

BERKELEY JOURNAL OF INTERNATIONAL LAW



ARTICLES

Access Denied? The International Criminal Court, Transnational
Discovery, and the American Servicemembers Protection Act

*Alexa Koenig, Keith Hiatt, and
Khaled Alrabe*

Is ISIS a State? The Status of Statehood in the Age of Terror

Noah Benjamin Novogrodsky

Diversity and Decision-making in International Judicial Institutions:
The United Nations Human Rights Committee as a Case Study

Vera Shikhelman

Ransom Kidnapping and Human Trafficking: The Case of the Sinai
Torture Camps

Yehuda Goor

Protecting the Maritime Rights of States Threatened by Rising Sea
Levels: Preserve Legacy Exclusive Economic Zones

James L. Johnsen

BERKELEY JOURNAL OF INTERNATIONAL LAW

VOLUME 36

2018

NUMBER 1

ABOUT THE JOURNAL

The *Berkeley Journal of International Law* (BJIL) (ISSN 1085-5718) is edited by students at U.C. Berkeley School of Law. As one of the leading international law journals in the United States, BJIL infuses international legal scholarship and practice with new ideas to address today's most complex legal challenges. BJIL is committed to publishing high-impact pieces from scholars likely to advance legal and policy debates in international and comparative law. As the center of U.C. Berkeley's international law community, BJIL hosts professional and social events with students, academics, and practitioners on pressing international legal issues. The Journal also seeks to sustain and strengthen U.C. Berkeley's international law program and to cultivate critical learning and legal expertise amongst its members.

Website: <http://www.berkeleyjournalofinternationallaw.com/>
<http://scholarship.law.berkeley.edu/bjil/>

Journal Blog: <http://berkeleytravaux.com/>

Subscriptions: To receive electronic notifications of future issues, please send an email to bjil@law.berkeley.edu. To order print copies of the current issue or past issues, contact Journal Publications, The University of California at Berkeley School of Law, University of California, Berkeley, CA 94720. Telephone: (510) 643-6600, Fax: (510) 643-0974, or email JournalPublications@law.berkeley.edu.

Indexes: The *Berkeley Journal of International Law* is indexed in the *Index to Legal Periodicals*, *Browne Digest for Corporate & Securities Lawyers*, *Current Law Index*, *Legal Resource Index*, *LegalTrac*, and *PAIS International in Print*. Selected articles are available on LexisNexis and Westlaw.

Citation: Cite as *Berkeley J. Int'l L.*

Submissions: The editors of the *Berkeley Journal of International Law* invite the submissions of manuscripts. Manuscripts will be accepted with the understanding that their content is unpublished previously. If any part of a paper has been published previously, or is to be published elsewhere, the author must include this information at the time of the submission. Citations should conform to THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (20th ed.) except where common sense dictates otherwise. Please review our website for additional submissions guidance and send all manuscripts to bjilsubmissions@law.berkeley.edu.

Sponsorship: Individuals and organizations interested in sponsoring the *Berkeley Journal of International Law* should contact the Editors-in-Chief at bjil@law.berkeley.edu.

Copyright: Copyright for material published in the Journal is held by the University of California Regents except where otherwise noted.

BERKELEY JOURNAL OF INTERNATIONAL LAW

VOLUME 36

2018

NUMBER 1

CONTENTS

Articles

ACCESS DENIED? THE INTERNATIONAL CRIMINAL COURT, TRANSNATIONAL DISCOVERY, AND THE
AMERICAN SERVICEMEMBERS PROTECTION ACT

Alexa Koenig, Keith Hiatt, and Khaled Alrabe..... 1

IS ISIS A STATE? THE STATUS OF STATEHOOD IN THE AGE OF TERROR

Noah Benjamin Novogrodsky..... 36

DIVERSITY AND DECISION-MAKING IN INTERNATIONAL JUDICIAL INSTITUTIONS: THE UNITED NATIONS
HUMAN RIGHTS COMMITTEE AS A CASE STUDY

Vera Shikhelmman..... 60

RANSOM KIDNAPPING AND HUMAN TRAFFICKING: THE CASE OF THE SINAI TORTURE CAMPS

Yehuda Goor..... 111

PROTECTING THE MARITIME RIGHTS OF STATES THREATENED BY RISING SEA LEVELS: PRESERVE
LEGACY EXCLUSIVE ECONOMIC ZONES

James L. Johnsen..... 166

BERKELEY JOURNAL OF INTERNATIONAL LAW

VOLUME 36

2018

NUMBER 1

BOARD OF EDITORS

Editors-in-Chief

NOAH GUINEY
DAVID NAHMIA

Managing Editor

PETER ANDREWS

Senior Publishing Editor

MARIBETH HUNSINGER

Senior Executive Editor

JORDAN ELKIN

Senior Submissions Editor

SEAN PINCKNEY

Internal Supervising Editor

MATT GAUTHIER

Executive Editor

HEIDI LIU

External Supervising Editor

TAE KIM

Publishing Editors

ILYA AKDEMIR
MADDIE BOYD
EUN SUN JANG

Symposium Editors

NATHALIE ALEGRE
EMMANUELLE BERDUGO
JIARUI WANG

Submissions Editors

CAMILA ABELLO
CHARLOTTE CHUN
NATE KELLER

Blog Editor

NICOLE SAWERES

IL Representatives

HARRIS MATEEN
ROBYN PARISER

Web Editor

NIKITA YOGESHWARUN

Senior Articles Editors

SARA BIRKENTHAL
LUISA PATINO
JOSE RAMOS

Articles Editors

ANDI MADDOX
KIERSTEN MEEHAN
SANAZ PAYANDEH

Isaac Ramsey

LABEAT RRHAMANI
ZHU ZHU

PAULA GERGEN
LAUREN KELLY-JONES
KATIE LEE

Associate Editors

ROSE WANG
ALLISON MURRAY
JESSICA N. SIAH

LIA SILIUNAS
RACHEL THAMPAPILLAI

NORAH ARAFEH
MICHAEL D. HARRIS

Members

SHAIKA AHMED
ELISE BAKER
KARIN BASHIR
ELIAS BOUKACHABINE
NINA BROWN
CASSANDRA CALDERON
JONATHAN T. DEBBI
STEPHEN DOCKERY
BENOIT DOUBLET
BRENDEN GLAPION

ANSHU GUPTA
YEJI HAN
SAMANTHA HAMILTON
JULIA JACOVIDES
LEYLA KARIMZADEH
KAUSHIK BHARDWAJ
BRENDAN LAYDE
GRACE LEE
SU LI
AMBER MUHAMMED
LI NONG
SARAH ALMOND PIKE

EDWARD RICHTER
FATMA EZZAHRA SASSI
NAIRI SHIRINIAN
VICTORIA SNYERS
DRU SPILLER
RYAN SUN
BLAKE VOGEL
MARIE VON FALKENHAUSEN
HILARY WONG
ALEXANDRA ZARETSKY

Faculty Advisor

MARCI HOFFMAN
KATERINA LINOS

Access Denied? The International Criminal Court, Transnational Discovery, and The American Servicemembers Protection Act

Alexa Koenig,* Keith Hiatt,** and Khaled Alrabe***

ABSTRACT

This paper addresses how international criminal tribunals can obtain content and non-content data held in electronic storage by private companies incorporated in the United States for use as evidence. We primarily focus on the International Criminal Court (ICC) for two reasons: first, the ICC faces hurdles above and beyond those of other international criminal tribunals—including barriers created by the 2002 passage of the American Servicemembers' Protection Act (ASPA)—and thus represents the most restrictive case; second, as the world's first permanent international criminal court, it is crucial to analyze how the court is functioning and establish a legal infrastructure to facilitate the ICC's long-term operation.

We conclude that, with regard to the ICC, and contrary to conventional understanding and practice, ASPA is not a barrier to the ICC's investigations in the United States so long as the ICC limits any requests for assistance to investigations of crimes against humanity, war crimes, and genocide allegedly perpetrated by foreign nationals. Second, we conclude that tribunals such as the ICC have five options for securing privately-held electronic information: (1)

DOI: <https://doi.org/10.15779/Z38JW86N2M>

* JD, PhD, Lecturer-in-Residence, UC Berkeley School of Law; Executive Director, Human Rights Center.

** JD, Vice President, Human Rights Program, Benetech.

*** JD, MA, Attorney, the National Immigration Project of the National Lawyers Guild; Researcher, Human Rights Center, UC Berkeley School of Law. The authors thank their colleagues—Roxanna Altholz, Laurel Fletcher, Mark Gergen, Jonathan Simon, Eric Stover, Beth Van Schaack, Chuck Weisselberg, Kate Westmoreland, and Frank Zimring—for their feedback at critical stages of this Article's development. The authors also thank Suzanne Chenault, Rebecca Chraim, Natalia Krapiva, Nikita Mehandru, Eleanor Naiman and Peggy O'Donnell for their research assistance. Any errors are, of course, the authors' own.

submitting requests directly to tech companies; (2) filing requests for assistance in U.S. district courts; (3) requesting assistance from the executive branch; (4) asking foreign governments to submit Mutual Legal Assistance (MLA) requests on the ICC's behalf; and (5) partnering with joint law enforcement bodies, like INTERPOL, to make foreign-to-domestic law enforcement requests.

INTRODUCTION.....	2
I. PART I.....	7
A. <i>Brief History of Documentary Evidence in International Criminal Tribunals</i>	7
B. <i>Brief History of the ICC</i>	9
C. <i>Evidentiary Challenges at the ICC</i>	11
II. PART II	13
A. <i>Plain Meaning</i>	17
B. <i>Legislative History</i>	18
C. <i>Congressional Action</i>	19
D. <i>Executive Branch Views</i>	20
E. <i>ASPA As Applied to ICC Investigations: Section 7422(h)</i>	22
F. <i>Summary</i>	23
III. PART III	23
A. <i>Requests to U.S. Service Providers</i>	24
B. <i>Requests to U.S. District Courts</i>	27
C. <i>Requests Through U.S. Diplomatic Channels</i>	29
D. <i>Requests for Mutual Legal Assistance</i>	32
E. <i>Joint Investigations</i>	33
CONCLUSION	34

INTRODUCTION

In 2003, a petite, auburn-haired woman—Natasa Kandic—could often be spotted in the cafés of Sid, a small town in northern Serbia. A sociologist by training, the fifty-seven-year-old Serbian native had founded the Humanitarian Law Center in Belgrade in 1992 to investigate and expose atrocities that had been committed during the breakup of Yugoslavia. She had thrown herself full-force into her investigations, earning the contempt—even hatred—of the Serbian military and other powerful leaders in the region. In the midst of her most recent investigation, one rumor in particular had caught her attention—that a videotape existed somewhere in town and documented war crimes committed by the Serbs.¹

1. See Daniel Williams, *Srebrenica Video Vindicates Long Pursuit by Serb Activist*, WASH. POST (June 25, 2005), <http://www.washingtonpost.com/wp->

The video was rumored to show four young men, ranging in age from sixteen years old to their early twenties, clothed in camouflage and red berets decorated with the Serbian flag,² shooting six emaciated Bosnian male civilians, several of whose arms were tied.³ After the first four captives were executed, the other two were forced to dispose of the bodies. Then, they, too, were shot.⁴

The killers were purportedly members of the Skorpions, a shadowy paramilitary unit under the command of Slobodan Milosovic, then-President of Serbia. The footage was believed to have been taken by one of the Skorpions' members. Twenty copies had been made as souvenirs. At one time, copies could even be rented in Sid, where the Skorpions were based—that is, until the unit's commander caught wind of the tapes, realized they could be incriminating, and ordered all twenty copies to be destroyed.⁵ However, a disgruntled member of the unit,⁶ who was not involved in the killings, had apparently made a backup copy and kept it carefully hidden.⁷ If Natasa could get hold of that videotape, it could be used to tie Milosovic to the commission of war crimes and provide some of the first documentary evidence of Serbian atrocities—critical footage for beginning to counter the impassioned denial by locals that Serbs had ever committed such crimes.

A race to find the tape began: members of the Skorpions had also heard the rumor and were determined to get to it first.⁸ But Kandic beat them to it. She waited until the copy's owner fled the country, made copies of her own, and then passed some of the tapes along to media outlets and to the Yugoslavia tribunal in The Hague,⁹ which had recently been established to investigate and prosecute crimes that had been committed during the wars in the region.¹⁰

Milosevic's trial opened at the International Criminal Tribunal for the former Yugoslavia (ICTY) on February 12, 2002. On June 1, 2005, the Skorpions' "massacre video," as it came to be known, would finally be shown in court.¹¹

dyn/content/article/2005/06/24/AR2005062401501.html.

2. See Alissa J. Rubin, *Video Alters Serbs' View of Bosnian War*, L.A. TIMES (June 13, 2005), <http://articles.latimes.com/2005/jun/13/world/fg-bosnia13>.

3. See Beti Bilandzic, *Serbs are Stunned by Video of Srebrenica*, WASH. POST (June 3, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/02/AR2005060201720.html>.

4. See Prosecutor v. Milošević, Case No. IT-02-54, Trial Transcript, 40278 (Int'l Crim. Trib. for the Former Yugoslavia June 1, 2005), http://www.icty.org/x/cases/slobodan_milosevic/trans/en/050601IT.htm (*hereinafter* Milošević Trial Transcript).

5. See Rubin, *supra* note 2.

6. See Williams, *supra* note 1.

7. See Rubin, *supra* note 2.

8. See Williams, *supra* note 1.

9. See Rubin, *supra* note 2.

10. See generally U.N. Int'l Crim. Tribunal for the Former Yugoslavia, *The Tribunal—Establishment*, <http://www.icty.org/en/about/tribunal/establishment>.

11. See Milošević Trial Transcript, *supra* note 4; see also Associated Press, *Bosnia Agonizes Over Release of Massacre Video*, CNN NEWS (June 3, 2005), http://www.nbcnews.com/id/8085091/ns/world_news/t/bosnia-agonizes-over-release-massacre-

While Milosevic died before his case concluded, a portion of that video and others, along with a series of screen shots from those videos, would be used in other ICTY cases to establish the crimes that had occurred and to link the highest-level perpetrators to those crimes. The most important trial was that of Serbian General Ratko Mladic.¹² For Mladic's case, the prosecution created a compilation from twenty-five different source videos, including the Skorpions' footage and a related binder of stills,¹³ which the prosecution arranged chronologically to depict the story of the murder and expulsion of the Muslim population from Srebrenica between the 10th and 20th of July 1995.¹⁴ The four and a half hours of footage had been acquired in disparate, painstaking ways: in addition to being passed along by activists like Kandic at great personal risk, videos were acquired during a search of Mladic's home, as well as a sweep of properties owned by Milan Milutinovic, Serbia's second president.¹⁵

The most infamous of those clips showed Mladic, late in the day on the 11th of July 1995, exuberantly strutting through the streets of Srebrenica, pausing to greet and embrace each of his officers; Srebrenica had just fallen to his men. Finally, he stopped and turned to face the camera; "[o]n the eve of yet another great Serb holiday," he declared, "we present this city to the Serbian people as a gift. Finally the time has come to take revenge on the Turks."¹⁶

Another clip showed the commander of the Drina Wolves, a paramilitary group, ordering his men to hit the Srebrenica victims "hard" and crowing "I want to hear wolves howl!"¹⁷ while yet another featured the Skorpions killing.¹⁸ In the Mladic case, Erin Gallagher, an investigator for the ICTY's prosecutor, testified as to the locations and people depicted in the footage, as well as the recordings'

video/.

12. See Sense Tribunal, 'Wolves' and 'Scorpions' at Ratko Mladic's Trial, SENSE NEWS AGENCY (Apr. 19, 2013), http://www.sense-agency.com/icty/%E2%80%98wolves%E2%80%99-and-%E2%80%98scorpions%E2%80%99-at-ratko-mladic%E2%80%99s-trial.29.html?news_id=14880.

13. See Interview by Alexa Koenig with Sun Kim, a former legal officer with the United Nations International Criminal Tribunal for the Former Yugoslavia (Aug. 18, 2016) (describing the binder of still shots as particularly beneficial to the case by making it particularly easy for the judges to understand what was happening in the videos).

14. See Prosecutor v. Mladić, Case No. IT-09-92, Trial Transcript, 10096 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19 2013), <http://www.icty.org/x/cases/mladic/trans/en/130419IT.htm>.

15. See *id.* at 10129.

16. See ERIC STOVER & GILLES PERESS, THE GRAVES: SREBRENICA AND VUKOVAR 122-24 (Scalo ed., 1998); Interview with Eric Stover, Faculty Director, Human Rights Center at UC Berkeley (August 9 & 22, 2016). Stover and Peress had first seen the video in Tusla while visiting a local human rights organization. Their interpreter had told them, "You have to see this video," handing Stover a copy, which the two popped into a computer. Realizing what they were seeing and the potential value of the footage, Peress photographed seven frames, which they passed along to prosecutors at the ICTY.

17. Kate Ferguson, An Investigation into the Irregular Military dynamics in Yugoslavia, 1992-1995 74 (2015) (unpublished Ph.D. thesis, University of East Anglia), https://ueaeprints.uea.ac.uk/59455/1/FINA_SUBMISSION_KFERGUSO.pdf.

18. See Sense Tribunal, *supra* note 12.

sources and dates.¹⁹ Based on her testimony, the videos and stills could be authenticated and entered into evidence.

So-called perpetrator footage and other videos continue to serve as critical linkage and lead evidence²⁰ to support legal accountability for war crimes and other atrocities. However, today, such documentary evidence is as likely to be acquired from the relative safety of a desk hundreds or even thousands of miles from the site of a crime. A careful search through YouTube or Facebook can uncover footage of a crime, versus the painstaking legwork conducted by investigators such as Kandic or Gallagher. In such cases, what becomes most difficult to acquire is not the footage itself, but the metadata behind it—the date, time, location, and other information relevant to its creation—which is helpful to authenticate the videos and support their admissibility in court.²¹ Service providers are frequently the gatekeepers of that information, and investigators must often overcome a series of hurdles—including compliance with domestic law and corporate policy—to gain the necessary access.

Overcoming these hurdles is crucial. While witness testimony is often central to trials, documentary evidence can be especially helpful in international cases, where not only the base crimes must be proven (the fact that a rape or a murder occurred) but additional “chapeau elements” which establish that the wrongdoing is not just a domestic crime, but an international one.²² For example, in order to qualify as an international crime against humanity, a series of murders must be systematic or widespread and target a civilian population.²³ Genocide requires that killers have the requisite intent to destroy a population based on the victims’ national, ethnic, religious, or racial group.²⁴ Because of their additional complexity, international crimes are particularly difficult to prove, and thus, it can be especially helpful for prosecutors to be able to present diverse forms of evidence—including documentary evidence, such as video footage—to provide key linkage evidence that ties the crimes committed by subordinates to their

19. See *id.*; see also Sense Tribunal, *Identification in Srebrenica Court Video*, SENSE NEWS AGENCY, Nov. 11, 2010, http://www.sense-agency.com/icty/identification-in-srebrenica-court-video.29.html?news_id=12246&cat_id=1 (discussing how Gallagher similarly testified in court about the video footage during the trial of Zdravko Tolimer, Mladic’s assistant for security and intelligence, attesting to “when and where the videos were recorded” and identifying “locations, persons and items in the footage”).

20. Linkage evidence is information that ties perpetrators to alleged crimes; lead evidence is information that leads to further evidence.

21. For an overview of the basic evidentiary principles at international tribunals such as the International Criminal Court see, e.g., GLOB. RIGHTS COMPLIANCE LLP, *BASIC INVESTIGATIVE STANDARDS FOR FIRST RESPONDERS TO INTERNATIONAL CRIMES* 4 (2016), http://www.globalrightscpliance.com/wp-content/uploads/2016/07/GRC_BIS_ENG.pdf (explaining that before evidence may be used at trial, it must be ruled admissible; before evidence can be ruled admissible, it needs to be shown to be authentic and its provenance should be demonstrated).

22. See RONALD C. SLYE & BETH VAN SCHAACK, *INTERNATIONAL CRIMINAL LAW* 216 (2009).

23. *Id.*

24. See, e.g., Rome Statute of the International Criminal Court, A/CONF.183/9, Part II, art. 6 (July 16, 2002), https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

commanders, to corroborate witness testimony, and sometimes even to supplant that testimony when witnesses' lives are at risk.

In addition, in recent years, video and photographic evidence have assumed increasing importance. Thanks in part to the expanding distribution of internet-connected mobile devices and the popularity of media sharing services like YouTube, Facebook, Snapchat and others, tribunals have turned to the internet as a source of evidence.²⁵ This "digital" evidence includes traditional documentary evidence such as videos, audio, images, emails, memoranda, reports, and other documents, in digitized form.

A significant proportion of this new kind of documentary evidence is in the possession of, or otherwise controlled by, technology companies incorporated in the United States.²⁶ To date, the ICC, as one example, has been unable to obtain much of this evidence for a variety of reasons. In 2002, Congress passed a statute—at a time of heightened Congressional hostility towards the Court—that governs the United States' relationship with the ICC. ASPA, as it is known, contains several prohibitions on U.S. government cooperation that render it difficult for the ICC to gain assistance from the United States in its investigations and prosecutions. Congress's predominate concern was ICC prosecutions of U.S. servicemembers or government officials, however its effect has been much broader.²⁷

At first blush, ASPA would appear to stymie potential efforts by the ICC to obtain data from American companies via American legal processes. As a further complication, some American data companies, like Google and Facebook, require a subpoena or warrant issued from an American court in order to turn over data,²⁸ even though ASPA does not prevent private entities' voluntary cooperation with the ICC.

In this article, we sketch a way forward for the ICC and other international or regional criminal tribunals that may face similar obstacles to obtaining evidence stored as data by American companies. In Part I, we explore the history and importance of documentary evidence to international criminal tribunals generally and the ICC specifically. In Part II, we analyze the ASPA provisions

25. See Avi Asher-Schapiro, *YouTube and Facebook are Removing Evidence of Atrocities, Jeopardizing Cases Against War Criminals*, INTERCEPT (Nov. 2, 2017), <https://theintercept.com/2017/11/02/war-crimes-youtube-facebook-syria-rohingya/>; Keith Hiatt, *Open Source Evidence on Trial*, 125 YALE L.J. 323 (2016); Alexa Koenig, *Harnessing Social Media as Evidence of Grave International Crimes*, MEDIUM (Oct. 23, 2017), <https://medium.com/humanrightscenter/harnessing-social-media-as-evidence-of-grave-international-crimes-d7f3e86240d>.

26. See Avi Asher-Schapiro, *YouTube and Facebook are Removing Evidence of Atrocities, Jeopardizing Cases Against War Criminals*, INTERCEPT (Nov. 2, 2017), <https://theintercept.com/2017/11/02/war-crimes-youtube-facebook-syria-rohingya/>.

27. JENNIFER K. ELSEA, CONGRESSIONAL RESEARCH SERVICE, U.S. POLICY REGARDING THE INTERNATIONAL CRIMINAL COURT, at CRS-5 (2006), <https://fas.org/sgp/crs/misc/RL31495.pdf>.

28. See Google Transparency Report Help Center, *Legal process for user data requests FAQ*, <https://support.google.com/transparencyreport/answer/7381738?hl=en>; *Information for Law Enforcement Authorities*, FACEBOOK, <https://www.facebook.com/safety/groups/law/guidelines/>.

that bar U.S. government cooperation with the ICC to identify how and in what contexts the ICC can legally secure linkage and lead evidence and other critical information from U.S.-based technology companies. In Part III, we discuss the thicket of statutes and mechanisms that—even without ASPA’s bar—complicate discovery requests by international courts. We conclude that there are five avenues through which international criminal tribunals, American courts, and American companies can legally work together to further accountability for war crimes, crimes against humanity, and genocide. International courts such as the ICC can (1) request data directly from technology companies; (2) file requests for assistance directly in U.S. district courts; (3) request assistance from the executive branch; (4) ask foreign governments to submit Mutual Legal Assistance requests on their behalf; and (5) partner with joint law enforcement bodies.

I. PART I

While witnesses are the “lifeblood” of criminal trials,²⁹ documentary evidence (like physical evidence) can be critical to successful prosecutions. Documentary evidence can be used to corroborate witness testimony, provide linkage evidence that ties the highest-level defendants to crimes perpetrated by their subordinates, point to additional evidence, and even replace witnesses, for example when testifying would be disproportionately dangerous for the witness and/or her family.³⁰

A. Brief History of Documentary Evidence in International Criminal Tribunals

Documentary evidence has played a central role in the evolution of international criminal investigations. The prosecution team at Nuremberg, led by U.S. Supreme Court Justice Robert Jackson, relied almost exclusively on documentary evidence. Jackson was determined to show the world that war crime-related cases could be decided based on the rule of law as opposed to the emotions he felt survivor-witnesses would inevitably bring into the courtroom.³¹ Documentary evidence also offered strategic advantages, such as lessening the risks affiliated with faulty memories³² and perjury.³³ Jackson was determined that

29. See, e.g., Patricia Wald, *Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal*, 5 YALE HUM. RTS. & DEV. L.J. 217, 219 (2014).

30. See, e.g., INT’L BAR ASS’N, EVIDENCE MATTERS IN ICC TRIALS 19–20 (2016), <https://www.ibanet.org/Document/Default.aspx?DocumentUid=864b7fc6-0e93-4b2b-a63c-d22fbab6f3d6>; see generally NANCY A. COMBS, FACT FINDING WITHOUT FACTS: THE UNCERTAIN EVIDENTIARY FOUNDATIONS OF INTERNATIONAL CRIMINAL CONVICTIONS (2010).

31. See MICHAEL SALTER, NAZI WAR CRIMES, US INTELLIGENCE AND SELECTIVE PROSECUTION AT NUREMBERG 404 (2007).

32. See generally ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY (1979); NANCY A. COMBS, FACT FINDING WITHOUT FACTS: THE UNCERTAIN EVIDENTIARY FOUNDATIONS OF INTERNATIONAL CRIMINAL CONVICTIONS (2010).

33. SALTER, *supra* note 31, at 404.

the prosecution “put on no witnesses the [team] could reasonably avoid,”³⁴ instead “try[ing] the case by indisputable documentary proof.”³⁵

The International Criminal Tribunal for the former Yugoslavia (ICTY) also relied heavily on documentary evidence. As illustrated by the *Mladic* case discussed above, the ICTY’s Office of the Prosecutor (OTP) introduced a broad array of evidence, including “expert testimony from military commanders and scientists; eyewitness evidence; forensic investigations, including crime scene analysis, exhumations and DNA analysis, photographic and video evidence; documentary evidence; insider evidence from subordinates who testified against their superiors; and interrogation of the accused.”³⁶ The ICTY struggled, however, under the challenge of organizing and analyzing significant quantities and diversities of documentary evidence, including videos, faxes, audio files, and aerial photographs.³⁷ At the International Criminal Tribunal for Rwanda, documentary evidence also proved helpful, such as video footage that was used as linkage evidence to tie the defendants to underlying crimes.³⁸

Documentary evidence has been particularly helpful in the Extraordinary Chambers in the Courts of Cambodia (ECCC), which was established in 2006 as a national court with a mandate to try senior members of the Khmer Rouge. Evidence there included copious photographs; lists of executed prisoners; prisoner “confessions” (often secured under duress); and the painstaking documentation of thousands of mass graves and prison sites.³⁹ Starting in 1994, participants in the Cambodian Genocide Program at Yale University and at the Documentation Center of Cambodia⁴⁰ began gathering and preserving primary documents related to the mass killings in order to establish the facts underlying the genocide and help establish complicity in those deaths. By the 21st century, the program and center had amassed more than 1 million pages of “primary

34. *Id.*

35. *Id.* at 409.

36. PEGGY O’DONNELL ET AL., BEYOND REASONABLE DOUBT: USING SCIENTIFIC EVIDENCE TO ADVANCE PROSECUTIONS AT THE INTERNATIONAL CRIMINAL COURT 4 (2012), https://www.law.berkeley.edu/files/HRC/HRC_Beyond_Reasonable_Doubt_FINAL.pdf [*hereinafter* HRC, BEYOND A REASONABLE DOUBT]

37. See Prosecutor v. Tolimir, Case No. IT-05-88/2-T, Judgement, ¶ 63 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 12, 2012), <http://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>.

38. See, e.g., Prosecutor v. Karemera, Case No. ICTR-98-44-T, Judgement and Sentence, ¶¶ 169-73 (Feb. 2, 2012); Prosecutor v. Bagosora, Case No. ICTR-98-41-T, Judgement and Sentence, ¶¶ 2029-31 (Dec. 18, 2008); Prosecutor v. Bagosora, Case No. ICTR-98-41-A, Judgement, ¶ 460 (Dec. 14, 2011).

39. For an overview of the evidence collection process and the kinds of evidence collected, see Rachel Louise Snyder, *Dispatches From Cambodia*, SLATE, (Feb. 19, 2004), http://www.slate.com/articles/news_and_politics/dispatches/features/2004/dispatches_from_cambodia/gatheringthe_evidence.html.

40. The work of these related entities was made possible by passage of the Cambodian Genocide Justice Act, which the U.S. Congress passed in 1994. See CRAIG ETCHESON, *AFTER THE KILLING FIELDS: LESSONS FROM THE CAMBODIAN GENOCIDE* 54 (2005).

documentary holdings, along with some 25,000 photographs and many other types of materials.”⁴¹

Other modern-day courts, such as the Special Tribunal for Lebanon (STL), have recognized the increasingly important role of digitized and digital information for successful prosecutions. The STL built on earlier tribunals’ use of remote sensing and satellite imagery to include data pulled from cell phones.⁴² Similarly, satellite imagery and social media posts have been critical to monitoring and uncovering recent atrocities in Syria and will likely be crucial to legal accountability.⁴³

Today, citizen-journalists, first responders, victims, bystanders, perpetrators, and others are increasingly capturing information about war crimes and human rights abuses—often on smartphones—that may be helpful as corroborating evidence or as leads to additional evidence. However, despite the abundant information available to support such cases, investigators and prosecutors must often secure the underlying metadata, and/or be able to document chain-of-custody, to ensure such images are admissible in court.

B. Brief History of the ICC

In July of 1998, just two years before the first camera would be embedded in a cellphone,⁴⁴ representatives of more than 160 countries convened in Rome, Italy to finalize a set of laws that would bring into being the world’s first permanent international criminal court.⁴⁵ Known as the Rome Statute, that treaty declared the ICC’s mandate as ensuring an end to impunity for the perpetrators of “the most serious crimes of international concern.”⁴⁶ State Parties, those countries that signed on to and ratified the Rome Statute, would be responsible for the court’s funding and governance.⁴⁷

41. *Id.* at 55–56.

42. *See, e.g.*, Prosecutor v. Ayesh, Case No. STL-11-01/I/PTJ, Indictment, ¶ 17 (June 10, 2011); KATHLEEN O’NEILL ET AL., BERNARD AND AUDRE RAPOPORT CTR. FOR HUMAN RIGHTS AND JUSTICE, NEW WINE IN OLD WINESKINS? NEW PROBLEMS IN THE USE OF ELECTRONIC EVIDENCE IN HUMAN RIGHTS INVESTIGATIONS AND PROSECUTIONS, 40–44 (2012), <http://www.crl.edu/sites/default/files/d6/attachments/pages/Rapoport-E-evidence-report.pdf>.

43. *See, e.g.*, BELLINGCAT, <https://www.bellingcat.com> (a consortium of investigative journalists led by Eliot Higgins that has been investigating potential war crimes in Syria).

44. *See* Simon Hill, *From J-Phone to Lumia 1020: A Complete History of the Camera Phone*, DIGITAL TRENDS (Aug. 11, 2013), <http://www.digitaltrends.com/mobile/camera-phone-history/>.

45. *See* Coalition for the International Criminal Court, *History of the ICC: Rome Conference*, <http://www.iccnw.org/?mod=rome>.

46. Rome Statute of the International Criminal Court, art. 1, U.N. Doc. A/CONF.183/9 (July 17, 1998) [*hereinafter* Rome Statute]. The Court’s first trial was that of Thomas Lubanga Dyilo, leader of the Lord’s Resistance Army, a rebel group that terrorized northern Uganda, South Sudan, the Central African Republic and the Democratic Republic of the Congo. The investigation commenced in 2004. The trial began in 2009 and culminated in March of 2012. Since its inception in 2002, the Court has commenced a number of investigations, most in Africa.

47. *See* American Non-Governmental Organization Coalition for the International Criminal Court, *The ICC: Assembly of State Parties*, <https://www.amicc.org/understanding-the-icc>.

The ICC's work was, from the outset, designed to complement national prosecutions.⁴⁸ As a result, the ICC acquired jurisdiction over cases only when states either could not or would not investigate if those cases otherwise satisfied the ICC's admissibility requirements.⁴⁹ Cases could come in to the court in any of three ways: 1) a referral by a state party; 2) a referral by the Security Council; or 3) an investigation initiated by the Prosecutor with authorization from the Pre-Trial Chamber.⁵⁰

On July 17, 1998, 120 nations voted to adopt the Rome Statute.⁵¹ Twenty-one countries abstained.⁵² Although the United States had originally supported the court's creation, when the vote finally came, the United States voted against adoption, protesting the omission of a Security Council-based right to control future cases.⁵³ While President Clinton signed the treaty at the end of 2000,⁵⁴ he failed to push for ratification—a ratification that has never come.

From the beginning, the United States was a fickle friend: "Washington supported a global war crimes court, but only as long as it could ensure that the United States and its allies stood beyond the reach of prosecutorial scrutiny as perpetrators of war crimes."⁵⁵ This was consistent with past practice, as explained by David Scheffer, then-war crimes ambassador for the United States and chief negotiator at the Rome conference: "[T]he United States has a tradition of leading other nations in global treaty-making endeavors to create a more law-abiding international community, only to seek exceptions to the new rules of the United States because of its constitutional heritage of defending individual rights, its military responsibilities worldwide requiring freedom to act in times of war . . . or just stark nativist insularity."⁵⁶ One U.S. Senator, in debating the possibility of joining the ICC, was far less ambivalent, and simply declared the court "a Monster."⁵⁷

Despite the United States' hostility towards the court, within a year the ICC's four primary units—the Presidency, the Judicial Division, the Registry, and the Office of the Prosecutor (OTP)—were functional, and the first judges, registrar,

48. See generally INT'L CRIMINAL CT. REGISTRY, UNDERSTANDING THE INTERNATIONAL CRIMINAL COURT (2015), <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf>.

49. Rome Statute, *supra* note 46, art. 17.

50. Rome Statute, *supra* note 46, arts. 13, 15.

51. See ERIC STOVER ET AL., HIDING IN PLAIN SIGHT: THE PURSUIT OF WAR CRIMINALS FROM NUREMBERG TO THE WAR ON TERROR, 284 (2016).

52. See *id.*

53. See G. BASS ET. AL. THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW (2000).

54. President Bill Clinton, Statement Authorizing the U.S. Signing of the Rome Statute of the International Criminal Court (Dec. 31, 2000), <http://www.iccnw.org/documents/USClintonSigning31Dec00.pdf>.

55. STOVER, *supra* note 51, at 283.

56. *Id.*

57. *Is a UN International Criminal Court in the US National Interest: Hearing Before the S. Subcomm. on Int'l Operations of the Comm. on Foreign Relations*, 105th Cong. 2 (1998) (statement of Sen. Grams, Chairman, S. Subcomm. on Int'l Operations).

and chief prosecutor had been sworn in.⁵⁸ By the court's one-year anniversary, the chief prosecutor had announced the conflict in the Democratic Republic of Congo as "the most urgent situation" his office would be following.⁵⁹

When investigating and prosecuting cases, the OTP is tasked with gathering and presenting both incriminating and exculpatory evidence.⁶⁰ As a court of last resort, the OTP takes on cases that countries are either unwilling or unable to prosecute themselves, which means that the OTP's cases are some of the most difficult in the world to investigate—especially when they focus on crimes in countries that are hostile to the ICC's efforts. Further complicating evidence collection, the OTP's budget is relatively tiny compared with its expansive mandate to investigate and prosecute serious crimes from all over the world.⁶¹ Thus, the office often has to depend on nongovernmental organizations and other external partners to provide lead and linkage evidence and other information relevant to its cases.⁶²

C. Evidentiary Challenges at the ICC

The court's early investigations were plagued with evidentiary inadequacies. First, the OTP initially relied on testimony from victims and other witnesses to the exclusion of most other types of evidence.⁶³ While powerful, witness testimony can also be incredibly dangerous for the testifier and his or her family, and witnesses can be tampered with, bullied into recanting, or discredited.⁶⁴ Thus,

58. See Int'l Criminal Ct., *How We are Organized*, <https://www.icc-cpi.int/about/how-the-court-works/Pages/default.aspx#organization>; American Bar Association, *Structure of the ICC*, AM. BAR ASS'N, ICC PROJECT, <https://www.aba-icc.org/about-the-icc/structure-of-the-icc/>. Importantly, the ICC is not a government actor. Instead, the ICC is an independent tribunal established to account for wrongs that are often committed by state officials and quasi-state actors against individuals who possess far less formal power than those who have harmed them. Unlike intelligence organizations, the court does not pursue information to prevent future crimes, but rather seeks information about crimes that have already taken place in order to hold perpetrators accountable.

59. Press Release, Int'l Criminal Ct., Communications Received by the Office of the Prosecutor of the ICC, PIDS.009.2003-EN (July 16, 2003) [*hereinafter* ICC Press Release].

60. Rome Statute, *supra* note 46, art. 54.

61. See, e.g., Niklas Jakobsson, *The 2016 ICC Budget—More Money, More Problems?*, JUSTICE HUB (Sept. 17, 2015), <https://justicehub.org/article/2016-icc-budget-more-money-more-problems> (explaining how the OTP has been "under-resourced").

62. See generally, e.g., ANDREA LAMPROS ET AL., HUMAN RIGHTS CTR., FIRST RESPONDERS: AN INTERNATIONAL WORKSHOP ON COLLECTING AND ANALYZING EVIDENCE OF INTERNATIONAL CRIMES (2014), https://www.law.berkeley.edu/files/HRC/First_Responders_final_with_cover4.pdf; INT'L CRIMINAL CT., OFFICE OF THE PROSECUTOR, STRATEGIC PLAN 2016-2018 (2015), https://www.icc-cpi.int/iccdocs/otp/070715-OTP_Strategic_Plan_2016-2018.pdf.

63. See generally STEPHEN CODY ET AL., HUMAN RIGHTS CTR., BEARING WITNESS AT THE INTERNATIONAL CRIMINAL COURT: AN INTERVIEW SURVEY OF 109 WITNESSES (2014), <https://www.law.berkeley.edu/wp-content/uploads/2015/04/Bearing-Witness-at-the-International-Criminal-Court-June-2014.pdf>; Keith Hiatt, *Open Source Evidence on Trial*, 125 YALE L.J. 323 (2016).

64. See STEPHEN CODY, ALEXA KOENIG, ROBIN MEJIA & ERIC STOVER, BEARING WITNESS AT THE INTERNATIONAL CRIMINAL COURT: AN INTERVIEW SURVEY OF 109 WITNESSES (June 2014), [https://www.law.berkeley.edu/files/HRC/Bearing-Witness_FINAL\(3\).pdf](https://www.law.berkeley.edu/files/HRC/Bearing-Witness_FINAL(3).pdf).

in addition to a lack of corroborating evidence, the court sometimes struggled to retain witnesses.⁶⁵ In reviewing the OTP's challenges in successfully prosecuting its earliest cases, researchers at the University of California, Berkeley School of Law found that the ICC's Pre-Trial Chamber had dismissed charges against four defendants out of fourteen "because the judges did not find 'sufficient evidence to establish substantial grounds to believe' that the accused committed the alleged crimes"⁶⁶ and that part of this could be explained by the OTP's lack of scientific evidence, which was defined as including digital evidence.⁶⁷ Judge Bruno Cotte, presiding judge in the *Katanga* case, explicitly advised the OTP to rely more heavily on non-testimonial evidence, explaining that "the court should be able to improve in this area in order to present evidence likely to reinforce the testimonies that we know are often fragile."⁶⁸ Similarly, in the *Sang* case, the trial chamber vacated the charges, in part, due to the fact that the prosecutor was unable to obtain any recordings from the radio show from which Sang allegedly incited violence.⁶⁹ The chamber specifically cautioned against the use of witness testimony alone with respect to recordings.⁷⁰

In their report, the UC Berkeley researchers concluded that the prosecutor's office could and should offset some of these potential vulnerabilities by corroborating witness testimony with a greater use of scientific, forensic, and digital evidence, the latter of which was warned to be a "coming storm."⁷¹ As noted by the researchers, "Improving the collection and analysis of digital information can enhance the Office of the Prosecutor's ability to secure quality evidence that results in convictions, as well as diversify evidence coming into the courtroom [to better] corroborate witness testimony or authenticate documentary or physical evidence."⁷²

65. See International Bar Association, *Witnesses Before the International Criminal Court* (July 2013), [file:///Users/maribeth.hunsinger/Downloads/ICC%20Witness%20report%20\(July%202013\).pdf](file:///Users/maribeth.hunsinger/Downloads/ICC%20Witness%20report%20(July%202013).pdf).

66. HRC, BEYOND A REASONABLE DOUBT, *supra* note 36, at 3.

67. See *id.* Digital evidence has been defined as "information transmitted or stored in a digital format that a party to a case may use at a proceeding;" Aida Ashouri et al., An Overview of the Use of Digital Evidence in International Criminal Courts 5 (2013) (unpublished manuscript) (on file with the International Human Rights Law Clinic at the University of California, Berkeley, School of Law) <https://www.law.berkeley.edu/wp-content/uploads/2015/04/Digital-Evidence-and-the-American-Servicemembers-Protection-Act-Salzburg-Working-Paper.pdf>.

68. Franck Petit, *Interview with ICC Judge Bruno Cotte, presiding judge at the second trial at the ICC*, RADIO NETHERLAND WORLDWIDE (May 2013), <http://www.rnw.nl/international-justice/article/judge-cotte-%E2%80%9Cwe-are-making-progress%E2%80%9D>.

69. See Prosecutor v. Ruto, Case No. CC-01/09-01/11, Public Redacted Version of Decision on Defense Applications for Judgments of Acquittal, ¶ 141 (Apr. 5, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_04384.pdf.

70. See *id.*

71. PEGGY O'DONNELL ET AL., BEYOND REASONABLE DOUBT, *supra* note 36, at 7; see generally ALEXA KOENIG ET AL., HUMAN RIGHTS CTR., DIGITAL FINGERPRINTS: USING ELECTRONIC EVIDENCE TO ADVANCE PROSECUTIONS AT THE INTERNATIONAL CRIMINAL COURT (Feb. 2014), <https://www.law.berkeley.edu/wp-content/uploads/2015/04/Digital-Fingerprints-.pdf>.

72. *Id.* at 3 (discussing the collapse of the ICC's case against President Uhuru Kenyatta of

Based in part on concerns with its dependency on witness testimony, in its 2016-2018 Strategic Plan, the OTP focused on the need to collect more diverse evidence than previously.⁷³ Specifically, the Plan “emphasized three essential shifts in strategy to improve the quality and efficiency of the Office’s work,” one of which was “adopting a new prosecutorial policy.” That new policy included “collecting diverse forms of evidence.”⁷⁴ The OTP nodded to the importance of collecting digital and digitized evidence by explaining that “[t]he high pace of technological evolution changes the sources of information, and the way evidence is obtained and presented in court.”⁷⁵ The emphasis on diverse evidence reflected an attempt to capture advice from outside partners as well as recent evidentiary successes. For example, in the *Jean-Pierre Bemba Gombo* case, the OTP successfully introduced ten audio recordings that provided critical background and other information, demonstrating that such evidence could be effective in court.⁷⁶

As this history suggests, the OTP has increasingly committed itself to diversifying its evidentiary base. While the OTP has begun to make significant strides towards collecting and utilizing digital evidence, including satellite imagery and social media, it has not yet fully mined these potential sources. There are a number of stumbling blocks; for one, longstanding tensions with the United States have been perceived as presenting a barrier to requesting assistance and information from U.S. corporations. With many of the companies that process and store digital information based in the United States, the ICC has also found its access to some of that information complicated by the existence of the American Servicemembers’ Protection Act (ASPA or the Act).⁷⁷

II. PART II

Although its passage reflects long-standing concerns about the potentially abusive power of an international criminal court, ASPA was further influenced by the atmosphere of fear and confusion immediately following the September 11, 2001 terrorist attacks on the United States.⁷⁸ On September 25, just months before

Kenya in 2014 due to a lack of linkage evidence, such as emails, phone records, and texts, underscores the critical importance of improving the court’s access to and ability to utilize digital evidence).

73. See ICC Press Release, *supra* note 59, at 5.

74. *Id.*

75. *Id.* at 6.

76. Prosecutor v. Bemba Gombo, ICC-01/05-01/08, Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute ¶ 9 (Oct. 8, 2012).

77. 2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States, Pub. L. No. 107-206, §§ 2001-2015, 116 Stat. 820, 899-909 (to be codified at 22 U.S.C. §§ 7421-7433) [hereinafter ASPA] (ASPA was passed as Title II of this legislation).

78. See, e.g., U.S.: ‘Hague Invasion Act’ Becomes Law, HUM. RTS. WATCH (Aug. 3, 2002), <https://www.hrw.org/news/2002/08/03/us-hague-invasion-act-becomes-law> [hereinafter *Hague*

the ICC commenced operations, North Carolina Senator Jesse Helms, then-ranking Republican on the Senate Foreign Relations Committee, took to the Senate floor to voice his concerns that American military personnel could someday be dragged in front of the ICC for actions taken in response to the attacks.⁷⁹ In the wake of recent events, Senator Helms said, America's military must be ready to protect "the miracle of America."⁸⁰ As it commenced an aggressive fight against terror, Helms argued, America's military needed to be free from the worry that it might become targeted by the court, forced to stand trial for its actions in war should it push (or cross) the bounds of legally-permissible interrogation and investigation tactics.⁸¹ After all, as Cofer Black, then-chief of the CIA's Counterterrorism Center, announced to the Senate Select Committee on Intelligence during those first raw days, U.S. civilian and military personnel were being directed to go all out in waging that war: "[A]ll I want to say is there was 'before' 9/11 and 'after' 9/11. After 9/11 the gloves come off."⁸²

Denouncing the ICC as a bogeyman and citing the potential for politicized prosecutions, Helms insisted that legal protections needed to be put in place to protect American soldiers, and quickly: "Mr. President, . . . I am among those of their fellow countrymen who insist that these men and women who are willing risk their lives to protect their country and fellow Americans should not have to face the persecution of the International Criminal Court—which ought to be called the International Kangaroo Court. . . . Mr. President, . . . [i]nstead of helping the United States go after real war criminals and terrorists, the International Criminal Court has the unbridled power to intimidate our military people and other citizens with bogus, politicized prosecutions."⁸³ He argued that "[i]f the signatories to the Rome Treaty proceed to establish a permanent International Criminal Court, we need an insurance policy against politicized prosecution of American soldiers and officials. It is easy to imagine the US or Israel becoming a target of a UN witch hunt, with officials or soldiers being sent before judges handpicked by undemocratic countries."⁸⁴

Holmes followed his list of concerns with a request for six "assurances" from the Secretary of State.⁸⁵ Those six assurances became the seeds of ASPA,⁸⁶ which

Invasion Act] (noting that ASPA was passed as part of the 2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States).

79. 47 Cong. Rec. 18026-28 (2001) (statement of Sen. Helms).

80. *Id.*

81. *See id.*

82. Joint Investigation into September 11th: Fifth Public Hearing, 'Unclassified Testimony of Cofer Black to the Joint House/Senate Intelligence Committee Hearing', Sept. 22, 2002 https://fas.org/irp/congress/2002_hr/092602black.html; *See also* MARK DANNER, *SPIRAL: TRAPPED IN THE FOREVER WAR* (2016).

83. 47 Cong. Rec. 18026-28 (2001) (statement of Sen. Helms).

84. 147 Cong. Rec. 7871 (2001) (statement of Sen. Helms).

85. 47 Cong. Rec. 18026-28 (2001) (statement of Sen. Helms).

86. *See* M. Tia Johnson, *The American Servicemembers' Protection Act: Protecting Whom?*, 43 VA. J. OF INT'L L. 405, 441-42 (2003).

was soon passed as a subset of the 2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States.⁸⁷ Just one month after the ICC began operations on July 1, 2002, having finally gained the requisite number of ratifications, President George W. Bush signed ASPA into law.⁸⁸

At the Act's heart are a number of sweeping prohibitions against cooperation between U.S. government entities, including U.S. courts, and the ICC. These include prohibitions against specific conduct such as responding to a request for cooperation from the ICC, transmittal of letters rogatory from the ICC, and using appropriated funds to assist the ICC.⁸⁹ The Act also includes a very broad general prohibition against U.S. support of the ICC.⁹⁰ In addition to prohibiting U.S. cooperation, the act also bars the ICC and its "agents" from engaging in investigative activities in the U.S.⁹¹

The sweeping nature of ASPA's prohibitions, along with a provision that empowers the U.S. military to invade the court's detention facilities should any American end up there, led to the legislation's unusual nickname:⁹² the Invade The Hague Act. As reported in the *Chicago Tribune*, two weeks before ASPA's passage, "the U.S. seems poised to enact what's known in the Netherlands as The Hague Invasion Act . . . which will allow Bush to use 'all means necessary' to liberate the citizens of the U.S.—and those of allies—from the clutches of the court."⁹³

One provision, which has since been repealed, went so far as to bar the United States government from providing military aid to the ICC's States Parties unless those States Parties entered into "Article 98" or "bilateral immunity" agreements.⁹⁴ Per those agreements, countries were forced to pledge to never turn over a United States national to the ICC in exchange for financial aid that would otherwise be granted.⁹⁵

87. ASPA, *supra* note 77; see *Hague Invasion Act*, *supra* note 88.

88. See, e.g., *Hague Invasion Act*, *supra* note 88.

89. ASPA, *supra* note 77, at §§ 7423(c), (d), (f).

90. *Id.* at § 7423(e).

91. *Id.* at § 7423(h).

92. See *Hague Invasion Act*, *supra* note 88.

93. Lauren Comiteau, *The International Criminal Court: In Dutch With America*, CHI. TRIB., (July 14, 2002), http://articles.chicagotribune.com/2002-07-14/news/0207140459_1_dutch-parliament-nato-international-criminal-court/.

94. See AMICC, *Bilateral Immunity Agreements*, <https://www.amicc.org/bilateral-immunity-agreements-1>; see generally HUMAN RIGHTS WATCH, *BILATERAL IMMUNITY AGREEMENTS* (2003), <https://www.hrw.org/legacy/campaigns/icc/docs/bilateralagreements.pdf>.

95. See generally AM. NON-GOVERNMENTAL ORGS. COAL. FOR THE INT'L. CRIMINAL CT., *PROPOSED TEXT OF ARTICLE 98 AGREEMENTS WITH THE UNITED STATES*, <http://www.amicc.org/docs/98template.pdf>. These agreements have been the source of controversy. One issue has been whether they violate international law and are therefore void because they directly contradict states' obligations under the Rome Statute when those agreements were signed after the country becomes a party to the court. They were also criticized on moral grounds. Kenneth Roth, Executive Director of Human Rights Watch, declared the practice of pressuring "small, vulnerable

To explore the potential for selective cooperation to help advance a range of United States foreign policy objectives, Congress adopted an amendment proposed by Senators Chris Dodd and Patrick Leahy. The last-minute addition to ASPA was designed to be a “catch-all exception authorizing the United States government to participate in a wide-range of international justice efforts.”⁹⁶ The relevant passage reads “Nothing in this title shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosevic, Osama bin Laden, other members of Al Queda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity.”⁹⁷

In the years that followed ASPA’s enactment, the initial hard line against the United States cooperating with the ICC—and with State Parties—proved too extreme, raising unanticipated barriers to an array of United States foreign policy objectives. As Condoleezza Rice, then-United States Secretary of State, explained in 2006, using ASPA to cut off military aid to foreign entities—for example to Latin American countries that refused to sign Article 98 agreements but were attempting to collaborate with the United States to limit terrorism and drug trafficking—was “sort of the same thing as shooting ourselves in the foot.”⁹⁸ As a result, the Dodd Amendment, and the flexibility it potentially offered, would prove both prescient and critical.

ASPA’s most problematic provisions for purposes of ICC-United States evidence sharing are contained in 22 U.S.C. § 7423 and fall under two categories. First, as stated above, there are a number of provisions prohibiting United States government entities, including courts, from cooperating with the ICC.⁹⁹ Broadest among them is a prohibition against providing support to the ICC, which reads: “Notwithstanding any other provision of law, no agency or entity of the United States Government or of any State or local government, including any court, may provide support to the International Criminal Court.”¹⁰⁰ Second, as described in greater detail below, ASPA also prohibits the ICC itself from conducting investigations in the United States.¹⁰¹

and often fragile democratic governments” into signing such agreements “unconscionable” and a “raw misuse of U.S. power,” simultaneously noting the harm such practices could do to United States objectives in seeking support for its fight against terrorism. *See* Letter from Kenneth Roth, Exec. Dir., Human Rights Watch, to Colin Powell, Sec’y of State, US Bully Tactics Against the International Criminal Court (June 30, 2003), <https://www.hrw.org/news/2003/06/30/letter-us-secretary-state-colin-powell-us-bully-tactics-against-international>. The issue became moot in 2008 with the conclusion of the funding sources to which the agreements had been tied, as the United States no longer has leverage to compel compliance.

96. AM. NON-GOVERNMENTAL ORGS. COAL. FOR THE INT’L. CRIMINAL CT., *supra* note 96, at 283.

97. ASPA, *supra* note 77, at § 7433.

98. S. R. Weisman, *U.S. Rethinks Its Cutoff of Military Aid to Latin American Nations*, N.Y. TIMES (Mar. 12, 2006), http://www.nytimes.com/2006/03/12/politics/12rice.html?_r=0.

99. ASPA, *supra* note 77, § 7423(b)-(g).

100. *Id.* at § (e).

101. *Id.* at § (h).

Despite the sweeping language of these two provisions, ASPA offers several exceptions to its ban on aiding investigations, which could prove helpful to the ICC. The first is a series of presidential waivers.¹⁰² The second is the Dodd Amendment, which qualifies ASPA's prohibition by allowing the United States government to provide assistance to international efforts to "bring to justice" certain named individuals,¹⁰³ as well as several broad categories of potential suspects, including "foreign nationals accused of genocide, war crimes or crimes against humanity."¹⁰⁴

On its face, this provision seems to create an exception to § 7423, permitting cooperation so long as investigations are limited to facilitating the prosecution of "foreign nationals" (and not United States citizens) who are suspected of having committed the three listed atrocity crimes.¹⁰⁵ As discussed below, this reading of the Dodd Amendment is supported by the Amendment's plain meaning, its legislative history, and the views of both Congress and the Executive Branch.

A. Plain Meaning

First, a text-based analysis of the Dodd Amendment strongly suggests that investigations of foreign nationals are exempt from ASPA. Thus, most (and probably all) of the ICC's cases—none of which have focused on United States citizens—would fall outside ASPA's ambit.¹⁰⁶ The plain language of the Dodd Amendment states that nothing in ASPA, including § 7423, shall prevent the United States from "rendering assistance to international efforts to bring to justice . . . foreign nationals accused of genocide, war crimes or crimes against humanity."¹⁰⁷ Assuming that the phrase "international efforts to bring to justice" includes the ICC, this language strongly suggests that the cooperation of the American government is permissible so long as the accused is a foreign national charged with committing war crimes, crimes against humanity, or genocide.

The Dodd Amendment, however, does not mention the ICC, which creates some ambiguity as to whether the ICC is included within the exception. However, the Dodd Amendment does refer to "international efforts" to bring to justice to "foreign nationals accused of genocide, war crimes or crimes against humanity," all of which are crimes that fall within the ICC's jurisdiction.

102. See 22 U.S.C. § 7422(a)–(c) (explaining that the President can waive the provisions of § 7423 on a case-by-case basis). The President can similarly waive § 7425, which prohibits the transfer of classified national security and law enforcement information to the ICC. *Id.* As far as can be determined, no § 7423 or § 7425 waivers have yet been issued. *Id.*

103. 22 U.S.C. § 7433.

104. ASPA, *supra* note 77, § 7433.

105. Notably, the crime of aggression—over which the ICC will likely assume jurisdiction in 2017—is not listed, and therefore does not fall within the Dodd exception.

106. For an overview of the ICC's current cases, including a complete list of defendants, see *Cases*, INT'L CRIMINAL CT., <https://www.icc-cpi.int/cases>.

107. ASPA, *supra* note 77, § 7433.

B. Legislative History

Second, the Amendment's legislative history also suggests that the Dodd Amendment extends to the ICC. Although the ICC is not mentioned in the Dodd Amendment, Senator Dodd himself noted on the record that, "[m]y amendment merely says that despite whatever else we have said when it comes to prosecuting [foreign nationals], we would participate and help [the ICC], even though we are not a signatory or a participant in the International Criminal Court."¹⁰⁸

Senator Leahy, who helped draft the Dodd Amendment, has also explained that the Amendment was meant to cover the ICC. Noting his involvement in both the drafting and original co-sponsorship of the Amendment, Leahy argued that he "specifically added the phrase 'and other foreign nationals accused of genocide, war crimes or crimes against humanity' to ensure that this section would apply to the International Criminal Court" which "has jurisdiction over these three crimes."¹⁰⁹ Leahy went on to explain that:

the importance of this phrase was not lost on the House, and opponents of the Dodd-Warner amendment tried repeatedly to nullify or remove it. It was even reported to me that, at the eleventh hour, House staff members sought, unsuccessfully, to insert the word 'other' before the phrase 'international efforts to bring to justice', in an attempt to prevent the Dodd-Warner amendment from applying to the ICC.¹¹⁰

Leahy has further emphasized that no other provision in that title prevents the United States "from cooperating with the ICC in cases involving foreign nationals." He argued that "[n]o one disputes the fact that Congress has serious concerns about Americans coming before the ICC, which is the reason that ASPA was passed. . . . However, through the Dodd-Warner amendment, Congress sets a different standard with respect to non-Americans."¹¹¹ As Leahy has explained, the Amendment "makes unequivocally clear that no provision in ASPA prevents the US from cooperating with the ICC in cases involving foreign nations."¹¹² Instead, "[t]he Dodd-Warner amendment simply ensures that the United States can assist the ICC, or other international efforts, to try foreign nationals accused of war crimes, genocide, or crimes against humanity. It is not difficult to think of a number of instances when it would be in the interest of the United States to support such efforts."¹¹³

Leahy has further outlined that in passing the amendment, "Congress decided that it did not want to tie the President's hands if he determined that it makes sense for the United States to cooperate with any international body, including the ICC,

108. *Id.*

109. 147 CONG. REC. S7859 (daily ed. Aug. 1, 2002) (statement of Sen. Leahy).

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

in prosecuting foreign nationals accused of genocide, war crimes and crimes against humanity.”¹¹⁴

A few legislators, however, have taken the position that the Dodd Amendment was not intended to apply to the ICC. For example, Representative Henry Hyde has argued that the Amendment applies only to non-ICC international efforts to prosecute foreign nationals accused of genocide, war crimes, or crimes against humanity. He has reasoned that if helping the ICC had been intended, Congress would have simply struck the relevant provisions from ASPA.¹¹⁵

However, Hyde’s argument that the Dodd Amendment applies only to non-ICC international investigations makes the Dodd Amendment superfluous. If Hyde is correct, the Amendment would merely reiterate that ASPA does not apply to non-ICC international efforts. Since statutory provisions are supposed to be interpreted so as not to render any provision superfluous, this would not be an appropriate reading.¹¹⁶ Dodd and Leahy’s interpretation avoids this problem.

Finally, when considering legislative history, courts will more heavily weigh the statements of a bill’s sponsor than the statements of its opponents.¹¹⁷ This further suggests that Dodd and Leahy’s interpretation should trump.

C. Congressional Action

In addition to the plain language and legislative history, later actions by Congress suggest the Dodd Amendment is a general exception to the prohibitions set out under § 7423 and thus, that it permits ICC investigations of non-nationals.

After ASPA was enacted, Congress clarified that ASPA’s prohibitions on United States and ICC cooperation are not applicable to cases committed by foreign nationals. Specifically, in 2012, Congress enacted the Department of State Rewards Program Update and Technical Corrections Act (the Rewards Act), which allows the Secretary of State to authorize the payment of rewards to any person who provides the United States government with information that could lead to “the arrest or conviction in any country, or the transfer to or conviction by an international criminal tribunal (including a hybrid or mixed tribunal), of any foreign national accused of war crimes, crimes against humanity, or genocide, as defined under the statute of such tribunal.”¹¹⁸

114. *Id.*

115. 147 Cong. Rec. H5220 (daily ed. Jul. 23, 2002) (statement of Rep. Hyde).

116. *See Corley v. United States*, 556 U.S. 303, 314 (2009).

117. *See, e.g., National Woodwork Mfrs. Ass’n v. Nat’l Labor Relations Bd.*, 386 U.S. 612, 640 (1967); *Shell Oil Co. v. Iowa Dep’t of Revenue*, 488 U.S. 19 (1988).

118. *See* Department of State Rewards Program Update and Technical Corrections Act of 2012, Pub. L. No. 112-283 (codified as 22 U.S.C. § 2708 (2013)) (stating “(b) the Secretary may pay a reward to any individual who furnishes information leading to – (10) the arrest or conviction in any country, or the transfer to or conviction by an international criminal tribunal (including a hybrid or mixed tribunal), of any foreign national accused of war crimes, crimes against humanity, or genocide, as defined under the statute of such tribunal.”).

Thus, the Rewards Act created financial incentives for individuals to assist in international cases related to the arrest or conviction of foreign nationals for any of the three stated international crimes.¹¹⁹ This most likely includes ICC cases. Congress enacted the Rewards Act while aware of ASPA and the Department of State's intent to use the Rewards Act to encourage and otherwise facilitate the capture of ICC defendants. The Senate Committee on Foreign Relations considered the propriety of cooperating with the ICC and explicitly found that there is no conflict with ASPA where a case involves crimes committed by a foreign national, even when the case is brought by the ICC:

The committee notes that, by authorizing rewards in connection with proceedings of international criminal tribunals, S. 2318 could provide authority for rewards with respect to foreign nationals indicted by the International Criminal Court (ICC). The committee wishes to stress that S. 2318 limits the rewards authority to cases of crimes committed by "foreign nationals" and that section 5 of the legislation expressly states that nothing in this Act or amendments made by the Act shall be construed as authorizing the use of activity precluded under the American Servicemembers' Protection Act of 2002.¹²⁰

Thus, Congress seems to read the Dodd Amendment as permitting cooperation where investigations involve crimes committed by foreign nationals, borrowing language from the Amendment, including reference to "war crimes, crimes against humanity, or genocide" and "foreign nationals."

D. Executive Branch Views

Various bodies within the U.S. government's executive branch have also read ASPA as permitting cooperation with the ICC in cases involving foreign nationals. For example, since 2009, the Department of State has actively cooperated with the ICC. The scope of cooperation has been broad, and has included the Department of State adopting explicit policies aimed at supporting the ICC, meeting with ICC prosecutors, and advocating for the prosecution of war criminals at the Court.¹²¹ Indeed, the White House's National Security Strategy of 2010 states:

119. See Michael A. Newton, *Introductory Note to the Department of State Rewards Program Update and Technical Corrections Act of 2012*, 52 I.L.M. 861, 863 (2013). The act's previous iteration provided for rewards to be issued for the ICTY, ICTR and the Special Court for Sierra Leone.

120. S. REP. NO. 112-232, at 5 (2002) (emphasis added).

121. See, e.g., WHITE HOUSE, NATIONAL SECURITY STRATEGY (2010), <http://nssarchive.us/NSSR/2010.pdf>.

Although the United States is not at present a party to the Rome Statute of the International Criminal Court (ICC), and will always protect U.S. personnel, we are engaging with State Parties to the Rome Statute on issues of concern *and are supporting the ICC's prosecution of those cases that advance U.S. interests and values, consistent with the requirements of U.S. law.*¹²²

This position, with its reference to consistency with U.S. law, suggests that the government has examined ASPA and determined that—in certain cases—supporting the ICC does not contravene the statute.

In practice, the Department of State has publicly and positively engaged with the ICC. For example, U.S. Ambassador-at-Large for War Crimes, Stephen Rapp, began attending the annual Assembly of State Parties (ASP) meeting as an observer in 2009.¹²³ In 2010, statements by Harold Koh, then Legal Advisor at the Department of State, and Ambassador Rapp, suggested the United States had adopted a policy of “principled engagement” with the ICC and that the United States would continue a “strategy of engagement” with the court.¹²⁴

Ambassador Rapp has also suggested that the permitted level of engagement with the ICC under U.S. law is fairly broad:

We have been meeting with the ICC Prosecutor and Registrar and are working to furnish the greatest possible assistance that is permitted under our law for ICC investigations and prosecutions. *This can include information sharing and help with witness protection and witness relocation. Also, we are providing diplomatic and political support for the arrest and transfer to the The Hague of all ICC fugitives.*¹²⁵

Additionally, the Department of Justice (DOJ) has reportedly provided support for the argument that the Dodd Amendment permits cooperation with the ICC. A DOJ memo, which is not publicly available but has been referenced in publicly-available documents, claims that based on the DOJ’s analysis, “diplomatic support or ‘informational support’ for ‘particular investigations or prosecutions’ by the ICC would not violate existing laws.”¹²⁶ This presumably includes ASPA.

