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Focus on International Human Rights

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Message From the Chair

Human Rights and the Law

This edition of the *International Law Quarterly* is dedicated to a topic I have wanted to highlight during my chairmanship, and that is the topic of human rights.

When it comes to the subject of human rights, we can look at it from many perspectives, including the political, philosophical, humanitarian, and economic, but as lawyers, our focus, and the focus of this edition of the *ILQ*, will be on human rights and the law, which is a broad topic and an extremely international one.

CARLOS F. OSORIO

We know that each continent on earth and many of its islands, including one only ninety miles away, have human rights issues, or better put, problems. Lawyers are often the ones advancing and defending human rights, and calling out abuses, such as the separation of children from their parents at the U.S.-Mexico border or the systematic erosion of democracy by dictatorial regimes. Lawyers are often targets of repression and need a strong backbone, or they develop one out of necessity.

Human rights lawyers in the third world and at our borders deserve our support within the ILS, and we have provided it, both as a section and quietly on an individual basis. We have assisted our colleagues in Cuba, Haiti, Nicaragua, and Venezuela, and our reach is not limited to those countries, although certainly the news from there and their proximity to Florida create natural affinities within our membership.

I hope this edition of the *ILQ* will raise your awareness of human rights issues and the practice of law. I also hope it will enlighten the majority of us who are not practitioners in this very important area of public international law, which most of us understand on a conversational but not a practical or procedural level.

To show our ongoing dedication to the human rights practice, the ILS recently created the Committee for Human Rights, Public International Law, and Global Justice, which has been active and well-supported by ILS members.

Human rights issues will also be prominently addressed during our annual iLaw Conference at the JW Marriott Marquis on 22 February 2019 in Downtown Miami. Please register by visiting *http://internationallawsection.org/events/ilaw/*.

Lastly, a human rights conference at the University of Miami Alumni Center, headed by Professor Elizabeth Iglesias of the University of Miami, has been scheduled for 19 April 2019. More news on that to come.

I hope you enjoy this edition of the *ILQ*, and I invite you to remain involved in our vibrant and dynamic section of The Florida Bar, of which we all should be proud.

Carlos F. Osorio
Chair
International Law Section of The Florida Bar
Harper Meyer LLP

From the Editors . . .

ANA M. BARTON

LAURA M. REICH

Seventy years ago, in the aftermath of World War II, a group of visionaries from different legal and cultural backgrounds and from all parts of the world came together to draft the United Nations' Universal Declaration of Human Rights, which was announced by the U.N. General Assembly in Paris on 10 December 1948. The Declaration set forth, for the first time, those fundamental and inalienable human rights belonging to all members of the human family. It was a landmark document, declaring that all people "are born free and equal in dignity," and are "endowed with reason and conscience and should act towards one another in a spirit of brotherhood."

In honor of the seventieth anniversary of the Universal Declaration of Human Rights, the *International Law Quarterly* has collaborated with the International Law Section's newly created Committee for Human Rights, Public International Law, and Global Justice to bring you this *ILQ* edition entitled "Focus on International Human Rights." While public international law has made great strides in promoting and safeguarding the worldwide recognition of certain fundamental human rights since the end of the Second World War, sadly, human rights abuses continue around the globe.

The topic of human rights could not be more timely given the current state of affairs across the world, which, among other things, is marked by mass movements of people fleeing harrowing conditions due to war, extreme violence, poverty, and other severe humanitarian deprivations. Human rights abuses are present before, during, and after these migrations. Today, Syrian refugees desperately seek basic human needs like food and shelter as they flee the violence in their home country. Closer to home, along the U.S.-Mexico border, a sharp spike in the number of immigrants seeking entry into this country resulted in the separation of families, including families with children, as a matter of U.S. immigration policy that underwent intense scrutiny and, eventually, reversal.

Certainly, technology and access to more transparent reporting has helped spread awareness of current human rights abuses across the world. Images of civilian war victims in Qatar, starvation in South Sudan, and violent political protests in Venezuela or Nicaragua, for example, cannot be avoided or ignored. We have seen the emergence of tent cities across the Middle East and Africa as entire populations flee their homes in desperation, not to mention the thousands-deep caravan of individuals making their way north through Central America to the United States. And with the images come stories of people desperately seeking better lives, free of violence and with the opportunity to work and provide for themselves and their families.

Florida is not immune to the effects of these global crises. Traditionally, and as a result of geographical proximity, South Florida has been the place of retreat for Latin Americans who feel unsafe in their home countries. Indeed, lawyers in Florida are holding the powerful accountable for trampling on human rights.

To that end, **Professor Elizabeth Iglesias** starts off this edition of the *ILQ* by making the case for why universal human rights should matter to the International Law Section of The Florida Bar, providing a background on the emergence of the Universal Declaration of Human Rights in 1948 and the international treaties that codify these rights in binding law. Next, **Rafael Ribeiro** and **Felipe Hasson** explore the different arguments and points of view on whether there exists—or should exist—a human right to be free from official corruption. That leads us

From the Editors, continued

into a discussion on passport seizures by **Richard Alton**, who provides an update to his prior work on the topic. Alton raises questions about the implications of the U.S. government's impounding of foreign passports, and whether it is an encroachment on the jurisdiction of the issuing state. From there, **Emercio Aponte** makes the case for why fear of future political persecution is a crime against humanity, such that Venezuelans should be granted asylum in the United States on the basis of a well-founded fear of such future persecution by the government of President Maduro.

The next articles explore issues of criminal international law. **Carolina Obarrio** provides us with a brief background on the creation of the International Criminal Court, and we are excited to bring you her work both in its original Spanish version and in English, thanks to TransPerfect Legal Solutions. Finally, **Takashi Yokoyama** considers the continued existence and implementation of the death penalty, which departs from international norms, in both the United States and Japan.

Although abuses still abound, there are many reasons for hope. As the world evolves, so has the concept of human rights, and in the last decade, we have seen the scope of human rights expand tremendously. Humanitarian organizations are quick to scrutinize and criticize governments that do not support an independent judiciary or enforce the rule of law. Torture has been outlawed in many parts of the world, and peaceful protests permitted. There are pushes to include the right to environmental protection, access to clean water, and access to the Internet within the gamut of fundamental human rights. We hope that this issue of the *ILQ* will serve as a reminder to our readers that, as lawyers, we have the unique ability (and responsibility) to elevate the conversation and to shine a light on those who would prefer their actions be conducted in the shadows.

Sincerely,
Laura M. Reich—co-Editor-in-Chief
Ana M. Barton—co-Editor-in-Chief

Universal Human Rights: A Matter of Necessary and Proper Concern for the International Law Section of The Florida Bar

By Elizabeth M. Iglesias, Miami

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Seventy years ago, in 1948, the General Assembly of the United Nations (UN) adopted the Universal Declaration of Human Rights (UDHR). The UDHR includes thirty articles affirming the basic and universal rights of the human person.[1] Although recognized today as customary international law and some of its provisions are deemed jus cogens, as a resolution of a deliberative body with no legislative power, the UDHR had no direct legal effect. In the absence of a common legislative power, the only way these rights could become universally binding law was for each member state of the UN to incorporate them into its own domestic legal system. Proponents would advance this process by codifying in a binding treaty the rights recognized in the UDHR. The rights would become universally binding as increasing numbers of member states ratified the treaty and implemented their obligation to make them legally enforceable.

Universal Human Rights, continued

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The move from nonbinding resolution to a binding treaty underscored divergent views regarding the nature, scope, and order of rank proper to the rights recognized by the UDHR, which included substantive economic, social, and cultural rights, as well as civil and political rights. This divergence eventually resulted in the production of two distinct treaties eighteen years after the UDHR was adopted. The International Covenant on Civil and Political Rights (ICCPR) addresses the fundamental freedoms necessary to preserve individual liberty and thus prevent the consolidation of totalitarian state power. The International Covenant on Economic, Social and Cultural Rights (ICESCR) addresses the basic minimums necessary to cultivate, and enable individuals to develop and enjoy, fully human lives. Together, the UDHR and the two covenants constitute the international bill of rights for the world community.

It is impossible to exaggerate the significance of these achievements given the context of their fruition after the Second World War. The rise of totalitarian regimes had enabled criminal factions in the Axis powers to take control of the state and use its structures and institutions to launch aggressive wars and execute the Holocaust as a program of positive law and national lawlessness. After the war, "realism" was ascendant in the political belief that neither law nor morality, but only power, could provide a foundation for international order.[2] In philosophy, "humanism" was in retreat in the belief that no natural order grounded human society or informed human nature.[3] With these world views in play, the notion of a declaration of universal human rights appeared as a suspiciously naive idealism that would, at best, distract from the imperative of securing international order through the maximization of national power and enforcement of the post-war balance of power. At worst, a declaration of universal human rights based on false presuppositions about human nature and the nature of a "fully human life" could plant its own seeds of future strife.

Against this backdrop of post-war nihilism, the UDHR reflects the vision of those who advocated that international peace and justice required the adoption and effective implementation of an international bill of rights. The recognition and adoption of such rights are often and rightly credited to the vision of Franklin and Eleanor Roosevelt. In his famous "Four Freedoms" speech, President Roosevelt presented the vision of a moral world order founded on four essential freedoms—freedom of speech and expression, freedom of every person to worship God "in his own way," "freedom from want," and "freedom from fear."[4] After his death, his wife and former first lady would lead in drafting the UDHR as the first chair of the newly established UN Commission on Human Rights.[5]

Without the Roosevelts' leadership, the diplomatic path to the adoption of the UDHR and its further codification in the covenants would have been impossible. But to fully appreciate the accomplishment of the UDHR,

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Corruption and Human Rights

By Rafael R. Ribeiro and Felipe Hasson, Miami

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The curved white band diagonally spanning the Brazilian flag sets forth the national motto, *Ordem e Progresso* (Order and Progress). Inspired by the Positivist theories of the French philosopher Auguste Comte, the national motto was to reflect "love as the principle and order as the base, with progress as the goal."[1] Five years after the initiation of the largest anticorruption investigation in Brazilian history—known as Operation *Lava Jato*—which has led to the arrest and conviction of hundreds of individuals involved in official corruption,[2] a more appropriate motto for the country's flag would have been *Criam-se Dificuldades Para Vender Facilidades*, meaning "We'll Create Difficulties to Sell You Solutions."

Indeed, corruption is so systemic in Brazilian society that several expressions relating to corruption have entered the Brazilian vernacular, most famous among them the *jeitinho brasileiro* (Brazilian way). The interplay between these concepts can be illustrated by the following example: when confronted with a bureaucrat who insists that issuing your Brazilian passport will take months due to a backlog (the above-mentioned "difficulty"), Brazilians reflexively ask him if there is a *jeitinho*, to which the bureaucrat may respond that a bribe will put you on the express track for the passport (the above-mentioned "sale of a solution"). At all levels of Brazilian society, such corruption-related interactions with bureaucrats are commonplace.

And Brazilians are not alone. According to a 2017 Transparency International survey of corruption in Asia, more than half of the respondents from India admitted to paying bribes in exchange for the provision of basic services such as education and health care.[3] Similarly, in an April 2018 poll of 400 Mexican citizens, 37% found that corruption was worse than the previous year, 64% found that the Mexican government was not doing enough to combat corruption, and 73% found that corruption had taken root in "all of the Mexican government."[4] A quick review of Transparency International's Corruption Perceptions Index reveals that corruption is not a developing country problem—no country is immune from the scourge of official corruption.

Faced with evidence of the severe impact that official corruption inflicts on a large percentage of the world's population, several commentators have argued that official corruption itself is a violation of a human right—the right to be free from such corruption. Other commentators have argued that corrupt practices are

Corruption and Human Rights, continued

indirectly linked to the violation of human rights, but they are not human rights violations themselves. In this article, we will briefly discuss these countering viewpoints and will weigh the pros and cons of classifying acts of official corruption as per se violations of human rights.

Existing International Legal Framework Relating to Official Corruption

Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish. This evil phenomenon is found in all countries—big and small, rich and poor—but it is in the developing world that its effects are most destructive. —Kofi Annan, former secretary-general of the United Nations.[5]

Public Domain

Although corruption currently is not recognized as a violation of human rights, almost all jurisdictions criminalize or punish official corruption.[6] In addition to local laws, several international treaties also address official corruption, and several international tribunals have adjudicated claims for human rights abuses derived from acts of corruption. Before discussing whether it is necessary or advisable to elevate freedom from official corruption to a recognized human right, below is a summary of the major international treaties and regimes aimed at fighting corruption.

The United Nations Convention Against Corruption

The General Assembly of the United Nations, after passing several resolutions since 2000 with the general theme of combating corruption, adopted, on 31 October 2003, the United Nations Convention Against

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Revisiting the Nature of a Passport and the Implications of Government Seizures

By Richard A.C. Alton, Miami

Introduction

Over eight years ago, I produced a law review article with my friend and colleague, Jason Reed Struble, on a topic that was sparsely considered in the international legal realm. That initial work has been downloaded close to 3,000 times and cited by authors from around the world, in pieces in several languages, and by our own U.S. Court of Appeals. I now believe it is time to revisit my work on foreign passport seizures.[1] The emphasis behind this revisiting comes from the realization that not much has changed since Mr. Struble and I first set hand to keyboard, and direction is still needed in this realm.

jackmac34/pixabay.com

When I was practicing deportation defense regularly, I had many unpleasant experiences ensuing from the impounding of a client's foreign passport by the Department of Homeland Security (DHS) before placing him or her in removal proceedings. Recently I had the pleasure of attending a CLE program produced by the Miami Lakes Bar Association on immigration, during which the topic arose that the DHS still seizes individuals' foreign passports, and occasionally loses track of or fails to timely return them, causing turmoil and undue delay to these individuals. These issues can include unnecessary extended detention, loss of the ability to travel freely (even domestically due to lack of identification), and costs for renewal (if an individual's particular consulate is even willing to do so). Additionally, over the past several years, I have received phone calls from interested parties whose foreign passports were seized, both in the United States and Europe. None of these recent activities come as a surprise to me, as these issues were the impetus for my original work. What does surprise me is the continued lack of regulation on the issue.

As to passports themselves, they have existed for centuries.[2] A passport has served as "an authorization to pass from a port or leave the country, or to enter or pass through a foreign country; a permit for soldiers to depart from their service; a sea letter; and a document issued in time of war to protect person from the general operations of hostilities."[3] Also, "much that can be said about the nature and function of passports is derived from the jurisprudence and practice of each State with respect to its own passports and its view towards the passports issued by other States."[4] And widespread consistent state practice arising from a sense of legal obligation supports the view that a particular practice has become a rule of customary international law.[5]

In the United States, the DHS confiscates a foreign national's passport when he or she is in removal proceedings. This is done for practical reasons—to

prevent flight and to facilitate return of the foreign national to his or her country of origin if he or she is ordered deported. If the foreign national is removed, he or she will be able to return to his or her place of origin. If the foreign national is not removed, his or her passport will be returned.

