



## IMPUNITY WATCH

### ANNUAL REVIEW

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## Syracuse University College of Law

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# IMPUNITY WATCH



*Impunity Watch* is owned, published, and printed annually by Syracuse University, Syracuse, New York 13244-1030, U.S.A.

The publication is designed to chronicle some of the most significant instances of impunity during the previous year, as reported on our website. *Impunity Watch* provides objective reporting on impunity issues throughout the world, allowing oppressed individuals to gain a public voice. The goal of *Impunity Watch*'s web-based presence is to immediately alert the world to impunity issues. *Impunity Watch* also publishes articles relating to impunity issues from academic, professional, and student authors. *Impunity Watch* aims to examine human rights and impunity issues from both a grassroots and academic perspective.

*Impunity Watch* actively seeks and accepts article submissions from scholars and practitioners in the fields of international law, human rights, political science, history, and other humanitarian law related fields. The publication hosts an annual symposium in the spring of each year and maintains a comprehensive website of all the articles and reports published. From *Impunity Watch*'s founding, it has grown through the dedication of many students and the guidance of Professor David Crane at Syracuse University College of Law. *Impunity Watch* now has a dedicated readership around the world, including many government officials and NGOs. Please visit our website to read past and current reports, and consider subscribing to our daily news feed.

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DAVID M. CRANE



Professor David Crane was appointed a professor of practice at Syracuse University College of Law in the summer of 2006. From 2002-2005, he was the founding Chief Prosecutor of the Special Court for Sierra Leone, an international war crimes tribunal, appointed to that position by the Secretary General of the United Nations, Kofi Annan.

As Chief Prosecutor, Professor Crane served with the rank of Undersecretary General, with a mandate to prosecute those who bore the greatest responsibility for war crimes, crimes against humanity, and other serious violations of international human rights committed during the civil war in Sierra Leone during the 1990's. Among those he indicted for those horrific crimes was the President of Liberia, Charles Taylor, the first sitting African head of state in history to be held accountable. Professor Crane was the first American since Justice Robert Jackson and Telford Taylor at the 1945 Nuremberg Trials to be the Chief Prosecutor of an international war crime tribunal. Prior to his departure from West Africa in 2005, Professor Crane was made an honorary Paramount Chief by the Civil Society Organizations of Sierra Leone.

Professor Crane teaches international civil and criminal law, atrocity law, law of armed conflict, military law, and national security law courses at the College of Law. Additionally, he is a member of the faculty of the Institute for National Security and Counterterrorism, a joint venture with the Maxwell School of Citizenship and Public Affairs at Syracuse University. Professor Crane is on the leadership council of the American Bar Association's International Law Section and serves as a co-chair on the section's International Criminal Court Task Force. In 2006, he worked with a group of dedicated students to found *Impunity Watch*, a law review and public service blog, with the official launch of the website in October 2007.

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BACK TO BASICS: SENTENCING OBJECTIVES AT THE INTERNATIONAL  
CRIMINAL COURT

Drew J. Beesley\*

*“Men are unable to forgive what they cannot punish and are unable to  
punish what turns out to be unforgivable.”<sup>1</sup>*

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\*J.D., University of Toronto, 2015. The author’s opinions are his own and do not reflect those of his employer.

<sup>1</sup> HANNAH ARENDT, THE HUMAN CONDITION 241 (1958).

## INTRODUCTION

As the International Criminal Court (“ICC”) embarks on the promise of defining and enforcing international criminal law (“ICL”), now is a salient time for it to fully explain its sentencing philosophy and objectives. Unfortunately, despite delivering its first two sentences, the Court has yet to close the door on errant sentencing philosophies of the past that led to disproportionately light punishments for the worst crimes known to humankind. In fact, the 2014 *Katanga* sentencing decision threatens to drag the ICC down the same path of the confusing and seemingly arbitrary sentencing practice that dogged its predecessors.<sup>2</sup>

If the ICC is to retain its legitimacy and further the international justice project, its ability to articulate the aims of sentencing clearly and consistently is paramount. The lack of a clear thread tying past ICL sentencing jurisprudence together made the practice seem arbitrary. ICL sentencing has become amorphous, in large part, due to the proliferation of sentencing objectives that emerged after the WWII tribunals. These diverse objectives pull courts in opposing directions. The sentence that tries to give credence to each objective ends up doing a poor job at fulfilling any.

The primary focus of this paper will be to explore various sentencing objectives and how they may or may not scale up to *sui generis* atrocity crimes.<sup>3</sup> Current debates around the deterrent effect are canvassed in depth. Domestic criminal sentencing objectives that focus on rehabilitation and reconciliation are ill suited for the demands thrust upon them in the ICL arena. Several other utilitarian objectives of punishment are inapplicable in ICL and should be discarded or given very little weight.

I conclude that the ICC should adhere to an emphasis on the two sentencing objectives that it is best equipped to achieve: denouncement and deterrence. This approach will ensure coherence and consistency in sentencing. Making the sentencing analysis simpler reduces arbitrariness. This facilitates respect for the fair trial rights of the accused by increasing clarity and predictability while better serving the chosen sentencing goals. Sentencing has an important, yet modest role to play in international peace. The approach should also realign ICL sentences to be more proportionate to the crimes they seek to punish and avoid the past practice of unduly lenient prison terms.

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<sup>2</sup> *Prosecutor v. Katanga*, ICC-01/04-01/07-3484, Judgment on Sentencing (May 23, 2014).

<sup>3</sup> Atrocity crimes are defined as genocide, crimes against humanity and war crimes.

## I. PAST ICL SENTENCING PRACTICES

Not one of the eight international criminal tribunals explicitly codified the objectives of sentencing.<sup>4</sup> This is likely because not only are the aims of sentencing a matter of debate at the domestic level,<sup>5</sup> but different legal regimes place vastly different emphases on punishment rationales.<sup>6</sup>

Given the fervent rate that executions and life sentences were doled out at the Nuremberg and Tokyo Tribunals, it is clear that ICL gave little consideration to rehabilitation at that time.<sup>7</sup> Instead, punishment almost exclusively channeled retribution and sought to denounce.<sup>8</sup> Deterrence was not fully applicable, in a technical sense, because the Tribunals actually adjudicated crimes neither codified nor definitively established in customary international law at the time of commission.<sup>9</sup>

After the WWII Tribunals, ICL was reborn into a culture of idealism. In the 1990s, the *ad hoc* Tribunals formed: the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda. A canvas of their jurisprudence reveals that ICL sentencing was called on to advance a myriad of goals: “retribution, deterrence, reconciliation, rehabilitation, incapacitation, restoration, historical record building ... expressive functions, crystalizing international norm[s], general affirmative prevention, establishing peace, preventing war,

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<sup>4</sup> KARIM A. KHAN, RODNEY DIXON & ADRIAN FULFORD, ARCHBOLD: INTERNATIONAL CRIMINAL COURTS PRACTICE, PROCEDURE AND EVIDENCE, § 18–40 (4th ed. 2014) [hereinafter Archbold] (this includes the International Criminal Court (“ICC”), International Criminal Tribunal for the Former Yugoslavia (“ICTY”), International Criminal Tribunal for Rwanda (“ICTR”), Special Court for Sierra Leone (“SCCL”), Special Tribunal for Lebanon (“STL”), Extraordinary Chambers in the Courts of Cambodia (“ECCC”), Nuremburg and Tokyo Tribunals).

<sup>5</sup> See e.g. CLAYTON C. RUBY, GERALD J. CHAN & NADER R. HASAN, SENTENCING § 1 (8th ed. 2012) (discussing the debate around Canadian sentencing theories).

<sup>6</sup> MARGARET M. DEGUZMAN, PROPORTIONATE SENTENCING AT THE INTERNATIONAL CRIMINAL COURT, IN THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 932 (Carsten Stahn, ed., 2015).

<sup>7</sup> Mark B. Harmon & Fergal Gaynor, *Ordinary Sentences for Extraordinary Crimes*, 5 J. INT’L CRIMINAL JUST. 683, notes 2–3 (2007) (92% given life or death at Tokyo, 79% at Nuremberg); see TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR, 559–611 (1992).

<sup>8</sup> Daniel B. Pickard, *Proposed Sentencing Guidelines for the International Criminal Court*, 20 LOYOLA LOS ANGELES INT’L & COMP. L. REV. 123, 130 (1997); WILLIAM A. SHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 331 (4th ed. 2011).

<sup>9</sup> Michael L. Smidt, *The International Criminal Court: An Effective Means of Deterrence?*, 167 MIL. L. REV. 156, 182 (2001).



vindicating international law prohibitions, setting standards for fair trials, and ending impunity.”<sup>10</sup>

Legal scholars criticized the “under-theorization and lack of clarity among international judges regarding the purpose of international criminal prosecution”.<sup>11</sup> They felt that this was becoming damaging to ICL’s integrity and credibility.<sup>12</sup> An analysis of two decades of *ad hoc* jurisprudence identifies no consistently predominant sentencing philosophy.<sup>13</sup> However, retribution and deterrence emerge as the two principal aims with rehabilitation and reconciliation occasionally playing a role.<sup>14</sup>

It appeared that international judges were choosing their result and then applying whatever sentencing theory buttressed it. This conclusion comes from the observation that from case to case, sentencing ideologies were abandoned, marginalized or inflated depending on whether they went against or advanced the target sentence.<sup>15</sup> The plethora of sentencing aims tended to distort the sentencing analysis and led to disproportionately light punishment for high-ranking perpetrators of mass atrocities. While many of these utilitarian goals have laudable aspirations, so far in ICL they have perversely influenced sentencing to the point that the punishments do not reflect the culpability and gravity of the crimes.<sup>16</sup>

## II. SENTENCING PURPOSES AT THE ICC THE ROME STATUTE

The *Rome Statute* does not explicitly describe any purposes or objectives of sentencing.<sup>17</sup> The ICC is tasked with representing all peoples in the current 124 states party to the *Rome Statute*—representing nearly every major legal system in the world. The lack of sentencing guidance was likely a consequence of a failure to square disagreements between delegates representing these various legal traditions. Within the West alone, there are

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<sup>10</sup> Shahram Dana, *The Limits of Judicial Idealism: Should the International Criminal Court Engage with Consequentialist Aspirations?*, 3:1 PEN. ST. J.L. & INT’L AFF. 30, 37 (2014).

<sup>11</sup> Dana, *supra* note 10, at 63; PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY 167 (Andrew J. Ashworth et al. eds., 3d ed. 2009).

<sup>12</sup> *Id.* at 63; Ashworth, *supra* note 11.

<sup>13</sup> Dana, *supra* note 10, at 111.

<sup>14</sup> DEGUZMAN, *supra* note 6, at 946.

<sup>15</sup> Dana, *supra* note 10, at 111.

<sup>16</sup> *Id.*; see also COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES, ARTICLE BY ARTICLE 1420 (Otto Triffterer ed., 2d ed. 2008).

<sup>17</sup> Compare Rome Statute of the International Criminal Court, Jul. 17, 1998, 2187 U.N.T.S. 90 [hereinafter *Rome Statute*], with Criminal Code § 718, R.S.C. 1985, c. C-46 (Can.) (explicitly stating the purpose and objectives of Canadian sentencing).

sharp disagreements on sentencing aims between common law and civil law countries and likewise between different legal cultures.<sup>18</sup> A compromise solution overcame the impasse: the *Rome Statute* is largely silent on the matter, giving broad discretion to judges.<sup>19</sup> Each of the ICC's three-judge panels draws from states party to the *Rome Statute*.<sup>20</sup> Therefore, their reasoning may very well be colored by domestic sentencing philosophies.<sup>21</sup>

#### ICC INTERPRETATION

In the ICC's first sentencing decision, *Lubanga*, the Trial Chamber dedicated a single paragraph to the purposes of sentencing. The Chamber turned to the *Rome Statute*'s preamble to find sentencing purposes.<sup>22</sup> It states that the ICC is founded on the idea that "the most serious crimes of concern to the international community as a whole must not go unpunished".<sup>23</sup> It also affirms that the States party to the ICC are "determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes".<sup>24</sup> Although the Chamber did no more than quote the text of the preamble, discernable from these two passages, are the sentencing goals of denouncement and deterrence.

In the ICC's second sentencing decision, *Katanga*, the Chamber was more explicit. However, its sentencing philosophy also grew muddled by introducing additional objectives without being clear about where they fall within the hierarchy of sentencing purposes. Quoting the same preamble passages, the Chamber held that in sentencing, its task was to "punish crimes" and "ensure that the sentence truly serves as a deterrent."<sup>25</sup> The Chamber began to lose analytical clarity when it affirmed that its task was "also [to] respond to the legitimate need for truth and justice expressed by the victims and their family members. Thus, the Chamber is of the view that the sentence has two major functions: [punishment and deterrence]."<sup>26</sup> The Chamber used the word "punishment", describing it as "express[ing]

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<sup>18</sup> Pickard, *supra* note 8, at 127.

<sup>19</sup> *Id.* at 128.

<sup>20</sup> *Rome Statute*, *supra* note 17, art. 39(i)–(ii) (representing the principal legal systems of the world and geographic diversity are primary considerations in judicial appointments).

<sup>21</sup> *Id.* at art. 21(1)(c) (in certain circumstances, the Court may apply national principles of law if they are not in conflict with the *Rome Statute* or international law).

<sup>22</sup> *Prosecutor v. Lubanga*, ICC-01/04-01/06, Decision on Sentence Pursuant to Article 76 of the Statute, ¶ 16 (Jul. 10, 2012).

<sup>23</sup> *Rome Statute*, *supra* note 17, preamble.

<sup>24</sup> *Id.*

<sup>25</sup> *Prosecutor v. Katanga*, *supra* note 2, at 37.

<sup>26</sup> *Id.* [emphasis added]; *Accord* ARCHBOLD, *supra* note 4, §18-41; GIDEON BOAS ET AL, INTERNATIONAL CRIMINAL PROCEDURE 393 (2011).

society's disapproval".<sup>27</sup> Common law lawyers prefer the term denouncement, used throughout this article.

How truth and justice fit into the purposes of sentencing is unclear. The word "also" indicates that they are additional or subsidiary goals of sentencing. In the next sentence, "thus" indicates that the two "major functions" of sentencing—punishment and deterrence—are somehow logical consequences of truth and justice. A third reading suggests that truth and justice are derivatives of the trial and judgment phases. Hence, truth and justice provide the raw ingredients necessary—i.e. the facts—for fashioning an appropriate sentence. This is the most likely reading. The confusion arises because "truth" and "justice" are loosely inserted into the middle of a discussion on sentencing philosophy without much precision or explanation. What is clear, however, is that the concepts of truth and justice lie outside of the two "major functions" of sentencing as indicated by the word "also."

The *Katanga* Trial Chamber then discussed what its understandings of punishment and deterrence are with more precision. Punishment (what others might call denouncement) is the expression of societal condemnation and recognition of the harm suffered by victims.<sup>28</sup> Thus, the concept of gravity couples with the purpose of denouncement. In discussing deterrence, the Chamber noted that the punitive nature of the sentence serves to quench the thirst for vengeance.<sup>29</sup> The Chamber tempered the deterrent objective by emphasising that the inevitability of punishment is important for this objective, not the harshness.<sup>30</sup>

After noting the principle of proportionality, the Chamber adds on the sentencing goals of promoting reconciliation and the offender's reintegration into society (rehabilitation).<sup>31</sup> However, the Chamber minimized the applicability of rehabilitation in ICL because it questioned whether a sentence alone could ensure a successful return to society.<sup>32</sup> The Chamber did end up considering the rehabilitation objective: it noted the fact that Katanga had a young family and many dependents. The Chamber noted that this would help him reintegrate into society.<sup>33</sup> However, it gave very little weight to this factor, given the gravity of Katanga's crimes.<sup>34</sup>

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<sup>27</sup> *Prosecutor v. Katanga*, *supra* note 2, at 37.

<sup>28</sup> *Prosecutor v. Katanga*, *supra* note 2, ¶ 38.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* (full discussion on this will be found at pages 15–17, below).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Prosecutor v. Katanga*, *supra* note 2, ¶ 88.

<sup>34</sup> *Id.*

In summary, the ICC jurisprudence so far has espoused the major sentencing goals of denouncement and deterrence. Other subsidiary goals include reconciliation and to a lesser extent, rehabilitation. It is unclear what role truth and justice play in sentencing goals.

### III. THEORIES OF PUNISHMENT

Punishment theories fall into two broad categories. The first is retributive, which seeks to represent communal disapproval for the criminal behavior. The second is utilitarian, which seeks to maximize utility to society through the imposition of sentences. Retributionists tend to favour *ex ante* determinations of gravity. They prefer strict sentencing guidelines, statutory minimum and maximum sentences. The emphasis is that punishment ought to mirror the crime rather than the individual accused.<sup>35</sup> For them, consistency in sentencing is paramount. Utilitarians seek greater flexibility, tailoring sentences to pursue the greater good of society in various ways.<sup>36</sup>

Retribution expresses communal contempt for the criminal's breach of society's norms.<sup>37</sup> It is said that great crimes cry out for great punishment; if this demand is not satisfied, victims may resort to vigilantism.<sup>38</sup> However, retribution is not to be confused with vengeance.<sup>39</sup> As the ICTY Appeal Chamber held in *Aleksovski*, retribution "is not to be understood as fulfilling a desire for revenge but as duly expressing the outrage of the international community at these crimes ... show[ing] that the international community [is] not ready to tolerate serious violations of international humanitarian law and human rights."<sup>40</sup>

The ICC implicitly follows the utilitarian model. First, judges have broad discretion in sentencing ranges. The court can fashion an appropriate sentence in the range of one to 30 years or, if meeting a higher gravity threshold, more than 30 years, which is highly tailored to both the crime and the offender's circumstances.<sup>41</sup> In addition, it can impose fines and forfeiture.<sup>42</sup> Some mitigating factors that the Court is obliged to consider

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<sup>35</sup> DEGUZMAN, *supra* note 6, at 941–942.

<sup>36</sup> *Id.*

<sup>37</sup> RUBY, *supra* note 5, §1.5–1.6.

<sup>38</sup> SCHABAS, *supra* note 8, at 501.

<sup>39</sup> RUBY, *supra* note 5, §1.5–1.6; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at ¶ 80 (Can.).

<sup>40</sup> *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Judgment, ¶ 185 (Int'l Crim. Trib. For the former Yugoslavia Mar. 24, 2000) (footnotes omitted).

<sup>41</sup> *Rome Statute*, *supra* note 17, art. 77(1); International Criminal Court, Assembly of States Parties, *Rules of Procedures and Evidence*, ICC-ASP/1/3 (Part.II-A), rule 145 (Sept. 9, 2002) [hereinafter *ICC Rules*].

<sup>42</sup> *Rome Statute*, *supra* note 17, art. 77(2).

focus on the offender's attempts to make amends, through compensating victims and aiding the Court.<sup>43</sup> This tends to suggest that the ICC's sentencing philosophy focuses on proportionality and aims to produce socially beneficial consequences.

#### IV. SENTENCING OBJECTIVES DENOUNCEMENT

Denouncement is a sentencing objective closely associated with retributive justice. A sentence should sufficiently convey society's condemnation for the breach of social values.<sup>44</sup> Denouncing the crime through sentencing rebuilds the moral order by punishing the perpetrator for punishment's sake—to give the offender his or her just deserts.

Some judges caution against the use of retribution as a sentencing philosophy in ICL. For instance, Judge Mumba in her separate opinion in *Deronjić*, made an eloquent argument against overemphasis on retribution: “[i]nternational justice ... is not about unfair retribution; if that were the case, humanity should forget about reconciliation and its off-shoot, peace. It is my humble view that this Tribunal is not about vengeance, using the pen as the firearm, ... [this] would amount to accepting the erroneous view that you can conquer hatred with hatred.”<sup>45</sup>

A common criticism of retribution is that the task is near impossible. At best, it involves taking the temperature of community standards. ICL amplifies the difficulty of this task. How can a three-judge panel sufficiently represent the communities of the currently 124 countries party to the *Rome Statute*? It certainly cannot represent those states' infinite communities and cultural subdivisions.<sup>46</sup> The response is that the ICC does not purport to represent any one state.<sup>47</sup> Rather, it represents the international *community* as a whole. Thus, the ICC channels baseline moral norms inherent in every human society.

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<sup>43</sup> *ICC Rules*, *supra* note 41, rule 145(2)(a)(ii).

<sup>44</sup> See e.g., *R v. M. (C.A.)*, *supra* note 39, at ¶ 81.

<sup>45</sup> *Prosecutor v. Deronjić*, Case No. IT-02-61-S, Separate Opinion of Judge Mumba Dissenting, ¶ 3 (Int'l Crim. Trib. For the former Yugoslavia Mar. 30, 2004).

<sup>46</sup> See DEGUZMAN, *supra* note 6, at 950–53.

<sup>47</sup> *Id.* at 3; see Triffterer, *supra* note 16, at 732–34 (considering the sentencing practices of the locality of the crime or the nation state of the offender were rejected at the *Rome Statute's* drafting conference).

## DETERRENCE

The word deterrence comes from the Latin phrase, *de terrere*—meaning ‘to frighten from’ or to ‘frighten away.’<sup>48</sup> Deterrence is based on the theory that one will make the choice not to commit a crime for fear of punishment. The notion that criminal sentences have a deterrent effect is debatable, speculative and difficult to empirically measure. Nonetheless, it is a generally accepted goal of sentencing.<sup>49</sup> ICL compounds the problem of measuring the deterrent effect because the target audience spans across cultures and continents. Furthermore, atrocity crimes often occur during temporary and *sui generis* circumstances of acute social strife or armed conflict.<sup>50</sup>

## A CULTURE OF INVERSE MORALITY

In order to assess whether the deterrence objective is applicable to ICL, the nature of the crimes must be considered. The line between criminal and legal behavior may seem rather obvious and intuitive, at first. This holds true for most serious crimes against the person: murder, rape, torture and the like. However, some argue that the context of armed conflict bring fresh considerations to criminal behavior and the criminal psyche.

Atrocity crimes are often committed against victims who are systematically de-humanized through the imposition of abjectly squalor living conditions and vilification in propaganda.<sup>51</sup> Prejudices and hatreds are inflamed. Perpetrators are indoctrinated with a belief that their group is superior, the great protectors, and the real victims, while their victims are treated as a threat.<sup>52</sup> This converges with the knowledge that atrocity crimes largely go unpunished to produce a criminal psyche of what one scholar termed “inverse morality”.<sup>53</sup> At the time of the first criminal act, an individual may be aware that his or her behavior is unlawful. However, in a culture of impunity that person becomes desensitised to this concern.<sup>54</sup> Under this ethos, terrorizing civilians becomes normalized, encouraged by superiors, and an accepted part of warfare. Professor Dana writes,

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<sup>48</sup> Smidt, *supra* note 9, at 166–7 (citations omitted).

<sup>49</sup> RUBY, *supra* note 5, at §1.21–1.22, 1.27, 1.31.

<sup>50</sup> Mark Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 N.W. U.L. REV. 510, 539 (2005).

<sup>51</sup> See, DANIEL JONAH GOLDHAGEN, *WORSE THAN WAR: GENOCIDE, ELIMINATIONISM, AND THE ONGOING ASSAULT ON HUMANITY* 194–231, 309–30 (2009).

<sup>52</sup> *Id.*

<sup>53</sup> Dana, *supra* note 10, at 60 [internal citations and quotations omitted].

<sup>54</sup> Dana, *supra* note 10, at 62; GOLDHAGEN, *supra* note 51.

[a]n individual's inner sense of morality and repulsion towards such brutality is overridden by peer pressure from immediate comrades and superiors, and reinforced by inflammatory rhetoric of national leaders. The perversity can reach a point where, far from being considered wrongful, violence against "the other" is considered a righteous deed.<sup>55</sup>

#### SUPPORT FOR THE DETERRENCE EFFECT

##### LAW AND ECONOMICS ARGUMENT

From a law and economics perspective, tough sentences may increase the costs of criminal activity enough to make it prohibitive.<sup>56</sup> Atrocity crimes are often orchestrated by political and military elites who seek to inflame ethnic hatred to acquire or preserve power. For them, these acts are just part of a rational (although morally devoid) cost-benefit analysis. Atrocities are a viable way of achieving their ends. The law and economics theory rests on the premise that even extreme willful violations of the legal and moral order do not preclude the ability of the perpetrator to make a self-serving decision.<sup>57</sup>

The economic perspective provides a unique role for ICL sentencing: keeping a culture of inverse morality from taking root. Long sentences advance the project of having actors internalize norms, values and interests protected by international law.<sup>58</sup> The hope is that leaders will pay attention to ICL sentences and this knowledge will trickle down to the foot soldier. Criminologists and criminal law scholars generally embrace this function.<sup>59</sup> Thus, deterrence may prevent atrocities by tipping the scales of the cost-benefit analysis undertaken by high-level organizers. A lack of support or

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<sup>55</sup> *Id.* at 60 [internal citations and quotes omitted].

<sup>56</sup> Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7, 12 (2001).

<sup>57</sup> Isaac Ehrlich, *Crime, Punishment, and the Market for Offenses*, 10 J. ECON. PERSP. 43, 43 (1996); Jan Klabbbers, *Just Revenge? The Deterrence Argument in International Criminal Law*, 12 FINNISH Y.B. INT'L L. 249 (2001).

<sup>58</sup> Dana, *supra* note 10, at 59.

<sup>59</sup> Akhavan, *supra* note 56, at 7; Mirjan R. Damaska, *What is the Point of International Criminal Justice?*, 83 CHI.-KENT L. REV. 329, 334–35, 339, 345 (2008); J.C. Nemitz, *The Law of Sentencing in International Criminal Law: The Purposes of Sentencing and the Applicable Method for the Determination of the Sentence*, 4 Y.B. INT'L HUMANITARIAN L. 87 (2001).

even active discouragement from the top prevents a culture of inverse morality from taking root within the ranks of armed forces.<sup>60</sup>

#### EVIDENCE OF THE DETERRENT EFFECT

It must be conceded that no crazed ultranationalist will be deterred by a sentence in The Hague, nor the warlord who has a more legitimate and immediate fear of being killed by the enemy. However, there is evidence that at least Western military commanders pay close attention to ICL judgments. Military commanders are now leaning closer than ever on their legal advisors when selecting bombing targets and war tactics.<sup>61</sup> To the begrudging admission of some generals, military lawyers have now become *de facto* tactical commanders—often analyzing and approving each bombing mission for conformity with international law.<sup>62</sup>

Not only are commanders paying attention, but ICL is actually changing how powerful nations wage war. In declining to open an investigation in Iraq against the UK in 2006, the ICC's Chief Prosecutor noted that the UK (who is under the ICC's jurisdiction) dropped 85% precision-guided munitions.<sup>63</sup> On the other hand, the rest of the US-led coalition only used on average 66% precision-guided munitions.<sup>64</sup>

This finding is significant for two reasons. First, the same laws of war bind both the UK and its allies, yet they behave differently. These laws derive from a collection of international treaties and customary international law that the *Rome Statute* largely adopts. The difference is that the ICC serves as a tangible enforcement mechanism for signatory states.

Second, the cost-benefit analysis is indeed changing. Guided munitions are considerably more expensive than unguided ones, yet produce far less

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<sup>60</sup> Dana, *supra* note 10, at 80.

<sup>61</sup> Harmon & Gaynor, *supra* note 7, at 695–6; see GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 270–80 (2010); see e.g., MICHAEL R. GORDON & GEN. BERNARD E. TRAINOR, *CORBA II* 89, 110 (2006) (discussing the elaborate U.S. targeting decision process in the Iraq wars).

<sup>62</sup> J.E. Baker, *When Lawyers Advise Presidents in Wartime: Kosovo and the Law of Armed Conflict*, 55 *NAVAL WAR C. Rev.* 11 (2002); W.K. CLARK, *WAGING MODERN WAR: BOSNIA, KOSOVO, AND THE FUTURE OF COMBAT* 208 (2001).

<sup>63</sup> LETTER FROM LUIS MORENO OCAMPO, ICC PROSECUTOR, "LETTER TO SENDERS CONCERNING IRAQ", at 7 (Feb. 9, 2006), [www.icc-cpi.int/NR/rdonlyres/FD042F2E-678E-4EC6-8121-](http://www.icc-cpi.int/NR/rdonlyres/FD042F2E-678E-4EC6-8121-690BE61D0B5A/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf)

[690BE61D0B5A/143682/OTP\\_letter\\_to\\_senders\\_re\\_Iraq\\_9\\_February\\_2006.pdf](http://www.icc-cpi.int/NR/rdonlyres/FD042F2E-678E-4EC6-8121-690BE61D0B5A/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf).

<sup>64</sup> *Id.*



collateral damage.<sup>65</sup> Expected collateral damage is relevant to the core ICL analysis of whether a war crime was committed, namely whether the expected military advantage of the attack was disproportionate in relation to its expected damage to civilians and civilian objects.<sup>66</sup> Despite the considerably higher cost, the UK opted to use weapons that cause less damage to civilians. This shows that the economic calculus has begun to change in the context of war crimes.

Finally, there are encouraging examples of even low-tech, non-Western militaries modifying their behavior under the shadow of ICC prosecutions. The ICC's prosecution of the recruitment and use of child soldiers in the Congo has been linked to the successful demobilization of over 3,000 child soldiers in Nepal and more in Sri Lanka.<sup>67</sup> Furthermore, charges brought against Kenyan leadership preceded a notable decrease in perennial post-election violence in that country.<sup>68</sup>

#### THE UNEVEN DETERRENT EFFECT PROBLEM

Some have argued that the deterrent effect of ICL is uneven and therefore creates an unfair burden on more sophisticated and wealthy professional armies as opposed to low-tech or irregular forces.<sup>69</sup> While ICL may incentivise advanced Western militaries to modify their behavior in order to limit criminal liability, the same cannot be said for their enemies. This argument contends that ICL does not fetter the conduct of many modern irregular armed groups—for example, the Taliban, Boko Haram, and the Islamic State of Iraq and the Levant.

There are several responses to this line of thinking. First, no legal system is so hubristic as to believe it can achieve universal adherence or burden all members of the community equally. The hope is for a trickle-down effect. If commanders who face the most liability for atrocity crimes modify their behavior, the behavior of the foot soldier should follow. Just because there will inevitably be some breaches of the law or it becomes

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<sup>65</sup> Geoffrey S. Corn & Lieutenant Colonel Gary P. Corn, *The Law of Operational Targeting: Viewing the LOAC Through an Operational Lens*, 47:2 TEX. INT'L L.J. 337, 369–372 (2012).

<sup>66</sup> SOLIS, *supra* note 61, at 273–80; *Rome Statute*, *supra* note 17, art. 8(2)(b)(iv) (“[i]ntentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects ... which would clearly be excessive in relation to the concrete and direct overall military advantage anticipated”).

<sup>67</sup> FATOU BENSOUDA, CHIEF PROSECUTOR, ICC, ADDRESS AT THE LAUNCH CONFERENCE FOR THE INST. FOR THE 21ST CENTURY QUESTIONS “21CQ”, Univ. of Toronto, “ACCOUNTABILITY AND WHY AFRICA WILL RISE THIS CENTURY” (Nov. 14, 2014).