Since 2009, cooperation and engagement between the United States and the ICC has been extensive. This engagement has included direct meetings with ICC

122. See *id.* (emphasis added).

123. Bruce Zagaris, *International Enforcement Law Trends for 2010 and Beyond: Can the Cops Keep Up with the Criminals?* 34 SUFFOLK TRANSNAT’L L. REV. 1, 64 (2011).

124. *U.S. Engagement with the ICC and the Outcome of the Recently Concluded Review Conference*, U.S. STATE DEP’T (2010), https://2009-2017.state.gov/j/gcj/us_releases/remarks/2010/143178.htm.

125. Geraldine Coughlan, *U.S. Supports International Justice*, INT’L JUST. TRIB., (Mar. 30, 2011), <https://www.justicetribune.com/articles/us-supports-international-justice> (emphasis added).

126. ALEXIS ARIEFF ET. AL., CONG. RESEARCH SERV., INTERNATIONAL CRIMINAL COURT CASES IN AFRICA: STATUS AND POLICY ISSUES (2011), <https://www.fas.org/sgp/crs/row/RL34665.pdf>.

prosecutors,¹²⁷ the offering of support specific to prosecutions already underway,¹²⁸ publicly acknowledging and encouraging the work of the ICC,¹²⁹ voting in favor of and co-sponsoring a resolution at the Security Council to refer the Libya situation to the ICC,¹³⁰ supporting a resolution to refer Syria to the ICC,¹³¹ and adopting a policy of opposing invitations and travel support to individuals indicted by the ICC.¹³²

The White House, the Department of State and the Department of Justice have all conveyed, both expressly and through their actions, that ASPA does not prevent cooperation with the ICC where such cooperation would further U.S. interests and where the subject of investigation is a foreign national. Although at the time of writing it is not yet clear what the relationship between the Trump administration and the ICC will be like, the analysis should not change given the plain language of the statute, the legislative history, and subsequent congressional actions.

E. ASPA As Applied to ICC Investigations: Section 7422(h)

As previously mentioned, in addition to its prohibitions against the U.S. government supporting and cooperating with the ICC, ASPA also prohibits the ICC from conducting investigations in the United States. That provision reads: “No agent of the International Criminal Court may conduct, in the United States or any territory subject to the jurisdiction of the United States, any investigative activity relating to a preliminary inquiry, investigation, prosecution, or other proceeding at the International Criminal Court.”¹³³ Because the language of the Dodd Amendment specifically addresses U.S. actions (“[n]othing in this subchapter shall prohibit the United States from rendering assistance to international efforts to bring to justice. . . foreign nationals. . .”), its application to the §7422(h) prohibition against the ICC conducting investigations in the United States is less clear.

127. *Id.*

128. See, e.g., U.S. Mission to the United Nations, *Remarks by Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, at a UN Security Council Debate on Peace & Justice, with a Special Focus on the Role of the International Criminal Court*, U.S. DEP’T OF STATE (2012), <https://2009-2017-usun.state.gov/remarks/5542>.

129. See Press Release, White House, Statement by President Obama on the International Criminal Court (Dec. 15, 2010), <https://www.whitehouse.gov/the-press-office/2010/12/15/statement-president-obama-international-criminal-court-announcement>.

130. See Barack Obama, David Cameron, Nicolas Sarkozy, *Libya’s Pathway to Peace*, N.Y. TIMES (Apr. 14, 2011), http://www.nytimes.com/2011/04/15/opinion/15iht-edlibya15.html?_r=0.

131. See Press Release, U.N. Sec. Council, Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution (SC/11407) (May 22, 2014), <https://www.un.org/press/en/2014/sc11407.doc.htm>.

132. See *Remarks by Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, at a UN Security Council Debate on Peace & Justice, with a Special Focus on the Role of the International Criminal Court*, U.S. MISSION TO THE U.N. (Oct. 17, 2012), <https://2009-2017-usun.state.gov/remarks/5542>.

133. ASPA, *supra* note 77, at § 7423(h).

While the unambiguous language of the Dodd Amendment likely trumps any provision within ASPA (“[n]othing in this subchapter”), including §7422(h), because §7422(h) addresses assistance by the United States, the Dodd Amendment can only be read to apply to subsection (h) with respect to ICC investigative activities conducted in the United States that involve the assistance of any of the branches of the United States government. But it is unclear how the ICC could legally conduct *any* investigative activity in the United States without some form of assistance. Even within the context of a treaty-based mutual legal assistance mechanism, individuals cannot operate in the United States at the direction or control of a foreign government or official without providing prior notification to the United States government.¹³⁴ Any investigative activity in the United States by the ICC implies some form of assistance by the United States and therefore brings §7422(h) within the purview of the Dodd Amendment.

F. Summary

Ultimately, the plain meaning of the Dodd Amendment, its legislative history, and the views of both Congress and the President all clarify that the amendment was drafted to be a general exception to the prohibitions set forth in ASPA, in cases involving foreign nationals charged with genocide, crimes against humanity or war crimes. Although much has been written about ASPA and the anti-ICC policies of past U.S. administrations and Congress, very little literature squarely addresses ASPA’s scope. However, where the issue *is* addressed by other legal scholarship, authors seem to view ASPA as permitting cooperation between the United States and the ICC when the subject of the prosecution is a foreign national.¹³⁵ Ultimately, the Dodd Amendment “ensures that U.S. cooperation with the ICC is possible when (1) the ICC has jurisdiction over an international crime, (2) a foreign national (as opposed to U.S. national) is being investigated or prosecuted, and (3) there is no U.S. objection to that jurisdiction (such as when U.S. nationals—or, potentially, U.S. allies—could be prosecuted).”¹³⁶

III.

PART III

In order to obtain vital evidence from companies located within the United States, international tribunals—including the ICC—have a number of

134. See 18 U.S.C. § 951; 28 C.F.R. § 73.3.

135. See, e.g., Newton, *supra* note 119, at 863; Stephen E. Smith, *Definitely Maybe: The Outlook for U.S. Relations with the International Criminal Court During the Obama Administration*, 22 FLA. J. INT’L L. 155, 187 (2010); Jonathan P. Tomes and Michael I. Spak, *Practical Problems with Modifying the Military Justice System to Better Handle Sexual Assault Cases*, 29 WIS. J.L. GENDER AND SOC. 377, 408 (2014).

136. See Aida Ashouri & Caleb Bowers, Digital Evidence and the American Servicemembers’ Protection Act 7 (Oct. 2013) (unpublished manuscript), <https://www.law.berkeley.edu/wp-content/uploads/2015/04/Digital-Evidence-and-the-American-Servicemembers-Protection-Act-Salzburg-Working-Paper.pdf>

mechanisms available to them. There are five approaches that could be utilized by tribunal personnel to secure information from U.S. service providers: (1) a direct request to those U.S. service providers (a voluntary, tribunal-to-corporation approach); (2) a direct request for judicial assistance from U.S. District Courts (a court-to-court approach); (3) a request for judicial assistance through diplomatic channels (a court-to-country based approach); (4) a mutual legal assistance request (a country-to-country-based approach); and (5) a joint investigation (an investigator-to-investigator based approach). Each is discussed below. Where relevant, ICC specific barriers such as ASPA will be addressed.

A. *Requests to U.S. Service Providers*

In the gathering of vital evidence, international tribunals can make direct requests to the companies from which they hope to acquire desired information.

With respect to electronically stored data, the first key legal consideration is the scope of the Electronic Communications Privacy Act (ECPA),¹³⁷ which protects wire, oral, and electronic communications from disclosure, including when such communications are stored electronically. Barring some exceptions, ECPA generally prohibits service providers from voluntarily disclosing the contents of a customer's communications held in electronic storage to "any person or entity,"¹³⁸ which would include international courts. The term "content" is defined to include "any information concerning the substance, purport, or meaning" of the communication.¹³⁹ ECPA also includes a more limited prohibition against the voluntary disclosure of customer non-content information, such as metadata, to "any government entity."¹⁴⁰ Interestingly, the definition of a government entity excludes international tribunals as it is limited to "a department or agency of the United States or any [U.S.] State or political subdivision thereof."¹⁴¹ Consequently, although a service provider cannot voluntarily disclose content data to international tribunals, they are permitted to disclose metadata.¹⁴²

The key barrier international criminal tribunals face in their attempts to obtain metadata via corporate requests is internet service providers' internal policies. As explained by Kate Westmoreland of the Stanford Center for Internet and Society, how companies respond to such requests—at least as made by

¹³⁷ Electronic Communications Privacy Act of 1986 (ECPA), Pub. L. No. 99-508, 100 Stat. 1848 (1986) (codified as amended in scattered sections of 18 U.S.C.).

¹³⁸ 18 U.S.C. § 2702(a)(1).

¹³⁹ *Id.* at § 2510(8).

¹⁴⁰ *Id.* at § 2702(a)(3), (c)(6).

¹⁴¹ *Id.* at § 2711(4).

¹⁴² Although the terms "metadata" and "content" are used in this paper in the context of ECPA, it is important to note that ECPA does not have this distinction. Rather, it differentiates between subscriber information, transactional information, and content. For more information on these classifications, see The U.S. Internet Service Provider Association, *Electronic Evidence Compliance-A Guide for Internet Service Providers*, 18 BERKELEY TECH. L.J. 945, 949 (2003).

foreign governments—“is largely a matter of company discretion.”¹⁴³ While international tribunals are not foreign governments, their judicial function is analogous to a foreign country’s law enforcement authorities. Therefore, their requests should fall within the penumbra of a corporation’s internal policies, which would be used to manage requests from foreign governments. The degree to which service providers are willing to disclose information to foreign governments varies across companies.¹⁴⁴

Westmoreland also notes that “big Internet companies have committed to five principles for...access to their information.”¹⁴⁵ While the fifth and most relevant principle for purposes of this Article focuses on each company having a “‘robust, principled and transparent framework to govern lawful requests for data across jurisdictions’ [it] does not provide any detail about how this should be achieved or what companies are doing in the meantime.”¹⁴⁶ Ultimately, there is significant variability across companies with regard to their response to lawful requests for data. Per Westmoreland, rejections can result from requests that are overly broad, include information that does not exist or that is no longer held by the company, exceed legal parameters, or raise policy concerns.¹⁴⁷ Additional factors that impact company responses include company values and priorities, and scale (the larger the company, the greater the pressure to comply).¹⁴⁸

Noting that “there is [currently] no efficient, effective, formal way for foreign governments to access user data from U.S. internet companies,” Westmoreland explains that this has resulted in an increase in governments

¹⁴³ Kate Westmoreland, *Are Some Companies Yes Men When Foreign Governments Ask for User Data?*, STANFORD CTR. FOR INTERNET AND SOC’Y (May 30, 2014), <http://cyberlaw.stanford.edu/blog/2014/05/are-some-companies-yes-men-when-foreign-governments-ask-user-data>.

¹⁴⁴ Kate Westmoreland & Gail Kent, *International Law Enforcement Access to User Data: A Survival Guide and Call for Action*, 13 C.J.L.T. 235, 239–240 (2015) (explaining “Different companies adopt different policies on this issue. For example, Google acknowledges that ‘[o]n a voluntary basis, we may provide user data in response to valid legal process from non-U.S. government agencies, if those requests are consistent with international norms, U.S. law, Google’s policies and the law of the requesting country.’ LinkedIn, Twitter, and Facebook take a similar approach. Dropbox previously required that all data requests go through the US judicial system, but changed their policy in 2013 to allow voluntary disclosure. LinkedIn states that they ‘generally’ require that requests come through MLA or a letter rogatory. Twitter also states that they respond to requests that properly come through MLA or letter rogatory.”); *see also* Nate Cardozo, *Who Has Your Back? The Electronic Frontier Foundation’s Seventh Annual Report on Online Service Providers’ Privacy and Transparency Practices Regarding Government Access to User Data* (Jul. 2017), https://www EFF.org/files/2017/08/08/whohasyourback_2017.pdf.

¹⁴⁵ Westmoreland, *supra* note 143.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

reaching out directly to U.S. internet companies to create ad hoc arrangements, with varying results.¹⁴⁹

With respect to the ICC specifically, while ASPA limits the U.S. government's cooperation with the court, "there is nothing in [ASPA's] statutory language to suggest that U.S. service providers that hold digital evidence are bound by its restrictions."¹⁵⁰ While service providers may hesitate to cooperate for "practical, political or other reasons,"¹⁵¹ ASPA is not a barrier.

Although direct corporate requests are an available option for tribunals seeking evidence held by service providers in the United States, this option is limited in three significant ways. First, this option is fairly unreliable and dependent on international tribunals developing individualized relationships with each of the corporations from which they might seek information and potentially raises issues of arbitrariness, as well as lack of transparency and consistency in decision-making, which could have serious privacy ramifications. Second, this option is limited to requests for metadata, as content data cannot be voluntarily disclosed by service providers. Metadata, however, is extremely important as a means of authenticating evidence because it can provide critical information regarding people (such as the potential creator of the data), places (through geo-tagging), and when something occurred (through time and date stamping). It can also potentially corroborate other evidence. Third, and finally, while arguably analogous to that of foreign law enforcement requests and therefore potentially worth exploring, any direct request from an international tribunal such as the ICC would be one of first impression and thus it's difficult to predict how companies would respond.¹⁵²

¹⁴⁹ *Id.*

¹⁵⁰ Aida Ashouri & Caleb Bowers, *2013 Salzburg Workshop on Cyberinvestigations: Digital Evidence and the American Servicemembers' Protection Act*, 11 DIGITAL EVIDENCE & ELECTRONIC SIGNATURE L. REV. 107, 109 (2014).

¹⁵¹ *Id.* at 110.

¹⁵² Berkeley Law Human Rights Workshop, *War Crimes: Defending Human Rights Against Gross Abuses of State Power* (2014) (unpublished manuscript) (on file with the authors). On March 3, 2014, a group of internet service providers and human rights organizations met with OTP investigators and prosecutors in San Francisco, California, to take part in the War Crimes Workshop on Defending Human Rights Against Gross Abuses of State Power and Crimes Against Humanity. Acknowledging the ICC's unique challenges, which many of the companies were learning about for the first time, tech company representatives provided human rights organizations and ICC representatives with a basic overview of the framework under which they operate. Outside of a narrow set of circumstances, internet service providers do not voluntarily provide user data to law enforcement. However, they explained there are several other ways to secure or otherwise preserve information including emergency exceptions; compliance with corporate policies to facilitate take down and preservation requests; using public search tools; partnering with local law enforcement; approaching non-government or media organizations that might have independently acquired the information; and approaching end users directly.

B. Requests to U.S. District Courts

A second option for accessing vital evidence is for international tribunals to make a direct request for judicial assistance or a request for information via a letter rogatory—a formal request from one court to another for assistance in evidence gathering. Section 1782 of Title 28 of the U.S. Code —“Assistance to foreign and international tribunals and to litigants before such tribunals” —permits foreign tribunals to transmit a letter rogatory directly to the district court in which the person from whom they seek testimony or other evidence can be found.¹⁵³ Section 1782 empowers such district courts to order individuals to give testimony or statements, or to produce documents “for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation.”¹⁵⁴ Such court orders would be “pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person.”¹⁵⁵

The statute’s “twin aims” are “providing efficient assistance to participants in international litigation and encouraging foreign countries, by example, to provide similar assistance to our courts.”¹⁵⁶ As argued below, the phrase “foreign or international tribunal” almost certainly qualifies the ICC or other ad hoc international tribunals to use these tools under 28 U.S.C. §1782.

The U.S. Supreme Court case *Intel Corp. v. Advanced Micro Devices, Inc.*, in which the petitioner applied to a U.S. District Court under 28 U.S.C. §1782 for an order requiring a U.S. tech company to produce documents relevant to an antitrust complaint in a tribunal at the European Commission, established that the statute may be used by any “interested person” and that discovery can take place even before foreign courts initiate formal proceedings. These proceedings do not have to be “imminent” so long as they are “within reasonable contemplation.”¹⁵⁷ Thus, even preliminary investigations would likely qualify.

However, the statute exempts “privileged material”: “a person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.”¹⁵⁸ Thus, so long as tech companies do not have a legally-applicable privilege that they choose to exercise, that provision should not bar proceeding with providing information to the tribunal.

Notably, district courts have broad discretion when deciding whether to order an action based on a letter rogatory.¹⁵⁹ The statute “leaves the issuance of an appropriate order to the discretion of the court which, in proper cases, may refuse

¹⁵³ See generally 28 U.S.C. § 1782.

¹⁵⁴ 28 U.S.C § 1782(a).

¹⁵⁵ *Id.*

¹⁵⁶ *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 252 (2004).

¹⁵⁷ *Id.* at 259.

¹⁵⁸ *Id.* at 260.

¹⁵⁹ *United Kingdom v. United States*, 238 F.3d 1312, 1319 (2001).

to issue an order or may impose conditions it deems desirable.”¹⁶⁰ Higher courts may only overturn a district court’s decision if that lower court had abused its discretion,¹⁶¹ a standard that has been deemed identical to district courts’ ordinary discovery rulings.¹⁶²

Factors that district courts may consider when deciding whether to grant the foreign court’s request for information include the nature of the foreign tribunal, the proceedings’ character, and the receptiveness of the international tribunal to U.S. federal-court judicial assistance.¹⁶³ Since at the time of writing the ICC has never issued a letter rogatory to a district court, any forthcoming ICC case would be one of first impression. However, there is reason to think that these factors would weigh in the foreign court’s favor.

Because the Supreme Court has defined a tribunal broadly—encompassing any “first instance decisionmaker”¹⁶⁴—most international tribunals, including the ICC, should be able to use this statute. In *Intel Corp.*, the petitioner filed a request under 28 U.S.C. §1782 at a U.S. District Court requesting documents relevant to an antitrust complaint at the Directorate-General for Competition of the Commission of the European Communities (European Commission).¹⁶⁵ In their decision, the Supreme Court explained that the term tribunal “includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal and administrative courts.”¹⁶⁶ Ultimately, the Court held that the European Commission qualified as a tribunal under 28 U.S.C. §1782. Because international tribunals, including the ICC, are as well established as the European Commission, and are globally-recognized as *bona fide* courts, the ICC will likely be considered a tribunal for purposes of §1782 requests.

The type of electronic evidence that a district court can compel via 28 U.S.C. § 1782 is limited by ECPA. Generally, both ECPA and subsequent case law work to prevent any government entity from compelling the production of content data, absent a search warrant or an emergency.¹⁶⁷ Therefore, as Section 1782 does not authorize district courts to issue warrants in connection with a request by an

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ See *Intel Corp.*, *supra* note 156, at 264.

¹⁶⁴ *Id.* at 243.

¹⁶⁵ *Id.* at 246.

¹⁶⁶ *Id.* at 258.

¹⁶⁷ ECPA, which was enacted in the 1980s, did not impose this requirement to all content data as it drew an antiquated distinction between two types of storage — electronic storage and remote computing services — and treated content data differently with respect to warrant requirements based on the type of storage and the length of time it is in storage. Subsequent case law has clarified that the Fourth Amendment requires the use of a warrant for content information regardless of where such content is stored. See *Westmoreland & Kent*, *supra* note 137, at 238–39.

international tribunal, content data cannot be obtained through this mechanism. However, as stated above, under §2702(a)(3), ECPA allows service providers to disclose metadata to entities so long as they are not an “agency or department of the United States.”¹⁶⁸ Therefore, if a court chooses to exercise its discretion to order the production of metadata for use by an international tribunal via 18 U.S.C. §1782, ECPA would not be a barrier.

In addition, U.S. District Courts have in fact granted requests under §1782 to compel metadata from tech companies in the United States for use in foreign tribunals.¹⁶⁹

Therefore, as long as the ICC’s request for information via a letter rogatory concerns the investigation of a foreign national for war crimes, crimes against humanity, and/or genocide, and the case is otherwise justiciable, ASPA should not be a barrier. Thus, assuming the proceedings are legally sound, there should be solid grounds for a district court to decide in favor of the ICC’s request.

In conclusion, the main advantage of the direct court-to-court mechanism is that it allows for tribunals to avoid having to rely on the timely cooperation of the United States’ executive branch. The main disadvantage, however, is that this option does not allow for access to content data, and is also potentially complicated in practice: it requires the request to be made in the district court in which the person or the evidence is located.

C. Requests Through U.S. Diplomatic Channels

A letter rogatory or request for assistance can also proceed through diplomatic channels. Established by Congress in 28 U.S.C. §1781, this mechanism gives the Department of State the power to receive a letter rogatory and to transmit it to the U.S. tribunal to which it is addressed.¹⁷⁰ The Department of State executes requests for judicial assistance, including letters rogatory, based on treaty obligations or “international comity and courtesy.”¹⁷¹ Such letters

¹⁶⁸ 18 U.S.C. §2702(a)(3), (c)(6); 18 U.S.C. §2711(4).

¹⁶⁹ See e.g., *London v. Does 1-4*, 279 Fed. App’x. 513 (9th Cir. 2008) (affirming a District Court decision to grant a §1782 request to subpoena Yahoo! to produce metadata on e-mail accounts and usernames, including IP addresses, for use in a foreign divorce case); *In re Request for Subpoena by Ryanair Ltd.*, 2014 WL 5088204 (N.D. Cal. Oct. 9, 2014) (granting a §1782 request to subpoena Google and Twitter to produce metadata for use in legal proceeding in Ireland); *In re Application for Appointment of a Comm’r re Request for Judicial Assistance for the Issuance of Subpoena Pursuant to 28 U.S.C. 1782*, 2011 WL 2747302 (N.D. Cal. Jul. 13, 2011) (granting a §1782 request to subpoena Wordpress.com to produce metadata, including user names and addresses, for use in a Spanish legal proceeding); *Ex parte Application of Am. Petroleum Inst. for Order to Obtain Discovery for Use in Foreign Proceedings*, 2011 WL 10621207 (N.D. Cal. Apr. 7, 2011) (granting a §1782 application requiring Google to produce documents, including search terms and other non-content data, for use in six cases in China.).

¹⁷⁰ 28 U.S.C. § 1781(a)(1).

¹⁷¹ U.S. DEP’T OF STATE, 7 FOREIGN AFFAIRS MANUAL 963, CRIMINAL MATTERS, REQUESTS FROM FOREIGN TRIBUNALS, AND OTHER SPECIAL ISSUES (2013),

rogatory are generally referred to the Department of Justice's Office of International Affairs (OIA).¹⁷² It has also become common for assistance requests to be directly transmitted to OIA through informal or formal arrangements.¹⁷³

OIA has two distinct mechanisms to request the relevant evidence or testimony from a district court:

[W]hen [letters rogatory or request for judicial assistance] are transmitted directly to the U.S. Department of Justice, or when they are transmitted to it through diplomatic channels, they will be processed by the Office of International Affairs (OIA) of the Department's Criminal Division.... When the use of compulsory measures is necessary, an assistant United States attorney will submit the request to the district court pursuant to 28 U.S.C. § 1782 or 18 U.S.C. § 3512[.]¹⁷⁴

OIA can rely on 28 U.S.C. § 1782—as described previously—to request evidence from the district court in which the person from whom they seek testimony resides or is found. From the perspective of the foreign tribunal, there are two key differences between transmitting a letter rogatory directly to a district court and transmitting a letter in a diplomatic manner through the Department of State and OIA. First, the use of diplomatic channels is generally more time consuming than a direct court-to-court approach, as the process of executing a letter rogatory by the Department of State could take up to a year or more.¹⁷⁵ Second, a request under 28 U.S.C. § 1782 through OIA has the substantial weight of the federal government behind it, which could impact how the court exercises its discretion.

Alternatively, the OIA can use 18 U.S.C. § 3512—the Foreign Evidence Request Efficiency Act—an even more expansive statute that empowers the Department of Justice to request federal judges to “issue such orders as may be necessary to execute a request from a foreign authority for assistance in the investigation or prosecution of criminal offenses, or in proceedings related to the prosecution of criminal offenses, including proceedings regarding forfeiture, sentencing, and restitution.”¹⁷⁶ Under this statute, not only can federal judges order the appearance of witnesses or the production of documents, they can issue warrants.¹⁷⁷

<https://fam.state.gov/fam/07fam/07fam0960.html>.

¹⁷² See MICHAEL ABBEL, OBTAINING EVIDENCE ABROAD IN CRIMINAL CASES 242 (2010).

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 272.

¹⁷⁵ *Id.* at 273; *Preparation of Letters Rogatory*, U.S. DEP'T OF STATE, <https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/international-judicial-assistance/obtaining-evidence/Preparation-Letters-Rogatory.html>.

¹⁷⁶ 18 U.S.C. § 3512(a)(1).

¹⁷⁷ 18 U.S.C. § 3512(a)(2) (stating “(2) **Scope of orders:**--Any order issued by a Federal judge pursuant to paragraph (1) may include the issuance of--

(A) a search warrant, as provided under Rule 41 of the Federal Rules of Criminal Procedure;

Congress enacted § 3512 in 2009 in order to address the inefficiencies associated with the 28 U.S.C. § 1782 mechanism described above.¹⁷⁸ Because § 1782 can only be used in the district court in which the person or evidence exists, it requires that a request be made in each district in which there is evidence. This approach has led to time consuming and inefficient investigations in cases involving evidence in multiple districts. Congress highlighted these inefficiencies when enacting the statute:

“[U]nder current law, over a dozen different U.S. attorneys' offices could have to work on an evidence request for a single case. Several district courts would also have to be involved. This process is inefficient, it's burdensome, and makes little sense for Federal prosecutors across the country or for the interests of justice. The Foreign Evidence Request Efficiency Act would rectify this situation by allowing foreign evidence requests to be handled centrally, ideally by one or two U.S. attorney offices.”¹⁷⁹

Section 3512 allows for the appointment of an Assistant United States Attorney as a commissioner to collect evidence and perform other necessary actions to implement a request for assistance.¹⁸⁰ More importantly, unlike 28 U.S.C. § 1782, a request for assistance under § 3512 does not have to be filed in the district court where the witness or evidence is located. The statute specifically allows for the filing of a request in the District of Columbia, regardless of where the evidence may be found.¹⁸¹

However, the issue of whether a § 3512 is applicable to requests made by international tribunals has not been tested. Unlike 28 U.S.C. § 1782, § 3512 does not explicitly refer to foreign or international tribunals. Instead, it addresses requests from a “foreign authority.” This term is defined as follows:

(B) a warrant or order for contents of stored wire or electronic communications or for records related thereto, as provided under section 2703 of this title;

(C) an order for a pen register or trap and trace device as provided under section 3123 of this title; or

(D) an order requiring the appearance of a person for the purpose of providing testimony or a statement, or requiring the production of documents or other things, or both.”)

¹⁷⁸ 155 CONG. REC. S6807-01, S6810 (daily ed. Jun. 18, 2009) (letter from U.S. Department of Justice, Office of Legislative Affairs to Hon. Sheldon Whitehouse, U.S. Senate).

¹⁷⁹ 155 CONG. REC. H10092-01, H10093 (daily ed. Sep. 30, 2009).

¹⁸⁰ 18 U.S.C. § 3512(b); *see, e.g.*, *Palmat Int'l, Inc. v. Holder*, 2013 WL 594695, at 1 (S.D. Fla. Feb. 14, 2013).

¹⁸¹ 18 U.S.C. § 3512(c)(3) (stating “(c) Filing of Requests. -- Except as provided under subsection (d), an application for execution of a request from a foreign authority under this section may be filed--... (3) in any case, the district in which a related Federal criminal investigation or prosecution is being conducted, or in the District of Columbia.”)

The term “foreign authority” means a foreign judicial authority, a foreign authority responsible for the investigation or prosecution of criminal offenses or for proceedings related to the prosecution of criminal offenses, or an authority designated as a competent authority or central authority for the purpose of making requests for assistance pursuant to an agreement or treaty with the United States regarding assistance in criminal matters.¹⁸²

A plain reading of this language suggests that an international tribunal is indeed a foreign authority under the first two formulations: either (1) “a foreign judicial authority” or (2) “a foreign authority responsible for the investigation or prosecution of criminal offenses or for proceedings related to the prosecution of criminal offenses.”¹⁸³ An international tribunal such as the ICC would therefore likely fall under the purview of § 3512.

Because § 3512 grants the Department of Justice a broad set of tools for aiding international investigations—including requests for the issuing of warrants from a district court—this option does not limit the *type* of electronic communications that can be obtained. Under ECPA, content data can be compelled through a warrant.¹⁸⁴ In fact, the definition of a “court of competent jurisdiction,” under ECPA, and thus the types of court that may issue a warrant under it, specifically includes any district court “acting on a request for foreign assistance pursuant to § 3512 of this title.”¹⁸⁵

The letter rogatory option is a particularly powerful one. If held to be open to international tribunals, this option would allow them to obtain both metadata and content data. The advantages of this option, however, are counterbalanced by one key challenge: it depends on the cooperation and discretion of the Department of Justice.

D. Requests for Mutual Legal Assistance

Mutual Legal Assistance (MLA) requests are a government-to-government mechanism for information and evidence-sharing between countries. Under the MLA regime, foreign countries that hope to acquire stored electronic communications and/or other digital data from private technology companies based in the United States and have an MLA treaty in place with the United States would make a request for assistance to the secretary of state, the U.S. attorney general, or their designees.¹⁸⁶

Unfortunately, the ICC cannot make MLA requests on its own. The MLA regime works on the basis of reciprocity, or treaties entered into between countries.¹⁸⁷ As the ICC is not a country, and thus does not qualify as a “central

¹⁸² 18 U.S.C. § 3512(h).

¹⁸³ *Id.*

¹⁸⁴ 18 U.S.C. §2703(a).

¹⁸⁵ *Id.* at §2711.

¹⁸⁷ *See, e.g.,* Mutual Legal Assistance Treaties, *Frequently Asked Questions*, ACCESS NOW, <https://mlat.info/faq> (explaining that MLATs are agreements

authority” for treaty purposes, it cannot be a party to any MLA treaty. Furthermore, an MLA based on more informal reciprocity would not be an option, as it is unclear what reciprocation would even mean between a tribunal and the United States.

However, the ICC can ask an ICC State Party that has an MLA agreement with the United States to request the desired information on its behalf. In some cases, this may be a viable option, particularly where the State in question has self-referred a situation to the ICC, and is gathering evidence of the commission of crimes for domestic prosecutions. While certain provisions of ASPA, such as §7423(g), barring foreign countries from submitting MLA requests for the ICC, and §7425, prohibiting the indirect transfer of law enforcement information to the ICC through a third party, appear to foreclose this option, the Dodd Amendment likely qualifies these potential bars for investigations of foreign nationals. One potential obstacle with such MLA requests is that many MLA treaties require the requested State’s permission before using any sought information for purpose that go beyond the scope of the MLA.

Of course, the downside of the MLA process is that it is notoriously time consuming, sometimes taking as long as a year or more.¹⁸⁸ While this might not matter given the length of many ICC investigations, it is not a great option for securing information quickly.

E. Joint Investigations

A fifth option for information gathering is for the ICC to partner with domestic law enforcement. Either in the United States or abroad, the ICC can work with domestic investigators to conduct joint investigations where there are suspects who are of interest to both that state and the ICC.¹⁸⁹ By placing an ICC investigator in the offices of a complementary investigations team, information can be shared relatively quickly and informally. This has been done effectively in the United States (bringing together state and federal law enforcement when there is overlapping jurisdiction) and overseas.¹⁹⁰ Similarly, INTERPOL—the

between countries).

¹⁸⁸ See Gail Kent, *The Mutual Legal Assistance Problem Explained*, STANFORD CTR. FOR INTERNET AND SOC’Y (Feb. 23, 2015), <http://cyberlaw.stanford.edu/blog/2015/02/mutual-legal-assistance-problem-explained> (explaining that even for the United Kingdom, which has a relatively good working relationship with the United States when it comes to cooperating on investigations, MLA requests for privileged information can take as long as 13 months).

¹⁸⁹ See, e.g., Rome Statute, *supra* note 46, art. 86 (establishing the obligation of states parties to “cooperate fully with the Court in its investigations and prosecution of crimes within the jurisdiction of the Court”); see also HRC, BEYOND A REASONABLE DOUBT, *supra* note 36, at 8–9 (discussing the ability of the ICC to work with government agencies in the United States to support investigations).

¹⁹⁰ See Press Release, U.S. Dep’t of Justice, Joint Federal-State-Local Law Enforcement Action: Operation “Spring Clean” – 17 Search Warrants And 6 Arrests Related To Crimes Against Children (Jun. 1, 2013), <https://www.justice.gov/usao-edva/pr/joint-federal-state-local-law-enforcement->

international police organization—is structured to aid information sharing, including joint investigations.¹⁹¹

Europe has also created an EU-based mechanism for conducting joint criminal investigations.¹⁹² EU members that are State Parties to the ICC can conduct investigations in partnership with the ICC through that mechanism, requesting the information the ICC needs from those EU members' investigatory partners. In some cases, even non-EU members are allowed to participate in the program, if all parties agree, meaning that non-EU State Parties could potentially request information through that mechanism on the ICC's behalf, as well.¹⁹³

Therefore, it appears that the ICC has a number of options for securing documentary evidence held in electronic storage by private companies incorporated in the United States. They can submit requests directly to those companies; file letters rogatory or requests for assistance in U.S. courts; request assistance from the United States' executive branch; benefit from third party governments' MLA requests; or partner with other investigative bodies.

CONCLUSION

The digital world brings with it both challenges and opportunities for documenting serious international crimes. Today, much documentary evidence, including digital photographs, videos, emails, and internet postings, resides on the servers of U.S. corporations. International courts, including the ICC, cannot fulfill their mandate to prosecute the most serious crimes of concern to the international community unless they have some way of locating, acquiring, preserving, analyzing, and presenting such information for trials.

The overarching issue that this Article addresses—"when and through what mechanisms might the ICC legally and appropriately seek information from private and government entities in the United States to advance their investigations?"—will only increase in salience. As the ICC increasingly conducts investigations in technologically-sophisticated countries, and as growing communities across the globe use digital platforms to communicate, it is imperative that the parameters of potential cooperation be clarified.

Based on the above analysis, it appears there are several contexts in which information sharing with the ICC would be both legal and appropriate for entities

action-operation-spring-clean-17-search (providing one example, Operation "Spring Clean," was a joint federal, state and local operation to combat the sexual exploitation of children).

¹⁹¹ See *Fugitive Investigations*, INTERPOL, <https://www.interpol.int/Crime-areas/Fugitive-investigations/Fugitive-investigations> (last visited Nov. 12, 2017) (discussing investigative and other support that they provide to member countries).

¹⁹² See *Joint Investigation Teams (JITS)*, EUROPOL, <https://www.europol.europa.eu/content/page/joint-investigation-teams-989> (last visited Nov. 12, 2017).

¹⁹³ *Id.*

within the United States. To that end, there are several mechanisms that can be used to enable the legal transfer of information: initially, the ICC can reach out to tech companies to obtain the desired information.¹⁹⁴ There, any barrier to disclosing such information would come from corporate policy. If a company's policies, however, require court intervention in the form of a warrant (as many of them likely would), the ICC has two more options: it could see if a State Party would request the information on its behalf using that state's Mutual Legal Assistance treaty with the United States, or it could use a letter rogatory to ask a U.S. district court to facilitate discovery. The ICC could also use its diplomatic channels to engage the U.S. State Department in order to have the request come from the State Department to the U.S. district court, likely strengthening its chance of successfully accessing the information. In none of these cases is ASPA a bar to U.S. cooperation so long as the prosecution in question is for a foreign national accused of war crimes, crimes against humanity, or genocide.

Since ASPA's passage in 2002, ICC-U.S. relations have thawed considerably. In 2009, the United States, through its representatives, began formally participating in the annual meeting of States Parties, and, in 2010, took part in the Rome Statute's review conference in Kampala, Uganda, where the United States made its intended support of ICC cases explicit.¹⁹⁵ Both President Barack Obama and former Secretary of State Hillary Clinton have echoed that statement, the latter even stating her "great regret" that the United States is not a party to the Court.¹⁹⁶ While it is unlikely the United States will become a party to the Rome Statute any time soon, the United States has already taken several steps to facilitate cooperation where such cooperation is deemed mutually advantageous. Facilitating the collection of evidence to further accountability for the world's most egregious human rights abuses and war crimes is the next logical step in this evolution.

¹⁹⁴ Publicly-available information is, of course, less of an issue than private information. The ICC, like any institution or individual, is free to use publicly-available tools to scour public sources, such as public Facebook pages, Twitter sites, etc. There, the barriers relate more to capacity—including knowledge regarding how to optimize such searches—than corporate policy or law.

¹⁹⁵ See ARIEFF ET AL., *supra* note 126, at 3.

¹⁹⁶ *Id.*

Is ISIS a State? The Status of Statehood in the Age of Terror

Noah Benjamin Novogrodsky*

ABSTRACT

This Essay considers the definitional challenge posed by the Islamic State’s State-like attributes and suggests a new approach to recognizing sovereignty within the meaning of international law. The dual factors I set forth—respect and observance of fundamental human rights in territory controlled by the candidate State and acceptance of the sovereign co-existence of other States—are intended to reframe traditional analyses of the Montevideo Convention. This piece draws upon recent scholarship, judicial decisions, and diplomatic practices surrounding recognition of would-be States to identify a form of human rights minimalism and acknowledgment of the international order that may usefully inform debates concerning potential future sovereigns.

INTRODUCTION	37
I. MONTEVIDEO’S LIMITATIONS	40
A. <i>A Minimal Standard</i>	40
B. <i>The Challenge Posed by ISIS</i>	45
II. HUMAN RIGHTS MINIMALISM WITHIN THE INTERNATIONAL ORDER: A TWO-PART PROPOSAL	50
A. <i>Respecting Human Security Domestically</i>	50
B. <i>Respect for Sovereign Co-existence</i>	55
CONCLUSION	59

DOI: <https://doi.org/10.15779/Z38VD6P497>

* Carl M. Williams Professor of Law & Ethics, University of Wyoming College of Law and Human Rights Fellow, UC Berkeley School of Law, Human Rights Center. The author thanks Karen Knop, Eric Naiman, Chris Kutz, Jamie O’Connell, Katerina Linos, Francisco Rivera, David Sloss, Kathleen Morris, Chimene Keitner, David Levine, Matthew Stannard, Anupam Chander, Anne Nesbit, and Alexa Koenig for their insights. The author also thanks research assistants Al Walsh and Keeley Cronin.

INTRODUCTION

In August 2014, the group known as ISIS (the Islamic State in Iraq and al-Sham, ISIL, or Daesh¹) conquered the Yazidi homeland in Northern Iraq.² ISIS quickly subjected civilian Yazidi women and girls to a theologically infused form of sexual slavery.³ The following year, *New York Times* reporter Rukmini Callimachi interviewed Yazidi escapees who related that ISIS fighters raped women who were bought and sold in a sexual slavery market.⁴ The accounts of ritualized sexual violence at the hands of ISIS militants⁵ followed news of beheadings, mass killings, the intentional destruction of antiquities in Palmyra, and the grizzly immolation of a captured Jordanian pilot—all grotesque, deliberate, performative acts designed to attract maximum attention.⁶

At the same time, the Islamic State is an administrative authority, taxing local businesses and spending financial resources to govern territory and provide quotidian social services to the quiescent local population.⁷ Charles Lister writes that one of the Islamic State's first steps upon assuming control of a town or city

1. Daesh is the Arabic acronym for ISIS; ISIL is the acronym for the Islamic State in Iraq and the Levant. For an analysis of why many critics of the Islamic State call the organization Daesh, see generally Zeba Khan, Words matter in “ISIS” war, so use “Daesh,” *Bos. Globe* (Oct. 9, 2014), <https://www.bostonglobe.com/opinion/2014/10/09/words-matter-isis-war-use-daesh/V85GYEuasEEJgrUunOdMUP/story.html>; Uri Friedman, *Does it Really Matter what People Call the So-Called Islamic State?*, *THE ATLANTIC* (June 1, 2016), <http://www.theatlantic.com/international/archive/2016/06/wole-soyinka-isis-boko-haram/484310/>.

2. Cathy Otten, *Slaves of Isis: the long walk of the Yazidi Women*, *THE GUARDIAN* (July 25, 2017), <https://www.theguardian.com/world/2017/jul/25/slaves-of-isis-the-long-walk-of-the-yazidi-women> (on August 3rd, 2014, ISIS attacked Sinjar, resulting in over 100,000 Sinjar residents fleeing into Mount Sinjar, and thousands of Yazidis were summarily executed by ISIS fighters); see also Off. of the U.N. High Comm’r for H.R. (2016), *A Call for Accountability and Protection: Yazidi Survivors of Atrocities Committed by Isil* (2016).

3. WILLIAM MCCANTS, *THE ISIS APOCALYPSE: THE HISTORY, STRATEGY, AND DOOMSDAY VISION OF THE ISLAMIC STATE* 111–13 (2015); Rukmini Callimachi, *ISIS Enshrines a Theology of Rape*, *N.Y. TIMES* (Aug. 14, 2015), <https://www.nytimes.com/2015/08/14/world/middleeast/isis-enshrines-a-theology-of-rape.html>.

4. Callimachi, *supra* note 3. Also Catherine Porter, *Canada Struggles as it Opens its Arms to Victims of ISIS*, *N.Y. TIMES* (Mar. 16, 2018), <https://www.nytimes.com/2018/03/16/world/canada/canada-refugees-yazidi.html?mtref=www.google.com> (over 1,200 victims of the Islamic State have fled to Canada where government’s refugee services are providing treatment for the survivor’s severe trauma).

5. *Id.*

6. See JOBY WARRICK, *BLACK FLAGS* 287–91, 308–10 (2015);

Andrew Curry, *Here Are the Ancient Sites ISIS Has Damaged and Destroyed*, *NAT’L GEOGRAPHIC* (Sept. 1, 2015), <http://news.nationalgeographic.com/2015/09/150901-isis-destruction-looting-ancient-sites-iraq-syria-archaeology/>.

7. CHARLES R. LISTER, *THE ISLAMIC STATE: A BRIEF INTRODUCTION* 47–48 (2015).

is to take control of industries and municipal services and facilities so as to ensure what it considers a more efficient and egalitarian provision of services. Consistently, this has meant assuming authority over electricity, water, and gas supplies, local factories, and even bakeries—all of which lend [ISIS] total control over the core needs of a civilian population. . . In Raqqa, [ISIS] even operates a consumer-protection office, which has closed shops for selling poor-quality products.⁸

The duality that is the Islamic State confounds traditional categories used to understand statehood, global society, and international law. The organization responsible for the coordinated killing of 130 people in Paris on November 13, 2015, is a terrorist network characterized by an escalating spate of attacks in States far beyond Iraq and Syria.⁹ ISIS is also a territorial governor and possesses multiple attributes of a sovereign entity.¹⁰ At its peak, as many as eight million people lived under the Islamic State's control, and millions more were influenced by its actions.¹¹ Until recently, ISIS held significant swaths of

8. *Id.*

9. Rukmini Callimachi, *How ISIS Built the Machinery of Terror Under Europe's Gaze*, N.Y. TIMES (Mar. 29, 2016), <https://www.nytimes.com/2016/03/29/world/europe/isis-attacks-paris-brussels.html>. ISIS has massacred workers in Egypt, and it has sponsored attacks in Indonesia, Turkey, the United States, Australia, Canada, Saudi Arabia, Belgium and elsewhere, fast becoming *hostis humani generis* (the enemy of mankind). In carrying out these deadly attacks, ISIS has violated norms of international law which courts have found include the prohibition against terrorism and torture. See *Filaritiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) (extending a doctrine traditionally applied to pirates and slaver traders to modern day torturers); *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, (Dec. 10, 1998) (convicting a torturer before the ICTY and characterizing the crime as a preemptory norm, part of customary international law and a *jus cogens* offense).

10. See Marti Nadal Pibernat, *Can ISIS Be Considered a State?* (2015) (unpublished manuscript), https://www.academia.edu/25055342/Can_ISIS_Be_Considered_a_State; Doug Irving, *Life During Wartime: What Satellite Images Reveal About ISIS's Attempts to Govern in Syria and Iraq*, RAND REVIEW, Jan.–Feb. 2018, at 12, 12–15, https://www.rand.org/content/dam/rand/pubs/corporate_pubs/CP000/CP22-2018-01/RAND_CP22-2018-01.pdf. The terrorist organization ISIS, best known for its brutality, is also known throughout Iraq for its efficient bureaucracy. Rukmini Callimach, *The ISIS Files*, N.Y. TIMES (Apr. 4, 2018), <https://www.nytimes.com/interactive/2018/04/04/world/middleeast/isis-documents-mosul-iraq.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=span-ab-top-region®ion=top-news&WT.nav=top-news>. In the midst of the daily executions, fines, and torture, ISIS ran an efficient administration that collected taxes, picked up garbage—more efficiently than the previous Iraqi government—and built a state-like territory, amassing over 800 million dollars in annual tax revenue. *Id.*

11. Christopher M. Blanchard & Carla E. Humud, *The Islamic State and U.S. Policy*, 18 NOVA SCI. PUBLISHERS, INC. 477–522 (2016); *In ISIL-controlled territory, 8 million civilians in 'state of fear'—U.N. expert*, U.N. NEWS CTR. (July 31, 2015), <http://www.un.org/apps/news/story.asp?NewsID=51542#.WNRaVJJzetw>. The terrorist organization ISIS, best known for its brutality, is also known throughout Iraq for its efficient bureaucracy. Rukmini Callimach, *The ISIS Files*, N.Y. TIMES (Apr. 4, 2018), <https://www.nytimes.com/interactive/2018/04/04/world/middleeast/isis-documents-mosul-iraq.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=span-ab-top-region®ion=top-news&WT.nav=top-news>. In the midst of the daily executions, fines, and torture, ISIS ran an efficient administration that collected taxes, picked up garbage—more efficiently than the previous Iraqi government—and built a state-like territory, amassing over 800 million

territory in Iraq and Syria, it had a military presence in Libya, it imposed a governing structure on the population under its control, and it maintained a conventional army featuring weapons and a command structure more commonly associated with regular, uniformed forces.¹² Joby Warrick, the Pulitzer Prize-winning author, observes that the Islamic State had even begun to engage in a form of diplomacy and statecraft.¹³ Warrick reports that in April 2013, Free Syrian Army supporters and international negotiators convening a meeting on how to administer a post-Assad Syria were stunned to find that one of the attendees introduced himself as a duly authorized representative of ISIS.¹⁴

Notwithstanding the Islamic State's name, most scholarship on the subject has avoided the question of whether ISIS was, is or could become a State in the international community.¹⁵ To confront this issue is to grapple with the forms of legal personality a controlling authority can possess and how outside powers understand an entity which is engaged in systemic human rights violations and that rejects foundational conventions of the post-Westphalian international order.¹⁶

International law offers an incomplete answer. The familiar standard drawn from the four-part 1933 Montevideo Convention on the Rights and Duties of States requires only that a would-be State enjoy: "(a) a permanent population; (b) a defined territory; (c) a government; and (d) the capacity to enter into relations with other states."¹⁷ Unlike many other non-State terrorist organizations, ISIS has a plausible claim to satisfying the first three criteria. As a consequence, much rests on the fourth criterion: the ability to enter into relations with other States. Because that dynamic is premised on an act of bilateral or multilateral recognition, this Essay seeks to give normative content

dollars in annual tax revenue. *Id.*

12. LISTER, *supra* note 7, at 47.

13. See WARRICK, *supra* note 6, at 291.

14. *Id.*

15. By contrast, there is a wealth of scholarship on the legality of the use of force against ISIS as the latest group in a line of terrorist organizations. See Gabrielle LoGaglio, *Crisis With ISIS: Using ISIS's Development to Analyze "Associated Forces" Under the AUMF*, 5 NAT'L SEC. L. BRIEF 125 (2014) (arguing the United States can use force against ISIS under the same Authorization for Use of Military Force Congress passed to use force against the perpetrators of the September 11, 2001 attacks); Michael P. Sharf, *How the War Against ISIS Changed International Law*, 48 CASE W. RES. J. INT'L L. 15 (2016) (arguing that the use of force against ISIS is justified under self-defense); Johan D. van der Vyver, *The ISIS Crisis and the Development of International Humanitarian Law*, 30 EMORY INT'L L. REV. 531 (2016) (arguing that the use of force against ISIS is not legally justified on a humanitarian or self-defense basis).

16. See William Thomas Worster, *Law, Politics and the Conception of the State in State Recognition Theory*, 27 B.U. INT'L L. J. 115 (2009). ISIS is both a de facto state and a non-state terrorist actor that has formalized its external arm and engaged in grotesque attacks against "soft" targets in Paris, Brussels, San Bernardino, and elsewhere. Rukmini Callimachi et al., *A View of ISIS's Evolution in New Details of Paris Attacks*, N.Y. TIMES (Mar. 19, 2016), <https://www.nytimes.com/2016/03/20/world/europe/a-view-of-isis-evolution-in-new-details-of-paris-attacks.html>.

17. Montevideo Convention on Rights and Duties of States art. 1, Dec. 26, 1933, 165 L.N.T.S. 19.

to a decision that is usually driven by political or diplomatic considerations.¹⁸ It does so by rooting State recognition in human rights values and international legal principles that offer a touchstone against which to measure the predictable opposition of existing States that stand to lose control over people or territory.¹⁹ The result is an attempt to identify salient differences between groups like ISIS, Boko Haram, and al-Shabaab, on the one hand, and Kurdistan, Palestine, and Somaliland on the other.

The first part of this Essay assesses the Montevideo Convention's strengths and limitations, including its peculiar and intransigent qualities, and examines why ISIS poses a challenge to current conceptions of statehood. The second part suggests two ideas—the protection of human security internally and respect for external sovereign co-existence—that aim to inform the international community's recognition of a potential sovereign.

I.

MONTEVIDEO'S LIMITATIONS

A. A Minimal Standard

For an international order that gives primacy to states, the rules for statehood are surprisingly thin. The Montevideo Convention is a product of its time and was intended to provide an empirical set of standards that would define statehood as an objective matter.²⁰ Through the establishment of the four criteria, “the existence of a state and of its entitlements [would] transcend any difference in interests and values in the international system.”²¹ The underlying rationale for the Montevideo Convention was that no single State or ideology

18. See Chris Borgen, *From Intervention to Recognition: Russia, Crimes, and Arguments over Recognizing Secessionist Entities*, OPINION JURIS (Mar. 18, 2014), <http://opiniojuris.org/2014/03/18/intervention-recognition-russia-crimea-arguments-recognizing-secessionist-entities/> (“States tend to view the decision to recognize or not recognize an entity as a state as a political decision, albeit one that exists within an international legal framework.”).

19. China's refusal to recognize Taiwan, Israel's opposition to a fully sovereign Palestine, or Turkey's hostility toward an independent Kurdistan (even one created entirely within Iraq's current borders) represent recent examples of entrenched political opposition to emerging states. See G.A. Res. 25/2625 (Oct. 24, 1970), <http://www.un-documents.net/a25r2625.htm> (enshrining as a principle that each state has a duty not to intervene in an internal political affair of another state); Diego Cupolo, *It's Never a Good Time for the Iraqi Kurds to Become Independent*, THE ATLANTIC (Sept. 24, 2017), <https://www.theatlantic.com/international/archive/2017/09/turkey-kurds-barzani-iraq-referendum/540909/> (“Turkey's hostility towards Kurdish autonomy dates back to 1923.”); RASHID KHALIDI, THE IRON CAGE: THE STORY OF THE PALESTINIAN STRUGGLE FOR STATEHOOD 182–212 (2009) (analyzing Palestine's quest for statehood and Israeli opposition to those efforts); Shelley Rigger, *Is Taiwan Independence Passé? Public Opinion, Party Platforms, and National Identity in Taiwan*, in THE ROC ON THE THRESHOLD OF THE 21ST CENTURY: A PARADIGM REEXAMINED 48 (Chien-min Chao & Cal Clark eds., 1999) (assessing China's adherence to the “One China” proposition).

20. Brad R. Roth, *New Developments in Public International Law: Statehood, Self-Determination, and Secession*, 6 NAT'L TAIWAN U. L. REV. 639, 645 (2011).

21. *Id.*

could control the international order by failing to acknowledge an aspiring entity's statehood.²² If an entity seeking statehood fulfilled the doctrinal framework, it became a State. Realism was the order of the day, a point underscored by the fact that the U.S. recognized the Soviet Union as a State just one month before the Montevideo Conference.²³

The deliberate deracination of statehood per the Montevideo Convention rewards units that meet the four criteria while simultaneously rejecting ambiguities associated with the claims of entities displaying some, but not all of the elements. The convention was signed in Uruguay, a largely stable and unthreatening State that was itself a product of a well-settled colonial history.²⁴ At the conference, Latin American nations sought and obtained a declaration supporting the principles of non-intervention, formal equality among and between states, and an unconditional and irrevocable doctrine of recognition.²⁵ Unsurprisingly, the accord was silent on the rights of autonomous regions within confederated states, and the Convention offered no guidance to an entity displaying both State and non-State attributes, much less a requirement that such units respect or observe human rights norms.

Montevideo did not, because it could not, address the aspirational qualities of future states envisioned by the Convention. So varied were the participants to the original agreement—robust democracies, repressive autocracies, staid principalities, and cultish monarchies—that the Montevideo Convention soon ossified into a minimal and easy to obtain test.²⁶ The great ideological debates for and against independence and self-determination occurred largely outside the formula for statehood; within the four-part matrix, Montevideo privileges order, comity, and predictability.

Almost immediately, the Montevideo standard invited a boon in the number of recognized States. From fewer than seventy-five states at the Convention's entry into force in 1933 to almost two hundred today, the increase in sovereign States and post-WWII, membership in the United Nations has been steady.²⁷ Even as the decolonization movement of the 1950s took root in Africa,

22. Thomas D. Grant, *Defining Statehood: The Montevideo Convention and its Discontents*, 37 COLUM. J. OF TRANSNAT'L L. 403, 414–19 (1999).

23. See J. H. Wilson, *American Business and the Recognition of the Soviet Union*, 52 SOC. SCI. Q. 349, 367 (1971); Montevideo Convention on Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, T.S. 881.

24. See ARNULF BECKER LORCA, *MESTIZO INTERNATIONAL LAW: A GLOBAL INTELLECTUAL HISTORY 1842–933*, 351 (2015).

25. *Id.* at 351.

26. See *Seventh International Conference of American States, Montevideo, Uruguay, December 3–26, 1933*, 28 AM. J. OF INT'L. L. 52 (1934) (“The signatories were Honduras, The United States of America, El Salvador, The Dominican Republic, Haiti, Argentina, Venezuela, Uruguay, Mexico, Panama, Bolivia, Guatemala, Brazil, Ecuador, Nicaragua, Colombia, Chile, Peru, and Cuba.”).

27. See *growth in United Nations Membership, 1945–present*, UNITED NATIONS, <http://www.un.org/en/sections/member-states/growth-united-nationsmembership-1945-present/index.html> (last visited Mar. 6, 2018).

Asia, and the Caribbean (alongside theoretical and political developments in self-determination), the core definition of sovereignty remained unchanged.²⁸ For independence movements the world over, the ultimate goal was, and is, statehood—defined as the right to govern without interference on territory that is unquestionably theirs.²⁹ Achieving that objective carries with it tangible benefits: membership in international organizations, the ability to receive and control the terms of economic assistance from international financial institutions, legal immunity for heads of State, and the ability to exclude other authorities from claims over territory, populations, and resources—in short, a seat at the table and plenipotentiary standing to assert uncontested sovereignty with all that the idea connotes.³⁰

Statehood also offers an enduring prize because once created, States, even failed States, rarely disappear.³¹ The legal construct that is Somalia offers a case in point.³² At times in the not-too-distant past, Somalia featured a permanent population, defined territory, a government, and the capacity to enter into relations with other States.³³ Yet “Somalia” as a singular entity owes more to the perceptions of the international community than to internal political realities.³⁴ A deeper analysis reveals that Somalia, like other dysfunctional States, is a temporally contingent formation but its fixed status persists.³⁵ Instead of reevaluating the sovereign designation, the international community’s response to Somalia and other failed States has been a paternalistic desire to “save” the failing entity through “trusteeship arrangements” or direct military intervention—anything but allow the State to wither.³⁶

The notion that a State will exist in perpetuity begs the question of how States become States in the first place. International law scholars have long recognized that the Montevideo Convention is an inadequate benchmark and

28. See STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* 185–202 (1999).

29. See S.S. “Lotus” (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

30. KRASNER, *supra* note 28, at 14–20.

31. See Jeffrey Gittleman, *War Consumes South Sudan, A Young Nation Cracking Apart*, N.Y. TIMES (Mar. 4, 2017), <https://www.nytimes.com/2017/03/04/world/africa/war-south-sudan.html>. The exception that proves the rule is amalgamation (North and South Yemen, East and West Germany). See JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 52 (1979).

32. See Brian J. Hesse, *Introduction: The Myth of “Somalia,”* 28 J. CONTEMP. AFR. STUD. 247 (2010).

33. *Id.*

34. *Id.*

35. See Rosa Ehrenreich Brooks, *Failed States, or the State as Failure?*, 72 U. CHI. L. REV. 1159 (2005).

36. See Ruth Gordon, *Saving Failed States: Sometimes A Neocolonialist Notion*, 12 AM. U. J. INT’L L. & POL’Y 903 (1997); Matthew Olmsted, *Are Things Falling Apart? Rethinking the Purpose and Function of International Law*, 27 LOY. L.A. INT’L & COMP. L. REV. 401, 404 (2005). For an illustration of the burgeoning literature describing the international legal order’s inability to deal with state failure, see CHIARA GIOREGETTI, *A PRINCIPLED APPROACH TO STATE FAILURE: INTERNATIONAL COMMUNITY ACTION IN EMERGENCY SITUATIONS* (2010).

that additional requisites are needed before sovereignty is achieved.³⁷ First among these plus factors is the “Effective Control Doctrine,” the de facto ability of self-declared leaders to control order.³⁸ Although some commentators point to cases of nations “earning” their sovereignty despite lacking complete authority, such as Kosovo and South Sudan, the doctrine appears to reward internal security above all else.³⁹ According to the Effective Control Doctrine, a self-governing sovereign ought to be capable of establishing functioning institutions, managing a restive population, and resisting the influence of terrorist organizations, narco-traffickers, pirates, or other transnational criminal enterprises that pose a threat to governmental control.⁴⁰

“Constituent authority,” or “the things that a given people in a given time and place understand as competent to make a binding constitution,” offers a second post-Montevideo element integral to the notion of a true sovereign.⁴¹ First articulated by Richard Kay, the theory of constituent authority posits that the consent of the governed is a relational process; it results from the interaction of current values and the present-day perception of historical events.⁴² Benedict Anderson famously observed that nations, as distinct from legal States, are the product of imagined communities, socially constructed entities through which people perceive themselves to be part of an inclusive group.⁴³ To speak for an imagined community, the sovereign must respect the ties that bind inhabitants to a given place and, in turn, reinforce the connection between the people and its leadership.

In the same vein, James Crawford’s work provides additional post-Montevideo criteria, including a rule that the entity not be created in violation of the right of self-determination or solely as a result of the unlawful use of force.⁴⁴

37. Grant, *supra* note 22, at 403.

38. Brad R. Roth, *Secessions, Coups, and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine*, 11 MELB. J. INT’L L. 393, 394 (2010) (assessing the paradox between “might makes right” and the international community’s insistence that the assertion of raw power cannot be the sole basis of a legitimate government).

39. Paul R. Williams, *Earned Sovereignty: The Future of Sovereignty-Based Conflict Resolution*, 40 DENV. J. INT’L L. & POL’Y 128, 137–42 (2011).

40. CRAWFORD, *supra* note 31, at 46 (1979) (“[I]nternational law lays down no specific requirements as to the nature and extent of this control, except it seems, that it include some degree of maintenance of law and order.”) Samantha Power’s account of U.N. official Sergio Vieira de Mello’s experience in East Timor provides additional detail. “Airports and ports had to be opened, clean water procured, health care provided, schools resuscitated, a currency created, relations with Indonesia normalized, a constitution drafted, an official language chosen, and tax, customs, and banking systems devised.” SAMANTHA POWER, *SERGIO: ONE MAN’S FIGHT TO SAVE THE WORLD* 304 (2008).

41. Richard S. Kay, *Constituent Authority*, 59 AM. J. COMP. L. 715, 715–16 (2011).

42. *Id.* at 718.

43. BENEDICT ANDERSON, *IMAGINED COMMUNITIES* 6–7 (2006).

44. CRAWFORD, *supra* note 31, at 40. It follows that Northern Cyprus is not an independent state, despite Turkey’s occasional insistence that it is before international tribunals. *Loizidou v. Turkey*, 40/1993/435/514 Eur. Ct. H.R. 10 (1995) (The European Court of Human ordered Turkey to pay substantial damages to a Greek Cypriot woman who had been forcibly displaced from her home

Specifically, Crawford observes that modern conceptions of statehood include a definition of independence, an appreciation of territorial integrity, engagement with international institutions, and avoidance of invitations to intervention or merger with other States.⁴⁵ In 2010, however, the International Court of Justice—the one body that could have provided greater clarity—passed on the opportunity to elevate any of the additional elements to essential components of the test for statehood when it issued its advisory opinion on Kosovo’s declaration of independence.⁴⁶ Rather than formulate a revised rule, the Court confined its decision to the question presented and the lines remain blurred between the application of the traditional criteria and any emerging framework.⁴⁷ At present, the four Montevideo criteria are “commonly accepted to be customary international law,” while observance of additional factors varies widely.⁴⁸

Curiously absent from any of these analyses has been respect for or promotion of international human rights laws and norms within the borders of potential States. Even as international human rights values have become, in Michael Ignatieff’s words, “the major article of faith of a secular culture that fears it believes in nothing else,” the legal work of state-making avoids any judgment about the conduct of the aspiring sovereign.⁴⁹ Indeed, the idiom of classic international law is relational, focused as it is on the horizontal equality of States rather than the vertical, internal oppression occurring in potential sovereigns.⁵⁰ If human rights considerations have played any role in the creation of new States, those ideas have been expressed in the guilt of the international community for failing to stop atrocity crimes in political entities that would become Bangladesh, Eritrea, East Timor, and South Sudan, and the conception that some geographic entities are entitled to secession as a remedy for past wrongs.⁵¹

during Turkey’s invasion of Northern Cyprus. The ECHR found Turkey’s Armed Forces’ continued control and occupation of North Cyprus sufficiently constituted a continued violation of human rights against the woman as she was effectively prevented from returning to her property).

45. CRAWFORD, *supra* note 31, at 47–48; *see also* Milena Sterio, *A Grotian Moment: Changes in the Legal Theory of Statehood*, 39 DENV. J. INT’L L. & POL’Y 209, 234–35 (2011).

46. Marc Weller, *Modesty Can Be a Virtue: Judicial Economy in the ICJ Kosovo Opinion?*, 24 LEIDEN J. INT’L L. 127, 132 (2011).

47. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. Rep. 438 (July 22); *see* Cedric Ryngaert & Sven Sobrie, *The Recognition of States: International Law or Realpolitik? The Practice of Recognition in the Wake of Kosovo, South Ossetia, and Abkhazia*, 24 LEIDEN J. INT’L L. 467, 477–78 (2011). The international community’s recognition of Croatia as a state when the entity was bereft of an organized government and its concomitant refusal to recognize Somaliland, although it appears to possess the four factors, further undermines the enduring validity of the Montevideo criteria as the sole standard. *See* Roth, *supra* note 20, at 647.

48. Ryngaert & Sobrie, *supra* note 47, at 470.

49. MICHAEL IGNATIEFF, *HUMAN RIGHTS AS POLITICS AND IDOLATRY* 53 (2001).

50. *See* IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 564–80 (3d ed. 1979).

51. Israel is the paradigmatic case of the international community supporting a political community’s sovereign aspirations following atrocities and non-intervention, although Israel was not

B. The Challenge Posed by ISIS

The Islamic State—as well as Boko Haram and al-Shabaab (all entities that hold or have held vast territories and significant populations)—turns the concept of remedial secession on its head because in such cases the would-be sovereign is the victimizer, not the victim. Once known as “rogue States,” these entities are characterized by contempt for international norms, persecution of their own population, and the export of disorder.⁵²

Unlike its predecessor terrorist organizations, the Islamic State has employed organizing principles that appear to satisfy the first three elements of the four-pronged Montevideo test. Yuval Shany, Amichal Cohen, and Tal Mimran write that, “the requirement of a permanent population stems from the fact that a State is a means of realizing the shared aspirations of groups that have united due to cultural, religious, historical, or other characteristics they have in common.”⁵³ Importantly, it is not necessary that the denizens feel a connection to the State. As in Syria, the State may even render much of its population refugees outside the territory.⁵⁴ Nor, as the low-population States of Belize, Luxembourg, and Lichtenstein demonstrate,⁵⁵ is there a minimum number of nationals necessary for a State to be recognized as a sovereign, assuming neighboring States acknowledge a bona fide border. All that is required is that the people of the place are not transitory.⁵⁶

Many of the people trapped in ISIS-controlled territory would leave if they could and they are uninterested in realizing their “shared aspirations” within the confines of the Islamic State.⁵⁷ Yet the change in rulers and governing ideology is immaterial to the question of their permanence—the population is of the territory and currently answers to ISIS.

carved out of German territory. The concept of “remedial secession” addresses the phenomenon of a state that is “owed” sovereignty to redress past maltreatment. *See generally* Joel Day, *The Remedial Right of Secession in International Law*, POTENTIA, Fall 2012, at 19, <http://www.cips-cepi.ca/wp-content/uploads/2015/03/Potentia2012.revised.edited.compressed.pdf>; *accord* Charlotte Mueller, *Secession and Self-Determination—Remedial Right Only Theory Scrutinised*, 7 POLIS J. 283 (2012).

