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## Articles



## Recent Decisions




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# The Application of the Foreign Sovereign Immunities Act to an Action Against the French Railroad for Transporting Thousands of Jews and Others to Their Deaths: *Abrams v. SNCF*

**By Malvina Halberstam***

A class action was recently brought in the Federal District Court for the Eastern District of New York against the Societe Nationale des Chemins de Fer Francais (SNCF), the French Railroad,[1] charging that between 1942 and 1944 the French Railroad transported 72,000 Jews and tens of thousands of others[2] to Nazi death camps for profit.[3] Fewer than 3% survived.[4] Many died en route because of the horrible conditions in which they were transported.[5] One

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1. Abrams v. Societe Nationale des Chemins de Fer Francais (SNCF), 175 F. Supp. 2d 423 (E.D.N.Y. 2001) ("Abrams").

2. Included among the plaintiffs are several of the more than 60 U.S. pilots shot down over France and transported to Auschwitz and Buchenwald by SNCF. See forms on file with Harriet Tamen, attorney for the plaintiffs. *See also* Ralph Blumenthal, *U.S. Suit Says French Trains Took Victims to the Nazis*, N.Y. TIMES, June 13, 2001, at A19. *See generally* Associated Press, *WWII Victims Sue French Railroad* (June 13, 2001), *available at* <http://www.codoh.com/newsdesk/2001/010613b.html> (discussing the extent SNCF was used to transport people to concentration camps).

3. *See* Associated Press, *WWII Victims Sue French Railroad* (June 13, 2001), *available at* <http://www.codoh.com/newsdesk/2001/010613b.html> (confirming that the plaintiffs accuse the French Railroad of transporting 72,000 people to Nazi death camps); *see also* Matthew Lippman, *Fifty Years After Auschwitz: Prosecutions of Nazi Death Camp Defendants*, 11 CONN. J. INT'L L. 199, 208–209 (1996) (describing how French officials were charged with War Crimes for deporting Jews to Auschwitz). *See generally* Vivian Grosswald Curran, *Deconstruction, Structuralism, Antisemitism and the Law*, 36 B.C. L. REV. 1, 29 (1994) (offering that the French treatment of Jews during World War II may have been more severe than the Germans').

4. *See* The History Place—Holocaust Statistics, *available at* <http://www.historyplace.com/worldwar2/holocaust/h-statistics.htm> (last visited Mar. 8, 2002) (stating that over 77,000 French Jews were killed, representing 22% of the pre-Holocaust Jewish population).

5. *Abrams*, 175 F. Supp. 2d at 425. *See* Ralph Blumenthal, *U.S. Suit Says French Trains Took Victims to the Nazis*, N.Y. TIMES, June 13, 2001, at A19 (noting the atrocious environment the holocaust victims were subjected to while transported by the railroad); Alan Riding, *The Painful Past Still Eludes France,* N.Y. TIMES, June 13, 1993, at E4 (indicating the low survival rate of holocaust victims transported to Germany from France).

* **Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University.** **This article was presented at International Law Weekend 2001 at a Panel on International Human Rights and the U.S. Sovereign Immunities Act of 1976, held on October 26, 2001, in New York City. I would like to thank Harpreet K. Mann, Cardozo 2003, for her assistance with the research for this article.**

train left the French holding camp at Compiegne on July 2, 1944, with 2,166 passengers.[6] When it arrived in Dachau three days later, one quarter—536—were already dead.[7]

One of the plaintiffs, Nicole Silberkleit, said, "there was no room to sit . . . no food and no water. A bucket in the corner—that was the bathroom. Once in a while they would open the cars to throw out the dead people."[8]

One of the defenses raised by the French Railroad is that the action is barred by the Foreign Sovereign Immunities Act of 1976 (FSIA).[9] The FSIA defines a foreign state to include "a separate legal person corporate . . . or otherwise . . . a majority of whose shares . . . is owned by a foreign state . . ."[10] The French Railroad argues that since it is wholly owned by the French government it is entitled to immunity under the FSIA.[11]

The FSIA was intended to limit sovereign immunity.[12] It adopted the restrictive theory of immunity[13] and denied states immunity in various categories of cases,[14] including commercial

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6. *Abrams*, 175 F. Supp. 2d at 425; *see* Ralph Blumenthal, *U.S. Suit Says French Trains Took Victims to the Nazis*, N.Y. TIMES, June 13, 2001, at A19 (indicating 2,166 people were transported from Compiegne); *see also* Richard Weisberg, *Book Review Response: The True Story: Response to Five Essayists*, 15 CARDOZO L. REV. 1245, 1257 (1994) (noting Compiegne as the site of a concentration camp).

7. *Abrams*, 175 F. Supp. 2d at 425; *see* Ralph Blumenthal, *U.S. Suit Says French Trains Took Victims to the Nazis*, N.Y. TIMES, June 13, 2001, at A19 (detailing the facts alleged by plaintiffs).

8. Ralph Blumenthal, *U.S. Suit Says French Trains Took Victims to the Nazis*, N.Y. TIMES, June 13, 2001, at A19 (quoting Nicole Silberkleit).

9. *Abrams*, 175 F. Supp. 2d at 426; *see* The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602–1611 (1994 & Supp. V. 1999).

10. The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1603(b) (1994).

11. *Abrams*, 175 F. Supp. 2d at 429.

12. H.R. Rep. No. 94-1487 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605 ("[T]he bill would codify the so-called 'restrictive' principle of sovereign immunity, as presently recognized in international law"). *See* Argentine Republic v. Amerada Hess Shipping, 488 U.S. 428, 434 (1989); Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 488 (1983) (The FSIA codifies the restrictive theory of foreign sovereign immunity); *see also* William C. Hoffman, *The Separate Entity Rule in International Perspective: Should State Ownership of Corporate Shares Confer Sovereign Status for Immunity Purposes?,* 65 TUL. L. REV. 535, 537 (1991) (discussing the intentions of the Foreign Sovereign Immunities Act).

13. *See* H.R. Rep. No. 94-1487 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605; *see also* Alfred Dunhill of London v. Republic of Cuba, 425 U.S. 682, 698 (1976) (finding that the FSIA was intended to promote restrictive sovereign immunity in U.S. courts); Brian S. Fraser, *Adjudicating Acts of State in Suits Against Foreign Sovereigns: A Political Question Analysis*, 51 FORDHAM L. REV. 722, 733 (1983) (commenting on the restrictive theory of sovereign immunity).

14. The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605 (1994 & Supp. V. 1999). *See* Victory Transport Inc. v. Comisaria General, 336 F.2d 354, 364 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965) (denying the appellant's claim of sovereign immunity after determining that the charter did not perform a public service). *See generally* Margot C. Wuebbels, *Commercial Terrorism: A Commercial Activity Exception Under 1605(a)(2) of the Foreign Sovereign Immunities Act,* 35 ARIZ. L. REV. 1123, 1127 (1993) (defining the primary purpose of the Foreign Immunities Act of 1976).

activities.[15] However, the commercial activity exception applies only if the commercial activity is carried on in the U.S., an act is performed in the U.S. in connection with the commercial activity elsewhere, or there is a direct effect in the U.S.[16] Unless one interprets the last clause very broadly, to include the loss of a relative by someone in the U.S.,[17] the commercial activity exception does not apply. Nor does the case fit into any of the other exceptions.

The paradox is that long before the U.S. adopted the FSIA—as far back as the 1920s—a rule developed, known as the "separate entity" rule, under which there was a presumption against immunity for commercial corporations, even if they were wholly owned by a state.[18] This rule was applied in numerous U.S. cases before the adoption of the FSIA[19] and still applies in many states, including Germany, Switzerland and France.[20] Thus, adoption of the

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15. The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605 (1994 & Supp. V. 1999). *See* Georges R. Delaume, *Decision: Sovereign Immunity—Nature of the Act Test for Commercial Activity*, 85 AM. J. INT'L L. 696, 698, n.2 (1991) (noting that "France long ago adopted the restrictive theory of sovereign immunity, under which foreign states generally are not accorded immunity in respect of their private or commercial activities"); *see also* Wuebbels, *supra* note 14, at 1129 (discussing the commercial activity exception of the Foreign Sovereign Immunities Act of 1976).

16. The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605(a)(2) (1994 & Supp. V. 1999). *See* James A. Beckman, *Citizens Without a Forum: The Lack of an Appropriate and Consistent Remedy for United States Citizens Injured or Killed as the Result of Activity Above the Territorial Air Space*, 22 B.C. INT'L & COMP. L. REV. 249, 268 (1999) (stating that the commercial activity exception applies only when the activity occurs within the U.S. or in a foreign state if the activity directly affects the U.S.); *see also* Hadwin A. Card, III, *Interpreting the Direct Effects Clause of the FSIA's Commercial Activity Exception,* 59 FORDHAM L. REV. 91, 99 (1990) (explaining that by extending the jurisdiction of U.S. courts to all commercial activities in foreign countries that have a direct effect on the U.S., this exception annuls a foreign states' immunity from prosecution in the U.S.).

17. For example, Sumner Moore Kirby, an American Protestant millionaire, heir to the Woolworth fortune, was arrested in Nice in 1944 and transported on the French Railroad in convoy 81 to Buchenwald, where he died. *See* Ralph Blumenthal, *U.S. Suit Says French Trains Took Victims to the Nazis*, N.Y. TIMES, June 13, 2001, at A19.

18. *See* Hoffman, *supra* note 12, at 545–46 (declaring that when commercial corporations were owned in any way by a foreign state, they lost the presumption of immunity unless the corporation was deemed a public agency or instrumentality of the state); *see also* Jane H. Griggs, *The Foreign Sovereign Immunities Act: Do Tiered Corporate Subsidiaries Constitute Foreign States?,* 20 W. NEW ENG. L. REV. 387, 390–91 (1998) (relating that the Supreme Court first delineated the "separate entity" rule in 1824, stating that although a foreign state may own a corporation, the corporation retains a separate legal identity and is subject to lawsuits as a private corporation); Sunil R. Harjani, *Litigating Claims over Foreign Government-Owned Corporations under the Commercial Activities Exception to the Foreign Sovereign Immunities Act*, 20 J. INT'L. L. BUS. 181, 199–200 (1999) (asserting that under the "separate entity" rule, separate commercial entities are presumed to be independent of a foreign state unless the court finds that the entity and the foreign state are essentially the same).

19. *See* H. Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 BRIT. Y.B. INT'L L. 220 (1952); C.J. Hamson, *Immunities of Foreign States: The Practice of French Courts*, 27 BRIT. Y.B. INT'L L. 293, 309 (1950). There are a number of cases in which the French Railroad was sued in the U.S. before the adoption of the FSIA. *See* Fuss v. French National Railroads, 35 Misc. 2d 682, 231 N.Y.2d 57 (Supp. Ct. N.Y. Co. 1962), *aff'd* 17 A.D.2d 941, 233 N.Y.S.2d 1013 (1st Dep't 1962); Shulman v. SNCF, 152 F. Supp. 833 (S.D.N.Y. 1957); Siegmeier v. SNCF, A.S.2d 879, 150 N.Y.S.2d 775 (1st Dep't 1956); Kaufmann v. SNCF, No. 92-130 (S.D.N.Y. 1954); Abatangelo v. SNCF, No. 88-391 (S.D.N.Y. 1953); Wheeler v. SNCF, 108 F. Supp. 652 (S.D.N.Y. 1952); and Dunajevski v. SNCF, 35 N.Y.S.2d 102 (City Ct. of N.Y. Co. 1942).

20. *See* Banco de la Nacion v. Banca Cattolica del Veneto, Judgment of Mar. 21, 1984, BGE 110 IA 43 (in German) (a Swiss case) *cited in* Hoffman, *supra* note 12, at 555–56; National Iranian Oil Co. Pipeline Contract Case, May 4, 1982, 1982 RIW/AWD 439, 65 I.L.R. 212 (German case); Banque Camerounaise de Developpement v. Societe des Establissements Rolber, Judgment of Nov. 18, 1986, 1987 R.C.D.I.P. 773, 79 I.L.R. 532 (French case).

FSIA, which was intended to limit immunity, had the effect of expanding it with respect to commercial entities that are government owned.[21] This was not the intent of Congress.[22] It was inadvertent and needs to be corrected.

In their action in the district court, plaintiffs argued that the FSIA does not apply retroactively.[23] There is broad language in *Amerada Hess*[24] that the FSIA "provides the sole basis for obtaining jurisdiction over a foreign state."[25] However, the issue in *Amerada Hess* was not retroactivity. Thus, even though the broad language in *Amerada Hess* would appear to apply regardless of when the events giving rise to the claim occurred, the Supreme Court never considered the question of retroactivity. Some lower courts that have considered the question have held that the FSIA is not retroactive.[26]

This issue was recently argued before Judge Trager in *Abrams v. Societe Nationale des Chemins de Fer Francais (SNCF)*.[27] In his decision granting the defendant's motion to dismiss, Judge Trager did not decide the retroactivity question. Although he questioned the continued validity of the Carl Marks decision, he took the position that even if the FSIA did not apply retroactively and SNCF did not have immunity, the plaintiffs' action could not be maintained

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21. *See* Danny Abir, *Foreign Sovereign Immunities Act: The Right to a Jury Trial in Suits Against Foreign Government-Owned Corporations,* 32 STAN. J. INT'L L. 159, 159 (1996) (noting that after the Foreign Sovereign Immunities Act was passed in 1976, foreign government-owned corporations were provided with immunities granted to foreign sovereigns "including the exclusion of jury trials"); *see also* Harjani, *supra* note 18, at 195 (stating that it is generally easy for a foreign government-owned corporation to claim immunity under the Foreign Sovereign Immunities Act). *But see* Kimberly K. Hill, *Foreign Government-Owned Corporations, the Foreign Sovereign Immunities Act, and the Right to Jury Trial,* 1982 DUKE L.J. 1071, 1075 (1982) (noting that acts performed by foreign government-owned corporations prevent them from receiving the protection granted by foreign sovereign immunity).

22. *See* Teresa M. O'Toole, *Amerada Hess Shipping Corp. v. Argentine Republic: An Alien Tort Statute Exception to Foreign Sovereign Immunity*, 72 MINN. L. REV. 829, 857 (1988) (discussing the limiting language of Congress in regard to the FSIA); *see also* Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 500 (1998) (discussing the courts' interpretation of how Congressional intent should not be read more broadly than it was expressly intended); William F. Webster, *Amerada Hess Shipping Corp. v. Argentine Republic: Denying Sovereign Immunity*, 39 HASTINGS L.J. 1109, 1124 (1988) (explaining that the intent of Congress in regard to the FSIA was to restrict sovereign immunity).

23. *See* Stephen J. Schnably, *International Decisions: Alejandre v. Republic of Cuba, 996 F. Supp. 1239. U.S. District Court, S.D. Fla., December 17, 1997*, 92 AM. J. INT'L L. 768 (1998) (stating that in the absence of evidence of intent, there is a presumption against retroactive application of the FSIA); *see also* Monroe Leigh, *Decision*, 82 AM. J. INT'L L. 126, 132 (1988) (stating that based on two early cases, it would be inequitable to strip absolute immunity from sovereign nations prior to 1952); Monroe Leigh, *Decision: Foreign Sovereign Immunities Act—No Retroactive Application to Confer Jurisdiction*, 81 AM. J. INT'L L. 214, 216 (1987) (relying on legislative history of the FSIA to conclude that retroactive application of the act would intrude on the rights of foreign nations).

24. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989).

25. *Id*. at 439.

26. *See*, *e.g.,* Carl Marks & Co., Inc. v. Union of Soviet Republics, 841 F.2d 26 (2d Cir. 1988) (holding that the Foreign Sovereign Immunities Act was not intended to confer jurisdiction for pre-1952 claims); Jackson v. People's Republic of China, 794 F.2d 1490, 1498–99 (11th Cir. 1986).

27. 175 F. Supp. 2d 423 (E.D.N.Y. 2001).

because there was no statutory provision on which to base jurisdiction.[28] He stated, "Carl Marks may no longer be good law, or may, at least, be limited in its application, in the wake of the Supreme Court's decision in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994)."[29] He concluded:

> There is no need to decide, however, whether or not plaintiffs here are prejudiced in an impermissibly retroactive way by the application of the FSIA to this case, since, as we have already seen, even if they were prejudiced and even if the FSIA's sovereign immunity law were, consequently, not applicable here—that is, even if older sovereign immunity law could be applied—there would still be no way to restore the jurisdictional regime of a bygone era and exercise jurisdiction over SNCF under § 1331 or the Alien Tort Claims Act.[30]

It is asserted that the conclusion that the Alien Tort Claims Act[31] cannot provide a jurisdictional basis, even if there is no sovereign immunity, misinterprets *Amerada Hess*. In that case, the Supreme Court held that the Alien Tort Claims Act could not be used as a basis for denying sovereign immunity—in addition to the bases provided for in the FSIA, as the Court of Appeals had done,[32] that the exceptions to immunity listed in the FSIA were the only bases for denying sovereign immunity.[33] The Supreme Court never considered whether the Alien Tort Claims Act could be used to establish jurisdiction if there was no immunity.[34] There would appear to be no logical reason why the Alien Tort Claims Act, which has not been repealed, cannot be a basis for jurisdiction if there is no immunity. Therefore, if the court determines that the FSIA does not apply to events that occurred before its adoption, and if under the law that existed at the time of the events in question SNCF would not have been entitled to immunity,[35] there is no reason that the Alien Tort Claims Act cannot be invoked in this case as in any other case in which it applies by its terms.[36]

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28. *Id.* at 436.

29. *Id.* at 434.

30. *Id.* at 444–45.

31. The Alien Tort Claims Act provides jurisdiction "of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (1994).

32. *See* Argentine Republic v. Amerada Hess Shipping Corp., 830 F.2d 421 (2d Cir. 1987).

33. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 429 (1989).

34. *See generally id.*

35. Judge Trager questioned whether, even under the law that applied pre-FSIA, SNCF would have been denied immunity. Abrams v. Societe Nationale des Chemins de Fer Francais (SNCF), 175 F. Supp. 2d 423 (E.D.N.Y. 2001).

36. *See* Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995); Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

The FSIA should be amended to deny sovereign immunity for human rights violations. However, it should not be limited to *jus cogens* violations.[37] *Jus cogens* is very narrow; it is also very unclear.[38] This would result in tremendous litigation as to whether a rule of international law is or is not a rule of *jus cogens*. An amendment should be passed that would permit actions against a state for violations of specific human rights treaties, provided that the state has ratified the treaty.

In the last fifty years there has been a revolution in substantive international human rights law, but no remedies have been established.[39] Until recently, international law has exclusively focused on states.[40] Individuals did not have rights under international law.[41] In the last fifty years, a large number of states have ratified treaties that deal with individual human rights, such

37. *See* Princz v. Federal Republic of Germany, 26 F.3d 1166, 1184–85 (D.C. Cir. 1994) (Wald, J., dissenting) ("I believe that the only way to interpret the FSIA in accordance with international law is to construe the Act to encompass an implied waiver exception for *jus cogens* violations"); Robert A. Ramey, *Armed Conflict on the Final Frontier: The Law of War in Space*, 48 A.F. L. REV. 1, 158 (2000) (noting that the concept of *jus cogens* embraces "preemptory norms of general international law"); *see also* Vienna Convention on the Law of Treaties, May 23, 1969, art. 53. U.N. Doc. A/Conf. 39/27, 8 I.L.M. 679, 699 (describing *jus cogens* as those "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character").

38. *See* Eva M. Kornicker Uhlmann, *State Community Interests,* Jus Cogens *and Protection of the Global Environment: Developing Criteria for Peremptory* Norms, 11 GEO. INT'L ENVTL. L. REV. 101, 103 and 133–34 (1998) (describing the unclear application of *jus cogens*); *see also* Jules L. Lobel, *Foreign Policy and the Courts*, 3 U.C. DAVIS J. INT'L L. & POL'Y 171, 179 (1997) (citing Committee of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 935 (1988), in the court's assessment that the consequences of violating *jus cogens* remain uncertain); Pia Zara Thadhani, *Regulating Corporate Human Rights Abuses: Is Unocal The Answer?*, 42 WM. AND MARY L. REV. 619, 623 (2000) (indicating the vagueness of the origins of *jus cogens*).

39. *See* Kathryn L. Boyd, *Collective Rights Adjudication in U.S. Courts: Enforcing Human Rights at the Corporate Level*, 1999 BYU L. REV. 1139, 1147–48 (1999) (establishing that new standards in international human rights allow for private redress by victims although no specific remedy has been provided for in the human rights laws); Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CAL. L. REV. 449, 462, 480 (1990) (stating that human rights laws have provided for "adequate and effective" remedies but do not detail what remedies are available for human rights violations); *see also* Jonathan A. Gluck, *Customary International Law of State-Sponsored International Abduction and United States Courts*, 44 DUKE L.J. 612, 615 (1994) (arguing that victims of crimes violating their human rights are not offered specific remedies).

40. *See* William Aceves, *Affirming the Law of Nations in U.S. Courts: The Karadzic Litigation and the Yugoslav Conflict*, 14 BERKELEY J. INT'L L. 137, 137 (1996) (discussing the positivist legal theory view of international law and how individuals are not subject to international law); Jack Goldsmith, *International Human Rights Law & the United States Double Standard,* 1 Green Bag 2d 365, 366 (1998) (discussing tenets of customary international law); Ivan Simonovic, *State Sovereignty and Globalization: Are Some States More Equal?*, 28 GA. J. INT'L & COMP. L. 381, 395–96 (2000) (discussing traditional international law's focus on relations between nations).

41. *See* Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 YALE L.J. 2277, 2297 (1991) (explaining that it is states that have rights under international law, not individuals); Carlos Manual Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1087 (1992) (analyzing the rights individuals do not have under international law); Erik G. Luna & Douglas J. Sylvester, *Beyond Breard,* 17 BERKELEY J. INT'L L. 147, 155 (1999) (stating that individual rights are not conferred under international law).

as the Genocide Convention,[42] the Covenant on Civil and Political Rights,[43] the Convention on Racial Discrimination[44] and the Convention on the Elimination of All Forms of Discrimination Against Women.[45] All of these protect individual human rights. There are, however, very few remedies for violations of these conventions.[46] Permitting civil actions in U.S. courts for monetary damage would transform a theoretical right into a meaningful right.

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42. Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260A (III), U.N. GAOR, 3rd Sess., U.N. Doc. A/RES/260 A (III) (1948), 78 U.N.T.S. 277, entered into force Jan. 12, 1951 (entered into force in the U.S. on Feb. 23, 1989).

43. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976 (entered into force in the U.S. on Sept. 8, 1992).

44. International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res 2106 (XX), U.N. GAOR, 20th Sess., U.N. Doc. A/RES/2106A (XX) (1965), 60 U.N.T.S. 195, entered into force on Jan. 4, 1969 (entered into force in the U.S. on Nov. 20, 1994).

45. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U/N/ GAOR, 34th Sess., U.N. Doc. A/RES/34/180 (1979), 1249 U.N.T.S. 13, entered into force on Sept. 3, 1981 (This Convention has not been ratified by the U.S.). *See generally* Malvina Halberstam, *United States Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women*, 31 GEO. WASH. J. INT'L. L. & ECON. 49 (1997) (discussing the political issues involved in the ratification of this Convention).

46. Each of the Conventions require the state parties to submit a report periodically to a Committee established by the Convention. *See, e.g.*, International Covenant on Civil and Political Rights, *supra* note 43, art. 40. Some also permit communications by another state alleging violations of the Convention. *See id.* art. 41. Others permit communication by an individual. *See, e.g.*, Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force on Mar. 23, 1976. However, in the end, all the Committee can do is issue a report. *See id.*

# The Failure of the State-centric Model of International Law and the International Criminal Court

**By Joshua Bardavid***

> *The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated . . .*
>
> *[T]he ultimate step in avoiding periodic wars, which are inevitable in a system of international lawlessness, is to make statesmen responsible to law.*
>
> —Chief Justice Robert H. Jackson, opening statement as Chief Prosecutor of Nuremberg Trials, 1945

## I. Introduction

Somewhere in the world, the next Hitler or Pol Pot or Milosevic or Stalin endeavors to unleash a suffering that will become unique to his name—a suffering that was promised to occur "never again."[1] Somewhere in the world, as you read these very words, a sword is being swung, a trigger is being pulled, an oven is being locked or a village is being raped—all in the name of a state.

The second half of the twentieth century saw the promise of "never again" go unfulfilled as the international community responded to countless cases of genocide, human rights violations, mass rape and other war crimes with nothing short of a thunderous silence.[2] Despite hundreds of treaties and two ad hoc tribunals, a permanent body for the universal adjudication and enforcement of human rights through individual accountability does not exist—and thus

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1. "The motto 'never again' belongs to the entire world community, not as a vindictive slogan, but as a reflection of our moral-ethical values and of our intellectual commitment to protect future generations from events similar to those that led to Nuremberg (and Tokyo). If Nuremberg did nothing else, that is indeed a worthy legacy."

   M. Cherif Bassiouni, *Nuremberg: Forty Years After*, 80 AM. SOC'Y INT'L L. 65 (1988).

2. "The world has failed to take action as 4 million people were murdered in Stalin's purges (1937–1953), 5 million were annihilated in China's Cultural Revolution (1966–1976), 2 million were butchered in Cambodia's killing fields (1975–1979), 30,000 disappeared in Argentina's Dirty War (1976–1983), 200,000 were massacred in East Timor (1975–1985), 750,000 were exterminated in Uganda (1971–1987), 100,000 Kurds were gassed in Iraq (1987–1988), and 75,000 peasants were slaughtered by death squads in El Salvador (1980–1992)." Arle Levinson, *Genocide a Thriving Doctrine in 20th Century*, STAR, Sept. 18, 1995, at A9. *See also* Nikolai Krylov, *Humanitarian Intervention: Pros and Cons*, 17 LOY. L.A. INT'L & COMP. L.J. 365, 383 (1995) (noting that the United Nations' failure to respond to so many human rights violations may justify future humanitarian interventions); Peggy E. Rancilio, *From Nuremberg to Rome: Establishing An International Criminal Court and the Need for U.S. Participation*, 78 U. DET. MERCY L. REV. 299, 305 n.31 (2001) (commenting that from 1945 to the present, the United Nations did not respond to numerous instances of significant human rights violations).

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humanity continues to be violated time and again.[3] Noting the lack of an international rule of law to prevent atrocities, the former United Nations' High Commissioner for Human Rights commented that "a person stands a better chance of being tried and judged for killing one human being than for killing 100,000."[4]

The substantive creation of an international criminal court, years in the making, took place when the member states of the United Nations and 250 non-governmental organizations met in Rome, Italy, during the summer of 1998 for five weeks.[5] During the meeting, a treaty was drafted to create the International Criminal Court (ICC)—a court that would have jurisdiction to try individuals for "the most serious" cases of genocide, crimes against humanity and war crimes.[6] After the final vote was taken, in which 120 nations voted in favor of the Treaty ("Rome Statute") and only seven against,[7] the hundreds of delegates erupted into tears and rhythmic applause that lasted for more than ten minutes.[8] The world had finally begun to answer the call made over half a century prior.[9]

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3. *See* Daniel J. Steinbock, *Interpreting the Refugee Definition*, 45 UCLA L. REV. 733, 785 (1998) (noting the void between the enumeration of human rights and the actual enforcement of those rights); Leila Sadat Wexler, *The Proposed Permanent International Criminal Court: An Appraisal*, 29 CORNELL INT'L L.J. 665, 665 (1996) (discussing the lack of international individual accountability in international law). *See generally* Alex Ward, Comment, *Breaking The Sovereignty Barrier: The United States and The International Criminal Court*, 41 SANTA CLARA L. REV. 1123, 1125–44 (2001) (analyzing the development of the International Criminal Court in response to the ineffective and inefficient responses to human rights violations).

4. Michael P. Scharf, *Conceptualizing Violence: Present and Future Developments in International Law: Panel II: Adjudicating Violence: Problems Confronting International Law and Policy on War Crimes and Crimes Against Humanity: The Prosecutor v. Dusko Tadic: An Appraisal of the First International War Crimes Trial Since Nuremberg*, 60 ALB. L. REV. 861, 861 (1997) (quoting Jose Anala Lassa in International Criminal Tribunal for the Former Yugoslavia Bulletin, No. 8, May 14, 1996, at 1).

5. *See* Leila Nadya Sadat and S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 383 (2000) (noting that over 160 countries and 250 NGOs participated in Rome).

6. Rome Statute of the International Criminal Court A/Conf. 183/9, art. 1 (July 17, 1998).

7. *See* Barbara Crossette, *U.S. Fights New War Crimes Court; EU, NATO Oppose Exemption Sought by White House*, CHI. TRIB. June 12, 2000, at 4 (stating the breakdown of the vote); Panel Discussion, *Association Of American Law Schools Panel On The International Criminal Court*, 36 AM. CRIM. L. REV. 223, 227 (1993) ("There were 120 delegations in favor, seven opposed, and twenty-one abstentions").

8. *See* M. Cherif Bassiouni, *Negotiating the Treaty of Rome on the Establishment of an International Criminal Court*, 32 CORNELL INT'L. L.J. 443, 458–59 (1999) (noting that "the delegates burst into a spontaneous standing ovation, which turned into rhythmic applause that lasted close to ten minutes"); John Washburn, *The Negotiation of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century*, 11 PACE INT'L L. REV. 361, 361 (1999) (discussing the outburst of emotion from the delegates); Phyllis Bennis, Editorial, *U.S. Chooses Wrong Side Of Tribunal Issue; Americans Seem To Want A War Crimes Court For Everyone But Americans*, THE BALT. SUN, July 26, 1998, at 4C (commenting that the "exhausted" delegates broke out into tears after the final vote in Rome).

9. *See* MICHAEL P. SCHARF, BALKAN JUSTICE 14 (1997) (commenting that the development of an international criminal court has been an objective since the Nuremberg trials); Henry T. King, Jr., *The Meaning of Nuremberg*, 30 CASE W. RES. J. INT'L L. 143, 146 (1998) (noting that the ICC is a direct descendant of Nuremberg); *see also* Tomas A. Kuehn, *Human "Wrongs"?: The U.S. Takes an Unpopular Stance in Opposing a Strong International Criminal Court, Gaining Unlikely Allies in the Process*, 27 PEPP. L. REV. 299, 299 (2000) (discussing the goals of the ICC).

The delegates of the United States did not join in the outburst of exuberance as they represented one of the seven nations voting against the Treaty.[10] The U.S., embarrassed by the company it shared in opposing the court, requested the official vote go "unrecorded."[11] Consequently, the official identity of the nations voting against the ICC remains unknown, yet reports identify the United States joining China, Iraq, Iran, Libya, Israel and Syria in opposition.[12] The U.S. State Department describes the human rights conditions in those six concurring nations as either "poor" or "extremely poor."[13] Any potential for the United States to continue with "leadership in the pursuit of International Justice"[14] significantly diminished when the votes were cast in Rome.[15]

The state-centric model of international law has failed in its obligation to protect the most basic rights of humanity. It is asserted that there are four primary interrelated reasons for its failure. First, individuals commit crimes of international law, yet international law is not applicable to the individual. Second, the state-centric model fails to be state-centric in effect. Third,

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10. *See* Lynn Sellers Bickley, *U.S. Resistance to the International Criminal Court: Is the Sword Mightier than the Law?*, 14 EMORY INT'L L. REV. 213, 213 (2000); Scott T. Johnson, *On the Road to Disaster: The Rights of the Accused and the International Criminal Tribunal for the Former Yugoslavia*, 10 INT'L LEGAL PERSP. 111, 157 (1998) (stating that the U.S. voted against the Rome Statute); Guy Roberts, *Assault On Sovereignty: The Clear And Present Danger Of The New International Criminal Court*, 17 AM. U. INT'L L. REV. 35, 35 (2001) (stating that the U.S. joined six other nations in voting against the treaty).

11. *See* Mahnoush H. Arsanjani, *Developments in International Criminal Law: The Rome Statute of the International Criminal Court*, 93 AM. J. INT'L L. 22, 22 (1999) (noting that the vote was "nonrecorded"); James Blount Griffin, *A Predictive Framework for the Effectiveness of International Criminal Tribunals*, 34 VAND. J. TRANSNAT'L L. 405, 433 (2001) (discussing the fact that the U.S. requested the vote to go unrecorded); Cheryl K. Moralez, Article and Essay: *Establishing an International Criminal Court: Will it Work?*, 4 DEPAUL INT'L L.J. 135, 147 n.61 (2000) (stating that the vote went unrecorded).

12. Guillaume Debr, *US Struggles To Limit The Reach Of A Global Court*, CHRISTIAN SCI. MONITOR, July 3, 2000, at 10 (noting that the U.S., joined by "China, Iraq, Libya, and three other countries" voted against the Rome Statute); Martin Kettle, *Britain 'Backing US Against World Court,'* GUARDIAN (London), Nov. 28, 2000, at 19 (stating that China, Iran, Iraq and Libya joined the U.S. in opposition to the Court); Christopher Lockwood, *US Fails To Halt War Crimes Court*, DAILY TELEGRAPH, July 18, 1998, at 16 (noting the same).

13. *See* U.S. Dep't of State, Country Reports on Human Rights Practices for 1999, 106th Cong. (Joint Comm. Print 2000). The Department of State issued separate reports for Israel and the Occupied Territories of the Gaza Strip and West Bank. The report on Israel is only mildly critical of the human rights conditions, but is severely critical of the conditions in the Occupied Territories. *See id*.

14. David J. Scheffer, Remarks at Washington College of Law, *War Crime Tribunals: The Record and the Prospects: Conference Convocation*, 13 AM. U. INT'L L. REV. 1383 (1998).

15. In the three years following the Rome Convention, the United States has experienced significant "blowback" from its stance on international agreements such as the Rome Treaty, Land Mine Treaty, Nuclear Test Ban Treaty and Kyoto Accords. *See* Tyler Marshall and Jim Mann, *Goodwill Toward U.S. is Dwindling Globally; The Nation's Prominence as the World's Sole Superpower Leaves Even Allies Uneasy. They Fear that Washington has Lost its Longtime Commitment to International Order*, L.A. TIMES, Mar. 26, 2000, at A1. This blowback has significantly encumbered the U.S.' ability to lead in the field of international human rights and has resulted in the U.S. losing its seat on the UN Human Rights Commission. *See* Gwynne Dyer, Editorial, *The US Finds Support Lacking For Its International Policies*, THE SOUTHLAND TIMES (New Zealand), July 11, 2001, at 4 (citing U.S. opposition to the ICC, the Kyoto Accords, the ABM Treaty and other international agreements as a source of tension amongst its allies); Bill Nichols, *Tension Returns to U.S. Relationship with U.N.*, USA TODAY, Sept. 11, 2001, at 8A (discussing the tension between the U.S. and the UN, which is caused by, among other things, U.S. opposition to the ICC).

the current system creates a paradigm that is most susceptible to the dynamics or raw power and Realpolitik. Finally, the state-centric model has distorted and misapplied the principle of sovereignty, permitting it to become a basis for absolute personal immunity.

Part II of this article analyzes these four interrelated causes while providing historical examples. Part III draws lessons from the failure of the state-centric system to outline a model of international law that would be more responsive and effective in preventing atrocities. Finally, in Part IV, this article analyzes the Rome Statute to the Proposed International Criminal Court to determine whether it contains these essential aspects of a system designed to prevent the gravest of atrocities.

## II. The Failure of the State-centric Model

### 1. State-centric System and Individuals

The modern-day notion of the sovereign nation-state in a state-centric international system has its formalistic origins in the 1648 Treaty of Westphalia.[16] That treaty, which ended the Thirty-Years War in Europe, established a world system of independent nations that, in theory, were assured the equal sovereign right to govern their own affairs, free from outside regulation (most notably, the Pope or Holy-Roman Emperor).[17]

The peace of Westphalia, coupled with the rise of positivism (which emphasizes written law) and decline of the metaphysical obligations of natural law towards the end of the Enlightenment, led to the focus on laws and treaties among nations, which were binding solely upon the state, and not the individual.[18] Jeremy Bentham, the philosopher who first crafted the term "inter-national law" in 1789, noted that it was "exclusively about the rights and obligations of states *inter se* and never about the rights and obligations of individuals."[19]

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16. *See* Thomas M. Franck, *Is Personal Freedom A Western Value?*, 91 AM. J. INT'L L. 593, 619 (1997) (citing the Treaty of Westphalia as ushering in the modern notion of the sovereign nation-state); Louis W. Goodman, *Democracy, Sovereignty, and Intervention*, 9 AM. U. J. INT'L L. & POL'Y 27, 27 (1993) (noting the same).

17. *See* Hurst Hannum, *Sovereignty and Its Relevance to Native Americans in the Twenty-First Century*, 23 AM. INDIAN L. REV. 487, 487 (1998/99) (discussing the origins of sovereignty, tracing this principle to the Treaty of Westphalia); Cornelius F. Murphy, Jr., *The Grotian Vision of World Order*, 76 AM. J. INT'L L. 477, 478–79 (1982) (noting that the Treaty of Westphalia granted "full sovereignty" to the nations of Europe); Walter Gary Sharp, Sr., *Revoking An Aggressor's License To Kill Military Forces Serving The United Nations: Making Deterrence Personal*, 22 MD. J. INT'L L. & TRADE 1, 21 n.98 (1998) (stating that the Westphalian Treaty left the Holy Roman Emperor "virtually powerless").

18. *See* K. Lee Boyd, *Are Human Rights Political Questions?*, 53 RUTGERS L. REV. 277, 311–12 (2001) (noting that international law is binding upon the state as a consequence of the rise in positivism); Note, *Restructuring Modern Treaty Power*, 114 HARV. L. REV. 2478, 2492 (2001) (analyzing the rise of sovereignty and positivism and decline of natural law in the 19th century); Jianming Shen, *The Basis of International Law: Why Nations Observe*, 17 DICK. J. INT'L L. 287, 291 (1999) (discussing the decline of natural law and the rise of positivism).

19. *See* William J. Aceves, *Liberalism and International Legal Scholarship: The Pinochet Case and the Move Toward a Universal System of Transnational Law Litigation*, 41 HARV. INT'L L.J. 129, 130 (2000) (quoting JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 6 (J.H. Burns & H.L.A. Hart eds., Athlone Press 1970) (1789)). *See generally* Jianming Shen, *National Sovereignty and Human Rights in a Positive Law Context*, 26 BROOK. J. INT'L L. 417, 420 (2000) (discussing the general precepts of state-centric international law).

The state-centric approach posits that states are the primary actors in the international arena, and thus the instruments of international law can only establish legal obligations and rights upon the nations that are parties to them—not individuals.[20] This modern approach to international law has resulted in significant problems in establishing a universal rule of law with respect to human rights.[21] Humans have become peripheral to the rule of law by the focus on the state as an actor.[22] While hundreds of treaties have sought recognition of the rights of individuals, only states may enter into these agreements.[23] In addition, only states may enforce these agreements—no international forum exists for individuals to assert their rights or to bring claims against a state.[24]

Consequently, a violation of a treaty, pact or norm of international law by a nation-state can only result in remedies directed at the "state" and not the individual violator.[25] The current options of remedies available are essentially limited to diplomatic protest, sanctions or the use of force.[26]

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20. *See* MICHAEL AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 1 (1982) (stating that "international law is primarily concerned with states"); Joel Richard Paul, *Cultural Resistance To Global Governance*, 22 MICH. J. INT'L L. 1, 13 n.55 (2000) (commenting that since international law is focused on states, non-state actors have traditionally not been addressed); Carlos Manuel Vazquez, *Treaty Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1082 (1992) (noting that international instruments establish the rights of states, but not of the individuals that compose the state).

21. *See* Aceves, *supra*, note 19, at 131 ("[T]his focus on the state as the basic unit in international relations has marginalized humans in human rights law"); Paul, *supra* note 20, at 13 n.55 (noting that the focus solely on the state as an actor has resulted in international law ignoring the rights of individuals); *see also* Robinson O. Everett & Scott L. Silliman, *Forums for Punishing Offenses Against the Law of Nations*, 29 WAKE FOREST L. REV. 509, 509–18 (1994) (discussing alternatives to the state-centric paradigm).

22. *See* Aceves, *supra* note 19, at 130–31 (discussing the failure of international law to address the rights of the individual); Paul, *supra* note 20, at 13 n.55 (analyzing the obstacles to establishing basic protections of the individual).

23. *See* Aceves, *supra* note 19, at 130–31 (noting the fact that only states may enter into treaties); Vazquez, *supra* note 20, at 1087–88 (discussing individual rights in international law despite the fact that they may not enter into treaties); *see also* Louis Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1, 1 (1982) (asserting that individuals must be made both objects and subjects of international law).

24. *See* Aceves, *supra* note 19, at 130 (noting the lack of international venues for individuals to prosecute their rights); Alexander Orakhelashvili, *The Position of the Individual in International Law*, 31 CAL. W. INT'L L.J. 241, 248 (2001) (commenting that a treaty requires the consent of a state to be valid); *see also* Beth Stephens, *Conceptualizing Violence: Present And Future Developments In International Law: Panel I: Human Rights & Civil Wrongs At Home And Abroad: Old Problems And New Paradigms: Conceptualizing Violence Under International Law: Do Tort Remedies Fit The Crime?*, 60 ALB. L. REV. 579, 580–81 (1997) (analyzing the benefits of permitting domestic tort suits as a means of providing a forum for an individual to assert her rights).

25. *See* Jose E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L. L. 365, 369–71 (1999) (discussing the problems of remedies directed solely at the state); Mary Margaret Penrose, *Impunity—Inertia, Inaction, And Invalidity: A Literature Review*, 17 B.U. INT'L L.J. 269, 302 (1999) (noting that international law has traditionally failed to hold individuals accountable for breaches); Steven R. Ratner, *The Schizophrenias of International Criminal Law*, 33 TEX. INT'L L.J. 237, 241 (1998) (observing that international law fails to pursue the individual violator, but rather, addresses breaches at the state level).

26. *See* Lt. Col. Susan S. Gibson, *International Economic Sanctions: The Importance of Government Structures*, 13 EMORY INT'L L. REV. 161, 161–62 (1999) (noting that sanctions provide a third option for actions against a state that fall between protest and war). In some jurisdictions, there has been a move towards individual civil liability, such as the recent enforcement of the United States' Alien-Tort Claims Act. However, these are domestic remedies and only applicable in a very limited number of jurisdictions. *See, e.g.*, Kadic v. Karadzic, 70 F.3d 232 (2d. Cir. 1995); Bigio v. Coca-Cola Co., 239 F.3d 440, 447 (2d Cir. 2000).

These remedies are inherently flawed because individuals commit crimes of international law, yet international law is not enforced against the individual. As Justice Jackson during the International Military Tribunal (IMT) at Nuremberg noted "[t]he idea that a state, any more than a corporation, commits crimes, is a fiction. Crimes always are committed only by persons. . . . It is quite intolerable to let such a legalism become the basis of personal immunity."[27]

The presiding judges of the Tribunal concurred with Justice Jackson in ruling that "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[28] Nonetheless, international law has neither conclusively nor uniformly followed the advice of Justice Jackson or the precedent of the IMT, and sovereign immunity remains the norm.[29] Accordingly, the effectiveness of the rule of law has been significantly enfeebled.

The state-centric remedies permit individuals to violate international law with the knowledge that, nearly universally, they will remain immune from the consequences. Any deterrence effect of law is lost when it is not enforced against the individual.[30] World leaders know that they are free to manipulate the system and play the international political "game" in an effort to diffuse, deflect or completely prevent consequences. Speaking to his generals on the eve of the invasion of Poland, Hitler asked "After all, who now remembers the [massacres of the] Armenians?"[31] So long as leaders know that they can remain immune from world retribution, international law will continue to be violated.

### 2. The Failure of the State-centric Model to be State-centric in Effect

Just as it is a fiction to assert that a state commits a crime, so too is it to assert that punishment affects the abstract notion of the "state." Individuals comprise the state, and it is the individual that suffers when the state is punished. While the citizens endure hardships from international punishment, the leaders responsible for the violation of international law rarely suffer the consequence of diplomatic protest, embargoes, sanctions and even war.

The international sanctions imposed upon Iraq following the Persian Gulf War are demonstrative of this reality. At the conclusion of the war, the UN-adopted Security Council Resolution 687, which required Iraq to surrender all weapons of mass destruction, and created

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27. *Trials of the Major War Criminals Before the International Military Tribunal*, Nuremberg 14 November 1945–1 October 1946, 149–50. (Nuremberg: Int'l Mil. Tribunal, 1946–49).

28. *Id*. at 223. Judgment has been reprinted in *International Military Tribunal (Nuremberg), Judgment and Sentences, October 1, 1946*, 41 AM. J. INT'L. L. 172, 220, 220–21 (1947).

29. *See* Patricia A. McKeon, *An International Criminal Court, Balancing the Principle of Sovereignty Against the Demands for International Justice*, 12 ST. JOHN'S J. LEGAL COMMENT. 535, 535 (1997) (commenting that sovereignty "still thrives" in international law); Penrose, *supra* note 25, at 302 (stating that international law has created a system of impunity for those who violate its provisions); Ratner, *supra* note 25, at 241 (discussing the failure of international law to create individual accountability as a norm).

30. *See* note 56, *infra*.

31. *See* M. Cherif Bassiouni, *Combating Impunity For International Crimes*, 71 U. COLO. L. REV. 409, 414 (2000).

the United Nations Special Commission on Iraq (UNSCOM) to monitor compliance.[32] As an enforcement mechanism, the Security Council further adopted Resolution 661, which imposed severe economic sanctions on Iraq by prohibiting imports of "all commodities and products originating in Iraq."[33] The resolution also provided for a total ban on financial transactions and transfers of funds to the Iraqi government and suspended "any and all contractual obligations held by states or their nationals with Iraq . . . which could undermine the sanctions regime."[34]

The purpose of the sanctions was to force Iraqi compliance with the Security Council resolutions, weaken Iraq's "wartime resolve," and destabilize the economic and political power structures, thus enfeebling Saddam Hussein's hold on power.[35] Over a decade of sanctions and two American presidents later, Saddam Hussein remains in power just as firmly if not more so than in the time prior to the sanctions.[36] His ability to wage war is weakened but intact, the extent of Iraq's chemical and biological weapons program is unknown, and the sanction regime suffers from problems of national self-interest and Realpolitik.[37]

However, the one known effect of the sanctions is the consequences to the Iraqi citizens. As early as 1993, the UN Food and Agriculture Organization (FAO) reported that as a result of the sanctions, the entire Iraqi economy had been "paralyzed . . . [and there was] persistent deprivation, chronic hunger, endemic undernutrition, massive unemployment, and widespread human suffering."[38]

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32. SC Res. 687, U.N. SCOR, 46th Sess., 2981st mtg. at 11, U.N. Doc. S/INF/47 (1991).

