similar to women, children, and people with disabilities, suggesting that the next focused international human rights instrument should reasonably be directed towards protecting the rights of older persons around the world. By all indications, this candidate group is ready.

Two other groups stand out as having most of the characteristics of the six groups that already have focused treaties: the world's poorest people and LGBTQ people. For each, however, an analysis of their characteristics suggests that some barriers remain, rooted for both in otherness or a lack of universal familiarity. For the world's poorest, the very fact of their poverty and uneven placement around the world makes poor people relatively invisible, so the way forward looks likely to be through continued efforts to raise awareness of core global poverty. Similarly, disagreements on the number and distribution of LGBTQ people around the world, as well as disputes about whether being LGBTQ is a choice would undermine any current efforts to craft a focused human rights treaty. The way forward appears to lie with continued data-gathering and public education about human sexuality and gender identity.

This analysis did not find that other candidate groups shared key characteristics with groups that have already received focused human rights treaties, suggesting that these candidate groups will not soon become the focus of their own global human rights instruments. However, this analysis does provide a roadmap in suggesting alternate approaches to protecting the human rights of these groups who lack their own focused instruments and do not appear poised to obtain such instruments.

The human rights tapestry is a rich one, into which the world's leaders will continue to weave new yarns that resemble and will interweave with what has already been woven. Each such yarn will be distinctive in hue, yet familiar in texture and weight.