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Recognition and Enforcement of United States Money Judgments in Brazil

Maria Angela Jardim de Santa Cruz Oliveira*

Introduction

As global trade intensifies around the world, many business-related disputes are emerging. International judicial cooperation becomes crucial for dealing with those disputes. Brazil is one of the top trading partners of the United States.[1] In 2003, U.S. export and import trade with Brazil amounted to approximately $29 billion U.S.[2]

The objective of this article is to explore whether the money judgments issued in the United States on business matters are enforced in Brazil. In Part I, I will analyze the mechanisms for recognition and enforcement of foreign judgments in Brazil by surveying the historical background. In Part II, I will discuss the process of centralization, and in Part III, I will describe the current requirements for recognition of foreign money judgments in Brazil. In Part IV, I will explain the grounds for non-recognition, and in Part V, I will consider relevant Brazilian cases on recognition of American judgments on business matters. In Part VI, I will give a brief description of how the recognition of foreign money judgments is regulated in the United States, and I will compare both American and Brazilian systems to show their differences and similarities.

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1. This data refers to the year 2004 up to May. *See* U.S. CENSUS BUREAU, FOREIGN TRADE STATISTICS, TOP TRADING PARTNERS-TOTAL TRADE, EXPORTS, IMPORTS: YEAR TO DATE MAY 2004, *available at* http://www.census.gov/foreign-trade/statistics/highlights/top/top0405.html (last visited July 14, 2004) (reporting that Brazil was fifteenth out of all countries that conduct the most trade with the United States); *see also* Peter F. Allgeier, United States Ambassadnr, Remarks at Sao Paulo American Chamber of Commerce: Brazil and the United States—A Continuing Partnership (Nov. 18, 2002), *available at* http://www.ustr.gov/World_Regions/Americas/Speeches/Section_Index.html (last visited Oct. 23, 2005) (explaining that the United States and Brazil make natural partners since Brazil is the world's fifth most populous country, a democracy, has the eleventh largest economy, and is one of the world's top trading countries).

2. *See* U.S. CENSUS BUREAU, FOREIGN TRADE STATISTICS, TRADE IN GOODS (IMPORTS, EXPORTS AND TRADE BALANCE) WITH BRAZIL, *available at* http://www.census.gov/foreign-trade/balance/c3510.html#2003 (last visited Oct. 23, 2005) (showing that trade between Brazil and the U.S. in 2003 amounted to approximately $29 billion); *see also U.S.-Latin Trade: 2003 Trade Grows Slightly, Driven by U.S. Imports from Latin America*, LATIN BUS. CHRON., *available at* http://www.latinbusinesschronicle.com/statistics/trade/usa2003.htm (last visited Oct. 23, 2005) (reporting that in 2003 exports between Brazil and the United States totaled $11.2 billion and imports totalled $17.9 billion).

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It should be noted that this paper addresses the recognition of money judgments rendered by the judicial branch only, and does not address questions related to arbitral awards. Nor does it address the enforcement of non-money judgments, such as cases in family law matters and alimony. Furthermore, this paper will not discuss any international treaties to which Brazil might be a signatory, since the United States is not a party to any other international or bilateral treaty regarding recognition and enforcement of foreign judgments.[3]

The jurisdiction for the "homologation"[4] of foreign court decisions is established in the Brazilian Federal Constitution. For procedural matters, "homologation" of foreign judgments is the process by which, once the request is granted, a plaintiff requests the recognition of an alien judgment in order to enforce it in Brazilian territory through the regular execution procedures in the competent domestic courts.[5]

Historically, this task was attributed to the highest court of Brazil, the Supreme Federal Court (SFC).[6] However, in December 2004, a constitutional amendment was passed, transfer-

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3. U.S. DEPT. OF STATE, BUREAU OF CONSULAR AFF., *Enforcement of Judgments*, *available at* http://www.travel.state.gov/law/info/judicial/judicial_691.html (last visited Oct. 25, 2005) ("There is no bilateral treaty or multilateral international convention in force between the United States and any other country on reciprocal recognition and enforcement of judgments."); *see also* John F. Molloy, *Part II Conference Report: Miami Conference Summary of Presentations*: *IV. Jurisdictions, Service of Process, and Enforcement of Judgment Issues in Actions Against U.S. Companies or Subsidiaries in U.S. and Latin American Courts*, 20 ARIZ. J. INT'L & COMP. L. 47, 58 (2003) (noting that Latin American nations are parties to bilateral and multilateral treaties that govern the enforcement of foreign judgments, to which the United States is not a party).

4. Homologation is not a well-known procedure in Common Law countries. Black's Law Dictionary defines homologation as: "*Civil law.* 1. Confirmation, esp. of a court granting its approval to some action." *See* BLACK'S LAW DICTIONARY 753 (8th ed. 2004); *see also* M.W. Janis, Note and Comment, *Jeremy Bentham and the Fashioning of "International Law,"* 78 AM. J. INT'L L. 405, 414 (1984) (stating that homologation is the "codification of unwritten laws which are considered as established by custom").

5. *See* Jacob Dolinger, *Brazilian International Procedural Law*, *in* A PANORAMA OF BRAZILIAN LAW 349, 365–66 (Jacob Dolinger & Keith S. Rosenn eds., North-South Center & Editora Esplanada Ltda. 1992) (1991) [hereinafter *Brazilian International Procedural Law*] (asserting that foreign judgments must be homologated by the Supreme Federal Court (SFC), based on the requirements of Article 15 of the Law of the Introduction to the Civil Code, which states that the foreign judgment can be enforced in Brazil only after the SFC recognizes it); *see also* Nadia de Araujo, *Dispute Resolution in MERCOSUL: The Protocol of Las Lenas and the Case Law of the Brazilian Supreme Court*, 32 U. MIAMI INTER-AM. L. REV. 25, 44 (2001) (reporting that the 1988 Brazilian Constitution grants the Supreme Court original jurisdiction to homologate foreign judgments); Horacio Falcao, *Recognition and Enforcement of Foreign Arbitral Awards: A New Chapter in Brazilian Arbitration History*, 8 AM. REV. INT'L ARB. 367, 377–79 (1997) (explaining that foreign arbitral awards are recognized through homologation).

6. *See* Rett R. Ludwikowski, *Constitutionalization of Human Rights in Post-Soviet States and Latin America: A Comparative Analysis*, 33 GA. J. INT'L & COMP. L. 1, 104 (2004) (asserting that Brazil's Constitution made the Supreme Federal Tribunal (SFT) the "main organ of judicial review," which hears direct actions on the unconstitutionality of state and federal acts, is binding on the parties to the controversies, and must be followed by the Judiciary and the Executive); *see also* Keith S. Rosenn, *Judicial Review in Brazil: Developments Under the 1988 Constitution,* 7 SW. J. L. & TRADE AM. 291, 293 (2000) [hereinafter *Judicial Review in Brazil*] (reporting that Supreme Federal Court or Supreme Federal Tribunal (SFT) is the highest court in Brazil, where the constitutionality of any law or decree may be challenged).

ring the jurisdiction on the recognition of foreign judicial opinions to the Superior Court of Justice (SCJ). [7]

I. Historical Antecedents

As for the origins and influences of the Brazilian system, Jacob Dolinger explains that "Brazil has followed the Italian system of *giudizio di delibazione*," which limits the scope of judicial inquiry to form, not substance.[8] Courts review judgments for their external, formal requisites, without any kind of reexamination of the merits of the foreign judgment."[9] This is paralleled in the German system, where foreign judgments are not subject to revision on the merits except if they violate good morals (*contra bonos mores*) or the purpose of German law.[10] However, there is no evidence of direct German influence on Brazilian law. [11]

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7. *See* Constituição Federal [C.F.] Art. 105, *available at* http://www.v-brazil.com/government/laws/titleIII.html (last visited Oct. 23, 2005) (providing that on December 8, 2004, Article 105 of Brazil's Constitution was amended to grant the Superior Court of Justice competency to institute legal proceedings regarding homologation of foreign judgments and the granting of exequatur to letters rogatory); *see also* de Araujo, *supra* note 5, at 46 (arguing that the amendment was proposed because it was not efficient for the Supreme Court to decide whether to honor the foreign court's request for judgment and to permit the lower courts to decide the merits of the judgment; rather, it would be more appropriate for the Superior Court of Justice to make these decisions).

8. *See* Jacob Dolinger, *Brazilian Confirmation of Foreign Judgments*, 19 INT'L LAW. 853, 854 (1985) [hereinafter *Brazilian Confirmation*] (providing that Brazil courts, unlike French courts, do not demand that foreign tribunals apply the merits of the case based on the foreign rule of law). *But see Brazilian International Procedural Law*, *supra* note 5, at 365–66 (explaining that while Brazil does follow the Italian system in terms of recognition, unlike Italy, Brazil will not reexamine the merits of a foreign default judgment and will never retry cases that have been decided abroad by a proper jurisdiction).

9. *See Brazilian Confirmation*, *supra* note 8, at 854, n.7; *see also* PAUL GRIFFITH GARLAND, BILATERAL STUDIES IN PRIVATE INTERNATIONAL LAW 93 (Arthur Nussbaum ed., 1959) [hereinafter BILATERAL STUDIES] (listing the current requirements for the recognition of foreign judgments in Brazil, all of which are procedural in nature, and remarking on the fact that courts will not evaluate the merits of foreign law); *see also* Jacob Dolinger & Carmen Tiburcio, *The Forum Law Rule in International Litigation—Which Procedural Law Governs Proceedings to be Performed in Foreign Jurisdictions: Lex Fori or Lex Diligentiae?*, 33 TEX. INT'L L.J. 425, 440 n.83 (1998) (outlining the Law of Introduction to the Brazilian Civil Code Article 15, which provides the requirements that must be met prior to a foreign judgment's recognition). While the Italian system has come to require a more substantive inquiry (in the cases where the judgment is against a defendant who is in default), the modern Brazilian system remains procedural in nature. *See id*.

10. *See* Dennis Campbell & Dharmendra Popat, *Enforcing American Money Judgments in the United Kingdom and Germany*, 18 S. ILL. U. L.J. 517, 538, 542–46 (1994) (summarizing the German civil code of procedure as it pertains to the recognition of foreign judgments, and remarking that although German courts will grant recognition without evaluating the merits, the courts will deny recognition if such judgment runs contrary to public policy or offends fundamental principles of German law); *see also* Hans-Michael Kraus, *Enforcement of Foreign Money Judgments in the Federal Republic of Germany—Some Aspects of Public Policy*, 17 TEX. INT'L L.J. 195, 197–98 (1982); Wolfgang Wurmnest, *Recognition and Enforcement of U.S. Money Judgments in Germany*, 23 BERKELEY J. INT'L L. 175, 194–95 (2005) (noting that German courts generally review cases liberally, denying recognition only to those that are clearly repugnant to their notions of justice, and pointing out that most violations are founded upon the judgment's violation of substantive rather than procedural law).

11. *See* BILATERAL STUDIES, *supra* note 9, at 15–16 (remarking on the German, French, and Italian influence upon the Brazilian civil code, but providing evidence of only the Italian influence). *But see* Daniela Trejos Vargas, *Proceedings Inaugural Conference on "Legal and Policy Issues in the Americas,"* 13 FLA. J. INT'L L. 125, 127–28 (2000) (stating that Brazilian civil law has been influenced by both Italian and German law); Symposium, *Responding to the Legal Obstacles to Electronic Commerce in Latin America: General Questionnaire*, 17 ARIZ. J. INT'L & COMP. L. 23, 24 (2000) [hereinafter *Responding to the Legal Obstacles*] (noting that European law, including that of France and Germany, has had an influential impact upon the Brazilian legal system).

Since 1847,[12] Brazil has had a tradition of confirming foreign country judgments almost automatically. During the Imperial period,[13] under the influence of Portuguese juridical traditions, Brazil was very liberal in recognizing equality of judgments in both nationals and foreigners.[14] Judgments of foreign courts would be recognized upon the fulfillment of certain requirements.[15] It was required that the decision be final and contain the external formalities for execution in accordance with the law of the foreign country where it was issued.[16] However, there was no prescription that the foreign decision was to be issued by a judge of competent jurisdiction.[17] In addition, the grounds for mandatory refusal of recognition and enforcement of foreign judgments were limited to cases involving a violation of national sovereignty, public policy, real estate laws, or moral laws.[18] Reciprocity was required in the mid-nineteenth century,

12. *See* AGUSTINHO FERNANDES DIAS DA SILVA, DIREITO PROCESSUAL INTERNACIONAL—EFEITOS INTERNACIONAIS DA JURISDIÇÃO BRASILEIRA E RECONHECIMENTO DA JURISDIÇÃO ESTRANGEIRA NO BRASIL 25 (1971) (explaining that recognition and enforcement of foreign judgments was first regulated in Brazil by the Imperial Government Announcement of October 1, 1847). *See generally Brazilian Confirmation*, *supra* note 8, (remarking on the liberal Brazilian tradition of recognizing foreign judgments requiring only reciprocity or the existence of an enforcement treaty).

13. *See* E. BRADFORD BURNS, A HISTORY OF BRAZIL 543–44 (2d ed. 1980) (listing, in chronological order, significant events in Brazilian history); *see also* F. Assis Cintra, *D. Pedro I e o Grito da Independência [D. Pedro I and the Shout of Independence]*, *in* A DOCUMENTARY HISTORY OF BRAZIL 197, 197–200 (E. Bradford Burns ed., 1966) (recounting Dom Pedro's verbal declaration of independence from Portugal on September 7, 1822).

14. *See* DIAS DA SILVA, *supra* note 12, at 25; *see also Papers Relating to the Foreign Relations of the United States*, in A DOCUMENTARY HISTORY OF BRAZIL 283, 283–84 (E. Bradford Burns ed., 1966) (reprinting a declaration by the Imperial government, guaranteeing that the civil administrative rights of both foreigners and nationals would continue to be recognized by the new imperial regime). *See generally* THOMAS FLORY, JUDGE AND JURY IN IMPERIAL BRAZIL, 1808-1871 SOCIAL CONTROL AND POLITICAL STABILITY IN THE NEW STATE 37 (Univ. of Tex. Press 1981) (noting that Brazilian independence from Portugal had little effect on the judiciary during the Imperial period, even though it was subject to enormous criticism as citizens voiced their distaste for the Portuguese legal system).

15. *See* DIAS DA SILVA, *supra* note 12, at 25; *see also* Hilton v. Guyot, 159 U.S. 113, 227 (1894) (noting that Brazil required reciprocity). *But see Brazilian Confirmation*, *supra* note 8, at 854 (stating that the Imperial regime would grant judgments without examining the merits and that it did not adhere to the reciprocity rule). Dias da Silva explains that, after the regulation of recognition and enforcement of foreign judgments by the Imperial Government Announcement of October 1, 1847, the Decree of 6982 of the year 1878 systematized Law 2615, enacted in 1875, governing the necessary requirements. These requirements included that the foreign judgment should be final and ready to be executed in the country in which it was rendered, and also reciprocity. Violation of public policy was already grounds for non-recognition of foreign judgments.

16. *See* DIAS DA SILVA, *supra* note 12, at 25–6 (listing the requirements of recognition of foreign judgments under Law 2615 of 1875); *cf. Guyot*, 159 U.S. at 227 (quoting Wheaton's International Law as asserting that states, for the purpose of convenience, have recognized final judgments subject to certain restrictions, even absent an express agreement that the State was not obligated to do so).

17. *But see* BILATERAL STUDIES, *supra* note 9, at 93 (proclaiming that foreign judgments must be rendered by a competent court)*; see also Brazilian Confirmation*, *supra* note 8, at 855 n.12 (holding that in order to enforce foreign judgments, the judgment must be made by a competent court); *cf.* Symposium, *The New Latin American Debt Regime—Latin American Debt Obligations in the 1990s: Risk Strategies, Remedies and Judicial Enforcement*, 16 NW. J. INT'L L. & BUS. 5, 22 (1995) [hereinafter *The New Latin American Debt Regime*] (stating that the judgment of a court of competent jurisdiction will be recognized by Brazil).

18. *See Brazilian Confirmation*, *supra* note 8, at 854 n.13 (indicating that if national sovereignty, public policy or good customs are violated, Brazil will not recognize foreign judgments); *see also* DIAS DA SILVA, *supra* note 12, at 25; Andre Emrich, *The Evolving Nature of Arbitration in Brazil*, MEALEY'S INT'L ARB. REP., Feb. 2004, at 5 (showing that a reason for not enforcing foreign judgments is that they may be contrary to public policy).

but the execution of foreign judgments which did not comply with this condition was authorized in 1880.[19]

In 1891, a new Constitution was enacted due to the establishment of the Republican government in 1889.[20] The Constitution did not mention the recognition of foreign judgments.[21] The subject matter was then regulated by ordinary federal statute, which attributed to the Supreme Federal Court the jurisdiction to recognize judgments rendered by foreign countries.[22] The Federal Constitution of 1934 and the following Constitutions[23] provided original jurisdiction to the Supreme Federal Court to confirm foreign judgments. In December 2004, the current Federal Constitution of 1988 was amended, relocating jurisdiction to recognize foreign judgments to the Superior Court of Justice (SCJ).[24]

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19. *See* DIAS DA SILVA, *supra* note 12, at 26 (recognizing that foreign judgments by the judiciary required reciprocity from the requesting forum and stating that decree 7777 authorized the executive branch to enforce those foreign decisions when the country of origin did not ensure reciprocity). Because the recognition of foreign judgments by the judiciary required reciprocity of the requesting forum, Decree 7777 authorized the executive branch to enforce those foreign decisions when the country of origin did not ensure reciprocity. As Dias da Silva explained, "[i]n 1894, Law 221 substituted the two processes above for the homologation by the Supreme Federal Court. Four years later, the Decree 3084 consolidated the existing legislation. The former Introduction to the Civil Code of 1917 and the Introduction Law of 1942, as well as the Code of Civil Procedure of 1940, came to regulate the subject matter later on without, however, introducing any substantial alterations." *Id. See also Guyot*, 159 U.S. at 227 (stating that foreign judgments in Brazil are recognized if reciprocity is rendered).

20. *See Brazilian Confirmation*, *supra* note 8, at 853 n.4 (proclaiming the Brazilian republic in 1889); *see also* Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 COLUM. J. TRANSNAT'L L. 529, 602 (1998) (mandating that Brazil follow the constitution of the French republic). *But see* Guido F.S. Soares, *Symposium on Parliamentary Participation in the Making and Operation of Treaties: Latin America: The Treaty-Making Process Under the 1988 Federal Constitution of Brazil*, 67 CHI.-KENT L. REV. 495, 500 (1991) (stating that the U.S. constitution served as a model for the 1891 republican constitution of Brazil).

21. *See Brazilian Confirmation*, *supra* note 8, at 854 n.11 (supporting the proposition that the constitution does not talk about enforcement of foreign judgments by indicating that the rule comes from the Brazilian Code). *See generally* BILATERAL STUDIES, *supra* note 9 (reasserting that it was the Law of Introduction and the Code of Civil Procedure and not the constitution which provided that foreign judgments shall be enforced in Brazil).

22. *See* de Araujo, *supra* note 5, at 46 (stating that one of the ways for foreign judgments to be homologated is through the Brazilian Supreme Court); *see also* Legislation and Regulations Brazil: Arbitration Act, Nov. 1997, 36 I.L.M. 1562, 1575 [hereinafter Legislation and Regulations Brazil] (subjecting the validity of foreign judgments only through the Brazilian Supreme Court); Jacob & Tiburcio, *supra* note 9, at 470 n.81 (indicating that the Supreme Court has original jurisdiction in homologating foreign judgments).

23. In total, Brazil has had eight Constitutions: the Imperial Constitution of 1824, and the republican Constitutions of 1891, 1934, 1937, 1946, 1967, 1969, and the current constitution of 1988. *See* Jacob Dolinger, *Brazilian Supreme Court Solutions for Conflicts Between Domestic and International Law: An Exercise in Eclecticism*, 22 CAP. U. L. REV. 1041, 1093 n.71 (1993) (expressing that Brazil has been blessed by a multitude of constitutions from 1824, 1891, 1934, 1937, 1946, 1967, 1969, and the present constitution of 1988); *see also* Jeremy Firestone et al., *Cultural Diversity, Human Rights, and the Emergence of Indigenous Peoples in International and Comparative Environmental Law*, 20 AM. U. INT'L L. REV. 219, 281 (2005) (speaking about the present day Brazilian constitution of 1988). *See generally* Antonio Gidi, *Class Actions in Brazil—A Model for Civil Law Countries*, 51 AM. J. COMP. L. 311 (2003) (referring to Brazil's 1934 constitution).

24. *See* Constituição Federal [C.F.], *supra* note 7, at Art. 105 (establishing that the Superior Court of Justice has jurisdiction on homologation of foreign court decisions and the granting of exequatur to letters rogatory); *see also* de Araujo, *supra* note 5, at 47–48 (mentioning that the proposed amendment will transfer recognition of foreign judgments from the Supreme Federal Court to the Superior Court of Justice); Juliette Kerr, *Government of Brazil Wins Supreme Court Victory on Judicial Reform*, WORLD MKTS. ANALYSIS, Apr. 14, 2005, at 2 (stating that Congress promulgated an amendment to reform the judiciary in December 2004).

II. Centralization: Is It Necessary?

The dramatic increase of cases arriving at the SFC[25] indicated its broad jurisdiction should be reduced to the most important issues to the Brazilian people.[26] Judicial reform has, for many years, been the object of debate before the Brazilian Congress, and proposals favored the removal of the SFC's original jurisdiction to recognize foreign judgments.[27] As Rosenn notes, recognition of foreign judgments has nothing to do with the Supreme Federal Court's role in safeguarding the Constitution and is not important enough to be dealt with solely by the highest court.[28] Indeed, recognition of foreign judgments should not be attributed to the Supreme Federal Court.[29]

Surprisingly, however, jurisdiction was transferred to the Superior Court of Justice by the December 2004 constitutional amendment.[30] While the Supreme Federal Court is the highest

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25. *See* Maria Angela Jardim de Santa Cruz Oliveira, *Reforming the Brazilian Supreme Court: A Comparative Approach* (2004) (unpublished LL.M. paper, on file with the Harvard Law School Library) (stating the Supreme Federal Court is composed of eleven judges only). "In 2001 alone, 110,771 appeals were presented before the Court, of which 109,692 were ruled. Those appeals represented a 660% increase compared to the 14,366 cases ruled in 1991. In 2002, there were 160,453 appeals filed with the SFC, and 83,097 judgments were rendered." *Id. See also* Daniel Brinks, *Judicial Reform and Independence in Brazil and Argentina: The Beginning of a New Millennium?*, 40 TEX. INT'L L.J. 595, 614 (2005) (alleging that the Supreme Federal Court has been flooded with cases and that it decided about 110,000 cases in 2003); *Judicial Review in Brazil*, *supra* note 6, at 311 (asserting that the Supreme Federal Court received 105,307 cases, and decided 86,138 cases compared to the 17,432 cases that the Supreme Federal Court decided in 1989).

26. *See Judicial Review in Brazil*, *supra* note 6, at 312–17 (claiming that the Supreme Federal Court's original jurisdiction is overly broad, characterizing the recognition of foreign judgments as trivial, and contending that the SFC's dealing with such trivial cases prevents it from concentrating on significant national cases); *see also* Oliveira, *supra* note 25 (contending that judicial reform is needed so that the SFC may focus on constitutional matters that are important to Brazil and its people).

27. *See* Brinks, *supra* note 25, at 614 (stating that the debate over judicial reform commenced over 10 years ago); *see also* de Araujo, *supra* note 5, at 47 (noting that the proposed amendment for judicial reform that will transfer recognition of foreign judgments from the SFC to the SCJ has gained the support of the President of the STF); *Senate Approves Judicial Reform*, LATIN NEWS DAILY, Nov. 18, 2004 (commenting that discussions in Congress for judicial reform lasted for over twelve years).

28. *See Judicial Review in Brazil*, *supra* note 6, at 26 n.36 (stating that the SFC's jurisdiction is largely confined to constitutional claims); *see also* Oliveira, *supra* note 25 (declaring that the SFC's "cardinal role" is to safeguard the Constitution).

29. *See* de Araujo, *supra* note 5, at 47 n.55 (arguing that because homologation of foreign judgments does not raise any constitutional issues, jurisdiction over foreign judgments should lie in the SCJ (citing CARLOS MARIO DA SILVA VELLOSO, TEMAS DE DIREITO PUBLICO 117 (2d ed. 1997)); *cf.* J. Noelle Hicks, Note, *The U.S. Needs Federal Legislation Governing the Enforcement of Foreign Judgments*, 28 BROOK. J. INT'L L. 155, 157 (2002) (stating that foreign judgments in the U.S. are enforced on the state, not the federal, level).

30. *See* Diego P. Fernandez Arroyo, *Derecho Internacional Privado de los Estados del MERCOSUR*, 36 U. MIAMI INTER-AM. L. REV. 361, 364 (2005) (book review) (stating that authors of the book discussed the transfer of recognition of foreign judgments from the SFC to the SCJ which resulted from a constitutional amendment of 2004). *See generally* de Araujo, *supra* note 5 (mentioning that the proposed constitutional amendment will transfer recognition of foreign judgments from the Supreme Federal Court to the Superior Court of Justice).

court for constitutional matters, the SCJ is a court of last resort on issues of federal law.[31] Although this newly promulgated amendment freed the Supreme Federal Court of this trivial function, which is an improvement, it maintained this jurisdiction in the high court system by delegating it to the Superior Court of Justice.[32] The question therefore remains: Why should the jurisdiction to recognize foreign judgments be conferred to a higher court in Brazil? Would it not be more reasonable to entrust this task to federal judges of first instance? The Superior Court of Justice, though it has more judges than the SFC,[33] also faces an overwhelming caseload, and its jurisdiction should be restricted to relevant federal issues.[34]

Even though centralization of the jurisdiction to recognize foreign judgments seems inefficient from the point of view of the partition of jurisdiction within the Brazilian judiciary, it is certainly more convenient for the parties seeking recognition of a foreign judicial opinion in Brazil because centralization is more likely to bring about consistency and predictability in rulings than would decentralization.[35] It also avoids long litigation over whether a foreign judgment would violate national sovereignty, public policy or good mores,[36] which are grounds for non-recognition of foreign judgments.[37] Indeed, as globalization and international commerce

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31. *See* Brazil, COURTS AND JUDGMENTS, *available at* http://jurist.law.pitt.edu/world/brazil.htm (last visited Oct. 23, 2005) (describing the two highest Brazilian courts); *see also* Helplinelaw, Judiciary of Brazil, *available at* http://www.helplinelaw.com/law/brazil/judiciary/judiciary.php (last visited Oct. 23, 2005) (discussing the functions of the Brazilian Superior Tribunal de Justiça); Mutual Legal Assistance in Criminal Matters and Extradition, The Brazilian Legal System, http://www.oas.org/juridico/MLA/en/bra/en_bra-int-des-ordrjur.html (last visited Oct. 23, 2005) [hereinafter Mutual Legal Assistance] (describing the judicial system of Brazil).

32. *See* Edilenice Passos, *Doing Legal Research in Brazil 2002*, LEGAL & TECH. ARTICLES & RESOURCES FOR LIBR., LAW. AND L. FIRMS, Sept. 2, 2002, *available at* http://www.llrx.com/features/brazil2002.htm (last visited Oct. 23, 2005) (listing the Brazilian federal courts); *see also* Mutual Legal Assistance, *supra* note 31 (describing the roles of the Brazilian federal courts).

33. *See* Passos, *supra* note 32 (describing the composition and competencies of the Brazilian Supreme Federal Court and the Higher Court of Justice); *see also* Brazil, COURTS AND JUDGMENTS, *supra* note 31 (providing the number of judges on the Supreme Federal Court and on the Superior Tribunal of Justice (STJ)).

34. In 2001, 184,478 cases arrived at the Superior Court of Justice, 198,613 were decided; in 2002, 155,959 were filed, while 171,980 were decided. *See* Banco Nacional de Dados do Poder Judiciário [National Database of the Judicial Power], *available at* http://www.stf.gov.br/bndpj/tribunaissuperiores/STJ3A1.asp (last visited Oct. 23, 2005) (listing the statistics for cases filed in Brazilian courts). *See generally* Mutual Legal Assistance, *supra* note 31 (describing the judicial system of Brazil).

35. *Cf.* Sean M. McEldowney, Comment, *The "Essential Relationship" Spectrum: A Framework for Addressing Choice of Procedural Law in the Federal Circuit*, 153 U. PA. L. REV. 1639, 1649–50 (2005) (discussing the advantages of having a centralized court with nationwide jurisdiction for patent cases). *See generally* Vincenzo Di Cataldo, *From the European Patent to a Community Patent*, 8 COLUM. J. EUR. L. 19 (2002) (illustrating the need for consistency in judgments).

36. *See* Anuj Desai, *Arbitral & Judicial Decision: Case No. A27: The Iran-United States Claims Tribunal's First Award of Damages for a Breach of the Algiers Declarations*, 10 AM. REV. INT'L ARB. 229, 244 n.64 (1999) (illustrating the refusal of courts to enforce foreign judgments when enforcement would violate national sovereignty or due process); *see also* Harold G. Maier, *Could a Treaty Trump Supreme Court Jurisdictional Doctrine? A Hague Conference Judgments Convention and United States Courts: A Problem and a Possibility*, 61 ALB. L. REV. 1207, 1210 n.12 (1998) (discussing court refusal to enforce foreign judgments when such enforcement would violate public policy).

37. *See* Terrence F. MacLaren, *Business Environment for Joint Ventures in Selected Countries*, 2 ECKSTROM'S LICENSING: JOINT VENTURES § 9:16 (2005) (detailing the requirements for recognizing a foreign judgment in Brazil); *see also* Ved P. Nanda & David K. Pansius, *Conformity and Burden of Proof*, 2 LITIG. OF INT'L DISP. IN U.S. CTS. § 12:33 (2004) [hereinafter *Recognition and Enforcement*] (listing the statutes which determine recognition of foreign judgments in the courts of Brazil).

grow, so do the number of homologation requests of foreign judgments.[38] In 1990, 86 requests were filed before the SFC.[39] Five years later, 171 requests were presented.[40] In the following years, this upward tendency was further augmented.[41] In 2000, 413 petitions for recognition of foreign judgments were registered in the SFC's docket, reaching 749 new filings in 2004.[42]

Different from recognition of foreign judgments, the jurisdiction on enforcement is attributed to federal judges of first instance.[43] Execution of a foreign judgment is therefore an independent proceeding filed before the federal court where the defendant is domiciled,[44] who

38. *See* Keith S. Rosenn, *Judicial Reform in Brazil*, 4-SPG NAFTA L. & BUS. REV. AM. 19, 19 (1998) [hereinafter *Economic and Political Challenges*] (proposing that with Brazil's economic growth, demand for judicial reform became urgent); *see also* Megan J. Ballard, *The Clash Between Local Courts and Global Economics: The Politics of Judicial Reform in Brazil*, 17 BERKELEY J. INT'L L. 230, 237–38 (1999) (adding that with globalization comes an expectation of judicial uniformity between countries).

39. These figures encompass all filings of recognition of foreign judgments, not only of money judgments. *See* Banco Nacional de Dados do Poder Judiciário, *supra* note 34 (confirming the number of requests that were filed with the SFC); *see also Economic and Political Challenges*, *supra* note 38, at 24 (stating that the number of cases in the Brazilian courts multiplied more than ten-fold).

40. *See Brazil: Legal and Regulatory Risk*, RISKWIRE BRAZIL, Sept. 15, 2004, at 10, *available at* 2004 WLNR 14011644 (noting that the Brazilian judicial process is slow and complicated, and favors national businesses over foreign companies); *Brazil Politics: Not-so-Swift Justice*, EIU VIEWSWIRE BRAZIL, Mar. 26, 2004, at 40, *available at* 2004 WLNR 14002581 (describing Brazil's judicial system as dysfunctional, with layers of complications preventing foreign companies from conducting business in the country).

41. *See* Daniel Brinks, *Judicial Reform and Independence in Brazil and Argentina: The Beginning of a New Millenium?*, 40 TEX. INT'L L.J. 595, 621 (2005) (arguing that streamlining of Brazil's judicial process is desperately needed); *see also Brazilian Senate Approves Judicial Reform*, NOTICIAS FINANCIERAS (FINANCE CO. NEWS) (Latin America) Nov. 19, 2004, *available at* 2004 WLNR 10989904 (commenting on Brazil's efforts to improve the inefficiencies of the judicial system).

42. *See Brazil: Swifter Justice?*, ECONOMIST INTELLIGENCE UNIT (Bus. Latin America), Nov. 29, 2004, at 3, *available at* 2004 WLNR 15811951 (reporting on the changes in Brazil's constitution, which foreign and domestic companies claim caused inefficiency of the judicial system); *see also* Raymond Colitt, *The Americas: Brazil Promises to Clean Up its Judicial System*, FIN. TIMES (U.K.), Nov. 19, 2004, at 12, *available at* 2004 WLNR 11007802 (discussing how foreign corporations are afraid of becoming involved in the slow and uncertain judicial system of Brazil).

43. *See* Constituição Federal [C.F.], art. 109 (Braz.), *supra* note 7 (asserting that federal judges have the competence to institute legal proceedings and trials of foreign court decisions under certain circumstances); *see also* de Araujo, *supra* note 5, at 45 (explaining that in order to be executable in Brazil, a foreign judgment must be previously submitted to homologation by the Brazilian Supreme Court).

44. *See* CÓDIGO DE PROCESSO CIVIL [C.P.C.] art. 94 (Braz.) (stating that execution of a foreign judgment is an independent proceeding filed before the federal court where the defendant is domiciled); *see also* Dolinger & Tiburcio, *supra* note 9, at 442 (establishing that if the defendant is domiciled in Brazil, recognition and enforcement of a judgment against him or her will only occur if the defendant was either served by letter rogatory or appeared in court to defend himself on the merits).

may oppose execution under formal defects in the process.[45] There are neither studies nor statistics that show how much time it takes to enforce a foreign judgment in Brazil.[46] Nevertheless, enforcement of a foreign judgment is to be implemented by the same execution rules applied for national judgments.[47] Accordingly, there is no discriminatory or differentiated treatment regarding the execution of foreign judgments.[48]

Regardless of the transference of jurisdiction from the SFC to the SCJ, the system of recognition of foreign judgments remains the same, with identical requirements and procedures.[49] Resolution 9/2005[50] of the President of the SCJ reproduces the requirements of recognition of foreign judgments established by the Internal Rules of the Supreme Federal Court; the only

45. *See* CÓDIGO DE PROCESSO CIVIL [C.P.C.] art. 741 (Braz.) (stating that these defects include: (a) invalid service of process on default judgment; (b) failure to comply with a legal requisite, such as failure to move for calculation of damages, fees, costs, or monetary correction, or failure to take a mandatory appeal; (c) lack of a legal interest by the party seeking execution; (d) execution sought against the wrong party; (e) improper accumulation of executions, such as where a court does not have jurisdiction over all the judgments; (f) seeking more than plaintiff is entitled to under the judgment; (g) nullity of the executory process, such as where a good that cannot be pledged has been pledged; (h) any factor that occurs after the judgment that modifies or extinguishes the obligation, such as payment, novation, or bankruptcy; or (i) lack of jurisdiction or disqualification of the judge because of interest or bias); *see also* Gretchen Cowen & Chin Kim, *The Recognition and Enforcement of Foreign Judgments Under Brazilian Law and the Uniform Money-Judgments Recognition Act,* 5 TRANSNAT'L LAW. 725, 735 (1992) (stating that Brazil will recognize a foreign judgment only if "the Brazilian domiciliary expressly submits to the foreign court's jurisdiction"); Keith S. Rosenn, *Civil Procedure in Brazil,* 34 AM. J. COMP. L. 487, 503 (1986) (describing circumstances under which a defendant may oppose execution of a foreign judgment).

46. *See* Viola I. Balan, Comment, *Recognition and Enforcement of Foreign Judgments in the United States: The Need for Federal Legislation,* 37 J. MARSHALL L. REV. 229, 229 (2003) (explaining that the seven-year statute of limitations that would normally limit the time to enforce a judgment entered in a foreign country does not apply to its registration). *See generally* Russell J. Weintraub, *How Substantial is Our Need For a Judgments-Recognition Convention and What Should We Bargain Away to Get It,* 24 BROOK. J. INT'L L. 167 (1998) (admonishing that the Brazilian procedure makes it difficult to obtain recognition of a U.S. judgment there).

47. *See* CÓDIGO DE PROCESSO CIVIL [C.P.C.] art. 484 (Braz.) (citing that enforcement of foreign judgments are to be carried out in the same way national judgments are implemented). *See generally* Joseph Kelly, *Gaming Law Symposium: Caught in the Intersection Between Public Policy and Practicality: A Survey of Legal Treatment of Gambling-Related Obligations in the United States,* 5 CHAP. L. REV. 87 (2002) (describing the Brazilian Supreme Court's "exequatur proceedings" that must be followed if a casino attempts to register a foreign judgment against a Brazilian resident).

48. *See Brazilian Confirmation*, *supra* note 8, at 856 (explaining that in Brazil, there is no preferential treatment for nationals, but there is for domiciliaries because they cannot be tried in a foreign court unless they expressly consent). *See generally* Cowen & Kim, *supra* note 45 (describing how there is no differentiated treatment regarding the execution of foreign judgments because Brazil generally follows Article 322 of the Bustamante Code which allows a finding of implied submission when the defendant has filed any form of pleading other than an objection to jurisdiction).

49. *See* Commodity Futures Trading Comm'n v. Nahas, 738 F.2d 487, 494–95 (D.C. Cir. 1984) (referring to the Brazilian law that requires service of process by foreign nations be made pursuant to a letter rogatory or a letter of a request transmitted through diplomatic channels). *See generally* Dolinger & Tiburcio, *supra* note 9 (commenting on the procedural requirements and procedures in recognizing foreign judgments).

50. *See* Resolução No. 9 de 4 de Maio de 2005, *available at* http://www.trt02.gov.br/geral/tribunal2/Trib _Sup/STJ/Resol/9_05.html (last visited Oct. 23, 2005) (detailing all articles and sections of this resolution); *see also* Pesquisa de Resoluções, http://www.tj.se.gov.br/scap/resolucoes/pesquisa.wsp?tmp_ano=2005 ¶ 1 (last visited Oct. 23, 2005) (enumerating the 2005 resolutions); Passos, *supra* note 32 ("*Resolutions (Resoluções*) are initiatives connected to the exclusive activities of the National Congress, are independent from sanction by the President of the Republic, and are directed to specific purposes . . . [t]here are some resolutions which have the force of law, even though they are not part of the legislative process . . .").

exception is that Resolution 9/2005 permits emergency requests in the proceedings of recognition of foreign judgments.[51] Resolution 9/2005 expressly states its temporary validity, that is to say, it is valid until the SCJ deliberates its own Internal Rules on this subject matter.[52] The possible changes, however, are limited to internal proceedings, not to the substantial requirements and procedures for recognition of foreign judgments as the SCJ has no power to legislate on procedural law.[53]

III. Requirements for Recognition of Foreign Judgments

The Brazilian system of recognition of foreign judgments does not examine whether a decision was fair or in accordance with Brazilian law or with the foreign country's law where the decision was rendered.[54] Indeed, it does not confirm or deny the merits of a foreign judgment;[55] it only cooperates with a foreign court by acknowledging that the judgment was rendered in a sovereign manner through a foreign country's laws.[56] The Brazilian system does not

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51. *See* Falcao, *supra* note 5, at 378–79 (clarifying the Supreme Federal Court's jurisdiction over foreign court decisions and not over foreign arbitral awards); *see also* Resolução No. 9 de 4 de Maio de 2005, *supra* note 50, at ¶ 3 (detailing article 1 of Resolution 9 which allows expeditious proceedings of foreign judgments).

52. *See* Resolução No. 9 de 4 de Maio de 2005, *supra* note 50, at ¶ 2 (providing that the Resolution will only be in effect until the Plenary assembly finalizes the rules).

53. Brazilian Constitution of 1988, article 22, I, states that the Union has the exclusive power to legislate on procedural law. *See* Constituição Federal [Federal Constitution] Chap. III § III, art. 104–105, *available at* http://www.georgetown.edu/pdba/Constitutions/Brazil/brtitle4.html (last visited Oct. 23, 2005) (listing the areas in which the SCJ has competence); *see also* Constituição Federal [Federal Constitution] Chap. II, art.22, *available at* http://www.georgetown.edu/pdba/Constitutions/Brazil/brtitle3.html (last visited Oct. 23, 2005) (stating that the Union and no other entity is empowered to pass legislation on procedural law); PAUL GRIFFITH GARLAND, AMERICAN-BRAZILIAN PRIVATE INTERNATIONAL LAW 93–94 (Oceana Publications) (1959) [hereinafter AMERICAN-BRAZILIAN PRIVATE INTERNATIONAL LAW] (emphasizing the Federal Supreme Court's exclusive jurisdiction in matters of homologation of foreign judgments).

54. *See* AMERICAN-BRAZILIAN PRIVATE INTERNATIONAL LAW, *supra* note 53, at 93 (stressing that Brazil's recognition and enforcement of foreign judgments is a legal duty not based on maintaining social harmony). *But see* Cowen & Kim, *supra* note 45, at 738 (echoing Brazil's Civil Code which disallows enforcement of foreign judgments when they offend, "national sovereignty, public policy, and good customs").

55. *See* AMERICAN-BRAZILIAN PRIVATE INTERNATIONAL LAW, *supra* note 53, at 93 (stating that the merits of a foreign law are not weighed when recognizing foreign judgments); *cf. Guyot*, 159 U.S. at 205–06 (proffering a test for enforcement of foreign judgments which, once met, should be *prima facie* evidence of the truth of the matter and conclusive upon the merits). *But see* Cowen & Kim, *supra* note 45, at 735 (expressing the Brazilian Supreme Federal Court's reluctance to enforce foreign judgments on Brazilian domiciled defendants, unless the defendant submitted to the foreign jurisdiction).

56. *See* JOSÉ CARLOS BARBOSA MOREIRA, Temas de Direito Processual Civil—Quinta Série [Themes in Civil Procedure Law—Fifth Series] (Saraiva, 1994), as cited at STF, SEC 4738, Relator: Ministro Celso de Mello, 24.11.1994, D.J.U. de 7.4.1995; Cowen & Kim, *supra* note 45, at 741 (stating that upon compliance with all requirements, the Brazilian Court generally gives effect to the judgment as stated by the foreign court because modification of the judgment would likely be considered an act of disrespect for the foreign court); *see also The New Latin American Debt Regime*, *supra* note 17, at 22 (stating that judgments rendered by a competent foreign court against a Brazilian company would be recognized and enforced by the courts of Brazil without re-examination of the issues, as long as the judgment is obtained in compliance with the legal requirements of the jurisdiction of the court rendering such judgment). *See generally* ENFORCING FOREIGN JUDGMENTS IN THE UNITED STATES AND UNITED STATES JUDGMENTS ABROAD 71 (Ronald A. Brand ed., 1992) [hereinafter ENFORCING FOEIGN JUDGMENTS] (explaining that Brazil will enforce foreign judgments and that according to Brazilian law, "judgments" are defined as final decisions of a "civil, commercial, or penal nature, rendered by a judge or court of justice, pursuant to due process of law").

require reciprocity by the foreign country which rendered the judgment,[57] and is regulated by several norms: the Resolution 9/2005 of the President of the SCJ (Resolution 9)[58], the Code of Civil Procedure (CPC),[59] and the Law of Introduction to the Civil Code (LICC).[60]

Resolution 9 regulates the recognition of foreign judgments. It enumerates four requirements as mandatory:[61] 1) the foreign decision must have been rendered by a judge of a competent jurisdiction; 2) the parties must have been served notice of process, or a non-answer default judgment must have been legally entered; 3) the judgment must be final with the force of *res judicata*; and 4) the foreign judgment must be notarized by the Brazilian consul and be accompanied by a Portuguese translation rendered by a sworn translator in Brazil.[62]

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57. *See* ENFORCING FOREIGN JUDGMENTS, *supra* note 56, at 71 ("Foreign judgments may be confirmed and enforced in Brazil irrespective of reciprocity or the existence of a specific foreign judgment treaty or convention."). *But cf.* Richard H. M. Maloy & Desamparados M. Nisi, *A Message to the Supreme Court: The Next Time You Get a Chance, Please Look at Hilton v. Guyot; We Think It Needs Repairing*, 5 J. INT'L LEGAL STUD. 1, 5–6 (1999) (referring to a U.S. Supreme Court case from 1895 in which Brazil was named as a country that utilized reciprocity when deciding whether to recognize a foreign judgment); Matthew Heaphy, Comment, *The Intricacies of Commercial Arbitration in the United States and Brazil: A Comparison of Two National Arbitration Statutes*, 37 U.S.F. L. REV. 441, 461–62 (2003) (asserting that the United States and Brazil share similar bases for refusing to enforce a foreign arbitral award, namely, both require that the foreign nation of the party seeking enforcement of the award must be party to the same arbitration treaty).

58. *See* INTERNAL RULES OF THE SUPREME FEDERAL COURT, Arts. 215–24 (Braz.) (Resolution 9) [hereinafter INTERNAL RULES]; ENFORCING FOREIGN JUDGMENTS, *supra* note 56, at 71 ("In matters relating to the enforcement of foreign judgments in Brazil, the controlling statutes are the Law of Introduction to the Brazilian Civil Code (LICC), the Code of Civil Procedure (CCP), and the Internal Rules of the Federal Supreme Court (IRSC)."). *See generally* Passos, *supra* note 32 (explaining that there are some resolutions and initiatives connected to the exclusive activities of the National Congress that are independent from sanction by the President of the Republic, which have the force of law, even though they are not part of the legislative process, including the resolution which establishes the Internal Rules of the Supreme Federal Court).

59. *See* CÓDIGO DE PROCESSO CIVIL [Code of Civil Procedure], arts. 483–84 (Braz.), *available at* http://www.planalto.gov.br/ccivil_03/Leis/L5869.htm (last visited Oct. 23, 2005) (providing relevant articles from the Code in its original Portuguese). *See generally Passos, supra* note 32 (describing that the Code was established in 1973 and that during the 27 years it has been in force, some laws on specific matters have brought about small, continuous reforms that have substantially changed the Code, so as to accelerate proceedings, streamline procedural mechanisms, and eliminate superfluous formalities).

60. *See* LEI DE INTRODUÇÃO AO CÓDIGO CIVIL [LICC] [Civil Code Introduction Act], art. 15 (Braz.); AMERICAN-BRAZILIAN PRIVATE INTERNATIONAL LAW, *supra* note 53, at 113 (providing the author's translation of Article 15 of the Law of Introduction to the Brazilian Civil Code, which establishes the requisites for the execution of foreign judgments in Brazil); *see also* ENFORCING FOREIGN JUDGMENTS, *supra* note 56, at 71 (stating that "[i]n matters relating to the enforcement of foreign judgments in Brazil, the controlling statutes are the Law of Introduction to the Brazilian Civil Code (LICC), the Code of Civil Procedure (CCP), and the Internal Rules of the Federal Supreme Court (IRSC)").

61. *See* LEI DE INTRODUÇÃO AO CÓDIGO CIVIL [LICC] [Civil Code Introduction Act], art. 217 (Braz.). *But cf.* ENFORCING FOREIGN JUDGMENTS, *supra* note 56, at 71–74 (assessing five requirements needed in Brazil for the recognition of a foreign judgment); *The New Latin American Debt Regime*, *supra* note 17, at 22 (listing six requirements needed in Brazil for the recognition of a foreign judgment).

62. In the original text in Portuguese, the fourth requirement is referred to as "translation by official translator," which implies that the translation must be done by a translator duly sworn by a Brazilian state board of trade. *See* INTERNAL RULES, *supra* note 58, at Arts. 483–84; AMERICAN-BRAZILIAN PRIVATE INTERNATIONAL LAW, *supra* note 53, at 113 (demonstrating that article 15(d) of the Law of Introduction to the Brazilian Civil Code requires that in order for a foreign judgment to be enforced in Brazil, it must be "translated by an authorized interpreter"); *see also* ENFORCING FOREIGN JUDGMENTS, *supra* note 56, at 74 (providing the general rule that for foreign documents to be valid in Brazil, they must be notarized "by the Notary Public or equivalent authority at the site of issuance and thereafter submitted to the Brazilian Consulate for authentication").

A. The Foreign Judgment Must Have Been Rendered by a Judge of Competent Jurisdiction

For the purposes of meeting the first requirement, "the foreign judgment must have been rendered by a court having personal jurisdiction over the judgment debtor and subject matter jurisdiction over the dispute to which the judgment applies."[63] However, jurisdiction is examined according to the law of international concurrent jurisdiction in Brazil ("where Brazilian as well as foreign courts are competent"),[64] which allows both Brazil and foreign countries to exercise jurisdiction over cases in which the defendant is domiciled in Brazil, the obligation must be complied with in Brazil, or the lawsuit derives from an act that occurred or was performed in Brazil.[65] Under the CPC, Brazilian courts have exclusive jurisdiction in cases related to real estate within Brazil, as well as controversies about inheritance and estate division proceedings of properties situated in Brazil, even if the testator was a foreigner and lived abroad.[66] As a result, "if Brazilian courts have concurrent jurisdiction with the foreign court, and all other relevant requirements are fulfilled, the foreign judgment may be enforced. If Brazilian courts have exclusive jurisdiction under Brazilian law, enforcement will be denied."[67]

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63. *See* ENFORCING FOREIGN JUDGMENTS, *supra* note 56, at 72 (enumerating the first of five requirements needed for Brazilian enforcement of a foreign judgment). *See generally* Cowen & Kim, *supra* note 45 (stating that the Brazilian Supreme Court has been reluctant to enforce foreign judgments against Brazilian-domiciled defendants and that the Court will not enforce such judgments unless the Brazilian domiciliary expressly submits to the foreign court's jurisdiction).

64. *See Brazilian Confirmation*, *supra* note 8, at 858 (citing the author's quote); *see also* Cowen & Kim, *supra* note 45, at 734 (reiterating the concurrent jurisdiction of foreign judgments in Brazilian courts). *See generally* Selma M. Ferreira Lemes, *Litigation versus Arbitration in the Americas: Advantages and Disadvantages: A Brazilian Perspective*, 15-SPG INT'L L. PRACTICUM 17 (2002) (explaining the enforcement of foreign arbitration judgments and awards in Brazil); *Recognition and Enforcement*, *supra* note 37 (discussing generally the requirements and potential obstacles to enforcement).

65. *See* Código de Processo Civil [CPC], art. 88 (Braz.) (codifying the requirements for Brazilian jurisdiction over international judgments); *see also Brazilian International Procedure*, *supra* note 5, at 350–51 (outlining Article 88); Cowen & Kim, *supra* note 45, at 734–35 (translating Article 88 and identifying corporations with a branch or agency in Brazil as "domiciled"); *Responding to the Legal Obstacles*, *supra* note 11, at 105 (listing the areas of concurrent jurisdiction enumerated by CPC Article 88). *See generally* Luiz Bernardo Gomide & Jose Roberto de Castro Neves, *Commercial Financing and Insolvency Law in Brazil*, 2 SW. J.L. & TRADE AM. 123 (1995) (stating that creditors can enforce foreign judgments and recover from Brazilian-domiciled debtors if the necessary requirements are met).

66. *See* Código de Processo Civil [CPC], art. 89 (Braz.) (codifying the requirements for Brazilian jurisdiction over international judgments); *see also Brazilian International Procedure*, *supra* note 5, at 350–51, 356, 358–60 (outlining article 89, recognizing that just as Brazil has exclusive jurisdiction over real property within its bounds, it does not have jurisdiction over property in other territories, and explaining how this general principle applies to inheritance property and matrimonial property in divorce proceedings); *Responding to the Legal Obstacles*, *supra* note 11, at 105 (recognizing the courts' exclusive jurisdiction over real estate disputes where property is within Brazil); MacLaren, *supra* note 37, at § 9:16 (distinguishing Brazil's exclusive jurisdiction over all cases involving real property within its territory from its recognition and enforcement of foreign judgments in other areas).

67. *See* ENFORCING FOREIGN JUDGMENTS, *supra* note 56, at 72 (citing the same); *see also Responding to the Legal Obstacles*, *supra* note 11, at 105 (distinguishing the courts' concurrent jurisdiction which permits enforcement of most foreign judgments and contracts from its exclusive jurisdiction over real estate disputes where property is within Brazil). *See generally* J. Andrew Murphy & Ferdinand Calice, *Foreign Law Issues in U.S. Cross-Border Leases: Enforcement of Judgments of U.S. Courts in Foreign Jurisdictions*, *in* EQUIPMENT LEASING—LEVERAGED LEASING 24-5 (Practicing Law Institute ed., 2004) (citing Brand's book for a review of issues and laws in the enforcement of U.S. judgments abroad).

As for concurrent jurisdiction, submission of a Brazilian-domiciled defendant to a foreign court is required.[68] Nevertheless, it is very important to understand the concept of voluntary and involuntary submission[69] to determine how the Brazilian system works, especially since there has been some misconception about the doctrine which suggests that Brazil would "refuse to enforce a judgment against its nationals unless there is a 'clear indication' that the national intended to submit to the foreign court's jurisdiction."[70] Voluntary submission refers to when a Brazilian–domiciled defendant, who is not obliged to submit himself to a foreign court, nevertheless appears in the proceeding, thereby giving the court jurisdiction to hear the case.[71] Involuntary submission results from a contract or from any activity that a Brazilian-domiciled defendant develops in the territory of a foreign country.[72] Even in involuntary submission cases, notice of process is paramount and, if it is to take place in Brazilian territory, must be satisfied by a rogatory letter.[73] This question was considered in *Minpeco S.A. v. Naji Robert*

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68. *See* ENFORCING FOREIGN JUDGMENTS, *supra* note 56, at 72 (recognizing the voluntary submission requirement, which requires the defendant's unequivocal acceptance of the foreign court's jurisdiction, either through express written representations or appearance in foreign court for this specific purpose; default does not yield the same conclusion); *see generally* Cowen & Kim, *supra* note 45 (acknowledging that this requirement stems from Brazil's reluctance to enforce foreign judgments against Brazilian-domiciled defendants); *Brazilian Confirmation*, *supra* note 8 (highlighting key case law surrounding the issue of whether a foreign judgment, where a Brazilian-domiciled party did not offer free submission, could be confirmed in Brazil).

69. *See Brazilian Confirmation*, *supra* note 8 (detailing the salient distinctions between the two types of jurisdiction); *see also* Cowen & Kim, *supra* note 45, at 734 (highlighting when voluntary and involuntary submission to applies with respect to Brazil's jurisdiction over international judgments).

70. *See* OFFICE OF THE CHIEF COUNSEL FOR INTERNATIONAL COMMERCE, U.S. DEPARTMENT OF COMMERCE, RECOGNITION AND ENFORCEMENT OF FOREIGN MONEY JUDGMENTS (March 2002), *available at* http://www.osec.doc.gov/ogc/occic/refmj.htm (last visited Oct. 23, 2005) [hereinafter OFFICE OF THE CHIEF COUNSEL] (stating that Brazil is one of a number of countries who will refuse to enforce a judgment against their nationals absent evidence that they willingly submit to foreign jurisdiction); *see also* ENFORCING FOREIGN JUDGMENTS, *supra* note 56, at 72 (citing the author's quote) (affirming that "[e]ven where the Brazilian law admits concurrent jurisdiction, enforcement may be barred if the Brazilian-domiciled defendant fails to submit voluntarily to the foreign court."); *Brazilian Confirmation*, *supra* note 8, at 858 (stating that "In Brazil, there is no preferential treatment for nationals, but there is for domiciliaries. Unless a Brazilian domiciliary expressly agrees to be tried in a foreign court, any judgment enacted against him will not be homologated."); Cowen & Kim, *supra* note 45, at 735 (suggesting that the Court will not enforce foreign judgments unless the Brazilian domiciliary expressly submits to the foreign court's jurisdiction). This debate will be addressed below in Part III, in the case study of STF, SEC 4738, Relator: Ministro Celso de Mello, 24.11.1994, D.J.U. de 7.4.1995, and of STF, SE 4415, Relator: Ministro Francisco Rezek, 11.12.96, D.J.U. de 3.4.1998.

71. *See* ENFORCING FOREIGN JUDGMENTS, *supra* note 56, at 72 (describing that voluntary submission has taken place when a Brazilian-domiciled defendant appears in a proceeding in a foreign court); *see also* Cowen & Kim, *supra* note 45, at 735 (explaining how voluntary submission by a Brazilian-domiciled defendant gives a court jurisdiction).

72. *See* ENFORCING FOREIGN JUDGMENTS, *supra* note 56, at 72 (remarking on how contact with a foreign country can result in involuntary submission); *see also* Cowen & Kim, *supra* note 45, at 735–36 (discussing that a Brazilian law requiring a defendant domiciled in Brazil to submit to foreign jurisdiction and renounce the law of Brazil in effect denies the defendant of any form of voluntary jurisdiction).

73. *See* ENFORCING FOREIGN JUDGMENTS, *supra* note 56, at 72 (describing a letter rogatory); *see also* de Araujo, *supra* note 5, at 42 (explaining the process by which a defendant is served with a letter rogatory); Dolinger & Tiburcio, *supra* note 9, at 447 (remarking that if service is to be performed in Brazil on a defendant who is domiciled in Brazil, then the defendant must be served with letter rogatory).

Nahas[74] and *Eastman Kodak Company v. Luiz Geraldo Bresciani*,[75] two cases which are discussed further below.

B. The Parties Must Have Been Served Notice of Process, or a Non-Answer Default Judgment Must Have Been Legally Entered

Although the Brazilian system of recognition of foreign judgments examines basic formal aspects and defers to foreign jurisdictions to bring about international judicial cooperation, it maintains strict compliance with the requirement of notice of process.[76] For defendants not domiciled in Brazil, notice of process is to be served according to the law of the country where the decision was rendered.[77] On the other hand, if the respondent is domiciled in Brazil, notice of process must comply with Brazilian law, in that the foreign country must send a rogatory letter to Brazil requesting that the Brazilian domiciled defendant be served notice of the process.[78]

The granting of *exequatur* to letters rogatory was also recently transferred from the SFC to the SCJ.[79] Once *exequatur* is granted to the required citation,[80] the proceedings are sent to a district judge who sits in the locale where the defendant lives to give proper notice of the existing process abroad.[81] It is very important that this process is complied with to ensure valid ser-

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74. STF SEC 4415, Relator: Ministro Francisco Rezek, 11.12.96, D.J.U. de 3.4.1998. *See Nahas*, 738 F.2d at 494–95 (stating that failure to comply with the letter rogatory requirement amounts to an intrusion of Brazilian sovereignty). *See* Minpeco, S.A. v. Hunt, 686 F. Supp. 427, 432 (S.D.N.Y. 1988) (finding that the defendants failed to honor Minpeco's status as a corporation); *see also Nahas*, 738 F.2d at 494–95 (stating that failure to comply with the letter rogatory requirement amounts to an intrusion of Brazilian sovereignty).

75. STF, SEC 4738, Relator: Ministro Celso de Mello, 24.11.1994, D.J.U. de 7.4.1995; STF, SEC 5418, Relator: Ministro Maurício Corêa, 7.10.1999, D.J.U. de 24.11.2000.

76. *See* Dolinger & Tiburcio, *supra* note 9, at 447 (discussing that a defendant must be served with a letter rogatory); *see also* Kelly, *supra* note 47, at 138 (implying that Brazil required strict compliance regarding service of process).

77. *See* de Araujo, *supra* note 5, at 42 (describing how notice of process is to be served when a decision rendered in another country is executed in Brazil); *see also* Jacob Dolinger, *Application, Proof and Interpretation of Foreign Law: A Comparative Study in Private International Law*, 12 ARIZ. J. INT'L & COMP. L. 225, 252 (1995) (asserting that domicile establishes choice of law in Brazil).

78. *See* de Araujo, *supra* note 5, at 42 (discussing how a letter rogatory must be sent to a defendant in order for notice of process to be proper); *see also* Dolinger & Tiburcio, *supra* note 9, at 447 (explaining that a defendant domiciled in Brazil is duly served when the defendant either receives a letter rogatory or appears in court to defend on the merits of the claim).

79. *See* Constituição Federal [C.F.] [Constitution] amend. XLV (Braz.); *see also* Araujo, *supra* note 5, at 46–47 (referring to the judicial reform proposal to allow lower courts to comply with letters rogatory). *See generally Judicial Review in Brazil*, *supra* note 6 (criticizing the prior procedure of having the SFT rule on recognition of foreign judgment cases).

80. The proceedings of letter rogatory will not be explained in this paper; however, it should be noted that the Brazilian-domiciled defendant will be notified about the request and may challenge the letter rogatory in fifteen days. The Attorney-General will also give an opinion in ten days on whether *exequatur* should be granted. The acceptable grounds for not granting *exequatur* are violation of national sovereignty or public policy, and lack of authenticity of the letter rogatory. *See* SCJ RESOLUTION 9/2005, *supra* note 50, at Arts. 6, 8, 9, 10; *see also* AMERICAN-BRAZILIAN PRIVATE INTERNATIONAL LAW, *supra* note 53, at 98 (discussing that the Supreme Federal Court has discretion to honor foreign rogatories of citation).

81. *See* de Araujo, *supra* note 5, at 49 (noting that the foreign judgment proceedings must be sent to the correct lower court to make a ruling on the case); Brazilian Embassy in Washington Website, *Company Formation in Brazil* 74–76 (2000), *available at* http://www.brasilemb.org/trade_investment/company_formation.pdf (finding that foreign judgment will be enforced by the relevant Brazilian lower court).

vice on a defendant.[82] Consequently, affidavits, notifications by lawyers, by air mail, or any other method of properly serving notice of process according to foreign jurisdictions' law are invalid if served in Brazilian territory.[83]

However, if the defendant voluntarily answers the pleading in the foreign jurisdiction, even if not served with notice of process by a rogatory letter, any irregularity in service of process will be disregarded.[84] Indeed, voluntary submission of a Brazilian-domiciled defendant to a foreign jurisdiction by answering to the complaint and presenting full defense cures any irregularity in serving notice of process.[85]

C. The Foreign Judgment Must Be Final with the Force of *Res Judicata* and Be in the Form Required for its Execution Where Rendered

As for the third requirement that the judgment must be final with force of *res judicata* and be in the form required for its execution where rendered,[86] it is necessary to understand the concept of final judgment under Brazilian law. Final judgment requires that the decision not be subject to any appeal, that is to say, if an appeal is pending or still possible, the foreign judgment will not be recognized.[87] In practical terms, this may be complied with by a certificate of judgment filed without a notice of appeal and issued by the court clerk.[88] This provision safe-

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82. *See* ENFORCING FOREIGN JUDGMENTS, *supra* note 56, at 73 (explaining that the lack of proper service in foreign judgments is seen as a violation of due process); Julie C. Ferguson & David A. Pearl, *Practicing Law in the Americas*: *The New Hampshire Reality*: *International Litigation in the Hemisphere*, 13 AM. U. INT'L L. REV. 953, 960 (1988) (noting that compliance with letter rogatory procedures are needed to ensure valid service).

83. *See* STF, SE 4248, Relator: Ministro Carlos Velloso, 20.11.1991, D.J.U. de 13.3.1992; ENFORCING FOREIGN JUDGMENTS, *supra* note 56, at 73 (asserting that notice served by means other than letters rogatory is not valid to enforce judgments in Brazil); *see also* Dolinger & Tiburcio, *supra* note 9, at 447 (emphasizing that a letter rogatory is the only method for proper service to enforce foreign judgments).

84. *See* STF, SEC 7178, Relator: Ministro Carlos Britto, 09.06.2004, D.J.U. de 06.08.2004; *see also* Dolinger & Tiburcio, *supra* note 9, at 442 (declaring that Brazilian recognition of a foreign judgment requires the defendant to be served with a letter rogatory).

85. *See* ENFORCING FOREIGN JUDGMENTS, *supra* note 56, at 72 (commenting that voluntary submission by a Brazilian defendant is an unequivocal submission to foreign jurisdiction); *see also* Dolinger & Tiburcio, *supra* note 9, at 447 (stressing that if a defendant voluntarily answers to or appears in a foreign jurisdiction, previously ineffective service will be cured).

86. *See Brazilian Confirmation*, *supra* note 8, at 855 (citing Article 15 which states the requirements for the enforcement of a foreign judgment); *see also The New Latin American Debt Regime*, *supra* note 17, at 22 (stating that the judgment has to be final in the jurisdiction where rendered and the applicable procedure complied with in order to enforce a foreign judgment in Brazil).

87. *See Brazilian Confirmation*, *supra* note 8, at 872 n.93 (stating that the rules indicate that judgments have to be final and binding); *see also* Cowen & Kim, *supra* note 45, at 757 (explaining that Brazil denies recognition if an appeal on a prior judgment is pending or if a simultaneous action is pending before a Brazilian court); Thomas Benes Felsberg, *Brazil: Cross-Border Insolvencies and Restructurings*, 10 NAT'L L. CTR. FOR INTER-AM. FREE TRADE 1, 4 (2003), *available at* http://www.natlaw.com/bulletin/2003/0302/trfeb03.pdf (last visited Oct. 23, 2005) (stating that one of the reasons why some decisions often do not qualify for recognition is because the decision was not final and would still be subject to appeal).

88. *See Brazilian Confirmation*, *supra* note 8, at 872–73 n.94 (listing that a certified copy of the document stating that the judgment if final is required as proof); *see also* Cowen & Kim, *supra* note 45, at 742 (explaining that upon recognition, the Court will attach a certificate of recognition to the foreign judgment and will grant the right to enforce the judgment).

guards against the inconvenience of having the homologation of a foreign judgment in Brazil reexamined due to a modification done before a foreign court.[89]

D. The Foreign Judgment Must Be Notarized by the Brazilian Consul and Be Accompanied by Official Translation

The fourth requirement is that the foreign judgment must be notarized by the Brazilian consul in the foreign country and be accompanied by a translation into Portuguese done by a translator duly sworn by a Brazilian state board of trade.[90] In addition, the petition shall be filed by the interested party according to procedural law[91] and shall be accompanied by a certificate or an authentic copy of the full text of the foreign judgment, translated and notarized.[92] This requirement aims to ensure the authenticity of the foreign judgment. The exception[93] is if the documents are transmitted via diplomatic channels, in which case there is a presumption of authenticity.[94]

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89. *See* Cowen & Kim, *supra* note 45, at 741 (stating that upon compliance with the requirement, the Brazilian Court generally gives effect to the judgment as stated by the foreign court because modification of the judgment would likely be considered an act of disrespect by the foreign court). *See generally Brazilian Confirmation*, *supra* note 8 (providing extensive overview of Brazilian confirmation of foreign judgments, including requirements for homologation).

90. *See* Emrich, *supra* note 18, at 11 (stating that the decision rendered must be certified by a Brazilian Consul and accompanied by an official sworn translation); *see also* Arnoldo Wald et al., *Some Controversial Aspects of the New Brazilian Arbitration Law*, 31 U. MIAMI INTER-AM. L. REV. 223, 250 (2000) (requiring that the original judgment authenticated by Brazilian Consulate, accompanied by official translation, be provided with the initial complaint).

91. *See* Kelly, *supra* note 47, at 138 (explaining that the petition must be submitted to a review of service of process, and a cause of action must be filed with one of the Brazilian Supreme Court Justices in order to initiate an *exequatur* proceeding); *see also* Wald, *supra* note 90, at 250 (stating that the initial complaint for homologation of a foreign judgment should contain requirements of procedural law); Brazil Legal Bulletin, *Brazil Ratifies New York Convention on Recognition and Enforcement of Foreign Arbitral Award*, *available at* http://www.macleoddixon.com/content/files/Brazil_Bulletin_3_pdf.pdf#search='law%209307%2F96' (last visited Oct. 23, 2005) (explaining that the procedure to obtain the *exequatur* is established in Article 37 of the Brazilian Arbitration Law).

92. *See* Law Introduction to the Brazilian Civil Code, LICC § 15(d) (codifying that the foreign judgment must have been "translated by an authorized translator."); *see also Brazilian International Procedural Law*, *supra* note 5, at 366 (explaining that one of the criteria of the Internal Regulations of the Federal Supreme Court is that "the judgment has been translated by an authorized translator"); *Brazilian Confirmation*, *supra* note 8, at 854 (informing that Article 15 of the Law of Introduction to the Brazilian Civil Code requires that a foreign judgment be "translated by an authorized interpreter").

93. *See* STF, SE 4738, Relator: Ministro Celso de Mello, 24.22.1994, D.J.U. de 7.4.1995; *see also* Dolinger & Tiburico, *supra* note 9, at 445 (stating that a defendant's appearance in court or request that the judgment be recognized will cure invalid service); ENFORCING FOREIGN JUDGMENTS, *supra* note 56, at 72 ("Voluntary submission is the unequivocal acceptance of the foreign court's jurisdiction.").

94. Another exception to this rule is if there is no Brazilian diplomatic representation in the foreign country where the judgment was rendered, which is not the case in the United States. *See* STF, SE 4738, Relator: Ministro Celso de Mello, 24.22.1994, D.J.U. de 7.4.1995; *see also* ENFORCING FOREIGN JUDGMENTS, *supra* note 56, at 74 (detailing that "[a]s a general rule, for foreign documents to be valid in Brazil, they must first be notarized by the Notary Public or equivalent authority at the site of issuance and thereafter submitted to the Brazilian Consulate for authentication"); *Brazilian Confirmation*, *supra* note 8, at 861 (asserting that "personal summons may be served by a Brazilian court in compliance with a request of the foreign court through a letter rogatory"); Dolinger & Tiburico, *supra* note 9, at 445 ("[S]ervice in Brazil will only be considered valid if effected through a letter rogatory . . . [n]o mail service, no diplomatic service, and no affidavit may substitute for the letter rogatory.").

IV. Grounds for Non-Recognition of Foreign Judgments

The mandatory grounds for non-recognition of foreign judgments on their merits are traditionally threefold, namely, where a foreign judgment violates national sovereignty, good mores and public policy.[95] As already noted, these terms are not defined in the governing law and their scope is the subject of some debate. To Amilcar de Castro, as cited by Dolinger, this limitation should have been restricted to public policy because national sovereignty and good mores are superfluous concepts.[96] To other authors, national sovereignty embodies the set of public laws, and to others, it takes on a political character.[97] Dias da Silva states that the principles of public policy vary in accordance with historical moments, and violations of these principles contribute to anarchy or serious social commotion.[98] The requirements of good mores and public policy are very closely related. In fact, violations of good mores are very rare because foreign judgments, before being against good mores, generally violate national sovereignty or public policy.[99] Resolution 9/2005 reiterates that no foreign judgment violating public policy or national sovereignty will be recognized; it does not, however, mention the good mores requirement.[100]

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95. *See* INTERNAL RULES, *supra* note 58, at Art. 216; *see also* Law Introduction to the Brazilian Civil Code, LICC § 17 ("The statutes, acts and judgments from other country, as well as any declaration of will, will not have efficacy in Brazil when they offend national sovereignty, public policy and good mores."); *Brazilian Confirmation*, *supra* note 8, at 854 (recognizing that Article 17 of the Law of Introduction states that foreign judgments shall not be effective in Brazil when they offend (1) national sovereignty, (2) public policy and (3) good customs); ENFORCING FOREIGN JUDGMENTS, *supra* note 56, at 74 ("[T]he basic objectives are to ascertain that the judgment debtor has been awarded full right of defense and that no fraud against Brazilian Law has occurred.").

96. *See* JACOB DOLINGER, DIREITO INTERNACIONAL PRIVADO (PARTE GERAL) [PRIVATE INTERNATIONAL LAW (GENERAL PART)], 367, Editora Renovar (1997). *See generally Brazilian Confirmation*, *supra* note 8 (describing the three factors for non-recognition of foreign judgments).

97. *See* SE No. 1.578, 8 RTJ 276 (1958) (Brazilian Supreme Court refused confirmation of a foreign judgment against a Brazilian domiciliary under the consideration that service by German diplomatic representatives offended national sovereignty); *see also* REVISAO DAS CONVENCOES INTERMERICANAS DE DIREITO INTERNACIONAL PRIVADO, *supra* note 96. *See generally Brazilian Confirmation*, *supra* note 8 (describing the three factors for non-recognition of foreign judgments).

98. *See* DIAS DA SILVA, *supra* note 12, at 172; *see also Brazilian Confirmation*, *supra* note 8, at 854 (explaining that public policy considerations change with societal needs). *See generally* REVISAO DAS CONVENCOES INTERMERICANAS DE DIREITO INTERNACIONAL PRIVADO, *supra* note 96.

99. *See* DIAS DA SILVA, *supra* note 12, at 175; *see also Brazilian Confirmation*, *supra* note 8, at 854 (explaining the interconnections between the three factors of non-recognition).

100. *See* MacLaren, *supra* note 37, at § 9:16 (explaining that foreign judgments will not be upheld if they are contrary to Brazilian public policy). *But see Recognition and Enforcement*, *supra* note 37 (holding that a foreign judgment that is against "good customs" will not be enforced).

A very interesting example of how the concept of public policy might arise in a money-related foreign judicial opinion concerns a collection process of a debt incurred through gambling.[101] In *Trump Taj Mahal Associates v. Miguel Nicolau Duailibe Neto*,[102] Trump Taj Mahal Associates brought such a request before the SFC, seeking recognition of a judgment awarded by the Superior Court of New Jersey, compelling a Brazilian-domiciled person to pay a debt in connection with gambling.[103] In Brazil, while casinos are illegal and gambling debts and bets are not enforceable, one cannot recover any payment that is voluntarily made.[104] At the beginning of the judgment before the SFC, Justice Sepúlveda Pertence voted for denial of the request on the grounds that it would violate public policy.[105] Three other Justices agreed.[106] However, the case was suspended at the request of Justice Marco Aurélio, in order for his Honor to give further consideration to the question.[107] The plaintiff then withdrew the request, thus leaving the question undecided.[108]

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101. There are other cases in which the question of public policy is raised but are related to family law, such as guardianship of minors, or divorce before it was allowed in Brazilian legislation, which are not the subject matter of this paper and therefore will not be addressed. *See* Kelly, *supra* note 47, at 139 (commenting on the problems that face casinos who attempt to enforce judgments in Brazil); *see also* Thomas J. Skola, *The Collection of Gaming Debts Outside the United States*, *available at* http://www.becker-poliakoff.com/publications/article_archive/collection_gaming_debts.htm (last visited Oct. 23, 2005) (reporting on the trouble that gambling states have with enforcing gambling judgments against debtors in Brazil as a matter of public policy).

102. *See* SFC, SEC 5404, Relator: Ministro Sepúlveda Pertence, 15.05.2005, D.J.U. de 24.06.2005.

103. *See The New Latin American Debt Regime*, *supra* note 17, at 23 (stating the correct procedure through which to bring a request of enforcement of a foreign judgment to a Brazilian court). *See generally* Hakimoglu v. Trump Taj Mahal Assoc., 70 F.3d 291 (3d Cir. 1995) (confirming that Trump Taj Mahal generally goes after those who have gaming debts).

104. At the time of this judgment session, this rule was encapsulated in article 1477 of the 1916 Civil Code (Law 3071, enacted in January 1, 1916). Now, a new Civil Code is in force (Law 10406, January 10, 2002), which repeats the same norm in article 814. *See* Charles A. Samuelson, *The Fall Barings: Lessons for Legal Oversight of Derivatives Transactions in the United States*, 29 CORNELL INT'L L.J. 767, 790 (1996) (remarking on the illegality of gambling in Brazil and its ramifications).

105. *See* MacLaren, *supra* note 37, at § 9:16 (highlighting that judgments contrary to public policy will not be upheld); *see also* Gomide & Neves, *supra* note 65, at 136 (explaining the validation process of a foreign judgment in Brazil and the role public policy plays).

106. *See* Lothar Determan & Saralyn M. Ang-Olson, *Recognition and Enforcement of Foreign Injunctions in the U.S.*, 755 PRAC. L. INST. 187, 192 (2003) (acknowledging that "money judgments rendered in U.S. states that have adopted the UFMJR-Act are more likely to be recognized and enforced abroad"); *see also* Alan Lescht, *Hunting the Elusive Money Judgment*, LEGAL TIMES, Oct. 23, 1995, at 35 (observing that foreign courts will recognize and enforce U.S. money judgments provided that the plaintiff can demonstrate that the defendant has been accorded a fair hearing in a court properly exercising jurisdiction, the judgment is final, is not contrary to public policy, and that the U.S. jurisdiction rendering the judgment would accord reciprocal recognition to the foreign courts' judgments).

107. *See generally* Cowen & Kim, *supra* note 45 (informing that Brazil will recognize a foreign judgment only if "the Brazilian domiciliary expressly submits to the foreign court's jurisdiction"); Weintraub, *supra* note 46 (proclaiming that it is "conventional wisdom" that the U.S. recognizes and enforces foreign judgments, but that "other countries do not accord reciprocal treatment to U.S. judgments").

108. *Cf.* Matthew H. Adler, *If We Build It, Will They Come?—The Need for a Multilateral Convention on the Recognition and Enforcement of Civil Monetary Judgements*, 26 LAW & POL'Y INT'L BUS. 79, 81 (1994) (proclaiming that "the consensus" in academic circles and in the U.S. Department of State "is that individuals seeking enforcement of U.S. judgments abroad have not had the same good fortune as foreign litigants seeking enforcement in the United States"). *See generally* Arthur T. von Mehren & Donald T. Trautman, *Recognition of Foreign Adjudications: A Survey and a Suggested Approach*, 81 HARV. L. REV. 1601 (1968) (explaining that recognition and enforcement practices vary from country to country).

This question was later re-submitted to the SFC for consideration, but through a different vehicle. This time the question was presented in a rogatory letter by which the Superior Court of New Jersey requested that notice of process of collection of a gambling debt be served to a Brazilian-domiciled defendant.[109] The then President of the SFC,[110] Justice Marco Aurélio, gave *exequatur* to the rogatory letter, rejecting the alleged violation of public policy.[111] Referring to article 9 of the LICC, which provides that obligations are regulated by the law of the country where they were constituted,[112] Justice Marco Aurélio held that gambling is a lawful activity where the judgment was delivered, and that denial of recognition of the debt collection would be unjust enrichment and, therefore, against public policy.[113] The defendant filed an appeal to the SFC *en banc* and the question is now before the Court.[114] At the first judgment session of this appeal, Justice Ellen Gracie voted against the *exequatur*,[115] and later, the session was reserved for further consideration at the request of Justice Nelson Jobim.[116] However, with the aforementioned Constitutional Amendment,[117] the jurisdiction for the judgment of rogatory

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109. *See* STF, CR 9897, Relator: Ministro Marco Aurélio, 12.15.2001, D.J. DATA 04.02.2002; *see also* Dolinger & Tiburcio, *supra* note 9, at 447 (emphasizing that in order for service to be considered valid in Brazil, it must be accomplished through a letter rogatory).

110. As mentioned earlier, the President of the SFC has jurisdiction to give *exequatur* to letters rogatory. If any of the parties are against his decision, there is a right to appeal to the SFC *en banc*. *See* de Araujo, *supra* note 5, at 45 n.52 ("Unlike other civil law countries where exequatur refers to confirmation of foreign judgments, in Brazil exequatur refers exclusively to the order issued by the President [of the SFC] directing the lower courts to perform letters rogatory."); *see also* Cowen & Kim, *supra* note 45, at 739–40 (explaining that when the President of the SFC is presented with a foreign letter rogatory, he is authorized to give his *exequatur*, i.e., an order for compliance).

111. *See* STF, CR (AgR) 9897, Relator: Ministro Marco Aurélio, 12.15.2001, D.J. DATA 04.02.2002; *Cf.* Cowen & Kim, *supra* note 45, at 740 (stressing that the Chief Justice may deny exequatur upon a finding that the requested act would violate public policy). *But see* Weintraub, *supra* note 46, at 184 (describing Brazil as a "trouble spot" for recognition of U.S. judgments).

112. *See* Law of Introduction to the Civil Code, art. 9 (1942), *available at* http://www.planalto.gov.br/ccivil_03/Decreto-Lei/Del4657.htm (last visited Oct. 23, 2005) (declaring that the court shall apply the laws of the country where the original activity took place). *See generally* de Araujo, *supra* note 5 (acknowledging that the Law of Introduction to the Civil Code directs Brazilian judges regarding extraterritorial application of the law); *Brazilian Confirmation*, *supra* note 8 (informing that the Law of Introduction to the Civil Code dictates the current law for enforcement of foreign judgments in Brazil).

113. *See* N.J. STAT. ANN. § 5:12-173.10 ¶ (a) (2001) (asserting that New Jersey citizens voted to legalize gambling in Atlantic City as part of a program of urban development in 1976). *See generally* Thomas B. Colby, *Revitalizing the Forgotten Uniformity Constraint on the Commerce Power*, 91 VA. L. REV. 249 (describing the legalized state of gambling in Atlantic City); *Brazilian Confirmation*, *supra* note 8 (finding that the Article of the Law of Introduction to the Brazilian Civil Code ensures that Brazil will not recognize acts that are against public policy).

114. The judgment session started on June 17, 2002. *See generally* Martindale-Hubbell International Law Digest: Argentina-Vietnam International Law Digests: Selected International Conventions U.S. Uniform Acts, 2005 Digest BRZ-5 [hereinafter Martindale-Hubbell International Law Digest] (attributing the Supreme Federal Court as a court of sole or last instance).

115. *See generally* Martindale-Hubbell International Law Digest, *supra* note 114 (noting that the Supreme Federal Court grants "*exequatur*" and undertakes the homologation of foreign court decisions); Falcao, *supra* note 5 (affirming that "*exequatur*" involves recognition of foreign judgments).

116. *See generally* Julio C. Barbosa, *Arbitration Law in Brazil: An Inevitable Reality*, 9 SW. J. L. & TRADE AM. 131 (2002/2003) (stating that Justice Nelson Jobim sits on the Federal Supreme Court and reviews proceedings); Cowen & Kim, *supra* note 45 (demonstrating that the Chief Justice may deny *exequatur*).

117. *See Constitutional Amendment* n.45 (2004) (transferring jurisdiction of letters rogatory to the Superior Court of Justice); *see also* de Araujo, *supra* note 5, at 48 n.58 (noting that all letters rogatory from abroad are handled by the STF).

letters has been transferred to the Superior Court of Justice, which will eventually decide this case.[118]

V. Notable Cases on the Recognition of U.S. Judgments in Brazil

Two significant cases provide a useful insight into how the SFC has approached the question of jurisdiction and the mandatory grounds for non-recognition.

A. *Minpeco S.A. v. Naji Robert Nahas* (SEC 4415)[119]

This case is paramount for defining the meaning and application of the concept of submission.[120] Minpeco, a Peruvian state mine company, sought before the SFC the recognition of a decision rendered by the U.S. District Court of the Southern District of New York, against Naji Nahas, resident and domiciled in Brazil.[121] The dispute before the U.S. District Court arose out of a lawsuit for damages against Nahas and others, including members of the Saudi royal family, for manipulation of the silver market for the purpose of artificially enhancing the price of silver.[122] The jury awarded a judgment against Naji Nahas and his corporations for

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118. According to the jurisprudence of the Supreme Federal Court, when the original jurisdiction of the SFC is terminated by a constitutional amendment, the controversy already presented before the court may not be judged. The case is to be immediately sent to the competent court. *See* STF, HC (QO) 78824, Relator: Ministro Marco Aurélio, 22.3.99, D.J.U. de 23.2.2001. According to the jurisprudence of the Supreme Federal Court, when the original jurisdiction of the SFC I terminated by a constitutional amendment, controversies already presented before the court may not be judged. Cases are to be immediately sent to the competent court. *See generally* Cowen & Kim, *supra* note 45 (claiming that an order for compliance with foreign letters rogatory, or *exequatur* falls under the jurisdiction of the Federal Supreme Court prior to the 2004 constitutional amendment).

119. *See* Posting of Dan Roth, Associate Professor, U. Ill. At Urbana-Champaign, http://l2r.cs.uiuc.edu/~danr/Data/Sentence/TRAIN_corpus.satz (last visited on Oct. 23, 2005) (identifying the parties in this litigation as Minpeco S.A., a minerals concern owned by the Peruvian government, and Naji Nahas, a Brazilian financier); STF, SEC 4415, Relator: Ministro Francisco Rezek, 11.12.96, D.J.U. de 3.4.1998. The proceedings for recognition of foreign judgments at the SFC challenged by the defendant are called "Sentença Estrangeira Contestada (SEC)" [Answered Foreign Judgment]. *See generally* Supremo Tribunal Federal, Legal Glossary, Foreign Judgment/Contested Foreign Judgment, *available at* http://216.239.37.104/translate_c?hl=en&sl=pt&u=http://www.stf.gov.br/noticias/glossario/verbete.asp%3FSEQ_VERBETE%3D217&prev=/search%3Fq%3D%2Bwhat%2Bis%2Bsentenca%2Bestrangeira%2Bcontestada%26hl%3Den%26lr%3D (last visited on Oct. 23, 2005) (explaining that the SEC is the Supreme Court of Brazil, and that it has the authority to confirm foreign judgments).

120. *See, e.g.*, Dubai International Financial Centre Regulatory Authority, Consultation Paper No.7, *Law Relation to Application of DIFC Laws*, ¶ 4, (Jan. 2003) (clarifying the concept of submission as a term used regarding jurisdiction as well as arbitration). *See generally* C.J.S. ARBITRATION, MATTERS WHICH MAY BE ORDERED, AWARDED, OR DECIDED UNDER SUBMISSION—GENERAL, SPECIAL OR RESTRICTED SUBMISSION § 161 (2005) (outlining and defining the difference between general and specific submission in the case of arbitration disputes).

121. *See* Minpeco, S.A. v. ContiCommodity Services, Inc., 116 F.R.D. 517, 519 (S.D.N.Y. 1987) (explaining that the plaintiff, Minpeco, S.A., is a minerals trader that is owned by the Peruvian Government); *see also* Fustok v. Nahas, 122 F.R.D. 151, 153 (S.D.N.Y. 1988) (stating the opinion of the case in the Southern District of New York against Naji Nahas, as well as the appeal opinion that affirmed the judgment).

122. *See* Charles Savoie, *Is The Silver Lie Ready?* (Oct. 2002), *available at* http://www.silver-investor.com/charlessavoie/SILVERLIE.htm (last visited Oct. 23, 2005) (summarizing the details of the dealings between Nahas and the members of the Saudi royal family leading up to the litigation). *See generally* Posting of Steven Bird, Associate Professor of Computer and Information Science, U. Penn. Sch. Eng'g & Applied Sci., http://www.cis.upenn.edu/~cis530_fall2001/materials-2000/data2.txt (Fall 2001) (last visited Oct. 23, 2005) (noting the legal problems of Niji Nahas).

fraud, violation of the Sherman Act, as well as the Racketeer Influenced and Corrupt Organizations Act, with a monetary damage award in the amount of $239,124,696 U.S.[123] The defendant was properly served notice of process by means of a rogatory letter in Brazil.[124]

In the proceedings before the SFC in Brazil, Nahas answered the request, asking for non-recognition of the U.S. money judgment.[125] The relevant arguments raised by the defendant were lack of jurisdiction of the New York District Court and violation of public policy.[126] He presented the allegation of lack of jurisdiction on the basis that he, a Brazilian domiciled defendant, had expressly refused to submit himself to the New York District Court's jurisdiction.[127] As for the second argument of public policy, he claimed that the institution of the civil jury is incompatible with the Brazilian system,[128] and that the jury decision was unfounded for it was rendered without due indication of the grounds of condemnation.[129]

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123. *See Fustok*, 122 F.R.D. at 153 (stating that there was a default judgment entered against Naji Nahas that was later amended). *See generally* Fustok v. ContiCommodity Services, Inc., 873 F.2d 38 (2d Cir. 1989) (upholding the judgment against Nahas).

124. *See generally* de Araujo, *supra* note 5 (summarizing the process of implementing the homologation of a letter rogatory to facilitate the homologation of a foreign judgment); Oliveira, *supra* note 25 (discussing "the homologation of foreign court decisions and the granting of exequatur to letters rogatory").

125. *See* Charles S. Donovan, *Thinking Outside the Box: Drafting Ocean-Cargo Container Lease Agreements*, 9 MSU-DCL J. INT'L L. 327, 333 (2000) (discussing the American recognition of foreign judgments through the Uniform Foreign Money Judgments Recognition Act and comparing it to the foreign practice of recognizing U.S. judgments, while providing reasonable alternatives to foreign enforcement, i.e. arbitration clauses); *see also* Brian Richard Paige, Comment, *Foreign Judgments in American and English Courts: A Comparative Analysis,* 26 SEATTLE U. L. REV. 591, 601–04 (2003) (setting forth the grounds for non-recognition of a foreign judgment*).*

126. *See* Jonathan A. Franklin & Roberta J. Morris, *International Jurisdiction and Enforcement of Judgments in the Era of Global Networks: Irrelevance of, Goals for and Comments on the Current Proposals*, 77 CHI.-KENT L. REV. 1213, 1237–39 (2002) (discussing the dilemmas surrounding international agreements of judicial recognition and the many different jurisdictional and public policy considerations that arise in an international forum); *see also* Edward C.Y. Lau, *Update on the Hague Convention on the Recognition and Enforcement of Foreign Judgments*, 6 ANN. SURV. INT'L & COMP. L. 13, 22–23 (2000) (describing the guidelines under The Hague Convention and how each final judgment is subject to the enforcing country's public policy and fundamental principles of procedure).

127. *See* Staten Island Hosp. v. Alliance Brokerage Corp., 560 N.Y.S.2d 859, 861 (2d Dept. 1990) (commenting on how one transaction in New York could render jurisdiction sufficient); *see also* John Goldring, *Consumer Protection, Globalization and Democracy,* 6 CARDOZO J. INT'L & COMP. L. 1, 54 (1998) (explaining the significance of the "territoriality principle" and how judgments are assessed differently depending on the foreign country at issue).