<sup>68</sup> *Id.*

<sup>69</sup> See Smidt, *supra* note 9.

more costly for some members of society to bear than others does not mean the entire project should be abandoned.

Second, the international community in ratifying human rights standards and the laws of war *chose* to subscribe to a higher standard. The alternative leads to the dangerous thinking that if an opponent breaks the rules, it gives the opposing force license to do the same. This leads to a race to the bottom where nearly anything can be justified. This thinking jettisons the bedrock principle of the laws of war: breaches of international law by one side cannot justify another's breach.<sup>70</sup>

Third, claims that the world is in a new war paradigm are overblown and ignore centuries of warfare history. Many modern commanders over-romanticise the "good old days": when armies chivalrously lined up in open fields and waged pitched battles far away from civilians. This is a false conception of history. For example, Christian Crusaders massacred civilians with zeal in mediaeval times,<sup>71</sup> French-Canadian forces committed barbarous atrocities against English settlements in the mid-18<sup>th</sup> century<sup>72</sup> and the allies bombed German and Japanese cities into oblivion with the intent of killing civilians, destroying the necessary infrastructure to sustain life and spreading terror among civilians in WWII.<sup>73</sup> All this is to say that excesses are nothing new in warfare, and not confined to one category of combatant. The codification of ICL in the 20<sup>th</sup> and 21<sup>st</sup> centuries promised to keep this kind of behavior in check.

Fourth, as mentioned earlier, there are encouraging examples of less sophisticated militaries modifying their behavior, and the anti-impunity message taking root in civil society.

#### CONCLUSIONS ON SUPPORT FOR THE DETERRENCE EFFECT

Just because deterrence is difficult to measure does not mean it does not exist. Given the predominant lack of international will to intervene to prevent atrocities—for example, Srebrenica, Rwanda, Darfur and Syria—

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<sup>70</sup> Francois Bugnion, *Just Wars, Wars of Aggression and International Humanitarian Law*, INT'L REV. Red Cross no. 847, 3–18 (2002); PHILIP ALSTON, *SOVEREIGNTY ISSUES AND STATES' INVOCATION OF THE RIGHT OF SELF-DEFENCE*, IN U.N. SPECIAL RAPPORTEUR ON EXTRAJUDICIAL, SUMMARY, OR ARBITRARY EXECUTIONS, *STUDY ON TARGETED KILLINGS*, ¶ 37–45, U.N. Doc. A/HRC/14/24/Add.6 (2010).

<sup>71</sup> JOHN FRANDE, *VICTORY IN THE EAST: A MILITARY HISTORY OF THE FIRST CRUSADE*, 92, 314 (1994).

<sup>72</sup> IAN K. STEELE, *BETRAYALS: FORT WILLIAM HENRY & THE 'MASSACRE'* 144 (1990).

<sup>73</sup> GOLDHAGEN, *supra* note 51, at 201–3.

ICL remains one of the only tools with the potential to limit impunity.<sup>74</sup> As one New York Times editorialist put it, “short of the international military interventions that never seem to come in time, the incremental enforcement of international law is one of the most important tools available for establishing accountability and deterring future genocides”.<sup>75</sup> From a law and economics perspective, even if the deterrent effect is at best negligible, the costs of atrocity crimes are so grave, that the deterrence objective cannot be abandoned entirely.<sup>76</sup> In fact, general deterrence should play an even greater role than at the national level. This is especially true where armed groups lie in wait with the potential of resuming further criminal acts—for example, in East Timor, the Congo, Columbia and many other conflicts.<sup>77</sup>

#### CRITIQUE OF THE DETERRENCE EFFECT

##### NORMATIVE ARGUMENTS

Deterrence theory is not without its critics. The theory rests on two fundamental, yet debatable assumptions. First, the wide dissemination of information about particular sentences is possible.<sup>78</sup> Second, the targeted audience actually listens. The response to the first assumption is that, unlike domestic trial decisions, ICL judgments make international headlines. They are readily available online in multiple languages. Furthermore, discussion on each decision is extensive within military, political and academic circles.<sup>79</sup>

Some argue that it is precisely because mass violations of human rights are orchestrated for political purposes, they are beyond deterrence.<sup>80</sup> The potential political gains are so tempting and the consequences of failure are so catastrophic, that no potential jail time could deter an individual. Another attack on the deterrent effect is that it targets those already not in need of social control. For most individuals, the influences of upbringing and life experiences are enough to prevent serious crime.<sup>81</sup> This argument is persuasive on the national level, but with ICL, it is not.

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<sup>74</sup> Harmon & Gaynor, *supra* note 7, at 694; Smidt, *supra* note 9 (arguing ICL is an important component of system-wide deterrence for atrocity crimes, but is insufficient on its own without the credible threat of military force).

<sup>75</sup> *Taking Genocide to Court*, N.Y. TIMES, Mar. 5, 2007.

<sup>76</sup> Jens David Ohlin, *Applying the Death Penalty to Crimes of Genocide*, 99:4 AM. J. INT’L L. 747, 758 (2005).

<sup>77</sup> ARCHBOLD, *supra* note 4, at §18–42.

<sup>78</sup> RUBY, *supra* note 5, at §1.25.

<sup>79</sup> *See* notes 62–65.

<sup>80</sup> Klabbers, *supra* note 57.

<sup>81</sup> RUBY, *supra* note 5, at §1.25.

ICL tribunals and the ICC in particular, do not generally indict lower ranking soldiers. Rather, they target top military and political leaders most responsible for orchestrating atrocity crimes. These individuals do not match the typical profile of a national-level violent criminal. Their crimes are not crimes of passion but of cool calculation. They are often highly educated and intelligent individuals in formal positions of power.<sup>82</sup> Despite this, they still commit crimes. These kinds of people are used to weighing risks and benefits. Education and good upbringing are clearly not sufficient factors to deter this species of criminal behavior. Therefore, ICL is speaking to the right audience.

Even those questioning the deterrent effect at the national level concede that it may be appropriate in certain circumstances. For instance, when the crime is premeditated, large-scale, committed against the public and its consequences are highly publicised, others may well be deterred by lengthy jail sentences.<sup>83</sup> Breaches of international criminal law typically meet all of these preconditions.<sup>84</sup>

Other opponents of deterrence claim that the presence of ICL actually exacerbates atrocities.<sup>85</sup> The theory is that combatants who face indictments for one instance of criminal behavior will lose all incentive to follow the rules. Their calculus hardens to win at all costs, therefore acting like a catalyst for atrocity crimes. An analogous phenomenon occurs in the United States. So-called three-strike laws incentivise violent crimes against witnesses and police officers. This happens as individuals become desperate to evade capture and a third conviction that carries an automatic life sentence.<sup>86</sup>

#### EXAMPLES OF FAILED DETERRENCE

The historical record is rife with instances of ICL seemingly having no practical deterrent effect on perpetrators.<sup>87</sup> Nuremburg and Tokyo did not deter Stalin's oppressions in the USSR, Mao's Cultural Revolution in

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<sup>82</sup> See text accompanying notes 121–124 (for example, Libya's Saif al-Islam Gaddafi, accused of war crimes, holds a PhD from the London School of Economics and The Democratic Republic of the Congo's Thomas Lubanga, convicted of war crimes, holds a degree in psychology).

<sup>83</sup> *R. v. Drabinsky*, 2011 ONCA 582, 107 O.R. (3d) 595 (Can. Ont. C.A.) at ¶ 159–160.

<sup>84</sup> Compare *R. v. Karigar*, 2014 ONSC 3093 at ¶ 21, 25, 30, [2014] O.J. no. 2490 (Can. Ont. S.C.) (discussing a need to emphasize denouncement and deterrence for large-scale premeditated white collar crime); *id.*

<sup>85</sup> DEGUZMAN, *supra* note 6, at 959, note 160; Smidt, *supra* note 9, at 186.

<sup>86</sup> Jeffrey L. Johnson & Michael A. Saint-Germain, *Officer Down: Implications of Three Strikes for Public Safety*, 16:4 CRIMINAL JUST. POL'Y REV. 443 (2005).

<sup>87</sup> BOAS, *supra* note 26, at 393, note 91; see Harmon & Gaynor, *supra* note 7.

China, Pol Pot's genocide in Cambodia, Idi Amin's atrocities in Uganda, or Hussein's massacres of the Kurds and Shiites in Iraq. The relative peace experienced in Rwanda after the 1994 genocide may be more attributable to the policies of the presiding government than fear of future ICL prosecutions. Despite its 1993 establishment in the midst of an ongoing conflict, several ICTY prosecutions and sentences failed to dissuade perpetrators of the Srebrenica genocide in Bosnia, war crimes in the Krajina region or the grave human rights abuses in Kosovo.<sup>88</sup> Nor have the ICC indictments and convictions of several Congolese warlords ended the violence and human rights abuses in the region.

#### INAPPLICABILITY OF DETERRENCE

Some argue that two types of perpetrators are beyond deterrence. First, is a category of psychologically unstable perpetrators for whom reason cannot reach: psychopaths. Hitler, Gaddafi and many others may fit this profile. No body of law or morality can deter crazed megalomaniacs believing that they are invincible.<sup>89</sup> Another breed of the psychologically unstable is a religious or ideological extremist. This kind of combatant has no historical connection to the rules of war. They conduct asymmetrical warfare using brutal tactics that know no bounds or recognizable morality. Deterrence may also be useless against such extremists.<sup>90</sup>

The second category is perpetrators who believe they are in a "total war" struggling against annihilation. Thus, the line between civilian and combatant is blurred. Former Yugoslavia combatants reportedly "felt they were in a life and death struggle and the limits on warfare had to be suspended."<sup>91</sup> Legal systems struggle to respond to the human instinct of self-preservation. Some examples are the strict doctrines of self-defence, duress, and necessity.<sup>92</sup>

#### SPECIFIC DETERRENCE AND INCAPACITATION

Most of the discussion in this article so far has centred on general deterrence—detering others from committing crime. Many commentators and ICL judges agree that specific deterrence—detering the actual offender

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<sup>88</sup> Smidt, *supra* note 9, at 187; Mary Margaret Penrose, *Lest We Fail: The Importance of Enforcement in International Criminal Law*, 15 AM. U. INT'L L. REV. 321, 325 (2000).

<sup>89</sup> See STANTON E. SAMENOW, *INSIDE THE CRIMINAL MIND* (rev. ed. 2004); ROBERT D. HARE, *WITHOUT CONSCIENCE: THE DISTURBING WORLD OF THE PSYCHOPATHS AMONG US* (1999).

<sup>90</sup> Smidt, *supra* note 9, at 222–234.

<sup>91</sup> *Id.* at 188.

<sup>92</sup> *Rome Statute*, *supra* note 17, art. 31(1)(c)–(d).

from perpetrating again—is usually not applicable to ICL.<sup>93</sup> This is because often offenders lose their military and political power, which enabled the commission of the crimes. Furthermore, by the time of release, the *sui generis* conditions of civil strife or war have often subsided. This makes it unlikely that offenders will even be capable of committing further breaches of ICL. Only in rare cases, a conflict persists even after the sentence is served, allowing criminal behavior to resume.

#### SHOULD SEVERITY OR INEVITABILITY DRIVE DETERRENCE?

In *Katanga*, the Trial Chamber adopted the concept that for deterrence, it is the inevitability of the sentence that matters, not its severity.<sup>94</sup> An early ICTY Trial Chamber decision borrowed this principle from the 18<sup>th</sup> century Italian jurist and criminologist Cesare Beccaria.<sup>95</sup> In denouncing the death penalty and torture as forms of punishment, Beccaria wrote, “punishment should not be harsh, but must be inevitable.”<sup>96</sup> That Trial Chamber made the dubious assertion that this theory is particularly true in ICL because “penalties are made more onerous” by internationalization of the crime, the moral authority the Court holds and its judgments’ impact upon world public opinion.<sup>97</sup> There are several problems with this reasoning.

To start, it is debatable whether those orchestrating atrocity crimes have any particular concern for the ICC’s moral authority or regard for global public opinion.

Next, the Court took Beccaria’s comments out of context. He wrote during an age when hard labor, corporal and capital punishment were commonplace. The harshness he decried was punishment that entailed calculated physical suffering. He was not speaking of the length of custodial sentences served in prisons meeting 21<sup>st</sup> century international standards.

Finally, the strength of Beccaria’s proposition rests on a high probability of facing consequences for criminal acts. The truth is, the likelihood of receiving punishment for breaches of ICL is actually quite low. First, perpetrators benefit from the ICC’s spotty jurisdiction. Nationals of non-

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<sup>93</sup> DEGUZMAN, *supra* note 6, at 960.

<sup>94</sup> *Prosecutor v. Katanga*, *supra* note 2, at 3.

<sup>95</sup> *Prosecutor v. Furundzija*, IT-95-17/1-T, Judgment, ¶ 290 (Int’l Crim. Trib. For the former Yugoslavia Dec. 10, 1998).

<sup>96</sup> *Id.*; Compare RUBY, *supra* note 5, at §1.32 (echoing the same argument in Canadian law).

<sup>97</sup> *Id.*

signatory countries can often avoid ICC prosecution if crimes were committed in a non-signatory state or if they flee to one.<sup>98</sup>

Second, prosecutorial policy makes the threshold for an ICC indictment quite high. The ICC seeks to indict the narrow band of those “most responsible” for crimes—namely, top leadership.<sup>99</sup> It steps in only when domestic systems are unwilling or unable to bring those most responsible to justice. In addition, investigations only proceed for crimes of sufficient gravity.<sup>100</sup> For instance, the ICC Prosecutor recently declined to proceed with a further investigation into Israel’s attack of a humanitarian flotilla that left ten dead and more than 50 wounded citing the case was not of sufficient gravity.<sup>101</sup> This was despite acknowledging that Israel likely committed war crimes.<sup>102</sup>

Third, the Court faces considerable institutional constraints that hinder prosecutions. The ICC is dependent on state cooperation and lacks a robust enforcement mechanism. Unless there is a regime change, it can prove difficult to hold a current leadership to account. ICC indictments against Sudanese and Kenyan leadership have led to entrenchment and a lack of cooperation with the Court.<sup>103</sup> For instance, in December 2014, the Prosecutor was forced to drop her office’s case against Kenyan President Uhuru Kenyatta due to a lack of cooperation and loss of witnesses.<sup>104</sup> Those indicted often hold such powerful positions that they can easily interfere in the judicial process.<sup>105</sup> Even with a regime change, ending impunity is no simple feat. Saif Gaddafi’s captors have still not surrendered him to the ICC to face charges.<sup>106</sup>

Fourth, the accused benefits from the full suite of fair trial rights. Accused persons receive full procedural protections and fair opportunity to meet the case against them. Indeed, an indictment in the ICC is not synonymous with conviction. Several accused have successfully challenged

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<sup>98</sup> *Rome Statute*, *supra* note 17, art. 17 (on admissibility).

<sup>99</sup> *Id.*, preamble, art. 53(2)(c).

<sup>100</sup> *Id.*, art. 53(1)(c) (gravity must be taken into account before opening an investigation).

<sup>101</sup> SARAH LAZARE, *OUTRAGE AS THE INTERNATIONAL CRIMINAL COURT (ICC) DROPS CASE AGAINST ISRAEL FOR DEADLY ATTACK ON HUMANITARIAN FLOTILLA*, Global Research (Nov. 7, 2014).

<sup>102</sup> *Id.*

<sup>103</sup> *International justice: You and what army?*, THE BOSTON GLOBE (Oct. 15, 2014).

<sup>104</sup> Olivia Ward, *International Criminal Court drops charges against Kenyan president*, THE TORONTO STAR (Dec. 5, 2014).

<sup>105</sup> Stella Dawson, *Kenyatta trial must probe witness tampering says activist*, REUTERS (Oct. 1, 2014).

<sup>106</sup> Associated Press, *International Criminal Court calls on Libya to hand over Gaddafi’s son*, SOUTH CHINA MORNING POST (Nov 12, 2014).

charges. All of this is to say, that punishment for atrocity crimes is far from certain.<sup>107</sup>

The Chamber in *Katanga* was wrong to transplant Beccaria's reasoning into the unique field of ICL. It would have made more sense in a world where judicial punishment for breaches of ICL is far more likely. In addition to channeling Beccaria, the Chamber in *Katanga* held that the aim of deterrence was to "ensure that the sentence *truly* serves as a deterrent."<sup>108</sup> Given the current state of ICL, sentences should err on the side of severe if they are to serve as a true deterrent.

#### THE PROBLEM OF PROPORTIONALITY ICL: LIGHT SENTENCES

Some ICL judges justify punishment in terms of a breach of the social contract, some in terms of the damage done to the individual victim. All tend to apply more punishment as the gravity of the crime and moral culpability increases.<sup>109</sup> Denouncement and deterrence necessarily imply proportionality—it would be useless if the punishment for premeditated murderer were a single days' incarceration. The length and quality of the sentence must map onto the gravity of the offense and moral culpability of the offender.<sup>110</sup> This raises a difficult concern with proportionality in ICL.

Atrocity crimes are often committed on such a massive scale and with such savagery that they are hard to comprehend. ICL courts have had to admit, absent capital punishment, it is impossible to make the punishment proportional to the severity of the crime.<sup>111</sup> Quite simply, no sentence will alleviate the suffering of whole communities or bring victims back to life.

For example, Krstić participated in the Srebrenica massacre of Muslim men and boys. If he serves the typical two-thirds of his 35-year sentence, using a conservative estimate of 7,000 victims, he will spend 1.205 days in prison for the life of each.<sup>112</sup> The ICC sentenced Lubanga to 14 years imprisonment for assisting in the enlistment and use of hundreds of children in armed conflict.<sup>113</sup> The Chamber noted the egregious treatment of

<sup>107</sup> Dana, *supra* note 10, at 70.

<sup>108</sup> *Prosecutor v. Katanga*, *supra* note 2, at 3 [emphasis added].

<sup>109</sup> DEGUZMAN, *supra* note 6, at 936.

<sup>110</sup> Ohlin, *supra* note 76; *Rome Statute*, *supra* note 17, art. 76–8; International Criminal Court, Assembly of States Parties, *ICC Rules*, *supra* note 41, rule 145.

<sup>111</sup> *Prosecutor v. Babic*, IT-03-72-S, Sentencing Judgment, ¶ 44 (Int'l Crim. Trib. For the former Yugoslavia Mar. 24, 2000); Robert D. Sloane, *The Expressive Capacity of International Punishment: the Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 STAN. J. INT'L L. 39, 82 (2007).

<sup>112</sup> Harmon & Gaynor, *supra* note 7, at 692 (releasing after two-thirds time served was customary at the ICTY).

<sup>113</sup> *Prosecutor v. Lubanga*, *supra* note 22, at ¶ 98.



vulnerable children while within the forces and the severe and debilitating psychological scars their use left on the victims, families and communities.<sup>114</sup> Katanga received a 12-year sentence for being an accessory to an attack on a village that left it pillaged, burden and killed nearly 200.<sup>115</sup> Civilians were systematically “hunted down” and slaughtered.<sup>116</sup> Attackers targeted a specific ethnic group, “literally carving victims up limb from limb before killing them”, despite desperate pleas for mercy.<sup>117</sup>

First, “a day or two in prison for the murder of a human being is inconsistent with any serious notion of human dignity.”<sup>118</sup> Insignificant punishments are a slap in the face of victims. These sentences are grossly and disproportionately lenient considering that in many countries, individuals receive life sentences for a single murder.<sup>119</sup>

The measure of gravity will change depending on what sentencing goal animates the analysis.<sup>120</sup> Often the concern with disproportionate sentences is that the punishment is more severe than the crime warrants. In ICL, the inverse seems to be true. A partial cause of inadequate sentences comes from undue weight placed on inapplicable and inappropriate sentencing objectives, like local justice efforts and rehabilitation of the offender.

#### REHABILITATION

There is serious doubt as to the proposition that the ICC ought to be in the business of rehabilitating offenders. ICL has not traditionally placed much weight on rehabilitation as a sentencing objective.<sup>121</sup> ICL criminals do not often commit their acts because of inherent character flaws that are curable. The stronger influence seems to be perceived impunity and extreme circumstances—namely, armed conflict or civil strife.

Those indicted by the ICC are not typical criminals. The dominant contemporary view of psychiatrists and criminologists is that perpetrators of atrocity crimes are normal people—not displaying any abnormal or deviant

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<sup>114</sup> *Id.* at ¶ 37–44.

<sup>115</sup> *Prosecutor v. Katanga*, *supra* note 2, at 7–8, 12, 20.

<sup>116</sup> *Id.* at 6.

<sup>117</sup> *Id.* at 7–8, 12.

<sup>118</sup> Harmon & Gaynor, *supra* note 7, at 692.

<sup>119</sup> Pickard, *supra* note 8.

<sup>120</sup> DEGUZMAN, *supra* note 6, at 941–942.

<sup>121</sup> ARCHBOLD, *supra* note 4, at §18–43; Dana, *supra* note 10, at 53; *Prosecutor v. Katanga*, *supra* note 2, at 3; *Prosecutor v. Delalić*, IT-96-21-T, Appeals Judgment, ¶ 805–6 (Int’l Crim. Trib. For the former Yugoslavia Feb. 20, 2001) (the Chamber mentioned rehabilitation but failed to give it any weight).

psychological predispositions or mental illness.<sup>122</sup> A Swedish report into conditions of confinement at the United Nations Detention Unit in The Hague observes that most political and military leaders housed there exhibited traits that would be abnormal in a typical violent criminal population.<sup>123</sup> They are well educated and well adjusted, have a higher average age, display relatively high social skills, have strong internal discipline (a lack of impulsiveness), and are typically non-violent individuals for whom there is no need for solitary confinement or physical restraint.<sup>124</sup>

#### INCAPACITATION

Arguably incapacitation takes on unique importance in ICL. Most of those charged in ICL occupy important leadership roles in military or political organizations. These leaders have proven to be apt at leveraging their leadership capital to either exploit ethnic animosities or conduct war without regard to civilians. Their removal from society may arguably contribute to peace and security in post-conflict societies.

#### TEACHING

The teaching objective of sentencing strives to have an educative effect on combatants and civilians alike about what kind of force is legal and which is illegal—even during times where it must seem like the locality is entirely devoid of law.<sup>125</sup> Teaching differs from deterrence because it seeks to normalize behavior not through fear of consequences but through education.<sup>126</sup> Proponents say that if something is criminalized, it becomes more immoral and this helps to build empathy.<sup>127</sup> This teaching effect operates on peoples who may not be fully aware of the protections afforded by international human rights and international humanitarian law.

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<sup>122</sup> See GEORGE M. KREN & LEON RAPPOPORT, *THE HOLOCAUST AND THE CRISIS OF HUMAN BEHAVIOR*, 70 (1980); ZYGMUNT BAUMAN, *MODERNITY AND THE HOLOCAUST*, 19 (1989); DONALD G. DUTTON, *THE PSYCHOLOGY OF GENOCIDE, MASSACRES AND EXTREME VIOLENCE*, 135 (2007); Olaoluwa Olusanya, *Excuse and Mitigation Under International Criminal Law: Redrawing Conceptual Boundaries*, 13:1 *NEW CRIMINAL L. REV.* 23, 24–9 (2010).

<sup>123</sup> *Independent Audit of the Detention Unit at the International Criminal Tribunal for the Former Yugoslavia*, Commissioned by the Government of Sweden (May 4, 2005), [www.icty.org/x/file/Press/PR\\_attachments/DU-audit.pdf](http://www.icty.org/x/file/Press/PR_attachments/DU-audit.pdf); Julian Mortenson, *Inside the United Nations Detention Unit*, *SLATE* (Jan. 10, 2006) (offers a personal account of the lack of tension among detainees); Harmon & Gaynor, *supra* note 7, at 692–93.

<sup>124</sup> *Id.*

<sup>125</sup> Dana, *supra* note 10, at 59–60.

<sup>126</sup> RUBY, *supra* note 5, at §1.8–1.9.

<sup>127</sup> Dana, *supra* note 10, at 59–60.

Teaching is indeed a derivative of the ICL process in general, but it should not be an independent consideration in determining sentences. Adequate regard for teaching happens throughout the trial with the presentation of evidence, witness impact statements and at the judgment stage where the court makes findings of fact. It seems counter intuitive that a sentencing decision's capability of educating the global public should have any bearing on the severity of a sentence.

#### RECONCILIATION AND THE PEACE PROCESS

Reconciliation has played a role in ICL because the *ad hoc* tribunals had mandates to further the peace process.<sup>128</sup> Ending impunity clears the way for dialogue that leads to lasting peace. In *Katanga*, the Court held that a “real and sincere” attempt to promote peace and reconciliation after the criminal act may be taken into account as a mitigating factor.<sup>129</sup>

Unlike the *ad hoc* tribunals, the *Rome Statute* makes no explicit reference to local reconciliation in the ICC's purposes.<sup>130</sup> The Statute does however provide for a reduction in a sentence already two thirds served if the offender helps facilitate the Court's work or if “other factors establish[] a clear and significant change in circumstances”.<sup>131</sup> However, this provision considers post-sentencing circumstances.

Making considerations for local reconciliation at the sentencing phase overreaches and allows political considerations to enter into the equation. Once the wheels of justice have started to turn, it must take its course—political considerations should be irrelevant at this stage. Indeed, Louise Arbour, former Chief Prosecutor for the ICTY, made the valiant choice to indict Serbian leader Slobodan Milošević despite him being a sitting head of state and having the potential to derail the peace process. Thus, ICL strove to occupy a domain free of political decision-making, clothing itself in the rule of law. If politics ought to be considered at all, it should be before the indictment is made. However, peace versus justice is still hotly debated.

Some argue that reconciliation itself should not be a mitigating factor. The limits of the justice system need to be recognized. “[R]econciliation is better understood as a slow rebuilding process, not an event,” writes

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<sup>128</sup> ARCHBOLD, *supra* note 4, at §18–44.

<sup>129</sup> *Prosecutor v. Katanga*, *supra* note 2, at 16.

<sup>130</sup> *Rome Statute*, *supra* note 17, art. 53(1)(a) (local peace considerations could be read into the Prosecutor's obligation to consider “the interests of victims” before opening an investigation); *Compare* art. 76–78; *Rules of Procedure*, *supra* note 110, rule 145 (the sentencing phase demands no such considerations aside from a *post factum* assessments of damage).

<sup>131</sup> *Rome Statute*, *supra* note 17, art. 110.

Professor Dana.<sup>132</sup> Reconciliation inherently involves predicting future events. This is something courts are ill-equipped to do. Courts are most apt at making determinations of past fact. Whatever an accused has contributed to reconciliation and the peace process is not easy to measure with legal certainty.<sup>133</sup>

For example, Bosnian leader Biljana Plavšić received a mitigated sentence following her crimes against humanity conviction for contributing to local reconciliation through a heart-felt public apology, making a remorseful admission and playing a substantial role in the peace process.<sup>134</sup>

Two years later, Plavšić gave media interviews where she unravelled the foundation of her mitigated sentence. She said, “I sacrificed myself. I have done nothing wrong. I pleaded guilty to crimes against humanity so I could bargain for the other charges [of genocide]. If I hadn’t, the trial would have lasted three, three and-a-half years. Considering my age that wasn’t an option.”<sup>135</sup>

She went on to indicate that her side did nothing wrong during the conflict and the victims deserved what they got.<sup>136</sup> This raises the paradox that those who are most responsible for atrocity crimes, by virtue of their positions, are also most capable of contributing to local reconciliation and thus angling for a mitigated sentence.<sup>137</sup>

This example demonstrates that the emphasis of ICL sentencing should be on denouncement and global crime prevention rather than local justice objectives.<sup>138</sup> Reconciliation is a slow process built of many moving parts. Countless organizations work on the ground or at diplomatic levels to achieve it. Justice through ICL prosecution is an important part of it, but a modest one.

Louise Arbour told the United Nations Security Council at the ICTY’s formation, “[t]ruth is the cornerstone of the rule of law ... it is only the truth that can cleanse the ethnic and religious hatreds and begin the healing process.”<sup>139</sup> Thus, reconciliation is one ultimate purpose of ICL, in general. This is just as true as creating a safe and peaceful society is the ultimate

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<sup>132</sup> Dana, *supra* note 10, at 96.

<sup>133</sup> *Id.*

<sup>134</sup> *Prosecutor v. Plavšić*, IT-00-39&40/1-S, Sentencing Judgment, ¶ 71–81 (Int’l Crim. Trib. For the Former Yugoslavia Feb. 27, 2003).

<sup>135</sup> Biljana Plavšić quoted in JELENA SUBTONIĆ, THE CRUELTY OF FALSE REMORSE: BILJANA PLAVŠIĆ AT THE HAGUE, 36 *Se. Eur.* 39, 48–49 (2012).

<sup>136</sup> Dana, *supra* note 10, at 98–9.

<sup>137</sup> *Id.* at 100–3; SUBTONIĆ, *supra* note 135.

<sup>138</sup> DEGUZMAN, *supra* note 6, at 962.

<sup>139</sup> U.N. SCOR, 48th Sess. 3217th mtg. at 12, U.N. Doc. S/PV.3217 (May 25, 1993).

purpose of any criminal justice system.<sup>140</sup> However, its consideration clouds the more immediate aims of sentencing. Guilty verdicts and facts found by the Court set a ground floor, a common narrative, from which communities may begin dialogue. This is an inevitable consequence of the trial process, but is incompatible with the sentencing aims of denouncement and deterrence.

### V. Prescription Going Forward

The German-born political theorist and Holocaust survivor Hanna Arendt concluded after observing the prosecution of a former Nazi SS Lieutenant Colonel for mass atrocities, “[t]he purpose of a trial is to render justice and nothing else; even the noblest of ulterior purposes ... only detract from the law’s main business: to weigh the charges brought against the accused, to render judgment, and to mete out due punishment.”<sup>141</sup>

Some call on ICL sentencing to achieve a plethora of aggrandized tasks. These expectations are unrealistic and often conflicting. Many sentencing rationales—e.g. rehabilitation, teaching, reconciliation—may apply at the national level but do not scale up to *sui generis* atrocity crimes. These romanticized ideals of what ICL sentencing can accomplish should be reined in. ICL should focus on what it is best positioned to do and historically has always done: denounce and deter. These humble objectives promise to help prevent old grievances from festering and turning into renewed cycles of violence.

Prussian general Carl von Clausewitz wrote in the early 19<sup>th</sup> century, “[t]o introduce the principles of moderation into the theory of war itself would always lead to a logical absurdity.”<sup>142</sup> Likewise, to introduce mitigating sentencing objectives like reconciliation, teaching and rehabilitation into ICL leads to not only logical absurdity but also disproportionate sentences. ICL sentences cannot fix broken societies or rehabilitate those that do not need it. ICL sentencing and the punishment of individuals are inappropriate tools for social engineering in post-conflict societies: their roles are far more modest. Judicial humility should recognize that these goals are best left to other institutions and processes. Legalism, after all, has its limits.

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<sup>140</sup> See e.g., *Criminal Code*, *supra* note 18, § 718 (in Canada, the purpose of sentencing is *inter alia*, “to contribute [...] to respect for the law and maintenance of a just, peaceful and safe society”).

