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A Case Study of Egypt’s Pharmaceutical Industry

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A New Perspective on the Universality Debate: Reverse Moderation

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Sahar Aziz

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I. INTRODUCTION

The World Trade Organization (WTO) was formed in order to establish a set of international rules and norms for conducting trade among nations. The objective of the organization is not only to strive towards a more harmonious and equitable playing field within the global market, but to "raise standards of living, ensure full employment, and expand the production of and trade in goods and services. . . ." Despite the organization's recognition "that there is need for positive efforts designed to ensure that developing countries, especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development," many WTO agreements have created discord between developed and developing nations with respect to implementing these goals.

One particular WTO agreement, the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), has created a great deal of debate about the usefulness of international intellectual property rights. Will they result in increased trade and fairer global competition or will they simply strengthen the West's hold on the international economy as they increase western multinationals' profits and weed out competitors from developing nations? Although the process for developing and ratifying TRIPS was preceded with extensive debate among WTO members, there remain a number of disagreements among nations in regard to the interpretation and enforcement of TRIPS. The main divide exists between developed nations and developing nations due to their diverging national interests, which stem from their different levels of economic development. The developing nation members, with their limited research, development, and manufacturing capacities, took a leap of faith when they committed to adopting and enforcing strong, non-discriminatory minimum standards of intellectual property rights. Although it will take years to confirm whether this commitment will result in the foreign investment and domestic economic growth they aspire to obtain, these nations are under potent domestic pressure to produce tangible results in a short timeframe. However, these expectations cannot be met simply by strengthening intellectual property laws, but require numerous other changes to interrelated legal regimes.

2. Id.
4. Id.
This Note focuses on TRIPS’ impact on the pharmaceutical industry as well as health care in developing nations. By using Egypt as a case study, this Note aims to emphasize that the benefits of TRIPS for developing nations depends on the linkage between intellectual property rights (IPR) and other legal regimes, particularly drug regulation, technology transfer, and foreign direct investment (FDI) policies. The failure to adopt a holistic approach to the creation of effective and beneficial intellectual property rights regimes will merely increase the western pharmaceuticals’ market share and increase drug prices in developing nations.\(^6\) By asking whether Egypt, versus foreign multinational companies, is likely to benefit from its new IPR law (that is for the most part TRIPS compliant)\(^7\) one has to analyze the entire context in which the law exists. This in turn will expose the importance of various factors relevant to fulfilling the expected benefits of stronger IPRs in developing nations in general.

Consequently, Section I provides a brief description of the ongoing debate between the developed and developing nations in regard to the costs and benefits of international pharmaceutical patents. Section II outlines and describes the controversial provisions in TRIPS and how they are addressed, adequately or inadequately, in Egypt’s new IPR law. Section III then analyzes the context in which the new IPR law is being introduced including the structure of Egypt’s pharmaceutical industry and national health care system. Section IV addresses other legal regimes and policies, such as research and development, technology transfer, and competition policy, which are inextricably linked to the efficacy of intellectual property rights. Finally, Section V offers recommendations on how Egypt can fully benefit from its commitment to TRIPS and its new IPR law, which can then be extrapolated to other developing nations in similar circumstances.

II. THE INTERNATIONAL DEBATE BETWEEN DEVELOPED AND DEVELOPING NATIONS ON PHARMACEUTICAL PATENTS

A. Developed Nations’ Perspectives

The global pharmaceutical industry is a technology intensive and science-based industry, which can be divided into three categories: chemicals (or bulk

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6. *See id.* at 112-13 (admitting that developing countries’ interests in promoting foreign direct investment, trade, and technological expertise is linked to numerous broader programs including stronger IPR regimes).

drugs), intermediates, and formulations (or medicine ready for consumption). Only a few developed countries (Belgium, France, Germany, Italy, Japan, Netherlands, Sweden, Switzerland, UK, and USA) in the world have the sufficiently sophisticated pharmaceutical industry and significant research base necessary to conduct complex research and development activities. The remaining nations can either reverse engineer already discovered drugs, produce therapeutic ingredients and finished goods, or do nothing with regard to producing even the most basic pharmaceutical products.

These factors have created a small group of pharmaceutical multinational enterprises (MNE) worldwide that possess significant influence in the formation of their home nation's domestic policy, particularly in the United States. Hence it is predominantly their business concerns that determine developed nations' approaches to implementing IPRs on an international scale. As the focus of competition is increasingly on innovation and invention, the cost of creative activities is increasing, as is the ease of copying these activities. For example, the large up-front investments of $200 to $500 million, which amount to approximately 18% of product sales, necessary to develop a new chemical entity can only be returned through higher profits captured during the patent period. Patents create more certainty of potential profits at the end of the research cycle and decrease the risk of investment. Therefore, the most effective way of protecting profit margins from being eroded by cheap generic drugs is through internationally enforceable patent rights.

10. Omer, supra note 8, at 551.
11. See KEITH E. MASKUS, INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY 52-54 (Institute for International Economics 2000) (describing the international pharmaceutical industry as being hierarchical and very competitive. There are a small number of large MNEs based in the USA, Switzerland, Germany, United Kingdom, and Japan that conduct most of the private sector R&D. The remaining majority of pharmaceuticals are based worldwide and predominantly produce generic drugs.).
13. MASKUS, supra note 11, at 2.
16. MASKUS, supra note 11, at 2; see also JACKSONET AL., supra note 3, at 926 (citing a 1988 study by the United States International Trade Commission that concludes that $24 billion is lost annually due to inadequate intellectual property protection abroad).
considerations have translated into significant pressure by developed nations onto developing nations to strictly conform to TRIPS via domestic laws in return for other concessions.17

However, much of the developed nations' discourse justifying international IPRs does not revolve around their MNEs' economic interests, for obvious political reasons, but rather emphasizes the global benefits of intellectual property rights in general.18 By providing private firms with a monopoly over the sale and distribution of their patented goods for a fixed period of time,19 IPRs are supposed to create incentives for research and development (R&D) activities20 in every nation's private sectors. Developing nations' ensuing concerns with high pharmaceutical prices and inaccessibility to important medicines are countered with the theory that too much access caused by weak IPRs will create more inaccessibility in the long run, resulting in the stagnancy of new drug discoveries.21 Ultimately, the economic incentives derived from monopoly power of individual pharmaceuticals will benefit overall global welfare through the discovery of new drugs and therapies that cure debilitating, if not fatal, diseases.22

Developed nations emphasize their belief that these benefits will not be limited to their MNEs, but will also assist local firms in developing nations to establish their own R&D activities, which will be better suited to local needs.23 Many scholars note that one particular disadvantage of the current laxity in IPR


18. See Sykes, supra note 17, at 55-59 (providing a general discussion of the pros and cons of intellectual property rights from an economic perspective).


22. Id. (“The main goal of an intellectual property system should be to create economic incentives that maximize the discounted present value of the difference between the social benefits and the social costs of information creation, including the costs of administering the system.”): A survey of 12 manufacturing industries (including the chemical industry) concluded that 30% of inventions would not have been developed without patent protection because research and development is high and imitation is easy. Id. at 43.

23. Id. at 33-34.
laws in developing nations is the lack of focus by pharmaceutical MNEs on diseases prevalent in developing nation illnesses.\textsuperscript{24} For example, currently 99% of the global disease burden is concentrated in the low and middle-income countries, but only 4.3% of global health-related R&D expenditures address those diseases.\textsuperscript{25} Therefore, IPRs will support innovative behavior that adapts existing technologies to local needs of which the cumulative effect can ignite growth in knowledge and economic activity.\textsuperscript{26} The local firms will also have an equal opportunity to sell their products abroad in order to reap the higher profits currently enjoyed by western MNEs that own the majority of existing pharmaceutical patents.\textsuperscript{27}

Additional expected benefits from this process include the dissemination of knowledge through required patent disclosures, which can be used as inputs for more innovation,\textsuperscript{28} the transfer of technology through foreign direct investment from wealthy to poor nations with stable IPR regimes,\textsuperscript{29} and the facilitation of contracting between firms which will increase the production of drugs and the efficiency of the R&D process for new drugs.\textsuperscript{30} IPR laws may also prove to be of more assistance to local firms than international firms in protecting their intellectual property because the former do not have the large resources necessary to prevent infringement nor the option to withdraw from the market as a means of protecting their profit base.\textsuperscript{31}

Finally, the creation of global IPRs is supposed to provide developing nations with more access to up-to-date technologies through technology transfer.\textsuperscript{32} Weak IPR regimes cause developing nations to have retarded technological development limited to outdated technologies and become isolated from new technologies with the only solution being to build their own technological knowledge from scratch, a nearly impossible mission given their

\begin{itemize}
\item \textsuperscript{24} Lanjouw, \textit{supra} note 20, at 2-5, 7 (acknowledging that stronger IPRs in developing nations will lead to R&D on "neglected diseases" as well as the development of products more tailored to the specific needs of poor countries).
\item \textsuperscript{25} Lanjouw, \textit{supra} note 20, at 8-9 (also noting that only 0.2% of global R&D is spent on pneumonia, diarrheal diseases, and tuberculosis which are all prevalent in developing countries and account for 18% of the total global disease burden).
\item \textsuperscript{27} MASKUS, \textit{supra} note 11, at 40-41.
\item \textsuperscript{28} \textit{id.}; Lanjouw, \textit{supra} note 20, at 5.
\item \textsuperscript{29} See Lanjouw, \textit{supra} note 20, at 1, 5 (concluding that MNEs will be more willing to license patented innovations to local manufacturing firms for production); see also MASKUS, \textit{supra} note 11, at 181 (qualifying the technology transfer benefits to developing nations with strong imitative and manufacturing capabilities, hence the least developed countries are unlikely to experience much technology transfer).
\item \textsuperscript{30} Lanjouw, \textit{supra} note 20, at 5.
\item \textsuperscript{31} MASKUS, \textit{supra} note 11, at 190.
\item \textsuperscript{32} Omer, \textit{supra} note 10, at 558; see also TRIPS \textit{supra} note 19, at art. 66.2.
\end{itemize}
economic constraints. On the other hand, with strong IPRs, foreign MNEs should be more willing to commit to foreign direct investment, joint ventures, and licensing agreements in developing countries. Developed nations emphasize that the possibility of an increase in foreign direct investment (developing nations' most preferred form of technology transfer) "in complex but easily copied technologies [such as pharmaceuticals] is likely to increase as IPRs are strengthened." Through the shipment of advanced inputs to subsidiaries, MNEs will indirectly share blueprints, product designs, and skilled producer services with the local market. Technology transfer can also occur through trade in technologically advanced inputs that will raise importers' productivity and reduce their production costs. Without strong IPR laws, not only will FDI hesitate to move east and south, but many foreign producers may refuse to export their high-tech goods in order to protect their global profit margins. Therefore, the onus is on the developing world to create a business environment friendly to the needs of wealthy, western multinationals.

**B. Developing Nations' Perspectives**

Although the aforementioned arguments facially appear to be sound and reasonable, developing countries often emphasize the disparity between what is theoretically supposed to occur after the implementation of IPRs and what actually materializes. They complain that IPRs have a negligible impact on R&D incentives in their economies as they simply raise prices on patented drugs, transfer rents to foreign pharmaceutical patent holders, and create deadweight losses as the consumers willing to pay the marginal cost of medicines are

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33. MASKUS, supra note 11, at 55.
34. See Maskus, supra note 5, at 111 (defining foreign direct investment as "the establishment or acquisition of production subsidiaries abroad by multinational enterprises"); see also Nerozzi, supra note 17, at 621 (citing a 1994 World Bank study that 86%-100% of developed country pharmaceutical companies based their decisions on whether or not to invest in a country on the amount of patent protection offered to them by the host country).
35. MASKUS, supra note 11, at 138.
36. Maskus, supra note 5, at 133.
37. MASKUS, supra note 11, at 137.
38. Id. at 150.
39. UNITED NATIONS COMMITTEE ON TRADE AND DEVELOPMENT, The TRIPS Agreement and The Built-In Agenda: Background Paper, 4 (Jan. 1, 2002) ("several developing countries wish to re-open the TRIPS Agreement which they consider has proven to be unable to reach its main objectives and has put a disproportionate burden on developing countries without providing them with commensurate benefits"), available at www.unctad.org/sections/comdip/docs/en/webcdpbkgd3_en.pdf (last visited Oct. 11, 2003); see also JACKSON ET. AL, supra note 3, at 926 ("[d]eveloping countries tend to have lower levels of human capital . . . thus [have] perhaps less capacity in relation to their size to generate commercially valuable innovations.").
40. See Maskus, supra note 26, at 469 (citing the increase in pharmaceutical prices in India, of up to 50%, after the implementation of patents).
priced out of the market. Moreover, the claim that more global R&D will be directed towards developing nations' diseases may prove to be illusory due to the low per capita incomes of their consumers. One expert on India predicted that if you assume there are 20 MNEs in a market as large India, each MNE would earn $2-3 million per product, which is significantly less than the required $200 to $500 million R&D expenditures. Therefore, "R&D for pharmaceuticals [that are] relevant only to a few developing countries [will] less likely take place, even with full TRIPS implementation." Another scholar notes that the losses experienced from the transfer of monopoly rents from developing nations to developed nations greatly exceed any benefits to developing nations of the new drugs entering the market due to patent protection. For example, "to compensate for the loss of domestic surplus ... as a result of higher drug prices for existing patented products, a threefold increase in the number of equivalent new products reaching [developing countries] would be required."

The issue at the forefront of this debate is the accessibility to essential medicines. Before TRIPS was ratified, developing nations' ability to imitate foreign products and technologies without paying royalty fees was their primary means of making medicine affordable for their large, poor populations as well as a means of limiting the costs of health care. The lack of national health care insurance magnifies the importance of cheap medicine since most consumers pay for drugs directly from their low GDP per capita incomes. These GDP per capita incomes are much lower than developed nations per capita incomes

42. WATAL, supra note 19, at 739.
46. MASKUS, supra note 11, at 33-34, 53-54; see Watal, supra note 14, at 747 (describing a simulation of the Indian pharmaceutical market concluding that prices are likely to increase and welfare is likely to decrease after the enforcement of patent rights).
47. Lanjouw, supra note 20, at 10; see MASKUS, supra note 11, at 33-34 (noting that higher pharmaceutical prices will raise costs to health care providers and consumers).
48. See THE WORLD BANK, 2002 WORLD DEVELOPMENT INDICATORS 18-20 tbl. 1.1 (listing various gross national income per capita for developed as well as developing countries).
when they decided to fully implement IPRs in their economies.\textsuperscript{49} Therefore, developing nations feel unduly coerced into prematurely implementing a legal regime that has not been preceded with the same degree of economic development and industrialization that existed in developed nations preceding their enforcement of IPRs.\textsuperscript{50}

In addition to specific public health concerns, developing nations have broader macroeconomic issues such as the erosion of the terms of trade, competitive abuses by foreign MNEs, and employment losses within the generic drug-producing firms.\textsuperscript{51} As technology importers, developing nations are concerned that stronger IPRs will expand the market power of foreign providers of information and new products, giving them more leverage to increase prices on their goods. As MNEs repatriate these higher profits abroad, the nation experiences a larger trade deficit and outflow of foreign currency, causing a decrease in the nation's terms of trade.\textsuperscript{52} However, this phenomenon is highly dependent on the market structure, demand elasticity, and competition policies within the economy,\textsuperscript{53} which reemphasizes the importance of linking IPR regimes with other policies in order to avoid simplistic conclusions by either side about their interactions.

The increased market power may also lead to competitive abuses such as the "cartelization" of horizontal competitors through licensing agreements that fix prices, limit output, or divide markets,\textsuperscript{54} patent pooling,\textsuperscript{55} and cross-licensing agreements between competing licensors.\textsuperscript{56} Individual and patent-pooled licensors can also hinder the entrance of new competing technologies through exclusive grant-back provisions,\textsuperscript{57} purchase exclusive rights to competing technologies and products as a means of increasing market power and creating

\textsuperscript{49} Lanjouw, supra note 15, at 39 tbl. 1.

\textsuperscript{50} See Maskus, supra note 26, at 460 (describing how Japan's post-war patent system promoted Japanese technical progress by encouraging incremental and adaptive innovation in order to promote diffusion of knowledge throughout the manufacturing sector).

\textsuperscript{51} MASKUS, supra note 11, at 33-34.

\textsuperscript{52} Id. at 159; Lanjouw, supra note 20, at 1.

\textsuperscript{53} See MASKUS, supra note 11, at 159 (defining the market structure to include the number of total firms competing with rights holders, the type of competition, the ease of market entry and exit, quality differentiation among products, openness to trades, and wholesale and retail distribution mechanisms).

\textsuperscript{54} Id. at 206-07.

\textsuperscript{55} Dorothy G. Raymond, Benefits and Risks of Patent Pooling For Standard Setting Organizations, 16 SUM ANTITRUST 41 (2002) ("A patent pool is an agreement by multiple owners of IPR to interchange licenses or to grant licenses to third parties. ... Patent pools can enable the spread of technology, lower consumer prices, and foster competition, but they can also limit innovation, restrict output, and raise prices.").

\textsuperscript{56} MASKUS, supra note 11, at 206-07.

\textsuperscript{57} Patricia A. Martone & Richard M. Feustel, Jr., The Patent Misuse Defense – Does It Still have Vitality?, 708 PLI/PAT 213, 242 (2002) (defining grant back provisions as “require[ing] the licensee to grant back to the licensor rights that the licensee may acquire or develop”)}
horizontal mergers, and initiate bad-faith litigation and opposition proceedings as a means of harassing and discouraging competitors from entering the market. Although the degree of impact from such practices depends on the market structure and regulatory framework of a nation, they are particularly detrimental to developing nations with weak institutions. Hence the reduction in competition ultimately harms consumers by increasing the prices of goods, which is particularly devastating with respect to access to basic medicines.

Finally, the link between strong IPRs and technology transfer is not as direct as some proclaim. There are immediate opportunity costs to implementing stronger IPRs. The elimination of imitative activities does stop some level of learning, albeit a much lower level than if true FDI existed, by the locals that is produced via reverse engineering. The jobs created by imitative and copying activities will also be eliminated in countries with pre-existing high unemployment rates. Although stronger IPRs may indeed encourage more participation of foreign firms with superior technological capabilities, the manner of participation is what matters. A patent must be worked locally to induce technology transfer. Foreign direct investment that results in "the successful learning of information and the know-how to use it by one party from another party" is what developing nations hope to receive in return for strengthening their IPRs. The spillover effects of on-the-job training, expanded management expertise, the learning of new technologies, and the training of suppliers are additional incentives for seeking FDI. Therefore licensing agreements, which some economists believe are more likely to result from stronger IPRs and subsequent increased certainty in contracting, insufficiently transfer information, know-how, and technology to the market.

As the aforementioned discussion highlights, the issues relating to TRIPS and global IPRs are complex and can be articulated in significantly different ways depending on a nation’s economic and social constraints. One must fully understand the details of a nation’s disposition in order to appreciate the burdens it faces in meeting its international commitments while maintaining its national

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58. MASKUS, supra note 11, at 206-07.
59. Id. at 136.
60. See THE WORLD BANK, supra note 48, at 60-62 (listing unemployment rates for numerous developing nations).
62. MASKUS, supra note 11, at 136.
63. Id. at 152.
64. See id. at 123 (recognizing that as IPRs increase, MNEs no longer have to worry about local imitation of their products, therefore they are more willing to license out production to local firms since it is often cheaper than setting up a subsidiary due to non-IPR related costs).
integrity and economic survival. The following sections will shift to a more focused analysis of what one particular developing country, Egypt, is experiencing with respect to TRIPS. A brief comparison of Egypt's new IPR law with TRIPS will be followed by an assessment of the legal and social context in which this new law was passed.

III. A COMPARISON OF TRIPS WITH EGYPT'S NEW INTELLECTUAL PROPERTY LAW

A. A Brief Description of TRIPS Standards

The Agreement on Trade-Related Intellectual Property Rights was adopted on April 15, 1994 at the Uruguay Rounds in Marrakesh, Morocco. The agreement set out to establish minimum international standards, versus complete harmonization, for intellectual property rights with the requirement that individual member nations enact local laws to enforce the agreed upon rights. Although it incorporates previous agreements such as the Paris Convention for the Protection of Industrial Property of 1967, Berne Convention for the Protection of Literary and Artistic Works of 1970, and the Washington Treaty, TRIPS aims to improve perceived weaknesses in these agreements. Under its purview of protection are copyrights, trademarks, geographical indications, industrial designs, patents, integrated circuits, and undisclosed information or "trade secrets." Member nations must provide the procedures, remedies, and dispute resolution processes associated with the enforcement of intellectual property rights. For example, each member nation must allow for civil injunctive remedies to prevent infringement of rights, provide a means by which rights holders can gain the cooperation of customs authorities to stop infringing goods from entering the nation, and establish contact points in relevant agencies in order to distribute information about counterfeit or pirated goods. All laws, measures, and decisions affecting the enforcement of intellectual property rights

65. Nerozzi, supra note 17, at 611.
66. See TRIPS, supra note 19, at art. 1(3), 2; see Gutowski, supra note 41, at 718-25 (describing the history of the Paris and Berne Conventions and how they lead up to the adoption of TRIPS); see also Benedicte Callan, Pirates on the High Seas: The United States and Global Intellectual Property Right, COLUMBIA INTERNATIONAL AFFAIRS ONLINE, at www.ciaonet.org/book/callan/index.html (last visited Oct. 7, 2003).
67. Nerozzi, supra note 17, at 611; see Gutowski, supra note 41, at 724 (listing "lack of harmonization, disparate national treatment, and deficient enforcement and dispute resolutions" as shortcomings in the Paris and Berne Conventions).
68. See generally TRIPS, supra note 19, at Part II §§ 1-8 ("Standards Concerning the Availability, Scope, and Use of Intellectual Property Rights").
69. Callan, supra note 66.
must be published and available to the public. Because TRIPS aims for minimum standardization rather than complete harmonization, the national IPR legal and regulatory regimes of individual member nations can vary to accommodate local constraints as long as the general provisions of TRIPS are adhered to. However, it is this inherent flexibility that has caused the ongoing debates, as discussed in the previous section, among nations with respect to textual interpretation.

Under TRIPS, patents can be obtained for any invention, whether it is a product or a process, that is new, involves an inventive step, is non-obvious, and is useful or capable of industrial application. The rights of the patent holder, which must last at least 20 years from the date of filing of the patent application, include the right to prevent unauthorized persons from making, using, selling, or importing any product covered by the patent. If the patent is for a process, then the patent holder can stop unauthorized use, sale, or importation of products directly obtained through that process. However, products or processes that endanger the public order or morality; diagnostic, therapeutic drugs, or surgical methods; plants and animals; and biological processes are not necessarily eligible for patent protection.

Furthermore, the agreement does take into consideration the problems of developing nations as exemplified in the extended transition periods granted for implementation of TRIPS provisions, exclusion of certain items from patentability, compulsory licensing under certain conditions, parallel importing, and technical and financial cooperation in favor of developing member nations. These provisions have caused the most heated debates among member nations, and thus will be discussed in detail in the following section.


71. See supra subparts I(A-B) for a detailed discussion on controversies between developed and developing nations.

72. TRIPS, supra note 19, at art. 28.

73. NATHAN ASSOCIATES INC., supra note 70, at 50.

74. TRIPS, supra note 19, at art. 27; Callan, supra note 66.

75. TRIPS, supra note 19, at art. 66 (allowing least developed countries to enjoy a transitional period of 10 years from the date of application).

76. See UNCTAD, supra note 45, at 2 ("plants and animals may be excluded from patentability, however, micro organisms cannot"). Consequently, developing countries want to clarify the definition of microorganism in order to ensure greater legal certainty, avoid biopiracy, and assure fair access to genetic resources. Id.

77. TRIPS, supra note 19, at art. 31.

78. TRIPS, supra note 19, at art. 6 (excluding the issue of parallel imports from the dispute settlement system).

79. Nerozzi, supra note 17, at 612.
B. An Overview of Egypt's Intellectual Property Law 82 of 2002

Law No. 82 of 2002 Promulgating Intellectual Property Law was passed on June 2, 2002 after a seven-year drafting process and two years of formal debate. The new law constituted a comprehensive and historic improvement in the legal rights of inventors, artists, and entrepreneurs. The section on patents replaced the outdated Law 132 of 1949, which only protected the manufacturing process rather than the finished pharmaceutical or agricultural chemical product. Additional shortcomings of Law 132 include an overly broad compulsory licensing provision, a forfeiture requirement if the patent is not worked two years after the issuance of the first compulsory license, a fifteen-year term of protection, and a definition of infringement that did not include the use, sale, or importation of products made using the processes patented in Egypt. Although the new law resolves some of these issues, there remains pressure from abroad to change some provisions, particularly compulsory licensing, parallel imports, and enforcement provisions, which will be discussed in more detail below.

Each ministry is currently developing its own executive regulations to implement and enforce the provisions of the law. Because these executive


81. Law 82 of 2002 is divided into four books that are individually assigned to a specific ministry's profile for enforcement purposes. Book one addresses patents, utility models, semiconductor topography, and undisclosed information and falls under the Ministry of State for Scientific Research and the Ministry of Health. Book two deals with trademarks, appellations of origin, and industrial designs, which fall under Ministry of Internal Trade and Supply. Book three covers copyrights and neighboring rights and is under the purview of the Ministry of Culture and Communications as well as the Ministry of Information Technology. Finally, book four focuses on plant varieties and is applied by the Ministry of Agriculture and Land Reclamation. UNOFFICIAL TRANSLATION OF THE EGYPT'S IPR LAW, PUBLISHED IN THE OFFICIAL JOURNAL ISSUE, No. 22 BIS- Dated 2nd of June 2002 (copy on file with author) [hereinafter Law No. 82 of 2002].


83. ECONOMIST INTELLIGENCE UNIT, *Still Under Scrutiny*, BUSINESS MIDDLE EAST, June 1, 2000, at 3.


85. An executive regulation in the Egyptian legal context is equivalent to an administrative regulation formulated by an administrative agency.

regulations were still being negotiated at the time of the writing of this Note, the issues discussed here are based on the various ways that the text of the law may be interpreted and the consequences of such interpretations. It is worth mentioning that Egypt has decided to take advantage of the ten-year transition period offered to developing countries under TRIPS, which postpones full implementation of a TRIPS compliant law until January 1, 2005 but requires compliance with the mailbox, exclusive marketing rights, and undisclosed information provisions as of January 2000.

1. Compulsory Licensing

TRIPS Article 31 allows member countries to grant compulsory licenses in limited circumstances. A compulsory license is an annulment of patent rights by a judicial or governmental authority, causing a temporary deprivation of a patentee’s monopoly over the original subject matter. Therefore, recipients of compulsory licenses may make, use, and sell the otherwise patented subject matter before the expiration period of the compulsory license. Because the language of Article 31 does not specify or place clear restrictions on the purposes for granting compulsory licenses and a compulsory license may reduce the market price of a medicine by 75 percent, the issue has become very controversial. In general, developed nations, including the United States, want to limit this remedy to violations of competition laws or national emergencies whereas developing nations want to include public health and economic crisis as legitimate justifications for granting compulsory licenses. Developed nations also prefer to apply closely textual interpretations to Article

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87. Mostafa, supra note 7.
89. Nerozzi, supra note 17, at 612.
90. TRIPS, supra note 19, at art. 31 (“in the case of a national emergency or other circumstances of extreme urgency”); Champ & Attaran, supra note 61, at 366.
92. Id. at 198-201.
31(b) regarding the working of a patent with respect to compulsory licensing.\textsuperscript{94} They support the view that as long as the patent is worked in any one of the WTO member nations there is no grounds for invoking Article 31(b) as a basis for compulsory licensing, placing this approach in direct opposition to developing nations’ local production requirements.\textsuperscript{95}

Article 23 of Egypt’s Law 82 of 2002 exercises a broad interpretation of TRIPS Article 31. The basis for granting compulsory licenses without the need for prior negotiation with the patentee include non-commercial public uses necessary to preserve “national security, health, food, and environmental safety” and “confronting cases of emergencies and extreme urgent circumstances,” which is more or less TRIPS compliant. However, the provision permitting compulsory licensing “to support the national effort in a significant sector for economic, social and technological development, without unreasonable prejudice to the patentee rights”\textsuperscript{96} expands TRIPS’ “national emergency and other circumstances of extreme urgency”\textsuperscript{97} to include economic, social (i.e. public health), and technological issues. Such language may be setting the stage for broad public health exceptions to patent-holders’ rights similar to those invoked by Brazil or South Africa with respect to AIDS/HIV medicines.\textsuperscript{98}

Egypt’s working standards for a patent are narrowly construed. “If the patentee did not exploit the patent in Egypt directly or under his/her authorization the exploitation was not sufficient following four years from the date of filing the patent application or three years from the grant date whichever is longer[,]”\textsuperscript{99} then a compulsory license will be issued. If the patentee ceases to exploit the patent without an acceptable reason for over a year, a compulsory license will be issued. Egypt’s law defines exploitation as “the manufacturing of the product subject matter of production in Egypt, or using the manufacturing process subject matter of the protected patent invention”\textsuperscript{100} and excludes

\textsuperscript{94} TRIPS, supra note 19, at art. 31(b) (“if . . . the proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time”).

\textsuperscript{95} WATAL, supra note 19, at 316-17 (citing art. 68(I) of Brazilian Patent Law, art. 43 of Argentine Law). Note also that New Zealand issues compulsory licenses if there is a failure to supply the market on reasonable terms and Germany issues them if there is no other substitute for the treatment of a disease. \textit{Id.}

\textsuperscript{96} Law No. 82 of 2002, supra note 81, at art. 23, sec. I(3).

\textsuperscript{97} TRIPS, supra note 19, at art. 31.


\textsuperscript{99} Law No. 82 of 2002, supra note 81, at art. 23, sec. IV.

\textsuperscript{100} \textit{Id.} at art. 23, sec. IV.
importation.\textsuperscript{101} This language is likely to invite protest from MNEs who do not want to perform foreign direct investment in a nation, but do want to preserve their patents and import their goods.

A final justification for issuing compulsory licensing under Law 82 is "the lack of supply of patented drugs to satisfy the country’s needs, or because the decline in its quality, or irregular incline of its price, or in the event that the invention drug is related to critical cases or chronic or endemic or epidemic diseases. . . ."\textsuperscript{102} Although the patent holder has the right to immediate notification in this instance,\textsuperscript{103} the government will possess a significant degree of leeway that will impede her freedom to make market-based decisions in pricing or sales. Egypt may have decided to use the aforementioned language in order to avoid falling victim to global reference pricing. Many governments in developed nations, including the United States, base their price controls on pharmaceuticals on a global reference price that averages in the price of a drug in the various countries it is sold. Therefore, if a price in a particular country (or countries) is so low that it will decrease the global reference price, then the pharmaceutical company may either raise the price to the levels found in developed countries or withdraw from the market altogether in order to preserve its primary profit base in developed countries.\textsuperscript{104} Either option may prove to be catastrophic to the developing nation’s public health.

2. Compensation for Compulsory Licensing

An intimately related issue to compulsory licenses is the determination of compensation owed to the patent holder in return for monetary losses incurred. TRIPS Article 31(h) states that, “the right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization” (emphasis added). Egypt’s law states, “[t]he patentee is entitled to a fair compensation against the exploitation of the invention. The economic value of the invention must be considered while determining said compensation” (emphasis added).\textsuperscript{105} The difference in text has sparked the debate of how to determine the compensation.

Pharmaceutical companies from developed countries want to be placed in the same position monetarily as they would have been had the compulsory license not been issued. This translates into the full market value of the license,
incorporating the costs of development and lost profits. Factors they believe should be considered include: the risks and costs associated with the invention claimed in the patent and the commercial development of products that use the invention, the efficacy and innovative nature and importance to the public health of the invention or products using the invention, the degree to which the invention benefited from publicly funded research, the need for adequate incentives for the creation and commercialization of new inventions, the interests of the public as patients and payers of health care services, and the public health benefits of expanded access to the invention.

The Egyptian government, on the other hand, may decide to limit the remuneration to the profits earned from the temporary use by the compulsory license recipient. Or it may refuse any compensation to a pharmaceutical company with no plans to invest in the domestic market, claiming it has suffered no loss and hence is not entitled to compensation. These diverging interpretations have unsurprisingly initiated significant controversy within the ongoing executive regulation negotiation process.

3. Parallel Imports (Gray Markets)

TRIPS Article 6 purposely punts the issue of exhaustion by stating, "nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights." Exhaustion limits the rights of a patent holder in controlling the importing, exporting, and distribution of the patented item. A national exhaustion scheme gives the patent holder control over importing, exporting, and distribution of the patented item so long as the patent holder has not released the patented item into the market. But as soon as the patent holder releases the item into that nation's market, then it is considered fully exhausted and the patent holder no longer has that type of control, allowing anyone to import or export the item. On the other hand, if a country chooses international exhaustion the patent holder loses control of distribution once he or she puts the item into the market anywhere in the world.

108. Vaughan, supra note 106, at 105.
109. Id. at 108-09.
110. TRIPS, supra note 19, at art. 6.
112. Id.
113. Id.
In Egypt's case, Article 10 states that the patentee's right in excluding others from importing, exporting, using, selling, or distributing the product "shall be exhausted if the patentee marketed or licensed said product to third party/others." It does not specify the applicable jurisdiction for marketing and licensing activities, nationally or internationally. However, the Permanent Mission of Egypt in the WTO replied to a question pertaining to exhaustion posed by the United States with, "[t]he patent rights are 'exhausted' if the patent owner has marketed the invention (i.e. actually put the protected product on the market for circulation in the normal channels of commerce) anywhere in the world" (emphasis added). Therefore, once a party legally obtains the patented item from the patentee, anywhere in the world, it may argue that it is free to export or import it to whomever it chooses. From the patentee's perspective this is problematic because she may sell it to an authorized purchaser who then sells it to a third party who then engages in parallel exporting to another country with similar or weaker laws.

This process of re-exporting to another country creates gray markets. Gray markets are the unauthorized distribution of a good or service. They are created when a business imports a good for a low price (due to its nation's lower GDP per capita) from the patent holder and subsequently exports it to another country to be sold for a price higher than the business purchased it for but lower than the price offered by the patent holder. Consequently, the gray market goods compete with the patent holder's goods and compromise her profit margins in the higher priced market. This specific situation is unlikely to occur in the United States because US patent law protects patent holders from parallel imports, allowing them to sue the US importer. However, if the exchange takes place between Egypt, applying an international exhaustion approach, and another country with weak IPR laws, then the US company would have no power to prevent this exchange.

As a consequence, the pharmaceutical may raise the price of the drug in Egypt, in order to thwart any profitability from parallel trading. Hence, Egyptian consumers will bear the burden for the lower prices obtained in the importing nation. The patent holder will no longer engage in price discrimination among poor and rich nations, which will price out poor consumers.
Egypt may then react to the price increase by issuing a compulsory license based on Law 82 of 2002 Article 23 Section Two’s “irregular incline in its price” justification. And if the patent holder responds by refusing to sell or produce the drug in Egypt, then Article 23 Section Four’s provision for failing to exploit the patent domestically may also initiate a compulsory license. The patent holder is thus placed in a quandary when it comes to protecting her profits with respect to gray markets.\textsuperscript{119}

4. Enforcement of Intellectual Property Rights

TRIPS addresses wealthy nations’ specific concerns with IPR enforcement deficiencies in developing nations’ domestic laws. For example, TRIPS compliant laws should address the inability to obtain evidence to prove infringement, indeterminable delays in bringing a case to trial and getting a final judgment, the inability to get preliminary injunctions, inadequate damage awards and criminal sanctions, and the lack of enforcement at the borders to prevent importation of infringing goods.\textsuperscript{120} Consequently, TRIPS Article 41 requires that enforcement include “expeditious remedies to prevent infringement and remedies which constitute a deterrent to further infringement [and] . . . procedures . . . shall not be unnecessarily complicated or costly, or entail unreasonable time limits or unwarranted delay.” Articles 42, 43, 44, and 45 address fair and equitable procedures, evidence, injunctions, and damages respectively.

With respect to damages, Article 181 of Law 82 of 2002 may fail to meet the TRIPS requirements. Article 32 of Law 82 of 2002 imposes a fine of 20,000 to 100,000 Egyptian pounds (approximately $3700 to $18,000)\textsuperscript{121} for first time offenders. Recidivism is penalized with imprisonment of no less than three months and a fine of 40,000 to 200,000 Egyptian pounds.\textsuperscript{122} Western commentators believe this is an insufficient deterrence considering the high profits gained from patent drug infringement.

However, the new law does include new provisions that provide for temporary injunctions against the violator until the case goes to court.\textsuperscript{123} Equitable procedures are also available to patentees since they may ask the judge to “order conservative procedures concerning the products and goods subject matter of

\textsuperscript{119} It is worth mentioning that gray markets create quality control issues. The US company may be legally selling a lower quality version of the drug to Egypt in order to compensate for the lower prices. But if this product is then re-exported to a higher priced market that is receiving a higher quality version of that good, then consumer deception and potential litigation may ensue. Ghosh, supra note 111, at 220; WATAL, supra note 19, at 297.

\textsuperscript{120} WATAL, supra note 19, at 333.


\textsuperscript{122} Law No. 82 of 2002, supra note 81, at art. 32.

\textsuperscript{123} Id.; Mostafa, supra note 7.
the claim [in order to]... preserve the condition of such goods and products ..."\(^{124}\) and to "order appropriate conservative procedures to fulfill rendered fines or compensation in addition to ordering the destruction of confiscated subject matter..."\(^{125}\) Finally, non-disclosure agreements are now subject to Egyptian law and enforceable in Egyptian courts, which saves foreign companies the time and resources of going abroad to enforce their rights.\(^{126}\)

Despite the legal improvements in the law, there remain institutional and financial obstacles to efficient enforcement. For example, the Patent Office is not automated, there is a shortage of trained patent examiners (those available are poorly trained), and there are not enough judges to handle all of the cases and appeals.\(^{127}\) Overcoming these limitations is an expensive feat. In 1996, an Egyptian spokesman to the United Nations estimated a cost of $98,000 to increase patent personnel and purchase necessary equipment, $192,000 to prepare the judiciary for patent enforcement, and $1,000,000 to train and develop customs authorities.\(^{128}\) For a developing country with a pre-existing budgetary crisis, these expenses serve as formidable impediments to effective enforcement of the new IPR law.

The Patent Office also lacks the necessary communication link with the Ministry of Health to ensure that health regulatory authorities do not provide marketing authorization for unauthorized copies of products subject to patent protection.\(^{130}\) Foreign pharmaceuticals are particularly concerned with the Ministry of Health's interference with the patenting process.\(^{131}\) Under the old law, the Ministry of Health participated in patent application processing in collaboration with the Patent Office.\(^{132}\) The new law's text grants the Patent Office sole jurisdiction over patent applications,\(^{133}\) with some exceptions. If the invention "possess[es] health value"\(^{124}\) then the Ministry of Health may oppose

\(^{124}\) Law No. 82 of 2002, supra note 81, at art. 33.
\(^{125}\) Id. at art. 35.
\(^{126}\) Id. at arts. 42, 63; Mostafa, supra note 7.
\(^{128}\) Al-Ali, supra note 88, at 283.
\(^{130}\) PHARMACEUTICAL RESEARCH MANUFACTURERS OF AMERICA, PhRMA Special 301 Submission Priority Watch List Countries: Middle East, Africa, South Asia 64, www.phrma.org/international/resources/2002-02-22.45.pdf (last visited Oct. 7, 2003) [hereinafter PhRMA].
\(^{131}\) ECONOMIST INTELLIGENCE UNIT, Failing Grades, BUSINESS MIDDLE EAST, Jan. 1, 2001, at 1.
\(^{132}\) Wahish, supra note 86.
\(^{133}\) Law No. 82 of 2002, supra note 81, at art. 16.
\(^{134}\) Id. at art. 17.
the granting of a patent. This will inevitably involve the Ministry in reviewing patents albeit for a limited purpose. The Ministry of Health also decides on a case-by-case basis if the patent should be subject to a compulsory license.\textsuperscript{135} But most importantly, the Ministry of Health controls the drug registration process and price-control system (discussed in detail in Subsection III (C)), which impacts a drug manufacturer’s profits as much as her patent rights. This important separation of authority necessary to avoid inconsistent treatment among patent holders is likely being addressed in the executive regulations currently under negotiation.

IV. THE EGYPTIAN CONTEXT IN WHICH INTELLECTUAL PROPERTY RIGHTS EXIST

A. The Political Debate on Intellectual Property Rights

Unsurprisingly, passage of the new IPR law in Egypt did not occur in the absence of public controversy and opposition. The Egyptian government faced significant political pressure from public sector generic pharmaceutical manufacturers. They launched a major lobbying campaign against the new law in order protect their generic drug production.\textsuperscript{136} This powerful opposition group obtained public support by claiming that intellectual property rights would raise the price of medicine, cause unemployment, and force the local factories to shut down.\textsuperscript{137} Pharmacists also believed that new therapies would take years to become available to most Egyptians due to the increase in prices.\textsuperscript{138} Such allegations are particularly sensitive in a country where 23\% to 35\% of households live below the official poverty line.\textsuperscript{139} Even a former Minister of Health was staunchly against patent protection, claiming it was an unnecessary evil and would result in foreign dominance of a key national sector and higher prices for the poor.\textsuperscript{140}

Despite such strong opposition, the law managed to pass due to a variety of factors. First, the number of patent applications by local parties doubled from 1995 to 2000 due to improvements in the economy. This surge in applications indicated an increase in innovation of intellectual property as well as a

\begin{itemize}
\item \textsuperscript{135} Id. at art. 23.
\item \textsuperscript{136} Susan Postlewaite, \textit{Egypt Changes the Way It Does Drugs}, IP WORLDWIDE, Aug. 2002, at 16.
\item \textsuperscript{139} ECONOMIST INTELLIGENCE UNIT, \textit{supra} note 137.
\item \textsuperscript{140} Id.; Downes, \textit{supra} note 88; Mostafa, \textit{supra} note 7.
\end{itemize}
subsequent desire for protection.\textsuperscript{141} Second, foreign investors, in particular the members of the Pharmaceutical Research and Manufacturers of America (PhRMA), informed Egypt that its weak IPR regime deterred them from investing $300 million in Egypt's pharmaceutical sector.\textsuperscript{142} A number of reform-minded legislators in the Parliament took such missed opportunities seriously and managed to get the law through.\textsuperscript{143} Third, a new Minister of Health, who is a respected academic, was recently appointed. His appreciation for the need to attract foreign investment by strengthening pharmaceutical patent protection played a key role in convincing the public of the benefits of the new law.\textsuperscript{144} Finally, Egypt feared that Jordan's recent passage of a new IPR law would divert potential investment and deny Egypt the opportunity of becoming a regional pharmaceutical manufacturing center.\textsuperscript{145}

In order to fully appreciate the impact of this new law on Egypt's economic growth prospects, as well as the reason why the new law is so controversial, one must understand the highly concentrated market structure of Egypt's pharmaceutical industry and its deficient health care system.

\section*{B. The Local Pharmaceutical Industry and Health Care Insurance}

The pharmaceutical industry is one of the oldest strategic industries in Egypt and the largest producer of pharmaceuticals in the Middle East and North Africa region. Established in 1939, the sector underwent significant growth in the 1980s as new pharmaceutical factories began locally manufacturing pharmaceutical products for local consumption as well as export to the Arab and African markets.\textsuperscript{146} The sector is composed of eight public production companies, three public support services companies (importing, distributing, and packaging), and twenty-two private production companies. It is highly concentrated with the top nine (foreign) companies controlling 45% of the market and the top five of those controlling 32% of the market.\textsuperscript{147} Egypt exports 6% of its production of which 74.9% is exported to the Middle East and North Africa region.\textsuperscript{148}

\begin{thebibliography}{99}
\bibitem{141} Downes, \textit{supra} note 88.
\bibitem{142} \textit{Economist Intelligence Unit, Egypt: Patent Pending, Business Middle East}, Jan. 16, 2001, at 1. Note that with stronger IPR laws, PhRMA members would also reclaim their annual losses of $100 million from patent infringements in Egypt and increase their market share from 18\% to 25\%. \textit{Economist Intelligence Unit}, \textit{supra} note 131, at 2.
\bibitem{143} Mostafa, \textit{supra} note 7.
\bibitem{144} Mostafa, \textit{supra} note 138.
\bibitem{145} \textit{Economist Intelligence Unit, supra} note 142.
\bibitem{146} AmCham, \textit{supra} note 9, at 3.
\bibitem{147} \textit{Id.} at 24-27.
\bibitem{148} \textit{Id.} at 15.
\end{thebibliography}
Public sector companies control 17.6% of local production and export 63% of the nation's total pharmaceutical exports.\textsuperscript{149} Public sector firms have been losing market share to the private sector, primarily foreign firms, due to inefficient distribution channels, high operating costs, heavy governmental control and restrictions on expenditures, highly restricted R&D expenditures of 1%-2%, weak marketing and sales efforts, overstaffing, and sale of drugs below cost for socio-economic reasons.\textsuperscript{150} The consequent loss of revenues has placed more pressure on them to export. Moreover, since at least 200 drugs are currently produced by Egyptian drug companies (private and public) without the payment of royalties to the multinational pharmaceutical companies that discovered the drugs through their own research and development,\textsuperscript{151} public sector firms have reason to fear further erosion of market share upon implementation of the new IPR law.

Although the public firms' concern with elimination from the market is legitimate, it may be misdirected. The real threat to their success may not be as simple as the presence of stronger IPRs, but their sub-standard managerial, packaging, advertising, and quality control standards. To some extent, they will lose their sources of revenue from on-patent generic drugs. But fully relying on patent infringements for revenue is not sustainable in the long run. As the costs of operations increase, due to their inefficient business structure, any potential profits gained from producing a lower-cost, generic drug will be undermined. If the government absorbs the losses in order to keep the prices of drugs low, the public will ultimately suffer in other ways as the country's overall budget deficit increases. Hence, a false sense of security regarding the affordability of medicine is created among the population. Yes, the price of drugs is currently affordable but perhaps at the expense of a higher quality health care system or an adequate physical infrastructure.

But price does matter. Only 59% of Egyptians are covered by health insurance of which 4% are covered by private health insurance and 55% by sub-standard public health insurance.\textsuperscript{152} The public health insurance scheme entitles the recipient to a doctor and a hospital bed, but the quality of the services is so low that most resort to private services paid at their own expense.\textsuperscript{153} That brings the number of people that pay for medicines straight from their pockets to 98%, which resulted in a low per capita consumption of LE57.81 (approximately

\begin{itemize}
  \item 149. \textit{Id.} at 5.
  \item 150. \textit{Id.}
  \item 152. \textit{Id.} at 21.
\end{itemize}
$16.76) in 1998. These low consumption levels exist notwithstanding that the price of drugs are as low as $1-$2 per package, which are among the lowest prices in the world. Given Egypt's low GDP per capita of $1,490 and that 49.6% of the 70 million Egyptians live below the upper poverty line, any increase in price may decrease consumption levels to unacceptable lows particularly with respect to diabetes, renal and heart diseases, and cancer. Add to that the recent elimination of food subsidies and the increasing cost of living. These factors combined impose a heavy burden on consumers as they struggle to meet their most basic needs. Due to the country's inadequate political transparency and notorious record of government corruption, consumers may nonetheless choose to have the lower priced drugs because they do not believe that the savings gained from addressing the macroeconomic inefficiencies will be passed onto them in other forms.

Nevertheless, the Egyptian government decided in 1995 that privatization and reform of public sector pharmaceutical companies was an integral part of reforming the overall economy. Therefore, even in the absence of IPRs, public sector pharmaceutical companies will have to reform their internal management systems, obtain the marketing and sales skills to prepare them to compete in the global market, and invest more money into R&D. They will have to improve their quality assurance tests to meet international quality standards if they want to continue exporting their products abroad.

If these weaknesses are properly addressed, then the addition of strong IPRs may indeed prove beneficial to local firms. For example, public sector companies import most of their active ingredients, machinery, spare parts, and equipment. The cost of these inputs will decrease in the presence of strong IPRs. Foreign pharmaceutical patent holders will no longer be forced to increase the price of inputs as a means of recouping lost profits from finished drugs. The public sector also focuses on export markets, which is unlikely to exist in MNEs with strict orders from headquarters to limit service to the domestic market. If public pharmaceuticals do invest in R&D and patent new products, these exports may become a significant source of profits and a vital

154. Amcham, supra note 9, at 24 (comparing this to $34.10 in Kuwait and $35.40 in Qatar the same year).
155. Postlewaite, supra note 136.
156. THE WORLD BANK, supra note 48, at 18 tbl. 1.1.
158. ECONOMIST INTELLIGENCE UNIT, supra note 153.
159. Amcham, supra note 9, at 8.
160. Id. at 23.
161. Id.
162. Id. at 6.
163. Id. at 8.
source of foreign currency for Egypt – assuming the profits are reinvested into the Egyptian economy.

Ten of the twenty-two private sector pharmaceutical producers are domestic firms. These firms control 8.9% of total private sector sales. They too import a large percentage of their primary elements, 80%-85%, in order to produce end-use products for final consumption. They export these drugs free of margin ceiling limitations that are imposed on locally sold products. Because most of their production is over the counter and generic drug (of on-patent drugs), the new law will appreciably impact their operations. They will be forced to innovate their own formulas and patent them, sign licensing agreements with foreign pharmaceuticals to produce their patented drugs domestically, or simply go out of business.

If the first scenario is too occur, these firms will need the research and development training and financing necessary to engage in drug innovation. How and whether this will occur will likely depend on the government’s willingness to directly fund their R&D endeavors, form public-private R&D partnerships, and reform the price control system. If the predominant effect is the proliferation of licensing agreements, then actual technology transfer will need to take place in order to produce the desired increase in productive capacity within the local pharmaceutical industry. And if the least desired result of bankruptcy occurs, then the Egyptian government will most certainly face a major political crisis.

C. Regulatory Obstacles to Efficiency

With respect to drug regulation, TRIPS’ guidelines are limited to the principles of non-discrimination and most favored nation treatment. Each individual nation, “in formulating or amending their laws and regulations, [is free to] adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development. . . .” Therefore, price controls, drug registration and approval, and import-export regulations are left to the discretion of the individual WTO members, “provided that such measures are consistent with the provisions [of TRIPS].”

164. Amcham, supra note 9, at 6-8.
165. Id. at 6.
167. See generally infra subpart IV(B) (providing a detailed discussion of technology transfer).
168. TRIPS, supra note 19, at arts. 3, 4.
169. Id. at art. 8.
170. Id.
The Egyptian pharmaceutical industry exists within a complicated regulatory environment. The government exercises strict control over the types of drugs that can be imported into the country, which often results in the banning of some finished drugs.\textsuperscript{171} Importers must obtain an import license to bring in a specified quantity of a drug at a specified price. Imported raw materials are subject to a 5\% customs duty and a 1\% sales tax unless they are to be used for the production of an essential drug thereby subjecting them to a 1\% customs tax and no sales tax.\textsuperscript{172}

New finished drugs must be registered. Under the old law, registration took up to three years after submitting all the relevant research documentation to the Ministry of Health.\textsuperscript{173} However, foreign firms were more susceptible to persevering through this process because local firms simply submitted a document showing a slight variation in the manufacturing process of an existing drug, gave the drug a new name, and received approval much quicker.\textsuperscript{174} Whether this phenomena is a form of discriminatory treatment between foreign and domestic firms is debatable since there is a substantive difference between registering an entirely new drug and registering a slight variation of an existing registered drug. Nonetheless, this issue should be resolvable under the new IPR law’s non-discrimination provision.\textsuperscript{175} The more pressing issue lies in the registration process itself. If Egypt is serious about attracting foreign direct investment and assisting its own private sector’s profitability, the registration process must be reformed to decrease the amount of time taken to bring a new finished product to the market, whether by a foreign or local party.

Egypt also sets price controls on pharmaceuticals, which is a legitimate practice under TRIPS.\textsuperscript{176} The Pharmaceutical Pricing Committee at the Drug Planning and Policy Center sets prices with the aim to keep medicine affordable to the majority of the population. Because the process revolves more around social concerns, the pharmaceutical’s profitability objectives are overlooked. The prices do not adequately reflect the fair market value with respect to R&D costs, promotion spending, inflation, currency devaluation,\textsuperscript{177} and the changes in costs of raw materials. In 1996, the Government of Egypt (GOE) made some reforms to the price-setting system by adopting a cost-plus formula that allowed

\begin{itemize}
  \item \textsuperscript{171} PhRMA, supra note 130, at 64; ECONOMIST INTELLIGENCE UNIT, supra note 84.
  \item \textsuperscript{172} AmCham, supra note 9, at 10.
  \item \textsuperscript{173} Postlewaite, supra note 136.
  \item \textsuperscript{174} \textit{Id}.
  \item \textsuperscript{175} See Law No. 82 of 2002, supra note 81, at art. 4 (“Every natural or legal person whether or Egyptian or foreign nationals . . . are entitled to the rights of applying for patent at the Egyptian Patent Office and enjoy all rights granted by this law.”).
  \item \textsuperscript{176} Lanjouw, supra note 15, at 22.
  \item \textsuperscript{177} See PhRMA, supra note 130, at 65 (citing major reductions in profitability in the sector due to the recent 60\% devaluation of the Egyptian pound).
\end{itemize}
for a fixed profit margin above the cost of ingredients, but it continued to 
eclude the other variables that contribute to production costs.\textsuperscript{178}

The adverse effect of this price-setting scheme is a reduction in R&D by 
foreign and domestic firms because they cannot recoup those costs through 
sales.\textsuperscript{179} The limited potential profits deter prospective manufacturers of patent-
able pharmaceuticals from setting up shop in the country and stifle the 
importing of new products.\textsuperscript{180} Additionally, monitoring and enforcement of 
these price controls is costly as it adds more bureaucracy to an already strained 
business environment.\textsuperscript{181} Because allowing the market to completely control 
prices may result in inaccessibility to medicine by a significant portion of the 
population, one scholar suggests a selective use of price control for the products 
with few affordable therapeutic alternatives. Therefore, the price-controlled 
segment will be too small to jeopardize the introduction and availability of 
newer, more effective pharmaceuticals into the market.\textsuperscript{182} Ultimately, if the 
GOE wishes to fully exploit the benefit of the new IPR law, it will have to 
address this important issue through dialogue and cooperation with the private 
sector.

V. STRONGER INTELLECTUAL PROPERTY RIGHTS IS NOT ENOUGH

A. \textit{Strengthening Research and Development Capabilities}

Although the aforementioned description of Egypt's IPR reforms appears 
to represent a significant step towards "reduc[ing] distortions and impediments 
to international trade[,]"\textsuperscript{183} it is insufficient to bring about the expected benefits 
to both the Egyptian private sector and the Egyptian consumer. The IPR regime 
must be complemented and linked with other legal regimes dealing with 
research and development, technology transfer and competition policy. One 
cannot disregard that the developed nations' reasoning in support of IPRs\textsuperscript{184} is 
based on the pivotal assumption that domestic pharmaceuticals in developing 
nations, public or private, have the technical as well as financial resources to 
conduct adequate research and development activities. However, this is rarely 
the case, and Egypt is no exception. The domestic sector's technical capability 
is limited to the production of therapeutic ingredients and finished goods and

\begin{itemize}
\item \textsuperscript{178} AmCham, \textit{supra} note 9, at 9.
\item \textsuperscript{179} \textit{Id}.
\item \textsuperscript{180} WATAL, \textit{supra} note 19, at 742.
\item \textsuperscript{181} \textit{Id}.
\item \textsuperscript{182} \textit{Id}.
\item \textsuperscript{183} TRIPS, \textit{supra} note 19, at Preamble.
\item \textsuperscript{184} See infra subpart I(A) (providing detailed discussion of developing countries' concerns regarding strengthening intellectual property regimes).
\end{itemize}
lacks a sophisticated research and development base. Pharmaceuticals operating in Egypt allocate less than 2% of their revenues to research and development activities, due in part to the defective price setting structure. Local pharmaceuticals depend on imports for 85% of their raw materials, making their costs heavily based on external economic factors. Moreover, Egyptian higher education, the main component in creating the necessary human resources, is in urgent need of reform and upgrading. In 1987, there were only 3,782 Egyptian research scientists per million inhabitants compared to 466,211 in the United States or 29,509 in India.

These debilitating factors will not miraculously be resolved by mere IPR regime reforms. Although stronger IPR legal regimes will create financial incentives and legal certainty for current and new entrants into the market, that is not enough to produce the objectives of economic growth and improved public welfare sought by developing nations. A robust system of national and international linkages among practitioners needs to be established. Egypt should also tap into the ongoing transformation of industrial firms in wealthy nations. As these firms transition from vertically integrated firms to outsourcing and subcontracting to individuals and businesses in the developing world, Egyptian businesses can utilize the new IPR law to earn the trust of MNEs concerned with their trade secrets and patented products.

Technology policies that link Egyptian scientists and practitioners with each other as well as with their foreign counterparts should be adopted. For example, the GOE should focus on creating incentives for cooperation between research and development institutions, universities, and industry. Favorable tax treatment and economic rewards, an obvious one being the monopoly power created by patent, should be granted to local entrepreneurs. The policies' incentive structures should also attract financing for research and development activities. Egypt can learn from the United States' experience by providing public funding for R&D activities through direct sponsorship.

185. Omer, supra note 8, at 551 n. 4.
186. AmCham, supra note 9, at 20.
187. Id. at 21.
189. Id. at 67.
190. See id. (noting that Asia and Latin American subcontractors greatly benefited from this process).
191. See id. at 66 (noting the establishment of linkages and policies in Brazil, China, and the Republic of Korea as a means of strengthening their national knowledge base).
192. Id. at 70.
193. Id. at 71 ("more than 45% of all R&D efforts in the United States over the last 20 years have been funded directly by government agencies").
To the GOE's credit, new polices have recently been passed to support information technology. National plans include promoting infrastructure, encouraging foreign and local investment, providing Internet services to schools, and establishing a free zone for information and communication technology (known as Smart Village). Similar approaches and attitudes are required with respect to the needs of the technology intensive and science based pharmaceutical industry.

B. Encouraging Effective Technology Transfer and Preventing Anti-Competitive Practices

As subparts I (A) and (B) of this Note mention, a primary incentive for developing countries to reform their IPR regimes is to encourage technology transfer. More specifically, nations want an effective transfer of skills and intangible know-how that will lead to an increase in production capabilities by local market participants. TRIPS Article 7 states "protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology... in a manner conducive to social and economic welfare" and Article 8 states that "[a]ppropriate measures [consistent with other provisions]... may be needed to prevent the... adverse affect [to] the international transfer of technology." In addition, a WTO Working Group on Trade and Transfer of Technology (of which Egypt is a member) was created to "examine and recommend measures that might be taken to increase flow of technology to developing countries. . . ." Therefore, signatories are encouraged to adopt policies that will encourage the transfer of technology along with the strengthening of IPRs.

