

**PROTOCOL NO. 14 TO THE EUROPEAN CONVENTION  
FOR THE PROTECTION OF HUMAN RIGHTS AND  
FUNDAMENTAL FREEDOMS: TOWARDS A MORE  
EFFECTIVE CONTROL MECHANISM?**

PATRICIA EGLI\*

I.	INTRODUCTION.....	1
II.	THE NEED FOR REFORM.....	5
III.	THE CONTROL MECHANISM TODAY.....	7
	<i>A. The European Court of Human Rights.....</i>	7
	<i>B. Procedure Before the European Court of Human Rights.....</i>	8
	<i>C. The Court's Judgments.....</i>	10
IV.	MAIN CHANGES TO THE CONTROL SYSTEM.....	11
	<i>A. Optimizing the Filtering and the Subsequent Processing of Applications.....</i>	12
	<i>B. New Admissibility Criterion.....</i>	14
	<i>C. Measures to Reinforce the Execution of the Court's Judgments.....</i>	17
	<i>D. A More Effective Control Mechanism? .....</i>	18
V.	BEYOND PROTOCOL NO. 14.....	23
	<i>A. A More Constitutional Court? .....</i>	23
	<i>B. Individual and Constitutional Justice as Interdependent Functions.....</i>	25
	<i>C. Introducing a New Filtering Mechanism.....</i>	27
VI.	CONCLUSIONS.....	31

I. INTRODUCTION

The European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention)<sup>1</sup> was drawn up within the Council of Europe, an international organization formed after the Second World War in the course of the first post-war attempt to unify Europe. As a reaction to the serious human rights violations that Europe witnessed during the Second World War, the European Convention was established with a specific ob-

---

\* LL.M., Yale Law School; Dr. iur., University of Zurich, Switzerland; lic. iur., University of St. Gallen, Switzerland. The author wishes to thank Molly Beutz for her comments and encouragement, and the editing team at the Florida State University Journal of Transnational Law & Policy for all their effort.

1. Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221, Europ. T.S. No. 5. [hereinafter European Convention], *available at* <http://conventions.coe.int/Treaty/EN/Treaties/Html/005.htm>.

ject and purpose announced in its preamble: to take the first steps for collective enforcement of certain rights stated in the Universal Declaration of Human Rights.<sup>2</sup> The European Convention represents, therefore, a collective guarantee in the European context of a number of fundamental principles set out in the Universal Declaration of Human Rights.<sup>3</sup> In addition to articulating a catalogue of civil and political rights and freedoms,<sup>4</sup> the Convention established a mechanism for the enforcement of the obligations agreed upon by contracting states.<sup>5</sup> Compared to most other international and regional human rights treaties, this enforcement system proved very effective because it provides for both inter-state applications<sup>6</sup> and (considerably more important in practice) individual applications.<sup>7</sup>

---

2. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948), *reprinted in* 43 AM. J. INT'L L. SUPP. 127 (1949).

3. This purpose has been underlined in the case-law of the Strasbourg organs. In *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at 239 (1978), the Court observed that, "[u]nlike international treaties of the classic kind, the [European] Convention comprise[d] more than mere reciprocal engagements between contracting states. [The European Convention] create[d], over and above a network of mutual, bilateral undertakings, objective obligations which . . . benefit from a 'collective enforcement.'"

4. The European Convention contains a list of civil and political rights: art. 2 (right to life); art. 3 (prohibition of torture); art. 4 (prohibition of slavery and forced labour); art. 5 (right to liberty and security); art. 6 (right to a fair trial); art. 7 (no punishment without law); art. 8 (right to respect for private and family life); art. 9 (freedom of thought, conscience, and religion); art. 10 (freedom of expression); art. 11 (freedom of assembly and association); art. 12 (right to marry); art. 13 (right to an effective remedy); and, art. 14 (prohibition of discrimination).

5. The enforcement mechanism established by the 1950 European Convention had a tripartite structure: (1) the European Commission of Human Rights -- to consider the admissibility of applications, to establish the facts, to promote friendly settlements and, if appropriate, to give an opinion as to whether or not the applications reveal a violation of the Convention; (2) the European Court of Human Rights -- to give a final and binding judgment on cases referred to it; (3) the Committee of Ministers of the Council of Europe -- to give a final and binding decision on cases which cannot be referred to the Court or which, for one reason or another, are not referred to it. For an overview, see PIETER VAN DIJK & GODEFRIDUS J.H. VAN HOOF, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 97-284 (3d ed. 1998). This structure was radically reformed by Protocol No. 11 to the European Convention. *See infra* note 31 and accompanying text.

6. Inter-state applications under Article 33 of the European Convention are characterized by a general approach in that they seek to secure compliance with the obligation under the Convention by another member state in the common interest, regardless of whether there is a special relation between the rights and interests of the applicant state and the alleged violation. *See generally* DONNA GOMIEN ET AL., *LAW AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE EUROPEAN SOCIAL CHARTER* 39-42 (1996); Hans C. Krüger & Carl A. Nørgaard, *The Right of Application, in THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS* 659-661 (Ronald St. J. Macdonald et al. eds., 1993); VAN DIJK & VAN HOOF, *supra* note 5, at 40-44.

7. *See* European Convention, *supra* note 1, art. 34, stating:

The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties un-

The key role of the Convention's control mechanism is two-fold. First, it gives every victim of an alleged violation of the European Convention the right to seek and obtain vindication both for his or her infringed rights, and where appropriate, for financial compensation of the harm suffered.<sup>8</sup> As the European Court of Human Rights ("Court") recently stressed in *Mamatkulov v. Turkey*, "the Convention right to individual application . . . has over the years become of high importance and is now a key component of the machinery for protecting the rights and freedoms set forth in the Convention."<sup>9</sup> Second, as the Court stated in *Ireland v. United Kingdom*, its judgments serve not only to decide individual cases but, more generally, "to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties."<sup>10</sup> The Court therefore has two functions to fulfill that are commonly referred to as "individual justice" and "constitutional justice," respectively.<sup>11</sup>

However, the massive influx of individual applications is leading to a rapid accumulation of pending cases before the Court, resulting in lengthy proceedings.<sup>12</sup> It is alarming that the Strasbourg organs, which have repeatedly and quite rightly declared, on the basis of Article 6(1) of the European Convention,<sup>13</sup> that the duration of proceedings before the domestic courts is unreasonable, can now scarcely comply with that same obligation.<sup>14</sup> Against this

---

dertake not to hinder in any way the effective exercise of this right.

8. See Pietro Sardaro, *The Right of Individual Petition to the European Court*, in PROTOCOL NO. 14 AND THE REFORM OF THE EUROPEAN COURT OF HUMAN RIGHTS 47-50 (Paul Lemmens & Wouter Vandenhole eds., 2005); DAVID J. HARRIS ET AL., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 31-34 (1995).

9. *Mamatkulov & Askarov v. Turkey*, App. Nos. 46827/99, 46951/99, Eur. Ct. H.R. para.122 (Feb. 4, 2005), available at <http://www.echr.coe.int/echr> (follow "Case Law" and search "HUDOC" for "Mamatkulov & Askarov v. Turkey").

10. *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at 154 (1978).

11. See Luzius Wildhaber, *A Constitutional Future for the European Court of Human Rights?*, 23 HUM. RTS. L.J. 161, 162-63 (2002); Steven Greer, *Constitutionalizing Adjudication Under the European Convention on Human Rights*, 23 OXFORD J. LEGAL STUD. 405, 406-07 (2003).

12. It is estimated that 50, 500 individual applications were lodged in 2006 with the European Court of Human Rights (Court). See COUNCIL OF EUROPE, SURVEY OF ACTIVITIES 2 (2007), [hereinafter SURVEY OF ACTIVITIES] available at [http://www.echr.coe.int/NR/rdonlyres/69564084-9825-430B-9150-A9137DD22737/0/Survey\\_2006.pdf](http://www.echr.coe.int/NR/rdonlyres/69564084-9825-430B-9150-A9137DD22737/0/Survey_2006.pdf).

13. Article 6(1) of the European Convention provides that, in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. European Convention, *supra* note 1, art. 6(1).

14. See, e.g., *Ipek v. Turkey*, App. No. 25760/94, Eur. Ct. H.R. (Feb. 17, 2004), available at <http://www.echr.coe.int/echr> (follow "Case Law" and search "HUDOC" for "Ipek v. Turkey") concerning the disappearance of the applicant's two sons after they had been taken into police custody. The application was lodged with the Court in 1994 and declared admissible in May 2002. However, the Court's judgment was finally pronounced in February 2004,

background it becomes clear that reform of the European Convention's control system is imperative and that failure to realistically address the problem of delay will undermine the achievements of the system and public confidence in it. If, as expected, the caseload continues to rise, the Court will be able to administer neither individual justice nor constitutional justice effectively. Thus, the European Ministerial Conference on Human Rights, held in Rome in November 2000 to mark the 50th anniversary of the signing of the European Convention, found that "the effectiveness of the Convention system . . . is now at issue" because of "the difficulties that the Court has encountered in dealing with the ever-increasing volume of applications."<sup>15</sup> Hence, it called on the Committee of Ministers of the Council of Europe to "initiate, as soon as possible, a thorough study of the different possibilities and options with a view to ensuring the effectiveness of the Court in the light of this new situation."<sup>16</sup> Three and a half years after this reflection process about guaranteeing the continued effectiveness of the Court was launched, Protocol No. 14<sup>17</sup> to the European Convention was adopted by the Committee of Ministers at its 114<sup>th</sup> Ministerial Session in May 2004.<sup>18</sup> The member states have committed themselves to ratifying Protocol No. 14 as speedily as possible so as to ensure its entry into force within two years. However, Protocol No. 14 has not yet entered into force because Russia's ratification is still pending.<sup>19</sup>

After examining the main reasons for the Court's dramatically increased caseload, this paper addresses the basic features of the Convention's control system as it currently functions. The paper

---

about ten years after the application's introduction.

15. European Ministerial Conference on Human Rights, Rome, Italy, Nov. 3-4, 2000, *Resolution I on Institutional and Functional Arrangements for the Protection of Human Rights at National and European Level*, ¶ 16, reprinted in COUNCIL OF EUROPE, THE EUROPEAN CONVENTION ON HUMAN RIGHTS AT 50, 36 (2000), available at <http://www.humanrights.coe.int/Bulletin/eng/ib50e.pdf>.

16. *Id.* ¶ 18(ii).

17. Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention, *opened for signature* May 13, 2004, Council of Europe T.S. No. 194 [hereinafter Protocol No. 14], available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/194.htm> (last visited Nov. 27, 2007).

18. For the principal stages in the preparation of Protocol No. 14 see Council of Europe, *Explanatory Report to the Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention*, ¶¶ 20-33 [hereinafter *Explanatory Report*], available at <http://conventions.coe.int/Treaty/EN/Reports/Html/194.htm>.

19. On December 20, 2006, the State Duma of the Council of the Russian Federation refused to ratify Protocol No. 14. See Press Release, Council of Eur., Parliamentary Assembly, We Have a Responsibility to Future Generations to Safeguard the Court's Independence (Jan. 25, 2007), available at [http://www.coe.int/t/dc/files/pa\\_session/jan\\_2007/20070125\\_news\\_cour\\_en.asp](http://www.coe.int/t/dc/files/pa_session/jan_2007/20070125_news_cour_en.asp).

then discusses the key reform measures adopted in Protocol No. 14 and their potential impact on the control system's effectiveness. Although some of the reform measures respond to current challenges and will introduce important changes enhancing the system's effectiveness, this paper argues that the new admissibility criterion will curtail the Court's ability to deliver individual justice without, however, strengthening the Court's ability to deliver constitutional justice. The paper concludes with a discussion of reform measures beyond Protocol No. 14 which could contribute to the long-term effectiveness of the Convention's control mechanism.

## II. THE NEED FOR REFORM

The European Convention's control mechanism is considered to be "the most effective international system for the protection of individual human rights to date."<sup>20</sup> However, the system's success has brought with it an increased caseload which the Court has found more and more difficult to handle. The main threat to the effectiveness of the control system is the exponential growth in the number of individual applications lodged with the Court under Article 34 of the European Convention. This can be illustrated by the following figures: the number of individual applications registered annually with the Court increased from 404 in 1981 to 44,100 in 2004, with an estimated increase to 50,500 in 2006.<sup>21</sup>

The problem of this excessive rise is aggravated by the accession of new member states to the Council of Europe. Since the European Convention was signed in 1950, membership in the Council of Europe has more than tripled. Moreover, there has been a corresponding increase in the number of parties to the European Convention, from eight when it came into force in 1953, to forty-seven in 2007. Since 1989, an increasing number of Eastern and Central European states have been admitted to the Council of Europe, all of which have ratified the Convention.<sup>22</sup> As can be imagined, the case-law of the Court has had, and hopefully will continue to have, an important influence on legal reform in these states still in transition to democracy.<sup>23</sup> Hence in 2007, the Con-

---

20. Thomas Buergenthal, *The Evolving International Human Rights System*, 100 AM. J. INT'L L. 783, 792 (2006).

21. See Survey of Activities, *supra* note 12, at 2.

22. Council of Europe, Chart of Signatories and Ratifications for the Convention for the Protection of Human Rights and Fundamental Freedoms, available at <http://conventions.coe.int/treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG>.

23. See Paul Mahoney, *Speculating on the Future of the Reformed European Court of Human Rights?*, 16 HUM. RTS. L.J. 4 (1995); Evaluation Group, *Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights*, ¶ 15, EG

vention system was open to no fewer than 800 million people in Europe.<sup>24</sup>

Another contributing factor to the Court's increasing caseload is its dynamic approach to the interpretation of the European Convention which has widened its protection.<sup>25</sup> In *Tyrer v. United Kingdom*, the Court held that "the Convention is a living instrument which . . . must be interpreted in the light of present-day conditions."<sup>26</sup> Hence, the concepts used in the Convention are to be understood in the context of the democratic European society of today, thereby raising the protection afforded by the Convention to a higher level than that of 1950. In addition, the protection of the European Convention has been widened by the inclusion of additional Protocols.<sup>27</sup> Furthermore, the dissemination of knowledge about the European Convention and its control mechanism encourage more and more people to explore its possibilities.<sup>28</sup>

---

Court (2001)1 (Sept. 27, 2001) [hereinafter *Evaluation Group Report*], reprinted in 22 HUM. RTS. L.J. 308 (2001), available at <https://wcd.coe.int/ViewDoc.jsp?id=226195&Lang=fr>.

24. In addition, the accession of the European Union to the European Convention has been discussed for several years. See Wolfgang Peukert, *The Importance of the European Convention on Human Rights for the European Union*, in PROTECTING HUMAN RIGHTS: THE EUROPEAN PERSPECTIVE 1107-1122 (Paul Mahoney et al. eds., 2000); Jean Paul Jacqu e, *The Convention and the European Communities*, in THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 901-02 (R. St. J. Macdonald et al. eds., 1993); Steering Committee for Human Rights [CDDH], *Study of Technical and Legal Issues of a Possible EC/EU Accession to the European Convention on Human Rights*, DG-II(2002)006 [CDDH(2002)010 Addendum 2] (June 28, 2002), available at [http://www.coe.int/T/e/com/files/events/2002-09-Symposium-Judges/CDDH2002\\_010.asp](http://www.coe.int/T/e/com/files/events/2002-09-Symposium-Judges/CDDH2002_010.asp).

25. See Søren C. Prebensen, *Evolutive Interpretation of the European Convention of Human Rights*, in PROTECTING HUMAN RIGHTS: THE EUROPEAN PERSPECTIVE 1123-37 (Paul Mahoney et al. eds., 2000); Franz Matscher, *Methods of Interpretation of the Convention*, in THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 68-70 (R. St. J. Macdonald et al. eds., 1993); VAN DIJK & VAN HOOFF, *supra* note 5, at 77-80.

26. *Tyrer v. United Kingdom*, 26 Eur. Ct. H.R. (ser. A) at 31 (1978).

27. Further substantive rights and freedoms have been introduced by the following additional Protocols: Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Mar. 20, 1952, Europ. T.S. No. 9 (*entered into force* May 18, 1954); Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Securing Certain Rights and Freedoms Other than Those Already Included in the Convention and in the First Protocol Thereto, *opened for signature* Sept. 16, 1963, Europ. T.S. No. 46 (*entered into force* May 2, 1968); Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, *opened for signature* Apr. 28, 1983, Europ. T.S. No. 114 (*entered into force* Mar. 1, 1985); Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 11, 1984, Europ. T.S. No. 117 (*entered into force* Nov. 1, 1988); Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 2000, Europ. T.S. No. 177 (*entered into force* Apr. 1, 2005); and, Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Concerning the Abolition of the Death Penalty in all Circumstances, *opened for signature* May 3, 2002, Europ. T.S. No. 187 (*entered into force* July 1, 2003); all available at <http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG>.

28. As the European Convention has a major influence on the protection of human rights in Europe, it has been described as the "jewel in the Council of Europe crown." See

## III. THE CONTROL MECHANISM TODAY

A. *The European Court of Human Rights*

The increasing workload of the European Convention control mechanism since 1980 has prompted a lengthy debate on the necessity for a reform of the mechanism to shorten the length of proceedings. The first important step in the reform process was the adoption of Protocol No. 11<sup>29</sup> in May 1994, which radically reformed the control mechanism established by the 1950 European Convention.<sup>30</sup> The aim of Protocol No. 11, which came into force on November 1, 1998, was to simplify the original control system with a view to shortening the length of proceedings while strengthening the judicial character of the system. The main effect of Protocol No. 11 was to replace two supervisory organs created by the 1950 Convention, the part-time European Commission and the European Court of Human Rights, with a single, full-time court able to perform all the functions of the original organs.<sup>31</sup>

The Court created under the European Convention, as amended by Protocol No. 11, is composed of a number of judges equal to that of the member states.<sup>32</sup> Judges are elected for a term of six years with the possibility of reelection.<sup>33</sup> Because a court of forty-seven judges is too large to function as a single unit, the Court sits in a Grand Chamber of seventeen judges, in chambers of

---

Markus G. Schmidt, *A Fresh Impetus for the European Social Charter*, 41 INT'L & COMP. L.Q. 659 (1992).

29. Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby (Nov. 1, 1998), 33 I.L.M. 943 (1994) [hereinafter Protocol No. 11], available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/155.htm>.

30. See generally Council of Europe, *Explanatory Report to Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby* [hereinafter *Explanatory Report to Protocol No. 11*], <http://conventions.coe.int/Treaty/en/Reports/Html/155.htm> (last visited Nov. 27, 2007).

31. For commentary and description of Protocol No. 11, see Rudolf Bernhardt, *Reform of the Control Machinery Under the European Convention on Human Rights: Protocol No. 11*, 89 AM. J. INT'L L. 145 (1995); Andrew Drzemczewski & Jens Meyer-Ladewig, *Principal Characteristics of the New ECHR Control Mechanism, as Established by Protocol No. 11, Signed on 11 May 1994*, 15 HUM. RTS. L.J. 81 (1994); Henry G. Schermers, *Adaptation of the 11th Protocol to the European Convention on Human Rights*, 20 EUR. L. REV. 559 (1995); HARRIS ET AL., *supra* note 8, at 706-14.

32. European Convention, *supra* note 1, at art. 20.

33. *Id.* at art. 23(1). Note, however, that according to Protocol No. 14, the judges will be elected for a single nine-year term instead of the present six-year renewable term. This reform measure has its origins in concerns of the Court, the Parliamentary Assembly and the Committee of Ministers in regards to a few instances where there seemed to be abuse. Some sitting judges of recognized competence and effectiveness had not been renominated by their countries on expiration of their term, apparently for purely political reasons. See Martin Eaton & Jeroen Schokkenbroek, *Reforming the Human Rights Protection System Established by the European Convention on Human Rights*, 26 HUM. RTS. L.J. 1, 10 (2005).

seven judges and in committees of three judges.<sup>34</sup> For its day-to-day work, the Court is divided into four Sections; the composition of these is balanced by geography and by gender reflecting the contracting states' different legal systems.<sup>35</sup> Within each section, smaller chambers of seven judges are constituted to consider cases brought before the Court.<sup>36</sup> Screening functions previously implemented by the European Commission are carried out by committees of three judges and individual judge rapporteurs.

### *B. Procedure Before the European Court of Human Rights*

Any individual claiming to be a victim of a violation of the European Convention may lodge directly with the Court in Strasbourg an application alleging a breach of any Convention right by a state party. Once an individual application has been registered, it is assigned to a Section, where it will be dealt with by a Committee or a Chamber. Where the material submitted is clearly sufficient to disclose that the application fails to meet the admissibility criteria, it is referred to a Committee of three judges.<sup>37</sup> The Committee may, by a unanimous vote, declare the application inadmissible or decide to strike it off the list without further examination.<sup>38</sup> If no such decision can be taken by a Committee, the application will be referred to a Chamber of seven judges. One member of the Chamber will act as Judge Rapporteur for the case. The Chamber will decide on both the admissibility and merits of the case.<sup>39</sup>

When an application has been declared admissible, the Chamber has two functions: to examine the case, undertaking an investigation if necessary, and to place itself at the parties' disposal with a view to securing a friendly settlement.<sup>40</sup> Once the Chamber has admitted the application, it may invite the parties to submit

---

34. European Convention, *supra* note 1, at art. 27(1). The plenary Court comprising all judges will only deal with matters of organisation. *See id.*, *supra* note 1, at art. 26.

35. *Id.* at art. 26(b); European Court of Human Rights, Revised Rules of Court, rule 25 (July 2006) [hereinafter Rules of Court], <http://www.echr.coe.int/NR/rdonlyres/D1EB31A8-4194-436E-987E-65AC8864BE4F/0/RulesOfCourt.pdf> (last visited Nov. 27, 2007).

36. Each Chamber "must include the President of the Section and the judge elected in respect of" the state concerned by the case, even if he or she is not a member of the Section. Rules of Court, *supra* note 35, rule 26(1)(a).

37. *Id.* at rule 49(1).

38. European Convention, *supra* note 1, at art. 28.

39. Rules of Court, *supra* note 35, rule 53(3). For inter-state cases, the procedure is slightly different as a Chamber must decide on their admissibility and merits. *See* European Convention, *supra* note 1, at art. 29(2).

40. European Convention, *supra* note 1, at arts. 38(1)(a), 38(1)(b).



further evidence and written observations.<sup>41</sup> If no hearing has taken place at the admissibility stage, it may decide to hold a hearing on the merits of the case. Hearings relating to the merits, like those concerned with admissibility, must normally be public,<sup>42</sup> but proceedings concerning a possible friendly settlement are confidential.<sup>43</sup> If there is no friendly settlement, the case concludes with a Chamber's judgment subject to referral to the Grand Chamber. Judgments on the merits are taken by a majority vote and must be reasoned, as must all decisions declaring applications admissible or inadmissible.<sup>44</sup>

At any time before judgment, the Chamber may relinquish jurisdiction in favor of the Grand Chamber where a case raises a serious question affecting the interpretation of the Convention or where the resolution of a question before the Chamber might have a result inconsistent with a previous judgment by the Court. However, relinquishment cannot take place if one of the parties to the case objects.<sup>45</sup>

The Convention also provides for the possibility of a rehearing of the case before the Grand Chamber.<sup>46</sup> Within three months of a Chamber's judgment, any party to the case may "in exceptional circumstances" request that it be referred to the Grand Chamber.<sup>47</sup> Then a panel of five judges of the Grand Chamber accepts the request "if the case raises a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a

41. Note that Article 36 of the European Convention only provides for limited third party interventions. "In all cases before a Chamber or the Grand Chamber, a [state party] one of whose nationals is an applicant shall have the right to submit written comments and to take part in hearings." In addition, "the President of the Court may, in the interest of the proper administration of justice, invite any [state party] which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings." According to Protocol No. 14, however, the Council of Europe Commissioner for Human Rights, as *amicus curiae*, may submit written comments and take part in hearings in all cases before a Chamber or the Grand Chamber. See Eaton & Schokkenbroek, *supra* note 33, at 12; Anthony Lester, *Amici Curiae: Third-Party Interventions Before the European Court of Human Rights*, in PROTECTING HUMAN RIGHTS: THE EUROPEAN DIMENSION 341, 341-50 (Franz Matscher & Herbert Petzold eds., 2d ed. 1990).

42. European Convention, *supra* note 1, at art. 40(1).

43. *Id.* at art. 38(2).

44. *Id.* at art. 45(1).

45. *Id.* at art. 30.

46. During the negotiations of Protocol No. 11, some states firmly insisted . . . on the right to appeal decisions of the . . . Court considered by them to be unacceptable and harmful to their internal legal order. Since a two-tier system with a court of first instance and an appeals court was not accepted by the other [member states], a compromise . . . was found

and incorporated in the single-court control system. Bernhardt, *supra* note 31, at 152. Bernhardt expressed the concern that this compromise could seriously endanger the coherence of the case-law of the Court. *Id.* at 153.

47. European Convention, *supra* note 1, at art. 43(1).

serious issue of general importance.”<sup>48</sup> If the panel accepts, the Grand Chamber renders a judgment that is final.<sup>49</sup>

### C. The Court's Judgments

The control system's effectiveness depends to a large extent on the fast and faithful execution of the Court's judgments. However, the Court's judgments are declaratory in character and have no direct effect in the internal law of the member states.<sup>50</sup> The Court rules on whether a European Convention provision has been breached in the impugned case, without repealing, annulling or modifying domestic provisions or decisions.<sup>51</sup> As the Court concluded in *Marckx v. Belgium*<sup>52</sup> and in *Vermeire v. Belgium*,<sup>53</sup> it does not have the power to order remedial measures in a certain case. In view of the principle of subsidiarity,<sup>54</sup> it is the respondent state, not the Court, which determines the measures needed to implement its obligations.<sup>55</sup> Traditionally, the contracting states,

---

48. European Convention, *supra* note 1, at art. 43(2). A serious question affecting the interpretation of the Convention is raised “when a question of importance not yet decided by the Court is at stake, or when the decision is of importance for future cases and for the development of the Court's case-law.” Further “[a] “serious question concerning the application of the Convention may be at stake when a judgment necessitates a substantial change to national law or administrative practice but does not itself raise a serious question of interpretation of the Convention. A serious issue considered to be of general importance could involve a substantial political issue or an important issue of policy.” Explanatory Report to Protocol No. 11, *supra* note 30, ¶¶ 100-02.

49. European Convention, *supra* note 1, at art. 44(1).

50. See *Pelladoah v. The Netherlands*, 297-B Eur. Ct. H.R. (ser. A) at 44 (1994).

51. A proposal in this sense at the time when the Convention was drafted was not accepted. See *HARRIS ET AL.*, *supra* note 8, at 683-84.

52. *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) at 55-59 (1979).

53. *Vermeire v. Belgium*, 214-C Eur. Ct. H.R. (ser. A) at 26 (1991).

54. Under Article 1 of the European Convention, it is with the member states that the obligation lies to “secure to everyone within their jurisdiction the rights and freedoms” guaranteed by the European Convention, whereas the role of the Court, under Article 19, is “[t]o ensure the observance of the engagements undertaken by the [member states] in the Convention.” European Convention, *supra* note 1, at arts. 1, 19. See generally Herbert Petzold, *The Convention and the Principle of Subsidiarity*, in *THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS* 41,43 (R. St. J. Macdonald et al. eds., 1993); Kersten Rogge, *Examining the Merits of Human Rights Applications - The Legal Issues*, in *PROTECTING HUMAN RIGHTS: THE EUROPEAN PERSPECTIVE* 1215,1220-21 (Paul Mahoney et al. eds., 2000).

55. This contrasts with Article 63(1) of the American Convention on Human Rights which not only authorizes the Inter-American Court of Human Rights to “rule that the injured party be ensured the enjoyment of his right or freedom that was violated” but, if appropriate, “that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied.” Organization of American States, American Convention on Human Rights, *opened for signature* Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (*entered into force* July 18, 1978), *reprinted in* 9 I.L.M. 673 (1970). The American Convention on Human Rights was modelled on its European counterpart. On this subject, see generally Thomas Buergenthal, *The European and Inter-American Human Rights Courts: Beneficial Interaction*, in *PROTECTING HUMAN RIGHTS: THE EUROPEAN PERSPECTIVE* 123, 123-33

therefore, have a wide margin of appreciation in deciding which measures are necessary to execute the judgment of the Court and to discharge their legal obligation under Article 46(1) of the Convention.<sup>56</sup> However, in its recent case-law, the Court seems prepared to include in its judgments more explicit indications of measures that the respondent state must take to execute the judgment of the Court.<sup>57</sup>

The judgments of the Court are transmitted to the Committee of Ministers of the Council of Europe which supervises their execution. The Committee of Ministers verifies whether states in which a violation of the Convention has been found have taken adequate remedial measures to comply with the specific or general obligations arising out of the Court's judgments.<sup>58</sup> However, the European Convention does not provide the Committee of Ministers with means to force a defaulting state to execute the judgment of the Court. Nevertheless, given its position, the Committee of Ministers may bring considerable political pressure to bear on such a member state, including recourse to Article 8 of the Council of Europe's Statute<sup>59</sup> providing for suspension or even expulsion from the Council of Europe.

#### IV. MAIN CHANGES TO THE CONTROL SYSTEM

To guarantee the long-term effectiveness of the control system

---

(Paul Mahoney et al. eds., 2000); Antônio Augusto Cançado Trindade, *The Inter-American Court of Human Rights at a Crossroads: Current Challenges and its Emerging Case-law on the Eve of the New Century*, in PROTECTING HUMAN RIGHTS: THE EUROPEAN PERSPECTIVE 167, 184-86 (Paul Mahoney et al. eds., 2000).

56. The member states, under Article 46(1) of the Convention, "undertake to abide by the final judgment of the Court in any case [in] which they are parties." European Convention, *supra* note 1, art. 46(1).

57. See, for example, the case *Broniowski v. Poland*, in which the Court held that the violation found originated in a systemic problem and that *general* remedies were to be taken in respect of a similarly affected class of citizens as the claimant in the judgment. *Broniowski v. Poland*, App. No. 31443/96, Eur. Ct. H.R. paras. 189, 193-194 (June 22, 2004), available at <http://www.echr.coe.int/echr> (follow "Case Law" and search "HUDOC" for "Broniowski v. Poland"). All similar applications were adjourned, pending the implementation of the relevant general measures asked for in the "pilot judgment." *Id.* See also Pierre-Henri Imbert, *Follow-up to the Committee of Ministers' Recommendations on the Implementation of the Convention at the Domestic Level and the Declaration on "Ensuring the Effectiveness of the Implementation of the European Convention on Human Rights at National and European Levels"*, in COUNCIL OF EUROPE, REFORM OF THE EUROPEAN HUMAN RIGHTS SYSTEM 33, 39 (2004).

58. See GOMIEN ET AL., *supra* note 6, at 90; Peter Leuprecht, *The Execution of Judgments and Decisions*, in THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 791, 796-99 (R. St. J. Macdonald et al. eds., 1993).

59. Statute of the Council of Europe, art. 8, opened for signature May 5, 1949, 87 U.N.T.S. 103, Eur. T.S. 1, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/001.htm>.

of the European Convention, Protocol No. 14 introduces the following principal changes: (1) measures for optimizing the effectiveness of filtering and subsequent processing of applications; (2) a new admissibility criterion; and (3) measures to reinforce the execution of the Court's judgments. These reform measures will be discussed in turn.

*A. Optimizing the Filtering and the Subsequent Processing of Applications*

The Court's excessive caseload manifests itself in two areas in particular. First, the case-processing capacity at the pre-admissibility stage is a key area of concern. More than ninety percent of all lodged applications are terminated without a ruling on their merits, usually because they are declared inadmissible.<sup>60</sup> In 2006, there were some 28,160 applications declared inadmissible or struck out of the list of cases by the Court; only 1,634 applications were considered admissible.<sup>61</sup> Thus, the first step of the filtering procedure, the admissibility decision of the Committee of three judges, proves very time-consuming. "It is clear that the considerable amount of time spent on filtering [the applications] has a negative effect on the capacity of judges . . . to process" cases already declared admissible.<sup>62</sup>

To address this first issue, Protocol No. 14 provides for the establishment of a single-judge procedure. "A single judge may declare inadmissible or strike out" an individual application from the Court's list of cases "where such a decision can be taken without further examination."<sup>63</sup> Hence, the single judge may take such decisions only in clear-cut cases, where the inadmissibility of the application is manifest from the first examination of the case. If admissibility is doubtful, the judge will refer the application to a Committee or a Chamber. Moreover, the "judges will [also] be relieved of their rapporteur role when sitting in a single-judge formation."<sup>64</sup> The function of rapporteur will be exercised by the lawyers of the Court's registry which "will examine the application, and in most cases will undoubtedly also prepare a draft decision

---

60. *Explanatory Report*, *supra* note 18, ¶ 7; CDDH, *Final Report Containing Proposals of the CDDH*, ¶ 8, CM (2003)55 (Apr. 8, 2003) [hereinafter *Final Report*], available at [http://www.coe.int/T/F/Droits\\_de\\_l'Homme/2003cm55.asp#TopOfPage](http://www.coe.int/T/F/Droits_de_l'Homme/2003cm55.asp#TopOfPage) (last visited on Nov. 27, 2007).

61. SURVEY OF ACTIVITIES, *supra* note 12, at 40.

62. *Explanatory Report*, *supra* note 18, ¶ 8.

63. Protocol No. 14, *supra* note 17, at art. 7.

64. *Explanatory Report*, *supra* note 18, ¶ 62.

for the judge.”<sup>65</sup>

The second challenge relates to the nature of cases that are brought before the Court. Some sixty percent of the remaining admissible cases are so-called repetitive cases; they derive from the same structural cause as an earlier application leading to a judgment finding a breach of the European Convention.<sup>66</sup> The *Broniowski* judgment provides a definition of such systemic violation “[where] the facts of the case disclose the existence, within the [relevant] legal order, of a shortcoming as a consequence of which a whole class of individuals have been or are still denied [their Convention rights]” and “[where] the deficiencies in national law and practice identified . . . may give rise to numerous subsequent well-founded applications.”<sup>67</sup> Most individual applications concerning the length of civil or criminal proceedings before domestic authorities must be considered as repetitive cases deriving from systemic violations of the European Convention.<sup>68</sup>

With respect to repetitive cases, the filtering mechanism is improved by extending the competence of the Committees of three judges to cover repetitive cases. Under new Article 28(1)(b) of the European Convention, they are empowered to rule, in a simplified summary procedure, not only on the admissibility but also on the merits of an application if the underlying question “is already the subject of well-established case-law of the Court.”<sup>69</sup> This applies, in particular, to cases where an application is one of a series deriving from the same systemic defect at the national level; hence, a repetitive case.

In addition, the Court is given more latitude to rule simultaneously on the admissibility and the merits of individual applications.<sup>70</sup> This joint procedure enables the Court to deal with cases more rapidly, without unnecessary duplication and delay, inherent

---

65. *Explanatory Report, supra* note 18, ¶ 62; *see also* Paul Lemmens, *Single-Judge Formations, Committees, Chambers and Grand Chamber, in* PROTOCOL NO. 14 AND THE REFORM OF THE EUROPEAN COURT OF HUMAN RIGHTS 31, 33-34 (Paul Lemmens & Wouter Vandenhole eds., 2005).

66. *Explanatory Report, supra* note 18, ¶ 7.

67. In *Broniowski v. Poland*, the Court found a violation of Article 1 of Protocol No. 1 to the Convention (right to property). This violation had originated in a systemic problem caused by the Polish authorities' failure to implement an effective mechanism to compensate persons for the property abandoned in the territories beyond the Bug River as a result of boundary changes following the Second World War. *See* *Broniowski v. Poland*, App. No. 31443/96, Eur. Ct. H.R., para. 189 (June 22, 2004), *available at* <http://www.echr.coe.int/echr> (follow “Case Law” and search “HUDOC” for “Broniowski v. Poland”).

68. *See, e.g.*, *Voggenreiter v. Germany*, App. No. 47169/99, Eur. Ct. H.R., (Jan. 8, 2004); *Patane v. Italy*, App. No. 29898/96, Eur. Ct. H.R., (Mar. 1, 2002), *available at* <http://www.echr.coe.int/echr> (follow “Case Law” and search “HUDOC” for “Voggenreiter v. Germany” and “Patane v. Italy”, respectively).

69. Protocol No. 14, *supra* note 17, at art. 8.

70. *Id.* at arts. 8, 9.

in taking separate decisions on the admissibility and on the merits.<sup>71</sup>

Furthermore, the drafters of Protocol No. 14 intended to enhance the Court's important friendly settlement practice.<sup>72</sup> Thus, every stage of the application procedure allows for the possibility of negotiating a friendly settlement.<sup>73</sup> This may provide a fast and effective way of redressing individual grievances; it may also be attractive to the applicant, the respondent state, and the Court alike. Friendly settlements will prove particularly useful in repetitive cases, as well as other cases where questions of principle or changes in domestic law are not involved.<sup>74</sup>

### B. New Admissibility Criterion

To provide the Court with an additional tool to assist it in its filtering work, Protocol No. 14 inserts a new admissibility criterion in Article 35 of the European Convention.<sup>75</sup> Under new Article

71. Article 29(3) of the European Convention provides that "[t]he decision on admissibility shall be taken separately unless the Court, in exceptional cases, decides otherwise." European Convention, *supra* note 1, art. 29(3).

72. See Hans C. Krüger & Carl A. Nørgaard, *Reflections Concerning Friendly Settlement under the European Convention on Human Rights*, in PROTECTING HUMAN RIGHTS: THE EUROPEAN DIMENSION 329, 334 (Franz Matscher & Herbert Petzold eds., 2d ed. 1989); HARRIS ET AL., *supra* note 8, at 711; Herbert Petzold & Jonathan L. Sharpe, *Profile of the Future European Court of Human Rights*, in PROTECTING HUMAN RIGHTS: THE EUROPEAN DIMENSION 471, 473 (Franz Matscher & Herbert Petzold eds., 2d ed. 1989). See also Committee of Ministers, Resolution Res (2002)59 Concerning the Practice in Respect of Friendly Settlements (Dec. 18, 2002), <https://wcm.coe.int/ViewDoc.jsp?id=331569&Lang=en> (last visited Nov. 27, 2007).

73. Protocol No. 14, *supra* note 17, art. 15.

74. See Final Report, *supra* note 60, Proposal B.3; Explanatory Report, *supra* note 18, ¶ 93. For critical remarks see Fiona Ang & Eva Berghmans, *Friendly Settlements and Striking out of Applications*, in PROTOCOL NO. 14 AND THE REFORM OF THE EUROPEAN COURT OF HUMAN RIGHTS 89, 94-97 (Paul Lemmens & Wouter Vandenhoele eds., 2005).

75. Article 35 of the European Convention states:

1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.
2. The Court shall not deal with any application submitted under Article 34 that:
  - a. is anonymous; or
  - b. is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.
3. The Court shall declare inadmissible any individual application submitted under Article 34 which it considers incompatible with the provisions of the Convention or the protocols thereto, manifestly ill-founded, or an abuse of the right of application.
4. The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings.

35(3)(b) of the European Convention, the Court shall declare inadmissible an individual application when

the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.<sup>76</sup>

The new admissibility criterion aims at excluding those cases from the control mechanism in which a violation of the Convention may have occurred but did not result in a “significant disadvantage” for the applicant. However, Article 35(3)(b) mentions two circumstances (so-called “safeguard clauses”) under which the Court still can decide that an application that otherwise meets these criteria nonetheless requires an examination on the merits.

The main element contained in the new admissibility requirement is whether the applicant has suffered a “significant disadvantage.” These terms require interpretation; the Court first will have to develop the necessary case-law principles to apply the new admissibility criterion.<sup>77</sup> However, this new criterion implies an additional restraint for the applicants and contrasts with the established case-law of the Strasbourg organs which declares admissible even cases in which applicants are characterized as “potential” or “indirect” victims of a Convention violation.<sup>78</sup> Although the European Convention system does not allow for *actio popularis*,<sup>79</sup> the Strasbourg organs have found the threat of future injury sufficient to establish the status of victim under Article 34 of the Convention. Hence, a “potential victim” can lodge an individual application with the Court.<sup>80</sup> Additionally, the Strasbourg organs have

---

European Convention, *supra* note 1, art. 35.