<sup>141</sup> HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 253 (1964).

<sup>142</sup> KARL VON CLAUSEWITZ, *ON WAR*, 76 (ed. and trans. Michael Howard & Peter Paret 1976).

MAGNITSKY RULE OF LAW ACCOUNTABILITY ACT: SUCCESS AND IMPACT

*Jhanisse Vaca Daza*

On November 16th, 2009, Sergei Magnitsky was taken from the Butyrka prison in Moscow to the Matrosskaya Tishina hospital in a critical medical situation. He should have received emergency care for months of untreated pancreatitis, gallstones and cholecystitis. Instead, he was murdered. He was taken to an isolation cell, handcuffed to a bedrail and beaten to death by eight guards of the Russian government.<sup>1</sup> What seemed to be the tragic and secret end of a man's life turned into the birth of a game changer in international human rights politics.

The Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act was passed by the U.S. Congress in 2012 as a direct reaction to Magnitsky's murder.<sup>2</sup> How successful has this Act been when it comes to halt Human Rights violations in Russia? How much of an impact did it have in such country and in Putin's government? In order to reply to these questions this work will analyze the Human Rights situation in Russia and its status under Putin's administration. Likewise, it will study Sergei Magnitsky's case itself in an intricate manner and the construction of the bill carrying his name. Finally, this work will present the repercussion of the Magnitsky Act in Putin's administration and its future projection.

#### PART I: AN EROSION OF FEAR IN RUSSIA

As the Soviet era came to an end and Russia started its never-finished transition into democracy, the state of Human Rights was relatively weak. While the First Chechen War was developing, Russia entered the Council of Europe in February 1996 and ratified the European Convention of Human Rights only two years afterwards.<sup>3</sup> However, as scholar Jonathan D. Weiler explains, despite all the rights granted to Russian citizens in their constitution and the ratification of international human rights treaties the abuse to such rights has done nothing but grow steadily in the past decades.<sup>4</sup>

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<sup>1</sup> BILL BROWDER, RED NOTICE 264 (2015).

<sup>2</sup> *Text of the Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/112/hr6156/text> (last visited Dec. 5, 2015).

<sup>3</sup> Bill Bowring, *Russia and Human Rights: Incompatible Opposites?*, 1 GÖTTINGEN J. INT'L LAW 33, 43 (2009).

<sup>4</sup> Jonathan D. Weiler, *Human Rights in Post-Soviet Russia*, 4 DEMOKRATIZASIYA: J. POST-SOVIET DEMOCRATIZATION 257, 258 (2014).

Scholars have also highlighted that although the Soviet Union came to an end, Russia never fully achieved democracy and was, until recently, what is denominated as a Competitive Authoritarian Regime. This term was coined by Steven Levitsky and Lucan A. Way who explained that in such regimes political and civil rights are violated in such a systematic way that it creates an uneven “playing field” in which the opposition has virtually no way to exercise any factual power.<sup>5</sup> While this clearly applies to Putin’s first terms in power, his current term in office pushes this boundaries even further closer to authoritarianism. Upon interview Javier El- Hage, chief legal officer of The Human Rights Foundation, indicated that while Russia was never a fully democratic state, it was closer to become one during the early post-soviet years. El-Hage stated that under Putin’s government Russia became a fully authoritarian regime<sup>6</sup>. Likewise, Bill Browder indicated when interviewed for this work that he considers there is absolutely no democracy in the current Russian state.<sup>7</sup>

Vladimir Putin’s government has marked a specific style of authoritarianism that even coined a name for itself: Putinism. Its main quality is that there is an intense centralization of power under the executive power and, more specifically, under the president’s authority.<sup>8</sup> This is described as a “power vertical” in William J. Dobson’s book *The Dictator’s Learning Curve*.<sup>9</sup>

The power vertical indicates that all decisions and power in the Russian executive moves in one direction only, with Putin clearly being the highest end of the line. Another specific characteristic of Putinism is that while it attacks the common Russian citizen political rights,<sup>10</sup> it does not touch their personal freedom.<sup>11</sup>

As it would be expected from a non-democratic state, any type of opposition to the government in current Russia is met with direct retaliation from the government. While in the early years of Putin’s

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<sup>5</sup> Steven Levitsky & Lucan A. Way, *The Rise of Competitive Authoritarianism*, 13 J. OF DEMOCRACY 51, 53 (2002).

<sup>6</sup> Interview with Javier El-Hage, Director, Human Rights Found.

<sup>7</sup> Interview with Bill Browder, founder and CEO, Hermitage Capital; Head, Glob. Magnitsky Justice Campaign; Author, RED NOTICE.

<sup>8</sup> WILLIAM J. DOBSON, *THE DICTATOR’S LEARNING CURVE* 16 (2013).

<sup>9</sup> *Id.*

<sup>10</sup> Note: By “Common Russian Citizen” I refer to citizens who are not politically active, since in that case their personal freedom is indeed at risk as well.

<sup>11</sup> DOBSON, *supra* note 8, at 19.



government this meant imprisonment, now the trend is murder. Upon asked why the Russian head of state had taken such path, Bill Browder replied stating two reasons that would lead Putin to question his ability to remain in power.<sup>12</sup> One is the overthrow of the Ukrainian president, which could cause a contagious riots situation like that of the Arab Spring. Another is the stagnation and decline of economy in Russia. Further on, Browder indicated that the assassination of Boris Nemstov in front of the Kremlin was the turning point as to how the regime now dealt with opponents.<sup>13</sup>

Another essential area of civil society has also been seized by Putin's regime: Media. While Russia had three main television networks and only one of them was owned by the Russian states, now all three of them are controlled by the government.<sup>14</sup> Statistically, Putin's government now controls 93% of all media outlets in the country.<sup>15</sup> Not only that, but the Kremlin gives media executives direct specifications on how information must be shown to the public.<sup>16</sup> With such controlled flow of information it is not difficult to understand how gross human rights violations can go unnoticed and the president's popularity can be steadily high across the country. Non Governmental Organizations have run the same luck as Media under the former KGB agent's presidency. Putin's government took charge of this by making an NGO law pass in 2006.<sup>17</sup> This law enabled the state to tighten its control over all NGOs in Russia. At the same time, it prohibited all foreign NGOs from operating in Russia.<sup>18</sup> William J. Dobson explains that the Russian government went further than simply repressing NGOs: it "manufactured a civil society on its own".<sup>19</sup> Russia appears to be an innovator when creating GONGOs: Government-operated NGOs.<sup>20</sup> The purpose of GONGOs is to replace the place in society NGOs occupied

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<sup>12</sup> *Id.*

<sup>13</sup> Interview with Bill Browder, *supra* note 7.

<sup>14</sup> WILLIAM J. DOBSON, THE DICTATOR'S LEARNING CURVE 17 (2013).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 17-18.

<sup>17</sup> Yevgeny Volk, *Russia's NGO Law: An Attack on Freedom and Civil Society*, WEB MEMO NO. 1090 (May 24, 2006), <http://www.heritage.org/research/reports/2006/05/russias-ngo-law-an-attack-on-freedom-and-civil-society>.

<sup>18</sup> *Id.*

<sup>19</sup> DOBSON, *supra* note 14, at 27.

<sup>20</sup> *Id.*

and legitimize Putin's government. They are funded with the money that originally went to now- closed NGOs and it confuses society by presenting only positive facts about the executive.<sup>21</sup>

How has the Russian government been able to get away with so many violations to civil and political rights with not one action from the West? Bill Browder, David Kramer and Julia Sibley indicated when interviewed to Obama's administration "Reset" strategy. "Basically the Reset is a euphemism for appeasement", Browder said, "Obama's goal was to ask the Russians to reduce their nuclear arms which they were happy to do anyways because they have a lot more nuclear arms than we do and they have a lot of stuff that was deconditioning because it wasn't working anymore. So they were pretty happy to give up on that, and in his case he was pretty happy to give up on everything else."<sup>22</sup> He added that while attempting to negotiate nuclear reduction with Putin's government, Obama put every other national interest toward Russia in the second page – Human Rights being one of them.<sup>23</sup> Likewise, former United States Assistant Secretary of State for Democracy, Human Rights, and Labor David Kramer indicated that when the Magnitsky Act was first proposed in Congress, the administration did not support it because it would interrupt the Reset policy.<sup>24</sup> Julia Sibley pointed to the Reset as the reason the Obama Administration did not support the Magnitsky Act as well, adding that the Reset is now "laughably moribund."<sup>25</sup>

## PART II: BILL BROWDER, \$230 MILLION AND SERGEI MAGNITSKY

William Felix Browder, mostly known as Bill Browder, was born in the United States of America in 1964. His family political views were leftist by intellect and tradition.<sup>26</sup> Browder's grandfather ran for president of the United States twice in his lifetime under the Communist Party.<sup>27</sup> While Browder's parents remained leftist, Bill himself rebelled against it in the strongest way possible: he decided to become a

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<sup>21</sup> DOBSON, *supra* note 14, at 27.

<sup>22</sup> Interview with Bill Browder, *supra* note 7.

<sup>23</sup> *Id.*

<sup>24</sup> Interview with David Kramer, former U.S. Assistant Sec'y of State for Democracy, Human Rights, and Labor; former President, Freedom House.

<sup>25</sup> Interview with Julia Sibley, Director of Partnerships for Movements

<sup>26</sup> BILL BROWDER, RED NOTICE 14 (2015).

<sup>27</sup> *Id.* at 11.

capitalist, and do so as successfully as possible.<sup>28</sup> Browder graduated from economics from the University of Chicago and received an MBA from Stanford Business School.<sup>29</sup>

By 1996, Bill Browder founded Hermitage Capital Management along with Edmond Safra. He did this after leaving his position in Salomon Brothers firm, since he realized the investment market in the newly-born Russian Republic was too good to be ignored.<sup>30</sup> Soon enough, Hermitage Capital became the best performing fund in the world, with assets that rose to more than one billion U.S. dollars.<sup>31</sup> However such success came at its cost: Russian oligarchs were not happy to see a foreigner thriving so highly in their country, and took it upon themselves to sink Hermitage Capital. This led to different financial moves from oligarchs such as Vladimir Potanin with the goal of bringing significant losses to Browder's firm – and their consequent trials.<sup>32</sup> After having several encounters with corrupt Russian government officials and winning in legal trials against them, Browder was expelled from Russia and declared a national threat.<sup>33</sup> Not long afterwards his firm, Hermitage Capital, was accused of fraud.<sup>34</sup>

Bill Browder then proceeded to hire Sergei Magnitsky to investigate the case. Magnitsky's reputation was that of the best tax lawyer in Russia and head of Firestone Duncan's tax practice.<sup>35</sup> Through his research Magnitsky found that three companies originally belonging to Hermitage Capital had been stolen and re-registered by the Russian government after its forces raided Hermitage Capital's offices.<sup>36</sup> Under these false new-owners, such companies supposedly did business with shell companies and ended with a debt of 71 million dollars.<sup>37</sup> As a fake trial developed against Hermitage Capital (without Bill Browder or his team ever knowing about it), Russian government officials were entitled

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<sup>28</sup> *Id.* at 16.

<sup>29</sup> *Id.* at 20.

<sup>30</sup> *Id.* at 74.

<sup>31</sup> BILL BROWDER, RED NOTICE 14 (2015).

<sup>32</sup> *Id.* at 132.

<sup>33</sup> Lydialyle Gibson, *Reversal of Fortune*, THE UNIVERSITY OF CHICAGO MAGAZINE, <http://mag.uchicago.edu/law-policy-society/reversal-fortune>.

<sup>34</sup> *Bank accounts related to alleged fraud uncovered by Magnitsky frozen in France*, RUSSIAN LEGAL INFORMATION AGENCY (June 25, 2015, 12:05 AM), <http://rapsinews.com/news/20150625/274007999.html>.

<sup>35</sup> Browder, *supra* note 1, at 194.

<sup>36</sup> *Id.* at 205.

<sup>37</sup> *Id.*

to take the amount of taxes that Hermitage Capital had paid in 2007 - \$230 million dollars.<sup>38</sup> The word about this scam got to the actual Hermitage Capital personnel in a matter of weeks. On July 23<sup>rd</sup>, 2008 Bill Browder and his team, including Sergei Magnitsky, sent thorough complaints to every law enforcement and regulatory agency in the Russian state about the illegal actions of Russian officials. Likewise, they published the story in major news outlets such as the *New York Times* and Russia's *Vedomosti*.<sup>39</sup> This was a brave and unheard-of move from a foreign investing firm in Russia.

While Bill Browder was expelled from Russia, his lawyer Sergei Magnitsky did not run the same luck. Despite Browder insisting on Magnitsky leaving the country, the lawyer decided to stay and carry on with the investigation and reports from Moscow itself. Not long afterwards, on November 24<sup>th</sup>, 2008, Magnitsky's home was raided and he was taken into prison that very same day.<sup>40</sup> Although his trial had no real evidence and lacked of legal basis, Sergei Magnitsky was kept in prison for eleven months. During this time, he was continuously tortured and denied medical treatment when he developed several diseases due to the terrible conditions in which he was held captive.<sup>41</sup> The goal of the tortures was to get the lawyer to testify against Bill Browder and Hermitage Capital, as well as denying the results of his investigations. Despite being tortured constantly, Magnitsky never agreed to this.<sup>42</sup> Finally, Sergei Magnitsky was tortured to death on November 16th, 2009. He was only thirty-seven years old.<sup>43</sup>

After Sergei Magnitsky's death, Bill Browder launched a large international campaign to make his case known in the hopes of having his murderers accountable. This was not going to happen in Russia. The Interior Ministry of said country said in a press release that Magnitsky had died of "heart failure" and his passing was a shock to investigators.<sup>44</sup> Likewise, three days after Sergei Magnitsky was buried the Russian General Prosecutor's Office stated publicly that there had been "no wrongdoing by officials and no violations of the law" related

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<sup>38</sup> *Id.* at 223.

<sup>39</sup> *Id.* at 225.

<sup>40</sup> Browder, *supra* note 1, at 254.

<sup>41</sup> *Id.* at 248, 252, 255.

<sup>42</sup> *Id.* at 264.

<sup>43</sup> Browder, *supra* note 1, at 278.

<sup>44</sup> *Id.* at 285.

to Magnitsky's demise, and reinstated that the cause of his death had been heart failure.<sup>45</sup>

### PART III: MAGNITSKY RULE OF LAW ACCOUNTABILITY ACT OF 2012

Bill Browder took upon himself to bring justice for Sergei Magnitsky, and attempted to do so in 2012 by asking several US government officials to impose Proclamation 7750 (visa sanctions) on the more than sixty people connected to the Magnitsky case. US executives did not agree with this even though the Magnitsky case had all elements necessary for the application of the sanctions.<sup>46</sup> However, with the help of US Senator Jim McGovern and the support of Senator John McClain, the newly created Magnitsky Act was presented before the Senate in September 2010.<sup>47</sup> The Act intended to expose those involved with the Magnitsky case, ban them from entering the United States and freeze any of their assets in such country.<sup>48</sup>

It took two years to get the Magnitsky Act to be approved by the House. In 2012, as Russia joined the World Trade Organization, the US government found itself in need to repel the Jackson-Vanik amendment which forbade trade with Russia due to previous human rights abuses. This amendment was created in 1974 when the Soviet country forbade emigration from Jewish people out of the USSR. With Russia now in the WTO, there was great interest in the US to trade with such economic power but the Jackson-Vanik amendment impeded so. The Magnitsky Act team cleverly took advantage of this situation. In order to have this amendment repealed senators Cardin, McCain and others conditioned it to the passing of the Magnitsky Act.<sup>49</sup> It worked. Finally on November 16th, 2012, the Magnitsky Rule of Law Accountability Act was approved by the House with eighty nine percent of the votes, while at the same time the Jackson-Vanik act was repelled.<sup>50</sup> The Magnitsky Act indicated that all those related to the Sergei Magnitsky case would be held responsible, as well as those in future human rights violations in Russia. It was a success. While Congress does not pass most laws,

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<sup>45</sup> *Id.*

<sup>46</sup> Browder, *supra* note 1, at 289-97.

<sup>47</sup> *Id.* at 327.

<sup>48</sup> Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012, Pub. L. No. 112-208, 126 Stat. 1496 (codified in scattered sections on 19 and 22 U.S.C.).

<sup>49</sup> Browder, *supra* note 1, at 336.

<sup>50</sup> Browder, *supra* note 1, at 347.

clearly the Magnitsky Act had something peculiar about it that made it a success. Why did the U.S. approve sanctions about this specific human rights abuse in Russia when there are so many others across the world? Bill Browder had a clear response for this. When interviewed, he indicated: “The Magnitsky Act was about stopping Russia’s torturers and murderers from coming into the country, so you have a situation that there is not a single member or congressman that would lose a vote by banning Russian torturers and murderers. We had no political opposition.”<sup>51</sup>

Likewise, Browder indicated the repeal of the Jackson-Vanik amendment as another major element: “We had all the right political winds blowing in our favor of having a non-opposed political agenda but the thing that really worked perfectly for us was this moment, random moment, when the Jackson-Vanik amendment was being repealed. They wanted to repeal what was once the most important human rights legislation that has been put in existence, it was no longer operated but it was still on the books. They were going to repeal it while at the same time blocking the Magnitsky Act and that created a totally intolerable situation for the members of Congress. I’m not a religious man but I feel God was looking out for us to put together this one moment in time.”<sup>52</sup>

#### PART IV: SUCCESS OF MAGNITSKY ACT

The Magnitsky Rule of Law Accountability Act stirred a quick response from the Russian government. On December of 2012, only a couple months after the Magnitsky Act was passed, Vladimir Putin signed a Bill that forbid adoption of Russian children by U.S. citizens.<sup>53</sup> This act was such clear retaliation to the Magnitsky Act that it was informally called “anti- Magnitsky bill” by the media.<sup>54</sup> Newspapers such as *The New York Times* and *The New Yorker* explained the new laws as a consequence of the Magnitsky bill in their articles.<sup>55</sup> In Russia,

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> David M. Herszenhorn & Eric Eckholm, *Putin Signs Bill That Bars U.S. Adoptions, Upending Families*, THE NEW YORK TIMES, (Dec. 27, 2012), [http://www.nytimes.com/2012/12/28/world/europe/putin-to-sign-ban-on-us-adoptions-of-russian-children.html?\\_r=0](http://www.nytimes.com/2012/12/28/world/europe/putin-to-sign-ban-on-us-adoptions-of-russian-children.html?_r=0)

<sup>54</sup> Masha Lipman, *What’s Behind The Russian Adoption Ban?*, THE NEW YORKER, (Dec. 21, 2012), <http://www.newyorker.com/news/news-desk/whats-behind-the-russian-adoption-ban>

<sup>55</sup> *Id.*

the bill stirred protests among civil society and even members of the Orthodox Church pronounced their opinions against the ban.<sup>56</sup> Surveys carried by the Levada Centre in Russia show clear support from Russia civil society groups.<sup>57</sup> Regardless, president Putin did not back down.

Russian officials not only implemented the adoption bar to the US as retaliation for the Magnitsky Act, but also threaten other countries to do the same. In an open letter to the Irish House of parliament, the Russian ambassador to Dublin indicated that if Ireland passed the Magnitsky bar it would “have negative influence on the negotiations on the adoption agreement between Russia and Ireland being proceeded”.<sup>58</sup> Former president of Freedom House David J. Kramer and the Russian ambassador to the U.S. Sergei Kislyak had an exchange of words on this very subject in a debate on US-Russia policy at the Center for National Interest in Washington D.C. in 2003.<sup>59</sup> The Russian Ambassador denied there being any link between the Magnitsky Act and the Adoption Bar. When questioned about the threats to the Irish House of Parliament, Kislyak indicated not to be aware of them.<sup>60</sup>

Javier El-Hage, Chief Legal Officer of the Human Rights Foundation, indicated when interviewed that he considers the Magnitsky Act to have been successful, especially in two main aspects.<sup>61</sup> “One purpose is just to express the position from the world’s strongest democracy and the leader of the free world regarding one of the largest and most important countries on earth whose political system has eroded in the past 20 years into a full fledged dictatorship” El- Hage stated, “Expressing the United States support for the people that are suffering violations in Russia is the main purpose of this act – it punishes specific individuals involved in human rights violations of its own citizens”.<sup>62</sup>

An equally important purpose of the Magnitsky Act, according to El-Hage, was to prevent these human rights violations to happen again. “The second purpose that it fulfills is to try to debilitate the dictatorship in Russia, to try to change the set of incentives so that people that are

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<sup>56</sup> *Id.*

<sup>57</sup> David J. Kramer, *The Magnitsky Act Is The Right Thing To Do*, 29, WHY EUROPE NEEDS A MAGNITSKY LAW, (Elena Servettaz, ed. 2013).

<sup>58</sup> *Putin rejects foreign adoptions by same-sex couples*, BBC NEWS, (April 26, 2003), <http://www.bbc.com/news/world-europe-22310890>

<sup>59</sup> Kramer, *supra* note 59 at 28.

<sup>60</sup> *Id.* at 29.

<sup>61</sup> Interview with Javier El-Hage, Chief Legal Office of the Human Rights Foundation

<sup>62</sup> *Id.*

involved in Human Rights violations that are involved in torture know that there will be a consequence and a price to pay for doing those things in the free world” El-Hage indicated.<sup>63</sup> Julia Sibley had comments among the same lines: “It’s a way of saying ‘the emperor has no clothes,’ it creates a disincentive to people participating in state corruption, and it’s an important expression of solidarity with the Russian people, who are the real victims of corruption”.<sup>64</sup>

One of the main aspects that Bill Browder stressed when talking about the success of the Magnitsky Act is the fact that it is a bill against individuals and not an entire country. He compared: “It’s like a modern cancer drug. Instead of killing the patient it kills the cancer cells.”<sup>65</sup> Browder also stated that widespread sanctions hurt the people that they are supposed to protect while they have little to no impact on the elites responsible. “The Magnitsky Act singles them (individuals) out and it doesn’t make people feel nationalistic or any rage towards the west. It makes them feel happy, actually, that you’re going after the individuals.”<sup>66</sup>

In a more tangible aspect, denying corrupt Russian officials the opportunity to spend and save their money on the west is a direct and substantial consequence of the Magnitsky act. Not long afterwards Putin ordered government officials to repatriate money into the country.<sup>67</sup> However, the very reason corrupt Russian individuals hold their money in the west is because they themselves don’t trust the absence of rule of law inside country, as well as the lack of predictability in case influences and power shifts inside the Kremlin.<sup>68</sup> The Magnitsky Act puts a direct restraint in this aspect. Javier El-Hage of The Human Rights Foundation indicated: “Unfortunately most people who are either leaders or in these vertical structures in authoritarian governments around the world, all those guys love to go to the free world, to Europe, to the United States, to send their kids to study there, to visit Disney World, to open bank accounts in the free world – so freezing assets and denying visas of all these individuals involved in gross human rights violations, in this case in Russia, sends a powerful message that the free

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<sup>63</sup> *Id.*

<sup>64</sup> Interview with Julia Sibley, Director of Partnerships for Movements

<sup>65</sup> Browder, *supra* note 1, at 347.

<sup>66</sup> *Id.*

<sup>67</sup> David J. Krammer, *The Magnitsky Act Is The Right Thing To Do*, 29, WHY EUROPE NEEDS A MAGNITSKY LAW, (Elena Servettaz, ed. 2013).

<sup>68</sup> *Id.*



world does not tolerate living among these types of human rights violators.”<sup>69</sup>

It is important to acknowledge that while the Magnitsky Act cannot stop all human rights violations in Russia –neither did it intend to do so– it is necessary to put human rights in front of the agenda, especially when dealing with non-democratic regimes such as Russia. US Representative James McGovern stated in the book *Why Europe Needs a Magnitsky Law* that international diplomacy will never be able to achieve long-lasting nor sustainable results unless human rights play a vital part in it.<sup>70</sup> Cases like South Africa and Serbia are examples of this.

While meaningful change in authoritarian countries must indeed come from within, it is important to show solidarity and restrict the gains from corrupt individuals in such regime. This is what the Magnitsky Act did.<sup>71</sup>

Despite all the positive aspects as to why the Magnitsky Act has indeed been successful, there is a small negative aspect of which even Bill Browder is aware: It has not been used as aggressively as it should have. Julia Sibley indicated when interviewed that indeed the Magnitsky Act is not doing as much as it could due to how slow the “slow wheels of the government”.<sup>72</sup> Likewise, David J. Kramer believes much more could have been achieved already. “Because we have not aggressively implemented Magnitsky I don’t think it’s had the impact that it could. Of course events in Ukraine starting in late 2013 into 2014 and today largely overshadowed the Magnitsky Legislation and the impact it could have. But I think Ukraine related sanctions are no substitute for serious implementation of the Magnitsky sanctions, so we should be doing a much stronger job on that.”<sup>73</sup>

In any event, the Magnitsky Act has been a meaningful step forward for Human Rights across the globe and even greater in Russia’s specific case. Whether it has been implemented in an aggressive manner or not, it is now law in the U.S. and therefore it cannot be ignored: there are

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<sup>69</sup> Interview with Javier El-Hage, Chief Legal Office of the Human Rights Foundation.

<sup>70</sup> James P. McGovern, *Promotion of Human Rights Demands Collaboration*, in *WHY EUROPE NEEDS A MAGNITSKY LAW*, (Elena Servettaz, ed. 2013) at 24.

<sup>71</sup> *Id.* at 26.

<sup>72</sup> Interview with Julia Sibley, Director of Partnerships for Movements

<sup>73</sup> Kramer, *supra* note 59 at 28.

dates, reports and further criteria that must be respected and applied not only to Magnitsky case but also others in Russia.<sup>74</sup> The Magnitsky Act not only punishes but also prevents. Its success can also be measured in the response it has gotten from the Russian government: Putin announced in 2012 that combating the Magnitsky Act was at the top of his foreign policy goals.<sup>75</sup> Indeed, this piece of legislature has had an impact in many different levels. The fact that it stops corrupt government officials from using the money for which they broke human rights laws in the first place is a perfect punishment. In the words of David Crane, founder of Impunity Watch, \the Magnitsky Rule of Law Accountability Act “hits thugs where it hurts the most”.<sup>76</sup>

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<sup>74</sup> Krammer, *supra* note 59 at 28.

<sup>75</sup> *Putin Declares Fighting Magnitsky Sanctions One of His Top Foreign Policy Goals*, LAW AND ORDER IN RUSSIA (May 16, 2012), <http://lawandorderinrussia.org/2012/putin-declares-fighting-magnitsky-sanctions-one-of-his-top-foreign-policy-goals/>

<sup>76</sup> Interview with David Crane, Law Professor at Syracuse University College of Law

## APPENDIX

### **Magnitsky Act Interviews**

#### **Julia Sibley**

*Julia Sibley is the Director of Partnerships for Movements, an online platform that connects dissidents with assistance through crowdsourcing.*

#### **- How do you perceive the current state of Human Rights in Russia in comparison to Putin's first term in office?**

There has undoubtedly been a marked deterioration in human rights since Putin's first term. It's important to remember that Putin benefited from seemingly calming down what had been a chaotic landscape ruled by robber baron oligarchs and mafia. But what he did in bringing those destructive forces to heel was in fact aimed at concentrating power in his own hands and securing loyalty through patronage, rather than reinforcing the rule of law. This is where the link between corruption and human rights violations comes in--in order to maintain that kind of control, the concept of equal protection goes out the window; in order to corral the tremendous resources needed to keep the elite in lockstep, corruption is necessary. That's when whistleblowers like Magnitsky become victims.

#### **- What do you think were the main obstacles to have the Magnitsky Act passed?**

The main obstacle was the State Department and the White House, which were careful not to be publicly opposed to the Act, but privately tried to defang. That's because the foreign policy objective at that time (though it's now laughably moribund) was the "reset" with Russia, and it was felt that the Magnitsky legislation was provocative and disruptively punitive. Moscow also does a fairly good job hiring high-power PR firms and lobbyists to represent its interests in Washington, though they don't have the same kind of clout in the States as they do in Europe, where passing Magnitsky legislation has been much more of a challenge due to Russia's economic influence and relative proximity.

#### **- What could have made the passing of the law simpler?**

I'm not sure I'm the best person to answer that, as I wasn't on the Hill and inside the process. From my perspective, it was a pretty remarkable

exercise in single-minded focus by the team who got it passed. Bill and his team were able to get senior and immensely well-respected figures in the House and Senate on Board, and that combined with the moral clarity of Sergei's case made it very difficult to publicly oppose.

**- Is there anything that made the Magnitsky act peculiar in comparison to other Human Rights Laws?**

I think it's a very effective way to look at the challenge of disincentivizing bad behavior by human rights abusers--creating consequences for the abusers, and not for the people as a whole. That is in line with the evolving consensus that sanctions need to be deployed much more strategically.

**- How do you envision the possibility of the Magnitsky Act being applied globally and not only to Russia?**

I think that is much more of a challenge for obvious reasons--there are so many more constituencies ranged against you when you're going for a universal application, and you might start getting people rattled by the idea that perhaps an ally like Israel or Saudi Arabia could have sanctions imposed on individuals accused of violations. There are some very good rejoinders to that argument, but it's enough to scare off skittish Congressmen going into election season. So politically I think it will be much more difficult, though by no means impossible if they get the right team behind it.

**- How much of a success do you believe the Magnitsky Act has been?**

Politics is the art of the possible, so I would say that while it's not doing as much as it could be doing due to the slow wheels of government, it has had a concrete impact and sent an enormous message to the type of people who profit from corruption in Russia. It's saying that if you're going to engage in this kind of behavior, at a minimum you don't get to go spend your stolen money in the playgrounds of the Western rich.

The logic behind the act has certainly been borne out--we've seen Russia's behavior towards the human rights of both her own people and others internationally steadily worsen as their increasingly aggressive behavior went unopposed, so it's clear that instruments like the Magnitsky Act that stand up to that behavior are going to be more and

more important. It's a way of saying 'the emperor has no clothes,' it creates a disincentive to people participating in state corruption, and it's an important expression of solidarity with the Russian people, who are the real victims of corruption--not just in terms of the billions of dollars of state funds siphoned off to Putin's cronies, but also the victims of a system that has become primarily dedicated to protecting criminals rather than the people.

**David J. Kramer**

*David J. Kramer was United States Assistant Secretary of State for Democracy, Human Rights, and Labor from 2008 to 2009. He was President of Freedom House from October 2010 to November 2014.*

**- Why did the Obama administration not support the Magnitsky Act at first?**

The Obama administration is not unique in disliking sanctions that come from congress. Most administrations don't like sanctions imposed by the legislature. But I think they worried that (the) Magnitsky legislation would upset the Reset policy that they had, because you have to remember that it was first put forward in 2010 when the Reset policy was still very much in place. Medvedev was still president before Putin returned as president, and I think the administration feared that this kind of move would damage relations. The other element is, I would say, this administration has not attached any way nor importance on issues of Human Rights In Russia. The president did give a decent speech in July 2009 when he travelled to Moscow, but since then he barely has raised human rights concerns. They felt that it should have simply been a graduation of Jackson-Vanik for Russia and not a substitution for that legislation with Magnitsky.

