

Using a Human Rights Law Approach to Allege Human Rights Violations in the Trump Administration's Termination of the DACA Immigration Program

ABSTRACT:

The Trump Administration announced its decision to terminate the Deferred Action for Childhood Arrivals immigration program (DACA or “the Program”) on September 5, 2017. Multiple domestic lawsuits have been filed against the Administration as a result. At the same time, numerous domestic and international human rights actors have denounced the Trump Administration's decision, and the United Nations High Commissioner for Human Rights expressed concern over the Administration's actions. This paper uses an international human rights law approach to present plausible legal arguments that human rights advocates could employ to allege that the Trump Administration violated international human rights law in terminating the DACA program.

In doing so, the paper assumes the legality of the DACA program as enacted and operated. Further, the paper focuses on claims most likely to be persuasive to an audience within the U.S. government and therefore does not analyze potential claims under international human rights instruments that the United States has not ratified. The paper consequently focuses on viable claims under two international human rights treaties to which the United States is a party: the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

Following a brief introduction, the paper proceeds in three substantive parts. Section two offers background information on DACA and the circumstances surrounding the Program's termination by the Trump Administration. Section three then outlines the international human rights law analytical framework for alleging human rights violations by state governments and highlights the advantages that using this approach can provide for pro-DACA advocates. Section four explicitly applies the human rights law analytical framework developed in section three to the Trump Administration's termination of DACA and notes benefits and drawbacks of bringing specific claims. Finally, the paper provides concluding remarks for human rights advocates seeking to infuse a formal human rights law analysis into the legal arguments currently used domestically for condemning the Trump Administration's termination of the DACA program.

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I. INTRODUCTION

The Trump Administration announced its decision to terminate the Deferred Action for Childhood Arrivals immigration program (DACA or “the Program”) on September 5, 2017.¹ Multiple domestic lawsuits have been filed against the Administration as a result, focusing on alleged violations of due process, equal protection, and the Administrative Procedure Act (APA).² At the same time, numerous domestic and international human rights organizations have

¹ U.S. DEPARTMENT OF HOMELAND SECURITY, MEMORANDUM ON RESCISSION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS (2017) [hereinafter *Duke Memorandum*], <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca>.

² See Anna Giaritelli, *Trump’s DACA Decision Hit with Five Lawsuits in Three Weeks*, WASH. EXAM’R (Sept. 26, 2017, 12:01 AM), <http://www.washingtonexaminer.com/trumps-daca-decision-hit-with-five-lawsuits-in-three-weeks/article/2635595> (discussing claims in the lawsuits filed against the Trump Administration as of September 26, 2017).

also denounced the Trump Administration's decision,³ and the United Nations High Commissioner for Human Rights expressed concern over the Administration's actions.⁴ This paper uses an international human rights law approach to present plausible legal arguments that human rights advocates can employ in alleging that the Trump Administration violated international human rights law in terminating the DACA program.

In doing so, the paper assumes the legality of the DACA program as enacted and operated.⁵ Further, the paper focuses on claims most likely to be persuasive to an audience within the U.S. government. Consequently, no in-depth analysis is provided for potential claims

³ See, e.g., Marjorie Cohn, *Will the Courts Save the Dreamers?*, HUFFINGTON POST (Sept. 14, 2017, 10:56 AM), https://www.huffingtonpost.com/entry/will-the-courts-save-the-dreamers_us_59ba97ebe4b0390a1564db75 ("Human rights and civil liberties organizations as well as legislators on both sides of the aisle condemned the ending of DACA.").

⁴ Reuters Staff, *U.N. Rights Boss Urges U.S. Congress to Give 'Dreamers' Legal Status*, REUTERS (Sept. 11, 2017, 4:37 AM), <https://www.reuters.com/article/us-usa-immigration-un/un-rights-boss-urges-u-s-congress-to-give-dreamers-legal-status-idUSKCN1BM0VE>.

⁵ For literature discussing the debate over the legality of DACA's enactment and operation, see Miriam Valverde, *What Have Courts Said About the Constitutionality of DACA?*, POLITIFACT (Sept. 11, 2017, 10:59 AM), <http://www.politifact.com/truth-o-meter/statements/2017/sep/11/eric-schneiderman/has-daca-been-ruled-unconstitutional/> ("While there is debate on the constitutionality of DACA, that [DACA's constitutionality] has not been determined by courts."); see also Michael Tan, *DACA Is and Will Always Be Constitutional*, ACLU (Aug. 15, 2017, 11:15 AM), <https://www.aclu.org/blog/immigrants-rights/road-citizenship/daca-and-will-always-be-constitutional> ("[T]he U.S. government has repeatedly – and successfully – defended DACA against constitutional challenges. . . . Deferred action is one way in which the executive branch historically has exercised discretion over whom should and shouldn't be deported from the United States.") (emphasis omitted); Hans A. von Spakovsky, *DACA is Unconstitutional, as Obama Admitted*, HERITAGE FOUND. (Sept. 8, 2017), <http://www.heritage.org/immigration/commentary/daca-unconstitutional-obama-admitted> ("Under our Constitution, Congress has plenary authority over immigration. The president only has the authority delegated to him by Congress – and Congress has never given the president the power to provide a pseudo-amnesty and government benefits to illegal aliens."). Similarly, for a discussion of the Supreme Court's holding in *United States v. Texas*, 136 S. Ct. 2271 (2016), which limited the scope of the DACA program to that upon its original enactment, see Adam Liptak & Michael D. Shear, *Supreme Court Tie Blocks Obama Immigration Plan*, N.Y. TIMES (June 23, 2016), <https://www.nytimes.com/2016/06/24/us/supreme-court-immigration-obama-dapa.html> (discussing how the Supreme Court deadlocked and thus reaffirmed the Fifth Circuit's decision blocking expansion of DACA to include DAPA, Deferred Action for Parents of Americans and Lawful Permanent Residents).

under international human rights instruments that the United States has not ratified. The paper focuses therefore on viable claims under two international human rights treaties to which the United States is a party: the International Covenant on Civil and Political Rights (ICCPR)⁶ and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).⁷

The paper proceeds in four additional parts. Section two offers background information on the DACA immigration program and the circumstances surrounding its termination by the Trump Administration. Section three then outlines the international human rights law analytical framework for alleging human rights violations by state governments and highlights the additional advantages that using this approach can provide for pro-DACA advocates. The framework is then applied to the Trump Administration's termination of DACA in section four, where potential claims of human rights violations are identified and the benefits and drawbacks of bringing each claim are addressed. Finally, section five offers concluding remarks for human rights advocates seeking to infuse a formal human rights law analysis into the legal arguments currently used domestically for condemning the Trump Administration's termination of the DACA program.

II. THE DACA IMMIGRATION PROGRAM AND ITS TERMINATION

The DACA program was introduced in a memorandum from Secretary of Homeland Security Janet Napolitano to those in charge of U.S. Customs and Border Protection, U.S. Citizenship and Immigration Services, and U.S. Immigration and Customs Enforcement on June

⁶ International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976, ratified by the United States on June 8, 1992) [hereinafter ICCPR].

⁷ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 78 (entered into force June 26, 1987, ratified by the United States on Oct. 21, 1994) [hereinafter CAT].

15, 2012.⁸ The Obama Administration packaged the Program as an exercise of prosecutorial discretion in the enforcement of immigration laws,⁹ reasoning that U.S. immigration laws “are not designed to be blindly enforced” and that they are also not designed “to remove productive young people to countries where they may not have lived or even speak the language.”¹⁰ While the DACA program did not provide any “substantive right, immigration status or pathway to citizenship,” it did allow for deferred action for those individuals meeting specified criteria.¹¹

The criteria for deferred action under DACA as articulated within Secretary Napolitano’s memorandum included requiring that an individual (i) arrived to the United States when younger than sixteen, (ii) was currently younger than thirty, (iii) was present in the United States at the time of the memorandum and for at least the preceding five years, (iv) “is currently in school, has graduated from high school, has obtained a general education development certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States[,]” and (v) “has not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety.”¹² If these criteria were met and a background check was passed, then deferred action, a form of prosecutorial discretion, was encouraged in the particularized case-by-case review of each

⁸ U.S. DEPARTMENT OF HOMELAND SECURITY, MEMORANDUM ON EXERCISING PROSECUTORIAL DISCRETION WITH RESPECT TO INDIVIDUALS WHO CAME TO THE UNITED STATES AS CHILDREN (2012) [hereinafter Napolitano Memorandum], <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

⁹ See *id.* at 2 (“Prosecutorial discretion, which is used in so many other areas, is especially justified here.”).

¹⁰ *Id.*

¹¹ *Id.* at 3.

¹² *Id.* at 1.