128. Brazil adopts jury trials for serious criminal cases against human life only. *See* Gidi, *supra* note 23, at 318–19 (noting the general differences between American and Brazilian procedure); *see also* Luiz Flávio Gomes & Ana Paula Zomer, *The Brazilian Jury System*, 2002 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 75, 76 (2002) (detailing how strict the applicability of the jury system is in Brazil); Stephen C. Thaman, *Japan's New System of Mixed Courts: Some Suggestions Regarding Their Future Form and Procedures*, 2001 ST. LOUIS-WARSAW TRANSATLANTIC L. J. 89, 98 (2001) (describing the limited role that juries play in Brazil).

129. *See* John M. Olin, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. LEGAL STUD. 521, 553 (1997) (describing "grounds for condemnation" as relating to efforts of achieving the substantive goals of the law); *see also* Eric Wills Orts, *Tenant's Rights in Police Power Condemnation Under State Statutes and Procedural Due Process*, 23 U. MICH. J.L. REFORM 105, 145–46 (1989) (paralleling how a lack of grounds of condemnation is akin to a deprivation of due process).

The case law on the submission of Brazilian-domiciled defendants to foreign jurisdiction has been the subject of some controversy.[130] Deputy Attorney-General Miguel Frauzino Pereira properly addressed this question in his opinion before the SFC in this case.[131] He pointed out that:

> The international jurisdiction provided in article 88 of the Civil Procedure Code is concurrent: the defendant domiciled in Brazil can be sued here or in another country where the obligation must be executed, the fact occurred or the act was performed, if the respective legislation provides the jurisdiction of the local justice in those cases . . . . In the execution of letters rogatory, the remark often made that the refusal of the defendant in submitting himself to a foreign jurisdiction as grounded in the domestic juridical order does not mean that he has immunity, but instead that our legislation ensures him to except the forum.[132]
>
> Therefore, we do not see any basis in the allegation that the defendant has the right to answer before the Brazilian jurisdiction only over facts occurred and acts he executed in another country [the U.S.] in activities subject to the respective laws. . . . At last, that would let the recognition of a foreign jurisdiction at the will of the defendant.[133]

Justice Francisco Rezek's opinion for the Court elucidated that exclusive domestic jurisdiction relates only to immovable property located in Brazil, inheritance, and a decedent's estate

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130. *See* Cowen & Kim, *supra* note 45, at 735 (stating that Brazil will recognize a foreign judgment only if "the Brazilian domiciliary expressly submits to the foreign court's jurisdiction"). *See generally Brazilian Confirmation*, *supra* note 8 (generally addressing the Brazilian recognition of foreign judgments).

131. *See Supreme Federal Tribunal, available at* http://translate.google.com/translate?hl=en&sl=pt&u=http://www.stf.gov.br/institucional/decisaomonocratica/decisaomonocratica.asp%3Fministro%3D22&prev=/search%3Fq%3DMiguel%2BFrauzino%2BPereira%26hl%3Den%26lr%3D%26c2coff%3D1%26sa%3DG_ (last visited Oct. 23, 2005) (indicating that Mr. Pereira is the Deputy Attorney General of the SFC); *see also* Considerations on the Imposed Administrative Restrictions to the Contributors in Debit with the Treasury Department, *available at* http://translate.google.com/translate?hl=en&sl=pt&u=http://jus2.uol.com.br/doutrina/texto.asp%3Fid%3D5546&prev=/search%3Fq%3DMiguel%2BFrauzino%2BPereira%26hl%3Den%26lr%3D%26c2coff%3D1%26sa%3DG (last visited Oct. 23, 2005) (listing Mr. Pereira as the Deputy Attorney General).

132. In a letter rogatory for service of process in Brazil, the defendant may state that he refuses to submit himself to the foreign jurisdiction for the purposes of letting the foreign court know his objection to the alien jurisdiction. However, it must be noted that this statement only has effect based on the legislation of the foreign country which requested the letter rogatory. *See* STF, CR (AgR) 9734, Red.p/o ac.: Ministra Ellen Gracie, 23.05.2002, D.J.U. de 16.05.2003; *see also Recognition and Enforcement*, *supra* note 37, at §12.33 (explaining that a defendant cannot always except a certain jurisdiction, but rather Brazilian Courts will decide whether or not to accept a foreign jurisdiction's decision).

133. *See* Cowen & Kim, *supra* note 45, at 731–32 (referring to a Brazilian law that requires its courts to uphold foreign court's decisions); *see also* Brian L. Zimbler, *Debtor State Law and Default: Enforcement of Foreign Loan Agreements in Brazilian Courts*, 17 U. MIAMI INTER-AM. L. REV. 509, 545–46 (1986) (noting that Brazilian Courts only have exclusive jurisdiction over certain issues); Iris Martinez-Peta, Note, *State v. Pang: A Narrow Interpretation of the United States-Brazil Extradition Treaty Implying Additional Limitations on Post-Extradition Prosecution,* 30 U. MIAMI INTER-AM. L. REV. 183, 192–94 (1998) (stating that the SFC decides whether a Brazilian has to stand trial in a foreign jurisdiction).

division proceedings of property located in Brazil.[134] In all other circumstances, the jurisdiction is concurrent with foreign courts.[135] He added that "[t]herefore, if there is competence of the foreign forum from our point of view, in a hypothesis of necessary submission, appearance is imposed, under the penalty of justified judgment by default with all its consequences."[136] In the present case, the Brazilian-domiciled defendant engaged in business activities in the United States, which therefore proves that he performed acts in that territory, implicating the concurrent international jurisdiction of the United States.[137] In addition, Nahas was duly served notice of process in a Brazilian territory by letter rogatory.[138] Express non-submission to the New York District Court by the defendant did not have the effect of determining the competence of the forum, unless the American law would state the opposite.[139]

The alleged violation of the principle of public policy was also rejected.[140] The SFC has a specific precedent stating that the system of civil jury adopted by the United States law does not

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134. *See* MacLaren, *supra* note 37, at § 9.16 (stating that Brazilian Courts have exclusive jurisdiction in cases involving real property); *see also id.* at § 9:23 (citing Brazilian Law concerning exclusive jurisdiction); Cowen & Kim, *supra* note 45, at 733–34 (noting that real property located in Brazil is under exclusive Brazilian jurisdiction).

135. *See* MacLaren, *supra* note 37, at § 9.16 (stating that foreign courts' decisions are enforceable in Brazil); *see also Recognition and Enforcement*, *supra* note 37 (noting that Brazil has a very liberal approach to accepting foreign jurisdictions' rulings); Zimbler, *supra* note 133, at 545–46 (discussing the issues that arise when a Brazilian citizen is put on trial in a foreign country).

136. *See* Cowen & Kim, *supra* note 45, at 733–34 (explaining that Brazilian Courts will often defer to foreign jurisdictions even at the expense of its own citizens); *see also* Zimbler, *supra* note 133, at 545–46 (stating that only in certain situations will Brazilian Courts claim exclusive jurisdiction).

137. *See* Roger P. Alford, *The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches,* VA. J. INT'L L. 1, 22–23 (1992) (describing cases in which the U.S. will have concurrent jurisdiction); *see also* Fusae Nara, *A Shift Toward Protectionism Under § 301 of the 1974 Trade Act: Problems of Unilateral Trade Retaliation Under International Law,* HOFSTRA L. REV. 229, 262–63 (1990) (explaining when concurrent international jurisdiction is used); Lynn Sellers Bickley, Note, *U.S. Resistance to the International Criminal Court: Is the Sword Mightier than the Law?*, EMORY INT'L L. REV. 213, 254 (2000) (noting that the U.S. can invoke concurrent international jurisdiction when the crime takes place or has an effect on the U.S.).

138. *See generally* Felsberg, *supra* note 87 (commenting that insufficiency of service of process is one of the most frequently contested grounds for recognition and enforcement of foreign judgments against a Brazilian domicilary); Dr. Mariana Silveira, *Jurisdiction—Fundamental Concepts: Focus on Latin America*, NAT. CENTER FOR AM. FREE TRADE, USA (Sept. 11, 2000) (last visited Jan. 31, 2006), *available at* http://www.ilpf.org/events/jurisdiction2/presentations/silveirapr/silveira.htm (last visited Oct. 23, 2005) (indicating by a chart the requirements for recognition and enforcement of foreign judgments in Brazil, including service of process of Brazilian domiciliaries by letter rogatory).

139. *See generally* Asahi Metal Indus. Co., Ltd. v. Super. Ct. of Cal., Solano County, 480 U.S. 102 (1987) (applying the "minimum contacts" rationale to exercise of American jurisdiction over foreign domiciliaries); Int'l Shoe Co. v. Wash., 326 U.S. 310 (1945) (establishing the "minimum contacts" standard for exercise of jurisdiction over those defendants who, though domiciled outside the state, had sufficient contact within the state to have established a connection with it); Minpeco, S.A. v. Naji Robert Nahas, 673 F. Supp. 684 (S.D.N.Y. 1987) (discussing Nahas's involvement in activity in the U.S., including physically shipping silver out of the U.S. on airplanes, which would be enough under U.S. law to establish minimum contacts with the country, sufficient for exercise of jurisdiction over a foreign domiciliary).

140. *Cf.* Jose Antonio B.L. Faria Correa, et al., JURISDICTION AND APPLICABLE LAW IN THE CASE OF CROSS-BORDER INFRINGEMENT (INFRINGING ACTS) OF INTELLECTUAL PROPERTY RIGHTS 3 (BRAZILIAN GROUP ed., 2003) (noting various considerations for foreign judgments in Brazil as they pertain to intellectual property law). *See generally* Silveira, *supra* note 138 (stating that a foreign judgment will not be recognized or enforced in Brazil if it offends Brazilian public policy).

constitute any violation of public policy in Brazil.[141] Justice Rezek, acknowledging that American judgments are generally concise, refused the defendant's claim that the decision was unfounded.[142] Explaining that the decision described all stages of the process, and that the jury is not expected to state the reasons for its findings, Justice Rezek explained that a foreign decision would only be considered as unfounded for total lack of motivation, such as where a decision lacks a single indication that the material allegation was conclusively established due to a default judgment.[143]

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141. *See* SFC, CR (AgR) 4274, Relator: Ministro Moreira Alves, 1.7.1985, D.J.U de 23.8.1985. *See generally* Nadia de Araujo, *Status of the Brazilian Legal Education* (2000), http://www.cejamericas.org/doc/documentos/bra-legal-educ.pdf (last visited Oct. 23, 2005) [hereinafter *Brazilian Legal Education*] (referencing the fact that there is no civil jury in Brazil); Casa Civil, Capitulo III, Da Competencia Pela Natureza Da Infracao [Civil House, Capital III, Of the Competence for the Nature of the Infraction], *available at* http://www.planalto.gov.br/ccivil_03/Decreto-Lei/Del3689.htm (last visited Oct. 23, 2005) (citing Brazilian criminal law on jury trials).

142. *See generally* Treaty of Peace, Friendship, Commerce, and Navigation, U.S.-Braz., art. XXIII, Dec. 12, 1828, 8 Stat. 190, *available at* http://www.yale.edu/lawweb/avalon/diplomacy/brazil/brazil01.htm (last visited Oct. 23, 2005) (creating an agreement between the U.S. and Imperial Brazil that, in cases of one country's judgment against the goods, vessels, or property of citizens of the other, the country rendering judgment shall provide, upon request, the grounds for the sentence and an authenticated copy of the judgment); AMERICAN-BRAZILIAN PRIVATE INTERNATIONAL LAW, *supra* note 53, at 94–95 (referring to a general deference by Brazilian courts to foreign judgments, in the absence of violations of due process or suggestions of basic unfairness).

143. *See generally* AMERICAN-BRAZILIAN PRIVATE INTERNATIONAL LAW, *supra* note 53 (explaining that the choice of whether or not to recognize a foreign letter rogatory is up to the discretion of the Chief Justice of the Supreme Court of Brazil).

The SFC homologated the New York District Court decision, rejecting the interpretation given to the precedent SEC 2114 by which the SFC would back up Brazilian-domiciled defendants' insubmission to foreign jurisdiction in international concurrent jurisdiction hypotheses.[144]

144. In this SEC 4415, Deputy Attorney General Miguel Frauzino Pereira explains the controversy around the decision on SEC 2114:

> It is true that the jurisprudence of this prominent Court has been guided by the precedent of the Action of Homologation of Foreign Judgment number 2114, also from the United States of America, judged by the Court *en banc* in April 4, 1974 (RTJ 87/384-397), admitting only the competence of the foreign jurisdiction, in cases like the present one, when there is voluntary submission of the defendant, also with invocation of the Bustamante Code. However, as reminded by Professor Botelho de Mesquita, that judgment had already begun when the new Code of Civil Procedure was enacted, and it was restricted to article 12 of the Law of Introduction to the Civil Code and to article 322, as the notable jurist remarks: "As for the merits of this decision, we can not let it pass without registering our disagreement with the reasoning expressed by Justice Rodrigues de Alckmin that the concept of submission under the Brazilian law criteria, including the Bustamante Code, would prevail over the North American law. We see two errs [sic] there. First, the adoption of the domestic law criteria in the application of the foreign law on the competence of the judicial authority is in clear opposition to article 15 of the Law of Introduction. Second, the extraction of this criteria from the Bustamante Code, knowingly that this Code is only applicable by its express dispositions to the complaints filed before the judicial authorities of the States submitted to its provisions, which is not the case of the United States for it did not ratify the Havana Convention (cf. Irineu Strenger, Private International Law Course, 1978, p. 203). Starting at this point, the prevailing thesis in that opinion begun to be invoked as a precedent in entirely diverse cases from the perspective of the international competence, but which had, with this one, a point of similarity: the defendants domiciled in Brazil were not properly served notice of process. Therefore, it is evident that in cases of nullity of citation, the submission of the defendant to the court is important, without any doubts, but not to determine the judge jurisdiction (unless the foreign law in contrary, naturally), but yes to cure the nullity or to supply the lack of citation. It can not be implied therefore that the SFC has affirmed its jurisprudence in the sense that the Brazilian law would give a regularly cited defendant the power to not submit himself to a foreign judicial authority which is internationally competent according to the foreign law as much as according to the Brazilian law. This subversion of principles and norms that rule the international competence, at least knowingly, was not committed by the SFC."

See generally ENFORCING FOREIGN JUDGMENTS, *supra* note 56 (establishing that pursuant to section 483 of the Code of Civil Procedure (CCP), the judgment rendered by a foreign court shall become effective in Brazil, solely upon its homologation by the Federal Supreme Court); *Brazilian Legal Education*, *supra* note 141 (emphasizing that the enforcement of a foreign judgment subjects to its prior review process of homologation by the Federal Supreme Court).

B. *Eastman Kodak Company v. Luiz Geraldo Bresciani*[145] (SEC 4738[146] and SEC 5418[147])

The result of these two proceedings under study (SEC 4738 and SEC 5418) was a judgment awarded by the Supreme Court of the State of New York against Consumex, Inc., an American corporation, and Luiz Geraldo Bresciani, a Brazilian citizen, for bad checks, fraud and breach of contract, in the total amount of $5,485,891.04 U.S.[148] The dispute arose from a contract of sale of goods between Consumex, Inc. and Eastman Kodak Company, whose payment was made with bad checks written by Consumex and given to Eastman Kodak by Bresciani, President of Consumex.[149] In the first proceeding before the SFC (SEC 4738), the request of enforcement of the decision was dismissed without prejudice due to the absence of one formal requirement: the certificate stating that the judgment was final with the force of *res judicata*[150] was not notarized by the Brazilian consulate.[151] The plaintiff was notified to amend the petition with the duly notarized certificate, but he failed to provide the SFC this document.[152] Although the request was not judged on its merits, Justice Celso de Mello, who wrote

145. *See ISTOE Independente*, *available at* http://translate.google.com/translate?hl=en&sl=pt&u=http://www.zaz.com.br/istoe/1629/economia/1629_queimou_filme2.htm&prev=/search%3Fq%3Dluiz%2Bgeraldo%2Bbresciani%2Band%2Beastman%2Bkodak%26hl%3Den%26lr%3D (last visited Oct. 23, 2005) (reporting that the plaintiff in this case, Luiz Geraldo Bresciani, exclusive deliverer of Brazilian Kodak in the European East, was indicted for fraud).

146. *See* STF, SEC 4738, Relator: Ministro Celso de Mello, 24.11.1994, D.J.U. de 7.4.1995.

147. *See* STF, SEC 5418, Relator: Ministro Maurício Corêa, 7.10.1999, D.J.U. de 24.11.2000.

148. *See ISTOE Independente*, *supra* note 145 (stating that a damage judgment of $5.4 million had been awarded to the Eastman Kodak Company in the Supreme Court of the State of New York in the United States).

149. *See ISTOE Independente*, *supra* note 145 (maintaining that Bresciani made calumnious accusations in retaliation for having lost a legal action in the United States and having a great debt with American Kodak).

150. This document was a "search certificate" issued by the County Clerk and Clerk of the Supreme Court, New York County, which reads: "I, Norman Goodman, County Clerk and Clerk of the Supreme Court, New York County, do hereby certify that I have diligently examined and searched the records of my office for the above entitled action, and found a judgment filed September 10, 1990. No decision or judgment has been filed affecting or modifying the judgment. No notice of appeal has been filed." *See Brazilian International Procedural Law*, *supra* note 5, at 195 (indicating that judgments may be executed when there is a final judgment for purposes of *res judicata*, which means that there can be no further appeal); *see also* Correa, *supra* note 140 (asserting that in order for foreign judgments to be enforced in Brazil the foreign decision must be irreversible and not submitted to further appeals (*res judicata*)).

151. *See* ENFORCING FOREIGN JUDGMENTS, *supra* note 56, at 73–74 (discussing that foreign judgments must be authenticated by the Brazilian Consulate located nearest to the court rendering judgment, and submitted to the Federal Supreme Court together with a sworn translation thereof); *see also* Consular Legalization, http://www.brazilhouston.org/ingles/vlegaliz.htm (last visited Oct. 23, 2005) (remarking that documents issued in the United States must be validated by a Brazilian Consulate in order to be officially recognized in Brazil); Consulate General of Brazil, *Legalization of Documents*, http://www.brazilsf.org/legal_eng.htm (last visited Oct. 23, 2005) (detailing that in order for a document to be valid in Brazil, all foreign documents must be notarized by a Notary Public and then authenticated by the Brazilian Consulate).

152. *See Trigésima-sétima (37ª) Ata de Publicação de Acórdãos, realizada nos termos do art. 95, do Regimento Interno do S.T.F.*, SUPREMO TRIBUNAL FEDERAL, *available at* http://www.acta-diurna.com.br/biblioteca/acordaos.stf/ac20001124.htm (last visited Oct. 23, 2005) (confirming that the foreign decision must be joined to other legal documents and certified before it can be brought before Brazil Supreme Federal Court for enforcement). *See generally* Falcao, *supra* note 5, at 378–79 (explaining that under Brazil Constitution the Supreme Federal Court has jurisdiction only over the recognition of foreign judicial judgments).

the opinion for the Court, analyzed the defendant's argument that the United States lacked jurisdiction, bringing to light the issue of competence of foreign courts.[153] Justice de Mello noted that:

> the circumstance that the defendant, in a lawsuit started before a foreign court, is Brazilian and casually domiciled in Brazil does not constitute cause for exclusion of the jurisdictional competence of the alien authority, because the nationality and the domicile of the defendant in Brazilian territory do not qualify as a connecting factor to define the absolute or exclusive international competence of the national justice. . . . The controversy raised before the foreign court, which was solved by the decision whose homologation is now intended, does not characterize any hypotheses provided in article 89 of the CPC, which, regulating the absolute international jurisdiction of the Brazilian Judicial Power, repels, consequently, as emphasized by the jurisprudence of the Supreme Federal Court, all and any possibility of concurrent jurisdiction on the subject matter.[154]

Later, Eastman Kodak filed a second request of recognition of the decision of the Supreme Court of the State of New York (SEC 5418), this time with the certificate duly notarized.[155] In his answer, the defendant claimed dismissal of the petition for lack of jurisdiction of New York state court, arguing that a U.S. federal court was the proper forum for hearing the dispute.[156] Justice Ilmar Galvão, who delivered the opinion of the SFC, rejected the defendant's argument.[157] Justice Galvão pointed out that this argument should have been presented before the

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153. *See* Cowen & Kim, *supra* note 45, at 734 (proclaiming that judgments must be rendered by a competent court in order for a foreign judgment to be enforced in Brazil). *See generally* Michael J. Lockerby, *Ucita: The Uniform Computer Information Transactions Act*, 7 RICH. J.L. & TECH. 12 (2000) (emphasizing that most foreign countries will only enforce foreign judgments which are final).

154. *See* SFC, SEC 4738, *supra* note 146; *see also* Cowen & Kim, *supra* note 45, at 734 (clarifying that Brazil is reluctant to enforce foreign judgments against Brazilian-domiciled defendants, and insists that the judgments be valid and final in the country where ordered).

155. *See generally The New Latin American Debt Regime*, *supra* note 17 (demonstrating that there are certain factors that need to be fulfilled in order for a Brazilian court to enforce a foreign decision without re-examination of the issues); Carlos Drummond, Queimou o filme—continuação (2000), *available at* http://www.zaz.com.br/istoe/1629/economia/1629_queimou_filme2.htm (last visited Oct. 23, 2005) (confirming that the Supreme Court of the State of New York found in favor of Eastman Kodak Company and enforcement of the judgment was brought against Bresciani in Brazil).

156. *See generally* Lionel M. Schooler, *Fifth Circuit En Banc Resolves Conflicts in its Decisions Concerning District Court Procedure in Resolving Removal Jurisdiction: Subject Matter Jurisdiction Must be Decided Before Personal Jurisdiction*, 36 HOUS. LAW. 42 (1998) (noting that a federal court can remove a case for lack of subject matter jurisdiction without affecting the right and judicial power of the state court); 3 AM. JUR. TRIALS 611 § 1 (2005) (recognizing that a defendant should look into alternative courts before filing answer to a suit in order to have the best chance of winning).

157. *See generally* Lawrence W. Newman & David Zaslowsky, *International Litigation International Arbitration in Brazil*, 230 N.Y. L.J. 3 (2003) (commenting that the party opposing the enforcement of the foreign judgment must ask the Brazil Supreme Federal Court to declare it void); Posse do Ministro Marco Aurélio Mello na Presidência do, *available at* http://www.stj.gov.br/Discursos/0000361/Texto01.doc (last visited Oct. 23, 2005) (providing a brief history of the life of Justice Ilmar Galvao).

American courts under their procedural laws.[158] He added that the requirement by which a foreign judgment must have been rendered by a competent court relates to international competence, that is to say, whether the judgment should have been delivered in Brazil or in a foreign country.[159] He also cited Oscar Tenório who observed that the analysis of the internal jurisdiction of a foreign country would amount to undue interference of Brazilian justice in a sovereign nation, which would eliminate the formal character of recognition of alien judgments without weighing the merits of the foreign law.[160] The SFC found that all legal requirements were complied with, and therefore granted homologation of the judgment delivered by the Supreme Court of the State of New York.[161]

VI. Differences and Similarities Between American and Brazilian Systems

The United States is not part of any international treaty regarding recognition and enforcement of foreign judgments.[162] With the intention of promoting the enforcement of American judicial decisions abroad, the United States requested the Hague Conference on Private International Law[163] to initiate negotiations on drafting a convention on international jurisdiction and foreign judgments in civil and commercial matters in 1992, which have not yet been concluded.[164]

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158. *See* Cowen & Kim, *supra* note 45, at 736 (noting procedure and progression of arguments concerning money judgments).

159. *See* POST, *Zambia; High Court Sets Aside*, AFR. NEWS, Jan. 31, 2002 (remarking on the registration and delivery of a foreign judgment).

160. *See generally* Garland, *supra* note 9.

161. *See generally* Luiz Bernardo Gomide & Jose Roberto de Castro Neves, *Commercial Financing and Insolvency Law in Brazil*, 2 SW. J.L. & TRADE AM. 123 (1995) (stating that creditors can enforce foreign judgments and recover from Brazilian-domiciled debtors if the necessary requirements are met).

162. *See* U.S. Department of State Bureau of Consular Affairs, Enforcement of Judgments, *available at* http://travel.state.gov/law/info/judicial/judicial_691.html (last visited Oct. 23, 2005) (quoting U.S. Department of State: "[t]here is no bilateral treaty or multilateral international convention in force between the United States and any other country on reciprocal recognition and enforcement of judgments"); *see also* Lescht, *supra* note 106, at 35 (recognizing that the United States does not take part in treaties regarding enforcing foreign judgments).

163. The Hague Conference on Private International Law is an intergovernmental organization constituted by 64 member countries. Brazil and the United States are members of the Hague Conference. As article 1 of its Statute provides, "the purpose of the Hague Conference is to work for the progressive unification of the rules of private international law." The full list of member states of the Hague Conference is available at http://www.hcch.net/index_en.php?act=states.listing (last visited Oct. 25, 2005); *see also* Dugie Standeford, *U.S. to Decide Whether to Pursue Hague Talks as Concerns Linger*, WASH. INTERNET DAILY, June 17, 2003 (noting the struggle of the U.S. in determining whether to join the conference).

164. For more details on the development of the negotiations, see the homepage of the Hague Conference on Private International Law, at http://www.hcch.net/index_en.php (last visited Oct. 23, 2005). *See* William New, *Intellectual Property: U.S. Officials May Seek to Trim Treaty, Talks*, NAT'L J. TECH. DAILY, Jan. 24, 2001 (discussing need to place limits within treaty); *see also Recipe for Havoc*, FIN. TIMES, June 4, 2001, at 12 (referring to treatment of commercial and civil judgments).

Recognition and enforcement of foreign judgments in the United States is controlled by state law, as federal courts' decisions on this subject matter have affirmed.[165] The National Conference of Commissioners on Uniform State Laws has, however, sought to achieve some consistency in the enforcement of foreign money judgments by preparing the Uniform Foreign-Money Judgments Recognition Act in 1962.[166] Currently, 32 states have adopted the Uniform Foreign-Money Judgments Recognition Act.[167] A summary of the approach of the Uniform Foreign Money Judgments Recognition Act and of the Third Restatement is set out in Appendix A.

One of the most striking differences between the American and Brazilian systems of recognition of foreign judicial opinions is centralization.[168] Brazil has a tradition of concentrating jurisdiction on the recognition process.[169] Even with the newly-enacted Constitutional Amendment, this jurisdiction was transferred to another higher court with exclusive jurisdiction on recognition of foreign judgments.[170] As for the American system, the enforcement of

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165. *See* Erie Rail Road Co. v. Tompkins, 304 U.S. 64, 78 (1938) (holding that except in matters governed by the Federal Constitution or Acts of Congress, the law to be applied in any case is the law of the State); *see also* Klaxon Co. v. Stentor Electric. Mfg. Co., 313 U.S. 487, 496 (1941) (holding that conflict of laws to be applied in federal court must conform to those prevailing in the particular state court); ENFORCING FOREIGN JUDGMENTS, *supra* note 56, at 7 (stating that federal courts consistently held that state law governs judgment recognition and enforcement in diversity cases).

166. *See* Cedric C. Chao and Christine S. Neuhoff, *Enforcement and Recognition of Foreign Judgments in United States Courts: A Practical Perspective*, 29 PEPP. L. REV. 147, 150–51 (2001) (stating that one purpose of the Uniform Act passed in 1962 is to provide some uniformity among the states in the area of enforcement of foreign judgments); *see also* Paige, *supra* note 125, at 598 (describing the Commisioner's purpose in approving the Uniform Act in 1962).

167. *See* The National Conference of Commissioners on the Uniform State Laws, *A Few Facts About the Uniform Foreign Money Judgments Recognition Act*, *available at* http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ufmjra.asp (last visited Oct. 23, 2005) (stating that the 32 states that have adopted the Uniform Act are: Alaska, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, U.S. Virgin Islands, Virginia, and Washington). *See generally* Peter D. Trooboff, *Foreign Judgments*, 26 NAT'L L. J. 10 (2004) (discussing proposals for a new federal statute establishing uniform rules throughout the U.S.).

168. *See* de Araujo, *supra* note 5, at 45 (stating that the Brazilian Constitution grants to the Supreme Court original jurisdiction to homologate foreign judgments); *see also* Paige, *supra* note 125, at 592–93 (illustrating how individual states rather than the federal government possess the authority with regard to recognition of foreign judgments).

169. *See* de Araujo, *supra* note 5, at 45 (stating that the Brazilian Constitution grants to the Supreme Court original jurisdiction to homologate foreign judgments); *see also* NATIONAL LAW CENTER FOR INTER-AMERICAN FREE TRADE, *Recognition & Enforcement of Foreign Judgments and Arbitration Awards in Brazil*, 5 INTER-AMERICAN TRADE REP. 3, 3 (1998), *available at* http://www.natlaw.com/bulletin/1998/r9806/980626c.htm (last visited Oct. 23, 2005) (stating that the Brazilian Supreme Court has authority to establish requirements for recognition of foreign judgments).

170. *See* de Araujo, *supra* note 5, at 45 (stating that the Brazilian Constitution grants to the Supreme Court original jurisdiction to homologate foreign judgments); *see also* Kluwer Law International, 3 ITA MONTHLY REPORT (April/May 2005), *available at* http://www.kluwerarbitration.com/arbitration/arb/newsletter/aprilmay2005/ (last visited Oct. 23, 2005) (announcing the transfer of jurisdiction for enforcement of foreign arbitral awards in the Constitutional Amendment). *See generally* NATIONAL LAW CENTER FOR INTER-AMERICAN FREE TRADE, *supra* note 169 (describing the jurisdiction of the Brazilian Supreme Court prior to the Constitutional Amendment).

foreign decisions is decentralized and is regulated by state law,[171] which can impose requirements such as reciprocity independently of any other states' procedures or of federal jurisdiction.[172] Therefore, a plaintiff seeking recognition of a foreign judgment in the United States should be aware of the law of the particular state where he intends the decision to be enforced.[173] This decentralization becomes particularly important when it comes to the principle of reciprocity.[174] Even though reciprocity is not required in general in the United States, a few states impose this condition,[175] whereas Brazil abandoned the reciprocity requirement in 1880,[176] as shown above.

Because the Brazilian system does not consider the principle of reciprocity, the lack of a treaty between United States and Brazil on recognition of foreign judgments does not pose any barriers to recognition of American judgments in Brazilian territory, provided, of course, that

171. *See* ENFORCING FOREIGN JUDGMENTS, *supra* note 56, at 7 (describing the fact that federal courts must apply state law on recognition and enforcement); *see also* Balan, *supra* note 46, at 236 (discussing the fact that enforcement of foreign money-judgments is a matter of state law).

172. *See* Aetna Life Ins. v. Trembley, 223 U.S. 185, 190 (1912) (holding that absent a federal question, federal courts do not have jurisdiction to hear claims pertaining to judgments of foreign states); *see also Guyot*, 159 U.S. at 219, 227 (concluding that reciprocity of foreign judgments is not determined by the federal judiciary while noting that in federal systems throughout the international community, most States allow the individual political unit to determine whether or not to allow reciprocity under the laws therein); ENFORCING FOREIGN JUDGMENTS, *supra* note 56, at 2 (writing that a state's law on reciprocity is independent of any other state's law or the federal government).

173. *See* Banque Libanaise Pour Le Commerce v. Khreich, 915 F.2d 1000, 1003 (5th Cir. 1990) (reaffirming that the enforcement of a foreign money judgment will be determined by the state law in which enforcement is sought); *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 (1989) (expressing that absent a federal question, federal courts will look to the governing state law to determine whether to enforce a foreign judgment); Weintraub, *supra* note 46, at 173 (stating that the enforcement of a foreign judgment will be determined by the jurisdiction in which the plaintiff seeks to have it enforced).

174. *See generally* Steven G. Calabresi, *Federalism and the Rehnquist Court: A Normative Defense*, 574 ANNALS 24 (2001) (discussing the reasons why the founders established a decentralized system in the United States); Martin A. Rogoff, *Interpretation of International Agreements by Domestic Courts and the Politics of International Treaty Relations: Reflections on some Recent Decisions by the United States Supreme Court*, 11 AM. U. J. INT'L L. & POL'Y 559 (1996) (asserting that the United States is decentralized).

175. *See* Balan, *supra* note 46, at 255 n.43 (explaining that a few states require reciprocity and others have reciprocity as a discretionary standard in enforcing foreign judgments); *see also* Hicks, *supra* note 29, at 176 (informing that the majority of states do not require reciprocity as a condition of enforcing foreign judgments); Drafting Committee to Amend the Uniform Foreign Money-Judgments Recognition Act, *Memorandum on Issues for Conference Consideration at the 2004 Annual Meeting*, to Uniform Law Commissioners 1, 8 n.7 (June 7, 2004), http://www.law.upenn.edu/bll/ulc/ufmjra/2004AnnMtgRpt.pdf (listing those states to which reciprocity is a *sine qua non* to enforcing foreign judgments). "The states are Colorado, Florida, Georgia, Idaho, Maine, Massachusetts, North Carolina and Texas. Colorado, Georgia and Massachusetts make lack of reciprocity a mandatory ground for denying recognition, while the other states list it as a discretionary ground." *Id.*

176. S*ee, e.g.*, Panama Processes v. Cities Services Co., 796 P.2d 276, 282 (Okla. 1990) (opining that a Brazilian court may accept the judgment of the Supreme Court of Oklahoma absent reciprocity); *see Guyot*, 159 U.S. at 227 (maintaining that while reciprocity is one of methods in which foreign judgments are executed in Brazil, it is not the only method); *see also* Cowen & Kim, *supra* note 45, at 732 (reporting that Brazil abandoned the requirement of reciprocity in the enforcement of foreign judgments in the late nineteenth century).

the legal requirements are met.[177] The Brazilian process for recognition of foreign judgments does not significantly vary, nor is it faster depending on whether or not a country is a signatory of a jurisdictional cooperation treaty with Brazil,[178] except for the Mercosul members: Protocol of Las Leñas provides that the request for recognition and enforcement of judgments by judicial authorities of Mercosul's member States shall be transmitted by way of rogatory letter through the Central Authority.[179]

Although both Brazilian and American systems require that the foreign decision whose recognition is sought must be a final one, the standards on "final and conclusive judgment" applied in the Uniform Act are distinct from the Brazilian conception.[180] As already noted, the Brazilian system requires a final decision to the extent that no further appeals can be filed. In contrast, the Uniform Act "applies to any foreign judgment that is final and conclusive and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal."[181]

Furthermore, in the Brazilian system, there are no discretionary exceptions to recognition of a foreign judgment, given the formal procedural value of the homologation process.[182] It can

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177. *See* ENFORCING FOREIGN JUDGMENTS, *supra* note 56, at 71–76 (setting forth the Brazilian legal guidelines under which a foreign judgment will be enforced even if there is no reciprocity with the other State); *see also* Cowen & Kim, *supra* note 45, at 733 (discussing the Brazilian legal requirements a foreign judgment must meet to be given effect in Brazil).

178. In general, cooperation treaties facilitate the accomplishment of legal requirements, but they do not have an expressive influence on the speed of the process before the Judiciary. One example is the Judicial Cooperation Treaty in Civil Matters, signed between Brazil and France, by which the French petitioners are exempt of notarizing French public documents. *See* Decreto 3.598, de 12.9.2000, *available at* http://www.planalto.gov.br/ccivil_03/decreto/D3598.htm (last visited Oct. 23, 2005). This treaty certainly facilitates the compliance of the requirements for recognition of a foreign judgment, but it does not interfere in the time-length of the process itself before the judiciary. *See generally* ENFORCING FOREIGN JUDGMENTS, *supra* note 56 (writing that foreign judgments are enforced in Brazil according to Brazilian law and regardless of whether there is a foreign judgment treaty).

179. *See* Las Lenas Protocol on Jurisdictional Cooperation and Assistance in Civil, Commercial, Labor, and Administrative Matters, art. 19 (Nov. 12, 1996) (illustrating Brazilian law); *see also* STF, CR (AgR) 7613, Relator: Min. Sepulveda Pertence, 3.4.1997, D.J.U. de 9.5.1997 (dealing with the expediency of enforcements of foreign judgments in Brazil; the SFC explained that the Protocol of Las Leñas permits that a foreign court requests the enforcement of its own judgment directly, without petition of the prevailing party).

180. *See* UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 2, 13 (Pt. II) U.L.A. 46 (1962) [hereinafter FOREIGN MONEY-JUDGMENTS] (limiting the applicability of the act to foreign judgments that are "final and conclusive and enforceable"); *see also* Korea Water Resources Corp. v. Lee, 8 CAL. RPTR. 3D 853, 857–58 (Cal. Ct. App. 2004) (holding that California's application of Uniform Foreign Money Judgments Recognition Act, notwithstanding the fact that the judgment was pending appeal, was correct).

181. 13 (Pt. II) U.L.A. 46. Also, § 6 of the Uniform Act states that "[i]f the defendant satisfies the court either that an appeal is pending or that he is entitled and intends to appeal from the foreign judgment, the court may stay the proceedings until the appeal has been determined or until the expiration of a period of time sufficient to enable the defendant to prosecute the appeal." *See* FOREIGN MONEY-JUDGMENTS, *supra* note 180, at 46 (noting the applicability of the act to foreign judgments that are "final and conclusive and enforceable"); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 481 (1987) (delineating that a final judgment, even from a foreign court, is "conclusive" between the parties and should be recognized in United States courts).

182. *See* AMERICAN-BRAZILIAN PRIVATE INTERNATIONAL LAW, *supra* note 53, at 93 (emphasizing that foreign judgments "shall" be enforced in Brazil, with no hesitation, as long as certain requirements are met); *see also* ENFORCING FOREIGN JUDGMENTS, *supra* note 56, at 71 (explaining that Brazil only permits limited review of foreign judgments and that these judgments become effective upon homologation).

be argued that discretion lies in the concept of violations of national sovereignty and public policy;[183] however, there is no such thing as a formal discretionary power by which the court could deny enforcement on its own, regardless of those specific grounds for non-recognition.[184] In contrast, in the American system, both the Uniform Act and the Restatement authorize circumstances under which the judicial branch has discretionary power to refuse the enforcement of a foreign decision, regardless of whether the mandatory requirements are met.[185]

As for the possibility of denial of recognition provided in the Uniform Act for a "seriously inconvenient forum with jurisdiction based only on personal service" and for "judgments contrary to party agreement," there is no such specific provision in the Brazilian legislation.[186] It might, of course, be possible to make similar arguments in Brazil based on the violation of public policy, though the success of such an argument would be subject to much greater doubt.[187]

Apart from the fact that the American system distinguishes between discretionary and mandatory grounds of non-recognition of foreign judgments, the American and Brazilian

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183. *See* Cowen & Kim, *supra* note 45, at 738 (referring to Brazilian courts' right not to enforce foreign judgments where they violate public policy, as stipulated in Article 17 of the Law of Introduction to the Brazilian Civil Code); *see also* Chao & Neuhoff, *supra* note 166, at 157 (discussing how the United States will not enforce a foreign judgment on certain public policy grounds, such as injury to public health or morals).

184. *See* AMERICAN-BRAZILIAN PRIVATE INTERNATIONAL LAW, *supra* note 53, at 93–96 (discussing the five formal requirements foreign judgments must comply with in order to be recognized in Brazil); *see also* Decree-Law No. 4.657 (1942), *amended by* Law No. 3.238 (1957), Law of Introduction to the Brazilian Civil Code, art. 15, at 113 (Paul Garland trans., Appendix A) (listing the five requisites for a foreign judgment to be executed in Brazil, which are: "(a) Having been rendered by a competent court; (b) The parties having been cited and having taken part in the action or having allowed the judgment to go by default; (c) Being in final form and being invested with the necessary formalities for execution at the place where it was rendered; (d) Being translated by an authorized interpreter; (e) Having been homologated by the Federal Supreme Court"); Durval de Noronha Goyos, Jr., *Recognition & Enforcement of Foreign Judgments and Arbitration Awards in Brazil*, 5 INTER-AM. TRADE REP. 3 (1998), *available at* http://natlawip.abra.info/bulletin/1998/r9806/980626i.htm (last visited Oct. 23, 2005) (setting forth the essential requirements for ratification of foreign judgments in Brazil).

185. *See* FOREIGN MONEY-JUDGMENTS, *supra* note 180, at 58 (codifying the various circumstances that allow for non-recognition of foreign judgments); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482 (1987) (using the words "may" and "need not" when referring to the court's jurisdiction to recognize foreign judgments).

186. *Compare* Foreign Money-Judgments, *supra* note 180, at 58 (highlighting two ways that allow courts broad discretion when deciding to recognize foreign judgments) *with* Decree-Law No. 4.657, *supra* note 184 (stating the five necessary requirements for recognition of foreign judgments, with no exceptions). *But see* Cowen & Kim, *supra* note 45, at 744 (positing that Brazilian enforcement of foreign judgments has lessened, with the courts taking advantage of complicated homologation procedures and utilizing broad interpretations of public policy and due process, especially with judgments rendered against Brazilian domiciliaries).

187. *See* Legislation and Regulations Brazil, *supra* note 22, at 1576 (noting that an effective summons to a Brazilian domiciliary "shall not be considered contrary to national public policy"); *see also* Welber Barral & Frederico Cardoso, *The New Brazilian Arbitration Act: A Firm Step Forward*, 5 CROAT. ARB. Y.B. 81, 96 (1998) (asserting that a notification by mail to a Brazilian party is not to be considered as against national public policy). *See generally* Heaphy, *supra* note 57 (describing the definition of "public policy" under the standard of the United States and comparing that to the "quite vague" definition under Brazilian law).

approaches share certain common features.[188] For instance, both countries would refuse enforcement of a foreign decision for lack of jurisdiction and due process.[189] Furthermore, the "causes of action contrary to public policy" in the Uniform Act are similar to the idea of "judgments violating public policy" in Brazilian legislation.[190] Although the public policy concept seems to be a very broad ground to refuse recognition of a foreign judgment, the United States and Brazil have rarely applied this exception.[191] In fact, there is no record of any money-judgments that was denied recognition on the grounds of public policy in Brazil.[192]

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188. *See* Cynthia H. Hall & Michael M. Mihm, *The History of the Committee on International Relations of the United States Judicial Conference*, 42 ST. LOUIS U. L.J. 1163, 1182–83 (1998) (noting that Brazil's civil procedure reforms are borrowed largely from the United States, resembling the common law system rather than that of its civil system heritage); *see also* W. Gary Vause & Dulcina de Holanda Palhano, *Labor Law in Brazil and the United States—Statism and Classical Liberalism Compared*, 33 COLUM. J. TRANSNAT'L L. 583, 588–89 (1995) (commenting that although the Brazilian and the United States legal systems originate from civil and common law, respectively, the distinction "does not provide a satisfactory line of demarcation between the two systems of jurisprudence"; in fact, the current American labor law very much resembles that in civil law countries).

189. Even though due process of law is not expressly mentioned as a requirement in the Brazilian legislation, it is certainly encompassed within the principle of public policy. *See* Barral & Cardoso, *supra* note 187, at 96 (noting that the STF will refuse to recognize or enforce an international arbitral award where the party against whom it is invoked was not served with proper notice of the appointment of the arbitrator or proceedings); *see also* OFFICE OF THE CHIEF COUNSEL, *supra* note 70 (addressing that the enforcement of U.S. judgments abroad depends on the foreign country's domestic law, which normally requires proper due process and jurisdiction; specifically, Brazil will refuse to enforce a U.S. judgment unless there is a "clear indication" that the Brazilian national "intended to submit to the foreign court's jurisdiction").

190. *See* Cowen & Kim, *supra* note 45, at 738 (citing the provision of the Law of Introduction to the Civil Code, which states the Brazilian Court will not enforce foreign judgments that offend "national sovereignty, public policy and good customs"). *Contra* Heaphy, *supra* note 57, at 464 (holding that the standard of public policy in Brazil is "quite vague" when compared to that of the United States standard; that is, Brazilian judges enjoy unchecked discretion in their application of the standard, while the United States, on the other hand, is unclear as to whether it should apply a "national or international" standard of public policy). *See generally* Mariano Municoy, *Allocation of Jurisdiction on Patent Disputes in the Models Developed by the Hague Conference in Private International Law: Asymmetric Countries and the Relationship of Private Parties*, 4 CHI.-KENT J. INTELL. PROP. 342 (2005) (suggesting that denial of enforcement of judgments based on their incompatibility with the public policy serves to curb forum shopping).

191. *See* ENFORCING FOREIGN JUDGMENTS, *supra* note 56, at 17–18 (noting that although the United States declares it will not enforce foreign judgments that contravene public policy, this declaration has seldom lead to denial of recognition); *see also* Heaphy, *supra* note 57, at 464 (stressing that case law in the United States indicates that courts are "wary" of invoking public policy to deny recognition of arbitral awards; that enforcement of foreign judgments are denied only where it would "violate the forum state's most basic notions of morality and justice"). *See generally* Karen E. Minehan, *The Public Exception to the Enforcement of Foreign Judgments: Necessary or Nemesis?*, 18 LOY. L.A. INT'L & COMP. L. REV. 795 (1996) (discussing the refusal of the Court of Justice of the European Communities, ECJ, in its application of the public policy exception to the enforcement of foreign judgments where the objection is founded on jurisdictional or conflicts of laws issues).

192. Cases denying recognition of foreign judgments under the public policy exception are found in the realm of family law. *See* rel. Min. Thompson Flores, 10.11.72, D.J.U. de 29.12.77, *available at* http://www.stf.gov.br/jurisprudencia/jurisp.asp (case number search "2373," then select file name "SE 2373 AgR") (last visited Oct. 23, 2005) (denying recognition of a divorce decree entered by a foreign county's embassy through the husband's unilateral manifestation); *see also* rel. Min. Djaci Falcão, 25.02.76, D.J.U. de 06.08.76, *available at* http://www.stf.gov.br/jurisprudencia/jurisp.asp (case number search "2174," then select file name "SE 2174") (last visited Oct. 23, 2005) (refusing to give recognition to a divorce decree delivered on the grounds of adultery when the couple was already judicially separated in Brazil; a condition that prevented an allegation of adultery). A search of the Brazilian Supreme Federal Court's (STF) online database reveals no record of any denial of recognition to a money-judgment under public policy grounds. The only significant issue regarding judgments of money damages before the Brazilian judiciary consisted of foreign judgments for collection of gambling debts. The STF's searchable database can be found at http://www.stf.gov.br/jurisprudencia/jurisp.asp (last visited Oct. 23, 2005).

Conclusion

The standard for recognition of foreign judgments in Brazil is very deferential to the foreign judiciary in that it does not analyze the merits of the legal controversy decided abroad. Whereas the Brazilian system of recognition is centralized and therefore predictable, with mostly formal requirements respecting and cooperating with foreign jurisdiction, it also protects the domestic rule of law by refusing enforcement of foreign judgments when there is a violation of national sovereignty, public policy and good mores.

Within the concurrent international jurisdiction, the Brazilian legal system will recognize foreign decisions which arise from proceedings against Brazilian domiciliaries who entered into business transactions in the United States with parties subject to American jurisdiction. The only exception would be the cases of Brazilian exclusive jurisdiction, as this article shows. The Brazilian model of recognition of foreign adjudication should certainly contribute to advance U.S.-Brazilian trade and investment relationships.

Appendix A:

	Uniform Foreign Money-Judgments Recognition Act	Restatement (Third) Foreign Relations Law (1986)
Foundational Requirements for Recognition	1) Final and conclusive and enforceable where rendered	1) final judgment
Mandatory Grounds for Non-Recognition: Act § 4(a) Restatement § 482(1)	1) lack of due process 2) lack of personal jurisdiction 3) lack of subject matter jurisdiction	1) lack of due process 2) lack of personal jurisdiction
Discretionary Grounds For Non-Recognition: Act § 4(b) Restatement § 482(2)	1) insufficient notice to defendant 2) fraud 3) cause of action contrary to public policy 4) judgment conflicts with another final judgment 5) proceedings contrary to agreement of the parties 6) "seriously inconvenient forum" with jurisdiction based only on personal service	1) lack of subject matter jurisdiction 2) insufficient notice to defendant 3) fraud 4) cause of action contrary to public policy 5) judgment conflicts with another final judgment 6) proceedings contrary to agreement of the parties

Table 10 at Ronald A. Brand, ed., *supra* note 23.[193]

193. As Brand explains, both Uniform Act and Restatement are very similar and only a couple of differences can be noted: lack of subject matter jurisdiction constitutes a mandatory ground for non-recognition in the Uniform Act, while it characterizes a facultative option in the Restatement; and "serious inconvenient forum" is provided as a discretionary ground for non-recognition at the Uniform Act only. *See* ENFORCING FOREIGN JUDGMENTS, *supra* note 56, at 10–11 (explaining that both the Uniform Act and the Restatement are very similar and that only a couple of differences can be noted: first, in regard to lack of subject matter jurisdiction, it constitutes a mandatory ground for non-recognition under the Uniform Act, while it is treated on discretionary grounds under the Restatement; second, in regard to non-recognition based on "serious inconvenient forum," it is provided for as a discretionary ground under the Uniform Act only).

A Viable Model for International Criminal Justice: The Special Court for Sierra Leone

J. Peter Pham*

Introduction

The May 25, 1993, decision by the United Nations Security Council to invoke its Chapter VII powers to set up "an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the former Yugoslavia between January 1, 1991, and a date to be determined by the Security Council upon the restoration of peace"[1] was a jump-start in the development of the international system of criminal justice that had been effectively stalled since the conclusion of the International Military Tribunals at Nuremberg and Tokyo after World War II.[2] In the decade since its establishment, the International Criminal Tribunal for the former Yugoslavia (ICTY)—along with its companion, the International Criminal Tribunal for Rwanda (ICTR), created on November 8, 1995, to try "persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighboring states between

1. *See* S.C. Res. 827, ¶ 2, U.N. Doc. S/RES/827 (May 25, 1993) (invoking the power of the Articles of the United Nations Security Council to establish an international tribunal); *see also* M. Cherif Bassiouni, *Current Development: The United Nations Commission of Experts Established Pursuant to Security Council Resolution* 780 (1992), 88 AM. J. INT'L L. 784, 791–92 (1994) (noting that the international criminal tribunal was established by the Security Council's unanimous vote); Louis B. Sohn, *Recommendation and Report: International War Crimes Tribunal*, 28 INT'L LAW. 545, 545 (1994) (describing the action taken by the United Nations to exercise its Chapter VII powers).

2. *See* Kyle R. Jacobson, *Doing Business with the Devil: The Challenges of Prosecuting Corporate Officials Whose Business Transactions Facilitate War Crimes and Crimes Against Humanity*, 56 A.F. L. REV. 167, 170–71 (2005) (emphasizing that the International Military Tribunal at Nuremberg laid the foundation for the International Criminal Tribunal for the Former Yugoslavia (ICTY)); *see also* Thomas Hethe Clark, Note, *The Prosecutor of The International Criminal Court, Amnesties, and The "Interests of Justice": Striking A Delicate Balance*, 4 WASH. U. GLOBAL STUD. L. REV. 389, 393–94 (2005) (noting that the Nuremberg legacy was "stunted" by post WWII politics, until the U.N. created the two international tribunals for the former Yugoslavia and Rwanda). *See generally* JACKSON NYAMUYA MAOGOTO, WAR CRIMES AND REALPOLITIK: INTERNATIONAL JUSTICE FROM WORLD WAR I TO THE 21st CENTURY 143–55 (2004) (describing the Security Council's creation of the ICTY as "groundbreaking," and as a measure that would have been "unthinkable" four years before its establishment).

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January 1, 1994, and December 31, 1994"[3]—has seen tremendous progress in the global effort to prosecute violations of humanitarian and human rights law, including the first convictions for the crime of genocide and the consolidation of the jurisprudence regarding sexual violence as genocide.[4] While the way forward has, on more than one occasion, been unsteady, advances in both procedure and substance have been significant.

Despite the tribunals' accomplishments in combating the regime of impunity that has long shielded high officials responsible for abuse in many conflict situations, the tribunals have also been criticized for their inefficient administration.[5] A decade into its operation, the ICTY, based at The Hague, employs 1,238 persons from 84 countries and costs over $270 million annually.[6] As of the end of 2004, the ICTR has handed down 17 judgments, involving some 23 accused. However, to accomplish that, the tribunal, based in Arusha, Tanzania, and staffed by 872 individuals from more than 80 countries, was spending about $250 million annu-

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3. *See* S.C. Res. 955, ¶ 1, U.N. Doc. S/RES/955 (Nov. 8, 1994) (exercising the Chapter VII powers of the United Nation's Charter); *see also* Gregory S. Gordon, *"A War of Media, Words, Newspapers, and Radio Stations": The ICTR Media Trial Verdict and A New Chapter in the International Law of Hate Speech,* 45 VA. J. INT'L L. 148, 148 (2004) (describing the creation of the ICTR, its purpose and subject matter); Theodor Meron, *War Crimes Law Comes of Age*, 92 AM. J. INT'L. L. 462, 462–63 (1998) (stressing the importance and significance of establishing *ad hoc* international criminal tribunals).

4. *See, e.g.,* Prosecutor v. Jean-Paul Akayesu, Case No. ICTR 96-4-T, Judgment (Sept. 2, 1998), *available at* http://www.ictr.org/ENGLISH/cases/Akayesu/judgement/akay001.htm#8 (last visited Oct. 18, 2005) (finding Akayesu guilty of facilitating and encouraging the sexual violence, since he knew and witnessed women regularly being raped and subjected to sexual violence); *see also* David S. Mitchell, *The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying The Doctrine*, 15 DUKE J. COMP. & INT'L L. 219, 234 (2005) (emphasizing that the jurisprudence of the ICTY and the ICTR recognize sexual violence as an instrument of genocide); Thekla Hansen-Young, Comment, *Defining Rape: A Means to Achieve Justice in the Special Court for Sierra Leone*, 6 CHI. J. INT'L L. 479, 484 (2005) (stating that the ICTR issued the first conviction for genocide and humanity crimes based on sexual violence).

5. *See* Daniel J. Hendy, *Is a Truth Commission the Solution to Restoring Peace in Post-Conflict Iraq?*, 20 OHIO ST. J. ON DISP. RESOL. 527, 546 (2005) (noting that the tribunal needs serious logistical and structural improvements); *see also* Geoffrey Nice QC & Philippe Vallières-Roland, *Procedural Innovations in War Crimes Trials*, 3 J. INT'L. CRIM. JUST. 354, 355 (2005) (criticizing the tribunals for being too expensive, remote, ineffective, and slow). *See generally* J. Peter Pham, *Politics and International Justice in a World of States*, 4 HUM. RTS. & HUM. WELFARE 119 (2004) (reviewing JACKSON NYAMUYA MAOGOTO, WAR CRIMES AND REALPOLITIK: INTERNATIONAL JUSTICE FROM WORLD WAR I TO THE 21st CENTURY (2004)), *available at* http://www.du.edu/gsis/hrhw/volumes/2004/pham-b-2004.pdf [hereinafter Pham, *Politics and International Justice*] (tracing the historical events surrounding the creation of the tribunals, some of their accomplishments, and many of their shortcomings).

6. *See* INT'L CRIM. TRIB. FOR THE FORMER YUGO., *General Information*, http://www.un.org/icty/glance/index.htm (last visited Sept. 25, 2005) (stating that the projected budget of the ICTY for its ordinary expenses for the 2004–2005 fiscal year is $271,854,600). *See generally* Daryl A. Mundis, *The Judicial Effects of the "Completion Strategies" on the Ad Hoc International Criminal Tribunals*, 99 AM. J. INT'L L. 142 (2005) [hereinafter Mundis, *Completion Strategies*] (emphasizing that some have criticized the ICTY for being "slow to dispense justice and extremely costly to operate"); Michael P. Scharf, *The Tools for Enforcing International Criminal Justice in The New Millennium: Lessons from the Yugoslavia Tribunal*, 49 DEPAUL L. REV. 925 (2000) (expanding on the inadequacy of ICTY's earlier budget).

ally[7]—a sum roughly fifty percent greater than the total annual revenues of the Rwandan government—and was poised to continue doing so at least through the end of the decade.[8] In fact, dissatisfaction with the inefficiencies inherent to the use of *ad hoc* international tribunals as vehicles for pursuing international criminal justice was one of the arguments adduced in favor of the establishment of the permanent International Criminal Court (ICC)[9] along with the Security Council's "tribunal fatigue" vitiating against the multiplication of *ad hoc* international tribunals.[10]

However, despite the adoption of its Rome Statute[11] being hailed by UN Secretary-General Kofi Annan as "a giant step forward in the march toward universal human rights and the

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7. *See* INT'L CRIM. TRIB. FOR RWANDA, *General Information*, *available at* http://www.ictr.org/default.htm (last visited Sept. 25, 2005) (stating that the gross budget for the 2004–2005 fiscal year for the ICTR is $255,909,500); *see also* 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, 181 (2000) (criticizing the ICTR for the scarcity of trials, despite having a multi-million dollar budget); Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U. L. REV. 539, 601 (2005) [hereinafter Drumbl, *Collective Violence*] (admonishing the West for its lack of involvement in Rwanda's judicial infrastructure, leading to costs of roughly $25 million per conviction).

8. *See Completion Strategy of the International Criminal Tribunal for Rwanda*, U.N. SCOR, U.N. Doc. S/2004/341 (2004), *available at* http://www.ictr.org/ENGLISH/completionstrat/s-2004-341.pdf (last visited Sept. 28, 2005) (stating that the ICTR and the ICTY's work will be completed by 2010); *see also* International Panel of Eminent Personalities (IPEP): Report on the 1994 Genocide in Rwanda and Surrounding Events, July 7, 2004, 40 I.L.M. 141, 151 (noting Rwanda's dependence on foreign funding for a third of its already minimal budget); Mark A. Drumbl, *Law and Atrocity: Settling Accounts in Rwanda*, 31 OHIO N.U. L. REV. 41, 46 (2005) [hereinafter Drumbl, *Law and Atrocity*] (suggesting that Rwanda would significantly benefit if portions of the funding for the international tribunal were directed to the nation).

9. *See* William Bradford, *Barbarians at the Gates: A Post-September 11th Proposal to Rationalize the Laws of War*, 73 MISS. L.J. 639, 650 n.35 (2004) (noting that the Rome Statute, which establishes the ICC, was ratified by a vote of 120 in favor and 7 opposed); *see also* Hans-Peter Kaul, *Developments at The International Criminal Court: Construction Site for More Justice: The International Criminal Court After Two Years*, 99 AM. J. INT'L L. 370, 370 (2005) (stating that the ICC officially opened in The Hague on March 11, 2003). *See generally* INT'L CRIM. CT., *Historical Introduction*, *available at* http://www.icc-cpi.int/about/ataglance/history.html (last visited Sept. 25, 2005) (detailing the establishment of the ICC as the first permanent treaty-based international criminal tribunal).

10. *See* Anne K. Heindel, *International Human Rights & U.S. Foreign Policy: The Counterproductive Bush Administration Policy Toward the International Criminal Court*, 2 SEATTLE J. SOC. JUST. 345, 350 (2004) (stating that the birth of the ICC was due to "tribunal fatigue" and to the impracticality of establishing new *ad hoc* international tribunals); *see also* Larry D. Johnson, *Closing an International Criminal Tribunal While Maintaining International Human Rights Standards and Excluding Impunity*, 99 AM. J. INT'L L. 158, 174 (2005) (advising the Security Council, General Assembly, and members of the United Nations Organization that, although future challenges will arise, they should not succumb to "tribunal fatigue"); Michael P. Scharf, *The Politics of Establishing an International Criminal Court*, 6 DUKE J. COMP. & INT'L L. 167, 169 (1995) ("[Tribunal fatigue is] the process of reaching a consensus on the tribunal's statute, electing judges, selecting a prosecutor, and appropriating funds [that] has turned out to be extremely time consuming and politically exhausting for members of the Security Council").

11. *See* INT'L CRIM. CT., *Rome Statute of the International Criminal Court* (July 17, 1998), 37 I.L.M. 999, 999, *available at* http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf [hereinafter Rome Statute] (detailing each part of the Rome Statute); *see also* Sean D. Murphy, ed., *Contemporary Practice of the United States Relating to International Law*, 95 AM. J. INT'L L. 387, 399 (2001) ("Under the Rome Treaty, the [ICC] will come into being with the ratification of 60 governments and will have jurisdiction over the most heinous abuses that result from international conflict, such as war crimes, crimes against humanity, and genocide."); Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 11 (2005) (stating that the Rome Statute contemplated a permanent international criminal tribunal as opposed to the *ad hoc* tribunals that were formed as a result of crimes against humanity).

rule of law,"[12] the ICC faces two major limitations. First, the ICC has not been supported by the United States government.[13] Under the Clinton Administration, the U.S. voted against the Court's Statute at the Rome Conference and did not sign the treaty until the very last day on which it was open for signature.[14] Even then, President Clinton left his successor with the recommendation not to submit for Senate ratification a treaty that, despite his signature, the outgoing chief executive described as "flawed."[15] The George W. Bush Administration took opposition to the ICC even further, formally declaring that the U.S. did not intend to become a party to the Court and that it had "no legal obligations arising from its signature of December

12. *See* Heindel, *supra* note 10, at 347–48 (2004) (restating Secretary-General Kofi Annan's words and noting that the establishment of the ICC is no less important than the establishment of the U.N. Charter itself); *see also* Jon M. Van Dyke, *Promoting Accountability for Human Rights Abuses*, 8 CHAP. L. REV. 153, 173 (2005) [hereinafter Van Dyke, *Human Rights Abuses*] (noting U.N. Secretary-General Kofi Annan's support for ICC intervention into the crisis in Darfur); Kofi Annan, United Nations Sec'y-General, *Statement at the Ceremony Held at Campidoglio Celebrating the Adoption of the Statute of the International Criminal Court* (July 18, 1998), *available at* http://www.un.org/icc/speeches/718sg.htm (last visited Sept. 25, 2005) (memorializing Secretary-General Kofi Annan's speech after the adoption of the Rome Statute).

13. *See* John Dugard, *A Tribute to United States District Judge David Hittner: John W. Turner Lecture: The Implications for the Legal Profession of Conflicts Between International Law and National Law*, 46 S. TEX. L. REV. 579, 590–91 (2005) (citing the American Service Members Protection Act (ASMPA) as evidence of an American effort to destroy the ICC); *see also* Diane F. Orentlicher, *Unilateral Multilateralism: United States Policy Toward the International Criminal Court*, 36 CORNELL INT'L L.J. 415, 415–22 (2004) (elaborating extensively on American confrontational measures and opposition to the ICC); Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for A Moral High Ground*, 99 AM. J. INT'L L. 370, 380 (2005) (describing the nature of the United States administration's opposition to the ICC).

14. *See* Heindel, *supra* note 10, at 345 (stating that, despite the United States' long-held position supporting international justice, both the Clinton and Bush Administrations have done very little to facilitate the formation of the ICC); *see also* Sasha Markovic, Note, *The Modern Version of the Shot Heard 'Round the World: America's Flawed Revolution Against the International Criminal Court and the Rest of the World*, 51 CLEV. ST. L. REV. 263, 268 (2004) (asserting that President Clinton signed the Rome Statute, hoping that future preparation meetings would alleviate any U.S. reservations); Mark E. Wojcik et al., *International Human Rights*, 37 INT'L LAW. 597, 597 (2003) (stressing the Clinton administration's reluctance to ratify the Rome Statute and the Bush administration's later withdrawal of the U.S. signature).

15. *See* Julian Borger, *U.S. Will Join World Court*, GUARDIAN (London), Jan. 1, 2001, at 11 (noting that in signing the Rome Treaty, Clinton engendered a major foreign policy controversy within the Bush Administration, which for the most part, opposed it); *see also* William J. Clinton, *Statement of the President on the Signature of the International Criminal Court Treaty* (Dec. 31, 2000), *available at* http://clinton6.nara.gov/2000/12/2000-12-31-statement-by-president-on-signature-the-icc-treaty.html (last visited Sept. 25, 2005) ("In signing, however, we are not abandoning our concerns about significant flaws in the Treaty. In particular, we are concerned that when the Court comes into existence, it will not only exercise authority over personnel of states that have ratified the Treaty, but also claim jurisdiction over personnel of states that have not. With signature, however, we will be in a position to influence the evolution of the Court."). *See generally* Steven L. Meyers, *U.S. Signs Treaty for World Court to Try Atrocities*, N.Y. TIMES, Jan. 1, 2001, at A1 (reporting that in announcing his decision to sign, Clinton said that he would neither submit the treaty for Senate approval nor recommend that his successor do so immediately).

31, 2000."[16] Moreover, further distancing the American government from the Court, the administration stated that ICC's scope of activity, at least for the foreseeable future, is limited by the Rome Statute's provisions in no less than two articles that, for all practical purposes, "the Court is a futuristic project, for a 'future generation' of criminals."[17] Article 11 of the Statute recognizes that "[t]he Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute,"[18] while Article 24 holds that "[n]o person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute."[19] The Statute entered into force on July 1, 2002, and even then, the ICC's jurisdiction was generally limited to crimes that either occurred in the territory of a state party or were committed by a national of a state party.[20]

But if "tribunal fatigue" works against the establishment of additional *ad hoc* international tribunals and its limitations—both internal and external—stymie the International Criminal Court, what model are we left to propose in response to war crimes and other violations of international humanitarian and human rights law that have occurred in recent years? While international criminal justice is not the only appropriate response to mass atrocities, trials do serve a number of salutary purposes, including bringing a measure of recognition for victims

16. *See* Letter from John R. Bolton, U.S. Undersec'y of State for Arms Control and Int'l Sec., to Kofi Annan, Sec'y-General, U.N. (May 6, 2000), *available at* http://archives.cnn.com/2002/US/05/06/court.letter.text (last visited Sept. 25, 2005) (providing the cited quotation); *see also* Joel F. England, Note, *The Response of the United States to the International Criminal Court: Rejection, Ratification or Something Else?*, 18 ARIZ. J. INT'L & COMP. L. 941, 976–77 (2001) (noting that the Bush administration opposed the ICC and believed that ratification by the Senate was unlikely, but recognized that the United States' signature signified certain obligations of good faith); Jonathan S. Landay, *Milosevic Extradition Boosts Support for International Criminal Court*, PITTSBURGH POST-GAZETTE, June 29, 2001, at A6 (reporting that the Bush administration has denounced the ICC as infringing on U.S. sovereignty and as a threat to national security).

17. *See* GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE 389 (2002) (explaining that governments represented at the Rome Conference "would never countenance a court with the power to reach back into history, or even to feel the collars of leaders who were currently in power"); *see also* Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 459 (2000) ("[T]he final product is a fragile compromise that may or may not succeed."). *See generally* Rome Statute, *supra* note 11 (announcing that while the statutory policy is to ensure that crimes against humanity do not go unpunished, nations must not interfere with the territorial integrity of others).

18. Rome Statute, *supra* note 11 (noting the prescriptive force of the Statute); *see also* Payam Akhavan, *Developments at the International Criminal Court: The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court*, 99 AM. J. INT'L L. 403, 412 (2005) [hereinafter Akhavan, *Uganda's Submission*] (summarizing Article 11 of the Rome Statute); Ruth Wedgwood, *The United States and the International Criminal Court: Achieving a Wider Consensus Through the "Ithaca Package,"* 32 CORNELL INT'L L.J. 535, 540 (1999) (interpreting the provision from Article 11 which limits jurisdiction to member states).

19. Rome Statute, *supra* note 11 (recognizing the limits of the Statute's force); *see also* Bradford, *supra* note 9, at 660 n.52 (mentioning Article 24, which limits jurisdiction to crimes committed after the entry into force of the Statute); Edward M. Wise, *The International Criminal Court: A Budget of Paradoxes*, 8 TUL. J. INT'L & COMP. L. 261, 277 (2000) (quoting Article 24 of the Rome Statute).

20. Rome Statute, *supra* note 11 (propounding the Court's jurisdiction); *see also* Jonathan I. Charney, *Progress in International Law?*, 93 AM. J. INT'L L. 452, 453 n.11 (1999) (elucidating that ICC jurisdiction is limited to persons who are nationals of states parties to the statute or who committed listed crimes within the territory of a state party). *But see* Jacobson, *supra* note 2, at 212 (explaining that the ICC can exercise jurisdiction only over crimes committed in the territory of, or by a national of, one of the parties to the Rome Statute, but that those limitations do not apply to cases referred to the ICC by the United Nations Security Council).

through the prosecution of those who committed atrocities and the creation of permanent records that acknowledge and condemn the horrors that transpired.[21]

This article proposes that the Special Court for Sierra Leone (SCSL), created by an agreement between the United Nations and the government of Sierra Leone,[22] is a viable compromise model for international criminal justice, one that avoids some of the pitfalls encountered by the two *ad hoc* international criminal tribunals while still overcoming the judicial and political limitations of the ICC. If such is the case, this model might be applicable to other similar circumstances, including the eventual trial of former Iraqi leader Saddam Hussein and his principal collaborators, where, notwithstanding claims advanced otherwise,[23] the fitful starts of the exclusively national Iraqi Special Tribunal do not inspire confidence.[24]

Part I of this study will begin by describing the context for the creation of the SCSL, including an overview of the decade-long civil conflict in Sierra Leone—itself a part of a regional conflict that occurred in the context of several decades of political corruption, economic stagnation, social alienation, and government collapse, culminating in communal vio-

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21. *See* Antonio Cassese, *Reflections on International Criminal Justice*, 61 MOD. L. REV. 1, 1–6 (1998) (stating the principal aims of tribunal justice as: 1) distinguishing culpable perpetrators from others of the same ethnic or other group; 2) dissipating calls for revenge by showing victims that perpetrators are being punished; 3) fostering reconciliation by ensuring that perpetrators pay for the crimes; and 4) creating a reliable record of past atrocities); *see also* Allison M. Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 94–95 (2005) (explaining that international criminal trials serve as a method of recording history and are meant to create a record of horrific events for future generations). *See generally* MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 47–51 (1998).

22. *See* Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, U.N.-Sierra Leone, Jan. 16, 2002, http://www.sc-sl.org/scsl-agreement.html (last visited Oct. 8, 2005) [hereinafter U.N.-Sierra Leone Agreement] (setting out the Articles to establish the Special Court); *see also* Joshua Rozenberg, *Just What Sort of Trial Will This Man Get? More Could Be Done to Meet International Standards*, DAILY TELEGRAPH (London), Dec. 18, 2003, at 19 (noting that the only hybrid court with both international and local judges in existence is the Special Court for Sierra Leone); Somini Sengupta, *Besieged Liberian*, N.Y. TIMES, July 11, 2003, at A7 (reporting that the Special Court for Sierra Leone was established by the government of Sierra Leone and the United Nations, but is independent with some of its judges being citizens of Sierra Leone and others being from other countries).

23. *See, e.g.,* Michael J. Frank, *Justice for Iraq, Justice for All*, 57 OKLA. L. REV. 303, 332 (2004) ("[B]y subjecting Saddam and the Baathists to a trial by their primary victims, however, Iraq will take a substantial step away from its violent past and toward a democratic future."); *see also* Joseph Betz, *Just a War: America's 2003 War of Aggression Against Iraq*, 9 Nexus 145, 155 (2004) (opining that the United States had no right to invade Iraq and that it was the task of the Iraqi people to try their former leader); John F. Burns, *Defiant Hussein Rebukes Iraqi Court for Trying Him*, N.Y. TIMES, July 2, 2004, at A1 (reporting that White House spokesman Scott McClellan emphasized the importance of Saddam Hussein "facing justice from the Iraqi people in an Iraqi court").

24. *See* J. Peter Pham, *Bringing Saddam Hussein to Justice*, IN THE NAT'L INT., July 7, 2004, *available at* http://www.inthenationalinterest.com/Articles/Vol3Issue27/Vol3Issue27Pham.html (opining that it would be most efficient for there to be international involvement in the forthcoming trial of former Iraqi dictator Saddam Hussein in order to help cover the financial costs as well as "lend a certain legitimacy to the process"); *see also* Michael A. Newton, *Iraq's New Court Finds Itself on Trial*, N.Y. TIMES, Nov. 24, 2004, at A23 (suggesting that international cooperation is needed for the trial of Saddam Hussein and criticizing the United Nations and Europe for not taking a more active role in the preparation); *Trying Saddam Hussein*, N.Y. TIMES, Dec. 17, 2003, at A38 (arguing that the best way to educate Iraqis and the world about the nature of Saddam Hussein's regime, adhere to the highest international standards of fairness, and provide a mechanism for appropriate punishment is to create a U.N. tribunal inside Iraq staffed by Iraqi and international judges and prosecutors).

lence—that left the Court with the Herculean task of prosecuting the most grievous offenders against international humanitarian law and other human rights abusers.[25] Parts II and III will describe the establishment of the Special Court, its structure, and operation. Part IV examines the progress of the tribunal to date, the first trials having opened only on June 3, 2004. While recognizing that the SCSL is not without its drawbacks, the advantages of this mixed international-national system as a model for international criminal justice in the near term will be discussed in Part V.

I. The Context for the Creation of the Special Court

While the heaviest responsibility is borne by Foday Saybana Sankoh, the leader of the rebel Revolutionary United Front (RUF)—who died in prison in 2003 while awaiting trial before the SCSL[26]—as well as his chief patron, former Liberian president Charles Ghankay Taylor—who has been indicted by the same tribunal but is still free in his Nigerian exile[27]—it would be more accurate to decline to ascribe a single cause to the war in Sierra Leone. Rather, the conflict's origins are more complex, rooted in the very history of the country.[28]

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25. *See* Nsongurua J. Udombana, *Globalization of Justice and the Special Court for Sierra Leone's War Crimes*, 17 EMORY INT'L L. REV. 55, 130 (2003) (mentioning the difficult task facing the Special Court in that it must investigate war crimes and crimes against humanity committed during an internal armed conflict, as opposed to international war); *see also* Laura R. Hall & Nahal Kazemi, Recent Development*, Prospects for Justice and Reconciliation in Sierra Leone*, 44 HARV. INT'L L.J. 287, 287 (2003) (explaining the Special Court's difficult task of separating the guilty from the innocent under a combination of international humanitarian and criminal law). *See generally* Rory Carroll, *U.N. Puts Seven on Trial for Sierra Leone Atrocities*, GUARDIAN (London), Mar. 11, 2003 (reporting that the Special Court indicted seven people, against whom there are allegations of murder, rape, extermination, acts of terror, sexual slavery, conscription of children into an armed force, and attacks on U.N. peacekeepers).

26. *See* Douglas Farah, *Foday Sankoh Dies; Rebel Group Leader in Sierra Leone*, WASH. POST, July 31, 2003, at B6 (reporting that Foday Sankoh, leader of one of West Africa's most ruthless rebel groups, died of a stroke after being in prison for three years, following an indictment by the Special Court for Sierra Leone on charges of mass murder, rape, abduction, use of child soldiers, and sexual slavery); *see also* Somini Sengupta, *African Held for War Crimes Dies in Custody of a Tribunal*, N.Y. TIMES, July 31, 2003, at A6 (stating that Foday Sankoh had died in the custody of the Special Court for Sierra Leone and that he was not the first to have been charged by the Special Court to then not live to experience a trial); David White, *Trials Off to Mixed Start Special War Crimes Court: Officials Warn About the Potential for Trouble Making,* FIN. TIMES (London), Feb. 14, 2005, at 5 (mentioning that RUF leader Foday Sankoh died in prison while awaiting trial).

27. *See* Ed Royce, *Bring Charles Taylor to Justice*, N.Y. TIMES, May 5, 2005, at A35 (reporting that Charles Taylor sits exiled in Nigeria and has been indicted on charges of fueling a brutal war in Sierra Leone); *see also* Betsy Pisik, *Power in Exile: Taylor Extends Political Reach; Nigeria Turns Blind Eye as World Finds More Evidence for Tribunal*, WASH. TIMES, June 2, 2005, at A17 (noting that there is pressure mounting in Washington and in the United Nations to transfer Charles Taylor, charged with 17 counts of war crimes and related charges, to the Special Court for Sierra Leone as accusations mount that the former Liberian president is working from exile to destabilize West Africa); *In Brief: Ex-Liberian Leader May Be Prosecuted*, HOUSTON CHRON., June 1, 2004, at A7 (documenting that the Special Court for Sierra Leone declared that the ousted Liberian leader, Charles Taylor, is not immune from prosecution for war crimes in the international court).

28. See Laurence Juma, *The Human Rights Approach to Peace in Sierra Leone: The Analysis of the Peace Process and Human Rights Enforcement in a Civil War Situation*, 30 DENV. J. INT'L L. & POL'Y 325, 327 (2002) (analyzing the conflict in the context of its historical evolution); *see also* J. Peter Pham, *Lazarus Rising: Civil Society and Sierra Leone's Return from the Grave*, 7 INT'L J. NOT-FOR-PROFIT L. 1, ¶5 (2004), *available at* http://www.icnl.org/JOURNAL/vol7iss1/ar_pham.htm (last visited Sept. 27, 2005) [hereinafter Pham, *Lazarus Rising*] (reaffirming the need to understand the historical roots of the conflict); Karen Gallagher, Note, *No Justice, No Peace: The Legalities and Realities of Amnesty in Sierra Leone*, 23 T. JEFFERSON L. REV. 149, 152 (2000) (explaining that an understanding of Sierra Leone's history was necessary background to a discussion of its civil war).

A. Historical Background

Founded in 1789 by an eponymous company of British abolitionists and other philanthropists and intended as a haven for freed black slaves (thus the name of the capital, "Freetown")—including some 1,200 who had supported the loyalist cause during the American War of Independence and had consequently been driven from the 13 newly independent United States—Sierra Leone is one of the oldest modern polities in Africa, having become a Crown Colony in 1808.[29] The establishment in 1827 of Fourah Bay College, the oldest university-level institution in sub-Saharan Africa, assured the country its pioneering role in higher education on the Continent.[30] Unfortunately, the seeds of political and ethnic division were also sown early, with a marked cleavage between the anglicized "Krio" (the local variant of "Creole") freedman-settlers of the Crown Colony and the diverse inhabitants of the country's interior, where a British Protectorate was only proclaimed in 1896 and where the colonial administrators exercised an indirect control through traditional rulers, designated "paramount chiefs," until independence.[31]

Sierra Leone received its autonomy within the British Commonwealth in 1961 under the leadership of Sir Milton Margai and the Sierra Leone People's Party (SLPP).[32] Although the proud scion of a Mende chiefly family from the former Protectorate, Sir Milton was also thor-

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29. *See* JOHN L. HIRSCH, SIERRA LEONE: DIAMONDS AND THE STRUGGLE FOR DEMOCRACY 23 (2001) (explaining that Freetown became a British post and settlement area for repatriated slaves in 1787); BANKOLE THOMPSON, THE CONSTITUTIONAL HISTORY AND LAW OF SIERRA LEONE (1961-1995) 1 (1996) (stating that Sierra Leone was established in 1722 by Granville Sharpe as a settlement for freed slaves, and proclaimed a crown colony of Great Britain in 1808); Babafemi Akinrinade, *International Humanitarian Law and the Conflict in Sierra Leone*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 391, 392 (2001) (acknowledging that Sierra Leone, founded in 1808, was the first modern political state in sub-Saharan Africa).

30. *See* John D. Hargreaves, *The Idea of a Colonial University*, 72 AFR. AFF. 26, 26–27 (suggesting that Fourah Bay College, founded in 1827 by the Church Missionary Society, was an exception to the establishment of universities as part of Britain's post-1945 political strategy for gradual and controlled decolonization); *see also* John Karefa-Smart, *Africa in World Affairs*, 6 AFR. STUD. BULL. 4, 5 (1964) (reflecting on Sierra Leone's pioneering role in higher education for all of tropical Africa); BUREAU OF AFRICAN AFF., U.S. DEP'T OF STATE, *Background Note: Sierra Leone*, *available at* http://www.state.gov/r/pa/ei/bgn/5475.htm (last visited Oct. 8, 2005) [hereinafter Sierra Leone Profile] (recognizing Fourah Bay College's place as the only European-style university in western sub-Saharan Africa for more than a century).

31. *See* JAMES W. ST. G. WALKER, THE BLACK LOYALISTS: THE SEARCH FOR A PROMISED LAND IN NOVA SCOTIA AND SIERRA LEONE 1783-1870 318–21, 362–64 (1976) (explaining that the upward mobility of the Creoles and assimilation into European culture established a more common identity with white colonists than other repatriated natives); *see also* AKINTOLA WYSE, THE KRIO OF SIERRA LEONE: AN INTERPRETATIVE HISTORY 70–71 (1989) (suggesting that although there was a significant cultural and political divide between the Krio elite and people of the protectorate, the two groups did intermingle and co-exist in limited spheres). *See generally* JOHN PETERSON, PROVINCE OF FREEDOM: A HISTORY OF SIERRA LEONE 283–84 (1969) (describing the various social classes and cultures of Freetown).

32. *See* EARL CONTEH-MORGAN & MAC DIXON-FYLE, SIERRA LEONE AT THE END OF THE TWENTIETH CENTURY: HISTORY, POLITICS, AND SOCIETY 75 (1999) (stating that Sierra Leone achieved independence in 1961); *see also* A. P. KUP, SIERRA LEONE: A CONCISE HISTORY 207–10 (1975) (explaining that although political parties were dissolved in the wake of independence in 1961, the 1957 election confirmed the ascendancy of the SLPP with Margai as its leader); Sierra Leone Profile, *supra* note 30 (explaining that Sir Milton Margai's SLPP led the country to independence in April 1961, at which point the country opted for a parliamentary system within the British Commonwealth).

oughly at home in the westernized world of Freetown's "Kriodom."[33] Before venturing into politics, he had been the first native of the Protectorate to earn a bachelor's degree from Fourah Bay College and the first to qualify as a physician.[34] Sierra Leone inherited from its departing colonial rulers a a healthy foreign reserve account, as well as a Westminster-style parliamentary democracy that was the envy of the region.[35] The new country was admitted to the United Nations as the one-hundredth member state, an event that observers noted for its great symbolism, since the country was founded as a haven for freed Africans and the world body was instrumental in bringing about decolonization of the African Continent.[36] One prominent American scholar of Africa, Thomas Patrick Melady, later United States Ambassador to Burundi and Uganda and Ambassador to the Holy See,[37] was typical of his contemporaries in his enthusiastic optimism about the future of the new West African state:

> Sierra Leone can emerge as a showcase of West Africa, progressive in its politics and forward-looking in its policies. Its prime minister, Sir Milton Margai, is strongly opposed to Communist infiltration. Building on a solid agricultural base, the economy has profited from diamond deposits and [a] growing interest in its promising industries, which range from fish to oil.

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33. *See* CHRISTOPHER FYFE, A SHORT HISTORY OF SIERRA LEONE 144 (1979) (reporting that Margai was a descendant of the ruling family of Banta chiefdom); *see also* John Cartright, *Some Constraints Upon African Leadership*, 11 CAN. J. AFR. STUD. 435, 449 (1977) (underscoring Margai's ability to maintain legitimacy with both Chiefs and Creoles through various avenues of appeal); SIERRA LEONE WEB, *Sierra Leonean Heroes: Achievement of Independence*, http://www.sierra-leone.org/heroes8.html (last visited Oct. 18, 2005) [hereinafter *Sierra Leonean Heroes*] (recognizing Margai's ability to distance himself from political rivalries to remain admired by all Sierra Leoneans).

34. *See* FYFE, *supra* note 33, at 144 (noting that Margai was educated at Fourah Bay College, studied medicine in England, and was the first man from the Protectorate to qualify as a doctor); *see also* MARTIN KILSON, POLITICAL CHANGE IN A WEST AFRICAN STATE: A STUDY OF THE MODERNIZATION PROCESS IN SIERRA LEONE 147 (1966) (noting that prior to his political career, Dr. Margai was the first Protectorate medical doctor, serving as Medical Officer in the 1930s and 1940s); *Sierra Leonean Heroes*, *supra* note 33 (recognizing Margai's paramount achievements).

35. *See* KILSON, *supra* note 34, at 170–76 (explaining that the newly independent Sierra Leone adopted a representative form of government but maintained many of the vestiges of the colonial regime to diffuse tensions between the African elite and colonial authorities); *see also* Amanda Bryant Banat, Note, *Solving the Problem of Conflict Diamonds in Sierra Leone: Proposed Market Theories And International Legal Requirements For Certification of Origin*, 19 ARIZ. J. INT'L & COMP. L. 939, 942 (2002) (noting that Sierra Leone adopted a parliamentary government upon gaining independence in 1961). *See generally* Alan Cowell, *The World: Britain in Africa; Colonialisms' Legacy Becomes a Burden*, N.Y. TIMES, June 4, 2000 (reflecting on Britain's post-colonial role in quelling Sierra Leone's civil unrest from competition over the country's diamonds).

36. *See* John Karefa-Smart, *Africa in World Affairs*, 16 AFR. STUD. BULL. 4, 4–5 (1963) (reflecting on the historical context of being admitted to the U.N. and contribution of Sierra Leone to the development of Africa); *see also Sierra Leone is 100th U.N. State by Unanimous Vote in Assembly State*, N.Y. TIMES, Sept. 28, 1961, at 19 (describing the Prime Minister's vision for his country, as expressed in his address to the U.N. General Assembly). *See generally The 100th Member*, WASH. POST, TIMES HERALD (1959-1973), Oct. 2, 1961 (recognizing the significance of Sierra Leone's admission to the U.N.).

37. *See generally* THOMAS PATRICK MELADY, FAITH, FAMILY, FRIENDS: A FEW GLANCES AT THE LIFE OF THOMAS PATRICK MELADY, DIPLOMAT, EDUCATOR, SOLDIER (2003) (rendering a personal account of Thomas P. Melady's career as United States ambassador to the Vatican, Burundi, and Uganda).

> Sierra Leone is more than a symbol of freedom; it is an embodiment of the aspirations of Africa.[38]

Tragically, the ensuing decades turned this promise on its head and made Sierra Leone the poster child for all that has gone wrong in Africa since the heady days of its liberation from colonialism—the veritable embodiment of the continent's dysfunctional politics, environmental exploitation, economic misery, and fratricidal conflicts.[39] Today, despite the wealth of both its human capital and natural resources, as well as the billions of dollars in international assistance it has received in recent years, Sierra Leone enjoys the dubious distinction of apparent tenure in the absolute last place in the annual rankings of the United Nations Development Program (UNDP) Human Development Index (HDI), currently occupying the 177th place among 177 countries surveyed.[40]

The slide began after the hotly contested general elections of 1967, which the SLPP, led by the deceased Sir Milton's brother, Sir Albert Margai, who had transformed the ruling party from a national institution into one dominated by the southeastern Mende, narrowly lost to their opposition, the All Peoples' Congress (APC), which was heavily backed by Temne tribesmen from the North, as well as Krio urban dwellers.[41] However, the new prime minister, Siaka Probyn Stevens, had barely been sworn in by the Governor-General on March 21, 1967, when he was overthrown in a *coup d'état*.[42] After a year in exile, Stevens regained power in 1968 when

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38. THOMAS PATRICK MELADY, FACES OF AFRICA 39 (1964); *see* Karefa-Smart, *supra* note 36, at 4 (echoing Melady's enthusiasm for the future of Sierra Leone and the increased attention from the international community and the U.S.). *See generally* John Karefa-Smart, *Africa and the United Nations*, 19 INT'L ORG. 764 (1965) (discussing the diplomatic importance of U.N. membership to African countries, and recognizing Sierra Leone part of the initial group of African states to gain admission).

39. *See* Michael A. Corriero, *The Involvement and Protection of Children in Truth and Justice-Seeking Processes: The Special Court for Sierra Leone*, 18 N.Y.L. SCH. J. HUM. RTS. 337, 337 (2002) (asserting that Sierra Leone is struggling to deal with economic and political strife); *see also* Juma, *supra* note 28, at 331 (discussing that leadership after Sierra Leone's independence has caused the civil war to continue raging today); Jeana Webster, Note, *Sierra Leone: Responding to the Crisis, Planning for the Future: The Role of International Justice in the Quest for National and Global Security*, 11 IND. INT'L & COMP. L. REV. 731, 733 (2001) (stating that the conflict in Sierra Leone has undermined Africa's ability to achieve long-term stability).

40. *See* Andrew Child, *Mines that Fuel and Sustain War Sierra Leone: Andrew Child on the Catalyst for a Crippling Conflict*, FIN. TIMES (London), June 18, 2005, at 3 (stating that Sierra Leone ranked at the bottom in the 2005 United Nations Human Development Report); *see also* UNITED NATIONS DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2004: CULTURAL LIBERTY IN TODAY'S DIVERSE WORLD 142 (2004), *available at* http://hdr.undp.org/reports/global/2004/pdf/hdr04_HDI.pdf (last visited Oct. 18, 2005) (indicating that Sierra Leone ranks at number 177 in the Human Development Index). *See generally U.N. Rates Us Third*, HERALD SUN (Austl.), Sept. 9, 2005 (reporting that Sierra Leone ranked among the least prosperous countries in the United Nations Human Development Report).

41. *See* Akinrinade, *supra* note 29, at 393 (asserting that the 1967 election in Sierra Leone was corrupt and mismanaged); *see also* Juma, *supra* note 28, at 331 (declaring that the All People's Congress was supported by the Temne, while the SLPP was supported by the Mende); Lucinda Saunders, Note, *Rich and Rare are the Gems They War: Holding De Beers Accountable For Trading Conflict Diamonds*, 24 FORDHAM INT'L L.J. 1402, 1423–24 (2001) (stating that Siaka Stevens represented the All People's Congress).

