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ARMED INJUSTICE: ABUSE OF THE LAW AND COMPLEX CRIME IN POST-SOVIET RUSSIA

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"For man, when perfected, is the best of animals, but, when separated from law and justice, he is the worst of all; since armed injustice is the more dangerous, and he is equipped at birth with arms, meant to be used by intelligence and virtue, which he may use for the worst ends."[1]

"[A] club is a primitive weapon, a rifle is a more efficient one, the most efficient is the court."

Nikolai Krylenko, Commissar of Justice of the Soviet Union, 1936-1938[2]

I. INTRODUCTION

Abuse of the legal system has become a central technique in various fraudulent and extortionate schemes in Russia. Examples include:

- "commissioned" criminal prosecutions brought for the purpose of extorting money from the victim or driving him out of business;
- "intellectual property squatting" in which "squatters" exploit legal loopholes to register rights to a trademark or patent then initiate extortionate legal proceedings against alleged "infringers";
- "corporate raiding"[3] in which criminals use corruptly obtained legal documents, such as shareholders' resolutions, court judgments and state registration documents, as justification to seize a victim company's assets; and

* Resident Legal Advisor, U.S. Department of Justice, U.S. Embassy-Moscow. The views and opinions expressed in this article are those of the author and not necessarily those of the Department of Justice or the U.S. government. For reasons set forth below, very few of the cases discussed herein have resulted in criminal convictions. Therefore, in discussing particular cases, this article relies heavily on publicly available allegations by victims and law enforcement. Unless otherwise noted, nothing in this article should be taken as a statement by the author or the U.S. government that the individuals or companies mentioned as defendants or subjects of investigation are in fact guilty or that they should not be presumed innocent. The author would like to thank the following for their helpful comments: Pavel Boulatov, Richard Daddario, Eric Hamrin, Rosie Hawes, Kathryn Hendley, Daniel Klein, Lauren McCarthy, Catherine Newcombe, Peter Prahar and Daniel Rosenthal.

1. ARISTOTLE, POLITICS 29 (Benjamin Jowett & H.W.C Davis eds., Cosimo Inc. 2008)(1905).
2. HAROLD J. BERMAN, JUSTICE IN THE U.S.S.R. 36 (1963) (quoting N.V. Krylenko in 1923).
3. *See generally, Thomas Firestone, Criminal Corporate Raiding in Russia,* 42 INT'L LAW. 1207 (2008) (discussing corporate raiding in Russia as "a new and sophisticated form of organized crime").

- collusive litigation in which private parties create a pretextual lawsuit to obtain a predetermined judicial ruling which is then used as part of a scheme to misappropriate the victim's assets.[4]

American businesses, such as Hermitage Capital and Starbucks have reportedly been victimized by the practices described in this article and, according to a U.S. federal judge, "esteemed" U.S. law firms have been used as an instrument in at least one such scheme in the United States.[5] From a purely criminal standpoint, such schemes are brilliant. Using the law as both sword and shield, the perpetrator turns the victim into a legal defendant, misappropriates the state's legal enforcement power for private ends, and obtains a cover from liability through the claim that he is merely enforcing a legal right.

Despite a wealth of quality literature on the various manifestations of organized crime in contemporary Russia, analysts have failed to isolate and study this dangerous trend.[6] This article attempts to fill that gap by: (1) identifying and explaining some of the most common schemes relying on manipulation of the legal system; (2) tracing the historical origins of this phenomenon; (3) analyzing the steps the government is taking to combat the problem; and (4) identifying possible implications of this study for those concerned with the rule of law in Russia.

II. SCHEMES RELYING ON ABUSE OF THE LEGAL SYSTEM

A. Commissioned Prosecutions

Commissioned criminal prosecutions ("zakaznye dyela"), a term referring to (a) criminal cases "commissioned" by third parties as a way of sabotaging business competitors and (b) criminal cases initiated by law enforcement for extortionate or other improper purposes, are probably the most clear-cut examples of criminal legal abuse in Russia.[7] As Genri Reznick, the head of the Moscow City Bar

4. These schemes are not mutually exclusive and sometimes supplement one another as part of the same scheme. For example, commissioned prosecutions and collusive litigation are often used in support of corporate raids. They are separated here only for purposes of analytical clarity.

5. *See* Telenor Mobile Commc'ns AS v. Storm LLC, 587 F. Supp. 2d 594, 608 (S.D.N.Y. 2008) (expressing "outrage[ ]" and "surpris[e]" that "two esteemed New York law firms" had become instruments of Storm and the Altimo's scheme to use a "sham" Ukrainian judicial ruling in a U.S. court).

6. For English language literature, *see, e.g.*, JOSEPH SERIO, INVESTIGATING THE RUSSIAN MAFIA (2008); MISHA GLENNY, MCMAFIA: SERIOUSLY ORGANIZED CRIME 30-31, 312-13 (2008) (discussing Russian cybercrime and money laundering); STEPHEN HANDELMAN, COMRADE CRIMINAL: RUSSIA'S NEW MAFIYA (1995); VADIM VOLKOV, VIOLENT ENTREPRENEURS: THE USE OF FORCE IN THE MAKING OF RUSSIAN CAPITALISM (2002); PAUL KLEBNIKOV, GODFATHER OF THE KREMLIN: BORIS BEREZOVSKY AND THE LOOTING OF RUSSIA (2000); ROBERT I. FRIEDMAN, RED MAFIYA: HOW THE RUSSIAN MOB HAS INVADED AMERICA (2000); RUSSIAN ORGANIZED CRIME: THE NEW THREAT? (Phil Williams ed., 2d ed. 2000); JAMES O. FINCKENAUER & ELIN J. WARING, RUSSIAN MAFIA IN AMERICA: IMMIGRATION, CULTURE, AND CRIME (1998); Louise Shelley, *Crime, Organized Crime and Corruption, in* AFTER PUTIN'S RUSSIA: PAST IMPERFECT, FUTURE UNCERTAIN 183-98 (Stephen K. Wegren & Dale R. Herspring eds., 4th ed. 2009).

7. According to some, only cases initiated by third parties should be referred to as "commissioned cases," given the role of a third party in "commissioning" the case. However, given the

Association, recently said, "commissioned prosecutions" are the "most repulsive phenomenon in our justice system."[8]

The problem of commissioned cases is widespread and openly recognized at the highest levels of government. In 2008, President Medvedev called on law enforcement to stop "terrorizing" business through "attacks" motivated by commercial aims.[9] Prime Minister Putin recently stated that the majority of regulatory inspections of businesses (often the first stage of a criminal case) were likely "commissioned."[10] And in 2006, Prosecutor General Yuriy Chayka identified commissioned prosecutions as a major problem for Russia, acknowledged at least 20 such cases in Russia's Central Federal District alone, and promised a review of all criminal cases to determine if they had been commissioned.[11] Of course, the United States has seen its share of abuse of the criminal justice system for extortionate ends. But in the United States, such cases typically involve extortion of criminals who are, by definition, vulnerable to the threat of criminal prosecution.[12] In Russia, however, extortionate prosecutions have expanded to target legitimate businesses, a feat accomplished by the creative use of legal loopholes and ambiguities to create a threat of criminal prosecution which would not otherwise exist.

One example of the creative abuse of legal ambiguity is provided by the so-called "Chemists Case," in which corrupt agents of the State Drug Control Agency (FSKN) tried to extort money from the owners of a chemical business. As part of the scheme, the agents brought criminal charges against them for the distribution of diethyl ether, a chemical solvent commonly used as an anesthetic.[13] The agents

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perception of a tight connection between corruptly motivated private parties and corrupt law enforcement and the widespread belief that some cases are "commissioned" by higher-ups within the government or law enforcement for improper motives, the term is used to refer generally to criminal cases brought for improper commercial or political motives. *See* P.A. SKOBLIKOV, KORRUPTSIYA V SOVREMENNOI ROSSII 33-34 (2009). Given the frequent overlap of corrupt commercial motives between these two types of cases, the similarity in techniques that such prosecutions employ and common legal issues that such cases raise, this article uses the term "commissioned cases" to refer to both and treats them as one phenomenon.

8. Interview with Genri Reznick, Sept. 18, 2009, *available at* http://www.rusnovosti.ru/programms/prog/39964/ 51027/.

9. *Medvedev Poprosil Perestat' "Koshmarit" Biznes*, [*Medvedev Asked to Stop "a Nightmare" Business*] LENTA.RU, July 31, 2008, http://www.lenta.ru/news/2008/07/31/koshmarit/.

10. Nigina Beroeva, *Vladimir Putin: "Bol'shinstvo proverok biznesa – "zakazniye" ili nedobrosovestniye"* [*"The Majority of Russian Business inspections -- are "commissioned" or unscrupulous"*], KOMSOMOL'SKAYA PRAVDA [THE TRUTH OF THE KOMSOMOL], Nov. 25, 2009, *available at* http://pskov.kp.ru/print/article/24400/576309/.

11. *Yuri Chaika prekratit "zakaznye dela,"* [*Yuri Chaika Stop "Custom Action"*], LENTA.RU, Aug. 15, 2006, http://lenta.ru/news/2006/08/15/chaika/. It is not clear what became of this promised review and Russian sources are devoid of any indication that it was ever conducted or its results announced.

12. *See, e.g.*, United States v. Moore, 363 F.3d 631, 634 (7th Cir. 2004) (extortion of drug dealers by corrupt police officers); United States v. DePeri, 778 F.2d 963, 968 (3d Cir. 1985) (extortion of illegal gambling operations by corrupt police officers).

13. *See* Gregory L. White, *Once Jailed Russian Executive Pushes Law Changes*, WALL ST. J.,

relied on Article 234 of the Russian Criminal Code, which criminalizes the commercial distribution of so-called "virulent" substances, a term nowhere defined in the criminal law.[14] The absence of a statutory definition allowed the officers to rely on a list of allegedly "virulent" substances that had been prepared by an outside expert who had no official status or legislative or administrative authority.[15] After a disavowal of the list by the Ministry of Health and a public campaign highlighting the absurdity of the prosecution, the case was eventually dropped.[16] However, the subjects each spent at least seven months in jail.[17]

Similar cases, relying on contradictions and ambiguities in Russian law related to the anesthetic ketamine (which was prohibited by one official act, but authorized for veterinary anesthetic purposes by another) were brought in 2003 against veterinarians for administering ketamine to pets during routine operations.[18] In these cases, drug control agents set up sting operations in which they brought animals in for treatment. As soon as the veterinarian administered ketamine, they arrested him.[19] Approximately 20 such cases were initiated during 2003.[20] Eventually, the Ministry of Agriculture officially approved the use of ketamine for veterinary uses and almost all of the criminal cases were closed.[21]

Another common technique of subjecting businesses to enhanced penalties for the purpose of facilitating extortion involves the use of Article 171 of the Criminal Code, "Illegal Enterprise" ("operating an illegal enterprise without registration or a special permit (license), in cases where such permit (license) is obligatory"), in conjunction with Article 174.1(1), which criminalizes the use of illegally generated proceeds for "pursuance of entrepreneurial or another economic activity."[22] Because Article 174, in contrast to U.S. money laundering laws, is not based on a

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Dec. 30, 2009, at A7, *available at* http://online.wsj.com/article/SB126212533991109359.html; *see* Thomas J. Evans, *The Unusual History of Ether* (2008), http://www.anesthesia-nursing.com/ether.html. *See also Materiali Dyela Khimikov NPK Sofeks*, [*The Case Materials Chemists*], http://www.himdelo.ru/material/podrobnee/008/ [hereinafter *Khimikov*] (describing the events of the arrest and subsequent proceedings).

14. Ugoloynyi Kodeks RF [UK] [Criminal Code] art.234 (Russ.).

15. *See Khimikov*, *supra* note 13.

16. *Id.*; Interview with Yanna Yakovleva, one of the defendants in the case, in Moscow, Russia (Feb. 2010) [hereinafter Yakovleva Interview] (on file with author).

17. Yakovleva Interview, *supra* note 16.

18. Sid Yanyshev, *Dyelo Veterinarov-Vreditelyei* [*Case Veterinary Pests*], GAZETA.RU, Dec. 26, 2003, http://www.gazeta.ru/2003/12/25/vovsemvinove.shtml.

19. Elya Vermisheva, *Prokuratura Moskvi priznala zakonnim izpol'zovaniye ketamina v veterinarnoi praktike* [*Prosecutors in Moscow have Recognized the Legitimate Use of Ketamine in Veterinary Practice*], GAZETA.RU, June 19, 2004, http://www.medlinks.ru/article.php?sid=16360.

20. *Id.*

21. *Id.*; *Prikaz Ministerstvo sel'skogo khozyaistva Rossisskoi Federatsii ot 29 Dekabrya 2003 g. N 1580/619 g Moskva ob utverzhdenii perechnya narkoticheskikh sredstv i psikhotropnikh veshestv ispol'zuyemykh v veterenarii* [*Order of the Ministry of Agriculture of the Russian Federation, Ministry of Health of the Russian Federation of December 29, 2003 Moscow N 1580/619 Approving the List of Narcotic Drugs and Psychotropic Substances Used in Veterinary Medicine*], Feb. 3, 2004, *available at* http://www.rg.ru/2004/02/03/veterinary-doc.html.

22. Ugolovnyi Kodeks RF [UK] [Criminal Code] arts.171, 174 (Russ.).

list of specified unlawful activities, any crime (with the exception of certain tax offenses) can be used as a money laundering predicate. Thus, taken together, these two statutes allow corrupt law enforcement officers to use a paperwork violation in a company's registration documents to charge the business owners with illegal entrepreneurship, declare all of the business's proceeds illegal, and then threaten the owners and employees with aggravated money laundering (an offense which carries up to 15 years incarceration and a fine equal to the defendant's total earnings).[23]

For example, such a scheme was allegedly used in the so-called "Pharmacists' Case." In that case, the lead defendant, Fyodor Dushin, co-owned a pharmacy in the city of Podolsk with a business partner, Vagif Kuliyev. Kuliyev sought to buy him out, but Dushin refused. According to Dushin, Kuliyev then initiated a criminal case against him and helped law enforcement officers plant false evidence, ostensibly showing that the pharmacy was distributing prescription medicines without an appropriate license. This formed the basis for an Article 171 illegal entrepreneurship charge which, in turn, provided a basis for charges of money laundering by an organized group under Article 174.1. Eventually, Dushin was sentenced to seven years incarceration and 10 of his employees were each sentenced to two years incarceration.[24]

According to Viktor Denisenko, a businessman in Taganrog recently subjected to similar charges, there are currently five prosecutions relying on the same combination of Articles 171 and 174 just in the city of Taganrog (population of approximately 260,000).[25] The abuse of these statutes has become so widespread that lawmakers recently announced a plan to redraft parts of the Criminal Code in order to make such schemes impossible by, for example, excluding proceeds from "illegal entrepreneurship" from the scope of Article 174.[26]

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23. *See, e.g., Dyelo farmatsevtov: obshchestvennaya otsenka prigovora* [*Lawsuit of the pharmacists: the public evaluation of the sentence*], DYELO FARMATSEVTOV, Apr. 6, 2009, http://www.himdelo.ru/hrono/podrobnee/139/; Aleksander Tveretin, *Obrasheniye k deputatam Gosudarstvennoi Dumi RF* [*Turning to Deputies of the State Duma RF*] (July 29, 2008), transcript *available at* http://www.himdelo.ru/prima/podrobnee/168/; Ugolovnyi Kodeks RF [UK] [Criminal Code] arts. 174.1 (Russ.).

24. *See* Tveretin, *supra* note 23. Kuliyev, who allegedly had responsibility for establishing and implementing the pharmacy's policies on distribution of medicines and also for all financial disbursements in the pharmacy, escaped prosecution altogether, a fact which seems to corroborate Dushin's claims that the case was orchestrated by him.

25. Denisenko was charged under Articles 171 and 174 on the grounds that his industrial machine parts laboratory allegedly lacked a necessary "supplemental license." Viktor Denisenko, *Kak menya naznachali prestupnikom* [*As they Appointed me the Criminal*] transcript *available at* http://www.kapitalisty.ru/prime/podrobnee/016/ (last visited Apr. 6, 2010); The Official Website of the City of Taganrog, http://www.taganrogcity.com/guide.html (last visited Apr. 6, 2010).

26. *See, e.g., Chast' Gosdumi Priznayet NeobkhoDimost'popravok v Stat'yu ob Otmyvanii Deneg* [*A Part of Gosduma Recognizes the Necessity of Amending the Statute Which Concerns Money Laundering*], FINAM FM, Nov. 10, 2010, http://finam.fm/news/39388/print/ [hereinafter – *Money Laundering*]. Partly in response to this initiative, in April 2010, the Duma amended Article 174.1 of the

B. Intellectual Property Squatting

"Intellectual property squatting"–the practice of registering trademarks and patents on brands and products already in use and then threatening civil or criminal litigation against the existing rights holders if they do not pay—is another prime example of legal abuse in Russia. According to one analysis, the business of misappropriating others' brands has reached "colossal proportions."[27] Russia has even spawned a class of professional IP "marauders"–lawyers who specialize in identifying trademarks and patents vulnerable to attack, registering them, and then initiating litigation against the true rights holders in order to force a buyback.[28] Allegedly, they earn hundreds of millions of dollars annually.[29] One famous trademark squatter, Sergey Zuykov, stated publicly that each successful case of squatting brings him approximately $10-15,000.[30]

Russia's IP squatters rely on a variety of legal techniques. For example, under Article 1486(1) of Part IV of the Civil Code, which regulates intellectual property rights, a trademark can be invalidated if not used for more than three years and anyone has the right to file an application to cancel a trademark on the grounds of non-use.[31] Zuykov relied on this provision to cancel and then re-register the Russian trademark of the American coffeehouse Starbucks (which had registered in Russia in 1997, but then delayed its entry into the market because of the financial crisis of 1998) in the name of a company he controlled.[32] Zuykov demanded a $600,000 payout from Starbucks to sell the trademark.[33] Although the company refused to pay and eventually won the case in court, Zuykov was able to delay Starbucks' entry into the Russian market by three years,[34] a fact which makes the threat of trademark extortion potent for other potential victims.

Similarly, in patent squatting schemes, a "patent racketeer" takes one distinctive aspect of an established product, describes that aspect in an original way, obtains a patent on that part, and then initiates litigation against the maker of the complete product.[35] One example might be obtaining a patent on a machine

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Criminal Code to exclude from its scope the use of criminal proceeds for the realization of entrepreneurial activity. *See* Ugolovnyi Kodeks RF [UK] 174.1.

27. *Mastera na Vsye Znaki* [*Masters of all Trademarks*], RUWEB, http://www.ru-web.com/index.php?vprn=yes&id=39 (last visited Apr. 14, 2010) [hereinafter *Masters of all Trademarks*].

28. *See, e.g.*, Dmitrii Denisov, *Intellektual'noye maroderstvo bez vzloma* [*Intellectual Looting without the Breaking*], BIZNES-ZHURNAL, Jan. 25, 2006, http://www.linnik-patent.com/article0030.html.

29. *Masters of all Trademarks*, *supra* note 27.

30. *Patentnyi reket v Rossii: Vorovstvo tovarnykh znakov i brendov* [*Trademarks: Racketeering of Patents in Russia*], http://www.advertme.ru/znaki/9 (last visited April 8, 2010).

31. Grazhdanskii Kodeks RF [GK] [Civil Code] Part IV, art.1486(1) (Russ.).

32. *See* Denisov, *supra* note 28; Andrew Kramer, *After Long Dispute, A Russian Starbucks*, N.Y. TIMES, Sept. 7, 2007, at C3, *available at* http://www.nytimes.com/2007/09/07/business/worldbusiness/07sbux.html.

33. *See* Denisov, *supra* note 28; Kramer, *supra* note 32.

34. Kramer, *supra* note 32.

35. Dmitrii Denisov, *Ostorozhno Zliye Patenti*! [*Careful, Evil Patents!*], BIZNES-ZHURNAL, Sept.

that produces cavitation bubbles of a certain size at a certain depth in water at a certain temperature and then suing manufacturers of Jacuzzis for infringement.[36] In one famous case, a company called Technopolis took one aspect of the design of bottles used by several beer makers – a rounded cone-like shape at the top – described it in a novel, complicated and almost incomprehensible way (referring, in part, to vessels with fragments of a slanted conical diameter with an inside and outside) obtained a patent on this "design" and then demanded 5% of the beer companies' proceeds.[37] Eventually, the beer companies were able to get the Technopolis patents annulled.[38]

Patent racketeers typically rely on a "utility model patent," a simplified form of patent, not available in the United States, which does not require an extensive world-wide search for analogous products or a thorough examination of the product's originality.[39] According to the World Intellectual Property Organization (WIPO), utility model patents are primarily designed for small and medium sized businesses that make minor improvements to and/or adaptations of existing products.[40] Therefore, the applicant often does not need to prove an "inventive step" or "non-obviousness" of the invention, as is the case with ordinary patent applications, and patent offices do not make a substantive examination of the application of the patent before approving it.[41] For example, under Russian law, an invention can be patented if it is: (1) new; (2) has "inventive level" (i.e. inventive step); and (3) has industrial application.[42] For utility models, however, the requirements are relaxed and the applicant need not demonstrate "inventive level."[43]

30, 2008, http://www.business-magazine.ru/trends/competition/pub307157.

36. *Id.*

37. *Id.*

38. Tatyana Samoilova, *Kak ya izobrel butylku, gvozd' i skvorechnik*, [*How I invented the bottle, the nail, and the birdhouse*], I2R INTERNET LIBRARY, http://i2r.ru/static/494/out_9815.shtml (last visited Apr. 6, 2010).

39. *See* Vladislav Sorokin, *Taina Patentnykh Trollei* [*The Secret of Patent Trolls*] (NTV Television broadcast July 6, 2009 at 19:19) *available at* http://ip.ntv.ru/news/2745/.

40. *See* World Intellectual Property Organization (WIPO), *Protecting Innovations by Utility Models*, http://www.wipo.int/sme/en/ip_business/utility_models/utility_models.htm (last visited Apr. 6, 2010).

41. *Id.* According to WIPO, only a small but significant number of countries make utility model patents available. These include: Albania, Angola, Argentina, ARIPO, Armenia, Aruba, Australia, Austria, Azerbaijan, Belarus, Belize, Brazil, Bolivia, Bulgaria, Chile, China (including Hong Kong and Macau), Colombia, Costa Rica, Czech Republic, Denmark, Ecuador, Estonia, Ethiopia, Finland, France, Georgia, Germany, Greece, Guatemala, Honduras, Hungary, Indonesia, Ireland, Italy, Japan, Kazakhstan, Kuwait, Kyrgyzstan, Laos, Malaysia, Mexico, OAPI, Peru, Philippines, Poland, Portugal, Republic of Korea, Republic of Moldova, Russian Federation, Slovakia, Spain, Taiwan, Tajikistan, Trinidad & Tobago, Turkey, Ukraine, Uruguay and Uzbekistan. *See* WIPO, *Where can Utility Models be Acquired?*, http://www.wipo.int/sme/en/ip_business/utility_models/where.htm (last visited Apr. 6, 2010).

42. Grazhdanskii Kodeks RF [GK] [Civil Code] Part IV, art.1350(1) (Russ.).

43. Grazhdanskii Kodeks RF [GK] [Civil Code] Part IV, art.1351(1) (Russ.).

Whatever their merits may be, the relative ease of obtaining utility model patents makes them ideally suited to abuse. As one Russian lawyer said, a utility model patent can be obtained on almost any product, so long as it is described in an original way. For example, one could theoretically obtain a utility model patent for a standard eyeglass case by describing the plastic trim at the intersection of the two sides as a distinguishing characteristic guaranteeing the hermetic seal of the case.[44] Other lawyers claim that not even this much is required, and that a utility patent model can be obtained on almost any product which is not already patented within six months, as no substantive review is required.[45] Although utility model patents generally enjoy lesser protection than ordinary patents (in Russia, they are protected for 10 years, while ordinary patents are protected for 20 years[46]), this is still more than enough time for the patent racketeer to shake down his prey (especially given that annulling a utility model patent can often take up to three years[47]). And under Russian law, when a patent holder, no matter how nominal or dubious his claim to the patent may be, brings an infringement suit, the burden is on the defendant to prove non-infringement, rather than on the plaintiff to prove the validity of the underlying patent, a rule which facilitates extortionate litigation.[48]

Patent extortion is also facilitated by the fact that Russian law, in contrast to U.S. law, provides for criminal liability for patent infringement.[49] This allows patent racketeers to enhance their threats by initiating criminal prosecutions against "infringers." According to Daniel Klein, a U.S. patent attorney practicing in Moscow and a partner in the law firm of Hellevig, Klein & Usov, the cost to a patent racketeer of initiating a criminal proceeding against his victim is relatively low. However, once the criminal case begins, the victim may face serious business disruptions because law enforcement authorities can seize property, temporarily close importation and manufacturing operations, and arrest the business's managers. Such attacks disrupt the company's physical operations and drive away customers, who may fear criminal prosecution for purchasing potentially infringing products and/or be prohibited from doing business with suppliers under criminal investigation. In short, the combination of operational disruption and reputational damage resulting from a racketeer's attack can destroy a legitimate business.[50]

Moreover, annulling a utility model patent that was obtained in bad faith can often take three years, thus creating the likelihood that the victim "infringer" will be prosecuted and serve his sentence before he succeeds in demonstrating the

44. Denisov, *supra* note 35.

45. Interview with Daniel Klein, Partner-In-Charge, Hellevig, Klein & Usov, in Moscow, Russ. (Dec. 17, 2009) (on file with author); Interview with Denis Uzoykin, in Moscow, Russ. (Dec. 17, 2009) (on file with author).

46. Grazhdanskii Kodeks RF [GK] [Civil Code] art.1363(1) (Russ.).

47. *See* Klein, *supra* note 45; Uzoykin, *supra* note 44.

48. *See* Sorokin, *supra*, note 39.

49. Ugolovnyi Kodeks [UK] [Criminal Code] art.147 (Russ.).

50. E-mails from Daniel Klein, Partner-In-Charge, Hellevig, Klein & Usov, to author, (Feb. 2010) (on file with author).

invalidity of the faux patent, which gave rise to his criminal prosecution.[51] Finally, Russian law does not clearly criminalize squatting,[52] thus allowing squatters to claim, as Zuykov once stated, "it's not fair, but it's legal."[53]

C. Corporate Raiding ("Reiderstvo")

Corporate raiding ("reiderstvo"), a phenomenon which President Medvedev has called "shameful" and which the Ministry of Internal Affairs (MVD) estimates generates approximately 120 billion rubles (approximately $40 million) a year in illegal profits, is "legal racketeering" at its worst.[54] Raiding lacks an official legal definition in Russia and the word is used carelessly to describe a number of unethical business practices. For purposes of this article, corporate raiding will be defined as the seizure, or attempted seizure, of a business or a substantial part of its assets, through the corrupt reliance on a legal document, including, but not limited to, a court order, judicial decision, corporate resolution, corporate charter document, or state registration document. The execution of a corporate raid typically involves the following three stages: (1) the raider creates or corruptly obtains a legal document establishing faux legal title to some assets, usually shares or real property of a business; (2) the raider carries out a forcible takeover of the target property; and (3) the raider launders the seized property through a series of shell companies to an ostensible "good faith purchaser" from whom it is essentially impossible to recover the property. Typically, the shell companies disappear as soon as they have fulfilled their purpose and the victim is left with no one to pursue. Each stage relies on abuse of the legal system.

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51. There is some indication that intellectual property racketeering has now moved into cyberspace. According to one report, Burger King recently filed suit against squatters who registered the internet domain name burgerking.ru. *See* Christina Busko, *Forgery of a Hamburger*, KOMMERSANT, Dec. 23, 2009, http://www.kommersant.ru/doc.aspx?DocsID=1297726.

52. For example, there is no article in the Criminal Code on intellectual property squatting. Article 147 of the Criminal Code criminalizes, *inter alia*, the "illegal use of a ... utility model" but it is not clear if this applies only to the misappropriation of a third party's utility model or to the (mis)use of one's own utility model for extortionate purposes. Ugolovnyi Kodeks [UK] [Criminal Code] art.147 (Russ.). Article 180 of the Criminal Code criminalizes the illegal use of "another's" trademark, thus seemingly excluding the use of one's own trademark for extortionate purposes. Ugolovnyi Kodeks [UK] [Criminal Code] art.180 (Russ.). Finally, Article 163, Extortion, applies by its terms to threats to damage "another's property." Ugolovnyi Kodeks [UK] [Criminal Code] art.163 (Russ.). It is not clear how this statute applies in a situation where the victim no longer holds legal title to the intellectual property in question because such title has been acquired by the squatter. The author is unaware of any criminal prosecutions of squatters under Article 163 and is unaware of any legal authority the applicability of Articles 147, 163 or 180 to intellectual property squatting.

53. Andrew Kramer, *Ex-salesman Stalls Starbucks' Russian Entry*, INDIAN EXPRESS, Oct. 13, 2005, http://www.indianexpress.com/oldStory/79886/.

54. *See, e.g.*, Rosbalt Informationnoe Agenstvo [Rosbalt Information Agency], *Medvedev: Za Reiderstvo Nuzhno Bit' po Rukam* [*Medvedev: Corporate Raiding Should be Punished*], http://www.rosbalt.ru/2008/02/27/460264.html (last visited Apr. 14, 2010); Philip Aldrick, *Exposing Russia's Corporate 'Corruption'*, Apr. 4, 2008, http://www.telegraph.co.uk/finance/markets/2787471/Exposing-Russias-corporate-corruption.html; PAVEL ASTAKHOV, PROTIVODEISTVIYE REIDERSKIM ZAKHVATAM 5-6 (2007).

Stage 1 - Obtaining the Documents

In the most blatant schemes, the raider simply creates false legal documents purporting to establish title to the property he intends to take. For example, in one 2005 case in Moscow, a real estate developer was convicted of creating false documents purporting to establish ownership of 400 hectares of land, worth 6.5 million rubles.[55] Sometimes, the raider blackmails or bribes an employee of the target company for access to the documents, which are then falsified to install a false board of directors. According to court documents from one recent case, a St. Petersburg organized crime boss, Vladimir Barsukov, a/k/a "Kumarin," and several of his associates were convicted of a raiding scheme in which they deposited false documents with the State Registry of Corporate Entities, purporting to transfer ownership of the target businesses to Kumarin's co-conspirators. This official registration then generated other official documents which were used as the pretext for the forcible takeover of the businesses. In some cases, officials at the State Registry were simply deceived into believing that the deposited documents were authentic. In other cases, they were bribed to accept documents that they knew to be false.[56]

In more sophisticated schemes, the raider files a lawsuit against the target, often in a remote location where the raider has influence over the local judiciary, and then obtains a judicial order authorizing seizure of some or all of the target's assets.[57] This tactic was allegedly used in the much publicized Ilim Pulp case, which involved an attempted (but unsuccessful) raid of Ilim Pulp, Russia's largest forest products company by an entity controlled by oligarch Oleg Deripaska. In 2002, a minority shareholder in one of Ilim's mills filed suit in a remote location in Siberia, alleging that Ilim had failed to comply with all the terms of its 1994 privatization.[58] A judge awarded the plaintiff $113 million in damages, confiscated two-thirds of the mill's stock, and transferred the stock to the St. Petersburg State Property Committee, which then sold the stock to Deripaska and his partner.[59] Ilim

55. Denis Tykulov, *Prokuratura Proveryaet Skupshchikov Podmoskovnykh Zemel'* [*Prosecution Checking Buyers of Land in the Moscow Suburbs*], GZT.RU NOVOSTI [GZT.RU NEWS], http://gzt.ru/print.phpp=home/2005/12/19/211137.html (last visited Apr. 14, 2010).

56. *See* Prigovor Imenem Rossiiskaia Federatsii [Conviction by the Russian Federation], ROSSIISKAIA GAZETA [Ros. Gaz.] Nov. 12, 2009 (Russ.) Case No. 1-41/09 [hereinafter Kumarin Judgment] (on file with author), 8, 14. The Kumarin case is the largest raiding case which has been successfully prosecuted in Russia and the court's very detailed judgment provides a rich source of information on the mechanics of raiding schemes. Therefore, this article relies extensively on the judgment. *See also* Vladimir Fedosenko, *Srok i Avtoritet* [*Time and "Authority"*], ROSSIISKAIA GAZETA [Ros. Gaz.] Nov. 13, 2009, *available at* http://www.rg.ru/2009/11/13/barsukov.html.

57. Ivan Novitskii, Tezisy doklada deputata Moskovskoi gorodskoi dumy [Theses of the report of a Deputy of the Moscow City Duma] 7 (Nov. 16, 2007) (unpublished manuscript, on file with author) (presented at roundtable on raiding, Moscow Oblast Advocates Chamber).

58. Sabrina Tavernise, *Handful of Corporate Raiders Transform Russia's Economy*, N.Y. TIMES, Aug. 13, 2002, at A1; Daniel J. McCarthy & Sheila M. Puffer, *Ilim Pulp Battles a Hostile Takeover, in* CORPORATE GOVERNANCE IN RUSSIA 300, 304 (Daniel J. McCarthy, Sheila M. Puffer & Stanislav V. Shekshnia eds., 2004).

59. Tavernise, *supra* note 58, at A1; McCarthy & Puffer, *supra* note 58, at 304.

Pulp's owners claimed that they were never notified of the suit, (though Deripaska claimed that notice had been sent by mail.)[60] The Deripaska companies then sent in a private security force to seize the mill and court bailiffs arrived with an order installing a new director.[61] However, the mill's owners refused to yield and filed several countersuits against the Deripaska companies.[62] Eventually, according to Ilim, the case was settled amicably out of court.[63]

The same tactic was also allegedly used in a shareholder dispute within the telecommunications company, VimpelCom, between shareholders Telenor, a Norwegian telecommunications company, and Alfa Group, a Russian investment group. In that case, Farimex, a tiny Virgin Islands company that owned less than 1% of VimpelCom filed suit against Telenor in a remote court in Siberia, a location that had no discernible connection to the case. Nevertheless, the Siberian court (at 2:00 a.m. on a Saturday) handed down a $1.7 billion damage award on behalf of Farimex.[64] This award was then used to freeze Telenor's assets in an effort to compel it to pay $1.7 billion to Farimex. [65]

Other tactics are also possible. For example, one lawyer told the author about a situation in which a land raider offered the legitimate occupants the opportunity to rent the land on extremely favorable terms. When they agreed, the rent agreements were offered in court as evidence of their affirmation of his legal title to the land.[66]

Stage Two – Takeover

During stage two, the documents obtained during Stage One are used as legal cover for the forcible takeover of the target business. For example, in the Telenor case discussed above, a lawyer for Farimex justified Alfa's attempts to force Telenor to pay $1.7 billion by stating that "Everything is happening in strict compliance with the law."[67] Similarly, the court's judgment in the Kumarin case identifies several instances in which the raiders used corrupt registration documents during the forcible seizure of target businesses.[68] A dramatic illustration of this tactic is provided in the novel *Raider* by Pavel Astakhov, a well-

60. Tavernise, *supra* note 58, at A1.

61. *Id.*

62. *Id.*; McCarthy & Puffer, *supra* note 58, at 305.

63. Hugo Miller & Yury Humber, *Determined Deripaska Casts a Long Shadow*, THE ST. PETERSBURG TIMES, Apr. 29, 2008, *available at* http://www.sptimes.ru/index.php?story_id=25836&action_id=2.

64. Dan Sabbagh, *Telenor to Fight Siberian Court Order*, The TIMES (London), Aug. 18, 2008, *available at* http://business.timesonline.co.uk/tol/business/industry_sectors/telecoms/article4553417.ece.

65. Nadia Popova, *Court Marshals Order Sale of Telenor Stake in VimpelCom*, THE ST. PETERSBURG TIMES, June 23, 2009, *available at* http://www.sptimes.ru/index.php?action_id=2&story_id=29306.

66. Interview with Vladmir Lisnyak, Attorney, in Moscow, Russ. (Mar. 2009) (on file with author).

67. Popova, *supra* note 65.

68. Kumarin Judgment, *supra* note 56, at 11.

known Russian lawyer. In the novel, the head of the victim business is confronted in his office by the raider's armed thugs, who tell him that he has lost his position and must leave. The victim protests and calls the police. When the police arrive, a judicial marshal working with the raiders presents a package of documents, including minutes of a shareholders' meeting at which a new board of directors was selected and a judicial order restraining 90% of the corporate shares. Satisfied that the takeover is legally authorized, the police officers let the raiders continue their business.[69]

Stage 3 – Laundering

During the "laundering" stage, the raider typically transfers the seized assets through a series of shell companies to an ostensible "good faith purchaser," exploiting provisions of Russian law which make recovery of misappropriated assets from a "good faith purchaser" almost impossible.[70] What this means, as a practical matter, is that even if a raiding victim succeeds in obtaining a court ruling voiding the transfer of his company's assets, he cannot recover the misappropriated assets. As the Chief of the Investigative Committee of the General Procuracy, Aleksander Bastrykhin, has written, "after a raiding takeover, the property is laundered through a series of fictitious or offshore firms and eventually becomes the property of a good faith purchaser. Demanding it from such an entity is practically impossible."[71] Similarly, an August 2008 report by the National Anti-Corruption Committee cites a typical case in which raiders falsified corporate documents and transferred the seized assets through a series of offshore shell companies to another offshore shell company which, relying on its alleged good faith purchaser status, sent in its security forces to forcibly remove the real owners from the property.[72]

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69. PAVEL ASTAKHOV, REJDER [RAIDER] 25-26 (2008).

70. Article 167 of the Russian Civil Code provides that when a transaction is declared invalid, each of the parties to the transaction must return to the other everything it has received in the deal or make appropriate monetary compensation. Grazhdanskii Kodeks RF [GK] [Civil Code] art.167 (Russ.). However, Russia's Constitutional Court held that these provisions "cannot be extended to a good faith purchaser unless this is specifically provided by statute." WILLIAM BURNHAM, PETER B. MAGGS & GENNADY M. DANILENKO, LAW AND LEGAL SYSTEM OF THE RUSSIAN FEDERATION 356 (Juris Publishing 3d ed. 2004). By contrast, U.S. law allows for recovery of assets from a third party in a civil proceeding upon a showing that the purchaser "possesses knowledge of facts that suggest a transfer may be fraudulent." *See* Banner v. Kassow, 104 F.3d 352, 352 (2d Cir. 1996). In addition, some states recognize a "larceny exception" which defeats even a good faith purchaser's claim when it can be shown that that the seller acquired title to the transferred property by larceny. Dimension Funding LLC v. DKA Assocs., Inc., 191 P.3d 923, 926 (Wash. Ct. App. 2008). For a complete discussion of the aspects of Russian law that make recovery from a good faith purchaser difficult, see Firestone, *supra* note 3.

71. Letter and recommendations from A.I. Bastrykhin, Chairman of the Investigative Comm. of the Procuracy of the Russian Fed'n, to E.P. Velikhov, Chairman of the Counsel of the Public Chamber of the Russian Fed'n para 2 (Oct, 30, 2009) (on file with author) [hereinafter Bastrykhin Letter].

72. DOKLAD NATIONAL'NOGO ANTIKORRUPCIONNOGO COMMITTETA [NATIONAL ANTICORRUPTION COMMITTEE REPORT], PREDLOZHENIYA PO POVYSHENIYU EFFEKTIVNOSTI BORBY S REIDERSTVOM (NEZAKONNYM ZAKHVATOM SOBSTVENNOSTI) [SUGGESTIONS TO INCREASE

This technique was also at the heart of the Kumarin case. According to the court's judgment, Kumarin's organization recruited co-conspirators to pose as "good-faith purchasers" and then arranged the sale of the seized businesses from one to the other.[73] Kumarin even retained lawyers to create litigation among the good faith purchasers,[74] a process which obscures the legal status of the misappropriated assets, making their recovery, and any possible criminal prosecution, more difficult. Bastrykhin considers abuse of the law on good faith purchasers to be so severe that he recommends changing the traditional rule to make it easier for raiding victims to get property back from even legitimate good faith purchasers.[75]

D. Collusive Litigation

Perhaps the most sophisticated form of legal abuse involves collusive litigation, in which a party concocts uncontested litigation with the goal of obtaining a judicial decision that can be used for criminal purposes. Collusive litigation is sometimes used as a means to effectuate a raid (as, for example, in Kumarin's orchestration of suits among the various "good faith purchasers" through whom he laundered the raided business assets). But it can also be used in support of other fraudulent schemes. For example, collusive litigation was allegedly at the heart of a massive tax fraud in the infamous Hermitage Capital case. According to Hermitage, raiders, operating in conjunction with law enforcement officials, obtained a search warrant for the offices of certain Hermitage law firms located in Moscow. During the search, the officials seized corporate seals, charters and articles of association of Hermitage investment companies, transferred ownership of the seized companies to co-conspirators, and sued the misappropriated companies, using shell companies as the nominal plaintiffs.[76] According to court documents, lawyers representing the seized companies conceded the claims entirely and the courts entered judgments against the seized companies for hundreds of millions of dollars.[77] Using these judgments, the raiders claimed that the lawsuits had wiped out the historic profits of the seized companies and obtained a refund of $230 million in "overpaid taxes" from the government.[78]

EFFECTIVENESS IN THE FIGHT AGAINST ILLEGAL SEIZURE OF PROPERTY] 13-14 (MA Krasnov, KV Kabanov, CB Vasya, EM Golenkovoy & GA Shantina, eds., 2008) (unpublished manuscript, on file with author), [hereinafter NACC Report].

73. Kumarin Judgment, *supra* note 56, at 9, 13.

74. *See, e.g., id.* at 7.

75. Bastrykhin Letter, *supra* note 71, at para. 2.

76. *See Persecution of Hermitage Capital in Russia in Order to Steal US $230 Million from the Russian People,* LAW AND ORDER IN RUSSIA, Oct. 7, 2009, http://lawandorderinrussia.org/news releases/presentations/ [hereinafter *Persecution of Hermitage*].

77. *Id.* at 26, 56. *See also* Protokol Sudebnogo Zasedaniya [Protocol of Legal Proceeding], No A5622479/2007 (Arbitrazhniy Sud Sankt-Peterburga i Leningradskoj Oblasti [Arbitration Court of St. Petersburg and Leningrad Region] Aug. 28, 2007) (on file with author).

78. *Persecution of Hermitage*, *supra* note 76, at 50.

According to Russian experts, collusive litigation is also used in complex frauds that typically work as follows. The corporation perpetrating the fraud (the "fraud corporation") enters into a contract, often with a foreign party (the "counter-party"). In order to protect itself against the vagaries of the Russian court system, the counter-party inserts a clause requiring that disputes be adjudicated in an international arbitral forum. The counter-party performs its obligations under the contract. The fraud corporation does not. The counter-party avails itself of the arbitration clause, files a claim, and wins an award. The fraud corporation then arranges for a shareholder to bring a suit in a Russian court alleging that the contract should be declared null and void because the representative who entered into the contract on behalf of the fraud corporation lacked the requisite authority under Russian law or had an interest in the transaction. The corporation does not contest the charge in any meaningful way and the court finds that the contract was entered into in violation of the corporation's internal rules and declares the entire contract, including the arbitration clause, null and void. As a result, the arbitration award cannot be enforced and the fraud corporation walks away with the benefits of the contract, but no liability.[79]

Perpetrators of such schemes often create the fraud corporation solely to enter into the contract and deliberately create violations during negotiations with the goal of using the violations to later invalidate the contract.[80] Schemes such as these are made possible by several aspects of Russian corporate law, including: (1) provisions that certain major transactions and transactions involving a possible conflict of interest can be declared null and void if entered into without shareholder approval or the approval of the Board of Directors, or in some cases, shareholder approval;[81] (2) provisions allowing almost any shareholder, whether or not the individual held stock at the time of the transaction, to challenge a corporate transaction;[82] (3) the absence of serious penalties for bad faith litigation;[83] and (4)

79. B.R. KARABEL"NIKOV, KOSVENNIYE ISKI KAK SPOSOB UZAKONIT NARUSHENIE ROSSIISKIMI KOMPANIAMI IKH SOBSTVENNYKH OBIAAZATELSTV [Indirect Lawsuits by Russian Companies as a Way to Legalize the Breach of Their Responsibilities] 1 (2007) (on file with author).

80. Conversation with P.A. Skoblikov, Professor, Acad. of Mgmt. of the Ministry of Interior Affairs of Russ. (Dec. 29, 2009) (on file with author).

81. *See, e.g.*, Federal'nyi Zakon ob Aktsionernykh Obshestvakh [FZAO] [Federal Law on Joint Stock Companies] (2007), No. 120, art. 79(1) (requiring that a large scale transaction must be approved by Board of Directors or General Shareholders Meeting as provided for herein); *id.* art. 79(3) (requiring that a transaction involving more than 50% of the balance price of the corporation's shares must be approved by 75% of voting shareholders at a general shareholders' meeting); *id.* art. 79(6) (indicating that a major transaction concluded in violation of the Federal Law on Joint Stock Companies can be declared null and void based on a suit by the corporation or a shareholder); Federalnyi Zakon ob Obshestvakh s Ogranichenoi Otvetsvenostyu [Federal Law on Limited Liability Companies] [FZOOO] (2007), No. 14-FZ, art. 45(3) (requiring that a transaction involving a conflict of interest must be approved by a general shareholders' resolution); *id.* art. 45(5) (requiring that a transaction involving conflict of interest concluded in violation of art. 45 of the Law on Limited Liability Corporations can be declared null and void based on a suit brought by the corporation or a shareholder); KARABEL"NIKOV, *supra* note 79, at 1, 2.

82. FZAO, *supra* note 81, art. 79(6); FZOOO, *supra* note 81, art. 45(5); KARABEL"NIKOV, *supra* note 79, at 2.

Russian courts' reluctance to award quantum meruit damages in breach of contract cases.[84]

A collusive litigation scheme was apparently used in part of the litigation discussed above between Telenor and Alpha. Telenor and Alpha jointly owned Kyivstar, a Ukrainian telecommunications venture, pursuant to a contract that provided for arbitration of any disputes before an arbitral tribunal in New York.[85] Eventually, Telenor fell into a dispute with the subsidiary through which Alpha exercised its ownership of Kyivstar, an entity named Storm, and initiated arbitration against Storm in New York.[86] Storm then initiated a lawsuit in Ukraine in which Alpren, a company which owned a minority share of Storm, sought a declaration that the Storm-Telenor contract was invalid because Storm's General Director had concluded it without the requisite shareholder approval.[87]

According to a court in the Southern District of New York which was called upon to consider the arbitrability of the Storm-Telenor dispute, the Ukrainian litigation had a "number of curious features."[88] For example, Storm did not retain counsel or file any written opposition.[89] Storm's legal representative in the case was not a lawyer, but was the Vice President of the holding company that owned both Storm and Alpren.[90] The proceeding lasted just ten minutes and, not surprisingly, given the lack of any opposition, ended in a ruling that the shareholders' agreement was invalid.[91] Moreover, when Storm appealed the decision, it failed to submit any real defense of its position.[92] The appellate court not only affirmed the lower court's decision against Storm, but broadened it by finding specifically that the Arbitration Agreement was invalid, a ruling which Storm used to contest the arbitrability of the dispute in New York.[93] After extensive litigation, the Southern District of New York rejected Storm's arguments, finding that "Storm colluded in the bringing of this litigation against itself," held the dispute arbitrable, and eventually upheld the arbitration panel's

83. *E.g.*, Grazhdanskii Protsessual'nyi Kodeks RF [GPK] [Civil Procedural Code] art. 99 (Russ.) (allowing courts to award damages to victims of bad faith litigation; however, such a provision is useless in deterring collusive litigation given that the "victimized" party is by definition connected to the offending party). *See also* Grazhdanskii Kodeks RF [GK] [Civil Code] art. 10 (Russ.) (stating broadly that "abuse of rights" shall not be permitted, but the only remedy it provides is for the court to refuse to protect the rights of the offending party, a remedy that would not have any effect in cases of collusive litigation). The Criminal Code does not criminalize collusive litigation or abuse of process.

84. KARABEL'NIKOV, *supra* note 79, at 2.

85. Storm LLC v. Telenor Mobile Commc'ns, No. 06 Civ. 13157 (GEL), 2006 WL 3735657, at 1 (S.D.N.Y. Dec. 15, 2006).

86. *Id.* at 1-2.

87. *Id.* at 2, 4.

88. *Id.* at 3.

89. *Id.* at 2.

90. *Id.* at 3.