The seizure of a passport is indeed a seizure of the property of a foreign government. Based on many accepted sources of customary international law, Mr. Struble and I concluded, in 2010, that the U.S. government's impounding of a foreign passport violates general principles of customary international law because it is an encroachment upon the personal jurisdiction of the issuing state. After almost a decade, I still find myself desirous of a legal standard that could be used to prevent the DHS from confiscating clients' foreign passports or, at a minimum, to codify the procedures for doing so.

The Nature of a Passport Under International and U.S. Law

Under the doctrine of restricted returnability, a state can return an individual who is refused entry into its borders to the state that issued the individual's passport[6] because "international comity recognizes that the bearer of a legal passport will be readmitted to the issuing State if the passport is valid."[7] A passport itself is the property of the issuing government.[8] A state's property right in its passport flows directly from its sovereign right to determine its own citizens and the criteria for becoming one under domestic law.[9] A state issuing the passport has the right to demand its return from a foreign government taking custody of the document[10] since the actions of one state should not interfere with, or encroach upon, the personal jurisdiction of another state.[11]

Under U.S. law, the issuance of a passport is an act of state.[12] A U.S. passport is the property of the U.S. government and must be returned to the government upon demand.[13] Several U.S. Department of State memoranda and dispatches from the 1920's and 1930's indicate that the U.S. government considers the impounding of a U.S. citizen's passport by foreign governments "inconsistent" with customary international law.[14] Until 1931, the Department of State asserted that the issuing government always retains a paramount right to its passport.[15] The current Department of State's position on the issue is unknown.

A State's Impounding of a Foreign National's Passport Is an Impermissible Interference With the Personal Jurisdiction of the Issuing State Because a Passport Is the Property of the Issuing State: Passport Seizure Case

In 1972, an alien living in the Federal Republic of Germany challenged the impounding of his passport by the federal authorities in proceedings before the Superior Administrative Court of Munster.[16] The alien argued that Article 3 of the Law on Aliens (*AuslG*) does not entitle the German administrative authorities to confiscate or impound a valid foreign passport.[17] The court agreed, for only if the alien had placed himself under German passport jurisdiction by obtaining a German alien's passport or refugee document, or acquiring German citizenship, would the issue of confiscation of a foreign passport have come into question under German federal law, and because the alien had not done so, the court relied on general principles of international law.[18] The court concluded that the confiscation or impounding of a valid foreign passport—even on the grounds of control of aliens—constitutes an encroachment upon the passport jurisdiction of the foreign state issuing the document.[19]

The U.S. Government's Impounding of a Foreign National's Passport Encroaches Upon the Personal Jurisdiction of Another State, but It Ensures Returnability: *Onwubiko v. United States*

Onwubiko v. United States concerns the confiscation by the DHS of a foreign national's passport.[20] Martin Onwubiko was arrested at JFK International Airport on drug trafficking charges. The arresting officers seized

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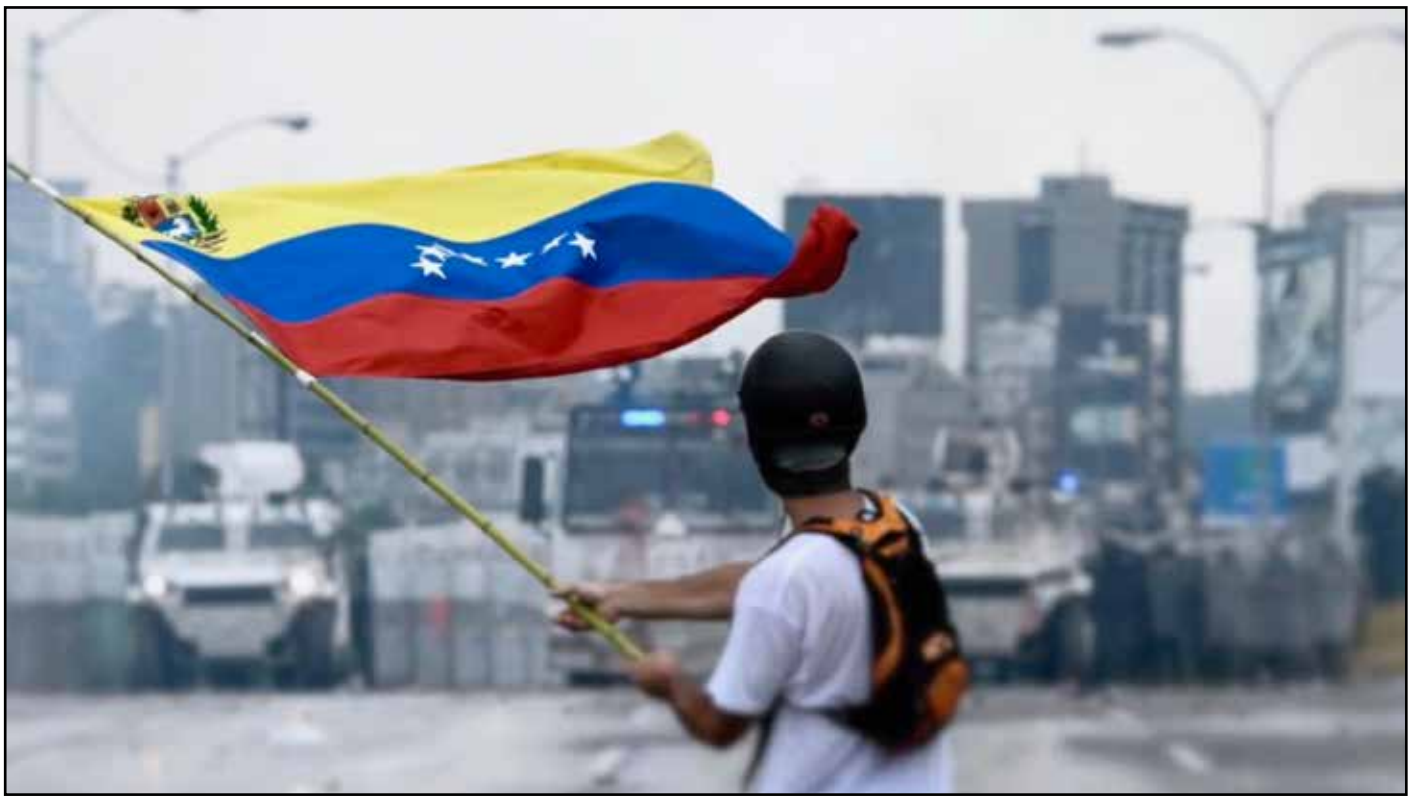
The Well-Founded Fear of Future Persecution Within the Context of Crimes Against Humanity in Venezuela

By Emercio José Aponte Núñez, Gainesville



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It is impossible to deny the authoritarian nature of the Venezuelan executive power, which exercises control over the other branches of its government.[1] Multiple human rights reports and press releases detail the existence of a pattern of persecution, torture, and ill-treatment, as well as extrajudicial killings, arbitrary detentions, brutal repression, and the use of the judiciary to intimidate, prosecute, and punish those who oppose the government. These abuses are carried out in a manner that implies the existence of a systematic violation of human rights with complete impunity.[2] Such systematic violations of human rights with complete impunity grossly violate the fundamental human rights principles expressly enshrined in the Venezuelan Constitution.[3]

The severity of these actions perpetrated by the government of Venezuela through its security forces, along with paramilitary groups named *colectivos*, provoked the secretary general of the Organization of American States (OAS) to announce on 19 July 2017 the commencement of an investigation into the possible commission of crimes against humanity in Venezuela, which would be reported to the International Criminal Court (ICC).[4] The investigation was led by a Panel of Independent International Experts, which released a report on 29 May 2018, confirming that reasonable

Crimes Against Humanity in Venezuela, continued

grounds existed to believe crimes against humanity have been perpetrated in Venezuela.[5]

Likewise, the United Nations' high commissioner for human rights announced on 11 September 2017 that Venezuelan security forces may have committed crimes against humanity against dissident protesters.[6] On 8 February 2018, the prosecutor of the ICC started a preliminary investigation into the situation in Venezuela since at least April 2017, which later was extended to include any crime under the jurisdiction of the ICC that may have been committed since 12 February 2014; and due to the "open-ended nature" of the Venezuelan situation, the Office of the Prosecutor stated it would "continue to record allegations of crimes committed in Venezuela."[7]

The report of the General Secretariat of the OAS and the Panel of Independent International Experts on the Possible Commission of Crimes Against Humanity in Venezuela, in addressing the use of a military plan to target the civilian population and the Bolivarian concept of the internal enemy, concluded that "[t]o the Venezuelan Government, the internal enemy is any member of the population in opposition to the Bolivarian revolution. By this definition this includes any individual—not just formal political opposition parties—who speaks out against government policies."[8]

The report also addresses specific groups of the Venezuelan population who have been political prisoners and the subject of the attacks perpetrated within the context of crimes against humanity, among them "political activists, students, professors, journalists, military members, doctors, human rights defenders and citizens from every walk of life, who were exercising their fundamental right to peaceful protest, and demanding respect for the rights protected by the Constitution," as well as their families.[9]

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The Rome Statute That Created the International Criminal Court

By Carolina Obarrio, Miami

As a result of the atrocities committed in the First and Second World Wars, the international community shouted "never again" and committed itself to preventing a recurrence of such an enormous tragedy as the Holocaust for future generations.

UN General Assembly meeting room
UN Photo/Manuel Elias

Consistent with this commitment and with the Principle of Universal Jurisdiction, five international investigatory commissions and four ad hoc international tribunals were created, namely: the International Military Tribunal to prosecute the major war criminals of the European war of 1945, better known as the Nuremberg and Tokyo Tribunals; the International Military Tribunal for the Far East of 1946; the International Criminal Tribunal for the former Yugoslavia of 1993; and the International Criminal Tribunal for Rwanda of 1994.

The work of these tribunals was limited, and they were only partial mechanisms for the establishment of international criminal liability. It is for this reason, and also because criminal justice lacked jurisdictional bodies with permanent worldwide reach, that the UN International Law Commission saw the need to establish in the international community a permanent criminal court. In 1992, the UN General Assembly requested the International Law Commission to prepare a draft statute for the creation of an international criminal court.

The premises of the International Criminal Court in The Hague, Netherlands. The ICC moved into this building in December 2015.
Hypergio - Own work [CC BY-SA 4.0, https://commons.wikimedia.org/w/index.php?curid=47958553]

The process of creating this court had as its main precedent Resolution No. 50/46 of 11 September 1995, pursuant to which the UN General Assembly decided to establish a Preparatory Committee for the creation of an international criminal court, whose main function would be to review the draft statute for the creation of a permanent criminal court, prepared by the UN International Law Commission in 1994.

International Criminal Court, continued

After a series of meetings of the Preparatory Committee, the UN General Assembly, in its 52nd Regular Session and by Resolution No. 52/160 of 15 December 1997, convened the **United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court**, which was held in Rome, Italy, from 15 June to 17 July 1998. That diplomatic conference, on 17 July, approved the Final Act that adopted the Rome Statute, establishing the International Criminal Court (ICC), with a vote of 120 states in favor, 21 abstentions, and 7 against. In that same session, it was decided that the seat of the court would be in The Hague, The Netherlands.

Pursuant to the Rome Statute, the ICC is a permanent institution with jurisdiction over natural persons, and not over states, having jurisdiction to hear the most serious offenses of international significance, such as genocide, crimes against humanity, war crimes, and crimes of aggression, codifying for the first time these offenses in an organic and detailed manner and making individual criminal liability effective.

The Rome Statute is the result of a long evolution of the international community to establish a permanent criminal jurisdiction with standing to hear international crimes, constituting an international jurisdictional stance against impunity, and also contributing to the prevention of new crimes.

Consistent with the above, it is worth noting that the ICC is, by itself, a special jurisdiction, which will act only in the most serious cases of violations of human rights and international humanitarian law, and in a subsidiary or complementary manner to national justice.

The ICC complements national jurisdictions, and it is to be used only in the event that a state is unable or unwilling to prosecute persons accused of serious human rights violations. The ICC is a permanent institution, which is authorized to exercise its jurisdiction over persons with respect to the most serious crimes of international significance in accordance with its statute, complementary to national criminal jurisdictions.

The Rome Statute creating the ICC entered into force on 1 July 2002, and it was formally constituted on 11 March 2003, in its inaugural session held in The Hague, The Netherlands. As a result of its coming into force, the perpetrators of the worst crimes against humanity may be judged, thus fighting impunity.

Editors' note: We are grateful to TransPerfect Legal Solutions for providing the English translation of this article.

***Carolina Obarrio** is a highly respected, well-known, and successful litigator and mediator licensed in Buenos Aires, Argentina. She serves as one of only eight Argentine foreign legal consultants with The Florida Bar. She is a member of the International Law Section's Standing Committee on Diversity and Inclusion. Dr. Obarrio has expertise in criminal and commercial litigation and complex foreign investigations, especially involving ethics and fraud allegations; international law and international arbitration, mediation, and other ADR procedures; risk mitigation; and project management.*

El Estatuto de Roma Que Crea La Corte Penal Internacional

Por Carolina Obarrio, Miami

Como consecuencia de las atrocidades cometidas tanto en la Primera como en la Segunda Guerra Mundial, la Comunidad Internacional se comprometió a liberar a las generaciones futuras de esos crímenes y es así como el mundo gritó "Nunca más" ante la enormidad del holocausto vivido.

Congruentes con tal compromiso y con el Principio de Jurisdicción Universal, es que se crearon cinco Comisiones Internacionales de Investigación y cuatro Tribunales Internacionales Ad-hoc, siendo éstos: El Tribunal Militar Internacional para perseguir a los grandes criminales de la Guerra de la escena Europea de 1945, mejor conocido como los Tribunales de Nüremberg y de Tokyo; el Tribunal Militar Internacional para perseguir a los criminales de guerra del Lejano Este de 1946; El Tribunal Penal Internacional para la Ex Yugoslavia de 1993 y el Tribunal Penal Internacional para Ruanda de 1994.

La labor de estos Tribunales fue limitada y solo parcialmente fueron mecanismos para el establecimiento de una responsabilidad penal internacional. Es por esta razón y porque además la justicia penal había carecido de Órganos Jurisdiccionales de alcance mundial permanente, que la Comisión de Derecho Internacional de las Naciones Unidas concibió la necesidad de establecer en la Comunidad Internacional un Tribunal Penal Permanente. En 1992 la Asamblea General de la ONU solicitó a la Comisión de Derecho Internacional, la preparación de un Proyecto de estatuto de una Corte Penal Internacional.

