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**An Emphasis on Relationships:
The Driver for Success of the Special Court for Sierra Leone's Office of the Prosecutor**

*Kiri Latuskie*¹

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Introduction and Scope

International criminal tribunals² have been subject to significant scrutiny. On paper, international criminal tribunals have internationally agreed upon procedures for creation, applying the rules created specifically for that court/tribunal, and implementing justice. However, in practice, implementing a successful international criminal tribunal requires slick political maneuvering, efficient use of resources (both relational and economic), building strong community foundations, and utilizing close relations to: produce evidence to support both the prosecution and defence, access and protect witnesses and informants, find and confiscate suspected international criminals, and imprison international criminals. International criminal tribunals rely heavily on funding and cooperation from diverse international groups.³ In addition, the communities for which they seek to provide justice must place trust in the programs and must not view the institutions as political moves or contrary to their best interests.

It is important to consider past successes in the implementation and execution of existing and future international criminal tribunals. The Special Court for Sierra Leone (SCSL) was reportedly particularly successful due to the prosecution teams' use of relational resources and foundation within the local and international community.⁴ Within the Office of the Prosecutor

² Hereinafter, "international criminal tribunals" will collectively refer to the numerous ad-hoc tribunals (the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the Special Panels for East Timor, the Special Court for Sierra Leone, Extraordinary Chambers in the Courts of Cambodia, and the Special Tribunal for Lebanon), and the International Criminal Court (ICC).

³ See Shakiratu Sanusi, *SCSL Practice on Cooperation with the Host State and Third States: A Contribution to Africa and International Criminal Justice*, in Charles Jalloh, ed, *THE SIERRA LEONE SPECIAL COURT AND ITS LEGACY: THE IMPACT FOR AFRICA AND INTERNATIONAL CRIMINAL LAW*, 469 (Cambridge University Press, 2013).

⁴ See generally Douglas Farah, *BLOOD FROM STONES: THE SECRET FINANCIAL NETWORK OF TERROR* (2004) (discussing the complexity of the conflict and its roots); Jalloh, *supra* note 3 (providing an in-depth background on the establishment of the SCSL).

(OTP), relationships were valued and teamwork proved successful in the execution of investigations and indictments. The chief prosecutor, David Crane, employed a similar relational approach with community members – developing their confidence in the Court and achieving justice for their people. Finally, the SCSL had an innovative “Outreach Program” which attempted to engage with the broader community in Sierra Leone and educate them on the Court’s mandate while hoping to glean insight in their cases.

Empirical evidence shows that relational approaches are regarded as successful in other arenas, such as illicit substance use counselling and child-rearing.⁵ This will be used as support for a relational approach in the context of trauma. Additionally, this paper will demonstrate that this translates to the application of justice in international criminal law.

Finally, it is important to note that there are characteristics that make effective lawyers. Many of these characteristics are relational in nature. Relational characteristics are not new to justice. In fact, relational characteristics are some of the most important traits exemplified by effective lawyers.⁶ The chief prosecutor of an international tribunal is a lawyer. It is argued that these characteristics must be displayed and utilized to engage the citizens of the post-conflict country/countries, the global community, and others involved in the execution of the tribunal’s mandate. Finally, this paper will use the SCSL as an example and draw from findings on research in other areas to make recommendations for international criminal tribunals in the future.

⁵ Debra J. Pepler et al, *The Mother-Child Study: Evaluating Treatments for Substance-Using Women – A Focus on Relationships*, TORONTO: MOTHERCRAFT PRESS (2014), mothercraft.ca/assets/site/docs/resource-library/publications/Mother-Child-Study_Report_2014.pdf.

⁶ Marjorie M. Shultz & Sheldon Zedeck, *Identification, Development, and Validation of Predictors for Successful Lawyering* at 26–27 (2008), <https://www.law.berkeley.edu/files/LSACREPORTfinal-12.pdf>, (see Appendix A, *infra* at 23, for highlighted factors that involve relational skills).

International criminal law was hatched at the Nuremburg trials. This occurred after several mass atrocities on the global stage resulted in a cry for justice to hold those accountable. Those, who may be so powerful in their own state that the global community was the only opportunity to hold perpetrators of mass atrocities accountable. This trend continues in the current landscape and mass atrocities continue, though generally more localized. The “highly complex sociopolitical environment”⁷ in which international criminal institutions operate, creates many obstacles to efficient and effective justice seeking. There is no doubt that it is impossible to have a challenge-free environment for any international institution as states must protect their own interests. However, the challenges predominantly faced by international criminal institutions⁸ can be greatly mitigated by a prosecution team who focus on building relationships. These relationships include those built locally, nationally, and internationally with, *inter alia*, politicians, victims, witnesses, informants, local and international enforcement, defendants. Given that politics are the most prevalent thread weaved through international criminal institutions,⁹ positive relationships with political partners (and adversaries) can be extremely rewarding – as was the case with the SCSL.

⁷ Leila N. Sadat, *International Criminal Justice – The Journey from Politics to Law in FOUNDERS: FOUR PIONEERING INDIVIDUALS WHO LAUNCHED THE FIRST MODERN-ERA INTERNATIONAL CRIMINAL TRIBUNALS* 19 (David M. Crane, Leila N. Sadat, & Michael P. Scharf, eds., Cambridge University Press, 2018) .

⁸ *Id.* at 20; Challenges include “lack of funding, problems of state cooperation, difficulties in arresting defendants, challenges stemming from uneven support for their institutions, and significant criticism of their work by the media, governments, defendants, and academics.”

⁹ David M. Crane, Faculty of Law, W. Univ., *Creating a tribunal/court; considerations as to prosecutorial strategy* (Sept. 25, 2018).

Reflexivity

In any social science research piece, it is important to consider ones' biases and how those biases are molded by past and present experiences and knowledge, and subsequently how those experiences and knowledge mold the current work. It is particularly important to acknowledge my views in the context of this paper so that readers can read the immediate paper with the researcher's position in mind.

I undertook my MSc thesis project¹⁰ at an early intervention centre in Toronto, Ontario.¹¹ At this centre, the clinicians (primarily social workers and psychologists) ran programming for mothers who used substances during pregnancy or motherhood, and their children. The centre employed a relational approach with their clients – putting the relationship of the mother and child at the forefront of intervention and support.¹² Through decades of evaluation of their programming, they have observed extremely positive results. With this context in mind, I completed my own study on patterns of substance use in pregnancy. In the qualitative portion of my study, it was concluded, *inter alia*, that positive relationships in the women's personal lives and with service providers contributed to the women's increased self-efficacy and belief that they could succeed in discontinuing their substance use.¹³ Given this positive finding about relationships and having seen

¹⁰ See generally, Kiri Anna Latuskie, *Discontinuation Patterns of Substances of Abuse in Pregnancy in a Cohort of Women Seeking Addiction and Parenting Support: A Mixed Methods Study* (2016) (MSc Thesis, University of Toronto Leslie Dan Faculty of Pharmacy), <https://tspace.library.utoronto.ca/handle/1807/75111>.

¹¹ "Breaking the Cycle (BTC) is an early identification and prevention program designed to reduce risk and to enhance the development for substance-exposed children (prenatal - 6 years) by providing services which address maternal addiction problems and the mother-child relationship through a community based cross-systemic model," See generally, *Breaking the Cycle*, MOTHERCRAFT, <http://www.mothercraft.ca/index.php?q=ei-btc>.

¹² Pepler et al., *supra* note 5.

¹³ Kiri Latuskie et al., *Reasons for substance use continuation and discontinuation during pregnancy: A qualitative study*, 32 WOMEN AND BIRTH 57, 60 (Feb. 2019), [https://www.womenandbirth.org/article/S1871-5192\(17\)30727-8/abstract](https://www.womenandbirth.org/article/S1871-5192(17)30727-8/abstract).

firsthand the incredible steps taken forward by the women at Breaking the Cycle, I acknowledge my bias in favour of taking a relational approach and the importance of relationships in all aspects of life and practice.

More closely connected to the topic of this paper, I attended the lectures of Professor David Crane¹⁴ in *International Criminal Practice*.¹⁵ Throughout the course and his book chapter,¹⁶ Crane reflected most positively on and emphasized most thoroughly the relationships that he built with colleagues, local communities (and individual community members) in Sierra Leone, and international partners. This is only my second introduction to international criminal law and my first to its practice on a global stage. As such, I have largely adopted Crane's perspectives in regard to the importance of relationships to the success of an international criminal tribunal. In addition, despite having read on the topic of the SCSL and tried to develop a critical view of the successes and failures of the SCSL, I likely view the SCSL too favourably because I was taught by its first chief prosecutor whom had a positive experience at it and experienced significant successes despite starting with very limited resources, support, and belief from others in its success.

I try my best to present a neutral view and critically assess the evidence in favour of adoption of a relational approach to international criminal practice. With that being said, it is important to take into account the possible biases involved in this assessment. It is also important to view my experiences as possibly positive in this regard as analogies may lend support to an adoption of this approach, despite being found in different contexts. The type of trauma is case

¹⁴ In an effort to write a paper that has the potential for publication I will hereinafter refer to Professor David M. Crane as "Crane." This is not meant to disrespect Professor Crane's position.

¹⁵ David M. Crane, Faculty of Law, W. Univ., *International Criminal Practice* (Sept. 24-28, 2018).

¹⁶ David M. Crane, *The Special Court for Sierra Leone in FOUNDERS: FOUR PIONEERING INDIVIDUALS WHO LAUNCHED THE FIRST MODERN-ERA INTERNATIONAL CRIMINAL TRIBUNALS* 74-93 (David M. Crane et al., eds., Cambridge University Press, 2018).

specific, however trauma in general is experienced by both populations that I will be discussing. Namely, mothers who are substance-involved and the people of post-conflict or amidst-conflict countries both have, *inter alia*, history of sexual violence, loss of relationships, and mental health issues.

Sierra Leone Special Court: Background

The Sierra Leone Special Court was the product of significant international cooperation – politically, operationally, and financially.¹⁷ Obviously, its operation and success were highly dependent on this. The focus of this discussion will be on the operation of the Office of the Prosecutor (OTP) during its first three years. The OTP's dedication to engaging with Sierra Leoneans led to successful and efficient fact-finding, investigation, indictment, and the eventual prosecution of many significant players in the atrocities that occurred in Sierra Leone.

The SCSL was unique in many ways. Unlike its predecessors, the SCSL and OTP were located in the region where the atrocities occurred.¹⁸ The SCSL benefitted from the support of its host nation, Sierra Leone.¹⁹ The OTP was to be made up of both Sierra Leoneans and international staff.²⁰ Additionally, organizing members of the SCSL had the advantage of learning from past international criminal tribunals and using their successes and failures to organize *inter alia* the

¹⁷ Sanusi, *supra* note 3 at 469.

¹⁸ *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, Sierra Leone and United Nations, Jan. 16, 2002, 2178 UNTS No 38342 art. 10 [UN SL Agreement]; *See also*, *First Annual Report of the President of the Special Court for Sierra Leone for the Period December 2, 2002–December 1, 2003*, at 3, SPECIAL COURT FOR SIERRA LEONE, <http://rscsl.org/Documents/AnRpt1.pdf> [SCSL First Annual Report].

¹⁹ Gerhard Anders, *Juridification, Transitional Justice and Reaching Out to the Public in Sierra Leone* in LAW AGAINST THE STATE: ETHNOGRAPHIC FORAYS INTO LAW'S TRANSFORMATIONS 94 (Julia Eckert et al., eds., Cambridge University Press, 2012); *Id.* at 95 (The SCSL was established by agreement between the UN and Sierra Leone).

²⁰ UN SL Agreement, *supra* note 18 at art. 3(4).

court, statute, funding, outreach, and investigations. The court was also unique in that its mandate was to “try those bearing the greatest responsibility for crimes against humanities and war crimes committed during the civil war in Sierra Leone between November 1996 and February 2002.”²¹ This meant that there were a limited number of individuals who could have been and were tried.²²

Once established, the court was also exceptional in the expedience of its operations. For example, the OTP not only issued eight indictments within seven months of its establishment, it also captured six of the indictees.²³ The SCSL began their trials in June of 2004.²⁴ The accused were joined in their trials based on their associations during the civil war, meaning that trials for six of the accused were underway within two years of the establishment of the OTP.²⁵ Compare this to the ICTY. The OTP was established on August 15, 1994.²⁶ Only three indictments were issued within the first seven months of the tribunal’s operation and all indictees remained at large.²⁷ The first trial for a single accused took place in 1996, two years after the OTP’s establishment.²⁸

²¹ Anders, *supra* note 19 at 426.

²² *Id.* at 427.

²³ David M. Crane, *White Man’s Justice: Applying International Justice after Regional Third World Conflict*, 27 CARDOZO L. REV. 1683, 1685 (2006).

²⁴ *Second Annual Report of the President of the Special Court for Sierra Leone for the Period January 1, 2002–January 17, 2005*, SPECIAL COURT FOR SIERRA LEONE at 5, <http://rscsl.org/Documents/AnRpt2.pdf>.

²⁵ *SCSL First Annual Report*, *supra* note 18 at 10.

²⁶ Richard J. Goldstone, *The International Criminal Tribunals for the Former Yugoslavia and Rwanda in FOUNDERS: FOUR PIONEERING INDIVIDUALS WHO LAUNCHED THE FIRST MODERN-ERA INTERNATIONAL CRIMINAL TRIBUNALS* 55, 60 (David M. Crane et al., eds., Cambridge University Press, 2018).

²⁷ *See generally*, U.N. GAOR, 50th Sess., 365th mtg., *Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, U.N. Doc. A/50/365 (Aug. 23, 1995), http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_1995_en.pdf.

²⁸ International Criminal Tribunal for the former Yugoslavia, *The Tribunal’s first trial: another step in the fulfillment of the Tribunal’s mandate* (May 6, 1996), <http://www.icty.org/en/press/tribunals-first-trial-another-step-fulfillment-tribunals-mandate>.

It is true that an international criminal tribunal is not a race, however when resources are limited and peace and justice are at stake, timing is of the essence.

The distinctiveness of the SCSL also flowed from the attitude, experience, and strategy of its first chief prosecutor, David Crane. Crane put significant emphasis on relationships: relationships with international leaders; relationships with staff; and relationships with community members.²⁹ This is clear reading his contribution to *Founders* and stands out from the other contributions in the book. While other “founders” focus on their work and experience, Crane focuses on the relationship he has with each person brought up in the chapter.³⁰ There is a discussion of whether he perceives them as helpful or will thwart his efforts. He used these judgment calls to pursue his strategy effectively. Crane also worked extensively with and placed emphasis on the Outreach Section to develop rapport with the local population.³¹ Crane was quoted as saying that outreach was “an absolute key to success.”³²

Relational Approach at the SCSL

Perhaps outreach was the key to success, but more likely it was an accumulation of all of the relationships that were built by and within the OTP, the Outreach Section and the Witness and Victims Section (WVS).

²⁹ Crane, *supra* note 15.

³⁰ See, e.g., Crane, *supra* note 15 at 89 & 91-92 (The relationships Crane built with Her Majesty’s government would eventually be crucial to Operation Justice at 80; the relationship Crane avoided with the United Nations Special Representative of the Secretary General who was suspected of trying to obstruct justice by moving two future indictees out of Sierra Leone).

³¹ *SCSL First Annual Report*, *supra* note 18.

³² Stuart Ford, *How Special is the Special Court’s Outreach Section?* in Charles Jalloh, ed., *THE SIERRA LEONE SPECIAL COURT AND ITS LEGACY: THE IMPACT FOR AFRICA AND INTERNATIONAL CRIMINAL LAW*, 505, 513 (Cambridge University Press, 2013).

Inside Office of Prosecutor

Workplace culture heavily influences the work product and productivity of the team.³³ Workplace culture “is simply the sum total of customs, actions, attitudes, and ideas that permeate a given workplace.”³⁴ A positive culture contributes to employee dedication and continuity in the organization.³⁵ Crane had a vision for the OTP. In *Founders*, he discusses social events that he hosted for staff.³⁶ By including his employees in activities inside and outside the workplace he empowered them to complete tasks and work towards their shared goals. Although Crane being a “transformative leader” contributed heavily to the culture within the OTP, the organization of the OTP also furthered the positive culture and productivity of the OTP. As referred to above, the office was made up of Sierra Leonean and international staff.³⁷ The creation of opportunities for all staff members to bond with each other and to exchange knowledge about Sierra Leonean culture and the conflict and international norms gave everyone the tool kit to succeed.

Chief Prosecutor

In his contribution to *Founders*, Crane focuses heavily on the relationships he built and how they were not only personally rewarding but also professionally rewarding in his post as the chief prosecutor of the SCSL. For instance, a relationship Crane cultivated assisted him when President Charles Taylor arranged for a hit man to take out one of the OTP’s witnesses.³⁸ Crane

³³ See, e.g., Edna C. Ward, *Positive Culture: The Key Element for Successful Teamwork*, 14 EQUAL OPPORTUNITIES INT’L., 11, 11 (1995).

³⁴ Andrew J. Edelman, *Retain Talent with Positive Culture: Organizational culture can fortify or erode staff commitment* 21 HEALTHCARE REGISTRATION: THE NEWSLETTER FOR HEALTH CARE REGISTRATION PROFESSIONALS 6,6 (2011).

³⁵ Edelman, *supra* note 34.

³⁶ Crane, *supra* note 16 at 84 (such as weekly pizza parties and a Halloween costume party).

³⁷ *UN SL Agreement*, *supra* note 18 at art. 10; See also *SCSL First Annual Report*, *supra* note 18 at 3.

³⁸ Crane, *supra* note 16 at 87.

used a local connection to arrange an emergency rescue flight to secure the witness and his family.³⁹ Crane credits “getting out and getting to know the key players in Freetown and [in] the region” for this connection and successful rescue operation.⁴⁰ This occurred within a few hours of the tip and the operation was completed just in time. Presumably, this would be a very difficult and indiscrete operation if Crane had to use international resources to secure his witness. This is just one example of many where Crane’s relational approach contributed to the success and credibility of the SCSL.

SCSL Outreach Section

The SCSL’s Outreach Section began as an element of the OTP.⁴¹ It eventually joined the Registry, as its independence and partiality from the OTP was questioned.⁴² The trust of the people of Sierra Leone was presumably necessary for the success of the SCSL and thus, as the client of the prosecutor,⁴³ it does seem at least partly necessary that the people trust their representative. Crane himself visited town hall events, schools and every state in the nation.⁴⁴ Throughout his tenure, this was organized through the Outreach Section.

The Outreach Section had three goals in its mission statement.⁴⁵ The first two goals were to foster a two-way information exchange between the court and people of Sierra Leone (and eventually Liberia).⁴⁶ The Outreach Section aimed to educate about the SCSL.⁴⁷ They hoped that

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Ford, *supra* note 32 at 512, n. 72.

⁴² *Id.*

⁴³ Crane, *supra* note 16 at 83 (“During my tenure, I walked the entire countryside listening to my client, the people of Sierra Leone tell me about what had happened to them over the past 10 years”).

⁴⁴ *Id.* at 83, 93.

⁴⁵ Ford, *supra* note 32 at 506 at n. 7, 514.

⁴⁶ *Id.*

⁴⁷ *Id.*

there would be a reciprocal communication of information from the people of Sierra Leone.⁴⁸ Thirdly, it aimed to “promot[e] respect for human rights and the rule of law”.⁴⁹ According to Crane, outreach and legacy programs are one of the “six important “truisms”” for international criminal courts”.⁵⁰ In his words,

“Outreach and legacy programs work and should be part of any initial plan and strategy [for an international criminal tribunal]. Again, the tribunal is about the victims. They need to be listened to, informed and involved. One of the essential implied mandates of the tribunal must be to reach out, sensitize, teach, mentor, and to embrace the people, their culture, and their customs.”⁵¹

Meeting these goals and living up to the mandates stated by Crane was an essential part of the relational approach employed by the Court and more specifically, the OTP.

The Outreach Section of the SCSL is repeatedly referred to as “innovative” by academics.⁵² In a critical assessment of the success of the SCSL’s Outreach Section, Ford rejects this classification, in part, by referencing the earlier established outreach policy of the International Criminal Tribunal of the Former Yugoslavia (ICTY).⁵³ However, he does concede that the scope, both in geography and number of activities, is “moderately innovative”.⁵⁴ Although the idea of outreach was contemplated by prior tribunals, it was different in its nature. For example, the majority of outreach activities in first several years of ICTY’s outreach program’s existence, the target populations were 1) legal professionals and law students 2) government officials and 3)

⁴⁸ *Id.*

⁴⁹ Ford, *supra* note 32 at 506 n. 7, 514.

⁵⁰ Crane, *supra* note 23 at 1684.

⁵¹ *Id.*

⁵² Ford, *supra* note 32 at 512; David Cohen, “Hybrid” Justice in East Timor, Sierra Leone and Cambodia: ‘Lessons Learned’ and Prospects for the Future, 43 STAN. J. INT’L L. 1, 21 (2007).

⁵³ Ford, *supra* note 32 at 512–13.

⁵⁴ *Id.* at 513.

media representatives and journalists.⁵⁵ In contrast, the SCSL's outreach program reached community members through town halls, the employment of Sierra Leoneans at the OTP, and engagement at schools.⁵⁶ Ford fails to acknowledge this.

Ford's strongest critique of the Outreach Section is based on a survey⁵⁷ which attempts to measure "how well Sierra Leoneans understand the SCSL".⁵⁸ The source of the criticism is that respondents to the BBC Survey stated that they had an awareness of the SCSL (98% for men, 94% for women) but very few stated that "know a lot" about the court (ranging from 2-11% in the different districts). The remainder described their knowledge as "I know a little". Ford acknowledges that legal systems are, in general, complex and as such concludes that it is probably unattainable for international criminal tribunal outreach to make a significant difference in terms of population understanding.⁵⁹

Although it would be ideal for every respondent to be confident in their knowledge of the court, knowing "a little" may suffice. The Outreach Section's purpose was not to educate Sierra Leoneans to the extent that they could practice at the SCSL. Instead, I would argue that the Outreach Section was dedicated to educating to the extent that Sierra Leoneans were prepared to engage and building trust between Sierra Leoneans and the SCSL.⁶⁰ If Sierra Leoneans were

⁵⁵ *Outreach Activities Archive*, UNITED NATIONS INT'L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/en/content/outreach-activities-archive> (focus on years 1999-2003).

⁵⁶ Ford, *supra* note 32 at 508.

⁵⁷ BBC World Service Trust, International Center for Transitional Justice, Search for Common Ground, *Peace, Justice and Reconciliation in Sierra Leone: A Survey of Knowledge and Attitudes towards Transitional Institutions in Post-Conflict Sierra Leone* 1, 24 (Aug. 2008), <http://www.rscsl.org/Documents/BBCWST2008.pdf>.

⁵⁸ Ford, *supra* note 32 at 513.

⁵⁹ *Id.* at 516–17.

⁶⁰ Crane, *supra* note 23. Crane calls this "buy-in" and refers to the essential implied mandate of outreach programs at 1684, see block quote under **Error! Reference source not found..**

confident in the operation of the SCSL and trusted the results, it is more likely that the rule of law could be accepted in the future.⁶¹ The fact that 60% of respondents to the BBC Survey said that the SCSL was “either very successful or quite successful at communicating its work” is more indicative of success of the Outreach Section because it demonstrates an appreciation for the Outreach Section’s effort.⁶² One must recall that the people of Sierra Leone were rebuilding after years of conflict and trauma. Having “a lot” of knowledge about the SCSL is likely not a priority.

Ford also contends that “one cannot simply assume that everything Sierra Leoneans know about the Court is a result of the work of the Outreach Section.”⁶³ This may be true. He supports his assertion that outreach activities were not the main source of knowledge with the fact that only twelve percent of Sierra Leoneans identified “community meetings” as the primary source of information regarding the Court.⁶⁴ This argument has many holes. Firstly, community meetings may be interpreted in many ways. It does not explicitly state “activities involving the SCSL” or the like. Secondly, the survey asked about “the sources from which [respondents] get information about what is happening in Sierra Leone.”⁶⁵ This is not specific to information about the Court. Given that Sierra Leone was post-conflict, there are likely many changes occurring at a fast pace. Finally, Ford ignores the possibility that the sources identified as main sources (e.g. Radio – 94%, people – 70% and newspapers – 25%)⁶⁶ may be relaying information that was received from the

⁶¹ Shu Yu et al., *Trade, trust and the rule of law*, 37 Eur. J. Pol. Econ. 102, 102 (2015).

⁶² See BBC World Service Trust, International Center for Transitional Justice, Search for Common Ground, *supra* note 57 at 61-62 (success ranged in regions with only 3% percent in one district, including an outlier with 71% “don’t know/no response,” and greater than 60% in three districts).

⁶³ Ford, *supra* note 32 at 515.

⁶⁴ *Id.*

⁶⁵ BBC World Service Trust, International Center for Transitional Justice, Search for Common Ground, *supra* note 57 at 23-24.

⁶⁶ *Id.* at 24.

Outreach Section originally. Crane held regular press conferences which is a likely source of information regarding the Court.⁶⁷ All in all, the surveys may actually support an Outreach Section, contrary to what Ford argues.

On the second goal of the Outreach Section's mission statement, Ford says the contribution of the Outreach Section to the court's knowledge (the second prong of the mission statement) is "more difficult to evaluate success empirically".⁶⁸ He does recognize that deferring to qualitative evaluations is acceptable in this case and concludes that on this point the Outreach Section was generally successful.⁶⁹ Ford primarily cites the recommendations produced in the Victims Commemoration Conference and the relationships between the Court and local civil society organizations as support for the Outreach Section fulfilling the second prong of its mandate.⁷⁰ Other measures could have been used as a proxy to further this qualitative conclusion. For example, the extensive participation of witnesses in the SCSL trials suggests that Sierra Leoneans trusted the court at least enough to contribute to the justice being served by the court while potentially putting themselves at risk in their home country.⁷¹

Overall, Ford's classification of the Outreach Section as only "moderately innovative" and his hesitance to accept the success of the Outreach Section on their first goal in the mission statement is based on a nuanced and strict approach which relies heavily on the BBC Survey. Ford may have found different results if he conducted a qualitative study using methods such as focus groups. Focus groups can assist to gain a greater understanding of the true experiences of people

⁶⁷ Crane, *supra* note 16 at 84, 88–89, 92.

⁶⁸ Ford, *supra* note 32 at 519–20.

⁶⁹ *Id.*

⁷⁰ *Id.* at 520.

⁷¹ Rebecca Horn et al., *Testifying in the Special Court for Sierra Leone: witness perception of safety and emotional welfare*, 17 Psychol., Crime & L. 435, 435 (2011).

and does not wipe away relationships and experiences in favour of increased subject size and over-simplification of the results.

Witnesses and Victims

Relationships between the OTP and the WVS assisted with achieving the second prong of the Outreach Section's mission statement and realizing justice at the SCSL. Accounts of witnesses and victims were important in both SCSL investigations and trials. Witness testimony was the major source of evidence at the SCSL.⁷² Compared to other international criminal tribunals, the SCSL had a greater number of witnesses and relied more heavily on their testimony.⁷³ There was a dedicated, specialized unit to witness protection and support called the WVS. Although the WVS of the SCSL is not unique with regard to international criminal tribunals,⁷⁴ it is unique in the number of witnesses it is tasked with protecting and the Court's location. According to Horn's exploration of witness perceptions of safety and welfare at the SCSL, witnesses indicated that they did "not feel less safe as a result of their involvement with the SCSL, and that they [became] less worried as their familiarity with the Court and its processes increases."⁷⁵ This is important for two primary reasons. Firstly, it means that witnesses will gain knowledge and trust in the Court as their involvement progresses. Witnesses can disseminate their knowledge to the community which will further amplify trust. This is especially true for nations similar to Sierra Leone where the BBC Survey confirmed that people are a significant source of information (70%) about what is

⁷² Horn et al., *supra* note 71 at 436.

⁷³ *Id.*

⁷⁴ *Id.* at 437 ("...the ICTY and ICTR both contain units whose task is to support and protect all witnesses called to testify in front of the tribunal").

⁷⁵ *Id.* at 452.

happening in Sierra Leone.⁷⁶ Secondly, witness safety encourages truthful testimony. This corresponds to the Outreach Section's second goal of information transfer to the Court.⁷⁷

The culmination of the relationships: within the OTP; between David Crane, the chief prosecutor, and the staff at the OTP and his client, the people of Sierra Leone; between the Outreach Section and the people of Sierra Leone; and between the WVS and the people of Sierra Leone, built a strong, effective international criminal tribunal that met its goals and did so in an efficient and culturally respectful manner. The relational approach rendered an SCSL that stood out from the international criminal tribunals that came before it.

Relational Approach in Diverse Settings

Relational approaches are used in diverse settings to achieve positive outcomes. Empirical evidence justifies this approach in controlled environments.⁷⁸ Despite the fact that a relational approach may not be *proven* (as in proven with empirical data) effective in the international criminal context, we can use evidence of its success to advocate for the use of a relational approach in future international criminal tribunals. One example will be used to illustrate.

Shared characteristics between mothers' use of substances and international criminal law make this illustration plausible. The similarities stem from three sources. Firstly, women who use substances during pregnancy are more likely to have a history of trauma.⁷⁹ People who live in countries who have experienced mass atrocities are likely to have witnessed and have experiences of trauma.⁸⁰ Secondly, women who use substances during pregnancy are likely balancing many

⁷⁶ BBC World Service Trust, International Center for Transitional Justice, Search for Common Ground, *supra* note 57 at 23–24.

⁷⁷ Ford, *supra* note 32 at 514, 506 at n 7.

⁷⁸ As compared to international criminal law, where it is so context dependent that it would be difficult to measure, compare, and control empirically.

⁷⁹ Pepler, *supra* note 5 at 17.

⁸⁰ *Id.* at 9.

societal issues such as, among others: poverty, stigma, lack of stability.⁸¹ People who live in countries who have experienced mass atrocities likely experience these same issues, especially in the transitional period, post-conflict.⁸² Thirdly, both populations experience either perceived or real injustices regularly.⁸³ This leads to a lack of trust in institutions and people.

There are clear differences between the goals of an intervention centre for women with substance use issues and the goals of an international criminal tribunal. Here, I assume the goal of the intervention center is to provide women with the toolkit to successfully lead a stable, physically and mentally healthy life. While I frame the goal of the SCSL as “trying those bearing the greatest responsibility”⁸⁴ accountable in a way that is sensitive to the experiences of the people of Sierra Leone. With these goals in mind, consider the relational approach utilized and the achievements of both.

The use of a relational approach for intervention with women who used substances during pregnancy not only decreased use of substances and improved confidence to resist substance use in the future, but the women also improved their mental health and increased their relationship capacity which led to ability to feel more secure in relationships.⁸⁵ Most importantly for this comparison, it was identified that a relational approach throughout the hierarchy of the organization (for example, between community agencies, among staff, between staff and the

⁸¹ *Id.* at 17.

⁸² See Friederike Mieth, *Bringing Justice and Enforcing Peace? An Ethnographic Perspective on the Impact of the Special Court for Sierra Leone*, 7 INT’L J. CONFLICT & VIOLENCE 10, 16 (2013).

⁸³ *Id.* at 16–17; See also Pepler, *supra* note 5.

⁸⁴ Anders, *supra* note 19 at 426.

⁸⁵ Pepler, *supra* note 5 at 27–32.

families) created a model for relationships in the clients' personal lives.⁸⁶ With these achievements in mind, the intervention centre arguably achieved its goal.

The SCSL implemented a relational approach.⁸⁷ Although empirical evidence is slim, principally due to the fact that measuring success of an international criminal tribunal is complicated and context dependent, the relational approach utilized allowed the SCSL to accomplish its mission quite possibly better than any other international criminal tribunal. Evidence that a relational approach creates human advances outside the realm of relationships (e.g. substance use discontinuation) also makes it plausible that a relational approach can create efficiencies in a prosecutorial and post-conflict environment.

A Relational Approach to Lawyering

More related to international criminal law, it is now widely recognized that relational competencies must be touted by legal professionals.⁸⁸ In groundbreaking social science research, twenty-six characteristics were identified as skills for "effective lawyers". Of these characteristics, many are relational. In fact, several law professors have adapted their teaching style to incorporate relational skills into the curriculum.⁸⁹ This is premised on the fact "that lawyers with strong relational skills are more satisfied in their professional (and personal) lives".⁹⁰

The need for lawyers who excel in the identified "26 lawyering effectiveness factors" does not change in the international criminal context. One of the reasons Crane was likely so

⁸⁶ *Id.* at 34, 41.