76. Protocol No. 14, *supra* note 17, art. 12.

77. Some guidance as to the interpretation of the term “significant disadvantage” could be drawn from an impact assessment made by a study group of the Court’s Registry. In view of the study group, applications concerning some particular rights (in particular the non-derogable rights) cannot but entail “a significant disadvantage.” Non-derogable rights are the rights from which no derogation can be made, even in time of war or other public emergency threatening the life of a nation. See Frédéric Vanneste, *A New Inadmissibility Ground*, in PROTOCOL NO. 14 AND THE REFORM OF THE EUROPEAN COURT OF HUMAN RIGHTS 69, 76-79 (Paul Lemmens & Wouter Vandenhole eds., 2005).

78. For further details and references see Kersten Rogge, *The “Victim” Requirement in Article 25 of the European Convention on Human Rights*, in PROTECTING HUMAN RIGHTS: THE EUROPEAN DIMENSION 539 (Franz Matscher & Herbert Petzold eds., 2d ed. 1989).

79. GOMIEN ET AL., *supra* note 6, at 43; VAN DIJK & VAN HOOFF, *supra* note 5, at 46.

80. Such is the case when a law or practice has not yet been applied to the complain-

developed in their case-law the concept of “indirect victim,” meaning that a close relative of the victim or any other third party can refer the matter to the Court on his own initiative if the violation is prejudicial to him or if he has a personal interest in terminating it.<sup>81</sup> Applying this broadly interpreted notion of victim, the applicant need not have suffered direct harm as a result of the alleged violation under the Court’s current jurisprudence.<sup>82</sup> With the introduction of the new admissibility requirement, however, the physical, moral, legal or pecuniary prejudice that an individual has suffered will play an important role in assessing admissibility. Therefore, the new “significant disadvantage” criterion poses a risk of limiting access of individuals to the Court, impairing the Court’s function to provide individuals who claim to be victims of human rights violations with an effective international remedy.<sup>83</sup>

However, the new admissibility requirement contains two safeguard clauses: even where the applicant has not suffered a significant disadvantage, the application will not be declared inadmissible if “respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits” or if the case “has not been duly considered by a domestic tribunal.”<sup>84</sup> The first safeguard clause will include cases which raise important questions affecting the application or the interpretation of the Convention or major issues concerning national law.<sup>85</sup> The second safeguard clause ensures that every case will receive a judicial examination -- whether at the national or at the Convention level. Indeed, it is in the first place the task of the domestic tribunals to consider all human rights complaints, even if there appears to be no significant disadvantage for the individual. If the domestic tribunals fail, however, the Court still has the option to examine these cases brought to Strasbourg. The second

---

ing party, but where the possibility exists for the state to do so in future. *See* Johnston v. Ireland, 112 Eur. Ct. H.R. (ser. A) at 42 (1986); Marckx v. Belgium, 31 Eur. Ct. H.R. (ser. A) at 27 (1979); Open Door & Dublin Well Woman v. Ireland, 246-A Eur. Ct. H.R. (ser. A) at 41-44 (1992).

81. GOMIEN ET AL., *supra* note 6, at 46; HARRIS ET AL., *supra* note 8, at 637; VAN DIJK & VAN HOOF, *supra* note 5, at 56-58.

82. *See, e.g.*, Eckle v. Germany, 51 Eur. Ct. H.R. (ser. A.) at 66 (1982); Prager & Oberschlick v. Austria, 313 Eur. Ct. H.R. (ser. A.) at 26 (1995). *See also* Krüger & Nørgaard, *supra* note 6, at 663-64.

83. The new admissibility criterion may therefore encourage European human rights claimants to turn to other complaint mechanisms in international law, for example to the individual petition provided for under the First Optional Protocol of the International Covenant on Civil and Political Rights. *See* Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 302; *See generally* MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY (1993).

84. Protocol No. 14, *supra* note 17, art. 12.

85. *Explanatory Report*, *supra* note 18, ¶ 83.



safeguard clause in particular should guarantee that applications deriving from systemic problems of the adjudication system of the newer contracting states will not be declared inadmissible.<sup>86</sup>

### *C. Measures to Reinforce the Execution of the Court's Judgments*

The control system's effectiveness also depends on a large extent on the fast execution of the Court's judgments. Failure or too much delay in taking individual or general measures to execute judgments, especially judgments concerning repetitive cases, will inevitably generate further individual applications to the Court. Consequently, the introduction of individual and general measures capable of providing redress to both current and future applicants will help to ease the Court's caseload.

The Committee of Ministers' experience of supervising the execution of judgments shows frequent difficulties due to disagreement as to the interpretation of judgments.<sup>87</sup> Therefore, the European Convention will be amended by Protocol No. 14 to empower the Committee of Ministers to refer a case to the Court for a ruling on the question of interpretation if it considers that the supervision of the execution of a final judgment hindered by a problem of interpretation.<sup>88</sup> A referral decision shall require a majority vote of two-thirds of the representatives on the Committee of Ministers. The Court's reply will settle any argument concerning a judgment's exact meaning, giving the member state concerned as well as the Committee of Ministers guidance for a correct execution of the judgment.<sup>89</sup>

The Committee of Ministers has only the power to supervise the execution of a judgment by a state; it has no power to force a defaulting state to take adequate remedial actions to comply with

---

86. See CDDH, *Interim Activity Report*, ¶ 38, CDDH(2003)026 Addendum I Final (Nov. 26, 2003) [hereinafter *Interim Activity Report*], available at [http://www.coe.int/t/ldroits\\_de\\_l%27homme/CDDH\(2003\)026\\_%20E%20Interim.asp#TopOfPage](http://www.coe.int/t/ldroits_de_l%27homme/CDDH(2003)026_%20E%20Interim.asp#TopOfPage).

87. European Commission for Democracy Through Law (Venice Commission), *Opinion on the Implementation of the Judgments of the European Court of Human Rights*, ¶ 76, Op. No. 209/2002, CDL-AD (2002)034 (Dec. 18, 2002) [hereinafter *Venice Commission Opinion*], available at <http://www.venice.coe.int/site/interface/english.htm>.

88. In addition, the Committee of Ministers adopted a resolution in which it invites the Court as far as possible

to identify, in its judgments finding a violation of the Convention, what it considers to be an underlying systemic problem and the source of this problem, in particular when it is likely to give rise to numerous applications, so as to assist states in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments.

Comm. of Ministers, Resolution Res (2004) 3 on Judgments Revealing an Underlying Systemic Problem (May 12, 2004), <https://wcm.coe.int/ViewDoc.jsp?id=743257&Lang=en>.

89. *Explanatory Report*, *supra* note 18, ¶¶ 96-97.

the Court's judgment. The ultimate sanction of suspension of voting rights in the Committee of Ministers or expulsion from the Council of Europe are extreme measures that would prove counterproductive in most cases.<sup>90</sup> It can be argued that a state which refuses to execute a Court's judgment would need to be subjected to the discipline of the Council of Europe, rather than to be excluded from it. Protocol No. 14 therefore empowers the Committee of Ministers to bring infringement proceedings in the Court against any state which refuses to comply with a Court's judgment. The Committee's decision to bring such infringement proceedings must be adopted by a two-thirds majority vote.<sup>91</sup> Since the political pressure exerted by proceedings for non-compliance is assumed to secure execution of the Court's judgment by the state concerned, Protocol No. 14 does not provide for payment of a financial penalty by a member state found in violation of its treaty obligations.<sup>92</sup> Protocol No. 14 suggests that the procedure's mere existence, and the threat of using it, should provide for an effective new incentive to execute the Court's judgments.<sup>93</sup>

#### *D. A More Effective Control Mechanism?*

It will not be possible to make a final assessment of the effects of Protocol No. 14 until it has entered into force and has been in operation for some time. However, some of the Protocol's effects on the control mechanism can be anticipated based on the foregoing considerations. The three main areas of reform identified in the previous chapter will be discussed in turn.

The reform measures aimed at optimizing the effectiveness of filtering and subsequent processing of applications surely will allow the Court to improve its procedure shortly after Protocol No. 14 enters into force. The new single-judge formation is introduced to examine and decide manifestly inadmissible applications. Thus,

---

90. See Eaton & Schokkenbroek, *supra* note 33, at 15; Bernhardt, *supra* note 31, at 153.

91. Protocol No. 14, *supra* note 17, art. 16.

92. The Steering Committee for Human Rights first proposed that the infringement procedure could include a competence for the Court to order payment of a financial penalty (in the form of a lump sum) payable to the Council of Europe. See *Final Report*, *supra* note 60, Proposal C.4. However, the European Commission for Democracy through Law concluded that the added value of the introduction of a penalty-imposing mechanism in the Convention system would be insufficiently clear. See *Venice Commission Opinion*, *supra* note 87, ¶ 85.

93. Such a mechanism of financial penalties was introduced in the Treaty Establishing the European Community in 1993 as a tool of ensuring adequate and timely execution by member states of judgments of the Court of Justice of the European Communities. See Maria A. Theodossiou, *An Analysis of the Recent Response of the Community to Non-Compliance with Court of Justice Judgments: Article 228(2) E.C.*, 27 EUR. L. REV. 25 (2002).

it takes over the task entrusted in the present system to the Committee of three judges.<sup>94</sup> Therefore, the introduction of a single-judge formation reduces Court time spent on clearly inadmissible applications.<sup>95</sup> This has considerable potential for removing a bottleneck in the Court's mechanism.<sup>96</sup>

In addition, the Committee of three judges will be able not only to declare applications inadmissible or to strike them out; but also, under certain conditions, to declare them admissible and to hand down a judgment on the merits. Repetitive cases will also be eligible for examination by a Committee. The new competence of the Committee, therefore, will increase substantially the Court's effectiveness, since repetitive cases, a majority of the admissible cases, can be decided by a three-judge Committee, instead of a seven-judge Chamber currently required.<sup>97</sup> Moreover, the length of proceedings will be reduced by ruling simultaneously on the admissibility and the merits of an application as well as by the encouragement of friendly settlements at any stage of the proceedings. The implementation of these measures therefore should contribute to a more simple and expeditious treatment of a majority of the cases lodged with the Court.<sup>98</sup>

Based on the foregoing analysis, however, it cannot be assumed that the new admissibility criterion will decrease the workload of the Court in a substantial way. With respect to the filtering work, the drafters of Protocol No. 14 suggest that the new admissibility criterion will enable the Court to dispose of inadmissible cases more rapidly.<sup>99</sup> However, one must know that the unclear terms of the new admissibility criterion first need to be interpreted and clarified by the Court to allow a faster disposal of inadmissible cases. It can be expected that the Court will have to devote a significant amount of time and resources to the development of the necessary clear-cut case-law to apply the new admissibility criterion.<sup>100</sup> This holds especially true because in the two years follow-

---

94. See Lemmens, *supra* note 65, at 31.

95. *Id.* at 34.

96. See *id.*; Alastair Mowbray, *Protocol 14 to the European Convention on Human Rights and Recent Strasbourg Cases*, 4 HUM. RTS. L. REV. 331, 332 (2004).

97. See *Explanatory Report*, *supra* note 18, ¶¶ 7, 70; Lucius Caflisch, *The Reform of the European Court of Human Rights: Protocol No. 14 and Beyond*, 6 HUM. RTS. L. REV. 403, 408 (2006); see also Philip Leach, *Access to the European Court of Human Rights — From a Legal Entitlement to a Lottery?* 27 HUM. RTS. L.J. 11, 24 (2006).

98. See Eaton & Schokkenbroek, *supra* note 33, at 16.

99. *Explanatory Report*, *supra* note 18, ¶ 79.

100. See also Amnesty International, *Council of Europe: Ensuring the Long-term Effectiveness of the European Court of Human Rights - NGO Comments on the Group of Wise Persons' Report*, ¶ 24, AI Index IOR 61/002/2007 (Jan. 16, 2007), available at <http://web.amnesty.org/library/index/engior610022007>.

ing the entry into force of Protocol No. 14, the new admissibility criterion may be applied only by the Chambers and the Grand Chamber of the Court, not by the single judges and the Committees.<sup>101</sup> Hence, it can be argued that the new admissibility criterion will not enable the Court to process inadmissible cases in a significantly more rapid manner shortly after Protocol No. 14 enters into force.

In addition, the drafters of Protocol No. 14 state that the new criterion will result in a more effective filtering because additional applications can be declared inadmissible.<sup>102</sup> However, only very few additional cases will probably be declared inadmissible under the new Article 35(3)(b). Under the current control system, ninety percent of all lodged applications are declared inadmissible.<sup>103</sup> The new criterion therefore applies in principle only to ten percent of the individual applications not declared inadmissible under existing admissibility criteria provided in Article 35 of the European Convention. The majority of these cases must be considered as repetitive cases.<sup>104</sup> One feature of these cases is that they are almost by definition well-founded; thus, they cannot be declared inadmissible, not even under the new admissibility criterion. These considerations do not only show that the amount of additional cases declared inadmissible under the new criterion will be very small but also that it does not address adequately the Court's problem to process more effectively the mass of repetitive applications, allowing the judges to concentrate more on decisions of principle.<sup>105</sup>

Moreover, the Court already can exercise a high degree of discretion in declaring an application inadmissible and deciding not to go into the merits of a case.<sup>106</sup> Under Article 35(3) of the European Convention, the Court has wide flexibility to declare inadmissible an application which it considers "manifestly ill-founded." According to the case-law, the term "manifestly ill-founded" has been broadly interpreted as encompassing cases which have no merit, either because they were unsubstantiated or because the facts alleged did not disclose any appearance of a *prima facie* violation of the rights and freedoms set out in the European Convention.<sup>107</sup> Thus, it can be argued that many of the applications to

---

101. Protocol No. 14, *supra* note 17, art. 20.

102. *See Explanatory Report, supra* note 18, ¶ 79.

103. *Id.* ¶ 7.

104. *See Explanatory Report, supra* note 18, ¶ 7.

105. *See Leach, supra* note 97, at 23-24.

106. *See Vanneste, supra* note 77, at 85.

107. By far the greatest numbers of individual applications are declared inadmissible because they are considered to be "manifestly ill-founded." *See GOMIEN ET AL., supra* note 6, at 66; VAN DIJK & VAN HOOF, *supra* note 5, at 162-65; HARRIS ET AL., *supra* note 8, at 627;

which the new admissibility criterion applies already can be declared inadmissible under the existing Article 35(3).

If the new provision is incapable of achieving the practical aims for which it was designed -- to enable the Court to process unmeritorious and repetitive cases more effectively and to devote more time to cases which warrant examination on the merits<sup>108</sup> -- then the restriction on the right of individual access to the Court is even more questionable. These concerns were also stressed by the Parliamentary Assembly of the Council of Europe, which stated that it “cannot accept the proposal to add a new admissibility criterion to Article 35 of the (individual application) Convention because it is vague, subjective and liable to do the applicant a serious injustice, and would exclude only 1.6% of existing cases.”<sup>109</sup> Fundamental objections to the new admissibility criterion were also expressed by various NGOs which stated that such a criterion would have “little impact on the main source of the Court’s overburdening, which is disposing of the high number of cases that are inadmissible under the current criteria.”<sup>110</sup>

It remains questionable whether the interpretation and infringement proceedings introduced by Protocol No. 14 will meet the goals of improving and speeding up the execution of judgments. The new procedure’s effectiveness is particularly problematic in cases where non-enforcement depends on problems or delays relating to the internal democratic processes of the member state, or where execution has been initiated but may be inadequate or insufficient, or where the delay is caused by the lack of financial means. In addition, in cases where the government in question willfully has not abided by a judgment, it is unlikely that much additional pressure will result from a declaratory default judgment by the Court.<sup>111</sup>

---

JOHN G. MERRILLS & ARTHUR H. ROBERTSON, *HUMAN RIGHTS IN EUROPE: A STUDY OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 311-12 (4th ed. 2001); Rogge, *supra* note 54, at 1217-18.

108. See *Explanatory Report*, *supra* note 18, ¶ 77.

109. Parliamentary Assembly of the Council of Europe, *Draft Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention* ¶ 11, Op. No. 251 (2004) (Apr. 28, 2004), available at <http://assembly.coe.int/Main.asp?link=http%3A%2F%2Fassembly.coe.int%2FDocuments%2FAdoptedText%2Fta04%2FEOP1251.htm>.

110. Amnesty International, *Joint Response to Proposals to Ensure the Future Effectiveness of the European Court of Human Rights*, ¶ 8, AI Index IOR 61/008/2003 (Dec. 1, 2003) [hereinafter *Joint Response*], available at <http://web.amnesty.org/library/index/enior610082003>.

111. In the case *Loizidou v. Turkey* for example, the Turkish government refused for years to pay the just satisfaction ordered by the Court, notwithstanding the political pressure from the Council of Europe and even the European Union. See Wouter Vandenhoe, *Execution of Judgments*, in *PROTOCOL NO. 14 AND THE REFORM OF THE EUROPEAN COURT OF HUMAN RIGHTS* 105, 120 (Paul Lemmens & Wouter Vandenhoe eds., 2005).

The improvements in the control mechanism's efficiency achieved by Protocol No. 14 should thus not be overestimated. True, the reform measures aimed at optimizing the effectiveness of filtering and subsequent processing of applications surely will allow the Court to improve its procedure shortly after Protocol No. 14 enters into force. However, according to estimates prepared by the Court, the increase in productivity resulting from the implementation of Protocol No. 14 might be between twenty and twenty-five percent.<sup>112</sup> Given the enormous case-load of the Court, this increase in productivity will not suffice to guarantee the Court's long-term effectiveness which can be illustrated by the following figures. The latest activity report of the Court estimates that 50,500 new applications were lodged with the Court in 2006. In the same year, the Court disposed of 28,160 cases, either by rendering a final judgment, declaring them inadmissible or striking them from the Court's list of cases.<sup>113</sup> Assuming hypothetically that the amount of individual applications filed with the Court does not continue to rise in the future and that Protocol No. 14 results in a productivity increase of twenty-five percent, the number of new applications still exceeds the number of cases disposed of by the Court by about 15,300 applications. As a consequence, the number of cases pending before the Court is constantly growing.<sup>114</sup> It is therefore widely agreed that additional reform measures will be needed in the foreseeable future.<sup>115</sup> This position was also entertained by the Council of Europe member states which decided, even before Protocol No. 14 has entered into force, to establish a Group of Wise Persons to draw up a comprehensive strategy to secure the long-term effectiveness of the European Convention and its control mechanism.<sup>116</sup> In addition, the Secretary General of the Council of Europe and the President of the Court asked a team of experts to conduct a review of the Court's working methods to pro-

---

112. See Minister's Deputies, *Report of the Group of Wise Persons to the Committee of Ministers*, ¶ 32, CM(2006)203 (Nov. 15, 2006) [hereinafter *Group of Wise Persons Report*], available at <https://wcd.coe.int/ViewDoc.jsp?id=1063779&BackColorInternet=9999CC&BackColorIntranet=FFBB5&BackColorLogged=FDC864>.

113. See SURVEY OF ACTIVITIES, *supra* note 12, at 38.

114. As of December 31, 2006, 89,900 applications were pending before the Court. See *id.*

115. See Paul Mahoney, *Parting Thoughts of an Outgoing Registrar of the European Court of Human Rights*, 26 HUM. RTS. L.J. 345, 346 (2005); Mowbray, *supra* note 96, at 336; Caflich, *supra* note 97, at 423.

116. See Third Summit of Heads of State and Government of the Council of Europe, Warsaw, Poland, May 16-17, 2005, *Warsaw Declaration*, ¶ 2, available at [http://www.coe.int/t/dcr/summit/20050517\\_decl\\_varsovie\\_en.asp?](http://www.coe.int/t/dcr/summit/20050517_decl_varsovie_en.asp?); Third Summit of Heads of State and Government of the Council of Europe, Warsaw, Poland, May 16-17, 2005, *Action Plan*, ¶ I.1., CM(2005)80 final (May 17, 2005), available at [http://www.coe.int/t/dcr/summit/20050517\\_plan\\_action\\_en.asp?](http://www.coe.int/t/dcr/summit/20050517_plan_action_en.asp?).

pose administrative steps to be taken, without amending the European Convention, to enable the Court to cope more effectively with its current and projected caseload.<sup>117</sup>

## V. BEYOND PROTOCOL NO. 14

The acknowledged need for further reform measures to guarantee the Convention's control mechanism presents a more fundamental question: what shall the premises for the new reform be? Would it be desirable to establish a more constitutional Court, not accessible for everyone but dealing with more cases of principle, thereby setting human rights standards for Europe? Or should the member states try to preserve the Court's ability to deliver individual as well as constitutional justice?

### A. A More Constitutional Court?

The reform process has prompted a fundamental discussion about the two basic purposes of the European Convention's control mechanism; to provide alleged victims of human rights violations with an effective international remedy; and, more generally, to decide cases of principle, thereby contributing to the elaboration of a higher human rights standard for Europe. In view of the Court's increasing caseload, some argue that the only way to reform the Court's control mechanism is to emphasize the constitutional justice function over the individual justice function.<sup>118</sup>

Some proposals made in the early reform discussion went in that direction. Certainly the most far-reaching suggestion was to grant to the Court unrestricted discretion in accepting a case for examination.<sup>119</sup> This proposal aimed at introducing a system comparable to the *certiorari* procedure of the United States Supreme Court by leaving the Court free to select cases involving sufficiently serious questions regarding the Convention's rights. However, this proposal was rejected in the further reform discussion on grounds that such a radical change would have been "tantamount to calling into question the entire philosophy on which the Euro-

---

117. Lord Woolf et al., Review of the Working Methods of the European Court of Human Rights (Dec. 2005) [hereinafter Lord Woolf Report], *reprinted in* 26 HUM. RTS. L.J. 447 (2005).

118. See Wildhaber, *supra* note 11, at 163-64; Greer, *supra* note 11, at 406-07.

119. See Reflection Group on the Reinforcement of the Human Rights Protection Mechanism, *Activity Report*, Appendix II, ¶¶ 9-13, CDDH-GDR (2001)010 (June 15, 2001) [hereinafter *Reflection Group Report*], [http://www.coe.int/t/ff/droits\\_de\\_l%27homme/cddh-gdr\(2001\)010%20e.asp#P87\\_2086](http://www.coe.int/t/ff/droits_de_l%27homme/cddh-gdr(2001)010%20e.asp#P87_2086). See also *Evaluation Group Report*, *supra* note 23, ¶ 91.

pean Convention on Human Rights was based.”<sup>120</sup> It was stressed that any individual claiming to be a victim of a violation of the European Convention had the right to lodge an application alleging a breach of a Convention right directly with the Court in Strasbourg. This policy should be firmly upheld as a “cornerstone of the Convention.”<sup>121</sup>

However, the Evaluation Group, which was charged with making further reform proposals, argued in its report that “a vital consideration must be to ensure that judges are left with sufficient time to devote to what have been called ‘constitutional judgments.’”<sup>122</sup> Accordingly, this Group proposed to empower the Court “to decline to examine in detail applications which raise no substantial issue under the Convention.”<sup>123</sup> Although this proposal was less radical than the one suggested to introduce a procedure like *certiorari*, it encountered strong opposition. More than seventy NGOs, national human rights institutions and bar associations in twenty-two Council of Europe countries adopted a joint response, stating that the reform must “ensure that the right of individual application . . . is not prejudiced, restricted or weakened.”<sup>124</sup> This joint statement therefore rejected the Evaluation Group’s proposal and stressed that applicants must not be denied effective access to the Court.<sup>125</sup> The proposal was subsequently considered by the Steering Committee for Human Rights, which had been instructed to create a set of concrete and coherent reform proposals. In its final report, the Committee rejected the Evaluation Group’s proposal to allow the Court to dismiss cases which raise no substantial issue, as providing the Court with “too wide a discretion enabling it to pick and choose the cases it would wish to deal with.”<sup>126</sup> Nevertheless, the Steering Committee retained in principle the idea of giving some additional discretion, however limited, to the Court in the form of a new admissibility criterion. The Committee finally proposed to allow the Court to declare a case inadmissible if the applicant has not suffered a “significant disadvantage,” a proposal which was adopted within new Article 35(3)(b) of Protocol No. 14 with minor changes regarding the provision’s safeguard clauses.<sup>127</sup>

Hence, it can be argued that the Council of Europe member

---

120. *Reflection Group Report*, *supra* note 119, ¶ 9.

121. *Id.*

122. *Evaluation Group*, *supra* note 23, ¶ 98.

123. *Id.* ¶ 93.

124. *Joint Response*, *supra* note 110, ¶ 2.

125. *Id.* ¶ 8.

126. *Final Report*, *supra* note 60, ¶ 14.

127. *Id.* ¶ 15.



states were not prepared to abandon the Court's function to deliver individual justice, at least in principle, in favor of constitutional justice. Although the new admissibility criterion introduced by Protocol No. 14 restricts the access of individuals to the Court, the drafting history bears witness to the political will to preserve the goal of individual justice.<sup>128</sup>

*B. Individual and Constitutional Justice as Interdependent Functions*

It can be argued that a shift to a more constitutional Court would fail to acknowledge that the two functions of the Court are not separate, but interdependent. There is no fundamental dichotomy between the Court's role to provide individuals who claim to be victims of human rights violations with an effective international remedy and the Court's constitutional role to establish a human rights standard for Europe.<sup>129</sup> On the contrary, by preserving the right to individual application, the Court enhances its constitutional function. The legitimacy theory of compliance, propounded by Thomas M. Franck, provides a useful theoretical tool for explaining this interrelation. The basic premise of Franck's legitimacy theory is that an international rule (as well as an international institution) perceived to have a high degree of legitimacy generates a correspondingly high measure of compliance by those to whom it is addressed.<sup>130</sup> The legitimacy of a rule or of a rule-applying institution "is a function of the perception of those in the community concerned that the rule, or the institution, has come into being endowed with legitimacy: that is, in accordance with right process."<sup>131</sup> Franck identifies four elements as indicators for the legitimacy of an international institution: determinacy, symbolic validation, coherence, and adherence.<sup>132</sup>

With regard to the European Court of Human Rights, it is im-

---

128. For an analysis of the goals and influences of the different political actors in drafting Protocol No. 14, see Christina G. Hioureas, *Behind the Scenes of Protocol No. 14: Politics in Reforming the European Court of Human Rights*, 24 BERKELEY J. INT'L L. 718 (2006).

129. But see Wildhaber, *supra* note 11, at 162, who stresses that "there is a fundamental dichotomy running throughout the Convention. This is as to whether the primary purpose of the Convention system is to provide individual relief or whether its mission is more a 'constitutional' one of determining issues on public policy grounds in the general interest."

130. See THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 16 (1990); Thomas M. Franck, *The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium*, 100 AM. J. INT'L L. 88, 93 (2006).

131. Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 711 (1988).

132. *Id.* at 725.

portant to remember that it is not -- in contrast to the constitutional courts in the member states -- established according to a democratically legitimated constitution. The Court is an international institution established by an international treaty, and the implementation of its decisions is unsupported by an effective structure of coercion comparable to a national enforcement system.<sup>133</sup> Compliance with the “constitutional” decisions of the Court therefore depends in part on the perception of the Court as legitimate international institution. This perception is affected decisively by the institution’s symbolic validation which is described as the “cultural and anthropological dimension”<sup>134</sup> of Franck’s legitimacy theory. The Court’s legitimacy thus is enhanced by the right to individual application which is considered a “basic feature of European legal culture”<sup>135</sup> by the Court itself. This assessment is shared by the Group of Wise Persons’ report whose importance was stressed by the Council of Europe member states.<sup>136</sup> These statements mirror the public opinion on the right to individual application, which is considered a “highly symbolic”<sup>137</sup> element of the Convention system. As Paul Mahoney stresses:

European institutions are often . . . perceived by the public as distant, bureaucratic machines, issuing uniforming regulations over our daily lives and hermetically closed to the ordinary person. The Council of Europe, through its European Court of Human Rights, has made freely available to individual men and women in Europe an international remedy allowing them to ventilate openly complaints about alleged human rights violations committed against them by their national authorities . . .<sup>138</sup>

Therefore, the Court’s goal to provide any individual who claims to be a victim of a human rights violation with an effective international remedy can add to the perceived legitimacy of the

---

133. See HARRIS ET AL., *supra* note 8, at 700-05; GOMIEN ET AL., *supra* note 6, at 90.

134. Franck, *supra* note 131, at 725.

135. European Court of Human Rights, *Opinion of the Court on the Wise Persons’ Report*, at 1 (Apr. 2, 2007), <http://www.echr.coe.int/NR/rdonlyres/26457EAB-2840-4D71-9ED7-85F0F8AE0026/0/OpinionoftheCourtontheWisePersonsReport.pdf>.

136. *Group of Wise Persons Report*, *supra* note 112, ¶ 23; Ministers’ Deputies, Decisions, 984th mtg., Item 1.6, ¶ 2, CM/Del/Dec (2007) 984 (Jan. 22, 2007), available at [https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/Dec\(2007\)984&Sector=secCM&Language=lanEnglish&Ver=original&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75](https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/Dec(2007)984&Sector=secCM&Language=lanEnglish&Ver=original&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75).

137. Mahoney, *supra* note 115, at 346.

138. *Id.*

institution. A higher degree of legitimacy, in turn, results in stronger compliance with the Court's judgments, thereby promoting its constitutional function. Hence, a reform beyond Protocol No. 14 should reaffirm the two basic roles the Court has played to date: to deliver individual as well as constitutional justice.

This position seems to be also entertained by the Group of Wise Persons which rejected the idea to introduce a *certiorari* system similar to that of the United States Supreme Court. The Group stressed that "a power of this kind would be alien to the philosophy of the European human rights protection system"<sup>139</sup> and stated that the present system should be upheld which "confers on the Court at one and the same time a role of individual supervision and a 'constitutional' mission."<sup>140</sup>

### C. Introducing a New Filtering Mechanism

Two major challenges for the Court's control mechanism have been identified: first, the filtering of the clearly inadmissible cases which make up approximately ninety percent of all applications lodged with the Court; and second, the processing of the mass of repetitive cases deriving from a systemic violation of the European Convention.<sup>141</sup> Protocol No. 14 opens up significant possibilities for more efficient filtering and subsequent processing of the cases by introducing a single judge for inadmissibility decisions and by assigning a Committee of three judges to rule on both the admissibility and the merits of an application. However, these measures will not be enough to control the current and expected caseload of the Court.<sup>142</sup> Therefore, proposals for additional reform measures in these two main areas of concern should be discussed.

One proposal put forward in the drafting process of Protocol No. 14 contained the establishment of a special "filtering" division as an integral part of the Court. This special division, with responsibility for preliminary examination of applications, would be composed of so-called "assessors," "appropriately appointed independent and impartial persons invested with judicial status."<sup>143</sup> The idea behind this special division is to separate the functions of filtering and adjudication on the merits. This division of labor is in-

---

139. *Group of Wise Persons Report*, *supra* note 112, ¶ 42.

140. *Id.* ¶ 24.

141. See *Explanatory Report*, *supra* note 18, ¶ 7; *Final Report*, *supra* note 60, ¶ 8.

142. See *Group of Wise Persons Report*, *supra* note 112, ¶ 32; see also Lord Woolf Report, *supra* note 117, at 453.

143. Evaluation Group Report, *supra* note 23, ¶ 98; see also Paul Mahoney, *New Challenges for the European Court of Human Rights Resulting from the Expanding Case Load and Membership*, 21 PENN. ST. INT'L L. REV. 101, 108-10 (2002).

tended to increase efficiency of output. The filtering division composed of additional personnel would specialize in the admissibility examination of individual applications, thereby speeding up the filtering procedure. As a consequence, the Court's judges not involved in the filtering work could concentrate on the adjudication of cases which raise substantial issues under the Convention. The Court strongly supported this suggestion, stressing that "ultimately a separate filtering body will be required."<sup>144</sup> That proposal, however, was finally rejected, mainly because of the financial implications and concerns about creating lower status judges. In addition, the drafters of Protocol No. 14 were worried that the establishment of a separate filtering mechanism would be perceived as reverting to the two-tiered system, encompassing the Commission and the Court, which was abolished with Protocol No. 11 in 1998.<sup>145</sup>

Nonetheless, in the long run, the establishment of a separate, specialized filtering mechanism may prove an important additional measure to process more effectively the mass of inadmissible and repetitive cases.<sup>146</sup> The Group of Wise Persons has also recommended introducing a judicial filtering body attached to, but separate from the Court. This new filtering body -- the so-called "Judicial Committee" -- would have jurisdiction to hear "all applications raising admissibility issues," and "all cases which could be declared manifestly well-founded or manifestly ill-founded on the basis of well-established case-law of the Court."<sup>147</sup> The Judicial Committee thus would in particular process the mass of inadmissible and repetitive cases which, under Protocol No. 14, are assigned to single judges and Committees of three judges. As a consequence, a large number of applications would be transferred to the specialized Judicial Committee, enabling the Court to concentrate more on cases of principle and its constitutional role.

The Group of Wise Persons suggested that the new, full-time

---

144. Group on the Reinforcement of the Human Rights Protection Mechanism, *Response of the European Court of Human Rights to the CDDH Interim Report Following the 46th Plenary Administrative Session on 2 February 2004*, ¶ 7, CDDH-GDR(2004) 001 (Feb. 10, 2004), available at [http://www.coe.int/T/F/Droits\\_de\\_l'Homme/CDDH-GDR\(2004\)001%20E%20Response%20of%20Court%20to%20CDDH%20Interim%20Report.asp#TopOfPage](http://www.coe.int/T/F/Droits_de_l'Homme/CDDH-GDR(2004)001%20E%20Response%20of%20Court%20to%20CDDH%20Interim%20Report.asp#TopOfPage).

145. See Steering Committee for Human Rights (CDDH), *Interim Report of the CDDH to the Committee of Ministers "Guaranteeing the Long-term Effectiveness of the European Court of Human Rights"*, ¶¶ 23-31, CM(2002)146 (Oct. 18, 2002), available at [http://www.coe.int/t/f/droits\\_de\\_l%27homme/2002cm146.pdf](http://www.coe.int/t/f/droits_de_l%27homme/2002cm146.pdf).

146. The proposal of establishing a separate filtering body was also supported by various NGOs. See Amnesty International, *Council of Europe: Ensuring the Long-term Effectiveness of the European Court of Human Rights - NGO Comments on the Group of Wise Persons' Report*, ¶ 26, AI Index IOR 61/002/2007 (Jan. 16, 2007), available at <http://web.amnesty.org/library/index/engior610022007>.

147. *Group of Wise Persons Report*, *supra* note 112, ¶¶ 55-56.

judges sitting on the Judicial Committee should, like those of the Court, be of high moral character and possess qualifications required for appointment to judicial office.<sup>148</sup> They would enjoy full guarantees of independence and be subject to the same requirements as the members of the Court with regard to impartiality.<sup>149</sup> Candidates' professional qualifications and language skills should be evaluated by the Court "in an opinion prior to their election by the Parliamentary Assembly."<sup>150</sup> The Group also suggested that the number of judges sitting on the Judicial Committee should be smaller than the number of Convention member states.<sup>151</sup> However, the Committee's composition "should reflect a geographical balance as well as a harmonious gender balance and should be based on a system of rotation between states."<sup>152</sup>

As a consequence of creating this Judicial Committee and according to the "logic underlying the new role proposed for the Court," the Group of Wise Persons suggested that the reform "should lead in due course to a reduction in the number of judges" of the Court.<sup>153</sup> The Group thus recommended limiting the number of members of the Court which, under the present system, equals the number of Convention member states.<sup>154</sup> The Group's report, however, did not mention how many judges the Court should contain; it only referred to the fact that the International Court of Justice consists of fifteen members and the Inter-American Court of Human Rights of seven members. To ensure the presence of a national judge of the member state party to a dispute before the Court, the Group suggested appointing an *ad hoc* judge.<sup>155</sup>

It can be expected that the Group's proposal to establish a Judicial Committee will confront the same objections put forward in earlier reform discussions. The appointment of new judges for the Judicial Committee will lead to more costs, hence budgetary con-

---

148. Under Article 21(1) of the European Convention, "[t]he judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence." European Convention, *supra* note 1, art. 21(1).

149. See Article 21(3) of the European Convention, according to which, "[d]uring their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office." European Convention, *supra* note 1, art. 21(3).

150. *Group of Wise Persons Report*, *supra* note 112, ¶ 54.

151. *Id.* ¶ 53.

152. *Id.* ¶ 53.

153. *Id.* ¶ 120.

154. *Id.* ¶ 53.

155. *Id.* ¶ 122. Under Article 27(2) of the European Convention, the judge elected in respect of a member state shall sit as an *ex officio* member on the Court whenever a case against the respective member state is heard. If there is no elected national judge or if he is unable to sit, an *ad hoc* judge shall sit in the capacity of a judge. European Convention, *supra* note 1, art. 27(2).

cerns. Moreover, compared to the Court's judges, the members of the Committee will be "lower status" judges. In contrast to the Court's judges who enjoy full jurisdiction, the jurisdiction of the Committee's judges will be limited to applications which raise admissibility issues or can be decided with reference to well-established case-law. In addition, the election of the Committee's judges will depend on the assessment of their professional qualifications and language skills by the Court. Concerns will also be raised that the establishment of a Judicial Committee amounts to a return to a pre-Protocol No. 11 two-tiered filtering system.<sup>156</sup>

These concerns should be taken seriously and the Group's proposal modified accordingly. Instead of appointing new Committee judges, the members of the new filtering mechanism could be drawn from the existing Court judges.<sup>157</sup> One could imagine that the Judicial Committee, composed of thirty-eight judges of the existing Court, would deal with applications that raise admissibility questions or can be decided based on well-established case-law. Further, that the Court itself, composed of nine judges, would deal with the other cases, raising more complex issues.<sup>158</sup> The decisions of the Judicial Committee should, as under Protocol No. 14, be taken by a single judge or by panels of three judges. Undoubtedly, the Judicial Committee would have to rely on the support of rapporteurs, introduced by Protocol No. 14, to increase the filtering capacity. It will be up to the Court to decide how many rapporteurs are needed, and how and for how long they will be appointed.<sup>159</sup>

This approach would have several advantages. First, the new filtering mechanism would be composed of existing judges, avoiding additional costs for newly appointed Committee judges. Second, the members of the Judicial Committee and the members of the Court would be elected according to the same rules, guaranteeing the same legitimacy. To ensure that all judges enjoy the same status regarding their jurisdiction, it would be equitable to assign the judges to the Committee or the Court on the basis of a system of rotation. Such a rotation system would facilitate electing highly qualified judges, because it may be difficult to find enough competent judges for the Committee who would limit themselves to de-

---

156. See Caflisch, *supra* note 97, at 414.

157. See Vanneste, *supra* note 77, at 84. For critical remarks, see Alastair Mowbray, *Beyond Protocol 14*, 6 HUM. RTS. L. REV. 578, 583 (2006).

158. The new number of Court judges would of course require a rethinking of the composition of the Court's Grand Chamber and the possibility of a rehearing of cases before the Grand Chamber. For reform proposals regarding the Grand Chamber, see Caflisch, *supra* note 97, at 414-15.

159. See *Explanatory Report*, *supra* note 18, ¶ 59.

ciding issues of jurisdiction and admissibility.<sup>160</sup> Third, the fact that the members of the Committee and the Court enjoy the same judicial status and that the Committee is attached to the Court should resolve concerns that this new filtering mechanism amounts to a return to the two-tier system operating prior to Protocol No. 11. In addition, drawing the members of the Committee from the existing Court judges would guarantee that at least one judge from every member state is sitting on the Committee or the Court. As a consequence, when the presence of a national judge in a case against a member state is required, it would not be necessary to appoint an *ad hoc* judge who had not been through the regular election process and approved by the Parliamentary Assembly.<sup>161</sup>

## VI. CONCLUSIONS

Protocol No. 14, adopted by the Committee of Ministers of the Council of Europe at its 114th Ministerial Session in May 2004, is responding to current challenges and introducing some significant changes to the existing enforcement system of the European Convention. However, even if it is a step in the right direction, it will not guarantee the long-term effectiveness of the Court. In addition, a major flaw of Protocol No. 14 is its negative impact on the access of individuals to the Court without reducing significantly the workload of the Court. The Court's function of delivering individual justice thus is impaired without reinforcing the constitutional function of the Court. This article argues that these two functions are closely interrelated, and that any future reform should be designed to reaffirm the Court's dual role.

