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CARDOZO LAW INSTITUTE *in Holocaust and Human Rights*

HUMAN RIGHTS AND ATROCITY PREVENTION CLINIC

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February 28, 2023

Submitted to:

United Nations Special Rapporteur on trafficking in persons, especially women and children

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Call for input: Trafficking in persons and protection of refugees, stateless persons and internally displaced persons (IDPs)

Dear Special Rapporteur Prof. Siobhán Mullally,

Thank you for providing the opportunity to contribute submissions to the report to be delivered to the 53rd session of the Human Rights Council in June 2023 on access to international protection of victims of trafficking in persons or persons at risk of trafficking. Our submission focuses on international criminal law and international refugee law perspectives on issues regarding trafficking in persons. Specifically, it presents an overview of the most comprehensive legal protections available to victims of trafficking whose exploitation occurred by acts of the slave trade and/or slavery. To fully protect refugees, stateless persons and internally displaced persons (IDPs), we suggest that trafficking safeguards be utilized complementary to the guarantees provided by slavery and the slave trade as international crimes and as human rights violations. The Special Rapporteurs' attention to the risk factors of trafficking offers an appropriate occasion to delineate how such legal compatibility functions to access more complete and comprehensive international protection for victims. As such, the submission addresses:

1. Prevention of trafficking among refugees, IDPs and stateless persons in conflict situations;
2. Refugees, IDPs and stateless persons as victims of trafficking or persons at risk of trafficking for all purposes of exploitation: conceptual and procedural issues as it relates to international criminal law; and
3. Trafficking in persons for all purposes of exploitation as a form of persecution under crimes against humanity under international criminal law.

Prior to addressing these points, we comment upon the legal relationship between trafficking in persons and slavery and the slave trade.¹

Slavery and the Slave Trade

Slavery and the slave trade are distinct international crimes, including war crimes, and international humanitarian law prohibitions under treaty law and customary international law.² Slavery crimes are peremptory norms and, thus, have *jus cogens* status.³ Slavery or enslavement, whether under international customary or treaty law, outlaws the exercise of any or all of the powers attaching to the rights of ownership over a person.⁴ The slave trade prohibits the reduction of a person into slavery or the further enslavement of an already enslaved person.⁵ Proof of consent or of non-consent of victimized persons is legally irrelevant to the establishment of slavery and the slave trade as international crimes. All acts and practices of slavery and of the slave trade are illegal, under all circumstances, including during periods of armed conflict. Thus, slavery crimes are justiciable under the jurisdiction of international and national judicial bodies.⁶

Slavery and the slave trade, likewise, are recognized under international law and regional law as human rights violations.⁷ Importantly, the Universal Declaration for Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) prohibit slavery and the slave trade in all

¹ A legal discussion of the crime of smuggling and its frequent interaction with trafficking, slavery and the slave trade are beyond the scope of the present submission. Nonetheless, we are cognizant of risk of refugees, stateless persons and IDPs to be concurrently subjected to smuggling. See U.N. Committee on the Elimination of Discrimination Against Women (CEDAW Committee), *General Recommendation No. 38 (2020) on trafficking in women and girls in the context of global migration*, ¶¶ 6, 13, 24 (Nov. 20, 2020). Recent prosecutions in the Netherlands against traffickers and enslavers reductively only include charges of smuggling despite availability of compatible legal redress by human trafficking and enslavement crimes.

² League of Nations, Convention to Suppress the Slave Trade and Slavery, Sept. 25 1926, 60 L.N.T.S. 253, Registered No. 1414 [hereinafter 1926 Slavery Convention]; U.N. Economic and Social Council (ECOSOC), Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, entered into force Apr. 30, 1957, 266 U.N.T.S. 3 [hereinafter 1956 Supplementary Convention]; International Committee of the Red Cross, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 2(f), June 8, 1977, 1125 U.N.T.S. 609.

³ By the early 1970s, a consensus emerged that slavery was a norm of *jus cogens*, spurred on by the work of the United Nations International Law Commission and the determination by the International Court of Justice, in the 1970 *Barcelona Traction* case, that the “protection from slavery” created state obligations *erga omnes*.