91. *Id.*

92. *Id.*

93. *Id.*

award of relief to Telenor.[94] Storm then returned to Ukraine and through more collusive litigation obtained a ruling that compliance with the New York court's decision would place it in violation of Ukrainian law.[95] In rejecting this argument, the court stated:

> The [Ukrainian] opinions appear to be nothing more than a sham, a pseudo-legal excuse for Storm and the Altimo Entities to continue to refuse to do what they have all along refused to do. It is outrageous, though not surprising given their prior conduct in this matter, that Storm and the Altimo Entities would construct such a sham. It is both outrageous and surprising that their counsel-two esteemed New York law firms-would represent that sham to the Court, unexamined, as a bona fide basis for their clients' refusal to comply with the [arbitration panel's] Final Award.[96]

A recent legislative amendment based on a 2008 ruling by the Russian Constitutional Court in the "case of Surinov" may provide new opportunities for collusive litigation scams. The defendant, Tatevos Surinov, was convicted of embezzlement.[97] While the criminal case was proceeding, Surinov initiated litigation in the commercial (arbitrazh) courts[98] and obtained rulings that he had acquired the subject property legally. He then attempted to use these rulings to get the criminal case dismissed.[99] The court hearing the criminal case refused to give preclusive effect to the commercial court rulings.[100] Surinov then challenged his conviction in the Constitutional Court on the grounds that the criminal court's refusal to give deference to the rulings of the arbitrazh courts was unconstitutional. The Constitutional Court agreed, holding that the presumption of innocence requires courts of general jurisdiction to give deference to arbitrazh court rulings favorable to a criminal defendant.[101] In fulfillment of the Surinov decision, in 2009 President Medvedev signed into law amendments to the Code of Criminal

94. *Id.* at 12.

95. *Telenor*, 587 F. Supp. 2d at 608 n.14.

96. *Id.* One of the New York law firms was Cravath, Swaine & Moore LLP.

97. P.A. Skoblikov, *Preiuditsiya Aktov Arbitrazhnykh Sudov v. Ugolovnom Protsesse: Novoe Prochteniye* [*Prejudicial Acts of Arbitral Courts in Criminal Procedure: The New Reading*], 2 J. RUSS. L. 69, 75 (2008).

98. Russia has a tripartite court system consisting of: (1) arbitrazh or commercial courts which have jurisdiction over disputes between legal entities and between the state and legal entities; (2) courts of general jurisdiction, which are empowered to hear criminal cases as well as civil disputes between individuals and legal entities; and (3) the Constitutional Court, which is authorized to hear challenges to the constitutionality of certain statutes. BURNHAM ET. AL., *supra* note 70, at 50.

99. Skoblikov, *supra* note 97, at 75.

100. *Id.* at 77. Specifically, Surinov challenged the constitutionality of Article 90 of the Code of Criminal Procedure, which provides, in pertinent part, that a sentence imposed by a court of general jurisdiction has preclusive effect in a subsequent criminal investigation. Article 90 is silent with regard to the potentially preclusive effect of a ruling in a civil case, an omission generally understood to mean that a ruling by a commercial court has no preclusive effect in a criminal case. Ugolovno-Protsessual'nyi Kodeks RF [UPK] [Criminal Procedural Code] art. 90 (Russ.).

101. Bastrykhin Letter, *supra* note 71, at 12 (on file with author).

Procedure essentially making the factual findings of arbitrazh court decisions binding on investigators and prosecutors.[102]

'Like many of the other rules discussed in this article, the Surinov ruling and the amendments to Article 90 on issue preclusion appear well-motivated. However, in the hands of criminals, they could easily be abused. Some Russian experts contend that organized crime groups will now use collusive litigation in the arbitrazh courts to obtain desired rulings on property issues that will then be used to defeat criminal prosecutions or, even worse, initiate criminal prosecutions for malicious purposes.[103] For example, a fraudster accused of misappropriation of property could concoct litigation in the arbitrazh courts to establish faux title to the property in question and then use that ruling to obtain the dismissal of the criminal prosecution. Alternatively, raiders could orchestrate litigation in the arbitrazh courts to establish their title to someone else's property and then use the arbitrazh court ruling to initiate a criminal prosecution of the real property owner as part of a scheme to misappropriate the property.

III. CAUSES

Upon first glance, it may appear that widespread legal abuse in contemporary Russia is simply the result of state and judicial corruption. While there is undoubtedly truth to this, corruption does not appear to provide a complete explanation for at least two reasons. First, many of the schemes described herein do not require corruption. For example, in collusive litigation schemes, a judge presented with an uncontested claim has little choice but to enter judgment for the plaintiff.[104] Similarly, trademark squatters do not need to corrupt state officials if they identify trademarks that have lapsed. Patent squatters do not need to corrupt state officials if they are adept enough at drafting applications for utility model patents. And even raiding does not always require corruption. For example, while some of the state officials who registered fraudulent documents in the Kumarin case were bribed, others were simply deceived.[105] Second, to the extent that legal

102. *See* DOMINIQUE TISSOT & ANASTASIA PROZOR, CMS RUSSIA, RUSSIA TAX OUTLOOK #9 DECEMBER 2009 – JANUARY 2010: MAJOR AMENDMENTS TO RUSSIAN TAX LEGISLATION COMING INTO FORCE IN 2010, at 5 (2010) (discussing Federal Law "On Amendments to Part 1 of the Tax Code of the Russian Federation and Certain Regulations of the Russian Federation" No. 383-FZ dated 29 December 2009); KPMG, RUSSIAN LEGISLATIVE NEWS: TAX 2 (Feb. 10, 2010), http://www.kpmg.ru/russian/supl/publications/periodicals/RussiaLegislativeNews/2010/1_RLN_10.pdf (discussing Federal Law "On Amendments to Part 1 of the Tax Code of the Russian Federation and Certain Regulations of the Russian Federation" No. 383-FZ dated 29 December 2009).

103. *See* Skoblikov, *supra* note 97, at 80-81 (on file with author); Bastrykhin Letter, *supra* note 71, at 12-15 (on file with author).

104. It should be noted that Article 70(4) of the Arbitrazh Procedure Code provides that a judge should not accept a party's concession if there is a basis to believe that the concession was made with the goal of concealing certain facts. Arbitrazhno-Protsessual'nyi Kodeks RF [APK] [Code of Arbitration Procedure] art. 70(4) (Russ.). However, if the litigation is collusive and neither party has an interest in presenting the relevant facts, it is hard to know how the judge could identify a basis for rejecting the concession.

105. Kumarin Judgment, *supra* note 56, at 8 (on file with author).

abuse does rely on corruption, explaining it as the result of corruption is simply circular. It does not explain the underlying cause of the corruption or why it takes the particular form that it does. Therefore, an additional explanation must be sought elsewhere.

This explanation can be found in the continuing legacy of certain aspects of the Soviet legal system. While the Russian legal system has, of course changed since Soviet times, the current legal system is still heavily influenced by its Soviet predecessor (which was, in turn, heavily influenced by its imperial predecessor). As President Medvedev has noted, fifteen years is not sufficient to overcome the legacy of traditional Russian legal attitudes.[106] According to the leading textbook on the Russian legal system:

> [T]he Soviet and imperial past have left their marks on Russia's legal system. This legacy affects not only the content of legal institutions and rules, but also underlying attitudes about the nature and significance of law and the way it should be reformed and enforced . . . . The effects of the traditional Soviet and imperial authoritarian administrative style are felt at every level and branch of government.[107]

For purposes of this article, three aspects of the Soviet legal system appear particularly relevant to explaining the prevalence of legal abuse.

First, the Soviet legal system was based on the notion that law is an instrument of political rule rather than a neutral system for the arbitration of disputes. According to historian Peter Solomon, "most Bolshevik leaders adopted an instrumental view of the law. Without enshrining the law as a value and always stressing the subordinate status of the law, Lenin and his colleagues used the law as a tool for implementing their policies."[108] The leading early Soviet legal theorist E. B. Pashukanis provided a theoretical rationale for this approach, writing: "In bourgeois-capitalist society, the legal superstructure should have maximum immobility—maximum stability—because it represents a firm framework of the movement of the economic forces whose bearers are capitalist entrepreneurs . . . . [L]aw occupies among us, on the contrary, a subordinate position with reference to politics."[109]

This approach reached practitioners, such as Procurator General Andrei Vyshinsky, who in 1935 wrote: "[t]here might be collisions and discrepancies between the formal commands of laws and those of the proletarian revolution . . . .

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106. *Dmitri Medvedev: Pravovoi nigilizm poiavilsia ne vchera* [*Dmitri Medvedev: Legal Nihilism Did Not Occur Yesterday*], VSLUH.RU NEWS, Nov. 5, 2008, http://www.vsluh.ru/news/politics/155483.html [hereinafter VSLUH.RU NEWS – *Legal Nihilism*].

107. BURNHAM ET. AL., *supra* note 70, at 6.

108. PETER H. SOLOMON, JR., SOVIET CRIMINAL JUSTICE UNDER STALIN 17 (1996).

109. BERMAN, *supra* note 2, at 42 (quoting E. B. Pashukanis, Director, Institute of Soviet Construction and Law, Sovetskoe Gosudarstvo i Revolutsiia Prava [The Soviet State and the Revolution of Law] (1930) *translated in* HUGH W. BABB, SOVIET LEGAL PHIL. 237-80 (1951)).

This collision must be solved only by the subordination of the formal commands of the law to those of party policy."[110]

Use of the law for political repression found its fullest and most dramatic expression in the "show trials" in which Stalin's political enemies were convicted of crimes against the state.[111] This public abuse of the legal system set an example for ordinary citizens, some of whom apparently began to use criminal denunciation to advance their personal interests. Historian Sheila Fitzpatrick maintains that one offshoot of the Stalinist terror was the denunciation by ordinary citizens of their neighbors and co-workers as a way of settling personal scores and advancing their personal interests.[112] Fitzpatrick cites one typical case that bears eerie similarity to contemporary raiding and commissioned prosecutions. Two con men joined a collective farm (kolkhoz), persuaded the kolkhoz members to criticize the chairman for abuse of power, then used these criticisms to write denunciations accusing him of corruption, all in order to get him replaced by their own man and obtain control of the kolkhoz assets for themselves.[113] Although the post-Stalin era saw significant reforms, according to Solomon, "[t]he Stalinist mold of criminal justice proved to have lasting significance, for it persisted for decades after the death of the tyrant . . . each of [the] core features of Stalinist criminal justice remained alive in the 1980s . . . ."[114] For example, the use of criminal prosecution to repress political dissent continued into the Brezhnev era.[115]

Given this history, it is not surprising that the post-Soviet period still maintains some features of what President Medvedev has termed "legal nihilism" (defined as disrespect for the law), a problem which he identified as a legacy of Russia's past.[116] It is also not surprising that many continue to view the law as an

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110. *Id.* at 42-43.

111. THE GREAT PURGE TRIAL, at ix-x (Robert C. Tucker & Stephen F. Cohen eds., 1965).

112. *See* SHEILA FITZPATRICK, EVERYDAY STALINISM: ORDINARY LIFE IN EXTRAORDINARY TIMES: SOVIET RUSSIA IN THE 1930S 205-08 (1999); Nellie H. Ohr, *The Care and Feeding of Homo Sovieticus,* H-RUSSIA, Mar. 2000, at 2 (reviewing SHEILA FITZPATRICK, EVERYDAY STALINISM: ORDINARY LIFE IN EXTRAORDINARY TIMES: SOVIET RUSSIA IN THE 1930S (1999)). *See also* Vladimir A. Kozlov, *Denunciation and Its Functions in Soviet Governance: A Study of Denunciations and Their Bureaucratic Handling From Soviet Police Archives, 1944-1953, in* ACCUSATORY PRACTICES: DENUNCIATION IN MODERN EUROPEAN HISTORY, 1789-1989, at 121, 133 (Sheila Fitzpatrick & Robert Gellately eds., 1997) (identifying "interested denunciations" directed against supervisors, co-workers and neighbors as one of the main forms of Stalin-era denunciation).

113. Sheila Fitzpatrick, *Signals from Below: Soviet Letters of Denunciation of the 1930s, in* ACCUSATORY PRACTICES: DENUNCIATION IN MODERN EUROPEAN HISTORY, 1789-1989, at 85, 107-08 (Sheila Fitzpatrick & Robert Gellately eds., 1997).

114. SOLOMON, *supra* note 108, at 453.

115. *See, e.g.,* ON TRIAL: THE SOVIET STATE VERSUS "ABRAM TERTZ" AND "NIKOLAI ARZHAK" (Leopold Labedz & Max Hayward eds., 1967) (discussing a case that occurred in 1966, during the Brezhnev Era 1964-1982).

116. VSLUH.RU NEWS – *Legal Nihilism, supra* note 106; Burnham, Maggs and Danilenko also note that "legal nihilism in the mass consciousness . . . continues to undermine efforts to install legality as a principle on which both society and the state should be based" and the Council of Europe has also identified the development of a "legal culture" of respect for the law as one of Russia's main tasks. BURNHAM ET AL., *supra* note 70, at 6-7.

instrument for achieving extra-legal ends. During the Soviet period, abuse of the law usually took the form of government use of the legal system for political ends. Today, with the disappearance of Soviet ideology, it appears to have devolved all too often into an instrument of extortion and fraud by criminals. But the underlying principle of utilitarian manipulation of the law for improper ends remains the same.

The second cause appears rooted in the Soviet legal system's relationship to private property. The Soviet legal system criminalized entrepreneurial activity, provided almost no protection for private property, and even provided a legal mechanism for the expropriation of property. As Burnham, Maggs and Danilenko write:

> According to Marx, the abolition of private ownership of [the] means of production was an absolute prerequisite for a just society. Guided by this theory, the Soviet communists nationalized all means of production and almost all private property . . . . As private property disappeared and a command economy replaced private industry and commerce, most of the private civil and commercial law disappeared.[117]

The legacy of this system lives on in laws like the criminal prohibition on "illegal entrepreneurship" that underlies many commissioned prosecutions, the uncertain protection of intellectual property rights underlying patent racketeering and trademark squatting, and the attitude among some law enforcement officials that the "terrorization" of business is acceptable. It also lives on in the split between general jurisdiction courts and arbitrazh courts (successors to the Soviet state arbitrazh system which settled disputes between state enterprises),[118] which make possible the issue preclusion schemes discussed above. Moreover, because of the absence of a well-defined body of law regulating property rights, the post-Soviet privatization of state assets was carried out without a firm legal framework. As a result, property rights in contemporary Russia are uncertain, making it possible to present a legal challenge to almost any property ownership, thus creating fertile ground for all the schemes discussed above.[119] This point is well illustrated by a recent survey in which 45 percent of Russian business owners said that Russian property law provides no protection against illegal takings by the state and 24 percent said that it actually facilitates the misappropriation of private property by the state.[120]

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117. BURNHAM ET AL., *supra* note 70, at 4-5.

118. *Id.* at 77.

119. SKOBLIKOV, *supra* note 7, at 35 (noting that pursuit of certain business activities in post-Soviet Russia almost inevitably involves violations of the law).

120. BUSINESS SOLIDARNOST': ORGANIZACIYA ZASCHITI PREDPRIYATIY [ORGANIZATION FOR PROTECTION OF ENTERPRISES], ISSLEDOVANIYA BIZNESS ZHURNAL-ONLAIN [INVESTIGATIONS OF THE BUSINESS JOURNAL-ONLINE], SCHITAETE LI VY CHTO ZAKONODATEL'NAYA BAZA I PRAVOPRIMENITEL'NAYA PRAKTIKA POLNOST'YU ZASHISHYAYET VASH BIZNES OT POSYAGATEL'STV SO STORONY GOSUDARSTVA? [DO YOU THINK THAT THE LAW AND ITS PRACTICE PROTECTS YOUR BUSINESS FROM ILLEGAL TAKING BY GOVERNMENT?] (2009), http://www.kapitalisty.ru/research/podrobnee/003/.

Third, the Soviet legal system was rigid, formalized and abstract, like European civil law in the 19th Century, before the advent of legal realism. As Burnham, Maggs and Danilenko write:

> [T]he Soviet legal system missed out on developments that took place in Western European civil law systems during the 20th [C]entury. One of these was the relaxation in Western continental systems of many of the more absolutist and dogmatic aspects of legal theory. In essence, many aspects of Soviet legal theory remained stuck in a "time warp." To the extent that it had a kinship with Western European civil law systems, Soviet legal theory reflected 19th Century ideas that had long ago been discarded by Western European legal scholars.[121]

Such a pre-legal realism approach provides fertile opportunity for those who seek to manipulate the letter of the law while violating the spirit of the law. For example, formalism encourages judicial actions based on facially valid documents without a meaningful inquiry into the process that generated the documents, thus making the system vulnerable to raiding and collusive litigation. It promotes the mechanistic enforcement of intellectual property rights that makes patent and trademark squatting possible, as well as the literal application of rules on "good faith purchasers" so often exploited by raiders. But perhaps most importantly, it limits judges' ability to hold parties to a flexible notion of "good faith" and to fashion practical, equitable remedies on a case by case basis, something that is essential to preventing the kinds of schemes discussed herein.[122] In short, as Jeffrey Kahn has written:

> Russia is not tabula rasa when it comes to law and legislation. Russia is not starting from scratch, which certainly has advantages, but it has the disadvantage of a lot of bad legal habits. Worst of these is a historical attachment to bare legal positivism as a tool for state control.[123]

IV. POSSIBLE CURES

Yet, not all is bleak. Consistent with President Medvedev's calls for an end to the "terrorization" of business, the government appears to be taking important initial steps to combat raiding and official extortion. Some of these measures are designed to prevent raiding, others to facilitate its prosecution.

A. Prevention

In terms of prevention, on July 19, 2009, the Duma passed a series of amendments to existing legislation, which was designed to limit the opportunities

121. BURNHAM ET AL., *supra* note 70, at 4.

122. *See, e.g.*, Gevorg Beknazar-Yuzbashchev, Zloupotreblenie Pravom i Printsip Dobroi Sovesti v Grazhdanskom Prave Rossii I Germanii [Abuse of the Law and the Principle of Good Conscience in Russian and German Civil Law] 3, 24-5, (2010) (unpublished Ph.D. dissertation, Avtoreferat, Institut Gosudarstva i Prava Rossiiskoi Akademii Nauk [The Russian Science Academy Institute of Government and Law]) (on file with author).

123. Jeffrey Kahn, *Vladimir Putin and the Rule of Law in Russia*, 36 GA. J. INT'L & COMP. L. 511, 520 (2008).

for raiding.[124] For example, in order to prevent schemes in which a raider obtains a judicial decision in a remote location freezing the target corporation's assets (as allegedly happened in the Ilim Pulp and Telenor/Farimex cases discussed above), the law requires that corporate disputes and motions for restraint of corporate assets be brought in the district where the corporation is located.[125] In order to prevent "sneak attacks," the law also requires commercial courts to post on their web sites information about the filing of the case and its progress.[126] To deter raids accomplished through falsification of the corporate register, the law amends the Law on Joint Stock Companies to provide that the company and its registrar will be subject to joint and several liability for shareholder losses resulting from improper maintenance of the shareholder register.[127] Other provisions of the July 19 amendments will make collusive litigation schemes more difficult. For example, one provision amends the law on limited liability companies to provide judges the discretion to refuse to invalidate corporate transactions concluded in violation of internal corporate rules if such violations were not "material" and did not cause damages to the company or the party bringing the claim.[128]

In another significant act, in December 2009, President Medvedev signed amendments to the Criminal Code which provide tax offenders the opportunity for exoneration from criminal liability if they pay their tax in arrears within a designated period of time and which eliminate pretrial detention in criminal tax investigations, two steps which are expected to reduce extortionate tax prosecutions.[129] In April 2010, the Duma passed legislation restricting the possibility of pre-trial detention in cases involving white collar crimes, including fraud and money laundering.[130] This legislation will also make it much more difficult to use criminal prosecution to extort businesses.

B. Prosecution

In terms of prosecution, the Kumarin case, which resulted in a fourteen-year sentence for Kumarin and convictions for seven other members of his gang, was a notable success in the battle against raiding.[131] To facilitate future raiding

124. *See, e.g.*, Federal'nyi zakon ot 19 iyulya 2009 O vnesenii izmenyenii v otdel'nye akti Rossisskoi Federatsii [Federal Law of July 19, 2009 on Amending Some Legislative Acts of the Russian Federation] 2009, N. 205-FZ [No. 205-FZ] [hereinafter July 19, 2009 Law]. Arbitrazhnyi Protessual'nyi Kodeks RF [APK] [Code of Arbitration Procedure] arts. 38(4.1), 99(3.1) (Russ.).

125. *See* July 19, 2009 Law, art. 10.

126. Arbitrazhnyi Protessual'nyi Kodeks RF [APK] [Code of Arbitration Procedure] art. art. 225.4(1) (Russ.).

127. July 19, 2009 Law, art. 3; FZAO, art. 44(4), *in* BERNARD S. BLACK, REINIER KRAAKMAN & ANNA S. TARASSOVA, GUIDE TO THE RUSSIAN LAW ON JOINT STOCK COMPANIES app. III p. 36 (1998).

128. July 19, 2009 Law, art. 6; *see* FZOOO, art. 43.

129. TISSOT & PROZOR, *supra* note 102; *see* Yana Yakovleva, *Medvedev's Battle Against Legal Nihilism*, ST. PETERSBURG TIMES, Jan. 26, 2010, http://www.sptimes.ru/index.php?story_id=30693 &action_id=2 (discussing Federal Law "On Amendments to Part 1 of the Tax Code of the Russian Federation and Certain Regulations of the Russian Federation" No. 383-FZ dated 29 December 2009).

130. Ugolovno-Protessualnyi Kodeks RF [UPK] art. 108 1.1

131. Kumarin Judgment, *supra* note 56, at 168-71 (on file with author); Barsukov (Kumarin) Priznan Vynovnym po Delu o Reiderstve v Sankt Peterburge [Barsukov (Kumarin) Found Guilty of

prosecutions, Investigative Committee Chief Bastrykhin recently put forward a series of legislative proposals which include the following: (a) "introducing criminal liability for corruptly obtaining and using unlawful rulings from civil litigation" (this would facilitate the prosecution of collusive litigation schemes and raids based on corruptly obtained arbitrazh court decisions); (b)changing the law to give civil court decisions only a rebuttable presumption of preclusive effect in criminal cases and creating a mechanism for prosecutors to appeal decisions of arbitrazh courts (this would help address the Surinov problem); and (c) amending the law on good faith purchasers to address the laundering aspects of raiding.[132]

Moreover, in 2009 a new law on cooperating witnesses took effect. The law provides, in pertinent part, that defendants who cooperate completely and honestly, as certified by the prosecutor and judge, cannot be sentenced to more than one-half of the otherwise applicable maximum sentence.[133] While applicable to all multi-defendant cases, this law could be especially valuable in raiding prosecutions. As Bastrykhin notes, prosecuting crimes that use corrupt judicial rulings is difficult because it requires proof that rulings which are facially valid were corruptly obtained with criminal intent.[134] Testimony from insiders who were part of the scheme is often the only way to obtain such evidence and the new cooperating witness law will, for the first time, provide Russian prosecutors with a legal mechanism to reward witnesses for such testimony.[135]

C. Expansion of Jury Trials

One solution that the government has not yet pursued may lie in the expansion of jury trials, currently available only for a limited class of criminal cases, to all criminal cases.[136] There are at least two reasons for this. First, trial by jury is a deterrent to commissioned prosecutions, a fact recognized even by America's founders. As Alexander Hamilton explained in Federalist 83, trial by jury provides security against corruption because it is much harder to corrupt a jury than a single judge. "By increasing the obstacles to success," Hamilton wrote, this "complicated agency" discourages "[a]rbitrary impeachments, arbitrary methods of

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Corporate Raiding in St. Petersburg], POLIT.RU NOVOSTI [POLIT.RU NEWS], Nov. 12, 2009, http://www.polit.ru /news/2009/11/12/Kumarin.html.

132. Bastrykhin Letter, *supra* note 71, at 14 (on file with author).

133. Federal Law 383-FZ, December 29, 2009 "On the Introduction of Amendments in the First Part of the Tax Code of the Russian Federation and Other Legislative Acts of the Russian Federation."

134. Bastrykhin Letter, *supra* note 71, at 1 (on file with author).

135. Russian prosecutors appear to appreciate the value of the law. In a recent survey conducted by the author, 109 out of 131 respondents indicated they think that the new cooperating witness law is an "essential" element in combating organized crime and stated that they intend to use the new law in their work. Survey by Thomas Firestone, Survey of Russian Prosecutors (2009) (on file with author). Moreover, the law is already being used. For example, according to statistics of the Sverdlovsk District Court, within the first three months, thirteen applications for cooperation were approved just in the city of Belgorod. Statistics of the Sverdlovsk District Court (Oct. 8, 2009) (on file with author).

136. Trial by jury is not available for illegal entrepreneurship, money laundering, fraud and criminal patent infringement – some of the statutes that are most commonly abused for extortionate purposes. Nor is it available for any civil cases.

prosecuting pretended offenses, and arbitrary punishments upon arbitrary convictions."[137] This theory seems to apply even more so in contemporary Russia. While the acquittal rate in bench trials is less than 1%, the acquittal rate in Russian jury trials is approximately 20%,[138] making commissioned prosecutions much less likely to succeed. Moreover, according to judges and former jurors, Russian juries regularly reject cases that they perceive as fabricated, commissioned, or brought for improper purposes.[139] For example, in 2007, feeling that they were all that had protected a businessman from wrongful conviction in a commissioned prosecution, a group of former jurors even formed an association to protect and expand trial by jury in Russia and to lobby for legal reform.[140] As one former investigator bluntly wrote on a Russian blog, "commissioned cases fall apart in jury trials."[141] Thus, the expansion of jury trials to more criminal cases, especially white collar crimes, would reduce the opportunity to use criminal prosecution for extortionate purposes.

Second, trial by jury can be an effective means of instilling popular respect for the law and curing so-called "legal nihilism." In *Democracy in America*, Alexis de Tocqueville described jury service as an education in civic virtue and said that trial by jury in the United States had helped to "promote the legalistic attitude even down to the lowest of the social classes." [142] According to Tocqueville, jury service:

> [M]olds the human mind to its procedures and becomes bound up, as it were, with the very conception of justice . . . . Juries . . . help to instill in the minds of all the citizens something of the mental habits of judges, which are exactly those which best prepare a people to be free. They spread respect for the courts' decisions and the concepts of right throughout all classes . . . .[143]

A recent study of almost one hundred former jurors conducted by the Russian Academy of Sciences suggests that jury service has begun to have such an effect on Russians. In oral interviews, former jurors repeatedly described developing a

137. THE FEDERALIST PAPERS, 498-500 (CLINTON ROSSITER ED., SIGNET CLASSIC 2003) (1788).

138. Kahn, *supra* note 123, at 547.

139. Interview with Russian Jurors, Meeting of the Russian "Jurors' Club," in Moscow (Mar. 2008) (on file with author); Interview with Russian Jurors, Meeting of the Russian "Jurors' Club," in St. Petersburg, (June 2008) (on file with author); Interview with Russian Jurors, Meeting of the Russian "Jurors' Club," in St. Petersburg (Oct. 2008) (on file with author); Interview with Russian Jurors, Meeting of the Russian "Jurors' Club," in Moscow (Dec. 2008) (on file with author); Interview with Russian Jurors, Meeting of the Russian "Jurors' Club," in Sochi (Sept. 2009) (on file with author).

140. Club of Jurors, *About Us*, GUILD OF COURT REPORTERS, 2008, http://www.juryclub.ru.

141. Andrei Skrobot, "Ne Vinoven: Pervyi v Moskve Sud Prisyazhnykh Opravdal Podsudimogo Obvinyavshevosa v Ubistve" ["Not Guilty: The First Moscow Jury Acquitted a Defendant Accused of Murder"], NEZAVISIMAYA GAZ. [THE INDEPENDENT NEWSPAPER], Aug. 15, 2003, Posting of Arthur Poghosyan to http://www.advokatrus.ru/doc/292 (Jan. 31, 2007).

142. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 316, 321 (GERALD E BEVIN TRANS., PENGUIN BOOKS 2002) (1835).

143. *Id.* at 320-21.

sense of responsibility for the fate of another person. Many indicated that, even months after their jury service ended, they continued to feel stress over the verdict and to wonder whether they had done the right thing.[144] In numerous interviews that the author has conducted with former jurors, they repeatedly described the experience as empowering and explained that it had instilled in them a new interest and respect for the law. Thus, jury service, if available to a large enough portion of the population, can help to create a culture in which abuse of the law is less tolerated.

IV. IMPLICATIONS

What are the implications of this study?

First, at the most general level, this study reminds us of the continuing legacy of the Soviet past, the obstacles it creates for reformers, and the opportunities it creates for criminals.

Second, it has implications for the broader theoretical debate over whether participation in legitimate spheres of social and economic activity is likely to force criminals to "legitimize" their behavior. Daniel Bell in his famous essay "Crime as an American Way of Life: A Queer Ladder of Social Mobility" predicted the "embourgeoisement" of organized crime in America and its decline "[w]ith the rationalization and absorption of some illicit activities into the structure of the economy . . . ." [145] This theory has been applied to Russia by those who see contemporary Russian financial crime as a stage in the development of Russian capitalism, analogous to the robber baron era in U.S. history.[146] However, this study highlights the opposite possibility–when criminals enter the legal system, they are just as likely to corrupt the legal system as the legal system is likely to force them to behave honestly. Thus, this study suggests that we should not be sanguine about contemporary Russian financial crime or assume that it is simply a passing fad. Rather, affirmative measures on the part of governments and businesses are necessary.

Third, governments and enforcement authorities, both in Russia and in countries affected by the schemes discussed above, should recognize manipulation of the legal system as a new and potentially dangerous form of crime. Investigators should be prepared to investigate the legal aspects of such schemes and to trace the origins of judicial decisions and other legal documents used therein in the same way that they investigate financial machinations and the origins of

144. Interview by L.M. Karnozova and V.S. Merkulova with Russian Jurors (on file with author).

145. DANIEL BELL, THE END OF IDEOLOGY: ON THE EXHAUSTION OF POLITICAL IDEAS IN THE FIFTIES 148-50 (Harvard Univ. Press 1988) (1960).

146. *See e.g.*, Annelise Anderson, *The Red Mafia: A Legacy of Communism, in* ECONOMIC TRANSITION IN EASTERN EUROPE AND RUSSIA: REALITIES OF REFORM (Edward P. Lazear ed., 1995) (summarizing arguments that contemporary Russian organized crime is an early stage of capitalism like the robber baron era); *see also* DAVID E. HOFFMAN, THE OLIGARCHS: WEALTH AND POWER IN THE NEW RUSSIA 6 (2003) (comparing techniques of the first Russian financiers to exploitation of banks, the state, and investors, manipulation of the stock market and acquisition of companies by early 20th Century American businessmen).

suspected criminal schemes. Governments should review their relevant legislation and, where appropriate, consider heightening civil and/or criminal penalties for bad faith litigation, falsification of documents and abuse of process.

Fourth, this study has implications for the provision of rule of law technical assistance to developing countries. Specifically, it highlights the danger that law enforcement tools that have proven effective in combating organized crime in the West, such as criminal penalties for money laundering, can become perverted when transported to foreign soil and can sometimes enhance, rather than reduce, organized crime if they are not carefully adapted to local conditions and accompanied by appropriate guarantees of transparency. Thus, technical assistance providers should carefully study local conditions and, rather than automatically basing legislative recommendations on what has worked in the United States,[147] should support efforts to adopt legislation addressing receiving countries' specific crime problems. In the case of Russia, legislation establishing criminal liability for such practices as commissioned prosecutions, trademark squatting, and collusive litigation, as well as legislation removing criminal liability for patent infringement, could prove as important in combating organized crime as the adoption of legislation based on U.S. experience.

Finally, while good legal counsel is essential in any business in any country, the prevalence of legal abuse in Russia means that it is especially important for businesses operating there. Quality legal counsel can ensure that contracts are drafted tightly, with minimal opportunity for abuse; that corporate books and records are subject to minimum risk of falsification; and that patents and trademarks are maintained and are not vulnerable to squatting. Although such measures are not a guarantee of protection, they can help to reduce the risks. Complete protection will be possible only after more significant changes in the law and the societal mindset.

147. A previous article by the author provides a good example of this mistake. *See* Thomas Firestone, *What Russia Must Do to Fight Organized Crime*, 14 DEMOKRATIZATSIYA: J. POST-SOVIET DEMOCRATIZATION 59 (2006).

TOWARDS HOLISTIC TRANSNATIONAL PROTECTION: AN OVERVIEW OF INTERNATIONAL PUBLIC LAW APPROACHES TO KIDNAPPING

CECILIA M. BAILLIET*

This article assesses dilemmas presented by the global phenomenon of kidnapping. It highlights the challenge presented by failed or semi-failed states, the current reliance on private actors to provide assistance in the face of non-state violence, protection gaps in the transnational legal framework, and the pursuit of asylum as a remedy. It describes the evolution of civil society reclamations for cosmopolitan justice in past situations of state directed enforced disappearance in the Americas to current appeals for communitarian justice in non-state actor kidnapping epidemics. The conclusion calls for innovation in legal institutions and norms addressing the protection needs of victims, as well as broader strategies to tackle the root causes of inequality, poverty, and corruption which have enabled kidnapping to escalate as an industry.

I. INTRODUCTION

[P]ublic security is the duty and exclusive obligation of the State, strengthens the rule of law, and is intended to safeguard the well-being and security of persons and protect the enjoyment of all their rights.

- Ministers Responsible for Public Security in the Americas, October 2008[1]

The global criminal phenomenon of kidnapping is on the rise around the world, increasing at alarming rates in countries such as Algeria, Argentina, China, Mexico, Venezuela, Brazil, Colombia, Ecuador, El Salvador, Georgia, Guatemala, Honduras, Afghanistan, Haiti, India, Indonesia, Iraq, Israel & Palestine, Kenya, Lebanon, Nigeria, Pakistan, the Philippines, Russia, Somalia, Sudan, Saudi Arabia, and Yemen.[2] The states with the highest kidnapping rates correlate with the

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1. First Meeting of Ministers Responsible for Public Safety in the Americas, Mexico City, Mex., Oct. 7-8, 2008, *Commitment to Public Security in the Americas*, at 1, OEA/Ser.K/XLIX. 1, (Oct. 29, 2008), *available at* http://www.oas.org/CSH/english/documents/RM00028E08.doc.

2. See U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Crime Prevention and Crim. J., International Cooperation in the Prevention, Combating and Elimination of Kidnapping and in Providing Assistance to Victims:Report of the Sec'y-Gen., U.N. Doc. E/CN.15/2003/7 (Mar. 5, 2003) [hereinafter 2003 U.N. Report on Kidnapping]; see Kate Goldberg, Kidnapping Becomes Growth

characterization of "failed/failing state": in which the rule of law and civic trust is deemed to be extremely weak, corruption is endemic, and governance is fragmented.[3] In addition, these states demonstrate high levels of poverty, unemployment, income inequality, stratified social classes, and lower development resulting in the deprivation of a guarantee of basic human security to citizens.[4] At the root of insecurity is a foundation of a failure to fulfill social and economic rights. Essentially, it may be argued that, in part, kidnapping epidemics are the fruit of social injustice.[5] From Weber's perspective, the state has lost its monopolization of organized violence, and civil society has lost enjoyment of a domestic zone of peace.[6] Indeed, the Preamble of Brazil's National Plans of Actions for the Promotion and Protection of Human Rights sets forth: "Kidnapping... may not be considered normal or even tolerated in a state and in a society that claims to be modern and democratic."[7] The notion of the rule of law is rendered opaque, as judicial systems prove ineffective in penalizing those involved in kidnapping. While private security companies grapple with securing release of hostages, individuals and families are frustrated with the inability of states to

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Industry, BBC NEWS (Sept. 7, 2000) available at http://news.bbc.co.uk/2/hi/914448.stm. See also eGlobalHealth Insurers Agency, LLC, http://www.eglobalhealth.com/kidnap-ransom-extortion-insurance.html (last visited Apr. 18, 2010) (listing high risk kidnapping countries); CLAYTON CONSULTANTS, INC., 2009 KIDNAP RISK BRIEF (2009), available at http://www.claytonconsultants.com/en/download/CCKRB-EN-0409.pdf (listing high risk kidnapping countries); CLAYTON CONSULTANTS, INC., 2008 KIDNAP RISK BRIEF (2008), available at http://www.claytonconsultants.com/en/assets/pdf/Clayton2008KidnapRiskBrief.pdf (listing high risk kidnapping countries); PAX CHRISTI NETHERLANDS, THE KIDNAP INDUSTRY IN COLOMBIA: OUR BUSINESS? 9 (2001), available at www.ikvpaxchristi.nl/catalogus/uploaded_file.aspx?id=167 (estimating that almost one country in four around the world is affected by kidnappings).

3. *Compare* 2008 KIDNAP RISK BRIEF, *supra* note 2 (listing all the major countries in the world where kidnappings regularly occur and the rates of frequency), *with* The Fund for Peace, Failed States Index 2009, http://www.fundforpeace.org/web/index.php?option=com_content&task=view&id=99&Itemid=140 (last visited Apr. 7, 2010) (listing all the failed, failing, and at risk states in the world) [hereinafter The Fund for Peace].

4. *See* The Fund for Peace, *supra* note 3 (listing twelve indicators of a failed state with pop-up windows that describe these indicators in-depth). GINI coefficients are used to measure income inequality, which often indicates failed or failing states. For more information on GINI coefficients, *see* The World Bank, *Measuring Inequality*, http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPOVERTY/EXTPA/0,,contentMDK:20238991~menuPK:492138~pagePK:148956~piPK:216618~theSitePK:430367,00.html (last visited Apr. 7, 2010). *See also* Elias Carranza, Speaker at Curso Internacional de Capacitación en Reformas al Sistema de Justicia Penal en America Latina, San Jose, Costa Rica, (July 26-Aug. 4 2005), Vision Empirica de la Justicia Penal, (on file with author) (explaining that many of these countries have high numbers of urban, male youths with limited employment possibilities, as well as significant numbers of demobilized or active armed actors with expertise to apply in criminal networks).

5. *See* Rodanthi Tzanelli, *Capitalizing on Value: Towards a Sociological Understanding of Kidnapping*, 40-5 SOCIOLOGY 929, 935-36 (2006).

6. Mary Kaldor, *Reconceptualizing Organized Violence*, *in* RE-IMAGINING POLITICAL CMTY: STUDIES IN COSMOPOLITAN DEMOCRACY 91, 92 (Daniele Archibugi, David Held & Martin Köhler eds. 1998).

7. U.N. High Comm'r for Human Rights, National Plans of Action for the Promotion and Protection of Human Rights – Brazil, Preamble (1996), *available at* http://www2.ohchr.org/english/issues/plan_actions/brazil.htm.

prevent abductions. Some pursue cosmopolitan preventive/responsive measures by seeking asylum on the basis of high risk of kidnapping. [8] Others choose to stay in pursuit of communitarian aspirations to reclaim the nation from criminal gangs and assist the state by participating in restoration of the rule of law and non-violence.[9]

This article highlights civil society reclamations for justice in response to kidnapping, reviews accountability gaps within transnational law, and calls for the evolution of normative protection responses to the global kidnapping market in which private actors form part of both the cause and solution. Part II provides an overview of kidnapping as a transnational criminal activity, identifies the elements of the crime, reviews its connection to human rights violations by identifying cases and reports from UN and regional human rights bodies, and presents humanitarian and international criminal law dimensions. Part III gives an historic overview of kidnapping as state terrorism and the identification of the international crime of enforced disappearance. Part IV discusses the emergence of kidnapping, first by non-State actors, highlighting Latin America and the impact of two particular cases, Martí and Blumberg, and second, by underscoring the role of private companies in providing solutions. Part V assesses the provision of asylum as an important but often neglected aspect of international protection, reviewing select cases to highlight the need for increased attention. Part VI concludes by calling for improved harmonization among transnational actors as well as closer analysis of the public/private dimensions of the causes and solutions to the global kidnapping crisis.

II. KIDNAPPING AS TRANSNATIONAL CRIMINAL ACTIVITY

Kidnapping has evolved from constituting a means/weapon of warring gangsters, tribes, family feuds, or other groups to forming an actual profession/end in itself. The principal consequence of this change is the shift from targeting persons affiliated with these groups to civilians chosen on account of perceived wealth. To paraphrase Boaventura de Sousa Santos, there has been a "conversion of the human body into the ultimate commodity."[10]

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8. *See infra* Part 5. As a clarification, this paper will *not* address the contemporaneous phenomenon of the kidnapping of refugees or asylum-seekers by state actors in order to return them to their country of origin. Nor will it address the dilemma of kidnapping of persons by states for the purpose of detention, prosecution, or extraordinary rendition. These cases often involve persons with political affiliations that are considered a threat to the government. *See generally* R. v. Barak, [1985] 7 Crim. App. 404, (appeal taken from England & Wales) (addressing the sentencing of four men who kidnapped a Nigerian refugee in order to enforce his return); Abdul Ghafur Hamid (a.k.a. Khin Maung Sein), *Jurisdiction over a Person Abducted From a Foreign Country: Alvarez Machain Case Revisited*, J. Malay. & Comp. L. (2000) (discussing jurisdiction of national courts concerning extraditions and abductions by state actors); Agiza v. Swed., U.N. Doc. CAT/C/34/D/233/2003 (May 20, 2005), *available at* http://www1.umn.edu/humanrts/cat/decisions/233-2003.html (determining that a State is in violation of the non-refoulement obligation under Article 3 of UN Convention Against Torture on account of resorting to diplomatic assurances in an expulsion case.); David Weissbrodt & Amy Bergquist, *Extraordinary Rendition and the Torture Convention*, 46 Va. J. Int'l L. 585 (2006) (discussing extraordinary rendition policies).

9. *See infra* Part 4.1.

10. BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW LEGAL COMMON SENSE: LAW,

Although kidnapping now affects the middle and working classes, victims are often characterized as belonging to upper classes or having imagined wealth.[11] Kidnappers also target less wealthy younger persons because they lack the protection of body guards and armoured cars.[12] Furthermore, specific targeting of persons who have family members who have relocated abroad is common, given the assumption that they will have access to economic resources to pay higher ransoms. The payment of high ransoms can completely wipe out family savings, leaving the victimized family destitute. To make matters worse, governments rarely provide full restitution of economic loss to these victims.[13]

Invisible criminal networks transcend borders. In Resolution 2002/16 of 24 July 2002, the UN Economic and Social Council indicated concern for the growing tendency of organized criminal groups to resort to kidnapping.[14] At the base is the purpose of extortion as a method of accumulating capital with a view to consolidating criminal operations and carrying out other illegal activities.[15] The UN Economic and Social Council strongly condemned the world-wide practice of kidnapping. Kidnapping is an element of the evolution of transnational crime as a business threatening local, national, regional and global security.[16] It is conducted by professional kidnappers;[17] gangs also dealing in narco-trafficking, illicit trade in

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GLOBALIZATION, AND EMANCIPATION 9 (2d ed. 2002).

11. Shannon O'Neil, *The Real War in Mexico: How Democracy can Defeat the Drug Cartels*, 88 FOREIGN AFF. 63, 68 (2009) ("The fear of kidnapping plagues the upper, middle, and working classes alike."). The U.S. Country Report on Human Rights Practices for Mexico 2008 noted that "kidnapping remained a serious problem for persons of all socioeconomic levels." U.S. Dep't of State, 2008 Human Rights Report: Mex. (Feb. 25, 2009), http://www.state.gov/g/drl/rls/hrrpt/2008/wha/119166.htm.

12. Ranko Shiraki Oliver, *In the Twelve Years of NAFTA, the Treaty Gave to Me . . . What Exactly? An Assessment of Economic, Social, and Political Developments in Mexico Since 1994 and Their Impact on Mexican Immigration into the United States* 10 HARV. LATINO L. REV. 53, 110 (Spring, 2007).

13. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 99 (2003) (explaining that even where rights to reparation exist, receiving actual victim compensation is another matter). Honduras is an example of a state which does not offer victim restitution. *See* Embassy of the United States, Honduras, Help for Victims of Crime in Honduras (Feb. 25, 2010), http://honduras.usembassy.gov/victcrime.html.

14. ECOSOC Res. 2002/16 (July 24, 2002).

15. *Id.* This includes illicit trafficking in firearms, money-laundering, drug trafficking, illicit trafficking in human beings, and terrorist crimes.

16. *See* U.N. Office on Drugs and Crime, 18th Sess. of the Comm'n on Crime Prevention and Crim. J. *The Global Crime Threat- We Must Stop It*, Vienna, Austria (Apr. 16, 2009) (*given by* Antonio Maria Costa, Exec. Dir. U.N. Office on Drugs and Crime), *available at* http://www.unodc.org/unodc/en/about-unodc/speeches/2009-16-04.html. According to the Convention on Transnational Organized Crime, Article 3, a crime may be considered transnational if:

> *(a)* It is committed in more than one State;
>
> *(b)* It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
>
> *(c)* It is committed in one State but involves an organized criminal groupthat engages in criminal activities in more than one State; or
>
> *(d)* It is committed in one State but has substantial effects in anotherState.

U.N. Convention on Transnational Organized Crime art. 3, ¶ 2, Nov. 15, 2000, 2225 U.N.T.S. 209.

17. Tzanelli, *supra* note 5, at 939.

firearms, money-laundering, trafficking of persons;[18] insurgents/rebels (FARC in Colombia, Afghanistan, Iraq);[19] state security forces;[20] terrorist groups (Russia, Peru, Philippines);[21] common criminals (Haiti, Mexico, Iraq);[22] and other actors, such as those engaged in bride kidnapping (Kyrgyzstan, Turkmenistan, Georgia, China, Uganda, Uzbekistan, Ethiopia).[23]

In 2008 it was reported that organized crime gangs had exported the "kidnapping industry" to California, abducting Mexicans living in San Francisco and holding them in Tijuana, Mexico.[24] Spain reported that Moroccan immigrants were being kidnapped and ransom demanded from their family members in Morocco.[25]

Furthermore, the targeting of innocent civilians by groups engaged in the pursuit of violence has resulted in characterization of these acts as "terrorism", or in the alternative that kidnapping is used to finance and facilitate terrorism, thereby escalating crime fighting initiatives to anti-terrorist strategies which are subject to international support and attention.[26] Nevertheless, common concepts of terrorism refer to the use of violence to coerce or intimidate governments or societies, in

18. U.N. Econ. & Soc. Council [ECOSOC] Res. 2002/16, *supra* note 14.

19. Tzanelli, *supra* note 5, at 929, 938; Human Rights Watch, Afghanistan: Events of 2009, http://www.hrw.org/en/node/87390 (last visited Apr. 10, 2010).

20. *See* Bureau of Consular Affairs, U.S. Dep't of State, *Mexico*, http://travel.state.gov/travel/cis_pa_tw/cis/cis_970.html (last visited April 17, 2010) ("Mexican authorities have failed to prosecute numerous crimes committed against U.S. citizens, including murders and kidnappings. . . . In some cases, assailants were wearing full or partial police uniforms and have vehicles that resemble police vehicles, indicating that some elements of the police may have been involved.").

21. 2003 U.N. Report on Kidnapping, *supra* note 2, ¶ 22.

22. *See* Bureau of Consular Affairs, U.S. Dep't of State, Haiti, Country Specific Information, http://travel.state.gov/travel/cis_pa_tw/cis/cis_1134.html (last visited Apr. 10, 2010); O'Neil, *supra* note 11, at 67; Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, 2005 Country Reports on Human Rights Practices, Iraq (March 8, 2006), http://www.state.gov/g/drl/rls/hrrpt/2005/61689.htm.

23. U.N. Div. for the Advancement of Women, Expert Group Meeting on Good practices in Legislation to Address Harmful Practices Against Women, Addis Ababa, Ethiopia May 25-28, 2009, *Forced and Early Marriage: A Focus on Central and Eastern Europe and Former Soviet Union Countries With Selected Laws From Other Countries*, at 7, U.N. Doc. EGM/GPLHP/2009/EP.08 (June 19, 2009) (*prepared by* Cheryl Thomas) (discussing bride kidnapping in Georgia, Kyrgyzstan, Turkmenistan, and Uzbekistan); Martin Adler, *China, Mongolia: Kidnapped Wives*, Insight News TV, http://www.insightnewstv.com/d08/ (last visited Apr. 13, 2010) (discussing bride kidnapping in China); IRIN, ETHOPIA: SURVIVING FORCED MARRIAGE (2007), http://www.irinnews.org/Report.aspx?ReportId=69993 (discussing bride kidnapping in Ethopia); *Hundred Young Girls Abducted in Uganda*, AFROL NEWS (June 25), http://www.afrol.com/articles/11089 (last visited Apr. 13, 2010) (discussing bride kidnappings in Uganda).