⁸⁷ As described above, under **Error! Reference source not found..**

⁸⁸ Susan L Brooks, *Using a Communication Perspective to Teach Relational Lawyering*, 15 NEV. LEGAL J. 477, 477 (2015); *See also* Shultz, *supra* note 6 at 26–27 (at least 11 of the 26 characteristics that authors identified are clearly relational, as seen in **Error! Reference source not found..**, and many more have relational components).

⁸⁹ Brooks, *supra* note 88 at 402.

⁹⁰ *See generally*, Brooks, *supra* note 88 at 402.

successful at the SCSL is due to his focus on relationships and the skills that allow the growth of relationships.

What Was Learned from the SCSL

Although there are critiques of the Outreach Section, majority of them are about initial implementation, organization and detected conflicts⁹¹. Critiques on the Outreach Section focus on its beginning, and its reach. Substantial time, effort and resources were directed to the Outreach section, so it is hard to believe that it is for lack of trying. It is difficult to find critiques of the approach of the prosecution strategy. This is possible for a few reasons. It is acknowledged that the lack of a negative does not make its counter true. So, one of the options is that there were minimal critiques of the strategy. Secondly, it is possible that critiques are few and far between because it was only recently published in *Founders* and there is limited discussion in *White Man's Justice*⁹² from 2006. However, with the praise for the SCSL that is received from the bulk of sources, it is more likely the former option.⁹³

Use of Empirical Evidence and Anecdotal Evidence from the SCSL for Future Recommendations

Unfortunately, most of the evidence from the SCSL that is used in this paper is only anecdotal in nature. This means that although we can make assumptions from the successes of the SCSL, it is difficult to compare the successes of multiple tribunals because no two tribunals have been the same. Each has a unique statute, distinct prosecutorial strategy, and is found in a different conflict context. With that being said, with international tribunals, it is best to single out

⁹¹ See e.g., Ford, *supra* note 32 at 506 (The Outreach Section was originally situated in the OTP which was seen as a conflict; it was soon moved to the Registry).

⁹² See generally, Crane, *supra* note 23.

⁹³ See e.g., Antonio Cassese, *Report on the Special Court for Sierra Leone*, (Dec. 12, 2006), <http://www.rscsl.org/Documents/Cassese%20Report.pdf>.

characteristics that were felt by parties involved that they were successful and led to outcomes that were tangible and measurable.⁹⁴ From a cultural or customary point of view, this may not be perceived as success. For instance, locals may perceive success as less injustice in their society.⁹⁵ However, from the international point of view, and as Crane so aptly raises, African nations (as in this case anyway) have signed on to international norms.⁹⁶ The success measured in this paper was the effectiveness and efficiency of the prosecutorial strategy utilized by the David Crane, with regard to the relational aspects of the approach.

It is recommended that the OTP engages with the public to achieve a bilateral movement of information and works with the outreach program to achieve this. It needs to be kept in mind that the community may have larger “fish to fry” in terms of their daily life, but information about the court should be readily available if and when they should seek it out. It is recommended that all sectors of an international criminal tribunal employ both international and local individuals. These individuals should bond through team building exercises and social activities. And finally, the chief prosecutor should be a visionary, a transformative leader, and someone who puts relationships at the forefront of his or her role as chief prosecutor. This will assist the tribunal in gaining trust from their staff, the local community, politicians and the international community.

Conclusion

Relational approaches were utilized as an important part of David Crane’s prosecutorial strategy. Relationships strengthened ties with the local community. Relationships presumably increased moral in the OTP and contributed to quick results and meeting of tight deadlines and demanding quality standards. The Outreach Section reached a significant portion of the country

⁹⁴ For example, the number of indictments, detainees, amount of time, etc.

⁹⁵ Mieth, *supra* note 82 at 16–17.

⁹⁶ Crane, *supra* note 23.

and assisted in obtaining the “buy-in” of locals in terms of working in unison with the prosecutor, understanding and trusting the process used by the SCSL, and eventually working towards justice in Sierra Leone. Although these achievements are not wholly attributable to relationships, given findings in other areas with relational approaches and the necessity for trust in international tribunals, it is asserted that relationships were a significant contributor to the success of the SCSL. Relational approaches are consistently employed in different areas as an approach to rebuilding after trauma. In addition, relational qualities such as communication, advocacy, and the ability to see the world through the eyes of others are factors that have been identified as characteristics that are found in effective lawyers. The culmination of this evidence is convincing of the fact that a relational approach is the gold-standard strategy for prosecution in international criminal law.

Appendix A**26 LAWYERING EFFECTIVENESS FACTORS***Marjorie M. Shultz and Sheldon Zedeck*

*Emphasis added by author to show factors which have a clear nexus with a relational approach

- 1) **Analysis and Reasoning:** Uses analytical skills, logic, and reasoning to approach problems and to formulate conclusions and advice.
- 2) **Creativity/Innovation:** Thinks “outside the box,” develops innovative approaches and solutions.
- 3) **Problem Solving:** Effectively identifies problems and derives appropriate solutions.
- 4) **Practical Judgment:** Determines effective and realistic approaches to problems.
- 5) **Providing Advice & Counsel & Building Relationships with Clients:** Able to develop relationships with clients that address client’s needs.
- 6) **Fact Finding:** Able to identify relevant facts and issues in case.
- 7) **Researching the Law:** Utilizes appropriate sources and strategies to identify issues and derive solutions.
- 8) **Speaking:** Orally communicates issues in an articulate manner consistent with issue and audience being addressed.
- 9) **Writing:** Writes clearly, efficiently and persuasively.
- 10) **Listening:** Accurately perceives what is being said both directly and subtly.
- 11) **Influencing & Advocating:** Persuades others of position and wins support.
- 12) **Questioning and Interviewing:** Obtains needed information from others to pursue issue/case.
- 13) **Negotiation Skills:** Resolves disputes to the satisfaction of all concerned.
- 14) **Strategic Planning:** Plans and strategizes to address present and future issues and goals.
- 15) **Organizing and Managing (Own) Work:** Generates well-organized methods and work products.
- 16) **Organizing and Managing Others (Staff/Colleagues):** Organizes and manages others work to accomplish goals.
- 17) **Evaluation, Development, and Mentoring:** Manages, trains, and instructs others to realize

their full potential.

18) **Developing Relationships within the Legal Profession:** Establish quality relationships with others to work toward goals.

19) **Networking and Business Development:** Develops productive business relationships and helps meet the unit's financial goals.

20) **Community Involvement and Service:** Contributes legal skills to the community.

21) **Integrity & Honesty:** Has core values and beliefs; acts with integrity and honesty.

22) **Stress Management:** Effectively manages pressure or stress.

23) **Passion & Engagement:** Demonstrates interest in law for its own merits.

24) **Diligence:** Committed to and responsible in achieving goals and completing tasks.

25) **Self-Development:** Attends to and initiates self-development.

26) **Able to See the World Through the Eyes of Others:** Understands positions, views, objectives, and goals of others.

**Trade Liberation and Labor Bondage:
US Agreements with Mexico and Colombia**

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Trade Liberation and Labor Bondage: US Agreements with Mexico and Colombia

In Latin American countries struggling with internal armed conflicts, it can be difficult to separate the violent suppression of labor by corporate interests from other forms of hostility. The changes in labor relations that accompany free trade agreements in such countries can have catastrophic impacts on workers. In Mexico and Colombia, foreign industry brought about by free trade agreements with the United States over the past two decades has substantially affected worker protections.² There is evidence of corporate and state complicity in the suppression of workers' rights in both countries.³

This paper examines the efficacy of supplemental agreements to the 1994 North American Free Trade Agreement (NAFTA)⁴ and the 2012 US-Colombia Trade Promotion Agreement (CTPA) aimed at protecting workers in Mexico and Colombia, respectively. Pervasive labor suppression existed in both countries before the implementation of free trade agreements with the United States. The supplementary agreements sought to redress concerns over worker exploitation and abuse. Despite these attempts at preventative measures, labor issues persisted after trade agreement implementation in both countries. The presence of armed conflict

² In Mexico, for instance, after NAFTA, jobs in protected sectors disappeared, while employers in new foreign-owned factory ("maquiladora") resisted union representation. *See* Lance Compa, *Justice for All: The Struggle for Worker Rights in Mexico*, AM. CTR. INT'L LAB. SOLIDARITY 6,7 (2003) <https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1033&context=reports>; In Colombia, years after the CTPA agreement implementation, the U.S. Department of Labor reported widespread abusive suppression of workers' rights to organize. *See* Public Report of Review of U.S. Submission 2016-02 (Colombia), Office of Trade & Labor Affairs, Bureau of Int'l Labor Affairs, U.S. Dep't of Labor (2017). https://www.dol.gov/sites/default/files/documents/ilab/PublicReportofReviewofUSSubmission2016-02_Final.pdf

³ In Colombia, for instance, twelve percent of unionist killings recorded in 2008 were attributed to state actors. *See infra* Sections I(B)(3) and III(A)(1).

related to drug trafficking and political unrest within the two countries complicates analyses of targeted violence against unionists.

I. Labor Issues Before Trade Agreement Implementation

Both the governments of Mexico and Colombia had begun adopting neoliberal policies aimed at opening the countries up to global trade prior to the adoption of formalized free trade agreements.⁵ As the states sought to attract foreign investment, they weakened government protections for local producers and workers.⁶

⁵ Mexico began implementing neoliberal policy reforms in 1982, when Mexico indicated that it would be unable to meet its external debt service payments. Mexico entered into debt renegotiations with foreign creditors that required Mexico to “implement reforms such as the privatization of state-owned enterprises, currency devaluation, and state budget reductions. Later agreements expanded upon the neoliberal reforms (the 1986 adherence to GATT; the 1992 revision of Article 27 of the Constitution...” Kathleen Schwartzman, *Mexico and the New Neoliberalism*, OXFORD RESEARCH ENCYCLOPEDIA OF LATIN AMERICAN HISTORY (2019), <https://oxfordre.com/latinamericanhistory/view/10.1093/acrefore/9780199366439.001.0001/acrefore-9780199366439-e-730?print=pdf>; In Colombia, neoliberal economic reform largely began in 1990, with President César Gaviria’s National Plan of Development followed by a series of economic reforms aimed at curbing regulation on business and opening Colombia’s economy to foreign investment. See Laura Spagnolo and Daniel Munevar, *After Years of (Economic) Solitude: Neoliberal Reforms and Pay Inequality in Colombia*. 47 UTIP Working Paper 5, 7 (2008), https://utip.lbj.utexas.edu/papers/utip_47.pdf.

⁶ See Manuel Fuentes Muniz, *The NAFTA Labor Side Accord in Mexico and Its Repercussions for Workers*, 10 CONN. J. INT’ L. 379, 379 (1995) (“From within, successive administrations of the Institutional Revolutionary Party have abandoned effective enforcement of Mexican labor laws in an effort to attract foreign investment”).

A. Worker Exploitation in Mexico Before NAFTA

Mexico has a tumultuous history of labor unrest and brutal suppression.⁷ The Constitution of 1917, which marks the culmination of the Mexican revolution,⁸ protects workers' rights to organize and bargain collectively, the right to strike, and the right to an eight-hour workday.⁹ Mexico's Federal Labor Law has roots in the principle that the law should affirmatively intervene to protect workers and alleviate the power discrepancy between workers and employers.¹⁰

But in the few decades before NAFTA's 1994 implementation, foreign interests exerted substantial influence over Mexico's labor policy.¹¹ In an effort to attract foreign investors, the former ruling party of Mexico, the Institutional Revolutionary Party, steadily chipped away at these rights.¹² As multinational companies increased their presence in Mexico, they brought anti-labor policies with them.¹³ Labor law authorities failed to protect workers against illegal

⁷ See Dan LaBotz & Robin Alexander, *Origins of Mexico's Labor Law Reform*. North American Congress on Latin America (Sept. 25, 2007), <https://nacla.org/article/origins-mexicos-labor-law-reform> ("The Mexican state has historically responded to reform movements and strikes with repression. The army, for example, was used to crush the railroad workers in 1959, and the electrical workers in 1976. Police and military action also accompanied the privatization of state-owned industries in the 1980s; the army occupied the mine and town of Cananea in 1989 and police used bazookas to attack the petroleum workers' union headquarters the same year.")

⁸ See William Beezley, *The Constitution of 1917: 100 Years Making Mexico's Revolutionary Goals into Law*, 102 VOICES OF MEXICO, UNIVERSIDAD AUTÓNOMA DE MÉXICO (2016) <http://www.revistascisan.unam.mx/Voices/no102.php>

⁹ 1917 Constitution of Mexico, Title VI, Art. 123.

https://www.justice.gov/sites/default/files/eoir/legacy/2013/11/08/constitution_22.pdf

¹⁰ *Id.* at 384.

¹¹ *Id.*

¹² *Id.* at 379 ("From within, successive administrations of the Institutional Revolutionary Party have abandoned effective enforcement of Mexican labor laws in an effort to attract foreign investment").

¹³ *Id.*

limitations on their right to organize.¹⁴ In 1990, the U.S. State Department described the former Mexican Minister of Labor as “a formidable labor opponent...Farell has not hesitated in declaring a number of strike actions illegal, thus undercutting their possibility for success.”¹⁵ In addition to complicity by labor authorities, there is evidence that higher Mexican government officials condoned labor violations.¹⁶ In 1992, the U.S. Embassy in Mexico City reported “recent government, economic and financial policies have undermined labor power, and probably will continue to do so.”¹⁷ State sanctioning of labor violations appears to have been systemic.

The changing nature of worker relations in Mexico mirrored policies in the United States that favored employers and limited union power.¹⁸ In the years leading up to NAFTA’s ratification, foreign firms had been operating in Mexico’s free trade zones for decades,¹⁹ and workers’ rights had already been substantially eroded.²⁰

1. Free Trade Zones

In an effort to provide employment opportunities for residents of economically distressed border cities, the Mexican government established the Border Industrialization Program in

¹⁴ *Id.*

¹⁵ U.S. Embassy in Mexico City, *Mexican Labor Trends: Annual Labor Report for Mexico for 1988 to mid-1990*, as quoted in Muniz *supra* note 5 at 385.

¹⁶ Muniz, *supra* note 5 at 385.

¹⁷ *Id.*

¹⁸ *Id.* at 381-82.

¹⁹ For example, in the five years after the 1965 implementation of the Border Industrialization Program, about 160 new enterprises, most of which were subsidiaries of U.S. firms, arose in Mexico. Anna-Stina Ericson, *An Analysis of Mexico’s Border Industrialization Program*. US DEPARTMENT OF LABOR MONTHLY LABOR REVIEW 33 (1970) <http://content.ebscohost.com/ContentServer.asp?EbscoContent=dGJyMNxb4kSepq84y9f3OLCmr1Gep7RSrqm4SrCWxWXS&ContentCustomer=dGJyMPGqsVGwrbdQuerwgd%2FiuX3i6d%2BI5wAA&T=P&P=AN&S=R&D=bah&K=6012378>

²⁰ For example, in 1969, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) claimed that U.S. industrial plants were evading Mexican labor laws and largely running non-union enterprises. *Id.* at 34.

1965.²¹ This program created a free trade zone along the U.S.-Mexico border.²² Foreign firms in these zones could import equipment and raw materials duty-free, on the condition that all assembled products would be exported.²³

The foreign-owned factories that sprouted up in the free trade zones, *maquiladoras*, have been besieged by violent labor suppression for decades.²⁴ In the majority of maquiladora cities, labor organization is suppressed by political alliances between foreign companies, the Mexican government, and unions put in place by the Institutional Revolutionary Party (Mexico's former ruling party).²⁵ These so-called "ghost unions" are aligned with management and serve to protect business interests and prevent meaningful worker organization.²⁶ With these management-aligned ghost unions in place, workers are unable to gain legal status for independently organized unions, as firms claim the ghost union to be the exclusive representative of the workers in longstanding agreements.²⁷ Local labor boards have further frustrated independent organizing by siding with employers and failing to enforce labor law.²⁸ This

²¹ CE Rumbaugh, *American Utilization of the Mexican Border Industrialization Program*. 1 CAL. WESTERN INT. L. J. 1, 128 (1970).

<https://scholarlycommons.law.cwsl.edu/cgi/viewcontent.cgi?article=1008&context=cwilj>

²² *Id.*

²³ Martha Ojeda & Rosemary Hennessy, *NAFTA From Below: Maquiladora Workers, Farmers, and Indigenous Communities Speak Out on the Impact of Free Trade in Mexico* 3 (2006).

²⁴ Sara Mojtehdzadeh, *Extortion, threats, kidnapping: Workers the hidden casualty of Mexico's violence*, THE STAR, (May 23, 2016), <https://www.thestar.com/news/gta/2016/05/23/extortion-threats-kidnapping-workers-the-hidden-casualty-of-mexicos-violence.html>.

²⁵ *Id.*

²⁶ *Id.*

²⁷ John Holman, *NAFTA: How 'Ghost' Unions Exploit Workers in Mexico*, Al Jazeera (Sept. 1, 2018), ("These unions - which exist only on paper - sign a 'collective' contract with the company and becomes the legal representative of the workers.") <https://www.aljazeera.com/indepth/features/2017/08/nafta-ghost-unions-exploit-workers-mexico-170831110315826.html>.

²⁸ David Bacon, *The Maquiladora Workers of Juárez Find Their Voice*, THE NATION, (November 20, 2015), <https://www.thenation.com/article/the-maquiladora-workers-of-juarez-find-their-voice/>.

systemized worker suppression is touted as an incentive to convince foreign investors to invest in building factories.²⁹

The challenges to union organizers are exacerbated by the continuous threat of armed drug cartels that operate throughout Mexico.³⁰ Workers in border areas have lost their lives in militarized drug war crossfire bolstered by United States policy.³¹ But unions also fall victim to extortion by drug cartels, who expropriate worker dues to finance criminal activity.³² Kidnappings and murders of unionists by drug cartels are common in border areas.³³ Unlike paramilitary-complicit killings of unionists in Colombia, which likely serve the interests of the multinational corporations that bankroll them,³⁴ cartel murders of Mexican unionists do not seem to be motivated by political opposition to worker organization, but rather by cartels seeking to fund illegal activity by extorting dues paid to unions by workers.³⁵

²⁹ *Id.*

³⁰ Mojtehdzadeh *supra* note 23.

³¹ See Lora Lumpe, *The US Arms Both Sides of Mexico's Drug War*, 61 *Covert Action Quarterly* 39, 46 (1997). ("The Clinton administration increasingly militarizes Mexico's drug war, by providing more weapons aid and encouraging the military to become more involved...Thousands of Mexican citizens are getting caught in the crossfire.")
<https://fas.org/asmp/library/publications/us-mexico.htm>

³² *Id.*

³³ *Id.*

³⁴ See, for example, Juan Smith, *Colombia: Ex-Paramilitary Implicates Two U.S. Companies in Murder of Trade Unionists*, North American Congress on Latin America (Dec. 14, 2009), ("Dole Food Company and Chiquita Brands International paid a Colombian terrorist organization to perform protection services that included murdering trade unionists."),
<https://nacla.org/news/colombia-ex-paramilitary-implicates-two-us-companies-murder-trade-unionists>.

³⁵ Mojtehdzadeh, *supra* note 23. ("...cartels seem to have a new target: unions, where expropriating workers' dues serves as a new source of financing.")

2. Agrarian Reforms in Anticipation Of NAFTA

After the 1910 Mexican Revolution, a number of land reforms were implemented to move the country towards greater stability and equality.³⁶ Article 27 of the 1917 Constitution required that lands be redistributed from the concentrated ownership of an elite ruling class to communal control by community rural groups (*ejidos*).³⁷ This program enabled peasants to work as sharecroppers on state-owned land, which gave rise to a vibrant agricultural industry.³⁸

However, in the face of increasing import competition from the United States, Mexico began to reform its agriculture sector in the 1980's.³⁹ These reforms, which were implemented as free trade negotiations were underway, included the privatization of state-owned land previously under ejido control.⁴⁰ Much of the previously communal farmland became available for private sale and development.⁴¹ Reforms also included the elimination of state subsidies, state-run enterprises, and price controls for agriculture.⁴² The government also abolished CONASUPO (Compañía Nacional de Subsistencias Populares; in English, the National Company of Popular Subsistences), the agency that had managed state intervention in agriculture.⁴³ CONASUPO purchased crops from farmers at fixed prices, then either processed them or sold them to consumers at low prices.⁴⁴

³⁶ *Agrarian Reform in Mexico*, ECONOMY WATCH: WORLD AGRICULTURE (Apr. 21, 2010), <http://www.economywatch.com/agrarian/world/mexico.html>.

³⁷ M. Angeles Villarreal, *NAFTA and the Mexican Economy*, CRS REPORT FOR CONGRESS 1, 10 (2010), <https://fas.org/sgp/crs/row/RL34733.pdf>.

³⁸ *Agrarian Reform in Mexico*, *supra* note 35.

³⁹ *Id.* at 11.

⁴⁰ *Id.*

⁴¹ Villarreal 2010, *supra* note 36 at 11.

⁴² *Id.*

⁴³ *Id.* at 12.

⁴⁴ *Id.*

These unilateral policy changes by the Mexican government began the process of dismantling state protections for the rural poor. These changes made new land available for private foreign development. But they also converted great numbers of Mexican farmers, now in economic desperation, into a potential industrial workforce. The passage of NAFTA would accelerate the deterioration of small farms as well as the exploitation of industrialized labor.

B. Unionist Abuse In Colombia Before CTPA

1. A History Of Labor Suppression And Targeted Violence

Colombia has a long history of violent suppression of labor activity, which peaked in the 1990's and early 2000's. Rising incidents of violence directed at unionists corresponds with increasing embrace of neoliberal trade and labor policies—especially under right-wing former president Álvaro Uribe, who led Colombia from 2002 to 2010.⁴⁵ For decades, Colombia has been described as the most dangerous country in the world for trade union activists.⁴⁶ Close to 2,800 unionists were murdered between 1986 and 2010,⁴⁷ amounting to one death every three days.⁴⁸ Ninety-seven percent of the killings were perpetrated by military and paramilitary actors.⁴⁹ Although the US-Colombia Trade Promotion Agreement (CPTA) was negotiated and

⁴⁵ Todd Gordon & Jeffery R. Webber, *Canada's Evil Hour in Columbia*, in *BLOOD OF EXTRACTION: CANADIAN IMPERIALISM IN LATIN AMERICA* 154 (Fernwood Publishing 2016).

⁴⁶ *Id.*; see also Jet Van Dijck, *Colombia is the Most Dangerous Country for Unionists: ITUC*, Colombia Reports (June 5, 2012), <https://colombiareports.com/colombia-most-dangerous-country-for-unionists>; W.T. Whitney Jr., *Colombia tops list as most dangerous place for union workers, once again*, People's World (June 15, 2010), <https://www.peoplesworld.org/article/colombia-tops-list-as-most-dangerous-place-for-union-workers-once-again/>.

⁴⁷ Gordon and Webber *supra* note 44 at 153.

⁴⁸ W.T. Whitney Jr., *Colombia tops list as most dangerous place for union workers, once again*, People's World (2010) <https://www.peoplesworld.org/article/colombia-tops-list-as-most-dangerous-place-for-union-workers-once-again/>

⁴⁹ Gordon and Webber *supra* note 44 at 153.

signed by both parties in 2006, due to concerns over human rights abuses, the United States Congress rejected the bill in 2008 and delayed its ultimate approval until 2012.⁵⁰

The lack of protection for Colombia's workers can be attributed to weak labor laws that limit collective bargaining power and fail to comply with international labor standards.⁵¹ Among the neoliberal reforms that former President Uribe put in place were labor market reforms that made it easier to hire and fire workers.⁵² In contrast with international norms,⁵³ Colombia's labor law restricts unionization to workers working under contracts.⁵⁴ Consequently, of the 18,749,836 workers in Colombia in 2008, fewer than 3 million have the right to join unions, and less than four percent of workers are in fact unionized.⁵⁵ Another detrimental aspect of Colombia's labor law is permission of collective pacts and extralegal benefits plans, which undermine unions' collective bargaining rights.⁵⁶ Tellingly, the wages of public workers remained stagnant in the first decade of the 2000's and failed to rise with inflation.⁵⁷

⁵⁰ See M. Angeles Villarreal, *The U.S.-Columbia Free Trade Agreement: Background and Issues*, CRS REPORT FOR CONGRESS, (Feb. 14, 2014), <https://fas.org/sgp/crs/row/RL34470.pdf>.

⁵¹ Gordon & Webber, *supra* note 44, at 154.

⁵² *Id.*

⁵³ Article 23, Section 4 of the Universal Declaration of Human Rights, which has been a point of reference for human rights treaties and customary international law, the right of all workers to form unions, regardless of whether they are working under contracts. Universal Declaration of Human Rights, United Nations (Art. 3, Sect. 4: "Everyone has the right to form and to join trade unions for the protection of his interests."), <https://www.un.org/en/universal-declaration-human-rights/index.html>; see also United Nations, *The Foundation of International Human Rights Law* (stating that the Universal Declaration of Human Rights, which is "generally agreed to be the foundation of international human rights law").

⁵⁴ *Examining Workers' Rights and Violence Against Labor Union Leaders in Columbia Before the Committee on Education and Labor*, 111th Cong. 13 (2009) (statement of Hon. George Miller, Chairman of the Committee), <https://www.govinfo.gov/content/pkg/CHRG-111hhrg47097/pdf/CHRG-111hhrg47097.pdf>.

⁵⁵ *Id.*

⁵⁶ *Id.* at 14.

⁵⁷ Gordon & Webber, *supra* note 44, at 154.

José Luciano Sanin Vásquez, director of a Colombian research organization, Escuela Nacional Sindical, testified before Congress that the body charged with ensuring that employers respect labor rights, provides poor oversight and presents even more obstacles for organized labor.⁵⁸ Vásquez charged that the Ministry of Labor consistently fails to investigate employers' rampant union-busting practices and fails to protect workers' rights to organize collectively.⁵⁹ Between 2002 and 2007, the Ministry of Social Protection denied the registration of 515 labor union registry petitions, most of which were petitions for the registration of new unions.⁶⁰ The arbitrary denial of union registration diminished after the Constitutional Court issued decrees requiring the Ministry of Labor to approve registry petitions absent a compelling reason.⁶¹

Because Colombian labor laws are weak and a relatively small percentage of Colombia's workforce is unionized, outspoken advocates of unionization are exceedingly vulnerable to violent reprisal.⁶² The Escuela Nacional Sindical reported in 2009 that almost 2,700 trade union members had been killed in Colombia since the group started recording killings in 1986.⁶³ Human Rights Watch reported that 4,200 unionists received threats over the same period.⁶⁴ Sixty percent of all union members murdered worldwide during this period were Colombian.⁶⁵

⁵⁸ *Examining Workers' Rights and Violence Against Labor Union Leaders in Columbia Before the Committee on Education and Labor*, *supra* note 53 at 14. (Statement of Jose Luciano Sanin Vasquez, Director of the Escuela Nacional Sindical of Colombia).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *See Examining Workers' Rights and Violence Against Labor Union Leaders in Columbia Before the Committee on Education and Labor*, *supra* note 53, at 14.

⁶³ Human Rights Watch, *Human Rights Watch Comments to the Office of the US Trade Representative Concerning the US-Colombia Free Trade Agreement* (2009).
<https://www.hrw.org/news/2009/09/15/human-rights-watch-comments-office-us-trade-representative-concerning-us-colombia>

⁶⁴ *Id.*

⁶⁵ *Examining Workers' Rights and Violence Against Labor Union Leaders in Columbia Before the Committee on Education and Labor*, *supra* note 53, at 9.

The murders of unionists have been particularly brutal. Before the CTPA was implemented, one union organizer protesting paramilitary violence was severely burned with acid before being shot to death.⁶⁶ Such vicious targeted murders have a palpable chilling effect on workers' ability to assert their rights.⁶⁷

Violence against unionists is not isolated from the conflict between the government, the radically left-leaning FARC, and rightwing paramilitary groups—a conflict that has engulfed the country for decades leading to the 2016 peace agreement.⁶⁸ FARC guerrillas have historically promoted organized labor and aligned themselves with unionists.⁶⁹ For instance, the FARC was deeply involved in efforts to unionize Chiquita banana workers in the 1960s—efforts that were met with bloody repression.⁷⁰ Due to history of labor advocacy of left-wing guerrilla groups, rightwing paramilitary groups and state actors stigmatize unionists as guerrilla sympathizers.⁷¹

Even high-level state officials characterize legitimate union activity as a veneer for left-wing guerilla activity.⁷² Former President Uribe dismissed international concerns over violence

⁶⁶ *Id.* at 34.

⁶⁷ *Id.* at 36.

⁶⁸ *Id.*

⁶⁹ See James Petras and Michael M. Brescia, *The FARC Faces the Empire*, 27 LATIN AMERICAN PERSPECTIVES 137, 138 (2000) (Discussing worker mobilization, peasant movements, and other social movements in the 1990's: "Complete harmony exists between the insurgency and other popular struggles, resulting from each side's recognition of the other's organizational autonomy as they fight for their demand The Fuerzas Armadas Revolucionarias de Colombia (Revolutionary Armed Forces of Colombia- FARC) and the Ejercito del Pueblo (People's Army-EP), with their 60 fronts, are present throughout the country, including an urban component in Colombia's major cities. These movements have initiated strong campaigns over the past few years, demonstrating their growing ascendancy among the Colombians most affected by the economic, political, and social situation."), <https://www.jstor.org/stable/pdf/2634161.pdf?refreqid=excelsior%3A11a54c9ea3cc85ef7b3cd445eeae7835>.

⁷⁰ *Id.*

⁷¹ *Id.* at 34.

⁷² Human Rights Watch, *Human Rights Watch Comments to the Office of the US Trade Representative Concerning the US-Colombia Free Trade Agreement* (2009). ("high-level

against unionists by describing the victims as “a bunch of criminals dressed up as unionists.”⁷³ Such conflation has prevented substantial public mobilization against the violent suppression of organized labor.⁷⁴

In 2009, Human Rights Watch called on Congress to delay consideration of the CTPA until Colombia could demonstrate progress in addressing human rights abuses against unionists and impunity for killers.⁷⁵ The organization called on the U.S. to increase aid to prosecutors and investigators of human rights abuses, as well as civil society groups monitoring armed groups.⁷⁶ In response to concerns that the CPTA would lead to an increase in violent acts against unionists, the U.S. Congressional Committee on Education and Labor held a hearing in 2009 to assess the problem, where Colombian labor organizers, human rights activists, and politicians testified.⁷⁷ Bowing to these concerns, congress ended up delaying the implementation of the CPTA until 2012, after the US devised a plan to address Colombia’s labor issues.⁷⁸

2. Rural Land Dispossession

As had been the case in Mexico, the decade leading up to the trade agreement in Colombia was marked by massive redistribution of agrarian land to private entities.⁷⁹ In the 1990’s and early 2000’s, large landowners cooperated with rightwing paramilitary groups to illegally confiscate land with ambiguous property titles, thereby displacing hundreds of

Colombian officials have repeatedly stigmatized legitimate union activity as a cover for the abusive left-wing guerrillas.”)

⁷³ *Id.* at 36.

⁷⁴ *Id.*

⁷⁵ *Examining Workers’ Rights and Violence Against Labor Union Leaders in Columbia Before the Committee on Education and Labor*, *supra* note 53, at 38.

⁷⁶ *Id.* at 39.

⁷⁷ *Id.*

⁷⁸ *Id.* at 3.

⁷⁹ Gordon & Webber, *supra* note 44 at 153.

thousands of peasant farmers.⁸⁰ By early 2000's, when the United States and Colombia began negotiations, 62.2 percent of Colombia's agrarian land was owned by .4 percent of landowners.⁸¹ The damage to rural workers by neoliberal policies has been compounded by the war.⁸² Nearly five million people have been forced to leave their land by armed conflict through forced dispossession and massacres of civilian populations.⁸³

3. State and Corporate Complicity Create an Atmosphere of Impunity

Much of the violence against union members is carried out by rightwing paramilitary death squads.⁸⁴ There is evidence suggesting that Colombian businesses and political leaders have had a hand in the anti-labor violence.⁸⁵ Paramilitary leaders have admitted to accepting payments from Colombian and international corporations.⁸⁶ The former director of national intelligence under former right-wing President Álvaro Uribe was accused of providing hit lists with the names of union leaders to paramilitary groups.⁸⁷ While the true extent of state complicity in these killings is unknown, there is ample evidence linking state actors to systemic killings of unionists.⁸⁸

Government forces, including the Colombian police and army, have regularly used excessive violence against workers attempting to assert their rights.⁸⁹ Large number of

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 154.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 154.

⁸⁶ *Examining Workers' Rights and Violence Against Labor Union Leaders in Columbia Before the Committee on Education and Labor supra* note 53, at 3.