As for the Convention's control mechanism, one next important step in the reform process is to create additional tools to improve the filtering of inadmissible cases and the processing of repetitive cases. Thus, the proposal to establish a specialized Judicial Committee along the above-developed lines deserves further considera-

---

160. See Caflisch, *supra* note 97, at 414.

161. Note that under the present rules of procedure, the practice has been for the President of the Court to invite the state to make the appointment of an *ad hoc* judge at the same time as communicating the case. However, NGOs expressed concerns about the independence of *ad hoc* judges, and the Parliamentary Assembly was concerned because of the number of cases in which *ad hoc* judges were appointed who had never been through the election process of approval by the Assembly, and accordingly, in their view, lacked legitimacy. Because of these concerns, Protocol No. 14 provides for a new system of appointment of *ad hoc* judges. Under the new rule, each member state is required to draw up a reserve list of *ad hoc* judges from which the President of the Court shall appoint someone when the need arises. See *Explanatory Report*, *supra* note 18, ¶ 64; Eaton & Schokkenbroek, *supra* note 33, at 11.

tion. However, in accordance with the principle of subsidiarity, any reform of the Convention aimed at guaranteeing the long-term effectiveness of the Court must be accompanied by effective measures on the national level. Therefore, at its 114th session in May 2004, the Committee of Ministers of the Council of Europe adopted three recommendations addressed to the member states concerning, respectively, university education and professional training;<sup>162</sup> the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the Convention;<sup>163</sup> and the improvement of domestic remedies.<sup>164</sup> It is important to stress that the implementation of the Convention's guarantees at the national level will undoubtedly reduce the need to apply to the Court for redress. In addition, better dissemination of information about the Convention and of the Court's case-law, in particular regarding the admissibility criteria, may reduce the number of inadmissible applications lodged with the Court.<sup>165</sup> As the experiences from the Warsaw pilot project show, the establishment of an information office at the national level can support this goal.<sup>166</sup> However, it is clear that only a comprehensive set of interdependent measures tackling the problem from different angles will make it possible to overcome the present challenges of the control mechanism of the Convention, thereby ensuring its long-term effectiveness. As former Court's President Luzius Wildhaber explained, Protocol No. 14 is "not the end of the story."<sup>167</sup>

---

162. See Committee of Ministers, Recommendation Rec (2004) 4 on the European Convention on Human Rights in University Education and Professional Training (May 12, 2004), available at <https://wcm.coe.int/ViewDoc.jsp?id=743277&Lang=en>.

163. See Committee of Ministers, Recommendation Rec (2004)5 on the Verification of the Compatibility of Draft Laws, Existing Laws and Administrative Practice with the Standards laid down in the European Convention on Human Rights (May 12, 2004), available at <https://wcm.coe.int/ViewDoc.jsp?id=743297&Lang=en>.

164. See Committee of Ministers, Recommendation Rec (2004)6 on the Improvement of Domestic Remedies (May 12, 2004), available at <https://wcm.coe.int/ViewDoc.jsp?id=743317&Lang=en>.

165. See Committee of Ministers, Recommendation Rec (2002)13 on the Publication and Dissemination in the Member States of the Text of the European Convention on Human Rights and of the Case-law of the European Court of Human Rights (Dec. 18, 2002), available at <https://wcd.coe.int/ViewDoc.jsp?id=331657&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>; see also Committee of Ministers, Resolution Res (2002)58 on the Publication and Dissemination of the Case-law of the European Court of Human Rights (Dec. 18, 2002), available at <https://wcd.coe.int/ViewDoc.jsp?id=331559&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>.

166. The main objectives of the Warsaw Information Office are "to provide [potential] applicants with information on the requirements as to Convention admissibility, to make them aware of the domestic remedies available," and to inform them about alternative dispute resolution systems on the domestic level. Lord Woolf recommended in his report to develop the Warsaw Information Office concept further to create "Satellite Offices of the Registry" in the member states. See Lord Woolf Report, *supra* note 112, at 453-54.

167. Luzius Wildhaber, *Consequences for the European Court of Human Rights of Pro-*







**UNITED STATES IMPLEMENTATION OF THE  
INTERNATIONAL CRIMINAL COURT:  
TOWARD THE FEDERALISM OF FREE NATIONS**

LAUREN FIELDER REDMAN\*

I.	BACKGROUND: THE UNITED STATES AND THE ICC.....	38
II.	PRINCIPLE UNITED STATES OBJECTIONS TO THE INTERNATIONAL CRIMINAL COURT.....	41
	<i>A. Constitutional Concerns</i> .....	41
	<i>1. Constitutional Due Process Concerns in General</i> ..	41
	<i>2. No Right to Trial by Jury</i> .....	41
	<i>3. Other Due Process Concerns</i> .....	42
	<i>B. Sovereignty Concerns</i> .....	43
	<i>1. The ICC May Restrict Military Action That Is in the National Security Interest of the United States or Its International Peacekeeping Missions</i> .....	43
	<i>2. The ICC May Undermine the U.N. Security Council</i> .....	45
	<i>3. The Referral System and the Robust Office of the Prosecutor</i> .....	46
	<i>4. The Inadequacy of the Appeals Process and the Possibility of Double Jeopardy</i> .....	47
III.	THRESHOLD CONSTITUTIONAL ISSUES: QUESTIONS OF “ULTIMATE POWER”.....	48
	<i>A. Comparing Surrender and Extradition: An Argument for the Constitutionality of the ICC</i> .....	48
	<i>1. Surrender Under the Rome Statute of the International Criminal Court</i> .....	48
	<i>2. United States Extradition Law</i> .....	51
	<i>3. Analysis</i> .....	60
	<i>B. Structural Concerns</i> .....	62
	<i>1. Does Article III of the Constitution Allow Congress to Delegate Criminal Jurisdiction to the ICC? ....</i>	62
	<i>2. Does the ICC’s Jurisdiction Over U.S. Nationals for Crimes Committed on U.S. Soil Violate the Constitution? .....</i>	65
	<i>3. The Jury Issue Revisited</i> .....	66
IV.	USING A FEDERALIST “LEGAL PROCESS” APPROACH TO MEDIATE REMAINING TENSIONS BETWEEN THE UNITED	

---

\* Lecturer in International Law, Baylor University. J.D. University of Tulsa, LL.M., University of Texas. I am deeply grateful to John Dzienkowski, Derek Jinks and Ernest Young at the University of Texas School of Law for their helpful comments and suggestions.

	STATES AND THE ICC.....	67
	<i>A. A Legal Process Approach Will Make the United States More Comfortable With the ICC.....</i>	68
	<i>B. Proposed Rules and Policies for the ICC to Adopt to Promote Institutional Settlement and Resolve U.S. Objections.....</i>	70
	1. <i>High Threshold for Opening Cases Should Be Rigidly Enforced.....</i>	70
	2. <i>The Complementarity Regime Should Be Strengthened.....</i>	72
	3. <i>“Unwilling” and “Unable” Should Be Clearly Defined.....</i>	72
	4. <i>Allow Questions of Law From National Courts....</i>	73
	5. <i>Disallow Appeal for Acquittals.....</i>	74
	6. <i>Independent Appellate Body Should Be Established.....</i>	74
	<i>C. Proposed Policy for the United States to Adopt to Promote Institutional Settlement: Congress Should Establish a Panel of Judges to Render Decisions on Whether the ICC Has Exceeded Its Authority.....</i>	74
	<i>D. Other Ways That a Legal Process Approach Will Foster a Workable, Peaceful Relationship Between U.S. Courts and the ICC.....</i>	75
	1. <i>Rules of Abstention.....</i>	76
	2. <i>Standards of Review and Collateral Attacks.....</i>	76
	3. <i>Choice of Law.....</i>	77
V.	IMPLEMENTING LEGISLATION THAT TAKES INTO CONSIDERATION CONSTITUTIONAL ISSUES AND THE LEGAL PROCESS METHOD.....	77
	<i>A. Crimes.....</i>	78
	<i>B. Cooperation and Judicial Assistance.....</i>	79
	<i>C. Surrender.....</i>	80
	<i>D. Immunity.....</i>	81
	<i>E. Bail.....</i>	81
	<i>F. Repeal of the American Servicemembers’ Protection Act (ASPA).....</i>	82
	<i>G. Status of Force Agreements (SOFAs).....</i>	82
VI.	CONCLUSION.....	83

The political winds are changing, and a more liberal United States government may very well be receptive to ratification of the Rome Statute of the International Criminal Court (Rome Statute). The nature and scope of international law are also changing. Indi-

viduals are sharing responsibility with states for grave breaches of international law, and globalization has resulted in a marked increase in international tribunals deciding disputes affecting individual interests. Despite these trends, Americans have been wary of the International Criminal Court (ICC). The roots of this fear run deep. One can see shadows of this distrust at the 1787-1788 Constitutional Convention, where “fiercely independent states were being enjoined to surrender part of their precious sovereignty to an as yet inchoate united entity and were doing so at best grudgingly.”<sup>1</sup> Out of that gathering, the U.S. Constitution was born and federalism principles set in place that slowly evolved and soothed these fears. These same principles can and should be implemented to govern relations between the ICC and domestic courts, for there is much to be gained from an international criminal court with the power to deter and punish those who commit the most severe crimes. In addition, a positive interaction between the ICC and the United States will contribute to what philosopher Emmanuel Kant named “the federalism of free nations,” which is a “decentralized system of cooperative relations among nations that, where possible, advances goals of democracy and respect for individual rights.”<sup>2</sup>

This article provides a brief introduction to the background and workings of the ICC in Part I. Part II engages the primary U.S. objections to the ICC. Part III considers whether acceding to the Rome Statute is constitutional by comparing surrender to extradition. Part IV argues that federalism principles, specifically the Legal Process approach and institutional settlement, can be used to interpret the ICC in a less threatening way, and introduces the idea that these principles can be used to build a healthy framework of cooperation between the United States and the ICC. In doing so, this Part proposes rules and policies that the ICC should implement to encourage U.S. participation and strengthen institutional settlement. Finally, Part V identifies areas that will need to be included in legislation to implement the Rome Statute in U.S. law.

---

1. Lawrence Weschler, *Exceptional Cases in Rome: The United States and the Struggle for an ICC*, in *THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW* 85, 88 (Sarah B. Sewall & Carl Kaysen eds., 2000).

2. See Jenny S. Martinez, *Towards An International Judicial System*, 56 *STAN. L. REV.* 429, 461 (2003) (discussing Kantian philosophy in relation to international law).

## I. BACKGROUND: THE UNITED STATES AND THE ICC

The United States has long believed in the concept of an international criminal court to provide a forum for trying those accused of committing the most abhorred crimes. The idea of an international criminal court was first conceived after World War I, but did not materialize.<sup>3</sup> The concept resurfaced after World War II and resulted in the International Military Tribunal in Nuremberg. Although an ad hoc instead of permanent tribunal, Nuremberg proved hugely important in the journey to the ICC, for the tribunal ushered in the concept of individual responsibility for the most serious crimes.<sup>4</sup> World War II was followed by decades of the Cold War, which paralyzed international agreement on an international criminal court.<sup>5</sup> In 1989, Trinidad and Tobago, concerned about international drug activity, initiated a push for a permanent court.<sup>6</sup> Other nations, again including the United States, began to have a renewed interest in a permanent tribunal to punish international crimes. The U.N. General Assembly mandated that the International Law Commission (ILC) prepare a draft convention establishing the court.<sup>7</sup> While this process was taking place, conflicts involving major humanitarian crises broke out in the Balkans and Rwanda,<sup>8</sup> so two ad hoc criminal tribunals were created by the U.N. Security Council to prosecute atrocities in different areas of the world. They were the International Tribunal for the Former Yugoslavia (ICTY)<sup>9</sup> and the International Criminal Tribu-

---

3. Joanna Harrington, et al., *Introduction, in BRINGING POWER TO JUSTICE? THE PROSPECTS OF THE INTERNATIONAL CRIMINAL COURT* 3, 3-4 (Joanna Harrington et al. eds., 2006). A post-war compromise resulted in German war criminals being tried in Germany. *Id.*

4. International law had long recognized war crimes, but had held states responsible for breaches. See ANTONIO CASSESE, *INTERNATIONAL LAW* 435-36 (2d ed. 2005). An International Military Tribunal was established in Tokyo in the aftermath of World War II as well, but it is not given as much historical weight as Nuremberg because it is widely believed that some of the defendants were not treated fairly. Leila N. Sadat, *The Evolution of the ICC: From the Hague to Rome and Back Again, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW* 31, 34 (Sarah B. Sewall & Carl Kaysen eds., 2000).

5. Anne-Marie Slaughter, *Memorandum to the President, in TOWARD AN INTERNATIONAL CRIMINAL COURT?* 1, 7 (Alton Frye ed., 1999).

6. Harrington, *supra* note 3, at 5.

7. *Id.*

8. See S.C. Res. 827, U.N. SCOR, 48th Year, 1993 S.C. Res. & Dec. at 29, U.N. Doc. S/INF/49 (1993) (establishing The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991).

9. See 1994 S.C. Res. 955, U.N. SCOR, 49th Year, 1994 S. C. Res. & Dec. at 15, U.N. Doc. S/INF/50 (1994) (establishing The International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda).

nal for Rwanda (ICTR), for which the U.S. provided much support.<sup>10</sup> These tribunals, though they experienced difficulties, rekindled interest in a permanent court.<sup>11</sup> The United States remained supportive of efforts to form an international criminal court, and envisioned referrals for prosecution to come from the U.N. Security Council as they had under the ICTY and ICTR.<sup>12</sup> This system would effectively insulate the U.S. from prosecution because of its veto power in the Council. The United States took early leadership in the Rome Conference establishing the ICC, and was successful in its push to incorporate rights-protecting provisions into the Rome Statute.<sup>13</sup> The United States became disenchanted with the process when it became clear that they would be unsuccessful in the push for complete U.N. Security Council control over prosecutions.<sup>14</sup> The United States was also bothered by the broad scope of the war crimes provisions and the future inclusion of the crime of aggression. Ultimately, the United States voted against the Rome Statute, as did China, Iraq, Israel, Libya, Qatar and Yemen.<sup>15</sup> President Clinton, although displeased with the final draft, signed the treaty on the last day it was open for signature, but it was never ratified, and President Bush withdrew the signature in 2002.<sup>16</sup>

Despite the lack of U.S. support for the ICC, the treaty was adopted on July 17, 1998, and entered into force on July 1, 2002.<sup>17</sup> As of November 2, 2007, the treaty has 105 parties.<sup>18</sup> The Rome Statute provides a forum for prosecuting individuals accused of the most egregious international law crimes, namely genocide, crimes against humanity and war crimes.<sup>19</sup> The crime of aggression is

---

10. See Slaughter, *supra* note 5, at 6. The U.S. provided money, attorneys, investigators and staff. *Id.*

11. The most severe difficulties included financing the tribunals and recruiting qualified personnel, as well as corruption in the ICTR. See Sadat, *supra* note 4, at 38.

12. In 1997, a presidential address to the U.N. actually called for the court's creation. Slaughter, *supra* note 5, at 7.

13. See *id.* at 7.

14. *Id.*

15. *Id.*

16. The primary objections of the United States to the ICC are discussed in Part II, *infra*. They can be summarized as follows: uncertainty over the definition of the crime of aggression; the possible future inclusion of crimes against international drug trafficking and terrorism; the referral system; the independence of the Prosecutor; the fact that an opt out period for war crimes jurisdiction applies only to states parties; the unique position of the United States as "world policeman," which puts U.S. officials and military leaders in a risky position with the ICC; and due process concerns.

17. PHILIPP MEISSNER, THE INTERNATIONAL CRIMINAL COURT CONTROVERSY: A SCRUTINY OF THE UNITED STATES' MAJOR OBJECTIONS AGAINST THE ROME STATUTE 11 (2005).

18. International Criminal Court, *The States Parties to the Rome Statute*, <http://www.icc-cpi.int/statesparties.html> (last visited Nov. 2, 2007).

19. International Criminal Court, *About the Court*, <http://www.icc-cpi.int/about.html>

also included in the subject matter jurisdiction of the court, but is left undefined by the statute. The Assembly of States Parties must reach a definition of aggression by supermajority agreement before the ICC may exercise jurisdiction over this crime.<sup>20</sup> Investigations and prosecutions may be initiated by the U.N. Security Council, a state party or the court's Prosecutor (with authorization from two of three pre-trial chamber judges).<sup>21</sup> The ICC is built around a system of complementarity, which means that the court is a court of last resort.<sup>22</sup> It will not prosecute a case unless a domestic judicial system with jurisdiction is unwilling or unable to effectively prosecute the case.<sup>23</sup>

Although the concerns of the United States are valid, and will be discussed in depth later in this paper, there is much to be gained from U.S. support of the ICC. The interaction of the ICC and the United States can serve multiple functions, such as promoting an institutional framework for cooperation, promoting compliance with international law and reinforcing rights-respecting democracy at the local level.<sup>24</sup> The ICC promotes the values of justice, due process and the rule of law, all of which are values of central importance to Americans.<sup>25</sup> In addition, the ICC with its extensive scheme of rights protections may prove to be a safer place for American service members who have fallen into enemy hands to be tried than the foreign country where they are being held if that country refuses extradition to the United States.<sup>26</sup> In deciding to ratify the Rome Statute, the United States must accept that these advantages outweigh U.S. concerns, and should look for ways to minimize the conflict between the two systems.

---

(last visited Nov. 2, 2007). See Rome Statute of the International Criminal Court, arts. 6-8, July 17, 1998, 2187 U.N.T.S. 90, [hereinafter Rome Statute]. for definitions of each of these crimes.

20. See MEISSNER, *supra* note, 17 at 24. It is unlikely that the court will be able to prosecute the crime of aggression in the near future. *Id.*

21. See *id.* at 25-26.

22. See *About the Court*, *supra* note 19.

23. *Id.* See Part IV.B.2., *infra* for further discussion of complementarity. As of June 7, 2007, there were four situations where the Prosecutor had opened investigations: those of the Democratic Republic of Congo, Uganda, the Central African Republic, and Darfur in the Sudan. See International Criminal Court, *Situations and Cases*, <http://www.icc-cpi.int/cases.html> (last visited Nov. 2, 2007). The U.N. Security Council referred the Darfur situation to the ICC, while Uganda, Congo and the Central African Republic referred their own cases. *Id.*

24. See Martinez, *supra* note 2, at 516.

25. David J. Scheffer, *The U.S. Perspective on the ICC*, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW 115, 115-16 (Sarah B. Sewall & Carl Kaysen eds., 2000).

26. Robinson O. Everett, *American Servicemembers and the ICC*, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW 137, 141 (Sarah B. Sewall & Carl Kaysen eds., 2000).



This is where tools from the U.S. federal system are invaluable.

## II. PRINCIPLE UNITED STATES OBJECTIONS TO THE INTERNATIONAL CRIMINAL COURT

The United States has articulated many concerns about the ICC. The objections fall into several categories, some having merit and some being purely political. Those having merit can roughly be divided into constitutional objections and infringement-of-sovereignty objections. These grievances should be divided in this way because, as this paper will show in Parts III and IV, the majority of the constitutional concerns are largely pretextual, while the objections relating to the court's capacity to trump national sovereignty are really what is driving the United States' opposition to the ICC.

### A. Constitutional Concerns

#### 1. Constitutional Due Process Concerns in General

One of the most proclaimed criticisms of the ICC is that the Rome Statute "does not adequately embody the type of due process rights that American nationals would be entitled to receive under U.S. law and the U.S. Constitution."<sup>27</sup> Under the Rome Statute, the possibility exists for a U.S. citizen to be tried by the ICC for a crime that is an offense in the United States without the "full and undiluted guarantees of the Bill of Rights."<sup>28</sup> Despite the fact that there are procedural protections for accused criminals in the Rome Statute, the ICC's detractors point out that the protections in the Bill of Rights and the Rome Statute do not mirror each other.<sup>29</sup>

#### 2. No Right to Trial by Jury

In the opinion of the United States, the ICC's largest incompatibility with the Constitution is its failure to provide a trial by jury, using a three judge panel instead.<sup>30</sup> This objection cannot be dismissed lightly, because the right to trial by jury "is among the

---

27. Mariano-Florentino Cuéllar, *The International Criminal Court and the Political Economy of Antitreaty Discourse*, 55 STAN. L. REV. 1597, 1605 (2003).

28. Lee A. Casey, *The Case Against the International Criminal Court*, 25 FORDHAM INT'L L.J. 840, 858 (2002).

29. See Protection of United States Troops From Foreign Prosecution Act of 1999, H.R. 2381, 106th Cong. § 2(5) (1999).

30. See Cuéllar, *supra* note 27, at 1610.

most important rights guaranteed by the Constitution.”<sup>31</sup> In fact, it is the only due process right that was incorporated into the original six articles of the United States Constitution.<sup>32</sup> Its importance in the American criminal justice system goes far beyond an information gathering mechanism; indeed, it is believed to be a “fundamental and necessary check on the use and abuse of governmental power.”<sup>33</sup>

### 3. *Other Due Process Concerns*

There are several other due process protections that are missing or inadequate in the Rome Statute. In addition to having the right to trial by jury, the U.S. Constitution mandates that a defendant have a speedy, public trial.<sup>34</sup> This trial must be held in the state where the crime was committed.<sup>35</sup> Although the Rome Statute provides for the accused to be entitled to a public hearing without inexcusable delay,<sup>36</sup> there is no firm definition of what constitutes inexcusable delay.<sup>37</sup> The ICTY, which served as a model for the ICC, has given some indication that five years in custody awaiting trial might not be undue delay.<sup>38</sup> In contrast, the United States law makes plain what is unacceptable delay. In the U.S., the defendant has the right to be brought to trial within seventy days of indictment.<sup>39</sup>

Further, the Rome Statute, while providing a watered down version of the exclusionary rule, does not protect accused persons against unreasonable searches and seizures.<sup>40</sup> Also of concern is the fact that the Rome Statute lacks a provision giving accused persons the right to confront and cross-examine witnesses, the

---

31. Casey, *supra* note 28, at 861.

32. *See id.* (citing U.S. CONST. art. III, § 2).

33. Casey, *supra* note 28, at 861. Casey claims that a trial by jury’s nature is so fundamental that it should be respected by an international court. *Id.* at 862. However, “few would suggest that the nations of Western Europe following the civil law tradition are fundamentally unjust.” Paul D. Marquardt, *Law Without Borders: The Constitutionality of an International Criminal Court*, 33 COLUM. J. TRANSNAT’L L. 73, 147 (1995).

34. *See* U.S. CONST. amend. VI.

35. *See id.* at art. III, § 2, cl. 3.

36. Rome Statute, *supra* note 19, at art. 60(4).

37. *See* Casey, *supra* note 28, at 863 (citing Rome Statute, *supra* note 19).

38. *See id.* at 863-864 (citing *The Prosecutor v. Aleksovski*, Prosecution Response to the Defense Motion for Provisional Release, ICTY Case No. IT-95-14/1-PT, Jan. 14, 1998, p 3.2.5). This position has been echoed by the European Court of Human Rights, which has approved provisional custody stays of three and four years awaiting trial. *See* Casey, *supra* note 28, at 864.

39. *Id.* at 863 (citing 18 U.S.C.S. §3161 (c)(1) (2001)).

40. *See* Douglas E. Edlin, *The Anxiety of Sovereignty: Britain, the United States and the International Criminal Court*, 29 B.C. INT’L & COMP. L. REV. 1, 8 (2006) (citing Rome Statute, *supra* note 19, at art. 69 (7)).

right to know the identity of hostile witnesses and the right to exclude hearsay evidence.<sup>41</sup> Finally, convicted persons under the ICC are not protected against double jeopardy--a Fifth Amendment protection--since the Prosecutor can appeal an acquittal verdict.<sup>42</sup>

### *B. Sovereignty Concerns*

#### *1. The ICC May Restrict Military Action That Is in the National Security Interest of the United States or Its International Peacekeeping Missions*

The central sovereignty argument of the United States is that no entity other than its own government should influence how or when it will undertake its interests or defend itself.<sup>43</sup> The United States is the biggest peacekeeper in the world, safeguarding its national security and defending its allies and friends.<sup>44</sup> There is no other state that consistently deploys hundreds of thousands of soldiers around the world.<sup>45</sup> Indeed, "America is expected to intervene in humanitarian crises."<sup>46</sup> This places the United States in a uniquely precarious position with respect to the ICC. Marcella David conducted a study in which she examined how recent American peacekeeping missions would have been impacted had the Rome Statute been in force at the time they were conducted.<sup>47</sup> She studied American interventions in Iraq, Bosnia and Sudan and noted that the United States could have been exposed to charges of war crimes and/or crimes of aggression in all three situations.<sup>48</sup> This problem is exacerbated by the treaty framework

---

41. See Casey, *supra* note 28, at 863. These are all areas that the ICTY was weak on due process protections. See MICHAEL P. SCHARF, *BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG* 7, 67, 108-09 (1997).

42. Casey, *supra* note 28, at 864.

43. Edlin, *supra* note 40, at 15. According to U.S. Senator Rod Grams, "the United States will not cede its sovereignty to an institution which claims to have the power to override the U.S. legal system and pass judgment on our foreign policy actions." *Id.* at 7.

44. See David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, 18-19 (1999).

45. See William K. Lietzau, *International Criminal Law After Rome: Concerns from a U.S. Military Perspective*, 64 LAW & CONTEMP. PROBS. 119, 126 (2001).

46. See John Seguin, Note, *Denouncing the International Criminal Court: An Examination of U.S. Objections to the Rome Statute*, 18 B.U. INT'L L.J. 85, 96 (2000) (citing David J. Scheffer, *Status of Negotiations on the Establishment of an International Criminal Court*, p.1, (July 15, 1998) available at [http://www.state.gov/www/policy\\_remarks/1998/980715\\_scheffer\\_icc.html](http://www.state.gov/www/policy_remarks/1998/980715_scheffer_icc.html)).

47. See Edlin, *supra* note 40, at 15 (citing Marcella David, *Grotius Repudiated: The American Objections to the International Criminal Court and the Commitment to International Law*, 20 MICH. J. INT'L L. 337, 374-84 (1999)).

48. David, *supra* note 47, at 374-384 (stating that the Iraq intervention would be the most legitimate area of complaint, the Bosnia situation of weaker concern, and the Sudan action might have led to unsubstantiated political claims).

which enables internal conflicts—often the type of conflict with the worst humanitarian crises—to escape the jurisdiction of the court, while subjecting peacekeepers to the court’s jurisdiction.<sup>49</sup> Therefore,

it might be argued that the Rome Treaty combines the worst of both worlds. Reaching the most egregious violations of fundamental human rights—those occurring in internal armed conflicts—still requires Security Council involvement . . . but it does not require Security Council involvement to put even non-party peacekeepers at risk . . . whereby U.S. armed forces operating overseas could conceivably be prosecuted by the ICC even if the United States has not agreed to be bound by the treaty.<sup>50</sup>

The arguments of the United States center on military actions, specifically war crimes and the crime of aggression.<sup>51</sup> The crime of aggression is especially problematic in the eyes of the United States since it is a politically controversial crime.<sup>52</sup> It is a crime that remains undefined despite vigorous attempts to come to a definition at the Rome Conference.<sup>53</sup> Over the robust protests of the U.S. delegation, the crime was added to the Statute as a prospective crime despite its undefined status.<sup>54</sup> The United States fears that use of the crime of aggression as a prosecutorial tool “could be without limit and call into question any use of military force or even economic sanctions” and could call into question the credibility of the court.<sup>55</sup>

Complementarity as it is now understood is inadequate to ease U.S. fears over this issue.<sup>56</sup> The recent trials of U.S. soldiers accused of torturing Iraqi prisoners illustrates this problem.<sup>57</sup> While

---

49. See Lietzau, *supra* note 45, at 129 (stating that “[m]ost atrocities—and certainly such is the case in recent years—are committed internally”).

50. *Id.* at 129-30.

51. See Gerhard Hafner, *An Attempt to Explain the Position of the USA Towards the ICC*, 3 J. INT’L CRIM. JUST. 323, 327 (2005) (stating that the United States does not feel that there is any danger of allegations of genocide or crimes against humanity).

52. See Lietzau, *supra* note 45, at 122. This is in contrast to war crimes and crimes against humanity, which have elements that are well established under international law and are substantially the same under customary international law. *Id.* at 124.

53. See Scheffer, *supra* note 44, at 21.

54. *Id.* The crime is prospective, meaning that it will only be prosecuted after it is defined. The U.S. position is that the U.N. Security Council should determine that a crime of aggression has occurred before the ICC could prosecute. See *id.*

55. *Id.*

56. See Hafner, *supra* note 51, at 327.

57. See *id.*

the U.S. military tried the individuals accused of perpetrating the abuses, this would not have shielded high ranking military personnel from prosecution under the ICC:

[I]t is not only the individual soldier who would be likely to become the subject of investigations by the ICC. It is rather the person higher in the chain of command, and ultimately the highest state actors who would be affected. It is unlikely that the United States would take judicial action on the national level against such persons.<sup>58</sup>

This raises symbolic sovereignty issues. Americans cannot accept the possibility of the “spectacle of an American President or high-ranking military or political official standing trial before a non-American tribunal.”<sup>59</sup>

## 2. *The ICC May Undermine the U.N. Security Council*

The Charter of the United Nations assigns primary responsibility for maintenance of international peace and security to the U.N. Security Council.<sup>60</sup> Because the ICC also deals in matters that affect international peace and security, and the U.N. Charter’s obligations were designed to prevail over other international agreements,<sup>61</sup> the United States believes that the ICC displaces the role of the Security Council.<sup>62</sup> According to this position, the role of the Security Council may be usurped by withholding from individual

---

58. *Id.* (stating that this threat will only increase as more states sign on to the Rome Statute).

59. Edlin, *supra* note 40, at 18 (stating that this situation would have “symbolic and practical effects on American position, prestige, and power [which would be] intolerable to the sensibilities of many Americans”).

60. *See id.* at 7 (citing U.N. Charter arts. 24(1) & 39 which provide that “[i]n order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf,” and “[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”)

61. *See* Diane Marie Amann & M.N.S. Sellers, *The United States of America and the International Criminal Court*, 50 AM. J. COMP. L. 381, 386 (2002) (citing U.N. Charter art. 103 which provides that “[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”). This presumably includes the ICC.

62. *See* Amann & Sellers, *supra* note 61, at 386-87. Note, however, that the other Nuremberg members of the Security Council—Britain, France and Russia—have accepted the ICC. *See* Edlin, *supra* note 40, at 6.

permanent members of the Security Council the right to veto a prosecution by the ICC.<sup>63</sup> This may have been the intention of some states parties to the Rome Statute.<sup>64</sup> The danger as seen through the lens of the United States is that this undermining of the role of the Security Council has the potential to “transform fundamental international relations” in a way that is detrimental to international peace and security.<sup>65</sup>

### 3. *The Referral System and the Robust Office of the Prosecutor*

The United States hoped for a referral system by which the Security Council refers cases to the ICC, however the U.S. delegation was not successful on this point.<sup>66</sup> The Prosecutor, with the approval of a three judge pretrial panel, can initiate an investigation.<sup>67</sup> According to the United States, the office of the ICC Prosecutor should not have this power because the office is lacking nec-

63. See Edlin, *supra* note 40, at 7.

64. See Lietzau, *supra* note 45, at 134 (stating that the great deal of authority vested in ICC judges was a direct attempt to undermine the role of the Security Council, due in part to disdain for the Security Council by some states).

65. *Id.* at 135.

66. Rome Statute, *supra* note 19, at art 15.

67. *Id.* (stating that:

1. The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.

2. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.

3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.

4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.

5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation.

6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.)

essary checks and balances.<sup>68</sup> For example, the office answers to no executive authority.<sup>69</sup>

The reason for making the Prosecutor so independent was to avoid a politicized court.<sup>70</sup> However, the U.S. position is that the independent Prosecutor makes the court more politicized. The U.S. fears that the Prosecutor can manipulate the court to achieve political agendas.<sup>71</sup> This political manipulation is possible because the office has great power over the agenda of the court.<sup>72</sup> The United States fears that there is the potential for “nondemocratic governments [to] control the personnel and activities of the ICC.”<sup>73</sup> A related fear is that U.S. military personnel will not be able to act without fearing political agendas.<sup>74</sup>

#### 4. *The Inadequacy of the Appeals Process and the Possibility of Double Jeopardy*

The Rome Statute provides an appeals process.<sup>75</sup> The United States has two major issues with the way the appeals process works. First, the appeal is to an appeals division of the court, which has “institutional interests identical to those of the other ICC organs.”<sup>76</sup> No review by an independent body is available.<sup>77</sup> In addition, the Rome Statute permits appeals of acquittals.<sup>78</sup> This

68. See Casey, *supra* note 28, at n.15 (stating that the judicial bench, Prosecutor’s office and registrar are “merely a bureaucratic division of authority”).

69. See Lietzau, *supra* note 45, at 137.

70. See Matthew A. Barrett, Comment, *Ratify or Reject: Examining the United States’ Opposition to the International Criminal Court*, 28 GA. J. INT’L & COMP. L. 83, 95 (1999). Some states participating at the Rome Conference believed an independent Prosecutor essential to the court. See Alexander A.K. Greenawalt, *Justice Without Politics? Prosecutorial Discretion and the International Criminal Court*, 39 N.Y.U. J. INT’L L. & POL. 583, 591-592 (2007).

71. See David M. Baranoff, Comment, *Unbalance of Powers: The International Criminal Court’s Potential to Upset the Founders’ Checks and Balances*, 4 U. PA. J. CONST. L. 800, 802 (2002). The U.S. fears this especially in the context of the crime of aggression. See Amann & Sellers, *supra* note 62, at 389.

72. See Greenawalt, *supra* note 70, at 585-86.

73. Amann & Sellers, *supra* note 62, at 388 (explaining that “[e]ach state party to the ICC is to have one vote in the Assembly of State Parties, the body empowered to chose and remove the prosecutor and judges” (citing Rome Statute, *supra* note 19, at art. 112)). This is problematic because the states voting for the Prosecutor and judges do not always adhere to the rule of law. *Id.* at 388. This is especially troubling to the United States in light of an “emerging multi-polar, post-Cold War negotiating dynamic.” Lietzau, *supra* note 45, at 120.

74. See Edlin, *supra* note 40, at 16 (citing Lietzau, *supra* note 45, at 125-126).

75. Rome Statute, *supra* note 19, at art. 81(1)(b) (providing that the convicted person may make an appeal based on procedural error, error in fact, error of law or “[a]ny other ground that affects the fairness or reliability of the proceedings or decision”).

76. Casey, *supra* note 28, at 847.

77. *Id.*

78. Rome Statute, *supra* note 19, at art. 81(1)(a) (providing that the Prosecutor may make an appeal based on procedural error, error of fact or error of law).

raises serious double jeopardy concerns for the United States<sup>79</sup>

### III. THRESHOLD CONSTITUTIONAL ISSUES: QUESTIONS OF “ULTIMATE POWER”<sup>80</sup>

Because the United States cannot enter into treaties that violate the Constitution,<sup>81</sup> it is necessary as a threshold matter to consider whether jurisdiction in criminal cases can be delegated from the U.S. government to the ICC.<sup>82</sup> These constitutional issues can be understood by comparing surrender under the ICC to the current extradition regime in place in the United States, then examining whether Article III of the Constitution allows Congress to delegate criminal jurisdiction to the ICC.

#### A. Comparing Surrender and Extradition: An Argument for the Constitutionality of the ICC

##### 1. Surrender Under the Rome Statute of the International Criminal Court

###### a) Background and Procedure

Article 89 of the Rome Statute requires the surrender of suspects to the jurisdiction of the court.<sup>83</sup> The Rome Statute uses the term “surrender” as opposed to “extradition,” stating that suspects are “surrendered” to the jurisdiction of the ICC and “extradited” to the jurisdiction of another state.<sup>84</sup> The drafters of the Rome Stat-

---

79. See Casey, *supra* note 28, at 864. The Fifth Amendment of the U.S. Constitution protects criminal defendants against double jeopardy. U.S. Const. amend. IV cl. 2. The prohibition against double jeopardy is firmly established in Anglo-American law, having been in place since the seventeenth century. See Casey, *supra* note 28, at 864.

80. Ernest A. Young, *Institutional Settlement in a Globalizing Judicial System*, 54 DUKE L.J. 1143, 1161 (2005).

81. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 137 (1972).

82. See Young, *supra* note 28, at 1161.

83. Rome Statute, *supra* note 19, at art. 89(1).

The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 91, to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.

Id.

84. Roy S. Lee, *States' Responses: Issues and Solutions*, in STATES' RESPONSES TO ISSUES ARISING FROM THE ICC STATUTE: CONSTITUTIONAL, SOVEREIGNTY, JUDICIAL COOPERATION AND CRIMINAL LAW 1, 18-19 (Roy S. Lee ed., 2005). The purpose of distinguishing surrender from extradition was to “express the special relationship between the ICC and states parties,” and to try to avoid constitutional problems with extradition in various



ute were purposeful in making this distinction so that states party to the statute whose understanding of extradition excluded extradition of its own nationals would not have a loophole through which to escape the surrender requirements of the ICC.<sup>85</sup> The Rome Statute leaves states parties discretion in designing surrender legislation, yet mandates that states adopt a straightforward procedure.<sup>86</sup> The surrender request must be accompanied by evidence that will give the judicial officer of the sending state cause to believe the person in question committed the crime.<sup>87</sup> The Rome Statute calls for a determination of whether the person before the court is the person named in the warrant, whether the person has been arrested in accordance with the proper process, and that the person arrested had his or her rights protected.<sup>88</sup> The Statute calls on a domestic court to immediately consult with the ICC if there are any problems meeting the requirements of surrender.<sup>89</sup> Like the relaxed standards for extraditing suspects in conjunction with the ICTY and ICTR, prejudices are “presumed to be absent in this

---

states. *Id.* at 19.

85. See Helen Duffy, *National Constitutional Compatibility and the International Criminal Court*, 11 DUKE J. COMP. & INT’L L. 5, 21 (2001). For a discussion of extradition of nationals and the U.S. stance on this issue, see *infra* Part III. A.3.

86. See Lee, *supra* note 44, at 37. See also, Rome Statute, *supra* note 19, at art. 91(2)(c) (providing that “those requirements should not be more burdensome than those applicable to requests for extradition pursuant to treaties or arrangements between the requested State and other States and should, if possible, be less burdensome, taking into account the distinct nature of the Court”).

87. Rome Statute, *supra* note 19, at art. 91(2) & (3) provides the following procedural instructions:

§ 2. In the case of a request for the arrest and surrender of a person for whom a warrant of arrest has been issued by the Pre-Trial Chamber under article 58, the request shall contain or be supported by:

- (a) Information describing the person sought, sufficient to identify the person, and information as to that person’s probable location;
- (b) A copy of the warrant of arrest; and
- (c) Such documents, statements or information as may be necessary to meet the requirements for the surrender process in the requested State, except that those requirements should not be more burdensome than those applicable to requests for extradition pursuant to treaties or arrangements between the requested State and other States and should, if possible, be less burdensome, taking into account the distinct nature of the Court.

§3. In the case of a request for the arrest and surrender of a person already convicted, the request shall contain or be supported by:

- (a) A copy of any warrant of arrest for that person;
- (b) A copy of the judgement of conviction;
- (c) Information to demonstrate that the person sought is the one referred to in the judgement of conviction; and
- (d) If the person sought has been sentenced, a copy of the sentence imposed and, in the case of a sentence for imprisonment, a statement of any time already served and the time remaining to be served.

88. *Id.* at art. 59(2).

89. *Id.* at art 97.

type of international tribunal.”<sup>90</sup> Finally, the Rome Statute requires that a “State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question in accordance with its laws and the provisions of Part 9.”<sup>91</sup> A state must cooperate fully with a request for surrender, since there are no exceptions to a state’s obligation to cooperate with the ICC in the arrest and surrender of the accused.<sup>92</sup>

*b) Post-Surrender Protections*

Once the defendant is surrendered to the ICC, he or she is entitled to a broad scheme of protections much like those criminal defendants in the United States can expect to receive. In fact, the U.S. delegation to the drafting of the Rome Statute was instrumental in the inclusion of many of these provisions giving those accused before the ICC due process-like protections. The American negotiators at Rome worked diligently to have the Rome Statute incorporate U.S. constitutional protections into the Statute.<sup>93</sup> The result is a system that closely mirrors the U.S. Bill of Rights.<sup>94</sup> In fact, one past State Department and Defense Department legal adviser, in addressing Congress, invited them “to not regard it . . . with suspicion, (but) rather with pride . . . since . . . it cannot be denied that the Treaty of Rome contains the most comprehensive list of due process requirements which has so far been promulgated.”<sup>95</sup> For example, ICC defendants have the following enumerated rights:

[T]he presumption of innocence (Art. 66); assistance of counsel (Arts. 67(1)(b), (d)); the right to remain silent (Art. 67(1)(g)); the privilege against self-

---

90. Kenneth J. Harris & Robert Kushen, *Surrender of Fugitives to the War Crimes Tribunals for Yugoslavia and Rwanda: Squaring International Legal Obligations With the U.S. Constitution*, 7 CRIM. L.F. 561, 594. This same presumption against prejudice is inherent in the U.S. federal system.