33. SC Res. 661, U.N. SCOR, 46th Sess., 2933rd mtg. at 19, U.N. Doc. S/INF/46 (1990). Provisions were made for consideration of funds for humanitarian and medical needs. *Id*.

34. *Id*.

35. *See* SC Res. 661, U.N. SCOR, 46th Sess., 2933rd mtg. at 19, U.N. Doc. S/INF/46 (1990); *see also* Andrew K. Fishman, Comment, *Between Iraq And A Hard Place: The Use Of Economic Sanctions And Threats To International Peace And Security*, 13 EMORY INT'L L. REV. 687, 702–703 (1999) (discussing the various goals, largely unaccomplished, of the sanctions against Iraq); Christopher C. Joyner, *Sanctions, Compliance and International Law: Reflections on the United Nations' Experience Against Iraq*, 32 VA. J. INT'L L. 1, 5 (1991) (analyzing the goals of the sanction regime, including the weakening of Iraq's "wartime resolve").

36. *See* Charles M. Sennott, *Fighting Terror/Diplomacy*, BOSTON GLOBE, Mar. 12, 2002, at A12 (commenting that Saddam Hussein remains firmly in power); Howard Witt and John Diamond, *U.S. Weighs Use Of Iraqi Dissidents; Groups Could Help Destabilize Hussein*, CHI. TRIB., Feb. 14, 2002, at 1N (discussing Hussein's long-term grip on power); *see also* Michael R. Gordon, *After The Attacks: The Strategy; A New War And Its Scale*, N.Y. TIMES, Sept. 17, 2001, at A1 (stating that U.S. bombing of Iraq has not weakened Hussein's strength).

37. *See* Erica Cosgrove, *The Sanctions Dilemma And The Case Of Iraq: Human Rights And Humanitarian Challenges To The Use Of Multilateral Economic Sanctions*, 9 WINDSOR REV. LEGAL SOC. ISSUES 65, 67 (1999) (commenting that the sanctions have "largely failed"); Fishman, *supra* note 35, at 702–03 (noting the absolute failure of the sanctions to accomplish their intended goals); Julian Borger, *Gulf Battle Lines Blurred; When Iraq Invaded Kuwait in 1990 Most of the World Supported US Calls for Air Strikes. This Time Around There are Fewer Takers, With Only Britain and Israel Supporting the Hard Line. Most Other Countries have Deserted to the Middle Path of Peaceful Persuasion*, GUARDIAN (London), Feb. 7, 1998, at 17 (discussing the failed policy of economic sanctions).

38. Food and Agriculture Organization, *Crop & Food Supply Assessment Mission to Iraq*, Special Alert Number 237 (1993). *See* Fishman, *supra* note 35, at 706 (discussing the devastating effects of the sanctions on the Iraqi people); Mark Fineman, *Iraq on Brink of Famine, U.N. Finds; Destitution: Sanctions are Blamed. Studies Liken Nation to 'Disaster-Stricken African Countries,'* L.A. TIMES, Aug. 8, 1993, at A4 (noting that the Iraqi population was dying in large numbers due to the sanctions); *see also* Matthew Hay Brown, *Iraqi Doctors Fighting for Lives Under Medical Shortages*, SAN FRANCISCO CHRONICLE, Nov. 26, 2000, at D4 (reporting that one of the effects of the sanctions has been a shortage of medicine).

Ironically, George H.W. Bush declared that the United States does "'not seek Iraq's destruction, nor do we seek to punish the Iraqi people for the decisions and policies of their leaders.'"[39] Despite this assertion, the official UN estimate is that over *one million* Iraqi civilians have died in the last decade as a *direct result* of the sanctions.[40] Prior to the Gulf War, Iraq's population had "the highest caloric consumption per head in the Middle East."[41] Now they suffer from rampant starvation. However, the sanction regime has continued despite the CIA's own assessment that "there is no assurance or guarantee that economic hardships will compel Saddam to change his policies or lead to internal unrest that would threaten his regime."[42]

Punishing the "state" of Iraq, in reality, is punishing the people of Iraq. Yet, the people punished are not those individuals responsible for the initial violations of international law. One recent study noted that "top Iraqi officials from President Saddam Hussein to senior officers in the military and ruling Arab Baath Socialist Party are exempted from suffering by special access to food imports and hard currency. . . ."[43]

The Iraqi example demonstrates how the state-centric model often only serves to harm civilians. Remedies for violations of international law must be directed at those responsible for the violations, not the citizens that comprise the state. Only in a system of individual leadership accountability can this occur.

### 3. The State-centric Model, Raw Power and Realpolitik

The state-centric paradigm is a system that is often arbitrary and based upon undocumented law.[44] Consequently, it is the model that is most susceptible to the dynamics of raw power, self-interest and Realpolitik.[45] The Security Council, the only international body with

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39. Thomas L. Friedman, *War in the Gulf: Baker Sketches Future Gulf Role*, N.Y. TIMES, Feb. 7, 1991, at A1 (quoting President George Bush).

40. *See* Matthew Hay Brown, *Iraqi Doctors Fighting for Lives Under Medical Shortages*, SAN FRANCISCO CHRONICLE, Nov. 26, 2000, at D4 (discussing the catastrophic human toll of the sanctions).

41. *See* Fishman, *supra* note 35, at 706 (quoting *EIU Country Profile of Iraq 1995–96*, Economist Intelligence Unit, 1996, at 6–7).

42. *See Standoff in the Gulf; Excerpts from Remarks by Webster and Baker on Embargo's Drain on Iraq*, N.Y. TIMES, Dec. 6, 1990, at A16.

43. *See* Patrick E. Tyler, *Study Says Iraq's Child Mortality Rate Has Tripled*, N.Y. TIMES, Oct. 22, 1991, at A6.

44. *See* H.L.A. HART, THE CONCEPT OF LAW 209 (1961) (asserting that international law is like a "simple form of social structure," given the absence of an international legislature, courts of mandatory jurisdiction, and centralized enforcement); John A. Barrett, Jr., *International Legal Education in the United States: Being Educated for Domestic Practice While Living in a Global Society*, 12 AM. U. J. INT'L L. & POL'Y 975, 977 (1997) (noting that many political scholars believe that international law can often be a system of power politics). This is the very theory espoused by the "realist" school of international law. *See* Shen, *supra* note 18, at 326 (discussing the realist assertion that international law is simply a system of power politics, not documented law).

45. *See* Richard A. Barnes, *Democratic Governance and International Law*, 8 IND. J. GLOBAL LEG. STUD. 281, 294 (book review) (asserting that the "more powerful States can influence the development of law in a disproportionate manner"); Michael Bowers, *Custom, Power, and the Power of Rules Customary to International Law from an Interdisciplinary Perspective*, 17 MICH. J. INT'L L. 109, 122–24 (1995) (analyzing the substantial effects of power and politics upon international law); Brian F. Havel, *An International Law Institution in Crisis: Rethinking Permanent Neutrality*, 61 OHIO ST. L.J. 167, 168 n.3 (2000) (noting that international law is a product of, among other things, raw power).

any legal authority to enforce individual accountability, repeatedly demonstrates its inability to act in the face of atrocity. The unanimity requirement for Security Council action almost universally has prevented action. Pol Pot was protected by the Chinese,[46] Stalin by the Soviets, Congo's Laurent Kabila was shielded by France,[47] Pinochet and the Argentinean Generals were rescued by the U.S. as were the Indonesian leaders for the slaughter in East Timor[48]—the list goes on and on.[49] Rwanda and Yugoslavia, the only two instances of Security Council action to create individual accountability, were mere political flukes—the indicted leaders simply did not have an ally on the Security Council.[50]

Justice cannot be predicated upon luck, as selective enforcement defeats the rule of law.[51] It delegitimizes both the law itself and the institution seeking its enforcement.[52] Lon L. Fuller noted that the route to a legal system's collapse can be paved by, among other things, ad hoc decision making and a failure to enforce laws as announced.[53] To be effective, men must be governed by law, "not the arbitrary fiat of the man or men in power."[54] As numerous empirical studies have shown, when laws are not perceived to be universally or equally enforced, normative obligations become non-existent, respect for the law is compromised and any potential deterrence effect is defeated.[55]

With no rule of law offering protection, individual nation-states often must act to protect their own interests.[56] The will of the powerful dominates and relations amongst nations become Darwinistic in nature. Consequently, scholars often refer to the Westphalian system as

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46. *See* Douglass Cassel, *The ICC's New Legal Landscape: The Need To Expand U.S. Domestic Jurisdiction To Prosecute Genocide, War Crimes, And Crimes Against Humanity*, 23 FORDHAM INT'L L.J. 378, 385–86 (1999) (stating that since the Chinese would veto any attempts to take Security Council action against Pol Pot, he was never held accountable).

47. Kabila was a leading figure in the slaughter of hundreds of thousands of Tutsis in Rwanda and an unknown number of villagers in Congo. *See* Craig R. Whitney, *France Rejects Calls to Try Congo Leader for Torture*, N.Y. TIMES, Nov. 28, 1998, at A6.

48. *See* Frederick J. Petersen, Note, *The Facade Of Humanitarian Intervention For Human Rights In A Community Of Sovereign Nations*, 15 ARIZ. J. INT'L & COMP. LAW 871, 898 (1998) ("The U.S. assured [Indonesia] that the U.N. would not take action following the invasion by using its influence in the General Assembly and the Security Council").

49. *See* Lawrence Weschler, *Exceptional Cases in Rome: The United States and the Struggle for an ICC,* in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW 85, 92 (Sarah B. Sewall et al. Eds., 2000).

50. *See id.*

51. *See* note 55, *infra.*

52. *See* Lon L. Fuller, THE MORALITY OF LAW 33-94 (2d ed. 1969).

53. *Id*. at 39.

54. *In re* Winship, 397 U.S. 358, 384 (1970).

55. *See* Eduardo Moises Penalver, *The Persistent Problem of Obligation in International Law*, 36 STAN. J. INT'L L. 271, 271–75 (2000); Erik Luna, *Principled Enforcement of Penal Codes*, 4 BUFF. CRIM. L. REV. 515, 575 (2000).

56. *See* David P. Fidler, *War, Law & Liberal Thought: The Use of Force in the Reagan Years*, 11 ARIZ. J. INT'L & COMP. L. 45, 93 (1994). An example of this is, following the Security Council's refusal to respond to the massacre or the Tutsis lead by Kabila, Rwanda invaded Congo in an attempt to bring him to justice. *See* Gwynne Dyer, *Forgotten Wars—Miles from Kosovo*, TORONTO STAR, May 18, 1999, at 1.

anarchical, not unlike man's "state of nature" envisioned by liberal philosophers of the 18th and 19th centuries.[57]

Nevertheless, to describe the international system as pure anarchy would be disregarding the significant steps taken to create normative guidelines of action over the past century. International law exists in the form of treaties and other legal instruments, doctrines and norms—and states do generally follow.[58] However, when it is not in their best interest to follow, there is no accountability of those individuals who were responsible for the breach of law. Consequently, human rights are repetitively violated.

The disaster of the Persian Gulf War and the resulting sanctions would have been averted had individual accountability been a norm over the past three decades. Saddam Hussein evidenced his disregard for human life in the gassing and slaughter of an estimated 300,000 Kurdish people from 1987 to 1989.[59] The world did little to respond, as it was stifled by problems of narrowly construed national self-interest. The Western world viewed Iran as a greater threat than Iraq and, led by the Reagan and Bush administrations, continued to trade mass quantities of arms and military technology with Iraq, supplying it with many of the weapons used in the Persian Gulf War.[60]

A criminal indictment of Saddam and the others responsible for the slaughter during the late 1980s would have reduced Iraq's ability to wage future wars, such as the invasion of Kuwait.[61] A functioning and enforceable system of individual accountability could prevent, at

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57. *See* Shen, *supra* note 18, at 304 (discussing the comparison between the international system to the liberal theory of the state of nature).

58. *See* LOUIS HENKIN, HOW NATIONS BEHAVE 47 (2d ed. 1979) (asserting that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time"); Phillip R. Trimble, *International Law, World Order and Critical Legal Studies,* 42 STAN. L. REV. 811, 833 (1990) (commenting that a state "may decide to forgo the short-term advantages derived from violating rules because it has an overriding interest in maintaining the overall system"); *see also* Penalver, *supra* note 55, at 273–74 (distinguishing the question of whether states have an obligation to obey international law from the question of whether they do obey).

59. *See* John Roberts, *Chameleon Leader Still The Hero Of Troubled Arab World*, SCOT. ON SUN., Sept. 15, 1996, at 15 (asserting that the number of Kurds gassed in the late 1980s was "upwards of 300,000"); *Saddam's Deadly Intentions*, BOSTON GLOBE, Feb. 15, 1998, at C6 (stating that Hussein gassed 300,000 Kurdish civilians from 1987–1989); *see also* Jeffrey Goldberg, *The Great Terror; In Northern Iraq, There Is New Evidence Of Saddam Hussein's Genocidal War On The Kurds—And Of His Possible Ties To Al Qaeda*, NEW YORKER, Mar. 25, 2002, at 52 (detailing specific incidents of Hussein's use of the Kurdish people as "guinea pigs" for his chemical weapons).

60. *See* Douglas Frantz, *Bush Denial On Iraq Arms Aid Challenged; Foreign Policy: Papers Show State Department Knew U.S. Exports Were Used In Baghdad Weapon Programs, Lawmaker Says*, L.A. TIMES, Sept. 24, 1992, at A24 (citing to various state department documents which indicate that the U.S. provided military assistance to Iraq up until at least one week prior to the invasion of Kuwait); Jeffrey Goldberg, *The Great Terror; In Northern Iraq, There Is New Evidence Of Saddam Hussein's Genocidal War On The Kurds—And Of His Possible Ties To Al Qaeda*, NEW YORKER, Mar. 25, 2002, at 52 (discussing the Reagan and Bush administrations' stifling of attempts to take punitive action against Iraq for the genocide); *Saddam's Deadly Intentions*, BOSTON GLOBE, Feb. 15, 1998, at C6 (noting that the U.S. was helping Iraq fight the war with Iran at the same time that the gassing of the Kurds was occurring).

61. *See* Christopher Hitchens, *How the U.S. Created Monster Saddam: The Americans Deviously Worked for and Against Iraq Over the Years. Saddam Got Sick of the Shell Game. The Solution, He Thought, Was to Come on Strong*, TORONTO STAR, Jan. 12, 1991, at D1 (discussing the fact that Hussein felt empowered by the Western world's failure to respond to various incidents).

the very least, arms trades with leaders under indictment, consequently making the arms deals of the 1980s impossible. Moreover, an arrest and trial of those responsible would have probably prevented Hussein's invasion of Kuwait in the first place. "The principle of personal liability is a necessary as well as logical one if international law is to render real help to the maintenance of peace."[62] However, with no international rule of law to condemn and seek accountability, self-interest has dominated. As the International Commission of Jurists observed to the UN Human Rights Commission, "after having perpetrated the most flagrant abuses on its own population without a word of reproach from the UN, Iraq must have concluded it could do whatever it pleased."[63]

### 4. The Distortion of the Principle of Sovereignty

The essence of a sovereign state lies in its right of self-determination.[64] It is this very concept—the right of a state to control the political, social, economic and cultural systems within its borders—that has defined the core of international law since the peace of Westphalia. Self-determination is considered a universal principle that has developed independently in both Western and Eastern political cultures.[65] The right of sovereignty is essential to the functioning of a state.[66] It is a nation's ability to self-govern that permits it to protect the rights of its citizens. Territorial integrity and political sovereignty ensures, at least in theory, against the global hegemony of the powerful.

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62. *Chief Justice Jackson, Trials of the Major War Criminals Before the International Military Tribunal*, Nuremberg 14 November 1945–1 October 1946, 149–50, (Nuremberg: Int'l Mil. Tribunal, 1946–49).

63. David Korn, ed., *Human Rights in Iraq* (Human Rights Watch, Yale, 1989). *See* Jeffrey Goldberg, *The Great Terror; In Northern Iraq, There is New Evidence of Saddam Hussein's Genocidal War on the Kurds—And of His Possible Ties to Al Qaeda*, NEW YORKER, Mar. 25, 2002, at 52 (noting that the Reagan administration prevented Congress from enacting any punitive measures against Iraq for the use of chemical weapons on the Kurdish people); *Saddam's Deadly Intentions*, BOSTON GLOBE, Feb. 15, 1998, at C6 (commenting that U.S. aide continued to Iraq even as it was committing genocide).

64. *See* Noelle M. Kahanu & Jon M. Van Dyke, *Native Hawaiian Entitlement to Sovereignty: An Overview*, 17 U. HAW. L. REV. 427, 445 (1995) ("The most fundamental element of sovereignty is the right to choose and establish a form of government"); David A. Nill, *National Sovereignty: Must it be Sacrificed to the International Criminal Court?*, 14 BYU J. PUB. L. 119, 119 (1999) (book review) ("The essence of statehood . . . is the capacity for self-determination"); *see* also ROBERT H. JACKSON, QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS, AND THE THIRD WORLD 75 (1990) ("Sovereignty [is] based on a universal doctrine of categorical self-determination which [does] not presuppose underlying nationhood but only subject colonial status").

65. *See* Shen, *supra* note 19, at 420–21 (discussing the evolution of sovereignty in various cultures). Non-intervention by states in each other's domestic affairs is one of the "Five Principles of Peaceful Co-existence" (known as *Heping Gongchu Wuxiang Yuanze* in Chinese and *Pancha Shila* in Hindi) jointly espoused by China, India and Burma. *See* INTERNATIONAL LAW 58-62 (Wang Tieya, ed., Law Publishing House 1995); Mu YAPING ET AL., A TREATISE ON CONTEMPORARY INTERNATIONAL LAW 72-77 (1998).

66. *See* George Miron, *Did the ABM Treaty of 1972 Remain in Force After the USSR Ceased to Exist in December 1991 and Did It Become a Treaty Between the United States and the Russian Federation?*, 17 AM. U. INT'L L. REV. 189, 221–22 (2002) (noting that sovereignty is an essential element of a state in international law); Shen, *supra* note 19, at 419 (asserting that the continuing existence of the international system depends upon the protection of sovereignty); Jianming Shen, *Sovereignty, Statehood, Self-determination, and the Issue of Taiwan*, 15 AM. U. INT'L L. REV. 1101, 1137 (2000) ("The element of sovereignty or independence is so essential for statehood that the capacity of an entity to enter into foreign relations is actually contingent upon the degree of such sovereignty or independence").

However, to fully define a state's sovereignty, it is essential to recognize the source of this right. Both political and military sovereignty are derived from the rights of individuals, as individuals compose the state and in "social contract" terms, grant it authority.[67] Irish philosopher Edmund Burke commented that the "duties and rights of states are nothing more than the duties and rights of men who compose them."[68] The rights of states are the rights of individuals in collective form—thus giving rise to the principles of self-determination. Accordingly, individual rights must underlie all legal judgments of state actions.

Despite this, human rights infringements most often occur in the name of the state, and are defended on the grounds of sovereignty. However, since sovereignty is derived from the individual, it cannot grant the state the unfettered right to encroach upon the most basic rights of the individual. State sovereignty, by its very definition, does not include the power to violate human rights. Consequently, it cannot be used as a shield or legal justification by the perpetrators of inhumanity.

Nonetheless, the state-centric model that has grown out of the peace of Westphalia has permitted the abuse of the notion of sovereignty. While the principle of sovereign immunity is a logical and necessary principle that permits the functioning of a legitimate government, it is neither logical nor necessary that illegitimate actions are permitted. The *jus cogens* prohibitions of international law—genocide, crimes against humanity and war crimes—are not within a state's sovereignty to carry out. Thus, the slaughter of innocents is clearly an illegitimate state action, under any jurisprudential or logical theory upon which international law is founded. Consequently, sovereign immunity cannot protect the heads of state for these types of criminal actions.

## III. Lessons

From the foregoing analysis, the failure of the state-centric paradigm is apparent. Four principal lessons can be drawn from it in order to determine what is necessary in a system of individual accountability. First, the crimes punishable must be narrowly defined to protect sovereignty, and only include crimes that violate the core rights of man. These crimes should include the *jus cogens* prohibitions of international law—genocide, mass rape and sexual torture, slavery, terrorism and significant breaches of the Laws of War (such as killings of prisoners, attacks on civilians, etc.). Only crimes done with intent and those conducted on a large scale (so as to eliminate isolated or accidental incidents from falling under the rubric of international law) should be punishable.

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67. *See* Joy Gordon, *The Concept Of Human Rights: The History And Meaning Of Its Politicization*, 23 BROOK. J. INT'L L. 689, 736–745 (1998) (discussing the social contract theory and the general principles of liberalism which hold that the state's authority is derived from the individual). For a general outline of the liberal school and the social contract, see THOMAS HOBBES, LEVIATHAN (C.B. Macpherson ed., 1985) (1651); JOHN LOCKE, SECOND TREATISE ON GOVERNMENT (Thomas P. Peardon ed., 1952) (1690).

68. EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 90 (1988) (1790).

Second, the prosecutor must be entirely independent so as to minimize the forces of Realpolitik. The prosecutor should have an obligation to investigate all crimes that are referred to him or her, and document all findings and decisions (and be provided adequate funding to do so). The independence of a prosecutor and investigatory wing of an international court would be necessary to accomplish a system that more universally and evenly applies the law. Moreover, this would increase its legitimacy and international acceptance.

Third, the system must have various protections to ensure that fair and neutral justice is served. This should include basic rights of defendants and significant checks and balances within the court, including an appeals process. In addition to protecting defendants from the abuse of power, this would serve to increase the legitimacy of a court and its decisions, and again, help insulate it from instances of political maneuvering and corruption.

Finally, the member states of the United Nations would have to make an absolute commitment towards legitimizing a court. They would have to consistently seek to prevent the politicization of the system and permit the court to maintain its independence. The court, in turn, would have to do the same. Its enforcement of the laws would have to be as universal as possible, regardless of political forces. A legal system is only as good as the people who make up its composition. The ideal court can be drafted on paper, but that paper is nothing without the commitment and efforts of those who implement its words.

## IV. The International Criminal Court: Does it Meet This Criteria?

### 1. The Statute

When the required 60 nations ratified the Rome Statute on April 11, 2002, the ICC was created. The Court began operating on July 1, 2002, and has jurisdiction over any crimes committed on or after that date. Its seat is in The Hague, the Netherlands.[69] The Treaty is open to all UN-recognized nations of the world—regardless of participation in Rome.[70] As of this writing, 139 have signed and 66 have ratified the Treaty.[71]

The Rome Statute is made up of a preamble, 13 parts, and 128 articles.[72] The Statute defines the Court's purpose,[73] legal status,[74] jurisdiction[75] and enforcement powers.[76] It further defines what crimes are punishable,[77] what punishments are available,[78] the rights of defen-

69. *Id*., art. 3(1).

70. *Id*., art. 125(3).

71. *See* Rome Statute of the International Criminal Court: Ratification Status, *available at* <http://www.un.org/law/icc/statute/status.html> (last visited Mar. 22, 2002).

72. *See generally* Rome Statute.

73. *Id*., Preamble.

74. *Id*., art. 4.

75. *Id*., part 2. s

76. *Id*., part 10.

77. *Id*., art. 5.

78. *Id*., part 7.

dants,[79] what defenses will exculpate a defendant,[80] an appeals process,[81] and general financing and functioning issues.[82]

**a. Composition of the Court**

The ICC will have four principal organs: (1) The Presidency; (2) The Chambers—Pre-Trial (six judges), Trial (six judges) and Appeals (five judges); (3) The Office of the Prosecutor; and (4) The Registry.[83]

The seventeen judges who will compose the three chambers of the ICC are elected to single non-renewable nine-year terms by a majority vote of state parties.[84] The judges selected are to represent the "principal legal systems of the world" with no two being from the same state.[85] Judges of the ICC must be "persons of high moral character, impartiality and integrity who possess the qualifications required in their respective appointment to the highest judicial offices."[86] In addition, judges must have both criminal trial experience as well as extensive knowledge of international law.[87]

The judges, according to the Rome Statute, "shall be independent in the performance of their functions."[88] Any activity that might "interfere with their judicial functions" or "affect confidence in their independence" is prohibited.[89] They are barred from engaging in any other professional occupation.[90] In addition, recusal is required when there is an action before the court in which the judge is from the same state as a party to that action.[91]

The Office of the Prosecutor is an entirely independent organ of the court.[92] Headed by a Prosecutor and several Deputy Prosecutors, the Office is responsible for investigating alleged crimes and prosecuting the accused.[93] State parties nominate and elect the Prosecutor and his or her Deputies, like the judges, to single, non-renewable nine-year terms. They must be "persons of high moral character and have high competence and experience in the prosecution of criminal cases."[94]

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79. *Id.*, arts. 55, 67.
80. *Id.*, art 33.
81. *Id.*, part 8.
82. *Id.*, part 9.
83. *Id.*, art. 34.
84. *Id.*, art. 36.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*, art. 40.
89. *Id.*
90. *Id.*
91. *Id.*, art. 41.
92. *Id.*, art. 42.
93. *Id.*
94. *Id.*

The Presidency, consisting of a President, and a first and second Vice-President, is elected from among the judges of the ICC by a majority of judges.[95] The Presidency, along with the Registry, is responsible for the various administrative and public relations functions of the Court.[96]

#### b. Preconditions to the Exercise of the Jurisdiction

Before the ICC can act, its jurisdiction must be accepted either by the territorial state where the alleged crimes occurred or by the accused's home state.[97] By becoming a Party State, a nation automatically accepts the jurisdiction of the Court under either circumstance.[98] Non-Party States can accept the jurisdiction of the ICC on a case-by-case basis by issuing a declaration of acceptance to the Court.[99] Finally, the ICC would have universal jurisdiction over any crimes referred to it by the UN Security Council, regardless of a state's consent.[100]

#### c. Personal Jurisdiction of the ICC

Unlike the International Court of Justice, the International Criminal Court will have jurisdiction over individuals rather than states.[101] However, the preferred forum for the trial of accused war criminals would be national courts rather than the ICC.[102] To accomplish this, the delegates in Rome devised a system known as "complementary jurisdiction."[103]

The complementary system gives the ICC jurisdiction only over those individuals who would otherwise go unpunished by their home state.[104] According to this principle, the ICC would be barred from pursuing cases that are being prosecuted in good faith by any state.[105]

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95. *Id*., art 37.

96. *Id*., art. 38.

97. *Id*., art. 12(2).

98. *Id*., art. 12(1).

99. *Id*., art. 12(3).

100. *Id*., art. 13; *see* Sadat & Carden, *supra* note 5 (discussing the principles behind the ICC's universal jurisdiction). The authority of the Security Council to enforce crimes of universal jurisdiction vests in the UN Charter. *See* UN CHARTER, ch. XII.

101. *See* James L. Taulbee, *A Call to Arms Declined: The United States and the International Criminal Court*, 14 EMORY INT'L L. REV. 105, 107 (2000) (comparing the ICC to the International Court of Justice which only has jurisdiction to resolve disputes between states). *Compare* Stat. Of The Int'l Ct. Of J., June 26, 1945, 59 Stat. 1031 (entered into force Oct. 24, 1945), *with* Rome Statute, art. 1.

102. *See* David Stoelting, *Status Report On The International Criminal Court*, 3 HOFSTRA L. & POL'Y SYMP. 233, 239 (1999) (commenting that "national tribunals" remain the preferred forum for prosecutions); Johan D. Van der Vyver, *Personal and Territorial Jurisdiction of the International Criminal Court*, 14 EMORY INT'L L. REV. 1, 28 (2000) (noting the same); *see also* Rome Statute, art. 1 (affirming the "complementary" nature of the ICC).

103. *See* Rome Statute, Preamble.

104. *See* Rome Statute, art. 17 (stating that the court does not have jurisdiction to prosecute unless the state with traditional jurisdiction is "unwilling or unable [to] genuinely carry out the investigation or prosecution"); *see also* Van der Vyver, *supra* note 102, at 66 (discussing the ICC's complementary jurisdiction).

105. *See* Rome Statute, art. 17.

Complementary jurisdiction is enforced by the elaborate procedural requirements that serve to limit the ICC Prosecutor's authority to proceed with a case.[106] Under article 18, the ICC Prosecutor must notify all concerned states of the commencement of an investigation.[107] After receiving notice, states have one month to notify the Court of their own investigation of the events and/or individuals implicated.[108] If notification occurs, the Prosecutor may then only proceed with the investigation if the Pre-Trial Chamber concludes that the domestic jurisdiction concerned is still "unwilling or unable . . . to carry out the investigation or prosecution."[109]

Article 17 lays out the factors for determining *unwillingness*, such as intentional and unjustifiable delays or sham proceedings for the sole purpose of shielding individuals from the jurisdiction of the ICC.[110] The Statute defines *inability* as occurring when there is "a total or substantial collapse or unavailability of [a state's] national judicial system, [causing] the state [to be] unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings."[111]

### d. Subject Matter Jurisdiction of the ICC

Under the Rome Statute, the ICC will have jurisdiction over three core crimes: genocide, crimes against humanity and war crimes.[112] All three crimes have demarcated definitions which are, in most cases, considered more limited than their definitions in general international law.[113]

#### Genocide

Following the revelation of the savage nature of Nazi crimes, the UN General Assembly adopted the Genocide Convention in 1948,[114] to which 133 nations have become a party.[115]

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106. *See* Rome Statute, part 5. *See generally*, Daniel J. Brown, *The International Criminal Court and Trial in Absentia*, 24 BROOK. J. INT'L L. 763 (1999) (discussing the variety of procedural safeguards built into the Rome Statute).

107. Rome Statute, art. 18(1).

108. *Id*., art. 18(2).

109. *Id*., art. 17(1)(a).

110. *Id*., art. 17(2).

111. *Id*., art. 17(3).

112. *Id*., art. 5.

113. *See id.*; *see also* Bartram S. Brown, *The Statute of the ICC: Past, Present, and Future, in* THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW 61, 67 (Sarah B. Sewall et al. Eds., 2000) (noting that the definitions of the crimes within the ICC's jurisdiction are as narrow or more narrow than their traditional definitions in international law); John Seguin, *Denouncing The International Criminal Court: An Examination Of U.S. Objections To The Rome Statute*, 18 B.U. INT'L L.J. 85, 102 (2000) (commenting that the "limited jurisdiction" of the court to only the most serious international crimes will limit the power of the prosecutor).

114. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. VI, 78 U.N.T.S. 277 (entered into force for the United States on Feb. 23, 1989) ("Genocide Convention"); *see also* Timothy L.H. McCormack, *Conceptualizing Violence: Present and Future Developments in International Law: Panel II: Adjudicating Violence: Problems Confronting International Law and Policy on War Crimes and Crimes Against Humanity: Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law*, 60 ALB. L. REV. 681, 721 (1997) (discussing the adoption of the Genocide Convention).

115. *Status Of Ratifications, Reservations And Declarations*, United Nations Treaty Collection, *available at* <http://www.unhchr.ch/html/menu3/b/treaty1gen.htm> (last visited on Mar. 25, 2002).

The text of the Convention encapsulated the international consensus in defining the crime of genocide.[116] In deference to this consensus, the ICC Statute mirrors the text of the Convention verbatim.[117] Accordingly, the Statute defines genocide as killing or other listed abuses "committed *with intent* to destroy . . . a national, ethnical, racial, or religious group."[118]

### Crimes Against Humanity

Crimes against humanity are acts of murder, rape and forced pregnancy,[119] torture, enslavement and other listed wrongs that are committed "as part of a *widespread or systematic* attack directed against any civilian population, *with knowledge* of the attack."[120] The inclusion of the words "widespread or systematic" eliminates minor and isolated incidents from the jurisdiction of the court, while the words "with knowledge" eliminate accidental bombings, shootings or other inadvertent acts from its jurisdiction.[121]

### War Crimes

Article 8 grants the Court jurisdiction over individuals who have committed a variety of war crimes, including "grave breaches of the Geneva Convention of 12 August 1949 war crimes" and "other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law."[122] The statute makes it clear that it only has jurisdiction over war crimes "when committed as part of a plan or policy or as part of a large scale commission of such crimes."[123] Furthermore, the Court would not have jurisdiction for "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature."[124]

### Aggression

The crime of aggression will be within the Court's jurisdiction only if a definition is agreed upon and the Statute amended by a two-thirds majority of the Party States.[125] Further-

116. *See* Brown, *supra* note 113, at 67 (noting that the Genocide Convention represented the international consensus as to the definition of genocide).

117. *See* Rome Statute, art. 5; Genocide Convention, arts. II, III; *see also* Brown, *supra* note 113, at 67 (noting that the Rome Statute mirrors the language of the Genocide Convention); Nicole Eva Erb, *Gender-Based Crimes Under The Draft Statute For The Permanent International Criminal Court*, 29 COLUM. HUM. RTS. L. REV. 401, 427 n.106 (1998) ("[T]he crime of genocide as articulated in the ICC final draft is taken directly from the Genocide Convention").

118. Rome Statute, art. 6 (emphasis added).

119. The inclusion of rape, sexual slavery and forced pregnancy was a monumental step in the protection of the basic rights of women. Sexual violence has been largely ignored by international law, even within international human rights law. For example, neither the IMT at Nuremberg or Tokyo prosecuted such crimes despite compelling evidence that rape was prevalent in both theaters. *See* Rhonda Copelon, *Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law*, 46 McGill L.J. 217, 220–229 (2000).

120. *Id*., art. 7 (emphasis added).

121. *Id*., art. 8; *see also* David J. Scheffer, *Blaine Sloan Lecture: War Crimes and Crimes Against Humanity,* 11 PACE INT'L. L. REV. 319, 334 (1999) (commenting that the Court would not have jurisdiction in isolated incidents).

122. Rome Statute, art. 8.

123. *Id*.

124. *Id*., art. 8(2)(f).

125. *Id*., art. 5(2).

more, the Statute provides that any provisions regarding aggression must be consistent with the "relevant provisions of the Charter of the United Nations,"[126] meaning that it will give deference to the Security Council to determine whether an act of aggression has occurred, regardless of the agreed upon definition.[127]

**e. Other Aspects of the Statute**

## Independent Prosecutor

Articles 15 and 42 establish a *proprio motu* prosecutor[128] whom, as noted, "shall act independently as a separate organ of the Court."[129] The prosecutor has the autonomous power to initiate preliminary investigations but must, upon the conclusion that there is sufficient evidence of a crime falling under the jurisdiction of the Court, receive authorization from the Pre-Trial Chamber in order to proceed.[130] Furthermore, the Security Council, through a resolution, can halt an investigation for a renewable period of 12 months in order to facilitate peace negotiations.[131]

## Protections for the Accused

The Rome Statute grants numerous rights and protections to the accused. These protections include the presumption of innocence,[132] the right to an open, speedy and public trial,[133] the right to counsel[134] and the right to subpoena and cross-examine witnesses.[135] The defendant has the right to remain silent as well as the right against self-incrimination.[136] The Prosecutor has the burden of proof beyond a reasonable doubt.[137] All crimes falling under the jurisdiction have a *mens rea* requirement.[138] Furthermore, the accused may appeal the decision

126. *Id.*

127. *See* UN CHARTER, chapter XII; *see also* Brown, *supra* note 113, at 67–68.

128. Rome Statute, art 15(1).

129. *Id.*, art. 42(1).

130. *Id.*, art. 15(3).

131. *Id.*, art. 16. The United States wanted the prosecutor to be able to open an investigation only upon Security Council referral. This proposal proved unacceptable to the vast majority of the conference in Rome, as the Security Council has been handcuffed by the unanimity requirement in numerous instances of human rights violations. Singapore suggested, and the conference members agreed, that instead of requiring Permanent Five unanimity to begin an investigation, the Statute would require unanimity to temporarily block Court action—thus permitting sensitive peace negotiations to proceed without "Court interference." Weschler, *supra* note 49, at 92.

132. Rome Statute, art. 66.

133. *Id.*, art 67.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*, art. 30; *see* Ltn. Cmdr. Gregory P. Noone and Douglas William Moore, *An Introduction to the International Criminal Court*, 46 NAVAL L. REV. 112, 135 (1999) (discussing the mental culpability requirements under the Rome Statute).

of the Court to the Appeals Chamber on the grounds of substantive outcome, procedural application or excessive sentence.[139]

Part 3 of the Statute lists several other principles, grounded in the core tenets of legal positivism, which will operate to protect the accused.[140] One such provision in article 22, *nullum crimen sine lege* (no crime without law), requires that (1) the accused only be charged with crimes within the statutorily defined jurisdiction of the court, and (2) applicable law be strictly construed by the Court.[141] Another principle, *nulla poena sine lege* (no punishment without law), articulated in article 23, limits punishment strictly to the provisions of the statute.[142]

**Analysis**

The Rome Statute appears, at least on paper, to meet the requirements as set forth in the previous section, which would move international law towards remedying the failure of the state-centric model. With the exception of the crime of aggression, the Rome Statute only addresses very limited crimes that are *jus cogens* prohibitions. Genocide, crimes against humanity and war crimes are all absolute prohibitions in international law. The inclusion of the crime of aggression is a significant departure from international law, and it should not have been included. Moreover, the fact that it is unclear to what extent the Security Council would be involved also poses a significant threat to the clarity of the law and the independence of the prosecutor and court. Nonetheless, the inclusion of this crime does not make the Rome Statute a failed document. Rather, it is an area that must be addressed and safeguarded from abuse.

The Rome Statute does meet the other criteria set forth in this article. It provides extensive protections for the accused. These protections are derived from widely, if not universally, accepted practices of the judicial systems of democratic and free states. While there is no trial by jury, this is not a universal practice and is not considered a requirement for a fair trial.

Finally, the court is sufficiently independent. The judges and prosecutors are elected from amongst the party states to non-renewable terms—thus they are insulated from the politics of re-election. The Security Council, outside of the crime of aggression, cannot hinder the operation of the court (except upon unanimous vote where they can temporarily block prosecution). These are significant guarantees that, at least on paper, the court can remain sufficiently isolated from political pressures.

However, this is not to say that the document does not have flaws. In addition to the inclusion of the crime of aggression, there are areas of the Rome Statute that are vague and poorly drafted. There are issues of procedure and evidence that have yet to be resolved. Finally, while the document itself may meet the general criteria for a proper system of individual

139. Rome Statute, part 8.

140. *See id.*, part 3.

141. *See id.*

142. *See id.*

accountability, it is meaningless without the effort of the nation-states. Any system, domestic or international, can become politicized if those who compose it have mal intentions. If the international community does not make a legitimate effort to insulate the court from politics, the International Criminal Court will fail. However, if efforts are made, the foundation is in place, through the Rome Statute, for a court that can remedy many of the failures of the state-centric model.

## V. Conclusion

The state-centric model of international law has failed. The time has come to hold individuals accountable for their inexcusable actions. Just ten years ago, it would have been unimaginable to think that the nations of the world could come together and create such a court. However, the end of the Cold War resulted in a tremendous shift in world politics that presented the opportunity to create the ICC, and to its credit, the world responded.

During the final week of negotiations in Rome, the head delegate from Sierra Leone—a nation suffering from horrors that have become unique to its name[143]—addressed the Conference with an impassioned plea for the International Criminal Court. Following his speech, he opened up his copy of the Draft Statute and turned to a confidant:

> For many of the delegates here, these pages are just so much text. For me, they are like a mirror of my life. This article here [pointing to a section of the Statute] this is my uncle; this one here, my late wife; this one here, my niece. This is not just paper for me.[144]

We must strive to make history linear, not cyclical. Scholarly debate on the subject, while necessary, is not sufficient. We, the lawyers and future lawyers of the world, as "guardians of the law,"[145] have an absolute obligation to protect the rule of law, and consequently are obliged to act to support a rule of law that no longer permits impunity for genocide and crimes against humanity. The American Bar Association, in recognition of this fact, has been instrumental in

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143. The "Revolutionary United Front," seeking to establish themselves as the ruling authority of Sierra Leone, has implemented a campaign of terror in which they cut off the limbs of the civilian population. *See* Karsten Nowrot and Emily W. Schabacker, *The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone*, 14 AM. U. INT'L L. REV. 321, 331–32 (1998).

144. Michael P. Scharf, *The ICC's Jurisdiction over the Nationals of Non-Party States*, *in* THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW 213, 220 (Sarah B. Sewall et al. Eds., 2000).

145. N.Y. LAWYER'S CODE OF PROFESSIONAL RESPONSIBILITY, Preamble. (1999). The preamble to the N.Y. Code of Professional Responsibility states:

> The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual. . . . Lawyers, as guardians of the law, play a vital role in the preservation of society.
>
> *Id.*

lobbying Congress and the president to support the International Criminal Court.[146] Jerry Shestack, former president of the ABA, advised world leaders to move forward with the ICC with or without U.S. membership.[147] Others must follow the lead of the ABA.

Education is necessary. The American public remains largely ignorant of the most basic information regarding individual accountability. On the historic day of the signing of the Rome Statute, not a *single* mention of the Treaty was made on the ABC, CBS or NBC national news programs—instead, Monica Lewinsky took center stage.[148]

If the international community fails to complete its work in creating a permanent system of accountability, it will only be assisting the next person who swings a sword, pulls a trigger, locks an oven, digs a ditch or rapes a village in the name of the state. Without a functioning international court, the peril of genocide will continue to dangle like the sword of Damocles over humanity into eternity. The rights of the individual may be grounded in nature, divinity or a product of human reason, but so long as we are willing to say that these rights are universal in theory, then we must strive to ensure that they are universal in practice.

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146. *See* Henry T. King and Theodore C. Theofrastous, *From Nuremberg to Rome: A Step Backward for U.S. Foreign Policy,* 31 CASE W. RES. J. INT'L L. 47, 70 (1999); *see, e.g.*, American Bar Association Task Force on an International Criminal Court: Final Report (1992), *reprinted in* 140 CONG. REC. S105 (daily ed. Jan. 26, 1994) (sponsored by the ABA Task Force on an International Criminal Court and by the New York State Bar Association).

147. *See* "Build a Strong Court and Hope the U.S. will Follow, Says ABA President," *On the Record*, July 14, 1998, at 1.

148. *See* Weschler, *supra* note 49, at 92.

# RWANDAN *GACACA:*

## Seeking Alternative Means to Justice, Peace and Reconciliation

**By Pernille Ironside***

### Introduction

The massacre of an estimated 800,000 Rwandan civilians, from April to July of 1994, wiped out nearly ten percent of the tiny country's population and left it shattered in the wake of its swift brutality.[1] The government-organized slayings were carried out by an astounding number of Hutu civilians against members of the rival ethnic Tutsi group and those perceived to be Tutsi sympathizers.[2] The high level of public participation and complicity in the killings, attacks, rapes and pillages, is particularly disturbing. The slaughter often took place in broad daylight within the perpetrators' local communities and was committed against neighbors, friends and even family members.[3] Not only did the aggressors personally know their victims, but the Tutsi extermination was carried out with such collective conviction and moral patriotic imperative that it lost its deviance.[4]

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1. *See* Prof. Kader Asmal, MP, *International Law and Practice: Dealing With the Past in the South African Experience*, 15 AM. U. INT'L L. REV. 1211 (2000) (noting that over 800,000 people were slaughtered in the Rwandan genocide); Mark A. Drumbl, *Rule Of Law Amid Lawlessness: Counseling The Accused In Rwanda's Domestic Genocide Trials*, 29 COLUM. HUM. RTS. L. REV. 545, 547 (1998) (citing statistics which show that approximately ten percent of Rwanda's population was wiped out during the genocide); *see also World in Brief/ Rwanda; Census-Takers Count Genocide Deaths*, L.A. TIMES, July 19, 2000, at A10 (documenting the survey by the Rwandan government and human rights organizations of the mostly Tutsis killed by Hutu extremists).

2. *See* Alan Zarembo, *Keeping Their Faith in a Land Time Forgot*, ST. PETERSBURG TIMES, Feb. 12, 1995, at 15A (noting that, in large part, it was the government who organized the killings); *see also* Colin Nickerson, *Refugee Massacre Unfolds in Congress: Witnesses Tell of Slaughter of Hundreds by Kabila's Soldiers*, BOSTON GLOBE, June 1, 1997, at A1 (discussing the organized genocide in which many Hutu males participated); David Lamb, *Rwanda Tragedy May Reflect Larger Africa Problem: Most Armies Protect Ruling Hierarchy, So Winner Takes All*, DALLAS MORNING NEWS, June 12, 1994, at 21A (illustrating how the government-sponsored radio station motivated the killers). While ethnic tensions and violence existed between the Hutu majority and the controlling Tutsi minority since Rwanda gained independence from Belgium in 1959, it never rose to the level seen in 1994. *See* Nancy Gibbs, *Why? The Killing Fields of Rwanda; Hundreds of Thousands Have Died or Fled in a Month of Tribal Strife. Are These the Wars of the Future?*, TIME, May 16, 1994, at 56.

3. *See* Linda Melvern, *Focus: Genocide in Africa: The Rwandan Blood on the UN's Hands: Rwanda Saw the Worst Slaughter Since the Holocaust, Yet the West Sat Back and Did Nothing*, OBSERVER, Sept. 3, 2000, at 18 (contrasting the killings of the Holocaust, which were carried out in secret); Ellie Tersher, *Carnage of the Mind in Rwanda*, TORONTO STAR, Apr. 29, 1996, at A2 (describing in an interview that what made the killings so grotesque was that they were carried out in broad daylight); *see also* Ann M. Simmons, *Rwanda Executes 22 For '94 Genocide Roles; Africa: Massacre Survivors Hail Punishment*, L.A. TIMES, Apr. 25, 1998, at A1 (discussing the plight of Kato Ninyetegeka, director of political affairs in the office of the Rwandan president, who lost about 15 family members).

4. *See* Mary Gray & Sarah Milburn Moore, *Next Arena for Genocide?*, WASH. POST, Aug. 24, 1994, at A19 (showing that neighbors had been frightened into killing neighbors); Elizabeth Sullivan, *Genocide's Unwelcome Herald*, PLAIN DEALER, May 11, 1998, at 7B (hypothesizing that the efficiency of the massacres exceeded that of the Nazi gas chambers); *see also From Rwanda's Ashes, Justice Rises*, TORONTO STAR, Dec. 10, 1999, at 1 (explaining how a mayor turned on his own neighbors to save his prestige).