⁴ Rights of ownership could be de facto by practice or custom. See Jocelyn Getgen Kestenbaum, *Disaggregating Slavery and the Slave Trade*, 16 FIU L. Rev. 515, 518 (2021) (citing JEAN ALLAIN, SLAVERY IN INTERNATIONAL LAW: OF HUMAN EXPLOITATION AND TRAFFICKING 109 (2012)).

⁵ 1926 Slavery Convention, *supra* note 2, at art. 1(2); 1956 Supplementary Convention, *supra* note 2, at art. 3.

⁶ For example, jurisdiction exists through the Inter-American Court of Human Rights; European Court of Human Rights (slavery only); African Court of Human Rights; International Covenant on Civil and Political Rights, Art. 8(1), Dec. 16, 1966, S. Exec. Rep. 102–23, 999 [hereinafter ICCPR]; International Criminal Tribunal for the Former Yugoslavia (Prosecutor v. Kunarac, Kovač & Vuković, Case No. IT-96-23 & IT-96-23/1-T, Trial Judgment, U 542 (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2002)).

⁷ Org. of African Unity, *African Charter on Human and Peoples’ Rights*, art. 5, OAU Doc. CAB/LEG/67/3 rev. 5 (June 27, 1981); Org. of American States, American Convention on Human Rights “Pact of San José, Costa Rica” art. 6, Nov. 22, 1969, 1144 U.N.T.S. 123; European Convention on Human Rights art. 4, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

their forms.⁸ Slavery and the slave trade are non-derogable human rights violations⁹ that must be respected during periods of armed conflict, as well as in times of peace.

Pursuable regardless of the age, religion, gender, race or ethnicity, or any other distinction of the victim, slavery and the slave trade cover, without exception, persons who are refugees, stateless, or internally displaced. Whether as international crimes or as human rights violations, slavery and the slave trade extend protection to all persons of concern in the Special Rapporteur's upcoming report.

Human Trafficking

Human trafficking, a transnational crime applicable to all persons as per Article 3 of the Palermo Protocol,¹⁰ is justiciable in national jurisdictions. Trafficking is not an international crime under treaty or customary law. Trafficking in persons refers to the exploitation of individuals that can occur within a country or involve crossing borders.¹¹ Women, men, and children can be trafficked for *inter alia* forced labor, slavery, sexual exploitation, removal of organs, and forced marriage.¹² The three key elements of human trafficking are: (1) action, (2) means,¹³ and (3) purpose (exploitation).¹⁴ Trafficking requires that an accused's purpose is for exploitation; thus, human trafficking criminalizes the transfer of individuals into exploitative practices.¹⁵ Acts of slavery or the slave trade can be recognized as forms of exploitation under trafficking. The Palermo Protocol established a framework for states to pursue trafficking as a crime in their respective domestic jurisdictions while emphasizing cross-border cooperation.¹⁶

Trafficking is an international and a regional human rights violation that mainly protects women and children. Article 6 of the Convention to Eliminate Discrimination Against Women (CEDAW) calls on states to "suppress all forms of traffic in women."¹⁷ The Convention on the Rights of the Child (CRC) prohibits the trafficking and exploitation of children.¹⁸ The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa condemns trafficking in women in Article IV(2)(g).¹⁹ The Council of Europe Convention on Action Against Trafficking in Human Beings, however, proscribes trafficking of any persons within the jurisdiction of the European Council, without

⁸ G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 4, Dec. 10, 1948; ICCPR, *supra* note 6, at art. 8.

⁹ See, e.g., ICCPR, *supra* note 6, at art. 4(2); ECHR, *supra* note 7, at art. 15(2).

¹⁰ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, *adopted* Nov. 15, 2000, art. 3, 2237 U.N.T.S. 319 [hereinafter Palermo Protocol].

¹¹ *Id.* at art. 3(a).

¹² Office of the U.N. High Commissioner for Human Rights, *Human Rights and Human Trafficking: Fact Sheet No. 36*, 2 (June 1, 2014).