DACA applicant.¹³ This deferred action meant that individuals within the Program would have pending or future removal actions deferred in favor of higher priority enforcement actions.¹⁴

DACA recipients would thus be allowed to stay in the United States and could work or study, but they did not receive any form of legal presence or immigration status within the United States while in the Program.¹⁵

The narrow tailoring of the DACA program resulted in only approximately 800,000 individuals benefitting from its prosecutorial discretion during its over five years of existence, with only approximately 690,000 of those individuals in the Program at the time of the Trump Administration's termination announcement.¹⁶ These individuals gave the government a great deal of personal data, including biometrics, addresses, and financial information.¹⁷ They also paid a \$465 or \$495 filing fee to apply for the Program.¹⁸ Each period of deferred action lasted

¹³ See *id.* at 2 (“No individual should receive deferred action under this memorandum unless they first pass a background check and requests for relief pursuant to this memorandum are to be decided on a case by case basis.”).

¹⁴ See *id.* (discussing a desire “to prevent low priority individuals from being placed into removal proceedings or removed from the United States”).

¹⁵ See *id.* at 3 (noting that while the “memorandum confers no substantive right, immigration status or pathway to citizenship[,]” USCIS was required to accept work authorization applications from DACA recipients and determine if they qualified for work authorization while in the Program).

¹⁶ Gustavo López & Jens Manuel Krogstad, *Key Facts about Unauthorized Immigrants Enrolled in DACA*, PEW RES. CTR. (Sept. 25, 2017), <http://www.pewresearch.org/fact-tank/2017/09/25/key-facts-about-unauthorized-immigrants-enrolled-in-daca/>.

¹⁷ See Michelle Mark, ‘Can ICE Now Come and Find Me?’: DACA Recipients Fear Data They Provided to Government Will Be Used Against Them, BUS. INSIDER (Sept. 6, 2017, 8:39 AM), <http://www.businessinsider.com/daca-dreamers-homeland-security-information-2017-9> (“DACA invited people who were in the shadows to come forth, get biometrics taken, get put in the system, get a Social Security number, get a job, take out a loan, open a bank account, get a credit card.”).

¹⁸ National Immigration Law Center, *Frequently Asked Questions: Deferred Action for Childhood Arrivals Renewal Process* 4 & n.6, NILC (Aug. 31, 2015), <https://www.nilc.org/wp-content/uploads/2015/10/DACA-renewal-FAQ-2015-08-31.pdf>.

two years, and renewal was required, including re-paying the filing fee, prior to the end of each two-year period in order to continue in the DACA program.¹⁹

The Trump administration announced it was terminating the Program on September 5, 2017.²⁰ As of that date, no new DACA applications were accepted.²¹ Moreover, all current DACA recipients with their deferred action expiring between September 5, 2017 and March 5, 2018 had only until October 5, 2017, one month from the initial termination announcement, to apply for renewal.²² Approximately one in seven eligible DACA recipients missed this deadline.²³ All other DACA recipients, with their deferred action expiring starting after March 5, 2018, were to see their benefits expire on their currently listed expiration date.²⁴ Individuals no longer within the DACA program were to revert to purely undocumented status without the benefits of deferred action and were to be subject to removal if pursued by U.S. Immigration and Customs Enforcement, which now has a great deal of the individuals' personal data resulting from their prior participation in DACA and that it can use against these individuals if it desires.²⁵

¹⁹ See *id.* at 2–4, 4 n.6 (discussing DACA renewal requirements).

²⁰ Duke Memorandum, *supra* note 1.

²¹ See *id.* ([T]he Department . . . [w]ill reject all DACA initial requests and associated applications for Employment Authorization Documents filed after the date of this memorandum.”).

²² See *id.* (“[T]he Department . . . will adjudicate . . . properly filed pending DACA renewal requests . . . from current beneficiaries whose benefits will expire between the date of this memorandum and March 5, 2018 that have been accepted by the Department as of October 5, 2017.”).

²³ Alan Neuhauser, *DHS: 1 in 7 DACA Recipients Did Not Apply to Renew Status*, U.S. NEWS & WORLD REP. (Oct. 19, 2017, 3:20 PM), <https://www.usnews.com/news/national-news/articles/2017-10-19/dhs-1-in-7-daca-recipients-did-not-apply-to-renew-status>.

²⁴ See National Immigration Law Center, *Frequently Asked Questions on DACA Termination*, NILC (Sept. 14, 2017), <https://www.nilc.org/wp-content/uploads/2017/09/DACA-Termination-FAQ-2017-09-14.pdf> (noting that DACA is still valid but that individuals with documents expiring beginning on March 6, 2018 are not eligible for renewal).

²⁵ See Alan Gomez, *As Trump Phases Out DACA, Here's What It Means*, USA TODAY (Sept. 5, 2017, 5:58 AM), <https://www.usatoday.com/story/news/world/2017/09/05/trump-phases-out->

Notably, two different federal district courts have issued preliminary injunctions affecting this original termination plan as announced by the Trump Administration.²⁶ The preliminary injunctions were ordered after the initial October 5, 2017 renewal deadline but have resulted in the Trump Administration determining that it will continue to accept renewal applications from individuals already enrolled in the DACA program despite prohibiting any new initial applications.²⁷ This is the current status of the program's operation,²⁸ and litigation to determine its future is ongoing.²⁹

The Trump Administration's stated reasons for terminating the DACA program have fluctuated.³⁰ The President has indicated "that he was driven by a concern for the millions of Americans victimized by this unfair system[.]" and Attorney General Sessions indicated that DACA "denied jobs to hundreds of thousands of Americans by allowing those same illegal

daca-heres-what-means/633009001/ ("DACA enrollees will face a higher likelihood of being arrested and deported to their birth countries once their protections expire.").

²⁶ See DEFERRED ACTION FOR CHILDHOOD ARRIVALS: RESPONSE TO JANUARY 2018 PRELIMINARY INJUNCTION – FEB. 14, 2018 UPDATE, <https://www.uscis.gov/humanitarian/deferred-action-childhood-arrivals-response-january-2018-preliminary-injunction> (last visited Mar. 27, 2018) (noting that two different federal court judges issued preliminary injunctions affecting the Program's termination on January 9, 2018 and February 13, 2018).

²⁷ See *id.* (noting that "USCIS is not accepting requests from individuals who have never before been granted deferred action under DACA" but that "USCIS has resumed accepting requests to renew a grant of deferred action under DACA" based on the January 9, 2018 and February 13, 2018 preliminary injunctions).

²⁸ See *id.* ("Unless otherwise provided in this guidance, the DACA policy will be operated on the terms in place before it was rescinded on Sept. 5, 2017, until further notice.").

²⁹ See, e.g., National Immigration Law Center, *Status of Current DACA Litigation*, NILC (Feb. 28, 2018), <https://www.nilc.org/wp-content/uploads/2018/02/Status-of-Current-DACA-Litigation-2018.pdf> (detailing the current status of the litigations giving rise to the preliminary injunctions issued against the Trump Administration's planned termination of the DACA program).

³⁰ See Michael D. Shear & Julie Hirschfeld Davis, *Trump Moves to End DACA and Calls on Congress to Act*, N.Y. TIMES (Sept. 5, 2017), <https://www.nytimes.com/2017/09/05/us/politics/trump-daca-dreamers-immigration.html> (discussing conflicting statements from President Trump, Attorney General Sessions, and Press Secretary Huckabee Sanders regarding motivations for terminating DACA).

aliens to take those jobs.”³¹ The Administration has also “portrayed the decision as a matter of legal necessity, given that nine Republican state attorneys general had threatened to sue to halt the program immediately if [President] Trump did not act.”³² Ultimately, the Trump Administration abruptly announced the termination of the DACA program through executive action, leaving hundreds of thousands of young people worrying about their future.³³

Domestic and international actors swiftly condemned the Trump Administration’s decision to terminate the DACA program using human rights rhetoric.³⁴ Human Rights Watch referred to the Administration’s actions as “unseemly and fundamentally dehumanizing.”³⁵ The NAACP Legal Defense Fund derided the termination as “disastrous and cruel.”³⁶ The Center for Constitutional Rights deemed the decision “an inhumane affront to immigrant youth.”³⁷ The Leadership Conference on Civil and Human Rights suggested the decision was “inhumane, cruel and shameful.”³⁸ Human Rights First condemned the decision as “unnecessary, cruel, and

³¹ *Id.*

³² *Id.*

³³ See Gomez, *supra* note 25 (discussing immediate implications for young people that will lose the DACA program relating to jobs, school, the military, and possible deportations).

³⁴ See, e.g., Cohn, *supra* note 3 (“Human rights and civil liberties organizations as well as legislators on both sides of the aisle condemned the ending of DACA.”).

³⁵ Bill Frelick, *Holding Dreamers Hostage: Trump’s Cruel End to DACA*, HUM. RTS. WATCH (Sept. 6, 2017, 4:29 PM), <https://www.hrw.org/news/2017/09/06/holding-dreamers-hostage-trumps-cruel-end-daca>.

³⁶ David Jacobs, *NAACP Legal Defense Fund Statement on the Trump Administration Ending DACA*, NAACP LEGAL DEF. FUND (Sept. 5, 2017), <http://www.naacpldf.org/files/about-us/Ending%20DACA%20Statement.pdf>.

