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# **Towards Holistic Transnational Protection: An Overview of International Public Law Approaches to Kidnapping**

## **Keywords**

Kidnapping, Public Law

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

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

## I. INTRODUCTION

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

*- Ministers Responsible for Public Security in the Americas, October 2008<sup>1</sup>*

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

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

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

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

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

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

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

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

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

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

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

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

## II. KIDNAPPING AS TRANSNATIONAL CRIMINAL ACTIVITY

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

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

9. See *infra* Part 4.1.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20. See Bureau of Consular Affairs, U.S. Dep’t of State, Mexico, [http://travel.state.gov/travel/cis\\_pa\\_tw/cis/cis\\_970.html](http://travel.state.gov/travel/cis_pa_tw/cis/cis_970.html) (last visited April 17, 2010) (“Mexican authorities have failed to prosecute numerous crimes committed against U.S. citizens, including murders and kidnappings. . . . In some cases, assailants were wearing full or partial police uniforms and have vehicles that resemble police vehicles, indicating that some elements of the police may have been involved.”).

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

22. See Bureau of Consular Affairs, U.S. Dep’t of State, Haiti, Country Specific Information, [http://travel.state.gov/travel/cis\\_pa\\_tw/cis/cis\\_1134.html](http://travel.state.gov/travel/cis_pa_tw/cis/cis_1134.html) (last visited Apr. 10, 2010); O’Neil, *supra* note 11, at 67; Bureau of Democracy, Human Rights, and Labor, U.S. Dep’t of State, 2005 Country Reports on Human Rights Practices, Iraq (March 8, 2006), <http://www.state.gov/g/drl/rls/hrrpt/2005/61689.htm>.

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

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

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

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

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

#### *A. Elements of Kidnapping*

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

The common elements of kidnapping as a crime are:

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

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

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

28. ECOSOC Res. 2002/16, *supra* note 14, ¶ 1.

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

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

31. *Id.*



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

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

### 1. Human Rights

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

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

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

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

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

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

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

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

39. *Id.* art. 9.

40. *Id.* art. 6.

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

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

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

41. *Id.* art. 9.

42. *Id.* art. 7.

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

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

45. See Dep't of Econ. And Soc. Affairs [DESA] U.N. Comm. On the Elimination of Discrimination Against Women, *Report on Mexico*, U.N. Doc. CEDAW/C/2005/OP.8/MEXICO (Jan. 27, 2005) [hereinafter *Report on Mexico*] (noting that kidnappings of women in Ciudad Juarez, Mexico represent structural violence within the society). See also Case of Gonzalez *et al.* v. Mexico, 2009 Iner-Am. Ct. H.R. (ser. C) No. 205, ¶ 133 (Nov. 16, 2009), available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_205\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_205_ing.pdf) (noting sexual violence in conjunction with kidnapping). See generally U.N. News Centre, *Haiti: U.N. Mission Alarmed as Another Child Kidnapping Victim is Killed*, U.N. News Centre, Aug. 19, 2008, <http://www.un.org/apps/news/story.asp?NewsID=27756&Cr=minustah&Cr1=kidnap> (stating that in Haiti, in 2008 half of all kidnapping victims were composed of children, and they were frequently subject to torture, rape, sexual abuse, and murder).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

U.N.T.S. 3.

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

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

61. *Id.*

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

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

64. *Id.* art. 16.

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

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

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

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

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

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

68. See *Velasquez Rodriguez v. Honduras*, 22/86 Inter-Am. Ct. H.R., (ser. C) No. 7920 (Jul. 29, 1988) available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_04\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_04_ing.pdf) (finding the state in violation of articles 1, 4 (life), 5 (humane treatment), and 7 (personal liberty) of the American Convention on account of its responsibility for enforced disappearance of the victim); "*Street Children*" (*Villagran-Morales et al.*) v. Guatemala Case 2001 Inter-Am. Ct. H.R. (ser. C) No. 77 (Nov. 19, 1999) (finding the state in violation of article 1 for failure of the state to identify or penalize the persons who abducted and killed street children).