**- What do you think made the Magnitsky act peculiar in comparison to other human rights acts that haven't passed through Congress?**

Well it's a very targeted piece of legislation which focuses on individuals engaged in gross human rights abuses so it's not against the country, it's not against the population, it's against individuals who engage in gross human rights abuses and it's aimed to act both as punitive measure to those already engaged in such abuses as a way to try to seek justice – but it also is to act as a deterrent, so that future abuses might be deterred because the individuals who might engage in

them would worry about being on the Magnitsky list. I think in that sense it is different than say the Jackson amendment or other pieces of legislation that were broader on scope. This is much more focused on individuals. Compare it for example to, this isn't quite a human rights legislation or action even, but sanctions for Ukraine have been both targeted on individuals but also much broader in their scope, whereas the Magnitsky bill has been more focused.

**-As I mentioned before I'm a human rights activist from Bolivia and I believe if this legislation were to go global and not just for Russia, it would have a great impact for other countries. Do you think it's realistic to expect this bill to go global?**

It's hard to say. When the Magnitsky legislation was first being proposed in 2010 no one thought that would pass. And you may recall that in the Fall of 2012 there were efforts to make the Magnitsky act global in that time and in fact the Senate was very interested in doing that, Senator Cardin who is the champion of the Magnitsky legislation became interested himself, Senator Levin from Michigan was also very interested in that. I support a Global Magnitsky bill but I argued in that time to focus it on Russia for several reasons. One was the House had already voted on it, it was not going to vote again. So if we wanted to have something, I felt something was better than nothing, having a piece of legislation focused on Russia was better than having no legislation at all and that would have been the case. Second, I do think there is value in targeting individual situations, countries such as Russia where such an authoritarian crackdown has taken place. With a global Magnitsky Bill the problem you face is that it's so broad and sweeping that it doesn't give the opportunity for serious debate and discussion of the Congress on the problems that may exist in certain countries. And without guidance or even direction from the Congress I worry that the administration won't implement a Global Magnitsky act in a serious way. Implementation of the Russian Magnitsky Act to me has been insufficient, with only 35 names in the public list and few others on the classified list. To really be effective it has to be implemented aggressively and the Obama administration has not done that. So there are also a number of business organizations, lobby groups that are strongly opposed to a Magnitsky Act. They worry about the impact it would have in doing business in places like China and Saudi Arabia and places like that. So there are a lot of obstacles, BUT I do think there is strong bi-party support in the U.S. Congress – this is not a republican

issue beating up on a democratic president, this is an issue that has both parties coordinate it in Congress.

**- Which is a rare thing.**

Yes.

**- That's the path in which my next question was going. How successful do you think the Magnitsky Act for Russia has been? Do you think it had the impact, the outcome that we were all expecting?**

No, because the situation has gotten worse - although I didn't expect that legislation would lead to a major overhaul on the human rights situation in Russia. The initial reaction if you recall was that Putin banned the adoption of Russian orphans by American citizens which is a horrible way for Putin to have responded, picking on the most vulnerable segment of the Russian population. Denying Russian orphans loving homes in the United States. And he did that clearly in response to the Magnitsky legislation, not because of Russian official explanations or problems with adoptions in the United States. There were some problems, but that is not the reason they passed that legislation and imposed that ban in that time. Because we have not aggressively implemented Magnitsky I don't think it's had the impact that it could. Of course events in Ukraine starting in late 2013 into 2014 and today largely overshadowed the Magnitsky Legislation and the impact it could have. But I think Ukraine related sanctions are no substitute for serious implementation of the Magnitsky sanctions, so we should be doing a much stronger job on that.

**- What impact do you think U.S. negotiations with Russia over Syria and ISIS will have now on the Magnitsky Act implementation? Do you think it will also undermine its effect?**

We should have indications of that possibly in the next week, when the administration will need to submit its annual report to the Congress - it might actually slip into the week after, the 14<sup>th</sup>. That will be an indication on whether we are moving ahead with this or if we have put it to the side. My hope is that there will be more names on the open, public, unclassified list and there may be some names added on the classified list. It is well known that Kadyrov is on the classified list, Mr. Bastrykin the head of the investigation committee is on the classified list, I think we should move those from the classified list to the

unclassified list. There's no more justification that I can see in keeping them on a classified basis. So that too would be a positive sign on demonstrating that we remain serious about this. It is law, the president of the United States signed it into law. It's the only way that Jackson-Vanik got lifted from Russia; so unlike legislation which is called for legal assistance as Ukraine, which the president has ignored, he can't ignore this. There are deadlines and there are criteria and other things that are set. So they can implement it in a weak fashion but they can't ignore it completely.

**David Crane**

*Mr. Crane served over three decades in the federal government of the United States. He is also the founder of Impunity Watch. He currently works as a Law professor in Syracuse University.*

**- How do you see the current status of human rights in Russia in comparison to Putin's first term in office?**

Surely Putin has gained personal control over what was once a democratic process, it has taken its time, it's been brutal in some places and subtle in others. This is a reflection really of the Russian state of mind. Why is he able to do this? Because the Russian citizen is used to being settled. Their past history of no democracy, and no tradition of democracy – their default is the strong man they are ready to respect and certain equipment which is a rather assertive foreign policy which is doing what the Russian citizen likes to see. So he is popular and he will continue to make these certain moves to show his power and his machismo. It is probable he will continue breaking the rules of the international community looking at the west, who don't look at the world like he does and in fact are having a tough time trying to figure this gentleman out.

**- How successful do you think the Magnitsky Act has been in punishing those involved in the Magnitsky case?**

It certainly has gotten the attention from Russia and the rest of the world; in fact, I heard that Putin one or two years ago said that one of his top five foreign policy priorities is to confront this situation regarding the Magnitsky Act. Other countries have done the same thing and he considers that a threat to his foreign policy. That's a clear signal that he is not happy with this and he is taking more of a combative mode to confront as opposed to resolve, to deal with a situation where a



human being was tortured. What's interesting is that he is personally aware of this, so Magnitsky Act passing in the U.S. obviously had media repercussions and other repercussions, which impeded the ability of individuals to adopt Russian children. It does have the threat of some type of embargo or stopping your ability to travel or freeze your assets: it hits these thugs where it hurts the most. Not in the moral or the political but in their purse, in their money and bank accounts. I have dealt with these type of thugs myself personally for many many years – when it comes to the money it's a very good detention. So yes, it has in fact impacted in many levels and it will continue to do so as we continue to expand the Magnitsky Act in other federal laws that go after those who torture human beings. The U.S. has been one of the major torturers over the past decade so this is a problem ourselves but that does not diminishes the intent of the Magnitsky Act and what it has done.

**- How do you envision the possibility of the Magnitsky Act to be applied globally and not only to Russia? Do you think it is realistic to expect so?**

The closest thing would be an international treaty and that is unlikely. We are seeing domestic solutions in using the Magnitsky Act as a model by which local governments sanction Russia and their policy of torturing individuals who oppose the government. The model is there. Freezing assets, limiting travel, these all certainly get attention from dictators. It gives them pause as to what they want to do to their citizens.

**Javier El-Hage**

*Mr. El-Hage is the Chief Legal Officer of the Human Rights Foundation which produces the Oslo Freedom Forum. He is an attorney graduated summa cum laude from Columbia University and he has published in Constitutional Law and International Human Rights Law.*

**- How successful do you believe the Magnitsky act has been in punishing those involved in the Magnitsky case?**

I think the Magnitsky Act has been successful; it has fulfilled its two main purposes. One purpose is just to express the position from the world's strongest democracy and the leader of the free world regarding one of the largest countries and most important countries on earth whose political system has eroded in the past 20 years into a full fledged dictatorship. After the fall of the totalitarian Soviet Union, Russia

attempted to do a transition into democracy and although it never became a fully democratic system, it was much closer to a fully democratic system then. Then it eroded to a competitive authoritarianism under Putin and it has consolidated itself by now as a fully authoritarian regime. Expressing the United States support for the people that are suffering violations in Russia is the main purpose of this act – it punishes specific individuals involved in human rights violations of its own citizens. That is one purpose.

The second purpose that it fulfills is to try to debilitate the dictatorship in Russia, to try to change the set of incentives so that people that are involved in Human Rights violations that are involved in torture know that there will be a consequence and a price to pay for doing those things in the free world. Unfortunately most people who are either leaders or in these vertical structures in authoritarian governments around the world, all those guys love to go to the free world, to Europe, to the United States, to send their kids to study there, to visit Disney World, to open bank accounts in the free world – so freezing assets and denying visas of all these individuals involved in gross human rights violations, in this case in Russia, sends a powerful message that the free world does not tolerate living among these types of human rights violators.

Those are the two aspects in which I think the Magnitsky human rights act has succeeded.

**- How much of a role do you think the Reset played in the continuous deterioration of Human Rights in Russia since it got no attention in the U.S.?**

I'm not too knowledgeable about that subject; I would recommend Garry Kasparov's latest book *Winter Is Coming*. He walks the reader through the U.S. foreign policy in regards of Russia for the past decades.

**- As a lawyer and someone who works with the legal aspect of human rights internationally, do you think it is possible or realistic to expect the Magnitsky Act to be applied globally and not only to Russia?**

I think it is possible and it is realistic. I think that as long as there is political will by the representatives of the American people in congress

and the leadership of a group of congressmen that have taken the lead of this, I think the Magnitsky act can be turned into a global Magnitsky act. There is in fact a bill that has been introduced for a few months already in Congress with this topic so as long as the application of the bill is narrow enough so it doesn't dilute the importance of the bill and the prospects of consistency of its application. There are two ways of doing that: One is to limit the application of the bill to those countries that are fully authoritarian or that are clearly authoritarian countries where there is an entire system of government that is behind gross human rights violations. This is very important because there are a lot of democratic countries around the world where there are human rights violations occurring but there are systems in place to address these issues, to bring some justice to the most serious human rights violations. I think a bill like this, as long as it focuses on authoritarian governments and the most emblematic violations within those countries, would definitively serve a good purpose. I do believe it's possible.

**Bill Browder**

*Bill Browder is the founder and CEO of investment fund Hermitage Capital, the Head of Global Magnitsky Justice Campaign and Author of Red Notice.*

**- What role do you think Obama's Reset policy played in the deterioration of human rights in Russia?**

Basically the Reset is an euphemism for appeasement. This is my theory, I can't prove this, but I think that Obama was awarded the Nobel Peace Prize before he became president, and he was awarded the Nobel Peace Prize for his goal of eliminating nuclear weapons which was one of his campaign pledges and everyone thought that was wonderful and so on and so forth. So he was awarded this Nobel Peace Prize for denuclearizing the world so – I think he really wanted to earn his Peace Prize even though he got in, sort of, in advance. And the way to earn it was to be able to negotiate nuclear arm reduction treaties with Russia, because they are the main holder of nuclear weapons. So effectively what the reset a policy – Obama's goal was to ask the Russians to reduce their nuclear arms which they were happy to do anyways because they have a lot of more nuclear arms than we do and they have a lot of stuff that was deconditioning because it wasn't working anymore. So they were pretty happy to give up on that, and in his case he was pretty happy to give up on everything else. And there are four or five other areas of U.S. National Interest prior to his presidency, which he gave up

on, and Human Rights was obviously the one that we are most interested. There was also the missile shield – They promised Czech Republic, Poland and other countries they were putting batteries of anti-missiles to shoot down Russian missiles and he said “We won’t do that anymore”. They gave up on any further NATO expansion – these were all things but Human Rights was at the top of these pile of things that had been done before which weren’t being done forward. It was really very obvious to me when I was in Washington dealing with all this stuff that they were just not interested in human rights. They talk about human rights but talking and acting are two very different things.

**- Yes, you made that clear in your book and I loved that – many people “express concern” but don’t take any further action. That’s it.**

Yes and expressing concern is just a totally meaningless exercise. I should point out it wasn’t only the U.S. government that operated on this basis, it was all governments. Governments would say “We brought up the Magnitsky case”. I can just picture David Cameron had a list of cases, fifteen cases, and probably Putin or Medvedev or whoever was at the time, they had their list of fifteen cases and they all would just read out in monotone very quickly at the beginning of meetings and then go “Ok, let’s get down to business now”. There wasn’t anyone who with true sincerity would brought up the case.

**- How do you view the state of human rights in Russia now in comparison to Putin’s first term in office?**

Basically human rights have gotten worse and worse and worse every year since Putin came into office, and it’s now at a point where there are no human rights in Russia – there is no democracy, there is no free media, there is no rule of law. Anybody who does anything that is contrary to the power or money for Putin and the people around him basically they are tortured, killed, disappeared, exiled, or imprisoned. So now it’s a situation which is completely and unabashedly disastrous for human rights.

**- Why do you think he takes this approach of going ahead and killing members of the opposition instead of just expelling them or putting them in jail like other countries are doing?**

It started out that way. The great downside of being an opposition activist three years ago was jail. What has happened is that what Putin has seen as his own personal risk of being overthrown has increased dramatically for two reasons. One because the Ukrainian president was overthrown and that is one of these contagious situations like the Arab Spring. It was too terrible a symbol to allow to have happened. The second thing is the economy which had been doing well during Putin's first two terms and started to stagnate and go down. So before people were much more accepting than when things are going down. So as a result of that he became much more scared. While putting someone in jail was enough to calm his fears, as things got scarier Putin needed to take more drastic action. And the killing of Boris Nemstov in front of Kremlin – that is where Russia crossed from jailing to killing opposition politicians.

**- Do you see Putin staying much longer?**

Putin is now in a weak office in his current situation – Putin has stolen a lot of money from Russia, he has imprisoned and killed his enemies, and in a place like Russia you can't just say "Okay". It's like being a mafia boss, you can't just have a peaceful and quiet retirement as a mafia boss. If you were to retire, then the money you stole would be taking away and you very likely would be imprisoned and possibly killed. So Putin has no exit strategy. There is no way he can exit and save himself. So as a result of that, he's going to stay as long as he can stay. How long is that? Nobody knows the answer. In his perfect world he would be able to stay until he dies of natural causes and he's got a proper succession plan and that could be in twenty years time. He will be the longest serving head of state of Russia in history.

**- Garry Kasparov and others have criticized the U.S. for joining forces with Putin to fight ISIS. How do you feel about this?**

Well first of all Putin is a terrorist who has killed more people than ISIS has. Secondly, Putin is not fighting ISIS, he is fighting the forces that are fighting Assad. Third, ISIS is a pinprick compared to the danger that Putin poses for the world. He's a mad man who has all the weapons and

all the power of a recognized sovereign state so I think it's absolute foolishness to get involved with Putin in anything.

**- Now speaking about the Magnitsky act specifically, what do you think made it peculiar so that it got passed by Congress? Many human rights acts don't get passed.**

They really don't, this is a real thing. If you actually go back to previous Congress before the Magnitsky act got passed, I think there were something like a hundred and thirteen laws passed, forty-two of them were naming post-offices or something ridiculous like that. It's very very difficult to get any legislation passed in Washington, but then there are several things that allowed the Magnitsky act to work. First, there was no domestic counter-lobby. In other words, if you're talking about eastern pipelines there is people who wanted oil, there is people that defend the environment, there are arguments on either side and that's going to be really hard to get through. If you talk about Medicare reform there is people who are going to want to use Medicare, people who won't. But the Magnitsky act was about stopping Russia's torturers and murderers from coming into the country so you have a situation that there is not a single member or congressman that would lose a vote by banning Russian torturers and murderers. So we had no political opposition. But we did have what I call administrative opposition, which is that the only people against the Magnitsky Act was the Obama administration itself. And in theory the Obama administration had the ability to block it through different technical means that I described in my book. We had all the right political winds blowing in our favor of having a non-opposed political agenda but the thing that really worked perfectly for us was this moment, random moment, when the Jackson-Vanik amendment was being repealed. And so they wanted to repeal what was once the most important human rights legislation that has been put in existence, it was no longer operated but it was still on the books. They were going to repeal it while at the same time blocking the Magnitsky Act and that created a totally intolerable situation for the members of Congress. So they basically said: "We are not going to allow you to repeal Jackson-Vanik"- and there was huge business interest in repealing Jackson-Vanik. I describe Washington as playing checkers, not chess. I'm not a religious man but I feel God was looking out for us to put together this one moment in time.

**- Do you see the Magnitsky Act becoming global anytime soon? What do you think is the main obstacle for that?**

We had a lot of opposition from the Russian government to the American government. Now we would have hundreds of countries – Bahrainis, Chinese, Saudi Arabians – all sort of people, what I jokingly refer to as the “good” human rights violators. There are congressmen that have big Chinese factories in their district, there’s all sorts of elements – it’s a much more complicated thing to do. Because it involves so many more countries there’s an argument being made that it’s actually going to be really expensive to monitor and implement this. We have a lot of opposition. Having said that, we also have a lot more support because every group – from Bolivian activists, to Tibetan activists to Chinese activists – everybody has got an interest in this thing happening. The Global Magnitsky Act is currently stuck in the first stage in the House, and we haven’t got it through a committee in the House and there’s some political problems of people who don’t want to get involved in this which we have to overcome. In a certain way, it’s easier to do it against one country because we had one case and one country which demonstrates it all. It becomes much more nebulous when you talk about it theoretically so we have a lot of more work to do to get it global – and there is people who want to make it global and I hope we can succeed in doing it in this Congress. There’s one very big problem with the global Magnitsky act though as it stands right now, which is that the wording doesn’t force the administration to sanction anybody. Under the Russian Magnitsky act the wording says “the President shall sanction” people who do this and this and this. Under the global Magnitsky act it says “the president may sanction” this and this and this, and may is a way of saying that he can do it right now, he doesn’t need the authority to sanction or do anything. So it’s closer than we were to a proper human rights legislation but still it allows the president out if he wants to have an out. Having said that, I think it will be a great piece of legislation to rally around, when it’s passed it will open debate and discussion about many issues, puts the State Department on the defensive if they don’t do something, etcetera. It is still worthwhile to do but it will never have the same dramatic impact that the Russian Magnitsky act had.

**- I really hope it passes because it is a legislation that goes against specific individuals and not against a country and its population as a whole.**

It's like a modern cancer drug. Instead of killing the patient it kills the cancer cells. I'm a non-believer of wide-spread sanctions because the people who gets hurt with the sanctions are the ones you are trying to protect, and the elite goes on comfortably even with sanctions. The Magnitsky Act singles them out and it doesn't make people feel nationalistic or any rage towards the west. It makes them feel happy, actually, that you're going after the individuals.

**- Why do you continue to fight this specific fight?**

Basically because it's so wrong and heartbreaking what they did to him, and it's the only thing that gives me any peace to know that I'm going after to get back to them. After what happened I don't feel at peace with myself, I often feel sad or angry. After having a good day, making progress somewhat on the Magnitsky act I can go home and sleep thinking that I have done the most that I can do.



PROTECTING THE UNPROTECTED: WHY UNACCOMPANIED ALIEN CHILDREN  
SHOULD BE AFFORDED THE RIGHT TO LEGAL COUNSEL

*By: Josh Goldstein*

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I would like to thank my family for all they have done to help me get to this point and make me the person I am today, my mentors, friends and family here at SUCOL for encouraging me to pursue this topic, and to the great editorial staff at *Impunity Watch* for reviewing, editing and reading this note.

## INTRODUCTION

Keybi is basically like any other sixteen year old.<sup>1</sup> A tenth grader at Progress High School in New York City, Keybi plays soccer at school and attends church with his family.<sup>2</sup> But Keybi is just one of many minors who gained entry to the United States by himself, who crossed the border in an effort to flee horrifying gang violence, starvation and lack of parental care at home in Honduras.<sup>3</sup> After being detained by immigration officials, Keybi was put in the custody of his uncle in New York City, where Keybi still lives.<sup>4</sup> New York City's public advocate, Letitia James, argued Keybi's case before a local family court judge, who granted him special immigrant judicial status.<sup>5</sup> This would pave the way for Keybi to succeed in a dismissal hearing.<sup>6</sup>

Keybi's fate, unfortunately, is the exception to the rule. There are thousands upon thousands of children like Keybi who have not the same amount of legal help or the same amount of luck. These children are referred to as "Unaccompanied Alien Children" ("UACs"). A UAC is a child like any other, except that the UAC designation applies upon arrival at the American Boarder.<sup>7</sup> Some come from bordering or contiguous countries such as Canada and Mexico, and many more come from non-contiguous countries, including many Central American states.<sup>8</sup> When these children get to the United States, they are separated into two categories based on whether their country of origin is contiguous or non-contiguous (bordering or non-bordering).<sup>9</sup> From there, they are screened to make sure they are not victims of human trafficking and then given a health examination.<sup>10</sup> The

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<sup>1</sup>Jillian Jorgensen, *Letitia James Represents Unaccompanied Minor In Immigration Case*, NEW YORK OBSERVER (Mar. 11, 2015), <http://observer.com/2015/03/letitia-james-represents-unaccompanied-minor-in-immigration-case/>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Jorgensen, *supra* note 2.

<sup>7</sup> Administration of Children and Families Office of Refugee Resettlement, *Who We Serve – Unaccompanied Alien Children* (Oct. 2, 2012), <http://www.acf.hhs.gov/programs/orr/resource/who-we-serve-unaccompanied-alien-children>.

<sup>8</sup> Haeyoun Park, *Children at the Border*, N.Y. TIMES (Oct. 21, 2014), [http://www.nytimes.com/interactive/2014/07/15/us/questions-about-the-border-kids.html?\\_r=0](http://www.nytimes.com/interactive/2014/07/15/us/questions-about-the-border-kids.html?_r=0).

<sup>9</sup> Lazaro Zamora, *Unaccompanied Alien Children: A Primer*, BIPARTISAN POLICY CENTER (July 21, 2014), <http://bipartisanpolicy.org/blog/unaccompanied-alien-children-primer/>.

<sup>10</sup> *See Id.*

UACs from non-contiguous countries are subsequently required to go to an Immigration and Naturalization Service ("INS") hearing to plead their case as to why they should or should not remain in the United States.<sup>11</sup> In such a hearing, the UAC must convince the tribunal, most often without any sort of legal representation, to let him stay in America.<sup>12</sup>

This note will focus on this last piece of the UAC experience – the uncomfortable fact that when a UAC from a non-contiguous country goes to his/her immigration hearing, he will most likely do so without any sort of legal representation. This note will focus on how the United States government enforces this policy in conjunction with its handling of the 2014 Immigration Crisis, in which thousands of UACs flooded the southern border of the United States.

#### PART I: THE UNITED STATES' LEGAL DUTIES TO UACS

When a UAC appears at the United States border, the child is immediately considered a potential victim of human trafficking under the Trafficking Victims Protection Reauthorization Act ("TVPRA").<sup>13</sup> The TVPRA was passed in 2000 and was reauthorized by President George W. Bush in 2005, with an amended version that was passed in 2008.<sup>14</sup> In the 2008 reauthorization, provisions were added to govern the screening of UACs as potential human trafficking victims and to delineate how the UACs were to be treated based on where they came from.<sup>15</sup> Under existing repatriation agreements between the United States and Canada and the United States and Mexico, UACs from contiguous countries are screened and then quickly returned to their country of origin.<sup>16</sup> If the UAC is not from a contiguous nation, the UAC is screened by the Department of Health and Human Services and then sent to an immigration court for a formal removal proceeding.<sup>17</sup>

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<sup>11</sup> *Id.*

<sup>12</sup> *See Id.*

<sup>13</sup> A child, for this note, is a person under the age of 18.

<sup>14</sup> Trafficking Victims Protection Reauthorization Act of 2005, U.S. DEP'T ST., <http://www.state.gov/j/tip/laws/61106.htm> (last visited April 10, 2016).

<sup>15</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, U.S. DEP'T ST., <http://www.state.gov/j/tip/laws/113178.htm> (division based on whether the UACs came from a contiguous or non-contiguous country).

<sup>16</sup> Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008).

<sup>17</sup> Lazaro Zamora, *Unaccompanied Alien Children: A Primer*, BIPARTISAN POLICY CENTER (July 21, 2014), <http://bipartisanpolicy.org/blog/unaccompanied-alien-children-primer/>.

If a UAC comes from a non-contiguous country, the UAC is not guaranteed, nor is the UAC likely to receive, legal counsel paid for by the government during a formal removal proceeding.<sup>18</sup> To acquire representation, the UAC would have to either be given legal funding under a small scale government funded program, retain private counsel, or be lucky enough to get pro bono counsel.<sup>19</sup> This is uncommon, however, as only 30% of UACs actually receive representation.<sup>20</sup> The processes of legal representation for UACs will be discussed at a further point in this Note, but at this point, it should be highlighted that the chance of legal representation for UACs is quite limited.<sup>21</sup>

Current United States immigration law specifically states that when a person is before an immigration court, they can be afforded “the privilege of being represented (at no expense to the Government) by such counsel . . . as he shall choose.”<sup>22</sup> This clearly indicates that the United States government has decided that a person, whether adult or child, will not be supplied with free legal counsel. This inevitably results in many UACs being incapable of rendering legal counsel. As a result, this lack of access to counsel results in a recurring deprivation of the due process rights enjoyed by United States citizens. Thus, there is a clear difference between the rights of citizens and non-citizens simply from a statutory perspective. The United States’ legal duty towards UACs is merely to process them, perform health screenings, determine whether the UAC is seeking any sort of asylum and if not, to put them before an immigration court where the UAC will most likely be returned to their home country.

It should be noted that there are several forms of legal relief for immigrant children. Such remedies include asylum, Special Immigrant Juvenile Status, the acquisition of a U-Visa or a T-Visa, a Deferred Action for Childhood Arrivals and of course, prosecutorial discretion.<sup>23</sup>

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<sup>18</sup> Kate M. Manuel, *Aliens’ Right to Counsel in Removal Proceedings: In Brief*, CONGRESSIONAL RESEARCH SERVICE (March 17, 2016), <https://www.fas.org/sgp/crs/homesec/R43613.pdf>.

<sup>19</sup> Alan Greenblatt, *What’s Causing the Latest Immigration Crisis? A Brief Explainer*, NAT’L PUB. RADIO (July 9, 2014, 10:54 AM), <http://www.npr.org/2014/07/09/329848538/whats-causing-the-latest-immigration-crisis-a-brief-explainer>.

<sup>20</sup> Mariano Castillo, *For Immigrant Children, Fate in U.S. A Roll of the Dice*, CNN (Oct. 7, 2014), <http://www.cnn.com/interactive/2014/10/us/immigrant-children/>.

<sup>21</sup> *Id.*

<sup>22</sup> 8 U.S.C. § 1362 (2015).

<sup>23</sup> U.S. Committee for Refugees and Immigrants, *Guide to Common Forms of Legal Relief for Unaccompanied Immigrant Children*, 2-8,

## PART II: THE UAC IMMIGRATION CRISIS OF 2014

During the summer of 2014, there was a massive increase in the number of children asylum seekers/UACs entering the United States.<sup>24</sup> In fact, since October 2013, more than 52,000 children sought asylum in the United States, which is double the amount of children who sought asylum in the previous year and nearly ten times the amount of children who sought asylum in 2009.<sup>25</sup> President Obama referred to the massive influx as a “humanitarian crisis.”<sup>26</sup>

Most attributed the stark rise in UACs to substantial safety concerns in the UACs' various home countries.<sup>27</sup> Several Central American countries including El Salvador, Honduras, and Guatemala experienced a surge in gang and drug-related violence.<sup>28</sup> Poverty is also a majority factor contributing to the increase in UACs.<sup>29</sup> There was also a disinformation campaign spread by opportunistic smugglers that distorted the United States' immigration policy.<sup>30</sup> According to Homeland Security Secretary Jeh Johnson, the perpetrators of this campaign said that the government was issuing free passes.<sup>31</sup> Thus, many parents sent their kids to the United States for greater economic opportunity and a greater opportunity to live in a safe environment.<sup>32</sup>

What resulted was an unprecedented influx of UACs to the U.S., some coming from thousands of miles away just to have a chance to live in the

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<http://www.refugees.org/assets/documents/hq/-forms-of-legal-relief.pdf> (last updated July 2013).

<sup>24</sup> Haeyoun Park, *Children at the Border*, N.Y. TIMES (Oct. 21, 2014), [http://www.nytimes.com/interactive/2014/07/15/us/questions-about-the-border-kids.html?\\_r=0](http://www.nytimes.com/interactive/2014/07/15/us/questions-about-the-border-kids.html?_r=0).

<sup>25</sup> Greenblatt, *supra* note 20.

<sup>26</sup> *Why Are So Many Children Trying to Cross the U.S. Border?*, BRITISH BROADCASTING CORP. (Sept. 30, 2014), <http://www.bbc.com/news/world-us-canada-28203923>.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Elizabeth Kennedy, *No Childhood Here: Why Central American Children Are Fleeing Their Homes*, AMERICAN IMMIGRATION COUNCIL (July 2014), [http://www.immigrationpolicy.org/sites/default/files/docs/no\\_childhood\\_here\\_why\\_central\\_american\\_children\\_are\\_fleeing\\_their\\_homes\\_final.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/no_childhood_here_why_central_american_children_are_fleeing_their_homes_final.pdf).

<sup>30</sup> DEP'T OF HOMELAND SEC., STATEMENT BY SEC'Y JOHNSON ABOUT THE SITUATION ALONG THE SW. BORDER. (2014).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

United States.<sup>33</sup> Thus, the United States government was presented with substantial administrative and legal challenges. In particular, the government faced the financial burden of placing the UACs with relatives or foster care, resulting in President Obama having to ask for emergency funding.<sup>34</sup>

It should also be noted that for the first time in years, significant attention was drawn to such a substantial immigration issue. The issue prompted organizations such as the American Bar Association to issue strongly worded releases on the lack of representation for UACs.<sup>35</sup>

Soon after the crisis became the subject of considerable media coverage, President Obama requested \$3.7 billion in funds for additional immigration judges, increased border security, a public awareness campaign against the existing disinformation campaigns as well as funds for medical services and transportation costs.<sup>36</sup> Congress did not agree to the president's request, causing the Department of Homeland Security to reprogram approximately \$405 million from disaster relief funds to deal with the impending crisis.<sup>37</sup> This request sent a clear signal that President Obama was serious about border security by emphasizing that the United States was committed to removing UACs from America in the least amount of time and within the confines of the law.<sup>38</sup>

After the initial influx during the early summer months, the number of UACs and undocumented adults decreased significantly.<sup>39</sup> In August 2014,

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<sup>33</sup> *Why Are So Many Children Trying to Cross the U.S. Border?*, BRITISH BROADCASTING CORPORATION (Sept. 30, 2014), <http://www.bbc.com/news/world-us-canada-28203923>.

<sup>34</sup> See Hannah Rappleye, *Undocumented and Unaccompanied: Facts, Figures on Children at the Border*, NBC NEWS (July 9, 2014), <http://www.nbcnews.com/storyline/immigration-border-crisis/undocumented-unaccompanied-facts-figures-children-border-n152221>.

<sup>35</sup> *A Humanitarian Call to Action: Unaccompanied Children in Removal Proceedings*, AMERICAN BAR ASSOCIATION (June 3, 2015), <http://www.americanbar.org/content/dam/aba/administrative/immigration/UACStatement.authcheckdam.pdf>.