52. Thomas H. Henrickson, *The Rise and Decline of Rogue States*, 54 J. INT’L AFF. 349 (2001) (discussing the behaviors and roles of modern and historical rogue states including the Gauls, Germanic Visigoths, Vandals, and Carthaginians).

53. Yuval Shany, Amichal Cohen & Tal Mimran, *ISIS: Is the Islamic State Really a State?*, ISR.DEMOCRACY INST. (Sept. 14, 2014), <http://en.idi.org.il/analysis/articles/>.

54. *About the Crisis*, U.N. OFF. FOR THE COORDINATION OF HUMANITARIAN AFF., <http://www.unocha.org/syrian-arab-republic/syria-country-profile/about-crisis> (last visited Mar. 15, 2018) (“Over half of the [Syrian] population has been forced from their homes.”).

55. Bernard Yack, *Popular Sovereignty and Nationalism*, 29 POLITICAL THEORY 517, 517–36 (2001).

56. CRAWFORD, *supra* note 31, at 40.

57. Sinan Salaheddin, *ISIS is making civilians put up \$20,000 in collateral just to leave the ‘caliphate’ for 2 weeks*, BUS. INSIDER (Mar. 13, 2015), <http://www.businessinsider.com/heres-how-isis-is-preventing-civilians-from-leaving-its-harsh-caliphate-2015-3> (Civilians trapped by ISIS report being forced to put up title to cars and homes before being allowed to leave, while other feel as though leaving will constitute death).

The second prong of the test, the interpretation of “defined territory” under international law, requires only that the entity must exercise effective control over a particular piece of land.⁵⁸ The United Nations recognizes very small territories, including Monaco and Singapore, as sovereign member States, as are non-contiguous entities such as Angola, Argentina, and Russia.⁵⁹ Moreover, the borders of a State need not be permanent, although sovereign claims are helped when there is no other claimant to the territory in question.⁶⁰ Philip Jessup, arguing for Israel’s admission to the United Nations on behalf of the United States, discussed the requirement of territory as follows:

One does not find in the general classic treatment of this subject any insistence that the territory of a State must be exactly fixed by definite frontiers. . . [O]ne cannot contemplate a State as a kind of disembodied spirit. . . [T]here must be some portion of the earth’s surface which its people inhabit and over which its Government exercises authority. No one can deny that the State of Israel responds to this requirement.⁶¹

In June 2014, ISIS seized the city of Mosul in Iraq, consolidating its military control of lands larger than comparable to the total area of United Kingdom.⁶² ISIS’s conquest of territory in Iraq and Syria (and its presence in Libya) has occurred in places that are emphatically part of existing, recognized States. Although the Iraqi government, the Syrian government, the Syrian opposition, and Kurdish forces have since reclaimed much of the territory under ISIS’s control, the Islamic State was or has been the sole authority of significant geographic holdings for years on end.⁶³

The third criterion under the Montevideo Convention is an effective government. International law demands no particular form of governance—fully recognized States need not be democratic, pluralistic, representative, or secular

58. CRAWFORD, *supra* note 31, at 40; James Leslie Brierly, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 137 (6th ed. 1963) (“Whether or not a new state has actually begun to exist is a pure question fact.”).

59. MILENA STERIO, *THE RIGHT TO SELF-DETERMINATION UNDER INTERNATIONAL LAW: “SELFISTANS,” SECESSION, AND THE RULE OF THE GREAT POWERS* 46, 179 (2013).

60. Countries’ exerted efforts to deny recognition of Statehood to utopian and libertarian republics established on largely disclaimed land suggests an exception that proves the defined territory rule. See Gideon Lewis-Kraus, *Welcome to Liberland, the World’s Newest Country (Maybe)*, N.Y. TIMES (Aug. 25, 2015), <https://www.nytimes.com/2015/08/16/magazine/the-making-of-a-president.html>.

61. U.N. SCOR, 3d Sess., 383d mtg. at 41, U.N. Doc. S/PV.383 (Dec. 2, 1948).

62. Graeme Wood, *What ISIS Really Wants*, THE ATLANTIC (Mar. 2015), <https://www.theatlantic.com/magazine/archive/2015/03/what-isis-really-wants/384980/>.

63. Iraq’s second largest city, Mosul, was declared “liberated” on July 10, 2017. This liberation occurred nine months after the US-led multinational coalition launched their air and group support offensive against ISIS. *Islamic State and the crisis in Iraq and Syria in maps*, BBC NEWS (Oct. 11, 2017), <http://www.bbc.com/news/world-middle-east-27838034>. Likewise, the Syrian Democratic Forces recaptured ISIS’s self-proclaimed capital, Raqqa on October 17, 2017. Anne Barnard & Hwiada Saad, *Raqqa, ISIS ‘Capital,’ Is Captured, U.S.-Backed Forces Say*, N.Y. TIMES (Oct. 17, 2017), <https://www.nytimes.com/2017/10/17/world/middleeast/isis-syria-raqqa.html>.

in nature—effectiveness means simply that a controlling structure exists. The motivation behind this third criterion is to ensure that States establish a governing structure that behaves like a sovereign by policing borders, collecting taxes, and maintaining a legal system, among other indicia of statehood.⁶⁴

Whatever else the Islamic State represents, it is the only governing authority on the territory it controls. While ISIS uses extreme violence to stamp its exclusive power over the civilian population residing on large ribbons of land in Iraq and Syria and to deny access to other rulers, it also exercises government-like authority over varied facets of life, including tax collection, revenue-generating oil exports, the regulation of local businesses, payment of salaries to fighters and a near total control of family life and personal status.⁶⁵ By ruling as it does, ISIS is engaged in what James Scott termed (in a different context), “sedentarization. . . a state’s attempt to make a society legible, to arrange the population in ways that simplif[y] the classic state functions of taxation, conscription, and prevention of rebellion.”⁶⁶

ISIS’s declaration of itself as a caliphate, a fact that flows from the organization’s putative leader Abu Bakr al-Baghdadi’s assertion that he is a modern-day Caliph, may strengthen its claim to effective governance insofar as it forestalls any other authority engaged in the organization of civic or religious life.⁶⁷ To govern the caliphate, the Islamic State established “nine councils, including the Leadership Council, the Shore Council, the Military Council, the Legal Council, the Fighters’ Assistance Council, the Financial Council, the Intelligence Council, the Security Council, and the Media Council” all of which reinforce fealty to the organization and control the population.⁶⁸ For the cooperative population, ISIS endeavors to provide some social services.⁶⁹ For

64. CRAWFORD, *supra* note 31, at 45–46.

65. See MCCANTS, *supra* note 3, at 152–53; LISTER, *supra* note 7, at 47–48 (“IS frequently subsidizes the prices of staple products, particularly bread, and has been known to cap rent prices . . . Civilian bus services are frequently established and normally offered for free. Electricity lines, roads, sidewalks, and other critical infrastructure are repaired; postal services are created; free healthcare and vaccinations are provided for children; soup kitchens are established for the poor; construction projects are offered loans; and Islam-oriented schools are opened for boys and girls.”)

66. JAMES C. SCOTT, *SEEING LIKE A STATE* 2 (1998).

67. Virtually all scholars of Islamic law reject al-Baghdadi’s interpretation of a true Caliphate. See David S. Sorenson, *Priming Strategic Communications: Countering the Appeal of ISIS*, 44 PARAMETERS 25, 25–26 (2014) (“The real vulnerability of ISIS is not its brutality, which seems to draw followers, but rather its claim to be a true Islamic group, when its operations significantly violate fundamental Islamic tenets. The writings of the very Islamic theorists who are considered foundations of jihadi Sunni Islam contradict ISIS’ claims concerning the religious legitimacy of their actions, and the most legitimate source of Islam, the Qur’an, specifically forbids many of ISIS’ actions. Remove its claim of religious legitimization of murder and destruction, and ISIS becomes only a criminal enterprise. As ISIS uses Islam to recruit and motivate members, its embrace of Islam may ultimately expose it as a naked emperor, who has distorted the core of Islam to the point where ISIS members may be guilty of the very crime it attaches to its Muslim victims—apostasy.”).

68. See Hope Lozano Bielat, *Islamic State and the Hypocrisy of Sovereignty*, E-INT’L REL. (Mar. 20, 2015).

69. See MCCANTS, *supra* note 3, at 136.

the remainder, ISIS's rule is characterized by daily terror and a manifest determination to eliminate any potential challengers.⁷⁰

If ISIS plausibly meets the first three Montevideo criteria, the fourth factor, the ability to enter into relations with other States, assumes additional significance. The capacity to engage in relations with other States traditionally pertained to the entity's technical ability to conduct foreign affairs. Satisfying this prong of the test did not imply that other States agreed to maintain diplomatic, economic or other relations with it, but rather that they *could* do so.⁷¹

International opinion has consistently condemned ISIS without referring to it as a State, and no country has yet raised the possibility of recognizing the Islamic State as a sovereign equal.⁷² Additionally, ISIS has not sought formal membership in the United Nations nor in any other international organization. Should Syria or Iraq fracture along sectarian or ethnic lines, however, it is possible to imagine a future version of the Islamic State seeking the status of statehood. When the former Yugoslavia disintegrated, the international community established the Badinter Commission to determine which of the rump entities qualified as sovereign nations.⁷³

Such cases trigger the longstanding debate on the *effect* of recognition. Under one theory, recognition by other States is simply a declaration of statehood, and the entity has already achieved the status by fulfilling the fixed legal criteria.⁷⁴ The contrary position, known as the constitutive view, suggests that recognition is one of the elements of statehood, and that regardless of its satisfaction of the objective criteria, a claimant to statehood is not itself a State until others have recognized it.⁷⁵

70. LISTER, *supra* note 7, at 49 ("Executions—sometimes by crucifixion and stoning—and the amputation of limbs as punishment for murder, adultery, and robbery have demonstrated a shocking level of brutality.").

71. *See id.*

72. *See* S.C. Res. 2170, ¶ 1 (Aug. 15, 2014) (condemning gross, widespread abuse by extremist groups in Iraq and Syria and their gross, widespread human rights abuses).

73. *See* Alain Pellet, *The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples*, 3 EUR. J. INT'L L. 178, 178 (1992), <http://ejil.org/pdfs/3/1/1175.pdf>. A rump state or entity is a politico-geographic entity which is a remnant of a previous, larger state that has subsequently been broken up. *See generally* Jerome Wilson, *Ethnic Groups and the Right to Self-Determination*, 11 CONN. J. INT'L L. 433 (1996); Stephen C. McCaffrey, *Developments in Public International Law*, 30 INT'L L. REV. 287 (1996).

74. Brierly, *supra* note 58, at 137; GERARD KREIJEN, *STATE FAILURE, SOVEREIGNTY AND EFFECTIVENESS: LEGAL LESSONS FROM THE DECOLONIZATION OF SUB-SAHARAN AFRICA* 15–18 (2004).

75. *See, e.g.,* JURE VIDMAR, *DEMOCRATIC STATEHOOD IN INTERNATIONAL LAW* 63 (2013) (arguing that states do not emerge automatically from the application of legal criteria but instead through a political process in which a declaration of independence is accepted); Dapo Akande, *The Importance of Legal Criteria for Statehood: A Sur-Rejoinder to Jure Vidmar*, EJIL: TALK! (Aug. 10, 2013), <http://www.ejiltalk.org/the-importance-of-legal-criteria-for-statehood-a-sur-rejoinder-to-jure-vidmar/> (contending that the fourth Montevideo factor includes the recognition requirement of legal and factual independence); *see also* Martii Koskenniemi, *The Place of Law in Collective Security*, 17

Under the first theory, the determination of a State is intimately connected to the politics of recognition. International law is a dialectical enterprise such that putative or quasi-States ultimately require symbolic and operational recognition from their erstwhile equals. Because recognition involves a gesture from outside of the State, foreigners' assumptions matter in establishing the contours of legitimacy.⁷⁶ In recent months, Catalonia and Kurdistan have struggled to translate internal enthusiasm into external recognition.⁷⁷ Similarly, the refusal of influential states to recognize Taiwan and Kosovo as sovereigns fuels their uncertain statuses.⁷⁸ Robust external recognition, as well as great power consensus, is required for full membership in the United Nations (decided through a vote "by a two-thirds majority of the members present and voting, upon its application for membership")—clear evidence that outside powers play a role at each stage in the sovereignty accrual process.⁷⁹

Since existing countries have no legal obligation to recognize an aspiring entity as a State, refusing to engage the would-be State is as political an act as choosing to establish diplomatic relations.⁸⁰ Recognition is best understood as a complex socio-economic and diplomatic process that occurs within a soft international legal framework.⁸¹ In this sphere, the phenomenon of persistent non-recognition is more commonly informed by *realpolitik* interests than by legal or normative considerations.⁸² It is therefore important to distinguish between opposition of those States that have a vested interest and opposition by

MICH. J. INT'L L. 455, 469 (1996) (arguing for a "resuscitated 'constitutivist' approach to the recognition of states").

76. This is true whether or not one accepts the full constitutive theory of statehood which holds that "[t]hrough recognition only and exclusively a State becomes an International Person and a subject of International Law." L.F.L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 135 (1906).

77. George Kyris, *Catalonia and Kurdistan Find the Road to Statehood Filled with Obstacles*, THE CONVERSATION (Oct. 19, 2017), <http://theconversation.com/catalonia-and-kurdistan-find-the-road-to-statehood-filled-with-obstacles-85768>; Saim Saeed, *How the world reacted to Catalan independence declaration*, POLITICO (Oct. 27, 2017), <https://www.politico.eu/article/how-the-world-reacted-to-catalan-independence-declaration/>.

78. Existing states almost always object to any threat to territorial integrity. *See generally* Stephen Allen, *Recreating 'One China': Internal Self-Determination, Autonomy and the Future of Taiwan*, 4 ASIA-PAC J. ON HUM. RTS. & L. 21, 23 (2003) (stating that "both the ROC and PRC . . . were ideologically incapable of accepting the existence of the other regime or any compromise solution"). It is therefore worth distinguishing between recognition by less interested external actors and the predictable opposition of those states that stand to lose land or have a vested interest in the previous regime.

79. Under the U.N. Charter, the Security Council must recommend membership before the General Assembly can approve it. Gen. Assembly of the U.N., *Article XIV, Admission of New Members to the United Nations*, UNITED NATIONS, <http://www.un.org/en/ga/about/ropga/adms.shtml> (last visited Oct. 27, 2017).

80. Int'l Law Ass'n, *Recognition/Non-recognition in International Law*, 76 INT'L L. ASS'N REP. CONF. 424, 427 (2014).

81. *See Declaration on The Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union*, 31 I.L.M. 1485, 1486–87 (1992).

82. The practice of premature recognition is a closely related concept. *See* Int'l Law Ass'n, *supra* note 80, at 432.

actors based on moral considerations, such as observance of human rights and acceptance of the sovereign co-existence of other States.

II.

HUMAN RIGHTS MINIMALISM WITHIN THE INTERNATIONAL ORDER: A TWO-PART PROPOSAL

A. *Respecting Human Security Domestically*

All states are simultaneously outward and inward-looking creatures. To the extent a State encompasses people, territory, and cultures, it reflects certain qualities of its inhabitants and represents those characteristics in its external relations.⁸³ The concept of sovereignty thus captures the duality of internal authority and the boundaries of that power.⁸⁴

ISIS's abhorrent human rights record renders it almost unrecognizable in international legal terms.⁸⁵ This is true not because the Montevideo Convention precludes a pariah State from becoming a full member of the international community, but because the scale of repression produced by the Islamic State suggests an entity unable or unwilling to adopt legitimating behaviors toward its own population. In much of Syria and Iraq today, ISIS threatens basic human security—an idea that provides a normative baseline necessary for the recognition of any candidate State seeking or invested with sovereign status. The term “human security” gained favor with the establishment of the U.N. Commission on Human Security (CHS) in 2000, a process co-chaired by Amartya Sen and Sadako Ogata.⁸⁶ The CHS issued its final report in 2003, in which it concluded that human security “means protecting people from critical and pervasive threats and situations, building on their strengths and aspirations.”⁸⁷ It also means creating systems that give people the building blocks of survival, dignity, and livelihood.⁸⁸

Human security is therefore focused on the rights of people in a given territory to live in safety and dignity, rather than on State-centric security imperatives.⁸⁹ According to Anne-Marie Slaughter:

83. KREIJEN, *supra* note 74, at 15–18.

84. *Id.*

85. Hannah Arendt and Carlos Nino both used the term “radical evil” to describe the commission of well-planned and systematic crimes against humanity. *See, e.g.*, HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 591–92 (1966); CARLOS NINO, *RADICAL EVIL ON TRIAL* vii–viii (1998).

86. Alice Edwards, *Human Security and the Rights of Refugees: Transcending Territorial and Disciplinary Borders*, 30 MICH. J. INT'L L. 763, 764 (2009).

87. *Id.*

88. *Id.*

89. Anne-Marie Slaughter, *Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform*, 99 AM. J. INT'L L. 619, 619 (2005).

we all seek to live our lives in dignity, free from fear and from want. We need not be guaranteed prosperity, but at least the health and education necessary to strive for it. . . [and] that our government will not try to murder us and will do its utmost to prevent our fellow citizens from doing so.⁹⁰

Alice Edwards notes that, “[h]uman security treats security, rights, and development as mutually reinforcing goals and is oriented as much toward the protection of individuals as toward their empowerment.”⁹¹ The human security agenda was buttressed by the work of the International Commission on Intervention & State Sovereignty (ICISS), the body that produced the Responsibility to Protect (RtoP) doctrine.⁹² Convened by the Canadian government in 2002, ICISS proposed a radical reconceptualization of sovereignty.⁹³ The final ICISS Report urged an understanding of sovereignty not primarily as a right to control what happens within a State’s borders, but rather as a responsibility the State bears to protect its population and those in other States.⁹⁴ Margaret DeGuzman concludes that, “[t]his reorientation led ICISS to include within the ambit of RtoP the whole range of States’ internal and external responsibilities, rather than simply their responsibilities related to military intervention.”⁹⁵

RtoP thus provides a framework for considering the many consequences of human rights violations, not an operational blueprint for international intervention.⁹⁶ Several scholars have nonetheless proposed RtoP as a tool for clarifying international obligations in the face of ethnic cleansing,⁹⁷ explaining

90. *Id.*

91. See Edwards, *supra* note 86, at 765 (“[Human Security] also challenges us to revisit notions of territory and sovereignty as far as they inhibit global action in the face of transnational threats to our shared security and humanity.”).

92. See Int’l Comm’n on Intervention & State Sovereignty, Rep. on its Fifty-Seventh Session, U.N. Doc. A/57/303 (Aug. 14, 2002) [hereinafter Responsibility to Protect] (describing the same responsibility); see also Christopher C. Joyner, *The Responsibility to Protect: Humanitarian Concern and the Lawfulness of Armed Intervention*, 47 VA. J. INT’L L. 693, 716 (2007) (referring to the responsibility to protect as an emerging international legal norm); Slaughter, *supra* note 91, at 621 (The “responsibility to protect” encapsulates the idea that the international community has a right and a duty to intervene in states that cannot or will not protect the human rights of their people against “genocide and other large-scale killing,” ethnic cleansing or serious violations of international human rights).

93. Margaret M. DeGuzman, *When Are International Crimes Just Cause for War?*, 55 VA. J. INT’L L. 73, 78–79 (2014).

94. *Id.* at 79.

95. *Id.* at 80.

96. See generally Monica Hakimi, *Toward a Legal Theory of The Responsibility to Protect*, 39 YALE J. INT’L L. 249 (2014) (arguing that RtoP should not posit an all-encompassing duty that falls, at once, on the entire international community but should propose more discrete duties that attach to specific outside states).

97. David Scheffer, *Atrocity Crimes Framing the Responsibility to Protect*, 40 CASE W. RES. J. INT’L L. 111, 128–30 (2007).

the Security Council's response to civil war in Libya⁹⁸ and conceiving of refugee cost-sharing.⁹⁹

If RtoP stipulates minimal human security standards and duties for extant States, logic dictates that a similar rule should apply to those entities seeking sovereign recognition. In practice, a form of principled non-recognition has existed since the 1930s when the U.S. refused to acknowledge Manchukuo as a State.¹⁰⁰ The so-called Stimson Doctrine has since achieved increased validity through its enumeration in Article 41(2) of the Responsibilities of States for International Wrongful Acts.¹⁰¹ At base, the Stimson Doctrine identifies some State-building practices as beyond the pale and reflects what Cedric Ryngaert termed "the field of tension between statehood as a factual given and statehood as a moral engagement."¹⁰²

Republika Srpska, the majority Serbian ethnic entity within Bosnia-Herzegovina, has never been recognized as a sovereign State, in part because of its dismal human rights record during the wars following the break up of the former Yugoslavia.¹⁰³ Led by Radovan Karadžić and Ratko Mladić, Bosnian Serb forces of Republika Srpska committed grave atrocities, including the massacre at Srebrenica.¹⁰⁴ Although Republika Srpska secured significant autonomy, at no time did the United Nations or major actors within the international community entertain complete independence for the Serbian enclave and, in fact, the continued use of the name has become synonymous with "genocidal aggression."¹⁰⁵

The fate of Republika Srpska suggests that, for purposes of international recognition and legitimation, statehood carries with it a bundle of attributes associated with the political unit in question. Those characteristics include

98. See generally Spencer Zifcak, *The Responsibility to Protect After Libya and Syria*, 13 MELB. J. INT'L L. 59 (2012).

99. See generally E. Tendayi Achiume, *Syria, Cost-sharing, and the Responsibility to Protect Refugees*, 100 MINN. L. REV. 687 (2015).

100. Ryngaert & Sobrie, *supra* note 47, at 472.

101. G.A. Res. 56/83, annex, Articles on Responsibility of States for Internationally Wrongful Acts (Jan. 28, 2002) (stating that "[n]o State shall recognize as lawful a situation created by a serious breach [of an obligation arising under a peremptory norm of general international law], nor render aid or assistance in maintaining that situation").

102. Ryngaert & Sobrie, *supra* note 47, at 487.

103. In April 1992, the EU and U.S. "recognized the Republic of Bosnia-Herzegovina but ignored [Radovan] Karadzic's claim to an independent Republic of Srpska." THE BOSNIAN CONFLICT 91 (Alexander Cruden ed., 2012).

104. See Prosecutor v. Karadžić, Case No. IT-95-5, Judgment, ¶ 5849 (Mar. 26, 2016); David Pettigrew, *Justice in Bosnia After Mladic*, GREATER SURBITON (June 18, 2011), <https://greatersurbiton.wordpress.com/2011/06/18/justice-in-bosnia-after-mladic/>.

105. Paul C. Szasz, *The Quest for a Bosnian Constitution: Legal Aspects of Constitutional Proposals Relating to Bosnia*, 19 FORDHAM INT'L L.J. 363, 365 (1995) (citing Conference on Yugoslavia Arbitration Commission Opinion Nos. 2, 3 and 4, January 11, 1992, 31 I.L.M. 1497, 1499, 1501 (1992)); RICHARD HOLBROOKE, TO END A WAR 130–31 (1998) ("Retention of the name Republika Srpska was 'a big problem for Sarajevo' and called 'a Nazi name' by Izetbegovic, who, with Sacirbey, finally relented.")

respect for life and the essential dignity of the human beings counted as members of the State. Max Weber's sociological definition of the State as the monopoly of the legitimate use of force within a territory is thus insufficient to confer legitimacy on a political community under international law.¹⁰⁶ The unit in question must also demonstrate effective control in a way that respects the basic humanity of the permanent population.¹⁰⁷

Additional evidence of a future sovereign's respect for minimal human rights observance is found in its declaratory commitments. For aspiring States, signaling a willingness to be bound by constitutional norms and international human rights agreements represents a necessary if insufficient condition for statehood.¹⁰⁸ Kurdistan, Palestine, and Somaliland have all adopted constitutions that promise respect for international human rights, and they have all been embraced by global bodies that are prepared to accept entities that are not yet recognized as States.¹⁰⁹ Such promises lead to the conclusion that the socialization of States begins pre-independence.¹¹⁰ Of course, an aspiring State may promise to uphold human rights principles and then repudiate those assurances once it becomes a recognized sovereign, but doing so carries reputational, economic, and strategic costs.¹¹¹

106. See Max Weber, *Politics as a Vocation*, (1919), in FROM MAX WEBER 77 (H.H. Gerth & C. Wright Mills eds., 1946).

107. Grant, *supra* note 23, at 403, 410–12.

108. See generally Erik Voeten, *Does Participation in International Organizations Increase Cooperation?*, 9 REV. INT'L ORGS. 285 (2014) (asserting the proposition that international institutions, even those without international enforcement mechanisms, impact state's behavior); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2625 (1997).

109. See generally Michael J. Kelly, *The Kurdish Regional Constitution within the Framework of the Iraqi Federal Constitution: A Struggle for Sovereignty, Oil, Ethnic Identity, and the Prospects for a Reverse Supremacy Clause*, 114 PENN ST. L. REV. 707 (2010); Andrew Arato, *Post-Sovereign Constitution-Making and its Pathology in Iraq*, 51 N.Y. L. SCH. L. REV. 535 (2006–07) (detailing Iraq's interim and final constitutions following the 2003 invasion); Lisa Davis, *Symposium: The Global Struggle for Women's Equality: Iraqi Women Confronting ISIL: Protecting Women's Rights in the Context of Conflict*, 22 SW. J. INT'L L. 27 (2016) (exploring the ways in which observance of women's rights differed between Iraq's constitution and reality); see also U.N. Office of the High Comm'r on Human Rights, *Status of Ratification Interactive Dashboard*, U.N. (2007), <http://indicators.ohchr.org/> (indicating that the State of Palestine ratified the International Covenant on Civil and Political Rights in 2014); *States Parties—Chronological list*, INT'L CRIM. CT. (2017), https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/states%20parties%20_%20chronological%20list.aspx (listing the State of Palestine as a party to the Rome Statute); *Somaliland*, FREEDOM HOUSE (2012), <https://freedomhouse.org/report/freedom-world/2012/somaliland> (noting that the Somaliland constitution guarantees the freedoms of expression and of the press).

110. See RYAN GOODMAN & DEREK JINKS, *SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW* (2013) (demonstrating that the global human rights architecture can socialize states to honor and protect human rights).

111. See generally Oona Hathaway, *The Costs of Commitment*, 55 STAN. L. REV. 1821 (2003) (arguing that the cost of compliance with international human rights treaties varies according to a country's divergence from the requirements of a treaty and the likelihood that the country will change its practices to comply with its requirements).

Conversely, international law disfavors recognition of entities accused of the illegal use of force, the forcible annexation of territory, or grave, systematic, and independently-verified human rights abuses.¹¹² A group's violation of *erga omnes* or *jus cogens* obligations, particularly those resulting from the commission of war crimes, genocide, or crimes against humanity, renders the potential sovereign an international criminal enterprise and stigmatizes it in ways that preclude it from consideration as a future equal.¹¹³ (While widespread discrimination or systematic prejudice against minority populations by would-be actors is less clearly disqualifying, overt persecution or the failure to stop serious offenses caused by non-State actors is likely to trigger resistance to recognition by international stakeholders). Likewise, the insertion of dignity-based values into the recognition dynamic surely constitutes a double standard because the same existing States that behave in ways disrespecting human security are also loathe to admit the comparison in negotiations over the independence of new States.¹¹⁴

Much as RtoP has pierced the veil of absolute sovereignty, a demand that the candidate State observe minimal human rights standards prior to recognition joins a pre-existing normative tradition. The European Union, for example, has long conditioned admission to the organization and regional institutions on the acceptance of the European Convention on Human Rights.¹¹⁵ Any European State may seek to join the EU, but as Utz P. Toepke has posited, "the principles of pluralist democracy and respect for human rights form part of the common heritage of all Member States and adherence to them is therefore an essential requirement of membership."¹¹⁶

112. See Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CALIF. L. REV. 449, 462 (1990). Notably, the birth of Israel, Eritrea, South Sudan and Kosovo were all surrounded by serious human rights abuses committed by independence forces although in each case those offenses paled in comparison to atrocities committed by opponents of sovereignty prior to recognition. On this point, Xanana Gusmao's instruction to Timorese rebels not to retaliate against Indonesian militias in 1999 represented a conscious effort to ensure that East Timor would not be accused of the crimes perpetrated by the Indonesian occupiers. See e.g., POWER, *supra* note 40, at 288.

113. See generally, *Barcelona Traction, Light and Power Co. Ltd. (Belg. v. Spain)*, Judgment, 1970 I.C.J. 3, at 32 (Feb. 5) (holding that a State necessarily assumes an obligation for the treatment of foreign investments based on general international law if and when that State admits foreign investments or foreign nationals into its territory).

114. See Louis Henkin, *Lecture: That "S" Word: Sovereignty, Globalization, and Human Rights*, 68 FORDHAM L. REV. 1 (1999/2000) (speaking of non-state actors' responsibilities for human rights violations under international law); Neil Stammers, *Social Movements and the Social Construction of Human Rights*, 21 HUM. RTS. Q. 980, 981 (1999) ("[D]ominant discourses from both proponents and opponents of human rights are not analytically equipped to grasp the way in which ideas and practices in respect of human rights have been socially constructed in the context of social movement challenges to extant relations and structures of power.").

115. See also Consolidated Version of the Treaty on European Union art. 49, 2016, 202 O.J.C 43 (requiring acceptance of art. 2); see also, *Conditions for Membership*, EUR. COMM'N (2016), http://ec.europa.eu/enlargement/policy/conditions-membership/index_en.htm (providing the criteria required before a state can join the European Union).

116. Utz P. Toepke, *The European Economic Community – A Profile*, 3 NW. J. INT'L L. & BUS.

Since its founding, ISIS has consistently rejected demands that it conform to the international community's notion of what it means to behave like a sovereign. If the Islamic State is engaged in State-building, its project has been defined by conquest, brutality, and a demand for theological obeisance among the population it controls, all wrapped in a peculiar form of managerial acumen.¹¹⁷ In the event a future version of the Islamic State seeks recognition as a sovereign State, that entity could continue to exercise control over many facets of public and private life—certainly, nothing in international law prohibits the maintenance of Sharia law.¹¹⁸ But ethnic cleansing, torture, sexual slavery, the violent persecution of religious minorities, and accompanying incitement or rhetorical support thereof is antithetical to a fulsome conception of sovereignty.¹¹⁹

B. Respect for Sovereign Co-existence

By fomenting human insecurity *outside* of its territorial control, ISIS has violated a second fundamental tenet of international life: respect for sovereign co-existence.¹²⁰ The Islamic State's actions demonstrate the denial of an international order premised on reciprocity and near-absolute authority within sovereign borders. The commission of mass atrocities around the world directed at soft targets (rather than military installations or symbols of government power) suggests adherence to ideas that are alien to global civic life organized through a system of nation States.¹²¹ In its attempt to create a war without

640, 643 (1981) (citing 12 E.C. Bull., no. 5, at 73 (1979)); see also *Memorandum on the Accession of the European Communities to the European Convention on Human Rights*, 12 BULL. OF THE EUR. COMMUNITIES 5 (1979); Cesare Pinelli, *Conditionality and Enlargement in Light of the EU Constitutional Developments*, 10 EUR. L.J. 354 (2004); Yassin Abdullah Kadi and Al Barakaat Int'l Found. v. Council of the Eur. Union and Comm'n of the European Communities, Judgment, C-402/05 P and C-415/05 P (2008) ("Respect for human rights is therefore a condition of the lawfulness of Community acts, and measures incompatible with respect for human rights are not acceptable in the Community.").

117. ISIS's attempts to provide certain public services, such as fixing potholes, running post offices, distributing food and vaccinating its subjects against polio although it has also been accused of taxing Syrian and Iraqi communities to pay the salaries of foreign fighters. MCCANTS, *supra* note 3, at 152.

118. ISIS has adopted Saudi Arabia's conservative brand of Sunni Islam, complete with hudud penalties, although ISIS has interpreted punishments even more severely than Saudi Arabia and does so in public. *Id.* at 16–37.

119. See generally Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991) (arguing that countries transitioning to a more just and democratic future cannot gain legitimacy without reckoning for international crimes of the past).

120. *Prospects for Protecting People Improve When Sovereignty Not Viewed as 'Wall or Shield', Secretary-General Tells Security Council in Ministerial Debate*, U.N. (Feb. 23, 2015), <https://www.un.org/press/en/2015/sc11793.doc.htm>.

121. The Islamic State's frequent attacks on fellow Muslims has caused a rift within jihadist groups and caused even al-Qaeda to distance itself from the organization. See MCCANTS, *supra* note 3, at 95–96.

bounds, ISIS relishes its role as a threat to people and a disrupter of societies the world over.¹²²

Regardless of its motivations or doctrinal teachings, ISIS's pattern of conduct is fundamentally hostile to orderly relations among bordered nations. Even States that are notoriously repressive internally—North Korea, Zimbabwe, China, or Saudi Arabia—rarely sponsor or coordinate terrorist attacks in locations far beyond their spheres of influence. By contrast, ISIS routinely attacks civilians in territory to which the organization makes no claim, a pattern of conduct replicated by Boko Haram's infamous abduction of 276 girls at Chibok Government Secondary School in Nigeria and al-Shabaab's deadly attack on Kenyan university students in 2015.¹²³

All successful States eventually delineate their territorial ambitions. While precise borders may be contested, the claim to statehood is ultimately a demand for recognition of a people to a place, without which there may be no center, no homeland, and no diaspora. In that regard, the Islamic State's multiple identities, including its State-like attributes, have bewitched the international community. Security Council Resolution 2249, calling on U.N. Member States to take all necessary measures in "the territory under the control of ISIL" to suppress terrorist acts, reflects the conceptual incoherence provoked by ISIS, which is seen as both the responsible party in law and a temporary authority, a transitory tormenter of the local population.¹²⁴

In the classic story of new State recognition, a restive portion of an existing entity seeks independence from the parent State.¹²⁵ Opposition from the encompassing State is consistent and predictable, and the parties involved generally understand the costs and benefits of designating territory for a new unit.¹²⁶ As the process unfolds, sometimes under U.N. stewardship, the international community legitimates some groups' desire for complete self-determination, sometimes at the expense of others.¹²⁷

122. Wood, *supra* note 62.

123. See Kevin Sieff, *Boko Haram kidnapped 276 girls two years ago. What happened to them?*, WASH. POST (Apr. 14, 2016), https://www.washingtonpost.com/news/worldviews/wp/2016/04/14/boko-haram-kidnapped-276-girls-two-years-ago-what-happened-to-them/?utm_term=.897cde946618; Jessica Hatcher & Kevin Sieff, *Al-Shabab attacks Kenyan university, killing at least 147*, WASH. POST (Apr. 2, 2015), https://www.washingtonpost.com/world/africa/70-killed-hundreds-rescued-after-kenya-university-attack-by-al-shabab-militants/2015/04/02/0c554516-d951-11e4-ba28-f2a685dc7f89_story.html?utm_term=.a0eaafd9a353.

124. S.C. Res. 2249, ¶ 5 (Nov. 20, 2015).

125. See generally Christopher J. Borgen, *The Language of Law and the Practice of Politics: Great Powers and the Rhetoric of Self-Determination in the Cases of Kosovo and South Ossetia*, 10 CHI. J. INT'L L. 1 (2009).

126. ALLEN BUCHANAN, JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW 337 (2004); see generally Alexander H. Berlin, *Recognition as Sanction: Using International Recognition of New States to Deter, Punish, and Contain Bad Actors*, 31 UNIV. PA. J. INT'L L. 2 (2009).

127. See generally Charles Riziki Majinge, *Emergence of New States in Africa and Territorial Dispute Resolution: The Role of the International Court of Justice*, 13 MELB. J. INT'L L. 462 (2012).

The Islamic State's unrelenting violence in far-flung locales disrupts this analysis in at least three ways. First, it creates adversaries of States beyond the parent, whose recognition or acquiescence are needed to reconceive of the entity in question. Since multiple States now bear the brunt of the Islamic State's terrorist activities or the contagion of cross-border attacks, those same countries have a material interest in marginalizing ISIS and are far less likely to admit the source of the conflict into the family of recognized nations.

Second, ISIS exploits the vulnerabilities of an international world built on cooperation among sovereign equals and the flow of people, goods, and ideas across borders. Operating from a base of territory in Syria and Iraq, ISIS has deployed trans-State and non-State terrorist tactics to amplify its capacity.¹²⁸ Bahrin Naim reportedly organized and funded the January 14, 2016, bombing in Jakarta.¹²⁹ ISIS has also attracted militants from dozens of countries far from Iraq and Syria and is now engaged in human rights violations that cross frontiers and nationalities but benefit from a secure, centralized location.¹³⁰

Third, the Islamic State's use of social media transcends traditional boundaries, allowing it to reach audiences well beyond its territorial control. Web-based technologies provide multiple platforms to disseminate messages and evade the chokepoints and censorship that curbed previous generations of speech, hateful or otherwise. ISIS regularly films and disseminates gruesome acts of violence, recruits foreign fighters, wires funds, encrypts its communication, and experiments with brand and marketing ideas, all online.¹³¹ Magazines and pamphlets once connected relatively small numbers of extremist readers; today, social media, including Twitter, Facebook, Instagram, and YouTube, enables instantaneous and memorialized broadcasting from anywhere on the planet.

In this fashion, ISIS profits from phenomena that exceed the capacity of any one State to regulate. The enlistment of foreign fighters, easy cross-border travel, occasional fraudulent refugee claims, and internet-based communication are so hard to control that ISIS has effectively turned the international system against itself.¹³²

At base, statehood within the international community reflects a bargain. In exchange for internal autonomy, each State recognizes that others enjoy the same status. Moreover, each State tacitly or explicitly acknowledges that it cannot, by itself, control all people and territory. The principle of sovereign co-

128. Ahmed Rafik, *Story of Bahrin Naim, Suspected Mastermind of the Jakarta Attack*, TEMPO (Jan. 15, 2016), <https://en.tempo.co/read/news/2016/01/15/055736518/Story-of-Bahrin-Naim-Suspected-Mastermind-of-the-Jakarta-Attack>.

129. *Id.* (Bahrin Naim is an Indonesian computer expert whose last known whereabouts were in Syria).

130. See WARRICK, *supra* note 6, at 289–90.

131. See LISTER, *supra* note 7, at 48–49.

132. French antiterrorism police compiled a report documenting the difficulties French and Belgian authorities had sharing intelligence or preventing one of the Paris assailants from traveling to Brussels following the November 13, 2015, attack. Callimachi et al., *supra* note 16.

existence, therefore, enables the enduring practices of comity, diplomacy, and the mutuality of recognition necessary for functioning State-to-State relations.

Many non-State groups that once scorned the geopolitical habitat have later embraced the conventions of statehood. Today's Palestinian representatives have achieved inclusion in some international fora by observing a set of geopolitical rules that the PLO airplane hijackers or Munich Olympic assailants of the 1970s did not.¹³³ Similarly, Kurdish nationalists have largely repudiated guerilla attacks against Turkish, Syrian, and Iraqi State figures in favor of a strategy aimed at defining Kurdistan within the borders of present-day Iraq.¹³⁴ The September 25, 2017, referendum on Kurdish independence was held entirely within Iraq and aimed to exploit the Peshmurga's battlefield successes against ISIS.¹³⁵ Somaliland too has long struggled to achieve international recognition of its State-like institutions and to disassociate itself with the chaos of Somalia.¹³⁶ One lesson from each of these States-in-waiting is that independence movements mature over time and that the experience of governing people and territory inculcates leaders with ideas central to sovereignty and the maintenance of a functioning international system. Viewed collectively, these entities have come to understand that they will not achieve statehood if they produce excessive negative externalities for the global commons in the form of piracy, terrorism, the production of refugees, or environmental pollutants and infectious disease.

In the final analysis, membership in the international community demands acceptance of a shared set of expectations. These norms range from hortatory commitments to robust multilateralism, to the demarcation of territory and the delineation of bordered spaces. Unless and until ISIS, or any other non-State organization, recognizes the existence of other sovereign actors, it cannot become a full player on the world stage within the meaning of international law.

133. *General Assembly grants Palestine non-member observer State status at U.N.*, U.N. NEWS CENTRE (Nov. 29, 2012), <http://www.un.org/apps/news/story.asp?NewsID=43640#.WhHeSbQ-dE6>.

134. Like other breakaway regions and people wanting self-determination, Kurds in Iraq have begun to deploy the trappings of Statehood, including the issuance of Kurdistan license plates. See Richard A. Oppel Jr., *Iraq's Kurds Enjoy Self-Rule and Are Trying to Keep It*, N.Y. TIMES (Dec. 31, 2014), <http://www.nytimes.com/2014/12/31/world/middleeast/iraqs-kurds-enjoy-selfrule-and-are-trying-to-keep-it.html>.

135. Galip Dalay, *After the Kurdish Independence Referendum: How to Prevent a Crisis in Iraq*, FOREIGN AFF. (Oct. 2, 2017), <https://www.foreignaffairs.com/articles/middle-east/2017-10-02/after-kurdish-independence-referendum>.

136. Brad Poore, *Somaliland: Shackled to a Failed State*, 45 STAN. J. INT'L L. 117 (2009); see also J. Peter Pham, *Somalia: Where a State Isn't a State*, 35 FLETCHER F. WORLD AFF. 133, 148 (2011) ("The reality is that [Somalia] has long ceased to be a state; meanwhile, what are at least potentially viable successor states, in not already such in all but name, continue to be denied recognition."); Mary Harper, *Somaliland: Making a Success of Independence*, BBC NEWS (May 18, 2016), <http://www.bbc.com/news/world-africa-36300592>.

CONCLUSION

ISIS represents the latest challenge to “the role, content, and scope of the legal norms on State recognition.”¹³⁷ To address ongoing uncertainty surrounding the recognition dynamic, the International Law Association has convened the Committee on Recognition in International Law.¹³⁸ The committee is conducting a multi-year survey to derive “a conclusion about the current state of international law with respect to the recognition of States and government”¹³⁹ The results may be instructive because how the global community treats ISIS is no longer strictly academic. Since the Islamic State’s 2014 territorial expansion, relief organizations, cross-border business enterprises, U.N. agencies, and neighboring States have been forced to grapple with a non-State actor that controls land and lives and operates through select statist modalities.

More fundamentally, recognition implies an inquiry into the motivations of the potential State, the impact on existing political communities, and the priorities of evaluating States, regional organizations and global institutions. To date, the Islamic State’s nihilism and contempt for the Westphalian order—coupled with military defeats—have allowed the international community to avoid serious consideration of ISIS as a candidate for sovereignty.

But in the nearly uniform condemnation of the Islamic State lie clues to what is and ought to be valued in any discussion concerning the attributes of statehood. Clarifying those factors begins with the Montevideo Convention pillars but quickly extends to the core of recognition—common principles and the acknowledgment of an international order premised on formal, moral, and political equivalence. In the space between what Montevideo allows and what ISIS represents, respect for human security and sovereign co-existence offers a means of distinguishing the next generation of sovereign States from rights-abusing movements.

137. Roth, *supra* note 20, at 647.

138. *Id.*

139. Int’l Law Ass’n, *supra* note 80, at 424–25.

Diversity and Decision-Making in International Judicial Institutions: the United Nations Human Rights Committee as a Case Study

Vera Shikhelman*

ABSTRACT

The lack of diversity in the background of the decision-makers in international judicial and quasi-judicial institutions has been widely criticized in recent years. It has been argued that the background of the decision-makers is too homogeneous and not representative of the international community as a whole. However, there is little empirical evidence on whether the background of the decision-makers actually influences their decision-making processes in the international context. This article uses the United Nations Human Rights Committee as a case study for testing empirically the influence of geographical origin, gender, domestic legal system, and professional background on decisions.

The article finds certain voting patterns that are associated with geographical origin, domestic legal systems, professional background, and possibly gender. This is especially true in cases where the Committee Members' State's interests are at stake, since the most significant voting pattern was found for Committee Members from Western States voting in favor of States from their regions in immigration cases. However, it is safe to say that on most issues the background of the Committee Members did not have significant influence on their voting patterns. Beyond the practical implications of diversity on the decision-making process, this article also uses the United Nations Human Rights Committee as a case study to demonstrate the importance of diversity to the legitimacy of international institutions.

DOI: <https://doi.org/10.15779/Z38FB4WM2B>

* Emile Noel Research Fellow, NYU School of Law. I would like to thank Eric Posner, Tom Ginsburg, Adam Chilton, Lee Epstein, Nienke Grossman, David Kretzmer, Yuval Shany, Erik Voeten, Tomer Broude, Shai Dothan, Yahli Shershevsky, Ivana Isailovic, the participants of PluriCourts-iCourts Workshop, the participants of the JSD Colloquium at the University of Chicago Law School, the Participants of the Pozen Center for Human Rights Workshop, and the editorial staff of the Berkeley Journal of International Law for very helpful comments, discussions and suggestions. All views expressed here, as well as any errors are, of course, only my own.

INTRODUCTION	61
I. DIVERSITY IN INTERNATIONAL INSTITUTIONS	65
A. <i>The Importance of Diversity in International Judicial Institutions</i>	67
B. <i>What are We Seeking to Diversify?</i>	71
II. THE UNITED NATIONS HUMAN RIGHTS COMMITTEE	78
A. <i>General Background</i>	78
B. <i>Diversity in the HRC</i>	81
III. HYPOTHESES AND HYPOTHESES TESTING.....	85
A. <i>Data and Hypotheses</i>	85
B. <i>Descriptive Statistics</i>	87
C. <i>Results</i>	90
IV. DISCUSSION	97
A. <i>Empirical Implications</i>	97
B. <i>Implications on Legitimacy and Beyond</i>	100
CONCLUSION	104
APPENDIX 1	105
APPENDIX 2	109
A. <i>General Hypotheses</i>	109
B. <i>Specific Hypotheses</i>	110

INTRODUCTION

Discussion about the significance and practical implications of the diversity of decision-makers is not unique to the international legal system. Long before diversity was discussed in the context of international judicial institutions, national jurisdictions around the globe grappled with the issue. For instance, in the American context, there have been many debates about the lack of racial, ethnic, and religious diversity in the judiciary and the problems that arise from such a situation.¹ One of the main arguments raised in different jurisdictions in

1. For general literature discussing diversity in courts, see Sheldon Goldman, *Why We Have a Catholic-Majority Court: The Politics of Appointing Catholics to the Federal Courts*, 4 U. ST. THOMAS L.J. 193, 202 (2006) (discussing the “Catholic seat” on the US Supreme Court); Barbara L. Graham, *Towards an Understanding of Judicial Diversity in American Courts*, 10 MICH. J. RACE & L. 153 (2005) (discussing the lack of racial and ethnic diversity in US courts and its implications on the legitimacy of those courts); Mark S. Hurwitz & Drew Noble Lanier, *Diversity in State and Federal Appellate Courts: Change and Continuity Across 20 years*, 29 JUST. SYS. J. 47 (2008); Paul Horwitz, *Religious Tests in the Mirror: The Constitutional Law and Constitutional Etiquette of Religion in Judicial Nominations*, 15 WM. & MARY BILL RTS. J. 75, 127 (2006) (discussing the role of religion in nominating judges); Mark S. Hurwitz, & Drew Noble Lanier, *Explaining Judicial Diversity: The Differential Ability of Women and Minorities to Attain Seats on State Supreme and Appellate Courts*,

favor of the diversity of judges is that no person is a “clean slate,” and the decisions of people are influenced by their backgrounds.² Many see the international legal system as fragile, since its implementation very much depends on the cooperation and goodwill of the member States.³ Therefore, issues of diversity and equal representation in international courts and quasi-judicial institutions (to which I will refer together as “judicial institutions”) are seen as of special importance by scholars, States, and the international community. Some argue that diversity is important both because it influences the process of decision-making and because it promotes the legitimacy of the international institutions.⁴ Following this, in the statutes of many international judicial institutions there are so called “diversity clauses” that determine the backgrounds from which the decision-makers should come. Currently, the most common diversity criteria are geographical origin, gender, legal system of the country of origin, and

3 ST. POL. & POL’Y Q. 329, 329 (2003) (“[T]he [American] legal profession and the judiciary have been historically dominated by white males.”); Mark S. Hurwitz & Drew N. Lanier, *Women and Minorities on State and Federal Appellate Benches*, 85 JUDICATURE 84 (2001) (assessing empirically the representation of minorities on federal appellate courts, arguing that “political minorities have made substantive progress in attaining the bench over the past 15 years, although clearly there remains room for improvement.”); Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405 (2000) (arguing that diversity of the judiciary is important because of different perspectives that minority judges bring to courts); THOMAS KARFUNKEL & THOMAS W. RYLEY, *THE JEWISH SEAT: ANTI-SEMITISM AND THE APPOINTMENT OF JEWS TO THE SUPREME COURT* 144–46 (1978) (discussing the “Jewish seat” on the US Supreme Court); Kate Maleson, *Diversity in the Judiciary: The Case for Positive Action*, 36 J.L. & SOC’Y 376, 377 (2009) (discussing positive action in nominating judges from diverse backgrounds). For discussion of diversity in jurisdictions outside the United States, see Abhinav Chandrachud, *Diversity and the International Criminal Court: Does Geographic Background Impact Decision Making?*, 38 BROOK. J. INT’L L. 487, 490–502 (2013) (discussing diversity of the judiciary in different jurisdictions); Peter J. Van Koppen, *The Dutch Supreme Court and Parliament: Political Decisionmaking Versus Nonpolitical Appointments*, 24 L. & SOC’Y REV. 745 (1990) (discussing diversity in the Dutch courts); Kate Maleson, *The New Judicial Appointments Commission in England and Wales: New Wine in New Bottles?*, in *APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD* 39 (Kate Maleson & Peter H. Russell eds., 2006) (discussing diversity in English courts); Eli M. Salzberger, *Judicial Appointments and Promotions in Israel: Constitution, Law, and Politics*, in *APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD* 241, 250 (Kate Maleson & Peter H. Russell eds., 2006) (discussing diversity in Israeli courts).

2. See Leigh Swigart & Daniel Terris, *Who are International Judges?*, in *THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION* 619, 620 (Cesare P.R. Romano, Karen J. Alter & Chrisanthi Avgerou eds., 2014) (discussing how some judges argue that they are influenced by the collective culture of the court, and put away their personal experiences); LEE EPSTEIN ET AL., *THE BEHAVIOR OF FEDERAL JUDGES* 65–99 (2013) (providing an introduction to the empirical studies of judicial behavior). For an extended discussion of the effect of diversity on judicial decision-making see *infra* Part I.

3. For general discussion about the legal nature of international law and various theories regarding the implementation of international law by States, see, for example, JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005); ANDREW T. G. HAROLD, *HOW INTERNATIONAL LAW WORKS—A RATIONAL CHOICE THEORY* (2008); Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997).

4. For discussion about the normative and sociological legitimacy of international courts see *infra* Part I.

professional background.⁵ In recent years, diversity criteria have been gaining increased attention in the international community amid claims that decision-makers in international judicial institutions are too homogeneous and not representative of the international community as a whole. Scholars and diplomats argue that international institutions cannot be called “international” nor considered legitimate if they are not truly diverse.⁶

The most recent example demonstrating the interrelationship between diversity, decision-making, and legitimacy in the international sphere is the African backlash against the International Criminal Court (ICC). Many African countries see the court as a new form of Western colonialism, given that all the cases heard before the court have been against African defendants.⁷ In an attempt to promote the legitimacy of the ICC, the international community decided to appoint more African judges and a chief prosecutor from Africa (a Gambian national).⁸ However, that was insufficient, and eventually three African countries, including Gambia, announced their intention to leave the ICC.⁹

The question of how and whether the background of the decision-maker influences his or her decision-making in the international legal context has been largely understudied empirically. This article aims to fill this gap in the legal literature. It uses the United Nations Human Rights Committee (HRC) as a case study and explores empirically the ways in which the diversity of decision-makers in international judicial institutions can influence the decision-making process. The HRC is of special interest to researchers it is a quasi-judicial institution that in many regards resembles a world court of human rights. The HRC itself is composed of eighteen experts nominated by States who are parties to the International Covenant on Civil and Political Rights (ICCPR).¹⁰ Individuals may

5. RUTH MACKENZIE ET AL., SELECTING INTERNATIONAL JUDGES: PRINCIPLE, PROCESS AND POLITICS 24 (2010) [hereinafter MACKENZIE ET AL., SELECTING INTERNATIONAL JUDGES]; Ruth Mackenzie, *The Selection of International Judges*, in INTERNATIONAL ADJUDICATION 737, 743–47 (Cesare PR Romano, Karen J. Alter & Yuval Shany eds., 2014) [hereinafter Mackenzie, *Selection of International Judges*]; see also Swigart & Terris, *supra* note 2.

6. For a discussion about the normative the sociological legitimacy of international courts, see *infra* Part I.

7. Harmen van der Wilt, *Universal Jurisdiction under Attack: An Assessment of African Misgivings towards International Criminal Justice as Administered by Western States*, 9 J. INT’L CRIM. JUST. 1043 (2011); *African Union Accuses ICC of ‘Hunting’ Africans*, BBC (May 27, 2013), <http://www.bbc.com/news/world-africa-22681894>; see also Chandrachud, *supra* note 1, at 511–13; Farouk Chothia, *Africa’s Fatou Bensouda is New ICC Chief Prosecutor*, BBC (Dec. 12, 2011), <http://www.bbc.com/news/world-africa-16029121>; Sominy Sengupta, *As 3 African Nations Vow to Exit, International Court Faces Its Own Trial*, N.Y. TIMES (Oct. 26, 2016), https://www.nytimes.com/2016/10/27/world/africa/africa-international-criminal-court.html?_r=0.

8. Gaëlle Le Roux, *Gambia’s Fatou Bensouda Poised to Lead ICC*, FRANCE24 (Dec. 5, 2011) <http://www.france24.com/en/20111205-african-woman-icc-chief-prosecutor-profile-bensouda-moreno-ocampo-hague>; Farouk Chothia, *Africa’s Fatou Bensouda Is New ICC Chief Prosecutor*, BBC (Dec. 12, 2011), <http://www.bbc.com/news/world-africa-16029121>.

9. *Gambia Announces Withdrawal from International Criminal Court*, REUTERS (Oct. 26, 2016), <http://www.reuters.com/article/us-gambia-icc-idUSKCN12P335?il=0>.

10. International Covenant on Civil and Political Rights, art. 28(1), Dec. 16, 1966, 999 U.N.T.S. 180 [hereinafter ICCPR].

bring communications to the HRC against 115 States for alleged violations of their human rights. The procedure itself is adversarial and quasi-judicial.¹¹ If the HRC finds that a State has indeed violated a right guaranteed by the ICCPR, it may grant the individual a remedy against the member State. When making decisions on individual communications, the role of Committee Members (CMs) resembles the role of judges.¹²

Whereas previous empirical literature has focused on judicial behavior in regional courts or on specific aspects of judicial behavior in international courts (mainly political influences on judges),¹³ this article is the first to provide a wider and more comprehensive empirical picture of judicial decision-making in an international setting. Moreover, whereas previous articles have focused mainly on courts, this is the first article to discuss decision-making in an international quasi-judicial institution.

The article asks to what extent, if at all, the backgrounds of CMs influence the decision-making process of the HRC. As mentioned above, the article focuses on the following aspects of the CMs' backgrounds: geographical origin, gender, domestic legal system, and professional background. In order to answer the research question, I hand-coded an original dataset of the decisions of the HRC under the First Optional Protocol to the ICCPR (OP).¹⁴ The dataset includes the votes of all CMs in each and every decision on the merits of the HRC (between the years 1997–2013), as well as the backgrounds of the CMs.

In line with the well-established literature on judicial behavior in the national context, the article takes into account that the background of the CM can influence different aspects of the decision-making process. Accordingly, the article uses three dependent variables. On the level of the individual CM, the article looks both into how the CM voted in a given case, and whether he or she chose to write an individual opinion in the case. On the level of the HRC itself, the article examines whether the presence of CMs from certain backgrounds increases the probability that the HRC as a whole decides in a certain way—for instance, whether a higher percentage of CMs from democratic countries increases the probability that the HRC votes in favor of applicants and against States. Also, in line with the previous literature, the article differentiates general voting patterns from specific voting patterns on subject matters in which the background of the

11. YOGESH TYAGI, THE UN HUMAN RIGHTS COMMITTEE 547–50 (2011) (discussing in which ways the decisions of the HRC differ from regular judicial decisions).

12. Cecilia Medina, *The Role of International Tribunals: Law-Making or Creative Interpretation?*, in THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 649, 657 (Dinah Shelton ed., 2013).

13. Empirical studies have been conducted mainly on the following international tribunals: the International Court of Justice (ICJ), the *ad hoc* international criminal tribunals (the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR)), and the International Criminal Court (ICC). For detailed discussion of the empirical literature on international judicial institutions, see *infra* Part I.b.

14. Optional Protocol to the International Covenant on Civil and Political Rights art. 1, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter *Optional Protocol*].

CM might be of special importance. For instance, women CMs are expected to vote differently from their male colleagues in gender sensitive cases.

The article finds certain voting patterns associated with geographical origin, domestic legal systems, professional background, and possibly gender. This is especially true in cases where the CMs want to protect the interests of their home States. For instance, the most significant voting pattern was found for CMs from Western countries voting in favor of countries (mostly from their regions) in immigration cases. It is assumed that all the States from Western countries might share an interest in limiting immigration to their territory. However, it is safe to say that on many issues the article did not find that the background of the CMs had a significant influence on their voting patterns.

Finally, the article uses the HRC to demonstrate that diversity can be important in order to establish the institution's normative and sociological legitimacy in the international community. It argues that there should be a distinction between two sorts of diversity criteria. The first sort are diversity criteria that the international community views as important and representing certain values (such as geography and gender). The second sort are diversity criteria that are instrumental and that should be relevant only if there is empirical evidence that they influence the behavior of the decision-maker (like professional background and legal system).

This research contributes to our understanding of diversity, decision-making, and legitimacy in international judicial institutions, and sheds light on the various reasons to support diversity. The article proceeds as follows. Part I introduces the general debate about the importance of diversity in international judicial institutions and the relevant empirical literature. Part II introduces the HRC and the issues of diversity within it. Parts III and IV, the main parts of the article, perform an empirical analysis of the votes of CMs. Part V discusses what inferences might be drawn from the results presented.

I.

DIVERSITY IN INTERNATIONAL INSTITUTIONS

The agreement on the criteria according to which decision-makers are appointed to international judicial institutions is regarded as an important part of the agreement to establish the institutions.¹⁵ Therefore, in almost all the treaties and statutes establishing international judicial institutions, a “diversity clause” can be found. In the context of international courts, there is a distinction between “full representation courts” and “selective representation courts.”¹⁶ Full representation

15. See MACKENZIE ET AL., SELECTING INTERNATIONAL JUDGES, *supra* note 5, at 26.

16. *Id.* at 7 (“[A] key distinction arose (which still affects judicial selection processes today) between ‘full representation’ courts, where each state has a judge of its nationality on the court permanently, and ‘selective representation’ courts, where there are fewer seats than the number of states that are parties to the court’s statute. In the latter type of court, a choice has to be made between candidates from different states, thus giving rise to a greater degree of competition in which political influences, amongst other factors, can and do hold sway.”).

courts are those in which each member State nominates its own representative to the court. These courts are mainly found in the European regional system, and include the European Court of Human Rights (ECtHR)¹⁷ and the European Court of Justice (ECJ).¹⁸ Other courts, especially those in which full representation is impractical, are known as selective representation courts. Such courts include the International Court of Justice (ICJ),¹⁹ the ICC,²⁰ and the International Tribunal for the Law of the Sea.²¹ In these courts, States must agree on a limited number of judges, and therefore their foundational statutes include diversity clauses to ensure that the composition of the court will not be monolithic.

Currently, almost all of the statutes establishing international judicial institutions have provisions regarding the diversity of the decision-makers.²² For instance, Article 9 of the Statute of the ICJ States that, "At every election, the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured."²³ Over time, awareness of the significance of diversity in judicial institutions has risen, and therefore one of the new major international courts, the ICC, has an exceptionally detailed provision regarding diversity of the judiciary. Article 36 of the Statute of the ICC (the "Rome Statute") indicates that there should be diversity in professional background, representation of the principal legal systems, equitable geographical representation, and gender balance.²⁴ Also, in order to promote diversity, most international judicial institutions have a provision that prohibits two or more individuals of the same nationality from being appointed at the same time.²⁵

17. Statute of the European Court of Human Rights art. 20 ("[T]he Court shall consist of a number of judges equal to that of the High Contracting Parties.").

18. Even though there is no explicit provision about full representations in the ECJ, in practice, every member State has a judge on the court. *See* SIMON HIX & BJORN HOYLAND, *THE POLITICAL SYSTEM OF THE EUROPEAN UNION* 80 (3rd ed. 2011)).

19. Statute of the International Court of Justice art. 3(1), June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993 [hereinafter ICJ Statute] ("[T]he Court shall consist of fifteen members, no two of whom may be nationals of the same State").

20. *See* Rome Statute of the International Criminal Court art. 36(1), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome statute] ("[S]ubject to the provisions of paragraph 2, there shall be 18 judges of the Court.").

21. Statute of the International Tribunal for the Law of the Sea art. 2(1), Annex VI to the United Nations Convention on the Law of the Sea, 1833 U.N.T.S. 397 (entered into force Dec. 10, 1982) ("[T]he Tribunal shall be composed of a body of 21 independent members, elected from among persons enjoying the highest reputation for fairness and integrity and of recognized competence in the field of the law of the sea").

22. *See* MACKENZIE ET AL., *SELECTING INTERNATIONAL JUDGES*, *supra* note 5, at 9.

23. *See* ICJ Statute, *supra* note 19, art. 9.

24. *See* Rome Statute, *supra* note 20.

25. *See, e.g.*, ICJ Statute, *supra* note 19, art. 4(2); Statute of the Inter-American Court on Human Rights art. 3(1), O.A.S. Res. 448 (IX-0/79), O.A.S. Off. Rec. OEA/Ser.P/IX.0.2/80, Vol. 1 at 98; Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights art. 11(2), Jan. 25, 2004, <http://www.africa->

Therefore, in planning the composition of an international court, there is an attempt to reach a balance and to look beyond the qualification of each and every individual.²⁶

A. *The Importance of Diversity in International Judicial Institutions*

There are two lines of arguments in favor of diversity in international institutions in general and judicial institutions in particular – function and legitimacy.²⁷ This Section will briefly elaborate on these two arguments and raise potential counterarguments.

According to the functional argument, international judicial institutions should be diverse because the background of the decision-maker influences both the way he or she votes and the way the institution makes decisions.²⁸ The background of the decision-maker can influence the judicial decision-making process in several ways. First, the background of the individual influences the way that he or she votes.²⁹ Additionally, through separate opinions (both concurrences and dissents) the decision-maker can bring into the jurisprudence certain ideas

union.org/root/au/Documents/Treaties/Text/africancourt-humanrights.pdf; Statute of the International Tribunal for the Law of the Sea art. 3(1), Annex VI to the United Nations Convention on the Law of the Sea, 1833 U.N.T.S. 397 (entered into force Dec. 10, 1982) [hereinafter ITLS Statute].

26. John Hedigan, *The Election of Judges to the European Court of Human Rights, in PROMOTING JUSTICE, HUMAN RIGHTS AND CONFLICT RESOLUTION THROUGH INTERNATIONAL LAW* 239, 239 (Marcelo G. Kohen ed., 2007).

27. See generally Susan D. Franck et al., *The Diversity Challenge: Exploring the “Invisible College” of International Arbitration*, 53 COLUM. J. TRANSNAT’L L. 429, 467, 429–30 (2015) (arguing that “[a] diversity can affect the perceived legitimacy of a state’s dispute resolution system and the quality of judicial decisions, diversity levels in the national bench and bar have been an area of transnational concern”); Kurt Gaubatz & Matthew MacArthur, *How International is “International” Law?*, 22 MICH. J. INT’L L. 239, 247 (2001) (“We argue here that looking at the diffusion of practitioners also matters because it sheds light on the diffusion of ideas and norms in international law in particular and international relations more generally; the bias in who practices international law reveals an underlying limitation in the internalization of international legal norms among a large number of states in the international system.”); Ifill, *supra* note 1, at 405 (“[T]he lack of racial diversity on our nation’s courts threatens both the quality and legitimacy of judicial decision-making.”).

28. Ifill, *supra* note 1, at 453–55 (discussing how a racial perspective matters to the decision-making process of the court); Kathleen Mahoney, *Judicial Bias: The Ongoing Challenge*, 2015 J. DISP. RESOL. 43 (2015) (using the Canadian judicial systems as a case study for the importance of diversity in decision making).