³⁷ Press Center, *CCR Stands with Immigrant Communities in Condemning DACA Repeal*, CTR. FOR CONST. RTS. (Sept. 5, 2017), <https://ccrjustice.org/home/press-center/press-releases/ccr-stands-immigrant-communities-condemning-daca-repeal>.

³⁸ Vanita Gupta, *Civil and Human Rights Coalition Dismayed by Trump’s Cruel Decision to End DACA*, LEADERSHIP CONF. ON CIV. AND HUM. RTS. (Sept. 5, 2017), <https://civilrights.org/civil-human-rights-coalition-dismayed-trumps-cruel-decision-end-daca/>.

counterproductive to American interests.”³⁹ The African Human Rights Coalition termed the decision “cruel and unconscionable.”⁴⁰ The Government of Mexico brought concerns about the human rights of Mexican immigrants to the United Nations following the Program’s termination.⁴¹ The Inter-American Commission on Human Rights held a hearing on February 27, 2018 “on the impact that cancelling . . . Deferred Action for Childhood Arrivals (DACA) in the United States will have on the human rights of program beneficiaries.”⁴² The United Nations High Commissioner for Human Rights also “voiced concern” over the Trump Administration’s decision to terminate DACA.⁴³

Yet, the domestic litigations that have been filed against the Trump Administration resulting from its termination of the DACA program have focused on violations of domestic law, particularly due process, equal protection, and proper administrative procedure.⁴⁴ The following two sections articulate an international human rights legal framework and then apply it to the termination of the DACA program by the Trump Administration to offer additional legal

³⁹ Corinne Duffy, *DACA Termination Cruel, Unnecessary, and Counterproductive to American Interests*, HUM. RTS. FIRST (Sept. 5, 2017), <https://www.humanrightsfirst.org/press-release/daca-termination-cruel-unnecessary-and-counterproductive-american-interests>.

⁴⁰ Melanie Nathan, *Outrage at the Trump Administration’s Dumping of DACA*, AFR. HUM. RTS. COAL. (Sept. 5, 2017), <http://www.africanhrc.org/single-post/2017/09/05/Outrage-at-the-Trump-Administrations-Dumping-of-DACA>.

⁴¹ Secretaría de Relaciones Exteriores [Secretary of Foreign Affairs], México reafirma en el Consejo de Derechos Humanos de la ONU la importancia de proteger a los migrantes mexicanos [Mexico reaffirms in the Human Rights Council the importance of protecting Mexican Migrants], GOBIERNO DE MÉXICO [MEX. GOV’T] (Sept. 13, 2017), <https://www.gob.mx/sre/prensa/mexico-reafirma-en-el-consejo-de-derechos-humanos-de-la-onu-la-importancia-de-proteger-a-los-migrantes-mexicanos>.

⁴² ADVOCATES URGE REGIONAL HUMAN RIGHTS BODY TO DEFEND DACA AND TPS: ACLU, CENTER FOR JUSTICE AND INTERNATIONAL LAW, LATIN AMERICA WORKING GROUP, AND ALIANZA AMERICAS PARTICIPATED IN HEARING, <https://www.aclu.org/news/advocates-urge-regional-human-rights-body-defend-daca-and-tps> (last visited Mar. 27, 2018).

⁴³ Reuters Staff, *supra* note 4.

⁴⁴ See Giaritelli, *supra* note 2 (discussing claims in the lawsuits filed against the Trump Administration as of September 26, 2017).

ammunition for human rights advocates arguing against the Trump Administration's termination of the Program.⁴⁵

III. USING AN INTERNATIONAL HUMAN RIGHTS LAW APPROACH

An international human rights law analytical approach “is a conceptual framework . . . that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights.”⁴⁶ International human rights “are universal legal guarantees protecting individuals and groups against actions and omissions that interfere with fundamental freedoms, entitlements and human dignity.”⁴⁷ Duty-bearers have obligations to rights-holders under international human rights law, with states understood as traditional duty-bearers and individuals as traditional rights-holders.⁴⁸ “A human rights-based approach identifies

⁴⁵ It is worth noting that one primary reason human rights arguments are likely not directly raised in U.S. domestic litigation over DACA is that when the United States ratified both the ICCPR and the CAT it included a Declaration that “the substantive articles of the treaty are not self-executing.” David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT’L L. 129, 131 (1999) (internal quotations omitted). Consequently, individuals do not have private rights of action to bring claims in the United States for substantive violations of these U.S. treaty obligations. *See id.* at 133 (“Virtually all commentators agree, either explicitly or implicitly, that the . . . declarations, if legally valid, preclude U.S. courts from applying human rights treaty provisions directly to resolve cases involving alleged human rights treaty violations by federal, state, or local governments or officials.”). The goal of this paper is therefore not to suggest that human rights advocates should attempt to directly bring claims for human rights violations by the U.S. government based on its termination of the DACA program in U.S. Courts. Rather, the aim of the paper is to outline a human rights law approach that can be used as a rhetorical device for framing the U.S. government’s actions in terms of human rights and that reinforces the binding nature of the U.S. government’s human rights obligations under domestic and international law. This framing highlights alternative available methods of advocacy in support of DACA and encourages the increased use of human rights discourse to discuss domestic actions taken by the U.S. government. Further information regarding the relevance of a treaty declaration is included in sections III and IV, *infra*.

⁴⁶ Office of the United Nations High Commissioner for Human Rights, *Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation* 15, U.N. Doc. HR/PUB/06/8 (2006).

⁴⁷ *Id.* at 1.

⁴⁸ *See id.* (“Human rights law obliges Governments (principally) and other duty-bearers to do certain things and prevents them from doing others.”).

rights-holders and their entitlements and corresponding duty-bearers and their obligations, and works towards strengthening the capacities of rights-holders to make their claims and of duty-bearers to meet their obligations.”⁴⁹

State obligations under human rights law include (i) respecting individuals’ human rights by not affirmatively violating those rights by an act or omission of the state or a non-state actor with a nexus to the state, (ii) protecting individuals’ human rights from third-party violators, and (iii) ensuring human rights standards are met.⁵⁰ Moreover, international human rights law applies to state actors regardless of a state’s federal or other internal structure.⁵¹ Recent efforts by human rights advocates to develop additional frameworks for assigning responsibility to non-state actors for human rights abuses is outside the scope of this paper.⁵²

When a rights-holder seeks to assert a human rights claim against a duty-bearing state, the state can be held accountable if the alleged violation contravenes one of the nine core treaties of international human rights law.⁵³ A state is bound under a treaty if it has consented to being a

⁴⁹ *Id.* at 15 (emphasis omitted).

⁵⁰ *See id.* at 2 (discussing the respect, protect, and fulfill framework of human rights law through which states must respect human rights by not infringing on them, protect human rights by ensuring third parties do not violate them, and fulfill human rights by facilitating and providing for their realization).

⁵¹ *See* U.N. Human Rights Committee, *International Covenant on Civil and Political Rights General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* ¶ 4, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) [hereinafter ICCPR General Comment 31] (“[T]he Committee reminds States Parties with a federal structure of the terms of article 50, according to which the Covenant’s provisions ‘shall extend to all parts of federal states without any limitations or exceptions.’”).

⁵² For literature discussing expanding human rights obligations to include non-state actors, see generally ANDREW CLAPHAM, *HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS* (2006).

⁵³ *See* THE CORE INTERNATIONAL HUMAN RIGHTS INSTRUMENTS AND THEIR MONITORING BODIES, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> (last visited Mar. 27, 2018) (listing the nine core international human rights instruments and their monitoring bodies); *see also* THE FOUNDATION OF INTERNATIONAL HUMAN RIGHTS LAW, <http://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html> (last visited Mar. 27, 2018) (noting that treaties and customary international law

party to the treaty through the ratification or accession process.⁵⁴ Consequently, use of a human rights framework to assert legal claims is most useful for a rights-holder when a duty-bearing state can be alleged to have violated a binding treaty provision under one of the nine core human rights treaties to which the state is a party.

Once a potentially binding norm has been identified by a rights-holder, an analysis must still be undertaken to determine if the binding norm may be modified under the circumstances by reviewing derogation exceptions within the treaty and any textual limits on the right itself.⁵⁵ For example, ICCPR Article 21 states:

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.⁵⁶

Consequently, the ICCPR obligates states to allow a right of peaceful assembly unless the explicitly identified textual conditions within Article 21 allowing for derogation are met.⁵⁷

Alternatively, Article 4(2) of the ICCPR contains a derogation exception by listing specific treaty

can provide international protections for human rights). This paper focuses on international treaty obligations because customary international law is notoriously difficult to define and identify, and its place within the U.S. legal regime is contested. *See, e.g.,* Curtis A. Bradley, *Customary International Law's Uncertain Status in the US Legal System*, OXFORD UNIV. PRESS BLOG (May 18, 2015), <https://blog.oup.com/2015/05/customary-international-laws-uncertain-status-in-the-us-legal-system/> (“[T]here continues to be debate and uncertainty about customary international law’s status in the US legal system.”).

⁵⁴ UNICEF, *Signature, Ratification, and Accession: The Process of Creating Binding Obligations on Governments*, UNITED NATIONS (May 19, 2014), https://www.unicef.org/crc/index_30207.html (identifying that states “decide for themselves whether to be legally bound by” a treaty and then become bound “by signature and ratification or by accession” in the context of the Convention on the Rights of the Child).