<sup>36</sup> Rappleye, *supra* note 35.

<sup>37</sup> STATEMENT BY SEC'Y JOHNSON, *supra* note 31.

<sup>38</sup> FACT SHEET: EMERGENCY SUPPLEMENTAL REQUEST TO ADDRESS THE INCREASE IN CHILD AND ADULT MIGRATION FROM CENTRAL AMERICA IN THE RIO GRANDE VALLEY AREAS OF THE SW. BORDER, THE WHITE HOUSE (July 8, 2014), <https://www.whitehouse.gov/the-press-office/2014/07/08/fact-sheet-emergency-supplemental-request-address-increase-child-and-adu>.

<sup>39</sup> M. Chishti, and F. Hipsman, *Unaccompanied Minors Crisis Has Receded from Headlines But Major Issues Remain*, MIGRATION POLICY INSTITUTE (Sept. 25, 2014),

for example, “3,141 unaccompanied children and 3,295 families [were] apprehended at the border that month, down from 10,622 children and 12,772 families in June.”<sup>40</sup> In that time, the federal government engaged in a massive campaign to catch immigration smugglers and Mexico did so as well.<sup>41</sup> The crisis eventually receded from the headlines in the late summer, but that does not mean that the crisis somehow ceased to exist.

### PART III: WHY UACs SHOULD HAVE ACCESS TO LEGAL COUNSEL IN DEPORTATION PROCEEDINGS

For those UACs who made it into the United States, deportation proceedings have occurred at an alarming rate: immigration courts have been tasked with conducting over 800 hearings per week, causing a significant backlog.<sup>42</sup> Over half of the cases received continuances by judges so that the affected parties could find legal representation, but those continuances were only for a very limited amount of time, ranging from 60 days or less.<sup>43</sup> Moreover, 85% of completed cases ended with orders of removal, which carry significant criminal penalties and make it increasingly harder for people faced with this order to reenter the United States legally at a later time.<sup>44</sup> Out of the completed cases, 94% of children who were issued removal orders underwent their removal hearings without legal representation – this means that many cases were adjudicated in absentia.<sup>45</sup>

It is vastly more likely for a case to be decided unfavorably for a UAC if done in absentia, and it is more likely to be conducted in absentia if the UAC does not have access to legal representation.<sup>46</sup> In fact, “according to recent data released by the Transactional Records Access Clearinghouse, juveniles who have legal representation in immigration proceedings are permitted to remain in the United States, at least temporarily, in nearly 50 percent of cases, while nine in ten juveniles without lawyers are ordered

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<http://www.migrationpolicy.org/article/unaccompanied-minors-crisis-has-receded-headlines-major-issues-remain>.

<sup>40</sup> Brianna Lee, *2014 Was The Year of the Child Immigrant Crisis, And It May Reappear in 2015*, INTERNATIONAL BUSINESS TIMES (Dec. 27, 2014), <http://www.ibtimes.com/2014-was-year-child-immigrant-crisis-it-may-reappear-2015-1765284>.

<sup>41</sup> *Id.*

<sup>42</sup> Lee, *supra* note 41.

<sup>43</sup> David Rogers, *Many Child Migrants Still Lack Lawyers*, POLITICO (Nov. 6, 2014), <http://www.politico.com/story/2014/11/child-migrants-lawyers-112654>.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

deported.”<sup>47</sup> Cases adjudicated in absentia account for about 30% of total immigration cases of unaccompanied minors.<sup>48</sup> It is evident that there is a clear difference between the outcome of the immigration proceedings for a UAC who is able to obtain legal representation, and a UAC who is unable to obtain legal representation.

There are also facts we inherently know about children, especially when they are defendants in a legal proceeding. We know that the Supreme Court has expressly held that minors have the right to counsel as a matter of due process.<sup>49</sup> The Court held as such in *In Re Gault*:

The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child “requires the guiding hand of counsel at every step in the proceedings against him.”<sup>50</sup>

Thus, the Court held:

The Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.<sup>51</sup>

Moreover, the Court has acknowledged that minors possess vulnerabilities such as a lack of maturity, susceptibility to outside pressures and a lack of character development when compared to adults.<sup>52</sup> It is well established that these vulnerabilities must be compensated for when a minor is the subject of a legal proceeding, and is entitled to counsel as a result.<sup>53</sup>

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<sup>47</sup> Chishti et al., *supra* note 40.

<sup>48</sup> Chishti et al., *supra* note 40.

<sup>49</sup> *In re Gault*, 387 U.S. 1, 36 (1967) (quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932)).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Roper v. Simmons*, 543 U.S. 551, 570 (2005); *see also Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982).

<sup>53</sup> *Id.*



This understanding of the Due Process Clause in the Fourteenth Amendment should not change, despite the fact that UACs are not American citizens. In fact, the legal framework for the appointment of counsel for a minor already exists in the context of voluntary departures. Under C.F.R. § 1240.10(c), unrepresented minors cannot make an admission of removability before a court without the presence of counsel.<sup>54</sup> In fact, “the clear recognition of the plight of unaccompanied minors led to the amended treatment during voluntary departure admissions.”<sup>55</sup> This, however, in no way guarantees the quality of legal representation to minors in voluntary deportation proceedings.<sup>56</sup>

Perhaps the more potent vehicle to assert a right to counsel for minors in deportation proceedings is through the Sixth Amendment. The Court recently held in *Padilla v. Kentucky* that the risk of deportation should be extracted from the ambit of Sixth Amendment collateral consequences because of the graveness and severity of deportation.<sup>57</sup>

*Padilla* was a case that differentiated greatly from its predecessors, as it changed the Court’s definition of deportation in the context of criminal proceedings. Prior to *Padilla*, the Court viewed a deportation as, “merely a ‘collateral’ consequence of a criminal conviction; because deportation was not part of the criminal sentence because the sentencing judge could not himself deport someone, it was not held to be a ‘direct’ consequence.”<sup>58</sup> In *Padilla*, however, the Court began to align with modern jurisprudence on the issues “suggesting that deportation (but perhaps not exclusion) may fall in the crease between civil and criminal proceedings.”<sup>59</sup>

The notion that a deportation is a unique event in the legal system that requires the assistance of counsel, and will therefore fall under Sixth Amendment jurisprudence, is a legal construct solidified by *Padilla*.<sup>60</sup> This framework, in conjunction with the Court’s holdings on the unique rights

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<sup>54</sup> 8 C.F.R. § 1240.10(c) (2013).

<sup>55</sup> Samantha Casey Wong, *Perpetually Turning Our Back to the Most Vulnerable: A Call for the Appointment of Counsel for Unaccompanied Minors in Deportation Proceedings*, 46 CONN. L. REV. 853, 871 (2013).

<sup>56</sup> *Id.*

<sup>57</sup> *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010).

<sup>58</sup> Stephen H. Legomsky, *Transporting Padilla to Deportation Proceedings: A Due Process Right to the Effective Assistance of Counsel*, 31 ST. LOUIS U. PUB. L. REV. 43 (2011).

<sup>59</sup> Legomsky, *supra* note 59.

<sup>60</sup> *Padilla*, 559 U.S. at 366.

and requirements of minors in the judicial system, should provide a sufficient basis upon which courts should require the effective assistance of counsel for UACs in deportation proceedings. Though the facts of *Padilla* are not on point because the defendant in *Padilla* was not a UAC, that distinction should not result in a different outcome - a UAC, like the defendant in *Padilla*, would face the same grave consequences in a deportation hearing.<sup>61</sup>

There is however, a more practical issue that underlies the dearth of representation for UACs. The primary reason there is such a significant backlog in the immigration court system is the lack of government funds available to immigration courts and legal services. This past fiscal year, immigration courts were allocated \$351 million.<sup>62</sup> Though this is a \$36 million increase from last year's appropriation, it pales in comparison to the \$16.2 billion spent on overall border security in the last fiscal year.<sup>63,64</sup> The Department of Health and Human Services allocated \$9 million towards "post release legal services" to up to 2,600 children - \$4.2 million from its 2014 allocation and the rest from a continuing resolution that expired last month.<sup>65</sup> This will result in about \$3,460 for legal services per child.<sup>66</sup>

That grant, however, does not rectify the problem - it merely aids it. Though the United States government has provided funds for the legal representation of 2,600 UACs, it did not provide funds for the remaining 55,500 UACs.<sup>67</sup> It should also be noted that the United States' appropriation would not be the only source of funding for legal representation for UACs. In fact, the \$9 million was "added to existing grants from the U.S. Conference of Catholic Bishops and the U.S. Committee for Refugees and

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<sup>61</sup> *Id.*

<sup>62</sup> Lee, *supra* note 41.

<sup>63</sup> Louis Jacobson, *Luis Gutierrez says U.S. spends more on immigration enforcement than other agencies combined*, POLITIFACT (July 15, 2014), <http://www.politifact.com/truth-o-meter/statements/2014/jul/15/luis-gutierrez/luis-gutierrez-says-us-spends-more-immigration-bor/>.

<sup>64</sup> That is not to say that those figures should necessarily be compared, but there is an argument to be made that an efficient and thorough immigration court system is an important facet to this nation's border security.

<sup>65</sup> Rogers, *supra* note 44.

<sup>66</sup> Niraj Chokshi, *Obama Administration to Provide \$9 million in Legal Help to Undocumented Children*, THE WASHINGTON POST (Oct. 2, 2014), <http://www.washingtonpost.com/blogs/govbeat/wp/2014/10/02/obama-administration-to-provide-9-million-in-legal-help-to-undocumented-children/>.

<sup>67</sup> Julia Preston, *Money Allocated for Immigration Lawyers*, THE NEW YORK TIMES (Sept. 30, 2014), <http://www.nytimes.com/2014/10/01/us/money-allocated-for-immigration-lawyers-.html>.

Immigrants.”<sup>68</sup> Immigration groups involved in the work include Catholic Charities, the Legal Immigration Network and the Immigrant Child Network” as well as a \$2 million grant from the Department of Justice.<sup>69,70</sup> Despite this, the legal representation of 58,100 UACs in the past year, let alone an untold number of future UACs, should not be left largely in the hands of private organizations. Though a legal framework is beginning to exist for UACs to gain legal representation, the practical and political side of this crisis is far from being resolved, resulting in the same dichotomy that existed even before the Court issued its ruling in *Padilla* and the immigration crisis during the summer of 2014 occurred.

#### PART IV: WHERE DO WE GO FROM HERE?

There is a lot of information that tells a rather simple sounding, yet remarkably complex story. Its simplicity registers in an emotional appeal. UACs should get legal representation because it is unmistakably the right thing to do and is in line with our understanding and enforcement of the Sixth Amendment. Further, the Court acknowledged in *Padilla* that deportation is a grave consequence.<sup>71</sup> Thus, in many cases, UACs are at a severe disadvantage because without the means to pursue legal representation or the knowhow to acquire sufficient legal representation, the United States government is essentially deciding the result of a hearing before the hearing even occurs. UACs should have greater access to legal counsel in this context because of their juvenile nature and the likelihood that they entered the country not of their own volition. By providing access to legal counsel, if these juveniles are, in fact, deported as a result of the hearing, they may have a chance to lawfully re-enter the country and go through the legal immigration/naturalization process in the future.

The crisis that happened during the summer of 2014 exemplifies this point further. 52,193 children did not come to the United States over an eight-month period, between October 2013 and May 2014, at random.<sup>72</sup> In many cases, the children faced horrifying living conditions, were potential/past victims of violent crimes and had no money to support an

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<sup>68</sup> Stephanie Francis Ward, *Federal Government Announces \$9M in Funding for Unaccompanied Minors' Counsel*, ABA JOURNAL (Oct. 1, 2014), [http://www.abajournal.com/mobile/article/federal\\_government\\_announces\\_9\\_million\\_in\\_funding\\_for\\_unaccompanied\\_minors](http://www.abajournal.com/mobile/article/federal_government_announces_9_million_in_funding_for_unaccompanied_minors).

<sup>69</sup> *Id.*

<sup>70</sup> Chishti et al., *supra* note 40.

<sup>71</sup> *Padilla*, 559 U.S. at 366.

<sup>72</sup> Rappleye, *supra* note 35.

education.<sup>73</sup> These children came to the United States in order to avoid the horrifying problems of their own home nations. Though it may seem sympathetic to accept all the children because of what they had to endure to enter the United States, let alone what they faced in their home countries, our immigration laws need to be enforced. In making sure that immigration laws are fairly enforced, however, the United States needs to adhere to existing standards of due process, not only from a moral perspective, but also because - based on *Padilla* and its progeny- our jurisprudence may very well head in that direction.

It is clear that a problem like this is never going to be solved purely on a monetary or even a legal basis. Thus, it is evident that there needs to be a real political commitment by the Obama Administration, as well as by members of Congress, to solve this problem and to appropriate the necessary funds to allow government agencies to provide legal services to the many UACs who have yet to face a deportation hearing.

During Keybi's hearing, his attorney, New York City Public Advocate Letitia James, told the court about where Keybi came from.<sup>74</sup> She told the judge how Keybi feared the powerful and violent gangs that personally threatened him, went hungry routinely, and was the son of a father who passed and a mother who could not care for him.<sup>75</sup> She told the judge that, "it's in the court's best interest and in the interest of individuals who care about these children to have him stay with his cousin."<sup>76</sup>

Judge Adam Silvera listened to her argument and decided that it was not in the best interest of anyone to send Keybi back to Honduras, adding that doing so "would be cruel and unjust."<sup>77</sup> Judge Silvera then looked at Keybi and said, "Keybi, I just have one word of wisdom: 'you follow your dreams, you work as hard as you can, and you don't accept no as an answer.'"<sup>78</sup>

A significant legal and policy change must be made for all of those UACs whose names will never be printed on paper or read online, yet whose stories align with that of Keybi. Providing UACs with competent legal counsel will not only help the United States honor its constitutional

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<sup>73</sup> Rappleye, *supra* note 35.

<sup>74</sup> Jorgensen, *supra* note 2.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> Jorgensen, *supra* note 2.

<sup>78</sup> *Id.*

obligations, but will also show to the world that the United States is not a country that turns its back on children who come to our country to live a better and safer life. As former South African President Nelson Mandela plainly said, “We owe our children - the most vulnerable citizens in any society - a life free of violence and fear.”<sup>79</sup>

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<sup>79</sup> World Health Organization, *World Report on Violence and Health*, at ix, (2002).

DOMESTIC VIOLENCE IN ARMENIA: THE MISGUIDED PERCEPTION THAT  
WOMEN DESERVE THE ABUSE

*Polene Ghazarian*

## INTRODUCTION

The traditional role of Armenian women contributes to the misguided notion that domestic violence is a private family matter that deserves no recognition from the law. Due to this way of thinking, Armenia has yet to implement any laws criminalizing acts of domestic violence. The stigma surrounding domestic violence leads many women to refrain from reporting the abuse or worse, believing that they in some form deserved the abuse. This note examines the various factors that have shaped Armenia's culture and stresses the importance of implementing domestic violence laws by analyzing the current status of Armenia.

Section I provides the history of Armenia and how the country's tumultuous past has shaped the status of Armenia today. Section II discusses the traditional role of Armenian women in the household, as well as in society. Section III looks at the status of women's rights in Armenia and how it's evolved over time, including Armenia's participation in international treaties. Section IV addresses the issue of domestic violence and the impact the absence of domestic violence laws has on the life and safety of Armenian women. Section V examines the efforts being made in the movement towards the modernization of Armenia and how the resistance towards equality still persists. Section V also provides recommendations for combating domestic violence. Lastly, Section VI concludes by addressing how the absence of domestic violence laws impacts an Armenian women's ability to be a participating member of society.

### I. HISTORY OF ARMENIA

Armenia is one of the world's oldest countries with a history full of geographic and political uprisings.<sup>1</sup> Given the country's long history of struggles, the overall development of modern day Armenia has been slow. The more recent contributions to the country's current economic and social status are the Armenian Genocide of 1915 and its prior rule under Soviet Russia from 1921 to 1991.<sup>2</sup> In 1915, the Turkish members of the Ottoman Empire annihilated approximately 1.5 million Armenians in order to

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<sup>1</sup> Scott A. Moore, Note, *In the Shadow of the Law: An Examination of Corruption and the Rule of Law in Armenia*, 31 B.U. INT'L L.J. 189, 194 (2013).

<sup>2</sup> Moore, *supra* note 1, at 194.

achieve a “homogenous Turkic society.”<sup>3</sup> The Russian military intervention prevented a complete extermination of the Armenian population.<sup>4</sup> As a consequence of Russia’s involvement, Armenia became a satellite of Soviet Russia.<sup>5</sup> This union changed Armenia from an agriculturally centered country to an industrial one, with business being conducted by means of “corruption, speculation, black-marketeering, and simply doing favors.”<sup>6</sup> Under rule of the Soviets, Armenians became committed to corruption, as it became so “ingrained in citizens’ minds as a way of life.”<sup>7</sup>

The collapse of Soviet Russia in 1991, once again led to turmoil for the Armenian people. After being part of a Communist republic for so long, Armenia finally had the opportunity to become an independent state.<sup>8</sup> However, on their journey towards independence, Armenia faced a devastating 6.9 magnitude earthquake – leaving a majority of the country in shambles – war with Azerbaijan, rapid privatization, and a considerable economic collapse.

The transition to a free-market based economy and democracy also had an impact on Armenian women and their role in society. These changes reverted a women’s position in society back to the traditional roles. Despite Armenia’s tumultuous past and its control under various governments, Armenia’s practices, norms, and customs are based on old traditional Armenian values. As a result, Armenia has turned a blind eye on issues regarding women’s rights and thus the movement towards the protection and equality of women has been slow on the uptake.

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<sup>3</sup> *Id.* at 195 (quoting Richard G. Hovannisian, *Genocide and Independence, 1914 -1921*, in *THE ARMENIANS PAST AND PRESENT IN THE MAKING OF NATIONAL IDENTITY* 89, 91 [Edmund Herzig & Marina Kurkchian eds., 2005]).

<sup>4</sup> Moore, *supra* note 1, at 195.

<sup>5</sup> *Id.* at 196. See Cecilia Menjivar and Victor Agadjanian, *Men’s Migration and Women’s Lives: Views from Rural Armenia and Guatemala*, 88 *SOCIAL SCIENCE QUARTERLY* 1243, 1244 (Russia’s significant involvement in Armenia’s history plays a role in the notable influence Russia has had on Armenian culture).

<sup>6</sup> Ronald Grigor Suny, *Soviet Armenia*, in *ARMENIAN PEOPLE FROM ANCIENT TO MODERN TIMES*, VOLUME II 347, 373-74 (Richard G. Hovannisian ed., 2004).

<sup>7</sup> Moore, *supra* note 1, at 197.

<sup>8</sup> Sanan Shirinian, *Domestic Violence Against Women in Armenia*, UHRC, (May 26, 2010, 2:25 PM), <http://www.unitedhumanrights.org/2010/05/domestic-violence-against-women-in-armenia>.



## II. THE TRADITIONAL ROLE OF WOMEN IN ARMENIA

Armenia's dawdling transition to modern day ideologies plays a significant role in inhibiting women's rights and their progress in society. There is an old folk saying in Armenia, "A woman is like wool, the more you beat her, the softer she will be."<sup>9</sup> This way of viewing the role of women in the family leads to the historically widespread issues of domestic violence.<sup>10</sup> Traditionally, Armenian men are the head of the household,<sup>11</sup> intended to be the providers, whereas women are the child bearers.<sup>12</sup> Women are expected to be chaste and passive, making them easily susceptible to abuse.<sup>13</sup> Their responsibilities include cooking – many believe a woman's "kingdom" is the kitchen – cleaning, and raising the children, regardless of whether the woman has a career.<sup>14</sup> Armenians believe that "women are genetically designed to excel in such tasks" and therefore it would be completely out of a man's domain to engage in such activities.<sup>15</sup> In addition, these "chores are considered useless, do not provide any material benefit, and are degrading to a man's honor."<sup>16</sup> Therefore, the prestige and reputation of an Armenian woman was solely dependent on her ability to cook and play hostess.

These traditional stereotypes underwent changes when Armenia's socio-economic status took a turn for the worse in the 1990s.<sup>17</sup> Armenia's current economic situation has left many impoverished. Two noticeable changes were observed from the declining economic situation in Armenia. First, due to the lack of employment opportunities in Armenia, men were leaving the country in order to earn a living.<sup>18</sup> In these cases, women stayed behind and took on a more prominent role in the household.<sup>19</sup> Second, because men were left unemployed and unable to provide for their families, the situation created an environment where men often turned to alcohol and gambling, which inconsequently exposed women to situations where they often

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<sup>9</sup> Shirinian, *supra* note 8.

<sup>10</sup> *Id.*

<sup>11</sup> See Menjivar and Agadjanian, *supra* note 5, at 1258 (where tradition dictates that a woman is to leave her household to join her husband's once married).

<sup>12</sup> Shirinian, *supra* note 8.

<sup>13</sup> *Id.*

<sup>14</sup> *Changing Status, Role of Women in Armenia*, KEGHART.COM (MAR. 4, 2012), [www.keghart.com/M-Yeganian-Women](http://www.keghart.com/M-Yeganian-Women).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Changing Status, Role of Women in Armenia*, *supra* note 14.

<sup>19</sup> *Id.*

became victims of domestic violence.<sup>20</sup> It is in the nature of an Armenian man to be considered the patriarch of the family, therefore when left unemployed, domestic abuse was the only means they had to exert their power and control over their family.<sup>21</sup>

### III. WOMENS RIGHTS' IN ARMENIA

The perception of gender-equality was not always an issue in Armenia's history. Customarily, women are seen as inferior to their male spouses. In the face of the law, women are seen as "equal" to their male counterparts.<sup>22</sup> Ancient legal regulations indicate that women were treated as equal members of society.<sup>23</sup> The *Code of Shahapivan*, written in 443 BC, provided that women were to have the same rights of ownership of family property if their husbands abandoned them for no reason.<sup>24</sup> Even The First Armenian Republic of 1918-1920 gave women the right to vote and be elected to Parliament.<sup>25</sup> However, under Soviet rule, even though it was declared that women were guaranteed equal rights, women still faced structural discrimination.<sup>26</sup>

The status of women further deteriorated when Armenia made the transition to a democracy.<sup>27</sup> Today, the government still has made minimal attempts to address the issues of gender discrimination or minimum efforts to enforce gender equality.<sup>28</sup> Most of the active supporters responsible for any improvements in gender equality can be accredited to outside influence rather than internal support. It was after the 1995 Beijing Conference when women organizations became increasingly more active.<sup>29</sup> With the heightened awareness there came increased support and funding from donors around the world.<sup>30</sup> Internationally, these movements have had a

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<sup>20</sup> Shirinian, *supra* note 8.

<sup>21</sup> *WRC Activities*, WOMEN'S RIGHTS CENTER, <http://www.wrcorg.am/en/activities.htm>.

<sup>22</sup> Svetlana A. Aslanyan, *Gender Equality: History must be Honoured*, SOCIAL WATCH 62 (2010).

<sup>23</sup> Svetlana A. Aslanyan, *Women's rights in Armenia*, OCCASIONAL PAPERS 31 (2010).

<sup>24</sup> *Gender Equality: History must be Honoured*, *supra* note 22; *Women's Rights in Armenia*, *supra* note 23.

<sup>25</sup> *Women's Rights in Armenia*, *supra* note 23.

<sup>26</sup> *Id.*

<sup>27</sup> *Women's Rights in Armenia*, *supra* note 23; *Gender Equality: History must be Honoured*, *supra* note 22.

<sup>28</sup> *Women's Rights in Armenia*, *supra* note 23.

<sup>29</sup> *Changing Status, Role of Women in Armenia*, *supra* note 14.

<sup>30</sup> *Id.*

tremendous impact on the advancements made on issues of women's rights, advocacy, leadership, and trafficking.<sup>31</sup>

Though national legislation and ratified treaties reflect *de jure* gender equality for men and women,<sup>32</sup> in practice gender inequality is a more significant issue. Upon further analysis, it is apparent that Armenian women face *de facto* discrimination. An example of this façade is evident in the Millennium Declaration. Armenia, as one of 191 signatories of the Millennium Declaration, promised to ensure equal rights and opportunities to both women and men.<sup>33</sup> The goals of the Millennium Declaration were to eliminate gender inequality by empowering women.<sup>34</sup> However, in application, Armenia reported in 2005 that the likelihood of achieving that goal was at most only "possible" or "likely."<sup>35</sup> The lack of determination from the Armenian government has been one of the biggest roadblocks in the progress of gender equality.

#### IV. THE ABSENCE OF DOMESTIC VIOLENCE LAWS IN ARMENIA

Due to the lack of enforcement of equal protection in Armenia, women who are often victims of domestic violence find they are faced with resistance when they try to report the crime.<sup>36</sup> Unlike the United States or Western Europe, there is a lack of women's organizations or support groups for battered women in Armenia.<sup>37</sup> It was not until the late 1990s when Western feminist activists introduced the issue of domestic violence as a national concern in Armenia.<sup>38</sup> The lack of recognition of domestic violence as a public issue<sup>39</sup> is one of the major reasons why there has been

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<sup>31</sup> *Id.*

<sup>32</sup> *Human Rights in Armenia*, CIVIL SOCIETY INSTITUTE NGO, [http://www.hra.am/en/tag/womens\\_rights](http://www.hra.am/en/tag/womens_rights).

<sup>33</sup> United Nations Millennium Declaration, G.A. Res., U.N. GAOR, 8<sup>th</sup> plenary meeting, U.N. Doc A/55/L.2 (Sept. 8, 2000) (creating a "foundation of a more peaceful, prosperous and just world").

<sup>34</sup> *Women's rights in Armenia*, *supra* note 23; The Millennium Declaration and the MDGs, United Nations Development Group, [http://www.undg.org/content/achieving\\_the\\_mdgs/millennium\\_declaration\\_and\\_the\\_mdgs](http://www.undg.org/content/achieving_the_mdgs/millennium_declaration_and_the_mdgs)

<sup>35</sup> *Women's rights in Armenia*, *supra* note 23.

<sup>36</sup> Amnesty International, *No Pride in Silence: Domestic and Sexual Violence against Women in Armenia* (November 13, 2008), <http://www.amnesty.org/en/news-and-updates/report/no-pride-silence-domestic-sexual-violence-against-women-armenia-20081113#sthash.BYUsYiPt.dpuf>.

<sup>37</sup> Armine Ishkanian, *En-gendering Civil Society and Democracy-Building: The Anti-Domestic Violence Campaign in Armenia*, THE SOCIETY FOR THE ADVANCEMENT OF SOCIO-ECONOMICS 488, 490 (Winter 2007).

<sup>38</sup> Ishkanian, *supra* note 37, at 490.

<sup>39</sup> *Id.*

limited progress on women's rights compared to other countries. In addition, because domestic violence was not considered an issue until the intervention of other countries, there has been criticisms and resistance to the veracity and gravity of the issue.<sup>40</sup>

Though battery in itself is prohibited in the Republic of Armenia, women who try to report such crimes receive little to no relief.<sup>41</sup> Instead, since a domestic partner committed the crime and Armenia has not implemented any domestic violence specific laws there is nothing protecting women.<sup>42</sup> In fact, the only mention of women in the Criminal Code of the Republic of Armenia is in the context of pregnant women.<sup>43</sup> Due to the culturally submissive role of women in Armenia, those who do report such abuses are stigmatized<sup>44</sup> and left without any support from their families, the police, courts, or society.<sup>45</sup> The reporting of such crimes has led to social isolation.<sup>46</sup> In one instance, a woman went to press charges against her abusive husband who threatened her with a knife and broke a glass door near her, causing injuries, and the police denied her assistance claiming such problems were a "private family matter."<sup>47</sup> The notion that these types of domestic violence cases are private family matters deters most judges from accepting these as crimes deserving of punishment.<sup>48</sup> In other cases, women are blamed for instigating such conduct by "encouraging" such behavior from their spouses.<sup>49</sup>

Another case that brought some public attention to the issue of domestic violence in Armenia is the death of Zaruhi Petrosyan. Zaruhi was a young, twenty-two year old mother of a two-year-old girl.<sup>50</sup> At first it was believed

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<sup>40</sup> See *id.*

<sup>41</sup> Shirinian, *supra* note 8.

<sup>42</sup> Human Rights in Armenia, *supra* note 32; Elaboration of Appropriate Legal Mechanisms, WOMEN'S RIGHTS CENTER, [http://www.wrcorg.am/en/activities/act\\_67.htm](http://www.wrcorg.am/en/activities/act_67.htm).

<sup>43</sup> See Criminal Code of the Republic of Armenia (April 18, 2003), <http://www.legislationline.org/download/action/download/id/1655/file/bb9bb21f5c6170dad c5efd70578c.htm/preview>

<sup>44</sup> *No Pride in Silence: Domestic and Sexual Violence against Women in Armenia*, *supra* note 36.

<sup>45</sup> Shirinian, *supra* note 8.

<sup>46</sup> *No Pride in Silence: Domestic and Sexual Violence against Women in Armenia*, *supra* note 36.

<sup>47</sup> *Id.*; Shirinian, *supra* note 8; Amnesty International, *No Pride in Silence: Countering Violence in the Family in Armenia*.

<sup>48</sup> *Elaboration of Appropriate Legal Mechanisms*, *supra* note 42.

<sup>49</sup> Shirinian, *supra* note 8.

<sup>50</sup> Michael Mensoian, *Domestic Violence in Armenia: An Ugly Crime Still Denied*, ARMENIAN WEEKLY (Sept. 25, 2014, 12:54 PM),

that Petrosyan died as a result of accidentally falling down the stairs.<sup>51</sup> However, the neighbors and the victim's sister, Hasmig, state otherwise. According to Hasmig:

The neighbors have stated [to the Masis police] that on the day of my sister's death, they entered the apartment and witnessed how they [the husband and the mother-in-law]... had broken her knees and fingers, crushed her skull, and stuffed cloth in her mouth, to stop the bleeding. Then, one of the neighbors told their son to call the cops. When her mother-in-law and husband realized that the cops would be on their way, in her beaten state, they threw [Zaruhi] down the stairs, pulled her body back into the house, so that they could tell the cops that she fell down the stairs and crushed her bones.<sup>52</sup>

Prior to her death, there were several reports of abuse in Zaruhi's case.<sup>53</sup> According to Hasmig, the abuse was so bad and so regular that Zaruhi's husband and mother-in-law constantly beat her even when she was pregnant.<sup>54</sup> She tried to isolate herself from the abuse by living with her sister's family for two weeks.<sup>55</sup> The separation did nothing but cause her husband to threaten to kill Zaruhi along with her sister's family.<sup>56</sup> Twice Zaruhi went to the police, even obtaining in writing that the police were to "take him in" if "he so much as touches her."<sup>57</sup> The police proved to be entirely helpless in this situation. In fact, Zaruhi's situation was considered "unimportant and irrelevant" in their eyes.<sup>58</sup> The investigation into Zaruhi's death illustrates the refusal to accept the reality that domestic violence is a crime.