24. Julieta Martinez, *Mexican Kidnappers are Operating in the United States*, MEXIDATA, May, 26 2008 (on file with author); *see also* Joel Millman, *Immigrants Become Hostages as Gangs Prey on Mexicans*, WALL STREET JOURNAL, June 10, 2009, ("gangs that smuggle people in from Mexico are increasingly holding the migrants captive for ransom in rental houses").

25. 2003 U.N. Report on Kidnapping, *supra* note 2, ¶ 27.

26. *See* Human Rights and Terrorism, G.A. Res. 58/174, ¶ 12, U.N. Doc. A/RES/58/174 (Mar. 10, 2004). Increasingly, terrorist acts are defined as constituting violations of human rights, and may constitute crimes against humanity, war crimes, or genocide.

order to achieve political, religious, or ideological objectives.[27] At times kidnapping may fall into this framework, but most often the motive is sheer greed.

A. Elements of Kidnapping

The UN Economic and Social Council has characterized kidnapping as the unlawful detention of a person against his will for the purpose of demanding illicit gain, economic gain, or other material benefit; or in order to oblige someone to do or not do something in exchange for liberation of the victim.[28] Kidnapping is a criminal offence in national systems, however its motive is increasingly for private economic gain, incidentally spreading fear among the public.

The common elements of kidnapping as a crime are:

> 1. The illegal seizing, carrying off or deprivation of liberty of an individual without consent.
>
> 2. The use of violence, the threat of violence and/or fraud and deception in the commission of the offence.
>
> 3. The holding of the victim in a place that could not be found.
>
> 4. [With] the specific objective of economic or financial gain and/or political or other influence, including through the practice of extortion.[29]

Escalation to characterization as an aggravated crime occurs in circumstances in which kidnappers seek ransom or profit, engage in a conspiracy, use force or arms, result in death or injury (or threat therefore), torture, cruel mistreatment, psychological harm, or endangerment of the moral development of the victim (this is generally understood to be exposure of minors to drugs, alcohol, sexual acts, etc.).[30] Aggravated classification is also present in cases involving misrepresentation as a state authority, combination with assault on public or private mode of transportation, commission by a state official, commission by persons in security or insurance business, detention for a set period of time, sexual exploitation or forcible marriage, or coercion of the state to release a detainee, and so forth.[31] Domestic penalties range from imprisonment of between 1-10 years, and

27. *See* Measures to Eliminate International Terrorism, G.A. Res. 49/60, U.N. Doc. A/RES/49/60 at ¶ 3 ("Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.").

28. ECOSOC Res. 2002/16, *supra* note14, ¶ 1.

29. 2003 U.N. Report on Kidnapping, *supra* note 2, ¶ 4. The types of kidnapping include: a) For extortion, to demand ransom, influence business decisions or obtain commercial advantage, b) For debt recovery between criminal groups or securing an advantage in a criminal market; c) For sexual exploitation of women and children and subsequent trafficking, d) Domestic and family disputes, e) For political or ideological purpose, f) In the course of carrying out another criminal act, such as robbery, and g) Feigned or fraudulent kidnapping. *Id.* at ¶ 16.

30. *See, e.g.*, Código Penal, [CÓD. PEN.] [Penal Code of Colombia] No. 599/2000 arts. 168-172 (codifying the punishment for kidnapping).

31. *Id.*

in the event of aggravated circumstances 10-20 years.[32] An unfortunate negative consequence of states' improved crime fighting against professional kidnapping rings is that that it allows smaller, more unprofessional criminals to take over the field. Indeed, this is the case in Mexico and Italy.[33] These groups are described as being more violent towards victims.[34]

B. Kidnapping as a Violation of Human Rights, Humanitarian, and International Criminal Law

1. Human Rights

According to the UN Secretary-General the act of kidnapping is considered a gross violation of international human rights and humanitarian law.[35] The UN Economic and Social Council notes that kidnapping is also associated with various other human rights violations.[36] In general, kidnapping as a phenomenon may be considered a violation of Article 1 of the UN Charter because it does not encourage respect for human rights.[37] Specifically, kidnapping is defined as composing an unlawful deprivation of personal freedom/liberty.[38] It may also be considered to include violation of physical integrity and personal security,[39] a threat to life, and in the event of death of the victim, a violation of the right to life.[40] Kidnapping

32. *Id.*; 2003 U.N. Report on Kidnapping, *supra* note 2, ¶ 7. In the realm of criminal law, within the U.S., the most significant reforms occurred when wealthy or powerful families were victimized. ERNEST KAHLAR ALIX, RANSOM KIDNAPPING IN AMERICA 1874-1974 at 174-178 (1978). In Mexico, express kidnapping is classified as a serious crime of which 15-40 years of incarceration is possible. IMMIGRATION AND REFUGEE BOARD OF CANADA, MEXICO: KIDNAPPING FOR RANSOM, INCLUDING COMPLICITY OF POLICE OFFICERS, TYPES OF KIDNAPPING, EFFECTIVENESS OF LAW ENFORCEMENT OFFICIALS AND PROTECTION AVAILABLE TO VICTIMS (2004 - 2005) (Oct. 20, 2005), *available at* http://www.unhcr.org/refworld/docid/440ed728a.html [hereinafter MEXICO: KIDNAPPING FOR RANSOM].

33. GERMAN-MEXICAN CHAMBER OF INDUSTRY AND COMMERCE, SECURITY IN MEXICO: A PRACTICAL GUIDE FOR COMPANIES, EXPATRIATES, AND TOURISTS 33 (2007), *available at* http://mexiko.ahk.de/fileadmin/user_upload/Dokumente/SECURITY_IN_MEXICO.pdf (explaining that "express kidnappings" are performed by less professional criminals) [hereinafter SECURITY IN MEXICO]; *See* 2003 U.N. Report on Kidnapping, *supra* note 2, ¶ 28.

34. SECURITY IN MEXICO, *supra* note 32, at 33.

35. Press Release, Secretary-General, Secretary-General Welcomes Release of Six Hostages by Colombian Rebel Group, Stresses Kidnapping 'Unjustifiable Crime,' Gross Human Rights Violation, U.N. Doc. SG/SM/12088 (Feb. 6, 2009).

36. 2003 U.N. Report on Kidnapping, *supra* note 2, ¶ 2 ("Reiterating that the kidnapping of persons under any circumstances and for any purpose constitutes a serious crime and a violation of individual freedom and undermines human rights"). *See also* ECOSOC Res. 2006/19, *supra* note 14, ¶ 2.

37. U.N. Charter arts. 55, 56. *See also* International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI) art. 2, U.N. GAOR, U.N. Doc. A/6316 (Mar. 23, 1976); European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, Dec. 10, 1948, Europ. T.S. 5; American Convention on Human Rights, arts. 1, 9, Nov. 22, 1969, O.A.S. T.S. No. 36, 1144 U.N.T.S. 123 (stating that state parties must respect and ensure rights to all individuals; affirmative action to secure the right from intervention).

38. International Covenant on Civil and Political Rights, *supra* note 37, art. 9.

39. *Id.* art. 9.

40. *Id.* art. 6.

often involves arbitrary detention,[41] torture, inhuman or degrading treatment,[42] as well as interference with family life.[43] As an example, the amputation of fingers as a means of extorting a higher ransom from the family may be characterized as both a violation of physical integrity and torture.[44] In addition, women are often exposed to rape and other forms of sexual violence.[45]

The temporal scope of kidnapping varies. In Mexico, kidnapping may be long term (lasting weeks or months) or "express" (resulting in release after a few days or hours).[46] In Colombia, the FARC has retained hostages for several years, including the famous case involving Ingrid Bentancourt.[47] Additionally, there is kidnapping extortion in which persons are forced to pay money in order to guarantee that they will not be kidnapped in the future.[48]

Given the relevant human rights violations linked to kidnapping, the following UN bodies would be appropriate forums for presentation of complaints or reports, as appropriate: the Human Rights Committee, Committee Against Torture, the Committee on the Rights of the Child, the Committee on the Elimination of Discrimination Against Women, the Committee on the Elimination of Racial Discrimination, the Special Rapporteur on Violence Against Women, the Special Rapporteur on Trafficking, the Working Group on Enforced Disappearance, and the Special Rapporteur on Torture.

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41. *Id.* art. 9.

42. *Id.* art. 7.

43. Universal Declaration of Human Rights, G.A. Res. 217A, art. 3, 4, 5, 9, 12, U.N. Doc A/810 (Dec. 12, 1948).

44. *See* International Covenant on Civil and Political Rights, *supra* note 37, art. 7.

45. *See* Dep't of Econ. And Soc. Affairs [DESA] U.N. Comm. On the Elimination of Discrimination Against Women, *Report on Mexico*, U.N. Doc. CEDAW/C/2005/OP.8/MEXICO (Jan. 27, 2005) [hereinafter *Report on Mexico*] (noting that kidnappings of women in Ciudad Juarez, Mexico represent structural violence within the society). *See also* Case of Gonzalez *et al.* v. Mexico, 2009 Iner-Am. Ct. H.R. (ser. C) No. 205, ¶ 133 (Nov. 16, 2009), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_205_ing.pdf (noting sexual violence in conjunction with kidnapping). *See generally* U.N. News Centre, *Haiti: U.N. Mission Alarmed as Another Child Kidnapping Victim is Killed*, U.N. News Centre, Aug. 19, 2008, http://www.un.org/apps/news/story.asp?NewsID=27756&Cr=minustah&Cr1=kidnap (stating that in Haiti, in 2008 half of all kidnapping victims were composed of children, and they were frequently subject to torture, rape, sexual abuse, and murder).

46. IMMIGRATION AND REFUGEE BOARD OF CANADA, MEXICO: KIDNAPPINGS FOR RANSOM, INCLUDING THE TYPES OF KIDNAPPING, PROTECTION AVAILABLE TO VICTIMS, THE EFFECTIVENESS OF ANTI-KIDNAPPING MEASURES, AND THE COMPLICITY OF SOME POLICE OFFICERS (2007 - April 2009) MEX103154.FE, (2009), *available at* http://www.irb-cisr.gc.ca:8080/RIR_RDI/RIR_RDI.aspx?id=452423&l=e.

47. *See generally* Simon Romero, *Colombia Plucks Hostages From Rebels' Grasp*, N.Y. TIMES, July 3, 2008, *available at* http://www.nytimes.com/2008/07/03/world/americas/03colombia.html (reporting Ms. Betancourt was held for six years).

48. *See generally* Juan Forrero, *Kidnappers in Colombia Branch Out To Venezuela*, N.Y. TIMES, Dec. 16, 2001, *available at* http://www.nytimes.com/2001/12/16/world/kidnappers-in-colombia-branch-out-to-venezuela.html?pagewanted=all (noting Venezuelan ranchers pay a "vacuna" (vaccine) to avoid kidnapping by criminal gangs).

a. Concluding Observations to State Reports Filed with UN Treaty Bodies

In general, the UN Committees' discussion of non-state kidnapping is largely focused on specific vulnerable groups, such as women, children, and migrants.[49] Although it is positive that that these persons are given particular attention, the trend of kidnapping epidemics is such that the threat also applies across socio-economic, gender, ethnic, or other lines. What is missing is recognition of kidnapping as a broader symptom of state failure. The Committee conclusions indicate a truncated discussion of state responsibility to provide security to the citizenry, as it focuses on specific categories.[50] The U.N. Committee on the Rights of the Child issued Conclusions in response to Kyrgyzstan's Periodic report which highlighted the right of non-discrimination as requiring State action against bride kidnapping:

> The Committee recommends that the State party increase its efforts to ensure implementation of existing laws guaranteeing the principle of non-discrimination and full compliance with article 2 of the Convention, and adopt a proactive and comprehensive strategy to eliminate discrimination on any grounds and against all vulnerable groups. The Committee urges the State party to pay particular attention to the situation of the girl child, in particular girls living in rural areas, in order to halt the practices of forced marriage and bridal kidnapping, which prevent the girl child from fully enjoying the rights enshrined in the Convention.[51]

It also linked kidnapping to trafficking of children in India and called for penal reform: "In order to combat trafficking in children, including for commercial sexual purposes, the Penal Code should contain provisions against kidnapping and abduction."[52] Similarly, the U.N. Committee on Economic, Social and Cultural Rights advised Kyrgyzstan to eliminate discrimination against women and specifically counter gender based violence against women by continuing to more actively implement the law with regard to the practice of polygamy and bride kidnapping.[53] In like manner, the UN Human Rights Committee called upon the government of Uzbekistan to "combat the practice of forced marriages of kidnapped women."[54] In relation to Georgia, the Human Rights Committee

49. *See Report on Mexico*, *supra* note 45; Convention on the Rights of the Child, G.A. Res. 44/25, art. 35 U.N. GAOR 44th Sess. Supp. No. 49, U.N. Doc. A/44/49 (Sept. 2, 1990); Press Release, General Assembly, Third Committee Approves Draft Resolutions On Human Trafficking, Literacy, Ageing, Crime Prevention, Kidnapping; Continues Consideration of Human Rights Issues, U.N. Doc. GA/SHC/3858 (Oct. 19, 2006).

50. *See Report on Mexico*, *supra* note 45.

51. Office of the U.N. High Comm'r on Human Rights, U.N. Comm. on the Rights of the Child, *Concluding Observations: Kyrgyzstan*, ¶ 27, U.N. Doc. CRC/C/15/Add.244 (Nov. 3, 2004).

52. U.N. Comm. on the Rights of the Child, *Concluding Observations: India*, ¶ 75, U.N. Doc. CRC/C/15/Add.115 (Feb. 23, 2000).

53. ECOSOC, *Concluding Observations: Kyrgyzstan*, ¶ 30, U.N. Doc. E/C.12/1/Add.49 (Sept. 1, 2000).

54. U.N. Human Rights Comm'n., *Concluding Observations: Uzbekistan*, ¶ 24, U.N. Doc. CCPR/CO/83/UZB (Apr. 26, 2005) (citing violation of Articles 3, 23, and 26).

instructed the state to: "(P)romptly investigate complaints related to domestic violence and other acts of violence against women, as bride-kidnapping and rape, and institute criminal proceedings against perpetrators."[55] It also addressed the kidnapping of women in Venezuela:

> The Committee is concerned about the level of violence against women, including the many reported cases of kidnapping and murder that have not resulted in arrests or prosecution of those responsible.... All the foregoing gives rise to serious concerns in the light of articles 6 and 7 of the Covenant. The State party should take effective measures to guarantee women's safety, ensure that no pressure is put on them to dissuade them from reporting such violations, that all allegations of abuses are investigated and that those committing such acts are brought to justice.[56]

Of interest, the UN Committee on the Elimination of Racial Discrimination highlighted the importance of addressing the socio-economic root causes of kidnapping epidemics affecting non-nationals:

> The Committee is concerned about the recent incidents of tension between Lesotho nationals and Asian and South African white factory owners which resulted in kidnapping, violence and the flight of about 100 Asian nationals from the country for fear of persecution. The Committee recommends that the State party take measures to resolve the underlying socio-economic causes of these events. In this context, the Committee draws the attention of the State party to General Recommendation XI on non-citizens and the obligation to report fully on legislation concerning foreigners and its implementation. It therefore requests that more detailed information be included in the State party's next report on the situation and rights of non-nationals residing in the country.[57]

These reports highlight the protection duty of the state vis-à-vis vulnerable groups, but it is important to highlight the general protection duty which applies to all persons within the state.

b. Obligation of State to Protect Individuals from Kidnapping and Provide Remedies

Pursuant to Article 2 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, States have duties to respect and ensure human rights.[58] A state of impunity is

55. U.N. Human Rights Comm'n., *Concluding Observations: Georgia*, ¶ 8, U.N. Doc. CCPR/C/GEO/CO/3 (Nov. 15, 2007).

56. U.N. Human Rights Comm'n., *Concluding Observations: Venezuela*, ¶ 17, U.N. Doc. CCPR/CO/71/VEN (Apr. 26, 2001).

57. U.N. Comm'n. on the Elimination of Racial Discrimination, *Concluding Observations: Lesotho*, ¶ 5, U.N. Doc. CERD/C/304/Add.99 (Apr, 19 2000).

58. International Covenant on Civil and Political Rights, *supra* note 36, art 2. *See also* International Covenant on Economic, Social, and Cultural Rights, *entered into force* Jan. 3, 1976, 993

considered to promote the violation of human rights.[59] The UN Human Rights Committee General Comment 31 highlights the protection duty of the state to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities or otherwise be in breach of the Covenant.[60] The Committee also sets forth the importance to bringing to justice the perpetrators of violations, as impunity for violations may contribute to the recurrence of violations.[61] In like manner, the European Court of Human Rights has held that the European Convention and its Protocols identify a duty of the State to secure rights and freedoms by taking positive action to ensure respect for those rights and freedoms between private actors.[62] The UN Convention Against Torture, Article 2 sets forth that "[e]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."[63] Further, Article 16 states that

> [e]ach State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[64]

In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.[65]

As emphasized by Clapham, there is no requirement of attribution of the state to the violation, but rather failure of the state to react to the act.[66] In order to ensure respect for human rights, the state must take affirmative action to prevent

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U.N.T.S. 3.

59. See Ed Bates, *State Immunity for Torture*, 7:4 HUM. RTS. L. REV. 651 (2007) for a commentary on the extent to which State immunity acts as a barrier to international legal actions for torture.

60. U.N. Human Rights Comm'n., *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 18, U.N. Doc. CCPR/C/21/Rev.1/Add.13, (May, 26 2004) [hereinafter *Obligation Imposed on States*] (commenting on article 2 of the International Covenant on Civil and Political Rights).

61. *Id.*

62. *See* Case of X. & Y. v. Netherlands, App. No. 8978/80, 8 Eur. H.R. Rep. 235, 235-36 (1986) *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=8978/80&sessionid=51432633&skin=hudoc-en (finding a violation of article 8 of the European Convention; a mentally handicapped girl was raped but unable to institute criminal proceedings against the alleged perpetrator in the crime due to a gap in domestic law). *See also* A. v. United Kingdom, App. No. 25599/94, 27 Eur. H.R. Rep. 611 (1998) (finding domestic law did not provide adequate protection for a child who had been beaten by his stepfather, the failure to provide adequate protection was violation of article 3 of the European Convention).

63. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, art. 2, U.N. Doc. A/39/51, 1465 U.N.T.S. 85 (June 26, 1987).

64. *Id.* art. 16.

65. *Id.* arts. 10-13.

66. ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 426-27 (2006).

kidnapping by non-state actors.[67] The failure to prevent or adequately investigate, punish and redress the kidnapping would entail violation of the state's duty to exercise due diligence in ensuring enjoyment of the rights infringed upon in the context of kidnapping.[68] Clapham advocates flexibility in recognizing human rights violations involving non state actors where the human dignity of the person is at stake. In other words, he calls for dismantling of a hierarchical application of human rights that effectively excludes victims from protection.[69]

In short, whereas kidnapping inherently involves violation of the autonomy of the person and inhuman treatment, it is difficult not to argue in favour of recognition as a human rights violation. The issue is not the motive of the act, but rather the interest/right of the victim that defines the status of the act. The global kidnapping epidemic is not primarily based on political ideology, but more based on economic incentive. Nevertheless, the atrocious effect of the act upon the individual and the family is as devastating as that within the context of state terrorism. This effect is the central aspect to the consideration of kidnapping in relation to protection. The gravity of abduction is rooted in the premise of the basic human dignity of each individual and in the primacy of family. When a kidnapping of an individual occurs, it has been noted that the family is virtually kidnapped as well.[70] Because of the severity of the violations involved in kidnapping, the State's failure to attempt kidnapping prevention, or respond to kidnapping as it occurs, would signify abandonment of the rule of law.

At the regional level, the Inter-American Court of Human Rights has held that the duty to provide access to justice in cases involving forced disappearance constitutes jus cogens.[71] Hence, it may be argued that similar weight to should be given to kidnapping cases.[72] The Court issued a provisional order in the *Matter of*

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67. *See Obligations Imposed on States, supra* note 60, ¶8. International Convention for the Protection of All Persons from Enforced Disappearance, G.A. Res A/RES/61/177, art. 3,U.N. Doc. A/HRC/RES/2006/1 (Dec. 20, 2006) ("each State Party shall take appropriate measures to investigate acts defined in article 2 committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice"). *See also* Declaration on the Right and Responsibility of Individuals, Groups, and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, U.N. GAOR 3d Comm. 53d Sess., Annex, 85th plen. mtg. art. 10, U.N. Doc. A/RES/53/144 (Mar. 10, 1999) ("[n]o one shall participate, by act or by failure to act where required, in violating human rights and fundamental freedoms and no one shall be subjected to punishment or adverse action of any kind for refusing to do so").

68. *See* Velasquez Rodriguez v. Honduras, 22/86 Inter-Am. Ct. H.R., (ser. C) No. 7920 (Jul. 29, 1988) *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_04_ing.pdf, (finding the state in violation of articles 1,4 (life), 5 (humane treatment), and 7 (personal liberty) of the American Convention on account of its responsibility for enforced disappearance of the victim,); "Street Children " (Villagran-Morales et al.) v. Guatemala Case 2001 Inter-Am. Ct. H.R. (ser. C) No. 77 (Nov. 19, 1999) (finding the state in violation of article 1 for failure of the state to identify or penalize the persons who abducted and killed street children).

69. CLAPHAM, *supra* note 66, at 546.

70. *See* Case of Goiburú *et al.* v. Paraguay, 2006 Inter-Am. Ct. H.R. (ser. C) No. 153, ¶ 103 (Sep. 22, 2006) *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_153_ing.pdf.

71. *Id.* ¶ 84.

72. *See* Case of La Cantuta v. Peru, 2006 Inter-Am. Ct. H.R. (ser. C) No. 162, ¶ 157 (Nov. 29, 2006) *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_162_ing.pdf.

the Communities of Jiguamiandó and Curbaradó, calling for State investigation, identification of perpetrators and punishment in the case of kidnapping and murder of a man allegedly via complicity by police and paramilitary.[73] It also issued a provisional order in the *Matter of the United States of Mexico Digna Ochoa y Plácido et al.* case, calling upon the state to protect the lives of human rights activists who had been subject to kidnapping.[74] Indeed, the Inter-American Commission of Human Rights has repeatedly condemned kidnapping by non state actors in Colombia, Guatemala, El Salvador, Venezuela, Brazil, and others.[75]

In like manner, the European Court of Human Rights in the case of *Avsar v. Turkey* held Turkey to be in violation of Articles 2 (right to life) and 13 (effective remedy) for failing to carry out adequate and effective investigation in a case involving the kidnapping and killing of a man by village guards with complicity by the state.[76] In the cases of *Elmurzayev and Others v. Russia*, *Khadzhialiyev and Others v. Russia*, the European Court of Human Rights held Russia liable for violation of the same articles in cases involving kidnapping "unidentified armed men" and subsequent delays by the state in investigation and proceedings pursuant to the crimes.[77]

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73. Matter of the Communities of Jiquamiandó and Curbaradó Regarding Colombia, 2006 Inter-Am. Ct. H.R. (Provisional Measures) at 14 (Feb. 7, 2006) *available at* http://www.corteidh.or.cr/docs/medidas/jiguamiando_se_04_ing.pdf.

74. Digna Ochoa y Plácido *et al.* Case, 1999 Inter-Am. Ct. H.R. (Provisional Measures) at 3 (Nov. 17, 1999) *available at* http://www.corteidh.or.cr/docs/medidas/dignaochoa_se_01_ing.pdf.

75. *See, e.g.*, Press Release, Inter-Am. Comm'n H. R., No. 2/99 (Feb. 4, 1999) (calling upon the Colombian State to find victims kidnapped by AUC and fully investigate and prosecute those responsible); Press Release Inter-Am. Comm'n H. R., The IACHR Condemns Kidnapping of Antioquia Governor, No. 18/02 (Apr. 25, 2002) (condemning kidnapping by the FARC); Press Release Inter-Am. Comm'n H. R., IACHR Requests Information from Guatemala, No. 14/09 (Mar. 27, 2009) (calling upon the State of Guatemala to provide information on kidnapping victims). *See also* INTER-AMERICAN COMMISSION OF HUMAN RIGHTS COUNTRY REPORT ON COLOMBIA ch. V (D) (1993) (addressing the national kidnapping epidemic spawned by guerilla organizations seeking bankroll of their activities and the emergence of a powerful criminal machinery within the society and kidnapping as a violation of personal liberty).

76. Avsar v. Turkey, 2001 Eur. Ct. H.R. 1014, 1106-07, 1110-11 (2001) *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=25657/94&sessionid=51438273&skin=hudoc-en.

77. Khadzhialiyev and Others v. Russia, 2008 Eur. Ct. H.R. ¶¶ 109, 137-39 *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Khadzhialiyev&sessionid=51425976&skin=hudoc-en; Elmurzayev and Others v. Russia, 2008 Eur. Ct. H.R. ¶¶ 111, 138-40 *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=3019/04&sessionid=51426218&skin=hudoc-en. *See generally Buldan v. Turkey*, 2004 Eur. Ct. H.R. ¶¶ 79, 90 *available at* http://cmiskp.echr.coe.int/tkp197/ view.asp?item=1&portal=hbkm&action=html&highlight=28298/95&sessionid=51426284&skin=hudoc-en;Selim Yildirim and Others v. Turkey, 2006 Eur. Ct. H.R. ¶¶ 71, 72 *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=56154/00&sessionid=51426408&skin=hudoc-en (finding state responsibility for the kidnapping and death was not proven, but state responsibility for failing to effectively investigate and process the crime was established). *See also* Magomadova and Others v. Russia, 2009 Eur. Ct. H.R. ¶¶ 100, 108 *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=33933/05&sessionid=51426553&skin=hudoc-en; Sangariyeva and Others v. Russia, 2008 Eur. Ct. H.R. ¶ 69 *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&high

In contrast, the African Commission of Human Rights has addressed kidnapping topically within reports discussing the context of repression of freedom of expression and also as relating to forced marriage.[78]

In sum, it is conceivable that kidnapping victims may seek to attain justice at the international or regional level by filing a human rights complaint alleging the State's acquiescence or its failure to take measures to prevent the kidnapping or to investigate violations, identify those responsible, impose punishment and ensure redress/compensation to the victim. Nevertheless, attainment of actual remedy in individual cases may be difficult. This is even more evident when remedy is sought at the level of international and transnational criminal law.

C. Humanitarian Law, International Criminal Law & Transnational Criminal Law

1. Kidnapping as a War Crime

According to Kaldor the evolution of armed conflict has resulted in parties engaging in kidnapping, as well as other forms of organized crime, in order to finance their missions (such as the FARC in Colombia), or the contrary situation in which actors engage in warfare in order to support their criminal activities.[79] In the context of warfare, hostage taking is illegal under international humanitarian law in any circumstances in both international and non-international armed conflicts.[80]

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light=1839/04&sessionid=51426687&skin=hudoc-en (addressing kidnapping by servicemen, also resulting in violation of the rights to life and effective remedy).

The European Court of Human Rights has also issued decisions addressing state responsibility for enforced disappearance, where the abduction is directly carried out by state actors. These cases apply a flexible standard– where applicants establish a prima facie case, the burden of proof shifts to the state to prove it is not responsible. *See* Betayev and Beayeva v. Russia, 2008 Eur. Ct. H.R. ¶ 113 *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=37315/03&sessionid=51426847&skin=hudoc-en; Akhmadova and Akhmadov v. Russia, 2009 Eur. Ct. H.R. ¶73 *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=20755/04&sessionid=51427106&skin=hudoc-en; Gekhayeva and Others v. Russia, 2008 Eur. Ct. H.R. ¶¶88, 93 *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=1755/04&sessionid=51428289&skin=hudoc-en; Shakhgiriyeva and Others v. Russia, 2003 Eur. Ct. H.R. ¶152 *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=27251/03&sessionid=51428494&skin=hudoc-en; Imakayeva v. Russia, 2006 Eur. Ct. H.R. ¶142 available at http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Imakayeva&sessionid=51428767&skin=hudoc-en; Utsayeva and Others v. Russia, 2008 Eur. Ct. H.R. ¶126 *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=29133/03&sessionid=51428909&skin=hudoc-en; Takhayeva and Others v. Russia, Eur. Ct. H.R. ¶¶86, 121-23 *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=23286/04&sessionid=51512533&skin=hudoc-en (equally finding violations of the right to life and effective remedy).

78. African Commission of Human Rights, *Activity Report of the Special Rapporteur on Freedom of Expression and Access to Information in Africa,* ¶ 25, *presented to the 45th session of the African Commission on Human and Peoples' Rights* (May 12-27, 2009) (*prepared by* Pansy Tlakula); African Commission of Human Rights, *Report of a Promotion Mission of the Commissioner to Burkina Faso,* ¶ 36, *delivered to the African Commission on Human and Peoples' Rights* (March 26-30, 2007) (*prepared by* Rezag Bara).

79. KALDOR, *supra* note 6, at 98.

80. *See generally* Geneva Convention IV Relative to the Protection of Civilian Persons in the

Hans-Peter Gasser states "[t]he term 'hostages' applies to persons who are held in the power of the adversary, whether voluntarily or by force, in order thereby to obtain specific actions (such as release of prisoners, cancellation of military operations, etc.) from the other party to the conflict of from particular individuals."[81] ICRC Guidelines suggest that "hostage-taking" occurs where:

- A person has been captured and detained illegally.
- A third party is being pressured, explicitly or implicitly, to do or refrain from doing something as a condition for releasing the hostage or for not taking his life or otherwise harming him physically.[82]

At present, many armed groups engage in kidnapping purely for ransom,[83] so it may be questionable whether the international humanitarian law standards would be applicable. Instead, reliance on domestic criminal law pertaining to kidnapping would more likely prevail. Of primary importance, within international humanitarian law, non-state actors have an absolute obligation not to engage in

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Time of War, art. 34, Aug. 12, 1949, 6 U.S.T. 3585, 75 U.N.T.S. 287 ("The taking of hostages is prohibited"); Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 3(b), Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention II for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, art. 3(b), Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention III Relative to the Treatment of Prisoners of War, art. 3(b), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, art. 3(b), Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (prohibiting combatants from making civilians hostages); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 75(2)(c), 4(2)(c), June 8, 1977, 1125 U.N.T.S. 3 (prohibiting the taking of hostages). Rome Statute of the International Criminal Court, art. 8(2)(a)(viii), (c)(iii), July 17, 1998, U.N. Doc. A/CONF. 183/9 (1998), 2187 U.N.T.S. 90 (1998) (including hostage taking in the definition of war crimes); ICRC STUDY ON CUSTOMARY INTERNATIONAL LAW 334-36 (Henckaerts & Doswald-Beck eds.) (2005), (noting that the taking of hostages is prohibited under customary international law and is considered a war crime in both international and non-international armed conflicts); Press Release, Colombia Office of the U.N. High Commissioner for Human Rights Expresses Deep Satisfaction for Liberation (Jul. 2, 2008) ("kidnapping is cruel, inhumane and degrading act which under no circumstances can be justified or excused. . . this act constitutes a grave violation of international humanitarian law."). See the Turku Declaration of Minimum Humanitarian Standards, art. 3(c)(d) *reprinted in* Comm'n on Human Rights *Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-sixth Session*, Provisional Agenda Item 19, at 4, U.N. Doc. E/CN.4/1995/116 for an analysis of situations of internal violence, disturbances, tensions and public emergency which highlights principles governing behaviour of all persons, groups and authorities. The Turku Declaration also prohibits the taking of hostages as well as practising, permitting or tolerating the involuntary disappearance of individuals, including their abduction or unacknowledged detention. *See also* International Convention Against the Taking of Hostages, G.A. Res. 34/146, U.N. GAOR 6th Comm., 34th Sess., 105th mtg, Supp. No. 46, U.N. Doc. A/34/819 (1979) *entered into force* June 3, 1983 ("the taking of hostages is an offence of grave concern to the international community and that, in accordance with the provisions of this Convention, any person committing an act of hostage taking shall either be prosecuted or extradited").

81. Hans-Peter Gasser, *Protection of the Civilian Population* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 220 ¶508 (Dieter Fleck ed., 2d ed. 2008).

82. Int'l Comm. of the Red Cross, *ICRC Position on Hostage Taking*, 846 INT'L REV. RED CROSS, 467,467 (2002).

83. Meadow Clendenin, Comment, *"No Concessions" with No Teeth: How Kidnap and Ransom Insurers and Insureds are Undermining U.S. Counterterrorism Policy*, EMORY L.J. 741, 746-47 (2006).

hostage-taking of civilians and persons *hors de combat*.[84] The taking of hostages may include related violations of humiliating, degrading, cruel, inhuman, treatment, torture, arbitrary deprivation of liberty, rape, sexual violence, and murder with the passage of time.[85] If widespread enough, the taking of hostages may amount to a crime against humanity. Such characterization not only points to the state's duty to prosecute, but also potentially a prevention duty in the form of identification of a responsibility to protect.[86]

2. Kidnapping as a Crime Against Humanity

It should be noted that the Rome Statute of the ICC does not refer to kidnapping, instead referring to the category of hostage taking (discussed in the previous section) and the category of enforced disappearance which requires state attribution/acquiescence.[87] On the other hand the Rome Statute also includes reference to the related violations of murder, torture, rape, deprivation of liberty, or "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health" as components of a crime against humanity.[88] These acts must be committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack to be considered a crime against humanity.[89] States are not usually held responsible for a failure to prevent crime, but as the ICJ in the *Genocide* case recognized a duty to prevent genocide, it may be argued that similar reasoning may support a finding of responsibility in the situation of a crime against humanity.[90] It is possible to design a complaint linking kidnapping to these categories. A national

84. *See* ICRC STUDY ON CUSTOMARY INTERNATIONAL LAW, *supra* note 80, at 327.

85. *Id.* at 306-327.

86. The Inter-American Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance (1971), Article 1, highlights the state's duty to prevent and punish acts of terrorism, especially kidnapping, murder, and other assaults against the life or physical integrity of those persons whom the state has a duty according to international law to give special protection, as well as extortion in connection with those crimes. (Referring specifically to diplomats and other official actors). Organization of American States Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortions that are of International Significance, art. 1, February 2, 1971, 27 U.S.T. 3949. *See also* 2005 World Summit Outcome, G.A. Res. 60/1, ¶¶ 138, 139 U.N. Doc. A/RES/60/1 ("Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity.").

87. Rome Statute of the International Criminal Court, *supra* note 80, art. 7(2)(i) ("'Enforced disappearance of persons' means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.").

88. *Id.* art. 7(1)(a),(e),(f),(g),(k). *See also* Inter-American Commission of Human Rights, The Situation of the Rights of Women in Ciudad Juarez Mexico: the Right to be Free from Violence and Discrimination *Chapter II Violence Against Women, an Overview of the Problem* (2003) (describing their serial disappearances and murders).

89. Rome Statute of the International Criminal Court, *supra* note 80, art. 7(1)(i).

90. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 153-55 (Feb. 26, 2007).

kidnapping epidemic may meet the "widespread" component of a crime against humanity, rather than systematic. Since the terms are disjunctive, this would be sufficient. Nevertheless, as the definition also refers to the requirement of an "attack". According to Cryer, this implies some degree of scale and organization, although cumulative acts may amount to an attack.[91]

Cryer notes that a crime wave in and of itself may not constitute a crime against humanity, as there is a requirement of connection between the acts of individuals in order to constitute an "attack" directed against a civilian population.[92] Because the criminal actors engaged in kidnapping vary widely, this may prove difficult. Yet, the accusation of state involvement in the form of corrupt police, judges, and legal officers may indicate a degree of connection in the form of encouragement, instigation, or direction by sections of the state.[93] In many cases, ex-military or police/security personnel join gangs. This compounds the problem of corruption/coercion of a law enforcement system. Such phenomenon renders the division between state and non-state actor responsibility for kidnappings fuzzy as there appear to be varying degrees of complicity.[94] The most symbolic image of this state of affairs is when non-state actors utilize police or military uniforms and vehicles in order to block cars and abduct their victims.[95] Nevertheless, it is extremely difficult to prove acquiescence of the state, and when blame is assigned within the state it is often assigned to low ranking officials within police or security services (such as Iraq or Mexico).[96] This prevents identification and prosecution of powerful actors who expand their territorial command over extortion & kidnapping in part by permeating the state institutions.

3. Lack of Enforcement Mechanisms for Transnational Criminal Law

At the international level, it has been noted by Schloenhardt that:

> [T]he great majority of transnational organised crimes are outside the jurisdiction of the International Criminal Court.... perhaps the greatest failure of the existing regime is that it leaves enforcement, prosecution, and punishment of the offences to individual nations. The current system has failed to establish mechanisms that ensure that suspected offenders are indeed arrested, properly charged, investigated, prosecuted, and punished fairly and adequately.... The opportunities offered by globalisation have enabled sophisticated criminal

91. ROBERT CRYER, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 194 (2007).

92. *Id.* at 195.

93. *See* United Nations Convention Against Transnational Organized Crime, *supra* note 16, art. 5 (calling upon states to prohibit participation in an organized criminal group and states that participation may be inferred).

94. *See id.* arts. 8-9 (calling upon states to criminalize corruption and take legislative, administrative, and effective measures in order to prevent, detect, and punish corruption among public officials).

95. *See* Bureau of Consular Affairs, *supra* note 20.

96. *Id.*; *see also Houses Raided after Iraq Kidnap*, BBC NEWS, May 30, 2007, *available at* http://news.bbc.co.uk/2/hi/uk_news/6703055.stm.

> organisations to take advantage of the discrepancies in different legal systems and the non-cooperative attitude expressed by many nations.[97]

Schloenhardt advocates the establishment of an international agency to investigate, prosecute, and punish transnational organised crime when national authorities are unable, incapable or unwilling to intervene.[98] Kaldor states that the aftermath of the Cold War resulted in the "emergence of horizontal transnational global networks, both civil and uncivil. What one might call zones of civility and zones of incivility exist side by side in the same territorial space."[99] Indeed, the UN Secretary-General, Kofi Annan, cited concern for the battle between civil and uncivil society as grounding for the adoption of the UN Convention Against Transnational Organized Crime to advance cosmopolitan ideals relating to the right of all individuals to be free from violence.[100]

In spite of this convention, there is no permanent institutional mechanism for parties to review its implementation.[101] In September 2009, the Open-ended Intergovernmental Meeting of Experts discussed possible mechanisms to review implementation of the convention in a "transparent, efficient, non-intrusive, impartial, non-adversarial, non-punitive and flexible manner" (via peer review or committee of experts procedure) that would respect the sovereignty of states.[102] The goal is to share good practices as well as challenges, and complement existing international and regional review bodies. Specifically in relation to kidnapping, the Anti-Organized Crime and Law Enforcement Unit published a United Nations

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97. Andreas Schloenhardt, *Transnational Organised Crime and the International Criminal Court-Towards Global Criminal Justice*, 24 U. QUEENSLAND L.J. 1 (2005). ("The establishment of the International Criminal Court as it exists today, goes back to an initiative of the year 1989 in which Trinidad and Tobago made a request to the UN General Assembly to explore the possibility of establishing an international court with jurisdiction over drug trafficking offences.").

98. *Id.* at 2.

99. KALDOR, *supra* note 6, at 6-12. She cites *societas civilis* as expressing the goal of public security, of a civilized, i.e. non-violent society. Civil society has a relationship to markets which secure economic autonomy and the rule of law which provides security. It may be suggested that the criminal markets thrive on the absence of the rule of law and insecurity. She points to negative aspects of globalization, e.g. growing inequality and insecurity and new forms of violence.

100. Kofi Annan, Secretary General, United Nations, Statement Marking the Opening for Signature of the U.N. Convention against Transnational Organized Crime (Dec. 13, 2000) *available at* http://www.unis.unvienna.org/unis/pressrels/2000/cp382.html.

101. *See* Antonio Maria Costa, *supra* note 15 (noting that none of the major arms producing states have ratified the Firearms Protocol and that a hand-gun is cheaper than a cellular phone). The G8 2009 Declaration on Counter-Terrorism stated that "abductions and the taking of hostages are repugnant practices." G8 Statement on Counter Terrorism, Members Call for a New Era of International Cooperation (July 8, 2009) *available at* http://www.america.gov/st/texttrans-english/2009/July/20090709123904emffen0.3825342.html.

102. Convention Against Transnational Organized Crime, *supra* note 16, art. 4.

> 1. States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.
>
> 2. Nothing in this Convention entitles a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law.

Counter - Kidnap Manual to include best practices for law enforcement authorities.[103] In short, the approach is multilevel governance, combining international and national institutional cooperation, rather than establishment of an international court or other institution.

Similarly, the European Council issued Recommendation 2007/562/EC of 12 June 2007[104] which requires states to share information in all terrorist kidnappings. At the Inter-American level, the need for international cooperation to address crime (including kidnapping) has been promoted by the OAS Permanent Council's Special Committee on Transnational Organized Crime and the Ministers Responsible for Public Security.[105] In large part, these initiatives include assistance in border control, intelligence-sharing, police training and management (seeking transparency, accountability, and professionalization), telecommunication interception, assistance in legislative amendments, extradition, and overview of financial transactions.[106] Furthermore, they highlight the need for strengthened citizen and community participation in the implementation of security plans, as well as improved citizen trust in the public security institutions. Hence, the international community's response to the global threat of kidnapping is reflected in the innovative institutional trend towards horizontal and vertical cooperation across the public-private divide.[107] The concept of political community is not inimical to protection of the human community. Pursuant to this perspective, the state is not an obstacle to the fulfillment of human rights, it is central institution necessary for enjoyment of rights. At the same time, it is implicitly understood that a state undergoing a kidnapping epidemic should demonstrate openness to assistance from regional and international entities, as well as other states, in order to fulfill protection duties related to sovereignty.

III. HISTORIC OVERVIEW OF KIDNAPPING AS STATE TERRORISM AND THE IDENTIFICATION OF THE CRIME OF ENFORCED DISAPPEARANCE

Kidnapping and enforced disappearance by the state originated in the USSR and became formalized within Nazi Germany in a 1941 decree titled *Nacht und Nebel* (Night and Fog) which resulted in the secret transfer of thousands of persons from occupied territories to Germany.[108] It was later adopted by the military dictatorship in Argentina during the Dirty War (1976-1983).[109] Systematic

103. *See* 2003 U.N. Report on Kidnapping *supra* note 2, Addendum 7/1.

104. Council Recommendation of 12 June 2007 art. 1(a)(b), 2007 O.J. (L 214).

105. *See* Permanent Council of the Org. of Am. States, Special Committee on Transnational Organized Crime, *Summary of the Meeting of December 14, 2005* OEA/Ser.G/CE/DOT/SA (Jan. 4, 2006); Ministers of Public Security in the Americas, "Commitment to Public Security in the Americas," OEA/Ser. K/XLIX.1 (Oct. 29, 2008).

106. *Id. See also* DEPARTMENT OF STATE, MERIDA INITIATIVE (2009) http://www.state.gov/p/inl/merida/.

107. G8 Statement on Counter Terrorism, *supra* note 101 ("abductions and the taking of hostages are repugnant practices.").

108. TULLIO SCOVAZZI & GABRIELLA CITRONI, THE STRUGGLE AGAINST ENFORCED DISAPPEARANCE AND THE 2007 UNITED NATIONS CONVENTION 4 (2007).

109. See Working Group on Enforced or Involuntary Disappearances, *Disappeared, but Not Forgotten*, Officer of the High Commissioner for Human Rights, May 22, 2008,

kidnapping was a form of state terror. Marguerite Feitlowitz notes that the military referred to kidnapping as an "operation" conducted against persons believed to hold ideas contrary to the Western, Christian fatherland.[110] The concept of an operation implies removal of a malignant mass or repair of an organ in order to save the body at large. Within the Argentine society, persons deemed to embody the "cancer of subversion" were hooded and spirited off to detention centers in order to "heal the nation" and defend the regime.[111] Abductions were carried out in full impunity, often with acquiescence by the police and passivity by civil society (due to fear, denial, or justification).[112] The disappearances were characterized as "a true form of torture for the victim's family and friends, because of the uncertainty they experience as to the fate of the victim and because they feel powerless to provide legal, moral and material assistance."[113] Resistance to the wave of disappearances was headed by the Mothers of the Plaza de Mayo and the Grandmothers of the Plaza de Mayo who sought information about their abducted children and grand-children.[114] It is notable that few fathers chose to participate due to the risk of arrest or assassination for unpatriotic, oppositional action.[115] The peaceful demonstrations in the Plaza de Mayo and international lobbying efforts produced a transnational reclamation of conscience. This was a primary example

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http://www.wunrn.com/news/2008/07_08/07_21_08/072108_argetina.htm for a discussion of the Dirty War .

110. MARGUERITE FEITLOWITZ, A LEXICON OF TERROR: ARGENTINA AND THE LEGACIES OF TERROR 24, 56 (1998).

111. The Inter-American Commission of Human Rights published a report on Argentina in 1980 which described the phenomenon of kidnapping:

> "The operations, for the most part, are carried out by groups whose number varies from 6 to 20 persons which arrive at the home or place of work of the victim in several unmarked cars without license plates, and equipped with radios that allow them to communicate with each other. In some cases they are accompanied by additional support forces in vans, in which, after the mission is completed, they transport the household goods that are taken from the homes of the victims.
>
> It has also been denounced that when relatives, witnesses or building supervisors reported the occurrences to the local police, the response was usually, after admitting knowledge of the fact, to say that they were unable to intervene. In the few cases where police did arrive at the scene, they withdraw shortly after having spoken to the persons directly involved in the operation. This situation has been called "free zone", in favor of the intervening parties."

INTER AMERICAN COMMISSION ON HUMAN RIGHTS, *Chapter III The Problem of the Disappeared, in* ANNUAL REPORT 1976 (1977) *available at* http://www.cidh.org/countryrep/Argentina80eng/chap.3.htm.

112. CONADEP reported that 62% were abducted in their own homes, 24% on the street, 7% at work, and 6% at place of study. NATIONAL COMISSION ON THE DISAPPEARANCE OF PERSONS, NUNCA MAS (1984), *available at* http://web.archive.org/web/20031013222855/nuncamas.org/english/ library/nevagain/nevagain_005.htm.

113. INTER-AMERICAN COMMISSION OF HUMAN RIGHTS, REPORT ON ARGENTINA (1980) *in* THOMAS C. WRIGHT, STATE TERRORISM IN LATIN AMERICA, CHILE, ARGENTINA AND INTERNATIONAL HUMAN RIGHTS 108 (2007).

114. Marie Trigona, *Argentina's Mothers of Plaza de Mayo Pass on a Legacy of Defending Human Rights* (March 9, 2006) *available at* http://towardfreedom.com/home/content/view/769/54/.

115. *Id.*

of sub-altern cosmopolitanism from below. The civil society and international community cooperated to bring an end to the gross human rights violations promulgated in the name of patriotism.[116] Specifically, their efforts to attain justice led to the normative recognition of the crime of "enforced disappearance", culminating in the creation of the International Convention for the Protection of All Persons from Enforced Disappearance.[117] Instead of top-down, this was a bottom up evolution of protection norms.

As noted by Seibert-Fohr:

> The international protection of human rights is occasionally viewed as a legal basis for filing the gaps which still exist in international criminal law and also to complement international criminal law. This not only encompasses torture and genocide-for which the respective conventions already provide criminal sanctions-but serious human rights violations in general. Human rights law is now also used to enhance the enforcement of international criminal law at the domestic level. Since international criminal tribunals can only supplement and not replace national prosecution, domestic criminal proceedings remain pivotal for the effective implementation of international criminal law. The question of whether there is a comprehensive duty on States to criminalize serious human rights violations has therefore become particularly relevant.[118]

A. Enforced Disappearance

Enforced disappearance is considered to constitute an international crime for which individuals can be prosecuted. The key criterion is state attribution, which complicates application to modern kidnapping scenarios. The UN Convention on Enforced Disappearance Article 2 provides the following definition:

> For the purposes of this Convention, "enforced disappearance" is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.[119]

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116. There was a boomerang effect in which domestic actors turned to transnational network to force change at the national level. MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS 104 (1998) (describing how domestic human rights organizations, political exiles, Amnesty International, the Inter-American Commission of Human Rights, and the governments of the United States, France, Italy and Sweden placed pressure on the military junta to end the repression).