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The challenge for post-genocidal Rwanda has been how to cope with this mass atrocity and the huge numbers of perpetrators in order to achieve some measure of justice, reconciliation and peace for Rwandans.[5] Yet, seven years later, the two retributive responses adopted have made very little progress towards achieving these objectives.[6] The International Criminal Tribunal for Rwanda (ICTR) has secured fewer than nine convictions in five-and-a-half years of operation, despite an annual budget of approximately $80 million (in U.S. currency) and over 800 staff members.[7] While the domestic genocide trials have made greater progress with its dockets, having cleared an estimated 5,000 cases since 1996, this pace has occurred at the expense of due process guarantees to the accused.[8] But even if this pace were maintained, it would still take upwards of 120 years to prosecute the estimated 110,000 to 130,000 alleged *genocidaires* who continue to be held in overcrowded prisons and community lock-up cells throughout the country.[9]

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5. *See* Des Browne, *Census Due as People Emerge From Nightmare*, HERALD (Glasgow), Aug. 21, 2000, at 7 (arguing the impossibility of a poor country, such as Rwanda, to cope with the challenge); *see also Rwanda; Tribunal Judges Visit Rwanda For First Time,* AFR. NEWS, Nov. 10, 1999 (illustrating that whatever justice the ICTR hands down will not be enough); Peter Maguire, *War Criminals Have Little to Fear*, NEWSDAY, Jan. 27, 1999, at A41 (stating that the Rwandan government refuses to cooperate with the UN court). Carlos Santiago Nino identifies this type of mass violence that is no longer deviant within the society as "radical evil." CARLOS SANTIAGO NINO, RADICAL EVIL ON TRIAL vii (1996).

6. *See Rwanda; ICTR Chief Prosecutor Tracks Down Genocide Suspects in DRC*, AFR. NEWS, Dec. 7, 2001 (indicating that only 51 suspects have been held and seven trials are in progress by the ICTR); *see also Mali; Genocide Convicts: Ex-Prime Minister, 4 Others to Serve Prison Sentences*, AFR. NEWS, Nov. 27, 2001, *available at* LEXIS (describing that if the capacity of the ICTR remains the same, it will not be able to finish all its trials by 2007); Chris Simpson, *Obituary: Judge Laity Kama*, INDEPENDENT (London), May 16, 2001 at 6 (illustrating the displeasure of the Rwandan government with the ICTR's progress).

7. *See Rwanda; Six Genocide Convicts Transferred to Mali to Serve Their Sentences*, AFR. NEWS, Dec. 11, 2001 (illustrating the ICTR's record of eight convictions and one acquittal); *see also Tribunal Confirms Genocide Perpetrator's 15-Year Prison Sentence*, BBC SUMMARY WORLD BROADCASTS, Feb. 16, 2000 (noting the first conviction by the ICTR); *Tanzania; Shame On the UN's Genocide Court in Arusha*, AFR. NEWS, Dec. 5, 2001, *available at* LEXIS (stating that with a budget of $90 million and staff of 800, the ICTR has only meted eight sentences).

8. *See* Human Rights Watch, *Rwanda: Elections May Speed Genocide Trials*, *available at* <http://www.hrw.org/press/2001/10/rwanda1004.htm> (last visited February 13, 2002); *UN Integrated Regional Information Network (IRIN) RWANDA: September Returns Bring Year's Tally to 17,000*, AFR. NEWS, Oct. 23, 2000, *available at* LEXIS (showing two genocide suspects who boycotted their ICTR trial because they felt they could not get a fair trial); *see also* Susan Cook & George Chigas, *Putting the Khmer Rouge on Trial*, BANGKOK POST, Oct. 31, 1999, at 1 (illustrating the lack of a legal infrastructure in the Rwandan courts).

9. *See* Human Rights Watch, *Report on Rwanda: Justice and Responsibility* (1999) at 11, 15–16, *available at* <http://www.hrw.org/reports/1999/rwanda/Geno15-8-05.htm> (last visited February 13, 2002); Dana Harman, *Rwanda Turns to its Past for Justice*, CHRISTIAN SCI. MONITOR, Jan. 30, 2002, at 9 (opining that it will take 200 years to try some 135,000 suspects in custody); *see also* Ed O'Laughlin, *Worn Down by Horrors of War, the Children of Rwanda's Exodus Head Home to Face New Peril: No Turning Back for Red Cross Orphans*, INDEPENDENT (London), Mar. 27, 1997, at 19 (adding that thousands of children are also being held in the overcrowded Rwandan jails).

Faced with the realization that justice delayed amounts to justice denied[10] for Rwandans, and that the current international and domestic prosecutions are simply incapable of delivering any form of timely and broad-based justice, the government of Rwanda sought an alternative approach to healing the country's painful past and promoting national reconciliation.[11] It has implemented an updated version of the traditional quasi-judicial *Gacaca* (pronounced *ga-cha-cha*) system, where respected elders resolve disputes among community members.[12]

This article evaluates whether *Gacaca* will overcome the shortcomings of the ongoing international and national prosecutions, and allow Rwanda to finally heal itself and move forward as a nation. This evaluation is particularly necessary in light of the historical use of *Gacaca* in civil conflicts, and yet, the government of Rwanda is placing enormous faith in this system's ability to process as many as 125,000 perpetrators of the most egregious crimes in a manner that provides satisfactory justice to Rwandans.[13]

To contextualize the discussion, Part I briefly outlines the problems and inadequacies experienced to date with the prosecutions undertaken by the ICTR and the Rwandan criminal justice system, while Part II provides a detailed overview of the recently adopted Organic Law that will implement the *Gacaca* system. The heart of the discussion lies in Part III, which critically evaluates the *Gacaca* system in light of Rwanda's need for justice, peace and reconciliation and why these objectives have not been achievable so far. The article concludes that, in the context of post-genocidal Rwanda, *Gacaca* may well be able to heal the deep wounds that continue to divide the country by ethnicity in a manner for which Western retributive systems are not

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10. *See Rwanda; Bagosora: Decision on Prosecution Motion for Adjournment*, AFR. NEWS, Mar. 18, 1998, *available at* LEXIS (quoting Judge Ostrovsky who commented that international tribunals often fail to provide the accused with a speedy trial); *see also International Lobby Says International Tribunal for Rwanda Incompetence*, BBC WORLDWIDE MONITORING, June 9, 2001, *available at* LEXIS (stating that international crisis groups have criticized the ICTR for its record).

11. *See* Associated Press, *Rwanda to Use Traditional Justice in '94 Killings*, N.Y. TIMES, Oct. 7, 2001, at A4 (noting that Rwandans hope that the *Gacaca* Law will foster reconciliation); *see also East Africa; Great Lakes Update*, AFR. NEWS, Nov. 10, 1999, *available at* LEXIS (illustrating the UN's acceptance of the *Gacaca* as the only viable alternative to ease the overcrowding jails); *Rwanda; Hopes and Fears as Kigali Launches Participative Justice*, AFR. NEWS, Oct. 11, 2001, *available at* LEXIS (showing the people's desire for a quicker system of justice).

12. *See* Christina M. Carroll, *An Assessment of the Role and Effectiveness of the International Criminal Tribunal for Rwanda and the Rwandan National Justice System in Dealing with the Mass Atrocities of 1994*, 18 B.U. INT'L L.J. 163, 190–91 (2000) (discussing the implementation of *Gacaca* courts to deal with the judicial overload in Rwanda); Mary Robinson, *Genocide, War Crimes, Crimes Against Humanity*, 23 FORDHAM INT'L L.J. 275, 280 (1999) (commenting on the role of the *Gacaca* courts in exacting justice on those responsible for the genocide in Rwanda); Jennifer Widner, *Courts and Democracy in Postconflict Transitions: A Social Scientist's Perspective on the African Case*, 95 AM. J. INT'L L. 64, 66 (2001) (noting the positive effect of *Gacaca* in re-establishing the rule of law in Rwanda).

13. *See* Erin Daly, *Transformative Justice: Charting a Path to Reconciliation*, 12 INT'L LEGAL PERSP. 73, 175 (2001/02) (noting the suitability of the *Gacaca* courts to Rwandan society); Minh Day, Note, *Alternative Dispute Resolution and Customary Law: Resolving Property Disputes in Post-Conflict Nations, a Case Study of Rwanda*, 16 GEO. IMMIGR. L.J. 235, 249 (2001) (discussing the role of the *Gacaca* courts and their effectiveness in alleviating some of the problems of the Rwandan criminal justice system); Leah Werchick, Article, *Prospects for Justice in Rwanda's Citizen Tribunals*, 8 HUM. RTS. BR. 15, 27 (2001) (enumerating the positive aspects of the *Gacaca* courts in promoting "reconciliation and harmony").

designed. Indeed, it is unrealistic, impractical and short-sighted to rely solely on the ordinary criminal law model with all of its due process guarantees to address mass perpetration of crimes, particularly in a country whose judicial system has to be built *ex nihilo* and where ethnic tensions continue to run high.

## I. The Need for an Alternative

To date, criminal prosecutions have been the sole method by which justice has been sought for post-genocidal Rwanda.[14] This is premised on the perhaps misplaced faith that accountability and reconciliation can only be achieved through a Western-conceived adversarial trial model, and that individual criminal accountability pursued against a select few will "exonerate" the collective.[15] Given the unique features of the genocide, including the charge that millions were likely involved in atrocities in some way, and the inherent weaknesses in both the ICTR and Rwanda's domestic criminal justice system, it is not surprising that they have been unable to deliver justice effectively.[16]

### A. Shortcomings of ICTR Prosecutions

The ICTR was hastily established under Chapter VII of the United Nations Charter in the autumn of 1994, at least in part, to assuage the guilt felt by Western leaders for not having intervened to stop the genocide and to avoid appearing as favoring the former Yugoslavia, for whom an International Criminal Tribunal (ICTY) had just been created in the wake of its genocide. The "official" reasons for establishment were that the Rwandan judicial system lay in ruins, and that even if rebuilt, it was presumed to be incapable of rendering justice in an impartial and fair manner. Moreover, the crimes committed were of such an egregious nature as to constitute a threat to international peace and security, thereby necessitating international prosecution to send a strong deterrent message to other would-be perpetrators. The ICTR was intended to bring justice to the most serious perpetrators of the genocide and other violations of international humanitarian law, and to contribute to the process of national reconciliation, to the restoration and maintenance of peace and to ensuring that such violations do not reoccur.[17]

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14. *See* Daly, *supra* note 13, at 75–76 (discussing the view that criminal prosecution seems to be the "primary route to transitional justice"); Mark A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda*, 75 N.Y.U. L. REV. 1221, 1245 (2000) (noting the pursuit of criminal prosecutions in Rwanda after the genocide). *See generally* Drumbl, *supra* note 1, at 639 (stating that criminal prosecutions in Rwanda are only a temporary solution).

15. *See* Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?,* 95 AM. J. INT'L L. 7, 7 (2001) (noting that criminal prosecutions might have a positive effect on society as far as reconciliation is concerned); Drumbl, *supra* note 14, at 1277 (discussing the need for judicial intervention to placate some members of society in Rwanda). *See generally* Jose E. Alvarez, *Crimes of State/Crimes of Hate: Lessons from Rwanda,* 24 YALE J. INT'L L. 365, 467 (1999) (expressing doubt as to whether the Rwandan experiment with criminal prosecutions "against a select few will 'exonerate' the collective").

16. *See* Louise Arbour, *The Legal Profession and Human Rights: Progress and Challenges in International Criminal Justice*, 21 FORDHAM INT'L L.J. 531, 534 (1997) (discussing the weakness of the Rwandan criminal justice system in dealing with the atrocities); William A. Schabas, *Prosecuting International Crime: Justice, Democracy, and Impunity in Post-genocide Rwanda: Searching for Solutions to Impossible Problems*, 7 CRIM. L.F. 523, 527 (1996) (discussing the complexity of the Rwandan situation with respect to administering justice to those responsible for the genocide); Robert F. Van Lierop, *Report on the International Criminal Tribunal for Rwanda*, 3 HOFSTRA L. & POL'Y SYMP. 203, 213 (1999) (noting the inability of a judicial system in dealing with genocide perpetrators).

17. Security Council Resolution 955 (1994), S/RES/955 (1994), (Nov. 8, 1994) at 1–2.

In hindsight, one may speculate that the ICTR was doomed to fall short of these lofty expectations when Rwanda, coincidentally a member of the Security Council at the time, was the only country to vote against the resolution creating the Tribunal.[18] Since its inception, the ICTR has been mired in managerial, administrative and logistical deficiencies, including fraud and incompetence.[19] It has also had a poor working relationship with the Rwandan government, lacked an effective witness protection program and relied heavily on financial, political and moral support from the international community.[20] These factors have all contributed to the Tribunal's slow progress in conducting its work.[21]

While significant improvements have been made in these areas, it is clear that the ICTR is neither an efficient nor effective instrument in delivering justice, fostering reconciliation and restoring peace.[22] Indeed, if one is looking for value for money, the ICTR has not delivered.[23]

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18. Payam Akhavan, *The International Criminal Tribunal For Rwanda: The Politics And Pragmatics Of Punishment*, 90 AM. J. INT'L L. 501, 505 (1996) (commenting that Rwanda voted against the resolution to establish the Tribunal); Paul J. Magnarella, *Expanding The Frontiers Of Humanitarian Law: The International Criminal Tribunal For Rwanda*, 9 FLA. J. INT'L L. 421, 425 (1994) (noting the irony of Rwanda being the only Security Council member to vote against the Tribunal); Barrett Prinz, Comment, *The Treaty of Versailles to Rwanda: How the International Community Deals with War Crimes*, 6 TUL. J. INT'L & COMP. L. 553, 578–79 (1998) (noting the same).

19. *See* Stuart Beresford, *In Pursuit of International Justice: The First Four-year Term of the International Criminal Tribunal for Rwanda*, 8 TULSA J. COMP. & INT'L L. 99, 99 (2000) (discussing the "administrative and managerial" problems of the ICTR); Makau Mutua, *From Nuremberg to the Rwanda Tribunal: Justice or Retribution?*, 6 BUFF. HUM. RTS. L. REV. 77, 88–89 (2000) (enumerating the various administrative and budgetary difficulties facing the Tribunal); Mary Margaret Penrose, *Lest We Fail: The Importance of Enforcement in International Criminal Law*, 15 AM. U. INT'L L. REV. 321, 368 (2000) (commenting on the ICTR's difficulties with respect to its administrative and business functions). *See generally* Yacob Haile-Mariam, *The Quest for Justice and Reconciliation: The International Criminal Tribunal for Rwanda and the Ethiopian High Court*, 22 HASTINGS INT'L & COMP. L. REV. 667, 705 n.184 (1999) (asserting that the provisions for the selection of prosecutors were neither fair nor impartial).

20. *See* Beresford, *supra* note 19, at 131 (noting the need for more "administrative and financial support" from the UN); Carroll, *supra* note 12, at 180 (commenting that inadequate handling of prosecutions by ICTR is undermining its legitimacy); Drumbl, *supra* note 1, at 591 (stating the lack of an effective witness protection program in Rwanda).

21. *See* Carroll, *supra* note 12, at 181 (noting that the delays of ICTR are a result of a "number of physical, legal, and procedural impediments"); Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 DUKE J. COMP. & INT'L L. 349, 374 (1997) (noting the slow pace of ICTR in addressing the problems of genocide); Widner, *supra* note 12, at 70 (discussing the administrational difficulties of the Tribunal in dealing with war crimes).

22. *See* Rupert Cornwell, *Former PM Admits Part in Rwanda Genocide*, INDEPENDENT (London), May 2, 1999, at 11 (asserting that the ICTR has been a "debacle" due to its inability to wrap up any trials in a three-and-a-half year span); Sylvia de Bertodano, *Rwanda's Long Wait for Justice*, TIMES (London), Aug. 22, 2000, *available at* LEXIS (discussing the inability of ICTR to deliver "efficient and effective justice" according to the United Nations Security Council briefing); *Rwanda: Justice, Blinded*, ECONOMIST, Nov. 27, 1999, *available at* LEXIS (noting the rift between the Rwandan government and ICTR due to the release of Jean-Bosco Barayagwiza, "one of 50 genocide suspects to have been indicted by the tribunal").

23. *See* Victoria Cowan, *Who Says Traditional Ways Are Best?: Pensions Ombudsman Annual Report; Law*, TIMES, Aug. 22, 2000, *available at* LEXIS, (discussing the inability of ICTR to deliver justice despite its $80 million budget and a staff of 729). *See generally* Susan Cook and George Chigas, *Putting the Khmer Rouge on Trial*, BANGKOK POST, Oct. 31, 1999, at 1 (noting the belief of the Rwandans that their own courts are better able to deal with the genocide perpetrators than the ICTR); Penrose, *supra* note 19, at 368 (stating that only nine trials were completed in a six-year span).

After five-and-a-half years of operation, it has managed to secure, on average, only two convictions per year at an annual cost of U.S. $80 million.[24] The majority of Rwandans know little of trials in Arusha except that the ICTR has spent millions to prosecute a handful of genocidal masterminds.[25] To them, it is a foreign and removed body alien in procedure, whose slow pace of trials is proof of UN inefficiency, or worse, indifference to Rwandan needs.[26] Skepticism has evolved into anger with the hypocrisy that those most culpable are subjected to the best and most fair processes.[27] Indeed, extensive procedures exist to safeguard the rights of the accused before the ICTR, for whom conviction will likely lead to serving their terms in "luxurious" Western prisons and, in any event, to avoiding the death penalty.[28]

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24. *See* Carroll, *supra* note 12, at 181 (discussing the shortcomings and delays of the ICTR resulting from inexperience and infancy despite its multi-million-dollar budget). *See generally* Jose E. Alvarez, *Lessons from the Akayesu Judgment*, 5 ILSA J. INT'L & COMP. L. 359, 367–68 (1999) (noting additional problems with the ICTR stemming from the fact that many of the legal specialists in the ICTR are not familiar with international criminal law, thereby leaving the validity of the judgments open to question); Todd Howland & William Calathes, *The International Criminal Tribunal, Is It Justice or Jingoism for Rwanda? A Call for Transformation*, 39 VA. J. INT'L L. 135, 158–59 (1998) (discussing the ICTR's first case, the trial against Jean-Paul Akayesu, the former mayor of Taba).

25. *See* Carroll, *supra* note 12, at 193 (citing lack of knowledge regarding the trials as a source of frustration for the Rwandan people); *see also Justice Minister Commends USA for Extraditing Genocide Suspect in Kigali*, BRIT. BROADCASTING CORP., Jan. 28, 2000, *available at* LEXIS (discussing an attempt to make proceedings more accessible to the Rwandans); *International Genocide Tribunal Launches Information Center in Kigali*, BRIT. BROADCASTING CORP., Sept. 27, 2000, *available at* LEXIS (stressing that the purpose of the center is to give Rwandan citizens access to information about the ICTR trials). Dissemination of information about the Tribunal has improved somewhat since 1998, when Radio Rwanda was formed. *Radio Rwanda Announces New Frequencies*, BBC WORLDWIDE MONITORING, Dec. 23, 1998, *available at* LEXIS.

26. *See* Carroll, *supra* note 12, at 193 (discussing the belief among Rwandans that the ICTR has been insensitive to their needs). *See generally* Penrose, *supra* note 19, at 369–70 (discussing the problems of the Tribunal created by the laborious nature of the proceedings); Nicholas Kotch, *Nationwide General News: Overseas News*, AAP NEWSFEED (April 30, 1998) (stating that some of the inefficiency is due to the ICTR's location in Arusha, which is a remote town with a defunct telecommunications system).

27. *See* Alvarez, *supra* note 15, at 417–18 (noting that because of the sentencing disparities between Rwandan domestic courts and the ICTR, some of the most culpable perpetrators are likely to suffer much lighter penalties in the ICTR than their counterparts in Rwanda). *See generally* Bernard Muna, The Hon. Navanethem Pillay & The Hon. Theogene Rudasingwa, *The Rwanda Tribunal and its Relationship to National Trials in Rwanda*, 13 AM. U. INT'L L. REV. 1469, 1488 (1998) (stating that the relationship between ICTR and the Rwandan government can be described as strained); *Tanzania Re-Arrests Rwanda Genocide Suspect Freed by U.N. Court*, XINHUA NEWS AGENCY, *available at* LEXIS (Mar. 30, 1999) (discussing the ICTR's failure to convict Bernard Ntuyahaga, a major in the former Rwandan armed forces who was accused of multiple murders of UN peacekeeping forces). In particular, anger and distrust flared towards the Tribunal in November 1999, after the Appeals Chamber ordered the release of Jean Bosco Barayagwiza, a director in the Foreign Ministry during the genocide and the head of the radio station responsible for hate propaganda, because it was too slow in bringing him to trial after his arrest. *Rwandan Genocide Accused Freed by Tribunal*, NATIONAL POST, Nov. 6, 1999, at A15.

28. *See* Carroll, *supra* note 12, at 177 (noting the differences in Rwandan and ICTR sentencing guidelines); Magnarella, *supra* note 18, at 433–35 (discussing the ICTR's Rules of Procedure, including the rights of the accused, sentencing guidelines and the disparity between Rwandan and ICTR procedures); Penrose, *supra* note 19, at 344–45 (stating that one of the Rwandan government's initial objections to the ICTR was the prohibition of the death penalty).

### B. Shortcomings of Rwandan Prosecutions

Rwanda's judicial sector was virtually annihilated by the genocide, in both structural and human terms.[29] In 1996, less than 200 judicial personnel in all categories remained; others had fled, been killed or incarcerated.[30] With international support, the Government of National Unity began the slow process of (re)building[31] the justice system in an effort to begin prosecuting alleged perpetrators who had already been imprisoned and to combat the culture of impunity instilled by the ICTR.[32]

To this end, the Rwandan National Assembly adopted the Organic Law No. 8/96[33] of August 30th, 1996, and created 13 specialized chambers within the court structure to deal with cases flowing from the genocide.[34] The first trials began at the end of December 1996.[35] Since

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29. *See* Michael G. Karnavas, *Rwanda's Quest for Justice: National and International Efforts and Challenges*, 21-MAY CHAMP 16, 17 (1997) (stating that at the end of the war, the country was left without a functioning judicial system as most legal personnel were either killed or participated in the killings). *See generally* Lieut. Catherine S. Knowles, *Life and Human Dignity, the Birthright of all Human Beings: An Analysis of the Iraqi Genocide of the Kurds and Effective Enforcement of Human Rights*, 45 NAVAL L. REV. 152, 199–200 (1998) (noting the difficulties that the depleted judiciary system in Rwanda will have upon an attempt to prosecute those accused of crimes against humanity); Van Lierop, *supra* note 16, at 211–13 (discussing the impact of the genocide on Rwanda's judicial system).

30. *See* Widner, *supra* note 12, at 68 (noting that a serious problem affecting the ability to prosecute the hundreds of prisoners was the serious depletion of law enforcement and judicial personnel); *see also* Evelyn Bradley, *In Search for Justice—A Truth and Reconciliation Commission for Rwanda*, 7 J. INT'L L. & PRAC. 129, 130 (1998) (noting that after the war "[e]ighty percent of [the Rwandan justice system's] personnel, including judges and magistrates, had been killed"). *See generally* Morris, *supra* note 21, at 353 (stating that together with the destruction of much of the country in 1994, Rwanda's judicial system was devastated).

31. *See* Schabas, *supra* note 16, at 531 (arguing that while the term "rebuilding" is often used to describe the challenge facing Rwandan justice, it is not well-chosen, as the Rwandan legal system has never been more than a corrupt farce).

32. *See* Drumbl, *supra* note 1, at 587 (explaining that the intended purpose of the new confession procedure under the Organic Law was to accelerate preliminary investigations and, thereafter, judgments and convictions); Morris, *supra* note 21, at 357–58 (discussing the passage of specialized legislation aimed at attempting to handle the enormous task of prosecuting those being held on charges of genocide). *See generally* Knowles, *supra* note 29, at 199–200 (stating that "[a]pproximately 60,000 to 100,000 suspects remain in domestic Rwandan jails without much promise of successful prosecution any time soon").

33. *See* Organic Law on the Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Since 1 October 1990, Law No. 8/96, RWANDA OFF. GAZ., Aug. 30, 1996. ("Genocide Law").

34. *See* Drumbl, *supra* note 1, at 593–94 (discussing the staffing and jurisdiction of the specialized chambers created by the Organic Law). *See generally* Schabas, *supra* note 16, at 530 (stating that the Rwandan Ministry of Justice began to prepare legislation in 1996 with an eye towards effecting recommendations made at the Kigali conference regarding innovations in the justice system); Widner, *supra* note 12, at 68 (discussing the problems faced by the Rwandan government resulting from a devastated judiciary).

35. *See* Major Peter H. Sennett & Lieut. Gregory P. Noone, *Working with Rwanda Toward the Domestic Prosecution of Genocide Crimes*, 12 ST. JOHN'S J. LEGAL COMMENT., 425, 445–46 (1997) (noting many of the difficulties experienced in 1996 when the prosecutions began). *See generally* Howland & Calathes, *supra* note 24, at 158–59 (detailing the trial of Jean-Paul Akayesu, the former mayor of Taba); Widner, *supra* note 12, at 68 (discussing the establishment of specialized chambers to hear the genocide cases in 1996).

this time, an estimated 5,000 defendants have been processed by the specialized chambers, which includes an increasing number of acquittals.[36]

While this is certainly a respectable number of prosecutions to have been carried out by a fledgling judicial system, it has come at a price. The judiciary suffers from lack of experience,[37] inadequate resources and security measures,[38] corruption and executive influence, which have compromised the efficiency and impartiality of the process.[39] Due process violations for the accused have been compounded by the shortage of experienced defense counsel such that, at least in the early months of operation, some unrepresented defendants were convicted and sentenced to death at trial within a matter of hours.[40]

With between 110,000 and 130,000 persons incarcerated, the sheer number of detainees who remain in overcrowded prisons and communal lock-ups under substandard conditions is testing the limits of the system.[41] While promises have been made to release extremely young,

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36. *See* Drumbl, *supra* note 1, at 593–94 (reviewing the creation of "Specialized Chambers" in Rwanda); Schabas, *supra* note 16, at 530 (discussing the approval of the Kigali conference's recommendation for specialized chambers and its role in assisting the Rwandan judiciary in dealing with genocide); *see also* Richard Falk, Book Review, *Judging the World Court*, 63 N.Y.U. L. REV. 1376, 1386 n.44 (1988) (noting the tendency of defendants to prefer specialized chambers due to their ability to choose their judges). According to a former employee of the UN High Commissioner for Human Rights in Rwanda, the acquittal rate has increased from 6% in 1997 to 20% in 2000. Werchick, *supra* note 13, at 15. This phenomenon may be attributable to the stagnation of evidence over the years, the failure to preserve an accurate collective memory, a shortage of witnesses and potentially greater attention on the part of judges to standards for conducting a fair trial. Akhavan, *supra* note 15, at 26.

37. Human Rights Watch, *Report on Rwanda: Justice and Responsibility* (1999), *available at* <http://www.hrw.org/reports/1999/rwanda/Geno15-8-05.htm> (last visited Mar. 25, 2002) (noting that judges typically have had only four months of legal training prior to sitting on the specialized chambers). *See* Morris, *supra* note 21, at 353 (discussing the devastation of Rwanda's judiciary given the absence of judicial and law enforcement personnel); *see also* Justice Louise Arbour, *The Need for an Independent and Effective Prosecutor in the Permanent International Criminal Court*, 17 WINDSOR Y.B. ACCESS JUST. 207, 218 (1999) (describing the collapsed state of the Rwandan judiciary).

38. *See* Akhavan, *supra* note 15, at 25 (stressing the security problems in the Rwandan judiciary); Morris, *supra* note 21, at 353 (discussing the lack of judicial resources experienced in the aftermath of Rwanda's devastation); Guy Roberts, *Assault on Sovereignty: The Clear and Present Danger of the New International Criminal Court*, 17 AM. U. INT'L L. REV. 35, 50 (2001) (emphasizing the inadequate resources of the Rwandan judiciary system). Both judges and witnesses, especially for the defense, are particularly vulnerable to threats of death and bodily injury. As a result, many witnesses refuse to testify or instead fabricate stories. Alternatively, witnesses find it too difficult and expensive to travel to the courts. *See* Mark A. Drumbl, *supra* note 1, at 620.

39. *See* Roberts, *supra* note 38, at 76 (highlighting the struggle for efficiency in the Rwandan judiciary system); *see also* Morris, *supra* note 21, at 353 (noting the devastation of Rwanda's judiciary following the country's political collapse); *see* Arbour, *supra* note 37, at 218 (asserting the total destruction of the Rwandan judiciary).

40. *See* Amnesty International, *Rwanda: Unfair Trials; Justice Denied*, *available at* <http://www.amnesty.org/ailib/aipub/1997/AFR/14700897.htm> (last visited Mar. 25, 2002); Symposium, *Critical Perspectives on the Nuremberg Trials and State Accountability: Panel III: Identifying and Prosecuting War,* 12 N.Y.L. SCH. J. HUM. RTS. 631, 679 (1995) (citing due process concerns, such as a large percentage of detainees who have yet to appear before the magistrate); Morris, *supra* note 21, at 353 (describing the inadequate state of Rwanda's judiciary).

41. *See* Roberts, *supra* note 38, at 50 (blaming overcrowded prisons on a lack of due process in the Rwandan judicial system); *see also* Muna, Pillay & Rudasingwa, *supra* note 27, at 1474 (indicating that the number of men, women and children awaiting trial in Rwandan prisons is 120,000); Chen Reis, *Trying the Future, Avenging the Past: The Implications of Prosecuting Children for Participation in Internal Armed Conflict*, 28 COLUM. HUM. RTS. L. REV. 629, 633–34 (1997) (noting Rwanda's president placing blame for the overcrowding of prisons on the nation's extraordinary number of criminals).

old and ill detainees, they have yet to materialize consistently.[42] An indeterminate number of those detained have not been charged and are therefore undocumented, while others have already served more time than the maximum prison sentence they would receive if convicted.[43] Even if Rwanda were to dramatically increase the speed with which it has been processing cases, it would still take over 100 years for them to be processed.[44] Moreover, while the expense of feeding the detainees has been shared thus far with the international community, donors have indicated that Rwanda will have to bear an increasing amount of this burden in the future, which it cannot afford.[45]

While these numbers certainly reflect the unprecedented societal participation in the genocide, they are also the result of an alarming number of false accusations, undaunted by any real threat of punishment, by those who seek to enhance their own interests.[46] Moreover, given that Hutu males make up the vast majority of the prison population even though members of the pro-Tutsi Rwandan Patriotic Front (RPF) also committed acts of vengeance within the Genocide Law's temporal jurisdiction, some are accusing the Government of National Unity of carrying out victor's justice against the Hutu population.[47]

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42. *See* Alvarez, *supra* note 15, at 412 n.235 (noting the release of several young, elderly or ill prisoners by the Rwandan post-genocide courts as a result of weak evidence); Reis, *supra* note 41, at 635 (discussing transformations in the traditional imprisonment of children alongside adults, such as separate facilities and even release). *But see* David Nill, *National Sovereignty: Must it be Sacrificed to the International Criminal Court?*, 14 BYU J. PUB. L. 119, 130 n.67 (1999) (book review) (asserting the release of many young and old prisoners in an effort to salvage limited funds).

43. *See* Werchick, *supra* note 13, at 15 (noting that the number of detained people who have not been charged has been estimated to be 18,000 to 40,000); *see also* Drumbl, *supra* note 1, at 608 (noting the ignorance of prisoners maintaining innocence where they would be released for time served upon confession); Nill, *supra* note 42, at 130 n.67 (noting the impact of untimely judicial procedures in Rwanda on prisoners who remain detained for years prior to trial).

44. *See* Muna, Pillay & Rudasingwa, *supra* note 27, at 1490 (noting that at the current processing speed it would likely take "400 years to try the 120,000 people" in Rwandan prisons); *see also* Drumbl, *supra* note 1, at 630 (criticizing the Rwandan legal system for trying only 0.2% of prisoners in a three-year period); Drumbl, *supra* note 14, at 1287–88 (addressing concerns over the timeliness of due process in Rwanda).

45. *See* Daly, *supra* note 13, at 166 (referring to the immense costs of running overcrowded prisons, including cost of meals); *see also* Drumbl, *supra* note 1, at 573–74 (describing the reliance of Rwandan prisoners on their families for food). *See generally* Carroll, *supra* note 12, at 190 (noting the health risks involved in the Rwandan overcrowded prison system, citing malnutrition as a concern).

46. *See* Human Rights Watch, *Report on Rwanda: Justice and Responsibility* (1999) *available at* <http://www.hrw.org/reports/1999/rwanda/Geno15-8-05.htm> (last visited Mar. 25, 2002); *see also* Drumbl, *supra* note 1, at 592–93 (describing Rwanda's periodic publication of names of "suspects, accomplices, and conspirators" giving rise to false accusations); Mariann Meier Wang, *The International Tribunal for Rwanda: Opportunities for Clarification, Opportunities for Impact*, 27 COLUM. HUM. RTS. L. REV. 177, 185–86 (1995) (noting the Rwandan government's awareness of false imprisonment, crippled by a lack of resources available to investigate most accusations).

47. *See* Jose E. Alvarez, *Rush to Closure: Lessons of the Tadic Judgment*, 96 MICH. L. REV. 2031, 2038–40 (1998) (discussing impartiality achieved through international tribunals avoiding "victor's justice"); Morris, *supra* note 21, at 371 (citing "victor's justice" as a potential impediment to justice where defendants are tried in national as opposed to international courts).

The Rwandan government may have been well-intentioned in promulgating the Genocide Law, but it has thus far failed to provide sufficient incentives for confessions so as to begin alleviating the over-burdened judicial system.[48] This has added to the intractable struggle the government has been facing in attempting to build a solid judicial system for the long term while simultaneously prosecuting thousands of genocide-related cases as promptly as possible to allow Rwandan genocide survivors to move beyond the traumatic events of 1994.[49]

## II. The *Gacaca* System

In July 1997, the government of Rwanda began contemplating alternatives to dealing with the huge numbers of detainees, the slow pace of trials and the lack of national reconciliation.[50] It established a National Unity and Reconciliation Commission in 1999 that initiated country-wide consultations on issues of co-existence between Hutus and Tutsis.[51] The Commission ultimately recommended that Rwanda adopt the traditional *Gacaca*[52] system, whereby respected community elders endeavor to bring disputants together in an effort to render com-

48. *See* Widner, *supra* note 12, at 69 (attributing the lack of confessions to the fear by detainees of reprisal by fellow inmates as there is no separation in the prisons between defendants standing trial and plea-bargaining detainees); Schabas, *supra* note 16, at 541 (discussing how a reduction in sentence should be an incentive to confess but it will only induce the individual to plead guilty if the sentence offered is low enough). The incentives provided by the Genocide Law did not work because the number of detainees was too large, there were insufficient resources and no coherent communication strategy to inform those in custody about the confession and guilty plea procedure. Drumbl, *supra* note 1, at 589–91.

49. *See* Alvarez, *supra* note 15, at 394 (noting that the Rwandan government struggles to use the confession process to balance fairness and expediency for the detainees with recompense and revenge for the victims); Drumbl, *supra* note 14, at 1280–81 (explaining the struggle between allowing plea bargains to help process the large number of detainees and pacifying the victims of genocide who want justice done); *see also* Drumbl, *supra* note 1, at 575 (stating that the release of detainees who have been unjustly held must be viewed by the victims as legitimate in order to avoid protests by the citizens of Rwanda).

50. *See* Day, *supra* note 13, at 237 (emphasizing that Rwanda has over 120,000 cases in which only 5,000–6,000 have stood trial but the inefficiency of the judicial system has not quieted the citizens who cry for justice as a necessary part of reconciliation); Haile-Mariam, *supra* note 19, at 736 (describing how the large number of prisoners and the slow pace of prosecutions has negatively affected reconciliation for both the detainees and genocide survivors); Morris, *supra* note 21, at 360–61 (explaining how alternatives to trial are necessary to facilitate the enormous number of cases while contributing to national reconciliation).

51. *See* Carroll, *supra* note 12, at 198 (describing the function of the National Unity and Reconciliation Commission, established in 1999, as promoting peace, unity and reconciliation among the Rwandans); Daly, *supra* note 13, at 173 (asserting that the purpose of the National Unity and Reconciliation Commission was to achieve peace between the Tutsis and Hutus); *Rwanda: Reconciliation Commission Making Progress*, AFRICA NEWS, June 27, 2001, *available at* LEXIS (reporting that the National Unity and Reconciliation Commission has established programs to bring about reconciliation between the Hutus and Tutsis).

52. In Rwanda, "*Gacaca*" refers to the grassy plain or open space where village elders gathered to arbitrate disputes amongst community members. *See* Lara Santoro, *Rwanda Attempts an Atonement*, CHRISTIAN SCI. MONITOR, Aug. 5, 1999, at 5.

munal justice.[53] In turn, this led to the adoption of Organic Law No. 40/2000 of January 26th, 2001, setting up "*Gacaca* jurisdictions."[54]

### A. The Organic Law for *Gacaca*

#### 1. Structure and Jurisdiction

This Organic Law ("*Gacaca* Law") preserves the basic structure of offenses and the procedures for confessions and guilty pleas established by the Genocide Law, which formed the basis for domestic genocide trials.[55] Specifically, it classifies detainees into one of four categories according to their alleged participation in particular crimes: Category One for organizers, inciters and leaders of the genocide or crimes against humanity, including particularly brutal or notorious killings, and all acts of rape or sexual torture; Category Two for authors or accomplices of deliberate homicides or serious attacks causing death; Category Three for authors or accomplices of serious attacks without intending to cause death; and Category Four for persons having committed offenses against assets or property.[56] The *Gacaca* system will only have jurisdiction over defendants in Categories Two, Three and Four.[57] All Category One defendants will continue to be processed by the specialized chambers and procedures outlined in the Genocide Law.[58]

Consistent with Rwanda's existing administrative bureaucracy, the *Gacaca* Law establishes four hierarchical "*Gacaca* jurisdictions," notably, the Cell, Sector, District and Province, to administer the new system of 10,684 *Gacaca* "courts."[59] Rwanda is presently divided into

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53. *See* Drumbl, *supra* note 14, at 1264 (noting that "*Gacaca*" was a form of traditional communal justice used to solve disagreements between community members); Daly, *supra* note 13, at 175 (stating that *Gacaca* tribunals were comprised of village elders who resolved significant community issues); Madeline H. Morris, *Rwandan Justice and the International Criminal Court*, 5 ILSA J. INT'L & COMP. L. 351, 352 (1999) (discussing *Gacaca*'s role in traditional Rwandan justice as a method of dealing with community disputes and how it will apply in the Rwandan judicial system).

54. *See* Organic Law on the Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Since 1 October 1990, Law No. 8/96, RWANDA OFF. GAZ., Aug. 30, 1996.

55. *See* Morris, *supra* note 21, at 358–59 (detailing the categories of offenses and how the confession and plea-bargain system functions as set out in the "Organic Law"); Werchick, *supra* note 13, at 15 (setting out the structure of offenses and how those who confess will receive reduced sentences).

56. *Gacaca* Law, art. 51. *See* Organic Law on the Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Since 1 October 1990, Law No. 8/96, RWANDA OFF. GAZ., Aug. 30, 1996.

57. *See* Organic Law on the Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Since 1 October 1990, Law No. 8/96, RWANDA OFF. GAZ., Aug. 30, 1996.

58. *See* Werchick, *supra* note 13, at 15 (noting that Category One cases will be prosecuted by the conventional prosecutor's office and not by the *Gacaca* courts); *see also* Carroll, *supra* note 12, at 191 (stating that *Gacaca* courts will not have jurisdiction over those who planned and organized the genocide of 1994 and crimes carrying the death penalty); Laurie Anne Pearlman and Ervin Staub, Gacaca *Process as an Avenue Toward Healing and Reconciliation*, *available at* <http://www.heal-reconcile-rwanda.org/gacaca.htm> (last visited Feb. 13, 2002) (emphasizing that Category One defendants will not be tried by "*Gacaca*" courts).

59. *See Gacaca* Law, arts. 3 and 4.

8,987 Cells, 1,531 Sectors, 154 Districts and 12 Provinces, with the Cell being the lowest administrative unit closest to the community.[60] Cells will have primary jurisdiction over Category Four cases, Sectors will have primary jurisdiction over Category Three cases, Districts will have primary jurisdiction over Category Two cases and appellate jurisdiction over Category Three cases, and Provinces will have appellate jurisdiction over Category Two cases.[61]

In order to conduct hearings, *Gacaca* jurisdictions are vested with powers similar to those exercised by ordinary criminal jurisdictions, such that they may compel testimony, order searches and investigations, take protective measures, pronounce sentences and fix damages, issue arrest warrants and order preventive detention where necessary.[62]

### 2. Administration of *Gacaca* Jurisdictions

Each *Gacaca* jurisdiction is composed of a General Assembly, a Seat and a Coordinating Committee.[63] Direct elections are held at the Cell level, with designated representatives passing to the Sector, District and Province levels as determined by the elected members.

#### (i) Cell Level

The General Assembly for the Cell's *Gacaca* jurisdiction consists of all residents of the Cell aged 18 years and above.[64] It has the broadest responsibility of all the levels of *Gacaca* jurisdiction. In particular, all residents must provide evidence of where they lived before and during the genocide, as well as of events that occurred in their village during the genocide. This evidence will be used by the Seat to prepare a list of those who lived in the Cell before the genocide, and all victims and perpetrators within the Cell.[65] In addition, the General Assembly elects 24 "honest persons" from within itself, five of whom are delegated to the Sector's *Gacaca* jurisdiction while the remaining nineteen are chosen from the Seat for the Cell.[66]

In addition to preparing the aforementioned lists with the help of the General Assembly, the Seat has numerous crucial functions.[67] Upon receiving the files forwarded by the Department of Public Prosecution, the Seat gathers evidence and testimonies from each file and makes

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60. *See* Werchick, *supra* note 13, at 15 ("[T]he government foresees the creation of more than 100,000 *Gacaca* tribunals, composed of ordinary citizens, to operate in each of Rwanda's 12 prefectures, 145 communes, 1,531 secteurs, and 8,987 cellules"); *Rwandans to Vote Local Officials*, DEUTSCHE PRESSE-AGENTUR, Mar. 28, 1999, *available at* LEXIS ("Rwanda is divided into 12 districts, themselves divided into 155 communes. The latter subdivided into 1,531 sectors, made of 8,987 'cells'").

61. *See* Organic Law on the Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Since 1 October 1990, Law No. 8/96, RWANDA OFF. GAZ., Aug. 30, 1996.

62. *See Gacaca* Law, art. 37.

63. *See id.*, art. 5.

64. *See id.*, art. 6. The General Assembly at the Cell level can only sit legitimately if at least 100 of its members are present. *Id.*, art. 23.

65. *See id.*, art. 33.

66. *See id.*, art. 9.

67. *See id.*, art. 34.

any necessary investigations thereof.[68] This evidence is then used as the basis for classifying defendants in each Cell into one of the four categories of crimes. Once defendants have been classified, the Seat forwards Category One and Two cases to the District *Gacaca* jurisdiction and Category Three cases to the Sector *Gacaca* jurisdiction.[69] The Seat conducts hearings for and rules on all Category Four defendants itself, and processes any confessions or guilty pleas related thereto. It also elects five members for the Coordinating Committee from within itself who must know how to read and write Kinyarwanda.[70]

The Coordinating Committee is an administrative body that presides over meetings and coordinates activities of the Seat and General Assembly, registers testimony, evidence and complaints given by witnesses, receives and registers files for defendants, registers appeals and transfers appeal cases to the immediately higher jurisdiction, and writes decisions and prepares activity reports.[71] It will also be responsible for forwarding all copies of *Gacaca* judgments to the national Compensation Fund for Victims of the Genocide and Crimes Against Humanity, indicating the identity of people who have suffered physical and/or material damages.[72]

**(ii) Sector, District and Province Levels**

The General Assembly for each Sector's, District's and Province's *Gacaca* jurisdiction is made up of at least 50 honest persons, appointed from within the General Assemblies of the *Gacaca* jurisdiction immediately below.[73] In addition to delegating persons to the General Assembly at the next level of *Gacaca* jurisdiction, its primary functions are to elect Seat members, attend and testify at *Gacaca* hearings without voting power, provide evidence at *Gacaca* hearings and examine the activity reports prepared by the Coordinating Committee.[74]

At the Cell level, each *Gacaca* jurisdiction Seat for the Sector, District and Province is composed of 19 people, elected by the jurisdiction's General Assembly.[75] At these levels, the

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68. *See id.*

69. *See* Organic Law on the Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Since 1 October 1990, Law No. 8/96, RWANDA OFF. GAZ., Aug. 30, 1996.

70. *See Gacaca* Law, art. 17.

71. *See id.*, art. 18.

72. *See id.*, art. 91.

73. *See* Paul E. Nantulya, *The Gacaca System in Rwanda*, CONFLICT TRENDS (April 2001) *available at* <http://www.accord.org.za/web.nsf> (last visited Mar. 25, 2002) (explaining the general assembly system within the *Gacaca* jurisdictions); Stef Vandeginste, *Justice, Reconciliation and Reparation After Genocide and Crimes Against Humanity: The Proposed Establishment of Popular* Gacaca *Tribunals in Rwanda*, *available at* <http://www.africanprinciples.org/documents/paper_addis_full_text.doc> (last visited Mar. 25, 2002) (noting the number of representatives for each level of the tribunal). Those delegated to the Sector will form the General Assembly of the Sector, and will appoint five people from among themselves to the District's *Gacaca* jurisdiction. Those delegated to the District will form the General Assembly of the District, and will appoint five people from among themselves to the Province's *Gacaca* jurisdiction. *See* Stef Vandeginste, *Justice, Reconciliation and Reparation After Genocide and Crimes Against Humanity: The Proposed Establishment of Popular* Gacaca *Tribunals in Rwanda*, *available at* <http://www.africanprinciples.org/documents/paper_addis_full_text.doc> (last visited Mar. 25, 2002).

74. *See Gacaca* Law, art. 35.

75. *See id.*, art. 13.