El proceso de creación de este Tribunal tiene como principal antecedente la Resolución No. 50/46 de 11 de septiembre de 1995, por medio de la cual la Asamblea General de las Naciones Unidas decide constituir un Comité Preparatorio para el establecimiento de una Corte Penal Internacional, el cual tendría como función principal la de revisar el proyecto de Estatuto para la creación de un Tribunal Penal Permanente, elaborado por la Comisión de Derecho Internacional de la ONU en 1994.

Después de una serie de reuniones de dicho Comité Preparatorio, la Asamblea General de las Naciones Unidas en su 52º. Periodo Ordinario de Sesiones y por Resolución No. 52/160 de fecha 15 de diciembre de 1997, convocó a la **Conferencia Diplomática de Plenipotenciarios de las Naciones Unidas sobre el Establecimiento de una Corte Penal Internacional,** la cual se celebró en Roma, Italia, del 15 de junio al 17 de julio de 1998. Dicha Conferencia Diplomática aprobó el 17 de julio el Acta Final que adopta el Estatuto de Roma por el cual se constituye la Corte Penal Internacional, dicha Acta contiene la votación de los Estados presentes, que fue de la siguiente manera: 120 Estados a favor, 21 abstenciones y 7 en contra, en dicha sesión se decide que la Sede de la misma sea la ciudad de La Haya, Países Bajos.

Por el Estatuto de Roma, la Corte Penal Internacional es una Institución Permanente con jurisdicción sobre personas físicas o naturales y no sobre Estados, teniendo competencia para conocer los crímenes más graves de trascendencia internacional, como lo son: el genocidio, el de lesa humanidad, los crímenes de guerra y los de agresión, codificando por primera vez estos crímenes de manera orgánica y detallada y haciendo efectiva la responsabilidad penal individual.

El Estatuto de Roma, es consecuencia de una larga evolución de la Comunidad Internacional por establecer una Jurisdicción Penal Permanente con competencia para conocer crímenes internacionales, constituyendo además una instancia jurisdiccional internacional en contra de la impunidad, contribuyendo también a la prevención de nuevos crímenes.

Congruente con lo anterior, vale la pena resaltar que la Corte Penal Internacional constituye, por sí misma, una jurisdicción especialísima, que actuará sólo en los casos más graves de violaciones a los derechos humanos y al Derecho Internacional Humanitario y de manera subsidiaria o complementaria a la justicia nacional.

El Statuto de Roma, continued

La Corte Penal Internacional es un Organismo complementario de las jurisdicciones nacionales, y solamente es competente en caso de que el Estado no pueda o no quiera juzgar a personas acusadas de estos crímenes. La Corte Penal Internacional, es una institución permanente, que está facultada para ejercer su jurisdicción sobre personas respecto a los crímenes más graves de trascendencia internacional de conformidad con su Estatuto y tendrá carácter complementario de las jurisdicciones penales nacionales.

El Estatuto de Roma que crea la Corte Penal Internacional entró en vigencia el 1º. de julio de 2002, y se instaló formalmente el 11 de marzo de 2003, en su sesión inaugural que se llevó a cabo en La Haya, Holanda. A partir de su vigencia podrán ser juzgados los autores de los peores crímenes contra la humanidad, combatiendo así la impunidad.

The Death Penalty in the United States and Japan—*One for All*

By Takashi Yokoyama, Miami

How many countries have retained or abolished the death penalty? The Amnesty International Global Report *Death Sentences and Executions 2017* classifies death penalty usage among the world's countries into four categories.[1] Among these categories, the United States and Japan belong to the Retentionist category, as do China, Egypt, India, Saudi Arabia, and Singapore, while a majority of the world's countries have abolished the death penalty for all crimes, or for ordinary crimes only, or otherwise in practice.[2]

Among the retentionist countries, the United States has reached widely varying conclusions concerning the death penalty. Twenty states, the District of Columbia, and Puerto Rico have abolished the death penalty for all crimes. Of the thirty U.S. states that retain the death penalty, three governors have established administrative moratoriums on execution,[3] and ten states have not carried out an execution in the last decade.[4]

In 2014, a survey by the Cabinet Office, Government of Japan suggested strong public support for the death penalty, showing that 80.3% of those aged 20 or older favored it.[5] In July 2018, thirteen cult members of *Aum Shinrikyo*,[6] including the group's founder, Shoko Asahara,[7] accused of the deadly 1995 sarin attack on the Tokyo subway, were executed. This generated discussions about the death penalty in Japan and sparked international criticism concerning human rights abuses, including claims of brutalization and executions in secrecy.[8]

Retention of the death penalty in Japan seems unusual in terms of two social characteristics when compared to the United States and other retentionist countries. First, Japan's homicide rate of approximately 0.6 per 100,000 population is approximately one-tenth of the United States' homicide rate and has been consistently lower than many abolitionist countries of the European Union.[9] The high homicide rate in the United States has been employed to explain why the country retains the death penalty for deterrence or retribution. The outrage caused by homicide fuels public support for the death penalty in the United States; however, the low homicide rate in Japan cannot explain retention of the death penalty there. Second, Japan's society maintains a higher level of equality than the United States, where economic, racial, and social disparities could be linked to retention of the death penalty and executions.[10] Inmates on death row might be connected by their poverty in most retentionist countries; however, this inequality cannot explain retention of the death penalty in Japan.

How Adopted and For What?

The United States adopted the death penalty from Britain, and the first instance of this punishment was in Jamestown in 1608.[11] Pennsylvania moved executions into facilities (and away from the public eye) in 1834, and the first abolitionist state was Michigan in 1846. The end of the nineteenth century marked the time when other nations began simultaneously to abolish the death penalty, and the beginning of the twentieth century showed a trend of states following abolishment. In *Furman v. Georgia* in 1972, the U.S. Supreme Court struck down the death penalty, reducing all death sentences pending at the time to life imprisonment.[12] A majority of states passed new death penalty statutes, however, and in *Gregg v. Georgia* in 1976, the Court affirmed the legality of the death penalty. Since then, more than 7,800 defendants have been sentenced to death and 1,486 have been executed.[13]

Death Penalty, continued

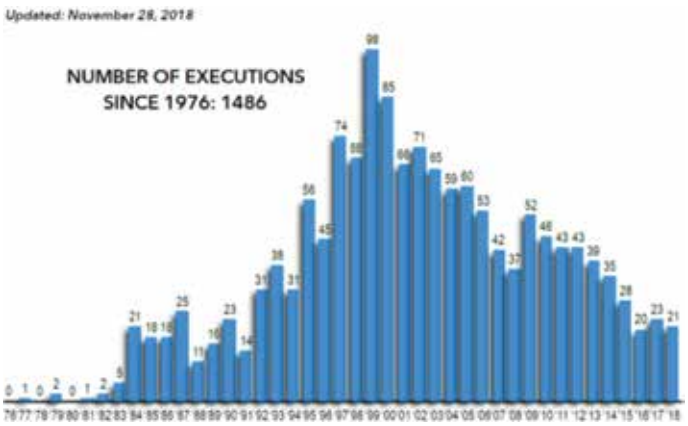

Figure 1
Source: Death Penalty Information Center (DPIC) "Facts about the Death Penalty"

In Japan, the political regime was changed during the postwar occupation from 1945 to 1952, and they missed an opportunity to abolish the death penalty, which Germany did in 1949. One explanation for retention in Japan is the Tokyo War Crimes Trial, where seven war criminals were executed in 1948 under American officials as retaliation.[14] Another explanation is the long hegemony of the conservative Liberal Democratic Party (LDP) since 1955. In *Nagayama* in 1983, Japan's Supreme Court delivered the constitutionality and principle for the death penalty.[15]

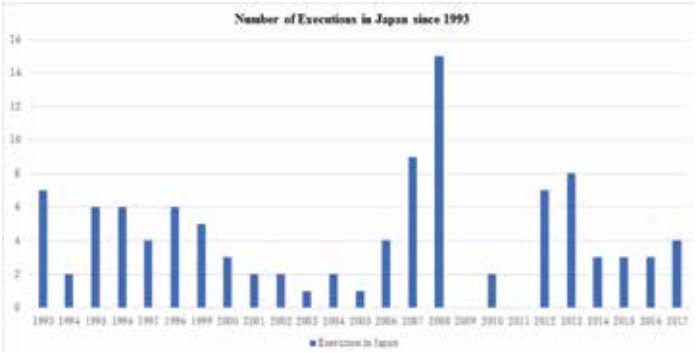

Figure 2
Source: Japan Federation of Bar Associations, "Reviewing Death Penalty" https://www.nichibenren.or.jp/activity/criminal/deathpenalty/shiryou.html#data03. Prosecutor's statistics do not publicly disclose accurate data for the number of executions in Japan prior to 1993.

Why Criticized?

1. Wrongful Conviction

One strong criticism of the death penalty in terms of human rights is that there is no remedy for executing

... continued on page 56

ILS Signs Collaboration Agreement With Rome Bar

By Fabio Giallanza, Miami

Tavolo sulla riservatezza e firma dell'accordo di cooperazione tra Florida Bar e Ordine degli Avvocati di Roma, Suprema Corte di Cassazione, Roma, Italia (Conference on privacy and signature of cooperation agreement between the International Law Section of The Florida Bar and the Rome Bar, Supreme Court of Cassation, Rome, Italy)

On 21 December 2018 at the Palace of Justice in Rome, the International Law Section of The Florida Bar (ILS) and the Rome Bar held a joint conference on privacy rights entitled *Tavolo sul Diritto alla Riservatezza – Sviluppi Normativi e Profili Comparatistici Italia-USA* (Panel on the Right to Privacy – Legislative Developments and Comparative Perspectives Italy-USA). At the conclusion of the conference, the two organizations signed a cooperation agreement that will be the stepping stone for future joint initiatives.

The Palace of Justice, a true labyrinth of high ceilings and long hallways, decorated by beautifully crafted chandeliers and majestic statues, is commonly referred to by Romans as "*il Palazzaccio*"—the "bad palace"—for its discordant architecture. Completed in 1911, it hosts both the *Corte di Cassazione*, Italy's court of last instance (except for constitutional matters, which are the realm of the *Corte Costituzionale*), and the Rome Bar (*Ordine degli Avvocati di Roma*), a professional organization overseeing more than 24,000 attorneys in the city of Rome and surrounding areas.

At this prestigious location, the Rome Bar maintains its administrative offices and a wonderful auditorium, the *Aula Avvocati*, which hosts CLE activities on a regular basis. Interestingly, this was the last event of the CLE reporting cycle ending in 2018 and was approved for three CLE credits. The International Relations Committee of the Rome Bar provided the ILS delegation a tour of the facilities, including preconference cappuccino.

The committee is tasked with liaising with foreign bar organizations. The Rome Bar recently entered into a collaboration agreement with the Tokyo Bar, and the International Relations Committee also played a role in representing the Rome Bar at the 2018 IBA Conference held in the Eternal City.

Attorney Cristina Tamburro, president of the International Relations Committee, welcomed the audience that filled the *Aula Avvocati*, and attorney Luca Bagnasco, committee member, served as moderator.

The panel included Francesco Pizzetti, professor of constitutional law at LUISS – Guido Carli and former head of the Italian Data Protection Authority. Professor Pizzetti discussed the mechanics of EU-US data transfers under the new regime of the General Data Protection Regulation, which took effect in May 2018. Professor Vincenzo Zeno-Zencovich of Roma Tre University provided a big-picture perspective of the role played by

Collaboration Agreement, continued

digital technologies in a connected world, where data can be a currency that knows no borders. Professor Zeno-Zencovich is also responsible for the dual degree program in place between the Roma Tre law school and Nova Southeastern University – Shepard Broad College of Law, which has been running continuously since 2008 and has led to the establishment of an ever-growing Italian legal community in Florida.

All three of the ILS delegates took the stage at the conference. Professor Mark Schlakman, senior program director for the Florida State University Center for the Advancement of Human Rights and member of the ILS Committee for Human Rights, Public International Law, and Global Justice, offered an engaging presentation on the interplay between constitutional privacy guarantees and the national security interests of the United States, with particular reference to recent events that further sparked the debate over governmental data-collection practices. ILS member Valeria Angelucci simultaneously and impeccably translated Professor Schlakman's remarks for the audience. Elena Maria Fontanelli, research associate with the International Arbitration Institute at the University of Miami, also assisted Professor Schlakman so that he could follow the substance of the presentations given in Italian. Finally, Fabio Giallanza, member of the ILS Executive Council and editor of the *ILS Gazette*, discussed financial privacy as it relates to corporate ultimate beneficial owners, with a look to possible legislative developments, such as the Corporate Transparency Act under consideration in Congress.

Alessandra Gabbani, president of the Rome Bar, and Fabio Giallanza, member of the ILS Executive Council and editor of the ILS Gazette, *sign the organizations' cooperation agreement on 21 December 2018.*

The Palace of Justice in Rome, Italy, is often called "il Palazzaccio" (the "bad palace") for its discordant architecture.

Alessandra Gabbani, president of the Rome Bar and the first woman to hold this position, made final remarks and expressed her satisfaction with the newly established relationship between the ILS and the Rome Bar, and called for the organization of similar initiatives in the future and other forms of collaboration, such as the establishment of a trainee exchange program. Ms. Gabbani and ILS delegate Fabio Giallanza then proceeded to sign the cooperation agreement in two copies, in Italian and in English, concluding the event.

***Fabio Giallanza** is an associate attorney at Salcedo Attorneys at Law PA and focuses his practice on cross-border transactions and real estate. Fabio regularly advises clients on corporate matters, including financing, mergers and acquisitions, and other business transactions. Fabio holds the JD from Nova Southeastern University and a law degree from the Roma Tre University in Rome, Italy. He is enrolled in the taxation LLM program at the University of Miami School of Law.*

WORLD ROUNDUP

INDIA

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Ruling party suffers defeats in India's 2018 Assembly Elections.

In the critical Assembly Elections that took place in December 2018, the ruling Hindu nationalist Bharatiya Janata Party (BJP) was defeated by the Indian National Congress party in three key states, Chhattisgarh, Madhya Pradesh, and Rajasthan. In Madhya Pradesh, Congress polled almost an equal number of votes as BJP and received more seats (114 vs. 109). Based on the recent election results, the Congress party will provide firm competition for the ruling party in India's 2019 General Election. The leader of the Congress party, and the key contender to Prime Minister Narendra Modi in 2019, is Rahul Gandhi. Rahul Gandhi is the great grandson of India's first prime minister, Jawaharlal Nehru, the grandson of Indira Gandhi, who served as India's first woman prime minister, and the son of Rajiv Gandhi, also a former prime minister. Many believe the 2019 General Election will essentially be a referendum on PM Modi, whose charisma has been fading, in part due to the widespread negative impacts of the 2016 demonetization scheme.