91. Rome Statute, *supra* note 36, at art. 59(1).

92. See Duffy, *supra* note 45, at 20.

93. See Ruth Wedgwood, *The Constitution and the ICC*, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW 119, 123 (Sarah B. Sewall & Carl Kaysen eds., 2000).

94. See MEISSNER, *supra* note 17, at 70-71 for an excellent chart that shows how ICC protections compare to U.S. constitutional protections. The only major departure is the absence of the right to a jury trial.

95. *Id.* at 71, quoting Monroe Leigh, U.S. Government Printing Office 2000b\*, p.96 (prepared statement of Monroe Leigh). Elsewhere, Leigh claims that in some ways the ICC protections are broader than the Bill of Rights. Monroe Leigh, *The United States and the Statute of Rome*, 95 AM. J. INT’L L. 1, 124, 131 (2001).

incrimination (Art. 67(1)(g)); the right to a written statement of charges (Art. 61(3)); the right to examine adverse witnesses (Art. 67(1)(e)); the right to have compulsory process to obtain witnesses (Art. 67(1)(e)); the prohibition of *ex post facto* crimes (Art. 22); protection against double jeopardy (Art. 20); freedom from warrantless arrest and search (Arts. 57 *bis* (3), 58); the right to be present at the trial (Art. 63); speedy and public trials (Art. 67(1)(a), (c)); the exclusion of illegally obtained evidence (Art. 69(7)); and the prohibition of trials *in absentia* (Arts. 63, 67(1)(d)).<sup>96</sup>

Precisely because of the similarities to the U.S. Bill of Rights, it might be advantageous for U.S. citizens to be tried by the ICC as opposed to a foreign state that would likely have inferior protections.<sup>97</sup>

## 2. *United States Extradition Law*

### a) *Background*

#### (1) *History*

The U.S. Supreme Court has defined extradition as “the surrender by one nation to another of an individual accused or convicted of an offense outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and to punish him, demands the surrender.”<sup>98</sup> The offense must be one that is criminal in both jurisdictions.<sup>99</sup> The United States has a long history of extradition. The first extradition treaty that the United States entered into was the Jay Treaty with Great Britain conducted in 1794.<sup>100</sup> Then, in a famous speech to the House of Representatives, Congressman John Marshall (who later became

---

96. Leigh, *The United States and the Statute of Rome*, *supra* note 95, at 131. *But see* Part II.A.1., *supra* for a discussion of how ICC protections, while similar, might not be as comprehensive as U.S. constitutional protections. For example, the ICC protects against double jeopardy but some scholars feel that the ICC’s rule that judgments of acquittal may be appealed is inconsistent with the U.S. notion of the prohibition against double jeopardy.

97. *See* MEISSNER, *supra* note 17, at 73.

98. *Terlinden v. Ames*, 184 U.S. 270, 289 (1902).

99. *See* John G. Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441, 1459 (1998). This is the dual criminality requirement—one of the few barriers to international extradition. *See* Part III.A.3., *infra*.

100. Benjamin N. Bedrick, Comment, *United States Extradition Process: Changes in Law to Address Constitutional Infirmity*, 15 DICK. J. INT’L L. 385, 387 (1997).

Chief Justice of the Supreme Court) announced that the authority to extradite under a treaty is vested in the executive branch as part of its power to carry out foreign affairs.<sup>101</sup> Since that time, the United States Supreme Court has echoed Marshall's view.<sup>102</sup> This particular area of U.S. law has been surprisingly static with no major changes since 1848.<sup>103</sup>

(2) *Procedure*

Extradition is a "highly formalized diplomatic process."<sup>104</sup> Under 18 U.S.C. § 3184, foreign states requesting extradition of a person in the United States must first issue a formal extradition request to the State Department.<sup>105</sup> The request is accompanied by documentation, such as an explanation of foreign criminal statutes allegedly violated, a certificate of conviction (if available), or an arrest warrant and evidence that the person in question probably committed the crime.<sup>106</sup> The State Department then screens the request to ensure that it fits within the parameters of applicable federal and treaty law.<sup>107</sup> If the Secretary of State determines that extradition is appropriate under the relevant laws, the Justice Department forwards the request to a U.S. Attorney who files a com-

---

101. See Jacques Semmelman, *Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings*, 76 CORNELL L. REV. 1198, 1206 (1991) (citing 10 ANNALS OF CONG., 6th Cong., 1st Sess. 596-618 (Mar. 7, 1800), reprinted in U.S. v. Furlong, 18 U.S. (5 Wheat.) 184, 198-202 (1800)). See also, Kathleen F. Elliott, *No Due Process Right to a Speedy Extradition*, 18 SUFFOLK TRANSNAT'L L. REV. 347, 350 (1995) (stating that the power to extradite derives from the President's authority to "conduct foreign affairs and make treaties").

102. See Semmelman, *supra* note 101 (explaining that "in the absence of voluntary delegation by the executive, judicial involvement in the extradition process, and the resulting encroachment on executive authority, must be premised upon treaty, statute, or the Constitution").

103. See Bedrick, *supra* note 100, at 390. In 1848, the first federal extradition statute was enacted which:

provided for an extradition magistrate to examine the evidence against a person sought by a foreign government. The extradition magistrate, if he found the evidence to be sufficient, was required to certify that determination to the Secretary of State. Upon certification, the Secretary of State was given authority to make a final determination whether to extradite.

*Id.* (citing Act of Aug. 12, 1848, ch. 167, 9 Stat. 302). Bedrick notes that "[t]he extradition law enacted in 1848 has been changed since then only in minor respects, for example, to substitute 'magistrate' for the original 'commissioner.' None of the changes have altered the basic statutory scheme." *Id.*

104. Devin C. McNulty, *The Changing Face of Extraditions Between Mexico and the United States*, CHAMPION, Apr. 2007, at 34.

105. See Matthew Murchison, *Extradition's Paradox: Duty, Discretion, and Rights in the World of Non-Inquiry*, 43 STAN. J. INT'L L. 295, 297 (2007).

106. Bedrick, *supra* note 100, at 391.

107. Murchison, *supra* note 105, at 298.

plaint in the proper judicial district.<sup>108</sup> The magistrate makes a cursory review of the matter to determine whether an arrest warrant is appropriate.<sup>109</sup> After the arrest warrant is issued and the defendant is arrested, he or she faces a hearing to determine whether he or she should be extradited.<sup>110</sup> The hearing considers the following:

whether there is Probable cause to believe that there has been a violation of one or more criminal laws of the [requesting] country, that the alleged conduct, if committed in the United States, would have been a violation of our criminal law, and that the extradited individual is the one sought by the foreign nation . . .  
.”<sup>111</sup>

In addition, the defendant may raise any affirmative defenses that might be available under the applicable treaty.<sup>112</sup> Upon finding sufficient evidence to extradite, the magistrate certifies the case to the Secretary of State.<sup>113</sup> The Secretary of State then makes the final determination of whether to extradite the defendant.<sup>114</sup> In making this determination, the Secretary has broad powers of discretion.<sup>115</sup>

### (3) *U.S. Acceptance of Extradition*

The United States strongly supports extradition, both to and from the United States,<sup>116</sup> and extradition numbers are on the rise.<sup>117</sup> While the United States could choose to follow the path of a

108. *Id.* The case is filed in the district in which the defendant is located. See Semmelman, *supra* note 101, at 1202.

109. Murchison, *supra* note 105, at 298. Circuits are split over scope of the government's probable cause obligation in granting a provisional arrest warrant. See Lis Wiehl, *Extradition Law at the Crossroads: The Trend Toward Extending Greater Constitutional Procedural Protections to Fugitives Fighting Extradition from the United States*, 19 MICH. J. INT'L L. 729, 787 (1998).

110. Murchison, *supra* note 105, at 298.

111. Bedrick, *supra* note 100, at 391 (quoting *Peroff v. Hylton*, 542 F.2d 1247, 1249 (4th Cir. 1976)).

112. See Semmelman, *supra* note 101, at 1202. The most frequently raised affirmative defense is that the crime charged is a political offense. *Id.*

113. Bedrick, *supra* note 100, at 392. The magistrate sends a transcript of the case and a copy of all evidence to the Secretary of State along with the certification. *Id.*

114. *Id.*

115. *Id.*

116. See Kester, *supra* note 99, at 1442 (stating that the United States has extradition treaties with approximately one hundred states). *Id.*

117. *Id.* at 1443. This is due to a world economy that is increasingly interdependent, a world population that finds it easier and faster to travel internationally, and an increasing

number of states that enter into extradition treaties but exclude their own nationals, it continues to decide not to do so.<sup>118</sup> Between ten and twenty percent of all persons extradited from the United States are U.S. nationals.<sup>119</sup> In addition to having no major qualms about extraditing its nationals, the United States also seems to have few reservations about the states with which it enters into extradition treaties.<sup>120</sup> In fact, the United States has treaties with most states, including those with questionable human rights records.<sup>121</sup>

*b) How Extradition Falls Short of Usual Constitutional Protections*

*(1) Lack of Constitutional Protection in the Process of Extradition*

In many ways, extradition is without many constitutional protections one usually associates with the U.S. criminal justice system. This is because an extradition hearing is really more like a preliminary hearing than a trial on the merits.<sup>122</sup> Like a preliminary hearing, the guilt or innocence of a person is not determined.<sup>123</sup> Preliminary hearings and extradition hearings share a low standard of proof—probable cause.<sup>124</sup> A magistrate deciding an extradition hearing must find “probable cause to believe that a crime had been committed and that the petitioner committed it.”<sup>125</sup>

Because an extradition hearing is not considered a criminal prosecution, the Federal Rules of Criminal Procedure and the Federal Rules of Evidence do not apply.<sup>126</sup> As a result, hearsay evi-

---

willingness of prosecutors worldwide to prosecute complex economic crimes. *Id.*

118. *See id.* at 1474 (citing Belgium as an example). *Id.* at n.190. Kester points out that some extradition treaties do not exclude the possibility of extraditing their nationals, but specify that they are under no duty to do so. *Id.* at 1475.

119. *Id.* However, extradition of U.S. nationals can only occur where authorized by treaty or statute. *See* *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5 (1936). All U.S. extradition treaties provide for this. *See* Kester, *supra* note 99, at 1474.

120. *See* Paul Coltoff, *Extradition and Detainers*, CJS §41 (2007).

121. *See* Kester, *supra* note 99, at n.223 (naming in particular Yugoslavia, Albania, South Africa, Romania, Bulgaria, Congo, Ghana, Iraq, Paraguay, Poland, Zambia and Haiti).

122. *See* Robert Iraola, *Foreign Extradition, Provision Arrest Warrants, and Probable Cause*, 43 SAN DIEGO L. REV. 347, 357 (2006) (citing *Benson v. McMahon*, 127 U.S. 457, 463 (1888) and *David v. Attorney General*, 699 F.2d 411, 415 (7th Cir. 1983)).

123. *See* Bedrick, *supra* note 100, at 393.

124. *See* Iraola, *supra* note 122, at 373. While the exact language under § 3184 is “evidence of criminality,” this has been interpreted by the courts to mean probable cause. *Id.*

125. *Id.* at 374 (citing *Parretti v. United States*, 122 F.3d 758, 776 (9th Cir. 1997), *appeal denied, rev'd en banc*, 143 F.3d 508 (9th Cir. 1998)).

126. *See* Kester, *supra* note 99, at 1443-44 (citing Fed. R. Crim. P. 54(b)(5) (stating that “[t]hese rules [of criminal procedure] are not applicable to extradition and rendition of fugitives”)); Fed. R. Evid. 111(d)(3); *see also*, *Messina v. United States*, 728 F. 2d 77, 80 (2d

dence is not prohibited, and is in fact often used in extradition hearings.<sup>127</sup> A magistrate “has wide latitude admitting evidence.”<sup>128</sup> Because of this, documents of “questionable authenticity” frequently are admitted into evidence.<sup>129</sup> For example, both unsworn summaries of witness statements<sup>130</sup> and documents containing inconsistencies have been admitted into evidence in U.S. extradition proceedings.<sup>131</sup> Affidavits or depositions may be used in place of witness testimony.<sup>132</sup> This practice denies the accused the opportunity to confront witnesses, a protection that a defendant has no right to under an extradition proceeding.<sup>133</sup> The primary reason that the United States has consistently accepted these relaxed standards in the extradition context is that incorporating constitutional due process requirements into the extradition process would place an enormous burden on the requesting state, therefore contravening the object and purpose of the underlying extradition treaty.<sup>134</sup>

Admission of evidence and documents are not the only areas where the extradition process falls short of constitutional protections. In addition to lacking the right to confront witnesses, most other Sixth Amendment protections are not present in extradition hearings.<sup>135</sup> The defendant in an extradition proceeding has no right to a jury and no right to a speedy trial.<sup>136</sup> Further, the Fourth Amendment exclusionary rule does not apply to extradition

---

Cir. 1984).

127. Kester, *supra* note 99, at 1444 (citing *Quinn v. Robinson*, 783 F.2d 776, 815 (9th Cir.), *cert. denied*, 107 S. Ct. 271 (1986)); *O'Brien v. Rozman*, 554 F. 2d 780, 783 (6th Cir. 1977); *United States ex. rel. Klein v. Mulligan*, 50 F. 2d 687, 688 (2d Cir.), *cert. denied*, 284 U.S. 665 (1931).

128. Iraola, *supra* note 122, at 358 (quoting *In re Mainero*, 990 F. Supp. 1208, 1219 (S.D. Cal. 1997)).

129. Kester, *supra* note 99, at 1444.

130. *Id.* at n.18 (quoting *Zanazanian v. United States*, 729 F.2d 624, 627 (9th Cir. 1984)).

131. *See id.* (citing *United States ex rel. Sakaguchi v. Kaulukukui*, 520 F.2d 726, 728 (9th Cir. 1975)).

132. *See Kester, supra* note 99, at 1444. In some instances, magistrates have admitted unsworn statements. *Id.*

133. *See* 9B Fed. Proc., L. Ed. § 22:2368 (citing *Oen Yin-Choy v. Robinson*, 858 F.2d 1400 (9th Cir. 1988); *Lopez-Smith v. Hood*, 951 F. Supp. 908 (D. Ariz. 1996), *aff'd*, 121 F.3d 1322 (9th Cir. 1997); *Matter of Extradition of Cheung*, 968 F. Supp. 791 (D. Conn. 1997)). In addition, live testimony is not permitted. *See* 9B Fed. Proc., L. Ed. § 22:2368 (citing *Surrender of Ntakirutimana*, 988 F. Supp. 1038 (S.D. Tex. 1997)); *Powell, Matter of Extradition of*, 4 F. Supp. 2d 945 (S.D. Cal. 1998)).

134. *See Kester, supra* note 99, at 1445.

135. *See id.* at 1446. The only sixth amendment protection present in extradition hearings is the right to counsel. *Id.* at 1444-1445.

136. *See id.* (citing *Jhirad v. Ferrandina*, 536 F.2d 478, 485 n.9 (2d Cir.) (Sixth Amendment speedy trial guarantee not applicable to extradition proceedings), *cert. denied*, 429 U.S. 833 (1976). *See also, Sabatier v. Dambrowsk*, 453 F. Supp. 1250, 1255 (D.R.I. 1978) *aff'd* 586 F. 2d 866 (1st Cir. 1978)).

hearings in all circuits.<sup>137</sup> The government does not have to disclose exculpatory evidence to the defendant,<sup>138</sup> and neither res judicata nor double jeopardy apply.<sup>139</sup> Bail, while theoretically available to a defendant, is infrequently granted.<sup>140</sup> One federal circuit has even ruled that the defendant does not have to be sane at the time of his or her extradition hearing.<sup>141</sup>

Another protection that is usually present in U.S. criminal law that is absent in the extradition process is the rule of lenity, the presumption that where a statute is ambiguous it is to be construed in favor of the defendant.<sup>142</sup> In fact, the opposite rule applies in extradition hearings. Extradition treaties are to be liberally construed in favor of extraditing.<sup>143</sup> This rule exists because extradition treaties “are in the interest of justice and friendly international relationships,”<sup>144</sup> which seem to trump individual rights in the extradition context.

## (2) *The Rule of Non-Inquiry*

The Rule of Non-Inquiry is to be applied in extradition hearings and instructs that the judicial officer deciding the case should not inquire into the judicial system of the requesting state.<sup>145</sup> All federal circuits that have considered the issue of whether to inquire into the judicial system of the requesting state have adopted the rule of non-inquiry.<sup>146</sup> The use of the rule has resulted in harsh results for extradited individuals.<sup>147</sup> For example:

situations have included those in which the defen-

137. See Kester, *supra* note 99, at 1445.

138. See Iraola, *supra* note 122, at 358-59 (citing *Montemayor Seguy v. United States*, 329 F. Supp. 2d 883, 888 (S.D. Tex. 2004)).

139. See Kester, *supra* note 99, at 1445. Again, the rationale is that extradition hearings are not full and final judgments on the merits. *Id.*

140. See *id.* at 1447-1449. The Department of Justice position is that persons awaiting an extradition hearing should “almost always” be imprisoned. *Id.* at 1448. The practice of granting bail varies by circuit. See *id.* at 1448-49.

141. See *id.* (citing *Romeo v. Roache*, 820 F.2d 540, 544 (1st Cir. 1987)).

142. See Frank B. Cross, *The Significance of Statutory Interpretive Methodologies*, 82 NOTRE DAME L. REV. 1971, 1978 (2007).

143. See Coltoff, *supra* note 120, § 41. See also, *Factor v. Laubheimer*, 290 U.S. 276, 293 (1933).

144. Coltoff, *supra* note 120, § 41 (citing *Matter of Extradition of Cheung*, 968 F. Supp. 791 (D. Conn. 1997)).

145. See Elliott, *supra* note 101, at 351 (citing *Ahmad v. Wigen*, 910 F. 2d 1063, 1066 (2d Cir. 1990); *Escobedo v. United States*, 623 F. 2d 1098, 1107 (5th Cir. 1980); *Jhirad v. Ferrandina*, 536 F.2d 478, 484-85 (2d Cir.), *cert. denied*, 429 U.S. 833 (1976)). This rule echoes “the broader separation of powers argument [the government] has often made in other cases where its foreign policy interests are involved.” Wiehl, *supra* note 109, at 772.

146. See Semmelman, *supra* note 101, at 1205.

147. See *id.* at 1204.



dant anticipates abuse, torture, or even murder at the hands of the requesting country's authorities; inadequate protection from lawless elements in the requesting country; prosecution for crimes not covered by the extradition request; or a fundamentally unfair trial, due to bias, restrictions on presenting a defense, or the use of illegally obtained evidence. The rule of non-inquiry has also governed when a defendant has claimed the protection of the statute of limitations; double jeopardy; breach of a plea agreement by the requesting country; or that the requesting country lacks jurisdiction. For those already convicted, the rule of non-inquiry has precluded claims that extradition should be barred because the conviction was secured unfairly or in absentia.<sup>148</sup>

A recent example highlights the serious consequences of the rule of non-inquiry. In *Prasoprat v. Benov*, the United States refused to deny the extradition of a U.S. citizen who was charged in Thailand with a non-violent drug offense.<sup>149</sup> What makes this particular case so compelling is that the defendant was facing the death penalty in Thailand for his crime.<sup>150</sup> If convicted of the same crime in the United States, the defendant would have faced imprisonment of as little as eight years.<sup>151</sup> However, he may face

---

148. *Id.* at 1205-1206 (citing *Linnaas v. I.N.S.*, 790 F.2d 1024, 1031-32 (2d Cir.) (deportation case), *cert. denied*, 479 U.S. 995 (1986); *In re Manzi*, 888 F.2d 204, 206 (1st Cir. 1989), *cert. denied*, 110 S. Ct. 1321 (1990); *Demjanjuk v. Petrovsky*, 776 F.2d 571, 583 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986); *Kamrin v. United States*, 725 F.2d 1225 (9th Cir.), *cert. denied*, 469 U.S. 817 (1984); *Arnbjornsdottir-Mendler v. United States*, 721 F.2d 679, 683 (9th Cir. 1983); *Sindona v. Grant*, 619 F.2d 167, 174-75 (2d Cir. 1980), *cert. denied*, 451 U.S. 912 (1981); *Escobedo v. United States*, 623 F.2d 1098 (5th Cir.), *cert. denied*, 449 U.S. 1036 (1980); *Geisser v. United States*, 627 F.2d 745, 749-53 (5th Cir. 1980), *cert. denied*, 450 U.S. 1031 (1981); *Peroff v. Hylton*, 542 F.2d 1247, 1249 (4th Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); *Magisano v. Locke*, 545 F.2d 1228, 1230 (9th Cir. 1976); *Holmes v. Laird*, 459 F.2d 1211, 1214 (D.C. Cir.), *cert. denied*, 409 U.S. 869 (1972); *Garcia-Guillern v. United States*, 450 F.2d 1189, 1192 (5th Cir. 1971), *cert. denied*, 405 U.S. 989 (1972); *Gallina v. Fraser*, 278 F.2d 77, 78-79 (2d Cir.), *cert. denied*, 364 U.S. 851 (1960); *Argento v. Horn*, 241 F.2d 258, 263-64 (6th Cir.), *cert. denied*, 355 U.S. 818 (1957); *In re Singh*, 123 F.R.D. 127, 128-29 (D.N.J. 1987); *United States v. Clark*, 470 F. Supp. 976, 979-80 (D. Vt. 1979); *In re Ryan*, 360 F. Supp. 270, 274 (E.D.N.Y.), *aff'd*, 478 F.2d 1397 (2d Cir. 1973); *cf. In re Mylonas*, 187 F. Supp. 716, 721 (N.D. Ala. 1960) (although "[t]he fact that the accused was convicted in absentia would not preclude his extradition," the court denied extradition on other grounds)).

149. See Andrew J. Parmenter, *Death by Non-Inquiry: The Ninth Circuit Permits the Extradition of a U.S. Citizen Facing the Death Penalty for a Non-Violent Drug Offense*, 45 WASHBURN L.J. 657, 657 (2006) (citing *Prasoprat v. Benov*, 421 F.3d 1009 (9th Cir. 2005)).

150. See *id.*

151. See *id.* at 658.

death in Thailand for the same offense, a punishment which would violate the Eighth Amendment prohibition against cruel and unusual punishment if imposed in the United States for the same offense.<sup>152</sup>

The Supreme Court case *Neely v. Henkel* provides a rationale for the rule of non-inquiry:

When an American citizen commits a crime in a foreign country he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people, unless a different mode be provided for by treaty stipulations between that country and the United States.<sup>153</sup>

There are several other justifications for the rule of non-inquiry. One rationale is that the existence of an extradition treaty compels the assumption that the trial in the requesting jurisdiction will be fair.<sup>154</sup> Another argument for the rule of non-inquiry is that it would be an enormous undertaking for domestic courts to examine the procedures of foreign courts.<sup>155</sup> Even if an inquiry were feasible, it might interfere with the executive's foreign policy activities and infringe on the requesting state's sovereignty.<sup>156</sup>

Regardless of the reasons for the rule of non-inquiry's utility, it is a rule that severely constrains individual rights. Some commentators suggest that the rule should be abolished as it is inconsistent with modern human rights norms.<sup>157</sup> For example, the United Nations Convention Against Torture prohibits the extradition of a defendant where there are reasonable grounds to believe that he or she may be tortured in the requesting state.<sup>158</sup> However, the rule of non-inquiry would prevent the magistrate from making that de-

---

152. *Id.* at 672-73.

153. Semmelman, *supra* note 101, at 1212 (quoting *Neely v. Henkel*, 180 U.S. 109, 123 (1901)).

154. Semmelman, *supra* note 101, at 1213. Despite this assumption, the State Department has on occasion demanded that extradited defendants that had been convicted in absentia be retried after they are extradited. *Id.* at 1233-34.

155. *See* Parmenter, *supra* note 149, at 674.

156. *See id.* at 674-75.

157. *See* Murchison, *supra* note 105, at 311 (explaining that "beginning in the late 1980s, influential international courts began to recognize and explore the intersection of the duty to extradite and the duty to respect human rights."). Indeed, there is some evidence that the rule may have limits. One case suggests that courts may make a more searching inquiry "where . . . procedures or punishment [are] so antipathetic to a federal court's sense of decency as to require reexamination of the principle." *Galina v. Fraser*, 278 F.2d 77, 79 (2d Cir. 1960).

158. *See* Murchison, *supra* note 105, at 311.

termination in an extradition hearing.

(3) *Sparse Review*

Very little review of extradition decisions is available. There are only two options available for review of the extradition hearing—State Department review and habeas corpus. Review by the State Department may be worth very little.<sup>159</sup> One study revealed that during a period of twenty-one years, only two extradition requests by foreign states were denied.<sup>160</sup> The difficulty with entrusting the State Department with the protection of extradition defendants is that there are so many political factors exerting pressure on the Department.<sup>161</sup> For example, the State Department is also the requesting party in situations where the United States is seeking the extradition of accused criminals from other states.<sup>162</sup> In fact, the U.S. Department of State sends out more requests than it receives. It benefits the State Department to cooperate with the extradition requests of other States.<sup>163</sup> Further, the State Department deals with a host of foreign relations issues and the refusal of an extradition request has the potential to create problems in any one of them. This creates tension between a defendant's individual rights and the executive branch's authority to conduct foreign relations. For example, "the Secretary [of State] may decide whether to extradite based on foreign policy or domestic political considerations, even though consideration of the individual rights of the defendant might call for a different result."<sup>164</sup>

Review of an extradition hearing is also available through a writ of habeas corpus.<sup>165</sup> However, the scope of habeas review is extremely narrow.<sup>166</sup> The district judge upon habeas review "is not to retry the magistrate's case."<sup>167</sup> So what can be challenged through habeas review? The answer is brief:

---

159. See Kester, *supra* note 99, at 1484-89.

160. *Id.* at 1486. However, there is no evidence that the State Department has been deficient in protecting the rights of defendants in extradition proceedings. See Semmelman, *supra* note 101, at 1232.

161. See Kester, *supra* note 99, at 1486.

162. See *id.*

163. In fact, "[n]othing in the extradition statute prevents the Secretary of State from acting for policy reasons in a manner that does not protect the defendant's rights." Bedrick, *supra* note 100, at 394 (citing 18 U.S.C. § 3186 (1994)).

164. Bedrick, *supra* note 100, at 395.

165. See 28 U.S.C. § 2241. See also, *Lindstrom v. Graber*, 203 F.3d 470, 473 (7th Cir. 2000).

166. See Kester, *supra* note 99, at 1472.

167. *Eain v. Wilkes*, 641 F.2d 504, 508 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981).

[w]hether the magistrate had jurisdiction, whether the offence charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty.<sup>168</sup>

### 3. Analysis

An extradited defendant faces a very uncertain future. The rule of non-inquiry prevents U.S. courts from inquiring into the judicial process the defendant will face upon extradition. In many ways, there are fewer dangers with surrendering a person to the ICC than extraditing him or her to a foreign state under an extradition treaty. This is due in part to the fact that the ICC is a creature of state consent.<sup>169</sup> States were involved in the formation of the protections in the ICC and continue to be involved with ensuring that fundamental rights are protected.<sup>170</sup> The Rome Statute was created to have procedural safeguards and human rights guarantees.<sup>171</sup>

The only areas where extradition seems to offer some advantage over surrender to the ICC are the political offense exception and the requirement of dual criminality. There no analogous bars in the ICC.<sup>172</sup> The dual criminality requirement, which prevents

---

168. Iraola, *supra* note 122, at n.15 (quoting *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925)). See also *In re Luis Oteiza y Cortes*, 136 U.S. 330, 334 (1890).

A writ of *habeas corpus* in a case of extradition cannot perform the office of a writ of error. If the commissioner has jurisdiction of the subject-matter and of the person of the accused, and the offense charged is within the terms of a treaty of extradition, and the commissioner, in arriving at a decision to hold the accused has before him competent legal evidence on which to exercise his judgment as to whether the facts are sufficient to establish the criminality of the accused for the purposes of extradition, such decision of the commissioner cannot be reviewed by a circuit court or by this court, on *habeas corpus*, either originally or by appeal.

*Id.*

169. See Duffy, *supra* note 85, at 22.

170. See *id.* Some commentators go so far as to suggest that “the ICC can properly be considered an extension of a [S]tate’s own domestic jurisdiction.” *Id.* at 23 (citing Cherif Bassiouni, *Observations on the Structure of the (Zutphen) Consolidated Text*, in OBSERVATIONS ON THE CONSOLIDATED ICC TEXT 12 (Leila Sadat Wexler ed., 1998)). However, this would trigger structural constitutional concerns, because the U.S. Constitution protections are triggered when “a foreign government acts as an agent of, or joint venturer with, the United States in violating a defendant’s rights.” Semmelman, *supra* note 101, at 1227. The academic consensus seems to be that the ICC, while being influenced by individual states, is not an extension of them. See Marquardt, *supra* note 33, at 104-05 (“[I]t is clear that an international criminal court would be more like a foreign jurisdiction than an instrumentality of the United States.”).

171. See Duffy, *supra* note 85, at 23-24. See also *supra* Part III.A.1.b.

172. See Semmelman, *supra* note 101, at 1235.

extradition where the offense claimed in the extradition request is not a crime in the receiving State, is not a requirement under the ICC, leaving a certain group of defendants vulnerable under a surrender regime that would be protected from extradition. This problem could be avoided by carefully drafted implementing legislation that criminalized all activities that are crimes under the Rome Statute.<sup>173</sup> Most importantly, these bars to extradition are protections that have arisen from state practice and are probably not constitutional protections.<sup>174</sup>

A comparison of surrender and extradition makes plain that the purpose and function of the two practices are substantially similar.<sup>175</sup> The few places of difference, most notably the lack of trial by jury, are “not absolutely essential to the administration of justice,” making claims of unconstitutionality difficult to justify.<sup>176</sup> This is especially true in light of the United States’ overwhelming support of and participation in international extradition and even surrender to other international criminal tribunals.<sup>177</sup>

Since “many constitutional protections afforded to defendants in domestic cases have never been extended to international fugitives arrested and detained in the United States on warrants in aid of extradition requests,”<sup>178</sup> it seems logical that the lack of a very few constitutional protections should not bar U.S. participation in the International Criminal Court. For constitutional purposes, extradition and surrender should be considered sufficiently close.<sup>179</sup> Therefore, “the procedural due process critique underexplains U.S. rejection of the ICC.”<sup>180</sup> Focusing on illegitimate objections diverts focus from a very real objection that remains— infringement on the sovereignty of the United States—and hinders inquiry into ways to resolve sovereignty concerns.

---

173. See Amann & Sellers, *supra* note 62, at 400-02 (noting that the dual criminality requirement is already met with regards to genocide, war crimes and torture but not for crimes against humanity). If the United States were to criminalize crimes against humanity, the complementarity scheme of the ICC would offer the U.S. protection. *Id.* See also *infra* Part V.A.

174. See Amann & Sellers, *supra* note 62, at 400 (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 476 cmt. d. (1986)). *But see* Jordan v. DeGeorge, 341 U.S. 223, 230 (1951) (implying that the dual criminality requirement may be constitutionally required because of the due process idea of fair warning).

175. See Marquardt, *supra* note 33, at 147.

176. *Id.* at 132 (“[T]he variations from standard United States domestic practice in the proposed international criminal court would not be significant enough to render the entire project unconstitutional . . .”).

177. A U.S. court held that transfer of a fugitive to the ICTR was constitutional. See Amann & Sellers, *supra* note 62, at 403 (citing *Ntakirutimana v. Reno*, 184 F.3d 419, 421 (5th Cir. 1999)).

178. See Wiehl, *supra* note 109, at 732.

179. See Barrett, *supra* note 70, at 107.

180. Cuéllar, *supra* note 27, at 1612.

### B. Structural Concerns

#### 1. Does Article III of the Constitution Allow Congress to Delegate Criminal Jurisdiction to the ICC?

Delegation of adjudicatory authority raises serious constitutional questions.<sup>181</sup> Article III of the U.S. Constitution does not allow Congress to delegate “essential attributes of judicial power” to a tribunal other than the federal courts, since federal courts have the power under the U.S. Constitution to decide cases and controversies.<sup>182</sup> Adjuncts to Article III courts are permissible so long as they are not delegated these essential attributes.<sup>183</sup> This raises a question about what comprises the essential attributes of judicial power reserved to the federal courts. *Commodity Futures Trading Commission v. Schor* used a balancing test to determine the permissibility of using an adjunct.<sup>184</sup> This two-part test balances the utility of using an adjunct against the two essential attributes of federal judicial power, which are promoting fairness through an independent judiciary and maintaining separation of powers through the structural role of the judiciary.<sup>185</sup> To determine the constitutionality of delegation of Article III power to decide criminal cases, it is necessary to apply this balancing test to the ICC situation. The first prong ensures that the judiciary is independent of the other political branches. The ICC passes this test. The second prong asks whether the ICC impermissibly threatens the institutional integrity of the federal judicial branch. Justice O’Connor in the majority opinion of *Schor* outlined four factors that can be used to determine whether separation of powers may be threatened.<sup>186</sup> They are

the extent to which the ‘essential attributes of judicial power’ are reserved to article III courts, and conversely, the extent to which the non-article III forum exercises the range of jurisdiction and powers normally vested only in article III courts, the origins

---

181. See Sandra Day O’Connor, *Federalism of Free Nations*, 28 N.Y.U. J. INT’L L. & POL. 35, 42 (1996).

182. *Id.* (quoting from *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 851 (1986)).

183. See *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 53 (1982); *United States v. Raddatz*, 447 U.S. 667 (1980) (approving the use of an adjunct in a criminal proceeding); *Cromwell v. Benson*, 285 U.S. 22 (1932).

184. *Schor*, 478 U.S. at 849. See also ERWIN CHEREMINSKY, *FEDERAL JURISDICTION* 251-254 (4th ed. 2003).

185. *Schor*, 478 U.S. at 849-50.

186. See CHEREMINSKY, *supra* note 184, at 254-55 (citing *Schor*, 478 U.S. at 851).

and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of article III.<sup>187</sup>

The essential attributes of judicial power are encroached on very little by the ICC since it is empowered to hear a narrow range of crimes, and the ICC does have a thin range of jurisdiction. The concern that led Congress to authorize adjunct power to the ICC is very important—the effective deterrence and punishment of persons committing the gravest crimes. However, the origins and importance of the right to be adjudicated is more problematic, since criminal prosecutions and protections granted accused persons are of central importance to the U.S. judicial system. On balance, it seems that this deferral of power to an adjunct does not conflict with separation of powers. Nonetheless, Erwin Chemerinsky points out that it is hard to have a definitive idea on how the Supreme Court would rule on any given situation, since there is no clear guidance as to how much weight the court gives to each of the factors.<sup>188</sup>

In addition, the United States has ratified other treaties authorizing tribunals that have decision-making authority over the lives and property of U.S. citizens.<sup>189</sup> The arbitration provisions of the World Trade Organization and the North American Free Trade Agreement are good examples. The Algiers Accord, which established the Iran-United States Claims Tribunal, is another.<sup>190</sup>

Most offenses covered by the ICC to which an accused American would be subject would be handled domestically by a non-Article III court, such as a military court-martial, or extradition to a foreign court.<sup>191</sup> *Ex Parte Quirin* is illustrative.<sup>192</sup> *Quirin* held that the use of military (non-Article III) courts for German spies apprehended in the United States were constitutional. One of the spies claimed to be a U.S. citizen. That notwithstanding, the Supreme Court held that

---

187. *Id.* at 245-55 (quoting *Schor*, 478 U.S. at 851).

188. *Id.* at 255.

189. Ruth Wedgwood, *The Constitution and the ICC*, in *THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW* 119, 121 (Sarah B. Sewall & Carl Kaysen eds., 2000).

190. *See id.* at 122 (citing Algiers Accords, U.S.-Iran, Jan. 19, 1981, 20 I.L.M. 223).

191. *See id.* at 121. The Supreme Court has authorized the use of military tribunals whose judges do not have salary protections and life tenure. This has been held to be permissible even in the instance of capital punishment. *See also* *Dynes v. Hoover*, 61 U.S. 65 (1858) (holding that military tribunals are not prohibited by Art. III); CHEMERINSKY, *supra* note 184, at 224.

192. *Ex Parte Quirin v. Cox*, 317 U.S. 1 (1942).

§2 of Article III and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by military commissions, or to have required that offenses against the law of war not triable by jury at common law be tried only in the civil courts.<sup>193</sup>

While delegation to the ICC of jurisdiction over military personnel seems plausible, ICC jurisdiction over civilians is less clear. Two cases seem especially problematic. *Ex Parte Milligan* reversed the conviction and death sentence of a civilian convicted by a military tribunal during the Civil War, stating that “no usage of war could sanction a military trial there for any offense whatever of a citizen in civil life, in nowise connected with the military service.”<sup>194</sup> A later case, *Reid v. Covert*, held that separation of powers prevented spouses of service personnel from being tried for capital crimes in military courts.<sup>195</sup> *Kinsella v. United States ex. rel. Singleton* extended this holding to non-capital cases.<sup>196</sup> Yet, Henry Hart has theorized that “these cases are equally as instructive in what they imply the government can do in allowing defendants to be tried by non-Article III courts as they are in establishing what the government cannot do.”<sup>197</sup> *Milligan* implies that the government can convict soldiers with a bench trial, limiting the reach of the Sixth Amendment.<sup>198</sup> Audrey Benison comments that “[i]f Congress may constitutionally abrogate the jury trial right from this class of defendants, then it is possible that there are other instances in which withholding the right may be appropriate.”<sup>199</sup> *Reid* held that the defendant military spouses could not be tried by military tribunals because their crimes were ordinary crimes (as opposed to law-of-war crimes which could be tried by military tribunals).<sup>200</sup> Benison argues that this focus on status of the crime rather than status of the accused in determining the permissibility of non-Article III review is consistent with the ICC approach.<sup>201</sup>

---

193. CHEMERINSKY, *supra* note 184, at 229 (quoting *Quirin*, 317 U.S. at 30-31).

194. *Ex Parte Milligan*, 71 U.S. 2 (1866).

195. *Reid v. Covert*, 354 U.S. 1 (1957). *See also* CHEMERINSKY, *supra* note 184, at 225.

196. *Kinsella v. United States*, 361 U.S. 234 (1960). *See also* CHEMERINSKY, *supra* note 184, at 226.

197. Audrey I. Benison, *International Criminal Tribunals: Is There a Substantive Limitation on the Treaty Power?*, 37 STAN. J. INT'L L. 75, 99 (2001) (citing Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1374-75 (1953)).

198. Benison, *supra* note 197, at 99-100.

199. *Id.* at 100.

200. *Id.*

201. *See id.*



2. *Does the ICC's Jurisdiction Over U.S. Nationals for Crimes Committed on U.S. Soil Violate the Constitution?*

Commentators arguing that the United States should exercise jurisdiction over all acts committed in its territory rely on antiquated ideas about territoriality. With increasing globalization, overlapping jurisdiction is common. The United States has embraced theories of jurisdiction other than territoriality when extraditing defendants accused of committing crimes in the United States as well as when exercising jurisdiction over acts committed outside the United States.<sup>202</sup> There is a body of cases validating the extradition of persons to foreign jurisdictions for crimes committed in the United States. Many are in conspiracy cases where some, but not all, elements of the conspiracy occurred in the United States.<sup>203</sup> The United States has departed from the territoriality principle when exercising jurisdiction over acts committed outside the United States in *United States v. Alvarez-Machain*, which upheld U.S. jurisdiction to try a Mexican national accused of murdering a DEA agent in Mexico.<sup>204</sup>

Another important case demonstrating a federal court's willingness to depart from the territoriality principle is *United States v. Yunis*, which applied universal jurisdiction over the crime of air piracy, where a hijacking occurred on a Jordanian airliner.<sup>205</sup> The court stated that the assertion of such jurisdiction is fully consistent with "norms of customary international law."<sup>206</sup> The line of reasoning in the *Yunis* case is particularly important because it embraces an expanded conception of jurisdiction for a crime that is considered to be a universal crime (piracy). The crimes covered by

---

202. Marquardt, *supra* note 33, at 115-16. There are four primary legal grounds of jurisdiction. Antonio Cassese defines them in his international law treatise:

Traditionally, States bring to trial before their courts alleged perpetrators of international crimes on the strength of one of three principles: *territoriality* (the offense has been perpetrated on the State territory), *passive nationality* (the victim is a national of the prosecuting State), or *active nationality* (the perpetrator is a national of the prosecuting State) . . . In more recent years, the so-called principle of *universality* has also been upheld, whereby any State is empowered to bring to trial persons accused of international crimes regardless of the place of commission of the crime, or the nationality of the author or of the victim.