42. *See* Akinrinade, *supra* note 29, at 393 (explaining that David Lansana declared martial law on the same day Stevens was appointed); *see also* Juma, *supra* note 28, at 331 (asserting that martial law was declared after Stevens was sworn in in 1967); Gallagher, *supra* note 28, at 154 (stating that a military coup resulted after Stevens won the 1967 election in Sierra Leone).

a popular uprising overthrew the erstwhile *putschists*.[43] The experience changed Stevens, however, who soon evinced signs of paranoia about conspiracies perceived to be swirling around him.[44] In 1971, Stevens used a legally questionable legislative maneuver to amend the Sierra Leonean Constitution, substituting the parliamentary democracy with a highly-centralized presidential republic.[45] Several years later, he held a farcical referendum to transform the country into a one-party state with the APC as the only legal political organization.[46]

Perhaps even worse than what Stevens did to Sierra Leone's political system was what he did to the country's economy.[47] Having inherited a sound, if not necessarily rich, economy with a diversified base of diamonds, iron mining and agriculture—primarily coffee and cocoa production—that expanded between 1965 and 1973 at the respectable, if not spectacular, annual rate of 4 percent against an annual population growth rate of 1.9 percent,[48] Stevens and his cronies gradually destroyed it all.[49] The annual rate of growth dipped to an average of 0.7

43. *See* Akinrinade, *supra* note 29, at 393 (stating that one year later, Stevens returned from exile); Gallagher, *supra* note 28, at 154 (noting that one year after the uprising, Stevens returned from exile and took over as Prime Minister).

44. *See generally Gambia: Governance and Conflict in Africa: The Gambia as a Case Study*, AFR. NEWS, Sept. 8, 2003 (explaining that African dictators become paranoid); *Gambia: Of State House Consultations and the Real Big Issues in Africa News*, AFR. NEWS, Jan. 20, 2003 (suggesting that Stevens became paranoid during his dictatorship); THOMAS S. COX, CIVIL-MILITARY RELATIONS IN SIERRA LEONE: A CASE STUDY OF AFRICAN SOLDIERS IN POLITICS 113–217 (1976) (noting that Stevens was paranoid about talk of conspiracy in Sierra Leone).

45. *See* Akinrinade, *supra* note 29, at 393 (stating that Stevens became the executive president of Sierra Leone); Amanda Bryant Banat, Note, *Solving the Problem of Conflict Diamonds in Sierra Leone: Proposed Market Theories and International Requirements for Certification of Origin*, 19 ARIZ. J. INT'L & COMP. L. 939, 942 (2002) (asserting that Stevens established a one-party state and instituted a dictatorship). *See generally* THOMPSON, *supra* note 29 (stating that Stevens created a highly centralized government).

46. *See* THOMPSON, *supra* note 29, at 145–46 (detailing how Stevens established an incredibly centralized government); Banat, *supra* note 35, at 942–43 (explaining that Stevens established a one-party state in Sierra Leone); Saunders, *supra* note 41, at 1423–24 (indicating that the All Peoples Congress was the only party in Sierra Leone).

47. *See* CONTEH-MORGAN & DIXON-FYLE, *supra* note 32, at 75–87 (analyzing Stevens' detrimental effect on the economy of Sierra Leone); *see also* Jamie O'Connell, *Here Interest Meets Humanity: How to End the War and Support Reconstruction in Liberia, and the Case for Modest American Leadership*, 17 HARV. HUM. RTS. J. 207, 211–12 (2004) [hereinafter O'Connell, *Interest Meets Humanity*] (noting that President Stevens caused the political institutions and economy of Sierra Leone to collapse); David Vesel, *The Lonely Pragmatist: Humanitarian Intervention in an Imperfect World*, 18 BYU J. PUB. L. 1, 26 (2003) (remarking that Stevens' policies accelerated the decline of Sierra Leone).

48. *See* Paul Collier, *The Market for Civil War*, FOREIGN POL'Y, May 1, 2003, at 38, *available at* 2003 WLNR 6594355 (asserting that Sierra Leone experienced the most rapid decline of any country despite its vast diamond deposits); *see also Portraits of the South: Stories of Development [Brazil: North & South Together/South Korea: The Han River Miracle/Sierra Leone: Life at the Bottom]*, CAN. AND THE WORLD BACKGROUNDER, May 2000, at 3 (commenting on the vast resources in Sierra Leone).

49. *See* Juma, *supra* note 28, at 333 (stating that Sierra Leone's corrupt government contributed to its decline in growth); O'Connell, *Interest Meets Humanity*, *supra* note 47, at 211–12 (asserting that Stevens' placement of his cronies into government positions led to Sierra Leone's demise); *see also* Vesel, *supra* note 47, at 26 (remarking that Stevens and his chosen successor, Momoh, set the stage for the conflict in Sierra Leone today).

percent between 1980 and 1987, before going into negative figures.[50] Dwindling revenues from the government's diamond monopolies and agricultural marketing boards, compounded by governmental corruption and profligate spending on non-essential "prestige projects," only served to accelerate the sharp rate of economic decline.[51]

Sierra Leone went from being the model for democratic governance and economic prosperity that it had been under Milton Margai to an example *par excellence* of Africa's post-colonial "neopatrimonial" malaise where national resources were redistributed as "marks of personal favor to followers who respond with loyalty to the leader rather than to the institution that the leader represents."[52] In the words of William Reno, Sierra Leone had degenerated into a "shadow state": a system of personal rule founded on neither concepts of legitimacy nor even governmental institutions, but on the control of markets and on the ruler's ability to manipulate access to resources created by those markets such that his own power was enhanced.[53] In short, the "shadow state"—a patrimonial network working for private interests normally, but not necessarily, constructed behind the façade of formal statehood—was the very antithesis of

50. *See Africa; Powell Isn't Pandering to Africa's Big Men*, L.A. TIMES, June 3, 2001, at 2 (stating that Sierra Leone's economic growth rate averaged far below the rate needed to reduce poverty). *See generally Kenya: World Bank's Dim Picture of Kenya's Economy*, AFR. NEWS, May 1, 2001 (stating that Sierra Leone's GDP growth rate is lower than negative eight percent); Michael Chege, *Sierra Leone: The State that Came Back from the Dead*, WASH. Q., Summer 2002 (discussing Sierra Leone's decline into a negative growth rate).

51. *See* Chege, *supra* note 50, at 151–53 (critiquing President Stevens' economic mismanagement on "prestige projects" when he spent millions of dollars to host an African Summit in 1980); *see also* ADEKEYE ADEBAJO, LIBERA'S CIVIL WAR: NIGERIA, ECOMOG, AND REGIONAL SECURITY IN WEST AFRICA 31 (Lynne Reiner Publishers 2002) (noting that Liberia was not invited to Sierra Leone's African Summit due to history of conflicts); LANSANA GBERIE, WAR AND PEACE IN SIERRA LEONE: DIAMONDS, CORRUPTION AND THE LEBANESE CONNECTION 7 (Ian Smillie ed., 2002), *available at* http://action.web.ca/home/pac/attach/sierraleone2002_e.pdf (last visited Oct. 3, 2005) (noting that British mining company's monopoly essentially robbed natives of their resources and situation did not improve with time).

52. *See* PAUL RICHARDS, FIGHTING FOR THE RAIN FOREST: WAR, YOUTH AND RESOURCES IN SIERRA LEONE 34 (2002) [hereinafter RICHARDS, FIGHTING FOR THE RAIN FOREST] (stating that patrimonialism includes redistributing national resources as marks of personal favors for the individual leader); *see also* O'Connell, *Interest Meets Humanity*, *supra* note 47, at 211–12 (addressing how Sierra Leone's institutions were destroyed by corrupt political leaders). *See generally* Margo Kaplan, *Carats and Sticks*: *Pursuing War and Peace Through the Diamond Trade*, 35 N.Y.U. J. INT'L. & POL. 559 (2003) (noting that Sierra Leone's early national history was full of promise because of its abundant natural resources and skilled civil servants).

53. *See* WILLIAM RENO, CORRUPTION AND STATE POLITICS IN SIERRA LEONE 80 (1995) (applying the term "shadow state" to President Stevens' methods of increasing his power at the cost of destroying state institutions); *see also* WILLIAM TORDORF, GOVERNMENT AND POLITICS IN AFRICA 16 (1984) (2002) (stating that leaders of "shadow states" in countries such as Sierra Leone and Zaire manipulated informal markets for personal interests and financial gains). *See generally* Gregory Fox, *Perspectives on Globalization from Developing States*: *Strengthening the State,* 7 IND. J. GLOBAL LEGAL STUD. 35 (1999) (questioning the ability of nations controlled by illegitimate means to function as government).

civil society, understood as organizations outside government that function as constraints upon it and upon advocates of the common good.[54]

In no sector was the "neo-patrimonial" corruption of the "shadow state" more evident than in the fabled alluvial diamond fields of Sierra Leone's east.[55] Before the APC took over, the diamond trade constituted one-third of national output and contributed over 70 percent of Sierra Leone's foreign exchange reserves.[56] By the mid-1980s, less than $100,000 worth of the precious minerals passed through legal, taxable channels.[57] Most of the rest was appropriated by Stevens and a coterie of his closest associates, who also embezzled profits and other assets from various state enterprises.[58] Having looted an estimated $500 million and leaving a balance of barely $196,000 in foreign reserves in the Bank of Sierra Leone on the day he left office, Stevens retired in 1985 after anointing the army chief, Major General Joseph Saidu Momoh, as his successor.[59] Unfortunately for Sierra Leone, Momoh's regime did no better than its prede-

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54. *See* PIERRE ENGELBERT, STATE LEGITIMACY AND DEVELOPMENT IN AFRICA 182 (2000) (explaining that the informal markets co-exist with legitimate state institutions and uses the state's resources for private gain); *see also* Jeremy I. Levitt, *The Responsibility to Protect*: *A Beaver Without a Dam?*, 25 MICH. J. INT'L L. 153, 160 (2003) (reviewing THOMAS G. WEISS & DON HUBERT, THE RESPONSIBILITY TO PROTECT (2001)) (commenting that other nations such as Liberia had a stronghold in Sierra Leone's government functions and profited from the illegal markets that existed). *See generally* CHRISTOPHER CLAPHAM, AFRICA AND THE INTERNATIONAL SYSTEM: POLITICS OF STATE SURVIVAL 248 (1996) [hereinafter CLAPHAM, POLITICS OF STATE SURVIVAL] (discussing how the informal markets in Sierra Leone undermine the formal economic sphere of the state).

55. *See* GREG CAMPBELL, BLOOD DIAMONDS: TRACING THE DEADLY PATH OF THE WORLD'S MOST PRECIOUS STONES 18 (2004) (stressing how the Kono District provided endless illicit mining opportunities); *see also* Sheryl Dickey, *Sierra Leone*: *Diamonds for Arms*, 7 HARV. HUM. RTS. J. 9, 9 (2000) (emphasizing how the Eastern Kono District was the source of conflict). *See generally* Michael Pugh, WAR ECONOMIES IN A REGIONAL CONTEXT: CHALLENGES OF TRANSFORMATION 119 (2004) (addressing the illicit mining in Sierra Leone's alluvial diamond fields, such as the Kono District).

56. *See* GBERIE, *supra* note 51, at 1 (addressing the strength of Sierra Leone's foreign exchange earnings in the 1970s); *see also* Akinrinade, *supra* note 29, at 393 (noting that by the 1980s, economic decline was rampant due to inflation and deficits). *See generally* Ian Martinez, Student Article, *Sierra Leone's "Conflict Diamonds"*: *The Legacy of Imperial Mining Laws and Policy*, 10 U. MIAMI INT'L & COMP. L. REV. 217 (2001) (explaining that the foreign exchange reserves in Sierra Leone significantly dropped under the leadership of Major General Momoh).

57. *See* Fred Hayward, *State Consolidation, Fragmentation and Decay, in* CONTEMPORARY WEST AFRICAN STATES 165–80 (2nd ed. 1989) (citing the amount of precious materials that were traded by legal means); *see also* WILLIAM RENO, WARLORD POLITICS AND AFRICAN STATES 116 (1998) [hereinafter RENO, WARLORD POLITICS] (asserting that only about $100,000 were passed through legal means in Sierra Leone). *See generally* Ian Smillie et al., THE HEART OF THE MATTER: SIERRA LEONE, DIAMONDS & HUMAN SECURITY (Bernard Taylor, ed., 2000), *available at* http://www.sierra-leone.org/heartmatter.html (last visited Oct. 18, 2005) (discussing the continuous trend of illicit mining in Sierra Leone, starting in the 1930s through the 1980s).

58. *See* JOHN OATES, MYTH AND REALITY IN THE RAIN FOREST: HOW CONSERVATION STRATEGIES ARE FAILING WEST AFRICA 82 (1999) (explaining that President Stevens maintained his power by distributing wealth to his associates who were influential businessmen); *see also* Juma, *supra* note 28, at 333 (commenting that Stevens handed over the entire diamond and fishing industry to a close business associate). *See generally* Martinez, *supra* note 56 (explaining that Sierra Leone's new leader Major General Momoh continued the corrupt practices of enriching his close associates, similar to former Sierra Leone President Saika Stevens' government).

59. *See* RENO, WARLORD POLITICS, *supra* note 57, at 116 (stating that President Stevens amassed a personal fortune of about $500 million through his corrupt government); *see also* Ndiva Kofele-Kale, *Patrimonicide: The International Economic Crime of Indigenous Spoliation*, 28 VAND. J. TRANSNAT'L L. 48, 99 (1995) (reporting examples of President Stevens's corruption which included his real estate portfolio of 16 houses with an estimated value of $5 million). *See generally* HIRSCH, *supra* note 29 (noting that in 1985 when President Stevens was in his 80s, he handpicked Major General Momoh as his successor).

cessor's, thus perpetuating the already vicious cycle of political, economic, and social malaise.[60] As former United States Ambassador to Sierra Leone John Hirsch reported:

> Unpaid civil servants desperate to keep their families fed ransacked their offices, stealing furniture, typewriters, and light fixtures. . . . One observer has noted that the government hit bottom when it stopped paying schoolteachers and the education system collapsed. Without their salaries, teachers sought fees from the parents to prepare their children for their exams. With only professional families able to pay these fees, many children ended up on the streets without either education or economic opportunity.[61]

B. The Civil War

Bereft of the resources to provide its potential clients with jobs and educational opportunities, the ruling APC lost its base of support and began to unravel altogether at the very moment when contracting services and collapsing infrastructure left the Sierra Leone state itself most vulnerable to attack.[62] The *coup de grâce* came in the form of a spillover from the civil war in neighboring Liberia.[63] In March 1991, Foday Sankoh, a charismatic former Sierra Leonean army corporal who had been jailed for several years in the 1970s for his role in an alleged plot against the Stevens regime and who subsequently underwent military training with a small group of Sierra Leonean dissidents in Libya (where Libyan warlord and later President Charles

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60. *See* Paul Richards, *War and Peace in Sierra Leone*, 25 FLETCHER F. WORLD AFF. 41, 42 (2001) [hereinafter Richards, *War and Peace*] (commenting on how Major General Momoh's regime could not withstand the military attacks); *see also* Shana Eaton, Article, *Sierra Leone*: *The Proving Ground for Prosecuting Rape as a War Crime*, 35 GEO. J. INT'L L. 873, 876 (2004) (highlighting that the Sierra Leone government under Major General Momoh was equally corrupt as President Stevens' prior regime). *See generally* Akinrinade, *supra* note 29 (reporting that former President Stevens' selection of Major General Momoh was first received warmly by the people of Sierra Leone because they thought changes would take place to improve the corrupt government).

61. *See* HIRSCH, *supra* note 29, at 30 (describing his observations during a visit as United States Ambassador to Sierra Leone); *see also* Kaplan, *supra* note 52, at 570–71 (stating that Sierra Leone was unable to pay its civil servants). *See generally* O'Connell*, Interest Meets Humanity*, *supra* note 47 (commenting that the Sierra Leone government under President Stevens did not put resources into education).

62. *See* HIRSCH, *supra* note 29, at 32 (indicating that Sierra Leone government lost support from the army's junior officers); *see also* Chege, *supra* note 50, at 153 (commenting on the inability of the APC to provide economic opportunities that caused youths to be attracted to the promises by political opportunists in nearby nations). *See generally* Webster*, supra* note 39 (noting that the All People's Party mismanagement of potentially rich resources led to the social and economic destruction of Sierra Leone, which made the nation susceptible to rebellion).

63. *See* Gregory Copley, *Sierra Leone's Capt. Valentine Strasser Ousted in Predictable, If Belated, Coup*, DEF. & FOREIGN AFF. STRATEGIC POL'Y, Jan. 1996, at 4 (stating that the civil war in Sierra Leone was a direct overflow of violence and instability from the civil war in Liberia); *see also* GLOBALSECURITY.ORG, *Liberia —First Civil War*, *available at* http://www.globalsecurity.org/military/world/war/liberia-1989.htm (last visited Sept. 14, 2005) (stating that Charles Taylor continued the war in Liberia which spilled over into Sierra Leone in 1991 when Foday Sankoh led a group of Liberians and Sierra Leoneans into eastern Sierra Leone). *See generally* J. Peter Pham, *A Nation Long Forlorn: Liberia's Journey from Civil War to Civil Society*, 6 INT'L J. NOT-FOR-PROFIT L. (2004), *available at* http://www.icnl.org/journal/vol6iss4/ar_pham.htm (last visited Sept. 26, 2005) (explaining the background of the Liberian civil war and also that the former Liberian warlord Taylor had helped to precipitate civil war in Sierra Leone).

Taylor had also drilled his insurgents), invaded Eastern Sierra Leone from Libya.[64] Sankoh, supported by Taylor, issued a call for anti-government uprising in the name of the heretofore unknown RUF.[65] The rebels, initially little more than a few dozen disaffected rural youth whom Sankoh enticed to his cause with promises of free education and medical care, ostensibly fought for a redress of the iniquities of a Sierra Leonean society in which the APC regime continued to exploit the country's rich diamond resources for the benefit of its elite cadres, while the living standards of the rest of the citizenry declined.[66] Despite the banner of justice, however, as they sent the government's forces reeling and quickly seized control of most of the eastern part of the country, including the diamond fields, the RUF rebels themselves soon proved to be an even worse plague.[67] Before long, RUF terror tactics—including the amputation of the limbs of civilians as a terror tactic, the systematic rape of women and girls, and the abduction of young boys to swell their ranks—provided rich fodder for Robert Kaplan's sensational article on "The Coming Anarchy."[68]

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64. *See* Jorg Raab & H. Brinton Milward, *Dark Networks as Problems*, J. OF PUB. ADMIN. RES. & THEORY, Oct. 1, 2003, at 413 (stating that Sankoh and Charles Taylor were trained at a Libyan terrorist training camp by Colonel Moammar Gaddafi and attacked Sierra Leone in the late 1990s); *see also* Nsongurua J. Udombana, *Can the Leopard Change Its Spots? The African Union Treaty and Human Rights,* 17 AM. U. INT'L L. REV. 1177, 1215 (2002) (claiming that Foday Sankoh's RUF was largely the creation of dissidents living and/or training in Libya); *Foday Sankoh*, TIMES (London), July 31, 2003, at 33 (reporting that after he was released from prison in the 1970s he joined other Sierra Leonean dissidents in Libya, staged a first attack in March 1991, and took control of Eastern Sierra Leone within a month).

65. *See* Juma, *supra* note 28, at 331 (claiming that the inherent emnity for government had emerged early on and Foday Sankoh began a military campaign against the government in the name of RUF); *see also* Richards, *War and Peace*, *supra* note 60, at 41 (explaining that angry exilees who wanted to end corruption and political mismanagement of the government formed the RUF); REVOLUTIONARY UNITED FRONT PARTY OF SIERRA LEONE, *Ideas and Ideals*, *available at* http://web.archive.org/web/20020202034026/rufp.org/rufp_ideas_and_ideals/rufp_ideas_and_ideals.htm (last visited Sept. 14, 2005) (claiming that RUF is committed to democratic ideals and recognizing three phases of struggle, which are arms to the people, power to the people, wealth to the people).

66. *See* Victoria Brittain, *Foday Sankoh: Rebel Leader who Helped Unleash a Decade of Carnage in Sierra Leone*, GUARDIAN (London), July 31, 2003, at 18 (explaining how RUF attracted a wide range of frustrated intellectuals and youths who demanded education and social justice and how the diamond mines were necessary to RUF's ability to continue the war); *see also* Tom Masland, *The Gems of War*, NEWSWEEK, July 10, 2000, at 18 (reporting how the documents found at Foday Sankoh's house prove that he logged more than 2000 diamonds mined by the RUF and how the rebels traded illicit gems for guns). *See generally* REVOLUTIONARY UNITED FRONT PARTY OF SIERRA LEONE, *The Armed Struggle*, *available at* http://web.archive.org/web/20020202040329/rufp.org/why_the_armed_struggle/ why_the_armed_ struggle.htm (last visited Sept. 14, 2005) (stating that the APC regime will "intimidate the people by a show of force" and that the only way to stop the corruption is to take up arms and take back the power).

67. *See* Ryan Lizza, *Where Angels Fear to Tread*, NEW REPUBLIC, July 24, 2000, at 22 (describing terror tactics of the RUF in trying to control people's behavior); *see also Foday Sankoh*, TIMES (London) July 31, 2003, at 33 (stating that Sankoh wanted to create a "revolutionary egalitarian society," and yet he committed atrocities). *See generally* Tom Rawstorne, *Diamonds to Die For*, DAILY MAIL (London), Oct. 25, 2004 (reporting how RUF took control of diamond mines by terrorizing people into submission).

68. Robert D. Kaplan, *The Coming Anarchy: How Scarcity, Crime, Overpopulation and Disease are Rapidly Destroying the Social Fabric of Our Planet*, 273 ATLANTIC MONTHLY 44, 44 (1994); *see also Foday Sankoh: Guerrilla Leader Whose Followers Raped, Tortured, Amputated and Murdered Their Way Through Sierra Leone*, DAILY TELEGRAPH (London), July 31, 2003, at 25 (describing atrocities by RUF including amputations of legs, buttocks, genitals, ears and lips, gouging out of eyes, indiscriminate rape, injections with acid, burning alive and beating). *See generally* Steve Coll, *The Other War,* WASH. POST, Jan. 9, 2000 (Magazine) (illustrating RUF's brutality by telling stories of how the victims were raped and how they lost their limbs and family members because RUF wanted to demonstrate their power to the government of Sierra Leone).

In April 1992, a group of disgruntled soldiers on leave in Freetown from the warfront, led by a 27-year-old captain named Valentine Strasser, overthrew President Momoh and formed a military junta, the National Provisional Ruling Council (NPRC).[69] The coup was actually popular at the time, as most Sierra Leoneans had grown disgruntled with the APC's corrupt and ineffectual rule.[70] However, disaffection at the inexperienced ruler's inability to end the war as well as his increasingly autocratic rule led to his overthrow in January 1996 by his deputy, Brigadier Julius Maada Bio.[71] Under increasing foreign and domestic pressure, the new Sierra Leonean leader Bio was forced to hold elections which were boycotted and sporadically disrupted by the RUF.[72] Despite various glitches, the elections took place and were won, after two rounds, by the newly-revived SLPP, led by Ahmad Tejan Kabbah, a veteran UNDP official, who became the country's first directly elected head of state.[73]

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69. *See* Mark Fritz, *Africa's Youngest Dictator Keeps Tight Rein*, L.A. TIMES, Mar. 20, 1994, at A20 (explaining that junior officers became malcontent because Momoh did not pay them and nine officers led a 60-soldier convoy to demand their pay at gunpoint which caused Momoh, who had no support, to flee the country); *see also* Tod Pitman, *Ex-Dictator Runs Home to His Mum*, SUNDAY HERALD SUN (Austl.), July 28, 2002, at 35 (providing that Strasser became the world's youngest head of state when he led a group of officers to demand unpaid salaries, which led to a coup that ousted then dictator Joseph Momoh); Cindy Shiner, *Growing Unruliness by Soldiers Sparks Coup Fear in Sierra Leone*, WASH. POST, Oct. 6, 1994, at A21 (stating that poor conditions on the war front prompted junior officers to overthrow Momoh, and that Strasser automatically became the "redeemer" and chairman of the National Provisional Ruling Council's government).

70. *See* Lee F. Berger, Note, *State Practice Evidence of the Humanitarian Intervention Doctrine: The ECOWAS Intervention in Sierra Leone*, 11 IND. INT'L & COMP. L. REV. 605, 615–16 (2001) (stating that Strasser took Freetown by a wave of popular enthusiasm); *see also* Abdul Tejan-Cole, *The Complementary and Conflicting Relationship Between the Special Court for Sierra Leone and the Truth and Reconciliation Commission*, 6 YALE HUM. RTS. & DEV. L.J. 139, 141 (2003) (stating that due to the deteriorated social conditions and heightened unrest the coup was extremely popular); Fritz, *supra* note 69, at A20 (indicating that he was hailed as a savior by many people who overlooked his regime's human rights violations including execution of 27 coup plotters without trial).

71. *See* Copley, *supra* note 63, at 4 (remarking that Strasser's failure to address the fundamental economic and security problems led to insurrection of RUF and his inability to deal with it was the cause of his overthrow); *see also* Juma, *supra* note 28, at 344–45 (suggesting that Strasser's lack of tangible efforts to make peace with RUF, and corruption, looting, and opulence of the military leadership were the causes of Strasser's exile); Gus Constantine, *Military Coup Outs Sierra Leone Leader: February's Civilian Elections Canceled*, WASH. TIMES, Jan. 17, 1996, at A9 (claiming that there was evidence of opposition to democratic elections by Strasser's second in command Brigadier Julius Maada Bio and that this is likely the reason for overthrowing Strasser).

72. *See* David Hecht, *Sierra Leone Changes Power Without Coup, Despite Ongoing War*, CHRISTIAN SCI. MONITOR, Apr. 1, 1996, at 6 (finding that despite RUF's refusal to participate in the elections and then cutting off the hands of civilians to prevent them from voting, civilian leaders wanted to go ahead with the elections); *see also* Akinrinade, *supra* note 29, at 395 (suggesting that pressure mounted on Bio to hold elections since overthrowing Strasser was construed as an attempt to hold on to power); Howard W. French, *West African Surprise: Suddenly, Peace Takes Root in Sierra Leone*, N.Y. TIMES, May 5, 1996, at 1 (explaining how Bio wanted to put off elections by asserting that peace was close, but pressure from foreign diplomats along with various civic groups, religious organizations, and student and labor union's desire for election caused him to relent).

73. *See* Webster, *supra* note 39, at 737 (noting that despite conflicts, Ahmed Tejan Kabbah was elected as the President of Sierra Leone in the country's first free, democratic election); *see also* Lizza, *supra* note 67, at 22 (explaining that RUF tried to dissuade people from voting by cutting their hands off, but two thirds of the electorate voted and Kabbah was elected as the President as a result); U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, Human Rights, and Labor, Country Report on Human Rights Practices for 1996—Sierra Leone, *available at* http://www.usemb.se/human/1996/africa/sierra_leone.html (last visited Oct. 3, 2005) (stating that President Kabbah won the first free and fair election since 1967 and that the transfer of power from NPRC was a peaceful one).

Given the lackluster performance of its own army and the reluctance of the international community to intervene in the conflict, the Sierra Leonean government hired a private military company from South Africa, Executive Outcomes, to lead its fight against the insurgents.[74] Executive Outcomes was instrumental in halting the RUF offensives and, in fact, rolled the rebels back for the first time, driving them out of the Kono diamond mining areas and the Sierra Rutile mines, both assets of great importance to the government, not the least because of their revenue potential.[75] Kabbah's new government, with the support of the Executive Outcomes mercenaries and its newly organized "*kamajor*" (traditional tribal hunter) irregulars, pushed the RUF to the brink of defeat, literally driving Sankoh to the negotiating table.[76] Under the leadership of Kabbah's deputy defense minister, Chief Sam Hinga Norman, the *kamajors* were transformed from an irregular "home guard" into the Civilian Defense Force (CDF), a veritable military arm capable of pursuing the rebels into the bush.[77]

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74. *See* Michael Ashworth, *Privatizing War, by 'The Executives',* INDEPENDENT (LONDON), Sept. 16, 1996, at 1 ("Executive Outcomes has shown it can deliver . . . 500 rebels lay dead and the remaining force scattered."); *see also* Jeremy Harding, *The Mellow Mercenaries*, GUARDIAN (LONDON), Mar. 8, 1997, at 32 (discussing the operations of Executive Outcomes against rebel groups in Western and Southern Africa). *But cf. A Continent in Crisis; Africa*, DOLLARS & SENSE, July 1, 2001, at 13 (denouncing the Executive Outcomes and other transnational corporations for the economic exploitation of African countries in the name of peacekeeping).

75. *See* Lansana Fofana, *Sierra Leone-Politics: Mercenary Exit Leaves Some Hearts Heavy,* IPS-INTER PRESS SERVICE, Feb. 10, 1997, at 1 (quoting Kai Bockarie, a 43-year-old miner who said, "[n]ever did rebels attack Kono district in all the years the Executive Outcomes was here."); *see also* Simon Barber, *Stars & Stripes—Bring Executive Outcomes Back to Fight In*, BUSINESS DAY (S. AFR.), May 10, 2000, at 2 (explaining that Executive Outcomes was able to drive RUF rebels out of Freetown and the country's principal diamond fields within two months). *See generally* PROHIBITION OF THE IMPORTATION OF ROUGH DIAMONDS FROM SIERRA LEONE, H.R. REP. NO. 107–24 (2001) (issuing an Executive Order which prohibits the importation of rough diamonds from Sierra Leone).

76. *See* Elizabeth M. Evenson, Note, *Truth and Justice in Sierra Leone: Coordination Between Commission and Court*, 104 COLUM. L. REV. 730, 736 (2004) (indicating that "[p]ressured and on the brink of defeat, the RUF acquiesced in peace negotiations."); *see also* Daniel J. Macaluso, Note, *Absolute and Free Pardon: The Effect of the Amnesty Provision in the* Lomé *Peace Agreement on the Jurisdiction of the Special Court of Sierra Leone*, 27 BROOK. J. INT'L L. 347, 349 (2001) (outlining that after the election of Ahmed Kabbah, Foday Sankoh, the leader of the rebel movement, signed the Abidjan Accord "which purported to end the conflict"). *See generally* HUM. RTS. WATCH, HUMAN RIGHTS WATCH REPORT OF SIERRA LEONE—BACKGROUND, *available at* http://www.hrw.org/reports/1999/sierra/SIERLE99-02.htm (last visited Sept. 13, 2005) (informing that the RUF and Kabbah's government signed the Abidjan Peace Accord which called for a cease-fire and demobilization of all forces).

77. *See* The Secretary-General*, Report on the Secretary-General on Sierra Leone*, ¶ 17, U.N. Doc. S/1997/80 (Jan. 26, 1997), *available at* http://daccessdds.un.org/doc/UNDOC/GEN/N97/013/27/IMG/N9701327.pdf (last visited Oct. 18, 2005) (stating that village-based hunters, known as Kamajors, were organized by paramount chiefs to protect their villages from rebel forces); *see also* Akinrinade, *supra* note 29, at 402 ("The Kamajo forces were comprised of local youths supported by the local population, whose shared knowledge of local bush tracks and ambush points were usually superior to the enemy's."). *But see* HUM. RTS. WATCH, HUMAN RIGHTS WATCH WORLD REPORT OF 1999—SIERRA LEONE, *available at* http://www.hrw.org/worldreport99/africa/sierraleone.html (last visited Oct. 14, 2005) [hereinafter HUMAN RIGHTS WATCH WORLD REPORT OF 1999—SIERRA LEONE] ("[T]he Kamajors were responsible for the majority of abuses committed by those fighting on behalf of the Kabbah government.").

In November 1996, a peace agreement was signed in Abidjan, Côte d'Ivoire, between the new government of President Kabbah and the RUF.[78] The accord granted amnesty for all acts committed prior to its signing and called for the transformation of the RUF into a political party.[79] The agreement quickly unraveled, however, as violence resumed after only the briefest lull.[80] When Sankoh was arrested on trumped up charges while visiting Nigeria in March 1997, allegedly at the urging of the Kabbah government, the accord collapsed altogether.[81] Two months later, however, yet another group of disgruntled Sierra Leonean soldiers, led by Major Johnny Paul Koroma, drove President Kabbah into exile, replacing his government with an Armed Forces Revolutionary Council (AFRC) that invited the RUF to join it.[82] The country fell into complete chaos as most of the judiciary system—judges, attorneys, police officers, and other law enforcement professionals, all of whom had previously been targeted by RUF

78. *See* Peace Agreement Between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone, R.U.F.—Sierra Leone, Nov. 30, 1996, *available at* http://www.sierra-leone.org/ abidjanaccord.html (last visited Sept. 13, 2005) [hereinafter Abijdan Accord] (codifying the Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone); *see also* Gallagher, *supra* note 28, at 156–57 (summarizing the events which led up to the signing of a peace agreement called the Abidjan Accord between RUF and Kabbah's government).

79. *See* U.N. Doc. S/1997/80, *supra* note 77 ("[U]nder the Accord, the parties declared an immediate end to the armed conflict and reaffirmed their commitment to observing the ceasefire and to undertaking every effort to ensure the full implementation of its provisions."). *Compare* Abidjan Accord, *supra* note 78 (codifying Art. XIII which says "the necessary conditions shall be created to enable the RUF/SL to register as a political movement according to law," and Art. XIV which says "no official or judicial action is taken against any member of the RUF/SL in respect to anything done by them in pursuit of their objectives as members of that organization up to the time of the signing of this Agreement."), *with* Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, R.U.F.—Sierra Leone, July 7, 1999, *available at* http://www.sierra-leone.org/lomeaccord.html (last visited Sept. 13, 2005) [hereinafter Lomé Agreement] (codifying the Lomé Agreement, which is the comprehensive peace agreement stemming from the failed Abidjan Peace Agreement, and the ECOWAS Peace Plan).

80. *See Restructuring Sierra Leone: Hearing Before the Subcomm. on Africa of the Comm. of International Relations*, 105th Cong. 1 (1998) (statement by Hon. Edward R. Royce, Chairman of Subcomm. on Africa) (asserting that President Kabbah's term in office was "shortened by a coup last May, [1997], led by Major General Johnny Paul Koroma"); *see also Statement by the Pres. of the Sec. Council*, U.N. SCOR, 3809th mtg., U.N. Doc. S/PRST/1997/42 (Aug. 7, 1997) (condemning the "overthrow of the democratically elected government of President Ahmad Tejan Kabbah and calls upon the military junta to take immediate steps to bring about the unconditional restoration of that government"); Stephanie H. Bald, Note & Comment, *Searching for a Lost Childhood: Will the Special Court of Sierra Leone Find Justice for Its Children?*, 18 AM. U. INT'L L. REV. 537, 556 (2002) (revealing that in May 1997, the government army faction Armed Forces Revolutionary Counsel (AFRC), led by General Johnny Paul Koroma, overthrew Kabbah's government).

81. *See* Gallagher, *supra* note 28, at 158 (explaining that Sankoh was arrested in Nigeria and returned to Sierra Leone to be tried in a court of law); *see also Sierra Leone Rebel Leader Charged*, BBC NEWS, Sept. 5, 1998, *available at* http:// news.bbc.co.uk/1/hi/world/africa/164833.stm (last visited Sept. 10, 2005) (reporting that RUF rebel leader, Corporal Foday Sankoh, was returned to Sierra Leone after being held under house arrest in Nigeria for a year, to face charges of treason); Indictment of Foday Sankoh in the Freetown Magistrate's Court, *available at* http://www.sierra-leone.org/indictment.html (last visited Sept. 27, 2005) (detailing the offenses against Sankoh).

82. *See* Akinrinade, *supra* note 29, at 431 ("[A]fter the AFRC took power in May 1997, the RUF and the AFRC combined forces to form the Peoples' Army of Sierra Leone. . . . There were several extra judicial tortures, mutilations, rapes, beatings, illegal searches, arbitrary arrests and detentions, and killings of unarmed civilians."); *see also* Richards, *War and Peace*, *supra* note 60, at 45 ("[M]utineers promptly invited the RUF to come out of the bush to join a government of national unity. The resulting, inherently unstable, junta called itself the Armed Forces Ruling Council (AFRC)."); Berger, *supra* note 70, at 617 (noting the coalition between the RUF and AFRC).

rebels—fled the country before what it imagined to be the imminent entrance of the dreaded insurgents into government.[83] The angry populace, fearful not only of the RUF but also of the continuing decline of the country as schools, banks, and commercial services ceased to function, launched a series of civil disobedience campaigns.[84]

The international reaction to the AFRC/RUF coup was swift and, for once, unequivocal.[85] The overthrow of President Kabbah took place on the eve of the annual summit meeting of the heads of state and government of the Organization of African Unity (OAU) in Harare, Zimbabwe.[86] Despite the fact that many of the leaders present at the meeting had themselves come to power through military coups, and in contrast to the OAU's usual practice of non-interference in the internal affairs of member states, the 66th session of the OAU Council of Ministers called for "the immediate restoration of constitutional order" in Sierra Leone and urged "all African countries and the international community at large to refrain from recognizing the new regime and lending support in any form whatsoever to the perpetrators of the *coup*

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83. *See* HUMAN RIGHTS WATCH WORLD REPORT OF 1999—SIERRA LEONE, *supra* note 77 ("[During the nine-month rule] many judges, lawyers, and police fled the country, causing a total collapse of the judicial system."); *see also Sierra Leone: Prospects for Peace and Stability: Hearing Before the Subcomm. on Afr. of the Comm. on Int. Rel.*, 104th Cong. 1 (Mar. 23, 1999) (statement by Hon. Edward R. Royce, Chairman of the Subcomm. on Afr.) ("[T]here are currently one million internally displaced persons in Sierra Leone. Today the city is devastated."); AMNESTY INTERNATIONAL, SIERRA LEONE: 1998—A YEAR OF ATROCITIES AGAINST CIVILIANS, *available at* http://web.amnesty.org/library/pdf/AFR510221998ENGLISH/$File/AFR5102298.pdf (last visited Sept. 8, 2005) (denouncing the poor quality of life under the AFRC/RUF regime).

84. *See* The Sec'y-General, *Second Report of the Secretary-General on the Situation in Sierra Leone,* ¶ 19, U.N. Doc. S/1997/958 (Dec. 5, 1997), *available at* http://daccessdds.un.org/doc/UNDOC/GEN/N97/350/71/PDF/N9735071.pdf (last visited Oct. 18, 2005) ("[T]he health and nutritional status of the population has been especially affected, owing to a combination of insecurity, a drastic breakdown in public services and limited supplies of essential drugs, vaccines and food."); *see also United States Policy in Sierra Leone: Hearing Before the Subcomm. on Afr. of the Comm. on For. Rel.*, 106th Cong. at 4 (Oct. 11, 2000) (statement of Hon. Susan E. Rice, Asst. Sec. of the State for Afr. Aff., Dept. of State) ("[T]he people under RUF's power also do not have access to the most basic social services, including health care and education. As a result, they are condemned to lives of fear, sickness, and poverty."); Berger, *supra* note 70, at 617 (commenting on the ongoing resistance from civilian groups, such as labor unions).

85. *See* Berger, *supra* note 70, at 617 (asserting that the OAU, which condemned the coup as being "unacceptable to the continent," ECOWAS, the Commonwealth, and the European Union quickly denounced the AFRC coup); *see also* Kofi Oteng Kufuor, *The O.A.U. and the Recognition of Governments in Africa: Analyzing Its Practice and Proposals for the Future,* 17 AM. U. INT'L L. REV. 369, 389 (2002) [hereinafter Kufuor, *O.A.U.*] (addressing that the OAU refused to recognize the AFRC as a government, because President Kabbah was a popularly elected president, which marked the beginning of OAU's policy to not recognize regimes that overthrow constitutional democracies); *Sierra Leone: Country Profile*, AFR. REV. WORLD INFO., Aug. 30, 2000 (explaining that the international community immediately condemned the coup and began taking action to try to put an end to the revolutionary overtaking of the government, imposing economic, oil, arms and travel sanctions).

86. *See* Theophilus Fuseini Maranga, *The Colonial Legacy and the African Common Market: Problems and Challenges Facing the African Economic Community,* 10 HARV. BLACKLETTER L.J. 105, 105 (1993) (explaining that the OAU, which today is made up of all 51 independent African countries, has its main headquarters in Addis Ababa, Ethiopia, and holds annual summits in its member countries with Heads of State and Government attending the summits); *Nigeria Takes Action in S. Leone at Invitation*, *Report Says*, XINHUA NEWS AGENCY, June 2, 1997 (asserting that the coup that ousted President Kabbah was condemned during the OAU summit held in Harare, Zimbabwe); AFRICA POLICY E-JOURNAL, *Sierra Leone: Documents on Coup,* AFR. ACTION, May 26, 1997, *available at* http://africaaction.org/docs97/sl9705.htm (last visited Oct. 14, 2005) (stating that President Kabbah was overthrown by the AFRC/RUF on the eve of the ministerial meeting of the 33rd OAU Summit, which was held in Harare from June 2-4 1997).

d'état."[87] In particular, the African leaders called upon "the leaders of [the regional Economic Community of West African States, ECOWAS] to assist the people of Sierra Leone to restore constitutional order to the country" and to "implement the Abidjan Agreement which continues to serve as a viable framework for peace, stability and reconciliation in Sierra Leone."[88] In October 1997, when the UN Security Council unanimously adopted a resolution[89] imposing economic sanctions against the AFRC/RUF junta, the embargo was scrupulously enforced by a regional military contingent, the ECOWAS Ceasefire Monitoring Group (ECOMOG).[90] Koroma quickly capitulated and promised to allow Kabbah to return to power by April 1998.[91] However, when the junta was slow to cede power, ECOMOG forces under the command of a Nigerian general and supported by the British-based firm Sandline International, yet another mercenary outfit, which had been hired by the exiled President Kabbah, launched an offensive

87. Org. of African Unity Council of Ministers [OAU], *Decisions Adopted by the Council of Ministers,* 66th Session, at 27, CM/Dec. 356 (LXVI) (1997), *available at* http://www.africa-union.org/home/Welcome.htm (last visited Oct. 14, 2005); *see also Sierra Leone: A Disastrous Set-Back for Human Rights*, *available at* http://web.amnesty.org/library/index/engafr510051997 (last visited Sept. 26, 2005) [hereinafter OAU Decisions] (explaining that the OAU Secretary immediately denounced the coup overthrowing President Kabbah and called for immediate restoration to the constitutionality to Sierra Leone and urged the international community to support efforts by the leaders of the ECOWAS). *See generally* Kufuor, *supra* note 85 (arguing that that the OAU was not consistent in its recognition of a country's government).

88. *See* OAU Decisions, *supra* note 87 (asking for support from ECOWAS leaders to restore order and to impose the Abidgan Agreement); Ademola Abass, *The Implementation of ECOWAS' New Protocol and Security Council Resolution 1270 in Sierra Leone: New Developments in Regional Intervention*, 10 U. MIAMI INT'L & COMP. L. REV. 177, 182 (2001-2002) (asserting that starting in 1997, ECOWAS was the force that was predominantly responsible for resolving the crisis occurring in Sierra Leone); Nancy Kaymar Stafford, *A Model War Crimes Court: Sierra Leone*, 10 ILSA J. INT'L & COMP. L. 117, 122 (2003) ("[The Abidjan Peace Accord called for the] immediate cessation of the armed conflict between the parties, the disarmament and demobilization of the insurgents, the restructuring of the military to integrate members of the RUF into Sierra Leone's armed forces, the release of prisoners of war, the transformation of the RUF into a political party, and provided a blanket amnesty for members of the RUF.").

89. *See* S.C. Res. 1132, U.N. Doc. S/RES/1132 (Oct. 8, 1997) (detailing the contents of Resolution 1132, adopted in Oct. 1997); Akinrinade, *supra* note 29, at 404 (discussing how the U.N. Security Council adopted Resolution 1132 on October 8, 1997, which imposed arms and petroleum embargos and restricted the travel of the military junta); *see also* Karsten Nowrot & 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, 328 (1998) (informing that the Resolution called for the military junta to "relinquish power" in order to allow the "restoration of the democratically elected government," and for the imposition of sanctions against the regime, only stopping at allowing the authorization of military intervention).

90. *See* ADEKEYE ADEBAJO, BUILDING PEACE IN WEST AFRICA: LIBERIA, SIERRA LEONE, AND GUINEA-BISSAU 87–93 (2002) (explaining the role and the purpose of the ECOMOG); Akinrinade, *supra* note 29, at 403–04 (noting that ECOWAS created a cease fire monitoring group in 1990, in order to stop the wanton destruction of human life and property and the problems resulting from the armed conflict in Liberia, which then became involved in the conflict in Sierra Leone); *see also* Vesel, *supra* note 47, at 28 (explaining that the U.N. Resolution proclaimed that, due to the threat to international peace and security, it was imposing oil and arms embargos, which ECOWAS had the power to strictly implement).

91. *See* Marissa Miraldi, *U.N. Report: Overcoming Obstacles of Justice: The Special Court of Sierra Leone*, 19 N.Y.L. SCH. J. HUM. RTS. 849, 850–51 (2003) (stating the Conakry Peace Agreement had six key elements: 1) cessation of all hostilities, 2) re-installment of President Kabbah, 3) receipt of humanitarian assistance, 4) disarmament, demobilization, and re-integration of demobilized personnel, 5) release of Sankoh, and 6) the formation of a government overseen by the ECOWAS and assisted by the U.N. military observers); Stafford, *supra* note 88, at 123–24 (claiming that Koroma's delegation came to an agreement with ECOWAS on the six terms of the peace agreement). *See generally Sierra Leone: Country Profile*, AFR. REV. WORLD INFO., Aug. 30, 2000 [hereinafter *Sierra Leone Country Profile*] (reporting that when signing the peace accord Koroma pledged to step down in April 1998).

in conjunction with the CDF against the now-combined AFRC/RUF forces in February 1998, which restored Kabbah to power the following month.[92]

The restoration, however, was tenuous, with the government's writ extending barely beyond the municipal boundaries of the capital.[93] Increasing numbers of regional peacekeepers were required to prop up the Kabbah government.[94] The RUF military commander, Sam 'Mosquito' Bockarie, backed by Major Koroma, now designated Deputy Commander of the RUF, threatened to make the country ungovernable if Sankoh, sentenced to death sentence for treason by the Kabbah government, was not freed and included in the government.[95] In January 1999, rebel forces encircled the capital.[96] During this phase, apocalyptic scenes were commonplace at every rumor.[97] Using women and children as human shields, some RUF units

92. *See* Akinrinade, *supra* note 29, at 404 (claiming that President Kabbah requested that in addition to the ECOWAS troops being sent to Sierra Leone, NIFAG also send more troops, who then merged to launch a military attack in order to remove the AFRC/RUF from power); *see also* Juma, *supra* note 28, at 351–52 (describing how ECOWAS backed by Nigerian troops and Kamajor militias, were provided with arms and ammunition by Sandline International in order to remove the junta from power, which resulted in Kabbah being restored to power); Nowrot & Schabacker, *supra* note 89, at 402 (providing that the AFRC breached the Conakry Agreement when the immediate cessation of hostilities and the disarmament of troops never occurred, so there was no breach when the Nigerian troops invaded Freetown before the six months the treaty called for had elapsed).

93. *See* Akinrinade, *supra* note 29, at 432 (demonstrating that after the ECOMOG forces took over Freetown, but the violence by the AFRC/RUF did not end, as they were brutally killing, abducting women and children, and causing terror to the civilians throughout the country); Stafford, *supra* note 88, at 123 (arguing that although the ECOMOG were successful in their takeover, this only caused the AFRC to "retreat to the bush" and split up into disorganized groups of troops in the country); *Sierra Leone: Country Profile*, *supra* note 91 (asserting that although the ECOMOG had taken over Freetown and ousted the AFRC from the city, the RUF still had the control of other large areas throughout Sierra Leone).

94. *See* J. Peter Pham, *Democracy by Force, Lessons from the Restoration of the State in Sierra Leone,* 6 WHITEHEAD J. DIPL. & INT'L REL. 129, 134 (2005), *available at* http://diplomacy.shu.edu/journal/new/ (last visited September 26, 2005) [hereinafter Pham, *Democracy By Force*] (stating that nearly a quarter of the Nigerian army, approximately 20,000 men, were in Sierra Leone to "prop up the Kabbah government"); Pham, *Lazarus Rising*, *supra* note 28, at 54 (emphasizing the increase in the Nigerian army to 20,000 men in order to back the Kabbah government). *See generally* Juma, *supra* note 28 (illustrating that Nigerian troops in Sierra Leone led ECOWAS on numerous occasions throughout this period, so that when President Kabbah regained his power, there was no coherent policy on national security causing the country to continue relying on Nigerian troops).

95. *See* Pham, *Democracy By Force, supra* note 94, at 134 (indicating that Sam "Mosquito" Bockarie was sentenced to death for treason after threatening to make the country ungovernable); Pham, *Lazarus Rising*, *supra* note 28, at 54 (recognizing that Sam Bockarie was not freed or included in the government after he was sentenced to death for treason). *See generally* Gallagher, *supra* note 28 (stating that Sankoh was arrested in Nigeria and brought back to Sierra Leone upon which he was convicted of treason and sentenced to death).

96. *See* The Secretary-General, *Fifth Report of the Secretary-General on the United Nations Observer Mission in Sierra Leone*, ¶ 1, U.N. Doc. S/1999/237 (Mar. 4, 1999) (describing the rebel attack on the capital and its subsequent effects); Macaluso, *supra* note 76, at 350 (stating that rebels had gained control over most of the capital by January 1999). *See generally Armed Rebels Rampage in Sierra Leone Capital*, N.Y. TIMES, Jan. 7, 1999 (detailing the confusion that ensued on the first day of the rebel attack).

97. *See Brutal Rebellion Rips Sierra Leone; Civil War*, CHRISTIAN CENTURY, Feb. 3, 1999, at 106 (reporting that 30,000 to 50,000 persons sought refuge in Freetown's National Stadium). *See generally* Jon M. Van Dyke, *The Fundamental Human Right to Prosecution and Compensation*, 29 DENV. J. INT'L L. & POL'Y 77 (2001) [hereinafter Van Dyke, *Prosecution and Compensation*] (noting that the most concentrated and horrific human rights violations of Sierra Leone's civil war were committed by rebel forces during the invasion on the capital); Miraldi, *supra* note 91 (describing the terror tactics and human rights violations that rebels systematically engaged in).

managed to bypass ECOMOG forces and join comrades who had already infiltrated the city.[98] Kabbah fled the country once more.[99]

Eventually, after ferocious fighting, ECOMOG forces managed to reestablish control over the capital and its environs, but at the cost of some 7,000 dead civilians and with two-thirds of the city leveled.[100] Compounding the human tragedy, the retreating RUF units abducted some 3,000 civilians, many of whom were never seen again.[101] As a result of the mayhem, about 600,000 of Sierra Leone's estimated 4 million people sought refuge in neighboring countries, while two-thirds of those who remained were internally displaced.[102] The Nigerians, worn out by the fighting which claimed an estimated 800 of their peacekeepers and cost them about $1 million daily, announced their intention to withdraw and forced the two Sierra Leonean parties to enter into negotiations, resulting in the July 7, 1999, Lomé Peace Agreement,[103] signed in the Togolese capital. The deal made Sankoh the "Chairman of the Board of the Commission for the Management of Strategic Resources, National Reconstruction and Development" and

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98. *See* HUMAN RIGHTS WATCH WORLD REPORT OF 1999—SIERRA LEONE, *supra* note 77 (stating that the rebels planned and effectively used civilian human shields to bypass ECOMOG troops and enter the capital); *see also President, Rebel Agree to Cease-Fire in Sierra Leone; Doubts about Truce Dampen Celebrations in African Nation*, BALTIMORE SUN, Jan. 8, 1999, at 12A (reporting that ECOMOG's efforts to suppress the incursion were hindered by the rebels use of civilians as human shields); *Sierra Leone Rebels Assault Capital Districts,* N.Y. TIMES, Jan. 8, 1999, at A6 (recounting witness statements that rebel forces were using civilians as human shields).

99. *See* Jason Burke, *War in Sierra Leone: In the Depths of the Jungle a Dark Nightmare Unfolds*, OBSERVER, June 18, 2000, at 24 (stating that Kabbah fled as rebel forces infiltrated the capital); *see also* Allieu Ibrahim Kamara & Jenny Percival, *Ceasefire Call in Freetown Battle*, SCOTSMAN, Jan. 8, 1999, at 12 (remarking that the siege on the capital forced Kabbah to flee to Lungi Airport); *Rebel Leader Rules out Freetown Truce*, GUARDIAN (London), Jan. 9, 1999, at 18 (reporting that rebel forces ordered the launch of an offensive on the Lungi airport to which Kabbah had fled).

100. *See* U.N. Doc. S/1999/237, *supra* note 96, at ¶ 5 (estimating the total number of casualties to be between 3,000 to 5,000, with civilian deaths comprising about 2,000); *see also World Briefs,* HOUSTON CHRON., Feb. 2, 1999, at A11 (reporting that the rebel attack on the capital resulted in some 3,000 civilian deaths). *See generally* Laura Forest, Note, *Sierra Leone and Conflict Diamonds: Establishing a Legal Diamond Trade and Ending Rebel Control over the Country's Diamond Resources*, 11 IND. INT'L & COMP. L. REV. 633 (noting the extensive destruction inflicted upon the capital and its surrounding areas during the rebel attack).

101. *See* Bald, *supra* note 80, at 557 n.92 (noting that by the time peacekeeping forces regained control of the capital, an estimated 3,000 children were already abducted by rebels); Gallagher, *supra* note 28, at 159 (stating that approximately 3,000 children were abducted as rebel forces withdrew from the capital). *See generally The Cost of News*, WASH. POST, Jan. 15, 2000 (reporting that thousands of children were abducted by rebels in Sierra Leone).

102. *See* The Secretary-General, *Sixth Report of the Secretary-General on the United Nations Observer Mission in Sierra Leone*, ¶ 9, U.N. Doc. S/1999/645 (June 4, 1999) (outlining the current status and living conditions of refugees and internally displaced persons within Sierra Leone); *see also* Evenson, *supra* note 76, at 733–34 (noting the number of refugees and internally displaced persons of Sierra Leone, and suggesting that the sheer size of these numbers is illustrative of the horrors experienced during the civil war); Celina Schocken, Notes and Comments, *The Special Court for Sierra Leone: Overview and Recommendations*, 20 BERKELEY J. INT'L L. 436, 436 (2002) (remarking on the number of Sierra Leoneans who sought refuge or who were internally displaced as a result of the civil war).

103. *See* Lomé Agreement, *supra* note 79; Akinrinade, *supra* note 29, at 437 (noting that due to the exorbitant cost of its peacekeeping operations Nigeria placed enormous pressure on Kabbah to enter into a peace agreement with the rebels). *See generally* Tom Masland & Jeffrey Bartholet, *Fury and Fear*, NEWSWEEK, May 22, 2000 (reporting that the Nigerian forces suffered heavy casualties in the rebel attack on the capital).

accorded him "the status of Vice-President answerable only to the President of Sierra Leone."[104] The accord also promised the rebel leader and his followers a "complete amnesty for any crimes committed . . . from March 1991 up to the date of the agreement."[105] The Lomé Agreement was initialed by the two parties as well as by an impressive array of international guarantors, including a special representative of the UN Secretary-General, although the latter signed with the proviso that the amnesty provisions did not apply to "international crimes of genocide, crimes against humanity, war crimes, and other serious violations of international humanitarian law."[106]

The Lomé Agreement was ratified by the Sierra Leonean National Assembly and initially endorsed by a UN Security Council resolution.[107] A second UN resolution also authorized the creation of the United Nations Mission in Sierra Leone (UNAMSIL) with 6,000 military personnel charged with assisting the implementation of the peace agreement and facilitating humanitarian assistance.[108] However, the accord, like its predecessors, quickly fell apart. In several incidents in late 1999 and early 2000, UN peacekeepers were themselves disarmed by RUF

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104. *See* Lomé Agreement, *supra* note 79, at Art. IX (detailing the parden and amnesty terms of the Agreement); *see also* Akinrinade, *supra* note 29, at 443 (criticizing the Lomé Agreement for awarding Sankoh with such a powerful economic and political position); Diane Marie Amann, *International Law Weekend Proceedings: Message as Medium in Sierra Leone*, 7 ILSA J. INT'L & COMP. L. 237, 240 (2001) (arguing that the Lomé Agreement rewarded Sankoh for his past actions by appointing him chairman of the Commission for Management of Strategic Resources).

105. *See* Lomé Agreement, *supra* note 79, at Art. V (detailing the Agreement terms with regard to enabling the RUF/SL to join a broad-based government of national unity, through cabinet appointments); Juma, *supra* note 28, at 355 (noting the Lomé Agreement's requirement that the government take affirmative steps to ensure the amnesty of the rebels and their leaders for all acts committed prior to the signing of the agreement); *see also* Saunders, *supra* note 41, at 1425 (stating that rebels and their leaders were given amnesty under the Lomé Agreement).

106. *See* The Sec'y-General, *Seventh Report of the Secretary General on the United Nations Mission in Sierra Leone*, ¶ 2, U.N. Doc. S/1999/836 (July 30, 1999) (listing the parties who signed the Lomé Agreement and stating that the Special Representative of the Secretary General was instructed to attach a proviso that the United Nations would not recognize violations of international law as part of the amnesty and pardon); *see also* James Rupert, *Tenuous Peace In Brutal War; Sierra Leone Sides Sign Accord*, WASH. POST, July 8, 1999, at A17 (reporting that while the United Nations supports the Lomé Agreement it would not recognize its amnesty and pardon provisions). *See generally* Laura A. Dickinson, *The Promise of Hybird Courts*, 97 AM. J. INT'L L. 295 (2003) (quoting the former U.N. Ambassador as stating "the Lomé agreement created this amnesty provision in domestic law, but the United Nations did not accept it in international law").

107. *See* S.C. Res. 1260, ¶ 1, U.N. Doc. S/RES/1260 (Aug. 20, 1999) (welcoming the Lomé Agreement and commending those involved in its facilitation); *see also* Peter Salama et al., *Health and Human Rights in Contemporary Humanitarian Crises: Is Kosovo More Important than Sierra Leone?*, 319 BRIT. MED. J. 1569, 1569 (1999) (noting that the Sierra Leonean Parliament unanimously ratified the Lomé Agreement); William A. Schabas, *Rethinking Reconstruction after Iraq: Amnesty, the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone*, 11 U.C. DAVIS J. INT'L L. & POL'Y 145, 149 (2004) [hereinafter Schabas, *Sierra Leone Truth*] (remarking on the United Nations' welcoming of the Lomé Agreement and its failure to expressly state its opinion of the agreement's amnesty provisions).

108. *See* S.C. Res. 1270, ¶ 1, U.N. Doc. S/RES/1270 (Oct. 22, 1999) (deciding to establish the United Nations Mission in Sierra Leone (UNAMSIL), with the purpose of implementing the Peace Agreement); *see also* Juma, *supra* note 28, at 358 (indicating that the U.N. Security Council established UNAMSIL and implemented 6,000 military personnel); Anna Roberts, *"Soldiering on in Hope": United Nations Peacekeeping in Civil Wars*, 35 N.Y.U. J. INT'L L. & POL. 839, 858 (2003) (holding that UNAMSIL was authorized by the Security Council with a maximum of 6,000 military personnel to assist in enforcing the agreement).

forces.[109] In response, the Security Council increased UNAMSIL's personnel to 11,100 and revised UNAMSIL's mission to include protecting the government of President Kabbah.[110] The situation only worsened, however, when in early May, the RUF killed seven UN peacekeepers and captured fifty others.[111] The number of peacekeepers captured soon increased to over 500 as UN forces apparently surrendered to the rebels without firing a shot.[112] British forces, operating independently of the UN command structures, then landed in Freetown, ostensibly to help evacuate foreign nationals, but in fact to shore up the Kabbah regime and rescue the beleaguered UN force.[113]

The capture of Sankoh while he led an incursion in Freetown, however, saved the situation, as the UN prisoners were released and the leaderless RUF forces began to disintegrate. Meanwhile, the Security Council authorized UNAMSIL to increase its strength to 13,000 military personnel,[114] a number that was later raised to 17,500, making it the largest UN peace-

109. *See* Joseph Opala, *What the West Failed to See in Sierra Leone*, WASH. POST, May 14, 2000, at B1 (stating that a second peace deal was made with the rebels and that hundreds of U.N. peacekeepers were kidnapped and disarmed); *see also* Warren Hoge, *British Free 7 Hostage Soldiers in Raid in Sierra Leone*, N.Y. TIMES, Sept. 11, 2000, at A12 (discussing that after signing the peace accord, war was started again and the rebels seized United Nations Peacekeepers); *Liberian Accuses Britain of Stirring Regional War*, N.Y. TIMES, May 30, 2001, at 6 (recognizing that the 1999 peace accord collapsed and U.N. peacekeepers were taken captive).

110. *See* S.C. Res. 1289, ¶ 1, U.N. DOC. S/RES/1289 (Feb. 7, 2000) (establishing that the Security Council increase UNAMSIL personnel to 11,100); *see also Backgrounder: Key Events in Sierra Leone Since 1991*, XINHUA NEWS AGENCY, May 12, 2002 (noting that the UNAMSIL mandate was revised to increase the soldiers to 11,100); UNITED NATIONS MISSION IN SIERRA LEONE, SIERRA LEONE—UNAMSIL—BACKGROUND, *available at* http://www.un.org/Depts/dpko/missions/unamsil/background.html [hereinafter UNITED NATIONS MISSION IN SIERRA LEONE] (stating that the mandate increased personnel to 11,100).

111. *See* Dexter Filkins & Richard A. Oppel Jr., *After the War: Truck Bombing; Huge Suicide Blast Demolishes U.N. Headquarters in Baghdad; Top Aid Officials Among 17 Dead*, N.Y. TIMES, Aug. 20, 2003, at A1 (stating that rebels in Sierra Leone killed seven U.N. peacekeepers and captured more than forty others); *see also* Blaine Harden, *Sierra Leone Insurgents Kill 7 In U.N. Force and Capture 49*, N.Y. TIMES, May 4, 2000, at A1 (indicating that the rebels killed 7 U.N. peacekeepers and took captive at least 49 others); *Seven U.N. Peacekeepers are Slain in Sierra Leone*, N.Y. TIMES, May 4, 2000, at A2 (holding that the rebels killed 7 peacekeepers and took at least 49 hostage).

112. *See* CAMPBELL, *supra* note 55, at 93 (totaling the number captured at 500 hostages); *see also* Barbara Crossete, *U.N. to Establish a War Crimes Panel to Hear Sierra Leone Atrocity Cases*, N.Y. TIMES, Aug. 15, 2000, at A6 (indicating that 500 U.N. peacekeepers were captured and released after some embarrassment to the U.N.); Tyson Trish, DAILY RECORD (Morristown, New Jersey), May 13, 2005, at 10 (stating that RUF rebels took 500 U.N. peacekeepers hostage).

113. *See* CAMPBELL, *supra* note 55, at 94 (proclaiming that the British sent troops, independent of the U.N. mission, to help stabilize the country); *see also* David B. Kopel et al., *Firearms Possession By "Non-State Actors": The Question of Sovereignty*, 8 TEX. REV. L. & POL. 373, 434 (2004) (mentioning that the U.N. peacekeepers handed over their weapons to RUF forces and that, because of the assistance of Britain's troops, civilian lives were saved and a complete U.N. defeat failed to occur); Douglas Farah, *Sierra Leone Rebels Contemplate Life Without Guns*, WASH. POST, Apr. 14, 2001, at A1 (holding the British forces helped defend the capital and halt the RUF advance, while also working with the government army).

114. *See* S.C. Res. 1299, ¶ 1, U.N. DOC. S/RES/1299 (May 19, 2000) (indicating that UNAMSIL shall expand to 13,000 military personnel); *see also* Roberts, *supra* note 108, at 860 (needing additional troops, the Security Counsel increased the number of military personel to 13,000). *See generally* Rainer Lange, *Sierra Leone; Nearly Half a Million Internally Displaced People*, AFR. NEWS, July 7, 2000 (advocating for the international community to help support the 13,000 U.N. troops in Sierra Leone).

keeping operation in the world.[115] UN Resolution 1346, approved on March 30, 2001,[116] also stretched UNAMSIL's brief presence, already expanded from mere peacekeeping to protection of the government, even further, declaring that: "[t]he main objectives of UNAMSIL in Sierra Leone remain to assist the efforts of the government of Sierra Leone to extend its authority, restore law and order and stabilize the situation progressively throughout the entire country, and to assist in the promotion of a political process which should lead to a renewed disarmament, demobilization and reintegration program and the holding, in due course, of free and fair elections."[117]

As the country gradually pacified during 2001, UNAMSIL celebrated the success of its disarmament program with an arms destruction ceremony on January 17, 2002, at which the force commander, Kenyan General Daniel Opande, declared the civil war officially over.[118] No one really knows the total number of casualties in the decade-long conflict, although it has been conservatively estimated that between 100,000 and 200,000 people lost their lives in the fighting, while hundreds of thousands of others suffered amputations or were otherwise

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115. *See* S.C. Res. 1346, ¶ 1, U.N. DOC. S/RES/1346 (Mar. 30, 2001) (increasing the military unit of UNAMSIL to 17,500 personnel); *see also* Somini Sengupta, *Letter From Africa; Liberia Seen as Icon of World's Neglect of Africa*, N.Y. TIMES, May 21, 2003, at A4 (demonstrating that the increase in personnel to 17,000 was the largest U.N. peacekeeping force in the world); *Sierra Leone; Zero Tolerance for U.N. Troops Involved in Sexual Abuse,* AFR. NEWS, Apr. 5, 2005, at 2 (showing that UNAMSIL had reached its full strength of 17,500).

116. *See* S.C. Res. 1346, *supra* note 115, ¶ 1 (mandating that the adoption of Resolution 1346 by the Security Council was on 30 March 2001); *U.N. Security Council Extends Sierra Leone Mission Until 31 March 2002, Unanimously Adopting Resolution 1370 (2001)*, M2 PRESSWIRE (U.K.), Sept. 19, 2001, at 1 [hereinafter *Resolution 1370*] (showing that a report was issued pursuant to Security Council Resolution 1346, enacted in 2001); *see also* UNITED NATIONS MISSION IN SIERRA LEONE, *supra* note 110 (indicating that Resolution 1346 was adopted on March 30, 2001).

117. *See* S.C. Res. 1334, ¶ 1, U.N. DOC. S/RES/1334 (Dec. 22, 2000) ("[T]he main objectives of UNAMSIL in Sierra Leone remain to assist the efforts of the government of Sierra Leone to extend its authority, restore law and order and stabilize the situation progressively throughout the entire country, and to assist in the promotion of a political process which should lead to a renewed disarmament, demobilization and reintegration program."); *see also Resolution 1370*, *supra* note 116, at 1 (establishing that the main objectives of UNAMSIL were to assist the government of Sierra Leone, to restore law and order and further stabilize the situation within the country and assist in the disarmament, demobilization, and reintegration program); *U.N. Security Council Extends U.N. Mission in Sierra Leone Until 30 September; Urges Restoration of Civil Authority, Public Services; Resolution 1400 (2002) Adopted Unanimously*, M2 PRESSWIRE (U.K.), Mar. 29, 2002, at 1 (emphasizing that the main objective of UNAMSIL was to ensure security for the upcoming elections).

118. *See* Katie Corbridge, *The Power of One*, TORONTO STAR, Dec. 11, 2003, at 1 (stating that the war ended in January 2002); *see also* Andrew Meldrum, *Sierra Leone Warlord Dies in U.N. Custody*, GUARDIAN (UK), July 31, 2003, at 1 (holding that the war was formally declared over in early 2002). *See generally Sierra Leone's "War Over,"* NEWSDAY, Jan. 19, 2002 (referring to the previous Friday when the decade-long civil war was over).

maimed.[119] Some 2.6 million Sierra Leoneans were either internally displaced or became refugees in neighboring countries.[120]

The peace culminated with presidential and parliamentary elections held on May 14, 2002; members of the security forces voted four days earlier.[121] The polling was largely peaceful and, despite some irregularities observed, was largely free and fair.[122] Over 2.3 million Sierra Leoneans (approximately 85 percent of the eligible population) registered to vote, a significant increase over the 1.5 million citizens who registered to vote in the elections of 1996.[123] Of those registered, some 2.2 million actually cast their ballots to give incumbent president Ahmad Tejan Kabbah just over 70 percent of the vote.[124] Kabbah's SLPP won 83 of the 112 open parliamentary seats—12 other seats are allocated to the country's paramount chiefs, a relic of the colonial system of indirect rule of the interior—compared with the 27 seats carried by the opposition APC, whose standard bearer, Ernest Koroma, received just slightly over 22 per-

119. *See* O'Connell, *Interest Meets Humanity*, *supra* note 47, at 213 (indicating that there are no reliable numbers of the death, but it is well over 100,000). *See generally* TEUN VOETEN, HOW DE BODY?: ONE MAN'S TERRIFYING JOURNEY THROUGH AN AFRICAN WAR 216–17 (Roz Vatter-Buck trans. Thomas Dunne Books, 2002) (referring to the rebels torturing, mutilating and raping captives); *Foday Sankoh, Arrested Sierra Leone Rebel, Dies*, ALB. TIMES UNION (NY), July 31, 2003 (mentioning the rebel leader who routinely cut off limbs of men, women and children during the decade-long conflict).

120. *See* Akinrinade, *supra* note 29, at 426 (stating that nearly half of the 4.5 million population of Sierra Leone was displaced and that approximately 500,000 people were refugees in neighboring countries); *see also* Evenson, *supra* note 76, at 734 (noting that as a result of the civil war in Sierra Leone, half a million refugees and 2 million people were internally displaced). *But see* HUMAN RIGHTS WATCH, THE JURY IS STILL OUT: A HUMAN RIGHTS WATCH BRIEFING PAPER ON Sierra Leone 1 (2002), *available at* http://www.hrw.org/backgrounder/africa/sl-bck0711.pdf (last visited Sept. 23, 2005) (contending that less than 2.5 million were displaced by mentioning that a quarter of the 4.5 million population was displaced).

121. *See* Jimmy D. Kandeh, *Sierra Leone's Post-Conflict Elections of 2002,* 41 J. MOD. AFR. STUD. 189, 189–92 (2003) [hereinafter Kandeh, *Post-Conflict Elections*] (asserting that the elections came after the disarmament of combatants and expressing the people's expectation that the elections would act to consolidate the peace); *see also Sierra Leone People Cheer Election Trend*, DESERT NEWS, May 15, 2002, at A4 (declaring that the elections comprised a test for the peace in Sierra Leone). *See generally Sierra Leone; U.N. to Clarify UNAMSIL Role in Elections*, AFR. NEWS, Jan. 11, 2002 (characterizing the 2002 elections as a milestone for peace in Sierra Leone).

122. *See* Stafford, *supra* note 88, at 120 (reporting that the elections of May 12, 2002, were peaceful); *see also Sierra Leone Holds Election*, BULLETIN'S FRONTRUNNER, May 16, 2002 (expressing that the free and fair elections that took place in Sierra Leone were like a miracle); *State Department Issues Background Note on Sierra Leone*, U.S. FED. NEWS, Apr. 1, 2005 (noting that the irregularities during the voting process were not severe).

123. *See* Danna Harman, *In Once-Brutal War Zone, a Model Arises*, CHRISTIAN SCIENCE MONITOR, May 16, 2002, at 1 (stating that the country's registered voters amounted to 2.3 million and that the voter turnout was over 80 percent); *see also* Norimitsu Onishi, *For Sierra Leone Ballot, Hope Trumps Despair*, N.Y. TIMES, May 13, 2002, at A3 (asserting that about 2.3 million people registered to vote); Jimmy D. Kandeh, *Transition Without Rupture: Sierra Leone's Transfer Election of 1996*, 41 AFR. STUD. REV. 91, 101 (1998) (noting that 1.6 million people had registered to vote in the 1996 elections of Sierra Leone).

124. *See* NAT'L ENDOWMENT OF DEMOCRACY, *Election Watch; Election Results (March-June 2002)*, 13 J. OF DEMOCRACY 178, 181 (2002) (showing that Kabbah won 70.6 percent of the vote); *see also* Foday B. Fofanah, *Elections in Sierra Leone: Kabbah Sweeps Polls,* 49 WORLD PRESS REV. 29, 29 (2002) (emphasizing Kabbah's victory and stating that he accumulated 70 percent of the vote); *War-Torn Nation Re-elects President over Rebel Foes*, CHI. TRIB., May 20, 2002, at 7 (stating that Kabbah received 70.6 percent of the total number of votes).

cent in the presidential poll.[125] The RUF Party (RUF-P), the new political incarnation of the former insurgents, garnered barely 1.7 percent of the votes cast; RUF leader Sankoh, who was awaiting trial before the SCSL, was not allowed to run due to a technicality that he was not a registered voter.[126] The former leader of the AFRC, Johnny Paul Koroma, drew just 3 percent of the vote, although his People's Liberation Party did gain two seats in parliament.[127] All in all, for a country that had endured more than a decade of civil war, preceded by three decades of political upheaval and stagnation, the first peaceful elections since independence represented an act of hope.[128] Two months later, on July 12, 2002, at the state opening of the new parliamentary assembly, Kabbah concluded: "[a]ll Sierra Leoneans, at home and abroad, suffered considerable loss. Some lost their cherished and loved ones, others their belongings, and still others, their dignity and honor. The bitter experience of armed conflict will linger in our memories for as long as we need to remind ourselves of the mistakes that we should never ever make again."[129]

C. Atrocities During the Conflict

As prolonged and deadly as the Sierra Leonean civil conflict was, it would probably have gone relatively unnoticed by the outside world were it not for the graphic images of child soldiers, drug use, torture, plunder, and diamonds that became associated with it, in large part

125. *See* NAT'L ENDOWMENT OF DEMOCRACY, *supra* note 124, at 181 (stating that Kabbah got 83 of the 112 parliamentary seats and that APC, with 22.4 percent of the vote, got 27 seats); *see also* Fofanah, *supra* note 124, at 29 (stating that APC got 23 percent of the vote and 27 seats, while SLPP won 83 of the 112 seats in Parliament); *War-Torn Nation Re-elects President over Rebel Foes*, CHI. TRIB., May 20, 2002, at 7 (noting that APC got 23.5 percent of the vote).

126. *See* Michael Baffoe, *Africa: Uneasy Calm in Sierra Leone*, MONTREAL CMTY. CONTACT, June 20, 2002, at 20 (discussing the results of elections and stating that the RUF party gathered 1.7 percent of the vote); *see also* Stafford, *supra* note 88, at 120 (revealing that RUF's leader Foday Sankoh was prohibited from running due to the fact that he had failed to register to vote); Norimitsu Onishi, *World Briefing: Africa; Sierra Leone Rebel Leader Barred From Election*, N.Y. TIMES, Mar. 29, 2002, at 13 (asserting that Sankoh, who has been in jail for two years and is now on trial, was not allowed to run because he had not registered to vote).

127. *See* Kandeh, *Post-Conflict Elections*, *supra* note 121, at 203 (detailing the 2002 election results and mentioning that Johnny Paul Koroma garnered 3 percent of the vote); *see also* Mike Butcher, *A Bit More Like It: After the War, National Reconstruction Is Well Under Way. The Country Has Even Found Oil in Commercial Quantities, and the Smiles Are . . . Almost Back; Around Africa: Sierra Leone*, NEW AFR., Nov. 1, 2002, at 18 (stating that the People's Liberation party gained two seats in parliament); Fofanah, *supra* note 124, at 29 (mentioning that former junta leader Johnny Paul Koroma's PLP got the remaining two seats).

128. *See* Zoe Hughes, *Blair Praises Sierra Leone Poll 'Signal to World',* PRESS ASS'N, May 15, 2002 (expressing Prime Minister Blair's view that the democratic elections of Sierra Leone and its return to peace after ten years of war sends a message of hope to other countries that are plagued with strife and discord); *see also Hope for Sierra Leone*, TIMES-PICAYUNE (New Orleans), May 20, 2002, at 6 (alleging that the landslide victory of Kabbah and the discredit of the rebel parties and movements by the people, show that there is hope for long-term peace and democracy); STANDARD TIMES, *Sierra Leone; Kofi Annan Congratulates Freetown*, AFR. NEWS, May 17, 2002 (emphasizing the role of peaceful elections in comprising a big step in consolidating peace in Sierra Leone).

129. *See* Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone Armed Forces, Inaugural Address on the Occasion of the State Opening of the First Session of the First Parliament of the Third Republic (July 12, 2002), *available at* http://www.sierra-leone.org/kabbah071202.html (last visited Oct. 18, 2005). *See generally Sierra Leone; Help Me to Fight Corruption—Kabbah Tells MPs*, AFR. NEWS, July 17, 2002 (last visited Sept. 25, 2005) (stating that Kabbah opened the first session of the second parliament on July 12, 2002 and characterizing his inaugural address as ambitious); *Sierra Leone: Plans for Kabbah's Inauguration*, AFR. NEWS, July 4, 2002 (last visited Sept. 25, 2005) (noting that Kabbah was preparing for his inauguration speech which would take place on July 14, 2002).

through the global broadcast by CNN of the lurid images from Sierra Leonean photojournalist Sorious Samura's Emmy-winning documentary film *Cry Freetown*, which depicted the rebel invasion of the capital.[130] In fact, it was the diabolic "creativity," as well as sheer volume of atrocities committed during the civil war—often by the underage combatants that were deliberately used by all sides in conflict—that motivated the clamor for post-conflict accountability.[131]

The RUF defied the conventional typologies for modern African insurgency movements.[132] It was neither an anti-colonial "liberation movement" of the sort represented by the Zimbabwe African National Union-Patriotic Front (ZANU-PF)[133] or the *Movimento Popular de Libertaçao de Angola* (MPLA), nor a "separatist insurgency" seeking regional secession like the Eritrean People's Liberation Front (EPLF) or the Sudan People's Liberation Army (SPLA).[134] Nor was it a "reform insurgency" seeking to transform the governing structure of a given state along either political or ethnic lines like the National Resistance Army (NRA), led by now-Ugandan president Yoweri Museveni, or the Rwanda Patriotic Front (RPF), the Tutsi-

130. *See* Eric Mink, *'Cry Freetown' : A Brutal Look at the Sierra Leone's Civil War*, DAILY NEWS (New York), Feb. 16, 2000, at 82 (describing Samura's documentary film and saying that it contains graphic images of the atrocities such as rapes, mutilations, drug use, etc., that were committed during the ten year civil war in Sierra Leone); *see also* Greg Quill, *Sierra Leone Brutally Exposed*, TORONTO STAR, Feb. 16, 2000, at 24 (stating that Samura recorded the violent scenes from the invasion of his country to show the world what was happening in Sierra Leone and adding that his award-winning documentary was broadcast on several channels); *Sierra Leone; Africa Can Stop - Cry Freetown*, AFR. NEWS, Feb. 5, 2000, at 3 (noting that Samura risked his life to record the most dreadful scenes of the catastrophic war that claimed the lives of 50,000 and the limbs of 10,000 people).

131. *See* Ismene Zarifis, Note, *Sierra Leone's Search for Justice and Accountability of Child Soldiers*, 9 HUM. RTS. BRIEF 18, 18 (2002) (holding that it was the nature and the extent of the war crimes and violations of human rights committed by both the government and the rebels that called for post-conflict accountability); *see also* Betsy Bisik, *New Tribunal to Target Sierra Leone Atrocities*, WASH. TIMES, Feb. 21, 2002, at A13 (stating that a tribunal has been set up to address accountability for the severe and appalling war crimes); Tina Susman, *Caught on Film: CNN is Ready to Air a Grim Documentary About the War in Sierra Leone*, NEWSDAY (New York), Feb. 2, 2000, at B3 (emphasizing that Samura tricked the rebels, as he pretended he was with them in order to be able to document their conduct).

132. *See* CHRISTOPHER CLAPHAM, AFRICAN GUERRILLAS 6–7 (1998) [hereinafter CLAPHAM, AFRICAN GUERRILLAS] (separating African insurgency movements into four distinct categories based on common characteristics); *see also* CLAPHAM, POLITICS OF STATE SURVIVAL, *supra* note 54, at 208–11 (describing the three major types of modern African insurgencies); Akinrinade, *supra* note 29, at 400 (explaining the uniqueness of the RUF movement from other African insurgency movements).

133. *See* Nick Dancaescu, *Land Reform in Zimbabwe*, 15 FLA. J. INT'L L. 615, 617 (2003) (describing the creation of the ZANU-PF as an effort to reform government treatment of blacks in Zimbabwe); *see also* Lorna Davidson & Raj Purohit, *The Zimbabwean Human Rights Crisis: A Collaborative Approach to International Advocacy*, 7 YALE HUM. RTS. & DEV. L.J. 108, 109–10 (2004) (examining the Zimbabwe black majority's fight for liberation from the oppressive white minority government); BUREAU OF AFRICAN AFF., U.S. DEPT. OF STATE, BACKGROUND NOTE: ZIMBABWE, *available at* http://www.state.gov/r/pa/ei/bgn/5479.htm (last visited Sept. 27, 2005) (explaining the origins of the ZANU-PF as a response to an oppressive government composed of whites, when the majority of the population was black).

134. *See* BUREAU OF AFRICAN AFF., U.S. DEPT. OF STATE, BACKGROUND NOTE: ERITREA, *available at* http://www.state.gov/r/pa/ei/bgn/2854.htm (last visited Sept. 26, 2005) (providing historical information about the formation of the EPLF); *see also* DeJuan Bouvean, *A Case Study of Sudan and the Organization of African Unity*, 41 HOW. L.J. 413, 417–19 (1998) (discussing the formation of the SPLA as a reaction against unilateral imposition of Islamic Shari'a law on all citizens of Sudan); Makau wa Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT'L L. 1113, 1159 n.202 (1995) (summarizing the major insurgency actions of the EPLF).

dominated group that eventually ousted the government of the Hutu *génocidaires*.[135] Nor was it really a "warlord insurgency" based on the personal ambitions of its leader in the way that the NPFL under Charles Taylor could be said to have been.[136]

Despite its name and the fact that it exploited the anti-APC sentiments of many Mende peoples in the South and East of Sierra Leone—during the initial invasion of Kailahun, villagers were ordered to wave palm fronds "in support" of the rebels, the palm symbolizing opposition that the Sierra Leone People's Party (SLPP) banned under the APC's one-party state[137]—the RUF never presented anything resembling a coherent political program, revolutionary or not.[138] As Sierra Leonean political scientist Ibrahim Abdullah has noted:

> [t]he RUF's *Footpaths to Democracy: Toward a New Sierra Leone* contains words and phrases lifted from Mao Zedong and Amilcar Cabral. Hurriedly drafted in London and tossed back to the *Zogoda* (the RUF headquarters in the Sierra Leone rain forest) for approval, it was subsequently reformatted complete with the RUF anthem and generous quotes from the head of ideology, Foday Sankoh. "We moved deeper into the comforting bosom of our mother earth—the forest. . . . The forest welcomed us and gave us succor and sustenance." . . . "Why we continue to fight"—these phrases were taken from Mao and Cabral. If the RUF cadres or leadership had actually read Mao and Cabral, however, they would have related to the peasantry in a different manner. . . . There is, I would argue, no revolutionary theory which guided the practice of the movement. If there is any theory, and certainly

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135. *See* Juma, *supra* note 28, at 334 (concluding that the Sierra Leone conflict was not based on ethnicity because of the lack of ethnic claims by the combatants); *see also* Carroll, *supra* note 7, at 167–70 (describing how exiled Tutsis developed the goal of reclaiming their homeland and inflitrated the RUF insurgency movement); BUREAU OF AFRICAN AFF., U.S. DEPT. OF STATE, BACKGROUND NOTE: RWANDA, *available at* http://www.state.gov/r/pa/ei/bgn/2861.htm (last visited Sept. 26, 2005) (providing the basic goals of the RUF and its first major insurgent action).

136. *See* Kufuor, *O.A.U.*, *supra* note 85, at 386 (discussing the initial major actions of the NPFL and its results); *see also* Kofi Oteng Kufuor, *Developments in the Resolution of the Liberian Conflict*, 10 AM. U. J. INT'L L. & POL'Y 373, 375 (1994) [hereinafter Kufuor, *Liberian Conflict*] (describing the actions of NFPL and the role of Charles Taylor); Erin L. Borg, Note, *Sharing the Blame for September Eleventh: The Case for a New Law to Regulate the Activities of American Corporations Abroad*, 20 ARIZ. J. INT'L & COMP. L. 607, 611–12 (2003) (examining the history and effect of NFPL and Charles Taylor).

137. *See* RICHARDS, FIGHTING FOR THE RAIN FOREST, *supra* note 52, at 7–8 (indicating that political leaders interpreted the palm fronds as an ethnic uprising); Paul Richards, *War as Smoke and Mirrors: Sierra Leone 1991-2, 1994-5, 1995-6*, 78 ANTHROPOLOGICAL QUARTERLY 377, 380–82 (2005) [hereinafter Richards, *War as Smoke and Mirrors*] (illustrating the formation of the RUF and its interaction with villagers); Paul Richards, *The Political Economy of Internal Conflict in Sierra Leone* 12 (Neth. Inst. of Int'l. Rel. Clingendael, Working Paper No. 21, 2003), *available at* http://www.clingendael.nl/publications/2003/20030800_cru_working_paper_21.pdf (last visited Oct. 18, 2005) [hereinafter Richards, *The Political Economy of Internal Conflict*] (illustrating the relationship between the RUF and villagers).

138. *See* Nicole Fritz & Alison Smith, *Current Apathy for Coming Anarchy: Building the Special Court for Sierra Leone*, 25 FORDHAM INT'L L.J. 391, 393 (2001) (assessing how RUF's lack of a coherent ideology caused their actions to be viewed as non-mitigating factors); Richards, *War and Peace*, *supra* note 60, at 47 (assessing the radically different aspirations of RUF members); Udombana, *supra* note 25, at 72 (discussing RUF's lack of a widely acknowledged clear political agenda).

> not a revolutionary one, it evolved on an *ad hoc* basis as a result of their experiences in the forest.[139]

The RUF's manifesto acknowledged as much when it admitted that initially it fought a semi-conventional war relying on vehicles for mobility only to find that "this method proved fatal against the combined fire power of Nigeria, Guinea, and Ghana,"[140] whose units, some of which were initially detailed to the ECOMOG intervention in the Liberian conflict, backed the Sierra Leonean government.[141] The rebels went on to admit: "[f]rankly, we were beaten and on the run . . . we dispersed into smaller units . . . we now relied on light weapons and on our feet, brains and knowledge of the countryside."[142] During the course of most of the civil war in Sierra Leone, the RUF never represented a formidable military force in the conventional sense.[143] Even as early as 1991, whenever the Sierra Leonean military and its West African allies managed to seriously defend a strategic position, such as at Daru and Joru, the rebel attack was repulsed.[144] After the counter-offensive operations by government forces in late 1992, the RUF switched tactics to favor guerrilla warfare involving small units making hit-and-run raids, often

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139. *See* Akinrinade, *supra* note 29, at 400 (asserting that the RUF had no publicly known coherent political agenda until the publication of its 1995 propaganda pamphlet); Ibrahim Abdullah, *Bush Path to Destruction: The Origins and Character of the Revolutionary United Front / Sierra Leone*, 36 J. MOD. AFR. STUD. 203, 223–24 (1998) (depicting the RUF's *Footpaths to Democracy: Toward a New Sierra Leone* as a hastily created ideology with phrases copied from Mao and Cabral); *see also* Celina Schocken, Notes and Comments, *The Special Court for Sierra Leone: Overview and Recommendations*, 20 BERKELEY J. INT'L L. 436, 439 n.14 (2002) (stating that *Footpaths to Democracy*, the only political pamphlet ever released by the RUF, contained slogans taken from others, such as Mao and Cabral).

140. *See* Martinez, *supra* note 56, at 233–34 (examining the use of soldiers from Nigeria and Guinea by ECOMOG to settle Sierra Leone's internal conflict); REVOLUTIONARY UNITED FRONT OF SIERRA LEONE, *Footpaths to Democracy: Toward a New Sierra Leone* (1995), *available at* http://www.fas.org/irp/world/para/docs/footpaths.htm (last visited Sept. 15, 2005) (presenting the political ideology of the RUF); *see also* Richards, *War and Peace*, *supra* note 60, at 42 (explaining how RUF evolved into a forest guerilla movement).

141. *See* Murphy, *supra* note 11, at 369 (detailing the role of ECOMOG troops in defeating RUF); Nowrot & Schabacker, *supra* note 89, at 327–28 (describing the extent of Nigerian military aid to the government of Sierra Leone against the RUF); *see also* Vesel, *supra* note 47, at 28–29 (detailing the ECOMOG military role in bringing peace to Sierra Leone).

142. *See* O'Connell, *Interest Meets Humanity*, *supra* note 47, at 221–22 (analyzing the combination of events that led to the defeat of the RUF); *see also* Jennifer L. Heil, Comment, *African Private Security Companies and the Alien Tort Claims Act: Could Multinational Oil and Mining Companies Be Liable?*, 22 NW. J. INT'L L. & BUS. 291, 298–99 (2002) (assessing the use of a private security company to defeat the RUF); Martinez, *supra* note 56, at 234 (realizing the role of the private security company in finally defeating the RUF).

143. *See* Akinrinade, *supra* note 29, at 398–400 (explaining the origins and numbers of the RUF army). *See generally* Juma, *supra* note 28 (describing the small group from which the RUF developed); Forest, *supra* note 100 (examining the recruitment methods used by the RUF).