Seat's functions revolve around the *Gacaca* hearings.[76] They include hearing testimony and conducting any necessary investigations, processing confessions and guilty pleas from defendants, hearing and ruling on all cases within their primary and appellate jurisdiction, receiving and examining activity reports of the *Gacaca* jurisdiction immediately below, and electing members of the Coordinating Committee from within itself.[77] The Coordinating Committees at the Sector, District and Province levels perform the same functions as at the Cell level.[78]

**(iii) Election of Judges**

Any Rwandan 21 years of age or older may be elected to serve as a judge in a *Gacaca* jurisdiction without discrimination on the basis of sex, origin, religion, opinion or social position, provided he or she has a reputation for being honest, truthful and trustworthy, has good behavior and morals, a spirit of sharing speech and is free of sectarian and discriminatory beliefs.[79] He or she is not required to have any knowledge of the law.[80] Persons are ineligible if they have been sentenced pursuant to trial for a penalty of six months imprisonment or greater, or participated in perpetrating offenses constituting genocide or crimes against humanity.[81] Also, people cannot serve as *Gacaca* judges if they hold positions in central or local government, or if they are active soldiers, members of the national police or local defense force, career magistrates or members of leading organs of political parties, religious confessions or non-governmental organizations.[82]

Between October 4th and 7th, 2001, the Rwandan government carried out an unprecedented election which saw the vast majority of Rwandans participate in electing 260,000 *Gacaca* judges to staff the 10,684 *Gacaca* courts at the four administrative levels.[83] These judges will undergo a brief but intensive training period before beginning their unpaid service, which is to begin in the first half of 2002.

**3. Sanctions and the Confession & Guilty Plea Procedure**

As in the Genocide Law, the *Gacaca* Law provides an incentive for defendants to confess and plead guilty in exchange for a reduced sentence.[84] In order to be accepted, a confession must be received within two years of the *Gacaca* Law's publication within Rwanda's Official Gazette (i.e., before March 15th, 2003)[85] and must contain a detailed description of the off-

76. *See id.*, art. 37.

77. *See id.*, art. 37.

78. *See id.*, art. 18.

79. *See id.*, art. 10.

80. *See id.*

81. *See id.*

82. *See id.*, art. 11.

83. *See Rwanda to Use Traditional Justice in '94 Killings*, N.Y. TIMES, Oct. 7, 2001, at 1A.

84. *See id.*, art. 58.

85. *See id.*

ense, including the location, date, witnesses, names of victim(s), co-authors and accomplices, and damaged assets.[86] In addition, the defendant must offer an apology for the offenses.[87] Defendants may confess at any stage during the proceedings, earning different reductions in penalties depending on the timing of the confession. Defendants who confess to their crimes prior to the drawing up of lists and categorization of cases at the Cell level will receive a greater reduction in penalties than those who confess after the drawing up of the lists (up to and including the day of the hearing itself).

Defendants who choose not to confess and plead guilty, or whose confessions have been rejected, are subject to a prison sentence ranging from 25 years to life imprisonment for Category Two offenses, and 5 to 7 years for Category Three offenses.[88] Defendants who choose to confess and plead guilty after their names have already appeared on the list of perpetrators drawn up by the Cell's *Gacaca* jurisdiction are subject to a reduced prison sentence ranging from 12 to 15 years for Category Two offenses, and 3 to 5 years for Category Three offenses.[89] Defendants who choose to confess and plead guilty before the Cell's *Gacaca* jurisdiction prepares the lists are subject to a reduced prison sentence ranging from 7 to 12 years for Category Two offenses, and 1 to 3 years for Category Three offenses.[90] For both confession procedures, half of the defendant's sentence will be served in custody while the rest is commuted into community service.[91] Category Four defendants are not subject to prison terms, and can only be ordered to pay civil reparation of damages caused to other people's property.[92]

The applicable sanctions for defendants who, at the time of committing their crimes, were between the ages of 14 and 18 will receive a penalty of 10 to 20 years for Category One offenses and half the adult sentence for offenses falling under Categories Two and Three. Those who were under the age of 14 at the time of the offense cannot be prosecuted, but can be placed in rehabilitation centers.[93]

### B. Relationship Between *Gacaca* Courts and the Department of Public Prosecution

The General Prosecutor of the Supreme Court will continue to supervise the prosecutions in the specialized chambers under the Genocide Law.[94] A new chamber, headed by the Vice-President of the 6th Chamber of the Supreme Court, has been designated to oversee the con-

86. *See id.*, art. 54.

87. *See id.*

88. *See id.*, arts. 69 & 70. Category One offenders will incur a death penalty or life imprisonment if they choose not to confess and plead guilty. *Id.*, art. 68.

89. *See id.*, art. 56. Category One offenders do not enjoy any penalty communications once their names appear on the Category One list. *Id.*

90. *See id.*

91. *See id.*

92. *See id.,* art. 72.

93. *See id.*, art. 74.

94. *See id.*, art. 90.

trol, inspection and coordination of all *Gacaca* activities at the national level, except implementation of community service programs which will be overseen by the Ministry of Justice.[95]

The Department of Public Prosecution and the military courts will continue to receive and investigate accusations dealing with offenses provided for by the Genocide Law and the *Gacaca* Law, as well as confessions and guilty pleas.[96] However, before initiating an investigation, they are obliged to check first with the *Gacaca* jurisdictions at the Cell level to ensure that the *Gacaca* courts have not yet processed or begun to process these cases.[97] Once investigated, completed files will be referred by the prosecutor's office to the *Gacaca* jurisdictions at the Cell level.[98] Copies of investigations carried out by the *Gacaca* jurisdictions will be filed with the Department of Public Prosecution.[99]

The effect is that all investigations that were completed and referred to the specialized chambers prior to the date of the *Gacaca* Law's publication (March 15, 2001) will remain under the classical jurisdiction; all other investigations will now fall under *Gacaca* jurisdiction.[100] This applies to the confession and guilty plea procedure as well, such that all confessions that were fully investigated, accepted and forwarded to a Specialized Chamber prior to March 15th, 2001 will be tried under the classical system; all other confessions and guilty pleas will now fall under *Gacaca* jurisdiction.[101] The first *Gacaca* hearings are expected to concentrate on defendants who have confessed their crimes and pleaded guilty.[102]

## III. A Critical Evaluation of *Gacaca*'s Prospects

The Rwandan government's quest to establish and implement the *Gacaca* system has conveyed a strong message to Rwandans and outsiders alike that it is serious about resolving the enormous problems the country continues to face post-genocide.[103] Clearly, the trials con-

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95. *See* Organic Law, *Title II: Creation, Organization, and Competence of the "*Gacaca *Jurisdictions,"* CHAPTER 4: SUPERVISION AND INSPECTION OF THE "GACACA JURISDICTIONS," art. 51 (discussing the responsibilities of the Department of "*Gacaca* Jurisdictions" of the Supreme Court).

96. See *Gacaca* Law, art. 47.

97. *See id.*

98. *See id.*

99. *See id.*

100. *See id.*, art. 97.

101. *See id.*, art. 62.

102. *See* David Wippman, *Atrocities, Deterrence, and The Limits of International Justice*, 23 FORDHAM INT'L L.J. 473, 482 (1999) (stating that out of the first 20,000 *Gacaca* indictments, nearly 18,000 defendants have pled guilty and their pleas have been accepted by the court); *see also* Werchick, *supra* note 13, at 15 (indicating the role of *Gacaca* as a tool to re-assimilate the guilty back into society). *But see* Sennett & Noone, *supra* note 35, at 444–46 (noting that very few of the Rwandan accused have plead guilty and those who have failed to disclose the full extent of their crimes were denied the benefits of the plea, thereby commencing a full trial).

103. *See Rwanda; Elections of Traditional Court Judges Begins*, AFR. NEWS, Oct. 4, 2001, *available at* LEXIS (discussing Rwandan President Paul Kagame's message that if the *Gacaca* trials were successful, they would help to solve problems that resulted from the genocide in 1994); *see also* Werchick, *supra* note 13, at 15 (discussing several goals of the *Gacaca* plan, including: punishing genocide-related crimes, reconciling and establishing the truth about what happened); *Rwanda: Kagame Urges Traditional Courts to "Expedite Backlog of Genocide Cases,"* RNA News Agency, Oct. 5, 2001, *available at* LEXIS (expressing how the *Gacaca* courts are both a unique way to deal with problems within Rwanda and an important contribution to international law).

ducted thus far by the specialized chambers have been unable to effectively tackle the broad societal participation in the genocide and the desperate need for communal reconciliation and healing.[104] In fact, rather than allowing communities to convalesce, trials may actually continue to polarize the country by ethnicity into the "guilty" and the "innocent," and encourage vigilantism to obtain redress where state institutions fail.[105] Given that Hutu and Tutsi live intermingled, share the same language, religion and lifestyle and are economically interdepenent, yet remain divided and distrustful of one another, reconciling past grievances and building trust and mutual respect is essential to avoiding repeat clashes.

The government is pinning high hopes on *Gacaca* jurisdictions to overcome the shortcomings of the domestic and international prosecutions and, specifically, to expedite genocide trials, alleviate chronic overcrowding in prisons, establish the truth about the genocide, fight impunity and promote national reconciliation through reintegrative measures.[106] Indeed, it has been advertising the *Gacaca* system with posters that read "The Truth Heals" and depict a bright yellow sun rising over the hills of Rwanda with villagers holding hands as they move from the dark towards the rising sun.[107]

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104. *See Rwanda; Kigali Pledges to Co-Operate with ICTR over Alleged RPF War Crimes*, AFR. NEWS, Dec. 4, 2001, *available at* LEXIS (discussing how Martin Noga, Rwanda's Special Representative to the ICTR, stated the purpose of the *Gacaca* system is to involve all citizens in justice and reconciliation); *see also Rwanda; Gacaca: Election of Judges in Rwanda Continues*, AFR. NEWS, Oct. 5, 2001, *available at* LEXIS (stating the Rwandan government's belief that *Gacaca* will help to bring reconciliation); *Rwanda; New Provisional Calendar for Launch of Gacaca Courts,* AFR. NEWS, Mar. 21, 2001, *available at* LEXIS (stating the belief by Rwandan authorities that *Gacaca* will both contribute to the fight against impunity as well as promote national reconciliation).

105. *See* Danna Harman, *Rwanda Turns to its Past for Justice*, CHRISTIAN SCI. MONITOR, Jan. 30, 2002, at 9 (stating that while *Gacaca* may play an important role in the healing process of the nation, it may also reawaken trauma and perhaps even instigate more violence); *see also* Tim Gallimore, *Rwanda's Dilemma*, CHRISTIAN SCI. MONITOR, June 7, 2000, at 21 (discussing one person's fear that by speaking out at the *Gacaca* trials, he or she has opened themselves up to the threat of potential violence and ostracism).

106. The Rwandan Foreign Ministry stated that the purpose of the *Gacaca* tribunals is:

> (1) To establish the truth about what happened, with the communities that were witness to the heinous crimes participating in the search for truth; (2) To return punishment of crime to the people, in order to eradicate once and for all the culture of impunity and afford an opportunity to all Rwandans to reach a common understanding of the tragedy which decimated our country; (3) To promote unity and tolerance between Rwandese through justice for both the victims of the atrocities and those accused of being responsible for them; (4) To prescribe penalties which promote the reform of criminals and their eventual reintegration in society without prejudice to the rights of other citizens; (5) To re-construct a new dispensation in Rwanda, free from conflict and sectarianism in order to make it possible for all Rwandese to reconcile; [and] (6) To promote security and stability within the country, establish the truth about what happened, and find lasting solutions to the problems caused by genocide and its consequences and to expedite the conduct of genocide trials and carrying out of sentences.

*Update on the Process of Justice in Rwanda after the 1994 Genocide*, *available at* <http://www.rwandemb.org/> (last visited Mar. 25, 2002). *See also* Carroll, *supra* note 12, at 190–91 (discussing the goals of the *Gacaca* tribunals); Werchick, *supra* note 13, at 15 (discussing the same).

107. *See* Sheena Kaliisa, *Gacaca: Election of Judges in Rwanda Constinues*, INTERNEWS (Arusha), *available at* <http://www.allafrica.com/stories/200110080106.html> (last visited Mar. 25, 2002) (analogizing the depiction of villagers holding hands moving toward the sun away from darkness, to the nation looking at *Gacaca* as a means of healing the wounds of the recent past).

In turn, *Gacaca* has raised both hopes and fears among Rwandans.[108] After seven years of waiting, there is optimism that this new system will be swifter and fairer in delivering justice given that it is inspired by the traditional *Gacaca*, which aimed at restoring order and social harmony within communities through conciliatory arrangements acceptable to all participants.[109] Yet, many of its features resemble those of the criminal justice system but without all of the accompanying procedural safeguards, which raises concerns as to whether the new system will simply amount to criminal justice in the guise of popular justice.[110]

The following discussion examines these competing issues with a view to determining whether the *Gacaca* system is capable of fulfilling the expectations that have been placed on it. The promising aspects of *Gacaca* are considered first, followed by those aspects that raise various concerns generally, as well as specifically, for defendants and victims.

### A. Positive Features

In evaluating the ability of the *Gacaca* system to address the needs of post-genocidal Rwanda, it must be remembered that Rwanda is a very small, poor country, the majority of whose population continues to live in the same rural villages and communities as their ancestors.[111] While it is within these rural communities that most of the atrocities took place during the genocide, these communities have been most alienated from the genocide trials conducted to date by the specialized chambers and the ICTR, by distance, procedure and lack of commu-

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108. *See Rwanda; Hopes and Fears as Kigali Launches Participative Justice*, AFR. NEWS, Oct. 11, 2001, *available at* LEXIS (discussing how Rwandan citizens have expressed a hope that *Gacaca* works in helping to solve their society's problems); *see also* James Astill, *Rapid Justice Used to Heal Rwanda*, SCOT. ON SUN., Mar. 25, 2001, at 22 (discussing one person's fear that *Gacaca* will increase group solidarity behind genocide); *Rwanda; Kigali Elects Judges for New Justice System*, AFR. NEWS, Oct. 3, 2001, *available at* LEXIS (stating that despite the fear some may become more traumatized by *Gacaca*, there is general optimism about the system).

109. *See* Carroll, *supra* note 12, at 190 (stating that the principles of the new *Gacaca* system of justice have been adopted from the traditional participatory system that was used to resolve disputes within small communities and villages); *see also* Day, *supra* note 13, at 249 (advancing the idea that participants in the *Gacaca* system both have confidence in the system and are less skeptical of it than the formal judicial system); Werchick, *supra* note 13, at 27 (discussing how the new *Gacaca* plan has borrowed several concepts from the traditional plan, including community participation, promotion of reconciliation and promotion of harmony).

110. *See* Daly, *supra* note 13, at 179 (discussing some of the shortcomings of the *Gacaca* system such as lack of precedent, elements of due process and a professional bar); *see also* Carroll, *supra* note 12, at 192 (noting some of the disadvantages of the *Gacaca* system, including the possibility of promoting revenge rather than justice and inadequately protecting due process rights as well as the safety of victims and witnesses); UN Integrated Regional Information Network, *Central Africa; Great Lakes Update 910*, AFR. NEWS, Apr. 26, 2000, *available at* LEXIS (stating that Amnesty International is concerned that a defense attorney will not represent the accused and that those judging the accused will have a personal interest in the verdict).

111. *See Panafrican News Agency*, Rwanda AIDS Moves From Urban to Rural Rwanda, AFR. NEWS, Dec. 7, 2000, *available at* LEXIS (stating that 70 percent of Rwanda's population live in rural areas and in poverty); *see also Rwandan Government Accused of Forcing Peasants Off their Farms*, AGENCE FRANCE PRESSE, June 11, 2001, *available at* LEXIS (stating "more than 90 percent of Rwandans live in rural areas"); Elizabeth Neuffer, *It Takes a Village*, THE NEW REPUBLIC, Apr. 10, 2000, at 18 (comparing the size of Rwanda to that of Maryland and describing it as a place where people live in small close-knit villages).

nication.[112] On this premise alone, therefore, the *Gacaca* system provides a more promising possibility for addressing the needs of those most affected by the genocide. Because *Gacaca* is based on local culture, it is likely to create from the beginning a greater sense of familiarity, respect, trust and commitment to the process than the Western judicial system. As members of the community, *Gacaca* judges will have a sense of the full measure of injury that the community has suffered and can lead hearings to address those facts. This benefit is enhanced by the greater role that women will play as *Gacaca* judges given that women have borne the heaviest burdens arising from the genocide.[113] Moreover, the participatory approach to justice will involve the entire community in truth-telling, shaming of perpetrators and broader discussions about the underlying causes of the genocide.[114]

This process has the potential to create an environment within which the truth behind the genocide can be revealed by encouraging and facilitating testimony. Because most communities are relatively small and the attacks tended to occur in broad daylight, everyone generally knows who the perpetrators and victims are within their community.[115] By bringing victims and perpetrators face-to-face to tell their stories, it will empower victims who have been voiceless so far and create moral pressure on perpetrators to confess to their crimes and seek forgiveness. The confession itself will be an important source of justice for victims. Community shaming and subsequent performance of community service as part of one's sentence can be an effective means for offenders to reintegrate with their communities, which the current genocide trials lack.[116] As a result, *Gacaca* has the potential to have a cathartic and consolidating effect on frag-

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112. *See* Carroll, *supra* note 12, at 193 (stating the ICTR has not provided adequate publicity); *see also* Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7, 25 (2001) (noting the ICTR is located in the remote area of Arusha, Tanzania); Howland & Calathes, *supra* note 24, at 155 (discussing that the population in Rwanda is disconnected from the ICTR due to the distance between the location of the ICTR trials and the lack of publicity).

113. *See* Daly, *supra* note 13, at 171 (discussing that women are probably more traumatized than men due to rape and bonds with children); *see also Citizens Turn Out* En Masse *to Elect "People's" Judges,* AFR. NEWS, Oct. 4, 2000*, available at* LEXIS (stating there was a large number of women nominated to be judges); *see also Rwanda Women Take Centre Stage in Election of People's Judges,* AFR. NEWS, Oct. 4, 2000*, available at* LEXIS (asserting women judges will encourage people to talk about the 1994 genocide more truthfully). *See generally Gacaca* Law, art. 11 ("[M]embers of committees of women's and youth organizations may, if they do not chair those committees, be elected as members of the '*Gacaca* Jurisdictions.'").

114. *See* Carroll, *supra* note 12, at 191 (states the *Gacaca* system will allow individuals to discuss genocide); *see also* Robinson, *supra* note 12, at 280 (mentioning that Special Representative Michael Moussali, in a report to the general assembly, drew attention to a system of participatory justice raised by the Rwandan government in order to fully and truthfully learn about the crimes committed in Rwanda); Elizabeth Neuffer, *It Takes a Village*, NEW REPUBLIC, April 10, 2000, at 18 (stating *Gacaca* advocates assert *Gacaca* tribunals "will use the moral force of tribunals to shame perpetrators into admitting the truth").

115. *See* Daly, *supra* note 13, at 178–79 (discussing the local focus of *Gacaca*); *see also* Day, *supra* note 13, at 249 (noting the effectiveness of *Gacaca* as a local instrument); Drumbl, *supra* note 14, at 1264 (describing the importance of *Gacaca* in strengthening local communities).

116. *See* Drumbl, *supra* note 14, at 1267 (noting that assimilation into society after shaming enhances community strength); *see also* Akhavan, *supra* note 15, at 25 (indicating the beneficial effect *Gacaca* would have on Rwanda). It should be noted that a number of defendants have already served sufficient time in prison for their crimes if they confess and plead guilty, and will thus be eligible for immediate release and/or community service. Daly, *supra* note 13, at 103.

mented communities, and could raise the level of consciousness among people about the genocide so that it will never be repeated.

*Gacaca* hearings will also allow defendants to feel that they finally received their day in "court" in front of a jury of their peers rather than languishing in prison indefinitely. To this end, *Gacaca* offers the hope of expedited hearings because so many more jurisdictions will be operating simultaneously throughout the country. This, in turn, could provide an organized way of alleviating overcrowded prisons and promote productivity within the country by returning people to their communities.

**B. Causes for Concern**

Notwithstanding its capacity to yield beneficial, indeed essential, results, the *Gacaca* system also raises a number of valid concerns. For instance, while the process may heal some wounds, it could actually re-open others and thereby exacerbate ethnic tensions. The potential also exists that the government's motives are not altogether virtuous in instituting the *Gacaca* system, but rather stem from the increasing rate of acquittals by the specialized chambers, which the government may wish to curb by subjecting defendants to *Gacaca*'s community justice.[117]

A more pervasive concern surrounds the possibility that, despite purporting to be based on a traditional form of dispute resolution, in effect *Gacaca* will be equivalent to criminal tribunals with few or no procedural safeguards against error or abuse.[118] Unlike traditional *Gacaca*, the modern hierarchical version is state-conceived and will ultimately be state-enforced through the new *Gacaca* Chamber of the Supreme Court.[119] Furthermore, *Gacaca* jurisdictions are vested with the same powers as ordinary courts, including the power to apply state criminal legislation, conduct criminal hearings for crimes as serious as pre-meditated murder, compel witnesses to testify, issue warrants, conduct searches and impose lengthy sentences.[120] For defendants who plead guilty or are found guilty, punishment will necessarily involve a retributive component (except where sufficient time has already been served), rather than being based on compromise and community acceptance.[121] The fact that *Gacaca* decisions may be appealed

117. *See* Carroll, *supra* note 12, at 197 (indicating the use of *Gacaca* as an "imperfect" tool to remedy Rwanda's overcrowded prisons); *see also* Daly, *supra* note 13, at 179 (describing the benefits of *Gacaca* to Rwanda's system of law); Drumbl, *supra* note 14, at 1266 (indicating that one of the Rwandan government's main goals of *Gacaca* was to also punish non-serious crimes).

118. *See* Carroll, *supra* note 12, at 192 (noting possible detrimental effects *Gacaca* could have on due process); *see also* Daly, *supra* note 13, at 179 (describing the imperfections of *Gacaca*, including lack of due process); Wippman, *supra* note 102, at 482 (indicating possible due process problems under a *Gacaca* system).

119. *See* Akhavan, *supra* note 15, at 25 (indicating the Rwandan government's interest in incorporating *Gacaca* into its justice system); Daly, *supra* note 13, at 176 (describing the structure of *Gacaca* and noting the Supreme Court's administrative role in the system); Drumbl, *supra* note 14, at 1265 (noting a Rwandan Supreme Court member's support of *Gacaca*).

120. Organic Law on the Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Since 1 October 1990, Law No. 8/96, RWANDA OFF. GAZ., Aug. 30, 1996.

121. *Id*; *see* Daly, *supra* note 13, at 177–78 (discussing how the retributive goals of the *Gacaca* are likely to be realized by using community adjudication of the accused); *see also* Drumbl, *supra* note 1, at 589 (asserting that those who plead guilty must offer a detailed description of the committed crimes, an apology and a list of any accomplices or other pertinent information).

to the next highest jurisdiction (except decisions relating to Category Four offenses) may create a further incentive to judicialize the process.[122]

Furthermore, a concern exists that the hope offered by the *Gacaca* system of increasing the rate for processing the tens of thousands of cases that remain untouched by the specialized chambers will be undermined by the time needed to train the judges, equip the *Gacaca* jurisdictions with basic materials and operationalize the whole system.[123] Progress and productivity might be further delayed because the number of prosecutors has not kept pace with the number of *Gacaca* jurisdictions, which will rely on the already overburdened local prosecutor's office to prepare case summaries.[124]

### 1. For the Defendant

Numerous concerns specific to defendants also exist, most flowing from the fact that the *Gacaca* system is structured as an expedited criminal justice process but without the requisite due process safeguards to ensure that defendants receive a fair hearing.[125] The African Commission on Human & People's Rights specifically stated, in its *Dakar Declaration* of September 11th, 1999, that "traditional courts are not exempt from the provisions of the *African Charter on Human and Peoples' Rights* relating to a fair trial."[126] Yet, three internationally entrenched guarantees to a fair trial will be significantly restricted by the *Gacaca* system, in particular (1) the right to a fair hearing by a competent, independent and impartial tribunal, (2) the right to have adequate time and facilities to prepare a defense and consult with counsel, and (3) the right to review by a higher tribunal.[127]

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122. *Gacaca* Law, art. 84 (stating that verdicts rendered by the various *Gacaca* jurisdictions may be appealed to the next highest jurisdiction).

123. *See* Daly, *supra* note 13, at 177 (stating that the Rwandan people elected 260,000 adults to serve as judges and have only been trained for three to six months); *see also* Drumbl, *supra* note 1, at 594 (asserting that although the Organic Law requires "career" magistrates, the judges presiding over the genocide hearings are inexperienced and newly trained).

124. *See* Carroll, *supra* note 12, at 188 (declaring that the lack of prosecutors and public accusations that prosecutors are themselves guilty of genocide have made it quite difficult to conduct fair trials); *see also* Drumbl, *supra* note 1, at 630 (maintaining that given Rwanda's scarce resources, it will take over 25 years to prosecute all those accused under the Organic Law); Morris, *supra* note 53, at 351–52 (commenting that the failure of prosecutors to quickly prepare and move cases is caused by political resistance to justice for the accused).

125. *See Reply of the Government of the Republic of Rwanda to the Report of Amnesty International Entitled "Rwanda: Unfair Trials—Justice Denied," available at* <http://rwandemb.org/prosecution/reply.htm> (last visited Mar. 25, 2002) (discussing that the prosecutor is not obligated to call witnesses to support the charges against an accused, and the defendant's right to summon witnesses or present evidence is within the judge's discretion); *see also* Alvarez, *supra* note 15, at 394 (maintaining that the desire for expeditious treatment of the detained prisoners has led to prisoners who have not been formally charged, a lack of defense attorneys and a failure of witnesses to come forward); Carroll, *supra* note 12, at 188–89 (stating that many of the accused are not represented by counsel despite the efforts of various advocacy groups to aid the indigent prisoners).

126. Dakar Declaration of the African Commission on Human and Peoples' Rights, Dakar, Senegal (Sept. 11, 1999).

127. *See, e.g.*, International Covenant on Civil and Political Rights, Dec. 19 1966, 999 U.N.T.S. 171 (ICCPR) [Rwanda acceded Apr. 16, 1975]; African (Banjul) Charter on Human and Peoples' Rights, June 26, 1981, OAU Doc. CAB/LEG/67/3 Rev.5 ("African Charter") [Rwanda acceded July 15, 1983], Universal Declaration on Human Rights, Dec. 10, 1948, G.A. Res. 217A, UN GAOR, 3rd Sess. Pt. I, Resolutions, UN Doc. A/810 at 71 [Incorporated into Rwandan law through the Arusha Accord of 3 August 1993].

The existence of these disadvantages for defendants also raises the issue that *Gacaca* jurisdictions, in effect, create two parallel systems of justice, where defendants in Category One, who will continue to be handled by the specialized chambers, as well as members of the RPF who perpetrated crimes and who are dealt with by the military courts, will receive greater fair trial guarantees than those in the *Gacaca* process.[128]

### (i) Right to a Fair Hearing by a Competent, Independent and Impartial Tribunal[129]

A real potential exists that a defendant's right to a fair hearing could be compromised and the rule of law undermined by a number of factors. It is safe to presume that most *Gacaca* judges will have had limited formal education and no prior legal training aside from the brief training program they will receive. Yet, they will be expected to perform many critical functions, including classifying defendants into the various criminal categories which will determine the framework for potential sentencing; distinguishing genuine from false evidence; deciding complex and sensitive cases while under enormous pressures from both victims and/or the accused; and imposing sentences as severe as life imprisonment.[130] As a result, serious errors and misjudgments are bound to occur, which could have detrimental effects for defendants.

In addition, the fact that 260,000 judges have been elected casts doubt on the possibility that they are all honest persons of integrity who are bias-free.[131] The broad complicity in perpetrating the genocide and the huge number of victims it produced leads to a great likelihood that some judges will be directly related to victims in particular cases.[132] Even where this is not the case, given the length of time that has elapsed since the genocide, biases may have become entrenched within communities, for jurisdictions are likely to reflect local political or ethnic dynamics and will favour victims or the accused accordingly.

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128. *See* Amnesty International, *Rwanda: The Troubled Course of Justice,* AFR 47/11/00 (April 2000) at 32, n.35 *available at* <http://web.amnesty.org/catalog.nsf> (last visited Mar. 25, 2002); Prinz, *supra* note 18, at 580–81 (commenting that defendants in categories other than Category One are more likely to plead guilty and receive a substantially reduced sentence rather than risk a biased and not impartial trial).

129. *See* ICCPR, art. 14(1); *African Charter*, arts. 7(1) & 26.

130. Organic Law on the Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Since 1 October 1990, Law No. 8/96, RWANDA OFF. GAZ., Aug. 30, 1996.

131. *See* Carroll, *supra* note 12, at 172 (discussing how the UN- Secretary General was afraid that the Rwandan court system would be unable to administer justice in an "objective, impartial and fair manner," due to the local impact of the genocide). *See generally* Werchick, *supra* note 13, at 17 (stating that the vast number of judges elected to preside over the hearings jeopardizes the right to an impartial and independent judiciary); Widner, *supra* note 12, at 67 (explaining that judges are likely to be swayed by popular sentiment and may aid the prosecution in convicting a defendant rather than face community outrage).

132. *See generally* Carroll, *supra* note 12, at 172 (explaining that since the tribunals are made up of local villagers, prosecutions may be motivated by revenge and "victor's justice" instead of fair trials based on notions of due process); Daly, *supra* note 13, at 79 (suggesting that the *Gacaca* system of electing judges from the local community will help effect retributive justice); Drumbl, *supra* note 14, at 1264–65 (noting that since the judges are from the very villages where the violence took place, the *Gacaca* tribunals may help to empower victims and involve the community as a whole in the judicial process).

In this way, *Gacaca* hearings could become a means of legitimizing popular retribution in predominantly Tutsi communities, where defendants may be *presumed* to be guilty. Some community members may use the testimonial element of the system as an opportunity to seek revenge against defendants by fabricating evidence; others may use it to shield family members from being implicated. As a result, there may be a legitimate fear on the part of defendants that their confessions could lead to greater reprisals by community members beyond the sentences imposed, particularly where their testimony implicates other people who have managed to elude custody thus far.

#### (ii) Right to Have Adequate Time and Facilities to Prepare a Defense and Consult with Counsel[133]

The procedural informality within which *Gacaca* hearings are to take place abrogates the principle of equality of arms by limiting a defendant's opportunities to an adequate legal defense if he or she chooses not to confess and plead guilty.[134] Specifically, the *Gacaca* Law does not entitle defendants to be represented by a lawyer, but provides, instead, an opportunity at the hearings for individuals to speak for or against the defendant.[135] While, in theory, someone with a legal background could speak on behalf of the defendant during the hearing, it is uncertain whether this could be arranged in advance if defendants are denied access to seek legal representation.[136]

The ability of an unrepresented accused person to defend himself effectively could be further compromised by the fact that *Gacaca* judges will rely on case summaries prepared by prosecutors and will have access to advice in regards to "good functioning" by legal advisers designated by the *Gacaca* Chamber of the Supreme Court.[137] While these advisers are not allowed to instruct judges on "trial dealings," they will undoubtedly have considerable influence given their professional legal background. This makes their independence critical, yet there are no apparent criteria for appointing these legal advisers.[138]

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133. *See* ICCPR, art. 14(3)(b), (d), & (e); *African Charter*, art. 7(1)(c).

134. *See* Carroll, *supra* note 12, at 192 (stating that a *Gacaca* hearing may not provide due process protection for someone on trial); *see also* Press Release, Amnesty International, *Rwanda: The Troubled Course of Justice*, *available at* <http://www.amnesty-usa.org/news/2000/14701500.htm> (last visited Apr. 26, 2000) (declaring the organization's concern with the lack of representation available to the accused). *See generally* Drumbl, *supra* note 14, at 1265 (offering that *Gacaca* has historically been used in small disputes and may not be applicable to severe crimes such as genocide and mass murder).

135. *Gacaca* Law, art. 66 (providing opportunities for defendants to present witnesses in their defense, but containing no mention of legal representation).

136. *See* Widner, *supra* note 12, at 68 (explaining that despite the lack of legal resources in Rwanda, lawyers from the United States are unwilling to offer services because they do not want to be viewed as defending those who practice genocide).

137. *See Gacaca* Law, art. 50.

138. *See Gacaca* Law.

The concerns raised here are particularly problematic given that defendants will not have access to their case files before the hearing, and will not be able to present witnesses in their defense, nor cross-examine witnesses who have testified against them.[139]

**(iii) Right to Review by a Higher Tribunal[140]**

The *Gacaca* Law does not allow defendants to present evidence during the process when the Cell jurisdiction categorizes defendants according to the severity of their crimes, let alone attend this procedure.[141] This determination is critical, as it provides the framework for sentencing where a defendant is found guilty or confesses and could entail a substantial difference in prison terms, and potentially one's life for those placed within Category One.[142]

Furthermore, there is only limited recourse to appeal to the next highest *Gacaca* jurisdiction for Category Two and Three defendants who are found guilty, or who plead guilty but want to contest their sentence.[143] This jurisdiction will issue a final and binding decision, such that there is no recourse ever to the ordinary courts.[144] By containing all hearings and appeals within the *Gacaca* system, the aforementioned concerns about the absence of fair trial guarantees pervade the entire system.

**2. For the Victim**

While fewer in number, several aspects of the *Gacaca* system also engender skepticism and distinct concerns for victims of the genocide. Of primary concern to families of deceased victims is that *Gacaca* will result in excessively light sentences for persons who did not mastermind the genocide, but whose actions nevertheless led to a number of deaths, intentional or not.[145] This is highlighted by the fact that many perpetrators of Category Two or Three crimes, who plead guilty before their names are placed on the list by the Cell jurisdiction, will be eligible for community service immediately, taking into account their time served in prison to date.[146]

In addition, the practice of distributing cases for processing to *Gacaca* jurisdictions based on the defendant's residence before the genocide does not adequately take into account the pos-

139. *See id.*

140. *See* ICCPR, art. 14 (5).

141. *See Gacaca* Law.

142. *See* Drumbl, *supra* note 14, at 1263–64 (explaining how Category One is reserved for the most serious crimes of planning and leading genocide).

143. *See Gacaca* Law, art. 87 (stating that defendants who confess or plea-bargain have no opportunity to appeal).

144. *See id.*, art. 88.

145. *See* Van Lierop, *supra* note 16, at 203 (noting that many of those involved in Rwandan genocide will escape punishment); *see also* Bradley, *supra* note 30, at 150–51 (remarking that many fear that amnesty will be granted to those implicated in the genocide). *But see* Mary Kimani, *Kibuye Prisoners Voice Doubts About 'Gacaca'* (Dec. 11, 2001), *available at* <http://allafrica.com/stories/200112110107.html> (last visited Mar. 25, 2002) (emphasizing that many of those responsible for the genocide have been sentenced to death).

146. RWANDAN CONST. arts. 70 & 71.

sibility that a defendant may have committed his or her crimes in other communities.[147] Accordingly, members of the defendant's community, including the *Gacaca* judges, may not be aware of any crimes committed by the defendant elsewhere, and the victims of these crimes will not have an opportunity to tell their stories unless they know where the hearing is taking place and it is accessible. This lack of information could lead to situations where a defendant is categorized incorrectly at the first instance, acquitted or improperly sentenced to a lesser crime, all of which undermine the fundamental aims of truth-telling and reconciliation. Moreover, situations may arise where insufficient witnesses remain in certain communities to provide full testimony at the *Gacaca* hearings.

Victims may also experience the flipside of some of the concerns applicable to defendants where *Gacaca* judges are related to defendants who come before them, or where the political or ethnic climate of a community is such that it favors defendants. Such biases could occur in communities that are predominantly Hutu and, as a result, could inhibit progress toward reconciliation.[148]

A further concern involves the potentially inadequate measures to protect the security of witnesses who are required by the *Gacaca* Law to testify in very public settings.[149] A related security issue is whether adequate measures will exist to monitor the release of defendants and the performance of their community service. If such measures are not in place and reprisals occur against victims, there is a great risk that the entire *Gacaca* system and the objectives it intends to achieve will be undermined.

### C. *Gacaca:* More False Hopes?

A critical evaluation of *Gacaca* must necessarily consider whether, in light of its positive features and drawbacks, this system is capable of facilitating a measure of accountability for perpetrators of the genocide, and of allowing divided communities to reconcile and unite in pursuit of a more peaceful and productive existence, in a manner that significantly improves upon the classical justice model employed so far. In this regard, it is important to recall that what constitutes justice is context-driven, and as one scholar has noted in the case of Rwanda, "a broader sense of justice may better accommodate the individuality of the post-genocidal society than simply locking people up in distant prisons."[150]

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147. *See generally* Morris, *supra* note 53, at 354–55 (expressing that the use of courts from varying jurisdictions will result in the unequal administration of justice amongst the perpetrators of Rwandan genocide).

148. *See* Drumbl, *supra* note 14, at 1309 (stating that in order for reconciliation to begin in Rwanda, "interethnic cooperation" between the Hutus and the Tutsis must prevail); *see also* Janice McDonald, *Rwandan Village Breaks Down Hutu/Tutsi Divisions, available at* <http://fyi.cnn.com/2001/fyi/news/11/26/mandela.village/> (last visited Mar. 25, 2002) (noting that many of the victims' families are hesitant but still willing to reconcile their interethnic conflicts). *See generally* Day, *supra* note 13, at 248–49 (noting that there are few Hutu representatives in the judiciary).

149. RWANDAN CONST. art. 33.

150. Drumbl, *supra* note 14, at 1244*; see also* Daly, *supra* note 13, at 100–107 (arguing that the traditional meaning of criminal prosecution may not be capable of fulfilling the needs of Rwanda as prosecutions must take into account the values of Rwandan society); Day, *supra* note 13, at 237 (citing that the use of alternative dispute resolution in Rwanda will aid in creative and expeditious justice within an overburdened Rwandan judicial system).

There can be no doubt that the *Gacaca* system raises numerous red flags and falls short of internationally recognized standards for conducting fair trials. However, the circumstances that precipitated the enshrining of due process safeguards within international law, as well as national laws, were based on the classic Western criminal trial model, which never contemplated situations of mass violence that generated 110,000 to 130,000 perpetrators of serious crimes within a few short months.[151] Professor Jose Alvarez notes that it is highly presumptuous for the international community, of which few countries have ever faced a dilemma comparable to that faced by Rwanda, to insist either that Rwanda suspend its local prosecutions, whatever form they may take, or that these prosecutions meet international due process standards, particularly where the international community has offered no viable alternative to providing speedy trials that fully respect all due process guarantees to the masses.[152] Even in the best-case scenario, these numbers would overwhelm the legal systems of the most highly developed nations, let alone a poor and politically unstable country like Rwanda whose caricature of a judicial system was completely destroyed in 1994.[153] Indeed, no state has ever succeeded in prosecuting so many detainees with appropriate due process guarantees.[154] The inevitable result is that justice will always be limited and involve compromise in cases of mass violence.[155]

In fact, the exception contained in the ICCPR that permits suspension of rights owed to criminal defendants in times of "public emergencies" could be applied to Rwanda, given the multiple challenges it faces such that Rwandan trials, whatever form they take, should not be required to meet international due process standards.[156] The terms of the Genocide Convention further support the proposition that the unquestioned institutionalization of criminal trials as the preferred remedy for dealing with egregious violations of human rights is unfounded.[157] The Genocide Convention imposes an affirmative duty on states to ensure that

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151. *See* GERARD PRUNIER, THE RWANDA CRISIS: HISTORY OF A GENOCIDE 237–238 (1995); *see also* Wippman, *supra* note 102, at 482 (finding that massive numbers of criminal prosecutions arising from the Rwandan massacres have severely taxed the judicial system). *See generally* Daly, *supra* note 13, at 163 (remarking that the acts of genocide were perpetrated by over 100,000 people).

152. Alvarez, *supra* note 15, at 41.

153. *See* Carroll, *supra* note 12, at 172 (remarking that 1994 marked the collapse of the Rwandan judicial system); *see also* Schabas, *supra* note 16, at 533 (emphasizing that the Rwandan judicial system was in disarray before 1994 and was virtually destroyed after the genocide).

154. *See* Maura Reynolds, *Chechens Endure 'Ghastly Abuse,' Study Concludes*, L.A. TIMES, Oct. 26, 2000 (acknowledging that due process of Chechen captives is trumped by the corruption of the Russian military); *see also Human Rights Abuses Rampant in Pak: Human Rights Watch*, PRESS TRUST OF INDIA, Oct. 10, 2000, *available at* LEXIS (indicating the lack of human rights and the denial of due process to political detainees). *See generally Jurists Intimidated and Attacked Worldwide*, AGENCE FRANCE PRESSE, Aug. 11, 2000, *available at* LEXIS (illustrating the facts of tremendous abuse of human rights and due process in a number of countries).

155. *See* Tina Sanjar, *The Nuremberg Laws*, *Persecution of Jews*, *available at* <http://cghs.dade.k12.fl.us/ib_holocaust 2001/Persecution_early_years/nuremberg_laws.htm> (last visited Mar. 25, 2002) (describing German laws of the 1930s which were designed for the state to take away civil or human rights from Jews); *see also* Theodor Meron, *Comment, War Crimes in Yugoslavia and the Development of International Law*, 88 AM. J. INT'L L. 78 (1994) (noting that the level of due process provided during the Nuremberg and Tokyo trials was low).

156. *See* ICCPR, art. IV.

157. *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 277 [acceded to by Rwanda on April 16, 1975].

accused persons are "tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction,"[158] and to undertake to prevent and punish such crimes by instituting effective penalties.[159] A "competent" tribunal does not *de facto* equate to the Western criminal trial model; it may encompass alternative quasi-judicial forums.[160] It is asserted that to the extent that a post-genocidal country attempts in good faith to fulfil these requirements by punishing perpetrators within the limits of its resources, the conditions of the Genocide Convention are satisfied. There can be no denying that, in defiance of the odds, Rwanda has attempted to fulfil these obligations through domestic criminal prosecutions, as has the international community through the ICTR.[161] Predictably, both of these measures have failed to address Rwanda's broader needs for accountability and reconciliation seven years after the genocide.[162]

Rather than giving up or succumbing to the temptation of granting a general amnesty, however, the Rwandan government has turned now to its own traditions and culture to alleviate the shortcomings of the criminal trial models. This courage and perseverance merits praise and deference, not denunciation or lofty criticism. The reality is that no system can deliver model justice under circumstances as those prevailing in Rwanda.[163] But this does not mean that a post-genocidal society should not still strive for justice, along with the companion goals of reconciliation and long-term peace.

As far as alternative conduits for justice and reconciliation may be compared, the *Gacaca* system provides an innovative and practical blend of retributive and restorative justice that could legitimately complement the existing domestic prosecutions. While one must be wary not to romanticize the notion of traditional forms of justice, *Gacaca* offers a promising means for Rwandans to draw together and gain a greater sense of justice and healing than experienced

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158. *Id.*, art. VI.

159. *Id.,* art. I & V.

160. *See* Jennifer J. Llewellyn and Robert Howse, *Institutions for Restorative Justice: The South African Truth and Reconciliation Commission*, 49 U. TORONTO L.J. 355, 355 (discussing possibilities of various criminal trial models). *See generally* Daly, *supra* note 13, at 73–4 (noting the modern trends of international criminal prosecution).

161. *See* Akhavan, *supra* note 15, at 22–7 (discussing the efforts to bring justice to Rwanda through various measures such as the ICTR and domestic prosecutions); Drumbl, *supra* note 14, at 1229 (showing due process in Rwanda had been improving due to the ICTR); *see also* Developments in the Law—International Criminal Law, *Fair Trials and the Role of International Criminal Defense*, 114 HARV. L. REV. 1982, 1982 (2001) (illustrating some debates behind the drafting of ICTR).

162. *See* Daly, *supra* note 13, at 73 (noting that there are difficulties that plague the ICTR); *see also* Howland & Calathes, *supra* note 24, at 135 (stating that objectives of the ICTR are too vague and, therefore, lack efficiency). *See generally* Developments in the Law—International Criminal Law, *supra* note 161, at 1982 (describing the drafting of ICTR).

163. *See* Yigal Chazan, *Belgrade Renews Threat of Prison Against Draft-Dodgers*, GUARDIAN (London), May 21, 1992, at 8 (illustrating that the Serbian judicial system was unable to handle the thousands of "army reservists who disobeyed the mobilisation order"); *see also* Mary Anne Fitzgerald, *Museveni Now Controls Most of Uganda, but Divisions Remain*, CHRISTIAN SCI. MONITOR, Mar. 20, 1986, at 12 (stating that "Uganda's judicial system functions, but has long been open to abuse and probably could not handle mass prosecution of Okello's soldiers"). *See generally* Judith Matloff, *S. Africa Verdict Sets Precedent of Leniency*, CHRISTIAN SCI. MONITOR, Oct. 15, 1996, at 7 (showing that a large number of South Africans believe that their judicial system will be unable to do justice when it faces mass prosecution cases).

thus far, even though there is no automatic linkage between reconciliation and truth-telling. It appears to strike a delicate balance between the competing interests of victims and defendants by ensuring that offenders are penalized and shamed by their communities, while providing defendants with an opportunity to expedite the processing of their cases and reduce their sentences significantly. Furthermore, it fosters a long-term vision of the rule of law within Rwanda by allowing the overburdened legal system to engage in a more systematic reconstruction process in conjunction with other government services.[164]

To take the position that justice cannot be achieved via the *Gacaca* system because it will not (and, arguably, cannot) provide all the due process safeguards required of classical criminal trials, even though it resembles these trials in certain ways, loses sight of the fact that very little justice has been achieved to date for Rwandans under the status quo.[165] Over 100,000 people have spent years in prison under appalling conditions without being brought to trial, let alone charged in some cases, while victims have been suspended in their ability to fully process their pain and suffering.[166] Moreover, no progress has been made towards reconciliation and consolidation within divided communities. *Gacaca* offers a solution to these critical deficiencies, albeit an imperfect one.[167]

As with any adapted and untried system, *Gacaca*'s success will depend greatly on the commitment of Rwandans to work together and make the system realize its full potential. This will require great vigilance, as many of the benefits will take time before they can be fully reaped. People must first develop confidence in the *Gacaca* hearings and trust that justice will be done

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164. *See Central Africa; Central and Eastern Africa: IRIN Weekly Round-up*, AFRICA NEWS, Jan. 7, 2000, *available at* LEXIS (showing that the government of Rwanda is confident that the *Gacaca* system will expedite the trial rate in genocide cases); *see also Rwanda; Elections May Speed Genocide Trials, but New System Lacks Guarantees of Rights*, AFRICA NEWS, Oct. 4, 2001, *available at* LEXIS (noting the potential drawback of the *Gacaca* system, namely the fact that it "may be subject to political pressures and lacks some basic internationally recognized safeguards, such as the right to legal counsel"); *Rwanda: Genocide Suspects Call for Speedy Establishment of Traditional Courts*, BBC WORLDWIDE MONITORING, July 23, 2001, *available at* LEXIS (stating that "Genocide suspects detained in Kigali Central Prison have called on government to speed up the establishment of [*Gacaca*] traditional judicial system courts so that they can testify before the courts what they did, saw or heard during the genocide of 1994").