Those victims who do choose to report domestic violence are left with limited recourse. Legally, the only options available for women are to

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<http://armenianweekly.com/2014/09/25/domestic-violence-armenia-ugly-crime-still-denied/>.

<sup>51</sup> Mensoian, *supra* note 50.

<sup>52</sup> Nanore Barsoumian, *Domestic Abuse? What Abuse?... She Fell and Died!*, ARMENIAN WEEKLY (Oct. 10, 2010), <http://armenianweekly.com/2010/10/10/domestic-abuse/>.

<sup>53</sup> Barsoumian, *supra* note 52.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Barsoumian, *supra* note 52.

either file for divorce or seek criminal action.<sup>59</sup> However, both are heavily frowned upon in the Armenian culture. To Armenians, these solutions are worse than the crime committed against women; to them any threat on family values is unacceptable.

Women also fear the consequences of reporting their abuser. According to a nationwide survey on domestic violence against women in Armenia conducted in 2008-2009, 7.4% of women refused to admit that their husband's were their abusers.<sup>60</sup> Other reasons for refusing to report domestic violence include: the fear of reprisal from their husbands, the lack of courage, strength, or opportunity to escape, or the fear of losing custody of their children in the battle.<sup>61</sup> Studies from 1988 to 1998 found that over thirty percent of all murders were committed within one's family.<sup>62</sup> By allowing the environment created by the abuser to go unchallenged, society is perpetuating the issue.

Without support from the legal system and the absence of police officers, judges, courts, and prosecutors trained in the field of domestic violence, the victims of domestic violence are left to fend for themselves.<sup>63</sup> Such lack of protection creates an environment where domestic violence is permitted to continue.<sup>64</sup> The situation Armenian women are left to endure cannot be permitted to continue in its current state. It is "[w]ith our silence we will allow such crimes to be justified and guilty people to avoid the punishment determined by law. In other words, by our silence we will have more innocent victims."<sup>65</sup> Therefore, action must be taken.

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<sup>59</sup> Shirinian, *supra* note 8.

<sup>60</sup> *Human Rights in Armenia*, *supra* note 32; United Nations Population Fund, Nationwide Survey on Domestic Violence Against Women in Armenia 2008-2009 Executive Summary, YEREVAN 2010, [www.armstat.am/file/article/dv\\_executive\\_summary\\_engl.pdf](http://www.armstat.am/file/article/dv_executive_summary_engl.pdf)

<sup>61</sup> See Mensoian, *supra* note 50.

<sup>62</sup> Shirinian, *supra* note 8.

<sup>63</sup> Elaboration of Appropriate Legal Mechanisms, *supra* note 42.

<sup>64</sup> Shirinian, *supra* note 8; Houry Mayissian, *The Uncelebrated, Nameless, Faceless Women of Armenia*, ARMENIAN WEEKLY (December 3, 2012), <http://armenianweekly.com/2012/12/03/the-uncelebrated-nameless-faceless-women-of-armenia/print/>.

<sup>65</sup> Barsoumian, *supra* note 52.

## V. THE MOVEMENT TOWARDS MODERNIZATION AND RESISTANCE AGAINST EQUALITY

As Armenia moves towards modernization, the traditional role of Armenian women is also seeing some advancement. In more recent years it has been observed that Armenian women are becoming increasingly more vocal about fighting for equality. On March 8, 2014, in the capital Yerevan, there was a procession held for the support of women's rights.<sup>66</sup> The procession spanned for a month and was expected to include flash mobs and display the slogan, "It is not a shame to fight for our rights."<sup>67</sup> The slogan is indicative of the evolving ideology that domestic violence is not something women should have to tolerate. The shame that was once associated with women acting out against injustice has dissipated to some degree. We must continue to promote the notion that there is nothing wrong with fighting against injustice and no shame comes to those who are brave enough to stand up and prevent a life of submission and abuse.

From the standpoint of women born and raised in a democratized society, these developments in women's role in the social, political, and economic spheres may seem futile and minimalistic in the least. However, for women born in Armenia, these changes are huge achievements towards gender equality. In their eyes, democratization has "broken gender stereotypes."<sup>68</sup>

### A. *The Steps to Combating Gender-Based Violence*

From 2004 to 2010 the Republic of Armenia developed the National Action Plan on Improving the Status of Women and Enhancing Their Role in Society. Section 5 of the National Action Plan is targeted at attempting to eliminate the violence against women.<sup>69</sup> Though this National Action Plan sets out an agenda on how to improve the role of women in society, it fails to address the specific issue of domestic violence. The language of Section 5, though possibly not intended to sound counterintuitive to the advancement of women in society, needs to be rewritten. Specifically,

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<sup>66</sup> *Armenia-Women-Rights-Procession*, ARMINFO – NEWSWIRE (Mar. 4, 2014), [http://go.galegroup.com/ps/i.do?id=GALE%7CA377156983&v=2.1&u=nysl\\_ce\\_syr&it=r&p=STND&sw=w&asid=6cc6986f669e8e38987456371641b11a](http://go.galegroup.com/ps/i.do?id=GALE%7CA377156983&v=2.1&u=nysl_ce_syr&it=r&p=STND&sw=w&asid=6cc6986f669e8e38987456371641b11a).

<sup>67</sup> *Armenia-Women-Rights-Procession*, *supra* note 66.

<sup>68</sup> *Changing Status, Role of Women in Armenia*, *supra* note 14.

<sup>69</sup> See UNITED NATIONS, 2004-2010 REPUBLIC OF ARMENIA NATIONAL ACTION PLAN ON IMPROVING THE STATUS OF WOMEN AND ENHANCING THEIR ROLE IN SOCIETY §5 (2010) [hereinafter "NATIONAL ACTION PLAN"].

Section 5 states “[w]omen are weaker and more vulnerable in terms of their ability to protect themselves, and, therefore often turn into victims of violent conflicts.”<sup>70</sup> In an effort to combat injustice, the proposed policy changes should not address women as incapable of protecting themselves or as vulnerable. The language should invite equality and refrain from addressing women in an inferior light.

Additionally, Section 5 of the National Action Plan only addresses how the sexual and physical violence towards women and girls requires “some attention.”<sup>71</sup> It then proceeds to state outdated statistics regarding the issue.<sup>72</sup> The section proceeds to only interpret violence towards women who have not yet reached the age of maturity.<sup>73</sup> In fact, there is no mention of what the situation is for Armenian women who are above the age of maturity.

In 2007, the Women’s Rights Center proposed the Draft Law on Domestic Violence.<sup>74</sup> The purpose of the law was to provide a definition of domestic violence as well as provide a framework for punishing the perpetrators and providing support for victims.<sup>75</sup> The proposed legislation was introduced to the Ministry of Labor and Social Affairs of the Republic of Armenia.<sup>76</sup> Unfortunately, on February 11, 2013, the Ministry of Labor and Social Affairs found the legislation to be unreasonable.<sup>77</sup> Thus, the Deputy Labor Minister declared the law “unenforceable.”<sup>78</sup>

Though the National Action Plan and the Draft Law on Domestic Violence failed in their endeavors, they have helped set a foundation for recognizing the importance in implementing domestic violence laws.

### *B. The Resistance to Change*

One would assume the recent efforts being made to empower women would provide for a more tolerant society, one where Armenian women are provided with the opportunities that were previously denied to them.

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<sup>70</sup> NATIONAL ACTION PLAN, *supra* note 69.

<sup>71</sup> NATIONAL ACTION PLAN, *supra* note 69.

<sup>72</sup> *See id.*

<sup>73</sup> *See id.*

<sup>74</sup> Elaboration of Appropriate Legal Mechanisms, *supra* note 42.

<sup>75</sup> Mary Aleksanyan, *Domestic Abuse Law Dumped in Armenia*, GLOBAL VOICES CAUCASUS (May 23, 2013), <https://iwpr.net/global-voices/domestic-abuse-law-dumped-armenia>.

<sup>76</sup> Elaboration of Appropriate Legal Mechanisms, *supra* note 42.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*



However, these improvements have not been without their share of resistance. For example, in 2013 Freedom House, an independent watchdog organization, issued a news release expressing their concerns regarding the threats being made against Armenian NGOs working on issues regarding women's rights.<sup>79</sup> Then, following Armenia's president Serzh Sargsyan signing the "Law on Equal Rights and Equal Opportunities for Men and Women" in June 2013, there was a rise in activity from extremist groups.<sup>80</sup> The extremists resorted to threats and violence against these NGOs making them the targets of smear campaigns.<sup>81</sup>

The motivation behind the attacks by the extremists is that they blame these NGOs for being "destroyers of families" and "traitors of the nation."<sup>82</sup> They have even gone as far as to accuse those fighting for gender equality as promoters of homosexuality and pedophilia.<sup>83</sup> These attacks are indicative of the ongoing battle Armenian women still face in their fight for equality. Those advocating a complete reversal back to the traditional roles of women need to be educated on the narrow-mindedness of their views. Armenian women are not throwing their culture or history aside when they advocate for equality. They are not failing to recognize family values, but rather working to improve the overall health and quality of the country by contributing to society in a more material way.

### C. *Recommendations*

The National Action Plan cannot suffice as being the only driving force for developing domestic violence laws in Armenia. The National Action Plan is geared more for the general advancement of women in society. Though the issues raised in the National Action Plan are equally important, they cannot be coupled with the fight for the criminalization of domestic violence in Armenia. In order to have domestic violence laws implemented in the Armenian Penal Code, there needs to be a more strategic litigation method developed with support from the Armenian government. One way of achieving such support is by increasing the public discourse regarding the issue of domestic violence. The Coalition to Stop Violence Against Women in Armenia is working to raise awareness as well as re-draft the

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<sup>79</sup> *Threats Against Women's Rights Groups Escalate in Armenia*, FREEDOM HOUSE (Sept. 16, 2013), <https://freedomhouse.org/article/threats-against-womens-rights-groups-escalate-armenia>.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

domestic violence law, calling it the Draft Law on Prevention of Domestic Violence.<sup>84</sup> Efforts like this must continue.

However, the implementation of domestic violence laws will prove ineffective unless the overall attitude and stigma surrounding domestic violence changes. The sense of superiority and entitlement Armenian men are raised to believe they have is a contributing factor to their misguided belief that domestic violence is an acceptable type of behavior. The historically patriarch society needs to evolve with the times. Men cannot continue being raised with the notion that they are invincible and women cannot be raised believing it is natural to be treated in a degrading manner. The “stinging slap across the face or the punch to the body”<sup>85</sup> is never deserved and should not be dismissed as being a trivial matter.

The law alone will not be sufficient in combating the issue of domestic violence. It is essential that the government and police agencies that provide women and children with protection from their abusers. Additionally, it is vital that police officers receive the proper training necessary to be able to identify and provide immediate assistance in cases of domestic abuse. Lastly, the legal system must be trained in how to handle these types of cases. The misconception that domestic violence is a private-family matter must be challenged, because “domestic abuse is a problem of society,” not a problem of women.<sup>86</sup>

## CONCLUSION

Without any laws specifically protecting women from all forms of domestic violence, we are preventing them from participating as full members of society.<sup>87</sup> The failure to implement domestic violence laws in Armenia has left women helpless and has created an environment where men believe they have the right to abuse their wives. The issue of domestic violence is still a significant problem in Armenia. In the first two months of 2014 alone, their husbands murdered five young Armenian women between the ages of twenty-eight and thirty-eight.<sup>88</sup> Amnesty International reported

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<sup>84</sup> Gayane Abrahamyan, *Armenia: Activists Push for Domestic-Violence Law amid Official Indifference*, EURASIANET.ORG (Mar. 7, 2014, 2:52 PM); Elaboration of Appropriate Legal Mechanisms, *supra* note 42. See Mensoian, *supra* note 50.

<sup>85</sup> Mensoian, *supra* note 50.

<sup>86</sup> *Armenia-Domestic Abuse-Expert-Opinion*, ARMINFO-NEWSWIRE (Mar. 10, 2014), [http://go.galegroup.com/ps/i.do?id=GALE%7CA377146572&v=2.1&u=nysl\\_ce\\_syr&it=r&p=STND&sw=w&asid=9ec1c62f9c1e3c554a67ba784199564b](http://go.galegroup.com/ps/i.do?id=GALE%7CA377146572&v=2.1&u=nysl_ce_syr&it=r&p=STND&sw=w&asid=9ec1c62f9c1e3c554a67ba784199564b).

<sup>87</sup> Elaboration of Appropriate Legal Mechanisms, *supra* note 42.

<sup>88</sup> Abrahamyan, *supra* note 84.

that as many as three out of ten Armenian women have suffered from physical abuse and about 66% from psychological abuse.<sup>89</sup>

It is time we end the era where Armenian women are led to believe they deserve to be abused and that it is just an act that should be “stoically endured.” Rather, stoicism comes with the strength and courage to come forth and put an end to this injustice by criminalizing domestic violence.

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<sup>89</sup> Gayane Abrahamyan, Armenia: Domestic Violence Taking High Toll, EURASIANET.ORG (Jan. 31, 2013, 2:35 PM), <http://www.eurasianet.org/node/66484>.

A GLOBAL ANSWER TO A GLOBAL PROBLEM: COMBATING PIRACY TRENDS  
IN THE INTERNATIONAL CRIMINAL COURT

*Molly White*

## I. INTRODUCTION

Piracy is the main maritime security concern in the contemporary world because the number of piracy incidents is increasing each year. Though universal jurisdiction provides opportunities for prosecution of maritime pirates, the number of prosecutions, compared with the number of incidents, is low. The growing incidences of piracy and the problems associated with the current legal system create doubts about whether the International Community should depend on domestic courts to prosecute pirates. This paper takes a brief look at the history and current situations in maritime piracy before addressing the issues that arise from the use of child pirates. After looking at the viability of prosecuting a child for atrocities committed under a pirate group's command, this paper will look at the role of the International Criminal Court (ICC) in prosecuting pirates. Though not an exhaustive exploration, this paper seeks to address the necessity of the ICC in piracy prosecutions. Though difficulties will arise if the ICC gains jurisdiction over piracy, prosecutors could charge actors with a new stand-alone crime, or under current crimes against humanity.

## II. PIRACY: AN ENDURING HUMANITARIAN PROBLEM

### A. HISTORY

Piracy has been around since “[t]he... first time something valuable was known to be leaving a beach on a raft...”<sup>1</sup> As a result, harsh and rigid rules against piracy developed as deterrents because states’ abilities to ward off pirates were limited. First, the Rhodian Sea laws codified maritime law.<sup>2</sup> Second, The Romans and Byzantines adopted and extended laws to encompass universal jurisdiction and a form of insurance by dividing the cost of the losses between the ship owner, the owners of the cargo, and the passengers.<sup>3</sup> Third, the Catholic Church condemned piracy in the Third Lateran Council and excommunicated pirates.<sup>4</sup> In the Seventeenth Century, disagreement over a broad or narrow definition of piracy began between

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<sup>1</sup>Michael J. Kelly, *The Pre-History of Piracy as a Crime & Its Definitional Odyssey*, 46 CASE W. RES. J. INT’L L. 25, 28 (2013) (citing Jose Luis Jesus, *Protection of Foreign Ships Against Piracy and Terrorism at Sea: Legal Aspects*, 18 INT’L J. MARINE & COASTAL L. 363, 364 (2003)).

<sup>2</sup>Kelly, *supra* note 1, at 29.

<sup>3</sup>*Id.*

<sup>4</sup>*Id.*

Gentili and Grotius.<sup>5</sup> That disagreement still occurs around the world and the lack of an agreed upon definition allows pirates to evade prosecution.<sup>6</sup>

#### B. EAST AFRICAN PIRACY

Poverty and civil war in the Gulf of Aden, along with the collapse of the Cold War contributed to, if not caused, extensive pirate activity in the region.<sup>7</sup> At the turn of the millennium, gangs began hijacking ships off Somalia's coast and began threatening global trade.<sup>8</sup> In response to the growth in Somali piracy, international naval fleets congregated off East Africa.<sup>9</sup> In response, Chinese naval vessels left East Asian seas to patrol international seas along with French, US, Russian, Indian, and British warships.<sup>10</sup>

In early 2011, pirates held 736 hostages and 32 ships for ransom off Somali beaches at one time.<sup>11</sup> At the height of these attacks, piracy cost international trade between \$7 billion and \$12 billion.<sup>12</sup> In 2014, that number dropped to \$2.3 billion.<sup>13</sup> Lower ransom payments, rerouting costs, and insurance costs helped reduce this sum.<sup>14</sup> At the end of 2015, pirate attacks in the region ceased, but substantial measures contributed to the sharp drop.<sup>15</sup> Governments in the horn of Africa, international organizations, and ship owners combined efforts to deter the Somali pirates.<sup>16</sup> Governments and international institutions deployed naval forces and coastal patrols.<sup>17</sup> Shippers also equipped vessels with barbed wire

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<sup>5</sup> *Id.* at 30.

<sup>6</sup> Kelly, *supra* note 1, at 42. Also suggesting, a uniform method for trying pirates would be to create a venue within the International Criminal Court.

<sup>7</sup> Mateo Taussig-Rubbo, *Pirate Trials, the International Criminal Court, and Mob Justice: Reflections on Postcolonial Sovereignty in Kenya*, 2 Human. Baldy Center for L. and Soc. Pol'y 51, 56 (2011).

<sup>8</sup> Sara Sjolín, *Forget Somalia – this is the new sea piracy hot spot*, MARKET WATCH, INC. (7 October 2015), <http://www.marketwatch.com/story/forget-somalia-this-the-new-sea-piracy-hot-spot-2015-10-07>.

<sup>9</sup> Taussig-Rubbo, *supra* note 7, at 56-57.

<sup>10</sup> *Id.*

<sup>11</sup> Sjolín, *supra* note 8.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Sjolín, *supra* note 8.

<sup>17</sup> *Id.*

water cannons, and armed guards. In addition, ships increased their speeds and changed their routes to prevent pirates from boarding.<sup>18</sup>

In 2009, the media gave significant attention to children in piracy because of the Maersk Alabama attack in the Gulf of Aden.<sup>19</sup> Though pirates are dormant in the area, Somalia demonstrates a high exposure of children in piracy.<sup>20</sup> Most of the young people volunteer because it improves their social and economic status.<sup>21</sup> In fact, young and wealthy pirates are challenging authority of elders and their religious upbringings.<sup>22</sup>

### C. SOUTHEAST ASIAN PIRACY

Piracy and sea crimes continue to rise in Southeast Asia. These rises demand governments bolster antipiracy countermeasures on vessels traveling around the world.<sup>23</sup> Since 2010, attacks in Southeast Asia have doubled each year.<sup>24</sup> In fact, about six out of ten sea crimes worldwide occurred in Southeast Asia.<sup>25</sup> Though not all attacks result in robbery, in 2015, pirates stole \$5 million worth of oil.<sup>26</sup> Similarly to the pirates in the Gulf of Aden, low ranking members of the syndicate, unemployed fishers, and urban youths carry out attacks on ships because economic hardship in Southeast Asia.<sup>27</sup> Furthermore, youths view pirates as champions and fighters for justice.<sup>28</sup> Thus, children seeking admiration attempt to join piracy rings.<sup>29</sup> In 2009, because of the Maersk Alabama attack in the Gulf of Aden the Indian Navy looked into the pirates it captured.<sup>30</sup> The Navy

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<sup>18</sup> *Id.*

<sup>19</sup> S. WHITMAN ET AL., CHILDREN AND YOUTH IN MARINE PIRACY: CAUSES, CONSEQUENCES AND THE WAY FORWARD 1, 4 (Marine Affairs Program Dalhousie Univ. 2012).

<sup>20</sup> *Id.*

<sup>21</sup> WHITMAN ET AL, *supra* note 19, at 7.

<sup>22</sup> *Id.* at 6-7

<sup>23</sup> Sjolín, *supra* note 8.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* On Saturday 8 August 2015, the Singaporean oil Tanker Joaquim bore 3,500 metric tons of fuel oil from the Indonesian port city of Tanjung Pinang to the Malaysian island Langkawi. It did not reach its destination; armed pirates attacked the ship in the narrow Malacca Strait. The pirates abused the crew, destroyed the navigation and communication equipment, and stole 3,000 metric tons of oil.

<sup>27</sup> WHITMAN ET AL, *supra* note 19, at 7.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> WHITMAN ET AL, *supra* note 19, at 4.

discovered 25 out of 61 arrested pirates were under the age of 15.<sup>31</sup> In 2011, 38 of the 61 pirates on trial were under 18 years of age.<sup>32</sup>

Again, like the crimes in the Horn of Africa, the Strait of Malacca provides pirates with easy targets because it is a choke point that shippers must use.<sup>33</sup> However, piracy issues in Southeast Asia differ from those in the Gulf of Aden. Unlike Somali piracy, experts are unable to identify the reasons sea crimes in Southeast Asia have reached a 12-year high.<sup>34</sup> These attacks also differ from Somali piracy because pirates rarely seek ransom for ship crewmembers. Instead, pirates capture tankers, sail them to a mother ship, siphon off the fuel, and release the boats with equipment destroyed and crews injured.<sup>35</sup> This attack plan is more lucrative than those employed in the Gulf of Aden.<sup>36</sup>

Because of these differences, experts deduce that the measures used to combat piracy in the Gulf of Aden will not work to combat piracy in Southeast Asia.<sup>37</sup> The pirates in this area are adept at escaping to other nations' territorial waters.<sup>38</sup> Whereas the open international seas around the African coast allow for easy military vessel patrol, the territorial waters in Southeast Asia complicate the use of such vessels.<sup>39</sup> This decreases the safety of ships, and shippers must harden their ships with barbed wire, reinforced doors, and safe rooms. If attacked, shippers must attempt to wait out the attack.<sup>40</sup>

In light of these issues, local governments are stepping up efforts to address piracy before the situation worsens. In Indonesia, authorities

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Sjolín, *supra* note 8.

<sup>34</sup> *Id.* Experts say poverty in Southeast Asia, in part caused by overfishing, has strained communities, while others say active gages are now able to pull off ambitious attacks.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* In 2015 alone, Pirates stole more than 16,000 metric tons of oil products from Southeast Asia. There is a high return on investment in a short period time. Unlike Somali pirates sitting on a vessel for more than a year for ransoms, pirates in the Malacca straits siphon oil and make millions off the black market.

<sup>37</sup> *Id.*

<sup>38</sup> Sjolín, *supra* note 8.

<sup>39</sup> Sjolín, *supra* note 8. Arild Nodland, founder of Bergen Risk Solutions, a Norwegian intelligence firm specializing in assisting ships through high-risk waters, stated armed guards are critical to protecting against piracy.

<sup>40</sup> *Id.* Safeguarding a ship like this runs between \$5,000 and \$15,000.



arrested the mastermind behind a high profile oil tanker attack.<sup>41</sup> In Malaysia, the Maritime Enforcement Agency set up an airborne special task and rescue team.<sup>42</sup> In 2004, the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against ships in Asia (ReCaap) attempted to promote regional cooperation and discuss strategies and tactics.<sup>43</sup> However, Indonesia and Malaysia are not involved in ReCaap, which reduces the group's effectiveness.<sup>44</sup> Countries will need to coordinate with one another before conditions improve.<sup>45</sup>

### III. CHILDREN IN MARITIME PIRACY

#### A. ISSUES IN COMBATING YOUTH PIRATES

Issues arise when warships involved in antipiracy activities detain or arrest underage suspects. Often, if antipiracy patrols detain suspected pirates, the patrol employs a catch and release tactic.<sup>46</sup> Defenders of this practice argue it is difficult to prove an individual's age.<sup>47</sup> However, this argument is hard to defend when pirates are as young as 11 years old.<sup>48</sup> It also conflicts with the International Labour Organization conventions (ILO).<sup>49</sup> Most states involved in these antipiracy patrols are also party to the ILO conventions dictating the worst forms of child labor.<sup>50</sup> Thus, these warships are obligated under law to place youths under 18 in safe locations.<sup>51</sup> The antipiracy forces must not return them to the criminal gangs to which they belong.<sup>52</sup> This makes catch and release of juvenile pirates problematic.<sup>53</sup> However, this forces antipiracy patrols to apply legal

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<sup>41</sup> *Id.* The hijacking of the Orkim Harmonin in June 2015 was one of the highest profile oil-tanker attacks.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Sjolín, *supra* note 8.

<sup>45</sup> *Id.*

<sup>46</sup> Taussig-Rubbo, *supra* note 7, at 58.

<sup>47</sup> WHITMAN ET AL., *supra* note 19, at 13.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 12.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* As noted in article 3(c) the ILO Convention the term 'worst forms of child labour' include the use of procuring or offering every child for illicit activities. The section specifically mentions trafficking in drugs, but the statute is not limited to drug trafficking. The section also requires the removal of children from such forms of child labor, protection from reprisals, and the children's rehabilitation and social integration.

<sup>52</sup> WHITMAN ET AL., *supra* note 19, at 12.

<sup>53</sup> Sonia Messaoudi, *Child pirates: A key issue for respecting child's rights and halting piracy*, Piracy-Law.com (Oct. 23, 2012), <http://piracy-law.com/2012/10/23/child-pirates-a-key-issue-for-respecting-childrens-rights-and-halting-piracy/>. A solution needs to be found in

provisions of their national laws concerning the treatment of young or juvenile offenders. Often, the patrol is unwilling to criminally prosecute the child, but under the ILO convention the patrol is also unable to release the children.<sup>54</sup>

Instead of releasing suspects, state authorities should use medical and forensic tests to determine the suspected pirate's age. First, authorities should conduct interviews with the detained suspects, in which they should inquire into the detained suspect's age.<sup>55</sup> If a pirate claims he is less than eighteen years of age, authorities should separate him from the rest of the suspects for the remainder of his stay on board.<sup>56</sup> States should conduct a hearing to determine the suspect's age as soon as possible. During which, the judge may order medical and forensic examinations be performed on the defendant. If tests determine the defendant is a juvenile, or are inconclusive, the State must ensure it obeys the ILO and other international human rights law on the standard treatment of juveniles.<sup>57</sup>

A moral dilemma also arises when navies face children involved in maritime piracy. Though a child pirate is vulnerable and impressionable, he is still a pirate and denying this may cause harm to those on board the ship.<sup>58</sup> Thus, if the adult security sector actor cannot engage child soldiers, the security actor will put himself, the ship, and the child in danger. Though rules of engagement (ROEs) provide guidance on the use of force, ROEs do not make particular recommendations concerning use of force between security actors and child soldiers.<sup>59</sup> Pre-deployment training should include exercises designed to address child soldiers and child pirates. Navies and private security companies must consider children in maritime piracy because the appropriate response to child pirates may involve lethal force.<sup>60</sup> Without forethought, use of force against a child may cause self-doubt and psychological hardships on the adult actor. This hesitation, as stated above, could put all parties in grave danger.

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order to reintegrate children into the society but does not put the child in a situation where he may be forced to perpetuate further acts of piracy as required by Article 7 of the 1999 ILO convention and article 40 in the Convention of the Rights of the Child.

<sup>54</sup> WHITMAN ET AL., *supra* note 19, at 12-13.

<sup>55</sup> Milena Sterio, *Juvenile Pirates: "Lost Boys" or Violent Criminals?*, 46 CASE W. RES. J INT'L L. 279, 298 (2013).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 299.

<sup>58</sup> WHITMAN ET AL., *supra* note 19, at 13.

<sup>59</sup> *Id.*

<sup>60</sup> WHITMAN ET AL., *supra* note 19, at 13.

*B. IS PROSECUTION OF A CHILD POSSIBLE?*

Of the 2.2 billion people in the world below 18 years of age, 2 billion children live in developing world and are susceptible to criminal activity.<sup>61</sup> Moreover, the imbalance of power in the developing world lends itself to exploitation of those with little power. In order to combat exploitation of children the UN drafted the Convention on the Rights of the Child (UNCRC). This is now one of the most accepted international conventions.<sup>62</sup> Therefore, a human under the age of 18 is a child, however, the UNCRC does allow states to choose an earlier age of majority.<sup>63</sup> The convention places limits on when an individual may be charged and the mandatory procedures for handling youthful offenders.<sup>64</sup> However, some jurisdictions treat all piracy suspects the same and disregard age.<sup>65</sup>

Countries follow one of two approaches to determining whether a child can be a defendant. Some seek to identify what the Minimum Age of Criminal Responsibility (MACR) is, while others apply the standards set out in the UNCRC.<sup>66</sup> The MACR approach attempts to determine the age at which a child may be liable for acts of piracy.<sup>67</sup> There is no consensus; the age varies between 10 and 16 years.<sup>68</sup> Here, the concern is how to prosecute using age appropriate legal procedures. The UNCRC focuses on the welfare of the child and mandates safeguarding children.<sup>69</sup> The convention also specifies safeguards and procedures to ensure justice systems treat youths accused of crimes with respect.<sup>70</sup> In fact, the UNCRC recommends children should be reintegrated into society.<sup>71</sup> However, the UNCRC does not provide states with a minimum age of criminal responsibility; instead, it demands each state set its own age limit.

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<sup>61</sup> *Id.* at 3.

<sup>62</sup> *Id.* 139 countries are signatories and 192 countries are parties to the convention.

<sup>63</sup> WHITMAN ET AL., *supra* note 19, at 3, 10. The minimum age of criminal responsibility ranges from 10 to 16, England and Wales attribute responsibility to younger people while Scandinavian countries and Canada attribute responsibility to older individuals.

<sup>64</sup> Messaoudi, *supra* note 53. The UNCRC has four general principles: (i) the right to life, survival and development; the right not to be discriminated against; the requirement that the best interests of the child be a primary consideration in all actions concerning children; the right of the child to be heard in all decisions that affect him.

<sup>65</sup> WHITMAN ET AL., *supra* note 19, at 9.

<sup>66</sup> WHITMAN ET AL., *supra* note 19, at 10

<sup>67</sup> *Id.* at 9.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* UNCRC article 37 requires all children be free of torture, inhuman or degrading treatment, capital punishment, and life in prison without parole.

<sup>70</sup> *Id.* at 12.

<sup>71</sup> WHITMAN ET AL., *supra* note 19, at 12

The United Nations and most international Non-Government Organizations treat children, who are associated with armed groups, as victims.<sup>72</sup> Additionally, the Paris Principles of 2007 demand that children accused of crimes under international law be considered victims not perpetrators.<sup>73</sup> The UN SRSG stated, “even the most voluntary of acts can be a desperate attempt to survive by children with a limited number of options.”<sup>74</sup> Prosecutors must then interpret any consent a child gives as not voluntary.<sup>75</sup> Hence, there is a lack of clarity as to the best way to address the interests of the child.

Though most industrialized states mandate different treatment for adults and children, the International Community must reach a consensus on how to treat child pirates. Without a consensus, prosecution of young offenders is not viable. The lack of consensus has a significant impact on transfers of juvenile piracy suspects for trial. Prisoner transfer agreements require the receiving State afford the same standard of treatment as the delivering State provided.<sup>76</sup> If both States do not meet the level of care, transfer and prosecutions are not possible.