144. *See* Richards, *War and Peace*, *supra* note 60, at 42 (commenting on RUF's failure to take the main provincial towns of Kenema and Bo in 1991); Martinez, *supra* note 56, at 233–34 (noting that the Sierra Leonean Army and the Economic Community of West African States Ceasefire Monitoring Group (ECOMOG) pushed the RUF back to the Sierra Leone-Liberia border by early 1992); *see also New Fighting Reported on Liberia's Border*, N.Y. TIMES, Sept. 7, 1991, at 8 (reporting that a key border bridge was recaptured from rebel fighters by Sierra Leonean, Nigerian, and Guinean forces).

over long distances using "by-pass" bush paths.[145] RUF units showed themselves to be increasingly adept at camping for long periods in the bush while observing their targets before launching surprise attacks or mounting ambushes.[146] The RUF also used violence to terrorize both opponents and ordinary civilians.[147] One journalist wrote:

> [c]omposed of mostly uneducated . . . the RUF was quickly revealed as an army of murderous thugs rather than justice-seeking rebels. RUF fighters fueled this impression at every opportunity. Field commanders adopted nicknames that both inspired terror and revealed their ruthlessness. Soldiers were named Rambo, Blood Master, Blood Center, What Trouble, and Wicked to Women. Their "tactics" of warfare were unbelievably brutal. Sometimes, after capturing a village, RUF fighters would gather civilian prisoners in the town square and make them choose small strips of paper from the ground that described different forms of torture and death, such as "chop off hands," "chop off head," or simply "be killed." Soldiers would bet with one another about the sex of pregnant women's unborn children. Winners were determined after the baby had been removed from the womb with a bayonet. In one instance, a young boy was beaten and roasted nearly to death on a spit in front of his mother for refusing to kill her.[148]

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145. *See* Richards, *The Political Economy of Internal Conflict*, *supra* note 137 (indicating that the RUF advanced further west into Sierra Leone "through a combination of rumours and hit-and-run raids"); Kenneth B. Noble, *Intensified Liberia War Threatens to Engulf Other African Nations*, N.Y. TIMES, Nov. 15, 1992, at A1 (referring to the rebel's response to the military offensive, which included "punishing air and ground attacks," and terrorizing civilians); *see also* TRUTH & RECONCILIATION COMM'N OF SIERRA LEONE, 3A The Final Report of the Truth & Reconciliation Commission of Sierra Leone 413–14 (2004), *available at* http://www.trcsierraleone.org/pdf/FINAL%20VOLUME%20THREE/VOLUME%203%20A.pdf (last visited Oct. 19, 2005) [hereinafter TRUTH & RECONCILIATION COMMISION OF SIERRA LEONE] (confirming the strategy of the rebel forces to revert to guerrilla warfare, using footpaths and by-passes to surprise and disarm the Sierra Leone Army).

146. *See* Abdullah, *supra* note 139, at 224 (quoting from the RUF document, *Footpaths to Democracy,* describing how the rebels relied on their feet and knowledge of the countryside); *see also* Evenson, *supra* note 76, at 735 (affirming that by 1992, the civilians of Sierra Leone frequently found themselves the target of random rebel attacks); TRUTH & RECONCILIATION COMMISSION OF SIERRA LEONE, *supra* note 145 (detailing how rebels would hide and wait for days, observing and assessing potential dangers, to mount a surprise attack when least expected).

147. *See* O'Connell, *Interest Meets Humanity, supra* note 47, at 213–14 (remarking on the wide-spread decapitating and murdering of more than 100,000 Sierra Leoneans); *see also* Udombana, *supra* note 25, at 73 (asserting that the human rights violations that occurred during Sierra Leone's civil war were unparalleled in the nation's history: it was common for the RUF to cut off arms, legs, lips, ears, and various other body parts of innocent men, women, and children); Hansen-Young, *supra* note 4, at 481 (stressing that the civil war was marked with brutal rebel campaigns, such as arson attacks on homes, looting, raping of thousands of women and children, and one of the bloodiest campaigns, "Operation No Living Thing," during which rebels destroyed or killed anything in their way).

148. *See* CAMPBELL, *supra* note 55, at 71–72 (citing the methods of terror the rebels would use against local villagers); *see* Eaton, *supra* note 60, at 880 (revealing the rebel fighters' torture tactics of decapitating and raping women); *see also* HUMAN RIGHTS WATCH, "WE'LL KILL YOU IF YOU CRY": SEXUAL VIOLENCE IN THE SIERRA LEONE CONFLICT 25–26 (2003), *available at* http://hrw.org/reports/2003/sierraleone/sierleon0103.pdf (last visited Sept. 15, 2005) [hereinafter HUMAN RIGHTS WATCH, WE'LL KILL YOU IF YOU CRY] (documenting the crimes of sexual violence upon female Sierra Leoneans, including rape and sexual slavery).

However, contrary to perceptions fed by sensationalist accounts by some journalists—some were rather surprisingly graphic—the RUF units were kept under strict discipline and the seemingly wanton violence they perpetrated had its own logic,[149] as Ibrahim Abdullah and Patrick Muana noted:

> [c]ommanders were under orders to control rape, looting and drug abuse, and some ruled their potentially unruly lumpen troops with an iron rod of summary execution. The movement's leadership insists it had a well-discipline guerrilla force at its command, and that RUF discipline prevented unsanctioned rape, looting and drug abuse. Abuses are laid at the door of government troops and "sobels." But in many cases it is absolutely clear that commanders sanctioned rape and torture of civilians as a means to control local populations.[150]

Relying on his extensive ethnographic studies of Sierra Leone, however, Paul Richards cautioned against interpreting the violence as "senseless barbarism," much less imputing some sort of "African primitivism" to it, arguing that:

> [w]hereas it is true that the war in Sierra Leone is a terror war, and involves horrifying acts of brutality against defenseless civilians, this sad fact cannot in any way be taken to prove a reversion to some kind of essential African savagery. Terror is *supposed* to unsettle its victims. The confused accounts of terrorized victims of violence do not constitute evidence of the irrationality of violence. Rather they show the opposite—that the tactics have been fully effective in disorientating, traumatizing and demoralizing victims of violence. In short, they are devilishly well-calculated.[151]

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149. *See* Abdullah, *supra* note 139, at 226–27 (providing evidence that leaders within the RUF did not approve of the random violence committed by the RUF fighters); Akinrinade, *supra* note 29, at 399 (suggesting that the RUF had "some semblance of organization"); *see also* Binaifer Nowrojee, *Making the Invisible War Crimes Visible: Post-Conflict Justice for Sierra Leone's Rape Victims*, 18 HARV. HUM. RTS. J. 85, 90 (2005) (referring to the "systematic" method of sexual violence).

150. *See* Ibrahim Abdullah & Patrick Muana, *The Revolutionary United Front of Sierra Leone*, *in* AFRICAN GUERRILLAS 190 (Christopher Clapham ed., Indiana Univ. Press, 1998) (arguing that rapes, looting, and drug use among the rebels were controlled by those commanders in charge); Richards, *The Political Economy of Internal Conflict*, *supra* note 137, at 17 (referring to RUF cadres who, under the influence of drugs, "hacked and amputated their way" through the capital of Freetown); *see also* Corriero, *supra* note 39, at 340 (confirming the lack of discipline over the RUF fighters and the use of drugs and violence to persuade and threaten young children and innocent civilians).

151. *See* RICHARDS, FIGHTING FOR THE RAIN FOREST, *supra* note 52, at xvi, n.7 (warning people not to see the terrorism committed by the rebels as anything less than calculated); Chernor Jalloh & Alhagi Marong, *Ending Impunity: The Case for War Crimes Trials in Liberia*, 1 AFR. J. LEGAL STUD. 53, 56 (2005) (assessing the rebels' use of sexual violence as an "instrument" to show force and intimidate); *see also* Mark Iacono, Note, *The Child Soldiers of Sierra Leone: Are They Accountable for their Actions in War?*, 26 SUFFOLK TRANSNAT'L L. REV. 445, 448–49 (2003) (attributing the RUF's proclaimed notoriety and power to violence and manipulation of young children).

Substantial evidence also suggests that the RUF leadership—although government commanders are hardly innocent on this count—sanctioned the use of narcotics and other drugs in order to "prepare" their forces for battle:

> [i]t is also clear from talking to combatants that both sides in the war tolerated and in some case actually encourage use of drugs like amphetamines and crack cocaine, as ways of preparing terrified young combatants for battle. Combatants on both sides also report having used marijuana extensively. Before major battles RUF fighters were officially "de-sensitized" with a concoction of amphetamines and herbal intoxicant in order to eliminate a sense of fear on the battlefield.[152]

After its setbacks in 1993, while the RUF generally avoided the permanent occupation of towns and other population centers that could prove to be inviting targets for conventional counterattacks, it nonetheless controlled—especially after its resurgence in 1994—large swathes of forests and other isolated territory.[153] There, the RUF established isolated civilian enclaves, guarded by its separately-run military camps, based on the egalitarian "ideology system" outlined by its "head of ideology," Foday Sankoh.[154] Based on his interviews with escapees from these enclaves as well as demobilized former RUF combatants, Paul Richards sketched the picture of a rather distinctive social experiment with few links to outside society not unlike the "killing fields" of Pol Pot's Cambodia:

> [t]hese camps were a forcing ground for egalitarianism . . . [with] a rather distinctive approach to social justice typical of an isolated sectarian organization. . . . It was death to leave the movement. As with many closed sects, the defection of one threatened the solidarity of all. But within the confines of the camps, tribalism was eschewed, religious pluralism was cultivated, age hierarchies were abolished, Krio was the *lingua franca*, cases between members were settled by open group arbitration, and basic items—notably whatever few health and educational resources the movement could command—were distributed to members according to need. . . . Severe punishments

152. *See* CAMPBELL, *supra* note 55, at 80 (describing how RUF soldiers would don women's wigs and smoke marijuana to thoroughly terrorize civilians); Abdullah & Muana, *supra* note 150, at 190 (detailing the drug use among the RUF troops); *see also* Stafford, *supra* note 88, at 121 (discussing the RUF method of cutting the legs of child soldiers and rubbing cocaine on the cuts to promote excessive violence).

153. *See* Richards, *The Political Economy of Internal Conflict*, *supra* note 137, at 14–15 (assessing the movement of the RUF into the bush for a change of military strategy); HUMAN RIGHTS WATCH, WE'LL KILL YOU IF YOU CRY, *supra* note 148 (establishing that by early 1995, the RUF controlled most of Sierra Leone's diamond region); *see also* TRUTH & RECONCILIATION COMMISSION OF SIERRA LEONE, *supra* note 145 (explaining RUF's switch to guerrilla warfare when, late in 1993, they were forced back into the forest and ultimately claimed control).

154. *See* Akinrinade, *supra* note 29, at 399–400 (categorizing battalions within the RUF and their explicit duties within each rank); Richards, *The Political Economy of Internal Conflict*, *supra* note 137, at 27 (detailing how the RUF evolved into an "enclaved" organization, "with very few links to society outside the confines of its highly organised [sic] and strongly defended forest camps"); *see also* Gallagher, *supra* note 28, at 155–56 (explaining that what little ideology Sankoh and the RUF had started fighting with, the RUF had deteriorated into a campaign of violence).

> were levied on those who tried to hide items for personal use or accumulate their own sources of wealth.[155]

During the lead-up to the 1996 election, the RUF "perfected its special contribution to the chamber of war horrors: the chopping of hands of innocent civilians."[156] The rebel movement called for the boycott of the poll and embarked on a campaign of indiscriminate mutilations and amputations to discourage participation in the election by sending the message that those who used their hands to mark a ballot risked losing their limbs altogether.[157] William Shawcross, who monitored the situation on behalf of the International Crisis Group,[158] recalled:

> [h]undreds of Sierra Leoneans had their fingers, hands, arms, noses or lips chopped off with machetes in the cause of democracy. They were being punished either for voting in, or for the mere fact of, the first round of the country's first multi-party elections in more than twenty-five years. The assaults were carried out by men in uniform, often very young men at that. They were teenagers or younger, members of the world's fastest-growing army—children. Among those whom I met in Bo . . . was a man who had had his right ear and his lips slashed off. Someone had carved with a knife the word

155. *See* Richards, *The Political Economy of Internal Conflict*, supra note 137, at 27–28 (detailing the egalitarian world of the RUF); Richards, *War and Peace*, *supra* note 60, at 42–43 (maintaining the secular build of the group, which grew to lethal levels of punishment if anyone refused to follow the group); *see also* TRUTH & RECONCILIATION COMMISSION OF SIERRA LEONE, *supra* note 145 (revealing stories of former RUF soldiers who attended the training camps and who were prohibited from leaving).

156. *See* ROBERTSON, *supra* note 17, at 466 (stating that the RUF was infamous for amputating the arms and hands of potential voters in an attempt to discourage turnout at the polls); *see also* Evenson, *supra* note 76, at 735 (explaining that indigent civilians were the main targets of the RUF); Juma, *supra* note 28, at 342 (expressing that the deeply engrained brutal and merciless nature of the RUF rebels can be traced back to their childhoods, characterized by poverty, drug abuse, and street gambling).

157. *See U.S. Representative Edward Royce (R-CA) Holds Hearing on the Ivory Coast: House Comm. On Int'l Relations: Subcomm. On Africa Holds A Hearing on the Ivory Coast,* 108th Cong. 11 (2003) (statement of U.S. Rep. Edward Royce, Chariman, House Int'l Relations Comm.) (describing how rebels attempted to discourage voter turnout by mutilating children); *Keeping the Terror at Bay: British Soldiers Are Trying to Restore Order to the West African Country of Sierra Leone, Which Has Been in Civil War for Nine Years,* NOTTINGHAM EVENING POST, July 20, 2000, at 6 (stating that the RUF boycotted the polls and terrorized potential voters with random amputations); Miles O'Brien & Ben Wedeman, *In Sierra Leone Voting Not Taken for Granted*, CNN Sunday Morning 07:00 (May 11, 1997) (Transcript #051908CN.V46) (reporting that rebels severed voter's limbs because they did not boycott the 1996 election).

158. *See* INT'L CRISIS GROUP, *About Crisis Group*, http://www.crisisgroup.org/home/index.cfm?id=1086&l=1 (last visited on Sept. 28, 2005) (describing the International Crisis Group); INT'L CRISIS GROUP, *Sierra Leone: A Radical New Strategy*, Apr. 11, 2001, *available at* http://www.crisisgroup.org/home/index.cfm?id=2028&l=1 (last visited on Sept. 28, 2005) (describing journalist and author William Shawcross's opinion on the civil war in Sierra Leone). *See generally* BBC NEWS, *Sierra Leone: The Balance of Forces*, May 10, 2000, *available at* http://news.bbc.co.uk (last visited on Sept. 28, 2005) (asserting William Shawcross's suggestion that foreign mercenaries may be the solution to the violence in Sierra Leone).

> TERROR on his chest and on his back AGAINST THE ELECTION FEBRUARY 26. Some men and women had had their armes hacked off above the elbow; some had lost their hands at the wrist.[159]

The rebel terror campaign had a macabre "logic" to it: Voting in Sierra Leone is normally done by dipping one's thumb in an inkpot and pressing it onto the ballot;[160] so, reasoned the rebel leaders, people without hands cannot vote.[161] In addition, as photojournalist Teun Voeten noted, the RUF "drew extra inspiration from the canvassing slogan of the hated presidential candidate Tejan Kabbah—'The future is in your hands.'"[162] The RUF killed two birds with one stone. "The well-known rebel remark dates from [this] time: 'Go to your president. He will give you new hands.'"[163]

The counterinsurgency efforts by the forces arrayed in support of the Sierra Leonean government—the Sierra Leonean army, the *kamajors* in the Civilian Defense Force, and the regional peacekeepers of ECOMOG—resulted in further human rights abuses, although, as New York-based Human Rights Watch noted, the scale and nature of these abuses "differ[ed] significantly from atrocities carried out by [the RUF], but the abuses [were] often no less hor-

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159. *See* WILLIAM SHAWCROSS, DELIVER US FROM EVIL: PEACEKEEPERS, WARLORDS, AND A WORLD OF ENDLESS CONFLICT 193 (2000) (detailing some of the atrocities suffered by voters during Sierra Leone's first multi-party elections); *Sharing Sovereignty: New Institutions for Collapsed and Failing States International Security,* THE CTR. FOR STRATEGIC INT'L STUDIES MASS. INST. OF TECH., Fall 2004, at 85 (emphasizing that the RUF was notorious for severing the limbs of its victims); Leon Burton Davies, *Weekend: Getting By: In 1999, the Photographer Stuart Freedman Visited Strife-Torn Sierra Leone. His Aim? To Record the Impact of a Civil War that Left Thousands Butchered, their Arms or Feet Cut off with Machetes. This Year, He Went Back to Find the Victims Not Bitter, Just Getting on with Life*, GUARDIAN (LONDON)-FINAL EDITION, Aug. 14, 2004, at 28 (describing how children were often forced to amputate arms and hands).

160. *See* O'Brien & Wedeman, *supra* note 157 (describing how an ink-dipped toe was sufficient to mark ballots in the wake of hand amputations); *Portraits of the South: Stories of Development*, CAN. WORLD BACKGROUNDER, May 2000, at 3 (establishing that those who voted had their fingers marked with ink); *Sierra Leone Holds First Postwar Elections Turnout High as Voters Test Hard-Won Peace*, SEATTLE TIMES, May 15, 2002, at A10 (indicating that some voters marked their ballots by dipping their toes in ink).

161. *See* Francis Gibb, *On Trial in Sierra Leone: A New Kind of International Remedy for an Old Bloody Problem,* TIMES (UK), Mar. 30, 2004, at 6 (noting that rebels chopped off the hands of civilians who had cast electoral votes); Lizza, *supra* note 67, at 22 (describing how almost two-thirds of the eligible population cast ballots despite the rampant amputations); Willow Bay & Jim Clancy, *Cry Freetown*, CNN NEWSSTAND 22:00 (Feb. 17, 2000) (Transcript #00021700V01) (discussing how rebels cut off the arms and hands of voters in a symbolic attempt to prevent them from casting ballots).

162. *See* Lindsay Clydesdale, *Red Nose from Lindsay Clydesdale in Sierra Leone,* DAILY RECORD (Glasgow, Scotland), Feb. 19, 2005, at 35 (observing that rebels cut off the hands of civilians in response to the 1996 campaign slogan, "The future is in your hands."); Ginger Livingston, *Sierra Leone Refugees Plea for Humanitarian Assistance*, COX NEWS SERVICE (N. Carolina), Sept. 24, 2000 (characterizing the government's campaign slogan as "give a hand"); Rose Spinelli, *Charles Taylor: Personal Snapshot of Horror,* CHI. TRIB., Aug. 17, 2003, at 1 (explaining that Taylor's response to the government's campaign slogan was the amputation of hands, fingers, legs, lips, and noses).

163. *See* VOETEN, *supra* note 119, at 169 (commenting on rebels' violent response to the government's campaign slogan); Dean E. Murphy, *W. African Rebels on Mutilating Rampage: Hundreds Have Lost Limbs and Loved Ones During Conflict in Sierra Leone*, L.A. TIMES, Mar. 14, 1999, at A1 (reporting that rebel soldiers told voters to "Go ask Tejan Kabbah for a hand" after severing their victims' arms); *Small Miracle in Sierra Leone*, TIMES-PICAYUNE (New Orleans), May 14, 2002, at 6 (discussing how rebels told an amputee to go ask his President for a new arm).

rific."[164] In addition to decapitating captured rebels and cannibalizing their organs—particularly the heart and liver[165]—the *kamajors* were also implicated in the abuse of suspected rebel sympathizers in conjunction with or under the direction of government officials.[166] One prominent Freetown businessman, identified only as "Chief K" by the foreign journalists who interviewed him, was abducted by the rebels and kept prisoner for over a year before he escaped during a government counteroffensive.[167] Accused of being one of Sankoh's financiers, the man's agony had only began:

> [The pro-government fighters] subjected him to the most brutal interrogations and torture. They bound him naked with ropes to a thorny tree for days on end, leaving him prey to insects and exposed to the elements. They stabbed him in the chest with a bayonet. He kept the wound clean himself with sand and herbs. "I couldn't believe how mean they were," says Chief K. There followed five days of continual flogging, without food or water, forced to drink other prisoners' urine to stay alive. Then he was transferred to Bo. There, they threw him into a cell with a group of other people, tossing in a tear gas grenade after them. Two fellow prisoners choked to death; Chief K survived by lying flat on the ground and breathing through a damp cloth.
>
> Chief K was lucky he had been a rich man and had powerful friends. His wife secured his freedom through the intervention of Western ambassadors and the International Red Cross, but only after he had spent four months in various prison cells in Freetown. "The government troops treated me worse

164. *See* Juma, *supra* note 28, at 363–64 (discussing the atrocities committed by ECOMOG and members of the Civilian Defense Force); HUMAN RIGHTS WATCH WORLD REPORT OF 1999—SIERRA LEONE, *supra* note 77 (specifying the human rights atrocities committed by ECOMOG forces and members of the Civilian Defense Forces); HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH WORLD REPORT OF 1998 – SIERRA LEONE, *available at* http://www.hrw.org/reports98/sierra/Sier988-03.htm#P272_46769 (last visited Oct. 15, 2005) (asserting that the abuses committed by the Kamajors, although different, were no less brutal than those carried out by the RUF).

165. *See* Juma, *supra* note 28, at 363–64 (suggesting that ECOMOG officials were aware of these random killings); Tracey Michelle Price, *The Kimberley Process: Conflict Diamonds, W.T.O. Obligations, and the University Debate*, 12 MINN. J. GLOBAL TRADE 1, 32 (2003) (acknowledging the existence of cannibalistic gangs in Sierra Leone); *Sierra Leone: Truth And Reconciliation Report*, AFR. NEWS, Oct. 31, 2004 (declaring forced cannibalism as a ritual of the kamajor militia).

166. *See* Juma, *supra* note 28, at 363 (claiming that ECOMOG was to blame for gross human rights violations); *Sierra Leone: The 90s: A Decade of Decadence (Final Part)*, AFR. NEWS, Jan. 3, 2000 (noting that the kamajor civil militia's involvement in Sierra Leone violated the agreed-upon cease fire); HUMAN RIGHTS WATCH WORLD REPORT OF 1999—SIERRA LEONE, *supra* note 77 (suggesting that government officials were aware of human rights violations in Sierra Leone).

167. *See* Juma, *supra* note 28, at 363 (detailing how civilians were brutally attacked and abducted); George Kay Kieh Jr., *Irregular Warfare and Liberia's First Civil War,* 11 J. INT'L & AREA STUD. 57, 57 (2004) (describing how the Taylor regime harassed, intimidated and imprisoned its enemies); *State Department Issues Background Note on Guinea,* U.S. FED. NEWS (HT Syndication), Aug. 1, 2005, at 1 (finding that thousands were imprisoned in Soviet-style prison gulags, where hundreds perished).

> than the RUF. As long as the rebels were not under the influence of drugs, you could get along with them," says Chief K.[168]

The CDF also recruited child soldiers for many of the same reasons that the RUF forces did: Children are more easily indoctrinated, have fewer scruples about committing atrocities themselves, and can be sent into battle almost recklessly.[169]

One of the most salient features of the Sierra Leonean conflict was, in fact, the widespread use of child soldiers which, retrospectively, contributed to the recognition by customary international law of their recruitment as a war crime entailing personal responsibility, as enshrined in the Rome Statute.[170] While child combatants have been used in conflicts in various parts of the world, a disproportionate number of these cases have been in African countries.[171] While the RUF was the first to use child combatants, the Sierra Leonean government likewise resorted to underaged soldiers during the military regime of Valentine Strasser, when the SLA expanded not only to include children, but also a large number of unemployed urban youths who were drafted into the military.[172] While estimates vary considerably, one reputable study, widely used as a benchmark, estimated that "half of all combatants in the RUF/SL [were] in the age range

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168. *See* VOETEN, *supra* note 119, at 261–62 (reflecting on the various methods of torture used by both the rebels and the government during the Civil War in Sierra Leone); Van Dyke, *Prosecution and Compensation*, *supra* note 97, at 79 (describing the horrific atrocities carried out by government troops in Sierra Leone); *see also* Thierry Cruvellier, *Truth Report Spares No Parties*, INT'L JUST. TRIB., Oct. 18, 2004, at 3 (reporting on the drug use by RUF soldiers and the torture inflicted by soldiers of the CDF in Sierra Leone).

169. *See U.S. Policy in Sierra Leone, Testimony Before the Subcomm. on African Affairs of the S. Foreign Relations Comm.*, Federal Document Clearing House Transcript, Oct. 11, 2000 (testimony of Adotei Akwei, Africa Advocacy Director, Amnesty International U.S.A.) (detailing the use of child soldiers by CDF); *see also* Elliot P. Skinner, *Child Soldiers in Africa: A Disaster for Future Families*, INT'L J. PROFESSORS WORLD PEACE ACAD. WORLD PEACE, June 1, 1999, at 7 (pondering the attractiveness of fighting to child soldiers in Sierra Leone); Schocken, *supra* note 139, at 449 (highlighting the method of education that led to the variety of tortures that were committed by child soldiers fighting for the CDF, and the rise to leadership positions within the army).

170. *See* Rome Statute, *supra* note 11 (codifying a list of crimes of these children that would be prosecuted under international law); *see also Special Court for Sierra Leone: Prosecutor v. Sam Hinga Norman*, 43 I.L.M. 1129, 1136 (2004) (regarding the recruiters of child soldiers as war criminals and their status as a part of customary international law); The Secretary General, *Report of the Secretary General on the establishment of the Special Court for Sierra Leone*, ¶ 17, *delivered to the Security Council and the General Assembly*, U.N. Doc. S/2000/915 (Oct. 4, 2004) (discussing the Special Court's capacity regarding the relatively new area of criminals who have recruited child soldiers for war crimes).

171. *See* Jo de Berry, *Child Soldiers and the Convention on the Rights of the Child*, 575 ANNALS AM. ACAD. POL. & SOC. SCI. 92, 93 (2001) (commenting on the propensity of African nations to use child soldiers in their conflicts by providing them with comparable protection); *see also* Hall & Kazemi, *supra* note 25, at 297 (remarking on the widespread use of child soldiers in Africa); Tunde Zack-Williams, *The Forgotten Realities of Contemporary African Conflict*, 5 NEW POL. ECON. 116, 118 (2000) (comparing the various African conflicts and finding similarities in the compilation of their armies).

172. *See* Melissa Leach, *New Shapes to Shift: War Parks and the Hunting Person in Modern West Africa*, J. ROYAL ANTHROPOLOGICAL INST, Dec. 1, 2000, at 577 (addressing the government's implementation of rebellious young civilians in their military); *see also* Bald, *supra* note 80, at 554 (reviewing the government's use of the poor and dejected urban population of Sierra Leone as soldiers); Gallagher, *supra* note 28, at 156 (examining the government of Sierra Leone and its use of criminals and disaffected youth in their armies).

of 8-14 years," while "there [were] also significant numbers of under-18 combatants in army irregular units and the *kamajor* militia."[173]

Observers noted that "the trend to[wards] more youthful combatants . . . reflect[ed] the discovery that children—their social support disrupted by war—make brave and loyal fighters."[174] As a result, the conscription of children by the RUF:

> constitute[d] a viable fighting force and suggest a credible "popular uprising" against the APC. Conscripts were tattooed for military identification, and, perhaps intentionally, to discourage escape. The tattoos served to identify RUF deserters to the [SLA]. Some [government troops] unwittingly consolidated RUF membership by summary executions of rebel suspects. Conscripts were also snared by enforced participation in RUF Renamo-style atrocities against local leaders; youngsters were deterred from returning to their villages for fear of revenge.[175]

As a result, thousands of children were abducted in raids on rural villages by the RUF, while others were conscripted into CDF groups.[176] Once recruited, the child soldiers, given their background, easily fell into the violent designs of their abductors.[177] In fact, they were

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173. *See* Krijn Peters & Paul Richards, *"Why We Fight": Voices of Youth Combatants in Sierra Leone*, 68 AFR. 183, 186 (1998) (describing on the various age groups that participated in Sierra Leone's civil war); *see also Sierra Leone: Child Soldiers Released; Other Development*, WORLD NEWS DIG., May 25, 2001, at 442C2 (noting that the majority of RUF combatants were between ages of 10 and 15); *U.N. to Send Observers, Soldiers to Sierra Leone*, XINHUA NEWS AGENCY, Jan. 30, 1997 (revealing that the RUF mainly consisted of youths between ages of 8 and 14).

174. *See* Peters & Richards, *supra* note 173, at 186 (theorizing on the major role that children play in African conflicts); *see also* Skinner, *supra* note 169, at 7 (suggesting that children were proven to join armies, viewing it as a safe haven against a warzone); CHILDREN IN EXTREME SITUATIONS: PROCEEDINGS FROM THE 1998 ALISTAIR BERKLEY MEMORIAL LECTURE 9, *available at* http://www.lse.ac.uk/collections/DESTIN/pdf/WP05.PDF (last visited Sept. 12, 2005) (concluding that the number of children forced to become soldiers is increasing, as is the violence of their actions).

175. *See* RICHARDS, FIGHTING FOR THE RAIN FOREST, *supra* note 52, at 5 (analyzing the RUF and its role during the war in Sierra Leone); *see also* Remy Ourdan, *Africa's Small Soldiers*, FOREIGN POL'Y, May 1, 2001, at 74 (book review) (rationalizing child soldiers' fears of returning home due to the request of their army capturers who force them to attack their own villages and families); U.N. INTEGRATED REGIONAL INFORMATION NETWORK, *Sierra Leone; Plastic Surgeons to Remove Children's Scars*, AFR. NEWS, June 23, 2001 (announcing the use of plastic surgeons to remove the initials of RUF and CDF on children in Sierra Leone).

176. *See* Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?* 95 AM. J. INT'L L. 7, 28 (2001) [hereinafter Akhavan, *Beyond Impunity*] (outlining RUF strategies of abducting children to fight for them); *see also* Schocken, supra *note* 139, at 449 (indicating that the tactics of both the RUF and CDF involved abducting children); *Liberia; Nigeria Faces U.N. Sanction Over Charles Taylor*, AFR. NEWS, Mar. 24, 2005 (reiterating that the RUF resorted to abductions in order to fill their armies).

177. *See* Bald, *supra* note 80, at 554 (analyzing the culture of African children, surrounded by war, that causes them to serve as soldiers voluntarily); *see also* Schocken, *supra* note 139, at 449 (emphasizing the active role that children took during the conflict in Sierra Leone); Edward Barnes, *The Kalashnikov Kids; The Russians are Coming . . . and Boy Are They Cute. Inside the Children's Brigade*, LIFE, July, 1999, at 92 (speaking to the ease with which children joined in battle as members of the army).

often the most violent actors in the civil conflict.[178] As David Keen of the London School of Economics noted in his study of civil wars:

> [f]ar from being random or meaningless, abuse by both government and RUF forces in Sierra Leone can be explained as reflecting the deep resentment of young men denied a substantial role or status in their communities. Teenage fighters repeatedly humiliated chiefs and local "big men."[179]

As Geoffrey Robinson noted, before he was appointed to the Special Court, the phenomenon of the child soldier is "the most difficult ethical question"[180] facing the legal system in the Sierra Leonean conflict's aftermath since "many of the worst mutilations were committed by brutal and aggressive 16- and 17-year-olds, and the populace demanded that they be punished"[181] even though many regard the youths as victims themselves.[182]

II. Establishing the Special Court

A. From Amnesty to Justice

The Lomé Peace Agreement had stipulated that a Truth and Reconciliation Commission would be established "to address impunity, break the cycle of violence, provide a forum for both the victims and perpetrators of human rights violations to tell their story, get a clear pic-

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178. *See* Ilene Cohn, *Progress and Hurdles on the Road to Preventing the Use of Children as Soldiers and Ensuring Their Rehabilitation and Reintegration*, 37 CORNELL INT'L L.J. 531, 539 (2004) (citing the Special Court's grapple with the issue of prosecuting child soldiers, who committed some of the most terrible abuses); *see also* Peters & Richards, *supra* note 173, at 186 (affirming that it is children who fought with the most skill, who perpetrated some of the most violent crimes); Iacono, *supra* note 151, at 448 (claiming that the world has yet to realize the vicious actions taken by child soldiers).

179. *See* DAVID KEEN, THE ECONOMIC FUNCTIONS OF VIOLENCE IN CIVIL WARS 48 (1998) (hypothesizing that although the civil war and torture of civilians in Sierra Leone initially appeared meaningless, the repression of the rights of the young converted them to rebels); *see also* Corriero, *supra* note 39, at 340 (asserting that one of the goals of warfare was humiliation); Corinna Schuler, *Helping Children Warriors Regain Their Humanity*, CHRISTIAN SCI. MONITOR, Oct. 20, 1999, at 1 (expressing that children's frustrations with authority caused them to lash out through violence).

180. *See* ROBERTSON, *supra* note 17, at 468 (theorizing on the ethical problems of prosecuting child soldiers); *see also* Iacono, *supra* note 151, at 448 (enumerating on the United Nations problematic quest to charge child soldiers with war crimes); *Around the World,* DALLAS MORNING NEWS, Oct. 6, 2000, at 31A (assessing the United Nations' struggle with the issue of prosecuting child soldiers and the opposition by various organizations).

181. *See* ROBERTSON, *supra* note 17, at 469 (comparing the desire to defend child soldiers, who are victims, with the desire to defend the victims of child soldiers); *see also* Alison Dundes Renteln, *The Child Soldier: The Challenge of Enforcing International Standards*, 21 WHITTIER L. REV. 191, 199 (1999) (commenting on the positive reaction of local civilians to prosecuting child soldiers); Schocken, *supra* note 139, at 449 (discussing the domestic sentiment in support of trying juveniles).

182. *See* Bald, *supra* note 80, at 578 (focusing on the reluctance by children to testify as victims because of their dual role as soldiers); *see also* Iacono, *supra* note 151, at 448 (maintaining that the children of Sierra Leone are indeed victims); *Thousands of Sierra Leone Civilians Held Hostage*, XINHUA NEWS AGENCY, Mar. 8, 1998 (referring to UNICEF's attempt to help the children of Sierra Leone who were soldiers, but also victims).

ture of the past in order to facilitate genuine healing and reconciliation."[183] Although the Sierra Leonean parliament ratified the peace accord on July 15, 1999, it was not until February 22, 2000, that it adopted legislation establishing the commission to:

> create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone, from the beginning of the Conflict in 1991 to the signing of the Lomé Peace Agreement; to address impunity, to respond to the needs of the victims, to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered.[184]

The renewed fighting in early 2000, however, not only stalled the actual establishment of the TRC, but revived the debate over the much-criticized amnesty provisions of the Lomé accord[185] and forced both the Sierra Leonean government and the sponsors of the peace agreement to rethink their options, opening the way to a different approach, albeit one which does not necessarily preclude the work of the TRC.[186]

On August 9, 2000, Ambassador Ibrahim M. Kamara, the permanent representative of Sierra Leone to the United Nations, delivered to the President of the Security Council a letter, dated June 12, 2000, from Ahmad Tejan Kabbah in which the Sierra Leonean president requested that the international body "initiate a process whereby the United Nations would resolve on setting up a special court for Sierra Leone" to "try and bring to credible justice those members of the Revolutionary United Front (RUF) and their accomplices responsible for com-

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183. *See* Lomé Agreement, *supra* note 79 (emphasizing the goal of national reconciliation); Fritz & Smith, *supra* note 138, at 421 (quoting Article XXVI of the Lomé Accord, which states how the TRC will facilitate reconciliation); Schabas, *Sierra Leone Truth*, *supra* note 107, at 150 (citing Article XXVI of the Lomé Agreement).

184. *See* Truth and Reconciliation Commission Act of 2000, Art. 6, para. 1, *available at* http://www.sierra-leone.org/trcact2000.html (last visited Oct. 14, 2005) (providing for the establishment of the Truth and Reconciliation Commission in connection with Article XXVI of the Lomé Peace Agreement); *see also* Truth and Reconciliation Commission Act of 2000, Memorandum of Objects and Reasons, *available at* http://www.sierra-leone.org/trcact2000.html (last visited Oct. 14, 2005) (illustrating that the function of the Truth and Reconciliation Commission was to heal the wounds from the armed conflict of 1991); Schabas, *Sierra Leone Truth, supra* note 107, at 151 (recognizing that the 90-day deadline to establish the Commission proved too ambitious and that the Truth and Reconciliation Commission Act was not enacted until 2000).

185. *See* Solomon Berewa, *Addressing Impunity Using Divergent Approaches: The Truth and Reconciliation Commission and the Special Court*, *in* TRUTH AND RECONCILIATION IN SIERRA LEONE 55–56 (2001) (admitting that the amnesty provisions faced strong reservations); *see also* Benjamin Mason Meier, *International Criminal Prosecution of Physicians: A Critique of Professors Annas and Grodin's Proposed International Medical Tribunal*, 30 AM. SOC'Y L. MED. & ETHICS B.U. SCH. L. 419, 447 (2004) (describing the difficulties in setting up an international criminal tribunal for Sierra Leone). *See generally* Corinna Schuler, *A Wrenching Peace: Sierra Leone's "See No Evil" Pact*, CHRISTIAN SCIENCE MONITOR, Sept. 15, 1999 (claiming that the war crimes committed by RUF were more ruthless than those committed by Serbian leaders in the Balkans, and criticizing the developed world for ignoring the war in Sierra Leone).

186. *See* Evenson, *supra* note 76, at 739 ("[The] U.N.'s reservation to the amnesty provisions opened a door into a future for Sierra Leone where the truth commission and criminal prosecutions could proceed side-by-side."); William A. Schabas, *The Relationship Between Truth Commissions and International Courts: The Case of Sierra Leone*, 25 HUM. RTS. Q. 1035, 1036–37 (2003) [hereinafter Schabas, *The Case of Sierra Leone*] (claiming that renewed fighting in 2000 forced the government of Sierra Leone to reassess its position with regard to the amnesty); Schabas, *Sierra Leone Truth*, *supra* note 107, at 153 (acknowledging that the renewed fighting in early 2000 caused the government to reassess its position on the amnesty).

mitting crimes against the people of Sierra Leone and for the taking of United Nations peacekeepers as hostages."[187] Citing the precedents of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), the gaps in Sierra Leonean law that failed to encompass some crimes against humanity and other human rights abuses,[188] as well as the collapse of the judicial system in Sierra Leone wrought by the conflict,[189] Kabbah invited the Security Council to dispatch a fact-finding delegation to assess the situation and enclosed a suggested framework for the eventual tribunal.[190] Solomon Berewa, at that time attorney-general and minister of justice in Kabbah's cabinet, explained his government's changed prise de position in terms of force majeur at the time of the Lomé Peace Agreement:

> 1. After the atrocities of 6 January 1999, what every Sierra Leonean wanted most was peace and reconciliation. If, as we had hoped, we had achieved sustainable peace as a result of the Lomé Agreement, Sierra Leoneans would have grudgingly settled for this and gone about mending their shattered lives.[191]
> 2. We needed a Peace Agreement with the RUF, which alone would have enabled the international community to come here as they have now done and to do things they are now doing.[192]

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187. Letter from the Permanent Representative of Sierra Leone to the United Nations to the President of the Sec. Council, U.N. Doc. S/2000/786 (Aug. 9, 2000) (transmitting Kabbah's June 12, 2000, letter regarding the creation of a special court); *see also* Fritz & Smith, *supra* note 138, at 400 (discussing the nature of the request sent by Kabbah to the U.N. Secretary-General); Juma, *supra* note 28, at 368–69 (emphasizing that it was Kabbah's June 2000 letter which ignited the U.N. process).

188. *See* Eaton, *supra* note 60, at 880–81 (noting that, under Article 27 of the Sierra Leone Constitution, unequal treatment of women is not illegal with regard to certain issues); Gallagher, *supra* note 28, at 197 (explaining that amnesty is legal under international law); *see also The United Nations and Humanitarian Intervention: Building Legitimacy By Confronting Our Past–An Open Letter*, 16 FLA. J. INT'L L. 483, 501–02 (2004) (declaring that the peace agreement was flawed).

189. *See* Fritz & Smith, *supra* note 138, at 406 (commenting that the judicial system in Sierra Leone had collapsed during the prolonged conflict); *see also* Tejan-Cole, *supra* note 70, at 145 (remarking that war has destroyed the Sierra Leonean judicial system); Webster, *supra* note 39, at 773 (claiming that civil war has "decimated" the Sierra Leonean judicial system).

190. *See* James Cockayne, *The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals*, 28 FORDHAM INT'L L.J. 616, 680 n.6 (2005) (reiterating that Kabbah wanted a tribunal established to try those who had committed crimes during Sierra's period of civil war); *see also* Eric Pape, *Cleaning House: Sierra Leone's War Crimes Tribunal Defied History by Going After the Victors, Not Just the Losers, in the Country's Civil War. Rebuilders of Iraq are Taking Notice*, LEGAL AFF., Sept./Oct. 2003, at 69 (revealing that Kabbah requested a court that would prosecute rebel leaders, but that the Security Council ultimately decided the court should try those "most responsible" for atrocities, regardless of their political or military status); Schabas, *Sierra Leone Truth*, *supra* note 107, at 153 ("[T]he purpose of [the tribunal] is to try and bring credible justice . . . ").

191. *See* Berewa, *supra* note 185 (describing the environment within which the terms of the Lomé Peace Agreement were settled); Udombana, *supra* note 25, at 81 (admitting the shortcomings of the Lomé Agreement). *See generally* Akhavan, *Beyond Impunity*, *supra* note 176 (detailing the atrocities committed by the RUF).

192. *See* Berewa, *supra* note 185 (reiterating the precarious circumstances surrounding the formation of the Lomé Peace Agreement); *see also* Forest, *supra* note 100, at 640 (explaining how RUF control over Sierra Leone's diamond mines gave the group both economic and political clout); Zarifis, *supra* note 131, at 18 (admitting that several U.N.-brokered attempts at peace during the mid-1990s failed to end the fighting between the RUF and the Sierra Leonean government).

> 3. We needed to have an agreement with the RUF on having a permanent cessation of hostilities. The need for a Peace Agreement at the time became obvious from the panicky reaction of Sierra Leoneans to a threat issued in Lomé by Corporal Foday Sankoh that he would call off the talks. I had to make a radio broadcast from Lomé to assure the Sierra Leone public that there was every probability that the Peace Agreement would be concluded.[193]
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> 4. Most importantly, the RUF would have refused to sign the Agreement if the Government of Sierra Leone had insisted on including in it a provision for judicial action against the RUF and had excluded the amnesty provision from the Agreement.[194]

In response to Kabbah's request, the Security Council adopted Resolution 1315 on August 14, 2000, authorizing the Secretary-General to negotiate an agreement with the government of Sierra Leone to create a special tribunal to try "crimes against humanity, war crimes and other serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law."[195] Consequently, a team led by Assistant Secretary-General for Legal Affairs Ralph Zacklin visited Freetown from September 18 to 20.[196] On October 4, Secretary-General Kofi Annan presented the Security Council with a report containing proposals for setting up the court, including a draft agreement between the UN and the Sierra Leonean government and a draft statute for the Tribunal.[197] Thereafter, although some of those slated for trial by the even-

193. *See* Berewa, *supra* note 185 (revealing that many Sierra Leoneans doubted the Peace Agreement would be successful); *see also* Amann, *supra* note 104, at 240 (explaining that the Peace Agreement actually rewarded Sankoh); Macaluso, *supra* note 76, at 356–57 (remarking that the Agreement "transformed the RUF into a political party [and] gave Foday Sankoh . . . expansive privileges . . .").

194. *See* Berewa, *supra* note 185 (showing that the Agreement itself did not provide a means of accountability); *see also* Gallagher, *supra* note 28, at 197 ("[F]aced with continued carnage or amnesty and peace," Sierra Leone's choice of amnesty "was understandable."); Macaluso, *supra* note 76, at 359 ("Amnesties are an important tool of negotiations during a post-conflict society . . . the importance of amnesty in helping resolve conflict should not be discounted.").

195. *See* S.C. Res. ¶ 1315, U.N. SCOR, 4186th mtg. at 2, U.N. Doc. S/RES/1315 (2000) ("[T]he special court should have personal jurisdiction over persons who bear the greatest responsibility for the commission of the crimes referred to . . . ."); *see also* Akhavan, *Beyond Impunity*, *supra* note 176, at 28 (recognizing that Kabbah's request was endorsed on the understanding that the amnesty provisions of the [Lomé] Agreement would not apply to international crimes); John Cerone, *The Special Court for Sierra Leone: Establishing A New Approach to International Criminal Justice*, 8 ILSA J. INT'L & COMP. L. 379, 380–81 (2002) (detailing Resolution 1315's most important features).

196. *See* Hans Corell, *Seeking Justice Around the World*, 23 NAT'L L.J. 9, B1 (confirming that Ralph Zacklin visited Freetown in September 2000 to complete negotiations with the Sierra Leone government for a special court); Webster, *supra* note 39, at 748 (revealing what was accomplished when the U.N. team visited Sierra Leone from September 18-20, 2000); *see also* Press Briefing with Hirut Befecadu, UNAMSIL Spokesman, and Lt. Commander Patrick Coker, Military Spokesman (Sept. 18, 2000), *available at* http://www.un.org/Depts/dpko/unamsil/DB/DB180900.htm (last visited Sept. 13, 2005) (emphasizing that the purpose of the trip was for the members to consult with the Sierra Leone government about establishing the court).

197. *See* U.N. DOC. S/2000/915, *supra* note 170, at ¶ 1 ("A credible system of justice for the serious crimes committed in Sierra Leone would end impunity and contribute to the process of national reconciliation."); *see also* Macaluso, *supra* note 76, at 352–53 (illustrating that the draft statute is more flexible than that of the Peace Agreement); Webster, *supra* note 39, at 748 (acknowledging that the Secretary-General wanted the Special Court to have "concurrent jurisdiction with and primacy over Sierra Leonean courts").

tual court were already in custody, various events diverted the world's attention and prevented any action on the proposals until the end of 2001 when, in a letter dated December 26, Annan informed the Security Council that he was authorizing the commencement of operations for the Special Court for Sierra Leone (SCSL), beginning with the dispatch of a planning mission to the West African country.[198] During a 12-day tour of the war-torn country in January 2002, the new UN delegation was joined by Under-Secretary-General for Legal Affairs Hans Corell who, on behalf of the United Nations, signed an agreement with the government of Sierra Leone, represented by Solomon Berewa, on January 16, formally establishing the SCSL.[199] The agreement was essentially the one contained in the Secretary-General's October 2000 report, albeit with several notable amendments, including the abandonment of two trial chambers in favor of one.[200] Annan communicated the agreement, along with the Statute of the Special Court, to the Security Council on March 6, 2002.[201] Meanwhile, the implementing legislation for the tribunal was passed by the Sierra Leonean parliament on March 19, and signed into law by President Kabbah on March 29.[202]

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198. *See* Letter, United Nations Security Council, *Letter dated 6 March 2002 from the Secretary-General addressed to the President of the Security Council*, U.N. DOC. S/2002/246 (Mar. 8, 2002) (indicating that upon return of the planning mission, the Secretary-General would report to the Security Council on its recommendations on the organization and operation of the SCSL); *see also* Letter, United Nations Security Council, *Letter dated 26 December 2001 from the Secretary-General to the President of the Security Council*, U.N. DOC. S/2001/1320 (Dec. 28, 2001) (stressing that the purpose of the planning mission "[would] be to discuss with the Government of Sierra Leone the practical arrangements for the establishment and operation of the Court . . ."); Schabas, *The Case of Sierra Leone*, *supra* note 186, at 1037 (noting that the TRC "took some time to materialize").

199. *See* Tejan-Cole, *supra* note 70, at 143 (providing that Hans Corell and Solomon Berwa signed an agreement establishing the Special Court for Sierra Leone after a Security Council endorsement); *see also* JEFFERY L. DUNOFF ET AL., INTERNATIONAL LAW: NORMS, ACTORS, PROCESS, 604 (2002) (stating that the United Nations and the Government of Sierra Leone signed an agreement to establish the Special Court for Sierra Leone on January 16); *U.N. and Sierra Leone Agree to Set Up War Crimes Tribunal*, INT'L L. UPDATE (Transnat'l Law Associates, LLC), Jan. 2002 (indicating that the Government of Sierra Leone and the United Nations entered into an agreement on January 16 to create the Special Court for Sierra Leone).

200. *See* Daphna Shraga, *The Second Generation U.N.-Based Tribunals: A Diversity of Mixed Jurisdictions*, *in* INTERNATIONALIZED CRIMINAL COURTS 15, 29 (2004) (stating that the Special Court for Sierra Leone is composed of one trial chamber). *Compare* U.N.-Sierra Leone Agreement, *supra* note 22 (establishing that the SCSL will be composed of one trial chamber) *with* U.N. DOC. S/2000/915, *supra* note 170, at ¶ 39 (defining the Special Court for Sierra Leone as containing two trial chambers).

201. *See* Evenson, *supra* note 76, at 730, n.66 (citing the Agreement annexed to the letter dated March 6, 2002); *see also* Marco Simons, *The Emergence of a Norm Against Arbitrary Forced Relocation*, 34 COLUM. HUM. RTS. L. REV. 95, 131 n.173 (2002) (mentioning that the Statute of the Special Court of Sierra Leone was included in the Agreement dated March 6, 2002). *See generally* U.N. DOC. S/2002/246, *supra* note 198 (presenting the Statute of the Special Court for Sierra Leone to the Security Council).

202. *See* Geoffrey Robertson, *Powerful Enough to Bring Justice: Setting up the Special Court for Sierra Leone*, U.N. CHRON., Dec. 1, 2003, at 74, *available at* 2003 WLNR 11017844 [hereinafter Robertson, *Powerful Enough to Bring Justice*] (indicating that the government of Sierra Leone ratified the Special Court Agreement in March 2002); *see also* Alison Smith, *Sierra Leone: The Intersection of Law, Policy, and Practice*, *in* INTERNATIONALIZED CRIMINAL COURTS AND TRIBUNALS 125, 125 n.1 (Cesare P. R. Romona et al. eds., 2004) (reporting that the Parliament of Sierra Leone passed the Ratification Bill on 19 March 2002 and the President Kabbah assented to the Bill on 29 March 2002); HUM. RTS. WATCH: WORLD REPORT 2003: EVENTS OF 2002 67, 69 (2003) (stating that the Sierrra Leonean Parliament passed an act in March 2002 to codify an earlier agreement between the United Nations and the Government of Sierra Leone).

B. The Legal Basis for the SCSL

While copious references were made to the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda during the discussions leading to the establishment of the SCSL, there are notable differences between the bodies.[203] The former two tribunals are subsidiary organs of the United Nations, having been established by resolutions of the Security Council under its Chapter VII powers.[204] The SCSL, while endorsed by Security Council Resolution 1315, was, according to Corell, "different from earlier *ad hoc* courts in the sense that it is not being imposed upon a state.[205] It is being established on the basis of an agreement between the United Nations and Sierra Leone—at the request of the Government of Sierra Leone."[206] As a result, the SCSL is, like the ICC, a treaty-based court and, most significantly, represents the first time that a court has been established on the basis of an agreement between the U.N. and a member state.[207]

One effect of this unique status is that, unlike the ICTY and the ICTR which have primacy over national courts, the SCSL will have concurrent jurisdiction with Sierra Leonean

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203. *See Jacobson, supra* note 2, at 221 (explaining that the Special Court for Sierra Leone was established in a process that differed from the Yugoslav and Rwandan tribunals); *see also* Schocken, *supra* note 139, at 443–44 (asserting that the Special Court for Sierra Leone differs from the ICTR and ICTY in three primary ways); Stafford, *supra* note 88, at 126, 129 (distinguishing the Special Court for Sierra Leone from the Yugoslav and Rwandan tribunals).

204. *See* U.N. Doc. S/RES/827, *supra* note 1, at ¶ 10 (stressing that the Security Council is "acting under Chapter VII of the Charter of the United Nations . . ."); *see also* Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT'L L. 510, 529–30 (2003) (explaining that the Yugoslav and Rwandan tribunals were created by the Security Council pursuant to its Chapter VII powers); David S. Koller, *Immunities of Foreign Ministers: Paragraph 61 of the Yerodia Judgment as it Pertains to the Security Council and the International Criminal Court*, 20 AM. U. INT'L L. REV. 7, 32 (2004) (acknowledging that the Yugoslav and Rwandan tribunals were created by the Security Council based on Chapter VII of the United Nations Charter).

205. *See* SIERRA LEONE NEWS ARCHIVES, *News Archives* (Jan. 16, 2002), http://www.sierra-leone.org/slnews0102.html (last visited Oct. 12, 2005) [hereinafter *News Archives*] (asserting that the Special Court for Sierra Leone is different than earlier courts because it was established pursuant to an agreement between the United Nations and the Government of Sierra Leone); *see also* Eaton, *supra* note 60, at 911 (reporting that the Special Court for Sierra Leone was established on the basis of a request by the Government of Sierra Leone); Schocken, *supra* note 139, at 442–43 (describing the Special Court as unique compared to earlier *ad hoc* courts because the Government of Sierra Leone requested its creation).

206. *See* U.N. Doc. S/2000/786, *supra* note 187 (requesting the Security Council to set up the Special Court for Sierra Leone); *News Archives*, *supra* note 205 (noting that the Special Court for Sierra Leone was established at the request of the government and is different from earlier *ad hoc* courts); *see also* Franklyn Bai Kargbo, *International Peacekeeping and Child Soldiers: Problems With Security and Rebuilding*, 37 CORNELL INT'L L.J. 485, 495 (2004) (positing that the Special Court for Sierra Leone is a unique institution that was created by the United Nations at the request of the Government of Sierra Leone).

207. *See* U.N. Doc S/2000/915, *supra* note 170, at ¶ 9 (emphasizing that the Special Court for Sierra Leone is a "treaty-based *sui generis* court," which is a markedly different approach than that of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda); *see also* Micaela Frulli, *The Special Court for Sierra Leone: Some Preliminary Comments*, 11 EUR. J. INT'L L. 857, 857 (2000) [hereinafter Frulli, *The Special Court for Sierra Leone*] (positing that the Special Court is the first *ad hoc* criminal tribunal to be established as a result of an agreement between the U.N. and a government of a member state); Iacono, *supra* note 151, at 453–54 (acknowledging that, unlike the Rwanda and Yugoslav tribunals that were created under Chapter VII of the U.N. Charter, the Special Court for Sierra Leone is a treaty-based agreement).

courts,[208] although the SCSL does have the power to request that the national courts defer proceedings and transfer defendants to its jurisdiction.[209] Another potentially problematic effect is that the Special Court lacks the powers of Chapter VII of the United Nations Charter to compel member states to comply with the tribunal's requests for extradition or evidence.[210] While the UN Secretary-General recommended that the Security Council grant the Court those powers, it has not done so.[211] On the other hand, by incorporating national law into its jurisdiction, the SCSL is empowered to address certain categories of sexual crimes and crimes against property that were perhaps the most widespread offenses during the conflict and which the Secretary-General's report acknowledged were either unregulated or regulated inadequately under the international law that is the basis of the previous *ad hoc* international criminal tribunals.[212] By having a basis in both international law and national legislation, the Court can function as a mechanism of justice for a wider group of victims of atrocities during the civil war, regardless of the crime perpetrated against them, since the prosecution is able to appeal to domestic laws to cover violations that occurred during the conflict.[213]

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208. *See* Statute for the Special Court for Sierra Leone, Art. 8 § 2, *available at* http://sierra-leone.org/specialcourtstatute.html (last visited Oct. 12, 2005) [hereinafter Statute for the Special Court] (affirming that the Special Court for Sierra Leone will have concurrent jurisdiction); *see also* Juma, *supra* note 28, at 369–70 (illustrating that the Special Court for Sierra Leone enjoys concurrent jurisdiction); Daryl A. Mundis, *New Mechanisms for the Enforcement of International Humanitarian Law*, 95 AM. J. INT'L L. 934, 936 (2001) [hereinafter Mundis, *New Mechanisms*] (recognizing that the Special Court for Sierra Leone will have concurrent jurisdiction over Sierra Leone courts).

209. *See* Statute for the Special Court, *supra* note 208, at Art. 8, § 2 (codifying that the Special Court for Sierra Leone may request a national court to defer proceedings); *see also* U.N. Doc. S/2000/915, *supra* note 170, at ¶ 10 (noting that the Special Court for Sierra Leone will have the power to defer its jurisdiction at any stage); Stafford, *supra* note 88, at 128 (affirming that the Special Court for Sierra Leone may request to defer proceedings and transfer a defendant for prosecution).

210. *See* U.N. Doc. S/2000/915, *supra* note 170, at ¶ 10 (admitting that the Special Court for Sierra Leone lacks authority to compel states to abide by requests for extradition or evidence); Norman J. Printer, Jr., *Establishing an International Criminal Tribunal for Iraq: The Time is Now*, 36 UWLA L. REV. 27, 49 (2005) (illustrating that the Special Court for Sierra Leone is unable to seek jurisdiction over those located outside the country because the Court was not created under Chapter VII of the U.N. Charter); Bald, *supra* note 80, at 566 (noting that countries are not obligated to comply with the Special Court's request for evidence because the U.N. did not grant the Court Chapter VII powers).

211. *See* U.N. Doc. S/2000/915, *supra* note 170, at ¶ 10 (requesting that the Security Council empower the Special Court for Sierra Leone with Chapter VII powers, enabling the Court to request the transfer of defendants to its jurisdiction); *see also* Udombana, *supra* note 25, at 123 (suggesting that the Secretary General recommended that the Court be given the power to transfer defendants to its jurisdiction); Webster, *supra* note 39, at 758 (emphasizing that the Secretary General recommended that the Special Court for Sierra Leone be established outside the national court system).

212. *See* Statute for the Special Court, *supra* note 208, at Art. 8, § 2 (containing provisions which grant the Special Court for Sierra Leone jurisdiction over various sexual crimes and crimes against property); Fritz & Smith, *supra* note 138, at 409 (stating that Article 5 of the Statute of the Special Court for Sierra Leone grants prosecution of persons under domestic laws relating to the abuse of girls and destruction of property, and highlighting that both crimes are best regulated under Sierra Leonean law as opposed to international law). *See generally* Tejan-Cole, *supra* note 70 (noting the Special Court's subject matter jurisdiction over both international and Sierra Leonean law, specifically sexual abuse and destruction of property offenses falling under the Prevention of Cruelty to Children Act of 1960 and the Malicious Damage Act of 1861).

213. *See* Statute for the Special Court, *supra* note 208, at Arts. 2–5 (noting that the Special Court for Sierra Leone shall have jurisdiction over crimes against both international humanitarian law and Sierra Leonean law); Stafford, *supra* note 88, at 130 (outlining the breadth of crimes over which the Special Court has jurisdiction); *see also* Fritz & Smith, *supra* note 138, at 409 (stating that the inclusion of jurisdiction over crimes violating domestic law offers greater protection to a larger group of the population).

III. The Structure of the SCSL

As a consequence of the government's participation with its establishment, the Special Court for Sierra Leone differs from the earlier tribunals in several crucial respects. First, the Court sits within the territory of Sierra Leone, its permanent quarters occupying a prominent location in the capital of Freetown.[214] According to the Court's Statute, the Sierra Leonean government has significant input in the tribunal's operations, particularly through its powers of appointment.[215] The government appoints one of the three judges in the trial chamber and two of the five judges of the appellate chamber as well as the deputy prosecutor.[216] The UN Secretary-General appoints the other judges and the prosecutor.[217]

A. Jurisdiction

As noted above, significantly, the SCSL's jurisdiction embraces both international crimes and crimes under Sierra Leonean law.[218] One consequence of this is the need for the enabling legislation to incorporate the court within Sierra Leone's existing judicial system.[219] Another is that, unlike the ICTY and the ICTR, the SCSL was empowered to try offenses that were criminalized under Sierra Leonean law, such as the abuse of girls and arson, that are not strictly

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214. *See* Tejan-Cole, *supra* note 70, at 145 (explaining how the judicial system of Sierra Leone functions in Freetown); *see also* Bald, *supra* note 80, at 562 (stating that the Special Court will sit in the capital of Sierra Leone, Freetown). *See generally* Bruce M. MacKay, *A View from the Trenches: The Special Court for Sierra Leone–The First Year*, 35 CASE W. RES. J. INT'L L. 273 (2003) (detailing the construction of the court in Freetown and the complexities surrounding the location of the courthouse).

215. *See* Statute for the Special Court, *supra* note 208, at Art. 12 (stating that the Trial Chamber will consist of three judges, one of whom is appointed by the Sierra Leonean government, in addition to which the government will also appoint two of the five judges to serve in the Appeals Chamber); *see also* Udombana, *supra* note 25, at 86 (outlining the organization and composition of the Trial and Appellate Chamber, including the role of the government as the body empowered to appoint judges); Schocken, *supra* note 139, at 443 (stating that the government has significant control over the administration of judicial matters, including the appointment of judges, because the location of the court is within Sierra Leone as opposed to a foreign country).

216. *See* Statute for the Special Court, *supra* note 208, at Arts. 12, 15 (detailing the "Composition of the Chambers," and the position of "The Prosecutor," including provisions regarding appointment); Macaluso, *supra* note 76, at 353 (noting that the government of Sierra Leone has the power to appoint the remaining judge to the trial chamber, in addition to the two judges appointed by the Secretary General); *see also* Schocken, *supra* note 139, at 443 (stating that the Deputy Prosecutor is selected by the government of Sierra Leone).

217. *See* Statute for the Special Court, *supra* note 208, at Arts. 12, 15 (outlining the involvement of the U.N. Secretary-General in appointing the judges and the prosecutor); Macaluso, *supra* note 76, at 353 (2001) ("[T]he Secretary-General will appoint two of the judges to each of the two trial chambers."); *see also* Schocken, *supra* note 139, at 443 ("[T]he Prosecutor, after consultation with the GOSL, will be selected by the Secretary-General.").

218. *See* Statute for the Special Court, *supra* note 208, at Arts. 2–5, (stating that the Special Court for Sierra Leone has jurisdiction over both international humanitarian law crimes and offenses under Sierra Leonean law); Fritz & Smith, *supra* note 138, at 407–09 (summarizing the jurisdiction of the Special Court, which covers crimes both under international humanitarian law and under Sierra Leone domestic law); *see also* Tejan-Cole, *supra* note 70, at 146–47 (noting the Special Court's subject matter jurisdiction over both international and Sierra Leonean law).

219. *See* Stafford, *supra* note 88, at 133 (explaining the integral role of the Special Court as a mechanism in strengthening the current, albeit weak, judicial system); *see also* Fritz & Smith, *supra* note 138, at 406 (noting that the Special Court has been created with provisions tailored to achieving improvement in the currently decimated domestic legal system). *See generally* Webster, *supra* note 39 (stressing the need for the Special Court to be established in a manner that would stabilize and restore the rule of law to and for the citizens of Sierra Leone).

speaking crimes under international humanitarian law, which is covered by the grant of *ratione iuris* jurisdiction to the court for crimes against humanity[220] and violations of the common article 3 of the Geneva Conventions,[221] of Additional Protocol II, and other serious violations of international law.[222] This mixed jurisdiction led to a confusing situation based on the interpretation of Article 10, that the international crimes would have a different jurisdiction *ratione temporis* than Sierra Leonean crimes because the Sierra Leone crimes are covered by the Lomé Peace Agreement while the international crimes are not.[223] In general, international crimes since November 30, 1996, the date of the abortive Abidjan Peace Agreement, are subject to the SCSL, while only those crimes under Sierra Leonean law that would be judged were those committed after the July 1999 Lomé accord.[224] As a result of this provision, stipulations in the Statute calling for the applicability of the ICTR Rules of Evidence and Procedure, *mutatis mutandis*, to the SCSL,[225] will require the amendment of rule 89 barring the ICTR from being

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220. *See* Macaluso, *supra* note 76, at 352–53 (summarizing the Special Court's uniqueness, relative to the Yugoslavian and Rwandan international criminal tribunals, in presiding over crimes against Sierra Leonean law); *see also* Schocken, *supra* note 139, at 443 (stating that the Special Court differs from the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for Yugoslavia because it includes jurisdiction over crimes that violate domestic law, but would not be viewed as violating international human rights laws). *See generally* Amann, *supra* note 104 (explaining the court's jurisdiction over domestic and international criminal law, specifying arson and abuse of girls as domestic offenses that are distinguishable from crimes against humanity that offend international law).

221. *See* Statute for the Special Court, *supra* note 208, at Art. 3 (articulating the Special Court's power to prosecute people); Udombana, *supra* note 25, at 93 (categorizing the different violations over which the Special Court has jurisdiction, including Article 3 of the Geneva Conventions); *see also* Macaluso, *supra* note 76, at 353–54 (deducing that the Statute includes international crimes in violation of Article 3 of the Geneva Conventions, as a consequence of the specific tailoring done by the parties to the agreement).

222. *See* Statute for the Special Court, *supra* note 208, at Arts. 2–4, (providing the subject matter jurisdiction for the Special Court, specifically over crimes committed against humanity, violations against Protocol II, and other violations of international humanitarian law); Udombana, *supra* note 25, at 93 (including the Additional Protocol and "other serious violations of international humanitarian law" as violations against which persons can be prosecuted under the Statute); *see also* Schocken, *supra* note 139, at 448 (discussing Articles 2 through 5, specifically Article 3 which addresses the subject matter jurisdiction of the Special Court extending to the Additional Protocol II).

223. *See* Frulli, *The Special Court for Sierra Leone*, *supra* note 207, at 859 (stating that the U.N. and the government of Sierra Leone agreed that the Lomé Agreement was not to apply to those international crimes against humanity covered by the Statute); *see also* Schabas, *Sierra Leone Truth*, *supra* note 107, at 159 (concluding that the Lomé Agreement "was not an international instrument" but rather served to resolve internal conflicts). *See generally* William Schabas, *Truth Commission and Courts Working in Parallel: The Sierra Leone Experience*, 98 AM. SOC'Y INT'L L. PROC. 189 (2004) [hereinafter Schabas, *Truth Commission and Courts*] (noting that the Lomé Peace Agreement was not intended to apply to crimes against international human rights law).

224. *See* Statute for the Special Court, *supra* note 208, at Art. 1 (stating that the court will have the power to prosecute violations of international humanitarian law starting on November 30, 1996); *see also* Schocken, *supra* note 139, at 443 (noting that the Special Court will have jurisdiction over crimes against humanity from November 30, 1996 forward, and over domestic crimes from July 1999 on). *See generally* Banat, *supra* note 35 (asserting that the jurisdiction of the court extends only to those crimes which took place on or after November 30, 1996, the date of the peace agreement between the Government of Sierra Leone and rebels).

225. *See* Statute for the Special Court, *supra* note 208, at Art. 14 (stating that the Rules of Procedure and Evidence of the ICTR shall apply to the proceedings of the Special Court *mutates mutandis*); *see also* Frulli, *The Special Court for Sierra Leone*, *supra* note 207, at 859–60 (noting that Article 14 of the Statute establishes that the rules of procedure and evidence from the ICTR will apply, *mutatis mutandis*, to the Court); Udombana, *supra* note 25, at 116 ("[T]he Rules of Procedure and Evidence of the ICTR obtaining at the time of the establishment of the Special Court shall be applicable, *mutatis mutandis*, to the conduct of the legal proceedings before the Special Court.").

bound by national evidentiary rules in order to use Sierra Leonean rules in cases of Sierra Leonean offenses.[226]

That the SCSL is, in the words of Sierra Leonean scholar Lansana Gberie, "less concerned about foot soldiers than about those in leadership or command positions,"[227] is evidenced by the Statute's *ratione personae* provision, which empowers it "to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law."[228] The Statute—reflecting, according to some observers, the influence of the United States government on the establishment of the SCSL—specifically stipulated that

> any transgressions by peacekeepers and related personnel present in Sierra Leone pursuant to the Status of Mission Agreement in force between the United Nations and the Government of Sierra Leone or agreements between Sierra Leone and other Governments or regional organizations, or, in the absence of such agreement, provided that the peacekeeping operations were undertaken with the consent of the Government of Sierra Leone, shall be within the primary jurisdiction of the sending state.[229]

In the event that the sending state is unable or unwilling to investigate or prosecute, the SCSL will have jurisdiction only if authorized by the UN Security Council. Observers could not fail to detect the influence of outside considerations in this provision, as Lansana Gberie noted:

> [t]his rules out prosecution of Nigerian and other West African troops, some of them no doubt implicated in gross violations, including atrocities such as

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226. *See* Int'l Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, U.N. Doc. ITR/3/REV.1 (May 31, 2000), *available at* http://www.umn.edu/humanrts/africa/RWANDA1.htm (last visited Oct. 12, 2005) (setting forth the procedural guidelines for the ICTR); *see also* Emily Ann Berman, Note, *In Pursuit of Accountability: The Red Cross, War Correspondents, and Evidentiary Privileges in International Criminal Tribunals,* 80 N.Y.U. L. REV. 241, 251 (2005) (describing the flexibility accounted for in the inception of rule 89 by noting the "considerable discretion" granted to the international criminal tribunals); Schocken, *supra* note 139, at 444 (noting the necessary changes to rule 89 in certain instances of unique procedure).

227. Lansana Gberie, *Briefing: The Special Court of Sierra Leone*, 102 AFR. AFF. 637, 641 (2003) [hereinafter Gberie, *Briefing*]; *see also* Akinrinade, *supra* note 29, at 434 (acknowledging that individual responsibility must go beyond the average "foot soldier" to encompass leadership positions); O'Connell, *Interest Meets Humanity*, *supra* note 47, at 224 (explaining how the Special Court for Sierra Leone is concerned with the foot soldier type of criminal, yet also seeks out the leaders who perpetrated the crimes).

228. *See* U.N.-Sierra Leone Agreement, *supra* note 22, at Art. 1 (setting forth the parameters of the courts' jurisdiction); *see also* Dickinson, *supra* note 106, at 299 (confirming the purpose of the statute as a measure against those who "bear the greatest responsibility" for the wartime crimes committed in violation of international law and relevant Sierra Leonean law); Zarifis, *supra* note 131, at 20 (recounting a report by the U.N. Secretary-General Kofi Annan on the establishment of the Special Court, the "authority position of the accused," and the "gravity or massive scale of the crime" as indicators of "greatest responsibility" for purposes of prosecution under the statute).

229. *See* U.N.-Sierra Leone Agreement, *supra* note 22, at Art. 1 (specifying the procedural process by which the Sierra Leonean courts function); David J. Scheffer, *The Future of Atrocity Law*, 25 SUFFOLK TRANSNAT'L L. REV. 389, 417 (2002) (noting that it is possible to "look beyond the statutes of the tribunals to case law" in order to get a well-rounded understanding of atrocity crimes and law); Udombana, *supra* note 25, at 107 (demonstrating when the special court will apply the jurisdiction of the sending state over their own).

> summary executions, rape and looting. The U.S. government only fueled these corrosive suspicions when in April 2002 it reached an agreement with the Sierra Leone government committing Sierra Leone to an agreement not to surrender U.S. soldiers to the International Criminal Court.[230]

Another concern about the hybrid structure of the SCSL has to do with its assertion of a mixed jurisdiction and the implications for double jeopardy. Under the Statute, a defendant could conceivably be retried by the SCSL for crimes covered by Articles 2 through 4, even if he had already been tried by a Sierra Leonean national court.[231] All that is required is the prosecutor's belief that there was a sham trial or weak investigation, or the classification during the first trial of the crime as an ordinary crime rather than a war crime.[232] In short, someone convicted of, say, murder, by a national court could be brought before the Special Court on a "murder-plus" indictment. The SCSL would only be obliged to give him or her credit for the penalty already paid or time already served.[233] Or, if the defendant was acquitted by the national court, he or she could still be indicted by the SCSL on the grounds of partiality or incompetence on the part of the prosecutors or judges in the domestic proceeding.[234]

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230. *See* Gberie, *Briefing*, *supra* note 227, at 643 (stating that the American Servicemembers Protection Act of 2001 allows the President of the United States to use "all means necessary and appropriate" to free American soldiers arrested by the International Criminal Court); *see also* Diane Marie Amann & M.N.S. Sellers, *American Law in a Time of Global Interdependence: U.S. National Reports to the XVIth International Congress of Comparative Law: Section IV The United States of America and the International Criminal Court*, 50 AM. J. COMP. L. 381, 384 (2003) (describing the American Service Members Protection Act of 2001 in which the President of the United States is granted full power to free U.S. soldiers arrested by the International Criminal Courts); Peter Slevin, *U.S. May Cut Aid Over Court Immunity; About 35 Nations Could Lose Funds*, WASH. POST, July 1, 2003, at A7 (detailing the United States' position on asserting immunity from International Criminal Courts).

231. *See* U.N.-Sierra Leone Agreement, *supra* note 22, at Art. 9 (laying out the procedural steps for Sierra Leonean courts); Dickinson, *supra* note 106, at 300 (commenting on the complexities and problems that arise out of a hybrid system); Schocken, *supra* note 139, at 448 (discussing the double jeopardy impact that results from the hybrid structure of the SCSL).

232. *See* Statute for the Special Court, *supra* note 208, at Art. 9(2) (setting forth the conditions by which an individual may be tried twice for the same crime); Rome Statute, *supra* note 11, at Art. 7 (describing the parameters of crimes against humanity); Schocken, *supra* note 139, at 448 (discussing the possibilities of a person being tried more than once when it is believed there is a weak investigation or a sham trial).

233. *See* Statute for the Special Court, *supra* note 208, at Art. 9(3) (addressing the issue of overlapping sentences for the accused); *see also* Udombana, *supra* note 25, at 113 (confirming that the punishment handed down by the national court, if any, shall be considered by the Special Court in any subsequent trials). *See generally* Statute of the International Criminal Tribunal for the Former Yugoslavia, Art. 10, *available at* http://www.un.org/icty/basic/statut/statute-april04-e.pdf (last visited Oct. 18, 2005) ("In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.").

234. *See* Schocken, *supra* note 139, at 448 (commenting on the situation under which the accused might be retried due to bias or some other external influence); *see also* Danielle Tarin, Note, *Prosecuting Saddam and Bungling Transitional Justice in Iraq*, 45 VA. J. INT'L L. 467, 531 (2005) (discussing a similar situation of judicial partiality in Iraq and hopes of new procedural protections to safeguard against the injustice that results from it). *See generally* Michael P. Scharf, *Is it International Enough? A Critique of the Iraqi Special Tribunal in Light of the Goals of International Justice*, 2 J. INT'L CRIM. JUST. 330 (2004) (describing the various circumstances under which judicial competence has failed and succeeded).

All in all, with the exception of the instances outlined above, the structure of the SCSL and its rules of procedure are similar to the ICTY and the ICTR. In fact, the appellate chamber of the SCSL will be guided by the jurisprudence of the appellate chambers of the ICTY and the ICTR, as well as by that of the Supreme Court of Sierra Leone, insofar as the application of the laws of Sierra Leone are concerned.[235] Those eventually convicted and sentenced to imprisonment will be imprisoned in Sierra Leone, provided its prisons meet UN requirements.[236] Otherwise, they will be incarcerated in some third country that has signed agreements with the ICTY or the ICTR.[237] Ironically, this provision might result, from one point of view, in a certain lack of moral equity as more than one commentator has observed:

> [e]nforcement of sentences is a difficult problem because any prison that meets UN requirements will likely have better health care, food, and accommodations than most Sierra Leoneans currently experience. It will be difficult to make arrangements for a prison that is actually seen as punishment. The only true punishment inflicted by such a prison may be holding a convict far from his family and tribal lands. Many Sierra Leoneans are disappointed that the accused will face life imprisonment, rather than hanging, which is imposed in Sierra Leone for murder.[238]

B. Court Administration

The day to day operations are managed by the Court Registry,[239] which includes the offices of Court Management, Defense, Detention, Library, Outreach, Public Affairs, Security,

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235. *See* Statute for the Special Court, *supra* note 208, at Art. 20 (describing alternative dispute resolution methods); *see also* Nina H. B. Jorgensen, *The Right of the Accused to Self-Representation Before International Criminal Tribunals*, 98 AM. J. INT'L L. 711, 718–19 (2004) (commenting on the jurisprudence of the ICTR and ICTY). *See generally* Schocken, *supra* note 139 (describing similarities and differences between the SCSL and the ICTY/ICTR).

236. *See* Udombana, *supra* note 25, at 114–15 (detailing the conditions of serving imprisonment terms upon conviction); *see also* Joshua A. Romero, Note and Comment, *The Special Court for Sierra Leone and the Juvenile Soldier Dilemna*, 2 NW. U. J. INT'L HUM. RTS. 8, 17 (2004) (outlining the conditions of imprisonment in Sierra Leone under the U.N.); Schocken, *supra* note 139, at 452 (setting forth the dilemmas and the conditions of imprisonment in Sierra Leone).

237. *See* Statute for the Special Court, *supra* note 208, at Art. 22 (commenting on the ability of the countries to form alternative agreements in accordance with the statute); *see also* Romero, *supra* note 236, at 17 (detailing the option to use a third country prison that has signed the agreement); Udombana, *supra* note 25, at 114 (explaining the safety reasons for granting permission to incarcerate prisoners at a third country facility).

238. *See* Diane Marie Amann, *Capital Punishment: Corporate Criminal Liability for Gross Violations of Human Rights*, 24 HASTINGS INT'L & COMP. L. REV. 327, 336 (2001) (detailing how a prison sentence can be more effective than capital punishment when reforming a nation); *see also* Schocken, *supra* note 139, at 452 (recognizing the unforeseen problems with imprisonment in a country like Sierra Leone); Webster, *supra* note 39, at 760 (illustrating the rationale behind the imposed punishment methods of imprisonment over capital punishment).

239. *See* Statute for the Special Court, *supra* note 208, at Art. 16 (setting forth the necessary security measurements for the government to implement); *see also* Cockayne, *supra* note 190, at 652–53 (commenting on the impact of the registry upon the detainees); Michael P. Scharf, *The Role of Justice in Building Peace*, 35 CASE W. RES. J. INT'L L. 153, 157 (2003) (speaking on the role of the registry in relation to the Special Court and the prosecution).

Procurement, Witness and Victim Support, and various administrative offices.[240] The Rules of Evidence and Procedure vest considerable responsibility in the Office of the Registrar: "[t]he Registrar shall assist the Chambers, the Plenary Meetings of the Special Court, the Council of Judges, the Judges and the Prosecutor, the Principal Defender and the Defense in the performance of their functions. Under the authority of the President, he shall be responsible for the administration and servicing of the Special Court and shall serve as its channel of communication."[241]

The working language of the Special Court is English,[242] the official language of Sierra Leone, although some of the defendants, like many Sierra Leoneans, speak only Krio or one of the other local languages.[243] Non-English-speaking defendants are guaranteed the right to an interpreter "if he or she cannot understand or speak the language used in the Special Court."[244] While apparently small on the relative scale of things, access to adequate translation services has been an issue in other international criminal proceedings, most notably those of the ICTR.[245]

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240. *See* MacKay, *supra* note 214, at 275 (commenting on the benefits of a legal system which incorporates full access to the registry); *see also* Varda Hussain, *Sustaining Judicial Rescues: The Role of Outreach and Capacity-Building Efforts in War Crimes Tribunals*, 45 VA. J. INT'L L. 547, 573 (2005) (discussing the transition of the "outreach activities" from the prosecutor's office to the court registry); Webster, *supra* note 39, at 757–58 (explaining the reason for the unique makeup of the special court).

241. *See* Special Court for Sierra Leone, Rules of Procedure and Evidence 33(A), (Mar. 7, 2003), *available at* http://www.sc-sl.org/scsl-procedure.html (last visited Oct. 14, 2005) (specifying the role of the Registrar as a channel for communication); *see also* Theodor Meron, *Judicial Independence and Impartiality in International Criminal Tribunals*, 99 AM. J. INT'L L. 359, 365 (2005) (showing the direct nature and effectiveness that the Registrar plays in Special Court proceedings); Mundis, *Completion Strategies*, *supra* note 6, at 146 (detailing the role of the Registrar upon receipt of an indictment).

242. Statute for the Special Court, *supra* note 208, at Art. 24 (declaring English to be the official language of the court); *see also* Mundis, *New Mechanisms*, *supra* note 208, at 938 (stating that the SCSL will use English as its official language); Schocken, *supra* note 139, at 452 (explaining that the SCSL will be conducted in English, the official language of Sierra Leone).

243. *See* 21 COLLIER'S ENCYCLOPEDIA 13 (P.F. Collier, 1996) (showing that the Creoles still speak their own languages); *see also* 10 THE NEW ENCYCLOPEDIA BRITANNICA 790 (15th ed., 1992 Encyclopedia Britannica Inc.) (discussing how although English is the official language of Sierra Leone, many other languages are spoken); THE WORLD ALMANAC AND BOOK OF FACTS 2005 828 (2005, World Almanac Education Group) (noting that Sierra Leone has three official languages).

244. *See* Statute for the Special Court, *supra* note 208, at Art. 17(4)(f) (citing the statute which provides an interpreter to all non-English speaking defendants); *see also* Schocken, *supra* note 139, at 453 (explaining that the SCSL, like the ICTY and ICTR, provides interpreters to defendants). *See generally* Andrew J. Walker, *When a Good Idea is Poorly Implemented: How the International Criminal Court Fails to be Insulated from International Politics and to Protect Basic Due Process Guarantees*, 106 W. VA. L. REV. 245 (2004) (discussing how the ICC provides a defendant with an interpreter if needed).

245. *See* Antonio Cassese, *The ICTY: A Living and Vital Reality*, 2 J. INT'L CRIM. JUST. 585, 595 (2004) (discussing the problems that occur in international courts due to language barriers). *See generally* DINA TEMPLE-RASTON, JUSTICE ON THE GRASS: THREE RWANDAN JOURNALISTS, THEIR TRIAL FOR WAR CRIMES, AND A NATION'S QUEST FOR REDEMPTION 257 (Free Press 2005) (discussing John Floyd's inability to get translations of all documents relating to his client).

The SCSL is endowed with a legal defense unit, currently headed by New York attorney Simone Monasebian, formerly a prosecutor with the ICTR.[246] The Sierra Leonean tribunal's defense unit is unique in the annals of international criminal justice in that it represents the first time an international criminal tribunal has defense counsel supported in the same manner as the prosecution.[247] Defense counsel are assigned according to a directive issued by the Office of the Registrar.[248] After the assignment of counsel, members of the Office of the Principal Defender engage in oversight of defense teams.[249] The office also monitors trials, provides advice and substantive assistance to all teams in the preparation of their cases from research on legal issues, to arguments on matters of common interest, to vetting the provision of expert witnesses, consultants and investigators, and to liaising with various governments and other entities on matters of judicial cooperation.[250] Reflecting the perhaps uneven record of earlier tribunals, the Principal Defender's Office is currently developing a Code of Conduct for Counsel and other practical directives.[251]

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246. *See* SIERRA LEONE COURT MONITORING PROGRAMME, *Sierra Leone Court Monitoring Programme Trains New Court Monitors and Other Civil Society Advocates*, June 16, 2005, *available at* http://www.slcmp.org/news.htm (last visited Oct. 18, 2005) (announcing that the SCSL has a new defense unit head); *see also* OFFICE OF PRESS AND SPECIAL AFFAIRS, *Special Court for Sierra Leone Basic Facts Pamphlet*, *available at* http://www.sc-sl.org/basic-factspamphlet.pdf (last visited Sept. 27, 2005) (describing the court and each of its offices); WAR CRIMES RESEARCH OFFICE, WASHINGTON COLLEGE OF LAW, *Special Court for Sierra Leone Status Reports*, June 6, 2005, *available at* http://www.wcl.american.edu/warcrimes/sierraleone_status.cfm (last visited Oct. 18, 2005) (discussing news from the Special Court of Sierra Leone).

247. *See* DEFENCE OFFICE, OFFICE OF THE PRINCIPAL DEFENDER, *available at* http://www.sc-sl.org/defence.html (last visited Sept. 27, 2005) [hereinafter OFFICE OF THE PRINCIPAL DEFENDER] (describing how the SCSL has defense counsel similar to that of the prosecution). *See generally* Mackay, *supra* note 214 (describing the first year of the tribunal's operations from the perspective of the author, who served as Chief of Legal Operations in the Office of the Prosecutor); Michael P. Scharf & Christopher M. Rassi, *Do Former Leaders Have An International Right To Self-Representation In War Crimes Trials?*, 20 OHIO ST. J. DISP. RESOL. 3 (2005) (discussing how the SCSL provided stand-by counsel to the accused).

248. *See* SPECIAL COURT FOR SIERRA LEONE, DIRECTIVE ON THE ASSIGNMENT OF COUNSEL, *available at* http://www.sc-sl.org/assignmentofcounsel.html (last visited Sept. 27, 2005) (detailing the assignment of counsel procedure). *See generally* Jorgensen, *supra* note 235 (discussing how the court provides defendants with stand-by counsel to ensure a fair trial); Göran Sluiter, *'Fairness and the Interests of Justice' Illusive Concepts in the Milosevic Case*, 3 J. INT'L CRIM. JUST. 9 (2005) (discussing how a competent defense team is required for justice to be served).

249. *See* John R.W.D. Jones et al., *The Special Court for Sierra Leone: A Defence Perspective*, 2 J. INT'L CRIM. JUST. 211, 213–14 (2004) (describing the reasons for a supervisory role instead of a direct role for the Office of the Principal Defender); *see also* OFFICE OF THE PRINCIPAL DEFENDER, *supra* note 247 (explaining that the Office of the Principal Defender continues to help the defense team even after assigning counsel); David M. Crane, *Dancing With the Devil: Prosecuting West Africa's Warlords: Building Initial Prosecutorial Strategy for an International Tribunal After Third World Armed Conflicts*, 37 CASE W. RES. J. INT'L L. 1, 3 (2005) (stating that the Office of the Prosecutor is charged with the duty of logistically supporting various defense teams).

250. *See* Jones et al., *supra* note 249, at 214–15 (noting how the Office of the Principal Defender helps counsel with all aspects of the trial); *see also* OFFICE OF THE PRINCIPAL DEFENDER, *supra* note 247 (explaining the duties of the principal defender). *See generally* Crane, *supra* note 249 (describing the type of supervision and guidance which the Office of the Prosecutor affords to the defense teams it oversees).

251. *See* Luc Côté, *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, 3 J. INT'L CRIM. JUST. 162, 183–85 (2005) (discussing how the SLSC limited its jurisdiction in response to mistakes of earlier tribunals); *see also* Jones et al., *supra* note 249, at 217 (noting how the SCSL has set up a Code of Counsel); Nice & Vallières-Roland, *supra* note 5, at 354–55 (indicating that international courts have had many difficulties in the past).

Unlike the ICTY and ICTR, which are generally autonomous in their internal administration except for reliance upon the United Nations system for funding,[252] the general administration of the SCSL is overseen by a Management Committee consisting of the countries that contribute to its expenses.[253] The Agreement establishing the court stipulates that the Management Committee (whose members currently include the U.S., Britain, Canada, the Netherlands, Lesotho, and Nigeria, as well as Sierra Leone) was "to assist the Secretary-General in obtaining adequate funding, and provide advice and policy direction in all non-judicial aspects of the operation of the Court, including questions of efficiency, and to perform other functions as agreed by interested states."[254] The Committee meets monthly and approves its budget, presently $58 million, one-third of which is contributed by the United States.[255]

IV. Progress to Date

From the start, there was concern that the Special Court would, like the *ad hoc* international tribunals that preceded it, prove to be a large and cumbersome affair that clumsily ran an open-ended investigation.[256] Consequently, observers noted that SCSL's mandate to handle only a limited number of cases was directly tied to the desire of the states that supported its creation to keep it much smaller and less costly, as well as to make it, presumably, more effi-

252. *See* Dominic Raab, *Evaluating the ICTY and its Completion Strategy—Efforts to Achieve Accountability for War Crimes and Their Tribunals*, 3 J. INT'L CRIM. JUST. 82, 98–99 (2005) (explaining that the U.N. thought the ICTY should have independence); *Developments in the Law–International Criminal Law: III. Fair Trials and the Role of International Criminal Defense*, 114 HARV. L. REV. 1982, 1985 (2001) (noting how the U.N. did not give strict guidelines to the ICTY and ICTR); Schocken, *supra* note 139, at 444 (discussing how the U.N. makes payments to the ICTY and ICTR mandatory, but payment to the SCSL voluntary).

253. *See* Cockayne, *supra* note 190, at 626 n.47 (stating that the SCSL should consult with its donor countries for advice on all matters); Schocken, *supra* note 139, at 453–54 (discussing how the SCSL is responsible to its donors); Eaton, *supra* note 60, at 914 (indicating that the SCSL is funded by donations).

254. U.N.-Sierra Leone Agreement, *supra* note 22, at Art. 7 (detailing the duties of the management committee).

255. *See* Cockayne, *supra* note 190, at 630 (discussing the Special Court's budget and expressing concerns that the Special Court has not received adequate funding to continue its future operations); *see also* Eaton, *supra* note 60, at 916 (commenting that, as a result of "donor fatigue" from those countries who contribute to the mandatory international funding of the ICTR and ICTY, the SCSL is voluntarily funded, foreshadowing budgetary problems in the future, which could affect other areas of international law enforcement, especially witness protection); Schocken, *supra* note 139, at 453 (noting that the SCLS operates on a "shoestring budget," compared to that of the ICTR and the ICTY).