India's Active Supreme Court issues rulings on critical social impact issues.

India's Supreme Court is a critical institution in a democracy of more than 1.3 billion people. The Supreme Court does not shy away from addressing critical social impact issues. For example, in September 2018, the Indian Supreme Court struck down a 150-year-old ban on sexual intercourse between homosexual partners. The court held that the applicable law violated the fundamental right of freedom of expression including the right to choose a sexual partner, and further stated that the underlying law assumed the characteristic of unreasonableness as it became "a weapon in the hands of the majority to seclude, exploit, and harass the LGBT community." This was a significant decision in a country that is socially conservative and often shuns those who rebel against cultural, religious, and traditional norms.

Also in September 2018, India's Supreme Court struck down a colonial-era law making adultery a criminal offense. The court held that while adultery can be treated as a civil wrong for dissolution, it cannot be grounds for a criminal offense. A portion of the court's analysis focused on the applicable Section 497 as violative of the right to equality and a right to equal opportunity for women.

India celebrates a year of 'big fat weddings,' including India's richest family.

2018 was a year of big Indian weddings—the most notable was the wedding of Isha Ambani and Anand Piramal on 12 December 2018 at the Ambanis' 27-floor Mumbai residence known as "Antilla," the construction cost for which was reportedly US$1 billion to US$2 billion. Isha Ambani is the daughter of India's richest man, Mukesh Ambani, who is worth approximately US$40 billion, and Anand Piramal is the son of Indian billionaire Ajay Piramal. The guest list included Hillary Clinton and John Kerry. The Ambanis hired Beyoncé to perform at the festivities for a reported US$7 million. Preceding the Ambani-Piramal wedding was that of Priyanka Chopra and Nick Jonas, who tied the knot in Jodhpur with a wedding reception in New Delhi that was attended by Prime Minister Narendra Modi. On a related law and policy note, in December 2018, the Delhi government proposed to the Supreme Court a contemplated policy to limit the number of guests at extravagant weddings to avoid wasting food and to regulate food safety issues.

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LATIN AMERICA

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Newly elected presidents in Brazil and Mexico promise to fight corruption in Latin America.

Brazil and Mexico have newly elected presidents, Jair Messias Bolsonaro in Brazil and Andrés Manual Lopez Obrador in Mexico.

Although they represent opposite political positions, both presidents took strong stances against corruption in their successful campaigns.

Obrador, a leftist politician, promised to make an anticorruption agenda a priority of his administration, enhancing governmental controls over the contracting and procurement processes in addition to mandatory financial disclosures for public servants.

On the other hand, Bolsonaro promoted himself as an alternative to the Workers' Party and the ideals of the left. Regarded as a far-right politician, Bolsonaro promised to strengthen anticorruption efforts in his country. As a clear signal that this movement will be a priority in his administration, Bolsonaro appointed Sérgio Moro, the lead judge of Operation Carwash, minister of justice.

Both politicians pointed out that the fight against organized crime is vital to reducing corruption in their countries. Moro has indicated that he intends to work with the financial system for more effective prevention of money laundering and evasion of the foreign exchange in order to decrease the financing capacity of organized crime.

Both presidents only recently took office, Obrador on 1 December 2018 and Bolsonaro on 1 January 2019, so although there is an indication of what to expect from these new governments, legislative changes related to the fight against corruption have not yet been clearly delineated. Obrador has already indicated that, in addition to public corruption, he will fight against private corruption, and Bolsonaro has stated that he will support all of Moro's initiatives, especially efforts against money laundering and an increase in criminal prosecutions of corruption crimes.

Chilean Supreme Court rules on cryptocurrency case.

The recent ruling from the Third Chamber of the Chilean Supreme Court in favor of Orionx, a digital asset trading platform based in Chile, indicates a movement to impose restrictions on the cryptocurrency market in the country.

On 6 December 2018, the Third Chamber of the Chilean Supreme Court officially sided with the state-owned BancoEstado after it banned a local crypto exchange by shutting down its bank account. The court ruled in favor of the bank, stating that crypto exchange office characteristics and elements prevent the bank from complying with its regulatory obligations since those characteristics prevent the bank from knowing in depth the financial activities related to the cryptocurrencies developed.

According to a joint statement from crypto exchange offices operating in the country, the measure expressly stated that the lack of understanding about the sector may cause its end.

On 1 December 2018, during the G20 summit in Buenos Aires, Argentina, the G20 leaders reinforced their willingness to develop a regulation system that emulates the cryptocurrency regulation in the Financial Action Task Force (FATF), through the monitoring of risks and vulnerabilities in the financial system and through continued regulatory and supervisory cooperation. In their official declaration, the G20 leaders stated that they are looking to continue progress on achieving resilient non-bank financial intermediation, with the regulation of crypto-assets for anti-money laundering and countering the financing of terrorism in line with FATF standards.

Cintia D. Rosa *focuses her practice on internal corporate investigations and compliance matters, leveraging her experience with criminal proceedings and white-collar crime from when she worked with the Brazilian Federal Police. She earned her law degree (LLB) from the Pontifical Catholic University of São Paulo (PUC-SP) and has specialization in compliance from the GV São Paulo Law School.*

MIDDLE EAST

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United Arab Emirates (UAE) and other states have violated Qataris' rights.

In June 2017, the UAE and several other Arab states imposed a boycott against Qatar and expelled Qataris from the UAE. In June 2018, Qatar brought a claim against the UAE in the International Court of Justice (ICJ) alleging that the UAE violated the Convention on the Elimination of All Forms of Racial Discrimination by expelling Qataris and closing the office of Qatar-based Al-Jazeera. The ICJ issued a preliminary ruling agreeing with Qatar and ordering the UAE to allow Qatari families displaced by the boycott to be reunited and to provide Qataris access to UAE courts. The ruling is a breakthrough for Qatar in its efforts against the boycott.

Auditing firm KPMG suspended from accepting new clients in Oman for one year.

Oman's securities regulator, the Capital Market Authority (CMA), suspended audit firm KPMG from accepting new work for one year after finding major financial and accounting irregularities at some listed companies.

In a statement, the CMA said it found instances of "professional negligence" by KPMG in certain listed companies. The CMA did not identify those companies. The CMA banned KPMG for one year from doing new auditing work for companies regulated by the CMA, including listed companies, securities firms, and insurers. The penalty does not affect current KMPG projects or clients.

Iraq telecom provider Korek Telecom Co. rocked by more claims.

The joint venture of Kuwaiti logistics firm Agility and France's Orange have filed another claim against directors of Iraqi mobile telecom operator Korek. In 2011, Agility and Orange acquired a 44% interest in Korek through a joint venture company, Iraq Telecom. Collectively, Agility and Orange have invested over US$1 billion in Korek. In early 2018, however, Agility and Orange filed claims in the Dubai International Financial Centre Courts against three Korek directors, their Iraqi joint venture partner, and Korek's parent company alleging various claims of mismanagement, self-dealing, and conflict of interest.

Algeria to amend energy law in early 2019.

Algeria has been preparing changes to its hydrocarbon law to attract foreign investors that have stayed away in recent years. For instance, in 2011, Algeria received foreign bids for only two of ten fields for which it solicited bids. To help draft amendments to its energy law, Algeria has hired several foreign consultants, including U.S. law firm Curtis, Mallet-Prevost, Colt & Mosle LLP.

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NORTH AMERICA

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New U.S. law directs humanitarian aid to at-risk groups in Iraq and Syria.

In the United States, President Trump signed the Iraq and Syria Genocide Relief and Accountability Act of 2018 into law on 11 December 2018. The bill establishes "US policy to ensure that humanitarian, stabilization, and recovery assistance for nationals and residents of Iraq or Syria, and of communities from those countries, is directed toward ethnic and minority individuals and communities with the greatest need, including those individuals and communities that are at risk of persecution or war crimes." The new law will enable the federal government or other entities, including faith-based groups, to provide financial and technical assistance for the humanitarian, stabilization, and recovery needs of current and former religious minority nationals or residents of Iraq and Syria.

Trump administration redefines 'waters of the United States.'

Also on 11 December 2018, the Trump administration announced a new definition of "waters of the United States" at the EPA. The term's new meaning will primarily limit the federal government's regulation of waterways under the Clean Water Act to major waterways, their tributaries, and adjacent wetlands. This proposal follows the 2017 Executive Order "On Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule." According to an earlier EPA study, over 60% of waterways in the United States are ephemeral. Individual states, rather than the federal government, will regulate the waterways now excluded by the Trump administration's new definition.

United States grants ten-millionth patent.

The United States Patent and Trademark Office (USPTO) experienced a historic moment on 12 December 2018—its ten-millionth patent was issued to Raytheon Company, a major U.S. defense contractor. Now operating under the provisions of the 2012 America Invents Act, the United States is a "first to file" country and whoever wins the race to the USPTO will be granted priority. You want to win this race. In the past six years alone, more than two million U.S. patents have been issued. This reflects an exponential pace compared to prior years when increments of two million patents occurred far less frequently—often fewer than every twenty-four years. On a more global basis, however, the United States is actually slipping in its worldwide growth rate relative to other countries. This means that other countries are experiencing the same increase in patent application activity.

Huawei CFO's arrest strains China-Canada trade talks.

In Canada, previously strained trade talks with China have worsened following Canada's arrest of Huawei Technologies Co.'s Chief Financial Officer Meng Wanzhou in Vancouver on 1 December 2018. The arrest was made at the request of U.S. authorities, who want to extradite her amid a probe of suspected violations of Iran trade sanctions. In response, China has detained two Canadians on suspected corruption charges. Canada's

finance minister spoke at the Canada 2020 forum about the C$40 billion LNG Canada investment, saying that the legal issue of two Canadians currently detained by the Chinese government is a challenge and should be viewed separately from Canada and China's economic relations, which continue to "grow rapidly."

USMCA is the 'new NAFTA.'

There is a "new NAFTA." From the G20 Summit in Argentina, President Trump, Canadian Prime Minister Trudeau, and Mexican President Enrique Peña Nieto (on his last day in office) presented the agreement known as the United States Mexico Canada Agreement (USMCA). The USMCA includes thirty-four chapters, including new ones covering digital trade, intellectual property, anticorruption, and good regulatory practices, and it contains new tariff schedules, labor laws, and rules on which products can legally be imported or exported, including updated settlements and protections on textiles, agriculture, and digital trade.

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RUSSIA

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The Hague rules Russia must pay US$159 million for expropriation of hotels, apartments, and other Crimean real estate.

On 19 June 2015, an arbitration was commenced by eighteen Ukrainian companies and one individual (Everest Estate LLC and others) against the Russian Federation pursuant to the Ukraine-Russia BIT and in accordance with the UNCITRAL Arbitration Rules of 1976. The claimants contended that, as of August 2014, the Russian Federation had breached its obligations under the Ukraine-Russia BIT by interfering with and ultimately expropriating their investments in real estate located in Crimea. The arbitration concerned a number of residential and commercial properties located in Crimea, including hotels, apartment buildings, and individual residential apartments.

Nearly three years later, on 2 May 2018, the Permanent Court of Arbitration (PCA) in The Hague, the Netherlands, ruled that the Russian Federation must compensate some of the Ukrainian companies approximately US$159 million in losses caused by the annexation of Crimea. According to the ruling, Russia is responsible for violating the rights of Ukrainian investors beginning on 21 March 2014, when Russian President Vladimir Putin signed a decree authorizing the annexation of Crimea.

The PCA confirmed its jurisdiction over the real property claims in Crimea in summer 2017. Russia does not recognize the award and has ignored the case. Russia did not appear at the hearing on the merits and did not file any post-hearing submissions. Since the Russian Federation has refused to recognize the award, enforcement will be a long and complicated process. The Ukrainian companies will most likely try to expropriate Russian assets located in Ukraine.

Earlier in 2018, the Stockholm Arbitration Court (SAC) also ruled against Russia in another case following Russia's annexation of the Crimean Peninsula. The SAC obliged Russia's gas giant, Gazprom, to pay the Ukrainian company Naftogaz US$2.6 billion for failure to meet gas transit obligations. Gazprom and Naftogaz both filed claims with the SAC over the conditions of a gas contract signed in 2009 by then Prime Ministers Vladimir Putin and Yulia Timoshenko. Under the contract, Ukraine would annually buy and pay for at least 52 billion cubic meters of Russian gas. The volume of gas Naftogaz was buying was well below this level, and as a result, Gazprom filed a lawsuit demanding that Ukraine compensate the Russian company for failing to purchase the agreed gas volume in line with the take-or-pay clause. In response, Naftogaz requested a review of the contractual gas prices. According to the agreement, the price Ukraine paid for the Russian gas was tied to oil prices. Consequently, during the years that oil prices were high, the gas price for Ukraine was much higher than for Gazprom's customers in Europe. The arbitration tribunal ruled in favor of Naftogaz, granting its claim to review disadvantageous conditions of the gas deal with Russia.

U.S. announces additional sanctions against Russia.

On 19 December 2018, the Trump administration announced additional sanctions against fifteen Russian agents and companies for interfering in the U.S. presidential election in 2016 and for carrying out a nerve-agent attack in England.

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WESTERN EUROPE

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Brussels IV misses the mark on succession certainty and predictability.

The EU Succession Regulation No 650/2012 (known as Brussels IV) became effective on 17 August 2015. Yet, three years later, it is unclear whether it has achieved the intended certainty and predictability for the succession of estates where a decedent has property in multiple jurisdictions, one of them a member state of the EU.

Each EU member state has its own conflict-of-law rules concerning which country's law applies to the succession of a decedent's estate when there is property in multiple jurisdictions or when the decedent dies somewhere other than where he or she is a national. Conflict-of-law rules have historically been complicated and ambiguous. Brussels IV's aim was to reduce this uncertainty and to introduce common conflicts-of-law rules for the EU member states that adopt the regulation. This is extremely important as many countries across Europe are civil law jurisdictions with forced heirship regimes that dictate that a decedent's estate must pass to close family members instead of being decided freely by the testator.

Under Brussels IV, the succession of all or any part of a decedent's estate that is located in an EU member state is governed by the laws of the country where the decedent was "habitually resident" at the time of his or her death. The governing law of the succession controls a variety of matters, including the time and place of opening the succession. A decedent can choose to apply the law of his or her nationality instead of that of his or her habitual residence. While such a choice of law can be made by a will, codicil, or other agreement, it need not be explicit. If, for example, a decedent has already made a will in accordance with the law of his or her nationality, it may be treated as if the decedent had chosen to apply that law over the law of his or her habitual residence.

A classic example is that of an English national and habitual resident of England at the time of death, who owned real property in Spain, a civil law jurisdiction. The default under Brussels IV is that the succession law of England and Wales will apply to the disposition of the Spanish real property.