29. For of studies discussing how the background of the judge affects his or her personal voting, see LEE EPSTEIN ET AL., *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* 77–89 (2013); Carlos Berdojo, *It’s the Journey, Not the Destination: Judicial Preferences and the Decision-Making Process*, 51 U. LOUISVILLE L. REV. 271 (2012); Ifill, *supra* note 1, at 453; Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial Decision Making in the Federal Appellate Courts*, 114 YALE L.J. 1759 (2005) (discussing, among others, how gender influences the votes of the judge); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009) (discussing how the background of the judge can affect racial bias). *But see* Michael J. Gerhardt, *How a Judge Thinks*, 93 MINN. L. REV. 2185 (2009) (arguing that judges are professional enough so that their background does not influence the way they decide cases).

and voices that are not usually heard.³⁰ Judges with different backgrounds also contribute unique perspectives to the deliberation between the members of a panel, and thus can influence the decision of the panel as a whole.³¹ The background of the decision-maker can influence either the way that the decision-maker (or the panel) votes generally or in specific types of cases.³² Additionally, diversity can help correct biases that other judges have.³³

The second argument in favor of diversity is that it establishes the legitimacy of an international judicial institution.³⁴ The legitimacy of international judicial institutions is of special importance (as compared to national courts) for two main reasons.³⁵ First, international institutions exercise governmental power over people from all over the world.³⁶ Second, the international system lacks effective

30. See Mahoney, *supra* note 28, at 52–53 (discussing cases of individual opinions written by female judges in Canadian courts); Fred J. Bruinsma, *The Room at the Top: Separate Opinions in the Grand Chambers of the ECHR (1998–2006)*, *ANCILLA IURIS* 32 (2008) (discussing separate opinions in the context of the European Court of Human Rights). For discussion about the politics and considerations behind writing individual opinions, see also Marsha S. Berzon, *Dissent, “Dissentals,” and Decision Making*, 100 CALIF. L. REV. 1479 (2012); Paul J. Wahlbeck, James F. Spriggs II & Forrest Maltzman, *The Politics of Dissents and Concurrences on the U.S. Supreme Court*, 27 AM. POL. RES. 488 (1999); Meredith K. Lewis, *Dissent as Dialectic: Horizontal and Vertical Disagreement in WTO Disputes*, 48 STAN. J. INT’L L. 1 (2014) (discussing the advantages of allowing dissents in international courts in general, and in the WTO in particular); Diane P. Wood, *When to Hold, When to Fold, and When to Reshuffle: The Art of Decision Making on a Multi-Member Court*, 100 CALIF. L. REV. 1445 (2012) (discussing the general considerations of a judge when is it right to write a separate opinion).

31. See NINA-LOUISA AROLD, *THE LEGAL CULTURE OF THE EUROPEAN COURT OF HUMAN RIGHTS* 79 (2007) (conducting interviews with judges from the ECtHR where some of the interviewees suggested that Eastern European judges bring a different perception of human rights to the discussions on the court); Chandrachud, *supra* note 1, at 491 (discussing how judges from African States may have influenced other judges on the ICC to vote against criminal defendants from African States); Sean Farhang & Gregory Wawro, *Institutional Dynamics on the US Court of Appeals: Minority Representation Under Panel Decision Making*, 20 J.L. ECON. & ORG. 299 (2004) (discussing how women and minority judges influence the decision-making of the panel in US Federal Courts of Appeal); Ifill, *supra* note 1, at 455 (discussing the racial perspective that judges of color bring to discussions in US courts); Peresie, *supra* note 29, at 1761–62 (discussing how women judges influenced the decisions of their male colleagues in Title VII cases).

32. See Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117 (2009) (discussing how the votes of judges differ according to their race in racial harassment cases); Ifill, *supra* note 1, at 453 (citing research according to which white and black judges respond differently to discrimination claims); Peresie, *supra* note 29, at 1768 (finding that in Title VII sex discrimination and sexual harassment cases a significant correlation exists between gender and individual federal appellate judges’ decisions); Nancy Scherer, *Blacks on the Bench*, 119 POL. SCI. Q. 655 (2004) (finding that African-American judges vote differently in search and seizure cases).

33. Berzon, *supra* note 30, at 1483–86 (suggesting that group decision making through adversarial collaboration may reduce errors caused by trait and cognitive bias).

34. See, e.g., Nienke Grossman, *Legitimacy and International Adjudicative Bodies*, 41 GEO. WASH. INT’L L. REV. 107, 140 (2009) [hereinafter Grossman, *Legitimacy*].

35. See generally Nienke Grossman, *The Normative Legitimacy of International Courts*, 86 TEMP. L. REV. 61 (2013) [hereinafter Grossman, *Normative Legitimacy*].

36. See Allen Buchanan & Robert Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INT’L AFF. 405, 405 (2006).

tools for enforcing the judgments of its judicial institutions.³⁷ It also seems that given the somewhat political character of international law, legitimacy of the procedure is of special importance to the legitimacy of international institutions, and not only to the outcome.³⁸

The literature divides the discussion on the legitimacy of international institutions into two types—normative legitimacy and sociological legitimacy.³⁹ *Normative* legitimacy, as defined by Buchanan and Keohane, is the assertion that “an institution has a right to rule.”⁴⁰ International judicial institutions are seen as important players in creating legal norms. According to Article 38(1)(d) of the Statute of the ICJ, international courts do not only settle the specific dispute before them, but they also create binding norms of international law.⁴¹ Moreover, even diplomatic institutions, such as the United Nations Security Council, and administrative agencies, such as the World Health Organization, influence the shaping of international legal norms.⁴² Therefore, *all* those potentially affected by the policy should be adequately represented in the decision-making process in the relevant international institutions.⁴³ Even if the decision of the institution is just, to be normatively legitimate it should also be made by decision-makers who

37. See Grossman, *Normative Legitimacy*, *supra* note 35, at 63 (“[B]ecause no world legislature exists to counterbalance the decisions of international courts, and no worldwide police force enforces them, international courts’ legitimacy is all the more essential to their success.”); Shai Dothan, *Judicial Tactics in the European Court of Human Rights*, 11 CHI. J. INT’L L. 115 (2011); see generally Koh, *supra* note 3.

38. See Grossman, *Normative Legitimacy*, *supra* note 35, at 67, 104 (discussing the importance of the procedural participation of all stakeholders to the legitimacy of international courts); see also Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT’L L. 596 (1999) (discussing the importance of a democratic procedure and decision-making process to the legitimacy of international law in general, and specifically to international environmental law); Armin von Bogdandy & Ingo Venzke, *In Whose Name? An Investigation of International Courts’ Public Authority and Its Democratic Justification*, 23 EUR. J. INT’L L. 7, 32 (2012) (“The classic way to democratic legitimation of public authority is that of electing those in office The condition reflects how (judicial) socialization bears on legal interpretation. Often disputing parties who do not have a judge of their nationality on the bench may choose a judge *ad hoc*.”); Armin von Bogdandy & Ingo Venzke, *On the Democratic Legitimation of International Judicial Lawmaking*, 12 GERMAN L.J. 1341 (2011) (discussing the importance of judicial independence and diversity to the legitimacy of international courts).

39. Bodansky, *supra* note 38, at 601; Grossman *Normative Legitimacy*, *supra* note 35, at 63.

40. Buchanan & Keohane, *supra* note 36, at 407. See also Laurence R. Helfer & Karen J. Alter, *Legitimacy and Lawmaking: A Tale of Three International Courts*, 14 THEORETICAL INQUIRIES L. 479 (2013).

41. For a general discussion on the role of judicial precedents in international courts, see Yuval Shany, *No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary*, 20 EUR. J. INT’L L. 73, 75 (2009); MOHAMED SHAHABUDDEEN, PRECEDENT IN THE WORLD COURT 91 (2007); Bogdandy & Venzke 2012, *supra* note 38, at 19 (discussing precedent in international law in light of the legitimacy of legal institutions); Tom Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, 43 VA. J. INT’L L. 631, 639 (2005) (discussing the importance and inevitability of judicial lawmaking in international law, as well as its boundaries).

42. See generally JOSÉ E. ALVAREZ, THE IMPACT OF INTERNATIONAL ORGANIZATIONS ON INTERNATIONAL LAW (2016).

43. Grossman, *Normative Legitimacy*, *supra* note 35, at 104.

represent the people under the jurisdiction of the institution.⁴⁴ Some scholars have pointed out that there is a democratic deficit regarding the authority of international institutions, and that diversity of representation could somewhat help to bridge it.⁴⁵

The second sort of legitimacy is *sociological* legitimacy, defined by Buchanan and Keohane as an institution that “is widely believed to have the right to rule.”⁴⁶ Scholars have argued that a diverse and representative institution may increase public support.⁴⁷ Several officials in the international legal system have also noted a correlation between the composition of international judicial institutions and public confidence in them.⁴⁸

In contrast, the common critique of courts’ diversity in the national context is that it stands in opposition to appointing a candidate according to his or her merit.⁴⁹ Current literature has suggested several answers to this problem, some of which might be very relevant to the international system as well. The first one is that “merit” is not “an objective standard neutrally applied,” but that rather reflects certain standards set by the powerful members of society.⁵⁰ In the context of international law, it can be argued that the standards of “merit” are set by powerful Western States, and therefore potential nominees from non-Western States are a priori in a position of inferiority.⁵¹ Moreover, especially in international law, powerful States have a political advantage in nominating representatives to international judicial institutions. For instance, it is customary that the five permanent members of the Security Council (the “P5”) have a judge on the major international courts, including, first and foremost, the International Court of Justice.⁵² Therefore, diversity provisions can help less powerful States to promote

44. *Id.* at 67.

45. Bodansky, *supra* note 38, at 613; Malleon, *supra* note 1, at 376; Shany, *supra* note 41, at 89–90.

46. Buchanan & Keohane, *supra* note 36, at 407.

47. See Bodansky, *supra* note 38, at 613; Chandrachud, *supra* note 1, at 491 (arguing that more African judges on the International Criminal Court can increase the legitimacy of the Court in Africa); Barbara L. Graham, *Toward and Understanding of Judicial Diversity in American Courts*, 10 MICH. J. RACE & L. 153 (2004); Ifill, *supra* note 1, at 405; Nancy Scherer & Brett Curry, *Does Descriptive Race Representation Enhance Institutional Legitimacy? The Case of the U.S. Courts*, 72 J. POL. 90 (2010) (arguing that representation of African-Americans in courts increased their legitimacy among African-Americans); but see Alan Hyde, *The Concept of Legitimation in Sociology of Law*, 1983 WIS. L. REV. 379 (1983) (arguing that there is no empirical evidence to the concept of legitimacy).

48. MACKENZIE ET AL., SELECTING INTERNATIONAL JUDGES, *supra* note 5, at 26 (“The material gathered highlights the fact that those involved in the international courts see a correlation between the composition of the courts and issues of public confidence, judicial competence and independence. Perceptions as to the quality and background of the judges and the broader representativeness of the bench clearly impact upon perceptions of the legitimacy of the courts.”).

49. Chandrachud, *supra* note 1, at 493; Malleon, *supra* note 1, at 381; see also Nienke Grossman, *Shattering the Glass Ceiling in International Adjudication*, 56 VA. J. INT’L L. 339 (2016) [hereinafter Grossman, *Shattering the Glass Ceiling*].

50. Malleon, *supra* note 1, at 381.

51. See also Chandrachud, *supra* note 1, at 493.

52. MACKENZIE ET AL., SELECTING INTERNATIONAL JUDGES *supra* note 5, at 18; Chandrachud,

their candidates, even if they are not as “meritorious” as those nominated by powerful States.

B. What are We Seeking to Diversify?

The next question is what exact characteristics of the decision-makers the international legal system is seeking to “diversify.” According to the literature, there are four characteristics that in recent years have been seen as most important—geography, gender, legal systems, and professional background.⁵³ I will now briefly elaborate on each of these.

The first and perhaps most important characteristic is *geography*—from where the nominee comes. Geography is traditionally seen as the characteristic that States care most about, even if it is not always explicitly written in the statute of the institution.⁵⁴ However, in practice, international judicial institutions usually do not have equal geographical representation over different regions.⁵⁵ Very commonly, the Western countries are overrepresented, probably due to their political power, while Asian and Eastern European countries are underrepresented. Recently there has been a trend of appointing more judges from African countries, especially to the ICC.⁵⁶ Due to the great importance that States attribute to regional diversity, in some institutions the member States have negotiated unofficial regional quotas.⁵⁷

It is suggested that different geographical (or geopolitical) regions might be interested in appointing different types of representatives. For instance, it has been argued that regions with new democracies are more likely to appoint more activist judges in order to safeguard democracy in those regions.⁵⁸ Also, for various reasons, judges might want to vote in line with the legal culture of their regions. For example, given that Western States tend to have more progressive views on LGBT rights, judges from those States are more likely to support applicants on LGBT rights.⁵⁹ Another example might be African decision-makers and minority

supra note 1, at 488.

53. MACKENZIE ET AL., SELECTING INTERNATIONAL JUDGES *supra* note 5, at 32–60; see Mackenzie, *Selection of International Judges*, *supra* note 5, at 743–47; Swigart & Terris, *supra* note 2.

54. MACKENZIE ET AL., SELECTING INTERNATIONAL JUDGES, *supra* note 5, at 26; see generally DANIEL TERRIS ET AL., THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD’S CASES (2007).

55. TERRIS ET AL., *supra* note 54, at 17 (finding that as of January 2006, almost two-thirds of the international judges came from European countries: United Kingdom with the largest number of nationals (nine judges), followed by France, Italy and Germany; on the other hand, Asia, in which half of the population of the world lives, had only sixteen judges on international courts and tribunals (eight percent)).

56. Swigart & Terris, *supra* note 2, at 623; Chandrachud, *supra* note 1, at 488, 495.

57. MACKENZIE ET AL., SELECTING INTERNATIONAL JUDGES, *supra* note 5, at 744.

58. Erik Voeten, *The Politics of International Judicial Appointments*, 9 CHI. J. INT’L L. 387, 392 (2009).

59. However, it might also work the opposite way—the ruling of an international court on a relatively controversial subject such as LGBT rights, might trigger change in all member States of the

rights. Since the African Charter is very active in promoting the rights of groups (and not only individuals),⁶⁰ individuals from that region might be more likely to vote in favor of applicants who claim that the State violated their rights as a part of a minority group.

Moreover, as mentioned, geographical regions play an important part in electing decision-makers to judicial institutions.⁶¹ If we assume that a decision-maker has an interest in being re-elected, she might vote in line with the interests of her region on matters of special concern to that region.⁶² Therefore, decision-makers might be more willing to protect the interests of their regions in cases in which the subject matter is, for example, immigration, or trade.⁶³ On these two issues the stakes for different regions are very high, and therefore decision-makers might feel pressure to vote according to the interests of regions that nominated them.

Finally, as mentioned above, the personal experiences of decision-makers might influence their voting patterns on some issues. In this regard, individuals who come from countries and regions with a long history of authoritarian regimes might be much more sensitive to protecting human rights in general, and political rights in particular.⁶⁴ For instance, the judges of the Inter-American Court of Human Rights, together with members of the Inter-American Commission, have played a very important role in defining enforced disappearance as a human rights violation.⁶⁵

Previous empirical research on the ICJ finds that international judges tend to vote in favor of their countries of origin and countries that are geopolitically similar.⁶⁶ Additionally, Voeten finds in his research on the ECtHR that judges from Eastern European countries tend to vote *against* their home countries and

court. See Laurence Helfer & Erik Voeten, *International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe*, 68 INT'L ORG. 77 (2014).

60. See, e.g., Christof Heyns, *The African Regional Human Rights System: The African Charter* 108 PENN. ST. L. REV. 679, 686–93 (2004). For instance, the African Charter promotes collective rights and duties that are not found in the ICCPR or in the other regional instruments (for example, article 27(1) to the African Charter states that “[E]very individual shall have duties towards his family and society . . .”).

61. See MACKENZIE ET AL., SELECTING INTERNATIONAL JUDGES, *supra* note 5, at 101.

62. See Erik Voeten, *International Judicial Behavior*, in INTERNATIONAL ADJUDICATION 550, 552–53 (Cesare PR Romano, Karen J. Alter & Yuval Shany eds., 2014); Erik Voeten, *The Impartiality of International Judges: Evidence from the European Court of Human Rights*, 102 AM. POL. SCI. REV. 417, 420 (2008) [hereinafter Voeten 2008].

63. Developing and developed countries might have different, or even opposite, views and interests on these issues. See Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARV. INT'L L.J. 435 (2009).

64. David C. Baluarte, *Strategizing for Compliance: The Evolution of a Compliance Phase of Inter-American Court Litigation and the Strategic Imperative For Victims' Representatives*, 27 AM. U. INT'L L. REV. 263, 320 (2012) (discussion how the Inter-American system played an important role in promoting human rights in the region).

65. *Id.*

66. See generally, Eric A. Posner & Miguel F. P. de Figueiredo, *Is the International Court of Justice Biased?*, 34 J. LEGAL STUD. 599 (2004).

countries with socialist heritages more than other judges do.⁶⁷ Also, Arold suggested that in the ECtHR context, Eastern European judges are more protective of social and economic rights than are Western European judges.⁶⁸ Finally, Chandrachud found that the more African judges sit on the ICC, the more likely the ICC is to vote against African defendants who committed crimes in Africa.⁶⁹

Another characteristic of diversity is *gender*. Women are very often underrepresented in international judicial institutions.⁷⁰ According to data collected by Grossman, in most international courts women did not comprise more than twenty-five percent of the total bench in 2015.⁷¹ For instance, the Inter-American Court of Human Rights had only one woman out of seven judges, and the International Court of Justice had three women out of fifteen judges.⁷² A notable outlier in this regard is the International Criminal Court, in which seven out of eighteen judges (thirty-nine percent) were women.⁷³ In international arbitration the situation is not better: According to a survey of attendees at a congress of international arbitration, only 17.6% of the arbitrators were women.⁷⁴ In recent years there has been ongoing attention given to the underrepresentation of women in international judicial institutions, and therefore some steps have been taken to attempt to solve this problem. Different international courts have tried to tackle this problem in different ways. For instance, the Statute of the ICC clearly states in its diversity clause that in the selection of judges, there is a need for a “fair representation of female and male judges.”⁷⁵ A similar provision also exists in the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of the African Court on Human and Peoples’ Rights.⁷⁶ The European Treaty of Human Rights does not have a diversity clause, but there is an official parliamentary policy to increase the proportion of women in the

67. Erik Voeten, *International Judicial Independence*, in *INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS* 421, 427, 429 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013).

68. AROLD, *supra* note 31, at 70, 79.

69. Chandrachud, *supra* note 1, at 514–15.

70. TERRIS ET AL., *supra* note 54, at 18–19; Nienke Grossman, *Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?*, 12 CHI. J. INT’L L. 647, 656 (2012) [hereinafter Grossman, *Do Women Judges Matter?*]; Mackenzie, *Selection of International Judges*, *supra* note 5, at 745; MACKENZIE ET AL., *SELECTING INTERNATIONAL JUDGES*, *supra* note 5, at 47; Swigart & Terris, *supra* note 2, at 624. *See also* Nienke Grossman, *Achieving Sex-Representative International Court Benches*, 119 AM. J. INT’L L. 82 (2016) (discussing the main barriers to women’s appointment to international courts and possible solutions).

71. Grossman, *Shattering the Glass Ceiling*, *supra* note 49, at 350.

72. *Id.* at 343, 364.

73. *Id.* at 349–50.

74. Franck, *supra* note 27, at 452.

75. Rome Statute, *supra* note 20, art. 36(8)(a)(iii).

76. Protocol to the African Charter on Human and People’s Rights on the Establishment of an African Court on Human and People’s Rights art. 12(2), June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III) (“[D]ue consideration shall be given to adequate gender representation in nomination process.”).

ECtHR.⁷⁷ Other influential courts, such as the ICJ, have no statutory guidance or official policy regarding the nomination of women.⁷⁸

The question of whether women decision-makers actually vote differently than their male colleagues is almost unexplored in the international context. The basic assumption is that in some cases men and women may have different points of view that can influence their judicial decisions.⁷⁹ However, studies that have been conducted on this question in national courts suggest that women tend to vote differently only in very specific cases, mainly on issues that are of special relevance to women.⁸⁰ Evidence of different voting patterns of women in international judicial institutions is very scarce (because of the small number of women in international courts, among other reasons). King and Greening conducted one of the first studies in the field about the International Criminal Tribunal for the Former Yugoslavia.⁸¹ This study demonstrated that female judges sanctioned defendants who assaulted women more severely; however, in general, there was no evidence that women voted differently to men.⁸² For instance, Navanethem Pillay, the only female judge in the Akayesu case before the International Criminal Court for Rwanda, took the initiative to question witnesses about sexual violence.⁸³ Pillay herself said that “rape has been classified as a war crime for decades, but it was never successfully prosecuted until women started

77. Candidates for the European Court of Human Rights, Resolution 1366 (2004); Candidates for the European Court of Human Rights, Resolution 1627 (2008); Resolution 1841 (2011). See Grossman, *Shattering the Glass Ceiling*, *supra* note 49, at 41–44; John Hedigan, *The Election of Judges to the European Court of Human Rights*, in PROMOTING JUSTICE, HUMAN RIGHTS AND CONFLICT RESOLUTION THROUGH INTERNATIONAL LAW 246 (Marcelo G. Kohen eds., 2007).

78. Grossman, *Shattering the Glass Ceiling*, *supra* note 49, at 382.

79. Grossman, *Do Women Judges Matter?*, *supra* note 70, at 656.

80. See L. Boyd et al., *Untangling the Casual Effects of Sex on Judging*, 54 AM. J. POL. SCI. 403 (2010) (finding that women vote differently only in sex discrimination cases); Paul Collins et. al., *Gender, Critical Mass, and Judicial Decision Making* 32 J.L. & POL’Y 260 (2010) (finding that the most significant differences between men and women were in criminal cases); Sue Davis, Susan Haire & Donald R. Songer, *Voting Behavior and Gender on the U.S. Courts of Appeals*, 77 JUDICATURE 129, 131–32 (1993) (finding that the votes of women circuit court judges in employment discrimination and search and seizure cases differ from those of their male counterparts); Peresie, *supra* note 29, at 1768–69 (finding that women tend to vote more in favor of plaintiffs in Title VII cases); Donald R. Songer, Sue Davis & Susan Haire, *A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Courts of Appeals*, 56 J. POL. 425, 432–37 (1994) (finding no difference between male and female judges in obscenity or criminal search and seizure cases. However, in employment discrimination cases, female judges were significantly more liberal than their male colleagues). For a general discussion about women judges see generally Dermot Feenan, *Women Judges: Gendering Judging, Justifying Diversity*, 35 J.L. & SOC’Y 490, 509–19 (2008) (arguing that although there was no empirical evidence that women judges bring a different voice, the presence of women judges enhances the legitimacy of the courts); Michael E. Solimine & Susan E. Wheatley, *Rethinking Feminist Judging*, 70 IND. L.J. 891, 919 (1995) (discussing normative reasons to appoint female judges).

81. Kimi L. King & Megan Greening, *Gender Justice or Just Gender? The Role of Gender in Sexual Assault Decisions at the International Criminal Tribunal for the Former Yugoslavia*, 88 SOC. SCI. Q. 1049 (2007).

82. *Id.* at 1061–66.

83. Grossman, *Do Women Judges Matter?*, *supra* note 70, at 656–57;

to play a role in the International Criminal Tribunals.”⁸⁴ Finally, Meernik and his colleagues did not find a connection between gender, general sentencing, and verdict on the ICTY.⁸⁵ In line with the research on national legal systems, there are no good reasons to believe that women and men vote differently in general, but there might be different voting patterns on gender-sensitive issues.

The third characteristic of diversity is the *legal system* from which the decision-maker comes. This diversity criterion is a relatively common one in statutes of international courts, and exists, among others, in Article 9 of the Statute of the ICJ. Article 9 refers to: “the main forms of civilization and of the principal legal systems of the world.”⁸⁶ The common and traditional understanding is that those clauses refer mainly to the difference between common law and civil law legal systems.⁸⁷ The idea behind requiring representation of different legal systems is the benefit of having various legal points of view on a certain subject.⁸⁸ It is also seen as very helpful when national procedural matters are examined in the international court (for example, due process cases in human rights tribunals).⁸⁹

However, the interpretation of the term “different legal systems” can also be taken in a broader sense, especially since this term is sometimes written together with the requirement for representation of “different forms of civilizations.”⁹⁰ One possible interpretation might be that different political and legal regimes appoint different judges and expect them to behave in different ways. For instance, some regimes might expect judges to be more activist, interpreting broadly the jurisdiction of the courts and legal provisions, while others might prefer less

84. Navanethem Pillay, *Equal Justice for Women: A Personal Journey*, 50 ARIZ. L. REV. 657, 666 (2008); see also TERRIS ET AL., *supra* note 54, at 44–45.

85. James Meernik et al., *Judicial Decision Making and International Tribunals: Assessing the Impact of Individual, National, and International Factors*, 86 SOC. SCI. Q. 683, 696, 699 (2005).

86. ICJ Statute, *supra* note 19, art. 9. Similar provisions regarding legal systems also exist in other courts. See Rome Statute, *supra* note 20, art. 36(8)(a)(i); ITLS Statute, *supra* note 25, art. 2(2).

87. Georges Abi-Saab, *Ensuring the Best Bench: Ways of Selecting Judges*, in INCREASING THE EFFECTIVENESS OF THE INTERNATIONAL COURT OF JUSTICE 165, 169 (Connie Peck & Roy S. Lee eds., 1997).

88. See Mackenzie, *supra* note 53, at 743–44; see also William Teteley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 LA. L. REV. 677 (2000) (discussing the theoretical and practical differences between the common law and civil law legal systems).

89. See MACKENZIE ET AL., SELECTING INTERNATIONAL JUDGES, *supra* note 5, at 40–43; see also William W. Burke-White, *International Legal Pluralism*, 25 MICH. J. INT’L L. 963, 974–75 (2004) (discussing how international tribunals became a platform for blending legal procedures and traditions).

90. See, e.g., ICJ Statute, *supra* note 19, art. 9 (“At every election, the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured.”); ICCPR, *supra* note 10, art. 32(1) (“[I]n the election of the Committee, consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems.”); It is somewhat unclear what the term “civilization” means in the context of diversity statutes. See ANDREAS ZIMMERMANN ET AL., THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 306–15 (2012); see also Abi-Saab, *supra* note 87, at 170–71.

activist judges. Moravcsik argued that potentially unstable democracies are more likely to advocate binding human rights regimes.⁹¹ Voeten showed that judges from the new Eastern European democracies are more activist than their colleagues, but he did not find a connection between a State being a transitional democracy and the activism score of its judges.⁹² It should be noted, however, that a study by Bruinsma argued that judges elected to the ECHR by the new member States of Central and Eastern Europe deliver significantly fewer separate opinions than judges elected by the old member States.⁹³ This might indicate that different legal systems and political regimes do have different interests in appointing judges to the court.

The last diversity criterion is diversity in the *professional background* of the decision-makers.⁹⁴ For instance, the ICJ Statute grants the member States certain guidance regarding the professional background of international judges, stating that they should “possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.”⁹⁵ Abi-Saab argues that this provision not only introduces certain guidelines to States, but also seeks to diversify the professional background of the judges, acknowledging that it is important to have both judges with a background in municipal law and judges with background in international

91. See generally Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT’L ORG. 217 (2000).

92. See Erik Voeten, *The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights*, 61 INT’L ORG. 669, 689 (2007). [hereinafter Voeten 2007].

93. Bruinsma, *supra* note 30, at 32.

94. For research on how professional background influences the decisions of judges in the US system, see Orley Ashenfelter et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEG. STUD. 257 (1995) (finding no significant evidence that former judges and prosecutors vote differently); Brudney et al., *Judicial Hostility Towards Labor Unions? Applying the Social Background Model to a Celebrated Concern*, 60 OHIO ST. L.J. 1675 (1999) (finding that judges from private practice representing management are more likely to support union claims); Benjamin H. Barton, *An Empirical Study of Supreme Court Justice Pre-Appointment Experience*, 64 FLA. L. REV. 1137 (2012) (criticizing, among others, the findings that Supreme Court Justices are appointed mainly from academia and appellate judging); Theodore Eisenberg & Sheri L. Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151 (1991) (finding that judges with prior judicial experience are more likely to support claims of race discrimination); Lee Epstein et al., *The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court*, 91 CALIF. L. REV. 903 (2003) (discussing prior empirical literature on the professional background of judges and decision-making, and criticizing the tendency to appoint candidates with prior judicial experience to the US Supreme Court); Deborah J. Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 69 (2001) (finding that judges with experience in representing management are less likely to publish opinions); Monique Renee et al., *Evolution of Judicial Careers in the Federal Courts, 1789-2008*, 93 JUDICATURE 62 (2009) (empirically assessing whether currently there is a trend to appoint nominees to federal courts with prior judicial experience); Daniel M. Schneider, *Empirical Research on Judicial Reasoning: Statutory Interpretation in Federal Tax Cases*, 31 N.M. L. REV. 325 (2001) (finding that judges without private practice experience rely less on regulations or pronouncements as their primary interpretive approach).

95. ICJ Statute, *supra* note 19, art. 2.

law, so that there is a dialogue between the State level and the international level.⁹⁶ Over time, the requirement of diversity in professional backgrounds has become important in the context of the international criminal courts. Therefore, the statutes of the ICTY and ICTR State that “due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.”⁹⁷ The experience of these two *ad hoc* criminal tribunals showed that judges should come with theoretical knowledge from academia, and with *de facto* experience managing criminal trials.⁹⁸ Following this, the statute of the ICC created two different lists of candidates—those with expertise in criminal law, and those with expertise in international law.⁹⁹ Finally, in the context of the WTO, panel members are expected to have a “wide spectrum of experience.”¹⁰⁰

In practice, most of the international judges come from academia, the diplomatic corps and other civil servants, and the national judiciary.¹⁰¹ Traditionally, many international judges have been nominated from academia, and conventional wisdom is that they tend to be more independent.¹⁰² In contrast, some deem the nomination of diplomats as problematic, since diplomats might be too political and not as impartial as judges are expected to be.¹⁰³ Moreover, diplomats do not always have legal training. This is problematic because, according to an interviewee cited by Mackenzie et al., diplomats often see “the law as negotiable, not as a parameter you have to take as it is.”¹⁰⁴ Studies by Voeten¹⁰⁵ and by Terris et al.¹⁰⁶ demonstrate that judges who were diplomats prior to their nomination show more respect for the *raison d’etat*. On the other hand, professional judgments induce more compliance by member States.¹⁰⁷ In his research on the ECtHR, Bruinsma also shows that professional background might have an influence on the decision making of judges. For instance, in interviews he conducted with ECtHR judges, Bruinsma found that it was more likely for judges coming from academia to write separate opinions, and less likely for former practitioners to do so.¹⁰⁸ Although diversity in the professional

96. Abi-Saab, *supra* note 87, at 172.

97. S.C. Res. 827, U.N. Doc. S/RES/827, art. 13 (May 25, 1993) (ICTY Statute); S.C. Res. 955, art. 12 (Nov. 8, 1994) (ICTR Statute).

98. See Swigart & Terris, *supra* note 2, at 629.

99. Rome Statute, *supra* note 20, art. 36(5).

100. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 8(2), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.

101. TERRIS ET AL., *supra* note 54, at 20.

102. MACKENZIE ET AL., SELECTING INTERNATIONAL JUDGES, *supra* note 5, at 52.

103. *Id.* at 58–59.

104. *Id.* at 58.

105. Voeten 2008, *supra* note 62, at 696.

106. TERRIS ET AL., *supra* note 54, at 64.

107. Voeten 2008, *supra* note 62, at 430.

108. Bruinsma, *supra* note 30, at 36–37.

backgrounds of judges is important, it should also be noted that sometimes it is hard to classify judges by career, since many of the individuals appointed to international courts have had very long careers working in several legal capacities.¹⁰⁹

In conclusion, the four most commonly discussed criteria for diversity in international judicial institutions are geography, gender, legal system, and professional background. There are some studies on national and international institutions that, together with anecdotal evidence, find that those differences might influence the way a judge votes. However, none of those studies empirically explored all four characteristics of diversity in an international (as opposed to a regional) judicial institution.

Next, the article will introduce the relevant discussions about diversity in the HRC, and how it can influence the way that CMs make decisions.

II.

THE UNITED NATIONS HUMAN RIGHTS COMMITTEE

A. General Background

The International Covenant on Civil and Political Rights (ICCPR)¹¹⁰ codifies the civil and political rights recognized in the Universal Declaration of Human Rights.¹¹¹ The ICCPR guarantees a wide range of the most basic rights to people from all over the world. Currently, 169 countries are parties to the ICCPR,¹¹² making it the most widely ratified legally binding document granting civil and political rights. The ICCPR protects rights such as the right to life,¹¹³ freedom from torture,¹¹⁴ freedom of religion,¹¹⁵ gender equality,¹¹⁶ judicial due process,¹¹⁷ and equal protection of the law.¹¹⁸

Since there are many difficulties in enforcing a treaty that guarantees the rights of an individual against a State, the ICCPR drafting committee decided to establish a committee that would interpret the treaty and monitor its implementation in the member States.¹¹⁹ Thus, the HRC was established under Article IV of the ICCPR. The HRC is composed of eighteen CMs that come from

109. Swigart & Terris, *supra* note 2, at 626.

110. ICCPR, *supra* note 10.

111. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

112. ICCPR, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-4&chapter=4&clang=_en (last visited Feb. 8, 2017).

113. ICCPR, *supra* note 10, art. 6.

114. *Id.* art. 7

115. *Id.* art. 18

116. *Id.* arts. 3, 23

117. *Id.* art. 14

118. *Id.* art. 26

119. *Id.* art. 254

States that are members of the ICCPR.¹²⁰ Although the CMs are nominated only by their State of nationality, according to the ICCPR they serve in their personal capacity.¹²¹

Many regard the nomination and appointment of CMs to the HRC as political and as not always reflecting the qualification of the candidate.¹²² Although the ICCPR expressly States that CMs serve in their personal capacity and should not represent the interests of their respective States,¹²³ they can be nominated only by their States of nationality.¹²⁴ Also, in the process of the election of CMs at the international level, the UN regional groups play an important part in promoting their candidates.¹²⁵

As part of their role in supervising the implementation of the ICCPR in the member States, the HRC has three main roles. The first role is to review periodical reports of countries regarding “the measures they have adopted to give effect to the rights recognized” in the ICCPR, as well as “the progress made in the enjoyment of those rights.”¹²⁶ The second role is to publish general comments on the ICCPR so as to provide general guidance to the States on their obligations under the ICCPR.¹²⁷ The third main role of the HRC, which is also the focus of this article, is to adopt decisions (that are also called “views”) on individual communications.¹²⁸ In this function, the HRC acts as a quasi-judicial tribunal.

Article 1 of the First Optional Protocol to the ICCPR (OP) permits an individual to file a communication for a violation of a right guaranteed to him by the ICCPR. Although the OP is considered a separate treaty, only States that are

120. *Id.* art. 28.

121. *Id.* arts. 28(3) (“[T]he members of the Committee shall be elected and shall serve in their personal capacity”), 29(2) (“[E]ach State Party to the present Covenant may nominate not more than two persons. These persons shall be nationals of the nominating State.”).

122. James Crawford, *The UN Human Rights Treaty System: A System in Crisis?*, in *THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING* 9 (Philip Alston & James Crawford eds., 2000); see also A. Clapham, *UN Human Rights Reporting Procedures: An NGO Perspective*, in *THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING* 188 (Philip Alston & James Crawford eds., 2000). For a more detailed account of the nomination process to the HRC, see Vera Shikhelm, *Geopolitics and Culture in the United Nations Human Rights Committee*, 28 *EUR. J. INT’L L.* 845 (2017).

123. ICCPR, *supra* note 10, art. 28(3).

124. *Id.* art. 29(2).

125. Crawford, *supra* note 122, at 9.

126. See ICCPR, *supra* note 10, art. 40; Rules of Procedure of the Human Rights Committee, Rule 66, ICCPR, CCPR/C/3/Rev.10 (Jan. 11, 2012) [hereinafter Rules of Procedure].

127. The HRC interpreted its authority to issue General Comments from ICCPR article 40(4), which provides that the HRC may transmit “such general comments as it may consider appropriate.” See Office of the U.N. High Comm’r for Human Rights, Civil and Political Rights, *The Human Rights Committee Fact Sheet* 24, UNITED NATIONS (last visited Feb. 8, 2017); <http://www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf>; Office of the U.N. High Comm’r for Human Rights, *Human Rights Treaty Bodies—General Comments*, UNITED NATIONS (last visited Feb. 8, 2017). <http://www.ohchr.org/EN/HRBodies/Pages/TBGeneralComments.aspx>.

128. Optional Protocol, *supra* note 14, art. 23.

parties to the ICCPR are allowed to join it.¹²⁹ Currently, out of the 169 countries who are parties to the ICCPR, 115 are parties to the OP.¹³⁰ The role of the individual communications is to provide a remedy in case of a specific violation, as well as to give guidance to member States regarding the proper implementation of the ICCPR.

In the individual communications procedure, the applicant files a communication that includes the facts of the case and legal arguments. This triggers an adversarial procedure; following that, the member State has a chance to provide an answer in its defense.¹³¹ After reading the written submissions by both sides, the HRC issues one of the following three decisions—inadmissible, violation (of one or more of the treaty articles), or no violation by the State. The HRC also indicates the remedies that the State should undertake in order to compensate the individual for the violation of the human right (if it indeed occurred). In recent years, the HRC has ordered various remedies, such as adequate compensation,¹³² public apology,¹³³ commutation of the death sentence,¹³⁴ retrial,¹³⁵ effective investigation,¹³⁶ and prosecution of individuals who allegedly violated human rights of the applicant.¹³⁷

Since the individual communications procedure is quasi-judicial, it is the only procedure in which CMs are allowed to write separate opinions.¹³⁸ Therefore, we can best study how the background of the CM influences his or her voting pattern through these decisions, as opposed to the general comments and periodical reviews on States.

The main problem with the individual communications mechanism is that the normative status of this mechanism is unclear, and therefore States are not eager to implement the decisions in the communications. Originally, the decisions under the OP were not supposed to be legally binding on the member States. Rather, they were intended to serve a similar function to advisory opinions in other international tribunals.¹³⁹ However, over time the HRC has promoted the idea that its views should *de facto* be binding on the State parties, and States have become much more open to decisions against them.¹⁴⁰ In General Comment 33

129. *Id.* art. 1.

130. *See generally* Optional Protocol, *supra* note 14.

131. *Id.* art. 4.

132. Shchetko v. Belarus, ICCPR CCPR/C/87/D/1009/2001 (Aug. 8, 2006).

133. Lecraft v. Spain, ICCPR CCPR/C/96/D/1493/2006 (July 30, 2009).

134. Chisanga v. Zambi, ICCPR CCPR/C/85/D/1132/2002 (Nov. 3, 2005).

135. Kurbonov v. Tajikistan, ICCPR CCPR/C/86/D/1208/2003 (Mar. 16, 2006).

136. Medjnoune v. Algeria, ICCPR CCPR/C/87/D/1297/2004 (Aug. 9, 2006).

137. Madoui v. Algeria, CCPR/C/94/D/1495/2006 (Dec. 1, 2008).

138. Rules of Procedure, *supra* note 126, r. 104.

139. SUZANNE EGAN, THE UN HUMAN RIGHTS TREATY SYSTEM: LAW AND PROCEDURE 262 (2011). For earlier discussions on the legal status of the decisions of the HRC, see DOMINIC MCGOLDRICK, THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 54 (1991).

140. TYAGI, *supra* note 11, at 587–92 (2011); Henry J. Steiner, *Individual Claims in a World of*

issued by the HRC in 2008,¹⁴¹ the HRC pointed out that its decisions are arrived at in a “judicial spirit,” and that the decisions are of a determinative character.¹⁴² Moreover, the General Comment States that, “[T]he views of the Committee under the Optional Protocol represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument,”¹⁴³ and it reminds the countries that they have an obligation to act in good faith to fulfill their obligations under the OP and the ICCPR.¹⁴⁴

Regardless of the measures the HRC takes to ensure implementation of its decisions, many States refuse to recognize its decisions on individual communications as binding, and the status of implementation appears unsatisfactory. In a 2011 study by Open Society Initiative based on the reports of the HRC itself, it was found that only 12.27% of the HRC decisions had been fully implemented.¹⁴⁵ This is a relatively low figure compared to other national and even international tribunals.¹⁴⁶

B. Diversity in the HRC

The main provisions regarding the diversity of CMs are found in Articles 28(2) and 31 of the ICCPR. The articles read as follows:

Article 28. 2. The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience.

[. . .]

Massive Violations: What Roles for the Human Rights Committee?, in PHILIP ALSTON AND JAMES CRAWFORD, *THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING* 15, 28 (2000)

141. ICCPR, General Comment 33—The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights, CCPR/C/GC/33 (Nov. 5, 2008) [hereinafter General Comment 33].

142. *Id.* ¶ 11.

143. *Id.* ¶ 13.

144. *Id.* ¶ 14; *see also* EGAN, *supra* note 139, at 262–63.

145. OPEN SOCIETY JUSTICE INITIATIVE, *FROM JUDGMENT TO JUSTICE—IMPLEMENTING INTERNATIONAL AND REGIONAL HUMAN RIGHTS DECISION* 119 (last visited Feb. 8, 2017), <https://www.opensocietyfoundations.org/sites/default/files/from-judgment-to-justice-20101122.pdf> [hereinafter *FROM JUDGMENT TO JUSTICE*] (defining “satisfactory” Responses as “the willingness of the State party to implement the Committee’s recommendations or to offer the complainant an appropriate remedy”); *see also* Yuval Shany, *The Effectiveness of the Human Rights Committee and the Treaty Body Reform* (Hebrew Univ. Jerusalem Int’l L. Forum, Working Paper No. 02-13, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2223298.

146. Compliance with judgments of the International Court of Justice is around sixty-eight percent. *See* Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229, 1315 (2004). For data on implementation of judgments in the European Court of Human Rights and the Inter-American Court of Human Rights, *see generally* *FROM JUDGMENT TO JUSTICE*, *supra* note 145.

Article 31. 1. The Committee may not include more than one national of the same State. 2. In the election of the Committee, consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems.

Therefore, the ICCPR itself requires diversity mainly in geography and legal systems (it is somewhat unclear what exactly is meant by “different forms of civilization” and how that differs from geographical distribution). Also, it is unclear whether Article 28(2) actually seeks to diversify the professional experience of the HRC members, although it does mention that it is preferable for some CMs to have legal experience. In practice, unlike members of other UN treaty bodies, almost all of the members of the HRC have a legal education.¹⁴⁷ However, nothing is mentioned about diversity within the legal profession itself. Finally, gender representation does not appear in the relevant articles.

Over the years the most important criteria of nomination to the HRC has probably been the geographical origin of the nominee.¹⁴⁸ The UN has five regional voting groups—African, Asian-Pacific (Asian), Eastern European, Latin American and Caribbean (GRULAC or Latin), and Western European and Others (WEOG or Western).¹⁴⁹ The elections are seen as political, and every regional group tries to lobby for its candidates to be elected to as many UN bodies as possible, including the HRC.¹⁵⁰ As in many other international institutions, Western CMs have served on the HRC disproportionately more than CMs from other regions. There is no apparent evidence that diversity criteria such as gender, former occupation, or even legal systems (the latter being officially mentioned in the ICCPR) are seriously taken into account when States nominate and elect candidates.

The problem of lack of diversity of CMs has been addressed by the UN several times. Two resolutions on this subject were adopted. The UN Economic and Social Council adopted the first resolution in 2001,¹⁵¹ and the UN General Assembly adopted the second resolution in 2009.¹⁵² The main concern of those resolutions was the geographical distribution of CMs, and the 2009 resolution was even titled “[P]romotion of equitable geographical distribution in the membership of the human rights treaty bodies.”¹⁵³ However, the 2009 resolution also addresses

147. Kerstin Mechlem, *Treaty Bodies and the Interpretation of Human Rights*, 42 VAND. J. TRANSNAT'L L. 905, 917 (2009).

148. See Crawford, *supra* note 122, at 9 (discussing the political nature of nominations to the HRC).

149. This group also includes Canada, New Zealand, Australia and Israel. The United States of America is not a member of any regional group, but attends meetings of the Western Group as an observer and is considered to be a member of that group for electoral purposes. See United Nations Department for General Assembly and Conference Management, United Nations Regional Groups of Member States, <http://www.un.org/depts/DGACM/RegionalGroups.shtml> (last visited Feb. 8, 2017).

150. TYAGI, *supra* note 11, at 88–89; Crawford, *supra* note 122, at 9.

151. Economic and Social Council Res. 2001/275 (July 24, 2001).

152. G.A. Res. 64/173, U.N. Doc. A/RES/64/173 (Dec. 18, 2009).

153. *Id.*

the importance of gender balance and the representation of the principal legal systems. Regarding the professional background of the CMs, the resolution does not specifically say it should be diverse, but quotes Article 28(2): CMs should have recognized competence in the field of human rights, and of the usefulness of having several CMs with legal experience.¹⁵⁴

The 2009 resolution speaks about the importance of diversity, and, although not stating it straightforwardly, it hints at both the functional and the legitimacy arguments in favor of diversity. In the resolution, the General Assembly reaffirms the “importance of the goal of universal ratification of the United Nations human rights instruments,” and reiterates “the importance of the effective functioning of treaty bodies established pursuant to United Nations human rights instruments for the full and effective implementation of those instruments.”¹⁵⁵ It also mentions the significance of “national and regional particularities.”¹⁵⁶ In her 2012 report on strengthening the UN Treaty Bodies, the High Commissioner for Human Rights referred generally to the lack of diversity in the treaty bodies, writing that “[there is a] need to carefully review the qualifications of each candidate, and select the best candidates giving consideration to gender, geography, professional fields and legal systems in determining the final composition.”¹⁵⁷ Although recommended both by the resolution and by the report, no official system of regional quotas has been introduced.

The official reasoning of the General Assembly resolution, as well as the language of other official documents, speaks of the importance of diversity for the general good. However, given that States are most insistent on equal regional representation, a very important question to be raised is whether those benefiting most from the diversity are not the States themselves, who expect certain “personal” benefits from the fact that the CMs share a background with them. In my previous research on the HRC,¹⁵⁸ I presented empirical evidence that CMs tend to vote in favor of States that are similar geopolitically to their State of origin. The strongest statistical results were found for voting in favor of a State from the same regional group. Similarly, as mentioned above, research about the ICJ and the ECtHR has also found certain biases based on similarities, especially for voting in favor of the State of origin.

Before going to the empirical part of the article, it is interesting to present two examples in which the background of a CM could have influenced his or her decision and the dialogue between the CMs. In the case of *Hoyos v. Spain*, the applicant argued that Spain violated her right for equality as guaranteed by Article 26 of the ICCPR, because according to Spanish legislation only men could inherit

154. *Id.* at 1.

155. *Id.*

156. *Id.*

157. NAVANETHEM PILLAY (U.N. HIGH COMM’R OF HUMAN RIGHTS), STRENGTHENING THE UNITED NATIONS HUMAN RIGHTS TREATY BODY SYSTEM 78 (2012).

158. See Shikhelman, *supra* note 122.

nobility titles.¹⁵⁹ The HRC decided that it had no jurisdiction to review the case, and it was declared inadmissible.¹⁶⁰ Ruth Wedgwood, one of the two women CMs who sat on the Committee at the time, chose to write a separate opinion.¹⁶¹ Wedgwood pointed out that the Spanish legislation discriminated against women and violated international human rights norms.¹⁶² She also wrote that the scope of the Committee's decision should be narrowed in this case, and due regard should be given to the fact that the nobility title itself is devoid of material or financial content.¹⁶³

Another interesting example concerns immigration. In the case of *Shakeel v. Canada*, Canada refused to grant asylum to a Pakistani Christian priest.¹⁶⁴ The applicant claimed that he was persecuted in Pakistan for his faith, but the Canadian authorities did not find his story to be credible and decided to deport him back to Pakistan.¹⁶⁵ The applicant argued before the HRC that his deportation to Pakistan would constitute a breach of his right to life (Article 6), right not to be tortured (Article 7) and right to the security of person (Article 9).¹⁶⁶ The majority of CMs found that if the applicant were to be deported to Canada, his rights under Articles 6 and 7 would be violated.¹⁶⁷ However, seven CMs contested this decision, five of whom came from countries within the Western regional group.¹⁶⁸ The dissenting CMs pointed out that the HRC should "accord deference to fact-based assessments by national immigration authorities as to whether removed individuals would face a real risk of a serious human rights violation upon removal," since "it is generally for the instances of the States parties to the Covenant to evaluate facts in such cases."¹⁶⁹ Because in this case the author of the communication was unable to prove any irregularities in the decision of Canadian authorities, or to show that the procedure was unreasonable or arbitrary, the dissenting CMs argued that the HRC should not have found a violation of the ICCPR in the given case.¹⁷⁰

159. *Hoyos Martinez de Irujo v. Spain*, Comm. 1008/2001, U.N. Doc. A/59/40, Vol. II, at 472 (HRC Mar. 30, 2004), http://www.worldcourts.com/hrc/eng/decisions/2004.03.30_Hoyos_y_Martinez_de_Irujo_v_Spain.htm.

160. *Id.* ¶ 7.

161. *Id.* at Annex.

162. *Id.*

163. *Id.* It should be noted that two men CMs also wrote separate opinions in the case.

164. *Shakeel v. Canada*, Comm. 1881/2009, U.N. Doc. CCPR/C/108/D/1881/2009 (ICCPR June 24, 2013).

165. *Id.* ¶¶ 2.1–2.10.

166. *Id.* ¶ 3.4.

167. *Id.* ¶ 9.

168. CMs Mr. Yuval Shany, Mr. Cornelis Flinterman, Mr. Walter Kälin, Sir Nigel Rodley, Ms. Anja Seibert-Fohr, Mr. Yuji Iwasawa and Mr. Konstantine Vardzelashvili dissented.

169. *Shakeel v. Canada* Comm., *supra* note **Error! Bookmark not defined.**, dissenting opinion ¶ 2.

170. *Id.* ¶ 6.

III.

HYPOTHESES AND HYPOTHESES TESTING

A. *Data and Hypotheses*

This article uses data that I collected from all 571 decisions on the merits issued by the HRC between 1997 and 2013 (sessions 59–109). I did not include older decisions because until the 59th session the HRC did not indicate the CMs who participated in the discussion on the communication.¹⁷¹ The texts of the decisions came from the Bayefsky database,¹⁷² and I supplemented the texts with the UN Treaty Body Database (for decisions published after July 27, 2012).¹⁷³ Each observation in the database is a vote of a CM in a specific decision (N= 8,390).

As mentioned in the introduction, the main empirical question the article aims to answer is how geography, legal system, professional background, and gender influence the decision-making process in the HRC. Hypotheses about the voting patterns are divided into two groups—the first set of hypotheses looks into whether *in general* CMs vote differently based on their characteristics. In the other set of hypotheses, there is no reason to believe that the characteristics of the CM influence their general voting pattern, but rather that their background might influence voting patterns on *specific issues*. Also, there are several aspects in which diversity can influence the decision-making process of a panel: by directly influencing the voting pattern of a single CM, by giving a CM an opportunity to write a separate opinion, or by influencing the decision of the panel as a whole.

In order to capture all three possible dimensions, this article uses three dependent variables. The first is “vote in favor.” This is a dummy variable that is coded as “1” if the CM voted in favor of the State (*i.e.*, that there was no violation of the covenant), and “0” otherwise. The second is “separate opinion,” which is coded as “1” if the CM wrote a separate opinion (both dissenting and concurring) in the communication, and “0” otherwise. The third is “decision,” which is coded as “1” if the decision on the committee *as a whole* was in favor of the State, and “0” otherwise.

I first introduce the hypotheses that address general voting patterns, and then the hypotheses that consider voting patterns on specific subject matters. The general voting pattern hypotheses are as follows:

Geography. CMs from different geographic regions vote differently. In line with the previous research on the subject, CMs from regions that have many new

171. According to Rule 37 of the Rules of Procedure, twelve CMs constitute a forum. Therefore, most of the decisions of the HRC on the communications are not made by all the CMs.

172. *The United Nations Human Rights Treaties*, BAYESKY, <http://www.bayefsky.com/docs.php/area/jurisprudence/treaty/ccpr/opt/0/node/5/type/all> (last visited Feb. 8, 2017).

173. U.N. OFFICE OF THE HIGH COMM’R ON HUMAN RIGHTS, *Treaty Bodies Search*, UNITED NATIONS, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en (last visited Feb. 8, 2017).

democracies are more likely to vote against States and in favor of applicants. Therefore, I hypothesize that CMs from the Eastern European and the Latin American regional groups are more likely to vote against States. According to the same reasoning, judges from Eastern European and Latin American countries are more likely to be activists and write separate opinions. To test this hypothesis, I use the classification of the five regional UN voting groups¹⁷⁴—African, Asian, Eastern European, Latin American, and Western European and Others.¹⁷⁵

Legal Systems. CMs from common law States might be more likely to vote against States, since traditionally common law courts and judges tend to be more activist and less entrenched in the State bureaucracy. Also, since in many common law countries there is a long tradition of writing separate opinions, it is more likely that a CM from a common law country would write a separate opinion.¹⁷⁶ Finally, if we use the broader definition of legal systems, we might also expect that States that score strongly in judicial independence are more likely to appoint CMs that vote against States and write separate opinions. However, in accordance with the literature, it is also expected that States which are on the “middle of the scale” are more likely to appoint activist CMs than other States.

Professional Background. The professional background of the CM might influence the way he or she votes. I hypothesize that CMs who worked for the government prior to their election would tend to vote more in favor of States. On the other hand, CMs who worked in the judiciary or in academia prior to their election would tend to vote more against States. Also, CMs who came from academia and who were former judges would tend to write more separate opinions.

The hypotheses regarding the voting patterns on specific subject matters are:

Geography. I hypothesize that CMs coming from different geographical regions might be more sensitive to certain human rights issues, dependent on the history, culture, and human rights problems in their regions. I test the following hypotheses: (1) CMs from the Western group of States are likely to vote in favor of States and write more separate opinions in immigration and asylum cases. This is because most of these cases (85.19%) are against their regional group; (2) CMs from the Western group of States would be more willing to vote against States and write more separate opinions on cases of alleged violations of LGBT rights, because this region is considered to be more progressive on these issues; (3) CMs from the Latin American and Eastern European regions are more likely to vote against States and write more separate opinions in cases of political rights, since their regions have a history of political persecutions and enforced disappearances;

174. *U.N. Regional Groups of Member States*, U.N. DEP'T FOR GEN. ASSEMBLY & CONF. MGMT., <http://www.un.org/depts/DGACM/RegionalGroups.shtml> (last visited Feb. 8, 2017).

175. This group also includes Canada, New Zealand, Australia and Israel. The United States of America is not a member of any regional group, but attends meetings of the Western Group as an observer and is considered to be a member of that group for electoral purposes.

176. TERRIS ET AL., *supra* note **Error! Bookmark not defined.**, at 248–51.

and (4) CMs from the African region are more likely to vote in favor of applicants in cases of minority rights.

Gender. According to prior research, there is no reason to assume that women vote in a different way than men in general. However, women might be more sensitive to violations of women's rights. Therefore, I hypothesize that women are more likely to vote against States and write more separate opinions in cases of women's rights.

Legal Systems. Different legal systems can have different views on procedural matters before the courts, and give different weight to various procedural violations. Therefore, I hypothesize that CMs from common law countries would vote differently in cases where the right to due process before the courts was allegedly violated (Article 14 to the ICCPR).

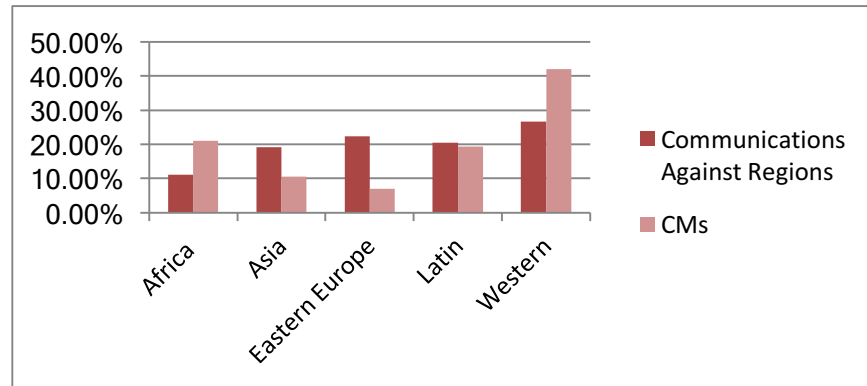
Appendix 1 summarizes variables used in the article, and Appendix 2 summarizes the hypotheses and the variables used to test them.

B. Descriptive Statistics

Before continuing to the Part on inferential statistics, I offer some descriptive statistics regarding the diversity of geography, gender, legal systems, and professional background of CMs. I provide this information only for the sessions relevant to the period of the research (sessions 59–109). During this period, fifty-seven CMs served on the HRC.

For the period relevant to the study, the regional distribution of the CMs is as follows: Western (42.11%), African (21.05%), Latin (19.3%), Asian (10.53%), and Eastern European (7.02%).¹⁷⁷ However, when we examine the distribution of the communications by regions, the distribution is different: Western (26.62%), Eastern European (22.42%), Latin (20.49%), Asian (19.26%), and African (11.21%). Therefore, there is not necessarily a connection between the number of communications filed against a region and the number of CMs from that region who serve on the HRC. For instance, while the number of communications against Eastern European countries was second only to the number of communications against Western countries, Eastern Europe was the group least represented on the HRC. We can also see that like in other international judicial institutions, there is a tendency to appoint more CMs from the African region. (see Figure 1).

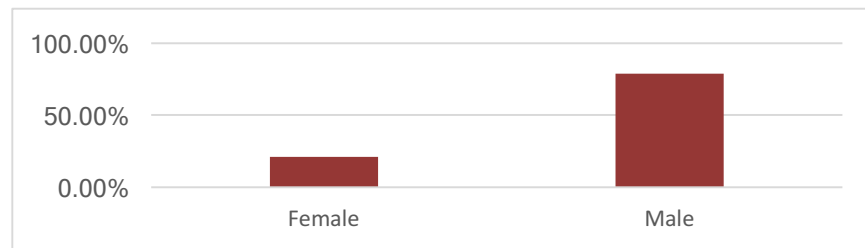
177. This data includes both communications that were decided on the merits and communications that were decided only on admissibility grounds.

Figure 1. Geography.

Regarding the legal systems of the countries against which the communications were filed, the distribution is much more balanced — 30.65% of the communications filed to the HRC came from common law countries, while 31.58% of the CMs came from these countries.

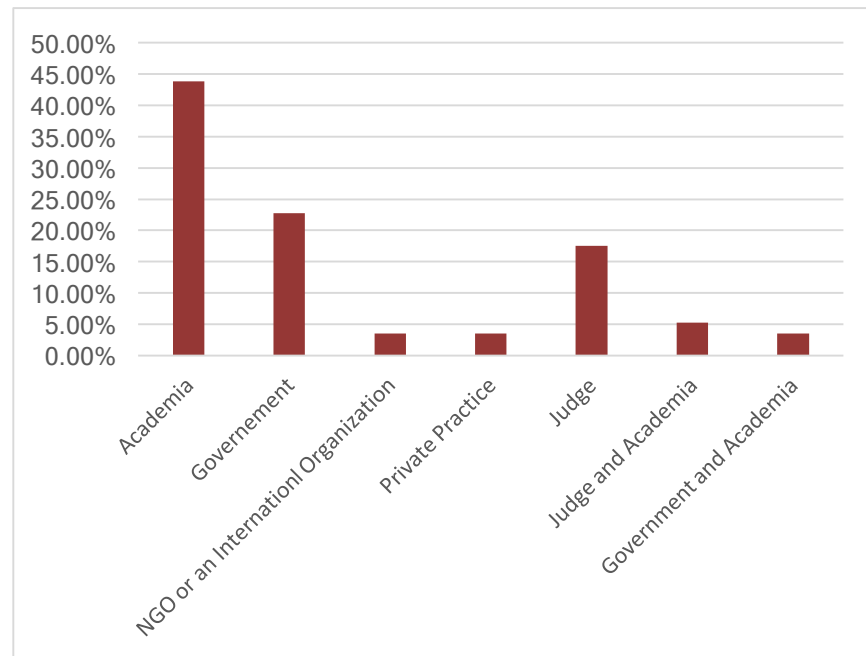
Figure 2. Legal Systems.

As for gender, it seems that historically women are very much underrepresented in the HRC, as they are in many other international tribunals. During the time period under research, only twelve women served on the HRC (21.05%), as compared to forty-five men (78.95%). However, it should be noted that recently the member States have become more aware of gender balance, and as of 2017, eight out of the eighteen CMs (44.44%) are women.

Figure 3. Gender.

As for the professional backgrounds of the CMs, the leading backgrounds were academia and government. Out of the fifty-seven CMs, thirty CMs (52.63%) had a prior career in academia before being nominated to the HRC (including both CMs with “pure” academic careers as well as CMs who also served as judges or government officials). The second most common professional background is working for the government.¹⁷⁸ Fifteen CMs (26.31%) held a position in the government or in politics before they were elected to the HRC (two of them held this position together with a position in academia). Given that the work of the CMs probably most closely resembles the work of a judge in a national court, it is to some degree surprising that only thirteen CMs (22.8%) served as judges prior to their appointment to the HRC.

178. It should be noted that I included here CMs who had a political career prior to their election.

Figure 4. Professional Background.

C. Results

The next step is to test the hypotheses using multivariate regression analysis. Doing so is important because it enables me to control simultaneously for multiple independent variables that could affect the dependent variable. In the following multivariate regressions, I control for the year in which the case was decided, and for how the majority voted in the decision¹⁷⁹ (I control for the latter variable only with “vote in favor” as a dependent variable). Since the dependent variables are binary, I use a logit regression. In all models presented below, the standard errors are robust and clustered for individual CMs.

Table 1 presents the results of the regressions with vote in favor as a dependent variable.

179. This variable appears as “vote case” in Table 1.

Table 1.

	(1) Geography	(2) Legal System	(3) Judicial Independence	(4) Professional Background	(5) Case Specific
Eastern European	0.0932 (0.285)				
Latin	-1.153*** (0.277)				
Western					-0.411 (0.614)
Legal system		-0.352 (0.337)			0.0430 (0.520)
Judicial Independence			-0.838 (0.605)		
Judicial Independence Sqr			0.515* (0.263)		
Academia				0.128 (0.272)	
Judge				0.234 (0.353)	
Government				-0.670** (0.304)	
Western X Immigration					1.049** (0.483)
Women X Women's rights					-1.093 (0.714)
Latin Eastern X Political					-0.344 (0.436)
LGBT X Western					-1.574** (0.782)
African X Minorities					-1.746 (1.216)
Legal system X Due process					-0.127 (0.350)
Women					0.477 (0.365)
Gender					-0.213 (0.555)
LGBT					0.546 (0.685)

Immigration	0.431 (0.349)				
Latin Eastern	-1.187** (0.590)				
Political	-0.958*** (0.297)				
African	-0.804 (0.574)				
Minorities	0.680* (0.355)				
Due process	-0.00488 (0.268)				
Year decide	0.0276 (0.0289)	0.0283 (0.0315)	0.0329 (0.0301)	0.0278 (0.0328)	0.0415 (0.0310)
Majority Vote	7.133*** (0.265)	7.044*** (0.270)	7.061*** (0.263)	7.074*** (0.265)	7.147*** (0.265)
Observations	8,390	8,390	8,317	8,390	8,390

Robust standard errors in parentheses *** p<0.01, ** p<0.05, * p<0.1

Table 2 presents the results of the regressions with separate opinion as a dependent variable.

Table 2.

	(1) Geography	(2) Legal System	(3) Judicial Independence	(4) Professional Background	(5) Case Specific
Eastern Europe	-0.938*** (0.334)				
Latin	0.131 (0.351)				
Legal system		-0.146 (0.237)			-0.0666 (0.265)
Judicial independence			0.472 (0.466)		
Judicial independence Sqr			-0.0687 (0.237)		
Academia				0.0547 (0.250)	
Judge				-0.128 (0.256)	
Government				-0.544* (0.310)	

Women X Women's rights	0.918 (0.838)				
Western X immigration	0.928*** (0.272)				
Latin Eastern X political	0.811** (0.378)				
LGBT X Western	-0.667 (0.855)				
African X Minorities	0.456 (0.441)				
Legal system X Due process	0.0497 (0.241)				
Women	-0.630 (0.536)				
Gender	-0.116 (0.355)				
LGBT	0.402 (0.582)				
Immigration	0.256 (0.208)				
Latin Eastern	-0.381 (0.458)				
Western	-0.147 (0.327)				
African	-1.018*** (0.393)				
Political	-0.237 (0.171)				
Minorities	0.715*** (0.269)				
Due process	-0.178 (0.195)				
Legal system	-0.0691 (0.253)				
Year decide	-0.0326 (0.0231)	-0.0310 (0.0247)	-0.0275 (0.0236)	-0.0327 (0.0236)	-0.0284 (0.0207)
Observations	8,390	8,390	8,317	8,390	8,390

Robust standard errors in parentheses *** p<0.01, ** p<0.05, * p<0.1

The first model corresponds to the general regional hypothesis, according to which CMs from the Eastern European and Latin American regions are less likely to vote in favor of States. According to this model, CMs from Latin American countries tend to vote more against States on a very high significance level ($p < .01$). However, contrary to my hypothesis, CMs from the Eastern European group do not seem to have any statistically significant voting pattern. As to writing

separate opinions, CMs from Eastern European (and African) countries tend to write significantly fewer individual opinions than their colleagues from other regional groups ($p < .01$).