⁸⁷ *Id.*

⁸⁸ *Id.* at 36.

⁸⁹ Brian Finnegan, *Five Reasons Colombia Is Violating Its Trade Agreement with the U.S.*, AFL-CIO (2016) ("aside from all the illegal actions by employers and failure to act by the government, the Colombian police and army frequently use excessive violence against workers attempting to exercise their rights. Many workers have been seriously and permanently injured—

extrajudicial killings carried out by the military over the past two decades have further intimidated unionists.⁹⁰ From 2002 to 2010, it what came to be known as the “false positives” scandal, the Colombian military carried out thousands of executions of over 10,000 civilians they falsely claimed to be enemy guerillas to claim a financial reward.⁹¹ These brutal killings contributed to the atmosphere of terror that chilled union activity.⁹²

Very few of the cases of violence directed at unionists in Colombia are investigated or prosecuted.⁹³ Of the 2,694 union members murdered in the twenty years before the Congressional hearing, only 90 killers were prosecuted.⁹⁴ The Colombian Commission of Jurists reported that the impunity rate for union member killings was 96 percent.⁹⁵ Furthermore, the convictions have largely failed to address the chain of responsibility of those complicit, which is believed to include corporate or state actors who fund and order the killings.⁹⁶ Investigations are carried out on a case-by-case basis, with no comprehensive investigational strategy for what appears to be systemic, targeted violence against labor organizers and union members.⁹⁷

losing vision, hearing and brain function—by government forces.”), <https://aflcio.org/2016/7/18/five-reasons-colombia-violating-its-trade-agreement-us>.

⁹⁰ *Examining Workers’ Rights and Violence Against Labor Union Leaders in Columbia Before the Committee on Education and Labor* *supra* note 53, at 36.

⁹¹ Joe Parkin Daniels, *Colombia Army Killed Thousands More Civilians Than Reported, Study Claims*, THE GUARDIAN (May 8, 2018).

<https://www.theguardian.com/world/2018/may/08/colombia-false-positives-scandal-casualties-higher-thought-study>.

⁹² *Examining Workers’ Rights and Violence Against Labor Union Leaders in Columbia Before the Committee on Education and Labor*, *supra* note 53 at 36.

⁹³ *Id.* at 103.

⁹⁴ *Id.* at 12.

⁹⁵ *Id.* at 2.

⁹⁶ *See Id.* at 36, (discussing, for example, the 2003 murder of three trade unionists by the Colombian military in Aracuca. “Unfortunately, while lower level soldiers have been convicted of the killings, prosecutors appear to have made little progress in investigating the potential responsibility of military officers up the chain of command.”)

⁹⁷ *Id.* at 12.

José Nirio Sánchez-Moreno, a former judge on a special jurisdiction established to rule on acts of violence committed against labor union leaders and union members, described systemic failures to adequately investigate and prosecute labor killings before the House Committee on Education and Labor.⁹⁸ Sanchez-Moreno observed a disturbing pattern to the investigation of union killings.⁹⁹ According to Sanchez-Moreno, prosecutors formally order investigations, but fail to actually carry them out. Prosecutors habitually misclassify crimes, misdirect investigations, and fail to investigate the chain of criminal liability behind the killings.¹⁰⁰ Sánchez reported, “in all of these murders of union leaders, the Public Prosecutor is content to hold material authors responsible without investigating the intellectual authors, who are most important, given that they are the ones who sponsor, order the executions, put up the money, and always remain in impunity.”¹⁰¹ Sánchez- Moreno’s congressional testimony also suggests that rightwing paramilitary groups infiltrated state institutions, including the Colombian Congress, which is now “undergoing a major crisis of legitimacy.”¹⁰² A number of senate members were investigated for collaborating with paramilitaries in crimes against unionists.¹⁰³

In addition to state complicity, there is evidence of corporate complicity in violent labor suppression. A 2002 murder and kidnapping of Colombian unionists implicates BP.¹⁰⁴ In February 2002, union organizer Gilberto Torres was abducted by paramilitaries after he helped

⁹⁸ *Id.* at 29. (Statement of José Nirio Sánchez-Moreno, former second criminal judge of the Specialized Circuit).

⁹⁹ *Id.* at 29.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 30.

¹⁰² *Id.* at 37.

¹⁰³ *Id.* at 35.

¹⁰⁴ Ed Vulliamy, *‘I was kidnapped, chained and blindfolded. They’d kill me if I went back to Colombia,’* THE GUARDIAN (Oct. 24, 2015), <https://www.theguardian.com/world/2015/oct/24/colombia-oilo-wars--kidnapped-chained-and-blindfolded-i-cant-go-bac-gilberto-torres>.

organize a 2001 strike in protest of the murder of fellow union activists.¹⁰⁵ He was held for 42 days, and the man with whom he was kidnapped was decapitated.¹⁰⁶ The paramilitaries brutally beat, imprisoned, chained and blindfolded Torres in a pit.¹⁰⁷ They screamed at him for “challenging the multinationals.”¹⁰⁸ According to news coverage of the incident, paramilitaries convicted of the kidnapping have testified that Ocesa, the joint venture company transporting BP’s oil, gave them orders to abduct Torres.¹⁰⁹ Connections have also been uncovered between the rightwing paramilitaries and the Colombian army, which was allegedly funded by BP to provide security for its operations.¹¹⁰

United States-based food and beverage companies Coca-Cola and Nestle also allegedly conspired with paramilitary groups to murder unionists.¹¹¹ In 2006, the wife of slain unionist Luciano Enrique Romero Molina, along with the International Labor Rights Fund, reportedly sued Nestle in a Florida district court, alleging that the food and beverage company conspired with paramilitary groups to murder her husband.¹¹² In 2009, the Colombian union Sinaltrainal sued Coca-Cola for its alleged role in assisting paramilitary groups to murder trade union members.¹¹³ Although the appeals court ultimately dismissed the union’s claims, the union’s

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ See Solidarity Center, *The Struggle for Worker Rights in Colombia*. American Center for International Labor Solidarity 34, 36 (2006). <https://www.solidaritycenter.org/wp-content/uploads/2015/02/ColombiaFinal-1.pdf>

¹¹² See International Labor Rights Fund, *Nestle Sued in U.S. For Complicity in Murder of Colombian Union Leader* (2006) (press release) <https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=2564&context=globaldocs>

¹¹³ See *Sinaltrainal v. Coca-Cola*, 578 F.3d 1252 (11th Cir. 2009).

“Killer Coke” media campaign aimed at bringing Coca Cola’s alleged complicity in the murders to the attention of the public garnered extensive press coverage.¹¹⁴

These patterns of violence against unionists, widespread impunity, and inadequate protections for workers motivated calls from President Obama and members of Congress to address labor rights in Colombia as a condition of the CPTA’s passage.¹¹⁵

II. The Agreements That Promised to Protect Workers

In response to concerns about labor exploitation, both trade agreements incorporated provisions aimed at protecting workers’ rights.¹¹⁶ Former United States president Bill Clinton’s administration oversaw the North American Agreement on Labor Cooperation (NAALC)—a set of provisions designed to prevent exploitation of Mexican workers by foreign firms. The agreement, which was considered essential to garner sufficient democrat support to enable NAFTA’s passage in Congress.¹¹⁷

Similarly, concerns of congressional democrats over violence towards unionists in Colombia gave rise to the Colombian Action Plan Related to Labor Rights (hereinafter “Labor Action Plan”), which was devised by the administration of former president Barack Obama.¹¹⁸ The Colombian government was required to commit to the action plan as a condition of CPTA

¹¹⁴ See http://killercoke.org/breaking_news.php (for a list of news coverage of the killings from multiple sources between 2003 and 2017).

¹¹⁵ Office of the United States Trade Representative, Labor in the U.S.-Colombia Trade Promotion Agreement. <https://ustr.gov/uscolombiatpa/labor>

¹¹⁶ Frank H. Bieszczat, *Labor Provisions in Trade Agreements: From the NAALC to Now*, 83 CHI.-KENT L. REV. 3, 1387 (2008).

¹¹⁷ *Id.* at 76.

¹¹⁸ U.S. TRADE REP., COLOMBIAN ACTION PLAN RELATED TO LABOR RIGHTS, (Apr. 7, 2011), <https://ustr.gov/sites/default/files/uploads/agreements/morocco/pdfs/Colombian%20Action%20Plan%20Related%20to%20Labor%20Rights.pdf>.

passage.¹¹⁹ The action plan consists of a series of action items aimed at redressing the violent intimidation of workers by agents of foreign firms and state investigative failures.¹²⁰

A. North American Agreement On Labor Cooperation (Labor Side Agreement to NAFTA)

The North American Agreement on Labor Cooperation (NAALC) was negotiated by Canada, Mexico, and the United States to supplement NAFTA, and entered into force in January of 1994.¹²¹ The agreement was initially proposed by the United States to address concerns that United States companies would move domestic factories to Mexico to exploit lower labor costs. Former US President Bill Clinton declared that he would only support NAFTA if it included safeguards for workers' rights and environmental protections.¹²²

By ratifying the NAALC, the three countries committed to protect eleven "Labor Principles," including the right to organize and bargain collectively, the right to strike, prohibitions of forced labor and child labor, wage and hour standards, workplace safety standards, and migrant worker protections.¹²³ While the agreement includes a vague requirement for countries to enact regulations providing for "high labor standards," the main objective of the agreement is to compel states to enforce their own existing labor laws.¹²⁴

The NAALC provides a cross-border complaint mechanism by which workers and advocates can file complaints in a new institutional structure that carries out investigations, evaluations, and non-binding recommendations.¹²⁵ However, the agreement indicates that no

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Lance Compa, *NAFTA's Labour Side Agreement and International Labour Solidarity*, 33 ANTIPODE: A RADICAL J. OF GEOGRAPHY 451, 452 (2001).

¹²² Bieszczat, *supra* note 115, at 1388.

¹²³ Compa, *supra* note 65, at 452.

¹²⁴ Bieszczat, *supra* note 115, at 1388.

¹²⁵ Compa, *supra* note 65, at 459.

party may “undertake labor law enforcement activities in the territory of another Party.”¹²⁶ The agreement also explicitly empowers private parties to bring complaints, and gives private parties access to quasi-judicial tribunals to assert their labor rights.¹²⁷ The NAALC requires each state to establish a National Administrative Office (NAO) and to designate a secretary to manage it. The NAO processes and adjudicates complaints, in collaboration with other states, if necessary.¹²⁸ If the matter cannot be resolved, it advances to a committee of independent experts in matters central to the dispute.¹²⁹ This “Evaluation Committee of Experts” provides non-binding recommendations, which are reviewed by the Council consisting of labor ministers of the parties.¹³⁰ The dispute then advances to an arbitral panel, which helps the parties agree to an action plan.¹³¹

B. Colombian Action Plan Related to Labor Rights (Labor Action Plan)

Proponents of the CTPA in both the United States and Colombia believed it would create thousands of jobs and produce economic growth.¹³² But concerns over the high rate of murders of unionists caused Congress to delay passing the agreement for several years. As pressure from multinational firms to enact the trade agreement mounted, the Obama administration devised the Labor Action Plan in 2011. The action plan laid out specific and concrete steps to be taken by the Colombian government with the goal of improving workers’ rights and ending impunity for

¹²⁶ Bieszczat, *supra* note 115, at 1389.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 1391

¹³² Michael Norby & Brian Fitzpatrick, *The Horrific Costs of the US-Colombia Trade Agreement*, THE NATION (May 31, 2013), <https://www.thenation.com/article/horrific-costs-us-colombia-trade-agreement/>.

those who perpetrate violence against unionists.¹³³ Unlike the NAALC, which bound all state parties of NAFTA to the same commitments,¹³⁴ the Labor Action Plan required action of Colombia only.¹³⁵ The Colombian government agreed to be bound by the agreement as a condition of the CTPA.¹³⁶

The nine-part action plan required Colombia to make substantial reforms to worker legal protections and its procedures for investigating labor issues.¹³⁷ The first part requires changes to the Ministry of Labor to better facilitate processing complaints.¹³⁸ The second part indicates that Colombia make substantial changes to its criminal code to criminalize a variety of actions restricting labor rights.¹³⁹ Parts three through five require the state to restrict and investigate employer misuse of worker organizations to undermine the rights of workers to organize independently: cooperatives, temporary service agencies, and collective pacts.¹⁴⁰ Part six

¹³³ *The U.S.-Colombia Free Trade Agreement: Background and Issues*, CRS REPORT, (June 11, 2015), https://www.everycrsreport.com/files/20150611_RL34470_ce3088a9745a9fb02fc240b13df4c4a959e3ccd9.pdf.

¹³⁴ See National Employment Law Project, *Background on Complaint Under North American Agreement on Labor Cooperation* (2001) (“The North American Agreement on Labor Cooperation (NAALC) is the side agreement to NAFTA under which each of the three countries that are parties to NAFTA agree to enforce their own labor standards, and to strive to improve labor standards in their country.”) <https://www.nelp.org/wp-content/uploads/2015/03/Background-on-Complaint-under-North-American-Agreement-on-Labor-Cooperation.pdf>

¹³⁵ See Office of the United States Trade Representative, *Labor in the U.S.-Colombia Trade Promotion Agreement* (“the U.S. and Colombian governments announced, on April 7, 2011, an ambitious and comprehensive Action Plan that included major, swift and concrete steps for the Colombian government to take. The U.S. Government has confirmed that Colombia has met all of its Action Plan milestones to date. In addition, successful implementation of key elements of the Action Plan will be a precondition for the Agreement to enter into force.”) <https://ustr.gov/uscolombiatpa/labor>

¹³⁶ *The U.S.-Colombia Free Trade Agreement: Background and Issues*, *supra* note 75.

¹³⁷ COLOMBIAN ACTION PLAN RELATED TO LABOR RIGHTS, *supra* note 117.

¹³⁸ *Id.* at Part I.

¹³⁹ *Id.* at Part II.

¹⁴⁰ *Id.* at Part III- Part V.

addresses inaccurate definitions of “essential services.”¹⁴¹ Part seven requires that the Colombian government seek implementation assistance from the International Labor Organization (ILO) office.¹⁴² Part eight obligates the state to create protection programs for labor activists, and part nine details directives for comprehensive criminal justice reform.¹⁴³

III. Actual Impact of Labor Protections After Trade Agreement Implementation

A. Mexico After NAFTA

NAFTA has been in place since January 1994.¹⁴⁴ Over a fifteen-year period, NAFTA eliminated all duties on imports and exports between the US and Mexico.¹⁴⁵ Exports from Mexico have grown by more than 500 percent since NAFTA’s implementation due to growth in manufacturing.¹⁴⁶ While NAFTA produced economic growth for Mexico at large, the local economic impact of the agreement varies vastly across geographic regions.¹⁴⁷ Regions with higher levels of direct foreign investment and trade saw stronger economic growth, while residents of more rural areas slid deeper into poverty.¹⁴⁸ Foreign investment was overwhelmingly concentrated in a few states.¹⁴⁹ NAFTA’s effect on Mexico essentially divided the country in two.¹⁵⁰ While part of Mexico grew more industrialized and wealthier, the other

¹⁴¹ *Id.* at Part VI.

¹⁴² *Id.* at Part VII.

¹⁴³ *Id.* at Part VIII-Part IV.

¹⁴⁴ Villarreal 2014, *supra* note 49, at 7.

¹⁴⁵ *Id.*

¹⁴⁶ Paul Imison, *How NAFTA Explains the Two Mexicos*, THE ATLANTIC (Sept. 23, 2017), <https://www.theatlantic.com/international/archive/2017/09/nafta-mexico-trump-trade/540906/>.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ In an empirical study of wealth distribution and migration patterns in Mexico post-NAFTA

¹⁵⁰ See James McBride and Mohammed Aly Sergie, *NAFTA’s Economic Impact*, COUNCIL ON FOREIGN RELATIONS (2018), <https://www.cfr.org/backgrounder/naftas-economic-impact> (“Many analysts explain these divergent outcomes by pointing to the ‘two-speed’ nature of Mexico’s economy, in which NAFTA drove the growth of foreign investment, high-tech manufacturing,

large part remained poverty.¹⁵¹ The gap between the two groups continues to grow.¹⁵² For instance, sixty percent of the population of Nuevo Leon (Mexico's richest state) are middle class, while eighty percent of the people in Chiapas are living in poverty.¹⁵³

Proponents of NAFTA on both sides of the border promised that the agreement would reduce economic inequality between the United States and Mexico.¹⁵⁴ However, wages and working conditions have not improved.¹⁵⁵ Of the 34 democratic countries comprising the Organization for Economic Co-operation and Development, Mexico has the lowest minimum wage.¹⁵⁶ When adjusted for inflation, wages of Mexican workers have hardly risen since 1980, and have been declining in recent years.¹⁵⁷

1. Efficacy of the NAALC

While the NAALC has had some positive impacts, the consensus among most who have studied it is that the agreement has fallen short of its objectives.¹⁵⁸ A 2001 Human Rights Watch report analyzing 23 complaints under the NAALC alleged systemic violations of labor rights in all three countries, with the bulk of the violations being in Mexico.¹⁵⁹ The complaints list General Electric, Honeywell, Sony, General Motors, McDonald's, Sprint, and the Washington State Apple industry as entities that allegedly violated labor rights.¹⁶⁰ The complaints allege

and rising wages in the industrial north, while the largely agrarian south remains detached from this new economy.”).

¹⁵¹ *Id.*

¹⁵² Imison *supra* note 145.

¹⁵³ *Id.*

¹⁵⁴ Mojtehdzadeh, *supra* note 23.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Bieszczat, *supra* note 115, at 1393.

¹⁵⁹ Human Rights Watch, *Trading Away Rights: The Unfulfilled Promise of NAFTA'S Labor Side Argument*, (Apr. 2001), <https://www.hrw.org/reports/2001/nafta/nafta0401.pdf>.

¹⁶⁰ *Id.*

pervasive retaliation against workers attempting to unionize, violations of collective bargaining rights, poor treatment of migrant workers, discrimination against women, and dire health and safety concerns.¹⁶¹

Human Rights Watch called for the creation of an independent oversight body to order action to correct labor violations.¹⁶² Jose Miguel *Vivanco*, who directed Human Rights Watch at the time, charged that the states involved failed to adequately enforce the NAALC.¹⁶³ He said, “In the case of NAFTA, these three countries have actually worked to minimize the impact of the labor provisions.”¹⁶⁴

The lack of enforceability of nonbinding recommendations from the adjudicative bodies has limited the agreement’s efficacy.¹⁶⁵ While an NAO can request a public hearing or Ministerial Consultation on alleged labor violations, witnesses cannot testify before it.¹⁶⁶ Violations may result in a Ministerial Declaration or Report of Review, but there is no meaningful relief.¹⁶⁷ The next step of enforcement, the Evaluation Committee of Experts (ECE), is empowered to investigate labor abuses but cannot impose binding sanctions.¹⁶⁸ Sanctions can only be imposed by the Arbitral Panel (AP), but even the sanctions available to this panel are limited and weak.¹⁶⁹

¹⁶¹ *Id.*, see also Alexia Fernández Campbell, *Trump’s Trade deal With Mexico Gives Workers More Rights Than NAFTA. But There’s a Catch*, Vox (2018).

<https://www.vox.com/2018/8/29/17791430/trump-mexico-trade-deal-nafta-labor>

¹⁶² Human Rights Watch, *NAFTA Labor Accord Ineffective*, (Apr. 15, 2001), <https://www.hrw.org/news/2001/04/15/nafta-labor-accord-ineffective>.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ Madison Chapman, *President Trump Gets a Second Chance to Address Labor Rights in NAFTA*, KENNEDY SCH. REV. (Aug. 20, 2017, 10:00 PM), <http://ksr.hkspublications.org/2017/08/20/president-trump-gets-a-second-chance-to-address-labor-rights-in-nafta/>.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

There are no sanctions available for states that violate a majority of the eleven principles the agreement protects—a state is only sanctioned if it fails to protect workplace safety and health, minimum wage standards, or child labor.¹⁷⁰ Despite several victories for workers seeking to assert their rights collectively, the failure of the agreement to provide sanctions for states that violate the right to organize has been problematic.¹⁷¹ Another obstacle to justice is the reliance on state governments, rather than an independent body, to enforce the NAALC.¹⁷² This has led to instances of bad faith enforcement by states, which discourages complainants to use the process.¹⁷³ This has caused many to perceive the NAALC as a “sham agreement negotiated by the governments in order to appease local opposition groups.”¹⁷⁴

Nevertheless, a number of NAALC complaints resulted in meaningful remedies for workers.¹⁷⁵ The NAALC facilitated cooperation between workers and advocacy groups across borders to protect workers’ rights, and Mexican workers have utilized the complaint mechanism provided by the NAALC with varying levels of success.¹⁷⁶ In the years immediately after NAFTA’s implementation, the NAALC proved effective in redressing selective worker grievances.¹⁷⁷ For example, in 1996, after Mexican authorities dissolved a trade union in the Fisheries ministry, the union joined with human rights groups in the United States to file a NAALC complaint alleging failure of the Mexican government to protect freedom of association.¹⁷⁸ After a public hearing in Washington D.C. gained national attention, the union’s

¹⁷⁰ Bieszczat, *supra* note 115, at 1393.

¹⁷¹ *Id.* at 1393-94

¹⁷² *Id.* at 1394-95.

¹⁷³ *Id.* at 1395-96.

¹⁷⁴ *Id.*

¹⁷⁵ *See Compa, supra* note 65, at 4-5.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 4.

¹⁷⁸ *Id.* at 4-5.

registration was restored.¹⁷⁹ A subsequent 1997 complaint led the Mexican Labor department to enforce fines for health and safety violations at a Han Young factory, a Hyundai Motors supplier.¹⁸⁰ Another 1997 complaint eliminated the widespread practice of pregnancy testing in border area maquiladoras.¹⁸¹

In these cases and others, the NAALC created opportunities for advocacy groups to generate public awareness of labor violations, which has resulted in some substantive changes.¹⁸² However, the most effective labor violation complaints have come from well funded, well organized advocacy groups, including powerful unions and NGOs.¹⁸³ This limits the utility of the NAALC complaint process for less advantaged private parties.¹⁸⁴

2. Impact on Agriculture

The adverse impacts of Mexico's neoliberal agricultural reforms on rural farmers were greatly exacerbated by NAFTA's implementation.¹⁸⁵ By opening Mexican markets up to cheaply produced foreign crop imports, the prices of basic crops like maize and tomatoes plummeted.¹⁸⁶ NAFTA has displaced more Mexican workers in the agricultural sector than in any other sector; by one estimate job losses in corn production alone between 1991 and 2000 exceeded 1 million.¹⁸⁷

¹⁷⁹ *Id.* at 5.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² Bieszczat, *supra* note 115, at 1395.

¹⁸³ *Id.* at 1396.

¹⁸⁴ *Id.*

¹⁸⁵ See generally Villarreal 2014, *supra* note 49.

¹⁸⁶ *Id.* at 12-13.

¹⁸⁷ M. Angeles Villarreal and Ian F. Fergusson, *The North American Free Trade Agreement*, CONGRESSIONAL RESEARCH SERVICE 19 (2017) <https://fas.org/sgp/crs/row/R42965.pdf> (citing Robert E. Scott, Carlos Salas, Bruce Campbell and Jeff Faux, *Revisiting NAFTA: Still Not Working for North America's Workers*, ECONOMIC POLICY INSTITUTE 43, Briefing Paper #173)

It became impossible for small-scale farmers and household farmers to make a living, as NAFTA's policies favored larger commercial farmers.¹⁸⁸ Mexican agriculture shifted increasingly towards large-scale farms, factory-type livestock lots, and capital-intensive food processing, which was economically detrimental to smaller-scale farms.¹⁸⁹ NAFTA reforms also disadvantaged small famers by limiting their access to credit.¹⁹⁰ Those with small farms in rural areas had difficulty accessing credit, as Mexican commercial banks declined to issue loans without government guarantees.¹⁹¹ Consequently, the number of rural agricultural workers in Mexico declined from 8.1 million in 1993 to 6.8 million in 2010.¹⁹²

The southern agrarian state of Chiapas was hit especially hard by the agrarian reforms that accompanied NAFTA.¹⁹³ Indigenous people make up over twenty-seven percent of the population of Chiapas.¹⁹⁴ Chiapas is the poorest state in Mexico and many of its residents live in extreme poverty—particularly its indigenous population.¹⁹⁵ Fearing they would lose their land and livelihood with the international competition that would occur with NAFTA's implementation, the Zapatista Army of National Liberation (EZLN), an indigenous organization, took up arms against the Mexican government in 1994.¹⁹⁶ This initiated many years of internal armed conflict that claimed hundreds of lives.¹⁹⁷ Despite the government's commitment to

¹⁸⁸ Villarreal 2014, *supra* note 49, at 11.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 14.

¹⁹² *Id.*

¹⁹³ Iker Reyes Godelmann, *The Zapatista Movement: The Fight for Indigenous Rights in Mexico*, AUSTRALIAN INSTITUTE OF INTERNATIONAL AFFAIRS (July 30, 2014), <http://www.internationalaffairs.org.au/news-item/the-zapatista-movement-the-fight-for-indigenous-rights-in-mexico/>.

¹⁹⁴ Godelmann, *supra* note 192.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

protect some rights for indigenous people in response to the uprising, the people of Chiapas permanently lost their ability to support themselves as farmers and many continue to live in extreme poverty.¹⁹⁸

3. More Maquiladoras; More Exploitation

In addition to displacing rural farmers, the 1992 privatization of communal land enabled transnational companies to purchase large amounts of land, which facilitated the expansion of maquiladora labor—and resultant worker exploitation.¹⁹⁹ Between 1993 and 2002, the agricultural sector lost 1.4 million jobs.²⁰⁰ Unemployed former farmers were forced to take jobs in the new maquiladoras.²⁰¹

After NAFTA, management-aligned ghost unions have continued to preclude worker organization in factories.²⁰² Poor working conditions have continued to plague maquiladoras.²⁰³ A 2008 study of workers at the Key Safety Systems plants, United States owned factories in Valle Hermosa, found that on average, employees work 48 hours a week for the equivalent of \$60.²⁰⁴ From that wage, the equivalent of \$25 is deducted for company-supplied housing, payments to the management-aligned union, and cafeteria costs.²⁰⁵ The Coalition for Justice in the Maquiladoras (CMJ), a worker advocacy group, estimates that a Key Safety Systems plant worker would need to work 147 minutes to afford a quart of milk.²⁰⁶ CMJ asserts that policies

¹⁹⁸ *Id.*

¹⁹⁹ Rachel Rosen, *Mexican Maquila Workers Denounce NAFTA*, 105 INDUSTRIAL WORKER 1 (Apr. 2008).

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *See* Rosen, *supra* footnote 198.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

and conditions at Key Safety Systems plants are typical of foreign-owned maquiladoras. In addition to paying low wages, the jobs are unstable.²⁰⁷ Workers are often laid off with no notice.²⁰⁸ Furthermore, safety standards are lacking.²⁰⁹ The maquiladoras often expose workers to dangerous chemicals, and workers have little recourse for adverse health impacts.²¹⁰

The evaporation of jobs in agriculture in Mexico, combined with rampant exploitation by industrial employers, led to NAFTA's most impactful unforeseen consequence: the staggering increase in migrant workers crossing the border into the United States to seek employment.²¹¹ The temporal link between NAFTA's passage and the migration upsurge, which has been comprehensively established,²¹² is beyond the scope of this paper.

4. Labor and 2018 NAFTA Renegotiation

In 2018, the Trump administration renegotiated NAFTA; proposing the United States-Mexico-Canada Agreement (USMCA).²¹³ As of May, 2019, the USMCA is signed but not yet ratified, pending passage by Congress.²¹⁴ The proposed USMCA revises NAFTA provisions

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ See Rosen, *supra* footnote 198.

²¹⁰ *Id.*

²¹¹ See David Bacon, *How US Policies Fueled Mexico's Great Migration*, THE NATION, (Jan. 4, 2012), <https://www.thenation.com/article/how-us-policies-fueled-mexicos-great-migration/>.

²¹² *Id.*; see also Tim Marcin, *Immigration From Mexico Grew Under NAFTA Trade Deal*, Newsweek (2017), <https://www.newsweek.com/nafta-and-immigration-trump-threatens-agreement-what-know-593325>; see also McBride and Sergie *supra* note 149 (noting that while "migration to the United States, both legal and illegal, more than doubled after 1994, peaking in 2007,...the flow reversed after 2008 as more Mexican-born immigrants began leaving the country than arriving. Experts attribute this to stricter border enforcement, changing demographics in Mexico, and the combination of fewer available jobs in the United States along with more in Mexico.").

²¹³ M. Angeles Villarreal and Ian F. Fergusson, *NAFTA Renegotiation and the Proposed United States-Mexico-Canada Agreement (USMCA)*, CONGRESSIONAL RESEARCH SERVICE (draft 2019), <https://fas.org/sgp/crs/row/R44981.pdf>.

²¹⁴ David Prentice and David Lawder, *U.S. Labor Unions Say NAFTA Replacement Does Not Go Far Enough for Workers*. REUTERS (Mar. 26, 2019), <https://www.reuters.com/article/us-usa->

related to workers' rights protections.²¹⁵ The new agreement would require all party states to effectively enforce existing labor laws, and to adopt new laws to mirror workers' rights protected by the International Labor Organization Declaration on the Fundamental Principles and Rights at Work.²¹⁶ The proposed USMCA places additional obligations on Mexico.²¹⁷ Mexico would be required to enact specific laws relating to the right to form unions and bargain collectively; establish independent bodies to register unions; establish separate Labor Courts to adjudicate labor disputes; and enact other legislation to protect workers.²¹⁸ USMCA would also require that 75 percent of automobile content be made in North America to exempt automobile exports from duties (compared to NAFTA's rule of 62.5 percent). Of the 75 percent content, 40 to 45 percent would have to be made by workers earning \$16 an hour or more.²¹⁹

While labor unions have lauded the new agreement's heightened labor protections, critics believe the USMCA enforcement mechanism would be insufficient to protect against continuing restrictions on workers' rights.²²⁰ Enduring state corruption presents an obstacle to effective enforcement; bribing government officials to overlook labor violations, for instance, is common

trade-labor/us-labor-unions-say-nafta-replacement-does-not-go-far-enough-for-workers-idUSKCN1R72H2.

²¹⁵ Villarreal and Fergusson, *supra* note 212, at 34.

²¹⁶ *Id.* (rights protected by the ILO Declaration on the Fundamental Principles and Rights at Work (1998) include "freedom of association; effective recognition of the right to collective bargaining; elimination of all forms of compulsory or forced labor; effective abolition of child labor; and elimination of discrimination in respect to employment and occupation").

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ Jack Caporal and William Alan Reinsch, *From NAFTA to USMCA: What's New and What's Next?* CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES (OCT. 3, 2018), <https://www.csis.org/analysis/nafta-usmca-whats-new-and-whats-next>.

²²⁰ Prentice and Lawder, *supra* note 213.

practice.²²¹ In 2012 the New York Times published a report revealing that Walmart in Mexico had paid over \$24 million in bribes, including to pay off union spies.²²² Even if Mexico adopts the agreed-upon changes, deeply embedded corruption causes some to doubt the country's ability to effectively enforce them.²²³

B. Colombia After the CPTA

1. Compliance with the Colombian Action Plan Related to Labor Rights

The Colombian Action Plan Related to Labor Rights was negotiated in 2011,²²⁴ and the CPTA was ultimately enacted in 2012.²²⁵ The agreement lowered trade barriers and gave rise to a \$17 billion dollar export market, but it impaired Colombia's labor movement.²²⁶ While there has been a notable drop in the number of union member assassinations since the CPTA was put in place, the drop corresponds with a decline in membership rates, from fourteen percent at the start of former President Uribe's term to four percent by 2013.²²⁷ Lori Wallach, director of Public Citizen's Global Trade Watch, claims the agreement was a farce from the outset.²²⁸ She said in 2013, "It was a cover. The Labor Action Plan was used as an ameliorative to try and overcome

²²¹ Alexia Fernández Campbell, *Trump's Trade Deal With Mexico Gives Workers More Rights than NAFTA. But There's a Catch*, VOX (Aug. 29, 2018), <https://www.vox.com/2018/8/29/17791430/trump-mexico-trade-deal-nafta-labor>.

²²² David Barstow, *Wal-Mart Husted Up a Vast Mexican Bribery Case*, The New York Times (Apr. 21, 2012), <https://www.nytimes.com/2012/04/22/business/at-wal-mart-in-mexico-a-bribe-inquiry-silenced.html>.

²²³ Campbell, *supra* note 220.