165. *See* Carroll, *supra* note 12, at 187 (stating "[t]he Rwandan judicial system . . . is not capable of enforcing the Constitution and other laws, honoring the rights of the accused, or processing cases within a reasonable time frame"); *see also* Daly, *supra* note 13, at 179 (noting that "[*Gacaca* tribunals] do not provide a professional bench or bar; they do not provide for decision according to precedent or other components of due process"); Werchick, *supra* note 13, at 15 (concluding that the *Gacaca* system possesses a multitude of due process concerns, "[a majority] stemming from inadequate resources for reasonably speedy trials").

166. *See* Carroll, *supra* note 12, at 167 (asserting that as a result of the *Gacaca* tribunal's ineffective operation, there are "lengthy detentions of defendants before charges are brought or before trial . . ."); *see also* Drumbl, *supra* note 14, at 1233 (stating that "[a]pproximately 125,000 individuals . . . are incarcerated in Rwandan jails . . . [and a]t the present rate of national trials, it would take hundreds of years to adjudge all of these detainees"). *See generally* James C. McKinley, Jr., *Massacre Trials in Rwanda Have Courts on Overload*, N.Y. TIMES, Nov. 2, 1997, at 3 (asserting that "[a]t the present rate of trials, it would take 500 years to try all the defendants").

167. *See* Carroll, *supra* note 12, at 197 (discussing the various solutions that the local *Gacaca* courts will provide to the current search for justice); *see also* Philip Sherwell, SUN. TELEGRAPH (London), Sept. 16, 2001, at 28 (discussing the favorable attitudes of Rwandans' toward the *Gacaca* system). *See generally Genocide Justice; 260,000 to Judge Suspects,* SUN. HERALD SUN, Oct. 7, 2001, at 40 (illustrating that Rwandans seem to favor the *Gacaca* system).

fairly and honestly, no matter who the accused or the victim is. In turn, this will encourage individuals, whether Hutu or Tutsi, to fully participate in truth-telling hearings within their communities and facilitate the reintegration of defendants. To foster this participative and credible environment, judges must demonstrate genuine impartiality and sensitivity to both the systemic disadvantages faced by defendants and the legitimate concerns of victims. In addition, the government must continue to carry out a broad and consistent communication campaign throughout Rwanda to counter misperceptions and explain the entire process, particularly the incentives to confess to defendants. Otherwise, possibilities to expedite processing of cases and greater reconciliation could be lost if few defendants plead guilty.

Based on a recent study commissioned by the government and conducted by the Center for Conflict Management of the National University of Rwanda on baseline information regarding the *Gacaca* system, Rwandans appear to be overwhelmingly in favour of the *Gacaca* jurisdictions.[168] The system seems to have kindled a lot of hope within people that it will be able to resolve the enduring problems related to the genocide. This enthusiasm and commitment bodes well for *Gacaca*'s prospects of succeeding where existing measures have fallen short. It may even foreshadow that, with time, the idealistic government poster advertising the *Gacaca* system's objectives may not be such an unattainable goal after all.

## Conclusion

Payam Akhavan insightfully notes that in order for Rwanda to move forward with reconciliation, "the Tutsi must absolve the Hutu of indefinite collective responsibility for the genocide while also having a legitimate means of vindicating their suffering through a 'collective catharsis.'"[169]

If justice and reconciliation are the ultimate goals to be achieved by a legal response to post-genocidal Rwanda, then total reliance on the criminal prosecutions conducted by the ICTR and the domestic specialized chambers to the exclusion of alternative schemes is misplaced. While these models have their role within the overall response to the genocide by punishing the most egregious offenders, it is unrealistic and shortsighted to place broader expectations on them to process mass numbers of cases and promote extensive community healing, while safeguarding due process standards.

In comparison, the *Gacaca* system's emphasis on restorative modes of justice, through participative truth-telling, atonement, public scrutiny, and reintegrative community service, provide post-genocide Rwanda's best hope for progressing towards national reconciliation and some greater sense of justice. While no doubt an imperfect model, *Gacaca* nevertheless promises to be a significant step in the right direction. Given the length of time that has elapsed

168. Gasibirege, S. & Babalola, S., *Perceptions About the Gacaca Law in Rwanda: Evidence from a Multi-Method Study*, Special Publication No. 19. Baltimore, Johns Hopkins University School of Public Health, Center for Communications Programs (Apr. 2001).

169. Payam Akhavan, *Justice and Reconciliation in the Great Lakes Region of Africa: The Contribution of the International Criminal Tribunal for Rwanda,* 7 DUKE J. COMP. & INT'L L. 325, 388 (1997).

without real progress having been made, the government of Rwanda has a high stake in ensuring that the *Gacaca* system succeeds in its objectives to the fullest extent possible. According to Philip Drew, "*Gacaca* is likely the last chance the government has to establish a society in which the rule of law is seen as supreme and 'national reconciliation' is something more than the name of a government institution."[170] To this end, the government must be careful that the impetus surrounding the *Gacaca* does not detract from long-term efforts to improve the ordinary court system, nor slow down the pace of trials in the specialized chambers.

In short, whether the *Gacaca* system conforms to a particular mode for delivering justice and accountability is irrelevant in the context of post-genocidal Rwanda. What is needed is a system that "truly resonates within [the] culture"[171]—a system the people believe in and embrace as their own, so they as individuals and members of communities can actively mobilize their own destiny beyond the horrors of their past, rather than wait for the judicial system to do it for them. *Gacaca* offers all Rwandans this golden ray of hope, which only courage, integrity and vigilance can keep from fading away.

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170. Philip J. Drew, *Dealing with Mass Atrocities and Ethnic Violence: Can Alternative Forms of Justice be Effective? A Case Study of Rwanda,* at 3, *available at* <http://www.law.ualberta.ca/centres/civilj/full-text/rwanda.htm> (last visited Mar. 25, 2002).

171. Alvarez, *supra*, note 15, at 482.

# The GE-Honeywell Merger Debacle: The Enforcement of Antitrust/Competition Laws Across the Atlantic Pond

**Yeo Jin Chun***

## Introduction

It was to be the capstone of General Electric's outgoing Chairman and Chief Executive Officer's (CEO) legendary career. Jack Welch, considered one of the greatest chief executive officers of the last century, and Michael Bonsignore, Chairman and CEO of Honeywell, engineered one of the largest mergers in history and the largest involving two firms in engineering or industrial manufacturing.[1] The deal was worth an estimated $45 billion.[2] Jack Welch said that GE and Honeywell were a "perfect fit."[3]

The American merger did not come to fruition because the European Commission's Directorate General for Competition Policy, Mario Monti, concluded that the merger would create or strengthen dominant positions leading to unfair competition.[4] The prohibition of the merger marked only the second time Commissioner Monti blocked an all-American merger.[5]

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1. *See* Peter Thal Larsen, *The Year the Giants Chose to Merge*, FIN. TIMES (London), May 11, 2001, at 10 (stating that GE's takeover of Honeywell would be the largest of an industrial company); *see also* The Associated Press, *It's Official—GE Chairman To Step Down at Sept. Meeting*, NEWSDAY, July 13, 2001, at A56 (stating that Jack Welch will probably be remembered not for his failures, but for his successes); Robert McLeod, *Europeans Say No to GE Buying Honeywell: $41 Billion Takeover Plan Halted Despite U.S. Nod*, SEATTLE TIMES, July 4, 2001, at E1 (discussing the enormity of the proposed merger).

2. *See* William Drozdiak, *European Union Kills GE Deal*, WASH. POST, July 4, 2001, at A1 (noting that GE's proposed acquisition of Honeywell was valued at $45 billion dollars); Michael Elliott, *How Jack Fell Down*, TIME, July 16, 2001, at 40 (discussing the value of the merger); Andrew Ross Sorkin & Claudia H. Deutsch, *General Electric Buying Honeywell in $45 Billion Deal*, N.Y. TIMES, October 23, 2000, at A1 (stating that the deal between General Electric and Honeywell would be worth $45 billion in stock).

3. GE Press Release, *General Electric to Acquire Honeywell in a Tax-Free Merger for $45 Billion; Honeywell Shareholders to Receive GE Stock; Jack Welch to Continue as GE Chairman Until End of 2001*, *available at* <http://www.ge.com/com/cgi-bin/cnn-storydispl23551A8B> (last visited on Mar. 28, 2002).

4. Case No. COMP/M.2220—General Electric/Honeywell, July 3, 2001 (forthcoming in the *Official Journal*). *See U.S. Push for GE Takeover of Honeywell,* AUSTRALIAN FIN. REV., June 18, 2001, at 8 (stating that GE's expertise in aviation engineering and Honeywell's aviation electronics bundling would be unfair to the competition); *see also* David Lawsky, *EC Says It Objects to GE's Purchase of Honeywell; Merger: Concerns About Competition Put Firm on the Defensive But Doesn't Necessarily Sink the Deal*, L.A. TIMES, May 9, 2001, at 3 (stating that the ability to offer lower prices would lead to unfair competition).

5. *See* Clayton Hirst, *The Lowdown: Bush Hates Him, Brown Hates Him and EMI Hates Him. So What's Mr. Monti Doing Right?; A Protectionist Control-Freak or a Principled Academic?*, IND. ON SUN. (London), June 24, 2001, at 5 (stating that the attorneys in the Sprint-MCI Worldcom merger knew what they were getting into with Mr. Monti); *see also* Carl Mortished, *Brussels Getting Tougher Over Mergers*, TIMES (London), Nov. 27, 2001, at Business (stating that Monti had blocked three mergers before the GE-Honeywell deal).

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More significantly, it was the first time the Europeans prohibited an all-American merger that had been cleared by the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC).[6] The European Commission found that the

> proposed merger would lead to the creation or strengthening of a dominant position on the [European Community] markets for large commercial jet aircraft engines, large regional jet aircraft engines, corporate jet aircraft engines, avionics and non-avionics products, as well as small marine gas turbine, as a result of which effective competition in the common market would be significantly impeded.[7]

This action caused a rift between the two giant regimes across the Atlantic.[8] President George W. Bush publicly stated that he wanted American companies to be treated fairly by the European legal enforcement authorities.[9] United States Senators John D. Rockefeller, Ernest F. Hollings and Phil Gramm, along with Secretary of the Treasury Paul O'Neill, were a few of the

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6. *See* Ariana Eunjung Cha, *Microsoft's Euro-Foe; EU's Antitrust Chief Hints He Will Continue Case*, WASH. POST, Nov. 15, 2001, at E01 (stating that Monti had gained the respect of the antitrust world by blocking the merger after U.S. regulators had approved it); *see also* Jean Eaglesham & Francisco Gurrera, *Brussels 'Tougher Than US on Merger Control,'* FIN. TIMES (London), Jan. 9, 2002, at 9 (stating that the Europeans take a more interventionist view than the U.S. regulators); Deborah Hargreaves & Peter Spiegel, *Mr. Tough Guy: Mario Monti Has Wrung More Concessions from GE Over Its Bid for Honeywell but Many are Unpersuaded by His Reasons for Doing So*, FIN. TIMES (London), June 29, 2001, at 18 (stating that Monti, like the Department of Justice, was concerned about vertical integration).

7. Case No. COMP/M.2220—General Electric/Honeywell, ¶ 567, July 3, 2001 (forthcoming in the *Official Journal*).

8. *See* Barbara Crutchfield George, Patricia Lynch & Susan F. Marsnik, *Multinational Employers: Navigating Through the "Safe Harbor" Principles to Comply with the EU Data Privacy Directive*, 38 AM. BUS. L.J. 735, 782 n.234 (2001) (noting that the EU as an integrated body will be able to challenge the dominant position of the U.S. in the global marketplace as evidenced by the rejection of the GE/Honeywell merger); Edward T. Swaine, *The Local Law of Global Antitrust*, 43 WM. & MARY L. REV. 627, 630–31 (2001) (noting the friction between the EU and the U.S. that came as a result of the failure of the GE/Honeywell merger); Francesco Guerrera, *What a Difference a Year Makes*, FIN. TIMES (London), Feb. 1, 2002, at 27 (discussing that the failed merger will spark a "transatlantic argument").

9. *See Why Europe Won't Let Jack Welch Get Bigger*, AUSTRALIAN FIN. REV., June 23, 2001, at 29 (noting that even the U.S. President, George W. Bush, has gotten involved due to the failure of the GE/Honeywell merger); Mario Monti, *The Bane of the Big Business World*, AUSTRALIAN FIN. REV., Dec. 15, 2001, at 24 (stating that the failure of the merger earned the "wrath of the US President"); Benjamin Wootliff, *Bush Under Fire Over GE*, DAILY TELEGRAPH (London), June 19, 2001, at 30 (discussing the European competition commissioner's attacks in response to George W. Bush's interference with the EU's decision with respect to the GE/Honeywell merger).

outspoken critics of the EC decision.[10] Some even vowed retaliation.[11] Certainly, trade wars have arisen between the two behemoths, such as the *Oilseeds* case and the beef and banana wars in the General Agreement on Tariffs and Trade-World Trade Organization context.[12] The GE-Honeywell conflict could have been avoided had the European Commission exercised comity as agreed to in the Cooperation Agreement.[13]

This article begins with a discussion of the general differences in United States and European Union merger regulation. It will be argued that the goals of U.S. antitrust laws are to promote market competition and efficiency, and to protect consumers from high prices, while the purposes of the European Union's competition laws include the strengthening of economic and social cohesion, and the promotion of a harmonious balance and sustainable development of economic activities.[14]

Second, there will be a comparison of the laws of the two regimes regulating mergers. In the U.S., Section 7 of the Clayton Act is the principal statute regarding mergers and acquisitions.[15] In the European Union, the EU Merger Regulation is the principal regulation concern-

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10. *See* William Drozdiak, *European Union Kills GE Deal*, WASH. POST, July 4, 2001, at A1 (commenting on the criticism of the decision to thwart the merger by John D. Rockefeller IV, Ernest F. Hollings and Paul H. O'Neil); Deborah Hargreaves & Andrew Hill, *How Monti Turned GE-Honeywell Into A Flight Of Fancy: The World's Largest Industrial Takeover Saw The Soft-Spoken EU Competition Commissioner Triumph Over the US Conglomerate's Buccaneering Chief Jack Welch*, FIN. TIMES (London) July 6, 2001, at 25 (noting that criticism by Paul O'Neil might have contributed to Mr. Monti's "resolve to judge the deal on the competition issues alone"); Guy Jonquieres, *Blocked Deal Leaves Monti With One Regret: The Commissioner Professes He Would Have Liked to Approve the GE-Honeywell Merger*, FIN. TIMES (London) July 23, 2001, at 7 (discussing the criticism by U.S. officials, including U.S. treasury secretary, Paul O'Neil).

11. *See* Michael Elliott, *When Jack Met Mario*; *There's No Reason To Turn The GE-Honeywell Case Into A Trade War*, TIME, July 2, 2001, at 42 (noting that various influential U.S. senators threatened retaliation); William Drozdiak, *European Union Kills GE Deal*, WASH. POST, July 4, 2001, at A1 (discussing the response of various senators to the EC decision); *see also* Deborah Hargreaves & Andrew Hill, *How Monti Turned GE-Honeywell Into A Flight Of Fancy: The World's Largest Industrial Takeover Saw The Soft-Spoken EU Competition Commissioner Triumph Over The US Conglomerate's Buccaneering Chief Jack Welch*, FIN. TIMES (London) July 6, 2001 (discussing the prospects of a European/U.S. trade war).

12. *See* Benjamin L. Brimeyer, *Bananas, Beef, and Compliance in the World Trade Organization: The Inability of the WTO Dispute Settlement Process to Achieve Compliance from Superpower Nations*, 10 MINN. J. GLOBAL TRADE 133, 133 (2001) (discussing various trade wars involving the WTO); James M. Cooper, *Spirits in the Material World: A Post-Modern Approach to United States Trade Policy*, 14 AM. U. INT'L L. REV. 957, 964 (1999) (noting the constant threat of trade wars). *See generally* Thomas J. Schoenbaum, *Agricultural Trade Wars: A Threat to the GATT and Global Free Trade*, 24 ST. MARY'S L.J. 1165, 1165–73 (1993) (discussing the impact of trade wars on the world economy).

13. *See* Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, 1995 O.J. (L 095) 47 ("Cooperation Agreement"). *See generally* Swaine, *supra* note 8, at 640 (noting that "attempts to harmonize national antitrust laws have failed"). The Cooperation Agreement is an informal agreement between the EU and the U.S.; it is not a legally binding agreement but an expression of the hope for cooperation and use of comity between the two regimes. Paul Stephen Dempsey, *Competition in the Air: European Union Regulation of Commerical Aviation*, 66 J. AIR L. & COM. 979, 996 (2001).

14. Treaty Establishing The European Community, Feb. 7, 1992, O.J. (C224) 1 (1992), 1 C.M.L. R. 573 (1992) ("EC Treaty").

15. *See* 15 U.S.C.A. § 12 (West 2002); Julie M. Song, Note, *Mega-Mergers and our Free-Enterprise System: A Need for Strict Enforcement of Section 7 of the Clayton Act*, 68 GEO. WASH. L. REV. 361, 363–64 (2000) (detailing the history of the Clayton Act and early attempts to prevent horizontal mergers). *See generally* Robert D. Joffe et al, *Proposed Revisions of the Justice Department's Merger Guidelines*, 81 COLUM. L. REV. 1543, 1555 (1981) (discussing the utility of the Clayton Act in comparison to the Sherman Act).

ing mergers and acquisitions.[16] Third, international comity and its role in merger regulation in the U.S. and the EU will be discussed, including a comparison of the effects test of the U.S. to the implements test of the EU.

Finally, this article posits that although the European Commission had prescriptive jurisdiction, its reasons to block the GE-Honeywell merger were diametrically opposed to the antitrust laws and economic policies of the U.S. and, in the interest of harmony and comity, the Commission should not have blocked the merger.[17] Furthermore, it is asserted that the European Commission did not abide by their Cooperation Agreement with the American authorities.

Indeed, as more and more companies today are multinational, it is imperative that the two most developed and significant antitrust regimes—the U.S. and the EU—exercise comity. In regard to the now common global outreach of merger deals, the Atlantic has become the proverbial pond. Recently, U.S. courts moved in the direction of limiting the extraterritorial reach of its antitrust laws, but failed to entrench the jurisdictional rule of reason in the overall extraterritorial jurisdiction analysis.[18] Since the chances of harmonization between American antitrust law and European Union competition law are minimal, it is more imperative than ever that courts and enforcement authorities exercise comity.

## I. The Different Purposes and Goals of the U.S. and European Union Factor Significantly in Conflicts.

Beginning with the passage of the Sherman Act[19] in the late 19th century and the Clayton Act in 1914,[20] the U.S. has amassed a large body of antitrust statutory and common law.[21]

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16. *See Business Guide to EU Initiatives 1998/1999*, THE EU COMMITTEE OF THE AMERICAN CHAMBER OF COMMERCE IN BELGIUM (1998/1999) (stating that the aim of setting up the Merger Regulation of 1989 was to control mergers and acquisitions and joint ventures); *Business Guide to EU Initiatives 2001/2002*, THE EU COMMITTEE OF THE AMERICAN CHAMBER OF COMMERCE IN BELGIUM (2001/2002) (discussing the importance of merger regulations in light of the rise in the number of merger notifications).

17. *See* David Andelman, *Regulators Throw Wrench in GE/Honeywell Deal*, DAILY NEWS, June 15, 2001, at 53. Many accuse the European Commission of having protectionist reasons for blocking the GE-Honeywell merger. For instance, the former general counsel of the U.S. Trade Representative's office, Robert Novick, commented on the GE-Honeywell decision, "[f]rom a trade perspective, when you look at the kind of subsidies the [Europeans] provide that is highly protective and supportive to their industries, this may be part of that pattern." *Id.*

18. *See, e.g.*, Timberlane Lumber Co. v. Bank of America, N.T. & S.A., 549 F.2d 597 (9th Cir. 1976) ("*Timberlane I*"); Timberlane Lumber Co. v. Bank of America, N.T. & S.A., 749 F.2d 1378 (9th Cir. 1984) ("*Timberlane II*"); and Laker Airways Limited v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984).

19. *See* 15 U.S.C.S. § 1 (Law. Co-op. 2001) (Title 15. Commerce and Trade).

20. *See* 15 U.S.C.S. § 14 (Law. Co-op. 2001) (Title 15. Commerce and Trade).

21. *See generally* Susan Beth Farmer, *More Lessons From the Laboratories: Cy Pres Distributions in Parens Patriae Antitrust Actions Brought by State Attorneys General*, 68 FORDHAM L. REV. 361, 376 (1999) (discussing a statutory amendment made to the Clayton Act by the HSRA to expand "the common law parens patriae power of the states in antitrust cases"); Burton D. Garland, Jr. & Reuven R. Levary, *The Role of American Antitrust Laws in Today's Competitive Global Marketplace*, 6 U. MIAMI BUS. L. REV. 43, 45 (1997) (discussing the nature and scope of American antitrust laws); James May, *The Sherman Act: The First Century; The Role of the States in the First Century of the Sherman Act and the Larger Picture of Antitrust Policy*, 59 ANTITRUST L.J. 93, 93–5 (1990) (detailing the past and present of historical scholarship relating to antitrust law in the U.S.).

Despite the long history of antitrust law in the U.S., some commentators criticize the simplicity of the purpose of these laws.[22] The focus of American antitrust law is on efficiency, competition and consumer welfare.[23]

The European Union, on the other hand, has many more goals than economic efficiency and maximizing consumer welfare.[24] Articles 81 and 82 (ex Articles 85 and 86) are part of a much larger and significant agreement: the Treaty Establishing the European Community.[25] While the Sherman Act and the Clayton Act was passed by Congress with the main purpose of maximizing economic efficiency, the Treaty Establishing the European Community has a far more significant purpose: "to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women . . . economic and social cohesion and solidarity among Member States."[26] Despite these broad and significant differences, there are some significant similarities between the two regimes.

## II. The European Union and the U.S. Have Similar Methods of Regulating Mergers Involving Foreign Undertakings/Firms.

As noted above, section 7 of the Clayton Act is the principal American statute regulating mergers and acquisitions.[27] Under Section 7, mergers and acquisitions are forbidden "where in any line of commerce or in any activity affecting commerce in any section of the country, the

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22. *See, e.g.*, Eleanor M. Fox, *The End of Antitrust Isolationism: The Vision of One World*, 1992 U. CHI. LEGAL F. 221 (1992); Spencer Weber Waller, *Understanding and Appreciating EC Competition Law*, 61 ANTITRUST L.J. 55 (1992). *See generally* Michelle K. Lee & Mavis K. Lee, *High Technology Consortia: A Panacea for America's Technological Competitiveness Problems?*, 6 HIGH TECH. L.J. 335, 343 (1991) (discussing the responses to the criticisms of current antitrust law).

23. *See* Malcolm B. Coate & Jeffrey H. Fischer, *Can Post-Chicago Economics Survive Daubert?* 34 AKRON L. REV. 795, 807 n.56 (2001) (suggesting a debate as to differing goals of antitrust law, including consumer and social welfare); Fredric J. Entin, et al., *Hospital Collaboration: The Need for an Appropriate Antitrust Policy*, 29 WAKE FOREST L. REV. 107, 122 (1994) (discussing antitrust statutes' reliance on the theory that competition fosters consumer welfare and efficiency). *See generally* Per Jebsen & Robert Stevens, *Assumptions, Goals, and Dominant Undertakings: The Regulation of Competition Under Article 86 of the European Union,* 64 ANTITRUST L.J. 443 (1996) (describing the economic goals of consumer welfare as primary to antitrust law).

24. *See* Gabriela I. Coman, *European Union Policy on Asylum and its Inherent Human Rights Violations*, 64 BROOK. L. REV. 1217, 1218 (1998) (suggesting the goal of political unity as a compliment to the EU's economic goals); *see also* Todd A. Sulger, Comment, *Harmonization of Securities Market Regulations in the European Union: Is the Price Tag Too High?*, 29 CAL. W. INT'L L.J. 221, 240 (1998) (referring to the EU's twofold goals of economic and political unity). *See generally* Karen M. Smith, *The Need for Centralized Securities Regulation in the European Union*, 24 B.C. INT'L & COMP. L. REV. 205, 205 (2000) (listing economic growth and cooperation among the members of the EU as a leading goal in its establishment).

25. EC TREATY art. 81–82, November 10, 1997, 1997 OJ C 340.

26. EC TREATY art. 2.

27. *See* 15 U.S.C. § 18; *see also* Jacqueline J. Ferber, *The U.S. Foreign Direct Investment Policy: The Quest for Uniformity*, 76 MARQ. L. REV. 805, 811 (1993) (describing Section 7 of the Clayton Act as America's primary statute controlling mergers and acquisitions); Judith C. Appelbaum & Jill C. Morrison, *Hospital Mergers and the Threat to Women's Reproductive Health Services: Applying the Antitrust Laws*, 26 N.Y.U. REV. L. & SOC. CHANGE 1, 14 (2000/2001) (suggesting the use of Section 7 of the Clayton Act as a starting point in analyzing merger proposals under Federal Law).

effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[28] The statute has been primarily supplemented by the Horizontal Merger Guidelines.[29]

With regard to U.S. jurisdiction over foreign firms, in 1995 the Department of Justice issued the Antitrust Enforcement Guidelines for International Operations, which formally extends the DOJ and FTC jurisdiction over foreign companies.[30] The DOJ International Guidelines employ two principal tests for exercising jurisdiction over foreign firms. First, the *Hartford Fire* test states that "foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States," and "foreign conduct that has a direct, substantial, and reasonably foreseeable effect on U.S. commerce" are factors to consider.[31] Second, the International Guidelines state that the FTC and the DOJ will "consider international comity." Regarding comity, the FTC and the DOJ will consider several factors:

> 1) the relative significance to the alleged violation of conduct within the United States, as compared to conduct abroad; 2) the nationality of the persons involved in or affected by the conduct; 3) the presence or absence of a purpose to affect U.S. consumers, marketers, or exporters; 4) the relative significance and foreseeability of the effects of the conduct on the United States as compared to effects abroad; 5) the existence of reasonable expectations that would be furthered or defeated by the action; 6) the degree of conflict with foreign law or articulated foreign economic policies; 7) the extent to which the enforcement activities of another country with respect to the same persons, including remedies resulting from those activities, may be affected; and 8) the effectiveness of foreign enforcement as compared to U.S. enforcement action.[32]

The European Community has no equivalent to Section 7 of the Clayton Act in the EC Treaty.[33] Articles 81 and 82 (ex Articles 85 and 86) are the primary articles on competition in

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28. 15 U.S.C. § 18.

29. *See* 57 Fed. Reg. 41,552 (1992) ("Merger Guidelines"). *See generally* William E. Kovacic, *The Competition Policy Entrepreneur and Law Reform in Formerly Communist and Socialist Countries*, 11 AM. U.J. INT'L L. & POL'Y 437, 453 (1996) (discussing the HHI's usefulness as a quantitative measure in assessing industry concentration, relieving frustration from use of subjective measures); John J. Curtin, Jr., Daniel L. Goldberg & Daniel S. Savrin, *The EC's Rejection of the Kesko/Tuko Merger: Leading the Way to the Application of a "Gatekeeper" Analysis of Retailer Market Power Under U.S. Antitrust Laws*, 40 B.C. L. REV. 537, 554 (1999) (emphasizing the general nature of the Merger Guidelines in their lack of concentration on particular commerce).

30. Department of Justice and Federal Trade Commission, *Antitrust Enforcement Guidelines for Int'l Operations*, *available at* <http://www.usdoj.gov/atr/public/guidelines/internat.htm> (last visited Mar. 28, 2002) ("DOJ International Guidelines").

31. *Id*. at 3.1; *see* 15 U.S.C. § 6a ("Foreign Trade Antitrust Improvement Act").

32. *Id*. at 3.2.

33. *See* Frank M. Hellemans, *Substantive Appraisal of Horizontal Mergers under EEC Regulation 4064/89: An Inquiry into the Commission's First Year Decisions*, 13 J. INTL. L. BUS. 613, 615 (1993) (noting that the EC has no "counterpart" to Section 7 of the Clayton Act).

the EC Treaty, but they are more similar to Sections 1 and 2 of the Sherman Act.[34] Article 81 prohibits agreements between undertakings (firms) that are "incompatible with the common market" and "have as their object or effect the prevention, restriction or distortion of competition within the common market . . ."[35] Article 82 prohibits "any abuse by one or more undertakings of a dominant position within the common market . . ."[36] The EU Merger Regulation was passed in 1989 and again reissued in 1997 because Articles 81 and 82 did not address merger regulation effectively.[37]

The European Union's Merger Regulation serves as the "one-stop shop" for all mergers meeting certain requirements.[38] The primary test for assessing mergers in the European Union is whether the concentration "creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it."[39] This test is similar to the language of Section 7 of the Clayton Act. However, while the Clayton Act casts a narrower net by forbidding mergers that "tend to create a monopoly,"[40] the Merger Regulation casts a broader net by targeting the "dominant position."[41]

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34. *See* William M. Hannay, *Transnational Competition Law Aspects of Mergers and Acquisitions*, 20 NW. J. INT'L L. & BUS. 287, 288–89 (2000) (explaining that Articles 81 and 82 function to regulate competition for the EC much like sections 1 and 2 of the Sherman Act regulate competition for the U.S.); Romano Subiotto & Filippo Amato, *Reform of the European Competition Policy Concerning Vertical Restraints*, 69 ANTITRUST L.J. 147, 193 n.1 (2001) (asserting that Articles 81 and 82 of the EC Treaty are the similar counterparts to sections 1 and 2 of the Sherman Act); Georg Terhorst, *Reformation of the EC Competition Policy on Vertical Restraints*, 21 NW. J. INT'L L. & BUS. 343, 351 (2000) (stating that the broad language of Articles 81 and 82 of the EC Treaty parallels that of sections 1 and 2 of the Sherman Act).

35. 15 U.S.C. § 1; *see* EC Treaty, Art. 81 (describing the competition regulations applied to undertakings).

36. 15 U.S.C. § 2; *see* EC Treaty, Art. 82 (defining the actions that constitute an abuse under the competition rules).

37. *See* Council Regulation (EC) No. 1310/97 of 30 June 1997 Amending Regulation (EEC) No. 4064/89 on the Control of Concentrations between Undertakings, *Official Journal*, *available at* <http://europa.eu.int/eur-lex/en/lif/dat/1997/en_397R1310.html> (last visited Mar. 12, 2002) (stating that the amendment to the EC Regulation of 1989 was necessary to create a more efficient merger system); *see also* James H. Bergeron, *Antitrust Federalism in the European Union after the Modernization Initiative*, ANTITRUST BULL., Sept. 22, 2001, *available on* WESTLAW *at* 2001 WL 26618177 (claiming that the 1997 amendment was intended to control mergers by implementing a more uniform law). Mario Monti, *EU Commission Launches Debate on Merger Control*, Dec. 11, 2001, *available at* <http://www.eurunion.org/news/press/2001/2001094.htm> (last visited Mar. 12, 2002) (reporting that the Merger Regulation of 1989 was last amended in 1997); James H. Bergeron, *Antitrust Federalism in the European Union after the Modernization Initiative*, ANTITRUST BULL., Sept. 22, 2001, *available on* WESTLAW *at* 2001 WL 26618177 (claiming that the 1997 amendment was intended to control mergers by implementing a more uniform law).

38. *See* Thomas P. O'Toole, *Long Arm of the Law—European Merger Regulation and its Application to the Merger of Boeing & McDonnell Douglas*, 11 TRANSNAT'L LAW. 203, 216–17 (1998) (noting that the Merger Regulation controls all mergers and, consequently, promotes a unified market for the EC); Mario Siragusa, *Merger Control in the European Community*, 9 CONN. J. INT'L L. 535, 537–38 (1994) (asserting that the purpose of the Merger Regulation is to allow mergers to go through one regulatory agency rather than several agencies as had been past practice).

39. Regulation (EEC) No 4064/89 of 21 December 1989 on the Control of Concentrations Between Undertakings, OJ L 395, 30.12.1989, p.1; corrigendum OJ L 257, 21.9.1990, p.13, as last amended by Regulation (EC) No 1310/97, OJ L 180, 9.7.1997, p.1.

40. Clayton Antitrust Act, Pub. L. No. 63-212, 38 Stat. 730 (1914) codified as amended at 15 U.S.C. §§ 12–27, § 18 (1994).

41. Council Regulation (EEC) No. 4064/89 on the Control of Concentrations Between Undertakings, 1989 O.J. (L 395).

The EU Merger Regulation will apply to any undertaking or undertakings that have a "Community dimension."[42] A concentration has Community dimension when: "(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than ECU 5 billion; and (b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 250 million . . ."[43]

However, the European Union, unlike the United States, has no separate guidelines regarding foreign firms.[44] While the Merger Guidelines of the United States arguably provide more transparency to firms by using relatively objective factors like the Herfindahl-Hirshmann Index (HHI) and the product market, the only guidance the EU provides is the EU Merger Regulation.[45] The EU Merger Regulation also does not address comity, which is addressed by the U.S. in the DOJ International Guidelines.[46]

The EU Merger Regulation is very robust in its extraterritorial jurisdictional powers but the European Union informally agreed, in the Cooperation Agreement with the United States, to consider comity.[47] The Cooperation Agreement recognizes that "the world's economies are

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42. *Id*., art. 1.

43. *Id*., art. 1(2). In current dollar terms, the European Commission can exercise jurisdiction over all mergers whose combined revenue is $4.2 billion, $212 million of which must be within the Europe Union. *See* Michael Elliott, *How Jack Fell Down*, TIME, July 16, 2001, at 40.

44. *See* Sabrina Haake, *Antitrust in the United States and European Community: Toward a Bilateral Agreement,* 2. IND. INT'L & COMP. L. REV. 473, 510 (1992) (comparing the EEC Guidelines to the U.S. Merger Guidelines); *see also* Thomas A. Kauper, *Merger Control in the United States and the European Union: Some Observations,* 74 ST. JOHN'S L. REV. 305, 305 (2000) (discussing how the European Community's policy standards are much more restrictive than the standards under the U.S. Merger Guidelines); Mark A. Warner, *Efficiencies and Merger Review in Canada, the European Community and the United States: Implications for Convergence and Harmonization,* 26 VAND. J. TRANSNAT'L L. 1059, 1092 (1994) (discussing how the European system provides only for the internal market).

45. *See* Haake, *supra* note 44, at 510 (referring to the EEC Regulation as only EU legislation); *see also* Kauper, *supra* note 44, at 305 (discussing the Merger Regulation and control by the member states); Warner, *supra* note 44, at 1092 (commenting on the various articles of the Merger Regulation).

46. *See* Merger Guidelines, 49 Fed. Reg. 26, 823 (1984); *see also* Brian Peck, *Extraterritorial Application of Antitrust Laws and the U.S.–EU Dispute Over the Boeing and McDonnell Douglas Merger: From Comity to Conflict? An Argument for a Binding International Agreement on Antitrust Enforcement and Dispute Resolution,* 35 SAN DIEGO L. REV. 1163, 1185–86 (1998) (discussing the significance of the comity provision in the U.S. DOJ Guidelines); David Snyder, *Mergers and Acquisitions in the European Community and the United States: A Movement Toward a Uniform Enforcement Body?*, 29 LAW & POL'Y INT'L BUS. 115, 119–20 (1997) (analyzing how the comity test works).

47. *See* Allison J. Himelfarb, *The International Language of Convergence: Reviving Antitrust Dialogue Between the United States and the European Union with a Uniform Understanding of "Extraterritoriality,"* 17 U. PA. J. INT'L ECON. L. 909, 914 (1996) (noting that the cooperation agreement codifies the U.S. concept of comity); Sondra Roberto, *The Boeing/McDonnell Douglas Merger Review: A Serious Stretch of European Competition Powers*, 24 BROOK. J. INT'L L. 593, 619 (1998) (indicating that the agreement between the U.S. and EU contains a comity provision); Spencer Weber Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. REV. 343, 368 (1997) (explaining that the 1991 agreement was the first one to include the concept of comity).

becoming increasingly interrelated, and in particular that is true of the economies of the United States of America and the European Communities."[48]

Article VI of the Cooperation Agreement, admittedly a non-binding and legally unenforceable agreement, addresses the need for both regimes to avoid conflicts over enforcement activities.[49] Where it seems there may be a conflict between the enforcement activities of the United States and the European Commission, the Cooperation Agreement states:

> Parties will consider the following factors . . . (a) the relative significance to the anticompetitive activities involved of conduct within the enforcing Party's territory as compared to conduct within the other Party's territory; (b) the presence or absence of a purpose on the part of those engaged in the anticompetitive activities to affect consumers, suppliers, or competitors within the enforcing Party's territory; (c) the relative significance of the effects of the anticompetitive activities on the enforcing Party's interests as compared to the effects on the other Party's interests; (d) the existence or absence of reasonable expectations that would be furthered or defeated by the enforcement activities; (e) the degree of conflict or consistency between the enforcement activities and the other Party's laws or articulated economic policies; and (f) the extent to which enforcement activities of the other Party with respect to the same persons, including judgments or undertakings resulting from such activities, may be affected.[50]

## III. Despite the Express Informal Agreements to Consider Comity, if Neither Party Chooses to Do So, There Are No Legal Ramifications. There Has Been Convergence on a Significant Issue in Antitrust Common Law and Its Extraterritorial Jurisdiction, International Comity: *Wood Pulp and Hartford Fire.*

Despite American and European differences on many issues, one critical convergence in the laws is their positions on comity in the field of antitrust law.[51] Both legal regimes do not

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48. Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, Sept. 23, 1991, U.S.-E.C., 30 I.L.M. 1487 *reprinted in* 61 Antitrust & Trade Reg. Rep. (BNA) No. 1534, at 382–85 (Sept. 26, 1991). The Cooperation Agreement was reissued in 1995 after the French government successfully argued that the Commission had no authority to enter such an agreement. *See* France v. Commission, 5 C.M.L.R. 517 (1994).

49. *See* Himelfarb, *supra* note 47, at 950–52 (noting that both the U.S. and EU must make more efforts to increase the number of enforcement activities under Article VI); Peck, *supra* note 46, at 1188 (noting that Article VI requires each side to consider the interests of the other party during enforcement proceedings); Roberto, *supra* note 47, at 620 (explaining Article VI and the "Avoidance of Conflicts" provision).

50. Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, Sept. 23, 1991, U.S.-E.C., art. VI, 30 I.L.M. 1487, 1498-00 *reprinted in* 61 Antitrust & Trade Reg. Rep. (BNA) No. 1534, at 382–85 (Sept. 26, 1991).

51. *See* Roger P. Alford, *The Extraterritorial Application of Antitrust Laws: A Postscript on Hartford Fire Insurance Co. v. California*, 34 VA. J. INT'L L. 213, 226 (1993) (noting that there is a convergence of the application of U.S. and EU antitrust laws); Sara M. Biggers, Richard A. Mann & Barry S. Roberts, *Intellectual Property and Antitrust: A Comparison of Evolution in the European Union and United States*, 22 HAMLINE J. PUB. L. & POL'Y 209, 246 (1999) (noting that there is greater degree of convergence in antitrust policy between the U.S. and EU); Peck, *supra* note 46, at 1184 (stating the same).

favor applying the principles of comity in antitrust law.[52] The European Union was the first to move in the direction of not applying the principles of comity, most significantly in *Wood Pulp*.[53] The European Court of Justice unequivocally rejected international comity.[54] The U.S., on the other hand, applied the principles of comity in the antitrust area until 1993 when, in *Hartford Fire Insurance Co v. California*[55] *("Hartford Fire*"), the Supreme Court delivered a resounding victory for the proponents of the effects doctrine.[56] That doctrine holds that foreign conduct that is intended to result in "a substantial effect" in the U.S. is subject to antitrust laws.[57]

**a. Recently American Courts Have Moved to Shorten the Extraterritorial Reach of American Antitrust Laws by Taking the Balancing Approach: *Timberlane I* and *II*.**

In *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.* ("*Timberlane I*"),[58] the Court of Appeals for the Ninth Circuit qualified the expansive reach of the American antitrust laws over foreign conduct with the doctrine of international comity.[59] They noted that "nations have sometimes resented and protested, as excessive intrusions into their own spheres, broad assertions of authority by American courts."[60] As the court noted, when "it is evident that at some point the interests of the United States are too weak and the foreign harmony incentive for restraint too strong," extraterritorial jurisdiction would not be exercised by the court.[61]

The Court concluded that the effects test is incomplete because it fails to take other countries' interests into consideration.[62] Many factors other than just the "mechanical circumstances

52. *See* Alford, *supra* note 51, at 225–29 (discussing the different approaches to the application of comity); Roberto, *supra* note 47, at 618 (noting that both the U.S. and EU use comity on a limited basis in antitrust law); Peck, *supra* note 46, at 1184 (commenting that the role of comity in the U.S. is getting closer to the approach used by the EU, which only applies comity if there is a true conflict).

53. Case 89/85, Ahlstrom Osakeyhtio and others v. Commission, [1988] E.C.R. 5193 ("Wood Pulp").

54. *Id*., ¶ 22 ("As regards the argument relating to disregard of international comity, it suffices to observe that it amounts to calling in question the Community's jurisdiction to apply its competition rules to conduct such as that found to exist in this case and that, as such, that argument has already been rejected").

55. 509 U.S. 764 (1993).

56. *Hartford Fire*, 509 U.S. at 796 (holding that the alleged conduct of unlawful conspiracies do affect the insurance market in the U.S. and that this conduct, in fact, produced substantial effects); *see also* America Banana Co. v. United Fruit Co., 213 U.S. 347, 350 (1909) (holding that the Sherman Act is well-established and applies to foreign conduct that was meant to, and did, in fact, produce some substantial effect in the U.S.).

57. *Hartford Fire*, 509 U.S. at 796; *see also* United States v. Nippon Paper Indus. Co., 109 F.3d 1, 9 (1st Cir. 1997) (stating that the U.S. brought a criminal action against Nippon Paper, a Japanese corporation, alleging conspiracy to fix prices of facsimile paper sold in the U.S.); Candice Jones, David S. Lee and Adrian Shin, *Antitrust Violations*, 38 AM. CRIM L. REV. 431 (2001) (discussing that the effects doctrine provides that if foreign conduct intended to produce a substantial effect in the U.S., it is subject to federal antitrust laws).

58. 549 F.2d 597 (9th Cir. 1976).

59. *Id*. at 609.

60. *Id.*

61. *Id.*

62. *Id.* at 611–12.

of effect on commodity exports or imports" must be considered.[63] Specifically, the factors include:

> the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of businesses or corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the U.S., the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of effect, and the relative importance to the violations charged of conduct within the U.S. as compared with conduct abroad.[64]

The Court then continued by enunciating a tripartite test for the trial court to consider on remand:

> Does the alleged restraint affect or was it intended to affect the foreign commerce of the United States? Is it of such a type and magnitude so as to be cognizable as a violation of the Sherman Act? [And as] a matter of international comity and fairness should the extraterritorial jurisdiction of the United States be asserted to cover it?[65]

In *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.* ("*Timberlane II*"),[66] the Court of Appeals for the Ninth Circuit affirmed the district court decision to not exercise jurisdiction.[67] They also added the seven sub-factors discussed above to part three of the tri-partite test.[68]

#### b. Hartford Fire Insurance Company v. California

In *Hartford Fire*, it was alleged that London re-insurers conspired to affect the U.S. insurance market and that the conspiracy did have substantial effect.[69] The defendants argued, on appeal to the Supreme Court, that although the American courts had jurisdiction, they should

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63. *Id.* at 612.

64. *Id.*

65. *Id.* at 615.

66. 749 F.2d 1378 (9th Cir. 1984).

67. *Id.* at 1382.

68. *Id.* at 1384.

69. Hartford Fire Insurance Co. v. California, 509 U.S. 764, 770–71 (1993). Plaintiffs accused the defendants of engaging in "conspiracies . . . to force certain primary insurers . . . to change the terms of their . . . policies to conform with the policies the defendant insurers wanted to sell." *Id.*

decline to exercise extraterritorial jurisdiction under the principle of international comity.[70] The majority effectively declined to adopt *Timberlane I* and *II*.[71]

The Supreme Court, in a fractured decision, reiterated "that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."[72] The Court, in a five-to-four decision, also stunted the growth of international comity in the area of antitrust law.[73] It refused to apply international comity because there was no direct conflict between domestic and foreign law.[74] However, Justice Scalia, in his dissent, reflected the view of the several lower court precedents, discussed above, that have "tempered the extraterritorial application of the Sherman Act with considerations of 'international comity.'"[75]

According to Justice Scalia, in determining the extraterritorial reach of a statute, the courts must consider legislative or prescriptive jurisdiction, or "the authority of a state to make its laws applicable to persons or states," which is a separate issue from subject matter jurisdiction.[76] He argued that while American law has a presumption against extraterritoriality, precedent has established that the Sherman Act has overcome this presumption.[77] Thus, while American antitrust laws have extraterritorial reach, international law and "the respect sovereign nations afford each other by limiting the reach of their laws" should prevent the full exercise of that extraterritorial reach.[78]

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70. *Hartford Fire*, 509 U.S. at 769. The foreign defendants argued that, in the name of "international comity," the District Court was required "to refrain from exercising jurisdiction . . ." *Id.*

71. *Hartford Fire*, 509 U.S. at 817 (Scalia, J., dissenting). Justice Scalia noted that lower court decisions, such as *Timberlane*, "tempered the extraterritorial application of the Sherman Act with considerations of 'international comity.'" The majority chose to ignore this trend in their decision. *Id. See* Andrew C. Udin, *Slaying Goliath: The Extraterritorial Application of U.S. Antitrust Law to OPEC*, 50 AM. U.L. REV. 1321, 1345–46 (2001) (stating that the Supreme Court's decision in *Hartford Fire* represented a "departure" from the Ninth Circuit's *Timberlane* test). *But see* Meredith E.B. Bell and Elena Laskin, *Antitrust Violations*, 36 AM. CRIM. L. REV. 357, 396 n.153 (1999) (offering that the Supreme Court "did not pass on the merits of the *Timberlane* comity test" in the *Hartford Fire* decision).