Brussels IV does not affect every aspect of a decedent's estate, but generally applies to determine who can benefit from the estate. Assets located in a particular jurisdiction will still be taxed according to the rules of that country. Claims against an estate may still be possible in an EU member state if forced heirship rules are overridden in a will.

There are limitations to Brussels IV. Most problems with Brussels IV have arisen as a result of successions linked to third countries that are not EU member states or that have not adopted Brussels IV and have their own conflicts-of-law rules. Sometimes this results in the fragmentation of the succession between two or more countries. The choice-of-law provision that overrides the default rule is also very limited, as one may only choose his or her nationality's law, and not that of any country, to govern his or her succession.

Another complication is that *habitual residence* is not defined in the text of the regulation. Recitals 23 and 24 of the regulation provide guidance on how to interpret the term; however, *habitual residence* is defined in each EU member state's own regulations and can vary from one country to another. In most cases, determining the habitual residence of a decedent is not an issue, but a few cases may need to be determined from a European perspective. And in cases where the habitual residence of a decedent is located outside the EU, an EU member state may need to apply non-EU law to the succession of property in an EU member state.

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SECTION SCENE

ILQ Asia Edition Launch Party

8 November 2018
The Offices of Hogan Lovells • Miami, Florida

Editors, authors, supporters, and friends of the Fall 2018 *International Law Quarterly* came together to celebrate the release of the *ILQ: Focus on Asia* edition.

ILS Holiday Luncheon

29 November 2018
Citrus Club • Orlando, Florida

Continuing our commitment to Central and North Florida, the ILS held a holiday luncheon in Orlando where members and friends of the ILS came together to celebrate and get to know each other.

SECTION SCENE

ILS Holiday Luncheon — 29 November 2018 *(cont.)*

Clarissa Rodriguez, Brock McClane, Deborah Kallas, Penelope Perez-Kelly, Laura Reich, Robert "Bob" Becerra, and Carlos Osorio

Carlos Osorio, Christopher Bondani, and Alan Sheppard, Jr.

Nadine Jacobson, Brock McClane, and Penelope Perez-Kelly

James Lavigne and Donna Draves

Nadine Jacobson, Shahzad Ahmed, James Lavigne, Penelope Perez-Kelly, Donna Draves, Linda Schultz, and Brock McClane

SECTION SCENE

ILS Holiday Luncheon — 29 November 2018 *(cont.)*

Penelope Perez-Kelly and Shelly Garg

Robert "Bob" Becerra, Teeluck Persad, and Jason Guild

Nouvelle Gonzalo, Carlos Osorio, and Clarissa Rodriguez

Laura Reich, Carlos Osorio, and Clarissa Rodriguez

SECTION SCENE

ILS Holiday Luncheon — 29 November 2018 *(cont.)*

Laura Reich, Clarissa Rodriguez, and Vernon Williams

Al Robinson and Kim Radcliffe

Bertha Cooper-Rousseau, Laura Reich, and Clarissa Rodriguez

Penelope Perez-Kelly and Nouvelle Gonzalo

SECTION SCENE

ILS Annual Holiday Party

13 December 2018

The Offices of Harper Meyer • Miami, Florida

Members and friends of The Florida Bar International Law Section gather at the law firm of Harper Meyer to celebrate the holidays.

Carlos Osorio, Jamie Cotera, and Aleesha Khan

Rahul Ranadive and James “Jim” Meyer

SECTION SCENE

ILS Annual Holiday Party— 13 December 2018 (cont.)

Carlos Osorio, Robert "Bob" Becerra, Clarissa Rodriguez, and James "Jim" Meyer

Robert "Bob" Becerra, Gary Birnberg, and Laura Reich

Eduardo "Eddie" Palmer, John Rooney, and Manuel A. Gómez

Sherman Humphry and Kristin Drecktrah Paz

Universal Human Rights, from page 9

we must also take into account the role played by the representatives of twenty Latin American states who mobilized, before, during, and after the founding San Francisco Conference in 1945, to ensure that the UN Charter would establish a world order grounded on respect for human rights as a basic purpose of the UN, both as an organization of member states and as a regime for maintaining international peace.[6]

This history, though marginalized and forgotten by many, is directly relevant to understanding the significance of the UDHR and the covenants. As Kathryn Sikkink notes, the language of human rights was "not the language of the Great Powers and was finally adopted by the Great Powers only in response to pressures from smaller States and civil society."[7] The first draft of the UN Charter circulated by the United States had no reference to human rights. The great powers were more focused on preserving state sovereignty than restricting state power. Meeting in Mexico City in February 1945, two months before the San Francisco Conference, various Latin American countries took issue with the priorities of "Great Power" politics and determined that the post-war world needed a binding international bill of rights with enforcement mechanisms sufficient to prevent the reconsolidation of totalitarian state power.[8] At the Mexico City meeting, they set the Inter-American Juridical Committee to work on drafting an American declaration, and then went on to push hard for inclusion of human rights in the UN Charter two months later in San Francisco. But for the conceptual clarity, diplomatic lobbying, and coordinated voting power of the Latin American state representatives, the UN Charter may very well have been adopted without the human rights language found in Articles 1(3), 55, and 56.

While these articles did not establish the desired comprehensive juridical order for enforcing human rights, they did commit the UN and its member states to promoting higher standards of living and full employment, to upholding conditions of economic and social progress and development, to international cultural and educational cooperation, and to universal respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. By signing on to the UN Charter, member states made their respect for human rights and the fundamental freedoms of their own people a matter of international, rather than strictly domestic, concern. Specifically, the UN Charter established an Economic and Social Council as one of its six principal organs. It was pursuant to the council's charter mandate that the UN Commission on Human Rights was established and charged with the task of drafting the UDHR and, later, the covenants.[9]

The inclusion of human rights in the UN Charter paved the way to an ever more inclusive collection of international human rights treaties by which member states can commit themselves to norms, procedures, and institutional arrangements that advance their people and improve the conditions for life on this planet. In addition to the UDHR and covenants, these include the Convention on the Prevention and Punishment of the Crime of Genocide (1948), the International Convention on the Elimination of All Forms of Racial Discrimination (1966), the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (1968), the International Convention on the Suppression and Punishment of the Crime of Apartheid (1973), the Convention on the Elimination of All Forms of Discrimination Against Women (1979), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), the International Convention Against Apartheid in Sports (1985), the Convention on the Rights of the Child (1989), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), the Agreement Establishing the Fund for the Development of the Indigenous Peoples of Latin America and the Caribbean (1992), the Convention on the Rights of Persons with Disabilities (2006), and the International Convention for the Protection of All Persons from Enforced Disappearance (2006). These multilateral treaties, along with their optional protocols, are deposited with the secretary-general.[10] During this same period, the UN Commission on Human Rights developed an elaborate system of special rapporteurs and working groups to investigate alleged violations and to monitor

member states' compliance with human rights law though fact-finding missions.[11]

In 2006, the UN General Assembly created today's Human Rights Council to replace the Commission on Human Rights. A year after its first meeting, the Human Rights Council announced the procedures, mechanisms, and structures that would guide its work and mission. Most notably, it established the Universal Periodic Review Working Group to oversee the Universal Periodic Review process.[12] In this periodic review process, each member state has its human rights record assessed every four years. The working group meets with representatives of the state under review in order to assess that state's respect for the human rights obligations set out in (1) the UN Charter; (2) the UDHR; (3) the human rights treaties ratified by the state; (4) the voluntary pledges and commitments made by the state (for example, national human rights policies and programs); and (5) any other applicable international humanitarian law. The working group's report is a factual presentation of the statements made during the review meeting between the state under review and the participating member state delegations forming the working group. The conclusions and recommendations are of the participating delegations, not of the working group, but the state under review is expected to respond to the recommendations, either accepting or noting them.[13]

Pursuant to this process, the United States has had its human rights record reviewed in 2010 and 2015, and is tentatively on the schedule for its third periodic review in September 2019.[14] These periodic reviews provide a valuable forum for self-study and the development of proactive initiatives to more fully comply with the country's international obligations. For example, in preparing for its second periodic review in 2015, the United States instituted six interagency working groups to review and address each of the recommendations it had accepted or supported in the course of its first periodic review in 2010.[15] The recommendations were organized thematically, and working groups were assigned to deal with issues regarding (1) respect for civil rights and non-discrimination; (2) criminal justice; (3) economic, social, and cultural rights, indigenous issues, and the environment; (4) national security; (5) immigration, migrants, labor, trafficking, and children; and (6) domestic mechanisms for human rights implementation.[16]

The Universal Periodic Review process helps member states set specific targets for improving their human rights records by giving them a lens into the way their records are assessed, not only by their own agencies, governmental units, and civil society organizations that participate in their internal review process but by other member states that can express their views through statements and recommendations made during the interactive stage of the working group's review.

During the United States' second periodic review in 2015, in addition to urging the United States to ratify human rights instruments to which it was not yet a party, member states expressed specific concerns regarding, among other things, the practice of extrajudicial killings of citizens and foreigners, torture by state actors both within and beyond the territorial boundaries of the United States, police brutality, prison conditions, gun violence and its racial dimensions, the death penalty, and the practice of life imprisonment without parole for juvenile and nonviolent adult offenders.[17]

Particularly interesting to the United States' 2015 Universal Periodic Review was the number of member states urging it to ratify the Rome Statute for the International Criminal Court (ICC), which entered into force in 2002 and established a permanent international court with jurisdiction to criminally prosecute individuals for (1) genocide; (2) crimes against humanity; (3) war crimes; and, as of July 2018, (4) the leadership crime of aggression.[18] Sixteen member states urged the United States to join the ICC. These were Ghana, Hungary, Austria, New Zealand, Maldives, France, Timor-leste, Slovenia, Guatemala, Trinidad and Tobago, Chad, Latvia, Fiji, Cyprus, Luxembourg, and Venezuela.[19] This number was notably up from the United States' 2010 Universal Periodic Review, during which only Germany, France, Cyprus, Austria, and Costa Rica urged it to ratify the Rome Statute.[20]

Universal Human Rights, continued

Mrs. Eleanor Roosevelt of the United States holds a Declaration of Human Rights poster in English in this undated photo from the 1940's.
UN Photo

The Universal Periodic Review process also allows nongovernmental organizations, national human rights institutions, and regional human rights organizations to participate in the review. These civil society actors are called "other stakeholders." They are empowered by the Universal Periodic Review process to submit written reports. They can also seek accreditation and, if accredited, attend and observe the Universal Periodic Review Working Group session of a member state under review and make oral statements during the regular session of the Human Rights Council in which the working group's conclusions and recommendations are reviewed by the Human Rights Council as a whole.[21] For example, the Coalition for the International Criminal Court used the Universal Periodic Review procedure to call on member states to ratify the Rome Statute by sending letters to all ICC state parties, asking them to make specific recommendations regarding the Rome Statute to each of the member states under review.[22] This coalition is notable because it represents 2,500 civil society organizations in more than 150 countries fighting to end impunity for crimes within the ICC's jurisdiction.[23]

The member state delegations urging the United States to ratify the Rome Statute during its 2015 Universal Periodic Review are notable for another reason. They include Guatemala and Venezuela, which are particularly notorious in the Western hemisphere for their poor

human rights records. Indeed, in February 2018, the prosecutor of the ICC announced she was opening preliminary examinations into the situations in the Philippines and in Venezuela.[24] The decision with respect to Venezuela arose in response to communications and reports that the prosecutor received regarding excessive use of force by Venezuelan security forces to disperse political demonstrations against the government, mass arrests of perceived opposition members, and serious abuses while in detention. A preliminary examination is not an investigation; rather, it is an examination to determine whether an investigation should be opened.[25]

Venezuela's case is particularly egregious. In September 2018, six state parties to the Rome Statute referred the situation in Venezuela to the prosecutor, asking her to initiate an investigation regarding crimes against humanity committed by government actors and others in coordination with government forces.[26] The six referring states were Argentina, Canada, Colombia, Chile, Paraguay, and Peru.[27] Their referral alleged crimes within the ICC's jurisdiction committed in Venezuela since February 2014. The factual record for the referral is based on three reports released by (1) the Inter-American Commission on Human Rights dated 31 December 2017;[28] (2) the General Secretariat of the OAS and the Panel of Independent International Experts of 29 May 2018, regarding possible crimes against humanity committed in Venezuela since 2014 in the form of systematic attacks against a part of the Venezuelan population perceived to be in opposition to the government of Nicholas Maduro;[29] and (3) the Office of the UN High Commissioner for Human Rights (OHCHR) from June 2018.[30] Pursuant to their findings, a Panel of Independent International Experts specifically recommended that the OAS secretary general forward the report to the Office of the Prosecutor of the ICC, and invited state parties to the Rome Statute to do so as well.[31]

These three reports are specifically referenced in the referral from the six state parties. In addition, in September 2018, the Human Rights Council called on Venezuela to accept humanitarian assistance in order to address "the scarcity of food, medicine and medical supplies, the rise of malnutrition, especially among children, and the outbreak of diseases that had been previously eradicated or kept under control in South America," and further requested the high commissioner for human rights to prepare a comprehensive report on the human rights situation in Venezuela for presentation to the Human Rights Council at its upcoming sessions.[32]

It is worth noting that the allegations against Venezuela for crimes against humanity are grounded in rights enshrined in the UDHR: murder, imprisonment, or other severe deprivation of physical liberty, torture, rape, the persecution of an identifiable group or collectivity on political grounds, and the enforced disappearance of persons are crimes that violate the fundamental rights to life, liberty, and security of a person (Article 3); the right not to be subject to torture or to cruel, inhuman, or degrading treatment or punishment (Article 5); the right not to be subjected to arbitrary arrest, detention, or exile (Article 9); the right to an impartial tribunal (Article 10); the right to freedom of opinion and expression (Article 19); the right to peaceful assembly and association (Article 20); and the right to take part in the government of one's country (Article 21). In this way, it is apparent that the efforts to establish an effective and permanent ICC are yet another sign of development in the direction of realizing the right to a social and international order in which the rights and freedoms set forth in the UDHR can be fully realized and member states be held accountable. *See* Article 28 of the UDHR.