CASSESE, *supra* note 4, at 451.

203. See, e.g., *Austin v. Healey*, 5 F.3d 598 (2d Cir. 1993); *Melia v. United States*, 667 F.2d 300 (2d Cir. 1981); *Valencia v. Scott*, 1992 U.S. Dist. LEXIS 3886 (E.D.N.Y. Mar. 19, 1992).

204. *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992) (*cited in* Marquardt, *supra* note 33, at n.177).

205. *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991) (*cited in* Marquardt, *supra* note 33, at n.177). The airliner was carrying U.S. citizens.

206. *Id.* at 1091.

the ICC are arguably even more universally accepted than piracy. The ICC crimes are crimes that have been defined in a way that all countries can prosecute notwithstanding the ICC.<sup>207</sup> For example, the four Geneva Conventions of 1949 not only allow a state to prosecute grave breaches of war crimes, they actually impose an obligation on all signatory states to do so.<sup>208</sup>

### 3. *The Jury Issue Revisited*

The key to the determination of whether the absence of a jury violates the Constitution is in the basis of comparison.<sup>209</sup> There is no dispute that jury trials are called for in criminal cases before federal and state courts.<sup>210</sup> Notwithstanding this requirement, there are numerous instances of the United States dispensing with the jury requirement in situations that fall outside of federal and state courts. The military court martial system is one example;<sup>211</sup> extradition of U.S. citizens to foreign jurisdictions or tribunals is another.<sup>212</sup> In the Supreme Court case *Wilson v. Girard*, a U.S. soldier stationed in Japan was accused of murdering a Japanese woman.<sup>213</sup> The United States held that Japan had jurisdiction over this case even though there was a treaty in place granting Japan and the United States concurrent jurisdiction.<sup>214</sup> This bolsters the argument that “the United States is not constitutionally required to exercise jurisdiction over its nationals whenever possible.”<sup>215</sup> Therefore, the point of comparison should be what a U.S.

---

207. See MEISSNER, *supra* note 17, at 68.

208. See JEFFEREY L. DUNOFF, ET. AL., INTERNATIONAL LAW: NORMS, ACTORS, PROCESS 537 (2d ed. 2006) (stating that the “four conventions, now almost universally ratified, are designed to protect wounded and sick members of armed forces in the field; wounded, sick and shipwrecked members of armed forces at sea; prisoners of war; and civilian non-combatants.”). In November 2006, attorneys representing nine Iraqi and Afghan citizens who were held at Abu Ghraib prison or Guantánamo filed suit in Germany against former Secretary of Defense Donald Rumsfeld, requesting that the German Federal Prosecutor open a criminal prosecution as required by the Geneva Convention looking into the responsibility of high-ranking U.S. officials for authorizing war crimes. Germany was chosen as a potential forum because it subscribes to the universal jurisdiction principle. Paul von Zielbauer, *Former Detainees Argue for Right to Sue Rumsfeld Over Torture*, N.Y. Times, Dec. 9, 2006, available at <http://www.nytimes.com/2006/12/09/washington/09torture.html>.

209. See MEISSNER, *supra* note 17, at 72.

210. See *id.*

211. In fact, because the ICC has jurisdiction over a very narrow range of crimes, it is hard to imagine how an American citizen would violate them outside the context of the military (which would subject the defendant to court martial jurisdiction—and no jury). See *id.*

212. See *supra* Part III. A. for a further discussion of extradition.

213. *Wilson v. Girard*, 354 U.S. 524 (1957).

214. *Id.*

215. MEISSNER, *supra* note 17, at 67.

citizen would face in a foreign jurisdictions.<sup>216</sup> As Paul Marquardt explains:

any case referred to an international criminal court would . . . contain other transnational elements sufficient to sustain foreign jurisdiction over the case. The nationality of the victim (passive personality), the nationality of the offender (active personality), the commission of elements of a crime in the territory of another state (territoriality), or the intended effects on another state (effects principle) could all be sufficient to sustain the jurisdiction of another state.<sup>217</sup>

#### IV. USING A FEDERALIST “LEGAL PROCESS” APPROACH TO MEDIATE REMAINING TENSIONS BETWEEN THE UNITED STATES AND THE ICC

While the constitutional concerns held by the U.S. may be resolved by a look to case law and the practice of extradition, other objections, which primarily address sovereignty issues, are more difficult to resolve. It is this second group of concerns that need to be viewed through the Legal Process lens of institutional settlement.

The ratification of the Rome Statute requires a system to govern interaction between overlapping judicial systems. A “federalist ideal of healthy dialogue and mutual trust” can be “adapted to describe the proper relationship between domestic courts” and the ICC.<sup>218</sup> Supreme Court Justice Sandra Day O’Connor has described this relationship as “the federalism of free nations.”<sup>219</sup> Ernest Young proposes that “interjurisdictional rules relating supranational courts to domestic courts should likewise reflect . . . [a] Legal Process approach.”<sup>220</sup> He is referring to a U.S. federal courts jurisprudential school developed in the 1950s by Henry Hart, Herbert Wechsler and Albert Sacks.<sup>221</sup> The main focus of the Legal Process school is the allocation of decision making authority.<sup>222</sup> Decision making is divided primarily by using an approach called “institutional settlement,” which means that the “law should allo-

---

216. *See id.* at 72.

217. Marquardt, *supra* note 33, at 115-16.

218. O’Connor, *supra* note 181, at 41.

219. *Id.*

220. Young, *supra* note 80, at 1149.

221. *Id.* (citing RICHARD H. FALLON, JR., DANIEL J. MELTZER, & DAVID L. SHAPIRO, HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 320 (5th ed. 2003) [hereinafter HART & WECHSLER]).

222. Young, *supra* note 80, at 1159.

cate decisionmaking [sic] to the institutions best suited to decide particular questions, and that the decisions arrived at by those institutions must then be respected by other actors in the system, even if those actors would have reached a different conclusion.”<sup>223</sup> There must be a powerful reason for an institution’s settled decision to be challenged.<sup>224</sup> The Legal Process approach is useful in the context of the United States and the ICC in two distinct ways. First, it facilitates U.S. acceptance of the ICC. In addition, the Legal Process approach will contribute to an evolving framework of procedures governing the relationship between the ICC and the U.S. judicial system. Using the principle of institutional settlement from the Legal Process approach can maintain the integrity of domestic structures, enhancing and protecting state sovereignty.<sup>225</sup>

*A. A Legal Process Approach Will Make the United States More Comfortable With the ICC*

The idea of conceding state sovereignty to the ICC is a hard pill for some Americans to swallow. However, the principle of institutional settlement can mediate this tension. In the U.S. system, federalism and separation of powers are manifestations of institutional settlement,<sup>226</sup> and with time the same principle will create a framework of checks and balances in the international system. The problem of the independent ICC Prosecutor illustrates this principle at work.

One of the major issues Americans have with the ICC is the Prosecutor, who operates in a much more independent capacity than most American prosecutors. This raises questions that there are no “adequate guarantees of transparency and accountability.”<sup>227</sup> However, this is balanced by both complementarity and the lack of an enforcement arm. We see institutional settlement at work here in on two levels. First, the independent Prosecutor’s involvement will be minimal if the United States is willing and able

---

223. *Id.* at 1149-50. The author is thankful to Professor Young for sharing the following analogy: if his wife and he decide that he will be responsible for dressing his kids for school, the principle of institutional settlement should preclude his wife from redressing his kids if she doesn’t like what he picked for them to wear.

224. *See id.* at 1160. In the forgoing example, if Professor Young dressed his kids for school in their swimsuits, his decision might be subject to question. Therefore, a settled decision is not necessarily a conclusive decision. *Id.*

225. *See id.* at 1178. Indeed, some scholars have suggested that involvement in international institutions is part of sovereignty, not a restriction on it. *Id.* at 1225 (citing ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 27 (1995)).

226. *See* Young, *supra* note 80, at 1160.

227. *Id.* at 1246.

to handle situations domestically. Second, the extra power that the ICC wields is balanced by the absence of enforcement power. This enforcement power promotes state sovereignty in a ways both obvious and not obvious. Since implementation of ICC judgments is not automatic, states hold final authority for their actions, thus strengthening their commitment to international values with each implementation.<sup>228</sup>

It would be difficult to find a clearer example of institutional settlement than the ICC system of complementarity, which establishes a regime of concurrent jurisdiction with domestic courts having the first bite at the apple to prosecute its nationals accused of committing genocide, crimes against humanity or war crimes. Complementarity mandates that the ICC defer to state sovereignty.<sup>229</sup> The court must defer to the domestic judicial system unless the state system is unable or unwilling to investigate or prosecute a case.<sup>230</sup> In addition, a state party or the accused may challenge the ICC's jurisdiction over a case or the case's admissibility.<sup>231</sup> This deference is clearly in line with the institutional settlement idea that once the best forum is chosen for a type of case, the individual court decisions should be respected unless there is a compelling reason not to. The most powerful part of institutional settlement is the fact that decisions must be respected even if the result is wrong, and even if other actors do not agree with the decision.<sup>232</sup>

The two examples discussed above, that of the Prosecutor and

---

228. Martinez, *supra* note 2, at 467. Martinez goes on to say that “[f]acilitating the orderly interaction between our legal system and the rest of the world is not about giving up sovereignty or surrendering the national interest but about figuring out how to protect and preserve the things our nation values in our inevitable interactions with the rest of the world.” *Id.* at 474-75.

229. See Sarah B. Sewall et al., *The United States and the International Criminal Court: An Overview*, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW 1, 3 (Sarah B. Sewall & Carl Kaysen eds., 2000).

230. See *id.* Because the United States legal system functions well, the ICC would arguably have jurisdiction in cases where the United States is unwilling to investigate or prosecute a case. *Id.*

231. See Roy S. Lee, *States' Responses: Issues and Solutions*, in STATES' RESPONSES TO ISSUES ARISING FROM THE ICC STATUTE: CONSTITUTIONAL, SOVEREIGNTY, JUDICIAL COOPERATION AND CRIMINAL LAW 1, 13 (Roy S. Lee ed. 2005) (citing Rome Statute, *supra* note 19, at arts. 17-19; ICC Rules of Procedure and Evidence, Preparatory Comm'n for the Int'l Criminal Court, Finalized Draft Text of the Rules of Procedure and Evidence, U.N. Doc PCNICC/2000/1/Add.1.(2000)).

232. See Young, *supra* note 80, at 1150. The United States was able to experience complementarity in action during the drafting of the Rome Statute. In 1998, a Marine jet flying too low in the Italian Alps caused a gondola to fall from its wire, killing twenty people. Because a Status of Force Agreement between the United States and Italy embodied the complementarity principle, the Italian prosecutor dropped all charges against the U.S. pilots upon the United States instigating court-martial proceedings. See Weschsler, *supra* note 1, at 96.

the system of complementarity, while good examples of institutional settlement systems already in place in the ICC, are also examples of how institutional settlement as it now exists, falls short of resolving the U.S. difficulty with the court. For example, the U.S. delegation authored portions of the Rome Statute delineating the Prosecutor's powers, yet as discussed in Part II.B.3. *supra*, the United States continues to have concerns over the potential for abuse inherent in such a robust office.<sup>233</sup> In addition, complementarity as it now stands, while an example of institutional settlement, is viewed with suspicion by the United States. While institutional settlement exists within the current mechanisms in place in the ICC, more tools are needed. The ICC and the Prosecutor should build in additional rules and policies to strengthen the court's system of institutional settlement.

*B. Proposed Rules and Policies for the ICC to Adopt to Promote Institutional Settlement and Resolve U.S. Objections*

*1. High Threshold for Opening Cases Should Be Rigidly Enforced*

In the specific instance of war crimes, a high threshold for prosecutions should be an established guideline that the Prosecutor must follow. It could be determined that a case is not admissible unless it reaches some predetermined level of seriousness, eliminating prosecution in cases involving "disputed exercises of military judgment."<sup>234</sup> This follows logically from the high degree of deference called for by Article 17(1)(d) of the Rome Statute.<sup>235</sup> As Ambassador Scheffer has pointed out, "individual soldiers often commit isolated war crimes that by themselves should not automatically trigger the massive machinery of the ICC."<sup>236</sup> He goes on to admonish that "an appropriately structured ICC should prosecute significant criminal activity during wartime but should leave to national jurisdictions the job of disciplining the isolated war crimes committed by errant soldiers."<sup>237</sup>

The United States often cites the scenario where, while engaged in a peacekeeping mission, its military force hits a civilian

---

233. *See supra* Part II.B.3.

234. Greenawalt, *supra* note 70, at 637.

235. *See* Rome Statute, *supra* note 19, at art. 17(1)(d).

236. Scheffer, *supra* note 44, at 16.

237. *Id.* The definition of war crimes under the Rome Statute of the ICC does define the crimes in a way that limits them to situations where the crimes are "committed as part of a plan or policy or as part of a large-scale commission of such crimes." Rome Statute, *supra* note 19, at art. 8(1).

target in error. There is the fear that the ICC may launch an investigation and prosecution based on these facts. However, if there is a policy in place by which a prosecution is commenced only where the crimes are committed “as part of a plan or policy or as part of a large-scale commission of such crimes,” then the United States would be protected.<sup>238</sup>

An additional potential guideline would require that crimes charged are of concern to the international community as a whole. There is some scholarship that insists that this is already a requirement of the Rome Statute.<sup>239</sup> Proponents of this view claim that Article 5 of the Rome Statute, which defines crimes within the jurisdiction of the court, proclaims that “[t]he jurisdiction [of the Court] shall be limited to the ‘most serious crimes of concern to the international community as a whole.’”<sup>240</sup> This proclamation is in addition to the enumerated crimes, leading some to believe that the clause is a further limitation on the court’s jurisdiction.<sup>241</sup> The language as it now stands is ambiguous, so a firm guideline should be established to clarify this issue.

A further guideline that the ICC may consider adopting is one that would exclude individual responsibility in two cases: where the suspect had acted in performance of his or her official duties, and where the state of which the suspect was an agent acknowledged the criminal act as its own.<sup>242</sup> This limitation on individual responsibility could be limited to situations where the United Nations or a regional organization, such as NATO, authorized the action.<sup>243</sup>

The legal basis for these and other guidelines that might limit the reach of the ICC comes from the court’s implied powers and Article 53, which constrains the activities of the Prosecutor that are restricted by the interests of justice.<sup>244</sup> The Rome Statute states that “the Prosecutor, when deciding on further investigations, has to consider whether there are substantial reasons to believe that an investigation ‘would not serve the interests of jus-

---

238. See Greenawalt, *supra* note 70, at 638 (citing Rome Statute at art. 8(1)).

239. See Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20, 38 (2001).

240. William W. Burke-White, *A Community of Courts: Toward a System of International Criminal Law Enforcement*, 24 MICH. J. INT’L L. 1, 7 (2002) (citing Rome Statute, *supra* note 19, at art. 5).

241. *Id.* at 167 (citing Newton, *supra* note 239, at 38).

242. Hafner, *supra* note 51, at 329.

243. See *id.* at 330. Hafner points out that this is in line with the U.N.’s practice of authorizing military actions instead of establishing its own forces. *Id.* at n.37.

244. See *id.* at 330.

tice.”<sup>245</sup>

## 2. *The Complementarity Regime Should Be Strengthened*

Complementarity is a system that seeks to infringe very little on state sovereignty, while exerting pressure on states to investigate and punish international crimes. National courts are encouraged to act when they know that the ICC will step in if they do not.<sup>246</sup> At the same time, national courts get the “political cover” they need, which helps them prosecute and avoid impunity.<sup>247</sup> An indictment by the ICC sends the signal that “a state is not doing what it should.”<sup>248</sup>

Despite complementarity’s positive institutional settlement qualities, order is needed in ICC investigation and prosecution decisions.<sup>249</sup> Tighter guidelines for accepting cases for prosecution should be established.<sup>250</sup> This would limit the Prosecutor’s discretion, soothing U.S. fears over the energetic office.<sup>251</sup> The guidelines could be developed by the Prosecutor and approved by the Assembly of States Parties.<sup>252</sup> Utilizing these guidelines in decisions to prosecute would “enhance legitimacy by rooting the Prosecutor’s decisionmaking [sic] in neutral ex ante criteria that ‘provide for a transparent standard that the Prosecutor will consistently apply.’”<sup>253</sup>

## 3. *“Unwilling” and “Unable” Should Be Clearly Defined*

There is a great deal of discretion in determining what it

245. *See id.* at n.38 (quoting Rome Statute, *supra* note 19, at art. 53).

246. Burke-White, *supra* note 240, at 92 (stating that otherwise, states might allow impunity to avoid political costs).

247. *Id.*

248. Greenawalt, *supra* note 70, at 629.

249. *See* Burke-White, *supra* note 240, at 101.

250. Greenawalt, *supra* note 70, at 650.

251. *See id.* at 651.

252. *Id.* at 652.

253. *Id.* (quoting Allison Marston Danner, *Enhancing the Legitimacy and Accountability of the Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT’L L. 510, 552 (2003)). Admittedly, it is difficult to come up with such rules. One set of rules proposed is a non-exclusive list of criteria for the Prosecutor to consult, including: the level of public outrage, popular support for a particular investigation, security issues (whether the conflict is ongoing . . .), threats to the security of a fragile transitional state by prosecuting key individuals, and political issues, including the existence of a peace treaty amnesties (distinguish between democratic and non-democratic societies/popular will and conditional and unconditional).

Greenawalt, *supra* note 70, at 654-55 (quoting Avril McDonald & Roelof Haveman, *Prosecutorial Discretion — Some Thoughts on ‘Objectifying’ the Exercise of Prosecutorial Discretion by the Prosecutor of the ICC*, Apr. 15, 2003, ICC-OPT, at 9, <http://www.icc-cpi.int/opt/consultations.php>).



means to be “unwilling” or “unable”.<sup>254</sup> It rests with the ICC to decide what these terms mean.<sup>255</sup> There are broad guidelines in the Rome Statute and in the Rules of Procedure and Evidence.<sup>256</sup> The term “unwilling”, which is the term that could benefit the most from a stronger definition, means that a state has not prosecuted, has unjustifiably delayed investigation or prosecution, has initiated a prosecution for the purpose of shielding the accused from the ICC or has not conducted the prosecution in a manner that is impartial or independent.<sup>257</sup> The court must develop guidelines stating precisely what these terms mean, so that the Prosecutor’s discretion will be appropriately limited. In developing guidelines over what it means to be “unwilling,” the ICC should adopt the position that substantial compliance with a state’s obligations is sufficient.<sup>258</sup> Substantial compliance should allow a “broad ‘zone within which behavior is accepted as adequately conforming.’”<sup>259</sup> If there has been substantial compliance, the Prosecutor must find that the state has been willing to prosecute and allow complementarity to keep the case out of the ICC. This is institutional settlement at its most elemental.

#### 4. Allow Questions of Law From National Courts

Trust, respect and interdependence between national and supranational courts can be enhanced by allowing states to submit questions of law to the ICC.<sup>260</sup> Allowing this process has the potential to keep cases out of the ICC and keep prosecution local.<sup>261</sup> The interaction between national courts of the European Union and the European Court of Justice provides a model for how this interaction might work, as does the interaction between federal and state

---

254. Burke-White, *supra* note 240, at 92 (citing Mohamed M. El Zeidy, *The Principle of Complementarity: A New Machinery to Implement Int’l Criminal Law*, 23 MICH. J. INT’L L. 869, 904 (2002)).

255. See Burke-White, *supra* note 240, at 9.

256. See Rome Statute, *supra* note 19, at art. 17 (2) & (3); Preparatory Comm’n for the Int’l Criminal Court, Finalized Draft Text of the Rules of Procedure and Evidence, ch. 3, U.N. Doc PCNICC/2000/1/Add.1.(2000).

257. See *id.*

258. See Burke-White, *supra* note 240, at 80. A state’s obligations must also be clearly set out in guidelines. In broad terms, these obligations are to: (1) criminalize the behavior by passing legislation; (2) have the necessary domestic institutions available to investigate and prosecute, such as establishing special courts or giving existing domestic courts jurisdiction over international claims; and (3) exercise the jurisdiction where appropriate. *Id.* at 80.

259. *Id.* at 80 (citing ABRAM CHAYES & ANTONIA CHAYES, *THE NEW SOVEREIGNTY* 1 (1993)).

260. See *id.* at 94.

261. See *id.*

courts in the United States.<sup>262</sup> This is a step that has great practical significance because the great majority of international crimes are prosecuted at the national level.<sup>263</sup>

#### 5. *Disallow Appeal for Acquittals*

The ICC should follow the example long established under Anglo-American law by which the acquittal of a defendant is a final judgment not subject to appeal.<sup>264</sup> This change will prove difficult for the court, since the mechanism for prosecutorial appeal is expressly stated in the Rome Statute.<sup>265</sup> Thus, an amendment to the statute will be necessary. Despite the difficulty of the process, this change would eliminate the one area where an accused's due process rights are truly under protected.

#### 6. *Independent Appellate Body Should Be Established*

Competence questions, such as who has the power to determine the limits of the ICC's authority, are important to the relationship between individual states and the ICC.<sup>266</sup> States, including the United States, usually want states to have ultimate authority to decide these questions, while internationalists want this power vested in a transnational body.<sup>267</sup> Under the Rome Statute, the ICC makes these competence determinations.<sup>268</sup> A middle ground between these two approaches is a court made up of justices from member states' high courts empowered to rule on competence questions.<sup>269</sup> This would provide a check on the power of the ICC, making it less of an intrusion upon state sovereignty.

#### *C. Proposed Policy for the United States to Adopt to Promote Institutional Settlement: Congress Should Establish a Panel of Judges to Render Decisions on Whether the ICC Has Exceeded Its Authority*

The United States should establish a court to determine

---

262. *See id.* at 95.

263. *See* Burke-White, *supra* note 240, at 97.

264. *See* Casey, *supra* note 28, at 861.

265. *See* Rome Statute, *supra* note 19, at art. 81(1)(a).

266. *See* T. Alexander Aleinikoff, *Thinking Outside the Sovereignty Box: Transnational Law and the U.S. Constitution*, 82 TEX. L. REV. 1989, 2012 (2004).

267. *See id.*

268. *Id.* These determinations are made by an in-house appellate body. *Id.*

269. *Id.*

whether the ICC has exceeded its authority.<sup>270</sup> This could be an Article I court, reporting to the President and Congress.<sup>271</sup> The court's mandate would be to issue warnings where the ICC has exceeded its authority.<sup>272</sup> The purpose of the court would be to influence the behavior of the ICC by keeping it within its prescribed boundaries.<sup>273</sup> The model for this new court would be the courts of the EU member states, which have "exerted gravitational force on the ECJ's approach to rights-based claims against EU regulations."<sup>274</sup>

*D. Other Ways That a Legal Process Approach Will Foster a Workable, Peaceful Relationship Between U.S. Courts and the ICC*

The ICC is a very new institution, therefore procedures governing the interactions of the ICC and domestic courts have yet to be worked out. Now is an opportune time to apply concepts from the Legal Process school to interactions between the ICC and the U.S. judicial system, thereby increasing the chances of a peaceful, successful relationship between the two.<sup>275</sup> The federal system in the United States provides a model of Legal Process doctrines that have the potential to mitigate conflict between courts with concurrent jurisdiction.<sup>276</sup> Professor Young in his article, *Institutional Settlement in a Globalizing Judicial System*,<sup>277</sup> outlines categories of U.S. statutory and judge-made rules that can be grafted onto the international legal system. Some of these are potentially useful in the context of the relationship between the United States and the ICC—rules of abstention;<sup>278</sup> standards of review and collateral at-

---

270. *Id.* at 2013.

271. *Id.*

272. Aleinikoff, *supra* note 266, at 2013.

273. *See id.*

274. *Id.* (citing KAREN J. ALTER, ESTABLISHING THE SUPREMACY OF THE EUROPEAN LAW 61 (2001)).

275. Jenny Martinez points out that a "[c]loser examination of a variety of existing judicial systems, however, shows that the practices of courts themselves in ordering their relationships over time are at least as important as formal legal documents are in making judicial systems function." Martinez, *supra* note 2, at 444.

276. Young, *supra* note 80, at 1177. We should not worry that these doctrines are not spelled out in the Rome Statute. Martinez reminds us that the Constitution says little about the requirements of federalism. The development of federalism has been a process. *See* Martinez, *supra* note 2, at 457. She continues by saying that "we need not wait for an international code of procedure before we start to consider issues related to the structure and functioning of the system." *Id.* at 460.

277. Young, *supra* note 80, at 1154-1156.

278. Note that Professor Young includes exhaustion in his analysis of abstention. Exhaustion of local remedies is an extremely common feature of international law, however, there is no exhaustion of local remedies rule under the ICC. This is logical considering the grave nature of the covered crimes and the high likelihood that the state or its instrumentality is the perpetrator of the crime(s).

tacks; and choice of law.

### 1. Rules of Abstention

Abstention is a vital component of federalism in the United States. It is a policy of judicial restraint whereby federal courts will not interfere with pending state cases. Abstention takes several forms in the United States.<sup>279</sup> The *Younger* abstention doctrine is particularly relevant to a study of how federalism principles can be exported to the ICC framework of shared jurisdiction.<sup>280</sup> *Younger* prohibits federal courts from interfering in a pending criminal case, absent bad faith.<sup>281</sup> The parallels between the *Younger* abstention doctrine and the complementarity system are striking, as both exist to facilitate relationships between courts with concurrent jurisdictions.<sup>282</sup> Jenny Martinez points out that abstention doctrines “invite a conversation among courts,” and this ongoing conversation promotes stability and peace between them.<sup>283</sup>

### 2. Standards of Review and Collateral Attacks

Federal courts have the power to review final state court judgments on appeal and, more rarely, collaterally through a writ of habeas corpus.<sup>284</sup> Because they are collateral, habeas standards of deference are similar to what can be expected under a system of complementarity. Federal habeas relief is a mechanism for a detained person to challenge the legality of his state court conviction in federal court. According to Hart & Wechsler, habeas corpus is unique among other methods of collateral attack because it is not subject to *res judicata*.<sup>285</sup> Habeas is admittedly opposite of complementarity in that habeas corpus is a mechanism used to free convicted persons, while complementarity has the potential to convict persons whose domestic legal systems have proved unwilling or unable to do so. However, the similarity is in the standard of deference used in an adequacy determination by the reviewing

---

279. See generally, HART AND WECHSLER, *supra* note 221, at 1186-1258. Abstention doctrines bear the name of the cases that gave birth to them.

280. *Younger v. Harris*, 401 U.S. 37 (1971).

281. *Id.* at 53-54.

282. The U.S. Supreme Court in another abstention case enunciated one of the purposes of abstention is to avoid needless friction with state policies. See HART & WECHSLER, *supra* note 221, at 1188 (quoting *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941)).

283. Martinez, *supra* note 2, at 450.

284. See Young, *supra* note 80, at 1155.

285. HART & WECHSLER, *supra* note 221, at 1296.

court. The federal habeas statute and Supreme Court cases plainly show that “an *unreasonable* application of federal law is different from an *incorrect* application of federal law.”<sup>286</sup> This deferential standard is clearly an example of institutional settlement, and should be applied under the ICC complementarity system.

### 3. *Choice of Law*

A federal system such as the United States is no stranger to the situation of choosing which law should apply in a given situation. U.S. courts have grappled with overlapping state laws as well as state and federal law. As a result, various doctrines have developed to govern which law should be applied. One of the most important of these doctrines is preemption.<sup>287</sup> Preemption provides a clear indication of which law should have precedence. In the United States, there are some areas where federal law preempts state law, so that the state law cannot stand in the event of a conflict. Because of the interstitial nature of federal law, however, federal preemption is the exception, not the rule. As applied to the ICC, Rome Statute crimes and defenses would preempt conflicting domestic laws covering genocide, crimes against humanity and war crimes.<sup>288</sup> Preemption is helpful, as all Legal Process doctrines are, in minimizing confusion and conflict.

## V. IMPLEMENTING LEGISLATION THAT TAKES INTO CONSIDERATION CONSTITUTIONAL ISSUES AND THE LEGAL PROCESS METHOD

Treaties in the United States are not automatically self-executing, therefore Congress will need to pass legislation to implement the requirements of the Rome Statute of the International Criminal Court.<sup>289</sup> This implementation legislation needs to be specific in order to comply with the treaty as well as to protect U.S. interests. Implementing legislation can be drafted in such a way as to minimize constitutional issues and take into account Legal Process methods. In addition to expressly accepting the Rome Convention of the International Criminal Court, implementing legislation must add to or change the law in the following areas:

---

286. Young, *supra* note 80, at 1179 (quoting *Williams v. Taylor*, 529 U.S. 362, 410 (2000)); *see also*, 28 U.S.C. § 2254(d)(1)(2000).

287. *See* Young, *supra* note 80, at 1156-57.

288. This is why, in conjunction with the system of complementarity, the United States should incorporate ICC definitions and elements into domestic implementing legislation. *See infra* Part V.A..

289. *See* Lee, *supra* note 84, at 5.

### A. Crimes

Because of the system of complementarity, arguably the most important piece of legislation needed to protect U.S. interests is to ensure that the crimes covered under the Rome Statute of the International Criminal Court are fully criminalized under U.S. law.<sup>290</sup> While this purpose could be served by individual state court criminal codes and the military court-martial system, the federal government should codify the crimes covered by the ICC to ensure uniformity and full coverage, ensuring an independent and impartial forum as required by the Rome Statute.<sup>291</sup> Although the Rome Statute does not require that a state party include the covered crimes in domestic legislation, it is advantageous for the United States to do so, in order to provide a jurisdictional base for U.S. courts to preempt ICC jurisdiction.<sup>292</sup> This would create a safety net for the United States, allowing domestic jurisdiction over any case brought against one of its citizens by the ICC under the complementarity principle. There are several other good reasons for the United States to criminalize Rome Statute crimes, such as preventing the chance that the United States could become a safe haven for perpetrators of covered crimes and to contribute to the international strengthening of criminal justice in the area of the most serious crimes.<sup>293</sup>

The most effective way for the United States to accomplish this goal of criminalizing Rome Statute offenses is to implement legislation that codifies the crimes and their elements in a way that mirrors their treatment in the Rome Statute.<sup>294</sup> Defenses and penalties should also track the Rome Statute to provide the broadest possible protection for U.S. citizens.<sup>295</sup>

Implementation legislation must also codify crimes against the administration of justice. Article 70 of the Rome Statute requires states parties to enact laws prohibiting the following: giving false testimony; presenting false evidence; corrupting or retaliating against a witness; impeding, retaliating or bribing a court official; retaliating against a member of the court; and soliciting or accept-

---

290. It is important to note that the United States should take this step even if it ultimately decides not to ratify the convention, since the International Criminal Court has jurisdiction over persons who commit covered crimes in the territory of a state party, even if the defendants are citizens of non-state parties. *Id.* at 24.

291. U.S. military courts are at the most risk of being considered not effectively independent and/or impartial.

292. *See* Lee, *supra* note 84, at 44.

293. *See id.* at 22.

294. *See generally* Rome Statute, *supra* note 19, at arts. 6-8 for elements of these crimes.

295. Rome Statute, *supra* note 19, at arts. 31-33, 77.

ing a bribe as a member of the court.<sup>296</sup>

These crimes are the responsibility of states parties to criminalize and prosecute under domestic law as part of the obligation to cooperate with the court.<sup>297</sup> The United States should have no problem implementing these prohibitions and should look to federal laws already on the books dealing with the same issues in the domestic context.<sup>298</sup>

### *B. Cooperation and Judicial Assistance*

For a system of shared power to work, with the power to enforce reserved to the states, states parties must cooperate with and lend assistance to the ICC. In fact, this is a requirement of the Rome Statute.<sup>299</sup> As a result, provisions for cooperation should be incorporated into U.S. implementing legislation. States are free to implement these requirements in a way that best suits each, provided that the cooperation mandated by the Rome Statute is possible.<sup>300</sup> At a minimum, provisions must be made in the following areas:<sup>301</sup> taking sworn testimony;<sup>302</sup> production of evidence;<sup>303</sup> questioning of suspects;<sup>304</sup> service of documents;<sup>305</sup> facilitating appearance of witnesses;<sup>306</sup> searches and seizures;<sup>307</sup> examination of sites, including exhumations;<sup>308</sup> provision of records and documents;<sup>309</sup> identification, freezing or seizure of assets;<sup>310</sup> provision for enforcement of fines, forfeitures and reparations;<sup>311</sup> provision for prisoners to serve their sentences in the U.S.<sup>312</sup>

---

296. *Id.* at art. 70.

297. Lee, *supra* note 84, at 35.

298. *See generally*, JULIE R. O'SULLIVAN, FEDERAL WHITE COLLAR CRIME 303-06, 383-85 (2d ed. 2003) (discussing the elements of perjury and obstruction of justice).

299. Rome Statute, *supra* note 86, at arts. 86-102.

300. BRUCE BROOMHILL, INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW 155 (2003).

301. Many of these provisions will have to be drafted carefully to comply with the Constitution.

302. *See* Elizabeth Wilmshurst, *Implementation of the ICC Statute in the United Kingdom, in STATES' RESPONSES TO ISSUES ARISING FROM THE ICC STATUTE: CONSTITUTIONAL, SOVEREIGNTY, JUDICIAL COOPERATION AND CRIMINAL LAW* 147, 155 (Roy S. Lee ed. 2005).

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.* at 160.

307. Wilmshurst, *supra* note 302, at 160.

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.* at 162. Many of these areas will have to be drafted carefully to avoid constitutional violations.

312. *Id.* at 148 (explaining that Great Britain has made provision for its citizens convicted by the ICC to serve their sentences in the United Kingdom). While there is no obliga-

A referral of non-cooperation can be made to the Assembly of States Parties (or the U.N. Security Council if the Security Council referred the case to the ICC).<sup>313</sup> It remains to be seen what the consequences of non-cooperation will be, since the ICC is still in its early days.<sup>314</sup>

### C. Surrender

Surrender of suspects is another area of fundamental importance in drafting implementing legislation for the Rome Statute Court, since it mandates the surrender of suspects to the jurisdiction of the court.<sup>315</sup> The Rome Statute leaves states parties discretion in designing surrender legislation, yet requires that surrender procedures should not be more burdensome than extradition procedures already on the books.<sup>316</sup> Because of the relaxed extradition procedures called for by the Rome Statute, a threshold issue in drafting surrender legislation is its constitutionality. As discussed in Part III.A.3., *supra*, legislation in the area of surrender is within the power of Congress.<sup>317</sup> The federal legislation providing for surrender in connection with the ICTY and ICTR is further proof that the necessary provisions of a new statute will be constitutional.<sup>318</sup>

Legislation should provide judicial review for the suspect, but a form of judicial review that is no more complex than that usually provided for under U.S. extradition law.<sup>319</sup> The judicial review should provide for a determination of whether the person before the court is the person named in the warrant and make an inquiry into whether the defendant's rights were protected.<sup>320</sup> Legislation must also instruct the judicial officer to immediately consult with the ICC about difficulties that arise in the surrender process.<sup>321</sup>

This relaxed standard presumes the trust relationship dis-

---

tion on states parties to accept prisoners, it would further protect U.S. interests to agree to accept them. States have the power to accept or reject prisoners on a case-by-case basis, which is a viable way to protect U.S. citizens convicted under the ICC. States accepting prisoners must agree to certain conditions, including agreeing not to shorten a sentence without ICC permission. *See generally*, BROOMHILL, *supra* note 300, at 161-62.

313. *See* BROOMHILL, *supra* note 300, at 156.

314. *See id.*

315. *See* Rome Statute, *supra* note, at art. 89.

316. Lee, *supra* note 84, at 37; Rome Statute, *supra* note 19, at art. 91(2)(c).

317. *See* Harris & Kushen, *supra* note 90, at 10.

318. *See generally*, National Defense Authorization Act, Pub. L. No. 104-106, § 1342, 110 Stat. 186, 486 (1986).

319. *See* Sheila O'Shea, *The Interaction Between International Criminal Tribunals and National Legal Systems*, 28 N.Y.U. J. INT'L L. & POL. 367, 379-80.

320. *See* Lee, *supra* note 84, at 37.

321. Rome Statute, *supra* note 19, at art. 97.



cussed previously, calling for a presumption against prejudice in the ICC.<sup>322</sup> This same presumption against prejudice is inherent in the U.S. federal system and is an essential feature of institutional settlement.

#### *D. Immunity*

Immunity is an area that is related to extradition and surrender, and implementing legislation must make provision for the unique treatment of immunity under the Rome Statute. The ICC both ignores and protects immunity of diplomats and state officials.<sup>323</sup> While the Rome Statute recognizes that immunity is an area covered by numerous international agreements and customary international law, its drafters recognized that to achieve the purposes of the ICC, all persons, including heads of state, state officials and diplomats, must be held accountable for their criminal acts. The solution is a system where states must surrender their own officials regardless of immunity for officials, while pre-existing international obligations between the state and a second state may excuse the state from surrendering a foreign official.<sup>324</sup>

#### *E. Bail*

Bail is allowed under the Rome Statute, therefore implementing legislation should provide for bail to be granted pending determination of the proceedings.<sup>325</sup> Legislation should reference the Rome Statute requirements, which state that

[i]n reaching a decision on any such application, the competent authority in the custodial State shall consider whether, given the gravity of the alleged crimes, there are urgent and exceptional circumstances to justify interim release and whether necessary safeguards exist to ensure that the custodial State can fulfil [sic] its duty to surrender the person

---

322. Harris & Kushen, *supra* note 90, at 8.

323. See Rome Statute, *supra* note 19, at arts. 27, 98(1).

324. See Wilmschurst, *supra* note 302, at 156. For an exacting study of the many issues of immunity under the ICC, see generally Dapo Akande, *The Application of International Law Immunities in Prosecutions for International Crimes*, in BRINGING POWER TO JUSTICE? THE PROSPECTS OF THE INTERNATIONAL CRIMINAL COURT (Joanna Harrington, et al., eds. 2006).

325. Rome Statute, *supra* note 19, at art. 59(4). See also, Wilmschurst, *supra* note 302, at 156.

to the Court.<sup>326</sup>

The federal statute should make clear that determination of bail must not include consideration of whether the arrest warrant was properly executed.<sup>327</sup>

#### *F. Repeal of the American Servicemembers' Protection Act (ASPA)*

Compliance with the Rome Treaty of the ICC will require legislation to repeal the American Servicemembers' Protection Act (ASPA). The ASPA was passed in 2002 in response to the entry into force of the ICC.<sup>328</sup> Its provisions are incompatible with the U.S. ratification of the Rome Statute. Major provisions of the ASPA include termination of military aid to countries that are party to the ICC, preclusion of U.S. military deployment to states party to the ICC, authorization for the U.S. president to employ "all means necessary," including military force, to rescue any United States national in ICC custody" and authorization to enter into immunity agreements with states party to the ICC.<sup>329</sup>

#### *G. Status of Force Agreements (SOFAs)*

Status of Force Agreements have been utilized by the United States since the 1950s to give the United States concurrent jurisdiction over their forces accused of illegal conduct while serving overseas.<sup>330</sup> Even though jurisdiction is concurrent, the agreements call for the host country to "give 'sympathetic consideration' to any U.S. request for waiver of the primary right to exercise jurisdiction if the United States claims such waiver 'to be of particular importance.'"<sup>331</sup> After the creation of the ICC, the United States utilized SOFAs in response to fear that U.S. military personnel would be subject to the jurisdiction of the ICC.<sup>332</sup> The United States should continue to use SOFAs to give the United States more areas of concurrent jurisdiction, providing the opportunity to

---

326. Rome Statute, *supra* note 19, at art. 59(4).

327. *Id.*

328. The American Servicemembers' Protection Act of 2002, 22 U.S.C. §§ 7421-7433 (2002).

329. Michael T. Wawrzycki, *The Waning Power of Shared Sovereignty in International Law: The Evolving Effect of U.S. Hegemony*, 14 TUL. J. INT'L & COMP. L. 579, 614 (2006) (commenting that "the United States has obtained separate bilateral immunity agreements from sixty countries, many of which are either smaller states or those with weak economies").

330. *See* Everett, *supra* note 26, at 138.

331. *Id.*

332. *See id.*

take advantage of complementarity.