²²⁴ AFL-CIO, *The Colombian Action Plan Related To Labor Rights: The View Through Workers' Eyes 1* (July 2012), <https://aflcio.org/sites/default/files/2017-03/report%2Bversion%2B2%2Bno%2Bbug.pdf>.

²²⁵ Michelle Chen, *Free Trade Is Killing Colombian Labor Activists*, THE NATION, (Aug. 1, 2016), <https://www.thenation.com/article/after-free-trade-came-to-colombia-workers-started-to-die/>.

²²⁶ *Id.*

²²⁷ Norby & Fitzpatrick, *supra* note 74.

²²⁸ *Id.*

the outrage in Congress over the United States associating itself with a government responsible for the single highest rates of unionist assassinations.”²²⁹

According to an AFL-CIO report, in the year after the Labor Action Plan was in place, some workers’ conditions actually deteriorated.²³⁰ Workers in the palm, sugar, mining, ports, and flowers sectors experienced reductions in compensation and benefits, restrictions on their rights to unionize, and pervasive threats of violence against themselves and their families for attempting to exercise rights protected under the Labor Action Plan.²³¹

Colombia did take steps to comply with provisions of the Labor Action Plan.²³² However, a 2017 report by the United States Office of Trade and Labor Affairs (OTLA) indicates that Colombia’s efforts have fallen short of its obligations under the action plan.²³³ The OTLA report charges that Colombia has failed to adequately enforce its labor laws related to the rights of freedom of association and collective bargaining.²³⁴ Although the country did meet its obligation under the agreement to hire 480 inspectors to the Labor Inspectorate, rural labor inspections happen infrequently²³⁵. High labor staff turnover, lack of inspection strategy, and failure to implement a national case management system contribute to inadequate enforcement.²³⁶ The report also indicates that the use of subcontracting and collective pacts continue to undermine workers’ rights to organize independently,²³⁷ despite Colombia’s commitments under part of the

²²⁹ *Id.*

²³⁰ AFL-CIO 2012 *supra* note 223

²³¹ *Id.*

²³² *Labor in the U.S.-Colombia Trade Promotion Agreement*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/uscolombiatpa/labor> (last visited Oct 21, 2018).

²³³ Public Report of Review of U.S. Submission 2016-02 (Colombia), Office of Trade & Labor Affairs, Bureau of Int’l Labor Affairs, U.S. Dep’t of Labor (2017).

²³⁴ Public Report of Review of U.S. Submission 2016-02, *supra* note 232, at 8.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.* at 12.

Action Plan; which explicitly prohibit the use of collective pacts to undermine the right to organize.²³⁸ The government's continued lack of prosecution for threats and violence against unionists was also identified as a key area of concern.²³⁹

While the state is working through its backlog of Criminal Code Article 200 cases, which provides criminal penalties for employers who undermine workers' freedom of association and collective bargaining, OTLA found no evidence of any convictions under the law, even though eighty-two cases had been processed.²⁴⁰ Despite some steps towards compliance, OTLA's report indicates that the state must make substantial reforms to adequately protect workers' rights.²⁴¹

2. Continuing Violence Directed at Unionists Post-CTPA

Despite the steps taken by the Colombian government to comply with the Action Plan, labor issues have continued.²⁴² Unstable, poverty-wage labor persists in many sectors—particularly in oil extraction and agriculture.²⁴³ In Colombia, “Cooperativas de Trabajo Asociado,” labor organizations which have evolved to serve the interests of employers, now operate much like Mexico's “ghost unions” to prevent the independent organization of workers.²⁴⁴ Only about .5% of Colombian workers have a collective bargaining agreement—due in large part to abuse by employers and the chilling effect of continuing violence against unionists.²⁴⁵

²³⁸ COLOMBIAN ACTION PLAN RELATED TO LABOR RIGHTS, *supra* note 117 at Part V.

²³⁹ Public Report of Review of U.S. Submission 2016-02 *supra* note 232 at 8.

²⁴⁰ *Id.* at ii.

²⁴¹ *Id.*

²⁴² Congressional Research Service, *Colombia: Background and U.S. Relations*, CRS Report 18 (Nov. 14, 2017) (“Despite the programs launched and measures taken to implement the LAP, human rights and labor organizations claim that violence targeting labor union members continues.”) <https://crsreports.congress.gov/product/pdf/R/R43813/18>.

²⁴³ Chen, *supra* note 224.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

According to a complaint filed by the American Federation of Labor and Congress of Industrial Organizations, (AFL-CIO) with the Department of Labor in 2016, Colombia's political climate is more hostile toward trade unionists now than it was before the trade agreement was enacted.²⁴⁶ The AFL-CIO reported that at least 1,466 threats and acts of violence have been directed towards workers attempting to assert their rights, including 955 death threats and 99 killings.²⁴⁷ The report also notes that poverty-level wages persist in many sectors, particularly in extraction and agriculture.²⁴⁸

Workers have reported that violence and threats have actually increased since the trade agreement's implementation.²⁴⁹ The International Trade Union Confederation documented an incident in which 125 female members of a food industry union staged a peaceful sit-in protest at a US- owned tuna processing plant after a sudden closure and mass layoff.²⁵⁰ In response, management summoned the state's Mobile Anti-Riot Squad (Escuadrón Móvil Anti Disturbios (ESMAD)).²⁵¹ The police unit used tear gas against the demonstrators to forcibly remove them.²⁵² Later, in March of 2016, ESMAD officers beat workers protesting at a sugar plant.²⁵³ Five of the workers sustained serious injuries.²⁵⁴ One worker who suffered permanent brain damage after an officer fired a teargas canister directly at his head.²⁵⁵

²⁴⁶ *Id.*

²⁴⁷ Chen, *supra* note 224.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² Chen, *supra* note 224.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

AFL-CIO Global Worker Rights Coordinator Brian Finnegan criticized the state's deployment of ESMAD to handle labor disputes.²⁵⁶ He said, "people are in a labor conflict, and instead of having a negotiation with the Ministry of Labor, they send in the riot police, and they beat people with machetes and clubs, and they've killed people. In the middle of a peace process, this is completely unacceptable."²⁵⁷ The complaint further charges that those who do exercise their rights through legal channels face bureaucratic obstacles and long delays that inhibit their access to justice.²⁵⁸

After concerns about continuing murders of unionists were brought to US attention in 2016, the US Trade Representative announced that murders of trade unionists were not considered a direct violation of the trade agreement provisions, prompting outrage by worker advocacy groups.²⁵⁹ Thea Lee, the AFL-CIO deputy chief of staff, claimed to have been present in two meetings where she was told that killing and brutalizing organizers would not be considered interfering with labor rights under the trade agreement terms.²⁶⁰

Notwithstanding the mutual assent to the Labor Action Plan as condition for the CPTA's passage, continued violence against unionists, employer intimidation, and impunity for those who break the law prevents workers from asserting their rights.²⁶¹ AFL-CIO Global Worker

²⁵⁶ *Id.*

²⁵⁷ Chen, *supra* note 224.

²⁵⁸ Chen, *supra* note 224.

²⁵⁹ Michael McAuliff, AFL-CIO's Trumka: USTR Told Us Murder Isn't A Violation Under U.S. Trade Deals, HUFFPOST (Apr. 22, 2015), https://www.huffingtonpost.com/2015/04/22/fast-track-trade_n_7113412.html.

²⁶⁰ *Id.*

²⁶¹ See Human Rights Watch, *Colombia: New Killings of Labor Leaders: Anti-Union Violence Prevents Free Exercise of Labor Rights* (2007) (Quoting HRW Americas Director José Miguel Vivancos: "Colombia has a long and ugly history of killing trade unionists, and a dismal record when it comes to bringing their killers to justice...to make the country safe for unions, the authorities must ensure these cases are vigorously investigated and prosecuted... Murders like

Rights Coordinator Brian Finnegan says, “It’s common sense for us that when you threaten, shoot at, kill people, they’re less able to create unions and collectively bargain.”²⁶²

IV. Conclusion

Efforts to protect workers in Mexico and Colombia from the impacts of trade agreements with the United States have been largely ineffective, as pervasive worker abuse and exploitation has persisted in both countries. While the Colombian Action Plan Related to Labor Rights laid out actions for the Colombian government to improve its protections for workers, the NAALC required all parties to the agreement to take action to protect workers’ rights. Critics of these supplementary labor agreements have charged that they were devised as symbolic measures to appease left-leaning trade deal opponents concerned about workers’ rights, without actually redressing pervasive violations. Both supplementary agreements failed to provide sufficient enforcement mechanisms. Deeply embedded state complicity in labor violations in both countries has impeded efforts by labor organizers and advocacy groups to hold employers accountable for rights violations. Finally, widespread internal violence in both countries, and a pattern of impunity for the perpetrators of violent crimes, has left workers vulnerable to abuse. Politically motivated killings of unionists in Colombia continued after the implementation of the CPTA. In Mexico, maquiladora workers in border cities have remained vulnerable to pervasive violence and extortion related to the activities of drug cartels. The heightened worker protections USMCA proposes are promising for Mexico. But absent effective enforcement mechanisms and comprehensive institutional reforms, workers’ rights violations related to US trade in Mexico and Colombia may persist.

these have a chilling effect on union members in Colombia...workers in Colombia should be able to push for their rights and assert their views without fearing for their lives.”)

²⁶² Chen, *supra* note 224.

**The International, Impartial and Independent Mechanism on Syrian War Crimes:
What It Does and Doesn't Do**

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INTRODUCTION

This paper is one of the first and only comprehensive works that describes and analyzes the International, Impartial and Independent Mechanism on Syria (IIIM), which is barely one year old. In Part I, the paper will describe the IIIM. First, it will explain the IIIM's basic mandate. Next, it will describe the context in which the IIIM was created. To understand how the IIIM is unique, one must understand the other traditional international justice mechanisms. This paper then discusses in detail how the IIIM works differently from any other previously established body, specifically focusing on its new uses of technology and the ways in which it cooperates with states and with NGOs.

In Part II, this paper will hypothesize about and analyze whether the IIIM's work is likely to successfully lead to war crimes^{**} prosecutions. Particularly, it will examine the challenges related to how the IIIM is working to assist a prosecutor or prosecutorial body that does not yet have jurisdiction or does not yet exist. Subsequently, it will demonstrate how the IIIM is necessary but not sufficient to enable prosecutions. In the penultimate section of Part II, the paper will address potential roadblocks to the IIIM's work and to the ultimate successful prosecution of war crimes. Finally, the paper will address the question of whether the IIIM itself can serve as a deterrent for war crimes perpetrators.

The main source that this paper relies upon is an interview with Catherine Marchi-Uhel, head of the IIIM.² Given that the IIIM is so new, relatively little has been written about it and

^{**} For brevity purposes, throughout this paper the term war crimes refers to the IIIM's official mandate that generally covers "violations of international humanitarian law and human rights violations and abuses."

² Telephone Interview with Catherine Marchi-Uhel, Head, International Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, (Feb. 28, 2018).

what literature does exist is not extensive. This paper hopes to prompt more discussion and critical thinking about what works and what does not work about the IIIM and international justice mechanisms more generally.

PART I: HOW THE IIIM CAME TO BE AND HOW IT WORKS

A. A New Mechanism is Born

In December 2016, the United Nations (“UN”) General Assembly adopted a resolution which established the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 (IIIM).³ The resolution was adopted with 105 votes in favor, 15 against, and 52 abstentions.⁴ The IIIM was established to cooperate with the Independent International Commission of Inquiry on the Syrian Arab Republic (CoI) and to

“collect, consolidate, preserve and analyse evidence of violations of international humanitarian law and human rights violations and abuses and to prepare file in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes, in accordance with international law.”⁵

The IIIM has a quasi-tribunal function, but it is not a court and it cannot issue indictments or prosecute cases.⁶ The IIIM’s mandate is two-fold: the first prong of the mandate is to gather evidence, and the second prong is to prepare case files for other jurisdictions to prosecute those

³ G.A. Res.71/248 (Dec. 21, 2016), <http://undocs.org/A/RES/71/248>.

⁴ *General Assembly Takes Action on Second Committee Reports by Adopting 37 Texts*, UNITED NATIONS (Dec. 21, 2016), <https://www.un.org/press/en/2016/ga11880.doc.htm>.

⁵ *General Assembly Takes Action on Second Committee Reports by Adopting 37 Texts*, *supra* note 4.

⁶ Catherine Marchi-Uhel, Head of the Int’l Impartial and Indep. Mechanism, Stanford WSD Handa Ctr. for Human Rights and Int’l Justice, Accountability for the Most Serious Crimes Committed in Syria (Feb. 12, 2018).

cases in the future.⁷ Under prong number one, the IIIM is to build a secure collection of evidence.⁸ This requires collecting and collating electronic and physical evidence and then preserving and securely storing it.⁹ Under the second prong, the IIIM will research alleged perpetrators of war crimes on all sides.¹⁰ To do so, the IIIM must be aware of and engage with research that other stakeholders, such as the CoI or NGOs, are doing; however, the IIIM must reach their own conclusion about each case.¹¹

Prong one overlaps with the CoI's mandate because both exist to gather evidence. The CoI was established in 2011 by the UN Human Rights Council and tasked to "investigate all alleged violations of international human rights law," to establish facts surrounding such violations, and to identify those responsible.¹² The CoI's mandate was for one year, and has been extended to another year every year since—most recently again in March 2018.¹³ However, the CoI was not created to enable prosecutions, as the IIIM was, and is not as systematic in its evidence gathering.¹⁴

B. Of All the Options? How and Why the IIIM was Chosen

While UN General Assembly action in relation to war crime prevention and prosecution is not unheard of—it passed resolutions in 1946, 1973, 1997, 2005, and 2008, which codified

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Marchi-Uhel, *supra* note 6.

¹² *Independent International Commission of Inquiry on the Syrian Arab Republic*, UNITED NATIONS HUMAN RIGHTS COUNCIL, <http://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/AboutCoI.aspx>.

¹³ *Human Rights Council extends mandates on Democratic People's Republic of Korea, Syria, Iran, South Sudan and Myanmar*, UNITED NATIONS HUMAN RIGHTS COUNCIL (March 23, 2018), <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=22895&LangID=E>.

¹⁴ Telephone Interview with Mark Simonoff, Head Legal Advisor, USUN (Apr. 11, 2018).

international crimes or assisted in establishing hybrid tribunals—it is unusual as a means to establish one of the traditional international justice mechanisms.¹⁵ Such established and traditional mechanisms include (1) ad hoc international criminal tribunals; (2) referrals to the International Criminal Court (ICC); or (3) hybrid tribunals.¹⁶ First, ad hoc tribunals such as the International Criminal Tribunal for the Former Yugoslavia and the International War Crimes Tribunal for Rwanda have been established by the Security Council.¹⁷ Second, pursuant to the Rome Statute, the ICC—created in 2003—can have jurisdiction through Security Council referral, state party referral, or the ICC Chief Prosecutor’s discretion.¹⁸ Third, at a member state’s request, the UN has assisted in establishing special criminal “hybrid” courts, such as the Extraordinary Chambers in the Courts of Cambodia, the Special Tribunal for Lebanon, and the Special Court for Sierra Leone.¹⁹ All three avenues tend to include either or both Security Council and member state approval.

Current geopolitical climate left the General Assembly as one of the only bodies that could still create a mechanism in response to perpetrated war crimes in Syria.²⁰ In 2014, China

¹⁵ Beth Van Schaack, *The General Assembly & Accountability for International Crimes*, JUST SECURITY (Feb. 27, 2017), <https://www.justsecurity.org/38145/general-assembly-accountability-international-crimes/>.

¹⁶ *International and Hybrid Criminal Courts and Tribunals*, UNITED NATIONS AND THE RULE OF LAW, <https://www.un.org/ruleoflaw/thematic-areas/international-law-courts-tribunals/international-hybrid-criminal-courts-tribunals/>.

¹⁷ *Id.*

¹⁸ *International and Hybrid Criminal Courts and Tribunals*, *supra* note 16.

¹⁹ *STL Timeline of Events*, SPECIAL TRIBUNAL FOR LEBANON, <https://www.stl-tsl.org/en/about-the-stl/636-creation-of-the-stl>; *The Special Court for Sierra Leone Its History and Jurisprudence*, THE RESIDUAL SPECIAL COURT FOR SIERRA LEONE, <http://www.rscsl.org/index.html>; *About ECCC*, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA, <https://www.eccc.gov.kh/en/about-eccc>.

²⁰ Alex Whiting, *Russia Maintains Objection to General Assembly’s Mechanism for Syria*, JUST SECURITY (Feb. 24, 2017), <https://www.justsecurity.org/38084/russia-maintains-objection-general-assemblys-mechanism-syria/>.

and Russia voted against a draft resolution proposed by France that referred the situation in Syria to the ICC, rendering the vote 13-2.²¹ From their behavior at the UN, it seemed clear that Russia and China would block any more Security Council attempts to refer a war crimes perpetrator in Syria to the ICC.²² Any international tribunal or hybrid court was opposed by Syria, which claimed that it was providing adequate justice domestically.²³ In its statements rejecting the ICC referral, Syria's representative claimed the following:

“[the] Government had implemented a series of measures aimed at holding accountable those involved in war crimes and had taken legal action against them. The National Investigation Committee continued to do its job in parallel with the judiciary, which was looking into thousands of cases. “This confirms the desire and ability of the Syrian Government to achieve justice and denies any pretext to involve any international judicial body that conflicts with the national judiciary’s powers.””²⁴

Although the CoI already existed, it could not enable or provide a body to enable prosecutions.²⁵ No court outside Syria could uniformly try war crimes committed in Syria; the ICC is the only court that would have jurisdiction, but referrals to the ICC were and would clearly be continuously blocked.²⁶ A hybrid tribunal was also considered as an option, and the U.S. even worked on a draft statute for such a hybrid tribunal.²⁷ U.S. officials brainstormed and

²¹ *Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution*, UNITED NATIONS (May 22, 2014), <https://www.un.org/press/en/2014/sc11407.doc.htm>.

²² Telephone Interview with Mark Simonoff, *supra* note 14.

²³ *Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution*, *supra* note 21.

²⁴ *Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution*, *supra* note 21.

²⁵ Telephone Interview with Mark Simonoff, *supra* note 14.

²⁶ *Id.*

²⁷ *Panel Convened on Technology, Syria, and Human Rights: Technology, Syria, and Human Rights: How a Tech “Connected” Civil Society Might Hold Governments Accountable*, STANFORD WSD HANDA CTR. FOR HUMAN RIGHTS AND INT’L JUSTICE (Feb. 24, 2018), <https://handacenter.stanford.edu/news/panel-convened-technology-syria-and-human-rights>; Dov Jacobs, *Draft Statute for Syria War Crimes Tribunal: A first commentary on a disappointing effort*, SPREADING THE JAM, INT’L LAW, INT’L CRIMINAL LAW, HUMAN RIGHTS AND

deliberated a Syria-related tribunal, but the idea ended up going nowhere.²⁸ Therefore, before the IIIM was created, it seemed like no option existed for pursuing justice for war crimes in Syria.

The initial draft of the resolution on the IIIM was presented in 2016 by Liechtenstein and co-sponsored by 15 other states.²⁹ None of the co-sponsoring states were Security Council Members. Liechtenstein rejected the Security Council's failure to address the issue:

“The situation in Syria is the defining crisis of our time, both with respect to human suffering and to the inability of the Security Council to take effective action to address the unfolding humanitarian tragedy. Nothing illustrates the political paralysis in the Council more starkly than the repeated use of the veto in connection with moderate resolutions that pursue the primary goal of alleviating the suffering of the civilian population in the country.”³⁰

Liechtenstein then argued that it was the General Assembly's duty to address the situation:

“Since the referral of the situation to the International Criminal Court was vetoed in the Council more than two years ago, there has been no serious effort in the Council to ensure accountability and end impunity. It is therefore imperative that the General Assembly steps in and enables the international community to at least take one decisive step forward in this respect: to prepare files that can serve as the basis for criminal proceedings in a court or tribunal that may in the future be able to exercise jurisdiction.”

C. New Innovations: How the IIIM works

TRANSITIONAL JUSTICE (Oct. 3, 2013), <https://dovjacobs.com/2013/10/03/draft-statute-for-syria-war-crimes-tribunal-a-first-commentary-on-a-disappointing-effort/>.

²⁸ Colum Lynch, *Exclusive: The United States' Pursuit of Syrian War Criminals Goes Back to the Drawing Board*, FOREIGN POLICY (May 23, 2014), <http://foreignpolicy.com/2014/05/23/exclusive-the-united-states-pursuit-of-syrian-war-criminals-goes-back-to-the-drawing-board/>.

²⁹ Nicolas Goeglin, *UN General Assembly Adopts a Resolution Establishing an International Investigation Mechanism in Syria on Grave Violations of Humanitarian Law and Human Rights*, DERECHO INTERNACIONAL, DIPUBLICO.ORG (Dec. 21, 2016), <https://www.dipublico.org/104791/un-general-assembly-adopts-a-resolution-establishing-an-international-investigation-mechanism-in-syria-on-grave-violations-of-humanitarian-law-and-human-rights/>; Telephone Interview with Mark Simonoff, *supra* note 14.

³⁰ Christian Wenaweser, H.E. Ambassador, PERMANENT MISSION OF THE PRINCIPALITY OF LIECHTENSTEIN TO THE UNITED NATIONS (Dec. 9, 2016), http://www.regierung.li/files/medienarchiv/unoallgemein/2016-12-09_GA_adoption_of_res_on_Syria_General_Statement_final.pdf?t=636180482942983416.

A novel major challenge is having too much documentation that now needs to be organized.³¹ Crimes committed during the Syrian war have been some of the most documented war crimes in history.³² The conflict is extremely well-documented, and one can see incidents almost immediately after they happen.³³ To address the challenge of having too much documentation—rather than too little—the IIIM must work differently.

The IIIM is unlike other international justice mechanisms because it hopes to rely upon entirely new technology to synthesize its data and evidence. To a certain extent, it plans to use artificial intelligence in organizing and analyzing evidence.³⁴ The IIIM is currently in the process of acquiring a software that will allow them to not only store and preserve the evidence, but can analyze the material in question.³⁵ Another new concern is cybersecurity, and the new software must be capable of protecting the material from cyberattacks.³⁶ The IIIM has considered numerous options and identified a software that is capable of achieving these needs.³⁷ The IIIM will be able to insert the metadata, including videos and images, as well as the documents retrieved into the software, and the software will be capable of analyzing the material itself.³⁸

³¹ *Panel Convened on Technology, Syria, and Human Rights: Technology, Syria, and Human Rights: How a Tech “Connected” Civil Society Might Hold Governments Accountable*, STANFORD WSD HANDA CTR. FOR HUMAN RIGHTS AND INT’L JUSTICE (Feb. 24, 2018), <https://handacenter.stanford.edu/news/panel-convened-technology-syria-and-human-rights>.

³² Marchi-Uhel, *supra* note 6.

³³ *Panel Convened on Technology, Syria, and Human Rights: Technology, Syria, and Human Rights: How a Tech “Connected” Civil Society Might Hold Governments Accountable*, *supra* note 31.

³⁴ See Telephone Interview with Marchi-Uhel, *supra* note 2.

³⁵ *Id.*

³⁶ Marchi-Uhel, *supra* note 6.

³⁷ *Id.*

³⁸ *Id.*

A tool such as the software for which the IIIM has searched for and identified is necessary because of the huge amount of material about crimes in Syria. The material, including many videos, exists in the terabytes. Catherine Marchi-Uhel, Head of the IIIM, reasons that not using a new software is just not an option.³⁹ Approaching the project of synthesizing material and evidence related to war crimes in Syria with traditional criminal justice tools would be unsuccessful. Moreover, she admits that storing, synthesizing, and analyzing the data without different technology could present impartiality concerns.⁴⁰ If approaching the material without such software, and instead simply using human employees and once relied upon Information Technology (“IT”), they would be forced to be extremely selective about which cases they choose to document. “It’s not something that you can support with IT in the traditional way of having IT that can find stuff for you,” Marchi-Uhel concludes.⁴¹ Nevertheless, artificial intelligence will not replace human intelligence but will be used alongside human analysis. The software is vital in going through the huge amount of video material and doing a first-step sorting. The standard is not taking every single piece of material into account, but going through huge amounts of material and being able to understand what is relevant and what needs further assistance or documentations. Value analysts and lawyers can then review the material and build the cases—that will not be done by technology.

D. The IIIM’s Collaborations

1. Collaboration with States

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Marchi-Uhel, *supra* note 6.

The IIIM collaborates in evidence-gathering and, to an extent, case development with both states and NGOs.⁴² The IIIM invites all those with whom it collaborates to provide information that could be sufficient evidence to open a case.⁴³ It works with states on three different levels: (1) broad and general forums, (2) bilateral contact with states' law enforcement and prosecutorial units, and (3) information exchange.⁴⁴

At the first and highest—in the most removed sense— level, the IIIM interacts directly with other countries' small crimes units through a forum nicknamed the “genocide network” made up of mostly European states.⁴⁵ States in the genocide network meet on a biannual basis, and the individuals are mostly prosecutors or law enforcement officers that deal with war crimes, crime against humanity, or genocide.⁴⁶ Participants in the genocide network are not focusing exclusively on Syria, but many do have cases that concern Syria.⁴⁷ This forum is important because states have already gathered and the IIIM requests not only permission to attend closed sessions but also to be a designated focal and contact point for aspects concerning Syria.⁴⁸ This can be an important place to discuss issues of interest, although generally these discussions do not cover all the details.⁴⁹ These are also only biannual meetings, which limit the possible amount of discussion.⁵⁰

⁴² Telephone Interview with Catherine Marchi-Uhel, *supra* note 2.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Telephone Interview with Catherine Marchi-Uhel, *supra* note 2.

⁴⁸ Telephone Interview with Catherine Marchi-Uhel, *supra* note 2.

⁴⁹ *Id.*

⁵⁰ *Id.*

At the second level, for engagements that are not appropriate for a broad forum, the IIIM enters into bilateral contact with states' crime units.⁵¹ At first, this was at high levels with the chief prosecutors or the heads of the units, and now is at the working level with many states.⁵² They exchange operational information that the IIIM collects if it seems usable.⁵³

The third level is still in development.⁵⁴ At this level, the IIIM hopes to be able to provide material to states so that they will be able to prosecute war crimes.⁵⁵ States are able to accept material that the IIIM provides.⁵⁶ Marchi-Uhel remarks that they "haven't seen yet a state that said they're not legally in a position that can accept what we provide or information from the mechanism."⁵⁷ Although some states have restrictions that would prevent them from *asking* the IIIM for certain things, most do not.⁵⁸ Most states find it proper for their prosecutors to receive information and use it in their own cases.⁵⁹

Another area of collaboration that the IIIM is hoping to explore is joining or establishing a Joint Investigative Team (JIT) with a state or with the EU.⁶⁰ A JIT is a team in which the information that the investigators gather is considered to be gathered by the team.⁶¹ This framework, which the Council of Europe has also used, would be very relevant and effective for

⁵¹ *Id.*

⁵² *Id.*

⁵³ Telephone Interview with Catherine Marchi-Uhel, *supra* note 2.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Telephone Interview with Catherine Marchi-Uhel, *supra* note 2.

⁵⁹ *Id.*

⁶⁰ Telephone Interview with Catherine Marchi-Uhel, *supra* note 2.

⁶¹ *Id.*

the IIIM.⁶² This concept is the most elaborate form of collaboration that the IIIM is considering, and it is prepared to adjust this type of framework.⁶³

2. *Collaboration with NGOs*

The IIIM works with any relevant NGOs, both Syrian and international.⁶⁴ Two types of NGOs are especially important to the IIIM's work.⁶⁵ First, NGOs that are focused on collection of relevant documents and evidence.⁶⁶ In fact, the IIIM's mandate clearly and strictly requires them to work with this category of NGO.⁶⁷ Accordingly, the IIIM has identified works with a large number of NGOs that do such work.⁶⁸ Second, some NGOs—particularly the international ones—have already done their own analysis.⁶⁹ Marchi-Uhel emphasizes that while they have interest in analysis done by others, they are mainly focused on the underlying material.⁷⁰ Because the IIIM is an independent organization that requires impartiality, they will not rely upon analysis done by NGOs.⁷¹ This also applies to conclusions rendered by other entities, such as the CoI or Organisation for the Prohibition of Chemical Weapons.⁷² Marchi-Uhel explains that they study such conclusions but they make their own, and do not import others.⁷³

Specifically with Syrian NGOs doing documentation work, the IIIM has three methods of engagement.⁷⁴ First, they do surveys asking them the type of material they use and the specific

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Telephone Interview with Catherine Marchi-Uhel, *supra* note 2.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Telephone Interview with Catherine Marchi-Uhel, *supra* note 2.

⁷¹ *Id.*

⁷² Telephone Interview with Catherine Marchi-Uhel, *supra* note 2.

⁷³ *Id.*

⁷⁴ *Id.*

material they have.⁷⁵ These surveys allowed the IIIM to decide the type of software that it required.⁷⁶ For the second method, which also uses surveys, the IIIM asks about the content that the NGOs have and what that content covers.⁷⁷ This allows the IIIM to prioritize between which NGOs it should work with most.⁷⁸ The third method of engagement is a platform for discussions.⁷⁹ This platform is still in the process of being established.⁸⁰ The IIIM has had two meetings with NGOs and hopes to have a third in which they sign a protocol laying out the type of interactions they envision having with one another.⁸¹ This platform will allow the collaborations to move from general discussions to a more technical interaction in which the IIIM can identify what is useful for them.⁸²

Syrian NGOs doing documentation work cover a broad scope of issues, such as advocacy and victim representation.⁸³ Figuring out how to have a victim-centered approach in practical terms is important to the IIIM.⁸⁴ They are willing to engage with victims in a way that allows them to hear victims' voices and factor them into their work.⁸⁵ At the same time, they must work to set boundaries that maintain their independence and impartiality.⁸⁶

PART II: WILL THE IIIM'S WORK LEAD TO WAR CRIMES PROSECUTIONS?

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Telephone Interview with Catherine Marchi-Uhel, *supra* note 2.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Telephone Interview with Catherine Marchi-Uhel, *supra* note 2.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Telephone Interview with Catherine Marchi-Uhel, *supra* note 2.

⁸⁶ *Id.*

This section will critically examine how and whether the IIIM is likely to lead to actual war crimes prosecutions. Given that the IIIM's goal is to support and enable prosecutions, this goal requires a future forum in which prosecution is possible. If no such forum allowing prosecutions is manifested, then will the entirety of the IIIM's work be in vain?

A. Working to Assist the Not-Yet Existent

The IIIM's goal is to gather evidence that will be considered admissible by future courts without impediments.⁸⁷ This creates challenges because the IIIM can only speculate where its evidence and cases might be used. Evidence requirements and legal elements of a crime differ depending on the court and the system—such as common law or civil law—but the IIIM is working to be as helpful as possible.

Evidence collection is deliberately broader than that necessary for each of the IIIM's individual case file for three main reasons.⁸⁸ First, they must not only prove the material elements of the underlying crime, but they also need to gather information about the context of those crimes.⁸⁹ For example, for crimes against humanity, the context is legally required as an actual element.⁹⁰ Second, investigations must be as broad as possible if the IIIM is to be able to support national prosecutions as efficiently as possible.⁹¹ Each nation can have different requirements. Additionally, nations may not always be focusing on prior perpetrators, but rather be prioritizing prosecutions of suspects present on their territory or with whom they have links.⁹² Different factors can guide different states—some might focus on certain individual conduct

⁸⁷ *See Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Telephone Interview with Catherine Marchi-Uhel, *supra* note 2.

⁹¹ Telephone Interview with Catherine Marchi-Uhel, *supra* note 2.

⁹² *Id.*

while others might have a broader approach within which they are building structural investigations beyond specific individuals.⁹³ Third, transitional justice occurs in stages and different evidence can be used in different stages.⁹⁴ At this point the IIIM is not publicly disclosing information about individual cases.⁹⁵ While this may change with certain cases in which publicly revealing information might further deter.⁹⁶

One particular issue that arises in evidence collection is whether to take a victim or witness' statement.⁹⁷ For past events, documentation often already exists because victims or witnesses have already provided statements.⁹⁸ If the IIIM takes these statements then they likely must fill in the gaps in the accounts.⁹⁹ However, this gap-filling could make the cases more complicated for prosecutors.