In Egypt's case, technology transfer in the form of foreign direct investment continues to lag behind expectations. The decrease in foreign direct investment inflows illustrates that the nation is still in the unavoidably lengthy process of transforming these legal incentives into tangible results. Consequently, Egypt passed a new Commercial Code Law No. 17 of 1999.

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194. Id. at 71, 77; Cam McGrath, Communication – Egypt: Silicon Oasis Rises in the Desert, INTER PRESS SERVICE, Jul. 16, 2002.
195. WATAL, supra note 19, at 386.
196. Omer, supra note 8, at 561.
197. THE WORLD TRADE ORGANIZATION, WORKING GROUP ON TRADE AND TRANSFER OF TECHNOLOGY, WT/WGT/T/T/1, (Apr. 15, 2002) [hereinafter WTO WORKING GROUP ON TRADE AND TRANSFER OF TECHNOLOGY].
which included provisions specifically addressing technology transfer. The provisions permitted the invalidation of any restriction on "the freedom of the importer of technology... in its use, development, acquaintance of the product or its advertisement" placed in a technology transfer contract. Examples of invalid contract restrictions include:

1) Prohibiting the improvement or modification to the imported technology to suit local conditions;
2) The prohibition of acquiring similar technology or competing technology;
3) Limitations on production volume, price, method of distribution, and export;
4) Required interference of the supplier in the importer's business operations;
5) Exclusive supply arrangements for raw materials, equipment, machines, or spare parts from the supplier alone; and
6) Restrictions on the sale of the production.

The supplier also has to supply the importer with information, data, and technical documents needed to assimilate the technology into the local market and provide the importer with technical services for the operation of the technology. Finally, the supplier has the obligation of providing the importer with spare parts for machines and equipment supplied, if she produces them, or advise the importer on other sources. This is particularly relevant to Egypt because the majority of capital equipment and machinery used in production is imported.

These complementary laws, however, may simply gather dust given the competitive realities in the global market. Foreign firms are loathe to reveal any trade secrets or technical information that may easily be imitated and compete with their products. Therefore, the legal certainty brought about by IPRs, which encourage information dissemination by guaranteeing patentees legal remedies for infringement, will give technology transfer polices vitality. Because

201. *Id.*
202. *Id.* at 121.
203. *See The World Bank, supra note 48, at 212 tbl. 4.3, 223 tbl. 4.6 (citing Egypt's manufacturing of machinery and transport equipment as 15% of total manufacturing in 1999 and Egypt's manufactured imports, which include capital equipment, as 77% of total imports in 2000).*
204. Omer, *supra* note 8, at 558.
pharmaceutical production does not entail complex technologies or highly differentiated goods, foreign pharmaceuticals will find it more attractive to import their products via licensing agreements rather than set up shop in a developing country with complicated bureaucratic red tape, a costly and time consuming drug registration system, and an unfamiliar legal regime.\footnote{205}{Maskus, supra note 11, at 127; AmCham, supra note 9, at 20.}

On the other hand, the presence of stronger IPRs may increase the costs of acquiring and diffusing technology if suppliers can negotiate higher license fees and royalties due to their monopoly power.\footnote{206}{Omer, supra note 8, at 558.} "Cartel-like restraints, exclusionary conduct and monopoly leveraging by dominant firms, practices, or mergers may chill technological innovation"\footnote{207}{United Nations Conference on Trade and Development, Competition Policy and The Exercise of Intellectual Property Rights, TD/B/COM.2/CLP22, 3 (July 2, 2001), available at wwwunctad.org/en/docs/c2clp22.en.pdf (last visited Feb. 24, 2003) [hereinafter UNCTAD2].} as well as technology transfer. Taking into consideration these competition risks, Egypt's technology transfer law appears to also serve as a competition policy.\footnote{208}{Egypt has not passed a formal competition law. Bahaa Ali El Dean and Mahmoud Moheildin, On the Formulation and Enforcement of Competition Law in Emerging Economies: The Case of Egypt, (The Egyptian Center for Economic Studies, Working Paper No. 60, 2 2001).} The second and fifth invalid contract restrictions previously mentioned address the risks associated with vertical licensing agreements. Although vertical-licensing agreements may ensure downstream product quality, they may also erode competition, as they become tie-in sales of unrelated products of technology that extend the scope of patent protection.\footnote{209}{Keith E. Maskus & Mohamed Lahouel, Competition Policy and Intellectual Property Rights in Developing Countries, 23 THE WORLD ECONOMY 595, 604 (Apr. 2000).} The third invalid contract restriction addresses the risks of fixed pricing, limiting output, and division of market issues created via the cartelization of horizontal licensing agreements.\footnote{210}{Id. at 603-05.}

The technology transfer provisions, although useful, cannot substitute for a well-developed competition policy addressing numerous other competition related problems created by strong IPRs.\footnote{211}{Id. at 603-05.} As the GOE transitions from a centralized, state-run economy to a free market, an appropriate competition policy is necessary to address the pre-existing, as well as potential, allegations of anti-competitive practices in the Egyptian market. Mergers and acquisitions are often undertaken without adequate investigation regarding their impact on market conditions and fair competition.\footnote{212}{El Dean & Moheildin, supra note 208, at 3, 23 tbl. 1 (listing recent acquisitions in Egypt by number and value).} A draft competition law, which addresses these issues and sets up an impartial and independent Competition Commission, has been proposed to Parliament. In order to maximize the
benefits of stronger IPRs in Egypt, the draft competition needs to be passed and enforced in concurrence with the full implementation of Law 82 of 2002.213

To the GOE’s credit, passage of Law No. 17 of 1999 successfully resulted in a public-private development agreement between the GOE and Siemens. Siemens plans to invest £E 1 billion to design, construct, and commission a new pharmaceutical plant during 2003 to 2005. Included in the deal is also technology transfer training for Egyptian employees and proactive efforts to export.214 Moreover, passage of another commercial law, Law No. 8 of 1997 on Investment Guarantees and Incentives provides numerous incentives for Egyptians and foreigners to invest in specific sectors as well as eliminates some obstacles to foreign direct investment.215 This law will likely prove very helpful once Law No. 82 of 2002 is fully and properly implemented. Pfizer, the largest pharmaceutical and health care product manufacturer in the world, declined to build a new, state-of-the-art production facility in Egypt because of its distrust of Egypt’s willingness to enforce its new IPR law.216 The fact that foreign firms are seriously considering foreign direct investment, but for the enforcement of IPRs, is a positive sign that Law No. 82 of 2002, in conjunction with other commercial laws, may produce the anticipated results.

VI. RECOMMENDATIONS AND CONCLUSION

Passage of Egyptian Law No. 82 of 2002 sent out a clear message to the international business community that Egypt is serious about its WTO commitments with respect to intellectual property rights. Despite this important development, intellectual property rights do not exist in a vacuum. They are closely linked and affected by competition policies, foreign direct investment laws, and regulatory schemes. Therefore, passing the law is only the first step. Egypt needs to “provide incentives to enterprises and institutions . . . for the purpose of promoting and encouraging technology transfer . . . in order to create a sound and viable technology base.”217 In order for this to come about, numerous related issues must be directly addressed and actions must be taken in order to maximize the benefits from the new law.

First, there needs to be internal improvements in the regulatory schema. The patent process should be linked with the drug registration process in order

213. Id. at 27-30 (describing the draft competition law currently in parliament).
216. Mostafa, supra note 138.
217. TRIPS, supra note 19, at art. 66(2).
to speed up the latter process as well as assure consistent case handling. The patent process should be solely controlled by the Patent Office, rather than the Ministry of Health, so as to avoid inconsistent treatment and delayed results. Patent examiners and judges need to be properly trained to handle sophisticated patent applications and disputes. A national intellectual property council should be created to oversee the granting of compulsory licenses rather than placing the decision at the sole discretion of one ministry. The price control system needs to be reformed to incorporate promotion spending, inflation, exchange rate changes, and costs of raw materials.

Second, economic incentives and public policies need to be adopted in order to support the local pharmaceutical industry through the initial transition phase. The government should take an active role in developing R&D in the nation through more public-private partnerships, a national network of government and university officials, tax incentives, and direct funding of R&D activities. An emphasis can be placed on incremental product development rather than new products that require economies of scale. Exports should be encouraged through tax incentives and technical support programs that can prepare local firms competing in the global market for the first time. The local firms should be encouraged to specialize in the phyto-pharmaceuticals sub-industry by developing plant extracts and herbal drugs from Egypt's abundant plants.

Third, other legal regimes need to be reformed. Adoption of an adequate competition law is necessary in order to protect the market from anti-competitive practices by patent holders. Commercial laws impacting foreign direct investment decisions are required to fully exploit technology transfer opportunities that arise from a stronger IPR regime. Insurance and health care policies need to accommodate the fundamental changes in the market that will inevitably take place. Adequate health insurance coverage needs to be expanded to cover

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218. AmCham, supra note 9, at 20.
219. Wahish, supra note 86.
220. AmCham, supra note 9, at 27; Lanjouw, supra note 20, at 19 (noting that patent examiners need advanced degrees and work experience in the relevant sciences in order to properly perform their job duties).
221. Wahish, supra note 86.
222. AmCham, supra note 9, at 27.
223. Id. See WTO WORKING GROUP ON TRADE AND TRANSFER OF TECHNOLOGY, supra note 197, ¶ 14, 16 (supporting "capacity building through specific projects and programs and by establishing a scientific and technological infrastructure on a cooperative basis for both the public and private research facilities" and "joint research and technology upgrading efforts by enterprises and Governments").
224. AmCham, supra note 9, at 26.
225. Id.
226. Id. at 27; See generally UNCTAD2, supra note 207, at 20-23 (describing the various ways in which competition policies with respect to IPRs need to be developed in order to promote innovation).
It is essential that these issues are identified and the linkages are made so that poor, developing nations do not idealistically expect that merely changing their IPR regime will automatically produce the proclaimed benefits espoused by the wealthy, western nations. To its credit, some of these issues have been and are currently being addressed by the GOE. For example, laws pertaining to export promotion, money laundering, special economic zones, and chambers of commerce have recently been passed by parliament. Meanwhile, the Unified Corporate Tax Law, the Anti-Trust and Competition Law, the Unified Labor Law, the Anti-Dumping Law, and the Information Technology Agreement are currently undergoing parliamentary debate. Passing such laws is an important first step. However, due to Egypt's limited human and financial resources, the nation will inevitably face numerous obstacles as it attempts to properly address such a variety of inter-linked issues.

Ideally, the developed nations will protect its own economic interests in meeting the TRIPS objective to “reduce distortions and impediments to international trade . . . and ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade[,]” by actively supporting, financially and technologically, nations like Egypt in their challenging endeavor to fully and equally benefit from the strengthening of intellectual property rights. Otherwise, developing nations' fears of becoming mere consumer targets for wealthy pharmaceutical MNEs, (rather than producers and beneficiaries of intellectual property rights) may materialize. If so, governments of developing nations will understandably protect their own interests and exploit compulsory licensing authority to the detriment of MNEs, fail to address gray market issues, and allow weak enforcement mechanisms to prevail, undermining the long-term sustainability of international intellectual property rights.


229. TRIPS, supra note 19, at Preamble.
I. INTRODUCTION

The goal of the human rights movement to formulate a jurisprudence of rights valid for all of humanity is considered laudable by some,\(^1\) offensive to

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1. HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 366 (2d ed. 2000) ("[T]he partisans of universality claim that international human rights . . . are and must be the same everywhere.").
The universality/cultural relativist debate on human rights has developed around the question of just how realistic it is to form universal rights in the presence of vastly differing local cultures. The compatibility (or non-compatibility) of Islam with human rights provides a particularly rich, and controversial, window into this debate. In Part II, I will briefly summarize the main areas in which human rights commentators have portrayed a tension between Islamic Law (hereinafter either “Islamic Law” or “Shari’a”) and human rights norms. In Part III, I will explore the three most common theories which have been propagated on the question of the universality of human rights—universalism, strict cultural relativism, and moderate cultural relativism—concluding that none of these offers a satisfactory analysis of the issue. In Part IV, the main part of this note, I begin by noting that, just as the American Critical Legal Studies (CLS) movement in the 1970s criticized the tacit acceptance of the oppressor view as neutral, the same critique could be made of the existing theories on the universality of human rights. I propose a new theory, reverse moderate relativism, which offers a superior way to conceptualize the universality question by focusing on local (in this case, Islamic) norms instead of maintaining an international bias. I will test this theory in four areas of Islamic law: the use of Zakat (almsgiving), the relationship between ‘umma (the Islamic community) and the individual, the coexistence of duties and rights in Islam, and the concept of Islamic gradualism. In these four areas, international human rights norms and local norms are converging, but contrary to the premise of moderate cultural relativists like Abdullahi Al An-Na’im, they are not (and should not be) converging towards international norms in all cases. Rather, in these four areas, international human rights norms and Islamic norms are converging towards a more Islamic standard. In Part V, I conclude that while strict cultural relativism/universality are both unrealistic, and moderate cultural relativism is neo-colonialist, reverse moderate relativism offers a refreshing new focus which continues to search for common ground between international and local norms, but with a necessary attention to underlying power dynamics.

2. Id. at 367 (“To the relativist, these [human rights] instruments and their pretension to universality may suggest primarily the arrogance or ‘cultural imperialism’ of the West, given the West’s traditional urge . . . to view its own forms and beliefs as universal, and to attempt to universalize them.”).

3. In this note, I will use the terms “local cultures” and “local norms” to refer to any culture/norm which is not an international one. But, I employ these terms broadly, to mean anything from a truly “local” culture/norm (such as the culture/norm of a specific and localized indigenous group), to domestic cultures/norms (such as the culture/norms of a specific country), to a regional or even international religious culture/norm (such as Islam/Islamic law). Thus, I refer to Islamic law as a “local norm” solely to distinguish it from international norms, since the term “domestic norms” would not be appropriate in light of the wide popularity of Islam throughout the world.
II. THE UNIVERSALITY/CULTURAL RELATIVIST QUESTION IN ISLAM

Unquestionably, there are many areas of potential tension between Shari'a and international human rights norms. In this section, I outline the areas that (Western) human rights commentators most commonly raise when the compatibility of Shari'a and human rights is at issue. The largest and most-often discussed point of contention involves the status of women, who generally cannot hold a political or judicial office, sometimes lack capacity to initiate a marriage contract or obtain a unilateral divorce, and may inherit half as much as an equally situated male. A woman’s testimony in court is valued at half that of a man’s, and monetary compensation for violent crimes (diya) is less for female victims than for male. According to some interpretations of Shari'a (some of which are state-sanctioned), her husband may chastise her, including “light beating,” demand intercourse at any time, and restrict her freedom of movement. The presence of polygamy is also considered a


5. An-Na’im, supra note 4, at 37 (“[T]he notion of general and specific qawama has had far reaching consequences for the status and rights of women in both the private and public domains. For example, Shari’a provides that women are disqualified from holding general public office, which involves the exercise of authority over men, because, in keeping with the verse 4:34 of the Qur’an, men are entitled to exercise authority over women and not the reverse”).

6. Arzt, supra note 4, at 223 (noting that “Iran, Pakistan, and Tunisia allow wives to seek divorce in a greater number of instances than Shari’a traditionally allowed . . . Divorce reforms have also been instituted in Algeria, Somalia, and the People’s Democratic Republic of Yemen.”).

7. Id. at 208; but see id. at 223 (“Tunisia has . . . altered inheritance law to allow daughters a greater share.”).

8. Holy Qur’an 2:282; Arzt, supra note 4, at 208; An-Na’im, supra note 4, at 39.


10. Arzt, supra note 4, at 208.

problem by Western human rights commentators. A close second in terms of sheer amount of commentary after the status of women is the frequently-debated tension between human rights and *Shari'a* in the area of religious freedom, including religious discrimination and *Shari'a* law of apostasy. A third and less-discussed area of tension is criminal defense rights, particularly the use of criminal penalties as retaliation (*qisas*). Fourth, a potential tension exists

A husband has a right to his wife's obedience in matters affecting the family's interests, particularly with regard to the following: She must . . . permit him to live with her and enjoy access to her . . . permit him to have licit intercourse with her . . . obey his orders without obstinacy and perform her work in the conjugal home . . . not leave the conjugal home without his permission.

*Id.*

12. An-Na‘im, *supra* note 4, at 38-39; Arzt, *supra* note 4, at 222-23 (noting that Tunisia has abolished polygamy, and that Syria, Morocco, and Pakistan have restricted it).


14. Compare Holy Qur’an 9:5 (“Slay them [those who do not believe in revealed scriptures] wherever you may find them.”), and *id.* at 3:85 (“If anyone desires a religion other than Islam, never will it be accepted of him; and in the hereafter he will be among the losers.”), with *Universal Declaration of Human Rights*, art. XVIII, G.A. Res. 217A, U.N. GAOR, 3d Sess., at 5, U.N. Doc. A/810 (1948), http://www.unhchr.ch/udhr/lang/eng.pdf (last visited Oct. 10, 2003) [hereinafter *UDHR*] (“Everyone has the right to freedom of thought, conscience and religion . . . .”); *id.* at art. II, at 2, (“Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as . . . religion . . . .”); International Covenant on Civil and Political Rights, Dec. 19, 1966, art. XVIII, para. 1, 999 U.N.T.S. 171, 178 (entered into force Mar. 23, 1976) [hereinafter ICCPR] (“Everyone shall have the right to freedom of thought, conscience and religion.”); *id.* at art. II, para. 1, at 173 (“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as . . . religion . . . .”). See also Arzt, *supra* note 4, at 223 (reporting that “the principles of religious freedom and nondiscrimination against religious minorities are now constitutionally protected in the majority of Islamic states,” but noting that “some such provisions are in conflict with other constitutional sections that establish Islam as the official state religion or *Shari'a* as a principle source of legislation”).

15. Compare An-Na‘im, *supra* note 4, at 23 (“According to *Shari'a*, a Muslim who repudiates his faith in Islam, whether directly or indirectly, is guilty of a capital offense punishable by death.”), with *UDHR*, *supra* note 14, at art. XVIII, at 5 (“Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief”) (emphasis added), and ICCPR *supra* note 14, at art. XVIII, paras. 1-2, at 178 (“Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and ... [n]o one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.”); but see Holy Qur’an 2:256 (“There should be no compulsion in religion . . . .”); see An-Na‘im, *supra* note 4, at 48 nn. 150-51.

16. Compare Arzt, *supra* note 4, at 208 (“Islamic law provides for penalties not to promote rehabilitation of the criminal but as a retaliation (*qisas*), either by financial extraction or bodily mutilation.”), with *UDHR*, *supra* note 14, art. V, at 2 (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”), and ICCPR, *supra* note 14, at art. VII, at 175 (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”).
between Shari'a and a number of Civil and Political rights, such as the right to be free from slavery, freedom of expression, and non-discrimination.

Faced with all of these possible tensions, one is likely to conclude that Islamic law and human rights are *prima facie* incompatible. But, a fertile debate continues to rage over the extent to which this is true. In the next section, I will summarize the three main theories dominating this debate—universalism, strict cultural relativism, and moderate cultural relativism—and conclude that none of these theories is adequate.

III. THREE THEORIES EXAMINED

In her comprehensive article on cultural relativism, Islam, and human rights, Kimberly Younce Schooley provided a useful framework with which to describe and analyze the universality debate, by identifying five distinct camps in the discourse: strict cultural relativism, moderate cultural relativism,
universalism, feminism, and communitarianism. Particularly useful is her distinction between strict cultural relativism, in which any contemplation of international human rights is a priori offensive to local cultures, and moderate cultural relativism, in which attention to local cultures precludes the universality of certain human rights, but that a certain set of "core" rights do transcend national and cultural boundaries. In this section, I will explore the three dominant categories Schooley identifies: Universalism, strict cultural relativism, and moderate cultural relativism. I will conclude that, for various reasons, each of these theories on the interplay between international and local norms is unsatisfactory.

A. Universalism

There are many human rights commentators that want human rights to be universal, and thus the literature on universalism is rich enough to be divided into two areas: philosophical universalism and positivist universalism. This section will treat, and reject, each in turn.

questionable rights, creating a workable, culturally sensitive list of universal rights. Schooley, supra note 20, at 682-90.

23. Universalists argue that (Western) notions of human rights are universally applicable. Schooley, supra note 20, at 691-98.

24. Feminists concentrate on deconstructing the male bias that exists, often both in the local cultures and in the international human rights laws themselves. Schooley, supra note 20, at 698-704.

25. In the beginning of Schooley's article, she claims that Communitarianism "offers an alternative framework that focuses on group privileges." Schooley, supra note 20, at 679. Yet, it is unclear why Schooley feels that "[w]hen seeking to facilitate discussion across cultural lines without falling prey to the alienation of universalism, the communitarian model, which views people in terms of their relationship to the group, is the more effective model for international dialogue." Id. at 705. Similarly, she claims that "[c]ommutarianism 'engages' with cultures excluded by liberal rights language" and that "[u]nlike cultural relativism, it does not discard universal standards." Id. at 711. But, Schooley does not explain why a preference for group privileges provides an alternative to cultural relativism or universalism, except perhaps that it would be part of a general goal of revising "international norms to remove the presuppositions that all communities are western liberal." Id. at 714; see id. at 704-14. In this note, I will attempt to expand where Schooley left off. Developing the concept of reverse moderate relativism, which searches for shared values beginning with a preference for local instead of international ones, I will provide four examples of areas in which international norms are moving closer to local norms. See this author, Part IV, infra at 14. Schooley is correct that communitarianism is one of these ways, but where she remained vague I will attempt to explain why this is so. See this author, Part IV(B)(2), infra at 14.

26. Schooley, supra note 20, at 679-82.

27. Id. at 682-90.

28. I do not examine feminism because, contrary to Schooley, I do not view it as a distinct theory of relativism per se. Rather, feminism (the deconstruction of male bias) is present in all of the theories. I do not examine communitarianism because it is unclear exactly how Schooley is using this term. See this author's comments, supra note 25, at 7.
1. Philosophical Universalism

Philosophical universalism is the belief that international human rights law can and should "transcend social and cultural idiosyncrasies by grounding moral judgments in universal principles." Thus, rather than being a solution to the tension between universal human rights norms and local customs, universalism is a rejection that the tension exists at all. The tensions I identified in part II are simply too numerous for this theory to be tenable. It is not possible to ignore these tensions, and it is neo-colonialist to discredit them. Perhaps some day—when cultures have mixed for many more millennia and human rights norms have been continuously refined—universalism will be viable, but that day is nowhere in sight.

2. Positivist Universalism

Positivists constitute another branch of the universalist school: by adopting strict legal positivist interpretations of a state's human rights obligations based on nothing more than the combination of its treaty ratifications and reservations, positivists confidently champion universality. They argue that as long as a state has made reservation to any provisions that it cannot meet, there is no threat to universalism. In fact, they contend, reservations to human rights treaties support universalist ambitions by maximizing membership in such treaties. Cook notes that "[r]eservations offer a middle path by which a convention's universality can be served by selective amendments that permit a state party to adjust its relations with other states parties while preserving ... [a human rights treaty's] integrity. ... Reservations may be ... seen as a limited concession that may be yielded in order to build an integrated world order." Indeed, reservations to human rights treaties, both by Islamic and Western states, are common.

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29. Schooley, supra note 20, at 692.
30. See Cook, supra note 4, at 684 ("Reservations may be viewed in different ways. For example, reservations may be seen as meeting the claim of sovereign states to bargain for treaty membership on their own terms, or as a limited concession that may be yielded in order to build an integrated world order."); ANTONIO CASSESE, INTERNATIONAL LAW 130 (2001) (describing state reservations and concluding that such a "legal regime has the great merit of allowing as many States as possible to take part in treaties that include provisions unacceptable to some of them").
31. Cook, supra note 4, at 711; see also id. at 680-81 ("It is proposed ... that the universal aspiration of the Convention [The International Convention on the Elimination of all forms of Discrimination Against Women] compels recognition that states parties are located at different points on the road to achievement of the Convention's obligation of result and that they may progress at different rates.");
32. Id. at 683-84.
33. See generally id.; Venkatraman, supra note 4. The most commonly reserved-to human rights treaty, by Islamic and non-Islamic states alike, is the Convention on the Elimination of All Forms of
The strongest critique of positivist universalism is that its acceptance undermines the whole system of human rights: If any given state (Islamic, Western, or otherwise) can easily ratify all human rights treaties merely by crafting reservations to relevant articles where state- and treaty-norms are in tension, human rights treaties could quickly reach universal ratification without ever effecting change at the domestic level. A false universalism is created and espoused in those treaties, ratified widely but followed nowhere.\textsuperscript{34}

\textbf{B. Strict Cultural Relativism}

Strict cultural relativism is the belief that “local cultural traditions … properly determine the existence and scope of … [human] rights enjoyed by individuals in a given society … [and] that no trans-boundary legal or moral standards exist against which human rights practices may be judged acceptable or unacceptable.”\textsuperscript{35} Strict cultural relativists “oppose any discussion of international human rights consensus as an affront to culture.”\textsuperscript{36}

Strict cultural relativism has been criticized as self-contradictory: the notion that all values are culturally relative, the belief in “the equal dignity and worth of all cultures,” or “the equal right of all peoples to participate in the formation of international law” are themselves culturally shaped value judgments, which would be void under the cultural relativist’s own theory. There is no reason for cultural relativists to accept these starting points as universal in order to support a doctrine which denies the legitimacy of

\textsuperscript{34} The positivist view that a State is subject only to its ratified treaty obligations less reservations has been considerably weakened since both the European Court of Human Rights and the Human Rights Committee have taken the view that reservations contrary to a treaty’s object and purpose are void. CASSESE, \textit{supra} note 30, at 130-31.


\textsuperscript{36} Schooley, \textit{supra} note 20, at 678.
From a normative human rights perspective, strict cultural relativism is also questionable because it has little to no support in human rights conventions. The only treatment of strict cultural relativism in a human rights convention is article 63(3) of the European Convention on Human Rights, which says that “[t]he provisions of this Convention shall be applied in [colonial territories] with due regard, however, to local requirements.” A strict cultural relativist reading of this provision has been rejected by the European Court of Human Rights in *Tyrer v. United Kingdom*, where the local custom of corporal punishment was at issue. Thus, because of the logical self-contradiction inherent in strict cultural relativism, and because of the virtual complete lack of support for strict cultural relativism in the human rights discourse, strict cultural relativism fails as a paradigm to conceptualize the universality discourse.

**C. Moderate Cultural Relativism**

Moderate cultural relativism is the belief that human rights are culturally relevant to a degree, but that there exists some minimum core of rights that can be considered universal. Thus, moderate cultural relativists concentrate on the

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39. The court interpreted the word “requirement” narrowly, and found that corporal punishment was not “required” to maintain law and order, and thus did not fit in to the exception. Tesón, *supra* note 35, at 877 (citing *Tyrer v. United Kingdom*, Eur. Ct. H.R. 5856/72 (ser. A) (1978)). As an additional defect, Schooley notes “a logical flaw in the cultural relativist argument. When stating that all cultures differ, the relativist makes a descriptive statement; however, when the relativist draws the conclusion that persons should not make cross-cultural judgments the relativist makes a normative statement. Thus, the relativist contradicts his own premise.” Schooley, *supra* note 20, at 682. For perhaps the most scathing critique of strict cultural relativism (without actually bolstering universalism), see generally Tesón, *supra* note 35. Tesón divides cultural relativism into three branches: descriptive relativism, under which “different societies have different perceptions of rights and wrong,” metaethical relativism, which holds that “it is impossible to discover moral truth,” and normative relativism, which “asserts that persons, depending on their cultural attachments, ought to . . . have different rights.” *Id.* at 886-87. The first two of Tesón’s theories are direct applications of philosophical relativism, and the third, although invoking norms, is based on a philosophical relativist rationale. According to Tesón, “[n]ot only does positive international law fail to provide any basis for the relativist doctrine, but the underlying philosophical structure of relativism also reveals profound flaws.” *Id.* at 894. He believes that “cultural relativism exhibits strong discriminatory overtones and is to a large extent mistaken in its factual assumptions.” *Id.* at 898.

40. Schooley, *supra* note 20, at 678-79 (“While maintaining a relativist perspective on the world, moderate cultural relativists accept a need for some form of minimal standard of protection that must be evaluated and legitimized through culture”). It bears mentioning that Tesón’s cultural relativism is only a critique of strict cultural relativism, and would not apply to moderate cultural relativism. See Tesón, *supra*
two tasks of defining the minimum core rights and investigating possibilities for the enlargement of this group of core norms, through reinterpretation of both local and international norms. This camp has been made famous in the Islamic context through the influential Islamic scholar Abdullahi Al An-Na’im, and his mentor Mahmoud Mohamed Taha. According to An-Na’im and Taha, “Shari’a reflects a historically-conditioned interpretation of Islamic scriptures in the sense that the founding jurists had to understand those sources in accordance with their own social, economic, and political circumstances.”

An-Na’im therefore advocates a constructive interpretation of primary sources based on modern conditions, all the way to the point of expanding the scope of *ijtihad* (Islamic legal reasoning) “to enable modern Muslim jurists … to substitute previously enacted texts with other, more general, texts of Qur’an and Sunna [the two principle textual sources of Islamic Law] despite the categorical nature of the prior texts.” Defending this technique on the grounds that “the proposed new rule would also be based on the Qur’an or Sunna, albeit on a new

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note 35, at 870. Tesón’s main thesis is that “[i]f there is an international human rights standard — the exact scope of which is admittedly difficult to ascertain — then its meaning remains uniform across borders … [and] if there is a possibility of meaningful moral discourse about rights, then it is universal in nature and applies to all human beings despite cultural differences.” _Id._ at 873. In fact, this thesis is practically the dictionary definition of moderate cultural relativism, admitting of some universal rights but remaining cautious of the scope of universality. And, just as the line between strict cultural relativism and moderate cultural relativism is often blurred, so is the line between positivist universalism and moderate cultural relativism. I have argued above that positivist universalists are mistaken to champion universalism based on treaty reservations. _See_ this author, Part III(A)(2), at 8. In some cases, however, treaty reservations may support the theory of moderate cultural relativism. For example, the fact that CEDAW is heavily reserved-to by all nations supports moderate cultural relativist argument. To the moderate cultural relativist, the high proportion of reservations to CEDAW by both Islamic and non-Islamic states shows that some core minimal set of shared universal rights does exist, but that CEDAW exceeds it. _See_ Cook, _supra_ note 4, at 663-73. The two main ways in which CEDAW offends both Islamic and Western states’ sense of acceptable international regulation is its regulatory reach into the private sphere and its breadth to include “all forms” of discrimination against women.

The Women’s Convention is a brand apart from other treaties because it seeks to regulate not only state, but also private, nongovernmental action. More specifically, the Women’s Convention seeks to influence cultural values that may prescribe the traditional roles of men and women in marriage, family relations, and other situations that are fertile ground for sexual stereotypes. It is precisely this state duty to counter discrimination in private life that renders the Women’s Convention a dynamic, as well as controversial, instrument of human rights.

Venkatraman, _supra_ note 4, at 1950-51.

41. Schooley, _supra_ note 20, at 682-83.
42. An-Na’im, _supra_ note 4, at 46.
43. _Id_. at 47 (“Working with the same primary sources, modern Muslim jurists might shift emphasis from one class of texts to the other, and interpret the previously enacted texts in ways consistent with a new understanding of what is believed to be the intent and purpose of the sources.”).
44. _Id_. at 49.
interpretation of the text," An-Na'im has employed this approach to justify various human rights through Islamic Law, such as non-discrimination, freedom of thought, conscience, and religion, abolition of apostasy, and equality of the sexes. Of the three theories explained in this section, An-Na'im's moderate cultural relativism is certainly the best. Contrary to universalism, it admits that notions of rights do differ between cultures, a reality I made readily clear in Part II. Contrary to strict cultural relativism, however, it does not discount the amount to which certain notions of rights are shared. It occupies a solid middle ground between these two extreme theories. Furthermore, at least on its face, moderate cultural relativism's goal of re-interpreting texts in light of modern conditions is consistent with the Islamic legal methods of 'Urf (considerations of custom), Maslahah Mursalah (considerations of public interest), Istihsan (considerations of equity), and changed circumstances, "whose apparent aim is to reverse the negative or unanticipated effects of a strict formalist reading ... and justify changes in doctrine."
But, although An-Na’im’s approach is prima facie valid from the perspective of these Islamic legal techniques, it should be analyzed from the perspective of Professor Sherman A. Jackson’s theory of a New Legal Formalism in Islamic Jurisprudence. Jackson analyzes the Shafi’i jurist Imam al-Haramayn al-Juwayni’s argument that non-Muslims should not serve as ‘executive viziers,” noting that “Al-Juwayni began with a set of presuppositions, among them the belief that it is not good for Jews and Christians to serve as executive viziers. From here, he would go on to validate this view by tapping into the rhetorical force supplied by usul al-fiqh [the science of source methodology in Islamic jurisprudence] and the legal master-narrative.” Just as Al-Juwayni began, and sought to validate, a set of assumptions in Jackson’s analysis, so too does An-Na’im. For An-Na’im, this set of presumptions is the superiority of international human rights. For example, Schooley notes that “although An-Na’im advocates a cross-cultural dialogue to define ‘rights,’ he actually adopts as ‘rights’ those already considered the norm in international law and advocates that the Shari’a be reformed to meet these standards. This approach seems conceptually inconsistent with An-Na’im’s cultural legitimacy theme.” Thus, despite its relative strength in comparison to the other camps, the An-Na’im school suffers a major flaw in its inherent international bias. Although it is possible under An-Na’im’s approach to reach common ground with international norms on some issues by a plausible reading of local texts, such a theory based on international norms is likely to offend local culture frequently, and is dangerously neo-colonialist. It is this ignorance of perspective that is the cornerstone of my theory of reverse moderate relativism, developed in the rest of this note.

IV. REVERSE MODERATE RELATIVISM: A DIFFERENT PERSPECTIVE ON THE DEBATE

A. Introduction: False Universalism and the Flaw of Perspective

Although there is some merit to any of the above views, and the moderate cultural relativist theory of Abdullahi Al An-Na’im has gained considerable

55. Id. at 196-98.

56. Schooley, supra note 20, at 690; see also Sayeh & Morse, supra note 4, at 331 (noting that the United Nations Declaration on the Elimination of Discrimination Against Women approaches human rights protection “from a Western perspective . . . [which] ignores an important truth: There exist in non-Western countries conceptions of human dignity which are as valid as those engendered in the West.”).

57. Even An-Na’im himself admits this, prefacing his work with the caveat: “These [constructivist] views, however, are appreciated by only a tiny minority of contemporary Muslims. To the overwhelming majority of Muslims today, Shari’a is the sole valid interpretation of Islam, and as such ought to prevail over any human law or policy.” An-Na’im, supra note 4, at 21.
attention, all of these theories contain a fundamental flaw: perspective. In other words, each proceeds on the assumption that any conflict between Islamic law and human rights norms is best resolved by a modification or reinterpretation of the Islamic norms, while the international ones remain the static. In setting up the international norms as neutral, this assumption validates international norms as a standard to be achieved by other norms, such as Islamic Law. This is as neo-colonialist as it is patronizing, and is particularly open to scrutiny in light of the fact that Islamic and other non-Western states did not have equal bargaining power in the creation of the international norms.58 In attempting to spawn universal consensus on rights based on a gravitation towards a Western-centered conception of human rights, moderate cultural relativism (and certainly universalism) do nothing more than re-enforce the (Western) oppressor view.

The concept of equality, which is all-too-often viewed through the lens of the oppressor, provides a fertile ground to explore this reality. For example, commentators have forcefully criticized procedural equality as over-simplistic when operating in a world where one group already holds the position of the accepted neutral. In his book White, Richard Dyer argues that “[t]here is no more powerful a position than that of being ‘just’ human. The claim to power is the claim to speak for the commonality of humanity. Raced people can’t do that—they can only speak for their race.”59 Professor Sherman Jackson notes that “[w]hiteness, in other words, reigns supreme precisely because it is invisible; and because it is invisible, whites enjoy the status of being ‘just people’ in the most generic sense.”60 This is exactly what occurs in the prevalent universality paradigms: by establishing human rights as the “neutral”

58. Schooley, supra note 20, at 680-81.
   It should not be forgotten that the San Francisco Conference which established the United Nations in 1945 was dominated by the West, and that the Universal Declaration of Human Rights was adopted at a time when most Third World countries were still under colonial rule. Thus to argue that human rights has a standing which is universal in character is to contradict historical reality

Id.; but see Tesón, supra note 35, at 897.
(Even if the law of human rights was originally conceived as an ideological tool [of the West] against communism, today human rights have achieved a universal scope and inspire the struggle against all types of oppression. In other words, the circumstances surrounding the origins of human rights principles are irrelevant to their intrinsic value and cannot detract from their beneficial features. (emphasis added).

Id. (emphasis added).


60. Id. at 411.
norms to be achieved, all other local norms are subjugated before the process of reconciling norms even begins.

Similarly, the Western notion of absolute equality of the sexes could be criticized because, although the equality standard to be strived for is absolute, the benchmark is masculine. In other words, the Western conception of equality among the sexes means letting women live in a masculine world like men. Just as the tacitly accepted neutral standard for race is white, the unspoken neutral standard for sex is male. Against this notion, several Islamic states have “emphasize[d] the concept of complementarity of the spouses . . . , . . . marshaling a ‘separate but equal’ argument, portraying the Islamic concept of women’s equality in terms of complementary rights, [and] ‘according women rights equivalent to the rights of their spouses so as to ensure a just balance between them.’”

These two substantive examples show that the Western notion of absolute equality is undermined by its ignorance of the neutral benchmark to which that absolute equality is expected to gravitate. As long as the neutral benchmark is the oppressor (white, male), absolute equality will be insufficient. The same can be said for human rights in general: as long as the neutral standard for gravitation is (western) human rights, any universalizing theory of human rights will have the effect of subjugating local norms to international norms in an effort to standardize them. Thus, a new theory about the universality of human rights is in order, which I will call reverse moderate relativism and elaborate in the following section.

B. Support for Reverse Moderate Relativism in Islamic Law

On a general level, the tacit acceptance of the oppressor view as “neutral” was critiqued by the Critical Legal Studies (CLS) movement born at Harvard in the 1970s. Like the legal realists of the thirties, CLS questioned the mechanics of formalism, asserting that interpreters of texts necessarily include their own beliefs in any supposedly rigid and formalistic interpretation...

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61. Venkatraman, supra note 4, at 1961 (citing Cook, supra note 4, at 704). The two most outspoken States in this regard by way of reservations to CEDAW Art. 16 have been Egypt and Morocco. Egypt’s reservation to article 16 (elimination of discrimination against women in all matters, public and private, involving marriage and the family) states Egypt’s adherence to that article must be without prejudice to the Islamic Shari’a provisions whereby women are accorded rights equivalent to those of their spouses so as to ensure a just balance between them. This is . . . in view of the fact that one of the most important bases of . . . [marital] relations is an equivalency of rights and duties so as to ensure complementarity [sic] which guarantees true equality between the spouses and not a quasi-equality that renders the marriage a burden on the wife. Cook, supra note 4, at 704 (first brackets added).

62. Jackson, supra note 54, at 182.
process. But, the CLS movement launched the greater critique that, by the addition of such personal beliefs and biases, ostensibly neutral interpreters create a "consciously preserved system of defending the interests of the powerful." Professor Sherman A. Jackson has since applied the CLS critique to usul al-fiqh. Just as the CLS movement has criticized American law for tacitly accepting and furthering the oppressor view, and just as Jackson has applied this same theory to Islamic law, so must the theories on the universality of human rights be understood and examined in light of the CLS critique. To accomplish this end, I propose a new theory on the universality of human rights is in order, which I will call reverse moderate relativism.

Like moderate cultural relativism, reverse moderate relativism proceeds on the premise that universality of human rights is impossible, but that some core set of rights or standards may exist which are universally applicable. But, reverse moderate relativism searches for these core shared values in reverse fashion from moderate cultural relativism: instead of starting with the international value as the neutral benchmark and reinterpreting local law to draw it closer to the international norm, reverse moderate relativism takes a given local law as the neutral standard, and exposes ways in which international law has drawn closer to that standard. Thus, in the remainder of this note, I will attempt to refocus the debate in the reverse moderate relativist model, considering four possible areas where Islamic law and human rights law are becoming more similar by way of a Western doctrinal gravitation towards an Islamic standard. While this approach does not aim to be exhaustive nor causative, such examples provide a much-needed respite from the excess of literature on the universality of human rights written in the Western-international-neutral paradigm.

1. Islam's Zakat and the International Right to Social Security

In the Islamic faith, the duties to God are encompassed in the "five pillars of Islam." These include the profession of faith (shahada), prayer (salat)
facing Mecca five times a day and a prayer in a community on Friday at noon, almsgiving (zakat), fasting during the month of Ramadan, and making a hajj pilgrimage to Mecca at least once in a lifetime if physically and financially able. This section will examine the zakat from a reverse moderate relativist standpoint.

The payment of Zakat by Muslims helps to "support the poor, orphans, and widows, [and] to free slaves and debtors." The actual administration of zakat has varied throughout time and from region to region, and the extent that zakat actually serves as a wealth-redistributing device is open for debate. But, an

68. Id.; see also Hamid M. Khan, Nothing is Written: Fundamentalism, Revivalism, Reformism, and the fate of Islamic Law, 24 MICH. J. INT'L L. (forthcoming 2003).
69. Schooley, supra note 20, at 668 n.94 (citing ESPOSITO, supra note 67, at 92); see also Arzt, supra note 4, at 207.
70. Zakat has a long and complex history. It is generally considered a wealth tax, but could be considered an income tax. Timur Kuran, Islamic Redistribution Through Zakat: Historical Record and Modern Realities, in POVERTY AND CHARITY IN MIDDLE EASTERN CONTEXTS (Michael Bonner, et al., eds.) (forthcoming) ("Zakat was initially a wealth tax, and to this day it is generally defined as such. ... But the decision to limit collections to a share of 'apparent wealth' turned the obligatory levy into what we would now call an income tax."). According to Professor Kuran, at the time of the Prophet Mohammed, "all taxes were called zakat," including customs duties, but the precise scope of zakat has since narrowed considerably. Id. at 8. Furthermore, at any one time, Zakat often differs substantially from one region to another. Kuran notes that "[in every country with a government-sponsored or -operated zakat system (including Malaysia, Pakistan, and Saudi Arabia), rates, exemptions, collection methods, and disbursement patterns have varied over time; and variations across countries are ... sharp." Id. at 1.
71. See id. at 2.

[P]overty alleviation is but one of the objectives that zakat was initially meant to serve. Indeed ... zakat was not designed solely, or even primarily, to redistribute wealth in the manner of a progressive tax scheme, or as an antidote to poverty in the manner of a welfare program. Although the Qur'an and the Sunna ... contain prescriptions consistent with using zakat to transfer wealth to the poor, the system's past applications are compatible with any number of other objectives, even redistribution in favor of the rich.

Id. at 2. Kuran's point, that zakat does not always benefit the poor and may benefit the rich, repeated many times over in his paper, is founded on the fact that the rich could potentially be among the eight possible beneficiaries of zakat (the poor, the needy, zakat administrators, potential converts and Muslims who might yet renounce Islam, manumitted slaves, debtors, people fighting for God, and wayfarers). Id. at 6 (citing Holy Qur'an 2:177, 2:217, 4:8, 9:60, 24:22). For example, according to Kuran, any rich Muslim who is fighting for Islam could "demand assistance," and "even the wealthiest traveler could make a case for having the state treasury cover his expenses." Kuran, supra note 70, at 6. This is a weak critique. Although Kuran repeatedly emphasizes that redistribution back to the rich is possible, he advances very little evidence to show it is common, or likely. Assuming zakat often functions as an effective wealth re-distribution system, it should
analysis of Islamic Law is concerned about norms, not facts or history. Normatively, Kamali notes that “[t]he Qur’an often indicates the rationale of its laws either explicitly or by reference to its objectives. . . . [T]he rationale of zakah is to prevent the concentration of wealth in a few hands, which is clearly stated in the Qur’an (al-Hashr, 59:7).”72 Similarly, Qur’an 51:19 states “And those who seek help and are needy have due share in their wealth.”73 In fact, “at least a dozen Qur’anic passages have been interpreted as instructing believers to establish foundations serving religious or charitable purposes.”74 Thus, through zakat and other social equalization measures,75 Islam has since the time of the Prophet placed a heavy concern on wealth redistribution and the elimination of poverty by creating individual duty incumbent on each Muslim to surrender a percentage of his or her income to the needs of others.

The importance of social equalization and wealth redistribution is also recognized in human rights, particularly in the human rights discourse on economic, social, and cultural rights (hereinafter “ESC rights”).76 For example, the International Covenant on Economic, Social, and Cultural Rights (hereinafter “ICESCR”) claims a right to social security,77 the right to an “adequate...
standard of living,"78 and the rights to be free from hunger.79 But, whereas zakat is a concrete duty upon Muslims which falls under criticism only because it can lead to perverse results or is not always followed,80 ESC rights have not even reached the preliminary level of creating concrete duties.81 In fact, even the extent to which ESC rights are individual rights at all is highly debatable, as can be evidenced by the lack of an Optional Protocol to the ICESCR along the lines of the Optional Protocol individual complaints mechanism that exists for the International Covenant on Civil and Political Rights.82 No such Optional Protocol exists because ESC rights are considered by many human rights commentators to be un-justiciable.83 The two largest human rights non-governmental organizations have also until recently refused to consider them.84 Thus, from a strictly normative standpoint, zakat norms create quantifiable

78. Id. at art. XI, para. 1, at 7 ("The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.").

79. Id. at art. XI, para. 2, at 6.

80. See Kuran, supra note 70, at 1-8, 19; this author’s comments, supra notes 70-71, at 17-18.

81. Kitty Arambulo, Essay, Drafting an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: Can an Ideal Become Reality? 2 U.C. DAVIS J. INT’L L. & POL’Y 111, 116 (1996) (noting the “vagueness of the formulation of economic, social and cultural rights, and the opaque normative contents of those rights”). Furthermore, it is interesting to note that social equalization under ESC rights concentrates only on deprivation, whereas some have argued that Islam is also concerned with over-affluence. Arzt comments that “[j]ust as extreme poverty leads to non-belief, riches are to be shunned, because they offer enticement to sin.” Arzt, supra note 4, at 208. Although certain schools of thought which influenced the drafting of human rights conventions (socialism, communism) are equally antithetical to individual wealth, from a normative standpoint the text of the ICESCR never takes any stand against wealth. Rather, it takes a stand against poverty and deprivation, while staying neutral on wealth. Thus, whereas zakat is, according to Arzt, concerned about equalization at both the privileged and deprived ends of the spectrum, ESC rights are solely concentrated on the deprivation end.

82. Arambulo, supra note 81, at 128.

83. Id. at 125.

84. Moreover, Amnesty International, the world’s largest human rights non-governmental organization (hereinafter NGO), had excluded ESC rights from its mandate until a recent change in 2001. Change in the Air for AI: The 2001 International Council Meeting Sets a New Course for the Future of AI, THE WIRE, Oct. 2001, http://web.amnesty.org/80256A3B00688CC9/0/77AACFCBED 7901C880256AD200370C62?Open&Highlight=2,mandate (last visited Oct. 3, 2003); This change came against bold criticism that Amnesty International’s mandate should stay fixed. See Katherine E. Cox, Should Amnesty International Expand Its Mandate to Cover Economic, Social, and Cultural Rights? 16 ARIZ. J. INT’L & COMP. L. 261 (1999); Similarly, Human Rights Watch, the world’s second largest human rights NGO, has only recently begun addressing violations of ESC rights, and even this most often occurs when the ESC violations “result from violations of civil and political rights or must be remedied as part of a plan for ending violations of civil and political rights.” Economic, Social, and Cultural Rights, (Human Rights Watch, New York, N.Y.), at http://www.hrw.org/esci (last visited Sept. 27, 2003). To its credit, Human Rights Watch, in the early 1990s, took a strong stance that ESC rights are fundamental to effective civil and political rights. See generally HUMAN RIGHTS WATCH, INDIVISIBLE HUMAN RIGHTS: THE RELATIONSHIP OF POLITICAL AND CIVIL RIGHTS TO SURVIVAL, SUBSISTENCE AND POVERTY (1992).
obligations on the part of each individual Muslim, while ESC rights create only ambiguous, general rights, with no individual duties.  

In recent years, however, interest in ESC rights has increased. A growing number of commentators are now arguing for the justiciability of ESC rights, and serious efforts are underway to create an Optional Protocol to the ICESCR which would render the debate over ESC rights much more individualized and specific. The debate is finally moving "from the legal character and validity of economic, social and cultural rights, to the problem of their application before quasi-judicial bodies."

In the area of wealth equalization, the rules of zakat, although not always effective, have been more rigid, quantifiable, and individualized than anything possibly conceived in the domain of ESC rights. With the growing interest among ESC rights commentators to further specify and individualize ESC rights, reverse moderate relativism demands nothing more than that those commentators recognize that such movement would be towards a standard that is more Islamic. Reverse moderate relativism does not imply that Islam influenced or caused this change, but rather attempts to refocus the universality debate in a more objective light, acknowledging that no ideology has all of the right answers or should ever be considered a neutral, benchmark standard.

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85. Certainly, if one were to leave normative judgment, it would perhaps be even easier to make the case that ESC rights, and human rights in general, have not led to tangible change any more than zakat. For the most convincing analysis yet, see Oona A. Hathaway, Do Human Rights Treaties Make a Difference?, 111 YALE L.J. 1935 (2002) (arguing based on extensive empirical analysis that human rights compliance of states decreases after ratifying human rights treaties). However, in this note I confine the analysis to the law itself, both of human rights and of Islam.

86. Arambulo, supra note 81, at 129-31.

87. Id. at 133 (noting the "quasi-judicial character of the proposed Optional Protocol to the ICESCR").

88. According to the ICESCR, the adoption of [an Optional Protocol to the ICESCR] ... would greatly enhance the understanding of economic, social and cultural rights in general for the following reasons: (1) a more detailed complaints procedure would be able to bring relief in concrete cases; (2) the focus on a particular case would provide a framework for inquiry which is otherwise absent in a report on the general situation; (3) the mere possibility that complaints might be brought in an international forum would encourage governments to ensure more effective local remedies with respect to economic and social rights; (4) the possibility of an adverse finding by an international committee would give economic and social rights political salience; (5) the existence of a potential remedy at the international level would provide an incentive to individuals and groups to formulate some of their economic and social claims more precisely; and (6) a complaints procedure would produce a tangible result, which is far more likely to generate interest in and understanding of the Covenant as a whole and of specific issues. Id. at 127-28.

89. Id. at 134.

90. Indeed, to the extent that moderate cultural relativists argue that international norms influenced or should influence changing interpretations of local standards, dangerous neo-colonial implications arise, particularly in light of differing levels of participation in the international system.
2. The Synergistic Relationship between the ‘Umma and the individual in Islam

This section compares the complex relationship between the individual and the ‘umma (Islamic community) in Islam to the historically simple preference for the individual in the Western liberal human rights tradition. After outlining the complex interplay between individual and ‘umma in Islam, it argues that the addition of “third generation” rights to the human rights discourse creates, from a reverse moderate relativist perspective, a similar level of complexity between individual and group importance that has long existed in Islam. Although still a legal analysis, this section takes a post-formative approach, relying more heavily on present day legal authorities and less on textual reference.91

The status of the individual in Islam is complex, and has at times been over-simplified. For example, Schooley notes that “non-western countries, such as those that are Islamic, define personal identity in connection with one’s group membership.”92 Although this may be true, it cannot be said that the group carries absolute importance over the individual in Islam. Muhammad ‘Amara, an Egyptian religious scholar and author, describes the Islamic balance between individual and group:

Islam doesn’t think either that the human being is the supreme being in creation, or that he is indistinguishable from the rest of creation. Man is the representative (khalifa) of God, and human beings have liberties that reflect their nature as God’s representatives. These liberties are not absolute, they are bounded. So the individual as civil and social being is free, but all this is limited by the need for the freedom of the society. There has to be a balance between what is good for the individual and good for the group—they are not mutually exclusive. This . . . is very different from the Western view where, in the democratic state, the ruling class’s interests take precedence; or where, in the authoritarian state, the state’s interests take precedence. In Islam, the ‘umma’s interests take precedence, not those of the ruling class, not those of the state, and not those of the individual.

91. See Sherman A. Jackson, Kramer Versus Kramer in a 10th/16th Century Egyptian Court: Post-Formative Jurisprudence between Exigency and Law, 8 ISLAMIC LAW AND SOCIETY 27, 32 (2001) (defining post-formative jurisprudence in these terms and noting that “[b]ecause of disparity in narration on the authority of the early authorities and differences in the way in which subsequent scholars extrapolated from these views, there came to exist a multiplicity of views within a school”).

92. Schooley, supra note 20, at 679-80. See also Téson, supra note 35, at 883 (“[T]he concept [that] human dignity implies that high priority should be given to individual choices in ways of life, beliefs and the conduct of public affairs. This concept, however, simple as it is, clearly contradicts many existing ideologies and political arrangements.”) (citation omitted).
So, in this sense, Islam has a moderate view of the individual: the individual is free in so far as it is of benefit to the community. So, in this sense, Islam has a moderate view of the individual: the individual is free in so far as it is of benefit to the community.  

Similarly, according to Salah ed-Din Jorshi, a leading Tunisian religious intellectual, it is incorrect to emphasize the concept of tawhid (unity of belief) and umma to "reinforce the domination of the community over the individual and to encourage conformity." Jorshi notes that:

in Islam the individual exists: on the Day of Judgement, God does not speak with the 'umma, He speaks with each individual. ... So, at one and the same time there is the 'umma and there is the individual. And in order to have an Islamic view of freedom, of the individual, of human rights, you have to have a vision of the whole society and also of the rights of the individual.

Thus, rather than a simple superiority of the umma over the individual, as many commentators have attempted to construct, Islam is a subtle balance of interests between them. In his authoritative treatise on Islamic law, Mohammad Hashim Kamali specifically notes that, in some areas "rights of the community and those of the individuals are combined." At times, this combination is weighted toward individual rights, such as:

[r]etaliation (qisas), and blood-money (diyeh) of any kind, whether for life or for grievous injury. ... The community is entitled to punish such violations, but the right of the heirs in retaliation and in diyeh for erroneous killing, and the right of the victim in respect of diyeh for injuries, is preponderant in view of the grievance and loss that they suffer as a result. The guardian (wali) of the deceased, in the case of qisas, is entitled to pardon the offender or to accept a compensation from him. But the state, which represents the commu-

93. KEVIN DWYER, ARAB VOICES: THE HUMAN RIGHTS DEBATE IN THE MIDDLE EAST 78 (1991) (emphasis added); see also id. at 91:

One of the problems in reconstructing civil society is that in Tunisia, today, everyone is talking of rights and freedoms. But if everyone thinks only of their own rights and freedoms, society will destroy itself, because we are a society that doesn’t have everything, that is permeated by scarcity. ... And that’s why, at the same time that we talk of rights and freedoms, we have to also talk of duties and obligations, which are essential for us in this historical moment. A society that talks only of rights becomes not a society, but an archipelago.

(quoting personal interview with Salah ed-Din Jorshi, one of Tunisia’s leading religious intellectuals).

94. Id. at 90.
95. Id.
96. KAMALI, supra note 50, at 349.
nity, is still entitled to punish the offender through a ta'zir punishment even if he is pardoned by the relatives of the deceased.97

In other situations, there is debate among the Islamic schools about where the emphasis should fall:

The right to punish a slanderer (qadhif) belongs, according to the Hanafis, to [the] class, by reason of the attack made on the honour of one of its members. Since the Right of God is dominant in qadhf, the victim of this offence (i.e. the maqdhuj) cannot exonerate the offender from punishment. The Shafi'is have, however, held the contrary view by saying that qadhf is an exclusive Right of Man and that the person so defamed is entitled to exonerate the defamer.98

Regardless of whether one sides with the Hanafis or the Shafi'is on this particular question, it is clear that there is a place in Islamic law for both individual and community interests. It may be true that Islam, and other non-Western legal and moral traditions, place a heavier emphasis on the community ('umma)99 than Western liberal traditions. But, to say that Islamic law affords no place at all for the individual would be misguided, ignoring the subtle coexistence between individual rights and duties that Jorshi describes, the very real presence of haqq Al-'abd (Islamic private rights)100 and active debate among the schools on this very question. Rather, in Islamic law, rights of the individual and duties to the 'umma can be said to coexist in a synergistic relationship.

97. Id. at 350.
98. Id. at 349-50.
99. Kamali's exploration of the numerous haqq Allah is illustrative. See Kamali, supra note 50, at 348-50; this author's comments, infra notes 115-120. Kamali specifically notes that haqq Allah "is called so not because it is of any benefit to God, but because it is beneficial to the community at large and not merely to a particular individual." Kamali, supra note 50, at 348-49. In the framework of this note, it should be noted, however, that notwithstanding Kamali's description, most of the principles he categorizes under haqq Allah are more appropriately categorized as duties of the individual to the group than rights of the group itself. See Part IV(B)(2)(3) of this article. Therefore, the norms Kamali mentions are specifically enumerated in the next section on duties. See Kamali, supra note 50, at 348-50; this author's comments, infra notes 115-120. Perhaps Kamali would argue that there is no difference between duties of the individual and rights of the group—that the two categories are reciprocal—but at least for this author, it is easier to conceptualize norms such as hajj, jihad, zakat and hudud as individual duties, not group rights. There are some exceptions, which are more easily conceptualized as group rights, including the uqubah qasirah (minor punishments) such as excluding the murderer from the inheritance of his victim, the kaffarat penances, and "community right to mineral wealth or to the spoils of war (ghana'im)." Kamali, supra note 50, at 349.
100. See Kamali, supra note 50, at 348-50; this author's comments, infra notes 115-20.
Human rights law, on the other hand, has historically placed a strong emphasis solely on the individual. For example, Professors Henry Steiner and Philip Alston state in their authoritative text on human rights that "[o]bservers from different regions and cultures can agree that the human rights movement . . . stems principally from the liberal tradition of Western thought. . . . [and that] [n]o characteristic of the liberal tradition is more striking than its emphasis on the individual." Amidst a historical tradition recognizing "first generation" civil and political rights of individuals, and "second generation" economic, social, and cultural rights of individuals, it is only recently that the human rights discourse has been enriched, becoming more like the Islamic discourse, to recognize the importance of the group simultaneously with the importance of the individual. Commentary on the importance of groups within society has spawned the most-recent and least developed category of human rights, the so-called "third-generation" human rights (group rights). This innovative category of "third generation" rights includes such group rights as the right of self-determination, the right to development, and the right to peace. A current and highly debated third generation right is affirmative action. Just as, "in the 1950's, the concept of and need for economic, social, and cultural rights were heatedly debated," now "the opponents of the[se] new rights contend in a similar manner that the third-generation rights are not really legal

101. STEINER & ALSTON, supra note 1, at 361-62.

102. DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 95-96 (2001) (listing "first generation" civil and political rights, such as "freedom from slavery, torture, the right to recognition and equality before the law, freedom from arbitrary arrest and the guarantee of fair criminal procedures, and respect for rights of worship and expression").