The second and third models correspond to the hypothesis that CMs from different legal systems vote differently. In the second model the coefficient of the legal system variable is negative, meaning that CMs from non-common law countries are less likely to vote in favor of countries than CMs from common law countries. Although the coefficient does not reach a statistically significant level, this is a surprising finding, since according to my hypothesis, CMs from common law countries are more likely to vote against countries. This might be partially explained by the fact that CMs from the Latin American group of countries belong to the non-common law countries group, and they tend to vote against States. In the specification with separate opinions as the dependent variable, the coefficient is negative, meaning CMs from non-common law countries are less likely to write a separate opinion than CMs from common law countries, but it does not reach statistical significance.

The third model uses both the regular judicial independence score as well as the square of the judicial independence score. The idea behind using the square of the judicial independence score as a dependent variable is that according to some theories, developing democracies struggling with judicial independence are more likely to nominate activist judges. As I hypothesized, there seems to be, in general, a positive correlation between judicial independence and the probability that a CM votes against a State. However, the coefficient of the squared judicial independence score is positive and statistically significant, meaning that for the highest judicial independence scores this tendency becomes less significant ($p < .1$). In the specification with separate opinions as the independent variable, neither of the coefficients reached statistical significance.

The fourth model corresponds to the hypothesis regarding the professional backgrounds of the CMs. I hypothesized that CMs that worked for the government prior to their election would tend to vote more in favor of States, and CMs who worked in the judiciary or in academia prior to their election would tend to vote more against States. Both in the specification with “vote in favor” as a dependent variable, and in the specification with “separate opinion” as the dependent variable, the only coefficient that reaches statistical significance is for CMs who came from government service. In the specification with “separate opinion” as the dependent variable, the only coefficient that reaches statistical significance is that for CMs who came from government service. Contrary to the hypothesis, those CMs tend to vote more *against* States, on a statistically significant level, than CMs with other professional backgrounds ($p < .05$). In the “separate opinion” specification, the coefficient for government background is negative and statistically significant ($p < .1$), meaning these CMs are less likely to write separate opinions.

The fifth model corresponds to specific hypotheses, according to which characteristics of CMs influence voting patterns on specific subject matters. In the specification with “vote in favor” as a dependent variable, the independent

variables that reach statistical significance are the interaction variables of a Western CMs on immigration cases, and Western CMs on LGBT rights cases. The coefficient of the first variable is positive and significant ($p < .05$), meaning Western CMs are more likely to vote in favor of States on immigration issues than other CMs. The coefficient of the second variable is negative and significant ($p < .05$), meaning that CMs from Western countries are more likely to vote in favor of the applicant in cases of alleged LGBT rights violations. The interaction coefficient of women with cases on women's rights is positive, and although very close, does not reach statistical significance. In the specifications with separate opinions as the dependent variable, the coefficients that reach statistical significance are the interaction coefficient of Western CMs on immigration cases ($p < .01$), and the interaction coefficient of CMs from Eastern European and Latin American countries in political cases ($p < .05$). Therefore, in those cases CMs are more likely to write separate opinions. Neither of the coefficients regarding African CMs voting (or writing a separate opinion) in minority rights cases reach statistical significance.

In addition to the hypotheses tested above, I also decided to examine whether CMs with a certain background might change the decision in the case itself, beyond their personal voting patterns. This was following the suggestion that the influence of a decision-maker might not be reflected only in the way that he himself votes, but also in the dynamics between the decision-makers themselves, thus influencing the final outcome. To test this hypothesis, I chose as the independent variables the percentage of judges from the Eastern European and Latin American groups, the percentage of CMs from non-common law States, the average judicial independence score of the countries from which CMs come, the percentage of CMs with government backgrounds, and the percentage of women. The dependent variable used in these regressions is "decision," which takes the value of "1" if the HRC finds no violation of the ICCPR, and "0" otherwise. I used a logit regression and controlled for the human rights score of the respondent State and for the year of the decision. Unlike the other regressions, in this regression the unit of observation is a decision in a communication ($N=571$). However, as can be seen in **Table 3**, none of the specifications reach statistical significance.

Table 3.

	(1) Latin- Eastern	(2) Legal System	(3) Judicial Independence	(4) Legal Occupation	(5) Gender
% Latin Eastern	2.738 (2.259)				
% Civil law and others		-0.720 (2.053)			
Average judicial			-0.812 (0.658)		
% Government				0.908 (1.951)	
% Women					0.114 (1.555)
Human Rights score	0.675*** (0.0981)		0.679*** (0.0983)	0.678*** (0.0982)	0.677*** (0.0981)
Year decide	-0.0474* (0.0283)	-0.0468 (0.0331)	-0.0589* (0.0337)	-0.0390 (0.0276)	-0.0365 (0.0288)
Observations	571	571	571	571	571

Standard errors in parentheses
 *** p<0.01, ** p<0.05, * p<0.1

In line with the previous approach, I also looked into whether the percentage of CMs in specific subject-matter cases might influence the outcome of the case. I tested the following hypotheses: (1) the percentage of Western CMs increases the probability of a decision in favor of a State in immigration cases; (2) The percentage of CMs from Eastern European and Latin American countries increases the probability of voting against a State in political cases; (3) the percentage of non-common law CMs influences the voting pattern in due process cases. It is noteworthy that due to small variance, I could not examine cases of specific hypotheses regarding whether the percentage of women in women's rights cases and the percentage of Western CMs in LGBT rights cases influences the result. Also, given that there is less variance, I do not control for the human rights score of the country in these specifications. Table 4 presents the results of the regression.

Table 4.

	(1) Immigration	(2) Political	(3) Due Process
% Western	12.82** (6.264)		
% Latin Eastern		6.905 (9.444)	
% Civil Law and others			-0.829 (2.658)
Year decide	-0.153* (0.0911)	-0.156 (0.114)	0.0304 (0.0432)
Observations	54	104	355

Standard errors in parentheses

*** p<0.01, ** p<0.05, * p<0.1

As can be seen from Table 4, the only variable that reaches statistical significance is the percentage of Western CMs in immigration cases. This coefficient is positive and statistically significant ($p < .01$), meaning that the more Western CMs there are in immigration cases, the more likely the HRC is to rule in favor of the State and against the applicant.

IV.

DISCUSSION

A. Empirical Implications

This article seeks to determine whether geography, gender, legal system, and professional background influence decision making in the HRC. This question is of special importance, given that diversity clauses are included in statutes of international judicial institutions and the scholarship argues in favor of diversity. Since the theoretical literature suggests several ways in which diversity could influence the decision-making process, this article uses three dependent variables that seek to reflect both influence on the vote of the individual CM and influence on the result that the HRC reaches. The article also looks into two possible planes in which diversity could influence decision-making by influencing voting patterns in general and on specific issues.

Regarding the *geographical* hypothesis, there seem to be two significant findings. The first is on general voting patterns of CMs from the Latin American group. These CMs tend to vote *against* countries on a statistically significant level. Also, contrary to the hypothesis, CMs from Eastern European States tend to write significantly fewer separate opinions than CMs from other regions. Also, according to the data, African CMs are less likely to write separate opinions.

The most interesting and consistent voting pattern in the geographical hypothesis is that Western CMs tend to vote more in favor of States and write

more separate opinions in immigration cases. Also, the more CMs from Western countries on the Committee, the more likely the HRC is to decide that no violation exists in the case. Since cases on immigration and asylum are usually filed against States from the Western regional group, this pattern aligns with previous research, which shows that CMs (and decision-makers in other judicial institutions) tend to protect the interests of their countries and countries similar to their countries of origin. However, when I controlled in a regression for the CM and the respondent State being from the same regional group, the immigration variable lost its statistical significance. Therefore, it is somewhat of an open question whether a Western CM votes in favor of States in immigration cases because of the subject matter of the communication, or due to a general allegiance with a country from the regional group. Another interesting finding is that Western CMs tend to vote *against* States in LGBT rights cases. This is probably a reflection of the increased awareness that the issue has in the Western regional group, and especially of the constantly broadening protection that the European regional human rights system gives to LGBT rights.

Regarding the *legal systems* hypothesis, the results are more mixed. If we refer to the classical definition of legal systems, then the regression analysis shows that CMs from non-common law States are less likely to vote in favor of States and less likely to write separate opinions, however the results do not reach statistical significance. This might suggest that the traditional attribution of certain patterns of thinking to common law and non-common law countries is erroneous. This perhaps also reflects the tendency in the era of globalization for different legal systems to become more similar to each other.¹⁸⁰ Another explanation might be that when CMs, and other international decision-makers, are nominated to an institution, they socialize into the institutions' existing legal culture. This effect might be of special importance for writing separate opinions, since writing these opinions might be affected by the laws and customs of each institution. Therefore, when a decision-maker is placed on a judicial institution where it is more (or less) common to write separate opinions, he or she will quickly adjust to the new culture and act accordingly. Finally, no statistically significant voting patterns were found in due process cases.

Regarding the broader view of legal systems as reflecting certain political regimes, looking at voting patterns through the lens of the judicial independence score reveals an interesting picture. In line with the hypothesis, CMs from States with high judicial independence scores are more likely to vote against respondent States, although the coefficient does not reach statistical significance. However, the squared coefficient of the judicial independence score is positive and

180. See generally Jean-Louis Baudouin, *Mixed Jurisdictions: A Model for the XXIst Century?*, 63 LA. L. REV. 983, 984 (2003) (arguing that "both the civil and common law systems are coming to be much closer one to another than they have ever been" in the 21st century); Colin B. Picker, *International Law's Mixed Heritage: A Common/Civil Law Jurisdiction*, 41 VAND. J. TRANSNAT'L L. 1083 (2008) (comparing the international legal system to mixed common law and civil law jurisdictions around the world); Teteley, *supra* note 88, at 725 (discussing the creation process of mixed jurisdictions).

statistically significant—meaning that the higher the judicial independence score of the CM, the less influence it has on his or her tendency to vote in favor of a State. This finding is in line with the previous literature, which suggests that emerging democracies are more likely to appoint activist judges that protect human rights.

As to the *professional background* of CMs, the only statistically significant result regards the voting patterns of CMs who worked for the government before their HRC appointment. According to the results, these CMs tend to vote more against States on a statistically significant level, but at the same time write significantly fewer separate opinions. The hypothesis regarding government officials assumes that over the years of working for the government they would have become more used to adopting the *raison d'état* and be more conservative with finding violations of human rights. Furthermore, as mentioned above, research on the ECtHR indeed supports the hypothesis that judges who worked for the government were more likely to vote in favor of States.¹⁸¹ A possible *realpolitik* explanation to this finding in the HRC context is that CMs usually retain their old professional positions when they are appointed to the HRC. This is contrary to the practice in many international courts, such as the International Court of Justice, the European Courts and the International Criminal Court, where judges should resign from any other professional occupation. For instance, Bouzid Lazhari, a CM from Algeria, retained his position as a Senator and member of the Foreign Affairs Commission at the Algerian Council of the Nation.¹⁸² Also, Duncan Muhumuza Laki, a CM from Uganda, served simultaneously as the legal adviser to the permanent mission of Uganda to the UN.¹⁸³ Therefore, perhaps CMs who work for the government are more likely to promote the policy of their governments in the HRC as well, and to vote against countries that are politically distant from their countries. However, deeper empirical research is needed in order to determine the reason for this voting pattern.

Finally, regarding *gender*, the regressions show a tendency of women CMs to vote against States on women's rights issues and write more separate opinions in cases of women's rights. However, none of the relevant coefficients in the regressions reach statistical significance. This might be explained by the fact that only twelve women served on the HRC over a sixteen-year period, and only seven cases on women's rights were decided during that time. Therefore, the relatively small number of observations and less variance might lead to a "type 2" statistical error (failure to reject a false null hypothesis). Perhaps with time, when there are more women CMs appointed and more decisions on women's rights, we would gain more variance that could show statistical significance. It should also be noted

181. See Voeten 2008, *supra* note 62, at 430.

182. *Algeria Introduces a Senator to Serve on the Human Rights Committee*, ALKARAMA (Sep. 3, 2008), <https://www.alkarama.org/en/articles/algeria-introduces-senator-serve-human-rights-committee>.

183. Curriculum Vitae of Amb. Duncan Muhumuza Laki, U.N. OFFICE OF THE HIGH COMM'R OF HUMAN RIGHTS www.ohchr.org/Documents/HRBodies/CCPR/Membership/DMLaki.doc (last visited Oct. 31, 2017).

that when I tried to run a specification without clustering standard errors on the level of CMs, the results were that women CMs were less likely to vote in favor of States in women's rights cases on a statistically significant level ($p < .05$).

This article finds certain voting patterns associated with geography, legal systems (broadly defined), professional background (for CMs working for the government), and possibly gender. However, on many issues, the article did not find evidence that the background of the CMs had significant influence on their voting patterns. The fact that the article did not find evidence for the existence of certain voting patterns does not necessarily mean that they do not exist. Rather, for various reasons, like lack of sufficient variance or too small number of decisions, statistical analysis could have missed these patterns. On the other hand, the reader should also take into account that since I have examined multiple hypotheses in this article, this might have caused a "type 1" statistical error (false positive).

B. Implications on Legitimacy and Beyond

The next step is to ask a "so what?" question. It seems that, in general, the background of a CM does not strongly affect his or her voting patterns in most cases. So is it still worth retaining and insisting on diversity clauses? Both in the HRC context, as well as in other international judicial institutions, I would answer in the affirmative, but with certain reservations.

As was mentioned at the beginning of this article, diversity is seen as very important to the normative and sociological legitimacy of international institutions. However, it is worth distinguishing between diversity criteria that may actually assist in establishing the international legitimacy of judicial institutions and those which serve only a functional role. For instance, it seems that equal geographical and gender representation are vital to the legitimacy of international judicial institutions. International law and international institutions cannot be titled as "international" if only individuals from certain geographic regions are appointed to them. Also, when taking gender into account, it is hard to accept a situation in which half of the population of the world does not take part in decisions that affect the international system. This is especially true in the context of human rights tribunals that adjudicate, among others, cases on women's rights.

On the other hand, it might be argued that diversity of professional background and of legal systems should be promoted only if empirical evidence justifies its existence. The legal profession is probably not seen as representing any value, group, or interest in the eyes of the international public. Therefore, in the absence of any empirical evidence or specific practical needs of the institution (such as in the international criminal courts), it is not worthwhile to insist on professional diversity. The same is somewhat true for legal systems. Although this diversity criterion appears in many statutes, it seems that States are really interested in the regional background of the nominee. Therefore, once again, the insistence on diversity in legal systems should be reserved only for judicial

institutions where there are grounds to believe that diversity could be relevant for legal questions brought to the institution.

Additionally, it seems that diversity in the *regional* background of decision-makers is of special importance to judicial institutions that decide questions of human rights, such as the HRC, because of claims of cultural relativism.¹⁸⁴ Since many human rights norms are general and abstract, judges have a significant role in widening and shaping them.¹⁸⁵ Thus, having a culturally diverse panel reaching a decision on a human rights question can contribute both to the sociological and to the normative legitimacy of the institution. Also, given that human rights evolve around the relationship between the State and the people under its jurisdiction, States have fewer incentives to implement the decision of a human rights judicial institution. Therefore, a geographically diverse and representative panel of decision-makers might increase the probability that a State implements the decision of the institution.

There are also good reasons to believe that retaining legitimacy is vital to the HRC itself. As mentioned in Section II(A), there is a disagreement between the HRC and the member States on the normative status of the decisions in individual communications. Whereas in General Comment 33¹⁸⁶ the HRC promotes the view that its decisions are binding, many States disagree and see the decisions merely as recommendations that the State can choose to adopt or not.¹⁸⁷ This position of the member States perhaps also leads to the very low implementation rate of decisions (only 12.7%). Increasing the diversity of CMs might increase the legitimacy of the HRC and thus the readiness of States to implement its decisions. As previously discussed, this might also be true for other international judicial institutions. However, this claim is only suggestive, and more in-depth empirical research is necessary to determine the connections between the legitimacy of international judicial institutions, diversity, and the implementation rate of decisions.

Also, the HRC has two additional roles beyond issuing decisions on communications as a quasi-judicial body. The HRC issues concluding observations on member States and general comments on the ICCPR. Diversity

184. See Abdullahi Ahmed An-Na'im, *Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives*, 3 HARV. HUM. RTS. J. 13, 42 (1990) (discussing problems and possible solutions to reconcile Muslim tradition with Western human rights); Douglas Lee Donoho, *Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity Within Universal Human Rights*, 15 EMORY INT'L L. REV. 391 (2001) (discussing cultural relativism in human rights and ways to accommodate cultural differences in international human rights law through the concept of "margin of appreciation"); Bilahari Kausikan, *Asia's Different Standard*, 92 FOREIGN POL'Y 24 (1993); Amartya Sen, *Human Rights and Asian Values*, NEW REPUBLIC 33, 38–40 (1997) (discussing Asian perceptions of human rights and ways to accommodate them within international human rights law).

185. See Erik Voeten, *Politics, Judicial Behavior, and Institutional Design*, in THE EUROPEAN COURT OF HUMAN RIGHTS BETWEEN LAW AND POLITICS 61, 61 (Jonas Christoffersen & Mikael Rask Madsen eds., 2011).

186. General Comment 33, *supra* note 141.

187. EGAN, *supra* note 139, at 262.

can be important in these two roles, both from the functional perspective and from the perspective of legitimacy. For instance, in the process of reviewing a State report, the HRC has the opportunity to choose which specific issues it will address with the State, and to conduct an oral dialogue with the representatives of the State. CMs from the region are more likely to be aware of problems particular to the region, collect information from the regional NGOs and civil society, and bring them to the attention of the committee. CMs from other regions might simply not be aware of those problems or lack the linguistic skills to communicate with the civil society in those countries. Therefore, regional diversity might be important for promoting more relevant and in-depth inquiry into State-specific problems. This argument is also true, to a certain extent, in the context of adjudication—both in the HRC and in other international judicial institutions. Judges from certain regions and backgrounds might be more aware of the political and historical context of problems in certain regions, and they can explain these backgrounds to their colleagues from other parts of the globe.

Under the procedure of the periodical review, the HRC monitors each State's compliance with the ICCPR. In the course of this procedure, there is a direct dialogue with the representatives of States, where a similar background with the State can also be useful. For instance, during the 114th Session of the HRC,¹⁸⁸ two of the States under review were the Former Yugoslav Republic of Macedonia (Macedonia) and Uzbekistan. When the HRC reviewed Macedonia, Ivana Jelic, a CM from Montenegro, welcomed the representatives in their native Macedonian language in the name of the Committee. Later, when the HRC reviewed Uzbekistan, Yadh Ben Achour, a CM from Tunisia, told the Uzbek representatives how much the legacy of Uzbekistan had influenced he and many other Muslims. Achour then tried to appeal to the government of Uzbekistan, insisting that they should not leave their influence on the Muslim world in the past, but instead should become leaders in promoting human rights today. The influence of these more personal appeals may not seem significant, but incorporating them can enhance the legitimacy of the HRC in the eyes of the member States and the broader international public in the long run. The identification with CMs might encourage States to be more open to a dialogue with the committee and accept its recommendations.

Also, diversity might be important in the process of drafting the general comments. The general comments are not only a restatement of the past jurisprudence of the HRC, but are also seen by the HRC as an authoritative and binding interpretation of the ICCPR. Therefore, both from functional and legitimacy perspectives, the diversity of CMs is very important. For instance, it is important for women to participate in drafting general comments on gender-sensitive issues. A good example is General Comment No. 28, Article 3 on "The

188. The 114th session took place during June 29 – July 24, 2015. ICCPR: CCPR, 114 Session General Documentation, CCPR/C/114, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=899&Lang=en.

Equality of Rights Between Men and Women,”¹⁸⁹ as well as General Comment No. 19, Article 23 on the “Protection of the family, the right to marriage and equality of the spouses.”¹⁹⁰ Additionally, CMs from different legal systems should discuss various aspects of the right to due process in national-level courts before issuing a document like General Comment No. 13, Article 14 on the “(Administration of Justice) Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law.”¹⁹¹ Finally, it is of special political importance that CMs coming from different political regimes participate in writing general comments on political rights, such as General Comment No. 25, Article 25 on “The right to participate in public affairs, voting rights and the right of equal access to public service.”¹⁹²

There might be a certain “legitimacy problem” if the HRC requires States to promote diversity and non-discrimination of women and minorities, when the HRC itself is far from being diverse. A good example for that is statements on women’s rights. For instance, in General Comment 28, Article 3 about the Equality between Men and Women, the HRC explicitly States that: “States parties must ensure that the law guarantees to women the rights contained in article 25 on equal terms with men and take effective and positive measures to promote and ensure women’s participation in the conduct of public affairs and in public office, including appropriate affirmative action.”¹⁹³ Another example is the HRC’s recent observations in the case of Namibia: “The rate of female unemployment is high, occupational segregation persists between men and women, and the number of women in positions of responsibility is relatively low (arts. 2, 3, 7 and 26).”¹⁹⁴ The HRC might be seen as less legitimate when discussing gender inequality, due to the fact that women have historically been significantly under-represented on the Committee.

189. U.N. Human Rights Comm., CCPR General Comment No. 23: The Equality of Rights Between Men and Women, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000).

190. U.N. Human Rights Comm., CCPR General Comment No. 19: Protection of the Family, the Right to Marriage and Equality of the Spouses (Art. 23), U.N. Doc. CCPR/HRI/GEN/1/Rev.1 (July 27, 1990).

191. U.N. Human Rights Comm., CCPR General Comment No. 13: Article 14 (Administration of Justice), Equality Before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law, U.N. Doc. HRI/GEN/1/Rev.1 (Apr. 13, 1984).

192. U.N. Human Rights Comm., CCPR General Comment No. 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Art. 25), U.N. Doc. CCPR/C/21/Rev.1/Add.7 (July 12, 1996).

193. U.N. Human Rights Comm., CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women), ¶ 29, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000).

194. U.N. Human Rights Comm., Concluding Observations on the Second Report of Namibia, ¶ 11(d), U.N. Doc. CCPR/C/NAM/CO/2 (Apr. 22, 2016); *see also* U.N. Human Rights Comm., Concluding Observations of the Human Rights Comm.: Chad, ¶ 17(d), U.N. Doc. CCPR/C/GHA/CO/1 (Aug. 11, 2009) (recommending that Chad “[m]ake further efforts to promote women’s participation in public life”); U.N. Human Rights Comm., Concluding Observations of the Human Rights Comm.: Gambia, ¶ 16(b), U.N. Doc. CCPR/CO/75/GMB (Aug. 12, 2004) (mentioning that in the case of Gambia “[t]he participation of women in political life, and in public and private sector employment, is particularly inadequate”).

The final question that has certain implications on legitimacy is whether States promote diversity because they think that there is a general interest for international judicial institutions to be diverse, or rather because they expect to receive certain “personal gains” from it. The present research found a pattern of Western CMs voting in favor of States in cases of immigration. In my previous research I showed that CMs tend to vote, on a very high level of statistical significance, in favor of States similar geopolitically to their State of origin. As previously discussed, research on international courts indicates that judges tend to vote in favor of their home States, or States similar to their States of origin. Since there is certain evidence that diversity benefits the States with representatives of a similar background on the institution, diversity makes a tribunal legitimate by allowing all States to benefit equally from votes in their favor on issues important to them.

CONCLUSION

Although diversity in international judicial institutions is an important aspect of the establishment of those institutions, there is little empirical evidence that diversity has practical implications on the work of the institution. This article finds certain voting patterns that are associated with geographical origin, domestic legal systems, professional background, and possibly gender. However, it seems that diversity matters most in cases where countries want to protect their interests by appointing decision-makers to international judicial institutions. For instance, this study finds that the most significant and consistent voting patterns are in cases of Western CMs in immigration cases—probably because the CMs want to protect the interests of their States and regions. Other studies, including my own previous study of the HRC, show that judges tend to vote in favor of States with geopolitical similarity to their State of origin. However, a significant aspect of diversity is that it helps promote the legitimacy of the institution, which is very important due to major implementation problems facing the international legal system.

In the debate about promoting diversity in international judicial institutions, the qualifications of the individual CM candidate are often put aside. It is true that diversity may promote the legitimacy of the institution, and in certain instances the background of the individual member might also influence the decision-making process. However, if the international legal system wants to promote itself as a legal, rather than political, system, it should also promote candidates who can produce high quality jurisprudence. Therefore, perhaps the next step in the diversity debate is not only to discuss which diversity criteria are important and why, but also to determine the right balance between diversity requirements and the personal qualifications of candidates in international judicial institutions.

APPENDIX 1

Variable	Description	Coding Range	Source(s)
Vote in favor	Dependent variable	0 = CM voted that there was a violation 1 = CM voted that there was no violation	Author
Separate opinion	Dependent variable	0 = CM did not write a separate opinion. 1 = CM wrote a separate opinion	Author
Decision	Dependent variable	0 = the HRC decided that there was a violation 1 = the HRC decided that there was no violation	Author
CM Group	Regional voting group UN of CM State.	1=African Group 2=Asia-Pacific Group 3=Eastern-European Group 4=Latin American and Caribbean 5=Western Europe & others	UN website: http://www.un.org/depts/DGACM/RegionalGroups.shtml
Africa	The CM comes from a State belonging to the African regional group.	0 = no 1 = yes	UN website: http://www.un.org/depts/DGACM/RegionalGroups.shtml
Asia	The CM comes from a State belonging to the Asia-Pacific regional group.	0 = no 1 = yes	UN website: http://www.un.org/depts/DGACM/RegionalGroups.shtml
Eastern Europe	The CM comes from a State belonging to the Eastern European regional group.	0 = no 1 = yes	UN website: http://www.un.org/depts/DGACM/RegionalGroups.shtml
Latin	The CM comes from a State belonging to the Latin American and Caribbean regional group.	0 = no 1 = yes	UN website: http://www.un.org/depts/DGACM/RegionalGroups.shtml

Western	The CM comes from a State belonging to the Western Europe & others regional group.	0 = no 1 = yes	UN website: http://www.un.org/depts/DGACM/RegionalGroups.shtml
Latin Eastern	The CM comes from a State belonging to the Latin or the Eastern European regional groups.	0 = no 1 = yes	UN website: http://www.un.org/depts/DGACM/RegionalGroups.shtml
Government	Prior to the nomination to the HRC the CM was a government official.	0 = no 1 = yes	Author
Academia	Prior to the nomination to the HRC the CM worked in the academia.	0 = no 1 = yes	Author
Judge	Prior to the nomination to the HRC the CM worked as a Judge.	0 = no 1 = yes	Author
Gender	Gender of the CM	0=male 1=female	Author
Legal system	The legal system from which the CM comes	0= common law 1= civil law and other	The Journal of Legal Studies, Vol. 30, No. 2 (June 2001), pp. 503-525 and http://referenceworks.brillonline.com.proxy.uchicago.edu/browse/foreign-law-guide
Judicial Independence	Judicial independence score of the State from which the CM comes when he was nominated	0-2	CIRI http://www.humanrightsdata.com/

Judicial independence sqr	Squared Judicial independence score of the State from which the CM comes when he was nominated	0-4	CIRI http://www.humanrightsdata.com/
Immigration	Is the case about immigration (including asylum and <i>non-refoulement</i>)?	0 = no 1 = yes	Author
Women	Is the case about women's rights?	0 = no 1 = yes	Author
LGBT	Is the case about LGBT rights?	0 = no 1 = yes	Author
Political	Is the case about political rights (including enforced disappearance)?	0 = no 1 = yes	Author
Minority	Is the case about minority rights?	0 = no 1 = yes	Author
Due process	Is the case about due process before the courts? (A violation of Article 14 is claimed)	0 = no 1 = yes	Author
Western X Immigration	Interaction variable between western and immigration	0 = no interaction 1 = interaction	Author
Women X women's rights	Interaction variable between Women and gender	0 = no interaction 1 = interaction	Author
Latin Eastern X Political	Interaction variable between Latin Eastern and Political	0 = no interaction 1 = interaction	Author
LGBT X Western	Interaction variable between LGBT and Western	0 = no interaction 1 = interaction	Author

African X Minority	Interaction variable between African and Minority	0 = no interaction 1 = interaction	Author
Legal System X Due Process	Interaction variable between Legal system and Due process	0 = no interaction 1 = interaction	Author
Year decide	When was the case decided?	1997-2013	Author
Vote majority	How did the majority of the CMs vote?	0 = violation 1 = no violation	Author
% Latin Eastern	What was the percentage of CMs from Eastern European or Latin States?	0 - 1	Author
% western	What was the percentage of CMs from Western States?	0 - 1	Author
% Civil Law	What was the percentage of CMs from non-common-law States?	0 - 1	Author
Average judicial	Average judicial independence score of the CMs in the case		Author
% Government	What was the percentage of CMs with background in government service?	0 - 1	Author
% Women	What was the percentage of women in the case?	0 - 1	Author

APPENDIX 2

A. General Hypotheses

Hypothesis	Description	Variables
Geography	CMs from Eastern European and Latin American countries are more likely to be activist and vote against countries, as well as write more separate opinions.	African, Asian, Eastern Europe, Latin, Western.
Legal systems	(1) CMs from common-law States tend to vote more against States and to write more separate opinions. (2) CMs from States with a high score of judicial independence are less likely to vote in favor of States and more likely to write separate opinions.	Legal system, judicial independence.
Occupation	(1) CMs who prior to their appointment served as judges or worked in academia are more likely to vote against States and more likely to write separate opinions. (2) CMs who prior to their appointment worked for the government are more likely to vote in favor of States and less likely to write separate opinions.	Academia, judge, government

B. Specific Hypotheses

Hypothesis	Description	Variables
Geography	<p>(1) CMs from the Western regional group are more likely to vote in favor of States and write more separate opinions in immigration cases.</p> <p>(2) CMs from the Western regional group are more likely to vote against States and write more separate opinions in LGBT rights cases.</p> <p>(3) CMs from the Eastern European and Latin regional groups are more likely to vote against States and write more separate opinions in political cases.</p> <p>(4) CMs from the African region are more likely to vote in favor of applicants in minority rights cases.</p>	<p>Western, Immigration, Western</p> <p>Immigration, LGBT, LGBT</p> <p>Western, Latin</p> <p>Eastern, Political, Latin</p> <p>Eastern, Political, African, Minority, African</p> <p>Minority.</p>
Legal systems	CMs from common law States vote differently in due process cases and write more separate opinions in those cases.	Legal system, due process, Legal System Due Process.
Gender	Women are more likely to vote against States and write separate opinions on women's rights cases.	Gender, women, Women on women's rights.

Ransom Kidnapping and Human Trafficking: The Case of the Sinai Torture Camps

Yehuda Goor*

ABSTRACT

Over the past decade, tens of thousands of refugees and asylum seekers have entered Israel through the Sinai Peninsula. While en route to Israel, thousands of them were kidnapped and traded as commodities within organized-crime networks. These networks shared one main purpose: holding victims hostage in “camps” and torturing them until a friend or family member paid a ransom for their release. This practice of kidnapping refugees and asylum seekers (“Ransom Kidnapping”) has also taken hold in other parts of the world and is becoming increasingly common. Looking at the experiences of Eritrean and Sudanese asylum seekers in Sinai torture camps as a case study, this Article explores the nexus between Ransom Kidnapping and the legal framework surrounding human trafficking. Despite deep similarities, most legal systems and international actors do not consider Ransom Kidnapping to be a form of human trafficking. Instead, they consider Ransom Kidnapping a species of human smuggling. This classification adversely affects the rights and entitlements of survivors. For instance, in Israel, only a small fraction of those who survived the Sinai torture camps have been recognized as victims of human trafficking. Those recognized as victims of human trafficking were granted a visa and exemption from detention, free legal aid, and a room at a designated shelter. Meanwhile, those not recognized as victims of human trafficking experienced detention and were denied suitable treatment. Almost 20 years after the signing of the United Nations’ Trafficking Protocol and the U.S. Trafficking Victims Protection Act of 2000 (TVPA), and in

DOI: <https://dx.doi.org/10.15779/Z383R0PT20>

* Dechert LLP New York, Associate; Harvard Law School, LL.M. ‘16; Tel Aviv University, LL.B. ‘14. The views expressed in this Article are mine and not those of the firm. Earlier versions of this Article were submitted to Professor Janet E. Halley as part of the Critical Theory in Legal Scholarship Seminar at Harvard Law School. I am very grateful to Professor Halley for her invaluable guidance and constructive comments on this Article. Many thanks to Elena Chachko, Matan Goldblatt, Aeyal Gross, Alon Harel, Ayelet Hochman, Steven Levy, Siobhan Namazi, Maayan Niezna, Gregory Reith, Hila Shamir, Humzah Soofi, and Gillian Teo for helpful comments and conversations. I also thank the editors of the Berkeley Journal of International Law for their excellent work. Mistakes are all mine.

light of the rise of Ransom Kidnapping and other forms of exploitation, the legal framework surrounding human trafficking must be revisited. This Article suggests a critical outlook on these mechanisms and examines how they respond to current realities on the ground.

INTRODUCTION	112
I. RANSOM KIDNAPPING AND TORTURE IN THE SINAI	118
A. <i>Reasons for Departure and Transportation Routes: Between Voluntary and Forced Migration</i>	120
B. <i>Treatment After Entering Israel</i>	127
II. HUMAN TRAFFICKING - DEFINITIONS AND LIMITATIONS	134
A. <i>The United Nations' Trafficking Protocol's Definition</i>	135
B. <i>The U.S. Trafficking Victims Protection Act's Definition</i>	138
III. THE SMUGGLING/TRAFFICKING DISTINCTION	142
A. <i>Defining Smuggling in the Shadow of Trafficking: Is Classification Important?</i>	143
B. <i>New Cracks in the Smuggling/Trafficking Distinction</i>	146
IV. LAW IN ACTION: TRAFFICKING CLASSIFICATION IN ISRAELI DETENTION REVIEW TRIBUNALS AND APPEALS TRIBUNALS	150
A. <i>Detention Review Tribunals, Appeals Tribunals, and the Border Control Officer: Background and Scope of Mandate</i>	151
B. <i>Law in Action: Trafficking Classification Issues at the Tribunals</i>	155
V. RETHINKING TRAFFICKING THROUGH THE SINAI CASE STUDY AND EVALUATING A POTENTIAL REFORM: RANSOM TRAFFICKING? ...	159
CONCLUSION	164

INTRODUCTION

Over the past decade, tens of thousands of refugees and asylum seekers have entered Israel through the Sinai Peninsula.¹ In 2010, human rights organizations began reporting that an increasing number of them carried clear signs of torture, often also showing signs of severe sexual abuse.² It did not take long before these

1. See POPULATION, IMMIGRATION AND BORDERS AUTH., FOREIGNERS IN ISRAEL – 2017 2ND QUARTER 4 tbl. A.2 (2017), https://www.gov.il/BlobFolder/generalpage/foreign_workers_stats/he/foreign_workers_stats_q2_2017_1.pdf [hereinafter FOREIGNERS IN ISRAEL – 2017 2ND QUARTER] (translation on file with the author).

2. PHYSICIANS FOR HUMAN RIGHTS—ISRAEL, HOSTAGES, TORTURE, AND RAPE IN THE SINAI DESERT: A PHR-ISRAEL UPDATE ABOUT RECENTLY ARRIVING ASYLUM SEEKERS (2010); MIRJAM VAN REISEN ET AL., HUMAN TRAFFICKING IN THE SINAI: REFUGEES BETWEEN LIFE AND DEATH 17–19 (2012),

organizations made a startling discovery: thousands of refugees and asylum seekers, most of whom were Eritreans trying to flee grave human rights violations in their country, were being kidnapped and traded as commodities among organized-crime networks.³ These networks operated in Sudan and the Sinai area of Egypt, using the exact same routes that Eritreans used to escape into Israel.⁴ The networks, which consisted mainly of individuals from the Bedouin Rashaida tribe, shared one main purpose: holding victims hostage in “camps,”⁵ often raping and torturing them, until a friend or family member, who is often already in Israel, pays the ransom. Consistently, the victims’ suffering was used as leverage to obtain the ransom.⁶ This Article aims to expose and understand the nexus between this increasingly common practice (“Ransom Kidnapping”) and the human-trafficking framework, a nascent issue which is currently full of contradictions and uncertainty.⁷

Despite the similarities in both the practice and the degree of destructive impact on victims, government authorities and international actors generally do

<http://hottpproject.com/userfiles/PDF's%20news/2012ReportHumanTraffickingintheSinaiFinalWeb.pdf> [hereinafter REFUGEES BETWEEN LIFE AND DEATH]. While sexual abuse has often been reported by both men and women, the effects on the victims carried a clear gendered character as many of the women have required abortions due to forced pregnancies. See PHYSICIANS FOR HUMAN RIGHTS—ISRAEL, HOSTAGES, TORTURE, AND RAPE IN THE DESERT: FINDINGS FROM 284 ASYLUM SEEKERS ABOUT ATROCITIES IN THE SINAI 3 (2011), <http://www.phr.org.il/uploaded/Phr-israel-Sinai-Report-English-23.2.2011.pdf>.

3. See, e.g., REFUGEES BETWEEN LIFE AND DEATH, *supra* note 2, at 16–17, 30–34.

4. In this Article, I address these groups as “kidnappers” to avoid presupposing that this practice should be labeled as “trafficking” or “smuggling” under international law. According to a significant portion of human trafficking scholarship, they should be labeled “smugglers.” For a detailed discussion, see *infra* Part III.

5. In this Article, due to the unique characteristics of the described practice and the actors involved, I will use the terms “victim” and “survivor” interchangeably, while acknowledging the reductive potential of such terms and the risk to “easily reinforce the unrepresentative stereotypes and simplified distinctions between aggressors and victims.” See David Nelken, *Transnational Legal Processes and the (Re)construction of the ‘Social’: The Case of Human Trafficking*, in EXPLORING THE ‘SOCIO’ OF SOCIO-LEGAL STUDIES 137, 147 (Dermot Feenan ed., 2013).

6. See REFUGEES BETWEEN LIFE AND DEATH, *supra* note 2, at 48–49. However, it should be noted that there are also many “genuine” smuggling networks operating in the region, that is, networks operated by the Rashaida and others that do not abuse those they smuggle. Refugees consent to be transferred by these organizations. See Rachel Humphris, *Refugees and the Rashaida: Human Smuggling and Trafficking from Eritrea to Sudan and Egypt* 9 (U.N. Refugee Agency, Research Paper No. 254, 2013), <http://www.unhcr.org/51407fc69.pdf>. For a discussion on the significance of “good” smuggling networks, see *infra* Part V.

7. See, e.g., Mogos O Brhane, *Trafficking in Persons for Ransom and the Need to Expand the Interpretation of Article 3 of the UN Trafficking Protocol*, 4 ANTI-TRAFFICKING REV. 120 (2015) (arguing that kidnapping for ransom is in fact human trafficking). This piece further argues for the expansion of the “exploitation” element of human trafficking to include situations of Ransom Kidnapping. For the different elements of the definition, see *infra* Part II.A. See also Mirjam Van Reisen & Conny Rijken, *Sinai Trafficking: Origin and Definition of a New Form of Human Trafficking*, 3 SOC. INCLUSION 113 (2015) (suggesting different interpretive paths to define kidnapping for ransom in the Sinai as trafficking by qualifying these practices as slavery, forced labor or services, and debt bondage); cf. Laurie Lijnders & Sara Robinson, *From the Horn of Africa to the Middle East: Human Trafficking of Eritrean Asylum Seekers Across Borders*, 2 ANTI-TRAFFICKING REV. 137, 141–45 (2013).

not recognize Ransom Kidnapping as human trafficking.⁸ Rather, these authorities⁹ and international actors consider Ransom Kidnapping a species of human smuggling.¹⁰ This classification adversely affects the victims' rights and entitlements.

For instance, in Israel, only a small number of survivors from the Sinai torture camps were recognized as human trafficking victims.¹¹ These victims were granted a visa and exemption from detention, as well as offered free legal aid, room at a designated shelter, and appropriate treatment. Meanwhile, those not fortunate enough to be recognized as human trafficking victims experienced detention and were denied suitable treatment.¹²

Victims of both Ransom Kidnapping and "traditional" trafficking are undisputedly exploited. Additionally, both sets of victims experience heavy emotional and physical hardship. Nevertheless, states tend to recognize victims as "trafficked" persons only when they have been exploited for their labor. Specifically, states generally recognize sex workers or forced laborers in local markets as being trafficked.¹³ But the exploitation and hardship that derives from

8. See, e.g., Angela Walker, Oral Statement to the 35th Session of the UN Human Rights Council from Lawyers' Rights Watch Canada (June 9, 2017), <http://www.lrwc.org/ws/wp-content/uploads/2017/06/Item-3-ID-Trafficking-Statement-35th-9-June-2017.FINAL-AMENDED2.pdf> (calling on the United Nations to classify kidnapping for ransom as human trafficking, noting that "[t]he US and Canada do not appear to recognize kidnapping for ransom as trafficking," and giving concrete examples). This is also the official position of the United States with respect to the interpretation of the TVPA. See *infra* note 164.

9. The state authorities involved are mostly agencies in charge of executing the government's policy in connection with human trafficking. In the United States, for example, these authorities include federal agencies such as the U.S. Immigration and Customs Enforcement (ICE) and the Human Smuggling and Trafficking Center that operates within it (both operate under the Department of Homeland Security). In addition, the Department of State designs global trafficking-related policy in its annual Trafficking in Persons (TIP) reports. For further discussion, see *infra* text accompanying note 151.

10. As discussed in further detail below, the most salient distinction between the legal perception of human trafficking and that of human smuggling is free will. While human trafficking is generally defined by coercion and exploitation, human smuggling is perceived as the voluntary illegal transportation of migrants across borders with the paid assistance of others. Therefore, while trafficking victims are entitled to rights and protections, "smuggled" individuals are often criminalized and are not entitled to rights and protections. See Kara Abramson, *Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol*, 44 HARV. INT'L L.J. 473, 478 (2003) ("In contrast with the Trafficking Protocol, the [Smuggling Protocol] refers to smuggled people not as 'victims' but rather as 'objects' of smuggling, or 'migrants.'"). For a detailed account of the definitions of human trafficking and human smuggling, see *infra* Parts II and III.A. respectively. On the meaning of being defined and "trafficked" versus "smuggled," see *infra* Part III.A.

11. See *infra* note 116.

12. See HOTLINE FOR REFUGEES AND MIGRANTS, ANNUAL REPORT 2013, at 25–27 (2014), http://hotline.org.il/wp-content/uploads/english_interactive.pdf [hereinafter HOTLINE REPORT]; Hila Shamir, *Antitrafficking in Israel: Nationalism, Borders, and Markets*, in GOVERNANCE FEMINISM: AN INTRODUCTION 21–24 (Janet Halley et al. eds., 2018) [hereinafter Shamir, *Nationalism, Borders, and Markets*].

13. For a similar argument in a different context, see Dina F. Haynes, *(Not) Found Chained to a Bed in a Brothel: Conceptual, Procedural and Legal Failures Fulfill the Promise of the Trafficking*

being urinated on or gang raped, or having your nails ripped off and your flesh burned for profit, are often deemed insufficient for individuals to be considered “trafficked.”¹⁴ Instead, these individuals are considered to have been smuggled. However, given that the legal definition of human smuggling assumes that “smuggled” persons act on their free will and are not coerced by “smugglers,” the label of “smuggled” rather than “trafficked” implies that their experiences were somehow voluntary.¹⁵ This, in turn, dictates the legal remedy granted or deprived.¹⁶

Using the Sinai torture camps as a case study, this Article critiques the ill-fitted legal regimes that surround Ransom Kidnapping and the limited protections provided to victims. More specifically, it reveals a legal reaction that is completely opposite to the declared (even if arguably not genuine) purpose of the anti-trafficking regime—a legal reaction that does not support victims, but instead detains and treats them like criminals, thereby contributing to the deterioration of the victims’ mental and physical condition.

Ransom Kidnapping, or incidents very much like it, are increasingly being reported not only in the Sinai, but also in other parts of the world such as Thailand, Mexico, Burma, and Malaysia.¹⁷ As migration patterns change drastically and new systematic forms of exploitation and abuse emerge, it is imperative to understand and remedy the flaws in the existing legal regimes.

The Article focuses on two arenas: the local and the global. The local focus is on the Sinai survivors, who arrived in Israel as part of a greater wave of refugees

Victims Protection Act, 21 GEO. IMMIGR. L.J. 337, 372 (2007) (“If Ahn’s T-visa should not unambiguously have been granted, then this is the clearest example that the law has become distorted and that a victim of human trafficking can only be recognized as a victim when she is found chained to a bed in a brothel.”)

14. See, e.g., AMNESTY INT’L, EGYPT/SUDAN: REFUGEES AND ASYLUM SEEKERS FACE BRUTAL TREATMENT, KIDNAPPING FOR RANSOM AND HUMAN TRAFFICKING 12 (2013), <https://www.amnestyusa.org/wp-content/uploads/2017/04/afr040012013en.pdf> [hereinafter EGYPT/SUDAN REFUGEES FACE BRUTAL TREATMENT, KIDNAPPING FOR RANSOM AND HUMAN TRAFFICKING]; REFUGEES BETWEEN LIFE AND DEATH, *supra* note 2, at 47–49.

15. Abramson, *supra* note 10, at 5.

16. On the meaning of being defined and “trafficked” versus “smuggled,” see *infra* Part III.A.

17. See, e.g., U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 24, 198 (2009) [hereinafter 2009 TIP REPORT], <http://www.state.gov/documents/organization/123357.pdf>; Brhane, *supra* note 7, at 121–22; Jonathan Head, *Sold for Ransom: On the Trail of Thailand’s Human Traffickers*, BBC NEWS (May 22, 2015), <http://www.bbc.com/news/world-asia-32835811>; *Migrant Kidnappings by Criminal Organizations ‘Systematic’ in Mexico*, INSIGHT CRIME (May 11, 2012), <http://www.insightcrime.org/news-analysis/migrant-kidnappings-by-criminal-organizations-systematic-in-mexico>; Praveen Menon & Andrew Marshal, *Malaysian Police Reveal Grim Secrets of Jungle Trafficking Camps*, REUTERS (May 27, 2015), <http://www.reuters.com/article/2015/05/27/us-asia-migrants-idUSKBN0OB09E20150527>; Sarah Stillman, *Where are the Children?*, NEW YORKER (Apr. 27, 2015), <http://www.newyorker.com/magazine/2015/04/27/where-are-the-children>; Ryn Jirenuwat & Russell Goldman, *Dozens Found Guilty in Thailand in Human-Trafficking Case*, N.Y. TIMES (July 19, 2017), <https://www.nytimes.com/2017/07/19/world/asia/thailand-human-trafficking-case.html> (“[m]any victims were found buried in a mass grave near a secret jungle camp in which they had been imprisoned, tortured and held for ransom. . . they were imprisoned and made to call their families and beg for ransoms of around \$3,000. Some said they had been raped”).

from Eritrea and Sudan. Indeed, the influx of Eritrean and Sudanese refugees and asylum seekers into Israel practically stopped in 2012 when Israel built a wall along its Southern border. But before that point, about 60,000 asylum seekers entered the country. As of June 2017, according to official records, 35,363 Eritrean and Sudanese nationals lived in Israel.¹⁸ About 4,000 of them are survivors of the Sinai torture camps.¹⁹ Currently, Eritrean and Sudanese nationals, including the Sinai survivors, cannot be deported back to their countries of origin and are not expected to be deported in the foreseeable future.²⁰ This reality emphasizes the urgency of questions involving the legal rights of these communities as it forces victims into a legal limbo. The Article will address these questions by examining the treatment received by the victims of Sinai Ransom Kidnapping under the controlling legal regimes, as well as the alternatives to those regimes. Specifically, the Article will challenge the exclusion of such individuals from the human trafficking framework by confronting theory with practice and rethinking the former's defensibility.

The other focus will be the on the international arena, where a worldwide refugee crisis is unfolding. Europe and other regions have been grappling with a flood of refugees,²¹ and refugee law has been criticized for its inability to provide adequate solutions.²² At a time when refugee law mechanisms are heavily burdened and human trafficking is thriving, these related regimes require scrutiny and repeated assessment.²³ In this context, the Article encapsulates the confusion

18. See FOREIGNERS IN ISRAEL – 2017 2ND QUARTER, *supra* note 1.

19. See *infra* notes 43 & 116. Per a recent report issued by the State Department, the torture practice in the Sinai continued to some extent even after the building of the wall. See U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 38 (2017) [hereinafter 2017 TIP REPORT], <https://www.state.gov/documents/organization/271339.pdf> ("Israeli NGOs report that Bedouin groups in the Sinai resumed abuse—including trafficking crimes—against asylum seekers on a limited scale in 2015").

20. The individuals who are already in Israel cannot be deported back to Eritrea or Sudan due to the principle of *non-refoulement* (Eritreans) or as a matter of government policy derived from the absence of diplomatic relations between the two states (Sudanese). For a detailed discussion, see *infra* Part I.B.

21. See U.N. REFUGEE AGENCY, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2016, at 2-3 (June 19, 2017), <http://www.unhcr.org/en-us/statistics/unhcrstats/5943e8a34/global-trends-forced-displacement-2016.html> (presenting general data regarding displacement internationally); PETER TINTI & TUESDAY REITANO, MIGRANT, REFUGEE, SMUGGLER, SAVIOR 4 (2017) (stating that the current migration wave is "the biggest mass migration Europe has seen since the Second World War in what has come to be known as the 'migrant crisis'").

22. See, e.g., Elizabeth Collett, *The Asylum Crisis in Europe: Designed Dysfunction*, MIGRATION POL'Y INST. (Sept. 2015), <https://www.migrationpolicy.org/news/asylum-crisis-europe-designed-dysfunction> ("Much of the chaos and distress being seen in Southeast Europe, as Greece, Hungary, and other countries on the Western Balkans route are grappling with massive inflows of asylum seekers is caused by confusion about who exactly is in need of protection, who should be responsible for protection, and a lack of on-the-ground capacity to respond. The problem is conceptual, political, and practical . . . This challenge is, in essence, a product of a deep mismatch between the human imperatives impelling so many to undertake often dangerous journeys and an interlocking set of EU systems and policies unequal to this extraordinary phenomenon");

23. See Kinsey A. Dinan, *Globalization and National Sovereignty: from Migration to Trafficking*, in TRAFFICKING IN HUMANS: SOCIAL, CULTURAL AND POLITICAL DIMENSIONS 58, 75

and uncertainty among scholars and international organizations with respect to defining human trafficking and classifying situations as such. Without proper reasoning or attention, many situations are labeled as human trafficking, even though these situations would not be considered human trafficking under current international law.²⁴ Moreover, in the trafficking discourse there is a semantic slippery slope, and an irresponsible or unexplained use of definitions. These issues, too, will be addressed in the Article.

The attempt to understand and refine the legal framework surrounding Ransom Kidnapping is situated within the broader discursive space of the rich human trafficking scholarship and the emerging norms of the past two decades. During these years, academics produced extensive scholarship on human trafficking.²⁵ At the same time, significant legal developments and deep changes in trafficking patterns occurred, some of which bore troubling implications that have been critiqued by scholars.²⁶ Accordingly, after presenting an overview of Ransom Kidnapping in Sinai and the survivors' fates in Israel in further detail in Part I, Part II will examine the current definitions and limitations of the concept of human trafficking as established in the two legal mechanisms that constitute the core of the international anti-trafficking efforts: (1) the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000 (Trafficking Protocol)²⁷ and (2) the U.S. Trafficking Victims Protection Act of 2000 (TVPA).²⁸ While both instruments are significant, this

(Sally Cameron & Edward Newman eds., 2008) (“[t]rafficking networks flourish where migratory pressures are strong, legal migration opportunities are limited and existing migration networks are insufficient to overcome immigration barriers without assistance and provide protection for new migrants in destination countries”).

24. See, e.g., Jorgen Carling, *Why ‘trafficking’ is in the news for the wrong reasons*, JORGENCARLING.ORG (July 30, 2015), <https://jorgencarling.wordpress.com/2015/07/30/why-trafficking-is-in-the-news-for-the-wrong-reasons> (criticizing the overuse of trafficking terminology and stressing that “[w]hen any unauthorized transportation of people across borders is labelled ‘trafficking’ we lose the ability to pinpoint and prevent truly exploitative crimes”).

25. For a partial list, see THE UNIVERSITY OF TEXAS AT ARLINGTON LIBRARIES BIBLIOGRAPHY SERIES, HUMAN TRAFFICKING & MODERN SLAVERY BIBLIOGRAPHY (2016), <https://libraries.uta.edu/dillard/subfiles/SlaveryHumanTraffickingBib.htm>.

26. See, e.g., Janet Halley, *After Gender: Tools for Progressives in a Shift from Sexual Domination to the Economic Family*, 31 PACE L. REV. 887, 919–20 (2011) [hereinafter Halley, *After Gender*]; Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335, 388–90 (2006) [hereinafter Halley et al., *From the International to the Local*]; Hila Shamir, *A Labor Paradigm for Human Trafficking*, 60 UCLA L. REV. 76, 102–04 (2012) [hereinafter Shamir, *A Labor Paradigm*]; see generally Aziza Ahmed & Meena Seshu, “We have the right not to be ‘rescued’ . . .”: When Anti-Trafficking Programmes Undermine the Health and Well-Being of Sex Workers, 1 ANTI-TRAFFICKING REV. 149 (2012).

27. Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, G.A. Res. 55/25, Annex II, U.N. Doc. A/RES/55/25 (Nov. 15, 2000) [hereinafter Trafficking Protocol].

28. Victims of Trafficking and Violence Prevention Act of 2000, Pub. L. No. 106-386, div. A, 114 Stat. 1466 (codified as amended in scattered sections of 18 U.S.C. & 22 U.S.C.), amended by Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (codified at 18 U.S.C. § 1595 & 22 U.S.C. § 7109(a) (2006)), Trafficking Victims Protection

Article puts special emphasis on the application and interpretation of the TVPA. Although domestic and not international *per se*, this instrument has a significant influence on states' behavior in the struggle against human trafficking.²⁹ It certainly does for Israel, which is a paramount actor in the Sinai case study.³⁰ Part III will then discuss the definition of "human smuggling" against the backdrop of "human trafficking," and consider whether this classification is important. Further, Part III will address emerging cracks in the already-fragile trafficking/smuggling distinction in the context of Ransom Kidnapping. Part IV will switch from a global to a local lens by examining trafficking-classification decisions of the Israeli Detention Review Tribunals and the Appeals Tribunals. Among other things, these tribunals are in charge of granting individuals exemption from detention on the grounds that they are victims of human trafficking. Finally, Part V will try to rethink the Sinai case study through the prism of the foregoing discussion. This part will also examine the desirability and feasibility of classifying Ransom Trafficking as a new, untraditional type of human trafficking.

I.

RANSOM KIDNAPPING AND TORTURE IN THE SINAI

Since 2007, tens of thousands of Eritrean and Sudanese asylum seekers have crossed the border from Egypt to Israel, fleeing grave human rights violations in their countries of origin.³¹ Until Israel built a wall along its Southern border in 2012, some 64,498 "infiltrators," as they are labeled by Israel's statutes, entered the country illegally.³² Over 90 percent of them entered from the Sinai.³³ According to the most recent official report, 38,540 "infiltrators" live in Israel

Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2006) (codified in scattered sections of 18 U.S.C., 22 U.S.C. & 42 U.S.C.), and William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (codified in scattered sections of 8 U.S.C., 18 U.S.C. & 22 U.S.C.) [hereinafter the TVPA].

29. Susan W. Tiefenbrun, *The Domestic and International Impact of the U.S. Victims of Trafficking Protection Act of 2000: Does the Law Deter Crime?*, 2 LOY. U. CHI. INT'L L. REV. 193, 210 (2005) ("There is no doubt that the TVPA in general, and the Department of State TIP Reports in particular, have had a positive effect on many foreign governments").

30. Daphna Hacker, *Strategic Compliance in the Shadow of Transnational Anti-Trafficking Law*, 28 HARV. HUM. RTS. J. 11, 26–31 (2015).

31. On the human rights condition in Eritrea and Sudan, see *infra* Part I.A.

32. The Prevention of Infiltration Act, which was amended over the past few years to address African asylum seekers, was originally enacted as "an emergency law designed to tackle the entrance of terrorists into Israel during the early 1950s." Margit Cohn, *When, and Where, Does History Begin: Collective Memory, Selective Amnesia, and the Treatment of Asylum Seekers in Israel*, 2017 U. ILL. L. REV. 563, 588, 592 (2017) (arguing that the title "infiltrators" (Fedayeen) "marginalizes, if not obliterates, any reference to persecution and refugeedom").

33. POPULATION, IMMIGRATION AND BORDERS AUTH., FOREIGNERS IN ISRAEL – 2013 SUMMARY 3 tbl. A.1 (2014) (on file with author) [hereinafter FOREIGNERS IN ISRAEL – 2013]. The wall practically stopped the influx of asylum seekers: in 2013, only 43 asylum seekers entered Israel from the Sinai, compared to 10,400 in 2012 and 17,300 in 2011. See *id.*

today, 92 percent of them Eritrean and Sudanese nationals.³⁴ Thousands of the asylum seekers arrived in Israel only after being held captive and tortured in designated camps in the Sinai.³⁵ They were released only after a ransom was paid on their behalf.³⁶

The majority of abductions were committed by (1) members of the Bedouin Rashaida tribe who operate in Sudan, where many refugee camps are occupied by Eritreans and Sudanese and (2) Bedouins in the Sinai Peninsula, where Egyptian law enforcement is absent.³⁷ The ransoms charged were often worth tens of thousands of dollars (typically amounting to lifetime savings), paid by friends and family members who had already managed to get into Israel.³⁸

Friends and family members were contacted via cell phone, and what followed were horrific negotiations.³⁹ Family and friends were made to listen to the victims being tortured in order to motivate payment, which was then forwarded to the abductors' bank accounts in Cairo.⁴⁰ While official data on the number of ransom kidnappings is unavailable, NGOs estimate that in the years of 2009-2013 a minimum of 25,000-30,000 individuals were kidnapped and tortured in the Sinai.⁴¹ NGOs also estimate that a quarter of them perished after being

34. See FOREIGNERS IN ISRAEL – 2017 2ND QUARTER, *supra* note 1, at 4 tbl. A.1. According to this report, the population of “infiltrators” that currently resides in Israel is comprised of 7,869 Sudanese nationals (20%), 27,494 Eritreans (72%), 2,680 from other African countries (7%), and 497 from other countries around the world (1%). See *id.* at 5 tbl. A.2.

35. See generally Refugees Between Life and Death, *supra* note 2, at 1–3. According to this source, aside from Eritrean and Sudanese nationals, a smaller number of Ethiopian nationals were kidnapped as well. See *id.* at 25.

36. *Id.*

37. See, e.g., Eliav Lieblach, *Quasi-Hostile Acts: The Limits on Forcible Disruption Operations under International Law*, 32 B.U. INT’L L.J. 355, 393 n.170 (2014) (“[t]he recent ousting of President Morsi has led to rising chaos in Sinai, in which Bedouin tribes, Islamists, and smugglers exercise control over large swaths of land. Whether this situation will give rise to an armed conflict depends, to a large extent, on the reaction of these elements to current attempts by the government to retain control”); see also Matt Bradley & Tamer El-Ghobashy, *Egypt’s Coup Sparks Rising Chaos in Sinai*, WALL STREET J. (July 21, 2013), <http://www.wsj.com/articles/SB10001424127887324144304578619931690114670>.

38. REFUGEES BETWEEN LIFE AND DEATH, *supra* note 2, at 111 n. 60; HUMAN RIGHTS WATCH, “I WANTED TO LIE DOWN AND DIE”: TRAFFICKING AND TORTURE OF ERITREANS IN SUDAN AND EGYPT 1, 31 (2014) [hereinafter LIE DOWN AND DIE], https://www.hrw.org/sites/default/files/reports/egypt0214_ForUpload_1.pdf (“In hundreds of cases documented by refugee organizations and the UN, traffickers abused victims while forcing them to telephone relatives who pay the ransom after hearing the victims’ screams”).

39. *Id.*

40. *Id.* (“[w]hen I called my relatives to ask them to pay, they burnt me with a hot iron rod so I would scream on the phone. We could not protect the women in our room: they just took them out, raped them, and brought them back. They hardly let us sleep and I thought I was going to die but in the end a group of us managed to escape”); DAPHNA HACKER & ORNA COHEN, RESEARCH REPORT: THE SHELTERS IN ISRAEL FOR SURVIVORS OF HUMAN TRAFFICKING, 66–68 (2012), <http://www2.tau.ac.il/InternetFiles/news/UserFiles/The%20Shelters%20ino2Orael.pdf>. A

documentary film was made on these interactions, and included recordings of the phone calls and the begging of the ones held captive. See THE SOUND OF TORTURE (Trabelsi Productions, 2013).

41. See AID ORGANIZATION FOR REFUGEES AND ASYLUM SEEKERS IN ISRAEL, “WE ARE ALSO

kidnapped.⁴² About 4,000 of the survivors live in Israel as of 2017.⁴³ The following section will describe in further detail Ransom Kidnapping, the motivations behind it, and the participating actors.

A. Reasons for Departure and Transportation Routes: Between Voluntary and Forced Migration

This section sets the background and describes the practice of Ransom Kidnapping in a chronological order: the human rights condition in Eritrea and Sudan, respectively, the process of departing from these countries and what such departure entails for individuals, and the different actors who play a role in their journeys.

The vast majority of the victims of Ransom Kidnapping in the Sinai are Eritrean nationals who fled severe human rights violations in their country.⁴⁴ These include: “extrajudicial killing, enforced disappearance and incommunicado detention, arbitrary arrest and detention, torture, inhumane prison conditions, indefinite national [military] service, and lack of freedom of expression and opinion, assembly, association, religious belief and movement.”⁴⁵ In 2016, Ms.

HUMAN BEINGS”: SURVIVORS OF THE TORTURE CAMPS IN SINAI 6 (2014) [http://assaf.org.il/en/sites/default/files/ASSAF%20-%20we%20are%20also%20human%20beings%20\(english%20pdf\).pdf](http://assaf.org.il/en/sites/default/files/ASSAF%20-%20we%20are%20also%20human%20beings%20(english%20pdf).pdf). [hereinafter WE ARE ALSO HUMAN BEINGS]. Due to the urgency of the situation, in March 2014 twenty-four states addressed the United Nations Human Rights Council to demand action against the human rights violations in the Sinai. They further called for states to treat survivors humanely and to provide them with various services and refrain from detaining them. See 25th Session of the United Nations Human Rights Council, Statement by H.E. Mr. Hanns H. Schumacher, Permanent Representative of the Federal Republic of Germany (Mar. 13, 2014), <https://www.hrw.org/news/2014/03/13/statement-he-mr-hanns-h-schumacher-permanent-representative-federal-republic-germany>. In two different resolutions, the European Parliament referred to the situation in the Sinai as one of human trafficking. See European Parliament Resolution of 15 March 2012 on Human Trafficking in the Sinai, in Particular the Case of Salomon W. (2012/2569(RSP)), <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2012-92>; and European Parliament Resolution of 13 March 2014 on Human Trafficking in the Sinai (2014/2630(RSP)), <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2014-0255>.

42. See WE ARE ALSO HUMAN BEINGS, *supra* note 41, at 6.

43. This is the common estimation of human rights organizations. See Sigal Rozen, “*I Never Told What Happened to Me in Sinai*”: On the Difficulties of Identifying Survivors of the Torture Camps and the Conduct of the Immigration Authority toward Them, 7 HAGIRA 112 (2017) [Heb.]. One NGO estimated that about 7,000 survivors lived in Israel as of 2016. See INTERNATIONAL REHABILITATION COUNCIL FOR TORTURE VICTIMS & ASSAF, ISRAEL BRIEFING TO THE COMMITTEE AGAINST TORTURE, 57TH SESSION, MAY 2016, at 6–7 (Mar. 2016), http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/ISR/INT_CAT_NGO_ISR_23472_E.pdf.

44. Press Release, Egypt, Sudan: Kidnap and Trafficking of Refugees and Asylum-Seekers Must Be Stopped, Amnesty International (Apr. 3, 2013), <https://www.amnesty.org/en/press-releases/2013/04/egypt-sudan-kidnap-and-trafficking-refugees-and-asylum-seekers-must-be-stop/> (“The vast majority of victims are Eritrean”).

45. Special Rapporteur on the Situation of Human Rights in Eritrea, Rep. on the Situation of Human Rights in Eritrea, Human Rights Council, U.N. Doc. A/HRC/23/53 1 (May 28, 2013) (by

Sheila Keetharuth, the Special Rapporteur on the Situation of Human Rights in Eritrea, addressed the United Nations Human Rights Council and expressed her deep concern about the increasing and ongoing human rights violations, and the lack of legal protections in the country.⁴⁶ Among other observations, the Special Rapporteur stated that “[t]he human rights violations in Eritrea are widespread and few would be able to say that they or family members have not been affected or don’t know people who have been affected.”⁴⁷

As mentioned above, the main reasons for fleeing Eritrea are linked to fear of indefinite forced military conscription, arbitrary arrest, detention, and torture. Moreover, one report indicated that since early 2015, Eritrean authorities have evicted individuals from their homes en masse, and “bulldozed scores of houses, directly affecting hundreds of households.”⁴⁸ In many cases, these demolished homes took decades to build and required the investment of life savings.⁴⁹ This practice thus made an adequate standard of living unreachable for those affected.⁵⁰

Another motivation for leaving Eritrea is simply the desire to seek better educational opportunities, gain relative economic stability, and generally pursue a better future. As one refugee stated, “[i]n Eritrea there is no hope for a future, there is nothing to dream of or think of, so you have to leave the country to reach your goals.”⁵¹ This account is reminiscent of the narrative generally associated with movement from the undeveloped parts of the global South into the developed world—a narrative of “voluntary” or “economic” migration by “gold-digging” foreigners.⁵² When put in the context of the harsh reality of life in Eritrea and Sudan, adopting such a narrative seems cynical at best.⁵³ Yet this narrative pollutes the discourse and the decision-making process in Israel and elsewhere.⁵⁴

Sheila B. Keetharuth) [hereinafter Special Rapporteur on Eritrea 2013]; see also U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, ERITREA 2013 HUMAN RIGHTS REPORT (2014), <http://www.state.gov/documents/organization/220321.pdf>.