It is concerning, then, that in June 2018, precisely around the time the Office of the UN High Commissioner for Human Rights issued its report on the situation in Venezuela, the Trump administration announced it was withdrawing the United States from the Human Rights Council.[33] The withdrawal was said to have been long in the making, although the announcement came the day after *The New York Times* quoted the high commissioner concurring in the American Academy of Pediatrics' conclusions that the Trump administration's policy on family separation and detention of children caught illegally crossing the southern border with Mexico constituted "government-sanctioned child abuse."[34] Such

criticisms prompted return accusations by the United States that the council was "a protector of human rights abusers, and a cesspool of political bias," with references to the poor human rights records of current council member states, including China, Saudi Arabia, and Egypt.[35]

Equally concerning is that in September 2018, precisely around the time the prosecutor of the ICC received the referral from the six state parties to the Rome Statute regarding the situation in Venezuela, the national security advisor to the Trump administration attacked and threatened prosecutors, judges, and state parties to the ICC.[36] The threats came in response to the previously known fact that the prosecutor had requested, and a pre-trial chamber of the court was considering, authorization to initiate an investigation into alleged war crimes and crimes against humanity in Afghanistan and the territories of other state parties in connection with the armed conflict in Afghanistan.[37]

There is no doubt that criticisms and calls for accountability for human rights violations and criminal activity are bound to be unwelcome. This is especially likely when the accusers are perceived as themselves guilty of even worse crimes and violations. Still, it is important to remember that the rights recognized in the UDHR are not based on nationality or citizenship, but on a common humanity and a determination to create a world that affirms the reality that all human beings are born free and equal in dignity and rights. One should remember as well that the institutions established to effectuate the vision of the UDHR, though far from perfect, are nevertheless crucial to the progressive realization of those rights.

Florida Lawyers Can Promote International Human Rights Law

Recognizing the growing significance of international human rights law, in May 2018, the Executive Council of the International Law Section of The Florida Bar approved the formation of a standing Committee for Human Rights, Public International Law, and Global Justice. The committee's mission is to advance the progressive realization of universal human rights through seminars, articles, service projects, social events, resolutions, legislative proposals, partnerships, and other outreach. In its first year, the committee has organized programming on the domestic implementation of the ICCPR in the United States, and it will present at the section's upcoming iLaw Conference in February 2019 on the problem of threats confronted by human rights defenders. Other program activities are in the works. Interested section members are encouraged to contact this year's committee co-chairs, Professor Elizabeth Iglesias at *iglesias@law.miami.edu* and Richard Alton at *racaesq@gmail.com*.

Elizabeth M. Iglesias *is co-chair of the ILS's new Committee for Human Rights, Public International Law, and Global Justice and full professor of law at the University of Miami School of Law, where she teaches courses in constitutional and international criminal law. She is the cofounder of Latina and Latino Critical Theory, Inc. (LatCrit, Inc.), which she incorporated in 1998 and codirected until 2003. In 1997, she designed the Project for Legal Economic, Development, Justice and Equality (PLEDJE), an innovative clinical program to promote micro-business development, immigrant rights, and the use of NAFTA labor and environmental side accords through workshops, community-based study circles, and outreach to underprivileged high school students. She is also a licensed and IFR rated commercial pilot.*

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Corruption and Human Rights, from page 11

Corruption (UNCAC) and urged all member states to enact, ratify, and implement it. The UNCAC's purpose is to (1) promote and strengthen measures to prevent and combat corruption more efficiently and effectively; (2) promote, facilitate, and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery; and (3) promote integrity, accountability, and proper management of public affairs and public property.[7] The UNCAC also sets out measures of criminalization and law enforcement to be adopted by member states in relation to specific acts of corruption, such as bribery of national and foreign public officials and officials of public international organizations, embezzlement of property by public officials, trading in influence, abuse of functions, illicit enrichment, bribery, and embezzlement in the private sector, as well as the laundering of proceeds of crimes and concealment.[8]

The Inter-American Convention Against Corruption

Even before the adoption of the UNCAC, the Organization of American States (OAS) adopted, on 29 March 1996, the Inter-American Convention Against Corruption (IACAC). This regional anticorruption instrument is intended to "promote and strengthen the development by each of the States Parties of the mechanisms needed to prevent, detect, punish and eradicate corruption," as well as to promote and facilitate cooperation between the OAS member states.[9] Unlike the UNCAC, which covers private-sector corruption, the IACAC only addresses acts of corruption in the public sector and defines corrupt acts narrowly to include only bribery, embezzlement, and concealment, although Article IV of the IACAC stipulates that its member states can mutually agree to expand the scope of the convention to cover other acts not expressly defined in the IACAC.[10] Further, the IACAC also covers the concept of transnational bribery (persons or businesses in the territory of one member state bribing public officials of another) and illicit enrichment (defined as a significant increase in the assets of a government official that cannot be reasonably explained in relation to his or her lawful earnings), determining that, subject to each member state's domestic constitutions, necessary measures shall be taken to criminalize such conduct and to assist other member states in investigating and prosecuting it.[11]

The OECD Convention

The Organization for Economic Co-operation and Development's (OECD) Convention on Combating Bribery of Foreign Officials in International Business Transactions (OECD Convention) instructed its now thirty-four member states to enact a series of reforms, including (1) criminalizing the offer, promise, or tendering of a bribe to a foreign official; (2) creating corporate criminal liability, which is a concept that still is inapplicable in many jurisdictions' domestic anticorruption laws; and (3) implementing robust criminal penalties to dissuade both the bribe-giver and the foreign official receiving the bribe.[12]

Agreement Establishing the Group of States Against Corruption – GRECO

Created by the Council of Europe under Resolution (98)7, on 5 May 1998, the GRECO Agreement aimed to "improve the capacity of its members to fight corruption by following up, through a dynamic process of mutual evaluation and peer pressure, compliance with their undertakings in this field."[13] Different from the other international instruments described above, which were intended to create a legal framework for the fight against international corruption, GRECO was created as an institution designed to evaluate and report on the compliance by the member states of the Guiding Principles for the Fight against Corruption of 6 November 1997 and the implementation of international legal instruments pursuant to the Programme of Action against Corruption.[14] Although created by the Council of Europe and seated in Strasbourg, GRECO can be joined by nonmembers under specific circumstances.

African Union Convention on Preventing and Combatting Corruption

The African Union's Convention on Preventing and

Combatting Corruption (AUCPCC), adopted on 1 July 2003, resembles in many aspects the one adopted by the IACAC, with its objective being the promotion and strengthening of "mechanisms required to prevent, detect, punish and eradicate corruption and related offences in the public and private sectors" and its scope reaching private-sector corruption, passive and active bribery, embezzlement, concealment, and illicit enrichment.[15] Unlike the other instruments summarized, and more important for purposes of this discussion, the AUCPCC recognizes the relationship between corruption and the violation of human rights. The AUCPCC's preamble defines as one of the foundations (or justifications) for the adoption of the instrument precisely the "need to promote and protect human and people's rights,"[16] and Article 3 goes on to establish as a principle the "respect for human and people's rights in accordance with the African Charter on Human and Peoples Rights and other relevant human rights instruments."[17]

The European Court of Human Rights

"As a supranational court, The European Court of Human Rights rules on individual complaints in which applicants allege violations of their rights under the European Convention on Human Rights."[18] As noted in a 2018 report issued by the Raoul Wallenberg Institute of Human Rights and Humanitarian Law, however, it appears that "the court has not examined any cases where complainants argued that their rights were violated by corruption directly, thus the court has never examined that issue upfront."[19]

The Inter-American Court of Human Rights

"The Inter-American Court of Human Rights (IACHR) rules on individual cases of allegations of violations of the Inter-American Convention on Human Rights."[20] Like its European counterpart, the IACHR has issued judgments that discuss the impact of corruption on human rights, but it "has not a systematic, comprehensive approach to it."[21]

National Human Rights Institutions

"National human rights institutions (NHRIs), defined by the UN as bodies 'established by a Government under the constitution, or by law or decree, the functions of which are specifically designed in terms of the promotion and protection of human rights,' are increasingly seen as an essential link between the local and international spheres within the global human rights regime."[22] There are now more than 120 NHRIs around the world, and some, the Raoul Wallenberg Institute Report has noted, have played an important role in the combat against corruption while exercising their mandate to protect local citizens' human rights.[23] A similar criticism emerges, however: "[n]one of the NHRIs surveyed have addressed corruption in a systematic manner and in a number of cases, it seemed that the institutions have never looked into the issue in any of their publications."[24]

Corruption and Violation of Human Rights

As discussed above, there are international instruments in place that require their various member states to combat corruption, both domestic and transnational, and there are also a myriad of supranational tribunals or UN-authorized committees that deal with corruption and marginally address its nexus to violations of human rights. But some commentators have argued that these mechanisms are insufficient—they pose the question of whether the fight against corruption warrants the elevation of the concept to be free from public corruption to the status of a human right. As mentioned before, commentators appear to be divided between those who consider corruption as a violation of human rights per se, and those who consider that corruption is the fuel for human rights violations in specific cases or circumstances.

For those advocating for corruption as a human rights violation per se, the connection between corruption and human rights is established by considering that corrupt practices will always have an impact in human rights and human development, which, they argue, can lead to the conclusion that there is an inherent human right to be free of corruption. As explained by commentator Dr. Anne Peters,

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> Corruption means that administrative or political decisions by government authorities are bought rather than made on the basis of lawfulness in procedures formally envisaged for that purpose. Corruption follows the unofficial laws of the market, thereby circumventing the rule of law. Because corruption is thus the antithesis to the rule of law, and because the rule of law in turn is a necessary condition for the respect of human rights, then corruption—in a very general sense—constitutes the negation of the idea of human rights.[25]

For these commentators, elevating the right to be free from corruption to the status of a human right is important so that aggrieved parties can have access to international fora and mechanisms of human rights protection as means of combating corruption.[26] Put another way, these commentators do not think that the existing domestic laws and the international protocols discussed above are sufficient to protect the individuals who suffer most from the petty, official corruption described in the introductory paragraphs. Access to tribunals that protect against human rights violations might be accessible to these aggrieved individuals if the right to be free from official corruption were to be elevated to the status of a human right.

Other commentators have cautioned that this may not be the better approach. According to commentator Ronald Berenbeim, "[t]he connection between corruption and human rights abuses has seldom been persuasively made."[27] Berenbeim argued that the reason for the misconnection is derived from a difference of conception between groups of countries during the drafting of the Universal Declaration of Human Rights, with the United States and Western European countries focusing on political human rights, such as freedom of speech and religion, while the Soviet Union and developing countries were focusing on human rights as relating to a government's ability to "assure minimal standards of security, welfare and education."[28] Commentator Matthew Stephenson also has cautioned that there has not been sufficient analysis of the various consequences of elevating freedom from official corruption to a human right, noting that further inquiry had to occur on what is "gained by the framing that corruption is in and of itself a human rights violation." He added that "it was not obvious that this is helpful rhetoric to all stakeholders," and that "this framing may have legal ramifications or have some additional political benefit compared with the alternate framing that corruption causes human rights violations." Finally, he added that "many people outside of the human rights community care more about corruption than human rights."[29]

Along similar lines, several commentators have made the case that corruption leads to human rights violations but do not necessarily constitute per se human rights violations. According to commentator Julio Bacio-Terracino, corruption can violate human rights directly or indirectly. The direct violations would occur in instances where there is a conditionality of access to human rights through corruption, e.g., when a person has to bribe a public official in order to exercise a protected human right like the right to access health or education. Indirect violations, on the other hand, would occur in situations where the corruption is an "essential contributing factor in a chain of events that eventually leads to a violation of a right."[30] In such situations, it is not the act of corruption itself that generates the violation of a human right (as in the case in which a person must bribe an official to access a fundamental right), but the direct consequences of such corruption would not exist if it weren't for the corrupt act. Bacio-Terracino provides an example of a situation in which a public official is bribed in order to accept the illegal dumping of toxic waste close to a residential area. In this scenario, the corruption itself is not violating a human right, but the consequences of such corruption might pose a threat to the rights to life and health of the population living near the dumping area that would not exist if it weren't for the purported corrupt act.

With these commentators' helpful analyses in mind, we address the issue of whether elevating freedom from official corruption to the status of a human right is warranted or advisable. On the one hand, treating corruption as a human rights violation per se is viable and, based on the international instruments criminalizing corrupt practices, can even be considered as a matter

of transnational public policy.[31] There is a risk, however, in categorizing all corruption as human rights violations per se, especially in situations in which corruption is not entirely responsible for the harm suffered by the aggrieved individual. One possible solution is to provide access to international tribunals for those whose human rights have been affected by official corruption, thus creating a system that can actually force a country to respect, protect, and fulfil the human rights of its people. As noted by commentator Dr. Peters, it is "not about any (new) human right to a corruption-free society," but rather, "corruption affects the recognized human rights as they have been codified by the UN human rights covenants."[32]

Conclusion

Countries uniformly criminalize official corruption under domestic laws, and there are international frameworks in place, under the auspices of several international organizations, that target corruption at the transnational level. As discussed above, however, there are barriers that prevent aggrieved individuals from accessing domestic courts or invoking the provisions of these international organizations to seek redress from human rights violations that occurred because of an act of official corruption. Although the solution may not be to elevate the right to be free from official corruption to the status of a human right, additional thought should be given to endowing aggrieved individuals with the standing to invoke the existing international agreements to ensure that corrupt officials cannot hide behind the impunity that often occurs when prosecution of corruption is left to local authorities.

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Endnotes

1 In French, "*L'amour pour principe et l'ordre pour base; le progrès pour but*." http://www.historianet.com.br/conteudo/default.aspx?codigo=934 (last accessed on 17 Dec. 2018).

2 For purposes of this article, the term "official corruption" means "a breach of public duty by a public official for private gain." *See* Matthew Murray and Andrew Spalding, *Freedom from Official Corruption as a Human Right*, Brookings Institute (Jan. 2015) (https://www.brookings.edu/wp-content/uploads/2016/06/Murray-and-Spalding_v06.pdf) (last accessed on 12 Dec. 2018).

3 Transparency International, People and Corruption: Asia Pacific – Global Corruption Barometer, *Surveys,* https://www.transparency.org/whatwedo/publication/people_and_corruption_asia_pacific_global_corruption_barometer) (last visited 11 Dec. 2018).

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5 Kofi A. Annan, *Foreword to the United Nations Convention Against Corruption (UNCAC)* (2003), https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf).

6 Murray, *supra* note 2, at 1.

7 United Nations Convention Against Corruption art. 1, *opened for signature* 9 Dec. 2003, 2349 U.N.T.S. 41.

8 *Id.* at chapter III.

9 Inter-American Convention Against Corruption art. II, *opened for signature* 29 Mar. 1996, 35 I.L.M 724.

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10 *Id.* at art. IV.

11 *Id.* at art. VIII.

12 Organisation for Economic Co-operation and Development [OECD] Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 17 Dec. 1997, 37 I.L.M 1 (1998).

13 European Council Agreement Establishing The Group of States Against Corruption – GRECO, 1 May 1999, https://rm.coe.int/16806cd24f.

14 *Id.*

15 African Union Convention on Preventing and Combating Corruption, 1 Jul. 2003, https://au.int/sites/default/files/treaties/7786-treaty-0028_-_african_union_convention_on_preventing_and_combating_corruption_e.pdf.