103. Id. at 96 (listing "second generation" economic, social, and cultural rights, such as "the right to work, to rest and leisure, to education, and to participation in cultural life").


105. Id. at 48-52.

106. Id. at 52-56.

107. Id. at 56-59.

108. See Jason Morgan-Foster, From Hutchins Hall to Hyderabad and Beyond: A Comparative Look at Affirmative Action in Three Jurisdictions, 9 WASH. & LEE R.E.A.L. J. (forthcoming 2003) (arguing that "as a human right, affirmative action [is] . . . a positive duty on a government and it protects group rights"); Louise Mulder, How Positive can Equality Measures Be?, in NON-DISCRIMINATION LAW: COMPARATIVE PERSPECTIVES 65 (Titia Loenen & Peter R. Rodrigues eds., 1999) (arguing that, by its very nature, affirmative action represents some willingness to acknowledge group rights no matter what the jurisdiction); see also Stephanie Browning, et al., Dueling Fates: Should The International Legal Regime Accept a Collective or Individual Paradigm to Protect Women's Rights?, 24 MICH. J. INT'L L. 347 (2002) (a recent symposium attracting far less publicity than the affirmative action cases, but also at the University of Michigan and strongly signaling an increased interest in group rights).
rights but are either political or social principles, or, at best, ‘moral’ rights.’

Although third generation group rights remain controversial, they have become a regular part of the human rights discourse. From a reverse moderate relativist perspective, human rights has moved more towards an Islamic standard: it has moved away from a juridical structure which focused solely on the individual towards a discourse in which the individual and group are both primary topics of concern.

3. The Co-existence of Duties and Rights in Islam

This section begins by analyzing the co-existence of duties and rights in Islam. It then argues that recent movements to emphasize individual duties and responsibilities are another area that, from a reverse moderate relativist perspective, the human rights discourse is approaching an already existing Islamic dialogue.

Some commentators describe Shari‘a as if duties held absolute priority over rights. For example, A. Said explains that in Islam:

[H]uman rights . . . exist only in relation to human obligations. Individuals possess certain obligations toward God, fellow humans, and nature, all of which are defined in the Shariah. When individuals meet these obligations they acquire certain rights and freedoms which are again prescribed by the Shariah. Those who do not accept these obligations have no rights, and any claims of freedom that they make upon society lack justification.10

Similarly, Donna A. Arzt states that:

The Quran has numerous references to duties (farud), but the few references to rights (huquq) are better translated as “claims” and have particular and specialized application to penal law. The only rights that are “inalienable” in the Western, natural rights sense, are those belonging to Allah and to the state, Allah’s servant.11

A preference for the language of duties over rights is also evident in at least two Constitutions of states with a large Islamic population. Article 12 of the Constitution of Saudi Arabia states “The consolidation of national unity is a duty, and the state will prevent anything that may lead to disunity, sedition and

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111. Id. at 206.
Similarly, The Iraqi Constitution prefers the language of duties over rights in its Article 32(b): "Work is an honor and a sacred duty for every able citizen." But, the mere fact that Islamic law places importance in duty does not necessarily eliminate any place in Islamic law for individual rights. Quite the contrary, Professor Sherman Jackson states that "the relative dominance and sanctity in Islamic law of individual rights gives rise to a formidable high burden of proof for alienating private rights in pursuit of broader social interests." The importance of Islamic duties has been over-stated, ignoring the very real presence of private rights in Islamic law. In his authoritative treatise on Islamic law, Mohammad Hashim Kamali describes this relationship as one between haqq Allah (rights of God) and haqq al-'abd (rights of man). Haqq Allah, which generally embody individual duties, include iman (professing the faith), salah (prayers), zakah (almsgiving), the hajj (pilgrimage), jihad (holy war), the 'id al-fitr (charity given at the end of Ramadan), the tithe levied on agricultural crops, the kharaj (tax on land in the conquered territories), and the hudud (penalties for theft and adultery). Haqq al-'abd, "which exclusively consist of the rights of men," include:

The right to enforce a contract, or the right to compensation for loss, the purchaser's right to own the object he has purchased, the vendor's right to own the price paid to him, the right of pre-emption (shuf), and so on. To enforce such rights is entirely at the option of the individual concerned; he may demand them or waive them, even without any consideration. This divide between haqq al-'abd and haqq Allah, not always well delineated, is clear evidence of the simultaneous presence of both individual

112. SAUDI ARABIA CONST. art. XII (emphasis added).
113. IRAQ CONST. art. XXXII, para. b.
114. Jackson, supra note 54, at 410 (emphasis added).
115. KAMALI, supra note 50, at 348-50.
116. Kamali appears to consider haqq Allah as group rights rather than individual duties to the group. Based on the norms he lists, I disagree with this categorization. See KAMALI, supra note 50, at 348-50; this author's comments, supra note 99.
117. KAMALI, supra note 50, at 349.
118. Id.
119. Id.
120. See id.

According to the Maliki jurist al-Qarafi, all rights in Islam partake in the Right of God in the exclusive sense that there is no right whatsoever without the haqq Allah constituting a part thereof. Thus when a person buys a house, he exercises his private
rights and individual duties in Islamic law. Thus, similar to the synergy between individual and 'umma in Islam, a co-existence also exists between an individual's duties and rights. This combination of rights and duties is exemplified in Article 10 of the Constitution of Iraq: "[S]ocial solidarity is the first foundation for the Society. Its essence is that every citizen accomplishes his duty in full, and that the Society guarantees the citizen's rights and liberties in full." As is clear from this provision, it is the combination of individual rights and duties which leads to social solidarity, rather than a complete preference for either rights or duties.

Against this coexistence of rights and duties in the Islamic discourse, human rights law has, on the other hand, a historical normative grounding in rights, with hardly any focus on duties. Until very recently, the only "duties"

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right insofar as it benefits him, but the transaction partakes in the Right of God insofar as the buyer is liable to pay the purchase price.

Id.

121. IRAQ CONST. art. X.

122. STEINER & ALSTON, supra note 1, at 323 (noting that a "fundamental characteristic of the UDHR and ICCPR [is] their foundation in the rhetoric and concept of rights"). See also CEDAW, supra note 33 (fifty references to rights and no references to duties); Convention on the Elimination of All forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereinafter CERD] (forty-five references to rights and no references to duties); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 113 [hereinafter Convention Against Torture] (entered into force June 26, 1987) (fifteen references to rights and only one reference to duties (art. 10)); Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC] (entered into force Sept. 2, 1990) (seventy-six references to rights and three references to duties (arts. 3, 5, 14)); but see Ben Saul, In the Shadow of Human Rights: Human Duties, Obligations, and Responsibilities, 32 COLUM. HUM. RTS. L. REV. 565, 581 (2001) (arguing that "contrary to the assertions of the human responsibilities movement, there is rich and detailed critical literature addressing ideas of human duty, obligation, and responsibility in Western rights discourse and theories of morality"). Saul's strongest argument, that "[d]uty is central to contract, tort, equity, and criminal law," is weakened by the fact that, although potentially representative of many Western domestic systems, it says little about international human rights' notion of duty. Id. at 583.

The closest domestic relative of international human rights law, after all, is constitutional law, which is not included on Saul's list. Similarly, Saul's argument that "Rousseau's social contract presupposed reciprocal rights and responsibilities," says little about international human rights law, which is a creature apart from Rousseau. Id. at 584. Saul's main example is "correlative duties, referring to those duties that complement specific rights." Id. at 585. But, reliance on correlative duties to make the case for the existence of duties in the Western conception of human rights is weak, since correlative duties are not duties in their own right, but mere reformulations of existing rights. See STEINER & ALSTON, supra note 1, at 342, 361-62, 585; author's comments, infra note 125 Saul's discussion of duties language in regional human rights mechanisms seems to directly contradict his point that duties language is present in the Western rights discourse, since Saul himself claims that such regional treaties provide a mechanism for regional preferences to be acknowledged despite differing Western-dominated international preferences. Saul, supra note 122, at 591-96. When Saul does discuss international human rights, he rests his argument generally on articles of the UDHR. Id. at 588-91. The UDHR is not a treaty constituting binding human rights law, and the extent to which the UDHR represents customary international law is much more complicated than Saul admits. See, e.g., Hurst Hannum, The Status and Future of the Customary International Law of Human Rights: The Status of the Universal
language to emerge with regularity from the human rights movement was that of correlative duties, which exist only because of the presence of rights (such as the right to free speech implying a duty not to interfere in others' speech,123 or the right to be free from torture implicating a duty upon the state not to torture124), and are thus analytically distinct from the discourse on duties to a larger social group discussed supra in the Islamic context.125 Aside from the rare preambular reference to duties in two human rights instruments,126 human rights law has been completely grounded in the normative language of rights.127 As the name “human rights” itself suggests, “rights” and not “duties” have historically been its focus.

Against this historical focus in individual rights, there has been in the past few years a growing emphasis being placed on individual duties to groups. Beginning with the United Nations Commission on Global Governance’s 1995 report on individual responsibilities, entitled Our Global Neighbourhood,128 many declarations have been produced by various international bodies, including the Universal Declaration of Human Responsibilities, produced by the Inter-

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123. Saul, supra note 122, at 585.
124. STEINER & ALSTON, supra note 1, at 342.
125. Id. (emphasizing that the kinds of duties found in non-Western contexts “are not the same as duties within a scheme of rights that are correlative to the described rights”) (emphasis in original).
126. Saul, supra note 122 at 589. The UDHR art. 29 also contains a reference to duties, stating “Everyone has duties to the community in which alone the free and full development of his personality is possible.” UDHR, supra note 14, at art. XXIX para. 1, at 8. When the UDHR was codified in two binding Covenants, this reference to duties is now found only in the preambles.
127. See STEINER & ALSTON, supra note 1, at 323; CEDAW, supra note 33; CERD, supra note 122; Convention Against Torture, supra note 4; CRC, supra note 122; Saul, supra note 122, at 581; STEINER & ALSTON, supra note 1 at 342, 361-62, 585; Hannum, supra note 122.

Perhaps most notably of all, the debate over individual duties entered the UN human rights machinery with the Resolution on Human Rights and Human Responsibilities, by the United Nations Human Rights Commission.135 This has been followed by the appointment of a Special Rapporteur to study the question of human responsibilities and duties,136 who released a preliminary report on the subject in 2002,137 and will release his full report at the 59th Session of the Human Rights Commission later this year.138

In addition to this express advocacy and study of human duties, a number of other examples can be cited which implicitly do the very same thing. First, the growing movement in corporate social responsibility is easily characterized


131. Id. (citing Declaration of Responsibilities and Human Duties, City of Valencia (Valencia Third Millennium Foundation) & UNESCO (1998), http://globalization.icaap.org/content/v2.2/declare.html (last visited Oct. 2, 2003)).


133. Id. (citing A Declaration of Human Responsibilities, United People’s Assembly (1998), http://acgc.org/Documents%20Page.htm (last visited Oct. 10, 2003)).

134. Saul, supra note 122, at 574 (citing Universal Declaration of Human Responsibilities, The Hart Center (UK) (1998)).


138. Id. para. 119.
as a movement advocating increased individual duty, since corporations are legal individuals.\textsuperscript{139} Second, the building emphasis on the duty to protect the environment provides another salient example. Whereas many international treaties present a clean environment as a right, a growing number of such treaties are now emphasizing the duty to protect the environment over the right to enjoy it.\textsuperscript{140} Third, Saul notes that "human rights law occasionally recognizes the collective responsibility of present communities for past action by communal ancestors."\textsuperscript{141}

From a reverse moderate relativist perspective, this move from a wholly rights-centered discourse to one which combines rights with duties is another example of the international model moving closer to the Islamic one. The report of the UN Special Rapporteur studying responsibilities and duties emphasizes this point, noting that "the relationship between the individual's rights and duties" had already been "made clear in several provisions of the Cairo Declaration" on Human Rights in Islam.\textsuperscript{142} The emerging standard among human rights commentators recognizing the co-existence of rights and duties should be seen for what it is: a standard in which the Islamic conception was the benchmark for the human rights dialogue to approach.

4. Islamic Gradualism and Dynamic Human Rights Norms

Leila P. Sayeh and Adriaen M. Morse, Jr. use the term gradualism to describe the way Islamic law "proceeds by degrees, over time, advancing slowly but regularly" to suit evolving standards in the Islamic community itself.\textsuperscript{143} As a conceptual framework,\textsuperscript{144} gradualism can be observed in the measured and

\begin{itemize}
\item \textsuperscript{139} Saul, supra note 122, at 597.
\item \textsuperscript{141} Saul, supra note 122, at 599-600 (noting "compensation to Holocaust and World War II victims, victims of medical experimentation, for slavery and colonization, and for the dispossession of indigenous peoples, including genocidal child removal policies") (citations omitted).
\item \textsuperscript{142} Preliminary Report of the Special Rapporteur, supra note 137, ¶ 82 (citing the Cairo Declaration on Human Rights in Islam, Nineteenth Islamic Conference of Foreign Ministers, UN Doc: ST/HR/1/Rev.5 (Vol. II) (Aug. 5, 1990) (hereinafter "Cairo Declaration")).
\item \textsuperscript{143} Sayeh & Morse, supra note 4, at 318.
\item \textsuperscript{144} In addition to describing gradualism as a conceptual framework, Sayeh & Morse also describe gradualism as a method of interpretation. This conception of gradualism, championed by the exiled Sudanese
\end{itemize}
time-sensitive way in which certain points of Islamic law were revealed to the Prophet. For example, beginning in a time when "Arabs had been accustomed to drink alcohol and gamble," God gradually revealed Qur’anic verses on the interdiction of drinking and gambling to the Prophet Mohammed, first revealing a mere recommendation on their disuse, then a moratorium on drinking during the hour of prayer, and finally an “outright and absolute interdiction of all intoxicants and gambling in all circumstances.” Sayeh and Morse argue that gradualism produced more effective, lasting social change in “[c]ertain cultural practices and habits common in Arab society [which] … were less amenable to instant change” by preparing them “little by little” for the “full Word of God.”

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scholar Abdullahi Al-An-Na’im, is open to critique. See this author, supra part III(C), at 10. An example of this gradualism in interpretation is found in the Qur’anic verses on polygamy. Potentially because of then-existing situations (the battle of Uhud, killing ten percent of Muslim men and leaving many women and children without means of support), the Qur’anic verse 4:3 was revealed, allowing a Muslim man to marry up to 4 wives. Sayeh & Morse, supra note 4, at 328 (citing Holy Qur’an IV:3). But, verse 4:129 later qualifies verse 4:3 by stating that “Ye are never able To be fair and just As between women, Even if it is Your ardent desire,” Sayeh & Morse, supra note 4, at 328 (citing Holy Qur’an 4:129). Under gradualism of interpretation, the two verses must be read together, the latter being accepted as a qualification of the former based on changing times. This approach has indeed been adopted by the Tunisian personal Statute Code, exemplifying the “application of principles of religious interpretation to allow Islam to best serve the needs of a modern society.” Sayeh & Morse, supra note 4, at 330. For a thorough treatment of the interplay of these two Qur’anic verses on polygamy, see QUAMARUDDIN KAHN, STATUS OF WOMEN IN ISLAM 21-22 (1988); JOHN L. ESPOSTO, ISLAM: THE STRAIGHT PATH 97 (1991); Sayeh & Morse, supra note 4, at 329, n.122 (citing Azizah F. al-Hibri, A study of Islamic Herstory: Or How Did We Ever Get into This Mess? 5 WOMEN’S STUD. INT’L F. 207, 216 (1982)). For an exhaustive account of human rights in Tunisia, which has taken gradualism to the extreme and takes international human rights norms far more seriously than some Western countries, most notably the United States. See Republique Tunisienne, Les Droits De L’Homme et des Libertés Fondamentales; several area-specific councils; relations with all relevant UN and regional mechanisms; and voluminous documentation of relations with no less than 23 non-governmental organizations. Furthermore, contrary to the United States, which prefers to speak of human rights in United States Constitutional terms, the report contains 271 pages describing rights in Tunisia framed in and using language from international human rights mechanisms. Id. at 229-500. With Tunisia as a case-study, one would be hard pressed to argue that human rights offend Islam (at least Tunisia’s Islam). For a specific and exhaustive treatment of women’s human rights in Tunisia, see EMMA CHITIOUI AOUI, LA TUNISIE ET LES DROITS DE L’HOMME (1992).

145. Sayeh & Morse, supra note 4, at 320 (citing Holy Qur’an 2:219 (“They ask thee, concerning wine and gambling. Say: ‘In them is great sin, And some profit, for men; But the sin is greater Than the profit.’”); Holy Qur’an 4:43 (“O ye who believe! Approach not prayers With a mind befogged, Until ye can understand All that ye say, Nor in a state Of ceremonial impurity”); id. at 5:90-92 (“O ye who believe! Intoxicants and gambling, (Dedication of) stones, And (divination by) arrows, are an abomination, Of Satan’s handiwork; Eschew such (abomination), That ye may prosper”).

146. Sayeh & Morse, supra note 4, at 320.
Through a process of slow but regular change, gradualism’s various legal mechanisms adapt Islamic law to the changing needs and values in Islamic society. Sayeh and Morse note that:

**Gradualism is ideally suited to Islam because, while the Qur’an does enumerate certain legal standards, it consists primarily of very broad and general moral directives. The idea of gradualism complements the notion that Islam is a further step along the path to a greater understanding of God. Just as Muslims see Judaism and Christianity as precursors of the advent of Islam, so are the limitations and changes made upon society by the Qur’an signs of how God wishes His community to continue to evolve and grow in the future.**

Just like Islamic law under the Qur’an, human rights law is often framed in broad, generalist terms. Moreover, human rights law has never been stagnant or uncontroversial and has had to adapt to changing social standards. Moreover, more controversial human rights, such as ESC rights, are the most accepting of gradual change. For example, rather than adopting a rigid standard, the ICESCR requires that States parties “take steps, ... with a view to achieving progressively the full realization of the rights recognized in the present Covenant.” Thus, just as under gradualism the Prophet Mohammed gradually prepares Muslims for the “full Word of God” in areas they are “less amenable to instant change,” the ICESCR’s progressive realization standard is an open acknowledgment that ESC rights will also require gradual change to meet the full obligations of that Covenant in areas where they are less amenable to change due to economic or social barriers. From a reverse moderate relativist

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147. *Id.* at 318.

148. The controversial, and adaptable, nature of human rights has been evident since the birth of the modern human rights movement fifty years ago, when disagreement among States made it impossible to create a binding human rights instrument containing both Civil and Political rights and Economic, Social, and Cultural Rights, leading to the adoption of two separate human rights instruments. See *Comment on Historical Origins of Economic and Social Rights, in INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 242, 244-45 (Henry J. Steiner & Philip Alston eds., 2000); BEDERMAN, *supra* note 102, at 96-97 (explaining that “although the original conception was to have a single instrument on human rights, this proved politically impossible” because of ideological differences between socialist and capitalist nations). Similarly, the body of human rights law has gradually, and controversially, expanded with changing social realities, from “first generation” to “second generation” and now “third generation” rights. See *id.* at 95-96; Sohn, *supra* note 104, at 48-62; author’s comments, *supra* notes 102-07.

149. ICESCR, *supra* note 76, at art. II, para. 1, at 5 (emphasis added). Compare the rigid standard in the equivalent provision of the ICCPR: “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.” ICCPR, *supra* note 14, at art. II, para. 1., at 173.

150. Sayeh & Morse, *supra* note 4, at 320.
perspective, the ICESCR's progressive realization standard is employing a technique as old as the Qur'an itself.\textsuperscript{151}

\textbf{C. The Superiority of Reverse Moderate Relativism}

Reverse moderate relativism shares some characteristics with both strict cultural relativism and moderate cultural relativism, in that both theories place emphasis on the determination of rights by local cultures.\textsuperscript{152} But, whereas strict cultural relativism takes this criteria and creates an impasse for the advancement of universality by assuming Western norms to be inflexible, and moderate cultural relativism attempts to universalize norms only by changing the local norms, reverse moderate relativism calls for a reorganization of the examination of universal rights away from Western-oppressor starting points and towards local starting points. Schooley notes that "[c]ultural relativism's strength is its strong consideration of context. Yet, ... its weakness is 'its assumption that the importance of context proves it is not possible for one context to be superior to another in some transcendent sense.'"\textsuperscript{153} Reverse moderate relativism takes cultural relativism's strength (thoughtful consideration of context), and then doubly transcends its weakness by proposing not only that one context can be superior to another, but that the superior context could and may often be the non-Western context.

\textbf{V. CONCLUSION}

As I explored in Part II, commentators on Islamic Law and human rights alike all agree that a tension between the two doctrines exists in a number of areas; but, what to do with this tension is still an open question. The three most popular theories—universalism, strict cultural relativism, and moderate cultural relativism—are each conceptually flawed. Universalism is untenable, because it eliminates the tensions simply by ignoring them. Strict cultural relativism is unsatisfactory, because discredits the whole field of human rights, which may not be necessary. An-Na’im’s moderate cultural relativism, which first appears the most attractive, is perhaps the most dangerous of all: In attempting to create and expand a list of core shared rights, moderate cultural relativism treats the international norm as the neutral benchmark to be achieved, with dangerous neo-colonialist implications. In Part IV, I proposed a new theory, reverse moderate relativism, which accepts the virtues of moderate cultural relativism

\textsuperscript{151} Id. at 318 (noting that western Common Law also adopts a gradualist approach, although mistakenly framing that argument from a moderate cultural relativist perspective that gradualism "parallels the common law study in analogy and reason").

\textsuperscript{152} See Tes\textsuperscript{o}n, supra note 35, at 678.

\textsuperscript{153} Schooley, supra note 20, at 682.
while avoiding the western-centric detrimental focus on international norms as neutral benchmark standards to be achieved which is the hallmark of moderate cultural relativism. By refocusing attention to areas where international norms are approaching Islamic ones, reverse moderate relativism offers a superior outlook on relativism which avoids the neo-colonial and western-centric undertones of moderate cultural relativism.

It must be emphasized that reverse moderate relativism does not claim any causative link between (often) longstanding Islamic traditions and developing human rights norms. Perhaps the theory is open to criticism as nothing more than a catalogue of coincidences. But, such a critique ignores the profound importance of restructuring the universality debate from Western neutrals to local neutrals. Although reverse moderate relativism cannot claim to be causative (Indeed, why would it want to? Causation only lurks behind moderate cultural relativism as a neo-colonial phantom.), and this preliminary inquiry certainly cannot claim to be exhaustive, it provides a necessary change in momentum, a change of focus and perspective. The universality story has been told and rejected. An-Na‘im’s moderate cultural relativist theory, although a step in the right direction, lives in the shadow of a neo-colonialist cloud. Perhaps, with the refreshing new focus on rights universalization by Western gravitation towards certain local cultures, the stalled universality debate can be given some true meaning.
REVISITING THE UNITED STATES APPLICATION OF PUNITIVE DAMAGES: SEPARATING MYTH FROM REALITY

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I. ABSTRACT

The application of punitive damages in the United States is widely misunderstood by European jurists. The case of the "pet in the microwave" appears to be entirely fictional, yet it is often cited as an example of United States jurisprudence. Likewise, the McDonald's "coffee spill case" is often cited, even though it was reduced significantly upon appeal and later settled in a private out-of-court agreement between the parties. Neither case is satisfactory as an example of United States punitive damages in application, and neither has legal relevance or precedence in United States jurisprudence. This article discusses several sources of misunderstanding with respect to these "cases." As an alternative, the author proposes that his European colleagues review the legal standards set forth in the United States Supreme Court case BMW v. Gore.\(^1\) This is a real case, with binding legal precedence. Gore sets forth standards for the application of punitive damages and shows that punitive damages are in fact rational and understandable within the context of established legal standards and guidelines.

Most recently, the United States Supreme Court reviewed the application of punitive damages in the April 7, 2003 decision State Farm Mutual Automobile Insurance Company v. Campbell. In Campbell, the Supreme Court overturned a punitive damages verdict of $145 million because of an insurer's bad-faith failure to settle. The Supreme Court said that punitive damages were applicable to the case, but, after applying the Gore test, it found that the ratio of punitive damages to compensatory damages was excessive. Campbell provided further clarification on the application of punitive damages in the United States.

II. INTRODUCTION

American lawyers who live in Europe often find themselves in the line of fire of their continental\(^2\) colleagues who expect them to explain and justify the

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2. Here, "continental" refers to the European continent, i.e., Europe without England. The effect is to distinguish civil law from common law, since England is the only European country with a common law system.
sometimes bizarre twists of law and politics in the United States. Some favorite topics that arise from these discussions include the use of juries in the judicial process, death penalties, lawyers' contingency fees, and punitive damages. This article deals with one of those matters—punitive damages.

Admittedly, United States laws that allow for punitive damages are far from perfect. Still, the system, if properly understood, is not without merit. Unfortunately, the system is widely misunderstood. It is the author's proposition that much of the misunderstanding in Europe can be traced to instances in which the continental press takes highly publicized trial-level decisions, extrapolates from them, and incorrectly interprets them as a full function of United States law. This phenomenon is not unlike the many "urban legends" which have recently given rise to many popular books and Web sites on urban legends.3

III. THE UNFORTUNATE TENDENCY TO BELIEVE URBAN LEGENDS

It is tempting to focus on fictional "urban legends"—and even legitimate cases—in which the outcome seems bizarre and silly. Doing so is easy and entertaining. But without a deeper analysis into outcomes and an understanding as to the law and policy behind the underlying premises, such discussions have little value. In the context of anecdotes and stories, one commentator has suggested that the legal education system needs reform.4 The author applauds this proposition and believes this is particularly applicable in the context of United States law as it is taught in Europe.

One must look no further than the often discussed "case" in which a woman was allegedly awarded damages for an unsuccessful attempt to dry her pet in her new microwave (hereinafter referred to as the pet in microwave "case").5 If a plaintiff victory in the pet in microwave "case" ever existed—which is highly doubtful—it would almost certainly be reversed at the appellate

3. See, e.g., ROLF WILHELM BREDNICK, DIE SPINNE IN DER YUCCA-PALME, (C.H. Beck, 1999). Additional references to books and websites are provided in footnotes below. Note that many of the comments and references are to German speaking sources, since the author has previously worked and studied in Germany and therefore has selected mostly German speaking sources for examples and citation.

4. Deborah L. Rhode, Legal Scholarship, 115 HARV. L. REV. 1327 (2002) (Professor Rhode also notes at p. 1348 that the coffee spill case and the pet in the microwave case are not useful anecdotes although they "sell better than statistics").

5. See also http://www.snopes.com/horrors/techno/micropet.htm (last visited Nov. 25, 2002), which states that the pet in the microwave case is a hoax and notes other perverse variants of the hoax and other "cooked to death" legends. There are countless other sites in the UNITED STATES similar to www.snopes.com which directly state that the pet in the microwave case is a fabrication. See http://www.stellaawards.com/bogus.html (last visited Nov. 26, 2002). A German website for "urban legends" also exists: http://www.kuwest.de/joke/ul.html (last visited Nov. 26, 2002), although as of this date, the German website does not mention the pet case.
level. In a more likely scenario, the plaintiff would be prosecuted for a crime. Unfortunate as it may be, the author and many of his European colleagues have heard even well-respected European professors discuss the non-existent pet in the microwave "case" as an example of how far United States courts are willing to go. This "case" and others have taken on a life of their own, and as a result, the image of punitive damages has, perhaps, been perhaps irreparably harmed.

The United States has a full legal system with courts of various instances; including, obviously, courts of appeal. As will be illustrated, one must review the full process of the court system (i.e., beyond the first instance) to understand the functioning of punitive damages. Through a discussion of two cases, first, the legendary McDonald's coffee spill case (hereinafter called the "coffee spill case") and secondly, the more relevant United States Supreme Court decision in Gore, the article hopes to achieve two objectives. The first is to explain, from an American perspective; how the United States system of punitive damages works and to assist the author's European colleagues in understanding the policy behind it. This article is not intended to provide unconditional support for the punitive damages system in the United States, but rather to point out some of its strengths, outline the review procedure and guidelines, and identify areas in which punitive damages may have been misunderstood. The second objective of this article is to show that, for numerous reasons, the coffee spill case is a poor example to be used for academic purposes. While the coffee spill case is perhaps a good example for litigation strategy, it should not be used as an example of United States tort law.

IV. THE PET IN THE MICROWAVE

The author hopes to quickly and effectively discredit the pet in microwave "case" so as to convince the reader that it not useful for serious discussion. It is of course impossible to prove the non-existence of something. There is even some evidence that the story has European, not American origins. In any event, the lack of positive evidence of the case's existence should be sufficient

6. The only similar case that the author could find was State v. Tweedie, 444 A.2d 855 (R.I. 1982), a criminal case in which the defendant was criminally convicted under Rhode Island statute for "cruelly killing" a cat that defendant placed in the microwave.
7. Supra note 1, at 568.
9. The earliest citation of the pet in the microwave legend that the author could find was in Paul Smith's, THE BOOK OF NASTY LEGENDS, (T.J. Press Ltd.) (1983). The book dispels the pet in the microwave case as false (at p. 65). The author also noted that the "pet" has been described variously a cat and a dog, and even as a baby. Paul Smith has also traced origins of the story back to pre-microwave technology where the owner tried to dry her pet in a regular oven or wood stove.
for the sophisticated reader. Notwithstanding, it may be understandably difficult for many Europeans to "unlearn" the non-existent *pet in the microwave case." It seems to appear in many different forms, both at the University as well as in the press.

The *pet in the microwave* "case" has found its way into a (otherwise excellent) German Doctoral Dissertation as a footnote reference. This is not the only example in academia: an Austrian university lecturer appears to use the fictional "case" as a teaching example for his courses—or at least, he has used it in a newspaper article that makes a failed attempt to explain the United States punitive damages system. Note that here the lecturer's victim is a dog. In a similar article many years earlier in France, *Le Monde* discussed the fictional victory of the fictional plaintiff in the *pet in microwave* case as a real, non-fiction example of United States absurdity. But for *Le Monde*, the victim was a cat. Again, *Le Monde* provided no basis, citation, or reference of any kind to the underlying court proceeding. Even so, for *Le Monde*, the "case" served as a prime example as to why the United States system should be reformed. To cite the *pet in the microwave* case as an example of the need for United States punitive damage reform, as *Der Standard* and *Le Monde* have done, is in the author's view, just as absurd as it would be to cite an episode of "The Simpson’s" as legally binding precedent.

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10. See, for example the case reported in the German press, whereby the user of a microwave oven used the device to warm up his cold pet, and successfully obtained damages from the manufacturer, who neglected to advise him that the microwave device was not appropriate for this use.

11. Christian Hausmaninger, *Schadenersatzprozesse in den USA: das grosse Geld für Pechvögel*, DER STANDARD, Sept. 9, 1997. With no citation of the underlying "case," Dr. Hausmaninger highlights the *pet in the microwave* (he seems to think it is a dog) as an example of the failures in the United States system. To wit:

   It is often the case where the intentions of compassionate jurors grant exorbitant damages, particularly for dubious damages claims in the order of millions against deep-pocket companies. The case of a dog owner, who dried his dog in the microwave and then sued the manufacturer because there was not a warning regarding the drying of pets, is just one of many examples.

12. *LE MONDE*, *La 'société contentieuse'—Aux États-Unis, hommes d'affaires et médecins dénoncent la multiplication des procès en tout genre*, Aug. 18, 1992. Quoting from article:

   ...[t]his litigious explosion is directly responsible for the disappointments of the American light aircraft industry, or manufacturers of ladders and scaffolding, and has created a multiplication of lawsuits between people who have insurance and the insurance companies that insure them. Totally frustrated with this, the latter point out the case of a manufacturer who lost a lawsuit from a homemaker who inopportune

   attempted to dry her cat in a microwave...
V. PUNITIVE DAMAGES: THE UNDERLYING POLICY

Punitive damages, also commonly called in English exemplary damages, are designed to punish, not to compensate. In general, punitive damages are awarded for socially deplorable conduct, such as fraud or malicious, reckless, or abusive action. Since the early 1900s, punitive damages have been available only for tort but not for contract damages, with some exceptions. Punitive damages are discretionary and are never given as a matter of right. Although viewed as a United States law phenomenon, punitive damages can be traced back to the Old Testament, and their attraction has given rise to attempts by some European tort victims to seek recovery in an American forum. This was the case for the German train accident in Eschede. This was also the case in the wake of the Concorde aircraft accident in Paris, in which damages were statutorily limited. One German commentator has described the limitations on damages as “a deficit in German tort law.”

A. The Punishing and Deterrent Functions of Punitive Damages

The “punishing” function of punitive damages is a source of great criticism by civil law proponents. In Germany, for example, public policy equates all punishing functions—including fines—with criminal law, an area in which the state enjoys a constitutional monopoly. The argument in support of this view is that punitive damages should be rejected due to their criminal or quasi-criminal nature. After all, the purpose of a civil action, particularly in tort law, is to restore the plaintiff to the position in which he would have been if the...
tort did not occur. Indeed, United States lawmakers do not entirely disagree with this view. United States courts also believe that punitive damages are similar to criminal punishment. However, while many continental European courts (such as those in Germany) generally reject punitive damages outright, United States courts will allow them where appropriate substantive and procedural safeguards are used to minimize risk of unjust punishment.

There is little dispute that punitive damages are designed to punish, not to compensate. By punishing, punitive damages are said to have a deterring effect within society itself. According to that theory, the deterring effect depends, in part, on a broadcasting effect, so that punitive damages serve as a lesson to others in a similar situation. Few would argue with the proposition that awarding punitive damages has a “broadcasting effect,” although whether punitive damages actually deter and whether they are fair is a separate matter.

Convincing arguments have been advanced by American commentators that punitive damages have spun out of control and that they should be stopped. This is particularly true as applied to juries, which are generally the grantors of exaggerated awards. As stated by one commentator: “It is usually much easier to arouse a jury’s emotion or anger than it is to persuade a judge to abandon her comparatively detached and balanced view of a pending case.” Others have said that punitive damages create legal uncertainty and discourage new product innovation and introduction into the market. These arguments all make sense. On the other hand, tort reform measures and state action are under way to correct an upward trend in awards.

23. For the purposes of this article, “lawmakers” is defined as both the legislature and the law-creation function of the common law system.
28. See Schlegel, supra note 21, at 677.
29. For an analysis of data that shows the increase in award trends, see Marc Galanter, Real World Torts: An Antidote to Anecdote, 55 Md. L. Rev. 1093, 1113-115 (1996).
B. A Delicate Balance: Weighing "Enormity" of the Offense against the Wealth of the Defendant

In a punitive damages award, it is generally the plaintiff, not the state, who is the beneficiary of the award. The calculation is based on the degree of misconduct or "moral retribution" of the defendant. As explained by Justice Thomas in the United States Supreme Court decision *Molzof v. United States*, a jury may award punitive damages against a defendant based on "the enormity of his offense rather than the measure of compensation to the plaintiff." As a check and balance to make sure that juries do not overly punish, the United States Supreme Court requires that the "enormity" factor be carefully reviewed. In application, some courts require a showing of wealth of the defendant in order to determine whether the amount of damages exceeds the level necessary to properly punish and deter. Other courts may not have a firm requirement to show the wealth of the defendant, but they may encourage it. As Judge Posner explains, "to a very rich person, the pain of having to pay a heavy award of damages may be a mere pinprick and so not deter him (or people like him) from continuing to engage in the same type of wrongdoing."

Appellate courts in the United States are constantly reviewing the policies of balancing punishment against the wealth of the punishee, and of balancing punishment by the gravity of the tort. As will be demonstrated below in discussion of the *BMW v. Gore* decision, the Supreme Court has determined that under certain conditions, punitive damages can be excessive and violate the Due Process guarantee of the Fourteenth Amendment in the United States Constitution. Review by higher courts is available to all parties and is a key element to the full functioning of the legal system.

VI. THE MCDONALD'S CASE IN THE EUROPEAN PRESS

For the press to announce definitively that jury awards at the trial level are the end-all of a full legal process would be to call the winner of a football match after the first few minutes of play and to ignore the rest of the match. True, there are many exaggerations that arise from United States juries, but there are also many built-in checks and balances. Unfortunately, the checks and balances

30. The plaintiff does not necessarily always receive the punitive award. Damages may instead, upon agreement of the parties, go to charitable organizations, or third parties. See Dardinger v. Anthem Blue Cross & Blue Shield, 781 N.E.2d 121 (Ohio 2002) (Ohio Supreme Court requiring that one-third of a $30,000,000.00 punitive damages award go to a charity).
do not make headlines. This was the case in *Die Zeit*'s discussion of the *coffee spill case*:

In a sensational case in the early nineties an elderly woman successfully sued McDonald's. She had ordered a coffee in the drive-through and while driving out she put it in between her legs. When she braked, the cup was crushed and the woman burned herself on her thighs. The jurors awarded *punitive damages* of just under one million dollars. They based this on a finding that McDonald's should have warned its customers of the danger. Since this time McDonald's prints the warning: "Warning, contents hot." Incidentally, the elderly woman did not receive much from her victory—her lawyers' bills were so high that she only ended up with a bit more than one thousand dollars.

*Die Zeit* misstated the facts of the case in almost every possible way. First, the punitive damages that were initially awarded were $2.7 million, not $1 million, and the award was later reduced upon appeal by more than 75%, from $2.7 million to $480,000. Also, the comment on what was left for plaintiff Liebeck after attorney fees is curious; there is no public information available on that topic since the case between Liebeck and McDonald's was confidentially settled after the 75% reduction in the award. "The elderly woman" (Mrs. Liebeck) was not driving, but was a passenger in the car. Furthermore, as will be noted below, the issue in question was not the warning on the cup, but the fact that McDonald's had received over 700 complaints in the past resulting from similar accidents.

It is no wonder that the *coffee spill case* is misunderstood: other well-known German newspapers have also been careless in their reporting on the case. In 1996, the *Frankfurter Allgemeine Zeitung*, incorrectly reported total damages of $2.3 million, without reference to the reduction by the appellate

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38. *McDonald's Coffee Award Reduced 75% by Judge*, WALL STREET JOURNAL, Sept. 15, 1994, at A4. (Note that the total award, as reduced, was $640,000.00, consisting of $480,000.00 in punitive damages and $160,000.00 in actual damages).
court and final outcome of the case. The appellate reduction and the subsequent settlement were of course well known for over two years prior to publishing the article. The Frankfurter Allgemeine Zeitung also incorrectly stated that punitive damages are allowed "in all 50 states." They are not. Even Handlesblatt has recently (May 2003) cited the Coffee Spill case as an example of the functioning of the law in the United States within the context of recent tobacco judgments. It is hard to understand why a respectable paper such as the Handlesblatt would cite this as a real case when in fact it was reversed, privately settled, and has absolutely no legal or jurisprudential value in the United States.

To be fair, the German press is not alone in careless reporting of punitive damages. In 1997, long after the coffee spill case was reduced by the appellate courts and then settled for an unknown sum, the Neue Zürcher Zeitung incorrectly reported that Mrs. Liebeck “earned herself millions of dollars.” This was, as in the other examples, reported well after the case was reduced and then settled for an undisclosed sum. However, for the Neue Zürcher Zeitung, the case conveniently served as a key example in a series of reports brazenly entitled “Lawsuits as a National Sport in the U.S.A.”

On the one hand, the United States system is perhaps one that encourages frivolous lawsuits. Indeed, at the writing of this article, a class-action lawsuit was filed against McDonald’s claiming numerous damages, including punitive damages. It alleges that McDonald’s burgers and fries make kids fat, provoke

42. Id.

44. Gerhard Maurerer, “Ein Teil der Angst Löst sich in Rauch auf” HANDLESBLATT, May 28, 2003, at 29, Nr. 102m. (“One only needs to remember the McDonald’s case where a purchaser of hot coffee burned herself upon opening the cup and received punitive damages of $2.7 million.”).

45. U. Schmid, Klagen als Volkssport in den USA, NEUE ZÜRCHER ZEITUNG, Apr. 11, 1997, at 7. Although perhaps the NEUE ZÜRCHER ZEITUNG should be congratulated for publishing a letter to the editor the following week by a reader who, in response to the article, brought the editor’s attention to the incorrect statement and noted that the coffee spill case was reduced on appeal and ultimately settled, NEUE ZÜRCHER ZEITUNG, Apr. 25, 1997, at 77. Over the years, the NEUE ZÜRCHER ZEITUNG has been inconsistent in its reporting of the coffee spill case. Three years earlier, the NEUE ZÜRCHER ZEITUNG had properly noted the damages in the case in an article calling for reform in the United States. In the earlier article, however, the newspaper provided no discussion at all regarding the relevant facts of the case for punitive damages. The only facts provided were that Mrs. Liebeck poured coffee on herself and received third degree burns. If those were truly the only facts to the case, Mrs. Liebeck would probably have received nothing!; See Reinhard Meier, Der Fall O.J. Simpson und andere Beispiele Zweivel an Americas Geschworengerichten Inflationen massloser Schadenersatz-Verdikte, NEUE ZÜRCHER ZEITUNG, Oct. 15, 1994, at 9.

diabetes, and cause high blood pressure. As a worldwide actor and a "deep pocket" defendant, McDonald's has been the target of other lawsuits, including one that led to a recent settlement due to its use of meat products in its allegedly "vegetarian" french fries. The United States system—like any legal system—is indeed prone to aberrations. Notwithstanding, the fundamental distinction between lawsuits that are allowed and those that are not allowed cannot be overstated, particularly in understanding the full functioning of United States law. Although lawsuits alone may have strategic value, it is only the final outcome of a case at the appellate or Supreme Court level that becomes integrated into the United States common law system through the doctrine of stare decisis.

With respect to the coffee spill case, sensationalism has unfortunately twisted it in such a way that the true outcome is either ignored or not known. It is, in fact, very close to impossible to fully set the record straight on the coffee spill case. The case is not reported or published, which means that under United States law it cannot be considered as valid precedent for any legal purpose. Westlaw has a simple one-page "unpublished" version available as part of its database service. LEXIS-NEXIS has no record of the case. Regarding the appeal, there is nothing, either in published, unpublished, or any other unofficial or official form. Consequently, in order to find out what truly happened, one is required to review many different sources that discuss the topic. Sources include consumer-biased Web sites, personal Web sites, newspaper articles, and a few law review articles. This article uses all these sources to ascertain the details on the case. The reader is advised that his or her own research may yield different results, which again supports the proposition that the coffee spill case is really not a "case" at all.

48. FRANKFURTER ALLGEMEINE ZEITUNG, June 7, 2002, at 9, Nr. 129.
51. “Unpublished” opinions are provided by some databases as an additional customer service, but they have no effect as legal precedence.
52. See Liebeck, 1994 WL 360309.
A. McDonald's: The Facts

Plaintiff Liebeck was sitting in the passenger seat of her grandson's car holding a coffee that she purchased from a drive-through window of a McDonald's (in Europe this is often referred to as a "McDrive"). When Liebeck opened the lid of her coffee to add cream and sugar, she spilled the coffee on herself. The coffee cups were made of Styrofoam and were not particularly sturdy.

The sweatpants that Liebeck was wearing absorbed the coffee and held it next to her skin. A vascular surgeon determined that Liebeck suffered third-degree burns over 6% of her body, including her inner thighs, groin, buttocks, and genital areas. She was hospitalized for eight days, during which time she underwent skin grafting. As a result of the burns and surgery, Liebeck had permanent scarring on more than 16% of her body.

Plaintiff Liebeck initially contacted McDonald's for reimbursement of the medical charges, which at that time totaled $11,000. McDonald's countered with an offer of $800. After her medical treatment was completed, Liebeck had $20,000 of medical bills and decided to hire a lawyer. As part of the trial process, the case went to a mediator for attempted resolution. The mediator recommended the parties settle for $225,000. McDonald's refused and the case continued to trial.

B. McDonald's: The New Mexico Trial Court Ruling

Evidence submitted by Liebeck indicates that McDonald's kept its coffee at 165-170 degrees Fahrenheit, which is apparently hotter than at other fast-food chains. Although the cups are marked with the warning "Caution, contents are hot," Liebeck advanced the proposition that McDonald's customers should be in a position to reasonably expect that "hot" means "hot" relative to other fast-food vendors. Liebeck did not contest the axiom that coffee was hot, nor that coffee can cause burns; Liebeck argued, however, that the full circumstances must be taken into account. In this context Liebeck argued that

55. See Stella Award Subscriptions, Opportunists and Self-Described Victims, Plaintiffs v. Any Available Deep Pockets and the United States Justice System, Defendants, at http://www.stellaawards.com/stella.html (last visited Nov. 17, 2002) (stating that although there are discrepancies in the reporting of how much of Mrs. Liebeck's body was burned, sources seem to agree that burns covered between six percent and sixteen percent of her body).
56. See supra note 40.
it is relevant to consider the following: (a) whether the coffee is hotter than coffee served by similar restaurants, (b) whether the cups are fragile and adequate for handling hot material, (c) if the cups and lids work well in a drive-through setting, and (d) if the operator is aware that its product has caused damage to other consumers.

The last criterion proved to be one of the most relevant facts in the award of punitive damages. During the trial, the plaintiff demonstrated that McDonald's had already ignored more than 700 similar claims of coffee burns. The company even ignored a written request from the Shriners Burn Institute in Cincinnati to reduce the temperature of its coffee. Harry J. Gaynor, president of the National Burn Victim Foundation, had said the temperatures for McDonald's coffee were "[m]uch too hot for human consumption and extremely dangerous." Mr. Gaynor pointed out that coffee and other hot drinks are not deemed "shippable" until they cool to 154 degrees. Indeed, Liebeck advanced proof that the coffee was between 165 and 170 degrees when it spilled, compared to home-brewed coffee, which is usually between 135 to 140 degrees.

With respect to other claims, McDonald's representatives initially misled the court and jury about the existence of other claims and complaints. Liebeck produced evidence of nearly 700 prior complaints against McDonald's. Furthermore, the plaintiffs showed that McDonald's had paid out-of-court settlements to other victims for similar burns and injuries. Liebeck's evidence demonstrated that McDonald's total payouts for hospital fees and actual damages in similar injuries totaled more than $500,000. Yet McDonald's still had not changed its coffee temperature or serving method. McDonald's own testimony in court by one of its executives, Mr. Appleton, demonstrated that McDonald's knew that consumers had suffered burns, but the company had no interest in changing its policy. In a particularly callous statement, a McDonald's representative testified to the court that the number of injuries were "statistically insignificant" when compared to the billion cups of coffee McDonald's sells annually.

60. See supra note 40.
62. Id.
63. Gerlin, supra note 59.
64. Id.
Based on evidence produced by Liebeck, it would be difficult to argue that the decision of the New Mexico jury in favor of Liebeck was irrational. The amount of the award, however, is another story.

C. Calculation of Damages

As has been discussed earlier, punitive damages are intended to create an incentive for a company to change policy and behavior. To do this, punitive damage calculations will often be based on the strength of the company as a whole. The jury found that McDonald’s had engaged in willful, reckless, malicious, or wanton conduct, which is the standard used for the awarding of punitive damages. Ms. Liebeck’s attorney provided evidence that McDonald’s made $1.35 million per day from coffee sales alone. As a measure of punitive damages, the attorney’s recommendation was that the jury award one or two days of revenue coffee sales as punitive damages. The trial court award was the equivalent of two days of worldwide coffee sales, totaling $2.7 million.

With respect to actual damages for medical bills, attorneys’ fees, and compensation for loss, Liebeck was awarded $200,000. However, the jury determined that Liebeck was also at fault in the way she handled the coffee. On this point, the jury determined that Liebeck was 20% at fault, which automatically reduced the $200,000 award by 20% to $160,000.

D. McDonald’s: The New Mexico Appeals Court Ruling & Settlement

The punitive damages award became the main issue upon appeal. As previously noted, an appeals judge later reduced the $2.7 million jury award in punitive damages to $480,000, which, when added to the $160,000 compensatory damage claim, totaled $640,000. Liebeck then threatened to take the case to another level of appeal; however, the parties quickly settled the case for an undisclosed amount, requiring that the deal be kept sealed. According to some sources, the final total amount (compensatory and punitive) was less than $600,000. Based on the emerging case law, such as the Supreme Court Case of BMW v. Gore, it is unlikely that the plaintiff would have been able to do any better upon appeal.

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66. See Adams, 813 P.2d at 110 (noting that evidence of the defendant’s wealth is necessary to enable the court to determine “whether the amount of damages exceeds the level necessary to properly punish and deter”).


68. Liebeck, 1994 WL 360309 at 5. This is known in United States law as the comparative negligence doctrine, whereby a plaintiff’s recovery is reduced proportionally to the plaintiff’s degree of fault in causing the damage.

69. WALL STREET JOURNAL, supra note 39, at B6.

70. See Liebeck, 1994 WL 360309 at 1.
VII. BMM v. Gore: The Facts and the Alabama Trial Court Ruling

*BMW v. Gore*\(^1\) serves as an excellent example of reduction of punitive damages in practice. Also, it is interesting for the context of this article as it is "international" in the sense that it involves the repainting in the United States of cars ordered from a German manufacturer.

The facts of the case are as follows.\(^2\) The plaintiff, Dr. Ira Gore Jr., bought a new 1990 BMW 535i automobile from an Alabama dealership for approximately $40,000. At the time of the sale, Dr. Gore signed an "Acknowledgement of Disclosure" in which he acknowledged that the automobile might have sustained damage at some point prior to his purchase. The disclosure form also stated that Dr. Gore had inspected the automobile and had agreed to accept it. This disclosure form did not list the repair that is the subject of the case, and Dr. Gore did not know that he ought to specifically check the quality of the painting process.

Dr. Gore drove the car for approximately nine months before taking it to "Slick Finish," an independent automobile detailing shop, to make the car look "snazzier than it normally would appear." Prior to taking the car to "Slick Finish," Mr. Gore was not unsatisfied with the car's appearance and had not noticed any flaws in the finish on the car. Yet Dr. Gore's assumption had been that since the car was new, it had never been damaged.

The detailer at "Slick Finish" informed Dr. Gore that the car had been partially repainted. Dr. Gore later determined that the refinishing had been done because of acid rain damage to the car's paint finish sustained during transit between BMW AG's manufacturing plant in Germany and BMW NA's vehicle preparation center in Brunswick, Georgia. BMW NA, the American distributor of BMW automobiles, had adopted a policy that it would not disclose any damage to dealers or customers if the cost of repairing the damage was less than 3% of the manufacturer's suggested retail price (MSRP). The cost of refinishing Dr. Gore's automobile was $601, less than 3% of the MSRP. Consequently, BMW NA did not disclose to Dr. Gore that the automobile had been refinised prior to purchase. The jury found that the damage devalued the car by $4,000, or approximately 10% of the price paid by Dr. Gore. The devaluation was based on the assertion that the United States paint job was not as good as the "super heating" procedure used by the factory in Germany. The jury found that the paint would fade earlier, reducing the value of the car.

Upon his discovery that the automobile had been refinished, Dr. Gore sued German Auto, BMW AG, and BMW NA, alleging that the failure to disclose


\(^{2}\) Unless stated otherwise, the facts are taken from the United States Supreme Court Ruling, in *BMW*, 116 U.S. at 565.
the refinishing constituted fraud, suppression of a material fact, and breach of contract. At trial, Dr. Gore presented evidence that BMW’s Executive Board had adopted a policy in 1983 to deliberately and fraudulently conceal from customers and dealers that vehicles had been repainted, regardless of the extent of the damage or cost of repairs. Further evidence showed that a minimum of 983 other cars, each with at least $300 in damage, had been sold to unsuspecting American customers. Dr. Gore attempted to show that these figures, even though impressive, underestimate BMW’s program of nationwide fraud.

Dr. Gore’s claim was that, by selling damaged cars for more than they were worth, BMW reaped millions of dollars through nationwide consumer fraud. The jury returned a verdict against all three defendants for $4,000 in compensatory damages, and it assessed $4 million in punitive damages against the BMW defendants jointly. The ruling was based on a determination that the BMW defendants had been guilty of gross, malicious, intentional, and wanton fraud. The noteworthy result is that the ratio of actual damages versus punitive damages was 1000:1. The trial court entered a judgment on that verdict and subsequently denied post-judgment motions filed by the BMW defendants. The BMW defendants appealed.

A. BMW v. Gore: The Alabama Supreme Court Ruling

The Alabama Supreme Court agreed with the trial court that BMW’s misconduct had been reprehensible and merited punishment. However, the state Supreme Court found that the jury should not have considered the fraudulent acts occurring outside Alabama. The Alabama court then considered the fraudulent cases in that state and reduced the punitive award by 50% to $2 million. Said another way, the damages ratio of actual to punitive was reduced from 1000:1 to 500:1. BMW appealed to the United States Supreme Court, which accepted the case through a process in United States law known as certiorari.73

B. BMW v. Gore: The United States Supreme Court Ruling

The United States Supreme Court vacated the reduced $2 million award and remanded the case to the Alabama Supreme Court, finding the actual harm slight and the misconduct to be minor. The Court noted that “none of the

73. “Certiorari” is a writ of a higher court to a lower court to send all the documents in a case to it so the higher court can review the lower court's decision. Certiorari is most commonly used by the United States Supreme Court, which is selective about which cases it will hear on appeal. To appeal to the Supreme Court one applies to the Supreme Court for a so-called “writ of certiorari,” which it grants at its discretion and only when at least three Justices of the Supreme Court believe that the case involves a sufficiently significant federal question in the public interest. By denying such a writ the Supreme Court says it will let the lower court decision stand, particularly if it conforms to accepted precedents (previously decided cases).
aggravating factors associated with particularly reprehensible conduct is present” (emphasis added).

Justice Stevens, in writing for the Supreme Court,74 stated at the outset of the case that protections from the United States Constitution apply. In particular, the Due Process Clause of the Fourteenth Amendment prohibits a state from imposing a “grossly excessive” punishment on a tortfeasor.75 If an award can be fairly categorized as “grossly excessive” in relation to legitimate state interests, it enters the so-called “zone of arbitrariness” that violates the Due Process Clause of the Fourteenth Amendment.76

To assist lower courts in determining the constitutional boundaries of punitive damages, for this case and future cases, the Court offered three “guideposts” to gauge whether a punitive damages verdict violates substantive due process. The result is a three-factor test that analyzes the following elements: (1) the degree of reprehensibility of the defendant’s misconduct; (2) the relationship (or ratio) between the punitive award and the actual harm; (3) the difference between the punitive damages remedy and the civil penalties authorized or imposed in similar cases. Each of these “guideposts” will be briefly discussed below.

1. The First Guidepost: Degree of Reprehensibility

The Supreme Court explained that “[p]erhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s conduct.”77 In reviewing reprehensibility, the Court noted that reprehensibility included economic torts (which were present in the BMW v. Gore case), although it noted that conduct involving a substantial risk of bodily injury will be deemed more serious and more deserving of a sanction than pure economic torts. There was no risk of bodily injury here since painting is purely a cosmetic function.

One of the unique characteristics of United States jurisprudence, particularly in reading Supreme Court cases, is the presence of “majority,” “concurring,” and “dissenting” opinions. Often, the reader must refer to all three in order to fully “frame” the jurisprudence. The “concurring” portion of the opinion helps provide clarification for the first guidepost. In writing for concurring Justices O’Connor and Souter, Justice Breyer emphasized that the

74. In a United States Supreme Court case, one Justice is appointed by the Chief Justice to write the “majority” opinion. As will be explained later, the other justices may either join the majority opinion, or they may write a separate “concurring” opinion or a “dissenting” opinion.
75. Gore, 116 U.S. at 562 (citing TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 454 (1993)).
76. Id. at 568.
77. Id. at 575.
harm to Dr. Gore was certainly not "especially or unusually reprehensible enough to warrant $2 million in punitive damages, or a significant portion of that award. To find to the contrary . . . it is to make 'reprehensibility' a concept without constraining force, i.e., to deprive the concept of its constraining power to protect against serious and capricious deprivations" (emphasis in original).78 As noted above, it is perhaps more likely that risk of bodily harm or physical injury would lead to punitive damages than would pure economic torts.

2. The Second Guidepost: Ratio Between Damages and Actual Harm

The Court emphasized that the primary goal in awarding punitive damages is to punish present conduct, with the further objective of deterring future egregious conduct. However in doing so, the Court emphasized that rationality in awarding damages must prevail. The punitive damages must rationally relate to the award of compensatory damages:

[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award. Indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards if, for example, a particularly egregious act has resulted in only a small amount of economic damages (emphasis in original).79

The Court noted that the 500:1 ratio in actual damages to punitive damages awarded in BMW v. Gore was "breathtaking."80 Still, with respect to future cases, the Court refused to rule out the potential for granting high punitive awards even when the damages are low. Legal commentators who have analyzed case law after the BMW v. Gore decision have noted that courts have had little difficulty finding large ratios to be excessive, although no hard-and-fast "bright line" rule exists here.81

78. Id. at 590.
79. Id. at 582.
80. Id. at 583.
81. Fischer, supra note 24, at 709. See also Pulla v. Amoco Oil Co., 72 F.3d 648, 661 (8th Cir. 1995) (finding a ratio in the order of 250,000:1 to be excessive); Ace v. Aetna Life Ins. Co., 139 F.3d 1241, 1248 (9th Cir. 1998) (finding that a 13:1 ratio was far beyond what had been previously approved by Alaskan courts).
3. The Third Guidepost: A Review of Sanctions for Comparable Misconduct

The third guidepost in the Supreme Court's analysis in *BMW v. Gore* requires the court to compare "the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct." In reviewing excessiveness of punitive damages under this test, a court must "accord 'substantial deference' to legislative judgments concerning appropriate sanctions for the conduct at issue." In *BMW v. Gore*, the Court reviewed the Alabama Supreme Court's $2 million economic sanction against other statutory fines available for such misconduct in Alabama and elsewhere. The Court noted that the maximum civil penalty authorized by the Alabama Legislature for a violation of its Deceptive Trade Practices Act is $2,000. Ratios (borrowed from the "second guidepost") may help here: note that the Alabama Supreme Court's $2 million sanction is a factor of 1000:1. In applying its test to the *BMW v. Gore* case, the Supreme Court found that the sanction imposed—a ratio of 1000:1 versus the legislature's $2,000 violation for deceptive trade practices—was overly drastic. The decision was reversed.