46. Statement by Ms. Sheila B. Keetharuth, Special Rapporteur on the Situation of Human Rights in Eritrea, Statement at the 31st Session, Human Rights Council (Mar. 14, 2016), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17224&LangID=E>.

47. *Id.*

48. Sheila B. Keetharuth, Special Rapporteur on the Situation of Human Rights in Eritrea, Report on the Situation of Human Rights in Eritrea, Human Rights Council, 9–11, U.N. Doc. A/HRC/29/41 (June 19, 2015).

49. *Id.* at 14.

50. *Id.* at 13–15.

51. See Special Rapporteur on the Situation of Human Rights in Eritrea, *supra* note 46.

52. On such narratives, see generally Olivia Taylor, *Constructing the ‘Economic Migrant’ Narrative During the Refugee Crisis: The Neoliberal State of Exception and Political-Economic ‘Bare Life’*, 6 OXFORD MONITOR OF FORCED MIGRATION 6 (2017).

53. See Tricia R. Hepner, An Open Letter to Israel: Eritreans are NOT Economic Refugees (June 12, 2012), <http://assaf.org.il/en/sites/default/files/Eritreans%20are%20NOT%20Economic%20Refugees%20June%202012.pdf> (Amnesty’s specialist on Eritrea urging Israel “not be manipulated by the propaganda of a dying dictatorship” by cooperating with Eritrea’s strategy of labeling its fleeing refugees as economic migrants).

54. Former Israeli Minister of Interior, Eli Yishai, revealed the impact of this false image on

Looking beyond the significant data on human rights violations and the lack of security in Eritrea at large, the hardship in Eritrea and reasons for leaving the country are also evident in the first-hand stories of Eritrean refugees.⁵⁵ Many of these refugees are Sinai survivors who shared their experiences after arriving in Israel.⁵⁶

The act of leaving Eritrea itself involves serious risks. Under Eritrean law, citizens who want to leave the country must obtain special permits, which the authorities issue very scarcely and selectively.⁵⁷ Enforcement bodies are ordered to “shoot to kill” those trying to leave without suitable permits, and their remaining relatives in Eritrea are often punished and harassed by the government as means of deterrence.⁵⁸ This sort of environment and the “no exit” legal-political policy contributes to the rampant human rights abuses throughout transportation routes and to the proliferation of human smuggling and trafficking. In such a reality, trafficking and smuggling networks are inevitably created. Unfortunately, those involved in the networks—including corrupt government officials—grow powerful.⁵⁹

policy decisions when he was quoted saying—while Israel was refraining from reviewing asylum applications— that “[t]hese are not refugees, these are economic migrants who want to come to Israel for work.” Ben Hartman, *Yishai: “Every African ‘Infiltrator’ will Return Home,”* JERUSALEM POST (Aug. 12, 2011), <http://www.jpost.com/National-News/Yishai-Every-African-infiltrator-will-return-home>. Subsequently, Yishai, who was the senior government official in charge of the asylum system at the time, was quoted as saying that Israel should “lock [African asylum seekers] up and make their lives miserable.” See generally HUMAN RIGHTS WATCH, “MAKE THEIR LIVES MISERABLE”: ISRAEL’S COERCION OF ERITREAN AND SUDANESE ASYLUM SEEKERS TO LEAVE ISRAEL (2014), <https://www.hrw.org/report/2014/09/09/make-their-lives-miserable/israels-coercion-eritrean-and-sudanese-asylum-seekers>.

55. See, e.g., Mogos O. Brhane, *Understanding Why Eritreans Go to Europe*, 51 FORCED MIGRATION REV. 34 (2016); HUMAN RIGHTS WATCH, WORLD REPORT 2015: ERITREA (2015), <https://www.hrw.org/world-report/2015/country-chapters/eritrea#1e6c45>; AMNESTY INT’L, JUST DESERTERS: WHY INDEFINITE NATIONAL SERVICE IN ERITREA HAS CREATED A GENERATION OF REFUGEES (2015), <https://www.amnesty.org/en/documents/afr64/2930/2015/en/>; Dan Connell, *Escaping Eritrea: Why They Flee and What They Face*, MIDDLE E. RES. & INFO. PROJECT (Sept. 12, 2012), http://www.merip.org/mer/mer264/escapingeritrea?ip_login_no_cache=e8e0528d1e4d3ddcc1a288bf570720c; Matina Stevis & Joe Parkinson, *Thousands flee isolated Eritrea to escape life of conscription and poverty*, WALL STREET J. (Feb. 2, 2016), <http://www.wsj.com/articles/eritreans-flee-conscription-and-poverty-adding-to-the-migrant-crisis-in-europe-1445391364>; *Why They Leave*, ECONOMIST (Oct. 12, 2013), <http://www.economist.com/news/middle-east-and-africa/21587844-eritreans-are-taking-seas-because-worsening-conditions-home-why-they>.

56. *Id.*

57. See LIE DOWN AND DIE, *supra* note 38, at 16; see also Special Rapporteur on Eritrea 2013, *supra* note 45.

58. *Id.*

59. Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 2060 (2012): Eritrea, Human Rights Council, U.N. Doc. S/2013/440 35-37 (July 25, 2013). See also LIE DOWN AND DIE, *supra* note 38, at 16. A related argument was made in the context of the current reality in Europe, in a lecture given at Harvard Law School in March 2016, see Ryszard Piotrowicz, *The European Migration Crisis: Career Opportunities for People Traffickers* (2016).

The other, smaller group of victims originates from Sudan.⁶⁰ Like Eritrea, Sudan faces enormous human rights challenges. These challenges are caused by, among other things, ongoing inter-tribal and intra-tribal clashes, and violent conflicts between government forces and armed rebel groups.⁶¹ The violence perpetuated by all sides of the conflict has claimed numerous lives and resulted in the displacement of millions of people.⁶² In fact, the United Nations estimated that since the outbreak of the armed conflict between the Sudanese Government and rebel groups in 2003, about 300,000 people have been killed.⁶³ Some of them died as a direct result of the violence; others died due to conflict-related diseases, starvation, or dehydration.⁶⁴ Numerous communities and villages were destroyed and displaced, and sexual violence against women and girls became widespread.⁶⁵

Moreover, the government's military operations in "conflict-affected" provinces (namely, Darfur, Southern Kordofan, and the Blue Nile)⁶⁶ contribute to vast displacement and abuses of human rights. For example, government security forces, who are supposed to protect women and girls, are often the perpetrators of severe sexual violence.⁶⁷

60. See *Foreigners in Israel – 2017 2nd Quarter*, *supra* note 1, Table A.1. According to this report, the population of "infiltrators" that currently resides in Israel is comprised of 7,869 Sudanese nationals (20%), 27,494 Eritreans (72%), 2,680 from other African countries (7%), and 497 from other countries around the world (1%). *Id.* Table A.2.

61. Report of the Independent Expert on the Situation of Human Rights in the Sudan, Human Rights Council, 7–13, U.N. Doc. A/HRC/24/31 (Sept. 18, 2013).

62. See, e.g., HUMAN RIGHTS WATCH, WORLD REPORT 2015: SUDAN (2015), <https://www.hrw.org/world-report/2015/country-chapters/sudan>; ASYLUM RESEARCH CONSULTANCY, SUDAN COI QUERY RESPONSE (Apr. 11, 2014), <http://www.refworld.org/pd/538ec3c24.pdf>; United Nations Human Rights – Office of the High Commissioner, Sudan: UN expert urges protection of unarmed civilians after new escalation of violence in Darfur (Feb. 5, 2016), <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=17015&LangID=E>.

63. See generally U.N. OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS, SUDAN: DARFUR PROFILE (2015), http://reliefweb.int/sites/reliefweb.int/files/resources/Darfur_Profile_May_2015_A3.pdf; HUMAN RIGHTS WATCH, "MEN WITH NO MERCY": RAPID SUPPORT FORCES ATTACKS AGAINST CIVILIANS IN DARFUR, SUDAN (2015), <https://www.hrw.org/report/2015/09/09/men-no-mercy/rapid-support-forces-attacks-against-civilians-darfur-sudan>.

64. *Id.*

65. *Id.*

66. See generally, ENOUGH PROJECT, LIFE UNDER SIEGE – SOUTH KORDOFAN NEEDS ASSESSMENT (2014), <https://reliefweb.int/sites/reliefweb.int/files/resources/LifeUnderSiege-Report-EnoughForum-Nov2014.pdf>.

67. Report of the Independent Expert on the Situation of Human Rights in the Sudan, Human Rights Council, 10, U.N. Doc. A/HRC/30/60 (Aug. 24, 2015) ("Most victims of sexual violence are displaced women and girls attacked while engaged in livelihood activities outside their camp. In some cases, victims are attacked while in the supposed safety of their shelters inside the camp or while fleeing for safety during attacks on their villages. The pattern that has emerged from these attacks suggests that, in most cases, perpetrators cannot be identified; in other cases, attacks were allegedly perpetrated by government security forces, signatory and non-signatory armed factions and sometimes by individuals not part of any organized group or government entity").

In this reality, social, cultural, and economic rights are far out of reach and high rates of poverty are reported.⁶⁸ Beyond the danger to life and threats to personal security, other basic human rights are also constantly violated in Sudan, specifically: rights of a political nature, such as the right to freedom of expression and opinion, freedom of the press, freedom of religion, and freedom of association and assembly.⁶⁹

In sum, the reality that causes Sinai victims to flee their countries, in Eritrea or Sudan, includes genuine and immediate danger to their lives and personal security, sexual dangers, violation of basic rights, violent restriction of political freedom, and widespread poverty and displacement.

The journeys and destinations of those leaving Eritrea and Sudan vary significantly, and are often hard to predict due to various constraints and circumstances that change along the way. Many are kidnapped or smuggled from refugee camps. Some change their plans when an opportunity presents itself or when they are physically or otherwise unable to go on. Others fall victim to abuse and exploitation by both government officials and networks of organized crime (categories which often intersect).⁷⁰ However, the journeys generally include moving south to different parts of sub-Saharan Africa, north-west towards Libya (often as part of a longer journey to Europe), or north to Israel, through south Egypt and the Sinai.⁷¹

Given the lack of security and human rights violations in the countries of origin, departure often starts voluntarily and transforms into forced migration en route.⁷² That is, journeys that start with the assistance of paid smugglers or by

68. *Id.* at 10–11.

69. *Id.* at 6.

70. INT'L ORGANIZATION FOR MIGRATION, FATAL JOURNEYS: TRACKING LIVES LOST DURING MIGRATION 117–23 (2014), https://publications.iom.int/system/files/pdf/fataljourneys_countingtheuncounted.pdf [hereinafter FATAL JOURNEYS]; LIE DOWN AND DIE, *supra* note 38, at 16–30; REGIONAL MIXED MIGRATION SECRETARIAT, MIGRANT SMUGGLING IN THE HORN OF AFRICA & YEMEN: THE SOCIAL ECONOMY AND PROTECTION RISKS 25–32 (2013), http://www.regionalmms.org/fileadmin/content/rmms_publications/Migrant_Smuggling_in_the_Horn_of_Africa_and_Yemen_report.pdf.

71. KAREN JACOBSEN ET AL., RANSOM, COLLABORATORS, CORRUPTION: SINAI TRAFFICKING AND TRANSNATIONAL NETWORKS—A CASE STUDY OF THE ERITREAN MIGRATION SYSTEM FROM ERITREA TO ISRAEL 5–7 (2013), <http://fic.tufts.edu/assets/Ransom-Collaborate-Corrupt-8-12.pdf>. See also REGIONAL MIXED MIGRATION SECRETARIAT, GOING WEST: CONTEMPORARY MIXED MIGRATION TRENDS FROM THE HORN OF AFRICA TO LIBYA & EUROPE (2014), http://www.regionalmms.org/fileadmin/content/rmms_publications/Going_West_migration_trends_Libya_Europe_final.pdf.

72. On such transformations, see Joan Fitzpatrick, *Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking*, 24 MICH. J. INT'L L. 1143, 1150 (2003). See also ANDREAS SCHLOENHARDT, MIGRANT SMUGGLING: ILLEGAL MIGRATION AND ORGANISED CRIME IN AUSTRALIA AND THE ASIA PACIFIC REGION 17–19 (2003) (“smugglers . . . frequently [lure] migrants with . . . false information about transit and immigration systems and the dangers involved in the illegal methods of transportation It is arguable that migrant smuggling ceases to be voluntary if the illegal journey involves the deprivation of personal freedom, food and water, confiscation of property, passports and other identity documents,

travelling independently, transform under such circumstances into involuntary incidents of kidnapping and holding in captivity for ransom.⁷³

The shift from voluntary to forced journeys is both an evolution of specific journeys, as well as of the smuggling/trafficking/kidnappings networks themselves, which often change in nature over time. As one activist described it with respect to ransom kidnappings in the Sinai, “[a]t first the traffickers were more human . . . [t]hen slowly they started the torture, the rape. They started selling organs. They saw it was a good income.”⁷⁴ Accordingly, some of the victims who ended up in Israel did not even plan to arrive there when commencing their journey, but were forced into it after being kidnapped and held for ransom.⁷⁵ This feature of Ransom Kidnapping, namely, the lack of control one has over their whereabouts, seems similar to “traditional,” clearly coerced human trafficking.⁷⁶

The transformation of voluntary journeys into forced ones leads to the key component of the Sinai Ransom Kidnapping practice: abduction. A large number of the reported abductions were committed by members of the Rashaida Tribe, who operate in Sudan—where many refugee camps are occupied by Eritreans and Sudanese—and in the Sinai.⁷⁷ After the victims were kidnapped, they were sold—

or instances of threat and violence”).

73. *Id.* Many scholars and international organizations, including the International Organization for Migration (IOM), have referred to this transformation as human smuggling that becomes trafficking. Scholars and international organizations use the concepts of “trafficking” and “smuggling” interchangeably, often without proper attention to the content and components of each of these concepts under international law. This might be misleading to victims and practitioners. According to the IOM, “A markedly violent form of trafficking – in cases where the dominant trend is for human smuggling to turn into trafficking – has developed in recent years in Egypt and Sudan. Here, smugglers, traffickers and local officials work together to prey on Eritrean migrants leaving their country through Egypt, Ethiopia and Sudan, and increasingly through Libya to Egypt. Migrants are deceived and kidnapped on their journeys, or even snatched from refugee camps (in eastern Sudan and northern Ethiopia) and sometimes from the streets of Cairo. They are held for ransom by violent criminals who sell them up a chain that normally takes them into the Sinai desert. Migrants are frequently held in compounds of houses for weeks or months while their captors torture them until friends or relatives, mainly in the diaspora, pay high ransoms.” FATAL JOURNEYS, *supra* note 70, at 121–22. See Niina Meriläinen & Marita Vos, *Public Discourse on Human Trafficking in International Issue Arenas*, 5 SOCIETIES 14 (2015) for an argument regarding the context in which human rights organizations discuss human trafficking, as well as the way they frame the definitions of human trafficking in their presentations. This tension will be addressed in Parts II and III of the Article. On the use and application of these definitions, as well as on their accuracy and challenges when confronted with the changing reality on the ground, see *infra* Part III.

74. Eric Reidy, “At First The Traffickers Were More Human. Then Slowly They Started The Torture”, GHOST BOAT (Nov. 4, 2015) (quoting activist Dr. Alganesh Fisseha), <https://medium.com/ghostboat/at-first-the-traffickers-were-more-human-then-slowly-they-started-the-torture-2da698e1d846#.qwuwaf7nt>.

75. REFUGEES BETWEEN LIFE AND DEATH, *supra* note 2, at 28.

76. On the inherent coercive nature of human trafficking under international law, see *infra* Part II.

77. TINTI & REITANO, *supra* note 21, at 260; LIE DOWN AND DIE, *supra* note 38, at 17–28; Humphris, *supra* note 6, at 9–11; see also U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT, 343–44 (2013),

<https://www.state.gov/documents/organization/210741.pdf> [hereinafter 2013 TIP REPORT] (“Sudanese and Eritrean nationals are brutalized by smugglers from the Rashaida tribe in the Sinai,

sometimes several times—to Bedouins in the Sinai Peninsula, or transferred to other Tribe members.⁷⁸ After victims were transferred to the Sinai, in many cases, the kidnappers held them in designated houses or “camps” until a friend or family member paid a ransom on their behalf. In cases where ransom was not paid, victims were often killed.⁷⁹

While holding victims in captivity, kidnappers severely tortured and raped prisoners in order to increase the urgency of ransom payments.⁸⁰ Commonly reported practices involved: “rape of women, including having plastic piping inserted into their anuses and vaginas; burning of women’s genitalia and breasts; stripping women naked and whipping their buttocks; rape of men with plastic piping; beating with a metal rod or sticks; whipping with rubber whips or plastic cables; dripping molten plastic or rubber onto skin; burning with cigarettes or cigarette lighters; hanging from ceilings to the point of deforming arms; giving electric shocks; beating the soles of feet; forced standing for long periods, sometimes days; threatening to kill them, remove their organs, or cut off fingers; burning with a hot iron rod or boiling water; sleep deprivation; and putting water

including by being whipped, beaten, deprived of food, raped, chained together, and forced to do domestic or manual labor at smugglers’ homes; some of these individuals were not willing migrants but were abducted from Sudan-based refugee camps or at border crossings. . . . The [Sudanese] government did not report investigating or prosecuting public officials allegedly complicit in human trafficking, despite reports that Sudanese police sold Eritreans to the Rashaida along the border with Eritrea”).

78. *Id.*; LIE DOWN AND DIE, *supra* note 38, at 27–28.

79. REFUGEES BETWEEN LIFE AND DEATH, *supra* note 2, at 31–37; LIE DOWN AND DIE, *supra* note 38, at 24–26. Human Rights Watch managed to interview a 17-year-old kidnapper in the town of Arish in the Sinai (referred to as a “trafficker” by the Organization), who sheds some light on the way the practice actually works on the ground: “I buy Eritreans from other Bedouin near my village for about \$10,000 each. So far I have bought about 100. I keep them in a small hut about 20 kilometers from where I live and I pay two men to stand guard. I torture them so their relatives pay me to let them go. When I started a year ago, I asked for \$20,000 per person. Like everyone else I have increased the price This year I made about \$200,000 profit. The longest I held someone was seven months and the shortest was one month. The last group was four Eritreans and I tortured all of them. I got them to call their relatives and to ask them to pay \$33,000 each. Sometimes I tortured them while they were on the phone so the relatives could hear them scream. I did to them what I do to everyone. I beat their legs and feet, and sometimes their stomachs and chest, with a wooden stick. I hang them upside down, sometimes for an hour. Three of them died because I beat them too hard. I released the one that paid. About two out of every 10 people I torture pay what I ask. Some pay less and I release them. Others die of the torture. Sometimes when the wounds get bad and I want them to torture them more, I treat their wounds with bandages and alcohol. I beat women but not children and I have not raped anyone . . . I’m not interested in speaking to anyone who wants me to stop doing this. The government doesn’t care so I don’t mind talking to you. The police won’t do anything to stop us because they know that if they come to our villages we will shoot . . . I first started doing this because I had no money but saw others making lots of money this way. I know about 35 others who sell or torture Eritreans in Sinai. There are 15 just near my house, living close to each other. We are from different tribes. Some just buy them and sell them on to others, and some of us torture them to get even more money.” LIE DOWN AND DIE, *supra* note 38, at 11.

80. For the different “steps” of abduction and torture for ransom gathered in multiple interviews with survivors, *see* REFUGEES BETWEEN LIFE AND DEATH, *supra* note 2, at 40. For a detailed overview of the practices, *see id.* at 25–65; JACOBSEN ET AL., *supra* note 71, at 5–12; Humphris, *supra* note 6, at 14–19; LIE DOWN AND DIE, *supra* note 38, at 31–49; U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 157–58 (2013), <http://www.state.gov/documents/organization/210739.pdf>.

on wounds and beating the wounds.”⁸¹ Moreover, survivors reported a number of other cruel methods of humiliation and abuse, such as urinating on hostages and ripping off nails.⁸² Kidnappers often raped prisoners (predominantly though not exclusively women)⁸³ on a daily basis, and forced pregnancies were often reported.⁸⁴

In some cases, if ransom was paid, the kidnappers released the victims who were sometimes kidnapped again if they were unable to reach a safe place.⁸⁵ Some perished after they were released as a result of injuries sustained from severe torture.⁸⁶ Some, who either escaped or were released after a ransom was paid on their behalf, managed to cross the border into Israel illegally.⁸⁷ Others reached Cairo or Ethiopia.⁸⁸ The following section focuses on those who reached Israel and on Israel’s general treatment of refugees, asylum seekers, and noncitizens.

B. Treatment After Entering Israel

Upon entering Israel, Ransom Kidnapping victims are subjected to the local policies dealing with asylum seekers and refugees, who are labeled as “infiltrators” under domestic law, and often experience detention.⁸⁹ Since 2007,

81. LIE DOWN AND DIE, *supra* note 38, at 31–32. The U.S. Department of State has reported that “Sudanese and Eritrean nationals are brutalized by smugglers from the Rashaida tribe in the Sinai, including by being whipped, beaten, deprived of food, raped, chained together, and forced to do domestic or manual labor at smugglers’ homes.” 2013 TIP REPORT, *supra* note 77, at 343.

82. EGYPT/SUDAN REFUGEES FACE BRUTAL TREATMENT, KIDNAPING FOR RANSOM AND HUMAN TRAFFICKING, *supra* note 14.

83. See, e.g., Lijnders & Robinson, *supra* note 7, at 140.

84. REFUGEES BETWEEN LIFE AND DEATH, *supra* note 2, at 4.

85. See, e.g., Mark Anderson, *Inside Eritrea’s Exodus*, AFRICA REP. (Sept. 26, 2016) (“Natnael Hail . . . paid smugglers \$400 to take him into Sudan, where he was kidnapped and sold to nomads in the Sinai Desert. Gangs in the Sinai Desert prey on migrants. They have been found to kidnap and then torture them until their families pay a ransom. Natnael escaped and went to a refugee camp in northern Ethiopia . . . He was kidnapped again and was forced to pay \$3,500 to be freed in Tripoli”).

86. LIE DOWN AND DIE, *supra* note 38, at 35.

87. REFUGEES BETWEEN LIFE AND DEATH, *supra* note 2, at 69–72.

88. See *id.* at 69–71 (on escapes); *id.* at 6 (on destinations); see also EGYPT/SUDAN REFUGEES FACE BRUTAL TREATMENT, KIDNAPING FOR RANSOM AND HUMAN TRAFFICKING *supra* note 14, at 15.

89. See Prevention of Infiltration Act, 5704-1954, SH No. 160 (Isr.). One commentator indicated that Israel was making notable efforts to abolish the Ransom Kidnapping practice in the Sinai, although the nature of these efforts remained unclear. See Ayelet Levin, *The Reporting Cycle to The United Nations Human Rights Treaty Bodies: Creating a Dialogue Between the State and Civil Society – The Israeli Case Study*, 48 GEO. WASH. INT’L L. REV. 315, 344 (2016) (“There was a forum headed by the Anti-Trafficking Coordinator aimed at information exchange concerning the ongoing battle against the phenomenon of victims of the Sinai Camps, that is, persons who entered Israel illegally through the Egyptian border crossed through the Sinai Peninsula, and in some cases, while on Egyptian ground, such individuals were held in camps where they suffered heinous crimes and grave abuse at the hands of their captors, for the purpose of obtaining ransom from their family members living in Israel or abroad. Members from the Ministries of Health, Justice, Israel Prison Service, and the Police, as well as NGO representatives and UNHCR, all participated in this forum. The Author of this Article was present at some of the meetings as part of her work, and notes that it

Israel has been faced with the mass migration of asylum seekers (including victims of Ransom Kidnapping) fleeing from Eritrea and Sudan.⁹⁰ Until a wall was built in 2012, some 60,000 asylum seekers from Eritrea and Sudan crossed the border from the Sinai.⁹¹ The wall reduced the numbers dramatically, and since 2013 relatively few asylum seekers managed to get into Israel from the Sinai.⁹² Reacting to this influx, the Israeli government enacted controversial laws for dealing with asylum seekers.⁹³

The government's controversial policy towards asylum seekers was challenged three distinct times before the Supreme Court of Israel.⁹⁴ Variations of the policy suggested detaining asylum seekers indefinitely, denying them social benefits, denying them permission to work in Israel, refusing to review asylum applications, and deporting asylum seekers to dangerous "third countries" such as Uganda and Rwanda without adequate safeguards.⁹⁵ In each of the three rounds, the Supreme Court deemed parts of the legislation unconstitutional.⁹⁶

Throughout the entire process of judicial review, all parties agreed that many of the asylum seekers subjected to the contested policy had been tortured in the

was a welcome surprise to witness the good working relations among NGOs and the state, and their mutual respect and cooperation"). A petition seeking to exempt the victims of the Sinai torture camps from detention in an "open" facility was filed on January 2016, and is currently pending before the Supreme Court. *See* HCJ 718/17 Hotline for Refugees and Migrants v. CEO of the Department of Justice et al. (Isr.) [hereinafter HCJ 718/17]. For information on the facility, see *infra* note 98.

90. Although Israel built a wall along its border with Egypt in 2012, Ransom Kidnapping did not stop but merely narrowed in scope, often driving victims to other destinations, mainly through Libya, as activists describe. *See, e.g.,* Reidy, *supra* note 74; 2017 TIP REPORT, *supra* note 19; HOTLINE REPORT, *supra* note 12, at 25. Clearly, this does not change the situation of, and the legal regimes applicable to, the many victims who are already in Israel and cannot be deported back to Eritrea or Sudan due to the principle of *non-refoulement* (Eritreans) or as a matter of government policy derived from the absence of diplomatic relations with Israel (Sudanese). *See infra* notes 111–113.

91. POPULATION, IMMIGRATION AND BORDERS AUTHORITY, FOREIGNERS IN ISRAEL – 2012 SUMMARY, at 4 tbl. A.3 (2013) (on file with author); for a thorough account of the Israel-Egypt wall in the larger context of "walls as an immigration control strategy" see Moria Paz, *Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls*, 34 BERKELEY J. INT'L L. 1, 34–39 (2016).

92. FOREIGNERS IN ISRAEL – 2017 2ND QUARTER, *supra* note 1, at 4 tbl. A.1 (presenting data that in the entire period of 2013– June 2017 only a few dozen "infiltrators" entered Israel illegally, compared to nearly 60,000 Eritreans and Sudanese who entered Israel in the years of 2007–2012); *see also* FOREIGNERS IN ISRAEL – 2013, *supra* note 33, at 3 tbl. A.1; POPULATION, IMMIGRATION AND BORDERS AUTHORITY, FOREIGNERS IN ISRAEL – 2014 SUMMARY 3 tbl. A.1 (2015) (on file with author); POPULATION, IMMIGRATION AND BORDERS AUTH., FOREIGNERS IN ISRAEL – 2015 3RD QUARTER 4 tbl. A.2 (2015), https://www.gov.il/BlobFolder/generalpage/foreign_workers_stats/he/oct2015.pdf.

93. *See generally* Yonatan Berman & Reuven Ziegler, *The Union of Securitization and Demography: Immigration Detention in Israel*, in IMMIGRATION DETENTION: THE MIGRATION OF A POLICY AND ITS HUMAN IMPACT 154 (Amy Nethery & Stephanie J. Silverman eds., 2015).

94. Yehuda Goor, Gilad Zohari & Naama Omri, *Editors' Note: Parliament and the Law*, 37 TEL AVIV U. L. REV. 507, 507 (2016).

95. *See generally* Cohn, *supra* note 32, at 586–92.

96. HCJ 7146/12 Adam et al. v. The Knesset et al. [2013] (Isr.); HCJ 7385/13 Eitan et al. v. The Government of Israel et al. [2014] (Isr.) [hereinafter HCJ 7385/13]; HCJ 8665/14 Desete et al. v. The Knesset et al. [2015] (Isr.).

Sinai prior to their arrival. Justice Amit, for example, directly addressed the practice of Ransom Kidnapping described in this Article.⁹⁷ Currently, after the Supreme Court's third (and most recent) opinion of August 2015, asylum seekers are subject to three months of detention in a jail-like facility upon arrival, and, for adult men, up to one year in an "open" residence facility.⁹⁸ As determined by the Supreme Court, this residence facility is not effectively open due to its distant location in the desert and the fact that detainees are not allowed to work outside the facility.⁹⁹ Because detainees cannot seek employment in Israel, they cannot afford to travel outside the facility.¹⁰⁰ As a result, the detainees almost never leave even though they can technically move freely during the day (but they are more restricted at night).¹⁰¹

It is important to note that the detention warrants issued to asylum seekers are subject to judicial review in designated Detention Review Tribunals and Appeals Tribunals. These institutions, which review individual warrants, will be addressed in Part IV.A.¹⁰² These tribunals review cases brought by detainees who seek to challenge the detention warrants issued to them before or after they have been detained.

After being released from the detention facilities, asylum seekers are left on their own without adequate assistance in obtaining employment, appropriate healthcare, or housing.¹⁰³ Employment is formally forbidden, and although violations are often overlooked, many individuals are subsequently left with limited abilities to afford a living.¹⁰⁴ This lack of enforcement is a double-edged sword, since it leaves asylum seekers highly exposed to labor market exploitation,

97. H CJ 7385/13, at 131–32 ("Some compassion should be found for all those thousands who were severely tortured in the Sinai Peninsula and who came to us battered in body and soul. Many among them did not even plan to arrive in Israel, but were kidnapped by smugglers and held captive in the Sinai Peninsula for ransom, while being subjected to hideous torture.") (author's translation).

98. See SAM KUTTNER & SIGAL ROZEN, HOTLINE FOR REFUGEES AND MIGRANTS, IMMIGRATION DETENTION IN ISRAEL – YEARLY MONITORING REPORT 2015, at 13–31 (2016), <https://il.boell.org/sites/default/files/detention-monitoring-2015-eng.pdf>, [hereinafter DETENTION IN ISRAEL – YEARLY MONITORING REPORT 2015] for details on the different facilities, including daily routines, food, and living conditions. For a broad comparative account of global detention policies, see LIORA LAZARUS & EIRIK BJORGE, OXFORD PRO BONO PUBLICO, REMEDIES AND PROCEDURES ON THE RIGHT OF ANYONE DEPRIVED OF HIS OR HER LIBERTY BY ARREST OR DETENTION TO BRING PROCEEDINGS BEFORE A COURT (2014), <http://ohrh.law.ox.ac.uk/wordpress/wp-content/uploads/2014/05/2014.6-Arbitrary-Detention-Project.pdf>.

99. See H CJ 7385/13, *supra* note 96, at 76 (discussing the difficulties with this "open" facility); Berman & Ziegler, *supra* note 93. It should be noted that women and minors are currently exempt from detention in the "open" facility. See also *infra* Part IV (providing a further discussion on detention and coerced residency policies and procedures).

100. See H CJ 7385/13, *supra* note 96, at 76.

101. See *id.*; see also *Refugee Law and Policy: Israel*, LIBR. CONGRESS, <https://www.loc.gov/law/help/refugee-law/israel.php> (providing a general overview of the current legal arrangements).

102. See *infra* Part IV.

103. See Reuven Ziegler, *No Asylum for 'Infiltrators': The Legal Predicament of Eritrean and Sudanese Nationals in Israel*, 29 IMMIGR., ASYLUM & NAT'LITY L. 172 (2015).

104. *Id.*, at 183–84.

deprives them of labor law protections, and narrows their already-scarce employment opportunities because employers are presumably reluctant to engage in illegal hiring.¹⁰⁵ Asylum seekers' obvious reluctance to engage in any contact with state authorities creates a black market for employment with no effective regulation, which this highly vulnerable population is forced into. Additionally, a recent amendment to the Foreign Workers Act requires "infiltrators" to deposit twenty percent of their monthly salary into a special fund. Workers can recover these wages only upon leaving Israel, and the fund is designed to "encourage" them to leave.¹⁰⁶

Cases involving Ransom Kidnapping intensify these problems and cause new ones. As stated in the 2014 TIP Report, "Eritrean and Sudanese migrants and asylum seekers. . .are highly vulnerable to forced labor. . .in Israel, due to their lack of formal work status and pressure to repay their family and friends for the large debts owed for the ransoms paid to free them from criminal groups in Egypt's northern Sinai."¹⁰⁷

Israel's performance in connection with international standards of refugee law adds a crucial legal-political dimension. Under its current policy, Israel generally does not provide status to asylum seekers, despite the fact that it is unable to deport them.¹⁰⁸ It typically does not review asylum applications and in many cases simply ignores them, even though Eritreans and Sudanese are globally considered to have strong refugee claims that are recognized in many parts of the world.¹⁰⁹ Even when Israeli authorities do review asylum applications, recognition rates are very low. As of 2015, only forty-five out of 17,778 (0.25 percent) asylum applications have succeeded.¹¹⁰ Further, Israel cannot practically deport asylum seekers from Eritrea and Sudan back to their countries of origin. In

105. *Id.* (The "government announced its intention to penalise employers for employing 'infiltrators'").

106. Foreign Workers Act, 5751-1991, §§ 1(k), 1(k1), SH No. Amendment No. 18, 2017 (Isr.), art. 1(k), 1(k1). The Amendment also requires the employer to deposit an amount equal to 16 percent of the salary. *See id.* A petition challenging this Amendment on various constitutional grounds is now pending before the Supreme Court. *See* HCJ 2293/17 *Gersagher v. The Knesset*.

107. U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 215 (2014), <http://www.state.gov/documents/organization/226846.pdf>; *see infra* Part II.B, for a discussion on the TIP Reports system. However, this TIP report also indicated that asylum seekers in Israel are highly exposed to sex trafficking, an observation made with no evidence. *cf.* Hacker, *supra* note 30, at 84 ("there is no reliable source that this author is aware of that provides evidence of sex trafficking of Eritrean and Sudanese migrants and asylum seekers in Israel if one does not perceive prostitution as sex trafficking").

108. *See infra* text accompanying notes 111–113.

109. U.N. HIGH COMM'R FOR REFUGEES, UNHCR STATISTICAL YEARBOOK 2012, at 26 (2013), <http://www.unhcr.org/52a7213b9.html> (pointing out high global rates of recognition for Eritreans (81.9%) and Sudanese (68.2%) refugees).

110. Ziegler, *supra* note 103, at 181; *see also* Tally Kritzman-Amir, "Otherness" as the Underlying principle in Israel's Asylum Regime, 42 ISR. L. REV. 603 (2009); Hadas Yaron et al., "Infiltrators" or Refugees? An Analysis of Israel's Policy Towards African Asylum-Seekers, 51 INT'L MIGRATION 144 (2013) (outlining an argument offering a "genealogical approach" to these policies).

the case of Eritreans, the principle of *non-refoulement* applies. Article Thirty-Three of the 1951 Refugee Convention orders that:

No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.¹¹¹

By all accounts, Eritrean nationals easily fit into this category.¹¹² Israel does not deport Sudanese nationals as a matter of policy, due to the absence of diplomatic relations between Israel and Sudan.¹¹³ The Israeli government has made several off-the-record attempts to bring asylum seekers to “voluntarily” depart to “third countries,” such as Uganda and Rwanda. These attempts resulted in tragedies. According to the Hotline for Refugees and Migrants, an Israeli NGO that represents Sinai survivors, some asylum seekers were held captive upon arrival, while others were either deported from the third country back to their country of origin (where they face persecution), robbed, or arrested because they did not have suitable documentation.¹¹⁴

The described policies provide a first layer of regulation that applies to all asylum seekers who entered Israel, including victims of Ransom Kidnapping. In some cases, laws that govern human trafficking come into play and create a second layer. When an individual gains official recognition as a trafficking victim, that person is exempt from detention.¹¹⁵ NGOs estimate that about 4,000 victims of the Sinai torture camps lived in Israel as of 2017, and that only about 10 percent of them have been recognized as trafficking victims by the authorities.¹¹⁶ As of

111. Convention Relating to the Status of Refugees, 19 U.S.T. 6259, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954). See Tally Kritzman-Amir & Thomas Spijkerboer, *On the Morality and Legality of Borders: Border Policies and Asylum Seekers*, 26 HARV. HUM. RTS. J. 1, 10–14 (2013) for a discussion on this principle generally.

112. The Israeli government openly applies “temporary” *non-refoulement* protection to Eritrean nationals. See, e.g., HCJ 7385/13, *supra* note 96, at 22–23.

113. HCJ 7385/13, *supra* note 96, at 23.

114. See, e.g., SIGAL ROZEN, HOTLINE FOR REFUGEES AND MIGRANTS, DEPORTED TO THE UNKNOWN – MONITORING REPORT 10–12 (2015), <http://hotline.org.il/wp-content/uploads/2015/12/Deported-To-The-Unknown.pdf>. In August 2017, the Supreme Court held that there are no legal flaws in Israel’s practice of deporting asylum seekers to a third country because the Court was not convinced that such deportation is unsafe and because all the applicable procedural requirements were satisfied. That said, since Israel’s agreements with third countries provide that deportation must be “voluntary,” the Supreme Court held that Israel cannot detain asylum seekers in order to “encourage” them to leave “voluntarily.” See APA 8101/15 Zegete v. Minister of the Interior [2017] (Isr.). It could be inferred from this holding that if Israel amends such agreements as to allow involuntary deportations to a third country, detention for the purpose of coercing departure will presumably be found legal.

115. See Office of the Nat’l Anti-Trafficking Coordinator, *Procedure for Granting Status for Victims of Slavery and Trafficking for Slavery and Forced Labor, Population Administration Procedure No. 6.3.0008*, MINISTRY OF THE INTERIOR (ISR.) (June 15, 2010), <http://www.justice.gov.il/Units/Trafficking/IsraelFight/Activity/Pages/guidelines.aspx>.

116. This is the estimation of the Hotline for Refugees and Migrants, see *supra* note 43. In its

2010, only eight of the Sinai survivors (five women and three men) were treated in a designated trafficking shelter. However, even those eight languished in jail-like detention facilities for several months, before being identified as victims.¹¹⁷ Further, Israel often presents these “two layers” (of trafficking and refugee law assistance) as mutually exclusive alternatives. The government demands that victims choose whether they wish to file an application for asylum or be considered for trafficking related benefits.¹¹⁸

Low trafficking recognition rates can also be attributed to complex bureaucratic requirements, a need for legal counseling, and a general lack of resources. The individuals recognized as trafficking victims are entitled to rehabilitative care and various (though still limited) benefits, including exemption from detention and free legal aid.¹¹⁹ The others, mostly men, who are the majority of victims, receive no psychological or material assistance, and are ordinarily detained for long periods of time. Absent recognition as a trafficking victim, no adjustments or forms of relief are granted, and victims are subject to the general policy of scarce rights and entitlements described above. This usually also means detention.¹²⁰

Clearly, if the Sinai survivors were granted the treatment they are entitled to under international law as refugees, this discussion of Ransom Kidnapping would have been less significant in their context. Adequate protection of victims’ rights as refugees could have perhaps rendered this whole exercise unnecessary, as a mere legal classification project without any real world implications.¹²¹ This, however, is not the case. As the Supreme Court of Israel held, the government’s

petition mentioned above seeking to exempt the victims of the Sinai torture camps from detention in an “open” facility, the Hotline submitted that “a few hundred” Sinai survivors were recognized as trafficking victims, *see* HCJ 718/17, *supra* note 89. ASSAF, an aid organization for refugees and asylum seekers in Israel, estimated that about 7,000 survivors lived in Israel as of 2016, from which only 250 were recognized as trafficking victims. *See* INT’L REHAB. COUNCIL FOR TORTURE VICTIMS & ASSAF, ISRAEL BRIEFING TO THE COMMITTEE AGAINST TORTURE, 57TH SESSION, MAY 2016, at 6–7 (2016), <http://assaf.org.il/en/sites/default/files/Israel%27s%205th%20periodic%20report%20-%20ASSAF%20and%20IRCT.pdf>.

117. HACKER & COHEN, *supra* note 40, at 67.

118. *See id.* This policy does not coincide with international standards, according to which protection provided to trafficking victims is additional to that provided to them as asylum seekers. *See generally* EUROPEAN MIGRATION NETWORK, IDENTIFICATION OF VICTIMS OF TRAFFICKING IN HUMAN BEINGS IN INTERNATIONAL PROTECTION AND FORCED RETURN PROCEDURES 5 (2014), http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/emn-studies/emn_synthesis_identification_victims_trafficking_final_13march2014.pdf.

119. However, reports show that even upon recognition benefits are often delayed or denied. *See* WE ARE ALSO HUMAN BEINGS, *supra* note 41, at 6, 16–18; HOTLINE REPORT, *supra* note 12, at 25; on the benefits *see also infra* Parts III.A, IV.A.

120. HOTLINE REPORT, *supra* note 12, at 25.

121. *See generally* ANNE T. GALLAGHER, THE INTERNATIONAL LAW OF HUMAN TRAFFICKING 144–209 (2010) [hereinafter GALLAGHER, TRAFFICKING] (describing the still crucial interactions between trafficking and other international law regimes such as refugee law, migrant work, and slavery, which exceed the scope of this article).

policy is inconsistent with both internal constitutional standards and international legal obligations.¹²²

In sharp contrast to this disregard of domestic and international duties, Israel has exhibited outstanding compliance with international trafficking norms and adhered to obligations set forth by the United Nations and the United States, as the next sections will show. In such a reality—where refugee law is weak and trafficking law is an alleged success—questions arise with respect to the latter’s scope and the resulting value of its success. That is, if policymakers praise Israeli trafficking law, it is necessary to examine what the framework excludes, at what cost, and whether it is defensible. The following sections will engage in an analysis aimed at answering these difficult questions.

In sum, after managing to break free from the torture camps and arrive in Israel, many of the Sinai victims are subjected to detention, and are not given suitable treatment or assistance, because they were not labeled as victims of trafficking. Although many of them have strong refugee claims, Israel generally does not review asylum applications while simultaneously refraining from deportation. This reality creates a legal limbo, in which asylum seekers cannot obtain a stable legal status, despite the fact that they are there to stay.

Instead, asylum seekers, including the Sinai victims, are subject to the general policy, despite enduring experiences such as being traded as commodities among groups of organized crime for ransom, torture, and rape. To date, no international legal regime is designed to address their particular challenges. At the same time, the framework of human trafficking has been widely successful (though widely criticized)¹²³ in assisting individuals who were coercively moved across borders and exploited by criminals. Like victims of human trafficking, the Sinai victims were moved from place to place without effective control of their whereabouts, and were exploited for profit. In both situations, there is money to be made from cross-border control over the victims.

However, as explained in the following sections, the trafficking framework is unique. It has explicit boundaries and, as is well known, it was generally formed to deal with “trafficking” for sex work and forced labor. Despite this feature, the framework is still open textured, meaning it was intentionally designed in a way that allows new, emerging forms of exploitation to be included.¹²⁴ The open texture allows for new and unpredicted problems and emerging global practices to be addressed and potentially included. Ransom Kidnapping—at least in its Sinai version— is a new form of commodification of individuals across borders that has been increasingly practiced on a global scale.¹²⁵ Given those characteristics, the most suitable legal framework currently available to address the problem of Ransom Kidnapping appears to be that of human trafficking. Under such circumstances, the phenomena of Ransom Kidnapping must be

122. See *supra* note 96.

123. See, e.g., *supra* note 26.

124. See, e.g., *infra* note 144.

125. See *supra* note 17 (noting other places where Ransom Kidnapping is reported).

carefully examined against the human trafficking framework. Such examination is also necessary because of the significant misuse of the “trafficking” definition in connection with various situations (Sinai included), without reasoning or attention to the legal implications and the definition under international law. This misuse creates confusion and uncertainty for academics, practitioners, and judges.¹²⁶

Should the Sinai victims be recognized as trafficking victims, and hence be “rescued” from the general policy of detention and lack of basic rights which ordinarily applies to most asylum seekers? Can a framework that was carefully crafted to address sex work and, to a lesser extent, forced labor, be applied to this ostensibly unrelated problem? The following sections are dedicated to these questions.

II.

HUMAN TRAFFICKING - DEFINITIONS AND LIMITATIONS

Despite its universal-sounding title, human trafficking is extremely limited. In fact, this legal framework is almost exclusively used for the prevention of coerced and deceptive movement of persons, especially women and girls, for sex work and forced labor. The framework’s strict boundaries are dictated by concrete definitions, manifested by two central legal instruments that were established almost two decades ago, namely: the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000 (Trafficking Protocol);¹²⁷ and the United States Trafficking Victims Protection Act of 2000 (TVPA).¹²⁸ These instruments were conceived as part of an international effort to fight the exploitation of individuals for the purpose of sex work or forced labor. Though these instruments provided innovative definitions of trafficking in international law, they were not the first to use the term in an international context. In fact, this term was used in a series of treaties starting as early as 1904, initially in the context of what was referred to as “white slavery,” or, in other words, the transportation of women and girls for prostitution.¹²⁹ Although the current version of trafficking—rooted in the late

126. See, e.g., Carling, *supra* note 24; *infra* text accompanying notes 267 and 268.

127. Trafficking Protocol, *supra* note 27.

128. TVPA, *supra* note 28. As noted, although the TVPA is a domestic norm and is not international *per se* (and therefore analytically distinct from the Trafficking Protocol), as this Article shows, this instrument has the most significant influence on state behavior in the struggle against human trafficking.

129. Shamir, *A Labor Paradigm*, *supra* note 26, at 84–85; International Agreement for the Suppression of the White Slave Traffic, 1 L.N.T.S. 83 (entered into force July 18, 1905), as amended by

The UN General Assembly on Dec. 3, 1948, 30 UNTS 23; Later treaties include: International Convention for the Suppression of the White Slave Traffic, 3 LNTS 278 (entered into force Aug. 8, 1912), as amended by Protocol Amending the International Agreement for the Suppression of the White Slave Traffic, and Amending the International Convention for the Suppression of the White Slave Traffic, 30 UNTS 23 (Dec. 3, 1948); International Convention for the Suppression of the Traffic

1980s—is defined more broadly, it seems that these early twentieth-century roots are partly responsible for the still sex-centric regimes manifested in the 2000 definitions, as well as in practice. Examining the boundaries of the existing legal framework is crucial for accurately assessing Ransom Kidnapping against it. The following sections will try to do so by contextually addressing the two central definitions of trafficking.

A. *The United Nations' Trafficking Protocol's Definition*

The current version of trafficking began crystallizing in the late twentieth-century within the broader context of the United Nation's "political will" to fight transnational crime.¹³⁰ This process resulted in the Convention Against Transnational Organized Crime,¹³¹ which is supplemented by three protocols opened for signature in Palermo, namely: the Trafficking Protocol,¹³² the Protocol Against the Smuggling of Migrants by Land, Sea and Air (Smuggling Protocol),¹³³ and the Protocol Against the Illicit Manufacturing and Trafficking in Firearms, Their Parts and Components and Ammunition.¹³⁴ The drafting process took place in Vienna and involved a wide debate encompassing multiple actors and interests (e.g. feminists and feminist organizations advocating for focus on prostitution on the one hand and representatives of the "developed world" seeking to advance border control on the other).¹³⁵ The result was the Trafficking Protocol, with the definition of trafficking set forth in Article 3 (emphasis added):

in Women and Children, 9 LNTS 415 (entered into force June 15, 1922), as amended by The UN General Assembly on Oct. 20, 1947, 53 UNTS 13; International Convention for the Suppression of the Traffic in Women of Full Age, 150 L.N.T.S. 431, (entered into force Aug. 24, 1934), as amended by The UN General Assembly on Oct. 20, 1947, 53 UNTS 13; Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 96 U.N.T.S. 271, (entered into force July 25, 1951); *see generally* GALLAGHER, *TRAFFICKING*, *supra* note 121, at 13–16; *see also* Mohamed Y. Mattar, *Incorporating the Five Basic Elements of a Model Antitrafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention*, 14 TUL. J. INT'L & COMP. L. 357, 361–66 (2006), for an historic overview in the context of domestic legislation developments.

130. LeRoy G. Potts, Jr., *Global Trafficking in Human Beings: Assessing the Success of the United Nations Protocol to Prevent Trafficking in Persons*, 35 GEO. WASH. INT'L L. REV. 227, 241 (2003); Shamir, *A Labor Paradigm*, *supra* note 26, at 85.

131. G.A. Res. 55/255, annex, Convention Against Transnational Organized Crime (May 31, 2001); *see also* GALLAGHER, *TRAFFICKING*, *supra* note 121, at 69–70.

132. Trafficking Protocol, *supra* note 27.

133. G.A. Res. 55/25, annex III, Protocol Against the Smuggling of Migrants by Land, Sea and Air (Nov. 15, 2000) [hereinafter the Smuggling Protocol].

134. G.A. Res. 55/255, annex, Protocol Against the Illicit Manufacturing and Trafficking in Firearms, Their Parts and Components and Ammunition (May 31, 2001) [hereinafter the Firearms Protocol].

135. *See* Halley, *After Gender*, *supra* note 26, at 905–08 for the various actors who were involved in the crafting of the Trafficking Protocol's definition, including the central role of "structuralist sexual-subordination feminists"; *see also* GALLAGHER, *TRAFFICKING*, *supra* note 121, at 16–29.

(a) “Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. *Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;* (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used; (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (a) of this article. . .¹³⁶

This definition is considered relatively broad.¹³⁷ For a trafficking claim to be successfully established, the following three elements must be present: *action*, *means*, and *purpose*. In the context of the current discussion, attention should be given mainly to the third component, *purpose*.¹³⁸ Although Article 3(b) deems consent by a trafficking victim irrelevant, one of the major distinctions between trafficking and smuggling is the migrant’s free will.¹³⁹ If she travels “voluntarily” her conduct will often be criminalized as a “smuggled” person and assistance will not be granted.¹⁴⁰ While Ransom Kidnapping clearly satisfies the *means*

136. Trafficking Protocol, *supra* note 27, art. 3.

137. Shamir, *Nationalism, Borders, and Markets*, *supra* note 12, at 4 (“This broad definition is considered one of the Protocol’s most significant achievements in that it is gender neutral and extends beyond sex trafficking to include various types of labor market exploitation”).

138. See GALLAGHER, *TRAFFICKING*, *supra* note 121, at 29–33 (discussing the *action* and *means* elements); see also James C. Hathaway, *The Human Rights Quagmire of “Human Trafficking”*, 49 VA. J. INT’L L. 1, 48–51 (2008) [hereinafter Hathaway, *Human Rights Quagmire*] (critiquing the *means* element as focusing merely on the “transactional dimension” while neglecting other forms of exploitation and slavery); cf. Anne T. Gallagher, *Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway*, 49 VA. J. INT’L L. 789, 814–18 (2009) [hereinafter Gallagher, *A Response*] (“[I]t is difficult to identify a ‘contemporary form of slavery’ that would not fall within [the definition’s] generous parameters.”). The second component, *means*, will be addressed when trafficking and smuggling are compared in Part III, *infra*.

139. Trafficking Protocol, *supra* note 27, art. 3(b).

140. See, e.g., Abdelnaser Aijehani, *Legal Definition of the Smuggling of Migrants in Light of the Provisions of the Migrant Smuggling Protocol*, 79 J. CRIM. L. 122, 130–31 (2015); Ryszard Piotrowicz & Jillyanne Redpath-Cross, *Human Trafficking and Smuggling*, in FOUNDATIONS OF INTERNATIONAL MIGRATION LAW 234, 246–47 (Brian Opeskin, Richard Perruchoud & Jillyanne Redpath-Cross eds., 2012). This will-based dichotomy has been heavily critiqued. See, e.g., JESSICA ELLIOTT, *THE ROLE OF CONSENT IN HUMAN TRAFFICKING* 143 (2015) (“These examples may represent how one perceives ‘pure’ cases of smuggling or trafficking, but in reality cases are rarely this simple.”); TOM OBOKATA, *TRAFFICKING OF HUMAN BEINGS FROM A HUMAN RIGHTS PERSPECTIVE: TOWARDS A HOLISTIC APPROACH* 21–22 (2006) (“[T]he definition of smuggling means that those smuggled are willing participants in illegal migration and this may provide a justification for States to apply strict enforcement measures such as arrest, detention and deportation against them.”); Ahmed & Seshu, *supra* note 26; see Julie Kaye & Bethany Hastie, *The Canadian Criminal Code Offence of Trafficking in Persons: Challenges from the Field and within the Law*, 3 SOC. INCLUSION 88, 88 (2015), for “mirror” arguments regarding trafficking, criticizing the refusal to

component in the Trafficking Protocol's definition, it should be noted that arguments were made for further expansion of the coercion element's scope beyond physical and psychological domination to include, for example, economic pressures, terrorism, and armed conflicts.¹⁴¹ But even if interpreted more narrowly, the coerced holding of an individual until ransom is paid on their behalf, let alone when torture and rape are involved, clearly satisfies the *means* element.

Indeed, the elements of *action* and *means* of trafficking do not pose a significant challenge to Ransom Kidnapping to be considered "trafficking" under the Trafficking Protocol's definition. However, things become murky in connection with the third element, *exploitation*. This element is traditionally perceived in the literature as the fundamental distinction that separates smuggling from trafficking.¹⁴² Significantly, *exploitation* is the factor distinguishing the two definitions despite its open texture and the fact that it is not defined under the Trafficking Protocol itself. Instead, the definition provides that "exploitation shall include" certain types of behaviors "at a minimum."¹⁴³ This language makes clear that other types of exploitation may exist beyond that minimum. Gallagher explains that "[t]he open definition ('at a minimum') was included to ensure that unnamed or new forms of exploitation would not be excluded by implication."¹⁴⁴ Another feature derived from the exploitation component is the nature of the relationship between the trafficker and the trafficked person. This is an ongoing relationship, unlike the short-term relationship in a smuggling setting which ends as far as the law is concerned once the smuggled person has crossed the border into the destination state.¹⁴⁵

In sum, given these three elements, there is an open interpretive question regarding what constitutes trafficking under the Trafficking Protocol. The open texture of the exploitation element leaves room to advocate for a more inclusive approach and invites legal innovation in connection with the Trafficking Protocol.

recognize free will among trafficked "victims" and its problematic consequences; Abramson, *supra* note 10; see also *infra* note 179, for the legal structure of criminalization of smuggled migrants.

141. See, e.g., Linda A. Malone, *Economic Hardship as Coercion Under the Protocol on International Trafficking in Persons by Organized Crime Elements*, 25 FORDHAM INT'L L.J. 54 (2001); OBOKATA, *supra* note 140, at 25.

142. GALLAGHER, TRAFFICKING, *supra* note 121, at 51–52; Fitzpatrick, *supra* note 72, at 1149–51; An attempt was made to advocate for the interpretation of *exploitation* in the Trafficking Protocol to apply to cases of kidnapping for ransom. See Brhane, *supra* note 7; see also *infra* Part III (discussing human smuggling).

143. Trafficking Protocol, *supra* note 27, art. 3(a); see Susan Marks, *Exploitation as an International Legal Concept*, in INTERNATIONAL LAW ON THE LEFT: RE-EXAMINING MARXIST LEGACIES 281 (Susan Marks ed., 2008) ("[S]imply grasping exploitation can itself be hard. This is especially the case in our time, when what is at question is often . . . less a matter of face-to-face relations than of long and complex chains of interactions."); see also *id.* at 293–95, for a discussion on exploitation in the human trafficking framework specifically.

144. GALLAGHER, TRAFFICKING, *supra* note 121, at n.90.

145. See Trafficking Protocol, *supra* note 27, art. 3(a) (naming forms of exploitation as "sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs"). Interestingly though, the Trafficking Protocol also includes "removal of organs" in its definition of exploitation, which is typically characterized with an expiration-date interaction as well.

But it seems that the attempt to ensure inclusion of unnamed forms of exploitation, by using a non-exhaustive list of exploitation forms in Article 3 of the Trafficking Protocol, did not push the legal framework of trafficking far beyond sex work and forced labor. The decision to include or exclude different forms of exploitation from the definition remained, to a large extent, a matter of policy and ad hoc determination. Therefore, the Protocol does not necessarily guarantee protection to victims of unnamed forms of exploitation.¹⁴⁶ But in the context of the current discussion, this conclusion also means that there is a legal possibility to apply the Protocol's definition to Ransom Kidnapping.

B. *The U.S. Trafficking Victims Protection Act's Definition*

After discussing the definition of trafficking under the United Nation's Trafficking Protocol in the prior section, this section now turns to another definition of trafficking under a domestic U.S. legal mechanism. Two months before the Trafficking Protocol was adopted, in October 2000, President Clinton signed the United States Trafficking Victims Protection Act of 2000 (TVPA).¹⁴⁷ As with the Trafficking Protocol that followed, the TVPA was enacted as part of an ongoing global effort to abolish human trafficking and was formed to supervise states and incentivize them to actively pursue that cause. The TVPA was designed to attack human trafficking in three fronts, also known as "the three Ps": prosecuting traffickers, protecting victims, and preventing trafficking. A fourth "P," partnership, was added in 2009.¹⁴⁸ In order to measure compliance with "minimum standards for the elimination of trafficking"¹⁴⁹ and evaluate countries, the TVPA established, among other arrangements, a three-tier ranking system for states with respect to their performance in addressing trafficking within these categories.¹⁵⁰

According to the TVPA's ranking system, states that meet the statute's minimum standards will enjoy tier 1 status. Other states will be classified in either

146. See Hathaway, *supra* note 138, at 10–11; see also *infra* Part III.A, for a discussion on the importance of classification.

147. TVPA, *supra* note 28, 22 U.S.C. § 7106(a); see also ALICIA W. PETERS, RESPONDING TO HUMAN TRAFFICKING: SEX, GENDER, AND CULTURE IN THE LAW 44–55 (2015) (providing an overview and legislative history); Kelly E. Hyland, *Protecting Human Victims of Trafficking: An American Framework*, 16 BERKELEY WOMEN'S L.J. 29, 60–69 (2001).

148. U.S. DEP'T OF STATE, PARTNERSHIPS, <http://www.state.gov/j/tip/4p/partner/index.htm> ("[P]artnerships augment efforts by bringing together diverse experience, amplifying messages, and leveraging resources, thereby accomplishing more together than any one entity or sector would be able to alone."); see also Mohamed Y. Mattar, *Comparative Models of Reporting Mechanisms on the Status of Trafficking in Human Beings*, 41 VAND. J. TRANSNAT'L L. 1355, 1404–13 (2008) (suggesting the inclusion of two additional "P's"—Participation and Provision).

149. TVPA, *supra* note 28, 22 U.S.C. § 7106(a).

150. Tier-2 also includes a secondary category of a "watch list" for "[c]ountries whose governments do not fully meet the TVPA's minimum standards, but are making significant efforts to bring themselves into compliance with those standards." 2017 TIP REPORT, *supra* note 19, at 45. See also Hacker, *supra* note 30, at 15–17; GALLAGHER, TRAFFICKING, *supra* note 121, at 480–81 (discussing the evaluation and reporting system).

tier 2, tier 2's watch list, or tier 3, in accordance with their governments' efforts "to bring themselves into compliance" with the TVPA standards.¹⁵¹ While low-ranked states are at risk of being sanctioned,¹⁵² high-ranked states may be eligible for U.S. funds to subsidize their anti-trafficking endeavors.¹⁵³ For this purpose, the TVPA established a designated office in the State Department, responsible for producing annual Trafficking in Persons Reports ("TIP Reports") which periodically rank and assess states.¹⁵⁴

In addition, the TVPA delegates certain domestic and international anti-trafficking responsibilities to federal agencies, including the Department of Homeland Security, the Department of Justice, the Department of Labor, the Department of State (responsible for the TIP Reports), and the Department of Health and Human Services.¹⁵⁵ Although TIP reports in recent years also paid attention to "labor trafficking," the TIP reports system remains focused mainly on preventing trafficking of women and girls for sex work, resembling in that sense the early twentieth-century concept of the framework.¹⁵⁶

Since its enactment, the TVPA has been the subject of a heated academic debate, being both criticized by scholars who pointed out its shortcomings in facing human trafficking both domestically¹⁵⁷ and internationally,¹⁵⁸ as well as

151. U.S. DEP'T OF STATE, *TRAFFICKING IN PERSONS REPORT* 45–50 (2015), <http://www.state.gov/documents/organization/245365.pdf> [hereinafter 2015 TIP REPORT] ("Tier 1: The governments of countries that fully comply with the TVPA's minimum standards for the elimination of trafficking"; "Tier 2: The governments of countries that do not fully comply with the TVPA's minimum standards but are making significant efforts to bring themselves into compliance with those standards"; "Tier 3: The government of countries that do not fully comply with the TVPA's minimum standards, but are making significant efforts to bring themselves into compliance with those standards. . . .").

152. GALLAGHER, *TRAFFICKING*, *supra* note 121, at 268–69 ("[T]he United States Government will not, as a matter of policy, provide nonhumanitarian, non-trade-related assistance to any government that does not comply with its prescribed minimum standards to prevent and punish trafficking and that is not making significant efforts to bring itself into compliance.").

153. See Anne T. Gallagher, *Improving the Effectiveness of the International Law of Human Trafficking: A Vision for the Future of the US Trafficking in Persons Report*, 12 HUM. RTS. REV. 381 (2011); Janie Chuang, *The United States as Global Sheriff: Using Unilateral Sections to Combat Human Trafficking*, 27 MICH. J. INT'L L. 437, 449–54 (2006).

154. Halley, *After Gender*, *supra* note 26, at 907–08.

155. *Notes: Counteracting the Bias: The Department of Labor's Unique Opportunity to Combat Human Trafficking*, 126 HARV. L. REV. 1012, 1012–13 (2013) [hereinafter *Counteracting the Bias*]; see generally U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S ANNUAL REPORT TO CONGRESS AND ASSESSMENT OF U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS: FISCAL YEAR 2014 (2015), <https://www.justice.gov/ag/file/799436/download>.

156. Shamir, *A Labor Paradigm*, *supra* note 26, at 92–93. See also *supra* Part II, for further discussion on this concept.

157. See, e.g., *Counteracting the Bias*, *supra* note 155; Britta S. Loftus, *Coordinating U.S. Law on Immigration and Human Trafficking: Lifting the Lamp to Victims*, 43 COLUM. HUM. RTS. L. REV. 143 (2011); Jennifer M. Chacón, *Misery And Myopia: Understanding The Failures Of U.S. Efforts To Stop Human Trafficking*, 74 FORDHAM L. REV. 2977 (2006).

158. See, e.g., Janie A. Chuang, *Exploitation Creep and the Unmaking of Human Trafficking Law*, 108 AM. J. INT'L L. 609 (2014); Hacker, *supra* note 30; Ayla Weiss, *Ten Years of Fighting Trafficking: Critiquing the Trafficking in Persons Report through the Case of South Korea*, 13 ASIAN

praised for the significant changes and advancement it brought.¹⁵⁹ In terms of defining trafficking and setting its boundaries, the TVPA focuses on “Severe Forms of Trafficking in Persons” with two separate categories: *sex* trafficking and *labor* trafficking. The definition reads as follows:

SEVERE FORMS OF TRAFFICKING IN PERSONS.—The term “severe forms of trafficking in persons” means— (A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.¹⁶⁰

The TVPA’s definition of trafficking seems to make it even more about sex work than the Trafficking Protocol. As Halley shows, “[t]he TVPA segregates prostitution as a distinct type of severe trafficking and places fewer conditions on its being deemed to be severe trafficking than on labor in any other conceivable sector.”¹⁶¹ In turn, this sex-centric nature sets strict boundaries to the definition of trafficking and limits the array of incidents eligible to be considered as such. Unlike with the Trafficking Protocol’s open texture,¹⁶² there is arguably no room for an interpretive effort that examines whether Ransom Kidnapping falls within the scope of the TVPA’s definition of trafficking. Not only does the TVPA define human trafficking as merely the exploitation of an individual for the purpose of “commercial sex” or forced labor, a 2013 official Fact Sheet by the Human Smuggling and Trafficking Center,¹⁶³ which operates under the United States Immigration and Custom Enforcement (ICE), explicitly excluded Ransom Kidnapping from this definition by setting forth a concrete example:

If an individual is held hostage or held for ransom and abused—that is, someone who paid to be smuggled into another country is held captive and raped or tortured until they pay a ransom or smuggling fee—but is not exploited for labor or commercial sex, the individual is not a trafficking victim.¹⁶⁴

PAC. L. & POL’Y J. 304 (2012); Jonathan Todres, *Law, Otherness, and Human Trafficking*, 49 SANTA CLARA L. REV. 605, 623–29 (2009).

159. See, e.g., Frances Bernat & Tatyana Zhilina, *Trafficking in Humans: The TIP Report*, 5 SOC. COMPASS 452, 457–58 (2011); Susan W. Tiefenbrun, *The Domestic and International Impact of the U.S. Victims of Trafficking Protection Act of 2000: Does the Law Deter Crime?*, 2 LOY. U. CHI. INT’L L. REV. 193 (2005).