72. *Hartford Fire*, 509 U.S. at 796.

73. *Id. at* 795–99. Part III of the decision, in which four justices concurred with Justice Souter, discusses the issue of comity in antitrust law. The Court ruled that there was no need to decide if jurisdiction was improper based on comity considerations because there was no direct conflict between American law and that of a foreign nation. *Id.*

74. *Id*. at 798. Justice Souter's opinion named two instances when there is a true conflict between domestic and foreign law: When the foreign law "requires [the defendants] to act in some fashion prohibited by the law of the United States" or when the defendants' "compliance with the laws of both countries is otherwise impossible." *Id*. at 799.

75. *Id*. at 817; *see* Timberlane Lumber Co. v. Bank of America, N.T. & S.A., 549 F.2d 597 (9th Cir. 1976); Timberlane Lumber Co. v. Bank of America, N.T. & S.A., 749 F.2d 1378 (9th Cir. 1984); Laker Airways Limited v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984).

76. *Hartford Fire*, 509 U.S. at 814.

77. *Id*. at 817.

78. *Id*.

Justice Scalia wrote that countries should not exercise jurisdiction when doing so is "unreasonable."[79] He discussed the factors of the Restatement (Third) of Foreign Relations Law of the United States.[80] Restatement (Third) section 403(1) lists several factors which should be considered. These factors include:

> The link of the activity to the territory of the regulating state, . . . the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, . . . the character of the activity to be regulated, . . . the existence of justified expectations that might be protected or hurt by the regulations, . . . the importance of the regulation to the international political, legal, or economic system, . . . the extent to which the regulation is consistent with the traditions of the international system, . . . the extent to which another state may have an interest in regulating the activity, . . . [and] the likelihood of conflict with regulation by another state.[81]

After applying these several factors, Justice Scalia found it unreasonable for the U.S. to exercise jurisdiction.[82]

Although the Court, per Justice Souter, smothered the growing fire of international comity considerations in the exercise of prescriptive jurisdiction, it was nevertheless a close call. First, three other justices joined Justice Scalia in his dissent. With the Court's composition to change in the future, Justice Scalia's dissent may become the rule. Consequently, the jurisdictional rule of reason may still prevail. Second, Justice Souter's opinion also did not unequivocally deny the legitimacy of applying prescriptive jurisdiction in antitrust law.[83] When there is true conflict between two countries having concurrent prescriptive jurisdiction, comity should be a consideration.[84]

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79. *Id.* at 821 (quoting RESTATEMENT (THIRD), FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1)).

80. *See* RESTATEMENT (THIRD), FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1).

81. *See id.*, § 403 (2) (a)–(h) (1987).

82. *Hartford Fire*, 509 U.S. at 819.

83. *Hartford Fire*, 509 U.S. at 796, n.22. "The parties do not question prescriptive jurisdiction . . . it is well established that Congress has exercised such jurisdiction under the Sherman Act." *Id. See* Lonny Sheinkopf Hoffman & Keith A. Rowley, *Forum Non Conveniens in Federal Statutory Cases*, 49 EMORY L.J. 1137, 1207 (2000) (stating that Justice Souter would use prescriptive law in cases where foreign law is directly opposed to U.S. law); *see also* Philip R. Trimble, *The Supreme Court and International Law: The Demise of Restatement Section 403*, 89 AM. J. INT'L L. 53, 57 (1995) (noting that Justice Souter would only limit the use of prescriptive jurisdiction when foreign law directly conflicts).

84. *See* Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. PA. L. REV. 469, 580 n.252 (2000) (maintaining that a focus on comity will result in more balanced and suitable application of prescriptive jurisdiction); *see also* Jeremy C. Bates, *Home Is Where the Heart Is: Forum Non Conveniens and Antitrust,* 2000 U. CHI. LEGAL F. 281, 312–15 (2000) (commenting that international antitrust enforcement should factor in comity because it implores nations to acknowledge and respect the interests of other nations); Steven R. Swanson, *The Vexatiousness of a Vexation Rule: International Comity and Antisuit Injunctions,* 30 GW J. INT'L L & ECON. 1, 10 (1996) (stating that comity considerations aid peaceful resolution of disputes by focusing on the interests of both nations and encouraging each nation to treat the other as it wished to be treated).

## IV. Extraterritorial Jurisdiction of the American Antitrust Laws As Applied Are More Restrained than that of the European Union in Application.

The U.S. authorities are far less likely than the European Union to assert extraterritorial antitrust jurisdiction. The effects test of the U.S. is a tougher one than that of the European Union's direct or indirect, and actual or potential, effects test.[85]

United States antitrust laws currently have tremendous extraterritorial reach, although this was not always the case.[86] In *American Banana Co. v. United Fruit Co.*,[87] the Supreme Court refused to extend the jurisdiction of the Sherman Act to acts that occurred outside the U.S.[88] Today, however, it is black letter law that a conspiracy to monopolize or restrain domestic or foreign commerce of the U.S. is not outside the scope of U.S. antitrust laws, even if the offending conduct took place outside the U.S.[89] Since 1945, Section 1 of the Sherman Act has

85. *See* Il Hyung Jung, *A Comparative Study on the Question of Extraterritorial Application of the Competition Law,* 18 DICK. J. INT'L L. 305, 321–23 (2000) (remarking that the European Court of Justice utilizes an alternative to the effects test, focusing on the "place where the agreement is implemented"); *see also* Laura E. Keegan, *The 1991 U.S./EC Competition Agreement: A Glimpse of the Future Through the United States v. Microsoft Corp. Window,* 2 J. INT'L LEGAL STUD. 149, 156–58 (1996) (discussing that although the Commission of the European Communities has adopted an effects test similar to that of the United States, the European Court of Justice has expanded its jurisdiction only to the place of implementation); Spencer Weber Waller, *The Decline of the Nation State and Its Effect on Constitutional and International Economic Law: Contribution: National Laws and International Markets: Strategies of Cooperation and Harmonization in the Enforcement of Competition Law,* 18 CARDOZO L. REV. 1111, 1120 (1996) (commenting that the European Union has prudently expanded its competition law and jurisdiction, refusing to adopt the expansive effects test relied on by the United States).

86. *See* Anne-Marie Burley, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine,* 92 COLUM. L. REV. 1907, 1928–29 (1992) (recalling that in the 1897 decision in *Underhill v. Hernandez,* the Supreme Court expounded the principle that sovereign states are independent and not subject to the jurisdiction or judgment of other sovereigns); *see also* Michael Wallace Gordon, *United States Extraterritorial Subject Matter Jurisdiction in Securities Fraud Litigation,* 10 FLA. J. INT'L L. 487, 495–96 (1996) (stating that the Sherman Antitrust Act did not extend jurisdiction to any foreign conduct that had effects in the U.S., but only to territory within the U.S.); Edward L. Rholl, *Inconsistent Application of the Extraterritorial Provisions of the Sherman Act: A Judicial Response Based Upon the Much Maligned "Effects" Test,* 73 MARQ. L. REV. 435, 439–41 (1990) (providing that after the restrictive view of *American Banana*, courts expanded their application of extraterritorial jurisdiction to activities that had an effect on U.S. commerce, even if the activities were conducted outside the U.S.).

87. 213 U.S. 347 (1909).

88. *Id*. at 357.

89. *See* Hartford Fire Insurance Co. v. California, 509 U.S. 764, 796 (1993) (holding that the Sherman Act applied to foreign conspiracies to affect the insurance market in the U.S. since that conduct was meant to and did produce a substantial effect in the U.S.); *see also* Continental Ore Co., et al. v. Union Carbide & Carbon Corp., et al., 370 U.S. 690, 704 (1962) (concluding that "a conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries"). *See generally* Udin, *supra* note 71, at 1324 (discussing that U.S. antitrust laws ban trade restraints, price discrimination and other anti-competitive controls which force competitors out of business or raise prices to such levels as to benefit the perpetrator of such violations).

applied to those agreements that have unlawful consequences in the U.S.[90] In *United States v. Aluminum Company of America*,[91] ("Alcoa") the court enunciated the "effects" test.[92] If the agreement is intended to affect imports or exports and the agreement does have such an effect, the U.S. will have jurisdiction.[93]

In 1962, the Supreme Court again reinforced the *Alcoa* decision, stating that even if "part of the conduct complained of occurs in foreign countries" the Sherman Act would apply to the offending parties.[94] The European Union espouses similar views, but arguably differences between the two regimes will continue to be a source of friction.[95]

The EU has a somewhat similar stance on extraterritorial jurisdiction in the area of competition law.[96] In *Wood Pulp*, the European Court of Justice held that the European Commission was competent to decide whether or not an agreement made by non-nationals outside the common market and implemented within the common market had prohibited effects in the common market.[97] European law requires that there be a prohibited effect, but where as American common law requires intent, the European Court of Justice requires none.[98] "The decisive factor" in deciding whether there was a violation of common market competition law is where the agreement, decision or concerted practice was "implemented."[99] Also, the European Court

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90. 15 U.S.C. § 1 ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal"); *see* Jeffrey I. Zuckerman, *Decision: French Case Note*, 86 AM. J. INT'L L. 561, 563 (1992) (explaining that section 1 of the Sherman Act imposes a reasonableness standard upon trade agreements); *see also* Frank J. Schweitzer, *Recent Development: Flash Of The Titans: A Picture of Section 301 in the Dispute Between Kodak and Fuji and a View Toward Dismantling Anticompetitive Practices in the Japanese Distribution System*, 11 AM. U. J. INT'L L. & POL'Y 847, 867 (1996) (indicating that Section 1 of the Sherman Act prohibits agreements that restrict trade).

91. 148 F.2d 416 (2d Cir. 1945).

92. *Id.* at 444.

93. *Id*.

94. Continental Ore Co., et al. v. Union Carbide & Carbon Corp., et al., 370 U.S. 690, 704 (1962).

95. *See* Joseph P. Griffin, *Jurisdiction and Enforcement: Foreign Governmental Reactions to U.S. Assertions of Extraterritorial Jurisdiction*, 6 GEO. MASON L. REV. 505, 512 (1998) (indicating that the European Court of Justice has used the "implementation" test which is somewhat different from the U.S.'s "effects" test); *see also* Aubry D. Smith, *Bringing Down Private Trade Barriers—An Assessment of the United States' Unilateral Options: Section 301 of the 1974 Trade Act and Extraterritorial Application of U.S. Antitrust Law*, 16 MICH. J. INT'L L. 241, 290 (1994) (indicating that the European Union follows the "effects doctrine" of the *Alcoa*; Andres Rueda, *Price-Fixing at the Pump—Is the Opec Oil Conspiracy Beyond the Reach of the Sherman Act?*, 24 HOUS. J. INT'L L. 1, 76 (2001) (noting the European Court of Justice's use of *Alcoa*'s "effects doctrine").

96. *See, e.g.*, Case 6/72, Europemballage Corp. and Continental Can Co. v. Commission, [1973] E.C.R. 215 ¶ 16 (holding that Community law applies to agreements which influence market conditions within the common market) ("Continental Can").

97. Case 89/85, Ahlstrom Osakeyhtio and others v. Commission, [1988] E.C.R. 5193. Contrast this rule with the "direct, substantial, and reasonably foreseeable effect" requirement of the Foreign Trade Antitrust Improvement Act and the common law effects test. 15 U.S.C. § 6a.

98. *Id*; *see also* Andreas F. Lowenfeld, *Conflict, Balancing of Interests and the Exercise of Jurisdiction to Prescribe: Reflections on the Insurance Antitrust Case*, 89 AM. J. INT'L L. 42, 47 (1995) (indicating that U.S. law requires intent, contrary to the European Court of Justice); Griffin, *supra* note 95, at 513 (detailing that different possible outcomes exist under the effects and implementation tests).

99. Case 89/85, Ahlstrom Osakeyhtio v. Commission, [1988] E.C.R. 5193.

of Justice will find violations of Articles 81 and 82 if the conduct has prohibited effects on the common market, direct or indirect, actual or potential.[100] The European Court of Justice also does not require substantial effects but rather appreciable effects.[101] An appreciable standard is a lower threshold test than a substantial standard.[102]

## V. The European Commission Had Prescriptive Jurisdiction and Would Pass the More Stringent American Effects Test.

The European Commission's prescriptive jurisdiction would pass the implements test as well as the more stringent American effects test.[103] GE employs 85,000 people in Europe and collected over $25 billion in revenue from European markets in 2000.[104] Honeywell employs over 25,000 people, has over 200 offices, and had sales of $6.4 billion in Europe.[105] A successful merger may have meant streamlining of the company's work force, changes in prices for

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100. Case 61/80, Cooperatieve Stremsel-en Kleurselfabriek v. Commission [1981] E.C.R. 851 ¶14.

101. Commission Notice on Agreements of Minor Importance, 1997 O.J. (C 372) 13.

102. *See id; see also Hartford Fire*, 113 S. Ct. at 2909 (discussing the application of the substantial effects test); Griffin, *supra* note 95, at 380 (indicating that the appreciable effects test may apply where the substantial effects test will not).

103. *See* Himelfarb, *supra* note 47, at 926–27 (noting the European Commission's support of the effects test); *see also* Antroy A. Arreola, *Who's Isolating Whom?: Title III of the Helms-Burton Act and Compliance with International Law*, 20 HOUS. J. INT'L L. 353, 364 (1998) (discussing the use of an effects test in the European Community); Roberto, *supra* note 47, at 614 (discussing the EC's use of the effects test).

104. *See* Michael Elliott, *How Jack Fell Down*, TIME, July 16, 2001, at 40 (stating that GE has 85,000 employees and receives $25 billion dollars in revenue from Europe); *GE and Honeywell Submit Final Undertakings to European Commission*, BUSINESS WIRE, June 14, 2001, *available at* LEXIS (quoting GE's President and Chairman–elect as saying, "[w]e're thrilled with the performance of GE's 85,000 employees in Europe"); *see also* Kevin Done, et al., *Going Home Alone: Business and Political Leaders Appear Keen to Ensure General Electric's Stalled Takeover of Honeywell Does Not Widen Differences over Antitrust Policy*, FIN. TIMES (London), June 18, 2001, at 18, *available at* LEXIS (stating "GE employs 85,000 people in Europe").

105. *See* Bruce Barnard, *Competition Questions Linger*, BELL & HOWELL INFORMATION AND LEARNING, Sept. 2001, at 4 (stating that Honeywell's European operations, which include the Middle East and Africa, employs 25,000 people); Kevin Done, et al., *Going Home Alone: Business and Political Leaders Appear Keen to Ensure General Electric's Stalled Takeover of Honeywell Does Not Widen Differences over Antitrust Policy*, FIN. TIMES (London), June 18, 2001, at 18 (stating that Honeywell's European operations, which include the Middle East and Africa, employs 25,000 people); Tony Sacks, *Honeywell and AlliedSignal Unite to Form GBP 16 BN Giant*, ELECTRICAL REV., June 22, 1999, *available at* 1999 WL 12430494 (noting that Honeywell employed approximately 2,900 people in the UK and 13,000 employees in Europe before its merger with AlliedSignal).

European consumers, and other significant effects.[106] The merger between GE and Honeywell would have had substantial, foreseeable and direct effects on the European Community.[107]

## VI. Even Though the European Commission Had Prescriptive Jurisdiction, the European Commission's Decision to Block the GE-Honeywell Merger Was Unreasonable.

As previously noted, this was the first time the European Commission blocked an all-American merger approved by the United States' enforcement authorities.[108] Critics of Mario

106. *See Text of Commission's Statement,* THE ARK. DEMOCRAT-GAZETTE, July 4, 2001, at D6, (discussing that the merger would eliminate competition and adversely affect product quality, service and consumer's prices); *see also* Gary Becker, *What U.S. Courts Could Teach Europe's TrustBusters*, BUS.WK., Aug. 6, 2001, at 20 (stating that the European commission vetoed the merger largely on the grounds that the merged company would be much stronger than its competitors in aviation equipment); John Reid Blackwell, *Local Managers Concentrate on Costs, New Markets After Merger with GE Fails,* THE RICHMOND TIMES-DISPATCH, Dec. 3, 2001, at D14 (discussing the concern over competition in Europe's aerospace products market because of the potential merger between Honeywell and GE).

107. *See* Ilene Knable Gotts & Phillip A. Proger, *Multijurisdictional Review: A Societal Cost That Must Be Streamlined,* M&A LAWYER, Oct. 2001, at 7 (discussing that the merger would create horizontal overlaps as well as vertical and conglomerate effects); *see also News: $43 Billion Merger Collapse May Force GE Chief's Retirement*, SUN. BUS. POST, July 8, 2001, *available at* LEXIS (noting that the merger between GE and Honeywell would have led to higher prices for airlines because it would have reduced competition in the aerospace industry); Carol J. Williams, *U.S. European Arbiters Differ on Antitrust Matters; Mergers: Honeywell, GE Discover that Global Views Often are Obscured by Issues Closer to Home*, L.A. TIMES, June 27, 2001, at 1 (discussing that GE's main competitors are predominantly European companies that may be driven out of business with the merger).

108. *See* Steven Pearlstein, *Antitrust Enforcement is Alive and Well*, WASH. POST, July 3, 2001, at A1 (discussing the intent of the European Commission to block the merger of GE and Honeywell, despite the approval by the U.S.); *see also Mergers and Acquisition Markets Saw Cataclysmic Fall from Grace During the Year*, FIN. NEWS, Jan. 7, 2001, *available at* LEXIS (stating that the GE-Honeywell merger was blocked by the European Commission despite being approved by the U.S. and several other countries); *Europe's Fearless Diplomat,* ECONOMIST, July 7, 2001, *available at* LEXIS (stating that the European Commission blocked the merger of GE and Honeywell on July 3rd, 2001).

Monti said the Commissioner's motives were political.[109] Whether that is partly or wholly true is difficult to discern.[110]

**a. The European Commission's Decision Was in True Conflict with American Antitrust Law and Would not Withstand Judicial Scrutiny under the *Hartford Fire* Majority Rule.**

In *Hartford Fire*, Justice Souter discussed two instances where there would be a true conflict—when the foreign law "requires [the defendants] to act in some fashion prohibited by the law of the United States" or when the defendants' "compliance with the laws of both countries is otherwise impossible."[111] Certainly, the U.S. did not require GE to merge with Honeywell. However, true conflict can also occur when compliance with the two regimes that have concurrent prescriptive jurisdiction is impossible.[112] The GE-Honeywell merger was in compliance with the American enforcement authorities, as they cleared the merger.[113] The Department of

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109. *See* Francesco Guerrera, *How "Dominance" Became Europe's Dirty Word in Takeovers*, FIN. TIMES, Oct. 4, 2001, at 27 (discussing how Mario Monti blocked the merger of GE and Honeywell, despite tremendous pressure from the U.S.); *see also* Emma Kelly, *Honeywell Resets on Core Business*, FLIGHT INT'L, July 10, 2001, at 20 (indicating that Mario Monti was criticized for his decision to block the merger of GE and Honeywell); *Monti Braves the Catcalls*, ECONOMIST, Dec. 15, 2001, *available at* LEXIS (discussing criticism Mario Monti received for blocking the merger of GE-Honeywell as well as the power he has to block other potential mergers).

110. American antitrust laws do not punish firms that have gained dominance through "superior skill, superior products, natural advantages, economic or technological efficiency, low margins of profit maintained permanently . . ." United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 342 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954). In contrast, the European Court of Justice often criticizes firms for their competitive advantage. For example, in United Brands v. Commission, the ECJ remarked, "In the field of technological knowledge and as a result of continual research UBC keeps improving the productivity and yield of its plantation by improving the draining system. . . . It has perfected new ripening methods." 1 C.M.L.R. 429, ¶ 129 (1978). There the ECJ found a violation of Art. 82. *See also* Michelin v. Commission, 1 C.M.L.R. 282, ¶ 55 (1985) (ECJ remarked on Michelin having "the lead . . . in the matters of investment and research and the special extent of its range of its products" and there the ECJ also found an Art. 82 violation); *see also* Hoffmann-la Roche v. Commission, 3 C.M.L.R. 211, ¶ 48 (1979); AKZO Chemie BV v. Commission, 5 C.M.L.R. 215, 60 (1993). This criticism of the use of competitive advantage is evident in the GE-Honeywell opinion. The Commission criticized GE's market capitalization; it stated that if GE Capital were an independent company it would rank within the top twenty of the Fortune 500 largest companies. Case No. COMP/M.2220-General Electric/Honeywell, ¶ 107, July 3, 2001.

111. 509 U.S. at 799.

112. *See* D.C. Denison, *Super Mario EU Official, Fresh from Felling GE's Honeywell Bid, Looms as Key for HP-Compaq*, BOSTON GLOBE, Sept. 9, 2001, at G1 (discussing the new dual jurisdiction that exists between the European Commission and the Department of Justice that is needed to approve mergers); *see also Mergers and Acquisition Markets Saw Cataclysmic Fall from Grace During the Year*, FIN. NEWS, Jan. 7, 2002, *available at* LEXIS (noting the blockage of the GE-Honeywell merger by the European Commission, despite the approval by the U.S. and other countries). *See generally* Peter Spiegel, *US Calls For More Antitrust Agreement With Europe*, FIN. TIMES (London), Oct. 26, 2001, at 11 (analyzing the differences and conflicts that exist between the U.S. and the European Commission in the area of mergers and antitrust law).

113. *See* Anna Maria Virzi, *Why GE-Honeywell Merger Will Fly, available at* <http://www.forbes.com/2001/06/15/0615honeywell.html> (last visited on Mar. 17, 2002) (noting that the merger "was readily endorsed by U.S. regulators"); *see also Failed GE-Honeywell Merger Shows How Globalization Can Be Slowed, available at* <http://globalization.about.com/library/weekly/aa070901a.htm> (last visited on Mar. 17, 2002) (stating that the merger has been endorsed by the American authorities).

Justice has criticized the EC decision as flawed on the merits.[114] Nonetheless, the European Commission still blocked the merger.

**b. The Decision Would Also Fail to Pass the Jurisdictional Rule of Reason.**

The European Commission's decision would certainly be unreasonable under the *Timberlane* test and Justice Scalia's dissent in *Hartford Fire*. Certainly, the EC decision was viewed as an excessive intrusion into a U.S. merger.[115] The decision conflicted greatly with American economic policies and created great disharmony as evidenced by the outcry of American politicians and the antitrust enforcement authorities.[116] Additionally, the EU did not show the U.S. "the respect sovereign nations should afford each other." [117]

**c. The European Commission's Decision Did not Take into Account Comity Factors in Art. VI of Their Cooperation Agreement With the United States.**

The Cooperation Agreement between the U.S. and the European Union was entered into by the two regimes "to promote cooperation and coordination and lessen the possibility or impact of differences between the Parties in the application of their competition laws."[118] Under this Cooperation Agreement, the enforcement authorities will exchange information and try to coordinate their antirust and competition laws.[119]

The six factors to be considered, as listed in Article VI of the Cooperation Agreement, include "the degree of conflict . . . between the enforcement activities and the other Party's laws or articulated economic policies,"[120] and "the extent to which enforcement activities of the

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114. *See* Andrew Hill & Peter Spiegel, *Welch's Tough Style "May have Doomed" Honeywell Bid*, FIN. TIMES, Oct. 18, 2001, at 1 (noting that the Department of Justice was critical of the EC's decision); *GE-Honeywell: Publication of the European Commission Decision*, *available at* <http://www.crowell.com/worddocs/European/CommissionDecision.DOC> (last visited on Mar. 17, 2002) (acknowledging that the decision of EC was highly criticized by the Department of Justice's Antitrust Division); *see also* Andrew Hill & Peter Spiegel, *Senator Attacks EU Over GE Deal*, FIN. TIMES (London), June 22, 2001, at 1 (stating that the merger was approved by the U.S. Department of Justice).

115. *See GE and Honeywell Fail to Tie the Knot*, *available at* <http://news.com.com/2009-1017-269583.html?legacy=cnet> (last visited on Mar. 17, 2002) (exhibiting U.S. Senators' dissatisfaction with EC's decision to block the merger). *See generally* Peter Ford, *EU Is Blocking Major US Merger*, *available at* <http://www.csmonitor.com/durable/2001/06/21/text/p1s1.html> (last visited on Mar. 17, 2002) (providing a general explanation on why European organizations should have any say as to U.S. mergers).

116. *See* Andrew Hill & Peter Spiegel, *Welch Blamed for Honeywell Debacle*, FIN. TIMES (London), Oct 18, 2001, at 25 (citing the criticism of the EC's decision by the Justice Department's head of international antitrust enforcement, William Kolasky); *see also* Andrew Hill & Peter Spiegel, *Senator Attacks EU Over GE Deal*, FIN. TIMES (London), June 22, 2001, at 1 (noting that "Ernest Hollings, the powerful chairman of the Senate commerce committee . . . accused the European Commission of engaging in protectionism by moving to block General Electric's $44bn takeover of Honeywell, the industrial group"). *See generally* Kevin Done, Deborah Hargreaves, Andrew Hill & Peter Spiegel, *Dispute Over GE Takeover Deepens*, FIN. TIMES, June 19, 2001, at 1 (noting that the European Commission's decision prompted criticism from a number of U.S. officials).

117. *Hartford Fire*, 509 U.S. at 817.

118. Cooperation Agreement, 1995 O.J. (L 095) 47, art. I.

119. Cooperation Agreement, 1995 O.J. (L 095) 47, art. III(3).

120. Cooperation Agreement, 1995 O.J. (L 095) 47, art. VI(3)(e).

other Party with respect to the same persons . . . may be affected."[121] These factors are very relevant to the GE-Honeywell merger. While there is no obligation to apply these factors, they should have been considered in the interest of harmony.

## Conclusion

One major lesson to be learned from the GE-Honeywell merger is that American businesses must be more concerned with the European Commission's role in competition law enforcement. It is apparent that the Commission disfavors dominant firms and monopolies more so than do the American authorities. A critic of the decision says that the European Commission's decision "was a backdoor effort to protect the European aerospace industry from American competition."[122] Regardless of whether that argument is true, or even partly true, the past case law of the European Commission portends the GE-Honeywell decision. The European Union clearly disfavors dominant firms, and its economic policies differ from American policies.[123]

American businesses may also learn that what works on this side of the Atlantic may not work on the other side. That is, the European Commission disfavors the adversarial process.[124] American businesses are accustomed to fighting protracted and vigorous battles with the American antitrust enforcement authorities that will likely hurt American businesses.[125] Indeed, Jack

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121. Cooperation Agreement, 1995 O.J. (L 095) 47, art. VI(3)(f).

122. Steven Pearlstein, *EU Rejection Shows Divergence of World's Rules*, WASH. POST, July 4, 2001, at E1.

123. *See* Steven Pearlstein, *EU Rejection Shows Divergence of World's Rules*, WASH. POST, July 4, 2001, at E1 (showing that "[t]he essence of the difference between the [European Union and American economic policies] is that the aim of the European law is to protect competition—and at times, threatened competitors—while U.S. law focuses more directly on protecting consumers"). *See generally* Rob Lever, *US, EU, Headed for Virtual Trade War Over Online VAT Tax,* AGENCE FRANCE PRESSE, Feb. 15, 2002, *available at* LEXIS (explaining that the latest tax policies proposed by the European Union are disfavored by the U.S.); Grace Sung, *EU Makes Further Moves to Engage North Korea*, STRAITS TIMES (Singapore), Mar. 9, 2002, *available at* LEXIS (providing an example which illustrates that the European Union often adapts economic policies that are clearly disfavored by the U.S.).

124. *See* Francesco Guerrera & Birgit Jennen, *Commission May Change Takeover Regulations: Monti Sets Out Plan Aimed at Aligning US and European Anti-Trust Rules*, FIN. TIMES (London), Dec. 6, 2001, at 1 (commenting that GE offered too few concessions too late in the negotiation process for the merger to be approved in the European Community). *See generally* Francesco Guerrera & Juliana Ratner, *EU Decision Changes Attitudes*, FIN. TIMES (London), Sept. 13, 2001, at 3 (noting that receiving American approval for a merger will not automatically facilitate a similar European approval); Andrew Hill, *GE, Honeywell Ask Brussels to Listen to Customers*, FIN. TIMES (London), May 25, 2001, at 1 (commenting on the different approaches the U.S. and the European Community apply when investigating a possible merger).

125. *See* Jeffrey A. Miller, *The Boeing/McDonnell Douglas Merger: The European Commission's Costly Failure to Properly Enforce the Merger Regulation,* 22 MD. J. INT'L L. & TRADE 359, 362–63 (1998) (noting that the European Union Commission and the Federal Trade Commission have differed in the past concerning the possible formation of a monopoly); *see also* Swaine, supra note 8, at 739–43 (noting the discrepancy between American and International antitrust regulations). *See generally* Jack L. Goldsmith, *The Internet and the Legitimacy of Remote Cross-Border Searches*, 2001 U. CHI. LEGAL F. 103, 109–10 (2001) (addressing the significant influence foreign nations have over domestic corporations).

Welch's aggressive style, which succeeded here in the United States, may have hurt the negotiations with the Commission.[126]

Finally, the GE-Honeywell decision shows that the current regulatory mechanism is fraught with problems. While American and European Union authorities can more easily exercise jurisdiction than in the past, because companies are multinational, their standards often diverge. Clear differences in the standards of what constitutes a dominant position and an abuse of a dominant position or monopoly power exist between the two legal regimes. The Cooperation Agreement is ineffective in addressing these significant differences.

Perhaps the best solution would be for the U.S., the European Union and other countries to form a binding agreement on antitrust enforcement that harmonizes standards. However, this would be a huge challenge, not only because of different standards, but because many countries have no antitrust laws, or do not enforce them.

If the European Commission continues to make decisions like this one, where American antitrust law enforcement authorities and economic policies are diametrically opposed to the European Union, the United States should consider backing out of the Cooperation Agreement.[127] This is admittedly a very radical proposition and the European Union would still be able to exercise jurisdiction, but it would make a clear statement to the European Union that American businesses are not willing to sacrifice innovation, efficiency and competition. The best option would be for the two legal regimes to cooperate in enforcing their laws, but if cooperation means sacrificing American business goals and economic policies, the U.S. should walk away from the Cooperation Agreement. The U.S. became, and remains, the leader of international business because it adheres to the tenets of American business—competition, innovation and perseverance. The application of European Union competition laws appear overly protectionist, or to maintain the status quo. However, the EC, with or without the Cooperation Agreement, will be able to exercise jurisdiction because of the effects/implements doctrine and the EU Merger Regulation.

Also, the political muscle that can be exercised by the U.S. legislative and executive branches should not be forgotten. When dealing with foreign legal regimes, politics will inevitably play a prominent role. Perhaps the U.S. Congress may take retaliatory measures while keeping within the bounds of international legal obligations such as the GATT and WTO Agreements. Congress may place countervailing duties on goods, such as the heavily subsidized agricultural products from the EU, within the guidelines of the GATT. Since the European Union is the largest trading partner of the U.S., there remains any number of measures that could be taken. Hopefully, the U.S. will not have to resort to such measures because the EU, as well as the U.S., will exercise comity in their respective antitrust enforcement policies.

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126. *See* Andrew Hill & Peter Spiegel, *Welch's Tough Style "May have Doomed" Honeywell Bid*, FIN. TIMES, Oct. 18, 2001, at 1; Andrew Hill and Peter Spiegel, *Welch Blamed For Honeywell Debacle*, FIN. TIMES (London), Oct. 18, 2001, at 25 (citing that Jack Welch's negotiation tactics were partially responsible for the failure of the Honeywell takeover).

127. Currently the European Commission is investigating Microsoft and Intel as well as other American companies. *See* Michael Elliott, *How Jack Fell Down*, TIME, July 16, 2001, at 40.

# *Yahoo!, Inc. v. La Ligue Contre le Racisme et l'Antisémitisme*

169 F. Supp. 2d 1181 (N.D. Cal. 2001)

**The enforcement of a French court order regulating the speech of a United States resident within the U.S., on the basis that such speech can be accessed by Internet users in France, is inconsistent with, and thus violates, the Constitution and laws of the U.S.**

In *Yahoo!, Inc. v. La Ligue Contre le Racisme et l'Antisémitisme (Yahoo!)*,[1] the court held that it must and will apply the Constitution and laws of the United States in deciding which law to apply when information accessed over the Internet transcends international borders[2] and violates another country's laws.[3]

Defendants La Ligue Contre le Racisme et l'Antisémitisme (LICRA) and l'Union des Etudiants Juifs de France were non-profit organizations comprising French citizens devoted to eliminating anti-Semitism.[4] Yahoo!, Inc. ("Yahoo!") was an Internet service provider organized under the laws of Delaware with its principal place of business in Santa Clara, California, USA.[5] Yahoo! provided services through two distinct Uniform Resource Locators (URL). Those services ending in the suffix ".com" targeted users who were residents of and operated under the laws of the United States.[6] Yahoo! also had subsidiary corporations that operated in regional locations such as Yahoo! France (ending in the suffix ".fr"), which operated in the local region's primary language and under the local laws.[7]

To enable people all over the world to interact, Yahoo! offered various means of Internet communication, including a search engine, auction sites, personal Web page hostings, shopping services, e-mail, as well as an assortment of interactive clubs.[8] At issue in this case was the Yahoo! auction site, which allowed users to advertise an item for sale and solicit bids from anyone using the Internet around the world.[9] Yahoo! did not regulate the content of the speech that is posted on any of its sites, thus allowing users to post matter that may be considered offensive.[10] The contentious items up for bid in this case included Adolf Hitler's *Mein Kampf*, *The Protocols of the Elders of Zion* and alleged evidence that gas chambers never existed during the Holocaust.[11] Because these items were accessible to any French citizen either on Yahoo.com

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1. 169 F. Supp. 2d 1181 (N.D. Cal. 2001).
2. *Id*. at 1186–87.
3. *Id.* at 1184.
4. *Id*. at 1183–84 (noting that to eliminate anti-Semitism, French law bans the sale of Nazi-related goods).
5. *Id*.
6. *Id.*
7. *Id.*
8. *Id.* at 1183–84.
9. *Id*. at 1184.
10. *Id.*
11. *Id*.

directly or through the regional link Yahoo.fr,[12] the auction sites violated Section R645-1 of the French Criminal Code, which prohibits the display of Nazi propaganda and artifacts for sale.[13] The French court entered an order against Yahoo! which mandated compliance by July 2000.[14]

Plaintiff Yahoo! subsequently complied with part of the order and posted the requisite warnings on the Yahoo.fr site,[15] but asked the French court to reconsider that aspect of its order relating to the Yahoo.com site, because compliance with it would have been "technologically impossible."[16] To comply with the French order, Yahoo! would have had to find a way to block French citizens from gaining access to the ".com" site and viewing the materials that would violate the French law, but it lacked the technology to do so.[17] The only other option that would have achieved the results required under the order was to have an outright ban on all Nazi-related material on the Yahoo.com site.[18] Yahoo! claimed that having an outright ban would have impermissibly violated its rights granted to it under the First Amendment of the United States Constitution.[19] Therefore, Yahoo! sought a declaratory judgment that the French court's orders were not enforceable under the laws of the United States.[20] In particular, Yahoo! claimed that the French court order violated its First Amendment rights by impermissibly regulating the viewpoint of the speaker.[21]

The First Amendment to the United States Constitution protects the freedoms of press and speech,[22] and this protection applies to the states via the Fourteenth Amendment.[23] When analyzing speech, it is important to consider the forum in which the speech is made. When

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12. *Id.*

13. *Id.*

14. *Id.* at 1181. The order required Yahoo! to:

> (1) eliminate French citizens' access to any material on the Yahoo.com auction site that offers for sale any Nazi objects, relics, insignia, emblems, and flags; (2) eliminate French citizens' access to web pages on Yahoo.com displaying text, extracts, or quotations from *Mein Kampf* and *Protocols of the Elders of Zion*; (3) post a warning to French citizens on Yahoo.fr that any search through Yahoo.com may lead to sites containing material prohibited by Section R645-1 of the French Criminal Code, and that such viewing of the prohibited material may result in legal action against the Internet user; and (4) remove from all browser directories accessible in the French Republic Index headings entitled "negationists" and from all hypertext links the equation of "negationists" under the heading "Holocaust."

*Id.*

15. *Id.* at 1185.

16. *Id.*

17. *Id.*

18. *Id.* at 1186.

19. *Id.*

20. *Id.*

21. *Id.* at 1186–87 (noting that it is better to allow offensive viewpoints than to permit governmental regulation upon the speaker).

22. U.S. CONST. amend. I (stating, in pertinent part, that Congress shall make no law abridging the freedom of speech or press).

23. *See* Mills v. Alabama, 384 U.S. 214, 218 (1966) (stating that the First Amendment applies to the states through the Fourteenth Amendment); Near v. Minnesota, 283 U.S. 697, 707 (1931) (explaining that an individual's liberty of speech and of press are safeguarded from invasion by the states by the Fourteenth Amendment).

speech takes place in a traditional public forum,[24] any regulation of its content is presumptively invalid.[25] The presumption can be rebutted only if the benefit from the regulation is clearly outweighed by the social interest involved.[26] As such, regulation of the traditional forum receives the highest form of scrutiny when the court is deciding on First Amendment issues.[27] On the other hand, if the speech is made within a non-public forum,[28] content-based discrimination is allowed as long as it is viewpoint-neutral.[29] In either case, an issue that is raised is speech involving offensive language.[30] Considering this, the Supreme Court has held that all speech, even if considered offensive to some in society, deserves protection.[31] The issue in this case involved offensive viewpoints "spoken" over the Internet.[32]

In analyzing the different mediums used for making speeches, the Supreme Court has ruled that the government can regulate broadcast radio and television without violating the First Amendment,[33] but it is restricted from regulating cable television.[34] The Internet, on the other hand, is "a unique and wholly new medium."[35] As such, fitting it into one of the already interpreted mediums with the subsequent level of regulation allowed has become a topic of controversy.[36]

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24. *See* Hill v. Colorado, 530 U.S. 703, 715 (2000) (noting that public streets and sidewalks are quintessential public forums where speech is protected by the First Amendment); Jeffrey Evans Stake, *Are We Buyers or Hosts? A Memetic Approach to the First Amendment*, 52 ALA. L. REV. 1213, 1247 (2001) (noting that parks, sidewalks and streets are considered traditional public forums); Byron v. Olson, Note, *Rust in the Laboratory: When Science is Censored*, 58 ALB. L. REV. 299, 314 (1994) (noting that parks and universities are considered traditional public forums).

25. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (explaining that the First Amendment usually does not allow the government to regulate speech based on the content of the speech) (citing Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 115 (1991)).

26. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (noting that the right of free speech is not absolute and does not apply if the speech is obscene, defamatory or involves fighting words); *see also* Widmar v. Vincent, 454 U.S. 263, 270 (1981) (noting that the state must have a compelling interest to enforce the regulation in a public forum).

27. *See* Carey v. Brown, 447 U.S. 455, 461 (1980) (noting that a state can only survive strict scrutiny by showing that it has a compelling interest and that the law is narrowly drawn to serve that interest).

28. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 49 (1983) (explaining that non-public forums are not open to the general public and that selective access alone does not transform the forum into a public forum).

29. *See id.* at 49 (explaining that access to a non-public forum based on subject matter and speaker identity is not unconstitutional); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 390 (1993) (noting that in a non-public forum, the discrimination must be reasonable and viewpoint-neutral).

30. *See* Cohen v. California, 403 U.S. 15, 17 (1971) (defining offensive language as "behavior which has a tendency to provoke others to acts of violence or to in turn disturb the peace").

31. *See* FCC v. Pacifica Found., 438 U.S. 726, 745 (1978) (noting that just because speech may be considered offensive to society does not render it subject to automatic suppression); *Cohen*, 403 U.S. at 25 (1971) (noting that "one man's lyric is another man's vulgarity").

32. *Yahoo!,* 169 F. Supp. 2d at 1187.

33. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (noting that because there are limited frequencies, the government has authority to allocate them accordingly).

34. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 637 (1994) (noting that the less rigorous First Amendment scrutiny used for broadcast television does not apply to cable television).

35. *See* ACLU v. Reno, 929 F. Supp. 824, 844 (E.D. Pa. 1996) (explaining that the Internet is a new form of worldwide human communication).

36. *See* Angela E. Wu, Comment, *Spinning a Tighter Web: The First Amendment and Internet Regulation*, 17 N. ILL. U. L. REV. 263, 283 (1997) (noting that the Internet has no geographical, temporal or physical barriers).

In analyzing the public nature of the content involved on the Internet, and considering that any individual can "publish" and have access to the information on it,[37] the Supreme Court has held that the protections of the First Amendment do apply to the Internet.[38] One reason given why the Internet should be free from government regulation is that its goal is to create a community unbounded by any physical barriers.[39] As such, to regulate the Internet would, in essence, destroy the very reason for its existence.[40] Also, unlike the other mediums that have been analyzed, the Internet has no owners or editors to account for it.[41] Therefore, in keeping with the fundamental ideas behind the First Amendment and encouraging individual freedom, not allowing censorship or governmental regulation of the Internet would ultimately protect the individual's rights guaranteed by the Constitution.[42]

When considering the constitutional right that attaches to Internet communications, and understanding that the Internet is not under the control of any single entity, problems arise when Internet content crosses international boundaries, because it is not subject to the laws of any particular nation.[43] Furthering the controversy, once an individual publishes material on the Internet, he or she cannot prevent that material from passing through various communities,[44] or from even entering certain countries. When this occurs, the issue becomes what nation's laws will bind other countries.[45]

In this case, the French court ordered compliance by both the .fr and .com sites. Yahoo! challenged the French court order regarding the .com site in a United States court seeking a declaratory judgment.[46] In response to Yahoo!'s complaint, defendants first argued that they were protected by the Declaratory Judgment Act.[47] The Act states, in pertinent part, that "[i]n a case of actual controversy within its jurisdiction . . . any court in the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration. . . . Any such declaration shall have the force and effect of a final judgment or decree and shall be

37. *See* Reno v. ACLU, 521 U.S. 844, 886 (1997).

38. *Id.* at 874 (holding that adults have a First Amendment right to address and receive information over the Internet); *see also* Kevin P. Keech & Missy McJunkins, *Constitutional Law*, 20 U. ARK. LITTLE ROCK L.J. 1055, 1060 (1998) (noting that although *Reno* did not explicitly say so, it seemed to indicate that the Internet is a traditional public forum and, therefore, receives First Amendment protection).

39. Wu, *supra* note 36, at 296.

40. *Id.*

41. *Id.*

42. *Id.* at 299.

43. *Id.* at 300.

44. *See* ACLU v. Reno, 929 F. Supp. 824, 844 (E.D. Pa. 1996) (noting that once information is published on the Internet, it is available to all other Internet users worldwide).

45. *Id.*

46. *Yahoo!*, 169 F. Supp. 2d at 1186.

47. *Id.*; 28 U.S.C. § 2201 (1994).

reviewable as such."[48] Defendants claimed that the "actual controversy" requirement[49] was not met in the case at hand[50] and, therefore, a declaratory judgment was not appropriate. They argued that there was no controversy because Yahoo! was currently appealing the French order, so that, until the appeals process was finished, there was no final order to be enforced against Yahoo! in the United States.[51] In reviewing this contention, the district court determined that not only were there no appellate proceedings pending in France regarding this matter, but the French court already set a fine for non-compliance with the order.[52] In addition, even if there were more legal proceedings pending, Yahoo! still faced a real and immediate threat to its First Amendment rights.[53] The French order was still valid under French law and, as such, the French court could still have set retroactive penalties to the date of the order.[54] Further, there was no evidence that Defendants planned on halting the enforcement of the order and, as such, the threat that there may be future sanctions against Yahoo! for its "present and ongoing" actions remained.[55] Therefore, the Defendants' claim that the order did not violate Yahoo!'s First Amendment rights failed.

Defendants next argued that the court should have abstained rather than supported Yahoo! in what amounted to forum shopping.[56] But abstention is a discretionary action[57] and, therefore, the court can choose between it and any other recourse measures that might be appropriate.[58] Furthermore, the court determined that a United States court is in the best position to apply the United States Constitution to the facts of this case.[59] However, defendants claimed that Yahoo! was simply forum shopping and, thus, abstention was the appropriate remedy.[60] The court held, however, that Yahoo! was not bringing the action to the United States in an attempt to relitigate the French court's application of French law, but rather to have a United States court decide whether it can apply the French order without violating the First

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48. 28 U.S.C. § 2201 (1994); *see also* Willy E. Rice, *Insurance Contracts and Judicial Discord over Whether Liability Insurers Must Defend Insureds' Allegedly Intentional and Immoral Conduct: A Historical and Empirical Review of Federal and State Courts' Declaratory Judgments—1900–1997*, 47 AM. U.L. REV. 1131, 1144 (1998) (explaining that judges have discretion in granting or denying declaratory relief and, therefore, consider many different factors).

49. *See* Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240 (1937) (noting that "actual" is used for emphasis, and "controversy" means that the case is one for judicial determination).

50. *See Yahoo!,* 169 F. Supp. 2d at 1188.

51. *Id.*

52. *Id.*

53. *Id.* at 1189.

54. *Id.* (noting that Yahoo! can still be penalized even though there may be procedural obstacles in France before there can be any actual penalties).

55. *Id.* at 1191.

56. *Id.* at 1186.

57. *See* James L. Huffman & Mardilyn Saathoff, *Advisory Opinions and Canadian Constitutional Development: The Supreme Court's Reference Jurisdiction*, 74 MINN. L. REV. 1251, 1321 (1990) (noting that the doctrine is discretionary).

58. John Norton Moore, *Enhancing Compliance With International Law: A Neglected Remedy*, 39 VA. J. INT'L L. 881, 991 (1991).

59. *See Yahoo!,* 169 F. Supp. 2d at 1192 (explaining generally that the application of the United States' Constitution should be determined by a United States court).

60. *Id.* at 1191.