⁵⁵ *See* Emilie M. Hafner-Burton, Laurence R. Helfer & Christopher J. Fariss, *Emergency and Escape: Explaining Derogations from Human Rights Treaties*, 65 INT’L ORG. 673, 676–77 (2011) (discussing the derogations regime of international human rights law treaties).

⁵⁶ ICCPR art. 21.

⁵⁷ *Id.*

obligations from which no derogation is permitted.⁵⁸ It is vital for advocates to review this information to determine if a state is bound by a relevant treaty provision as written.⁵⁹

Additionally, a state party may file a reservation, declaration, or understanding to a human rights treaty that modifies that state's obligations under the treaty.⁶⁰ The United States, for example, filed a reservation to Article 6 of the ICCPR, which prohibits imposing the death penalty on "persons below eighteen years of age[.]"⁶¹ indicating that it was maintaining the right to impose capital punishment on minors.⁶² Human rights advocates must be cognizant of this when analyzing U.S. obligations under the ICCPR.

Beyond ascertaining any modifications or limitations to a binding norm, a human rights advocate must also determine whether there is a jurisdictional basis for international human rights law to apply in a situation and if international humanitarian law will intersect with any human rights obligations under the circumstances.⁶³ In analyzing the ICCPR, for example, advocates know that Article 2(1) articulates the Convention's jurisdiction as applying "to all

⁵⁸ See *id.* art. 4(2) ("No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.").

⁵⁹ See Hafner-Burton, Helfer & Fariss, *supra* note 55, at 674–75 (identifying derogations as relevant to understanding compliance with human rights agreements).

⁶⁰ See Madeline Morris, *Few Reservations About Reservations*, 1 CHI. J. INT'L L. 341, 341 (2000) (discussing U.S. practice of "attaching a package of reservations, understandings, and declarations ('RUDs') to its ratification of international human rights conventions" as a way of qualifying its adherence to those conventions).

⁶¹ ICCPR art. 6(5).

⁶² See Kristina Ash, *U.S. Reservations to the International Covenant on Civil and Political Rights: Credibility Maximization and Global Influence*, 3 NW. J. INT'L HUM. RTS. 1, ¶¶ 19–20 (2005) (discussing the U.S. reservation to ICCPR Art. 6 and objections from other countries suggesting that the reservation violated other treaty articles, notably the right to life, and sought to derogate from a non-derogable treaty provision).

⁶³ See, e.g., ICCPR General Comment 31, *supra* note 51, at ¶ 11 (identifying that the ICCPR "applies also in situations of armed conflict to which the rules of international humanitarian law are applicable").

individuals within its [a state party's] territory and subject to its jurisdiction.”⁶⁴ Furthermore, international human rights law under the ICCPR is traditionally complementary to, rather than mutually exclusive from, international humanitarian law.⁶⁵

An additional factor to consider when undertaking a human rights law approach includes whether the rights-holders claiming human rights violations are citizens or non-citizens of the duty-bearing state, as a duty-bearer's human rights obligations under specific circumstances and under certain treaties may differ in relation to citizens and non-citizens.⁶⁶ The ICCPR, for example, applies its jurisdiction “to all individuals” without making a distinction based on citizenship.⁶⁷ The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),⁶⁸ however, states in Article 1(2) that “[t]his Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens”⁶⁹ and in Article 1(3) that “[n]othing in th[e] Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate

⁶⁴ ICCPR art. 2(1).

⁶⁵ See ICCPR General Comment 31, *supra* note 51, at ¶ 11 (stating that international humanitarian law and international human rights law “are complementary, not mutually exclusive” in the context of the ICCPR).

⁶⁶ See University of Minnesota Human Rights Library, *Study Guide: The Rights of Non-Citizens*, UNIV. OF MINN. HUM. RTS. CTR. (2003), <http://hrlibrary.umn.edu/edumat/studyguides/noncitizens.html> (discussing the United Nations Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live and how certain human rights obligations apply to citizens compared to non-citizens).

⁶⁷ ICCPR art. 2(1).

⁶⁸ International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969, ratified by the United States on Oct. 21, 1994) [hereinafter ICERD].

⁶⁹ *Id.* art. 1(2).

against any particular nationality.”⁷⁰ Such differences must be taken into account by advocates and rights-bearers in determining under which treaties they are best situated to bring a human rights claim.⁷¹

Finally, the nature of the human rights obligation and the timing of its effect must be understood by a rights-holder or advocate alleging a human rights violation by a duty-bearing state.⁷² For example, the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁷³ allows for the progressive realization of a state party’s obligations under the treaty.⁷⁴ The obligations of the ICCPR, alternatively, take immediate effect for state parties.⁷⁵ This gives duty-bearing states much less room to maneuver out of obligations under the ICCPR as opposed to the ICESCR and makes it easier for advocates to identify states in violation of ICCPR obligations.⁷⁶ Moreover, whether a state is charged with respecting, protecting, or fulfilling a

⁷⁰ *Id.* art. 1(3).

⁷¹ The distinction made in the ICERD between citizens and non-citizens is why the ICERD is not analyzed with the ICCPR and the CAT in section IV, *infra*, even though the United States is a party to the ICERD. Individuals enrolled in the DACA program are, by definition, not U.S. citizens and will therefore have a difficult time in advancing arguments that the U.S. government violated obligations to them under the ICERD.

⁷² See Bruce Porter, *Rethinking Progressive Realization: How Should It Be Implemented in Canada?*, SOC. RTS. ADVOC. CTR. 2 (June 4, 2015) (“It remains important, however, to distinguish obligations of immediate effect from those which are tied to progressive realization.”).

⁷³ International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976, signed by the United States on Oct. 5, 1977) [hereinafter ICESCR].

⁷⁴ See ICESCR art. 2(1) (“Each State Party to the present Covenant undertakes to take steps[] . . . with a view to achieving progressively the full realization of the rights recognized in the present Covenant . . .”).

⁷⁵ See ICCPR General Comment 31, *supra* note 51, at ¶ 5 (“The article 2, paragraph 1, obligation to respect and ensure the rights recognized . . . in the Covenant has immediate effect for all States parties.”).

⁷⁶ See, e.g., Office of the United Nations High Commissioner for Human Rights, *supra* note 46, at 2–3 (noting that a lack of resources can impede realization of human rights and that achieving progressive realization is up to individual states). It is the case, however, that some rights under the ICESCR still have immediate effect, including “[t]he obligation not to discriminate between

particular human right makes a difference for when the state can be held accountable for an alleged violation of the right.⁷⁷

Once a human rights advocate has thought through these factors involved in a human rights law approach, the analytical framework can be applied to a concrete problem of alleged human rights violations. Doing so has multiple advantages for advocates. First, allowing individual rights-holders to bring human rights law claims against duty-bearing states reinforces the legally binding nature of a state's human rights obligations under domestic and international law. Second, bringing international human rights law claims is an excellent way to “name and shame” a government in the international community and bring additional domestic attention to its alleged violations.⁷⁸ These advantages help bolster the legal positioning of human rights advocates.

Section IV below applies a human rights law framework to the concrete problem of the Trump Administration's termination of the DACA immigration program and highlights how using this approach is an effective legal strategy, can help name and shame the U.S. government,

different groups of people in the realization of the rights in question;” “[t]he obligation to take steps . . . targeted deliberately towards the full realization of the rights in question;” and “[t]he obligation to monitor progress in the realization of human rights.” *Id.* at 3 (emphasis omitted).

⁷⁷ See *id.* at 2 (noting that fulfilling human rights “means to take steps progressively to realize the right in question” whereas obligations to respect and protect human rights are more immediate. States should, for example, “refrain from carrying out forced evictions” and “ensur[e] that parents and employers do not stop girls from going to school” as part of their respect and protect obligations). Additionally, not all states can be simultaneously held to the same standards for fulfilling economic, social, and cultural rights, making it harder to successfully allege state violations of those rights, because fulfilling them is a “national task” and “a lack of resources can impede the[ir] realization.” *Id.*

⁷⁸ See Emilie M. Hafner-Burton, *Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem*, 62 INT'L ORG. 689, 693 (2008) (“[C]omitted advocates name and shame extensively. . . . The general consensus, even among UN skeptics, is that shining a spotlight on a country's abuses can bring about better practices, especially when those shining the spotlight respect human rights.”).

and can help increase domestic attention to the international human rights law claims of pro-DACA advocates.