#### **IV. ACCOUNTABILITY: PIRACY AT THE INTERNATIONAL CRIMINAL COURT**

##### *A. SEEKING JUSTICE AT THE INTERNATIONAL CRIMINAL COURT*

The globe is seeking justice for those affected by piracy. Somalia, along with Kenya, Yemen, and India have held or prosecuted numerous actors on piracy charges.<sup>77</sup> In addition, on a smaller scale, Belgium, Japan, the Netherlands, Madagascar, Malaysia, the Republic of Korea, China, and the U.S. have all prosecuted pirates.<sup>78</sup> Despite countries attempting to prosecute actors for piracy, jurisdiction, logistics, and imprisonment solutions create barriers. Individual States, in particular, face issues associated with the costs and logistics of piracy prosecution.<sup>79</sup> Any state

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<sup>72</sup> *Id.* at 10

<sup>73</sup> *Id.* at 11.

<sup>74</sup> *Id.* at 10.

<sup>75</sup> WHITMAN ET AL., *supra* note 19, at 10.

<sup>76</sup> *Id.* at 11.

<sup>77</sup> Melanie O’Brien, *Where Security Meets Justice: Prosecuting Maritime Piracy in the International Criminal Court*, ASIAN J INT’L L. 1, 85 (2013)

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 86. (citing Robert L. Phillips, *India: A Case Study* Piracy-Law.com (24 September 2011)). Even states, like India, that are taking steps to update its piracy legislation face problems.

undertaking piracy prosecutions is likely to encounter problems with inadequate or non-existent piracy legislation and will have to use general criminal law provisions. However, under the UN Convention on the Law of the Sea, countries are not required to use general criminal law.<sup>80</sup> This may result in the state failing to prosecute pirates. Universal jurisdiction permits piracy prosecutions but also creates further difficulties.<sup>81</sup> However, prosecution is only allowed when crimes are not committed in territorial waters.<sup>82</sup> Although states may enter Somali territorial waters in pursuit of pirates, the enactment of universal jurisdiction creates problems for crimes committed in the Malacca Strait, which is comprised of territorial waters.<sup>83</sup> Problems also arise in the South China Sea where territorial disputes are ongoing.<sup>84</sup>

Despite difficulties prosecuting piracy in domestic courts, the International Community is reluctant to give the ICC jurisdiction over the crime.<sup>85</sup> Piracy was suggested at the Rome conference but did not make it into the Rome Statute. At negotiations parties decided to focus on crimes that did not already exist under treaties.<sup>86</sup> In addition, when the ICC came into force, the International Community viewed piracy as a crime for personal gain committed by non-state actors and decided to exclude it from the Statute.<sup>87</sup> *In arguendo*, a number of other crimes under the Rome Statute are committed for personal gain and by non-state actors. Thus, the initial reasoning for piracy's exclusion is flawed. Furthermore, government officials, like in Somalia and Southeast Asia, often play a role in the piracy chain; this demonstrates that piracy is not limited to non-state actors.<sup>88</sup>

Due to the growth of piracy in the 21<sup>st</sup> century, scholars have proffered numerous ways to combat piracy outside States' territories. Some suggest enhancing regional capacity to try pirates or the creation of a new Somali court within a third party state.<sup>89</sup> In addition, others have speculated a

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<sup>80</sup> O'Brien, *supra* note 77, at 86 (citing ZOU Keyuan, *Enforcing the Law of Piracy in the South China Sea* (2000) 31 J. MAR. L. & COM. 107 at 114-5).

<sup>81</sup> Elizabeth Anderson *et al.* *Suppressing Maritime Piracy: Exploring the Options in International Law*, American Society of International Law, Workshop Report, 7.

<sup>82</sup> *Id.* at 8.

<sup>83</sup> *Id.* at 2.

<sup>84</sup> *Id.* at 14

<sup>85</sup> *Id.* at 4

<sup>86</sup> Anderson *et al.*, *supra* note 81, at 4.

<sup>87</sup> Antonio Cassese, *International Criminal Law*, 2nd ed. Oxford: Oxford University Press, 2008 at 12.

<sup>88</sup> O'Brien, *supra* note 77, at 87.

<sup>89</sup> *Id.* at 88.

special chamber within the courts of a regionally located state or the adoption of a regional tribunal, or the establishment of an international tribunal could reduce strain on domestic courts.<sup>90</sup> Scholars do not view the ICC as a feasible option because the Court will face a handful of problems.

First, the ICC will face funding issues if it adopts Piracy as a crime. The ICC's budget is limited, the Court is understaffed, and its current staff is overworked.<sup>91</sup> Since 2009, the number of staff and the budget at the ICC has remained constant.<sup>92</sup> In 2013, the ICC's budget was just over 118 million euros.<sup>93</sup> That budget must encompass costs for investigations, trials, field offices, supplies, contractual services, training, travel, furniture, equipment, permanent premises, and salaries for 766 staff members.<sup>94</sup> With an increasing caseload, the budget and the staff may not be able to sustain an additional type of crime. However, the funding that would be put into establishing a new court could be given to the ICC to relieve funding burdens.<sup>95</sup>

Second, amending the Rome Statute may be difficult. Under Article 121 of the Rome Statute, any State party may propose an amendment at any time.<sup>96</sup> Though achievable, history suggests that there will be disagreement over what the definition of piracy should be. Negotiations over whether or not to add three offenses to the list of war crimes were short and entered into force immediately; in contrast, discussions over the crime of aggression were lengthy, drawn out over several years, and resulted in an amendment that the International Community does not know how to enforce.<sup>97</sup> Though

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 89.

<sup>92</sup> *Id.*

<sup>93</sup> O'Brien, *supra* note 77, at 89.

<sup>94</sup> *Id.*

<sup>95</sup> O'Brien, *supra* note 77, at 89.

<sup>96</sup> *Id.*

<sup>97</sup> *Rome Statute* of the International criminal Court, 17 July 1998, 2187 U.N.T.S. 90 (entered into force 1 July 2002)

art. 8, insertion through RC/Res.6, 11 June 2010; Megan Fairlie, *The United States and the International Criminal Court Post-Bush: A Beautiful Courtship But an Unlikely Marriage*, 29 BERKELEY J. INT'L L. 528, 538 (2011). The definition decided on in Kampala reads in part: (1) For the purpose of this Statute, "Crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations...(2)For the purpose of paragraph 1, "act of aggression" means the use of armed force by a State against the Sovereignty, territorial integrity or political independence of another state....<sup>97</sup>

piracy is not as controversial as crimes of aggression, a single, agreed upon, definition does not exist. Therefore, the process for all the State Parties to reach a consensus will take time. Unlike at Kampala, due to the escalating nature of global piracy problems, the new crime would likely be enacted immediately.

As an alternative, State parties could make an amendment through an optional protocol. This protocol would create a separate chamber for piracy prosecutions.<sup>98</sup> This chamber could sit in The Hague with the ICC or act as an extension of the Court in a location closer to the region where piracy crimes are committed. A secondary location for the ICC would reduce costs for transporting witnesses long distances and might make obtaining evidence easier.<sup>99</sup> However, the ICC would incur greater costs in moving all chamber personnel to a secondary and temporary location. Witness tampering may also increase because of crime groups in the proximity.<sup>100</sup>

Though the ICC is a court of last resort, the growth of piracy and the relative few prosecutions demonstrate that an international solution to piracy is necessary. The ICC presents a prosecutorial option that covers piracy crimes committed in any location.<sup>101</sup>

#### *B. CREATION OF A NEW CRIME*

As piracy continues to grow, the Security Council continues to discuss it as a major issue. The Security Council passes resolutions with the aim of combating piracy, and receives reports from the Secretary-General on various aspects of combating piracy.<sup>102</sup> Both the Security Council and the Secretary-General are invested in ensuring accountability for piracy perpetrators.<sup>103</sup> Piracy continues to be a global concern affecting the freedom and safety of shipping. As shipping is a global industry, piracy crimes have a global impact. This international impact demonstrates the need for an addition to the Rome Statute. A crime before the ICC must meet several factors. These factors include the scale, nature, manner of commission, impact of crimes committed on victims, and the existence of

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<sup>98</sup> Yonne M. Dutton, *Brining Pirates to Justice: A Case for Including Piracy Within the Jurisdiction of the International Criminal Court* (2010) 11 CHI. J. INT'L LAW 197 at 233.

<sup>99</sup> *Id.* at 233.

<sup>100</sup> Dutton, *supra* note 98, at 233.

<sup>101</sup> Maggie Gardner, *Piracy Prosecutions in National Courts*, 10, J. INT'L CRIM. JUST. 797, 797 (2012).

<sup>102</sup> See O'Brien, *supra* note 77, footnote 11

<sup>103</sup> *Id.* at 91.

aggravating circumstances.<sup>104</sup> First, pirates commit crimes across the globe, which results in thousands of victims. Second, the geographical spread also demonstrates the widespread nature of the crimes. Third, the impact of the crimes on victims yields significant physical and psychological injuries. Fourth, many incidences of piracy contain aggravating circumstances; most often are the uses of violence and the taking of hostages. An assessment of these factors shows that piracy fits among other crimes of serious concern to the International Community.

As such, piracy should be included in the Rome Statue. Obtaining a consensus on the definition of piracy as a crime will be the main obstacle. The definition should be produced by merging the definitions found in the United Nations Convention on the Laws of the Sea (UNCLOS) and the United Nations Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (CSUA).<sup>105</sup> <sup>106</sup> However, a comprehensive definition need not include all aspects of both conventions. For instance, the UNCLOS definition focuses on violence, detention, and robbery, whereas the CSUA focuses on the damage or destruction of a ship

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<sup>104</sup> See *Decision Pursuant to Art.15 of the Rome Statue on the Authorization of an Investigation into the Situation in the Republic of Kenya*, Situation in the Republic of Kenya (ICC-01-09-19), Pre-Trial Chamber II, 31 March 2010 at 42-50.

<sup>105</sup> United Nations Convention on the Laws of the Sea, art. 101, Dec. 10, 1982, 1833 U.N.T.S. 3. UNCLOS defines piracy as (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State; (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

<sup>106</sup> United Nations Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, art. 3(1), Mar. 10 1988, 1678 U.N.T.S. 221. The CSUA does not use the word piracy but article 3(1) states that any person commits an offence if that person unlawfully and intentionally: (a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or (b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or (c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or (d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or (e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or (f) communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or (g) injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f).



or its cargo. In general, the CSUA crimes may be too broad to institute ICC jurisdiction. If the intentional damage of a ship occurs in a non-piracy related scenario, it does not amount to an international crime. Therefore, the definition must reference ship damage committed in combination with acts of violence, detention, or depredation. The CSUA also includes modes of liability for attempting, abetting, and threatening another person to commit these offences. The eventual Rome Statute definition of piracy must include modes of liability; it will be crucial to capturing all level offenders involved in a pirate group's system.<sup>107</sup> The mode of liability, to satisfy the Rome Statute, must be committed with "the aim of furthering the criminal activity or criminal purpose of the group."<sup>108</sup>

### C. PROSECUTION UNDER EXISTING CRIMES

In the event that the International Community fails in creating a new crime, the ICC could prosecute acts of piracy under current Rome Statute crimes. The most successful cases would likely charge pirates with crimes against humanity. Successful cases will charge actors for deprivation of physical liberty, torture, and murder.<sup>109</sup> However, prosecutors can make a case for charging actors with the war crime of conscripting children under 15 into armed conflict.

When charging actors with crimes against humanity, prosecutors must demonstrate the crimes are part of a widespread or systematic attack against a civilian population.<sup>110</sup> Acts of maritime piracy are both widespread and systematic. First, widespread does not mean affecting a large geographical location; instead, it refers to the number of victims affected.<sup>111</sup> Tribunals defined the term as "the large scale nature of the attack and the number of targeted persons."<sup>112</sup> Piracy attacks fulfill the large-scale prong because the attacks continue over many years and target hundreds, even thousands, of

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<sup>107</sup> O'Brien, *supra* note 77, at 94. For example, an actor commits a crime for funding piracy operations but does not take direct part in the ship hijackings.

<sup>108</sup> See *Rome Statute*, *supra* note 97

<sup>109</sup> *Id.* (Prosecutors would charge actors under *Rome Statute* articles 7(1)(e) [deprivation of physical liberty], 7(1)(f) [torture], and 7(1)(a) [murder]).

<sup>110</sup> O'Brien, *supra* note 77, at 97. (The first element of crimes against humanity is widespread or systematic attack).

<sup>111</sup> *Id.* at 95

<sup>112</sup> *Id.* (citing *Prosecutor v. Kordic, Appeal Judgment*, Case No. IT-95/I4/2-A, 17 December 2004, 94). The ICTR has also used similar language, defining it as "The scale of the attacks and the multiplicity of the victims."

ships over that time.<sup>113</sup> When juxtaposed against current cases within the ICC's jurisdiction, although the number of targeted people is low, pirates have injured hundreds of people and taken thousands hostage across time.<sup>114</sup> Despite the definition of widespread not necessitating geographical distribution, prosecutors should consider geographical distribution in the case of maritime piracy. At one point, Somali pirates covered an area of over 7.3 million square kilometers.<sup>115</sup>

Maritime piracy also meets the second prong: systematic attacks. A systematic attack is an organized and methodical act of violence.<sup>116</sup> Prosecutors must demonstrate a pattern of non-accidental criminal conduct committed on a regular basis because crimes against humanity do not include random violence.<sup>117</sup> However, Article 7(2)(a) of the Rome Statute states the attack must be "pursuant to or in furtherance of a State or organizational policy to commit such attack."<sup>118</sup> The ICC interpreted this to mean the policy does not have to be explicitly defined but it must be "thoroughly organized and follow a regular pattern."<sup>119</sup> Furthermore, the attacks must also be "conducted in furtherance of a common policy involving public or private resources."<sup>120</sup>

Initially, pirate attacks started as random events, but today the organized nature of the attacks has developed significantly.<sup>121</sup> Now, pirates plan attacks over a period of weeks with attack teams assessing security

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<sup>113</sup> O'Brien, *supra* note 77, at 97. The acts of piracy in Somali are more widespread in temporal terms than, the Gbagbo case in the ICC now. That case covers crimes committed over only four months. However, the number of targeted people is much higher.

<sup>114</sup> *Id.* Article cites hundreds injured and 5,000 people taken hostage but the number varies depending on if pirates from outside the Aden Gulf are included. In addition, numbers of pirate attacks occurred in the two years since the article's publication.

<sup>115</sup> *Id.* at 95.

<sup>116</sup> *Id.* at 96

<sup>117</sup> *Id.* at 96; See Kordic, Appeal Judgment, *supra* note 82; *Situation in the Republic of Kenya*, *supra* note 104 (an act listed therein constitutes a crime against humanity when committed as part of a widespread or systematic attack directed against any civilian population).

<sup>118</sup> *Situation in the Republic of Kenya*, *supra* note 104, at para. 78.

<sup>119</sup> O'Brien, *supra* note 77, at 95. (citing Katanga and Chui, confirmation of Charges, ICC-01/04-01/07, 30 September 2008 at 396); *Situation in the Republic of Kenya*, *supra* note 104, at para. 84.

<sup>120</sup> *Id.*; *Situation in the Republic of Kenya*, *supra* note 104, at 84.

<sup>121</sup> See *Report of the Monitoring Group on Somalia and Eritrea Pursuant to Security Council Resolution 2002* (2011), UN Doc. S/2012/544 Annex 41 (13 July 2012), at 195. Somalia's two main pirate groups, the Puntland Piracy Network and the Hobyo-Harardheer Piracy Network both remained active and well organized in 2012.

situations to determine strategies.<sup>122</sup> In addition, pirates now use mother ships that are anchored in one location as the group's base.<sup>123</sup> Therefore, these bases allow groups to cover larger swathes of the ocean and become more successful. Further evidence of piracy's advancement is pirate groups' use of informal codes between them.<sup>124</sup> These codes ensure one group does not encroach on the territory of another group.<sup>125</sup> Furthermore, most groups have an organized and military structure, including power commanders similar to warlords.<sup>126</sup> The ICC ruled that a group satisfies the systematic necessity of crimes against humanity if it has the ability to perform acts that infringe on basic human values.<sup>127</sup> The combination of these factors demonstrates an organizational policy and satisfies the systematic prong of crimes against humanity.

The attacks committed must be widespread or systematic. However, prosecutors may charge individuals with limited acts, if those attacks occur within the greater context of the assault on the civilian population.<sup>128</sup> While piracy is sporadic in the context of an armed conflict, crimes against humanity consider the violence widespread and systematic. The crimes are isolated in a geographic context, but pirate groups carry out multiple attacks. Thus, each attack fits within a broader scheme. Further, though pirates attack each ship in a different geographical location, the groups are not attacking separate groups of civilians. Instead, pirates attack a group of civilians categorized as seafarers or passengers aboard the ships. Though private security actors aboard the ships are able to defend themselves, they are not military personnel and, therefore, must be considered civilians.<sup>129</sup>

Though piracy meets the widespread and systematic threshold of crimes against humanity, crimes against humanity do not adequately describe the acts of piracy. Article 7 of the Rome Statute does not cover the crimes relating to damages, destructions, and thefts of the ships pirates attack.<sup>130</sup>

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<sup>122</sup> O'Brien, *supra* note 77, at 97.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* (citing Jatin Dua and Ken Menkhaus, *The Context of Contemporary Piracy: the Case of Somalia* (2012) 10 *Journal of International criminal Justice* 749 at 751).

<sup>127</sup> *Situation in the Republic of Kenya*, *supra* note 104.

<sup>128</sup> O'Brien, *supra* note 77, at 97-98.

<sup>129</sup> *Situation in the Republic of Kenya*, *supra* note 104; O'Brien, *supra* note 77, at 98. Only military vessels do not constitute part of the civilian population targeted by pirates. The military ships are capable of defending themselves.

<sup>130</sup> *See generally Rome Statute*, *supra* note 97.

The lack of inclusiveness in the current Rome Statute demonstrates a need for a creation of a new crime of Piracy.

However, the Rome Statute does encompass the crimes pirates commit against persons. First, prosecutors could charge pirates with imprisonment, or other severe deprivation of physical liberty, under the Rome Statute. As Pirates often take hostages and prosecutors could charge such actors with arbitrary deprivation of liberty without due process of law.<sup>131</sup> This crime is applicable whether hostages are kept on their boat, taken to a pirate ship, or if they are taken onto land.<sup>132</sup> In addition, similar to concentration camps, pirates still imprison civilians if the person can physically move but are under the pirates' control.

Second, prosecutors could bring charges of torture against pirates. Once a civilian is taken hostage, that person is under the pirate's control. Often, that person is subjected to beatings, deprivation of food and water, being shot with water cannons, being locked in the ship's freezer, being tied up in the hot sun, kept in solitary confinement, forced to parade naked, mock executions, and denial of medical care.<sup>133</sup> Many of the abuses pirates commit are acts of torture.<sup>134</sup> However, the definition of torture is broad and the circumstances must demonstrate the pirates' actions resulted in unnecessary physical or mental suffering.<sup>135</sup> If these actions do not meet the torture threshold, charges may also be brought under Article 7(1)(k) for other inhumane acts intended to cause great suffering or serious injury to body, mental health, or physical health.<sup>136</sup>

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<sup>131</sup> *Id.*

<sup>132</sup> O'Brien, *supra* note 77, at 98-99

<sup>133</sup> *Id.* at 84.

<sup>134</sup> See *Report of the Special Rapporteur on the Question of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc. A/56/156, 3 July 2001, paras. 8-14; ICCPR General Comment 7 (Sixteenth session, 1982: *Article 7: Torture or Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc. A/37/40 (1982) 94. See also *A.R. v. The Netherlands* (203/2002, CAT, A/59/44 (14 November 2003) 247 (CAT/C/31/D/203/2002).

<sup>135</sup> *Id.*

<sup>136</sup> *Rome Statute*, *supra* note 79, at art.7(1)(k). (The act of parading around naked hostages constituted an outrage upon personal dignity in the International Criminal Tribunal for the Former Yugoslavia's Foca case). See *Prosecutor v. Kunarac et al. (Foca)* Trial Judgment, IT-96-23-T&IT-96-23/1-T, 22 February 2001, at ¶. 766-74. Though "outrages upon personal dignity" is a war crime, not a crime against humanity, "inhumane acts" is a similar concept. Thus prosecutors could argue for charging pirates who force hostages to parade naked.

Third, pirates could be potentially charged with murder. This crime could apply to any person killed during the commission of hijackings. In addition, the crime of murder applies to those killed after pirates take them hostage. However, the perpetrator must have caused the death of another person; prosecutors cannot attribute incidental deaths to pirates. Moreover, the deaths must be carried out in line with the group's organized attack.

The final crime attributable to piracy is the exploitation and conscription of children. The similarities between child soldiers and child pirates are the basis for this charge.<sup>137</sup> Often, child pirates are readily available, financially desperate, have no prospective employment, and State status exposes them to violence and exploitation.<sup>138</sup> Moreover, those who work with child soldiers propose that juvenile pirates face exactly the same situations.<sup>139</sup> The ICC may prosecute actors for conscription of children, if the actor partakes in armed conflict.<sup>140</sup> From this point, there are two options. First, the pirates partake in a non-international armed conflict and reach the threshold of an armed group.<sup>141</sup> Second, pirates engage in an armed conflict.<sup>142</sup> As pirates are not armed forces of a State, pirates fail to reach the threshold of the second option. However, pirates may meet the minimum level of organization to qualify as groups arising on the territory of a State.<sup>143</sup> If there are no quantifiable differences, the ICC should also have jurisdiction over conscription of children in piracy.

## V. CONCLUSION

Maritime Piracy is a threat to international peace and security; the crime is not about the theft of a ship but all the atrocities committed along with the theft. Today, piracy continues to expand its web and circumnavigates international laws. At the basic level, the increase in piratic activity has caused an increase in the costs felt by the shipping industry. In addition,

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<sup>137</sup> WHITMAN ET AL., *supra* note 19, at 11

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 8.

<sup>140</sup> *Rome Statute*, *supra* note 79 art. 8(2)(b)(xxvi). The Rome statute includes conscripting or enlisting children under the age of fifteen years into national armed forces or using them in active hostilities in an international armed conflict as a war crime; Article 8(2)(e)(vii) also includes the use of children in armed forces during internal armed conflicts as a war crime.

<sup>141</sup> Messaoudi, *supra* note 37.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* An international armed conflict exists wherever there is a resort to armed force between two or more States. A non-international armed conflict is a protracted armed confrontations occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State.

victims of these attacks suffer physical and mental consequences because of the injuries, torture, and deaths pirates inflict on their hostages. As pirates evolve with counter-piracy measures, organized groups begin exploiting children. As a result, the International Community is also at odds with how navies and security companies should approach confrontation with child pirates. A moral dilemma develops because child pirates are neither innocent, nor hardened criminals. Domestic court systems are inadequate to address, prosecute, and deter piratic attacks.

The next viable option is prosecution via the ICC. However, that is not to say States should avoid pursuing prosecutions. The ICC should act under the complementarity principle and only step in where states are unwilling or unable. Before the ICC can act an amendment to the Rome Statute is necessary. The adoption of the crime of piracy outright could be a difficult process, however. And in such case as party States fail to adopt piracy, the Prosecutor could charge pirates under current crimes against humanity listed in the Rome Statute. As pirates continue to outwit current anti-piracy defenses, the International Community must approach piracy with a comprehensive response. This response must include the ICC because States created the court to ensure accountability for grave international crimes. Without this response, piracy will continue growing into one of the most threatening crimes the International Community faces.

ALLOWING THE LESSONS OF OUR PAST TO LIBERATE OUR FUTURE

*Katherine Mills*

In 1945, the Holocaust ended with the liberation of over 60,000 emaciated and maltreated Jews from Nazi concentration camps. Famous photos from this period have surfaced, depicting the German people as they were forced to walk through the camps and witness the repercussions of their silence. Indeed, some had even promoted the Nazis, shouted “Heil Hitler!” at the sight of the anti-Semitic, sadistic dictator. Others still had supported the Nazis, and were even outspoken about Socialist ideals in their communities, or hailed their works to rid the Earth of “non-Aryan” races as necessary. As they walked through the heaps of bodies, surrounded by the scent of death and suffering, they were brought to tears, overwhelmed by the realization of their actions. Women hid their faces with handkerchiefs, and men looked guiltily at the ground, in disbelief. These people were bystanders, and their silence contributed to the death of nearly six million Jews. These photos were taken to impart an imperative message: We must not let this happen again. Unfortunately, as a human race, we have not learned to look past hatred and prejudice, or to be upstanders. We have allowed further genocides to occur, and the time for standing aside is over. Everyone’s unique and individual voices and skills make an impact, and need to be utilized. The use of social media to promote Hate, the downplayed role of history, the fact that Holocaust survivors are dying, and the “them versus us” mentality of today’s youth are issues that need to be addressed in order to be upstanders and learn from our past in order to liberate our future.

Being an upstander in the modern world is harder than it may seem. With the secrecy and therefore power of social media, it is simpler for people to spew Hate without consequences. Others either do nothing, or join in, as it is so easy to hide behind a username. Those that act as bystanders are doing so without the slightest inkling of any repercussions; the fact of the matter is, no one will ever know that the bystander saw a hateful tweet or post, unless he or she tells someone. Social media is an outlet for racism, sexism, ageism, and other prejudices, as well as being an outlet for good deeds. Solving this issue is less complex than one would think. Using the Holocaust as an example from the past, we can employ methods of stamping out social media inaction. A valuable lesson learned from the Holocaust is the power of youth. Hitler utilized the young, impressionable minds of children to form the Hitler Youth; an organization that promoted anti-Semitism while preparing children of all ages for future lives in the Nazi military or political hierarchy. When these children aged out of the group, they were put to work as fearless soldiers, brainwashed into paying any price for their country, many of which employing the ideology of “it is better to be dead than to be a prisoner”. Just as Hitler saw



the power of younger generations, we can utilize children to solve this issue of social media. The solution is simple: teach children morals and contributory attitudes from kindergarten through high school. As a community, people can join their voices to call for these actions to be taken, as well as calling for stricter disciplinary action to be taken against students that employ social media Hate, or support Hate groups. Many people today underestimate the power of pressure put on authorities. As students, children and teens can promote upstanding by acting as role models and being proactive in the cause to remove hate from their schools and communities. Also, by not conforming to stereotypes, or following the lead of those spewing hate. Removing one's self from bias or prejudicial situations is imperative to the removal of bigotry from the community. In addition, an important step to being an upstander is eradicating one's self from friend groups that support- even jokingly- abhorrent groups that promote predisposed notions. Educators and administrative staff should also become role models; endorsing nonbiased views of others, and encouraging upstanding behaviors. On the whole, if actions are taken to look to the past lessons of the Holocaust, and individuals in the community promote change, prejudice made simple by social media can be combated effectively; through these actions, social media can be liberated of some Hate, to the extent of making a marginal difference that has the capacity to change the world.

Yet another problem faced by the liberators of today is the inevitable fact that Holocaust survivors are dying, and history is not widely appreciated by younger generations. The most infamous genocide is indubitably the Nazi Holocaust; this means that men and women that have survived the atrocities during that epoch are important contributors to the fight against successive genocides of the future. Hearing a survivor tell their story is imperative to ensure that events such as the Holocaust will never occur again. As a first-hand account, full of the original and unique emotions that individual felt during their oppression, is more moving than an incessant stream of facts. Unfortunately, the Holocaust transpired over eighty years ago, and consequently survivors are dying, and with them, so are their stories. Also, the majority of the younger generation today does not care about history, just about the modern world and the future. When important events in history similar to the Holocaust are ignored, or thought of as "a drag" to learn about, further genocides are inevitable. Students today must liberate themselves of these ideas, become upstanders, and fight against the causes of genocide. Students as individuals have a powerful voice, and should attempt to remove themselves from the cycle of looking ceaselessly forward and never learning from the past. In order to liberate

our future, younger generations must make an effort to learn from Holocaust survivors while they are still here to share their stories. The younger generation will be the teachers of the future generations, and need to be passionate about saving the world from crimes against humanity. As a community, people must promote Holocaust education, especially by survivors. Those passionate about the need for effective Holocaust education in schools need to put pressure on school administrators and teachers. The time for improving Holocaust and genocide studies is now; the urgency of the matter cannot be stated more clearly. As teachers and administrators, people need to take an interest in contacting Holocaust survivors in order to expose students to their engaging and moving stories. There is also a great need for Holocaust studies to be appealing to young people, and to endorse upstanding behavior. Teachers, administrators, members of community, and students alike are obliged to liberate themselves of passive attitudes when it comes to genocide education; there is no time like the present to prepare for the future of humanity.

Additionally, the upstanders of today and revolutionaries of tomorrow are faced with the attitude of the modern world; an “us versus them” mentality. Today, when devastating news about a foreign country reaches America and other countries, the original reaction is that of “Wow, things look terrible over there” followed immediately by “What are they going to do about this?” This reaction displays the “them versus us” mentality. The ideology of “We have our own problems” is always at the forefront, with people constantly wondering what they can do for themselves. The world has become an environment in which bystander activity is normal, and the illusion of “that’s their problem” is everywhere. This temperament is just that however, an illusion; genocide is a crime against humanity, against everyone in the world. It weakens alliances, crumbles treaties, and demolishes human nature. This approach to genocide was a chief factor in the lack of upstanding seen in the Holocaust, and contributed to the death of millions of Jews during that time. To liberate the future, individuals must lead by example, and exhibit the qualities of an upstander. Those that witness upstanding behavior need to then mimic such attitudes, and spread the cause. It is difficult to be a leader, but much more challenging to be the first follower. Looking to the past, and learning what not to do in the face of adversity is essential to the act of freeing one’s self of prejudice, and allowing and supporting empathy for others. Empathy is a major part of making a difference, and the idea that weakness is synonymous with caring for others is absurd. Society needs to be supporting compassion, as it drives people to achieve extraordinary feats. Also, ridding one’s self of egocentricity is key, as removing the need to constantly improve one’s own

position will pave the way for compassion for those suffering in other parts of the world. Moreover, placing one's self in the belief that all humans deserve to be liberated will help with the removal of the aforementioned them versus us mentality. Blurring language and country boundaries and viewing everyone as equals is essential, as is eliminating prejudice and bigotry. Liberating the future means removing the major issues of today and striving to do better.

Individuality is an essential part to liberating the future. Everyone has different talents which contribute to the cause, which stimulates different ideas and creativity. Those with a gift for writing must utilize their abilities and speak out towards injustice with powerful writing. Writing is an important tool to employ during human rights studies, as properly placed words motivate others to achieve the impossible. Those that are creatively inclined are obliged to use such talents to create artwork, music, dances, or films to express the need for change in our world, and convey emotions to move people into action. Like writing, dance, art, film, and music can be extremely powerful to some individuals, and will push bystanders to become upstanders. Those with a natural ability to speak and be heard must take advantage of their talents and become leaders of the cause to liberate the future. People inclined to follow or be behind-the-scenes are important as well; being a follower is just as important as being a leader, and humility is always needed to keep everyone focused on the main goal. Without the use of different talents, a one-dimensional interpretation would be displayed to the world as the only outlet of change, and change would therefore be doomed. Different approaches appeal to different people, and a variety of individuals are needed to spark a revolution that will change today, and liberate tomorrow.