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

70. See *Case of Goiburú et al. v. Paraguay*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 153, ¶ 103 (Sep. 22, 2006) available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_153\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_153_ing.pdf).

71. *Id.* ¶ 84.

72. See *Case of La Cantuta v. Peru*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 162, ¶ 157 (Nov. 29, 2006) available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_162\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_162_ing.pdf).

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

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

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73. *Matter of the Communities of Jiguamiandó and Curbaradó Regarding Colombia*, 2006 Inter-Am. Ct. H.R. (Provisional Measures) at 14 (Feb. 7, 2006) *available at* [http://www.corteidh.or.cr/docs/medidas/jiguamiando\\_se\\_04\\_ing.pdf](http://www.corteidh.or.cr/docs/medidas/jiguamiando_se_04_ing.pdf).

74. *Digna Ochoa y Plácido et al.* Case, 1999 Inter-Am. Ct. H.R. (Provisional Measures) at 3 (Nov. 17, 1999) *available at* [http://www.corteidh.or.cr/docs/medidas/dignaochoa\\_se\\_01\\_ing.pdf](http://www.corteidh.or.cr/docs/medidas/dignaochoa_se_01_ing.pdf).

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

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

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

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

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

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

#### **1. Kidnapping as a War Crime**

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

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

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

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

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

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



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

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

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

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

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

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

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

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

## 2. Kidnapping as a Crime Against Humanity

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

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

85. *Id.* at 306-327.

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

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

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

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

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

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

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

### 3. Lack of Enforcement Mechanisms for Transnational Criminal Law

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

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

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

92. *Id.* at 195.

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

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

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

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

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

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

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

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

98. *Id.* at 2.

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

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

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

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

1. States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.

2. Nothing in this Convention entitles a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law.

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

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

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

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

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

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

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

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

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

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

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

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

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[http://www.wunrn.com/news/2008/07\\_08/07\\_21\\_08/072108\\_argentina.htm](http://www.wunrn.com/news/2008/07_08/07_21_08/072108_argentina.htm) for a discussion of the Dirty War.

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

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

"The operations, for the most part, are carried out by groups whose number varies from 6 to 20 persons which arrive at the home or place of work of the victim in several unmarked cars without license plates, and equipped with radios that allow them to communicate with each other. In some cases they are accompanied by additional support forces in vans, in which, after the mission is completed, they transport the household goods that are taken from the homes of the victims.

It has also been denounced that when relatives, witnesses or building supervisors reported the occurrences to the local police, the response was usually, after admitting knowledge of the fact, to say that they were unable to intervene. In the few cases where police did arrive at the scene, they withdraw shortly after having spoken to the persons directly involved in the operation. This situation has been called "free zone", in favor of the intervening parties."

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

112. CONADEP reported that 62% were abducted in their own homes, 24% on the street, 7% at work, and 6% at place of study. NATIONAL COMMISSION ON THE DISAPPEARANCE OF PERSONS, NUNCA MAS (1984), available at [http://web.archive.org/web/20031013222855/nuncamas.org/english/library/nevagain/nevagain\\_005.htm](http://web.archive.org/web/20031013222855/nuncamas.org/english/library/nevagain/nevagain_005.htm).

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

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

115. *Id.*

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

As noted by Seibert-Fohr:

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

#### *A. Enforced Disappearance*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



Although the inclusion of non-State actors acting without the support or consent of the Government may at first glance look like an advancement of the law, in the sense that it protects more than the limited definition of the Declaration, it is the opinion of the Working Group that enforced disappearance is a “State Crime” (as opposed to kidnapping). Although in other cases of violations of human rights the inclusion of non-State actors indeed offers more protection to the victims, (i.e. in the case of discrimination or labour or environmental human rights), in the case of enforced disappearance such inclusion dilutes the responsibility of the State.

For that same reason, the Working Group resists accepting the official Colombian attitude to ‘disappearances’, linking the definition of the phenomenon to or even equating it with ‘kidnappings’. To accept this definition would amount to diluting or even ousting State responsibility for acts of ‘disappearances’. The Working Group made it a point to emphasize that ‘disappearances’ are a State responsibility, while ‘kidnappings’ are things one attributes to non-State individuals, gangs, or criminal networks. The Working Group also took pains to condemn both acts of “disappearances” and “kidnappings”, irrespective of their perpetrators, as reprehensible.<sup>124</sup>

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

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

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to Colombia].