256. *See* Tony Baldry, *Iraq Needs a Special Court for Prosecution of War Crimes*, THE INDEP. (LONDON), Apr. 17, 2003, at 21 (agreeing that the international criminal tribunals for Yugoslavia and Rwanda have progressed slowly); *see also* Cockayne, *supra* note 190, at 619 (asserting that, because they have been so expensive and difficult to run, international support for *ad hoc* tribunals is "dwindling"); Thierry Cruvellier, *Too Narrow a Mandate*, INT'L JUST. TRIB., Sept. 20, 2004 (contending that, as a result of donor countries' concern that avoiding too many indictments was necessary in order to fulfill the mandate of the SCSL, the mandate was instead being construed too narrowly and not doing as much work as it might).

cient.[257] In fact, the UN representative to the tribunal's Management Committee told journalists that:

> [n]o one ever said that the Special Court for Sierra Leone would try a large number of people. That it can be done in three years remains to be seen. Statutes do not limit the mandate in time. What limits it is the funding. On a strictly legal point of view, there is no reason why these trials could not be completed within three years. We are expecting them to be completed within this deadline. Donors do not want it to become another ICTR or ICTY. I think that three years is a reasonable time-frame.[258]

In a similar vein, the SCSL's registrar, Robin Vincent, told a press conference in early 2003: "[w]hat is also at stake with this Court is to prove that we have an efficient court with a much smaller budget than the other two international tribunals."[259]

Despite the commitment to efficiency and timeliness, the SCSL was slow in getting started. As indicated previously, while its creation was authorized by the Security Council during the summer of 2000, it was not until the beginning of 2002 that the establishing Agreement was signed between the U.N. and the government of Sierra Leone.[260] On April 17, 2002, the UN Secretary-General appointed David M. Crane, a veteran lawyer with the U.S. Depart-

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257. *See* Michael Dynes, *War Crimes Court Waits for Sierra Leone Poll*, THE TIMES (LONDON), May 14, 2002, Overseas News Section (observing that the tribunal would issue "up to" twenty indictments to concentrate on only those "who bear 'the greatest responsibility'" for the atrocities in Sierra Leone, and had granted immunity to thousands of rebel youth fighters who were under age eighteen); *see also* Baldry, *supra* note 256, at 21 (commending the SCSL as such a good model for trying war criminals that its structure should be adopted in Iraq); *Sierra Leone War Court Set to Try Rebels*, CHANNEL NEWS ASIA, July 3, 2004, World Section (acknowledging skepticism of the tribunal in Sierra Leone in light of the fact that only nine defendants were in custody and some of the worst offenders had died before being brought to justice).

258. *See* THE SPECIAL COURT FOR SIERRA LEONE: PROMISES AND PITFALLS OF A "NEW MODEL" 3 (Int'l Crisis Group ed., 2003) [hereinafter PROMISES AND PITFALLS] (expressing that the objective behind the creation of the Special Court for Sierra Leone was to have a smaller, less costly tribunal which would decide only a few cases within a short timeframe); *see also* Evenson, *supra* note 76, at 764 (affirming Crane's position that legally, the trials could be carried out expeditiously, as evinced by the speed with which Mr. Crane issued indictments); Bruce Zagaris, *Special Court for Sierra Leone Grapples with Challenges*, INT'L LAW ENFORCEMENT REP., Oct. 2004, Law of War Section (commenting that the delay in receiving the pledged funding for the SCSL delayed proceedings, and, in turn, had forced further consideration of how to secure more funding if proceedings had to continue beyond 2005).

259. *See* Cockayne, *supra* note 190, at 618 (observing that, as a result of the excessive costs and problems associated with other *ad hoc* tribunals, the SCSL and others like it "are in many ways being asked to do more than their *ad hoc* cousins, but with fewer resources"); *see also* PROMISES AND PITFALLS, *supra* note 258, at 3 n.14 (iterating the pressures the Special Court faces in trying to improve on the ways in which other existing war crimes tribunals operate and decide cases); Beth Dougherty, *Victim's Justice, Victor's Justice: Iraq's Flawed Tribunal*, MIDDLE E. POL'Y COUNCIL, June 22, 2004, at 61 (commenting that because of the short duration of the SCSL's mandate, it will only be able to hold four trials at most if it is to finish by its three-year deadline).

260. *See* S.C. Res. 1351, U.N. SCOR, 55th Sess., 4186th mtg., at 14, U.N. Doc. S/RES/1351 (Aug. 14, 2000) (requesting "the Secretary-General to negotiate an agreement with the Government of Sierra Leone to create an independent special court" to prosecute war criminals in that country); *see also* Cockayne, *supra* note 190, at 624–25, 680, n.6 (specifying that on August 14, 2000, the U.N. Security Council passed Resolution 1315, requesting the establishment of the SCSL, and that the Agreement between the United Nations and Sierra Leone establishing the SCSL was signed on January 16, 2002); U.N.-Sierra Leone Agreement, *supra* note 22, at 1 (stating the date of the agreement).

ment of Defense who had most recently served as the Pentagon's senior Inspector General, to a three-year term as the chief prosecutor for the Court.[261] Crane is a jurist who is well-thought-of among international legal experts, having served for many years as a professor of international law at the U.S. Army Judge Advocate General's School in Charlottesville, Virginia.[262] At the same time, Annan also appointed British civil servant Robin Vincent as the SCSL's provisional registrar.[263] Vincent, who was subsequently confirmed as the tribunal's permanent registrar, had nearly 40 years' experience as a court administrator in England and had served briefly in 2000 as an advisor on the reorganization of the then-troubled ICTR.[264]

The appointment of judges for the three-member trial chamber and the five-member appellate chamber was delayed until July 29, 2002, as the UN Secretariat's bureaucracy struggled to create a slate that reconciled the competing interests, just as the choice of an American for the role of chief prosecutor had been carefully crafted to allay the doubts of the Bush Administration regarding international criminal assizes, especially as the U.S. was expected to bear the major burden of paying the SCSL's bills.[265] Ultimately the judges appointed to the trial chamber by UN Secretary-General Annan were Brigadier General Pierre Boutet, former Judge Advocate General of the Canadian Forces, and Benjamin Mutanga Itoe, Deputy Chief

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261. *See, e.g., Attack on Monrovia: Anatomy of an Open Conflict*, THE GUARDIAN (LONDON), Aug. 9, 2003, at 15 (contextualizing Crane's June 2003 announcement of the indictment of former Liberian President Charles Taylor for crimes against humanity in Sierra Leone based on his alleged trade with Sierra Leonean rebels exchanging arms for diamonds, amid increasing tensions in Liberia and attacks on the capital Monrovia by the LURD, a rebel faction made up of former Taylor adversaries); *see* U.N.-Sierra Leone Agreement, *supra* note 22, at Art. 3 (mandating the U.N. Secretary-General to appoint a prosecutor to a three year term); *see also* LIBERIAN OBSERVER, *Special Prosecutor David Crane: Taylor Indictment Will Never Expire*, AFR. NEWS, May 16, 2005 [hereinafter *Special Prosecutor David Crane*] (noting Mr. Crane's appointment, background, and past work experience).

262. *See, e.g., Special Prosecutor David Crane*, *supra* note 261 (noting Mr. Crane's past work experience); *see also* PROMISES AND PITFALLS, *supra* note 258, at 13 n.76 (detailing Mr. Crane's background of government and private employment); *Special Court Prosecutor Resigns*, STANDARD TIMES, Mar. 2, 2005 (referring to the views of some staff who believe Crane "would be remembered for his racist postures" as special prosecutor for the tribunal).

263. *See, e.g.,* THE INDEPENDENT, *Annan Gives Hassan Jallow New Appointment*, AFR. NEWS, Aug. 9, 2002 (noting Vincent's appointment as registrar and commenting that he was expected to begin his work for the SCSL in August of 2002); *see also* U.N.-Sierra Leone Agreement, *supra* note 22, at Art. 4 (mandating the U.N. Secretary-General to appoint a registrar to the SCSL); Udombana, *supra* note 25, at 92 (noting Mr. Vincent's appointment as "Acting Registrar" in 2002).

264. *See* Hans Nichols, *Truth Challenges Justice in Freetown*, WASH. TIMES, Jan. 6, 2005, at A15 (referring to Vincent's experience with the ICTR); *see also* Zagaris, *supra* note 258 (mentioning that the U.N. appointed Vincent, a "British court administrator," to the post in 2002); *Robin Honoured for Work in Rwanda*, STOCKPORT EXPRESS, June 6, 2001, *available at* http://www.stockportexpress.co.uk/news/s/7/7148_robin_honoured_for_work_in_rwanda.html (last visited Oct. 18, 2005) (discussing Mr. Vincent's 39 years of experience as a British court administrator).

265. *See, e.g.,* 149 CONG. REC. H12378 (daily ed. Nov. 25, 2003) (Conference Report on H.R. 2673, Consolidated Appropriations Act of 2004) (authorizing no less than $5 million for fiscal year 2004 in funding for the SCSL); *see* Dina Temple, *Watching Africa's Saddam Hussein From the Bleachers*, N.Y. SUN, June 27, 2003, at 4 (suggesting that the Bush administration has doubts its actions reflect a reluctance to get involved in African conflicts after the debacle in Mogadishu, Somalia, when American soldiers were mutilated and dragged through the streets). *But see Sierra Leone War Court Set to Try Rebels*, *supra* note 257 (discussing criticism of the SCSL as being a way for the U.S. to legitimize its opposition to the ICC by endorsing this type of intra-nationally regulated tribunal as a viable alternative to those under exclusively U.N. jurisdiction).

Justice of the Supreme Court of Cameroon.[266] Sierra Leonean President Kabbah designated as his appointee to the trial chamber Rosulu John Bankole Thompson, a Sierra Leonean jurist who held prominent positions in the Stevens regime before emigrating to the United States after the dictator's retirement.[267] Since that time, Thompson has taught at Eastern Kentucky State University, where he was most recently Dean of its Graduate School in Richmond, Kentucky.[268] Annan's nominees for the appellate chamber of the SCSL were Emmanuel O. Ayoola, a justice of the Nigerian Supreme Court; Alhaji Hassan B. Jallow, a justice of the Supreme Court of The Gambia who had had some experience with the ICTY; and the SCSL's only sitting female member, Renate Winter, an Austrian lawyer who had served as an international judge on the Supreme Court for Kosovo.[269] For the appellate chamber Kabbah nominated Geoffrey Robinson, an Australian-born British lawyer who had prosecuted the case against former Chilean President Augusto Pinochet, and George Gelaga King, a Sierra Leonean politician who had previously served as the country's permanent representative to the UN.[270] The secretary-general and the Sierran Leonean president also agreed on two alternate judges, Isaac Aboagye, a judge on the High Court of Ghana, and Elizabeth Muyovwe, a judge on the High

266. *See* Cristin Schmitz, *Openness Urged in Selection of Canadian Nominee for ICC*, LAW. WKLY., Apr. 26, 2002, at ¶ 28 (reviewing Brigadier General Boutet's nearly five-year stint as chief advisor on military law to the Canadian government, and his near miss at being elected as Canada's representative to the ICTY); *see also* Kelvin Lewis, *All Defendants Boycott Trials at Special Court*, INT'L JUST. TRIB., Jan. 24, 2005, at ¶ 1 (discussing how Judge Mutanga Itoe was presiding over the proceedings at the beginning of this year when one of the defendants had to be led out of the courtroom in the midst of a political diatribe). *See generally* Udombana, *supra* note 25 (detailing the names and home countries of the members of the Court).

267. *See* Udombana, *supra* note 25, at 88 (citing that Rosulu John Bankole Thompson was appointed by the government of Sierra Leone); *see also* Miraldi, *supra* note 91, at 855 (noting that Rosulu John Bankole Thompson of Sierra Leone was appointed to the Special Court of Sierra Leone); CONCORD TIMES, *Sierra Leone; Special Court to Sit Soon*, AFR. NEWS, July 29, 2002, at ¶ 1 (reporting that Bankole Thompson is one of the Sierra Leonean justices appointed by the Sierra Leonean government to sit on the court).

268. *See* THE INDEPENDENT, *supra* note 263 (asserting that Judge Bankole Thompson is currently a Professor at Eastern Kentucky University in the United States); *see also U.N. Appointments to Sierra Leone Special Court*, M2 PRESSWIRE, July 29, 2002 (indicating that Judge Bankole Thompson is currently the Dean of the Graduate School at Eastern Kentucky University); Nduka Uzuapundu, *We are Trying to Redress the Injustices of War Year–Minister of Justice*, VANGUARD (NIGERIA) AAGM, June 6, 2003 (defining Judge Bankole Thompson as a foreigner on the Special Court).

269. *See* Kelly D. Askin, *The Quest for Post-Conflict Gender Justice*, 41 COLUM. J. TRANSNAT'L L. 509, 514 n.30 (2003) (stating that female judges, including Justice Renate Winter, have been appointed to high level positions in war crime trials); *see also Sierra Leone; Special Court Settling In*, AFR. NEWS, Jan. 24, 2003 (outlining the list of judges selected and sworn in for the Special Court); *U.N. Appointments to Sierra Leone Special Court*, *supra* note 268 (describing Justice Ayoola's present experience as a Justice of the Supreme Court of Nigeria since 1998 and past experience as a former Justice of the High Court and Court of Appeal, Chief Justice of The Gambia in 1983, and President of the Seychelles Court of Appeal in 1999).

270. *See* Miraldi, *supra* note 91, at 855 (outlining Robertson of England and King of Sierra Leone as appointees to the Special Court for Sierra Leone); *see also Sierra Leone Special Court Judge Barred from Trying RUF Rebels*, PANAFR. NEWS AGENCY (PANA) DAILY NEWSWIRE, Mar. 16, 2004, at D3 (revealing that Judge Robertson could only be removed from presiding over trials of RUF defendants); *Sierra Leone; War Crimes Tribunal Opens; Other Developments*, FACTS ON FILE WORLD NEWS DIG., July 15, 2004, at 533, D3 (indicating that Robertson was replaced on March 13, 2004, as acting president of the Special Court for Sierra Leone over claims that he was biased against RUF defendants).

Court of Zambia.[271] Following the SCSL's formal inauguration—which was not held until December 2, 2002—Judges Robertson and Thompson were elected by their colleagues to be, respectively, President of the Special Court's Appellate Chamber (and *ex officio* President of the Court) and Presiding Judge of the Trial Chamber.[272] Subsequently, A. Raja N. Fernando, a judge of the Sri Lankan Court of Appeal, was sworn in as a judge of the appellate chamber in March 2004 to replace Judge Jallow who was unanimously elected chief prosecutor of the ICTR by the Security Council when it decided to sever that office from that of chief prosecutor of the ICTY in August 2003.[273]

Even with the appointment of judges, the Special Court was slow to begin operations. On November 13, 2002, the Sierra Leonean government appointed Desmond de Silva, a Sri Lankan-born British lawyer, to a three-year term as deputy prosecutor of the SCSL.[274] The international judges themselves did not begin arriving in Freetown until November 28, 2002, just days before the December 2, 2002, inauguration of the tribunal; most of them left the country shortly thereafter.[275] In fact, the approval of the tribunal's rules of procedure and evidence, copied for the most part from the analogous rules of the ICTY and ICTR, occurred at a meeting of

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271. *See* Askin, *supra* note 269, at 514 n.30 (noting that Judge Muyovwe of Zambia is an alternative judge for the Special Court); *see also AAGM: Special Court to Sit Soon*, CONCORD TIMES (SIERRA LEONE), July 29, 2002 (confirming that both the U.N. Secretary General and the Sierra Leonean government agreed to the two alternate judges, Issac Aboagye and Elizabeth Muyovwe); *U.N. Appointments to Sierra Leone Special Court*, *supra* note 268 (providing the current and past legal career experiences of alternate Judge Aboagye, presently a Justice of the High Court of Botswana, and alternate judge Muyovwe, presently a Judge in the High Court of Zambia).

272. *See Judges From Around Globe Gather at Stanford to Weigh Impact of International Courts*, ASCRIBE NEWSWIRE, Mar. 24, 2005 (referring to Judge Robertson's view that international war crime trials must be crime-specific and not take too many years to complete); *Sierra Leone: Special Court Taking Shape*, AFR. NEWS, Dec. 17, 2002 (remarking that Judge Robertson will head the Appeal Chamber and that Judge Thompson will head the Trial Chamber); Dave Tacon, *Law and Disorder*, SUNDAY TELEGRAPH, Mar. 6, 2005, at 86 (maintaining that the Special Court has been marred by controversy including the removal of Judge Robertson from hearing any cases of RUF defendants following his 2002 book about human rights abuses in Sierra Leone).

273. *See* S.C. Res. 1505, ¶ 6 U.N. Doc. S/RES/1505 (Sept. 4, 2003) (articulating that Hassan Bubacar Jallow was appointed as the Prosecutor of the International Tribunal for Rwanda, effective September 5, 2003, for a term of four years); *see also* Thierry Cruvellier & Kelvin Lewis, *Trial Opens in Dramatic Style*, INT'L JUST. TRIB., June 7, 2004 (indicating that on May 26, 2004, judges elected May Emmanuel Ayoola and Raja Fernando to the posts of President and Vice-President, respectively, of the Special Court for Sierra Leone); Bruce Zagaris, *Rwanda Prosecutor Calls on Surrounding Countries to Cooperate with ICTR*, INT'L ENFORCEMENT LAW REP., Jan. 2005, Law of War Section (commenting on a remark by Judge Jallow that countries harboring genocide suspects should cooperate with the ICTR).

274. *See* Nigel Dempster, *Defender de Silva is So Alone in Leone*, MAIL ON SUNDAY, Sept. 15, 2002, at 47 (citing that de Silva took the position as deputy prosecutor because it was 'a challenge'); *see also* Gabi Menezes, *Former Liberian President Still Not Brought To Justice*, VOICE OF AM. NEWS, July 21, 2005, at ¶ 2 (relaying a statement from deputy prosecutor Desmond de Silva that Nigeria should extradite former Liberian President Charles Taylor for trial at an international tribunal on war crimes charges because he has broken the terms of his exile); *Special Court Gets New Deputy Prosecutor*, CONCORD TIMES (SIERRA LEONE), July 12, 2005 (informing that Dr. Christopher Staker will succeed Desmond de Silva as deputy prosecutor and that as provided by the Special Court Statute, the Government of Sierra Leone nominated Dr. Staker).

275. *See Sierra Leone; Court Investigations May Be Completed in June*, AFR. NEWS, Feb. 7, 2003 (reiterating that the eight judges were sworn in in December 2002); *see also Sierra Leone Swears in Judges for War Crimes Tribunal*, VOICE OF AM. NEWS, Dec. 3, 2002 (proclaiming that the eight judges for the Special Court of Sierra Leone have been sworn in); *War Court Judges For Sierra Leone Take Their Oaths*, N.Y. TIMES, Dec. 3, 2002, at A8 (announcing the swearing in of judges of the tribunal to hear war crimes committed during the civil war in Sierra Leone).

the judges convened in the congenial setting of the Middle Temple in London on March 7, 2003.[276]

In addition to the delays, the creation of the SCSL caused concerns about the effect that its proceedings would have on the country's fragile peace process.[277] First, the difficulties of communicating the truth about the scope and mandate of the tribunal among a scattered, mainly illiterate population were compounded by rumors that, as the International Crisis Group noted, prove to be "almost more dangerous than the truth."[278] For many ex-combatants as well as civilian critics of the Kabbah regime, the SCSL, with its limited mandate and selective approach to prosecution, seemed to be a political instrument.[279] Secondly, the unclear relationship between the Special Court and the Truth and Reconciliation Commission led to fears that the former would undermine the latter.[280] Finally, there was the worry that fear of prosecution would lead warlords and other strongmen who might be charged with war crimes to reopen

276. *See* Drumbl, *Collective Violence*, *supra* note 7, at 554 (explaining that the law of the Special Court for Sierra Leone resembles that of the ICTR and that the Special Court is required to consult ICTR sentencing practices); *see also* Hansen-Young, *supra* note 4, at 483 (reiterating that the Special Court's Rules of Procedure and Evidence were adopted from rules of the ICTR); Kingsley Chiedu Moghalu, *International Humanitarian Law from Nuremberg to Rome: The Weighty Precedents of the International Criminal Tribunal for Rwanda*, 14 PACE INT'L L. REV. 273, 304 (2002) (indicating that the ICTR will apply *mutatis mutandis* to the Sierra Leone Court and that the ICTR will provide expertise and advice to the Special Court on a continual basis).

277. *See* Juma, *supra* note 28, at 375 (positing that the consequences of the Special Court may be that holdouts may not want to comply with the Lomé Accord, that everyone will fear arrest and prosecution, that it may legitimize the Kabbah government despite the government's ineffectiveness, and that it may create political uncertainty); *see also* Webster, *supra* note 39, at 776–77 (concluding that a successful court will activate reconstruction of Sierra Leone); *U.N. Speakers in Security Council Stress Importance of Regional Approach to Resolving Interrelated West Africa Conflicts*, M2 PRESSWIRE, Jan. 26, 2004 (emphasizing that the Special Court is promoting national reconciliation and re-establishing the rule of law in Sierra Leone).

278. *See Sierra Leone: Managing Uncertainty*, AFR. REP., Oct. 24, 2001, at 15 (describing the task of communicating with Sierra Leoneans as being incredibly formidable); *see also* Jason Motlagh, *Analysis: Ivory Coast's Missing Peace*, UPI, Apr. 7, 2005 (explaining that the director for the Africa Program of the International Crisis Group believes the peace process in Sierra Leone to be on shaky ground); *cf. Sierra Leone; Wanted: An Independent Anti-Corruption Commission*, AFR. NEWS, July 30, 2004 (describing the reports of the International Crisis Group that there is rampant political corruption in Sierra Leone).

279. *See* Neil Boister, *Failing to Get to the Heart of the Matter in Sierra Leone? The Truth Commission is Denied Unrestricted Access to Chief Hinga Norman*, 2 J. INT'L CRIM. JUST. 1100, 1114–15 (2004) (noting that President Kabbah will be using the SCSL to eliminate his personal enemies and competitors); *see also* Jacobson, *supra* note 2, at 221 (indicating that the Special Court was created for political reasons and not because it was the best or most effective method to deal with the circumstances of Sierra Leone); Declan Walsh, *The Struggle for Forgiveness*, SCOT. ON SUNDAY, Feb. 3, 2002, at 24 (stating that some people believe that the Special Court will satisfy foreign donors, but it will not be successful in delivering justice).

280. *See* Cockayne, *supra* note 190, at 650–51 (remarking that a person's fear of being prosecuted by the Special Court undermines the work of the Truth and Reconciliation Commission); *see also* Tejan-Cole, *supra* note 70, at 150 (emphasizing that in spite of overlapping purposes, the Special Court and the Truth and Reconciliation Commission do not have a clearly defined relationship); Evenson, *supra* note 76, at 745–46 (mentioning that the Special Court uses its coercive power to force the Truth and Reconciliation Commission to disclose its confidential information).

hostilities.[281] In a commentary published in the *Sunday Observer*, former British high commissioner in Sierra Leone, Peter Penfold, asked:

> [i]s it right to pursue the prosecutions in Sierra Leone at this time, when the wounds of the conflict are still so raw and the peace so fragile? Those supporting the Court cry "justice delayed is justice denied," but is this another example of the international community telling poor Sierra Leoneans what is right for them? Do those involved realize that this is not just the exercise of justice, but something which has profound political and security implications?[282]

Finally, on March 10, 2003, in what his office called "Operation Justice," Chief Prosecutor David Crane announced indictments against seven defendants: RUF leader Foday Sankoh; AFRC leader Johnny Paul Koroma; RUF military commanders Sam "Mosquito" Bockarie, Issa Hassan Sesay, and Morris Kallon; AFRC member Alex Tamba Brima; and the Sierra Leonean interior minister, Chief Sam Hinga Norman, who, as deputy defense minister in the first Kabbah administration transformed the *kamajors* into the highly effective Civilian Defense Force (CDF).[283] All of the defendants except Koroma, who took flight, and Bockarie, who was in Liberia at the time of the indictment and apparently died a violent death not long afterward, were held in an undisclosed location until their initial court appearances on March 15 and 17, 2003, in Bonthe on Sherbro Island, off the southern coast of Sierra Leone.[284] Four of the defendants pleaded not guilty to all counts, while Foday Sankoh was ordered to undergo medi-

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281. *See* Charles Cobb, Jr., *Sierra Leone's Special Court: Will it Hinder or Help?*, ALLAFRICA.COM—AAGM, Nov. 21, 2002 (maintaining that several Sierra Leoneans fear that the Special Court's work would disrupt their recent peace); *see also* INTER PRESS SERVICE, *Sierra Leone; War Crimes Court Opening Up Old Wounds*, AFR. NEWS, Jan. 17, 2005 [hereinafter *War Crimes Court Opening Up Old Wounds*] (commenting that subtle threats to the court may be signs of renewed hostilities); Lansana Fofana, *Politics—Sierra Leone: A Top Official Indicted For War Crimes*, INTER PRESS SERVICE, Mar. 11, 2003 [hereinafter Fofana, *A Top Official Indicted*] (expressing Sierra Leoneans' fear that the Special Court's actions may lead war leaders to rebel).

282. *See* Bruce Baker & Roy May, *Reconstructing Sierra Leone*, COMMONWEALTH & COMP. POL., Mar. 1, 2004, at 35, 54–55 (showing that it is not justice that will help peace but an individual's willpower that will help bring about reconciliation in Sierra Leone); *see also* Peter Penfold, *Will Justice Help Peace in Sierra Leone?*, OBSERVER, Oct. 20, 2002, *available at* http://observer.guardian.co.uk/comment/story/0,,814949,00.html (last visited Oct. 18, 2005) (questioning whether justice at this time will help peace in Sierra Leone); White, *supra* note 26, at 5 (asserting that one of the major security concerns surrounding the Special Court is the disruption of trials by groups that are involved).

283. *See* Van Dyke, *Prosecution and Compensation*, *supra* note 97, at 79 (detailing the crimes committed by the members of the Civilian Defense Forces); *see also* Fofana, *A Top Official Indicted*, *supra* note 281, (listing the various crimes for which the seven defendants are being indicted); *State Department Issues Background Note on Sierra Leone*, U.S. FED. NEWS, Apr. 1, 2005, (affirming the first indictment of seven defendants who were involved in war crimes during the civil war).

284. *See* Cockayne, *supra* note 190, at 663 (noting that the defendants were held in Bonthe after their arrest); *see also* MacKay, *supra* note 214, at 277 (discussing the nature of the prison facility in Bonthe where the arrested defendants were held until their first court appearances); *Sierra Leone; Now that David Crane is Going (II)*, AFR. NEWS, Mar. 7, 2005, (expressing that Chief Prosecutor David Crane finally put his words into action by arresting certain Sierra Leoneans and detaining them in Bonthe).

cal and psychiatric evaluation.[285] Crane hailed the first indictments in a press release: "[t]oday the people of Sierra Leone took back control of their lives and of their future. They have spoken as one voice, a voice that shouts 'no more,' a voice that declares to the world 'never again.' The dark days of the rule of the gun are over. The bright shining light of the law burns back the shadows of impunity in this ravaged country."[286] Subsequently, the Court also arrested and indicted five other Sierra Leoneans: Augustine Gbao of the RUF; Ibrahim "Bazzy" Kamara and Santigie Barbor Kanu of the AFRC; and Moninina Fofana and Allieu Kondawa of the CDF.[287] In addition to specific personal charges, all of the defendants were charged with 17 counts of crimes against humanity, violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, and other serious violations of international humanitarian law, except for Fofana and Allieu, who were charged with eight counts each.[288]

Although the indictments of the AFRC and RUF leaders were expected, Sierra Leoneans were surprised to learn of the indictment of Minister of Internal Affairs Sam Hinga Norman, who, as Deputy Defense Minister and national coordinator of the CDF, had loyally served as a member of Kabbah's cabinet since 1996 and had been, arguably, the government's most effec-

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285. *See Sierra Leone Rebel Faces War Crimes Court*, WASH. POST, Mar. 16, 2003, at A22 (citing the judge's order to have Sankoh undergo medical and psychological examination); *see also Sierra Leone; Further Psychiatric Evaluation for Sankoh*, AFR. NEWS, Mar. 20, 2003, at ¶ 1 (showing that the judge ordered Sankoh to have psychiatric evaluations, and stated that a plea of not guilty would be determined by the three judges of the trial chambers); *Sierra Leone; Suspects Plead Not Guilty Before War-Crimes Court*, AFR. NEWS, Mar. 20, 2003, at ¶ 1 (stating that Kallon, Brima, and Sesay pleaded not guilty to all counts, Sankoh was ordered medical attention, Norman still had to appear in court, and Bockarie and Koroma were still at large).

286. *See* Statement by David M. Crane, Prosecutor, Special Court for Sierra Leone, Mar. 10, 2003, *available at* http://www.sc-sl.org/Press/prosecutor-031003.html (last visited Oct. 18, 2005) (expressing the feelings of unity and triumph that existed among Sierra Leoneans after their country's leaders were indicted for committing several crimes). *See generally* James E. Baker, *The Role of the Lawyer in War: LBJ's Ghost: A Contextual Approach to Targeting Decisions and the Commander in Chief*, 4 CHI. J. INT'L L. 407, 411 (2003) (remarking that Crane believed the quick indictments could help in the exercise of jurisdiction by improving time, cost effectiveness, and precision); Geoffrey Robertson, *Powerful Enough to Bring Justice*, *supra* note 202, at 74 (opining that the presence and the work of the Special Court in Sierra Leone represent the end of the atrocities of the war, and help to bring about closure for the victims).

287. *See War Crimes Court Opening Up Old Wounds*, *supra* note 281 (observing that since the first indictment, the Special Court has indicted four more war criminals, bringing the total number to eleven defendants); *see also* T. Michael Johnny, *War Crimes Court Essential Says Un-Backed Court Registrar*, NEWS NIGHT, July 15, 2004 (listing the names of the eleven defendants indicted, including Augustine Gbao, Samuel Hinga Norma, Brima Bazzy Kamara, and Santigie Borbor Kanu); Bruce Zagaris, *Sierra Leone Prepares Trials of Three High-Profile War Crime Indictees*, INT'L ENFORCEMENT L. REP., Apr. 2005 (commenting on the crimes that resulted from the work of AFRC defendants, including Santigie Kanu and Ibrahim Kamara).

288. *See Sierra Leone: Former Rebel Security Chief Appears Before Special Court*, BBC MONITORING INT'L REP., June 20, 2003 (explaining that Augustine Gbao was charged with 17 counts of war crimes, violations of humanitarian law, and crimes against humanity, including attacks against United Nations peacekeepers); *see also Sierra Leone; Two Plead Not Guilty at Special Court*, AFR. NEWS, July 2, 2003 (noting that Moninina Fofana and Allieu Kondawa pleaded not guilty to eight counts of war crimes and crimes against humanity, which included murder, terrorizing individuals, looting, and employing child soldiers); *Sierra Leone; War Crimes Suspect Protests at Trial By White Men*, AFR. NEWS, Sept. 24, 2003 (confirming that Santigie Kanu was charged with 17 crimes to all of which he pled not guilty).

tive opponent against the RUF and the AFRC *putschists*.[289] In fact, the Court, fearing the negative reaction of the *kamajors* and other former CDF members, undertook special security measures with regard to Norman's arrest and arraignment.[290] Unlike the other defendants, his location was kept secret and attempts were made, albeit ultimately unsuccessfully, to transfer him abroad.[291] Likewise, the former CDF chief's initial court appearance was a closed session.[292] Subsequently, Norman's communications and visits were restricted to those with his defense counsel.[293]

Even more surprising, albeit not so much for the fact as the manner in which it was unveiled, was the unsealing of the SCSL's indictment, dated March 3, 2003, against Liberian President Charles Ghankay Taylor on June 4, 2003.[294] Taylor was indicted on 17 counts for crimes against humanity, violations of Article 3 common to the Geneva Conventions and of

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289. *See* Cockayne, *supra* note 190, at 642 (explaining that many Sierra Leonans did not agree with the indictment of Sam Hinga Norman because they believed that CDF saved the country); Danner & Martinez, *supra* note 21, at 156 (highlighting Sam Hinga Norman's role in the crimes with which he is charged); Evenson, *supra* note 76, at 742–43 (revealing that Sam Hinga Norman's indictment exemplified conflict, as CDF was initially a group that protected and defended the people).

290. *See* Evenson, *supra* note 76, at 743 (pointing out that the Special Court took special measures in the arrest and detention of Norman due to a perceived threat of retaliation); *see also Sierra Leone; Ex-Minister on Trial*, AFR. NEWS, Mar. 20, 2003 (stating that Norman's trial was being conducted in secret due to fear that the Kamajors might disrupt the trial); *Sierra Leone; Hinga Norman Appeals to the Nation*, AFR. NEWS, Apr. 2, 2003 (acknowledging that there was fear about the negative reaction of the Kamajors with regard to Norman's arrest and detention).

291. *See Ex-Minister on Trial*, DAILY OBSERVER (The Gambia), Mar. 20, 2003 (describing Hinga Norman's detainment and trial at a secret location); *see also* STANDARD TIMES, *Sierra Leone; Hinga Norman's Arrest: Peter Penfold Reacts*, AFR. NEWS, May 7, 2003 (reviewing Hinga Norman's arrest and reports of his treatment); *War Crimes Suspect Denies Guilt at Trial*, CHI. TRIB., Mar. 19, 2003, at C17 (detailing the war crimes of and denial of guilt at trial by Sierra Leone's former interior minister).

292. *See* Thierry Cruvellier, *The Special Court for Sierra Leone: The First Eighteen Months*, INT'L CTR. FOR TRANSITIONAL JUST., Mar. 2004, at 3 (examining the civil war in Sierra Leone and showcasing the procedure of Sierra Leone's Special Court); *see also Sierra Leone; First Indictments of the Special Court*, AFR. NEWS, Mar. 20, 2003 (outlining the charges against the indictees of the Special Court); Press Release from the Press and Public Affairs Office, Special Court for Sierra Leone, *Suspect Detained*, Mar. 21, 2003, *available at* http://www.sc-sl.org/Press/pressrelease-032103b.html (last visited Oct. 18, 2005) (presenting the facts of the war crime suspects' detainment).

293. *See* Prosecutor v. Norman, Case No. SCSL-03-08-PT-128, Decision Prohibiting Communications and Visits, (Jan. 20, 2004), *available at* http://www.sc-sl.org/Documents/SCSL-03-08-PT-128.pdf (last visited Oct. 18, 2005) (describing the restriction of Hinga Norman's communications while in detention); *see also* Dougherty, *supra* note 259, at 61 (recounting the SCSL's need to revoke Hinga Norman's communication privileges); *Freetown U.N. Court Restricts Communication By Indicted Ex-Minister*, PANAFR. NEWS AGENCY, Jan. 21, 2004 (recounting that Hinga Norman's communications were limited to his defense counsel).

294. *See* PROMISES AND PITFALLS, *supra* note 258, at 1 (critiquing the procedure and effects of the Special Court for Sierra Leone); *see also Liberia; Law & Human Rights–the Indictment of Charles Taylor*, AFR. NEWS, July 4, 2003 (examining the facts of Charles Taylor's indictment and assessing the impact of Taylor's flight from Ghana); *International Organizations and Africa; War Crimes Prosecutors Meet in Sierra Leone*, AFR. NEWS, July 1, 2005 (commenting on the prosecutor colloquium and discussing the challenges before the prosecutors of the world's major criminal tribunals).

Additional Protocol II, and other serious violations of international humanitarian law.[295] The announcement of the indictment against the Liberian leader came as he arrived in Accra, Ghana, for the opening ceremony of peace talks with his Liberian opponents.[296] The timing evoked that of the ICTY's indictment of Bosnian Serb leaders President Radovan Karadzic and General Ratko Mladic just as the Dayton negotiations got underway in November 1995.[297] At the time, that indictment received considerable media attention speculating that its timing was no coincidence and that it was used to pressure the negotiators to take into account the tribunal, a charge that the ICTY's chief prosecutor, South African Justice Richard Goldstone, has strenuously denied, terming it a "coincidence."[298]

In contrast, SCSL Chief Prosecutor Crane stated that the indictment and the order for Taylor's detention, the latter dated March 7, 2003, both signed by the Presiding Judge of the Trial Chamber, Bankole Thompson, were unsealed when they were precisely because Taylor was in a third country where there was the prospect of arresting him.[299] Of course, this explanation does not account for the fact that that Taylor had been in Togo in late April to attend talks with President Laurent Gbagbo of Côte d'Ivoire over the conflict in the western part of

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295. *See* Special Court for Sierra Leone, Indictment, SCSL-03-01 (Mar. 7, 2003), *available at* http://www.sc-sl.org/Documents/SCSC-03-01-I-001.html (last visited Oct. 18, 2005) (stating the war crimes against Charles Taylor); *see also Liberia; Rule of Law Better Than Rule of Guns*, AFR. NEWS, Aug. 31, 2004 (outlining Chief Prosecutor David Crane's views on justice regarding war crimes and illustrating the need for world leaders to cooperate in bringing Charles Taylor before the court); Press Release from the Press and Public Affairs Office, Special Court for Sierra Leone, *Red Notice Issued for Charles Taylor*, Dec. 4, 2003, *available at* http://www.sc-sl.org/Press/press-release-120403.html (last visited Oct. 18, 2005) (presenting the events surrounding Taylor's indictment).

296. *See* Felicity Barringer & Somini Sengupta, *War Crimes Indictment of Liberian President Is Disclosed*, N.Y. TIMES, June 5, 2003, at A12 (expressing the frustration of the prosecution in arresting Taylor and reiterating the charges against Taylor); *see also* Ken Kou, *Politics-Liberia: Panic, as Rebels Advance Near the Capital*, INTER PRESS SERV., June 7, 2003 (assessing the impact of Taylor's indictment while in Ghana on the Liberian people); Michael Peel & Mark Turner, *Taylor Indictment Puts Africa Talks in Doubt*, FIN. TIMES, June 5, 2003, at 10 (analyzing the future of peace talks in West Africa after Taylor's indictment).

297. *See* Paul Adams, *War Crimes Panel Names Karadzic*, FIN. TIMES, Apr. 25, 1995, at 3 (announcing the investigation of Karadzic and Mladic by the war crimes tribunal); *see also Sierra Leone; Special Tribunals: Limits to Transitional Justice*, AFR. NEWS, Mar. 15, 2005 (remarking on Taylor's indictment and detention in Nigeria); *War and Peace*, MACLEAN'S, Nov. 27, 1995, at 35 (addressing the charges against Karadzic and Mladic and citing the impact on the Dayton peace talks).

298. *See* RICHARD J. GOLDSTONE, FOR HUMANITY: REFLECTIONS OF A WAR CRIMES INVESTIGATOR 107–09 (2000) (commenting on Goldstone's experiences as ICTY chief prosecutor and his efforts at making human rights violators accountable); *see also* William Drozdiak, *Two Serb Chiefs Are Indicted in Massacre; War Crimes Tribunal Cites Karadzic, Mladic*, WASH. POST, Nov. 17, 1995, at A01 (addressing the complication of the Dayton peace talks by Karadzic and Mladic's indictment); Randolph Ryan, *Prosecutor: Leaders Not Immune*, BOSTON GLOBE, Nov. 19, 1995, at 16 (acknowledging Karadzic and Mladic's use of the Dayton peace talks to escape prosecution).

299. *See* Ryan Lizza, *Ace of Diamonds,* NEW REPUBLIC, July 21, 2003, at 14 (recognizing Crane's strategy behind unsealing Taylor's indictment when he had arrived in Ghana); *see also* David White, *Trials Off to Mixed Start*, FIN. TIMES, Feb. 14, 2005, at 5 (describing the scope of authority of the Sierra Leone Special Court with regard to the Taylor indictment); Press Release from the Press and Public Affairs Office, Special Court for Sierra Leone, *Statement of David M. Crane, Chief Prosecutor, Special Court for Sierra Leone*, June 5, 2003, *available at* http://www.sc-sl.org/Press/prosecutor-060503.html (last visited Oct. 18, 2005) [hereinafter June 5, 2003 Press Release] (reporting on the progress of the prosecution and the unsealing of Taylor's indictment).

that country.[300] In any event, the indictment was criticized by West African and other international political leaders for effectively scuttling the peace talks that had finally brought Liberia's warring factions together.[301] In his defense, Crane quoted the comments made by Justice Goldstone's successor at the ICTY, Justice Louise Arbour, at the time of Serbian President Slobodan Milošević's indictment:

> I don't think it's appropriate for politicians—before and after the fact—to reflect on whether they think the indictment came at a good or bad time; whether it's helpful to a peace process. This is a legal, judicial process. The appropriate course of action is for politicians to take this indictment into account. It was not for me to take their efforts into account in deciding whether to bring an indictment, and at what particular time.[302]

However, the histrionic reference to the Yugoslav prosecution only heightened the sense among some observers that the whole indictment was an elaborate publicity stunt whose only real effect was to damage the prospects for the peace negotiations—Taylor, upon learning of the indictment, quit the talks[303]—and contributed to the two-month-long siege of Taylor's final redoubt in Monrovia by the Liberians United for Reconciliation and Democracy (LURD) and the Movement for Democracy in Liberia (MODEL) before the Liberian leader was persuaded to resign and go into exile in Nigeria on August 11, 2003.[304] The indictment was certainly criticized by Western diplomats who had labored strenuously to convince Taylor to sit down with

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300. *See Cote d'Ivoire Seeks Truce with Liberia*, DEF. & FOREIGN AFF. DAILY, Apr. 28, 2003 (detailing the potential alliance of French and West African troops); *see also Gbagbo, Taylor Agree to Restore Security on Common Border*, PANAFR. NEWS AGENCY, Apr. 28, 2003 (commenting on the Togo talks and efforts to secure borders); Somini Sengupta, *Ivoirian Fighters Kill Leader Who Told Them to Lay Down Arms*, N.Y. TIMES, Apr. 29, 2003, at A9 (noting the meeting between Taylor and Gbago in Togo).

301. *See* Pham, *Politics and International Justice*, *supra* note 5, at 126–27 (analyzing the effects of international military tribunals); *see also* Kou, *supra* note 296 (commenting on the timing of Taylor's indictment in conjunction with the West African peace process); Barringer & Sengupta, *supra* note 296, at A12 (reporting on Taylor's abrupt exit from Ghana).

302. *See* Edward S. Herman & David Peters, *The New York Times on Yugoslavia Tribunal: A Study in Total Propaganda Service*, COLDTYPE (2004), at 18, *available at* http://www.coldtype.net/Assets.04/Essays.04/YugoTrib.pdf (reviewing the Yugoslavia Tribunal and noting Arbour's view of the timing of indictments); *see also* Christopher Black & Edward S. Herman, *Louise Arbour; Role as Chief Prosecutor at International Criminal Tribunal Criticised*, 34 CAN. DIMENSION 2, Mar. 1, 2000, at 31 (outlining the effects of Arbour's prosecution); June 5, 2003 Press Release, *supra* note 299 (applying Arbour's comments as chief prosecutor to Crane's efforts in Sierra Leone).

303. *See* Kathy Ward, *Might v. Right: Charles Taylor and the Sierra Leone Special Court*, 11 HUM. RTS. BR. 8, 8 (2003) (noting that after news of the indictment broke and Taylor rushed back to Liberia, accusations flew that the Court had ruined the best chance for quick peace in Liberia); *see also Charles Taylor, Indicted*, WASH. POST, June 5, 2003, at A32 (stating that Taylor reportedly fled on a Ghana-supplied plane); Morton Abramowitz and Paul Williams, *Peace Before Prosecution*, WASH. POST, Aug. 5, 2003, at A17 (discussing the effect of the timing of Taylor's indictment on the peace process).

304. *See* Gareth Evans and Comfort Ero, *How to Secure Peace in Liberia,* GUARDIAN UNLIMITED, Observer Worldview Extra: Unseen Wars, June 29, 2003, at 1 (discussing how the indictment of Taylor perhaps inspired the LURD and MODEL to launch a drive on Monrovia, leading to hundreds of deaths); *see also* Declan Walsh, *Rebels Agree to End Three-Week Siege of Monrovia*, THE INDEP., Aug. 13, 2003, at 10 (discussing the rebel's agreement to withdraw the day after Taylor went into exile); Ward, *supra* note 303, at 10 (stating that while the terms of the exile agreement were not publicized, there was speculation that it included a ban on Taylor participating in governing Liberia and an agreement not to press the Nigerian government to turn over Taylor to the Special Court).

his opponents and who had pressed Ghana to guarantee the immunity of the participants at the parley.[305] When the arrest order was publicized, Ghanaian President John Kufuor, who had personally invited Taylor to come to Accra, suffered considerable loss of face in a region where links between heads of state are highly personalized.[306]

Even with the eleven indictments (the indictments against Sankoh, who died on July 29, while in custody, and Bockarie, who died in Liberia in early May, purportedly at the hands of factions loyal to his erstwhile patron Taylor who allegedly feared what he might reveal if interrogated, were withdrawn following their deaths) and ten defendants in custody (the whereabouts of Koroma are unknown) the Special Court was slow to get started.[307] At the time the indictments were announced, the SCSL did not even have permanent quarters; most of the tribunal's personnel was housed in prefabricated container-sized structures shipped to Sierra Leone from Slovenia on a twelve acre site on Jomo Kenyatta Road in Freetown's New England neighborhood.[308] Finally on July 21, 2003, a design for the courthouse, drawn up by the British architectural firm of Norman and Dawburn, was approved by the Management Committee.[309] The construction contract, worth an estimated $5 million and awarded to a local firm,

305. *See* Pham, *Politics and International Justice*, *supra* note 5, at 131–32 (noting that both African and American diplomats were quick to criticize the timing of the indictment for complicating the peace process after working hard to set up the peace conference); *see also* Ward, *supra* note 303, at 9–10 (discussing the competing demands between the Special Court and the diplomats who helped arrange the peace talks); PROMISES AND PITFALLS, *supra* note 258, at 7–8 (explaining how the issue of trust was critical in discussing why Ghana was not given earlier notice of President Taylor's indictment).

306. *See* Pham, *Politics and International Justice*, *supra* note 5, at 131–32 (stating that President Kufuor, clearly embarrassed, ignored the arrest request because he had stood personal surety for Taylor's safe passage to the parley); *see also* GHANA CTR. FOR DEMOCRATIC DEV., *In the Annals of Governance,* DEMOCRACY WATCH, Vol. 4 No. 2, June 2003, at 8, *available at* http://www.cddghana.org/documents/jun_03_vol4_No.2.pdf (last visited Oct. 19, 2005) (discussing whether Ghana's decision not to arrest President Taylor was the politically wiser course to take); PROMISES AND PITFALLS, *supra* note 258, at 9 (stating that the strength of solidarity and brotherhood links among the heads of state in the region made it unlikely that one president would hand over another to the Court).

307. *See* Douglas Farah, *Guerilla Boss Reported Killed in Liberia*, WASH. POST, May 7, 2003, at A28 (discussing the death of Bockarie); *see also* PROMISES AND PITFALLS, *supra* note 258, at 21–22 (summarizing the list of people indicted by the Special Court); Press Release from the Press and Public Affairs Office, Special Court for Sierra Leone, *Registrar Announces the Death of Foday Sankoh*, July 30, 2003, *available at* http://www.sc-sl.org/Press/pressrelease-073003.html (last visited Oct. 18, 2005) (announcing Sankoh's death while in custody).

308. *See* Rupert Skilbeck, *Building the Fourth Pillar: Defence Rights at the Special Court for Sierra Leone,* 1 ESSEX HUM. RTS. REV. 66, 70 n.1 (discussing the temporary headquarters set up for the Court in Freetown while the courthouse was being built); *see also Special Court Occupies New Site*, AFR. NEWS, Jan. 22, 2003 (reporting on the Special Court's move to a permanent site); Press Briefing from Yousef Hamdan, Chief of Public Information, United Nations Mission in Sierra Leone, Jan. 17, 2003, *available at* http://www.un.org/Depts/dpko/unamsil/DB/DB170103.pdf (last visited Oct. 18, 2005) [hereinafter January 17, 2003, Press Briefing] (describing the progress of setting up the Court's headquarters and stating that 188 pre-fabricated container site structures to be used as offices arrived from Slovenia in December 2002).

309. *See Red Tape Delays Sierra Leone Court*, BUILDING DESIGN, Nov. 14, 2003, at 4 (discussing the bureaucratic delays in building the new courthouse); *see also* Robertson, *Powerful Enough to Bring Justice*, *supra* note 202, at 74, 75 (stating that the Management Committee announced in February of 2003 that Norman and Dawbarn won the contract to design the courthouse). *See generally* Skilbeck (discussing the need for a new courthouse to be built from scratch).

Sierra Construction Systems, was not let until two months later on September 20.[310] The new facility was not inaugurated until March 10, 2004.[311] The first trial—that of the three CDF defendants, Norman, Fofana, and Kondewa—began on June 3, 2004, while the second—that of RUF defendants Kallon, Gbao, and Sesay—opened on July 5, 2004.[312]

Arguably, to date, the SCSL's most legally significant accomplishment was the unanimous ruling, handed down on May 31, 2004, by its Appeals Chamber that former Liberian president Charles Taylor would not enjoy immunity from prosecution before the Court despite the contention by his counsel that he was the incumbent head of a sovereign state at the time the criminal proceedings against him were initiated.[313] The Court ruled expansively that "the principle of state immunity derives from the equality of sovereign states and therefore has no relevance to international criminal tribunals which are not organs of a state but which derive their mandate from the international community"[314] and concluded that "the principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted

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310. *See* Skilbeck, *supra* note 308, at 70 n.1 (stating that construction on the courthouse began in October 2003 at a cost of $3.4 million); *see also* January 17, 2003, Press Briefing, *supra* note 308 (stating that the courthouse was originally scheduled to be completed by mid 2003); Public Announcement from the Press and Public Affairs Office, Special Court for Sierra Leone, *Sierra Construction Systems Wins Bid to Build Courthouse*, Sept. 20, 2003, *available at* http://www.pict-pcti.org/news_archive/03/03Sep/Sierra_Leone_092003.pdf (last visited Oct. 18, 2005) (announcing and discussing Sierra Construction's winning bid to build the new courthouse).

311. *See* Press Release from the Press and Public Affairs Office, Special Court for Sierra Leone, *Special Court for Sierra Leone Officially Opens New Courthouse*, Mar. 10, 2004, *available at* http://www.sc-sl.org/Press/pressrelease-031004.html (last visited Oct. 18, 2005) (announcing the official opening of the courthouse); *see also Sierra Leone War Crimes Court Inaugurated*, CHANNEL NEWSASIA, Mar. 10, 2004, World Section (stating that the courthouse was inaugurated on March 10, despite construction work being unfinished). *See generally* Letter from Kofi A. Annan, Secretary-General of the United Nations, to the President of the General Assembly and the President of the Security Council, 8 (May 26, 2005), *available at* http://www.sc-sl.org/Documents/completionstrategy.pdf (last visited Oct. 18, 2005) (noting the opening of the new courthouse).

312. See INT'L CRISIS GRP., *The Special Court for Sierra Leone: Promises and Pitfalls of a New Model*, AFR. BRIEFING, Aug. 4, 2003, at 21–22, *available at* http://www.essex.ac.uk/armedcon/story_id/000109.pdf (last visited Oct. 18, 2005) (summarizing the list of people indicted by the Special Court); *see also* Press Release from the Press and Public Affairs Office, Special Court for Sierra Leone, *First Trial to Begin on June 3*, May 11, 2004, *available at* http://www.sc-sl.org/Press/pressrelease-051104.html (last visited Oct. 18, 2005) (announcing the trial dates for the CDF and RUF leaders accused); Press Release from the Press and Public Affairs Office, Special Court for Sierra Leone, *Trial Chamber Joinder Decision: Accused to be Tried in Three Groups,* Jan. 27, 2004, *available at* http://www.sc-sl.org/Press/pressrelease-012704.pdf (last visited Oct. 18, 2005) (announcing that nine people indicted by the Special Court will be tried jointly in three groups).

313. *See* Prosecutor v. Taylor, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction (May 31, 2004), *available at* http://www.sc-sl.org/Documents/SCSL-03-01-I-059.pdf (last visited Oct. 18, 2005) (holding that Charles Ghankay Taylor is not immune from the Special Court for Sierra Leone's jurisdiction); *see also* Dapo Akande, *International Law Immunities and the International Criminal Court*, 98 AM. J. INT. L. 407, 416 (2004) (discussing state and diplomatic immunities and the decision by the Special Court to reject President Taylor's claim of immunity). *See generally* Micaela Frulli, *The Question of Charles Taylor's Immunity: Still in Search of a Balanced Application of Personal Immunities?*, 2 J. INT'L CRIM. JUST. 1118 (discussing head of state immunity and the rejection of President Taylor's immunity).

314. *See* Prosecutor v. Taylor, Case No. SCSL-2003-01-I, *supra* note 313, at ¶ 51 (holding that state immunity is not relevant in international tribunals because they are under the mandate of the international community rather than the state); *see also* Frulli, *The Special Court for Sierra Leone*, *supra* note 207, at 1122 (indicating that the reason heads of state have immunity in state courts and not in international courts is because the international court's mandate is from the international community and is above state immunity); *Human Rights Groups Launch Fresh Initiatives to Compel FG to Extradite Charles Taylor*, AFR. NEWS, May 25, 2005 (citing an Amnesty International Report that concurs with the SCSL vis-à-vis Charles Taylor's lack of immunity).

before an international criminal tribunal."[315] While Taylor remains free in exile, "the decision reaffirms the idea that the long arm of international criminal law would extend to reach the most powerful state official, so long as that person commits crimes that shock the conscience of the international community."[316]

V. Evaluating the Model

The UN Security Council, in entering into negotiations leading to the establishment of the SCSL, stipulated that the Court should be funded by voluntary contributions rather than by mandatory assessments like the ICTY and the ICTR.[317] Although the UN Secretary-General later recommended moving to assessed contributions as a more stable funding mechanism,[318] this suggestion was not followed.[319] Consequently, the SCSL has periodically suffered

315. *See* Prosecutor v. Taylor, Case No. SCSL-2003-01-I, *supra* note 313, at ¶ 52 (concluding that equality among sovereign states does not preclude a president from being tried before an international criminal court); *see also* Akande, *supra* note 313, at 416 (listing the Nuremberg, Tokyo, the ICC, and other international judicial proceedings as sources of statutes that the SCSL relied on in concluding that Taylor, as a head of state, could be prosecuted before an international criminal tribunal). *See generally* Thierry Cruvellier, *Hinga Norman, Former-Chief of the Civil Defence Forces: "Is It Because You Are at the Top That You Are a Criminal?"*, INT'L JUST. TRIB., Nov. 27, 2003 (International Justice Tribune, Paris, France) (detailing Taylor's rejection of SCSL's jurisdiction over him and his claim of state immunity).

316. *See* Anthony D'Amato, *Defending a Person Charged with Genocide*, 1 CHI. J. INT'L L. 459, 469 (2000) (describing that bringing justice to state officials for international crimes is a goal of international criminal tribunals); *see also* Johan D. van der Vyver, *Torture as a Crime Under International Law*, 67 ALB. L. REV. 427, 433 (2003) (recognizing that the prohibition against torture under international criminal law applies to state officials); Chernor Jalloh, *Immunity from Prosecution for International Crimes: The Case of Charles Taylor at the Special Court for Sierra Leone*, ASIL INSIGHTS, Oct. 2004, *available at* http://www.asil.org/insights/insigh145.htm (last visited Sept. 14, 2005) (declaring that at the will of the international community, even the most powerful state officials are subject to international criminal law).

317. *See* U.N. Doc. S/RES/1315, *supra* note 195, at ¶ 8 (requesting that the Secretary-General recommend the amount of voluntary contributions for the Special Court of Sierra Leone); *see also* S.C. Res. 1508, ¶ 6, U.N. Doc. S/RES/1508 (Sept. 19, 2003) (appealing to states for generous voluntary contributions to the Special Court for Sierra Leone in light of the court's unfortunate fiscal position); Miraldi, *supra* note 91, at 856 (commenting that the United Nations' three-year mandate over the Special Court is funded by voluntary contributions).

318. *See* The Secretary-General, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 43, U.N. Doc. S/2004/616 (Aug. 23, 2004) (suggesting that assessed contributions replace voluntary contributions for the tribunals in Cambodia and Sierra Leone because judiciaries should not be left susceptible to voluntarism); *see also Annan Proposes Assessed Dues to Close Sierra Leone Court's Budget Gap*, AFR. NEWS, Mar. 11, 2004 (reporting that Secretary-General Annan suggested to the Security Council that the contributions for the SCSL be switched from voluntary to assessed); *U.N. Seeks Re-financing For S. Leone Court*, UNITED PRESS INT'L., Mar. 11, 2004 (noting that Secretary-General Annan believed that a decision switching from voluntary to assessed contributions for the SCSL could be made before the court runs out of money).

319. *See Financing for Sierra Leone Court, Somalia Political Office Among Issues Taken Up in Budget Committee*, M2 PRESSWIRE, May 17, 2005 (declaring that the states will continue voluntary contributions following the date of the Secretary-General's suggestion); *see also U.N.: Fifth Committee Takes Up 2006-2007 Budget Outline: Women's Institute, Sierra Leone Court Financing*, M2 PRESSWIRE, Dec. 14, 2004 (describing Japan's decision, amongst others pertaining to voluntary contributions following Kofi Annan's proposal). *See generally United Nations Vital to US Interests, Negroponte Says*, AFR. NEWS, Apr. 5, 2004 (recounting the circumstances behind the Secretary-General's decision to suggest assessed contributions as funding for the SCSL).

from fiscal difficulties necessitating both revisions of its budget and a scaling back of its activities.[320]

Against this challenge, which has admittedly contributed to the slow start-up of the Court, one must weigh the benefits derived from its status as a mixed international-national tribunal located in the country where the crimes that it is charged with adjudicating took place. Contrast this with the ICTY and the ICTR, located in the Hague, Netherlands, and Arusha, Tanzania, respectively, which would be a two-day, four-country bus trip from Rwanda that would set the average Rwandan back nearly a month's pay.[321] According to Ambassador Pierre-Richard Prosper, head of the U.S. State Department Office for War Crimes Issues and the former ICTR prosecutor who prosecuted the *Akeyasu* case, the tribunals should, insofar as possible, be located in the country where the abuses occurred.[322] In the case of the SCSL, this location has been especially fortuitous, not just for the investigative aspects, but also the larger dividends for the war-torn country.[323]

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320. *See* Beth Dougherty, *Victims' Justice, Victors' Justice: Iraq's Flawed Tribunal*, 11 MIDDLE EAST POL'Y 61, 68 (2004) (stating that the SCSL's annual $30 million budget will not allow it to achieve the goals it has been assigned); Andrea O'Shea, *Ad Hoc Tribunals in Africa: A Wealth of Experience But a Scarcity of Funds*, 12 AFR. SECURITY REV. 17, 19 (2003) (proposing that the fiscal uncertainty surrounding the court is unfortunate because justice should not be dependant on politics); Cockayne, *supra* note 190, at 630 (stressing the Special Court's duties may not be completed as a result of the financial uncertainty stemming from a policy of voluntary contributions).

321. *See* TEMPLE-RASTON, *supra* note 245, at 125 (illustrating the hardship Rwandans faced if they wanted to travel to the tribunal)*; see also* Schocken, *supra* note 139, at 436-37 (opining that establishment of the SCSL will provide closure to Sierra Leonean citizens who want to see justice brought to their abusers). *See generally* Bald, *supra* note 80 (explaining that the Security Council established a mixed international-national tribunal in Sierra Leone because there was no desire to fund another costly tribunal).

322. *See* U.N. Doc. S/2004/616, *supra* note 318, at ¶ 44 (enumerating the various benefits of housing an international tribunal in the country where the crime was committed); *see, e.g.,* Norman Kempster, *U.S. May Back Creation of Special Atrocity Tribunals*, L.A. TIMES, Aug. 2, 2001, at A4 (arguing that it is in the best interest of the injured people to have the tribunal in their country); *see also* Schocken, *supra* note 139, at 456 (citing Prosper's thought that because each conflict is different, the court should be located in the place that the crimes occurred).

323. *See* Ivana Nizich, *International Law Weekend Proceedings: International Tribunals and Their Ability to Provide Adequate Justice: Lessons from the Yugoslav Tribunal*, 7 ILSA J. INT'L & COMP. L. 353, 363 (2001) (suggesting that establishing war crimes tribunals in a country where the atrocities occurred, such as Sierra Leone, will help usher the aggrieved population to the rule of law that had previously been commandeered); *see also* Bald, *supra* note 80, at 562 (acknowledging that the SCSL's presence in Sierra Leone will send an important message to the people of that country about the nature of justice and a fair judicial system); *Special Court: Promises and Pitfalls*, AFR. NEWS, Aug. 4, 2003 (expressing the desire that the Court can educate the Sierra Leonean population about its work).

In fact, although it is too soon to make definitive judgments—the first trials are still underway—indications are that the SCSL will provide a model for other post-conflict justice mechanisms, standing in contrast to the experience of the International Criminal Court for Rwanda, which has often been at odds with the Rwandan government and been apathetically received by the populace.[324] In fact, it could be said that its activity has made the SCSL itself something of a *de facto* civil society institution within Sierra Leone.[325]

Shortly after their appointments, prosecutor David Crane and registrar Robin Vincent undertook extensive efforts to reach out to Sierra Leonean civil society groups and the population in general.[326] On September 27, 2002, Crane traveled to the Kono region, one of the centers of the conflict, to hold the first in a series of "town hall" meetings to explain the SCSL's mandate and receive input from citizens who participated in the encounters.[327] In December, shortly after the tribunal was formally inaugurated, Crane, together with Vincent, met with students at Fourah Bay College to encourage their involvement with the university's Human Rights Clinic.[328] Subsequently, the SCSL has become perhaps the first international tribunal to

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324. *See* Carroll, *supra* note 7, at 175–78 (outlining the Rwandan government's grievances and disagreements with the establishment of the International Criminal Tribunal for Rwanda); *see also* Hans Nichols, *Search for Justice Stalls in Rwanda; Government at Odds with U.N. Court*, WASH. TIMES, Jan. 3, 2003, at A08 (chronicling the poor relations between Rwanda and the Tribunal for Rwanda, as evidenced by a disagreement over witness traveling); Betsy Pisik, *War-crimes Judge Fears Rwandan Noncompliance*, WASH. TIMES, Nov. 10, 1999, at A13 (detailing the Rwandan government's threat to suspend cooperation with the United Nations Tribunal for Rwanda over a ruling that a genocide suspect had to be released because he had yet to receive a trial).

325. *See* Pham, *Lazarus Rising*, *supra* note 28, at 66 (postulating that the SCSL can become a very important institution within Sierra Leone). *See generally* Stephen Macedo, *Public Reason and Reasons for Action by Public Authority: An Exchange of Views: In Defense of Liberal Public Reason: Are Slavery and Abortion Hard Cases?*, 42 AM. J. JURIS. 1 (1997) (defining a civil society institution as an "institution intermediate between the individual and the state nurture the 'in-between' motivations of cooperativeness and reciprocity, on which a healthy liberal democratic social order depends"); BLACK'S LAW DICTIONARY (8th ed. 2004) (defining "de facto" as an entity that exists even if not formally recognized).

326. *See* Hussain, *supra* note 240, at 572–73 (asserting that Crane and Vincent took hands-on approaches to outreach efforts in Sierra Leone); *see also Special Prosecutor David Crane*, *supra* note 261 (commenting that as David Crane canvassed Sierra Leone listening to the citizens' stories, he was most commonly asked how he was going to get Charles Taylor); Linda Slonksnes, *A Meeting with Chief Prosecutor David Crane,* FRIENDS OF SIERRA LEONE, Sept. 2003, at 1, *available at* http://www.fosalone.org/FOSL2003SeptNews.pdf (last visited Oct. 18, 2005) (acknowledging that Crane discussed his town hall meetings throughout Sierra Leone).

327. *See* Hussain, *supra* note 240, at 573 (explaining how outreach efforts became the province of the Registrar's Office, but Special Prosecutor David Crane continued holding townhall meetings with Sierra Leoneans); *see also* Judith Crosbie, *Trying to Bring Justice to the Victims of a Broken Land*, IRISH TIMES, July 14, 2004, at 11 (stating how Crane uncovered "horrors" during the town hall meetings he organized); Press Release from the Press and Public Affairs Office, Special Court for Sierra Leone, *Prosecutor for the Special Court Begins Holding "Town Hall" Meetings*, Sept. 27, 2002, *available at* http://www.sc-sl.org/Press/pressrelease-092702.html (last visited Oct. 19, 2005) (explaining how Chief Prosecutor David Crane pledged to hundreds in the Kono district at a two-hour meeting that he would work for their interests and that this meeting would be the first of a series of meetings).

328. *See* Press Release from the Press and Public Affairs Office, Special Court for Sierra Leone, *Special Court Call for Students to Take a Lead in Human Rights*, Dec. 11, 2002, *available at* http://www.sc-sl.org/Press/pressrelease-121102.pdf (last visited Oct. 19, 2005) (relating Crane and Vincent's visit to Fourah Bay College on International Human Rights Day, which was sponsored by the school's Human Rights Clinic, and where both officials commended the students' efforts and compelled them to support SCSL); *see also* Eve Holwell, *Students Visit From Sierra Leone*, YALE DAILY NEWS, Oct. 22, 2001, *available at* http://www.yaledailynews.com/article .asp?AID=16734 (last visited Oct. 7, 2005) (reporting on students' visit from Fourah Bay College, where Yale law students helped develop Sierra Leone's first human rights clinic).

create its own non-governmental organization, the "Accountability Now Clubs," a student-based program supported by the Special Court's outreach budget.[329] The main objective of the clubs is to promote understanding among students and their communities of the tribunal as well as to study broader justice-related issues, including the rule of law, human rights, good governance, and accountability.[330] The clubs will exist after the SCSL has concluded its work, and they represent an important part of the Court's legacy.[331]

Together with the Sierra Leonean branch of No Peace Without Justice, the international NGO made up of parliamentarians, mayors, and other local leaders promoting accountability for violations of international humanitarian law,[332] the SCSL held "Train the Trainers" seminars to prepare 1,500 Sierra Leonean community leaders and activists to inform their constitu-

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329. *See* Hussain, *supra* note 240, at 573 (noting how the Outreach section's campaign for awareness in Sierra Leone led to the outgrowth of Accountability Now Clubs, which are comprised of law students); *see also* Theophilus S. Gbenda, *David Crane Launches Accountability Now Club at FBC*, STANDARD TIMES (SIERRA LEONE), July 5, 2004 (describing Crane's formal launch of the student group during a ceremony at Fourah Bay College, soon to be repeated at other tertiary institutions around the country); Press Release from the Press and Public Affairs Office, Special Court for Sierra Leone, *The Prosecutor Launches "Accountability Now Clubs" at Fourah Bay College*, July 1, 2004, *available at* http://www.sc-sl.org/prosecutor-070104.html (last visited Oct. 19, 2005) [hereinafter "*Accountability Now Clubs*"] (reporting Crane's formal launch of the student group as part of the Special Court's Outreach section).

330. *See "Accountability Now Clubs" supra* note 329 (describing ANC's goal of promoting "understanding among students and their communities of the Special Court and to examine broader justice-related issues, including the rule of law, human rights, good governance, and accountability."); *see also* Alison Smith, *No Peace Without Justice's Country Director for Sierra Leone*, NPWJ Testimony before the Sierra Leone Truth and Reconciliation Commissionn (Jul. 29, 2003), *available at* http://www.specialcourt.org/SLMission/NPWJTestimonySLTRC.html (last visited Oct. 19, 2005) (addressing the need for victims and witnesses to be able to recount their stories so they can be part of the accountability process); U.N. OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS (OCHA), *Sierra Leone: Humanitarian Situation Report May/Jun. 2004*, at ¶ 4, *available at:* http://www.reliefweb.int/rw/RWB.NSF/db900SID/SZIE-62VPX7?OpenDocument (last visited Oct. 19, 2005) (referring to the goals of ANCs established by Special Court as part of its outreach strategy).

331. *See Sierra Leone; Crane Launches Accountability Now Club at FBC*, AFR. NEWS, Jul. 2, 2004 ("The clubs will exist after the Special Court is gone, and they represent an important part of the Court's legacy programme."); *see also Sierra Leone; Now That David Crane is Going (II)*, AFR. NEWS, Mar. 7, 2005 (criticizing Special Court's efficacy, but noting that the "outreach section . . . has been appraised as one of the few successful components when it comes to mandate implementation"); "*Accountability Now Clubs*," *supra* note 329 ("[T]he clubs will exist after the Special Court is gone, and they represent an important part of the Court's legacy programme.").

332. *See* NPWJ Sierra Leone Mission, NPWJ Status Report December 2002, at § 2, *available at*: http://www.specialcourt.org/SLMission/NPWJStatusReport2002.html (last visited Sept. 14, 2005) [hereinafter NPWJ Status Report 2002] (outlining its projects, listing governmental and legal advisors that make up its program directors, and noting the local staff members who they train and work with); *see also* Press Release from No Peace Without Justice, *NPWJ calls for Charles Taylor Indictment Over Sierra Leone Atrocities*, Apr. 11, 2003, *available at:* http://www.specialcourt.org/documents/NewsArticles/NPWJCallsTaylorIndictment.html (last visited Sept. 14, 2005) (explaining the mission of supporting accountability mechanisms for war crimes, and the seconding of government leaders in Sierra Leone who negotiated for the establishment of the Special Court). *See generally* Elaina I. Kalivretakis, Comment, *Are Nuclear Weapons Above The Law? A Look at the International Criminal Court and the Prohibited Weapons Category*, 15 EMORY INT'L L. REV. 683 (2001) (mentioning No Peace Without Justice as one of the important nongovernmental organizations that participated in negotiating process which led to the Rome Statute Establishing an International Criminal Court).

encies about the work of the tribunal.[333] The office of the Registrar has also organized regular meetings with representatives of civil society organizations and other stakeholders in the process to formally brief them on the progress of the SCSL's work and to receive feedback.[334]

In response to criticism it has received about access to the proceedings, the SCSL's Press and Public Affairs Office has produced weekly summaries of the proceedings that have been aired on local radio stations as well as the government-owned Sierra Leone Broadcasting System.[335] When the trials started earlier this year, the press office also began producing weekly video summaries that it has been sending on tour around with mobile video units.[336] These screenings have become something of a routine in many localities, giving rise, in turn, to a further strengthening of civil society through a sense of participation and ownership in a judicial system after years marred by lawlessness or fatalism.[337]

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333. *See Bringing Justice: the Special Court for Sierra Leone: Accomplishments, Shortcomings, and Needed Support*, 16 HUM. RTS. WATCH 8A, at 35 (2004), *available at* http://hrw.org/reports/2004/sierraleone0904/sierraleone0904.pdf (last visited Sept. 15, 2005) [hereinafter Human Rights Watch, *Bringing Justice*] (applauding the Special Court's efforts at outreach programming, including its training of 1,500 Sierra Leoneans in "train-the-trainer" seminars); *see also* NPWJ Status Report 2002, *supra* note 332, at § 2.2, (detailing its collaboration with Special Court Working Group, where previously-trained Sierra Leoneans led participants to put on 10-minute plays about the Special Court, which would be used to educate the community).

334. *See* Human Rights Watch, *Bringing Justice*, *supra* note 333, at 35 n.146 (stating how Registrar Vincent has held regular interactions with civil society since 2002, including monthly meetings with Sierra Leonean organizations); *see also* Hall & Kazemi, *supra* note 25, at 295–96 (speculating that the Special Court does not have broad extra-territorial power, but may nevertheless be successful, especially if the Court's president increases visibility of the Court in the international community); Press Release from the Press and Public Affairs Office, Special Court for Sierra Leone, *Joint Statement on Implementation of Inter-Tribunal Co-operation Projects*, Mar. 12, 2004, *available at* http://www.sc-sl.org/Press/pressrelease-031204.html (last visited Oct. 19, 2005) (detailing how Registrars of different international criminal tribunals are working together to provide coherent and consistent practice within international criminal justice).

335. *See* Hussain, *supra* note 240, at 575 (indicating that Outreach section has implemented radio skits to broadcast on local stations in order to inform the public about the Special Court); *see also* Human Rights Watch, *Bringing Justice*, *supra* note 333, at 37 (acknowledging that Special Court has implemented its plan to reach out to the local population through audio summaries broadcasted on radio and suggesting that these summaries be produced on a more regular basis); Special Court for Sierra Leone, Public Service Audio Announcements, http://www.sc-sl.org/audio.html (last visited Sept. 15, 2005) (providing access to dozens of audio public service announcements in MP3 format).

336. *See* Human Rights Watch, *Bringing Justice*, *supra* note 333, at 37 (explaining how SCSL's Press and Public Affairs Office is preparing to show weekly video summaries of the trials through mobile video units); *see also* Special Court for Sierra Leone, Video Productions, *available at* http://www.sc-sl.org/video.html (last visited Sept. 15, 2005) (providing access to over ten video summaries of the trials of the CDF, RUF, and others accused); Special Court for Sierra Leone, Press and Public Affairs Office, Pressroom, *available at* http://www.sc-sl.org/pressroom.html (last visited Sept. 15, 2005) (organizing its different resources, including press releases, video summaries, and public radio announcements).

337. *See, e.g.,* Hussain, *supra* note 240, at 574 (describing how outreach activities, such as town-hall meetings and ongoing public discussions, give Sierra Leoneans a sense of "domestic ownership over the prosecutorial process"); *see also* Stafford, *supra* note 88, at 134 (reporting that if the Special Court for Sierra Leone is to assist in the healing of the nation, then the people of Sierra Leone need to be "present to 'judge' the proceedings"). *See generally* Amy Powell, *Three Angry Men: Juries in International Criminal Adjudication*, 79 N.Y.U. L. Rev. 2341 (2004) (noting that the use of a local jury in international trials gives the appearance of legitimacy and an opportunity for the citizenry to participate and share the power of the judiciary, which in turn will help the society gain experience in self-governance).

While the SCSL will, in the end, probably prosecute less than one dozen individuals, its real impact on Sierra Leone, especially the civil society sector, will reach well beyond the tribunal's statutory mandate in its contribution to the country, as well as its revitalization of the war-torn populace's sense of the rule of law.[338] From the Appeals Chamber to the custodial staff of the courthouse, Sierra Leoneans are involved in every aspect of the tribunal's work.[339] The Sierra Leonean personnel, who, overall, account for half of the SCSL's staff, have acquired significant skills that they will undoubtedly carry over, not only to eventual local prosecutions of lesser offenders, but to civic life in general.[340] For example, unlike other international tribunals, members of the local bar have worked on all defense teams before the Special Court due to a requirement that at least one member of each team have experience in Sierra Leonean law.[341]

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338. *See* Fritz & Smith, *supra* note 138, at 406 (asserting that the cooperative endeavor between the U.N. and Sierra Leone will benefit and inject new life into the country's domestic legal system, and at the same time help safeguard the rule of law that will outlive the existence of the Special Court); *cf.* Tejan-Cole, *supra* note 70, at 158 (stressing that the Special Court needs to work in conjunction with the civil society of Sierra Leone in order to secure a strong, effective, and self-sufficient judicial system and rule of law in the long term). *See generally* Wendy S. Betts & Gregory Gisvold, *Conflict Mapping: Innovation in International Responses in Post-Conflict Societies*, 10 HUM. RTS. BR. 24 (2003) (stating that a "conflict mapping," or accountability mechanism, is crucial and serves as the starting point for a society to overcome the human rights violations it experienced, which will then encourage the public to "call for a new way forward").

339. *See, e.g.,* Chante Lasco, Article, *News from the International Criminal Tribunal*, 10 HUM. RTS. BR. 26, 27 (2002) (highlighting the domestic and international character of the Special Court as reflected in its personnel, with local judges in its Trial and Appeals Chambers); *see also* Hussain, *supra* note 240, at 569 (reporting that according to the SCSL Statute, the government of Sierra Leone shares control over the administration by exercising its right to appoint judges to the court); *cf.* Chandra L. Sriram, *Revolutions in Accountability: New Approaches to Past Abuses*, 19 AM U. INT'L L. REV. 301, 398 (2003) (noting that the frustrated goals of the international tribunal in Rwanda to bring reconciliation and deterrence to its people, and to impart knowledge and skills, are caused by its failure to involve Rwandans and make them participants in the daily court procedures).

340. *See* Corriero, *supra* note 39, at 356 (noting that the quasi-international characteristic of the Special Court will help rebuild the country's societal and cultural institutions, which in turn will aid in the social services needed to rehabilitate and reintegrate children soldiers into society); *see also* Fritz & Smith, *supra* note 138, at 404 (proclaiming that the Special Court's promise is not limited to putting an end to the widespread impunity, but to provide a more tangible rebuild of the society by "generating institutional skills and resources crucial to any functioning democracy"); *cf.* Brady Hall, *Using Hybrid Tribunals as Trivias: Furthering the Goals of Post-Conflict Justice While Transferring Cases from the ICTY to Serbia's Domestic War Crimes Tribunal*, 13 MICH. ST. DCL J. INT'L L. 39, 55 (2005) (arguing that the international court tribunal of Yugoslavia will do little to "improve the capacity of the local population to establish its own justice system" because it is a "pure" international court, employing only non-local judges, prosecutors, and staff).

341. *See* Dickinson, *supra* note 106, at 295 (announcing that the nature of hybrid courts, which incorporate local as well as international law, necessitates that cases be prosecuted and defended by teams of local and international lawyers); *see also* Tarin, *supra* note 234, at 506 (describing the characteristics of hybrid courts, where cases are tried, prosecuted, and defended by teams of local lawyers, as well as lawyers from foreign countries). *See generally* Cockayne, *supra* note 190 (proclaiming that the incorporation of local lawyers in the prosecution, defense, and on the bench works to legitimize the trial process).

These attorneys have, in turn, acquired considerable experience in international and criminal law.[342] By its presence, visibility, and accessibility in Sierra Leone, the Court not only makes an important contribution to the rebuilding of the ravaged nation's judicial system, but it also signals that "international and domestic trials are complementary parts of an integrated, holistic, and multifaceted approach to justice."[343]

Conclusion

Sierra Leone is in the historically unique position of having both a post-conflict Truth and Reconciliation Commission charged with promoting societal reconciliation through the documentation and recognition of past abuses and an internationally-sanctioned tribunal, the Special Court for Sierra Leone, and a mandate to adjudicate those "most responsible" for crimes against humanity, war crimes, and other serious violations of humanitarian law during its civil war.[344] The mixed nature of the Court, by addressing some of the shortcomings of the *ad hoc* international criminal tribunals, represents a workable model that might be profitably copied in other instances where similar concerns, such as weakened or collapsed national judicial systems, nationalist sentiment, lack of political support, jurisdiction *ratione temporis* limitations, preclude recourse to an international tribunal, even as purely national instances remain unsatis-

342. *See* Cockayne, *supra* note 190, at 648–49 (finding that while inclusion of local lawyers in the judicial process of the Special Court is essential to the efficacy of the hybrid model, similarly, the international community makes its contribution by providing legal training to the local professionals); *see also* Dickinson, *supra* note 106, at 307 (recognizing that legal professionals who are involved in the proceedings of the Special Court are likely to learn and improve their knowledge of international jurisprudence and apply it to future domestic cases); Eaton, *supra* note 60, at 913 (asserting that the presence of the Special Court in Sierra Leone will facilitate the diffusion of legal knowledge to its judicial officials, which will help its people and government to "internalize international human rights norms").

343. *See* Neil J. Kritz, *Accountability for International Crime and Serious Violations of Fundamental Human Rights: Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights*, 59 LAW & CONTEMP. PROBS. 127, 132 (1996) (noting that when international tribunals cannot be held in the country where the alleged crimes took place, it is essential that the people of that country have access to the hearings in order to convey the concept of an integrated international and domestic approach to justice); *see also* Bald, *supra* note 80, at 562 (commenting that the Court's presence in Sierra Leone is critical to sending the message that international and domestic trials are complementary to each other); *cf.* Udombana, *supra* note 25, at 128 (suggesting that international tribunals in Rwanda and Bosnia have had little impact on the wars' victims because they were not located within their respective countries, and diffusion of the proceedings from the international location to local communities was not easily facilitated).

344. *See* Eaton, *supra* note 60, at 915 (asserting that the operation of a Truth and Reconciliation Commission in concurrence with the Special Court is a unique feature, which will provide Sierra Leone with a forum for victims and perpetrators to tell their stories while at the same time fulfill its prosecutorial goals); *see also* Webster, *supra* note 39, at 774–75 (explaining that in order for Sierra Leone to effectively restore the country from the atrocities of the civil war, it needs to address two factors: 1) the criminal accountability of the offenders, and 2) the reconciliation within its community); *cf.* Macaluso, *supra* note 76, at 371 (arguing that in light of the Lomé Peace Agreement, which granted amnesty to some offenders with respect to violations of domestic law, the government of Sierra Leone is in a difficult position as it strives to balance two conflicting interests: 1) its effort to reach a level of reconciliation between the rebels and their victims, and 2) the need to vindicate the victims by punishing the offenders).

factory.[345] Iraq is but one example that comes to mind.[346] In these cases, the mixed international-national model provided by the SCSL—as well as the lessons learned from the difficulties it has encountered—can be a standard for empowering a post-conflict nation to participate in reestablishing the rule of law while insuring that the demands of international criminal justice are satisfied.[347]

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345. *See* Peggy Kuo, *Prosecuting Crimes of Sexual Violence in an International Tribunal*, 34 CASE W. RES. J. INT'L L. 305, 320 (2002) (explaining that the hybrid nature of the Special Court can facilitate and assist in the building of a lasting judicial system for Sierra Leone, unlike the *ad hoc* tribunals of Rwanda and Yugoslavia); *see also* Stafford, *supra* note 88, at 142 (proclaiming that the hybrid court in Sierra Leone serves as a standard model for future war crime tribunals because it encompasses every key attribute necessary for its success in the international and domestic arenas); Webster, *supra* note 39, at 774 (noting that the Special Court of Sierra Leone, as well as any future international court tribunal, can work more effectively if it is "combined with and utilized as a part of a comprehensive domestic and international process of accountability, reconstruction, and reconciliation").

346. *See* Jeffrey L. Spears, *Sitting in the Dock of the Day: Applying Lessons Learned from the Prosecution of War Crimes and Other Bad Actors in Post-Conflict Iraq and Beyond*, 176 MIL. L. REV. 96, 164 (2003) (asserting that the Special Court for Sierra Leone is a "great modern model to consider when formulating a plan for a system of post-conflict justice" and one with the greatest likelihood of success when compared to other *ad hoc* tribunals; as such, it can be applied to post-conflict Iraq); *see also* Margaret Sewell, *Freedom from Fear: Prosecuting the Iraqi Regime for the Use of Chemical Weapons*, 16 ST. THOMAS L. REV. 365, 388 (2004) (outlining the advantages of creating a court in Iraq modeled after the Special Court of Sierra Leone); *cf.* Dickinson, *supra* note 106, at 295–96 (noting that although hybrid courts have been developed to assist in post-conflict situations and are likely to be the type of court to be established in postwar Iraq, little study has been made among scholars and policymakers in this matter of transitional justice).

347. *See* Betts & Gisvold, *supra* note 338, at 25 (noting that goals of an international tribunal assume that a society that benefits from the international assistance will develop and strengthen its own domestic rule of law); *see also* William W. Burke-White, *Diversity or Cacophony?: New Sources of Norms in International Law Symposium: Article: International Legal Puralism*, 25 MICH. J. INT'L L. 963, 975–77 (2004) (commenting on the special characteristics of hybrid tribunals, which can accommodate "legitimate difference of national choices within a unitary legal order" and its powerful development into the system of choice in future international courts); Spears, *supra* note 346, at 160–61 (recognizing the vital need to uphold international standards of justice in the local process of reconciliation and restoration of peace).

It's Not All Mutilation: Distinguishing Between Female Genital Mutilation and Female Circumcision

Natalie J. Friedenthal*

"People will change their behavior when they understand the hazards and indignity of harmful practices and when they realize that it is possible to give up harmful practices without giving up meaningful aspects of their culture."[1]

Introduction

Female genital mutilation is a debilitating practice which serves to continue the subjugation of women.[2] Female circumcision, however, is not a human rights violation and is due

1. *See* Reproductive Health Outlook, Harmful Traditional Health Practices: Overview and Lessons Learned, *available at* http:// www.rho.org/html/hthps_overview.htm (last visited Oct. 4, 2005) (quoting the joint statement given by the World Health Organization, the United Nation's Children's Fund, and the United Nations Population Fund on the importance and challenges of addressing the health hazards of some of the world's most traditional and cultural practices).

2. *See* Alexi N. Wood, *A Cultural Rite of Passage or a Form of Torture: Female Genital Mutilation from an International Law Perspective*, 12 HASTINGS WOMEN'S L.J. 347, 371–72 (2001) (denouncing the practice of female genital mutilation as "a form of subordination, degradation, and humiliation," performed not only for the purpose of controlling women's sexuality, but to teach them their social role as inferior to that of men); *see also* Kimberly A. Johns, *Reproductive Rights of Women: Construction and Reality in International and United States Law*, 5 CARDOZO WOMEN'S L.J. 1, 18 (1998) (maintaining that the practice of female genital mutilation not only ensures the subjugation of women, but causes physical and psychological problems, ranging from complications in childbirth to fear and obviation of the enjoyment of sex). *See generally* United Nations Fourth World Conference on Women, Sept. 4–15, 1995, *Declaration and Platform for Action*, ¶ 39, U.N. Docs. A/CONF.177/20 (Oct. 17, 1995) & A/CONF.177/20/Add.1 (Oct. 27, 1995), *reprinted in* 36 I.L.M. 401 (1996) [hereinafter United Nations Fourth World Conference on Women] (stressing that in order to attain the goals of equality, development, and peace for female children, it is necessary to address the existing discrimination and violation against them, including various forms of sexual exploitation and harmful practices, such as female genital mutilation).

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multi-cultural respect consistent with a pluralistic global perspective.[3] Unfortunately, in the international movement to identify and eradicate a practice harmful to the health and welfare of women and children, a neat line was drawn in a broad circumference around the practice, condemning both human rights violations and acceptable cultural traditions.[4] While the welfare of cultures which subscribe to the practice of female circumcision in developing countries would benefit from basic education on health and gender equality, the eradication of the harmful forms of female genital cutting would be more successfully accomplished if confronted with more awareness and respect.[5]

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3. *See* Leslye Amede Obiora, *The Issue of Female Circumcision: Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign Against Female Circumcision*, 47 CASE W. RES. L. REV. 275, 284 (1997) (explaining that because female circumcision is performed predominantly by "female private actors with the apparent consent of the circumcised," it cannot be readily classified as a human rights violation). *But see* Gregory A. Kelson, *Female Circumcision in the Modern Age: Should Female Circumcision Now Be Considered Grounds for Asylum in the United States?*, 4 BUFF. HUM. RTS. L. REV. 185, 201–03 (1998) (declaring female circumcision to be a human rights violation because it violates the body's integrity). *See generally* Barrett Breitung, Comment, *Interpretation and Eradication: National and International Responses to Female Circumcision*, 10 EMORY INT'L L. REV. 657 (1996) (indicating that the U.N. Sub-Commission for the Prevention of Discrimination and the Protection of Minorities does not analyze female circumcision as a human rights violation, but applies a "balancing process weighing the procedure's health consequences against its cultural functions").

4. *Compare* Abbie J. Chessler, *Justifying the Unjustifiable: Rite v. Wrong*, 45 BUFF. L. REV. 555, 587–89 (1997) (arguing that female circumcision is linked to issues of sexual inequality and that cultural justifications for the practice only serve to perpetuate women's inferiority and are in violation of the provisions of the Convention on the Rights of the Child), *with* Karen Engle, *Culture and Human Rights: The Asian Values Debate in Context*, 32 N.Y.U. J. INT'L L. & POL. 291, 301–02 (2000) (explaining that human rights advocates should not condemn female genital surgeries without putting the practice into the applicable cultural context), *and* Elene G. Mountis, *Cultural Relativity and Universalism: Reevaluating Gender Rights in a Multicultural Context*, 15 DICK. J. INT'L L. 113, 124–26 (1996) (commenting that while in many societies female genital mutilation is an accepted cultural practice related to hygiene or rituals into adulthood, western cultures have condemned such practice as a human rights violation against women).

5. *See* Amanda Cardenas, Note, *Female Circumcision: The Road to Change*, 26 SYRACUSE J. INT'L L. & COM. 291, 306 (1999) (asserting that in order to confront successfully the practice of female circumcision, one "must first understand the firmly rooted and deeply felt beliefs of the people who practice it"); *see also* Obiora, *supra* note 3, at 362–63 (reporting the efforts by the Inter-African Committee in its attempt to eradicate female circumcision by fostering awareness of the dangers of the practice and its approach of blending the "old" and the "new"); Jaimee K. Wellerstein, Comment, *In the Name of Tradition: Eradicating the Harmful Practice of Female Genital Mutilation*, 22 LOY. L.A. INT'L & COMP. L. REV. 99, 136 (1999) (citing an alternative to female circumcision consisting of "circumcision through words," which substitutes the physical "cutting" and accomplishes the ritual signifying the coming-of-age for young women).

I. The History and Prevalence of Female Genital Cutting

The general practice of female circumcision is estimated to be at least 1,400 years old[6] and has been practiced by Muslims, Jews, and Christians.[7] This act has been particularly associated with the Islamic religion, not only because it is practiced in those African communities which are predominantly Islamic,[8] but also because it has been claimed as a religious tradition by some Islamic leaders.[9] However, the practice of circumcising females pre-dates Islam.[10] Many Islamic

6. *See* ALICE WALKER & PRATIBHA PARMAR, WARRIOR MARKS: FEMALE GENITAL MUTILATION AND THE SEXUAL BLINDING OF WOMEN 82 (1996) (noting that genital mutilation is at least 6,000 years old); *see also* Gregory A. Kelson, *Gender-Based Persecution and Political Asylum: The International Debate for Equality Begins*, 6 TEX. J. WOMEN & L. 181, 185 (1997) (stating that female circumcision has been in practice for approximately 2,500 years, predating Christianity and Islam); Breitung, *supra* note 3, at 658 (explaining that female circumcision is a 2,000 year-old practice in Africa that has spread to more than 25 countries).