117. International Convention for the Protection of All Persons from Enforced Disappearance, *supra* note 67.

118. ANJA SEIBERT-FOHR, PROSECUTING SERIOUS HUMAN RIGHTS VIOLATIONS 3-4 (2009).

119. International Convention for the Protection of All Persons from Enforced Disappearance, *supra* note 67, art. 2.

In like manner, the Inter-American Convention on Forced Disappearance Article 2 also refers to acts supported, authorized or acquiesced to by the State:

For the purposes of this Convention, forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.[120]

According to the 1998 Rome Statute's Elements of Crime, Article 7 (1) (i) Enforced Disappearance may also be part of a crime against humanity.[121] Under the principle of complimentarity, victims would have to demonstrate that prosecution at the national level is impossible.[122] Given the crisis in the national justice systems of countries experiencing kidnapping epidemics it is possible to envision such claim being made. Yet, at present it is non-state actors that most directly engage in kidnapping, hence the above definitions relating to enforced disappearance may prove difficult to apply as proving state complicity or acquiescence is often convoluted in situations involving corrupt state actors.

B. Kidnapping by Non-State Actors and Classification as Enforced Disappearance

The Colombian State sought to respond to the changing nature of kidnapping by amending its criminal law in order to characterize an act as enforced disappearance even when committed by non-State actors without the support, consent or acquiescence of the State.[123] The UN Working Group on Enforced or Involuntary Disappearances criticized this reform:

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120. Inter-American Convention on Forced Disappeance of Persons art. 2, June 9, 1994, 33 I.L.M. 1529.

121. Rome Statute of the International Criminal Court, *supra* note 80, art. 7(1)(i).

122. *See* United Nations Department of Public Information, *International Criminal Court Fact Sheet* (2002) http://www.un.org/News/facts/iccfact.htm (last visited Apr. 9, 2010).

123. Código Penal, [CÓD. PEN.] [Penal Code of Colombia] No. 599/2000 arts. 165-166 (codifying the punishment for forced disappearance); *id.* arts. 168- 172 (codifying the punishment for kidnapping). Forced Disappearance carries a penalty of 20-30 years imprisonments, as well as financial penalties. Aggravated Forced Disappearance carries a penalty of 30-40 years imprisonment, financial penalties. It involves commission by a person in a position of authority or jurisdiction, when committed against an incapacitated person, when committed against persons engaged in public service, communication, human rights, political candidates, religious, political or union leaders who have witnessed punitive acts, justices of the peace, or any other person subject to discrimination or intolerance on account of his political or religious beliefs; when committed against relatives of such person (to the second degree of consanguinity), when committed using government property, when the victim is subject to cruel, inhuman or degrading conduct, when the victim dies or suffers physical or psychological harm, when the corpse is subject to destruction in order to prevent identification or harm third parties. *See also* ECOSOC, Comm'n on Human Rights, *Report of the Working Group on Enforced or Involuntary Disappearances Addendum Mission to Colombia* (5-13 July 2005) ¶¶ 26-27, 46 U.N. Doc. E/CN.4/2006/56/Add.1 (Jan. 17 2006) (noting that both the U.N. Declaration on the Protection of all Persons from Enforced Disappearance and the Inter-American Convention on Forced Disappearance of Persons refer to acts perpetrated by officials of government or individuals or groups acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the government) [hereinafter *Mission*

> Although the inclusion of non-State actors acting without the support or consent of the Government may at first glance look like an advancement of the law, in the sense that it protects more than the limited definition of the Declaration, it is the opinion of the Working Group that enforced disappearance is a "State Crime" (as opposed to kidnapping). Although in other cases of violations of human rights the inclusion of non-State actors indeed offers more protection to the victims, (i.e. in the case of discrimination or labour or environmental human rights), in the case of enforced disappearance such inclusion dilutes the responsibility of the State.
>
> For that same reason, the Working Group resists accepting the official Colombian attitude to 'disappearances', linking the definition of the phenomenon to or even equating it with 'kidnappings'. To accept this definition would amount to diluting or even ousting State responsibility for acts of 'disappearances'. The Working Group made it a point to emphasize that 'disappearances' are a State responsibility, while 'kidnappings' are things one attributes to non-State individuals, gangs, or criminal networks. The Working Group also took pains to condemn both acts of "disappearances" and "kidnappings", irrespective of their perpetrators, as reprehensible.[124]

The Working Group's rejection of Colombia's statutory attempt to recognize a private duty not to engage in kidnapping is based on the concern that the government would use this as a pretext to avoid responsibility. The dilemma is that by not including kidnapping by non-state actors within the concept of enforced disappearance, victims and their families may be denied the benefits related to recourse to an international human rights tribunal, committee, or complaint mechanism related to it. The alternative is to demonstrate state responsibility for failure to protect the victim from kidnapping or provide effective investigation/remedy.

It is disquieting that the UN Working Group failed to fulfill the cosmopolitan expectation of expanding the possibility for transnational justice in its narrow interpretation of its mandate and resulting opposition to the national legal reform. The UN Working Group's view appears conservative and unfair in the context, as well as not in keeping with the evolution in human rights theory regarding non-state accountability for violations. In practice, it heavily criticized a state which actually had been quite successful in diminishing the level of kidnappings via a comprehensive program which combined increased legislative penalties, improved institutional capacity, cooperation with the public, and provision of legal aid and financial assistance to victims.[125] In short, this example reflects that de facto

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to Colombia].

124. Mission to Colombia, *supra* note 123, ¶¶ 48-49.

125. According to the Colombian Foundation País Libre, there has been a decrease in kidnappings from a high of 3572 in 2000 to 242 in 2008. Fundacion País Libre reports that in the period 1996-2008, a total of 23,908 persons have been kidnapped in Colombia. The majority were kidnapped by FARC or ELN. In the same time period, 13927 were liberated (843 liberated under pressure), 4555 were rescued,

bias/exclusionary perspectives can taint the international institution, calling into question the cosmopolitan notion of subordination of the state to the international legal order. In this case, it is the state, rather than the UN body, that appears most open to providing impartial, universal justice to kidnapping victims, demonstrating a significant gap in the cosmopolitan legal order.

IV. NON-STATE KIDNAPPING IN LATIN AMERICA AND THE PLEA FOR COMMUNITARIAN JUSTICE

Latin America is considered to have the highest rate of kidnappings in the world.[126] Although Colombia once had the highest percentage of cases, it has since been overtaken by Mexico.[127] In 2007, Mexico experienced 3,000 kidnappings and the ransom market has been calculated at over USD 100 million.[128] The escalation of violence has manifested itself in the targeting of civilians as opposed to members of the drug cartels. The Gulf, Sinaloa, La Familia, and Juarez cartels engage in acts of violence (including acts of torture, dismemberment, decapitations, arbitrary executions) against society, as well as the army and security services. This has resulted in astounding bloodshed, calculated at 16,000 homicides from 2000 to 2008.[129] New groups emerged which were not engaged in drug trafficking, but rather extortion and kidnapping of citizens.[130] The proliferation of smaller, less "professional" gangs meant that the profile of the criminal altered. Victims are more often murdered, in spite of payment of ransoms-indicating a worsening of brutality involved in this act.[131] In contrast to the fact that drug trafficking does not directly affect the well-being of the elites of Mexico, extortion and kidnapping specifically targets their members.

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388 escaped, 2820 remained captive, and 1314 died. FUNDACIÓN PAÍS LIBRE, ESTADÍSTICAS JANUARY 1996 - JUNE 2008. *See also* MINISTERIO DE DEFENSA NACIONAL & FONDE LIBERTAD, AVANCES EN DEFENSA DE LA LIBERTAD (2009).

126. Although Latin America only consists of eight percent of the world population, 75 percent of all kidnappings take place in the region. *See* Tomas Ayuso, *Latin America's Response to Narco-Fueled Transnational Crime* COUNCIL ON HEMISPHERIC AFFAIRS, Nov. 18, 2008 *available at* http://www.coha.org/latin-america's-response-to-narco-fueled-transnational-crime.

127. *See generally Kidnappers Inject Acid Into Boys Heart*, CBS NEWS WORLD, Nov. 4, 2008 *available at* http://www.cbsnews.com/stories/2008/11/04/world/main4571385.shtml?source=RSSattr=World_4571385 (blaming the increase on a growing web of drug cartels, current and former police officers and informants who point out potentially lucrative victims).

128. Clayton Consultants, *supra* note 2, powerpoint presentation *available at* http://www.authorstream.com/Presentation/BAWare-32521-tues-RMI-cloonan-valuable-assets-Definition-Kidnapping-Types-Kidnappings-Political-Religious-as-Entertainment-ppt-powerpoint/. Mexico has long been subject to comparative study in relation to its level of democratic transition, *see* AREND LIJPHART, PATTERNS OF DEMOCRACY: GOVERNMENT AND FORMS OF PERFORMANCE IN THIRTY-SIX COUNTRIES (1999).

129. Dr. Carlos Flores, Centro de Investigaciones y Estudios Superiores en Antropología Social, Lecture at the University of Oslo, The Drug Violence in Mexico: Implications for Democracy, Peace and Security (April 20, 2009) (on file with author).

130. Emilio Godoy, *Mexico Kidnapping – A Growing Risk for Central American Migrants,* INTER PRESS SERVICE NEWS SOCIETY (Mar. 19, 2010) *available at* http://ipsnews.net/news.asp?idnews=50725.

131. *See Kidnappers Inject Acid Into Boys Heart, supra* note 127.

At present, the consolidation of democracy in Latin America is threatened by a new wave of kidnappings, and the call for an end to impunity is being led by the fathers of the victims.[132] The current wave of kidnapping is pursued by non-state actors and fathers are assuming the forefront of the public discourse, calling for domestic penal law reform and often presenting themselves as defenders of the state which is under attack by the crime spree. Instead of assuming a cosmopolitan perspective, there approach is communitarian. They achieve societal resonance in attaining civic engagement to battle corruption and inefficiency within state institutions in an effort to restore the domestic rule of law.[133]

Nevertheless, identification of criminal responsibility is difficult because it is diffuse within different elements of society. As noted by Dr. Carlos Flores, at present in Mexico, even housewives pursue kidnapping as a means of income; they provide food to the hostages and are remunerated for their services.[134] There are invisible criminal networks infusing the state and society, challenging governance. The design of a crime fighting strategy is necessary but complex because the state of "unrule" of law is grounded in the citizenry.

A. The Martí Case

The abduction of children belonging to affluent (real or perceived) families has provoked societal outrage in both the US and Mexico, resulting in normative consequences via the adoption of the highest criminal penalty, the death penalty, as well as legalization of firearms.[135] The most symbolic case is that of the 2008 kidnapping and murder of 14 year old Fernando Martí, son of a prominent Mexican businessman, Alejandro Martí.[136] The kidnappers used the uniforms of the Federal Investigations Agency (AFIS), indicating that they were either police or disguised as police.[137] Alejandro Martí explained that he did not contact the police initially after the kidnapping because "[t]hose who grabbed him were police officers, and the last thing we wanted was for the police to be involved."[138] President Calderon remarked that there was a need to purge the police of

132. *See infra* Part 4.1.

133. *See* Palma Joy Strand, *Law as a Story: A Civic Concept of Law (with Constitutional Illustrations)*, 18 S. CAL. INTERDISC. L.J. 603, 635-636 (2009).

134. Dr. Carlos Flores, *supra* note 129.

135. In the United States, the 1932 kidnapping and murder of Charles Lindbergh's toddler son devastated the society and resulted in kidnapping receiving status as a federal crime and the application of the death penalty. *See The Supreme Court: No Death for Kidnapers*, TIME, April 19, 1968, *available at* http://www.time.com/time/magazine/article/0,9171,838260,00.html. Similarly, in Mexico, the 2008 kidnapping and murder of 14 year old Fernando Martí prompted street demonstrations and calls for reforms of the penal code to apply the death penalty. Marc Lacey & Antonio Betancourt, *A Boy's Killing Prods a City to Stand Up to Kidnappers*, N.Y.TIMES, Aug. 14, 2008, at A8.

136. *See* Duncan Kennedy, *Mexican Fury Grows at Kidnappings*, BBC NEWS, Aug. 11, 2008, *available at* http://news.bbc.co.uk/2/hi/americas/7553633.stm.

137. *See* Laurence Iliff, *Calderón Proposes Life Sentence for Police Involved in Kidnappings in Mexico*, THE DALLAS MORNING NEWS, Aug. 8, 2008, at 1A.

138. Marc Lacey & Antonio Betancourt, *supra* note 135.

infiltration by criminal elements and put an end to "the conspiracy between criminals and authorities."[139]

The heinous crime galvanized massive demonstrations on the street, in which the society demanded an end to impunity and new legislation to impose the death penalty in kidnapping cases.[140] Alejandro Martí became a spokesperson for the Mexican society.[141] He lamented the state of evil and degradation of morality within the society, noting that the country was undergoing the worst security and moral crisis.[142] He remarked that the country was at a critical point- that the government and civil society had to make an immediate decision to repair the country or if not, suffer the consequence that it will be emptied out, leaving only the wicked.[143]

Martí cited the state of impunity within Mexico and blamed the civil society for the existential offence of failing to hold state actors accountable.[144] The passivity of the society in the face of increased corruption and violence resulted in the complete loss of liberty. Martí characterized the inhibition of freedom of movement as escalating to the level of a nation-wide psychosis, in which Mexicans are afraid to engage in normal activity, such as walk on the street, take the children to the playground, go to work, and so forth.[145] Specifically, he cited the case of police (or persons dressed as police) entering schools to kidnap children; the result being that parents are actually afraid to send children to school and some children refuse to go.[146] The irony is that in the age of globalization, the wave of

139. *Id.* Martí further explained that he was accustomed to utilizing a private security firm.

140. *Id.*

141. Interview by Joaquín López-Dóriga with Alejandro Martí (Aug. 14, 2008), *available at* http://www.youtube.com/watch?v=ogztRT8EJ14.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* Martí cited the case of a man who purchased a taxi and was stabbed in the first week on the job as result of the theft of his vehicle, indicating that the taxi driver had nearly lost his life for trying to work, and the criminal had gained the profit of the vehicle at no cost whatsoever to his well-being or freedom.

146. *Id.* Indeed, one may refer to the UN Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, Principle 36:

> "States must take all necessary measures, including legislative and administrative reforms, to ensure that public institutions are organized in a manner that ensures respect for the rule of law and protection of human rights. At a minimum, States should undertake the following measures:
> (a) Public officials and employees who are personally responsible for gross violations of human rights, in particular those involved in military, security, police, intelligence and judicial sectors, shall not continue to serve in State institutions. Their removal shall comply with the requirements of due process of law and the principle of non-discrimination. Persons formally charged with individual responsibility for serious crimes under international law shall be suspended from official duties during the criminal or disciplinary proceedings".

ECOSOC, Comm'n on Human Rights, *Promotion and Protection of Human Rights: Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, Principle 36, U.N. Doc. E/CN.4/2005/102/Add.1 (Feb. 8, 2005). Principle 35 sets forth: "States shall ensure that victims do not again have to endure violations of their rights. To this end, States must

kidnappings results in the de facto detention of civil society within their homes and relegation of the public spaces to the criminals.

Martí assumed a communitarian perspective in his explanation as to why he chose to stay in Mexico to fight impunity, in spite of the fact that many Mexicans are leaving the country in search of a cosmopolitan solution to their plight in the form of asylum. When he saw the vast demonstrations mourning his son's death, he said he realized that the loss of his son had an importance which transcended the family.[147] He noted that he lost a son, but that Mexico had gained one.[148] In his view, his son managed to awaken the conscience of the society. The great evil had provided a great message – that the society shared responsibility for the level of impunity and hence it was essential to repudiate corruption within the state. For Martí, this implies resisting the impetus to migrate abroad, placing the love of the country above the cosmopolitan search for an international haven for his family.[149] In keeping with the principles of the OAS Commitment to Public Security in the Americas, he committed his family to strengthening community participation in the implementation of public security and engendering a culture of social responsibility towards the prevention of crime.[150] Hence, he articulates recognition of greater involvement by the community in buttressing the state in order to secure the rule of law and restore public freedom and societal morality. Indeed, it is ironic that President Calderon noted that while the country celebrated the bicentennial of its independence, the government was confronted by the challenge of establishing the rule of law.[151]

B. The Blumberg Case

Similarly, the kidnapping and murder of 23 year old Axel Blumberg in Argentina in 2004 also resulted in allegations of police involvement.[152] This prompted marches including hundreds of thousands of persons who responded to his father's call to rally for increased security and penalization of kidnapping.[153] The people sang the national anthem,[154] of which it is notable that the lyrics

undertake institutional reforms and other measures necessary to ensure respect for the rule of law, foster and sustain a culture of respect for human rights, and restore or establish public trust in government institutions." *Id.*

147. Interview by López-Dóriga with Alejandro Martí, *supra* note 141.

148. *Id.*

149. *Id.* The State enacted reforms to the penal code to increase penalties for kidnapping based on popular demand. See SERIO GARCÍA RAMÍREZ ET AL., LA REFORMA A LA JUSTICIAL PENAL: QUINTAS JORNADAS SOBRE JUSTICIA PENAL (2006) *available at* http://www.bibliojuridica.org/libros/libro.htm?l=2142 for a series of articles on penal reforms.

150. Interview by López-Dóriga with Alejandro Martí, *supra* note 141.

151. President Calderon, President of Mexico, Address to the Joint Meeting of Congress (May 20, 2010) *available at* http://www.c-spanvideo.org/program/293616-2.

152. It was alleged that neighbors saw Axel being beaten as he tried to escape; they called the police who chose not to respond. Larry Rohter, *Police Corruption Plagues Argentines and President*, N.Y. TIMES, Aug. 4, 2004, at A6.

153. Elliott Gotkine, *Could a Kidnapping Change Argentina?*, BBC NEWS, July 22, 2004, *available at* http://news.bbc.co.uk/2/hi/americas/3887805.stm.

154. MARIEKE DENISSEN, WINNING SMALL BATTLES, LOSING THE WAR: POLICE VIOLENCE, THE *MOVIMIENTO DEL DOLOR* AND DEMOCRACY IN POST-AUTHORITARIAN ARGENTINA 125 (2008).

include the emphatic call for "*Libertad, Libertad, Libertad*!" The 1813 anthem was originally penned as a stinging cry for independence from the colonial kingdom of Spain and now was being directed at the non-state actors that exploited the citizenry via extortion. Axel Blumberg's father, Juan Carlos Blumberg, gathered 5.2 million signatures on a petition urging for judicial and police reform, lamenting the low levels of conviction rates in criminal cases.[155] He cited concern for corruption within the police and reclamation of the restoration of justice.[156] He sought efficient processing of cases, complete investigation, gathering of evidence, and prosecution.[157] The wave of support for reform of the Penal Code was deemed the "Blumberg Phenomenon" as the Congress passed increased heavy penalties for carrying weapons, homicide, kidnapping, and rape.[158] Once again, the approach is communitarian rather than cosmopolitan, a call for the restoration of the national rule of law and the enjoyment of democratic peace. Instead of seeking to raise the transnational conscience, as was done by the Mothers of the Plaza de Mayo, the objective is to influence domestic institutions and their output. The Argentine government responded with a national security plan and new agency, as well as a strategy to battle corruption within the police.[159] Criticism arose that it was unfortunate that the phenomenon did not place pressure on the government in the area of social needs which are among the root causes of delinquency.[160] Indeed,

155. *See* Elliott Gotkine, *supra* note 153.

156. *See* Elliott Gotkine, *Argentine Crime Sparks Protest*, BBC NEWS, Apr. 2, 2004, *available at* http://news.bbc.co.uk/2/hi/americas/3592005.stm.

157. *See* SouthAmericano.com, The Kidnapping that (Almost) Changed Argentina, http://www.southamericano.com/article.aspx?idArticle=75# (last visited April 11, 2010).

158. *See* 15 EUR. J. CRIM. POL'Y. & RES. 121, 130-35 (Feb. 13, 2009).

159. *See generally* ADRIÁN MARCHISIO, EL SEQUESTRO EXTORSIVO EN LA REPÚBLICA ARGENTINA, (2006) *available at* http://www.bibliojuridica.org/libros/libro.htm?l=2233 (outling the legislative reform and review of other Latin American countries).

160. Horacio Cecchi, "*Un Año de Discurso de Exclusion*", PAGINA, Apr. 1, 2005, at 12. Indeed, the OAS Secretary-General noted that:

> It is also necessary to attack the roots of the crime problem. The OAS is convinced that there is a link between poverty, exclusion, marginalization, inequality, and citizens' security. Poverty and social exclusion are key issues that should be addressed in order to eliminate the true causes of the problem. Others include a culture of lawlessness, impunity, and the absence of respect for government institutions in several urban areas in which criminal groups replace the legal authorities. Additional factors include the breakdown of the family with a proliferation of single parent homes, and the increased number of youth in Latin America who are unable to go to school or work. Also, flaws in the prison system have produced some of the biggest human rights violations due to a precarious infrastructure, the sub-human conditions in which the prisoners are kept, and overcrowding. These factors often make prisons places to learn more advanced criminal behavior.

Org. of Am. States, *Rapporteur's Report – First Meeting of Ministers Responsible for Public Security in the Americas*, at 3, OEA/Ser.K/XLIX.1, (Oct 7-8, 2008), *available at* http://www.oas.org/seguridad_hemisferica/documents/Informe%20Relatoría%20MISPA_Rev%201_RM00033E08.doc; The Ministers Responsible for Public Security in the Americas' 2008 document: "Commitment to Public Security in the Americas" sets forth, "[t]hat conditions for public security are improved through full respect for human rights and fundamental freedoms, as well as through the promotion of education, health, and economic and social development," Org. of Am. States, *First Meeting of Ministers Responsible for*

given the gravity of the situation, there is a clear need for a holistic approach which would confront severe inequality and inequity within the region and pursues restorative justice initiatives to rehabilitate marginalized individuals who turn to crime as a means of survival or for a lack of viable options.

C. The Role of Private Companies

The fundamental characteristic of the kidnapping epidemic is that the private market is both part of its origin and solution. Inequitable enjoyment of socio-economic resources and exclusion from participation in formal markets prompts marginalized individuals to pursue the criminal market of kidnapping as a means of survival. The customary practice of private security and insurance companies paying ransoms in the majority of cases[161] stimulates the significant growth of the market; the benefit being the increased chance of reunion of the victim to his/her family. The kidnapping market clearly benefits private actors on both sides. A point of interest, in the context of kidnapping at sea (for example the kidnapping of shipping crews by Somali pirates in the Gulf of Aden), is that it has been noted that costs of negotiation services can supersede the actual ransom itself.[162] Maritime companies are unwilling to sacrifice their crews in order to break the market because it would contravene the code of honor at sea.[163] Further, in spite of the fact that the costs incurred as a result of a hostage-taking may be high, the shipping industry has vast economic resources that can afford it. On land, families of victims are understandably unwilling to sacrifice their family members, hence many lose entire life savings in order to rescue their loved ones. As an example of the growth of the industry, middle-class Mexicans can purchase transmitter chips from a security company to be inserted into their bodies so as to allow tracking by satellite in the event of a kidnapping. The chips cost $4,000 plus an annual fee of $2,200.[164]

A salient issue is that because families will often negotiate directly with the kidnappers via use of private security firms (to the exclusion of state authorities), official oversight of the scale of the problem is rendered vague.[165] The reasons why the families of victims of kidnapping may eschew the state when seeking resolution include: instruction and fear of reprisal by the kidnappers should they

Public Security in the Americas: Commitment to Public Security in the Americas, at 1, MISPA/doc. 7/08 rev. 4 (Oct. 8, 2008) *available at* http://www.oas.org/CSH/english/documents/RM00028E08.doc.

161. *Insurance: Hedge Against Ransom*, TIME, Mar. 18, 1974, *available at* http://www.time.com/time/magazine/article/0,9171,911137,00.html.

162. Trine-Lise Wilhelmsen, Prof., University of Oslo, Conference Comment on Piracy in Maritime Law, Institute for Maritime Law, (Apr. 29, 2009) (on file with author).

163. *Id.*

164. Mica Rosenberg, *Satellites Track Mexico Kidnap Victims with Chips*, REUTERS, Aug. 21, 2008, *available at* http://www.reuters.com/article/idUSN2041333820080821. *See*, eGlobalHealth Insurers Agency, LLC, http://www.eglobalhealth.com/kidnap-ransom-extortion-insurance.html (last visited Apr. 18, 2010 (for an overview of the kidnap insurance industry).

165. Barnard R. Thompson, *Kidnappings are Out of Control in Mexico*, MEXIDATA, June 14, 2004, http://mexidata.info/id217.html (stating that the National Autonomous University of Mexico estimated that over 90% of kidnappings in Mexico go unreported due to lack of faith in the police and government).

contact the police, distrust in the police due to corruption allegations, or concern regarding the state's lack of effectiveness in actually obtaining the release of victims. Private companies offering services in handling kidnapping fill a niche by solving individual cases but do not provide a holistic solution for the transnational criminal pathology as a whole.

Hence, the distrust of the state appears similar to that in situations of direct state terrorism. Protection is directly contingent on victims' financial ability to pay the private actors that have assumed dominance in this arena. This service industry previously concentrated on multinational company executives or political actors. Now the market is significantly broadened. The emergence of hundreds of citizens around the world seeking basic protection to simply walk down the street, go to work, go to school, and so forth confirms the significant growth of the private business of anti-kidnapping.

The recession of state police as guarantors of security in accordance with their basic protection duty to citizens is remarkable. A particular irony is that whereas the Mexican state often had problems collecting taxes from its citizens,[166] the extortion groups proved remarkably effective in collecting "taxes".[167]

Given the lack of effective national protection mechanisms, victims and potential victims of kidnapping go abroad in search of asylum. The following section reviews cases and reports from the United States, Canada, and France. It should be noted that the provision of asylum to past victims or potential victims of kidnapping may be deemed less urgent than the adoption of policies designed to strengthen strategies to defeat gangs and other non-state actors engaged in kidnapping. This is particularly salient when the same groups are also involved in narco-trafficking and support of terrorist acts, such as the FARC, in Colombia. Furthermore, although international attention responds to kidnapping of foreigners, the wave of kidnapping of locals is largely unreported.

V. REFUGEE LAW AS AN ASPECT OF INTERNATIONAL PROTECTION

A. Background

De Sousa Santos describes modern Western thinking and, in turn, modern law, as dividing societies between existent (legal) and non-existent (illegal) groups, the latter of which are denied recognition and protection by the State.[168] In modern states, citizens enjoy the benefit of the social contract; in countries undergoing kidnapping epidemics, governments are unable to guarantee their citizens basic security against violence by non-state actors. At present, citizens are deprived the benefits of citizenship and turn to the international community for protection in the

166. *See* Elisabeth Malkin, *Mexico Moves to Cut Back Tax Loopholes for Businesses*, N.Y. TIMES, June 21, 2007, at C4.

167. *See* Alfredo Corchado, *Drug Gangs Extort Money from Nuevo Laredo Business Owners*, DALLAS NEWS, Oct. 17, 2007, *available at* http://www.dallasnews.com/sharedcontent/dws /news/nationworld/stories/101707dnintmobsters.37202a7.html.

168. Boaventura de Sousa Santos, *Beyond Abyssal Thinking: From Global Lines to Ecologies of Knowledge*, EUROZINE, June 29, 2007, *available at* http://www.eurozine.com/articles/2007-06-29-santos-en.html.

form of asylum. De Sousa Santos asserts that modern states refuse to recognize the state of inequity, thereby resulting in "global cognitive injustice."[169] Furthermore, he asserts that "the logic of appropriation/violence has been gaining strength to the detriment of the logic of regulation/emancipation. This has occurred to such an extent that the domain of regulation/emancipation is not only shrinking but becoming internally contaminated by the logic of appropriation/violence."[170] Hence, Western states, fearing an opening of floodgates, in turn, adopt restrictive policies to deny protection and return asylum seekers to their countries of origin (thereby engaging in *refoulement*).[171] This is accompanied by additional human rights violations, including arbitrary detention.[172] Indeed, the most evocative image of this epoch is the erection of walls or fences (such as the one between Mexico and the United States) to separate the "civilized" and "savage" zones which produce refugees and migrants.[173] This counters de Sousa Santos' advocacy of a "sub-altern cosmopolitanism" which would guarantee inclusion of those excluded from protection by their own governments.

B. Asylum

A consequence of the rise in kidnapping is an escalation in migration.[174] The problem that arises when considering transnational responses to kidnapping is that there is an inherent conflict between the individual's desire to attain immediate protection for himself and his family via the filing of an asylum claim and the traditional state-centered interpretation of cooperation as implicating measures designed to facilitate arrest and prosecution of offenders.

Indeed, the UN Economic and Social Council Resolution on International Cooperation in the Prevention, Combating and Elimination of Kidnapping and in Providing Assistance to Victims (2003/28) primarily highlights the importance of amendment of national penal legislation to abide by the UN Convention Against Transnational Organized Crime, further addressing the need for extradition and international cooperation in the freezing of assets.[175] In terms of fulfilling *protection* duties towards victims and their families, only general reference is made

169. *Id.*

170. *Id.*

171. JESSICA RODGER, DEFINING THE PARAMETERS OF THE NON-REFOULEMENT PRINCIPLE, (2001), *available at* http://www.refugee.org.nz/JessicaR.htm.

172. Human Rights First, Background Briefing Note, The Detention of Asylum Seekers in the United States: Arbitrary under the ICCPR, (2007), *available at* http://www.humanrightsfirst.info/pdf/061206-asy-bac-un-arb-det-asy-us.pdf.

173. Within the United States, the increase in asylum applications by Mexicans is resulting in increased investment in border patrol and a large scale policy to reject cases at the administrative level. Indeed, the U.S. has constructed various fences on the border of Mexico, and the recent execution of Mexican prisoners resulted in a critical decision by the ICJ. Case Concerning Avena and Other Mexican Nationals (Req. for Interpretation) (Mex. V. U.S.), 2004 I.C.J. 12 (Mar. 31). *See* HUMAN RIGHTS FIRST, U.S. DETENTION OF ASYLUM SEEKERS: SEEKING ASYLUM, FINDING PRISON (2009), *available at* http://www.humanrightsfirst.org/pdf/090429-RP-hrf-asylum-detention-report.pdf.

174. *See* Sam Dillon, *Kidnappings in Mexico Send Shivers Across Border*, N.Y. TIMES, Jan. 4, 2009, at A1.

175. 2003 U.N. Report on Kidnapping, *supra* note 2, ¶¶ 35, 45.

to the need to review *domestic* measures (not transnational measures).[176] In UN Economic and Social Council Resolution 2004/20 on International Cooperation in the Prevention, Combating and Elimination of Kidnapping and in Providing Assistance to Victims, noting "the considerable psychological, social and economic damage associated with kidnapping," member States are urged to adopt legislative, administrative and other measures to provide appropriate support and assistance to victims and their families.[177] From a trans-national perspective one may argue that this may be interpreted to include the provision of asylum where appropriate; however this is not explicit in the resolution.

Of concern is that the Colombian response to the UN Economic and Social Council 2003 report indicated that "from a psychological standpoint, people never fully recovered from the experience of kidnapping."[178] Kidnapping severely affects family relations and the payment of ransom may lead to bankruptcy. Furthermore, in cases where persons have experienced repeated kidnappings or threat of repeated kidnapping, pursuit of asylum is increasingly considered an option for pursuing a durable solution.

On the other hand, when kidnapping becomes endemic, societies may undergo mass flight of entire groups, such as medical professionals, businessmen, university professors, and other professionals.[179] The impact of this loss is particularly detrimental in states undergoing internal conflict that have an acute need for such professionals, for example, Iraq or Afghanistan. Similarly, in Colombia the FARC established the practice of miraculous catches ("pescas milagrosas") in which they set up roadblocks in order to identify targets for kidnapping.[180] This strategy proved effective as the state was unable to police the vast national transportation infrastructure. This phenomenon prompted over 1 million Colombians to leave the country in order to avoid kidnapping or extortion.[181] Ironically, the process of migration in itself may actually lead to kidnapping as the Mexican Human Rights Commission reported that an estimated 9,758 migrants were allegedly kidnapped by gangs or authorities while en route to the US in a period of six months in 2009.[182]

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176. *See id.* ¶¶ 1, 36.

177. ECOSOC Res. 2004/20, ¶ 6, U.N. Doc. E/2004/INF/2/Add.2 (July 21, 2004).

178. 2003 U.N. Report on Kidnapping, *supra* note 2, ¶ 53.

179. *See* Sumedha Senanayake, *Iraq: Brain Drain Poses Threat to Future*, RADIO FREE EUROPE RADIO LIBERTY, Nov. 16, 2006, http://www.rferl.org/content/article/1072793.html (explaining how mass kidnappings in Iraq caused engineers, doctors, lawyers, and professors to flee the country).

180. U.S. BUREAU OF CITIZENSHIP AND IMMIGRATION SERVS., COL.00001.OGC, COLOMBIA: KIDNAPPING AND EXTORTION BY ARMED GROUPS IN URBAN AND SUBURBAN AREAS (2000); *see also* 2003 U.N. Report on Kidnapping, *supra* note 2, ¶ 15 (discussing kidnappings conducted by guerrillas in Colombia by means of illegal roadblocks).

181. Juan Forero, *Prosperous Colombians Flee, Many to U.S., to Escape War*, N.Y. TIMES, Apr. 10, 2001, at A1.

182. The ransoms ranged from USD $1,500 to $5,000 totaling USD $25 million in the six-month period. *Rights Commission: Almost 10,000 Migrants Passing Through Mexico Kidnapped in 6 Months*, BREAKING NEWS 24/7, June 16, 2009, http://blog.taragana.com/n/rights-commission-almost-10000-migrants-passing-through-mexico-kidnapped-in-6-months-82421/.

Dilemmas arise in determining the legitimacy of applying asylum as a solution to kidnapping. For example, there is the concern as to whether provision of asylum to those belonging (imputed or not) to higher classes indicates a bias towards protection of affluent members of society. Kidnapping victims are normally viewed to be wealthy. Nevertheless, due to kidnapping, they also belong to the global community of victims and hence would appear to have equal claim to seek protection. Furthermore, a common consequence of chronic state dysfunction is that acts that appear extraordinary in modern, well-functioning democracies become routine, breeding familiarity and resignation within both society and state actors. This in turn may hamper recognition of a persecution risk by immigration officers, given that the individual may not be able to prove an additional risk over that of persons of the same socio-economic background or nationality. A case in point is revealed by the fact that in the United States the majority of Mexican asylum claims are transferred directly to the judge for deportation processing, irrespective of the kidnapping epidemic that is ongoing.[183] Refugee law is fragmented as there is great variance among states in interpreting the refugee definition. The cases addressed below confirm a lack of harmonized approach to the issue, some resulting in asylum, others are granted secondary protection or are subject to rejection. The essential consideration is that various cases indicate actual adoption of cosmopolitan values by national immigration authorities who are willing to recognize modern forms of persecution in order to grant protection, while other cases reflect conflict and contradiction in protection assessments conducted by different state institutions (e.g. protection criteria contained national penal law in the country of origin versus negative protection determination by immigration authority in the country of asylum). The presentation of select cases seeks to demonstrate how asylum may form part of a transnational solution for kidnapping epidemics.

1. Kidnapping as Persecution

According to the 1951 Convention on the Status of Refugees, the definition of a refugee is:

> [O]wing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[184]

The concept of persecution is central to the definition and generally implies serious violation of human rights by nature or repetition, or amounting to a severe

183. *See* Todd Bensman, *Attorneys Speak Out on Mexican Deportations*, GLOBALPOST, July 14, 2009, *available at* http://www.globalpost.com/dispatch/mexico/us-asylum-cases-mexico.

184. Convention Relating to the Status of Refugees art. 1, ¶A2, *adopted* July 28, 1951,189 U.N.T.S. 137.

violation via accumulation.[185] Goodwin-Gill & McAdam provide the following definition:

> Persecution within the Convention thus comprehends measures, taken on the basis of one or more of the stated grounds, which threaten deprivation of life or liberty; torture or cruel, inhuman, or degrading treatment; subjection to slavery or servitude; non-recognition as a person (particularly where the consequences of such non-recognition impinge directly on an individual's life, liberty, livelihood, security, or integrity); and oppression, discrimination, or harassment of a person in his or her private, home, or family life. [186]

It may be argued that kidnapping can be considered to constitute persecution as it constitutes a deprivation of liberty, often involves harassment or coercion of the person and his/her family in the home, and also commonly include acts of violence or inhuman treatment (cf. human rights listed in II B 1, pages 107-108). In the United States, the Court of Appeals for the Eleventh Circuit held that the cumulative effect of the FARC's threatening phone calls, beatings, and kidnapping of a Colombian man who was active in the Colombian Liberal Party constituted past persecution on account of political opinion.[187] The Court noted that the applicant's provision of records documenting the medical treatment he received for injuries suffered during the kidnapping supported a rebuttable presumption that his life or freedom would be threatened upon removal to Colombia.[188] The Court confirmed that "[w]e have no difficulty in concluding that this kidnapping, coupled with the beatings before and during the kidnapping, and the threatening phone calls, cumulatively amount to persecution."[189] It may be suggested that cases in which asylum is denied will generally be a result of other criteria within the refugee definition.[190]

2. Well-founded Fear of Persecution

185. *See* Council Directive 2004/83/EC, art. 9, 2004 O.J. (L 304) 16 (EU).

186. GUY S. GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 93 (3d ed. 2007).

187. Ruiz v. Gonzales, 479 F.3d 762, 766 (11th Cir. 2007).

188. *Id.*

189. The applicant was held in the jungle for eighteen days. The applicant also provided a police report describing the kidnapping and beatings, as well as the death certificate of his friend who was kidnapped with him and eventually shot and buried in a common grave. *Id.* at 764.

190. Although UNHCR has yet to produce a Background Note or Guideline on the issue, it consistently reports on kidnapping in its country reports, as does the Immigration and Refugee Board of Canada when considering the security situation in the country of origin. *See* U.N. High Comm'r for Refugees [UNHR] Refworld database, http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=search&skip=0&query=kidnapping (last visited Apr. 8, 2010); Responses to Information Requests Immigration and Refugee Board of Canada (2009), *available at* http://www.irb-cisr.gc.ca:8080/RIR_RDI/RIR_RDI.aspx?id=452423&l=e. Review of asylum cases involving kidnapping at the appeal level in Norway revealed majority rejection on account of lack of nexus to a protection category, low credibility, low risk of persecution, and/or application of internal flight alternative. *See* Utlendingsnemnda Cases, http://www.une.no (last visited Apr. 8, 2010).

Asylum officers evaluate the risk of persecution faced by the applicant.[191] This is often complicated because entire societies in countries undergoing kidnapping epidemics may often be described as subject to a generalized level of risk. As pertaining to risk, a negative conclusion was formulated by the Canadian Immigration and Refugee Board in a case involving a Haitian woman who was victim of an attempted kidnapping, telephone threats, intervention of her home, and murder of her sister in 2005.[192] The Board noted that "in Haiti, kidnapping or attempted kidnappings have reached epidemic proportions."[193] The Board concluded that she did not suffer a particular risk; rather she was subject to a risk faced generally by other individuals in Haiti.[194] Hence, asylum was denied. Canada applies two different tests. The first is the comparative approach "which involves comparing the claimant's predicament with the circumstances of other persons in the same country, and requiring that the claimant's predicament be worse than the predicaments of other people."[195] The second is the non-comparative approach (preferred):

> The issue is not a comparison between the claimant's risk and the risk faced by other individuals or groups at risk for a Convention reason, but whether the claimant's risk is a risk of sufficiently serious harm and is linked to a Convention reason as opposed to the general, indiscriminate consequences of civil war.[196]

The case reflects the problem that the non-comparative approach can be just as problematic as the comparative approach. By describing the risk of kidnapping as general, the Board denied the need for individual protection, which appears astounding given the case history.

a. The State's Ability to Protect

Non-prosecution of offenders in kidnapping cases is common and damages victims and the society as a whole, solidifying a culture of impunity and prompting many people to migrate. Where a state is unable or unwilling to protect persons from persecution by non-state actors, grounds for asylum may exist. In Canada, the

191. *See, e.g.*, ASYLUM DIV., OFFICE OF INT'L AFFAIRS, U.S. CITIZENSHIP AND IMMIGRATION SERVS., AFFIRMATIVE ASYLUM PROCEDURES MANUAL 53, 123 (2003).

192. Immigration and Refugee Board of Canada [Refugee Division], MA5-04427, MA5-0440, ¶¶ 7-10 (May 29, 2006).

193. *Id.* ¶ 19.

194. *Id.* ¶ 27-28.

195. IMMIGRATION AND REFUGEE BOARD OF CANADA LEGAL SERVICES, INTERPRETATION OF THE CONVENTION REFUGEE DEFINITION IN THE CASE LAW 9-3 (2005), *available at* http://www.irb-cisr.gc.ca/Eng/brdcom/references/legjur/rpdspr/def/Documents/crdef_e.pdf. The Board points out that "[r]equiring a worse predicament might mean any one of several things. To succeed, a claimant might have to establish: (i) that the claimant's level of risk is greater than the risk level of persons in other groups, or (ii) that the claimant's risk level is greater than the risk level of other persons in the claimant's own group; or (iii) that the claimant is at risk of suffering harm greater than that which threatens others." *Id.* at 9-3 n.10 (analyzing Salibian v. Canada, [1990] 3 F.C. 250 (Can.); Rizkallah v. Canada (Minister of Employment and Immigration) [1992] 156 N.R. 1 (Can. F.C.A., May 6, 1992)).

196. Ali v. Canada (Minister of Citizenship & Immigration), [1999] 235 N.R. 316, ¶ 4 (Can. F.C.A. Jan. 12, 1999).

Immigration Authorities look for evidence demonstrating a complete breakdown of state apparatus, that similarly situated individuals were let down by state protection facilities, or past personal incidents in which state protection did not materialize.[197] Where the state retains effective control of its territory and makes serious efforts to protect its citizens, the fact that it is not always successful will not be enough to justify protection.[198] Where applicants have experience many incidents of violations without receiving state protection, protection may be offered.[199] In Australia, a finding of adequate state protection is founded on evidence that the country has effective judicial and law enforcement agencies, is governed by the rule of law and has an infrastructure of laws to protect its nationals against the harm feared.[200]

The Canadian Immigration and Refugee Board granted recognition of refugee status to a Kyrgyzstani man (of mixed nationality- Ukranian/Tartar) who claimed that ethnic Kyrgyzs kidnapped his daughter to attain his assets.[201] The Board held that "even though this may be interpreted as a purely criminal act and not make the claimant a refugee, the lack of will on the part of the authorities, i.e. the police, to intervene and protect the claimant is, in our view, persecutory."[202]

In another case, France's Commission des Recours des Refúgiés (CRR) granted asylum to a Russian woman whose husband was an officer in the Army who had objected to the war in Chechnya.[203] As a result both were kidnapped and she was held for three months in cave where she was interrogated about the location of documents her husband had hidden.[204] The Commission granted asylum given the passivity of the Russian states to respond to the disappearance of the officer (he was released only after a non-state organization pursued the case), which the Commission interpreted to indicate state tolerance of the kidnapping.

One of the most interesting cases involved an Albino member of the Bambara ethnicity in Mali who was subject to several kidnapping attempts and was granted

197. IMMIGRATION AND REFUGEE BOARD OF CANADA LEGAL SERVICES, *supra* note 194, at 6-6.

198. *Id.* at K-10 (citing Canada (Minister of Employment and Immigration) v. Villafranca, [1992] 99 D.L.R. (4th) 334 (Can.)).

199. *Id.* at 6-10 (citing Bobrik v. Canada (Minister of Employment and Immigration), [1994] 85 F.T.R. 13 (Can. F.C.T.D. Sept. 16, 1994)); *but see* Smirnov v. Canada (Secretary of State), [1995] 1 F.C. 780, ¶ 11 (Can.) (noting that where random assaults are conducted by unknown assailants and there are no independent witnesses, it is difficult for the state to effectively investigate and provide protection).

200. Svecs v. Minister for Immigration & Multicultural Affairs (1999) F.C.A. 1507, 11 (Nov. 2, 1999).

201. Immigration and Refugee Board of Canada (Refugee Division), M99-01930 (Feb. 10, 2000), *available at* http://www.iijcan.org/en/ca/irb/doc/2000/2000canlii21358/2000canlii21358.html.

202. *Id.*

203. Commission des Recours des Refúgiés [CRR] [Refugee Appeal Comm'n], Jul. 16, 1999, Oct. 22, 2004, Case no. 340095 (Fr.). The Denver Journal of International Law and Policy expresses no opinion as to the accuracy of the source, citation, reference or translation of this document.

204. *Id.*

asylum due to the state's inability to protect Albinos from kidnapping and assassination.[205]

b. Internal Flight Alternative

After considering refugee status, immigration authorities often consider alternatives to asylum, including whether protection may reasonably be sought elsewhere in the country of origin, establishing an internal flight alternative.[206] The Canadian Immigration and Refugee Board addressed the harrowing case of a Mexican family that experienced the kidnapping of their son in 2006.[207] The mother was forced to pay 100,000 Mexican pesos (thereby forced to sell her car and use up her savings).[208] The kidnappers cut the son's arm with a knife and eventually released him.[209] They called the mother and threatened that she would eventually have to pay ransom for her other son.[210] She filed a complaint with the police and changed phones.[211] The kidnappers called her on the new phone and accused her of contacting the police.[212] The Immigration and Refugee Board held that they were subject to a risk to their life or to a risk of cruel and unusual treatment or punishment.[213] The Board noted country reports citing the current trends in Mexico in terms of spread of kidnapping to popular social classes, the proliferation of more ruthless gangs, and increased police collusion in cases.[214] It expressed concern for the kidnappers' knowledge about the victims, violent threats, past exhibition of violence, and plausible ties to the police.[215] It found a serious possibility that kidnappers would target them if they returned.[216] The Board recognized that given police implication in the case, the requirement to exhaust domestic remedies when seeking protection was inappropriate given the danger involved.[217] The Board stated that there was no possibility of internal flight alternative, given possible use of the national documentation system in Mexico to

205. Commission des Recours des Refúgiés [CRR] [Refugee Appeal Comm'n], June 10, 2005, Nov. 23, 2005, Case no. 514926 (Fr.) *available at* http://www.cnda.fr/ta-caa/media/document/recueil 2005_anonymise.pdf.

206. UNHCR, *Guidelines on International Protection: "Internal Flight or Relocation Alternative" within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, U.N. Doc. HCR/GIP/03/04 (July 23, 2003) (setting forth an analysis framework which addresses whether the area of relocation is practically, safely, and legally accessible to the individual; whether the persecutor is likely to pursue to the claimant to the area; whether state protection is available; would there be a new form of persecution or harm; and would he or she experience undue hardship).

207. Immigration and Refugee Board Refugee Protection Division, 2007 CanLII 64580 (I.R.B.), Oct. 17, 2007, MA6-05154, MA6-05155, MA6-05190, *available at* http://www.canlii.org/en/ca/irb/doc /2007/2007canlii64580/2007canlii64580.html.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

identify citizens.[218] This is important, because application of the internal flight alternative is often used in cases in which the administrative agencies fear the opening of floodgates, such as those originating from Mexico.[219] In this case, the family was granted refugee status. However, in other cases in which there is less evident linkage to the State, immigration authorities may be inclined to indicate the existence of an Internal Flight Alternative. Hence, it is essential to demonstrate the State's inability to provide protection throughout the nation.

3. Nexus to Protection Category

Another criteria for recognition as a refugee is the nexus to the protection categories: race, religion, political opinion, nationality, or social group.[220] At times, kidnapping is conducted to attain a political objective, such as change of state policy towards an alleged repressed minority group, or exchange for political prisoners. Kidnapping by groups with political agendas are considered high-risk in terms of threat of serious harm or death to the victim.[221] In such cases, the victims may themselves be political actors or merely persons considered to belong to a prosperous family with connections/influence upon the state. In these cases, the category of the political opinion may be relevant, also in combination with social group, as often the victim and the family deem themselves to oppose corruption among state actors involved in the crime or unable to prevent the crimes.[222]

The U.S. Court of Appeals for the Second Circuit addressed the case of a Colombian woman who was kidnapped and held for three days in order to set up a computer network for the FARC.[223] As there was a delay in arrival of the equipment, she was released and informed that she would be contacted again to perform the service. She fled and sought asylum. Of interest, she claimed risk of persecution on account of her political opinion against the FARC and her membership in a particular social group (experts in computer science). The Court held that the BIA had erred by failing to consider that her refusal to provide further technological assistance to the FARC could be regarded as imputed political opinion (opposition to the FARC).[224] The Court also found that the BIA had erred in assuming that kidnapping could not constitute persecution. The Court indicated that kidnapping is considered to be a very serious offence and when a case presents a credible fear of such act, the issue is whether the motive for the kidnapping is

218. *Id.*

219. *See* Reinhard Marx, *The Criteria of Applying the "Internal Flight Alternative" Test in Nat'l Refugee Status Determination Procedures*, 14 INT'L J. OF REFUGEE LAW 179, 180 (2002).