C. *BMW v. Gore*: Remand to the Alabama Supreme Court

When the United States Supreme Court reverses a lower court's ruling, it will rarely change the award directly. Instead, it will remand the case for reconsideration by the same lower court that issued the previous ruling. In the present case, the Supreme Court remanded the case to the Alabama Supreme Court and required that it analyze the case with an application of the United States Supreme Court's newly established tests. Upon remand, the Alabama Supreme Court applied the United States Supreme Court's test and reduced the punitive damages award to $50,000.

VIII. STATE FARM

Most recently, the United States Supreme Court reviewed the application of punitive damages in the April 7, 2003 decision *State Farm Mutual Automobile Insurance Company v. Campbell*, ("Campbell"). In *Campbell*, the Supreme Court overturned a punitive damages verdict of $145 million because of an insurer's bad-faith failure to settle out-of-court. The

82. 116 U.S. at 583.
83. *Id.* See also *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 301 (1989).
84. *BMW*, 116 U.S. at 584.
85. BMW of N. Am., Inc. v. Gore, 701 So. 2d 507, 515 (Ala. 1997).
Supreme Court said that punitive damages were applicable to the case, but the ratio of punitive damages to compensatory damages—here, 145:1—was excessive. The Supreme Court reached this conclusion by applying the criteria of *BMW v. Gore*. Perhaps the most important contribution of *Campbell* to United States jurisprudence is its further clarification of the second *BMW v. Gore* guidepost.

**A. Background and Facts**

The case took over two decades to resolve, beginning in 1981 and ending in 2003. In 1981, Curtis Campbell ("Campbell") was driving with his wife on a two-lane highway in Utah. Campbell decided to pass six vans traveling ahead of them. Todd Ospital ("Ospital") was driving a small car approaching from the opposite direction. To avoid a head-on collision with Campbell, Ospital swerved off the highway, lost control of his car and collided with another car driven by Robert Slusher ("Slusher"). Ospital was killed, Slusher was permanently disabled, and the Campbells escaped without injury.

Although Campbell initially insisted that he was not at fault, opposite conclusions were reached by early investigations after the accident. The Campbells were insured by the insurance company State Farm. Even State Farm's own internal investigators concluded that Campbell was probably responsible for the accident.

The policy limit that the Campbells purchased from State Farm covered their losses up to $50,000, or $25,000 per claimant. Prior to trial, Slusher and Ospital offered to settle the matter out of court with Campbell for the policy limit of $25,000 each. State Farm, however, refused the offer to settle and insisted on challenging the matter in court, gambling to pay either nothing or less than $50,000. It would be later determined that State Farm altered the records from their own investigation to hide their determination that Campbell was at fault.

When State Farm insisted on litigation, company representatives reassured the Campbells that "their assets were safe, that they had no liability for the accident, that [State Farm] would represent their interest, and that they did not need to procure separate counsel." This reassurance equated to an indemnification, since it was State Farm's choice alone to litigate rather than settle at the $50,000 policy limit.

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87. *Id.* at 1517.
88. *Id.* at 1518.
89. *Id.*
90. *Id.*
State Farm proceeded with challenging the matter in court and lost at the court of first instance.\textsuperscript{91} The court of first instance determined that Campbell was 100% at fault and awarded damages to Slusher and Ospital of $185,849. This judgment equated to a delta of $135,849 over the Campbells' $50,000 policy limit.

In spite of their earlier promise to indemnify the Campbells, State Farm then refused to pay the $135,849 in excess liability. Representatives from State Farm boldly told the Campbells that "you may want to put for sale signs on your property."\textsuperscript{92} State Farm further refused to represent Campbell any further through an appeals process and therefore Campbell hired his own lawyer to appeal the judgment.

Eventually, after many months and a series of litigious activity, State Farm decided to pay the $135,849 in excess liability. Still, the Campbells believed that their refusal to settle and their advice (in capacity of their attorney and insurer) to sell their home was bad faith, and further that they had committed fraud and intentional infliction of emotional distress.

\textbf{B. A unique litigation strategy}

After many months in the litigation process, Slusher, Ospital and the Campbells—together—made a strategic agreement. They agreed that the activities of State Farm were in bad faith and decided to join together against State Farm on the bad faith, fraud and intentional infliction of emotional distress claims. Slusher and Ospital agreed not to seek payment of their $135,849 claim against the Campbells. In exchange, the Campbells agreed to pursue a "bad faith" lawsuit against State Farm which would hopefully render punitive damages. This would result in a new lawsuit that would be represented by Slusher's and Ospital's attorneys. The Campbells also agreed that Slusher and Ospital would have a right to participate in all major decisions concerning the bad faith lawsuit. For example, no settlement could be concluded without Slusher's and Ospital's approval. Furthermore, Slusher and Ospital would receive 90% of any verdict against State Farm. This new lawsuit would continue under Campbell's name since the bad faith claims against State Farm were vested in Campbell alone.

\textbf{C. Claims against State Farm}

When the new portion of the trial was underway, the Campbells introduced evidence that State Farm's decision not to take the case to trial was the result

\textsuperscript{91} State Farm Mut. Auto Ins. Co. v. Campbell, 65 P.3d 1134, 1141 (Utah 2001).
\textsuperscript{92} Campbell, 123 S. Ct. at 1518.
of a national scheme to fraudulently limit payouts company wide.93 In support of this claim, the Campbells introduced extensive expert testimony regarding fraudulent practices by State farm in its nation-wide operations. The Campbells also showed how they altered documents related to their own investigation of Campbell. The Campbells claimed that these nation-wide practices were sufficiently egregious to warrant punitive damages.

The Campbells were very successful at the court of first instance in Utah. The jury of the court of first instance awarded the Campbells $2.6 million in compensatory damages and $145 million in punitive damages. However, the judge of first instance partially corrected the verdict, citing the (then recently-decided) BMW v. Gore decision. The judge reduced the jury verdict from $2.6 million and $145 million to $1 million and $25 million respectively. Both parties appealed, and the Utah Supreme Court reinstated the jury’s $145 million punitive damages decision, but left the $1 million in compensatory damages intact.94 State Farm then appealed to the United States Supreme Court.

D. The United States Supreme Court applies its previous punitive damages judgments to the facts

The majority opinion of the Court in Campbell was written by Justice Kennedy, and was joined by Justices Rehnquist, Stevens, O’Connor, Souter and Breyer. Justices Scalia, Thomas and Ginsburg filed dissenting opinions. Kennedy evaluated the facts of Campbell against the judgment of BMW v. Gore, stating that, under the BMW v. Gore principles, the case was “neither close nor difficult.”95

1. The Supreme Court provides further clarification on the second “ratio” guidepost

The Supreme Court in Campbell stated, at the outset, that this was not punitive damages per se, but, as in BMW v. Gore, the Court reviewed the amount of punitive damages. In Campbell the punitive damages ratio was 145:1. The issues which gave rise to punitive damages, as stated above, was the fact that State Farm had altered the company’s records to make Campbell appear less culpable. Then they promised the Campbells that they would indemnify them and take the matter to court, when it was almost certain that they would lose. When State Farm lost, they reversed their indemnification promise. This harm was amplified by the fact that State Farm told the Campbells that they should put a for-sale sign on their house.

93. Id.
94. Campbell, 65 P.3d at 1153.
95. Campbell, 123 S. Ct. at 1521.
In applying the first Gore guidepost (reprehensibility) the Supreme Court in Campbell found that the reprehensibility claimed was related to State Farm's bad faith, fraud, and intentional infliction of emotional distress. Since the claims were not related to damage or risk of bodily injury, the Supreme Court found that the amount of punitive damages should be relatively low.

In applying the second Gore guidepost (the ratio of punitive damages to compensatory damages), the Supreme Court provided further clarification on what they believed would be reasonable in cases where reprehensibility is low. As noted above, however, the Gore court decided not to apply a mathematical formula. While the Supreme Court still officially maintains this position, in State Farm it provided a useful additional guideline, stating that "[s]ingle-digit multipliers are more likely to comport with due process, while still achieving the state's goals of deterrence and retribution, than awards in range of 500:1 [citing BMW v. Gore], or in this case, of 145:1" (emphasis in original).96

The third Gore guidepost (the ratio of punitive damages to statutory criminal fines) received little discussion.

Finally, the Supreme Court emphasized that the application of punitive damages must be limited to harm related to the plaintiff. In Campbell, the lower court's punitive damages award was also based on nation-wide conduct. This is not allowed, because it would require a calculation of hypothetical damages to other parties' claims in other states. By allowing evidence of nation-wide evidence it infringes on the ability of other states to punish and regulate the same conduct. This, itself, would also infringe the United States Constitution.

E. Dissenting Opinions

Dissenting opinions were filed by Justices Scalia, Thomas and Ginsburg. In State Farm, the dissenting opinions of Scalia and Thomas were very short and contained little new interpretive information. Justices Scalia and Thomas regularly dissent whenever the Supreme Court overturns punitive damages. According to Scalia and Thomas, the Constitution should not be used to reduce the size of punitive damage awards. Scalia and Thomas would have upheld the $145,000 judgment.

Justice Ginsburg's dissent was somewhat more detailed and speaks to the tort reform movement in the United States. According to Ginsburg, the legislatures, not the courts, should pass laws to limit punitive damages. Ginsburg also extensively reviewed the data and found that the action by State Farm was extremely reprehensible. Consequently, Ginsburg, like Scalia and Thomas, would have let the $145,000 award stand.

96. Id.
The United States system of punitive damages makes European lawyers nervous for a number of reasons. One of them is predictability and certainty. Civil lawyers, although supported by hybrid systems of jurisprudence, are not comfortable with uncertainties that arise from common law claims for punitive damages. Another reason is the "strategy" factor present in the United States law system, i.e., the fact that United States lawyers can sue and create massive legal costs for their opponents without having to pay for them if they lose. The recently filed "McDonald's makes kids fat" case is an excellent example of this. Another previously noted example is the filing of claims by a German victim of the Eschede train accident in United States courts.

Although the United States system may operate in a manner that is confusing—some may say inefficient—it is not irrational. This is not to say that the United States tort system does not need reform—it does. With respect to who receives the payouts of punitive damage awards, i.e., generally the victim, the author supports a commonly held view that punitive damages should be paid to government. Although this view still needs to be reconciled against the incentive argument, i.e., that plaintiffs should have an incentive to bring to court cases in which defendant conduct is egregious and against public policy. A trend in tort reform is already in place that requires portions of punitive damages to be given up by the plaintiffs; so far, eight states have enacted laws in this regard. On the whole, however, solid empirical data exist to show that the full review procedure will often assure rational results for tort cases in the end. BMW v. Gore is an example of this rationality as a case that emerged from the full functioning of the United States system. The United States Supreme Court's recent Campbell decision further secures the rationale and policy, and provides further clarification (particularly the "single digit multiplier" in cases of low reprehensibility).
Although liabilities in the United States common law system may seem "unknown," the system of checks and balances, if properly understood and considered, sets relatively rational limits to damages. A recently published, detailed analysis by three Cornell law professors has shown that the relationships between actual damages and punitive damages is in fact coherent and rational.\textsuperscript{101} One may believe that the rational limits of the system are being tested by the ongoing litigation with asbestos and in the tobacco industry. This may be true. However, since many of these cases are still under way, it is perhaps too early to tell. It should never be forgotten that the United States system is a complete one that only\textit{begins} with the trial process. Outrageous damages can and will be reduced by appellate courts if they fall within certain clearly defined criteria. While the United States Supreme Court has still declined to set an absolute constitutional limit on punitive damage awards, its holding in\textit{Campbell} that "single-digit multipliers" are more likely to agree with due process provides the clearest guidance to date concerning the permissible size of punitive damages.

INTERNATIONAL STANDARDS AND THE 2002 PRESIDENTIAL ELECTION IN ZIMBABWE

Gabriel Shumba*

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I. GENERAL INTRODUCTION

A. Introduction

Zimbabwe held a crucial Presidential Election from the 9th to the March 11, 2002. The election was momentous because it was preceded by cataclysmic events in the country's post-colonial scene. The election attracted such singular international attention that the question of sovereignty that had never been raised vis-à-vis the conduct of elections became a topical issue in Zimbabwe and other countries. Furthermore, human rights fears that had characterized the 2000 parliamentary elections paled into insignificance by comparison.¹

The importance of these elections provides more evidence when we consider that more than a year later, the political crisis in the country was far from over. This article is an attempt to critique the presidential election in the light of international human rights standards guiding electoral practices. This article also measures electoral practices against democratic norms prevailing in the global environment. Consequently, it is envisaged that this will help scholars and political scientists who are studying electoral institutions to contextualize the event and appraise it against the democratic ethic that Africa is aspiring towards. The election, as a model, can either be accepted or rejected in contributing to the improvement of domestic or regional systems.² The limitation of this paper is that during the election, the writer was only an unaccredited observer. As such, it was not possible to gain access into polling stations or to formally interview the main actors in the election. Thus, much reliance was placed on information from the Zimbabwe Human Rights (N.G.O.) Forum (Z.H.R.F. or the Forum), newspaper reports, the Internet and reports from international groups, aside from the traditional forms of information gathering.³

B. The importance of elections

Granted that the reasons that the international community was drawn to the Zimbabwean election may not have been entirely selfless; this concern is based

¹ Allegations from different corners were made regarding the state of human rights in the pre-and post-2000 Parliamentary election period. See e.g., Zimbabwe: Terror Tactics in the Run-up to the Parliamentary Elections, AMNESTY INTERNATIONAL, June 2000; Rule of Law, The LAW SOCIETY OF ZIMBABWE MAGAZINE, 2000, at 5; Law Society of Zimbabwe; B. Raftopoulos, Politics in Zimbabwe-2001: Confronting the Crisis, Address at the Crisis in Zimbabwe Conference, (Aug. 4, 2001) (transcript is on file with the author).

² Individual aspects of the election may be dealt with likewise.

on the fact that democratic practices are not only important but must be monitored.\textsuperscript{4} Thus, in this age of globalization, no country is an island. If Country X does not measure up to democratic behavior, there may be a ripple effect that impact not only the region, but on the whole world.

It is now axiomatic that one of the fundamental prerequisites for any democratic transition is free and fair elections.\textsuperscript{5} Indeed, some scholars go as far as to say that the notion of democracy, involving the two aspects of "free and fair elections" and "good governance" has become a global norm.\textsuperscript{6} It is admitted that the notion of democracy and all its corollaries like the rule of law and good governance has not yet found universal acceptance, let alone interpretation.\textsuperscript{7} Nonetheless, it cannot be gainsaid that the notion of democracy, involving the two aspects of "free and fair elections" and good governance has become established in the course of the 1990's.\textsuperscript{8}

Among other things, governance in the modern sense recognizes that the will of the people should be central to how they must be ruled.\textsuperscript{9} Like elsewhere, the outcome of the 2002 election in Zimbabwe was expected to reflect the will of the majority of the people since the citizens have a right to determine their own existence and to choose who should preside over their day-to-day life in their pursuit of fulfillment and happiness.\textsuperscript{10} This will of the people is reflected in the doctrine of free and fair elections.

\textsuperscript{4} The ruling party and its friends argued that American and European interests, especially that of the British, was actuated not because of any concern for democracy but because of a 'satanic conspiracy' to return white supremacy and prevent the land redistribution exercise in which prime land belonging to white commercial farmers was being acquired reportedly for redistribution to landless blacks. \textit{See generally, \textsuperscript{28}PARL. DEB. (The Parliament of Zimbabwe) (2002) 4:4128-9; 28 PARL. DEB. (The Parliament of Zimbabwe) (2002) 46:4136.}


\textsuperscript{7} J.A. Wiseman, \textit{The New Struggle for Democracy in Africa} 7-8 (Ashgate, Aldershot 1996).

\textsuperscript{8} I.D.E.A., \textit{supra} note 6.


1. Free and fair elections

It is unlikely to be seriously contested that free and fair elections are a human right. Indeed, the elements of freedom and fairness in elections pervade all international and regional legal instruments. Elections should also be free and fair so that the rights and interests of the governed are protected.

The right of individuals to determine their own fate will remain a sham if they are not granted the necessary environment in which to exercise that right freely and without unnecessary impediments. Thus, state parties, in this case Zimbabwe, are bound to hold genuine and periodic elections "guaranteeing the free expression of the will of the electors." State parties are also bound to ensure that representatives are "freely-chosen." Apart from protecting the individual, these requirements are also designed to give legitimacy to the political system and to enhance democracy. In this respect, they are a motivation to contribute to the development process.

It should also be observed that the idea of freeness protects the voters not only at the time of voting, but also stretches back to the pre-election period. As a consequence, the principle of free elections is closely linked to the fundamental freedoms of thought, conscience, religion, expression, and association as well as assembly; and freedom from discrimination. These essential freedoms are also protected in the African Charter.

Lastly in this respect, it is also observed that the idea of freedom in the electoral process contemplates a political environment that is not manipulative. It envisages a situation where there is greater freedom of the media to operate...
without undue influence or hindrance. G. Feltoe sets out some of the considerations that could negate the freeness and fairness of an election as where:

a) Campaigning by a political party is prevented or seriously obstructed;

b) Voters are intimidated or bribed;

c) The electoral laws give an unfair advantage to one of the political parties contesting the election;\(^{20}\)

d) There is rigging of the elections.\(^{21}\)

It follows from the above therefore that the notion of freedom in elections is a prerequisite for democracy. It basically denotes an environment wherein voters have the freedom to participate in elections the way they want without fear of adverse effects on their and/or their families' safety, welfare, or general dignity and without coercion and restrictions.\(^{22}\)

It may also be added that fairness means that the rules of the game are clearly spelled out for all contesting parties to know what is at stake. The elections must also be held in respect to the principles of universal and equal suffrage, paying attention to the right to equality.\(^{23}\) These requirements are widely captured in international and regional legal instruments.

2. The international and regional instruments governing elections

Many conventions, declarations and protocols provide for free, fair and genuine elections. The International Covenant on Civil and Political Rights (I.C.C.P.R.) makes provision for open elections, as does the Convention on the Elimination of All Forms of Racial Discrimination (C.E.R.D.).\(^{24}\) Zimbabwe is


\(^{21}\) G. Feltoe, An unfair contest: The Presidential Elections in Zimbabwe, in 6 ZIMBABWE HUMAN RIGHTS BULLETIN 81 (2002). (Electoral fraud vitiates or even perverts the will of the people.)

\(^{22}\) This is the requirement for the secrecy of the ballot.


a party to these two conventions.\textsuperscript{25} It also ratified the African Charter on Human and Peoples’ Rights.\textsuperscript{26}

For the purposes of this inquiry, it suffices to say that all the instruments cited above basically make provisions for the conduct of regular (or periodic), genuine (or free and fair) elections, mostly by secret ballot. However, it is interesting to note that unlike the European and American conventions, the African Charter is silent on the issue of secrecy of the ballot. It is also remarkable that of the regional instruments, it is only the American Convention that makes a direct reference to the question of suffrage.\textsuperscript{27} The Charter may also be compared to the American Convention, which adds a right to be elected.\textsuperscript{28}

Evaluated against international and regional instruments the African charter therefore “stands out as meager and without substantial legal content” with regard to the right to vote. Moreover, the right is to be exercised “in accordance with the provisions of national laws.” It may be noted however that there is no clear check or limitation on the import or operation of national legislation, leaving wide discretion to the individual state.\textsuperscript{29} This leads us to examine the extent to which sovereignty, as contested by the government of Zimbabwe, can preclude international interest in domestic elections.

3. Sovereignty and elections

The state party to the international instruments setting out the rules and standards for the conduct of elections has some modicum of latitude to conduct elections within the parameters of its own laws.\textsuperscript{30} The United Nations recognized sovereignty in its Resolution on “respect for the principles of national sovereignty and non-interference in the internal affairs of states in their electoral processes.”\textsuperscript{31}

\begin{thebibliography}{99}
\bibitem{26} \textit{Id.} at 5.
\bibitem{28} \textit{Id.}
\bibitem{30} The principle of sovereignty has been codified in, among others, Article Two of the United Nations Charter.
\end{thebibliography}
Although they are held within the limitations of domestic law and practice, elections must be held in an environment that caters to the exercise of fundamental freedoms in accordance with international law. It seems incontrovertible that on the global scene, the principle of sovereignty is and should indeed keep on giving way to the principles of accountability, the observance of international norms, and human rights. Sovereignty should never become a sanctuary for dictatorship and human rights violations.

II. ZIMBABWE: A BRIEF POLITICAL BACKGROUND

The struggle for democracy and human dignity has its roots in the colonial period of the country. The British formally colonized Zimbabwe in 1890. In 1893, the Anglo-Ndebele War erupted against the local Ndebele ethnic group in the Matebeleland region. This war was actuated by the dispossession of blacks of their land and cattle.

Shortly thereafter the Shona groups from Mashonaland joined the war and by 1896, the conflagration had become so widespread that it was called The First Chimurenga or "war of liberation." After the arrest and execution of the Chimurenga leaders, further dispossession and oppression followed, the upshot of which was that dissent spread commensurately.

As a result, the trade union movement gave birth to several opposition political parties. The Zimbabwe African National Union (Z.A.P.U.) was formed in 1961 under the leadership of Joshua Nkomo and the Zimbabwe African National Union (Z.A.N.U.) was formed in 1963 under the headship of Ndabaningi Sithole as discontent with a political system that was premised on the notion of white supremacy grew. Smith proclaimed a Unilateral Declaration of Independence (U.D.I.) on November 11, 1965. This move was designed to perpetuate minority rule and is largely seen as the precipitator of the bitter liberation struggle that was to follow: the Second Chimurenga. The guerrilla war forced Smith to the negotiating table, culminating in the country’s first
majority vote in 1980. The elections were won by Z.A.N.U. (P.F.), uninterruptedly the ruling party, and ushered in black majority rule.\textsuperscript{37}

Although the country has never been a \textit{de jure} one-party state, the ruling party has completely dominated Zimbabwean politics since the Unity Accord with Z.A.P.U. in 1987. However, it seems to have been shocked out of complacency when the Movement for Democratic Change under the leadership of Morgan Tsvangirai almost won over half the contested seats in the June 2000 Parliamentary Elections. Compounded by the fact that the government had suffered defeat when Zimbabweans rejected a government-sponsored draft Constitution at a referendum earlier in the year, the tone of government official speeches became ominous if not utterly menacing as the Presidential election drew near.\textsuperscript{38}

\textit{The legal regime for the elections}

In evaluating the election, recourse should be had to the domestic legal regime, in particular, the electoral law and the Constitution. The Constitution provides for fundamental human rights.\textsuperscript{39} These include political rights like freedom of conscience, expression, assembly and association, movement and protection from discrimination.\textsuperscript{40} Other freedoms include the right to life, the right to protection from inhumane treatment and the right to protection from arbitrary search or entry.\textsuperscript{41}

The Constitution also provides for the election of the president in accordance with the electoral law.\textsuperscript{42} To be elected to presidency, one must be a citizen by birth or descent and should have attained forty years of age and be ordinarily resident in Zimbabwe.\textsuperscript{43} The tenure of the office of the president is limited to six years. It is however notable that the constitution is silent on the duration of the term of office of the incumbent president in the event of his/her being re-elected.

Section Sixty-one of the Constitution provides for the establishment of an Electoral Supervisory Commission (E.S.C.). It may be observed that although the Constitution provides for the registration of voters,\textsuperscript{44} it does not guarantee

\textsuperscript{37. Id. Z.A.N.U. (P.F.) won 116 out of the 120 contested seats.}
\textsuperscript{38. See generally, The FORUM, supra note 3. (These speeches are extensively captured within.)}
\textsuperscript{39. ZIMB. CONST., ch. III.}
\textsuperscript{40. Id. §§ 19-23.}
\textsuperscript{41. Id. §§ 12, 15, 17.}
\textsuperscript{42. Id. at ch. V, § 2.}
\textsuperscript{43. Id.}
\textsuperscript{44. ZIMB. CONST., ch. VI, § 8.}
that those entitled to be registered will actually be registered as voters. It also does not grant the right not to be prevented from casting the ballot.

The Electoral Act provides for regulations and procedures governing parliamentary and presidential elections.\(^\text{45}\) It makes provisions for the appointment of an Electoral Directorate (the E.D.), the functions of which include “giving instructions and making recommendations” for “ensuring that elections are conducted efficiently, properly, freely and fairly.”\(^\text{46}\) It also regulates the procedure and conditions of service of the E.S.C. and Registrar-General of Elections (the R-G) as well as the registration of voters. The Act also provides for the functions of the R-G who is subject to the direction of the E.D.\(^\text{47}\)

1. The Election Directorate (E.D.)

The E.D. consists of a chairman appointed by the President, the Registrar-General and no fewer than two, or more than ten other members. The Minister of Justice, Legal and Parliamentary Affairs appoints the ten others. Any other person assigned for the administration of the Act in terms of Section Three may also assume the Minister’s responsibility.\(^\text{48}\) It would seem that the composition of the E.D. does not augur well for guaranteeing free and fair elections. Ultimately, the President appoints members in one way or another. In practice, it has often been shown that the E.D.’s partiality in handling contentious elections is suspect.\(^\text{49}\)

The E.D. was chaired, ex officio, by Mariyawanda Nzuwa (appointed by President Robert Mugabe) and the Registrar-General (Tobaiwa Mudede). Who exactly comprised the E.D.’s other members in March 2002 was not clear. However, the Police Commissioner sat together with the E.D. Chair and the R-G at the table from which the results were announced.\(^\text{50}\)

2. The Electoral Supervisory Commission (E.S.C.)

An Electoral Supervisory Commission (E.S.C.) is established by Section Sixty-One of the Constitution. The President, in consultation with the Judicial Service Commission, appoints a chairperson and two other members.\(^\text{51}\) Two


\(^{46}\) Id. § 4.

\(^{47}\) Id. § 15(2)-(3).

\(^{48}\) Id. § 4.

\(^{49}\) See generally, THE FORUM, supra note 3, Angela P. Cheater (2001).

\(^{50}\) Id.

\(^{51}\) ZIMB. CONST., ch. LXI(1).
additional members are “appointed by the President after consultation with the Speaker.”

It should be noted that although the President must consult, he or she is not required to adopt recommendations given to him/her. The President also decides the tenure of office of the Commissioners. Furthermore, members hold office “on such conditions as the President may fix” and the President may remove them from such office. Thus, the impartiality of the E.S.C.—appointed by the President—remains suspect. Practice has also generated suspicions that the E.S.C. panders to political considerations although the Constitution provides for its independence.

Together with the R-G, the E.S.C. is responsible for conducting presidential and parliamentary elections. Still, it is interesting that neither the Electoral Act nor the Constitution specifically grants the E.S.C. a mandate to conduct elections for presidency.

The E.S.C. appeared to be inadequately geared to discharge its constitutional mandate as only four of the five required E.S.C. members were appointed. The President appointed retired army colonel, ex-combatant, and lawyer Sobusa Gula-Ndebele as the Chair. In turn, the Chair of the E.S.C. appointed as Director of Elections brigadier Douglas Nyikayaramba.

Seventy-two Zimbabwe National Army officers were reportedly seconded to the E.S.C. One thousand eighty election supervisors and 22,000 election monitors were mostly recruited from the ministries of defense, home affairs and education.

It would appear that the selection of electoral officers was not transparent and inclusive. A balance could have been attained by also including people from other sectors of the national spectrum to give the impression of independence. In Lesotho, for example, officers of the Independent Electoral Commis-

52. Id.
53. Electoral Act, supra note 45, at art. § 7.
54. Id. §§ 7, 10.
55. ZIMB. CONST., ch. LXI(6). In 2002, the United Parties resolved to boycott the election until amendments were made to the Electoral Act and the Registrar-General was precluded from conducting voter registration. See also Angela Cheater, A Baseline Report in Zimbabwe Lawyers for Human Rights, ZIMBABWE HUMAN RIGHTS BULLETIN, Jan.-June 2000, at 66.
56. See generally THE FORUM, supra note 3.
57. He took over after Peter Hatendi resigned in protest over funding and other inadequacies.
sion (I.E.C.) came from diverse backgrounds. Moreover, the law was amended willy-nilly to favor the ruling party, as will be seen below.

3. Changes to the electoral law

The President used his wide powers three times under the Electoral Act to promulgate laws that were detrimental to the opposition. One such law was the General Laws Amendment Act (G.L.A.A.). The G.L.A.A. made extensive amendments to the Electoral Act. It was described by the opposition as “undemocratic and contrary to the S.A.D.C. Parliamentary Forum Norms and Standards for Elections in the S.A.D.C. Region.” The Minister of Justice, Legal and Parliamentary Affairs described the amendments as designed “to kick out from our politics the influence of foreign money and foreign interests” and to prevent private organizations from conducting voter education.

Also contentious was a provision in the G.L.A.A., which empowered the Registrar-General to change voters’ registration particulars without informing them. It was feared that it facilitated rigging of the voter roll by moving voters between constituencies without their knowledge or even throwing them off the roll altogether. After the Supreme Court nullified the G.L.A.A., an Electoral Amendment bill was introduced carrying identical provisions.

4. Evaluation

It may be observed that the electoral institutions for the election were not independent, at least in principle. International standards for transparency, freeness and fairness of the electoral process can normally be enforced when, among other things, the selection of electoral officers and the setting up of institutions is seen as unbiased. Charges to the electoral law that fly in the face of court judgments may only have one purpose: to favor the ruling party at the

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62. See Electoral Act, supra note 45, § 158. This section gives the President powers to make statutory instruments that s/he “considers necessary or desirable to ensure that any election is properly and efficiently conducted and to deal with any matter or situation. . . .”


65. See generally, THE FORUM, supra note 3.

66. See ZIMB. CONST., ch. XXXIV(1).

67. See COMMONWEALTH, supra note 61, at 23.

detriment of the opposition. However, this on its own should not be taken in isolation to arrive at any conclusion on the freeness or otherwise of the election. There are other stages that are crucial to an electoral process, as those analyzed hereunder.

III. THE PRE-ELECTION SCENARIO

A. Voter education

Unlike the position regarding the 2000 parliamentary election, the government outlawed the provision of voter education by civil society and made it a preserve of the E.S.C. The E.S.C., however, could delegate its responsibility and supply material to whomever it granted the permission to carry out voter education.

The G.L.A.A. also banned foreign contributions or donations for the purposes of voter education to anyone except the Electoral Supervisory Commission. This restricted the participation of civil society in voter education and deprived voters of their freedom of information. This provision was not as illogical as it might seem considering that the E.S.C. was short on resources. Since education is power, it is arguable that the government had a reason to want the electorate to remain ignorant in the face of mounting economic problems and what promised to be a stiff election. It is notable, however, that these provisions were largely ignored as the Zimbabwe Election Support Network (Z.E.S.N.) and others continued to distribute pamphlets. Thus, although the G.L.A.A. had the potential to, and did prejudice voters, the effect was not fatal in terms of voter education.

B. Voter registration

On January 31, 2002, the nomination day for the presidential election, the E.S.C. announced that 5,479,100 people were registered on the voters roll. The official government newspaper, The Herald, announced that, of those

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69. In Lesotho, electoral laws were only changed to facilitate the smooth running of elections in view of the compromises made by the contestants.


71. Id. § 14D(5).

72. Lesotho Report, supra note 60.

73. It may also be noted that the Civic Alliance for Social and Economic (C.A.S.E.P.) and the Legal Projects Centre (L.P.C.) continued to educate people on their rights in spite of the G.L.A.A.

74. The Forum reports that the M.D.C. claimed to have uncovered 524 duplications and 107 deceased voters still registered on the roll.
registered, 3.2 million were urban voters and 2.2 million rural voters. The government later altered the figure to reflect the presence of 3.2 million rural voters and 2.2 million urban voters. This is significant because the ruling party believed its support base was the rural area.

It is alleged that the office of the Registrar-General declined to publicize the number of voters registered in each constituency on the grounds that the information was confidential. Furthermore, the R-G is also alleged to have refused to release the final roll used in the election. This caused disquietude within the opposition as it was argued that the roll could be used to manipulate the outcome of the vote. Some commentators claimed that this anomaly reflected the fact that the roll had not been updated, leaving "a vast reservoir of fictional voters who can then be mobilized at will when the going gets tough." This secretiveness was hardly in the spirit of transparency and had the potential to vitiate the fairness of the election, contrary to international expectations.

C. Complaints with regards to registration

The Human Rights Forum observes that the fundamental rights to vote and equality were compromised. It also observed that the effects of the G.L.A.A. and other subsequent laws was to disenfranchise Zimbabwean citizens of foreign descent and those previously entitled to postal votes. Moreover, procedural complexities also resulted in most people being deprived of their right to register, and therefore, their right to vote.

Disenfranchisement occasioned by failure to secure national identification was particularly rampant among women married under customary law and the youth. Chiefs and headmen (under the pay of the ruling party) became a conduit for securing national identity cards (IDs) for the purposes of registration. Tendai Shumba, of Magunje (Hurungwe district) failed to secure a national ID reportedly because she did not take a letter of recommendation from Z.A.N.U. (P.F.) officials.

It is also reported that numerous roadblocks were set up by Z.A.N.U. (P.F.) supporters to dispossess people of their identity cards so that they could not prove their membership to the ruling party. The Forum also reported that, by the time of voting, about 1,300 national identity cards had been reportedly stolen in the districts of Mutoko, Tsholotsho, Nkayi, Bulilimamangwe South,

Kwekwe and Buhera North. Such extensive disenfranchisement impacted the freeness and fairness of the election.

Other "stringent" provisions that may have contributed to the disenfranchisement of voters were the proof of residence requirements in the G.L.A.A.\footnote{G.L.A.A., supra note 63, § 3(e)-(f). It is generally felt that the G.L.A.A. placed "unreasonable" demands on the electorate.} Many people in the urban areas (touted to be the opposition M.D.C. stronghold) were either homeless or could not obtain proof of residence. Many expatriates intending to come to Zimbabwe to vote were likewise disenfranchised.\footnote{See The Zimbabwe Standard, Mar. 10, 2002, at http://www.standard.co.zw (last visited Oct. 11, 2003).} Approximately 22,000 prisoners in jail could not vote either, although there is no legal impediment for those on remand or those serving six months or less. In contrast, all prisoners were allowed to vote at independence in 1980.

Students were also among those to suffer disenfranchisement. Those who had been registered at tertiary institutions found that they could not vote as the Ministry of Higher Education gave instructions that the institutions remain closed during the election. Students attempting to vote at polling stations near their institutions were reportedly turned away.\footnote{See The Daily News, Mar. 2, 2002, at http://www.herald.co.zw (last visited Oct. 11, 2003) (quoting the Zimbabwe National Students Union (Z.I.N.A.S.U.).)}

In addition, amendments that were introduced to the Citizenship Act\footnote{See The Citizenship of Zimbabwe Act, § 4:01 (1990).} were also used to disenfranchise a majority of the electorate who held dual citizenship. It is reported that the R-G refused to re-instate those who had successfully applied to the courts against these amendments.\footnote{Lesotho Report, supra note 60.} There were also allegations of procedural irregularities like registration after the roll had been closed or by the underage.\footnote{See generally, The Zimbabwe Human Rights Forum, at http://www.hrforumzim.com/special-inhrru/Election (last visited July 30, 2002).}

Although it is difficult, if not impossible, to verify all allegations, surely some of these complaints must have a basis in fact. It would seem that most of them were founded, as the government did little to counter them. Violations, and willful manipulation of the law is difficult to dispute. Such a scenario offends the standards for elections as contemplated in the international instruments adverted to previously.\footnote{See also Southern African Development Community (S.A.D.C.) Parliamentary Forum, Norms and Standards for Elections in the SADC region. (Zimbabwe is a member of S.A.D.C.)}
IV. THE ELECTIONS AND FUNDAMENTAL FREEDOMS

A. The freedoms of expression and information

The right of freedom of expression is protected in the Constitution.\(^\text{88}\) As was the case in Lesotho’s General Elections, the state-controlled media devoted most of their coverage to the ruling party. In Zimbabwe, however, the situation was more serious. To begin with, the media was clearly polarized between the independent press and the state-controlled press.\(^\text{89}\) The former seemed to favor the opposition, although most of them strove for balance. The government controlled media was however glaringly partisan. For example not a single state-controlled newspaper, radio or television ran any advertisement for the opposition when the private press would advertise the ruling party.\(^\text{90}\)

Even more repugnant, the state-controlled media often invented stories to paint the opposition in a bad light.\(^\text{91}\) In fact, the Zimbabwe Broadcasting Corporation (Z.B.C.) was subsequently accused of not adhering to basic standards of journalism in their support for the ruling party.\(^\text{92}\) The Media Monitoring Project issued a report of the news bulletins carried by the television from December 1, 2002 to March 7, 2002. It observed that ninety-four percent favored Z.A.N.U. (P.F.) while the remainder was negatively slanted against the opposition.\(^\text{93}\)

Unlike the case with Lesotho, incidents of violence against media house and personnel were not uncommon during the Zimbabwean election. Offices and printing houses of The Daily News were bombed several times by suspected ruling party supporters. Independent publications were ‘banned’ from such areas as Bindura, Karoi and Masvingo, all strongholds of the ruling party.\(^\text{94}\) Vendors of these publications were invariably assaulted or tortured.

The law was also used to make it difficult for the media to freely inform the populace. Laws like the Public Order and Security Act (P.O.S.A.),\(^\text{95}\) as well

\(^\text{88}\) ZIMB. CONST. § 20; see also U.D.H.R., supra note 10, at 19; I.C.C.P.R., supra note 12, at art. 19.


\(^\text{91}\) G. Feltoe, supra note 21, at 83-84; See also SUNDAY MAIL, Feb. 24, 2002 and Mar. 3, 2002; see also THE HERALD, Feb. 11, 2002.

\(^\text{92}\) COMMONWEALTH, supra note 61.

\(^\text{93}\) FORUM, supra note 3, at 18.


\(^\text{95}\) Public Orders & Security Act, ch. 11:17.
as the Access to Information and Protection of Privacy Bill (now an act), were often used to arrest journalists for publishing "false statements, which are peddled internationally."\(^96\)

In summary on this issue, it may be observed that ruling party supporters deliberately violated the rights of media personnel as well as the electorate. Opposition parties were denied coverage in the state-owned media. As if that was not enough, laws were introduced to curtail the right of expression as well as its attendant right to receive information. Where the playing field is not level, elections cannot be said to be genuine, free and fair. Next, we look at the level at which other basic rights were respected during the election.

### B. Freedoms of association and assembly

The Constitution protects these two freedoms.\(^97\) The African Commission in *John D Ouko v Kenya* also held freedom of association sacrosanct.\(^98\) Likewise, the Commission affirmed freedom of assembly as a fundamental political right in *Sir Dawda K. Jawara v The Gambia*.\(^99\) However, these freedoms seem to have been trampled upon during the Zimbabwean election.

The introduction of the P.O.S.A. heralded the intensification of a series of violations.\(^100\) Summarized, P.O.S.A. made it illegal to hold political meetings without advance notice and permission of the police. It also prohibited statements likely to cause ‘ridicule’ to the President. A month after its promulgation, forty-two people had been arrested under the Act. The Forum notes that none of them were ruling party supporters.\(^101\)

While President Mugabe addressed fifty major rallies, Tsvangirai could only address eight as the police mostly refused to grant permission on the grounds that they feared for public security.\(^102\) In White City Stadium in Bulawayo, the police fired tear gas to disperse M.D.C. supporters after clashes with Z.A.N.U. (P.F.) sympathizers who invaded the stadium.\(^103\) Subsequently,

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96.  P. Chinamasa, as recorded in 28 PARL. DEB. (Parliament of Zimbabwe) 39:3547.
97.  ZIMB. CONST., ch. § XXI. See also U.D.H.R., supra note 10, at art. XX; I.C.C.P.R., supra note 12, at arts. XXI, XXII.
101.  THE FORUM, supra note 3, at 23.
102.  Id.
the M.D.C. had to obtain an injunction against the police. There were also reports that police asked for national IDs before allowing people to attend rallies addressed by M.D.C. Those with no cards were allegedly turned away.

C. Freedom from violence and intimidation

Political violence impedes the elector's ability to participate freely in the electoral process. The electors can either be deterred from voting or may be unduly influenced in their choice. Violence was the most outstanding occurrence in the Zimbabwean election. In most instances, it appeared to have been incited by the ruling party. The opposition M.D.C. was the principal target, but civil society and churches were not spared. We must, however, mention that the opposition itself was not above perpetrating violence. Nonetheless, the ruling party employed the full weight of the 'war veterans' and state agents in order to win the election.

Political violence on such a scale had never been experienced before the 2000 Constitutional referendum and Parliamentary election. Inflammatory statements from the leadership of the ruling party worsened it. President Mugabe was quoted boasting that his party had several "degrees in violence." He also urged his supporters to wage "a real war" on the M.D.C. "The war is going to be physical," he said.

Following a request by S.A.D.C., he eventually made an appeal for an end to violence, arguing that it was drawing international attention. After the European Union (E.U.) and the Commonwealth mounted the pressure, the President made further calls for an end to violence. The governor for

106. COMMONWEALTH, supra note 61, at 7.
107. Id.
Manicaland is also reported to have called for a peaceful campaign. These pleas did nothing to stop the tide as party youths trained under the national youth service, known as the “green bombers” for their military-style uniforms, continued to set up roadblocks and terrorize the people.

The “war veterans” and the “green bombers” also set up terror “bases” where victims would be tortured or “re-educated”. Several deaths and disappearances were reported. In the Midlands, an M.D.C. supporter was allegedly beheaded with a spade. Another victim had the letters M.D.C. carved with a knife on his back. Gang rapes were not uncommon against suspected opposition supporters. In stark contrast, Tsvangirai appealed for reason and resort to the law.

Tsvangirai’s faith in the rule of law was however misplaced, as the Zimbabwe Republic Police (Z.R.P.) was clearly partisan in enforcing the law. In fact, it has been said, “[s]ympathizing with the opposition became a sure way of having normal life disrupted by the law enforcement agents.” In Chivi District, police fired live bullets and hurled teargas at Tsvangirai’s convoy after he stopped to greet supporters lining the roadside. This was not the first or last time the police harassed him or his supporters. Today, the M.D.C. president faces two counts of treason, whereas senior Z.A.N.U. (P.F.) officials perpetrate violence and incite mayhem with impunity during elections.

115. The Forum catalogues a total of 56 reported politically motivated deaths. THE FORUM, supra note 3, at 97-100.
116. COMMONWEALTH, supra note 61.
117. Id. This writer has assisted some of these victims and has also suffered torture at the hands of state agents. Such mindless violence is still continuing at the time of writing.
119. This has been going on since the Constitutional referendum in which the government’s sponsored Draft Constitution was rejected, see for example The Human Rights Observer ‘Deterioration of the rule of law in Zimbabwe’; Norwegian Election Observation Mission (2002 Presidential Elections in Zimbabwe 2002, Preliminary Report Issued on 12 March 2002 p 3 and G. FELTOE, The Onslaught Against the Rule of Law in Zimbabwe (2001) (Paper presented to the South African Institute of International Affairs, Johannesburg).
120. ZIMBABWE HUMAN RIGHTS ASSOCIATION, ZIMBABWE PRESIDENTIAL ELECTIONS 2002 REPORT 3 (2002) [hereinafter ZIMRIGHTS].
V. POLLING AND POST-ELECTION SCENARIO

Although there were incidents of gross human rights abuses in the run-up to the election, it is encouraging that the election days were generally peaceful.\textsuperscript{123} However, police fired teargas in Kuwadzana, Harare to dispel voters who had become impatient with the slow pace of the election process. A large number of people could not vote in the M.D.C. strongholds of Harare and Chitungwiza as a result of the reduction of polling stations in urban areas. The reduction amounted to about thirty to forty percent.\textsuperscript{124}

Even though verification and counting was delayed, the process was conducted smoothly and according to procedure, as was the case in Lesotho. Notwithstanding that, prior irregularities had marred the whole process. For example, it is reported that the uniformed forces’ voting was done in the presence of senior officers and was therefore not secret and subject to influence.\textsuperscript{125} “Numerous M.D.C. agents were kidnapped, injured or arrested or had their cars stoned or taken away,” making it impossible to supervise the process.\textsuperscript{126}

Furthermore, in Kuwadzana, “war veterans” allegedly assaulted and dispersed voters while wielding guns.\textsuperscript{127} It is not surprising, therefore, that the outcome of the election has not been accepted by the main opposition party, which has filed suit. More importantly, the European Union and the United States have imposed targeted sanctions against senior members of the ruling party.

VI. WHAT WENT WRONG?

A. The electoral system

In analyzing the Zimbabwean anomaly, it is fitting to make a brief comparison with other countries.\textsuperscript{128} Lesotho 2002 elections and Ghana 2000 elections were remarkable for the peacefulness. In Lesotho, it has been mooted that this was because of the new electoral system that was introduced.\textsuperscript{129}

Zimbabwe uses the First Past the Post (F.P.P.) or “winner takes all” electoral arrangement. It cannot be said that the choice of a political model is merely important. Apart from its impact on the “representativeness, legitimacy

\textsuperscript{123} This writer was an unofficial observer on behalf of the Centre for Human Rights, University of Pretoria.
\textsuperscript{124} COMMONWEALTH, supra note 61, at 16.
\textsuperscript{125} ZIMRIGHTS, supra note 120, at 5.
\textsuperscript{126} Feltoe, supra note 21, at 92.
\textsuperscript{128} This writer has observed several elections, including the Lesotho 2002 ones.
\textsuperscript{129} The Mixed Member Proportional Representation system.
and stability of the government born of it,'" the choice of a model is also important in that it shapes the limitations and expectations of the contestants and steers their conduct with respect to human rights. For example in the F.F.P. system the stakes are high in the sense that the loser loses everything. Knowing this, parties and individuals are liable to use unethical and unlawful means to win the election. Since elections have been held relatively peacefully (in Ghana for instance) using the F.F.P. system, the choice of an electoral model should not be overemphasized. Even in Lesotho, where a new model was introduced, it must not be forgotten that it was used on a limited scale. There are other vital considerations to be taken into account.

B. The lack of transparency in Zimbabwe

Perhaps the most serious cause of violence in Zimbabwe was the lack of openness accompanying the electoral process. For instance, the registration process reopened three times, amid claims by the opposition that there was insufficient publicity of the event.131 The electoral laws that had been the hallmark of past elections were often changed haphazardly. The courts sometimes struck down some of the laws but nevertheless, the same provisions would be returned in the form of other laws.132 In instances such as these, it is likely that both the electorate and the contestants would be driven to unlawful means out of sheer frustration or even to compliment an apparently anarchical process.

The refusal to grant accreditation to both domestic and foreign observers that the Zimbabwean government perceived as unfriendly worsened the situation.133 It also seemed to give credence to the fact that the process was flawed.134

Also important is the fact that in Lesotho, the "rules of the game" were clearly defined. The opposition had been included in the negotiations surrounding the post-1998 electoral preparations. This was in sharp contrast to the "ostracization" of the opposition in Zimbabwe. Thus, more because of the "inclusivity" of the development in Lesotho rather than the new electoral system, the election went smoothly.


131. COMMONWEALTH, supra note 61.

132. For example the General Laws Amendment Act was struck down by the courts to be returned a barely two weeks later in the form of the Electoral Amendment Bill (number 4 of 2002).

133. The local Zimbabwe Election Support Network (Z.E.S.N.) applied to field 12,500 observers but was only allowed 500. The twenty-three strong delegation of NGOs from South Africa was refused accreditation. The E.U. pulled out after its head of delegation had also been denied observer status.

C. The advent of a strong opposition in Zimbabwe

It could be contented that the Zimbabwean election was strikingly different because of the recent emergence of a strong official opposition. Unlike in Lesotho, where the major opposition parties had been testing their strengths against one another for a considerable period of time, the ruling party in Zimbabwe had a history of dominance and complacency that made it appear invincible. Although Z.A.N.U. (P.F.) seems to have a history of violence against political opponents, in 2002 the fear of loss was palpably existent, as evidenced in the overreaction by the ruling party. This apprehension could only lead to desperate measures that would be an indictment to the whole electoral course.

It should be noted further that unlike Lesotho, Zimbabwe has a very big middle class, a student movement and civil society so strong that consciousness was complementally high. Because of unparalleled economic woes—largely the result of corruption and Economic Structural Adjustment Policies—students, urbanites, and the middle class were the most poignant victims of the economic downturn. This could only increase strife, as demonstrations became a daily phenomenon. Believing it was under a siege of coup like proportions, the ruling party increased strong-arm tactics.

D. The Land Question

Although no African state could be said to be liberated from problems regarding the land issue, in Zimbabwe the clamor took on a serious tone in the run up to the elections for various reasons. The liberation struggle (one of the most bitter in the struggle for the decolonisation of Africa) was principally premised on the land question.

The Lancaster House Constitution, which was negotiated in 1979, made it practically impossible for the new black government to expedite the process of redistribution. Thus after the government failed to win support to solve the land issue through what many perceived to be an unrepresentative, unjust and discriminatory Constitutional overhaul, it mounted what was dubbed a "racist campaign" against white farmers. They were accused of having sponsored the


136. Most statements by senior personnel in the government were astonishingly un-statesmanlike.

rejection of the draft Constitution in cahoots with the M.D.C., who were also called “puppets” of Western influence and “Rhodies.”

This gospel of hate found its mark and spawned ruling party militants in the form of “war veterans” and most unemployed youths who were willing to go to extremes to advance the “Third Chimurenga.” Thus, although other countries have their own land crisis, the demagoguery surrounding the issue in Zimbabwe contributed to violence.

VII. CONCLUSION AND RECOMMENDATIONS

Following from the above, it is our submission that an honest critique will reach the conclusion that the 2002 Presidential election was not genuine, legitimate, free, or fair. While there is little controversy over the genuineness of the elections in Lesotho, the Zimbabwean process violated all the norms and standards, international or regional, expected in an election. It is sad, therefore, that some observers opted to see no evil, hear no evil and speak no evil.

In view of this, it is hoped that it is not a misplaced sense of brotherhood or an "old-boy network of African strongmen," (as Philip Gourevitch calls it) that makes African leaders stick together in the face of wanton human rights violations. Now is the time to come up with clear, binding and enforceable human rights protection protocols and mechanisms before the continent is relegated to the dustbin of democratic competitiveness.

For the sake of progress and development, the continent should be courageous enough to admit, condemn and rectify its shortfalls. Where praise is due, as in the Lesotho election, it must be generously accorded. By the same token, wherever intervention is necessary, as was arguably the case in Zimbabwe, the international community should not hesitate to intervene. It is mainly because nothing was done then that people continue to die today.

138. Zimbabwe was formerly Rhodesia under colonial rule.

139. South Africa, Kenya and Namibia are some of the countries where the land question has manifested itself recently.

140. These include the Namibian, Kenyan and Tanzanian Government Observer Teams, the C.O.M.E.S.A. Observer Team, the O.A.U. Observer Mission, the African Heads of (Diplomatic) Mission and the S.A.D.C. Ministerial Task Force.

141. PHILIP GOUREVITCH, WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA 254 (Picador USA 1999).
A MODEL WAR CRIMES COURT: SIERRA LEONE

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"Nothing can be right and balanced again until justice is won—the injured party has to have justice. Do you understand that? Nothing can be right, for

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years, for lifetimes, until that first crime is punished. Or else we’d all be animals.”

I. OVERVIEW

Is it possible that the perpetrators of an atrocity so heinous it was code-named “Spare No Living Thing” could not be brought to justice? The Government of Sierra Leone said no! On June 12, 2000, the President of Sierra Leone sent a letter to the United Nations Secretary General requesting assistance in establishing a special court to try those responsible for the heinous crimes perpetrated against his people and the country. The Special Court for Sierra Leone (the “Special Court”) was established on January 16, 2002, when the United Nations and the Government of Sierra Leone agreed to a hybrid structure, or joint effort, for prosecuting those most responsible for the murders, rapes, mutilations, looting and other crimes against humanity that have occurred during the civil war in Sierra Leone.

The Special Court is currently scheduled to open on June 30, 2003. The hybrid Special Court, the first of its kind, should be the model for pursuing war criminals in countries where the local courts and or governments are unable to do so. Part II of this paper will provide a brief background on the country of Sierra Leone and provide limited examples of the atrocities that occurred during war. Part III will address the numerous attempts at peace and the failure of those attempts. Part IV will provide background information on the establishment of the Special Court, its mandate, and the offenses it will cover. Benefits and detriments of the statutory structure of the Special Court will be outlined. Additionally, there will be some comparisons to the Yugoslavia and Rwanda tribunals, as well as the International Criminal Court (“ICC”). Part V will discuss the benefits of the hybrid system as an institution and why it is an appropriate model for future tribunals. Part VI will address the pitfalls in the hybrid model as an institution and ways to overcome them. The historical background and attempts at peace outlined in Parts II and III created an environment that compelled the government of Sierra Leone to seek assistance from the international community. The Special Court, outlined in Part IV, is a direct result of that request for assistance. While the Special Court is not without its defects, they are clearly outweighed by the benefits of the hybrid system. As such, hybrid courts, like the Special Court, should be a model for future international criminal tribunals.

2. Sierra Leone: “Special Court is Threat to Peace” – Ex Combatants, AFRICA NEWS, Nov. 22, 2002.
II. BACKGROUND

A. History/Country Issues

In 1652, the first slaves in North America were brought from what would become the Republic of Sierra Leone to the islands off the southern coast of the United States. In 1772, Sierra Leone was established as a settlement for freed slaves by Granville Sharpe, but was later proclaimed a crown colony of Great Britain in 1808. On April 27, 1961, Sierra Leone became an independent state, although it retained the Queen of England as the constitutional Head of State until April 19, 1971. On September 27, 1961, Sierra Leone became a member of the United Nations.6

In 1967, an army coup ousted the previously elected government and the country came under military rule until 1992. At this time, Valentine E.M. Strasser was installed as head of state by the Revolutionary United Front ("RUF"). He held office until January of 1996 when he was "ousted by a military coup led by his defense minister, Brigadier Julius Maada Bio." General elections followed and Ahmad Tejan Kabbah was elected President in February 1996. However, civil war once again erupted in 1997. Kabbah was forced to flee in May 1997, but he was returned to power in March 1998 after intervention by ECOMOG, the Economic Community of Western African States Monitoring Group.

On May 14, 2002, the people of Sierra Leone held peaceful elections, in which incumbent President Ahmed Tejan Kabbah, of the Sierra Leone People's

5. Id. at 7-8.
8. Id.
10. Id.
11. Id.
Party was elected for a second five year term.\textsuperscript{12} While numerous parties were represented, the RUF’s leader Foday Sankoh, who is currently being held to face trial in front of the Special Court, was prevented from running for the post due to a technicality; he had not registered to vote.\textsuperscript{13}

Today, Sierra Leone has a population of approximately five million people.\textsuperscript{14} The life expectancy at birth is 36 years for men and 39 years for women, with an infant mortality rate of 170 per 1,000 births.\textsuperscript{15} In its 2002 Human Development Report, the United Nations Development Programme ranked Sierra Leone 173rd (lowest) in human development.\textsuperscript{16} It is officially the poorest country in the world.

**B. The Insurrection**

It is estimated that between 100,000 and 200,000 people (2-4\% of the population) lost their lives during the war.\textsuperscript{17} An additional 100,000 or more were mutilated.\textsuperscript{18} Moreover, countless persons were displaced by the war.\textsuperscript{19} There is no single cause for the 10 year war in Sierra Leone, which began on March 23, 1991. The conflict started as a rebel incursion at Sierra Leone’s border with Liberia.\textsuperscript{20} The RUF claimed responsibility for the uprising, declaring it was fighting against the corrupt middle-class in the capital, Freetown.\textsuperscript{21} Additional contributing causes include corruption, monopolization of power, and unequal distribution of wealth. The prominent human rights group, Human Rights Watch stated, the “[d]eep-rooted issues that gave rise to the war [include]...”\textsuperscript{22}

\begin{itemize}
  \item \textsuperscript{13} Declan Walsh, The Vote For Hope in a Country that Once had No Future, The INDEPENDENT (LONDON), May 15, 2002.
  \item \textsuperscript{14} Sierra Leone, FINANCIAL TIMES INFORMATION, June 14, 2002.
  \item \textsuperscript{15} United Nations Department of Economic and Social Affairs, World Statistics Pocketbook 170 (2000).
  \item \textsuperscript{17} Ex-S. Leone Rebels Demand Sankoh’s Unconditional Release, AGENCE FRANCE PRESSE, Sept. 17, 2002 [hereinafter Ex-S. Leone Rebels].
  \item \textsuperscript{18} Children on the Frontline, THE IRISH TIMES, Mar. 2, 2002 [hereinafter Children].
  \item \textsuperscript{19} Human Rights Watch estimates hundreds of thousands of civilians were displaced during the war. See The Jury Is Still Out, supra note 12, at 1.
  \item \textsuperscript{20} There have been reliable reports that the war, or parts thereof, was supported by Charles Taylor of the National Patriotic Front of Liberia, now President of Liberia. Liberia’s involvement in the war is outside the scope of this paper, but may help to understand how the RUF and other factions were able to sustain the insurrection for prolonged periods.
  \item \textsuperscript{21} Children, supra note 18.
\end{itemize}
a culture of impunity, endemic corruption, weak rule of law, crushing poverty, and the inequitable distribution of the country’s vast natural resources . . .  

The leader of the RUF was an ex-Corporal in the Sierra Leone Army ("SLA"), Foday Sankoh. The goal of the RUF was to overthrow the All People’s Congress Party Government, headed by Major-General Joseph Saidu Momoh. While claiming they were liberating the people of Sierra Leone from Government corruption, the RUF began a reign of terror over them. No area of the country was spared.

The rebels became notorious for hacking off limbs, predominantly of women and children. They conscripted children, often through coercion and drugs, to aid in the performance of atrocities. For instance, Musa Daboh was abducted when he was 13. The RUF made cuts in his leg and rubbed cocaine in before sending him into the front line. “Daboh says they were on drugs when they attacked the village [his home town Kabala], going on a firing spree, as humans ‘were like chickens.”

Rape and murder were widespread. “’They stripped me naked and raped me in front of my husband . . . They told him to laugh in front of the children or he would be shot.’ [said Baindu] It didn’t matter. They shot him anyway, and their three children.”

There was mass destruction of property and forced labor. Sahr Gbamanja saw the RUF burn his 13-year-old brother to death in their house. “The rebels, he said, tied people together in gangs and forced them to work or carry food and ammunition. Those who refused or were too weak to work had their hands cut off or were butchered.”

These are just a few examples. A United Nations supported forensic team has uncovered more than 75 mass graves, which are expected to be exhumed after the final mapping of the sites takes place. Additional information regarding how the bodies were killed should be available after the bodies are exhumed. The exhumation may uncover atrocities that to date are unknown.