IV. APPLYING AN INTERNATIONAL HUMAN RIGHTS LAW APPROACH TO THE TRUMP ADMINISTRATION'S TERMINATION OF DACA

This section applies the international human rights law framework outlined above to the Trump Administration's termination of the DACA immigration program. In doing so, the analysis is focused specifically on potential claims under the ICCPR and CAT. This is because the United States has not ratified many of the core human rights law treaties,⁷⁹ including the ICESCR and the Convention on the Rights of the Child (CRC).⁸⁰ The United States has signed both the ICESCR and the CRC, which means it is obliged to avoid violating the "object and purpose" of those treaties,⁸¹ but this is a lesser obligation upon the United States than that imposed when it is fully bound by a treaty's terms following ratification or accession.⁸² Consequently, potential claims under the ICESCR and CRC, notably regarding the right to

⁷⁹ See RATIFICATION OF INTERNATIONAL HUMAN RIGHTS TREATIES – USA, <http://hrlibrary.umn.edu/research/ratification-USA.html> (last visited Mar. 27, 2018) (listing whether the United States has signed, ratified, or acceded to various international human rights treaties).

⁸⁰ Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990, signed by the United States on Feb. 16, 1995) [hereinafter CRC].

⁸¹ See Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980, signed by the United States on Apr. 24, 1970), art. 18 [hereinafter VCLT] (indicating that a treaty signatory must "refrain from acts which would defeat the object and purpose of [the] treaty"). Note that while the United States has not ratified the VCLT, it does consider many of its provisions as binding customary international law. See VIENNA CONVENTION ON THE LAW OF TREATIES, <https://www.state.gov/s/l/treaty/faqs/70139.htm> (last visited Mar. 27, 2018). Further, "many commentators claim that [VCLT] Article 18 reflects customary international law that is binding on nations that have not joined the Convention, a claim that the United States has not denied." Curtis A. Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48 HARV. INT'L L.J. 307, 307–08 (2007) [hereinafter Bradley, *Unratified Treaties*].

⁸² See Bradley, *Unratified Treaties*, *supra* note 81, at 307–08 (indicating that signing a treaty is distinct from being completely bound by and receiving full benefits from a treaty upon ratification or accession).

work,⁸³ the right to physical and mental health,⁸⁴ the right to education,⁸⁵ the right to non-discrimination,⁸⁶ and the fact that the “best interests of the child” are a primary consideration in state actions concerning children,⁸⁷ are omitted from this analysis.

Focusing on the ICCPR and the CAT therefore allows an advocate to focus on two treaties that the United States has ratified and considers binding international human rights law.⁸⁸ This renders the provisions of the treaties, pending modifications or limitations, fully binding on the United States.⁸⁹ Furthermore, obligations within the CAT, like those within the ICCPR, take immediate effect within state parties and are not subject to progressive realization.⁹⁰ Finally, using these treaties to allege human rights abuses by the Trump Administration in terminating DACA plays into the historical U.S. bias of taking civil and political rights more seriously than

⁸³ See ICESCR art. 6(1) (“The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.”).

⁸⁴ See *id.* art. 12(1) (“The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”).

⁸⁵ See CRC art. 28(1) (“States Parties recognize the right of the child to education[]”); ICESCR art. 13(1) (“The States Parties to the present Covenant recognize the right of everyone to education.”).

⁸⁶ See CRC art. 2(1) (“States Parties shall respect and ensure the [Convention’s] rights . . . without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.”); ICESCR art. 2(2) (“The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”).

⁸⁷ See CRC art. 3(1) (“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”).

⁸⁸ See RATIFICATION OF INTERNATIONAL HUMAN RIGHTS TREATIES – USA, *supra* note 79 (noting that the United States has ratified both the ICCPR and the CAT).

⁸⁹ See *supra* note 54 and accompanying text.

⁹⁰ See CAT art. 2(1) (“Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.”).

rights considered more economic, social, or cultural in nature.⁹¹ This, in turn, makes claims under such treaties more effective naming and shaming tools than claims brought under treaties not legally binding on the United States or that place a heavier emphasis on economic, social, and cultural rights.⁹²

In the context of the Trump Administration's termination of the DACA program, the most obvious rights-holders are those individuals participating in the Program at the time its termination was abruptly announced and will therefore lose the benefits of deferred action when their current two-year enrollment period ends.⁹³ The alleged duty-bearer and human rights violator is the United States government. This scenario provides advocates an avenue to neatly fit human rights arguments surrounding the Trump Administration's termination of the DACA program into the traditional paradigm of a human rights law approach addressing state duty-bearers violating human rights of rights-bearing individuals.⁹⁴ The following two sub-sections address specific treaty claims under the ICCPR and the CAT that advocates could plausibly use in claiming that the Trump Administration violated the human rights of DACA recipients upon terminating the Program and in naming and shaming the U.S. government for these actions.

⁹¹ See, e.g., International Institutions and Global Governance Program, *The Global Human Rights Regime: Scope of the Challenge*, COUNCIL ON FOREIGN REL. (May 11, 2012), <https://www.cfr.org/report/global-human-rights-regime> (describing the United States as the United Nations' "greatest skeptic on economic and social rights").

⁹² See Hafner-Burton, *supra* note 78, at 693 ("The NGO Human Rights Watch considers the strategy to be one of the most effective human rights tools to oblige governments, at a minimum, to protect some civil and political rights. So do many other NGOs and also some members of the United Nations.") (internal quotations and citations omitted).

⁹³ Note that terms like "human rights advocates," "pro-DACA advocates," and "advocates" are used interchangeably in this paper to reference those best suited to allege the Trump Administration violated international human rights in abruptly terminating the DACA program and also those individuals working on their behalf.

⁹⁴ See section III, *supra* (outlining a traditional human rights law approach).

Notably under the international human rights law framework, the United States has ratified both the ICCPR and CAT, and this renders the U.S. government a duty-bearer under these treaties to relevant rights-holders. Furthermore, a human rights law approach here does not implicate international humanitarian law. The potential human rights claims identified for pro-DACA advocates are thus contextualized by the remaining factors in the human rights law approach: whether specific U.S. treaty obligations relevant to pro-DACA claims have been modified or limited, whether DACA recipients are covered in the relevant treaty's jurisdiction, whether the status of DACA recipients as non-citizens matters under the relevant treaty, and whether the nature of the obligation held by the U.S. government under the relevant treaty can ultimately render the Trump Administration accountable for human rights violations in terminating the DACA program.⁹⁵ Benefits and obstacles for highlighting each potential claim are also identified to assist advocates in prioritizing plausible international human rights law claims.

A. THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)

As a party to the ICCPR, the United States has committed “to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.”⁹⁶ U.S. obligations under the ICCPR therefore apply to all people, citizens or non-citizens, who are at least present on U.S. territory.⁹⁷ The U.S. government and the Human Rights Committee (HRC), the governing body for the ICCPR,⁹⁸ disagree on the interpretation of this

⁹⁵ See *id.* (describing factors included in a traditional human rights law approach).

⁹⁶ ICCPR art. 2(1).

⁹⁷ *Id.*

⁹⁸ See THE CORE INTERNATIONAL HUMAN RIGHTS INSTRUMENTS AND THEIR MONITORING BODIES, *supra* note 53 (identifying the HRC as the ICCPR's monitoring body). Note that human rights treaty monitoring bodies “are committees of independent experts” that “monitor implementation of the core international human rights treaties.” HUMAN RIGHTS BODIES,

jurisdictional clause, with the United States government believing it applies only to those individuals physically present within U.S. territory⁹⁹ and the HRC asserting that the jurisdiction applies “to anyone within the power or effective control of [a] State Party.”¹⁰⁰ This distinction is irrelevant here, however, because DACA recipients, by definition, are located on U.S. soil.¹⁰¹

DACA recipients are therefore covered under U.S. obligations under the ICCPR, and the only remaining factors for analysis relating to U.S. government duties under specific ICCPR provisions are whether the United States’ relevant treaty obligations have been modified or limited and whether the nature of the obligations held by the U.S. government under the treaty can render the Trump Administration accountable for human rights violations in terminating the DACA program.

1. ICCPR Article 17

Perhaps the most straightforward argument to be made under the ICCPR that the U.S. government violated the human rights of DACA recipients when it terminated the Program is that the Trump Administration violated Article 17(1) of the ICCPR, which states that “[n]o one

<http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx> (last visited Mar. 27, 2018).

⁹⁹ See KAREN DA COSTA, THE EXTRATERRITORIAL APPLICATION OF SELECTED HUMAN RIGHTS TREATIES 67 (2013) (“[T]he US adopts a restrictive interpretation, in which it sees ‘territory’ and ‘jurisdiction’ as referred to in article 2(1) ICCPR as a dual requirement limiting the scope of the Covenant to persons both under United States jurisdiction and within United States territory.”).

¹⁰⁰ ICCPR General Comment 31, *supra* note 51, at ¶ 10.