## VI. CONCLUSION

The International Criminal Court has the potential to reinforce principles of justice and the rule of law that the United States has long valued. The concurrent jurisdiction scheme established by the ICC represents a balanced distribution of power and does not overly threaten the U.S. Constitution or state sovereignty. U.S. involvement with the court would enhance the court's credibility and power, and increase its chance of success. If the United States becomes party to the treaty while the court is in its early days, it can graft federalism principles onto an emerging framework of transnational power. Doctrines in place in the U.S. federal system that have promoted order and functionality will serve the ICC well.<sup>333</sup> The ICC can increase the probability of U.S. involvement by adopting a vigorous set of rules and policies designed to promote institutional settlement. With lots of cooperation and a little luck, history will bear witness, just as it has in the case of the U.S. Constitution, to the creation of a "judicial comity borne of dialogue and trust."<sup>334</sup>

---

333. See Martinez, *supra* note 2, at 449.

334. O'Connor, *supra* note 181, at 40.



**A BALANCING ACT: THE INTRODUCTION OF  
RESTORATIVE JUSTICE IN THE INTERNATIONAL  
CRIMINAL COURT’S CASE OF *THE PROSECUTOR  
V. THOMAS LUBANGA DYILO***

MARY WILL \*

I.	INTRODUCTION.....	86
II.	VICTIM PARTICIPATION IN PAST INTERNATIONAL CRIMINAL TRIBUNALS.....	88
	<i>A. Theories of Justice: Retributive and Restorative.....</i>	88
	<i>B. Nuremburg and Tokyo.....</i>	89
	<i>C. ICTY.....</i>	90
	<i>D. ICTR.....</i>	92
III.	THE ROME STATUTE AND RULES OF EVIDENCE AND PROCEDURE OF THE ICC: A DEFINITE ROLE FOR THE VICTIM.....	93
	<i>A. Becoming a Victim Participant in the ICC.....</i>	93
	<i>B. The Victims and Witnesses Unit.....</i>	95
	<i>C. Victim Participation in the Proceedings.....</i>	96
	<i>D. Reparations under the ICC.....</i>	97
IV.	THE CONFIRMATION OF CHARGES HEARING OF THE CASE OF <i>THE PROSECUTOR V. THOMAS LUBANGA DY- ILO</i> .....	99
	<i>A. Opening Statements.....</i>	99
	<i>B. Questioning the Witness.....</i>	103
	<i>C. Document Requests.....</i>	105
	<i>D. Closing Statements.....</i>	106
V.	WAS THE ROLE OF THE VICTIMS DURING THE CONFIR- MATION OF CHARGES HEARING CONSISTENT WITH THE RESTORATIVE JUSTICE INTENTIONS OF THE DRAFTERS OF THE ICC? .....	108
	<i>A. Restorative Justice.....</i>	109
	<i>B. The Role of Restorative Justice in the ICC.....</i>	112
	<i>C. Pre-Trial Chamber in The Prosecutor V. Thomas Lubanga Dyilo Upholds the Incorporation of Restora- tive Justice Aims.....</i>	115
VI.	CONCLUSION.....	119

---

\* J.D. Candidate, Florida State University College of Law, May 2008. The author would like to thank her parents and Josh for their love and support. She would also like to thank the members of the Journal of Transnational Law & Policy for their help editing this piece.

## I. INTRODUCTION

If one has ever been the victim of a serious crime, it is very clear that the harm does not necessarily end when the criminal action does.<sup>1</sup> Many victims require justice and public recognition of their suffering in order to be restored<sup>2</sup> or aided in their recovery. The relatively recent theory of restorative justice strongly supports victim involvement in the proceedings against their offender.<sup>3</sup> Advocates of restorative justice feel that actual participation in the process is important to victims' sense of recovery as well as future well-being.<sup>4</sup> The International Criminal Court (ICC) has recognized the importance of granting the victims of mass atrocities a forum in which to be heard<sup>5</sup> and, perhaps, healed.<sup>6</sup> This is the first time that an international criminal tribunal has permitted victims to participate in legal proceedings against their offenders<sup>7</sup> and represents the international community's desire to see more rights given to victims of serious crimes.<sup>8</sup> This Note will focus on the level of victim involvement in the first Confirmation of charges Hearing to take place before the ICC and analyze the extent to which that participation is consistent with the goals of restorative justice.

The ICC is currently overseeing its first case, *The Prosecutor v. Thomas Lubanga Dyilo*.<sup>9</sup> Mr. Dyilo, a native of the Democratic Republic of the Congo,<sup>10</sup> is the alleged founder of the *Union des Patriotes Congolais* (UPC), a political party, and its military wing, the *Forces patriotiques pour la libération du Congo* (FPLC).<sup>11</sup> He

---

1. See Linda G. Mills, *The Justice of Recovery: How the State Can Heal the Violence of Crime*, 57 HASTINGS L.J. 457, 457-58 (2006).

2. See Neil J. Kritz, *Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights*, 59 LAW & CONTEMP. PROBS. 127, 128 (1997).

3. Mills, *supra* note 1, at 458.

4. Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH L. REV. 15, 24 (2003).

5. Gerard J. Mekjian & Mathew C. Varughese, *Hearing the Victim's Voice: Analysis of Victims' Advocate Participation in the Trial Proceeding of the International Criminal Court*, 17 PACE INT'L L. REV. 1, 5 (2005).

6. *Id.* at 19.

7. Raquel Aldana-Pindell, *In Vindication of Justiciable Victims' Rights to Truth and Justice for State-Sponsored Crimes*, 35 VAND. J. TRANSNAT'L L. 1399, 1428 (2002).

8. Mekjian & Varughese, *supra* note 5.

9. Press Release, Int'l Criminal Court, The Office of the Prosecutor of the International Criminal Court Opens Its First Investigation (June 23, 2004), available at [http://www.icc-cpi.int/pressrelease\\_details&id=26&1=en.html](http://www.icc-cpi.int/pressrelease_details&id=26&1=en.html).

10. *Chronology of the Thomas Lubanga Dyilo Case*, INT'L CRIMINAL COURT NEWSLETTER (The Hague, Neth.), Nov. 2006, at 1, available at [http://www.icc-cpi.int/library/about/newsletter/10/en\\_01.html](http://www.icc-cpi.int/library/about/newsletter/10/en_01.html).

11. *Id.* at 2.

was arrested on March 17, 2006<sup>12</sup> for the charges (at that point yet-to-be confirmed) of the war crimes of conscripting children into armed groups, enlisting children into armed groups, and using children to participate actively in hostilities.<sup>13</sup> Each of these charges constitutes a crime under Article 25(3)(a) and Article 8(2)(e) of the Rome Statute.<sup>14</sup>

On January 29, 2007, the Pre-Trial Chamber of the ICC confirmed the charges brought by the Prosecutor, allowing the case to be set for trial.<sup>15</sup> Prior to this confirmation of charges, the Pre-Trial Chamber of the ICC conducted a Confirmation of charges Hearing in order to determine if there was substantial evidence to proceed to trial.<sup>16</sup> In accordance with the Rome Statute of the ICC<sup>17</sup> and the Rules of Procedure and Evidence of the ICC,<sup>18</sup> certain victims, represented by counsel, played an active role in this hearing.<sup>19</sup> While subject to procedural restrictions, such as the inability to call their own witnesses,<sup>20</sup> the legal representatives of the victims made their presence known through forceful opening<sup>21</sup> and closing<sup>22</sup> remarks, as well as numerous document requests and even a question posed to the witness.<sup>23</sup> This hearing set the precedent for victims to play an important role in international criminal proceedings as they seek closure for the harms committed against them.

---

12. *Id.*

13. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Warrant of Arrest (Feb. 10, 2006), *available at* <http://www.icc-cpi.int/cases/RDC/c0106.html>.

14. *See infra* note 17.

15. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Hearing: Decision of the Pre-Trial Chamber Following the Confirmation of Charge Hearing (Jan. 29, 2007), *available at* [http://www.icc-cpi.int/cases/RDC/c0106/c0106\\_hs.html](http://www.icc-cpi.int/cases/RDC/c0106/c0106_hs.html).

16. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Confirmation of charges Hearing (Nov. 9, 2006), [hereinafter Nov. 9 Confirmation of charges Hearing] *available at* [http://www.icc-cpi.int/cases/RDC/c0106/c0106\\_hs.html](http://www.icc-cpi.int/cases/RDC/c0106/c0106_hs.html) (follow “English” hyperlink).

17. *See* Rome Statute of the International Criminal Court, art. 68, U.N. Doc. A/CONF. 189/9, July 17, 1998, reprinted in 37 I.L.M. 999 (1998), [hereinafter Rome Statute], *available at* <http://www.un.org/law/icc/statute/romefra.htm>.

18. *See* Rules of Procedure and Evidence, Rule 89, U.N. Doc. PCNICC/2000/1/Add.1, Nov. 2, 2000, [hereinafter ICC Rules of Procedure and Evidence], *available at* [http://www.un.org/law/icc/asp/1stsession/report/english/part\\_ii\\_a\\_e.pdf](http://www.un.org/law/icc/asp/1stsession/report/english/part_ii_a_e.pdf).

19. Nov. 9 Confirmation of charges Hearing, *supra* note 16, at 4.

20. ICC Rules of Procedure and Evidence, *supra* note 18, at art. 89. The inability of victims to call their own witnesses is a reflection of the administrative and logistical constraints of the ICC as well as deference to the procedural rights of the defendant.

21. Nov. 9 Confirmation of charges Hearing, *supra* note 16, at 75.

22. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Confirmation of charges Hearing, (Nov. 28, 2006), [hereinafter Nov. 28 Confirmation of charges Hearing] *available at* [http://www.icc-cpi.int/cases/RDC/c0106/c0106\\_hs.html](http://www.icc-cpi.int/cases/RDC/c0106/c0106_hs.html).

23. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Confirmation of charges Hearing, (Nov. 21, 2006), [hereinafter Nov. 21 Confirmation of charges Hearing] *available at* [http://www.icc-cpi.int/cases/RDC/c0106/c0106\\_hs.html](http://www.icc-cpi.int/cases/RDC/c0106/c0106_hs.html).

This Note will analyze the role of the victims in the Confirmation of charges Hearing in the case of *The Prosecutor v. Thomas Lubanga Dyilo* and examine whether their participation served to fulfill the restorative justice aim of healing the victims by giving voice to their suffering. Their role as a third party to the proceedings will be explored in terms of the rights and restrictions placed upon the victims by the Rome Statute and the ICC Rules of Evidence. This Note will argue that the extent to which the Pre-Trial Chamber allowed victims to participate in this hearing illustrated the ICC's recognition of restorative justice through public expression and acknowledgment of the victims' suffering. In addition, it will show how the ICC has attempted to create a balance between restorative justice aims and purely retributive proceedings which focus solely on the individual wrongs of the offender. This Note will explore the incorporation of group reparation payments into the ICC as well as the Court's efforts to maintain the procedural rights of the defendant.

Section II of this Note begins with a background investigation of the limited role of victims in past international criminal tribunals. Section III then turns to the current system of the ICC and the specific role granted to victims. Section IV involves an overview of the victims' participation in the Confirmation of charges Hearing in the case of *The Prosecutor v. Thomas Lubanga Dyilo*. Next, Section V provides an introduction to restorative justice theory, as well as an analysis of whether or not the role of the victims in this hearing was consistent with the restorative aims that their inclusion was meant to accomplish. This section will explore the methods employed by the Pre-Trial Chamber to balance the role of restorative justice with that of retributive justice as well as the due process concerns of the defendant. Section VI will conclude with a brief forecast for future ICC proceedings and the role of victims and their legal representatives there.

## II. VICTIM PARTICIPATION IN PAST INTERNATIONAL CRIMINAL TRIBUNALS

### *A. Theories of Justice: Retributive and Restorative*

The first international criminal tribunals were primarily focused on dispensing retributive justice. The retributive approach "defines the state as victim, defines wrongful behavior as violation of rules, and sees the relationship between victim and offender as



irrelevant.”<sup>24</sup> In fact, retributive justice theory is not only thought of as a means of defining a system of justice but also the method for carrying it out.<sup>25</sup> Restorative justice advocate Howard Zehr states that under retributive justice theory “crime is a violation of the state, defined by lawbreaking and guilt. Justice determines blame and administers pain in a contest between the offender and the state directed by systematic rules.”<sup>26</sup> There is really no role given to the victim in a retributive justice proceeding other than that of a possible witness.<sup>27</sup> Critics of the retributive model argue that it leaves victims, society and even offenders unsatisfied and injured.<sup>28</sup> While retributive justice does seek to punish the offender, it was clear that, over time, this was not sufficient.<sup>29</sup>

As a response to this, policy-makers, community leaders, and scholars began focusing on an approach known as restorative justice, which could be seen as both an alternative and a complement to the current retributive processes.<sup>30</sup> This Note will address the theory of restorative justice and its incorporation into the international criminal justice system in greater detail in Section V.

### B. Nuremburg and Tokyo

The idea of international criminal tribunals that would impose individual liability for mass atrocities was first put into practice with the Nuremburg Tribunal following World War II.<sup>31</sup> Here, the Allied nations united to prosecute many of those responsible for these crimes and hold the guilty parties accountable for their actions.<sup>32</sup> This tribunal was influential in moving the prosecution of mass atrocities from the domestic sphere to the international.<sup>33</sup> Similarly, the Tokyo Tribunal following World War II sought to punish individuals on an international level for mass atrocities

---

24. HOWARD ZEHR, *CHANGING LENSES* 184 (1990).

25. *Id.*

26. *Id.* at 181.

27. *Id.* at 30.

28. GERRY JOHNSTONE & DANIEL W. VAN NESS, *HANDBOOK OF RESTORATIVE JUSTICE* 75 (2007).

29. Those who conducted research on victims of violent crimes found that “victims have multiple needs beyond the punishment of the offender.” Mills, *supra* note 1, at 463. Assuming a passive role in the proceedings against their offender was found to be insufficient compared to the restorative benefits that victims experienced when they assumed more active roles. *Id.*; see also ZEHR, *supra* note 24, at 184

30. JOHNSTONE & VAN NESS, *supra* note 28, at 76.

31. Mekjian & Varughese, *supra* note 5, at 8.

32. *Id.* at 3.

33. Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Human Atrocities*, 84 WASH. U. L. Q. (forthcoming 2007), available at <http://ssrn.com/abstract=931567>.

committed during the War.<sup>34</sup> While the perpetrators of these crimes were prosecuted by the Allied parties, the role of the victims in the proceedings was nonexistent.<sup>35</sup> In the Nuremburg tribunal, while the Prosecution did call a small number of witnesses, they were mainly low-level Allied prisoners of war who testified to insider information that they had against the defendants. Most of the prosecution's evidence was in the form of detailed documents kept by the Nazis.<sup>36</sup> Also, because the Nuremburg and Tokyo tribunals were organized based on the common-law, adversarial model for legal proceedings, the inclusion of victims as a third party to the proceedings was not considered.<sup>37</sup>

### C. ICTY

It was not until the early 1990's that another international criminal tribunal, the International Criminal Tribunal for the Former Yugoslavia (ICTY), was established.<sup>38</sup> Created in 1993, the ICTY is authorized to prosecute grave breaches of the 1949 Geneva Convention, violations of the laws of customs of war, genocide and crimes against humanity when these crimes occurred on the territory of the former Yugoslavia after January 1, 1991.<sup>39</sup> The ICTY only has jurisdiction over natural persons, excluding organizations, political parties, administrative entities, etc.<sup>40</sup> United Nations Security Council Resolution 827, which created the ICTY, stated that "the establishment of an international tribunal [is] for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law."<sup>41</sup> This language suggests that there is no place for restorative justice in the ICTY and that the intent of the tribunal is to "limit redress for serious violations of international human rights law to punitive damages."<sup>42</sup> In

---

34. Mekjian & Varughese, *supra* note 5, at 3.

35. TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBURG TRIALS* 184 (1992). There was disagreement amongst the Prosecution regarding the use of the main defendants (i.e., Goering) as prosecution witnesses (in exchange for a plea agreement) but ultimately, Chief Prosecutor Jackson decided against this.

36. M. CHERIF BASSIOUNI, *INTRODUCTION TO INTERNATIONAL CRIMINAL LAW* 411 (2003). This abundance of Nazi documentation eliminated the need for victim testimony.

37. Mark S. Ellis, *Achieving Justice Before the International War Crimes Tribunal: Challenges for the Defense Counsel*, 7 *DUKE J. COMP. & INT'L L.* 519, 524 (1997).

38. ICTY at a Glance, available at <http://www.un.org/icty/glance-e/index.htm> (last visited Nov. 28, 2007).

39. *Id.*

40. *Id.*

41. S.C. Res. 827, ¶ 11, U.N. Doc. S/RES/827 (May 25, 1993), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N93/306/28/IMG/N9330628.pdf>.

42. Mekjian & Varughese, *supra* note 5, at 12; see also Nsongurua J. Udombana, *Pay Back Time in Sudan? Darfur in the International Criminal Court*, 13 *TULSA J. COMP. & INT'L L.* 1, 44 (2005).

fact, victims of the crimes tried before the ICTY were not permitted to receive reparations or compensation for their suffering or participate in the proceedings aside from possibly being called as witnesses.<sup>43</sup> The Rules of the ICTY clearly delineate the procedures for witness testimony but do not include the rights of witnesses, who may in fact also be victims, to be represented by counsel or be heard outside of their testimony given during direct or cross-examination.<sup>44</sup> The Rules of the ICTY do assign the Registry the task of recommending protective measures for victims and witnesses, as well as providing counseling and support for them.<sup>45</sup>

There are various theories regarding the lack of victim involvement in the ICTY procedures. As previously mentioned, Resolution 827 clearly limits the purpose of the ICTY to the prosecution of individuals for mass atrocities.<sup>46</sup> In addition, this ad hoc tribunal seems to be based more on an adversarial, common-law system in which only two parties, the prosecution and defense, operate.<sup>47</sup> In addition, the rules of the ICTY require any witness who testifies to take an oath of truthfulness<sup>48</sup> which creates the possibility of the victim/witness being held in contempt of court should they not tell the truth.<sup>49</sup> Quite clearly, the drafters of the ICTY Rules of Evidence did not intend for the victims to play an active role in the proceedings, relying instead on the prosecution to represent their interest in seeking justice.<sup>50</sup>

Although the ICTY did not have the power to assign or enforce victim reparation payments itself,<sup>51</sup> Rule 106 of the ICTY Rules of Procedure and Evidence states that:

- (a) The Registrar shall transmit to the competent authorities of the States concerned the judgment finding the accused guilty of a crime which has caused injury to a victim. (b) Pursuant to the rele-

---

43. Mekjian & Varughese, *supra* note 5, at 12.

44. See Rules of Procedure and Evidence, Rule 90, U.N. Doc. IT/32/REV/39, Sept. 22, 2006, [hereinafter ICTY Rules of Evidence], *available at*: [http://www.un.org/icty/legaldocs/basic/rpe/IT32\\_rev39.htm](http://www.un.org/icty/legaldocs/basic/rpe/IT32_rev39.htm); *see also*, Press Release, ICTY, Remarks of Judge Richard May, Judge of the International Criminal Tribunal for the Former Yugoslavia, to the Fourth Session of the Preparatory Commission for the International Criminal Court (Mar. 20, 2000), *available at* <http://www.un.org/icty/pressreal/p479-e.htm>.

45. ICTY Rules of Evidence, *supra* note 44, at rule 34.

46. S.C. Res. 827, *supra* note 41.

47. Mekjian & Varughese, *supra* note 5, at 13.

48. ICTY Rules of Evidence, *supra* note 44.

49. Mekjian & Varughese, *supra* note 5, at 13.

50. *Id.*

51. Mark S. Ellis & Elizabeth Hutton, *Policy Implications of World War II Reparations and Restitution as Applied to the Former Yugoslavia*, 20 BERKELEY J. INT'L L. 342, 351 (2002).

vant national legislation, a victim or persons claiming through the victim may bring an action in a national court or other competent body to obtain compensation.<sup>52</sup>

By allowing the legal representative of the victim to bring suit in a national court, the victim is able to be compensated through ICTY's standing power under the UN Security Council.<sup>53</sup> However, the cooperation of national governments is required for this to prove effective. Unfortunately, the governments of Serbia and Montenegro, as well as the Republica Srpska (which is the Bosnian-Serb) *de facto* government, have not been cooperative with the ICTY investigations nor have they acknowledged "the competence of the Tribunal."<sup>54</sup>

In essence, the ICTY did not provide any real mechanisms for victim restoration aside from the scant possibility of being compensated via the national courts. Since the Security Council has not used its powers to enforce the orders of the ICTY in regards to individual defendants or States,<sup>55</sup> it is unlikely that the victims will ultimately receive reparations for the crimes committed against them.

#### D. ICTR

The second international criminal tribunal created in the 1990's was the International Criminal Tribunal for Rwanda (ICTR) which was established in 1994.<sup>56</sup> The purpose of the ICTR is to prosecute those responsible for genocide and serious crimes against international humanitarian law that took place in the territory of Rwanda during the calendar year of 1994.<sup>57</sup> While the ICTY allowed no participation for victims outside of the role of witnesses,<sup>58</sup> the ICTR did grant a very minimal role to victims as individual participants in the prosecutions of low level perpetrators.<sup>59</sup> Here, some victims were given restricted rights to participate in community gatherings where "they were asked to be judge

---

52. ICTY Rules of Evidence, *supra* note 44.

53. Ellis & Hutton, *supra* note 51.

54. BASSIOUNI, *supra* note 36, at 429.

55. *Id.* at 430.

56. ICTR Rules of Procedure and Evidence, (Nov. 10, 2006), available at <http://69.94.11.53/default.htm> (follow "BASIC LEGAL TEXTS" hyperlink; then follow "Rules of Procedure and Evidence" hyperlink).

57. *Id.*

58. Mekjian & Varughese, *supra* note 5, at 13.

59. *Id.* at 15, n.52.

and jury against low level perpetrators.”<sup>60</sup> In this setting, an ICTR prosecutor questioned victims and witnesses about whether or not certain suspects being held in custody should be further investigated for crimes against humanity.<sup>61</sup>

In spite of this small improvement, the ICTR Statute, like that of the ICTY, granted very few individual rights to victims.<sup>62</sup> One clear difference between the ICTY Rules and those of the ICTR is the inclusion in the ICTR Rules of “develop[ing] short and long term plans for the protection of witnesses who have testified before the Tribunal and who fear a threat to their life, property or family.”<sup>63</sup> The ICTY had no provision like this in its Rules of Procedure and Evidence.<sup>64</sup> This provision shows increased awareness of the need to offer victims additional safeguards to help them feel comfortable enough to testify before an international tribunal.

In spite of this, the focus of the ICTR remained primarily retributive<sup>65</sup> while also encouraging a fair and expeditious trial for the defendant.<sup>66</sup> The overall concern was that the inclusion of victims as a separate legal entity, without clearly defined rules of procedure governing their involvement, could significantly delay the proceedings of the tribunal and adversely affect the rights of those charged.<sup>67</sup> Specifically, it has been argued that since each individual victim is different, the need for “case-specific research and custom-made procedures” could prove time consuming and costly.<sup>68</sup> The drafters of the Rome Statute of the ICC took this into account and revolutionized victim participation in the international criminal arena.

### III. THE ROME STATUTE AND RULES OF EVIDENCE AND PROCEDURE OF THE ICC: A DEFINITE ROLE FOR THE VICTIM

#### *A. Becoming a Victim Participant in the ICC*

The International Criminal Court is a permanent and independent criminal court that was established by the Rome Statute

---

60. *Id.*

61. *Id.*

62. *Id.* at 15.

63. ICTR Rules of Procedure and Evidence, *supra* note 56, at rule 34.

64. See ICTY Rules of Procedure and Evidence, *supra* note 44.

65. Adrian Di Giovanni, *The Prospect of ICC Reparations in the Case Concerning Northern Uganda: On a Collision Course with Incoherence?*, 2 J. INT'L L. & REL. 25, 40 (2006).

66. Mekjian & Varughese, *supra* note 5, at 14.

67. *Id.*

68. Timothy K. Kuhner, *The Status of Victims in the Enforcement of International Criminal Law*, 6 OR. REV. INT'L L. 95, 142 (2004).

and adopted on July 17, 1998.<sup>69</sup> The Rome Statute became effective on July 1, 2002 and today, one hundred and four States have become parties to the Statute.<sup>70</sup> The creation of the ICC represents a significant milestone in international affairs<sup>71</sup> through its establishment of a permanent tribunal dedicated to eradicating the culture of impunity for international human rights violations.<sup>72</sup> More specifically, the Rome Statute of the ICC, as well as the Rules of Procedure and Evidence of the ICC also include specific and much more significant roles for victims in the proceedings.<sup>73</sup>

According to Rule 85 of the Rome Statute, victims include those who are “natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.”<sup>74</sup> Victims do not necessarily have to be individuals and “may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.”<sup>75</sup>

Victims must follow a specific application process if they would like to be granted the legal status of “victim” and given participatory rights in a criminal proceeding.<sup>76</sup> According to Rule 89 of the Rules of Procedure and Evidence, the Chamber of the ICC that has been assigned to a particular case has the discretion “on its own initiative or on the application of the Prosecutor or the defense” to determine if an applicant qualifies as a victim.<sup>77</sup> In order to qualify as a victim and be granted participatory status, one must send a written application to the Victims’ Participation and Reparation section of the Court Registrar.<sup>78</sup> The Registrar will then submit the application to a pre-trial chamber of judges who will decide the arrangements for their participation in the proceedings.<sup>79</sup> Applicants must present evidence showing that they “are victims of crimes which come under the competence of the Court.”<sup>80</sup> The

---

69. International Criminal Court, <http://www.icc-cpi.int/about/ataglance/establishment.html> (last visited Nov. 28, 2007).

70. *Id.*

71. Ku & Nzelibe, *supra* note 33, at 1.

72. Aaron Fichtelberg, *Democratic Legitimacy and the International Criminal Court*, 4 J. INT’L CRIM. JUST. 765, 768 (2006).

73. Aldana-Pindell, *supra* note 7, at 1414.

74. ICC Rules of Procedure and Evidence, *supra* note 18, at rule 85.

75. *Id.*

76. ICC Rules of Procedure and Evidence, *supra* note 18, at rule 89.

77. *Id.*

78. International Criminal Court, Participation of Victims in Proceedings, <http://www.icc-cpi.int/victimissues/victimsparticipation.html> (last visited Nov. 28, 2007).

79. *Id.*

80. *Id.* The evidence presented includes things that would help to prove they are vic-

Chamber possesses the right to reject any applicant who cannot meet its criteria.<sup>81</sup> The ICC website contains applications and instructions to aid potential victims in the process.<sup>82</sup> The application inquires about such things as an applicant's ethnic tribe, biographical information, medical history, reason for applying, and availability of witnesses to the crime.<sup>83</sup> Once granted the status of victim, the applicant may then choose a legal representative to assist him or have the Registrar appoint a legal representative.<sup>84</sup>

### *B. The Victims and Witnesses Unit*

The Rome Statute anticipated the need for an organization within the Court to coordinate and oversee all administrative matters concerning victims and witnesses. For this reason, Article 43(6) ordered the Registry of the ICC to create a Victims and Witnesses Unit.<sup>85</sup> This "Unit" provides "protective measures and security arrangements, counseling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses."<sup>86</sup> The Rome Statute further states that the Victims and Witnesses Unit may alert the Court to certain safety measures and security arrangements that may be required for victims and witnesses in addition to other services, such as counseling.<sup>87</sup>

The ICC Rules of Procedure and Evidence go into greater detail concerning the specific duties and functions of the Victims and Witnesses Unit.<sup>88</sup> Concerning victims in particular, the Unit works to help them obtain legal advice, secure legal representation and subsequently to provide all necessary support and assistance to the counsel who agree to represent the victims.<sup>89</sup> The Unit aids the victims and witnesses in all stages of the legal proceedings,<sup>90</sup> but also provides support and a relocation option for those victims and witnesses who are at risk.<sup>91</sup> During the Confirmation of charges

---

tims of this crime. Such things that the Chamber looks for include proof of identity, ethnic tribe, address, information about the alleged crime, when and where the alleged events occurred, and whether or not there were other witnesses to the crime. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. ICC Rules of Procedure and Evidence, *supra* note 18, at rule 90.

85. Rome Statute, *supra* note 17, at art. 43.

86. *Id.*

87. *Id.* at art. 68.

88. ICC Rules of Procedure and Evidence, *supra* note 18, at rules 16-18.

89. *Id.* at rule 16.

90. *Id.*

91. *Id.*

Hearing, all victims remained anonymous removing the urgency for relocation.<sup>92</sup> It remains to be seen if these protective measures will be used during the forthcoming trial of Thomas Lubanga Dyilo.<sup>93</sup>

### C. Victim Participation in the Proceedings

Victim participation begins in the initial stages of the investigation of any case being considered by the ICC.<sup>94</sup> In fact, Article 53 of the Rome Statute states that the Prosecutor, in deciding to investigate a case, should take into account the interests of the victims.<sup>95</sup> Additionally, Article 68(3) of the Statute provides that the Court is to permit the witnesses to express their views and concerns at “stages of the proceedings determined to be appropriate by the Court” when the “personal interests of the victims are affected.”<sup>96</sup> Although the Prosecution has expressed concern regarding the participation of victims in the investigation process, especially in the initial stages before a warrant of arrest has been issued,<sup>97</sup> the Pre-Trial Chamber in the Case of *The Prosecutor v. Thomas Lubanga Dyilo* recently held that victims may participate in the investigation phase in which the judges deem their “personal interests” to be affected.<sup>98</sup> While the Rome Statute provides a unique right of participation to the victims, it clearly places the extent of their involvement in the hands of the judges.<sup>99</sup> A criticism of the decision to allow victims to participate in the investigation can be found in the argument that while victims may participate, the Pre-Trial chamber did not clearly define their procedural rights,<sup>100</sup> leaving room for delay and confusion.

Victims and their legal representatives have the right to attend all preliminary hearings and participate in them orally unless the Pre-Trial Chamber judges feel that their participation should be limited to written submissions.<sup>101</sup> When victims have been author-

---

92. Nov. 9 Confirmation of charges Hearing, *supra* note 16.

93. Decision of the Pre-Trial Chamber, *supra* note 15.

94. Aldana-Pindell, *supra* note 7, at 1429. See, e.g., Jerome de Hemptine & Francesco Rindi, *ICC Pre-Trial Chamber Allows Victims To Participate in the Investigation Phase of Proceedings*, 4 J. INTL CRIM. JUST. 342 (2006).

95. Rome Statute, *supra* note 17, at art. 53.

96. *Id.* at art. 68.

97. Hemptine & Rindi, *supra* note 94, at 343 (discussing the Prosecution’s position that “the participation of victims in the investigation phase was not envisaged by the ICC Statute and allowing a third party to intervene at such an early stage of the proceedings could jeopardize the objectivity and integrity of the Prosecutor’s work”).

98. *Id.* at 346.

99. *Id.*

100. Hemptine & Rindi, *supra* note 94, at 347.

101. ICC Rules of Procedure and Evidence, *supra* note 18, at rule 91.



ized to participate in proceedings, the Registrar possesses the duty to inform the victim or their legal representatives in a timely manner of the date and time of proceedings, as well as any motions of requests or submissions filed with the Court.<sup>102</sup> During a hearing or trial, the victim may participate in accordance with the ruling of the Chamber as it interprets Rules 89 and 90.<sup>103</sup> In general, the scope and manner of victim involvement is determined by the Pre-Trial Chamber judges.<sup>104</sup> Victims, usually through their legal representatives, may pose questions to witnesses, experts or even the accused<sup>105</sup> if the judges feel that the question would not violate the rights of the accused or unfairly delay the trial.<sup>106</sup> Before posing a question, the victim must apply to the Chamber to be able to ask the question.<sup>107</sup> If the Chamber feels that it is necessary, it may require the victim to submit a written application of the questions, in which case, the questions will then be submitted for observation to the prosecutor and perhaps even the defense.<sup>108</sup>

The ICC Rules of Procedure and Evidence do not state that victims may call their own witnesses or present their own evidence.<sup>109</sup> In essence, during the actual proceedings, victims are limited to opening and closing remarks, possible questioning of a witness, and access to most documents and submissions. During the Sentencing Hearing, the Court must take into account the specific harm caused to victims and their families.<sup>110</sup> Furthermore, the Court may award reparations to individual victims,<sup>111</sup> representing the first time that an international criminal tribunal has permitted victims to recover any form of compensation for the harms committed against them.<sup>112</sup>

#### *D. Reparations under the ICC*

The Rome Statute directs the Court to develop procedures regarding the disbursement of reparation payments.<sup>113</sup> Reparations to or in respect of victims are not necessarily monetary, but can

---

102. ICC Rules of Procedure and Evidence, *supra* note 18, at rule 92.

103. *Id.*

104. Aldana-Pindell, *supra* note 7, at 1431.

105. Mekjian & Varughese, *supra* note 5, at 26.

106. ICC Rules of Procedure and Evidence, *supra* note 18, at rule 92.

107. *Id.*

108. *Id.*

109. *See* ICC Rules of Procedure and Evidence, *supra* note 18.

110. *Id.* at rule 145.

111. *Id.* at rule 96.

112. Mekjian & Varughese, *supra* note 5, at 17.

113. Rome Statute, *supra* note 17, at art. 75.

include “restitution, compensation and rehabilitation.”<sup>114</sup> After a trial, the Court will determine the “scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.”<sup>115</sup> Before deciding the reparations, the Court shall take into account the views of the victims, convicted persons and other interested parties, including States.<sup>116</sup> States must give effect to the decisions of the ICC concerning reparations as if the provisions of Article 109<sup>117</sup> apply.<sup>118</sup>

The Rules of Procedure and Evidence detail the process by which victims may receive reparations.<sup>119</sup> They must file a written request with the Registrar containing numerous particulars.<sup>120</sup> The reparation proceedings are also encouraged to be done in a public manner so that the victims at issue, as well as other victims and States, will be aware of all measures being taken to restore them.<sup>121</sup> After assessing the amount to be awarded for reparations, the Court can either decide to assign them on an individualized basis, a collective basis, or both.<sup>122</sup> Experts can also be appointed to assess the amount of damage done if no readily available figures exist.<sup>123</sup> As an alternative to paying reparations to individual victims, the ICC has created a Victim Trust Fund.<sup>124</sup> This was created for situations where awarding reparations to individual victims is not currently possible.<sup>125</sup> While the Court does assign repa-

---

114. *Id.*

115. *Id.*

116. *Id.*

117. Rome Statute, *supra* note 17, at art. 109 (explaining how State parties must enforce fines and forfeiture measures ordered by the ICC and if the State is unable to recover forfeited property, it must take measures to secure the value of that property.)

118. *Id.* at art. 75.

119. ICC Rules of Procedure and Evidence, *supra* note 18, at rule 94.

120. *Id.* These requirements include:

- (a) The identity and address of the claimant; (b) A description of the injury, loss or harm; (c) The location and date of the incident and, to the extent possible, the identity of the person or persons the victim believes to be responsible for the injury, loss or harm; (d) Where restitution of assets, property or other tangible items is sought, a description of them; (e) Claims for compensation; (f) claims for rehabilitation and other forms of remedy; (g) To the extent possible, any relevant supporting documentation, including names and addresses of witnesses.

*Id.*

121. *Id.* at rule 96.

122. *Id.* at rule 97.

123. *Id.* At the Court’s invitation, the victims, their legal representatives and the convicted offender will have an opportunity to comment on the assessments made by the experts. *Id.*

124. *Id.* at rule 98.

125. *Id.* It may be impossible or impracticable to simply award a sum of money to a victim at any given time due to possible relocation, trauma, etc. The money is held for the victim and awarded to them through the Trust Fund as soon as possible. *Id.*

rations on an individual basis, it could require the convicted offender to direct the money to a trust fund to be awarded to the individual victim at a later date.<sup>126</sup>

#### IV. THE CONFIRMATION OF CHARGES HEARING OF THE CASE OF *THE PROSECUTOR V. THOMAS LUBANGA DYILO*

##### A. *Opening Statements*

On March 3, 2004, the situation in the Democratic Republic of the Congo<sup>127</sup> was reported to the prosecutor of the ICC.<sup>128</sup> On June 23, 2004, the Prosecutor announced his decision to open an official investigation, and on February 10, 2006, an arrest warrant was issued for Mr. Thomas Lubanga Dyilo.<sup>129</sup> On March 6, 2006, Mr. Dyilo made his initial appearance before the ICC in a public hearing.<sup>130</sup> The Confirmation of charges Hearing, which is required by and detailed in Article 61 of the Rome Statute,<sup>131</sup> officially began on November 9, 2006.<sup>132</sup> Although legal representatives for those victims that had been granted participatory rights had been involved in previous preliminary hearings and investigations,<sup>133</sup> this Confirmation Hearing was the first time that they spoke in general terms about their clients and their mission.<sup>134</sup>

The hearing began on November 9, 2006 when the presiding judge of the Pre-Trial Chamber, Judge Claude Jorda,<sup>135</sup> called the Court to order at 9:44 a.m.<sup>136</sup> As this was the first day of the Confirmation of charges Hearing, Judge Jorda began by emphasizing certain points. He pointed out to the Prosecution, Defense, Legal Representatives of the Victims, and the observing public<sup>137</sup> that

126. *Id.*

127. For purposes of this article, the situation in the Democratic Republic of the Congo will refer to the conflict allegedly involving Mr. Thomas Lubanga Dyilo, the UPC, and the FPC in the Ituri province between the years 2002-2004.

128. *Chronology of the Thomas Lubanga Dyilo Case*, *supra* note 10, at 1.

129. *Background to the Case The Prosecutor v. Thomas Lubanga Dyilo*, INT'L CRIMINAL COURT NEWSLETTER, (The Hague, Neth.), Nov. 2006, at 3, available at [http://www.icc-cpi.int/library/about/newsletter/10/en\\_03.html](http://www.icc-cpi.int/library/about/newsletter/10/en_03.html).

130. *Id.*

131. Rome Statute, *supra* note 17, at art. 61.

132. Nov. 9 Confirmation of charges Hearing, *supra* note 16.

133. See Hemptine & Rindi, *supra* note 94; see also Mekjian & Varughese, *supra* note 5, at 22.

134. Nov. 9 Confirmation of charges Hearing, *supra* note 16.

135. International Criminal Court, [http://www.icc-cpi.int/chambers/judges/Jorda\\_Claude.html](http://www.icc-cpi.int/chambers/judges/Jorda_Claude.html) (last visited Nov. 28, 2007). Judge Claude Jorda, of France, served as President of the ICTY before joining the ICC.

136. Nov. 9 Confirmation of charges Hearing, *supra* note 16, at 2.

137. The public nature of these proceedings is extremely important to the theory of restorative justice. See Mika, *infra* note 237, at 35.

this hearing was most certainly not a trial.<sup>138</sup> He also presented a summary of the subsequent proceedings in the case leading up to the hearing.<sup>139</sup> Judge Jorda had the members of the Prosecution, Defense, Registry, and the Legal Representatives of the Victims all introduce themselves.<sup>140</sup>

Four victims, represented by their counsel, and given numerical labels to protect their anonymity,<sup>141</sup> were authorized to participate in this Confirmation Hearing.<sup>142</sup> These victims, exercising their right to remain anonymous until the actual trial,<sup>143</sup> were not present during this hearing. Their legal representatives were Mr. Luc Walley, who informed the Court that he is assisted by Mr. Frank Mulenda and represented victims 01-03, and Mr. Gebbie, who represented victim 05, and is accompanied by Ms. Carine Bapita.<sup>144</sup> Judge Jorda, in his preliminary statements to the Court, detailed the role of the victims and their legal representatives in this proceeding.<sup>145</sup> He stated that while the victims have certain rights within the statute,<sup>146</sup> “[t]hey of course don’t have the same rights” as the Prosecution and Defense.<sup>147</sup> He also informed the Court that one of the rights that the legal representatives of the victims do have is the right to make an opening statement and that they would be making such a statement that day.<sup>148</sup> Before entertaining comments from any of the parties, Judge Jorda also stated that the legal representatives for the victims have the right to ask the judge to intervene on their behalf at any time during the trial, and the judges will rule on their requests on a “case-by-case basis.”<sup>149</sup> He further explained that the legal representatives for the victims would be permitted to make closing statements at the end of the hearing.<sup>150</sup>

After the Prosecution completed its opening statement, Judge Jorda turned to the legal representatives of the victims.<sup>151</sup> Mr.

---

138. Nov. 9 Confirmation of charges Hearing, *supra* note 16, at 6.

139. *Id.*

140. *Id.* at 2.