22. The Jury is Still Out, supra note 12, at 1.
23. UNITED NATIONS INSTITUTE FOR DISARMAMENT RESEARCH, BOUND TO COOPERATE: CONFLICT, PEACE AND PEOPLE IN SIERRA LEONE 15 (Anatole Ayissi & Robin-Edward Poulton eds., 2000) [hereinafter BOUND TO COOPERATE].
27. UN Team Identifies 75 Mass Graves in Sierra Leone, PANAFRICAN NEWS AGENCY DAILY NEWSWIRE, June 26, 2002.
III. ATTEMPTS AT PEACE

A. Abidjan Peace Agreement

The Peace Agreement between the Government of the Republic of Sierra Leone and the RUF, signed at Abidjan on 30 November 1996, was the first attempt to end the internal conflict in Sierra Leone. This agreement, among other things, 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 Article 14 of the agreement provided a blanket amnesty for members of the RUF, stating:

To consolidate the peace and promote the cause of national reconciliation, the Government of Sierra Leone shall ensure that no official or judicial action is taken against any member of the [RUF] in respect of anything done by them in pursuit of their objectives as members of that organization up to the time of the signing of this Agreement.

Although signed by President Kabbah of Sierra Leone and RUF leader, Corporal Foday Sankoh, with the Government of Côte d'Ivoire, the United Nations, the Organization of African Unity and the Commonwealth Organization acting as moral guarantors, peace in Sierra Leone was not lasting. Despite the accord, attacks on the civilian population continued. The Government blamed the RUF for the attacks and the RUF blamed the Government civil defense forces, also known as the Kamajors.

As a result of the continued conflict, on May 25, 1997, a coup led by Major Johnny Paul Koroma of the Armed Forces Revolutionary Council (“AFRC”) ousted the Kabbah government. Rebels from the RUF joined forces with the AFRC junta, which also consisted of members of the SLA. Although the AFRC claimed the merging of the antagonistic forces of the RUF and the SLA meant peace for Sierra Leone, the AFRC did not have the support of the local

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29. See id. at art. XIV, at 6.
30. See BOUND TO COOPERATE, supra note 23, at 39.
or international communities. As such, the AFRC resorted to terror tactics in order to impose its will.32

B. Economic Community of West African States (ECOWAS) Peace Plan

The Communiqué issued at Conakry on 23 October 1997, at the conclusion of the meeting between the Ministers of Foreign Affairs of the Committee of Five on Sierra Leone of the Economic Community of West African States and the delegation representing Koromah,33 laid out a six point peace plan, to be implemented over a six month period. First, it called for the immediate cessation of hostilities throughout Sierra Leone. Second, it called for the disarmament, demobilization and reintegration of combatants supervised by ECOMOG. Third, it called for the monitoring of humanitarian assistance by ECOMOG and the United Nations military observers. Fourth, it called for the return of refugees and displaced persons, with the assistance of the United Nations High Commissioner of Refugees. Fifth, it called for the Kabbah government to be restored as of April 22, 1998, with a procedure for power sharing. Sixth, it called for the reintegration of combatants through job training or educational scholarships. In addition to these points, the Plan included that "unconditional immunities and guarantees from prosecution be extended to all involved in the events of 25 May 1997 with effect from 22 April 1998."34

This agreement was not implemented due to lack of political will on both sides.35 Although the ECOMOG forces were successful in reinstating President Kabbah, the result was the AFRC retreated into the bush and broke up into disorganized bands of RUF and SLA troops.36 In early January 1999, a combined force of rebel soldiers invaded Freetown. A massive attack on the city, which included the killing of more than two hundred police personnel and their families took place.37 The first three weeks of this battle are considered the most "intensified, systematic and widespread violations of human rights and international humanitarian law against the civilian population."38

32. See BOUND TO COOPERATE, supra note 23, at 164.  
34. See id. para. 8.  
35. See BOUND TO COOPERATE, supra note 23, at 41.  
36. Id.  
37. See id. at 75.  
The January 1999 mission was code-named “Spare No Living Thing”, and consisted of the murder, rape and mutilation of thousands of civilians. Other missions included “Operation Burn House” which was a series of arson attacks and “Operation Pay Yourself” which was a looting mission.

C. Lome Peace Agreement

On July 7, 1999, the Government of Sierra Leone and the RUF entered into another Peace Agreement, the Lome Peace Agreement. The Lome Peace Agreement was much broader in scope than the previous agreements. It addressed such issues as: an immediate cease-fire and monitoring thereof, incorporation of the RUF into the government and its transformation into a political party, the establishment of various commissions to ensure peace and humanitarian assistance, the establishment of a formula for post-conflict peace and security, the transformation of ECOMOG and UNOMSIL’s mandates, the disarming, demobilization and reintegration of all combatants, the establishment of a Truth and Reconciliation Commission, and the request for international involvement. As with the prior agreements, Article IX of the Lome Peace Agreement contains a broad amnesty, stating:

1. . . . the Government of Sierra Leone shall take appropriate steps to grant Corporal Foday Sankoh absolute and free pardon.
2. . . . also grant absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives . . .
3. To consolidate the peace and promote the cause of national reconciliation . . . shall ensure that no official or judicial action is taken against any member of the [RUF], ex-AFRC, ex-[Sierra Leone Army]

42. Id. A separate Cease-fire Agreement was signed by the parties on May 18, 1999.
43. This included a Commission for the Management of Strategic Resources, National Reconstruction and Development, which is to control the exploitation of natural resources, including diamonds. Id. at art. VII, para. 1. Corporal Foday Sankoh was offered Chairmanship of the Board of this Commission. Id. at art. V, para. 2. This is ironic since much of the fighting during the decade of war was perpetrated by Corporal Sankoh ostensibly in part because of diamonds.
44. The United Nations Observer Mission in Sierra Leone (UNOMSIL) was later replaced by the United Nations Mission in Sierra Leone (UNAMSIL).
or [civil defense forces] in respect of anything done by them in pursuit of their objectives... since March 1991... 45

Like before, peace was fleeting as general incursions continued to take place, including an attack on ECOMOG troops, the abduction of UN forces, and 11 British soldiers being taken hostage.46 Additionally, in May 2000, Corporal Sankoh ordered his guards to open fire on protestors outside of his house: Twenty people were killed.47

D. Ceasefire Agreement dated November 10, 2000

The most recent cease-fire agreement48 between the Government of Sierra Leone and the RUF was signed on November 10, 2000.49 This agreement called for the halting of hostilities on that date. It also reaffirmed the parties' commitment to the Lome Peace Agreement as the framework for establishing peace in the country.

The war was officially declared over on January 14, 2002, when approximately 45,000 rebels surrendered.50 Weapons from these fighters were symbolically destroyed over the prior six-month period. Significantly, the Statute for the Special Court was adopted two days later, on January 16, 2002. No reports of rebel incursions have occurred since this time. With the support of the UN, the Kabbah government could declare the war over with conviction knowing it had the backing of the international community.

IV. SPECIAL COURT

In response to President Kabbah's request of June 12, 2000, Resolution 1315 (2000) was adopted by the Security Council on August 14, 2000.51 The resolution requested the Secretary-General to negotiate an agreement with the Government of Sierra Leone to create a special court (the "Special Court"). Pursuant to that resolution, the Secretary General submitted a report to the Security Council (the "Report").52 The Report outlined the general premise for

45. Lome Peace Agreement, supra note 41, at art. IX, paras. 1-3 (emphasis added).
46. See Timeline: Sierra Leone, supra note 9.
47. Ex-S. Leone Rebels, supra note 17.
49. It should be noted that the AFRC is not a party to this ceasefire agreement. Id. The last peace agreement signed by the AFRC was the ECOWAS Peace Plan.
50. Michael Chege, Sierra Leone: The State that Came Back from the Dead, 25 WASH Q. 147 (Summer 2002).
52. See Report, supra note 38.
the statute of the Special Court with commentary from the Secretary General regarding the workings of the Special Court.

The agreement between the United Nations and the Government of Sierra Leone creating the Special Court was adopted on January 16, 2002. The Statute of the Special Court for Sierra Leone (the "Statute") establishes the guidelines under which the Special Court will operate.

Significantly, the Special Court is a treaty-based court. It represents the first time that a court has been established between the UN and a local government. The previously established ad hoc tribunals, the International Criminal Tribunal for the Former Yugoslavia ("ITCY") and the International Criminal Tribunal for Rwanda ("ICTR"), were established under Chapter VII of the UN Security Council. The International Criminal Court ("ICC") is also a treaty-based court.

The following sections will discuss the Statute, and where significant note the statute based differences between the Special Court and the ITCY, ITCR, and the ICC.

A. Temporal Jurisdiction

The Special Court's temporal jurisdiction is limited to violations that were committed in Sierra Leone after November 30, 1996. This date was determined after careful consideration of three possible dates by the Secretary General: November 30, 1996, May 25, 1997, and January 6, 1999. The following issues were taken into consideration: (a) not overburdening the Special Court or the prosecutor; (b) arriving at a date that corresponds with a new phase in the conflict, but is not politically motivated; and (c) ensuring the date encompasses the most serious crimes.

It was determined the March 23, 1991 date would create a heavy burden on the Special Court, and was not considered by the Secretary General. The May 25, 1997 date was thought to have political connotations that may imply that the prosecutions were aimed at punishing the coup d'etat. To ensure the prosecutions encompassed the many crimes that
were committed in the rural areas and countryside, the January 9, 1999 date was also not deemed appropriate.

The November 30, 1996 date represents a significant limitation, as it effectively absolves the crimes that occurred from the beginning of the war, March 23, 1991. Such limitation risks undermining the objective of the Special Court "... to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law ..." 58 Admittedly, the worst atrocities of the war took place in January 1999, however, there are reports of extra-judicial executions, deliberate and arbitrary killing, torture, rape and mutilation dating back to the beginning of the war. 59 The prosecutor could use his discretion to meet all of the concerns of the Secretary-General, without denying justice to victims during the early part of the war.

B. Personal Jurisdiction

Pursuant to Article 7 of the Statute, the Special Court has personal jurisdiction only over individuals 15 years or older at the time the alleged crime was committed.

As with temporal jurisdiction, the Report outlines several options for personal jurisdiction: (a) a minimum age of 18 for prosecution; (b) a minimum age of 18 for prosecution, with children between the ages of 15 and 18 recounting their stories to a Truth and Reconciliation Commission or similar mechanism; or (c) have those 15 to 18 go through the judicial process but without punishment. The Government of Sierra Leone strongly urged judicial accountability for child combatants responsible for crimes falling within the Special Court's jurisdiction. 60 There were equal concerns, particularly from non-governmental organizations, that judicial accountability might hinder the rehabilitation of the child combatants. The Report reviewed internationally recognized standards for juvenile justice, in particular the Convention on the Rights of the Child, and gave weight to the moral-educational message that would be given to both the present and future generations of the children of Sierra Leone. It was determined that personal jurisdiction should include persons between the ages of 15 and 18, but that they would not be subject to incarceration. 61

The Special Court is authorized to order any of the following for children under the age of 18 found guilty of crimes outlined in the Statute: "care

59. The Preeminent human rights organizations Amnesty International and Human Rights Watch publish reports for Sierra Leone which are available online at www.amnesty.org and www.hrw.org, respectively.
60. See Report, supra note 38, para. 35.
61. See id. para. 32-38.
guidance and supervision orders, community service orders, counseling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies." However, the Prosecutor for the Special Court has stated that he will not prosecute children over the age of fifteen because they do not bear the "greatest responsibility."

As with temporal jurisdiction, this is a significant limitation on the Special Court's mandate, as there were a plethora of child combatants involved in the conflict. However, given the circumstances and special needs of child combatants, this limitation is legitimate especially since the Statute provides for rehabilitation of the children involved in the war. "[C]hild combatants were initially abducted, forcibly recruited, sexually abused, reduced to slavery of all kinds and trained, often under the influence of drugs, to kill, maim and burn." Children, as young as 5, were combatants in the conflict. These children were coerced to fight for fear they would be killed. A 12 year old child combatant said, "[w]hen I was killing, I felt like it wasn't me doing these things. I had to because the rebels threatened to kill me." These child combatants represent the future of Sierra Leone. Limiting personal jurisdiction in this situation, in line with international standards, and providing rehabilitation, is appropriate. A benefit of the hybrid court model is that these types of situations can be taken into account because jurisdiction is not bound by a global mandate.

C. Primacy over National Courts

Article 8 of the Statute states, "[t]he Special Court and the national courts of Sierra Leone shall have concurrent jurisdiction." However, the Special Court is given primacy over the national courts and therefore has the power to request that a national court of Sierra Leone defer proceedings in a particular case and transfer a defendant to the Special Court for prosecution. For Example, on July 10, 2002, the prosecution requested the transfer of Foday Sankoh, who was being held for violations of domestic laws.

64. See Report, supra note 38, para. 32.
67. Ex-S. Leone Rebels, supra note 17.
Concurrent jurisdiction is also found in the statutes for the ICTY\(^6\) and ICTR,\(^6\) which both have primacy over all national courts. However, because they were established under the Chapter VII powers of the Security Council, the ICTY and ICTR also have the power to assert primacy over the national courts of third States and to order the surrender of an accused within their territory. This power has not been extended to the Special Court. That factor should not impede the Special Court. If a person located outside of Sierra Leone is indicted by the Special Court, an international arrest warrant could be issued by the Special Court. Given the stature of the Special Court, it is presumed that most countries would comply. If a country did not comply, or if the person being sought is the head of state, as may be the case with Charles Taylor from Liberia,\(^7\) the Special Court could request the UN Security Council intervene on its behalf. In fact, if a warrant cannot be executed locally, or a country refuses to execute a warrant, the Special Court has the authority to go directly to the Security Council for intervention.\(^7\)

In contrast, the ICC statute provides that national courts will have primacy over the international tribunal, unless the State is unwilling or unable to prosecute the crimes.\(^7\) If the State were unable to adequately prosecute an accused, the ICC can assert its primacy over the national courts. Like the Special Court, the ICC is a treaty based body, and as such can only exercise jurisdiction in accordance with its statute.\(^7\) Presumably, if the accused fell outside the jurisdiction of the ICC, the same procedure outlined above for requesting the aid of

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71. Charles Cobb Jr., Sierra Leone’s Special Court: Will It Hinder or Help?, AFRICA NEWS, Nov. 21, 2002.


... the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless that State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; ... .

Id.

73. Article 12 of the ICC Statute provides for court to have jurisdiction if (a) the State where accused committed the crime is a party to the statute; (b) the accused is a national of a State that is a party to the statute, or (c) if the UN Security Council refers a matter. See id. at art. XII, para. 2, at 1010.
the UN Security Council, would be used if a country was unable or unwilling to comply with an arrest warrant.

D. Crimes

Articles 2 through 5 of the Statute outline the crimes that the Special Court has the jurisdiction to prosecute. These include: (i) Crimes Against Humanity,\(^\text{74}\) (ii) Violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977,\(^\text{75}\) (iii) Other serious violations of international humanitarian law,\(^\text{76}\) and (iv) Specific crimes under Sierra Leonean Law.\(^\text{77}\)

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74. Crimes against humanity are defined thusly:

[the Special Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population:

a. Murder;
b. Extermination;
c. Enslavement;
d. Deportation;
e. Imprisonment;
f. Torture;
g. Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence;
h. Persecution on political, racial ethnic or religious grounds;
i. Other inhumane acts.


75. Additional Protocol II thereto of 8 June 1977 provides that these violations shall include:

a. Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
b. Collective punishments;
c. Taking of hostages;
d. Acts of terrorism;
e. Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
f. Pillage;
g. The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;
h. Threats to commit any of the foregoing acts.


76. Article IV provides that the Special Court shall have the power to prosecute persons who committed the following serious violations of international humanitarian law:

a. Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities:
It was determined that the crime of genocide could not be included under the jurisdiction of the Special Court, as it is in the other criminal tribunals. There was no evidence that the "massive, large-scale killing in Sierra Leone was perpetrated against an identified national, ethnic, racial or religious group with an intent to annihilate the group." 78

Chief Investigator, Alan White, has placed a special emphasis on gender related crimes stating:

And let me mention one of the things that makes this special tribunal unique. Gender crimes will be emphasized as a war crime and will be pursued from the onset. It will not be an afterthought. We are making gender crimes a top priority of our investigation and prosecution because rape, and sexual assault used as a tool of war needs to be prosecuted. 79

Although rape falls under the mandates of the ICTY and ICTR and has been included in prosecutions by these tribunals, this is the first time such a forceful statement has been made regarding the intent to specifically address the issue of gender crimes on a large scale basis.

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77. Article V includes
the following crimes under Sierra Leonean law:

a. Offences relating to the abuse of girls under the prevention of Cruelty to Children Act, 1926 (Cap.31):
   i. Abusing a girl under 13 years of age, contrary to section 6;
   ii. Abusing a girl between 13 and 14 years of age, contrary to section 7;
   iii. Abduction of a girl for immoral purposes, contrary to section 12.

b. Offences relating to the wanton destruction of property under the Malicious Damage Act, 1861:
   i. Setting fire to dwelling - houses, any person being therein, contrary to section 2;
   ii. Setting fire to public buildings, contrary to sections 5 and 6;
   iii. Setting fire to other buildings, contrary to section 6.

78. See Report, supra note 38, para. 13.
79. Cobb, supra note 71.
E. Amnesty

There appear to be conflicting opinions regarding the amnesty provision in the Lome Peace Agreement. If the provision is effective, no crimes prior to July 7, 1999 could be prosecuted. However, the UN Secretary-General has stated:

While recognizing that amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict, the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law.\(^80\)

Moreover, the UN representative was instructed to append a disclaimer to his signature to the Lome Peace Agreement stating that, “the amnesty provision contained in article IX of the Agreement... shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.”\(^81\)

As the UN representative was not a party to the Lome Peace Agreement, it is unclear what legal status, if any, his disclaimer would have. Additionally, since the RUF breached the Lome Peace Agreement, one may consider the amnesty clause no longer binding. The issue of whether customary international law has supplanted the amnesty provision in certain areas, while of significant concern, is beyond the scope of this paper. The fact is the Special Court will be trying perpetrators, if their crimes occurred after November 30, 1996. Article 10 of the Statute states that any “amnesty granted to any person falling within the jurisdiction of the Special Court in respect of crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution.”\(^82\)

V. Benefits of the Hybrid System

A. Location of the Court where the Atrocities took Place

The Special Court will be located in Sierra Leone, the country where the crimes took place; in contrast to the ICTY and ICTR which are located in The Hague, Netherlands\(^83\) and Arusha, Tanzania, respectively.

\(^80\). See Report, supra note 38, para. 22.
\(^81\). See id. para. 23.
\(^82\). See Statute, supra note 53, at art. X, at 34.
\(^83\). The ICC will also sit in The Hague.
Holding the court in Sierra Leone will reap immeasurable benefits. First, it will enable the Special Court greater and timelier access to witnesses and evidence. Because the Special Court will be based in Freetown, the prosecutor will have direct access to many of the victims and alleged perpetrators. It will also be easier to visit sites where atrocities took place for hands-on fact-finding and evidence gathering without the need for lengthy delays in the trials. Victims may also feel more comfortable testifying in their own country under familiar surroundings.

Second, it will help to strengthen the legal system in Sierra Leone. Based on the British system, the legal system in Sierra Leone is comprised of a Supreme Court, an Appeals Court and a High Court. Pierre Bourin, Justice of the Court, stated, "[t]he main objective of the court is to reestablish the rule of law in this country and then show to the people of Sierra Leone that justice can be done in this country." The judicial system has been decimated by 10 years of war. As the Government will have significant involvement in the establishment and administration of the Special Court, the experience will set concrete examples of how the courts in Sierra Leone should be run in the future. It will also help to cement the rule of law, including that of international law, into the judiciary. Robin Vincent, Registrar of the Special Court noted:

... it will become not only a Special Court for the period that it is here, but beyond that we see it as being part of a legacy that hopefully the international community will leave behind in Freetown. It is important that we make sure that the structure is built properly... and that it would stand the test of time.

While Mr. Vincent was primarily speaking about the physical structure of the Special Court, his words are equally applicable to the imprint the Special Court should leave on the judicial structure of Sierra Leone, by laying the foundation for an effective system of criminal justice.

Third, the local population will have greater access to the proceedings of the Special Court if they are local. Local journalist will be able to provide

86. Although certainly other firms may exist, Martindale Hubble reported one law firm, Basma & Macaulay, in Sierra Leone, with four lawyers. The author met one of the lawyers who was residing in the United States, leaving three lawyers at that firm. For more information, see http://www.martindale.com (last visited Sept. 20, 2003, at which time the site listed two firms). Moreover, Human Rights Watch reported that only 10 judges remain in the country. See http://www.hrw.org (last visited Oct. 11, 2003).
updates in native languages, in periodicals read by the local population. This is not only important for the successes of the Special Court, but also for the failures. The entire population of Sierra Leone is a victim of the war. If the Special Court is not assisting in the healing of the nation, the people of Sierra Leone are present to "judge" the proceedings and ensure the Special Court does not deviate from its mandate or get bogged down in political issues or mismanagement. This can be done most effectively when the victims are in the proximity of the court. The UN Secretary-General stated:

If the role of the Special Court in dealing with impunity and developing respect for the rule of law in Sierra Leone is to be fully understood and its educative message conveyed to Sierra Leoneans of all ages, a broad public information and education campaign will have to be undertaken as an integral part of the Court's activities.

Unfortunately, at this time there is no clear plan for keeping the people outside of Freetown informed. Robin Vincent, Registrar of the Special Court, has suggested using a network of NGOs, district coordinators, Paramount chiefs and leaflet/fact sheets to tell people about the Special Court. Broadcasting the trials over the radio has also been suggested. UNAMSIL was successful using traditional ways of communication to inform the local people about its mission, including: "town criers, comedians, theatre groups, women mobilisers, sports, and drama." These methods certainly could be used for communicating the trials to the local people. Regardless of the method used, having the Special Court in Sierra Leone will keep the community in touch with its progress, as well as any failures, and will allow the victims personal access to justice.

Lastly, since the Special Court will only be able to prosecute a small number of the perpetrators, those "who bear the greatest responsibility for serious violations", having the Special Court in Sierra Leone should encourage the local population to seek redress from the national courts for crimes not addressed by the Special Court. Watching justice occur at the Special Court

88. While English is the official language of Sierra Leone, Bassa, Bom, Bullom So, Fuuta Jalon, Gola, Kisi (alternatively, Kissi), Klaou, Kono, Krin, Krio, Kuranko, Limba, Loko, Mandingo, Mendé, Sherbro, Susu, Themne, Vai and Yalunka are also spoken. See, Languages of Sierra Leone, Ethnologue.com, www.ethnologue.com/show_country.asp?name=Sierra+Leone (last visited Oct. 8, 2003).
89. See Report, supra note 38, para. 7.
90. See generally id. para. 48.
93. As previously noted, it is unclear what effect the amnesty provision in the Lome Peace Agreement will have on the ability to prosecute those accused of crimes prior to July 7, 1999. However,
will serve as an impetus for the people, the government and the judiciary to continue the “healing” of the country after the Special Courts mandate expires.

The people of Sierra Leone need justice for the 10 years of atrocities that devastated their country. The most effective way for the people to reconcile with the past and start building a future is to see justice being done. Having the Special Court located in a third country deprives the local communities—the victims—of being a part of the judicial process.

Yugoslavia’s tribunal is in the Hague. There is not a real sense of justice or feeling of justice by the victims because they don’t see it, unless you have the opportunity to go from the Yugoslavia area to the Hague. Same thing with Rwanda; the trials are in Arusha, Tanzania. It is not easy to get there. People don’t see it.94

B. Use of Domestic Criminal Law in Conjunction with International Law

The Statute includes sexual crimes and certain crimes against property,95 both of which were widespread during the conflict. Every war is fought differently. Therefore “cookie cutter” justice is not always the best answer. The common crimes in the ICC, ICTY and ICTR (crimes against humanity, genocide, and grave breaches of article 3 of the Geneva Convention) are sufficient as a starting point, but will not always be adequate to address all atrocities that occurred.

While most of the crimes committed in the Sierra Leonean conflict during the relevant period are governed by international law provisions set out in articles 2 to 4 of the Statute, recourse to Sierra Leonean law has been had in cases where a specific situation or an aspect of it was considered to be either unregulated or inadequately regulated under international law.96

As previously noted, genocide was not considered as a crime under the Statute due to the nature of the war. However, because mass abuses occurred to both children and property, it was deemed appropriate to expand from the “traditional” tribunal crimes to include these domestic crimes. Just because future atrocities do not fit neatly within the traditional mold of what constitutes a war crime, does not mean that the crimes should not be punished by tribunals. Access to domestic laws permits the Special Court to seek justice for all of the victims, regardless of the crime. Future hybrid courts would be able to use the prosecution for crimes committed since that date, which are not heard by the Special Court, can be brought in the domestic courts.

94. Cobb, supra note 71 (quoting Alan White).
95. See Statute, supra note 53, at art. V., at 31-32.
96. See Report, supra note 38, para. 19.
relevant aspects of their domestic laws to ensure the prosecutions cover all atrocities that were committed during their particular conflict.

C. Regional Example

Sierra Leone is located in a hot bed of civil unrest. Liberia, Guinea, Burkina Faso and other countries in Western Africa have had tumultuous pasts. Obtaining sustained peace and the return to the rule of law in Sierra Leone would set an exceptional example for both the people and the governments of other West African nations. Equally important is the fact that the prosecution of key war criminals would send a clear message to rebels in neighboring areas that the international community will no longer permit impunity. While this is true for the ICTY and ICTR also, the message is not as visible when the trials take place hundreds or thousands of miles away. Moreover, there have been clear indications that rebel units have served in different regional militias. If these rebels see their commanders and comrades being prosecuted locally, they may hesitate before engaging in hostilities in a neighboring state.

D. Truth and Reconciliation Commission

Although not part of the Statute, the Lome Peace Agreement mandated the establishment of a Truth and Reconciliation Commission ("TRC"). The TRC working in conjunction with the Special Court will be instrumental in providing a forum for victims and perpetrators to heal the wounds of Sierra Leone. The Special Court will help end the culture of impunity and provide accountability for past abuses, while the TRC will create a historical record, to ensure that the mistakes of the past are not repeated. The Prosecutor for the Special Court, David Crane, has said that he would not use evidence adduced at the TRC for the indictment of alleged perpetrators of crimes.97 This will encourage all parties to go before the TRC and tell their story without fear of reprisal, and preserve the cleansing and restorative aspects of the TRC. Although there is no amnesty if you come before the TRC, the pledge not to use evidence from the TRC appears to be analogous to "use immunity" under US law, where a witness’ compelled testimony and its fruits cannot be used for criminal prosecution of the witness. If however, the witness can be indicted through information not related to the testimony that they were compelled to give, the prosecution can continue. This system will allow the mandates of both bodies to be met, while continuing to encourage the people to tell their stories.

Although the hybrid court system is effective without the TRC, the TRC is an important tangential body for the Special Court. Together these two

97. David Crane, Sierra Leone; Special Court will not use TRC’s Evidence, CONCORD TIMES, Sept. 30, 2002.
Stafford

institutions can address most of the judicial and rehabilitative needs of Sierra Leone, particularly given the number of child combatants previously discussed.

E. Hybrid Courts Working in Conjunction with the ICC

The ICC became a reality when the Rome Statute entered into force on July 1, 2002. Currently, 84 countries have ratified the Rome Statute, including Sierra Leone. This represents less than half of all nations and does not include three of the five permanent members of the UN Security Council or some countries in which significant human rights abuses and crimes against humanity have occurred in the past. While some countries are objecting to trials by an independent international tribunal, they may be more amenable to a joint initiative between the international and national courts, such as the Special Court. This will allow all war criminals to be held accountable for their crimes.

Article 3 of the ICC Statute provides for the court to be established in The Hague, but permits the court “to sit elsewhere, whenever it considers it desirable.” Since a hybrid court has already been established in Sierra Leone, the ICC may want to use this as a seat for prosecutions that take place in Western Africa. This would aid in maintaining peace and stability in Freetown and continue to reinforce the importance of the judiciary and in upholding the rule of law. It would also bring international prestige to Sierra Leone, which could boost its economy. Future hybrid courts could serve this same function in other regions.

As previously discussed, there are certain benefits to establishing a criminal tribunal in the nation where the atrocities occurred. Even if a country has ratified the ICC, there may be issues related to the particular conflict that took place that would warrant a separate in-country tribunal. This could either be a full tribunal within the country, or a smaller version where some crimes are

98. Ratifying countries include: Andorra, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Belgium, Belize, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Bulgaria, Cambodia, Canada, Central African Republic, Colombia, Costa Rica, Croatia, Cyprus, Democratic Republic of the Congo, Denmark, Djibouti, Dominica, Ecuador, Estonia, Fiji, Finland, France, Gabon, Gambia, Germany, Ghana, Greece, Honduras, Hungary, Iceland, Ireland, Italy, Jordan, Latvia, Lesotho, Liechtenstein, Luxembourg, Malawi, Mali, Marshall Islands, Mauritius, Mongolia, Namibia, Nauru, Netherlands, New Zealand, Niger, Nigeria, Norway, Panama, Paraguay, Peru, Poland, Portugal, Republic of Korea, Romania, Samoa, San Marino, Senegal, Sierra Leone, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Tajikistan, The Former Yugoslav Republic of Macedonia, Timor-Leste, Trinidad and Tobago, Uganda, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, Uruguay, Venezuela, Yugoslavia, and Zambia. See ICC Statute, supra note 72, available at http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp (last visited Sept. 23, 2003).

99. Id. at art. III, para. 3, at 1003.

100. See id. at art. III; see ICC Statute, supra note 72.
prosecuted within the country and some at the ICC. There appears to be no reason why the ICC could not establish a hybrid type tribunal in a country under Article 3. Allieu Ibrahim Kanu, the representative from Sierra Leone to the ICC Legal Committee stated, "[t]he crimes covered by the [ICC] would augment and solidify the work of the tribunals and similar institutions, such as the special court established in [Sierra Leone]... contributing to the establishment of a just international legal order... [and] the rule of international law."^101^ Hybrid tribunals can effectively work side by side with the ICC providing the best of both worlds: personal justice within the victimized country and the backing of a UN organ.

VI. DETRIMENTS OF THE HYBRID SYSTEM

A. Relies on Funding Commitments from States

In the Secretary General’s Report on the Special Court, he noted the only realistic financing mechanism would be through assessed contributions, realizing that this would for all practical purposes transform the Special Court from a treaty-based court to a UN organ.\(^{102}\) Voluntary contribution was not deemed desirable because of the risk of insufficient or continued availability of funds. However, the final agreement was for individual countries to contribute. The Secretary General’s recommendation was well founded as the original budget of $114 million has already been slashed, due to lack of contributions, to $60 million for the three years and will be financed by only 15 to 20 countries.\(^{103}\)

Even if the Special Court is eventually fully funded, there may be donor fatigue for future hybrid courts, particularly with the ICC coming into force. This would send a negative signal to other countries that may be considering establishing UN assisted tribunals. There are some things the UN could consider to address this issue. First, United Nations members that are not a party to the ICC could be required to make set payments annually into a fund for future country specific tribunals outside the ambit of the ICC. Second, private benefactors, who wish to support the spread of justice and furthering victim’s rights could be permitted to donate to future tribunals. If this money was placed in a trust or a similar mechanism for disbursement by the UN, as it

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102. See Report, supra note 38, para. 71.

103. Christopher Wren, *Sierra Leone War Crimes Court to Begin Deliberations in Fall, NEW YORK TIMES*, Mar. 21, 2002.
deemed necessary, any concerns regarding outside pressure from a particular source to target or harass a specific individual would be allayed. Third, countries could be solicited for services in-kind, instead of strictly monetary contributions to help defray the cost of additional tribunals. This could take the form of lawyers and judges remaining on a country’s payroll but being loaned to a tribunal, or a country could donate needed legal resources or other furnishings that a court may need. Last, and probably least likely to occur, there could be a resolution to expand the UN budget to address these tribunals as they come up, or to fund them directly from the current budget. Given the difficulty in financing the Special Court, this appears to be the least desirable alternative. However, if the Special Court is successful, particularly when combined with the healing process of the TRC, it may be possible to pass such a resolution in the future. To some degree funding for future tribunals will depend on how efficient the current tribunals are in the future and how successful the ICC will be in bringing war criminals to justice.

Donor fatigue is a factor with the ICTY and ICTR also. Although countries are not individually donating, they are being assessed through the UN. After experiencing long delays and limited prosecution by the ICTY and ICTR, the international community should welcome a tribunal with a limited mandate that will be able to hand-off any outstanding indictments or evidence for indictments when its term has expired. Tribunals modeled after the Special Court should help to limit donor fatigue and produce greater results from the funds committed.

B. Retaliation

There is a certain amount of concern that if the rebel commanders are tried for their crimes, their supporters may be angered and retaliate sending the country back into war. This is of particular concern once the UNAMSIL peacekeeping force is withdrawn. For some time now foreign forces have been training the police and the armed service in proper conduct and integrating former combatants into formal military service. The local police and military should be sufficiently trained to deal with any uprisings that occur once the international forces leave. It will be incumbent upon the United Nation to ensure UNAMSIL forces are not prematurely withdrawn from the region. Moreover, the international community is keeping a close eye on Sierra Leone particularly since this is the first time post World War II, that a war crimes tribunal is being held in the country where the crimes were committed. An immediate response should come from the international community if any retaliatory measures are taken.

If the Special Court is successful in prosecuting the most powerful combatant commanders, it will deter future incursions, not serve as an impetus
for them. The perpetrators of future war crimes will meet the same fate as those who were responsible for the atrocities of the past. Contrary to the claims of possible retaliation, prosecuting the key perpetrators will reduce the potential for any future incursions.

Moreover, this is an issue related to prosecution and not the structure of the hybrid court system. Presumably retaliation, if it were to occur, would be planned regardless of where the perpetrators were prosecuted.

C. Impartial Judiciary

The eight judges for the Special Court were sworn in on December 2, 2002. Five, from varying countries outside Sierra Leone, were appointed by the UN Secretary General and three by the Sierra Leone government. Some claim that the inclusion of judges from Sierra Leone renders the proceedings unfair. Issa Sesay, interim Chairperson of the RUF stated, "If the Court is to be neutral then no Sierra Leonian judge should be included because they may have their prejudices."\(^4\)

The mix of national and international legal experts is germane to the continuing development of the judiciary in Sierra Leone. International judges from Britain, Canada, Austria, Nigeria, Gambia and Cameroon will be impartial and provide the necessary impediment to any prejudices the local judges may have. At the same time, the international judges will be reaffirming the rule of law and helping the local judges to reestablish a working judicial system in the country.

Article 13 of the Statute requires impartial and independent judges.\(^5\) The Trial Chamber will consist of one local judge and two international judges and the Appellate Chamber will consist of two local judges and three international judges.\(^6\) Article 18 of the Statute requires judgments be delivered in public and be rendered by a majority of the judges. International judges represent the majority in both chambers and therefore will be able to safeguard against any issues of impartiality. Significantly, public judgments subject to external scrutiny, will serve as an additional check on impartiality.

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105. See Statute, supra note 53, at art. XIII, para. 1, at 36.
106. See Statute, supra note 53, at art. XII, para. 1, at 35.
D. Issues of Corruption

It is generally agreed that one major contributing factor to the war in Sierra Leone was corruption within the government. It is not, nor should it be, within the mandate of the Special Court to deal with this issue. However, if issues of corruption are not address, the chance for lasting peace diminishes. If the domestic courts are able to apply the lessons of accountability and rule of law garnered from the Special Court, those engaging in corrupt activities can be brought to justice, giving Sierra Leone a greater survival rate. This can only be effective because the Special Court is being held in Sierra Leone and providing hands-on experience to the future purveyors of justice.

The Government has also established an Anti-Corruption Commission and states that it will maintain a zero tolerance for corruption.107

VII. CONCLUSION

The combined initiative of the United Nations and the government of Sierra Leone is ground breaking. Not only will it end the cycle of impunity in Sierra Leone, after 10 years of ravaging internal conflict, it will set an example for the people, the nation, and the region. Accountability and reconciliation are the cornerstone to peace and stability in Sierra Leone. The hybrid court will provide the accountability and the TRC will provide the reconciliation. There is no reason that future tribunals based on the hybrid model should not be established, either free standing or in conjunction with the International Criminal Court. On the contrary, such tribunals should be encouraged by the international community.

The numerous attempts at peace, followed by the break down thereof, indicate sever weaknesses in the past governments of Sierra Leone. The hybrid court provides an international component to the political structure that affords the government the backing to support lasting peace. With the court seated in Sierra Leone, the eye of the international community remains focused on the country, providing additional political support.

The victims of the war in Sierra Leone saw devastating tragedy. One can only imagine what operations “Spare No Living Thing,” “Burn House” and “Pay Yourself” included. Impunity has been allowed to continue for too long. Justice will be done by the Special Court. The victims will see justice being done and will be able to rebuild their lives and their country. A primary reason for this is the fact that the court will be located in Sierra Leone but will have the backing of the international community. The perpetrators of these heinous crimes can and will be called to account for their actions.

There are many countries that face the same problems as Sierra Leone. They too could reap the significant benefits of an institution like the Special Court: seeing justice, a key pillar of any democracy, done first hand; reestablishing the rule of law and creating a solid criminal justice system; and applying domestic, as well as international, laws to ensure that no crime escapes punishment. These are key attributes that set the Special Court above the prior models for ad-hoc tribunals. Moreover, the benefits of the hybrid court as an example to the West African region could be substantial. While there are some potential detriments, these are not insurmountable with the support of the international community. The hybrid model of the Special Court should be the standard for future war crimes tribunals.

“Healing is a matter of time, but it is sometimes also a matter of opportunity.”
~ Hippocrates
KING ARTHUR IN A YANKEE COURT: THE UNITED STATES SUPREME COURT'S USE OF EUROPEAN LAW IN LAWRENCE V. TEXAS

J. Andrew Atkinson*

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I. INTRODUCTION

In July 2003, the United States Supreme Court ruled in a six to three decision that a state statute proscribing "deviate sexual intercourse with another individual of the same sex" violated the United States Constitution. The Court in this landmark decision held that the "State cannot demean [the petitioners'] existence or control their destiny by making their private sexual conduct a crime." According to the Court, the petitioners' "right to liberty under the Due Process Clause gives them the full right to engage in their

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2. Id. at 2476 (quoting Tex. Penal Code Ann. § 21.06(a) (2003)).
3. Id. at 2484.
conduct without intervention by the government. The Court concluded that "[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."

_**Lawrence v. Texas** has garnered a considerable amount of media coverage and legal criticism because of the majority's use of foreign law in its opinion. While the Court asserted that "[t]he right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries," it provided very little insight into the legal reasoning of the judiciaries of those countries as to why homosexual sex is considered an integral part of human freedom.

After a litany of references to foreign decisions protecting homosexual conduct, the Court admonished that "[t]here has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent." This direct comparison between the United States and other countries invites an analysis of the law upon which foreign cases were decided and the reasoning of their courts. Without such an analysis we cannot be satisfied that Texas' governmental interest is less "legitimate or urgent" than that of those foreign governments whose similar statutes were invalidated. The purpose of this article is to provide that analysis as it pertains to the European Court of Human Rights case _Dudgeon v. United Kingdom_.

To stress the importance of analyzing any case that is cited as precedent is not to concede the majority's implication that a State needs to show that its governmental interest in circumscribing any behavior is as legitimate or urgent than that of a foreign country. If an American court relies on the decision of another American court, it is expected that the decision being relied upon is analogous in reasoning to the case for which it is being cited as authority. That _Dudgeon_ is not an American case should not exempt it from the same scrutiny.

## II. DUDGEON, THE CONVENTION, AND THE EUROPEAN COURT OF HUMAN RIGHTS

The majority in _Lawrence v. Texas_ made explicit reference to _Dudgeon v. United Kingdom_. In _Dudgeon_, the European Court of Human Rights ruled that certain laws of Northern Ireland "which have the effect of making certain

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5. _Lawrence_, 123 S. Ct. at 2484.
6. _Id._
7. _Id._ at 2483.
8. _Id._
9. _Id._
10. _Lawrence_, 123 S. Ct. at 2483.
11. _Id._ at 2481.
homosexual acts between consenting adult males criminal offences" violated Article Eight of the European Convention of Human Rights. Article Eight provides that "[e]veryone has the right to respect for his private and family life, his home and his correspondence."

The Vice-President of the European Commission of Human Rights said, "the European Court of Human Rights has for all practical purposes become Western Europe’s constitutional court. Its case law and practice resembles that of the U.S. Supreme Court," comparing the influence of the European Court of Human Rights (E.C.H.R.) to the United States Supreme Court’s interpretation of the United States Constitution’s Bill of Rights. The E.C.H.R. was established in 1959 by the Council of Europe for the purpose of enforcing the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention). The Convention, "drawn up within the Council of Europe in 1950," was "opened for signature" by Contracting States in 1953. According to Article One of the Convention, the signatory nations ("High Contracting Parties") are obliged to "secure to everyone within their jurisdiction the rights and freedoms defined in Section One," which includes Article Eight.

In Lawrence, Justice Kennedy, writing for the majority, used almost the same words used in Article Eight of the Convention when he asserted that the "petitioners are entitled to respect for their private lives." The similarities of Lawrence and Dudgeon do not end there. Both Lawrence and Dudgeon chronicle the debate over the issue of anti-sodomy statutes in the United States and Europe respectively, describing a trend toward abolishing same-sex sodomy prohibitions. Both Lawrence and Dudgeon make note of a reluctance to enforce existing anti-sodomy laws in their respective jurisdictions. Both Courts come to the same conclusion: that the most powerful judicial body in their jurisdiction must make the ultimate decision concerning the propriety of laws proscribing homosexual behavior. The legal framework upon which this conclusion was

13. Id. at 23.
18. Id.
20. Lawrence, 123 S. Ct. at 2484.
based, and the reasoning employed to arrive at it, says much about the perception that each Court has of its own role in the democratic process.

III. THE CONVENTION’S ARTICLE EIGHT AND THE CONSTITUTION’S FOURTEENTH AMENDMENT

The European Court of Human Rights and the United States Supreme Court share a similar power: the power to declare government action within their respective jurisdictions to be in violation of a governing document.21 In the case of the E.C.H.R., that document is the Convention.22 For the Supreme Court, that document is the Constitution.23 Because the E.C.H.R. and the Supreme Court have come to the same conclusion from different bodies of law, a comparison of those legal documents is in order.

Article Eight of the Convention gives the E.C.H.R. the power to decide what constitutes a legitimate state interest. With express language, it empowers the E.C.H.R. judges to do that job. Article Eight, Section Two gives the Court the task of making a final determination of what laws are “necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”24

This language effectively affords the Court a power normally reserved to a legislature; it requires them to balance personal privacy against the good of society and a state’s interest in protecting that good. The entity in a democratic society that makes the final decisions concerning what is necessary in that democratic society is usually a body of elected lawmakers, if not the people themselves. To the extent that these decision-makers are not elected, the “democratic” society is not very democratic. Nonetheless, when the Convention gives this decision-making power to a group of judges, the fact that they are not elected makes them no less lawmakers.

Judges, in the traditional sense, apply pre-determined norms, previously enacted laws, and transcendent principles—preformed decisions about what is necessary in a democracy—to the cases that come before them. One need not agree with the foregoing characterization of a judge’s role to acknowledge that if what is necessary in a democracy has not been finally decided by the time a judge is hearing a case, then the judge must decide then and there what is necessary. The Convention authorizes the E.C.H.R. to do just such last-minute

22. Id.
23. Id.
24. Convention, supra note 14, at art. 8, § 2.
decision-making. The E.C.H.R. judges do not write the laws of the member nations, but they do act as the final arbiters of what government actions are necessary for national security, public safety, economic well-being, prevention of disorder or crime, and protection of health or morals.\textsuperscript{25}

Whether the power that the Convention confers on the E.C.H.R. can accurately be characterized as legislative is a semantic debate for another place. What is pertinent is that the text of the United States Constitution does not confer that power upon the United States Supreme Court. Consider the clause upon which the majority in \textit{Lawrence} relied in overturning Texas' statute. The Due Process Clause of the Fourteenth Amendment, although it does not include the word "privacy," does have something to say about liberty. Yet the text of the Due Process Clause gives the Supreme Court the power to determine, not whether a state can deprive an individual of liberty, but whether due process has been afforded the person whose liberty has been deprived: "Nor shall any State deprive any person of life, liberty, or property, without due process of law."\textsuperscript{26}

The Due Process Clause presupposes that states can deprive a citizen of freedom. Justice Scalia, conceding that the Texas statute "undoubtedly imposes constraints on liberty," as do laws "prohibiting prostitution, [and] recreational use of heroin," pointed out in his dissent that "[t]he Fourteenth Amendment expressly allows States to deprive their citizens of 'liberty,' so long as 'due process of law' is provided."\textsuperscript{27}

The Supreme Court has relied on this logic before. In \textit{Gregg v. Georgia}, the Court upheld a Georgia statute that imposed the death penalty against a challenge that capital punishment violated the Eighth and Fourteenth Amendments to the Constitution.\textsuperscript{28} The Court argued that rather than prohibiting the death penalty, the Constitution presupposes its existence in American law.\textsuperscript{29} "[T]he Fourteenth Amendment ... similarly contemplates the existence of the capital sanction in providing that no State shall deprive any person of 'life, liberty, or property' without due process of law."\textsuperscript{30} The Due Process clause does not give persons the right not to be put to death; neither does it give persons the right not to be deprived of liberty. The State retains the right to take both life and liberty from its citizens.

\begin{itemize}
\item \textsuperscript{25} See id.
\item \textsuperscript{26} U.S. CONST. amend. XIV, § 1.
\item \textsuperscript{27} \textit{Lawrence}, 123 S. Ct. at 2491 (Scalia, J., dissenting) (emphasis in original).
\item \textsuperscript{28} \textit{Gregg v. Georgia}, 428 U.S. 153 (1976).
\item \textsuperscript{29} \textit{id.} at 177. ("It is apparent from the text of the Constitution itself that the existence of capital punishment was accepted by the Framers.")
\item \textsuperscript{30} \textit{id.}
\end{itemize}
The dissent in Lawrence asserts that, “there is no right to ‘liberty’ under the Due Process Clause, though today’s opinion repeatedly makes that claim.” It is with this claim that the majority opens its opinion:

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions. Justice Kennedy’s idea of liberty may presume what he says it does, but the Fourteenth Amendment does not presume any freedom of “certain intimate conduct.” The Constitution’s text does include protections for “thought, belief, [and] expression,” but the majority’s addition of “certain intimate conduct,” is just that—an addition. While the Dudgeon court may have relied on an express right to privacy in the Convention, the Constitution does not provide any express right upon which the Lawrence court can base its asserted entitlement to respect for “private lives” or the “realm of personal liberty which the government may not enter.”

This illuminates an inherent difference between the structure of Article Eight and that of the Constitution’s Fourteenth Amendment, although at first blush they may appear similar. Article Eight prohibits government “interference” with the right to private and family life and lists various exceptions to that prohibition. The Fourteenth Amendment’s Due Process clause prohibits government “deprivation of life, liberty, and property” and lists an exception to that prohibition—the provision of due process. This ostensible similarity in structure belies very important and effectual textual differences.

31. Lawrence, 123 S. Ct. at 2491 (Scalia, J., dissenting).
32. Id. at 2475.
33. Id.
34. U.S. CONST. amend. I. (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”)
35. Lawrence, 123 S. Ct. at 2475.
36. Id.
37. Id. at 2484.
38. Convention, supra note 14, at art. 8.
The Convention grants individuals express rights. The rights granted to individuals by the Constitution are most often characterized by prohibitions on governmental power. The difference has been explained as the distinction between negative and positive rights. A recent comparative law article explains that the Convention proclaims "positive rights," "phrased in affirmative terms," e.g., "[e]veryone has the right to respect for his private and family life, his home and his correspondence." The article points out that, in contrast, the Constitution guarantees "negative rights" by limiting the power of government: "[s]imilar protection is granted by the Fourteenth Amendment of the Constitution which provides, in part, that '[n]o State shall ... deprive any person of life, liberty, or property, without due process of law." The right to privacy that the Supreme Court has recognized in past decisions is "a judicial extrapolation from the Due Process Clause of the Fourteenth Amendment." Moreover, while the word "liberty" is actually found in the Fourteenth Amendment, the right to liberty relied upon by the court in Lawrence is similarly extrapolated from text that guarantees only the right to due process of law. Having found unenumerated rights in the text of the Constitution, the Court has had to find unenumerated balancing tests in order to take into consideration the government's inevitable need to encroach upon those rights from time to time.

As the article explains, the Convention prescribes a balancing test, ready-made for the E.C.H.R.: "[T]he Convention does provide in Articles 8 through 11 specific requirements for standards of review, which the European Court, after concluding that a Member State interfered with an applicant's substantive right or freedom, must apply to determine whether the interference is

40. Id.
41. Convention, supra note 14, at art. 8, § 1.
44. Bowers v. Hardwick, 478 U.S. 186, 191 (1986) ("It is true that despite the language of the Due Process Clauses of the Fifth and Fourteenth Amendments, which appears to focus on the process by which life, liberty, or property is taken, the cases are legion in which those Clauses have been interpreted to have substantive content, subsuming rights that to a great extent are immune from federal or state regulation or prescription. Among such cases are those recognizing rights that have little or no textual support in the constitutional language.")
45. Kleijkamp, supra note 15, at 315. ("[T]he Supreme Court...was forced to 'create some judicial exceptions' to the absolute language of, for example, the First Amendment's Freedom of Speech Clause or the Fourteenth Amendment's Due Process Clause.") (quoting Gregory P. Propes, Wherefore Art Thou Deference? The European Court of Human Rights, Military Discipline, and Freedom of Expression, 19 HOUS. J. INT'L L., 281, 286 (1996)).
justified." If a government interferes with a person's right to privacy, that interference must be "in accordance with the rule of law" and must be "necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." "In contrast to the E.C.H.R., the Supreme Court's balancing remains mostly implicit, once the regulation has passed its initial legitimacy hurdle." Gerda Kleijkamp notes that the Supreme Court's strict scrutiny test, which demands that any government infringement on "fundamental liberty interests" be "narrowly tailored to serve a compelling state interest," closely resembles the E.C.H.R.'s "review of a Member State's interference with an applicant's fundamental right or freedom." Kleijkamp explains that the government must not only prove that its interference is "in accordance with the law," 'pursues a legitimate aim' and 'is necessary in a democratic society,' but must also prove that it is "motivated by a 'pressing social need'" and "no greater than necessary and should utilize the least intrusive means possible." According to the United States Supreme Court's due process clause rational basis test, if the Court does not find that a right is fundamental, a state must prove only that its interference with that right is rationally related to a legitimate government interest.

IV. THE DIFFERING ROLES OF THE EUROPEAN COURT OF HUMAN RIGHTS AND THE SUPREME COURT

"To the extent Bowers relied on values we share with a wider civilization, it should be noted that the reasoning and holding in Bowers have been rejected elsewhere." Justice Kennedy's use of the Dudgeon case in Lawrence, without any explanation as to Dudgeon's reasoning or bases, obscures the fact that what the Lawrence Court did is not what the E.C.H.R. did in Dudgeon. The E.C.H.R., applying Article Eight's explicit right to privacy, was acting in

47. Convention, supra note 14, at art. 8, § 2.
49. Lawrence, 123 S. Ct. at 2491 (Scalia, J., dissenting) (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).
51. Id. (citations omitted).
52. See id. at 322.
53. Lawrence, 123 S. Ct. at 2483.
accordance with its Conventional role as the arbiter of what government action is "necessary in a democratic society."\textsuperscript{54}

The Fourteenth Amendment does not give the Supreme Court the role of arbiter of what government action is "necessary in a democracy."\textsuperscript{55} It requires only that due process is afforded to people whose liberty is deprived.\textsuperscript{56} Despite having divergent roles—the Supreme Court's role being decidedly more limited than that of the E.C.H.R.—both courts embark on a very similar analysis of public policy considerations.

In \textit{Dudgeon}, "the E.C.H.R. focused its attention on recent developments in the member states in public perceptions of the limits of acceptable government interference as reflected in legislative developments in the member states."\textsuperscript{57} Article Eight of the Convention allows this type of analysis; in fact, it actually provides for it. It is relevant to look to the member states in determining what is "necessary in a democratic society."\textsuperscript{58} What is working? What is not working? If a significant number of countries have repealed anti-sodomy laws without detriment to their security, safety, economy, order, health or morals,\textsuperscript{59} then the conclusion could be drawn that such laws are not "necessary in a democratic society."

The E.C.H.R. also considered how the anti-sodomy laws were enforced, noting that the majority of the very infrequent instances of prosecution involved "persons under eighteen."\textsuperscript{60} This too is a fitting analysis for a court charged with applying Article Eight. If the court is to determine what laws are necessary, it would do well to look to the member nations. If those nations are not prosecuting existing anti-sodomy laws, the conclusion that such laws are not "necessary in a democratic society"\textsuperscript{61} may be warranted.

It being accepted that some form of legislation is 'necessary' to protect particular sections of society as well as the moral ethos of society as a whole, the question in the present case is whether the

\begin{enumerate}
\item Convention, supra note 14, at art. 8, § 1.
\item Id. at art. 8, § 2.
\item See U.S. CONST. amend. XIV, § 1.
\item Dubber, supra note 48, at 210-11.
\item Id. at 205. ("The ECHR initially assesses whether the particular law challenged responds to a pressing social need. In this inquiry, the court may take into account evidence of a popular consensus on the issue, whether the regulation has fallen into disuse, and the state’s ability to further the law’s aims in the absence of the challenged regulation.")
\item Convention, supra note 14, at art. 8, § 2.
\item Dudgeon, 45 Eur. Ct. H.R. (ser. A) at 11 ("During the period from January 1972 to October 1980 there were 62 prosecutions for homosexual offences in Northern Ireland. The large majority of these cases involved minors, that is persons under eighteen.")
\item Convention, supra note 14, at art. 8, § 2.
\end{enumerate}
contested provisions of the law of Northern Ireland and their enforcement remain within the bounds of what, in a democratic society, may be regarded as necessary in order to accomplish those aims.\textsuperscript{62}

The E.C.H.R., in answering this question, is assuming its rightful role not only as interpreter of what the Convention says, but as arbiter of what is necessary in a democratic society. The Member Nations of the Council of Europe understood when they became members that the E.C.H.R. is, as far as Article Eight is concerned, the final arbiter of what is "necessary in a democratic society" with respect to "interference by a public authority with the exercise" of the "right to respect for his private and family life."\textsuperscript{63}

The states that ratified the Fourteenth Amendment of the United States made no such concession to the Supreme Court. The Constitution does not give its Supreme Court the power to decide what is necessary in a democracy. After ratification of the Fourteenth Amendment, the States retained the power to deprive their citizens of life, liberty or property as long as they ensured that those citizens enjoyed "due process of law." Each citizen, regardless of race, would henceforth be guaranteed due process of law, without regard to how compelling a government's interest may be in depriving them of that process. Legislators remained the arbiters of what is necessary in the democratic society of each State.

For the Supreme Court, which has not been granted the power to decide what is necessary in a democracy, a survey of the criminalization and decriminalization of same-sex sodomy is a gratuitous exercise. What difference does it make how many states have repealed laws that punish homosexual conduct, when what is really at issue is whether the Constitution gives states the power to pass anti-sodomy laws in the first place?

The Court intended to overrule \textit{Bowers v. Hardwick}, which anthologized the history of anti-sodomy laws in America in order to discredit the argument that sodomy is a fundamental right "deeply rooted in this Nation's history and tradition."\textsuperscript{64} Yet the majority in \textit{Lawrence} did not find that Texas had deprived the plaintiff of a fundamental right; it did not apply strict scrutiny. "\textit{W}hile overruling the \textit{outcome} of \textit{Bowers}, the Court leaves strangely untouched its central legal conclusion: 'Respondent would have us announce ... a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do.'\textsuperscript{65}"

\begin{itemize}
\item[[62] Dudgeon, supra note 60, at 11.}
\item[[63] Convention, supra note 14, at art. 8.}
\item[[64] Bowers, 478 U.S. at 192 (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977)).}
\item[[65] Lawrence, 123 S. Ct. at 2488 (Scalia, J., dissenting)(quoting Bowers, 478 U.S. at 191) (emphasis
Nonetheless, the majority attempted to establish that “early American sodomy laws were not directed at homosexuals as such but instead sought to prohibit non-procreative sexual activity more generally.” It posited that “laws targeting same-sex couples did not develop until the last third of the 20th century.” Yet the Court’s reasoning does not lead it to the conclusion that there is a fundamental right to engage in homosexual sodomy.

If bestowing fundamental right status on sodomy was not its aim, the Court’s analysis of American sodomy laws must have served another purpose altogether—describing a great national debate, and positioning itself as the institution to bring it to resolution. “States with same-sex prohibitions have moved toward abolishing them,” the Court asserted. The Court described how the American Law Institute omitted laws against consensual sex in its Model Penal Code in 1955, after which states began to “change [their] laws to conform to the Model Penal Code.” This all tends to “show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.” If some states, like Texas, are yet unaware of, or refuse to conform to, this emerging awareness, the Court presumably sees itself as ideally positioned to bring the trend to the attention of such intransigent lawmakers.

The majority discussed the states’ divergent treatment of same-sex sodomy as though it were a circuit-split—a situation in which the same issue is decided differently by lower federal courts, and the highest court in the land must resolve the matter. Likewise, if states cannot agree on whether to criminalize sodomy, the Court must assume the role of its European cousin and become the arbiter of what laws are “necessary in a democracy.” That the Court is assuming this new role is further evidenced by its discussion of a “pattern of non-enforcement” of sodomy laws “with respect to consenting adults acting in private.” The Court infers from the supposed reluctance of law enforcement officials, district attorneys, and attorneys general across America what the people of Texas have never expressed by democratic means: that they want their statute repealed.

However, differences in state law concerning homosexual sodomy do not amount to the legislative equivalent of a split in opinions among the circuit
courts. Rather, this statutory variation is a reflection of the divergent views of the citizens of various American states, represented by laws, enacted by their elected officials. The dissent concedes that, "Texas is one of the few remaining States that criminalize private, consensual homosexual acts." However, it rejects the notion that the Supreme Court should compel Texas to follow the trend of its sister states: "What Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed ... by a Court that is impatient of democratic change."74

V. THE CULMINATION OF EXPANDING SUPREME COURT POWER

In his dissent, Justice Scalia laments that "the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed." Yet the Court has gone a step farther. It has taken measures to change the rules of engagement. It has thrown off the encumbering former role, and taken for itself that of the European Court of Human Rights: arbiter of what is necessary in a democratic society. To be accurate, it must be pointed out that this change began decades ago when the Court assumed the duty of rating governmental interests by its own special formulas. That the Court decided that the Texas statute "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual" presupposes what has now long been accepted: Texas has an obligation to justify its intrusion into private life with something more than due process of law.