¹⁰¹ See Napolitano Memorandum, *supra* note 8, at 1 (identifying eligibility criteria for DACA applicants, including a requirement of having at least five years of residency in the United States and a requirement that the applicant be in the United States on the date of the memorandum announcing the DACA program). DACA recipients were able to travel outside the United States once in the Program, but because they could only do so for very limited purposes and time periods and were not guaranteed re-entry to the country upon their return, DACA recipients were effectively tied to U.S. territory to receive their deferred action benefits. See U.S. Customs and Immigration Enforcement, *USCIS Form I-131: Instructions for Application for Travel Document*, U.S. DEP’T OF HOMELAND SECURITY 1, 5 (Dec. 23, 2016), <https://www.uscis.gov/sites/default/files/files/form/i-131instr.pdf> (detailing possibilities for and restrictions on travel with advance parole while enrolled in the DACA program).

shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.”¹⁰² The United States has filed no reservation, declaration, or understanding with respect to Article 17.¹⁰³ Furthermore, while Article 17 is not explicitly enumerated as non-derogable under Article 4(2),¹⁰⁴ there is no “public emergency which threatens the life of the nation and the existence of which is officially proclaimed” that would allow the United States to derogate from its Article 17 obligations based on a textual limit within the obligation itself.¹⁰⁵ Finally, Article 17’s mandate requires the state to not affirmatively interfere arbitrarily or unlawfully in an individual’s affairs and also protect against third party infringement of the right.¹⁰⁶ Given that pro-DACA advocates would be making human rights arguments alleging that the Trump Administration directly acted to violate human rights by terminating the DACA program, such rights claims could succeed if the alleged violations contravene the substantive guarantees of Article 17.

To this end, the HRC explicitly indicates that unlawful or arbitrary interference in violation of Article 17 includes both interference not “on the basis of law” and interference that may be on the basis of law but is still otherwise arbitrary because it contravenes “the provisions, aims and objectives of the Covenant” or is not “reasonable in the particular circumstances.”¹⁰⁷ Moreover, HRC jurisprudence highlights that “the notion of arbitrariness includes elements of

¹⁰² ICCPR art. 17(1).

¹⁰³ See Ash, *supra* note 62, at ¶ 17 (identifying U.S. reservations to the ICCPR, which did not include a reservation to Article 17).

¹⁰⁴ ICCPR art. 4(2).

¹⁰⁵ *Id.*

¹⁰⁶ See U.N. Human Rights Committee, *International Covenant on Civil and Political Rights General Comment No. 16: Article 17 (Right to Privacy): The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation* ¶ 1 (Apr. 8, 1988), <http://www.refworld.org/docid/453883f922.html> (reiterating that states must refrain from themselves violating Article 17 and must also protect against third-party violations).

¹⁰⁷ *Id.* at ¶¶ 3–4.

inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.”¹⁰⁸ State party rationales are weighed against the degree of hardships on individuals under such circumstances.¹⁰⁹ Notably, there are situations where not allowing an individual to stay on a state’s territory, a very real consequence of DACA termination for hundreds of thousands of young people currently present in the United States, would itself constitute a violation of Article 17.¹¹⁰

DACA recipients can make strong claims that the Trump Administration’s termination of the DACA program was in violation of its substantive obligations under ICCPR Article 17. It appears clear that abruptly losing deferred action under DACA interferes with the privacy, family life, and home life of the Program’s recipients—those in the Program will in many instances no longer be able to study or work.¹¹¹ They will also now be subject to removal from the United States and “the arbitrary cruelty of deportation” if pursued by U.S. immigration authorities.¹¹² These are major life-altering circumstances that inherently introduce great stress and anxiety into the lives of DACA recipients and their families. Given the Trump Administration’s abrupt termination of the Program and the disproportionate consequences of this action, including an increased likelihood of deportation for the Program’s participants,

¹⁰⁸ HRC Dec. 2387/2014, CCPR/C/117/D/2387/2014, at ¶ 8.7 (Mar. 16, 2017).

¹⁰⁹ *See id.* (addressing the need to weigh state party interests against the degree of hardship on individuals and their families in the context of removing an individual from a state’s territory).

¹¹⁰ *See id.* at ¶ 8.6 (“[T]he Committee reiterates its jurisprudence that there may be cases in which a State party’s refusal to allow one member of a family to remain on its territory would involve interference in that person’s family life.”).

¹¹¹ *See Gomez, supra* note 25 (discussing immediate implications on employment and education opportunities for young people that will lose deferred action under the DACA program).

¹¹² Brian Naylor, Vanessa Romo & Martina Stewart, *Trump Ends DACA, Calls on Congress to Act*, NPR (Sept. 5, 2017 9:05 AM), <https://www.npr.org/2017/09/05/546423550/trump-signals-end-to-daca-calls-on-congress-to-act>.

advocates have a very plausible claim for human rights law violations under ICCPR Article 17.¹¹³

Using ICCPR Article 17 as a conduit for alleging human rights abuses by the Trump Administration in terminating DACA has both benefits and drawbacks for advocates. An important drawback is that the rights articulated in Article 17, relating to privacy, family, home, correspondence, honor, and reputation, facially sound like economic, social, and cultural rights about which the U.S. government is much less favorable to for granting protection than more traditional civil and political rights like freedom of speech and freedom from torture.¹¹⁴ A major benefit of using ICCPR Article 17, however, is that the United States government has not in any way modified its obligations under the provision.¹¹⁵

Additionally, claims under ICCPR Article 17 can be tied to similar claims under the current DACA-related domestic litigations filed against the Trump Administration. If the Administration violated domestic due process, equal protection, or APA law, for example, that is strong evidence that the Administration would have contravened Article 17's requirement that interference be lawful.¹¹⁶ Similarly, if domestic courts find that the Administration was "arbitrary and capricious" in changing agency regulations concerning DACA specifically in violation of the APA,¹¹⁷ this arbitrariness finding would also be strong evidence for advocates that the Trump

¹¹³ See *supra* note 110 and accompanying text.

¹¹⁴ See *supra* note 91 and accompanying text.

¹¹⁵ See *supra* note 103 and accompanying text.

¹¹⁶ See ICCPR art. 17 ("No one shall be subjected to arbitrary or *unlawful* interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.") (emphasis added).

¹¹⁷ See 5 U.S.C. § 706 (2012) (noting that actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" are unlawful under the APA).

Administration violated its human rights obligations under ICCPR Article 17.¹¹⁸ Tying international human rights law claims to domestic law claims in this way is effective legal strategy and would likely increase the effectiveness of naming and shaming the U.S. government if it could be highlighted that the government has broken its own laws in addition to international human rights law.¹¹⁹

Ultimately, whatever a pro-DACA human rights advocate thinks about the efficacy of advancing arguments under ICCPR Article 17 for human rights law violations by the Trump Administration in terminating DACA, the argument can and should be combined with additional arguments under the ICCPR and the CAT to bolster the strength of an advocate's positions.

2. ICCPR Articles 2 and 26

In addition to Article 17, there are plausible claims for U.S. government violations of ICCPR Articles 2 and 26 resulting from its termination of the DACA program. Article 2(1) states that

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹²⁰

Similarly, Article 26 provides that

¹¹⁸ See ICCPR art. 17 (“No one shall be subjected to *arbitrary* or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.”) (emphasis added).

¹¹⁹ The import of this strategy is markedly increased now that two different federal district court judges have signaled likely success on the merits for challenges to the Trump Administration's ending of the DACA program by issuing preliminary injunctions affecting the Program's termination. These facts can be used as additional evidence by human rights advocates in arguing that the United States did not adhere to its international human rights law obligations as a result of the Trump Administration's decision to end DACA.

¹²⁰ *Id.* art. 2(1).

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹²¹

These Articles require due process and equal protection be provided by states bound by the treaty and prohibit discrimination by the state against individuals based on the enumerated grounds.¹²² Like ICCPR Article 17, these Articles require a state to not act affirmatively to discriminate against individuals or deny them equal protection while also prohibiting states from allowing other actors to do so as well.¹²³ Also similarly to ICCPR Article 17, ICCPR Articles 2 and 26 are not listed as non-derogable under ICCPR Article 4(2),¹²⁴ and no public emergency exists and has been announced that would allow the United States to be relieved of its obligations under these Articles.¹²⁵

¹²¹ *Id.* art. 26.

¹²² See U.N. Human Rights Committee, *International Covenant on Civil and Political Rights General Comment No. 18: Non-Discrimination* ¶¶ 1, 12 (Nov. 10, 1989) [hereinafter ICCPR General Comment 18], <http://www.refworld.org/docid/453883fa8.html> (discussing the common non-discrimination language in ICCPR Articles 2 and 26 while also noting that Article 26 is distinct in providing for non-discrimination and equal protection under a state's law generally whereas Article 2 applies to non-discrimination more specifically in applying the Covenant's provisions).

¹²³ See ICCPR art. 2(1) (noting that states must both "respect" and "ensure" the right to non-discrimination); *id.* art. 26 (prohibiting discrimination under law and guaranteeing protection from discrimination).

¹²⁴ See *id.* art. 4(2) ("No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.").