¹³ Under Article 3(c) of the Palermo Protocol, the "means" element is not required for trafficking in children. See Office of the U.N. High Commissioner for Human Rights, *Human Rights and Human Trafficking: Fact Sheet No. 36*, 3 (June 1, 2014).

¹⁴ Palermo Protocol, *supra* note 10, at art. 3(a).

¹⁵ Getgen Kestenbaum, *supra* note 4, at 543; see also Nicole Siller, "Modern Slavery" Does International Law Distinguish between Slavery, Enslavement and Trafficking?, 14 J. INT'L CRIM. JUST. 405, 418 (2016).

¹⁶ Palermo Protocol, *supra* note 10, at art. 3.

¹⁷ Convention on the Elimination of All Forms of Discrimination Against Women, art. 6, Dec. 18, 1979, 1249 U.N.T.S. 13, <https://www.refworld.org/docid/3ae6b3970.html> [<https://perma.cc/WM24-JFJT>] (last visited Feb. 27, 2023) [hereinafter CEDAW].

¹⁸ Convention on the Rights of the Child, arts. 34-36, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

¹⁹ African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa art. IV(2)(g), July 11, 2003, <https://www.refworld.org/docid/3f4b139d4.html> [<https://perma.cc/854H-U6ZS>] (last visited Feb. 27, 2023).

discrimination to the status of the person.²⁰ Also, the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (Convention of Belém do Pará) condemns the trafficking of women.²¹

As stated previously, slavery or enslavement, whether under customary or treaty law, outlaws the exercise of any or all the powers attaching to ownership over a person. Enslavement is a provision under crimes against humanity in Article 7 of the Rome Statute of the International Criminal Court (Rome Statute, or ICC).²² The definition of enslavement refers to acts of “trafficking, especially women and children.”²³ Notwithstanding, trafficking is not a crime under the Rome Statute. Respectively, no elements of the crime, neither its *actus reus* nor *mens rea*, are provided for in the ICC Elements of Crimes.²⁴ The descriptive term “trafficking” in the definition of enslavement refers to actions or conduct that, if accomplished while exercising powers of ownership over a person, would constitute proof of enslavement. The Office of the Prosecutor (OTP) of the ICC affirmed that they had no authority to pursue the crime of trafficking.²⁵ However, the OTP acknowledged in their strategic plan that crimes under the jurisdiction of the ICC are typically linked to other forms of criminal activity, including transnational organized crime. The OTP specifically identifies trafficking as one such linked transnational criminal activity.²⁶

Accordingly, the establishment of acts or conduct similar to acts of trafficking as a transnational crime and trafficking as a human rights violation could crucially assist in the proof of international crimes, in particular slavery and the slave trade as war crimes or crimes against humanity under customary law and, in particular, as persecution as a crime against humanity.

After setting forth this brief legal background, the submission now addresses three points to respond to the Special Rapporteur’s call for input to the report. The examples below intend to highlight potential positive legal interactions between trafficking acts and slavery and/or slave trade crimes that could ensure protection from and prevention of trafficking of refugees, stateless persons, and IDPs.

²⁰ Council of Europe, Council of Europe Convention on Action Against Trafficking in Human Beings art. 14, May 16, 2005, C.E.T.S. No. 197, <https://www.refworld.org/docid/43fdd544.html> [<https://perma.cc/3LDB-MVC5>] (last visited Feb. 27, 2023).

²¹ Organization of American States (OAS), Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (“Convention of Belém do Pará”) art. 2(b), June 9, 1994, <https://www.refworld.org/docid/3ae6b38b1c.html> [<https://perma.cc/A7YN-6P7G>] (last visited Feb. 27, 2023).

²² See Rome Statute of the International Criminal Court, art. 7(2)(c), 2187 U.N.T.S. 90, *entered into force* July 1, 2002.

²³ *Id.*

²⁴ See ICC, *Elements of Crimes* (2011), <https://www.icc-cpi.int/sites/default/files/ElementsOfCrimesEng.pdf> [<https://perma.cc/6RN8-3E62>].