Moreover, the misconception that someone else's voice is more powerful than yours is an imminent problem in the journey that is the liberation of tomorrow. Everyday people can make a difference in the world, because every voice matters. The belief that there is a certain age or time to take a stand is equally absurd; average individuals have made an impact at every age and stage of their lives and taking action is not just for the people that seem to have their path laid out for them. Upstanding is something everyone can do, and standing up, in even the smallest of ways, causes a ripple, which expands and spreads to others. There is no "right way" to be an upstander, there are no rules; when you see injustice, act upon it, and change someone's view; that one person will spread contributory attitude to others, and those will spread upstanding to yet more people, and so on until there is an overwhelming amount of people that

have a capacity for change. Gandhi once said, “Whatever you do will be insignificant, but it is very important that you do it.” The fundamental lesson of this is that everything you do, in the grand scheme of things, is trivial, but it is imperative that you do it; one small act can spark a change bigger than one individual. The bottom line is: Your voice *counts* and it is imperative that you act upon it to liberate the future from the issues of today.

The future is dependent on our actions today as a global community. The upstanders and liberators of the modern world realize this; and are fighting to end genocide, prejudice, stereotyping, and bigotry. However, there are major issues they face on a daily basis, such as the use of social media to promote Hate, the downplayed role of history, the fact that Holocaust survivors are dying, and the “them versus us” mentality of today’s youth. As an international society, we must work to solve these issues by looking at the lessons of the Holocaust for answers, and by becoming upstanders in order to liberate the future of the atrocities of today. The individual talents and voice of each person now contribute a great deal to this cause, and it is imperative that we set aside differences and passive attitudes, and work together to save tomorrow from today.

## HUMAN RIGHTS ABUSES IN SOUTH SUDAN

*John Api*

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· LLM Candidate, Syracuse University College of Law; Class of 2016. I would like to thank the Open Society Foundation Scholarship for granting me a scholarship and making all of this possible.

According to the recent United Nations Panel Report on South Sudan, the South Sudanese civil war has resulted in widespread atrocities and left thousands of people on the brink of starvation.<sup>1</sup> South Sudan gained independence from Sudan in 2011, and became the newest sovereign entity to be recognized on the world stage. Though rich in natural resources, including oil, two decades of civil war against Sudanese rule has left the country in ruins.<sup>2</sup>

The South Sudanese civil war started in December 2013, just two years after independence from Sudan. The war erupted when President Salva Kiir accused his former deputy Dr. Riak Machar of attempting a military coup.<sup>3</sup> Dr. Machar denied the allegation, but called on the Army to remove President Kiir from power, accusing him of dictatorship.<sup>4</sup> The war set off by a power struggle between Mr. Kiir and Dr. Machar quickly devolved into a battle fought largely along ethnic lines, with Dinka ethnic group supporting president Kiir and Nuer backing Machar.<sup>5</sup> However, despite fighting along ethnic lines, Dr. Machar received backing of Rebecca Nyandeng an ethnic Dinka, a politician and widow of late Dr. John Garang De Mabior, the founding Father of Kiir's ruling party, Sudan People's Liberation Movement (SPLM).<sup>6</sup>

The United Nations Panel Report on South Sudan (the "U.N. Report"), released earlier this year, states that South Sudan's conflict has created one of the world's biggest humanitarian crises outside of the Syrian conflict.<sup>7</sup> The U.N. Report estimates that 1,000 civilians were killed, 1,300 women and girls were raped, and 1,600 women and children were abducted between April and September 2015 in northern parts of the country.<sup>8</sup> The U.N. Report also indicates that, per international aid agencies, more than 2.2 million people have fled their homes over the past two years, including some 600,000 who have sought refuge in neighboring countries.<sup>9</sup> The

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<sup>1</sup> Nick Cumming-Bruce, U.N. Finds South Sudan Increasingly in Turmoil, New York Times, (March 5<sup>th</sup>, 2016, 3:42 PM E.T), <http://www.nytimes.com/2016/01/22/world/africa/un-finds-south-sudan-increasingly-in-turmoil.html?ref=topics>.

<sup>2</sup> *Id.*

<sup>3</sup> *South Sudan Says Coup Defeated after Heavy Fighting*, Daily Nation, (March 5, 2016, 6:32 PM E.T), <http://www.nation.co.ke/news/africa/South-Sudan-says-coup-defeated-after-heavy-fighting/-/1066/2114344/-/nh5amcz/-/index.html>.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *South Sudan Says Coup Defeated after Heavy Fighting*, *supra* note 3.

<sup>7</sup> Nick Cumming-Bruce, *supra* note 1.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

fighting, which originated in the north, has also led to the formation of vigilante armed groups in southern states.<sup>10</sup>

The U.N. Report recommended targeted sanction on the leaders of the conflict and for the imposition of an arms embargo.<sup>11</sup> The recommendations stem from the U.N. Report's finding that the Army loyal to president Kiir and opposition forces under the command of Riek Machar are responsible for most of the reported incidents of violence.<sup>12</sup> Moreover, the U.N. Report further noted the increasing violence directed toward U.N. forces and aid workers by government forces and its affiliated militias; noting that "[t]he scale, intensity and severity of human rights violations and abuses have increased with the continuation of the hostilities."<sup>13</sup> The violence has led to "large-scale killings, attacks that have singled out and killed children and an 'unprecedented level' of sexual violence, including gang rape and sexual slavery."<sup>14</sup>

After the outbreak of the war, the international community led by United States, United Nations and other actors called on the warring parties to immediately cease hostilities and start peace talks to reach negotiated settlement. The Peace Talks which were held in Addis-Ababa, Ethiopia made the parties sign the August 2015 Compromised Peace Agreement. To demonstrate political will, President Kiir appointed Dr. Riak Machar as the First Vice President of the Country.<sup>15</sup> This appointment fulfilled an important condition of the August 2015 Peace Agreement, in which it was agreed that President Kiir should restore his rival and civil war adversary to his former position as Vice President.<sup>16</sup>

Despite his appointment as First Vice President, Dr. Machar delayed his return to the capital citing a lack of funds to facilitate transportation of his forces from various locations in South Sudan to cantonment areas and to the

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Nick Cumming-Bruce, *supra* note 1.

<sup>14</sup> Nick Cumming-Bruce, *supra* note 1.

<sup>15</sup> Rick Gladstone, *South Sudan Leader Appears to Take Major step to End Conflict*, New York Times, (March 5, 2016, 7:01 PM E.T), <http://www.nytimes.com/2016/02/12/world/africa/south-sudan-leader-takes-major-step-to-ending-conflict.html>.

<sup>16</sup> *Id.*

capital Juba as stipulated under the Agreement.<sup>17</sup> In February 2015, Troika nations (United States, United Kingdom and Norway) promised to transport opposition forces to Juba.

The January 2016 report issued by the Chairperson of the Joint Monitoring and Evaluation Commission (JMEC), the African Union body charged with monitoring the implementation of the August 2015 Compromise Peace Agreements, indicated that there is limited consolidation of peace, a worrying economic decline and violence ongoing in other parties despite the peace agreement.<sup>18</sup> The JMEC Report further explained that “[t]he economy is in particularly dire straits, with foreign reserves rapidly diminishing, growing inflation and rapid depreciation of the national currency.”<sup>19</sup> Moreover, the JMEC report placed the blame squarely on the shoulders of the government and rebel forces for the declining well-being in the country.<sup>20</sup>

During his visit to South Sudan at the end of February 2016, the United Nations Secretary General Ban Ki-Moon urged both President Kiir and opposition leader, Dr. Machar, to respect the terms of the Peace Agreement.<sup>21</sup> The Secretary General stressed that the government must fulfill its obligations to its population, which has suffered violence, displacement and hunger. Presently, South Sudan receives only 3% of the recommended international aid and the civilian population continues to bear the consequences of the conflict.<sup>22</sup>

Dr. Machar has stated he will return to the capital Juba on April 18, 2016 to uphold his duties as First Vice President and together with President Kiir, form the Transitional Government of National Unity (TGoNU) as stipulated under the Peace Agreement.<sup>23</sup> Only time will tell whether this Peace Agreement promote stability in the country as the deep

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<sup>17</sup>*Troika nations to transport Machar's forces to Juba*, Sudan Tribune, (April 18, 2016, 7:30 PM E.T), <http://www.sudantribune.com/spip.php?article58023>.

<sup>18</sup> Report by Chairperson of Joint Monitoring and Evaluation Commission, (March 5, 2016, 4:45 PM E.T) <http://jmecsouthsudan.org/uploads/AUPSCreport.pdf>.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Charlton Doki, *UN chief to South Sudan: Respecting peace deal not an option*, Associated Press, (March 5, 2016, 4:56 PM E.T) [https://www.washingtonpost.com/national/un-chief-to-south-sudan-respecting-peace-deal-not-an-option/2016/02/25/3283c42a-dbf6-11e5-8210-f0bd8de915f6\\_story.html](https://www.washingtonpost.com/national/un-chief-to-south-sudan-respecting-peace-deal-not-an-option/2016/02/25/3283c42a-dbf6-11e5-8210-f0bd8de915f6_story.html).

<sup>22</sup> *Id.*

<sup>23</sup> *Machar returns to Juba on Tuesday: Spokesman*, Sudan Tribune, (April 18, 2016, 7:30 PM E.T), <http://www.sudantribune.com/spip.php?article58675>.



mistrust between the two political parties could serve to further impede implementation of the Agreement.

## FORCED STERILIZATION IN PERÚ: A CASE AWAITING JUSTICE

*Pamela Smith*

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During the administration of former President Alberto Fujimori, over 200,000 women and men were sterilized without their consent as part of the Reproductive Health and Family Planning Programme.<sup>1</sup> The Ombudsman Office has identified irregular enforcement of this programme during the years 1996 to 2000.<sup>2</sup>

Testimony reveals that poor, indigenous, and rural women were targeted by this policy.<sup>3</sup> The testimony of G.H.C., a 28-year-old who lives in the Mantoclla province of Anta Cusco, illustrates the shared experience of many of the women targeted during the forced sterilization program.<sup>4</sup> G.H.C. explained that the Health Center of Izcuchaca personnel took her from her home to have the sterilization procedure.<sup>5</sup> She wanted to run away from the hospital but they did not let her go.<sup>6</sup> Another victim of this sterilization program, V.E.V.E., had the tubal ligation procedure performed at the Regional Hospital Cayetano Heredia in Piura.<sup>7</sup> She was pregnant and admitted to the hospital because of a hemorrhage.<sup>8</sup> The doctor informed her that she had to sign a document and she recalled, “At that moment I could not think, I signed [the paper] without reading it, I did not understand what it was all about.”<sup>9</sup>

Additionally, the Ombudsman Office has identified in the reports issued between 1998 and 1999 that at least 18 women have died as a consequence of the sterilization program.<sup>10</sup> One of the identified victims was Mamérita Mestanza, a 33-year-old mother of seven.<sup>11</sup> The personnel of the Health Center in the District of La Encañada repeatedly threatened to report her

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<sup>1</sup> SUB COMMISSION INVESTIGATING INSTITUTIONS AND INDIVIDUALS INVOLVED IN THE VOLUNTARY SURGICAL CONTRACEPTION, INFOME FINAL SOBRE LA APLICACIÓN DE LA ANTICONCEPCIÓN QUIRÚRGICA VOLUNTARIA (AQV) EN LOS AÑOS 1990-2000 [Final report on the application of the Voluntary Surgical Contraception 1990-2000] 84 (Congress of the Republic of Perú, 2002).

<sup>2</sup> THE OMBUDSMAN OFFICE, ANTICONCEPCIÓN QUIRÚRGICA VOLUNTARIA I [Voluntary Surgical Contraception] 3 (1998).

<sup>3</sup> GIULIA TAMAYO, NADA PERSONAL [Nothing Personal] 44 (CLADEM, 1999).

<sup>4</sup> *Id.* at 88.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 90.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Julisa Mantilla, *Las esterilizaciones forzadas contra las mujeres peruanas: cuando la impunidad reina*, IUS 360 (Feb. 18, 2014), <http://www.ius360.com/otro/sociologia-del-derecho/las-esterilizaciones-forzadas-contra-las-mujeres-peruanas-cuando-la-impunidad-reina/>.

<sup>11</sup> Mestanza v. Perú, Petition 12.191, Inter-Am.Comm’n H.R., Report N°71/03, OEA, 9-13 (2003).

and her husband, Jacinto Salazar, to the police; falsely asserting Peruvian law punishes anyone with more than five children.<sup>12</sup> She finally agreed to have the tubal ligation surgery on March 27, 1998, at the Cajamarca Regional Hospital without any medical examinations prior to the surgery.<sup>13</sup> Ms. Mestanza was released the next day despite symptoms associated with complications of surgery.<sup>14</sup> In the following days, her health rapidly deteriorated.<sup>15</sup> Her husband informed the personnel of the Health Center, but was informed post-operative effects of anesthesia were to be expected.<sup>16</sup> Mamérita died on April 5, 1998.<sup>17</sup> According to the death certificate, “sepsis” was the direct cause of her death due to a bilateral tubal blockage.<sup>18</sup>

Ms. Mestanza’s case was brought before the Interamerican Commission of Human Rights.<sup>19</sup> There, the Peruvian government agreed to enter into a friendly settlement.<sup>20</sup> One condition of the settlement was that the government must punish those responsible for the death of Mamérita Mestanza.<sup>21</sup>

These stories are not unique, but indicative of the widespread forced sterilization program orchestrated by Former President Alberto Fujimori. In the last 15 years, there have been intermittent preliminary investigations into the alleged forced sterilization of over 2,000 indigenous women.<sup>22</sup> In 2011, these cases were reopened, but subsequently closed in 2012.<sup>23</sup>

The Public Prosecutor’s Office reopened the investigation again in 2015 and it was recently extended for 150 days.<sup>24</sup> The Ministry of Justice and Human Rights has set up the Forced Sterilized Victims Registry under Law Decree N.- 006-2015-JUS, which seeks to identify forced sterilization

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 10.

<sup>14</sup> *Id.* at 11.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 12.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 1.

<sup>20</sup> *Id.* at 3.

<sup>21</sup> *Id.* at 14.

<sup>22</sup> *La sombra de las esterilizaciones forzadas*, (Cuarto Poder-América Televisión Set 11, 2015)

<sup>23</sup> *Id.*

<sup>24</sup> Jacqueline Fowks, La investigación por esterilizaciones forzadas se prolonga, *El País* (Feb. 21, 2016), [http://internacional.elpais.com/internacional/2016/02/10/america/1455140195\\_712699.html](http://internacional.elpais.com/internacional/2016/02/10/america/1455140195_712699.html).

victims in order to provide legal remedies and adequate healthcare treatment.<sup>25</sup> The Registry is another measure aimed to uphold Peru's obligations under the friendly settlement.<sup>26</sup> The Registry is operational in three cities, and more than 452 women have already registered.<sup>27</sup> The creation of the registry system is pending in a number of other Peruvian cities.<sup>28</sup>

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<sup>25</sup> Law Decree N.- 006-2015-JUS, noviembre, 2015, Diario Oficial El Peruano (Perú).

<sup>26</sup> Jacqueline Fowks, Perú crea un registro de víctimas de esterilización forzada bajo Fujimori, El País (Nov. 7, 2016), [http://internacional.elpais.com/internacional/2015/11/07/actualidad/1446851524\\_983241.html](http://internacional.elpais.com/internacional/2015/11/07/actualidad/1446851524_983241.html).

<sup>27</sup> Fabiola Valle, *Van 452 mujeres que reportan ser víctimas de esterilización durante el gobierno de Fujimori*, Perú 21 (Feb. 21, 2016), <http://peru21.pe/politica/van-452-mujeres-que-reportan-victimas-esterilizacion-2239585>.

<sup>28</sup> *Id.*

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**NORTH AMERICA & OCEANIA DESK**

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**Australia Announces All Mainland Asylum-Seeking Children Freed from Detention**

*By Samuel Miller*

*Impunity Watch Reporter, North America and Oceania*

**April 4, 2016**

**BRISBANE, Australia --** Over the weekend, the Australian government confirmed that all the asylum-seeking children that were being held in mainland immigration centers across the country had been released. However, this appears only to be possible as the government has reclassified sections of detention centers as “community detention” in order to be able to claim that all children have been released from immigration detention.

Following a High Court decision earlier this year, approximately 90 children currently in Australia are due to be sent to Nauru.

Under its strict anti-immigration policy, Australia currently detains all asylum seekers arriving by boat, holding them in detention camps in Nauru and New Guinea. Over the past year, as the number of refugees fleeing conflict-hit zones in the Middle East has surged, the Australian government has increasingly faced severe criticism from several human rights groups over the conditions in these detention camps.

Australian Immigration Minister Peter Dutton over the weekend in Brisbane told reporters, “Today we have no children of boats in detention, and that is a significant achievement of this government.” “It’s been almost a decade since there were no children in detention,” Dutton added.

Specifically, officials in Australia say the last group of children ranged from a baby to a 17-year-old. According to SBS, Mr. Dutton said the last few children’s cases had been complicated because they involved one parent being subject to a negative security assessment from the national spy agency, but the whole family had been in detention so they wouldn’t be separated.

As for the status of the children, Mr. Dutton told the ABC the Government’s policy had not changed in relation to the children, who are currently in

Australia either for medical treatment or accompanying a family member to hospital.

"They are all subject to go back to Nauru once medical support has been provided and we've been very clear about that," he said.

Natasha Blucher, from the Darwin Asylum Seeker Support and Advocacy Network, expressed doubt and caution over the government's announcement. "Because of the way the law is set up, because of Australia's policy, and because of the children's date of arrival in Australia, they're not eligible to apply for protection in Australia, so they do remain essentially in limbo until we see a change of legislation and a change of our policy."

In a report published last February, Australia's Human Rights Commission said that hundreds of refugee children were suffering from severe mental illness as a result of prolonged detention at these offshore processing camps.

Under its strict anti-immigration policy, Australia currently detains all asylum seekers arriving by boat, holding them in detention camps in Nauru and New Guinea.

*For more information, please see:*

ABC News (AU) – About 90 asylum seeker children in Australia to be returned to Nauru, Peter Dutton confirms – 3 April 2016

BBC News – Australia asylum: Children held on mainland freed – 3 April 2016

IB Times – Australia Says All Asylum-Seeker Children In Mainland Detention Centers Have Been Released – 3 April 2016

NEWS.com (AU) – No more asylum seeker children in Australian detention – 3 April 2016

SBS News – No migrant kids detained on Aust mainland – 3 April 2016

Sky News AU – No asylum seeker children left in detention – 3 April 2016

The Guardian – Asylum seeker children still in detention despite claims all have been released – 2 April 2016



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**ASIA DESK**

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**Tibetan Monk Sets Himself on Fire in Protest of Chinese Rule**

*By Christine Khamis*

*Impunity Watch Reporter, Asia*

**March 4, 2016**

**BEIJING, China** – A Tibetan monk named Kalsang Wangdu set himself on fire in China's Sichuan Province this week as an act of protest against Chinese rule. Mr. Kalsang was only 18 years old. This was the first act of self-immolation to take place in China since August.

Mr. Kalsang set himself on fire outside of his monastery on Monday, which is located in Kardze Prefecture, a common site for protests against China's rule. Free Tibet, an organization that campaigns for Tibet's freedom from China, reports that Mr. Kalsang called for Tibet's independence while burning himself. Onlookers poured water on Mr. Kalsang, but he later died while on the way to a hospital.

Tibetans living in the Kardze region are known for their sense of Tibetan identity and for their frequent protests against China's rule. News from the region is hard to obtain, and local law enforcement in the area are instructed to stay quiet about acts of self-immolation.

The Chinese government has consistently cracked down on the Tibetans since its invasion of Tibet in 1950. During uprisings beginning in March 1959, the Dalai Lama fled from China to India. Every year since then, Chinese authorities fears protests among Tibetans to commemorate the March anniversary of the uprising.

For decades, Tibetans have resisted China's rule. Over 140 Tibetans have protested by self-immolation since 2009. During 2009, Tibetan uprisings gained intensity, with protestors calling for freedom and the return of the exiled Dalai Lama. Most of them have been monks like Mr. Kalsang, but other individuals have also committed acts of self-immolation.

A Tibetan woman was detained on Tuesday for walking around with a portrait of the Dalai Lama. China has banned images of the Dalai Lama,

who it blames for Tibetan's protests and self-immolations, throughout the country. The Dalai Lama has stated that he is against all forms of violence.

*For more information, please see:*

The New York Times – Protesting Chinese Rule, Tibetan Monk Dies After Setting Himself Ablaze – 3 March 2016

Radio Free Asia – Tibetan Monk Burns to Death in Kardze Protest – 3 March 2016

Time – Tibetan Monk in China Said to Self-Immolate in Independence Protest – 3 March 2016

South China Morning Post – Tibetan Monk Calls Out for Independence, Sets Himself on Fire in Western China to Protest Beijing's Rule: Report – 2 March 2016

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#### ASIA DESK

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### **Missiles Strike Four Hospitals in Syria**

*By Brittani Howell*  
*Impunity Watch Reporter, The Middle East*

**February 23, 2016**

**DAMASCUS, Syria** – Nearly 50 civilians were killed on Monday, as four hospital facilities were struck by missiles. The United Nations stated that the airstrikes were a blatant violation of international law.

In the town of Azaz, near the Turkish border, fourteen people were killed and another 30 were wounded, as airstrikes struck a school and the children's hospital. Local news footage showed ambulances unloading children on stretches at the Kilis State hospital.

The Turkish Prime Minister Ahmet Davutoglu accused Russia of conducting the airstrikes that hit the hospital and school, killing children. Turkey's foreign minister called it an "obvious war crime." Russia denied responsibility for the attacks, stating that their country does not bomb indiscriminately and does not target civilians. The United States State Department, however, claimed the Syrian regime for the attacks.

Unicef, the United Nations children's agency, stated, "We at Unicef are appalled by reports of attacks against four medical facilities in Syria – two of which were supported by Unicef." It continued, "One is a child and maternal hospital where children were reportedly killed and scores evacuated." "Apart from compelling considerations of diplomacy and obligations under international humanitarian law, let us remember that these victims are children," Unicef continued.

Another attack occurred on Monday at Maarat al-Numan, in the Idlib province, as a Doctors Without Borders hospital was struck by missiles four times within minutes. According to Doctors Without Borders, seven people were killed with another 8 people missing and presumed dead. Of those killed, five were patients, one was a caretaker, and one was a hospital guard. The eight unaccounted for are staff members, patients also may be missing, however it is not clear how many.

Massimilian Rebaudengo, Doctors Without Borders' head of mission, stated, "This appears to be a deliberate attack on a health structure, and we condemn this attack in the strongest terms possible." He continued, "The destruction of the hospital leaves the local population of around 40,000 people without access to medical services in an active zone of conflict."

Doctors Without Borders claimed that the Syrian government was responsible for the airstrikes in the Idlib province. The Syrian ambassador to Russia accused the United States led coalition for the attacks in Idlib. The United States stated that the coalition did not conduct any military operations in the area.

Riad Hijab, the head of the high negotiations committee, stated on Sunday, "Everyday, hundreds of Syrians die from airstrikes and artillery bombardment, poison gas, cluster bombs, torture, starvation, cold and drowning." He continued, "The Syrian people continue to live in terror and in utter despair after the international community failed to prevent even the gravest violations committed against them."

According to Physicians for Human Rights, 697 health care workers have been killed in 336 attacks on medical sites over the course of the Syrian conflict. The vast majority of attacks are carried out by the Syrian government and its allies according to Physicians for Human Rights.

*For more information, please see:*

CNN – Syria: At least 22 Killed in Strikes Against 2 Hospitals, Sources Say – 16 February 2016

Reuters – Missiles in Syria Kill 50 as Schools, Hospitals Hit; Turkey Accuses Russia – 16 February 2016

Al-Jazeera America – Deadly Airstrikes Destroy Three Hospitals, School in Syria – 15 February 2016

The Guardian – Airstrikes Hit Two Syrian Hospitals, with Turkey Condemning ‘Obvious War Crimes’ – 15 February 2016

The New York Times – Syrian Hospitals Hit as Battlefield Grows More Chaotic – 15 February 2016

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#### AFRICA DESK

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### **The Day the Press Stood Still**

*By Tyler Campbell*  
*Impunity Watch Reporter, Africa*

**February 16, 2016**

**CONAKRY, Guinea** – This Tuesday, 5 media outlets in Guinea joined together to create a media blackout day in remembrance and in protest to the death of fellow journalist, El Hadj Mohamed Diallo. The black-out was intended to draw attention to the dangerous climate that Guinea journalists work in on a daily basis. At this point it is not clear if Diallo was targeted for being a journalist or just caught in the cross fire during a politically motivated uprising in the nation’s capital.

Before his death, Diallo was covering the opposition party’s vice president, Mamadou Bah Oury’s attempt to enter his office after he had been removed from that office by supporters of Union of Democratic Forces of Guinea (UFDG) earlier that day. The opposition party and their ex-vice president are blaming each other for the violence that broke out during the walk in.

The risk involved with being a journalist in Guinea cannot be chalked up to mere government oppression. In fact the government is currently investigating the death of Diallo. However, it is not unusual for journalists to be targeted by different segments of the Guinea public. There are wide

reports of journalists being beaten by police officers and media outlets and radio stations being told to not run stories.

One notable instance of journalist oppression happened during the 2014 Ebola crisis. One journalist and two media workers lost their lives while trying to cover the crisis in Guinea. This media team lost their lives not to the disease they were covering but for covering the story. The three went missing and were later found murdered in a septic tank. It is in this environment that Guinea journalist are risking their lives.

In response to the murder of Diallo the authorities in Guinea have arrested 17 opposition party members. Why these 17 members were arrested and what they are being charged with is unclear at this time.

Diallo worked for Guinea7 news and wrote for the weekly L'indépendant. He is survived by his wife and younger daughter.

*For more information, please see:*

[The Guardian -- Guinea's media holds 'press-free day' over shooting of journalist in clashes --9 Feb 2016](#)

[AfricaNews -- Guinea: 17 arrested over journalist's death -- 12 Feb. 2016](#)

[Bloomberg Business -- Guinea Reporter Killed During Clash Between Opposition Party -- 9 Feb 2016](#)

[All Africa -- Guinea: Media Blackout in Memory of Slain Journalist -- 9 Feb. 2016](#)

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## EUROPE DESK

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### **France May Extend State of Emergency Powers**

*by Shelby Vcelka  
Impunity Watch Desk Reporter, Europe*

**January 26, 2016**

**PARIS, France**--France is in the process of extending its state of emergency that has been in place since the Paris attacks in November of last year. The French Prime Minister, Manuel Valls, said that the state of

emergency must continue for a “necessary” period of time, despite protests from the UN experts and human rights groups. Prime Minister Valls also said that Europe could not handle the influx of refugees fleeing the “terrible” wars in Iraq and Syria, as it could destabilize the country.

Valls’ remarks have ignited international debate about how long an emergency state and extra police powers could exist. The French President, Francois Hollande, has stated that the extension of the police powers is probable, with a final decision likely next week.

The state of emergency was supposed to last for a short period of time, but was extended for three months and set to expire on 26 February, 2016. The government first extended the police powers immediately after the Paris attacks on 13 November 2015. The state of emergency allows police to conduct house raids and searches without a warrant during the day or night, gives police the ability to place people under house arrest without extrajudicial process, and allows for restrictions on large gatherings or protests.

Since the state of emergency has gone into effect, there have been around 3,100 raids and searches, and almost 400 people have been placed under house arrest. Most of the raids and arrests occurred immediately after the attacks, but have substantially slowed down since then. At least 500 weapons have been seized, but over 200 of them have been seized from one person.

The Human Rights League of France has taken a case contesting the state of emergency to the highest court of France. Their reasoning states that it is no longer defensible and “seriously impacts public freedoms.” The court will hear the case next week.

Likewise, the UN has condemned the extension of the police powers, as it “lack[s] clarity and precision of several provisions of the state of emergency and surveillance laws.” Their main problems involve issues with freedom of expression, peaceful assembly, and the right to privacy.

*For more information, please see:*

CNN -- French Parliament considers expanded emergency powers -- 19 November 2015

Euronews -- France's national assembly votes to extend state of emergency -- 19 November 2015

BBC -- Migrant crisis: EU at grave risk, warns France PM Valls -- 22 January 2016

The Guardian -- France considers extending national state of emergency -- 22 January 2016

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## SOUTH AMERICA DESK

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### Opposition Leader Killed in Election Lead Up

*By Kaitlyn Degnan*  
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**CARACAS, Venezuela** -- Venezuelan President Nicolas Maduro's government is facing intense scrutiny in the days leading up to the national election following the murder of an opposition leader last Wednesday. Luis Diaz, the Guarico States leader of the Democratic Action party of Guarico State was shot and killed during a public meeting.

Mr. Diaz was on stage with Lilian Tintori, a campaigner and activist. Ms. Tintori is married to opposition leader Leopoldo Lopez whose trial garnered worldwide criticism. It is unknown whether Ms. Tintori was also an intended target of the attack.

Other opposition figures have faced violence in the lead up to the election. Ms. Tintori alleged that she was the victim of at least two attacks, including the dismantling of brakes on a plane used by her team. Henrique Capriles, who lost the 2013 presidential election to Maduro has also been the victim of aggression.

President Maduro's government has faced international criticisms in the aftermath of the killing, with statements of concern coming from a number of NGO and the United States. In a statement released the day after Diaz's death, the Director of Amnesty International Venezuela, Marcos Gomez, said that the killing gave a "terrifying view of the state of human rights in Venezuela."

The Democratic Action party is part of the Democratic Unity coalition, a bloc of opposition parties looking to unseat the Maduro's Socialist Party. Democratic Action national leader Henry Ramos blames the Socialist party for Diaz's death.

The Venezuelan government has denounced any connection between the ruling party and the killing, and has said that it would sue opposition leaders blaming the Socialist Party. Foreign Minister Delcy Rodriguez said in a tweet that trying to establish such links was in "bad faith."

Venezuela has opened an investigation into the killing through the Public Prosecutor's office. Government officials claim that Mr. Diaz was involve with a violent gang in Guarico, and that the killing was carried out on behest of a rival gang member.

The upcoming elections may be historical – there is a significant chance for the first time in 16 years that the Socialist Party may lose the legislature. In the past year alone, 43 people have died and hundreds have been injured during violence sparked by opposition protests.

*For more information, please see:*

Amnesty International – Venezuela: Killing of opposition politician sparks fears of spiraling violence – 26 November 2015

The Guardian – US condemns murder of opposition politician before Venezuela election – 26 November 2015

Reuters – Opposition activist's murder shakes Venezuela before election – 26 November 2015

Business Insider – Venezuela lashes U.S., opposition amid blame over activist's slaying – 27 November 2015

Global News – Calls for Venezuela to protect politicians after opposition leader killed – 27 November 2015

UN News Centre – Top UN human rights official calls for more safety after political opponent killing in Venezuela – 27 November 2015

Fox News – Slaying of Venezuelan opposition leader has become flashpoint ahead of elections – 28 November 2015