16 *Id.*

17 *Id.* at art. 3.

18 *The Nexus Between Anti-Corruption and Human Rights*, Raoul Wallenberg Institute of Human Rights and Humanitarian Law (2018) (http://um.dk/~/media/UM/Danish-site/Documents/Danida/Resultater/Eval/2018NexusReport.pdf?la=en) (last accessed on 17 Dec. 2018).

19 *Id*. at 9.

20 *Id*. at 11.

21 *Id*.

22 *Id*. at 12.

23 *Id*. at 12-14.

24 *Id*. at 13.

25 Anne Peters, *Corruption and Human Rights,* 9 (Basel Institute of Governance Working Paper Series 20, 2015).

26 Julio Bacio-Terracino, *Corruption as a Violation of Human Rights,* International Council on Human Rights Policy (2008), *available at* http://ssrn.com/abstract=1107918) (last visited 11 Dec. 2018).

27 Ronald Berenbeim, *Linking Human Rights to Anti-Corruption,* 77 Vital Speeches of the Day 75 (2011).

28 *Id.*

29 Corruption and Human Rights: The Linkages, the Challenges and the Paths for Progress, Symposium Report, Harvard Kenney School, Carr Center for Human Rights Policy (25 April 2018) at p. 23 (https://carrcenter.hks.harvard.edu/files/cchr/files/corruption_symposium_report.pdf) (last accessed on 17 Dec. 2018).

30 *Id*. at 11.

31 *See* Ndiva Kofele-Kale, *The Right to a Corruption-Free Society as an Individual and Collective Human Right: Elevating Official Corruption to a Crime under International Law,* International Lawyer 34 (2000) 149-178.

32 Peters, *supra* note 25, at 11.

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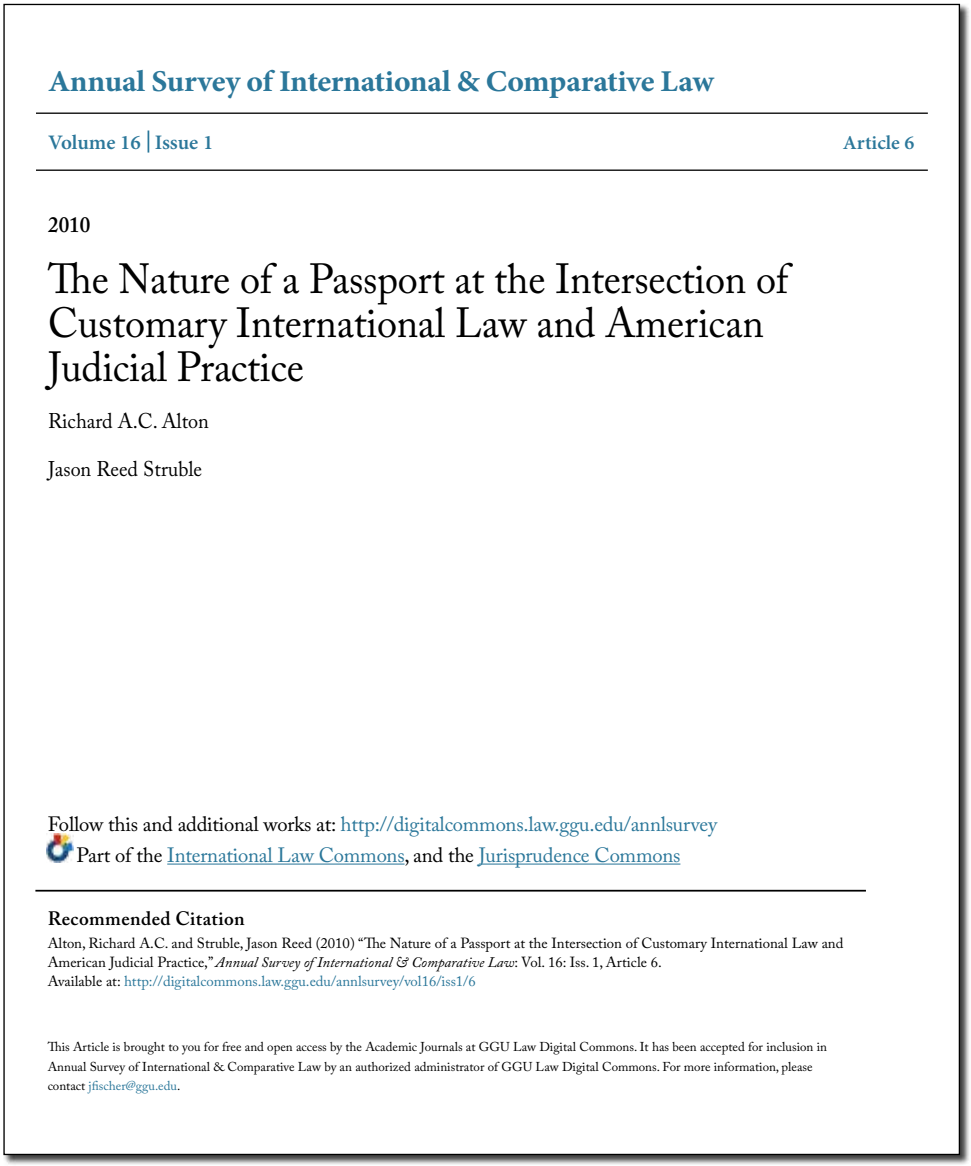
several items from Onwubiko, including a Nigerian passport.[21] Onwubiko petitioned the trial court for release of his passport, among other items.[22] Because exclusion proceedings were pending against Onwubiko, the government made the following representation:

> Practically speaking, the government must retain the passport until exclusion proceedings are concluded so that, if Onwubiko is excluded, he will be able to be returned to his place of origin. Of course, if Onwubiko is not excluded, his passport and ticket will be returned to him.[23]

Despite agreeing with the government that while awaiting the results of the pending exclusion proceedings "the passport must be retained for practical reasons,"[24] the court concluded that Onwubiko had "presented a claim for deprivation of property without due process," among other claims, and ordered the proper addressing of his due process claim.[25] Because neither the Court of Appeals nor the U.S. government considered Onwubiko's Nigerian passport the property of the Nigerian government, the Court of Appeals never addressed the issue of impounding a foreign passport under international law.[26]



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The Nature of a Passport at the Intersection of Customary International Law and American Judicial Practice

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Almost a decade later, the author revisits the topic of foreign passport seizures, a topic he investigated in this 2010 article.

An Individual Lacks Standing to Request the Return of a Foreign Passport: *United States v. Abdul-Ganiu*

In a 2012 non-precedential case from the Court of Appeals for the Third Circuit, the court relied specifically on my work in determining whether to release Olajide Abdul-Ganiu's Nigerian passport.[27] A jury convicted Abdul-Ganiu of several drug-related offenses. A timely appeal followed, challenging both his conviction and sentence and requesting the return of his Nigerian passport. The Court of Appeals affirmed the lower court's decision on his conviction. The court also addressed the issue of the return of his Nigerian passport:

> Abdul-Ganiu also challenges the propriety of the District Court's order at sentencing that he surrender his Nigerian passport. We conclude that Abdul-Ganiu lacks standing to contest the District Court's directive as passports are the property of the issuing sovereign, not the holder of the passport. See Richard A.C. Alton & Jason Reed Struble, The Nature of a Passport at the Intersection of Customary International Law and American Judicial Practice, 16 Ann. Surv. Int'l & Comp. L. 9, 15 (2010); Cf. 22 C.F.R. § 51.7 (providing that "[a] passport at all times remains the property of the United States").[28]

U.S. Department of State

As such, U.S. courts appear to be content to rely on the issue of standing with regard to foreign passport seizures. It is important to note that my work served a central tenant to the passport decision. The only law the court could have considered concerns U.S. property rights over its own passports, which is not the issue at fact in the case.[29] This serves as an important reminder that there is no law regarding foreign passport seizures in the United States and that this decision and others like it in the future will rest on standing.

If a Seizure of Foreign Passport by a Government Is Unlawful, the Passport Should be Returned to the Individual: *Atapattu, R. v. The Secretary of State for the Home Department*

Rosalind English gave an excellent overview of the UK case *Atapattu R. v. The Secretary of State for the Home Department*.[30] Luck Saman Atapattu had applied for a student visa to enter the United Kingdom. In January 2010, following two failed attempts, Atapattu reapplied by submitting his passport to the British High Commission in Sri Lanka; however, he received neither a response nor the return of his passport. Atapattu applied for judicial review, during which time his visa was granted. The passport was returned in August 2010, but Atapattu still pursued his claim, seeking to recover damages. As English notes,

> [h]e contended that the retention of his passport meant that he was not able to pursue employment in the merchant navy, which caused actual loss of earnings, and that since the failure to grant a visa meant that he could not pursue a course of study in the UK, he had been prevented from qualifying as a ship's master, which caused loss of enhanced earnings.

Among other claims, Atapattu claimed that the wrongful retention of his passport made the secretary of state liable for damages for conversion under the Torts (Interference with Goods) Act 1977. The application for judicial review was granted on the conversion basis. English confirms, "[s]ince it was possession of property, not ownership, which gave title to sue for possession, the claimant's right to possession of his passport was sufficient to give him title to sue for conversion." Atapattu was found entitled to damages for that element of the claim—a fascinating result, in that conversion was used to bypass the standing issue.

Implications of the U.S. Government's Impounding of Foreign Passports

When I wrote the law review article about passport seizures in 2010, I noted that it may be impractical for one state to notify another state when it confiscates a passport, let alone return it to the issuing state's representatives. Yet, as reported in a 2014 congressional

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hearing on passport fraud, it was confirmed that the international community, through INTERPOL, has created a travel document database that gives countries a mechanism to send information regarding lost or stolen passports.[31] With mechanisms of this type available, impracticality may no longer be a defense. Still, it would appear now, as in 2010, that the United States has become entrenched in its practice of impounding foreign passports without notice.

With this continued practice, the United States is opening itself up to international disputes and retaliation. Theoretically, if a foreign government perceives the U.S. government's confiscation of its passport as an encroachment upon its personal jurisdiction, that state could request to bring a contentious suit before the International Court of Justice for each particular instance.[32] In order to avoid such disputes from arising, the United States should, at a minimum, codify into law a procedure for impounding a foreign passport. Such a law should comply with general principles of international law while allowing for the sequestration of a passport for practical reasons, such as when removal proceedings are pending.

The United States' continued impounding of foreign passports, while having in the past argued against countries doing the same to American passports, is confounding. Now is the time to clarify the United States' current position on the issue of impounding foreign passports because it would remove the current policy standard from mere dicta and intergovernmental memoranda to a more authoritative realm. If the United States desires to continue impounding foreign passports in violation of customary international law, it should codify into law the means by which the DHS may impound passports issued by other countries.[33] By creating such a law, the United States would set a standard by which impounding foreign passports can occur and enact an enforceable domestic jurisdictional defense in the international arena to avoid being drowned by international claims.

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Endnotes

1 *See* Richard Alton, Passports at the junction of international and domestic law, *available at* https://ukhumanrightsblog.com/2015/08/30/passports-at-the-junction-of-international-and-domestic-law-richard-alton/ (30 Aug. 2015).

2 The Old Testament holds the earliest known reference to a document that embodied the nature of a passport under customary international law. *See Nehemiah* 2:7-9.

3 Daniel C. Turack, The Passport in International Law 16 (Lexington Books 1972) (*citing* Henry Wheaton, Elements of International Law 1:268 and 2:122 (London 1836)).

4 *Id.* at 18.

5 Richard A.C. Alton & Jason Reed Struble, the Nature of a Passport at the Intersection of Customary International Law and American Judicial Practice, 16 Ann. Surv. Int'l & Comp. L. 9, 14 (2010).

6 *See* Guy S. Goodwin-Gill, International Law and the Movement of Persons Between States 8, 44–46 (1978). Courts have noted, however, that a passport is not always to be considered conclusive evidence of nationality for restricted returnability issues. *See* Guy S. Goodwin-Gill, International Law and the Movement of Persons Between States 26 n.6 (1978) (*citing Rex v. Burke, Casey and Mullady*, II Cox C.C. 138 (1868)). A U.S. passport is merely an aid in establishing citizenship for purposes of reentry into the United States. 59A Am Jur. 2d *Passports* § 4 (2003) (*citing Kent v. Dulles*, 357 U.S. 116 (1958)).

7 Turack, *supra* note 3, at 21.

8 *Id.* at 226 (*citing* The Daily Telegraph, 11 Nov. 1967 at 16). *See also* Passports, 3 Hackworth Digest § 259, 437-38 (1942). *See generally* British passport ("This passport remains the property of Her Majesty's Government in the United Kingdom and may be withdrawn at any time."), Jamaican passport ("This passport remains the property of the Government of Jamaica and may be withheld or withdrawn at anytime."), and Canadian Passport Order ("Every passport shall at all times remain the property of Her Majesty in right of Canada.").

9 Nottebohm Case, 1955 I.C.J. 4. The ICJ stated that it is the sovereign right of all states to determine their own citizens and criteria for becoming one in municipal law.

10 Turack, *supra* note 3, at 226 (*citing* The Daily Telegraph, 11 Nov. 1967 at 16). *See also* Passports, 3 Hackworth Digest § 259, 437-38 (1942).

11 *See* Greek National Military Service Case, 73 I.L.R. 606, 607 (Federal Administrative Court 1973) (Federal Republic of Germany). The court said, "The issue of an alien's passport could represent an encroachment on the personal jurisdiction of another State. In such a case consideration should be given to the emphasis put by that other

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State upon the exercise of its personal jurisdiction by means of its competence to issue passports." *See also* Nottebohm Case, 1955 I.C.J. at 23.

12 *Underhill v. Hernandez*, 168 U.S. 250 (1897).

13 22 C.F.R. § 51.7 (2009). The importance of this statute is playing out currently in domestic passport seizures. Such seizures and revocations (i.e., a government seizing passports issued to its own citizenry) has risen to prominence in recent times, for the purposes of ensuring nationals are unable to leave to aid terrorist organizations, as is common in Britain and the EU, or as means for invalidating citizenship, as used in the southern border region of the United States. Domestic passport seizures are a topic of importance, but outside the scope of this current work, yet perhaps some lessons gleaned here can be applied across the board.

14 *See* Passports, 3 Hackworth Digest § 259, at 437-43.

15 *Id.* at 438 (*citing* MS Department of State, file 825.00/622, /624 (30 Jan. 1931)).

16 Passport Seizure Case, 73 I.L.R. 372 (Superior Administrative Court of Munster 1972) (Federal Republic of Germany).

17 *Id.* (citations omitted).

18 *Id*.

19 *Id.* at 373.