²⁵ See ICC, Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, 12-13, §§ 16-17 (2014); See also CEDAW GR 38, *supra* note 1, at ¶¶ 13-14 (wherein the compatibility of resorting to protections against slavery and the slave trade along with safeguards against trafficking is recognized).

²⁶ ICC, Office of the Prosecutor, *Strategic Plan 2016–2018*, 14, § 30 (July 6, 2015), <http://www.pgaction.org/pdf/OTP-Draft-Strategic-Plan-2016-2018.pdf> [<https://perma.cc/8G3G-DBTX>] (“[T]he impact of [transnational organized criminal activity] may fuel the conditions for crimes within the jurisdiction of the ICC and simultaneously frustrate efforts to re-establish the rule of law, bring perpetrators to account and provide justice for the victims.”).

1. Prevention of trafficking among refugees, IDPs and stateless persons in conflict situations: Strengthening access to international protection

Victims or persons at risk of trafficking, the slave trade, or slavery may be entitled to international refugee protection.²⁷ The UNHCR *Trafficking Guidelines*²⁸ recognize that not all victims or potential victims of trafficking fall within the refugee definition, and being a trafficking victim is not *per se* a guarantee of international protection.²⁹ In certain situations, however, victims of trafficking or persons at risk thereof may be eligible for international refugee protection.³⁰ UNHCR's Guidelines on International Protection No. 7 sets out the parameters under the Refugee Convention as to when the definition of "refugee" applies to victims of trafficking and persons at risk of being trafficked. For example, the definition applies in situations where:

- a) victims who have been trafficked abroad seek international protection as a refugee in the state in which they are currently present;
- b) victims who have been trafficked inside their own country and then fled abroad seek international protection as a refugee; and
- c) persons who, although having never been trafficked, fear becoming a victim of trafficking in their country of origin and have fled abroad in search of international protection as refugees.

As outlined in the discussion of the legal relationship between trafficking and the slave trade or slavery above, the former can be considered a serious violation of international human rights law whereas the latter is a non-derogable, *jus cogens* violation of international human rights law. To strengthen the access to and granting of international protection for victims of trafficking and persons at risk of trafficking, understanding whether their exploitation occurred through acts of the slave trade and/or slavery is critical to ensuring they are granted the most comprehensive legal protection that international law provides. By analogy, slavery and the slave trade enjoy the same *jus cogens*, non-derogable status as torture,³¹ and evidence of torture constitutes past persecution, creating a rebuttable presumption of a well-founded fear of future persecution for refugee protection.

There are several recent examples of situations in which victims of trafficking exploited by acts of the slave trade and slavery sought to access international protection. Further analysis and study are needed to understand specifically whether and to what extent their slave trading and slavery experience was considered upon individual assessment under international refugee law and in line with international law. Recent examples include Yazidi women and children slave traded and enslaved in and from Iraq to Syria,³² or migrants from the African continent slave traded and enslaved through Libya. Understanding how the exploitation of their trafficking experience occurred through acts of the slave trade and/or slavery does not only provide them with an enhanced access to international protection,

²⁷ See U.N. High Commissioner for Refugees, *IOM-UNHCR Framework Document on Developing Standard Operating Procedures to Facilitate the Identification and Protection of Victims of Trafficking*, 6 (2020), <https://www.refworld.org/docid/5ee22b4f4.html> [<https://perma.cc/FK4S-2NYX>] (“[A]ll trafficked persons should have access to asylum procedures and the possibility to obtain international protection.”).

²⁸ U.N. High Commissioner for Refugees, *Guidelines on International Protection: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked*, HCR/GIP/06/07 (Apr. 7, 2006).

²⁹ Office of the U.N. High Commissioner for Human Rights, *Human Rights and Human Trafficking: Fact Sheet No. 36*, 52 (June 1, 2014).

³⁰ *Id.*

³¹ CEDAW GR 38, *supra* note 1, at ¶ 15.