Marchi-Uhel describes the different criteria used in selecting which cases to prioritize building: (1) gravity of the crime committed, (2) potential for prosecution of the crime to deter future atrocities, (3) whether the collection of cases that are built give a fair and reasonable representation of the total and the types of crime that have been committed, (4) whether cases can accurately and empathetically portray actual individuals in the conflict, (5) whether particular crimes such as sexual violence are being included, (6) whether cases take specific known incidents into account, and (7) whether their choices reflect those of an impartial body, and do not have suspects of only one affiliation.¹⁰⁰ Being completely exhaustive is not possible,

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Telephone Interview with Catherine Marchi-Uhel, *supra* note 2.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Telephone Interview with Catherine Marchi-Uhel, *supra* note 2.

even at the level of the most egregious crimes, so among those, certain cases must be prioritized.¹⁰¹ The second criterion—deterrence—is a stronger factor in choosing which cases to develop for conflicts in which crimes continue to be committed.¹⁰² Deterrence can then play an important role in prioritizing certain cases over others by sending a signal to those currently committing crimes.¹⁰³

B. Necessary but not Sufficient

While documentation and evidence preservation may not be sufficient in enabling prosecutions, it is certainly necessary.¹⁰⁴ Cases cannot be brought and tried without evidence. Without the comprehensive documentation that the IIIM is doing, prosecutions would be unfeasible or severely limited. Although other groups such as the CoI and Syrian NGOs are also documenting evidence of war crimes, both have limitations. First, the CoI's breadth and scale is limited and it is only mandated to identify cases, not to analyze and build a legal prosecution.¹⁰⁵ Second, Syrian NGOs naturally focus on their own priorities, and in so doing can skew the information they gather. The IIIM's comprehensive mandate and duty to remain impartial will enable wide-ranging prosecutions that otherwise might not have supporting evidence. Given that prosecutions, generally, are not happening right now, the evidence needs to be preserved now so that it still exists when prosecutions do take place.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Panel Convened on Technology, Syria, and Human Rights: Technology, Syria, and Human Rights: How a Tech "Connected" Civil Society Might Hold Governments Accountable*, *supra* note 31.

¹⁰⁵ *Independent International Commission of Inquiry on the Syrian Arab Republic*, *supra* note 12.

However, that IIIM is meant to enable future prosecutions assumes that a body will exist in the future and will have jurisdiction to try such cases. Without any such body, the IIIM will have no platform upon which all its work can be put to use. Therefore, while the IIIM is a necessary step towards enabling prosecutions for war crimes in Syria, the final goal cannot be recognized without further work to establish such a jurisdiction. No alternate plan exists if a platform for prosecutions is not enabled in the future.¹⁰⁶

C. Potential Roadblocks

1. Lack of Syrian Support

A potential challenge to the IIIM's work is Syria's lack of support. Unlike other international tribunals, the IIIM was established without Syria's support and over Syria's blatant objections. Syria vocally opposed the IIIM as an infringement upon its national sovereignty and it voted against the resolution under which the IIIM was established.¹⁰⁷ In the General Assembly discussion, Syria's UN representative argued:

“the resolution violated the United Nations Charter, which stated that the Organization could not intervene in matters within the domestic jurisdiction of States . . . The establishment of the proposed mechanism was a flagrant interference in the internal affairs of a Member State, undermining the legal jurisdictions of national authorities and organs as well as national reconciliation efforts undertaken by his Government, thus constituting a direct threat to a political solution in Syria.”¹⁰⁸

Syria's opposition may render the IIIM's efforts futile in a way that other international tribunals were not.

¹⁰⁶ Telephone Interview with Mark Simonoff, *supra* note 14.

¹⁰⁷ Nicolas Goeglin, *supra* note 29.

¹⁰⁸ *Id.*

2. *Budget*

Another challenge to the IIIM's work is the uncertainty of its future budget. To properly do its work, the IIIM requires 60 staff members, but has so far been unable to recruit all such staff because they are unsure that they will be able to actually pay them for at least a year. Scheduling efficiently for recruitment requires planning ahead, employment protection which is negatively affected by the future budget uncertainty. The IIIM's goal is to have a 2021 budget that is included in the UN's regular budget. While the IIIM is currently being funded by voluntary contributions, Marchi-Uhel stresses: "This is not affecting our independence. It is affecting our capacity to plan properly to predict. But it doesn't affect our independence per se. That fact that it is funded by voluntary contributions doesn't give any say to those who are supportive and contribute into our substantive work. Funding doesn't give you any say."¹⁰⁹

D. Does the IIIM as it Exists Itself Create Deterrence?

Even if a prosecutorial body is never created or no other court gains jurisdiction, one could argue that the IIIM has enforcement authority itself and that even without a guaranteed prosecutorial body the IIIM could create a deterrence effect by itself. However, the fact that atrocities in Syria have been among the most well-documented in history, and still continue to be committed, does not support a conclusion that the IIIM's evidence-gathering mission is sufficient to deter crimes. Documentation itself has not deterred war crimes perpetrators. Yet the second prong of the IIIM's mandate goes beyond documentation. Regardless, the second prong does not guarantee prosecution. Thus, without a real threat of prosecution, the IIIM is not likely to deter war crimes.

¹⁰⁹ Telephone Interview with Catherine Marchi-Uhel, *supra* note 2.

CONCLUSION

The IIIM is a new and innovative body that came about when traditional international justice mechanisms were not feasible. While its work is necessary for comprehensive war crimes prosecutions, the issues preventing an ICC referral or the creation of an international or hybrid tribunal have not gone away. The only recognized mechanisms that would have jurisdiction are the ICC or an international tribunal, which were not given authority or created, respectively. Because the IIIM still does not have prosecutorial authority, the challenges that the General Assembly was working to overcome by creating the IIIM still exist. For example, Russia, China, and Syria still oppose creating or allowing prosecutions of war crimes perpetrated during the Syrian war outside of Syria's jurisdiction. If these issues are not solved, then the same challenges to prosecuting war crimes still exist and the IIIM is not enough to overcome them. The IIIM is a stop-gap measure because it performs the work of a prosecutor with no court in which to bring its cases— at least no court with clear jurisdiction over these cases. The IIIM cannot prosecute cases but they can file cases and provide those case files to others who can prosecute the cases, ideally easing that investigatory burden.¹¹⁰ However, the result is that it ends up having to prepare cases in anticipation of multiple tribunals, each of which can have different rules and requires different types of evidence. The fact that the IIIM is gathering evidence and preparing cases for a prosecutorial body means that if no such body materializes, then the IIIM's work could never be used. The problem this creates is that the IIIM is doing twice, three-times, or even more times as much work as it would need to do if it had the authority to try crimes itself. In effect, the IIIM has assumed the function and mandate of a war crimes

¹¹⁰ *Responding to Misconceptions Regarding the IIIM*, SYRIA JUSTICE AND ACCOUNTABILITY CENTRE (Aug. 2, 2017), <https://syriaaccountability.org/updates/2017/08/02/responding-to-misconceptions-regarding-the-iiim/>.

prosecution unit without providing it with a courtroom or a judge. In other words, the IIIM functions as a mechanism that builds cases as a prosecutorial body would, but without a prosecutorial platform. Therefore, the need to establish a body with the authority to bring prosecutions remains, the longer it takes to establish such a body, the longer that resources will be expended needlessly.

**The Link Between Piracy and Terrorism:
A Suggested Course of Action for an Unsolvable Issue**

*Benjamin Millard*¹

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I. Introduction:

Piracy has taken on a new, arguably more dangerous form in modern pirates operating in South East Asia and off the Horn of Africa. As globalization shrinks the world, now more than ever piracy's effect is felt throughout the global economy. Even more frightening is the potential for, and increasing link between terrorist groups, rogue nations, and modern pirates. This is most visible through the virtual lawlessness of Somalia, which has allowed for piracy to flourish off the Horn of Africa.

When one thinks of pirates, the image of dirty men, peg legs, flint lock pistols or scabbards, and the trusty parrot perched upon the captain's shoulder pops into one's head, however, those days are over now. Let's be honest, piracy has been a scourge of humanity since the beginning of time when the Roman Emperor Pompey went to war with pirates from Crete.² Cicero even claimed that pirates are "*hostes human generis*," the enemies of all mankind.³ We have always had a love affair with pirates, romanticizing the Caribbean pirates with tales of Black Beard, and more recently Disney's "Pirates of the Caribbean" franchise, but this does not reflect the true barbarism of piracy.

This paper seeks to check the modern trend of impunity that is rampant in pirate prosecutions around the world. The first section address how the existing legal framework is antiquated, plagued with loopholes, and fails to recognize the possibility for or the substantiated links between terrorism and piracy. The subsequent section proposes that a merger between the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and the 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation

² Craig Thedwall, Note, *Choosing The Right Yardarm: Establishing An International Court For Piracy*, 41 GEO. J. INT'L L. 501, 502 (2010).

³ *Id.*

(SUA) could remedy the issues discussed in the first section. This merger could fill in the jurisdictional gaps of the two laws, modernize the definition of piracy, and recognize piracy as a potential form of terrorism. Additionally, this new piracy definition should be adopted in the Rome Statute, allowing piracy to fall within the jurisdiction of the International Criminal Court (ICC). The final section proposes the creation of two piracy charges: Piracy and Maritime Terrorism. These two charges will reflect the intention to recognize two forms of piracy: those who engage in piracy to survive, and those whose actions are part of a larger criminal or terrorist conspiracy.

II. Background Information

This section first discusses the history and evolution of piracy on the high seas. The next section explains the emergence and form of modern piracy. The final section discusses the growing ties between terrorist organizations and piracy, creating an ever-present threat to modern shipping and the international community.

a. History of Piracy

Ever since humanity took to the sea, there have been pirates.⁴ Athenians suppressed pirates, and the Romans declared war on piracy in 68 B.C., treating pirates as an enemy state, and eventually defeating them under Pompey.⁵ Cicero first developed the idea that piracy was a crime against humanity when he declared pirates were the enemies of all mankind.⁶

As humanity became bolder and ventured further out to sea, the concept of piracy being a crime of universal jurisdiction was born.⁷ The first instance of universal jurisdiction applied to

⁴ Thedwall, *supra* note 1, at 502.

⁵ *Id.*

⁶ *Id.*

⁷ See Michael Bahar, *Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations*, 40 VAND. J. TRANSNAT'L L. 1, 11 (2007).

piracy occurred when England implemented the English Act of Henry VIII of 1516, which extended the Crown's jurisdiction to pirates.⁸ With piracy emerging as a way to control the seas, a line was drawn between acts of piracy that were legally authorized by a State, and acts that were illegal because they lacked State authorization.⁹ Privateering was born, with pirates being legitimized in order to engage in high seas robbery as a way to attack enemies of the pirate's home nation.¹⁰ Pirates would receive a letter of marque from the government as a formal license to engage in piracy.¹¹ Countries, and their rulers saw piracy as a more cost efficient way to harass their enemies at sea than building, training, and equipping its own navy.¹² Letters of marque allowed such historical figures as Sir Francis Drake and Sir Walter Raleigh to act with impunity in attacking England's main rival at the time, Spain.¹³ With the explosion of state sponsored piracy through privateers, in combination with pirates, courts were needed to help distinguish between goods that were taken legally and illegally.¹⁴

In 1615, piracy entered the common law system, when English courts, echoing Cicero, declared "pirate est hostis humani generis," the enemy of mankind.¹⁵ A decade later, the debate over jurisdiction began with Hugo Grotius believing that the presence of a nation's fleet gave a

⁸ *Id.* at 11.

⁹ Thedwall, *supra* note 1, at 502-03.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 503.

¹³ Bahar, *supra* note 6, at 12, n. 38. This would allow England to preserve the air of diplomacy by giving the Queen of England the ability to feign horror when being told about the acts of pirates. Witness accounts tell stories of the Queen stating that "if Raleigh 'shall at any time or times hereafter robbe or spoile by sea or by lance, or do any act of unjust or unlawful hostilities [he shall] make full restitution, and satisfaction of all such injuries done.'" However, when Raleigh did what Queen Elizabeth forbid—robbing Spanish ports—Raleigh was punished by being knighted.

¹⁴ Thedwall, *supra* note 1, at 503.

¹⁵ Bahar, *supra* note 6, at 11 (quoting *King v. Marsh*, (1615) 81 Eng. Rep. 23 (K.B.)).

country legal control of the surrounding ocean.¹⁶ Sir Edward Coke disagreed, believing that piracy was a treasonous offence, and since ships from one nation do not owe allegiance to another, foreigners were exempt from being pirates.¹⁷ The English courts solved the issue by implementing two elements in a piracy charge: *animo furandi* (the intention to steal), and *hostes human generis* (acting as an enemy of all).¹⁸ The legal understanding of piracy evolved through *Rex v. Dawson*, where English courts expanded domestic law believing piracy was simple robbery at sea, and called for all seafaring nations to come together to help curb the growth and spread of piracy through the Piracy Act of 1700.¹⁹

Once privateers were allowed to act with impunity, it was hard for States to reign in the privateers they once relied upon to control the seas. Through the mid-19th century, privateers were the main tools for countries to wage secret wars against each other.²⁰ However, a series of events caused piracy to spin out of control. King George I of England passed laws banishing pirates from the Atlantic Ocean, allowing the Mediterranean corsairs to become the preeminent pirates of their day.²¹ Unlike the gentlemen pirates of Raleigh and Drake, the corsairs could not be controlled, continuing their acts of piracy even after the war between their masters and victims ended.²² In an effort to reign in the pirates that they created, the major sea fairing

¹⁶ Thedwall, *supra* note 1, at 503.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* (quoting *R. v. Dawson* (1696) 13 St. Tr. 451, 454, “Piracy is only a sea-term for robbery, piracy being committed within the jurisdiction of the Admiralty. If any man be assaulted within that jurisdiction, and his ship or goods violently taken away without legal authority, this is robbery and piracy . . . The intention will, in this case, appear by considering the end for which the fact was committed.”).

²⁰ Douglas R. Burgess, Jr. *The Dread Pirate Bin Laden*, JULY-AUG. 2005. LEGAL AFF. 32, 34 (2005).

²¹ Burgess, *supra* note 19, at 34.

²² *Id.*

nations—England, Spain, and France—and other European nations signed the Declaration of Paris in 1856, abolishing the use of piracy for State purposes.²³ Thus, piracy was placed outside of the expectations of legitimate State behavior.²⁴

Meanwhile, in America, the idea of piracy was rooted in the beliefs of Sir William Blackstone and his Law of Nations.²⁵ The ire towards piracy was so great the Founding Fathers included in the Constitution, “Congress shall have the power . . . To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations.”²⁶ The young nation addressed the issue of a nation’s ability to punish foreign nationals as pirates in the 1834 case of *United States v. Pedro Gilbert & Others*.²⁷ In the court’s opinion, Justice Story reasoned, “all nations exercise equal jurisdiction” over pirates and that any of the three nations involved could have exercised jurisdiction.²⁸

The *Pedro Gilbert* decision was based upon an earlier case, *United States v. Smith*, where Justice Story stated that “there is scarcely a writer on the law of nations who does not allude to piracy as a crime of a settled and determinate nature . . . Robbery or forcible depredations upon the sea, *animo furandi*, is piracy.”²⁹ With the expansion of nations’ seafaring efforts, and consequently the expansion of their jurisdiction, a multitude of treaties against piracy emerged,

²³ *Id.*

²⁴ *Id.*

²⁵ Thedwall, *supra* note 1, at 504. Blackwell believed there were three offenses against the Law of Nations: 1) violations of safe conduct; 2) infringing upon the rights of ambassadors; and 3) piracy.

²⁶ *Id.* (quoting U.S. Const. art. I, § 8, cl. 10.).

²⁷ *Id.*; see 25 F. Cas. 1287, 1311 (1834) (involving a Spanish captain who seized an American ship, who was then captured by the English fleet in an African port, and turned over to the United States for trial).

²⁸ *Id.*

²⁹ Thedwall, *supra* note 1, at 504.; see 18 U.S. 153, 161 (1820).

culminating in the 1889 Montevideo Convention that declared that it is mankind's responsibility to suppress piracy.³⁰

b. Modern Piracy

With piracy dying out around the turn of the twentieth century, the need for an international agreement defining piracy waned. In the 1930's, Harvard held a convention to draft an international definition of piracy.³¹ The Harvard draft laid out a framework for future international conventions to follow, but it also created controversial terms that still plague the definition of piracy today.³² The "for private ends" clause in Article 3 has caused an issue that will be discussed in Section III(a). Historians argue the clause was purposefully inserted into the text of the definition to exclude acts by unrecognized insurgents against the nation from which the insurgents were seeking independence.³³ It is unclear whether the Harvard draft, and later the Geneva Convention on the High Seas, intended to prevent attacks driven by a political motive from being classified as piracy, but the "for private ends" clause had that effect.³⁴

³⁰ *Id.* at 505.

³¹ Malvina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 AM. J. INT'L. L. 269, 277 (1988).

³² See Joseph Bingham, *Research in International Law: Part IV Piracy*, 26 AM. J. OF INT'L. L. SUPP., 739, 743 (1932); art. 3 ("Piracy is any of the following acts, committed in a place not within the territorial jurisdiction of any state: 1) Any act of violence or of depredation committed with intent to rob, rape, wound, enslave, imprison or kill a person or with intent to steal or destroy property, *for private ends* without bona fide purpose of asserting a claim of right, provided that the act is connected with an attack on or from the sea or in or from the air. If the act is connected with an attack which starts from on board ship, either that ship or another ship which is involved must be a pirate ship or a ship without a national character." (emphasis added)).

³³ Halberstam, *supra* note 30, at 277.

³⁴ *Id.*

As mentioned above, the United Nations also attempted to define piracy under international law in the Geneva Conventions on the Law of the Sea.³⁵ Specifically, Articles 15 through 23 in the Convention on the High Seas discussed piracy, and the exercise of jurisdiction over pirates.³⁶ The language used in the Convention on the High Seas is similar to the language used in the Harvard draft, but expands upon the definition of piracy.³⁷ With this definition in place, and nations like the United States ratifying the Geneva Convention of the High Seas, international law did not need to consider redefining piracy. However, things changed when the United Nations updated its definition of piracy in the 1982 United Nations Convention on the Law of the Sea (UNCLOS).³⁸

UNCLOS is considered binding international law, even though countries such as the United States have not ratified the updated definition of piracy contained within UNCLOS.³⁹ As seen in the Restatement Third of Foreign Relations Law, international laws—like UNCLOS—are binding upon non-ratifying countries since they are international agreements that are intended to be followed by States, regardless of whether a State adopted the treaty.⁴⁰ Adopting many of

³⁵ United Nations Convention on the High Seas, Apr. 29, 1958, 450 U.N.T.S. 11 [hereinafter Convention on the High Seas].

³⁶ *Id.*

³⁷ *Id.* at art. 15 (“Piracy consists of any of the following acts: 1) Any illegal acts of violence, 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: a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; b) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State; 2) 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; 3) Any of the inciting or intentionally facilitating an act described in subparagraph 1 or subparagraph 2 of this article.).

³⁸ Jordan Wilson, *The Rise, The Fall, and the Eventual Return of Modern Piracy: Addressing an Age Old Problem With Modern Solutions*, 47 J. MAR. L. & COM. 297, 313 (2016).

³⁹ *Id.* at 313-14.

⁴⁰ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 (AM. LAW INST. 2017).

the same principles of the Convention on the High Seas,⁴¹ UNCLOS reaffirmed the narrow definition of piracy, and the exclusion of piracy as a form of terrorism.⁴² Further, UNCLOS limited itself only to actions that occurred on the high seas, an area over which no nation has jurisdiction.⁴³ The true effect of UNCLOS's limitations would be felt three years later.

While not defined as an act of piracy under UNCLOS, the first major incident of piracy linked with terrorism was the 1985 hijacking of the *Achille Lauro*.⁴⁴ While en route from Egypt to Israel, four Palestine Liberation Front members, a faction of the Palestinian Liberation Organization, hijacked the ship and held 400 passengers hostage.⁴⁵ After the hijackers' demand that Israel release fifty Palestinian prisoners fell through, they shot Leon Klinghoffer, a wheelchair bound Jewish-American, and threw his body overboard.⁴⁶ Controversy arose when the hijackers' action were not deemed piracy because they did not involve two ships, and the hijackers seemed to be acting for a public end.⁴⁷

The *Achille Lauro* incident resulted in a variety of international reactions. The United States government, breaking from the international community, classified the hijackers actions as

⁴¹ Halberstam, *supra* note 30, at 276-77 (stating that Article 101 of UNCLOS adopts the language of Article 15 of the Convention on the High Seas: "Piracy consists of any of the following acts: (a) any illegal acts of violence, 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 intentionally facilitating an act described in subparagraph (a) or (b) of this article.").

⁴² Md Saiful Karim, *The Rise and Fall of International Law of Maritime Terrorism: The Ghost of Piracy is Still Hunting!*, 26 NZULR 82, 92-93 (2014).

⁴³ Wilson, *supra* note 37, at 315.

⁴⁴ Niclas Dahlvang, *Thieves, Robbers & Terrorists: Piracy in the 21st Century*, 4 REGENT J. INT'L L. 17, 25 (2006).

⁴⁵ *Id.* at 26.

⁴⁶ *Id.*

⁴⁷ *Id.*

piracy.⁴⁸ The International Maritime Organization (IMO) called for the development of an international law that dealt with acts of maritime terrorism.⁴⁹ Responding to the United Nations General Assembly's request, the IMO began a study of terrorism aboard or against ships in order to recommend a course of action for the United Nations to take.⁵⁰ Studying three other international law conventions dealing with terrorist acts, the IMO released its Suppression of Unlawful Acts Convention in 1988, outlining relevant offenses and unlawful acts recognized by the convention.⁵¹ This definition was eventually updated and expanded through the 2005 Suppression of Unlawful Acts Protocol (SUA).⁵²

Today, piracy exists primarily in Southeast Asia and off the Horn of Africa, most notably in Somalia.⁵³ With the rise in transporting goods around the world via the sea,⁵⁴ piracy has been reborn in areas that possess unique characteristics: highly congested ship traffic, and geographical chokepoints.⁵⁵ Rather than the wooden sailing ships with cannons employed by such infamous captain Blackbeard, modern pirates favor light, maneuverable skiffs, AK-47s, and rocket propelled grenades (RPG).⁵⁶

⁴⁸ Dahlvang, *supra* note 43, at 26.

⁴⁹ Karim, *supra* note 41, at 94.

⁵⁰ *Id.*

⁵¹ *Id.* at 94-95.

⁵² *Id.* at 98.

⁵³ Hugh R. Williamson, *New Thinking in the Fight Against Marine Piracy: Financing and Plunder Pre-Emptying Piracy Before Prevention Becomes Necessary*, 46 CASE W. RES. J. INT'L L. 335, 339 (2013).

⁵⁴ Yvonne M. Dutton, *Bringing Pirates to Justice: A Case for Including Piracy Within the Jurisdiction of the International Criminal Court*, 11 CHI. J. INT'L L. 197, 211 (2010). In 2010, about 80% of all global freight was shipped by sea.

⁵⁵ *Id.* Such as the Malacca Straits, Strait of Bab el-Mandab, Straits of Hormuz, Suez Canal, and Panama Canal.

⁵⁶ Wilson, *supra* note 37, at 298.

One possible explanation for the rise in piracy off the coast of Somalia is necessity. The constant assault on Somalia's fishing stocks by international fishermen exploiting Somalia's inability to police Somalia's sovereign waters has had a negative effect on the local fishermen, which may drive them to more lucrative ventures, such as piracy.⁵⁷ Somali piracy has even been praised as an act of "self defense."⁵⁸ The lure of easy money through piracy has a definite draw, causing Somalis to trade in their nets for a Kalashnikov or RPG.⁵⁹ Recently, Somali pirates have employed "motherships" to extend the range of their skiffs, increasing their area of operation.⁶⁰ With the increase of pirate attacks in the first decade of the twenty-first century, NATO created Task Force 150 to operate around the Horn of Africa and conduct anti-piracy operations; the United Nations Security Council also authorized Task Force ships to enter Somali territorial waters if they were in hot pursuit of pirates.⁶¹ The efforts of Task Force 150 have succeeded in reducing the number of successful pirate attacks, however, the threat of a resurgence of piracy off the Horn of Africa remains a looming threat due to the deteriorating conditions in the region.⁶²

⁵⁷ Thedwall, *supra* note 1, at 508-09.

⁵⁸ Argawe Ashine, *Gaddafi defends Somali pirates*, Daily Nation (May 2, 2009), <http://www.nation.co.ke/news/africa/1066-525348-7crt53z/index.html>. Gaddafi saw Somali piracy as "defending the Somalia children's food," and that Western nations were violating international law by intruding into Somali sovereign water territory; piracy was a way of defending Somalia from "greedy Western nations."

⁵⁹ Dutton, *supra* note 53, at 210-11. The average ransom is about \$2 million, with "mere gunmen" in Somalia earning around \$20,000 by participating in a pirate attack, while the average Somali annual income is around \$500. See Scott Baldauf, *Pirates, Inc.: Inside the Booming Somali Business*, CHRISTIAN SCIENCE MONITOR 6 (May 31, 2009), <https://www.csmonitor.com/World/Africa/2009/0531/p06s03-woaf.html>.

⁶⁰ Williamson, *supra* note 52, at 339-40.

⁶¹ Thedwall, *supra* note 1, at 509-10.

⁶² Wilson, *supra* note 37, at 300.

c. Terrorist Links to Piracy

With the international community's minimal effort to modernize the definition of piracy and recognize terrorist acts as acts of piracy, links formed between pirates and terrorist organizations. In the 1990's and early 2000's, a trend emerged in Southeast Asia, where Aceh separatists engaged in piracy or supported pirate operations in its fight for independence from Indonesia.⁶³ Along with Aceh, other violent Islamic groups operate in Southeast Asia, such as Abu Sayyaf, with some groups having considered and even conducted piracy operations.⁶⁴ Specifically, Abu Sayyaf has used boats to kidnap tourists from resorts, and demanded ransoms.⁶⁵ These acts caused the International Maritime Bureau (IMB) to recognize a "new brand of piracy" where acts are conducted for political goals, and the proceeds from the acts of piracy are used to finance "politically related terrorist activity."⁶⁶ A worrying trend also emerged from Southeast Asia, paralleling the efforts of the September 11th terrorists: hijacking a ship for "training purposes."⁶⁷ The ten pirates hijacked a chemical tanker, the *Dewi Madrim*, off the coast of Indonesia, and steered the ship for an hour before leaving with the ship's captain and first officer.⁶⁸

While operating off the Somali Coast in 2009, a Russian navy vessel captured twenty-nine suspected pirates days after Richard Phillips, captain of the *Maersk Alabama*, was freed;

⁶³ Milena Sterio, *The Somali Piracy Problem: A Global Puzzle Necessitating a Global Solution*, 59 AM. U. L. REV. 1449, 1458 (2010).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 1458-59.

⁶⁷ Dahlvang, *supra* note 43, at 33-34.

⁶⁸ *Id.* at 33 (noting the temporary hijacking was spurred on by terrorists learning to drive a ship, and the kidnapping of the captain and first officer was to gain expertise to help the terrorists mount a maritime attack). See *Peril on the Sea: The Threat of Maritime Terrorism*, THE ECONOMIST (Oct. 2, 2003), <https://www.economist.com/business/2003/10/02/peril-on-the-sea>.

among the captured pirates were Iranian and Pakistani nationals.⁶⁹ This capture was significant because it marked the first time foreign nationals, other than Somalis or Yemenis, were caught conducting piracy off the coast of Somalia.⁷⁰ The captured pirates' national diversity highlighted the growth of piracy throughout the region, and more worrisome, the growing link between piracy and Islamist militants.⁷¹

The link between Somalian pirates and terrorist organizations goes back further than the Russian Navy's capture of twenty-nine pirates in 2009. Since Somalia's government dissolved in the 1990's, al-Shabaab has attempted to take over the country and institute an Islamic state.⁷² Particularly, United States officials are worried that ransom money obtained by the Somali pirates is being used to fund al-Shabaab's operations within Somalia.⁷³ One Kenyan journalist went even further and said that al-Shabaab's monthly payments to its fighters came from "outsiders," implying the payments were funded by pirate ransoms.⁷⁴ Congress has even discussed the growing link between al-Shabaab and Somali pirates.⁷⁵

In their quest to establish a new Islamic caliphate, the Islamic State of Iraq and Syria (ISIS) saw an opportunity to expand its global reach by seizing territory in Libya after the overthrow of Muammar al-Gaddafi.⁷⁶ With its seizure and control of 150-miles of coastline in

⁶⁹ Wilson, *supra* note 37, at 303.

⁷⁰ *Id.* at 304.

⁷¹ Wilson, *supra* note 37, at 304.

⁷² *Id.*

⁷³ *Id.* at 305. Colonel John Steed's commented that "pirates are one of those potential sources of large amounts of money, so there is a natural link between Shabaab's desire for funding to support their activities and money that the pirates are getting from ransoms."

⁷⁴ Wilson, *supra* note 37, at 305.

⁷⁵ *Id.* at 306-07 ("Congressman Ed Royce spoke about the Kenyan Government's estimate that 30% of ransom payments to Somali pirates are funneled to al-Shabaab, and al-Shabaab commanders have opened a marine office to coordinate with pirates, and discussed a 'sea Jihad.'").

⁷⁶ *Id.* at 308.

Libya, ISIS put itself within striking distance of both Europe, and more importantly, commercial shipping and cruise liners.⁷⁷ ISIS's newly acquired territory concerns the international community because of the relative ease for ISIS to target strategic commercial shipping choke points, and the significant media attention that would follow an attack on those targets.⁷⁸ Although ISIS has not yet launched a maritime attack, they have stated that they intend to use Libya as a jumping-off point into Europe, and already have used kidnapping and ransoming individuals as a significant source of income to fund their operations.⁷⁹ NATO officials have warned the international community of ISIS's strides in equipping ships with weapons systems, and their development of a maritime arm similar to al-Qaeda's in the Arabian Sea.⁸⁰

Not to be ignored, it is believed that al-Qaeda possesses its own fleet of ships.⁸¹ Al-Qaeda already showed its willingness to use its maritime arm to conduct terrorist operations, as shown in the 2000 attack of the *USS Cole* in the port of Aden, Yemen, killing seventeen sailors, and injuring another thirty-eight.⁸² Al-Qaeda has been known to involve its merchant ships in its execution of terrorist attacks.⁸³ Al-Qaeda's willingness to use its merchant fleet poses a large

⁷⁷ *Id.* at 308-09.

⁷⁸ Wilson, *supra* note 37, at 309.

⁷⁹ *Id.*

⁸⁰ *Id.* at 309-10; see Larisa Brown, *ISIS's next target could be cruise ships in the Med: Top Nato commander says jihadists 'spread into Libya casts an 'uncomfortable shadow,'* DAILY MAIL (Jan. 29, 2016), <http://www.dailymail.co.uk/article-3422044/Terrorists-target-cruise-ships-Med-ranking-commander-says-ISIS-s-spread-Libya-casts-uncomfortableshadow.html#ixzz47hXBw8hf>.

⁸¹ Jason Power, *Maritime Terrorism: A New Challenge For National And International Security*, 10 BARRY L. REV. 111, 117 (2008). Al-Qaeda is said to have twenty freighters under their control.

⁸² Michael Isikoff, *U.S. failure to retaliate for USS Cole attack rankled then—and now*, NBC NEWS (Oct. 12, 2010, 11:31:41 AM), http://www.nbcnews.com/id/39622062/ns/us_news-security/t/us-failure-retaliate-uss-cole-attack-rankled-then-now/#.Wm5u6pM-fOQ.

⁸³ William Langewiesche, *Anarchy at Sea*, ATLANTIC MONTHLY (Sept. 2003), <http://wesjones.com/anarchy.htm>. Al-Qaeda used one of its ships to deliver explosives used in the United States embassy bombing in Kenya.

issue for the international community since al-Qaeda's ships are difficult to track by being registered in flag of convenience countries.⁸⁴ It is feared that one of al-Qaeda's merchant ships could be used as a massive bomb, causing devastation to cities with large residential sections close to the water, or devastating major port cities.⁸⁵ While the ships al-Qaeda possesses may not be able to cross an ocean to attack a target in the United States,⁸⁶ they could still be used to devastate London, which is vulnerable up to Canary Warf.⁸⁷ There is a real concern that, rather than use one of their own ships, an al-Qaeda cell could hijack a ship and then steer it into their target, as they did with planes on September 11th, 2001.⁸⁸ It remains to be seen whether al-Qaeda has the ability to mount another maritime attack, but the relative ease of pulling off an attack on a major city using a hijacked vessel is disturbing, and something the international community should not take lightly.⁸⁹

III. Current Legal Framework

The current legal framework involves two competing views on piracy. In this section, I will first discuss UNCLOS and its flaws. Then, I will discuss the evolution of the 1988 SUA Convention into the 2005 SUA Protocol, and how the 2005 SUA Protocol addresses the loopholes left open in UNCLOS. I will also to discuss SUA's flaws. While the two frameworks

⁸⁴ Martin Bright et. al., *Hunt for 20 terror ships*, THE GUARDIAN (Dec. 22, 2001, 10:14 p.m.), <http://www.theguardian.com/world/2001/dec/23/september11.terrorism1>.