7. *See* Hope Lewis, *Between Irua and "Female Genital Mutilation": Feminist Human Rights Discourse and the Cultural Divide*, 8 HARV. HUM. RTS. J. 1, 20–21 (1995) (noting that although female circumcision is a practice most predominant in the Muslim world, it is also practiced by Christian and Jewish groups); *see also* Note, *What's Culture Got to do With it? Excising the Harmful Tradition of Female Circumcision*, 106 HARV. L. REV. 1944, 1951–52 (1993) (explaining that although the practice of female circumcision is widely accepted in Nigeria, where the dominant religions are Christianity and Islam, it is, in fact, strongly based on traditional, rather than religious, justifications); B.A. Robinson, *Female Genital Mutilation (FGM) in Africa, The Middle East & Far East: Debates about FGM* (Jan. 10, 2005), *available at* http://www.religioustolerance.org/fem_cirm.htm (last visited Oct. 2, 2005) (explaining that the practice of female circumcision in Muslim countries is justified by two controversial sayings of the Prophet Mohammed, but the controversial sayings have not been confirmed and they have even been refuted by some scholars).

8. *See* Breitung, *supra* note 3, at 661–64 (indicating that female circumcision is a practice most predominant in the Muslim parts of Africa, and its justification relates to tradition, enhancement of fertility, religion, chastity, and female hygiene); *see also* Andra N. Behrouz, *Transforming Islamic Family Law: State Responsibility and the Role of Internal Initiative*, 103 COLUM. L. REV. 1136, 1157 (2003) (commenting on the unsuccessful attempt to abolish female circumcision, which is a common and continued practice of the African Muslim community); *cf.* Cassandra Terhune, *Current International and Domestic Issues Affecting Children: Cultural and Religious Defenses to Child Abuse and Neglect*, 14 J. AM. ACAD. MATRIMONIAL LAW. 152, 162 (1997) (arguing that although female circumcision is not rooted in religion, the practice is defended by members of the Christian and Muslim faith, as well as by other religious groups in Africa).

9. Specifically, some controversial Islamic religious leaders in Egypt have issued fatwahs on their interpretation of the role of female genital mutilation in Islam when the subject was before the Egyptian courts. *See* Chessler, *supra* note 4, at 581–82 (explaining that the religious justification for female circumcision may stem from the misinterpretation of the religious resources because in Africa, although it is justified through Islam, allegedly found in the Qur'an and the Hadith, the practice is known to precede Islam); *see also* Ross Povenmire, *Do Parents Have the Legal Authority to Consent to the Surgical Amputation of Normal, Healthy Tissue from Their Infant Children?: The Practice of Circumcision in the United States*, 7 AM. U. J. GENDER SOC. POL'Y & L. 87, 114–15 (1999) (positing that female circumcision is a predominant practice in North Africa and that although it is supported by Islamic beliefs, the practice is contested by some religious scholars); Muslim Women's League, Female Genital Mutilation (Jan. 1999), *available at* http://www.mwlusa.org/publications/positionpapers/fgm.html (last visited Oct. 2, 2005) (illustrating that female circumcision is ardently supported by Muslims, as it was celebrated in 1997 when the Egyptian government overturned a ban on the practice).

10. *See* NAHID TOUBIA, FEMALE GENITAL MUTILATION; A CALL FOR GLOBAL ACTION 31 (Rainbo, 1995) [hereinafter TOUBIA, GLOBAL ACTION] (asserting that "there is no question that [female genital mutilation] preceded Islam in Africa[,]" though many African Muslim communities cite religion as their reason for practicing female genital mutilation); *see also* Wellerstein, *supra* note 5, at 112 (stating that the practice predates Islam, though it is widely perceived as an Islamic religious ritual); WORLD HEALTH ORGANIZATION, *Female Genital Mutilation*, *available at* http://www.who.int/mediacentre/factsheets/fs241/en/index.html (last visited Oct. 5, 2005) (referring to common reasons cited for practicing female genital mutilation, one of which is religion, even though the practice predates Islam).

theologians have made clear that neither the Qur'an nor Saudi Arabia, the holy land of Islamic culture, support this practice.[11] Additionally, other members of the Islamic community are quick to emphasize that the Qur'an does not mention the practice and it is possible to argue that even the least severe form of female genital cutting is a violation of the basic tenets of Islam.[12] While female circumcision is referred to in less reliable portions of the Sunnah, the words and actions of the Prophet Mohammed, these references do not make the practice compulsory[13] and have been interpreted only to condone removal of the clitoral prepuce, the mildest form of female genital cutting.[14]

The World Health Organization estimates that over eighty million females have experienced female genital cutting, primarily girls under the age of eighteen.[15] This practice takes

11. *See* Binaifer A. Davar, *Women: Female Genital Mutilation* (July 1994), *reprinted in* 6 TEX. J. WOMEN & L. 257, 261 (1997) (citing Dr. Taha Ba'asher of the World Health Organization, who says that Islamic theologians refute the idea that Islam supports female genital mutilation); *see also* Julie Dimauro, Note, *Toward a More Effective Guarantee of Women's Human Rights: A Multicultural Dialogue in International Law,* 17 WOMEN'S RTS. L. REP. 333, 336 (1996) (noting that even Saudi Arabia, the "cradle" of Islam, does not support female genital mutilation); Wellerstein, *supra* note 5, at 130 (positing that the Koran does not support the most extreme form of female genital mutilation that some Islamic societies practice).

12. *See* TOUBIA, GLOBAL ACTION, *supra* note 10, at 31–32 (explaining how basic tenets of Islamic religion seem to go against female circumcision and that there is no direct call for it in the Koran); *see also* Nancy Ramsey, *In Africa, Girls Fight a Painful Tradition*, N.Y. TIMES, Jan. 3, 2004, at B23 (quoting a woman who discusses the origins of female circumcision, who said "[e]verybody blames somebody else. Some say it's since creation . . . [s]ome say it's from the Koran"). *See generally* Muslim Women's League, *supra* note 9 (relating how many Muslims "responded with disgust" when they heard of female genital mutilation performed in connection with Islam). The Muslim Women's League also asserts that the Qur'an embraces a sexual relationship between males and females that provides mutual satisfaction and that female genital cutting violates the integrity of the Qur'an, "insulting Allah the Creator Whose creation needs no improvement." *Id.* This organization also states that the practice was adopted by some Muslims in a period which is called "*al-gahiliyyah*," or the era of ignorance, in Arabic. *Id.*

13. *See* Imad-ad-Dean Ahmad, *Female Genital Mutilation: An Islamic Perspective* (2000), *available at* http://www.minaret.org/ fgm-pamphlet.htm (last visited Oct. 5, 2005) (reasoning that although the Prophet stated, "'[d]o not cut severely as that is better for a woman and more desirable for a husband[,]" this only permits female circumcision, but does not require or even encourage it). *But see* Shayla McGee, Note, *Female Circumcision In Africa: Procedures, Rationales, Solutions, and the Road to Recovery*, 11 WASH. & LEE RACE & ETHNIC ANC. L.J. 133, 137 (2005) (suggesting that although females have a choice in deciding whether to undergo circumcision, they often acquiesce to the pressures put on them by society).

14. *See* Elizabeth A. Syer, Comment, *The Status of the Crusade to Eradicate Female Genital Mutilation: A Comparative Analysis of Laws and Programs in the United States and Egypt*, 22 PENN ST. INT'L L. REV. 843, 846 (2004) (listing four different methods of female genital mutilation, the least invasive of which is a clitoridectomy, which involves cutting all or part of the clitoris); *see also* Dr. Imad-ad-Dean Ahmad, Remarks at a Conference on "Religion and Female Mutilation" sponsored by the Ethiopian Development Commission [date omitted] (summary *available at* http://www.minaret.org/fgm.htm) (last visited Oct. 5, 2005) (allowing for traditional justification of female circumcision, as long as only a "miniscule segment of skin from the female prepuce" is excised, and no harm is done); IRINNEWS.ORG, Web Special Documentary, *Razor's Edge: The Controversy of Female Genital Mutilation*, at 42 (last visited Oct. 5, 2005), *available at* http://www.irinnews.org/webspecials/FGM/FGM-web-special.pdf (defining female circumcision).

15. *See* Catherine L. Annas, *Irreversible Error: The Power and Prejudice of Female Genital Mutilation,* 12 J. CONTEMP. HEALTH L. & POL'Y 325, 326 (1996) (questioning the daily occurrence of female genital mutilations); *see also* Davar, *supra* note 11, at 258 (reviewing statistics provided by a World Health Organization press release about eliminating harmful practices in the world); *see also* Ellen Goodman, *Another Step Toward Redefining Abuse of Women*, BOSTON GLOBE, Mar. 27, 1994, at 75 (recounting the story of two girls who were saved from the ritual female genital mutilation by being granted asylum in the United States).

place in 28 African countries as well as several Asian, Middle Eastern, and Western nations.[16] Female genital cutting is generally practiced in three forms.[17] Circumcision, the mildest and rarest form of female genital mutilation, involves removal of the prepuce or hood of the clitoris.[18] The most common practice is excision or clitoridectomy which consists of the removal of most or all of the clitoris and the adjacent labia minora.[19] Infibulation, the most severe form, involves the removal of the clitoris, labia minora, and most of the labia majora, before stitching together the remaining sides of the vulva and inserting a sliver of wood or reed to leave a narrow opening for urine and menstrual blood to pass.[20]

These procedures commonly take place under primitive surgical conditions, often in a family home, lacking basic sanitation, anesthesia or proper surgical instruments.[21] The same instruments are often used to cut the genitals of several girls consecutively without any use of

16. *See* Gender and Women's Health Department, World Health Organization*, available at* http://www.who.int/docstore/frh-whd/FGM/infopack/English/fgm_infopack.htm (last visited Oct. 25, 2005) (providing statistics on the prevalence and distribution of female genital mutilation throughout the world); *see also* Alexandra Salomon, *Doctor Joins Genital Mutilation Debate*, BOSTON GLOBE, Feb. 12, 2004, at A29 (discussing types of female cutting performed in Somalia, Sierra Leone, Eritrea, and Sudan). *See generally* Barbara Crossette, *Female Genital Mutilation by Immigrants is Becoming Cause for Concern in the U.S.*, N.Y. TIMES, Dec. 10, 1995, at 18 (comparing the various cultural justifications for performing female genital mutilation).

17. *See* Syer, *supra* note 14, at 846 (listing four different ways to perform female genital mutilation); *see also* IRINNEWS.ORG, *supra* note 14, at 42 (listing the three types of female genital mutilation currently practiced); Robinson, *supra* note 7 (describing Sunnah circumcision, clitoridectomy, and infibulation, the three types of female genital mutilation).

18. This method is also referred to as Sunnah circumcision, perhaps because the words and action of the Prophet Mohammed, is the only religious text which specifically refers to female genital cutting. *See* Davar, *supra* note 11, at 258 (distinguishing circumcision from the other forms of female genital mutilation); *see also* Wellerstein, *supra* note 5, at 104 (detailing the procedure for a clitoridectomy, also known as an excision); Muslim Women's League, *supra* note 9 (discussing the Muslim perspective vis-à-vis female genital circumcision).

19. *See* Davar, *supra* note 11, at 259 (reporting on what an excision is); *see also* Hope Lewis & Isabelle R. Gunning, *Cleaning of Our Own House: "Exotic" and Familiar Human Rights Violations*, 4 BUFF. HUM. RTS. L. REV. 123, 140, n.4 (1998) (defining excision as the removal parts of both the clitoris and the labia minor); Note, *supra* note 7, at 1946–47 (explaining how an excision and clitoridectomy are performed).

20. *See* Davar, *supra* note 11, at 259 (detailing the brutal way in which infibulations are performed); *see also* Kelson, *supra* note 3, at 187–88 (summarizing the operative steps of an infibulation); Erin L. Han, Book Note, *Legal and Non-Legal Responses to Concerns for Women's Rights in Countries Practicing Female Circumcision: Debating Women's Equality*, 22 B.C. THIRD WORLD L.J. 201, 203–04 (2002) (reviewing UTE GERHARD, LEGAL AND NON-LEGAL RESPONSES TO CONCERNS FOR WOMEN'S RIGHTS IN COUNTRIES PRACTICING FEMALE CIRCUMCISION: DEBATING WOMEN'S EQUALITY (2001)) (explaining the practice of infibulation, the severest form of female circumcision).

21. *See* Chessler, *supra* note 4, at 562 (asserting that most surgical tools used in female circumcisions are rudimentary and unsanitary); *see also* Obiora, *supra* note 3, at 369 (detailing the nexus between the lack of sanitation that accompanies female circumcisions and the stigma that accompanies the procedure); Wellerstein, *supra* note 5, at 106 (detailing the conditions under which female genital cutting usually occurs).

antiseptic.[22] The practice may cause physical, as well as psychological, damage to a woman.[23] Physical harm includes tetanus, rupture of the vaginal walls, formation of dermoid cysts on scar lines, septicemia, lengthy periods of obstructed labor, chronic uterine and vaginal infections, obstruction of menstrual blood flow and increased risks of injury, and death to both the infant and the mother during childbirth.[24] The psychological harm associated with the procedure includes post-traumatic stress disorder, chronic psychomatic ailments, frigidity and marital conflicts, as well as feelings of anxiety, humiliation, and betrayal.[25] Interestingly, immigration courts considering asylum in the United States are one of the few entities which include in the list of harms that females who face genital mutilation may not be able to feel any sensation during future sexual intercourse.[26]

While women who experience any form of female genital cutting are affected by the procedure, it is not surprising that the extreme modification resulting from infibulation impacts many of the natural functions of a woman's body.[27] Infibulation often makes it necessary for a

22. *See* Mountis, *supra* note 4, at 122 (concluding that the lack of sterilization of instruments used on successive girls in their genital circumcision contributes to death, sickness, and infertility); *see also* Cardenas, *supra* note 5, at 295 (remarking that many unsterilized instruments used in performing female circumcisions are utilized in consecutive procedures on various girls without being cleansed); Wellerstein, *supra* note 5, at 106 (noting the lack of cleanliness and antiseptic used when performing female genital cuttings).

23. *See, e.g.*, Amy Stern, Article, *Female Genital Mutilation: United States Asylum Laws are in Need of Reform*, 6 AM. U. J. GENDER & L. 89, 109 (1997) (referring to an instance where genital mutilation caused both physical and psychological destruction); *see* Layli Miller Bashir, Article, *Female Genital Mutilation in the United States: An Examination of Criminal and Asylum Law*, 4 AM. U. J. GENDER & L. 415, 429 (1996) (opining that female genital mutilation can be prohibited under the Constitution because it has harmful physical and psychological effects on girls); *see also* Kris Ann Balser Moussette, Note, *Female Genital Mutilation and Refugee Status in the United States—A Step in the Right Direction*, 19 B.C. INT'L & COMP. L. REV. 353, 363 (1996) (stressing that there are both physical and psychological harms associated with female genital mutilation).

24. The harm to children at childbirth includes an increased occurrence of brain damage due to lack of oxygen or anoxia during delivery. Annas also states that one quarter of the incidents of infertility can be attributed to female genital mutilation. *See* Annas, *supra* note 15, at 330–32 (detailing the bodily dysfunctions that can arise as a result of female genital mutilation). *See* Davar, *supra* note 11, at 259 (discussing some of the various physical problems associated with female vaginal cutting). *See generally* Lewis, *supra* note 7 (describing many of the physical difficulties associated with female genital mutilation).

25. *See* WORLD HEALTH ORG., FEMALE GENITAL MUTILATION, INTEGRATING THE PREVENTION AND THE MANAGEMENT OF THE HEALTH COMPLICATIONS INTO THE CURRICULA OF NURSING AND MIDWIFERY: A TEACHER'S GUIDE 44–45 *available at* http://www.who.int/reproductive-health/publications/rhr_01_16_fgm_teacher_ guide/fgm_teacher_guide.pdf (asserting the various psychological problems that result from female genital mutilation); *see also* Jennifer Jewett, Note, *The Recommendations of the International Conference on Population and Development: The Possibility of the Empowerment of Women in Egypt*, 29 CORNELL INT'L L. J. 191, 199 (1996) (announcing that frigidity and anxiety are just two psychological consequences associated with female genital mutilation); Wellerstein, *supra* note 5, at 108 (detailing the psychological effects resulting from female genital cutting).

26. *See* Mohammed v. Gonzalez, 400 F.3d 785, 799 (9th Cir. 2005) (stressing that female genital mutilation robs the woman of a fulfilling sex life); *see also* Abay v. Ashcroft, 368 F.3d 634, 638 (6th Cir. 2004) (acknowledging that women who have undergone genital mutilation will not be able to have any sensation during sexual intercourse); Abankwah v. Immigration and Naturalization Serv., 185 F.3d 18, 23 (2d Cir. 1999) (maintaining that it is common for women who have had their genitals mutilated to be unable to have any sensation during sexual intercourse).

27. *See, e.g.*, Obiora, *supra* note 3, at 324 (illustrating one woman's physical problems menstruating and urinating); *see* Kelson, *supra* note 3, at 191 (listing dysmenorrhea, dyspareunia, difficult urination, and apareunia as a few of the many physical problems associated with infibulated women); *see also* Moussette, *supra* note 23, at 365 (detailing that painful urination and unusual menstruation arise from infibulation).

woman to spend fifteen minutes urinating.[28] It is impossible for an infibulated woman to have sexual intercourse without her vaginal opening being torn much wider during attempted penetration or cut open with a knife.[29] Continued intercourse must take place often or for prolonged periods of time to ensure that the opening heals wide enough.[30] In cultures where infibulation is common, women often undergo re-infibulation after each childbirth, divorce, widowhood or even during prolonged separation from their husbands.[31] Amnesty International estimates that in 2002, 98 percent of women in the Sudan, Ethiopia and Somalia experienced infibulation.[32]

Explanations for the continuing prevalence of female genital cutting include the fact that the practice is deeply-rooted in religion and cultural mythology,[33] women have been socialized to embrace the ritual,[34] and in the communities which continue the practice, they lack basic

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28. *See* Kelson, *supra* note 3, at 191 (noting that, because tightly infibulated women can only urinate drop by drop, their average time of urination is longer); *see also* Wood, *supra* note 2, at 363 (stating that a woman who has been infibulated can often take ten to fifteen minutes to urinate). *See generally* Dottie Lamm, *Egypt: Land of Contrasts, Contradictions*, DENVER POST, October 2, 1994 (discussing the health risks of genital mutilation).

29. *See* Annas, *supra* note 15, at 330 (stating that the infibulated woman's vagina must be cut open by her new husband on her wedding night, often with the aid of a knife); *see also* Moussette, *supra* note 23, at 366 (describing how the vagina must be cut open to allow penetration); Wellerstein, *supra* note 5, at 107 (noting that the infibulation must be torn, stretched, or cut open to allow penetration).

30. *See* Annas, *supra* note 15, at 330 (stating that repeated and prolonged intercourse is necessary to ensure the reopening of the vulva); *see also* Wood, *supra* note 2, at 364 (describing how the newly opened labia is prevented from healing after intercourse); Jamie Glazov, *Islam's Hatred of the Clitoris*, FRONTPAGEMAGAZINE.COM, October 19, 2001, *available at* http://www.frontpagemag.com/Articles/ReadArticle.asp?ID=241 (last visited Oct. 23, 2005) (explaining that a groom will have prolonged repeated intercourse with his bride to prevent scarring from closing the vaginal opening).

31. *See* Annas, *supra* note 15, at 331–32 (explaining that some women who are infibulated are restitched after they are divorced, widowed, or even during long periods of separation from their husbands); *see also* Davar, *supra* note 11, at 260 (discussing the different stages of life in which women are subjected to genital mutilation); Stern, *supra* note 23, at 106 (stating that female genital mutilation is practiced on unwed girls, widows, divorcees, and married women whose husbands have been absent for long periods of time).

32. *See* Wellerstein, *supra* note 5, at 105 (noting how statistics reveal that nearly 98 percent of women have undergone infibulation in countries such as the Sudan, Ethiopia, and Somalia); *see also* Susan Kreimer, *U.S. Health: Female Mutilations Slow, But Only Gradually*, WOMEN'S ENEWS, Dec. 26, 2003, *available at* 2003 WLNR 7265875 (describing how 98 percent of women from Somalia and the Sudan were mutilated in the previous generation). *See generally* Judy Mann, *After the Hungry Are Fed*, WASH. POST, December 9, 1992 (discussing the principle locations in which pharonic circumcision is practiced).

33. *See* Chessler, *supra* note 4, at 581–83 (discussing various religious justifications for female circumcision); *see also* Stern, *supra* note 23, at 106–07 (describing how cultural mythology is used to explain why female genital mutilation occurs); Wellerstein, *supra* note 5, at 112–13 (discussing the religious and cultural mythology explanations for female genital mutilation).

34. *See* Mann, *supra* note 32, at E17 (stating that young girls value infibulation as the key to womanhood, marriage and respect). *See generally* Annas, *supra* note 15 (discussing the need for female genital mutilation to gain social acceptance in certain cultures); Shannon Nichols, *American Mutilation: The Effects of Gender-Biased Asylum Laws on the World's Women*, 6 KAN. J. L. & PUB. POL'Y 42 (1997) (describing the significance of female genital mutilation for acceptance by the community).

health education.[35] For example, some cultures believe that female genital cutting is necessary to prevent foul smelling vaginal discharge or to prevent female genitals from growing to the length of a man's penis.[36] Female genital cutting is associated with cultural identity, the preservation of virginity, the prevention of promiscuity,[37] and sometimes fulfills local religious requirements.[38] Critics state that this procedure is used in some cultures to control a woman's sexuality.[39] Those who defend the practice claim that the procedure is merely an initiation rite for girls entering puberty[40] in special ceremonies, which include the careful dressing and perfuming of the female and breaking eggs over the female's head in an act to encourage fertility.[41]

In some cultures that mandate female genital cutting, it is considered an important prerequisite to marriage and motherhood.[42] This procedure is considered a condition to marriage

35. *See generally* Han, *supra* note 20 (stating that in many communities, female circumcision is justified through erroneous health beliefs); Khadijah F. Sharif, Note, *Female Genital Mutilation: What Does the New Federal Law Really Mean?*, 24 FORDHAM URB L. J. 409 (1997) (illustrating the basic health risks and lack of sterilization during genital mutilation); Wellerstein, *supra* note 5 (describing the misconceptions about the health benefits of female genital mutilation).

36. *See* Wellerstein, *supra* note 5, at 113 (critiquing the cultural beliefs behind female genital mutilation); *see also* Martin Cohn, *A Painful Prescription: Cairo's Plan to Eradicate the Practice of Female Circumcision*, TORONTO STAR, June 18, 1995, at F5 (noting medical reasons for continuing the practice of female genital mutilation); Hanny Lightfoot-Klein, *Prisoners of Ritual: Some Contemporary Developments in the History of Female Genital Mutilation*, *available at* http://www.fgmnetwork.org/Lightfoot-klein/prisonersofritual.htm (last visited Oct. 23, 2005) (explaining the cultural belief that women's genitals, if uncut, would compete with the length of man's penis).

37. It is also intended to promote chastity by deadening the sexual desires of women, which has been compared to the ancient European tradition of placing women in chastity belts. *See* Wellerstein, *supra* note 5, at 110 (recognizing the emphasis placed on the connection between chastity and female genital mutilation); *see also* Celia W. Dugger, *Tug of Taboos: African Genital Rite vs. U.S. Law*, N.Y. TIMES, Dec. 28, 1996, at A1 (reiterating the cultural belief that female genital mutilation is the only way to ensure a woman's virginity and suitability for marriage).

38. *See* Wellerstein, *supra* note 5, at 109 (rationalizing female circumcision and infibulation through religious mores); *see also* Natalie Angier, *New Debate Over Surgery on Genitals*, N.Y. TIMES, May 13, 1997, at C1 (recognizing the dichotomy in cultural views of circumcision of the genitals); Muhwezi G. Bonge, *Pains of Female Circumcision*, MONITOR (Uganda), Oct. 22, 2004, *available at* 2004 WLNR 16876645 (referring to religious motivations behind female genital mutilation).

39. *See* Davar, *supra* note 11, at 260 (citing societal justifications for female genital mutilation); *see also* Hassan, *supra* note 37 (identifying the cultural conviction that circumcision prevents promiscuity).

40. *See* Davar, *supra* note 11, at 260 (noting the performance of circumcision and infibulation as preparation for puberty); *see also* Kakaire A. Kirunda, *Sabiny Men Speak Out on FGM*, MONITOR (Uganda), Dec. 26, 2004, *available at* 2004 WLNR 16873492 (citing the reluctance to continue the tradition of female genital mutilation as initiation for puberty); Tessy Ochem, *Genital Mutilation, Girl-Child's Nightmare*, THIS DAY (Nig.), Aug. 20, 2004, *available at* 2004 WLNR 7435570 (presenting reasons for maintaining female circumcision for entry to womanhood).

41. *See* Davar, *supra* note 11, at 259 (referring to events involved in a circumcision ceremony); *see also* Mary Ann French, *The Open Wound*, WASH. POST, Nov. 22, 1992, at F1 (describing the effects of infibulation and circumcision on African women in the name of tradition); Donu Kogbara, *The Damaged Women of Africa*, INDEP. (London), Mar. 1, 1997, at 21 (denouncing the practice of FGM and its active continuation by African women).

42. *See* Annas, *supra* note 15, at 331–32 (critiquing the cultural beliefs behind female genital mutilation); *Dealing Sensitively With the Issue of Female Circumcision*, PULSE, May 27, 2002, at 66, *available at* 2002 WLNR 5821459 (stressing the tribal concerns of chastity and preparedness for marriage).

and proof of virginity;[43] refusal is a barrier to acceptance in the only social role available to women.[44] In some tribes, the groom's family gives the bride's family the "bride price," or dowry, only after the bride's genitals are inspected by her future mother-in-law.[45] If the bride is unwilling to be inspected or is found unacceptable by the groom's mother, the dowry must be refunded and the marriage may be called off.[46] Some African tribes believe that the clitoris is a poisonous organ which may blind an infant who comes in contact with it during childbirth, contaminate the breast milk of a new mother, cause illness or death in a man who touches it, or cause a woman to be more vulnerable to the transmission of sexually transmitted diseases, particularly HIV.[47]

A woman who has not undergone female genital cutting is considered dirty, dangerous, unfit for marriage, and unworthy of association with other women.[48] Such woman will become

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43. *See* Audrey Gillan, *Women: The Worst Cut*, GUARDIAN, Dec. 21, 2000, at 8 (describing the outlawing of female genital mutilation in the UK and the expansion of an international dialogue about female genital mutilation); *see also* Jeremy Laurance, *Doctors Must Refuse to Collude in This Abusive Practice*, INDEP. (London), Aug. 22, 2001, at 5 (explaining the difficulty in describing the cultural practice of female genital mutilation as abuse); *Trying to Stop a Barbaric Practice*, IRISH TIMES, Mar. 5, 2001, at 18 (describing the practice of female genital mutilation and the recurrent life-long health problems it causes in women).

44. *See* Annas, *supra* note 15, at 332 (confirming that female genital mutilation occurs mostly among women whose role in society is that of a wife and mother); *see also* Davar, *supra* note 11, at 247–48 (establishing that women who refuse to undergo female genital mutilation may be considered to have deviated from social customs); Eugenie Anne Gifford, *"The Courage to Blaspheme": Confronting Barriers to Resisting Female Genital Mutilation*, 4 UCLA WOMEN'S L.J. 329, 345–48 (1994) (stressing the many ways in which female genital mutilation controls the sexual and social role of women).

45. *See* Milena A. Abreu, *How Current United States Asylum Law Affects Women Escaping Genital Mutilation*, 2 T.M. COOLEY J. PRAC. & CLINICAL L. 401 (1999) (maintaining that the bride is usually inspected by the female relatives of the groom's family before the bride price is paid); *see also* Davar, *supra* note 11, at 260 (expressing that the mother-in-law inspects the bride in order to determine her virginity); Khadijah F. Sharif, Note, *Female Genital Mutilation: What Does the New Federal Law Really Mean?*, 24 FORDHAM URB. L.J. 409, 416 (1997) (affirming that in many African and Middle Eastern countries, the bride is examined by the groom's family in order to determine whether she is chaste and worthy of the bride price).

46. *See* Davar, *supra* note 11, at 260 (suggesting that if the bride-to-be is not a virgin then the future husband may refuse to marry her and get a refund of the dowry); *see also* Moussette, *supra* note 23, at 360–61 (alleging that women who do not experience female genital mutilation are not suitable for marriage); Wellerstein, *supra* note 5, at 110 (revealing that an African man would not marry a woman who is not circumcised).

47. *See* Isabel Coello, *Female Genital Mutilation: Marked by Tradition*, 7 CARDOZO J. INT'L & COMP. L. 213, 215 (1999) (confirming that some people believe that a woman's clitoris is dangerous); *see also* Stern, *supra* note 23, at 106–07 (commenting on the different mythical beliefs held by Africans explaining why female genital mutilation takes place); Wellerstein, *supra* note 5, at 113 (listing the many beliefs held regarding an uncircumcised clitoris and its effects on women, their babies, and men).

48. *See* Kay Boulware-Miller, *Female Circumcision: Challenges to the Practice as Human Rights Violation,* 8 HARV. WOMEN'S L.J. 155, 157 (1985) (mentioning that in some areas, uncircumcised women feel pressured to undergo the procedure in order to survive socially and economically); *see also* Melissa A. Morgan, Comment, *Female Genital Mutilation: An Issue on the Doorstep of the American Medical Community*, 18 J. LEGAL MED. 93, 96 (1997) (emphasizing that women who do not undergo female genital mutilation are considered unfit for marriage); *WHO Tells Third Committee Female Genital Mutilation Could be Eliminated in Three Generations*, M2 PRESSWIRE, Oct. 20, 1998, at ¶ 49 (indicating that a woman who chose not to have female genital mutilation was excluded from her community).

a social outcast without any support from the community, and with no means to independently support herself financially.[49] Completing the cycle, women believe they are preparing their daughters for a happy future and protecting their daughters from illness and social stigma by including their daughters in the traditional procedure.[50]

II. Room for Another Perspective

Those who unequivocally condemn the practice of female genital cutting use the term "female genital mutilation" for all forms of the practice and assert that calling any aspect of the practice by another phrase deceptively cloaks a brutal practice.[51] These absolutists believe that any form of the practice is morally wrong and unjustifiable.[52] Those who most adamantly oppose the practice use impassioned words to describe it, such as a "barbaric," "archaic," and "ancient ritual of torture,"[53] perceiving the practice as intentionally disfiguring and maiming women.[54] They advocate powerfully by intertwining the troublesome medical conditions in

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49. *See* Davar, *supra* note 11, at 260 (asserting that an uncircumcised woman may be considered a social outcast and may face serious economic consequences); *see also* Kay L. Levine, *Negotiating the Boundaries of Crime and Culture: A Sociolegal Perspective on Cultural Defense Strategies*, 28 LAW & SOC. INQUIRY 39, 63 (2003) (noting that parents force their children to undergo female genital mutilation in order to prevent them from becoming social outcasts); Lewis, *supra* note 7, at 23 (commenting that women who have not endured female genital mutilation are considered unclean and are barred from social and economic aid).

50. *See* Lori Ann Larson, Note, *Female Genital Mutilation in the United States: Child Abuse or Constitutional Freedom?*, 17 WOMEN'S RTS. L. REP. 237, 246–47 (1996) (claiming that it is usually women who have undergone genital mutilation who subject their daughters to the same procedure); *see also* Wellerstein, *supra* note 5, at 117 (stating that parents allow their children to be mutilated in order to protect them from social stigmatization); Symposium, *Intersectional International Human Rights*, 5 GEO. J. GENDER & L. 857, 872 (2004) (admitting that some mothers think it is in their daughters' best interest to undergo genital mutilation).

51. *See* Obiora, *supra* note 3, at 289–90 (stressing that critics prefer the term "female genital mutilation" because it is the only suitable characterization for the brutal practices of clitoridectomy and infibulation); *see also* Lewis, *supra* note 7, at 5–7 (clarifying that "female genital mutilation" is a more appropriate term to use than "female circumcision" for describing the physical pain and damage caused by the procedure); Wellerstein, *supra* note 5, at 100 (listing various terms used to describe the procedure of removing or injuring external female genitalia).

52. *See* Bashir, *supra* note 23, at 443 (opining that female genital mutilation is considered a violation of human rights); *see also* Gifford, *supra* note 44, at 330 (stating that several historians, sociologists, feminist theorists, and novelists believe that female genital mutilation is a violation of human rights); Note, *Saving Amina Lawal: Human Rights Symbolism and the Dangers of Colonialism*, 117 HARV. L. REV. 2365, 2378 (2004) (remarking that individuals opposed to female genital mutilation consider the procedure to be cruel, worthless, barbaric, and oppressive towards women).

53. *See* Mohammed v. Gonzales, 400 F.3d 785, 790 (9th Cir. 2005) (describing the practice of female circumcision as barbaric in nature); *see also* Wellerstein, *supra* note 5, at 101 (illustrating female genital mutilation as an ancient ritual of torture that violates fundamental human rights); David Thoronka, *Rescue Children From Cultural Prison,* THE INDEP. (Gambia), Aug. 26, 2005, *available at* 2005 WLNR 13465893 (depicting female genital mutilation or female circumcision as an "archaic" cultural practice).

54. The practice has been compared to wartime rape in the belief that the two practices are acts of aggression to achieve power and domination for the controlling males. *See* Catherine N. Niarchos, *Women, War, and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia,* 17 HUM. RTS. Q. 649, 650 (1995) (admonishing the crime of rape as mutilation being performed on women's bodies); *see also* Wellerstein, *supra* note 5, at 101, 110 (asserting that the practice has been compared to wartime rape in the belief that the two practices are acts of aggression to achieve power and domination for the controlling males); Jane O. Hansen, *Ancient Rite or a Wrong?: Genital Cutting of Girls Becomes an Issue in Georgia*, ATLANTA J. CONST., Mar. 2, 2005, at 1F, *available at* 2005 WLNR 3151653 (referring to the practice of female genital cutting as maiming young girls).

developing countries with vivid descriptions of female genital mutilation.[55] While it is understandably shocking, absolutists focus almost solely on the practice of infibulation, the rarest and most serious form of female genital mutilation.[56] Absolutists skim over cultural beliefs and spend little time on the anthropological roots of the practice, and cite broad concepts of tradition and religion. [57] They believe that the concept of cultural pluralism is merely a smoke screen to cloak the truth, and that the only solution is swift international intervention.[58] To the extent that absolutists do not attempt to understand the culture they feel obligated to change, they may be accused of being Eurocentric or imperialistic in exalting western cultural values as the standard by which right and wrong should be evaluated.[59]

Cultural pluralists or moral relativists are at the other end of the spectrum. A moral relativist believes that what may be considered wrong in our culture and value system is not necessarily wrong in another culture.[60] Individuals with this perspective are more likely to

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55. *See* Abay v. Ashcroft, 368 F.3d 634, 638 (6th Cir. 2004) (citing the conditions under which female genital mutilation is performed as unsanitary with the using of rudimentary instruments); *see also* Wellerstein, *supra* note 5, at 101, 106 (explaining that the procedure is mostly performed in unsanitary conditions using unclean instruments that are rarely cleaned and frequently used on many girls in succession); Ayan Hussein, *This Rite is Wrong: A Somali Teenager Asks Her Family and Community Why a Brutal Practice Endures. But Few are Willing to Talk*, ATLANTA J. CONST., July 24, 2005, at 1B, *available at* 2005 WLNR 11584352 (discussing the unsanitary conditions under which female genital mutilation is performed and noting that the instruments used are not sterilized before or after use).

56. *See* Fitnat Naa-Adjeley Adjetey, *Religious and Cultural Rights: Reclaiming the African Woman's Individuality: The Struggle Between Women's' Reproductive Autonomy and African Society and Culture,* 44 AM. U. L. REV. 1351, 1361–62 (1995) (revealing infibulation, or "pharaonic," circumcision as the most extreme form of female circumcision); *see also* Stern, *supra* note 23, at 92 (defining infibulaton as the removal of all of the foreskin, the entire clitoris, the labia minora, and the labia majora); Wellerstein, *supra* note 5, at 101, 107 (indicating that at marriage, the infibulation must be torn, cut, or stretched by the bridegroom).

57. *See* Olowo v. Ashcroft, 368 F.3d 692, 698 (7th Cir. 2004) (maintaining that female genital mutilation is a tribal tradition and cultural requirement); *see also* Wellerstein, *supra* note 5, at 109 (citing reasons for female genital mutilation, such as maintaining tradition and cultural identity, preserving virginity and preventing promiscuity, fulfilling religious requirements, and maintaining feminine health and hygiene); Colette Douglas Home, *Judge Pupils by Brains, Not Background,* DAILY MAIL (LONDON), Sept. 9, 2005, at 15 (referring to female circumcision as a cruel tradition).

58. See Berta Esperanza Hernandez-Truyol, *Women's Rights as Human Rights—Rules, Realities and the Role of Culture: A Forum for Reform*, 21 BROOK. J. INT'L L. 605, 654 (1996) [hereinafter *Women's Rights as Human Beings*] (alleging that culture can be a smoke screen to prevent dealing with and recognizing historic oppression of women and their subjection to the prevailing normative culture); *see also* Wellerstein, *supra* note 5, at 101 (commenting that female genital mutilation escapes significant international intervention because it is protected under the guise of "culture" or "religion"). *But see* Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberals' Dilemma*, 96 COLUM. L. REV. 1093, 1125 (1996) (emphasizing that there is a desire to protect and respect cultural pluralism and not to legally or morally indict those who practice female genital mutilation).

59. *See* Davar, *supra* note 11, at 270 ("[F]eminists who advocate recognition of female genital mutilation as a basic violation of human rights have encountered opposition from those who view these attempts as cultural condemnation, cultural imperialism, and/or 'Western' feminism."); *see also* Jonathan E. Berman, *Understand Female Genital Mutilation, Yes, but Don't Condone It,* N.Y. TIMES, Nov. 30, 1993, at A24 (suggesting that cultural sensitivity should not bar one from altering her "moral compass"). *See generally* Rozi Ali, *In Response to a Cultural Agent Provocateur*, NEW STRAITS TIMES, Oct. 1, 2002 (articulating that absolutists are often obsessed with regulating personal behavior).

acknowledge that the justification for female genital mutilation varies in rationale and complexity among the different religions, cultures, and traditions of the ethnic groups in the over 28 countries who practice it.[61] However, a relativist would conclude that whatever the rationale for another culture's practice, it is not necessary that he understand or judge another culture; he simply accepts it as different.[62]

Absolutists believe that the solution is a Western education informing women that female genital cutting is not a requirement of the Islamic religion.[63] Moral relativists value the importance of informed consent by the female undergoing genital cutting, rather than the necessity of eradicating the practice altogether.[64] A balanced approach between these two extreme philos-

60. *See* Anthony Chase, *Legal Guardians: Islamic Law, International Law, Human Rights Law, and the Salman Rushdie Affair*, 11 AM. U. J. INT'L L. & POL'Y 375, 433 (1996) (concluding that cultural relativism precludes sanctioning female circumcision as violative of international human rights); *see also Women's Rights as Human Beings*, *supra* note 58, at 657–58 (opining that cultural relativists would argue that local traditions are not reviewable under universal human rights norms because the locality itself should define what is right or wrong by its own standards); Gautam Rana, *And Justice For All: Normative Descriptive Frameworks for the Implementation of Tribunals to Try Human Rights Violators*, 30 VAND. J. TRANSNAT'L L. 349, 365 (1997) ("[C]ultural relativists argue that sovereignty and self-determination require the international community to practice tolerance and reject notions of normative standards.").

61. *See* Davar, *supra* note 11, at 260 (explaining that justifications for female genital mutilation vary across ethnic groups and that tradition, culture, and religion are among the complex reasons invoked for this harmful practice); *see also* Stern, *supra* note 23, at 106 (acknowledging one rationale for female circumcision: The view that the clitoris can inflict harm on the newborn and female genital mutilation will make a woman fertile). *But see* Mahsa Aliaskari, Note, *U.S. Asylum Law Applied to Battered Women Fleeing Islamic Countries*, 8 AM. U. J. GENDER SOC. POL'Y & L. 231, 252–53 (2000) (addressing that the Kasinga decision did not accept cultural tradition or social norms as a justification or legitimization of violence against women).

62. *See* Berta Esperanza Hernandez-Truyol, *Conceptualizing Violence: Present and Future Developments in International Law: Panel I: Human Rights and Civil Wrongs at Home and Abroad: Old Problems and New Paradigms: Sex, Culture, and Rights: A Re/Conceptualization of Violence for the Twenty-First Century*, 60 ALB. L. REV. 607, 619 [hereinafter *Conceptualizing Violence*] (explaining that Relativists believe condemnation of a cultural practice by a person not a member of that culture is invalid); *see also* Joan Beck, *Mutilation Practice Should not be Tolerated*, CHI. TRIB., Apr. 21, 1996, at C21 (noting that Western feminists have generally dropped their resistance to female genital cutting in the face of opposition by African women to interference with cultural beliefs); Michael Kelly, Editorial, *Non-Judgment Day at Yale*, WASH. TIMES, Dec. 19, 2001, at A39 (referring to a Yale undergraduate's assertion that, as a result of a culturally sensitive education, members of her generation generally believe that they must accept female genital cutting as a cultural practice without passing judgment, even though they find it personally "abhorrent").

63. *Accord* Wellerstein, *supra* note 5, at 112 ("[E]ducation focusing on the inaccurate belief that religion mandates female genital mutilation is an essential step in eradicating the practice."); *see* Tom Brune, *Refugees' Beliefs Don't Travel Well*; *Compromise Plan on Circumcision of Girls Gets Little Support*, CHI. TRIB., Oct. 28, 1996, at N1 (quoting Meserak "Mimi" Ramsey, an Ethiopian immigrant and anti-female genital cutting activist, as saying "[w]hat the Somalis, what the immigrants like me need is an education, not sensitivity to culture"). *But see* Bonita C. Meyersfeld, Article, *Reconceptualizing Domestic Violence in International Law*, 67 ALB. L. REV. 371, 376 (2003) (advocating a legal solution to female genital cutting through use of a hybrid of international and various domestic laws).

ophies would offer women who practice this tradition the knowledge which would allow them to protect their health and the health of their children, with the choice to continue the practice in a modified manner and in a less severe form.[65]

The perspective that seems most difficult to find in discussions of female genital cutting is a balanced position that attempts to understand diverse cultural practices and accepts that it might be possible to draw a line between one practice, which deserves international intervention, and another practice which should be accepted as different.[66] Perhaps in the struggle to change a practice that harmed millions of women, the decision was made that it was better to condemn all: at least the mandate would be clear. But there are a few voices, not the most influential or the most powerful, and now the definite minority, who believe it is not right to lump all forms of female genital cutting together.[67]

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64. *See* Annas, *supra* note 15, at 339 ("[I]nformed consent to reinfibulation is central to bodily autonomy. A patient must know and understand the risks of a procedure before entering into an agreement to undergo it."); *see also* Povenmire, *supra* note 9, at 123, nn.62, 80 (arguing that any surgery without informed consent, which may only come from the patient personally, not his or her parents, is battery, and thus, the requirement for informed consent should be applied not only to those undergoing female genital cutting, but also to infant boys whose parents seek to have them circumcised). *See generally* Obiora, *supra* note 3 (contending that many women may want to undergo female genital cutting for a number of beliefs and values and that an outright abolition, which runs the risk of being perceived as Western paternalism, is not an effective way to achieve this goal).

65. *See, e.g.,* Obiora, *supra* note 3, at 367 (commenting that the health implications of various forms of female genital cutting correspond to the severity of the procedure); *see also* Judy Mann, *Standing Against a Brutal Ritual*, WASH. POST, June 27, 1997, at E3 (noting that advocates of eradicating female genital cutting have seized upon the idea of framing the issue as one of informed consent/children's rights as a stalling tactic that will eventually lead to an eradication, by arguing that children cannot give informed consent, and thus the procedure should only be available to adult women who choose it, which they consider unlikely); *c.f.* Elizabeth Warner, *Behind the Wedding Veil: Child Marriage as a Form of Trafficking in Girls*, 12 AM. U.J. GENDER SOC. POL'Y & L. 233, 235, 252, 270 (analogizing female genital cutting to child marriage and advancing a policy of education that will allow women, not girls, to make informed decisions about participation in traditional practices and avoid possible deleterious effects on a culture that an absolute prohibition of a practice could produce).

66. *See* Lewis, *supra* note 7, at 32, 43–49 (articulating a desire for more open discourse among Western and non-Western feminists to form a "grass roots" collaboration to eradicate the practice in an effort to avoid the impression of paternalism); *see also* Alice Domurat Dreger, *"Ambiguous sex"—or Ambivalent Medicine? Ethical Issues in the Treatment of Intersexuality*, HASTINGS CENTER REP., May 15, 1998, at 24 (urging an expansion for condemning genital surgery without informed consent and a recognition of the rights of American intersex children to informed consent for medical procedures by comparing the widely condemned practice of female genital cutting with the largely accepted practice of gender reassignment surgery, which often involves similar procedures).

67. *See* Penelope Andrews, *Women's Human Rights and the Conversation Across Cultures*, 67 ALB. L. REV. 609, 613–15 (2003) (cautioning that in Western zeal to right perceived cultural wrongs, there is a danger of the baby being thrown out with the bathwater if we fail to consider the larger cultural picture at the expense of summarily resolving the issue as we see it); *see also Conceptualizing Violence*, *supra* note 62, at 619–20 (advancing a "cultural pluralist perspective within human rights discourse" as a means of striking a balance between Western paternalism that eliminates cultural practices it deems contrary to human rights norms, and blind acceptance of anything that can be termed a cultural practice). *See generally* Kathryn Christine Arnold, Note, *Are the Perpetrators of Honor Killings Getting Away With Murder? Article 340 of the Jordanian Penal Code Analyzed Under the Convention on the Elimination of All Forms of Discrimination Against Women*, 16 AM. U. INT'L L. REV. 1343 (2001) (distinguishing between practices in which women may choose to participate and those in which they have no choice as being an important consideration when thinking about possible discriminatory effects on women by cultural practices).

There is a distinction between circumcision and mutilation.[68] When true circumcision is performed, only the small piece of skin that covers the clitoris is removed.[69] This skin is comparable to the sheath of skin that is removed during male circumcision.[70] As with the circumcision of males in many cultures, the removal of the clitoral prepuce is often symbolic and performed in conjunction with cultural ceremonies.[71] Advocates of the practice suggest that, when the practice is not compared solely to Western cultural ideals, the true positive or negative aspects of the practice can be determined.[72] For example, one positive aspect of the practice may be that undergoing female genital cutting provides a sense of belonging to a culture and participating in a tradition.[73] However, for many females this feeling may soon fade since there are no other benefits from undergoing the procedure.[74]

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68. *See* Oforji v. Ashcroft, 354 F.3d 609, 620 (7th Cir. 2003) (Posner, J., concurring) (acknowledging that there is a difference between the terms "mutilation" and "circumcision"); *see also* Nowa Omoigui, *Protest Against Bill H22 Outlawing "FGM" in Nigeria*, JENDA: A JOURNAL OF CULTURE AND AFRICAN WOMEN STUDIES, 2001, *available at* http://www.jendajournal.com/vol1.1/omoigui.html (last visited Oct. 12, 2005) (explaining that mutilation and circumcision are two very distinct practices). *But see* Rita Chi-Ying Chung, *Women, Human Rights, and Counseling: Crossing International Boundaries*, 83 J. COUNS. & DEV. 262, 262, *available at* 2005 WLNR 11304025 (describing how mutilation and circumcision are used to refer to the same act).

69. *See* Wanda K. Jones et al., *Female Genital Mutilation: Who is at Risk in the U.S.?*, 112 PUB. HEALTH REP. 368, 368–71 (1997) (discussing the different ways females are circumcised); *see also* Xavier Bosch, *Female Genital Mutilation in Developed Countries*, THE LANCET, Oct. 6, 2001, at 1177 (describing female circumcision as the removal of the labia minora); Peter Kandela, *Clitoridectomy*, THE LANCET, Apr. 24, 1999, at 1453 (explaining the process known as a "clitoridectomy").

70. *See* Bonge, *supra* note 38 (explaining the part of the body that is removed in female circumcision); *see also* Joy Victory, *Why*, THE J. NEWS, July 15, 2005 (explaining the procedure used to circumcise a male); Harry R. Weber, *Father Denies He Circumcised His 2-Year-Old Daughter*, THE ASSOCIATED PRESS, Mar. 3, 2004 (describing a female circumcision).

71. *See* Adele Baleta, *Women's Groups in Kenya Win Small Victory Against Female Circumcision*, THE LANCET, Feb. 3, 2001, at 371 (explaining that female circumcision is a rite of passage to Kenyans); *see also* Yngve Hofvander, *New Law on Male Circumcision in Sweden,* THE LANCET, Feb. 16, 2002, at 630 (stating that male circumcision is widely practiced among certain religions); Steve U. Nwabuzor, *Opposition to Proposed HB 22 Bill on Female Genital Mutilation,* JENDA: A JOURNAL OF CULTURE AND AFRICAN WOMEN STUDIES, 2001, *available at* http://www.jendajournal.com/vol1.1/nwabuzor.html (last visited Oct. 12, 2005) (asserting that female circumcision is a cultural norm).

72. *See* Alice Behrendt & Steffen Mortiz, *Posttraumatic Stress Disorder and Memory Problems after Female Genital Mutilation*, AM. J. PSYCHIATRY, May 1, 2005 (addressing problems that women who were circumcised encountered later in life); *see also* Calev Ben-David, *Snip Judgment*, JERUSALEM POST (Canada), Sept. 9, 2005, at 9 (arguing that circumcision does not have long term effects on the baby); Rachel Pomerance, *Critics Ask U.N. to Outlaw Circumcision,* KANSAS CITY STAR, Sept. 3, 2005 (presenting the claim that circumcision might have positive effects).

73. *See* Bosch, *supra* note 69, at 1177–79 (enumerating some positive aspects of female circumcision); *see also* Cesar Chelala, *An Alternative Way to Stop Female Genital Mutilation*, THE LANCET, July 11, 1998, at 126 (commenting on the overwhelming number of circumcised women in certain countries); Eki Igbinedion, *Fighting Female Circumcision*, THE NIGERIAN VILLAGE SQUARE, Nov. 3, 2004, *available at* http://www.nigeriavillagesquare.com/board/showthread.php?t=1367 (last visited Oct. 23, 2005) (claiming that circumcision has no cultural value other than to make one feel like they belong). Eki Igbinedion is First Lady of Edo State of Nigeria and founder of the Idia Renaissance, a non-governmental organization dedicated to fighting prostitution and the trafficking of females. *Id.*

74. *See* Behrendt & Mortiz, *supra* note 72 (emphasizing that there are only detrimental effects to female circumcision); *see also* Sarah Harrison, *Backing the Ban*, NURSING STANDARD, Mar. 16, 2005, at 12 (detailing the detrimental effects circumcision has on women); *Politicians in Sierra Leone use support for female circumcision to win votes,* WOMEN'S HEALTH WKLY., Apr. 7, 2005 (opining that female circumcision has lost its cultural purpose).

A Nigerian-American doctor, who embraces a more balanced approach, notes that the Nigerian constitution recognizes that both Islamic and customary law are guiding forces in the lives of its citizens.[75] The doctor notes that Nigeria was under British rule for decades with no attempt to outlaw female genital cutting[76] and Western countries are not moving to end other acts of mutilation conducted by African and Middle Eastern countries, such as the practice of cutting off the hand of a thief or the head of a child molester.[77] He asks, if the issue is not about mutilation, but really about women's ability to control their own bodies, why isn't the same argument made for the circumcision of young boys and male infants?[78] If the concern is about sanitation and health, why not teach cultures how to perform genital surgery more safely?[79]

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75. Nigerian freedom of religion found in sections 10 and 38 of the Nigerian constitution. *See* Abdulmunini Adebayo Oba, *The Sharia Court of Appeal in Northern Nigeria: The Continuing Crises of Jurisdiction*, 52 AM. J. COMP. L. 859, 891 (2004) (commenting on the inclusion of Islamic law in the Nigerian Constitution); *see also* Ozonnia Ojielo, *Human Rights and Sharia'h Justice in Nigeria*, 9 ANN. SURV. INT'L & COMP. L. 135, 136–38 (2003) (describing the intense history behind the incorporation of Islamic principles into the Nigerian Constitution*);* Shannon v. Barrow, Comment, *Nigerian Justice: Death-By-Stoning Sentence Reveals Empty Promises to the State and the International Community*, 17 EMORY INT'L L. REV. 1203, 1218 (2003) (detailing the fine line distinction between customary Islamic law and Nigerian jurisprudence).

76. *See* Philip C. Aka, *Nigeria Since May 1999: Understanding the Paradox of Civil Rule and Human Rights Violations Under President Olusegun Obasanjo*, 4 SAN DIEGO INT'L L.J. 209, 220–21 (2003) (commenting on how the amalgamation of Nigeria under British rule perpetuated various human rights violations); *see also* Philip C. Aka, *The "Dividend of Democracy": Analyzing U.S. Support for Nigerian Democratization*, 22 B.C. THIRD WORLD L.J. 225, 228–29 (2002) (explaining Nigeria's history as a product of British colonialism for 46 years*);* Andrew M. Kanter, Note, *The Yenaldlooshi in Court and the Killing of a Witch: The Case for an Indian Cultural Defense*, 4 S. CAL. INTERDIS. L.J. 411, 450–51 (1995) (explaining the idea of Nigerian repugnancy clauses in post-colonial Africa and comparing it to rejections of an Indian cultural defense in state and federal courts).

77. *See* THE UNIVERSAL DECLARATION ON HUMAN RIGHTS: A COMMENTARY 103 (Asbjorn Eide et al., eds., 1992) [hereinafter A COMMENTARY] (stating that those attacking that practice made an effort to connect female genital mutilation to the concept of "gender violence" to distinguish this violence from random aggression more readily deplored by the international community) (quoting the European Commission on Human Rights); *see also* Dr. Khaled Abou El Fadl, *Islam and the Challenge of Democratic Commitment*, 27 FORDHAM INT'L L.J. 4, 69 (2003) (quoting the language from the qur'an, which states "as to the thief, male or female, cut off (faqta'u) their hands as a recompense for that which they committed, a punishment from God"); Jacqueline M. Young, *Torture and Inhumane Punishment of United States Citizens in Saudi Arabia and the United States Government Failure to Act*, 16 HASTINGS INT'L & COMP. L. REV. 663, 663–64 (1993) (commenting on the Islamic practice of cutting off a thief's hand as a punishment and how foreign this concept is to American practice).

78. *See* Povenmire, *supra* note 9, at 113 (comparing the western view of male circumcision to female mutilation and how international legal bodies have reacted as well); *see also* Leigh A. Trueblood, Article, *Female Genital Mutilation: A Discussion of International Human Rights Instruments, Cultural Sovereignty and Dominance Theory*, 28 DENV. J. INT'L L. & POL'Y 437, 441 (2000) (noting that despite the frequent comparison of female circumcision to male circumcision, it is drastically different and more dangerous for the female). *But see* Chessler, *supra* note 4, at 559 (recognizing the similarity between male and female circumcision).

79. *See* Dena S. Davis, *Male and Female Genital Alteration: A Collision Course with the Law?*, 11 HEALTH MATRIX 487, 487 (2001) (recognizing the illegal nature of female circumcision regardless of the sanitary conditions taken); *see also* Bashir, *supra* note 23, at 420 (demonstrating how the two types of "circumcisions" are not similar and cannot reasonably be performed in a similar manner); Christine E. Gudorf, *Gender and Culture in the Globalization of Bioethics*, 15 ST. LOUIS U. PUB. L. REV. 331, 337 (1996) (pointing out the preferred treatment given to male circumcision over female circumcision regardless of whether the appropriate sanitary conditions are met).

III. International Legal Challenges

The last 20 years have brought tremendous growth in the awareness of and activism by citizens and governments in many nations toward the practice of female genital cutting.[80] The medical profession made the earliest and strongest international declarations against the involvement of health professionals or health organizations in the performance of female genital mutilation.[81] This position was grounded in the strong belief that the involvement of health professionals in medical procedures renders that action socially acceptable, especially since doctors are required by oath to act in the best interests of their patients.[82] In 1982, the WHO denounced the performance of female genital mutilation by medical doctors.[83] In 1994, the General Assembly of the International Federation of Gynecology and Obstetrics captured that conviction in a United Nations Resolution.[84]

Many European countries, including Belgium, the Netherlands, Norway, Sweden and Switzerland, have passed laws making female genital mutilation an independent crime or have

80. *See* Cardenas, *supra* note 5, at 306 (noting how in the United Kingdom, certain organizations have been able to raise awareness and lobby for laws against female circumcision); *see also* Jane Maslow Cohen, *Equality for Girls and Other Women: The Built Architecture of the Purposive Life*, 9 J. CONTEMP. LEGAL ISSUES 103, 148–50 (1998) (commenting on how rapid the awareness of female circumcision has spread over the past couple of years as a result of the immigration of mutilation practicing groups); Susan A. Dillon, Comment, *Healing the Sacred Yoni in the Land of Isis: Female Genital Mutilation is Banned (Again) in Egypt*, 22 HOUS. J. INT'L L. 289, 300 (2000) (recognizing that the International Council of Nurses passed a resolution denouncing female circumcision in 1982).

81. *See* Annas, *supra* note 15, at 347 (arguing that the medical profession has denounced female genital mutilation on an international scale since the early 1980's); *see also* Morgan, *supra* note 48, at 1 n.2 (addressing the national and international attention that female genital mutilation has received from the medical community). *See generally* Amal Abd El Hadi, *A Step Forward for Opponents of Female Genital Mutilation in Egypt*, THE LANCET, Jan. 11, 1997 (discussing the longstanding focus by activists of raising health issues associated with female genital mutilation).

82. *See* Annas, *supra* note 15, at 347 (noting that a statement made by the World Health Organization urging doctors to refrain from performing procedures of female genital mutilation is evidence of the world community's reliance on the medical profession for sound social judgment); *see also* Bosch, *supra* note 69, at 1177 (citing the British Medical Association Report highlighting that health providers should not condone the practice because that would legitimize the harm). *See generally* Morgan, *supra* note 48 (arguing that the medical community in particular must grasp the cultural significance of the practice of female genital mutilation).

83. *See* Annas, *supra* note 15, at 347 (summarizing the 1982 initiative by the WHO to ban doctors belonging to establishments from performing female genital mutilation procedures); *see also* Malika Ladjali et al., *Female Genital Mutilation*, 307 BRIT. MED. J. 460, 460 (1993) (highlighting the statement made by the WHO in 1982 advising practitioners not to perform female genital mutilation). *See generally* Bosch, *supra* note 69 (stating that since the early 1980s the WHO has proposed that female genital mutilation be banned).

84. *See* Somalia Mogadishu, *Female Circumcision*, PITTSBURG POST-GAZETTE, Oct 1, 1994, at A4 (noting that the International Federation of Gynecology and Obstetrics passed a resolution stating that female genital mutilation is a violation of human rights and must be stopped); *see also* Mahmoud F. Fathalla, *The Girl Child and the Right to Health*, INT'L FED'N OF GYNECOLOGY AND OBSTETRICS, Jan. 1, 1997, *available at* http:www.childthai.org/ciec/c429.htm (last visited Oct. 3, 2005) (stating that the General Assembly of the International Federation of Gynecology and Obstetrics adopted a resolution in 1994 that banned the practice of female genital mutilation). *See generally Fourteenth World Congress of the International Federation of Gynecology and Obstetrics (FIGO) to be Held in Montreal: Designer Genes and Their Impact on Women's Health to be Addressed by FIGO Keynote Speaker*, CANADA NEWSWIRE, June 14, 1999 (announcing the review of FIGO and the WHO of female genital mutilation in an attempt to put a resolution before the General Assembly of the United Nations).

specifically included it in the definition of criminal child abuse.[85] The United Kingdom passed the Prohibition of Female Circumcision Act in 1985, outlawing the two more severe forms of mutilation.[86] In 1994, the Canadian Deputy Prime Minister announced that Canadian criminal laws would condemn female genital mutilation, regardless of the fact that Canadian laws made no specific reference to it.[87] Female genital mutilation is a crime in France, but judges usually choose suspended sentences subject to probation over incarceration[88] even though France estimates that 4,000 girls undergo female genital mutilation within its borders every year.[89]

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85. *Compare* Guido de Bruin, *Women: Dutch Government Ends Debate on Circumcision Proposal*, INTER PRESS SERVICE, Nov. 11, 1992, at 11 (highlighting that the Netherlands holds female genital mutilation punishable under child abuse laws), *with* UNFPA Frequently Asked Questions about Female Genital Cutting, The United Nations Population Fund Website, *available at* http://www.unfpa.org/gender/faq_fgc.htm (last visited Oct. 4, 2005) (listing the countries in which female genital cutting is banned, including Belgium, Norway and Sweden); *and* Nikki Katz, *About: Female Genital Mutilation*, About.com, *available at* http://womensissues.about.com/cs/fgm1/i/blfgm_p.htm (last visited Oct. 4, 2005) (stating that the procedure of female genital mutilation has been outlawed by Britain, the United States, Canada, France, Sweden, and Switzerland).

86. *See* HARP Female Genital Mutilation/Circumcision, Harpweb.org, *available at* http://www.harpweb.org.uk/content.php? section=women&sub=w9 (last visited Oct. 1, 2005) (noting that the Prohibition of Female Circumcision Act of 1985 passed in the United Kingdom outlawed female genital mutilation); *see also Female Circumcision Clampdown Call,* BBC NEWS ONLINE: HEALTH, Nov. 22, 2000, http://news.bbc.co.uk/1/low/health/1033732.stm (last visited on Oct. 4, 2005) (explaining that female genital mutilation is banned in the United Kingdom under the Act of 1985). *See generally* ABSOLUTEASTRONOMY.COM, Absolute Astronomy Reference: Female Circumcision, *available at* http://www.absoluteastronomy.com/encyclopedia/f/fe/female_circumcision.htm (last visited on Oct. 2, 2005) (stating that female circumcision is banned in the UK).

87. *See* Annas, *supra* note 15, at 334 (citing Section 273.3 of the Canadian Criminal Code) (noting that Canadian Deputy Prime Minister Sheila Copps stated that female genital mutilation is a crime in Canada, despite the fact that the laws make no reference to female genital mutilation). Canadian law also provides protection for women who are persecuted for their political opinions, including opposition to institutionalized discrimination or the socialization of a subordinate status for women. *Id.* at 270. *But see IPU: Legislation and Other National Provisions*, Ipu.org, *available at* http://www.ipu.org/wmn-e/fgm-prov-c.htm (last visited on Oct. 1, 2005) (explaining that the current legislation in Canada regarding female genital mutilation is stipulated in Article 268 of the Criminal Code, which states that one who wounds or maims another by mutilating, "in whole or in part, the labia majora, labia minora or clitoris of a person" can be liable for aggravated assault and imprisoned for up to 14 years). *See generally* Brune, *supra* note 63 (mentioning that Canada has outlawed the practice of female genital mutilation).

88. *See, e.g.*, Thomas Atenga, *Defendants in FGM Suit Get Suspended Sentences*, PANAFRICAN NEWS AGENCY, Mar. 18, 2002 (reporting that two families prosecuted for practicing female genital mutilation received suspended prison sentences); *see* A. Dorozynski, *French Court Rules in Female Circumcision Case*, 309 BRIT. MED. J. 831, 831–32 (1994), *available at* http://bmj.bmjjournals.com/cgi/content/full/309/6958/831/a (last visited on Oct. 4, 2005) (commenting on the cases that have been brought to court in France regarding female circumcision cases and noting that suspended prison sentences have been ordered in some of these cases). *See generally* Charles Wallace, *The Scars of Tradition*, TIME INT'L, May 5, 2003 (highlighting that female genital mutilation is outlawed in France).

89. *Compare* Annas, *supra* note 15, at 334 (citing Kathryn Hone, *Tackling Africa's Ritual of Female Circumcision*, IRISH TIMES, Oct. 12, 1994, in stating that each year an estimated 4,000 girls undergo female genital mutilation in France), *with* Bashir, *supra* note 23, at 419 (citing the WHO's estimates that as many as 6,000 girls are mutilated per day), *and* COUNCIL OF EUROPE, Report of the Committee on Equal Opportunities for Women and Men, Doc. 9076 (May 3, 2001), *available at* http://assembly.coe.int/Documents/WorkingDocs/doc01/EDOC9076.htm (last visited on Oct. 1, 2005) (stating that female genital mutilation affects two million women a year worldwide).

The United States outlawed female genital mutilation in the Federal Prohibition of Female Genital Mutilation of 1995.[90] In proposing this law, Congresswoman Patricia Shroeder intended to create a legal consequence for parents and doctors in situations where immigrant mothers request American doctors to perform female genital mutilation on their daughters or in situations where adult female immigrants ask American doctors to re-infibulate them.[91] This bill was emphatically supported by the American Medical Association (AMA), which asserts that doctors should not participate in female genital mutilation procedures because the medical profession would be perceived as legitimizing this medically unnecessary practice.[92] Medical bans were initiated by individual states prior to federal legislation.[93] In 2004, fifteen states passed leg-

90. *See* Federal Prohibition of Female Genital Mutilation Act of 1995, 18 U.S.C. § 116(a) (2005) (asserting that any person who assists the infibulation of another will face legal consequences); *see also* Mohammed v. Gonzales, 400 F.3d 785, 795 (9th Cir. 2005) (stating that the United States has outlawed the practice of female genital mutilation pursuant to 18 U.S.C. § 116); Abay v. Ashcroft, 368 F.3d 634, 638–39 (6th Cir. 2004) (recognizing that the United States criminalized the act of female circumcision under 18 U.S.C. § 116). Congresswomen Patricia Shroeder first proposed H.R. 3247, which eventually became part of the Federal Prohibition of Female Genitalia Mutilation of 1995 passed in September 1996.

91. *See Introduction of Legislation to Prevent Female Genital Mutilation and the Dangers of the National Security Revitalization Act*, 104th Cong. (1995) (statement of Congresswoman Patricia Shroeder) (providing that the proposed legislation was intended to supply legal consequences to those who assist in female mutilation in the name of tradition); *see also* Bashir, *supra* note 23, at 432 (detailing that Congresswoman Patricia Shroeder introduced the Federal Prohibition of Female Genital Mutilation Act of 1995 which would impose a fine and jail sentence upon anyone found performing infibulation). *See generally* Annas, *supra* note 15 (noting that some women who have been infibulated as children seek re-infibulation after moving to the United States). This law raises interesting possibilities for related conflicts with a parent's privacy right to autonomy in child rearing or a woman's right to exercise autonomy over her own body or as a privacy right if she considers it a requirement to maintain a sexual relationship with her husband. *Id.*

92. *See* Annas, *supra* note 15, at 339 (alleging that the AMA regards female genital mutilation as illegitimate); *see also* Chessler, *supra* note 4, at 577 (illustrating that the AMA believes there to be no medical reason in support of female circumcision). *See generally* Brian D. Gallagher, *A Brief Legal History of Institutionalized Child Abuse*, 17 B.C. THIRD WORLD L.J. 1 (1997) (commenting that the AMA regards the procedure of female genital mutilation as "chilling").

93. *See* Bashir, *supra* note 23, at 431–32 (providing that several states passed initiatives to outlaw female genital mutilation before federal legislation). *See generally* State v. Bass, 120 S.E.2d 580 (N.C. 1961) (discussing that assisted maiming by a physician in North Carolina constituted unlawful conduct); Annas, *supra* note 15 (noting that many states banned many forms of self-maiming).

islation making female genital cutting a crime.[94] Most of these states focused on protecting children, and made it a crime for parents to consent to the procedure.[95] Four of these states outlawed the practice even for females who have reached the age of legal majority.[96]

In addition to making it a crime, many countries allow the threat of female genital mutilation to be a justification for asylum or refugee status.[97] In 1985, the UNHCR Executive Committee concluded that women could be considered a "particular social group" under the 1951 United Nations Refugee Convention, which could be used as justification for countries to grant asylum.[98] Canada first recognized the threat of female genital mutilation as a valid basis for asylum in 1994.[99] Canadian immigration granted refugee status to a Somalian woman and

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94. *See* United States Legislation for Female Circumcision/Female Genital Mutilation (citing Nahid Toubia, Female Genital Mutilation: A Guide to Laws and Policies Worldwide), *available at* http://www.fgmnetwork.org/html/modules.ph?name=Content&pa=showpage&pid=13 (last visited Oct. 23, 2005) (listing the states that have passed legislation prohibiting female genital mutilation); *see also* MINN. STAT. § 609.2245 (2004) (criminalizing any act of female genital mutilation except when necessary to preserve the health of the woman); TENN. CODE. ANN. § 39-13 110 (2004) (declaring female genital mutilation illegal unless the procedure is essential for the health of the subject and is performed by a licensed physician).

95. *See, e.g.*, 325 Abuse and Neglected Child Reporting Act, 325 ILL. COMP. STAT. ANN. 5/3(f) (LexisNexis 2004) (stressing that a parent who consents to female genital mutilation is guilty of a crime); DEL. CODE. ANN. tit. 11, § 780 (2004) (defining Delaware criminal accountability regarding genital mutilation as extending to parents who consent to the procedure); N.Y. PENAL LAW § 130.85(1)(b) (Consol. 2004) (establishing that a parent is guilty of a crime in New York when he or she knowingly consents to circumcision).

96. *But see, e.g.*, N.J. STAT. ANN. § 9:6-8.9 (2005) (outlawing female genital mutilation of female minors in New Jersey); N.D. CENT. CODE § 12.1-36-01 (2005) (prohibiting female genital mutilation in relation to female minors in North Dakota); OR. REV. STAT. § 163.207 (2003) (ensuring the illegality of female genital mutilation upon female minors in Oregon).

97. *See* Coello, *supra* note 47, at 223–24 (indicating that countries like the United States, France, Sweden, and Canada allow the threat of genital mutilation as a basis for asylum); *see also* JEFFERY L. DUNOFF, STEVEN R. RATNER & DAVID WIPPMAN, INTERNATIONAL LAW: NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH 63–64 (Erwin Chemerinsky et al. eds., 2002) (emphasizing that the U.S. Department of Justice considered whether female genital mutilation constituted grounds for asylum); The Female Genital Cutting Education and Networking Project, *available at* http://www.fgmnetwork.org/html.modules.php?name=content&pa=list_pages_categ (last visited Oct. 2, 2005) (listing all countries that have introduced and passed legislation creating criminal penalties relating to female genital mutilation).

98. *See* United Nations Refugee Convention, Convention and Protocol Relating to the Status of Refugees, at art. 1A, para. 2, 189 U.N.T.S. 150 (1951) (according refugee status to any person who has a well-founded fear of being persecuted for reason of membership of a particular social group); *see also* Davar, *supra* note 11, at 267 (citing the 1985 UNHCR Executive Committee Conclusions which recognized that "States, in the exercise of their sovereignty, are free to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a 'particular social group' within the meaning of Article 1A(2) of the 1951 United Nations Refugee Convention."); Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 CORNELL INT'L L.J. 625, 658 (1993) (finding that the use of the particular social group basis of the refugee definition to extend protection to women is supported in pronouncements of the UNHCR).

99. *See* Gregory A. Kelson, *Granting Political Asylum to Potential Victims of Female Circumcision*, 3 MICH. J. GENDER & L. 257, 270 (1995) (affirming that Canada was the first country in the world to grant political asylum because of the threat of female genital mutilation); *see also* Clyde H. Farnsworth, *Canada Gives a Somali Mother Refugee Status,* N.Y. TIMES (Late Edition), July 21, 1994, at A14 (acknowledging that Canada was the first country to grant refugee status to a woman who fled her country to escape genital mutilation); Jennifer Bingham Hull, *Battered, Raped and Veiled; The New Sanctuary Seekers*, L.A. TIMES, Nov. 20, 1994, at 26 (recognizing that Canada was the first to grant asylum to a woman fleeing female circumcision in the West).

her ten-year-old daughter, whom the Canadian government believed would be subjected to female genital mutilation if deported to Somalia.[100]

There are currently many international declarations and conventions clearly stating that female genital mutilation is a human rights violation.[101] Before this was true, those wishing to attack the practice from a legal or political standpoint attempted creatively to interpret international law.[102] Most commonly, female genital mutilation was attacked as a violation of Article 3 of the Universal Declaration of Human Rights (Universal Declaration).[103] Arguments were crafted to characterize the practice of female genital mutilation as a violation of the right to be

100. *See* Annas, *supra* note 15, at 333–34 (reporting that the Canadian Immigration and Refugee Board determined that the family was eligible for refugee status because the threatened gender-based prosecution that it faced would result in a "gross infringement upon personal security"); *see also* Bashir, *supra* note 23, at 453–54 (stressing that Canada granted asylum because it was feared that the ten-year-old would be subject to female genital mutilation if she was forced to return to Somalia); Moussette, *supra* note 23, at 376 (emphasizing that the daughter was granted refugee status because "she is a female and a minor that . . . fears prosecution in the form of female genital mutilation in Somalia today").

101. *See* Committee on the Elimination of Discrimination against Women, General Recommendation 19, Violence against Women at 1, U.N. Doc. A/47/38 (1993) (stating that such gender-based violence is "a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men"); *see also* G.A. Res. A/RES/48/104, 20 Dec. 1993 (affirming that female genital mutilation and other forms of violence against women constitute violations of the rights and fundamental freedoms of women); Bashir, *supra* note 23, at 443 (declaring that the international community considers female genital mutilation a "serious human rights violation").

102. *See* Wood, *supra* note 2, at 372–73 (positing that it can be difficult to use international law to attack female genital mutilation because the practice of female circumcision is seen as a private matter); *see also* Margareth Etienne, Article, *Addressing Gender-Based Violence in an International Context*, 18 HARV. WOMEN'S L.J. 139, 160 (1995) (commenting that many women activists who challenge the practice of female genital mutilation in their own countries turn to international law because their own governments and domestic laws have not afforded them protection); Wellerstein, *supra* note 5, at 102–03 (arguing that "trying to fight [female genital mutilation] on legal terms is ineffective" and suggesting that "uniting the international community and uniformly declaring that female genital mutilation violates fundamental human rights" can effectuate change).

103. *See* Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc A/810 at art. 5 (Dec. 10, 1948), *available at* http://www.un.org/Overview/rights.html [hereinafter Universal Declaration of Human Rights] (last visited Oct. 23, 2005) ("[N]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."); *see also* Kristen Bowman, Comment, *Bridging the Gap in the Hopes of Ending Female Genital Cutting*, 3 SANTA CLARA J. INT'L L. 132 (2005) (revealing that the U.N. Declaration of Human Rights itself is an "instrument that protects women" from the practice of female genital mutilation); Trueblood, *supra* note 78, at 453 (noting that a major argument opposing female genital mutilation is that it is purposely performed to deprive women of equal status in society).

free from bodily invasion and torture,[104] the right to health,[105] the right to be free from discrimination,[106] and a violation of the rights of children.[107]

Under the Universal Declaration, this attack encountered three substantial barriers. First, the traditional interpretation of the Universal Declaration was that in order to constitute a violation, there must be state action.[108] Consequently, the practice of female genital mutilation taking place in a private home at the hands of private citizens seemed to fall outside its scope.[109] In an attempt to work around the state action requirement, some organizations sug-

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104. *See* Universal Declaration of Human Rights, *supra* note 103, at art. 25 ("[E]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family."); *see also* Harvetta Asamoah et al., *International Human Rights*, 32 INT'L LAW. 559, 569 (1998) (declaring that the practice of female genital mutilation is a violation of the Convention Against Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment); Wellerstein, *supra* note 5, at 119–20 (remarking that female genital mutilation is a violation of Article 5 of the Universal Declaration).

105. *See* Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, at art. 2, U.N. GAOR, 48th Sess., U.N. Doc. A/48/629 (Dec. 23, 1993), *available at* http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.RES.48.104.En?Opendocument [hereinafter Declaration on the Elimination of Violence Against Women] (last visited Oct. 23, 2005) (linking the Universal Declaration with Article 2 of the Declaration on the Elimination of Violence Against Women provision protecting women against female genital mutilation); *see also* Universal Declaration of Human Rights, *supra* note 103, at art. 25 (declaring that health and well-being are basic human rights); Elizabeth Heger Boyle & Sharon E. Preves, *National Politics as International Process: The Case of Anti-Female-Genital-Cutting Laws*, 34 LAW & SOC'Y REV. 703, 711 (2000) (reporting on the creation of the Universal Declaration of Human Rights, its enumerated right to health, and the relation of that right to female genital mutilation).

106. *See* Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, GG20876, (2000) (S. Afr.) (listing under discriminatory acts the crime of female genital mutilation); *see also* Declaration on the Elimination of Violence Against Women, *supra* note 105, at art. 3 (specifying that the equal rights of women originate from the Universal Declaration); Wellerstein, *supra* note 5, at 117 (explaining how the Universal Declaration protects against discrimination, specifically female genital mutilation).

107. *See* Yeyeshwork Abay v. John Ashcroft*,* 368 F.3d 634, 639 (6th Cir. 2004) (holding that female genital mutilation has been held as a violation of the rights of children); *see also* Traditional or Customary Practices Affecting the Health of Women and Girls, G.A. Res. 128, art. 3, U.N. GAOR, 53rd Sess., Supp. 117, U.N. Doc. A/RES/56/128 (Feb. 1, 1999) (reaffirming that female genital mutilation "constitutes a definite form of violence against women and girls and a serious violation of their human rights"); Convention on the Rights of a Child, G.A. Res. 44/25, art. 24, U.N. GARC, 44th Sess., U.N. Doc. A/RES/44/25 (Sept. 2, 1990), *available at* http://www.unhchr.ch/html/menu3/b/k2crc.htm [hereinafter Convention on the Rights of a Child] (last visited Oct. 23, 2005) (dictating that female genital mutilation is an infringement on the rights of children).

108. *See* Lewis, *supra* note 7, at 14–15 (noting that the requirement of a state action has prevented the enforcement of international laws banning female genital mutilation); *see also* United Nations Fourth World Conference on Women, *supra* note 2, at 431 (asking governments to condemn the domestic abuse of female genital mutilation); AMNESTY.ORG, Female Genital Mutilation—Human Rights Information Pack, *available at* http://www.amnesty.org/ailib/intcam/femgen/fgm5.htm (last visited Oct. 1, 2005) (highlighting that the traditional interpretation of international law does not protect against domestic forms of female genital mutilation).

109. *See* U.S. DEPT. OF STATE, Female Genital Mutilation (FGM) or Female Genital Cutting (FGC) in Benin, *available at* http://www.state.gov/documents/organization/10222.pdf [hereinafter FGM in Benin] (commenting on the problem of enforcing anti-female genital mutilation laws); *see also* Female Genital Mutilation in Sudan, Soat-Sudan.org, *available at* http://www.soatsudan.org/reports/female%20genital%20mutilation%20in%20sudan.pdf (remarking on the view of female genital mutilation as a private matter of the family and not a state issue); Women and Globalization, Globalization101.org, *available at* http://www.globalization101.org/issue/woman/5.asp (last viewed Oct. 2, 2005) (pondering the common misconception that states are not responsible for acts of female genital mutilation within their borders).

gested that female genital mutilation fell under Article 5 of the Universal Declaration as "inhumane" treatment which "deliberately causes severe suffering, mental or physical."[110] However, the requirement that this infliction of suffering be intentional was equally as hard to prove.[111] Eventually, it was determined that this state action could constitute, at a minimum, the "consent or acquiescence of a public official" amounting to more than governmental failure to enforce existing laws.[112] Second, female genital mutilation did not constitute its own express category of violations under the Universal Declaration as rape, murder, or enslavement did;[113] it constituted another violation category.[114] The final barrier to a successful claim that female genital mutilation is a human rights violation is that the Universal Declaration mandates that the action be against the will of the woman.[115]

By the 1990s, international declarations and conventions expressly mentioned female genital mutilation by name in a more aggressive effort to eliminate the practice. The 1989 United Nations Convention on the Rights of the Child promised to provide more effective legal sup-

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110. *See* Universal Declaration of Human Rights, *supra* note 103, at art. 5 (asserting that freedom from torture is a basic human right); *see also* A COMMENTARY, *supra* note 77, at 103 (quoting the European Commission on Human Rights); Bashir, *supra* note 23, at 433 (arguing that female genital mutilation is a violation of the freedom of torture right in the Universal Declaration of Human Rights).

111. *See* PARL. EUR. DOC. (A5-0285) 11 (2001) (calling on all member states to end female genital mutilation regardless of whether it occurred in the home or by consent); *see also* Annas, *supra* note 15, at 350–51 (arguing that conducting the procedure without anesthesia may qualify as intentional infliction of physical suffering in countries which do not possess vaccinations for common childhood illnesses); Lewis, *supra* note 7, at 8 (reflecting on and the idea of consent as well as the requirement of state action as an obstacle to preventing of female genital mutilation).

112. *See* Annas, *supra* note 15, at 351 (stating the requirements for an Article 5 violation of torture); *see also* Julia R. Hess, *United States and Africa on FGM: Cultural Comparatives, Resolutions, and Rights*, 10 ILSA J. INT'L & COMP. L. 581, 598 (2004) (questioning the success of avoiding the state action argument in the actual prevention of female genital mutilation); Vanessa Merton, *The Utility of International Law for Protecting Women's Health Rights*, 9 PACE INT'L L. REV. 259, 265 (1997) (reiterating the standards of a torture violation according to the United Nations, and questioning whether female genital mutilation qualifies as such).

113. *See* Radhika Coomaraswamy, *Identity Within: Cultural Relativism, Minority Rights and the Empowerment of Women*, 34 GEO. WASH. INT'L L. REV. 483, 492 (2002) (recognizing that sexual freedom has yet to be realized by the Universal Declaration); *see also* Merton, *supra* note 112, at 265 (arguing for female genital mutilation as a violation of human rights even though it is not expressly listed as a violation in the Universal Declaration); Jane Olson et. al., *Bosnia, War Crimes and Humanitarian Intervention*, 15 WHITTIER L. REV. 445, 454 (1994) (confirming that among the list of "crimes against humanity" are rape, murder, and enslavement).

114. *See* Lewis, *supra* note 7, at 14–15 (explaining that U.N. bodies and official conferences have categorized female genital mutilation within the broader violation of human rights); *see also* International Bill of Human Rights 73, U.N. Doc. A/810 (1948) [hereinafter International Bill of Human Rights] (declaring in Art. 5 that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"); Bernadette Passade Cisse, *International Law Sources Applicable to Female Genital Mutilation: A Guide to Adjudicators of Refugee Claims Based on a Fear of Female Genital Mutilation*, 35 COLUM. J. TRANSNAT'L L. 429, 433 (1997) (describing female genital mutilation as a form of unsanitary castration which is analogous to torture).

115. *See* International Bill of Human Rights, *supra* note 114, at 73 (declaring in Art. 7 that "[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law"); *see also* Cisse, *supra* note 114, at 432 ("[T]here is no choice involved for the child or young woman being subjected to the practice."); Female Genital Mutilation—A Human Rights Informational Packet, sec. 1, AMNESTY INTERNATIONAL, *available at* http://www.amnesty.org/ailib/intcam/femgen/fgm1.htm (last visited Sept. 30, 2005) (explaining the physical and psychological effects of female genital mutilation).

port for the international movement to eradicate female genital mutilation.[116] The Convention on the Rights of the Child states that all parties to the Convention "shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children."[117] Specifically, the Convention can be interpreted to ban the practice of female genital mutilation of children in four different articles which prohibit "sexual abuse,"[118] "all forms of physical or mental violence, injury or abuse" against children,[119] and "torture or other cruel, inhuman or degrading treatment or punishment" of children.[120] The Convention enunciated a child's right to enjoy "the highest attainable standard of health."[121] Supporters of the Convention suggested that adopting countries add an explicit term forbidding female genital mutilation of children.[122]

The United Nations Committee on the Elimination of Discrimination against Women (CEDAW) also adopted a recommendation that defined discrimination to include gender-based violence and specifically noted the continuing pressures that perpetuate the harmful practice of female genital mutilation.[123] The final Declaration on the Elimination of Violence against Women, which was adopted by the United Nations General Assembly in 1993 making it applicable to all United Nations member states, condemned both public and private physi-

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116. *See* Convention on the Rights of a Child, *supra* note 107, at art. 2 ("States Parties shall take all appropriate and effective measures with a view to abolishing traditional practices prejudicial to the health of children."); *see also* A.M. Rosenthal, *On My Mind: A Victory in Cairo*, N.Y. TIMES, Sept. 6, 1994, at A19 ("[G]overnments are urged to prohibit female genital mutilation wherever it exists and to give vigorous support to efforts among non-government and community organizations and religious institutions to eliminate such practices.").

117. *See* Convention on the Rights of a Child, *supra* note 107, at art. 24(3) ("[S]tates parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.").

118. *See* Convention on the Rights of a Child, *supra* note 107, at art. 34 ("[S]tates parties undertake to protect the child from all forms of sexual exploitation and sexual abuse.").

119. *See* Convention on the Rights of a Child, *supra* note 107, at art. 19 ("[S]tates parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse.").

120. *See* Convention on the Rights of a Child, *supra* note 107, at art. 37 ("[N]o child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.").

121. *See* Convention on the Rights of a Child, *supra* note 107, at art. 24 ("[S]tates parties recognize the right of the child to the enjoyment of the highest attainable standard of health.").

122. *See* Annas, *supra* note 15, at 351 ("[C]ountries that have adopted or will adopt the convention should add the phrase 'including female genital mutilation' to the end of Section 3 of Article 24."); *see also* Andreea Vesa, *International and Regional Standards for Protecting Victims of Domestic Violence*, 12 AM. U. J. GENDER SOC. POL'Y & L. 309, 314–16 (2004) (acknowledging that the Beijing Declaration of 1995 solidified the international community's resolve to protect women and girls from "any form of violence, whether in the home, the workplace, the community or society"); Wellerstein, *supra* note 5, at 124 ("[W]hile genital mutilation seems to fall within the description of practices hazardous to the health of children, an indirect prohibition through various U.N. documents lacks the force necessary to end this violative practice.")

123. *See* U.N Comm. On the Elimination of Discrimination Against Women, *Female Circumcision: General Recommendation No. 14*, 9th Sess., at 80 (1990) *available at* http://www.un.org/womenwatch/daw/cedaw/sessions.htm (last visited Oct. 3, 2005) (explaining the recommendation that the convention specifically address the problem of female genital mutilation as a gender-based issue); *see also* Convention on the Elimination of All Forms of Discrimination Against Women, U.N. Doc. A/RES/34/180 (Dec. 17, 1979) (proposing articles which will equate to an international bill or rights for women); Elizabeth Evatt, *Finding a Voice for Women's Rights: The Early Days of CEDAW*, 34 GEO. WASH. INT'L L. REV. 515, 516 (2002) (recognizing that CEDAW's general recommendation more clearly acknowledges gender-specific violence as a human rights violation than does the Declaration, which briefly mentions it in its preamble).

cal, sexual, or psychological harm or suffering to women, specifically naming violence within families and female genital mutilation as human rights violations.[124] This Declaration noted that these rights were already protected among several international conventions, including the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.[125] The United Nations Committee on the Elimination of Discrimination against Women monitors implementation of the Women's Convention in signatory states that have opted to be internationally accountable.[126] Currently, over 180 countries are party to the Convention.[127]

Subsequently, the UNHCR Division of International Protection stated that female genital mutilation amounted to a violation of human rights, including the rights of the child and can, therefore, be regarded as persecution for a woman or her daughters for the purposes of determining qualification for refugee status.[128] Official acquiescence necessary to qualify for

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124. *See* Declaration on the Elimination of Violence Against Women, *supra* note 105, at art. 2(a) (defining an act of violence against women as "[p]hysical, sexual and psychological violence occurring in the family . . . female genital mutilation and other traditional practices harmful to women"); *see also* Davar, *supra* note 11, at 250 ("[I]t should be recognized, however, that sexual violence—particularly female genital mutilation, systematic rape and domestic violence—is torture, and thus, is prohibited under international law."). *But see* Wellerstein, *supra* note 5, at 119–20 (denouncing CEDAW as an insufficient document which "seeks to protect individual rights, but fails to directly address the manner in which those rights are violated . . . It [U.N.] must openly declare the practice unacceptable and illegal.").

125. *See* Declaration on the Elimination of Violence Against Women, *supra* note 105, at art. 3 ("[W]omen are entitled to the equal enjoyment and protection of all human rights and fundamental freedoms in the political, economic, social, cultural, civil, or any other field."); *see also* Davar, *supra* note 11, at 263 (explaining that the 1994 International Conference on Population Development in Cairo denounced female genital circumcision as an infringement of reproductive rights which constitutes human rights). *See generally* International Covenant on Civil and Political Rights, U.N. Doc A/RES/2200 (XXI) (Dec. 16, 1966) (stating that one of the general purposes of the United Nations is to protect human rights and fundamental freedoms).

126. *See* Convention on the Elimination of All Forms of Discrimination Against Women [CEDAW], *supra* note 123, at art. 17, (indicating the established powers of the CEDAW who oversee the implementation of the Convention); *see also* Wellerstein, *supra* note 5, at 117–18 (asserting that the CEDAW "imposes a definitive duty on participating states to reevaluate their cultural traditions and determine whether these traditions discriminate against women and, if so, to abolish them"). *But see* Rebecca J. Cook, *State Responsibility for Violations of Women's Human Rights,* 7 HARV. HUM. RTS. J. 125, 159 (1994) ("[The Women's Convention] does not hold states absolutely liable to achieve certain results. It requires only that states parties exercise due diligence in implementing treaty provisions.").