Amendment.[61] This was, therefore, a separate legal issue, and a United States court was in the best position to apply the United States Constitution to the facts of this case.[62] As a result, the court rejected the argument, because the defendants were unable to establish any basis for abstention.[63]

Lastly, defendants raised the issue of comity.[64] Comity is based on the concepts of courtesy and good will that nations show for each other regarding applicable interests.[65] In this respect, international comity discourages a nation from applying its own laws if they will affront the laws of another nation and ultimately have a negative impact on the foreign nation's enforcement of its own laws.[66] Comity acts as a protective measure against conflicting laws of different nations.[67] Giving France the deference it deserved, the order would still have been viewpoint-based[68] and, therefore, clearly combated the First Amendment if enforced by a court within the United States.[69] As a sovereign nation, France has a right to regulate any speech it wants within its own borders, but this court cannot enforce the French order when it violates the United States Constitution by chilling such speech.[70] Without limiting comity in this case, the protections of the First Amendment and free speech would have been compromised by the "entry of foreign judgments granted pursuant to standards deemed appropriate in another country but considered antithetical to the protections afforded the press by the U.S. Constitution."[71] With that in mind, this court held that "absent a body of law that establishes international standards with respect to speech on the Internet and an appropriate treaty or legislation addressing enforcement of such standards to speech originating within the United States, the principle of comity is outweighed by the Court's obligation to uphold the First Amendment."[72]

In deciding this case, the court made it clear that the judgment was not promoting or encouraging Nazism.[73] It is evident that most would consider such activity offensive, considering its history.[74] But, as mentioned, the United States government is barred from regulating

61. *Id.*

62. *Id.* at 1192.

63. *Id.*

64. *Id.*

65. Michael J. Calhoun, Comment, *Tension on the High Seas of Transnational Securities Fraud: Broadening the Scope of United States Jurisdiction,* 30 LOY. U. CHI. L.J. 679, 688 (1999).

66. *Id.*

67. *Id.*

68. *See Yahoo!,* 169 F. Supp. 2d at 1188 (noting that it is justified under the First Amendment to permit the expression of non-violent offensive viewpoints rather than enable the government to regulate the same).

69. *Id.* at 1192.

70. *Id.*

71. *Id.* at 1193 (citing Bachchan v. India Abroad Publications, Inc., 585 N.Y.S.2d 661, 665 (Sup. Ct. 1992)).

72. *Id.* at 1194.

73. *See id.* at 1186 (noting that the decision is not about the "moral acceptability" of Nazism).

74. *Id.*

speech simply because it may be considered offensive to some.[75] The First Amendment encourages speech in what is considered the marketplace of ideas.[76] Considering the marketplace of ideas, this court also held that the French law never would have withstood the strict scrutiny required by the First Amendment, because it was overbroad.[77] On that issue alone, the Supreme Court has consistently held that overbroad laws "chill" innocent parties' freedom of speech,[78] and are therefore unconstitutional.[79]

The court here was also not attempting to interpret French law.[80] France is a sovereign state and, as such, has a right to enact and enforce any laws it deems appropriate.[81] But when these foreign laws conflict with, or are inconsistent with, the Constitution of the United States, this court is obligated to uphold the First Amendment.[82]

This is an important case for the Internet, holding that other countries' restrictions on content cannot be enforced within the United States, where most of the providers are based. Yahoo! was seeking a declaration from a United States court based on its First Amendment rights. While the order was valid under French law and could have been enforced within the boundaries of France, Yahoo! argued that enforcement in the United States would have been impermissibly regulating the content of its speech over its Internet sites.[83] In essence, the order had a chilling effect on Yahoo!'s free speech rights over the Internet. As a result, this court held that Internet speech deserves First Amendment protection, and the French court's orders were, therefore, not enforceable under the laws of the United States.

**Dan Dietrich**

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75. *See* FCC v. Pacifica Found., 438 U.S. 726, 745 (1978) (noting that just because speech may be considered offensive to society does not render it subject to automatic suppression).

76. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (noting that the theory of our Constitution is that the free trade of ideas is the best test of truth).

77. *Yahoo!,* 169 F. Supp. 2d at 1189 (noting that the French law fails to give Yahoo! a sufficient warning as to what is required by the law).

78. *See* Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503 (1985) (explaining that an overbroad statute may chill protected speech because the speaker will refrain from speaking rather than risk being prosecuted under the overbroad law).

79. *See* Dickerson v. United States, 530 U.S. 428, 430 (2000) (noting that chilling speech is a violation of the First Amendment).

80. *See Yahoo*!, 169 F. Supp. 2d at 1186.

81. *Id*.

82. *Id*. at 1193.

83. *Id.* at 1194.

# *Tachiona v. Mugabe*

169 F. Supp.2d 259 (S.D.N.Y. 2001), *reh'g denied*, 186 F. Supp.2d 383 (2002)

**The president and foreign minister of Zimbabwe are entitled to head-of-state immunity under United States and international law, but their political party is not immune and was properly served by notice of process served on it in New York.**

## I. Background and Procedural Posture

In *Tachiona v. Mugabe*,[1] the United States District Court for the Southern District of New York held that the president and foreign minister of Zimbabwe were immune from suit in the Untied States[2] under a claim arising out of alleged human rights violations engaged in while acting in their official capacities in their own country.[3] The motion for entry of default judgment against Robert Gabriel Mugabe, Stan Mudenge and Jonathan Moyo[4] was denied.[5] However, the court did enter default judgment against defendant Zimbabwe African National Union-Patriotic Front, which is the Zimbabwe government's ruling political party (ZANU-PF), the political party of which Mugabe and Moyo were senior officers. Following a motion

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1. 169 F. Supp.2d 256 (S.D.N.Y. 2001) ("*Tachiona I*").

2. *Id.* at 259 (stating that the State Department's formal "suggestion" of immunity was based on its interpretation of the Convention on Privileges and Immunities of the United Nations, Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 16, in force for the United States April 29, 1970 ("UN Convention"). 21 U.S.T. 1418, § 11 states:

   > Representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, shall, while exercising their functions and during their journey to and from the place of meeting, enjoy the following privileges and immunities:
   >
   > (a) immunity from personal arrest or detention and from seizure of their personal baggage, and, in respect of words spoken or written and all acts done by them in their capacity as representatives, immunity from legal process of every kind; (b) inviolability for all papers and documents; (c) the right to use codes and to receive papers or correspondence by courier or in sealed bags; (d) exemption in respect of themselves and their spouses from immigration restrictions, alien registration or national service obligations in the state they are visiting or through which they are passing in the exercise of their functions; (e) the same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions; (f) the same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys, and also (g) such other privileges, immunities and facilities not inconsistent with the foregoing as diplomatic envoys enjoy, except that they shall have no right to claim exemption from customs duties on goods imported (otherwise than as part of their personal baggage) or from excise duties or sales taxes.

   21 U.S.T. 1418, § 11

3. *See Tachiona I*, 169 F. Supp. at 265–66 (alleging that defendant's acts included "murder, torture, terrorism, rape, beatings, and destruction of property" and were directed at plaintiffs as a result of their membership in an opposition political group).

4. *Id.* at 264 (Mugabe is identified as President of Zimbabwe, Mudenge is identified as Zimbabwe's Foreign Minister, and Moyo is identified as Minister for Information and Publicity of Zimbabwe).

5. *Id.* at 318.

for reconsideration of the court's ruling as to ZANU-PF, the court added details to its reasoning but reached the same conclusion.[6] However, the government's motion to intervene for the limited purpose of appealing the decision was granted.[7]

Plaintiffs herein are members, or representatives of members, of the Movement for Democratic Change in Zimbabwe.[8] They assert that the actions taken against them[9] were conducted by trained ZANU-PF members and intended to intimidate all political opposition.[10] They further allege that the orders of violence were given by President Mugabe to be implemented through the ZANU-PF chains of command.[11]

Mugabe and Mudenge were served when they were in New York to attend a conference at the United Nations, but only when they were outside the boundaries of the UN Headquarters District.[12] Thereafter, Defendants failed to respond or appear before the court[13] and, consequently, Plaintiffs moved for entry of a default judgment.[14] Mugabe and Mudenge then requested immunity from the State Department.[15] Following the request, the State Department submitted a Suggestion of Immunity to the Department of Justice, arguing that permitting the suit to go forward would not be compatible with United States foreign policy interests.[16] The government set forth three grounds upon which immunity could be asserted, and which the court considered in its decision.[17]

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6. Tachiona v. Mugabe, 86 F. Supp.2d 383 (S.D.N.Y. 2002) ("*Tachiona II*"). On reargument, the government asserted that the judicial interpretation of FSIA was incorrect, and the issued "suggestion of immunity" was entitled not merely to deference but to what would amount to submission. The court declined to adopt this view and held that such a reading would convert the court into a mouthpiece for government policy decisions, as opposed to the ultimate interpreter of international treaties. *Id.*

7. *Id.*

8. *Tachiona I*, 169 F. Supp.2d at 266 (alleging that "by reason of their support for the MDC, Tapfuma Chiminya, Metthew Pfebve, and David Stevens were all extrajudicially murdered; Metthew Pfebve and David Stevens were tortured; Efridah Pfebve and Evelyn Masaiti were attacked and beaten; and all of the named and unnamed Plaintiffs were in other ways terrorized").

9. *Id.* at 266 (describing one act of violence in particular where three members of the MDC allegedly were beaten and burned alive by members of the ZANU-PF while Zimbabwe police stood by and watched).

10. *Tachiona I,* 169 F. Supp.2d at 266.

11. *Id.*

12. *Id.* at 267 (noting that Plaintiffs waited until Defendants were out of the district in order to avoid diplomatic immunity rules that apply within the United Nations boundaries). *See* 22 U.S.C. § 287 (2000) (Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations, Art. V, Section 15).

13. Tachiona v. Mugabe, 169 F. Supp.2d at 267.

14. *Id.*

15. *Id.*

16. *See id.* at 267 (stating that the "Department of State recognizes and allows the immunity of President Mugabe and Foreign Minister Mudenge from this suit," and further that the Department urged dismissal of the suit and an order either quashing or nullifying the service of process against them).

17. *Id.* at 268 (listing the three grounds supporting immunity as head-of-state immunity, diplomatic immunity and personal inviolability).

## II. Arguments Regarding Jurisdiction and Immunity

### A. Head-of-State Immunity

The court traced the history and development of the doctrine of sovereign immunity in American jurisprudence. From the earliest days of this country, tradition viewed a nation and its leader as synonymous and, therefore, accorded both absolute immunity, at least for actions taken in official state capacity.[18] In 1952, the Supreme Court, acting in response to contemporary trends in international law, attempted to restrict foreign sovereign immunity in certain areas.[19] However, a formal assertion or "suggestion of immunity" from the executive branch was sufficient to establish that absolute immunity should be conferred in a particular situation.[20] The result was that immunity was being decided by two separate branches of government subject to very different standards.[21] Further, no legal authority had addressed the issue of "controversies involving claims of individual immunity for sovereigns, represented in the person of the country's ruler, from the jurisdiction of the courts over matters relating to non-governmental transactions . . . undertaken in their private or public capacities."[22]

As the result of a prevailing dissatisfaction with the existing United States policy on foreign immunity, the Foreign Sovereign Immunities Act (FSIA)[23] was passed in 1976. The FSIA established that the U.S. policy would have two objectives. United States foreign relations practice would adhere to the currently enumerated policy of restrictive immunity; further, the FSIA attempted to remove the role that the executive branch previously played through the suggestion process.[24] More significant to the present case was the court's examination of the legislative history behind the passage of the FSIA. All indications are that the overarching concern of the FSIA was with restricting immunity of foreign officials in commercial activities affecting the United States.[25] There is no discussion of the application of such jurisdictional immunity to individuals such as those implicated herein.[26] The court recognized that the legislative history did not explicitly address the important issue of "whether the FSIA adopted an integrated doctrine of foreign state immunity, rescinding in its entirety and in all cases the practice of court deference to the State Department's intercessions, or whether a distinct branch of absolute immunity applying uniquely to heads-of-state survived the Act."[27]

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18. *See id.* at 268.
19. *Tachiona I,* 169 F. Supp.2d at 270 (noting that with the rise of communism, governments were becoming active participants in commercial activity and would in fact be the most culpable parties in certain situations).
20. *See id.* at 271 (stating that the Tate Letter put the world on notice of how the shift in U.S. policy change resulted from consideration of the increasing practice on the part of governments engaging in commercial activities).
21. *Id.* at 272.
22. *Id*.
23. 28 U.S.C. § 1603 (FSIA).
24. *Tachiona I*, 169 F. Supp.2d at 272.
25. *Id.* at 273–75.
26. *See id.* at 275 (listing the pertinent issues that are "palpably absent" from any of the legislative history of the Act or from prior policy).
27. *Id.* at 276.

Based on the existing international norms and practices at the time of the adoption of the FSIA, the court concluded that Congress could not have meant to ascribe to the Act the effect of granting absolute immunity to heads-of-state.[28] As the view of the sovereign as solely the state, with the nation's ruler as a separate entity is becoming a more prevalent international concept, it has also become increasingly obvious that there is no clear doctrine dealing with how to treat the measure of immunity that is to be granted to the ruler apart from the state. To further increase the difficulty arising from this uncertainty, a post-FSIA trend that is exemplified in the present action is the growing frequency with which claims are being asserted directly against heads of state, often arising out of allegedly personal conduct that is unrelated to any governmental duties.[29]

Recently, in recognition of official acknowledgment of humans rights and what constituted violations of them on an international scale, there has been increased judicial action attempting to establish methods for holding those responsible accountable, even where those individuals happen to be heads of state.[30] Problematic is the current existence of two theories of construction and application of the FSIA. The first theory holds that the FSIA absolutely shifted responsibility for determining all claims of foreign immunity from the State Department to the courts.[31] The second theory holds that the FSIA has no application to head-of-state immunity and, in fact, the common law that constrained the courts to accept as conclusive suggestions of immunity from the State Department still governs.[32]

After reviewing the controlling case law, the court concluded that the Congressional intent behind enacting the FSIA was not to disturb the prevailing practice of the filing of suggestions of immunity by the State Department in cases of claims brought against sitting foreign heads-of-state.[33] However, the case law on the FSIA has left some issues unaddressed: Who among the hierarchy of government is entitled to head-of-state immunity?; What are the extent and circumstances under which head-of-state immunity may be waivable?; To what degree are acts of individuals rather than government offices covered?; Is there a distinction between private and governmental acts to which immunity may extend?; and What is the exact weight to be accorded by the courts to the State Department's suggestions of immunity?[34] Due to all of the

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28. *See id.* at 276–77 (arguing that because the concept of a ruler as distinct from the sovereign itself was not a widely accepted international view, it would make little sense to assert that it was a consideration before Congress in contemplation of passage of the Act).

29. *See id.* at 278 (positing that this is a direct result of the increasing international recognition that atrocities often ascribed to the state are, in fact, carried out by people associated with the "state").

30. *See id.* at 280 (discussing recent Human Rights Conventions, the instituting of international criminal tribunals, and the recent case law that revitalized the previously dormant ATCA).

31. *See id.* at 281 (noting that this is the strand of construction advanced by Plaintiffs); *see also* Chuidian v. Philippine Nat. Bank, 912 F.2d 1095 (9th Cir. 1990).

32. *Tachiona I,* 169 F. Supp.2d at 281. (stating that this is the argument advanced by the government and articulated by the Eastern District of New York); *see also* Lafontant v. Aristede, 844 F. Supp. 128 (E.D.N.Y. 1994).

33. *Tachiona I,* 169 F. Supp.2d at 288 (noting that the courts have almost uniformly recognized an exception to the FSIA with regard to heads-of-state, and there seems to be an emerging rule of law that encompasses the scope of immunity of foreign heads-of-state as a unique concept); *see also* United States v. Noriega, 117 F.3d 1206 (11th Cir. 1997); Republic of Philippines v. Marcos, 665 F. Supp. 793 (N.D. Cal. 1987).

34. *Tachiona I,* 169 F. Supp.2d at 289.

uncertainties surrounding the Act, the court was not willing to accept that Congress had addressed any of these issues, nor would the court attribute to Congress an intent to do so.[35] Therefore, the FSIA should not be read to have changed the role of the State Department in connection with issuing suggestions of immunity in claims against heads-of-state in non-commercial cases.[36]

The court, therefore, held that inasmuch as the State Department's suggestion of immunity was dispositive as to immunity and lack of jurisdiction over Mugabe and Mudenge, they could not be prosecuted under the claims brought.[37] Left to be determined, however, was whether there was jurisdiction over them in their capacities as representatives of ZANU-PF.[38]

### B. Diplomatic Immunity

The government argued that under both the UN Convention[39] and the Vienna Convention on Diplomatic Relations,[40] Mugabe and Mudenge were entitled to diplomatic immunity, because they were present in this country as representatives of Zimbabwe at the time that they were served.[41] The competing arguments of the Plaintiffs and the government rested on the fact that Defendants were in the United States as temporary representatives of their country. Plaintiffs argued that as a result of their status in the country, Mugabe and Mudenge were immune only with respect to claims arising out of actions taken in their capacity as temporary representatives.[42] Plaintiffs inevitably concluded that because Defendants were not acting in their representative capacities when they were served, they did not qualify for diplomatic immunity.[43] The government asserted that the language of, and the legislative intent behind, subsection 11(g) of the UN Convention were consistent with a broad reading of the immunity that should be afforded to temporary international representatives in our country.[44] The court found the government's argument more persuasive and held that, under existing international law, those in the United States in the capacity of temporary representative are due the same privileges and immunities that are enjoyed by diplomatic envoys.[45]

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35. *Id.* at 290 (noting that the international norms at the time of the enactment of the FSIA did not yet accept the separation of sovereign and ruler, and describing the contemporary policy considerations and foreign relations issues that make answering the aforementioned questions difficult).

36. *Id.* at 291 (noting that the policies of comity and reciprocity are at the core of the immunity principles, and discussing the need for uniformity and clarity in the application of the law that encourages such immunity to be afforded to heads of state).

37. *Id.* at 297.

38. *Id.*

39. *See supra* note 2.

40. 23 U.S.T. 3229, 3231 T.I.A.S. No. 7502, 500 U.N.T.S. 95 (April 18, 1961).

41. *Tachiona I*, 169 F. Supp.2d at 297 (noting that Mugabe and Mudenge were in the United States to attend the United Nations Millennium Summit when they were served).

42. *Id.* at 298.

43. *Id.* at 267 (stating that Defendants were served after they left the United Nations and while they were at a fundraiser for ZANU-PF).

44. *Id.* at 298.

45. *Id.*

The prevailing interpretation of the status of foreign officials temporarily in the United States is that their immunity should be broadly construed.[46] Such officials should not have their immunity restricted to actions arising out of the particular event in which they are participating.[47] In many cases, officials who come to the United Nations for conventions are designated by their governments to do more than merely attend these international meetings. They are often meant to engage in important diplomatic functions—which are often beyond the scope of the conference or meeting that they are primarily present to attend—with the goal of educating foreign nations about their own country and its issues.[48] A broad grant of immunity to temporary officials also avoids the unintended result of granting a greater degree of immunity to an official who may be an inferior foreign officer than to the official's direct superior, merely because the official is given broader duties relating to a particular United Nations event.[49]

Finally, in light of the legislative history, a broad interpretation of section 11 serves best to comply with the United States' understanding of its scope when it adopted the text.[50] At hearings before the Foreign Relations Committee discussing the adoption of the treaty, it was clear that the U.S. contemplated that adoption of it would have the effect of granting to nonresident representatives of foreign nations the same privileges and immunities currently enjoyed by resident representatives, including diplomatic immunity.[51] It is unambiguously clear that the United States intended that the Convention would broaden the existing "functional immunity" of temporary nonresident representatives to equal that of resident representatives.[52]

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46. *Id.* at 288

47. *See id.* at 288–89 (noting that temporary diplomatic officials often engage in activities that "occur at the margins of United Nations events" and are ancillary to their primary purpose for being in the United States, but which are nonetheless integral to their foreign relations activities).

48. *Id.* at 299.

49. *See id.* at 299–300 (noting that anomalous results may occur where a president or other official entitled to head-of-state immunity would not be afforded the same exemption from territorial jurisdiction under the rules of diplomatic immunity).

50. *Id.* at 300 (stating that the United States understood that by adopting the treaty it was granting, to temporary representatives of United Nations member states, the same privileges and immunities enjoyed by formally accredited diplomats).

51. *See id.* at 300 n.178 (citing the Report of the Committee on Foreign Relations, Exec. Rept. 91-17, 91st Congress, Mar. 17, 1970).

52. *See id.* at 300 (concluding that because the United States' understanding of the UN Convention and that of the United Nations itself are in accord, without any strong evidence of a contrary interpretation, deference should be given to the stated meaning attributed to the UN Convention).

### C. Personal Inviolability

The court's analysis of personal inviolability of diplomats focused on two aspects of immunity—that from exposure to litigation and jurisdiction, and that from any or all service of process.[53] The central issue identified by the court is:

> [W]hether inviolability would extend to preclude service of process on foreign officials entitled to head-of-state or diplomatic immunity when service is effected on them for purposes not involving an assertion of personal jurisdiction against such officials, but is directed against an affiliated non-governmental third person or entity on whose behalf they may be served.[54]

Traditional principles of inviolability, as understood at common law and as embodied in the Diplomatic Relations Act,[55] comprehend that the "principle of personal inviolability extends its privileges and immunities to visiting heads-of-state as an aspect of head-of-state immunity."[56] The court declined to expand the prevailing understanding of personal inviolability to stand for the principle that it confers upon foreign officials an absolute immunity that not only protects them from exposure to litigation and compulsion to appear in foreign courts, but also from all service of process.[57] In effect, the court found that Mugabe and Mundenge could be subject to service of process when such service was intended to subject their political party, ZANU-PF, and not them individually, to suit.[58]

In this case, service upon Mugabe and Mundenge "was designed to reach an unofficial organization whose political function they were attending and whose purpose . . . was to raise funds for ZANU-PF in this country, to elicit political support for Mugabe's regime and to blunt domestic attacks on his policies."[59] ZANU-PF itself has no claim to immunity from jurisdiction or suit in the United States.[60] Allowing Mugabe and Mudenge to be served in their capacities as representatives of the organization would not offend the purposes served by granting personal inviolability to heads-of-state.[61] The court refused to allow the measure of inviolability granted to foreign officials to be used to cloak affiliated private individuals or organizations with their personal immunity.[62]

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53. *Id.* at 303.

54. *Id.* at 304.

55. 22 U.S.C. § 254a (2000); *see id.* at 303 (noting that the Diplomatic Relations Act was enacted to implement the Vienna Convention, and exists as the applicable U.S. law on the subject of unviolability).

56. *Tachiona I*, 169 F. Supp.2d at 303.

57. *Id.*

58. *Id.* at 306–08 (arguing that the concept of personal inviolability has never been deemed absolute, as foreign heads-of-state are on par with private individuals when they engage in non-political or diplomatic activities that would subject them to suit; implicit in that is the fact that, in certain limited circumstances, they are subject to service of process and, therefore, the doctrine of personal inviolability does not absolutely bar it).

59. *Id.*

60. *Id.* at 305.

61. *See id.* at 306–08 (noting that the mere service of process does not mandate that either person would be required to appear in a court for testimony, nor would accepting process in any way hinder an ability to conduct duties in this country).

62. *Id.*

### D. Jurisdiction

#### 1. Personal Jurisdiction

The question of personal jurisdiction over ZANU-PF was dispensed with quickly once the court determined that Mugabe and Mudenge could validly be served with process as representatives of the party. Based on the facts on record, Defendants had availed "themselves and their property of the security and sanctuary of the United States and the state of New York engaging in press and other activities."[63] Consequently, because sufficient minimal contacts were established, and the service constituted adequate notice of this action to ZANU-PF, default judgment against ZANU-PF was entered on behalf of Plaintiffs.

#### 2. Subject Matter Jurisdiction

Plaintiffs' causes of action were brought under the Alien Tort Claims Act (ATCA),[64] the Torture Victims Protection Act,[65] general federal-question jurisdiction[66] and jurisprudence defining international norms.[67] The threshold inquiry that the court addressed was whether the requirement that the acts alleged under these claims had been carried out by an individual under color of law, could be read so as to include an organization such as ZANU-PF in the definition of "individual."[68] The court engaged in an extensive analysis of the changing norms regarding the rights and roles of individuals in international law, and concluded that it would contravene the purpose of such acts to read into the language a different interpretation.[69] In fact, many of these organizations proceed at the direction of, and with official aid from, governmental personnel who are often the passive masterminds (those directing acts but not physically proceeding with them) behind the actions taken.[70] The purpose of the acts is to compensate victims, punish the culpable and deter wrongdoing, limiting liability in such cases "so as to permit recovery only from the particular natural individuals who actually commit the underlying wrongful acts, the result would effectively nullify the purposes of the statutes."[71] The most culpable directors of such atrocities would be able to assert head-of-state or diplomatic immunity, thereby escaping justice and remaining available to act again.[72]

To establish jurisdiction under the ATCA it is necessary that the claim: (1) be brought by an alien; (2) alleging a tort; (3) that was committed in violation of international law.[73] Addi-

63. *Id.* at 309.

64. 28 U.S.C. § 1350.

65. Pub. L. No. 102-256, 106 Stat. 73 (1992).

66. 28 U.S.C. § 1331.

67. *Tachiona I*, 169 F. Supp.2d at 309–10.

68. *Id.* at 311.

69. *Id*.

70. *Id.* at 312.

71. *Id*.

72. *Id*.

73. *See id.* at 313 (noting that the first two elements are undisputed and the third would have been a matter for adjudication).

tionally, contemporary standards in international law, as well as applicable case law, mandated that the court find the alleged torts had been committed either by state officials or under the color of state law.[74] Based on the actions alleged by Plaintiffs, and uncontested by Defendants, Plaintiffs establish that the atrocities were perpetrated with the aid and participation of Mugabe's government personnel, money and military, the wrongs were deliberate and systemic, and the aims of the harm inflicted were to further the goals of Mugabe's presidency and to perpetuate his policies.[75] In fact, the assertions of the Plaintiffs demonstrate that ZANU-PF itself was not merely an organization of individuals sharing like ideologies; rather, in furtherance of its wrongful acts, its members worked in tandem with Zimbabwe government officials and often under their direction.[76] These showings were more than sufficient to satisfy the "color of law" requirement under the ATCA.[77] Further, the court found that the same assertions were also sufficient to establish the explicit requirement that an actor have actual or apparent authority to be acting "under color of law" to bring a claim under the TVPA.[78] Accordingly, Plaintiffs were found to have established subject matter jurisdiction for their claim against ZANU-PF, and an entry of default judgment was granted on this ground as well.[79]

## III. Conclusion

The court ended its analysis of the current state of international law much as it began; that is to say, on a mixed note. At the outset, the court described the case as "one in which hopes outpace remedy"[80] and closed by acknowledging that now is a time for legislative reaction to judicial inability to act.[81] While the principles of comity and reciprocity and respect for foreign sovereigns are integral to foreign relations, the court urged that it is time to consider that international norms are rapidly changing, and government officials are able to hide from their wrongdoings under this cloak of immunity.[82] Unfortunately, in the balancing of public values and priorities, individual claims often come up short. In conclusion, the court urged that "the vanguard of the law should stand ready to adapt as appropriate, to shape redress and remedy so as to answer measure for measure the particular evil it pursues."[83]

**Nicole M. Walsh**

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74. *Id.* at 313 (noting that the ATCA, unlike the TVAP, does not, in the language of the statute, require that the alleged wrongful conduct be carried out under actual or apparent authority, or under color of state law).
75. *Id.*
76. *Id.* at 315.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* at 267.
81. *Id.* at 316.
82. *Id.*
83. *Id.* at 318.

# *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*

268 F.3d 103 (2d Cir. 2001)

**Civil RICO action brought by foreign sovereign to recover lost tax revenues and law enforcement costs is barred as violative of the Revenue Rule, which prohibits courts from enforcing the tax laws of other nations.**

In *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*,[1] the Second Circuit Court of Appeals held that Canada was barred from seeking lost tax revenues and law enforcement costs under the Racketeer Influenced and Corrupt Organizations Act[2] because the relief Canada sought was precluded by the Revenue Rule. The court further concluded that, in the absence of Congressional intent to abrogate the Revenue Rule with respect to civil RICO claims, the court could not grant Canada's requested relief.[3]

Canada brought suit against RJR-MacDonald, a Canadian company, and several related American companies: R.J. Reynolds Tobacco Holdings, Inc., Northern Brands International, Inc., R.J. Reynolds Tobacco Co., R.J. Reynolds Tobacco International, Inc., and R.J. Reynolds Tobacco Company PR (collectively referred to as "defendants"). Canada alleged that, as a result of defendants' scheme to evade Canada's cigarette taxes, defendants violated RICO[4] by conducting or participating in racketeering activity.[5]

Canada increased its tobacco taxes in 1991, raising the price of cigarettes to $48 (Canadian), up from $26 (Canadian) in 1989. After defendants' sales declined, they devised a scheme to increase cigarette sales and their profits.[6] Defendants exported cigarettes from Canada to the United States and then sold the cigarettes to distributors, known to them to be smugglers, who then resold the cigarettes to black market distributors in Canada.[7] Defendants utilized Indian

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1. 268 F.3d 103 (2d Cir. 2001).
2. 18 U.S.C. § 1961 *et. seq.* (RICO).
3. Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc., et al., 268 F.3d 103, 106 (2d Circuit 2001) ("R.J. Reynolds").
4. 18 U.S.C. § 1962. Section 1962 provides, in pertinent part:

   > (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
   >
   > (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

   *Id.*
5. *R.J. Reynolds*, 268 F.3d at 105. Canada also alleged defendants committed mail fraud, in violation of 18 U.S.C. § 1341, and wire fraud, in violation of 18 U.S.C. § 1343. Canada also brought suit under 18 U.S.C. § 1962(d) for conspiracy to violate subsections (a), (b) and (c) of § 1962. *Id.*
6. *Id.* at 106.
7. *Id.*

reservations and Foreign Trade Zones[8] on the New York-Canada border to export the cigarettes and then smuggle the cigarettes back into Canada.[9] In response to further tax increases, defendants began shipping raw Canadian tobacco to Puerto Rico, where defendants would manufacture Canadian-style cigarettes and smuggle them into Canada.[10]

Defendants were indicted for these activities and many of the defendants pled guilty to charges of wire fraud, mail fraud and criminal RICO violations.[11] In the present action, Canada brought a claim under RICO's civil enforcement provision.[12] Defendants moved to dismiss the action, which motion the district court granted.[13] The district court concluded that Canada's claims for lost revenues were barred by the Revenue Rule because the court would have to enforce Canadian revenue laws.[14] Canada appealed the district court's dismissal on the ground that the Revenue Rule should not apply in this situation, because the claim was brought under a federal statute, not Canada's tax laws.[15]

The court of appeals relied heavily on the common law doctrine of the Revenue Rule and its underlying policy. The Revenue Rule forbids one sovereign from enforcing "final tax judgments or unadjudicated tax claims of other sovereigns."[16] The rule finds its support in comity: respect for the rules and policies of a sovereign country. The court focused on the central role of the tax law in shaping a sovereign's political and social policies. Canada conceded that the purpose of the cigarette tax was to prevent under-age smoking and invite adult smokers to quit the

8. *Id.* at 106–07. Defendants used these Foreign Trade Zones as intermediaries to avoid paying Canada's sales tax. Defendants shipped the illegally exported cigarettes to these zones and then continued to smuggle the cigarettes back into Canada. *Id.*

9. *Id.* at 103. Defendants exported cigarettes out of Canada and lied to Canadian officials as to where the cigarettes would be consumed. Defendants then sold the cigarettes to smugglers who would sell the cigarettes back to Canadian smugglers for distribution in Canada in attempt to evade taxes.

10. *Id.* at 107. The defendants also used a North Carolina company to process and package the Canadian tobacco for eventual sale in Canada. Defendants manufactured one billion of these cigarettes in Puerto Rico annually.

11. *Id.* at 108. Several participants in the smuggling scheme pled guilty to charges of wire fraud, aiding and abetting smuggling, conspiring to defraud the United States, money laundering and criminal RICO violations. *Id*.

12. 18 U.S.C. § 1964(c); *see* De Falco v. Bernas, 244 F.3d 286, 305 (2d Cir. 2001) (stating that to establish a *prima facie* case under RICO, the plaintiff "must show: (1) a violation of the RICO statute; (2) an injury to business or property; and (3) that the injury was caused by the violation of Section 1962"). Canada alleged that the defendants' fraudulent schemes, mail fraud and wire fraud were the proximate cause of its injury, namely the revenue it lost from defendants' evasion of tobacco sales duties and the necessity to increase law enforcement costs to combat the defendants' racketeering. *Id.*

13. *R.J. Reynolds,* 268 F.3d at 108.

14. *Id.* at 108–10. The District Court maintained that for Canada to be able to pursue its claim, it must prove the applicability of its tax laws to the defendants and the validity of such laws. Such a determination would essentially enforce Canada's revenue laws and thus the court rejected the claim. *Id.*

15. Canada further appealed the district court's dismissal on the grounds that it sufficiently pled the elements of a civil RICO claim, that a commercial injury is not required to be pled and that equitable relief is a viable alternative in this instance since damages may be difficult to establish. *Id.*

16. Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc., et al., 268 F.3d at 109; *see* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 483 (1987) (stating that U.S. courts need not enforce judgments for taxes or penalties).

dangerous habit.[17] The court was wary of having to enforce Canada's social policy by enforcing its tax laws.[18]

Invoking a separation of powers argument, the court maintained that extraterritorial tax enforcement would infringe on the powers of the political branches and be an abuse of power by the judicial branch.[19] Discussing various tax treaties the United States has with other countries,[20] the court reasoned that Congress had evinced a general policy of not enforcing the tax claims of other sovereigns unless it was necessary to "ensure that the exemptions or reduced rates of tax provided under the respective conventions will not be enjoyed by persons not entitled to such benefits."[21] After reviewing the legislative history, the court found that Congress had expressly defined the limits of tax enforcement of foreign sovereigns.

Specifically, the 1995 tax treaty between the United States and Canada provided further support for the court's determination. Provisions of that treaty explicitly bar collection assistance of any revenue claim arising while an individual was a citizen of or incorporated in the "requested state," which in the instant case is the United States.[22] This provision speaks directly to this case, because many of the defendants were incorporated in the United States at the time of this action. Further, amendments to the treaty permit foreign sovereigns to collect finally determined revenue claims.[23] Given the political motivation behind the tax treaty, the court held that it would not be within its power to undermine the treaty and its policy judgments by refusing to apply the Revenue Rule and enforcing the revenue claim.

That the plaintiff in this civil action was a foreign sovereign proved to be a critical factor for the court. Furthering its separation-of-powers rationale, the court observed that when a United States attorney prosecutes a criminal action, the executive branch oversees the action and can harmonize the conduct of the prosecutor and its foreign relation's interests.[24] The same oversight is not readily available in civil cases, such as the RICO claim at issue, and the policies of the United States may not be furthered, because the case is not being prosecuted by an attor-

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17. *Id.* at 113.

18. *Id. But see* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 483 (*Reporter's Note 2*) (reflecting that the rationale behind non-recognition of foreign tax judgments is antiquated and useless since taxation is a common and rampant practice throughout most states, and nations and assets can be easily transferred).

19. *R.J. Reynolds*, 268 F.3d at 114 (referring to Judge Learned Hand's rationale for the Revenue Rule, which provided that courts do not have the power to adjudicate claims based on the public policy of foreign nations since "revenue laws . . . affect a state in matters as vital to its existence as criminal laws").

20. *Id.* at 116–18. The court noted that the Senate consistently limited tax collection assistance in treaties with France, Greece, Norway and various other countries. The Senate modified tax treaties with other countries that had broad collection provisions and confined tax collection to those cases where tax exemptions and benefits were being taken by those not entitled to such benefits and "finally determined" revenue claims. *Id.*

21. *R.J. Reynolds*, 268 F.3d at 114.

22. *Id.* at 120; *see* A Revised Protocol Amending the 1980 Tax Convention with Canada, Nov. 9, 1995, U.S.-Can., 1980 U.S.T. 154, art. 15, p. 8(b) ("Canada-U.S. 1995 Protocol").

23. *R.J. Reynolds,* 268 F.3d at 120; *see* Canada-U.S. 1995 Protocol, art. 15, p. 3.

24. *R.J. Reynolds,* 268 F.3d at 123.

ney for the government.[25] There was no indication in this case that the executive branch acquiesced in the adjudication of this claim.[26]

The court drew a distinction between criminal actions and civil actions. In *Trapilo*, a money-laundering scheme was being criminally prosecuted. The court there held that the action was not barred by the Revenue Rule, because the main issue was not the foreign sovereign's revenue laws, but rather wire fraud.[27] Although recognizing the similarity between the facts of *Trapilo* and the case at bar, the court held that while fraud schemes that affect a foreign nation's tax laws may be criminally prosecuted, civil courts may not "determine the validity of a foreign tax law or the extent of liability thereunder and award that amount to a foreign sovereign."[28] Although the court drew such a distinction, it did not explain why there was such a discrepancy between civil and criminal RICO claims.

Recognizing the many criticisms of the Revenue Rule, the court asserted that abandonment of the Revenue Rule was under the province of the legislative branch, not the judiciary.[29] Canada argued that the Revenue Rule should not be applied, because it was inconsistent with the "act-of-state" doctrine. According to this doctrine, a foreign state's laws within its own territory are presumed valid.[30] However, under the Revenue Rule, there is a presumption that a foreign nation's tax laws are unenforceable in another sovereign's courts.[31] Reconciling the two premises, the court accepted the defendants' argument that the doctrines are not inconsistent, because both focus on avoiding excessive entanglement in another sovereign's judicial competence by determining the validity of a foreign sovereign's laws.[32]

Canada challenged the district court's finding that the Revenue Rule applied in this situation, because this action was brought under the civil RICO statute and not Canadian tax law. Canada argued that, because prior to the enactment of RICO, courts had not applied the Revenue Rule to prohibit actions brought by foreign nations under U.S. statutes, Congress could not have intended that the Revenue Rule would limit a RICO claim.[33] The burden, according to the court, was thus on the plaintiff to prove that RICO barred the application of the Revenue Rule.[34]

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25. *Id.* at 123.

26. *Id.* (referring to First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972) (holding that if any branch of the federal government advises the court that determination would not interfere with the policies of the United States, then courts are free to adjudicate the claim)).

27. United States v. Trapilo, 130 F.3d 547 (2d Cir. 1997). In *Trapilo*, the court grappled with the issue of whether defendants' liquor smuggling scheme fell within the wire fraud statute (18 U.S.C. § 1343). The court reversed defendants' convictions, holding that § 1343 covers fraudulent schemes, regardless of whether foreign governments and tax laws are involved. *Id.*

28. *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc., et al.*, 268 F.3d at 124.

29. *Id.* at 134–35.

30. *Id.* at 125.

31. *See* U.S. v. Harden, 1963 S.C.R. 366, 371 (affirming that "in the absence of specific treaty provisions, no matter how conscious and deliberate the tax evasion, there are no judicial or administrative remedies available to the defrauded state or province outside its territorial jurisdiction").

32. *R.J. Reynolds*, 268 F.3d at 126. *But see* Barbara A. Silver, *Modernizing the Revenue Rule: The Enforcement of Foreign Tax Judgments*, 22 GA. J. INT'L & COMP. L. 609, 622 (1992) (contending that under the act of state doctrine, a foreign nation's interests are protected and aided because its laws are not subject to scrutiny).

33. *R.J. Reynolds*, 268 F.3d at 126.

34. *Id.*

In areas of foreign relations, courts are more cautious and search for unequivocal expressions of congressional intent as to the scope or limitations of a statute.[35] The court held that Canada did not meet this burden, because the Revenue Rule is a firmly established common law doctrine and there was no evidence that Congress intended to invalidate the Revenue Rule in civil RICO claims.[36] Moreover, Congress was aware of cigarette trafficking, but chose to amend RICO only with respect to state cigarette taxes, even though it was aware that cigarettes were being smuggled into foreign nations.[37]

The court noted that it must look to the substance of the claim to determine whether the claim is either directly or indirectly for the enforcement of tax revenues.[38] Relying on Canadian case law, the court maintained that if the purpose of the claim and its resulting decision is to collect the tax of a foreign sovereign, then the court may reject the claim.[39] The court determined that Canada sought to use the civil RICO claim to enforce its tax laws, and rejected Canada's argument that the claim was brought only under the civil RICO statute.[40] The court held that Canada was directly seeking enforcement of its tax laws by seeking to recover unpaid taxes due to the lost revenue from the defendants' scheme to avoid paying Canadian cigarette taxes.[41]

Canada's claim for law enforcement costs was an indirect attempt to enforce its tax laws insofar as the increased law enforcement was needed to confront the smuggling problems caused by defendants' actions.[42] Because the increased police presence was necessary to enforce Canada's tax laws, the court found that this was also seeking enforcement of Canada's tax laws. Canada contended that law enforcement costs are the functional equivalent of harm suffered by private victims, because the increased expenditures were "not as part of its normal policing, but in self-defense because it was under direct attack by defendants."[43] The court rejected this argument, stating that law enforcement costs are part of a sovereign's authority and power.[44]

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35. *Id.* at 127–28; *see* Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 109 (1991) (stating that the demand of a clear legislative statement "assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision").

36. *Id.* at 129. The court stated that the burden is on the challenger to establish that the legislature intended to abrogate or alter the Revenue Rule. There must be some indication that Congress intended to change the common law rule and without such evidence the Revenue Rule must remain intact. *Id.*

37. *Id.*

38. *R.J. Reynolds,* 268 F.3d at 130.

39. *Id.* at 130–31 (citing U.S. v. Harden, 1963 S.C.R. 366, 372–73, where the Canadian Supreme Court reasoned that "when it appears to the court that the whole object of the suit is to collect tax for a foreign revenue, and that this will be the sole result of a decision in favour of the plaintiff, then a court is entitled to reject the claim by refusing jurisdiction").

40. *Id.* at 131 (commenting that Canada's assertion that the claim is based on a U.S. statute does not avoid the judicial concern of interfering with foreign policy since the RICO statute is being used as a means of enforcing Canadian laws).

41. *Id.*

42. *Id.*

43. *Id.* at 132 (refuting plaintiff's comparison to a private plaintiff because a private plaintiff does not have state-funded resources and troops at his or her disposal).

44. *Id.* The court noted that law enforcement costs are *jure imperii* and U.S. courts have been hesitant to enforce such laws. *Jure imperii* denotes acts attributable to the sovereign's inherent authority. Revenue rules and penal laws have been viewed by courts as *jure imperii*. In contrast are acts that are defined as *jure gestionis*, meaning those acts of the sovereign that are more private or commercial in nature. *Id.*

Canada claimed that recognition of its tax laws, not enforcement, was sufficient under RICO, because its tax laws are relevant only to determine the amount of damages.[45] Dissenting, Judge Calabresi noted that the court was unconvincing in its determination that Canada was not seeking recognition of its tax laws.[46] Since this was a civil claim for lost revenue and taxes, the court found Canada's argument unpersuasive.[47] The court of appeals affirmed defendants' motion to dismiss on the ground that the Revenue Rule barred plaintiff's claim.[48] Remarking that it was unfortunate that Canada could not recover its lost revenue, the court deferred to the legislative and executive branches to afford possible remedies.[49]

Arguing that the Revenue Rule did not apply in this case, Judge Calabresi dissented.[50] The dissent maintained that Canada's action would not necessitate a ruling on its tax laws, but was only a civil action brought under a U.S. statute. Canada's lost revenue would only be considered in calculating damages, not as a major aspect of the underlying RICO violation.[51] According to the dissent, under the majority's reasoning all claims by foreign governments to recover government funds would be barred by the Revenue Rule.[52]

The dissent recognized that U.S. courts should not promote the sovereign interests of foreign nations. However, the RICO statute promotes America's interests in effective enforcement of our federal laws and U.S. courts are bound to apply and adjudicate claims arising under federal statutes.[53]

The dissent refutes the majority's argument that adjudication of this claim would involve analyzing Canada's tax laws. Noting that the amount of tax revenue lost is a factor in sentencing guidelines for criminal RICO violations, Judge Calabresi argued that there should be no difference in accounting for lost revenue in determination of civil damages.[54] The dissent disagreed with the majority's distinction between civil and criminal RICO violations. Because the Supreme Court has consistently held that the RICO statutes should be construed broadly, the dissent maintained that there should be no such distinction.[55]

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45. *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc., et al.*, 268 F.3d at 133.

46. *Id.* at 135 (contending that Canada was not seeking enforcement of Canadian tax laws, but basing its claim on the RICO statute).

47. *Id.* at 134. *But see* Barbara A. Silver, *Modernizing the Revenue Rule: The Enforcement of Foreign Tax Judgements*, 22 GA. J. INT'L & COMP. L. 609, 630 (1992) (asserting that courts could recognize foreign tax judgments without running afoul of the act of state doctrine since recognition would still take into account public policy and jurisdictional concerns).

48. *R.J. Reynolds*, 268 F.3d at 134. The court concluded that since the claim could be disposed of based on the applicability of the Revenue Rule, the other claims by the parties need not be addressed. *Id.*

49. *Id.* at 135.

50. *Id.*

51. *Id.* (arguing that the RICO statute authorizes those injured under the statute to recover the damages sustained. Here, the damages sustained were the lost revenue and the increased law enforcement costs).

52. *Id.* at 136 (questioning how the majority found Canada to have standing since the remedy in this action would have been payment of damages, which would have increased Canada's revenues. The dissent maintained that if Congress authorized foreign nations to have standing, then presumably the Revenue Rule would not bar all such actions).

53. *Id.* (stating that RICO was enacted for the benefit of American citizens and any effect on foreign governments is collateral).

54. *R.J. Reynolds*, 268 F.3d at 138 (asserting that sentencing guidelines require the same minimal involvement with Canadian tax laws and the case at bar).

55. *Id.* at 139.

The majority's holding may have exceeded the bounds of the applicability of the Revenue Rule. Canada sought damages for the defendants' violations of the RICO statute. Canada established a *prima facie* case that the defendants' violation of 18 U.S.C. § 1962 was the proximate cause of Canada's injury to business and property. As the dissent cogently argues, there is no need to pass on the validity of Canada's tax laws. This case was brought to remedy a wrong perpetrated by the defendants. If the Second Circuit's ruling is upheld, there will be little recourse for foreign sovereigns who are the victims of racketeering activities to seek damages. This decision essentially bars foreign sovereigns from ever seeking the protections of 18 U.S.C. § 1962 in a civil case, because damage awards will necessarily grant revenue to the complaining party. Ironically, the court's decision to dismiss, which it based upon its unwillingness to wade into legislative waters, ultimately denied the legislative goal of the RICO act. The Supreme Court has held that the purpose of the RICO statute is "to divest the association of the fruits of its ill-gotten gains."[56] By denying Canada any recourse against the defendants' actions, the court essentially permitted the defendants to retain the profits they made illegally. The Supreme Court further stated that "Congress has provided civil remedies for use when the circumstances so warrant. It is untenable to argue that their existence limits the scope of the criminal provisions."[57] As this reasoning suggests, it is likely that Congress did not intend to restrict RICO as asserted by the majority.