⁸⁵ Paul Harris and Martin Bright, *How the fleet of death menaces Britain: Twenty ships have been linked to bin Laden – and any one of them could be sailing towards our shores*, THE OBSERVER (Dec. 23, 2001), <https://www.theguardian.com/world/2001/dec/23/september11.terrorism2>.

⁸⁶ Philip Shenon, *A Nation Challenged: The Hunt At Sea; Al Qaeda's Leaders May Use Ships to Escape Capture, Intelligence Agencies Warn*, NY TIMES (Dec. 13, 2001), <http://www.nytimes.com/2001/12/13/world/nation-challenged-hunt-sea-al-qaeda-s-leaders-may-use-ships-escape-capture.html>.

⁸⁷ Harris, *supra* note 84.

⁸⁸ *Id.*

⁸⁹ *Id.*

talk specifically about actions viewed as piracy, they do not define what constitutes an act of terrorism. I will discuss the controversy behind defining terrorism, and how this causes problems prosecuting pirates with ties to terrorist organizations.

a. United Nations Convention on the Law of the Sea⁹⁰

Building upon the Convention on the High Seas, UNCLOS was seen as a “more encompassing regime.”⁹¹ One advantage to UNCLOS is the fact that, unlike other treaties that are binding only to States that ratify it, UNCLOS is binding on all nations. UNCLOS is considered a codification of international law, and is binding to all States, whether they ratified it or not.⁹² While UNCLOS provided an updated definition of piracy for international law from the Convention on the High Seas, it contains limitations that make current piracy prosecutions difficult.⁹³

First, UNCLOS limits acts of piracy to “the high seas or in any other place outside the jurisdiction of any State.”⁹⁴ The high seas requirement presents an issue with narrow shipping lanes that fall within a country’s territorial waters—such as the Malacca Straits, Strait of Hormuz, and the Suez Canal—where an act of piracy would confusingly not be piracy under UNCLOS since it does not occur on the high seas.⁹⁵ Additionally, this allows pirates, such as those in Somalia, to attack merchant vessels that come within the twelve-mile zone of Somali

⁹⁰ United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

⁹¹ Lawrence Azubuike, *International Law Regime Against Piracy*, 15 ANN. SURV. INT’L & COMP. L. 43, 49 (2009).

⁹² *Id.*

⁹³ Tina Garmon, *International Law of the Sea: Reconciling the Law of Piracy and Terrorism in the Wake of September 11th*, 27 TUL. MAR. L. J. 257, 264 (2002).

⁹⁴ UNCLOS, *supra* note 89, art. 100, p. 436.

⁹⁵ Garmon, *supra* note 92, at 264; *see* 2000 Annual Report, IMO Reports on Acts of Piracy and Armed Robbery Against Ships, MSC/Circ. 991, Mar. 31 2001.

sovereign waters without being piracy since the ship is not on “the high seas.” This foists the issue of combating piracy onto the countries where pirates use territorial waters to attack other vessels.⁹⁶ Issues like these are not rare.⁹⁷ In fact, most acts of piracy happen within the twelve-mile radius of sovereign waters, or even within a country’s ports.⁹⁸

Another issue with UNCLOS limiting acts of piracy to the “high seas or in any other place outside the jurisdiction of any State” is if the country has an exclusive economic zone (EEZ).⁹⁹ If a country adopts an EEZ, or does not limit its reaches, an EEZ can extend over 200 miles off shore, thus giving further impunity to a pirate’s actions not being recognized as piracy.¹⁰⁰ However, some commentators believe that UNCLOS has taken the EEZ limitation into consideration,¹⁰¹ and read UNCLOS as allowing for the prosecution of pirates within a States EEZ.¹⁰² This, unfortunately, is not the only issue plaguing UNCLOS.

Another issue that UNCLOS’s narrow definition of piracy creates is the “private ends”¹⁰³ requirement discussed above. This requirement precludes acts of terrorism or sea hijackings that have political motivations, such as the *Achille Lauro* incident, from being defined as acts of

⁹⁶ Garmon, *supra* note 92, at 264; see John E. Noyes, *An Introduction to the International Law of Piracy*, 21 CAL. W. INT’L L.J. 105, 113 (1990).

⁹⁷ Sir Peter Blake was killed by pirates near the mouth of the Amazon River. Blake’s research vessel was anchored off the Brazilian city of Macapa, awaiting clearance from Brazilian customs before conducting a two-month research trip up the Amazon and Rio Negro rivers in an attempt to document the effects of pollution and global warming. See *Sir Peter Blake killed in Amazon pirate attack*, NEW ZEALAND HERALD (Dec. 7, 2001, 5:42 pm), http://www.nzherald.co.nz/peter-blake-1948-2001/news/article.cfm?c_id=320&objectid=232024.

⁹⁸ Dutton, *supra* note 53, at 206; see Int’l Chamber of Com. Int’l Mar. Bureau, *Piracy and Armed Robbery Against Ships: Annual Rep.* (2010).

⁹⁹ Garmon, *supra* note 92, at 264.

¹⁰⁰ *Id.*

¹⁰¹ Professor Dubner at Thomas M. Cooley Law School has interpreted article 58(2) of UNCLOS to enable punishing pirate acts within a country’s EEZ.

¹⁰² Garmon, *supra* note 92, at 264-65.

¹⁰³ UNCLOS, *supra* note 89, art. 101(a), p. 436.

piracy.¹⁰⁴ This loophole, along with the territorial waters restriction in UNCLOS, would virtually let pirates with terrorist ties act with impunity in Southeast Asia, and may also preclude Somali pirates from UNCLOS's reach if their ties with al-Shabaab grow stronger. Neither UNCLOS nor the Convention on the High Seas, from which UNCLOS adopts its piracy language, attempted to define the "private ends" requirement.¹⁰⁵

Without the clarification on the true meaning behind "private ends," the international community has assumed that it precludes acts of piracy motivated by politics or religion.¹⁰⁶ Dr. Azubuike notes that some scholars believe that the "private ends" clause harkens back to piracy in the colonial era.¹⁰⁷ This understanding of the "private ends" clause requires a view of piracy that does not revolve around the actor's intent, but whether a State is liable for a pirate's actions.¹⁰⁸ LT Bahar makes a good point in his interpretation of the "private ends" clause, stating that "[i]t would be nonsensical indeed to interpret 'for private ends' in UNCLOS to exclude the kind of attacks that occurred on the *Achille Lauro* . . . [t]he opposite of 'private ends' must be understood as public ends; that is, ends equating to the commissioned benefit of a state."¹⁰⁹ This interpretation has some support, especially in Justice Story's opinion in *United States v. Smith*.¹¹⁰

¹⁰⁴ Dutton, *supra* note 53, at 207; *see also* Bahar, *supra* note 6, at 33.

¹⁰⁵ Azubuike, *supra* note 90, at 52.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* (believing that the clause was included to distinguish between State-sponsored piracy (which would be an act of war), and non-State sponsored piracy, which would be robbery); *see* Bahar, *supra* note 6, at 30.

¹⁰⁸ Bahar, *supra* note 6, at 30.

¹⁰⁹ *Id.* at 32.

¹¹⁰ *United States v. Smith*, 18 U.S. 153, 163 (1820) (considering acts of piracy as violations of property perpetrated by any national authority, and seen as the commencement of a public war; if without sanction); (defining pirates as "persons not under the acknowledged authority or deriving protection from the flag or commission of any government") *Id.* at 154; *see also United States v. Ambrose Light*, 25 F. 408, 416 (S.D.N.Y. 1885) (stating that the majority of international law authors define piracy as "the offenses of depredating on the high seas without being authorized

Regardless of which interpretation is correct, this is a glaring issue that should be addressed through updating the definition of piracy.

Finally, UNCLOS's requirement that another vessel,¹¹¹ a "pirate ship," be involved may be too restrictive. This provision is troubling because of how easily pirates can circumvent UNCLOS's two ship requirement for piracy.¹¹² But why should an act that, for all intent and purpose, has the same effect as using two ships be excluded from the definition of piracy? LT Bahar looked to the Harvard Draft protocols, which showed that the two-ship requirement may have had a more benign intention.¹¹³ However, LT Bahar specifically points to an event where pirates disguised themselves as crewmembers and then took over the vessel.¹¹⁴ If UNCLOS's intention in the two ship requirement was to prevent a mutiny, or people onboard a vessel who commit a crime at sea from being charged as pirates, it should have made that intention more clear.

There is support for the premise that individuals who commit mutiny while at sea did engage in an act of piracy.¹¹⁵ Further, there seems to be support for the premise of mutiny being

by any sovereign state; or without commissions from different sovereigns at war with each other").

¹¹¹ UNCLOS, *supra* note 89, art. 101(a)(i), p. 436.

¹¹² See Dutton, *supra* note 53, at 207. Potential pirates would be able to hijack a ship by posing as passengers to evade being defined as pirates under UNCLOS.

¹¹³ Bahar, *supra* note 6, at 38. The intention of the two ship requirement was to exclude criminal acts by one passenger or crewmember against another, "which were not tantamount to a revolt against law itself: '[A] simple act of violence on the part of the crew or passengers does not constitute in itself the crime of piracy, not at least as far as international law is concerned.'"; see Summary Records of the 290th Meeting, [1955] 1 Y.B. INT'L L. COMM'N 37, 42, U.N. Doc. A/CN.4/SER.A/1955 (quoting Harvard Research in Int'l Law, Draft Convention and Comment on Piracy, 26 AM J. INT'L L. 739, 815 (Supp. 1932)).

¹¹⁴ Bahar, *supra* note 6, at 38. Stating that "once attackers overtake a vessel and reject the authority of any state, they transform into lawless actors and "enemies of all mankind."

¹¹⁵ See e.g. 2 Lord McNair, International Law Opinions 79, 85-87 (1956).

a form of piracy directly within UNCLOS.¹¹⁶ The limitations on acts of piracy that this clause exempts are very frustrating. While there seems to be some justification in trying to protect individuals who commit a crime against another individual while at sea from being tried as pirates, requiring two ships for an act to be recognized as piracy is too broad to be effective. The two ship requirement supports an antiquated view of piracy that the international community should remedy to be able account for the modern evolution of piracy.

b. Suppression of Unlawful Acts Against the Safety of Maritime Navigation¹¹⁷

In response to the *Achille Lauro* incident, the IMO took it upon themselves to analyze and come up with a legal remedy to piracy's evolutionary step: acts of piracy committed by terrorists.¹¹⁸ While given the opportunity to provide an international definition of terrorism, or at least maritime terrorism, the IMO punted, and focused their convention around "relevant offences or unlawful acts."¹¹⁹ The 1988 SUA draft recognized a number of actions as falling into the convention's purview.¹²⁰ Additionally, the 1988 SUA Convention addressed UNCLOS's

¹¹⁶ Bahar, *supra* note 6, at 38-39. When a mutiny rejects any state authority, the mutineers become pirates . . . under UNCLOS if mutineers "take control of the ship" and then engage in acts of piracy defined under Article 101.

¹¹⁷ Protocol of 2005 to the Convention For The Suppression Of Unlawful Acts Against The Safety Of Maritime Navigation, LEG/CONF.15/21, 1 Nov. 2005; (hereinafter SUA).

¹¹⁸ Karim, *supra* note 41, at 94.

¹¹⁹ *Id.* at 95.

¹²⁰ Convention for the Suppression of Unlawful Acts Against The Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 222 (hereinafter 1988 SUA), art. 3: a person commits an offence if that person unlawfully: 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) place or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy a 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

limitation requiring piracy to be committed on the “high seas” by eliminating the territorial waters/EEZ restriction.¹²¹ Further, the 1988 SUA eliminated the “private ends” language and two ships requirement included within UNCLOS.¹²²

Unlike UNCLOS, the 1988 SUA does not recognize the concept of universal jurisdiction. Rather, SUA has an intricate jurisdictional process that extends jurisdiction to the nation where the act occurs,¹²³ the nation the ship hails from,¹²⁴ the nation of the persons affected by the act,¹²⁵ the nation that the act is focused against,¹²⁶ the nation of the offender,¹²⁷ and where the person committing the act—if stateless—resides.¹²⁸ In laying out the jurisdictional requirements, the 1988 SUA introduced the concept of *aut dedere aut judicare*,¹²⁹ requiring countries to either try the offenders themselves, or extradite the offenders to countries that are willing to try them.¹³⁰ This has allowed countries, such as the United States and other European nations, to export their piracy trials to countries in Africa—namely Kenya.¹³¹ The 1988 SUA Convention filled in a lot

person, in connection with the commission or the attempted commission of any of the offenses set forth in subparagraphs (a) to (f).

¹²¹ Bahar, *supra* note 6, at 23-24.

¹²² *Id.* at 24.

¹²³ 1988 SUA, *supra* note 119, at art. 6(1)(b).

¹²⁴ *Id.* at art. 6(1)(a).

¹²⁵ *Id.* at art. 6(2)(b).

¹²⁶ *Id.* at art. 6(2)(c).

¹²⁷ *Id.* at art. 6(1)(c).

¹²⁸ 1988 SUA, *supra* note 119, at art. 6(2)(a).

¹²⁹ Which means either to surrender or to judge.

¹³⁰ Karim, *supra* note 41, at 86.

¹³¹ See e.g., Nicholas Kulish, *Legal Hurdles in West Slow Pursuit of Pirates*, NY TIMES (Nov. 29, 2008), <http://www.nytimes.com/2008/11/29/world/europe/29pirates.html>; Matthias Gebaur and Holger Stark, *Policing the Gulf of Aden: Somali Pirate Trial Tests Limits of EU Mission*, SPIEGEL ONLINE (Apr. 1, 2009, 12:53 p.m.), <http://www.spiegel.de/international/world/policing-the-gulf0of-aden-somali-pirate-trial-tests-limits-of-eu-mission-a-616760-druck.html>; Frank Gardner, *How do you tackle piracy?*, BBC NEWS (Dec. 13, 2008, 9:18:48 p.m.), <http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/7782016.stm>.

of gaps that UNCLOS left open, but it also had some issues of its own. In addressing the gaps left by the 1988 Convention, the IMO updated their Convention in 2005.

Recognizing the current state of international affairs, the IMO updated the SUA in 2005.¹³² Specifically, SUA recognized the potential for a chemical, biological, or radiological attack via a ship.¹³³ Further, the updated SUA speaks directly to the premise of this paper, recognizing the use of a ship as a weapon, or as a means to facilitate a terrorist attack as an unlawful act.¹³⁴ Conscious of the clarity issues inherent in UNCLOS, the 2005 SUA added a *mens rea* requirement in an effort to help distinguish between those who commit unplanned acts of violence against other people on a ship and those whose acts of violence are part of a grander scheme.¹³⁵ Finally, unlike UNCLOS, the 2005 SUA chose to adopt and include offenses codified as the United Nations terrorist offenses,¹³⁶ thus recognizing the potential for terrorist acts—excluded from being recognized as piracy under UNCLOS—to be acts of piracy at sea.¹³⁷

Unlike UNCLOS, SUA is not applicable to all nations; rather, they must be parties to the convention for the law to apply.¹³⁸ Many nations signed the 1988 SUA Convention as of April

¹³² See SUA, *supra* note 116, art. 2-4.

¹³³ Bahar, *supra* note 6, at 24; see SUA art. 3*bis*(1)(b).

¹³⁴ SUA, *supra* note 116, art. 3*bis*(1)(a)(i), (iii).

¹³⁵ Karim, *supra* note 41, at 99-100; see SUA art. 3*bis*(1) “Any person commits an offense within the meaning of this Convention if that person *unlawfully and intentionally*. . .” (emphasis added).

¹³⁶ See *e.g.*, Convention for the Suppression of Unlawful Seizure of Aircraft, 860 U.N.T.S. 105; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 974 U.N.T.S. 177; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1035 U.N.T.S. 167; International Convention Against the Taking of Hostages, 1316 U.N.T.S. 205; Convention on the Physical Protection of Nuclear Materials, 1456 U.N.T.S. 124; International Convention for the Suppression of Terrorist Bombings, 2149 U.N.T.S. 256; International Convention for the Suppression of the Financing of Terrorism, 2178 U.N.T.S. 197.

¹³⁷ Karim, *supra* note 41, at 99.

¹³⁸ SUA, *supra* note 116, art. 17(4).

2014,¹³⁹ constituting about 94.52% of the world's gross tonnage.¹⁴⁰ This means that the nations who signed the 1988 SUA Convention make up 94.52% of the cargo transported annually by ship. Currently, the 2005 SUA has thirty-five signers, only covering 38.17% of the world's gross tonnage.¹⁴¹ While most countries are party to the 1988 SUA, many more need to ratify the updated 2005 SUA, and recognize that current international law schemes do not cover acts of terrorism occurring in maritime venues, requiring the states to undertake their own judicial proceedings if such attacks happen. Further, the glaring shortcoming of both SUA protocols is the requirement that countries prosecute or export the prosecution of individuals who commit the unlawful acts enumerated in the Convention and Protocol. As will be discussed in Section IV(b)(i), the ability to export piracy prosecutions has allowed countries to essentially skirt their responsibility of prosecuting those who commit unlawful acts, and potentially facilitating the violation of human rights of the pirates who are actually prosecuted.¹⁴² The SUAs have created, along with UNCLOS, an environment where international actors, such as Task Force 150, essentially capture and release suspected pirates because they do not know what to do with

¹³⁹ Karim, *supra* note 41, at 97. There are 164 signers.

¹⁴⁰ Karim, *supra* note 41, at 97; *see* IMO Status of Multilateral Conventions and Instruments, 1,420 (Jul. 31, 2013),

<http://www.imo.org/About/Conventions/StatusOfConventions/Documents/Status%20-%202014.pdf>. Gross Tonnage is the measurement of the amount of cargo a ship can transport.

¹⁴¹ *See, e.g.*, IMO Status of Multilateral Conventions and Instruments (Jan. 19, 2018) <http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/StatusOfTreaties.pdf>.

¹⁴² *See* Nicholas Kulish, *Legal Hurdles in West Slow Pursuit of Pirates*, NY TIMES (Nov. 29, 2008) <http://www.nytimes.com/2008/11/29/world/europe/29pirates.html>; Justin Stares, *Pirates Protected from EU task force by human rights*, THE TELEGRAPH (Nov. 1, 2008, 7:43 p.m.) <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/somalia/3363258/Pirates-protected-from-EU-task-force-by-human-rights.html>.

them.¹⁴³ The deficiencies in both UNCLOS and the SUAs necessitate a modernization of the piracy charge to account for the evolution of piracy.

c. Lack of International Definition for Terrorism

One glaring issue with linking piracy and terrorists together is the lack of an internationally recognized definition of terrorism. The League of Nations drafted a definition of terrorism during a convention in 1937, but the definition never entered into force.¹⁴⁴ Terrorism has always been a contentious issue.¹⁴⁵ The issue preventing the creation of a generic terrorist definition is: one man's terrorist is another man's freedom fighter.¹⁴⁶ The definitional problem with defining terrorism is one where the term "is often used as [a] politically convenient label by which to deny legitimacy to an adversary while claiming it for oneself."¹⁴⁷ While international law is devoid of a definition of terrorism, in 1985 the United Nations passed a resolution that "[u]nequivocally condemns, as criminal, all acts, methods and practices of terrorism wherever and by whomever committed, including those that jeopardize friendly relations among States and

¹⁴³ Justin Stares, *Pirates Protected from EU task force by human rights*, THE TELEGRAPH (Nov. 1, 2008, 7:43 p.m.) <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/somalia/3363258/Pirates-protected-from-EU-task-force-by-human-rights.html>.

¹⁴⁴ Karim, *supra* note 41, at 85. Defining terrorism as: "criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or group of persons or general public."; *see* Convention for the Prevention and Punishment of Terrorism, 19 League of Nations OJ 23, at art. 1(2).

¹⁴⁵ *See* Ben Saul, *The Legal Response of the League of Nations to Terrorism*, 4 J. Int'l Crim Just. 78, 78 (2006). The League of Nations' "attempt to generically define terrorism in an international treaty prefigured many of the legal, political, ideological and rhetorical disputes which plagues the international community's attempts to define terrorism in the 50 years after the Second World War."

¹⁴⁶ Garmon, *supra* note 92, at 270.

¹⁴⁷ Karim, *supra* note 41, at 85; Tal Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility*, HART PUBLISHING, Oxford, 2006, at 85.

their security.”¹⁴⁸ While the United Nations condemns terrorism, the record fails to elaborate how an act qualifies as terrorism. In the wake of September 11th, 2001, the United Nations Security Council adopted Resolution 1566, outlining what acts constitute terrorism, without explicitly calling them terrorism.¹⁴⁹ However, as seen in note 148, this resolution puts the burden of prosecuting terrorists on the State where the terrorist is from, which may be an issue if that State does not see the act as terrorism.¹⁵⁰ The lack of a definition for terrorism plagues the proper adjudication of international law; however, that does allow for a definition to be crafted from existing legislation.

IV. Proposed Framework

In this section, I will propose a modern solution to the problem of piracy. First, I propose modernizing the piracy charge through a merger of UNCLOS and the SUA Protocol, addressing how this course of action could solve the problems plaguing both statutes. Next, I will discuss a proposal for the Rome Statute to recognize piracy as a crime against humanity as a way to solve the impunity issues that currently plague modern pirate prosecutions. Finally, I will discuss a proposed bifurcation of the piracy charge in an effort to recognize the two motivations behind why a person engages in piracy.

¹⁴⁸ Garmon, *supra* note 92, at 269; G.A. Res. 40/61 U.N. GAOR, 40th Sess., Supp. No. 51, at 507, U.N. Doc. A/40/1003 (1985).

¹⁴⁹ Karim, *supra* note 41, at 86, n. 20. Resolution 1566 states, “criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offenses within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and calls upon all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature.”

¹⁵⁰ Christopher C. Joyner, *International Extradition and Global Terrorism: Bringing International Crimes to Justice*, 25 LOY. L.A. INT’L & COMP. L. REV. 493, 496-98 (2003).

a. Modernization of Piracy Charge

Piracy has been around since the beginning of time, and does not appear to be going away any time soon. As pirates adapt to the new and available technology, the definition of piracy must also modernize in order to effectively prosecute these individuals. One way, and I think the best way, is to merge the existing piracy statutes of UNCLOS and the 2005 SUA Protocol. This is the best solution because where one document allows for a loophole, the other document closes that loophole. Specifically, UNCLOS's lack of applicability in sovereign waters is covered by SUA, SUA's lack of being international law is covered by UNCLOS, and UNCLOS's narrow requirements of being for "private ends" and requiring two ships is eliminated by SUA.

i. Accounts for Development of Terrorism

UNCLOS was adopted prior to the real emergence of piracy as a vehicle of terrorism.¹⁵¹ In response to the *Achille Lauro* incident, the IMO drafted and produced the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, which recognized the potential for terrorists to use piracy to carry out their unlawful acts.¹⁵² The merger between UNCLOS and the 2005 SUA Protocol would recognize the development of terrorism as an unlawful act within the realm of piracy, and the advanced tactics that terrorists use, or potentially can use in an attack on maritime commerce. This loophole was a glaring issue with UNCLOS that can be corrected by the proposed merger with the 2005 SUA Protocol. Pirates and terrorist groups grow closer every day,¹⁵³ and it is time the international community recognizes

¹⁵¹ UNCLOS was adopted in 1982, the *Achille Lauro* incident occurred in 1985. *See supra* p. 7 and note 37; *see supra* p. 8 and note 43.

¹⁵² *See* SUA, *supra* note 116, art. 1(d), art. 3*bis*, and art. 3*quater*.

¹⁵³ *See* Sterio, *supra* note 62, at 1458-59.

this close connection and takes reasonable steps to address the issue. The consensus is that a maritime based terrorist attack is not an “if” but rather a “when” scenario.¹⁵⁴ By merging select sections of UNCLOS and the 2005 SUA Protocol, the international community can begin to proactively fight the link between terrorists and pirates.

ii. Recognizes Piracy can Occur Within National/International Waters

Another benefit of the merger between UNCLOS and the 2005 SUA Protocol is that it accounts for the territorial limitations plaguing UNCLOS. SUA’s recognition that piracy can occur both on the high seas and within a nation’s twelve-mile territorial radius eliminates a source of impunity that pirates can exploit. While modern pirates have been expanding their effective area of operation through the implementation of “motherships,” a fair amount of piracy still occurs within the twelve-mile zone excluded by UNCLOS.¹⁵⁵ Pirates acting within the twelve-mile zone operate with impunity when it comes to failed states such as Somalia, who lack the ability to patrol their sovereign waters.¹⁵⁶

Additionally, the merger would eliminate the ambiguity associated with the EEZ that caused debate over whether pirates can be prosecuted within the EEZ. The merger simplifies the issue when it comes to where piracy can occur, piracy can occur anywhere. There is no magic line in the ocean that marks where one will be a pirate, and where one will be someone who commits robbery at sea, and a statutory bright line that has the same effect should not exist either. Piracy is piracy whether it is committed 200 miles at sea, or on a ship anchored and waiting to enter a port. A merger between SUA and UNCLOS could effectively close the territorial waters limitation that allows pirates to act with impunity of being labeled pirates.

¹⁵⁴ See Harris & Bright, *supra* note 84.

¹⁵⁵ See note 97.

¹⁵⁶ See Noyes, *supra* note 95, at 113.

iii. Eliminates Terrorism for Private Ends

One noticeable difference between UNCLOS and the 2005 SUA Protocol is the private ends requirement. The private ends issue has caused a lot of debate, going back to Harvard's original attempt to define piracy in the 1930's.¹⁵⁷ While the debate over what the drafters of UNCLOS meant when they included the private ends requirement continues, this debate can be solved through the merger of the statutes, and the elimination of the requirement. If we take into account the history of piracy—first as a method of high seas robbery, then as a political loophole to attack a nation's enemies—piracy has been recognized as a state-sponsored activity. The notion that piracy can only be for private ends arose out of nations recognizing that the actions of state-sponsored piracy needed to end.¹⁵⁸ But the need to end state-sponsored piracy did not foreclose that the private ends clause excluded the possibility that an act of piracy can be politically motivated, it meant that countries could no longer recognize privateering as a lawful practice.

The private ends requirement also fails to account for those who are not acting on behalf of a nation, but rather a cause. Organizations such as al-Qaeda and Abu Sayyaf are not tied to a nation, or trying to advance the development of a separatist nation like ISIS and al-Shabaab. Al-Qaeda has the resources allowing them to commit a maritime terrorist attack.¹⁵⁹ Eliminating an al-Qaeda cell hijacking a ship to then be used as a sea-born ballistic missile from being recognized as an act of piracy creates a dangerous loophole in international law that can be easily exploited. If there is no underlying state motivation, the action should be seen as having a private motivation. The private ends requirement is a form of impunity that is not worth exploiting.

¹⁵⁷ See Bingham, *supra* note 31.

¹⁵⁸ See note 29.

¹⁵⁹ See Isikoff *supra* note 81; see Langewiesche, *supra* note 82.

There is sufficient historical evidence pointing to the private ends requirement being unnecessary, and outside of the fundamental premise of piracy.

b. Rome Statute's Adoption of Piracy

“Acts of terrorism, like acts of piracy, should be declared ‘crimes against humanity.’”¹⁶⁰ From the beginning of time, pirates have been deemed *hostes human generis*,¹⁶¹ and piracy should be recognized by the Rome Statute as a crime that is subject to the International Criminal Court’s (ICC) jurisdiction. As the Rome Statute states, the ICC has jurisdiction, “in accordance with this Statute with respect to the following crimes: . . . (b) [c]rimes against humanity.”¹⁶² The Rome Statute expands upon the definition of crimes against humanity by enumerating a number of acts “when committed as part of a widespread or systematic attack directed against any civilian population,”¹⁶³ which includes enumerated acts that are recognized as acts of piracy, and can be classified as a widespread or systematic attack. Further, the definition of Article 7(1) of the Rome Statute provides additional evidence that an act of piracy falls within the definition of a crime against humanity.¹⁶⁴ With piracy seeming to fit into the definition of crimes against humanity, piracy’s inclusion in the Rome Statute would create a standardized form of prosecution that would ensure fair and consistent outcomes. The proposed adoption of piracy

¹⁶⁰ Garmon, *supra* note 92, at 269; Franz W. Paasche, The Use of Force in Combating Terrorism, 25 COLUM. J. TRANSNAT’L L. 377, 380 (1987).

¹⁶¹ See Thedwall, *supra* note 1.

¹⁶² Rome Statute of the International Criminal Court, art. 5(1)(b), July 17, 1998, U.N. Doc. A/CONF.183/9*, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

¹⁶³ *Id.* at art. 7(1).

¹⁶⁴ See Rome Statute, *supra* note 160, at art. 7(2)(a); “Attack directed against any civilian population’ means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.”

into the Rome Statute would help eliminate the issue of lack of pirate prosecutions, ensure fair outcomes, and ease the burden on countries currently prosecuting pirates.

i. Eliminates Issue of Lack of Prosecution

A major issue of impunity associated with piracy is the lack of prosecution of pirates or suspected pirates. With the current system, prosecution of pirates falls upon the countries that capture the pirates, or the exportation of pirates to countries who are willing to prosecute them.¹⁶⁵ However, captured pirates are usually released.¹⁶⁶ Former Secretary of State Condoleezza Rice stated her views on piracy prosecutions to the U.N. Security Council when she said that international law has provided adequate legal authority to capture and try pirates, however, the international community is lacking the “political will and capacity.”¹⁶⁷ This lack of will and capacity is especially apparent with the central members in the Task Force 150 antipiracy movement.

In 2006, the United States began exporting captured pirates to Kenya to be prosecuted.¹⁶⁸ Kenya’s importation of pirates to be adjudicated was quickly followed by the passing of the Merchant Shipping Act, which established Kenya’s right to exercise jurisdiction over foreign nationals captured on the high seas, complying with the requirements of SUA.¹⁶⁹ Between 2008 and 2009, foreign nations exported 100 captured pirates into Kenya to be tried.¹⁷⁰ Following Kenya’s agreement with the United States, England, Denmark, and the European Union signed

¹⁶⁵ Wilson, *supra* note 37, at 323.

¹⁶⁶ Stares, *supra* note 142.

¹⁶⁷ Eugene Kontorovich, “*A Guantanamo on the Sea*”: *The Difficulty of Prosecuting Pirates and Terrorists*, 98 CALIF. L. REV. 243, 245 (2010).

¹⁶⁸ Wilson, *supra* note 37, at 323.

¹⁶⁹ *Id.* at 323-24.

¹⁷⁰ *Id.* at 324.

formal agreements with Kenya to prosecute captured pirates.¹⁷¹ However, the Kenyan High Court quickly halted the practice of accepting foreign nation's captured pirates, striking down Kenya's ability to prosecute pirates due to a lack of standing.¹⁷² As I will discuss below, the act of larger nations exporting their piracy prosecutions to Kenya is a convenient solution to the problem of dealing with pirates, but it allows for the exploitation of the pirates' basic human rights.¹⁷³

By incorporating piracy into the Rome Statute, and thus into the jurisdiction of the ICC, the ICC would serve as the formal court for piracy prosecutions. Far too many pirates are caught and then released because the capturing nation does not want to deal with prosecuting the pirates. Faced with either sending the captured pirates to a place where they will be possibly tortured, killed, or deprived of their basic human rights, or risk the inability to convict the pirate if brought to court in the capturing nation, nations find it easier to just let the pirates go and be someone else's problem.¹⁷⁴

An additional issue solved by piracy's inclusion in the ICC's jurisdiction is the ability to call witnesses. With the current system requiring countries to subpoena witnesses who are, as merchant mariners, difficult to contact while at sea, the ICC possesses a more formal framework and enforcement arm to ensure material witnesses would come to testify at piracy trials.¹⁷⁵

¹⁷¹ *Id.*

¹⁷² Wilson, *supra* note 37, at 323.

¹⁷³ Dutton, *supra* note 53, at 221.

¹⁷⁴ See Stares, *supra* note 142.

¹⁷⁵ See generally Matthias Gebaur & Holger Stark, *Policing the Gulf of Aden: Somali Pirate Trial Tests Limits of EU Mission*, SPIEGEL ONLINE (Apr. 1, 2009, 12:53 p.m.) <http://www.spiegel.de/international/world/policing-the-gulf-of-aden-somali-pirate-trial-tests-limits-of-eu-mission-a-616760.html>.