³² Getgen Kestenbaum, *supra* note 4, at 519-20.

but also increases prevention of such occurrences by understanding that they could constitute a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion grounds.

Under Article 1(A) of the Refugee Convention, victims of or persons at risk of trafficking, who experienced the slave trade or slavery are entitled to protection as refugees if they have a well-founded fear of persecution on account of protected grounds in their country of origin where the state is unable or unwilling to protect them. Persecution under refugee law is considered to include fear of serious harm or serious human rights violations. As outlined above, such exploitation in the individual victim-survivor's experience may constitute a serious human rights violation. If the exploitation occurs by means of the perpetration of the slave trade or slavery, both have *jus cogens* status³³ and are non-derogable human rights violations; thus, the persecution threshold most likely would be met.

2. Refugees, IDPs and stateless persons as victims of trafficking or persons at risk of trafficking for all purposes of exploitation: conceptual and procedural issues as it relates to international criminal law

Crimes against humanity constitute widespread or systematic attacks against the civilian population. When such attacks against civilians occur, inclusive of refugees, stateless persons, or IDPs, then crimes against humanity under international customary law and/or under the Rome Statute could provide judicial relief. Acts or conduct entailed in trafficking also could satisfy elements, especially the *actus reus*, of certain provisions of crimes against humanity, such as enslavement, other inhumane acts, or deportation or forcible transfers. For example, if civilian IDPs are transported to exploit their manual labor or to inflict sexual abuse when perpetrators are exercising powers attaching to ownership over them, such conduct would constitute enslavement as a crime against humanity. As such, the IDPs might be eligible for redress for the crimes against humanity of enslavement, or forcible transfer endured as provided under the jurisdiction of international or national judicial bodies.

Another example might be refugees who are situated on a territory during a non-international armed conflict and who are *hors de combat* or not engaged in the fighting. If perpetrators, in connection with or linked to the ongoing combat, transfer any of these refugees, especially children, to exploit them to fight within a militia, such conduct would comprise the war crime of slave trading under customary international law. Moreover, if militia members exercise powers attaching to the rights of ownership over those refugees, the war crime of slavery also would have been committed.

The Special Rapporteur's upcoming report should underscore that the status of "refugee," "statelessness," or "IDP" does not deprive persons of being part of the civilian population; hence, these persons continue to be protected by the safeguards against crimes against humanity under international criminal law. Importantly, refugee, statelessness and IDP status might exacerbate the vulnerability of this segment of the civilian population and increase their exposure to perpetrators whose acts of trafficking might also constitute international crimes of slave trading and slavery as crimes against humanity. The Special Rapporteur should draw urgent attention to the link or nexus acts analogous to

³³ See *supra*, at notes 3 & 9 and accompanying text.

trafficking during periods of armed conflict that likewise might be evidence of the war crimes of slavery and the slave trade under customary international law.³⁴

Furthermore, national courts can invoke Article 3 of the Palermo Protocol that redress trafficking in persons, as well as provisions in their national penal codes that enumerate international crimes described in the above examples. The Special Rapporteur's report should emphasize that a resort to provisions of international criminal law and international humanitarian law, as well as national criminal law trafficking provisions, are jurisdictionally compatible and offer the broadest judicial redress for persons with refugee, statelessness or IDP status.

3. Trafficking in persons for all purposes of exploitation as a form of persecution under crimes against humanity under international criminal law

A pillar of the Refugee Convention is the concept of a “well-founded fear of being persecuted, for reasons of race, religion, nationality, member of a particular social group or political opinion.”³⁵ Under international refugee law, persecution is considered to include fear of serious harm or *serious human rights violations*. By contrast, under international criminal law, crimes against humanity recognizes that sub-groups of the civilian population might be discriminated against based on religious, racial, or political grounds by the denial of *fundamental rights*.³⁶ Such targeted group discrimination and denial of fundamental rights constitutes persecution whenever it occurs within the context of a widespread and systematic attack against the civilian population. Under the Rome Statute of the International Criminal Court, groups who may be targeted include any “identifiable group or collectivity.”³⁷ Refugees, stateless persons and IDPs, in addition to ostensibly being part of the civilian population, are an identifiable group the subject of treaty law and international instruments. The group composition of refugees, stateless persons and IDPs is *per se* gendered, consisting of women,³⁸ men, and others of diverse gender identities or sexual orientations. The Rome Statute's provision for persecution, including safeguards against targeted groups based on gender grounds,³⁹ is applicable to refugees, stateless persons and IDPs.