Nonetheless, Justice Scalia is correct in his implication that Lawrence reveals an even deeper shift in the Court's role. In fact, Lawrence is arguably a much more momentous decision than Dudgeon was. After Dudgeon, the balancing test between the right to privacy and the interest of the government remained codified in Article Eight of the Convention. The protection of morals, to the extent that it is necessary in a democratic society, remained a governmental interest that could justify interference with the right to respect for a person's private life.77 The Dudgeon opinion only reaffirmed that fact: "As the Government correctly submitted, it follows that the moral climate in Northern Ireland in sexual matters ... is one of the matters which the national authorities may legitimately take into account in exercising their discretion."78

73. Id. at 2497 (Scalia, J., dissenting).
74. Id.
75. Lawrence, 123 S. Ct. at 2497.
76. Id. at 2484.
77. See Convention, supra note 14, at art. 8.
However, as Justice Scalia lamented in his dissent, *Lawrence's* majority opinion effectively forecloses the protection of morals as a legitimate justification for a state's regulation of non-violent sexual behavior. [*Lawrence*, 123 S. Ct. at 2495 (Scalia, J., dissenting) (warning that the majority opinion "decrees the end of all morals legislation").]

"[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." [*Lawrence*, 123 S. Ct. at 2483 (Stevens, J., dissenting)]. This is an epochal shift in Supreme Court jurisprudence. [*Lawrence*, 123 S. Ct. at 2483 (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)).] The dissent connects the dots, asserting that if "the promotion of majoritarian sexual morality is not even a legitimate state interest," then criminal laws against adult incest and bestiality cannot "survive rational-basis review." [*Lawrence*, 123 S. Ct. at 2495 (Scalia, J., dissenting)]. Those who have sought to overturn anti-sodomy laws realize the importance of this development.

In a forward-looking law review article entitled, *Lessons from the Past and Strategies for the Future: Using Domestic, International and Comparative Law to Overturn Sodomy Laws*, James D. Wilets and Charlene Smith expounded what has become a winning strategy:

The second strategy is to argue that morality alone cannot be used as a justification to strike down or uphold a law. This strategy questions the court's ability to apply objective criteria to determine whether the morality upon which the legislation is based represents a legitimate governmental purpose, or whether it simply represents the illegitimate biases of society towards a particular disfavored group. [*Lessons from the Past and Strategies for the Future: Using Domestic, International and Comparative Law to Overturn Sodomy Laws*, James D. Wilets & Charlene Smith, 24 SEATTLE U. L. REV. 49, 54 (2000)].

VI. JUSTICE KENNEDY'S NON-SEQUITURS

The *Lawrence* majority's reliance on foreign precedence reveals faults in Justice Kennedy's reasoning, if not a disregard for the Constitutional structure of the United States federal government.

If the Convention allows E.C.H.R. judges to determine what laws are necessary in a democratic society, then the Constitution must allow the Supreme Court to determine whether anti-sodomy laws are no longer necessary to the American democracy. This does not follow. The Court's reasoning disregards

79. *Lawrence*, 123 S. Ct. at 2495 (Scalia, J., dissenting) (warning that the majority opinion "decrees the end of all morals legislation").

80. *Id.* at 2483 (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)).

81. *Id.* at 2490 (Scalia, J., dissenting) (recalling that "[c]ountless judicial decisions and legislative enactments have relied on the ancient proposition that a governing majority's belief that certain sexual behavior is 'immoral and unacceptable' constitutes a rational basis for regulation," and citing a list of cases upholding, on the basis of public morality, laws proscribing such activity as the sale of sex toys and public indecency).

82. *Id.* at 2495 (Scalia, J., dissenting).

the decidedly different scopes of review afforded to the E.C.H.R. and the Supreme Court by the language of Convention and the Constitution, respectively.

The majority’s reference to British statutory bans on sodomy likewise bares its flawed reasoning. “A committee advising the British Parliament recommended in 1957 repeal of laws punishing homosexual conduct ... Parliament enacted the substance of those recommendations 10 years later.” The implication is that if the British Parliament decriminalizes homosexual conduct, the Supreme Court should decriminalize homosexual conduct. This overlooks the fact that British Parliament is a legislative body and the Supreme Court is not. The Texas legislature could have repealed its anti-sodomy law, just as Parliament did. However, the Supreme Court is not a legislature.

The Dudgeon decision and British Parliament’s repeal of sodomy statutes, if taken as persuasive authority, militate against Supreme Court action. If they provide any suggestion at all, it is this: the United States should codify its right to privacy and legislatively eliminate anti-sodomy laws.

VII. LAWRENCE’S LIBERTARIAN IDEALS

Justice Kennedy and the Lawrence majority may have a point that appeals to many Americans: perhaps states should not enjoy the presumption that their deprivation of a person’s liberty is valid. Perhaps our liberties would be more secure if our Constitution presumed, as the Convention does, that deprivation of liberty or invasion of privacy is invalid unless the court determines that it is “necessary in a democratic society.” Perhaps the Supreme Court should decide which laws serve the interest of security, safety, prosperity, and health. Perhaps state governments should legislate only public morality and leave private morality to the individual.

However, the text of the Constitution does afford states the presumption that their deprivation of personal liberty is valid; the Constitution does not grant the Supreme Court the power to decide which laws serve society’s interests; and nothing in the Constitution enjoins states from promoting private morality as well as public morality.

84. Lawrence, 123 S. Ct. at 2481.

85. The Institute for Justice, in its amicus curiae brief in support of the petitioners, drew a distinction between public and private morality:

There is a crucial difference ... between promoting public morality and protecting the sensibilities of reasonable members of the community while in the public sphere—something that falls under the police power of state—and criminalizing private consensual conduct that harms neither the individuals involved nor the general public—something that is outside the bounds of police power.

Two-thirds of Congress and three-fourths of the state legislatures could change all that. Article Five of the Constitution provides a procedure to amend the text of the Constitution. But Due Process jurisprudence has made the Article Five amendment process unnecessary, paving the way for the Supreme Court to make those changes itself.

VIII. A LEGAL STRATEGY BEARS FRUIT

James D. Wilets, in an article published in 1994, outlined a legal strategy of utilizing international law to bring about the invalidation of anti-sodomy laws in the United States. He enumerated "three principal strategies," suggesting that "legal practitioners ... [d]irectly apply the terms of international treaties that have been ratified by the United States government ... [u]se international law to guide the interpretations of U.S. domestic laws, [and] [d]irectly apply 'customary international law.'" Professor Wilets described a customary international norm as "a principle or practice accepted as 'customary' by the world's countries," that "binds all governments, including those that have not specifically recognized it, so long as they have not expressly and persistently objected to its development." However, he was not optimistic that attempts to apply these customary international laws or norms would be successful, lamenting that "it is, however, unlikely that a U.S. court would find the criminalization of same-gender private sexual behavior as violative of a binding customary international human rights norm." Professor Wilets' strategic prescience was mitigated only by the cautiousness of his optimism. The majority in Lawrence did find that the Texas statute was "violative of a binding customary international human rights norm." The law proscribes what the Court describes as a "right ... accepted as an integral part of human freedom in many other countries."

What the Court did not do might say a lot about its strategy. The Court did not employ Professor Wilets' first suggested strategy: application of interna-

87. Id. at 23.
88. Id. at 43.
89. Id.
90. The Court did not find the norm binding in the sense that it was bound to follow it; however, it considered the norm persuasive even thought it was not part of a binding treaty. Furthermore, foreign precedent was not found persuasive because of the substance of foreign law or the reasoning of foreign courts. (Neither was discussed, beyond that they have decriminalized same-sex sodomy.) For these reasons, the Court's use of foreign precedent falls into Professor Wilets' third category: an international norm.
91. Wilets, supra note 86, at 43.
92. Lawrence, 123 S. Ct. at 2483.
tional treaties that have been ratified by the United States.\textsuperscript{93} Forgoing this strategy may serve to insulate the \textit{Lawrence} decision from future threats. If it had relied on international treaties, as it was urged to do by amicus curiae,\textsuperscript{94} and if those treaties were subsequently dissolved, the Court's opinion would be weakened.

Neither did the Court not use Professor Wilets' second strategy—use of international law to guide the interpretation of United States law. While the Court mentioned the conclusions of foreign courts, it did not describe the law upon which the foreign opinions were based. Nor did it describe the foreign courts' reasoning process. The majority's use of foreign jurisprudence was based, not on the substance of foreign law or the superiority of international legal reasoning, but on the simple supposition that if other nations accept a purported right as "an integral part of human freedom," then American courts should do so as well.

What the Court did do was precisely what Professor Wilets predicted would be a long shot: directly apply a "customary international norm.\textsuperscript{95}" However, by relying on a totality of international law as persuasive "values we share with a wider civilization,"\textsuperscript{96} the Court has preempted debate that Professor Wilets' \textit{binding} international norms\textsuperscript{97} would have demanded: Can an international norm ever be binding on all governments?\textsuperscript{98} If so, what implications would that have for the rule of law and representative democracy?\textsuperscript{99} Do State anti-sodomy laws and a Supreme Court decision upholding their constitutionality\textsuperscript{100} amount to express and persistent objection\textsuperscript{101} to the development of customary international norms? If so, would those objecting countries not be

\textsuperscript{93} Wilets, supra note 86, at 23.

\textsuperscript{94} Brief of Amici Curiae of Mary Robinson, et al. at 11-12, Lawrence v. Texas 123 S. Ct. 2472 (2003) (No. 02-102) (citations omitted) ("In \textit{Toonen v. Australia} (1994), the United Nations Human Rights Committee followed the \textit{Dudgeon} Court's reasoning and rejected this Court's reasoning in \textit{Bowers}. The Committee construed Article 17 of the International Covenant on Civil and Political Rights, which applies to 149 states party with combined populations of at least three billion people. These countries include the United States, which ratified the Covenant on June 8, 1992.")

\textsuperscript{95} Wilets, supra note 86, at 43.

\textsuperscript{96} \textit{Lawrence}, 123 S. Ct. at 2483.

\textsuperscript{97} Wilets, supra note 86, at 43.

\textsuperscript{98} \textit{Id}.

\textsuperscript{99} \textit{See Lawrence}, 123 S. Ct. at 2494 (Scalia, J., dissenting) ("Constitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behavior. Much less do they spring into existence, as the Court seems to believe, because foreign nations decriminalize conduct.") (emphasis in original).

\textsuperscript{100} \textit{Bowers}, 478 U.S. 186 (upholding a Georgia state law banning sodomy).

\textsuperscript{101} Wilets, supra note 86, at 43.
bound by the norm? These questions, although pertinent, are for another article. \textit{Lawrence v. Texas} has provided much to contemplate.

In \textit{Lawrence}, the Court has made its innovations clear. It will now fill a role comparable to that of the E.C.H.R.: ultimate public policy decision-maker. In its new capacity, the Supreme Court will consider international norms and "values we share with a wider community"\textsuperscript{102} as persuasive authority, as it does the text of the Constitution.

\section*{IX. Conclusion}

\textit{Lawrence v. Texas} shows the extent to which the Court regards the Constitution as mere persuasive authority, along with past Supreme Court decisions, legislative statistics and public policy suggestions from abroad. While portraying this modern approach to Constitutional review, \textit{Lawrence} left Due Process jurisprudence largely unchanged. If a right is deemed fundamental, infringement of that right must still be narrowly tailored to serve a compelling state interest. If a right is not fundamental, infringement of that right must only be rationally related to a legitimate government interest.\textsuperscript{103} The revolutionary alteration of the \textit{Lawrence} decision is the pronouncement that the preservation of morals is no longer a legitimate government interest.\textsuperscript{104}

If the American people are to reassert their right to make laws that reflect their morals (a right that, on paper, the Member Nations of the Council of Europe still retain)\textsuperscript{105} the Due Process framework must be changed. It must be thrown out wholesale, and the presumption that a state may take life, liberty, and property must be restored. \textit{Lawrence} has not ushered in an era, as some libertarians might hope, in which no one can impose his "moral disapproval"\textsuperscript{106} upon another. The \textit{Lawrence} Court has not scrubbed the laws of America clean of morality. It has only ensured that the moral convictions of a Supreme Court majority can always trump a moral consensus of American voters.

The Institute for Justice, in its \textit{amici curiae} brief on behalf of the petitioners, warns of the dangers of elected officials: "Legislators are perfectly capable of invading liberty, and that is why government is limited."\textsuperscript{107} Duly

\begin{itemize}
\item \textsuperscript{102} Lawrence, 123 S. Ct. at 2483.
\item \textsuperscript{103} See id. at 2483 ("The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual") (emphasis added); \textit{id.} at 2483 ("... no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.") (emphasis added).
\item \textsuperscript{104} \textit{Id.} at 2483-84.
\item \textsuperscript{105} See Convention, \textit{supra} note 14, at art. 8, § 2.
\item \textsuperscript{106} \textit{Lawrence}, 123 S. Ct. at 2487 (O'Connor, J., concurring).
\item \textsuperscript{107} Brief of Amici Curiae The Institute for Justice at 6, \textit{Lawrence v. Texas}, 123 S. Ct. 2472 (2003) (No. 02-1-2).
\end{itemize}
noting the Institute's caveat, it must be remembered that legislators are elected by the people; Supreme Court justices are appointed for life.\textsuperscript{108}

\footnote{108. See THE FEDERALIST No. 78 (Alexander Hamilton) ("The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.")}
AGENCIES FOR PURPOSES OF SECTION 911 OF THE INTERNAL REVENUE CODE: THE FOREIGN EARNED INCOME EXCLUSION SURVIVES 2003 CONTROVERSIAL PROPOSAL TO REPEAL

Jorge L. Riera*

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I. INTRODUCTION

The United States, for over three-quarters of a century, has maintained a foreign trade policy concerning American citizens working abroad that provides for the foreign earned income exclusion.\(^1\) Citizens of the United States engaged in the promotion of American foreign trade and residing in foreign countries, were subject to double taxation by the foreign country and the United States.\(^2\) In an effort to stimulate foreign trade and to place Americans who work abroad on equal footing with competitors, Congress exempted the foreign earned income of its citizens working overseas from taxation.\(^3\) Today, the policy remains unscathed despite the limitations on the exclusion and the controversial

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3. \textit{Id.}
attempt to repeal section 911 of the Internal Revenue Code (IRC) under the Jobs and Growth Tax Relief Reconciliation Act of 2003.\(^4\)

In this endeavor, the legislative history of the exclusion reflects sharp conflicting views of members of Congress.\(^5\) As early as 1926, Senator Smoot, past chairman of the Senate Finance Committee, demonstrated strong opposition opining the tax exemption provision was unnecessary.\(^6\) In May 2003 Senator Grassley, present chairman of the Senate Finance Committee, restated past opposition to the exemption by saying, "section 911 is a tax loophole that forces you and me, as well as every other taxpayer out there throughout the United States, to subsidize high-paid corporate employees and their companies."\(^7\) However, the majority of the policy makers today continue to agree with the original policy as evidenced by the elimination of the amendment repealing the provision, thus allowing for the exclusion.

The purpose of this article is to analyze the policy for enacting and maintaining the foreign earned income exclusion. Beginning with Part II, this article assesses the legislative history and origins of section 911 of the IRC; including restrictions and limitations. Part III analyzes court issues regarding agencies of the United States as contemplated by section 911 of the IRC. Part IV examines the political and industry opposition to the repeal of the IRC provision wherein individuals were allowed to exclude foreign earned income from United States taxation. Part V discusses the conclusion that the policy and purpose of the provision excluding foreign earned income is beneficial to the economy of the United States and its citizens working abroad.

II. LEGISLATIVE HISTORY AND DEVELOPMENT OF SECTION 911

A. Origins of Section 911

In 1925, Congress projected that in the taxable year of 1926 they would over collect taxes by approximately $200,000,000.\(^8\) Congress enacted the Revenue Act of 1926 as a measure to reduce and equalize federal taxation.\(^9\) United States citizens and residents are generally subject to taxation on world-
wide income. However, Congress excluded United States citizens working abroad from taxation on all foreign earned income under section 213(b)(14) of the IRC. The foreign policy for the exclusion provision was to encourage employment of Americans abroad and place them on equal footing with their foreign competitors.

Six years later, the Senate Finance Committee embarked on an attempt to repeal the exclusion. The Committee expressed their concerns regarding certain United States citizens claiming the exclusion and consequently not paying any taxes. The Finance Committee believed the exclusion was unnecessary because of the foreign tax credit provision. Congress, under the Revenue Act of 1932, limited the exclusion “except as to amounts paid by the United States or agency thereof,” and codified the exclusion under section 116(a).

In 1942, the exclusion was again under siege by the House Ways and Means Committee. The Committee proposed a plan to repeal the exclusion to increase tax revenues and eliminate a tax benefit skewed toward United States citizens earning foreign income from nongovernmental employers and nongovernmental agencies. Instead of repealing, Congress amended the exclusion and extended the residency requirement from six months to “the entire taxable year.” Thus, the taxpayer must establish a bona fide residence for the entire taxable year to qualify for the exclusion. Congress’ intended purpose in

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10. Cook v. Tait, 265 U.S. 47, 56 (1924); see also I.R.C. § 61(a) (West 2003) (stating “gross income means all income from whatever source derived”).


14. Id.

15. Id.


18. Id.


enacting the amendment of 1942 was to eradicate the misuse under the former requirement of absence from the United States instead of presence in a foreign country.\textsuperscript{21} Congress, under the Revenue Act of 1951, attempted to remedy the strict application of the term "bona fide residence abroad."\textsuperscript{22} Under the prior provision adopted in 1942, individuals with technical knowledge were having difficulty establishing residency, and could not qualify for the exclusion.\textsuperscript{23} Examples of these individuals included, "managers, technicians and skilled [workers] induced to [work] abroad for periods of [eighteen] to [thirty-six] months to complete certain projects."\textsuperscript{24} Because Congress intended to encourage individuals with technical knowledge to work abroad, it eased the bona fide residency requirement.\textsuperscript{25} The residency requirement now permitted taxpayers working abroad to exclude foreign income if physically present in a foreign country for seventeen months during a period of eighteen months.\textsuperscript{26}

Some American citizens with substantial earnings exploited the amended version of section 116(a) by working abroad.\textsuperscript{27} These citizens went to foreign countries to perform tasks regularly performed within the United States, for the primary purpose of claiming the foreign earned income exclusion and evading taxation.\textsuperscript{28} Individual citizens of the United States physically present in a foreign country for seventeen months, out of a period of eighteen months were able to exclude their entire foreign earned income from taxation.\textsuperscript{29} Congress recognizing the need to limit the exclusion accordingly amended the provision "sufficient to correct the evils."\textsuperscript{30} As a result, those taxpayers who were residents abroad for an entire taxable year qualify to claim the exclusion subject to a ceiling of $20,000 of the foreign earned income.\textsuperscript{31} In 1954, Congress amended and reenacted former section 116, earned income of citizens of the United States from sources without the United States, as section 911 of the IRC of 1954.\textsuperscript{32}

\textsuperscript{21} Comm'r v. Matthew, 335 F.2d 231, 234 (5th Cir. 1964).
\textsuperscript{23} Id.
\textsuperscript{24} Id.
\textsuperscript{25} Id.
\textsuperscript{26} Krichbaum, 138 F. Supp. at 522.
\textsuperscript{28} Id.
\textsuperscript{29} Id.
\textsuperscript{30} Id. at 11.
\textsuperscript{31} Id.
B. Section 911 Revisions and Restrictions

During the Kennedy administration, President Kennedy proposed eliminating the exclusion except for citizens living abroad in undeveloped foreign countries allowing an unlimited exclusion of foreign income. The Legislature disagreed and rejected the President’s recommendation. Instead, the Revenue Act of 1962 placed a ceiling on the exclusion amount of earned income for those citizens establishing a bona fide residence in a foreign country. The amended provision permitted a taxpayer earning income abroad, who met the bona fide residence requirement, to exclude $20,000 per year from taxation for the first three taxable years. The excludable amount accrues throughout the taxable year, and is computed on a daily basis. Therefore, the amount excluded is not to exceed $20,000 for a United States’ citizen with foreign income qualifying under either the bona fide residence or the physical presence requirement. However, citizens working abroad, who qualify as a bona fide resident in a foreign country for more than three consecutive years, may exclude $35,000. The Revenue Act of 1964 reduced the maximum excludable amount to $20,000 for citizens that remain abroad for an uninterrupted period of more than three years.

The most radical changes to the foreign earned income exclusion can be attributed to the Tax Reform Act of 1976. Congress imposed restrictions on foreign earned income to counter growing sentiment that the exclusion provided a tax advantage to citizens working abroad. Moreover, Americans working abroad were not subject to double taxation because foreign countries did not tax

34. Id. at 167.
35. Id. at 171.
36. Id.
37. Id. The following example illustrates how to compute the excludable amount pursuant to section 911(a):

A, a U.S. citizen, who files his return on a calendar year basis, is privately employed, and is a bona fide resident of France for the period April 1, 1963, through June 30, 1968. The amounts excludable from gross income for the various calendar years, under the provisions of section 911(a) ... are computed by applying the special rules contained in section 911(c), are not to exceed the following amounts: For the year 1963, $15,068.49 (275/365 X $20,000); for the year 1964, $20,000 (366/366 X $20,000); for the year 1965, $20,000 (365/365 X $20,000); for the year 1966, $31,301.37 (90/365 X $20,000 plus 275/365 X $35,000); for the year 1967, $35,000; and for the year 1968, $17,404.37 (182/365 X $35,000)).

39. Id.
40. Id.
42. Id.
the income of United States' citizens.\textsuperscript{43} For example, an employee's compensation excluded under section 911 was not subject to taxation by the foreign country if the employer paid the compensation to a bank outside that foreign country.\textsuperscript{44} The amendment disallowed the exclusion to taxpayers working abroad, receiving income outside the country, if the foreign country did not tax income received outside that country.\textsuperscript{45}

The Committee recognized that citizens working abroad incurred higher cost of living expenses, since they did not benefit from services provided in the United States by state, local, or federal agencies.\textsuperscript{46} Congress accordingly reduced the excludable amount to $15,000 for individuals with foreign income.\textsuperscript{47} In addition, the foreign income was subject to taxation based at the higher tax bracket for the non-excludable earned income.\textsuperscript{48} For example, if a taxpayer earns $20,000 of gross income and qualifies for the exclusion under section 911, the individual would reduce their gross income by $15,000, thus would have taxable income of $5,000.\textsuperscript{49} That taxpayer would now pay taxes based on the higher tax bracket of $20,000 not the tax bracket of $5,000.\textsuperscript{50} However, employees of charitable organizations working abroad maintained an exclusion amount of $20,000 of their foreign earned income.\textsuperscript{51}

The Foreign Earned Income Act of 1978\textsuperscript{52} (FEI) liberalized the restrictions of its predecessor.\textsuperscript{53} The FEI "generally replaced the section 911 ... earned income exclusion with a new deduction for the excess costs of working in a foreign country."\textsuperscript{54} Under the FEI, taxpayers had the option of using the new provision, including deductions for the excess costs of working abroad, or the provisions under the Tax Reform Act of 1976.\textsuperscript{55} The deductions for excess costs of living overseas, defined under section 913 of the IRC, consisted of separate factors for each of the following; general cost of living, housing,

\begin{itemize}
\item \textsuperscript{44} Id.
\item \textsuperscript{45} Id.
\item \textsuperscript{46} Id. at 211.
\item \textsuperscript{48} S. REP. NO. 94-938, at 211 (1976). The manner of determining the applicable tax rate may be illustrated by the following example: "if a taxpayer has $20,000 of gross income which is excluded under the income exclusion and also has $5,000 of deductions not allowable ... the taxpayer is treated as having $15,000 of taxable income for purposes of computing the tax rates on the non-excluded income." Id.
\item \textsuperscript{49} Id.
\item \textsuperscript{50} Id.
\item \textsuperscript{51} Tax Reform Act of 1976, 90 Stat. at 1610.
\item \textsuperscript{54} Id.
\item \textsuperscript{55} Id.
\end{itemize}
education, and, home leave costs. The FEI defined the deductions for excess costs abroad as follows:

The [general] cost of living [deduction] is generally the amount by which the cost of living in the taxpayer's foreign tax home exceeds the cost of living in the highest cost metropolitan area in the continental United States (other than Alaska). [The general] deduction [was] based on the spendable income of a person paid the salary of a federal employee at grade level GS-14, Step 1, regardless of the taxpayer's actual income. The housing [deduction] is the excess of the taxpayer's reasonable housing expenses over [their] base housing amount (generally one-sixth of [the] net income). The education deduction is generally the reasonable schooling expenses for the education of the taxpayer's dependents at the elementary and secondary levels. The deduction for annual home leave consists of the reasonable costs of coach airfare transportation for the taxpayer, spouse, and dependents from the taxpayer's home outside the United States to [their] most recent place of residence within the United States.

To encourage United States citizens to accept positions in geographical hardship areas, the Congress carved out a special deduction of $5,000 for taxpayer's working abroad and living in areas designated by the State Department as hardship areas. Employees who reside in hardship areas may elect to claim a $20,000 earned income exclusion in place of the excess living costs and hardship area deductions. In addition, taxpayers under certain circumstances may qualify for a waiver of the time requirements for the excess living costs and hardship area deductions. To qualify for the waiver the taxpayer must meet the three following requirements:

First, the individual actually must have been present in, or a bona fide resident of, a foreign country. Second, [the taxpayer] must leave the foreign country after August 31, 1978, during a period with respect to which the treasury department determines, after consultation with the state department, that [required] individuals to leave the foreign country because of war, civil unrest, or similar adverse conditions in the foreign country which precluded the normal conduct of business by those individuals. Third, the individual must establish to the satis-
faction of the treasury that [they] reasonably could have ... expected to meet the time limitation requirements, but for the war, civil unrest, or similar adverse conditions.\(^{61}\)

Although the FEI liberalized the tax burden, American businesses faced an intense competitive market abroad.\(^{62}\)

Three years later, the Economic Recovery Tax Act of 1981\(^ {63}\) (ERTA) again revised taxation for citizens working abroad to encourage American businesses overseas and "promote the export of United States goods and services."\(^ {64}\) Congress recognized that although the FEI had liberalized the tax burden, American firms still experienced difficulty hiring American employees in foreign countries.\(^ {65}\) Most businesses, in an attempt to encourage employees to transfer to positions overseas, assumed the tax burden and incorporated those costs as part of the their compensation package.\(^ {66}\) Businesses such as the construction industry, facing overwhelming competition abroad, were unable to secure projects due to higher bids resulting from increased employee compensation packages.\(^ {67}\) Congress decided to modify the excess foreign living cost deduction and exclusion, and to provide qualifying United States citizens an appropriate incentive, by allowing them to elect a substantial exclusion from taxation.\(^ {68}\) However, Congress "placed a specific dollar limitation on the exclusion" to prevent abuse.\(^ {69}\) The provision also shortened the period of physical presence necessary to qualify for the exclusion.\(^ {70}\) The amended provisions allowed taxpayers to exclude foreign earned income and their housing expenses.\(^ {71}\) Under the revised provision, an individual qualified as physically present for the taxable year if present in a foreign country for 330 days in any period of twelve consecutive months.\(^ {72}\)

The Tax Reform Act of 1986\(^ {73}\) restricted the exclusion amount under section 911 to a maximum of $70,000 in a taxable year.\(^ {74}\) However, Congress revised the exclusion again under the Taxpayer Relief Act of 1997,\(^ {75}\) recognizing...
ing that working abroad imposed "additional financial burdens on the employees" of United States businesses, and increased the allowable exclusion amount of foreign earned income.\textsuperscript{76} These burdens transpired from taxpayers maintaining two separate homes; one in the foreign country, and the other in the United States.\textsuperscript{77} Additional burdens included the increased cost individuals incurred from traveling to maintain family relationships in the United States, or the increased cost of living in a foreign location.\textsuperscript{78} Congress decided that an increase of the exclusion amount was appropriate because of the higher financial burden coupled with the increase of worldwide inflation.\textsuperscript{79} The revised amendment increased the exclusion amount to "$80,000 in increments of $2,000 each year, beginning in 1998."\textsuperscript{80} Although Congress has dealt with section 911 after the 1997 Act, the provision has not suffered any further revisions or amendments to the exclusion for foreign earned income.

III. AGENCY FOR PURPOSES OF EXCLUSION

A. Payment of Earned Income from Agencies

Section 911 of the IRC allows "citizens or residents of the United States" living and working abroad to exclude foreign earned income from income taxation.\textsuperscript{81} Foreign earned income is an individual's earnings from sources "attributable to services performed" within a foreign country, subject to the individual either establishing a bona fide residence or being physically present in the foreign country, as prescribed under section 911 of the IRC.\textsuperscript{82} Foreign earned income does not include amounts "paid by the United States or an agency thereof to an employee of the United States or an agency thereof."\textsuperscript{83} The Treasury Regulations expands on the definition by exempting the amounts paid to an employee working for "any [United States] government agency or instrumentality."\textsuperscript{84} Moreover, employees working for a non-appropriated fund instrumentality (NAFI) and meeting the employee status test are employees of agencies of the United States and therefore are not entitled to the exclusion of foreign earned income.\textsuperscript{85}

\begin{thebibliography}{99}
\bibitem{77} \textit{Id.}
\bibitem{78} \textit{Id.}
\bibitem{79} \textit{Id.}
\bibitem{80} \textit{Id. at} 520.
\bibitem{81} I.R.C. § 911(a)(1) (West 2003).
\bibitem{82} I.R.C. § 911(b)(1)(A) (West 2003).
\bibitem{85} Matthews v. Comm'r, 907 F.2d 1173, 1176 (D.C. Cir. 1990). The court in \textit{Nadybol} defined a NAFI as: "an entity created to administer non-appropriated funds. Non-appropriated funds ... are funds that have not been appropriated by Congress, but are generated instead by participation of [military] personnel and..."
Courts have broadly construed the term agency under section 911 of the IRC because a "narrow construction ... would be incompatible with a strict application of the exclusion." The term agency was defined by the Revenue Act of 1942 as follows: "(1) Faculty or state of acting or of exerting power; ... instrumentality; or (2) Office or function of an agent, or factor; relation between a principal and his agent; business of one entrusted with the concerns of another." The term instrumentality was defined as: "Quality or state of being instrumental; that which is instrumental; means; medium; agency." The Treasury regulations interpreting the definition of the terms agency and instrumentality stated: "[i]nstrumentality ... [equals] agency." The following are examples of recognized Government agencies; "United States Armed Forces exchanges, commissioned and non-commissioned officers’ messes, Armed Forces motion picture services and other organizations similarly organized and operated under Government regulations.

The United States Court of Claims established "essential characteristics" to identify an agency of the United States under the meaning of section 911. The court, in determining "what constitutes an agency," applied the following factors in considering the "degree of control" by the United States Government: (1) power of the United States to initiate and terminate; (2) effectuation of government purposes by the entity; (3) the exclusion of private profit; and, (4) limitation of employment to government connected persons.

The United States Court of Appeals applied the "essential characteristics" test in Kalinski v. Commissioner, and determined that a United States Air Force (USAF) child-care center located in Germany was an agency of the United States, within the meaning of section 911. The USAF established and operated the center "to provide care for the disabled and handicapped children of its personnel." USAF exercised "pervasive control" of the centers' financial decisions and monitored the functioning of the center. The center, a not for

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87. Id.
88. Id.
89. Id.
90. Morse v. United States, 443 F.2d 1185, 1190 (Ct. Cl. 1971) (internal citations omitted).
91. Id. at 1188 (internal citations omitted).
92. Payne v. United States, 980 F.2d 148, 150 (2d Cir. 1992); see also Morse, 443 F.2d at 1188 (internal citations omitted).
93. 528 F.2d 969, 973 (1st Cir. 1976).
94. Id. at 973.
95. Id.
96. Id.
profit enterprise, limited its services to Air Force personnel. The court concluded that “the center was an agency” of the government and that employees of the center were not qualified to claim the foreign earned income exclusion.

The Second Circuit in *Payne v. United States* concluded that, “the Panama Canal Commission (PCC) was an agency of the United States Government.” The United States Congress under the auspices of the Panama Canal Treaty enacted legislation and created the PCC. The Treaty “required the United States to create the PCC” and referred to the PCC as “a United States Government agency.” The United States initiated the PCC under its laws and regulations. Furthermore, the majority of the board members are United States nationals and the President of the United States “appoints and terminates the administrator and the deputy administrator.” Thus, the United States actually has the power to initiate and terminate the PCC by exerting control over the Board membership and its policies.

The next factor used to determine whether the PCC is an agency, is whether the PPC was established to effectuate the United States Government purposes. Article III of the Panama Canal Treaty states that “the United States of America shall ... carry out its responsibilities [under the Treaty] by means of a United States Government agency called the [PCC].” The third factor is whether the PCC generates private profits or government revenues. The United States statute creating the PCC affirms that the PCC will expense any profits it generates, solely for purposes of the PCC. The final prong of the test is whether the “membership of the PCC is limited to government-connected persons.” The PCC employees were subject to substantially the same responsibilities, duties, and laws applicable to federal employees. Moreover, some United States citizens, working for the PCC, qualify for federal employment benefits packages. Therefore, the court deemed the PCC an agency for purposes of section 911 because it was under the control of the United States

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97. Id.
98. *Kalinski*, 528 F.2d at 974.
100. Id. at 149.
101. Id. at 150.
102. Id.
103. Id.
104. *Payne*, 980 F.2d at 151.
105. Id.
106. Id.
107. Id.
108. Id.
110. Id. at 151.
111. Id. at 151–52.
112. Id. at 152.
government and denied the taxpayer their claim to the foreign earned income exclusion. Next, we will examine whether NAFI programs are agencies for purposes of section 911 of the IRC.

B. Non-appropriated Fund Instrumentality

The purpose of establishing NAFI programs is to maintain the "morale, welfare and recreation" for the benefit of the military. The Bankruptcy Court for the District of Maryland determined that the Army Recreation Machine Fund (ARMF) a NAFI located in Germany, was an agency of the United States. The United States Department of the Army established the ARMF for the morale, welfare, and recreation of soldiers and their family members, as a NAFI. The debtor employed by the ARMF lived and maintained a residence in Germany.

The In re Nadybol court, acknowledged that the United States Army established the ARMF, and could terminate it at any time. The effectuation of government purposes by the entity was the second factor the court analyzed. The debtor interpreted the second prong in the following way: "only if the governmental purpose [achieved] by ARMF is essential or critical [emphasis added] can there be a finding that it is a section 911(a) agency."

The court not persuaded by the debtor’s contentions, quoted from AR 215-1, "the Army considers every NAFI...integral and essential to the conduct of the military mission."

Moreover, the court rejected the debtor’s line of reasoning

113. Id.
115. Id. at 353.
116. Id. at 357. The ARMF mission statement and purpose is "to provide a highly controlled gaming operation designed to provide recreation for soldiers and family members overseas while generating revenue for the morale, welfare and recreation programs and projects." Id. at 353.
117. Id. at 353; see I.R.C. § 911(a)(1).
118. Id.
119. 254 B.R. at 352.
120. Id. at 355.
121. Id.
122. Id.; see also Morse, 443 F.2d at 1188. The court in stated that the second element of control that identifies an agency is the effectuation of Government purposes is paramount over those of the organized members. Furthermore, the court stated that for taxpayers to succeed they “would have to show that the [entity taxpayers worked for] was established to provide essential morale and recreational facilities and services for personnel of an installation.” (internal citations omitted). Id.
124. Id.
that the ARMF must be essential to determine whether it was an agency of the government.\textsuperscript{125} The court, discussing the element of whether the ARMF operated for private profit, determined that the revenues generated by the ARMF were for the benefit of other morale, welfare and recreational programs of the Army.\textsuperscript{126} In addition, the ARMF funds were subject to the control of the Army.\textsuperscript{127} The court concluded that in order to satisfy the governmental connection prong of the test, a sufficient showing of governmental connection is enough.\textsuperscript{128} The debtor put forth a similar argument to that of the employee in Payne, that since foreign nationals could use the slot machines of the ARMF the purpose was not limited to "government connected persons."\textsuperscript{129} The court used a similar analogy to that of the court in Payne.\textsuperscript{130} First, the employees of the ARMF were subject to the same standards of conduct and regulations as those established by the Army.\textsuperscript{131} Moreover, the court quoted from the AR 215-1, "[all] Army NAFI's operate under the authority of the United States Government and are administered by military or civilian personnel acting in an official capacity."\textsuperscript{132} Although foreign nationals, persons other than the military personnel, had limited access to the ARMF, the court concluded that the evidence of government connection was sufficient so the ARMF satisfied the final prong of the government control test.\textsuperscript{133}

Although NAFI's generally are agencies of the United States, depending on the particular facts, courts may hold that they are not agencies contemplated by section 911 of the IRC.\textsuperscript{134} The Court of Claims in Brummitt,\textsuperscript{135} concluded that the United States Officers' Open Mess, Tapei (USOOMT) located in Taiwan was not an agency of the United States.\textsuperscript{136} The court reasoned that while the club possessed some characteristics of a NAFI because it was subject to the regulations of the military and received benefits from the military in the form of loans, the totality of the circumstances militated against determining the USOOMT an agency of the United States.\textsuperscript{137} The court considered the following factors: (1) the military did not exercise "fiscal control over the club;" (2) the club was constructed on privately owned land, (3) the club negotiated

\textsuperscript{125} Id. at 356.
\textsuperscript{126} Id.
\textsuperscript{127} Id.
\textsuperscript{128} Nadybol, 254 B.R. at 357.
\textsuperscript{129} Id. at 356.
\textsuperscript{130} Id. at 357.
\textsuperscript{131} Id.
\textsuperscript{132} Id.
\textsuperscript{133} Nadybol, 254 B.R. at 357; see also Kalinski, 528 F.2d at 973–74 (1st Cir. 1976).
\textsuperscript{134} Brummitt v. U.S., 329 F.2d 966, 969 (Ct. Cl. 1964).
\textsuperscript{135} Id.
\textsuperscript{136} Id.
\textsuperscript{137} Id.
and was financially responsible for its loan, and, (4) "government employees and foreign nationals [alike] were entitled to membership" without limitation. Therefore, the employees of the USOOMT, which is not an agency of the United States, are qualified to claim the exclusion. Next, we will examine the political and industry opposition to repealing the IRC provision for foreign earned income exclusion.

IV. POLITICAL AND INDUSTRY OPPOSITION TO REPEAL THE EXCLUSION PROVISION

Amid the Senate Finance Committee debating the Jobs and Growth Tax Relief Reconciliation Act, and limited to a budget of $350 billion in tax relief to stimulate the economy and increase the number of jobs in the United States, there emerged a controversial plan to repeal section 911 of the IRC. The proposed plan emerged as a potential revenue raising provision worth thirty five billion dollars over the next ten years to offset the tax reductions and remain within budget limits. The controversial plan by Senator Grassley, chairman of the Senate Finance Committee, would have eliminated the tax exemption available to over 358,000 American taxpayers working overseas.

Business leaders representing expatriates criticized the proposed repeal claiming that Congress should expand the foreign income exclusion instead of eliminating the provision. The taxpayers affected are American citizens overseas, working in remote areas of the world with modest salaries that create jobs in the United States. Many organizations with employees abroad expressed support for retaining the exemption, because without it they would have to replace those American employees with foreign nationals. Nonprofit organizations such as the Catholic Relief Services and the International Rescue Commission, performing humanitarian work on behalf of the United States, also

138. Id.
139. *Brummitt*, 329 F.2d at 969.
142. Id.
143. Id.
146. Id. Among the organizations voicing opposition to repeal the foreign earned income exclusion were "the Chamber of Commerce, the National Association of Manufacturers, the National Foreign Trade Council, the Financial Executives International, the U.S. Council for International Business, the Association of General Contractors of America, and, the American Council of Engineering Companies." Id.
expressed their support for retaining the exemption. Senator Breaux led the opposition and expressed his concerns to the Finance Committee regarding the elimination of the provision

Why do American workers get a credit for working overseas? ... [T]hey are [neither] in this country... [nor] enjoy the benefits and the security of living in this country, and, therefore, ... in order to encourage American workers to have jobs overseas instead of hiring foreign citizens, the [Internal Revenue Code provides] American workers an $80,000 tax exemption on [the] wages ... they earn overseas. In many cases, they work in dangerous places. In most cases, [American's working abroad do not] get the privileges and the security of living in the United States.

It is a bad tax policy to place American businesses in an uncompetitive position with foreign companies, forcing them to replace American workers with foreign nationals.

However, Senator Grassley justified his position in favor of repealing the foreign earned income exclusion, by stating on the Senate floor:

[t]he policy issue presented by repeal of section 911 is whether taxpayer dollars should be used to underwrite an employer's cost of sending employees overseas. Why do we subsidize moving employees overseas? I think sending employees overseas should be a business decision. Repeal will not cause U.S. citizens to be double taxed. A U.S. citizen who earns [foreign] income ... taxed by a foreign country [may elect]... to reduce ... U.S. taxes [by an amount equal to] ... any foreign income taxes paid.

In a memorandum addressed to reporters and editors, Senator Grassley further stated that, "[a] worker in Des Moines pays federal income taxes, but his colleague working for the same company overseas probably pays nothing, that [does not] make sense."

Ways and Means Committee members verbally assaulted the Senate Finance Committee bill to offset tax reductions by repealing the exclusion

147. Id.

148. Id.


Representative Foley, referring to the thirty-five billion dollar repeal of the tax exclusion declares "[t]he Senate's idea of giving tax relief to American families is to increase their taxes." Senate Majority leader Tom Daschle voiced his concerns over the impact the exclusion would have on the American economy "[w]e need people to take … jobs [abroad] to continue to grow this economy as much as we can … [not] a huge tax increase on working families [overseas] at the time when we need … them more than ever."

V. CONCLUSION

Repeal of the long standing provision that allows for foreign earned income exclusion would result in a loss of jobs that is in direct conflict with the Bush administration's "intentions to stimulate the economy." Eliminating the exclusion would result in United States businesses hiring foreign nationals in place of American workers employed in foreign countries. Moreover, if businesses replace American workers with foreign nationals the unemployment rate would rise and exports would suffer.

Those in opposition to the exclusion provision claim that American taxpayers working abroad have an advantageous tax position because they are not subject to double taxation, thus the provision is not necessary. Some taxpayers qualified to elect section 911 may work abroad and earn income free of personal income taxation by working in a foreign country that imposes no taxes. However, foreign countries that do not levy taxes on personal income use other means to tax individuals. For example, the Bahamas does not levy taxes on the personal income of its citizens or any individual working in that country. The Bahamian Government's means of generating revenues to sustain governmental services is through indirect taxation on goods and services.

153. Id.
156. Id.
157. Id.
160. Id.
161. Id.
services.\textsuperscript{162} Thus, an American citizen working in the Bahamas pays "approximately one-and-one-half times" more to purchase products than in the United States.\textsuperscript{163} Based on these circumstances, an American citizen working in the Bahamas, and qualified to elect the exclusion, would earn income of "approximately one-and-one-half times" the income in the United States.\textsuperscript{164} Simultaneously that same American citizen would pay to purchase products in the Bahamas one-and-one-half-times the cost of products in the United States.\textsuperscript{165} The net result is no gain.\textsuperscript{166}

The policy and purpose of the provision excluding foreign earned income continues to have a significant impact not only on the economy of the United States but also on its citizens working abroad.

\begin{itemize}
\item \textsuperscript{162} Id.
\item \textsuperscript{163} Vanландіngham, \textit{supra} note 159, at 52.
\item \textsuperscript{164} Id.
\item \textsuperscript{165} Id. at 52–53.
\item \textsuperscript{166} Id. at 53.
\end{itemize}
FUNDING OPPORTUNITIES FOR LEGAL SERVICES PROGRAMS OFFER HOPE FOR BATTERED IMMIGRANTS: A CALL FOR STRIDES IN COMMUNITY COLLABORATIONS

E. Lesleigh Varner*

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I. INTRODUCTION

Within the last decade, this country has made tremendous strides in the way of immigration legislation. The current Violence Against Women Act (V.A.W.A.) legislation allows a battered spouse or child with conditional status to self-petition for permanent legal residency, as well as request a cancellation of removal or suspension of deportation without the assistance of their abusive citizen sponsor. However, barriers to legal and social service agencies have impeded battered immigrants’ access to the legal remedies now available under the

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applicable immigration laws. As a result, battered immigrants are generally at variance with facing the legal, social, and economic consequence attendant to ending their abusive relationship.

Moreover, battered immigrants face numerous barriers when they attempt to access the civil legal system which often results in them avoiding the legal system altogether. Among these barriers is their lack of access to information concerning the civil and administrative remedies available to them that could potentially dispel their belief that reporting the abuse adversely affects their ability to obtain sufficient legal status in this country. There is also a widespread belief, amongst the immigrant population, that the domestic relation laws in the United States are comparable to similar laws in their home country. However, unlike the United States, many countries do not offer legal remedies to domestic violence victims.

Battered immigrants also mistakenly believe that legal and social services are only available to citizens and very providently to documented immigrants. Although accessibility to free legal services for certain categories of battered immigrants is limited, these services nonetheless exist and are administered by the Legal Services Corporation (L.S.C.).

L.S.C. is a private non-profit corporation that allocates federal funds to legal service programs to be used for representing indigent persons in certain civil matters. Legal Services programs now exist in virtually every county in every state. However, L.S.C. has imposed numerous restrictions upon legal services programs on the types of cases and classes of clients that these programs are allowed to represent. Also, over time, L.S.C. lost the support of Congress, which has often resulted in a reduction in funding and an increase in program restrictions, including the ability of federally funded programs to

4. Id.
5. Id.
6. Id.
7. Id.
9. Id. at 681.
12. Id.
provide representation to various classes of immigrants. However, for the most part, legal services programs provide the only source of free civil legal representation to indigent battered immigrants. Moreover, it is often the case that legal services attorneys are the only attorneys within the community who have the expertise and training necessary to address both the domestic violence and poverty law issues that generally accompany the abuse.

Notwithstanding their need for free legal services, it has been found that legal services programs routinely deny services to battered immigrants. However, it has been suggested that their denial of services is largely due to the programs' misconception that funding restrictions prohibit its legal representation of most immigrants.

Through V.A.W.A., federal funds are allocated to assist programs in addressing the social, economic, and legal needs of battered immigrants. Therefore, it would be safe to presume that legal services programs have expanded its client base to include battered immigrants.

This paper will first discuss the prevailing theories concerning domestic violence and the resulting effects of the abuse, including the fears and challenges that are unique to battered immigrants. A comprehensive discussion of both the prohibited and permissible L.S.C. activities will follow. Next, the effect of L.S.C. restrictions on federally funded programs' delivery of legal services, as well as an analysis of the traditional lawyering practices of most legal services programs will be addressed. This paper will also examine the impact that alternative sources of funding have on battered immigrants' access to legal services programs. Finally, this paper will discuss the need for a cooperative effort by legal services programs, immigration advocacy groups, and victim services programs as a means to ensure that the battered immigrant's efforts to flee from the abusive relationship are successful.

14. Id.
15. VIOLENCE AGAINST WOMEN OFFICE, supra note 10.
16. Id. at 277.
18. Id.
19. VIOLENCE AGAINST WOMEN OFFICE, supra note 10.
20. Id.
II. PREVAILING THEORIES ABOUT DOMESTIC VIOLENCE AND THE FEARS AND CHALLENGES OF BATTERED IMMIGRANTS

National statistics report that more than six million women are abused each year.\(^1\) Statistics further reveal that battered immigrant women are unlikely to report domestic violence occurring in the home or leave their abusive relationship.\(^2\) Moreover, it has been suggested that battered immigrant women face triple jeopardy because of the domestic violence they experience, cultural implications, and problems that may arise from the immigration processes.\(^3\)

Those who do not understand the psychological, social, and legal effect that domestic violence has upon its victims, often question why the victim remains in the abusive relationship.\(^4\) Therefore, in order to appreciate the problems faced by victims of domestic violence and to fully address their legal needs, it is imperative that the legal practitioner fully understands the dynamics of domestic violence.\(^5\)

Domestic violence is quite often ill defined and generally does not encompass the psychological, social, and familial constructs which forms the environment in which the abuse occurs.\(^6\) Typically, domestic violence is thought of as consisting of the physical act of abuse.\(^7\) However, there is actually no one physical act or distinctive trait or attribute that exemplifies a victim of abuse and which could accurately define the scope of domestic violence.\(^8\) Consequently, domestic violence is best defined as a multitude of factors and behaviors by which an abuser exercises dominion and control over the victim.\(^9\)

Moreover, through intimidation, manipulation, and aggression, the abuser forces the victim to live in continuous threat of danger and anticipation of violence.\(^10\) Batterers further succeed in controlling their victims by limiting their contact and associations with family and friends who might otherwise provide them with a source of support.\(^11\) This effectively results in the victim’s...

physical and emotional isolation. Consequently, abused women do not have the network of familial and social support needed to effectively deal with the debilitating effects of domestic violence.

Batterers also exert financial control over their victims by not permitting them to work which serves to ensure that the victim is also economically insecure. Therefore, battered immigrants' financial dependence on their abuser makes it extremely difficult for many of them to end their abusive relationship. Generally speaking, battered immigrant women are also unemployed and have very little, if any, individual financial resources. They also usually lack the requisite education or skills needed to secure an income sufficient enough to enable them to live independent of their abuser. For those battered immigrants who are undocumented or whose legal status is pending, immigration laws limit their ability to obtain suitable employment which forces many battered immigrants to resort to jobs that pay minimal wages with no benefits.

Language barriers also significantly limit battered immigrants access to employment opportunities. Given these harsh economic realities, many battered immigrants are forced to choose between a life of poverty or to succumb to the evils of domestic violence.

Language barriers also prevent battered immigrants from effectively articulating the conditions in which they live to victim services programs and legal advocates, as well as impede their understanding of the legal remedies available to them both in the civil arena and through the administrative processes of the immigration system. Moreover, because of their language and communication barriers, battered immigrants are usually unaware that domestic violence acts have been criminalized or that legal and social services are available.

Language and communication barriers also cause battered victims to refuse to seek the assistance of law enforcement officers, attorneys, shelters, or other

32. Id.
34. Id.
36. Id.
37. Id. at 129.
38. Id. at 128.
39. Id. at 129.
40. Ganatra, supra note 35, at 129.
41. Coto, supra note 17, at 752.
42. Ganatra, supra note 35, at 113.
domestic violence and immigration advocates. Furthermore, in view of the fact that domestic violence services are generally targeted to English speaking victims, the inability of immigrant victims to communicate effectively in English has the potential of significantly hindering their ability to escape from their abusers.

In an effort to assist battered immigrants to flee from their abuser, lawyers and domestic violence counselors fervently promote civil injunctions for protections. However, many battered immigrants fear that their physical safety would be significantly compromised if they confront their abuser in the legal system. Consequently, when faced with a system that is usually uninviting, battered immigrants will conced to the deeply rooted bureaucratic machinery of the immigration processes and remain undocumented or simply surrender to the abuse. One study reported that battered immigrants are extremely fearful of the immigration and naturalization agencies. As a result, battered immigrants are hesitant to seek the assistance of law enforcement out of fear that they or their abuser will be deported. In fact, instead of involving the police or the immigration authorities in their matters, many battered immigrants opt to remain in their abusive relationship.

Divorce also offers a solution to battered immigrants. However, in some immigrant communities, it comes at the high cost of extreme stigmatization. Some of these communities pressure battered women to remain in the marriage and rebuff those who choose to dissolve their marriage. In fact, in some immigrant communities, divorce is so heavily stigmatized that women who end their marriage because of domestic violence are forbidden to remarry within that community. She additionally faces the possibility of rejection by her family

43. Id.
44. Id.
45. Anderson, supra note 1, at 1421.
46. Id.
47. Id.
48. Id.
49. Id. at 1422.
50. Anderson, supra note 1, at 1422.
52. Id.
53. Id.
54. Id.
of origin because the divorce brings extreme disgrace and dishonor to the entire family.\textsuperscript{55}

Although the foregoing fears and challenges effectively immobilize battered immigrants from taking positive action to free themselves from their abusers' control, their most paralyzing fear is the threat of deportation.\textsuperscript{56} This is primarily due to false information given to battered immigrants by their abuser which is used as a means to exert continuous control over the victim.\textsuperscript{57} Consequently, rather than face deportation, many battered immigrants choose to remain in their abusive relationship.\textsuperscript{58}

Therefore, when addressing family law issues for battered immigrants, the legal practitioner must consider the foregoing challenges confronted by battered immigrants and advocate accordingly.

III. L.S.C. PROHIBITIONS AND PERMISSIBLE ACTIVITIES AS APPLIED TO IMMIGRANTS

As stated earlier, most legal services programs receive federal funding under the auspices of L.S.C.\textsuperscript{59} However, since the Regan administration, federally funded programs have operated under the constant threat of defunding.\textsuperscript{60} Moreover, L.S.C. imposed strict funding guidelines on the types of cases and classification of persons qualified for program representation, including immigrants.\textsuperscript{61}

Therefore, in order to receive services from federally funded legal services programs, pursuant to Title 45, Code of Federal Regulations, Section 1626.5, it is required that immigrants meet one of the following categories: (a) An alien lawfully admitted for permanent residence; (b) An alien who is either married to a United States citizen or is a parent or an unmarried child who has filed an application for adjustment of status to permanent resident on behalf of the alien; (c) An alien who has been permitted refugee admission or who has been granted asylum; and, (d) An alien who has been granted conditional entry because of persecution or fear of persecution from the alien's country of origin.\textsuperscript{62}

However, the Legal Services Corporation Appropriations Act of 1997, commonly referred to as the Kennedy Amendment, made a significant change.

\textsuperscript{55} Id.
\textsuperscript{56} Coto, supra note 17, at 751.
\textsuperscript{57} Id.
\textsuperscript{58} Id.
\textsuperscript{59} Bach, supra note 11, at 641-42.
\textsuperscript{60} Eagly, supra note 13, at 439.
\textsuperscript{61} Id. at 439-40.
to its general prohibition against representation of unqualified immigrants.\(^6^3\)

Prior to the Amendment, legal services programs were also prohibited from using its non-federal funds to provide legal representation to L.S.C. ineligible immigrants.\(^6^4\) This restriction effectively barred legal services programs from using its non-L.S.C. funds to the same extent as its L.S.C. funds.\(^6^5\) Consequently, many battered immigrants could not access legal assistance and were therefore left with little or no assistance in obtaining civil and administrative legal redress for the effects resulting from the abuse.\(^6^6\)

However, Congress subsequently amended the L.S.C. restriction by providing an exception for indigent battered immigrants who did not otherwise meet the L.S.C. alien eligibility guidelines.\(^6^7\) The exception authorized legal services programs to assist unqualified battered immigrants with issues that were "directly related to the prevention of the abuse or obtaining relief from the battery or cruelty."\(^6^8\) Therefore, legal services programs were permitted to assist undocumented immigrant spouses and children who had been abused or subjected to extreme cruelty by a spouse or a parent, as long as it could be demonstrated that the legal assistance was tied to the domestic violence.\(^6^9\)

The Kennedy Amendment defined the term "legal assistance directly related to the prevention of, or obtaining relief from the battery or cruelty" rather broadly, and thus permitted L.S.C. funded programs to assist undocumented battered immigrants with a wide range of legal issues.\(^7^0\) The intent of the legislation was to help battered immigrants to escape from their abusive situation, ameliorate the effects of the abuse, and to warn against future abuse.\(^7^1\)

However, the definition precludes L.S.C. funded programs from using non-L.S.C. funds to serve ineligible immigrants with any and all legal assistance that would ordinarily fall within the programs' established priorities.\(^7^2\) Therefore, this restriction effectively limits legal services programs' representation of undocumented battered immigrants to only those matters that have some nexus with the domestic violence.\(^7^3\) Consequently, many legal services programs are banned from assisting ineligible battered immigrants with services that

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64. 45 C.F.R. § 1626.3 (2003).
65. Id.
66. See Eagly, supra note 13.
70. 45 C.F.R. § 1626.2(g) (2003).
71. Id.
72. Id.
73. Id.
otherwise are provided to non-immigrant applicants.\textsuperscript{74} However, legal services programs are able to offer brief consultation to ineligible immigrants, as well as referrals to social services agencies and the private bar associations.\textsuperscript{75}

Although L.S.C. does not offer an exhaustive list of allowable issues that a program’s non-L.S.C. funds can be used to address, it does permit representation for a broad range of family law, housing, consumer, and public benefits issues.\textsuperscript{76} Therefore, in an effort to assist undocumented battered immigrants to physically escape the abusive relationship, non-L.S.C. funds can be used for representation of civil injunction for protections, dissolution of marriage, custody, dependency actions, and spousal and child support cases.\textsuperscript{77}

Non-L.S.C. funds can also be used to assist battered immigrants with securing and maintaining public housing and various public benefits, in order that the abused immigrant spouse and children are no longer forced to rely exclusively on the financial resources of their abuser.\textsuperscript{78} However, absent evidence that supports a claim that the immigrant’s circumstances were the direct result of the abuse, legal services programs are prohibited from providing legal representation to the immigrant.\textsuperscript{79}

Even though the Kennedy Amendment authorizes recipients of L.S.C. funded programs to use other funding to assist illegal immigrants, many programs do not allocate non-L.S.C. funds for this purpose.\textsuperscript{80} The reality for many legal services programs was that funding limitations simply did not permit the reallocation or diversion of funding to permit access to representation to L.S.C. ineligible immigrants.\textsuperscript{81}

Also, because most legal services programs are not experienced in handling immigration issues, primarily due to the prior L.S.C. restrictions, many programs simply did not address battered immigrant issues.\textsuperscript{82} Therefore, since a great number of these programs rely substantially on L.S.C. funding, non-L.S.C. funds do not provide a practicable source of funding to address legal issues for battered immigrants who are L.S.C. ineligible.\textsuperscript{83}

\textsuperscript{74} \textit{Id.}
\textsuperscript{75} 45 C.F.R. § 1626.2(g) (2003).
\textsuperscript{76} \textit{Id.}
\textsuperscript{77} 45 C.F.R § 1626.4 (2003).
\textsuperscript{78} \textit{Id.}
\textsuperscript{79} \textit{Id.}
\textsuperscript{80} Bach, \textit{supra} note 11, at 643.
\textsuperscript{81} \textit{Id.}
\textsuperscript{82} See Coto, \textit{supra} note 17.
\textsuperscript{83} See Bach, \textit{supra} note 11, at 643.
IV. THE EFFECT OF L.S.C. RESTRICTIONS ON THE DELIVERY OF LEGAL SERVICES

As stated earlier, some categories of battered immigrants qualify for representation by federally funded programs.\(^8\) Therefore, access to free legal service varies according to the battered immigrant’s legal status.\(^8\) Undocumented battered immigrants experience the most difficulty in accessing free legal assistance.\(^8\) Consequently, they are forced to rely on the most ineffective form of help; primarily, non-legal community based immigration agencies.\(^8\) In contrast, battered immigrants who meet the L.S.C. requirements are able to obtain legal assistance from federally funded legal services programs.\(^8\)

However, funding restrictions have induced legal services programs to maintain the status quo and represent only those issues that have been traditionally accepted by L.S.C.