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

125. According to the Colombian Foundation País Libre, there has been a decrease in kidnappings from a high of 3572 in 2000 to 242 in 2008. Fundación País Libre reports that in the period 1996-2008, a total of 23,908 persons have been kidnapped in Colombia. The majority were kidnapped by FARC or ELN. In the same time period, 13,927 were liberated (843 liberated under pressure), 4,555 were rescued,

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

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

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

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

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

127. *See generally* *Kidnappers Inject Acid Into Boys Heart*, CBS NEWS WORLD, Nov. 4, 2008 *available at* [http://www.cbsnews.com/stories/2008/11/04/world/main4571385.shtml?source=RSSattr=World\\_4571385](http://www.cbsnews.com/stories/2008/11/04/world/main4571385.shtml?source=RSSattr=World_4571385) (blaming the increase on a growing web of drug cartels, current and former police officers and informants who point out potentially lucrative victims).

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

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

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

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

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

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

#### A. *The Martí Case*

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

132. See *infra* Part 4.1.

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

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

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

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

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

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

infiltration by criminal elements and put an end to “the conspiracy between criminals and authorities.”<sup>139</sup>

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

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

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

140. *Id.*

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

142. *Id.*

143. *Id.*

144. *Id.*

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

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

“States must take all necessary measures, including legislative and administrative reforms, to ensure that public institutions are organized in a manner that ensures respect for the rule of law and protection of human rights. At a minimum, States should undertake the following measures:

(a) Public officials and employees who are personally responsible for gross violations of human rights, in particular those involved in military, security, police, intelligence and judicial sectors, shall not continue to serve in State institutions. Their removal shall comply with the requirements of due process of law and the principle of non-discrimination. Persons formally charged with individual responsibility for serious crimes under international law shall be suspended from official duties during the criminal or disciplinary proceedings”.

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

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

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

### *B. The Blumberg Case*

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

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

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

148. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### C. *The Role of Private Companies*

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

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

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

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

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

163. *Id.*

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

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

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

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

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

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

## V. REFUGEE LAW AS AN ASPECT OF INTERNATIONAL PROTECTION

### A. Background

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

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

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

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



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

### B. Asylum

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

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

169. *Id.*

170. *Id.*

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

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

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

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

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

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

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

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

176. *See id.* ¶¶ 1, 36.

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

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

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

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

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

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

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

### 1. Kidnapping as Persecution

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

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

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

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

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

violation via accumulation.<sup>185</sup> Goodwin-Gill & McAdam provide the following definition:

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

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

## 2. Well-founded Fear of Persecution

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

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

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

188. *Id.*

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

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

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

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

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

#### a. The State’s Ability to Protect

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

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

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

193. *Id.* ¶ 19.

194. *Id.* ¶ 27-28.

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

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

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

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

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

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

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

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

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

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

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

202. *Id.*

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

204. *Id.*

asylum due to the state's inability to protect Albinos from kidnapping and assassination.<sup>205</sup>

b. Internal Flight Alternative

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

205. Commission des Recours des Réfugiés [CRR] [Refugee Appeal Comm'n], June 10, 2005, Nov. 23, 2005, Case no. 514926 (Fr.) available at [http://www.cnda.fr/ta-caa/media/document/recueil2005\\_anonymise.pdf](http://www.cnda.fr/ta-caa/media/document/recueil2005_anonymise.pdf).

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

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

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

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

### 3. Nexus to Protection Category

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

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

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218. *Id.*

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

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

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

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

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

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



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

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

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

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

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

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

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

228. *Id.* at 864.

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

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

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

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

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

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

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

231. *Id.* ¶ 20.

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

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

234. *Id.*

235. *Id.*

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

237. *Id.* at 880.

238. *Id.* at 879-80.

239. *Id.* at 879.

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

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

## VI. CONCLUSION

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

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

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

241. *Id.*

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

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

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