20 *Onwubiko v. United States*, 969 F.2d 1392 (2d Cir 1992). Martin Onwubiko, a Nigerian national, was arrested at John F. Kennedy International Airport for violating 21 U.S.C. § 952(a) by importing 557 grams of heroin in 72 balloons within his stomach.

21 *Id.*

22 *Id.* at 1394-96.

23 *Id.*

24 *Id.*

25 *Id.* at 1400.

26 In a similar fashion, in the South African case of *R. v. Teplin*, the court was concerned whether a magistrate was entitled to order the surrender of an Israeli passport in a maintenance action. The court, on appeal, could find no authority by which the magistrate had the power to order surrender of the passport. *See* Turack, *supra* note 3, at 236 (*citing R. v. Teplin* 1950(2) S.A.L.R. 250, 254). Turack concluded that the South African court neglected to consider the international aspects to the case in that "Teplin could not be deprived of his Israeli passport without permission of the Israeli government." Turack, *supra* note 3, at 236.

27 *United States v. Abdul-Ganiu*, 480 F. App'x 128 (3d Cir. 2012). A jury convicted Olajide Abdul-Ganiu of possession with the intent to distribute 100 grams or more of heroin in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B)(i), and of importing a controlled substance into the United States in violation of 21 U.S.C. §§ 952(a) and 960(b)(2)(A).

28 *Id. at 8-9.*

29 An interesting side note is that this case is subsequently cited in Bankruptcy Court, in a case concerning a seizure of a U.S. passport, which is not the factual issue at hand in *United States v. Abdul-Ganiu*. *See In Re Eric Dawson* (U.S. Bankruptcy Court District of Maine) (Sept. 2017).

30 Rosalind English, "Seizure of a passport actionable in law", UK Human Rights Blog, 2011, <http://ukhumanrightsblog.com/2011/06/09/seizure-of-passport-actionable-in-law/>.

31 Passport Fraud: An International Vulnerability Hearing before the Subcommittee on Border and Maritime Security of the Committee on Homeland Security, House of Representatives, One Hundred Thirteenth Congress, Second Session, 4 Apr. 2014, Serial No. 113-62.

32 *See* Ian Brownlie, Principles of Public International Law 713-16 (Oxford 1998).

33 For example, the United States could model its law on Australia's Foreign Passports (Law Enforcement and Security) Act 2005. The Act refers to when and how an Australian law enforcement agent can take possession of a foreign passport.

Crimes Against Humanity in Venezuela, from page 15

Additionally, Venezuela is suffering a severe humanitarian crisis,[10] which has been considered a political operation to impose social and political control over the population[11] through the implementation of the *Carnet de la Patria*, an identification card "restricting access to what limited provisions of [food and health services] are available by the individual's relationship with the government," and allowing the regime to deny access to basic food, medicines, and health services to those who publicly have expressed their opposition to the Chavista Revolution.[12]

This reality has been pointed out not only by the 2017 Venezuela Human Rights Report from the U.S. Department of State,[13] the Inter-American Commission on Human Rights,[14] and the 2018 Venezuela World Report from Human Rights Watch,[15] but also by the Panel of Independent International Experts on the Possible Commission of Crimes Against Humanity, which arrived at the conclusion that within the context of the crimes against humanity committed in Venezuela, the deprivation of food, medicines, and health services for political reasons constitutes the crime of persecution.[16]

Similarly, the main advisor to President Donald Trump on Latin America, Juan Cruz, affirmed that the government of Venezuela is committing crimes against humanity because of "how they are starving their own people and how they use food for political manipulation."[17] This severe crisis explains the reason behind the fact that, since September 2016, Venezuelans are number one on the list of leading nationalities filing asylum applications with the U.S. Citizenship and Immigration Services (USCIS).[18]

According to the federal Immigration and Nationality Act (INA), to deserve the protection of asylum, a person needs to show that he or she is a refugee by meeting the following definition:

> any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country **because of persecution or a well-founded fear of persecution** on account of race, religion, nationality, membership in a particular social group, or political opinion . . . .[19]

Based on the aforementioned definition, a person may be a refugee not only when he or she has suffered past persecution on account of one or more of the five protected grounds[20] but also when the person has a well-founded fear of future persecution, which implies that an individual does not necessarily need to have suffered past persecution as a prerequisite to being granted asylum.

In order to be considered a well-founded fear, the person must demonstrate that his or her fear is based on one of the five protected grounds, that there is a reasonable possibility that the persecution will happen if he or she returns to the country, and that he or she "is unable or unwilling to return to, or avail himself [or herself] of the protection of, that country because of such fear."[21]

The U.S. Supreme Court, in *INS v. Cardoza-Fonseca*, affirmed that "there is simply no room in the United Nations' definition for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no 'well-founded fear' of the event happening,"[22] which implies that the U.S. Supreme Court has "suggested that even a 10 percent chance of persecution may amount to a reasonable possibility of persecution."[23]

This fear must be both subjectively genuine and objectively reasonable.[24] A person's testimony about his or her fear of persecution, supported by the evidence on record, should satisfy the subjective requirement. Regarding the objective requisite, "[t]he determination of whether a fear is well-founded does not ultimately rest on the statistical probability of persecution occurring to an applicant in the future, but rather on whether the applicant's fear is based on facts that would lead a reasonable person in similar circumstances to fear persecution."[25] Additionally, the Board of Immigration Appeals has established that in order to demonstrate a well-founded fear, the applicant must show that he or she "possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort; (2) the persecutor is already aware, or could easily become aware, that [he or she] possesses this belief or

European Parliament, http://www.termcoord.eu

Within this regulatory framework, it is important to highlight that probably not all of the Venezuelans who have applied for asylum have suffered past persecution, which means that a vast majority have applied or will apply for asylum based on a well-founded fear of future persecution, and the situation of crimes against humanity in Venezuela should play an important role at the moment of determining the existence of a well-founded fear of future persecution.

characteristic; (3) the persecutor has the capability of punishing [the applicant]; and (4) the persecutor has the inclination to punish [the applicant]."[26]

Nevertheless, if the applicant demonstrates the existence in his or her country of a pattern or practice of persecution of a group of persons similarly situated to him or her on account of one or more of the protected grounds, and his or her inclusion in such group of persons, the asylum officer or immigration judge "shall not require the applicant to provide evidence that there is a reasonable possibility he or she would be singled out individually for persecution."[27]

Moreover, "even if the government has not threatened all members of a political opposition with systematic persecution, the risk that a particular applicant will be persecuted can rise to the level required for establishing a well-founded fear of persecution . . . as a result of an individual's activities in support of the group."[28] Even though the person does not need to show that every member of the group "must face serious persecution," it is necessary to demonstrate that the group shares a characteristic that the "persecutor seeks to overcome and falls within one of the protected grounds."[29]

The numerous reports on human rights abuses, abundant press coverage, and the preliminary investigation by the Office of the Prosecutor of the ICC affirming the open-ended nature of the Venezuelan situation undoubtedly demonstrate there exists a systematic, persistent, and organized persecution that amounts to crimes against humanity targeting those who dare to oppose the Chavista regime and who have publicly expressed their dissident political opinion. This persecution extends to the dissidents' families and other vulnerable groups of people, such as journalists, professors, students, and women, such that any reasonable person situated in similar circumstances will fear persecution as well.

The commission of crimes against humanity in Venezuela, one of the most serious crimes of concern to the international community,[30] implies the existence of a widespread or systematic attack directed against the opposition civilian population, to murder, torture, exterminate, etc., such opposition civilian population.[31] Therefore, in each case where a Venezuelan asylum applicant can demonstrate his or her inclusion within one of the specific groups that has been, or is at greater risk of being, victims of these types of crimes, the applicant will not be required to demonstrate that he or

she would be singled out individually for persecution in case of return.

This conclusion is supported by the request of the Inter-American Commission on Human Rights to the member states of the OAS, urging them to "[g]uarantee the recognition of refugee status to Venezuelan people with a well-founded fear of persecution in case of return to Venezuela, or who consider that their life, integrity or personal freedom would be threatened due to the situation of violence, massive violations of human rights, and serious disturbances of public order []."[32]

Finally, it is important to remember that each application should be analyzed based on its own merits, and each applicant must comply with all the elements of the legal definition of refugee to deserve the protection of the United States.

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19 INA § 101(a)(42)(A).

20 The five protected grounds are race, religion, nationality, membership in a particular social group, or political opinion.

21 8 C.F.R. §§ 208.13(b)(2)(i) (2014).

22 *INS v. Cardoza-Fonseca,* 480 U.S. 421, 431 (1987).

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innocents. The bar chart in Figure 3 shows that 164 people in 28 states in the United States have been released from death row as innocents since 1973. There was a yearly average of 3.1 exonerations from 1973 to 1999 and five exonerations from 2000 to 2011.[16] Figure 4 shows a steep decline in death sentences in the United States since 1999. This appears to be driven by public concern about wrongful convictions, which has made prosecutors, judges, juries, and governors more cautious about the death penalty.

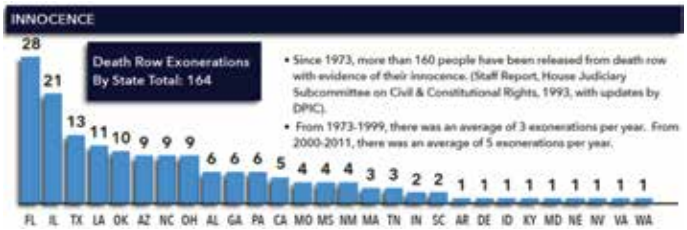

Figure 3
Source: DPIC "Facts about the Death Penalty" as of 28 November 2018.

The number of death sentences per year has dropped dramatically since 1999.

Year	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Sentences	295	279	223	153	168	151	138	140	123	128	120	118	114	85	82	83	73	49	31	39

Source: Bureau of Justice Statistics, "Capital Punishment, 2013" - 2014 - 2017 figure from DPIC research

Figure 4
Source: DPIC "Facts about the Death Penalty" as of 28 November 2018.

In contrast, only eight persons have been sentenced to death or to life imprisonment in Japan and subsequently acquitted at retrial since 1945. Iwao Hakamada will likely become number nine if he does not die before his retrial is completed; he was released in March 2014 after serving forty-five years on death row for four murders, but it is considered a wrongful conviction.[17] An average of one exoneration every eight years in Japan stands in contrast to the frequency of exonerations in the United States. One explanation of the small number of wrongful convictions in Japan is that Japanese prosecutors are more cautious about charging criminal cases than other jurisdictions. Another is that Japan has far fewer criminal defense lawyers per capita than the United States.[18] Nine exonerations might be the tip of an iceberg of wrongful convictions.

2. Execution in Secrecy

Another crucial criticism of the death penalty in terms of human rights is "execution in secrecy" in Japan, which is seldom seen in the United States and other retentionist countries.[19] This policy of secrecy includes these problems: (1) execution is basically long overdue (seven years and five months on average, but some inmates have been pending execution for twenty years); and (2) extremely short notice (a mere hour or two) before execution.[20] Inmates live in fear of a sudden notice of their execution after a long sentence, which decreases their mental capacity. Inmates should be notified of the time of their execution several days before, and the media and the public should be informed simultaneously.

Minister of Justice Keiko Chiba, an avowed opponent of the death penalty, attended two executions in Tokyo on 28 July 2010. She was the first minister of justice to observe an execution. Traditionally, the only persons who can attend an execution in Japan are a prosecutor, a prosecutor's assistant, a warden, and several executors. Shortly after the execution, Chiba gave journalists access to the gallows in Tokyo. This was the first time in a half-century that reporters were permitted to observe one of the seven locations where hangings are conducted in Japan.[21] In terms of the need for transparency and human rights, Japan's executions in secrecy are quite salient. Media and scholars, journalists, relatives, and friends of the victim and of the inmate should be given an opportunity to observe the execution. Greater transparency would spur further discussions and attention to the death penalty in public.

3. Racial Discrimination

In the United States, racial discrimination resulting in wrongful convictions is a major criticism of and reason for reform of the death penalty system. On 11 October 2018, in *State v. Gregory,* the Washington (State) Supreme Court found that the death penalty violates the state constitution because it is arbitrary and discriminatory with regard to race. Black defendants in Washington State are more than four times as likely to be sentenced to death as white defendants, and Washington became the twentieth abolitionist state.[22] Racial bias regarding the death penalty does not apply

in Japan because Japan's society is homogeneously mono-ethnic. This feature of Japan's society might make it difficult to move the country toward reform of its death penalty system. More immigrants and more visible minorities could lead to more awareness of racial bias in the death penalty in Japan, but these changes in society are not likely to occur soon.

Conclusion

Japan has not uncovered many wrongful convictions that resulted in the death penalty. Execution in secrecy has made the death penalty a low salience issue in Japan. Due to its homogeneity, Japan has not confronted social pressure to discuss the death penalty system as it relates to disadvantaged minorities. In all these respects, Japan is distinct from the United States, where death penalty reform markedly has occurred.

As an alternative to the death penalty, Japan could consider a life-without-parole sanction (LWOP). It would be one solution to the problem of executing innocents under the death penalty. In the United States, the LWOP sanction has given prosecutors and courts an extremely severe alternative punishment, which has made death sentences decrease in many jurisdictions.[23] In Japan, a few bills that would create an LWOP or LWOP-like sentence have been introduced, but these bills have never gone to a parliamentary vote, partly because of proponents of the death penalty in the LDP.[24]

Public support for the death penalty in Japan has not softened as it has in the United States. In a democracy, this form of retention of the death penalty can be fundamental. In this regard, a retentionist could argue that the death penalty serves positive functions. For prosecutors, it is a legal instrument that allows them to perform executions to meet professional objectives. For politicians, it is employed in policy discussions when they are running for office. For journalists, it is cited in their articles describing sensitive, prohibited, or controversial issues to garner attention and increase publication. For victims, it is believed to be the only legitimate method to achieve retribution. For the public, it is viewed as deterrence to homicide. For judges or juries, it convinces them of proof of justice by sacrificing a defendant regardless of whether he or she is truly a murderer or an innocent. For retentionists, one is executed for all.

Japan often follows the United States in matters of foreign policy. In a similar way, Japan's retention of the death penalty may depend on decisions made in the United States. If the United States abolishes the death penalty, Japan may conform to the international norm of the abolitionist countries. By that time, however, how many innocents might be executed without any awareness in Japanese society?

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2 It should be noted that Christianity's attitude toward the death penalty has become more and more restrictive, and in particular the Catholic Church has had a strong impact on the abolitionist movement during the last decade. For instance, the decision by the Philippines to abolish the death penalty in 2006 was strongly influenced by the Catholic Church and came only days before a meeting between President Gloria Arroyo and Pope Benedict XVI in the Vatican.

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