220. Convention relating to the Status of Refugees, *supra* note 184, art. 1.

221. Telephone Interview with Leslie Edwards, Clayton Consultants (May 5, 2009) (on file with author).

222. The New Zealand Appeals Authority granted asylum to an Iraqi man who claimed fear of kidnapping on account of his profession and targeting for imputed political opinion. New Zealand Refugee Status Appeals Authority, Refugee Appeal No. 75900, ¶ 2 (Nov. 21, 2006), *available at* http://www.unhcr.org/refworld/country,,NZL_RSAA,,IRQ,,477cfbc80,0.html.

223. Maria Del Pilar Delgado v. Michael B. Mukasey, 508 F.3d 702, 704 (2nd Cir. 2007).

224. *Id.* (citing *Osorio v. INS,* 18 F.3d 1017, 1028 (2nd Cir. 1994)) (noting that the conclusion that a cause of persecution is economic does not necessarily imply that there cannot exist other causes of persecution. This addresses mixed motives of persecution).

indicative of persecution.[225] The failure to do so, in particular in this cases in which the fear of kidnapping was accompanied by an objectively reasonable fear of death was considered to be an error.[226]

A contrary example is provided in another case, the U.S. Court of Appeals for the Eleventh Circuit upheld the immigration judge's conclusion that a single kidnapping incident by the FARC of another Colombian member of the Liberal Party (lasting a short period of time within an evening, including the use of hooding but no apparent beatings) amounted to one isolated incident of politically-based harassment and intimidation which ended when the applicant ceased his political dissemination activities.[227] The Court found that "although the cumulative effects of a kidnapping, threatening phone calls, and attempted murder can certainly constitute persecution, it is not sufficient to show past persecution when motivated only by FARC's political opinion and (the applicant's) refusal to cooperate with them."[228] The Court held that after the initial kidnapping incident, FARC harassed the applicant only because of his refusal to cooperate with them, which the Court held was not grounds for protection.

Asylum is also available to other forms of social groups. The Canadian Immigration and Refugee Board granted asylum to a Somali member of the Galgalo minority tribe who was subject to a risk of kidnapping, among other acts, on account of his membership in the particular social group consisting of the clan.[229]

In relation to establishing a nexus to protection category, one may suggest that it may be appropriate to advocate recognition of a particular social group composed of the "family".[230] In Albanian cases involving kidnapping as a result of a family feud, UNHCR confirms that social group would be applicable:

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225. *Id.* (citing *Matter of V-T-S*, 21 I. & N. Dec. 792, 798 (B.I.A. 1997); *Ucelo-Gomez v. Gonzales*, 464 F.3d 163, 167 (2nd Cir. 2006)).

226. *Id.* The Court noted State Department reports confirming the FARC's use of murder of civilians and deserters. *See also* Commission des Recours des Refúgiés, [CRR] [Refugee Appeal Comm'n], May 22, 2000, Nov. 11, 2004, Case No. 347838 (Fr.). A case in which CRR granted asylum to a woman from Bangladesh who founded a women's branch of a political movement which engaged on behalf of women's rights. She was subject to an attempted kidnapping by militant Islamicists of the Jamat-E-Islam party. Two of her companions were killed by them. She was later subject to attack by a firearm and condemned to 7 years imprisonment on false charges of trafficking of weapons. She was subject to an attempted kidnapping by militant Islamicists of the Jamat-E-Islam party. Two of her companions were killed by them. She was later subject to attack by a firearm and condemned to 7 years imprisonment on false charges of trafficking of weapons. The Denver Journal of International Law and Policy expresses no opinion as to the accuracy of the source, citation, reference or translation of this document.

227. Julio Cesar Diaz v. U.S. Attorney General, 275 Fed. App'x. 856, 863 (11th Cir. 2008).

228. *Id.* at 864.

229. Immigration and Refugee Board Refugee Protection Division, 2008 CanLII 76304 (I.R.B.), Nov. 17, 2008, TA7-02698, *available at* http://www.canlii.org/en/ca/irb/doc/2008/2008canlii76304/2008canlii76304.html.

230. UNHCR, *UNHCR Position on Claims for Refugee Status Under the 1951 Convention Relating to the Status of Refugees Based on a Fear of Persecution Due to an Individual's Membership of a Family or clan Engaged in a Blood Feud*, ¶ 18, ("In applying the definition of a particular social group

> In blood feud cases, it would be possible to define the particular social group, for instance, as "family members involved in a blood feud" or "family members targeted because of an ancient code", or "male members of a family targeted under a traditional blood feud canon" or, more specifically still, "male members of the XXX family threatened with death as a result of a blood feud with the YYY family". In this way, the group is not defined solely by the persecution feared as a result of the blood feud but also by its kinship ties.[231]

In this author's opinion, the identification of "family" as a social group is also applicable in kidnapping cases outside of the feud scenario. Asylum has been granted to family members of victims, usually in cases involving mixed motives of persecution. For example, the French Commission for Refugees granted asylum to a Belorussian doctor who denounced political corruption involving deviation of humanitarian aid intended for children in Chernobyl and whose son was kidnapped and beaten for a period of 24 hours.[232]

On the other hand, the Federal Court of Canada rejected asylum in the case of a Colombian businessman who claimed risk of kidnapping and extortion by the FARC on account of the family's wealth.[233] The applicant demonstrated prior kidnapping of the applicant's father (released after paying a ransom of USD 50,000), kidnapping of other family members, and threat of kidnapping of the applicant.[234] The applicant argued mixed motives of persecution (imputed political opinion and membership in a particular social group comprised of the wealthy family/businessmen), but the Court rejected the establishment of a nexus to a protection category.[235]

The U.S. Court of Appeals for the Eighth Circuit also rejected a case involving a Colombian family of which the sister of the applicant had been kidnapped, held for three days, and interrogated by the FARC on account of her employment as a government engineer.[236] The applicant claimed to have hired a woman as a maid who allegedly turned out to belong to the FARC.[237] She claimed that she feared the maid would kidnap her school age daughters and fired her.[238] Afterwards, she received anonymous threatening phone calls.[239] The Court held that the applicant had failed to establish a specific threat against the family as a

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provided in these Guidelines, it is UNHCR's view that a family unit represents a classic example of a 'particular social group'. A family is a socially cognizable group in society and individuals are perceived by society on the basis of their family membership.").

231. *Id.* ¶ 20.

232. Commission des Recours des Refúgiés [CRR] [Refugee Appeal Comm'n], Oct. 5, 1995, Sept. 11, 2004, Case no. 258877 (Fr.). The Denver Journal of International Law and Policy expresses no opinion as to the accuracy of the source, citation, reference or translation of this document.

233. Montoya v. Minister of Citizenship and Immigration, [2002] F.C.T. 63, (Can.).

234. *Id.*

235. *Id.*

236. Bernal-Rendon v. Gonzales, 419 F.3d 877, 881 (8th Cir. 2005).

237. *Id.* at 880.

238. *Id.* at 879-80.

239. *Id.* at 879.

social group, especially when the extended family continued to leave peacefully in the region.[240] The Court found that the kidnapping of the applicant's sister was due to her particular employment and did not appear to be connected to the family.[241] This case may be the result of deficient counsel as the Court points out that the applicant failed to discuss her political opinion or indicate how it differed from FARC.

In short this case indicates how difficult it is to take preventive action in the form of seeking asylum prior to experiencing severe harm. It is understandable that a mother would not want to wait until her daughters were kidnapped. It should be noted the Colombian Penal Code recognizes the status of aggravated forced disappearance in cases in which a person is detained and abducted on account of his/her status as a public servant.[242] The same status is given in cases involving the forced disappearance of a relative (up to the second degree of consanguinity, second degree of affinity and first degree of civil bond).[243] The Colombian Penal Code appears to recognize a risk of kidnapping of family members of government employees that was neglected by the U.S. court, thereby indicating a lack of harmonization of law at the transnational level that inhibits the pursuit of sub-altern cosmopolitan protection values.

VI. CONCLUSION

In conclusion, review of the phenomenon of kidnapping by non-state actors as a cause of flight from failed or failing states to modern states indicates that increased harmonization of transnational law (human rights, criminal law, and asylum law) is necessary in order to provide a holistic response to kidnapping; one that provides a protection perspective beyond the immediate goal of rescue of a victim towards prevention of other kidnappings and durable solutions for former victims as individuals. This study has demonstrated how public and private sectors merge creating new forms of insecurity/security and justice/injustice within formal and informal sectors. Immigration administrative agencies are exploring ways providing a transnational legal response to the criminal phenomenon of kidnapping via asylum. From a legal perspective, attainment of a humane asylum policy is contingent on dismantling policies which limit application of the refugee definition to modern form of harms. Asylum is not a panacea for the majority of kidnapping victims; it may be the solution for the minority who are compelled to leave their states of origin.

Adoption of a cosmopolitan approach to protection would complement the substantive measures being pursued by states in crime fighting and prosecution on behalf of the communitarian public interest. The weakness of the nation states is worsened by the limitations of the international system in cooperating and responding to or preventing the spread of kidnapping. Long term solutions require transnational state building initiatives- the strengthening of national judiciaries and

240. *Id.* at 881 (citing *In re* A-E-M-, 21 I. & N. Dec. 1157 (1998)).

241. *Id.*

242. Código Penal, [CÓD. PEN.] [Penal Code of Colombia] No. 599/2000 arts. 165-166(4).

243. *Id.* art. 166 (5).

reduction of corruption in police and security institutions in order to ensure that states meet their duties to provide basic security for their citizens. Such initiatives would also need to be supplemented by poverty reduction and social justice programs in order to tackle the root causes of kidnapping epidemics in stratified, unequal societies.

THE PLIGHT OF ZIMBABWEAN UNACCOMPANIED REFUGEE MINORS IN SOUTH AFRICA: A CALL FOR COMPREHENSIVE LEGISLATIVE ACTION

CERISE FRITSCH, ELISSA JOHNSON, AND AURELIJA JUSKA [*]

Since the economic and social breakdown in Zimbabwe, hundreds of thousands of people have fled the country for South Africa, including thousands of unaccompanied refugee minors. An unaccompanied refugee minor, or a "URM," is a person under the age of eighteen who has either crossed the border alone or with another child, or who has found himself or herself living in a foreign country without an adult caregiver. Zimbabwean URMs come to South Africa in search of education, shelter, or jobs to support family back in Zimbabwe. Unaccompanied refugee minors who travel to South Africa face a myriad of challenges, including physical safety, life without a parent or guardian, legal and social discrimination, and a constant struggle to find food, shelter, education, health care, and employment. Although these children have rights under international and domestic law, political and other factors combined have denied children the protection and support to which they are legally entitled.

While South Africa has been somewhat responsive to the needs of Zimbabwean adults, it has largely ignored those of unaccompanied refugee minors. This paper shifts that focus and argues that South Africa must immediately turn its attention to the plight of the thousands of unaccompanied minors who have entered the country from Zimbabwe. Specifically, it advocates for the adoption and implementation of comprehensive and carefully tailored legislation to protect unaccompanied minors who enter the country primarily for economic and educational reasons. Enactment and enforcement of such laws would respond to the immediate crisis of Zimbabwean URMs, while providing a sustainable approach for dealing with similar refugee populations in the future.

INTRODUCTION

Moses Re Muleya,[**] a fourteen-year-old Zimbabwean boy, lives in an overcrowded shelter in the South African border town of Musina. His father died approximately one year ago, a victim of political violence; his mother suffers from HIV. Given Zimbabwe's crippled economy, Moses' mother encouraged him to

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[**] Due to his age and legal status in South Africa, Moses' name has been changed to protect his identity.

travel to South Africa to earn money to help support her and his four younger brothers. In December 2008, he and a friend boarded a train and made the 538-mile journey to the border. Since arriving, he has been forced to beg and run errands to survive. He has been unable to enroll in school, find steady work, or travel safely to Zimbabwe to visit his family, nor has he had access to a social worker to help him with these problems, something to which he is theoretically entitled to under South African law.

Unfortunately, Moses' experience is not unique. In recent years, thousands of children have traveled alone from Zimbabwe to South Africa to seek a better life for themselves and their families. Currently, almost the entire unaccompanied refugee minor ("URM") population in South Africa is Zimbabwean, with approximately 1,500 URMs living in the Musina area alone.[1] Most children came with a sibling or a friend, but about 25% traveled alone.[2] The majority are between the ages of twelve and eighteen, with the largest percentage between the ages of fifteen and seventeen.[3] Approximately 70% of the children are boys.[4] It is likely that there are a greater number of girls, but the girls tend to work as domestic laborers or sex workers and thus remain unseen.[5] Some of the girls are young mothers, coming with children of their own.[6]

Unaccompanied refugee minors who travel to South Africa face a myriad of challenges, including physical safety, life without a parent or guardian, legal and social discrimination, and a constant struggle to find food, shelter, education, health care, and employment.[7] Although these children have rights under international and domestic law, political and other factors deny children like Moses the protection and support to which they are legally entitled. Some suggest that South Africa has been reluctant to move aggressively towards protecting Zimbabwean refugees because to do so might threaten the country's self-assumed

1. Interview with Bruno Geddo, United Nations High Commissioner for Refugees, in Musina, S. Afr. (Feb. 25, 2009). Non-governmental organizations have difficulty assessing the actual number of URMs living in South Africa and Musina, in particular, because URMs tend to be "invisible," by virtue of their means of entry into the country and their attempts to evade the authorities. Girls are particularly invisible since many of them take on domestic or sex labor. No shelters in the Musina-area provide services to girls, and few girls were present at the Showgrounds.

2. *Id.*

3. *Id.*; Interview with Vera Chrobok, UNICEF, in Musina, S. Afr. (Feb. 25, 2009).

4. Interview with Shyamol Choudhury, Emergency Response Worker, Save the Children UK, in Musina, S. Afr. (Feb. 25, 2009).

5. Chrobok, *supra* note 3.

6. Choudhury, *supra* note 4.

7. An unaccompanied refugee minor ("URM") is a person under the age of eighteen who has either crossed the border alone or with another child, or who has found himself or herself living in a foreign country without an adult caregiver. Trafficked children are not synonymous with URMs, but rather are a subset of URMs. *Children on the Move: Protecting Unaccompanied Migrant Children in South Africa and the Region*, SAVE THE CHILDREN UK, 2007, at 8. Throughout this paper, minors from Zimbabwe who have come to South Africa will be referred to as URMs although, as discussed later, these minors arguably may not qualify as refugees under international and South African law and may be more appropriately classified as migrants.

role as international mediator in the Zimbabwean conflict.[8] Others explain that the South African government is concerned that increased efforts to recognize and assist Zimbabwean refugees would strain the country's already overburdened infrastructure, encourage even more migration to South Africa, and exacerbate internal tensions around the refugee situation. [9]

To the extent that South Africa has responded to the refugee crisis, its focus has been on the needs of Zimbabwean adults.[10] This article shifts that focus and argues that South Africa must immediately turn its attention to the plight of the thousands of unaccompanied minors who have entered the country from Zimbabwe. Specifically, it advocates for the adoption and implementation of comprehensive and carefully tailored legislation to protect unaccompanied minors who enter the country primarily for economic and educational reasons. Enactment and enforcement of such laws would respond to the immediate crisis of Zimbabwean unaccompanied minors while providing a sustainable approach for dealing with similar refugee populations in the future.

Part I of this article provides background information on the circumstances that have led to the mass migration of unaccompanied minors from Zimbabwe. Part II examines the life of URMs in South Africa, including barriers and challenges that prevent them from taking advantage of their rights. Part III discusses the numerous international and African treaties that apply to URMs. Part IV focuses on South African domestic law and how it has been interpreted to apply to political rather than economic refugees. Lastly, Part V offers recommendations for addressing the plight of Zimbabwean URMs, including proposed legislation and additional humanitarian aid.

I. PUSH AND PULL FACTORS: WHY DO ZIMBABWEAN URMS COME TO SOUTH AFRICA?

In 1980, when Zimbabwe gained independence from Great Britain, the Zimbabwe African National Unity Party ("ZANU-PF") came into power, led by former political prisoner Robert Mugabe.[11] Mugabe was the Prime Minister until 1987, when he became President after merging the two offices.[12] Despite being a one-party state, Zimbabwe prospered, benefiting from its long legacy of public education and commercial farming. In the 1990s, Zimbabwe had the highest literacy rate in Africa.[13]

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8. FORCED MIGRATION STUDIES PROGRAMME, RESPONDING TO ZIMBABWEAN MIGRATION IN SOUTH AFRICA—EVALUATING OPTIONS (2007), *available at* http://migration.org.za/wp-content/uploads/2008/03/zimresponses07-11-27.pdf.

9. *Id.*

10. Interview with Motlalepule Nathane, Social Work Doctoral Candidate, University of Witswatersrand, School of Human and Community Development: Social Work, in Johannesburg (March 4, 2009).

11. OneWorld.net, http://uk.oneworld.net/guides/zimbabwe/development.

12. *Id.*

13. *Id.*; *Schools Close as Hordes of Teachers Resign*, U.N. OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS (Oct. 8, 2007), http://www.irinnews.org/Report.aspx?ReportId=74698.

In 2000, the Mugabe-led government embarked on a controversial land reform policy which redistributed over 4,000 white-owned commercial farms to non-land owners.[14] The land redistribution program led to a collapse of the fertilizer industry, disruptions in transportation and irrigation systems and a massive decline in foreign currency, all of which contributed to the current economic crisis.[15] The Zimbabwean economy has contracted by 35% since 2005, while unemployment has soared past 80%.[16] Annual inflation rates of 1,700%[17] and a serious food shortage make simple household items, such as milk and bread, too expensive for many families to afford.[18]

Zimbabwe's previously vaunted school system has essentially collapsed. Teacher salaries have fallen to Z$5 million, the equivalent of ten American dollars per month.[19] These meager salaries have not kept up with inflation, causing many teachers to seek employment in neighboring countries.[20] By the beginning of 2007, over 15,200 teachers had migrated to countries such as South Africa, Botswana, Namibia, and Swaziland.[21] Efforts to replace them with untrained recruits have failed.[22] The combined lack of resources, competent teachers, and students has resulted in the closing of virtually all public schools.[23] Because they are unable to receive a proper education in Zimbabwe, many children travel to South Africa for better opportunities. They believe that the school system is the "best thing" about South Africa, and they want to benefit from it.[24]

Zimbabwe also lacks the resources to provide its citizens with basic sanitation and health care. There is a severe lack of clean water for drinking, bathing, ablution, and food preparation.[25] Many people are forced to relieve themselves outdoors, rather than using the toilets in their homes, thereby contaminating the existing water supply and leading to serious diarrhea and cholera outbreaks in large portions of the country.[26] Like much of Southern Africa, Zimbabwe is also afflicted with an HIV and AIDS pandemic. In the country of 13.1 million,

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14. *Small Scale Farmers Seen as Backbone of Food Security*, U.N. OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS (May 15, 2008), http://www.irinnews.org/Report.aspx?ReportId=78222.

15. *Id.*

16. OneWorld.net, *supra* note 11; *It Is a Sorry Sight for Zimbabwe but We Pray That Freedom Will Come'*, ONEWORLD.NET (March 27, 2007), http://us.oneworld.net/node/147051.

17. OneWorld.net, *supra* note 11.

18. *Id.*

19. *Schools Close as Hordes of Teachers Resign*, *supra* note 13.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Children on the Move: Protecting Unaccompanied Migrant Children in South Africa and the Region*, *supra* note 7, at 18.

25. OneWorld.net, *supra* note 11.

26. *Illness Rises as Desperate Residents Seek Safe Water in Bulawayo, Zimbabwe*, UNICEF (Nov. 14, 2007), http://www.unicef.org/infobycountry/zimbabwe_41788.html?q=printme.

approximately 2 million people or 15.6% of the population has HIV or AIDS.[27] While the AIDS population has decreased since 2001,[28] the vastly underfunded government cannot provide those who still struggle with the disease with the antiretroviral drugs necessary to keep them healthy.[29] Thus, the average life expectancy in Zimbabwe has dropped below forty years old.[30]

The land redistribution program marked a change in the reasons that Zimbabweans travel to South Africa. Previously, they came to visit family, vacation, and shop and most returned to Zimbabwe voluntarily. [31] Only a small fraction crossed the border without official documentation.[32] Unlike today, many Zimbabweans felt that their country was safer and a better place to raise a family.[33] However, since 2000, the majority of Zimbabweans, including unaccompanied minors, come to South Africa for reasons tied to the economy. Many URMs, like Moses, come in search of work in order to earn money to send home to their families.[34] Some have lost parents or other caregivers to political violence, starvation, AIDS, or abandonment.[35] Without someone to provide for them in the chaotic environment of Zimbabwe, they migrate to South Africa where they may have family and friends to support them[36] or where they imagine they will have a "better life."[37] While some children want to stay in South Africa, many others want to travel legally and safely to and from Zimbabwe. [38]

II. LIFE IN SOUTH AFRICA FOR ZIMBABWEAN URMS

Many URMs have lofty expectations of South Africa, but they face many hardships both crossing the border and surviving in South Africa. The journey across the Zimbabwe-South Africa border is dangerous for any person, but it is especially dangerous for URMs. Some children migrate to South Africa by train or minibus, but the vast majority of URMs walk at least a portion of their journey.[39] While the risk of wild animals and exposure to the elements is undoubtedly a concern, the greater danger is the risk of exploitation.[40] To make themselves less

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27. *Id.*

28. In 2001, 26.1% of the country had AIDS. The decrease in the AIDS population has been attributed to both mortality and increased public health education. *Id.*

29. *Id.*

30. *Id.*

31. David A. McDonald, et al., *Guess Who's Coming to Dinner: Migration from Lesotho, Mozambique and Zimbabwe to South Africa*, 34 INT'L MIGRATION REV. 813, 822 (2000).

32. *Id.* at 824-25.

33. *Id.* at 826.

34. Chrobok, *supra* note 3.

35. Interview with Temdai Simom, Resident, Concerned Zimbabwe Campbell Shelter, in Musina, S. Afr. (Feb. 25, 2009).

36. Choudhury, *supra* note 4.

37. Interview with Forster Kwangwori, Pastor, Concerned Zimbabwe Citizens Campbell Shelter, in Musina, S. Afr. (Feb. 25, 2009).

38. Interview with Duncan Breen, Advocacy Officer, Consortium for Refugees and Migrants in South Africa, in Johannesburg (CoRMSA), S. Afr. (March 6, 2009).

39. Kwangwori, *supra* note 37.

40. Chrobok, *supra* note 3.

visible to the authorities, many URMs use irregular channels of border crossing,[41] which makes them more vulnerable to physical or sexual violence, theft, and muggings. *Gumagumas* ("scavengers") often wait in the bushes for unsuspecting travelers.[42] The *gumagumas* will take money in return for guiding URMs across the border, but then often steal larger sums of money and assault the children.[43] On the South African side of the border, "border jumper" gangs may attack the children and steal whatever cash or valuables they have left.[44] In an attempt to avoid the *gumagumas*, some children must trade money or sex to *malaishas* ("human smugglers" or "truck drivers") to assist in their passage into South Africa.[45] Approximately 10% of URMs paid off border guards or police to gain entry into the country.[46] Overall, approximately 40% of children gave some form of payment to enter South Africa and over one third of URMs experienced some sort of violence on their way to South Africa.[47] The girls are especially vulnerable to sexual exploitation, whereas the boys are at risk for physical brutality.[48] Because the children are undocumented, they rarely report these occurrences to the authorities for fear of deportation.[49]

Migrants most often enter from Zimbabwe at Beitbridge, Maroyi, and Dite, small border towns near Musina, South Africa.[50] Musina also borders Botswana and Mozambique.[51] Because of its location, it has a history of being a city of migrant workers.[52] The recent instability in Zimbabwe, however, has led to a dramatic increase in Zimbabwean migrants, overburdening the municipality's resources.

Once they reach South Africa, URMs encounter a serious shortage of humanitarian services, employment, and educational opportunity. The South African government is largely unable and unwilling to provide services for URMs, and the few locally run shelters lack the capacity to handle the volume of children

41. *Migrants' Needs and Vulnerabilities in the Limpopo Province, Republic of South Africa,* International Organization for Migration, Nov.- Dec. 2008, at 3.

42. *Id.* at 19-20; *Children on the Move: Protecting Unaccompanied Migrant Children in South Africa and the Region*, *supra* note 1, at 15; Kwangwori, *supra* note 37.

43. *Migrants' Needs and Vulnerabilities in the Limpopo Province, Republic of South Africa*, *supra* note 41, at 19; *Children on the Move: Protecting Unaccompanied Migrant Children in South Africa and the Region*, *supra* note 7, at 15.

44. *Id.*

45. *Id.* at 20.

46. *Id.*

47. *Id.* at 19-20.

48. Kwangwori, *supra* note 37.

49. *Migrants' Needs and Vulnerabilities in the Limpopo Province, Republic of South Africa*, supra note 41, at 20.

50. Kwangwori, *supra* note 37. Musina is a city of 40,000, located about 17 kilometers from the Zimbabwe-South Africa border. Zosa De Sas Kropiwnicki, Child Protection Research and Policy Advisor, Save the Children UK South Africa Programme, World Congress on Sexual Exploitation (Nov. 25-28, 2008).

51. Zosa De Sas Kropiwnicki, *supra* note 50.

52. *Id.*

who need their services.[53] Moreover, the URMs face hostility not only from the South African authorities but also from South African citizens.[54]

One of the constant worries for URMs and other refugees is the risk of deportation. Even though deportation of unaccompanied minors is illegal under South African law,[55] overburdened government agencies see no alternative but to send children back to their native country. In practice, the experience of detention is most acutely felt by migrants between thirteen and eighteen years old.[56] Some children are arrested when they cross the border or are trying to reach Musina.[57] The majority, however, are arrested and deported after authorities stop them on the street and ask for documentation, which they cannot produce.[58]

Lindela, near Johannesburg, and Soutpansberg Military Grounds ("SMG"), near Musina, are the two most prominent deportation centers in South Africa.[59] The conditions at these facilities are substandard, with insufficient toilets and sleeping quarters to meet the needs of detainees.[60] Contrary to South African law, children are held with adults, further increasing their vulnerability to being harmed. [61] Despite the time and resources spent on the deportation of minors, the process is counterproductive; once the children are dropped on the Zimbabwe side of the border they simply reenter South Africa.[62]

Although many URMs come to South Africa in the hope of finding work, the reality is that employment opportunities for minors are very limited because South African law makes it illegal to employ undocumented workers and/or workers under the age of eighteen.[63] Additionally, South Africa has a 40% unemployment rate, resulting in fierce competition for the jobs the URMs are seeking. While some businesses are willing to take the risk of employing URMs, many are not.[64] Because the children who obtain a job do so in contravention of South African law, employers exploit minors by paying them less than market wages.[65] A significant number of URMs take seasonal employment on farms.[66] Many of the girls take on domestic labor, where they are at additional risk for exploitation and sexual

53. Kwangwori, *supra* note 37; Interview with Georgina Matsaung, Church Mother, Uniting Reformed Church, in Musina, S. Afr. (Feb. 25, 2009).

54. Kwangwori, *supra* note 37.

55. See *infra* note 99.

56. *Migrants' Needs and Vulnerabilities in the Limpopo Province, Republic of South Africa*, *supra* note 41, at 19.

57. Chrobok, *supra* note 3.

58. *Id.*

59. *Id.*

60. Breen, *supra* note 38.

61. *Id.*

62. Chrobok, *supra* note 3.

63. Breen, *supra* note 38.

64. *Id.*

65. Matsaung, *supra* note 53.

66. Chrobok, *supra* note 3.

abuse.[67] Because farm and domestic labor are largely out of the public eye, it is impossible to determine exactly how many URMs are employed in these jobs.[68] Some children earn subsistence money through informal means: selling fruits and vegetables, washing cars, running errands, doing housework, and engaging in the sex trade.[69] These types of jobs not only compromise children's rights, but expose them to sexually transmitted diseases, including HIV/AIDS.[70] While most children want to save money in order to provide for family back home, the majority are unable to do so because they are barely surviving on their wages.[71]

For many of the children who enter South Africa through Musina, it is not their intended final destination. The majority hope to make their way to Johannesburg to find work, but the cost and logistics of travel make that difficult.[72] The United Nations High Commissioner for Refugees ("UNHCR") does make an effort to help URMs contact family members in other parts of South Africa and provides transportation in an attempt to re-connect families.[73] Nevertheless, UNHCR cannot provide this service to all URMs who need it.

Although URMs list education as the main reason they come to South Africa, many are disappointed when they arrive.[74] Despite a constitutional mandate to provide education to all children residing in South Africa,[75] school administrators often impose superficial roadblocks to providing education to Zimbabwean children. Some principals, for example, require official documentation to enroll in school—papers which the children do not possess.[76] Others turn away children because they cannot afford school fees or uniforms.[77] Additionally, South African schools are already overcrowded, especially in the border areas surrounding Musina, and therefore are not accepting additional students.[78] Although some international organizations, such as the United Nations Children's Fund ("UNICEF"), are planning to erect temporary schools and bringing in additional teachers, it is a time-consuming and costly enterprise that leaves children without access to education in the interim.[79] The lucky students who are able to complete

67. *Id.*

68. Kwangwori, *supra* note 37.

69. *Children on the Move: Protecting Unaccompanied Migrant Children in South Africa and the Region*, *supra* note 7, at 15-16.

70. *Id.* at 15.

71. *Id.* at 16. Only ~50% of URMs who can find work earn R1,000 (approximately $100) per month; the majority live off of less than R500 per month. *Migrants' Needs and Vulnerabilities in the Limpopo Province, Republic of South Africa*, *supra* note 41, at 19; *Children on the Move: Protecting Unaccompanied Migrant Children in South Africa and the Region*, *supra* note 7, at 13.

72. Nathane, *supra* note 10.

73. Geddo, *supra* note 1.

74. *Id.*

75. S. Afr. Const. Ch. 2, § 29.

76. Matsaung, *supra* note 53.

77. *Id. Children on the Move: Protecting Unaccompanied Migrant Children in South Africa and the Region*, *supra*, note 7, at 18.

78. Matsaung, *supra* note 53.

79. *Id.*; Geddo, *supra*, note 1.

secondary school are often unable to continue to the university level because one must be a South African citizen to be eligible for higher education student loans.[80] Moreover, many URMs are afraid to enroll in school for fear of making themselves more visible and thus more vulnerable to deportation.[81]

In 2008, South Africa was hit by a wave of xenophobic attacks against Zimbabwean refugees, particularly in Johannesburg and Tschwane.[82] These were largely targeted at adults and are believed to have been caused by tensions over competition for jobs and scarce government aid resources.[83] Some children have also experienced xenophobic attacks, especially in the form of arbitrary arrest and beatings by police officers.[84] Zimbabwean URMs additionally confront xenophobia in the school setting, where they are made to feel different and unwanted due to language differences and their inability to afford school uniforms.[85] Fortunately, this type of national prejudice has declined as South Africans grow accustomed to the increased number of Zimbabwean refugees,[86] and as schools have begun to implement a curriculum on tolerance.[87] Additionally, Zimbabweans' ability to speak English and Zulu has made them less conspicuous than other refugee populations and better suited to assimilate into South African culture.[88]

The plight of children entering South Africa from Zimbabwe has recently become even more dire. From July 2008 to April 2009, the Musina Showgrounds served as an informal refugee settlement or camp where Zimbabwean refugees congregated to sleep, receive minimal services, apply for asylum, and meet others in a similar position.[89] The South African government did not sanction the use of the Showgrounds for this purpose and prohibited the construction of "permanent structures" such as tents or portable toilets.[90] The government resisted creating a formal refugee camp because it believed such a facility would attract additional Zimbabweans to the country.[91] As a result, refugees staying at the Showgrounds slept under the open sky or in makeshift tents created from plastic bags and barbed

80. Nathane, *supra* note 10.

81. *Children on the Move: Protecting Unaccompanied Migrant Children in South Africa and the Region*, *supra* note 7, at 18.

82. *UNICEF Responds to Emergency Needs of Children and Women Affected by Xenophobic Violence in South Africa*, UNICEF (May 27, 2008), http://www.unicef.org/inforbycountrymedia_44181.html.

83. Many Zimbabweans come with technical and language skills to qualify for coveted positions. Additionally, because they are in South Africa illegally, they are willing to work for lower wages than South African workers. Nathane, *supra* note 10.

84. Chrobok, *supra* note 3.

85. *Id.*

86. Matsaung, *supra* note 53.

87. Breen, *supra* note 38.

88. Interview with Dr. Zosa De Sas Kropiwnicki, Child Protection Research and Policy Advisor, Save the Children UK, in Cape Town, S. Afr. (March 3, 2009).

89. Chrobok, *supra* note 3; Choudhury, *supra* note 4.

90. Choudhury, *supra* note 4.

91. Breen, *supra* note 38.

wire fences and relieved themselves in the bushes. Because there was no formal policing of the Showgrounds, women and children were especially vulnerable to sexual violence.[92] The situation became so serious that in November 2008, Save the Children-United Kingdom ("SCUK") declared Musina an emergency zone.[93]

Although the government did not provide any humanitarian services to the Showgrounds, international organizations provided minimal assistance. For example, Doctors Without Borders provided medical treatment and SCUK distributed food.[94] In response to the dangers of the Showgrounds, SCUK created "child-friendly spaces" to help serve the needs of mothers and young children.[95] These "child-friendly spaces" provided protection from adult males, food, informal education (with an emphasis on health and life skills), recreational activities, and assistance in filing asylum papers for the mothers.[96] Unfortunately, the spaces were only open for limited hours from 8 a.m. to 4 p.m. and thus did not protect women and children during the night, when they were most vulnerable.[97] Moreover, the Showgrounds were relatively unclean and exposed to the elements.

On March 2, 2009, the South African Department of Home Affairs ("DHA") ordered the Showgrounds closed and disassembled all semi-permanent structures without a realistic alternative plan for the refugees.[98] The government declared that those people already in possession of documents would have fourteen days to travel to the Refugee Reception Office ("RRO") in Johannesburg to renew their temporary asylum permit or they would face deportation.[99] The government required those without asylum documents, including all URMs, to return to Zimbabwe to apply for asylum.[100] Even those with documentation lacked the resources to make the 520-kilometer trek from Musina to Johannesburg, and if they do make it, it may take several days to reach the front of the queue at the Johannesburg RRO.[101] Additionally, one cannot apply for asylum from one's home country, thus asking the refugees to return to Zimbabwe is futile.[102] Therefore, this plan effectively prevents any lawful means of seeking asylum.[103] Without the minimal amount of protection from the Showgrounds, local resources and shelters are even more strained than previously.

There are currently only two functioning shelters in the Musina area that provide services to unaccompanied minors, the Uniting Reform Church Shelter[104]

92. Chrobok, *supra* note 3.
93. *Id.*
94. Choudhury, *supra* note 4; Chrobok, *supra* note 3.
95. Choudhury, *supra* note 4.
96. *Id.*
97. Chrobok, *supra* note 3
98. Breen, *supra* note 38.
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. Matsaung, *supra* note 53.

and the Concerned Zimbabwe Citizens Campbell Shelter.[105] While providing ad hoc support, they are insufficient to provide for all those in need of their services; the shelters only accept boys and have a limited capacity.[106] Both shelters were formed by local churches and are funded almost entirely by donations from congregants.[107] They do not receive government money, and international organizations only sporadically supply them with items such as blankets and hygiene products.[108] The accommodations are sparse: children sleep on dirt floors and in tents and converted garages. However, this is more protection than they would be receiving otherwise, and they are also provided food, clothing, and informal education. Moreover, the shelters are in a double-bind with the government: they cannot be licensed (and therefore cannot receive money) because they are substandard, but they cannot receive funds to meet regulations until they are licensed.[109] Despite their best efforts, those who run the shelters are consistently on the brink of collapse due to insufficient funding.

The problems minors face is further exacerbated by the fact that the provincial and municipal governments, the organizations bearing the brunt of the financial burden of attending to the refugees, are severely overextended and underfunded. Musina, the city most severely impacted by the influx of Zimbabwean refugees, only has five social workers to help provide services and documentation for the refugees and adult-asylum seekers.[110] Any attempt to provide food or shelter is taken on by international relief organizations or local privately-run shelters. These services are irregular and do not provide for all of those in need nor a sustainable solution to the problem.

III. THE INTERNATIONAL AND AFRICAN LEGAL FRAMEWORK FOR URMS

South Africa has signed numerous international treaties pertaining to the rights of URMs. The current situation of URMs living in South Africa, however, demonstrates that these laws are not being enforced in a way that affords children the broad spectrum of rights to which they are entitled.

South Africa is a signatory to four key international and continental treaties that affect URMs: the United Nations Convention Relating to the Status of Refugees ("UN Refugee Convention"), the Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention on Refugees"), the United Nations Convention on the Rights of the Child ("UNCRC"), and the African Charter on the Rights and Welfare of the Child

105. Kwangwori, *supra* note 37.

106. The Uniting Reform Church Shelter has a maximum capacity of 150. Matsaung, *supra* note 53. The Concerned Zimbabwe Citizens Campbell Shelter has a capacity of 20. Kwangwori, *supra* note 37.

107. Matsaung, *supra* note 53; Kwangwori, *supra* note 37.

108. Matsaung, *supra* note 53.

109. Geddo, *supra* note 1. In order to be licensed, shelters must demonstrate adequate measures of safety and inhabitability. Once the government licenses a shelter, the government provides funding to the shelter, to be used for food, bedding, hygiene, and other necessary services.

110. *Id.*

("ACRWC").

The traditional definition of "refugee" under international law is contained in the UN Refugee Convention. According to that instrument, a person must meet four criteria to be considered a refugee: the person (1) must be outside his or her country of origin, (2) must have a well-founded fear of persecution, (3) based on either race, religion, nationality, membership or a particular social group or political opinion, and (4) must be unwilling or unable to avail himself or herself to the protection of the country of origin for fear of persecution.[111] An additional provision is that one would lose his or her refugee status upon return to the country of origin.[112]

A critique of the UN Refugee Convention is that its narrow definition of refugee does not capture the situation faced by many African refugees, whose circumstances are a product of ethnic or tribal conflicts, socioeconomic breakdown, and natural disasters such as famine.[113] For that reason, the drafters of the 1969 OAU Convention on Refugees chose to define refugee in broader terms and gave African refugees greater rights than those provided by the UN Refugee Convention.[114] The OAU Convention on Refugees defines a refugee as any person compelled to leave his or her country "owing to external aggression, occupation, foreign domination *or events seriously disturbing public order in either a part or the whole of his country of origin or nationality.*"[115] The OAU Convention on Refugees also provides a general right to asylum,[116] a right to be housed in a refugee settlement,[117] and a right to mandatory issuance of travel documents.[118] Additionally, it states that refugees will not lose their refugee or asylum status by merely returning to their country of origin.[119]

Although the OAU Convention on Refugees provides a broader definition to account for the African context, it lacks some of the important provisions contained in the UN Convention on Refugees. For example, the OAU Convention on Refugees does not provide a right to education, housing, and health care.[120] The drafters of the OAU Convention on Refugees recognized that many African countries lack the resources to even provide their own citizens with such services let alone refugees from other countries.[121]

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111. Emmanuel Opoku, *Refugee Movements in Africa and the OAU Convention on Refugees*, 39 J. OF AFR. L. 79, 80 (1995). South Africa acceded to the OAU Convention in 1994. *Id.*

112. *Id.* at 82.

113. *Id.*, at 79.

114. *Id.* at 80.

115. Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa art. I(2), Sept. 6-10, 1969 (emphasis added).

116. *Id.* at art. II.

117. *Id.*

118. *Id.* at art. VI.

119. *Id.* at art. V(4).

120. Opoku, *supra* note 111, at 84.

121. *Id.*

The UNCRC also contains general and specific provisions that are relevant to the situation of URMs in South Africa.[122] First, the UNCRC's provisions apply to all children, not just children who are citizens of the country where they are physically located.[123] The UNCRC provides that the best interests of the child must be the primary consideration "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies."[124] Other provisions guarantee a child's right of identity and documentation[125] and a right to "special protections and assistance by the state for any child temporarily or permanently deprived of his or her family environment." [126]

Article 22 of the UNCRC applies specifically to refugee children, including unaccompanied minors.[127] It states that unaccompanied minors shall "receive appropriate protection and humanitarian assistance,"[128] and that unaccompanied refugee children "shall be accorded the same protections as any other child temporarily or permanently deprived of his or her family."[129] Those rights include the right to an adequate standard of living,[130] the right to a free, compulsory primary education,[131] the right to be protected from economic exploitation and child labor,[132] the right to protection against sexual exploitation,[133] and the freedom from arbitrary arrest and detention.[134]

Much like the UNCRC, the ACRWC enumerates a broad spectrum of rights to which unaccompanied children are entitled without regard to citizenship,[135] and mandates that "in all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration."[136] The ACRWC entitles children to virtually the same rights as the UNCRC, namely the right to an identity,[137] the right to free, compulsory education,[138] the right to health services,[139] the right to protection against economic exploitation,[140] and the right to

122. The UNCRC was adopted in 1989 and put into force in 1990. South Africa acceded to the CRC in 1996. Julia Sloth-Nielsen, *Children's Rights in the South African Courts: An Overview Since Ratification of the UN Convention on the Rights of the Child*, 10 INT'L J. CHILD. RTS. 137 (2002).

123. U.N. Convention on the Rights of the Child art. II, Nov. 20, 1989.

124. *Id.* at art. III.

125. *Id.* at art. VIII(1).

126. *Id.* at art. XX(1).

127. *Id.* at art. XXII(1).

128. *Id.*

129. *Id.* at art. XXII(2).

130. *Id.* at art. XXVII.

131. *Id.* at art. XXVIII.

132. *Id.* at art. XXXII.

133. *Id.* at art. XXXIV.

134. *Id.* at art. XXXVII.

135. African Charter on the Rights and Welfare of the Child art. III, 1990.

136. *Id.* at art. IV.

137. *Id.* at art. VI.

138. *Id.* at art. XI.

139. *Id.* at art. XIV.

protection against physical and sexual abuse or exploitation.[141] Article 23 of ACRWC specifically addresses the rights of refugee children, including unaccompanied minors, and uses the same phraseology as the UNCRC; refugee children shall "receive appropriate protection and humanitarian assistance,"[142] and an unaccompanied refugee minor "shall be accorded the same protections as any other child permanently or temporarily deprived of his family environment for any reason."[143] The ACRWC goes further than the UNCRC, however, by specifying that children may be considered refugees if they are displaced "through natural disaster, internal armed conflicts, civil strife, breakdown of economic and social order or howsoever caused."[144] Due to the current chaos in Zimbabwe, the "breakdown of economic and social order" provision includes the Zimbabwean URMs within ACRWC's definition of refugees entitled to specific rights.[145]

IV. DOMESTIC LEGAL FRAMEWORK FOR URMS IN SOUTH AFRICA

South Africa's domestic legal framework provides various avenues by which Zimbabwean unaccompanied minors can achieve legal status, be protected from abuse and exploitation, and receive humanitarian assistance and services. Specifically, the South African Constitution, Immigration Act, 13 of 2002 (as amended by Act 19 of 2004), the Refugees Act, 130 of 1998 (as amended by Act 33 of 2008), and the Children's Act, 38 of 2005 (as amended by Act 41 of 2007) all contain provisions that would allow for the protection of Zimbabwean URMs within South Africa.[146]

A. South African Constitution

After the end of apartheid in South Africa, the drafters of South Africa's new Constitution deliberately provided for a broad range of human and civil rights. The Preamble of the South African Constitution states, "We, the people of South Africa . . . believe that South Africa belongs to all who live in it, united in our diversity."[147] Moreover, Article 9 of the Constitution states, "Everyone is equal before the law and has the right to equal protection and benefit of the law."[148] The word "citizen" is notably absent, thereby providing a strong argument that non-citizens, including URMs, are entitled to the protections and rights provided in the Constitution. These rights include the right to adequate housing,[149] the right to

140. *Id.* at art. XV.

141. *Id.* at art. XVI.

142. *Id.* at art. XXVIII(1).

143. *Id.* at art. XXVIII(2).

144. African Charter on the Rights and Welfare of the Child art. XXVIII(4).

145. *Id.*

146. Immigration Act 13 of 2002; Immigration Amendment Act 19 of 2004; Refugees Act 130 of 1998; Refugees Amendment Act 33 of 2008; Children's Act 38 of 2005; Children's Amendment Act 41 of 2007.

147. S. AFR. CONST. 1996, Preamble.

148. *Id.* at ch. 2, art. IX, § 1.

149. S. AFR. CONST. ch. 2, art. XXVI, § 1.

health services and social assistance,[150] the right to education,[151] and the freedom from arbitrary arrest and detention.[152] These provisions imply that the South African government will provide humanitarian services for those in need.[153]

Drafters of South Africa's Constitution took the provisions of the UNCRC into special account, including many of the same rights set out in international law. Section 28 constitutionalized nine of the UNCRC's most important provisions, including the mandate that the child's best interests be of primary importance in every matter concerning the child.[154] Moreover, Sections 39(1) and 39(2) require that South African courts and legal forums to consider international law, including treaties, when interpreting the Bill of Rights.[155]

B. Other Domestic Laws Impacting URMs

In addition to the South African Constitution, the Immigration Act, Refugees Act, and Children's Act provide provisions for the protection of URMs. On first review, the Immigration Act takes a restrictive approach to addressing the issue of foreigners within the borders of South Africa by laying out its purpose of securing the country's borders. In contrast, the Refugees Act, on its face, should guarantee URMs full legal protection under South African law, including adequate housing, education, access to health care, public relief, and assistance. The Refugees Act references the Children's Act, which provides the procedures by which URMs can recognize the full realization of these rights. However, in practice, the Immigration Act (not the Refugees and Children's Act) potentially provides the greatest amount of protection and relief for Zimbabwean URMs in South Africa under a provision allowing for the grant of permanent residency rights. The efficacy of this provision to alleviate the current situation in South Africa necessarily depends on the government's full implementation of it.

1. Immigration Act

The post-apartheid government of South Africa replaced the Aliens Control Act of 1991 with the Immigration Act of 2002 in order to align the country's immigration policies and practices with the government's objectives of tolerance.[156] The Act became effective in 2003 and was subsequently amended in

150. *Id.* at ch. 2, art. XXVII, § 1.

151. *Id.* at ch. 2, art. XXIX, § 1.

152. *Id.* at ch. 2, art. XXV. In *Lawyers for Human Rights v. Minister of Home Affairs*, the Constitutional Court held that when the South African Constitution limits rights to only citizens, it clearly expresses that limitation. Therefore, because the Constitution did not specifically reserve the aforementioned rights for citizens, all those living within South African borders are entitled to them. *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2003 (8) BCLR 891 (CC) at 13-14 (S. Afr.), *available at* http://www.saflii.org/za/cases/ZACC/2004/12.html.

153. Breen, *supra* note 38.

154. S. AFR. CONST. ch. 2, art. XXVIII; Julia Sloth-Nielsen, *supra* note 122 at 139.

155. S. AFR. CONST. ch. 2, art. XXXIX; Sloth-Nielsen, *supra*, note 122. All of the aforementioned provisions of the South African Constitution are part of the South African Bill of Rights.