Inclusion within the ICC's jurisdiction would provide a formal framework and legitimacy that could eliminate the impunity associated with piracy prosecutions, and standardize the process.

ii. Ensures Fair Outcomes

Prosecuting piracy in the ICC will eliminate the opportunity for individual nations to adjudicate piracy cases according to their national laws, which creates inherently unfair outcomes. With the ICC's adoption of the proposed modernized piracy statute, the statute would become international law. Further, with acts of piracy falling under the ICC's jurisdiction, individual nations will no longer prosecute pirates, thus eliminating the inconsistencies among national statutes. One inconsistency can be seen through the case study of two piracy cases that occurred in the United States in 2010.¹⁷⁶ In *United States v. Said*,¹⁷⁷ the district court initially dismissed the piracy charge, a ruling reversed by the Fourth Circuit,¹⁷⁸ culminating in the defendants being convicted of piracy under United States law.¹⁷⁹ The *Said* case was similar to *United States v. Hasan*, where pirates attacked the *USS Nicholas* mistaking it for a merchant ship.¹⁸⁰ Differing from the initial *Said* ruling, the *Hasan* court found the five captured Somalis engaged in an act that met the definition of piracy.¹⁸¹ The fact that the same court could come to, initially, differing rulings based off of similar facts shows the need for a standardized piracy definition, and the need for the ICC to take jurisdiction over all piracy cases.

¹⁷⁶ Wilson, *supra* note 37, at 319.

¹⁷⁷ 3 F. Supp.3d 515, 517 (E.D. VA 2014) (seven Somalis approached a ship the had been following, the *USS Ashland*, and started to shoot at the *Ashland*).

¹⁷⁸ *United States v. Said*, 680 F.3d 374, 375. In this case, the sentencing was also reversed and remanded based on an 8th amendment issue.

¹⁷⁹ *Said*, 3 F. Supp. 3d at 518.

¹⁸⁰ *United States v. Hasan*, 747 F. Supp.2d 642, 654-55 (E.D. VA 2010).

¹⁸¹ Wilson, *supra* note 37, at 321.

With the inclusion of piracy in the Rome Statute and the jurisdiction of the ICC, another inconsistency found in piracy cases would be solved: sentences. In the few modern piracy cases that have been tried in the United States, the sentence has ranged between thirty and thirty-four years, contrasted with Malaysian where piracy can be a capital offense,¹⁸² and a life sentence in Kenya.¹⁸³ The inconsistent sentences in countries who try piracy cases causes alarm, and begs the question whether one country values the life of a pirate more than another country. The inclusion of piracy within the ICC's jurisdiction can ensure that a uniform sentence will be applied, only varying based off of the circumstances of a case.

iii. Eases Burden on Countries Prosecuting Pirates

As mentioned above, countries—such as Kenya—that have accepted jurisdiction to prosecute a foreign nation's piracy case causes potential issues. While Kenya receives substantial aid from foreign nations in exchange for prosecuting pirates,¹⁸⁴ the money is not enough to cover or expedite the process of prosecuting pirates.¹⁸⁵ Kenya seems, at best, to be a “stopgap solution.”¹⁸⁶ Kenyan officials have stated their limited willingness to accept pirates, and other countries that are alternative sites for prosecution have declined to take on the burden of trying piracy cases.¹⁸⁷ Kenyan courts and prisons are already extremely overburdened, and with other nations refusing to try their own piracy cases, the burden will eventually become too much for

¹⁸² Kevin H. Govern, *National Solutions to an International Scourge: Prosecuting Piracy Domestically as a Viable Alternative to International Tribunals*, 19 U. MIAMI INT'L & COMP L. REV. 1, 32-33, n. 128.

¹⁸³ Dutton, *supra* note 53, at 221.

¹⁸⁴ *Id.* at 220. Kenya has received around \$2.4 million dollars in assistance.

¹⁸⁵ *Id.* Kenya has requested further funds, and as of October 2009, has only tried and sentenced ten of 123 suspected pirates.

¹⁸⁶ Kontorovich, *supra* note 166, at 255.

¹⁸⁷ *Id.* at 255-56.

Kenya to handle.¹⁸⁸ Not only are the prisons and courts extremely overwhelmed, the prosecutors who are located in Mombasa, of which there are three, stated that they cannot take on any further pirate prosecutions unless they receive additional help.¹⁸⁹

A more pressing issue regarding off-site prosecutions, especially in Kenya, is the deprivation of basic human rights. A French legal aid network has reported that due to the overcrowding of Kenyan prisons, pirates “were held for months without adequate access to medical care or basic amenities.”¹⁹⁰ To further the deprivation of basic human rights, Kenyan domestic law denies defendants legal aid unless the defendant faces a capital charge.¹⁹¹ Since a piracy conviction is a life-sentence in Kenya, the Kenyan government has denied pirates access to lawyers, even by foreign legal aid organizations who have offered to represent pirates at trial.¹⁹² Further, with Kenya’s close proximity to Somalia, the worry that corruption could influence piracy trials shows why trying piracy cases on a national level is not the best solution.

The ICC taking jurisdiction over piracy cases would ease the burden on countries, such as Kenya, that currently are unable to handle pirate prosecutions. The ICC would ensure that pirates’ basic human rights are respected, and pirates are afforded fair and adequate representation. If more resources are needed to prosecute pirates on the international level, foreign corporations or nations who contribute money to countries like Kenya to prosecute pirates can contribute the money to the ICC instead. With piracy’s impact on the global economy estimated to be around twenty-five billion dollars per year,¹⁹³ the contributions by foreign

¹⁸⁸ Dutton, *supra* note 53, at 221. Kenya currently has 53,000 prisoners in a system that was built to handle 16,000, and its current case backlog consists of over 870,000 cases.

¹⁸⁹ Dutton, *supra* note 53, at 221.

¹⁹⁰ *Id.* at 222.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ Dahlvang, *supra* note 43, at 18.

nations and international companies engaged in merchant shipping could contribute a fraction of that sum and see a reduction of piracy. This money could also be used to cover the costs of establishing a regional arm of the ICC for piracy cases, or cover the cost of ICC judges traveling to foreign nations to try piracy cases instead of using a nation's judges and lawyers.¹⁹⁴

c. Bifurcation of Piracy Charges

With the proposed adoption of the new definition of piracy in the Rome Statute, the establishment of two piracy charges is warranted, distinguishing between those engaging in piracy as a way to survive, and those who engage in piracy for criminal or terrorist reasons. Essentially, the piracy charge would be based on the UNCLOS definition of piracy, excluding the restrictions on territorial waters, requirement of two ship, and private ends. The terrorism charge would be based off of the enumerated unlawful acts in SUA, and focus on the intent of the actors, rather than the action itself. This bifurcation would be seen through the creation of two basic charges: piracy, and maritime terrorism.

i. Piracy

The piracy charge would be the lesser of the two charges. Similar to the distinction in American law between a misdemeanor and a felony, the charge of piracy would function as the lesser offense. The justification behind this bifurcation is the recognition that some individuals engage in piracy because it is the only way they can make enough money to survive.¹⁹⁵ With this charge, pirates would not face the decades-long sentences that have been seen in the United States,¹⁹⁶ but would function more like a low-level felony. Hopefully, this will show those who

¹⁹⁴ See generally John D. Peppetti, *Building the Global Maritime Security Network: A Multinational Legal Structure to Combat Transnational Threats*, 55 NAVAL L. REV. 73, 146-49 (2008).

¹⁹⁵ See generally Ashine, *supra* note 57.

¹⁹⁶ Wilson, *supra* note 37, at 321.

engage in piracy the seriousness of the offense, but also give the international community a chance to reeducate and recognize the issues that lead to people engaging in piracy. The world needs to recognize piracy is a growing issue, and can be minimized if the international community makes a concerted effort.

ii. Maritime Terrorism

The maritime terrorism charge is the more serious of the charges. With the inherent violent nature of maritime terrorism—including such acts as murder or kidnapping—the charge calls for a more serious response. Additionally, this charge recognizes the growing links between pirates and both organized crime, and terrorist entities. These more elaborate and advanced groups are able to affect significant sectors of the global economy through terrorist attacks, or the hijacking of oil and chemical tankers. As with the increased violent nature of this type of crime, the sentences would be similar to the sentences seen in the recent piracy cases tried in the United States.¹⁹⁷

The increased punishment will hopefully deter criminal organizations from engaging in and seeking the windfalls associated with piracy. The increased risk-reward decision individuals would have to make could have a significant deterrent effect on those engaging in piracy as part of an organized syndicate, which could lead to a decrease in piracy. As for the terrorist groups who would be targeted by the maritime terrorism charge, the charge and sentences would hopefully cause those who are considering engaging in an act of maritime terrorism to consider the consequences if their efforts fail.

The real benefit to the international community through the creation of the maritime terrorism charge is clarity. Though not a specific definition of terrorism, it is a recognition of the

¹⁹⁷ Wilson, *supra* note 37, at 321.

potential for terrorists to carry out an attack at sea, or commit an act of piracy in furtherance of a terrorist scheme. The concept of jurisdictional “hot potato” that plagues the current scheme will be eliminated. Additionally, the maritime terrorism charge will hopefully cause countries to seriously look at their efforts trying to combat a maritime terrorist attack occurring at home.

d. Unlikelihood of Adoption

The above proposition, while a possible solution to modern piracy, is not a probable solution. The truth is, there is no solution to problem that modern piracy poses on the international community. Simply put, no one is willing to take any real action to address the lack of piracy prosecutions. As mentioned above, members of Task Force 150 capture and release pirates rather than detain and prosecute them. It seems that following through with prosecuting pirates is too much of a hassle for nations to deal with, and these nations would rather have some other country deal with the problem. No one is forcing countries who could exert jurisdiction over pirates to actually exercise that jurisdiction, which creates a culture of impunity that allows piracy to thrive. It begs the question, what will it take for foreign nations to make conscious efforts to combat piracy and its growing connection with terrorist organizations? A nightmare scenario where a terrorist organization detonates a ship loaded with explosives or a tanker ship containing a combustible substance wiping out a major city is not outside of the realm of possibility, and could be the necessary event to trigger a change in the current environment of impunity.

Further, the likelihood that shipping companies would contribute to the proposed funding of regional courts is low. Shipping companies may have accepted the costs associated with piracy as a price of doing business. This apathy is another reason why no solution to piracy has been implemented. Companies need to be weary of the dangers of piracy, and possible liability if

a hijacked ship is used as a weapon by terrorists. While the above proposed solution could solve issues associated with piracy and terrorism, it is not a plausible solution due to many national and international impediments.

V. Conclusion

With the current state of modern piracy, there is a need to update the current definition to reflect the evolution of the piracy problem. The international community needs to take heed of the ever present threat of the growing links between pirates and criminal or terrorist organizations, and address the link by merging the current international framework to create a more comprehensive piracy charge. Additionally, the charge of piracy, being the original crime against humanity, should be recognized under the Rome Statute, allowing for the International Criminal Court to invoke jurisdiction over piracy trials, and provide a structured legal process, and basic human rights to accused pirates. Finally, the bifurcation of piracy into two charges is needed to recognize the different types of piracy: piracy as a way to survive, and maritime terrorism. This proposed action could not only modernize the way the international community prosecutes piracy, but how the international community thinks about who the pirates are and what motivates them to commit acts of piracy.

The above is just a proposed solution. The sad truth in regards to piracy and terrorism is there is no solution. The international community does not see the link between piracy and terrorism as a priority. The feeling of apathy towards piracy is apparent when pirates are captured and then released. With the jurisdictional limitations of piracy, the solution lies in the willingness to change the current environment of lack of prosecution by disinterested countries and companies who see piracy as another cost to do business. Until countries and companies make a concerted effort, a solution to piracy will never be found.

**Gender Identity and Asylum:
The New Standard to be Applied for Transgender Applicants Seeking Relief Under a claim
of Asylum, Withholding of Removal, and Convention Against Torture**

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Introduction

In a recent decision the Ninth Circuit Court of Appeals correctly differentiated between gender identity and sexual orientation in an asylum case. The Ninth Circuit reversed the Board of Immigration's denial of a transgender woman's request for a stay of deportation under Convention Against Torture.

Being transgender is often incorrectly categorized as a class of sexual orientation instead of what it actually is, gender identity. This is how courts and the Board of Immigration have previously classified transgender. The new finding by the Ninth Circuit has correctly distinguished between the two and noted the difference for potential persecution.

This Note argues that the analysis done by the Ninth Circuit should be adopted by other circuit courts and the Board of Immigration, when handling similarly situated cases.

To understand how the Ninth Circuit ruled, and how courts should rule, it is important to understand the following terms: refugee, asylum, Withholding of Removal, Convention Against Torture, transgender and sexual orientation. As such, the definitions and summaries follow.

I. Relevant Definitions for Gender Identity, Sexual Orientation, and Claims of Relief

Refugee

To qualify for asylum, applicants must be refugees.² The term refugee refers to any person who is outside of their country of nationality, and who is unable or unwilling to return to that country, is unable or unwilling to avail himself or herself of the protection of that country because of persecution, or a well-founded fear of persecution, on account of race, religion, nationality, membership in a particular social group, or political opinion.³ Although the applicant

² Adena L. Wayne, "Unique Identities and Vulnerabilities": *The Case for Transgender Identity as a Basis for Asylum*, 102 CORNELL L. REV. 241, 243 (2016).

³ 8 U.S.C.A. § 1101(a)(42) (West 2014).

for asylum, withholding of removal, and convention against torture is a “refugee”, the application process for those should not be confused with the application process for refugee status, as there is a slight difference.

Asylum

Asylum is a protection afforded by the United States government to individuals that meet the eligibility requirements. To apply for asylum, the applicant must apply within one year of his or her last arrival date into the United States.⁴ If the applicant fails to apply within the first year, he or she must be able to show that circumstances have changed which materially affect the applicants eligibility or that there was a delay in filing due to extraordinary circumstances.⁵

To be eligible, the applicant must show that they are unable or unwilling to return to their country of nationality because of a well-founded fear of persecution based on race, religion, nationality, political opinion, or membership in a particular social group.⁶

Applicants must only show that there is a chance that they will face serious harm, equivalent to persecution, but are not required to prove that they will definitely face that persecution.⁷ Harm that is serious enough to constitute persecution includes torture, violations of human rights, forced institutionalization⁸, infliction of mental, emotional, or psychological

⁴ U.S. Department of Justice, *Asylum and Withholding of Removal Relief Convention Against Torture Protections* 1, 3 (Jan. 15, 2009), <https://www.justice.gov/sites/default/files/eoir/legacy/2009/01/23/AsylumWithholdingCATProtections.pdf>.

⁵ *Id.*

⁶ *Id.* at 1.

⁷ Florence Immigrant & Refugee Rights Project, “*I’m Afraid to Go Back: A Guide to Asylum, Withholding of Removal, and the Convention Against Torture*” 1, 4 (May 2013), http://www.immigrantjustice.org/sites/default/files/FIRRP%2520Asylum_WOR_CAT-Guide-2013_modified.pdf.

⁸ *Pitcherskaia v. INS*, 118 F.3d 641, 646 (9th Cir. 1997).

torture⁹, and various forms of physical violence including but not limited to rape or sexual assault, female genital mutilation¹⁰, violence against family¹¹, and other forced acts.¹² The persecution should be carried out by the government itself or by groups or authorities the government is unable to control.¹³

Even if the applicant is able to show that he or she face persecution if returned to their home country, there are other factors that may automatically bar them from being granted asylum. If the applicant has assisted in the persecution of others, the United States government will deny the application.¹⁴ This includes if the applicant ordered, incited, or participated in the persecution of another based on that person's race, religion, nationality, membership in a particular social group, or political opinion.¹⁵ If the applicant poses a risk to the safety or security

⁹ *Mashiri v. Ashcroft*, 383 F.3d 1112, 1121 (9th Cir. 2004).

¹⁰ *Abay v. Ashcroft*, 368 F.3d 634, 641-642 (6th Cir. 2004). The Court here ruled on two different claims pertaining to female genital mutilation. The application made the first claim on her daughter's behalf. She claimed that if her daughter were returned to Ethiopia she would be subject to female genital mutilation. The Court agreed that forced female genital mutilation involves the infliction of grave harm constituting persecution and because it happens to approximately 90% of the female population in Ethiopia, this claim was sufficient and should be granted asylum. The applicant made the second claim on her own behalf. She applied for asylum based on her fear that her daughter would be subject to the torture of female genital mutilation. Her claim was also granted because if she were not given refugee status, she would be forced to expose her child to physical torture causing grave and permanent harm.

¹¹ *Gonzalez v. INS*, 82 F.3d 903, 910 (9th Cir. 1996). The Court also ruled that threats may be sufficient to show persecution. *See also, Baballah v. Ashcroft*, 367 F.3d 1067, 1074-1075 (2004) (ruling severe harassment, threats, violence and discrimination may constitute persecution).

¹² Ilona Bray, *What Counts as Persecution When Applying for Asylum or Refugee Status* (last visited Dec. 28, 2017), <https://www.nolo.com/legal-encyclopedia/what-counts-persecution-when-applying-asylum-refugee-status.html>.

¹³ *Id.* Groups and other authorities may include guerillas, warring tribes or ethnic groups, and organized vigilantes. *See also, Bray, supra*, note 11. This defined government as police, army, or any official harming the applicant as part of their job. The applicant can show that the government cannot or will not protect them from the harm carried out by these groups.

¹⁴ Ilona Bray, *Bars to Receiving Asylum or Refugee Status* (last visited Dec. 28, 2017), <https://www.nolo.com/legal-encyclopedia/barred-from-refugee-asylum-32300.html>.

¹⁵ Bray, *supra* note 13.

of the United States, he or she will be barred from seeking asylum.¹⁶ An applicant will also be denied asylum if he or she had previously resettled in another country.¹⁷ Finally, the applicant will also be barred from seeking asylum if he or she were previously deported from the United States.¹⁸

Being granted asylum provides the applicant with the most benefits.¹⁹ It allows the applicant to remain in the United States, and it also allows family members currently in the United States with the applicant, or included on the application, to be granted asylum as well.²⁰ It also provides the applicant with the ability to petition to bring eligible family members.²¹ Naturally, asylum is sought after by individuals with family members whom the applicant does not wish to be separated from or leave behind. This is one of the biggest benefits for asylum, as the individual applying for asylum believes their safety is at risk, and individuals often have a hard time leaving family members behind. Another benefit to being granted asylum is that it will allow the applicant to eventually apply for permanent residency and then citizenship.²²

Asylum is preferred by applicants over Convention Against Torture and Withholding of Removal claims, both explained below, as there is no limit on the number of asylum applications that can be granted in a year and it is the easiest standard to meet.²³ Whether to grant asylum is a

¹⁶ *Id.*

¹⁷ *Id.* Resettling can occur in three different ways: (1) applicant had been granted permanent residency or citizenship in another country; (2) made permanent housing arrangements and traveled to and from that country they were meant to reside in; (3) achieved economic independence.

¹⁸ Florence Immigrant & Refugee Rights Project, *supra* note 6.

¹⁹ See Pride Immigration, *The Difference Between Asylum, Withholding of Removal, and CAT* (2018), <https://www.prideimmigration.com/difference-between-asylum-withholding-and-cat/>.

²⁰ U.S. Department of Justice, *supra* note 3.

²¹ *Id.*

²² *Id.*

²³ U.S. Department of Justice, *supra* note 3.

discretionary decision based on an interview with the applicant.²⁴ When one applies for asylum, he or she should also apply for Withholding of Removal and Convention Against Torture relief.

Withholding of Removal

In 1952, the United States Congress outlined procedures pertaining to the detention and removal of aliens that were within the United States jurisdiction illegally.²⁵ If this is the case, the applicant will appear before an Immigration Judge who will determine if the individual is removable from the country.²⁶ If the Immigration Judge determines that the applicant is removable from the United States, the applicant is able to apply for relief known as Withholding of Removal.

For a claim of Withholding of Removal, the applicant must show that it is more likely than not that their life or freedom would be threatened due to race, religion, nationality, membership in a particular social group, or political opinion in the country which the Immigration Judge is trying to remove the individual to.²⁷ Similar to asylum, Withholding of Removal requires persecution by the government or an organization that the government cannot control.²⁸ The “more likely than not” refers to a probability of there being at least a 51% chance of persecution.²⁹

²⁴ Dagmar R. Myslinska, *Which Should I Apply for: Asylum, Withholding of Removal, and/or Protection Under Convention Against Torture?* (2008), <https://www.nolo.com/legal-encyclopedia/differences-asylum-withholding-removal-protection-convention-against-torture.html>.

²⁵ Benjamin D. Rumph, *Avendano-Hernandez v. Lynch: Twenty-First Century Values and Transgender Communities' Impact on Immigration Policy and Foreign Relations*, 24 TUL. J. INT'L & COMP. L., 391, 393 (2016).

²⁶ *Id.*

²⁷ U.S. Department of Justice, *supra* note 3.

²⁸ Pride Immigration, *supra* note 18.

²⁹ Florence Immigrant & Refugee Rights Project, *supra* note 6.

For Withholding of Removal purposes, it has been found that being beaten by other youths, being robbed, and being accosted by mobs were insufficient to prove past persecution.³⁰ However, even though these instances were insufficient to prove past persecution, they could be used to show fear of future persecution if the fear is both subjective and objective.³¹ Harassment, assault and threats based on race have been found to meet the past persecution requirement.³²

As noted previously, it is beneficial to apply for Withholding of Removal when the applicant applies for asylum, especially if he or she is unsure if their request for asylum might be denied. The reason for this being that a request for Withholding of Removal, unlike asylum, is not a discretionary decision.³³ As long as the applicant meets the standards, the request must be granted and they are to be protected.

Although it is recommended that an applicant also apply for Withholding of Removal, it is a more difficult standard than asylum to meet. This is due to the applicant having to prove that it is more likely than not that they will be persecuted.³⁴ Unlike asylum, however, Withholding of Removal can be applied for more than a year after entering the United States, it can be applied

³⁰ *Wakkary v. Holder*, 558 F.3d 1049, 1059-1060 (9th Cir. 2009).

³¹ *Id.* The Court in *Wakkary* still found the instances to be insufficient to prove a fear of future persecution but based their reasoning on the fact that he claimed he was persecuted as a result of being Chinese in Indonesia but there was not sufficient evidence showing this was why he would be persecuted.

³² *Singh v. INS*, 94 F.3d 1353, 1359-61 (9th Cir. 1996). Here, applicant brought a claim of relief for Asylum and Withholding of Removal based on his Indo-Fijians race. He used various instances to prove his claim of past persecution. He was told that he would be killed and that his wife and daughter would be finished off, he had loaded cargo pellets dropped nearly on top of him, and he had been threatened at knifepoint. The Court found these instances did show past persecution.

³³ *Pride Immigration*, *supra* note 18.

³⁴ *Pride Immigration*, *supra* note 18.

for even if the applicant has a previous deportation order, and a criminal history does not necessarily disqualify the applicant from applying.³⁵ However, if they have committed a serious crime, then it may prevent them from being successful.³⁶

If the application for Withholding of Removal is granted, it prevents the applicant from being sent back to the country where their life or freedom would be threatened.³⁷ This is usually the country where they hold citizenship.³⁸ However, a granted Withholding of Removal claim does not necessarily mean that the applicant is permitted to stay in the United States. The applicant could be removed to a third country where it would be unlikely that their life or freedom would be threatened.³⁹ If denied, the applicant can appeal to the Board of Immigration where they may file a petition for review with the Federal Circuit Courts of Appeal.⁴⁰

Withholding of Removal has several restrictions. It does not allow for all the same benefits as asylum, it does not provide relief for eligible family members in the United States or the ability to petition to bring eligible family members, it does not lead to permanent residence or citizenship, and it does not allow for travel outside of the United States.⁴¹ It does however allow the applicant the ability to apply for work authorization.⁴²

The Department of Homeland Security also has the right to review the conditions in the country the applicant is seeking protection from, and during this review, if they find the country

³⁵ Florence Immigrant & Refugee Rights Project, *supra* note 6.

³⁶ *Id.*

³⁷ Pride Immigration, *supra* note 18.

³⁸ *Id.*

³⁹ U.S. Department of Justice, *supra* note 3.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

conditions have changed and are now safe, the United States government may terminate the Withholding of Removal at its discretion.⁴³

Convention Against Torture

In 1984, the United Nations adopted the Convention Against Torture to prevent torture and other inhumane and cruel treatment.⁴⁴ In 1994, this treaty was ratified in the United States.⁴⁵ This international treaty states the obligations of the United States with regards to protecting applicants from being returned to a country where they would more than likely face torture.⁴⁶

In the broadest sense, torture refers to severe pain or suffering, both physical or mental, that is intentionally inflicted by, or instigated by, or with consent or acquiescence of a public official, or person acting in an official capacity.⁴⁷ Under this claim however, the harm that is committed or would be committed, must fall under the government's definition of torture to qualify for this type of relief.⁴⁸ The torture claim for Convention Against Torture is different from asylum and Withholding of Removal in that it does not require the torture to be a result of race, religion, nationality, membership in a particular social group, or political opinion.⁴⁹

To help prove the torture claim, the applicant can use proof that they have previously been tortured.⁵⁰ The Board of Immigration should look to the cumulative effect of all the incidents a petitioner has suffered.⁵¹ They must however also have evidence proving they face

⁴³ Pride Immigration, *supra* note 18.

⁴⁴ Rumph, *supra* note 24, at 394.

⁴⁵ *Id.*

⁴⁶ U.S. Department of Justice, *supra* note 3.

⁴⁷ *Id.* Note that the standard for relief under Convention Against Torture is torture, and not persecution. Not all persecution is considered torture when seeking relief.

⁴⁸ Pride Immigration, *supra* note 18.

⁴⁹ U.S. Department of Justice, *supra* note 3.

⁵⁰ Pride Immigration, *supra* note 18.

⁵¹ *Krotova v. Gonzales*, 416 F.3d 1080, 1084 (9th Cir. 2005).

torture; this can include country reports or news articles that show it is more likely than not they would be tortured.⁵² The Court will then examine the conditions in the applicants home country for gross violations of human rights and will then evaluate whether it would be unsafe for the applicant to return to the country as a whole, or if there could be a safe part in the country for the applicant to return to.⁵³

Convention Against Torture is a very difficult standard to meet with only 2 to 3% of claims being granted.⁵⁴ As a result, Withholding of Removal and asylum are both preferred over Convention Against Torture.⁵⁵ However, there is a certain group of individuals that would only be granted relief through Convention Against Torture and not the other forms of relief. Convention Against Torture may be granted to criminals that have committed serious crimes including terrorism and persecution.⁵⁶ This is due to the purpose of the treaty, which forbids individuals that meet the eligibility from being returned to a country where they will face torture.⁵⁷

Convention Against Torture is similar to Withholding of Removal in many ways. Some similarities include that the applicant can be removed to a third country where they will not face persecution or torture, the applicant but not the applicant's family is eligible to apply for work authorization, they cannot become a permanent resident or citizen, and they are not allowed to

⁵² Pride Immigration, *supra* note 18.

⁵³ Rumph, *supra* note 24, at 396.

⁵⁴ Immigration Equality, *Withholding of Removal and CAT* (2015), <https://www.immigrationequality.org/get-legal-help/our-legal-resources/asylum/withholding-of-removal-and-cat/#.WnTLuWaZPBI>.

⁵⁵ *Id.* As noted previously, it is best to apply for all three forms of relief. If an alien meets the requirements for more than one form of relief, they will be granted the relief that provides the most protection.

⁵⁶ U.S. Department of Justice, *supra* note 3.

⁵⁷ *Id.*

bring their family to the United States.⁵⁸ Additionally, protection is mandatory and not discretionary. As long as the applicant meets the requirements, their request must be granted.⁵⁹

During the application process, most people are placed in mandatory detention, and if they are considered a danger the detention may continue even after their application has been granted.⁶⁰ The United States agrees not to expel, return or extradite the alien to another country where they could be tortured.⁶¹

Transgender

Transgender is an umbrella term used to refer to anyone who does not fit the societal construction of gender, meaning they do not identify with the sex that was assigned to them at birth.⁶² This term is flexible and may also encompass cross-dressers, transsexuals, genderqueer, and numerous other terms used to describe one's gender identity.⁶³

For the purposes of this Note, transgender refers to an individual whose gender identity does not match their biological sex. This includes individuals that were born female but identify as male, as well as individuals born male but identify as female. It also includes individuals that identify with both genders, or neither. For example, someone who is agender is included under the trans umbrella.⁶⁴ The reason for this being that not every individual who identifies as a

⁵⁸ U.S. Department of Justice, *supra* note 3.

⁵⁹ Pride Immigration, *supra* note 18.

⁶⁰ Immigration Equality, *supra* note 52.

⁶¹ U.S. Department of Justice, *supra* note 3, at 7.

⁶² Rebecca L. Stotzer, *Violence Against Transgender People: A Review of United States Data*, 14 AGGRESSION AND VIOLENT BEHAVIOR 170, 171 (2009), <https://pdfs.semanticscholar.org/6b0a/6560d3e9ec2bc5e98c6ba16d2f95fb1ac610.pdf>.

⁶³ *Id.*

⁶⁴ Agender is the term used to describe someone who does not have a gender. A. Stiffler, *What is Agender? Five Things You Should Know*, AUTOSTRADDLE (Apr. 23, 2014, 7:00AM), <https://www.autostraddle.com/five-things-you-should-know-about-your-agender-acquaintance-230899/>.

different gender has a desire to move forward with a full transition, however they should not be taken out of the classification.

The term transgender is often incorrectly used to describe someone that is gay, lesbian or bisexual, and therefore it is important to note the differences. Being transgender does not correlate with a certain sexual orientation therefore they may identify as any number of sexual orientation classifications.⁶⁵ To clarify, transgender refers to a gender identity, whereas gay, lesbian and bisexual are classes of sexual orientation, which will be defined further below.

Sexual Orientation

Sexual orientation refers to the inherent or immutable enduring emotional, romantic or sexual attraction to other people.⁶⁶ Unlike transgender, sexual orientation is a classification that is based on feelings and attractions to another person, instead of how one feels about oneself. Although distinct from gender identity, gender role and gender expression, get taken into consideration when classifying one's sexual orientation.⁶⁷

The most common categories of sexual orientation are heterosexual, homosexual, or bisexual.⁶⁸ Heterosexual refers to an individual having an attraction to the opposite sex. For example, a male being attracted to a female would classify himself as heterosexual. Homosexuality on the other hand refers to an individual having an attraction to someone of the same sex. For example, a male being attracted to another male would fit under this classification.

⁶⁵ Human Rights Campaign, *Sexual Orientation and Gender Identity Definitions* (2018), <https://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions>.

⁶⁶ *Id.*

⁶⁷ American Psychological Association, *Key Terms and Concepts in Understanding Gender Diversity and Sexual Orientation Among Students* 18, 21 (2015), <https://www.apa.org/pi/lgbt/programs/safe-supportive/lgbt/key-terms.pdf>.

⁶⁸ American Psychological Association, *supra* note 66, at 22.

Bisexuality refers to an attraction to either sex. An example of this would be a male being attracted to both men and women. Although these three are the most gender fluid classifications of sexual orientation, they are not the only classifications.⁶⁹

As noted above, gender identity and sexual orientation are distinct identities. However, for the purpose of determining one's sexual orientation, sometimes it will require taking into account one's gender identity. For example, for one to identify as homosexual, the individual must first know which gender they identify with.

II. The Ninth Circuit Review of Avendano-Hernandez Case

Background Information

Edin Avendano-Hernandez (Avendano-Hernandez) is a transgender woman, whose assigned sex at birth is male.⁷⁰ She grew up in a small town in Mexico.⁷¹ From a young age she knew that she was different and she faced abuse that included beatings, sexual assault and rape because of her gender identity and from a perceived sexual orientation.⁷²

When she was younger, she was brutally beaten by her father and called words such as “faggot” and “queer” which were meant to be derogatory and offensive.⁷³ Her brothers and cousins sexually abused her.⁷⁴ She was tormented and physically assaulted by students at her

⁶⁹ Classifications are being updated continuously as individuals are finding that their sexual preferences do not place them within an already classified identity. Additionally, some classifications have classes within. For example, homosexual is a broader classification that refers to an individual that has an attraction to a member of the same sex, but within that are more narrow classifications such as lesbian, which is when a woman is attracted to another woman. In this situation, one may identify their sexual orientation as either homosexual or lesbian, therefore it is difficult to determine how many individuals identify with which classifications.

⁷⁰ *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1075 (9th Cir. 2015).

⁷¹ *Avendano-Hernandez*, 800 F.3d at 1075.

⁷² *Avendano-Hernandez*, 800 F.3d at 1075.

⁷³ *Id.*

⁷⁴ *Id.*

school, and she was also harassed by one of her male teachers.⁷⁵ The abuse at the hands of her peers continued throughout middle school and into high school until she dropped out at the age of sixteen.⁷⁶ She moved out of her small town and began working at a nightclub; the harassment occurred there as well and she was also physically attacked.⁷⁷ Because of all that she endured throughout the years, she lived in fear.