141. The victims were labeled 01, 02, 03, and 05.

142. Nov. 9 Confirmation of charges Hearing, *supra* note 16, at 8.

143. Rome Statute, *supra* note 17, at art. 68(5).

144. Nov. 9 Confirmation of charges Hearing, *supra* note 16, at 4.

145. *Id.* at 9.

146. Referring to the Rome Statute, *supra* note 17.

147. Nov. 9 Confirmation of charges Hearing, *supra* note 16, at 9. When Judge Jorda stated that they do not have the “same rights,” he was referring to the same rights as the Prosecution and Defense. The right of victims to participate in ICC proceedings is not as broad as the rights of the Prosecution and Defense. *Id.*

148. *Id.*

149. *Id.* at 10.

150. *Id.*

151. *Id.* at 75.

Walleyne began by stating that

[T]oday for the first time in the history of international criminal justice, victims can express their viewpoints and concerns through their counsel. In ad hoc Courts, like the Courts of Nuremburg and Tokyo, the victims were absent, or at the very most they were questioned as witnesses of the Prosecutor. Today, they can express themselves.<sup>152</sup>

He presented some notes on behalf of his absent co-counsel, Mr. Mulenda, which described the background of the case.<sup>153</sup> Mr. Mulenda's notes explained how Mr. Dyilo was responsible for the abduction and forced conscription of many children into his militia.<sup>154</sup> Mr. Walleyne went on to explain how the Congolese justice system is not equipped to handle international crimes with so many victims.<sup>155</sup> This is precisely why "the Congolese victims put their hope in the International Criminal Court."<sup>156</sup> Mr. Walleyne described his victims as being unable to attend school anymore and being haunted by demons.<sup>157</sup> He emphasized how entire families are affected by conscription and enlistment of these children, not just the children themselves.<sup>158</sup>

Mr. Walleyne clearly stated that he was grateful to the Court for allowing his clients to participate in the Confirmation of charges Hearing while remaining anonymous.<sup>159</sup> He mentioned that due to this anonymity, his clients "exercise less rights than those provided for in the Rules of Procedure and Evidence,"<sup>160</sup> however, his clients do not wish to waive their anonymity because they fear "reprisals from the UPC movement."<sup>161</sup>

Mr. Walleyne ended his dramatic recount of the horrors suffered by his clients by stating:

---

152. *Id.* at 76.

153. Nov. 9 Confirmation of charges Hearing, *supra* note 16, at 76.

154. *Id.* at 77.

155. *Id.* at 79.

156. *Id.* For this hearing, only four victims were granted participatory status despite the fact that the ICC Registrar received numerous applications. *Id.* at 8. The application process to become a victim participant requires that varying degrees of evidence be presented to the court. See ICC Rules of Procedure and Evidence, *supra* note 18, at rule 89. This is the result of administrative convenience, logistics, and adherence to the procedural rights of the defendant. *Id.*

157. Nov. 9 Confirmation of charges Hearing, *supra* note 16, at 81.

158. *Id.*

159. *Id.* at 82.

160. Nov. 9 Confirmation of charges Hearing, *supra* note 16, at 82, referring to the ICC Rules of Procedure and Evidence, *supra* note 18.

161. *Id.* By "UPC movement" Mr. Walleyne was referring to those loyal to Mr. Dyilo.

[W]e hope that in the coming months the presence of the victims will remind all the participants that these proceedings are not an intellectual exercise; that it is not an absorbing exchange between the Prosecution and the Defense, but that the destruction of the thousands of young lives -- of thousands of young lives will be at the centre of discussions.<sup>162</sup>

When Mr. Walley concluded his opening statement, Judge Jorda turned to the legal representative for victim 05, Mr. Gebbie.<sup>163</sup> Mr. Gebbie began by stating that the most important thing was that his client holds Mr. Dyilo “criminally responsible in respect of the totality of his complaint of recruitment and deployment as a child soldier.”<sup>164</sup> Recognizing that this hearing was the first of its kind for victim participation, Mr. Gebbie announced,

The primary concern of the victim is his recognition as a human being, who is entitled to the dignity and respect that we are all entitled to. The victim requires this recognition, firstly, in the sight of the Court; he requires it in the sight of the world; and, most especially, he requires it in the sight of the person whom he holds criminally responsible --Thomas Lubanga Dyilo.<sup>165</sup>

Mr. Gebbie continued his opening remarks by explaining the limits to which victims may participate in the proceedings of the ICC.<sup>166</sup> He pointed out that victims have no say in the charges brought before the Court, nor are they eligible to introduce evidence or call witnesses.<sup>167</sup> He also mentioned that the Court, in applying Rule 121(10) of the ICC Rules of Procedure and Evidence,<sup>168</sup> does not have to make all documents available to the legal representatives of the victims and that the legal representatives may only have access to those documents that are available to the general public.<sup>169</sup> Mr. Gebbie explained that the victims’ representatives do not even have the right to be present during closed sessions in

---

162. *Id.* at 91.

163. *Id.* at 93.

164. *Id.*

165. *Id.* at 96.

166. Nov. 9 Confirmation of charges Hearing, *supra* note 16, at 97.

167. *Id.*

168. ICC Rules of Procedure and Evidence, *supra* note 18, at rule 121.

169. Nov. 9 Confirmation of charges Hearing, *supra* note 16, at 97.

which the Prosecution and Defense may request to have issues addressed.<sup>170</sup>

In conclusion, though, he did reaffirm the right of the victims to participate, to make opening and closing statements, and to make requests to the Court should they wish to question a witness.<sup>171</sup> He added that throughout the trial, it will be his duty to ensure that the victims' rights are carried out to the utmost by, among other things, asking the Court at each public session if something may have arisen during a closed session that "impacted the interests and concerns of the victims".<sup>172</sup>

### *B. Questioning the Witness*

During the Confirmation of charges Hearing, the Prosecution chose to call only one witness, Ms. Christine Peduto, an employee of the High Commissioner for Human Rights for issues relating to children.<sup>173</sup> Ms. Peduto worked in Ituri, in the Democratic Republic of Congo, from May of 2003 until June of 2004,<sup>174</sup> as a child protection advisor for the United Nations Organization Mission in the Democratic Republic of Congo (MONUC).<sup>175</sup> Ms. Peduto took the stand as a witness on November 15, 2006.<sup>176</sup> She was questioned by the Prosecution at length about her involvement in the Democratic Republic of the Congo and her knowledge of the situation involving Mr. Dyilo.<sup>177</sup>

On November 20, 2006, the Defense, led by Mr. Dyilo's attorney, Mr. Jean Flamme,<sup>178</sup> began its cross-examination of Ms. Peduto.<sup>179</sup> On November 21, 2006, after the midday recess but before

---

170. *Id.* Although the right to call witnesses, present evidence, and have unlimited access to documents would further promote the aims of restorative justice, these restrictions should not diminish the importance of the rights that victim participants do have before the ICC. It is unlikely that victims will ever have the same full procedural rights as the prosecution and defense because the court must remain committed to ensuring the defendant receives a fair trial. Furthermore, the ICC has both limited time and a limited budget and is unable to accommodate every victim applicant and request.

171. *Id.* at 98.

172. *Id.* at 101-02.

173. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Confirmation of charges Hearing, (Nov. 15, 2006), at 7, available at [http://www.icc-cpi.int/RDC/c0106/c0106\\_hs.html](http://www.icc-cpi.int/RDC/c0106/c0106_hs.html).

174. *Id.* at 11.

175. *Id.* at 12.

176. *Id.* at 4.

177. *Id.*

178. Jean Flamme, of Belgium, was selected by Thomas Lubanga Dyilo as his personal counsel on April 13, 2006. *Background to the Case*, *supra* note 129, at 1.

179. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Confirmation of charges Hearing, (Nov. 20, 2006) at 5, available at [http://www.icc-cpi.int/RDC/c0106/c0106\\_hs.html](http://www.icc-cpi.int/RDC/c0106/c0106_hs.html).

the cross-examination was complete, Mr. Mulenda, legal representative of victims 01-03,<sup>180</sup> informed Judge Jorda that he had a question that he would like to put to the witness.<sup>181</sup> Judge Jorda asked Mr. Mulenda if he wished to pose his question during a closed session, but Mr. Mulenda replied that he would prefer to ask it before that.<sup>182</sup> In response, Judge Jorda suggested that Mr. Mulenda pose his question near the end of that day's hearing, and then the judges would deliberate and decide whether or not to authorize the question.<sup>183</sup>

Around 4:00 p.m. that afternoon, Judge Jorda referred to Mr. Mulenda's request by stating "I would like to consult my colleagues to know if we should take your question by -- in writing or orally."<sup>184</sup> I assume that Judge Jorda signaled for Mr. Mulenda to ask the question orally because immediately thereafter, Mr. Mulenda said:

The witness saw several parents in Bunia. These parents came to see her, either to help in the demobilisation process of their children or to help them find their children, and therefore I would like to know whether the witness started a written procedure. Did she take notes during the interview she had with these parents; that was my question.<sup>185</sup>

Before coming to a decision about allowing the witness to answer the question, Judge Jorda stated that he wanted to ask the Prosecution and Defense counsel what they thought about the question.<sup>186</sup> Mr. Withopf,<sup>187</sup> for the Prosecution, answered that he had no problem with the question being asked to the witness.<sup>188</sup> However, Mr. Flamme, for the Defense, stated that he would prefer to wait and respond after the break.<sup>189</sup> Judge Jorda agreed to allow this and the hearing adjourned with the proceedings to continue in closed session.<sup>190</sup> As a result, it is not clear whether or not Mr. Mulenda was permitted to ask Ms. Peduto this question. When the hearing resumed in open session on November 22, 2006, no refer-

---

180. Nov. 9 Confirmation of charges Hearing, *supra* note 16, at 4.

181. Nov. 21 Confirmation of charges Hearing, *supra* note 23, at 95.

182. *Id.* at 96.

183. *Id.*

184. *Id.* at 141.

185. *Id.* at 142.

186. *Id.*

187. Senior Trial Lawyer, Mr. Ekkehard Withopf.

188. Nov. 21 Confirmation of charges Hearing, *supra* note 23, at 142.

189. *Id.*

190. *Id.*



ence was made to the question.<sup>191</sup>

### C. Document Requests

According to the ICC Rules of Procedure and Evidence, the victims or their legal representatives are entitled to have access to records of all proceedings before the ICC as well as all documents transmitted to the Chamber subject only to “restrictions concerning confidentiality and the protection of national security information. . . .”<sup>192</sup> On November 24, 2006, during the Confirmation of the charges Hearing, Mr. Flamme mentioned that his client, Mr. Dyilo, did not have any money because his assets had been frozen several months prior to the hearing.<sup>193</sup> Mr. Flamme addressed this issue in response to allegations that Mr. Dyilo had continued funding UPC operations out of his own pocket.<sup>194</sup> In order to prove that Mr. Dyilo’s assets had been frozen, Mr. Flamme requested that the Registrar produce a report regarding the freezing of assets.<sup>195</sup>

In concurrence, Mr. Walley, as legal representative of victims 01-03,<sup>196</sup> asked leave of the Court to state:

[W]e support the request of the Defense, which aims . . . to ask for a report from the Registrar with regards to the results of the freezing of the assets which was made several months ago. This is something that would be of interest to the victims, and possibly as well to envisage reminders with regards to certain States, which perhaps haven’t yet produced reports with regards to this request.<sup>197</sup>

Judge Jorda responded that the Chamber would address Mr. Walley’s request in due course and proceeded to ask the representative of the Registrar whether or not those documents, or a reference to them, had been included in the evidence.<sup>198</sup> According to the transcripts, the Registrar must have expressed that the docu-

---

191. See *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Confirmation of charges Hearing, (Nov. 22, 2006), available at [http://www.icc-cpi.int/RDC/c0106/c0106\\_hs.html](http://www.icc-cpi.int/RDC/c0106/c0106_hs.html).

192. ICC Rules of Procedure and Evidence, *supra* note 18, at rule 121.

193. *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Confirmation of charges Hearing, (Nov. 24, 2006), at 5, [hereinafter Nov. 24 Confirmation of charges Hearing] available at [http://www.icc-cpi.int/RDC/c0106/c0106\\_hs.html](http://www.icc-cpi.int/RDC/c0106/c0106_hs.html).

194. *Id.*

195. *Id.*

196. Nov. 9 Confirmation of charges Hearing, *supra* note 16, at 8.

197. Nov. 24 Confirmation of charges Hearing, *supra* note 193, at 8-9.

198. *Id.*

ments were included because Judge Jorda replied, “[w]ill there be reference for it? Yes? Thank you.”<sup>199</sup>

The other document request occurred on November 27, 2006 when Mr. Walleyne asked the Court if he could have access to a piece of evidence that was discussed in the Confirmation of charges Hearing on November 24, 2006.<sup>200</sup> He explained that the Prosecution had disclosed to the Court and to the Defense a piece of information concerning a confidential witness.<sup>201</sup> Mr. Walleyne requested that this document, or at least a redacted version of it, be made available to the legal representatives of the victims.<sup>202</sup> Judge Jorda addressed Prosecution counsel, Mr. Withopf, who stated that he would have no problem giving a redacted version of this document to the legal representatives of the victims.<sup>203</sup>

#### D. Closing Statements

The Confirmation of charges Hearing concluded on November 28, 2006.<sup>204</sup> The legal representatives of the victims were permitted to make closing statements. Before Ms. Bapita, one of the legal representatives of victim 05, began her closing statements, Judge Jorda commented about the important role of the legal representatives of the victims.<sup>205</sup> He stated, “we are listening to you very carefully, because what you have to say is perhaps what is most important, especially in view of the Statute of the ICC. Madame Bapita the floor is yours.”<sup>206</sup> Ms. Bapita began by explaining the background events in the DRC leading up to the alleged recruitment and enlistment of child soldiers.<sup>207</sup> She discussed the characterization of the situation as an armed conflict.<sup>208</sup> Then, she specifically discussed the enlistment of victim 05 and this child’s involvement in the UPC.<sup>209</sup> Ms. Bapita summarized some of the documents that had been submitted into evidence as providing support for the charges against Mr. Dyilo.<sup>210</sup> She concluded by

---

199. *Id.*

200. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Confirmation of charges Hearing, (Nov. 27, 2006), at 2, available at [http://www.icc-epi.int/RDC/c0106/c0106\\_hs.html](http://www.icc-epi.int/RDC/c0106/c0106_hs.html).

201. *Id.*

202. *Id.*

203. *Id.* at 3.

204. Nov. 28 Confirmation of charges Hearing, *supra* note 22, at 1.

205. *Id.* at 45.

206. *Id.*

207. *Id.* at 47.

208. *Id.* at 49.

209. *Id.* at 51.

210. Nov. 28 Confirmation of charges Hearing, *supra* note 22, at 57.

stating:

I hope you will remember that, on top of my victim, millions of other victims would also have liked to participate in these proceedings and I hope you will remember that thousands of others will not be able to even want to, as they died on the battlefield. I hope, through the confirmation of charges, you will give us justice. Thank you.<sup>211</sup>

After Ms. Bapita finished, Mr. Mulenda, legal representative of victims 01-03,<sup>212</sup> was able to speak.<sup>213</sup> He discussed, among other things, a search and seizure conducted in the DRC that had been ruled illegal by the Kisangani Appeals Court.<sup>214</sup> Mr. Mulenda also discussed how the Rome Statute permits summaries of witness interviews to be used in proceedings leading up to the trial.<sup>215</sup> In order to protect the anonymity of certain witnesses, Article 61 of the Rome Statute permits “[t]he Prosecutor [to] rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial.”<sup>216</sup> He also reminded the Court that, in spite of the Defense’s criticism of allowing anonymity of witnesses, the Rome Statute specifically permits this.<sup>217</sup>

Mr. Mulenda was followed by Mr. Walley, the last of the legal representatives of the victims to make closing remarks.<sup>218</sup> He began with:

Mr. President, your Honors, the representatives of the victims have had the honour over the last three weeks to participate in this first confirmation hearing before your Court. We have listened at length. We have listened far more than we have spoken, and we have studied -- studied those materials we were allowed to examine, and we have observed . . . .<sup>219</sup>

---

211. *Id.* at 59.

212. Nov. 9 Confirmation of charges Hearing, *supra* note 16, at 2.

213. Nov. 28 Confirmation of charges Hearing, *supra* note 22, at 59.

214. *Id.* at 61. The defense argued that any evidence procured during this search is inadmissible because the Kisangani Court held the search to be illegal. *Id.* The evidence collected here was not relied on heavily during the Confirmation of charges Hearing but may become an issue for the ICC judges that preside over Mr. Dyilo’s actual trial. *Id.*

215. Rome Statute, *supra* note 17, at art. 61(5).

216. *Id.*

217. *Id.* at art. 68(5).

218. Nov. 28 Confirmation of charges Hearing, *supra* note 22, at 70.

219. *Id.*

Mr. Walleyn proceeded to explain how his clients were in fact forced to participate in the UPC militia and were not there voluntarily.<sup>220</sup> He also noted that the victims are not primarily motivated by the desire for financial compensation, claiming “[a]t this stage in the proceedings, the priority for the victims is that the truth be established.”<sup>221</sup> He concluded by stating that he sincerely hoped that the Court would confirm the charges brought against Mr. Dyilo based on the years of investigative work culminating in the evidence and statements presented to the Court during the hearing.<sup>222</sup>

The Confirmation of charges Hearing concluded at 4:57 p.m. on November 28, 2006.<sup>223</sup> Judge Jorda informed the Court that the judges of the Pre-Trial Chamber have sixty days to decide whether or not to confirm the charges.<sup>224</sup> He concluded the Confirmation of charges Hearing by setting January 29, 2007 as the deadline for deciding whether or not the case of *The Prosecutor v. Thomas Lubanga Dyilo* will go to trial.<sup>225</sup>

#### V. WAS THE ROLE OF THE VICTIMS DURING THE CONFIRMATION OF CHARGES HEARING CONSISTENT WITH THE RESTORATIVE JUSTICE INTENTIONS OF THE DRAFTERS OF THE ICC?

The idea of victim-focused prosecutions is not entirely new.<sup>226</sup> In many South American and European countries practicing civil law, victims are considered to be those most deserving of prosecuting their offenders.<sup>227</sup> On the other hand, countries like the United States do not permit victim participation in the prosecution of offenders (aside from possible participation as a witness), leaving that role entirely to the State.<sup>228</sup> Recently, however, there has been an increased international recognition of the need and right of victims to be involved in the prosecution of those offenders who commit crimes against them.<sup>229</sup> This recognition is manifested in the Rome Statute and Rules of Procedure and Evidence of the

---

220. *Id.* at 73.

221. *Id.* at 74.

222. *Id.* at 86.

223. *Id.* at 151; see also *First ICC Confirmation of Charges Hearing Concludes*, INT'L CRIMINAL COURT NEWSLETTER, (The Hague, Neth.), Dec. 2006, at 4, available at [http://www.icc-cpi.int/library/about/newsletter/11/en\\_04.html](http://www.icc-cpi.int/library/about/newsletter/11/en_04.html).

224. Nov. 9 Confirmation of charges Hearing, *supra* note 16, at 151.

225. *Id.*

226. Aldana-Pindell, *supra* note 7, at 1406.

227. *Id.*

228. *Id.* Victims may bring tort suits against their offender in the form of a civil suit. However, the monetary costs of a tort suit may be too substantial for many victims.

229. Mekjian & Varughese, *supra* note 5, at 2. See also Mills, *supra* note 1, at 458.

ICC.<sup>230</sup> The drafters of the Rome Statute realized that victims of mass atrocities were not only concerned with the criminal prosecution of offenders but were also concerned with being restored.<sup>231</sup>

### A. Restorative Justice

The concept of restorative justice “focuses on the impact of the offender’s actions on the victim and a defined community.”<sup>232</sup> It has developed as a complement,<sup>233</sup> or alternative, to the retributive justice model which considers crime to be an action against the State.<sup>234</sup> Retributive justice theory is based on punishing the individual offender for the good of society with little or no focus given to the individual victim.<sup>235</sup> Conversely, restorative justice seeks to determine: “Who has been hurt? What do they need? Whose obligations and responsibilities are these? Who has a stake in this situation? What is the process that can involve the stakeholders in finding a solution?”<sup>236</sup> The restorative justice process also permits and encourages victims to participate in the proceedings involving their offender.<sup>237</sup>

The science of victimology, or the study of victims, is the “companion” to criminology and offers helpful insight into the needs of victims.<sup>238</sup> Studies in this area have shown that the victims need more than simply punishment of their offender.<sup>239</sup> Research shows that when victims are given an active role in a criminal justice process that “was designed to restore, rather than simply to punish, [they] were much more satisfied with the criminal justice system overall.”<sup>240</sup> In fact, victims gain much more when actively involved in a program focused on restorative healing as opposed to having only a passive role in the prosecution of their offender.<sup>241</sup> Restorative justice does not only include the idea of allowing vic-

230. Di Giovanni, *supra* note 65, at 40.

231. *Id.*

232. Mills, *supra* note 1, at 463.

233. Under the Rome Statute and ICC Rules of Procedure and Evidence, restorative justice is designed to complement, not replace, retributive justice. *See* Rome Statute, *supra* note 17; *see also* ICC Rules of Procedure and Evidence, *supra* note 18.

234. Jonathan Todres, *Toward Healing and Restoration for All: Reframing Medical Malpractice Reform*, 39 CONN. L. REV. 667, 706 (2006).

235. Mills, *supra* note 1, at 463.

236. HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 63 (2002).

237. Harry Mika, et al., *Listening to Victims- A Critique of Restorative Justice Policy and Practice in the United States*, 68 FED. PROBATION 32, 33 (2004).

238. Mills, *supra* note 1, at 462.

239. *Id.*

240. *Id.* at 492; *see also* Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH L. REV. 15, 24 (2003).

241. Strang & Sherman, *supra* note 240, at 15.

tims to have a greater role in the proceedings against their offender. In addition, it also encourages the victim to engage in self-reflection of the crime and consider which elements of the crime could have possibly been prevented.<sup>242</sup> Ultimately, some victims will even request a meeting with their offender in which they seek to obtain an apology or a showing of remorse.<sup>243</sup> Restorative justice researchers Strang and Sherman noted the results of a study showing that when victims met with their offender through a mediation program, they later experienced less fear and a greater sense of personal security than other victims.<sup>244</sup>

Restorative justice theorists feel that valuing the role of the victim helps the victim heal but also deters future crime.<sup>245</sup> Studies show that violence can be transferable, turning victims into future victimizers.<sup>246</sup> In many instances, victims will become victimizers for “vendetta, vengeance, reprisal, retaliation, [sic] getting even, paying back, settling of accounts, as well as cases of self-defense, vigilante action, auto-justice or taking the law into one’s own hands.”<sup>247</sup> Statistics support a clear link between the “interchangeability of victim and victimizer.”<sup>248</sup> One study showed that, in addition to a strong likelihood that victims could cross over and become offenders, this propensity toward violence could also be passed to future generations.<sup>249</sup> The implications of these findings show support for the importance of victim healing and restoration.

In order to be successful, restorative justice practices must be implemented to ensure that victims feel secure. These practices should guarantee specific rights to the victims “such as confidentiality, the ability to choose to become involved or to cease involvement, the option of reconsidering an outcome, and the ability to give voice to their own needs and aspirations (in lieu of being side-stepped by surrogate voices, such as prosecution).”<sup>250</sup> Furthermore, victims participating in restorative justice programs should receive all necessary information regarding the status of the case and all

---

242. Mills, *supra* note 1, at 463.

243. *Id.*

244. Strang & Sherman, *supra* note 240, at 29-30. It is important to note that these studies were conducted in a domestic setting absent civil conflict. To the author’s knowledge, no study on the implementation of restorative justice theory in a foreign country undergoing civil conflict exists.

245. Mills, *supra* note 1, at 481.

246. Ezzat A. Fattah, *The Vital Role of Victimology in the Rehabilitation of Offenders and Their Reintegration into Society*, 56 RESOURCE MATERIAL SERIES 71, 82 (2000) (Can.), available at [http://www.unafei.or.jp/english/pdf/PDF\\_rms/no56/56-07.pdf](http://www.unafei.or.jp/english/pdf/PDF_rms/no56/56-07.pdf).

247. *Id.* at 79-80.

248. Mills, *supra* note 1, at 481.

249. *Id.* at 482.

250. Mika, *supra* note 237, at 35.

possible outcomes.<sup>251</sup> Because taking an active role in the criminal proceedings of their offenders is an important component of restorative justice, there should be an audience to observe this participation.<sup>252</sup> If victims speak but no one listens, individual victims may receive some minimal benefit but nothing inures to the victim community at large.<sup>253</sup> Judicial proceedings provide an appropriate setting for restorative justice aims.<sup>254</sup> There, victims can be assured that they will be safe and that they will have a forum for their concerns. The legal system will also specifically define the “role[s] that victims may play in contributing both to the prosecution of their victimizers and to their own healing.”<sup>255</sup>

Some restorative justice theorists strongly advocate victim-offender mediation sessions.<sup>256</sup> These sessions originally involved only the victim, offender and a third-party facilitator.<sup>257</sup> However, as time went on, the sessions grew in size to involve other participants, such as family members of the victims and other supporters.<sup>258</sup> Today, many forms of victim-offender mediation sessions exist that are based on the idea of fostering meaningful communication between the parties so that the conflict can hopefully be resolved.<sup>259</sup> These mediation sessions typically occur during “[d]iversion [programs], pre-court, post-process adjudication, [or] post-sentence.”<sup>260</sup> The main goal of these interactions is to create a secure environment for the offender and victim to discuss the crime and its aftermath<sup>261</sup> in an effort to move forward and allow the offender to begin making amends.<sup>262</sup> Studies have shown that victims who engage in mediation sessions with their offender feel “a significant reduction in fear and a significant increase in their sense of security.”<sup>263</sup>

Restorative justice can also involve healing the victim through reparations made by the offender.<sup>264</sup> Traditionally, reparation has

---

251. *Id.*

252. *Id.*

253. *Id.*

254. Mills, *supra* note 1, at 482.

255. *Id.*

256. JOHNSTONE & VAN NESS, *supra* note 28, at 212.

257. *Id.* at 214.

258. *Id.* at 213-15. Other forms include Family Group Conferencing (where families of victims are brought together with the offenders) and Circles (where all interested stakeholders such as victims, offenders, family members and community members sit in a circle and speak when they are in possession of the “talking piece”). *Id.*

259. *Id.* at 213.

260. *Id.*

261. *Id.* at 217.

262. *Id.* at 224.

263. Mills, *supra* note 1, at 463.

264. JOHNSTONE & VAN NESS, *supra* note 28, at 28.

come to mean “a kind of recompense, which means to give back or give something of equivalent value.”<sup>265</sup> There are two main forms of reparations, or manners in which an offender can make amends: material reparation and symbolic reparation.<sup>266</sup> While the two are not mutually exclusive, material reparations usually involve the offering of something concrete such as money, property, counseling, transportation, employment, or medical treatment.<sup>267</sup> Symbolic reparation usually involves an apology by the offender, but could also include an explanation by the offender of why the crime was committed and an acknowledgment that it was wrong.<sup>268</sup> Howard Zehr, a leading restorative justice theorist, argues that the appropriate form of reparation is one that “is tailored to meet a victim’s particular needs, when the terms of the reparation are chosen by those most directly involved and when it is offered rather than ordered.”<sup>269</sup> In spite of this plan for ideal implementation, there are many instances where this level of detail and refinement is simply not possible. Overall, it is important to note that any attempt toward reparation is consistent with restorative justice since reparation is aimed at achieving “repair, vindication, the location of responsibility and the restoration of equilibrium.”<sup>270</sup>

While many proponents of traditional adversarial systems have argued its incompatibility with restorative justice, the contradiction is not necessarily self-evident.<sup>271</sup> In fact, studies have shown that the inclusion of programs and services designed to restore victims and “move beyond guilt and punishment opens a new door into fighting crime.”<sup>272</sup> When restorative justice programs are implemented with respect to the procedural rights of the defendant and in regard to the needs of the prosecution, the aims of both punishment and healing should successfully coexist.

### *B. The Role of Restorative Justice in the ICC*

The drafters of the Rome Statute of the ICC specifically focused on increasing the role of the victim in international criminal proceedings.<sup>273</sup> The victim’s increased role involved participation in the actual criminal proceedings as well as the right to collect repa-

---

265. *Id.* at 24.

266. *Id.* at 27.

267. *Id.*

268. *Id.* at 28.

269. *Id.* at 29.

270. *Id.* at 37.

271. Mills, *supra* note 1, at 464.

272. *Id.* at 465 (citing Fattah, *supra* note 246).

273. Di Giovanni, *supra* note 65, at 40.



ration payments directly from the offender.<sup>274</sup> In fact, the drafters were very much aware of the fact that there should be, as reflected in the Rome Statute, the idea that victims cared not only about retributive justice for their offenders, but also restorative justice in the form of “compensation, restitution, or otherwise.”<sup>275</sup> The ICC was described as a

new court . . . administering restorative justice. Under this system reparations will be made to victims, and victims will also be able to take part in proceedings, with rights to privacy, representation, and to security of person. The newly finalized Rules protect and promote these rights and interests, and establish a procedural framework to give meaning and effect to these important provisions, without in any way infringing upon the rights of the accused. A mechanism is also provided in the Rules to set up institutional support to victims through the Victims and Witnesses Unit.<sup>276</sup>

The increased concern for the rights of victims during the Rome Conference and the General Assembly’s Preparatory Committee for the Draft Statute of the ICC was due largely in part to the limited role allowed to victims in the previous international criminal tribunals.<sup>277</sup> During the drafting process, many Non-Governmental Organizations (NGOs) also championed the rights and role of the victim in the ICC.<sup>278</sup> As a result of increased global recognition of the devastation and suffering caused by mass atrocities,<sup>279</sup> the role of the victims, and their need to be healed, has gained prominence.<sup>280</sup>

In practice, the incorporation of some aspects of restorative justice into ICC proceedings is meant to complement the traditional retributive justice approach.<sup>281</sup> Roy S. Lee states that the ICC has jurisdiction to “impose penalties and to make reparation to victims.”<sup>282</sup> Similarly, the participation of victims was described as

---

274. *Id.*

275. *Id.*

276. ROY S. LEE, *THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE*, at lxiv (2001).

277. Mekjian & Varughese, *supra* note 5, at 16.

278. Peter G. Fischer, *The Victims’ Trust Fund of the International Criminal Court - Formation of a Functional Reparations Scheme*, 17 EMORY INT’L L. REV. 187, 195 (2003).

279. Mekjian & Varughese, *supra* note 5, at 2.

280. Aldana-Pindell, *supra* note 7, at 1407.

281. LEE, *supra* note 276, at lix.

282. *Id.*

important “because the Court’s role should not purely be punitive but also restorative.”<sup>283</sup> Clearly, the ICC is still focused on punishing the offender in an effort to avoid having injuries go unpunished and conflicts continuing to arise.<sup>284</sup>

As in common-law adversarial systems that are based on retributive justice theory, the ICC employs a prosecutor to conduct both the investigation and the prosecution.<sup>285</sup> A Pre-Trial Chamber of Justices is appointed to monitor the activity of the Prosecutor and be sure that he or she is not abusing their authority.<sup>286</sup> An interesting incorporation of restorative justice is seen in the ability of victims to participate in the investigation.<sup>287</sup> Additionally, the incorporation of restorative justice into ICC procedure has changed the traditional two-party system of Prosecution and Defense into a three party system in which victims are given their own unique role.<sup>288</sup>

The Rome Statute and the Rules of Procedure and Evidence clearly establish a role for the victim in most ICC proceedings.<sup>289</sup> However, these documents seem in many ways to place the extent of the victims’ participation in court proceedings in the hands of the judges, to be decided on an individual basis.<sup>290</sup> This could largely be based on the ICC’s desire to provide a voice to the victims while also maintaining the right of the defense to a fair trial and the right of the prosecution to present its case. While drafting the Rules of Procedure and Evidence that accompany the Rome Statute, it was established that while the Rules should

guide the Court when making orders for protective and special measures, they should not be overly prescriptive or exhaustive. They should allow the Court sufficient flexibility to respond to the particular interests, needs or personal circumstances of individuals in a particular case. The . . . most crucial was

---

283. Gilbert Bitti & Håkan Friman, *Participation of Victims in the Proceedings*, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 456, 457 (Roy S. Lee ed., 2001).

284. LEE, *supra* note 276, at lix.

285. *Id.* at lx.

286. *Id.*

287. Hemptine & Rindi, *supra* note 94, at 344.

288. LEE, *supra* note 276, at lxiv.

289. Rome Statute, *supra* note 17; *see also* ICC Rules of Procedure and Evidence, *supra* note 18.

290. Hemptine & Rindi, *supra* note 94, at 343; *see also* Nov. 9 Confirmation of charges Hearing, *supra* note 16, at 10 (explaining that while victims do have rights in the ICC proceedings, they do not have the same rights and that their participation will be decided on a “case-by-case” basis).

that the rules -- as a vital cog in the machinery of international justice -- must strike an appropriate balance between protecting victims and witnesses and respecting the rights of an accused under the Statute and international law.<sup>291</sup>

Perhaps the newness of the Court and the novelty of incorporating restorative justice aims were considered in deciding to allow the Court flexibility. The fact that the extent of victim involvement is largely decided on a case-by-case basis<sup>292</sup> is very likely a response to the drafters' concerns about maintaining the due process rights of the defendant as well as the ability of the prosecution to try its case. When the rights of victims to participate in the proceedings come in conflict with the other roles of the tribunal (i.e. retributive justice aims of the prosecution and the procedural rights of the defendant) the Court will have the flexibility to limit or expand victim involvement.

*C. Pre-Trial Chamber in The Prosecutor v. Thomas Lubanga Dyilo Upholds the Incorporation of Restorative Justice Aims*

As demonstrated in the previous sections of this Note, the drafters of the Rome Statute clearly wanted a more active role for victims than that in previous international criminal tribunals. However, the incorporation of restorative justice practices into a traditionally retributive arena remained to be seen. The recent Confirmation of charges Hearing in the case of *The Prosecutor v. Thomas Lubanga Dyilo* provided the first illustration of the limits to which the ICC judges would go to permit victim participation in ICC proceedings. This Section will explore the ways in which the Confirmation of charges Hearing upheld restorative justice aims and the ways in which it failed to do so.

To begin, the level of victim participation was consistent with the active role advocated by restorative justice theorists. An active role in the justice proceedings of their offender has been shown to aid victims in feeling more satisfied with the criminal justice system as a whole.<sup>293</sup> In accordance with Article 68 of the Rome Statute<sup>294</sup> and Rule 91 of the ICC Rules of Procedure and Evidence,<sup>295</sup>

---

291. Helen Brady, *Protective and Special Measures for Victims and Witnesses*, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 434, 436 (Roy S. Lee ed., 2001).

292. Nov. 9 Confirmation of charges Hearing, *supra* note 16, at 10.

293. Strang & Sherman, *supra* note 240, at 15.

294. Rome Statute, *supra* note 17, at art. 68.

Where the personal interests of the victims are affected, the Court shall

Judge Jorda and the other judges of the Pre-Trial Chamber recognized that the personal interests of these individuals were affected and that their participation in the hearing would not be limited to written observations or submissions. In fact, the legal representatives of the victims were given the same amount of time for their opening statements as the prosecution.<sup>296</sup> The legal representatives of the victims were present each day of the hearing and actively participated in each instance where the Rules permitted it.<sup>297</sup> In addition to opening statements, this participation included a question posed to the witness, document requests, and closing statements.<sup>298</sup> The ability to question a witness was not intended to replace the line of questioning traditionally conducted by the prosecution.<sup>299</sup> It was meant to supplement it, particularly as a way to gain more information for determining possible reparations and payments in the event of a guilty verdict.<sup>300</sup> Accordingly, the fact that there was only one question posed to the witness is not necessarily indicative of a lack of victim involvement. On the contrary, the fact that Mr. Mulenda's inquiry was in regard to notes taken during interviews with the families of victims speaks to the possibility of records that could be used to determine financial need down the road.<sup>301</sup> It is also important to note that the document request made by Mr. Walley on November 24, 2006 con-

---

permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused [to] a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

*Id.*

295. ICC Rules of Procedure and Evidence, *supra* note 18, at rule 91.

A legal representative of a victim shall be entitled to attend and participate in the proceedings in accordance with the terms of the ruling of the Chamber and any modification thereof given under rules 89 and 90. This shall include participation in hearings unless, in the circumstances of the case, the Chamber concerned is of the view that the representative's intervention should be confined to written observations or submissions.

*Id.*

296. Nov. 9 Confirmation of charges Hearing, *supra* note 16, at 36, 92, 102 (allowing ninety minutes each for the opening statements of the Prosecution and the legal representatives of the victims, and two hours and fifteen minutes for the opening statement of the Defense).

297. *Id.*

298. *Id.* at 9, 94.

299. Bitti & Friman, *supra* note 283, at 467.

300. *Id.* (indicating that the drafters felt that this type of questioning during the trial and pre-trial proceedings would "avoid repeated appearances of witnesses before the Court").

301. Nov. 21 Confirmation of charges Hearing, *supra* note 23.

cerned the freezing of Mr. Dyilo's assets.<sup>302</sup> Considering the fact that under international criminal law, victims had never been able to engage in any of these processes before, it seems as though this level of participation could be considered an "active" role.<sup>303</sup>

Next, restorative justice seeks to make the proceedings public, or open to the community, so that the victims' concerns can be understood and also so that the community can take steps to monitor criminal behavior.<sup>304</sup> It is important that the public, and not only the offenders, be made aware of victim trauma.<sup>305</sup> Here, the Confirmation of charges Hearing was open to the public.<sup>306</sup> In addition, the transcripts of all parts of the hearing that occurred in Open Session are available on the ICC website.<sup>307</sup> It is not possible to know exactly what occurred during the Closed Session Hearings. In this sense, the public nature of the hearing was hindered. We do know that the Court was concerned with making the hearings as public as possible.<sup>308</sup> For the majority of the proceedings, the legal representatives of the victims had a vast audience to hear their views.

Third, restorative justice theory focuses on maintaining the safety and security of the victims, thereby enabling them to assume an active role in the proceedings against their offenders.<sup>309</sup> In fact, restoring the victim's sense of security overall is a major goal of the restorative justice process.<sup>310</sup> The drafters of the Rome Statute recognized that the success of the ICC would depend largely on whether victims and witnesses were secure enough to come forward with information.<sup>311</sup> Similarly, the judges of the Pre-Trial Chamber felt that the situation warranted permitting the victims to remain anonymous during the hearing, while still allowing their voice to be heard.<sup>312</sup> Mr. Walley, legal representative for Victims 01-03, stated that the victims in this case do not want to waive their right to anonymity because they are afraid that the

---

302. Nov. 24 Confirmation of charges Hearing, *supra* note 193, at 8.

303. Strang & Sherman, *supra* note 240, at 15.

304. JOHNSTONE & VAN NESS, *supra* note 28, at 235.

305. Mika, *supra* note 237, at 35.

306. Nov. 9 Confirmation of charges Hearing, *supra* note 16, at 2, 6. Judge Jorda specifically made reference to the fact that these proceedings were open to the public. In addition, reporters and photographers were granted time before the hearing began to take pictures of the participants. The proceedings were not broadcast on television. The background of the case as well as status updates were also posted on the ICC website.

307. [http://www.icc-cpi.int/RDC/c0106/c0106\\_hs.html](http://www.icc-cpi.int/RDC/c0106/c0106_hs.html) (last visited Jan. 8, 2008).

308. Nov. 9 Confirmation of charges Hearing, *supra* note 16, at 99.

309. Mika, *supra* note 237, at 35.

310. Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801, 1841 (1999).

311. Brady, *supra* note 291, at 434.

312. Nov. 9 Confirmation of charges Hearing, *supra* note 16, at 82-83.

UPC will retaliate against them.<sup>313</sup> The Rome Statute states that the Prosecutor may withhold a witness' identity from the defense "prior to the commencement of the trial" if the information could seriously endanger the witness or his family.<sup>314</sup> This provision, while clearly pertaining to the Confirmation of charges Hearing, may not apply during the actual trial. Based on the plain language of the article, it seems as though the witnesses (some of whom are also victims in this case as well) will not be permitted to remain anonymous during the actual trial. If the victims are forced to disclose their identities, it is only to ensure that the defense has time to prepare an adequate response to their testimony.<sup>315</sup> Granting the defendant the right to a fair trial must not be forgotten in the quest to keep victims safe.<sup>316</sup>

Reparation payments are also a component of restorative justice.<sup>317</sup> As explained earlier in this Note, the ICC has implemented a novel procedure for ensuring that victims receive reparations if the Court decides to award them. Because of the fact that the Confirmation of charges Hearing was only held to determine if the defendant should stand trial,<sup>318</sup> the issue of reparations did not arise here. It is important to reiterate though, that the Rome Statute and the Rules of Procedure and Evidence of the ICC clearly dictate the method for awarding reparation payments.<sup>319</sup> It will be interesting to see if the Court chooses to award reparations, and if so how much, after the upcoming trial.