156. Aliens Control Act 96 of 1991; Immigration Act 13 of 2002.

2004.[157] Unlike the Aliens Control Act, the intended purpose of the Immigration Act of 2002 was to facilitate and encourage temporary skilled labor migration.[158] The Immigration Amendment Act of 2004 included the promising goals of preventing and countering xenophobia, promoting a "human rights based culture of enforcement," complying with international obligations, and educating civil society "on the rights of foreigners and refugees."[159] Nevertheless, the post-apartheid government maintains a restrictionist and anti-immigration approach to foreigners due to "the imperatives of nation-building, job protection for South Africans and rampant intolerance of outsiders, bordering on xenophobia."[160] Although the Immigration Amendment Act focuses on controlling and securing South Africa's borders and providing for the strict regulation of the admission to, residence in, and departure of foreign persons, the Act does provide protective provisions, which can be applied to the situation of Zimbabwean URMs.[161]

The Immigration Amendment Act of 2004 defines a "foreigner" as an individual who is not a citizen, and an "illegal foreigner" as an individual who is in South Africa in contravention of the Act, or in other words, without a legal permit.[162] The applicable regulation for asylum seekers is Section 23, which provides for an asylum transit permit.[163] This section, in theory, provides protection for up to fourteen days for those who enter the country and qualify for refugee status, but do not yet have legal documentation in South Africa.[164] Section 23 does not require, but rather allows the Director-General of the DHA to issue an asylum permit to a person who "at a port of entry claims to be an asylum seeker."[165] If the individual does not report to one of the five RROs to apply for asylum under Section 21 of the Refugees Act by the expiration of the fourteen day asylum transit permit, then the individual is automatically classified as an "illegal

157. Due to the 2002 Act being largely inconsistent with stated government goals and policies, President Thabo Mbeki directed the Ministry of Home Affairs to amend the Act to make it easier for skilled migrants to enter the country. The Immigration Amendment Act No. 19 of 2004 became effective on July 1, 2005 with the publication of the new Immigration Regulations. *See* Jonathan Crush & Vincent Williams, "International Migration and Development: Dynamics and Challenges in South and Southern Africa," United Nations Expert Group Meeting on International Migration and Development, Population Division, Department of Economic and Social Affairs, United Nations Secretariat, New York, July 6-8, 2005, 24; HUMAN RIGHTS WATCH, KEEP YOUR HEAD DOWN: UNPROTECTED MIGRANTS IN SOUTH AFRICA (2007).

158. Crush & Williams, *supra* note 157. The purpose of the Aliens Control Act No. 95 of 1991 was "to provide for the control of the admission of persons to, their residence in, and their departure from, the Republic; and for matters connected therewith." Aliens Control Act 95 of 1991.

159. Immigration Amendment Act 19 of 2004 Preamble.

160. Crush & Williams, *supra* note 157.

161. Immigration Amendment Act 19 of 2004.

162. *Id.* at s. 1.

163. *Id.* at s. 23.

164. *Id.* at s. 23(1).

165. *Id.* The Act in relevant part states that "The Director-General *may* issue an asylum transit permit to a person who at a port of entry claims to be an asylum seeker, which permit shall be valid for a period of 14 days only." *Id.* (emphasis added).

foreigner" under the Immigration Act.[166]

In order to more efficiently address the number of Zimbabwean nationals entering South Africa, the Consortium for Refugees and Migrants in South Africa ("CORMSA") along with numerous other non-governmental and humanitarian organizations, including Human Rights Watch, have called for the implementation of Section 31(2)(b) of the Immigration Act.[167] Section 31(2)(b) allows for a ministerial exemption from the standard permit requirements under the Immigration Act.[168] The exemption applies to specific groups of foreigners as designated by the Minister of Home Affairs and would provide the necessary legal basis to respond to the situation of URMs and Zimbabwean nationals in South Africa.[169] If "special circumstances" exist, then the Minister of Home Affairs may "grant a foreigner or a category of foreigners the rights of permanent residence for a specified or unspecified period" of time.[170] Advocates argue that the unique situation and push factors for Zimbabwean unaccompanied minors should qualify as a "special circumstance."[171] If granted permanent resident status, Zimbabwean unaccompanied minors would possess "all the rights, privileges, duties and obligations of a citizen" except for those which the Constitution or other law "explicitly ascribes to citizenship."[172]

The Minister is given substantial discretion under the Act to implement this provision under his or her own "terms and conditions."[173] Specifically, the Minister can:

> (i) Exclude one or more identified foreigners from such categories; and
>
> (ii) For good cause, withdraw such rights from a foreigner or a category of foreigners[174]

Additionally, the Minister has the power to "waive any prescribed requirement or form" and to "withdraw an exemption granted by him or her" under

166. *Id.* at s. 23. The five RROs are located in Pretoria, Durban, Cape Town, Port Elizabeth, and Crown Mines. The government opened up an additional RRO on July 12, 2008 in Musina to handle the large influx of Zimbabweans entering the country, but recently in March 2009 announced the closure of this office. Breen, *supra* note 38.

167. Immigration Amendment Act 19 of 2004 s. 31(2)(b); CONSORTIUM FOR REFUGEES AND MIGRANTS IN SOUTH AFRICA [hereinafter "CORMSA"], REPORT TO THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA ON THE HUMANITARIAN CRISIS IN MUSINA, SOUTH AFRICA 12 (2009); Breen, *supra* note 38.

168. Immigration Amendment Act 19 of 2004 s. 31(2)(b).

169. *Id.*

170. *Id.*

171. Breen, *supra* note 38.

172. Immigration Amendment Act 19 of 2004 s. 25(1). In *Lawyers for Human Rights & Another v. Minister of Home Affairs & Another*, the court stressed that illegal foreigners at the port of entry are entitled to the protections of the Constitution stating "when the Constitution intends to confine rights to citizens it says so." *Lawyers for Human Rights and Another v Minister of Home Affairs and Another*, *supra* note 152.

173. Immigration Amendment Act 19 of 2004 s. 31(2).

174. *Id.* at s. 31(2)(b)(i)-(ii).

Section 31 provided that he or she can demonstrate good cause.[175]

Recognizing the potential for this Section to apply to the current situation of Zimbabweans in South Africa, DHA has indicated that once it receives funding from the Treasury it will begin issuing Section 31(2)(b) permits.[176] The permits will provide legal status for a temporary interim during the humanitarian crisis in Zimbabwe and will grant similar rights as a Section 22 asylum seeker permit, including the right to work and study and the right to access health care.[177] The permits, however, will not provide Zimbabweans the right to housing or the right to access social grants.[178] Furthermore, the government will allow the permit to serve as a travel document for migration between South Africa and Zimbabwe.[179] All Zimbabwean nationals who plan on remaining in South Africa for longer than one month may apply for the permit, but URMs have yet to be granted the right to apply on their own without the appointment of a guardian.[180]

Advantages and Drawbacks: Implications of the Immigration Act

Despite advocates' support for the implementation of Section 31(2)(b), the application of the Immigration Amendment Act may have unintended ramifications. As the purpose of the Immigration Act is to control and secure the South African borders, numerous provisions serve to restrict the rights of persons without legal documentation in South Africa. First, the Act allows for the automatic deportation of all persons who an Immigration Officer has reasonable suspicion to believe to be an illegal foreigner.[181] This appears to conflict with the Immigration Regulations of June 2005 which provide that unaccompanied minors are not subject to detention and make it illegal to deport such minors without regard to the procedural processes under the Children's Act of 2007.[182]

The Immigration Amendment Act forbids the employment and education of persons classified as "illegal foreigners," effectively eliminating the pull factors for

175. *Id.* at s. 31(2)(c)-(d).

176. Breen, *supra* note 38.

177. CONSORTIUM FOR REFUGEES AND MIGRANTS IN SOUTH AFRICA [hereinafter "CORMSA"], SECTION 31(2)(B) PERMITS FOR ZIMBABWEAN NATIONAL'S IN SOUTH AFRICA 1 (2009). The Minister has yet to decide whether to issue the permits for 6 or 12 months from the date of issue. In either instance, the Minister has the power to extend the length of validity and announce its expiry once he has determined that the situation in Zimbabwe is sufficiently stable for Zimbabweans to return. Although providing temporary legal status, the permits will not constitute amnesty. *Id.* at 1-3.

178. *Id.*

179. *Id.*

180. *Id.*

181. Immigration Amendment Act 19 of 2004 s. 34. Lawyers for Human Rights challenged the constitutionality of parts of Section 34 in the Pretoria High Court and sought confirmation in the Constitutional Court of the High Court's order with respect to those provisions that the High Court ruled to be unconstitutional. The Constitutional Court established the reasonable suspicion standard. *Lawyers for Human Rights and Another v Minister of Home Affairs and Another, supra* note 152, at 19; HUMAN RIGHTS WATCH, *supra* note 157.

182. Children's Amendment Act 41 of 2007; JULIA WILLAND, IMMIGRATION LAWS SOUTH AFRICA 10 (Ritztrade 2005).

Zimbabwean unaccompanied minors.[183] Moreover, the Act forbids employers to hire illegal foreigners,[184] making it an offense, punishable by a fine or imprisonment.[185] The Act also prohibits learning institutions from "knowingly" teaching "illegal foreigners."[186] It is a crime to aid and abet "illegal foreigners," although South Africans and NGOs can provide humanitarian assistance to undocumented persons.[187] Lastly, the Act encourages the harassment of suspected persons in the country without legal documentation because it permits police and immigration officers to request a form of identification on demand and requires individuals to produce documentation demonstrating they are legally permitted in the country.[188]

Although the Minister can issue asylum transit permits under Section 23 of the Act, this section is essentially inapplicable to unaccompanied minors as it requires children to have a legal guardian.[189] Additionally, (as discussed above in Part II) many unaccompanied minors cross and re-cross the South Africa-Zimbabwe border, and Musina security officials frequently illegally detain and deport the children.[190] Under the Immigration Amendment Act, the children should therefore be classified as "prohibited persons," disqualifying them from obtaining a visa or a temporary or permanent residence permit or entering the country in the future.[191] The Act also grants broad power to the Director-General of the DHA to declare a group of persons "undesirable."[192] Classification as "undesirable persons," which includes "anyone who is or is likely to become a public charge," also prohibits the group of persons from obtaining a visa or a temporary or permanent residence permit or entering the country.[193]

Despite these restrictive provisions, South African courts have interpreted the Act in positive light, favoring foreigners. In *Lawyers for Human Rights v. Minister of Home Affairs*, the Court dealt with the issue of the detainment and deportation of persons classified as "illegal foreigners" and their procedural rights under the Constitution.[194] The Court acknowledged that "the very fabric of our society and the values embodied in our Constitution could be demeaned if the freedom and dignity of illegal foreigners are violated in the process of preserving our national integrity."[195] Moreover, the Court recognized that these persons who are not

183. Immigration Amendment Act 19 of 2004.

184. *Id.* at s. 38(1); HUMAN RIGHTS WATCH, *supra* note 157.

185. Immigration Act 13 of 2002 s. 49; Immigration Amendment Act 19 of 2004 s. 45; HUMAN RIGHTS WATCH, *supra* note 157.

186. Immigration Amendment Act 19 of 2004 s. 39.

187. *Id.* at s. 42.

188. *Id.* at s. 41.

189. *Id.* at s. 23.

190. Breen, *supra* note 38.

191. Immigration Amendment Act 19 of 2004 s. 29.

192. *Id.* at s. 30.

193. *Id.*

194. *Lawyers for Human Rights v Minister of Home Affairs*, *supra* note 157.

195. *Id.* at 13-14.

entitled to a "large variety of residence permits" under the Immigration Act are vulnerable and poor without support systems, family, friends or acquaintances in South Africa, and they also may have limited knowledge of the South African legal system, laws, policies, and values.[196]

Despite these potential unintended ramifications, the government and Minister of Home Affairs has recently taken positive steps by stating their intent to implement Section 31(2)(b). Nonetheless, the government has not yet expressed its intent to allow URMs to apply for these permits without a guardian, which substantially limits the utility of the Act and their ability to apply and have access to the full realization of their rights under South African law.

2. Refugees Act

The Refugees Act, as amended in 2008, seeks to protect children and adults who have been compelled to leave their countries of origin as a result of a well-founded fear of persecution, violence, or conflict.[197] The stated purpose of the Act is:

> To give effect within the Republic of South Africa to the relevant international legal instruments, principles and standards relating to refugees; to provide for the reception into South Africa of asylum seekers; to regulate application for and recognition of refugee status; to provide for the rights and obligations flowing from such status; and to provide for matters connected therewith.[198]

Contrary to the aims of the Immigration Act, the Refugees Act prohibits persons to be refused entry into South Africa, expelled, extradited or returned to another country if that individual falls into one of two categories.[199] While many contend that the Refugees Act is not applicable to unaccompanied minors from Zimbabwe due to their unique reasons for entering South Africa, arguably, under Section 2 of the Refugees Act, South Africa should be prohibited from refusing entry, expelling, extraditing, or returning these minors to their country of origin.[200]

196. *Id.* at 14.

197. In reviewing the applicable provisions of the Refugees Amendment Act, it is necessary to have an understanding of the similarities and differences between a refugee, asylum seeker, and migrant. Traditionally, the international community has recognized a refugee as a "person facing political persecution or discrimination on social, racial, religious, and political grounds from his or her own government." Siobhan Ciara Neveling, Implementing the Immigration Act: A Cause of or Hindrance to Xenophobia in South Africa (June 2005) (unpublished M.A. in Politics dissertation, University of Johannesburg) (on file with author). An asylum seeker on the other hand is a refugee whose asylum claim has not yet been examined to determine whether his or her fear of persecution is genuine. *Id.* at 17. Lastly, migrants are persons that move across borders, in and out of a country mainly for work, and most do not want permanent residency in South Africa. *Id.* at 18.

198. Refugees Amendment Act 33 of 2008.

199. *Id.*

200. Interview with Ingrid Palmary, Coordinator & Senior Researcher, Forced Migration Studies

The applicable provision states that an individual cannot be returned to his or her country of origin if it would result in "his or her life, physical safety or freedom [to] be threatened on account of . . . other events *seriously disturbing public order* in a part or the whole of that country."[201] Therefore, Zimbabwean unaccompanied minors qualify for refugee status because "owing to . . . other events *seriously disturbing public order* in either a part or the whole" of Zimbabwe has "compelled [the minors] to leave [their] place of habitual residence in order to seek refuge in" South Africa.[202] However, should a URM choose to return to Zimbabwe, his or her qualification for refugee status ceases.[203]

Similar to Section 31(2)(b) of the Immigration Act, the Refugees Act grants the Minister to enact additional regulations "relating to a large scale influx of asylum seekers into South Africa."[204] Therefore, the Minister has the power to create additional regulations that would more adequately protect the rights of Zimbabwean URMs.

The Refugees Act outlines general procedures in which asylum seekers can obtain refugee status and allows for a separate process by which URMs can seek asylum in South Africa. The general procedures require an application for asylum to be made in person at a Refugee Reception Office.[205] Upon application, a Refugee Reception Officer will conduct an interview of the applicant, and then the applicant will be issued with an asylum seeker's permit under Section 22 of the Act, allowing them to reside in South Africa temporarily.[206] The role of the Refugee Reception Officer is to inspect the forms and assist in accurately filling them out.[207] The application will then be referred to a Refugee Reception Determination Officer who will hold a hearing and make a ruling on the application.[208] Under Section 22 of the Refugees Act, the Refugee Reception Determination Officer must issue a temporary permit to all asylum seekers allowing them to remain in the country legally while the decision of their Section 21 refugee application is pending.[209] The Act does not enumerate a specified time period for which the temporary permit is valid; however, it was the practice of the DHA to issue the permits for 6 months.[210] Depending on the amount of time before a decision is made on their application, the Act requires the permit to be extended "from time to time."[211]

Programme, University of Witswatersrand, in Pretoria, South Africa (Mar. 4, 2009).

201. Refugees Amendment Act 33 of 2008 s. 2(b) (emphasis added).

202. *Id.* at s. 3(b)

203. *Id.* at s. 5.

204. *Id.* at s. 38.

205. *Id.* at s. 21.

206. *Id.* at s. 21-22.

207. *Id.* at s. 21.

208. *Id.*

209. *Id.* at s. 15.

210. Palmary, *supra* note 200.

211. Refugees Amendment Act 33 of 2008 s. 22(a)(3). In effect, applicants can remain in South Africa until the Refugee Service Determination Officer has reached a decision in the case. *Id.*

a. URM Rights under the Refugees Act

Under the Refugees Act, URMs are guaranteed the full legal protections including those under Chapter 2 of the Constitution: adequate housing, education, access to health care, public relief, and assistance.[212] Furthermore, they are granted identity documents, the right to employment and education, the right to remain in the country pending finalization of their refugee application, the right to have asylum applications adjudicated in a manner that is lawful, reasonable and procedurally fair, which includes the right to appeal a negative decision on an asylum claim, and the right to freedom of movement and against unlawful arrest or detainment.[213] Specifically with respect to children, detention should be used as a last resort for the shortest possible period of time taking into consideration family unity and the best interests of the child.[214] Furthermore, when detained, conditions must be consistent with human dignity, and URMs should be granted legal representation in refugee proceedings.[215] The Refugees Amendment Act restricts the rights granted to an unaccompanied minor under the Refugees Act. The Act limits the protections guaranteed under the Constitution to those rights not exclusively granted to citizens and further eliminated the provision that entitled refugees to "the same basic health services and basic primary education which the inhabitants of the Republic receive from time to time."[216] As previously stated, however, these rights are still guaranteed under the South African Bill of Rights.[217]

b. Reference to the Children's Act

In regards to unaccompanied minors, the Refugees Amendment Act of 2008 requires the government to issue a Section 22 asylum permit to an unaccompanied child "who is found under circumstances that clearly indicate that he or she is an asylum seeker and a child in need of care as contemplated in the Children's Act."[218] Furthermore, this child must be brought before the Children's Court and dealt with under the provisions of the Children's Act.

Under the Refugees Amendment Act, unaccompanied minors should be granted the same legal mechanisms of protection as national children of South Africa. In 2005, the Pretoria High Court affirmed the application of the Constitution and Child Act of 1983 to unaccompanied minors.[219] The case of *Centre for Child Law and Another v. Minister of Home Affairs and Others* 2005

212. S. AFR. CONST. 1996.

213. Child Rights Information Network, *A Legal Analysis of South Africa's Implementation of the UN Convention on the Rights of the Child* (CRIN, Working Paper, 2008), *available at* http://www.crin.org/resources/infoDetail.asp?ID=15447.

214. *Id.*

215. *Id.*

216. Refugees Act 130 of 1998 s. 27(g); Refugees Amendment Act 33 of 2008 s. 21-22.

217. S. AFR. CONST. 1996.

218. *Id.* at s. 21(A).

219. *Centre for Child Law & Another v Minister of Home Affairs & Others* 2005 (6) SA 50 (T) (S. Afr.), *available at* http://www.childlawsa.com/case_04.html.

(6) SA 50 (T)[220] further "entrenched the principle that government departments" cannot "without due process detain and deport unaccompanied foreign children from South Africa."[221] Judge Annemarie de Vos also noted that the "lofty ideals" of South Africa's Constitution become "hypocritical nonsense" if the government fails to make them a reality.[222] Although advocates view the importance of this case as "remov[ing] any doubt that may have existed about the fact that unaccompanied foreign children should be dealt with under the provisions of the Child Care Act," the High Court of Pretoria only has jurisdiction over all matters within its geographical area, the Transvaal Provincial Division, and the case was decided based on the old Child Act of 1983.[223] Nonetheless, the High Court's ruling served to reaffirm what the Refugees Amendment Act already requires in the case of unaccompanied minors.[224]

Thus, if an unaccompanied minor is found in need of care, then, similar to a South African child, the minor "must be placed in a place of safety, his or her personal circumstances investigated by a social worker and a Children's Court inquiry opened, conducted and finalized" in accordance with the Children's Act.[225]

Chapter 9 of the Children's Act gives the procedures and safeguards required in dealing with a child in need of care and protection.[226] The Act outlines several circumstances in which a child may be found to be in need of care. With respect to URMs, they may qualify under a number of circumstances including: being abandoned or orphaned without visible means of support; living or working on the streets; being exploited or living in circumstances that expose them to exploitation; or living in or being exposed to circumstances that may harm their physical, mental, or social well-being.[227]

If the child is suspected to be in need of care, a social worker will be appointed to the child and the case will be referred to the Children's Court for a determination of whether the child meets the requirements of Section 150(1).[228] In the interim before the court holds a hearing and makes a ruling, the court may order that the child:

> (i) remain in temporary safe care at the place where the child is kept; (ii) be transferred to another place in temporary safe care; (iii) remain with

220. *Id.*

221. Lawyers for Human Rights, *Deportation of Foreign Unaccompanied Children from South Africa*, http://www.lhr.org.za/case/deportation-foreign-unaccompanied-children-south-africa.

222. *Id.*

223. *Id.*

224. The judge also found that the government has a duty to work with one another in order to enact and implement "practical arrangements for unaccompanied foreign minors in South Africa." *Id.*

225. *Id.*

226. Children's Act 38 of 2005.

227. *Id.* at s. 105(1).

228. Under Section 155, prior to the child being brought before the Children's Court a social worker must investigate the case and within 90 days complete a report stating whether the child is in need of care. *Id.* at s. 155.

> the person under whose control the child is; (iv) be put under the control of a family member or other relative of the child; or (v) be placed in temporary safe care.[229]

If the Court determines that the child is in need of care, then the court can place the child in foster care, temporary safe care pending adoption, shared care, or a youth care centre.[230]

Under the amended provisions of the Children's Act, alternative care is defined as a placement in foster care, child and youth care centre, or drop-in centre.[231] Children are prohibited from leaving their placement without permission and are prohibited from leaving the country.[232] This causes conflicts with the goals of Zimbabwean URMs because of their frequent migration back to Zimbabwe to visit family or bring money home (as previously discussed in Part II).

c. Advantages and Disadvantages: Implications of the Refugees Act

Despite the legal framework for providing a process by which Zimbabwean unaccompanied minors can obtain legal status within South Africa, the implementation of the Refugees Act has had numerous shortcomings which have left the children unprotected and vulnerable. Unaccompanied minors face numerous barriers to obtaining asylum including: being prevented from lodging claims, failing to have their claims fairly adjudicated, failing to have their rights respected, and continually facing arbitrary arrest, detention, and unlawful deportation.

The initial hurdle in obtaining asylum involves the lack of knowledge of South African laws and policies. Unaccompanied minors are not adequately informed of the laws and do not understand the possible ramifications of obtaining asylum, non-governmental and humanitarian organizations interpret the laws inconsistently, and the government has implemented the laws in a piecemeal and inadequate fashion.[233] In addition, under the very narrow interpretation of the Refugees Act (initially taken by the DHA and government), only a limited proportion of the children who have experienced individual political persecution were seen to qualify for asylum.[234] Considering the majority of the children from Zimbabwe come for economic reasons and educational endeavors, their

229. *Id.* at 155(6)(i)-(v).

230. *Id.* at s. 156(1)(e).

231. Children's Amendment Act 41 of 2007 ch. 11.

232. *Id.*

233. Breen, *supra* note 38.

234. The Refugee Directorate stated that "The influx [in asylum seekers] observed throughout 2006 suggested that a massive population of people seeking asylum might increase in years to come although the majority are economic migrants as most of their claims are not aligned with the basic principles for asylum." THE FORCED MIGRATION STUDIES PROGRAMME [hereinafter "FMSP"], BARRIERS TO ASYLUM: THE MARABASTAD REFUGEE RECEPTION OFFICE 17 (Darshan Vigneswaran ed., 2008).

applications would be immediately denied.

However, as a result of the number of Zimbabwean unaccompanied minors in the border town of Musina and pressure from NGOs, the government did temporarily allow these minors to apply for refugee status.[235] With the help of UNICEF and UNHCR, Zimbabwean minors were allowed to apply for asylum at the Showgrounds in Musina. This raised confidentiality and privacy concerns given the location and the number of asylum seekers seen each day.[236]

When applying for asylum, unaccompanied minors face the additional barrier of needing a legally appointed guardian. Although the DHA required the children to have a guardian, they failed to recognize the Department of Social Development ("DSD") social workers as such, in contravention of the Children's Act.[237] This resulted in unaccompanied minors "effectively being denied access to asylum and documentation."[238] In Musina, however, SCUK had stepped in to act as the guardian for these children, and the government seemed to be accepting this procedure despite any legal provision allowing a government agency to act as the guardian.[239] This has further implications as to whether SCUK would then be legally responsible for providing for the care and protection of the child throughout the process as well as after the child has gained refugee status.[240]

Additionally, asylum seekers lack access to the RROs, delaying the process of initiating their claims. In a 2008 study conducted by the Forced Migration Studies Programme, researchers found the procedural issues at RROs and a lack of communication between applicants and the DHA were the key barriers for asylum seekers in obtaining refugee status.[241] Although all persons have the right to apply for asylum and have their application fairly considered under the Refugees Act, gaining physical access to RROs remains an impediment in the process.[242] There are groups of 5,000 per day at the RRO in Pretoria, which can only handle about 350 applications a day.[243] On average, a person would need to return to the Pretoria RRO three times, waiting approximately twenty-two days, in order to enter the actual office, and by this time their asylum seeker transit permit would have expired.[244] Once an individual gains access to an RRO, they face an indeterminate amount of time before their application will be reviewed and a decision issued.[245] Therefore, even if the minors coming from Zimbabwe are

235. Chrobok, *supra* note 3; Geddo, *supra* note 1.

236. SCUK, UNICEF, & INT'L RESCUE COMMITTEE, CHILD PROTECTION RAPID ASSESSMENT MUSINA MUNICIPALITY LIMPOPO PROVINCE, SOUTH AFRICA (2008).

237. *Id.*

238. *Id.*

239. Choudhury, *supra* note 4.

240. Geddo, *supra* note 1.

241. FMSP, *supra* note 234, at 2.

242. Palmary, *supra* note 200.

243. SCUK, UNICEF, & INT'L RESCUE COMMITTEE, *supra* note 236.

244. FMSP, *supra* note 234, at 9.

245. Of the 44,000 applications filed in November 2007 only 1,000 were granted and 9,000 were rejected, resulting in 34,000 applications still pending. FORCED MIGRATION STUDIES PROGRAMME,

aware they can apply for refugee status and arrive at an RRO with a guardian, they are unlikely to actually obtain legal documentation.

If an unaccompanied minor files a refugee claim and obtains a temporary permit under Section 22 of the Refugees Act, the permit is only valid for six months.[246] Therefore, the child would be required to return to an RRO after five months with the same legal guardian who accompanied them in the initial application in order to renew the temporary permit. However, this entire process could be circumvented if the government implemented the procedures under the Children's Act, necessitating that a Section 22 permit automatically be issued and the case be referred to the Children's Court.

There is also a question as to whether refugee status would in fact improve the situation of Zimbabwean unaccompanied minors in South Africa. While the minors would be granted legal status, eliminating any "fear of deportation and allow[ing] them to settle and move freely within the country," and facilitate their access to services, the Refugees Act disallows the minors to return to Zimbabwe, which many of them desire to do.[247] Additionally, service providers and the DSD are already underfunded and short-staffed; therefore, the minors' rights and services may never be realized.[248] Technically, under the South African Constitution, these children should have access to health care and education, however, as discussed above this is not happening. With the government's changing policies, the recent closure of the Showgrounds and the continual deportations, any previous effort to document the URMs has become futile and a waste of resources.

V. RECOMMENDATIONS FOR SUSTAINABLE SOLUTIONS

Based on the dire situation facing Zimbabwean URMs in South Africa, it is imperative for there to be action at the systemic and grassroots level. First, the South African government needs to address the shortfalls of the legislation meant to protect and provide for URMs. Secondly, there should be collaboration between the government, schools, and NGOs to provide increased humanitarian aid. Specifically, more services are needed to ensure that URMs have adequate shelter and their right to education is realized.

A. Legislative Solutions: Adapting Existing Legislation

RESPONDING TO ZIMBABWEAN MIGRATION IN SOUTH AFRICA—EVALUATING OPTIONS, *supra* note 8. The most recent report from CORMSA indicates that over 200,000 Zimbabweans have received Section 22 Asylum permits and subsequently over 90% of their applications for asylum have been denied. CORMSA, *supra* note 167.

246. The Act does not enumerate a specified time period for which the temporary permit is valid; however, it was the practice of DHA to issue the permits for six month periods. The FMSP study found that at the RRO in Pretoria it was the practice to issue the permits for only two and a half month periods which adds to the already timely, costly, and burdensome process for the government and applicants. FMSP, *supra* note 234, at 15.

247. SCUK, UNICEF, & INT'L RESCUE COMMITTEE, *supra* note 236.

248. *Id.*

There is no doubt that the South African government worked hard to amend its laws to reflect the new leadership and ideology after apartheid ended, but the present interpretation and implementation of the laws reveals how the government fell short of its goal when dealing with refugees.[249] When assessing the situation of Zimbabwean URMs, the government must balance the needs of South African citizens with those of Zimbabweans. [250] South Africa's hesitation to act is clearly evidenced by the fact that they have yet to formally recognize Zimbabwe as a refugee-producing country.[251] There is a need for legislative reform to put structural measures in place to afford Zimbabwean URMs legal status and adequate protection.

It is critical that the existing laws are interpreted broadly to include protections and allowances for Zimbabweans, especially URMs. If South Africa recognized Zimbabwe as a refugee-producing country, it would be forced to provide extensive humanitarian aid and extend legal status to the thousands of Zimbabweans in South Africa.[252]

1. Immigration Act: Reaching its Full Potential

Problem: *The government's narrow interpretation of the Immigration Act prevents Zimbabwean URMs from taking advantage of its protections intended for economic migration.*

Presently, the Immigration Act fails to meet the needs of Zimbabwean URMs because the South African government has narrowly interpreted the law and has failed to tailor its implementation to the unique situation of URMs.[253] Section 31(2)(b) gives the Minister of Home Affairs the authority to grant a category of foreigners status as a permanent resident.[254] However, the Minister has yet to grant Zimbabwean URMs permanent residency.

In April 2009, the DHA relied on Section 31(2)(b) of the Immigration Act to allow all documented Zimbabwean nationals to apply for a six or twelve month temporary residence permit that would allow them to live, work, and attend school legally in South Africa.[255] However, to date, the DHA has not issued these visas.[256] Although there was an announced moratorium on the deportation of documented Zimbabweans that accompanied the announcement on temporary permits, there are

249. Tara Polzer, *South African Government and Civil Society Responses to Zimbabwean Migration*, 22 Southern African Migration Project Policy Brief (2008), *available at* http://www.queensu.ca/samp/sampresources/samppublications/policybriefs/brief22.pdf.

250. FORCED MIGRATION STUDIES PROGRAMME, *supra* note 227, at 19.

251. Palmary, *supra* note 200.

252. *Id.*

253. Palmary, *supra* note 200.

254. Immigration Act 31(2)(b)

255. Delia Robertson, *South Africa Adopts New Visa Policy for Zimbabweans*, Voice of America, 2009, *available at* http://www.voanews.com/english/2009-04-03-voa22.cfm

256. CORMSA, *supra* note 167 at 1.

reports that the police continue to deport Zimbabweans.[257] To further complicate matters, the DHA failed to clarify whether these temporary permits would be available to URMs.[258]

Solution: *The Minister of Home Affairs must implement Section 31(2)(b) of the Immigration Act and grant Zimbabwean URMs status as permanent residents.*

In order for this modified invocation of Section 31(2)(b) of the Immigration Act to effectuate a sustainable solution for URMs, they must be eligible to take advantage of these temporary permits.[259] As it stands, the temporary permits are for *documented* Zimbabweans, and many URMs do not possess the requisite records to qualify.[260] Because of the high risk of deportation, URMs often avoid government officials or lie to NGO personnel about their age in an effort to apply for asylum as an adult, [261] making it difficult to provide services and humanitarian aid.[262] If URMs were eligible to apply for a temporary residence visa, they would no longer have to fear deportation and would be able to benefit from the protections and rights offered by legal status in South Africa. If the government does not allow URMs to apply for permits under Section 31(2)(b), their only recourse is under the Refugees Act, which, as discussed below, presents its own set of challenges. [263]

2. Refugees Act: Suggestions to Help URMs Seek Asylum

Problem: *The Refugee Act's requirement of a guardian presents two challenges to URMs: 1) the Act does not explicitly state who can serve as a guardian and 2) the lengthy application process makes it difficult for a URM to maintain contact with a guardian.*

Under Section 2 of the Refugees Act, URMs are entitled to asylum protection, and in some cases children have been granted Section 22 permits, allowing them to stay in South Africa temporarily.[264] As presently interpreted and applied, the Refugees Act does not adequately protect the majority of URMs seeking asylum.[265] The Refugees Act requires a guardian to apply for asylum on the URM's behalf.[266] In theory, the requirement of a guardian would seek to ensure that an adult helps to protect the best interests of the URM. However, in reality, the present system creates formidable obstacles for URMs who are trying to seek asylum. The DHA has been unclear and inconsistent on the question of who

257. Human Rights Watch, *South Africa Stop Deporting Zimbabweans available at* http://www.hrw.org/en/news/2009/04/30/south-africa-stop-deporting-zimbabweans

258. CORMSA, *supra* note 167, at 1.

259. Robertson, *supra* note 255.

260. *Id.*

261. *Id.*

262. Chrobok, *supra* note 3.

263. Geddo, *supra* note 1.

264. Refugees Amendment Act 33 of 2008 s. 5.

265. Geddo, *supra* note 1.

266. *Id.*

qualifies to serve as a URM's guardian.[267]

Presently, the DHA refuses to allow the five DSD social workers to serve as guardians, even though, under South African law, these individuals are charged with the safe placement and care of any child who is deemed a "child in need of care."[268] All URMs meet the definition of a "child in need of care," and despite the DSD's limited resources, a URM's social worker has more consistent contact with him or her and can assist a URM throughout the lengthy asylum application process.[269]

To date, however, South African law does not generally recognize NGO representatives as guardians.[270] In limited cases, the DHA has permitted SCUK to serve as a guardian and present their asylum papers to DHA.[271] Generally, it will take weeks or months for a child to be appointed a guardian by the court in order to be able to move forward with the asylum application process.[272] To address this issue, the court should allow NGOs such as SCUK and UNHCR to bring groups of children before the court to appoint guardianship.[273]

Secondly, even when the court does appoint a guardian, the law requires the same guardian to appear with the URM at every stage of the asylum process, which typically takes over a year.[274] Because of their vulnerability to arrest and deportation, URMs move frequently and can easily lose contact with their appointed guardian. Therefore, it is imperative that the DHA find a way to streamline the application process to ensure that URMs are not waiting in asylum limbo for months at a time.

Solution: *In order to remove the barriers associated with the requirement of a guardian, the DHA must 1) clarify or eliminate the guardian requirement and 2) create a special body to review URM asylum applications to ensure a speedy process.*

First, the DHA must explicitly state who can serve as a URM's guardian. An ideal choice would be the DSD social workers because of their ongoing contact with the URMs. However, considering that there are only five social workers in the Limpopo region, the DHA needs to recognize other adults who can act in URMs' best interests. NGOs are the obvious alternative to serve as guardians for the purpose of asylum applications. The DHA should accept the international community's viewpoint that organizations such as UNICEF, SCUK, and other

267. Choudhury, *supra* note 4.

268. Geddo, *supra* note 1.

269. Office of the United Nations High Commissioner for Refugees (hereinafter UNHCR), Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum (1997), *available at* http://wwww.reliefweb.int/rw/lib.nsf/db900sid/LGEL-5S5BY7/$file/hcr-children-93.pdf?openelement.

270. Geddo, *supra* note 1.

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

NGOs should be permitted to represent URMs. It is imperative that if the DHA allows NGOs to serve as guardians, it makes allowances for URMs to be represented by a different guardian at their interview than when the minor received their Section 22 permit. .[275] In addition, if a guardian can represent more than one URM at a time, it could help expedite the process to begin the asylum application process. To simplify this issue, the DHA could abolish the guardian requirement for URMs, therefore, allowing them to seek asylum by their own application.

Secondly, the lengthy application process creates another barrier for URMs, but the DHA could make minor adjustments to remedy this issue. It is imperative that URMs' applications for asylum receive priority in order to reach a prompt and fair decision.[276] Ideally, DHA would appoint a special committee to review and conduct interviews concerning URMs' asylum applications because they would be more familiar with child development, trauma, and their cultural background.

In addition, the DHA could confer refugee status upon all URMs.[277] In fact, the Refugees Act broadly defines refugee as a person who may have been displaced as a result of "events seriously disturbing public disorder."[278] However, this action seems unlikely considering the viewpoint that recognizing Zimbabweans as refugees would interfere with South Africa's role as a mediator in the Zimbabwean conflict.[279]

Problem: *URMs do not understand they will lose their refugee status if they return to Zimbabwe.*

Under Section 5 of the Refugees Act, an applicant who chooses to return to a country of origin forfeits his or her refugee status.[280] Unlike other refugee populations, Zimbabweans migrated to South Africa for economic reasons.[281] Their migration was not the result of civil war or genocide.[282] Zimbabwean URMs express an interest to stay in South Africa to attend school and find work, but they also travel home regularly to visit their families and take money to them.[283] Many URMs understand that refugee status gives them the right to live in South Africa and attend school, but they do not understand that they will lose their refugee status if they return home.[284] Therefore, this provision of the Refugees Act excludes many URMs who want to maintain contact with their family or take their

275. *Id.*

276. UNHCR, *supra* note 269.

277. FMSP, *supra* note 234.

278. Refugees Amendment Act 33of2008, s. 35.

279. FMSP, *supra* note 234.

280. Refugees Amendment Act 33 of2008 s. 5.

281. Refugees from countries such as Mozambique, Democratic Republic of the Congo, and Somalia came to South Africa because of armed conflict in their own countries. *See* FORCED MIGRATION STUDIES PROGRAMME, *supra* note 227.

282. Kwangwori, *supra* note 37.

283. Chrobok, *supra* note 3; Matsaung, *supra* note 53.

284. Matsaung, *supra* note 53; Kwangwori, *supra* note 37.

earnings home for their families.[285]

Solution: *The DHA should provide special passes that would allow URMs to travel home to visit their families, without forfeiting their refugee status.*

In response to the current situation, the DHA should institute a process whereby URMs could travel home to see their families if they had a Section 22 permit without forfeiting their refugee status. If the government allowed URMs to travel between South Africa and Zimbabwe, URMs would have a means to enter and exit the country legally. This would allow the DHA and DSD to know of their whereabouts and provide services. In light of the lack of education around this issue, it would be ideal for URMs to have the opportunity to apply for the temporary residence permit under the Immigration Act to circumvent any confusion related to their refugee status.[286]

3. Disaster Management Act: A Plan for Emergency Response

Problem: *The government has failed to utilize the Disaster Management Act as a means to provide emergency services to URMs.*

Ideally, the DHA would adapt the Immigration Act and Refugees Act to meet the needs of the Zimbabweans migrating for economic reasons. However, an additional piece of legislation, the Disaster Management Act, could be a valuable resource in addressing the issue of Zimbabwean migration and providing specific services for URMs.[287] The Disaster Management Act was enacted in 2002 to offer a legal framework in which the government can provide for the welfare and protection of all people in South Africa in an emergency situation.[288] Under the Act, an emergency can be declared at the municipal, provincial, or national level.[289] The Act applies to a situation where settlement "causes or threatens to cause: (1) death, injury, or disease; (2) damage to property, infrastructure or the environment; or (3) disruption of the life of a community that is of such a magnitude that exceeds the ability of those affected by the disaster to cope with its effects using only their own resources."[290] In relation to the current situation, URMs, do not have the resources to cope with the effects of their problems associated with living in South Africa.

This framework was employed to create a national disaster management contingency plan, a Limpopo provincial plan, and a municipal level plan in the Musina area, but no disaster has ever been declared.[291] The fact that the government had the foresight to formulate a plan to address this growing problem demonstrates recognition of the problem. However, failure to utilize the plan as more URMs have entered the country illustrates another example of the

285. Refugees Amendment Act 33 of 2008 s. 5.
286. CORMSA, *supra* note 167.
287. Polzer, *supra* note 249, at 7.
288. *Id.* at 12.
289. *See* Disaster Management Act 57 of 2002
290. Disaster Management Act 57 of 2002, s. 1.
291. Polzer, *supra* note 249, at 13.

government's failure to protect the people within its borders.[292]

Solution: *The South African Government needs to develop and implement a plan to address the mass migration of URMs into South Africa.*

Ideally, a disaster plan would recognize the specific concerns regarding URMs. An important part of the plan would include provisions to provide shelter for the thousands of URMs who are in the country. In addition, as granted by the South African Constitution, URMs have the right to health care, social assistance, education, adequate housing, and freedom from arbitrary arrest and education.[293]

Declaration of a disaster would allow the national government more oversight as to the services offered at the provincial and municipal level; as it stands, the national government has little power to force the provinces and municipalities to take specific action.[294] If the government declared a disaster at the municipal, provincial, or national level, it would allow the government to partner with communities and NGOs to implement a plan of action regarding the issue of Zimbabwean URMs in South Africa.[295] Any action taken under the Disaster Management Act would be a temporary solution that would provide necessary services and resources to URMs, while the government puts measures in place to ensure a sustainable solution that will provide for the safety and well being of Zimbabwean URMs.

B. Improving Humanitarian Services

Reform and adaptation of existing legislation is important to helping URMs; however, implementation and improved services is another crucial component of any sustainable solution in South Africa. It is insufficient to develop a plan or program, if its implementation is ineffective and inadequate to reach the target population. Part of the present crisis in South Africa is a direct result of poor follow through on the part of government entities.[296] In 2007, the Democratic Alliance, a South African political party, recommended the establishment of a transit centre near the Zimbabwean border.[297]

There is no question that the living conditions were deplorable and unsanitary at the Showgrounds.[298] However, the government was to blame for the horrific conditions because they refused to allow permanent structures, ablution services,

292. Nathane, *supra* note 10.

293. S. AFR. CONST. ch. 2, art. XXV.

294. Breen, *supra* note 38.

295. Polzer, *supra* note 249, at 13.

296. Geddo, *supra* note 1; Nathane, *supra* note 10.

297. FMSP, *supra* note 234.

298. The Consortium of Refugees and Migrants in South Africa ("CORMSA") supported the closing of the Showgrounds, but not without a long term plan in place; Breen, *supra* note 38.

or security at the Showgrounds.[299] The closing of the Showgrounds symbolizes DHA's non-responsiveness.[300] Upon closure, some Zimbabweans were given Section 23 transit permits valid for fourteen days to travel to an RRO in another part of the country, such as Polokwane or Johannesburg.[301] Undocumented Zimbabweans that remained in Musina would be subject to arrest and deportation and be unable to access any of the necessary services to start the asylum application process.[302]

In regards to URMs, the DHA and DSD abandoned their responsibility to this vulnerable population.[303] UNHCR offered transportation to some URMs, but because of the large numbers of URMs, many were left without aid or services.[304] Eliminating services in Musina will not discourage or prevent URMs from entering the country; it will only make it more difficult for them to find safety and realize any legal rights.[305] Therefore, in light of the closing of the Showgrounds, the need for effective implementation of services and programs has become even more dire.

1. Shelters and Drop-in Centers: The Need for More Places of Safety

Problem: *The DSD has not committed the necessary resources to provide temporary and permanent housing for Zimbabwean URMs.*

One of the major barriers to serving the increasing URM population in South Africa is the lack of places of safety and drop-in centers for minors.[306] The DSD is responsible for ensuring that if a minor is determined to be in need of care, then he or she must have a suitable, safe placement.[307] After the Showgrounds closed, the two shelters, Uniting Reformed Methodist Church Shelter and the Concerned Zimbabweans Citizens' Shelter remained open.[308] However, between these two shelters, there is only room for approximately 170 boys.[309] Since there are approximately 600 URMs in Musina, there is a pronounced need for more shelters.[310] In addition, neither one of these shelters is licensed by the DSD because they cannot meet the licensing requirements.[311] However, without government funding, the shelters cannot make the necessary improvements to meet the government standards and ensure that the children have a clean, safe place to

299. Emily Wellman, *Is how a country treats the most vulnerable of its people not a test of its humanity?* (2009), *available at* http://www.polity.org.za/article/is-how-a-country-treats-the-most-vulnerable-of-its-people-not-a-test-of-its-humanity-2009-03-25

300. *Id.*

301. *Id.*

302. Breen, *supra* note 38.

303. Nathane, *supra* note 10.

304. Geddo, *supra* note 1.

305. Breen, *supra* note 38.

306. Chrobok, *supra* note 3.

307. Nathane, *supra* note 10.

308. Breen, *supra* note 38.

309. Kwangwori, *supra* note 37; Matsaung, *supra* note 53.

310. Zosa De Sas Kropiwnicki, *Proposal: Emergency Assistance to Migrant Children in Musina, Limpopo*, (on file with author) (2008); Chrobok, *supra* note 3.

311. Geddo, *supra* note 1.

live.[312] While these shelters in Musina remain open to date, URMs cannot apply for asylum without a RRO.[313]

Solution: *The DSD needs to commit resources to help NGOs and other organizations open shelters for Zimbabwean URMs.*

In order to ensure the safety of all children, especially URMs, the DSD needs to establish many more shelters across the country.[314] One possible solution would be to create a probationary period for shelters to become licensed.[315] In this period, they would be able to receive some government funding to make the necessary improvements and also provide shelter for URMs who are living in the streets.[316] Part of a sustainable solution for URMs in South Africa is finding homes for these minors to provide housing and eliminate the possibility of exploitation.

2. Education: Increasing Accessibility

Problem: *School officials refuse to let Zimbabwean URMs enroll in school because they do not have documentation or school uniforms.*

One of the primary reasons Zimbabwean children migrate to South Africa is for the promise of education. Prior to the economic conflict, the education system in Zimbabwe was the best in southern Africa.[317] Under the South African Constitution, all children in South Africa are entitled to an education. However, in actuality, several barriers prevent Zimbabwean URMs from taking advantage of this right.[318] In order for a URM to attend school, school officials require paperwork showing a child's asylum or immigration status.[319] As discussed earlier, most URMs enter South Africa illegally and face considerable challenges to attain legal status. Moreover, in the rare instances where URMs can obtain documentation, their transient lifestyle makes it nearly impossible to keep track of such documents over time. Thus, most URMs do not have the required paperwork to attend school.[320] In addition, even if a child is able to enroll in school, they may be precluded from attending school because they do not have a school uniform.[321]

In February, all of the secondary schools in Musina were full and not accepting any additional students.[322] In response to the Department of Education's lack of action regarding URMs, UNICEF provided money to purchase school supplies for the children and planned to build additional classrooms.[323] Because of the shortage of classrooms, SCUK established places of safety for adolescents at

312. *Id.*
313. Breen, *supra* note 38.
314. Geddo, *supra* note 1.
315. *Id.*
316. *Id.*
317. Kwangwori, *supra* note 37.
318. FMSP, *supra* note 234.
319. Matsaung, *supra* note 53.
320. *Id.*
321. *Id.*
322. Chrobok, *supra* note 3.
323. *Id.*

the Showgrounds.[324] During the day, teachers taught the children, but these lessons were focused on life skills issues such as health, safety, and asylum application.[325] These actions and services were provided before the Showgrounds closed.[326] At this point, it is unknown as to the extent UNICEF and SCUK will be able to continue offering these programs.

Solution: *School officials should waive the documentation and school uniform requirement in order to provide URMs with their constitutional right.*

In response to the problem, improving access to education should be a priority for the South African Government. While there are limited resources to enroll children in school, the Government must partner with NGOs to provide education in ad hoc settings such as churches, tents, etc.[327] While this is not an idyllic setting, it will help accomplish the goal of providing education to all children in South Africa. Additionally, it is imperative that provincial and municipal governments abolish the paperwork requirement for children to enroll in school. Moreover, URMs should be able to forego the school uniform requirement if a child cannot afford to purchase the clothes. Making these simple adjustments and allowances will allow for more URMs to gain the education that they are legally entitled to under South African Law.

CONCLUSION

Presently, there are thousands of URMs in South Africa who fled Zimbabwe because of political and economic unrest. While they came to South Africa seeking food, work and education, the South African government has yet to respond to their needs in a meaningful manner. Moving forward, it is critical that the South African government provide ongoing protection and services to this vulnerable population. In order to affect long-term change, the government must modify the existing asylum application process to either make it easier for URMs to be appointed a guardian or abolish the guardian requirement entirely. Alternatively, the DHA could also allow URMs to apply for permits under Section 31(2)(b)of the Immigration Act. In addition, utilizing the Disaster Management Act would allow the government to declare a crisis and provide emergency relief to URMs. These changes to existing legislation would make it easier for URMs to attain legal status and ensure their protection and full realization of their rights under the law.

In addition to these legislative changes, the government's practices must reflect an intent to protect URMs from exploitation. More social workers are needed in order to fulfill the statutory mandate of providing for children in need of care under the Children's Act. Case management and family tracking will help URMs locate safe places to stay and connect with family members who live in South Africa. Currently, there are an insufficient number of shelters and places of safety to accommodate the increasing numbers of URMs. The DSD needs to

324. Choudhury, *supra* note 4.
325. *Id.*
326. *Id.*
327. Chrobok, *supra* note 3.

approve new shelters on a probationary basis; therefore, the government should provide funds to shelters to make the necessary improvements and become a fully registered place of safety.