It is typically the practice of legal services programs to provide high volume legal representation for poverty law issues to poor people residing within the program’s service area.\(^8\) However, due to the growth in poverty combined with an insufficiency of resources, legal services programs have become overwhelmed by demands for services and have, thus, found it necessary to limit the types of cases it will handle.\(^9\) As a result, legal services programs have established priorities for the types of cases that qualify for representation by taking into account several factors, which include the degree of need, severity of poverty, and the likelihood of success.\(^9\)

Traditionally, the focus of legal services programs has been on impact litigation.\(^9\) Although impact litigation had the potential to reform laws and effect policy changes that benefited indigent people, it also diminished the ability of the lawyer and client to establish a personal connection with each other, which is fundamental to the legal relationship.\(^9\) Instead, the client was reduced to a legal issue.\(^9\) However, due to the increase in domestic violence,
it became necessary for legal services programs to shift the focus of poverty law from impact work to intensive client service work.95

The client service model focuses on the one attorney to one client paradigm that is designed to impact the individual client.96 However, because legal services programs usually have extremely heavy caseloads and limited financial resources, little time is spent in fully assessing its clients' concerns.97 For that reason, representation is generally limited to the client's most pressing legal issues.98 Consequently, the legal, economic, and social consequences that could potentially result from the underlying legal problem are generally not taken into account.99 Therefore, it is arguable that this approach to service delivery is only effective in providing a temporary solution to the client's problems.100

Moreover, even though the client service approach may successfully remedy the battered immigrant's immediate concern, it often fails miserably in resolving their non-legal issues, such as the immigrant's overall economic situation.101 For the most part, the services provided to battered immigrants are strictly limited to legal representation of the family law issues that accompany the domestic violence and typically do not involve investigation into other legal or non-legal matters.102

However, some programs have strayed away from its traditional role and offer a holistic approach to legal representation, in an effort to address the economic, cultural, educational, and social implications generally faced by poor people.103 Unfortunately, this approach is not the norm of most legal services programs.104

Moreover, the current strategies employed by legal services programs often fail to consider that if provided sufficient information and the appropriate referrals, battered immigrants could become empowered to address their non-legal issues.105 Furthermore, without the appropriate direction, many battered

95. Id. at 511.
97. Coto, supra note 17.
98. Id.
99. Id. at 753.
100. Id.
101. Brustin, supra note 96, at 42.
102. Id. at 43.
103. Coto, supra note 17, at 752.
104. Id.
105. Id.
immigrants will simply fall through the cracks and abandon or refuse all efforts to resolve the issues surrounding the domestic violence.\textsuperscript{106}

Also, in spite of the fact that battered immigrants have been successful in accessing legal assistance from legal services programs, statistics reveal that private attorneys provide the largest source of legal representation to the indigent immigrant population.\textsuperscript{107} It has also been reported that grass-root community based immigration agencies provide a slightly higher percentage of legal assistance to indigent immigrants than do legal services programs.\textsuperscript{108} Although these organizations offer invaluable assistance to immigrants, the unfortunate reality is that most of these programs lack the legal training, knowledge, and skills necessary to sufficiently address the legal concerns of the immigrants they serve.\textsuperscript{109}

V. THE IMPACT OF ALTERNATIVE FUNDING OPPORTUNITIES ON BATTERED IMMIGRANTS’ ACCESS TO LEGAL SERVICES

Although L.S.C. authorized legal services programs to use its non-L.S.C. funds to assist battered immigrants, most programs choose not to utilize these funds for that purpose.\textsuperscript{110} Therefore, in order to avoid the restrictions of L.S.C., legal service providers seek private funding from its local community, the private bar, and non-profit foundations.\textsuperscript{111} However, due to a host of reasons, funding from these sources is inconsistent.\textsuperscript{112} Consequently, the availability of legal services to battered indigent immigrants has also been unstable.\textsuperscript{113}

However, as a direct result of the V.A.W.A. legislation, alternative funding streams were created which effectively increased the availability of services to battered immigrants.\textsuperscript{114} Among other purposes, the intent of the V.A.W.A. legislation was to ensure that battered immigrants were provided equal access to domestic violence services.\textsuperscript{115}

The Violence Against Women Office of the Department of Justice (V.A.W.O.) administers several grant programs that are designed to address the
legal needs of victims of abuse, which include funding for civil legal projects.\textsuperscript{116} V.A.W.O. also offers funds to programs that address the legal needs of battered immigrants.\textsuperscript{117} Because V.A.W.O. grants do not impose alienage restrictions on its grant recipients, L.S.C. funded programs that have been awarded V.A.W.O. grants, have broadened its accessibility of legal assistance to otherwise ineligible battered immigrants.\textsuperscript{118} However, these programs can only use V.A.W.O. funding for undocumented battered immigrants, in situations where it can be shown that the issue being represented is somehow tied to the abuse.\textsuperscript{119} Also, marriage or parentage must relate the undocumented battered immigrant's abuser.\textsuperscript{120}

Moreover, it is generally the policy of V.A.W.O. to provide funding to legal services programs that have a demonstrated history of providing direct legal representation and advocacy to domestic violence victims.\textsuperscript{121} Therefore, funding is available to legal service programs to implement and establish independent, as well as collaborative efforts with domestic violence and sexual assault victim services organizations.\textsuperscript{122} One of the most significant sources of V.A.W.O. funds for domestic violence victims, including battered immigrants, is the Legal Assistance for Victims (L.A.V.) grant.\textsuperscript{123} The L.A.V. grant is intended to increase the availability of legal assistance in order to provide effective aid to victims who are seeking relief in legal matters arising as a consequence of the abuse or violence.\textsuperscript{124} These funds enable legal services programs to represent battered immigrants in civil injunction for protection and family law cases, juvenile proceedings, evictions, and public benefits cases as it could be argued that the legal issues that arise within each of these areas are associated with domestic violence.\textsuperscript{125}

V.A.W.O. also offers special interest funding to legal service agencies to establish projects that respond to the unmet legal needs of individuals who are

\textsuperscript{116} Id.
\textsuperscript{117} Id.
\textsuperscript{118} Id.
\textsuperscript{119} VIOLENCE AGAINST WOMEN OFFICE, supra note 10, at 278.
\textsuperscript{120} Id.
\textsuperscript{122} Id.
\textsuperscript{123} VIOLENCE AGAINST WOMEN OFFICE, supra note 10.
\textsuperscript{125} VIOLENCE AGAINST WOMEN OFFICE, supra note 10, at 280.
members of a diverse and traditionally under served populations. Battered
immigrants are included in the list of the under served.\footnote{126}

Another funding source offered by V.A.W.O. is the Services, Training,
Officers, and Prosecutors (S.T.O.P.) grant, which is allocated to the states for
disbursement to projects that address issues on behalf of domestic violence
victims.\footnote{128} Numerous legal service providers, within the various states, have
been awarded S.T.O.P. funding and are able to use these funds to assist battered
immigrants with any legal action that could help the victim to end the abuse.\footnote{129}

In view of the fact that V.A.W.O. grants offer legal service programs an
alternative to L.S.C. funding, many programs are now able to provide needed
representation to battered immigrants.\footnote{130} Moreover, given the fact that
V.A.W.O. grants do not impose funding restrictions on immigration status, legal
service programs have been less apprehensive in opening their doors to both
documented and undocumented immigrants.\footnote{131} Consequently, through the use
of alternative funding, L.S.C. programs are able to offer a wide array of legal
services to battered immigrants.\footnote{132}

VI. THE NEED FOR COMMUNITY COLLABORATIONS

It has been recognized that legal services programs are unable to address
every issue faced by battered immigrants.\footnote{133} However, combining its efforts
with other community resources, such as victim service programs, grass-root
immigration initiatives, and legal immigration advocacy organizations, would
increase the effectiveness of legal services programs.\footnote{134} Considering that many
of these programs offer overlapping services, the benefits to battered immigrants
of such collaboration would be immeasurable and could result in a creative
project that utilizes the expertise of each program to address the unmet needs of
battered immigrant.\footnote{135} Furthermore, legal services programs likely view colla-

\begin{itemize}
  \item \footnote{126}{Id. at 276.}
  \item \footnote{127}{Id. at 268.}
  \item \footnote{128}{Id. at 269.}
  \item \footnote{129}{See \textit{Violence Against Women Office, U.S. Dep't of Justice, FY 2002 Awards List},
http://www.ojp.usdoj.gov/vawo/fy02awardslist.htm (last visited Sept. 12, 2003).}
  \item \footnote{130}{\textit{Violence Against Women Office, supra} note 10, at 272.}
  \item \footnote{131}{Id.}
  \item \footnote{132}{Id. at 276.}
  \item \footnote{133}{Brustin, \textit{supra} note 96, at 39. See also Valente, \textit{supra} note 24, at 194 (concluding that although
legal aid attorneys offer a vital service to domestic violence victims, they cannot single handedly address the
burgeoning occurrence of domestic violence).}
  \item \footnote{134}{See Eagly, \textit{supra} note 13, at 440.}
  \item \footnote{135}{Id.}
\end{itemize}
Varner

A study conducted by the American Bar Association reported that the resources of the community are paramount in diminishing the effects of abuse. Therefore, the criminal court system, family court judges, immigration advocacy groups, law enforcement personnel, shelter workers, victim services professionals, psychiatrists, psychologists, and social workers are equally instrumental in fighting the debilitating effects of domestic violence. In light of this, legal services attorneys who represent battered immigrant issues must work toward providing victims with solutions that not only ensure their physical safety, but which also offer remedies that focus on the emotional, mental, and economic hurdles presented to battered immigrants.

VII. CONCLUSION

In view of the fact that V.A.W.A. funding sources are now available for legal services programs, it is incumbent upon federally funded providers to reorganize its resources and priorities to additionally meet the needs of battered immigrants.

Although numerous legislators oppose providing federally funded legal services to undocumented immigrants, extending legal services to them would ensure that all battered immigrants are offered the same legal safeguards and protection as are their United States born counterparts. It would additionally heighten the likelihood that all categories of battered immigrants could escape from their abuser because funding restrictions would not confine legal services programs.

However, the only real chance that battered immigrants have to successfully overcome the effects of the abuse is by receiving a combination of both legal and social services. As it now stands, most community legal service programs and social service agencies require that the battered immigrant apply directly to each individual agency for individual services. Consequently, it generally rests upon battered immigrants to determine specifically which social services programs best meet their needs.

136. Margulies, supra note 93, at 512.
137. Valente, supra note 24, at 193.
138. Id. at 193-94.
139. Id. at 194.
140. See Bach, supra note 11, at 659.
141. Id. at 657-58.
142. Id. at 658.
143. Id.
services resource will appropriately address their economic, educational, mental health, social, and legal needs.

A part of the problem results from funding competition. Typically, the agencies that provide services to battered immigrants are all competing for the same funds. Unfortunately, this often results in a lack of commitment by the various community programs to join together to form a shared enterprise.\textsuperscript{144} However, the effects of the domestic violence on the battered immigrant can only be diminished when legal services programs, immigrant advocacy groups, and victim services agencies combine, and use the unique strengths of each program, to combat the challenges faced by battered immigrants.\textsuperscript{145}

\begin{flushleft}
\textsuperscript{144.} Id.
\textsuperscript{145.} Valente, supra note 24, at 194.
\end{flushleft}
THE INTERNATIONAL CRIMINAL COURT AND
THE FUTURE OF LEGAL ACCOUNTABILITY

Loyola University, New Orleans
October 18, 2003
William W. Burke-White*

I. THE WEAKNESSES OF THE ICC
   A. Limited Jurisdiction
   B. Complementarity and the Limits of Admissibility
   C. The Difficulty of Apprehension
   D. Limited Capacity

II. THE ICC AND THE TRANSFORMATION OF ACCOUNTABILITY
   A. An Expansion of Crimes
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IV. CONCLUSION: TOWARD A SYSTEM OF INTERNATIONAL
    CRIMINAL JUSTICE

With unexpected speed, the International Criminal Court has become a
reality. Now that the ICC prosecutor and judges are sitting in The Hague, a
careful analysis of the Court's implications for the future of legal accountability
for international crimes has become all the more important. At the entry into
force of the Rome Statute of the International Criminal Court on July 1, 2002,
UN Secretary General Kofi Annan gave his evaluation—claiming that the court
would be "a great victory for justice, and for world order—a turn away from the
rule of brute force, and towards the rule of law."

He was both right and wrong—right that we have witnessed a significant
turn toward the rule of law, but wrong that the court itself will be a powerful
and direct means for justice and world order. I do not mean to say that the ICC
is not important. In fact, it is extremely important. Rather, I hope to sketch for
you today the outlines of a court that, created in compromise, is highly
constrained, but has great potential to transform international criminal justice
as we understand it today.

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1. Secretary General Kofi Annan, Statement at the Closing of the 9th Session of the Preparatory
I will begin by suggesting four reasons why the ICC as it has been created is an extremely limited mechanism and will not itself be the victory for justice the Secretary-General predicted. Then, I will offer three observations about how the ICC will nonetheless transform and greatly strengthen accountability for international crimes. I will conclude with a brief look toward the future.

I. THE WEAKNESSES OF THE ICC

There is probably no weaker court in the world—including the local traffic court down the street—than the International Criminal Court. The ICC was designed to be weak. Its architects feared the effects of a powerful court and throughout the process of drafting the Rome Statute they reached a number of compromises that effectively undercut the Court at every turn. Most of these compromises were pushed by the U.S. delegation at Rome. U.S. Ambassador David Scheffer knew the only hope for U.S. ratification was a court so constrained it would appear impotent to its domestic critics. The Europeans gave way—in part to placate the U.S. and in part because they too could come to fear a strong court. I will hope to explore the limitations of the court by examining four of these compromises—the limitations on jurisdiction, the narrow admissibility of cases, the lack of authority to apprehend, and the Court’s limited capacity.

A. Limited Jurisdiction

One of the major compromises reached at Rome was to restrict the jurisdiction of the International Criminal Court. Largely based on pressure from the U.S., the Rome Statute requires that either the state where the crimes occurred or the state of which the accused is a national be a party to the Statute. This compromise, embodied in Article 12 of the Statute, has profound implications. In short it means that only crimes committed on the territory of a state party to the Statute or those committed by a national of a state party to the Statute can be prosecuted by the Court. Yet, this also effectively defines the two types of states least likely to accept the jurisdiction of the court. States where international crimes occur are often experiencing massive governmental breakdown or are run by tyrants who commit international crimes. These are the very people who wish to avoid prosecution and are unlikely to join the Court. Compounding this limitation, in cases where a dictator commits crimes against his own people, the national and territorial states are likely to be the same. Governments that are likely to commit crimes themselves are unlikely to join the Court and subject their own nationals to prosecution. Thus, the Court is unlikely to have jurisdiction over the very countries where crimes are most likely to be committed and where national courts are most likely to be ineffective. From the perspective of accountability, this is far from an ideal outcome.
Notably lacking in the Court’s jurisdiction are the victim state and the custodial state. Including the victim state—the state whose nationals were the victim of the crime—in the Court’s jurisdiction would have promoted accountability by focusing on those who were most effected by the crimes. Similarly, giving the Court jurisdiction when the custodial state—the state in which the accused is found—was a party would also have expanded the ICC’s reach, allowing it to prosecute when a suspect is apprehended by some third state. Without these jurisdictional provisions, the ICC will have a hard time finding cases in which it is empowered to prosecute.

Admittedly, the picture is not entirely bleak. Already more than 80 states have ratified the Statute. This includes a number of surprising candidates—states in which it is entirely possible that international crimes could be committed. Moreover, it seems that many transitional governments have decided to accept the Court’s jurisdiction, in part to lock in future governments, subjecting them to the ICC and thereby hopefully preventing them from committing crimes in the future. Over time more states are sure to join, thus further expanding the Court’s reach. However, at least in the short term, the ICC will find these limitations on jurisdiction a significant bar to ending impunity.

B. Complementarity and the limits of admissibility

A second major restriction on the ICC, which renders it a weak institution, is the limit on admissibility of cases before the Court. In another compromise at Rome, Article 17 of the Statute dictates that the cases are only admissible where national courts are unable or unwilling to prosecute. This is the principle of complementarity, which gives national courts a first opportunity to prosecute before the ICC can act. Understanding complementarity is essential to understanding the ICC. In effect, the ICC is designed to be a backstop to national courts, rather than itself on the front lines of prosecution. In fact, all a national court has to do to block the ICC from prosecuting is to conduct a good faith investigation and determine that no crime was committed. Where a national court investigates or prosecutes in good faith, the ICC is rendered powerless.

Note that this is very different from the Yugoslav (ICTY) or Rwandan (ICTR) Tribunals, which have primacy over national courts. The ICTY can take a case away from a national court if it wants to, but that the ICC must defer to national courts. Again, the constraining implications of complementarity are profound. Even if an individual is within the ICCs jurisdiction and the prosecutor wants to pursue the case, if a national court—any national court—investigates or prosecutes, the ICC is effectively stopped in its tracks. Thus, despite the Court’s best efforts to act, any national court can prevent it from doing so.
It is yet unclear what will constitute sufficient investigation by a national court to render the case inadmissible before the ICC. An important aspect of the Rome Statute is that it gives the ICC self-judging power in this respect through pre-trail motions. The ICC will itself determine when national court efforts are insufficient and therefore cases are admissible to the ICC. On one end of the spectrum, it could determine that only serious, legitimate prosecutions by national courts are sufficient to deny the ICC the power to prosecute. Conceivably, however, investigation could be defined more broadly to even include investigations by a truth and reconciliation commission that—notwithstanding its impact on reconciliation—does little to combat impunity. One of the most interesting questions the ICC will address in its early cases, then, is what constitutes sufficient investigation by a national court and when such prosecution is legitimate. To some degree, this will be a political question, with the Assembly of States Parties exerting pressure on the Court to either expand or restrict admissibility. However the ICC rules on these issues in its early cases, the Rome Statute makes clear that limits on admissibility will deprive the ICC of any number of cases.

C. The Difficulty of Apprehension

The third limit facing the ICC is the difficulty of apprehending suspects. Indicted war criminals don’t generally hand themselves over to courts. They are often in hiding or in places beyond the reach of law enforcement authorities. Despite requirements for national cooperation in the apprehension of suspects, the ICC has no police or military force at its disposal to secure the arrest of indictees. The Yugoslav Tribunal has also suffered from this problem. It was only able to secure its first suspect — Dusko Tadic — by exercising its powers of primacy, a power the ICC notably lacks, and having the German authorities hand over Dusko Tadic who was sitting in a German prison. The ICTY has another significant advantage over the ICC in apprehension. Most ICTY indictees are in Bosnia or Kosovo, areas patrolled by KFOR and SFOR, multinational forces that have the power to arrest. Nonetheless, two of the ICTY’s most wanted suspects, Radovan Karadzic and Ratko Mladic, remain at large. Most of the ICC’s indictees, in contrast, will be in territories without such multinational forces. Moreover, many of the likely target states for investigations have very limited national police forces to arrest suspects themselves or may be undergoing political transition and unwilling to apprehend suspects because of the potential for political destabilization.

The ICC’s power of apprehension is ever further limited by the U.S. hostility to the Court. Take, for example, the ICC’s first likely case — the crimes in the Ituri region of the Democratic Republic of Congo. The UN Mission in Congo (MONUC) currently lacks the authority and probably also the military
capacity to arrest potential indictees. If a Chapter VII Resolution were put forward in the Security Council to give MONUC such authority, it seems likely the U.S. would oppose the move and exercise its veto. In other regions such as Iraq, peacekeeping forces are largely led by the U.S. Again given U.S. opposition to the Court, it seems highly unlikely that the U.S. military would arrest an indictee and hand him over to the ICC.

Even after the ICC finds a case over which it has jurisdiction and which is admissible, the challenge of apprehension will remain. Just as the first ICTY prosecutor, South African Justice Richard Goldstone, carefully chose his first cases to focus on low-level perpetrators who could be apprehended, so too will Louis Moreno-Ocampo, the new ICC prosecutor, have to chose suspects who can be apprehended. Likely scenarios for early arrests include cases where the government of the territorial state is able and willing to hand over indictees or where such indictees travel to other states that will arrest them. This is, in fact, how Tihomir Blaskic, a Serb general, was arrested when he when to a conference in Vienna. Again, these limits on the power of the ICC to apprehend suspects will undoubtedly shape and restrict the Court’s effectiveness.

D. Limited Capacity

The fourth constraint on the ICC is its limited capacity. The ICC is designed to be a small court. At most, it may handle a few trials a year. International justice is, after all, slow and expensive. In its nearly 10 years of existence, the ICTY has issued just over 20 decisions and sentenced only about 30 individuals. The trial of Slobodan Milosevic is already well into its second year. It seems highly unlikely that the ICC could operate more quickly or handle many more cases than has the ICTY. By guaranteeing extensive procedural protections, the Rome Statute has ensured the ICC will hear only a few cases. Yet, each year hundreds, if not thousands, of international crimes are committed around the globe. In its first year of operation the ICC received 499 communications from individuals in 66 countries suggesting possible crimes to investigate and prosecute. The ICC simply lacks the capacity to deal with all, or even a significant proportion, of these alleged crimes. It will have to choose its cases carefully. Consequently, many crimes will go unprosecuted.

II. THE ICC AND THE TRANSFORMATION OF ACCOUNTABILITY

I have just sketched a picture of a weak and circumscribed court. The ICC can only exercise jurisdiction in very few cases. Cases are only admissible before the ICC when all national courts are unable or unwilling to act. The ICC will have a very hard time apprehending suspects even when it has jurisdiction. And it will only be able to hear a few cases. This is not a court that the U.S.
should fear or need actively thwart. In fact, it is a court that is likely to have little direct impact in its early years.

While the ICC is, by intent and compromise, a weak court, it is also a court with extraordinary potential to transform international criminal law and advance accountability everywhere. Let me share with you three ways in which I anticipate the ICC will reshape the landscape of international criminal law in at least the following three ways.

A. An Expansion of Crimes

First, let us consider the case of Ituri in Eastern Congo, where two of the most heinous international crimes are occurring with systematic regularity. In Ituri mass rape is being used as a political tool. There are no accurate reports as to the number of victims. But thousands, if not tens of thousands of women and men have been the victims of mass sexual violence. Similarly, in this region of Congo tens of thousands of children under the age of 15 are being conscripted—kidnapped might be a better word—and forced to serve regional warlords. Even if the children are able to escape, they are rarely welcomed back into their communities for fear that they have become spies and will betray the village. Often they are malnourished, drug addicted and toting AK 47s. The look in their eyes is both heartbreaking and frightening. Before the Rome Statute the perpetrators of sexual violence and crimes against children in internal armed conflicts would probably have gone unpunished.

In fact, before the Rome Statute it is unclear whether their acts would have been subject to individual criminal responsibility at all. Generally, international humanitarian law has two separate regimes—one for international conflicts and for internal conflicts. War crimes committed in international armed conflicts—where two states go to war with one another—are regulated by the four Geneva Conventions of 1949. The ICC definition of war crimes in international armed conflicts moves beyond the Geneva Conventions by including sexual crimes and the conscription of child soldiers. For example, Article 8(2)(b) of the Statute includes the commission of rape, sexual slavery and the conscription of children under the age of 15 as war crimes.

Traditionally, war crimes committed in internal conflicts—civil wars and the likes—have been subject to less regulation and civilian victims have had even less protection. The Rome Statute, however, includes a long list of crimes in internal armed conflicts that are subject to the Court’s jurisdiction. For example, the Statute, in its definition of war crimes in internal armed conflicts, includes intentional attacks on civilians, rape, and the conscription of minors. In many ways this is a radical and very important expansion of international criminal law and has been described by some commentators as the greatest achievement of the Rome Conference. Today, the crimes against women and
children in Eastern Congo are for the first time unquestionably subject to individual responsibility. Moreover, as states enact the requisite domestic legislation to implement the Rome Statute, they are modifying their own penal codes to include wider definitions of war crimes, including those committed in internal armed conflicts.

A little-noted paragraph in the preamble of the Rome Statute may also have a significant effect in expanding the substance of international criminal law. The paragraph provides, in a relatively understated tone “that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.” Prior to the Rome Statute, states were authorized to prosecute international crimes. However, with the exception of Grave Breaches of the Geneva Conventions, they were under no obligation to do so. Yet, the preamble to the Rome Statute speaks of a duty for states parties to affirmatively exercise jurisdiction. That paragraph should expand the willingness and ability of national courts to prosecute international crimes. Taken to its logical conclusion, the failure of states to enact the necessary domestic legislation and actually prosecute such crimes could generate some level of state responsibility. If said paragraph were operationalized, it would imply an affirmative duty for states to actively prosecute international crimes. Time will tell whether states parties take that duty seriously.

B. Empowering National Courts

While it is true that according to the principle of complementarity discussed earlier, the ICC is constrained to act only when national courts fail to do so, at the same time the principle of complementarity is probably the most important and transformative aspect of the Statute. Rather than thinking of complementarity as a limit on the ICC, we can also view it as a way of empowering national courts. Complementarity fundamentally changes the incentives for national courts and should make them more likely to address international crimes directly. Before the ICC, national courts had the choice of either prosecuting international crimes or allowing impunity. For a variety of political reasons, such courts often chose—or were forced to choose—impunity. With the creation of the ICC, however, the choice is very different. National courts can either prosecute the crimes themselves—ensuring some level of control over the proceedings and possibly greater acceptance by the local population—or the ICC may step in and prosecute. Many national courts would rather maintain control over the prosecution themselves. With these choices, national courts should be far more likely to act themselves and motivated, to clean up their own messes at home in order to avoid ICC action.

National courts are extremely powerful tools. To the degree that the ICC can spur them into action that is a great advancement for accountability. First,
national courts are ubiquitous. Collectively, their jurisdiction covers just about every territory where a crime could occur. Second, they are proximate to crimes and victims. This facilitates the collection of evidence and the involvement of victims. Finally, national courts have police power at their disposal and they can use that power to apprehend and arrest suspects.

The new prosecutor of the ICC, Louis-Moreno Ocampo, understands this fundamental power of the Court to encourage national courts to act. As he observed at his swearing in this past July: "the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success."

The ICC is having its desired effect in empowering national courts. Let me give you an example. The ICC Prosecutor has recently indicated that his first investigation is likely to involve the crimes in the Ituri region of Congo. The war in the Congo over the past decade has caused somewhere on the order of five million deaths, with at least tens of thousands dead since the entry into force of the Rome Statute last year. Yet, there is a new transitional government in Congo and, for the first time in years, there are real prospects for peace. While the ICC should and will have some role to play in ensuring accountability in Congo, after the Prosecutor’s announcement that Congo will be the Court’s first investigation, the government of Congo has shown new interest in strengthening its failed national judiciary. I will be working closely with the U.S. Department of State to investigate possibilities for developing national judicial capabilities in Congo to deal with these crimes and will present a report to the State Department and the ICC on how the domestic Congolese judiciary and the ICC could work together to provide accountability in Congo as envisioned by the concept of complementarity.

Many crimes committed in Congo are outside the jurisdiction of the ICC as they were committed before July 2002 when the Rome Statute entered into force. Even if the ICC does prosecute some of the crimes committed in Eastern Congo, given the vast scale of crimes, there is no way it could prosecute all those responsible. If, however, the threat of ICC prosecution spurs the Congolese government to create domestic prosecutorial mechanisms, it can foster the development of national capacity and promote accountability on a larger scale. Another way in which the complementarity provisions of the Rome Statute strengthen accountability is by encouraging the exercise of universal jurisdiction by national courts. The principle of universality allows national courts to prosecute international crimes wherever they are committed. A number of states have passed the necessary domestic legislation to do so. For example, Belgium

and the Netherlands have prosecuted international criminals from Rwanda, Congo, and Surinam. Complementarity gives national courts—even those outside the state where the crimes occurred—the opportunity to prosecute before the ICC. Complementarity may make national courts more willing to exercise universal jurisdiction.

Taken collectively, complementarity should greatly enhance accountability for international crimes. It allows and encourages series of different courts to prosecute international crimes. In so doing, it tends to keep prosecutions close to home, promoting legitimacy and enhancing the reconciliatory effects of criminal prosecution.

C. Backstopping National Courts

The third way in which the ICC may transform the future of accountability is by acting as a backstop for national courts. I have already described the potential power and benefit of national courts. Yet, sometimes national courts will fail. There are countless reasons for such failures—domestic political pressure, lack of capacity, and corruption, just to name a few. A judge in Congo, after noting that judges had not been paid in over five years, told me how to differentiate between a good judge and a corrupt one. He explained the good judge hears the case, decides who has the best argument and shakes down that side for money, effectively his salary. The bad judge demands payments from both parties and sides with the one who pays most. I'm not sure we want even a good unpaid judge enforcing international criminal law.

Even where national courts are not corrupt, they may not be effective. Take, for example, the courts of Chile that could not prosecute Augusto Pinochet due to national amnesty and domestic political pressure. Or, the courts of Rwanda which, for many years after the genocide, simply lacked the resources to engage in meaningful prosecution. One judge in Rwanda complained to me in 1999 that his office lacked pencils and paper to record cases. National courts should and will be on the front lines of international criminal law, but there will be times when they are unable or unwilling to act.

In these cases the ICC will be able to play a direct and meaningful role in prosecution. Admittedly, the ICC could not act in the two cases I have just mentioned—the crimes of Pinochet or the Rwandan genocide—because they occurred before the Rome Statute entered into force. But, looking toward the future, as the jurisdiction of the ICC expands and when national courts fail to prosecute, the ICC will find itself with a meaningful case load. In some of these cases it will step in as a backstop and ensure accountability. Admittedly, some cases will still slip through the cracks. Given the limits on jurisdiction, admissibility, and apprehension, there will be crimes that can not be prosecuted anywhere. But, over time, the ICC will continue to narrow the realm of impunity.
The ICC will have at least one other important function as a backstop to national courts. It will ensure some level of commonality and uniformity of jurisprudence. In the international criminal system there is no general form of appellate review. While individual cases can be reviewed within their own court system, no overarching supreme court exists to ensure commonality of jurisprudence. With the growing number of national and supranational courts enforcing international law this could pose a threat to the system as different standards evolve in different courts. Even though the ICC may handle only a few cases, it seems likely that national courts will defer to its decisions on key points of international criminal law. Just as the ICTY has played this role to date—with national courts frequently referencing ICTY decisions—the ICC will come to be the standard bearer of international criminal jurisprudence. Its comparatively greater resources, its international status, and the expected quality of its staff make it seem likely that the ICC—even acting only as a backstop—will come to be the definitive voice on the rules of international criminal law.

IV. CONCLUSION: TOWARD A SYSTEM OF INTERNATIONAL CRIMINAL JUSTICE

In conclusion, let me speculate for a moment on the future of accountability and, particularly, how we can move toward a real system of international criminal justice. As I have argued, the ICC is weak. It will try only a relatively small number of individuals. Where national courts are strong, they have jurisdiction over crimes committed on their territory and by their nationals. Relying on the principle of universal jurisdiction, many states have enacted the necessary legislation to prosecute international crimes committed anywhere. Crucially, national courts have the police power to actually apprehend and arrest suspects. And now, with the complementarity provisions of the Rome Statute, national courts have a new incentive to act. By developing domestic capacity and prosecuting, national courts address crimes close to home and avoid investigation by the ICC. Yet, where national courts are unable or unwilling to act—the ICC will be able to step in. Acting as a backstop, the ICC will help ensure accountability where other courts fail.

For this system to work, the ICC and national courts will have to cooperate. There will be many cases when the ICC will have to rely on national courts. And, there will be times—such as when new law is being developed or where globally known despots are being prosecuted—that national courts may want or need to defer to the ICC. For this relationship to work national courts and the ICC will have to build trust, such that the ICC can count on national courts and national courts will not fear ICC prosecution. Congolese judges, for example, will have to cooperate with their international counterparts and international judges will have to help train and assist domestic judges. Both sides will need to further develop and refine the "unable or unwilling to prose-
cute” language of the Rome Statute so that these two layers of judicial institutions can cooperate.

Most importantly, the ICC and national courts will need to understand that they are part of a common mission—accountability for international crimes—and that both bring different tools and capabilities to that effort. If they succeed, the Rome Statute and the ICC can have a truly transformative impact on the future of international legal accountability. And the perpetrators of the crimes will face justice.
ILSA PANEL OCT. 18, 2003, AT LOYOLA UNIVERSITY NEW ORLEANS – PANEL ON HISTORY OF INTERNATIONAL TRIBUNALS PRIOR TO NUREMBERG: SELECTIVE HISTORY OF INTERNATIONAL TRIBUNALS AND EFFORTS PRIOR TO NUREMBERG

Jordan J. Paust

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I. EFFORTS AND TRIALS PRIOR TO WWI.

The history of attempts to create international criminal tribunals for prosecution of international crimes includes attention to the responsibility of heads of state, other public officials, and private persons for violations of treaties and customary international law and, thus, nonimmunity of heads of state and other governmental actors. One of the early prosecutions of a public official for an international crime occurred in a domestic tribunal in Naples in 1268 when Conradin von Hohenstafen, Duke of Suabia, was tried for initiating an unjust war or what we term an offense against peace or war of aggression. Von Hohenstafen was later executed for his misdeeds on October 29, 1268.¹

In 1474, the Burgundian Peter von Hagenbach, who served as Governor of territory under Duke Charles of Burgundy, was tried before what can be termed an international tribunal for the oppression of persons under his charge and for actions against the “laws of God and man,” including responsibility for murder, rape and pillage.² The trial of von Hagenbach for the improper administration of pledged territories on the Upper Rhine had occurred at Breisach at the order of the Archduke of Austria and was presided over by twenty-eight judges from allied towns. It should also be noted that von Hagenbach was tried before actual war in 1476, so it would not be proper to label the case a normal “war crimes” trial. He raised a defense of obedience to superior orders and asked for adjournment to obtain confirmation of such orders, but the defense was denied as being contrary to the law of God.

¹. See, e.g., JORDAN J. PAUST, M. CHERIF BASSIO UNI ET AL., INTERNATIONAL CRIMINAL LAW 621 (2d ed. 2000).
². Id. at 622.
More generally during the Middle Ages, the Holy Roman Emperor failed to obtain sufficient authority to enforce the law of arms. Such application occurred in the councils and courts of the major sovereigns in Europe. Further, the Papacy had attempted to establish a right to hear claims concerning violations of the law of arms, but to no avail.³

During the U.S. Revolutionary War, there were suggestions that the King of England and others be prosecuted for their "War against the natural rights of all Mankind,"⁴ but there had been no capture of the King of England by the Americans and no such trials took place. Although the British war against human rights and crimes of political oppression led to no criminal sanctions, in view of the trial of von Hagenbach an international trial would not have been completely unprecedented.

One of the early recognitions of criminal responsibility of a head of state occurred at the Congress at Aix-La-Chapelle in 1818 when the Congress, without formal trial, found Napoleon guilty of waging wars against peace.⁵ After his capture in 1815, he had been banished to the Island of St. Helena where he died some six years later.

During the 1915 massacres of Armenians by Turks, the governments of Great Britain, France, and Russia had condemned the massacres as "crimes against humanity,"⁶ but none of the alleged perpetrators were captured abroad and subject to trial in domestic or international fora.

II. THE 1919 PARIS PEACE CONFERENCE AND REPORT

After World War I, there was an important Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties that was presented to the Preliminary Peace Conference in Paris on March 29, 1919.⁷ Members of the 1919 Commission were: the United States, the British Empire, France, Italy, Japan, Belgium, Greece, Poland, Romania, and Serbia. The Report identified then current opinio juris concerning "responsibility of the authors of the war"; responsibility for breaches of neutrality (another form of offenses against peace); responsibility for war crimes, including a list of customary crimes under the laws of war;⁸ responsibility for offenses against "the laws of humanity" (what we term crimes against humanity, which were

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³. Id. at 622.
⁴. Id. at 621-22.
⁶. See, e.g., PAUST, BASSIOUNI, ET AL., supra note 1, at 857.
⁷. See, e.g., PAUST, FITZPATRICK & VAN DYKE, supra note 5, at 874. Here, I quote and borrow extensively from the 1919 Report, as reproduced in our casebook.
⁸. See, e.g., PAUST, BASSIOUNI, ET AL., supra note 1, at 32-33.
recognizable crimes under international law prior to creation of the Charters of
the IMTs at Nuremberg and for the Far East); and nonimmunity for heads of
state and other public officials (which every 20th Century Charter and Statute
with respect to international criminal tribunals has adopted, e.g., those for the
IMTN, IMTFE, ICTY, ICTR, and ICC).

Importantly, the Report stated a "desire to state expressly that in the
hierarchy of persons in authority, there is no reason why rank, however exalted,
should in any circumstances protect the holder of it from responsibility when
that responsibility has been established before a properly constituted tribunal.
This extends even to the case of heads of states. An argument has been raised
to the contrary based upon the alleged immunity, and in particular the alleged
inviolability, of a sovereign of a state. But this privilege, where it is recognized,
is one of practical expedience in municipal law, and is not fundamental. How-
ever, even if, in some countries, a sovereign is exempt from being prosecuted
in a national court of his own country the position from an international point
of view is quite different.

"We have later on in our Report proposed the establishment of a high
tribunal composed of judges drawn from many nations, and included the pos-
sibility of the trial before that tribunal of a former head of state with the consent
of that state itself secured by articles in the Treaty of Peace. If the immunity of
a sovereign is claimed to extend beyond the limits above stated, it would
involve laying down the principle that the greatest outrages against the laws and
customs of war and the laws of humanity, if proved against him, could in no
circumstances be punished. Such a conclusion would shock the conscience of
civilized mankind.

"In view of the grave charges which may be preferred against—to take one
case—the ex-Kaiser—the vindication of the principles of the laws and customs
of war and the laws of humanity which have been violated would be incomplete
if he were not brought to trial and if other offenders less highly placed were
punished. Moreover, the trial of the offenders might be seriously prejudiced if
they attempted and were able to plead the superior orders of a sovereign against
whom no steps had been or were being taken.

"There is little doubt that the ex-Kaiser and others in high authority were
cognizant of and could at least have mitigated the barbarities committed during
the course of the war. A word from them would have brought about a different
method in the action of their subordinates on land, at sea and in the air.

"We desire to say that civil and military authorities cannot be relieved from
responsibility by the mere fact that a higher authority might have been convicted
of the same offence. It will be for the court to decide whether a plea of superior
orders is sufficient to acquit the person charged from responsibility."
III. CONCLUSION

"All persons belonging to enemy countries, however high their position may have been, without distinction of rank, including Chiefs of States, who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution...."9

However, with respect to an international criminal tribunal, the Report opined:

"Any tribunal appropriate to deal with the other offences to which reference is made [e.g., war crimes and crimes against humanity] might hardly be a good court to discuss and deal decisively with such a subject as the authorship of the war. The proceedings and discussions, charges and counter-charges, if adequately and dispassionately examined, might consume much time, and the result might conceivably confuse the simpler issues into which the tribunal will be charged to inquire. While this prolonged investigation was proceeding some witnesses might disappear, the recollection of others would become fainter and less trustworthy, offenders might escape, and the moral effect of tardily imposed punishment would be much less salutary than if punishment were inflicted while the memory of the wrongs done was still fresh and the demand for punishment was insistent.

"We therefore do not advise that the acts which provoked the war should be charged against their authors and made the subject of proceedings before a tribunal."10

The Report added that "acts which brought about the war should not be charged against their authors or made the subject of proceedings before a tribunal," but that the Conference should condemn them and "it would be right... even to create a special organ in order to deal as they deserve with the authors of such acts."11 Kaiser William II had fled to the Netherlands and was not surrendered for prosecution. No international criminal tribunals were established; but there were several, yet insufficient, domestic prosecutions of persons for war crimes in Germany during the Leipzig Trials of 1921 (involving prosecution of twelve and the conviction of six persons—including a civilian; a private; a sergeant; various lieutenants, captains and majors; and three generals).12 There were also prosecutions of various persons in the United States and in other countries.13

10. Id. at 879.
11. Id. at 880.
13. See, e.g., id. at 278-87.
It should not be forgotten, however, that later that year, on June 28, 1919, the Treaty of Versailles (or Treaty of Peace) with Germany was created and as Article 227 declared:

The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.

A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one appointed by each of the following were: namely the United States of America, Great Britain, France, Italy and Japan. ...

The Allied and Associated Powers will address a request to the Government of the Netherlands for the surrender to them of the ex-Emperor in order that he may be put on trial.\textsuperscript{14}

The treaty also proclaimed in Article 228 that "[t]he German Government recognizes the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by law. This provision will apply notwithstanding any proceedings or prosecution before a tribunal in Germany or in the territory of her allies," adding: "The German Government shall hand over to the Allied and Associated Powers, or to such one of them as shall so request, all persons accused of having committed an act in violation of the laws and customs of war, who are specified either by name or by the rank, office or employment which they held under the German authorities."\textsuperscript{15}

German accused were not surrendered, but both the 1919 Report of the Commission on Responsibility and the 1919 Treaty of Versailles demonstrate significant pre-Nuremberg expectations of the international community concerning individual responsibility and nonimmunity for crimes against peace, war crimes, and offenses against the laws of humanity. These patterns of expectation had historical support with respect to trials and condemnations of von Hohenstafen (1268), von Hagenbach (1474), and Napoleon (1818), among others, and in the claims of our Founders concerning offenses against the law of nations allegedly committed by the King of England and his entourage.

\begin{itemize}
\item \textsuperscript{14} Reproduced in \textit{Paust, Fitzpatrick & Van Dyke, supra} note 5, at 880-81.
\item \textsuperscript{15} See id.
\end{itemize}
Prior to Nuremberg, there had also been many domestic prosecutions for war crimes and breaches of neutrality, especially within the United States. Within the U.S., there had even been recognitions in the Supreme Court when war ships were not immune with respect to breaches of the law of nations that if a Prince "comes personally within our limits, although he generally enjoy a personal immunity, he may become liable to judicial process in the same way, and under the same circumstances, as the public ships of the nation." Similar expectations of nonimmunity for heads of state were demonstrated in an 1859 Opinion of the Attorney General: "A sovereign who tramples upon the public law of the world cannot excuse himself by pointing to a provision of his own municipal code." Even earlier, Vattel had written in his widely read book in 1758, that "[t]he Prince...who would in his transports of fury take away the life of an innocent person, divests himself of his character, and is no longer to be considered in any other light than that of an unjust and outrageous enemy." In 1625, Grotius had also recognized that sovereignty is limited by and all kings are bound to observe the law of nations and that a war against an oppressive ruler was a permissible sanction who violated "the right of all human society" to freedom from oppression. Other early U.S. cases had also recognized that commissions from foreign governments do not create any immunity with respect violations of international law. Further, universal jurisdiction over violations of international law was recognized early in U.S. cases, as well as the duty of all states to prosecute customary international crimes.

Was there precedent for the prosecutions at the IMT at Nuremberg, the IMT for the Far East, and the tens of thousands of convictions in military commissions under Control Council Law No. 10 in occupied territory after World War II? I believe there was significant, if somewhat sparse, precedent


20. Id. bk. II, chpt. 25, §8.


22. See, e.g., JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 421-22 (2 ed. 2003), and the many cases cited. A prominent example was Talbot v. Janson, 3 U.S. (3 Dall.) 159-61 (1795) ("all...trespasses committed against the general law of nations, are enquirable, and may be proceeded against, in any nation....") (emphasis added).

23. See, e.g., id. at 421-22, 443-46, and numerous references cited.
for individual responsibility for crimes against peace, war crimes, and crimes against humanity and for nonimmunity for international crimes.\textsuperscript{24}

\textsuperscript{24} Of particular interest with respect to violations of customary international law is the express recognition of nonimmunity by the International Military Tribunal at Nuremberg: "The principle of international law, which under certain circumstances protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position... [and one] cannot claim immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law." Opinion and Judgment, I.M.T. at Nuremberg (1946).
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INTERNATIONAL LAW MOOT COURT COMPETITION
INTERNATIONAL COURT OF JUSTICE

THE PEACE PALACE
THE HAGUE, THE NETHERLANDS

CASE CONCERNING THE WOMEN AND CHILDREN OF THE CIVIL WAR

REPUBLIC OF ANNOLAY
Applicant

v.

REPUBLIC OF RESTON
Respondent

SPRING TERM 2003

MEMORIAL FOR THE APPLICANT

Universidad Catolica Andres Bello

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Anneliese Fleckenstein and Jose Gregorio Rojas
CASE CONCERNING THE WOMEN AND CHILDREN OF THE CIVIL WAR

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I. STATEMENT OF FACTS

This dispute arises from the Dysfuntian civil war between Restonian and
Cascadian militias, resulting in the creation of Reston (Respondent)—a
developing State—and Cascadia (not party to the case). Annolay (Applicant)—a
neighboring State—remained neutral during the war and offered its services
for a peace conference.

In April 1997, WRI reported that Restonian militiamen were systematically
raping Cascadian women. This was confirmed by a UNCHR mission, which
found that Raskolnikov, the Restonian militia leader, and his deputies took no
steps to stop the rapes. In 1998, Raskolnikov admitted his knowledge of the
rapes and that he was powerless to stop them.

In 1999, the militias agreed to a cease-fire. On 14 September, Dysfunctia
partitioned, and on November 1st, Reston held its first elections. Raskolnikov,
President elect, granted a comprehensive amnesty to everyone in Reston
accused of wartime crimes as part of his “National Healing Campaign”.

The WRI Executive Director campaigned for the adoption by Annolaysian
parents of children left orphaned by the war. ARAS arranged for parents to
attend interviews in Reston to qualify for and receive foreign adoption certifi-
cates, and nearly 2000 children were adopted.

In January 2001, the ITP revealed that Restonian border officials were
exacting bribes from adoptive parents. The officials kept these amounts. On
February 2, Annolaysian President Contrary urged Raskolnikov to address the
corruption. Raskolnikov replied that it was a small issue, and that Annolay was
complicit in the children’s illegal removal. Upon further pressure, Reston reas-
signed 10 border officials accused of corruption—10% of those implicated.
None were prosecuted or disciplined.

On March 21, 2001, Contrary expressed concern about the wartime rapes
of Cascadian women, and urged Cascadia and Reston to punish the perpetrators
and pay reparations to victims. On March 31, 2001, Raskolnikov reminded
Annolay of the amnesty, denying that his government owed any reparations. On April 20, 2001, given its neighbors' failure to pursue the matter, Contrary stated that Annolay would take up the cause and seek reparations for the women.

On December 1999, the UNCHR estimated that thousands of raped women lived without families or means of support. Reports indicate that in September of that year agents of the Schmandefare Co.—an Annolaysian private company founded by Fred Schmandefare (Annolaysian, and company CEO)—traveled to Cascadia to recruit hundreds of these women to find new lives in Annolay. They were promised jobs and education, and were assisted in filing work and travel documentation. Once in Annolay, nearly all began working in the Company's brothels. By December 2000, over 2,500 Cascadian women had been relocated to Annolay, which granted them resident status. According to the ITP, Schmandefare organized their recruitment and transportation to Annolay.

On 1 May 2001, ILSA published a report focusing on Cascadian women working in Schmandefare's brothels, alleging that many were abused and deprived of their liberty, and that Annolaysian agencies had dismissed women's complaints. The Report provided a detailed account of a Cascadian rape victim living in the brothels, who was subject to harsh living and working conditions. On May 17, 2001, Contrary expressed shock and horror at this, and announced the creation of a blue-ribbon panel to examine the problem. She denied Annolay's responsibility for the brothels' operation, and her government's independent knowledge of the facts in the report. She expressed her concern for the Cascadian women, yet affirmed that the Report was insufficient basis for criminal charges. She recognized that although complaints had been filed, the government was not involved in the abuse of Cascadian women.

On 19 May, 2001, Raskolnikov ordered his Justice Minister to perform an investigation on human rights violations in Annolay. Later that day, the Justice Ministry announced that it would prosecute Schmandefare for trafficking in women for sexual slavery based on the universal jurisdiction principle applicable to crimes against humanity. It is the first time that Reston invokes universal jurisdiction. Reston announced that it would try him in absentia if jurisdiction was not obtained, and requested Schmandefare through diplomatic channels. There is no extradition treaty between Annolay and Reston.

The following day Contrary accused Raskolnikov of trying to distract attention from his country's problems, denying the commission of a crime against humanity and Reston's right to exercise universal jurisdiction. She requested that Reston respect Annolay's sovereignty.

On 21 May 2001, Raskolnikov released copies of the ILSA Report's unpublished background research, which indicated that the Schmandefare Co. operated dozens of brothels. Raskolnikov reiterated Reston's intention to try Schmandefare under the universality principle.
Following unsuccessful mediation by the UNSG, the parties agreed to submit their differences to the ICJ. Contrary has ordered Schmandefare not to leave the country, pending the judgment of the Court.

II. STATEMENT OF JURISDICTION

Annolay and Reston have submitted by Special Agreement their differences concerning the women and children of the Dysfunctian civil war and related matters, and transmitted a copy thereof to the Registrar of the Court pursuant to article 40(1) of the Statute. Therefore, both parties have accepted the jurisdiction of the ICJ pursuant to Article 36(1) of the Statute.

III. SUMMARY OF PLEADINGS

The Court should declare that Reston has breached its international obligations and must pay damages to Annolay to be distributed to victims of systematic rape during the Dysfunctian civil war now resident in Annolay. Annolay has standing since it can exercise diplomatic protection on behalf of the victims based on the effective link doctrine. In any case, since the rapes constitute war crimes in violation of Common Article 3 of the 1949 Geneva Conventions or, at least acts of torture, Annolay has standing because Reston breached these erga omnes obligations. Reston’s responsibility arises from the attribution of the acts of the Restonian militia to the new State of Reston because of the continuity of the organization of the militia and that of the new State, as well as from Reston’s subsequent ultimate default to prosecute and punish the perpetrators of such criminal acts through the granting of a comprehensive amnesty. Indeed, the granting of amnesty for gross violations of human rights is rejected under customary law.

Reston is in breach of its international obligations with respect to the bribes exacted by its border officials from Annolaysian citizens, and is obligated to pay restitution in the amount of the bribes. Annolay’s claim is not barred by the clean-hands doctrine, since the damage was not due to the sole fault of the parents, nor were the parents required to exhaust local remedies as such remedies would be futile. Reston is responsible for the bribes due to its failure to enact anti-bribery legislation—which defeats the object and purpose of the RACC—and as a result of not prosecuting and punishing the corrupt border officials. Furthermore, by not preventing the improper financial gain of those officials involved, Reston breached customary obligations set out in the CRC regarding adoption, which directly relate to the Best Interest of the Child Principle.

Reston is not entitled to exercise universal jurisdiction over Schmandefare, as it intends, since the only available evidence of a crime against humanity subject to universal jurisdiction are press articles and NGO reports, which are insufficient to establish a prima facie case of Schmandefare’s guilt. Moreover,
the contextual elements required of crimes against humanity are not met because Schmandefare was acting in his private capacity without instigation from any State or organization, and the attack was not directed against a specific civilian population. Reston is also barred from exercising universal jurisdiction, as the universality principle has not gained customary status. Additionally, trials in absentia are forbidden under international law, as evidenced by State practice. Moreover, trying Schmandefare in absentia without proper notice clearly breaches his right to due process, specifically to be present at trial. Finally, since Reston’s assertion of universal jurisdiction over Schmandefare is retaliatory to Annolay’s purpose of seeking reparation for the war victims, it is in bad faith.

Annolay has not breached any international legal obligations deriving from the alleged treatment of Cascadian women working in brothels in Annolay, and in any event, Reston has no standing to enforce such obligations. Indeed, the obligations relating to trafficking have not acquired erga omnes status, hence Reston, as it is not an injured State, cannot invoke Annolay’s responsibility. Alternatively, Annolay is not responsible for the treatment of the Cascadian women since customary law does not provide Reston any grounds for enforcing the obligation to prevent and punish trafficking upon Annolay, due to the lack of consistent State practice. Also, the creation of the investigatory panel evidences Annolay’s diligence in the matter.

IV. QUESTIONS PRESENTED

1. Whether Reston has breached its international obligations and must pay damages to be distributed as reparations to those victims of systematic rape during the Dysfunctian civil war who are now resident in Annolay;
2. Whether Reston is in breach of its international obligations with respect to the bribes exacted by its border officials from Annolaysian citizens and is obligated to pay restitution in the amount of the bribes to Annolay on behalf of the Annolaysian adoptive parents;
3. Whether Reston is entitled to exercise universal jurisdiction over Mr. Fred Schmandefare; and
4. Whether Annolay has breached any international legal obligations deriving from the alleged treatment of Cascadian women working in brothels in Annolay, and whether Reston has standing to enforce such obligations.

V. PLEADINGS

Reston has breached its obligations and must pay damages to Annolay to be distributed as reparations to those victims of systematic rape during the Dysfunctian Civil War who are now resident in Annolay.
A. Annolay Has Standing To Bring This Claim Before the Court.

Although in principle States can exercise diplomatic protection only on behalf of nationals,\(^1\) a progressive reading of *Nottebohm* can extend such protection to residents. In resolving which State could exercise diplomatic protection on Nottebohm's behalf, residence was used as a link between Nottebohm and the State to determine his nationality.\(^2\) Although the women are not Annolaysians, they came into Annolay as Dysfunctians, a State that ceased to exist; Cascadia declined its right to exercise this claim; and they were victims of gross human rights violations deserving reparation. Hence, their State of residence, the only one with which they have an effective link, should be allowed to step forward. Thus, Annolay requests this Court to innovate towards a more reasonable approach and allow Annolay to bring this claim on behalf of its Cascadian residents. Alternatively, States other than the injured State may invoke the responsibility of another for breaches of obligations *erga omnes.*\(^3\) As proven below, Reston's conduct breaches two *erga omnes* rules: the prohibition against war crimes\(^4\) and the prohibition against torture,\(^5\) hence Annolay has standing to bring this claim.

B. The Rapes Of The Cascadian Women Breached Erga Omnes Obligations.

Although the widespread and presumably systematic nature of the rapes may qualify them as crimes against humanity, Reston's responsibility arises more clearly from the commission of war crimes and/or torture. Thus, Annolay will base this claim on said arguments.

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1. The Rapes of the Cascadian Women were War Crimes.

An act is a war crime when: (i) it breaches a customary rule of international humanitarian law that protects important values, involving grave consequences for the victims; and (ii) said rule entails individual criminal responsibility under customary law.6 The rapes of Cascadian women constitute war crimes.

a. The rapes breached a customary rule of humanitarian law protecting important values.

Common Article 3, which applies to all armed conflicts7 (including internal wars without government involvement or where the State ceases to exist)⁸ is custom,⁹ as evidenced from State practice deriving from the creation of international criminal tribunals, whose case-law has applied this rule as custom.¹⁰ Opinio juris follows from the widespread acceptance of the 1949 Geneva Conventions, regarded as customary law,¹¹ and UN Resolutions calling for respect of human rights and humanitarian law, including Common Article 3, in all armed conflicts.¹² Additionally, a breach of Common Article 3 requires

(i) that the victims be "protected persons" (i.e., not taking part in the hostilities); and (ii) that a nexus exist between the offence and the armed conflict. In this case, (i) no evidence points to the victims' taking part in the hostilities, thus they were protected persons; and (ii) according to UNCHR and WRI reports, which are admissible evidence, the rapes were systematic and intended to coerce the Cascadian population, which proves their nexus to the war. Thus, the rapes breached Common Article 3.

Second, Common Article 3 implicitly prohibits rape, as rape constitutes cruel treatment under general principles of law, and can also take the form of torture, as did the rapes of the Cascadian women (as proven infra). Accordingly, Common article 3 protects important values, since it reflects elementary considerations of humanity, and protects rights recognized in major human rights instruments. Moreover, the rapes entailed grave consequences for victims, as rape inflicts severe physical and psychological suffering, and the Cascadian women endured ostracism, unemployment, and loss of family and friends.

b. The breach of Common Article 3 entails individual criminal responsibility.

International criminal courts prosecute breaches of Common Article 3 under the idea that they entail individual criminal responsibility, a notion


supported by States. Moreover, international law has developed towards the criminalization of breaches of Common Article 3, as acts perpetrated in internal conflicts cannot be treated more leniently than those committed in international conflicts. Thus, since both elements required for acts to constitute war crimes are met, the rapes constitute war crimes.


International criminal tribunals have relied on human rights instruments to define torture, which can be committed by non-state actors in some circumstances. The elements of torture are: (i) the intentional infliction of severe pain; (ii) for the purpose of, inter alia, intimidating or coercing the victim or a third person, or for any reason based on discrimination; (iii) with the consent or acquiescence of a public official or someone acting in official capacity. As stated supra, rape is a form of torture, specially when committed systematically and for political purposes. In armed conflict, rape inherently entails coercive or discriminatory purposes. This case was no exception: UNCHR and WRI reports characterized the rapes as systematic and deliberately used to spread terror among the Cascadian population. Moreover, rape victims endure a high degree of suffering, as stated supra. Therefore, the first two elements of torture are met. The third element is also present, since officials of non-state organizations or groups seeking political control over a territory, and non-state parties to an internal conflict, such as Restonian militia, act in official capacity. Thus, the rapes constituted torture.


The prohibition against torture in Common Article 3 constitutes an elementary consideration of humanity which must be respected in all armed conflicts,\textsuperscript{28} due to the need to ensure respect for certain human rights and humanitarian norms, minimum humanitarian standards, in all circumstances.\textsuperscript{29} Elementary considerations of humanity bind all States as principles of law.\textsuperscript{30} Thus, the prohibition against torture should have been respected during the Dys-functian war.

C. Reston is Responsible for Breaching Obligations in Connection with the Rapes.

Internationally wrongful acts of States, which occur when conduct is attributable to the State and constitutes a breach of its international obligations,\textsuperscript{31} entail their responsibility.\textsuperscript{32} A State’s international responsibility can arise from an ultimate default to prosecute and punish internationally injurious acts of its nationals.\textsuperscript{33} Such default results from the pardon of an offence, for this causes a State to deprive itself of the possibility to punish a crime under international law.\textsuperscript{34} Particularly, granting amnesties for war crimes breaches international human rights law and undermines principles enshrined in UN Resolutions.\textsuperscript{35}


\textsuperscript{30} \textit{Corfu Channel}, 1948 I.C.J. 15 \textsuperscript{28} 158; \textit{Nuclear Weapons}, 1996 I.C.J. 8 \textsuperscript{29} 79.