160. TVPA, *supra* note 29, 22 U.S.C. § 7102(9).

161. Halley, *After Gender*, *supra* note 26, at 909.

162. See *supra* note 144.

163. The Human Smuggling and Trafficking Center operates under the United States Department of Homeland Security, and was established in the Intelligence Reform and Terrorism Prevention Act of 2004. Pub. L. No. 108-458, 118 Stat. 3638 (2004).

164. HUMAN SMUGGLING AND TRAFFICKING CENTER, FACT SHEET: HUMAN TRAFFICKING VS. HUMAN SMUGGLING 4 (2013), <http://www.state.gov/documents/organization/226276.pdf> [hereinafter TRAFFICKING VS. SMUGGLING].

The Fact Sheet continues by stating that “although a smuggled person may be subjected to physical or sexual violence or held for ransom, the individual is not a trafficking victim unless he or she is compelled into forced labor or commercial sex.”¹⁶⁵ The TVPA is thus knowingly and explicitly interpreted to deny victims of Ransom Kidnapping the status of trafficking victims. This strict exclusion may be attributed to regional challenges the United States faces, namely the significant volume of kidnapping for ransom among smuggled persons in the Southern border.¹⁶⁶

Despite this current approach, just a few years earlier the United States explicitly acknowledged kidnapping for ransom as a type of human trafficking, both generally and concretely with regard to Thai traffickers and Burmese victims. In the 2009 TIP Report, under the title “Buying or Negotiating a Victim’s Freedom,” the Report reads as follows (emphasis added):

If *trafficking* victims are freed because of a payment or negotiation, the *trafficker* remains unpunished and unrepentant and is free to find new victims to perform the same service. By ‘purchasing’ a victim’s freedom, well-intentioned individuals or organizations may inadvertently provide *traffickers* with financial incentive to find new victims.¹⁶⁷

Further, the 2009 TIP Report recommends to fight Ransom Kidnapping using the TVPA rather than negotiating with traffickers.¹⁶⁸ When the official authority in charge of implementing the TVPA calls to fight a certain practice with anti-trafficking measures, the only conclusion is that this practice constitutes trafficking under TVPA standards. As the Thai/Burmese discussion in the 2009 TIP Report makes clear, this *de facto* recognition of Ransom Kidnapping as “trafficking” by the United States is with respect to victims who were not exploited in the sex or forced labor markets. And only the victims who were unable to pay the ransom were forced into these markets.¹⁶⁹ In other words, trafficking is established in the stage of kidnapping and negotiating for ransom, without exploitation through sex work or forced labor.

Moreover, in a symposium on human trafficking held in 2008, the-then Homeland Security Secretary Michael Chertoff described the process of smuggling that transforms into trafficking as a result of the demand for ransom:

165. *Id.* at 5.

166. *See, e.g.,* Jim Walters & Patricia H. Davis, *Human Trafficking, Sex Tourism, and Child Exploitation on the Southern Border*, 2 J. APPLIED RES. ON CHILD. 1, 18 (2011).

167. 2009 TIP REPORT, *supra* note 17, at 24.

168. *Id.*

169. *Id.* at 29 (“Immigration officials have sold refugees to Thai traffickers, who demand a ransom in exchange for freedom. The traffickers sell those who are unable to pay to brothels, fishing vessels, and plantations.”).

Let me be clear about this: the line between so-called voluntary migration and human trafficking is not a very bold line. It is often the case that people who begin the movement across the border in a voluntary way, because they want to come across in order to get work for themselves, quickly turn into victims when they are held for ransom, or when they are required to work off the cost of the smuggling by paying off the vast majority of their wages to the smuggling organizations. Therefore, by cracking down on illegal migration, we are actually cracking down on the kind of network activity, which actually facilitates human trafficking and victimization, as well.¹⁷⁰

In addition to pushing towards labeling situations of Ransom Kidnapping as human trafficking under the TVPA, Mr. Chertoff's statement further strengthens the critique that sees human trafficking as a matter of international criminal law, rather than human rights law, and again proves that border control is a higher priority than victim protection.¹⁷¹

However tempting, this inconsistency cannot be treated as mere semantics that do not reflect normative positions. Instead, it exposes how fragile these distinctions really are, and how easily they can be manipulated and framed in accordance with the different actors involved and the balance of power between them (admittedly, as in many other contexts). It proves that the TVPA's definition of trafficking can both tolerate and reject Ransom Kidnapping interchangeably, and how complex and multilayered the reality actually is in comparison to the binary legal ambitions to reflect it. The next part will add yet another layer, by bringing the human smuggling framework into the story and mapping its relations and tensions with the human trafficking framework set forth above.

III.

THE SMUGGLING/TRAFFICKING DISTINCTION

The Vienna meetings, where the Trafficking Protocol was crafted, also resulted in the "Smuggling Protocol."¹⁷² In part, this move was meant to bring clarity to the "confusion between the concepts of migrant smuggling and what is presently referred to as human trafficking."¹⁷³

170. Michael Chertoff, Sec'y, Dep't of Homeland Sec., Remarks at the Stop Human Trafficking Symposium (Sept. 9, 2008), <https://www.hsdl.org/?view&did=235171>.

171. See *infra* note 183.

172. See The Smuggling Protocol, *supra* note 133; The Firearms Protocol, *supra* note 134. As mentioned above, a third protocol emanated from the meetings as well.

173. ANNE T. GALLAGHER & FIONA DAVID, *THE INTERNATIONAL LAW OF MIGRANT SMUGGLING* 44 (2014).

A. *Defining Smuggling in the Shadow of Trafficking: Is Classification Important?*

Unlike trafficking, which is associated primarily with coercion and exploitation,¹⁷⁴ smuggling is simply defined in the Protocol as the “procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.”¹⁷⁵ As per this broad definition, smuggling is perceived as the voluntary illegal transportation of migrants across borders with the paid assistance of others. Exploitation and coercion are absent from this framework. This shifts the focus from the migrating person to the act of facilitating her movement.¹⁷⁶ As Gallagher and David note, “this distinction also served to remove the ‘exploitation’ element from the concept of migrant smuggling, thereby shifting the focus of the definition on the *action* of migrant smuggling rather than its *impact* on those who are smuggled.”¹⁷⁷ This difference makes classification crucial from the victim’s/migrant’s perspective.

Unlike trafficking, which is primarily considered a crime against the trafficked victim, smuggling is conceived as a crime against the state.¹⁷⁸ In cases of smuggling, both the smuggler and the smuggled person can be criminalized.¹⁷⁹

174. As noted in Part II.A., the definition of trafficking under the Protocol is “the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs; (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used; (c) The recruitment, transportation, transfer, harboring or receipt of a child for the purpose of exploitation shall be considered ‘trafficking in persons’ even if this does not involve any of the means set forth in subparagraph (a) of this article.” See Trafficking Protocol, *supra* note 27, art. 3.

175. The Smuggling Protocol, *supra* note 133, art. 3(a).

176. It is important to note that the Smuggling Protocol also includes a semi-hybrid definition of smuggling, by adding smuggling in “aggravating circumstances.” Such circumstances are defined as ones “[t]hat endanger, or are likely to endanger, the lives or safety of the migrants concerned” or circumstances “[t]hat entail inhuman or degrading treatment, including for exploitation, of such migrants an instruction for state parties, urging them to adopt domestic legislation.” *Id.* at art. 6(3). Since an element of “exploitation” is included, it is unclear how, in certain cases, “aggravating circumstances” differs from trafficking. However, the existence of this type of smuggling in the Protocol does not pose a challenge to the argument made in this Article (*e.g.*, by suggesting that Ransom Kidnapping is in fact merely aggravated smuggling and not a type of trafficking), since it is a provision of *criminalization*, and thus relevant only to smugglers and bears no significance to victims. See *id.*

177. GALLAGHER & DAVID, *supra* note 173, at 31.

178. ALISON SISKIN & LIANA S. WYLER, CONG. RESEARCH SERV., RL34317, TRAFFICKING IN PERSONS: U.S. POLICY AND ISSUES FOR CONGRESS 31 (2009); Mattar, *supra* note 129, at 370-71.

179. In spite of Article 5 of the Smuggling Protocol, which provides that smuggled migrants will not be criminalized for being the object of the smuggling act, article 6(4) allows states to preserve and implement their domestic criminal law. States often use this path to criminalize smuggled persons. See The Smuggling Protocol, *supra* note 133, arts. 5, 6(4); GALLAGHER & DAVID, *supra* note 173, at 358-

Although criminalization of trafficking victims is also possible,¹⁸⁰ the conceptual and practical distinction between the coerced and exploited trafficking *victim* and the choosing, free-willing smuggled *migrant* is an important one.¹⁸¹ Despite multiple real-life similarities, it can be argued (at least according to black-letter law), that smuggling and trafficking are working in somewhat different spheres: while the former focuses on criminalizing smugglers, the latter is largely dedicated to protecting victims.¹⁸² If this difference is taken seriously, then classification carries great weight as it determines whether an individual is a criminal or the victim of a crime.

In order to understand the significance of classification, a closer examination of the scope of victim protection within the trafficking regime, beyond the law-in-books, is necessary. Chantal Thomas offers such an outlook, arguing that the Trafficking Protocol should be classified as international criminal law and not international human rights law. In her view, the Trafficking Protocol “does contain language promoting the protection of human rights of trafficking victims” with regard to reducing the suffering of victims. However, she notes, “whereas the Protocol’s language relating to criminalization and repatriation establishes mandatory obligations, the provisions relating to assistance of victims and human rights protection are aspirational.”¹⁸³ Halley generally agrees with this line of argument and sees the anti-trafficking regime as a “border-control regime that grants a few penurious protections for migrants.”¹⁸⁴ Indeed, acknowledging the trafficking regime’s shortcomings and looking beyond its declared purposes is necessary for putting the current discussion in the right context.

The scope of protection provided to victims under the trafficking regime is generally limited, especially in comparison to the broad scope of “protection” it

60; see also James C. Hathaway, *Prosecuting a Refugee for “Smuggling” Himself* (Univ. of Mich. Law Sch., Public Law And Legal Theory Research Paper No. 429, 2014), <http://www.peacepalacelibrary.nl/ebooks/files/388117087.pdf> (critiquing criminalization in the context of refugee law and access to protection and noting that “Refugee Convention Art. 31(1) proscribes the penalization of a person seeking recognition of refugee status for having engaged in ‘human smuggling’ if the relevant actions were taken by that person either individually or collectively for purposes of securing access to protection.”) [hereinafter Hathaway, *Prosecuting a Refugee for “Smuggling” Himself*].

180. See Halley, *After Gender*, *supra* note 26, at 912–14; Anne Gallagher, *Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis*, 23 HUM. RTS. Q. 975, 990–91 (2001) [hereinafter Gallagher, *Preliminary Analysis*].

181. GALLAGHER & DAVID, *supra* note 173, at 72; Piotrowicz & Redpath-Cross, *supra* note 140, at 247.

182. See, e.g., Erick Gjerdingen, *Suffocation Inside a Cold Storage Truck and Other Problems with Trafficking as “Exploitation” and Smuggling as “Choice” Along the Thai-Burmese Border*, 26 ARIZ. J. INT’L & COMP. L. 699, 716–17 (2009).

183. Chantal Thomas, *Convergences and Divergences in International Legal Norms on Migrant Labor*, 32 COMP. LAB. L. & POL’Y J. 405, 438–39 (2011); see also Halley et al., *From the International to the Local*, *supra* note 26, at 388 (discussing the “unintended consequences” of sex trafficking to the “border control agendas of states”); Dinan, *supra* note 23 (discussing the “further tightening of immigration control” and the pushing of migrants underground in Japan due to anti-trafficking measures).

184. Halley, *After Gender*, *supra* note 26, at 916.

provides to border control.¹⁸⁵ Whether intended or not, this outcome is at odds with the trafficking regime's purported aspirations and human rights language. Despite these shortcomings, classification still matters. This is especially true from the victim's point of view because there are vital advantages in being identified as a trafficked person under either the TVPA or the Trafficking Protocol. As for the TVPA specifically, one of the "P's" that sets the scale under which states are evaluated, stands for (victim) Protection. Further, one of the parameters for classifying a state within the tier system is the "serious and sustained efforts to eliminate severe forms of trafficking" demand,¹⁸⁶ which includes measuring the following:

Whether the government of the country protects victims of severe forms of trafficking in persons. . . including provisions for legal alternatives to their removal to countries in which they would face retribution or hardship, and ensures that victims are not inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts as a direct result of being trafficked, including by providing training to law enforcement and immigration officials regarding the identification and treatment of trafficking victims using approaches that focus on the needs of the victims.¹⁸⁷

Therefore, states committed to the TVPA regime are urged to address sensitive issues such as problematic repatriation, inappropriate incarceration, and special training for agents. The Trafficking Protocol also addresses issues of victim protection. Compared to the minimal entitlements provided under the Smuggling Protocol, the Trafficking Protocol provides victims, whether by soft encouragement of states or by actual demands, with "special rights." Those rights include temporary or permanent permission to remain in the destination state's territory, as well as physical and psychological care and detention relief.¹⁸⁸

185. Thomas, *supra* note 183, at 438; Halley, *After Gender*, *supra* note 26, at 916; *see also* Miriam Ticktin, *Sexual Violence as the Language of Border Control: Where French Feminist and Anti-immigrant Rhetoric Meet*, 33 SIGNS 863, 866–69 (2008) ("While the law is purportedly about holding mafia and trafficking networks accountable for exploiting women, in practice this law permits increased identity checks by the police, blending easily into a policing of undocumented immigrants."); Jennifer M. Chacón, *Tensions And Trade-Offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 U. PA. L. REV. 1609, 1637 (2010) [hereinafter Chacón, *Tensions and Trade-Offs*] (describing how policymakers in the United States view anti-trafficking efforts and in particular noting that "government officials frequently have mentioned antitrafficking efforts within the context of border security. Antitrafficking is generally listed as one of a number of objectives that officials hope to achieve through an increased law enforcement presence at the border."); Marina Zaloznaya & John Hagan, *Fighting Human Trafficking or Instituting Authoritarian Control? The Political Co-optation of Human Rights Protection in Belarus*, in GOVERNANCE BY INDICATORS 344, 346 (Kevin E. Davis et al. eds., 2012) (offering an argument that is critical of the "selective compliance model" of governments with human rights obligations, and their manipulation of it for achieving other goals while "international indicators may fail to accurately assess human rights protections in cases of strategic selectivity by the ranked government").

186. TVPA, *supra* note 28, 22 U.S.C. § 7106(a)(4).

187. *See id.* § 7106(b)(2); 2017 TIP REPORT, *supra* note 19, at 38.

188. GALLAGHER, TRAFFICKING, *supra* note 121, at 278–80. Despite the general priority of the Trafficking Protocol in terms of entitlements, special attention should be given to the issue of

Despite such advancements, the protections provided to trafficking victims under the current regimes are far from perfect. They are dicey because they legitimize the tightening of border control under a veil of human rights. Rather than strict mandatory obligations, the protections act as soft guidelines.¹⁸⁹ Further, even when obligations do exist, states have been reluctant to fully comply.¹⁹⁰ Still, from the victim's point of view "[t]here is. . . much to be gained from being classified as trafficked, and much to lose from being considered smuggled."¹⁹¹ Significantly, that is because "[t]he difference, in terms of rights and entitlements owed to the trafficked individual (in comparison to a smuggled person), is substantial."¹⁹²

In sum, even with the grave deficiencies in the protections provided under the current trafficking regimes, a victim will generally be better protected when identified as a trafficking victim rather than as a smuggled migrant. Classification is therefore important.¹⁹³

B. *New Cracks in the Smuggling/Trafficking Distinction*

As alluded by the TVPA's inconsistency in connection with Ransom Kidnapping,¹⁹⁴ trafficking and smuggling are in serious tension with one another. Despite an explicit law-in-books distinction, in reality the two definitions often overlap, collide, and essentially apply simultaneously. The ability to reach a clear-cut result by accurately labeling a given situation as one of trafficking or of smuggling is limited, and the decision often seems arbitrary.

Still, given the strict binary definitions separating the two frameworks, the overarching consensus among scholars that, in practice, the line between the two

criminalization and prosecution. Whereas the Smuggling Protocol specifically provides in Article 5 that smuggled persons should not be criminalized for the act of being smuggled (but *can* be prosecuted under domestic laws according to Article 6(4), *see supra* note 179), the Trafficking Protocol is silent in this regard. Some scholars have interpreted this lacuna as providing permission for prosecution, rather than a prohibition. *See* Halley, *After Gender*, *supra* note 26, at 912; Gallagher, *Preliminary Analysis*, *supra* note 180, at 990–91 (noting that an attempt to include a provision prohibiting prosecution failed).

189. Thomas, *supra* note 183, at 438; Halley, *After Gender*, *supra* note 26, at 916; Gallagher, *Preliminary Analysis*, *supra* note 180, at 990–91.

190. GALLAGHER, *TRAFFICKING*, *supra* note 121, at 276–78.

191. Jacqueline Bhabha & Monette Zard, *Smuggled or Trafficked?*, 25 *FORCED MIGRATION REV.* 6, 7 (2006).

192. GALLAGHER, *TRAFFICKING*, *supra* note 121, at 278.

193. There is also a lot to be gained from being classified as a trafficking victim in the Sinai case study specifically, in Detention Review Tribunals and Appeals Tribunals. *See* discussion *infra* Part IV; *see also* U.S. DEP'T OF STATE, *HUMAN TRAFFICKING & MIGRANT SMUGGLING: UNDERSTANDING THE DIFFERENCE* (2017), <https://www.state.gov/documents/organization/272325.pdf> ("Human trafficking and migrant smuggling often overlap in reality, which makes it particularly important that policymakers, law enforcement, immigration officers, and civil society organizations are conscious of the differences between them. When human trafficking is confused with migrant smuggling, trafficking victims may not receive the protections, services, or legal redress to which they are entitled and may be vulnerable to being re-exploited.").

194. *See supra* Part II.B.

is often blurry and uncertain is quite surprising.¹⁹⁵ Indeed, the literature has long acknowledged the murky zone between trafficking and smuggling, avoidable only in paradigmatic cases.¹⁹⁶ The alleged open texture of the Trafficking Protocol's exploitation term, meant "to ensure that unnamed or new forms of exploitation would not be excluded by implication,"¹⁹⁷ does not suffice for successfully containing the multilayered and developing reality on the ground.

Moreover, current changes in international migration patterns seem to have deepened the cracks in the trafficking and smuggling distinction—further undermining its legitimacy, beyond a mere recognition of its blurriness. In an article, Jørgen Carling, Ann Gallagher, and Christopher Horwood address the increasing diversity in irregular migration and the changing role of the trafficking and smuggling definitions within this reality. The Article directly mentions situations similar in nature to Ransom Kidnapping as unsuitable to the existing framework (emphasis added):

Those who facilitate irregular movement have rapidly expanded and diversified their operations, with some recognising the opportunity to maximise their profits by exploiting smuggled migrants either during their journey or at their destination. *In such situations, the carefully crafted distinction between trafficking and smuggling dissolves.*¹⁹⁸

The authors continue by stressing that "[d]espite the diligent efforts of lawyers and policy-makers, it has become increasingly apparent that the legal distinction between migrant smuggling and human trafficking does not always stand in the real world."¹⁹⁹ One of the authors, Gallagher, took part in drafting the Trafficking Protocol and not once defended the legitimacy of its definitions from

195. See, e.g., DOMINIKA B. JANSSON, MODERN SLAVERY: A COMPARATIVE STUDY OF THE DEFINITION OF TRAFFICKING IN PERSONS 50–51 (2015); Gallagher, *a Response*, *supra* note 138, at 817 ("It is important to accept that no legal definition of trafficking, no matter how carefully crafted, can ever be expected to respond fully to the shades and complexities of the real world. Unless states were prepared to invent exploitation where it did not necessarily exist—or deny it where it did—they had little option but to separate formally the (inherently exploitative) practice of trafficking from the (only incidentally exploitative) practice of migrant smuggling. As a result, states were required to disregard the reality that both trafficking and migrant smuggling are processes that are often interrelated and almost always involve shifts, flows, overlaps, and transitions."); Bhabha & Zard, *supra* note 191, at 6–8; Alice Edwards, *Traffic in Human Beings: At the Intersection of Criminal Justice, Human Rights, Asylum/Migration and Labor*, 36 DENV. J. INT'L L. & POL'Y 9, 18 (2007); Fitzpatrick, *supra* note 72, at 1153; SISKIN & WYLER, *supra* note 178, at 370–71; SCHLOENHARDT, *supra* note 72, at 17–19.

196. See *id.*

197. GALLAGHER, TRAFFICKING, *supra* note 121, at n.90.

198. Jørgen Carling, Anne T. Gallagher & Christopher Horwood, *Beyond Definitions: Global Migration and the Smuggling–Trafficking Nexus* 4 (RMMS Discussion Paper No. 2, 2015), http://regionalmms.org/fileadmin/content/rmms_publications/RMMS_discussion_paper2-Beyond_DefinitionsNov_2015.pdf [hereinafter Carling et al., *Beyond Definitions*].

199. *Id.*

critics (while recognizing the aforementioned basic tensions).²⁰⁰ Her recognition of the frequent irrelevance of the existing definitions is a telling sign.²⁰¹

Further, in another article, Gallagher suggests that exploitation—which is the key to trafficking recognition and primarily distinguishes trafficking from smuggling—should be addressed with more flexibility, using a “threshold of seriousness.” This approach is meant to overcome the “current protection gap” and include more forms of exploitation.²⁰² However, it is fair to assume that putting open-textured standards for inclusion in the hands of border-centric states will not increase protection for victims. Such fluid standards may be potentially and undetectably abused. For example, a state may falsely achieve a high score (and funds) in the TVPA’s ranking system by not labeling persons as trafficking victims in order to keep trafficking statistics low.²⁰³

The fluidity and incompatibility of the definitions to current reality, and the resulting arbitrary classifications, is illustrated by an official fact sheet of the Human Smuggling and Trafficking Center.²⁰⁴ This center operates under the Department of Homeland Security. The center provides TVPA-related guidance on the proper way to classify a case as either trafficking or smuggling.²⁰⁵ The following fact sheet titled “Case Scenarios: Trafficking or Smuggling?” describes such a case and the classification process of a Ransom Kidnapping situation (emphasis added):

QUESTION: Mario wanted to come to the United States to work in construction and send money home to his family. He paid a smuggler \$3000 to facilitate his illegal entry through the Southwest border. Mario crossed the border with a group of other illegal migrants. Once they reached the United States, the smuggler took them to a safe house and demanded an additional \$10,000 from each migrant before he would release them. The smuggler locked the migrants in a basement, deprived them of food and water, and beat them. The smuggler told Mario he would kill Mario’s family in Mexico if he did not pay the ransom. The smuggler and his friends raped the female migrants, and the smuggler threatened additional abuse if the women did not pay the \$10,000. Were the migrants smuggled or trafficked?

200. See, e.g., Gallagher, *A Response*, *supra* note 138; GALLAGHER, *TRAFFICKING*, *supra* note 121, at 52 (“While acknowledging potential problems, it is also important to accept that no legal definition of trafficking, no matter how carefully crafted, can ever be expected to respond fully to the shades and complexities of the real world. The distinction that has been created in international law between trafficking in persons on the one hand and smuggling of migrants on the other is a clear example of such a limitation. It is nevertheless understandable and defensible.”).

201. See, e.g., Carling et al., *Beyond Definitions*, *supra* note 198, at 5 (discussing “the inability of current legal concepts and structures to capture the complexity of what is happening”).

202. Anne T. Gallagher, *Exploitation in Migration: Unacceptable but Inevitable*, 68 COLUM. J. L. & INT’L AFF. 55, 68–69 (2015) [hereinafter Gallagher, *Exploitation in Migration*].

203. Gallagher alludes to this possibility. See Gallagher, *Exploitation in Migration*, *supra* note 202, at 65 (“[A]s long as trafficked victims are not identified as such . . . states will never be called to account for failing to discharge their obligations.”).

204. *TRAFFICKING VS. SMUGGLING*, *supra* note 168 (the Human Smuggling and Trafficking Center is part of the United States Immigration and Custom Enforcement (ICE), operating under the United States Department of Homeland Security).

205. *Id.*

ANSWER: The migrants were smuggled. The abuse and deprivation they suffered in the safe house do not constitute human trafficking, since the migrants were not forced to work or engage in commercial sex. *The women who were raped were victims of sexual assault but not trafficking, since the perpetrators did not pay to have sex with them. If the smuggler had charged his friends a fee for having sex with the women, at that point the women would have been subjected to commercial sexual exploitation and become victims of sex trafficking.*²⁰⁶

Even though anti-trafficking regimes (and particularly the TVPA) purport to focus on victims, tracing the logic behind this case scenario reveals that, at least as far as Ransom Kidnapping is concerned, the classification is completely detached from the victims' experience. The female migrants, from the previous example, were held for ransom and raped while traveling along the transportation route. However, the question of whether they will be identified as trafficking victims has nothing to do with their experiences or personal identity. The classification process focuses solely on the relationship between the "smuggler" and his friends: If the "smuggler" had charged a fee from his friends for the rapes, the women will be classified as trafficking victims and will be entitled to benefits and protections.²⁰⁷ But if they were raped "for free" they will be classified as "smuggled" individuals and receive nothing.²⁰⁸

Despite the fact that from the female victims' perspective, both scenarios are completely identical—the victims are not even likely to be aware of the difference—modes of relations between the "smuggler" and his rapist friends will dictate their rights and classification. This arbitrary and victim-detached classification method amplifies the weaknesses of the existing regime. And it fails to confront the personal experience of trafficked individuals. Evidently, this regime is neither attentive to the victims' individual needs nor seeks to provide them with suitable services and protections.²⁰⁹ This chunk of human trafficking law suggests, once again, that it is closer to international criminal law and border control than to human rights law.²¹⁰

206. TRAFFICKING VS. SMUGGLING, *supra* note 164, at 7.

207. To see the benefits coupled with being recognized as a trafficking victim one only needs to look at the way the TVPA examines whether a certain country makes "serious and sustained efforts to eliminate severe forms of trafficking in persons": "Whether the government of the country protects victims of severe forms of trafficking in persons and encourages their assistance in the investigation and prosecution of such trafficking, including provisions for legal alternatives to their removal to countries in which they would face retribution or hardship, and ensures that victims are not inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts as a direct result of being trafficked, including by providing training to law enforcement and immigration officials regarding the identification and treatment of trafficking victims using approaches that focus on the needs of the victims." 22 U.S.C. § 7106(b)(2).

208. See Hathaway, *Prosecuting a Refugee for "Smuggling" Himself*, *supra* note 179 (noting that they could also face criminalization).

209. Liz Kelly, "You Can Find Anything You Want": A Critical Reflection on Research on Trafficking in Persons within and into Europe, 43 INT'L MIGRATION 235, 237–38 (2005); see also PETERS, *supra* note 147, at 127–28 (calling for defining trafficking "through survivor experience").

210. See Halley, *After Gender*, *supra* note 26, at 916, for a discussion on the right classification of human trafficking law; Thomas, *supra* note 183, at 438; see also Hathaway, *Human Rights*

After presenting these general classification challenges, the following part will shift from the general to the local by addressing the classification issues that the Sinai victims currently deal with on the ground.

IV.

LAW IN ACTION: TRAFFICKING CLASSIFICATION IN ISRAELI DETENTION REVIEW TRIBUNALS AND APPEALS TRIBUNALS

As the last sections have shown, classification matters. Despite the general fluidity (and often lack of attention) in the trafficking-recognition process, real-world implications are significant and should be taken seriously. After discussing the deepening theoretical cracks in the existing legal definitions, against the backdrop of the resulting conclusions and concerns, I turn to examine how classification works on the ground. That is, when the Sinai survivors are seeking detention relief from a Detention Review Tribunal or an Appeals Tribunal in Israel (the “Tribunals”), they may try to prove that their experiences in the Sinai make them victims of human trafficking as opposed to smuggling.

The definition of human trafficking under Israeli law dictates how the Tribunals may adjudicate trafficking claims.²¹¹ This definition is based on and informed by the other definitions that Israel is obliged or committed to, namely those of the TVPA and the Trafficking Protocol, as discussed above.²¹² The definition under Israeli law and the one set forth in the Trafficking Protocol are (at least theoretically) more open and can potentially cover a broader set of situations than the TVPA’s definition, which still remains the most influential one.²¹³ Under Israeli law, the crime of human trafficking is defined as follows:

“[S]elling or buying a person or carrying out another transaction in a person, whether or not for consideration” for the purpose of, or with one of the following results: (1) removing an organ from the person’s body; (2) giving birth to a child and taking the child away; (3) subjecting the person to slavery; (4) subjecting the person to forced labor; (5) instigating the person to commit an act of prostitution; (6) instigating the person to take part in an obscene publication or obscene display; (7) committing a sexual offense against the person.²¹⁴

Quagmire, *supra* note 138, at 6 (providing a general discussion on human trafficking and border control); Chacón, *Tensions And Trade-Offs*, *supra* note 185, at 1637; Ticktin, *supra* note 185, at 866–69.

211. Penal Code, 5737-1977, SH No. 864 p. 226, art. 377A (Isr.); *see generally* Hacker, *supra* note 30, at 45–46.

212. Penal Code, 5737-1977, Amendment No. 91 (Prohibition of Human Trafficking), 2006 (Isr.) (stating that the main purpose of the Amendment is to bring Israeli law into compliance with the Trafficking Protocol, and to achieve the TVPA’s “three Ps” – Prevention, Protection, and Prosecution).

213. *See, e.g.*, Hacker, *supra* note 30, at 29 (“[R]esearch findings clearly demonstrate that U.S. pressure, manifested by Israel’s placement on the lowest tier in the first TIP Report published during the team’s deliberation in July 2001, was the primary driving force that moved Israeli authorities from treating the foreign women working in the sex industry as unwanted criminal aliens to perceiving them as survivors deserving shelter.”).

214. Penal Code, 5737-1977, SH No. 864 p. 226, art. 377A (Isr.); *see generally* Hacker, *supra*

The Hotline for Refugees and Migrants, an Israeli NGO that represents asylum seekers and refugees in different proceedings, indicated that if a detainee is recognized as a trafficking victim, the Tribunals will facilitate his release on the exceptional humanitarian grounds that the legal framework provides.²¹⁵ This is added to free legal aid provided by the Ministry of Justice Legal Aid Department.²¹⁶ In cases of coerced residency, recognized trafficking victims are exempt as a matter of law.²¹⁷ Therefore, in the victims' reality, trafficking recognition becomes a resource—a good. And like any other good that this community is trying to achieve, it is scarce. Beyond examining classification from the Tribunals' crucial (and often overlooked) vantage point, this section will also try to shed more light on the fates and daily lives of the Sinai survivors, and reveal more of what their lives actually look like once they have entered Israel.

*A. Detention Review Tribunals, Appeals Tribunals, and the Border
Control Officer: Background and Scope of Mandate*

Restrictions on liberty and movement of asylum seekers in Israel come in the form of either detention or coerced residency in an “open” facility.²¹⁸ There are

note 30, at 45–46.

215. DETENTION IN ISRAEL – YEARLY MONITORING REPORT 2015, *supra* note 98, at 11 (“The HRM’s experience shows that in severe medical cases, in cases when the detainee was a trafficking or a torture survivor, or if detention has caused a minor to remain without a guardian, the Administrative Review Tribunal facilitated the release of the detainee under reasonable conditions.”); this comports with the position of the Supreme Court, *see* ARA 1689/13 Woldo v. The Minister of Interior, ¶ 7 [2013] (Isr.); *see also* Prevention of Infiltration Act, *supra* note 89, art. 30A, 32D (listing the humanitarian grounds for release); Entry into Israel Act, 5712-1952, Amendment No. 11, 5763-2003 (Isr.), art. 13F. However, it is important to note that such ad-hoc humanitarian relief without permanent and distinct guidelines followed by judges does not guarantee exemption in all cases. Sufficient protection to the Sinai victims can only be achieved through systematic recognition that will provide certainty for all victims, and not just in particular or paradigmatic cases.

216. This development of free legal aid to victims of human trafficking is a direct result of the TVPA and the incentives of the TIP Reports ranking system. In an account describing the legal aid services provided to victims, the Ministry of Justice stated that: “reports by the United States Department of State, submitted to Congress as part of a report on the global efforts to abolish human trafficking, commend the actions taken by the [Israeli] Legal Aid Department for the benefit of human trafficking victims. For example, in a report published in January 2007, legal aid was among the factors that contributed to the conclusion that significant progress has been made in Israel with respect to combating human trafficking, and assisted our exclusion from the watch list of states which do not take sufficient measures to abolish trafficking. In the Report published in 2008, the amendment to the Legal Aid Act, providing free legal aid to trafficking and slavery victims, was commended” (author’s translation). For this account, that includes details on the specific benefits provided to trafficking victims by the Legal Aid Department in the Ministry of Justice, *see* Ministry of Justice – Legal Aid Department, Human Trafficking, <http://www.justice.gov.il/units/SiuMishpaty/subjects1/NosimBetipulenu/Pages/HumanTrafficking.aspx>. *See also* DETENTION IN ISRAEL – YEARLY MONITORING REPORT 2015, *supra* note 98, at 31.

217. *See infra* note 236.

218. For details on the different facilities, including daily routines, food, and living conditions *see* DETENTION IN ISRAEL – YEARLY MONITORING REPORT 2015, *supra* note 98, at 13–31 (*on the “open” center*: “The facility is surrounded by two tall fences and operated by the IPS, but it is not legally defined as a prison. Detainees in Holot are free to exit its gates during certain hours of the day and some of the services in the detention are not provided by the IPS but by other ministries (e.g.

three main bodies in charge of making decisions that impose restrictions on individuals: (1) the Border Control Officer (an administrative official operating under the Ministry of the Interior); (2) the Detention Review Tribunals; and (3) the Appeals Tribunals (together with the Detention Review Tribunals, the “Tribunals”). The Tribunals are generally meant to provide judicial review over the Border Control Officer’s decisions. The Prevention of Infiltration Act established the Detention Review Tribunals for “Infiltrators” as part of a mechanism meant to ensure proactive judicial review over administrative decisions issuing detention warrants to individuals.²¹⁹ The Entry into Israel Act established the Appeals Tribunals which are meant (in our context) to hear petitions by individuals challenging coerced residency warrants.²²⁰ This area of law is generally not as accessible and appealing as the Supreme Court of Israel, which is the central legal arena for “macro” refugee-related decisions.²²¹ However, crucial decisions are routinely made in the Tribunals, which exercise control over the personal liberty and wellbeing of many individuals.

The Tribunals have their own institutional structure. The judges in the Tribunals are equivalent to magistrate judges and they are appointed by a professional committee. The Tribunals’ decisions are subject to appellate review of a District Court and subsequently reviewable by the Supreme Court, if permission is granted.²²² As noted, the Tribunals have two main areas for exercising judicial review: detention warrants (Detention Review Tribunals) and coerced residency warrants (Appeals Tribunals).²²³

Ministry of Health and Ministry of Interior). Since the Court’s 2015 decision to limit detention time to 12 months, the MOI has sent out thousands of new summons to asylum-seekers in conjunction with the broadening of the criteria for detention. On December 29th of 2015, Holot reached its maximum capacity of 3,360 people for the first time since it was opened two years ago.” *See id.* at 13–14; *on one of the detention centers*: “Located in the Negev, near the Nitsana border of Egypt, Saharonim was built in 2007 to detain African asylum seekers who entered Israel through the Egyptian border. Up until June 2012, Saharonim had eight wings of tents, each wing can host up to 250 detainees (2,000 all together). In the spring of 2012, six more wings were added, with the intention to replace the old wings. Regulations allow capacity of 3,000 detainees in the entire prison. When the construction of Saharonim was started, it was exempt from most local and national regulations, as requested by the Israeli Ministry of Defense.” *See id.* at 13).

219. *Supra* note 89; however, the roots of the Detention Review Tribunals precede the Prevention of Infiltration Act in its current version. These tribunals were first established (under different conditions and authorities) in the Entry into Israel Act, *see supra* note 215, art. 13K. The rich legislative and judicial history of these tribunals exceeds the scope of this Article. *See generally* HOTLINE FOR REFUGEES AND MIGRANTS, THE DETENTION REVIEW TRIBUNALS 4–12 (Dec. 2014), <http://hotline.org.il/wp-content/uploads/Administrative-Tribunal-Report-Eng.pdf> [hereinafter HOTLINE DETENTION REVIEW TRIBUNALS REPORT].

220. Entry into Israel Act, *supra* note 215, chap. 4(1).

221. *See* HCJ 7385/13, *supra* note 96 and accompanying text.

222. Prevention of Infiltration Act, *supra* note 89, art. 30C; Entry into Israel Act, *supra* note 215, art. 13K (noting that judges are appointed for an initial period of 5 years, which can later be extended by the Minister of Justice).

223. *Supra* notes 219–220. *See also* Entry into Israel Act, *supra* note 215, chap. 4(1); *supra* note 98 and accompanying text (discussing detention practices); *supra* note 218 (discussing the different detention facilities).

Detention warrants are the stronger measure of limiting liberty. Individuals who enter Israel illegally—called “infiltrators” under domestic law—are subject to three months detention upon arrival.²²⁴ The Border Control Officer is authorized to order the release of an “infiltrator” only on specific grounds, mainly humanitarian ones.²²⁵ In addition to these narrow exceptions, the Act also establishes the Detention Review Tribunals. These tribunals are a proactive mechanism of periodical judicial review over detention warrants. A detainee must be brought before them initially within ten days of their arrest, and then at a minimum once every thirty days.²²⁶ The Detention Review Tribunals are authorized to approve, revoke, order release or alter the terms of a detention warrant.²²⁷

Another area occupied by the Tribunals relates to another policy that affects the liberty of “infiltrators”: warrants of coerced residency in a so-called “open” facility. As mentioned above, the Prevention of Infiltration Act also authorizes the Border Control Officer to issue “infiltrators” a warrant for coerced residency.²²⁸ This warrant means that they must reside in an “open” facility located in a remote location in a desert area.²²⁹ Such a warrant is issued when the Border Control Officer is convinced that there is “any kind of difficulty to deport an infiltrator to its country of origin.”²³⁰ In practice, this language applies automatically to all Eritreans and Sudanese men for the reasons previously discussed.²³¹ Although residents may technically come and go for most hours of the day, this facility is not effectively open because of its distant location, as well as the economic restriction caused by the prohibition on employment outside the facility.²³²

The role of the Tribunals here is different than the one exercised in connection with detention warrants. Since the “open” facility is not considered a prison, there is no procedure for periodic proactive judicial review on residency

224. Prevention of Infiltration Act, *supra* note 89, art. 30A(c). As noted, this maximum period of time was enacted only after several judicial decisions of the Supreme Court. The maximum period of detention in the first version of the act, which the Supreme Court struck down on September 2013, was no less than three years. See HCJ 7146/12, *supra* note 96; after the Court’s decision, a new maximum period was set on one year, but was again struck down by the Court as unconstitutional. See *id.*; the last maximum period of detention that was set (to date) is three months, and was upheld by the Court. See HCJ 8665/14, *supra* note 96. It should be stressed that this arrest, which was initially set for three years, is without trial and without any claim for a threat posed to the public or other criminal justification.

225. Prevention of Infiltration Act, *supra* note 89, art. 30A(b) (noting that the grounds are age-related (minors are generally not detained), based on recognition of a severe health or a mental health situation. An “infiltrator” may also be released if that is likely to promote deportation proceedings).

226. *Id.* art. 30E(1)(a), 30D(a)(1).

227. *Id.* art. 30D(a).

228. *Id.* art. 32D.

229. *Id.*

230. *Id.*

231. See *supra* text accompanying notes 111–113.

232. The facility was established in the Act after the Supreme Court struck down the three years’ detention policy in 2013. See HCJ 7146/12, *supra* note 96; see also Berman & Ziegler, *supra* note 93, for a discussion on this “open” facility.

warrants.²³³ Those who wish to challenge the Border Control Officer's decision must actively file a petition to the Appeals Tribunal.²³⁴ Although this difference is significant (proactive periodical review versus filing an appeal), for the purposes of this Article, there is no substantial difference and the analysis remains the same.²³⁵

After the Supreme Court struck down parts of the legislation in three distinct opinions, the latest version of the Prevention of Infiltration Act excludes several groups from coerced residency in the facility: minors, women, individuals over the age of 60, parents with minor dependents, individuals with severe health or mental health problems (only under certain conditions), and victims of human trafficking.²³⁶ That is, if the Tribunals are convinced that the petitioner is a victim of human trafficking, his residency warrant will be revoked and he will be released.²³⁷

Moreover, when a Detention Review Tribunal orders the release of a detainee from detention, the judge is obliged to issue him a coerced residency warrant if the applicable conditions are met (and not actually release him).²³⁸ One of the applicable conditions is that the detainee is not a victim of human trafficking.²³⁹ Therefore, the judge will not issue a residency warrant to a recognized victim of human trafficking. Once again, the classification of victims is pivotal.

As with the detention maximum periods, the length of coerced residency in the facility has a constitutional evolution of its own. The first version of the legislation was without a time limit, *i.e.*, indefinite coerced residency in the facility. After it was struck down by the Supreme Court, the limit was set to twenty months, which was again struck down as unconstitutional. Currently, the limit is twelve months.²⁴⁰ In light of these facts, we can now see them applied in concrete cases from the Detention Review Tribunals and the Appeals Tribunals.

233. Compare Prevention of Infiltration Act, *supra* note 89, art. 32D with *id.* art. 30D(a).

234. Entry into Israel Act, *supra* note 215, chap. 4(1) and art. 13(23).

235. The judges in the Detention Review Tribunals and in the Appeals Tribunals are appointed in the same way and are of the same status. Decisions are subject to similar appeal procedures, and are bound by similar considerations. See Entry into Israel Act, *supra* note 220. It should be noted that lawyers have reported that only 30 minutes are allotted to meetings with clients at the Appeals Tribunals. See DETENTION IN ISRAEL – YEARLY MONITORING REPORT 2015, *supra* note 98, at 32–33.

236. Prevention of Infiltration Act, *supra* note 89, art. 32D(b)(6); formally, recognition should be granted by the Israeli Police, after examination of the evidence related to the trafficking crimes committed against an individual. However, in practice the Border Control Officer and the Tribunals have a cardinal role in this framework, as the authorities in direct contact with the ones seeking protection are responsible for referring them to the Police.

237. *Id.*

238. Prevention of Infiltration Act, *supra* note 89, art. 30D(d).

239. *Id.* art. 32D(b)(6).

240. *Id.* art. 32D(a); in its opinions, the Supreme Court has also struck down other provisions of the act that relate to life in the residency facility, including the times and frequency of “reporting” in the center and punitive measures, see HCJ 7385/13, *supra* note 96.

B. Law in Action: Trafficking Classification Issues at the Tribunals

As discussed, being classified as a trafficking victim has serious implications on the rights of the Sinai survivors. Recognition as a trafficking victim is a ticket to freedom: Out of detention (for everyone) and out of coerced residency (for men, since women are already exempt).²⁴¹ The cases described and analyzed below demonstrate attempts by Sinai survivors to be recognized as trafficking victims and be released. The decisions and respective briefs are not always easy to obtain, and at times it was necessary to rely on the description of the proceedings in the Tribunals provided by the Appellate District Court.

The first case is from an Appeals Tribunal and was decided in February 2016.²⁴² Tesfom, a young Eritrean man born in 1988, entered Israel illegally through the Sinai in 2010. Due to the general policy of not deporting Eritrean nationals, he was able to remain in Israel and had filed an asylum application that the authorities have not reviewed by the time of the decision.²⁴³ The decision does not indicate if Tesfom spent time in detention or not, but according to his attorney he spent almost two months in detention upon arrival in 2010.²⁴⁴

The Border Control Officer issued Tesfom a coerced residency warrant for the “open” facility but Tesfom chose to challenge it in the Appeals Tribunal.²⁴⁵ His main argument was that the residency warrant is void and unlawful under the Prevention of Infiltration Act, since he is a victim of kidnapping and torture, which constitute human trafficking. Tesfom told the Tribunal that he was kidnapped by Bedouins in the Sinai, and held for two months for ransom.²⁴⁶ The petition describes his time in captivity in the following way:

The Petitioner was held by his armed kidnappers for two months, in hard conditions, beaten constantly, while his life was threatened and guns were pointed to his head. He was required to pay an enormous amount of \$10,000.²⁴⁷

241. Prevention of Infiltration Act, *supra* note 89, art. 32D(b)(6) (coerced residency) and art. 30A(b)(2) (indicating special humanitarian grounds for exemption from detention, as noted by the Supreme Court in ARA 1689/13 Woldo v. The Minister of Interior, *supra* note 215, ¶ 7); *see also supra* note 215 and accompanying text (the Hotline for Refugees and Migrants indicated that according to its lawyers’ experiences, if a detainee is recognized as a trafficking victim, the Tribunals will facilitate their release on the exceptional humanitarian grounds).

242. Appeal (Tel Aviv) 4595-15 Tesfom v. Minister on the Interior – Population, Immigration and Borders Authority [2016] (Isr.) [hereinafter Appeal 4595-15].

243. *See supra* note 90 (discussing the policy of not deporting Eritrean and Sudanese nationals); *see also supra* note 113 (discussing the low rates of both reviewing and granting asylum applications in Israel).

244. E-mail from Adv. Anat Kidron, Kidron Hady Cohen – Law Office, to the Author (Apr. 10, 2016) (on file with the author). *See also supra* note 224 (discussing the general detention policy of asylum seekers and its different versions).

245. Appeal 4595-15, *supra* note 242.

246. *Id.*

247. As cited in *id.* at ¶ 9.

The Appeals Tribunal rejected Tesfom's argument and reasoned that even if Tesfom's factual contentions were adopted in full, they would not constitute human trafficking.²⁴⁸ Therefore, the Tribunal held that exemption from coerced residency in the facility was not warranted. The Tribunal added in dicta that the Border Control Officer should have inquired further into Tesfom's experience in the Sinai before issuing the residency warrant.²⁴⁹ Specifically, the Tribunal stated that the Border Control Officer should have asked how long Tesfom was held there and what exactly happened to him. However, the Tribunal nonetheless found that Tesfom's experience did not constitute human trafficking and thus did not justify exemption from coerced residency under the trafficking provisions of the Act. The petition was denied.²⁵⁰

One of the arguments made in Tesfom's petition related to the Border Control Officer's allegedly flawed inquiry into Tesfom's experience in the Sinai, which the Appeals Tribunal criticized.²⁵¹ The Officer asked Tesfom directly whether he was raped by his abductors, and because he answered that he was not, his experience was not characterized as unusual or as one justifying any special consideration.²⁵² That was despite the fact that his experience included severe violence, threats of armed weapons, and captivity under difficult conditions for ransom.²⁵³ According to the Appellant brief, "the only thing that would amount to an 'unusual experience' [for the Border Control Officer] would be if the victim was raped by his abductors."²⁵⁴ This argument precisely illustrates the real-world implications of the sex-centric trafficking regime, that *a priori* places sex crimes in a higher normative level than other atrocities regardless of their severity. This structured "sex panic" has been critiqued in other broader contexts and should be questioned here as well.²⁵⁵

In another case, this time from a Detention Review Tribunal, the detainee was a woman who was also sexually abused, in addition to being held captive and tortured for ransom.²⁵⁶ The woman's name is not mentioned in either of the two decisions made by the Tribunal which are discussed below. But her "detainee

248. *Id.*; a similar ruling was made in the case of another Eritrean national who entered Israel in 2010, after being kidnapped and held in the Sinai for ransom. He challenged the residency warrant issued to him by the Border Control Officer, and the Appeals Tribunal upheld the warrant. The District Court affirmed. *See* AP (Tel Aviv) 57941-10-15 Gabriselasi v. The State of Israel [2015] (Isr.).

249. *Id.*

250. *Id.*

251. Appellant Brief in Appeal (Tel Aviv) 4595-15 Tesfom v. Minister on the Interior – Population, Immigration and Borders Authority ¶ 24 [2015] (Isr.).

252. *Id.*

253. *Id.* at ¶¶ 23–24.

254. *Id.* at ¶ 24.

255. The rich debate and critique of why sex is different exceed the scope of this Article. However, parts of this discussion—which critique the single-dimensional approach that often vilifies sex as such and ignores questions of agency—can shed light on this piece of trafficking law. *See, e.g.,* Ahmed & Seshu, *supra* note 26; Halley et al., *From the International to the Local*, *supra* note 26.

256. *See, e.g.,* REFUGEES BETWEEN LIFE AND DEATH, *supra* note 2 (discussing the intensified vulnerability of women in the Sinai).

number” showed that the decisions are linked. Although only four days separate the two decisions, they include contradictory holdings by the same judge about whether the case should be classified as trafficking. In the first decision, the Tribunal found that the woman is a trafficking victim, and described her hardship in the Sinai with detail:

After thorough examination, the Tribunal finds that the detainee’s experiences in the Sinai meet the elements of human trafficking. The detainee has been prisoned, her belongings and passport were taken from her and not returned, she was threatened by firearms, she was physically abused and beaten, she was treated like an object and she was not free to leave the camp and walk away. The detainee was constantly exploited without savior. Under these circumstances, I hold that the conditions for human trafficking are fulfilled and it will be proper to transfer the detainee to a shelter for trafficking victims.²⁵⁷

Despite the express holding that the woman was a trafficking victim, just four days later the same judge issued an opposite holding, finding that the woman was in fact not a victim of human trafficking after all:

A thorough examination of the detainee’s case shows that even if she was severely traumatized, the case does not necessarily constitute human trafficking. There is no doubt that under the circumstances of this case, even if it is not one of human trafficking, which would have granted her suitable treatment and a place at a designated shelter, she still needs special caring and support for her mental and physical condition for a transition period, as well as rehabilitation. With the absence of a suitable governmental or other institution, in her very special circumstances, I believe that it is justified to make an exception—only in this case and without creating precedent—to transfer the detainee to “Maagan” shelter, which is meant only for trafficking victims.²⁵⁸

This contradiction exposes how threatened the system is from the human trafficking framework, and how reluctant it is to expand the recognition cycle even in hard cases. And even if the result of this particular case seems good at first glance (exemption from detention and a place at a shelter were granted)²⁵⁹ there is still a pressing need for a systematic solution: as later decisions show, the woman was detained again in 2010.²⁶⁰ A case-by-case “policy” evidently does not provide a real legal answer, and is insufficient for protecting fundamental rights. The two decisions do not explain the sharp turn within only four days, while the

257. (Givon) 88145/09 (June 14, 2009) (Isr.), www.justice.gov.il/Units/mishmoret/Pages/muhzakim.aspx (detainee number 88145) (author’s translation).

258. (Givon) 88145/09 (June 18, 2009) (Isr.), www.justice.gov.il/Units/mishmoret/Pages/muhzakim.aspx (detainee number 88145) (author’s translation).

259. *Id.*

260. All the decisions approving the second detention are available at: www.justice.gov.il/Units/mishmoret/Pages/muhzakim.aspx (detainee number 88145).

Tribunal purports in both instances to have conducted a “thorough examination.” This case shows that even when the experiences in the Sinai involve women who were raped—a population traditionally protected by the trafficking regime—the system is still reluctant to define them as such. This reluctance from recognition may be attributed, among other factors, to the TVPA and the TIP Reports ranking system. As noted, assessing and incentivizing states on the basis of statistics may induce intentional under-recognition and manipulation of trafficking rates in the preliminary classification stage, which often goes unmonitored.²⁶¹

The cases described above elucidate the real-world implications of the human trafficking framework’s rigidity. Even though in many instances (including by United States officials),²⁶² victims of Sinai-like situations are defined as trafficked persons, effective remedies are not guaranteed. Despite occasional humanitarian consideration, no current legal framework applies to victims of Sinai-like situations, as the woman’s second detention proves. Both cases illustrate how victims often find themselves in detention or in other coercive facilities without suitable treatment, after being traded as commodities, held captive, and tortured for ransom.

Almost all men who survived the Sinai are detained for certain periods of time (or are detainees-to-be) and are not entitled to any special treatment under the current regime.²⁶³ The absence of a suitable framework on the one hand, and the conceptual proximity to the trafficking framework on the other, raises deep concerns about the legitimacy of current exclusion. Against the backdrop of the slowly dissolving distinction between trafficking situations and other scenarios, the existing classification mechanism seems unpersuasive and motivated mainly by political interests, and thus less and less defensible.

261. See Gallagher, *Exploitation in Migration*, *supra* note 202, at 65 (“As long as trafficked victims are not identified as such. . . states will never be called to account for failing to discharge their obligations.”).

262. See, e.g., *supra* notes 167, 170.

263. A Report published in 2012 gathered transcripts from 30 different proceedings held in Detention Review Tribunals in which Sinai survivors sought trafficking recognition in order to obtain detention relief. Of the 30 survivors, 22 were women and 8 were men, all of them of Eritrean descent. On average, they spent 140 days in captivity, and paid a ransom of \$33,660 in order to be released. 18 of the women were raped by the abductors, including one woman who asked the Tribunal to assist her with having an abortion. 12 of the survivors claimed they had no intention to reach Israel. 8 of the survivors reported that they were electrocuted, and 10 were tortured by burning plastic bags that were thrown on their bodies. At the time of publication, 6 were recognized as victims (although remained in prison since there was no open space for them in a shelter), 6 were denied recognition, and all the rest were waiting for a decision. The stories quoted in the Report tell horrors of torture and rape, after which the survivors were detained in prison-like conditions, usually for long periods of time. See HOTLINE FOR REFUGEES AND MIGRANTS, TORTURED IN THE DESERT, JAILED IN ISRAEL: DETENTION OF SLAVERY AND TORTURE SURVIVORS UNDER THE ANTI-INFILTRATION LAW JUNE-SEPTEMBER 2012, at 24–36 (2012).

V.

RETHINKING TRAFFICKING THROUGH THE SINAI CASE STUDY AND EVALUATING
A POTENTIAL REFORM: RANSOM TRAFFICKING?

Migration and transportation patterns are constantly changing, creating new forms of vulnerabilities that often fall between the cracks and are overlooked by existing legal mechanisms.²⁶⁴ Ransom Kidnapping is one of them. New global pressures, mainly the deterioration of human rights conditions in the global South and further fortification of the developed world, provide a breeding ground for opportunism and exploitation of vulnerabilities throughout transportation routes.²⁶⁵ As Dinan notes, “[t]rafficking networks flourish where migratory pressures are strong, legal migration opportunities are limited and existing migration networks are insufficient to overcome immigration barriers without assistance and provide protection for new migrants in destination countries.”²⁶⁶ As illustrated by the Sinai case study, victims of such developments often remain unprotected because of the existing legal frameworks’ limited scope. Should so-called Ransom Trafficking be recognized as a new form of human trafficking?

To date, the literature offered different labels for the situation of the Sinai victims which did not always pay sufficient attention to or give justification for the chosen classification. While some scholars and international actors view the practices in the Sinai as amounting to trafficking,²⁶⁷ others stress that this is a matter of smuggling.²⁶⁸ The absence of reasoning strengthens the impression that classification is often arbitrary and overlooked by scholars, despite its crucial significance to victims. This is also the case with policymakers’ approach to Ransom Kidnapping in general, which—as demonstrated through the application of the TVPA—varies from complete recognition to explicit rejection.²⁶⁹

The Israeli experience with the victims of the Sinai torture camps illustrates the troubling implications caused by not recognizing Ransom Kidnapping as human trafficking. Indeed, Israeli policy regarding trafficking victims is governed primarily by domestic law, which can theoretically be applied by interpretation to encompass Ransom Kidnapping victims (although it is not applied that way in practice).²⁷⁰ But evidence shows that Israel is highly attentive to the TVPA, and

264. See generally U.N. REFUGEE AGENCY, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2016, *supra* note 21.

265. See generally Carling et al., *Beyond Definitions*, *supra* note 198.

266. Dinan, *supra* note 23, at 73.

267. See, e.g., Carling et al., *Beyond Definitions*, *supra* note 198, at 9; Brhane, *supra* note 7; Reisen & Rijken, *supra* note 7; TINTI & REITANO, *supra* note 21, at 260.

268. See, e.g., GALLAGHER & DAVID, *supra* note 173, at 9. More recently Gallagher has referred to the situation in Sinai as one of trafficking. See Carling et al., *Beyond Definitions*, *supra* note 198.

269. Compare Sec’y Chertoff, *supra* note 170 and 2009 TIP REPORT, *supra* note 17, at 24, with TRAFFICKING VS. SMUGGLING, *supra* note 164, at 4. Another policymaker, the European Parliament, explicitly referred to the situation in Sinai as one of human trafficking. See *supra* note 41.

270. Penal Code, *supra* note 214, art. 377A; Hacker, *supra* note 30, at 45–46; see also Penal Code, 1977, Amendment No. 91 (Prohibition of Human Trafficking), 2006 (stating that the main purpose of the Amendment is to bring Israeli law into compliance with the Trafficking Protocol, and

especially mindful of its tier system. For example, a memorandum prepared by the National Anti-Trafficking Coordinator on Behalf of the Ministry of Justice justified the classification of Sinai victims as smuggled persons by the fact that they are not “considered” victims of human trafficking according to international standards.²⁷¹ This again illustrates how strongly Israel is influenced by the TVPA and its ranking system when designing its anti-trafficking policy.²⁷² Additionally, recent indications of a drawback in Israel’s success in preventing trafficking are causing ample concern among officials. Israel’s evident fear of being downgraded to tier 2 demonstrates once again how influential the TIP Reports ranking system is.²⁷³

Hacker describes Israel’s reaction to the TVPA as “over-compliance,” because Israel is protecting trafficking victims and defining them as such, even when the TVPA does not require such action. However, such ad-hoc humanitarian/strategic relief cannot substitute policy. Clearly, “over-compliance” does not guarantee protection in all cases. It particularly does not guarantee protection to victims of Ransom Kidnapping, as demonstrated by Hacker in her research,²⁷⁴ and by the cases of Tesfom and Gabriselasi mentioned above.²⁷⁵ Those cases represent the vast majority of the Sinai survivors.

Interestingly enough, the 2015 TIP Report itself illuminates how artificial the legal definitions are in the context of Ransom Kidnapping. For example, the report refers to Eritreans tortured in the Sinai for ransom as victims of human trafficking and “related abuses.”²⁷⁶ Clearly, a decisive message from the United States, in regards to Ransom Kidnapping, might have influenced Israel and other countries in similar situations to recognize the survivors as trafficking victims.

to achieve the TVPA’s “three Ps” – Prevention, Protection, and Prosecution).

271. Statement by Ms. Rachel Gershoni, National Anti-Trafficking Coordinator, on Behalf of the Ministry of Justice, *Visas for Trafficking Victims: The International Perception and its Implications* (Dec. 2014) (Isr.) (Hebrew version on file with author).

272. See Hacker, *supra* note 30, at 29 (“Research findings clearly demonstrate that U.S. pressure, manifested by Israel’s placement on the lowest tier in the first TIP Report published during the team’s deliberation in July 2001, was the primary driving force that moved Israeli authorities from treating the foreign women working in the sex industry as unwanted criminal aliens to perceiving them as survivors deserving shelter.”).

273. Lee Yaron, *Israel to Fund Efforts to Fight Rising Prostitution in Hotels*, HAARETZ (Feb. 28, 2016), <http://www.haaretz.com/israel-news/.premium-1.705819> (“The Tourism Ministry has decided to earmark funds to fight prostitution in hotels, due to the rise in the use of hotel rooms for this activity. The ministry fears that Israel may slip in the international ranking on human trafficking compiled by the U.S. State Department.”).

274. Hacker, *supra* note 30, at 44 (“[T]he case of Ayoub is an example of the limited scope of the TVPA, which does not include in its definition of ‘severe human trafficking’ instances of smuggling-related torture for ransom, or torture for no end other than incomprehensible sadism.”).

275. See *supra* Part IV.B., for a discussion of Tesfom’s case; see also *supra* note 248 for a discussion on Gabriselasi’s case.

276. U.S. DEP’T OF STATE, *TRAFFICKING IN PERSONS REPORT 152* (2015), <http://www.state.gov/documents/organization/245365.pdf> (“International criminal groups kidnap vulnerable Eritreans living inside and near refugee camps, particularly in Sudan, and transport them to Egypt’s Sinai Peninsula, and to a greater extent Libya, where they are subjected to human trafficking and related abuses, such as being forced to call family and friends abroad to pay ransom for release.”).

Such recognition would assist them in various ways, including free legal aid and exemption from detention.²⁷⁷

Indeed, “Ransom Trafficking” is not a traditional application of human trafficking. It is not what the framework was initially meant for. However, with loyalty to The Death of the Author (or the international lawyer),²⁷⁸ this alone should not block transformations that are necessary for responding to the emerging needs on the ground. Undoubtedly, such application will require making adjustments to better suit the unique situation of the Sinai victims, who are also refugees (although they are ordinarily not recognized as such in Israel, as described above).²⁷⁹ However, the required adjustments are within reach and do not rule out the trafficking solution. For example, the TVPA provides that states must pursue alternatives for repatriation in cases where, among other terms, a victim “would suffer extreme hardship involving unusual and severe harm upon removal.”²⁸⁰ States’ performance with respect to providing such alternatives is measured in the TIP reports.²⁸¹ Therefore, the repatriation feature—however salient in traditional applications of trafficking—does not block this channel for Sinai-like scenarios even within the general boundaries of the existing trafficking regime. Nevertheless, other, more complex, concerns arise from such an expansion.

As previously discussed, although anti-trafficking efforts are conveyed in human rights language, they strengthen border control.²⁸² This is an optimal situation for governments, as they can gain international credit (and TVPA funds) for combating trafficking on the one hand, while keeping vulnerable groups out and pushing them back to poor economies on the other. Moreover, many of these individuals, once inside the territory, would have been entitled to various benefits and protections according to international law. Keeping them out thus saves destination states the obligation to assist and protect them. Increased enforcement in turn deters “good” smugglers and may either prevent them from collaborating with vulnerable persons or promote the creation of less safe and more costly underground networks and markets.²⁸³

277. Shamir, *Nationalism, Borders, and Markets*, *supra* note 12, at 21–24; HOTLINE REPORT, *supra* note 12, at 25–27. See *supra* notes 115, 215 & 239 for a survey of the various benefits attached to recognition as a trafficking victim, including, *inter alia*, exemption from detention, exemption from coercive residency in a designated facility, free legal aid, and suitable treatment.

278. See ROLAND BARTHES, *IMAGE-MUSIC-TEXT* 142 (S. Heath trans., 1977).

279. Ziegler, *supra* note 103, at 181 (indicating that as of 2015, only 45 out of 17,778 (0.25%) asylum applications have been successful); see generally Kritzman-Amir, *supra* note 110; Yaron et al., *supra* note 110.

280. TVPA, *supra* note 28, 22 U.S.C. § 7105(e)(l).

281. See, e.g., U.S. DEP’T OF STATE, *TRAFFICKING IN PERSONS REPORT* 92, 114, 134 (2010), <http://www.state.gov/documents/organization/142979.pdf>.

282. Thomas, *supra* note 183, at 438; Halley, *From the International to the Local*, *supra* note 26, at 916; Hathaway, *Human Rights Quagmire*, *supra* note 138, at 6; Chacón, *Tensions And Trade-Offs*, *supra* note 185, at 1637; Ticktin, *supra* note 185, at 866–69.

283. See, e.g., TINTI & REITANO, *supra* note 21, at 5 (“[E]fforts by European policymakers and their allies to stem the flow of migrants into Europe are pushing smuggling networks deeper

As James Hathaway notes, “no state. . . will grant a visa to a person who wishes to travel here in a law-abiding way in order to claim refugee status.”²⁸⁴ Smugglers can serve as an essential mode of promoting human rights and are necessary for creating the platform in which refugees’ claims can be brought.²⁸⁵ In other words, expanding the recognition cycle of trafficking victims would expand the criminalization of other actors, including smugglers. This sounds like a dangerous game of background rules, since any push in favor of victims flips right back to harm other people, who are still unsafe in transportation routes and need smugglers (even “bad” ones) in order to get to safety. The result of targeting smugglers once again illustrates the border-centric nature of the existing regimes, which are used for interstate schemes to block access through transportation routes, regardless of their nature, often pushing people back to danger and atrocities.²⁸⁶

Expanding the array of cases considered trafficking, with the accompanied intensified enforcement against newly defined traffickers, can assist states in avoiding the absorption of refugees and other vulnerable groups while being credited as human rights protectors. Indeed, some commentators expressed concern about the misuse of current definitions and the implications of “vilifying smugglers” through the expansion of the definition of trafficking.²⁸⁷ Further, expanding the trafficking regime may result in other worrisome effects. One example is lowering the international cost of military action by strengthening “the legitimacy of responses that may otherwise be politically unpalatable if directed against facilitators of irregular migration, especially when many of the migrants involved are clearly desperate refugees.”²⁸⁸ Further, assuming that all of the Sinai Ransom Kidnapping victims will be granted adequate protections, to what extent does this legitimize the government’s policy with respect to all other asylum

underground and putting migrants more at risk.”).