**Jennine B. Mazzola**

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56. United States v. Turkette, 452 U.S. 576, 585 (1981).

57. *Id.* at 585; *see also* European Community v. Japan Tobacco, Inc., 2002 U.S. Dist. LEXIS 2506 at *27 (E.D.N.Y. 2002) (remarking that while Congress has not expressly and sufficiently stated that the Revenue Rule does not bar civil RICO claims, the legislative debates over whether there should be such a limitation in the Patriot Act provide persuasive authority). The court noted the comments of Senator John F. Kerry, who stated:

> It has been brought to my attention that this bill, as originally passed by the House, contained a rule of construction which could have limited our ability to provide assistance and cooperation to our foreign allies in their battle against money laundering. The House-passed rule of construction could have potentially limited the access of foreign jurisdictions to our courts and could have required them to negotiate a treaty in order to be able to take advantage of our money-laundering laws in their fight against crime and terrorism. The conference report did not include a rule of construction because the Congress has always recognized the fundamental right of friendly nations to have access to our courts to enforce their rights. Foreign jurisdictions have never needed a treaty to have access to our courts. Since some of the money laundering conducted in the world today also defrauds foreign governments, it would be hostile to the intent of this bill for us to interject into the statute any rule of construction of legislative language which would in any way limit our foreign allies access to our courts to battle against money laundering. That is why we did not include a rule of construction in the conference report. That is why we today clarify that it is the intent of the legislature that our allies will have access to our courts and the use of our laws if they are the victims of smuggling, fraud, money laundering, or terrorism.

*European Community*, 2002 U.S. Dist. LEXIS at *26 (quoting 147 Cong. Rec. S10990-02 (daily ed. Oct. 25, 2001) (statement of Sen. Kerry)).

# *Ramakrishna v. Besser Co.*

172 F. Supp. 2d 926 (E.D. Mich. 2001)

**Federal District Court dismissed Indian plaintiffs' suit against Michigan corporation for *forum non conveniens* where Indian Law would govern the dispute, finding key testimony could be compelled only by Indian Courts, and evidence of delays and corruption in the courts of the pertinent Indian city had not been introduced.**

In *Ramakrishna v. Besser Co.*,[1] the United States District Court for the Eastern District of Michigan, Northern Division, granted Defendant's motion to dismiss based on *forum non conveniens*.[2] Initially, Plaintiffs, residents and citizens of India,[3] filed suit in the Eastern District of Michigan alleging breach of contract, fraudulent and innocent inducement, negligence, *quantum meruit* and unjust enrichment.[4] Subsequently, Defendants filed this motion to dismiss based on *forum non conveniens*, asserting that the appropriate forum is in India.[5]

In January 1995, Vibrant Investment & Properties, Ltd. ("Vibrant"), an Indian company, entered into a joint venture agreement with Defendant, Besser Company ("Besser"), a Michigan corporation.[6] Plaintiffs were all investors in Vibrant.[7] The joint venture agreement provided that Besser would provide assistance to Vibrant to build two manufacturing facilities, in addition to masonry products to be sold within India.[8] The agreement also included a forum selection clause, selecting the High Court of Judicature in Madras, India as the chosen forum.[9]

The joint venture was unsuccessful.[10] Vibrant installed concrete paving blocks, manufactured by the joint venture company, which eventually failed because of problems with their "sub-base foundation."[11] Plaintiffs alleged that Besser failed to contribute financing and technical skill as promised in their agreement.[12] As a result of this failed project, creditors sought money from Plaintiffs.[13]

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1. 172 F. Supp. 2d 926 (E.D. Mich. 2001).
2. *Id*. at 928.
3. *Id.*
4. *Id.* at 929.
5. *Id.*
6. *Id.*
7. *Ramakrishna*, 172 F. Supp. at 928.
8. Specifically, Besser agreed to provide Vibrant with "technical advice, maintenance and construction techniques, assist with arranging financing, and participate in product promotion and customer support." *Id.* at 928.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Ramakrishna*, 172 F. Supp. at 928.
13. *Id.*

Because Plaintiffs were not parties to the joint venture agreement, the forum selection clause does not apply to them.[14] Defendant therefore asserts that even though the forum selection clause may not apply, according to the doctrine of *forum non conveniens*, the suit should be dismissed.[15]

The court applied the test set forth in *Stewart v. Dow Chemical Co.* to determine whether dismissal based on *forum non conveniens* was proper.[16] In order for an action to be dismissed based on *forum non conveniens*, a defendant normally has the burden of proving that there is a reasonable alternative forum available and that the balance of private and public interests favors transfer.[17] However, while there is usually a presumption in favor of plaintiff's choice of forum, the presumption is not as strong for foreign plaintiffs.[18] Therefore, because Plaintiffs are foreign, they bear some of the burden to prove that their cause of action should not be dismissed based on a *forum non conveniens* motion.[19]

In order to establish that there is no reasonable alternative forum, plaintiffs must make a showing that they will not be able to bring their suit in another forum.[20] Plaintiffs assert that the corruption of the Indian courts establish that it is not a reasonable alternative forum.[21] The court rejected this argument as too general, and explained that Plaintiffs needed to provide specific evidence of corruption in a particular forum, in this case, the High Court of Madras, India.[22]

Plaintiffs may then show that excessive and unreasonable delays exist in the alternate forum.[23] Plaintiffs assert that there are extreme delays in the Indian judicial system.[24] To support this claim Plaintiff submitted newspaper articles.[25] The court found that this evidence was insufficient to prove such delays, and indicated that more specific information about the High

14. *Id.* at 929.

15. *Id.*

16. *Id.*; *see* Stewart v. Dow Chem. Co., 865 F.2d 103, 106 (6th Cir. 1989).

17. *Stewart*, 865 F.2d at 106; *Ramakrishna*, 172 F. Supp. at 929; *see* Leon v. Millon Air, Inc., 251 F.3d 1305, 1311 (11th Cir. 2001) (noting that the defendant has the burden to prove *forum non conveniens*).

18. *Ramakrishna*, 172 F. Supp. at 929; *see* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 256 (1981) (stating that "a foreign plaintiff's choice deserves less deference").

19. *Ramakrishna*, 172 F. Supp. at 929; *see Piper Aircraft Co.*, 454 U.S. at 256 (explaining that a foreign plaintiff's choice of forum should not be presumed convenient).

20. Leon v. Millon Air, Inc., 251 F.3d 1305, 1312 (11th Cir. 2001) (indicating that plaintiffs have the burden of demonstrating that no reasonable alternative forum exists); *Ramakrishna*, 172 F. Supp. at 931; *see* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 506–507 (1947) (explaining that a defendant must be amenable to process in two forums); *see also* Bhatnagar v. Surrendra Overseas Ltd., 52 F.3d 1220, 1225 (3d Cir. 1995) (noting that there must be another available forum in order for a court to grant dismissal based on *forum non conveniens*).

21. *Ramakrishna*, 172 F. Supp. at 931.

22. *Id.*; *see* Eastman Kodak v. Kavlin, 978 F. Supp. 1078, 1084 (S.D. Fla. 1997) (stating that sweeping accusations of corruption are insufficient to render a forum an unreasonable alternative).

23. *Ramakrishna*, 172 F. Supp. at 929, 931; *see Bhatnagar*, 52 F.3d at 1227–28 (determining that a delay of 25 years was excessive).

24. *Ramakrishna*, 172 F. Supp. at 930, 931.

25. *Id.*

Court of Madras and statistical evidence or expert witnesses would have provided the court with more insight.[26] While Plaintiffs did establish that it could take four to ten years to resolve this matter in India, the court found that this was not an unreasonable delay.[27]

The court also asserted that Plaintiff's arguments about the disadvantages of filing suit in India were disingenuous because Vibrant had agreed to a forum selection clause vesting jurisdiction in the High Court of Madras.[28]

Additionally, Plaintiffs may generally be able to show that Defendant would not be amenable to process in the alternative forum or that the laws of the forum do not provide an adequate remedy in order to establish that there is no reasonable alternative forum.[29] While Plaintiffs made no such showing in this case, the court notes that Defendant is amenable to process in India.[30]

Plaintiffs then sought to prove that the balance of private and public interests does not favor removal to another forum.[31] In balancing the private interests of both forums, courts take into account access to proof, whether witnesses can be compelled to appear before the court, and other practical problems affecting convenience and expense.[32] Plaintiffs argued that the private interests favored Michigan because the necessary documents were located at Besser's Michigan location.[33] Plaintiff further asserted that Defendant could use photographs of the Indian site and would not need witnesses, because it could rely on the depositions of the parties.[34] The court found that consideration of the private interests favored India as the appropriate forum.[35] The court stressed the Defendant's need to have access to the site in order to examine the allegedly defective blocks.[36] The court also noted that because letters rogatory[37] were unavailable, India was the only forum that could provide compulsory process to the parties.[38] The court further noted that as a practical matter, India was the appropriate forum, because a Michigan judgment would be unenforceable in India, while an Indian judgment would be enforceable against Defendants in Michigan.[39]

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26. *Id.* at 931.

27. *Id.*; *see also Bhatnagar*, 52 F.3d at 1227 (indicating that delay of a few years is not unreasonable).

28. *Ramakrishna*, 172 F. Supp. at 931.

29. *Id.* at 930. *But see Stewart*, 865 F.2d at 107 (citing DeMelo v. Lederle Laboratories, 801 F.2d 1058, 1063 (8th Cir. 1986) (stating that "[d]ismissal on grounds of *forum non conveniens* cannot be reversed solely because another forum's laws are more or less favorable to one or the other party")).

30. *Ramakrishna*, 172 F. Supp. at 930.

31. *Id.* at 929; *see* Gulf Oil Corp. v. Gilbert, 330 U.S. at 508–09 (setting forth the proper test for determining the appropriateness of dismissal based on *forum non conveniens*); *see also Stewart*, 865 F.2d at 106 (applying the test set forth by the Supreme Court in *Gulf Oil Corp.*)

32. *Ramakrishna*, 172 F. Supp. at 930.

33. *Id.* at 931.

34. *Id.*

35. *Id.*

36. *Id.* at 932; *see Stewart*, 865 F.2d at 107 (stressing the importance of access to the site of injury).

37. *See* Marion Nash, *Contemporary Practice of the United States Relating to International Law*, 91 AM. J. INT'L L. 93, 102–03 (1997) (explaining that letters rogatory are used to collect evidence from abroad, noting that they are merely "customary" and not "mandatory").

38. *Ramakrishna*, 172 F. Supp. at 932.

39. *Id.*

Public interests to consider in the competing forums include docket backlog; whether the burden of jury duty is being placed on a community that has no interest in the matter; whether the trial is being held near the community that is most affected by it; and whether it is appropriate to hear a diversity jurisdiction case applying foreign law.[40] While the court did concede that American courts are more efficient than India's, it found that Indian courts could still provide a reasonable forum.[41] In balancing the local interests, the court favored India's interests, considering that the outcome of the case would have a greater impact on the local economy in India.[42] Furthermore, even if the suit were heard in Michigan, the laws of India would likely apply.[43] In making this determination the court relied on the following factors set forth in *Johnson v. Ventra Group, Inc.*: "(a) the place of contracting, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence, nationality, place of the incorporation and place of business of the parties, and (d) the place where the relationship . . . between the parties is centered."[44] In balancing these factors the court determined that Indian law was preferred[45] and, as a practical matter, Indian courts are more suited to apply their own forum law.

Overall, the reasoning of the District Court is rational as well as consistent with the applicable case law. This case indicates that American courts may not be as willing to hear foreign issues that involve Americans as they had in the past. However, at one point in its decision the court is rather unclear. The court noted that Defendants conceded that the forum selection clause did not apply because the Plaintiffs were not party to the contract between Besser and Vibrant, considering that Plaintiffs were only investors in Vibrant.[46] Subsequently, the court suggests that Plaintiff's argument that an Indian court is not a reasonable alternative forum because of the corruption is disingenuous considering the forum selection clause agreed to by Besser and Vibrant.[47] However, it was actually Vibrant, and not Plaintiffs, who consented to a forum selection clause in India.[48] Therefore, it appears that Plaintiffs' corruption argument was not disingenuous. While this by itself did not seem to play a large role in the court's decision, there is the danger of this reasoning being improperly applied in subsequent cases.

**Lauren Maher**

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40. *Id.* at 930; *see Gulf Oil Corp.*, 330 U.S. at 508–09 (setting forth the relevant standards to determine the private interest considerations a court must take into consideration to determine whether it should grant a motion to dismiss based on forum *non conveniens*); *see also* Kryvicky v. Scandinavian Airlines Sys., 807 F.2d 514, 516 (6th Cir. 1986) (applying the factors set forth by the Supreme Court in *Gulf Oil Corp.*).

41. *Ramakrishna*, 172 F. Supp. at 932.

42. *Id.*

43. *Id*. at 932.

44. Johnson v. Ventura Group, Inc., 191 F.3d 732, 741(6th Cir. 1999); *Ramakrishna*, 172 F. Supp. at 932.

45. *Ramakrishna*, 172 F. Supp. at 932.

46. *Id.* at 929.

47. *Id.* at 931.

48. *Id.* at 929.

# *Foster v. Arletty 3 S.A.R.L.*

278 F.3d 409 (4th Cir. 2002)

**The United States Court of Appeals for the Fourth Circuit upheld the District Court's voiding of a default judgment against defendants for want of personal jurisdiction as required by traditional notions of fair play and substantial justice; and the defendants did not waive their personal jurisdiction defense because they filed their objection within a reasonable time.**

The issue of minimum contacts with a forum state by a foreign corporation was dealt with recently by the United States Court of Appeals for the Fourth Circuit in *Foster v. Arletty 3 S.A.R.L.*[1] The court ruled that a foreign corporation that did not have any business operations in the forum state, did not advertise in the forum state, and did not avail itself of the forum state's protection, failed to meet the "minimum contacts" test.[2] Because the exercise of personal jurisdiction over the foreign corporation in these circumstances would violate the *International Shoe* requirements of "fair play and substantial justice,"[3] it would violate the "due process" protection of the Fifth Amendment.[4]

Bruce Foster, the plaintiff, had dual citizenship in France and the United States, residing in South Carolina.[5] The defendant corporation ("Arletty") is incorporated in France, and had neither any business operations nor did any advertising in South Carolina.[6] Foster entered into several contracts with a number of French companies, in which Foster would assist these companies in obtaining licenses to promote their entertainment programs over the Internet.[7] Two of the companies, Sierra Madre Phone S.A.R.L. ("Sierra Madre") and BSF Phone S.A. (BSF), were ordered to be liquidated by a French court in 1995.[8] Foster had helped both companies get licenses, which were voided after liquidation.[9] After bankruptcy negotiation, Arletty gained the right to both licenses.[10] Foster claimed that he was entitled to a fee pursuant to the contracts he had previously entered into.[11] After Arletty refused payment, Foster first filed a com-

1. 278 F.3d 409 (4th Cir. 2002) ("*Foster*").
2. *Id.* at 414–16.
3. *See* International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) ("*Int'l Shoe Co.*") (stating that due process requires that *in personam* jurisdiction may only be exercised over a defendant not present in the state if "he ha[s] minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'") (citing Milliken v. Meyer, 311 U.S. 457, 463 (1940)).
4. U.S. CONST. amend. V (stating in pertinent part "No person shall . . . be deprived of life, liberty, or property, without due process of law").
5. *Foster*, 278 F.3d at 412.
6. *Id.* at 412, 415. The co-defendant in *Foster* was Patrick Abadie, an officer of the corporation. The Court of Appeals focused only on the exercise of personal jurisdiction to the corporation. *See id.* at 414, n.4 ("The court will treat the appellees as one for the purpose of establishing personal jurisdiction").
7. *Id.* at 412.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*

plaint in French Commercial Court in April 1998.[12] That court ordered Foster to pay Arletty 10,000 francs.[13] On September 1, 1999, Foster filed suit in United States District Court in Greenville, South Carolina, claiming breach of contract and unjust enrichment.[14]

The defendants did not answer the complaint, so the district court granted a default judgment in favor of Foster on January 18, 2000.[15] Foster first tried to enforce his judgment in a French court.[16] The defendants appeared in French court to dispute both the merits of the claim and the exercise of jurisdiction by the U.S. District Court.[17] On August 10, 2000, before the French court ruled on this action, Arletty and Abadie appeared in United States District Court in South Carolina and moved to have the default judgment set aside for lack of personal jurisdiction.[18] The district court granted the defendants' motion on October 3, 2000, and Foster appealed that decision.[19] The United States Court of Appeals for the Fourth Circuit reviewed the district court's decision and affirmed the ruling on January 25, 2002.[20]

The Court of Appeals looked to the Supreme Court's interpretation of due process as it pertains to the exercise of personal jurisdiction over a defendant.[21] The most basic form of personal jurisdiction occurs when a defendant is served while he is physically present in the forum.[22] This can also apply when the defendant cannot be found in the state, but owns property within the state.[23] The reasoning behind allowing jurisdiction in these cases is that those defendants who either appear in, or own property in, a state "understand" that the state possesses authority over persons and property within the state, and has implicitly consented to such authority.[24]

Reacting to the growing complexity of the corporate world, and the need to handle litigation from it, the United States Supreme Court extended the notion of personal jurisdiction in the landmark case of *International Shoe Co. v. Washington*.[25] The Supreme Court ruled that the

12. *Id.* at 413 n.2.

13. *Id.* This judgment was affirmed by the French Court of Appeals.

14. *Id.* at 412.

15. *Id.* at 413. The default judgment was granted pursuant to FED. R. CIV. P. 55, which states, in part, "(T)he clerk upon request of the plaintiff . . . shall enter judgment . . . against the defendant, if the defendant has defaulted for failure to appear and is not an infant or incompetent person." *Id.*

16. *Id.*

17. *Id.*

18. *Id.* The defendants moved pursuant to FED. R. CIV. P. 60(b)(4), which relieves a party from judgment if "the judgment is void." *Id.*

19. *Id.*

20. *Id.* at 412 (noting that the exercise of jurisdiction did not comply with the traditional notions of fair play and substantial justice).

21. *Id.* at 413; *see also supra* note 4.

22. *See, e.g.*, S.C. CODE ANN. § 15-9-210(a) (1999) (South Carolina's "long arm statute" which states that personal service against a domestic corporation in the state is binding).

23. *See* Pennoyer v. Neff, 95 U.S. 714, 723 (1877) (stating that the exercise of personal jurisdiction over out-of-state defendants who own property within the state is "legitimate and just").

24. *See Int'l Shoe Co.*, 326 U.S. at 318 ("[S]ome of the decisions holding the corporation amenable to suit have been supported by resort to the legal fiction that it has given its consent to service and suit, consent being implied from its presence in the state through acts of its authorized agents").

25. *See supra* note 3.

exercise of personal jurisdiction would survive a due process challenge, even if the defendant was not personally served inside the state, so long as the defendant has "certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play of substantial justice.'"[26] Subsequent Supreme Court decisions in this area have provided factors for courts to use in each individual case to determine whether or not the *International Shoe* test has been met.[27]

One of the cases the Court of Appeals looked to in *Foster* was *Hanson v. Denckla*.[28] *Hanson* proffered that the defendants must have "purposely availed" themselves of the privileges of the forum state.[29] In the corporate setting, this would mean that a business would have taken the affirmative step of taking advantage of the protections of the state's laws in conducting its business.[30] The Court of Appeals found that Arletty did not avail itself of South Carolina's laws.[31] Following *Asahi Metal Ind. Co.*,[32] the Court of Appeals also found that Arletty did not avail itself of the resources of South Carolina because it had no business operations or employees operating within the state, nor did it advertise to the residents of South Carolina.[33] In fact, the only contact the court found with the state is its business affiliation with one of its residents, Bruce Foster, who at times made telephone calls and sent faxes from the state.[34]

The Court of Appeals, after considering these factors, had to weigh the burden that the exercise of personal jurisdiction would place on the defendant.[35] The court was hesitant to

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26. *Int'l Shoe Co*, 326 U.S. at 316.

27. *See* Richard S. Zembeck, Comment, *Jurisdiction and the Internet: Fundamental Fairness in the Networked World of Cyberspace*, 6 ALB. L.J. SCI. & TECH. 339, 352–53 (1996) (stating that the Supreme Court developed factors in later cases to provide lower courts with a standard to be used in applying the *International Shoe* test).

28. 357 U.S. 235 (1958).

29. *Id.* at 253 ("(I)t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws"); *see also* Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985) (ruling that an out-of-state defendant who had a "substantial and continuing" business relationship with an in-state plaintiff was subject to personal jurisdiction because the defendant had "fair notice" that he could be subject to a suit arising from the business relationship).

30. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (ruling that a corporation that conducts activities in the state has "clear notice that it is subject to suit there").

31. *Foster*, 278 F.3d at 415.

32. 480 U.S. 102 (1987) ("*Asahi*"). The Supreme Court did not allow California to exercise personal jurisdiction over Asahi, a Japanese corporation. Despite Asahi's products entering the state via the "stream of commerce," the company did not "purposefully avail" itself of California's protection. Among the factors the Court looked to was the fact that Asahi "does not do business in California. It has no office, agents, employees, or property in California. It does not advertise or otherwise solicit business in California." *Id.* at 112.

33. *Foster*, 278 F.3d at 415.

34. *Id.*; *see* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984) ("[D]ue process is not offended by a State's subjecting the corporation to its *in personam* jurisdiction when there are sufficient contacts between the State and the foreign corporation"); *see also* Sean K. Hornbeck, Comment, *Transnational Litigation and Personal Jurisdiction over Foreign Defendants*, 59 ALB. L. REV. 1389, 1399–1400 (1996) (offering that the *Helicopteros* decision implicitly requires some physical presence by a foreign corporation in the state to exercise personal jurisdiction.)

35. *Asahi*, 480 U.S. at 113 (In order for the exercise of personal jurisdiction to pass the *International Shoe* test, the exercise must be "reasonable . . . [a] court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief").

exercise jurisdiction because Arletty was a foreign corporation,[36] which places an even larger burden on the defendant, because it is now forced to "defend [it]self in a foreign legal system."[37] Such a burden needs to be weighed against the necessity of exercising personal jurisdiction, especially against a foreign entity.[38] The Court of Appeals found that the burden to Arletty outweighed the need to assert personal jurisdiction.[39]

Foster's other argument was that Arletty had waived its right to contest the exercise of personal jurisdiction by August 2000.[40] Despite the requirement of due process protection for the exercise of personal jurisdiction over a defendant, the protection can be waived through the action, or inaction, of a defendant.[41] In this case, Foster pointed to three separate actions by Arletty, claiming that each one of them was a waiver.[42]

First, Foster pointed to his attempted enforcement of his default judgment in French court in July 2000.[43] Arletty did appear before that court to contest the exercise of jurisdiction by the U.S. District Court.[44] The Court of Appeals dismissed that argument, saying that if the French court had reached a decision in that case, *res judicata* would apply.[45] However, this was irrelevant, because the French court never did reach a decision, and the matter was taken up in the U.S. courts.[46]

Next, Foster argued that Arletty waived its right to contest personal jurisdiction under the Federal Rules of Civil Procedure.[47] Rule 12(h) states that a lack of personal jurisdiction defense is waived if not "made by motion under this rule."[48] According to Foster's argument, Arletty's only chance to contest personal jurisdiction was immediately after it received notice of Foster's lawsuit in September 1999.[49] Again, the Court of Appeals dismissed that claim, stating that

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36. *Foster*, 278 F.3d at 416.

37. *Asahi,* 480 U.S. at 114.

38. *Id.* ("The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders").

39. *Foster*, 278 F.3d at 416.

40. *Id.* at 413.

41. *See* Insurance Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982) ("Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived").

42. *Foster*, 278 F.3d at 413–14.

43. *Id.* at 413.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 413–14.

48. FED. R. CIV. P. 12(h)(1) reads:

> A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made a matter of course. *Id.*

49. *Foster*, 278 F.3d at 413–14.

such a waiver would have occurred only if the defendant had answered Foster's complaint and argued the merits, but omitted the defense of lack of personal jurisdiction.[50] Instead, Arletty chose not to answer the complaint at all, have a default judgment entered against it, and take its chances later by arguing lack of personal jurisdiction.[51] Arletty's tactic was proper and is supported by case law.[52]

Foster's final argument for waiver was that Arletty's motion to set aside the default judgment under Federal Civil Procedure Rules was not done in a "reasonable time."[53] Rule 60(b)(4) allows judgments to be set aside if "the judgment is void," as Arletty claimed it was, because the judgment was made by a court without personal jurisdiction.[54] Rule 60(b) states that such a motion "shall be made within a reasonable time."[55] Foster pointed to the time between the default judgment (January 2000) and Arletty's motion to dismiss (August 2000) and argued that such a lapse qualified as unreasonable.[56] The Court of Appeals disagreed with that characterization.[57] The court looked at "the international status of the parties" and the complexity and number of lawsuits filed between the parties.[58] Based on these factors, the court found that the delay was not unreasonable, so the defendants did not waive their right to contest personal jurisdiction.[59]

Once the Court of Appeals ruled that the defendants did not waive their due process protection against the exercise of personal jurisdiction, the court moved to the merits of their claim.[60] The court believed that exercising personal jurisdiction over Arletty and Abadie would violate traditional notions of fair play and substantial justice.[61] To arrive at its conclusion, the

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50. *Id.* at 414. The court did not consider Arletty's appearance in French court as an answer on the merits, which would have waived its right to a lack of personal jurisdiction defense. *Id.*

51. *See Insurance Corp. of Ir.*, 456 U.S. at 706 ("A defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding").

52. *See, e.g.*, Capital Investors Co. v. Executors of Estate of Morrison, 800 F.2d 424 (4th Cir. 1986); Bethlehem Steel Corp. v. Devers, 389 F.2d 44 (4th Cir. 1968). In both cases, defendants had made separate motions prior to attempting to make motions to contest personal jurisdiction. Both were ruled to have waived that right based on the prior motions. *Id.*

53. *Foster*, 278 F.3d at 414.

54. FED. R. CIV. P. 60(b) ("On motion . . . the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake . . . ; (2) newly discovered evidence . . . ; (3) fraud . . . ; (4) the judgment is void; (5) the judgment has been satisfied . . . ; or (6) any other reason justifying relief from the operation of the judgment").

55. *Id.* Rule 60(b) provides a one-year time limit to make a motion based on "reasons (1), (2), and (3)." *See supra* note 54. There is no such limit specified for reasons 4, 5 or 6 other than a "reasonable time."

56. *Foster*, 278 F.3d at 414.

57. *Id.* The court looked at rulings from other circuits to help decide this issue. A number of cases from other jurisdictions agreed with the notion that there is "little, if any, time limit" for a court to grant a motion based on Rule 60(b)(4). *Id.*; *see, e.g.*, Precision Etchings & Findings, Inc. v. LGP Gem, Ltd., 953 F.2d 21 (1st Cir. 1992).

58. *Foster*, 278 F.3d at 414.

59. *Id.*

60. *Id.*

61. *Id.*

court weighed, on one hand, the connections the defendants had to the forum state, and the burden they would incur by having to defend themselves in a foreign country against a foreign legal system, and, on the other hand, the need that the state of South Carolina had in adjudicating this conflict[62] or of the plaintiff's need to resolve the dispute in South Carolina.[63] It ruled that the burden to the defendants was greater than the need for the exercise of personal jurisdiction.[64]

If the decision in *Foster* is representative of a growing trend in American courts, the foreign corporations will benefit from these decisions.[65] These corporations will not have to worry about being forced to defend themselves in American courts for business relationships that have little to do with the United States.[66] Because nearly every aspect of the business relationship between the parties took place outside of American borders, the Court of Appeals exercised restraint in resolving the conflict arising from the business relationship.[67] In this case, a single individual could not simply use his status as an American citizen to gain a "home-field advantage" in a legal dispute.

It is refreshing to see that, even in the modern age, when global corporations and the Internet seem to make international borders less relevant, American courts still honor the importance of each nation's sovereignty and will not extend their "long arm" without a sufficient reason. Perhaps this will cause foreign nations to show American citizens the same amount of leeway in foreign dealings. This can be a benefit not just in terms of economics, but in keeping up good relations overall with the rest of the world.[68]

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62. *Id.*; *see also* Susan Nauss Exon, *A New Shoe is Needed to Walk Through Cyberspace Jurisdiction*, 11 ALB. L.J. SCI. & TECH. 1, 7 (2000) (stating that even if there are sufficient minimum contacts to justify personal jurisdiction, the courts look at several factors to determine if 'fair play and substantial justice' are met, including: the extent of the defendant's purposeful availment, the burden on the defendant if forced to defend in the state, the state's interest in adjudicating the dispute and the possibility of an alternate forum).

63. *Foster*, 278 F.3d at 416.

64. *Id.*

65. *But see* Kevin M. Clermont and Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120, 1140 (offering statistical evidence that foreign defendants who are forced to defend themselves in American courts obtain dismissals at a higher rate than domestic defendants).

66. *See generally* Terrence Berg, *www.wildwest.gov: The Impact of the Internet on State Power to Enforce the Law*, 2000 BYU L. REV. 1305, 1317 (discussing how circuit courts are wrestling with applying the Supreme Court's traditional tests for personal jurisdiction to cases involving business conducted over the Internet). The Supreme Court has yet to rule on a case providing updated guidelines for such a situation.

67. *See* Bret A. Sumner, *Due Process and True Conflicts: The Constitutional Limits on Extraterritorial Federal Legislation and the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996*, 46 CATH. U.L. REV. 907, 960–61 (1997) (commenting how courts will have to use the limits of personal jurisdictions to provide a check on the growing trend of extraterritorial legislation).

68. *See* Beth Van Schaak, *In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention*, 42 HARV. INT'L L.J. 141, 197 (2001) (discussing the need for clear guidelines in the Hague Convention for the exercise of jurisdiction over citizens of another country).

# *Germany v. United States of America*

2001 I.C.J. 104

**The International Court of Justice held that the United States failed to provide timely notice to Walter LaGrand, Karl LaGrand and the German consulate in violation of Article 36 of the Vienna Convention of Foreign Relations. Further, the Court ruled that the issuance of an Order by the International Court of Justice had a binding effect on the United States.**

In *Germany v. United States of America*,[1] Germany sued the United States in the International Court of Justice, claiming that the U.S. violated several provisions of the Vienna Convention on Consular Relations.[2] First, Germany claimed that the U.S. failed to provide Walter and Karl LaGrand with timely notice of their rights as German nationals. Next, Germany claimed that the U.S. failed to provide Germany with timely notice of the fact that the U.S. had imprisoned and sentenced two of its nationals.

## I. Facts

On January 7, 1982, Walter and Karl LaGrand were arrested in Arizona for armed robbery.[3] The robbery resulted in the death of one person and the injury of a second person.[4] The brothers were tried before the Superior Court of Pima County in Arizona and were convicted of murder in the first degree, attempted murder in the first degree, attempted armed robbery and two counts of kidnapping. Upon conviction, both brothers were sentenced to death.[5]

Walter and Karl LaGrand were born in Germany but moved to the U.S. with their mother while they were still young children.[6] Despite living in the U.S. for most of their lives, the two never became U.S. citizens. Instead, they remained German nationals throughout their lives.[7]

It is undisputed that during the time of the trials and convictions of the LaGrand brothers, both the U.S. and Germany were parties to the Vienna Convention on Consular Relations. However, there is some dispute as to when and how the U.S. became aware that the LaGrands were German nationals.[8] In particular, Germany believed that the U.S. had violated Article

1. LaGrand Case (Germany v. United States of America), 2001 I.C.J. 104, *available at* <http://www.icj-cij.org/icjwww/idocket/igus/igusjudgment/igus_ijudgment_20010625.htm> ("*Germany*").
2. Vienna Convention on Consular Relations, Apr. 24, 1963, 596 U.N.T.S. 8638–8640, *available at* <http://www.un.org/law/ilc/texts/consul.htm>.
3. State v. LaGrand, 153 Ariz. 21, 24 (1987) ("*LaGrand*").
4. *Id*. at 23.
5. *Id*.
6. *Germany*, 2001 I.C.J. 104, ¶ 13.
7. *Id*.
8. *Id*.

36(1)(b).[9] It is also undisputed that the U.S. failed to notify the LaGrands of their right to contact Germany, as is required by Article 36 of the Vienna Convention.[10] While it was also undisputed that the U.S. did not become aware that the LaGrands were German nationals until years after they had been arrested, there remained some dispute as to when exactly the U.S. became aware of the LaGrands' status. At trial, appointed counsel represented the brothers because they could not afford counsel of their own.[11] The LaGrand brothers' convictions and sentences were challenged in three separate legal proceedings.[12] The first was an appeal of their conviction and sentencing by the trial court. The Supreme Court of Arizona rejected their appeal on January 30, 1987.[13] The U.S. Supreme Court also denied their application for appeal later that year.[14] The next group of legal proceedings was a petition by the LaGrand brothers for post-conviction relief that was denied to them by an Arizona state court in 1990, and the U.S. Supreme Court in 1991.[15] During these two sets of proceedings, the LaGrands had still not been informed of their rights under the Vienna Convention.[16]

The LaGrands became aware of their rights in 1992 through sources outside of the Arizona authorities. Based on that outside information, they contacted the German consulate and informed it of their case. Immediately, German officials became involved and planned on raising the issue that the brothers had not been notified of their rights during new proceedings in federal court.[17]

After consultation with their new legal team, the LaGrands began a third set of legal proceedings in the U.S. District Court for the District of Arizona.[18] They sought a writ of *habeas corpus* hoping to have, foremost, their death sentence set aside.[19] For the first time, the issue was raised that the LaGrand brothers had not been notified of their rights as German nationals under the Vienna Convention. The court rejected their claim on the basis of procedural

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9. Article 36 (1)(b) states:

> With a view to facilitating the exercise of consular functions relating to nationals of the sending State: . . . (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.

Vienna Convention on Consular Relations, Art. 36(1)(b).

10. *Germany*, 2001 I.C.J. 104, ¶ 15.

11. *Id.* at ¶ 17.

12. *Id.* at ¶ 18.

13. *LaGrand*, 153 Ariz. at 21.

14. La Grand v. Arizona, 484 U.S. 872 (1987).

15. *Id.* at 872.

16. Germany v. United States of America, 2001 I.C.J. 104, ¶ 21.

17. *Id.* at ¶ 22.

18. LaGrand v. Lewis, 883 F. Supp. 451 (D. Ariz., 1995).

19. *Id.*

default.[20] Briefly, procedural default meant that in order to gain relief on the federal level, the claim must first be raised on the state level.[21] Because the brothers did not raise the issue of their rights in state court, the federal court could not rule on that issue in the first instance.[22]

On December 21, 1998, the LaGrand brothers were given their first official notification by U.S. officials that they were entitled to certain rights under the Vienna Convention.[23] Less than one month later, the Supreme Court of Arizona set the date of execution for Karl LaGrand to be February 24, 1999, and the execution date for his brother, Walter, to be March 3, 1999. Germany claimed it only first became aware of the scheduled dates on January 19, 1999.[24] Several appeals were made on the part of German officials to the U.S., including Arizona officials, to grant clemency.[25] The appeals were rejected and the execution of Karl went forward as planned on February 24, 1999.[26] The day before the execution of his brother Walter, Germany filed a last-minute action, which initiated the proceedings against the U.S., in the International Court of Justice on March 2, 1999.[27] The Court issued an order on March 3, 1999, instructing the U.S. to take measures necessary to prevent the execution of Walter LaGrand until the proceedings of the International Court of Justice, regarding Germany's last-minute filing, had been concluded.[28] Next, both Germany and Walter LaGrand initiated separate proceedings in the United States Supreme Court.[29] The United States Supreme Court ruled negatively for both parties. Despite the Order of Provisional Measures by the International Court of Justice, Walter LaGrand was executed later that day.[30]

## II. Germany's Claims

After rejecting challenges by the United States as to the admissibility of Germany's four submissions, the International Court of Justice considered the merits of each submission.[31] Germany claimed four separate submissions against the United States in regard to the LaGrand brothers. In its first submission, Germany wanted the Court to declare that the United States' failure to inform the LaGrand brothers of their rights as German nationals under Article 36(1)(b) in a timely fashion deprived Germany of its rights to render consular assistance. In

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20. *See* Brian M. Hoffstadt, *How Congress Might Redesign A Leaner, Cleaner Writ Of* Habeas Corpus, 49 DUKE L.J. 947, 956 (2000) (explaining that procedural default will kick in when a federal court is considering a *habeas corpus* claim, but it must abide by the procedural rules of the state from which it came).

21. *Id.*

22. *Germany*, 2001 I.C.J. 104, ¶ 23.

23. *Germany*, 2001 I.C.J. 104, ¶ 24.

24. *Id.* at ¶ 25.

25. *Id*. at ¶ 26.

26. *German Sought Injection at Last Minute*, DALLAS MORN. NEWS, Feb. 26, 1999 (discussing how the execution of Karl LaGrand was carried out by lethal injection, rather than in the gas chamber, on Feb. 24, 1999).

27. Germany v. United States of America, 2001 I.C.J. 104, ¶ 30.

28. *Id*. at ¶ 32.

29. *See* LaGrand v. Arizona, 526 U.S. 1001 (1999) (The U.S. Supreme Court denied the petition for a stay of execution and denied *certiorari*); *see also* Federal Republic of Germany v. United States, 526 U.S. 111 (1999) (United States Supreme Court failed to compel the State of Arizona to prevent the execution of Walter LaGrand).

30. *See* Houston Putnam Lowry & Peter Schroth, *Survey of 1999 Developments in International Law in Connecticut*, 74 CONN. B.J. 406, 425–429 (2002).

31. *Germany*, 2001 I.C.J. 104, ¶ 64.

turn, this failure on the part of the United States violated its international obligation to Germany in its own right, and in its right of diplomatic protection of nationals under Article 5 and Article 36(1) of the Vienna Convention.[32]

The second submission by Germany asked the Court to determine whether the United States, by applying domestic instead of international law and by using the procedural default rule, violated its international legal obligations under Article 36(2).[33]

The third submission by Germany asked the Court to decide whether the United States violated its international legal obligation by allowing the execution of Walter LaGrand to go forward, despite the Order of Provisional Measures that was ordered by the Court on March 3, 1999, instructing the United States to refrain from any action that would interfere with the subject matter of ongoing international judicial proceedings in the LaGrand case.[34]

In its fourth submission, Germany asked the Court to determine whether the United States should provide Germany with an assurance that it would not repeat its unlawful action and that in the future, if criminal proceedings against German nationals were to take place, they would be done in accordance with the United States' international legal obligations under Article 36 of the Vienna Convention on Consular Relations. In particular, in cases that involved the death penalty, the United States would be required to provide a process for review of criminal convictions that were guided by Article 36.[35]

## III. Court Decision

On the first claim, the Court found in favor of Germany. It reasoned that a basic principle of Article 36(1)(a) of the Vienna Convention is the right of communication and access.[36] The next provision, (b), spelled out the details of consulate notification and, finally, subparagraph (c) laid out the details of the measures a consulate may take to render assistance to its nationals.[37] The Court determined that when a state is not aware of the detention of its nationals, it is prevented from exercising its rights under the Vienna Convention and hence, in this case, the

32. *Id.* at ¶ 65.

33. *Id.* at ¶ 79*; see also* Vienna Convention on Consular Relations, art. 36, sub b (2):

> The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended. *Id.*

34. *Germany*, 2001 I.C.J. 104, ¶ 92.

35. *Id.* at ¶ 117.

36. *Id.* at ¶ 73.

37. *Id.* Under Article 36(1)(a) of the Vienna Convention, Germany should have been given the opportunity to meet with and speak to the LaGrand brothers because of their status as German nationals. As the sending state, Germany would have also been given the opportunity to provide legal assistance to the brothers. *Id.*

failure of the United States to notify the LaGrands or Germany was a breach of its duty under the Vienna Convention.[38]

As to the second submission of Germany, the Court determined that the procedural default rule does not by itself violate the Vienna Convention.[39] The Court thought a problem arose when the procedural default rule did not allow a conviction to be challenged on the basis of Article 36(1). The Court believed that once the United States became aware of the status of the LaGrand brothers, procedural default should have dropped out and the LaGrands should have at least been given the opportunity to raise in state court the issue that they had been denied their right to contact Germany.[40]

As to the third submission of Germany, the Court went through a significant statutory analysis. The Court considered this a novel issue, because it had not previously determined the legal significance of an order issued under Article 41(1) of its statute.[41] Germany contended that the United States was required to comply with the March 3, 1999 Order of the International Court of Justice. The United States argued that the Order was not binding on it, but was merely an indication of how the Court wanted the United States to act. The Court looked at both arguments and found its Order to be binding.[42]

First, the Court examined the language of Article 41, both in English and in French. The United States relied on the language of Article 41 which read, "[t]he Court shall have the power to *indicate,* if it considers that circumstances so require, any provisional measures which *ought* to be taken to preserve the respective rights of either party."[43] The United States argued that in English, "indicate" is not a term that binds someone to do anything. Instead, "indicating" is like making recommendations on how something should be done,[44] so that the Order did not have a binding effect. The other part of the sentence that the United States focused on was the word "ought." It argued that "ought" did not have a binding effect, but was merely of a suggestive nature. In light of these ambiguities, the Court examined the object and purpose of the statute. The Court found that, when viewed in context, it was clearly intended to have a binding effect on the parties.[45] It reasoned that one of the basic functions of judicial settlements in

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38. Germany v. United States of America, 2001 I.C.J. 104, ¶ 73. The United States, under the Vienna Convention, had two primary duties in this circumstance. First, they had a duty to disclose to Germany that the United States had some of its nationals in their custody and they were being tried in our system of justice. Next, the United States had a duty to tell the LaGrand brothers that they had certain rights under the Vienna Convention, including contacting Germany in hopes of gaining legal assistance. *Id.*

39. *Germany*, 2001 I.C.J. 104, ¶ 91.

40. *Id*.

41. *See* Statute of the International Court of Justice, chap. III, art. 41, *available at* <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm#CHAPTER_III>.

42. *Germany*, 2001 I.C.J. 104, ¶ 109.

43. *Id.* at ¶ 100. The second provision of Article 41 of the statute that that Court used for guidance in its decision reads as follows: "Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council." *Id.*

44. *Id.*

45. *Germany*, 2001 I.C.J. 104, ¶ 101.

international disputes is to have binding determinations.[46] The Court further reasoned that the exercise of its function could be hampered if the decisions it made did not have a binding effect.[47] The Court examined other alternative indicators that orders were binding, but by and large anchored its reasoning in the object and purpose of the statute.

The Court, having decided that the Order it issued was binding, next turned to whether the United States complied with the Order. Once the Order was issued, it was to be transmitted by United States officials to the Governor of Arizona.[48] The United States did transmit the Order to the Arizona governor, but it did not notify him that the Order was binding. However, the Order also instructed the United States to take all measures necessary to ensure that Walter LaGrand was not executed until a final decision was rendered in the international proceedings.[49] While the Court conceded that the United States was given very little time to act, it concluded that it should have acted nonetheless. The Court determined that the United States did not take all the steps it could have in order to ensure that Walter LaGrand was not executed.[50] While the Order was transmitted to the Governor, no letter or explanation of its significance accompanied it. Next, the Solicitor General of the United States sent a brief letter to the United States Supreme Court and argued that the Order did not have a binding effect.[51] Further, the United States Supreme Court rejected an application for a stay of execution that was submitted by Germany.[52] While the United States did take some steps, the Court concluded that the United States did not take the correct steps and, hence, failed to comply with its binding Order.[53]

The Court finally examined the fourth submission of Germany. The Court looked at the measures the United States had taken in order to assure that a similar violation does not occur again.[54] Some of these measures included providing information to federal, state and local law enforcement agencies about Consular notification rights.[55] Information was also provided to the judicial branch and training programs were implemented with the intent of reaching all levels of the government.[56] The Court concluded that the remedial measures undertaken by the

46. *Id.* at ¶ 102.

47. *Id.*

48. *Id.* at ¶ 111.

49. *Id.* The Order Stated that "[t]he United States should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this order." *Id.*

50. Germany v. United States of America, 2001 I.C.J. 104, ¶ 115. Some examples of what the United States could have done include: Having the United States Supreme Court stay the execution until the International Court of Justice concluded its proceedings; having the Arizona governor stay the execution until after the Court concluded its proceedings; or perhaps stay the execution and allow Walter LaGrand to raise the issue in state court that he had not been notified of his rights as a German national until well after he was sentenced to death. *Id.*

51. *Id.* at ¶ 112. The Court used this as one of several examples to illustrate how the United States did not do all that it could to stay the execution of Walter LaGrand. *Id.*

52. Federal Republic of Germany v. United States, 526 U.S. 111 (1999).

53. *Germany*, 2001 I.C.J. 104, ¶ 115.

54. *Id* at ¶ 123.

55. *Id.* at ¶ 121.

56. *Id.*

United States cannot be a complete assurance that an event like the LaGrand case will not happen again, but no state can assure one of total perfection.[57] The Court believed that these measures were adequate to meet Germany's request for a general assurance of non-repetition.[58]

The Court next considered what would be an appropriate procedure in the future if the safeguards that the United States has put into place fail. The Court believed that if notice were not given in a timely fashion, a mere apology would not suffice.[59] Rather, the United States would be required to review and reconsider the conviction by taking into account the Vienna Convention.[60] The Court left the way in which to conduct the review or reconsideration up to the United States.[61]

## IV. Conclusion

In conclusion, we can take three important principles from this case. The first, and clearly the most important principle, is that despite the unclear meaning of Article 41, an order issued by the International Court of Justice is binding. The second is that amongst nations who are parties to the Vienna Convention, there is a clear duty to notify a sending nation, when a host nation has imprisoned and is going to try nationals of the sending nation. Finally, the third principle is that a host nation must notify imprisoned nationals of their rights under the Vienna Convention, and allow them the opportunity to contact their home country.

**Daniel A. McFaul, Jr.**

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57. *Id.* at ¶ 124.
58. *Id.*
59. *Id.* at ¶ 125.
60. *Id.*
61. *Id.*