Finally, because the South African Constitution guarantees a right to education to all children in the Republic, the government must increase the number of schools and teachers to ensure all children can attend school. Considering the extenuating circumstances of URMs, schools must abolish the paperwork and uniform requirements for URMs. Until these changes are made, the country cannot create a sustainable solution for Zimbabwean URMs or future URM populations.

GOD V. GAYS?

THE RIGHTS OF SEXUAL MINORITIES IN INTERNATIONAL LAW AS SEEN THROUGH THE DOOMED EXISTENCE OF THE BRAZILIAN RESOLUTION

*Timothy Garvey**

INTRODUCTION

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."[1] For more than two hundred years, this sweeping statement from the United States Declaration of Independence has provided the starting point for conceptions of human rights. While radical at the time of the Declaration's signing, the notion "that all men are created equal"[2] is now a fundamental concept of human rights embraced by the international community.

Following the barbarous human rights violations perpetrated during World War II, the United Nations (UN) prepared its own declaration embracing this notion of equality. Ratified in 1948, the Universal Declaration of Human Rights (UDHR) states:

> All human beings are born free and equal in dignity and rights . . . . Everyone is entitled to all the rights and freedoms set forth in this Declaration, 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.[3]

Almost universally since the writing of the UDHR, international human rights documents have been routinely imbued with a spirit of equality and justice for all people. In fact, since the dawn of the twenty-first century, most of the world's recently-formed or recently-amended constitutions include language expressly

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1. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

2. *Id.*

3. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR].

stating just that.[4] But equality in form and equality in substance appear to be two different things.

Throughout the world, numerous groups are routinely denied the equality supposedly assured to them under their state constitutions or various international documents, such as the UDHR. One group consistently denied the right of equality is a group that international human rights scholar and professor Jack Donnelly refers to as "sexual minorities."[5] This term, as used by Professor Donnelly, includes not only those typically associated with sexual orientation issues–persons who are lesbian, gay, bisexual, and/or transgendered (LGBT)[6]–but it is also meant to include "any group (previously, now, or in the future) stigmatized or despised as a result of sexual orientation, identity, or behavior."[7] According to Professor Donnelly, "[i]n almost all countries, sexual minorities suffer under substantial civil disabilities."[8] While the most extreme violation, the imposition of the death penalty, is mostly limited to Islamic states,[9] discrimination against sexual minorities manifests itself in numerous other ways throughout the world.

To be sure, within the past two decades, the international community has increasingly recognized the rights of sexual minorities. However, sexual minorities are still subject to innumerable injustices in a significant portion of the world. Even when excluding the nearly universal animus toward same-sex marriage,[10]

4. Of the eighteen national constitutions promulgated, ratified, adopted, enforced, or amended since the year 2000, no fewer than 16 contain references to equality. *See, e.g.*, PERUSTUSLAKI [Constitution] ch. 2 § 6 (Fin.) ("everyone is equal before the law"); IRAQ CONST. ch. 2, pt. 1, art. 14 ("Iraqis are equal before the law"), *available at* http://confinder.richmond.edu.

5. JACK DONNELLY, UNIVERSAL HUMAN RIGHTS: IN THEORY AND PRACTICE 229 (2003).

6. LGBT is the acronym most commonly used to refer to this group of individuals, although numerous others exist. Other common versions include GLBT (gay, lesbian, bi-sexual, transgendered), LGBTIQ (with the 'I' signifying persons who are 'intersexed' and the 'Q' signifying persons who are 'queer' or 'questioning'), a term gaining more prevalence in the field is LBGTTTIQ (here the additional 'T's are intended to signify persons who are 'transsexual and transsensual' or alternately 'transsexual and two-spirited'). For the purposes of this article I will use the term "sexual minorities" as being inclusive of all of these groups. The decision to do so is done only for the purpose of readability, and is in no way meant to diminish or undermine those who would choose to use a term other than "sexual minorities."

7. DONNELLY, *supra* note 5, at 229.

8. *Id.* at 230 (providing a list of examples, many of them horrific, describing the practice of many countries to impose incarceration, and in several instances execution, for such minor homosexual acts as same-sex couples holding hands or kissing in public).

9. *Id.* at 230 n.1.

10. Same-sex marriages are allowed internationally in only seven countries (Belgium, Canada, Netherlands, Norway, South Africa, Spain, and Sweden). Additionally, a few states within the United States allow same-sex marriages (Connecticut, Iowa, Massachusetts, New Hampshire, and Vermont as well as the District of Columbia). Lornet Turnbull, *On Gay Rights, World, U.S. Continue to Shift*, SEATTLE TIMES, Jan. 7, 2010, at A12, *available at* http://seattletimes.nwsource.com/html /localnews/2010738123_gaychanges08m.html. Additionally, a few countries will recognize foreign same-sex marriages, even though some of them will not allow such marriages to occur within their own borders (Aruba, Israel, France, Netherlands Antilles, and within the United States - New York). *See* ILGA, LGBTI Rights in the World, http://www.ilga.org/ilga/en/article/1161 (last visited Feb. 22, 2010).

sexual minorities are subject to "persistent human rights violations"[11] that range from death and torture,[12] to inequitable access regarding housing and education,[13] to the forced imposition of attaining heterosexual norms,[14] and "pressure to remain silent and invisible."[15] Laws criminalizing sodomy and other homosexual acts still exist in nearly eighty countries.[16] In fact, it was not until 2003 that the Supreme Court of the United States of America struck down sodomy laws for violating notions of liberty and equality.[17] Before that decision, many states in the U.S., with the consent of the U.S. Supreme Court, criminalized the act of adult males engaging in consensual sodomy in the privacy of their own homes.[18]

Given this list of inequalities, it is impossible to deny the fact that sexual minorities are not granted substantive equality–even in countries that purport to guarantee such equality. In an attempt to combat these continuing injustices suffered by sexual minorities, Brazil introduced a resolution during the 2003 Session of the U.N. Commission on Human Rights (the Commission). The Resolution on Human Rights and Sexual Orientation (the Brazilian Resolution) simply sought to acknowledge the occurrence of human rights violations due to the sexual orientation of the victim and to reaffirm that the principles of the International Bill of Human Rights (IBHR) apply to all individuals including sexual minorities. [19] Unfortunately, for reasons detailed below, the Brazilian Resolution never even made it to a vote before the Commission.

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11. Michael O'Flaherty & John Fisher, *Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles*, 8 HUM. RTS. L. REV. 207, 208 (2008).

12. *Id.* at 208-10.

13. *Id.* at 211.

14. *Id.* at 208.

15. *Id.* This article's purpose is not to recount all the injustices suffered by sexual minorities throughout the world; however, those interested in a deeper discussion of that issue may wish to read the cited article. Another good source of information is AMNESTY INTERNATIONAL, CRIMES OF HATE, CONSPIRACY OF SILENCE: TORTURE AND ILL-TREATMENT BASED ON SEXUAL IDENTITY (2001), *available at* http://www.amnesty.org/en/library/info/ACT40/016/2001/en.

16. *See* DANIEL OTTOSSON, INTERNATIONAL LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX ASSOCIATION, STATE-SPONSORED HOMOPHOBIA: A WORLD SURVEY OF LAWS PROHIBITING SAME-SEX ACTIVITY BETWEEN CONSENTING ADULTS 4 (2008), *available at* http://www.ilga.org/state homophobia/ILGA_State_Sponsored_Homophobia_2008.pdf ("[i]n 2008, no less than 86 member states of the United Nations still criminalize consensual same-sex acts among adults, thus institutionally promoting a culture of hatred. Among those, 7 have legal provisions with death penalty as punishment. To those 86 countries, one must add 6 provinces or territorial units which also punish homosexuality with imprisonment.").

17. Lawrence v. Texas, 539 U.S. 558, 578 (2003) ("[t]he State cannot demean a homosexual person's existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. 'It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter'" (quoting Planned Parenthood v. Casey, 505 U.S. 833, 847 (1992))).

18. *See* Bowers v. Hardwick, 478 U.S. 186, 192 (1986) (holding no "fundamental right [for] homosexuals to engage in acts of consensual sodomy") (overruled by Lawrence v. Texas, 539 U.S. 538 (2003)).

19. The Brazilian Resolution on Human Rights and Sexual Orientation, U.N. Econ & Soc. Council [ECOSOC] 59th Sess., U.N. Doc.E/CN.4/2003/L.92 (April 17, 2003) (proposed but not

This paper explores the story of the Brazilian Resolution. Part I discusses the Brazilian Resolution's history. In so doing, it examines prior attempts to legislate the rights of sexual minorities, as well as prior attempts to adjudicate such rights within international law. Part I also discusses how those prior attempts to create a body of law regarding sexual orientation presented an inherent problem in Brazil's presentation of the Brazilian Resolution and discusses how those problems materialized once Brazil introduced it to the Commission.

In preventing the Commission from voting on the Brazilian Resolution, those who so vehemently opposed it presented three main arguments against its introduction. First, they argued that issues of gender and sexuality do not fall within the concern of international human rights.[20] Second, they argued that the term "sexual orientation" is not adequately defined in international law.[21] Finally, they argued that religious law prevents them from accepting a notion of equality for sexual minorities.[22]

Part II of this paper examines and subsequently dismisses each of these arguments. It explains why, despite arguments to the contrary, issues of gender and sexuality fall squarely within the concern of international human rights law. It also counters the second argument by proving that the term "sexual orientation" is clearly defined in international law. It then takes a step back and examines the issue from a broader perspective–looking at the role of religious law within the context of international law. In accepting the third argument as true–that religious law prevents them from ever accepting a notion of equality for sexual minorities–the third subsection of part II explains how such an argument necessarily denies citizens of their right to freedom of religion, thereby invalidating that argument as well.

Finally, Part III briefly discusses events subsequent to the Brazilian Resolution's demise. Although the Brazilian Resolution failed to make it to a vote before the Commission, its existence was not in vain. The mere introduction of the Brazilian Resolution considerably raised the concern of human rights for sexual minorities within the international sphere. Since 2003, international organizations, acting both within and outwith the UN, have actively pursued the acknowledgment and rectification of human rights violations due to the sexual orientation of the victim. Both non-governmental organizations (NGOs) and inter-governmental organizations (IGOs) joined these efforts with the motivatation of forcing states to recognize that the spirit and the plain language of the UDHR is meant to do what it says: ensure "[e]veryone is entitled to all the rights and freedoms set forth in [the] Declaration, without distinction of any kind, such as race, colour, sex, language,

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adopted), *available at* http://www.arc-international.net/L92.html [hereinafter Brazilian Resolution].

20. Douglas Sanders, *Human Rights and Sexual Orientation in International Law*, INT'L GAY & LESBIAN ASS'N FILES: U.N. COMM'N ON HUM. RTS, Nov. 5, 2005, http://ilga.org/ilga/en/article/577 (stating that opponents circulated a letter asserting that in their perspective sexual orientation is not a human rights issue).

21. *Id.*

22. *Id.*

religion, political or other opinion."[23] Accordingly, Part III discusses a few of these advancements made in the wake of the Brazilian Resolution.

I. THE BRAZILIAN RESOLUTION ON HUMAN RIGHTS & SEXUAL ORIENTATION

What is commonly referred to as the Brazilian Resolution is an international document officially titled The Brazilian Resolution on Human Rights & Sexual Orientation.[24] Brazil presented the Resolution during the 59th Session of the U.N. Commission on Human Rights (Commission) on April 17, 2003.[25] The purpose of the Brazilian Resolution was the promotion and protection of human rights for sexual minorities.[26]

The Brazilian Resolution did not seek to establish any new rights for sexual minorities. By its plain text, it merely sought to reaffirm (as applied to sexual minorities) rights already granted to all persons in documents such as the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),; and the Convention on the Rights of the Child (CRC).[27]

Based upon the rights already established in the aforementioned documents, the Brazilian Resolution "[e]xpress[ed] deep concern at the occurrence of violations of human rights in the world against persons based on their sexual orientation,"[28] and it "[s]tress[ed] that human rights and fundamental freedoms are the birthright of all human beings . . . and . . . should not be hindered in any way on the grounds of sexual orientation."[29] It also "[c]all[ed] upon States to promote and protect the human rights of all persons regardless of their sexual orientation."[30] It further "[r]equest[ed] the United Nations High Commissioner for Human Rights to pay due attention to the violation of human rights on the grounds of sexual orientation."[31]

A. The History of the Brazilian Resolution

The Brazilian Resolution's history is rather minor–mostly because Brazil gave no advance warning that it was going to propose such a resolution and introduced it during the final days of the 2003 Session. [32] However novel the Brazilian Resolution may have seemed at the time of its introduction, it was not the

23. UDHR, *supra* note 3, art. 2.
24. Brazilian Resolution, *supra* note 19.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. Sanders, *supra* note 20. The 59th session of the Commission ended on April 25th, 2003.

first attempt by a UN member state to bring issues concerning sexual orientation to the attention of the UN. In fact, "Brazil ha[d] been at the forefront of government efforts to include language on sexual orientation and human rights in the context of the UN" since 2001.[33] Nonetheless, Brazil should have been more cautious with the Resolution's introduction, as even the most minor prior attempts to insert recognition of rights for sexual minorities into international documents were routinely met with staunch criticism.[34]

Much of the earliest work concerning the recognition of human rights for sexual minorities was done within the European system–not the UN.[35] Relatively speaking, the UN has been slow to recognize human rights for sexual minorities, despite its assurances of equality. And while other international organizations began doing so as early as the 1980s, it is only since the 1990s that UN member states have consistently attempted to work the concerns of sexual minorities into the language of UN documents. However, as previously mentioned, such attempts were routinely plagued with problems, and it was not until the twenty-first century that member states made any consistent progress. Accordingly, those who criticize Brazil's late introduction of its Resolution assert that, had Brazil followed the lead of those advocating for the rights of sexual minorities within Europe, the rights of sexual minorities within the UN may have faired better.[36]

The following subsections give a short history of the fight for recognition of human rights for sexual minorities in international law. As previously mentioned, the UN was not nearly as quick as other international organizations in recognizing such rights. Accordingly, this section concentrates on other organizations' attempts, while only briefly discussing such attempts within the UN. The first subsection examines prior attempts to legislate rights of sexual minorities in international law, and the second subsection examines prior attempts to adjudicate rights for sexual minorities in international law.

1. Prior Attempts to Legislate Rights of Sexual Minorities

Throughout the 1980s and 1990s, the UN's legislative process was routinely plagued with an inability to insert language regarding sexual orientation into any UN document.[37] Even into the early 2000s, attempts to add such language to UN documents repeatedly failed.[38] This was so, despite the fact that most of these

33. INT'L GAY & LESBIAN HUM. RTS. COMM'N, RESOLUTION ON SEXUAL ORIENTATION AND HUMAN RIGHTS: CAMPAIGN DOSSIER 4 (2003), *available at* http://www.iglhrc.org/binary-data/ATTACHMENT/file/000/000/213-1.pdf.

34. *See* Sanders, *supra* note 20 (describing numerous failed attempts to insert language concerning sexual minorities into U.N. documents).

35. *Id.* (discussing the history of rights for sexual minorities in international law).

36. *See* Pratima Narayan, *Somewhere over the Rainbow . . . International Human Rights Protections for Sexual Minorities in the New Millennium*, 24 B.U. INT'L L.J. 313, 345-46 (2006) ("[o]ne key failure of the first Brazilian proposal was that the nation's representatives did not offer advance warning that they would be proposing the bill to gain support").

37. *See* Sanders, *supra* note 20 (describing numerous failed attempts to insert language concerning sexual minorities into U.N. documents).

38. *Id.*

attempts sought only to add language expressly recognizing that sexual minorities were included within the scope of a proposed document. While there were many UN members who opposed the insertion of such language, those countries with strong national ties to religion (mostly Catholic or Islamic) were the most vehement in their opposition.[39]

It is only within the twenty-first century that the UN has made consistent progress in inserting language recognizing the rights of sexual minorities. Those acknowledgments, few as they are, have come sporadically and with much debate and concession.[40]

> The . . . (CESCR) has dealt with [sexual orientation discrimination] in its General Comments . . . Nos 18 of 2005 (on the right to work), 15 of 2002 (on the right to water) and 14 of 2000 (on the right to the highest attainable standard of health), it has indicated that the Covenant proscribes any discrimination on the basis of, *inter alia*, sex and sexual orientation "that has the intention or effect of nullifying or impairing the equal enjoyment or exercise of [the right at issue]."
>
> . . .
>
> The Committee on the Rights of the Child (CRC) has also dealt with the issue in a General Comment. In its General Comment No. 4 of 2003, it stated that, "State parties have the obligation to ensure that all human beings below 18 enjoy all the rights set forth in the Convention [on the Rights of the Child] without discrimination (Article 2), including with regard to race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. These grounds also cover [inter alia] sexual orientation."[41]

Additionally, "Concluding Observations" submitted by the CESCR and the CRC have mentioned sexual-orientation-related discrimination.[42]

Although any acknowledgment regarding non-discrimination of sexual minorities is significant, it is also significant that those in favor of such rights face an uphill battle. While the UN allows many NGOs to be involved in lobbying efforts, such groups must first be granted consultative status. As of 2009, the UN has not granted consultative status to any NGOs dealing specifically with the rights of sexual minorities.[43]

2. Prior Attempts to Adjudicate Rights of Sexual Minorities

Given such limited success in the prior attempts to legislate the rights of sexual minorities, critics argue that those rights may have been better protected had Brazil left it to the various judicial and quasi-judicial international human rights bodies. Such arguments seem appropriate since Europe's international judicial

39. *Id.*
40. *Id.*
41. O'Flaherty & Fisher, *supra* note 11, at 214-15 (internal citations omitted).
42. *Id.* at 215.
43. Sanders, *supra* note 20.

bodies began recognizing rights for sexual minorities in the early 1980s.[44] In fact, by the start of the twenty-first century, European law had developed a consistent body of law protecting sexual minorities.

Conversely, the UN was much slower in recognizing such rights, with its first decision regarding sexual minorities not coming until the middle of the 1990s.[45] Arguably then, the rights of sexual minorities may have been better protected had Brazil allowed the judicial and quasi-judicial bodies of the UN to further develop interpretations of how sexual orientation falls within the context of international documents such as the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), or the International Covenant on Economic, Social, and Cultural Rights (ICESCR).

The following subsections further examine the jurisprudence of the European Court of Human Rights (ECHR)[46] and the United Nations Human Rights Council (UNHRC), as regards sexual minorities.

a. Prior Attempts to Adjudicate Rights of Sexual Minorities within the European Court of Human Rights

To best understand the prior attempts to adjudicate rights of sexual minorities, it is necessary to first look outside of the UN to Europe where those rights were first recognized. While the UN judicial bodies were not particularly quick to acknowledge the rights of sexual minorities, their European counterparts were (at least comparatively speaking). Starting in the early 1980s, the ECHR slowly began developing a series of decisions that upheld the basic rights of sexual minorities.[47] While development of this body of law was slow, it was nonetheless consistent.

Throughout the 1980s and much of the 1990s, the ECHR consistently struck down sodomy laws as violating notions of privacy.[48] The ECHR first applied such a rationale in *Dudgeon v. United Kingdom* in 1981, finding that a Northern Ireland law criminalizing male homosexual activity violated the petitioner's right to

44. *See* Dudgeon v. United Kingdom, App. No. 7525/76, 4 Eur. H.R. Rep. 149, ¶ 63 (1981), *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=dudgeon&sessionid=52029168&skin=hudoc-en (holding Northern Ireland's laws prohibiting buggery and acts of homosexual indecency constitute "a breach of Article 8" of the European Convention on Human Rights).

45. *See* Toonen v. Australia, U.N. H.R. Comm., No. 488, ¶ 9, U.N. Doc. CCPR/C/50/D/488/1992 (1994), *available at* http://www.unhcr.org/refworld/docid/48298b8d2.html (determining that a Tasmanian statute prohibiting private homosexual behavior violates articles 17, paragraph 1, juncto 2, paragraph 1, of the International Covenant on Civil and Political Rights).

46. Until 1998, the European Convention on Human Rights operated under a dual system. There was the European Court of Human Rights, and for those who lacked access to the Court (most often due to the Court's refusal to hear cases of individuals) there was the European Commission of Human Rights. However, in 1998 all state parties to the Convention accepted Protocol 11, which abolished the Commission and allowed the Court to hear more cases (including those of individuals). For the purposes of this essay, ECHR will refer to the decisions of either body.

47. Sanders, *supra* note 20.

48. *Id.*

respect for his private life.[49] In subsequent cases regarding sodomy laws, the ECHR continued to apply *Dudgeon*, and repeatedly struck down sodomy laws.[50] But, beyond striking down sodomy laws, the ECHR was reluctant to apply the rationale of *Dudgeon* to other notions of privacy regarding homosexual activity.[51] Such was the state of the law until 1997; the ECHR struck down sodomy laws on privacy grounds, but other laws regulating homosexual activity survived.

It was not until 1997 that the ECHR finally began to expand on that basic notion of privacy it found in *Dudgeon*. However, in a few a short years the ECHR dramatically expanded its jurisprudence in the area, and by the end of the twentieth century it had a full body of law protecting the rights of sexual minorities. This jurisprudential renaissance began in 1997 when the ECHR struck down a United Kingdom law that established an unequal age of consent for heterosexual and homosexual acts.[52] Within the next three years, the ECHR also found the U.K.'s discriminatory ban on homosexuals in the military to be unnecessary,[53] and ruled that a father, who lost custody of his child because of his homosexuality, had been unfairly deprived of his rights.[54]

With the dawn of the twenty-first century, the ECHR continued to expand its jurisprudence regarding sexual minorities. In 2002, the ECHR ruled that a male to female transsexual could lawfully marry a man.[55] In 2003, the ECHR "upheld successor tenancy rights for same-sex partners."[56] Crystallizing the differences between the ECHR of the twentieth century with that of the twenty-first century,

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49. *See* Dudgeon, 4 Eur. Ct. H.R ¶ 63 (holding Northern Ireland's laws prohibiting buggery and acts of homosexual indecency constitute "a breach of Article 8" of the European Convention on Human Rights).

50. *See* Norris v. Ireland, App. No. 10581/83, 13 Eur. HR Rep. 186 (1989) *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=norris%20|%20v.%20|%20ireland&sessionid=52029506&skin=hudoc-en (holding that an Irish law criminalizing homosexuality violates Articles 8 & 25 of the ICCPR); Modinos v. Cyprus, App. No. 15070/89 16 Eur. HR Rep. 485 (1993), *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Modinos%20|%20v.%20|%20Cyprus&sessionid=52029568&skin=hudoc-en (holding that a Cyprus law prohibiting homosexuality violates Article 8 of the ICCPR).

51. Sanders, *supra* note 20.

52. Sutherland v. United Kingdom (striking out), 2001 Eur. Ct. H.R. *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=sutherland%20|%20v.%20|%20united%20|%20kingdom&sessionid=52029703&skin=hudoc-en.

53. Lustig-Prean and Beckett v. The United Kingdom, 2000 Eur. Ct. H.R. 548, *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Lustig-Prean&sessionid=52029837&skin=hudoc-en.

54. Salgueiro da Silva Mouta v. Portugal, 1999 Eur. Ct. H.R., *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=33290/96&sessionid=52029866&skin=hudoc-en.

55. Goodwin v. United Kingdom, 2002 Eur. Ct. H.R., *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=goodwinv.unitedkingdom&sessionid=46838382&skin=hudoc-en.

56. Sanders, *supra* note 20 (citing Karner v. Austria, 2003 Eur. Ct. H.R. *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=40016/98&sessionid=52029974&skin=hudoc-en).

the ECHR stated in *Karner v Austria*, "[j]ust like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification."[57] Such a bold statement, equating sexual orientation discrimination with sex-based discrimination, perfectly exemplifies the ECHR's jurisprudential shift. Whereas the ECHR of the twentieth century refused to expand protections for sexual minorities, the twenty-first century ECHR equated discrimination against sexual minorities with that of gender-based discrimination.

To be sure, this jurisprudential shift did not occur overnight. In fact, it could not have. It was only by creating a consistent body of law protecting the basic rights of sexual minorities that the ECHR was subsequently able to understand the full scope of such rights and begin to expand those rights. Without the well-documented complaints of sexual minorities from a period spanning nearly two decades, it is unlikely that the ECHR could have ever recognized the rights of sexual minorities on par with those of women. However, because the ECHR had such a record, it was able to properly assert such a claim.

b. Prior attempts to adjudicate rights of sexual minorities within the United Nations Human Rights Committee

Most of the UN's disputes regarding sexual minorities arose as an issue under the ICCPR. As such, those disputes were subject to the jurisdiction of the United Nations Human Rights Committee.[58] While the ECHR began to recognize rights for sexual minorities in the early 1980s, it was not until nearly a decade and a half later (1994) that the UNHRC first recognized such rights.

Much like the ECHR, the UNHRC's first opinion recognizing rights for sexual minorities involved a complaint regarding a member state's sodomy laws. In *Toonen v. Australia*, Nicholas Toonen filed a communication with the UNHRC alleging that Tasmania's sodomy law (Australia's last remaining sodomy law) violated his right to privacy under articles 2, paragraphs 1, 17, and 26 of the ICCPR.[59] While the UNHRC could have simply declared the Tasmanian law to be in violation of the ICCPR, it went much further. Not only did the UNHRC agree with Toonen that the law interfered with his privacy rights under the ICCPR,[60] it further asserted that the ICCPR prohibits any discrimination based on sexual orientation. In drawing such a conclusion, the UNHRC declared "the reference to

57. Karner, 2003 Eur. Ct. H.R. ¶ 37.

58. While not an official judicial body, the UNHRC operates as a quasi-judicial body within the UN. It was established to oversee the compliance of states party to the International Covenant on Civil and Political Rights (ICCPR). The UNHRC allows for individuals within States that have adopted the ICCPR to obtain an opinion regarding violations of the ICCPR. However, those opinions are non-binding and are merely the interpretation of the UNHRC. *See* Office of the United Nations High Commissioner for Human Rights, Monitoring Civil and Political Rights, http://www2.ohchr.org/english/bodies/hrc/index.htm (last visited Apr. 24, 2010). Most of the UN "cases" dealing with discrimination of sexual minorities have arisen as an issue under the ICCPR, and thus were subject to the opinions of the UNHCR.

59. Toonen, U.N.H.R. Comm., No. 488 ¶ 3.1.

60. *Id.* at ¶ 8.2.

'sex' in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation,"[61] rather than simply referring to gender.

Since this landmark decision, the UNHRC's jurisprudence regarding sexual minorities has kept pace with that of the ECHR. The UNHRC, much like the ECHR, has subsequently found "that sexual orientation-related discrimination is a suspect category in terms of the enjoyment of the [ICCPR] rights . . . . The [UN]HRC has persistently observed, however, that discrimination on the basis of sexual orientation . . . is not inherently invidious . . . as long as it is based on reasonable and objective criteria."[62]

Although the UNHRC was not as quick as the ECHR to recognize the rights of sexual minorities, at the time Brazil introduced the Brazilian Resolution, the UNHRC had addressed the issue of sexual minorities on several occasions. More importantly, the UNHRC was even going so far as to repeatedly assert that violations of human rights based on sexual orientation violated the ICCPR by slowly developing a consistent series of decisions protecting the rights of sexual minorities. While it is true that the decisions of the UNHRC are non-binding, it is also true that the UNHRC was much more open to recognizing rights for sexual minorities than were the member states involved in the UN's legislative process. Accordingly, the following sections of Part I discuss the problems inherent in Brazil's promulgation of the Brazilian Resolution, and how those problems manifested once it was introduced.

B. The Problems Inherent in Brazil's Promulgation and Presentation of its Resolution

A number of scholars have written articles about the Brazilian Resolution, but those articles have rarely discussed the Resolution's inherent problems. While the ideals behind the Brazilian Resolution–the protection of rights for sexual minorities–are commendable, the Resolution was arguably flawed from the outset. And, those flaws manifested into foreseeable issues once Brazil introduced the Resolution to the UNHRC. This section discusses each of these perspectives. Section I examines the problems inherent in the mere promulgation of the Brazilian Resolution, while section II discusses how those problems manifested upon its introduction to the Commission.

1. The Problems Inherent in Brazil's Promulgation of the Resolution

As discussed above, prior attempts to insert language concerning sexual orientation into UN documents were routinely met with much hostility and marred by zealous resistance.[63] While Brazil occasionally succeeded at inserting language protecting the human rights of sexual minorities into UN documents, these were only very recent developments. [64] Over the course of the preceding decade, the

61. *Id.* at ¶ 8.7. *See also* O'Flaherty & Fisher, *supra* note 11, at 216 (discussing the implications of *Toonen*).

62. O'Flaherty & Fisher, *supra* note 11, at 216-17 (citing *Young v. Australia*, U.N.H.R. Comm., No. 941, ¶ 104, U.N. Doc. CCPR/C/78/D/941/2000 (2003)).

63. Sanders, *supra* note 20.

64. *Id.*

majority of attempts to work the phrase "sexual orientation" into even non-binding UN documents, such as conference statements, failed repeatedly.[65] As such, prior to introducing its Resolution, Brazil should have either: (1) waited for the international courts and committees to develop a more concrete view of the subject matter, or (2) made sure that it had enough supporters to pass the Resolution. However, Brazil did neither.

Brazil's decision to stop waiting for the judicial branch to fully recognize such rights is understandable. After all, rights for sexual minorities had been a (minor) concern of international law for more than twenty years by the time it introduced its Resolution.[66] Furthermore, the sexual-minority jurisprudence of the UNHRC was behind that of the ECHR, and perhaps Brazil felt that the issue deserved more immediate attention.

Brazil's decision to forgo the second option–securing enough votes to pass the Resolution–is more questionable. Despite Brazil's awareness that several member states were fiercely opposed to the UN's recognition of rights for sexual minorities, Brazil gave no advance warning to other states that it was going to introduce its Resolution and introduced it during the final days of the 2003 session.[67] Understandably, its brash decision to do so caught many states off-guard. In fact, the Brazilian Resolution's introduction was so surprising that a large number of states that might have otherwise supported the Resolution abstained from voting on the motion.[68] After its introduction, as discussed in further detail below, states did not vote on the Brazilian Resolution in 2003, and it was held over to the following session.

Given that the adjudication of rights for sexual minorities had been much more favorable than the legislation of such rights, the Brazilian Resolution would have faired better had Brazil simply waited for the judiciary to recognize the rights asserted by its Resolution. While neither the ECHR nor the UNHRC universally recognized rights for sexual minorities, they were both quicker (and more successful) in granting judicial protections against discrimination based on sexual orientation than member states were in legislating such protections. Another advantage of advancing such rights through the judicial process is that it allows advocates to avoid the stalling tactics often employed by states opposed to recognition of such rights. Quite foreseeably, those opposed to the Brazilian Resolution immediately employed such tactics, which led to the Resolution's ultimate demise.

2. The Flaws in Brazil's Introduction of its Resolution

Having been essentially doomed from its inception, the Brazilian Resolution fared no better once introduced. Introduced on April 17, 2003, the Brazilian

65. *See id.* (describing failed attempts at The Fourth World Conference on Women (1995), and The World Conference on Racism (2001), among others).

66. *See* Dudgeon, 4 Eur. H.R. Rep. ¶ 63 (holding in 1981 that sodomy laws constitute a breach of the European Convention on Human Rights).

67. Sanders, *supra* note 20.

68. *Id.*

Resolution was immediately entwined in a political quagmire. While twenty seven co-sponsors immediately supported the Resolution,[69] there was fierce opposition from both the Organization of the Islamic Conference (OIC) and various Vatican-influenced states, as well as the Holy See itself.[70] Those states combined to form a conglomeration of more than fifty states strongly opposed to the measure based on religious grounds. [71] They were so opposed, that several Islamic states immediately moved for a vote of "no action," which would have kept the Resolution from even being heard on the floor of the Commission.[72] However, that motion was successfully voted down.[73] Nonetheless, the Resolution failed to make it to a vote of the Commission in 2003. Just a few days after Brazil introduced its Resolution, the Commission voted 24 to 17 (with 10 states abstaining) to hold over discussion of the Brazilian Resolution until the Commission's 2004 session.[74]

Despite the best efforts of many NGOs advocating for the passage of the Brazilian Resolution, it fared no better during the Commission's 2004 session. In fact, it faired worse. Although the Commission voted in 2003 to hold-over discussion of the Brazilian Resolution until the 2004 session, considerable pressure from the Catholic/Islamic alliance convinced Brazil to withdraw its Resolution from the 2004 session.[75] In 2005, the Brazilian Resolution died a quite death when Brazil failed to re-introduce it to the Commission.[76]

Had Brazil thought about the possible (or even probable) repercussions of the Resolution's failure, it may not have introduced it so impulsively. However, because the Resolution was introduced and roundly dismissed, it now presents two major problems. First, states may now be free to refuse to grant its citizens the rights advocated by the Brazilian Resolution. That is to say, states may now argue that because the Commission never even voted on the Brazilian Resolution, it did not (and does not) intend for sexual minorities to be included within the documents invoked by the Brazilian Resolution's language. Second, some may argue that because states expressly refused to accept the language of the Brazilian Resolution, such states cannot be bound by any interpretations of those documents that include protections for sexual minorities–including non-binding judicial interpretations. Additionally, it seems highly likely that had Brazil never presented its Resolution, the UNHRC would have continued to protect the rights of sexual minorities–eventually securing the rights advocated by the Brazilian Resolution. Moreover, those opinions would have been powerfully persuasive over those states that would ignore such rights.

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69. *Id.*

70. *Id.*; Narayan, *supra* note 36, at 341.

71. Juan Perez Cabral, *Vatican, Muslim States Slam Queer Human Rights: Arm-twisting, Procedural Shenanigans at UN in Geneva,* THE GULLY, Apr. 25, 2003, http://www.thegully.com/essays/gaymundo/030425_UN_vatican_muslims.html.

72. Sanders, *supra* note 20.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

While the Commission failed to pass the Brazilian Resolution (or even vote on it), the Resolution succeeded in raising the profile of issues concerning sexual minorities. When it became apparent that the Resolution would not pass, several countries formed their own statements on the issue of sexual orientation.[77] Part III discusses those statements; however, Part II first discusses many of the inherent flaws in the arguments of the Catholic/Islamic alliance that so vehemently opposed the Brazilian Resolution.

II. THE INHERENT FLAWS IN THE ARGUMENTS AGAINST THE BRAZILIAN RESOLUTION'S ADOPTION

While this paper criticizes Brazil's presentation of its Resolution, it is not meant to suggest that Brazil was at fault for the Resolution's demise. It was not. In fact, one can argue that those most responsible for the Resolution's death were those silent states that failed to support the Brazilian Resolution out of fear for political repercussions. The truth of the matter is that the Brazilian Resolution was a simple re-affirmation of basic human rights for sexual minorities and should have been passed. This Part II examines why this is so, exposing the flaws in the arguments of those who so vehemently opposed adoption of the Brazilian Resolution.

Although the Catholic/Islamic alliance was successful in leading the Brazilian Resolution to a rather quiet death, it did not need to be that way. The flaws in their arguments against recognition of human rights for sexual minorities are threefold. First, the Organization of the Islamic Conference's (OIC) assertion that sexual-orientation discrimination is not a concern for the global south,[78] while potentially true, is simply inapposite with the goals of international human rights laws. While it may not be a concern of the global south, that does not negate the fact that human rights violations against sexual minorities still occur–nor does it excuse them. Second, at various points throughout the debates surrounding the Brazilian Resolution, the opponents asserted that the term "sexual orientation" had not been defined in international law.[79] However, as discussed below, such a statement is simply erroneous. Finally, and perhaps most importantly, those opposing the Brazilian Resolution did so out of a religious bias,[80] a bias that, as also discussed below, necessarily violates international law. The following sections examine each of these issues in turn.

A. Issues of Gender and Sexuality Fall Squarely within the Concern of International Human Rights Law[81]

Once introduced, the Brazilian Resolution was met with immediate

77. *Id.* The various statements are discussed in detail below, *infra* Part II.

78. *Id.*

79. *Id.*

80. *Id.*

81. The title of this subsection is borrowed from a quote of Nicholas Bamforth wherein he makes such an assertion. *See* Nicholas Bamforth, *Introduction to* AMNESTY INTERNATIONAL, SEX RIGHTS: OXFORD AMNESTY LECTURES 1 (Nicholas Bamforth ed., 2005) (stating "issues of gender and sexuality fall squarely within the concern of international human rights law").

opposition. Those states most opposed to the Brazilian Resolution's introduction were Islamic and Catholic states. Additionally, both the Vatican and the OIC circulated letters urging states not to adopt the Brazilian Resolution. The letter circulated by the OIC between the Commission's 2003 and 2004 sessions stated, among other things, that in the OIC's perspective sexual orientation is not a human rights issue.[82]

While such a statement may have persuaded some states against voting for the Brazilian Resolution, the veracity of the assertion is questionable. It is true that those within the OIC may not believe sexual orientation to be a human rights issue, but there are many who disagree. Numerous scholars, many advocating the recognition of human rights for sexual minorities, repeatedly assert just the opposite. As Nicholas Bamforth states in the introduction to an Amnesty International article, "[t]hat issues of gender and sexuality fall squarely within the concern of international and national human rights law cannot be doubted."[83] That is, "at least if one believes that human rights concern a person's ability to lead a valuable life free from oppression."[84]

While many scholars write on the topic of sexual orientation and human rights, [85] the scholarly argument is not the only one opposed to the OIC's view. The full body of international law also supports the notion that sexual orientation is an issue within international law. Throughout the world, sexual minorities routinely experience persecution and a denial of rights granted to the sexual majority.[86] Accordingly, such discrimination on the basis of sexual orientation has been ruled to be violative of both the ICCPR[87] and the ECHR[88], concern over such discrimination has found its way into numerous international documents[89] and numerous NGOs focus specifically on human rights violations that affect sexual minorities.[90] With so many players in the field of international human rights law

82. Sanders, *supra* note 20.

83. Bamforth, *supra* note 81, at 1.

84. *Id.* at 14.

85. For an in-depth discussion of this topic, see generally Vincent J. Samar, *"Family" and the Political Landscape for Lesbian, Gay, Bisexual and Transgender People (LGBT): Gay-Rights as a Particular Instantatiation of Human Rights,* 64 ALB. L. REV. 983 (2001).

86. *See* O'Flaherty & Fisher, *supra* note 11, at 211 (describing numerous forms of persecution endured by sexual minorities).

87. *See* Toonen, U.N.H.R. Comm'n, No. 488, ¶ 8.3 (determining that a Tasmanian statute prohibiting private homosexual behavior violates articles 17, paragraph 1, juncto 2, paragraph 1, of the International Covenant on Civil and Political Rights).

88. *See* Dudgeon, 4 Eur. H.R. Rep. ¶ 63 (holding Northern Ireland's laws prohibiting buggery and acts of homosexual indecency constitute "a breach of Article 8" of the European Convention on Human Rights).

89. O'Flaherty & Fisher, *supra* note 11, at 214-15.

90. For various political reasons, however, most of those groups have been denied observer status within the UN. One of the major international organizations dealing with the rights of sexual minorities is the International Lesbian and Gay Association (ILGA). ILGA was initially granted observer status within ECOSOC in 1994, but that status was rescinded at the behest of the United States in 1994. Since then, all attempts to gain observer status by groups representing sexual minorities have been denied. For a more in-depth discussion of this topic, see Douglas Sanders, *Human Rights and Sexual Orientation in International Law,* INT'L GAY & LESBIAN ASS'N FILES: U.N. COMM'N ON HUM. RTS,

spending time on protecting the rights of sexual minorities, it was disingenuous for the OIC to assert that sexual orientation is not a concern of international law.

Not only are such rights a clearly recognized concern of international human rights law, international bodies have a moral imperative to recognize these rights. Now that the issue is clearly a part of the international debate, failure to protect such rights would be a failure to uphold the human rights of all persons. As such, the OIC's assertion to the contrary was wrong; but it was also wrong for other states to acquiesce to the OIC's demands that were based upon such a disingenuous assertion.

B. International Law Does Define "Sexual Orientation"

The letters circulated by the Vatican and the OIC also expressed concern that international law does not define the term "sexual orientation."[91] As such, they suggested that inclusion of the term could lead to protections for universally-despised acts such as pedophilia. Such an assertion is inaccurate for at least two reasons. First, it is simply erroneous. International law clearly defines the term "sexual orientation" and this term is well understood. Second, this assertion demonstrates the basic misunderstanding between the granting of special rights and the recognition of human rights. This article discusses each reason below.

The OIC's assertion that "sexual orientation" is undefined in international law is plainly erroneous. As previously discussed, the term has been used in international law for more than two decades. Even within the UN, the UNHRC issued decisions dealing with sexual orientation long before the Brazilian Resolution's introduction. For example, in *Toonen*, the UNHRC's first decision to mention "sexual orientation," the UNHRC definitively stated, "the reference to 'sex' in articles 2, paragraph 1, and 26 [of the ICCPR] is to be taken as including sexual orientation."[92]

It would have been unfathomable for the UNHRC to make such a grand statement if the term "sexual orientation" was not a clearly defined term. Likewise, if the term did not have a clear meaning and understanding, the UNHRC certainly would have taken care to define it before making such a bold pronouncement. This is especially true given the importance of the term to the case. However, at no point during its decision did the UNHRC undertake such an effort. To the contrary, the term "sexual orientation" is so well defined in the general parlance that the UNHRC used it sixteen times in *Toonen* without ever finding a need to officially define it.[93]

It is not only within the UN that "sexual orientation" is clearly defined; it has a universally understood definition. Courts and committees of national and international jurisdiction (including, inter alia, those in France, the United Kingdom, Canada, and the United States) have included the term "sexual

Nov. 5, 2005, http://ilga.org/ilga/en/article/577.

91. Sanders, *supra* note 20.

92. Toonen, U.N.H.R. Comm'n No. 488 ¶ 8.7.

93. *Id.* (including individual opinion of Mr. Bertil Wennergren).

orientation" in their judicial decisions[94] Not only have judicial and quasi-judical bodies readily adopted the term because of its plain meaning; numerous binding and non-binding international documents and reports throughout the world have adopted the term.[95] Given the broad official use of the term "sexual orientation" throughout the world, the assertion that "sexual orientation" is an undefined term is simply preposterous.

It is, in fact, the immediate reaction of those opposing the Brazilian Resolution that proves the argument's flaw. At no point did any in the opposition ask for clarification or definition of the term. Yet, they still knew they were opposed to the introduction of the Brazilian Resolution. That the Vatican and the OIC immediately reacted against the introduction of the Brazilian Resolution proves the term "sexual orientation" has a plain and well understood meaning. Had this not been so, then neither the Vatican nor the OIC could have been immediately opposed to the Brazilian Resolution. It was only because the meaning of the term was so well defined that Vatican and OIC were immediately against the Brazilian Resolution.

Additionally, the claim that the term "sexual orientation" is too vague rings hollow. The term is certainly no more vague than the phrase used to punish sexual minorities throughout the OIC's member states. Laws prohibiting "carnal knowledge of any person against the order of nature"[96] are common in many of the countries represented by the OIC. Yet, these countries use these laws, vague as they are, to routinely punish only sexual minorities. This is true despite the science indicating it is the nature of these individuals to desire having sex with someone of the same-sex.[97]

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94. *See* Lawrence v. Texas, 539 U.S. 558, 581 (2003) (using the term "sexual orientation" without defining it); EB v. France, 2008 Eur. Ct. H.R., 4, ¶ 9, *available at* (finding the same); Ghaidan v. Godin-Mendoza, [2004] UKHL 30, ¶ 9 [2001] EWCA (Civ) 1533 (appeal taken from England) (U.K.), *available at* http://www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd040621/gha-1.htm (finding the same); Karner, 2003 Eur. Ct. H.R., ¶33; Halpern v. Canada, [2003] 14 BHRC 687, O.J. 2268, ¶ 6 (Ct. App. Ont. June 10, 2003), *available at* http://www.ontariocourts.on.ca/decisions/2003/june /halpernC39172.htm (finding the same).

95. *See supra* Introduction (discussing prior attempts to legislate rights of sexual minorities).

96. *See* Douglas Karekona Singiza, Exorcising the Antiquity Spirit of Intolerance: Possibilities and Dilemmas of Decriminalising Sodomy Laws in Uganda, 11 (Oct. 29, 2007) (unpublished LL.M. dissertation, University of the Western Cape, Cape Town, South Africa) *available at* http://www.up.ac.za/dspace/bitstream/2263/5851/1/singiza_2007.pdf. (quoting the Uganda statute that criminalizes homosexual acts).

97. While the cause of homosexuality is far from settled, much science supports the proposition that homosexuality is a genetic predisposition. *See* George Rice et al., *Male Homosexuality: Absence of Linkage to Microsatellite Markers at Xq28*, 284 SCI. 665, 665 (1999) ("Several lines of evidence have implicated genetic factors in homosexuality"), *available at* http://www.sciencemag.org/cgi/reprint /284/5414 /665.pdf. *But see*, P.S. Bearman, *Opposite-Sex Twins and Adolescent Same-Sex Attraction,* 107 AM. J. SOC.1179, 1179 (2005) ("the pattern of concordance (similarity across pairs) of same-sex preference for sibling pairs does not suggest genetic influence independent of social context"). However, even if sexual orientation is a choice made by homosexuals, the argument that those choosing homosexuality should be granted the same rights granted to all individuals is not diminished by such a conclusion. This is because homosexuals and other sexual minorities are nonetheless human and therefore just as deserving of basic human rights.

The second reason the argument is flawed is that it shows a basic misunderstanding between granting special rights and protecting human rights. The Brazilian Resolution sought to do only the latter. Even if one accepted the argument that the term's vagueness would lead to the inclusion of pedophilia, such an inclusion would not grant pedophiles any special rights.[98] The Brazilian Resolution sought to grant all sexual minorities (including, hypothetically, pedophiles) only the basic human right to be free from discrimination *for their existence.* Such a basic recognition of human rights would not remove any domestic sanctions that might be imposed for non-consensual (i.e. forced or exploitative) *acts.* The difference is one of being versus doing, and those fearful of the inclusion of persons such as pedophiles miss the key element present in the legal acts of sexual minorities; they are committed between consenting adults.[99]

International law clearly defines the term "sexual orientation." Universal use of the term with a clear understanding of its meaning spans several decades. And, even if some construe it to include persons such as pedophiles or rapists, such an inclusion would have been of no consequence to the adoption of the Brazilian Resolution. As such, the argument that international law does not define "sexual orientation" is simply devoid of merit.

C. Freedom of Religion Necessarily Includes Freedom from Religion

As their third argument against the Brazilian Resolution, both the OIC and the Vatican asserted that religious law would prevent them from recognizing the Brazilian Resolution and that, if adopted, there would be severe consequences.[100] By invoking the tenants of their religious laws to negate the human rights of sexual minorities, the OIC and the Vatican exposed the inherent flaws in allowing religious law to exist within the framework of the UN.

This section discusses those flaws, but in the process it presents a much broader argument than the previous sections. It looks at the history and framework of the UN, using the case of sexual minorities to expose why religious law cannot co-exist with international human rights laws within the UN. In so doing, the purpose is not to promote religious intolerance, but rather to promote religious freedom. This section argues that when religious law and religious freedom conflict, as is often the case, the Universal Declaration of Human Rights (UDHR)

98. It is odd that the concern expressed is for pedophiles rather than rapists. Perhaps that is because a concern for rapists would require the OIC to acknowledge the many acts of rape its member states perpetrate against sexual minorities in an attempt to "correct" their behavior. *See* AMNESTY INTERNATIONAL, BREAKING THE SILENCE: HUMAN RIGHTS VIOLATIONS BASED ON SEXUAL ORIENTATION (1994) and AMNESTY INTERNATIONAL, CRIMES OF HATE, CONSPIRACY OF SILENCE: TORTURE AND ILL-TREATMENT BASED ON SEXUAL IDENTITY (2001), *available at* http://www.amnesty.org/en/library/info/ACT40/016/2001/en.

99. At all times, this paper takes as a given that the sex acts discussed consist of acts between two consenting adults. While the issue of what constitutes consent is an interesting one, it is not for this paper. Nonetheless, this paper does not suggest that those persons (sexual minorities or otherwise) engaged in non-consensual sex acts, should be outside the reach of the law.