In addition to identification of the targeted group and the grounds of discrimination, persecution under crimes against humanity requires proof of the denial of fundamental rights of that group. The prohibition of trafficking, as discussed above, is a human right, recognized for women under CEDAW, for children under the Convention on the Rights of the Child (CRC), for all African persons under the African Charter, for all persons under the jurisdiction of the European Convention on Action Against Trafficking in Human Beings, and for all women under the jurisdiction of the Inter-American

³⁴ The Rome Statute does not have jurisdiction over slavery and the slave trade as war crimes. See Patricia Viseur Sellers & Jocelyn Getgen Kestenbaum, *Missing in Action: The International Crime of the Slave Trade*, 18 J. INT'L CRIM. JUST. 517, 530-32 (2020).

³⁵ Convention Relating to the Status of Refugees, art. 1A(2), 189 U.N.T.S. 150, *entered into force* Apr. 22, 1954.

³⁶ “Persecution” is defined in the Rome Statute as “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.” Rome Statute, *supra* note 22, at art. 7(2)(g).

³⁷ *Id.* at art. 7(h).

³⁸ The term “women” is to be understood expansively and beyond cis-gendered women, to include lesbian, bisexual, queer and trans women, in line with the work and recommendations of the United Nations Independent Expert on SOGI and experts in international human rights law. See Meghan Campbell, Loveday Hodson, & Catherine O'Rourke, *Advancing Sexual Orientation and Gender Identity Equality Through CEDAW*, OXFORD HUM. RTS. HUB (July 29, 2022), <https://ohrh.law.ox.ac.uk/advancing-sexual-orientation-and-gender-identity-equality-through-cedaw/> [<https://perma.cc/J3V4-8K2R>].

³⁹ See ICC, Office of the Prosecutor, *Policy on the Crime of Gender Persecution* (2022), available at <https://www.icc-cpi.int/sites/default/files/2022-12/2022-12-07-Policy-on-the-Crime-of-Gender-Persecution.pdf>.

Convention of Belém do Pará. The persecution of any of these persons who are refugees, stateless persons, or IDPs might find redress under the crimes against humanity provision of the Rome Statute. However, if such trafficking acts are analogous to or also constitute slavery or the slave trade as human rights violations, then persecution safeguards as a crime against humanity would be applicable to any and all such persons, regardless of gender, age, regional origin, or any such criteria.

In the interest of providing victims of trafficking with the most comprehensive legal protection under international law, the Special Rapporteur's upcoming report presents a critical opportunity to examine how persecution as a crime against humanity under international criminal law can reduce the gender inequalities of obtaining redress for certain trafficking acts. The Special Rapporteur is further urged to resort to the complementary use of the human rights of trafficking together with those slavery and the slave trade to satisfy the requirements of persecution as legal element to be fulfilled in accessing international protection and as a crime against humanity.

Again, thank you for receiving these submissions for your report to the Human Rights Council in June 2023 on access to international protection of victims of trafficking in persons or persons at risk of trafficking. We trust that a more nuanced understanding of the legal complementarity and compatibility of trafficking as a transnational crime and human rights violation, and of slavery and the slave trade as international crimes and human rights violations, can broaden the protection afforded to refugees, stateless persons and IDPs. We remain available to offer any additional legal sources, clarifications, jurisprudence, analysis, or other explanation.⁴⁰

Sincerely yours,



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⁴⁰ The authors are grateful for the research support of James Stitt and Thomas Paddock of the Benjamin N. Cardozo School of Law's Benjamin B. Ferencz Human Rights and Atrocity Prevention Clinic.