127. Current as of March 18, 2005. The United States is not a party. *See* Evatt, *supra* note 123, at 516 ("[B]y May 2001 the number had risen to 168 [States]. The Convention is now the second most widely ratified human rights treaty, after the Convention on the Rights of a Child."); *see also* Aida Gonzalez Martinez, *The Institute for Global Legal Studies Inaugural Colloquim: The UN and the Protection of Human Rights,* 5 WASH. U. J.L. & POL'Y 157, 167–68 (2001) ("[S]ince 1980, the year in which it [Convention] was open to signature, through October, 2000, 166 states have ratified or acceded to it [Convention]."); United Nations Division for the Advancement of Women: Department of Economic and Social Affairs—Convention on the Elimination of all Forms of Discrimination against Women, *available at* http://www.un.org/womenwatch/daw/cedaw/cedaw.htm (last visited Sept. 30, 2005) (listing the current 180 party states).

128. *See* Guidelines on the Protection of Refugee Women, Office of the United Nations High Commissioner on Refugess, U.N. Doc. ES/SCP/67 (1991) (categorizing the High Commissioner's guidelines on the protection of refugee women); *see also* Daliah Setareh, *Recent Developments: Women Escaping Genital Mutilation–Seeking Asylum in the United States*, 6 UCLA WOMEN'S L.J. 123, 137 (1995) (describing UNHCR's descriptions of harm which constitute persecution that allows qualification for one's refugee status). *See generally* United Nations High Commissioner for Refugees Executive Committee, *available at* http://www.unhcr.ch/cgi-bin/texis/vtx/home (last visited Oct. 3, 2005) (providing general information on the United Nations Refugee Agency).

refugee status could be found when a government failed to provide protection or tolerated this action.[129] In 1993, the Vienna Declaration of the World Conference on Human Rights declared female genital mutilation to be a human rights violation.[130] That same year the World Health Organization adopted a resolution on Maternal Child Health and Family Planning for Health, which sets as a goal the elimination of female genital mutilation as a harmful traditional practice restricting not only the human rights of all members of society, but also the health and development of women.[131] In 1994, the United Nations Population Fund Conference in Cairo urged governments to create legislation banning female genital mutilation and to support organizations working to eliminate this practice.[132] The Population Fund stated its belief that genital mutilation was an "unnecessary and dangerous" practice and called on all parties to ensure that national policies do not allow "culture and tradition" to justify practices that impede the development, health, freedom, or security of girls and women.[133]

The African Charter on the Rights and Welfare of the Child reiterated the United Nations Convention of the Rights of the Child's goal of protecting children against "harmful

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129. *See* Memorandum from UNHCR Division of Int'l Protection on Female Genital Mutilation, U.N. Doc. SUS/HCR/011 (May 10, 1994) (providing grounds for refugee status of women who may be subject to persecution because they didn't conform to the society and FGM may form a basis of asylum); *see also* Trueblood, *supra* note 78, at 460 (explaining that a woman was qualified for a refugee social group because there were no laws in Togo to protect women from the practice of female genital mutilation and that most African women can expect little government protection from it). *See generally* Coello, *supra* note 47 (stating that both UNHCR and European Parliament have taken up the position that women facing inhuman treatment due to refusal of strict social rules should have the right to be considered for refugee status).

130. *See* World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action*, ¶ 5, U.N. Doc A/CONF.157/23 (July 12, 1993) (declaring that genital mutilation violates freedom from torture); *see also* Nahid Toubia, *Female Circumcision as a Public Health Issue*, 331 NEW ENG. J. MED. 712, 715 (1994) [hereinafter Toubia, *Public Health Issue*] (commenting that the Vienna Declaration of the World Conference on Human Rights held that traditional practices such as female circumcision were violations of human rights). *See generally* PATH, Female Genital Mutilation—The Facts, *available at* http://www.path.org/files/FGM-The-Facts.htm (last visited Oct. 4, 2005) (listing the World Conference on Human Rights, Declaration and Programme of Action as the one of the conventions that condemn female genital mutilation as a human rights violation).

131. *See* Press Release, World Health Organization, Female Genital Mutilation: World Health Assembly Calls for the Elimination of Harmful Traditional Practices (May 12, 1993) (recognizing that female genital mutilation can cause serious problems and have a profound effect on the health and development of children); *see also* Ochem, *supra* note 40 (reporting that member nations at the 47th World Health Assembly passed a resolution urging members to ban FGM).

132. *See* Sue George, *Dying to Have a Baby: What is Going On? Sexual and Reproductive Health Should be a Right for All. But in Many Places, Particularly in the Developing World, That Right is Far from Universal*, OBSERVER, Oct. 10, 2004, at 4 (reporting that at the United Nations International Conference on Population and Development in Cairo, 179 countries signed up to an action program to establish sexual and reproductive health and rights for all by 2015); *see also* Rosenthal, *supra* note 116, at A19 (declaring that at the conference Cairo governments were urged to prohibit female genital mutilation wherever it exists); Ahmed Wetaka, *Female Circumcision Nosedives, as REACH Project Takes Root*, MONITOR (Uganda), Dec. 9, 2002 (identifying REACH as the brainchild of a resolution adopted at conference in Cairo to discard the harmful practices of female genital mutilation).

133. *See* Report of the Round Table on Women's Perspectives on Family Planning, Reproductive Health and Reproductive Rights, Ottawa, Can., Aug. 26–27, 1994, ¶¶ 2, 4–5 (declaring that all parties are called upon to ensure that culture and tradition do not justify practices that jeopardize their health, limit their freedom or threaten their security); *see also* Ochem, *supra* note 40 (stating that WHO does not believe there are any benefits from this practice and that, in fact, there are severe consequences that range from health to psychological complications); Judy Mann, *When Journalists Witness Atrocities*, WASH. POST, Sept. 23, 1994, at E3 (commenting that today people are aware of how dangerous the practice is to women's physical and psychological health).

social and cultural practice[s]" and gave African national governments the duty to "take all appropriate measures" to abolish those practices.[134] The African Charter on the Rights and Welfare of the Child purported to provide protection against harmful social and cultural practices "affecting the welfare, dignity, normal growth and development of the child" including customs which discriminate on the basis of sex.[135] Women who live in cultures which practice female genital mutilation and who have made efforts toward changing the tradition have been accused of attempting to undermine local cultural values and of associating themselves with the West.[136]

IV. Comparison to American Culture

In an attempt to understand the rationales behind female genital cutting, the practice has been compared to many different practices that take place in the United States.[137] Perhaps most commonly, female genital cutting is compared to male circumcision.[138] The United Nations and most western-based international organizations do not compare female genital cutting with male mutilation, but instead have grouped all forms of female genital cutting together as

134. *See* Davar, *supra* note 11, at 266 (citing the African Charter on the Rights and Welfare of the Child in documents of the Organization of African Unity 191 in 1992); *see also* Warner, *supra* note 65, at 252 (explaining that Article 24.3, which allows States to take measures to abolish "traditional practices prejudicial to the health of children," was adopted with female genital mutilation in mind); Organization of African Unity, African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (July 1990) (entered into force Nov. 29, 1999), *available at* http://www.itcilo.it/english/actrav/telearn/global/ilo/law/afchild.htm (last visited Oct. 13, 2005) (reaffirming the principles of rights and welfare of the children contained in United Nations Convention on the Rights of the Child).

135. *See* Davar, *supra* note 11, at 266 (citing African Charter on the Rights and Welfare of the Child in documents of the Organization of African Unity 191 in 1992); *see also* Janelle M. Diller & David A. Levy, *Child Labor, Trade and Investment: Toward the Harmonization of the International Law*, 91 AM. J. INT'L L. 663, 676–77 (1997) (declaring that the African Charter on the Rights and Welfare of the Child recognizes the obligation to "protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment"); Trueblood, *supra* note 78, at 455 (stating that the rights stipulated in the Convention on the Rights of the Child include the right to freedom from discrimination based on sex).

136. *See* Davar, *supra* note 11, at 270 (stating that African women who oppose FGM are accused of aligning with the West to undermine the traditional and religious values of their societies); *see also* Erika Sussman, *Contending with Culture: An Analysis of the Female Genital Mutilation Act of 1996*, 31 CORNELL INT'L L.J. 193, 248–49 (1998) (stating that legal efforts to eradicate female genital mutilation were not effective because they were perceived as imperialistic attempts by outsiders to alter or destroy their indigenous culture). *See generally* Nancy Luke & Susan Cotts Watkins, *Reactions of Developing Country Elites to International Population Policy*, 28 POPULATION & DEV. REV. 707 (2002) (explaining that some components of reproductive health agenda of the Cairo conference were viewed as Western ideas that would not be locally appropriate).

137. *See* Han, *supra* note 20, at 204–05 n.20 (comparing female genital mutilation to skin removal, breast implants, nose alterations, face lifts, and liposuction as a painful and risky medical procedure meant to produce a aesthetically pleasing body); *see also Women's Rights as Human Beings*, *supra* note 58, at 673 (questioning whether other medical procedures, such as breast augmentation, can carry the mental and physical risks that female genital mutilation carries); Obiora, *supra* note 3, at 320–21 (comparing female genital mutilation to cosmetic surgery, emphasizing breast implants in particular).

138. *See* Lisa Allardice, *Earth-Mothers Should Get Tax Breaks*, INDEP. (London), Apr. 2, 2000, at 52 (defending female genital mutilation on the grounds that male circumcision is widely practiced); *see also* Julie Remy, *Canada Debates Circumcision*, JERUSALEM POST (Canada), Mar. 1, 2001, at 7 (arguing that male circumcision cannot be compared to female genital mutilation); John Sanko, *Female Genital Mutilation Now a Felony in State*, ROCKY MOUNTAIN NEWS (Denver), May 26, 1999, at 25A (stating that female genital mutilation has been described as "female circumcision" but that it is much more harmful than the male circumcision).

condemned practices.[139] Those critical of the comparison state that circumcision cannot be accomplished on young girls with the same degree of accuracy and relative safety as it is done on young boys, due to the practical difficulty of distinguishing between the clitoris and clitoral hood on young girls.[140]

Proponents of female circumcision argue that the clitoral hood is the anatomical equivalent of the foreskin of a penis, which is removed from children in cultures around the world without public outcry.[141] Female circumcision is unlike the two severe forms of female genital mutilation, which are more similar to amputation than circumcision.[142] Although the practice of male circumcision can be traced to a Biblical mandate, modern medicine has shown that the subsequent effect of the procedure is to promote cleanliness.[143] Removing only the prepuce of the clitoris produces no health benefit,[144] but advocates claim that, rather than violating a woman's right to sexual fulfillment, female circumcision can enhance a woman's sexual experience.[145] Importantly, both male and female circumcision are potentially fatal when the proce-

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139. *See* Gifford, *supra* note 44, at 332 (rejecting the comparison of male circumcision to the misnomer of "female circumcision" because it nonchalantly includes all the procedures from removal of the clitoral hood to amputation of the whole genitalia into one simple category); *see also* Karen Engle, *Female Subjects of Public International Law*: *Human Rights and the Exotic Other Female*, 26 NEW ENG. L. REV. 1509, 1510 (1992) (stating that Western feminists condemn any mutilation of a woman's body). *See generally* The World Medical Association, *Statement on Female Genital Mutilation* (May 2005), *available at* http://www.wma.net/e/policy/c10.htm (last visited Oct. 23, 2005) (stressing that the Woman's Medical Association condemns all forms of female genital mutilation).

140. This practice may include removal of part of clitoris. *See* Annas, *supra* note 15, at 327 (refusing to make this comparison because most female genital cutting consists of the removal of all or part of a female's external genitals); *see also* Muslim Women's League, *supra* note 9 (reporting that it is difficult to distinguish between the clitoral hood and the clitoris on young girls). *But see* Letter from Edgar J. Schoen, M.D. to the Editor, in response to *Female Circumcision*, 332 NEW ENG. J. MED. 188 (1995), *available at* http://content.nejm.org/cgi/content/full/332/3/188 (last visited Oct. 21, 2005) (describing the inaccuracy of characterizing male and female circumcision as equivalents).

141. *See* Obiora, *supra* note 3, at 319 (suggesting that the regularity of male circumcision is due to social pressures); *see also* Muslim Women's League, *supra* note 9 (comparing the removal of the clitoral hood in female circumcision to the foreskin of a penis in male circumcision). *See generally* Chessler, *supra* note 4 (suggesting that all infant circumcision is equally harmful and that the harmful effects of male circumcision should not be ignored).

142. *See* Lewis, *supra* note 7, at 5 (explaining that female circumcision is less harmful than female genital mutilation practices of excision and infibulation, which consist of amputation); *see also* Lisa Manshel, Book Review, 16 HARV. WOMEN'S L.J. 298, 299 (1993) (*reviewing* ALICE WALKER, POSSESSING THE SECRET OF JOY (1992)) (arguing that removal of genitalia should be considered female genital mutilation, not female circumcision). *See generally* Larson, *supra* note 50 (asserting the three most common practices range from making a mark on the clitoris to removing the whole genitalia).

143. *See* Nwabuzor, *supra* note 71 (reporting that modern medicine has found male circumcision to promote cleanliness). *But see* Obiora, *supra* note 3, at 319 (questioning the health benefits of male circumcision). *See generally* Note, *supra* note 7 (reiterating the notion that male circumcision has its origins from the Bible).

144. *See* Toubia, *Public Health Issue*, *supra* note 130, at 715 (suggesting that female circumcision does not promote the health of women); *see also* Wood, *supra* note 2, at 358–59 (emphasizing that the female genital mutilation practice has not been recognized as having any health benefits). *See generally* Bashir, *supra* note 23 (stating that the belief that female genital mutilation promotes health is medically inaccurate).

145. *See* AMNESTY INT'L, *What is Female Genital Mutilation?*, *available at* http://www.amnesty.org/ailib/intcam/femgen/fgm1 .htm#ref1 (last visited Oct. 4, 2005) (suggesting that removal of female body parts is compensated in other psychological ways to enhance an infibulated woman's sexual experience); *see also* Muslim Women's League, *supra* note 9 (repudiating the notion that female circumcision can enhance sexual gratification when there is a removal of a part or whole of a woman's genitals). *But see generally* Annas, *supra* note 15 (stating that removal of the clitoris makes it impossible for a woman to receive sexual pleasure).

dures occur in unsanitary conditions outside of hospitals in developing nations.[146] However, only female circumcision is forced to be practiced under these conditions when countries ban medical professionals from performing the procedure.[147] Consequently, this form of female genital cutting deserves to be treated with as much international disdain as male circumcision. Interestingly, there has been an effort to ban male circumcision as an unnecessary medical procedure conducted on male children, quite possibly negatively affecting their ability to become sexually aroused later in life.[148] The National Organization of Circumcision Information Resource Centers is comprised of international social scientists and medical professionals dedicated to fighting both female genital cutting and male circumcision.[149]

Female genital cutting may also be compared to other cultural practices tolerated in the United States. For example, the Indochinese practice of "coining"—or passing a heated coin across the surface of the skin of an individual suffering from a cold—has been determined by American courts to be a relatively harmless practice with no permanent effects, although it may leave temporary red marks.[150] If female circumcision could be legally performed in American hospitals in this country, a similar legal argument could be made.

There are other non-therapeutic and non-medically necessary procedures which take place in the United States legally. Sex change operations, plastic surgery, body piercing, tattooing

146. *See* Robyn Cerny Smith, *Female Circumcision*: *Bringing Women's Perspectives into the International Debate*, 65 S. CAL. L. REV. 2449, 2492 (1992) (supporting the idea that women who undergo these procedures are subject to excessive pain because of the use of blunt instruments); *see also* Sussman, *supra* note 136, at 198 (stating that in the Sudan, female circumcision deaths were caused by unsanitary conditions and the lack of medicine). *But see* WORLD HEALTH ORG., *Female Genital Mutilation*: *A Student's Manual* (2001), *available at* http://www.who.int/reproductive-health/publications/rhr_01_17_fgm_student_guide/fgm_student_manual.pdf (noting that female genital mutilation should not even be performed in hospitals despite the supposed increased safety).

147. *See* Audrey R. Chapman, *The Right to Health: Monitoring Women's Right to Health Under the International Covenant on Economic, Social and Cultural Rights*, 44 AM. U. L. REV. 1157, 1173 (1995) (stating that female circumcision must be performed by a medical professional in Egypt); *see also* Audrey R. Chapman, *Conceptualizing the Right to Health: A Violations Approach*, 65 TENN. L. REV. 389, 416 (1998) (commenting that efforts have been made to require that female circumcision be performed by medical professionals); Doriane Lambelet Coleman, *The Seattle Compromise: Multicultural Sensitivity and Americanization*, 47 DUKE L.J. 717, 769 (1998) (suggesting that female circumcision is safer when performed by a medical professional rather than by a midwife).

148. Dr. George C. Denniston has been a spokesperson for the movement to ban male circumcision. *See* DOCTORS OPPOSING CIRCUMCISION, *Does Being Born a Healthy Male Require Surgical Correction?* (2003), *available at* http://www.nocircmo.org/pamphlets/DOCbrochure.pdf (calling male circumcision "unwanted, non-therapeutic, sexually desensitizing cosmetic surgery"); *see also* Coleman, *supra* note 147, at 769 (asserting that male circumcision is being examined today because medical professionals are questioning its appropriateness); James G. Dwyer et al., *Informed Consent for Neonatal Circumcision: An Ethical and Legal Conundrum*, 17 J. CONTEMP. HEALTH L. & POL'Y 61, 113 (2000) (commenting that various countries have discouraged male circumcision).

149. *See* Mike Crawley, *Africa Spurns Female Circumcision*, CHRISTIAN SCI. MONITOR, Apr. 5, 2005, at 6 (asserting that 13 Senegalese villages declared that they would not permit female genital mutilation); *see also* Stephen Rodrick, *Unkindest Cut*, NEW REPUBLIC, May 29, 1995, at 10 (declaring that the National Organization of Circumcision and Research Center was founded by Marilyn Milos who strongly opposes circumcision); Christopher Swope, *Budget Cuts Touch a Nerve*, GOVERNING MAGAZINE, Jan. 2002, at 14 (announcing that the National Organization of Circumcision and Research Center cheered the North Carolina decision to not extend Medicaid coverage for circumcision).

150. *See* Leslie Berger, *Learning to Tell Custom From Abuse*, L.A. TIMES, Aug. 24, 1994, at A1 (indicating that coining is common in Vietnamese culture); *see also* Andy Rose, *Breaking Down Cultural Barriers; Police and Asian Community Learn Each Other's Customs*, L.A. TIMES, May 20, 1986, at 1 (explaining that although coining may be mistaken for abuse it is a part of Indochinese culture).

and branding are only a few examples.[151] Breast implant surgery poses a more significant medical threat than piercing, branding, and tattoos, but implant procedures assist women in modifying their bodies to appear more attractive according to the standards of popular culture.[152] To the extent this procedure is performed to make women more acceptable in the eyes of men or more similar to the images of an ideal female body,[153] the motivation behind this type of plastic surgery is as troubling as the alleged motivation behind female genital cutting in male-dominated cultures.

When the same motivating rationale is understood to support the American practice of female genital plastic surgery, the driving force for heterosexual American women is practically identical to women who wish to be allowed to practice all forms of female genital cutting.[154] News reports regarding elective gynecological plastic surgery have begun to emerge in the past several years.[155] These "designer vaginoplasties" evolved from procedures originally deemed medically necessary to relieve urinary incontinence or to repair episiotomies, but which have become a mechanism by which a female may choose to have the diameter of her vagina reduced or "tightened" or her labia rounded or shortened.[156] Some doctors who perform these surgeries claim that the operations enhance a woman's sexual gratification and find it understandable that a woman would want to look more like pictures of women she sees modeled in Playboy

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151. *See* Annas, *supra* note 15, at 342 (asserting that branding, tattooing, body piercing and plastic surgery are common practices in America); *see also* Greg Beaubien, *Burning Question; Branding Makes its Mark as the Latest Fad in Body Modification, But is it Art or Self-Mutilation?*, CHI. SUN-TIMES, Feb. 17, 1995, at 1 (comparing body modification in America to mutilation commonly practiced by other cultures); A.M. Rosenthal, *Sentence of Hope Passed; Population Summit Commentary*, GUARDIAN (London), Sep. 8, 1994, at 9 (implying that girls feel they need to be mutilated in order to be "female").

152. *See* Annas, *supra* note 15, at 342 (stating that breast implant plastic surgery is controversial); *see also The Good News About Lactation After Breast Surgery: If You Think Having an Augmentation or a Reduction Means You Can't Nurse, Think Again*, MOTHERING, Nov. 1, 2004, at 56 (commenting that women often get breast implants to feel more attractive); Christine Rosen, *The Democratization of Beauty*, NEW ATLANTIS, Spring 2004, at 19 (implying that women get breast implants to look more sexually attractive).

153. *See Girls Gone Raunch*, MACLEAN'S, Sept. 26, 2005, at 44 (noting that women get breast implants because of the pressure they feel to look beautiful); *see also Government Rejects Health Warning on Breast Implant Ads*, CAMPAIGN, Apr. 20, 2002, at 2 (implying that females get breast implants to achieve the ideal body of a model).

154. *See* Gifford, *supra* note 44, at 363 (suggesting that American women get plastic surgery to obtain control over their lives while African women are mutilated for the same reason); *see also* Larson, *supra* note 50, at 255–56 (asserting that Western women engage in their own form of self-mutilation for the purpose of being accepted by the dominant culture); Sylvia Wynter, *Bridging Society, Culture, and Law: The Issue of Female Circumcision: "Genital Mutilation" or "Symbolic Birth?" Female Circumcision, Lost Origins, and the Aculturalism of Feminist/Western Thought*, 47 CASE W. RES. L. REV. 501, 514 (1997) (stating that the desire to be circumcised is the same desire as that of Western women who undergo plastic surgery to feel more attractive).

155. *See* Kathryn McNeil, *Surgery Dates Delivered Today Half Face Waiting a Year*, PRESS (CHRISTCHURCH), Feb. 15, 1999, at 1 (stating that many patients were waiting for plastic and gynecological surgery); *see also The Week in Health Care*, MODERN HEALTH CARE, Mar. 2, 1992, at 32 (describing how a hospital is expanding to accommodate more plastic and gynecological surgery patients); PR NEWSWIRE, *The Ultimate Sexual Makeover: Cosmetic Vaginal Surgery* (Jan. 10, 2005), *available at* http://surgerynews.net/news/2005/0101/vaginal1204-1.html (last visited Oct. 13, 2005) (describing a breakthrough in elective cosmetic vaginal surgery).

156. *See* Cay Crow, *LVR Surgery Has Medical Purpose, But Nix if it's Cosmetic*, SAN ANTONIO EXPRESS-NEWS, Nov. 1, 2003, at 9E (commenting on the recent surge of the medically-valuable vaginoplasty surgery for cosmetic purposes); *see also* Mireya Navarro, *The Most Private of Makeovers*, N.Y. TIMES, Nov. 28, 2004, § 9, at 1 (attributing the popularity of genital plastic surgery to modern social pressures and cultural influences). *See generally* Jennifer Wells, *"Sexy" Looks A Lot Like Boring*, TORONTO STAR, Sept. 24, 2005 (commenting on celebrities embracing vaginoplasties as part of a panoply of trendsetting self-improvements).

magazine.[157] Other doctors note that as long as a patient is informed about the risks and potential consequences of the operation, there is nothing wrong with conducting gynecological plastic surgery purely for aesthetic reasons.[158]

Doctors who condemn misuse of vaginoplasties say that the surgery should be used only for reconstruction or medically necessary operations, especially because there is a likelihood that subsequent scarring is likely to make intercourse painful.[159] American plastic surgeons conducting female genital cutting are not excluded from the international understanding that doctors condone cultural norms when they agree to be involved in the practice.[160] While American females need only give informed consent or demonstrate their knowledge and understanding of the risks of a procedure, women in other nations are robbed of the opportunity to make this decision once they have become informed.[161] Consequently, it does not appear that broad international declarations have given any more power or sexual autonomy to the females affected by international law.

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157. *See* Annas, *supra* note 15, at 353 n.164 (referencing Dr. Burt, who condones "vaginal-angle" surgery for arguably increasing female sexual pleasure); *see also* Simone Weil Davis, *Loose Lips Sink Ships*, 28 FEMINIST STUD. 7, 7 (2002) (quoting Dr. Matlock, a leading cosmetic vaginal surgeon, who validates women's desire to look like the "ideal" in Playboy); *Laser Vaginal Rejuvenation Center of Michigan; Vaginal Laser Cosmetic Surgery Offered at Michigan Center*, LAW & HEALTH WKLY., Feb. 12, 2005, at 218 (suggesting that vaginal rejuvenation can enhance sexual pleasure).

158. *See* Sandy Kobrin, *More Women Seek Vaginal Plastic Surgery*, WOMEN'S ENEWS, Nov. 11, 2004, *available at* http://www.womensenews.org/article.cfm/dyn/aid/2067/context/archive, ¶ 17–18 (last visited Oct. 5, 2005) (suggesting that labiaplasty and vaginoplasty are part of an overall upsurge of surgical procedures in the quest for eternal youth and beauty); *see also* Jen Loy, *Pushing the Perfect Pussy*, FABULA, June 30, 2000, at 26 (quoting Dr. Alter, premier Beverly Hills plastic surgeon specializing in labiaplasty, who does most of his surgeries for cosmetic reasons).

159. *See* Lynda Gorov, *The Latest Fad from La-La Land: a 'Designer Vagina'*, BOSTON GLOBE, Aug. 23, 1999, at C1 (highlighting the physicians' view regarding uncertain sexual benefits of cosmetic vaginoplasty, and the inherent risk of complications that may actually make intercourse more painful); *see also* Anka Radakovich, *New Sex Boosters Everyone's Talking About!*, MARIE CLAIRE, May 2005, at 202 (discussing Dr. Brian Kinney's concerns regarding the relative inexperience of the medical community with vaginal rejuvenation, and the potential risks, including significantly altered sensation and general surgical complications); *cf.* Carrie Havranek, *The New Sex Surgeries*, COSMOPOLITAN, Nov. 1998, at 146 (summarizing one surgeon's warnings about the potential downfalls of labiaplasty, including heightened sensitivity and an unnatural look).

160. *See* Wynter, *supra* note 154, at 366 (suggesting that doctors who perform genital mutilation in the clinical setting serve to further legitimize the procedure); *see also* Carolyn Adolph, *Doctors Must Become Advocates for Women, Conference Is Told,* GAZETTE (Montreal), Oct. 1, 1994, at A3 (reporting on the meeting of the International Federation of Gynecology and Obstectrics, where participants passed a fervent resolution against female genital mutilation, and called on doctors to refuse to perform the operation); Lisa Priest, *Our MDs "Involved" in Genital Mutilation,* TORONTO STAR, Oct. 3, 1994, at A9 (admonishing Canadian doctors who did little to end the practice of female genital mutilation, a "barbaric" practice, by their colleagues). *See generally* Andy Riga, *5,500 Girls a Day Have Genitals Mutilated; Medical Profession has Moral Duty to Protect Children, Doctor Says*, GAZETTE (Montreal), Sept. 27, 1994 (quoting a physician who believes that removal of functioning body organs for non-disease related reasons should be unacceptable within the health profession).

161. *Compare* Gudorf, *supra* note 79, at 332 (suggesting that female circumcision does not formally violate the principle of informed consent since the child's guardian arranges the surgery), *with* McGee, *supra* note 13, at 137 (arguing that the alleged "agency" of African women who elect to undergo female circumcision is questionable when the underlying motivation is fear of social ostracism and familial disgrace). *See generally* Annas, *supra* note 15 (suggesting that obtaining informed consent for female genital mutilation is very difficult because of the myths surrounding the procedure that frighten women into consent).

V. Solutions

The creation of international declarations and conventions was an important first step in providing awareness and securing condemnation of a harmful practice.[162] But even binding conventions proclaiming the importance of international intervention proved fruitless if plans were not created to implement them.[163] Different suggestions for implementation on the ban against female genital cutting ranged from pursuing the creation of criminal laws by nations with citizens who practiced female genital cutting to launching educational campaigns about the basic health and welfare of women.[164] The least successful approach was the attempt to pressure other sovereign nations to create and enforce criminal laws.[165] To this day, few of the governments in African countries will officially condemn female genital cutting or enact formal

162. *See* Gudorf, *supra* note 79, at 332 (suggesting that international organizations, such as UNICEF and WHO, brought the practice of female genital mutilation into the public eye); *see also Burkina Faso: Dial SOS Circumcision and Stop Girls Being Cut*, UN INTEGRATED REG'L INFO. NETWORK, Mar. 18, 2005 (describing the advances and setbacks of human rights organizations in Burkina Faso in protecting women from female genital mutilation amidst international uproar on the issue).

163. *See* Cardenas, *supra* note 5, at 301 (arguing in order for declarations and conventions to become effective, individual countries must pass legislation to enforce them); *see also* Wellerstein, *supra* note 5, at 101–02 (calling on the international community to take concrete measures towards transforming convention declarations into effective punishment and deterrence mechanisms in their respective countries). *But see* Mary Daly, *"The Courage to Blaspheme": Confronting Barriers to Resisting Female Genital Mutilation*, 4 UCLA WOMEN'S L.J. 329, 345 (1994) (suggesting that laws may not be the most effective method for combating the underlying cultural issues of female genital mutilation, and may cause most harm to the victims themselves); Alison DeLory, *Fighting for Foreskin: an Ontario Doctor is Crusading to Have Circumcision Criminalized, Just Like Female Genital Mutilation*, MED. POST, Sept. 4, 2001, at 52 (citing Section 268 of the Criminal Code of Canada which provides a 14-year prison sentence for conducting female genital mutilation).

164. *See* Wellerstein, *supra* note 5, at 102–03 (listing various ways to reduce the incidence of female genital cutting, including uniting as an international community to declare female genital mutilation a violation of fundamental human rights, and educating people on women's sexuality and the dangers of the practice); *see also* S. James Anaya, *International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State*, 21 ARIZ. J. INT'L & COMP. L. 13, 26 (2004) (describing how one Maasai woman advocates an educational campaign in her society to increase awareness that female genital mutilation is wrong); Allen E. White, *Female Genital Mutilation in America: The Federal Dilemma*, 10 TEX. J. WOMEN & L. 129, 131 (2001) (explaining that the influx of immigrants from cultures that practice female genital mutilation led the United States to pass the Female Genital Mutilation Act in 1996, which criminalizes female genital mutilation, and to coordinate a federal program to educate and monitor immigrants).

165. *See* Renu Mandhane, *The Use of Human Rights Discourse to Secure Women's Interests: Critical Analysis of the Implications*, 10 MICH. J. GENDER & L. 275, 312 n.226 (2004) (noting that, despite the Kenyan government's criminalization of female genital mutilation, mutilation is unlikely to stop because it is an "entrenched cultural practice"); *see also* Hess, *supra* note 112, at 589–90 (asserting that the United States' effort to deter female genital mutilation in other countries via the Female Genital Mutilation Act of 1996 actually had the opposite effect because African women felt as though Western women did not understand their culture and were trying to suppress African rituals, just as imperialism and colonialism had done in the past, causing African women to hold onto family and cultural values for protection and self-justification); Wellerstein, *supra* note 5, at 102 (maintaining that actions taken by the United Nations to oppose female genital mutilation have not been enough and that individual countries must enforce their own criminal laws against the practice in order to assert that the practice will not be tolerated).

legislation to ban the practice.[166] Some countries, such as Benin, Gambia, Burkina Faso, and Senegal have made declarations of the intent to eradicate the practice.[167] Other countries, such as Sudan, Somalia, and Kenya, have created legislation, but generally fail to enforce those laws.[168]

To exemplify this problem, it is helpful to look at Egypt's history of dealing with female genital cutting. In July 1997 the Egyptian government overturned an existing ban on the practice of female genital cutting in response to lobbying by some Muslim figures, particularly Sheikh Youssef al-Badri, an outspoken proponent of the circumcision of Muslim women.[169] This ban was subsequently reinstated when Egypt's Supreme Administrative Court ruled that the procedure was not required by Islam and that Islamic law (Sharia) does not provide a reli-

166. *See* Davar, *supra* note 11, at 261 (asserting that few African countries have officially condemned female genital mutilation and still fewer have enacted formal legislation against the practice); *see also* Adam Karp, Note, *Genitorts in Global Context: Female Genital Mutilation as a Tort Under the Alien Tort Claims Act, the Torture Victim Protection Act, and the Foreign Sovereign Immunities Act*, 18 WOMEN'S RTS. L. REP. 315, 316 (1997) (declaring that governments with bans against female genital mutilation are slow to enforce those bans and that other countries in Africa and Asia have "neither banned nor medicalized" the practice). *But see* Marc Lacey, *African Women Gather to Denounce Genital Cutting*, N.Y. TIMES, Feb. 6, 2003, at A3 (reporting that the first ladies of Burkina Faso, Nigeria, Mali and Guinea all gathered to condemn the cutting of young girls and that about half of Africa's 53 nations already have prohibitions in place).

167. *See* Davar, *supra* note 11, at 261 (indicating that official declarations against female genital mutilations have been made by the Presidents of Benin, Gambia, Burkina Faso and Senegal); *see also* David Hecht, *When a Law Sweeps in, Tradition Lashes Back*, CHRISTIAN SCI. MONITOR (Boston), Feb. 4, 1999, at 1 (reporting that in January 1999, Senegal criminalized the practice of female genital mutilation); Wellerstein, *supra* note 5, at 135 (listing Burkina Faso, Central African Republic, Djibouti, Ghana, Guinea-Conokry, Senegal, and Togo as countries that have passed laws banning female genital mutilation).

168. *See* Davar, *supra* note 11, at 261 (explaining that although some form of legislation against female genital mutilation exists in Sudan, Egypt, Somalia and Kenya, in reality the legislation often does not protect women against the practice); *see also* Lacey, *supra* note 166, at A3 (reporting that some young girls in Kenya, where female genital mutilation is officially banned, needed to resort to lawsuits to prevent their parents from compelling them to undergo the cuts). *See generally* Wellerstein, *supra* note 5 (maintaining that laws which simply ban female genital mutilation are ineffective if unaccompanied by local and global support); Mandhane, *supra* note 165 (noting the improbability that female genital mutilation will end despite its criminalization by the Kenyan national government).

169. *See* Wellerstein, *supra* note 5, at 134–35 (recounting how Muslim fundamentalist Sheikh Youssef al-Badri forced the Egyptian Health Minister to defend the ban in court); *see also* Lawrence Kelemen, *Learning from Sadism*, JERUSALEM POST (Canada), Nov. 21, 2002, at 7 (reporting that the Egyptian Minister of Health banned female genital mutilation, but in 1997, the ban was challenged by Sheikh Youssef al-Badri, on grounds that it violated Islamic law, leading Egyptian courts to overturn the ban and permit female genital mutilation once again). *But see World in Brief; Egypt; Genital Mutilation Ban Still Enforced*, L.A. TIMES, July 12, 1997, at A11 (reporting that Egyptian health authorities will continue to enforce a ban on female circumcision despite a court ruling striking down the ban in a suit brought by Islamic fundamentalists).

gious right to perform female circumcision.[170] Consequently, the Egyptian court held that female genital cutting was prohibited by Egyptian law.[171] Egyptian legislation only outlawed the two severe forms of female genital mutilation and prohibits the procedure on minors, even if accomplished with the agreement of the child and her parents.[172] Gynecologists must approve the surgery if it is medically necessary.[173]

The Inter-African Committee for the Eradication of Traditional Practices Affecting the Health of Women and Children in Africa was created to place an emphasis on incorporating education on women's rights into the concept of human rights.[174] When community outreach programs were created by non-governmental organizations (NGOs) in Africa, the most difficult hurdle to ending female genital cutting was the perspective women had about themselves

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170. Interestingly, these events coincided with a CNN News report which showed video footage of a ten-year-old girl being circumcised by a local barber, leading to several arrests and to Egypt's Health Minister to promise to enact legislation to ban this practice, which never happened. *See* Annas, *supra* note 15, at 325; Wellerstein, *supra* note 5, at 135 (noting that on appeal, Egypt's supreme administrative court upheld the ban on female genital mutilation and ruled that "female circumcision is not a personal right according to the rules of Islamic Sharia"); *see also* Editorial, *A Cruel Ritual is Outlawed*, HARTFORD COURANT, Jan. 9, 1998, at A12 (declaring that Egypt's highest court has held that there is nothing in the Koran that justifies genital mutilation); *Egypt's Circumcision Decision Upheld*, CHI. TRIB., Jan. 11, 1998, at 1 [hereinafter *Egypt's Circumcision Decision*] (reporting that Egypt's high court has upheld a Health Ministry decision banning government-certified doctors and health workers from performing female genital mutilation and that the procedure is not one of Islam's dictates).

171. *See* Wellerstein, *supra* note 5, at 135 (indicating the holding of Egypt's supreme administrative court, which held that the practice of female circumcision is subject to Egyptian law and further, that female genital mutilation may be outlawed even if the child and parents consent); *see also Egypt's Circumcision Decision*, *supra* note 170, at 1 (reporting that the Supreme Administrative Court ruled that female genital mutilation is subject to Egyptian law). *See generally* Editorial, *supra* note 170 (stating that Egypt's supreme administrative court upheld a ban on female circumcision and that the high court's decision means all legal avenues have been exhausted).

172. *See* Lewis & Gunning, *supra* note 19, at 136 (noting the there was a cultural and political backlash for implementing legislation disapproving FGM); *see also* Bashir, *supra* note 23, at 446 (emphasizing that the Egyptian legislation only bans certain types of female genital mutilation and allows those which remove only part of the clitoris); Wellerstein, *supra* note 5, at 134–35 (asserting that laws, such as the one passed by the Egyptian government in July 1996, which only ban female genital mutilation, are ineffective).

173. *See* Dillon, *supra* note 80, at 316 (asserting that the first Egyptian legislation banning female genital mutilation actually allowed a less intensive form in private clinics); *see also Egypt: Report on Female Genital Mutilation (FGM) or Female Genital Cutting (FGC)*, June 1, 2001, ¶¶ 15–16, *available at* http://www.state.gov/g/wi/rls/rep/crfgm/10096.htm (last visited Oct. 24, 2005) (stating that the Minister of Health permitted the procedure in governmental facilities, but later completely banned it, except in cases where it was medically necessary); *cf.* Kate Haas, *Who Will Make Room for the Intersexed?,* 30 AM. J.L. & MED. 41, 55 (2004) (emphasizing that although the U.S. prohibits genital mutilation, it condones genital reconstructive surgery on children where it is in their best interests and informed consent has been given).

174. *See* Adjetey, *supra* note 56, at 1362–63 (noting that the Inter-African Committee deems the practice of female genital mutilation the "epitome of gender-discrimination"); *see also* Coello, *supra* note 47, at 217–18 (acknowledging that in 1999 the Inter-African Committee had a strong presence in 22 countries that were developing training and information programs); Hess, *supra* note 112, at 585–86 (emphasizing international support for the Inter-African Committee by the U.N.'s adoption of its aims and purpose); *cf.* Roger J.R. Levesque, *Sexual Use, Abuse and Exploitation of Children: Challenges in Implementing Children's Human Rights*, 60 BROOK. L. REV. 959, 964 n.18 (1994) (stating that the Inter-African Committee has not categorized female circumcision as torture).

and their children in society.[175] Local women considered female genital cutting to be the social norm.[176] In cultures where women were only able to fill the societal roles of wife and mother, the refusal to conform to social expectations would not only decrease their social status, but render them social outcasts.[177] It became necessary to inform women that genital cutting constituted a human rights violation even when it was done with the intention of protecting children from social stigma.[178]

The International Day of Zero Tolerance to Female Genital Cutting was adopted at an international conference in Addis Ababa in February 2003.[179] This conference was organized by the Inter-African Committee on Traditional Practices Affecting the Health of Women and

175. *See* Kelson, *supra* note 99, at 297 (illustrating that even if a tribal woman refused to have her daughter circumcised, other women in the tribe would insist that it be done against the mother's consent); *see also* Trueblood, *supra* note 78, at 440 (recognizing the emergence of a conflict between the NGO's efforts in stopping female genital mutilation and the victims who support it). *But see* Wood, *supra* note 2, at 352 (recognizing that African women are also a part of the NGO who support the eradication of female genital mutilation).

176. *See* Oluyemisi Bamgbose, *Africa at the Crossroads: Current Themes in African Law: V. Women and the Law in Africa: Legal and Cultural Approaches to Sexual Matters in Africa: The Cry of the Adolescent Girl*, 10 U. MIAMI INT'L & COMP. L. REV. 127, 134 (2001) (maintaining that norms associated with circumcision are instilled in girls at an early age through song and dance); *see also* Note, *supra* note 7, at 1949 (noting that, for young tribal women, circumcision fulfills a "deep-seated need to belong" and prevents them from being ostracized); Wellerstein, *supra* note 5, at 109–10 (asserting that while female genital mutilation is a part of tradition and cultural identity, there are alternate rituals which do not permanently disfigure women and yet preserve a rite of passage).

177. *See* Annas, *supra* note 15, at 332 (noting that female genital mutilation most frequently occurs in societies where women are seen as having the "one-dimensional presence and purpose," that of fulfilling the roles of wife and mother); *see also* Nancy Ehrenreich & Mark Barr, *Intersex Surgery, Female Genital Cutting, and the Selective Condemnation of "Cultural Practices"*, 40 HARV. C.R.-C.L. L. REV. 71, 81 (2005) (listing reasons for undergoing circumcision, which include "economic pressures [to make one marriageable], social traditions [to celebrate womanhood], and health-related concerns [to ensure cleanliness and avoid disease or infertility]"); Breitung, *supra* note 3, at 663–64 (stating that the uncircumcised woman will be socially and economically ostracized and perceived as unsuitable for marriage).

178. *See* Larson, *supra* note 50, at 237 (noting that women have been granted asylum in the United States on the basis that their daughters would be subject to female genital mutilation if returned to their native country); *see also* Moussette, *supra* note 23, at 393–95 (applauding the United States' adoption of the Women's Refugee Project's "Guidelines for Women's Asylum Claims" which creates a separate and distinct category for women seeking asylum on the basis of gender-based persecution); Wellerstein, *supra* note 5, at 116 (arguing that genital mutilation is used by men to assert power and control over women, which directly conflicts with the basic tenet of the Universal Declaration of Human Rights that "all human beings are born free and equal in dignity and rights").

179. See *Female Mutilation Condemned,* PRESBYTERIAN REC., Nov. 1, 2004 at 22, *available at* 2004 WLNR 12600827 (describing how the conference condemned the practice of female genital mutilation and declared the procedure had no basis in religion); *see also* Juliana Taiwo, *First Lady Against Genital Mutilation*, THIS DAY (Nig.), Feb. 7, 2004, *available at* 2004 WLNR 7060972 (specifying Addis Ababa, Ethiopia as the location of the international conference); Anaclet Rwegayura, *Africa Marks Day of Zero Tolerance to FGM*, PANAFRICAN NEWS AGENCY, Feb. 4, 2004 (explaining that some 49 African nations agreed to participate in The International Day of Zero Tolerance to Female Genital Cutting).

Children.[180] The conference gathered high-level African government officials, representatives from UN agencies, African religious leaders, and women's groups to encourage cooperation in eradicating female genital cutting in Africa.[181] This committee developed an action plan to coordinate a more intense campaign to end female genital cutting.[182]

International declarations were more successfully implemented with local education and awareness campaigns, the dedication of NGOs, and subsequent grass-roots movements within the affected countries.[183] One NGO conducted an important study into the types of cam-

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180. *See* Krista J. Kartch, *Women Struggle with Circumcision Ritual,* OBSERVER-DISPATCH (New York), June 16, 2004, at 4A (stating that, according to the Inter-African Committee on Traditional Practices Affecting the Health of Women and Children, more than 130 million per year endure female genital mutilation); *see also* Rwegayura, *supra* note 179 (holding the Inter-African Committee on Traditional Practices Affecting the Health of Women and Children up as an important organization advocating the elimination of female circumcision); *African Women Call for Support in Fight Against FGM,* JAPAN ECON. NEWSWIRE, Nov. 29, 1996 (describing how members of the Inter-African Committee on Traditional Practices Affecting the Health of Women and Children attended symposiums on female genital mutilation in Japan).

181. *See Female Mutilation Condemned, supra* note 179, at 22–23 (providing that government and NGO representatives, affected women, and religious and cultural leaders were among the delegates fighting female genital mutilation); *see also* Karungari Kiragu, *Female Genital Mutilation: A Reproductive Health Concern*, POPULATION REP., SUPPLEMENT, *available at* http://www.infoforhealth.org/pr/j41/j41fgm.shtml (last visited Feb. 12, 2006) (reporting that advocacy by women's groups has placed female genital mutilation on the agenda of governments as well as regional and international organizations); Rosenthal, *supra* note 151, at 9 (asserting that the individual determination by a small number of people inspired Cairo declaration to include a statement calling for the elimination of female genital mutilation wherever it exists).

182. *See* Frauke Heldring, *Light on a Taboo Topic,* TIME, Jan. 14, 2002, at 3 (recognizing that the Inter-African Committee on Traditional Practices Affecting the Health of Women and Children is working at the village-community level to gradually eliminate the tradition of female genital mutilation); *see also* Editorial, *Female Genital Mutilation,* VOICE OF AM. NEWS, Feb. 14, 2003 (proclaiming that the Inter-African Committee on Traditional Practices Affecting the Health of Women and Children intensified its campaign to end female genital cutting in 26 African countries); World Health Org., Regional Office for Africa, *Message of the Regional Director, Dr. Luis G. Sambo on the Occasion of International Day on Zero Tolerance to Female Genital Mutilation* (Feb. 6, 2005), *available at* http://www.afro.who.int/regionaldirector/speeches/rd20050206.html (last visited Oct. 20, 2005) (describing how this committee campaigned to end female genital cutting and gained support from various high-level international figures and organizations).

183. *See Female Genital Mutilation—Living in Ignorance; What African Nations are Doing,* MAINICHI DAILY NEWS (Japan), Jan. 7, 1997, at 9 (indicating that the IAC, founded by a group of African women volunteers, operates through contributions from foreign NGOs); *see also* Claudie Gosselin, *Feminism, Anthropology and the Politics of Excision in Mali: Global and Local Debates in a Postcolonial World*, 42 ANTHROPOLOGICA 43, 52–53 (2000) (detailing that a host of NGOs and women's associations, often with the support of multilateral, bilateral or non-governmental aid donors, have actively campaigned against female genital mutilation in Africa); *Women and Gender: NGOs Form Coalition Against Female Genital Mutilation*, UN INTEGRATED REG'L INFO. NETWORKS, AFR. NEWS, Feb. 4, 2005, *available at* 2005 WLNR 1571074 (enumerating a list of NGOs who are a part of a coalition to fight female genital mutilation).

paigns with the most success in ending female genital cutting.[184] This study found that education on gender equality and the empowerment of women has been a crucial first step in countries where women are not yet accepted in the work force.[185] In 2003 this NGO launched the Women's Empowerment Community-Consensus model (WECC) with the goal of measurably reducing the practice of female genital cutting (a phrase that organization finds important to use) by the year 2010.[186]

Tostan, a human rights agency which has been used as a model program by the United Nations Children's Fund (UNICEF), focuses primarily on education, patiently believing that the citizens will desire change for themselves.[187] The Tostan model, now applied in Guinea,

184. *See* Asamoah, *supra* note 104, at 560–61 (commenting on studies conducted on female genital cutting); *see also* Kiragu, *supra* note 181, at S6 (referring to a study conducted by the New York-based Research, Action and Information Network for the Bodily Integrity of Women (RAINBO) to identify what determines programmatic success or failure in the effort to end female genital mutilation); Research, Action and Information Network for the Bodily Integrity of Women, *Female Genital Mutilation Review, Evaluation and Monitoring (FGM-REM) Project* (2001-02), *available at* http://www.rainbo.org/IIAFGM/iiafgm.html#assistance (last visited Oct. 20, 2005). This organization was established in 1994 as an African-led international NGO. RAINBO focuses on "issues of women's empowerment, gender, reproductive health, sexual autonomy and freedom from violence as central components of the African development agenda . . . striv[ing] to enhance global efforts to eliminate the practice of Female Circumcision/Female Genital Mutilation (FC/FGM) through facilitating women's self-empowerment and accelerating social change." *Id.*

185. *See* Wellerstein, *supra* note 5, at 115 (positing that female genital mutilation is intimately linked to the unequal position of women in the political, social cultural and economic structures of societies where it is practiced); *see also U.N. Chairperson on Status of Women Calls for Greater Role for Women in Conflict Resolution; Debate Continues on Human Rights of Women,* M2 PRESSWIRE, Apr. 6, 2004, at 2 (asserting that gender equality is essential to development). *But see* Gosselin, *supra* note 183, at 46 (suggesting that although the international women's movement of using a human rights approach to further gender equality has been successful and empowering in some cases, this strategy has been problematic in the case of female circumcision because it has deep cultural roots).

186. *See* Research, Action and Information Network for the Bodily Integrity of Women, *supra* note 184 (last visited Oct. 5, 2005) (declaring that the NGO hopes to drastically reduce the practice of FMC by 2010); *see also* AMNESTY INT'L, Female Genital Mutilation—A Human Rights Information Pack (1998), Section Eight—Strategies for Change, *available at* http://www.amnesty.org/ailib/intcam/femgen/fgm8.htm (last visited Oct. 5, 2005) (adding that NGOs in general are making considerable achievements in eradicating female genital mutilation); *Ethiopia: IRIN Interview with Anti-FGM Activist Berhane Ras-Work*, INTEGRATED REG'L INFO. NETWORKS, Feb. 11, 2004, *available at* 2004 WLNR 6915216 (interviewing an activist who challenged governments and the African Union to play a more active role to help eradicate female genital mutilation by 2010).

187. *See* Lois A. Gochnauer et al., *International Legal Developments in Review: 1999 Public International Law: International Human Rights*, 34 INT'L LAW. 761, 769 (2000) (finding that the "unexpected" result of the eight-month long Tostan education program was the voluntary and indirect decision by women who had participated in the women's health program to ban female genital mutilation in their village); *see also* Leslye Amede Obiora, *The Full Belly Quotient: Renegotiating a Rite of Passage*, 24 WOMEN'S RTS. L. REP. 181, 183 (2003) (detailing how the Tostan program promoted leaders of the local culture help integrate "non-formal" education to teach their people how to cope with the reality of female cuttings); Bowman, *supra* note 103, at sec. IV, para. 9 (focusing on the Tostan program's eight two-month long educational programs designed to address women's health and female genital cutting in an informal setting).

Burkina Faso, Mali, and Somalia,[188] has reported that it takes about three years from the time its program is initiated in a country before citizens decide to end the practice.[189]

Education has been combined with secondary measures to assist communities in making the change. For example, special provisions are necessary to the influential female elder who conducts female genital cutting in each village.[190] The opportunity for these women to gain respectable, alternate employment, such as community health care work, has served to minimize resistance to change.[191] Women in these positions often travel to educate other villages regarding issues such as pre-natal care, sexually transmitted diseases, and the harmful effects of female genital cutting.[192]

The ceremonial rite of passage that has traditionally surrounded the performance of female genital cutting has been another barrier to change in African nations.[193] Organizations have created "initiation without cutting" programs to allow communities to modify rather than

188. *See All Things Considered: Female Circumcision Educators* (National Public Radio broadcast, July 22, 1998) (noting that the Tostan "phenomenon" is gaining momentum, and that leaders of five West African countries have asked that the program be brought to their countries); *see also* Barbara Crossette, *Senegal Bans Cutting of Genitals of Girls*, N.Y. TIMES, Jan. 18, 1999, at A10 (declaring the ban in Senegal was the result of the Tostan program, and that other countries, including Burkina Faso, Ghana, Guinea, and Togo, followed in Senegal's footsteps); *Tostan: Women's Health and Human Rights Organization, 2004 Annual Report*, at 5, *available at* http://tostan.org/2004.pdf (stating that Tostan-based programs were implemented in numerous villages of Guinea).

189. *See* Crawley, *supra* note 149, at A3 (concluding that it takes approximately three years for the program to take effect); *see also* International Literacy Explorer, *Project Outcomes and Implications*, *available at* http://www.literacy.org/ explorer/tost_out.html (last visited Oct. 5, 2005) (explaining that the Tostan program is an 18-month program). *But see* Ginger Adams Otis, *Senegal Program Eradicating FGM*, WOMEN'S ENEWS, Dec. 7, 2003, *available at* http://www.womensenews.org/article.cfm/dyn/aid/1630/context/archive (last visited Oct. 5, 2005) (quoting the founder of Tostan as saying that female genital mutilation can be eradicated from Senegal in the next "two to five years" with the aid of the Totsan program).

190. *See* WALKER & PARMAR, *supra* note 6, at 46 (describing one elderly woman with cataracts who pontificated at length about how she was chosen by her village to perform circumcisions); *see also* GLOBAL ACTION, *supra* note 10, at 29 (commenting on the social status and wealth of village circumcisers, who are often elderly female laypeople who inherit their role); Mountis, *supra* note 4, at 123 (finding that elderly women in these villages perceive the continuance of female genital cutting as necessary to maintain ethnic identity and a sense of belonging).

191. *See* Marianne Sarkis, *Female Genital Cutting (FGC): An Introduction,* FGM Education and Networking Project, Apr. 10, 2004, *available at* http://www.fgmnetwork.org/intro/fgmintro.html (last visited Oct. 5, 2005) (noting one successful program involving training former cutters as educators who travel to various villages educating others on health issues); *see also* FGM or FGC in Benin, *supra* note 109 (observing outreach activities, such as one ceremony in which 17 women turned in their cutting tools in exchange for small grants); HANNY LIGHTFOOT-KLEIN, PRISONERS OF RITUAL: AN ODYSSEY INTO FEMALE GENITAL CIRCUMCISION IN AFRICA 195 (1989) (stressing that those who would best serve as potential educators are midwives, and that adequate training of these women can lead to the education of others).

192. *See* Crawley, *supra* note 149, at 6 (mentioning that villagers have taken it upon themselves to educate other villages); *see also* Megan Ryan, *A World View for the Next Generation of American Feminists: Lessons Learned from the United Nations Fourth World Conference on Women at Beijing*, 8 HASTINGS WOMEN'S L.J. 229, 230 (1997) (describing a workshop by African women who traveled to remote villages to educate locals about female genital mutilation, its misconceptions, and health dangers); Lacey, *supra* note 166, at A3 (reporting on participants of an international conference who acknowledged that eradication of female genital cutting will only happen if and when communities and villages are educated).

193. *See* Adjetey, *supra* note 56, at 1362 (discussing the cultural value placed on female virginity as a justification for female genital mutilation); *see also* Bashir, *supra* note 23, at 424 (listing four main justifications for the practice of female genital mutilation); Stern, *supra* note 23, at 103–04, 106–07 (designating female genital mutilation as a means of subjugating women and justified through tribal myths).

abandon this cultural tradition.[194] One alternative initiation constituted a pin-prick in a non-genital area to let out a drop of blood.[195] Another ceremonial rite of passage adopted in Kenya is called Circumcision Through Words.[196] The Maendeleo Ya Wanawake Organization (MYWO), Kenya's largest grass-roots women's organization,[197] created this alternative rite of passage to preserve some traditional aspects of the procedure, such as temporary seclusion of the young girl, celebration, and an exchange of gifts.[198] In 1996, the first Kenyan alternative ceremony included two dozen girls.[199] Two years later, a total of over 1,000 girls in several communities have graduated from the program.[200]

In 1997, 13 villages in Senegal made public declarations to end female genital cutting without the assistance of national legislation.[201] These declarations were celebrated with music,

194. *See* Davis, *supra* note 79, at 499–500 (explaining a Kenyan alternative to female genital mutilation that does not involve cutting); *see also* Sarkis, *supra* note 191 (describing safe alternatives to female genital mutilation that respect African culture). *See generally* Sussman, *supra* note 136 (describing various female genital mutilation reform movements in Africa).

195. *See* Sarkis, *supra* note 191 (explaining a bloodless alternative to female genital mutilation). *See generally* Davis, *supra* note 79 (describing alternatives to female genital mutilation that satisfy cultural requirements and which do not harm the female); Obiora, *supra* note 3, at 284–85 (discussing female genital mutilation alternatives where minimal blood is shed under sterile conditions).

196. *See* Davis, *supra* note 79, at 500 (discussing a Kenyan alternative to female genital mutilation that involves no cutting called "circumcision through words"); *see also* Wellerstein, *supra* note 5, at 136 (commenting on Kenya's "circumcision through words," an alternative to female genital mutilation); Dr. Cesar Chelala, *New Rite is Alternative to Female Circumcision,* S.F. CHRON., Sept. 16, 1998, at A23 (examining the new Kenyan alternative to female genital mutilation that replaces cutting with a week of seclusion, education, and counseling).

197. *See* Asha Mohamud et al., Reproductive Health and Rights—Reaching the Hardly Reached; Article 8: *Girls at Risk: Community Approaches to End Female Genital Mutilation and Treating Women Injured by the Practice*, PATH (2002), *available at* http://www.path.org/files/RHR-Article-8.pdf (explaining the role of the MYWO in creating female genital mutilation reform); *see also Harmful Health Practices; Promoting Alternatives to FGM*, Reprod. Health Outlook, PATH, *available at* http://www.rho.org/html/hthps_keyissues.htm#promote-alt (last visited Oct. 4, 2005) (introducing the MYWO as one of the main sources of female genital mutilation reform); Maendeleo Ya Wanawake (MYWO), *available at* http://www.maendeleo-ya-wanawake.org (last visited Oct. 4, 2005) (providing the background and goals of MYWO).

198. *See* Jessica A. Platt, Note, *Female Circumcision: Religious Practice v. Human Rights Violation*, 3 RUTGERS J. L. & RELIGION 1, 44 (2002) (explaining the circumcision through words ritual); *see also* Mohamud, *supra* note 197, at 75 (detailing the rituals and activities involved in a circumcision through words event).

199. *See* Malik Stan Reaves, *Alternative Rite to Female Circumcision Spreading in Kenya*, AFR. NEWS ONLINE, Nov. 1997, *available at* http://www.scsv.nevada.edu/~neese/fgm.html (last visited Oct. 5, 2005) (stating that 30 families participated in the first circumcision through words ceremony); *see also* Mohamud, *supra* note 197, at 76 (noting the number of girls who participated in the first circumcision through words ceremony).

200. *See* Mohamud, *supra* note 197, at 76 (discussing the increased acceptance of and participation in Circumcision Through Words by Kenyan girls). *See generally* Judith Achieng, *Ending the Nightmare Passage to Womanhood*, INTERPRESS SERVICE, Jan. 1998, *available at* http://www.bluegecko.org/kenya/tribes/meru/articles-circword.htm#achieng (last visited Oct. 5, 2005) (explaining the impact of Circumcision Through Words that has led to a 35% decrease in circumcised women); Reaves, *supra* note 199 (describing increased family participation in Circumcision Through Words instead of traditional female genital mutilation).

201. *See* Wellerstein, *supra* note 5, at 137–39 (stating that in 1997 a Senegalese village named Malicounda stopped practicing female circumcision and within a few months 12 more villages in Senegal made declarations to end female mutilation); *see also* Crawley, *supra* note 149, at 6 (noting that in 1997, 13 Senegalese villages publicly denounced female genital mutilation); Tim Sullivan, *AFR: First Lady Lauds Village That Ended Female Circumcision*, NEWSFEED, Apr. 3, 1998, at 2 (asserting that since the village of Malicounda stopped circumcising girls, as many as ten other Senegalese villages followed Malicounda's steps).

dancing, and speeches from elders often highlighting the villages' dedication and respect for women's rights and children's education.[202] In 2003, Senegal hosted the second African Regional Reproductive Health Task Force.[203] The Task Force unanimously condemned female genital mutilation and agreed to sanction medical professionals who participated in the practice.[204] Currently, 1,527 villages representing 30 percent of the affected communities in Senegal have made the same declaration.[205]

Perhaps the most detailed narrative of change can be found in Nigeria. The population of Nigeria's 36 states is 133 million people with an average of six children being raised by each woman.[206] Nigeria is the most populous country in Africa, accounting for approximately 20 percent of West Africa's population.[207] Nigeria is culturally and religiously diverse with 350 ethnic

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202. *See* Mike Crawley, *supra* note 149, at 6 (mentioning that the villages' declarations to stop female mutilation are accompanied by dancing, music and speeches on women's rights and children's education); *see also* Vivienne Walt, *Village by Village, Circumcising a Ritual*, WASH. POST, June 7, 1998, at C1 (stating that 15 villages in Senegal gathered and celebrated their declaration never again to practice female circumcision). *See generally* Vivienne Walt, *Knowing Rite from Wrong; Senegal's Villages Are Making a Healthy Leap Away from Old Traditions and Female Circumcision*, CHI. TRIB., Aug. 9, 1998 (mentioning that Hillary Clinton praised the Malicounda women after watching a televised celebration in Dakar following its declaration to stop female genital cutting).

203. *See "Road Map" for Africa*, 31 SAFE MOTHERHOOD 3, 3 (2004) (mentioning that maternal and newborn death issues were discussed at the second African Regional Reproductive Health Task Force meeting held in Dakar, Senegal); *see also African Countries Urged to Re-position Family Planning*, PANAFRICAN NEWS AGENCY DAILY NEWSWIRE, Oct. 26, 2003, at 13 (reporting key statements made at the second meeting of the African Regional Reproductive Health Task Force, in Dakar, Senegal); *WHO Urges Adoption and Scaling Up of 'Best Practices' for Maternal and Newborn Health*, WORLD HEALTH ORG., Oct. 21, 2003, at 4, *available at* 2003 WLNR 486649 (noting that the second meeting of the African Regional Reproductive Health Task Force occurred in the Senegalese capital).

204. *See* Press Release, World Health Organization, African Regional Office, *Participants at Reproductive Health Meeting Condemn Female Genital Mutilation* (Oct. 24, 2003), *available at* http://www.afro.who.int/press/2003/pr2003102403.html (last visited Oct. 24, 2005) (stating that participants of the Reproductive Health Meeting unanimously condemned female genital mutilation and agreed to punish those who practice it); *see also WHO Experts Want FGM Practitioners Sanctioned*, PANAFRICAN NEWS AGENCY DAILY NEWSWIRE, Oct. 26, 2003, at 1 (stating that participants at the second African Regional Reproductive Health Task Force meeting suggested that health workers and medical practitioners practicing female genital mutilation should be sanctioned and asked medical professional organizations to establish a regime of sanctions).

205. *See* Crawley, *supra* note 149, at 6 (alleging that 1,527 villages representing 30% of the Senegalese community have made declarations to stop female genital mutilation); *see also Inhabitants of 23 Burkinabe Villages Abandon FGM,* PANAFRICAN NEWS AGENCY DAILY NEWSWIRE, May 6, 2003, at 2 (stating that 816 villages representing 16 percent of the population of Senegal declared they will abandon female genital mutilation).

206. *See* Richard Slawsky, *Nigeria Civil War Complicates Oil Transactions*, NEW ORLEANS CITY BUS., Oct. 18, 2004, at 1 (noting that Nigeria has a population of 133 million); *see also Land of Goat's Head Soup*, SUN. MIRROR, June 9, 2002, at 6 (noting that Nigeria is a federation of 36 states); *Cairo '94: Vatican-Muslim Alliance Emerges on Population*, ABORTION REP., Aug. 19, 1994, at 2 (analogizing the increase of Nigeria's population to a time bomb ready to explode and ticking at a rate of six children per woman).

207. *See Nigeria Election Planned*, N.Y. TIMES, Aug. 26, 1998, at 5 (referring to Nigeria as the most populous country in Africa); Bureau of African Affairs, U.S. DEPARTMENT OF STATE, *Background Note: Nigeria* (Aug. 2005), *available at* http://www.state.gov/r/pa/ei/bgn/2836.htm (last visited Oct 4, 2005) (stating that Nigeria is the most populous country of Africa and that its population accounts for 20 percent of West Africa's population).

groups,[208] of which 50 percent of the citizens practice Islam and 40 percent practice Christianity.[209] Nigeria was a signatory to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (signed in 1985, ratified in 1989), but while the government initially publicly condemned female genital cutting, it refused to take legal action.[210]

In 1999, the United Nations Development System worked with the Federal Ministry of Women Affairs and Youth Development to conduct a National Survey on Harmful Traditional Practices.[211] This survey mentioned female genital cutting as a practice contributing to the continued discrimination against women.[212] Nigeria's representative to the CEDAW reported "deep-rooted ignorance," "preference for the preservation of mundane customs," religious criminal laws, "entrenched harmful cultural and religious attitudes," the practice of purdah (mandatory veiling and seclusion of women), wide-spread illiteracy, "male dominance," low socio-economic status of citizens, and discrimination against women in the Nigerian Con-

208. *See* Committee on the Elimination of Discrimination Against Women (CEDAW), *Consideration of Reports Submitted by State Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women: Combined Fourth and Fifth Periodic Reports of State Parties*, ¶ 12, U.N. Doc. GEN/N03/345/65 (April 28, 2003) [hereinafter *Consideration of Reports*] (asserting the existence of over 350 ethnic groups in Nigeria); *see also* Claire Armitstead, *Two African Dramas From LIFT*, FIN. TIMES (London), July 17, 1987, at I15 (clarifying that Nigeria is a country with 350 different cultures); *Nigerian Facts: The People*, Geocities.com, *available at* http://www.geocities.com/Athens/Acropolis/3629/nigeriaa.html (last visited Oct. 2, 2005) (claiming that there are more than 250 ethnic groups in Nigeria).

209. *See* Rosalind I.J. Hackett, *Conflict in the Classroom: Educational Institutions as Sites of Religious Tolerance/Intolerance in Nigeria,* 1999 BYU L. REV. 537, 545 (1999) (indicating that both Christianity and Islam are majority and minority religions in Nigeria depending on the specific region in Nigeria); *see also* The World Factbook: Nigeria (Sept. 20, 2005), *available at* http://www.cia.gov/cia/publications/factbook/geos/ni.html#People (last visited Oct. 2, 2005) (discussing that Nigerians are 50 percent Muslim, 40 percent Christian and 10 percent indigenous). *See generally Nigeria Probe Raises Coup Worries*, MORNING STAR (UK), Apr. 3, 2004 (reporting that the two major religions of Nigeria are Islam and Christianity).

210. *See* Sarah Crutcher, Note, *Stoning Single Nigerian Mothers for Adultery: Applying Feminist Theory to an Analysis of Gender Discrimination in International Law*, 15 HASTINGS WOMEN'S L.J. 239, 253 (2004) (affirming that Nigeria signed and ratified the CEDAW without any reservations); *see also Consideration of Reports*, *supra* note 208, at ¶ 13 (affirming that Nigeria is a signatory to CEDAW, which was signed in 1985 and ratified in 1989). *See generally* Cyril Uchenna Gwam, *The Need for Nigeria to Seek Advisory Services and Technical Assistance in the Field of Human Rights*, J. HUMAN. ASSISTANCE (1999), *available at* http://www.jha.ac/articles/a055.htm (last visited Oct. 3, 2005) (stating that Nigeria has signed and ratified the International Convention on Elimination of All Forms of Discrimination Against Women).

211. *See Consideration of Reports*, *supra* note 208, ¶ 21 (mentioning the survey on Harmful and Traditional practices implemented by the United Nations Development System and the Federal Ministry of Women Affairs and Youth Development).

212. *See Consideration of Reports*, *supra* note 208, ¶ 21 (recognizing that cultural and traditional practices can be discriminatory towards women, specifically female genital cutting); *see also* Committee on the Elimination of Discrimination Against Women (CEDAW), *Consideration of Reports Submitted by State Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women: Combined Second and Third Periodic Reports of State Parties*, ¶ 13, U.N. Doc. GEN/N97/267/73 (Feb. 26, 1997) [hereinafter *Consideration of Reports Submitted by State Parties*] (acknowledging that discrimination against women includes "any distinction, exclusion or restriction made on the basis of sex"). *See generally* Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (June 26, 1987), *available at* http://www.unhchr.ch/html/menu3/b/h_cat39.htm (last visited Oct. 3, 2005) (referring to torture as a form of discrimination, and stating that since female genital mutilation is a form of torture, it is discrimination).

stitution as the initial hurdles that had to be overcome in the mission of ending female genital cutting.[213]

Spurred by the United Nations, NGOs launched programs in Nigeria to create awareness and sensitivity in local communities, as well as to empower females.[214] Copies of the U.N. CEDAW handbooks were translated into three Nigerian languages and disseminated in different communities.[215] Subsequently, "women empowerment bills" were initiated in most of the state assemblies in Nigeria for consideration.[216] In the late 1990s, Nigerian states, like Edo, began to adopt the state laws banning female genital cutting and imposing a fine of 1,000 Naira and six months imprisonment for individuals who conducted the procedure.[217] In July

213. *See Consideration of Reports*, *supra* note 208, ¶ 21 (reasoning that deep-rooted ignorance and preference for mundane customs limit progress in eradicating female genital cutting); *see also Consideration of Reports Submitted by State Parties*, *supra* note 212, ¶ 13 (suggesting that tradition, customs, attitudes, religion, illiteracy and poverty are reasons for discrimination and potentially limitations). *See generally* Eugenie Anne Gilford, *"The Courage to Blaspheme": Confronting Barriers to Resisting Female Genital Mutilation*, 4 UCLA WOMEN'S L.J. 329 (1994) (reporting that exposure of the origins of why female genital mutilation is required, such as patriarchal religious codes and a male view of the ideal woman, is important).

214. *See* Crutcher, *supra* note 210, at 262 (commenting on how a Nigeria-based NGO places emphasis on learning, collaboration and promoting human rights education among Nigerian women); *see also* FGM Programmes to Date: What Works and What Doesn't (1999), *available at* http://www.who.int/reproductive-health/publications/fgm/fgm_programmes_review.pdf (listing the plan of action for multiple NGOs in their efforts to eradicate FGM). *See generally* U.S. DEPT. OF STATE, *Nigeria: Report on Female Genital Mutilation (FGM) or Female Genital Cutting (FGC)*, *available at* http://www.state.gov/g/wi/rls/rep/crfgm/10106.htm (last visited Oct. 2, 2005) (providing information on active NGOs in Nigeria and their plans to eradicate female genital mutilation practices in Nigeria).

215. *See* Handbook for Parliamentarians on the Convention on the Elimination of Discrimination against Women at the UN, World of Parliaments (Oct. 2003), at 5, *available at* http://www.ipu.org/news-e/11-5.htm (last visited Oct. 2, 2005) (stressing the need to ensure that the CEDAW Handbook is translated into as many languages as possible and disseminated freely); *see also Overview of the Current Working Methods of the Committee on the Elimination of Discrimination against Women*, at 6, *available at* http://www.un.org/womenwatch/daw/cedaw/wkmethods/Overview-English.pdf (emphasizing that specialized U.N. agencies work with NGOs to disseminate information on CEDAW). *See generally* Furthering Parliament Action on CEDAW, World of Parliaments (Dec. 2004), *available at* http://www.ipu.org/news-e/16-4.htm (last visited Oct. 2, 2005) (inferring that since the IPU assembly was comprised of participants from all over the world, CEDAW documents, including the handbook, must have been translated in different languages).

216. *See Consideration of Reports*, *supra* note 208, ¶ 18 (reporting that several pieces of legislation that sought to eliminate discrimination against women were enacted in the State Houses of Assembly and that at the time of the report more than 70 percent of the State Houses of Assembly had women empowerment Bills pending enactment). *See generally* Ravi Mahalingam, *Women's Rights and the "War on Terror": Why the United States Should View the Ratification of CEDAW as an Important Step in the Conflict with Militant Islamic Fundamentalism*, 34 CAL. W. INT'L L.J. 171 (2004) (noting that Article 2 of the Committee on the Elimination of Discrimination against Women requires that State parties take appropriate legislative action in order to eliminate discriminatory laws and practices against women); Charmaine Pereira, *Configuring "Global," "National," and "Local" in Governance Agendas and Women's Struggles in Nigeria*, 69 SOC. RES. 781, 781 (2002) (stating that the Legislative Advocacy Coalition on Violence against Women was formed in order to harmonize the women's rights legislation being proposed in the National and State assemblies).

217. *See* Maureen Murray, *Looking for a Safe Place to Call Home Mother and Daughter Don't Know What Lies Ahead, but They Hope Their Future will Include Canada*, TORONTO STAR, Mar. 16, 2004, at B1 (reporting that a Canadian immigration risk-assessment officer found that an applicant provided insufficient evidence to establish risk of female genital mutilation if returned to Edo, since the state banned the practice in October of 2000).

of 2000, Nigeria adopted the National Policy on Women.[218] The Nigerian national criminal justice system is considering revisions to federal criminal laws to punish discrimination against women.[219] Nigeria now maintains a Federal Ministry of Women Affairs and Youth Development, a National Centre for Women Development, a Women Crisis Centre, a Women Legal Aid Unit,[220] and a National Action Committee on Women in Politics.[221] One Nigerian State Supreme Court Judge went so far as to cite the U.N. CEDAW as a standard to be followed in judicial determinations.[222] By February 9, 2004, the Nigerian Minister of Information announced that February 6th would become Nigeria's Female Genital Mutilation Elimination Day, adopting the World Health Assembly's International Day for Zero Tolerance to Female Genital Mutilation.[223]

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218. *See Consideration of Reports*, *supra* note 208, ¶ 16 (reporting that the National Policy on Women seeks to ensure that Nigerian constitutional principles are enforced); *see also* Behrouz, *supra* note 8, at 1144 (stating that, in response to recommendations made by the Committee, the Nigerian government enacted the National Policy on Women which aimed to eliminate customary traditions that hindered the economic empowerment of women); *Federal Government Re-Affirms Commitment to Women Development*, THIS DAY (Nig.), Jan. 1, 2003, *available at* http://www.thisdayonline.com/archive.php (last visited Oct. 4, 2005) (noting that the National Policy on Women, enacted in July 2000, proposed a 30 percent set-aside for women in both the executive and legislative branches of Nigerian government).

219. *See Consideration of Reports*, *supra* note 208, ¶ 16 (reporting that Nigeria's Federal Ministry of Justice is evaluating the penal code and repealing provisions that act to discriminate against women in areas such as wife chastisement). *See generally* Pernille Ironside, *Reconciling Rights and Obligations: an Examination of Shari'ah Penal Reform in Northern Nigeria*, 20 AM. J. ISLAMIC SOC. SCI. 140 (2003) (commenting on the widespread criticism of the Shari'ah penal codes for their apparent human rights violations, and reporting that President Obasanjo declared strict adherence to Shari'ah law unconstitutional and called upon all states to modify the laws to bring them into conformity with the Nigerian Constitution); Olawale Fapohunda, *The Administration of Criminal Justice Bill 2005*, THIS DAY (Nig.), Aug. 15, 2005, *available at* http://www.thisdayonline.com/nview.php?id=25348 (last visited Oct. 24, 2005) (arguing that the Administration of Criminal Justice Bill 2005 is an official acknowledgement of the reform needed to protect Nigerian constitutional principles).

220. *See Consideration of Reports*, *supra* note 208, ¶ 17 (listing the organizations established by the Nigerian government in its efforts to comply with the Convention's requirement that Party governments take affirmative steps to eliminate discrimination against women).

221. *See Consideration of Reports*, *supra* note 208, ¶ 17 (noting the establishment of the National Action Committee on Women in Politics); *see also UN Delegates to Women's Commission Stress Need to Engage Males in Eliminating Stereotypes, Discrimination; They Must Be Involved in Changing the Mindsets, Says Minister as General Debate Concludes*, M2 PRESSWIRE, Mar. 5, 2004, at 2 (reporting that the National Action Committee on Women in Politics had successfully convinced certain political parties to waive registration fees for Women seeking political office).

222. *See Consideration of Reports*, *supra* note 208, ¶ 18 (commending the Supreme Court Judge's recognition and citation of CEDAW in Mojekwu v. Ejikeme). *See generally* Arnold, *supra* note 67 (stating that Article 2(c) of CEDAW requires that the judiciary protect women from discrimination and the inequitable application of the law); Hauwa Ibrahim, *Reflections on the Case of Amina Lawal*, 11 HUM. RTS. BRIEF 39, 40–41 (2004) (concluding that the Amina Lawal case sensitized lawyers and judges, created an awareness of how the Shari'ah legal system relates to international human rights laws, and established that the acts of the judiciary must be in compliance with Nigerian constitutional principles).

223. *See Nigeria Adopts Anti-Female Genital Mutilation Day*, AFROL NEWS, Feb. 10, 2004, *available at* http://www.afrol.com/articles/11236 (last visited Oct. 4, 2005) (stating that the Nigerian government had adopted the International Day for Zero Tolerance to Female Genital Mutilation by declaring February 6th as Nigeria's Female Genital Mutilation Elimination Day). *See generally Reporter Ban*, TOWNSVILLE SUN (Austl.), Feb. 5, 2003 (noting that the World Health Organization held a three day conference to declare a World Day for Zero Tolerance for Female Genital Mutilation).

Conclusion

It is possible to distinguish between female genital mutilation and female circumcision. Not only is it possible, it is important for western nations and organizations seeking international change to demonstrate the ability to extend respect to diverse cultural, religious, and ethnic groups. It is key to the success of the next important international movement against human rights violations that those nations which initiate the campaign for change earn credibility within the international community.

It is clear that the mission toward eradicating female genital mutilation could have found equal success with the implementation of international declarations which accepted female circumcision. Other countries, like Great Britain and Egypt, have differentiated between the two practices in adopting U.N. declarations.[224] Of historical importance, even the Muslim Sunna is interpreted to tolerate female circumcision, but not female genital mutilation.[225]

To some extent, female genital mutilation other than circumcision is a women's issue requiring education and empowerment of females worldwide.[226] But to the extent that female genital mutilation is an issue adopted by western women with the goal of repairing the lives of African women, the resulting solutions appear to be overbroad, paternalistic, and hypocritical. Women in developing nations, no less than women in western nations, deserve the right to decide what they wish to do with their own bodies. Until aesthetic gynoplasty in the United

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224. *See* U.N. Econ. & Soc. Council [ECOSOC], Comm. on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Egypt*, ¶1, U.N. Doc. E/C.12/1/Add.44 (May 23, 2000), *available at* http://www.unhchr.ch/TBS/doc.nsf (follow to hyperlink "Sessional/Annual Report of Committee;" then follow to "Egypt 23/05/2000") (last visited Oct. 6, 2005) (commenting that despite progress by Egypt to implement economic, social and cultural rights, the U.N. Committee was concerned with the steps taken against the practice of female genital mutilation, because it was only criminalized outside of hospitals, and is still legal in other circumstances); *see also* U.N. Convention on the Rights of the Child [CRC], *Initial Reports of States Parties Due in 1994: United Kingdom of Great Britain and Northern Ireland,* ¶399, U.N. Doc. CRC/C/11/ADD.1 (Mar. 28, 1994), *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol) (follow to hyperlink "Article 44.40EN") (last visited Oct. 6, 2005) (asserting that Great Britain describes the Prohibition of Female Circumcision Act of 1985 as a law which makes it an offense to carry out any procedure known as female circumcision); Bashir, *supra* note 23, at 420, 446 (explaining that in Egypt legislation bans only certain forms of female genital mutilation, while Sunnah circumcision is not outlawed and is still widely practiced).

225. *See* Sussman, *supra* note 136, at 250 n.110 (explaining that although there is nothing in the Koran that commands female circumcision, there is the suggestion by Islam of the most minor form of female genital mutilation, sunna proper, which leaves the clitoris intact). *Contra* Smith, *supra* note 146, at 2472 (arguing that female circumcision is not required by Islam as it is not mentioned in the Koran, and that other Islamic countries do not practice female circumcision). *See generally* Kimberly Younce Schooley, Comment, *Cultural, Sovereignty, Islam, and Human Rights—Toward a Communitarian Revision*, 25 CUMB. L. REV. 651 (1994) (stating that under Islam human rights are different from those in western societies, according to Islam "rights" are the corollaries of duties that are owed to God and to other individuals, there is not the idea of free will).

226. *See* Coleman, *supra* note 147, at 747 (stating that education may be the solution to eradicate female genital mutilation and to stop the perpetual discrimination against women and help to understand the potential harm that can result from FGM); *see also* Breitung, *supra* note 3, at 691 (arguing that relying on national and international law alone is not enough to put an end to FGM, the most successful approach is to have community education and outreach programs in order to change views on FGM along with legal requirements); Platt, *supra* note 198, at 25–26 (discussing that education is the most important factor concerning female circumcision because it will bring to African cities and rural communities knowledge about the procedures and the potential health effects).

States is considered a human rights violation, an adult woman's choice to undergo female genital cutting in Senegal should not be outlawed. If the protection of children is a primary goal, then the international prohibition against circumcision should extend to female and male children alike.[227] International condemnation should carefully target only those specific actions which may be universally categorized as a human right violation, regardless of the country in which it is performed, the education level achieved by the adult requesting the action, or the motivations underlying the choice.[228] Efforts toward modifying foreign cultures by condemning actions any more broadly or more narrowly risk the appearance of imperialistic dominance or hypocritical arrogance.[229]

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227. *See* Chessler, *supra* note 4, at 573 (arguing that although female and male circumcisions are performed differently, they both have drastic physical and psychological consequences, and children of both sexes suffer and do not ask for the tearing of their genitals); *see also* Garry L. Harryman, *Call It What It Is: Child Abuse*, MESSENGER (Cal.), Jan. 15, 1998, *available at* http://www.sexuallymutilatedchild.org/call-it.htm (last visited Oct. 5, 2005) (claiming that male circumcision, like female circumcision, is medically unnecessary and barbaric, and that both are human rights violations). *But see* Kirsten M. Backstrom, Note, *The International Human Rights of the Child: Do They Protect the Female Child?*, 30 GEO. WASH. INT'L L. & ECON. 541, 546 (1996/1997) (stating that male and female circumcisions are not the same because female circumcision has numerous adverse health effects and is medically unnecessary, while male circumcision does not usually result in permanent health damage).

228. *See Conceptualizing Violence*, *supra* note 62, at 620 (describing that universalists believe that everyone is entitled to the same inalienable fundamental human rights, these should be administered blind to culture); *see also* Wellerstein, *supra* note 5, at 127 (remarking that societies should be left to their own standards within their own countries, but the international community must draw a line when those standards violate universal human rights). *Contra* McGee, *supra* note 13, at 149 (reporting that a universal human rights system that would transcend "cultural and national boundaries" would be insufficient because it would not acknowledge or account for the culture, bias and differences between the Western view and other countries' practices and beliefs).

229. *See* Wynter, *supra* note 154, at 313 (reasoning that paternalism causes some feminists to impose certain choices on other women and try to constrain these women's choices); *see also* Platt, *supra* note 198, at 25–26 (asserting that the international legislation of female genital mutilation is contradictory as it promotes self-determination and individual freedom, but it also restricts international citizens from choosing to practice FGM, disregarding religious practices, forcing them underground and not allowing people to make educated decisions themselves); Wellerstein, *supra* note 5, at 132 (discussing that the U.N. needs to work with individual countries to stop female genital mutilation, but this needs to be done carefully because if western societies demand other countries to abandon their local traditions, this will just force these practices underground and this will only lead to greater health risks for the women being victimized).

Jama v. Immigration & Customs Enforcement

125 S. Ct. 694 (2005)

The United States Supreme Court held that removal of a criminally convicted alien pursuant to 8 U.S.C. § 1231(b)(2)(E)(iv) does not require advance consent from the recipient country's government.

In *Jama v. Immigration & Customs Enforcement*,[1] the United States Supreme Court held that an alien whose refugee status was terminated by reason of a criminal conviction could be returned to Somalia, in which he had been born and of which he remained a citizen, despite the inability of that country, which lacked a functioning government, to respond to the U.S. government's request for its advance consent to accepting him.

I. Facts and Procedural Posture

Keyes G. Jama was born in Somalia in 1979.[2] In 1991, Jama and his family, in the midst of inter-tribal warfare, escaped to Kenya, where they lived for several years, until they were admitted into the United States as refugees in 1996. They ultimately settled in the twin cities area of Minnesota, where Jama proceeded to attend school and work.[3] In June 1999, Jama got into a physical altercation with another man. He subsequently pled guilty and was convicted of third degree assault.[4]

As a result of Jama's felony conviction of "a crime involving moral turpitude," the Immigration and Naturalization Service (INS), now known as Immigration and Customs Enforcement, initiated removal proceedings pursuant to 8 U.S.C. § 1182(a)(2)(A)(i)(1).[5] Jama, in an effort to stop the removal proceedings, filed applications for asylum, for permanent resident legal status, and for relief under the United Nations Convention Against Torture.[6] In August 1999, the Immigration Judge rejected the applications for asylum and permanent resident legal status, and directed the INS to remove Jama to Somalia.[7] This decision was affirmed by the Board of Immigration Appeals.[8]

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1. 125 S. Ct. 694 (2005) [hereinafter *Jama I*].
2. *Id*. at 697.
3. *Id*.
4. *Id*. Jama inflicted a substantial injury upon the man, resulting in his being charged with third degree assault under Minnesota law. Minn. Stat. § 609.223 (2004).
5. *Id*. at 4; *see also* 8 U.S.C. § 1182 (a)(2)(A)(i)(I) (2005) (providing that aliens convicted of a crime of moral turpitude shall be deemed inadmissible and ineligible for visas).
6. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 Dec. 1984, G.A. Res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) 197, U.N. Doc. A/39/51 (1984), 1465 U.N.T.S 84, CTIA 8,623.000, 23 ILM 1027 (1984), entered into force 26 June 1987, entered into force for the United States 20 Nov. 1994, implemented by Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), Pub. L. No. 105-277, div. G, Title XXII, § 2242, 112 Stat. 2681-822 (1998), 8 U.S.C. § 1231 note; *see also Jama v. INS*, 2002 U.S. Dist. LEXIS 5731 at *4. *See generally* Houston Putnam Lowry & Peter W. Schroth, *Survey of 2002-2003 Developments in International Law in Connecticut*, 77 CONN. B. J. 171, 191–215 (2003).
7. *Jama I*, 125 S. Ct. at 698.
8. *Id*.

On May 25, 2001 Jama was notified by the INS that the removal order would be executed.[9] In response, Jama filed a petition for a writ of habeas corpus, which challenged whether the order could be executed pursuant to 8 U.S.C. § 1231(b)(2)(E)(vi) without Somalia first providing advance consent for his acceptance.[10] The magistrate judge, determining that advance consent was required, recommended that the writ be granted and ordered the INS to stop the removal proceedings.[11] In its review, the district court held that it had jurisdiction over the writ, and, in granting the writ, adopted the recommendations of the Magistrate Judge.[12] The Eighth Circuit affirmed the district court's determination that the court had jurisdiction over the matter, but reversed its granting of the writ.[13] The Supreme Court granted certiorari to determine whether a removal pursuant to 8 U.S.C. § 1231(b)(2)(E)(iv) requires the designated country's advance consent to acceptance.[14]

II. 8 U.S.C. § 1231(b)(2)

In 1996, Congress enacted 8 U.S.C. § 1231(b), which prescribes the countries to which the Attorney General may remove aliens from the United States once their deportation has been ordered.[15] It sets forth a step-by-step procedure for determining the recipient country.[16] According to the Supreme Court majority,[17] there are four steps. First, the recipient country may be designated by the alien, subject to the discretion of the Attorney General.[18] Second, if the alien does not designate a country, or if the alien's choice is disregarded by the Attorney General for any of the reasons set forth under subparagraph C, the Attorney General may designate "the country of which the alien is a subject, national, or citizen."[19] Third, if that country's acceptance is not received within 30 days, or if consent to acceptance is withheld, the Attorney General may designate a country to which the alien has any of the prior connections

9. *Id.*

10. *Id*. at 698.

11. *Id*.

12. *Id*.

13. *Id.; see also* Jama v. INS, 329 F.3d 630, 633–35 (8th Cir. 2003), *aff'd sub nom.* Jama v. Immigration & Customs Enforcement, 125 S. Ct. 694 (2005) [hereinafter *Jama II*].

14. *See* Jama v. INS, 540 U.S. 1176, 1176 (2004) (granting certiorari) [hereinafter *Jama III*].

15. 8 U.S.C. § 1231(b)(2) (2005). Pursuant to the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002), codified as amended at 6 U.S.C. § 101 *et seq.*, the Secretary of Homeland Security is now responsible for the removal of aliens under 8 U.S.C. § 1231(b)(2) (2005). *See supra* note 1.

16. 8 U.S.C. § 1231(b)(2) (2005).

17. *But see Jama I*, 125 S. Ct. at 706 (Souter, J., dissenting) (indicating that the statutory scheme has only three steps).

18. 8 U.S.C. § 1231(b)(2)(A) (2005) (providing that an alien may designate one country to which he would prefer to be removed and that the Attorney General shall make such a removal). 8 U.S.C. § 1231(b)(2)(C) (2005) (stating that the Attorney General *may* disregard the alien's designation if a designation is not made promptly, the country designated will not provide acceptance, or if such removal is deemed to be prejudicial to the United States).