\textsuperscript{31} Draft Articles on the Responsibility of States for Internationally Wrongful Acts, \textit{supra} note 3, at art. 2; Case Concerning Phosphates in Morocco, (Italy v. Fr.) 1938 P.C.I.J. 4, (ser. A/B), No. 74, at 10 (June 14); Case Concerning United States Diplomatic and Consular Staff in Tehran, (U.S. v. Iran), 1980 I.C.J. 3 (May 24) \textsuperscript{30} 56; Case Concerning the Gabcikovo-Nagymoros Project, (Hung. v. Slovak.), 1997 I.C.J. 78 (Sept. 25) \textsuperscript{31} 66.


Indeed, States have an obligation to prosecute and punish gross violations of human rights, which include acts of torture. Moreover, despite UN reluctance to reject general amnesties, as in the case concerning Haiti, the state of the law evolves towards the contrary. Indeed, in the more recent case of Sierra Leone, the UN affirmed that it did not recognize amnesty for war crimes and other serious violations of international law. Thus, Reston's granting of amnesty breaches its obligation to prosecute and punish the perpetrators of the crime, giving rise to its responsibility.

D. Reston Must Pay Damages.

States entitled to invoke another State's responsibility for breaches of *erga omnes* obligations may claim reparation in the interest of the beneficiaries of said obligation. Hence, Annolay can claim reparations for the Cascadian women, specifically compensation due when a wronged situation cannot be reestablished to the conditions that existed before the wrongful act was committed. Here, the situation cannot be reestablished, since the women's physical and psychological suffering cannot be undone. Thus, considering that compensation has been awarded before, both for physical and moral damage, Annolay requests that the Court order Reston payment to be distributed among the rape victims now resident in Annolay.

*Reston is in breach of its international obligations with respect to the bribes exacted by its border officials from Annolaysian citizens, and is obligated to pay*
restitution in the amount of the bribes to Annolay on behalf of the Annolaysian adoptive parents.

A. Annolay’s Claim Is Not Barred By The Clean-Hands Doctrine.

A claimant’s involvement in illegal activities may bar his claim, thus the clean-hands doctrine can be invoked as basis for rejecting a claim of diplomatic protection. Accordingly, Reston may argue that Annolaysian parents were, by paying the bribes, involved themselves in corruption and have “dirty hands.” However, said argument must be dismissed. Indeed, the value of “clean-hands” is highly questionable, since it has been rarely applied. The doctrine succeeds only where the breach by the victim was the sole cause of her damage, that is, where the cause-and-effect relationship between the damage and the victim’s conduct involved no wrongful act by the respondent State. However, the corruption of the Restonian officials was a quid pro quo, involving no sole fault since, as with any case of corruption, someone paid and someone was paid. Consequently, the clean-hands doctrine does not apply.

B. Furthermore, Annolaysian Parents Need Not Exhaust Local Remedies.

Reston may also argue that Annolaysian parents should have sought redress in Reston before Annolay could bring the case to the ICJ. Nevertheless, in this case exceptions to the exhaustion of local remedies rule apply: first, the requirement is exonerated where local remedies do not exist; second, local remedies need not be exhausted whenever they are futile. In this case, (i)

45. SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT CAUSES, CONSEQUENCES, AND REFORM 93 (Cambridge Univ. Press 1999).
47. Draft Articles on Diplomatic Protection, supra note 1, at art. 14(a); Finnish Shipowners’ Arbitration, (Fin. v. U.K.), 3 R.I.A.A. 1479 (1934); Case Concerning Elettronica Sicula S.P.A. (U.S. v. Italy), 1989
evidently there are no remedies available in Reston, since the non-existence of specific anti-bribery laws in that State makes it impossible for Annolaysians to charge the officials for bribery under Restonian criminal law; and (ii) remedies are obviously futile in a State that showed the most flagrant tolerance towards corruption, not only by its lack of anti-bribery laws, but by considering that the mere reassignment of officials, while none have been disciplined or prosecuted, was enough to solve the problem, and furthermore by its President’s declaration regarding the corruption problem as a small issue undeserving his immediate attention; a stand that contradicts most States’ view of corruption as an international crime that threatens democracy and human rights. Thus, arguments claiming non-exhaustion of local remedies should be disregarded.

C. Reston’s Conduct Entails A Breach Of Its International Obligations.

1. Reston Breached the Obligation to Enact Anti-Bribery Laws.

The customary character of the rule binding States to enact anti-bribery laws derives from its inclusion in international instruments, suggesting a pattern of State practice. *Opinio juris* follows from the criminalization of bribery in most States’ domestic law. In this case, Reston has clearly failed to enact legislation against corruption. Furthermore, such failure entails a breach

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of the object and purpose of the RACC, which Reston is bound not to defeat, as a signatory of the RACC, and a party to the VCLT. According to legal experts, the object and purpose of the RACC (identical to that of the CLCC) derives from its Preamble, which states the need to pursue, as a matter of priority, a common criminal policy to protect society against corruption, including the adoption of appropriate legislation. Accordingly, the duty of States to enact anti-corruption legislation (and forbid bribery) is part of the object and purpose of the RACC. Thus, Reston’s failure to enact anti-bribery laws defeats the object and purpose of a signed treaty.

2. Reston Breached its Obligation to Establish Jurisdiction over the Bribers.

States have a general duty to exercise due diligence in the prosecution and punishment of nationals when these have harmed nationals of other States. As regards corruption, there is a duty to assert jurisdiction over offenses committed within their territories or by their nationals, which is a customary obligation, as derives from its inclusion in international instruments and UN Resolutions on corruption urging States to adopt legislation permitting prosecution of corruption, and its continuous application by national tribunals. Reston’s breach of this obligation is evidenced by three facts: first, the Restonian officials committed passive bribery, defined as the request or receipt by any public official of an undue advantage in order to act or refrain from acting in the exercise of his

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functions; second, the State's only reaction to the rampant corruption at its borders was to reassign a mere 10\% of the individuals implicated; and third, although no border officials were ever prosecuted or disciplined, Reston considered that the problem had been "taken care of". Moreover, even if Reston has no criminal anti-bribery laws, at least civil and/or administrative liability remained possible. Therefore, Reston is responsible for the breach of the obligation to establish jurisdiction over acts of corruption.

3. Reston Breached its Obligation to Prevent Improper Financial Gain in Adoption.

The UN Convention on the Rights of the Child (CRC) binds all States under customary international law. Said status derives from its ratification by all States, excepting Somalia and the United States (which have nevertheless signed the CRC), and Reston, the only State in the world which has not even signed the CRC. The CRC requires States to take all appropriate measures to ensure that adoption does not result in improper financial gain for those involved, a customary rule, as evidenced from the practice of States in accepting its inclusion in international instruments, and from the opinio juris revealed by its adoption in domestic legislation. Also, State practice in

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fghting corruption in adoption is shown by cases such as Romania's, where States have halted their international adoptions to stop related acts of corruption.63

Moreover, this provision relates directly to the observance of the Best Interest of the Child Principle,64 as the rule seeks to contribute in the fight against baby selling and child trafficking. One case where the world has most clearly regarded the best interest of children is where a State has suffered internal or international conflicts, resulting in the adoption of approximately 20,000 children per year,65 most of which come from countries with serious difficulties (e.g., Paraguay, Colombia, Honduras, Sri Lanka, Romania, and the Former Yugoslavia).66 In Romania, thousands came forward to adopt over 165,000 children living in inhumane conditions.67 The case at hand is impressively similar to Romania's. However, Reston allowed its officials to obtain improper financial gain from the adoptions, even after knowing of the situation through the publication of the "Corruption in the Nursery" articles; which results in a breach of its international obligations.

D. Reston Is Bound To Pay Restitution.

In this case, the most adequate form of reparation is restitution of the amounts paid to the officials. Indeed, international tribunals have awarded restitution in a number of cases.68 Consequently, the most adequate form of


64. Conventlon on the Rights of the Child, supra note 60, at art. 21, 21(d); Bartner, supra note 58, at 416.


68. JOHN BASSETT MOORE, 2 HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE U.S. HAS BEEN A PARTY 1449, 1466 (1898); Orinoco Company, 9 R.I.A.A. 297 (1903); Case Concerning the Temple of Preah Vihear (Camb. v. Thail.), 1962 L.C.J. 6 (June 15); Rights of Britons in Spanish Morocco, 2 R.I.A.A. 615, 722 (1923).
reparation for the Annolaysians’ monetary losses is restitution in kind. However, since the parents paid the bribes, a question arises on the matter of comparative fault, recognized as grounds for the determination of damages.69 Indeed, international tribunals have reduced the claimant’s award in proportion to her culpability.70 In this case, Annolay is prepared to accept that the parents “culpability” has an effect on the determination of damages, conceding to the following: (i) that parents who complied with all adoption requirements bear absolutely no fault in the corruption, hence the Court should award them restitution in the full amount; and (ii) that parents who paid bribes after failing or without attending fitness interviews bear comparative fault, and thus Annolay accepts any reduction in recovery deemed appropriate.

Reston is not entitled to exercise universal jurisdiction over Mr. Fred Schmandefare.

Under “universal jurisdiction”, any State can prosecute perpetrators of crimes that are considered heinous and harmful to mankind under the idea that every State has a legal interest to prosecute crimes that have been universally condemned.71 In this case, Reston has argued that it is entitled to exercise universal jurisdiction over Schmandefare based on the assumption that he committed a crime against humanity. However, the argument must be dismissed.

A. Evidence Does Not Support a Prima Facie Case Of Schmandefare’s Guilt.

For this Court to assert that Reston can exercise universal jurisdiction over Schmandefare, a prima facie case of his guilt for the crime against humanity of sexual slavery (as affirmed by Reston) must be established. A prima facie case is a credible case which would, if not contradicted, be sufficient legal basis to convict the accused.72 However, in this case, the evidence does not support the


construction of a *prima facie* case against Schmandefare, since close analysis of the treatment of the Cascadian women is required, and the *Compromis* contains few facts on the matter, other than ILSAs findings and ITP articles. This information does not suffice, as NGO findings and press information have little evidentiary value in the field of criminal law,\(^7\) in light of the requirement of proof of guilt beyond reasonable doubt.\(^7\) Moreover, press reports alone are not regarded as evidence capable of proving facts.\(^7\) Thus, the ILSA report and ITP articles do not constitute sufficient evidence to establish a *prima facie* case of crimes against humanity.

**B. Alternatively, No Crime Against Humanity Has Been Committed.**

Qualification of conduct as a crime against humanity requires a stringent test,\(^7\) since these are considered the gravest crimes of international concern. Since Reston accused Schmandefare of "trafficking for the purpose of sexual slavery" there must be proof beyond reasonable doubt of all the elements of the crime against humanity of sexual slavery, which are:

(i) the exercise of powers attaching to the right of ownership over persons;
(ii) the causing of persons to engage in sexual acts;
(iii) a context of a widespread or systematic attack against a civilian population; and

the perpetrator's knowledge that his conduct is part of such an attack.\(^7\)

1. Schmandefare's Conduct does not Meet the Objective Elements of Sexual Slavery.

Reston has specifically alleged that Schmandefare's actions amount to trafficking in women, which is one of the property rights included in this

\(^{73}\) RATNER & ABRAMS, *supra* note 11, at 256.


\(^{75}\) Nicaragua, 1986 I.C.J. 14 ¶ 62.


element.\textsuperscript{78} Trafficking involves, \textit{inter alia}, the use of coercion or deception.\textsuperscript{79} As indicated in the \textit{Compromis}, representatives of the Schmandefare Company recruited women to work \textit{primarily} as nannies or domestic servants, and they voluntarily accepted to come into Annolay to work for the Schmandefare Company, hence the women appear to have had a choice as to their work, since not all of them ended up working in brothels, and they were all granted permanent resident status, meaning that they had no legal restraints as to their freedom of work in the country. Thus, since no coercion or deception is evident, Schmandefare’s conduct does not amount to trafficking, as one of the objective elements required by sexual slavery is not met.

2. Schmandefare’s Conduct does not Meet the Contextual Elements of Sexual Slavery.

The contextual elements of a crime against humanity exclude isolated random acts from this category, since conduct must be part of a widespread or systematic attack against a civilian population,\textsuperscript{80} pursuant to a State or organizational policy to commit such an attack.\textsuperscript{81} Absent State policy, the crime must be linked to the policy of an organization with State-like characteristics (e.g., control over territory or \textit{de facto} authority).\textsuperscript{82} The instigation or direction by such an organization is what makes the act a crime against humanity,\textsuperscript{83} and excludes acts of individuals acting on their own initiative pursuant to their own criminal plan.\textsuperscript{84} Schmandefare, as CEO and founder of the Schmandefare Company, which has no ties to any government or public agency, was acting...
pursuant to his own initiative. Indeed, it has not been disputed that he was responsible for organizing the recruitment and transportation of women from Cascadia to Annolay for employment in brothels. Moreover, the Schmandefare Company does not possess any State-like characteristics, and thus he could not be acting pursuant to the required organizational or State policy. Consequently, Schmandefare clearly was not under the control or instigation of a State or organization, which leaves out the possibility that he was acting pursuant to the required policy.

Additionally, the attack must be directed against a civilian population (individuals are victimized because of their membership to a targeted population). The Schmandefare Company owned a large number of brothels prior to the Cascadian women’s arrival, which means that the women working there were not only Cascadian. It follows that the women were not “victimized” specifically because they were Cascadian, hence this requirement is not met. Finally, the mens rea requirement is not met because, if as stated supra, Schmandefare’s acts were not part of a widespread or systematic attack, it follows that he did not intend his acts to be of said nature. In sum, the elements of a prima facie case of the crime against humanity of sexual slavery are missing, thus, prima facie no crime subject to universal jurisdiction has been committed.

C. In The Further Alternative, Reston Is Banned From Exercising Universal Jurisdiction.

Universal jurisdiction is the most exceptional basis for jurisdiction, used as an auxiliary form of jurisdiction in conjunction with other bases of jurisdiction, and only when the forum State has custody over the offender. As evidenced by State practice, States must rely on treaties when asserting jurisdiction based on universality, applying conventional rules regarding crimes of


89. Prosecutor v. Djajic (Bravarian High Ct. 1997), May 23, 1997; Prosecutor v. Jorgic (Dusselforf High Ct. 1997) Sept. 26, 1997; Pinochet, Tribunal de Premiere Instance de Bruxelles, No. X96-32.491 PF,
terrorism, drug trafficking, torture, etc. Hence, since Reston is not a party to any convention which allows universal jurisdiction, it must rely on custom.

However, the state of the law does not evidence any consensus supporting the notion that crimes against international law should be justiciable in national courts on grounds of universality. On the contrary, according to Amnesty International, a passionate advocate of universal jurisdiction, merely a dozen States have asserted universal jurisdiction. Such scant practice cannot amount to customary law, as evidenced today more than ever by the stand of several ICJ justices, who very recently expressly denied said customary status in the Arrest Warrant Case. Thus, Reston is banned from exercising universal jurisdiction. In any case, Reston's assertion of universal jurisdiction over Schmandefare breaches international law.

1. A Trial In Absentia would Breach International Law.

Trials in absentia are normally forbidden. Indeed, although most States have prescribed laws against war crimes or crimes against humanity, until 2002 only five allowed trials in absentia. Moreover, the rejection of trials in absentia is clearly evidenced by States' accord not to include this possibility under the ICC Statute. Also, even perpetrators of the most serious international crimes have been afforded the right to be present at trial, further evidencing a general rejection of trials in absentia.


Reston may argue that the *Lotus Case* supports the exercise of universal jurisdiction *in absentia*, based on the *dicta* that, unless conduct is expressly prohibited by international law, it is permitted.\(^9\) However, since in *Lotus* the acts occurred at high seas, assertion of jurisdiction over the defendants did not conflict with the territorial jurisdiction of any State. In contrast, Reston’s assertion of jurisdiction over Schmandefare would conflict with Annolay’s territorial jurisdiction. Hence, based on such distinguishing features, and on the fact that a cloud of doubt continues to hang over *Lotus,\(^9\) its invocation is dubious at best. Accordingly, Reston’s intention to prosecute Schmandefare *in absentia* contradicts international law.

2. A Trial *In Absentia* would Breach Schmandefare’s Right to Due Process.

A State’s power to exercise universal jurisdiction requires that the accused be present at trial and the observance of international due process norms.\(^9\) The right to due process has acquired customary status, as derives from its recognition in human rights instruments,\(^9\) suggesting a pattern of State practice. *Opinio juris* follows from its inclusion in most States’ national legislation,\(^9\) and application by international and national tribunals.\(^9\) Moreover, even if trials *in absentia* may be performed under exceptionally justified reasons,\(^9\) the accused must be sufficiently informed of proceedings, and he must voluntarily have waived his right to be present,\(^9\) none of which


\(^9\) Const. Arg., sect. 18; Can: Const., art. 4 §7; Chile: Const., art 19; PRC: Const., art 8(1); Colom: Const., art. 28; Ecuador: Const., art. 24; Mex: Const., art. 18; Nor: Const., art. 9; S. Afr.: Const., art. 12(1)(a); Spain: Const., art. 17; Venez: Const., art. 47.


has happened here. Indeed, Reston has *a priori* voiced its intention to try Schmandefare *in absentia* even before proper notice was issued. Therefore, he was not given the opportunity to be present or to waive such right; hence a trial *in absentia* would breach Schmandefare's due process rights.


In exercising its right to assert universal jurisdiction, a State must act in good faith, a principle that controls the exercise of rights by States. Facts show that Reston's assertion of jurisdiction over Schmandefare is retaliatory to Annolay's purpose of seeking reparation for the war victims, since a decision to exercise universal jurisdiction must be based on legal considerations, not political interference. The Restonian Min. of Justice expressed his intention to try Schmandefare *the same day* that he received a memorandum from President Raskolnikov stating: "Annolay's President challenges the conduct of Restonian militiamen (...), but at the same time, (...) fails to protect the human rights of women in her own country(...). Please have your Department investigate this." Clearly, this statement was not based on legal considerations, and the Court should dismiss Reston's bad faith claim for universal jurisdiction.

D. The Court Should Award Declaratory Relief.

This Court has awarded declaratory judgments establishing obligations on States to act in certain ways, and providing detailed guidance on their future conduct. Accordingly, Annolay requests the Court to declare that Reston is not entitled to exercise universal jurisdiction over Schmandefare.

Annolay has not breached any international legal obligations deriving from the alleged treatment of Cascadian women working in brothels in Annolay, and in any event, Reston has no standing to enforce any such obligations.

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106. U.N. CHARTER, art (2)(1) (1945); CHENG, supra note 42, at 121; Bassiouni, supra note 86, at 87.


A. Reston Lacks Standing To Bring This Claim Before The Court.

Annoy will first deal with the issue of *locus standi*, since States must raise their objections to admissibility in a timely manner (i.e., at the earliest stages of the case) lest it be presumed that they have tacitly waived such an objection.\(^{109}\) As established *supra*, a State other than the injured State can invoke another State's responsibility for breaches of obligations *erga omnes*.\(^{110}\) In this case, obligations regarding trafficking in women have not acquired *erga omnes* status. Indeed, *erga omnes* obligations are defined as peremptory norms recognized as such by the international community as a whole,\(^{111}\) which is not the case of obligations on trafficking, due to lack of international consensus as to a definition of trafficking and the varying practice and *opinio juris* of States.\(^{112}\) Hence, Reston has no standing to bring this claim.

Reston may then try to prove that trafficking breaches the *erga omnes* prohibition against slavery. However, that idea is not widely accepted, since States consider trafficking to be a prohibited, yet distinct practice from slavery,\(^{113}\) as derives from the treatment of trafficking as a distinct crime in specialized conventions.\(^{114}\) At most, trafficking may be a contemporary form of slavery, not "slavery" as originally understood (i.e., the status of persons over whom powers attaching to the right of ownership are exercised),\(^{115}\) and there is no evidence that the *erga omnes* status of slavery extends to its contemporary forms, since their substantive content has not been identified.\(^{116}\) Thus, Reston's attempt to base it *locus standi* on a supposed *erga omnes* breach through trafficking in women is, at the very least, highly questionable.

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111. VCLT, *supra* note 51, at art. 53.


115. Slavery Convention, 60 L.N.T.S. 253, entered into force March 9, 1927, at art. 1.

B. Alternatively, Annolay Has Not Breached Obligations Regarding The Treatment of Cascadian Women.

1. Reston Cannot Enforce Any Obligation Upon Annolay.

Reston will argue that the conventional "obligation to prevent, prosecute and punish trafficking in women"\(^{117}\) is customary. However, this is not so, as derives from these facts: (i) the most recent treaty on trafficking has been ratified by only 8 States;\(^{118}\) (ii) the Trafficking Convention has been ratified only by one third of States in over 50 years;\(^{119}\) and (iii) until very recently, there was no consensus on the definition of trafficking,\(^{120}\) which has today not been adopted by the majority of States.\(^{121}\) Moreover, differences in State practice and \textit{opinio juris} on this subject\(^{122}\) remove any possibility of customary status. On the contrary, State practice shows that: (i) persistent patterns of trafficking in women are common around the world, both into developed countries (e.g., in the US 50,000 trafficked women),\(^{123}\) and underdeveloped countries (e.g., India

\(^{117}\) Convention against Trafficking, \textit{supra} note 114, at art. 1, 2, 16; Protocol to Prevent, Suppress, and Punish Trafficking in Persons, \textit{supra} note 79, at art. 2(a); Women's Convention, \textit{supra} note 114, at art. 6.


and Thailand), and (ii) the culprits of this practice are rarely punished. Indeed, trafficking and prostitution of women are today a sad but extremely common reality. Hence, customary law does not provide Reston any grounds for enforcing the obligation to prevent and punish trafficking upon Annolay.

2. Alternatively, Annolay Complied with its Due Diligence Obligation.

Reston cannot argue that Annolay was insufficiently diligent in dealing with the matter of the Cascadian women since, as established supra, State obligations are not clear regarding trafficking in women, hence it is unrealistic to hold States legally responsible for lack of due diligence. In any case, Annolay created a blue-ribbon panel to look into the matter merely two weeks after the ILSA report was published, which evidences the State’s diligence on the matter. These panels have been created all over the world to resolve human rights violations, such as in Argentina. A blue-ribbon panel expedites results since proceedings need not follow rigid procedures, and their ability to gather evidence is enhanced. Moreover, although the panel has taken over a year to produce results, this is a reasonable period of time, since trafficking is an extremely complex problem. Thus, Annolay has been diligent in dealing with this matter.


125. Chiang, supra note 122, at 356.


127. RATNER & ABRAMS, supra note 11, at 234-35.


C. The Court Should Provide Declaratory Relief.

Declaratory judgments provide satisfaction for breaches of international law, and have been willingly granted by this Court and its predecessor. Accordingly, Annolay requests that this Court award a declaratory judgment stating that it has not breached its international obligations deriving from the alleged treatment of Cascadian women working in brothels in Annolay.

VI. PRAYER FOR RELIEF

Annolay respectfully requests that the Court: DECLARE that Reston has breached its international obligations with respect to the rape victims now resident in Annolay and ORDER payment of damages to be distributed to those victims; DECLARE that Reston has breached its international obligations with respect to the bribes exacted from Annolaysian citizens, and ORDER payment of restitution in the amount of the bribes; DECLARE that Reston is not entitled to exercise universal jurisdiction over Schmandefare; and DECLARE that Reston has no standing to raise a claim regarding the treatment of Cascadian women working in brothels in Annolay, and that, in any event, Annolay has not breached any international legal obligations in that respect.

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2003 PHILIP C. JESSUP
INTERNATIONAL MOOT COURT COMPETITION

IN THE
INTERNATIONAL COURT OF JUSTICE
AT THE PEACE PALACE
THE HAGUE, NETHERLANDS

CASE CONCERNING THE WOMEN
AND CHILDREN OF THE CIVIL WAR

REPUBLIC OF ANNOLAY
Applicant

v.

REPUBLIC OF RESTON
Respondent

SPRING TERM 2003

MEMORIAL FOR THE RESPONDENT

Bond University
Team Members:
Sefton Warner (Captain), Elena Tsangari,
Damien Agius, Anna Lyons, Jason Chai
CASE CONCERNING THE WOMEN AND CHILDREN OF THE CIVIL WAR

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I. STATEMENT OF JURISDICTION

The Republic of Annolay and the Republic of Reston have submitted the present dispute by Special Agreement to the International Court of Justice pursuant to Articles 36(1) and 40(1) of the Statute of the Court for final resolution. There is no dispute as to the court's jurisdiction in this matter.

II. STATEMENT OF FACTS

Following three years of civil war, the Kingdom of Dysfunctia was partitioned to create the Republics of Reston and Cascadia in September 1999. The Republic of Annolay, which borders Reston and Cascadia, assisted in the peace talks at the conclusion of the war. Annolay is a developed country in contrast to Reston, whose developing economy was devastated by the civil war.

In April 1997, War-Time Relief International claimed that Restonian militiamen were raping ethnic Cascadian women. However, Colonel Georg Raskolnikov, the leader of the Restonian militia, stated that he was powerless to stop the rapes.

Raskolnikov was announced as Reston's first democratically elected President in November 1999. His first presidential task was to foster reconciliation within the country by granting an amnesty to all persons in Reston who were accused of crimes during the civil war. Further, he established crisis centers for war victims. Annolay has reopened the wounds of the war by seeking reparations for Cascadian women raped during the war.

Due to Cascadia's conservative culture, rape victims were ostracized by their communities. The Schmandefare Company ('Company'), an operator of numerous brothels, coerced thousands of these women to Annolay. The Company's Chief Executive Officer, Fred Schmandefare, promised the women positions as nannies or domestic servants but despite all promises, the women were forced to work as prostitutes. The Company charged each woman an administrative fee of US$10 000. To pay this amount the women took out compounding loans from the Company, the effect of which was to double the amount owed. Ongoing costs for shelter, clothing, food and medical attention were added to the compounding debt. Although illegal, prostitution and solicitation are rarely prosecuted in Annolay.

The Institute for Labor Studies and Advancement ('I.L.S.A.') published an article about Cascadian women forced to work in the Company's brothels in May 2001. I.L.S.A. found that the women were mentally and physically abused. The report claimed that Annolaysian police and at least three
government departments ignored written appeals for help. The case of 'Heidi F' was reported as indicative of the treatment women experienced in the Company's brothels. 'Heidi F' was subjected to wretched conditions and severe restraints on her liberty. She fled from the brothel but Annolaysian police promptly returned her.

President Contrary denied Annolay's responsibility for the Company's abuse of the women. Following this, Reston expressed its intention to prosecute Schmandefare, applying the principle of universal jurisdiction. Reston seeks to prosecute Schmandefare for the crime against humanity of illegal trafficking for the purpose of sexual slavery.

In December 1999, the Annolaysian Regional Adoption Society ('A.R.A.S.'), through advertisements, called for the adoption of children orphaned in the civil war. A.R.A.S. charged a fee for its assistance to Annolaysian nationals seeking to adopt Restonian orphans. Reston's adoption laws obligated all prospective adoptive parents to attend mandatory fitness interviews. Successful applicants received a 'Certificate of Authorization for Foreign Adoption' ('certificate of fitness'), which was required for presentation at the border.

In January 2001, the International Times-Picayune reported that Reston's border officials were requesting fees from adopting parents, which was outside their authority. Although many Annolaysian adopting parents did not hold certificates of fitness for adoption, Annolaysian border officials seldom questioned them and in all cases allowed them to re-enter Annolay with a child. Upon the parents' return to Annolay, Annolaysian authorities swiftly concluded the adoption process. Consequently, a number of adopting parents admitted that they did not attend fitness interviews in light of Annolay's lax adoption administration process. Reston addressed the issue by permanently reassigning implicated border officials in March 2001.

Both Reston and Annolay are U.N. members and parties to Vienna Convention on the Law of Treaties, and both voted in favor of U.N. General Assembly Resolution 56/83 regarding the International Law Commission's Articles on State Responsibility. Annolay is a party to, and Reston is a signatory to, the Regional Anti-Corruption Convention.

After several failed attempts at mediation facilitated by the U.N. Secretary General's office, Annolay and Reston agreed to bring this dispute before the International Court of Justice for resolution.

III. QUESTION PRESENTED

Reston asks the court:

1. Whether Annolay has standing to bring a claim on behalf of the ethnic Cascadian women resident in Annolay;
2. Whether Reston acted lawfully regarding the treatment of ethnic Cascadian women during the civil war and must pay damages to Annolay;
3. Whether Reston has standing to bring an action regarding the treatment of ethnic Cascadian women;
4. Whether Annolay breached international law regarding the treatment of ethnic Cascadian women working in Annolaysian brothels;
5. Whether Reston may exercise universal jurisdiction to prosecute Mr. Schmandefare;
6. Whether Annolay’s claim regarding border corruption is admissible;
7. Whether Reston acted lawfully regarding the conduct of its border officials; and
8. Whether Reston is required to pay restitution to Annolay in the amount of the bribes.

IV. SUMMARY OF PLEADINGS

A. Reston is not responsible for the wartime rape of ethnic Cascadian women, nor is it liable to pay damages to Annolay on their behalf. Annolay does not have standing to bring a claim on behalf of wartime rape victims. Annolay cannot exercise diplomatic protection, as the Cascadian women are not nationals of Annolay. Standing cannot be asserted on the basis of obligations *erga omnes* because Annolay is not representing the international community. Alternatively, Reston did not breach any such obligations. The wartime rapes did not constitute genocide or torture so as to give rise to any obligation on Reston’s part. Even if they did, the rapes are not attributable to Reston, and the Restonian militia leaders were unable to stop them. Reston’s amnesty also justifies any breach of an obligation to prosecute Restonian militiamen. In any event, Reston is not liable to pay damages to Annolay because it is inappropriate for a state to request them on behalf of a limited group of victims for a breach of an obligation *erga omnes*.

B. Annolay acted unlawfully regarding the treatment of Cascadian women in its territory. Reston has standing to bring this claim on behalf of the international community because slavery is an obligation *erga omnes*. The ethnic Cascadian women who worked in brothels in Annolay were held in slavery because the Schmandefare Company exercised rights of ownership over them. Annolay breached its customary obligation to respect and ensure freedom from slavery by failing to prevent and punish acts of slavery. The Cascadian women are not under any obligation to exhaust local remedies in Annolay.

C. Reston may exercise universal jurisdiction to prosecute Fred Schmandefare for the crime against humanity of illegal trafficking for the purpose of
sexual slavery. Universal jurisdiction may be exercised over crimes against humanity, and trafficking for the purpose of sexual slavery is characterized as such an offence. The trial of Schmandefare in absentia is concordant with the content and purpose of the universality principle.

D. Reston is not responsible for corruption at its borders, nor liable to repay bribes in the form of restitution. Annolay’s failure to prevent the illegal removal of Restonian children invokes the doctrine of ‘unclean hands’, which renders a claim for restitution inadmissible. In any event, Reston did not breach international law with respect to the bribes. The bribery is not attributable to Reston as the border officials were acting in their private capacity and outside their authority. Reston upheld the object and purpose of the Regional Anti-Corruption Convention and exercised due diligence to protect Annolaysian nationals by permanently reassigning implicated border officials. Furthermore, there is no customary obligation to prevent bribery of public officials exists, nor did Reston breach such an obligation. Reston also acted in the best interests of Restonian children, and thus did not violate any obligations concerning the children’s rights. Even if Reston did breach international law, it does not owe Annolay reparations. Restitution would impose a disproportionate burden on Reston and Annolay cannot claim compensation because this remedy was not requested.

V. PLEADINGS

A. Reston is not internationally liable for the treatment of Cascadian women during the civil war

This dispute arises from a civil war that existed in the former sovereign territory of Dysfunctia [Compromis ¶1]. Annolay had no involvement in the war [Compromis ¶6] and no right to intervene in Dysfunctia’s internal affairs.¹ Now, as then, international legal norms prevent Annolay from involving itself in matters existing between Restonians and Cascadians.

1. Annolay has no standing to bring this action

The action regarding rapes during the civil war is inadmissible, as Annolay cannot adequately invoke a basis for standing. Diplomatic protection allows a state to protect its injured nationals and requires the victim to have continuously held the nationality of the asserting state from the time of the injury until the

presentation of the claim. The ethnic Cascadian complainants only recently acquired permanent residency in Annolay [Compromis ¶25], which is not a genuine and effective link of nationality for the purposes of diplomatic protection. Even if permanent residency is a sufficient link of nationality, the link was established after the injury occurred [Compare Compromis ¶3 & ¶25], and therefore was not continuous. Consequently, Annolay has no standing on the basis of diplomatic protection.

Also, Annolay may not derive standing from obligations erga omnes ('towards all') because it does not act on behalf of the international community. Obligations erga omnes are owed to the entire international community, so their breach injures that community. The international community is unable to bring a claim of its own, as it has no legal personality. Therefore, standing must be conferred on those member states prepared to act on its behalf. Annolay's claim of reparations for the narrow class of victims now resident within its territory is an inappropriate claim as it is represents Annolay's own interests rather than those of the international community.


7. RENE PROVOST, INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW 292 (Cambridge University Press 2002); Chinkin, supra note 6, at 286; Annacker, supra note 6, at 156; ANTONIO CASSESE, INTERNATIONAL LAW 16 (Oxford University Press 2001); see Simma, supra note 5, at 136; Oscar Schachter, International Law in Theory and Practice, in 13 DEVELOPMENTS IN INTERNATIONAL LAW 345 (Martinus Nijhoff Pub. 1991).

In any event, standing is limited to the established obligations *erga omnes*: the outlawing of acts of aggression and genocide, protection from slavery and racial discrimination, and the right to self-determination. Annolay has no standing to assert a breach of any other obligation.

2. Alternatively, Reston acted consistently with international law regarding the treatment of cascadian women

A state only breaches international law if conduct that is attributable to it breaches an international obligation. The occurrence of the rapes prior to the establishment of Reston precludes Reston from being internationally responsible for the wartime rapes, and other rules of international law demonstrate that Reston did not breach any of the limited obligations *erga omnes*.

*a. No obligations erga omnes may be invoked on the facts*

i. The wartime rapes did not constitute genocide

The rapes perpetrated by the Restonian militiamen did not constitute genocide. Genocide requires an intention to destroy an ethnic group in whole or in part. Such an intention must be formed prior to the commission of the offence. Rape is primarily a sexually or privately motivated offence. There is no evidence that the wartime rapes were intended to destroy the Cascadian group or that acts of rape were pre-meditated. Without clear evidence of such

14. *Campos-Guardado v. INS*, 809 F.2d 285 (5th Cir. 1987); *see Lazo-Majano v. INS*, 813 F.2d 1432, 1434 (9th Cir. 1987).
intent rape should not be characterized as genocide. Additionally, genocide generally requires the involvement of the state. The absence of incitement or condonation by the Restonian leadership therefore precludes the characterization of the rapes as genocide. In any event, rape must be accompanied by aggravating acts, such as murder, to constitute genocide. There is no evidence that Cascadian women suffered any other attacks or restraints on their liberty and consequently genocide has not occurred.

ii. No other obligation erga omnes applies

No other obligation erga omnes recognized by this court [see §I:A] is applicable to the wartime rapes. Even if this court should expand on the limited number of obligations erga omnes, it is likely that it would only do so to include obligations regarding torture.

Torture only covers the intentional infliction of severe physical or psychological pain or suffering for an interrogative purpose with the acquiescence of a public official. The requisite pain and suffering must amount to more than a mere assault on personal integrity and cause prolonged suffering of extreme intensity. Rape cannot constitute torture without such aggravating factors. There is no evidence that the rapes were prolonged nor is there evidence that the individual acts of rape were accompanied by additional injury. The rapes of

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Cascadian women were also not inflicted for an interrogative purpose. Rape is primarily sexually or privately motivated and there is no evidence that Restonian militiamen raped Cascadian women to gain information. In any case, there is neither condonation of the rapes nor clear acquiescence [Compromis §3] by public officials and as such, torture has not occurred.

b. In any event, Reston did not breach any obligation erga omnes

i. Reston did not breach any obligation prohibiting the wartime rapes

At customary international law, there is a general presumption of non-responsibility for the conduct of an insurrectional movement. However, such conduct may be attributable to the state in the event that the movement is successful. Although the conduct of the Restonian militia is attributable to Reston pursuant to this rule, the rapes perpetrated by individual militiamen are not attributable to Reston. Individual militiamen who act in the absence of command do so in their private capacity and are not attributable to Reston.

ii. Reston did not breach any obligation requiring it to prevent the wartime rapes

Should this court find Reston subject to customary obligations requiring it to prevent wartime rapes, Reston discharged these obligations. Any obliga-

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24. See Lazo-Majano, 813 F.2d at 1434; Campos-Guardado, 809 F.2d at 285.


26. JOHN BASSETT MOORE, 3 HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 2873 (1898); id. at 2881; id. at 2886; id. at 2900; id. at 2902; Iliolo (U.K. v. U.S.), 6 R.I.A.A. 158 (1925); Solis (Mex. v. U.S.), 4 R.I.A.A. 358 (1928); Home Missionary Society (U.K. v. U.S.), 6 R.I.A.A. 42 (1920).

27. ILC STATE RESPONSIBILITY, supra note 11, at art. 10(2).


29. MOORE, supra note 26, at 2995-96.


31. MOORE, supra note 26, at 2995-96.
tion to prevent rape is only breached if a state fails to take measures that are reasonably expected in the circumstances. The rapes were committed in the context of ethnic rivalry in existence for approximately 300 years [Compromis ¶2]. When Colonel Raskolnikov was informed of the rapes, he declared that he was powerless to stop them [Compromis ¶4]. Thus, in the context of the Dysfunctian civil war, measures to prevent the rapes could not reasonably be expected from the Restonian militia leaders.

iii. Reston did not breach any obligation requiring it to prosecute the wartime rapes

Reston did not breach any obligation to prosecute those who committed rape because of the general amnesty declared by President Raskolnikov. Post-conflict states may avoid customary obligations to prosecute individuals by granting amnesties in the interests of reconciliation, stability and democracy, and to prevent the re-emergence of conflict. National legislation, the U.N. Security Council, an international agreement, judicial decisions and the


opinions of publicists\textsuperscript{38} evidence the customary status of this power. President Raskolnikov's amnesty to promote national healing [\textit{Compromis} \(\S\)22] is consistent with these established justifications.

3. \textit{In any event, Reston is not required to make reparations to Annolay}

The consequence of an internationally wrongful act is that the delinquent state must make reparations to any other state that suffers injury\textsuperscript{39} for which the wrongful act is the proximate cause.\textsuperscript{40} Where Reston is not responsible for the rapes, it does not owe reparations.

In any event, the remedies available to an injured state are limited if standing is conferred on the basis of obligations \textit{erga omnes}.\textsuperscript{41} Actions concerning obligations \textit{erga omnes} are brought on behalf of the international community.\textsuperscript{42} It is inappropriate for a state to seek individual reparations for itself or a limited class of individuals when it is bringing an action on behalf of the international community.\textsuperscript{43} Therefore, Annolay may not seek individual reparations for the Cascadian women within its territory. Satisfaction, which may consist of an expression of regret or a formal apology,\textsuperscript{44} is the only appropriate remedy because it may be directed to the international community.\textsuperscript{45}

\textit{B. Annolay breached international law with respect to the treatment of Cascadian women in Annolay}

Reston brings this claim in relation to the abhorrent treatment of Cascadian women in Annolay. Although Annolay seeks to protect these women in one respect by requesting that this court award them damages for wartime injury, Annolay has not afforded the women the protection they deserve within its territory.

\bibliography{references}

\footnotesize{
\begin{itemize}
\item \textsuperscript{39} Factory at Chorzów (Germ. v. Pol), 1927 P.C.I.J. (ser. A) No. 9, at 20 [hereinafter Chorzów]; ILC \textit{STATE RESPONSIBILITY}, supra note 11, at art. 31; CHRISTINE D. GRAY, \textit{JUDICIAL REMEDIES IN INTERNATIONAL LAW} 79 (Ian Brownlie ed., Oxford University Press 1987); BROWNLIE, supra note 2, at 460.
\item \textsuperscript{40} DINAH SHELTON, \textit{REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW} 10 (Oxford University Press 1999); J.H.W. VERZIJL, \textit{INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE} 735 (Martinus Nijhoff 1973); LOUIS HENKIN ET. AL., \textit{INTERNATIONAL LAW: CASES AND MATERIALS} 758 (West Wadsworth 1993).
\item \textsuperscript{41} Carney, supra note 8, at 98.
\item \textsuperscript{42} \textit{Barcelona Traction}, 1970 I.C.J. at 33.
\item \textsuperscript{43} Sachariew, supra note 8, at 283.
\item \textsuperscript{44} ILC \textit{STATE RESPONSIBILITY}, supra note 11, at art. 37; see Mark S. Ellies & Elizabeth Hutton, \textit{Policy Implications of World War II Reparations and Restitution as Applied to the Former Yugoslavia}, 20 BERKELEY J. INT’L L. 342 (2002).
\item \textsuperscript{45} Crawford, supra note 28, at 232; BROWNLIE, supra note 2, at 463.
\end{itemize}}
1. Reston has standing to bring this action

A member state of the international community has standing to assert a breach of an obligation *erga omnes*\(^46\) regardless of the nationality of the victim.\(^47\) The sole condition is that the state acts on behalf of the international community [see §I:A]. Protection from slavery is an obligation *erga omnes* [see §I:A], and Reston is seeking a declaration from this court rather than any other form of reparation. Reston therefore has standing to assert a breach of the obligation to respect and ensure freedom from slavery.

2. Annolay breached its obligation to respect and ensure freedom from slavery

The Schmandefare Company’s [‘Company’] treatment of ethnic Cascadian women constituted slavery. Slavery is the situation in which entities exercise rights of ownership over individuals,\(^48\) characterized by the victims’ lack of true consent and lack of control over their own labor.\(^49\) The Company deceived the Cascadian women by promising them employment as nannies or domestic servants, yet forced them to work in its brothels [Compromis ¶24]. Upon arrival in Annolay, the Company controlled the Cascadian women’s work schedule, labour conditions, standard of living and financial position [Compromis ¶¶24 & 29]. The women also suffered mental and physical abuse and restraints on their liberty. The Cascadian women were also unable to escape the Company’s control due to the compounding debt on their loans [Compromis ¶24]. Therefore, the Cascadian women were enslaved due to their lack of consent to work in brothels and the control the Company exercised over them.


\(^{47}\) CASSESE, supra note 7, at 185, 201; THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 191, 194-95 (Clarendon Press 1989); ANDRE DE HOOGH, OBLIGATIONS ERGA OMNES AND INTERNATIONAL CRIMES: A THEORETICAL INQUIRY INTO THE IMPLEMENTATION AND ENFORCEMENT OF THE INTERNATIONAL RESPONSIBILITY OF STATES 68-69 (Martinus Nijhoff 1996); Schachter, supra note 7, at 208; RESTATEMENT, supra note 12, § 702, comment (b).


As ethnic Cascadian women were enslaved in Annolay, Annolay breached customary international law. Customary international law is formed by general and consistent practice and *opinio juris*. International and regional instruments, national constitutions and the work of publicists demonstrate that every state must respect and ensure freedom from slavery under customary international law. Freedom from slavery is also a *jus cogens* norm. The customary obligation to respect and ensure freedom from slavery is not negated by occasional non-observance of the slavery prohibition.

Annolay breached its customary obligation to respect and ensure freedom from slavery. This obligation requires a state to prevent, investigate and...
prosecute acts of slavery. A state must intervene in non-government affairs in its territory when slavery is reasonably predictable or suspected, when an individual has sought protection from a government agency, or where the victim is vulnerable to breaches of personal integrity. The Cascadian women sought the protection of the Annolaysian government, yet were ignored [

Compromis ¶ 28]. They were also vulnerable to breaches of personal integrity because of their ignorance of the Annolaysian language and culture and their impoverished status [

Compromis ¶ 22].

Annolay breached its duty to prevent slavery by failing to enforce its anti-prostitution laws or to monitor the actions of the Company [

Compromis ¶ 23]. Annolay also breached its duty to investigate acts of slavery. Investigation must be exhaustive, swift and impartial. Annolay’s failure to investigate swiftly and exhaustively, despite the written appeals of the brothel workers [

Compromis ¶ 28] and the police officer’s knowledge of the situation of ‘Heidi F.’ [

Compromis ¶ 29], evidence a breach of its duty. The blue ribbon panel established by President Contrary [

Compromis ¶ 30] has failed to discharge the obligation to investigate because it has not fulfilled its purpose to identify those responsible [

Clarification ¶ 9]. Finally, Annolay breached its obligation to prosecute acts of slavery. Annolay has not prosecuted anyone responsible for the enslavement of women. Annolay cannot escape responsibility for its conduct based on any attribution principle because its omissions, including those of its government agencies and police, are attributable to it.

3. The Cascadian women were under no obligation to exhaust local remedies

Individuals are not required to exhaust local remedies before a state may bring an action on their behalf if local remedies are available or effective. There is no evidence that effective remedies were available to the enslaved

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59. Rodriguez, supra note 32; Janes, supra note 58; Cruz, supra note 58; Roht-Arriaza, supra note 58, at 29.
61. Id.
63. Rodriguez, supra note 32.
64. Pugh (U.K. v. Pan.), 3 R.I.A.A. 1441, 1448 (1933); Roper (Mex. v. U.S.), 4 R.I.A.A. 145 (1927); Langdon (U.S. v. Pan.), 6 R.I.A.A. 325 (1933); Cibich (Mex. v. U.S.), 4 R.I.A.A. 57 (1926); ILC STATE RESPONSIBILITY, supra note 11, at art. 4(2); CRAWFORD, supra note 28, at 94.
65. Advisory Opinion on Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, 1999 I.C.J. (Apr. 29); ILC STATE RESPONSIBILITY, supra note 11, at art. 4; OPPENHEIM, supra note 2, § 165; CHITTHARANJAN F. AMERASINGHE, STATE RESPONSIBILITY FOR INJURIES TO ALIENS 38 (Clarendon Press 1967).
66. Altestor v. Uruguay, 70 I.L.R. 248, 253 (U.N. H.R Comm. 1982); ILC STATE RESPONSIBILITY, supra note 11, at art. 44(b); CRAWFORD, supra note 28; Schachtier, supra note 7, at 213-14.
Cascadian women and the burden lies with Annolay to prove otherwise.\textsuperscript{67} There is no evidence that the Annolaysian legal system provided the ethnic Cascadian women with individual rights to obtain redress for the injury they suffered. The purpose of the ‘blue ribbon panel’ was to identify possible offenders involved in the slavery and did not grant any rights to the victims. Even if domestic remedies did exist, they were not available to the Cascadian women. The women were held in slavery and therefore could not access potential avenues for any redress. Any complaints the women made to Annolaysian government organs proved ineffective [\textit{Compromis} \textsuperscript{28}] and there is no evidence that Annolay’s investigations will result in the release of ethnic Cascadian women from slavery.

\textbf{C. Reston is entitled to exercise universal jurisdiction over Fred Schmandefare (‘Schmandefare’)}

International law is founded on the sovereign equality of all states.\textsuperscript{68} Reston’s sovereignty permits it to exercise jurisdiction as it sees fit, unless it is restricted from doing so by international law. Annolay bears the burden of proving customary norms exist to limit Reston’s sovereignty.\textsuperscript{69}

1. Reston may exercise universal jurisdiction over crimes against humanity

States may use the principle of universality to obtain jurisdiction over an alleged offender whose crime is of such gravity and magnitude that it offends all humankind.\textsuperscript{70} Numerous offences, including crimes against humanity, have been recognized to give rise to universal jurisdiction.\textsuperscript{71} Crimes against humanity are of a peculiarly universal character vesting in every state the authority to prosecute anyone who participated in their commission.\textsuperscript{72} Reston is legally permitted to exercise universal jurisdiction over Schmandefare and to prosecute him on behalf of the international community for any offence that constitutes a crime against humanity.
2. Trafficking for the purpose of sexual slavery is a crime against humanity

Trafficking is the movement of people across borders with the use of threat, violence or coercion.\(^7\) It has recently been recognized as a crime against humanity in the Rome Statute of the International Criminal Court.\(^8\) This classification is confirmed by the nature of trafficking. Crimes against humanity are serious acts that are harmful to human beings because they strike down what is most essential to them: their life, liberty, physical welfare, health or dignity.\(^9\) Trafficking has the same effects, particularly when it is committed for the purpose of sexual slavery.

Alternatively, trafficking is a form of slavery.\(^10\) Slavery is a recognized crime against humanity\(^11\) that occurs where an entity exercises rights of ownership over an individual.\(^12\) Traffickers inevitably exercise rights of ownership over victims because they control the removal, transfer and destination of the victims. Often the victims cannot escape the control of their traffickers because of financial dependence, fear and physical restraint. Trafficking for the purpose of sexual slavery is slavery, because the victims are ultimately forced into situations where others exercise rights of ownership over them.

3. Reston may exercise universal jurisdiction over Schmandefare \textit{in absentia}

States may utilize universal jurisdiction to prosecute an individual accused of an international crime irrespective of whether the individual is in their custody.\(^13\) The purpose of universal jurisdiction is to prosecute individuals who


\(^8\) \textit{ROME STATUTE}, supra note 12, at art. 7(2)(c).


\(^10\) \textit{ROME STATUTE}, supra note 12, at art. 7(2)(c); \textit{BASSIOUNI}, supra note 19, at 454.

\(^11\) \textit{CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL} art. 6(c); \textit{CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST} art. 5(c); \textit{ICTY STATUTE}, supra note 12, at art. 5(c); \textit{ICTR STATUTE}, supra note 12, at art. 3(c); \textit{ROME STATUTE}, supra note 12, at art. 7(2)(c); \textit{BASSIOUNI}, supra note 19, at 215.

\(^12\) \textit{SLAVERY CONVENTION}, supra note 48; \textit{SUPPLEMENTARY SLAVERY CONVENTION}, supra note 48; \textit{RATNER}, supra note 70, at 112.

\(^13\) Organic Law of the Judicial Power art. 23 (B.O.E. 1985, 157) (Spain); Law of 16 June 1993 (Belg.); Law of 19 Feb. 1999, art. 7 (Belg.); Codice Penale [C.p.] art. 7.5 (Italy); \textit{CASSESE}, supra note 7, at 26.
have committed crimes that are universally condemned. Therefore, custody of the offender does not impact upon the purpose of the universality principle. This court recently confirmed that the exercise of universal jurisdiction in absentia is not a violation of international law. The alleged offence of Schmandefare is one that is deeply offensive and harmful to the international community. Reston is permitted to prosecute Schmandefare using universal jurisdiction regardless of the fact that he is not in its custody.

**D. Reston has acted consistently with international law with respect to the bribery and need not make restitution**

Annolaysians did not only instigate the transfer of Cascadian women into Annolay, but also the transfer of Restonian children. Annolay is claiming restitution for bribes paid to Restonian border officials by Annolaysian adoptive parents, but it has no basis for such a claim in international law.

1. Annolay’s unclean hands render this action inadmissible

A state’s involvement in illegal acts in international law prevents the state from claiming redress. This is known as the ‘clean hands doctrine’ and it is supported by judicial decisions and publicists. Annolay failed to prevent the illegal removal and retention of Restonian children and thus acted unlawfully. Its claim is therefore inadmissible under the clean hands doctrine.

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States have a customary obligation to prevent the illegal removal or retention of children. Removal of children is illegal where an entity's custodial rights over a child are violated without the entity's consent. Reston had custodial rights over the children removed from its territory because they were orphans [Compromis ¶9] and thus wards of the state. Reston's custodial rights were breached as children were removed without its consent [Compromis ¶13]. Annolay took no action whatsoever to determine whether Restonian children entering its territory were illegally removed [Compromis ¶13] or to ensure that illegally removed children were returned to Reston. Annolay therefore breached its customary obligation to prevent the illegal removal or retention of children, and consequently its claim regarding the bribery is inadmissible.

2. Reston acted consistently with international law with respect to the bribery

a. The conduct of the Restonian border officials is not attributable to Reston

The conduct of minor officials is not attributable to the state merely because they are agents of the state. Where minor officials act in their private capacity, their conduct is not attributable to the state. The particular circumstances of each case must be considered when determining the capacity of any individual. Officials motivated by personal profit act in their private capacity. The Restonian border officials kept the proceeds of the bribes for themselves [Clarifications ¶5], so their conduct is not attributable to Reston.

In any event, the conduct of minor officials is not attributable to the state where the conduct falls outside their apparent authority. Restonian border officials were not authorized to exact money unlawfully and acted without the

86. ILC State Responsibility, supra note 11, at art. 7.
87. Mallen (Mex. v. U.S.), 4 R.I.A.A. 173, 174-75 (1927); Moore, supra note 26, at 2999-3000, 3012-13, 3018-20; Caire (Fr. v. Mex.), 5 R.I.A.A. 516, 531 (1929); Oppenheim supra note 2, § 165; Amerasinghe, supra note 65, at 53.
approval of the Restonian government [Compromis ¶13]. The bribery of Annolaysian parents therefore fell outside the apparent authority of the border officials and is not attributable to Reston.

b. Reston has upheld the object and purpose of the Regional Anti-Corruption Convention [R.A.C.C.]

Signatories have an obligation not to defeat the object and purpose of a treaty before it enters into force.91 The object and purpose of a treaty is defeated when a signatory’s conduct is intended92 to do so. The purpose of the R.A.C.C. is to prevent and prohibit corruption.93 Reston never intended to defeat the object and purpose of the R.A.C.C. but instead demonstrated good faith by permanently reassigning border officials implicated in the bribery [Compromis ¶17].

Furthermore, a failure to act immediately to requests for investigation does not completely defeat the object and purpose of the R.A.C.C., especially when Reston’s delicate, post-conflict status is considered [Compromis ¶15]. Consequently, the failure of Reston to respond immediately to information regarding the exaction of bribes by a small number of Restonian officials does not evidence the state’s intention to defeat the object and purpose of the entire R.A.C.C.94

c. Reston fulfilled its obligation to exercise due diligence to protect the rights of aliens within its territory

States have a duty to protect the rights of other states and the rights of aliens within their territories in customary international law.95 States only breach this duty if they do not exercise due diligence to discharge it.96 This can

91. VIENNA CONV. art. 18.
94. See AUST, supra note 92, at 94; JONES, supra note 92, at 71.
96. MOORE, supra note 26, at 3033-34, 3039, 3041; Sevey (Mex. v. U.S.), 4 R.I.A.A. 474 (1929); Boyd (Mex. v. U.S.), 4 R.I.A.A. 380 (1928); Mead (Mex. v. U.S.), 4 R.I.A.A. 653 (1930); Kennedy (Mex. v.
only be proven if every reasonable and impartial person would recognize measures that a state takes as insufficient. Reston took reasonable steps to discharge its obligation by permanently reassigning border officials implicated in the bribery and it therefore did not breach it [Compromis ¶17].

d. There is no customary law to prevent the bribery of public officials

For customary international law to be established, rigorous conformity of state practice is required. State practice preventing bribery of public officials is inconsistent in its criminalisation of active and passive bribery, the size and type of bribes prohibited and the type of public officials liable. The inconsistency in state practice is further evidenced by the lack of legislation prohibiting bribery in developing states. This distinct lack of consistent state practice negates the existence of a customary obligation to prevent bribery of public officials. In any event, Reston did not breach any obligation requiring it to prevent bribery for the same reasons as it did not breach its obligations to prevent injury to aliens [see §IV:B:3].


98. Military and Paramilitary Activities in and Against Nicaragua, 1986 I.C.J. at 186; N. Sea Continental Shelf, 1969 I.C.J. at 3; Oppenheim, supra note 2; Cassese, supra note 7, at 119.


102. Compare R.A.C.C., supra note 93, at art. 1(a), and EUROPE CRIMINAL LAW CONVENTION, supra note 101, at art 1(a), with OECD BRIbery CONVENTION, supra note 100, at art. 4(a).

e. Reston satisfied any obligation to prevent violations of children's rights

If Reston was required to take action to prevent the illegal removal of children or other similar conduct, it satisfied its obligation. Obligations concerning children must be interpreted in light of the child's best interests. Reston consistently acted in the best interests of the children and thus did not breach any obligation regarding its treatment of the children. Reston provided facilities to care for orphaned children as best it could after the civil war [Compromis ¶9]. It also compelled prospective adoptive parents of Restonian children to attend fitness interviews and to obtain certificates of fitness before they were able to adopt a Restonian child [Compromis ¶11]. Finally, Reston reassigned the border officials implicated in bribery [Compromis ¶17] in order to prevent further illegal removal of Restonian children. These facts indicate that Reston acted in the best interest of Restonian children and thus it could not have breached any of its obligations regarding children.

3. Reston is not obligated to make reparations to Annolay

The consequence of an internationally wrongful act is that a state must make reparations to any other state that suffers injury for which the wrongful act is the proximate cause. Any willful or negligent contribution to the injury suffered by either the victims or the state itself must be taken into account. Such contribution negates or reduces any reparations owed.

Annolaysian adoptive parents with certificates of fitness negligently contributed to their injury because they knew of their legal right to return to Annolay with their child. Annolaysian nationals without certificates of fitness willfully contributed to their injury because they knew they could not cross the border without a certificate of fitness and therefore the only way of returning to Annolay with their child was to pay bribes to border officials [Compromis ¶13].

Annolay seeks reparations for the bribes exacted from its nationals in the form of restitution [Compromis ¶41]. Restitution may not be awarded, however, if it would result in a burden disproportionate to the benefit derived. This burden includes threats to political independence or the economic stability of a

104. CRC, supra note 84, at art. 3(1).
105. Chorzów, supra note 39, at 20; ILC STATE RESPONSIBILITY, supra note 11, at art. 31; GRAY, supra note 39, at 79; BROWNLIE, supra note 2, at 460.
106. SHELTON, supra note 40, at 101; VERZUL, supra note 40, at 735; HENKIN, supra note 40, at 758.
107. ILC STATE RESPONSIBILITY, supra note 11, at art. 39; CRAWFORD, supra note 28, at 232.
108. SHELTON, supra note 40, at 94; GRAY, supra note 39, at 23; BROWNLIE, supra note 2, at 508; CRAWFORD, supra note 28, at 240-41; HENKIN, supra note 40, at 757.
109. ILC STATE RESPONSIBILITY, supra note 11, at art. 35.
state. Reston is a developing state with a devastated economy [*Compromis* §8]. To provide restitution to the Annolaysian adoptive parents would require Reston to locate every implicated border official and every Annolaysian national. The administrative and economic burden this would place on Reston is disproportionate to any benefit derived by the Annolaysian parents. Compensation may not be awarded as an alternative because Annolay did not request it.111

VI. CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, the Republic of Reston respectfully requests that this Court:

1. DECLARE that Reston acted lawfully regarding the treatment of ethnic Cascadian women during the civil war and is not liable to pay Annolay damages;
2. DECLARE that Annolay violated international law regarding the treatment of Cascadian women working in Annolaysian brothels;
3. DECLARE that Reston is entitled to exercise universal jurisdiction over Mr. Fred Schmandefare; and
4. DECLARE that Reston acted lawfully regarding the bribes exacted by its border officials and is not liable to repay them.

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