284. James C. Hathaway, *Why Human Smuggling is Vital*, NATIONAL POST (Sept. 13, 2010), <http://news.nationalpost.com/full-comment/james-c-hathaway-why-human-smuggling-is-vital>; see also Hathaway, *Prosecuting a Refugee for “Smuggling” Himself*, *supra* note 179; GALLAGHER & DAVID, *supra* note 173, at 11–14 (discussing “politics of migrant smuggling”).

285. TINTI & REITANO, *supra* note 21, at 5, 32–33.

286. Sarah Elliott & Charlie Goodlake, *Libya’s People Trade is a Threat to International Peace and Security*, OXPOL—THE OXFORD UNIVERSITY POLITICS BLOG (Nov. 11, 2015), <http://blog.politics.ox.ac.uk/libya-shows-that-people-smuggling-is-a-threat-to-international-peace-and-security/> (“[F]or those who lack documentation and face increasingly tight border controls, people smugglers, despite their criminality, are often the only means to reaching safety.”).

287. Carling, *supra* note 24 (“Cracking down on smuggling is the easiest option for being assertive. But what if the smugglers are basically providing refugees with access to the protection they need and are entitled to? The costs and risks are high, but the vast majority of migrants receive the service that they pay for: they are brought to Europe. As a political strategy, the war on smuggling needs a rhetorical line of attack that casts smugglers as evil and cynical. If this portrayal succeeds, keeping refugees away from seeking protection can be presented as a way of shielding them from exploitation by smugglers.”). See also Aidan McQuade, *Migrant crisis: smuggling or trafficking? Politicians don’t seem to know*, THE GUARDIAN (Apr. 22, 2015), <http://www.theguardian.com/global-development/2015/apr/22/migrant-crisis-smuggling-trafficking-politicians-dont-seem-to-know>.

288. Carling et al., *Beyond Definitions*, *supra* note 198, at 5.

seekers and refugees, who are denied their basic rights and are often held in detention for long periods of time? Will this in effect divide the group into two classes, when the deprivation of rights from one will be tolerated (internationally and domestically) due to attention to the needs of the other? How will this influence the distribution of the already insufficient resources among the group?

However, all the flaws described above are not an insurmountable barrier for Ransom Trafficking. True, a mere law-in-books inclusion of Ransom Kidnapping victims in the benefits cycle cannot guarantee positive results, and the background rules and contingencies must be taken into account. But with the enormous global crisis and influx of more than one million migrants into Europe since 2015, causing practical suspension of refugee law, it is hard to see how expanding the trafficking framework of all things will be the reason for a backlash against smugglers and the narrowing of transportation options for vulnerable groups.²⁸⁹ In other words, if smugglers are already vilified and preyed upon, and borders are closing, then Ransom Trafficking should be considered from the victims' vantage point. It can encourage recognition and grant substantial benefits to individuals whose special conditions are not being treated under any current mechanism of international law.

Indeed, this global atmosphere caused immense strengthening of border control. Under these conditions, it does not seem that a victim-centric reform of Ransom Trafficking is a reason for concern. The European Union, for instance, already declared an "EU Action Plan against Migrant Smuggling (2015-2020)." The plan will make "proposals to improve the existing EU legal framework to tackle migrant smuggling, which defines the offence of facilitation of unauthorized entry and residence, and strengthen the penal framework."²⁹⁰ Thus, border control is constantly intensified regardless of the trafficking framework, and the argument against Ransom Trafficking from that direction seems less and less persuasive.

Finally, beyond the evils of allowing states to avoid accountability, vilifying "good" smugglers, and legitimizing flawed policies, there are also significant shortcomings in maintaining the status quo. Primarily, fluid and murky definitions

289. HUMAN RIGHTS WATCH, EUROPE'S MIGRATION CRISIS (2016), <https://www.hrw.org/tag/europes-migration-crisis>.

290. COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS – EU ACTION PLAN AGAINST MIGRANT SMUGGLING (2015 – 2020), at 2–3 (2015), http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/asylum/general/docs/eu_action_plan_against_migrant_smuggling_en.pdf. However, it is important to note that the Commission added that it will "seek to ensure that appropriate criminal sanctions are in place while avoiding risks of criminalisation of those who provide humanitarian assistance to migrants in distress." *See id.* at 3. Despite practical doubts about achieving such a balanced policy, stating it as a consideration is a step in the right direction. *See also* Alessandro Spena, *Human Smuggling and Irregular Immigration in the EU: From Complicity to Exploitation?*, in *IRREGULAR MIGRATION, TRAFFICKING AND SMUGGLING OF HUMAN BEINGS – POLICY DILEMMAS IN THE EU* 33 (Sergio Carrera & Elspeth Guild eds., 2016), http://aei.pitt.edu/72834/1/Irregular_Migration%2C_Trafficking_and_SmugglingwithCovers.pdf (critiquing this Action Plan).

of smuggling and trafficking may be and often are abused by states to serve political and strategic goals.²⁹¹ For example, the TVPA rewards states for combating human trafficking and protecting victims, but because evaluation is largely based on statistics, it may encourage underreporting and manipulation. That is, under the TVPA, cases that are not paradigmatic scenarios of “traditional” trafficking are likely to be excluded. Such a regime helps states keep trafficking statistics low, and in turn prevents them from allocating greater resources to fund victim benefits. It is questionable how valuable such a hermetic and single dimensional trafficking regime really is. When added to the severe condition of unrecognized victims as illustrated by the Sinai case study, these concerns strengthen the call for reform.

CONCLUSION

To conclude, this Article aimed to critique the international community’s narrow framing of human trafficking and its exclusion of Ransom Kidnapping. By using the Sinai torture camps as a case study, it sought to examine the feasibility and desirability of the emergence of a new form of trafficking, Ransom Trafficking, which is different from traditional applications of the framework. It suggested that there is no necessary justification for seeing exploitation solely as work-based. Rather, the Article stressed that an individual has more “exploitable” resources than those related to the sex and forced labor markets. Such resources can be exploited by kidnappers through emotional extrusion and physical and sexual torture for profit. In addition, the Article illustrated a serious degree of uncertainty and confusion surrounding the current often arbitrary conceptualization of “hard” trafficking cases, in both academia and practice.

The Article tried to provide a panoramic view of both the global and the local: on the one hand, the roots and current definitions and challenges of the trafficking and smuggling regimes and on the other, their local implications in a hard and painful case study. After this exercise, I am no longer concerned with disrupting or distorting the current regime with a call for reform. As Halley and Thomas argue, human trafficking laws are not primarily designed for victims, but rather meant to strengthen border control and result in pushing more vulnerable people back to poor economies, while drawing legitimacy from paying a small human rights tax.²⁹² Despite the good intentions underlying the framework and its undisputed achievements, this Article showed that current anti-trafficking efforts are mainly channeled to satisfy the standards dictated by the TVPA, which do not always respond to the genuine challenges of reality. Instead, these are efforts that, along with undeniable assistance to victims, always serve other greater political and regional agendas. In that sense, trafficking is a double-edged sword for victims. Adopting a victim-centric approach like Ransom Trafficking, and continuing to shape the regime while remaining attentive to the rapidly changing

291. See Gallagher, *Exploitation in Migration*, *supra* note 202.

292. Halley, *After Gender*, *supra* note 26, at 916; Thomas, *supra* note 183, at 438.

needs of vulnerable individuals does not seem like a threat. Especially considering that other international law regimes collapse when confronted with the current trends on the ground.

Protecting the Maritime Rights of States Threatened by Rising Sea Levels: Preserve Legacy Exclusive Economic Zones

By James L. Johnsen*

INTRODUCTION	167
I. BACKGROUND	170
A. <i>Causes, Timing, and Consequences of Climate Change on Sinking States</i>	171
1. <i>Causes of Sea Level Rise</i>	171
2. <i>Timing and Consequences of Sea Level Rise</i>	172
B. <i>The Current State of Relevant International Law</i>	173
1. <i>History of International Maritime Law</i>	173
2. <i>The UN Convention on the Law of the Sea</i>	175
i. <i>The Regime of Islands</i>	176
ii. <i>The Limited Bundle of Rights That Accompany Exclusive Economic Zones</i>	176
iii. <i>Amending the Law of the Sea Convention</i>	177
iv. <i>International Law Governing Compensation and Liability for Climate Change Damages</i>	178
C. <i>Illustrative Examples</i>	179
1. <i>Rockall</i>	179
2. <i>Okinotorishima</i>	180
3. <i>The Spratly Islands</i>	181
4. <i>The Order of Malta</i>	182

DOI: <https://doi.org/10.15779/Z38H98ZD29>

* Law Clerk to U.S. Magistrate Judge Douglas E. Miller, U.S. District Court for the Eastern District of Virginia; J.D., The George Washington University Law School, 2017; B.S. Georgetown University, 2010. The author wishes to thank his classmates and instructors at The George Washington University Law School for their insightful feedback on this Note. The author also owes a great debt to those friends and family who, from his thinking-aloud, learned more than they ever wanted about international maritime law. The opinions in this Note are the author's own. No official support or endorsement by the federal judiciary or the United States government is intended or should be inferred.

II. ANALYSIS	182
A. <i>The Desirability of Enduring Maritime Rights for Sinking States in General</i>	183
B. <i>Use of Existing International Law to Guarantee Sinking States' Rights to Their Legacy Exclusive Economic Zones</i> ..	185
C. <i>Amendment to the Law of the Sea Convention</i>	186
CONCLUSION	188

Now in this island of Atlantis there was a great and wonderful empire which had rule over the whole island. [T]here occurred violent earthquakes and floods; and in a single day and night of misfortune all your warlike men in a body sank into the earth, and the island of Atlantis in like manner disappeared in the depths of the sea.¹

INTRODUCTION

Within the next century, rising sea levels due to climate change will render uninhabitable the Maldives, Kiribati, Tuvalu, and the Marshall Islands.² Unlike the mythical Atlantis, these countries may not be great and wonderful empires,³ and their misfortune has taken place over three centuries⁴ rather than a single day and night. Nevertheless, eventually these States will become unfit for human habitation due to exposure to the sea, and they may even suffer complete immersion.⁵ Whether these countries are lost like Atlantis is a matter for urgent consideration. Today, the international community has the opportunity to mitigate the catastrophe facing these States and their populations numbering some 580,000 people.⁶ The dangers they face begin with loss of access to fresh drinking water due to saltwater contamination of their islands' water tables.⁷ Flooding, erosion, and severe weather caused by rising sea levels will expose their buildings and

1. PLATO, *TIMAEUS* (Benjamin Jowett trans., 365 B.C.).

2. Latif Nasser, *When Island Nations Drown, Who Owns Their Seas?* BOSTON GLOBE (Oct. 19, 2014), <https://www.bostonglobe.com/ideas/2014/10/18/when-island-nations-drown-who-owns-their-seas/hyH9W5b1mCAyTVgwIFh7qO/story.html>.

3. See *World Factbook*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook> (last visited Mar. 5, 2018). These States share a combined land area approximately half that of Rhode Island and a population smaller than Vermont. *Id.*

4. Anthropogenic climate change is largely due to the industrial processes developed in Europe in the late Eighteenth Century. For discussion of the timing and causes of climate change, see *infra* pp. 6–9.

5. Nasser, *supra* note 2.

6. See discussion *infra* p. 171.

7. See discussion *infra* pp. 169–171 of the effects of sea level rise on island States.

homes to progressively greater risk of damage and destruction.⁸ Ultimately, their lands will be submerged entirely beneath the rising oceans.⁹

The Maldives, Kiribati, Tuvalu, and the Marshall Islands are attempting to provide for their futures in a number of ways. For example, the Maldives is building a series of coastal defenses to battle erosion and a large artificial island to eventually shelter its population.¹⁰ In Kiribati, the cataclysm has already begun; uninhabited islands in the country were first submerged by rising sea levels in 1998.¹¹ To lessen the impact of future sea level rise on its population, Kiribati recently purchased a large piece of land in Fiji for future resettlement.¹²

Even with physical methods of mitigation like the ones described above, the international community faces many challenges in addressing the legal identity, rights, and privileges that will persist for the entities that succeed the governments of these States.¹³ This Note describes these countries as “sinking States.” This term specifically excludes those States which, though in possession of territories endangered by rising sea levels, also possess substantial territory that is not threatened.¹⁴

This Note assumes that the sinking States will endure in some form after the loss of their territory, either as States, quasi-States, sovereign trusts, or in some novel form. “Successor entity” is the generic term this Note uses to describe the organizations that assume the mantle of governance from the sinking States’ governments once rising sea levels force the residents from their territory. This Note makes no recommendation regarding the nature or constitution of these successor entities. It addresses only what rights the successor entities will retain over the sinking States’ current territorial seas and exclusive economic zones (“EEZs”).¹⁵

8. *See id.*

9. *See id.*

10. Michael Gagain, *Climate Change, Sea Level Rise, and Artificial Islands: Saving the Maldives’ Statehood and Maritime Claims Through the “Constitution of the Oceans,”* 23 COLO. J. INT’L ENVTL. L. & POL’Y 77, 86 (2012).

11. Geoffrey Lean, *Disappearing World: Global Warming Claims Tropical Island*, THE INDEPENDENT (Dec. 24 2006), <http://www.independent.co.uk/environment/climate-change/disappearing-world-global-warming-claims-tropical-island-5331748.html>.

12. Laurence Caramel, *Besieged by the Rising Tides of Climate Change, Kiribati Buys Land in Fiji*, THE GUARDIAN (June 30, 2014), <http://www.theguardian.com/environment/2014/jul/01/kiribati-climate-change-fiji-vanua-levu>.

13. *See, e.g.,* Abhimanyu George Jain, *The 21st Century Atlantis: The International Law of Statehood and Climate Change-Induced Loss of Territory*, 50 STAN. J. INT’L L. 1 (2014) (explaining that sinking States’ governments will continue in the short term but, without territory of their own, will cease to exist de facto); Gagain, *supra* note 10 at 82–83 (advocating permitting States to “defend” their territory using artificial islands); Jacquelyn Kittel, *The Global “Disappearing Act”: How Island States Can Maintain Statehood in the Face of Disappearing Territory*, 2014 MICH. ST. L. REV. 1207 (2014) (advocating for the creation of a new category of States without territory).

14. The United States’ outlying island territories, Johnston Atoll, Palmyra Atoll, Baker Island, etc., are examples of territories not considered in this Note because the United States will still have significant territory after their loss to rising sea levels.

15. *See generally* U.N. Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1245, 1833

No clear mechanism exists in international law for how to treat a State that has lost all of its territory.¹⁶ When considering the future status of sinking States' maritime possessions, the principles of justice and freedom of the seas must govern the analysis.¹⁷ Although denying the successor entities any rights at all to previously-controlled oceans may seem unjust,¹⁸ maritime law traditionally prefers openness and freedom of access over exclusivity and denial of access.¹⁹ Broadened interpretations of international maritime law to determine boundaries have been the subject of intense controversy.²⁰

The development of EEZs in the twentieth century, areas over which States do not enjoy complete sovereignty but may assert exclusive rights to exploit and license gathering of ocean resources,²¹ suggests a solution for these sinking States. Providing sinking States enduring access to EEZs would permit the successor entities to retain the exclusive right to license and control resource exploitation in these areas even after their territory is submerged, but would deny them complete sovereignty over these areas. All nations would have access to the seas for navigation and other common uses, and the successor entities to the sinking States' governments could still capitalize on the exploitation of their ocean resources to support their populations after resettlement.

The current foundation for international maritime law is the United Nations Convention on the Law of the Sea ("the Convention").²² While the Convention may offer some limited means for implementing an enduring EEZ solution, its provisions do not clearly enough guarantee such a solution's legitimacy.²³ The present regime governing the formation of territorial seas and EEZs requires that

U.N.T.S. 397 [hereinafter *The Convention*]. In general, a coastal State may exert complete sovereign rights over the seas out to twelve nautical miles from its coastline (the territorial sea) and exclusive rights to exploit or license the exploitation of resources in an area out to two hundred nautical miles from its coastline (the exclusive economic zone). For a more detailed discussion of the current international law regime for determining maritime possessions, see *infra* pp. 178–81.

16. See generally Maxine A. Burkett, *The Nation Ex-Situ*, in *THREATENED ISLAND NATIONS* 89 (Michael B. Gerard & Gregory E. Wannier eds., 2013) (advocating broader recognition of a form of post-territorial sovereign entity, "the Nation Ex-Situ"). The Order of Malta presents one instance from the 1700s in which a sovereign entity, dispossessed of its territory, was permitted to retain ownership—though not sovereignty—over real estate assets. See discussion *infra* p.187.

17. See discussion *infra* p. 181–93.

18. The sinking States make some of the smallest contributions to climate change. Allowing them to lose entirely their sovereign status without some accommodation or compensation is contrary to principles of justice and equity. See discussion *infra* p. 189.

19. See discussion *infra* pp. 171–72.

20. See discussion *infra* pp. 177–80.

21. The Convention, *supra* note 15, at Part V. See also discussion *infra* p. 172 regarding the history of exclusive economic zones in customary international law before their inclusion in the Convention.

22. Candace L. Bates, *U.S. Ratification of the U.N. Convention on the Law of the Sea: Passive Acceptance Is Not Enough to Protect U.S. Property Interests*, 31 N.C. J. INT'L L. & COM. REG. 745, 745–46 (2006).

23. See generally Rosemary Rayfuse, *Sea Level Rise and Maritime Zones*, in *THREATENED ISLAND NATIONS* 167, 180–91 (Michael B. Gerard & Gregory E. Wannier eds., 2013); see also discussion *infra* pp. 183–85.

a country base its claim on some land or island in its possession.²⁴ However, diaspora populations require financial support, and the rights to license and exploit ocean resources would provide the successor entities with needed revenue sources.²⁵ Therefore, an amendment to the Convention that would provide explicit protection to these rights by preserving current EEZs would appear most effective and prudent as sinking States weather the difficulty of losing their physical territory.²⁶

This Note argues that the international community must create an exception to the normal rules governing maritime boundaries to allow these endangered States to maintain economic rights over their legacy maritime possessions. This would allow these States to continue to benefit from remaining resources after the loss of their territory and to use those benefits to provide for their diaspora populations. As a basis for this proposition, Part I of this Note discusses the nature of the sinking States crisis, the relevant history and background of international maritime law, the relevant history and background of international environmental law, and previous instances of maritime possessions in controversy.²⁷ Part II argues that the best solution to the sinking States situation is an amendment to the Convention permitting sinking States to retain exclusive economic rights following territorial loss, rather than complete sovereign rights over their legacy territorial seas and EEZs.²⁸ The Note then concludes.²⁹

I. BACKGROUND

This Section provides background information relevant to the analysis of the problem of what rights, if any, sinking States should retain over their maritime possessions after the loss of their territory to rising sea levels. Part A reviews the causes, timing, and likely impacts of climate change generally and rising sea levels specifically. Part B addresses the current state of international maritime and environmental law. Part C presents several illustrative examples that inform solutions to the problem.

24. The Convention, *supra* note 15, at art. 121.

25. See discussion *infra* pp. 186–88.

26. *Id.*

27. See discussion *infra* pp. 168–81.

28. See discussion *infra* pp. 181–86.

29. See discussion *infra* p. 186–87.

A. *Causes, Timing, and Consequences of Climate Change on Sinking States*

1. *Causes of Sea Level Rise*

The reality of climate change and its anthropogenic nature has caused great political controversy.³⁰ Nevertheless, the scientific community is resolved: humans are causing the global climate to warm.³¹ Causation and attribution are relevant to the subject of sinking States' maritime rights due to the principles of fairness and justice: the countries that have contributed the least to climate change stand to lose their entire existence because of it and, therefore, deserve some special protection or compensation.³² When considering what maritime rights sinking States should retain, the analysis cannot be limited to descriptions of the physical phenomena. It must also address what and who caused those phenomena.

The main causes of rising sea levels are an increase in global ocean temperatures and, to a lesser extent, meltwater from glaciers, icecaps, and ice sheets.³³ Increased amounts of greenhouse gasses in the atmosphere at levels unprecedented in 800,000 years are causing and exacerbating these processes.³⁴ Fossil fuel combustion and industrial processes have substantially contributed to the increase in greenhouse gas emissions over the past few decades.³⁵ Although natural causes do have some effect on trends in global climate change, these have been greatly outpaced by anthropogenic causes since the beginning of the Industrial Age.³⁶

30. See Nick Gass, *Jerry Brown slams climate skeptics as 'troglodytes' at Vatican conference*, POLITICO (July 21, 2015, 7:10 AM), <http://www.politico.com/story/2015/07/jerry-brown-slams-climate-change-skeptics-troglodytes-120399>.

31. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014: SYNTHESIS REPORT 40 (2015), http://www.ipcc.ch/pdf/assessment-report/ar5/syr/SYR_AR5_FINAL_full_wcover.pdf.

32. See discussion *infra* pp. 182–183 regarding the emerging development in international law of processes to allow States harmed by climate change to seek recovery from the largest contributors to climate change.

33. P.P. Wong et al., 2014: *Coastal Systems and Low-Lying Areas*, in CLIMATE CHANGE 2014: IMPACTS, ADAPTATION, AND VULNERABILITY, PART A: GLOBAL AND SECTORAL ASPECTS 361, 367 (C.B. Field et al. eds., 2014).

34. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *supra* note 31, at 40 (“Warming of the climate system is unequivocal, and since the 1950s, many of the observed changes are unprecedented over decades to millennia. The atmosphere and ocean have warmed, the amounts of snow and ice have diminished, and sea level has risen.”); see also *id.* at 48 (“It is extremely likely that more than half of the observed increase in global average surface temperature from 1951 to 2010 was caused by the anthropogenic increase in GHG concentrations and other anthropogenic forces together.”).

35. *Id.* at 46.

36. *Id.* at 44 (“The radiative forcing from stratospheric volcanic aerosols can have a large cooling effect on the climate system for some years after major volcanic eruptions. Changes in total solar irradiance are calculated to have contributed only around 2% of the total radiative forcing in 2011, relative to 1750.”).

Major industrial producers are the largest contributors to the greenhouse gas emissions that cause rising sea levels.³⁷ The sinking States are among the smallest contributors.³⁸ Indeed, for 2011, the three sinking States for which data are available contributed approximately 346,000 tons of carbon dioxide.³⁹ The top three producers in 2011, the People's Republic of China, the United States, and the Republic of India, contributed 4,472,166 thousand tons of carbon dioxide.⁴⁰ It seems unjust that the States bearing the least responsibility for rising sea levels should face an existential threat because of them—and yet, that situation endures.

2. *Timing and Consequences of Sea Level Rise*

By the year 2100, the most conservative models of sea level rise project an increase in global mean sea levels of 0.24 meters; the direst predictions warn of increases of up to 0.98 meters.⁴¹ Sinking States' territory will either be rendered uninhabitable or submerged completely by these rises in sea levels.⁴² Initially, saltwater intrusion into island water tables will render the territory of sinking States uninhabitable.⁴³ Eventually, States will experience loss of territory to erosion and submergence, increased flood damage during extreme sea level events, and saltwater intrusion into freshwater bodies.⁴⁴ Saltwater intrusion will raise water tables, thereby impeding drainage and worsening the effects of flood events.⁴⁵ Taken together, these environmental impacts endanger vital ecosystems⁴⁶ even before the total submergence of the sinking States' territories makes them completely uninhabitable. The States whose territory is most critically threatened by rising sea levels are the Maldives, Kiribati, Tuvalu, and the Marshall Islands.⁴⁷

37. Tom Boden & Bob Andres, *Ranking of the World's Countries by 2011 Total CO₂ Emissions From Fossil-Fuel Burning, Cement Production, and Gas Flaring*, CARBON DIOXIDE INFORMATION ANALYSIS CENTER, <http://cdiac.ess-dive.lbl.gov/trends/emis/top2011.tot> (last visited Mar. 5, 2018) (citing China, the United States, and India as top carbon dioxide emitters in 2011); see also Duncan Clark, *Which nations are most responsible for climate change?*, THE GUARDIAN (Apr. 21, 2011), <http://www.theguardian.com/environment/2011/apr/21/countries-responsible-climate-change> (citing the United States, China, and Russia top carbon dioxide emitters overall between 1850 and 2007).

38. In the 2011 ranking of countries by carbon dioxide output, of 216 countries listed, the Maldives is 163rd, the Marshall Islands 204th, and Kiribati 210th. Tuvalu is unlisted. Boden & Andres, *supra* note 37.

39. *Id.*

40. *Id.*

41. Wong et al., *supra* note 33, at 369.

42. Nasser, *supra* note 2 (finding the following average elevations: Maldives (1.6 meters), Tuvalu (1.83 meters), Kiribati (1.98 meters), and the Marshall Islands (2.13 meters)).

43. *Id.*

44. Wong et al., *supra* note 33, at 375.

45. *Id.*

46. WORLD METEOROLOGICAL ORG., *SAVING PARADISE: ENSURING SUSTAINABLE DEVELOPMENT* (2005), http://library.wmo.int/pmb_ged/wmo_973_en.pdf.

47. Nasser, *supra* note 2.

These environmental impacts will have dramatic consequences for the populations of the sinking States, a current total of approximately 580,000 people.⁴⁸ These people will lose access to potable fresh water due to saltwater intrusion into the islands' water tables.⁴⁹ Their buildings and homes will be increasingly exposed to erosion⁵⁰ and damage from flooding during severe weather.⁵¹ In time, these populations will either have to take shelter on artificial structures,⁵² or evacuate their lands entirely as sea levels continue to rise.⁵³ This Note concerns itself primarily with the economic rights available to States, but the purpose of these economic rights is to protect resources that will benefit the people who will lose their livelihoods and homes due to human-caused sea level rise.

B. *The Current State of Relevant International Law*

The Convention⁵⁴ is the main source of international law on the subject of States' rights over their territorial seas and EEZs.⁵⁵ In Part 1, this Section explores the development in international law and politics that led to the Convention's creation. Part 2 discusses key language of the Convention itself. Part 3 examines various treaties related to international environmental law, with particular emphasis on those related to global climate change.

1. *History of International Maritime Law*

Since at least the second century A.D., legal scholars have understood the seas to be the common heritage of mankind, free to all for access and use.⁵⁶ The exceptions to this general rule grew in number over the centuries, however, and

48. *World Factbook: Kiribati*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/kr.html> (last visited Mar. 5, 2018) [hereinafter *World Factbook: Kiribati*]; *World Factbook: Tuvalu*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/tv.html> (last visited Mar. 5, 2018) [hereinafter *World Factbook: Tuvalu*]; *World Factbook: Maldives*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/mv.html> (last visited Mar. 5, 2018) [hereinafter *World Factbook: Maldives*]; *World Factbook: Marshall Islands*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/rm.html> (last visited Mar. 5, 2018) [hereinafter *World Factbook: Marshall Islands*].

49. Nasser, *supra* note 2.

50. *Id.* (explaining that erosion is due in part to rising sea levels but also to the loss of protective reefs that will die off in the warmer oceans).

51. Wong et al., *supra* note 33, at 375.

52. See discussion *supra* p. 168 regarding the Maldives' plan to build artificial islands.

53. See discussion *supra* p. 168 regarding Tuvalu's plan to resettle large portions of its population in territory purchased for the purpose in Fiji.

54. The Convention, *supra* note 15.

55. Bates, *supra* note 22, at 745–46.

56. Scott J. Shackelford, *Was Selden Right?: The Expansion Of Closed Seas and Its Consequences*, 47 STANFORD J. OF INT'L L. 1, 9–10 n. 47 (2011) (citing SUSAN J. BUCK, *THE GLOBAL COMMONS: AN INTRODUCTION* 76 (1998)) (“The first recorded statement on the LOS was a second-century work of the Roman jurist Marcianus, which declared that the seas were communes omnium naturali jure [sic], or common to all humankind.”).

States (or their pre-modern equivalents) came to assert sovereign rights over waters adjacent to their coasts.⁵⁷ There were many reasons for this development, including the desire to stamp out piracy and to enjoy rights of access for navigation.⁵⁸ State claims varied in their distance from shore but generally coincided with the coastal States' ability to exert control over adjacent waters.⁵⁹ Over time—and led by the world's dominant sea power, the United Kingdom—customary international law settled on the “cannon shot rule,” which permitted States to claim a territorial sea of three nautical miles.⁶⁰ This rule derived its name from the effective range of shore-based artillery.⁶¹

Prior to the 1940s, maritime territorial claims were total: a State claiming its three nautical mile-wide portion of ocean along its coast exercised complete sovereignty over that space.⁶² In the mid-twentieth century, however, States became aware of extensive mineral resources both on and beneath the seabed.⁶³ In 1945, the United States led a rush to stake claims to exclusive rights to exploit these resources.⁶⁴ However, its claim of exclusive ownership extended beyond the traditional three nautical mile limit, reaching even beneath the seabed on the continental shelves adjacent to its coastline.⁶⁵ This extended sovereignty was a novel concept in international maritime law, but States around the globe adopted it quickly.⁶⁶

57. *Id.* at 10.

58. *See id.* at 10–11 (citing THOMAS W. FULTON, *THE SOVEREIGNTY OF THE SEA* 6 (1911) and J.E.S. Fawcett, *How Free Are the Seas?*, 49 INT'L AFF. 14, 14 (1973)). Shackelford notes that Grotius' treatise advocating freedom of navigation for all on the high seas, *mare liberum* (open seas), precipitated a response from an English scholar, John Selden, called *mare clausum* (closed seas) in which Selden proposed that the sea could be made subject to traditional State practice of territorial possession just as the land could. Selden's immediate objective was to secure exclusive use of the North Sea for English shipping. Selden's position ultimately lost out over the course of the 17th century. Shackelford's thesis in the article cited is that the current regime of extended claims of economic rights beyond the typical two hundred-nautical mile exclusive economic zone based on continental shelves is essentially a return to Selden's *mare clausum* doctrine. *Id.*

59. *Id.* at 12.

60. *Id.* at 12 (citing SUSAN J. BUCK, *THE GLOBAL COMMONS: AN INTRODUCTION* 81–82 (1998)).

61. *Id.* at 12.

62. *See id.* at 14.

63. *Id.*

64. *Id.*

65. *Id.* (citing MICHAEL BYERS, *CUSTOM, POWER AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW* 91–92 (1999)).

66. *Id.* at 14–16. Norway had in fact won an exclusive right to fish in the waters up to four nautical miles from its coast line in a 1935 International Court of Justice decision, but the American continental shelf claim was the first significant grab for privileges or rights beyond the traditional three nautical mile line. Chile, Ecuador, and Peru followed the United States' lead in 1952 by also claiming that, because their continental shelves fall off very close to shore, they had a right to an (arbitrary) two hundred nautical mile zone of exclusive economic enjoyment. This was the first time the two hundred nautical mile standard arose in international law, and it subsequently would be adopted globally in the Convention. *Id.* at 15.

2. *The UN Convention on the Law of the Sea*

The Convention was intended to articulate and standardize territorial sea determinations and which rights of control States could assert beyond their immediate territorial seas.⁶⁷ Anthropogenic sea level rise, however, only became widely known after the Convention was written.⁶⁸ Although the Convention was not originally intended to address the rights of States that lose all of their territory to rising sea levels, certain provisions described in this Section may bear on the sinking States' rights in this crisis.

The Convention recognizes the rights of States with a coastline to exert sovereignty over a territorial sea, which extends beyond the States' coastline or archipelagic waters.⁶⁹ A State may claim as its territorial sea the waters that fall within lines connecting the outermost points of a State's land possessions⁷⁰ to a limit no more than twelve nautical miles from the coast or baseline as the State defines the coast or baseline in its official charts or published geographic coordinates.⁷¹

An important exception to the normal rule exists for baselines drawn near areas where the coastline is unstable.⁷² When shorelines are known to change frequently either due to erosion, accretion, or some other natural process, baselines can be fixed, even if the coastline subsequently moves.⁷³ The Convention does require, however, that any baselines must conform to the extent and direction of the country's coastline.⁷⁴ Development of navigational markers—lighthouses, radio aids to navigation, etc.—may be used as reference points to reinforce these enduring baseline claims.⁷⁵

The Convention's mechanisms for establishing and marking maritime boundaries, giving States the option of using charts or geographic coordinates,⁷⁶

67. Shackelford, *supra* note 56, at 14–16.

68. Ann Powers & Christopher Stucko, *Introducing the Law of the Sea and the Legal Implications of Rising Sea Levels*, in THREATENED ISLAND NATIONS 123, 123 (Michael B. Gerard & Gregory E. Wannier, eds., 2013).

69. The Convention, *supra* note 15, art. 2.

70. *Id.* art. 47.

71. *Id.* arts. 3, 5. The coastal State defines its own coastlines and baselines and the resulting territorial sea by publishing “charts or lists of geographical coordinates and . . . deposit[ing] a copy of each such chart or list with the Secretary General of the United Nations.” *Id.* art. 16, ¶ 2.

72. *Id.* art. 7, ¶ 2.

73. *Id.* This section of the Convention uses a delta as a geographical feature that could be sufficiently unstable as to justify one of these immutable baselines, but it does not provide an exhaustive list of these features. *Id.* See also Rayfuse, *supra* note 23, at 181–82 (“Although originally considered to apply only to deltas, it is open to States to (re-)interpret the criteria of instability to apply in the context of sea level rise.”).

74. The Convention, *supra* note 15, at art. 7, ¶ 3.

75. *Id.* art. 7, ¶ 4.

76. *Id.* art. 16, ¶ 2. See also *id.* art. 47, ¶ 8 (“The baselines drawn in accordance with this article shall be shown on charts of a scale or scales adequate for ascertaining their position. Alternatively, lists of geographical coordinates of points, specifying the geodetic datum, may be substituted.”); *id.* at art. 75, ¶ 1 (“[T]he outer limit lines of the exclusive economic zone and the lines of delimitation . . .

may lead to discrepancies between navigational charts and geographic coordinates.⁷⁷ This means that sinking States could use domestic legislation and regulatory action to fix their current claimed baselines. These baselines could then endure as a basis for determining maritime possessions even after the territory on which they were originally based is rendered uninhabitable or inundated entirely.⁷⁸ This Note will address the advisability of fixing baselines in this manner.

i. The Regime of Islands

Sinking States fall within the Convention's provisions on islands, which the Convention defines as "naturally formed area[s] of land, surrounded by water, which [are] above water at high tide."⁷⁹ States cannot use artificial islands or other man-made structures to assert the same claims as they could for continental land or islands.⁸⁰ Likewise, formations incapable of supporting "human habitation or economic life of [its] own" are *rocks* and cannot be the basis for EEZs or continental shelves.⁸¹ If territory becomes uninhabitable, the Convention denies a State an EEZ based on that uninhabitable territory.⁸² The following Section articulates the specific privileges that accompany possession of an EEZ.

ii. The Limited Bundle of Rights That Accompany Exclusive Economic Zones

Beyond States' territorial seas, over which they may exercise full sovereignty, States maintain an EEZ.⁸³ Out to 200 nautical miles,⁸⁴ coastal States enjoy exclusive privileges in: constructing artificial islands and installations;⁸⁵ harvesting and exploiting living resources and licensing other States to exploit living resources;⁸⁶ based on the State's scientific research, establishing the allowable catch for living resources;⁸⁷ and, enforcing State rules in these areas.⁸⁸

shall be shown on charts of a scale or scales adequate for ascertaining their position. Where appropriate, lists of geographical coordinates of points, specifying the geodetic datum, may be substituted for such outer limit lines or lines of delimitation.").

77. Rayfuse, *supra* note 23, at 183.

78. *Id.*

79. *See* The Convention, *supra* note 15, at art. 121, ¶ 1.

80. *Id.* art. 60, ¶ 8.

81. *Id.* art. 121, ¶ 3 ("Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf."). The Convention seems to permit by the implication in its silence that States may claim territorial seas based on rocks.

82. *Id.*

83. *Id.* art. 55.

84. *Id.* art. 57.

85. *Id.* art. 60.

86. *Id.* art. 62.

87. *Id.* art. 61.

88. *Id.* art. 73 (including by means of "boarding, inspection, arrest and judicial proceedings").

Foreign States still enjoy the rights to “navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines . . .”⁸⁹

As discussed, EEZs are established by noting their extent on charts or by listing the geographical points that make them up.⁹⁰ States then publicize the charts or lists of geographical coordinates and deposit them with the UN Secretary General.⁹¹

These EEZs are of particular importance for island nations, including the sinking States. The sinking States, including Kiribati,⁹² Tuvalu,⁹³ the Maldives,⁹⁴ and the Marshall Islands,⁹⁵ all enjoy substantial economic benefits from fishing or fish processing. In Tuvalu in 2002, 67% of households engaged in fishing activities, and fishing licenses sold to foreign fishing vessels made up almost a quarter of the country’s gross domestic product.⁹⁶ Sinking States’ EEZs contain substantial resources. The benefits from collecting or licensing the exploitation of these resources would be extremely helpful to the sinking States’ successor entities as they seek to support their diaspora populations or maintain the habitability of their territory by artificial improvements.

iii. *Amending the Law of the Sea Convention*

The Convention contains mechanisms for amendment.⁹⁷ A State party to the Convention may propose amendments to the UN Secretary General.⁹⁸ Along with that proposal, party States may request that the Secretary General seek approval from one half of party States to convene a conference.⁹⁹ If the conference is convened, party States vote to approve or reject the proposed amendment.¹⁰⁰ Alternatively, party States can request that the Secretary General disseminate the

89. *Id.* art. 58, ¶ 1.

90. *Id.* art. 75, ¶ 1.

91. *Id.* art. 75, ¶ 2. The Convention is silent on what the Secretary General must do with charts or geographical coordinates deposited with her.

92. *World Factbook: Kiribati*, *supra* note 48.

93. *World Factbook: Tuvalu*, *supra* note 48.

94. *World Factbook: Maldives*, *supra* note 48.

95. *World Factbook: Marshall Islands*, *supra* note 48.

96. See Ann Powers, *Sea-Level Rise and Its Impact on Vulnerable States: Four Examples*, 73 LA. L. REV. 151, 156 (2012); *Tuvalu - GDP - per capita*, INDEX MUNDI, <http://www.indexmundi.com/g/g.aspx?c=tv&v=67> (last visited Mar. 5, 2018).

97. The Convention, *supra* note 15, at arts. 312, 313.

98. *Id.* arts. 312, 313.

99. *Id.* art. 312.

100. *Id.*

proposed amendment.¹⁰¹ If, within twelve months, no party State objects to the amendment, the proposed amendment enters into force.¹⁰²

Because any amendment passed under these procedures would bind all Convention parties, either procedure could supply a mechanism for creating explicit international law to protect the legacy maritime rights of the sinking States.

*iv. International Law Governing Compensation and Liability for
Climate Change Damages*

Two competing doctrines dominate the development of international environmental law on climate change liability.¹⁰³ The first is the preference for allowing sovereign States the right to exploit and manage their resources in accordance with their own domestic legislation and policies.¹⁰⁴ The second is the desire to curb State violations of public international law—namely, the failure to adhere to limits on environmental pollution—and to compensate those States negatively impacted by those violations.¹⁰⁵ These doctrines conflict because one State’s internal law or policy regarding resource use can have a deleterious effect on other States.¹⁰⁶ In managing these conflicting doctrines, the international community has taken a number of paths, all of which favor some rights of redress for climate change damages.¹⁰⁷

To date, 196 countries are parties to the UN Framework Convention on Climate Change.¹⁰⁸ This widely accepted instrument adopts as its purpose the “stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.”¹⁰⁹ This objective accords with subsequent international conventions on climate change.¹¹⁰ These conventions stand generally for the principle that States have a

101. *Id.* art. 313.

102. *Id.*

103. See Jennifer Kilinski, *International Climate Change Liability: A Myth or A Reality?*, 18 J. TRANSNAT’L L. & POL’Y 377, 387–88 (2009).

104. U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), annex I, principle 2, (Aug. 12, 1992).

105. Kilinski, *supra* note 103, at 388 (citing Richard S.J. Tol & Roda Verheyen, *Liability and Compensation for Climate Change Damages - A Legal and Economic Assessment*, 32 ENERGY POL’Y 1109, 1111 (2004)).

106. Anthropogenic climate change is an example.

107. Kilinski, *supra* note 103, at 388–96.

108. UN Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107, 31 I.L.M. 849 [hereinafter UNFCCC]; *Status of Ratification of the Convention*, UNFCCC, http://unfccc.int/essential_background/convention/status_of_ratification/items/2631.php (last visited Mar. 5, 2018).

109. *Id.* art. 2.

110. See, e.g., Paris Climate Change Conference, *Report of the Conference of the Parties on its 21st Session*, Preamble to the Paris Agreement, FCCC/CP/2015/10/Add.1 (recognizing the need to account for the special circumstances of developing countries particularly vulnerable to climate change); United Nations Framework Convention on Climate Change, *Kyoto Protocol to the United*

responsibility to control their emissions and can be held accountable for their failure to do so.¹¹¹ Additionally, the Climate Change Convention includes several mechanisms for dispute settlement.¹¹²

The Climate Change Convention is an example of the commitment in the corpus of international law not only to recognize States' rights to be free from injury from environmental pollution but also to receive some compensation for those injuries. Sinking States' loss of territory is due to climate change caused by environmental pollution and thus is likely an injury of the kind that international environmental law would seek to redress. Providing enduring maritime rights to sinking States is one possible form of such redress.

C. Illustrative Examples

Several previous scenarios provide useful insights in analyzing how international maritime law would address sinking States' maritime rights and privileges. Generally, they support the proposition that maritime boundary claims based on a conservative reading of the Convention's terms and provisions regarding boundary determination receive the broadest international recognition.

1. Rockall

Rockall is a small, rocky outcrop in the North Sea, approximately 230 miles northwest of Scotland.¹¹³ The United Kingdom has uncontested possession of the islet and, between 1977 and 1997, used it to claim a 200 nautical mile fishery zone.¹¹⁴ The island is uninhabitable and incapable of sustaining economic activity.¹¹⁵ Rockall's inability to sustain human habitation makes it a rock within the meaning of the Convention.¹¹⁶ Indeed, the islet was even cited as an example

Nations Framework Convention on Climate Change, Annex B, Dec. 10, 1997, U.N. Doc. FCCC/CP/1997/CRP.6 (requiring signatories to the Protocol to meet their greenhouse gas reduction commitments). *But cf.* Ian McGregor, *Disenfranchisement of Countries and Civil Society at COP-15 in Copenhagen*, 11 GLOBAL ENV'T'L. POL. 1, 3–4 (2011) (explaining that the Copenhagen climate conference left substantive post-Kyoto issues regarding emissions control unresolved).

111. Kilinski, *supra* note 103, at 388–92.

112. UNFCCC, *supra* note 108, at art. 14.

113. Clive Schofield, *The Trouble with Islands*, in MARITIME BOUNDARY DISPUTES, SETTLEMENT PROCESSES, AND THE LAW OF THE SEA 19, 28 (Seoung-Yong Hong, Jon M. Van Dyke, & Martinus Nijhoff eds., 2009).

114. *Id.* at 28.

115. With the exception of occasional daredevil attempts to stay in pre-fabricated structures that have to be bolted onto the side of the 15-meter tall formation in order to survive the punishing wind and waves. *See, e.g.*, Harry Hount, *Loneliest man on the planet*, DAILY MAIL (Jul. 5 2014, 6:51 PM), <http://www.dailymail.co.uk/news/article-2681246/Loneliest-man-planet-Meet-dad-living-storm-tossed-rock-hundreds-miles-Britain-birds-whales-company.html>; Lester Haines, *Brit adventurer all set to assault ex-Reg haunt Rockall*, THE REGISTER (May 9, 2013, 11:19 AM), https://www.theregister.co.uk/2013/05/09/rockall_attempt/.

116. *See* The Convention, *supra* note 15, at art. 121; Schofield, *supra* note 113, at 29.

of a rock during the Convention's drafting conference.¹¹⁷ Because of its status as a rock, the United Kingdom relinquished its claim to a 60,000 square mile EEZ based on the islet when it ratified the Convention in 1997.¹¹⁸ The United Kingdom's ownership of Rockall is an instance of a State relinquishing its maritime rights in deference to the definitions in the Convention. Today, the United Kingdom possesses the islet and retains rights to a twelve nautical mile territorial sea around it, but it has no claim to an EEZ based on the islet.¹¹⁹

This example suggests that, as sinking States' land becomes uninhabitable, the land will no longer be able to serve as the basis for an EEZ under the Convention. This instance is an example of the international community favoring a conservative interpretation of the Convention.

2. *Okinotorishima*

Although its name means "remote bird islands," there is no evidence Okinotorishima has ever played host to sea birds, and there is only marginal evidence of human habitation.¹²⁰ This island is Japan's southernmost possession, a table reef some 450 miles from Iwo Jima, 680 miles from Okinawa, and approximately halfway between Guam and Taiwan.¹²¹ At high tide, only two rocky areas protrude above the sea, each by only a matter of centimeters, to make up a surface area approximately equivalent to two king size beds.¹²²

Japan has spent some \$600 million to prevent these two small islets from slipping beneath the waves.¹²³ The islets, if recognized internationally as islands under the Convention, would grant Japan a massive EEZ in otherwise vacant ocean.¹²⁴ Opponents to the claim, the People's Republic of China in particular, argue that the islets are simply uninhabitable rocks, which, under the Convention, do not support claims to an EEZ.¹²⁵ The Japanese government has made every

117. Schofield, *supra* note 113, at 29.

118. *Id.*

119. See discussion *supra* note 81 (discussing the Convention's implication in art. 121, ¶ 3, that rocks, while not usable to establish an exclusive economic zone, may be used to establish a territorial sea).

120. Yann-huei Song, *Okinotorishima: A "Rock" or an "Island"? Recent Maritime Boundary Dispute between Japan and Taiwan/China*, in MARITIME BOUNDARY DISPUTES, SETTLEMENT PROCESSES, AND THE LAW OF THE SEA 145, 148 (Seoung-Yong Hong, Jon M. Van Dyke & Martinus Nijhoff eds., 2009); see also Norimitsu Onishi, *Japan and China Dispute a Pacific Islet*, N.Y. TIMES (July 10, 2005), <http://www.nytimes.com/2005/07/10/world/asia/japan-and-china-dispute-a-pacific-islet.html>.

121. Song, *supra* note 120, at 148.

122. *Id.*; see also Alicia Q. Wittmeyer, *The even smaller rocks Japan and China are fighting over*, FOREIGN POLICY (Sept. 24, 2012, 6:15 PM), <http://foreignpolicy.com/2012/09/24/the-even-smaller-rocks-japan-and-china-are-fighting-over/>.

123. Onishi, *supra* note 120.

124. Wittmeyer, *supra* note 122.

125. *Id.*

effort to buttress its claim that the reef qualifies as an island, labeling it as such on charts and passing legislation recognizing it as an island.¹²⁶

While it may be legal for a State to claim an EEZ around any formation it chooses, enforcement of that claim is illegal if the claim contravenes the Convention.¹²⁷ Put another way, a claim is illegitimate unless it is grounded on a valid basis in international law. As with the Rockall example, the controversy surrounding Japan's claims to Okinotorishima shows that maritime claims based on anything but a conservative interpretation of the terms of the Convention draw severe criticism and, consequently, engender little respect from other States. If the sinking States were to assert claims based on creative interpretations of the Convention—like Japan's claims around Okinotorishima—other States would likely challenge or simply ignore the sinking States' claims altogether.

3. *The Spratly Islands*

In July of 2016, an international arbitration panel constituted under the Convention rejected the People's Republic of China's claim to maritime rights based on formations among the Spratly Islands in the South China Sea, endorsing the Republic of the Philippines' competing claim in the matter.¹²⁸ China has, like Japan with Okinotorishima,¹²⁹ artificially fortified various rocks and reefs among the Spratlys. China makes various claims based on these formations.¹³⁰ The Philippines challenged the validity of these claims because the formations were not naturally inhabitable.¹³¹ Vietnam, Taiwan, Malaysia, and Brunei all have their own different, overlapping claims in the South China Sea as well.¹³²

China's claims include the assertion of a right to a territorial sea based on Subi Reef, a formation that, before artificial improvement, did not remain above water at high tide.¹³³ This claim is inconsistent with the Convention's requirement that formations remain "above water at high tide" in order to be legitimate.¹³⁴

126. Song, *supra* note 120, at 156–61. Okinotorishima has a Tokyo address, an effort to convey its close ties to the Japanese mainland. *Id.*

127. *Id.* at 176.

128. Jane Perlez, *Tribunal Rejects Beijing's Claims in the South China Sea*, N.Y. TIMES (July 12, 2016), <https://www.nytimes.com/2016/07/13/world/asia/south-china-sea-hague-ruling-philippines.html>; see also The Convention, *supra* note 15, at Annex VII (procedures for arbitration); Lan Ngyuen, *South China Sea: Philippines v. China*, THE DIPLOMAT (July 27, 2015), <http://thediplomat.com/2015/07/south-china-sea-philippines-v-china> (analyzing the jurisdiction of the Annex VII arbitration tribunal).

129. See discussion *supra* pp. 177–78.

130. *Making a Splash*, THE ECONOMIST (Jan. 30, 2016), <http://www.economist.com/news/asia/21689633-taiwans-outgoing-president-further-roils-troubled-waters-making-splash>.

131. Perlez, *supra* note 128.

132. *Making a Splash*, *supra* note 130; see also Michael Bennett, *The People's Republic of China and the Use of International Law in the Spratly Islands Dispute*, 28 STAN. J. INT'L L. 425, 433–34 (1992).

133. *Making a Splash*, *supra* note 130.

134. See the Convention, *supra* note 15, at art. 121.

China also claims an EEZ based on Itu Aba,¹³⁵ a formation the Philippines argues cannot support human habitation without artificial improvements.¹³⁶ If the Philippines is correct, the formation is a rock and cannot be used as the basis for an EEZ claim.¹³⁷

The arbitration discussed above between the Philippines and the People's Republic of China is only one chapter in the dispute over land and maritime territorial possessions in the South China Sea.¹³⁸ Interpreting the Convention to resolve the dispute over the Spratlys has led to a complex international political dispute. Any attempt to read the terms of the Convention expansively to benefit the sinking States could be used to support questionable maritime claims from States not existentially threatened by rising sea levels. Sinking States would benefit from a measure that disconnects the territorial conflicts of these larger States from the protections the sinking States require.

4. *The Order of Malta*

The Knights Hospitaller of St. John of Jerusalem, of Rhodes, and of Malta (the Order of Malta) was a sovereign State governing the Mediterranean island of Malta until the late Eighteenth Century.¹³⁹ Although Napoleon drove it from Malta in 1798, more than sixty States continue to recognize the Order as a sovereign entity, albeit one with no sovereign control over territory.¹⁴⁰ The Order engages in charity work and only retains ownership (not sovereignty) over a collection of buildings in Rome.¹⁴¹ The Order of Malta is an example in international law of an instance of a State losing its territory, retaining its sovereign status, and maintaining control over some non-territorial assets. The differences between the Order and the sinking States are many, but the precedent helps to inform the analysis below.

II.

ANALYSIS

The threshold question in this matter is whether sinking States ought to retain rights in their legacy waters at all. If they should, which rights should endure?

135. Taiwan is actually in possession of Itu Aba, but the People's Republic of China, in accordance with its "One China" policy, considers Taiwan's territorial claims as its own. *Making a Splash*, *supra* note 130.

136. *Id.*

137. *See* The Convention, *supra* note 15, art. 121.

138. *See, e.g.,* Bennett, *supra* note 132, at 427. In 1988, People's Republic of China ships came upon Vietnamese freight vessels in the Spratlys. The Vietnamese freighters were carrying supplies to Vietnamese army posts in the Islands. The two sides exchanged fire, but the conflict did not subsequently escalate. *Id.*

139. John Alan Cohan, *Sovereignty in a Postsovereign World*, 18 FLA. J. INT'L L. 907, 928–29 (2006).

140. *Id.* at 929.

141. *Id.*

Part A of this Section discusses these questions. This Note asserts that sinking States should retain rights similar to those which they currently enjoy in their EEZs, even after their territory is lost as a result of global climate change. Two possible courses of action present themselves to guarantee these States' successor entities some economic rights over their present maritime possessions.¹⁴² The first is to use the existing provisions in the Convention to secure these enduring rights. Part B of this section considers this option. The second possibility is to amend the Convention to explicitly guarantee sinking States' rights to the economic resources of their current maritime possessions. Part C addresses this option. Only the latter option effectively balances the interests of international justice and the freedom of the seas. It is also the most politically feasible. For these reasons, the best way to guarantee these protections for sinking States is an amendment to the Convention.

A. The Desirability of Enduring Maritime Rights for Sinking States in General

As discussed above, the preference in international law is for free use of the seas.¹⁴³ The current international law regime of maritime possessions and boundaries is a compromise to this preference, based largely on coastal States' ability to control the waters adjacent to their land possessions.¹⁴⁴ Permitting the sinking States' successor entities to retain complete sovereign rights to their former maritime possessions¹⁴⁵—waters they would conceivably have very little, if any, ability to control due to their lack of adjacent land bases—would upset this existing balance.

In the second half of the twentieth century, several trends developed in international law suggesting that allowing sinking States to retain some control short of complete sovereignty over their legacy maritime possessions would be permissible. The first of these is the 200 nautical mile EEZ.¹⁴⁶ This showed a tolerance in the law for zones over which States enjoy some rights in the pursuit of economic interests, but not full sovereignty. The second of these is the manner in which the international community has addressed environmental pollution and climate change.¹⁴⁷ This demonstrated recognition in international law that States injured by environmental damage—including climate change—should have some

142. Professor Rayfuse identifies the three possible methods of protecting sinking States' maritime rights. However, she does not make a comparative assessment of these methods based on their consistency with the international law principles of justice and freedom of the seas. See Rayfuse, *supra* note 23.

143. See discussion *supra* pp. 171–177 on the history of international maritime law.

144. See *id.*

145. Gaggin, *supra* note 10, at 82–83 (recommending sinking States be allowed to retain full sovereign rights to maritime possessions based on artificial islands or land formations that the Convention would otherwise consider rocks).

146. See discussion *supra* pp. 171–78.

147. See discussion *supra* pp. 176–177 on the development of standards for liability for environmental damage in the Convention and international environmental compacts.

recourse to compensation. The example of the Order of Malta also supports the proposition that a sovereign entity, after losing its territory, could still retain ownership, though not complete sovereignty, over real property.¹⁴⁸ The arrangement between the Order of Malta and its real estate possessions is similar to that which this Note proposes between the successor entities to the sinking States and their enduring EEZs.

Balancing international law's interest in the freedom of the seas against the desire to compensate sinking States' injuries due to rising sea levels¹⁴⁹ suggests a compromise between denying sinking States their legacy maritime rights and guaranteeing them enduring, complete sovereignty. Although historically the assertion of EEZs may have extended out from territorial sea claims,¹⁵⁰ in the case of the sinking States, it will be desirable to invert the normal regime for State control over the seas. In these situations, the international community should permit the imperiled States to retain EEZ rights to their legacy territorial seas, though not complete sovereignty. This scheme would permit sinking States to retain some benefits from their former territorial seas, namely the right to exploit and license resource collection in their legacy EEZs,¹⁵¹ with the end in mind that those resources would be used to benefit the resettled populations of the sinking States. It also avoids setting the dangerous precedent in international law that States may assert complete sovereignty over empty expanses of ocean. This compromise upholds the doctrine of freedom of the seas and also makes provisions for States injured due to manmade climate change.

Other States with low-lying territories will also lose significant areas of territorial sea and EEZs as their coastlines recede beneath rising sea levels. A mechanism for guaranteeing sinking States' enduring EEZs must state clearly that these legacy rights are an exception to the rule, created to partially compensate for these countries' complete loss of territory. To do otherwise might open the door to aggressive maneuvering from States who, although not facing existential threats, would still have an interest in protecting territorial sea and EEZ rights based on threatened territorial possessions. As discussed above,¹⁵² the mechanism used to provide for the sinking States must be applicable only to the sinking States in order to minimize the controversy that would result from considering larger States' maritime rights in the same negotiation.

148. See discussion *supra* p. 180.

149. See discussion *supra* pp. 170–171 on the harms to low-lying islands due to sea level rise.

150. See discussion *supra* p. 172 on the history of the exclusive economic zone.

151. See discussion *supra* p. 175 on the economic benefits sinking States derive from their maritime possessions.

152. See discussion *supra* pp. 179–80 regarding the Spratly Islands dispute.

B. Use of Existing International Law to Guarantee Sinking States' Rights to Their Legacy Exclusive Economic Zones

There are several provisions in the Convention that allow States to stabilize, in perpetuity, their territorial and EEZ claims against lost territory.¹⁵³ These provisions could be interpreted broadly to allow an enduring EEZ, however none of these provisions contemplated a total loss of territory when drafted.¹⁵⁴ Indeed, the Rockall, Okinotorishima, and Spratly Islands examples suggest that the sinking States face an uphill battle for international recognition of their enduring maritime rights without some additional, explicit law on the subject.¹⁵⁵ Skepticism from more influential States of the sinking States' post-inundation maritime claims may result in these claims merely being rejected entirely as illegitimate.

The provisions in the Law of the Sea Convention that could be used to cement sinking States' maritime rights include the following.

First, States may "fix" their baselines against coastal regression in accordance with Article 5 of the Convention, which establishes the standard for the baseline from which maritime boundaries are determined.¹⁵⁶

Second, Article 7(2) of the Convention permits a fixed baseline when coastlines are highly unstable because of natural conditions (erosion, silting, etc.).¹⁵⁷ Sinking States could fix their baselines on the basis of the contention that they are losing their territory due to a condition like erosion or silting.

Article 47 allows archipelagic States to create straight baselines under certain limited circumstances.¹⁵⁸ If imperiled States create fixed base points using artificial or protected islands, they could retain a large archipelago-based territorial sea.¹⁵⁹ Many States have created domestic legislation for the determination and publication of maritime claims. Under Articles 16, 47, and 75 of the Convention, legislation may be sufficient to fix baselines and guarantee international recognition.

States can also create limited rights for themselves beyond the normal territorial sea and EEZ by mapping and publishing the outer limits of their continental shelf.¹⁶⁰ Once they have done so by domestic rulemaking or

153. See discussion *supra* pp. 173–74 regarding possible uses of current provisions in the Convention to fix maritime boundaries against coastline regression. See generally Rayfuse, *supra* note 23 (considering in detail the possible uses of existing provisions in the Convention to fix sinking States' maritime boundaries).

154. See discussion *supra* pp. 173–74.

155. See discussion *supra* pp. 177–80 explaining that maritime claims to exclusive economic zones based on non-habitable land are generally met with skepticism or outright condemnation.

156. The Convention, *supra* note 16, at art. 5; Rayfuse, *supra* note 23, at 181.

157. The Convention, *supra* note 16, at art. 7(2); Rayfuse, *supra* note 23, at 182.

158. The Convention, *supra* note 15, at art. 47.

159. Rayfuse, *supra* note 23, at 182–83.

160. *Id.* at 185–86 (citing the Convention, *supra* note 15, at art. 76).

legislation, those boundaries and the resulting privileges are arguably permanent.¹⁶¹

There are several positive aspects of using existing law to assert enduring claims over legacy territorial seas and EEZs. The first is that it does not require the difficult political wrangling—years of delay, costly lobbying and negotiation, etc.—that would go into any new treaties or conventions. It also allows imperiled States to protect their rights through domestic legislation.

On the other hand, the negative consequences of this approach are notable. Using the current Convention to address such a novel problem could result in claims from other States that are outside the intended scope and purpose of the Convention. Take for instance the People's Republic of China's claims of a territorial sea around its artificial islands in the South China Sea,¹⁶² or Japan's EEZ claims based on Okinotorishima.¹⁶³ Giving sinking States more liberal rights to maritime possessions within the provisions of the current Convention could encourage States with questionable claims, and without a justified interest, to use the Convention in a similar way to assert their claims. This conflicts with the tradition in international maritime law to limit claims to possessions.¹⁶⁴ It is also likely that many international actors would refuse to recognize the sinking States' claims developed using these mechanisms because they do not fit the original intentions of the Convention.¹⁶⁵ Thus, using the existing treaty framework alone would not create expansive recognition of imperiled States' rights to govern their former seas, and could embolden other States to assert meritless claims. Instead, a new international convention or a series of bilateral treaties to create broad, explicit recognition of sinking States' enduring sovereignty over their legacy territorial seas would likely have the benefit of achieving broad, clear-cut recognition of these enduring economic rights.

C. *Amendment to the Law of the Sea Convention*

The best method for protecting sinking States' rights to enduring EEZs is an explicit amendment to the Convention.¹⁶⁶ This approach has the advantages of clarity and consensus among the international community, since the amendment process encourages unanimity.¹⁶⁷ If kept separate from the issue of how to manage other non-sinking States' maritime possessions in the face of rising sea levels, it could also avoid a great deal of political wrangling.

161. *Id.*

162. *See* discussion *supra* pp. 179–80.

163. *See* discussion *supra* pp. 178–79.

164. *See* discussion *supra* pp. 171–72.

165. *See* discussion *supra* pp. 171–72 explaining that widespread concerns about the loss of the sinking States only came after the Convention came into force.

166. According to the amendment procedures discussed *supra* pp. 175–77.

167. The Convention, *supra* note 15, at arts. 312, 313.

To accomplish its goals of protecting sinking States' economic rights in their former maritime possessions, such an amendment must mirror the current provisions regarding EEZs. It must apply only to those States existentially threatened by rising sea levels. The amendment must also define the point in time at which the enduring boundaries will be set because, under the current provisions of the Convention, these boundaries will continue to shrink with the loss of territory. The text of the amendment should be as follows:

1. The purpose of this Amendment is to provide States whose territory is existentially threatened by rising sea levels with continued rights of access to economic resources in their legacy territorial sea and EEZ.
2. The States currently eligible to claim the rights defined in this Amendment are the Maldives, Kiribati, Tuvalu, and the Marshall Islands. Other States may be added to this category by amendment to the Convention according to the processes defined in Articles 312 and 313.
3. States in this category shall have rights to a fixed, enduring EEZ. States in this category shall enjoy the privileges States enjoy in EEZs as defined in Part V. States shall also have in their enduring EEZ the responsibilities defined in Part V.
4. The enduring EEZ shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured on the date this Amendment enters into force.
5. The enduring EEZs of States subsequently added to this category shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured on the date the Amendment adding them to the category enters into force.
6. Foreign States shall enjoy the rights of access listed in Article 58 in the enduring EEZ.¹⁶⁸

One critique of this method is that it denies imperiled States some rights they enjoyed while in complete sovereign control over their territorial seas.

A crucial benefit of this method is that it creates an unambiguous framework to protect some of the imperiled States' sovereignty over their former territorial seas. This new amendment is also the most politically practical option. It avoids the ambiguities that could arise from using existing provisions in the Convention to guarantee new rights to States—rights the Convention writers did not originally contemplate. It also separates the question of which rights are available to sinking States from the question of which rights are available to States that, although not existentially threatened by rising sea levels, will lose some territory to rising sea

168. The Articles and Parts cited in the text of the proposed Amendment are those in the Convention. *See supra* note 15.

levels. Any agreement defining sinking States' rights will be much more palatable to larger States if its impact on them will be minimized.

This option also best balances the dueling interests of international law: justice and freedom of the seas. Justice is enhanced because the peoples displaced by rising sea levels would have access to financial support by using the resources of their lost countries. The principle of freedom of the seas is served at the same time by restricting exclusive State control over the areas in question. Therefore, the amendment brings with it the additional benefit of being consistent with the two main principles of the international law regarding the governance of the sea.

CONCLUSION

World mythology is replete with stories of catastrophic inundations.¹⁶⁹ Sadly, the twenty-first century will inevitably see these stories manifest when rising sea levels submerge the sinking States discussed in this Note. The international community now has the opportunity to ameliorate the harms that will befall the sinking States and their populations. Engineers,¹⁷⁰ humanitarians,¹⁷¹ and statesmen¹⁷² debate how to wield the tools of their disciplines to assist in this work. An effective solution to protecting sinking States must balance the law's historical preference for maintaining the freedom of the seas against recent trends in favor of ameliorating the losses States suffer due to environmental pollution and climate change.¹⁷³ This Note has argued that allowing successor entities to retain some type of enduring EEZ over their legacy maritime possessions would strike the balance between these two interests, guaranteeing the freedom of the seas and also ameliorating the injuries sinking States will suffer due to rising sea levels.¹⁷⁴ This compromise would be most effective if done in an amendment to the Convention.¹⁷⁵ Allowing sinking States' successor entities to enjoy continued exclusive economic rights in their former maritime possessions is a relatively small means of assisting them in their time of need, but it will be an effective piece of a larger regimen of assistance.

Climate change will have an enormous impact on world history over the next century. Seemingly no area of human activity—whether political, economic, environmental, or other—will remain unaffected. The plight of the sinking States, their 580,000 inhabitants, and the generations that will follow those inhabitants,

169. See, e.g., *Genesis* 6:9 (King James) (Noah's flood in Christianity); Qur'an 11:38–45 (Noah's flood in Islam); PLATO, *supra* note 1 (the story of Atlantis).

170. See Gagain, *supra* note 10 (explaining how the Maldives are engaging in massive public works to build new artificial islands and shore up eroding, low-lying islands).

171. See Caramel, *supra* note 12 (explaining how the Anglican Church in Fiji sells Kiribati government land to resettle its population).

172. Burkett, *supra* note 16 (evaluating the possibilities for successor entities to sinking States).

173. See discussion *supra* pp. 171–177.

174. See discussion *supra* pp. 181–83.

175. See discussion *supra* pp. 184–86.

may only be one small thread in the world's historical tapestry, but their difficulty will be real. Fortunately, it can also be mitigated.