¹²⁵ See *id.* art. 4(1) (requiring a "public emergency which threatens the life of the nation and the existence of which is officially proclaimed" for states to derogate from Covenant obligations as necessary). Note, however, that even if the United States could derogate from its obligations, such derogations cannot "involve discrimination solely on the ground of race, colour, sex, language, religion or social origin." *Id.*

Unlike Article 17, however, the United States filed an understanding applicable to both ICCPR Article 2 and ICCPR Article 26.¹²⁶ Specifically, the understanding articulates that

The United States understands distinctions based upon race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status – as those terms are used in article 2, paragraph 1 and article 26 – to be permitted when such distinctions are, at minimum, rationally related to a legitimate governmental objective.¹²⁷

While this language is broad, the Senate Committee on Foreign Relations, upon suggesting ratification of the ICCPR, indicated with regard to this understanding that “U.S. law makes some legal distinctions, for example on the basis of age. . . . [T]he United States does not regard these distinctions as inconsistent with its obligations under the Covenant.”¹²⁸ This language helps clarify that the understanding is likely not aimed at using the deferential rational basis review test known to U.S. constitutional law, typically allowing the U.S. government to conjure up any conceivable objective to support its legislation, to avoid its obligations under international human rights law.¹²⁹ Rather, the language suggests that the U.S. government is more concerned with maintaining, for example, mandatory minimum age laws for voting or consuming alcoholic beverages without being held to have contravened its human rights duties

¹²⁶ See UNITED NATIONS TREATY COLLECTION: INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&lang=en (last visited Mar. 27, 2018) (identifying U.S. reservations, understandings, and declarations to the ICCPR, including the U.S. understanding to ICCPR Articles 2 and 26).

¹²⁷ *Id.*

¹²⁸ S. EXEC. REP. NO. 102-23, at 8 (1992).

¹²⁹ The rational basis language used in the understanding traces that of the rational basis review standard of U.S. Constitutional law that is the most lenient standard of constitutional review, presumes the constitutionality of a law, and rarely holds a law unconstitutional. See *Legal Dictionary: Rational Basis Test*, FREE DICTIONARY, <https://legal-dictionary.thefreedictionary.com/Rational+Basis+Test> (discussing the rational basis review test in U.S. constitutional law).

according to the explicit text of the treaty.¹³⁰ Consequently, this understanding is unlikely to pose a significant obstacle to claims that the Trump Administration violated ICCPR Articles 2 and 26 in terminating DACA.¹³¹

This reading of the understanding is also consistent with how the HRC interprets ICCPR Articles 2 and 26. The HRC notes, for example, that for Article 26 “[t]he right to equality before the law and to the equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of Article 26.”¹³²

Moreover, claims under Article 2 can only be brought in conjunction with other claims under the ICCPR.¹³³ The HRC has also reiterated that general non-discrimination obligations under the ICCPR apply to everyone, regardless of citizenship,¹³⁴ and that they prevent discrimination both by law and in fact.¹³⁵ Moreover, the term “discrimination” is left undefined by the Covenant, but the HRC broadly interprets it to

¹³⁰ See *id.* (noting that mandatory minimum age laws have been upheld under rational basis review in U.S. constitutional law).

¹³¹ The U.S. rational basis review test does not apply to race, which is a suspect class under U.S. law. *Id.* The U.S. understanding to ICCPR Articles 2 and 26, however, applies to all enumerated categories, including race. See UNITED NATIONS TREATY COLLECTION, *supra* note 126 (detailing the U.S. understanding to ICCPR Articles 2 and 26). This further suggests that the United States did not intend to translate its extremely deferential rational basis review test in domestic constitutional law to its non-discrimination obligations under the ICCPR.

¹³² HRC Dec. 425/1990, CCPR/C/51/D/425/1990, at ¶ 7.2 (July 27, 1994).

¹³³ See HRC Dec. 2172/2012, CCPR/C/119/D/2172/2012, at ¶ 6.7 (June 28, 2017) (“[A]rticle 2 can be invoked by individuals only in conjunction with other substantive articles of the Covenant[. . . .”).

¹³⁴ See U.N. Human Rights Committee, *International Covenant on Civil and Political Rights General Comment No. 15: The Position of Aliens Under the Covenant* ¶ 2 (Apr. 11, 1986), <http://www.refworld.org/docid/45139acfc.html> (“[T]he general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens.”).

¹³⁵ See ICCPR General Comment 18, *supra* note 122, at ¶¶ 9, 12 (identifying the need for non-discrimination under the ICCPR both in law and in fact).

imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.¹³⁶

Indeed, credible arguments may be advanced that race, national origin, and immigration status all played a role in the Trump Administration's termination of the DACA program in a way that was neither reasonable nor objective. It is well documented that "[a] vast majority of DACA recipients are Latino, with 79 percent coming from Mexico."¹³⁷ Moreover, President Trump has a history of making disparaging comments toward Mexicans, having notably questioned the judgment of a federal judge based on his Mexican heritage, suggested that Mexico is not a friend of the United States, and stated that Mexican immigrants are criminals, drug smugglers, and rapists.¹³⁸ When combined with the fact that President Trump's statements towards Muslims have been used by U.S. judges to question the legality of his Administration's actions regarding a travel ban from Muslim countries,¹³⁹ advocates can and should connect President Trump's statements regarding Mexico and its citizens to his policy decision to terminate DACA and the overwhelmingly disproportionate effect this decision had on Mexican immigrants.¹⁴⁰ Bringing claims under ICCPR Articles 2 and 26 could do just that by alleging that

¹³⁶ *Id.* at ¶ 6.

¹³⁷ Alicia Parlapiano & Karen Yourish, *A Typical 'Dreamer' Lives in Los Angeles, Is from Mexico and Came to the U.S. at 6 Years Old*, N.Y. TIMES (Sept. 5, 2017), <https://www.nytimes.com/interactive/2017/09/05/us/politics/who-are-the-dreamers.html>.

¹³⁸ See Katie Reilly, *Here Are All the Times Donald Trump Insulted Mexico*, TIME (Aug. 31, 2016), <http://time.com/4473972/donald-trump-mexico-meeting-insult/> (detailing various disparaging tweets, speeches, and statements made by Donald Trump against Mexicans and Mexican immigrants).

¹³⁹ See Ariane de Vogue, *Judges in Travel Ban Case Concerned About Trump Tweets*, CNN (Dec. 8, 2017, 2:55 PM), <http://www.cnn.com/2017/12/08/politics/travel-ban-trump-tweets/index.html> (discussing ongoing concern among judges on the United States Court of Appeals for the Fourth Circuit that the President's tweets could suggest that anti-Muslim animus motivated the travel ban).

¹⁴⁰ See *supra* note 137 and accompanying text.

the President discriminated against DACA recipients, and denied them equal protection of the law, by abruptly terminating the Program.

There are drawbacks to bringing claims for alleged human rights violations by the Trump Administration in terminating DACA under ICCPR Articles 2 and 26. Namely, there is the language of the U.S. understanding that advocates must take into consideration when bringing their claims,¹⁴¹ and a claim under Article 2 of the ICCPR needs to be brought in conjunction with claims under another Article.¹⁴² The language of the understanding can be countered, however, by providing evidence regarding the Administration's history of hostility toward Mexican and other immigrants that squarely fits into the HRC's broad understanding of discrimination that takes effects into account.¹⁴³ Furthermore, claims under Article 2 can easily be brought with other claims in this instance: advocates can argue that the Trump Administration has violated both Articles 2 and 26 by discriminating in its own policies toward Mexicans, and claims under Article 2 could also be brought with claims under Article 17 by suggesting that the Trump Administration discriminated against DACA recipients in invading their privacy rights.

This ability to attach claims under Article 2 is also a distinct benefit of using it as a conduit for bringing human rights law claims against the Trump Administration for terminating the DACA program because it allows advocates to insert additional claims into their legal arguments. Moreover, non-discrimination and equal protection are core concepts in U.S. law as well as in international human rights law, and this is likely to afford claims under ICCPR Articles 2 and 26 additional weight when addressing an audience in the U.S. government and

¹⁴¹ See *supra* notes 126–31 and accompanying text.

¹⁴² See *supra* note 133 and accompanying text.

¹⁴³ See ICCPR General Comment 18, *supra* note 122, at ¶ 6 (noting that having the purpose or effect to impair the enjoyment or exercise of the Covenant's rights fits within the HRC's interpretation of "discrimination").

attempting to name and shame the U.S. government to domestic and international constituencies.¹⁴⁴

B. THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (CAT)

Pro-DACA advocates could also allege human rights law violations against the U.S. government under the CAT. Like for claims under the ICCPR, an advocate must address whether specific U.S. treaty obligations under the CAT have been modified or limited, whether DACA recipients are covered by the CAT's jurisdiction, and whether the nature of the U.S. government's obligations under the CAT can render it accountable for human rights violations under the treaty in its termination of DACA.

Human rights claims for DACA recipients under the CAT would best fall under Article 16(1)'s prohibition on "other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture."¹⁴⁵ Article 16 applies to citizens and non-citizens alike,¹⁴⁶ and the U.S.'s obligations under the Article extends to "in any territory under its jurisdiction."¹⁴⁷

Additionally, U.S. obligations under Article 16 apply to action by state officials as well as "to all

¹⁴⁴ See, e.g., U.S. CONST. amend. XIV, § 1 (guaranteeing due process and equal protection of the laws).