19. 8 U.S.C. § 1231(b)(2)(D) (2005).

listed in subparagraph E, clauses one through six.[20] Fourth, if it is "impracticable, inadvisable, or inappropriate" for the Attorney General to remove the alien to any of those countries listed in subparagraph E, pursuant to clause seven, he may designate a country to which the alien has no ties, as long as advance consent to acceptance is acquired from the designated country.[21]

III. The Court's Analysis

A. Text & Structure of the Statute

The acceptance requirement appears only in the seventh clause of subparagraph E.[22] Accordingly, the Court, in an opinion by Justice Scalia, reasoned that, because Congress knew how to make its intention of requiring acceptance manifest, as illustrated by its description of the consequences of non-acceptance in subparagraphs D,[23] C,[24] and E(vii),[25] the Court would not construe the statute to include such a requirement, not made manifest in E(i) through (E)(vi).[26]

Petitioner argued, however, that the phrase "another country whose government will accept the alien" in E(vii) acted to incorporate its acceptance requirement into the preceding clauses E(i) through E(vi).[27] Petitioner and the dissenting Justices asserted that Congress's choice of the word "another" alluded to "a common characteristic of all the countries in the series," that being advance consent to acceptance.[28] The Court rejected that argument as contrary to the last antecedent rule, stating that the "limiting clause or phrase should ordinarily be read as modifying the noun or phrase that immediately follows."[29] In applying this rule, the Court found that the term "another" simply meant another country not listed in clauses (i) through (vi) of subparagraph E.[30] The Court also asserted that the structure of subparagraph E

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20. 8 U.S.C. § 1231(b)(2)(E)(i)–(vi) (2005). If the alien is not removed to his designated country or to the country of which he is a subject, national, or citizen, the Attorney General shall remove the alien to any of the following countries to which he has a prior connection:

> (i) The country from which the alien was admitted. (ii) The country in which is located the foreign port from which the alien left for the United States. . . . (iii) A country in which the alien resided before the alien entered the country from which the alien entered the United States. (iv) The country in which the alien was born. (v) The country that had sovereignty over the alien's birthplace when the alien was born. (vi) The country in which the alien's birthplace is located when the alien is ordered removed.

21. 8 U.S.C. § 1231(b)(2)(E)(vii) (2005).
22. 8 U.S.C. § 1231(b)(2)(E) (2005).
23. 8 U.S.C. § 1231(b)(2)(D) (2005).
24. 8 U.S.C. § 1231(b)(2)(C) (2005).
25. 8 U.S.C. § 1231(b)(2)(E)(vii) (2005).
26. Jama v. Immigration & Customs Enforcement, 125 S. Ct. 694, 700 (2005).
27. *Id*. at 700, 701.
28. *Id*. at 707 (Souter, J. dissenting).
29. *Id.* 700, 701 (majority opinion). For insight into the longstanding disagreement within the Court about the extent to which grammatical analysis should control statutory interpretation, such as that used here in Justice Scalia's opinion for the Court, see Peter W. Schroth, *Language and Law*, 46 AM. J. COMP. L. (supp.) 17, 25–30 (1998).
30. *Jama*, 125 S. Ct. at 701 n.3 (majority opinion).

refuted the theory of common characteristics, because each clause is "distinct and ends with a period—suggesting that each may be understood without reading any further."[31]

Petitioner further argued that, even though an acceptance requirement might not be explicit in the text, it was made manifest through the structure of 8 U.S.C. § 1231(b)(2).[32] Petitioner reasoned that, if the Attorney General cannot remove an alien to a country under Subparagraph A or D, due to that country's withholding of advance consent to acceptance, he should not be permitted to circumvent those acceptance requirements by removing the alien to the same country under subparagraph E.[33] In its response, the Court noted that it will not always be the case, as is here, that the country designated under subparagraph D is the same country designated under subparagraph E.[34] In addition, the Court stated that the premise upon which the petitioner's argument was founded was false, in that removal to a country of the alien's designation pursuant to subparagraph A does not require the consent of that country's government, as evidenced by subparagraph C, which states that the Attorney General "may disregard" the alien's designated country if that country's government withholds consent or fails to provide consent within 30 days, or within a time period deemed reasonable by the Attorney General.[35] Consequently, the Court rejected the petitioner's argument.

B. Congressional Ratification

According to the doctrine of congressional ratification, when Congress expresses satisfaction with a long-held administrative or judicial interpretation of a statute, the Court will deem Congress to have ratified that prior interpretation upon the statute's re-enactment.[36] Relying on *Tom Man v. Murff*[37] and *Rogers v. Lu*,[38] which prohibited deportation without advance consent, the petitioner argued that these cases established a well-settled construction, which Congress sought to incorporate into the law through its re-enactment of 8 U.S.C. § 1231(b)(2).[39] The Court rejected this argument, finding that both requirements of Congressional ratification were unmet in this instance.[40]

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31. *Id.* at 701. The Court also stated that it would be a stretch to conclude that, just because Congress expressly sought to require acceptance from countries of which the alien had no ties, Congress must have also intended to require acceptance from those to which the alien did have such ties. *Id.*

32. *Id*. at 702.

33. *Id.*

34. *Id.*

35. *Id*. at 702, 703. Use of the word "may" connotes discretionary authority, so the Court refused to interpret it to mean "shall." *Id.* at 703.

36. *Id.* at 704, 705.

37. 264 F.2d 926 (2d Cir. 1929) (holding that Tom Man could not be deported to China, pursuant to 8 U.S.C. § 1253(a), without the Attorney General first obtaining advance consent to acceptance from the Communist Government of China).

38. 104 U.S. App. D.C. 374 (D.C. Cir. 1958) (affirming the District Court's judgment that forbade the Attorney General to deport Lu to the Chinese People's Republic until advance consent to acceptance was obtained).

39. *Jama I*, 125 S. Ct. at 704, 705.

40. *Id.* at 704.

In evaluating the first requirement, that Congress simply re-enact the statute without change, the Court described the statute as a "newly formed statute of acceptance," which incorporated "two previously distinct expulsion proceedings based upon historical distinctions between those aliens who had entered and those seeking admission."[41] In evaluating the second requirement, that "judicial consensus [be] so broad and unquestioned that we must presume that Congress knew of it and endorsed it," the Court pointed out that the Petitioner would have been subject to the previous statute controlling exclusion proceedings, and that several courts had declined to read an acceptance requirement into that statute.[42] Furthermore, the Court noted that the case law presented by the Petitioner, in his effort to establish judicial consensus, did not involve the statute controlling the exclusion proceedings that he would have been subject to, but instead involved the statute controlling deportation proceedings.[43] Accordingly, the Court concluded that, without a long-standing broad and unquestioned consensus on the interpretation of the statute, the doctrine of congressional ratification could not be properly invoked.[44]

C. Deference to the President in the Matters of Foreign Affairs

The Supreme Court has traditionally deferred to the President in matters involving foreign affairs and policy.[45] The Court, in acknowledgement of this tradition, stated that "to infer an absolute rule of acceptance where Congress has not clearly set it forth" would run contrary to such a policy.[46] The Court argued that, given the discretion granted to the Attorney General to bypass countries that withheld or were likely to withhold acceptance, such a rule is not necessary to ensure that our diplomatic relations are not negatively impacted by an alien's removal.[47] Furthermore, the Court also noted that such a requirement is not necessary to ensure that the Attorney General give due consideration to the existing conditions of the designated country.[48] The withholding of advance consent is not indicative of a country's intent to mistreat the alien upon arrival, so the Attorney General should not be barred from removing the alien to that country based upon such silence.[49] Accordingly, the individualized proceedings available to aliens, such as asylum,[50] withholding of removal[51] and "relief under an inter-

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41. *Id.* at 705. Removal proceedings for those aliens who had already entered the United States and those who were seeking admission were respectively determined by the former 8 U.S.C. §§ 1253 and 1227. *Id.*

42. *Id*.

43. *Id*.

44. *Id*.

45. William R. Casto, *Executive Advisory Opinions and the Practice of Judicial Deference in Foreign Affairs Cases*, 37 GEO. WASH. INT'L L. REV. 501, 506–07 (2005) (presenting empirical data to demonstrate the judicial practice of deference to the President in matters involving foreign affairs).

46. *Jama I*, 125 S. Ct. at 704.

47. *Id*.

48. *Id*.

49. *Id*.

50. *See generally* 8 U.S.C. § 1158(a)(1) (2005) ("[A]ny alien who is physically present in the United States . . . irrespective of such alien's status, may apply for asylum.").

51. *See generally* 8 U.S.C. § 1231(b)(3)(A) (2005) ("[T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.").

national agreement prohibiting torture,"[52] are better suited for determining whether an alien will be subject to inhumane treatment.[53]

IV. Dissent

The dissent, written by Justice Souter and joined by Justice Stevens, Justice Ginsburg, and Justice Breyer, argued that the statute consisted of three steps rather then four, with the third step, consisting of subparagraph E clauses (i) through (vii), requiring advance consent to acceptance.[54] In rejecting the last antecedent rule as confining the acceptance requirement to clause (vii), the dissent argued that several indicia of meaning acted in concert to overcome this rule.[55] The dissent, in comparing the different language used in the last resort clauses of the current statute, noted that the paragraph controlling deportation reads "another country," which alludes to a common characteristic, whereas the paragraph controlling exclusion reads "a country" and does not allude to a common characteristic.[56] Consequently, the dissent argued that the difference in text indicates that Congress had intended the paragraphs to have different meanings and should not be subject to the same reading.[57] Furthermore, the dissent argued that the change in language from the prior statue controlling deportation proceedings, which read "any country," to the present statute, which reads "another country," when viewed in the context of prior legislative history, case law, and administrative determinations, indicates that Congress intended to clarify its intent to have the acceptance requirement apply to subparagraph E clauses (i) through (vi).[58]

The dissent argued that the two requirements of Congressional ratification were met in this instance, as evidenced by the judicial and administrative consensus and the fact that little change was made to the prior provisions in their reenactment. The dissent argued that, prior to the 1996 enactment of § 1231(b), there was consensus amongst the judiciary and the Board of Immigration Appeals that clauses (i) through (vi) contained an acceptance requirement.[59] The dissent also argued that the prior exclusion and deportation provisions were not combined in § 1231(b), but remained in separate paragraphs, with few changes made to the text.[60] Acknowledging that Jama would have been subject to the exclusion provision prior to the enactment of § 1231(b), the dissent argued that the present issue is not the enlargement of the class of aliens subject to the deportation proceedings, but rather how the procedure, as defined by the provision, is to be followed.[61]

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52. *See generally* 8 C.F.R. § 208.16(c) (2005) (outlining the eligibility requirements for withholding removal under the Convention Against Torture); *see generally* 8 C.F.R. § 208.17(a)(2005) (detailing the requirements for a "deferral of removal to a country where he or she is more likely not to be tortured").

53. *Jama I*, 125 S. Ct. at 704.

54. *Id*. at 706.

55. *Id*. at 708–12.

56. *Id*. at 708–9.

57. *Id*.

58. *Id*. 709–10.

59. *Id*. at 711.

60. *Id*. at 711–12.

61. *Id*. at 712.

The dissent argued that, absent a consent requirement in clauses (i) through (vi), the Attorney General will almost always have the option of circumventing the acceptance requirement of subparagraph D, as the country of the alien's citizenship will likely be included in clauses (i) through (vii).[62] Noting that Article I, Section Eight, clause four, of the Constitution grants authority over aliens to Congress, the dissent argued that the issue of deference to the Executive in this context is "not how much discretion we think the Executive ought to have, but how much Congress has chosen to give it."[63]

V. Conclusion

The Supreme Court has concluded that the statute sets forth a four-step process, through which the Attorney General must designate a recipient country once an alien has been ordered deported.[64] *Jama*, through its thorough discussion, has clarified the requirements of 8 U.S.C. § 1231(b)(2). Furthermore, *Jama* has effectively put an end to the ensuing disagreement amongst the federal courts, by holding that an acceptance requirement does not exist in subparagraph E clauses (i) through (vi).

The Court recognized the importance of executive discretion in an ever changing international political and economic landscape. If the Court were to interpret the statute to include an acceptance requirement, the Attorney General would be foreclosed from effecting the removal of certain aliens, as subparagraph E clauses (i) through (vi) may be the only viable means available for their removal. Accordingly, its interpretation preserved the exercise of executive discretion necessary to ensure that aliens ordered deported are in fact deported.

A question still remains, however, as to whether an alien may be deported to a territory without a functioning centralized government. Somalia has not had a functioning government since 1991,[65] so it remains to be seen whether the courts will permit that territory to be defined as a "country" within the meaning of 8 U.S.C. § 1231(b)(2). Until that issue is decided, the destiny of those aliens ordered removed to Somalia will remain uncertain, even after the court's decision in *Jama*.

Jennifer N. Thomas-Santaniello

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62. *Id*. at 712–15.
63. *Id*. at 715–16.
64. *Id*. at 699–700.
65. *Id*. at 698.

World Book v. International Business Machines Corp.

354 F. Supp.2d 451 (S.D.N.Y. Feb. 3, 2005)

United States District Court for the Southern District of New York followed previous Second Circuit decisions in asserting the need for plaintiffs to prove substantial effects of the alleged trademark infringement on domestic commerce to establish extraterritorial application of the Lanham Act. Mere domestic authorization of foreign activity, like domestic packaging and shipping of goods to foreign purchasers, is insufficient.

I. Holding

In *World Book, Inc. v. International Business Machines Corp.*,[1] the U.S. District Court for the Southern District of New York followed previous Second Circuit decisions[2] in granting the defendant's Rule 12(c) motion for judgment on the pleadings,[3] and held that (1) there was no trademark infringement under § 32 of the Lanham Act[4] because the only domestic activity alleged to have occurred in connection with the unauthorized distribution was the mere authorization of that activity, which was insufficient to satisfy the substantial domestic effects requirement for extraterritorial imposition of Act,[5] (2) the plaintiff's breach-of-contract and misappropriation claims were time-barred under a two-year limitation period set forth in the parties' agreement,[6] (3) the plaintiff's misappropriation claim failed for the same reason as its Lanham Act claim: failure to plead substantial effects on domestic commerce,[7] and (4) the

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1. 354 F. Supp. 2d 451 (S.D.N.Y. 2005).

2. *See* Atlantic Richfield Co. v. Arco Globus Int'l Co., 150 F.3d 189 (2d Cir. 1998).

3. See FED. R. CIV. P. 12(c). In deciding a motion for judgment on the pleadings, the court accepts the allegations in the complaint as true and draws all reasonable inferences in favor of the non-moving party. *See* D'Aslession v. N.Y. Stock Exchange, 358 F.3d 93, 99 (2d Cir. 2001). A court should not dismiss a complaint under Rule 12(c) "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* However, "bald assertions and conclusions of law will not suffice to state a claim." Tarshis v. Riese Org., 211 F.3d 30, 35 (2d Cir. 2000). In deciding the motion, the court may also consider written instruments and attached as exhibits, as well as documents that are incorporated by reference or heavily relief upon. *See* Chambers v. Time Warner, Inc., 282 F.3d 147, 152-53 (2d Cir. 2002).

4. 15 U.S.C.S. § 1114 (1). The Lanham Act describes infringement of a registered trademark as follows:

> Any person who shall, without the consent of the registrant:
>
> (A) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; or
>
> (B) reproduce, counterfeit, copy, or colorably imitate a registered mark and apply such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in connection with the sale, offering for sale, distribution, or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; shall be liable in a civil action by the registrant for the remedies hereinafter provided . . .

Id.

5. *World Book*, 354 F. Supp. 2d at 454.

6. *Id.* at 455.

7. *Id.*

plaintiff's requested accounting remedy is not an independent cause of action, but rather a showing that the Latham violations were taken in bad faith.[8]

II. Facts and Procedural Posture

In May 1996, the plaintiff World Book, the encyclopedia publisher, entered into a Base Agreement ("BA") with the defendant, International Business Machines Corp. ("IBM"), the well-known technology company, which established the basic terms and conditions of the parties' relationship and provided for the creation of future transaction documents.[9] In 1999, the plaintiff and the defendant executed a Joint Development Agreement ("JDA"), wherein World Book gave IBM specific exclusive distribution rights to its products, including the CD version of its encyclopedia ("Multimedia Products").[10] This grant included, among other things, the right to distribute and to sublicense copies of the Multimedia Products through limited distribution channels in accordance with all agreements between the parties.[11] Under both agreements, World Book's trademarks remained under its exclusive ownership.[12] IBM then authorized its subsidiary, Lotus Development (UK) Ltd, to enter into a distribution agreement in the United Kingdom with Time Group (the "Time Agreement") for the World Book trademarked product.[13] After unsuccessful attempts to persuade IBM to stop this distribution, World Book filed the instant action.[14]

III. The Court's Analysis

A. Extraterritorial Application of the Lanham Act

The alleged unauthorized distribution occurred only in the United Kingdom, so the court examined the extraterritorial application of the Lanham Act, particularly whether the defendant's actions had a "substantial effect on United States commerce."[15] The court relied on the interpretation of this factor in *Atlantic Richfield Co. v. Arco Globus International Co.*,[16] which provides that the mere presence of the alleged infringer in the United States is insufficient to constitute a "substantial effect" if (1) the alleged infringer's use of the mark did not mislead the United States public in its purchases or cause it to think less favorably of the mark, (2) the alleged infringer does not compete with the trademark owner by using United States streams of

8. *Id.*

9. *Id.* at 452.

10. *Id.*

11. *Id.* IBM's license permitted it to "use, execute, reproduce, display, perform, transfer, distribute and sublicense" the products in accordance with the BA, JDA, and other transactional documents between the parties. *Id.*

12. *Id.*

13. *Id.* at 453.

14. *Id.*

15. Vanity Fair Mills, Inc. v. T. Eaton Co., 234 F.2d 633, 642 (2d Cir. 1956). The *Vanity Fair* test provides: (1) the conduct of the defendant must have a substantial effect on United States commerce, (2) the defendant must be a United States citizen, and (3) there must be an absence of conflict with foreign law. The Second Circuit has held this factor to be determinative; *see also Atlantic Richfield,* 150 F.3d at 192.

16. 150 F.3d 189 (2d Cir. 1998).

commerce, [17] and (3) none of the alleged infringer's American activities materially support the foreign use of the mark.[18]

The court rejected the plaintiff's interpretation of *Piccoli A/S v. Calvin Klein Jeanswear Co.*[19] to suggest that *Atlantic Richfield* had limited reach in the present matter.[20] World Book asserted that, just as in *Piccoli,* there was a "substantial effect" when a defendant's domestic conduct materially supported its foreign infringing activity.[21] Unlike the *Piccoli* defendants, whose use of the physical stream of American commerce was essential to the alleged infringement—they were actively pursuing foreign sales through domestic shipment of promotional materials[22]—the court distinguished that the only domestic activity by the World Book defendant was merely authorizing foreign distribution.[23] Further, the court reasoned that if packaging and shipment of infringing goods from the United States were insufficient to meet the substantial effects test[24] then mere domestic authorization of foreign activity was as well.[25]

The court also rejected the plaintiff's alternative argument, that the alleged infringing goods were not "genuine," because they were no longer subject to their own quality controls,[26] for three reasons: (1) the plaintiff improperly raised this theory in its brief rather than in its complaint,[27] (2) even if it had followed proper procedure, the pleading would still have failed to state a claim, because it did not establish that its own, legitimate procedures were regularly

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17. *Atlantic Richfield Co.*, 150 F.3d at 193 (suggesting that this can be achieved through "manufacturing, processing, or transporting the competing product in United States commerce").

18. *World Book*, 354 F. Supp. 2d at 454. Applying the *Vanity Fair* test, the Second Circuit established that since the parties were United States citizens and there was no conflict with foreign law, two prongs were satisfied. Nevertheless, the court held that there was no substantial effect on United States commerce, because (1) AGI's use of the mark did not mislead the United States public, (2) AGI did not compete with Atlantic Richfield by using United States streams of commerce, and (3) AGI's domestic activities did not materially support the use of its trademark in foreign jurisdictions. Consequently, although AGI did have some contact with United States commerce, its mere geographic presence was insufficient to constitute a substantial effect. Although the two other *Vanity Fair* prongs were satisfied, the court found the absence of this factor to be determinative. *Id*.

19. 191 F. Supp. 2d 157 (S.D.N.Y. 1998).

20. *Id.* at 171 (holding that the second prong of *Atlantic Richfield* was satisfied, because the use of the physical stream of American commerce was essential to the alleged infringement).

21. *World Book*, 354 F. Supp. 2d at 454 (citing Piccoli A/S v. Calvin Klein Jeanswear Co., 19 F. Supp. 2d 157 (S.D.N.Y. 1998) to support this proposition).

22. *Piccoli*, 19 F. Supp. 2d at 161 (sending promotional materials to prospective purchasers and inviting them to come to the U.S. showroom to view, negotiate for, and purchase the defendant designer's surplus jeans for unrestricted international distribution, thereby infringing on the plaintiff's exclusive market area).

23. *World Book*, 354 F. Supp.2d at 454.

24. *See id.* (citing Totalplan Corp. of America v. Colborne, 14 F.3d 824 (2d Cir.1994)).

25. *Id.*

26. *World Book*, 354 F. Supp. 2d at 454 ("One of the most valuable and important protections afforded by the Lanham Act is the right to control the quality of the goods manufactured and sold under the holder's trademark. . . . The actual quality of the goods is irrelevant; it is the control of quality that a trademark holder is entitled to maintain.") (*quoting* El Greco Leather Prods. Co., Inc. v. Shoe World, Inc., 806 F.2d 392, 395 (2d Cir. 1986)).

27. *See* Wright v. Ernst & Young LLP, 152 F.3d 169, 178 (2d Cir. 1998) (stating that a party may not amend its complaint through statements made in motion papers).

adhered to, and that the alleged non-conforming sales diminished the value of the mark,[28] and (3) it failed to establish how the alleged loss of quality control had a substantial effect on domestic commerce.[29]

B. Breach of Contract and Misappropriation Claims

The court granted the defendant's motion to dismiss the plaintiff's breach of contract and misappropriation claims because they were time-barred under a two-year limitation period set forth in the BA § 12.5.[30] The court reasoned that this was an alleged contract violation for the authorization to distribute the Multimedia Products and not, as World Book contended, an "intellectual property rights" claim that was exempt from this time limitation.[31]

Furthermore, the court rejected World Book's misappropriation claim on the same basis as its Lanham Act claim—failure to plead substantial effects on domestic commerce.[32] Misappropriation requires a showing of both bad faith and consumer confusion; the plaintiff insufficiently pleaded the former and did not even address the latter.[33] The court also dismissed the plaintiff's request for accounting as a remedy, which is only available on a showing of bad faith and was not an independent cause of action.[34]

IV. Conclusion

World Book reaffirms *Atlantic Richfield* in asserting the need for plaintiffs to prove substantial effects on domestic commerce to establish extraterritorial application of the Lanham Act; mere domestic authorization of foreign activity is insufficient.[35]

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28. *World Book*, 354 F. Supp.2d at 454 ("[A] Lanham Act claim based on a 'loss of quality control' theory requires a showing by the mark holder that '(i) it has established legitimate, substantial, and nonpretextual quality control procedures, (ii) it abides by those procedures, and (iii) the [sales are nonconforming] and that such non-conforming sales will diminish the value of the mark.'") (citing Warner-Lambert Company v. Northside Development Corp., 86 F.3d 3, 6 (2d Cir. 1996)).

29. *Id.*

30. *Id.* at 455 ("Neither party will bring a legal action against the other more than two years after the cause of action arose. This does not apply to actions brought to enforce indemnification and liability or intellectual property rights.").

31. *See id.*

32. *Id*. at 455.

33. *See id.* (adding "[T]he essence of New York common law is 'the bad faith misappropriation of the labors and expenditure of another, likely to cause confusion or to deceive purchasers as to the origin of the goods.'") (citing Jeffrey Milstein, Inc. v. Greger, Lawlor, Roth, Inc., 58 F.3d 27, 34 (2d Cir. 1995)).

34. *Id.*

35. *See Atlantic Richfield,* 150 F.3d at 192 n.4. The Second Circuit has refused extraterritorial application of the Lanham Act where the substantiality requirement has not been met, but only when the geographical presence of the defendant within United States borders served as the sole contact with United States commerce. *See id*.

The Ninth Circuit has specifically rejected the substantial effect on commerce requirement from the *Vanity Fair* tripartite test, refusing to conclude that the absence of one of the prongs of the tripartite test signals inapplicability of the Lanham Act.[36] Instead, that court adopted the jurisdictional Rule of Reason analysis,[37] where each of the *Vanity Fair* requirements would be considered a single factor to be balanced against other elements in determining whether the United States has sufficient contacts and interests to warrant the extraterritorial application of the Lanham Act.[38]

Although the Fifth Circuit adopted the elements outlined in *Vanity Fair* and *Steele v. Bulova Watch Co.*,[39] like the Ninth Circuit, it also refused to impose the requirement that the infringement must have a "substantial" effect on United States commerce. Instead, that court indicated that the effect on United States commerce need only be "more than insignificant."[40] Further, the Fifth Circuit considers the *Vanity Fair* factors to be the primary, but not exclusive, basis for analysis; the absence of any single one is not necessarily dispositive.[41]

Despite the rigidity of the Second Circuit test, it has more flexibly extended the jurisdiction of the Lanham Act, limiting it only in cases where geographical presence of the defendant within U.S. borders serves as the sole contact with U.S. commerce, as is further clarified by *World Book*. Thus, contingent on the effect on U.S. commerce, U.S. companies operating abroad can expect to receive protection for their trademarks against infringement beyond U.S. borders.[42]

Susan Lutinger

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36. *See* Erika M. Brown, *The Extraterritorial Reach of United States Trademark Law: A Review of Recent Decisions Under the Lanham Act*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 863, 875, 876 (1999) (*citing* Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 427, 428 (9th Cir. 1977)).

37. *See id.* at 876 (citing Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976)).

38. *See* Ocean Garden, Inc. v. Marktrade Co., 953 F.2d 500, 503 (9th Cir. 1991) (requiring that three elements be present in order to extend the Lanham Act extraterritorially: (1) some effect on United States commerce; (2) an effect sufficient to present a cognizable injury under the statute; and (3) interest and links to United States commerce sufficiently strong in relation to other nations. The third requirement was subdivided into seven components, including: (1) the degree of conflict with foreign law; (2) the nationality of the parties; (3) the extent to which the enforcement of United States law could be expected to achieve compliance; (4) the relative significance of effects on the United States as compared to effects elsewhere; (5) whether the explicit purpose of the defendant was to harm United States commerce; (6) the foreseeability of such effects; and (7) the relative importance of the violations within the United States).

39. Steele v. Bulova Watch Co., 344 U.S. 280 (1952).

40. American Rice, Inc. v. Arkansas Rice Growers Cooperative Ass'n, 701 F.2d 408 (5th Cir. 1983).

41. Brown, *supra* note 36, at 880–81 (citing *American Rice*, 701 F.2d at 414).

42. *Id.* at 884.

Bigio v. Coca-Cola Co.

2005 U.S. Dist. LEXIS 1587 (S.D.N.Y. Feb. 3, 2005)

In declining to hear this case of Canadian plaintiffs claiming uncompensated expropriation of property owned by Jews by Egypt in 1962, the United States District Court for the Southern District of New York found that policy issues, including international comity and *forum non conveniens*, warranted its decision not to exercise its jurisdiction over the controversy, even though the prerequisites for jurisdiction had been satisfied.

I. Holding

In *Bigio v. Coca-Cola Co.*,[1] the United States District Court for the Southern District of New York held that the doctrines of international comity[2] and *forum non conveniens*[3] demanded that it dismiss the case.[4] In acting in accordance with the principles of international comity, the court found the dismissal warranted, so as not to bring this court into conflict with Egyptian law and policy.[5] Further, in balancing the public and private interest factors, the court found that they weighed more heavily in favor of litigating the matter in Egypt.[6] The court determined that the plaintiffs had provided insufficient proof that litigation in Egypt would be dangerous to them.[7]

II. Facts and Procedural Posture

The plaintiffs sought damages from defendants Coca-Cola Company and Coca-Cola Export Corporation for the conversion and nationalization of their property by the Egyptian government under President Gamal Abdel-Nasser in 1962.[8] The plaintiffs claim that their property, located in Heliopolis, Egypt, was sequestered and nationalized because they are Jewish.[9] In 1965, the plaintiffs, Raphael Bigio, Ferial Salma Bigio, and Bahia Bigio left their home in Egypt to become residents and citizens of Canada.[10] The plaintiff company, B. Bigio & Co.,

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1. 2005 U.S. Dist. LEXIS 1587 (S.D.N.Y. Feb. 3, 2005) [hereinafter *Bigio I*].
2. *See, e.g.,* Hilton v. Guyot, 159 U.S. 113, 164 (1895) (defining international comity); *see also* Finaz AG Zurich v. Banco Económico S.A., 192 F.3d 240, 245–46 (2d Cir. 1999) (concluding that a court may decline jurisdiction on the basis of international comity).
3. *See, e.g.,* Scottish Air Int'l, Inc. v. British Caledonian Group, PLC, 81 F.3d 1224, 1232 (2d Cir. 1996) (stating that a court may dismiss a case on the basis of *forum non conveniens*).
4. *Bigio I*, 2005 U.S. Dist. LEXIS 1587, at *18.
5. *Id.* at *8.
6. *Id.* at *14–*17 (finding that a proper forum for the court consists of balancing all of the public and private factors which arise in the case).
7. *Id.* at *13.
8. *Id.* at *3.
9. *Id.*
10. *Bigio I*, 2005 U.S. Dist. LEXIS 1587, at *2.

was organized under the laws of Egypt. The defendant Coca-Cola companies are incorporated in the state of Delaware and headquartered in Atlanta, Georgia.[11]

The Egyptian government transferred ownership of the Bigios' property to the Misr Insurance Company ("Misr"), which leased it to El-Nasr Bottling Company ("ENBC").[12] However, after the death of President Nasser, the Egyptian government is said to have issued an edict directing the Bigios' property, or the proceeds from any sale that might have occurred, to be returned to them, including any rental burden and active occupants. The property was never returned to the plaintiffs.[13] In 1980, the Bigios brought an action against Misr and ENBC in Egypt, but the claims were dismissed, apparently for failure to prosecute. Plaintiffs never brought an action against the Coca-Cola Company while in Egypt.[14]

The Coca-Cola Company leased land for its bottling companies from the Bigios in 1938 and bought bottle caps and marketing products from the Bigio factories until 1962.[15] In 1993, two subsidiaries of the Coca-Cola Export Company invested in the ENBC, and, by the time this action had been commenced, the Coca-Cola Export Corporation owned 42 percent of the bottling company.[16] In 1994, Raphael Bigio contacted Coca-Cola to discuss Coca-Cola's proposal to buy ENBC. In 1995, after an investigation of its own, Coca-Cola concluded that it had no liability to the Bigios in regard to the Heliopolis property.[17]

Following the Coca-Cola Company's refusal to compensate the Bigios, plaintiffs filed this lawsuit in the United States District Court for the Southern District of New York in 1997.[18] Plaintiffs claim that defendants converted plaintiffs' assets and did so knowingly, and for the sole reason that plaintiffs were Jewish.[19] In an earlier decision issued by the district court, plaintiffs' claims were dismissed, on the grounds that the plaintiffs did not satisfy the prerequisites for jurisdiction under the Alien Tort Claims Act and that the act-of-state doctrine barred jurisdiction of the court.[20] The Court of Appeals for the Second Circuit affirmed in part and reversed in part, holding the Alien Tort Claims Act did not apply, but concluding that the act-of-state doctrine did not in fact bar the claims of the plaintiff.[21] The Second Circuit then

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11. *Id.*

12. *Id.* at *3.

13. *Id.*

14. *Id* at *4 (noting that, although plaintiffs brought two separate actions in the Egyptian courts for issues arising out of these same occurrences, they never commenced an action against the current defendants, namely the Coca-Cola Company and the Coca-Cola Export Corporation).

15. *Id.*

16. *Id.*

17. *Id.* at *5.

18. *See* Bigio v. Coca-Cola Co., 1998 U.S. Dist. LEXIS 8295, at *2 (S.D.N.Y. June 4, 1998) (finding that jurisdiction was improper because plaintiffs could not meet the prerequisites under the Alien Tort of Claims Act) [hereinafter *Bigio II*].

19. Bigio v. Coca-Cola Co., 239 F. 3d 440, 444 (2nd Cir. 2001) [hereinafter *Bigio III*].

20. *Bigio II*, 1998 U.S. Dist. LEXIS 8295, at *2.

21. *Bigio III*, 239 F.3d at 440 (deciding that the case did meet jurisdictional requirements, but that the lower court should decide whether that jurisdiction should be exercised here).

remanded the case to the district court for a determination of whether the court had jurisdiction over the instant action under the abstention doctrine of international comity.[22]

III. The Court's Analysis

Following findings by the Second Circuit that the district court had jurisdiction based on diversity of citizenship of the parties and that the act-of-state doctrine did not bar the exercise of that jurisdiction, the question remained whether the court should choose to exercise that jurisdiction. The United States District Court, in *Bigio v. Coca-Cola Co.*,[23] examined the doctrines of international comity and *forum non conveniens* to determine whether the principles of international law dictated against the exercise of jurisdiction. The court held that exercise of jurisdiction was improper in this case and that it was Egypt that had the most significant relationship and strongest interest in the controversy.[24]

A. International Comity

Courts have defined the doctrine of international comity as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation."[25] In the instant action, the defendant was able to meet its burden of proof[26] to establish that only Egyptian law can properly determine the "legal effect" of the edict issued by the Egyptian government in regard to the return of the Egyptian property.[27] The United States is not in a better position than Egypt to clarify the meaning of an edict issued by that government. The court in *Bigio* then turned to the seven-step test laid out in *Timberlane Lumber Co. v. Bank of Am. Nat'l Trust and Savings Assoc.*[28]

The court reviewed all seven factors of the *Timberlane* test, including "the degree of conflict with foreign law or policy," "the nationality of the parties," "the extent to which enforcement by either country can be expected to achieve compliance," "a comparison of the relative significance of the effects on each country," "the extent to which there is explicit purpose to harm or effect American commerce, and the foreseeability of such an effect," and a comparison of "the relative importance to the violations charged of conduct"[29] in each country.[30] Here, the court focused mainly on the first factor, finding a high degree of conflict in this case.[31] A court

22. *Id.*

23. *Bigio I*, 2005 U.S. Dist. LEXIS 1587 (S.D.N.Y. Feb. 3, 2005).

24. *Id.* at *17 (describing the holding of the case that it was Egypt, and not the United States, that had the most significant relationship).

25. Hilton v. Guyot, 159 U.S. 113, 164 (1895).

26. *See* United Feature Syndicate, Inc. v. Miller Features Syndicate, Inc., 216 F. Supp. 2d 198, 212 (S.D.N.Y. 2002) (explaining that the party who bears the burden of proof is the party asserting comity).

27. *Bigio I*, 2005 U.S. Dist. LEXIS 1587, at *7.

28. Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Savings Assoc., 749 F.2d 1378, 1384–87 (9th Cir. 1984) (outlining the seven factors which the court examined on the issue of international comity).

29. *Id.*

30. *Bigio I*, 2005 U.S. Dist. LEXIS 1587, at *7 (listing the seven factors used in the *Timberlane* test).

31. *Id.*

in the United States would first have to find fault with the decisions of the Egyptian government before deciding that defendants were liable in this case. In effect, a determination by the United States that defendants converted plaintiffs' property means that the Egyptian government was wrong to take plaintiffs' property in the first place.[32] A finding such as the one described would cut against the principles of international comity, because the United States would be placing itself in conflict with the laws and policies of Egypt.[33] In balancing all of the other factors in the *Timberlane* test, the court found that the scales tipped in favor of giving deference to Egypt.[34] Finally, the court noted that the only connection the current lawsuit had to the United States was that the defendants are United States corporations.[35]

The court found that the plaintiffs clearly could have an "adequate forum"[36] for this litigation in Egypt. The plaintiffs had already commenced actions in Egypt pertaining to these occurrences in 1980 and again in 1983.[37] In addition, the court found that the plaintiffs had not established their claims that Egypt is "too dangerous" a forum in which to commence litigation.[38] Moreover, the court held that the newspaper article and television show that plaintiffs cite, although anti-Semitic in nature, were insufficient evidence to establish any physical danger if the plaintiffs were to commence an action in Egypt.[39] Significantly, plaintiffs had the ability to sue the Coca-Cola defendants in Egypt because the latter had stipulated to jurisdiction in Egypt.[40]

A careful examination of international comity by the *Bigio* court reveals that Egypt would be a more appropriate forum for the case. The court held, upon a weighing of the factors, that the case should be dismissed.

B. *Forum Non Conveniens*

The court in *Bigio*, in its own discretion, also determined that the case should be dismissed on the grounds of *forum non conveniens*.[41] Although there is a strong presumption in favor of allowing the plaintiff to choose the forum,[42] "[a] foreign plaintiff seeking to litigate in

32. *Id.* at *8.

33. *Id.*

34. *Id.* at *9.

35. *Id.* at *15.

36. *Bigio I*, 2005 U.S. Dist. LEXIS 1587, at *13 (stating that an alternate adequate forum needs to be established for a finding of *forum non conveniens* and declaring it adequate if defendants are subject to service of process there and the forum permits the litigation of the subject matter).

37. *Id.* at *5, *10.

38. *Id.* at *10.

39. *Id.*

40. *Id.* at *11.

41. *Id.* at *18.

42. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255 (1981) (recognizing that it is usually the plaintiff who decides the forum).

American court is generally given less deference, because the presumption of convenience is diminished."[43] In the *Bigio* case, the court found that Egypt was an adequate alternative forum, because the defendants were subject to service there and Egypt had subject-matter jurisdiction over the dispute.[44] The court noted that the Bigios were not trying to sue at home (therefore eliminating the argument of convenience), and that they had even litigated two previous claims in the Egyptian courts.[45]

In addition to Egypt being an adequate alternate forum, the balance of public and private factors in the case was found to weigh heavily in favor of dismissal. As to the private factors, the court found that the relevant evidence, documents, and witnesses were all located in Egypt and that nothing relevant was found in the United States.[46] The public interest factors in this case pointed in the same direction as the private factors. In weighing these factors, the court found that this case would only result in further administrative hassles with court congestion, a heavy burden on jury members from a community with no relation to the case, the problem of resolving local disputes locally, and trying to avoid difficult problems in conflict of laws.[47]

The court found that dismissal of the *Bigio* case was warranted on the ground of *forum non conveniens*. It held that Egypt had the most significant relationship and the strongest interest in having the claims litigated there, and that a United States court's "intrusion" would raise issues of international comity.[48]

IV. Conclusion

The court's dismissal of the *Bigio* case was warranted under the doctrines of international comity and *forum non conveniens*.[49] The dismissal signifies that, although a court may have jurisdiction to hear a controversy, it is within the court's discretion to decide whether it should exercise that jurisdiction. The weight of all of the factors in this case tipped heavily in favor of declining to exercise jurisdiction.[50] It would have been improper for the court to have found otherwise here.

In keeping with the guidelines laid out by the principles of international comity and *forum non conveniens*, this court has avoided a possible conflict between the laws and policies of the United States and Egypt.[51] Additionally, the court has been able to pinpoint the forum with the most significant relationship and interest in this case.[52] This decision emphasizes, once

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43. *See* Murray v. British Broad. Corp., 81 F.3d 287, 290 (2nd Cir. 1996) (quoting the court's response to a foreign plaintiff's desire to litigate in an American court).
44. *Bigio I*, 2005 U.S. Dist. LEXIS 1587, at *13.
45. *Id.* at *4.
46. *Id.* at *14–*16.
47. *Id.* at *16–*17.
48. *Id.* at *17.
49. *Id*. at *18.
50. *Bigio I*, 2005 U.S. Dist. LEXIS 1587, at *18.
51. *Id.* at *7.
52. *Id*. at *17.

again, the important duty placed on a court seized with an international matter to decide whether it is proper to hear the specific controversy. The decision in *Bigio* serves as an example to future courts of the factors to be considered when making this type of determination. Although the court has discretion in these matters relating to jurisdiction, it must carefully consider all of the circumstances of a case to ensure that it reaches a proper decision. The court in *Bigio* took extreme care to examine all the issues and properly determined that international comity and *forum non conveniens* directed dismissal in this case.[53]

Brooke Tiffany Skolnik

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53. *Id*. at *18.

Acree v. Republic of Iraq

370 F.3d 41 (D.C. Cir. 2004)

The United States Court of Appeals for the District of Columbia Circuit dismissed an action by American prisoners of war during the 1991 Gulf War against the Republic of Iraq, its president, and its intelligence service seeking damages for injuries allegedly suffered as a result of torture inflicted on the prisoners of war while in Iraqi captivity. The district court's denial of the U.S. government's motion to intervene as untimely was abuse of discretion, the President's suspension of economic sanctions against Iraq did not make the terrorism exception to the Foreign Sovereign Immunities Act (FSIA) inapplicable to Iraq, and neither the terrorism exception to the FSIA nor the Flatow Amendment thereto created a private right of action against a foreign government.

I. Holdings

In *Acree v. Republic of Iraq*,[1] the United States Court of Appeals for the District of Columbia Circuit was asked to decide whether the District Court had erred in denying as untimely the United States' motion to intervene, which was filed two weeks after judgment was entered for plaintiffs.[2] In so doing, the court raised and responded to three primary questions: (1) whether the District Court's denial of the United States' motion to intervene was an abuse of discretion; (2) whether the District Court had subject-matter jurisdiction under the FSIA[3]; and (3) whether the FSIA or the Flatow Amendment[4] —taken independently or in conjunction— created a private cause of action against a foreign government.

With respect to the first question, the Court of Appeals found that the District Court's denial of the United States' motion to intervene as untimely was abuse of discretion, because the District Court considered neither the importance of this case to the United States' foreign policy interests nor the purposes for which the United States sought to intervene.[5] With respect to the second question, the Court of Appeals determined that the District Court properly exercised subject-matter jurisdiction over the claims under the FSIA.[6] Specifically, the Emergency Wartime Supplemental Appropriations Act (EWSAA)[7] did not render the terrorism exception to the FSIA inapplicable to Iraq.[8] With respect to the third question, the Court of Appeals followed its recent holding in *Cicippio-Puelo v. Islamic Republic of Iran*[9] that neither the FSIA nor

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1. 370 F.3d 41 (D.C. Cir. 2004), *cert. denied*, 125 S.Ct. 1928 (2005) [hereinafter *Acree I*].
2. *Id.* at 43.
3. 28 U.S.C. § 1605(a)(7) (2000).
4. 28 U.S.C. § 1605 note (2000); *see* Pub. L. 104-208, Div. A, Title I, § 101(c) [Title V, § 589], 110 Stat. 3009-172 (1996).
5. *Acree I*, 370 F.3d at 50.
6. *Id.* at 57–58.
7. Pub. L. No. 108-11, § 1503, 117 Stat. 559, 579 (2003).
8. *Acree I*, 370 F.3d at 50.
9. 353 F.3d 1024 (D.C. Cir. 2004).

the Flatow Amendment, taken individually or together, created a cause of action against foreign states themselves, but only against their individual officials, employees, and agents.[10] Because these statutes had not created a cause of action and the prisoners of war had not pointed to any source of liability other than the FSIA and Flatow Amendment, the present case was dismissed for failure by the prisoners of war to state a cause of action upon which relief could be granted.[11]

II. Factual and Procedural Background

While serving in the first Gulf War after the Iraqi invasion of Kuwait in 1991, Colonel Clifford Acree and 16 other American soldiers (collectively, "appellees") were captured and held as prisoners of war in Kuwait and the Republic of Iraq between January and March 1991.[12] In April 2002, the appellees filed a complaint in the District Court against the Republic of Iraq, the Iraqi Intelligence Service, and Saddam Hussein in his official capacity as President of Iraq, alleging personal injuries caused to them and their family members as a result of the torturous treatment they received while in Iraqi captivity.[13]

Jurisdiction in the appellees' lawsuit was based on the terrorism exception to the FSIA.[14] Under the FSIA, foreign governments enjoy immunity from civil suit in American courts, subject to certain enumerated exceptions.[15] Section 1605(a)(7) creates such an exception for a case "in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act. . . ."[16] However, this terrorism exception applies only if the foreign state was designated as a "state sponsor of terrorism" at the time the alleged acts of torture occurred.[17] Iraq was designated as a "state sponsor of terrorism" on September 13, 1990; Iraq was therefore amenable to suit in federal court under the terrorism exception to FSIA at the time the appellees commenced their lawsuit.[18] Further, the appel-

10. *Acree I*, 370 F.3d at 59.

11. *Id.*

12. *Id.* at 43–44.

13. *Id.* at 44.

14. *Id.*

15. *See* 28 U.S.C. § 1604 (2005); *see also* 28 U.S.C. § 1330(a) (granting district courts jurisdiction over suits against a foreign sovereign in cases where that sovereign is not entitled to immunity under FSIA).

16. 28 U.S.C. § 1605(a)(7) (2005).

17. *Id.* at § 1605(a)(7)(A).

18. *Acree I*, 370 F.3d at 44.

lees based their cause of action for assault, battery, and intentional infliction of emotional distress[19] on section 1605(a)(7), as amended by the Flatow Amendment in 1996.[20]

The Iraqi defendants failed to appear, and the District Court accordingly entered a default judgment against them.[21] After the appellees submitted further evidence on the issue of damages, the District Court entered a final judgment in favor of the appellees on July 7, 2003.[22] Based on findings of fact regarding the specific injuries suffered by each appellee, the District Court awarded compensatory and punitive damages to all appellees totaling over $959 million.[23]

In April 2003, shortly after commencement of the most recent military action against Iraq, Congress enacted the EWSAA.[24] Section 1503 of the EWSAA granted to the President the power to "make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 or any other provision of law that applies to countries that have supported terrorism."[25] Pursuant to this authority, President Bush issued Presidential Determination No. 2003-23 of May 7, 2003, which "ma[d]e inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 [and] any other provision of law that applies to countries that have supported terrorism."[26]

On July 21, 2003, the United States moved to intervene for the sole purpose of contesting the District Court's subject matter jurisdiction.[27] The United States argued that the terrorism exception of FSIA § 1605(a)(7) is a "provision of law that applies to countries that have supported terrorism" within the meaning of § 1503 of the EWSAA. Hence, § 1605(a)(7) was made inapplicable to Iraq on May 7, 2003 by operation of Presidential Determination No.

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19. *Id.* at 45.

20. The Flatow Amendment was adopted shortly after § 1605(a)(7) was added to the FSIA in 1996. *Id.* The Flatow Amendment provides:

> An official, employee, or agent of a foreign state designated as a state sponsor of terrorism . . . while acting within the scope of his or her office, employment, or agency shall be liable to a United States national or the national's legal representative for personal injury or death caused by acts of that official, employee, or agent for which the courts of the United States may maintain jurisdiction under section 1605(a)(7) . . . for money damages which may include economic damages, solatium, pain, and suffering, and punitive damages if the acts were among those described in [§ 1605(a)(7)].

28 U.S.C. § 1605 note (2005).

21. *Acree I*, 370 F.3d at 45.

22. *Id.*

23. *Id.*; *see also* Acree v. Republic of Iraq, 271 F. Supp. 2d 179, 224–25 (D.D.C. 2003) [hereinafter *Acree II*].

24. Pub. L. No. 108-11, 117 Stat. 559 (2003).

25. *Id.* at 579.

26. Presidential Determination No. 2003-23 of May 7, 2003, 68 Fed. Reg. 26,459 (May 16, 2003). Further, in a message delivered to Congress on May 22, 2003, President Bush explained the need to protect Iraqi assets from judgment or other judicial processes, and stated his view that the May 7 determination applied to, among other things, the terrorism exception to the FSIA. *Acree*, 370 F.3d at 46.

27. *Acree I*, 370 F.3d at 46.

2003-23.[28] In other words, the District Court was divested of jurisdiction on May 7, 2003 and was thus incompetent to render its judgment in favor of the appellees.

On August 6, 2003, the District Court denied the United States' motion to intervene as untimely.[29] Further, the District Court held that the appellees' lawsuit did not threaten any cognizable interest of the United States and that permitting the United States to intervene would cause undue delay and prejudice to the parties.[30] Finally, the District Court concluded that it retained subject-matter jurisdiction under the FSIA despite the EWSAA and the Presidential Determination.[31] On August 22, 2003, the United States filed an appeal of the District Court's determination.[32]

III. The Court's Analysis

The Court of Appeals began its analysis by noting that it must first consider the propriety of the District Court's order denying the United States' motion to intervene.[33] That is, if the District Court was correct, then the United States would not be a proper party to this case, and hence, would have no right to appeal the District Court's judgment.[34]

A. Motion to Intervene

Under Rule 24 of the Federal Rules of Civil Procedure, a prospective intervenor's motion for intervention must be "timely" to be effective.[35] It is within the sound discretion of the trial court to evaluate the timeliness of a motion to intervene;[36] a trial court's denial of a motion to intervene is therefore an appealable final order to be reviewed under an abuse of discretion standard.[37]

The *Acree* court noted that courts are typically reluctant to permit intervention after a suit has proceeded to final judgment, particularly where the applicant had the opportunity to intervene prior to judgment.[38] However, post-judgment intervention is often permitted in situations where the applicant's interest did not arise until the appellate stage or where intervention

28. *Id.* at 46–47.

29. *Id.* at 47; *see also* Acree v. Republic of Iraq, 276 F. Supp. 2d 95, 98–99 (D.D.C. 2003) [hereinafter *Acree III*].

30. *Acree I*, 370 F.3d at 47; *see also Acree III*, 276 F. Supp. 2d at 99–102.

31. *Acree I*, 370 F.3d at 47; *see also Acree III*, 276 F. Supp. 2d at 100–01.

32. *Acree I*, 370 F.3d at 47.

33. *Id.* at 49.

34. *Id.*; *see also* Marino v. Oritz, 484 U.S. 301, 304 (1988).

35. *See* FED. R. CIV. P. 24(a), 24(b).

36. *Acree I*, 370 F.3d at 49; *see also* Fund for Animals, Inc. v. Norton, 322 F.3d 728, 732 (D.C. Cir. 2003) (citing Mass. Sch. of Law at Andover, Inc. v. U.S., 118 F.3d 776, 779 (D.C. Cir. 1997)).

37. *Acree I,* 370 F.3d at 49 (citations omitted).

38. *Id.*; *see also* Associated Builders & Contractors, Inc. v. Herman, 166 F.3d 1248, 1257 (D.C. Cir. 1999); 7C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1916 (2d ed. 1986).

would not unduly prejudice the existing parties.[39] The *Acree* court noted further that the timeliness of a motion to intervene must be considered in light of all the circumstances of the case, including the purpose for which intervention is sought.[40]

The court in *Acree* found that the District Court's primary reason for denying the United States' motion to intervene was that it had already entered judgment in the case.[41] The Court of Appeals found this insufficient because the District Court failed to consider the importance of this case to the United States' foreign policy interests.[42] Further, the only result achieved by the District Court's denial order in this case would have been the "effective insulation" of the District Court's decision from appellate review.[43] Under these circumstances, the Court of Appeals found that the District Court had abused its discretion in denying as untimely the United States' motion to intervene.[44] Consequently, the Court of Appeals reversed the District Court and turned to the merits of the United States' jurisdictional challenge.

B. Jurisdiction Under the FSIA

Whether § 1503 of the EWSAA and the subsequent Presidential Determination No. 2003-23 of May 7, 2003, divested the District Court of jurisdiction to hear the appellees' case presented "a basic question of statutory interpretation."[45] The Court of Appeals began by examining the EWSAA, concluding that its purposes were rather narrow: to provide emergency appropriations in support of the United States' military operations in Iraq following the most recent military action against Iraq in 2003, additional funding for homeland-security operations in the United States, and appropriations for certain foreign assistance programs.[46] The court rejected the government's argument that an additional purpose of the EWSAA was to modify the FSIA, because nothing in § 1503, the EWSAA as a whole, or its legislative history mentions the FSIA specifically or federal court jurisdiction in general.[47] The Court of Appeals then went on to find that the legislative history of § 1503, combined with the text of the EWSAA as a whole and with the complex web of economic sanctions and prohibitions on assistance that applied to Iraq prior to the EWSAA, supported the court's view that § 1503 embraces only those provisions of law that constitute legal restrictions on assistance to and trade with Iraq.[48] Consequently, the Court of Appeals rejected the United States' arguments against jurisdiction under the FSIA and affirmed the District Court's exercise of jurisdiction over appellees' claims under 28 U.S.C. § 1605(a)(7).[49]

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39. *Acree I*, 370 F.3d at 50. The court noted further that courts will often grant post-judgment motions to intervene where no existing party chooses to appeal the final judgment of the trial court. *Id.*
40. *Id.* at 49.
41. *Id.* at 50.
42. *Id.*
43. *Id.* at 50.
44. *Id.*
45. *Id.* at 51.
46. *Id.* at 53.
47. *Id.* at 56.
48. *Id.*
49. *Id.* at 57–58.

In his concurring opinion, Circuit Judge Roberts[50] disagreed with the majority in its holding that § 1503 of the EWSAA and the subsequent Presidential Determination No. 2003-23 of May 7, 2003, failed to divest the District Court of jurisdiction to hear the appellees' claims under 28 U.S.C. § 1605(a)(7). Judge Roberts stated that § 1503 of the EWSAA included the authority to make § 1605(a)(7) of the FSIA inapplicable to Iraq; the Presidential Determination of May 7, 2003, therefore divested the federal courts of jurisdiction in cases that relied on that exception to Iraq's sovereign immunity.[51] Specifically, Judge Roberts relied upon the language of § 1503 of the EWSAA which authorized the President to "make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 or *any* other provision of law that applies to countries that have supported terrorism."[52] Judge Roberts relied on the plain meaning of this language[53] to reason that Congress indeed intended to confer on the President this authority to render § 1605(a)(7) inapplicable to Iraq.

C. Cause of Action Under FSIA

Neither the parties nor the District Court raised the issue of whether the terrorism exception to the FSIA or the Flatow amendment created a private right of action against a foreign government.[54] However, in light of its recent holding in *Cicippio-Puleo v. Islamic Republic of Iran*[55] that it did not do so, the Court of Appeals held that the complaint in *Acree* failed to state a cause of action.[56]

In *Cicippio*, the Court of Appeals for the District of Columbia Circuit held that neither § 1605(a)(7) of the FSIA nor the Flatow Amendment thereto, nor the two taken together, creates a cause of action against foreign states themselves.[57] *Cicippio* also made clear that any suit against an official of a foreign government must be a suit in that official's personal capacity.[58] In the present case, the appellees based their claim on nothing other than § 1605(a)(7) of the

50. Circuit Judge Roberts was sworn in as Chief Justice of the United States Supreme Court on September 29, 2005. *See* Charles Babington & Peter Baker, *Roberts Confirmed as 17th Chief Justice*, WASH. POST, Sept. 30, 2005, at A01.

51. *Acree I*, 370 F.3d at 60. Circuit Judge Roberts also reasoned that application of § 1503 of the EWSAA to § 1605(a)(7) is retroactively applied to pending cases; hence, the appellees' cause of action was properly dismissed. *Id.* at 65.

52. *Id. See also* Pub. L. No. 108-11, 117 Stat. 559, 579 (2003) (emphasis added).

53. *See Acree I*, 370 F.3d at 64 ("In such circumstances I prefer to rest on the firmer foundation of the statutory language itself.").

54. *Id.* at 58.

55. 353 F.3d 1024 (D.C. Cir. 2004).

56. *Acree I*, 370 F.3d at 58. The *Acree* court noted that "courts of appeals are not rigidly limited to issues raised in the tribunal of first instance; they have a fair measure of discretion to determine what questions to consider and resolve for the first time on appeal." *Id.* (citing Roosevelt v. E.I. Du Pont de Nemours & Co., 958 F.2d 416, 419 n.5 (D.C. Cir. 1992)). Further, while they typically refrain from reaching non-jurisdictional questions that have not been raised by the parties or passed on by the district court, the courts of appeals may do so on their own motion in "exceptional circumstances." *Id.* In the instant case, the *Acree* court found that its intervening decision in *Cicippio* was the type of exceptional circumstance that "surely justifies" its exercise of such discretion. *Id.*

57. *See Cicippio*, 353 F.3d at 1033.

58. *Id.* at 1034.

FSIA and the Flatow Amendment.[59] Further, when pressed at oral argument, the appellees offered no cognizable alternative basis for their claim.[60] Finally, because the appellees were put on notice of this issue prior to the appeal[61] and subsequently failed to offer an alternative basis for their cause of action, the *Acree* court dismissed appellees' suit for failure to state a cause of action upon which relief may be granted, effectively ending the suit.[62]

IV. Conclusion

On its face, *Acree v. Republic of Iraq* seems to be a proper application of existing precedent and canons of statutory interpretation. However, in a practical sense the decision might make it impossible for torture victims to bring civil actions in United States federal courts against foreign governments.[63] In particular, the Court of Appeals' holding that § 1605(a)(7) of the FSIA and the Flatow Amendment do not independently or conjunctively create a cause of action against a foreign state is particularly troublesome, because there is not likely another source for liability for prisoners of war against their foreign captors. Further, it does not seem logical that Congress would have given jurisdiction to federal courts to hear cases such as *Acree* without simultaneously providing a cause of action for the claimants.[64] Since the Supreme Court denied certiorari,[65] *Acree* remains the law of the District of Columbia Circuit and victims of torture must therefore live with its implications.

Steven B. Gauthier

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59. *Acree I*, 370 F.3d at 59.

60. *Id.* At oral argument, counsel for the appellees alluded to generic common law torts as a basis for their claim. However, the *Acree* court pointed out that generic common law cannot be the source of a federal cause of action. *Id.*

61. The *Acree* court held that its decision in *Cicippio* and its order to the parties prior to oral argument had put the appellees on notice of the issue of whether § 1605(a)(7) of the FSIA or the Flatow Amendment thereto created a cause of action against a foreign state. *Id.*

62. *Id.* at 60. The alternative would have been to remand the case to the District Court in order to allow appellees to amend their complaint to state a cause of action under some other law. *Id.* at 59–60.

63. *See* Marya Lucas, *Ex-Gulf War POWs Plead Their Case to Supreme Court*, LEGAL TIMES, Apr. 21, 2005, *available at* http://www.law.com/jsp/newswire_article.jsp?id=1113987911339 (last visited Oct. 31, 2005).

64. *Id.* (quoting Matthew Yeo).

65. Acree v. Republic of Iraq, 125 S.Ct. 1928 (2005).

Otal Invs. Ltd. v. Capital Bank PLC

2005 U.S. Dist. LEXIS 13321 (S.D.N.Y. July 7, 2005)

In an action based on a collision in international waters, the parties stipulated only to Article 4 of the 1910 Brussels Collision Convention, so other provisions of the 1910 Convention did not apply. The Federal District Court for the Southern District of New York held that, because the law of the Netherlands did not recognize *in rem* actions, the *in rem* claim filed in New York was not duplicative of the claim filed in Rotterdam.

I. Holding

In *Otal Investments Ltd. v. Capital Bank PLC*,[1] the U.S. District Court for the Southern District of New York granted defendant's motion for a declaratory judgment that only Article 4[2] of the 1910 Brussels Collision Convention (1910 Convention)[3] applied to the case.[4] Additionally, the court denied defendant's motion to dismiss the *in rem* claim as duplicative of the claim filed by Otal in Rotterdam.[5]

Regarding the motion for a declaratory judgment, the court held that only Article 4 of the 1910 Convention applied.[6] Defendant asserted that the intent of the parties was to apply the entire 1910 Convention to the matter based on the amended stipulation of the parties.[7] The court held that the parties intended only Article 4 to apply,[8] reasoning that the parties knew Article 4 applied and signed both of the stipulations.[9] Based on both stipulations, the court

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1. 2005 U.S. Dist. LEXIS 13321 (S.D.N.Y. July 7, 2005) [hereinafter *Otal Invs. I*].
2. *See* International Convention for the Unification of Certain Rules of Law with Respect to Collisions Between Vessels, Sept. 23, 1910, 6 BENEDICT ON ADMIRALTY § 3-2, 3-11 (Doc. No. 3-2). Article 4 provides that "if two or more vessels are in fault, the liability of each vessel shall be in the proportion to the degree of the faults respectively committed. Provided that if, having regard to the circumstances, it is not possible to establish the degree of the respective faults, or if it appears that the faults are equal, the liability shall be appointed equally." *Id.*
3. *Id.*
4. *Otal Invs. I*, 2005 U.S. Dist. LEXIS 13321 at *7.
5. *Id.* at *11–*12.
6. *Id. See also supra* note 2.
7. *Otal Invs. I*, 2005 U.S. Dist. LEXIS 13321 at *6. The first stipulation was that "Article 4 of the Brussels Convention of 1910 applies to this action" and "that liability if any for claims before this Court between and among cargo interests, Otal, the Tricolor Interests and or Clary Interests shall be determined in accordance with the 1910 Convention." The amended stipulation provided, inter alia, that "liability, if any, for claims before this court shall be determined in accordance with the 1910 Collision Convention." Defendant, Clary Interests, argued that the parties intended to apply the entire 1910 Collision Convention, because the amended stipulation did not specifically state the words "Article 4." *Id.*
8. *Id.* at *7.
9. *Id.*

granted plaintiff's motion for summary judgments requesting that Article 4 of the 1910 Convention apply in this case.[10]

The court dismissed defendant's motion to dismiss the *in rem* claim.[11] Defendant argued that the *in rem* claim filed in the Southern District of New York was duplicative of the claim filed in Rotterdam.[12] However, the court held that the *in rem* action filed in the Southern District of New York was not duplicative because the law of the Netherlands recognizes only actions *in personam* and does not provide for an *in rem* action.[13]

II. Facts and Procedural Posture

On December 14, 2002, the M/V Kariba, the M/V Tricolor, and the M/V Clary were all sailing in international waters in the Dover Straits in the English Channel, when, due to dense fog, the M/V Kariba collided with the M/V Tricolor.[14] As a result of the collision, the M/V Kariba sustained damages, while M/V Tricolor sank and lost all of its cargo.[15] Even though the M/V Clary was two miles away, plaintiff asserts that it contributed to the collision, because it held to a collision course with the M/V Kariba before the latter collided with the M/V Tricolor.[16]

On December 20, 2002, plaintiff and owner of the M/V Kariba, Otal Investments (Otal), brought an action against the M/V Clary in the Netherlands and attached the Clary in Rotterdam to secure its claim.[17] Clary Interests then filed a limitation proceeding and posted security for Otal's claim, pursuant to the 1976 Limitation of Liability Convention.[18] Subsequently the vessel was released and Otal filed a claim against the liability fund.[19]

Otal filed a complaint in the Southern District of New York seeking release from or limitation of liability in case any claims were filed against it for its involvement in the collision.[20] Subsequently, Otal moved for partial summary judgment, requesting a determination that the rule of proportionate fault found in Article 4 of the 1910 Convention applied to any claims filed against Otal, should the court find that the M/V Kariba caused or contributed to the col-

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10. *Id*. The District Court for the Southern District of New York said that defendant knew that application of Article 4 was an issue for plaintiff, who had previously rejected a proposal by another party that had deleted Article 4 and who accepted the proposal as soon as it was put back into the text of the proposal.

11. *Id*. at *15.

12. *Id*. at *8–*11.

13. *Id*. at *11–*12.

14. *Id*. at *1–*5; *see also* Otal Invs. Ltd. v. Cent. Bank PLC, 2005 U.S. Dist. LEXIS 15592, at *5–*6 (S.D.N.Y. Aug. 1, 2005) [hereinafter *Otal Invs. II*].

15. *Otal Invs. II*, 2005 U.S. Dist. LEXIS 15592, at *5–*6.

16. *Id*.

17. *Otal Invs. I*, 2005 U.S. Dist. LEXIS 13321, at *2.

18. Convention on Limitation of Liability for Maritime Claims, Nov. 19, 1976, 16 I.L.M. 606; *see also Otal Invs. I*, 2005 U.S. Dist. LEXIS 13321, at *9.

19. *Otal Invs. I*, 2005 U.S. Dist. LEXIS 13321, at *9.

20. *Id*. *2.

lision with the M/V Tricolor.[21] The court granted plaintiff's partial summary judgment motion.[22]

Otal filed a complaint in the Southern District of Georgia against the M/V Clary, seeking recovery for collision damages and lost income.[23] Otal later dismissed this claim, when it received a letter from the West of England Ship Owners' Mutual Insurance Association (WOE) in the amount of 1.65 million dollars as security for its *in rem* claim.[24] The court recognized that the WOE letter of undertaking conferred jurisdiction on the U.S. District Court for the Southern District of New York over plaintiff's subsequent *in rem* claim brought in that court.[25]

Defendant Clary Interests moved for a declaratory judgment that only Article 4 of the 1910 Convention applied to this matter and, moreover, requested dismissal of plaintiff's *in rem* action as duplicative of the in *rem* claim brought in Rotterdam.[26]

III. The Court's Analysis

A. Applicability of Only Article 4 of the 1910 Brussels Collision Convention

Defendant Clary Interests sought a declaratory judgment in the U.S. District Court for the Southern District of New York as to the effect of the two stipulations signed by all parties and specifically as to the applicability of only Article 4 of the 1910 Convention.[27] The first stipulation read "Article 4 of the Brussels Convention of 1910 applies to this action" and "that liability if any for claims before this Court between and among cargo interests, Otal, the Tricolor Interests and/or Clary Interests shall be determined in accordance with the 1910 Convention."[28] However, the parties subsequently signed an amended stipulation providing, inter alia, that "liability, if any, for claims before this court shall be determined in accordance with the 1910 Collision Convention."[29]

Based on the above-mentioned stipulations, defendant Clary Interests argued that the parties intended to apply the entire 1910 Collision Convention because the amended stipulation did not specifically state the words "Article 4."[30] Conversely, plaintiffs Otal, Tricolor Interests,

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21. *Id*. at *3.
22. *Id*. at *7. The court reasoned that plaintiff's partial summary judgment motion, part of which called for application of Article 4 of the 1910 Convention, was granted based on both stipulations.
23. *Id*. at *4.
24. *Id*. at *9. *See* Mackensworth v. S.S. Am. Merch., 28 F.3d 246, 249 (2d Cir. 1994) (determining that the letter of undertaking became the substitute res for the value of the claim).
25. *Otal Invs. I*, 2005 U.S. Dist. LEXIS 13321, at *4.
26. *Id*. at *5.
27. *Id*.
28. *Id*.; *see also supra* note 6 and accompanying text.
29. *See supra* note 22.
30. *Otal Invs. I*, 2005 U.S. Dist. LEXIS 13321, at *4.

and Cargo Claimants argued that the parties intended only Article 4 to apply (the rule of proportionate fault) of the 1910 Collision Convention and proffered a past incident where Otal and Tricolor Interests rejected a proposal by Cargo Claimants in which Article 4 had been deleted and accepted the proposal only when reference to Article 4 was restored.[31]

The court began its analysis by stating that United States courts apply the 1910 Convention when vessels that fly flags of signatory states collide in international waters.[32] As far as the application of Article 4 of the 1910 Convention is concerned, the court concluded that the parties had stipulated only to Article 4 of the 1910 Convention and that Clary Interests knew that Article 4 applied.[33]

The court based its conclusion on the following observations. First, the court remarked that defendant, Clary Interests, knew that only Article 4 applied, because the application of Article 4 was part of the motion for partial summary judgment brought by Otal, which was granted by the court based on both the original and the amended stipulations.[34] Next, the court said that language from Article 4 of the 1910 Convention was employed in both stipulations and implied that Clary Interests should have known that Article 4 was applicable in this case.[35] Finally, the court added that the fact that Clary Interests signed both stipulations led to the conclusion that the parties intended to apply only Article 4 of the 1910 Convention.[36]

B. Motion to Dismiss the *In Rem* Claim as Duplicative

Defendant Clary Interests invoked the 1976 Limitation of Liability Convention and argued that the *in rem* action brought in the Southern District of New York must be dismissed as duplicative of the action filed in the Netherlands.[37] The 1976 Limitation of Liability Convention provides that where a limitation of fund has been constituted in accordance with Article 11, any person having made a claim against the fund shall be barred from exercising any right in respect of such claim against other assets of a person by or on behalf of whom the fund has been constituted.[38] Thus, Clary Interests argued because Otal had filed a claim against the limitation fund, it was barred from bringing an *in rem* action in the Southern District of New York.[39] Clary Interests, acknowledging that the 1976 Limitation of Liability Convention is not

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31. *Id.*; *see also supra* note 7.

32. *Otal Invs. I*, 2005 U.S. Dist. LEXIS 13321, at *5; *see also* In re Seiriki Kisen Kaisha, 629 F. Supp. 1374, 1377 (S.D.N.Y. 1986) (stating that the 1910 Convention applies when ships of the signatory states collide in international waters).

33. *Otal Invs. I*, 2005 U.S. Dist. LEXIS 13321, at *7.

34. *See id.* at *7.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *See id.* at *10.

binding on the United States, which is not a signatory to the 1976 Convention, argued that the court should give effect to the 1976 Convention as a matter of comity.[40]

However, the court said that it need not defer to the 1976 Convention as a matter of comity, because the United States had enacted its own statute governing limitation of liability issues.[41] The U.S. Limitation of Liability Act[42] is very similar to the 1976 Convention in that it allows parties to file proceedings in federal courts to limit the liability for loss and damage to cargo.[43] Its purpose is to gather all the claims against the ship owner into one concursus of claims.[44] Based on the U.S. Limitation of Liability Act, a ship owner that institutes a limitation fund proceeding may enjoin any action against him or his property that arises from a claim subject to the limitation.[45]

The court explained that, under U.S. law, Otal had a valid lien *in rem* against the M/V Clary, which could not be dismissed by the limitation of liability proceeding in the Netherlands pursuant to U.S. law and Rule C of the Federal Rules of Civil Procedure.[46] The court added that, under the law of the Netherlands, Otal only had an *in personam* claim against Clary Interests, because Netherlands law does not recognize *in rem* actions.[47] Therefore, the *in rem* action brought in the Southern District of New York was not duplicative of the one filed in the Netherlands. Finally the Court held that, even if the claim were duplicative, Article 13 of the 1976 Limitation of Liability Convention is not binding because the U.S. was not a signatory to the 1976 Convention.[48]

IV. Conclusion

The U.S. District Court for the Southern District of New York concluded that only Article 4 of the 1910 Brussels Collision Convention applied. The court reached its conclusion based on the facts that defendants knew that Article 4 applied from the partial summary judgment that was granted to plaintiff under both stipulations, that language of Article 4 was used in both stipulations and all parties had signed both stipulations.

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40. *See id*. at *10, *12. *See* JP Morgan Chase Bank v. Altos Hornos de Mex., S.A de C.V., 412 F.3d 418, 422 (2d Cir. 2005) (stating that international comity is the recognition by a nation of the legislative, executive or judicial acts of another nation, having due regard to international law, to the rights of its own citizens and to those who are under the protection of its laws).

41. *See Otal Invs. I*, 2005 U.S. Dist. LEXIS 13321, at *10, *13; *see also JP Morgan Chase Bank*, 412 F.3d at 423 (asserting that comity is a discretionary rule and not an imperative obligation of the courts).

42. 46 U.S.C.S Appx. §§ 181–189.

43. *Otal Invs. I*, 2005 U.S. Dist. LEXIS 13321, at *10.

44. *Id*. at *10; *see also* Md. Casualty Co. v. Cushing, 347 U.S. 409, 415 (1954) (stating that the purpose of the U.S. Limitation of Liability Act is to channel all claims against the defendant into one concursus of claims).

45. *Otal Invs. I*, 2005 U.S. Dist. LEXIS 13321, at *11; *see also* 46 U.S.C.S Appx. § 185 (stating that when the owner of the vessel has initiated a limitation of liability proceeding in compliance with § 185, any proceedings or claims against the owner with respect to the matter in question shall cease).

46. *Otal Invs. I*, 2005 U.S. Dist. LEXIS 13321, at *11.

47. *Id*. at *12.

48. *Id*.

Additionally, the court concluded that the *in rem* action filed in the Southern District of New York was not duplicative of the claim filed in Rotterdam because the law of the Netherlands does not recognize *in rem* actions. The court refused to apply the 1976 Convention of Limitation of Liability as a matter of comity because the U.S. was not a signatory to the 1976 Convention and has its own statute dealing with limitation of liability in maritime collisions.

The court's decision reaffirmed a core principle of international law: A convention is not binding upon parties that are not signatories to the convention. Moreover, the court's decision reaffirmed the principle that the international rule of comity is a discretionary rule which will not apply if its application conflicts with the policies and interests of the country called upon to apply the rule of comity.

The court's holding is an equitable one, giving plaintiff the opportunity to enforce a valid lien against a defendant in accordance with United States law. Plaintiff's *in rem* action in the U.S. does not give it the opportunity of double recovery, because *in rem* actions are not recognized in the Netherlands. Therefore, the court's decision in this case was wholly equitable. If the plaintiff could have brought an *in rem* action in the Netherlands and in the U.S. in order to obtain a larger recovery, the court's decision may have been inequitable. However, this is not the case here. This case provides redress to a plaintiff who does not otherwise have legal recourse with respect to its *in rem* claim.

Theodora Vasilatos

Medellin v. Dretke

125 S. Ct. 2088 (2005)

The United States Supreme Court dismissed as improvidently granted its writ of certiorari in a case asserting that Texas courts wrongly rejected the defendant's claim based on failure to notify him of his rights to consular access under the Vienna Convention on Consular Relations, despite the ruling by the International Court of Justice forbidding courts in the United States to rely on a procedural default.

I. Holding

In *Medellin v. Dretke*,[1] the Supreme Court, *per curiam* and by a 5-4 vote, dismissed as improvidently granted its writ of certiorari to review the Fifth Circuit's denial of a certificate of appealability regarding a federal district court's denial of a petition for a writ of habeas corpus to review the Texas courts' refusal to allow an evidentiary hearing on the claim of petitioner that he was prejudiced by the failure of Texas authorities to notify him of his rights to consult with his country's consul, as required by the Vienna Convention on Consular Relations (VCCR).[2] The Court held its writ was rendered improvident when it later became possible to have the state court provide the review and consideration it required.[3] In so doing, the Court also took into consideration several threshold issues that could, independently, preclude Medellin's federal habeas relief, rendering the Court's consideration of the issue advisory or academic.[4]

II. Facts and Procedural Posture

Medellin, a Mexican national, was convicted and sentenced to the death penalty after he confessed to participating in the gang rape and murder of two girls in 1993.[5] The Texas Court of Criminal Appeals affirmed his conviction on direct appeal.[6] Thereafter, Medellin filed a habeas corpus action in state court, claiming for the first time that Texas deprived him of his right to consular access under the VCCR.[7] This appeal was rejected and then summarily affirmed by the Texas Court of Criminal Appeals.[8] The government of Mexico later filed suit

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1. 125 S. Ct. 2088 (2005).
2. Apr. 24, 1963, 21 U.S.T. 77, 100–01, T.I.A.S. No. 6820 (requiring an open channel of communication between the detained foreign nationals and their consulates and mandating that the receiving State shall inform, without delay, the consular post of the sending State of the arrest, custody, or detention of nationals of that State).
3. *Medellin*, 125 S. Ct. at 2089. The writ of certiorari was granted for consideration of two questions: first, whether the federal court was bound by the International Court of Justice (ICJ) ruling in regard to Medellin's claim for relief under the VCCR, and second, whether the federal court should give effect to the ICJ's ruling as a matter of judicial comity and uniformity in treaty interpretation. *Id.*
4. *Id.* at 2090.
5. *Id.* at 2089.
6. *Id.*
7. *Id.*
8. *Id.*

on behalf of Medellin and 53 other Mexican nationals in the International Court of Justice (ICJ), as a result of which the ICJ held in 2004,[9] as the U.S. Supreme Court summarized it:

> that the Vienna Convention guaranteed individually enforceable rights, that the United States had violated those rights, and that the United States must "provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the [affected] Mexican national" to determine whether the violations "caused actual prejudice," without allowing procedural default rules to bar such review.[10]

Medellin's federal habeas corpus petition had already been denied by the District Court[11] despite the ICJ's ruling against the United States in an earlier case on the VCCR,[12] but the Court of Appeals for the Fifth Circuit had not yet ruled on his application for a certificate of appealability when the ICJ issued its decision in *Avena*.[13] In *Avena*, the ICJ ruled that: (1) the VCCR guaranteed individually enforceable rights and (2) the United States had to provide review and consideration of the convictions and sentences affecting those Mexican nationals who were deprived of their right to consular access under the VCCR.[14] Notwithstanding the ICJ's ruling in *Avena*, the Fifth Circuit denied Medellin's application based on procedural default and held that the VCCR did not create an individually enforceable right.[15]

Later, the Supreme Court granted certiorari, and two months thereafter, President Bush issued a memorandum in response to the ICJ's ruling in *Avena*.[16] In that memorandum, President Bush stated that the United States would discharge its international obligations under

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9. Case Concerning Avena and other Mexican Nationals (Mexico v. U.S.), 2004 I.C.J. No. 128 (Judgment of Mar. 31). The action was brought by the Republic of Mexico alleging violations of the VCCR with respect to Medellin and other Mexican nationals facing the death penalty in the United States.

10. *Medellin*, 125 S. Ct. at 2090.

11. *Id.* at 2089.

12. *See* LaGrand Case (Germany v. U.S.), 2001 I.C.J. 466 (June 27). *See generally* Houston Putman Lowry & Peter W. Schroth, *Survey of 2000-2001 Developments in International Law in Connecticut*, 76 CONN. B.J. 217, 227–37 (2002); Houston Lowry & Peter W. Schroth, *Survey of 1999 Developments in International Law in Connecticut*, 74 CONN. B.J. 406, 425–29 (2000); Daniel A. McFaul, Jr., Recent Decision, *Germany v. U.S., 2001 I.C.J. 466*, 15 N.Y. INT'L L. REV. 119 (2002).

13. *See supra* note 9.

14. *Medellin*, 125 S. Ct. at 2089 (holding that the United States must provide review and reconsideration to determine whether a violation of the VCCR resulted in "actual prejudice").

15. *Medellin*, 125 S. Ct. at 2090. The Court of Appeals ruling was based on *Breard v. Greene*, 523 U.S. 371 (1998) and *United States v. Jimenez-Nava*, 243 F.3d 192 (5th Cir. 2001). The Court's holding was in contravention of the ICJ's ruling in *Avena*, which stated that state procedural rules must give way in order to enforce its mandate requiring the United States to review the cases that are in violation of the VCCR.

16. *Medellin*, 125 S. Ct. at 2090.

Avena by having the state courts give effect to the ICJ ruling.[17] Relying on *Avena* and this memorandum, Medellin then filed for a writ of habeas corpus in a state proceeding with the Texas Court of Criminal Appeals and moved to stay further proceedings in the Supreme Court pending his pursuit of remedies in the state court.[18]

III. The Majority's Analysis

A. Subsequent Developments Rendered the Court's Grant of Certiorari as Improvident

In light of the developments taking place while the writ was pending and Medellin's subsequent filing in a state proceeding seeking the same relief, the Court held, per curiam, that Medellin's writ of habeas corpus should be dismissed as "improvidently granted."[19] The Court reasoned that Medellin was not without recourse, because his claims would receive the proper review and consideration in the state court.[20]

B. Were the Court to Give Consideration to the Question Presented, It Would Be Rendering an Advisory or Academic Opinion

The Court considered several factors that could, independently, preclude Medellin's federal habeas relief because they would render the Court's decision advisory or academic.[21]

First, the Court opined that a violation of the VCCR's provisions might not be cognizable in a federal habeas proceeding.[22] It had previously held in *Reed v. Farley*,[23] that a violation of federal statutory rights ranked among the "nonconstitutional lapses" that were not cognizable in post-conviction proceedings.[24] Therefore, Medellin would have to overcome the ruling in *Reed* and establish a "fundamental defect" in the proceedings that led to his conviction.[25]

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17. The memorandum announced that:

> The United States will discharge its international obligations under the decision of the International Court of Justice in *[Avena]*, by having State courts give effect to the decision in accordance with the general principles of comity.

Memorandum from George W. Bush to the Attorney General (Feb. 28, 2005), as quoted in *Medellin*, 125 S. Ct. at 2092 (Gingsburg, J., concurring).

18. *Medellin*, 125 S. Ct. at 2090 (noting that the state proceeding may provide Medellin with the review and reconsideration mandated by the ICJ in regard to his claim under the VCCR).

19. *Id.* (noting that although Medellin's writ should be dismissed, a writ of certiorari can still be sought, by Medellin or the State of Texas, once a disposition is reached by the state court on the habeas application).

20. *Id.* (assuring that the Court will have an opportunity to review the case once the Texas state court reaches a decision according to President Bush's memorandum, without the procedural posture issues that are present in the case as it stands).

21. *Id.*

22. *Id.*

23. 512 U.S. 339 (1994).

24. *Id.*

25. *Medellin*, 125 S. Ct. at 2090–91 (arguing that Medellin will have to meet the "fundamental defect" test announced in *Hill v. United States*, 368 U.S. 424 (1962) to overcome the rule established in *Reed*).

Second, habeas relief in federal court can be obtained when a state court's adjudication is found to be "contrary to, or an unreasonable application of," clearly established Federal law.[26] In disposing of Medellin's habeas relief, the state court held that the VCCR did not create an individually enforceable right.[27] This was, arguably, an adjudication of the case on the merits, despite the ICJ's later ruling in *Avena*.[28] Nevertheless, the Court found most telling that, during the state proceedings, Medellin failed to show that he was harmed in any way by the lack of notification of his arrest to the Mexican consulate, as required by the VCCR.[29] Additionally, the Court asserted that Medellin was provided with proper legal representation, which supported the presumption that his constitutional rights were safeguarded;[30] therefore, Medellin would have to overcome this presumption in order to obtain federal habeas relief.[31]

Third, generally, a habeas corpus petitioner cannot seek to enforce a "new rule" of law.[32] In order to consider the question presented by Medellin, the Court would have to decide first on a "new rule," namely, determining how the *Avena* decision would bear on the Court's jurisprudence.[33]

Fourth, Medellin requires a certificate of appealability in order to pursue the merits of his claim in the Court of Appeals.[34] Hence, he must make a "substantial showing" that a violation of the VCCR constituted a denial of a "constitutional" right.[35]

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26. 28 U.S.C. § 2254(d)(1) provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim
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> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;

Id.

27. *Medellin*, 125 S. Ct. at 2091 (finding, in addition, that the state procedural default rules barred Medellin's consular access claim).

28. *Id.*

29. *Id.* (noting the federal district court's review, which stated that Medellin's allegations of prejudice were "speculative," because he was informed of his right to legal representation before he confessed to the murders).

30. *Id.*

31. *Id.* (following the Court's ruling in Breard v. Greene, 523 U.S. 371 (1998), where a claimant was required to demonstrate prejudice to survive a dismissal of the claim based on a violation of the VCCR).

32. *See* Teague v. Lane, 489 U.S. 288 (1989) (holding that a habeas corpus petition could not be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively through an exception).

33. *Medellin*, 125 S. Ct. at 2091.

34. 28 U.S.C. § 2253(c)(1) provides:

> (c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from
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> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
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> (B) the final order in a proceeding under section 2255.

35. 28 U.S.C. § 2253(c)(2) (providing that a certificate of appealability may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right").

Fifth, before seeking habeas relief in federal court, Medellin has to show that he has exhausted all available state-court remedies.[36] President Bush's memorandum, in addressing the ICJ judgment, opened the potential for recourse in state courts; therefore, Medellin has not exhausted the remedies available.[37]

C. Conclusion of Decision

In light of the fact that Medellin had already filed a petition in the state court, seeking relief pursuant to the ICJ's judgment in *Avena* and in accordance to the President's memorandum, the Supreme Court held it would be unwise to consider the questions presented since recourse was available in the state court and because the Supreme Court would be, in effect, issuing an advisory opinion, which it does not do.

IV. Concurrence: A Remand to the Fifth Circuit Court Would Be Inappropriate

Justice Ginsburg would have granted Medellin's motion to stay the Supreme Court proceedings while he pursues his remedy in the Texas court.[38] However, in light of the absence of a majority support for a grant of stay, she joined the Court's election to dismiss the writ as improvidently granted.[39]

Justice Ginsburg, joined by Justice Scalia in this part of her opinion, asserted that a dismissal would be more appropriate than the dissent's proposal to remand the case to the Court of Appeals for the Fifth Circuit.[40] She offered two reasons why a remand would not be appropriate: (1) the Court would be returning the case to the Fifth Circuit leaving a "bewildering array of questions" unresolved, and (2) the dissent provides no clear instructions to the Fifth Circuit as to which of the several questions the dissenters would remit to that court.[41]

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36. *See* 28 U.S.C. § 2254(b)(1)(A), which provides:

> (b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that
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> (A) the applicant has exhausted the remedies available in the courts of the State;

and 28 U.S.C. § 2254(b)(3), which provides:

> (b)(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

37. *Medellin*, 125 S. Ct. at 2092.

38. *Id.* at 2093.

39. *Id.*

40. *Id.* (noting further that were the case remanded to the Circuit Court, a final determination of Medellin's claim by the Texas courts would render the entire array of questions moot).

41. *Id.*

V. Dissent

A. The Fifth Circuit's Decision Should Be Vacated and the Case Remanded for Appropriate Address by the Court

Justice O'Connor dissented, joined by Justices Stevens, Souter, and Breyer. Taking into consideration that certiorari was originally granted by this Court in regard to the substantive and debatable issues of Medellin's VCCR claim, Justice O'Connor would have elected to vacate the Fifth Circuit's denial of Medellin's certificate of appealability and to remand for further proceedings.[42] Justice O'Connor pointed to the vexing problem in the United States regarding the noncompliance with the VCCR treaty and the ramifications this may have.[43] Further, she asserted that it was "unsound to avoid questions of national importance when they are bound to recur."[44]

Given the posture of the instant case, Justice O'Connor argued that the Court's task was to decide only whether Medellin has presented claims worthy of a certificate of appealability.[45] She noted that the Texas court's reasons for dismissing Medellin's habeas corpus relief were not persuasive.[46] First, the case was dismissed on procedural default rules; therefore, there was no adjudication on the merits of the relevant questions.[47] Second, while the Texas court reasoned that there was no individually enforceable right under any treaty, that assertion was contrary to Supreme Court precedents and therefore not entitled to deference in federal proceedings,[48] therefore, Medellin's federal claim for habeas relief must proceed *de novo*.[49]

B. The Court Should Grant Medellin's Motion for a Stay While Action Is Adjudicated by the State Court

Justice Souter argued, in his dissenting opinion, that the best course of action would be to stay Medellin's claim while the Texas courts decided on a course of action in light of President Bush's memorandum.[50] The Justice asserted that in so doing, the Court would remain in a position to "address promptly the Nation's obligation under the judgment of the ICJ if that should prove necessary."[51] However, because the majority did not agree to a stay, Justice Souter argued that the next best course of action would be to take up the questions on which certiorari

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42. *Id.* at 2098.

43. *See, e.g.,* U.S. v. Emuegbunam, 268 F.3d 377 (6th Cir. 2001) (discussing cases about VCCR violations). Justice O'Connor points out that violations of the VCCR have already been the subject of three proceedings in the ICJ. In addition, the Justice Department notes that non-citizens account for over 10% of the prison population in a number of states in this country, making non-compliance with this treaty obligation more worrisome. *Id.*

44. *Medellin*, 125 S. Ct. at 2096.

45. *Id.* at 2100.

46. *Id.* at 2199.

47. *Id.*

48. *Id.*

49. *Id.* at 2100.

50. *Id.* at 2106 (asserting that by entering a stay, the Court would not "wipe out the work done" so far and would avoid making decisions on issues that may later turn out to be unnecessary).

51. *Id.*

was granted and evaluate their bearing on the Fifth Circuit's denial of Medellin's application for a certificate of appealability.[52] In so doing, however, he was of the opinion that the scope of the proceedings on remand should not be limited and that the Fifth Circuit should also stay until the Texas courts addressed the claims of the Mexican nationals according to the President's memorandum.[53]

C. Absent Majority Support for a Stay of Medellin's Claim, the Court Should Vacate and Remand to the Fifth Circuit

Justice Breyer dissented, joined by Justice Stevens. They opined that the Court should grant Medellin's motion for a stay.[54] However, in the absence of a majority to support such ruling, the Court should opt to vacate the Fifth Circuit's denial of a certificate of appealability and remand the case, rather than dismissing the writ.[55] First, the Fifth Circuit erred in holding that the courts were not bound by the judgment in *Avena*,[56] therefore, the judgment should be vacated and remanded so as to "remove from the books an erroneous legal determination."[57] Second, a remand by the Fifth Circuit would not necessarily contravene the proceedings of the Texas courts because it would likely stay the case while it awaits address by the state courts.[58]

VI. Conclusion

The Supreme Court's decision in *Medellin* illustrates the Court's limitation in the exercise of judicial review. The Court is correct in asserting that a grant of certiorari is improvident where a claim can be adjudicated by other courts. Certainly, the Supreme Court is a court of last resort and its decisions are final. The Supreme Court's decisions are meant to be binding and not to be considered as merely advisory or academic. Thus, the Court's entering of final adjudication to a meritorious claim would be undermined if a lower court were later to review and reconsider the same claim in a subsequent proceeding.

Nonetheless, the dissenting Justices in *Medellin* cite very strong reasons why the case deserves a more thorough analysis. First, the Court should take into account the specific circumstances that rendered the posture of the case very unusual. In originally granting certiorari, the Court recognized the substantive issues in Medellin's VCCR claim after he had unsuccessfully sought relief in the state and lower federal courts. However, the Court was deeply concerned with the risk of issuing an advisory opinion, as a result of Medellin's subsequent filing in the state court in response to the President's memorandum. Had Medellin not filed his petition in the state court, would the Court have decided his petition differently? Second, the Court

52. *Id.*

53. *Id.*

54. *Id.* at 2107.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* (noting that because the federal questions implicated in this case are important, further review of the Texas courts' decisions may well be appropriate).

should consider the consequences to the nation's legal system of precedents. By dismissing Medellin's claim, the Court left uncorrected the Fifth Circuit's determination that the VCCR did not create an individually enforceable right, which was in clear contravention of the ICJ's ruling in *Avena*. Third, a proper analysis should also take into account the possible ramifications that the holding in *Medellin* may have on the nation's stance from an international perspective, in light of the nation's history of violations of the VCCR.

Taking into consideration the factors outlined above, the dissenting Justices' views stand to offer a more balanced resolution of the issues at stake. It is agreed that Medellin's claim is meritorious and should be reconsidered in light of the ICJ's ruling in *Avena*. Therefore, it seems that a stay or remand would have been more appropriate than the majority's ruling for a dismissal of the writ.

Sui Jim

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