Approximately a year after moving away from home, she returned to care for her mother.⁷⁸ One of Avendano-Hernandez's brothers who had raped her as a child was also living in the parents home, and he threatened to kill her if she did not leave town again.⁷⁹

Troubles in the United States

Shortly after her mother's death, Avendano-Hernandez entered the United States, settled in California and began to openly live as a woman.⁸⁰ While living in the United States, Avendano-Hernandez was struggling with alcohol abuse.⁸¹ As a result of these struggles, she was convicted of driving under the influence on two separate occasions; the first, led to a misdemeanor conviction, the second time however involved a head on collision with another vehicle where both Avendano-Hernandez and the driver of the other vehicle were injured.⁸² This second offense resulted in a felony conviction; she was sentenced to one year incarceration and three years probation.⁸³ Once she was released, she was removed back to Mexico.⁸⁴

⁷⁵ *Id.* at 1075-76.

⁷⁶ *Id.* at 1076.

⁷⁷ *Avendano-Hernandez*, 800 F.3d at 1076.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Avendano-Hernandez*, 800 F.3d at 1076.

⁸³ *Id.*

⁸⁴ *Id.*

Return To and Persecution in Mexico

After her return to Mexico, Avendano-Hernandez again began facing harassment from family members and members of the community because of her gender identity.⁸⁵ On one evening, armed uniformed police officers that were stationed at a roadside checkpoint began verbally insulting Avendano-Hernandez as she walked by them.⁸⁶ Four officers began following her down the road, grabbed her, forced her into the bed of their truck and drove her to an unknown location.⁸⁷ They used homophobic slurs, beat her, held a knife up to her throat, made her perform oral sex on them, and raped her.⁸⁸ To ensure that she did not tell anyone about the attack, they told Avendano-Hernandez that they knew where she lived and they would hurt her family.⁸⁹ After this attack, Avendano-Hernandez decided to flee Mexico.

Within days she was part of a group of migrants attempting to cross the border.⁹⁰ The group encountered a group of uniformed Mexican military officers.⁹¹ The officers singled out Avendano-Hernandez, calling her “faggot” and separating her from the rest of the group.⁹² One of the officers forced her to perform oral sex on him while the others looked on and laughed without helping her.

Return To the United States and Claims of Relief

Avendano-Hernandez again entered the United States returning to California. After living there for three years, she was arrested for failing to report to her probation officer, which was

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Avendano-Hernandez*, 800 F.3d at 1076.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Avendano-Hernandez*, 800 F.3d at 1076-77.

mandated after her felony conviction.⁹³ Because Avendano-Hernandez was not legally in the country, she was placed in removal proceedings to be returned to Mexico.⁹⁴

Fearing for her safety if returned to Mexico, Avendano-Hernandez applied for relief under Withholding of Removal and Convention Against Torture.⁹⁵ Her request for Withholding of Removal was denied by the Immigration Judge because her felony conviction constitutes a particularly serious crime, which makes her ineligible for that form of relief.⁹⁶ Her Convention Against Torture claim was also denied by the Board of Immigration Appeals because they claimed that she failed to demonstrate that a member of the Mexican government acting in an official capacity will more likely than not consent to or acquiesce in her torture.⁹⁷ From these denials, Avendano-Hernandez appealed and the Ninth Circuit reviewed her claim.

Ninth Circuit Review

Avendano-Hernandez's case was appealed and brought before the Ninth Circuit. The Board of Immigration Appeals initially denied Avendano-Hernandez's claim of Withholding of Removal based on her felony conviction, which the Ninth Circuit agreed with.⁹⁸ The Ninth

⁹³ *Id.* at 1077.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Avendano-Hernandez*, 800 F.3d at 1077.

⁹⁸ *Avendano-Hernandez*, 800 F.3d at 1077-78. Avendano-Hernandez's Withholding of Removal claim was denied as a result of her having a felony conviction which the Immigration Judge and Board of Immigration found constituted a particularly serious crime, making her ineligible for that form of relief. The Ninth Circuit notes that there is no definition of what a "particularly serious crime" is, which allows the Attorney General to designate offenses as particularly serious on a case-by-case basis. Driving while intoxicated is an inherently dangerous activity which can cause serious harm to any number of people the driver may come in contact with, which is why it was considered a serious crime. If Avendano-Hernandez did not have the felony conviction, her application likely would have been granted. As the reason for her denial was case specific, her denial does not prevent other transgender applicants from being granted relief under Withholding of Removal.

Circuit however did not agree with the Board of Immigration Appeals decision to deny Avendano-Hernandez's claim under Convention Against Torture.

Convention Against Torture Claim

The Board of Immigration incorrectly concluded that Avendano-Hernandez failed to show that the Mexican government will more likely than not consent to or acquiesce in her torture.⁹⁹ The Immigration Judge and Board of Immigration were required to consider all evidence that was relevant to show the possibility of future torture, which includes evidence of past torture inflicted on the applicant.¹⁰⁰ The Ninth Circuit did not believe that the Immigration Judge and Board of Immigration did this, and as a result, they decided to reverse the decision.

The Ninth Circuit defined torture as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person ... for any reason based on discrimination of any kind.¹⁰¹ Rape constitutes torture, as it is a form of aggression constituting an egregious violation of humanity.¹⁰² In addition to being raped, Avendano-Hernandez had been physically and sexually assaulted, threatened, and verbally abused by citizens of Mexico as well as by uniformed military members and police officers as a result of her transgender identity and a perceived sexual orientation.¹⁰³ The Court ruled that rape and sexual assault absolutely rise to the level of torture needed for a Convention Against Torture relief claim.¹⁰⁴

The initial ruling denying relief under Convention Against Torture concluded that there was no evidence showing, "that any Mexican officials had consented to or acquiesced in prior

⁹⁹ *Id.* at 1078.

¹⁰⁰ *Id.* at 1079.

¹⁰¹ *Id.*

¹⁰² *Id.* (citing *Zubeda v. Ashcroft*, 333 F.3d 463, 472 (3rd Cir. 2003)).

¹⁰³ *Avendano-Hernandez*, 800 F.3d at 1079-80.

¹⁰⁴ *Id.* at 1079.

acts of torture committed against homosexuals or members of the transgender community.”¹⁰⁵

The Ninth Circuit did not agree with this. The Court found there was evidence as Avendano-Hernandez was actually tortured by public officials, which is an alternative way of showing government involvement for Convention Against Torture standards.¹⁰⁶ The facts show that Avendano-Hernandez was tortured by public officials on two separate occasions: once by armed, uniformed police officers and the other time by uniformed military.¹⁰⁷ Police and military officers are prime examples of the types of public officials that need to commit the torture for the purpose of making a Convention Against Torture claim.¹⁰⁸

The Board of Immigration required Avendano-Hernandez to also show that there was acquiescence of the government when public officials themselves inflicted the torture on her.¹⁰⁹ The government also argued that the military and police officers were rogue or corrupt officials.¹¹⁰ The Ninth Circuit on appeal rejected both of these claims.¹¹¹ The Ninth Circuit argued that both the military officers and the police officers were in uniform, on the job and acting in their official capacity when they tortured Avendano-Hernandez.¹¹² They also argued that Avendano-Hernandez was not required to show that the whole Mexican government was in on her torture and that the standard for Convention Against Torture only required she show that the torture occurred at the hands of local officials.¹¹³

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Avendano-Hernandez*, 800 F.3d at 1079.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 1080.

¹¹² *Rumph*, *supra* note 24, at 399.

¹¹³ *Avendano-Hernandez*, 800 F.3d at 1080.

One of the most significant factors in deciding if the applicant will face future torture is by determining if they have suffered past torture.¹¹⁴ This theory assumes that there have not been changes in the circumstances in the home country, therefore reasoning that absent changed circumstances, if an individual has been tortured and has escaped to another country, it is likely that he will be tortured again if returned to the site of his prior suffering.¹¹⁵ The determination of future persecution should also take into account the conditions of the home country. For example, the applicant should provide evidence that their home country faces gross, flagrant, or mass violations of human rights, as is the case here.¹¹⁶

Another important factor for Convention Against Torture claims, which the Board of Immigration relied on heavily, was the laws in the applicant's home country. Here, the Board of Immigration focused on laws that had been passed in Mexico that were meant to protect the gay and lesbian community.¹¹⁷ During the application review process, it was determined that these laws were in favor of denying Avendano-Hernandez's application as she would be protected as a result of these laws. As the Ninth Circuit pointed out, this analysis was severely flawed. The Ninth Circuit found that the agency's analysis was fundamentally flawed because it mistakenly assumed that these laws would also benefit Avendano-Hernandez, who faces unique challenges as a transgender woman.¹¹⁸

¹¹⁴ *Id.* Past torture is ordinarily the principal factor on which we rely when an applicant who has been previously tortured seeks relief under the Convention [Against Torture]. (citing *Nuru v. Gonzales*, 404 F.3d 1207, 1217-18 (9th Cir. 2005))

¹¹⁵ *Id.* at 1080.

¹¹⁶ *Id.*

¹¹⁷ *Id.* Examples of these laws that the court gave include the passing of a law in Mexico City that legalized gay marriage and adoption in 2009, as well as the Mexican Supreme Court holding that such marriages must be recognized by other Mexican states. Although these laws are a step in the right direction, these laws unfortunately do nothing at all to protect transgender individuals, such as Avendano-Hernandez, from being tortured or persecuted.

¹¹⁸ *Avendano-Hernandez*, 800 F.3d at 1080.

In discussing this aspect of the case, the Ninth Circuit stressed the importance of understanding that gender identity and sexual orientation are two distinct identities.¹¹⁹ The Court explained that transgender individuals are often especially visible and therefore vulnerable to harassment and persecution due to what the court describes as “public nonconformance with normative gender roles.”¹²⁰

The Court also explained that country conditions showed that police specifically target members of the transgender community for extortion and sexual favors, and that Mexico suffers from an epidemic of unsolved violent crimes against transgender individuals.¹²¹

The Board of Immigration noted the evidence showing corruption among Mexican police and military but incorrectly believed the corruption to only be the case where drug trafficking and bribes were involved.¹²² Again, the Ninth Circuit disagreed with how the agency reached this conclusion. The Ninth Circuit stated that there had been an increase in violence against gay, lesbian and transgender individuals following the expansion of legal protections afforded to these groups.¹²³ An expert testifying in the case said this was a result of the public and authorities reacting to and expressing their feelings towards a form of sexuality that the culture does not embrace.¹²⁴

¹¹⁹ A very in depth description was provided above in the definition section for both gender identity and sexual orientation. *See supra* pp. 11-13.

¹²⁰ *Avendano-Hernandez*, 800 F.3d at 1081.

¹²¹ *Id.* Noting that Mexico has one of the highest documented number of transgender murders in the world. *See also*, EFE, *More than 200 members of LGBT community killed in Mexico over three-year period*, AL DIA (May 18, 2017), <http://aldianews.com/articles/politics/more-200-members-lgbt-community-killed-mexico-over-three-year-period/48171>. This article claimed that between 2014 and 2016, 108 trans women were killed, and many had been tortured.

¹²² *Id.*

¹²³ *Avendano-Hernandez*, 800 F.3d at 1081.

¹²⁴ *Id.* at 1082.

The Ninth Circuit ended its decision by stating that the agency denied a claim of relief under Convention Against Torture as a result of two reasons. The first reason was the confusion regarding the differences between gender identity and sexual orientation.¹²⁵ The second reason was their erroneous conclusion that there was no evidence to show that a Mexican public official consented to or acquiesced to the torture of Avendano-Hernandez.¹²⁶ Avendano-Hernandez's evidence of past torture and the country conditions of Mexico prove that if she were to return, she would be in substantial danger. "[T]he unique identities and vulnerabilities of transgender individuals must be considered in evaluating a transgender applicant's asylum, Withholding of Removal, or Convention Against Torture claim."¹²⁷ Although the Ninth Circuit believed the Board of Immigration and Immigration Judge correctly ruled on the Withholding of Removal claim, the Ninth Circuit disagreed with the denial of the Convention Against Torture claim and has remanded the case for the Board of Immigration and Immigration Judge to grant Avendano-Hernandez's application under that relief.

Key Decisions and Precedent Set for Future Relief Claims

i. Applicant Not Required to Show Entire Government Consent

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

The Court determined that an applicant is not required to show that the government as a whole consented or acquiesced to the torture as this would undoubtedly put too heavy of a burden on the applicant.

Additionally, the Court noted that because the torture was done at the hands of Mexican public official, this was proof enough that the government would not be able to protect her.¹²⁸ Additionally, by requiring an applicant to prove that the government acquiesced would be too heavy of a burden when they had proof that officials had tortured them while on duty and acting in their official capacity.¹²⁹

ii. **Unique Threats and Vulnerabilities for Transgender Relief Claims in the Future**

The Ninth Circuit ruled that transgender asylum seekers are a separate class. Transgender claims cannot be assessed by grouping them in with sexual orientation claims, because as stated previously, these are two very different and distinct groups of individuals. Sexual orientation is associated with one's attraction to others, whereas gender identity, such as transgender, is how one identifies themselves with regards to gender.

When Avendano-Hernandez first entered the United States, she likely would have benefitted from applying for asylum. As shown earlier, this is the easiest standard to meet, and it provides the most protections. However, when Avendano-Hernandez first entered the United States she chose not to apply. For asylum purposes, the applicant seeking relief must apply within the first year or show that there was a reason for delay. Here, Avendano-Hernandez did not apply within one year and she had no reason for delay, and there were no changes within her home country. Had she applied, her claim for asylum likely would have been granted as she had

¹²⁸ *Avendano-Hernandez*, 800 F.3d at 1079.

¹²⁹ *Id.*

previously been tortured in Mexico, had no criminal record the first time she settled in California, and she was likely to face torture again if returned, as transgender individuals in Mexico are a vulnerable group.

The Ninth Circuit made several significant decisions in Avendano-Hernandez's case which will benefit other transgender individuals fleeing persecution in their home countries and seeking relief in the United States. One is that gender identity and sexual orientation must be considered different classes. Another, as previously stated, is that the applicant is not required to show that the whole government was behind his or her persecution. The Ninth Circuit has been the only court to apply this standard to transgender asylum claims,¹³⁰ however all other circuits should adopt this standard.

In Godoy-Ramirez, the Ninth Circuit on review found that the lower court failed to take into consideration how the country conditions would affect Godoy-Ramirez, who was a transgender woman.¹³¹ Interestingly, before deciding Avendano-Hernandez, this same court prior denied a Mexican transgender applicant's asylum, Withholding of Removal, and Convention Against Torture claims because it found that evidence showed that Mexico had been taking strides to protect the civil rights of gay, lesbian and transgender individuals.¹³² However, in that case, the Court noted that transgender individual's would be unlikely to face torture in larger

¹³⁰ The Eleventh Circuit came close to having to deal with this issue when plaintiff Jeune on appeal argued that the Board of Immigration failed to consider his transgender status separate from his homosexuality status. However, the Court of Appeals found that Jeune did not raise his persecution claim by arguing he would be persecuted because he was transgender and homosexual, instead he referred to himself only as a gay man who also dresses as a woman. *Jeune v. U.S. Attorney General*, 810 F.3d 792, 803 (11th Cir. 2016).

¹³¹ *Godoy-Ramirez v. Lynch*, 625 Fed.Appx. 791, 793 (9th Cir. 2015). This case is unpublished, and although the ninth circuit again, it shows that the court continues to apply the standard and therefore stands by their decision.

¹³² *Gutierrez v. Holder*, 540 Fed.Appx. 613, 614 (9th Cir. 2013).

cities.¹³³ Unlike *Avendano-Hernandez*, however, the Ninth Circuit failed to consider gender identity separate from sexual orientation. The Court in *Avendano-Hernandez* held that the Immigration Judges and Board of Immigration must consider the unique threats and vulnerabilities that these individuals face. This is especially important as transgender visibility has been increasing over the years however the laws needed to help protect these individuals has not been increasing alongside.¹³⁴

The case of Jaime Ramos, a transgender woman from El Salvador, who won her asylum appeal because the Board of Immigration had failed to consider her transgender identity separate from sexual orientation.¹³⁵ On appeal, it was ruled that that was not the standard to apply in light of *Avendano-Hernandez*. The Ninth Circuit was required to consider her claim separate from a sexual orientation claim and to understand that even where laws protecting those of a certain sexual orientation may be available in a country that does not protect transgender individuals.

The initial ruling on *Avendano-Hernandez* case also continued to use male pronouns and did not accept that she was in fact a female because they still considered her to be male.¹³⁶ This could be why the court decided to assess the claim under a sexual orientation view instead of gender identity, but regardless, that was incorrect.

Importance of Differentiating Between Gender Identity and Sexual Orientation

¹³³ *Gutierrez*, 540 Fed.Appx. at 614.

¹³⁴ Megan Townsend, *Timeline: A Look Back at the History of Transgender Visibility*, GLAAD (Nov. 19, 2012), <https://www.glaad.org/blog/timeline-look-back-history-transgender-visibility>.

¹³⁵ *Ramos v. Lynch*, 636 Fed.Appx. 710, 711 (9th Cir. 2016). Although unpublished, this case was the Ninth Circuit again standing by its prior decision in *Avendano-Hernandez v. Lynch*.

¹³⁶ *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1079.

Although some countries treat homosexual and transgender citizens the same, other countries treat them as two different classes, and sometimes one class has more acceptance than the other. Gender identity and sexual orientation are two different classes and should be treated as such and the Ninth Circuit was correct to differentiate between the two. This ideally will increase the likelihood for transgender applicants that really need to be successful in their asylum, Withholding of Removal, or Convention Against Torture claims to be granted said relief.

Ghana, in a way, falls under the first category mentioned above. LGBT individuals are treated very similarly, and very poorly.¹³⁷ Homophobia is common and homosexual children are often disowned.¹³⁸ In Ghana, being homosexual is seen as being evil, immoral and deviant.¹³⁹ Based on how homosexuals are treated in Ghana, and how “bad” the social culture is, transgender males and females keep their gender identity hidden out of fear of being punished or detained.¹⁴⁰ In Malawi, the citizens have a very basic understanding of what transgender means, as a result, transgender individuals are placed in the same classification as homosexuals.¹⁴¹ Because they are placed in the same category, they are punished the same and are persecuted due

¹³⁷ Solace Brothers Foundation, *Human Rights Violations Against Lesbian, Gay, Bisexual, and Transgender (LGBT) People in Ghana: A Shadow Report* (2015), http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/GHA/INT_CCPR_ICO_GHA_21415_E.pdf.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* Statistics from 2012 show that 98% of votes were against LGBT rights in Ghana. Additionally, when LGBT individuals and advocates are attacked, they are the ones punished, not their attackers.

¹⁴¹ Staff Writer, *Being Trans* in Malawi*, QUEERSTION (Mar. 22, 2017), <https://www.queerstion.org/2017/03/22/being-trans-in-malawi/>.

to the strict criminal laws against same-sex sexual activity.¹⁴² These are two instances that show the problems with grouping gender identity in with sexual orientation.

Unlike Ghana and Malawi, other countries do differentiate between gender identity and sexual orientation. Malaysia for example, is considered one of the worst countries in the world to be transgender because of the criminal laws against said individuals.¹⁴³ It is against the law for a man to pose as a woman, and vice versa, but sex change surgeries are also banned and have been since the 1980's.¹⁴⁴ This shows how difficult it is to be transgender in Malaysia where laws are in place to suppress citizens from identifying as a gender other than the one assigned at birth.

Additionally, in Malaysia, transgender individuals are subject to sexual assault and extortion by the police, transgender women are placed in prison with men where they are sexually assaulted, and transgender individuals also face employment discrimination which forces them into the sex trade business.¹⁴⁵ Malaysia began to make strides in 2014 when it found a law criminalizing cross-dressing to be unconstitutional, however that decision was overturned on appeal.¹⁴⁶

These examples, and the example shown in the case of Avendano-Hernandez, show why the Ninth Circuits decision to consider gender identity different from sexual orientation is important. They are two distinct groups and should be treated that way. Especially considering other countries may differentiate between the two, which can result in persecution for one group,

¹⁴² Staff Writer, *supra* note 140.

¹⁴³ Reuters Staff, *Malaysia among worst countries in world for transgenders – report*, REUTERS (Sept. 24, 2014), <https://uk.reuters.com/article/uk-malaysia-transgender/malaysia-among-worst-countries-in-world-for-transgenders-report-idUKKCN0HK07R20140925>.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Human Rights Watch, *Malaysia: Court Ruling Sets Back Transgender Rights* (Oct. 8 2015), <https://www.hrw.org/news/2015/10/08/malaysia-court-ruling-sets-back-transgender-rights>.

and not the other. Failure to consider the two as separate could prevent individuals who are trying to escape persecution from being able to be granted the relief.

Conclusion

With an increase in transgender visibility, yet no increase in laws protecting this group that faces high rates of violence, the United States has seen an increase in the transgender asylum applicants. The Ninth Circuit provided an appropriate standard to apply, when Avendano-Hernandez appealed to the Court because the Immigration Judge and Board of Immigration improperly handled her claim for relief.

The Ninth Circuit correctly ruled that transgender claims for asylum are to be considered separate from claims of sexual orientation. Transgender claims need to be considered under a gender identity claim, where as sexual orientation is its own distinct classification. Additionally, the Court ruled that the Immigration Judge and Board of Immigration in Avendano-Hernandez's case incorrectly considered the fact that Mexico had been progressing with their protections for those of homosexual orientation. The reason for this being that these protections did not extend to transgender individuals. Additionally, the laws that the agency was considering were marriage laws.

The Ninth Circuit held that unique identities and vulnerabilities must be considered when handling transgender claims. Furthermore, the applicant is not required to show that the entire government in their home country acquiesced to their torture. Showing that the torture was carried out by members of the government, such as public officials, was sufficient. The standard set out in the Avendano-Hernandez case is how all transgender asylum claims should be handled. This allows for the protection of a vulnerable class of individuals, which is the essential purpose of having asylum, Withholding of Removal, and Convention Against Torture relief claims.

Silence is the Killer: Fighting for the Millions of Unheard Voices

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The summer of 2014 was, for the most part, uneventful. At the time, I was in seventh grade and I felt proud that I knew the definition of liberation before I had stepped foot into my first year at the Summer Institute. Like most people who are twelve, I only had basic knowledge of the Holocaust: the gas chambers, the Nuremberg Trials, and the millions of lives that were lost without the true justice each and every one of them deserved. By the end of the summer of 2014, I learned about the fatal concentration-camp, Auschwitz; soon, I was speaking about the lost voices of Treblinka. Four years later, here I am, with more knowledge of the North Korean, Syrian, Rwandan, and Darfur genocides than anyone could ever fathom, and a voice that is demanding to be heard.

Nuremberg, the city of the Reich Party rallies, was the city where it all began. Since 1927, the Nazi Party was able to spread an immense amount of propaganda through rallies. These famous Nuremberg rallies were some of the minor feats and accomplishments of the Nazi Party. Later, the city of Nuremberg eventually became a significant city as it was a great speaking platform where Adolf Hitler gave some of his famous oratory speeches once he had risen to power in 1933. Two years later, the dreadful Nuremberg Laws were passed and quickly accepted by the public.

These laws did not simply just ban a Jewish individual from going to school or shopping at a supermarket. In fact, the Nuremberg laws had a more appalling effect: the creation of sociopolitical classes. For the first time, being Jewish was not seen as being a follower of a certain religion. Instead, Jewish people were seen as another race. To many Germans that did not have Jewish blood, they started noticing differences between the Jewish population and themselves. Hitler had praised and wanted the Aryan race, the master race, to lead Germany.

Soon, blue eyes and blond hair were favored. Non-Aryan and Aryan people were divided regarded as either powerful or inferior.

For years on end, after the Great War, Germany was a poverty-stricken country that was on the verge of collapsing from exhaust and embarrassment. The Treaty of Versailles made Germany completely accountable for the Great War, leaving Germany in millions of dollars in debt. The Nuremberg laws, as inhumane as it sounds, gave German citizens the legal opportunity to place the blame on Jewish people, who had been receiving prejudice and discrimination almost since the founding of Judaism. With this in mind, the German people quickly took this legal opportunity to denounce the Jewish population to be the sole reason for all of Germany's problems. The Nuremberg Laws were a racial policy that allowed hate against the Jewish people to spread much more rapidly because it was a legal. Furthermore, many Germans did not question how just the Nuremberg Laws were because they did not want to risk their lives trying to save a group of people the Nazi Party had marginalized. To many Germans, it was easier to follow the unjust law because it was after all, a law. The Nuremberg Laws were an example that once anything was a law, legalized, and demanded by the government for the people to follow, people eventually choose to follow it.

The Nuremberg Laws established Germany as an Anti-Semitic nation, and to the Nazi Party, it was extremely necessary to have these laws so Nazi officials could convince people that the mistreatment of the Jewish population was in fact a lawful necessity, instead of a sinful hate crime. Without the Nuremberg Laws, it would have been much more difficult to convince the German citizens that the Jewish people were to blame for Germany's downfall; the Nazi Party did not want to take the chance to have any protesters or uprisings against the Third Reich. With this in mind, the first few laws passed were mild in nature. These first couple of "harmless"

racial laws unfortunately, called for public discrimination of the Jewish population. Thus, it made it easier to identify whether one was Jewish or not. Later, the Third Reich legally forced the Jewish population to emigrate; this was known as Expulsion. Only a couple years after these laws were passed, the segregation and discrimination of the Jewish population made it easier for the Nazi Party to determine individuals that were to be sent off and killed at the death and labor camps.

Even before Nuremberg Laws were passed, there was still a lingering feeling of “us” versus “them” because of the Anti-Semitism that existed in Europe prior to the rise of the Third Reich. And this, lamentably, is how genocide starts. By labeling people as “Jew” or “gay” and pointing out their differences from ourselves, the tension between groups of people can easily escalate. Unfortunately, this leaves minorities to be left at a high risk of being scapegoated by powerful leaders. The Nuremberg Laws simply heightened and created a greater gap between the Non-Jewish and Jewish residents in Germany. Once many Jewish people were sent to ghettos and concentration camps, many Germans felt at ease because the cause of their problems were gone. What happened to the millions of Jewish people did not seem to affect them as much because of this kind of classification.

After Jewish people were sneered at with racial slurs, the Nazi Party took this opportunity to portray the Jewish people as barbaric animals. Appallingly, Jewish people were portrayed as “parasites” that should be squashed like the common housefly. By using the horrendous strategy of dehumanization as the second stepping stone to the Holocaust, many German citizens felt a strong sense of animosity towards the Jewish population. With the yellow badges clearly separating Non-Jewish and Jewish German inhabitants, it was easier for Nazi officials as well as ordinary German citizens to harass Jewish people. Jewish people were treated like they were

literal parasites that the Aryan master race needed to dispose of. By comparing them to lowly animals, this kind of devaluation made it easier for the Nazi Party to constantly recognize them as the enemy. Hitler emphasized that the “all-powerful” and “pure” Aryan humanity needed to defeat the disgusting “Jewish swine.” The final stepping stones to the Holocaust were hate speeches reminding people of how barbaric Jewish people were. Soon you had countries filled with citizens loyal to the Third Reich that were more than ready to persecute a group of innocent six million people.

To prevent genocide from starting, hate symbols such as swastikas or the Aryan Fist symbol should be banned. The famous saying, “Actions speak louder than words,” is even relevant to the act of promoting hate symbols. Even without standing on a podium to deliver a speech full of racial slurs and insensitive remarks, any kind of symbol supporting a cause for people to commit murder and other violent actions to a particular group of people should not be encouraged. Furthermore, hate speeches should be silenced, if not banned; it is rather infamously known that Hitler was one of the best orators in history that managed to deliver powerful, even hopeful messages to his audiences. Besides Hitler, before the Rwandan genocide, hate speech spewed out of radios to convince Hutus that the Tutsis were inferior to the country. Only a couple months later, 800,000 Tutsis were killed. As gruesome as it sounds, when people find a sense of hope from speeches or symbols, they find a purpose to take part in genocides. Moreover, by bridging the gap between people that are different from us and surrounding ourselves by those that are from different ethnic and religious backgrounds as us, there is a smaller chance people will group and label others. For example, if you go to work with many different co-workers from different backgrounds, this allows you to be exposed to different beliefs and cultures that may be much different from your own. Understanding others and having

friendly relations with those that may physically seem different from us can make everybody treat and regard each other as human.

Blaming someone is quite easy. In fact, it is too easy. Isn't it easier to blame someone for a bad test grade versus admitting you did not study enough? Doesn't it feel refreshing to know that the problems you are facing are not your fault? People forty years ago thought so, and forty years later, some people still have these ardor feelings of hatred toward certain groups of people. The truth is, it is just as easy to blame an employee for messing up your coffee order as it is to blame someone for ruining your life. This is how hate spreads, and it is how it spread in Europe during the reign of the Third Reich. Ordinary citizens do not have to go out of their way to stand before the United Nations and give passionate speeches. Ordinary citizens do not have to go out of their way to publish books on the importance of fighting for human rights. What ordinary citizens, what *anyone* can do is make sure any hateful, derogatory comments such as those that were promoted by the Nazi Party are not found in our society today. Speaking out against the small, insensitive remarks and name-calling can make a huge difference.

When people accept that a group is not normal or human, when people accept racial stereotypes to be the truth instead of distorted and cruel acts of prejudice, the risk of genocide is greater than ever. Acceptance can lead to mass murder, and it can start with a small joke. This small joke is considered to be the bottom of the Pyramid of Hate; a diagram which shows the growing complexity of behaviors of those that can contribute to a genocide. Every level of the pyramid is a greater act of aggression from the previous level. The only way each level of the Pyramid of Hate progresses is if the behavior is accepted. After small acts of prejudice, the next levels are discrimination and violence towards the group of people. The final level of the pyramid is genocide. People that lived in Europe in 1935 accepted that Jewish people did not have the right

to have the same basic human rights as them. There were people during the Holocaust that wholeheartedly believed that it was okay to compare a living, breathing human being that had a heart and blood pumping through their veins to be equivalent to a parasite.

The Pyramid of Hate may have been relevant to people forty years ago, but it is more relevant now than ever. With the help of social media, the number of hate groups have profoundly increased. Now, there are groups such as Neo-Nazis that have the same ideals as the Nazi Party officials did. We cannot take so many steps backwards after so many lives were lost these last forty years. Even today, genocide still exists. Chemicals were found in Syria that was responsible for the death of thousands of Syrian citizens that wanted democracy and freedom. In North Korea, famine and prison camps are all over the poverty-stricken country. As systemic as the Holocaust and other genocides such as the Cambodian genocide was, it only took one hateful comment to light up the sparks of destruction. We know now that we have the capability to start a genocide, but we also have the capability and responsibility to respect those that lost their lives in the most horrific ways possible by making sure we stop any kind of prejudiced attitude from harming a specific group of people.

The truth is that the world waited. The world did not have to wait seven years till people were liberated from concentration camps. Yet, the world let it happen. There were German citizens living only a couple miles from some of these concentration camps, and these people knew how millions were suffering, yet they chose to do nothing. The world waited to “take action” after the Armenian genocide, the world waited to “take action” after the Cambodian genocide, and the world “waited” to take action after the Guatemalan genocide.

Shortly after 1944, there were only pairs of shoes and suitcases left, with very few to actually save. We cannot be the heroes and heroines we desire to be- the changemakers the world

needs- if we do not stop the fuel of hate. The ashes of millions will always serve as a reminder that the world could have been very different. As Holocaust survivor Elie Wiesel had written in *Night*, “To forget the dead would be akin to killing them a second time.” To forget the death of millions of children, women, and men is just as terrible as ignoring these events in history and ignoring current events comparable to the Holocaust. Silence is the killer, and we can learn from these past genocides and the Holocaust, specifically, that silence is a more disturbing weapon than gas chambers.

Hate itself is the same as it was in Europe 1935, and the strategies used to silence people today are nearly identical. We can read newspaper headlines about Syrian refugees sharing a raft that is incompatible for an arduous journey to freedom, or we can go out and spread awareness of the unheard Syrian voices. We can watch a video of North Korean defectors describing their journey of surviving only on a couple grains of rice and sewing their feet together because shoes are only a luxury to the rich, or we can write to Amnesty International demanding for change. We can listen to a Rwandan genocide survivor tell a story about how she and her family were attacked in a sacred church that soon became a hunting ground, or we can write in our school newspapers for donations that are needed in Rwanda. Every time the earth spins on its axis, every year, every month, every day, every hour, every minute, and every second that passes is a reminder that people need saving and justice, and the world cannot seem to wait much longer.

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