¹⁴⁵ CAT art. 16(1). Note that CAT Article 2's prohibition on torture itself is not included in this analysis. Such a claim is unlikely to gain any traction against the U.S. government's restrictive definition of torture as used during and after its war on terrorism. See ENDURING ABUSE: TORTURE AND CRUEL TREATMENT BY THE UNITED STATES AT HOME AND ABROAD – EXECUTIVE SUMMARY, <https://www.aclu.org/other/enduring-abuse-torture-and-cruel-treatment-united-states-home-and-abroad-executive-summary> (last visited Mar. 27, 2018) ("To justify torture and abuse in the 'global war on terrorism,' the government narrowly defined torture and argued that the prohibition against cruel, inhuman or degrading treatment does not apply outside the United States."). Further discussion of the United States' contentious interpretations of its obligations under CAT Article 2 are outside the scope of this paper.

¹⁴⁶ See U.N. Committee Against Torture, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment General Comment No. 2: Implementation of Article 2 by States Parties* ¶ 7, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008) [hereinafter CAT Comment 2] (articulating that a state's obligation under the Convention is "to protect any person, citizen or non-citizen").

¹⁴⁷ CAT art. 16(1).

persons who act, de jure or de facto, in the name of, in conjunction with, or at the behest of the State party”¹⁴⁸ and are absolutely non-derogable.¹⁴⁹

The U.S. government has, however, filed a reservation to Article 16.¹⁵⁰ The reservation states

That the United States considers itself bound by the obligation under article 16 to prevent ‘cruel, inhuman or degrading treatment or punishment’, only insofar as the term ‘cruel, inhuman or degrading treatment or punishment’ means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.¹⁵¹

Consequently, the U.S. government has attempted to temper its broad obligations under Article 16 by equating the substantive protections to pre-existing standards of domestic law.¹⁵²

Advocates may therefore have a hard time being persuasive with direct human rights claims arguing that terminating DACA was a form of cruel, inhuman, or degrading treatment or punishment. This does not, however, render making international human rights law claims under the CAT useless or unnecessary. Doing so is an excellent way of naming and shaming the United States and drawing attention to the Trump Administration’s actions through the lens of human rights law.

Previous efforts by the “Ferguson to Geneva” delegation, which arose following the August 2014 death of Michel Brown, Jr. in Ferguson, Missouri, illustrate this point.¹⁵³

¹⁴⁸ CAT Comment 2, *supra* note 146, at ¶ 7.

¹⁴⁹ *See id.* at ¶ 6 (reaffirming the absolute nature of the obligations under the Convention and that not even terrorist attacks like those suffered by the United States on September 11, 2001 can justify derogating from obligations under the treaty).

¹⁵⁰ *See* UNITED NATIONS TREATY COLLECTION: CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&lang=en (last visited Mar. 27, 2018) (identifying U.S. reservations, understandings, and declarations to the CAT, including the U.S. reservation to CAT Article 16).

¹⁵¹ *Id.*

¹⁵² *Id.*

The delegation was comprised of members of Michael Brown, Jr.’s family and other human rights activists.¹⁵⁴ They submitted a report to the United Nations Committee Against Torture¹⁵⁵ detailing “the extrajudicial killing of Mike Brown and the repressive and violent response to protestors in Ferguson through the lens of torture and cruel, inhuman and degrading treatment.”¹⁵⁶ The delegation also “traveled to Geneva to take part in a live dialogue with representatives of the U.S. government, U.N. human rights experts, and members of the Committee Against Torture.”¹⁵⁷ The delegation “regarded their written statement and trip to Geneva to testify as an indictment of the U.S. justice system[.]” and “believed it necessary to use this global stage as a way to build awareness among the international community of the U.S. government’s human rights abuses against its communities of color”¹⁵⁸

The delegation was successful in their efforts: members were able “to testify in a plenary meeting before members of the CAT Committee, and before the U.S. government delegation and other U.N. experts in meetings”¹⁵⁹ Members’ arguments were also recognized in the CAT Committee’s Concluding Observations, and national and local

¹⁵³ See Justin Hansford & Moena Jagannath, *Ferguson to Geneva: Using the Human Rights Framework to Push Forward a Vision for Racial Justice in the United States After Ferguson*, 12 HASTINGS RACE & POVERTY L.J. 121, 123 (describing the birth of the Ferguson to Geneva delegation in the fall of 2014).

¹⁵⁴ See *id.* (noting the composition of the Ferguson to Geneva delegation).

¹⁵⁵ The United Nations Committee Against Torture is the Treaty Monitoring Body for the CAT. See THE CORE INTERNATIONAL HUMAN RIGHTS INSTRUMENTS AND THEIR MONITORING BODIES, *supra* note 53 (identifying the Committee Against Torture as the CAT’s monitoring body).

¹⁵⁶ Hansford & Jagannath, *supra* note 153, at 123.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 125–26.

¹⁵⁹ *Id.* at 145.

Missouri media outlets closely covered the delegation's actions.¹⁶⁰ Similar efforts by a delegation of pro-DACA advocates could garner further domestic and international attention for and criticism of human rights violations in the Trump Administration's termination of the DACA program.

It is true that the Ferguson to Geneva delegation utilized the Committee Against Torture's periodic review process to present its arguments¹⁶¹ and that such formal reviews only occur every four years.¹⁶² This does not mean, however, that pro-DACA advocates cannot similarly utilize U.N. mechanisms to raise awareness for their claims. Notably, the next periodic review for the United States under the CAT is in the fall of 2018, and the DACA program, if its phase-out continues at its current pace, will not have entirely ended by that time. Advocates could therefore follow a similar path to the Ferguson to Geneva delegation. More than that, however, the Ferguson to Geneva delegation highlights the power of human rights law claims and rhetoric in bringing attention to human rights abuses by the United States, even when the United States government tries to limit its exposure to accountability for domestic human rights violations.¹⁶³

V. CONCLUSION

¹⁶⁰ See *id.* at 152–53 (positively evaluating the impact of the delegation on the Committee's work product and on local and national attention to their claims).

¹⁶¹ See *id.* at 124–25 (noting that the Ferguson to Geneva delegation's efforts were part of the 2014 periodic review of the United States before the Committee Against Torture).

¹⁶² See Committee Against Torture, *General Guidelines Regarding the Form and Contents of Periodic Reports to be Submitted by States Parties Under Article 19, Paragraph 1, of the Convention* ¶ 1, U.N. Doc. CAT/C/14/Rev.1 (June 2, 1998) (noting that states "shall" submit periodic reports "every four years").

¹⁶³ See Hansford & Jagannath, *supra* note 153, at 122 ("[I]nternational attention is necessary to hold the U.S. government to account for the level of social injustice and inequality that persists in U.S. society.").

This paper has outlined the United States' DACA immigration program and the circumstances surrounding its termination by the Trump Administration. The paper has also discussed the international human rights law framework and applied it to DACA's termination to highlight feasible claims under the ICCPR and the CAT that pro-DACA advocates could bring to allege human rights violations in the Program's abrupt termination and to name and shame the U.S. government for its actions in front of both domestic and international constituencies.

While this paper focused on claims that could be most successful in the present before an audience with the U.S. government, this paper does not seek to inhibit human rights advocates from seeking greater recognition by the U.S. government of economic, social, and cultural rights. Similarly, nothing in this paper should suggest that human rights advocates should not pressure the U.S. government to allow private rights of action under human rights treaties to which the U.S. government is bound. Rather, this paper has highlighted how international human rights law can be an additional tool for pro-DACA advocates under present circumstances.

Ultimately, the story of DACA in the United States is not fully written: domestic litigations that challenge the Trump Administration's abrupt termination of the Program are ongoing,¹⁶⁴ and heated Congressional discussions continue about providing a legislative remedy to DACA's elimination.¹⁶⁵ Moreover, many individuals continue to receive deferred action under

¹⁶⁴ See, e.g., Josh Gerstein, *Appeals Courts Block Access to DACA Cancellation Files: Orders Halt Drive to See Why Trump Administration Decided to End Protection for Dreamers*, POLITICO (Oct. 25, 2017, 12:46 PM), <https://www.politico.com/story/2017/10/24/dreamers-daca-appeals-courts-access-244138> (discussing current litigation orders from federal circuit courts blocking district court orders requiring that the U.S. government release "more records about information and advice considered in making the decision . . . to wind down the Obama-era initiative known as . . . DACA").

¹⁶⁵ See Elise Foley, *Congress Punts DACA Fix to Next Year, with Dreamers Losing Protections Each Day: Lawmakers Kept the Government Open. But They Did Nothing for Young Undocumented Immigrants*, HUFFINGTON POST (Dec. 21, 2017, 8:28 PM), https://www.huffingtonpost.com/entry/congress-daca-dreamers_us_5a3c35a7e4b06d1621b3263d

DACA, at least until their current enrollment in the Program expires.¹⁶⁶ Consequently, there is space now for pro-DACA advocates to make a difference in the lives of hundreds of thousands of young people by adding an international human rights law framework to the chorus of criticism directed at the Trump Administration's termination of the DACA immigration program.

(discussing how the U.S. Congress voted to fund the U.S. government into January 2018 without addressing a legislative fix to the end of DACA, despite popular protests and urging from many Democrats).

¹⁶⁶ *See supra* note 24 and accompanying text.