100. Sanders, *supra* note 20.

requires religious freedom to reign supreme. To best represent this argument, this section takes as its example the existence of Shari'a law[101] within the UN.[102]

To properly understand the rights guaranteed by the UDHR, one must look beyond the text of the document. That is not to say that the text should be ignored; only that one must consider it within its broader context, taking into account both the document's history and the framework of its guarantees. This section briefly discusses each of these concerns–looking first to the text, then exploring both the history and framework of the UDHR. After properly framing its significance, this section proceeds to the broader discussion of why religious law cannot properly co-exist with international human rights law.

1. The Text, History, and Framework of the UDHR

To best understand the significance of the UDHR's guarantee of religious freedom, one must first look to the document's text. Article 2 of the UDHR states "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as . . . religion."[103] Article 18 further asserts, "[e]veryone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, *to manifest his religion or belief in teaching, practice, worship and observance.*"[104] Read together, these two Articles clearly affirm the right of all persons, without distinction of any kind, to freedom of thought, conscience, and religion, which includes the right to practice and worship in one's own way. Such is the text of the UDHR, but as simple as that statement may sound, one cannot fully understand its meaning without looking to both the history and framework of the UDHR.

When trying to understand the UDHR's guarantee of religious freedom, one must also look to the UN's history–including the horrific events that preceded its formation. Specifically, one must not forget the enormous role religion played in fostering the atrocities perpetrated by the Nazis during World War II. It was the extermination of millions of people, based on both religious and ethnic grounds, which led to the birth of the UN in 1945. Not only did World War II see the most rapid killing of members of a religious minority in human history,[105] but the Nazis' actions were condoned, and at times assisted, by numerous religious organizations

101. Islamic law. "The Arabic word means literally 'a way to a watering place,' and thus, a path to be followed. According to Muslim belief, it is the path ordained by God for the guidance of mankind, and must be followed by all Muslims." JAMILA HUSSAIN, ISLAM: ITS LAW AND SOCIETY 28 (2004) (internal citations omitted).

102. This is not done in an attempt to disparage Islam or Shari'a law. It is done only because Shari'a law provides the clearest example of the inherent conflict between religious and international law. However, within the context of the Brazilian Resolution, the arguments put forth below would apply equally to those states that followed the lead of the Vatican, which also asserted that religious law would prevent it from recognizing the Brazilian Resolution.

103. UDHR, *supra* note 3, art. 2.

104. *Id.* art. 18 (emphasis added).

105. D. NIEWYK & FRANCIS NICOSIA, THE COLUMBIA GUIDE TO THE HOLOCAUST 45 (2000) (estimating that more than 5,000,000 Jewish people were killed by the Nazis between the years 1933 and 1945).

throughout the world.[106] It is with these circumstances in mind that one must look at the UDHR's promise of religious freedom.[107]

Additionally, the Preamble to the UDHR clearly shows the intent to rectify these travesties of World War II. Among other things, the Preamble states:

> Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,
>
> Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people. [108]

Now, having read the UDHR's text, including the Preamble and the articles specifically relating to religion, and considering those words within its historical context, a clearer intent of its meaning emerges. Not only does the UDHR guarantee religious freedom, but it does so for the purpose of rectifying and preventing barbarous acts that have outraged the conscience of mankind. However, a full understanding of the UDHR's religious-freedom guarantees also necessitates a consideration of the UDHR's framework.

Understanding the framework of the UDHR helps solidify the proper understanding of its religious-freedom guarantees. The U.N. General Assembly adopted the UDHR on December 10, 1948. It is part of the U.N.'s International Bill of Human Rights (IBHR) which consists of the UDHR, as well as the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) (and its two Optional Protocols). The U.N. General Assembly completed the IBHR in 1966 when it adopted both the ICESCR and the ICCPR. These documents work in conjunction with one another to protect human rights throughout the world.

In reading each of the documents that make up the IBHR, it becomes clear that the IBHR grants religious freedom to the individual, not the state. For instance, Article 55 of the U.N. Charter states that the UN shall "promote . . . universal respect for, and observance of, human rights and fundamental freedoms for *all* without distinction as to race, sex, language, or religion."[109] The UDHR further compels religious freedom for the individual in its statement that,

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106. CHRISTOPHER HITCHENS, GOD IS NOT GREAT, 235-51 (2007) (describing the acquiescence of the Vatican, which signed the very first diplomatic accord undertaken by Hitler after his seizure of power, and other religious organizations throughout Europe who failed to even try to stop the Nazi's attempted extermination of the Jews).

107. Article 2 of the UDHR states "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as . . . religion," and article 18 further asserts, "[e]veryone has the right to freedom of thought, conscience and religion." UDHR, *supra* note 3, arts. 2 & 18.

108. UDHR, *supra* note 3, Preamble.

109. U.N. Charter, art. 55.

"[*e*]*veryone* is entitled to all the rights . . . without distinction of any kind, such as . . . religion."[110] The ICCPR is no less precise in according the right to the individual within the state by expressing, "the present Covenant undertakes to respect and to ensure to all *individuals* . . . the rights recognized in the present Covenant without distinction of any kind, such as . . . religion."[111] Likewise, Article 5 of ICESCR asserts, "[n]othing in the present Covenant may be interpreted as implying for any State, group or *person* any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein."[112] Taken together, these documents unequivocally establish that the rights of the individual are paramount, and that the rights provided for and protected by these documents exist with the individual.

Having established that the UDHR's religious-freedom guarantee is granted to the individual and intended to prevent future atrocities executed in the name of religion, the following sub-section proceeds to the broader discussion of why religious law cannot co-exist with international human rights law.

2. Why Religious Law Cannot Co-Exist with International Human Rights Law

Having explored the Universal Declaration of Human Rights' (UDHR) text, history, and framework within the International Bill of Human Rights (IBHR), it is now possible to explore why religious law cannot co-exist with international human rights law. Simply put, the IBHR prohibits the existence of theocracies within the UN because its religious-freedom guarantees reside with the individual (not the state), and it granted these guarantees to prevent states from executing future atrocities in the name of religion. As such, the IBHR's goals are in direct conflict with the goals of theocracies.

Theocracies exist not to guarantee religious freedom, but to impose religious law upon their citizens regardless of whether their citizens ascribe to those beliefs or not. Accordingly, theocracies necessarily violate international law in at least two ways. First, by denying individuals the ability to worship according to the dictates of their own conscience, theocracies deny individuals of their right to religious freedom as guaranteed under the IBHR.[113] Second, as demonstrated by the OIC's refusal to allow the Brazilian Resolution to come to a vote, theocracies often deny groups or individuals of basic human rights under the guise of religious doctrine. This paper discusses both of these concepts in further detail below.

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110. UDHR, *supra* note 3, art. 2 (emphasis added).

111. International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), arts. 2, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368, (emphasis added).

112. International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), arts. 5, December 16, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360, (emphasis added).

113. As previously mentioned, this argument is examined by considering the U.N. member states that apply Shari'a law. This is done not in an attempt to disparage Islam, but simply because such states – by deriving their domestic law almost entirely from religious texts – provide the clearest example from which to understand this argument. Again, much of the rationale used herein can also be applied to the Vatican and other states that rely heavily on other religious texts for their domestic law.

By denying individuals the ability to worship according to the dictates of their own conscience, theocracies subject religious minorities to state persecution and deny individuals of the IBHR's religious-freedom guarantees. Although not always recognized, these guarantees necessarily embody both negative and positive rights. All would agree that the IBHR's religious-freedom guarantees prevent a state from discriminating against individuals because of religion. This is typically understood to mean that states may not discriminate against individuals based upon the individual's religion. However, since the IBHR's religious-freedom guarantees exist to prevent the types of tragedies that precipitated its creation, it must also be true that states may not discriminate against persons because of the state's religion. To conclude otherwise would be to ignore the IBHR's history and that its religious-freedom guarantees reside with the individual rather than the state.

Exploring the case of sexual minorities within Shari'a law shows why this must be the case. In countries that abide by Shari'a law, there is no other source of law (such as the common law) and all citizens of that country are subject to the requirements of Shari'a law.[114] This is true, for example, of sexual minorities who choose to live by a religion other than Islam (presumably one that does not condemn them for their homosexual acts).[115] Although states applying Shari'a law may allow such individuals the choice to practice another religion, many of those states still condemn non-Islamic individuals for their homosexual acts. Accordingly, while Shari'a law may allow sexual minorities to choose a religion that would not condemn their sexual acts, that freedom of choice does not, by itself, protect them from the state condemning such acts. Such a result is untenable given the IBHR's clear intent to prevent state discrimination based upon religion.

Not only do theocracies wrongfully subject sexual minorities to state discrimination, they also prevent sexual minorities from fully practicing the religion they choose. As previously discussed, Article 18 of the UDHR ensures that "[e]veryone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."[116] However, by requiring non-Islamic citizens to adhere to Shari'a law, such states deny those individuals of the right to "manifest [their] religion or belief in teaching, practice, worship and observance." Accordingly, by subjecting sexual minorities to punishments for acts not prohibited under their own religion, Shari'a law prevents sexual minorities

114. HUSSAIN, *supra* note 101, at 6 ("Islamic law is entirely religious. In theory, there is no separation between 'church' and state.").

115. While many Islamic interpretations of both the Qur'an and the Hadith assert that both explicitly refer to homosexuality as a grave sin punishable by stoning, there are those who contest whether homosexuality is even prohibited by the tenets of Islam. *See id.* at 9 ("Islamic law prohibits . . . some types of personal relationships, such as . . . homosexual relationships"). *But see*, Narayan, *supra* note 36, at 342 ("historical analyses indicate that there is great variance in the interpretation of Islamic religious principles with respect to homosexuality . . . [which] is not explicitly referenced in the Q'uran").

116. UDHR, *supra* note 3, art. 18.

from fully practicing the religion of their own choosing. Unless the state allows a person to both freely choose and fully practice their right to religious freedom, that state denies its citizens of the IBHR's religious-freedom guarantees.

Certainly, however, one could argue that the IBHR's goal is only to prevent states from discriminating against individuals because of their chosen religion, rather than preventing states from instituting religious law. Put another way, it is arguable that the IBHR requires only that a state treat all religious groups equally and not grant certain rights to one religious group while denying such rights to other religious groups. Therefore, one could assert that Shari'a law's presence within the UN does not violate the IBHR, because the law in those states applies equally to all citizens regardless of their religion. However, such an understanding of the IBHR's religious-freedom guarantees is horribly restrictive and does not offer the protections necessary to prevent the types of atrocities that prompted the UDHR's creation.[117]

As previously discussed, nations developed the UDHR in response to the barbarous acts perpetrated during World War II. Given the oppressive historical backdrop of the UDHR's creation, it is difficult to imagine how the UDHR's framers would condone the imposition of religious ideals upon any group in the name of religious freedom. That the Jews of Europe were free to exercise their religion did not prevent the Nazis from killing several million of them. Likewise, that sexual minorities living under Shari'a law are free to practice a religion that would not condemn them in the afterlife does not prevent states from applying Shari'a law to condemn them in this life. That the IBHR's religious-freedom guarantees would allow such a curious result seems dubious, especially given the fact that sexual minorities also endured the wrath of the Nazis' extermination attempts.[118] Consequently, if the IBHR's religious-freedom guarantees mean anything, they must include not only the freedom *of* religion, but also the freedom *from* religion. Theocracies necessarily deny their citizens of the latter right, and as such their existence within the UN is inconsistent with the IBHR's religious-freedom guarantees.

While theocracies necessarily deny individuals of the IBHR's religious-freedom guarantees, they also violate international law by using religious doctrine to cover blatant human rights violations. Exploring the story of the Brazilian Resolution more closely shows why this is true. In opposing the Brazilian Resolution, the OIC and Vatican asserted that homosexuality is contrary to their religious law.[119] However, the OIC went even further. Speaking on behalf of the OIC, Pakistan stated that adoption of the Brazilian Resolution would lead to significant repercussions.[120] By invoking the teachings of their religious law, the

117. *See supra* Part III.C (explaining the history leading to the UDHR's creation).

118. It is estimated that "some 50,000 gays were branded criminals and degenerates by the Third Reich and 10,000 to 15,000 went to concentration camps, from which few ever returned." BBC News, *Berlin to Mark Nazis' Gay Victims* (Dec. 12, 2003), *available at* http://news.bbc.co.uk/2/hi/europe/3314887.stm

119. Sanders, *supra* note 20.

120. *See id.* (stating that the Pakistan delegate asserted that "attempts to develop norms which

OIC and Vatican exposed the second flaw of allowing theocracies to exist within the UN; theocracies often deny groups or individuals of basic human rights under the guise of religious doctrine.

In preventing the Commission from voting on the Brazilian Resolution, the OIC and Vatican also denied those citizens of many other rights. The Brazilian Resolution's adoption would have affirmed that sexual minorities are included within the scope of numerous international human rights documents, thereby explicitly granting such rights to sexual minorities. Had the Commission adopted the Brazilian Resolution, there would have been no question that the protections of those documents included sexual minorities. However, because the Commission never voted on the Resolution, whether the Commission intends for sexual minorities to be included within the documents invoked by the Brazilian Resolution's language remains an open question. And, at least for now, states are arguably free to continue subjecting sexual minorities to "persistent human rights violations."[121]

Nevertheless, in considering whether the Brazilian Resolution's stagnation leaves the question open, it is important to note that "[h]uman rights have a particular pre-occupation with disadvantaged individuals and groups. This pre-occupation is reflected in numerous provisions of international human rights law, not least those enshrining the principles of non-discrimination and equality."[122] As such, the IBHR's text and history caution against an interpretation that would negate the human rights of sexual minorities. Throughout history, millions of people have been and continue to be slaughtered in the name of religion.[123] Sexual minorities are one such group that continues to be subjected to "persistent human rights violations."[124] This, despite the UDHR's clear dictate that "[e]veryone is entitled to all the rights and freedoms set forth in [the UDHR], 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."[125]

It is immaterial whether the UDHR should include sexual minorities within the guise of "sex," "other status," or "everyone." Under any interpretation, it is difficult to understand how one could read the UDHR's broad language as excluding sexual minorities, especially when considering that sexual minorities were among those intentionally killed by the Nazis.[126] Accordingly, even without

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directly contradict fundamental value systems need to be avoided . . . . No Islamic society would be able to accept any obligation which directly contradicts the basic tenants of our religion.").

121. O'Flaherty & Fisher, *supra* note 11, at 208.

122. Paul Hunt & Gillian MacNoughton, *A Human Rights-Based Approach to Health Indicators*, *in* ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN ACTION 303 (Mashood A. Baderin & Robert McCorquodale eds., 2007).

123. *See* HITCHENS, *supra* note 106, at 235-51 (discussing numerous examples of mass killings perpetrated in the name of religion).

124. O'Flaherty & Fisher, *supra* note 11, at 208.

125. UDHR, *supra* note 3, art. 2.

126. It is estimated that "some 50,000 gays were branded criminals as degenerates by the Third Reich and 10,000 to 15,000 went to concentration camps, from which few ever returned." BBC News, *Berlin to Mark Nazis' Gay Victims*, BBC NEWS, Dec. 12, 2003, http://news.bbc.co.uk/2/hi/europe

the Commission's adoption of the Brazilian Resolution, those human rights documents invoked by the Resolution's text necessarily extend to sexual minorities. But, by invoking religious doctrine, the OIC and the Vatican have so far succeeded in denying these basic human rights to sexual minorities. Such a result is inapposite with international law, and exposes one reason why theocracies should not exist within the UN.

III. PROGRESS MADE IN THE ADVANCEMENT OF RIGHTS FOR SEXUAL MINORITIES SINCE THE INTRODUCTION OF THE BRAZILIAN RESOLUTION

To be sure, Brazil made a major misstep in presenting the Brazilian Resolution without first garnering enough support to ensure its passage. However, that does not mean that no good has come from its introduction. As previously mentioned, the Commission's inability to pass the Brazilian Resolution was not a complete failure in terms of advancing sexual minorities' rights. In fact, by raising the profile of human rights and sexual orientation, the Brazilian Resolution helped advance those rights throughout international law–despite its demise. And, perhaps that is all that Brazil sought to do by introducing its Resolution.

Since 2003, when Brazil first introduced its Resolution to the Commission, supportive governments have introduced numerous similarly themed documents to other UN bodies. On December 18, 2008, France and The Netherlands presented the U.N. General Assembly with the first declaration concerning gay rights. Although originally intended as a resolution, it lacked support for adoption as such and was quickly met with an opposing statement from the OIC.[127] It is now known as the United Nations Statement on Human Rights, Sexual Orientation and Gender Identity ("Statement").[128] Interestingly, the Statement is more strongly worded than was the Brazilian Resolution. It condemns, among other things, "human rights violations based on sexual orientation or gender identity wherever they occur."[129] However, despite its strong language, the Statement won the support of sixty-six countries in the U.N. General Assembly.[130]

Additionally, countries signed multiple statements expressing concern for discrimination based on sexual orientation or gender identity, and altogether sixty countries have signed at least one statement.[131] Most significantly, on January 12, 2006, Norway presented the U.N. Human Rights Council with a "statement on human rights violations based on sexual orientation and gender identity on behalf of . . . 54 states,"[132] which "urge[d] the Human Rights Council to pay due attention

/3314887.stm.

127. Neil MacFarquhar, *In a First, Gay Rights Are Pressed at the U.N.*, N.Y. TIMES, Dec. 18, 2008, at A22.

128. Statement on Human Rights, Sexual Orientation and Gender Identity, G.A. Res. 2435, ¶ 6, 4th plen. mtg., (Dec. 18 2008).

129. *Id.*

130. MacFarquhar, *supra* note 127, at A22.

131. ILGA, SUPPORTIVE GOVERNMENTS: 60 COUNTRIES HAVE PUBLICLY SUPPORTED SEXUAL ORIENTATION AT THE CHR/HRC BETWEEN 2003 AND 2008 (2008), *available at* http://ilga.org/ilga/en/article/583.

132. The Norwegian Statement, Human Rights Council, Dec. 1, 2006, http://www.ilga-

to human rights violations based on sexual orientation and gender identity."[133] The Norwegian Statement was particularly notable because several Islamic States actually signed onto it,[134]despite Pakistan's assertion that no Islamic state could ever support any document expressing concern over human rights violations of sexual minorities.[135]

Outside of the UN, numerous Intergovernmental Organizations (IGOs) have continued to work feverishly to protect the rights of sexual minorities. Although it did not occur during a session of the U.N. Human Rights Commission, Brazil did eventually get a version of its Resolution passed by an international governing body. In 2008, the Organization of American States (OAS) passed a slightly modified version of the original Brazilian Resolution. The "non-binding resolution was passed by consensus, meaning that all OAS countries agreed including the United States."[136]

In addition to the work of IGOs, individual experts in the field of human rights and sexual orientation have been hard at work as well. In March of 2007, a group of human rights experts launched the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (Yogyakarta Principles). The Yogyakarta Principles are a collection of twenty-nine principles relating to human rights and sexual orientation. Each enumerated principle contains recommendations directed at states to assure their fulfillment. "The Principles are intended as a coherent and comprehensive identification of the obligation of States to respect, protect and fulfill the human rights of all persons regardless of their sexual orientation or gender identity."[137]

Although the Commission failed to pass the Brazilian Resolution, it is arguable that Brazil managed to do indirectly what it was unable to do directly. After all, it can be assumed by Brazil's actions that it sought merely to raise the profile of human rights violations based on sexual orientation. Certainly it has managed to do that. While there are still numerous states that vehemently oppose adoption of such a resolution, many other states, IGOs, and NGOs have worked tirelessly over the past six years to advance those rights.

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europe.org/europe/issues/international/norwegian_statement_at_the_un.

133. *Id.*

134. The Norwegian Statement was signed by Albania, which is member state of the OIC. Additionally it was signed by Bosnia & Herzegovina and Cyprus, both of which have observer status with the OIC. *See id.* (listing all signatories); Organization of the Islamic Conference, Member States, http://www.oic-oci.org/member_states.asp (last visited Apr. 24, 2010) (listing OIC member states); Organization of the Islamic Conference, Observers http://www.oic-oci.org/page_detail.asp?p_id=179 (last visited Apr. 24, 2010) (listing OIC observers).

135. Sanders, *supra* note 20.

136. Samantha Singson, *Brazil Successfully Pushes Homosexual Rights at OAS Meeting*, 34 CATH. FAM. & HUM. RTS. INST. 1, 1 (2008), *available at* http://www.c-fam.org/publications/id.696/pub_detail.asp.

137. O'Flaherty & Fisher, *supra* note 11, at 207.

All this adds up to show that the rights of sexual minorities are a concern of the international community, and that those concerns are being recognized and slowly advanced. The Commission was designed so that all states would be held to the same human rights standards. With that in mind, the Brazilian Resolution should have passed, for it sought nothing more than a mere acknowledgment that states show concern for violations of human rights based on sexual orientation. However, the states opposing the Brazilian Resolution were those states most likely to be guilty of committing egregious violations of human rights against sexual minorities. In failing to pass the Brazilian Resolution, the Commission itself failed in its duty to promote and protect human rights.

CONCLUSION

Throughout the world, numerous groups are denied basic human rights because of their status within society. Oftentimes, those committing violations of human rights against these groups assert that they have a perfectly valid reason for doing so. In the case of sexual minorities, the reasons asserted for such violations appear at first glance to be logical. Surely, no one wants to grant special rights to sexual predators such as rapists and pedophiles, nor does anyone wish to rely upon laws that are based on undefined terms. Furthermore, religion is a very important and sacred part of millions of lives, and deserves the utmost deference.

However, this paper has attempted to explain why those arguments are not as sound as they may first seem. Sexual minorities are not seeking special rights, only basic human rights. Moreover, sexual predators are easily distinguishable from sexual minorities. The latter group deals with adults who have consensual sexual relations with one another, whereas the former does not. Additionally, while the use of undefined terms can bring havoc upon the legal system, the term "sexual orientation" presents no such problems. Numerous laws and judicial decisions throughout the world use the term. And as for religion, while it does deserve a certain level of respect, a concern for human rights deserves more. The international community cannot allow religion to excuse persistent human rights violations.

GLOBAL LEGALISM: THE ILLUSION OF EFFECTIVE INTERNATIONAL LAW

*Reviewed by Christopher J. Eby**

ERIC A. POSNER, THE PERILS OF GLOBAL LEGALISM (UNIVERSITY OF CHICAGO PRESS, 2009).

I. INTRODUCTION

In our increasingly complex and interconnected world, problems emerge that cannot be solved by the actions of one nation. For those problems that exceed the scope and capability of individual governments, international law and international government become the only possible solution. If international law aligns with state interests, compliance is both expected and easy to explain. However, when a state is confronted with international law antithetical to their self-interest, nothing prevents the state from simply violating or withdrawing from the international law.

Global legalists believe that international law will solve complex global problems and that states will comply because a legalistic culture will establish faith in international law. American global legalists generally believe that "the very high value of international law creates a presumption against violating it that is so strong that, for all practical purposes, it may never be violated."[1] European global legalists argue that "international law has value for its own sake . . . and therefore it is wrong for states to evaluate potentially illegal conduct with a cost-benefit analysis that uses national interests as a metric."[2]

Nevertheless, states *do* use self-interest as their standard when contemplating compliance. These interests are result of a nation fulfilling its obligations to its citizens. "A state's interest is fixed - the product of the domestic political process, reflecting the values and preferences of the public in a democracy, and those of a narrower elite in an authoritarian system. In short, the state's interest comes from within, and mainly concerns the security and prosperity of the state's citizens."[3] While campaigning, President Obama declared, "[p]romoting—and respecting—clear rules *that are consistent with our values* allows us to hold all nations to a high standard of behavior, and to mobilize friends and allies against those nations that

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1. ERIC A. POSNER, THE PERILS OF GLOBAL LEGALISM xii (2009).

2. *Id.*

3. Eric A. Posner, *Transnational Legal Process and the Supreme Court's 2003-2003 Term: Some Skeptical Observations*, 12 TULSA J. COMP. & INT'L L. 23, 24 (2004).

break the rules. Promoting strong international norms *helps us advance many interests* . . . ."[4] Recommendations from the United Nations Association of the United States of America in an occasional paper titled "Renewing America's Commitment to International Law" framed many of the recommendations in terms of American self-interest. "To secure agreement and cooperation on *issues central to American security*, the US needs to lead by example and ratify and implement existing arms control and environmental treaties."[5] "US adherence to the international treaty regime is essential *to America's ability to induce other nations* to join in the cooperative action necessary to address the great many global problems that are far beyond our ability to solve alone."[6]

Global legalism creates an illusion of order that loses its luster when removed from the vacuum of theory and exposed to the harsh light of global reality. In *The Perils of Global Legalism*, Professor Posner critically examines the arguments set forth by leading global legalists, addressing the fundamental flaws in their logic. He categorizes global legalism as "an excessive faith in the efficacy of international law" and cautions against adopting this mistaken view of the world.[7]

In this book review, I analyze Professor Posner's arguments by answering the following questions: (1) What is global legalism? (2) What are the flaws of global legalism? and (3) What impact does the presence of a large network of international courts have when considering the validity of global legalism?

II. DEFINING GLOBAL LEGALISM

A. Collective Action Problems

Nationally, goods services exist that private organizations cannot routinely provide for citizens. Classic examples of these public goods include transportation and national defense. Globally, the same types of problems exist; private organizations and national governments cannot solve them on their own. Professor Posner categorizes these as "collective action problems."[8] Examples of these problems are war, pollution, overfishing, disease, terror, global macroeconomic shocks, and transnational crime.[9] The efforts of any one nation are simply insufficient to combat such problems. However, they have serious ramifications and the potential to impact the quality of life for every citizen of every nation.

Unfortunately, resolving these collective problems on a global level is a far more challenging task than identifying them. Exceeding any single nation's authority or capability, collective action problems require just that: collective action. This cooperation is hard to come by for several reasons. First, states are

4. The American Society of International Law, International Law 2008 – Barack Obama, http://www.asil.org/obamasurvey.cfm (quoting then-Senator and Presidential Candidate Barack Obama) (emphasis added) (last visited Apr. 19, 2010).

5. LAWRENCE C. MOSS, RENEWING AMERICA'S COMMITMENT TO INTERNATIONAL LAW 3 (2010) (emphasis added).

6. *Id.* at 9 (emphasis added).

7. POSNER, *supra* note 1, at xii.

8. *Id.* at 3.

9. *Id.* at 3-6.

motivated by their self-interest. "International law emerges from states' pursuit of self-interested policies on the international stage."[10] Additionally, the tremendous heterogeneity of the global population brings countless values and needs to the bargaining table.[11] The divide is particularly wide between developing and industrial nations. Industrial nations have the ability to address long-term problems like environmental protection.[12] "For the developing world, the pressing environmental problem is not over-development, but rather the absence of economic development. The horrors of poverty, war, disease, malnutrition, and starvation are immediate evils in themselves, and they contribute directly to environmental devastation in the developing world."[13] This heterogeneity is unavoidable and complicates the development of international law. States acting to further their conflicting self-interests frustrates the goal of a well-defined, well-functioning international law.

These challenges are so great that some, including Professor Posner, argue that the resolution of global problems is unlikely.

> It seems plausible that global collective action problems cannot be solved—or not very well. If it is true that national governments are needed to solve national collective action problems, then it seems that it would follow that a world government would be needed to solve global collective action problems. If a world government is not possible, then solving global collective action problems is also not possible.[14]

B. Global Legalism

Global legalism has been offered as a solution to these collective problems. "[L]egalism defined broadly is the view that law and legal institutions can keep order and solve policy disputes. It manifests itself in powerful courts, a dominant class of lawyers, and reliance on legalistic procedures in policymaking bodies."[15] Strong legal institutions and ideology support legalistic societies. The codification of rules, thorough procedural safeguards during the trial process, the adversarial system, and the central role of detached judges increase the faith citizens have in the law.[16] Global legalism applies these factors on an international level. Global legalism "is most easily understood as an alternative to the other approaches to solving global collective action problems. According to global legalism, international law will solve these problems. Global legalism is the world government approach except without the government."[17] In spite of the severe limitations of world government, global legalists believe that international law can

10. JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 13 (2005).

11. POSNER, *supra* note 1, at 7.

12. John S. Applegate & Alfred C. Aman, Jr., *Introduction: Syncopated Sustainable Development*, 9 IND. J. GLOBAL LEGAL STUD. 1, 1 (2001).

13. *Id.*

14. POSNER, *supra* note 1, at 7-8.

15. *Id.* at 21.

16. *Id.* at 19-21.

17. *Id.* at 24.

solve global problems.[18] However, "global legalism is not a doctrine or theory. It is akin to an attitude or posture—a set of beliefs about how the world works, one that, in various forms, dominates the thinking of academic international lawyers, as well as practicing government officials."[19]

Global legalists believe "that law without government can nonetheless solve global problems."[20] International disputes should be resolved through international law. For example, "[w]ars should not be fought without the approval of the United Nations; disputes should be submitted to international courts."[21] States must bolster international institutions to increase the efficacy of international law; increasing the importance of treaties and establishing effective international courts are fundamental to an effective international law. "[T]hough global legalists acknowledge that a full-fledged world government is not possible in the near term" international institutions "should be promoted to the extent possible."[22] Global legalists also "believe that domestic political institutions should be bound by international legal obligations."[23] The combination of effective global government institutions and compulsory laws would strengthen international law's ability to solve global problems.

Several factors explain the rise and prevalence of global legalism. "[P]roblems of global collective action have multiplied and increased in seriousness, and alternative mechanisms for solving them, such as world government, are no more plausible today than they ever have been in the past."[24] Unlike a global government, international law as a solution to world problems has not concretely failed.[25] Meanwhile, the success of legalism on a national level in countries like the United States has spread to other countries.[26] Encouraged by the success and spread of domestic legalism, faith in international law, at first glance, appears appealing. In the face of global collective action problems beyond state's control it is reasonable to attempt to emulate the most successful nations' approach to resolving their own great problems. Finally, legalism thrives in heterogeneous cultures. "When people cannot resolve their differences by appealing to common religious beliefs, or common ethnic norms, or common historic memories, or tribal elders, they can at least appeal to the law."[27] With an immensely diverse global population, values and beliefs do not translate across all borders, and detached and neutral judges can resolve conflicts without imposing ethnic or historic biases.

18. *Id.* at xiii.
19. *Id.* at 16.
20. POSNER, *supra* note 1, at 24.
21. *Id.* at 25.
22. *Id.*
23. *Id.*
24. *Id.* at 38.
25. *Id.* at 26.
26. POSNER, *supra* note 1, at 23.
27. *Id.* at 18-19.

III. THE FLAWS OF GLOBAL LEGALISM

A. International Law Lacks Institutional Support

Legalists believe in "law without government."[28] They reject the notion that international government is necessary to ensure compliance with international law. Nevertheless, international law "does not have the capacity to command respect as domestic law (in some countries) does, because it is not backed by a world government that has the support of a global community."[29] Two institutions are noticeably absent from the international stage: an effective legislature, and effective enforcement institutions.

In most states, law is made through legislative process. Formal legislative structures provide legitimacy and ensure that the law reflects the will of the people. Internationally, this is not the case.[30] "The United Nations General Assembly lacks the power to enact legally binding rules. The Security Council does have the power to issue legally binging orders, but its power is limited. It does not have the power to issue legislation."[31] As a result, international law is made through treaties. There are several problems with this approach. First, "[a] state can be bound by a treaty only if it consents to it; thus, a treaty that will solve a global collective action problem requires the consent of all states, or all states that contribute to that problem."[32] Requiring this unanimity imposes a heavier burden on international lawmakers and the resulting treaties "usually end up imposing weak obligations."[33] Finally, treaties are difficult to amend. States are wary about entering into long-term irrevocable agreements, resulting in fewer and weaker treaties.[34]

Additionally, international law lacks capable enforcement mechanisms. Domestically, states have organized institutions that enforce their law. Police make arrests, subject to the limitations of the law.[35] Courts often require institutional support to impose their final judgments. The functions of enforcement agencies are vital not just for the administration of any legal system, but also the economic health of the nation. "Economies can function only if contract and property rights are respected."[36] Moreover, enforcement agencies maintaining order and prevent violations of citizens' rights. In the absence of strong enforcement agencies, "it would be too easy for the state to abuse its citizens, and for some citizens to use the state to abuse other citizens."[37] The UN Security

28. *Id.* at xiii.
29. *Id.* at 39.
30. *Id.* at 29.
31. *Id.*
32. POSNER, *supra* note 1, at 29.
33. *Id.* at 30.
34. *Id.*
35. *Id.* at 31.
36. *Id.*
37. *Id.* at 32.

Council is the sole global enforcement agency, and its power is severely limited.[38] According to Posner,

> Even when the Security Council can agree to approve some action, it cannot call upon an army or police force to carry out its will. It can only authorize or order states to call upon *their* armies to carry out the Security Council's will, but the states have ample reason not to participate, and few do.[39]

The lack of an international enforcement agency threatens the global legalist contention that states will comply with international law when it contradicts their self-interest. In the absence of a compelling inducement to follow international law, such as the threat of a powerful enforcement agency, total compliance with international law is unexpected.

B. Considerations of Legitimacy

International law must be perceived as legitimate in order to effectively govern the nations that consent to its authority. Professor Posner notes, "[i]nternational law has force because (or to the extent that) it is legitimate."[40] National governments acting contrary to the interests of their citizens are perceived as illegitimate and individuals challenge the authority of those governments.[41] On the global level, national governments, rather than individuals become the constituents. "[V]irtually everyone around the world owes his or her primary loyalty to a state, which delivers goods such as security that promote local values and interests."[42] As a result, international government lacks a direct connection to the individuals governed. Professor Posner explains the implications:

> The problem with global legalism is that because international law reflects the interests of governments, it will not always be consistent with the moral sense or legitimate interests of populations, so it will lack the authority that law needs to command general assent among individuals. This is not to say that populations will reject all international law; many people will benefit from specific treaties and support them accordingly. Rather, it is to say that international law will always be more appealing in theory than in practice.[43]

In contrast to domestic law, "[i]nternational law is a series of compromises between somewhat better governments, mediocre governments, and bad governments. It is not a reflection of the will or interests of a political community in the way that law created by democratic governments may be."[44] However, ignoring the will of the people ultimately governed by the law reduces the perception of legitimacy. "[N]o system of law will be perceived as legitimate

38. POSNER, *supra* note 1, at 32.
39. *Id.*
40. *Id.* at 35.
41. *Id.*
42. *Id.* at xii.
43. *Id.* at 37.
44. POSNER, *supra* note 1, at 51.

unless those governed by that law believe that the law does good—serves their interests or respects and enforces their values."[45] With both state and individual constituents, international law must maintain accountability to both parties in order to preserve its legitimacy and effectively govern the globe.

C. Problems of Sovereign Equality

International law also faces the challenge of sovereign equality. Because international law requires state consent, effective international law requires all states that participate in the creation of a problem to consent to law governing their behavior. "What this means is that if nearly everyone in the world agrees that some global legal instrument would be beneficial (a climate treaty, the UN charter), it can be blocked by a tiny country like Iceland (population 300,000) or a dictatorship like North Korea."[46] This mandate of unanimity is a far higher threshold for a law to pass than the majority rule required by most legislatures. This impedes the establishment of strong international laws because "international law cannot be created unless all agree."[47] A proposed international law will either be defeated by the absolute veto power possessed by every nation, or will survive in a diluted form. In either case, sovereign equality sharply contradicts global legalists' reliance on strong international law.

D. Global Fragmentation

Global legalists point to the increase in treaties as an indication of the increased importance and efficacy of international law. They argue that "the lawmaking and institution-building activities of the last sixty years show that ordinary people and elites have thrown their lot with international law."[48] Professor Posner attributes this increase to the fragmentation of states, rather than the value of international law, noting: "the greater-than-threefold increase in states since World War II surely accounts for much of the international legal activity—the treaty making, the institution building—that we continue to observe today."[49] The larger number of states increases the necessity and possibility of interstate agreements to govern a nation's interactions with another. "When only 50 states existed, the number of possible state pairs was 1,225. With 190 states, the number of state pairs is 17,995."[50] The fragmentation of single states like Yugoslavia leads to the creation of other countries. These countries in turn establish treaties with one another. However, the creation of these diplomatic ties do not signify "that international law is stronger or more reliable, or entitled to more respect, than before."[51]

Moreover, the heavy increase of treaties reflects the diminishing ability of states to provide public goods for their citizens. "International law becomes more

45. *Id.* at 35.
46. *Id.*
47. *Id.*
48. *Id.* at 98.
49. *Id.* at 95.
50. POSNER, *supra* note 1, at 95.
51. *Id.*

necessary and important as states crumble into smaller and smaller bits, but only because states can accomplish less for their populations when they are small than when they are large."[52] While "[d]emand [for international law] will increase because as states shrink, they can no longer supply public goods above a certain scale without cooperating with other states . . . . supply will fail because international law depends on states for those same structures of institutional support."[53]

The tremendous fragmentation of the globe has undeniably increased the number of international laws and treaties that govern states. However, global legalists' assertion that this trend strengthens the efficacy of international law is dangerously misguided. "[W]e do not know how much states comply with international law, and until we do, it is hazardous to draw conclusions about the prospects of global legalism in a world of fragmenting states."[54] International laws may be more common, but it does not necessarily follow that it is more effective or that states are more willing to comply with it.

E. Disaggregation Theory

Global legalists argue that legalism will succeed on an international level because of the success of legalism domestically. By disaggregating the internal factors within a state and determining what aspects enhance legalism, it is possible to understand what is necessary for legalism to function on a global level. Posner argues "the two kinds of legalism are fundamentally different: domestic legalism flourishes because governments support it; global legalism has no government to turn to."[55] Former Yale Law School Dean Harold Koh[56], a global legalist, asserts that "states comply with international law because internal actors—including bureaucrats, citizens, politicians, and businesses—and external actors—including other states, NGOs (nongovernmental organizations), and international legal institutions—pressure them to comply with international law."[57] Professor Posner rejects this argument, responding that "Koh never explains systematically why these various entities expend resources to force states to comply with international law. Sometimes, he seems to think that interest alone provides them with an incentive; often, it is ideology or 'habit' or sympathy."[58] By examining the various state and nonstate actors, including courts, government officials, interest groups, NGOs, and citizens, Professor Posner concludes that the disaggregation theory fails to account for the purported efficacy of international law.[59]

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52. *Id.* at 98.

53. *Id.* at 99.

54. *Id.* at 97.

55. *Id.* at xiv.

56. Professor Koh served as Yale Law School Dean from 2004 until 2009. Yale Law School, Faculty, Harold Hongju Koh, http://www.law.yale.edu/faculty/HKoh.htm (last visited Apr. 19, 2009). On June 25, 2009, Professor Koh was confirmed by the U.S. Senate as Legal Adviser to the United States Department of State. *Id.*

57. POSNER, *supra* note 1, at 41.

58. *Id.*

59. *Id.* at 45-48.

The first problem with the disaggregation theory is that "[t]here are many intrastate actors, and it is not clear which ones will matter for the decision of whether to comply with international law."[60] Second, many of the actors that global legalists argue compel states to comply with international law have little or no effect on states. For example, domestic courts in the United States "cannot force the American government to comply with a treaty for the simple reason that the government has constitutional authority to withdraw from or violate treaties either through the unilateral action of the president or the joint action of president and Congress."[61] Global legalists also argue interest groups will compel states to comply with international law. However, because there are often interests groups on both sides of a single issue, "in theory interest groups can both enhance the probability of compliance with a treaty and reduce the probability of compliance."[62] If these competing interest groups cancel each other out, their net effect on compliance with international law will be minimal.

Finally, global legalists falsely attribute apparent "compliance" with international law to situations where states are merely acting in their own self-interest. Claiming this success for global legalism, in situations where there is no causal connection to compliance, amounts to an artificial victory. Simplifying Professor Posner's hypothetical, imagine two bordering nations: Big State and Small State.[63] Big State has never invaded Small State. The global legalist would point to this example as a sign of strong international law; Big State complied because it was illegal to invade Small State. However, self-interest may also have played a role. Among other factors, potential international backlash, the cost of invasion, and economic ties would also account for Big State's failure to invade Small State. Simply not violating international law, especially through an act of omission, fails to prove that international law is effective or that states routinely comply with it.

IV. INTERNATIONAL COURTS

Despite the apparent flaws of global legalism, a complex network of international courts exists. "International adjudication, unlike international legislation and enforcement, is an accepted part of international relations."[64] The growth of these courts "is the most distinctive and lasting contribution of global legalism, as well as a phenomenon to which global legalists point with pride."[65] Though the international community lacks established legislative and enforcement institutions, dozens of adjudicative agencies exist on the international level as well as nearly thirty proposed or existing judicial bodies.[66] Additionally, legalism places great importance on the judiciary. Therefore, any critique of global legalism must account for, or discredit, the well-established system of international

60. *Id.* at 41.
61. *Id.* at 45.
62. *Id.* at 54.
63. POSNER, *supra* note 1, at 43.
64. *Id.* at 33.
65. *Id.* at 130.
66. *Id.* at 167.

adjudication. Professor Posner does both, arguing that the success of domestic judiciaries cannot be replicated on an international plane; "courts, like plants, flourish only in the right environment."[67]

A. Success, Failure, and Fragmentation

The large number of international courts is a poor gauge of their efficacy. "[A]n increase in supranational institutions should not be mistaken for a world law. Rather, they are simply creating courts with universal jurisdiction to hear certain limited types of cases."[68] Professor Posner examines several of these courts and concludes that issues of compliance, infrequent use, and enforcement render international courts ineffective. The Inter-American Court on Human Rights (IACHR), adjudication through GATT or the WTO, and the European Court on Human Rights (ECHR) all face monumental problems of compliance.[69] Each of these courts has non-compulsory methods of ensuring compliance, resulting from a lack of enforcement measures.[70]

The only adjudicatory body that can be deemed successful is the European Court of Justice (ECJ). EU member states appear to comply with ECJ decisions frequently.[71] Admittedly, "it is reasonable to conclude that the ECJ has been an effective tribunal—in some periods, a vital institution that spurred integration when the efforts of national governments flagged."[72] However, the success of the ECJ is the result of Europe's unique geopolitical climate. The European Union is an example of "'supranational' cooperation in which individuals owe loyalty to multiple levels of government authority."[73] Unlike other international courts,

> [t]he ECJ is just one of a number of European institutions—including the European Parliament, the Council of the European Union, and the Commission—and it works with these institutions to ensure that European law develops properly and flexibly in response to changing circumstances and the needs and interests of the populations of the member states.[74]

However, the ECJ has the vast institutional support of the EU. Additionally, other international adjudicatory bodies lack the loyalty of member states the EU enjoys. As a result, compliance and use of those international courts is understandably lower.

Although an increasing number of international courts exist, Professor Posner argues "the proliferation of international courts is a sign of the weakness of the

67. *Id.*

68. Russell Menyhart, *Changing Identities and Changing Law: Possibilities for a Global Legal Culture*, 10 IND. J. GLOBAL LEGAL STUD. 157, 184 (2003).

69. POSNER, *supra* note 1, at 151-159.

70. *Id.* at 157-158.

71. *Id.* at 160.

72. *Id.* at 161.

73. *Id.* at 7.

74. *Id.* at 162-163.

international system, not its strength."[75] While international courts appear at first to be expanding, they are, in fact, dividing and becoming increasingly fragmented. "[T]he fragmentary tribunals are the result of a collision between the ambitions of global legalism and the realities of politics."[76] As states lose control over existing courts, they quickly establish more to retain authority.[77] There are numerous consequences to this fragmentation. First, international courts are stripped of their power, and the number and types of cases before a specific court are limited. In turn, the power of international judges is diminished. Professor Posner notes, "global legalism has lead to a system of judges without (or with greatly limited) power."[78] Considering the importance legalism accords to the role of judges, fragmentation defeats any legalist benefit a large international court system provides. Finally, this division of international courts poses institutional problems including "conflicting law, jurisprudential overlap, and forum shopping."[79] Global legalists hail the growing number international courts as the surest sign of their accuracy. Nevertheless, it reflects an actual decline in the power of international law.

B. Lack of Compulsory Jurisdiction and Adequate Enforcement Procedures

Perhaps the largest barrier to effective global adjudication is the lack of compulsory jurisdiction. "International adjudication, however impressive in outward appearance, lacks an essential feature of adjudication that occurs *within* states: the absence of mandatory jurisdiction."[80] The root of this problem is simple—jurisdiction requires state consent. Therefore, state-interest influences the jurisdiction of an international court. However, "disputing states, whose interest and passions *are* engaged, need not consent to a panel's jurisdiction."[81] The solution to the problem, in Professor Posner's view, is to grant compulsory jurisdiction to international courts.[82] Unless and until international courts have the ability to bring unwilling states before them, international adjudication will remain an ineffective and diluted defense for international law.

Equally damaging is the lack of sufficient enforcement procedures. Even if an international court can clear the difficult hurdle of establishing mandatory jurisdiction, any judgment they order will be opposed during enforcement. Domestic courts garner support from powerful executive and enforcement bodies. On a global level "there is no such international enforcement agency on which courts can depend, with the limited exception of the Security Council, which has never shown any inclination to enforce a judgment of the International Court of

75. POSNER, *supra* note 1, at 173-174.
76. *Id.* at 151.
77. *Id.* at 174.
78. *Id.*
79. *Id.* at 167.
80. *Id.* at 33.
81. POSNER, *supra* note 1, at 133.
82. *Id.*

Justice."[83] The consequence is that only wealthy and powerful countries can receive the full measure of the decision of an international court. Posner stipulates,

> While formally a weak country can bring a case against a powerful country, the remedy available is limited to authorization to use self-help. But small countries cannot harm big countries by closing their markets to them; they can only hurt themselves by doing this. The remedy thus has value only for powerful countries, both with respect to their relations with each other and with small countries.[84]

Acting without the benefit of legitimate and powerful institutional support, international courts simply cannot achieve one of their major goals: compliance with their decisions.

C. Lack of Institutional Safeguards

Domestic courts, particularly in the United States, benefit from institutional safeguards that protect the legitimacy of the law and the courts. According to Posner,

> [N]umerous institutional safety valves ensure that bad judges have limited influence on people's behavior. When judges misinterpret laws, legislatures can amend the laws so as to eliminate the misleading ambiguities; executive officials can also intervene in court to argue against bad interpretations and soften their impact by modifying enforcement priorities. Multiple layers of review by appellate courts, the possibility of collateral challenges, redundant civil/criminal claims, presidential and gubernatorial pardons, paneling, and so forth, ensure that incompetent or biased judges have limited impact. The ultimate check on judicial abuse is the political system. The government can investigate and impeach judges; it can strip the judiciary of jurisdiction; it can defund the judiciary and harass it in other ways. In most American states, state judges are disciplined by electoral pressures or the threat of nonrenewal by the governor or legislature. In the United States, the balance of power between the judiciary and the other branches has worked over two hundred years.[85]

Such safeguards are noticeably absent from international courts. "No analogous world legislature can modify the law in question; instead, states must convene an international convention which must operate by consensus."[86] As a result, international judges have dramatically reduced power to make important and necessary policy decisions. While "domestic courts can make policy and assert their power . . . because of government safety valves," international courts lack the

83. *Id.* at 34.
84. *Id.* at 156.
85. *Id.* at 165-166.
86. *Id.* at 166.

institutional support necessary. Moreover, this tension leaves the international community with "no hierarchical structure to ensure uniformity in the law."[87]

V. CONCLUSION

At first glance, global legalism is an appealing solution to complex global problems. However, it does not withstand the challenges of global reality. Legalist ideals are not easily translated to international law. The tremendous heterogeneity of the global population, and lack of international institutions to define and enforce international law prevent legalism from working on a global scale.

Absent strong enforcement institutions that have the capability to ensure compliance, countries will only comply with international law when it aligns with their self-interest. In *The Perils of Global Legalism*, Professor Posner forcefully rejects the notion that compliance can simply be presumed. He notes from the beginning, "[i]f this book has a single theme, it is that politics, idealism, and careless thinking conspire to produce a picture of international law that bears little resemblance to reality."[88]

The collective action problems our world faces are very real. They have the potential to impact the lives of citizens in all corners of the globe. Though optimistic, global legalism is poorly matched for strong rebuttal of Professor Posner. He concludes *The Perils of Global Legalism* arguing that states will continue to act in their self-interest. "Only those who have lost sight of the geopolitical interests of nations and have mistaken the legalistic rhetoric of Europe and the United States for reality can be surprised by those events. Those people will continue to be unprepared to address such events as they occur."[89] Global legalism's hopeful and optimistic approach to solving global problems is laudable. However, failing to acknowledge the practical impediments to global legalism ignores the pernicious consequences that surely follow.

87. POSNER, *supra* note 1, at 150.
88. *Id.* at xv-xvi.
89. *Id.* at 228.