Although the majority of the Court's decisions concerning the victims were consistent with restorative justice aims, there was one notable exception. The ICC does not have a system in place to facilitate victim-offender mediation sessions. As a result, there will likely be cases where the defendant neither expresses remorse, nor apologizes at any stage in the proceedings. Restorative justice theorists believe that this could be detrimental to the healing of both the offender and the victim.<sup>320</sup> In the case of this Confirmation of charges Hearing, the defendant maintained and attempted to prove his innocence.<sup>321</sup> As the case will be proceeding to trial, we will have to wait to see whether or not the ultimate verdict may

---

313. *Id.*

314. Rome Statute, *supra* note 17, at art. 68(5).

315. ICC Rules of Procedure and Evidence, *supra* note 18, at rule 87.

316. Brady, *supra* note 291, at 436.

317. JOHNSTONE & VAN NESS, *supra* note 28, at 28.

318. Nov. 9 Confirmation of charges Hearing, *supra* note 16, at 6.

319. Rome Statute, *supra* note 17, at art. 75; ICC Rules of Procedure and Evidence, *supra* note 18, at rule 94-99.

320. JOHNSTONE & VAN NESS, *supra* note 28, at 224.

321. Nov. 9 Confirmation of charges Hearing, *supra* note 16.

lead to an expression of regret.

## VI. CONCLUSION

The uniqueness of the ICC stems foremost from being the first permanent international criminal tribunal but also from its inclusion of restorative justice theory. In ICC proceedings, certain victims may be granted third party status and actively participate in various stages of the prosecution of their offender. Through the Rome Statute and the Rules of Procedure and Evidence of the ICC, the world community professes its dedication to eradicating the culture of impunity for those who commit mass atrocities. The world community also recognizes the suffering of the victims and seeks to aid their recovery by permitting their voices to be heard.

The Confirmation of charges Hearing in the case of *The Prosecutor v. Thomas Lubanga Dyilo* provided the first glimpse of how victim participation in ICC proceedings would be implemented. While the presiding judge initially stated that victim participation would largely be decided on a case-specific basis, the victim participants played an active and notable role. Their legal representatives delivered forceful opening and closing statements and were also able to obtain most documents, as well as pose a question to the witness. The restorative justice aims of victim involvement and public recognition of the crimes committed were upheld. Other restorative justice components, such as victim-offender mediation sessions and the payment of reparations, did not occur in this phase of the proceedings. Because this proceeding was only a Confirmation of charges Hearing, no verdict that could possibly have resulted in reparation payments was handed down. It remains to be seen how the ICC will implement this piece of restorative justice theory in upcoming proceedings. Unfortunately, the ICC does not have a system in place for victim-offender mediation sessions. While these sessions are frequently considered to be effective for both victims and offenders,<sup>322</sup> a confrontation like this could not possibly have occurred during the Confirmation of charges Hearing as a result of the victims maintaining anonymity and the defendant maintaining his innocence.

Ultimately, the ICC has taken important steps toward recognizing the voices of victims of mass atrocities and permitting those voices to be heard by the world at large. As the case of *The Prosecutor v. Thomas Lubanga Dyilo* proceeds to trial, I anticipate a larger role for the victims in that proceeding. There, victims will no

---

322. When the sessions are conducted in the domestic setting absent civil conflict.

longer be anonymous and will probably pose more questions to witnesses and may even make personal statements themselves.<sup>323</sup> As restorative justice advocates suggest, an active role for the victim is essential to aid their healing, reduce further criminal behavior, and alert the community to take steps to prevent such atrocities from happening again. The ICC seems to be an important vehicle for the incorporation of restorative justice in both theory and practice.

---

323. The victims may wish to make a statement instead of having their legal representatives speak for them.



**IMPROVING THE PHARMACEUTICAL INDUSTRY:  
OPTIMALITY INSIDE THE FRAMEWORK OF THE  
CURRENT LEGAL SYSTEM PROVIDES ACCESS TO  
MEDICINES FOR HIV/AIDS PATIENTS IN SUB-SAHARAN  
AFRICA**

GOURAV N. MUKHERJEE\*

I.	INTRODUCTION.....	121
II.	CONSTRAINTS IN THE EXISTING FRAMEWORK.....	122
	<i>A. Government Authorized Monopoly.....</i>	123
	<i>B. Compulsory Licensing, Least Developed and Developing Country Enforcement of Patent Rights Exemptions.....</i>	126
	<i>C. Declining Efficacy of Research and Development.....</i>	128
III.	OBJECTIVES.....	128
	<i>A. Access to Medicines.....</i>	129
	<i>B. Research and Development Efficacy and Efficiency..</i>	131
	<i>C. Need for Lower Cost of Pharmaceutical Products.....</i>	132
	<i>D. Safety — Reduce Counterfeiting.....</i>	133
IV.	EFFECTING A CHANGE WITHIN THE FRAMEWORK.....	134
	<i>A. Research Reimbursements at Each Phase of Clinical Trials.....</i>	134
	<i>B. The Pharmaceutical Market Parity Approach.....</i>	140
	<i>C. NIH/University Licensing Standards.....</i>	143
	<i>D. Supply Chain Activity Improvement — Improving Efficiency of Research and Development.....</i>	144
	<i>E. Ensuring Safety — Counterfeiting and the Radio Frequency Identification Safety.....</i>	145
	<i>F. The Bargain.....</i>	146
V.	CONCLUSION.....	149

I. INTRODUCTION

Application of the theories contained in this paper could effect a substantial change on the HIV/AIDS epidemic in Africa through an increase in the availability of essential life saving medicines and a reduction in cost; optimizing within the existing legal framework for our current healthcare system can provide in-

---

\* The Author is a J.D. recipient from Florida State University College of Law December 2007. The Author would like to acknowledge the unconditional and loving support of his parents as well as the oversight of Professor Frederick Abbott.

creased benefits for industry players as well as those in need of medicines.

The author intends to examine and establish a representative model framework under which the current pharmaceutical industry operates. In specific, the framework consists of specific legal and industrial constraints that determine how the participants operate there-in. National Institutes of Health (NIH), universities, other sovereigns or countries, and the pharmaceutical firms participating within the confines of this framework each operate toward certain fundamental objectives that both drive and limit their manner and mode of participation. Pharmaceutical companies aim to achieve, primarily, market or financially driven goals while universities and NIH strive to achieve research efficacy and eventual implementation of effective outcomes in society. Similarly, sovereigns such as Least Developed Countries (LDCs), aim to attain treatment, care, and pharmaceutical products for the members of their populations who inevitably lack the resources to purchase much-needed essential medicines.

The framework consists of constraints, both monetary and non-financial, which steer and confine the participants in the industry. These constraints include government intellectual property rights protection, research funding and efficacy standards, and the ability of certain participants to forgo or exempt themselves from these constraints through compulsory licensing and exemptions to the Agreement of Trade-Related Aspects of Intellectual Property (TRIPS).

Throughout the overall pharmaceutical product realm, this paper will examine the societal objectives for access to medicines, improved research and development efficacy and efficiency, lower cost of finished goods, and improved safety. Through the application of revenue and supply chain optimization techniques, the author intends to demonstrate how the industry can be optimized within the existing legal and social framework and still achieve more of the objectives sought by the participants.

## II. CONSTRAINTS IN THE EXISTING FRAMEWORK

Over twenty-two million people have died to date worldwide as a result of HIV/AIDS, and 74% of the forty-two million living people currently infected reside in sub-Saharan Africa.<sup>1</sup> According to the WHO Regional committee for Africa and UNAIDS, it can cost

---

1. Until There's a Cure: Vital Statistics, <http://www.until.org/statistics.shtml> (last visited Sep. 30, 2007).

between \$130 and \$300 for a one year supply of antiretroviral drugs to treat a patient.<sup>2</sup>

The existing framework of the current legal system regarding pharmaceutical intellectual property rights will serve as the constraints within which the current system can be optimized. It is not necessary to change or evaluate the potential for changes to the legal system when the current system of constraints and the operation of the governments and pharmaceutical firms is not optimized. As our uppermost constraint, intellectual property rights protection affords originator companies who create new and innovative drugs the benefits of an artificially induced, government protected, monopoly. At the bottom of our frame, exceptions to these rights, through the use of compulsory licensing and other exemptions, allow governments of insufficient scale, technology, or ability to gain much-needed drugs and leverage resources. All the while, the processes by which drug products come to market exhibit certain critical attributes which shift the optimization within the other two constraints.

#### *A. Government Authorized Monopoly*

The current legal constructs of the U.S. Patent Act and the TRIPS agreement establish protection for, and incentivize, new innovation on a national and world scale.<sup>3</sup> The United States government provides patent protection and market exclusivity for new pharmaceutical drug products produced domestically. A majority of the countries in the world are signatories to the TRIPS agreement as part of their membership to the World Trade Organization (WTO), and they receive patent protection internationally thereunder.<sup>4</sup> The U.S. government patent protection provides for a 20 year term of protection and up to an additional five years of market exclusivity to make up for the time a drug candidate spends in the regulatory review process waiting for market approval<sup>5</sup>. The TRIPS agreement applies to the rest of the world markets and mirrors the U.S. regulation providing twenty years of patent pro-

---

2. WORLD HEALTH ORG., REPORT OF THE REGIONAL DIRECTOR ON TUBERCULOSIS AND HIV/AIDS: A STRATEGY FOR THE CONTROL OF A DUAL EPIDEMIC IN THE WHO AFRICAN REGION, 6, AFR/RC57/10 (June 25, 2007).

3. See Hatch-Waxman Act, 35 U.S.C.A. §§ 156, 271 (Westlaw through Oct. 2007); Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 2005, 33 I.L.M. 1197 (1994) [hereinafter TRIPS].

4. Understanding the WTO - Members, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last visited Dec. 3, 2007).

5. *Id.*; see also *Allergan, Inc. v. Alcon Labs., Inc.*, 324 F.3d 1322, 1325 (Fed. Cir. 2003).

tection from the filing date.<sup>6</sup> The U.S. government's patent protection creates a *de facto* monopoly and balances two competing policy interests: "(1) inducing pioneering research and development of new drugs and (2) enabling competitors to bring low-cost, generic copies of those drugs to market."<sup>7</sup> The use of low cost licensed generic production can offer life saving anti-retroviral medications to HIV/AIDS patients and governments in the developing world that currently cannot afford to purchase originator products.

By definition, these government-authorized monopolies create a condition in which pharmaceutical companies enjoy artificially inflated market prices and comparatively higher revenues than the free market.<sup>8</sup> Monopolists typically restrict output to maintain these artificially inflated prices, but even without restricted output, the monopolists' average revenue curve for the protected products becomes the industry demand curve.<sup>9</sup> This means that the pharmaceutical firm will, like any firm in a competitive industry, try to maximize its profit within the constraints of the market's supply and demand curve and will capture all the demand at the optimum price.<sup>10</sup> This pure monopolistic market model is representative of a pharmaceutical firm in a market that affords patent protection where no reasonably differentiated substitute products are available. Practically applied, no other company is producing a drug product that treats the same condition in the same therapeutic class of products.<sup>11</sup> As applied to the production of HIV/AIDS antiretroviral medication, companies can objectively set demand to maximize profits in lucrative markets without consideration for underserved or unserved markets.

In contrast, an idealistic competitive market with pure or close to pure competition will exhibit very different market attributes. The competitive market will consist of multiple firms each with small market shares, homogeneous products with seamless substitution and little or no product differentiation, low barriers to market entry, and non-collusive competitive pricing.<sup>12</sup> The competitive market model represents the generic drug production market where multiple firms compete in sales of bio-equivalent products.

---

6. TRIPS, *supra* note 3, at art. 33.

7. Allergan, 324 F.3d at 1325.

8. WILLIAM J. BAUMOL, ECONOMIC THEORY AND OPERATIONS ANALYSIS 343-346 (3d ed. 1972).

9. *Id.*

10. *Id.* at 343.

11. *See generally* National Institute of Health, Estimates of Funding for Various Diseases, Conditions, Research Areas, <http://www.nih.gov/news/fundingresearchareas.htm> (last visited May 1, 2007) (describing the therapeutic classes and the amounts of funding allocated to each).

12. BAUMOL, *supra* note 8, at 335-36.

Subsequently, this market model can be used to determine the market dynamics in a market where a compulsory license has been issued and the fixed cost of market entry license or patent royalties are eliminated or waived. In a competitive market, such as a generic pharmaceutical market, the price of products in the market will approach the average marginal cost of production for pharmaceutical firms.<sup>13</sup> Firms will keep prices inflated enough to maintain minimal profitability; if the differential between the price and the marginal cost increases beyond the cost of entry threshold, new firms will enter the market as a result of attractive profit margins.<sup>14</sup> This threshold can be described by the quantity, price, marginal cost, expected demand and fixed cost of market entry for a new firm in the market. Using a break-even calculation, one could see how to compute the cost benefit analysis and threshold for market entry. Later, this formula can be applied to compulsory licensing situations in establishing appropriate pricing to attract market entry for pharmaceutical firms.

$V_e$  = expected demand of the market  
 $P^* = P_{be}$  = breakeven point at which price is conducive to market entry  
 $C_v$  = variable or marginal cost of operations  
 $C_f$  = fixed cost of entry/operations (i.e. plant and equipment)  
 $M_s$  = expected market share percentage

$$P_{be} = \frac{[(V_e C_v M_s) + C_f]}{V_e M_s}$$

Note: The  $C_f$  and  $V_m$  calculations can consist of much more complex formulations including internal rate of return (IRR) and Time-Value of Money calculations as well as account for market growth and Consumer Price Index (CPI) adjustments.

When pharmaceutical firms encounter drugs that compete in the same therapeutic class and purport to treat the same disorder, albeit through a different patented substance, the market dynamic changes; the premise of product differentiation and substitution changes to allow for an overlap of the target market.<sup>15</sup> This difference modifies the average marginal cost of the firms in monopolistic competition via product differentiation. The average marginal cost curve will not directly mirror the demand curve; however it will tangentially approach this curve.<sup>16</sup> As applied, this model illustrates the competition between firms with products under patent protection but overlap in competitive therapeutic areas or prod-

13. *See id.* at 337-38.

14. *See id.* at 338-39.

15. *See id.* at 344-45.

16. *Id.* at 345.

uct categories. For example, there are currently at least three drugs from different manufacturers to treat Erectile Dysfunction (ED); each of these products, Viagra, Cialis, and Levitra, currently receives patent protection but compete in the same therapeutic category and treat the same disorder.<sup>17</sup> These products compete on differentiated product qualities such as dosage size, length of effect, and length of time before effects are realized.<sup>18</sup> Similarly, there are many cocktails of antiretroviral drugs available for the treatment of HIV/AIDS.<sup>19</sup> As is evident, the market demand for treatment sufficiently outstrips the artificially controlled supply, but products still compete based on efficacy, not on price because of artificial price supports and inelastic supply.

*B. Compulsory Licensing, Least Developed and Developing Country Enforcement of Patent Rights Exemptions*

On an international level, LDCs and Developing Countries receive opportunities to avoid enforcing patent rights within their countries in light of special needs such as economic, financial, technological, and administrative constraints.<sup>20</sup> Exceptions under Article 31 of TRIPS provide for provisions allowing all countries to issue a compulsory license for medicines.<sup>21</sup> Some of the developed countries, including the United States, have voluntarily agreed not to issue a compulsory license, and to date, despite the overwhelming outcry for HIV/AIDS medicines in developing countries, no compulsory licenses have been issued. However, the threat of compulsory licensing, at least thus far, has provided sufficient leverage for the company seeking the license to negotiate an amicable resolution with the patent holder.<sup>22</sup> Member countries can issue a license for virtually any reason under the TRIPS agreement and use of this flexibility is increasing rapidly.<sup>23</sup> Furthermore, LDCs re-

---

17. Press release, Harvard Health Publ'n, Two New Erectile Dysfunction Drugs: How They Measure Up Against Viagra (Dec. 17, 2003), *available at* [http://www.health.harvard.edu/press\\_releases/new\\_erecile\\_dysfunction\\_drugs.htm](http://www.health.harvard.edu/press_releases/new_erecile_dysfunction_drugs.htm) (last visited May 9, 2007).

18. *Id.*

19. NGO Comment on the Attaran/Gillespie-White and PhRMA Surveys of Patents on Antiretroviral Drugs in Africa - Access to Medicines Project, <http://www.essentialaction.org/access/index.php?archives/47-NGO-Comment-on-the-AttaranGillespie-White-and-PhRMA-surveys-of-patents-on-Antiretroviral-drugs-in-Africa.html> (last visited Dec. 3, 2007).

20. TRIPS, *supra* note 3, at art. 66.

21. *Id.* at art. 31.

22. Natasha T. Metzler, *Brazil Uses Compulsory Licensing Threat in Negotiations*, PHARMACEUTICAL EXECUTIVE, July 18, 2005, <http://www.pharmexec.com/pharmexec/article/articleDetail.jsp?id=170954>, *available at* <http://www.itssd.org/Publications/id.pdf>.

23. See news on current event. Dispute between Thailand and pharmaceutical manufacturer Abbott laboratories.

ceive an additional seven to ten year extension on the application of TRIPS on pharmaceutical products.<sup>24</sup> Under the threat of compulsory licensing, the markets that previously would exhibit traits of pure or differentiated monopolies will now resemble more purely competitive markets. The artificial legal barriers that normally prevent entry of copycat or generic drugs and artificially inflate the cost of entry essentially disappear under the threat of a compulsory license. Policies promoted by many of the developed countries promote free market and discourage the use of the compulsory licensing system but even the United States has used the threat of compulsory licensing to further its goals;<sup>25</sup> the United States threatened to issue a compulsory license during the post-September 11th Anthrax scares.<sup>26</sup>

Under the compulsory licensing provisions and the latest interpretation of TRIPS, countries that do not possess the manufacturing capacity or technology can procure manufacturing of necessary medicines from developing or developed countries that possess such capacity. India's generic industry has been targeted to fill some of the production capacity needs for the LDCs that issue compulsory licensing. Ranbaxy is the largest producer of generic pharmaceutical products in India and one of the top ten producers in the world.<sup>27</sup> India has just recently itself started to implement patent protection based on the original exemption and application of the mailbox rule; until the point at which India began to implement patent protection, the market pricing for pharmaceutical products resembled the competitive market model using marginal costs and low or eliminated fixed costs.<sup>28</sup> Both the compulsory licensing (even though a royalty will be paid) and the exemption from enforcement of IPRs for LDCs will react according to the competitive market model, as discussed above.

According to the Doha Declaration, TRIPS does not and should not prevent members from taking necessary measures to protect public health.<sup>29</sup> Further, the Doha Declaration emphasized the

---

24. Jerome H. Reichman, *Procuring Essential Medicines Under the Amended TRIPS Provisions: The Prospects for Regional Pharmaceutical Supply Centers* (Oct. 17, 2006), available at <http://law.fsu.edu/gpc2007/materials/procuringessentialmedicines.pdf>.

25. See generally *id.*

26. See, e.g., *Bird Flu Prompts Call for Compulsory Licensing*, IP LAW BULL. Oct. 13, 2005, available at [http://www.mhmlaw.com/media\\_coverage/Oct05\\_IPLaw\\_BirdFlu.pdf](http://www.mhmlaw.com/media_coverage/Oct05_IPLaw_BirdFlu.pdf).

27. Ranbaxy Laboratories Limited, [www.ranbaxy.com](http://www.ranbaxy.com) (last visited May 1, 2007).

28. Intellectual property (TRIPS) and pharmaceuticals - technical note, WTO, [http://www.wto.org/english/tratop\\_e/trips\\_e/pharma\\_ato186\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/pharma_ato186_e.htm) (last visited Dec. 3, 2007) (as a developing country, India had to start implementing in 2005).

29. World Trade Organization, Declaration of the TRIPS Agreement and Public Health of 14 November 2001, WT/MIN(01)/DEC/2, 41 I.L.M. 755 (2002) [hereinafter Doha Declaration].

ability for Members to use all provisions of TRIPS including compulsory licensing and favorable rules of patent exhaustion.<sup>30</sup> Compulsory licenses may be issued by any nation.

### C. Declining Efficacy of Research and Development

In addition to the market constraints already mentioned, the current framework of the pharmaceutical industry experiences ever increasing costs associated with research and development along with declining efficacy of that research.<sup>31</sup> The pharmaceutical industry increased spending from \$16 billion to \$40 billion between 1993 and 2004, but the number of NDA submissions to the Food and Drug Administration (FDA) has declined since 1999.<sup>32</sup> These staggering figures lead to the current estimates which range from \$500 million to \$2 billion to produce a new drug.<sup>33</sup> Since the average time for a drug to traverse the discovery, development, and approval process is fifteen years, the time-value of money, interest, and opportunity cost calculations substantially impact the fixed cost of new product development for pharmaceutical firms.<sup>34</sup> The FDA makes great strides, through its critical path initiative, to improve the efficiency of its application and review processes. However, the six to ten months spent reviewing an application does not represent a significant portion of the developmental process for new drug development.<sup>35</sup> Most of the inefficiencies lie in the first three phases of clinical trial. The first two phases alone take, on average, six and a half years.<sup>36</sup> Improvements can be made in the clinical trial process and within the existing framework of the pharmaceutical drug supply chain that can help reduce these costs and improve efficiency. Additionally, government involvement in the funding of research can provide a lower effective cost of market entry for a particular drug.

## III. OBJECTIVES

Moving forward within the framework of the existing pharma-

---

30. Reichman, *supra* note 24, at 8.

31. U.S. GOV'T ACCOUNTABILITY OFFICE, NEW DRUG DEVELOPMENT: SCIENCE, BUSINESS, REGULATORY, AND INTELLECTUAL PROPERTY ISSUES CITED AS HAMPERING DRUG DEVELOPMENT EFFORTS 4 (2006).

32. *Id.*

33. Christopher P. Adams & Van V. Branter, *Estimating the Cost of New Drug Development: Is It Really \$802 Million?*, 25 HEALTH AFF. 420, 420 (Mar./Apr. 2006).

34. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 32, at 6.

35. *Id.* at 10-11.

36. *Id.* at 6.



ceutical system several goals must be achieved through optimization. Unlike a traditional optimization, certain non-monetary, social goals must and should be achieved as a matter of public welfare while other goals must be achieved in order to ensure the survival of the industry and the continued successes of pharmaceutical firms therein. Underserved populations throughout the world experience shortages or the inability to access necessary medical treatment and care that is available and often commonplace in other regions. Throughout sub-Saharan Africa alone, over eleven million children remain orphaned as a direct result of AIDS.<sup>37</sup> The sovereigns in sub-Saharan Africa and similar regions are unable to provide for the members of their own populations and are confronted with the ever-painful struggle to gain access to medicines for their respective populations; in developed nations, the medications exist to convert AIDS into a chronic, non-fatal illness and prolong life. The U.S. and other developed nations provide billions of dollars to assist in purchasing drugs for those in need.<sup>38</sup> Frustrating as it may seem, the tremendous contributions offered by and through the U.S. and other philanthropic ventures pales in comparison to the need and demand for medicines. How can society achieve uniform access to life saving products?

In addition to funding and support of underserved populations, society needs improved efficiency in Research and Development (R&D). Firms must control and maximize the productivity of R&D efforts. Better efficacy leads to better treatments and new discoveries in underserved therapeutic classes. Society needs to lower the cost of drugs. Drug prices are a byproduct of R&D expenditures, market forces, and compound interest; the cost of chemical ingredients and manufacturing processes alone do not drive prices. Finally, and not least in importance, society must ensure the safety of patients and prevent dangerous counterfeit products from entering the market.

#### *A. Access to Medicines*

The free-market economy in which we live is challenged to devise a means by which its inherent “guiding hand” function can be induced to “lend a hand” to the underserved, disenfranchised sub-populations domestic and abroad. The question remains: “Who should be served and for what diseases?” According to the World

---

37. The White House, Africa Policy, <http://www.whitehouse.gov/infocus/africa/> (last visited Sept. 30, 2007).

38. *Id.*

Health Organization (WHO), essential medicines, or those given priority based on the needs of the populations, should be available at all times in sufficient quantities to avoid shortage.<sup>39</sup> Unfortunately, cost as well as unavailability of supply plagues LDCs which often have a medicine budget of less than \$30 per person, per year.<sup>40</sup> According to Frederick Abbott, the following describes the nature of the access to medicines problem:

The supply of essential medicines is a “public goods” problem in the sense that the private market does not adequately address it. Health care systems throughout the world require an array of low-cost medicines — some under patent by originators, some not — for distribution through public hospitals and clinics. But the provision of health care services is not limited to the public sector, even in the lowest-income countries.<sup>41</sup>

The compelling interest of capitalist economics is its derivative of profit and growth; striving to achieve bottom line results leaves little room for waste, inefficiency, or charity. Intervention is necessary to provide for those in need. Pharmaceutical firms, like other corporations of economic scale, tend to operate solely upon the principals of market demand and financial prosperity fostered from meeting product demand and market forces. As consequence will bear, these pharmaceutical firms will operate, enslaved to their investors and market forces, to serve those who can afford their products. Consequently, these firms fail to serve the needs of the economically burdensome, underserved population groups.

Contrary to market economics, it is incumbent upon society to serve the needs of all its members regardless of each member’s respective ability to pay; this does not have to be done at the cost of the firms who compete within the market, although this tends to be the traditional approach. The United States, and historically most countries and sovereigns, use taxation as a means to secure the necessary funding to service the members of its society including those disenfranchised or underprivileged members who do not contribute to the fund. Where governments fall short in providing

---

39. Frederick M. Abbott, *Managing the Hydra: The Herculean task of ensuring access to essential medicines in* INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY, 393, 394 (Keith E. Maskus & Jerome H. Reichman eds., 2004). *See also* The Selection of Essential Medicines, WHO Policy Perspectives on Medicines No. 4 (June 2002), available at [http://whqlibdoc.who.int/hq/2002/who\\_edm\\_2002.2.pdf](http://whqlibdoc.who.int/hq/2002/who_edm_2002.2.pdf).

40. Abbot, *supra* note 40, at 395.

41. *Id.*

necessary “public goods,” non-governmental or charitable organizations will access resources in the private markets in an attempt to fill the shortfall.<sup>42</sup> Many of these public and private financial solutions fall short in the face of anomalies such as epidemic and pandemic crisis; small governments lack financial capacity to address these anomalies and rely on global resources like the Global Fund and other sovereigns like the United States.<sup>43</sup> The United States, under the Ryan White HIV/AIDS Treatment Modernization Act of 2006 and its predecessor, contributed over \$74 billion to the treatment and care the HIV/AIDS pandemic since 2001.<sup>44</sup>

Developing countries and LDCs suffer the most from restricted access to medicines. These countries lack the resources to obtain essential medicines and face major political challenges from developed nations when threatening to invoke exceptions to intellectual property rights protection under TRIPS.

### *B. Research and Development Efficacy and Efficiency*

Only five out of every ten thousand compounds researched succeeds during the first two stages of clinical trials.<sup>45</sup> Increased spending has not resulted in increased efficiency or efficacy.<sup>46</sup> The number of New Molecular Entities (NME) and NDAs submitted to the FDA has declined since 1996, but the spending on research has increased.<sup>47</sup> Concerned about the decline, the FDA commenced an initiative to reduce critical path components in the NDA approval process focusing on: (1) the number of review cycles undergone by each drug; (2) the overall time to approve and NDA; and (3) cost of development. The initiatives undertaken by the FDA aim to reduce cost through reduction in approval time; this action further signifies the importance of time-value calculations on new drug cost and pricing. After increasing research expenditures by 147%, the number of NDAs and NMEs submitted by private firms failed to grow in a similar manner.<sup>48</sup> Meanwhile, the number of Investigational New Drugs (IND) submitted increased.<sup>49</sup> These observations

---

42. *Id.* at 396-402.

43. *Id.* See generally The Global Fund, To Fight AIDS, Tuberculosis, and Malaria, <http://www.theglobalfund.org/en/about/aids/default.asp> (last visited Sept 30, 2007) (providing an overview of the Global Fund).

44. Press Release, Office of the Press Secretary, Fact Sheet: The Ryan White HIV/AIDS Treatment Modernization Act of 2006 (Dec. 19, 2006), available at <http://www.whitehouse.gov/news/releases/2006/12/print/20061219-4.html>.

45. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 32, at 6.

46. See *id.* at 4..

47. *Id.*

48. *Id.* at 12.

49. *Id.*

imply at least two things: (1) pharmaceutical firms are eliminating INDs at earlier stages in development because of more rigorous safety standards or financial considerations; and (2) the availability of good IND candidates is declining because of technological limitations on our existing research sources. Further compounding the impact of these observations, most of the NDAs (68%) submitted between 1993 and 2004 were for modifications of existing pharmaceutical products and lacked the innovation seen in new pharmaceutical drug candidates for novel therapeutic applications.<sup>50</sup>

The efficacy and efficiency of research for new drug products is declining. The top reasons cited for this decline are limitations on scientific ability to transform discoveries into safe and effective drug products, pharmaceutical decisions about profitability of drug candidates, uncertainty about the outcome of regulatory applications, and the inability to obtain adequate intellectual property protection if available at all.<sup>51</sup> The efficacy and efficiency of research and development must improve.

### C. Need for Lower Cost of Pharmaceutical Products

During the period of patent protection and market exclusivity patented pharmaceutical products, by the nature of the industry's high research and development costs, are sometimes priced in excess of thirty times the marginal cost of production.<sup>52</sup> The prices of patented products often exceed the purchasing capacity of populations in LDCs and therefore are *de facto* unavailable.<sup>53</sup> Domestically, estimates range as high as \$20 billion for potential savings through the substitution of generic pharmaceutical products for brand name patent-protected products.<sup>54</sup> In some respects, generic substitution allows the consumer to realize a direct price savings at the counter through lower purchase prices and lower co-pay amounts. Medicine accounts for upwards of 10% of the overall cost of health care.<sup>55</sup> With domestic health care costs escalating and Medicare cost overruns, a reduction in the cost of medicine is essential to the continued viability of domestic health care programs.

---

50. *Id.* at 17.

51. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 32, at 25.

52. Jerome H. Reichman, *supra* note 24, at 4.

53. *Id.*

54. EMILY COX ET. AL. 2004 GENERIC DRUG USAGE REPORT 1 (2004), *available at* <http://www.express-scripts.com/ourcompany/news/outcomesresearch/onlinepublications/study/gdur.pdf>.

55. PHARM. RES. AND MFR. OF AM., PHARMACEUTICAL INDUSTRY PROFILE 2007 25 (2007).

*D. Safety — Reduce Counterfeiting*

Safety remains a key concern in the global pharmaceutical market and, with drug counterfeiting on the rise worldwide, many LDCs are exposed to increased threats. Advances in technology, intermediary proliferation, high prices, excess demand, and a lack of international regulatory intervention fuel the escalation of counterfeiting in the pharmaceutical industry.<sup>56</sup> Counterfeit drugs continue to proliferate in existing pharmaceutical supply chains; the introduction of these counterfeit drugs taints the quality, effectiveness, and safety of the drug supply. Drug counterfeiting estimates range from 8% of the total drug supply in the United States to as high as 60% in other countries.<sup>57</sup> Counterfeiting results in lost revenues, profits and lives.

The economic impact of counterfeit drugs has a multiplicative effect worldwide. Counterfeit drugs cause substantial losses in revenue and profit, which leads to secondary effects such as law suits, insurance costs and injuries, the creation of higher prices for the end consumer, and lower profit margins for pharmaceutical companies. The “faux products” also tarnish reputations, cause costly lawsuits from adverse drug reactions, and create expensive recalls and reverse logistics expenses. Indirectly, the counterfeit products can increase regulatory and political involvement in the industry, which creates lengthened product approval times and increased costs.

Industry wide profitability for pharmaceutical companies in 1996 was estimated conservatively at 18.8%; accounting for inflation, this figure translates into \$95 billion for 2004.<sup>58</sup> Subsequently, estimates for lost revenue due to counterfeiting in the pharmaceutical industry were approximately 5.8% or \$29.3 billion in terms of 2004 industry profit.<sup>59</sup> This staggering figure represents the significant impact that counterfeit products impose on the pharmaceutical industry. The WHO estimated that the percentage of counterfeit drugs world-wide could be as high as 10%.<sup>60</sup>

---

56. ALBERT I. WERTHEIMER ET AL., *Counterfeit Pharmaceuticals: Update on Current Status and Future Projections*, in BUS. BRIEFINGS: PHARMAGENERICS 2004 (2004).

57. *Id.* at 30.

58. Dr. Mahender Singh, Research Assoc. and Project Manager, MIT Ctr. for Transp. and Logistics, Supply Chain 2020 Presentation: An Overview of the Pharmaceutical Supply Chain (Nov. 16, 2004).

59. *Id.*

60. WORLD HEALTH ORG., COUNTERFEIT DRUGS: GUIDELINES FOR THE DEVELOPMENT OF MEASURES TO COMBAT COUNTERFEIT DRUGS (1999).

## IV. EFFECTING A CHANGE WITHIN THE FRAMEWORK

Several forums, within the existing framework, are available to improve the access to medicines, increase effectiveness and efficacy of research, lower the cost of pharmaceutical products, and increase the safety of the products in pharmaceutical supply chains, without using price controls or otherwise diminishing the profit goals of pharmaceutical firms. Alternative mechanisms may be available through the legislative/political process. However, as proposed below, most of the goals can be reached without exercising this option. The current industry framework is not optimized within the existing constraints. The incentives provided by the government and the market do not align to properly incentivize pharmaceutical firms to maximize the use of existing resources in order to maximize profits. Additionally, within the optimization process, additional parameters can allow for the service of non-financial goals through the use of licensing constraints, rebates, or industry market pressures. This means patients suffering from HIV/AIDS in LDCs will be able to access the medicines they need while still serving the interests of all parties involved.

*A. Research Reimbursements at Each Phase of Clinical Trials*

Traditional market forces will dictate that reducing the cost of a product will increase the demand for a given product. Likewise, in a less elastic monopolistic market, such as the pharmaceutical market for patent-protected drug products, lowering cost will create greater profit margins under the assumption of fixed retail pricing, thereby shifting the context and perspective under which we currently view pharmaceutical firms to a view in which the pharmaceutical firm is the retailer and the university is the wholesaler. Under this perspective one can apply the principles of supply chain coordination pricing incentives to establish an optimum price under which a pharmaceutical firm can “purchase” its supplies. Assume that the price the pharmaceutical manufacturer pays for a given product is represented by the cost of licensing plus the cost of the clinical trials thereby associated. Currently, the relative cost, as seen by the pharmaceutical firm, is too high for products that treat underserved therapeutic classes or diseases. Using the simple break-even equations presented earlier, it can be determined that these product classes are lacking in sufficient market demand or, relative to profit, are too expensive to produce. In order to make one of these products attractive to a pharmaceutical firm, we must either increase the revenue or lower the rela-

tive cost. How can this be done with the current uncertainty at each phase of clinical trials?

Take into account the supply contract theory as presented by Professor Yossi Sheffi from MIT.<sup>61</sup> Let us analogize the clinical trial phase of the pharmaceutical industry as a completely perishable process such as a newspaper stand. For the sake of argument, assume that at the end of the day, the daily newspaper has no residual or salvage value and any unsold items are waste. Similarly, assume that any NME that fails at any given stage of the clinical trial process has no salvage or residual value; once failed, the NME is essentially discarded. The wholesaler will try to sell (license) its products at the optimum price which will achieve its interests. Universities/NIH funded researchers want to push upon society as many of its achievements as possible. Meanwhile, the pharmaceutical firms (retailers) want to minimize risk and market the most profitable “blockbuster” products to maximize profit margin and revenue.<sup>62</sup> Also, assume that, if all clinical trial costs were funded by the government, the pharmaceutical firms would order (license) as many products as possible since there would be relatively insignificant associated fixed costs and only marginal or variable costs of production. Analogously, if newspapers were free or provided at cost, the retailer (newspaper stand) would order a relatively large amount without consequence from risk of loss.

There is a gap between what firms are willing to pay and the combined cost of licensure with associated clinical trial expenses. Average costs at phases one, two, and three of clinical trials are \$15 million, \$24 million, and \$86 million respectively.<sup>63</sup> Many theorize that clinical trials should be funded by the government,<sup>64</sup> but the author posits, how much, and through what mechanism, should this be done? A proportionate distribution of risk between the two alternatives, full funding versus no funding, would produce an optimal solution within the existing framework. How do we achieve maximum efficacy for our funding? Following with the analogy, the following equations will represent the optimal “order” for the overall supply chain instead of ordering with just the retailers’ profit margin objective.

---

61. Yossi Sheffi, Dir., MIT Ctr. for Transp. and Logistics, Supply Contracts Presentation (Dec. 2006).

62. See *Without the Next Blockbuster Drug, Merck Faces a Murky Future*, KNOWLEDGE@WHARTON, Dec. 2003, <http://knowledge.wharton.upenn.edu/article.cfm?articleid=886> (last visited Sept. 30, 2007).

63. Adams & Branter, *supra* note 34, at 422.

64. See Tracy R. Lewis et al., *The Case for Public Funding and Public Oversight of Clinical Trials*, 4 THE ECONOMISTS’ VOICE 1 (2007), available at [www.bepress.com/ev](http://www.bepress.com/ev).

P = retail price  
 W = wholesale price (assume this includes license royalties and associated clinical trial expenses)  
 C = supplier's cost  
 S = salvage value  
 Q = quantity ordered  
 D = actual demand  
 f(D) = demand density (retail); assume market demand  
 F(D) = retail cumulative demand distribution (normal)  
 Q<sub>r</sub>\* = optimal order quantity for the retailer/pharmaceutical firm  
 Q<sub>c</sub>\* = optimal order quantity for the supply channel

For this example, assume the demand distribution is normally distributed

$$F^{-1}\left(\frac{P - W}{P - S}\right) = Q_r^*$$

In contrast,

$$F^{-1}\left(\frac{P - C}{P - S}\right) = Q_c^*$$

Note: The above formulation and equations have been adapted from Yossi Sheffi's "Supply Contracts" presentation at the MIT/Zaragoza Logistics Center in December of 2006.

For the case in point, it can be generally postulated that the optimal channel order will exceed the optimal order of the firm. The optimal order for the channel, or the market demand for a given product, will, even in a relatively inelastic market, be greater than the optimal order for the pharmaceutical firm; the pharmaceutical firm (retailer) is not getting the product for free or for the same cost as the wholesaler. It is necessary to align the incentives of the pharmaceutical firms with those of the licensors' in order to achieve higher levels of market efficiency and optimality; we must align the incentives to bridge the gap between the wholesaler and the retailer.

This gap can be bridged using risk and reward preferences and the retailer's desire for profitability. It has been established that the pharmaceutical industry involves significant risk of loss at the various levels of clinical trials. Pharmaceutical firms also avoid costly trials on NMEs that serve unprofitable markets or small therapeutic classes. Risk sharing has been the key in other industries to optimize channel ordering; some have used rebate and buyback contracts for years to promote higher retail purchasing. Utilizing the previous analogy of the newspaper industry, news agencies sell papers to news stands for a given price. But in order to incentivize the news stand to carry more papers, and thereby



have the capacity to satisfy more consumer demand, the news agency will provide a buyback or salvage value to the news stand or end retailer.<sup>65</sup> The higher the guaranteed buyback, the larger quantity the news stand will order (limited by overall demand). By analogy, and as mentioned before, the more the government pays for clinical research (lowering the cost), the more pharmaceutical firms will take advantage and license products. This will effectively provide greater throughput and more licenses of products.

By corollary example, assume that the \$30 billion pledge from the White House to support HIV/AIDS<sup>66</sup> was redirected from purchasing on-patent treatment to fund university research or share the financial risk of clinical trials for new treatments. Also assume market makers require a 12.15% IRR for the pharmaceutical industry.<sup>67</sup> By the government sharing the risk of loss of clinical trials, 12% simple interest compounded annually on \$30 billion over an arbitrarily chosen five year term, the cost to the pharmaceutical firm for initial production of a product would be reduced by about 56%, or approximately \$22 billion. Of course, this savings would be passed to the pharmaceutical firms in the form of a rebate or incentive based on a proportion of completed product sales in the market. If we assume the annual demand for HIV/AIDS antiretrovirals is 22 million annual doses, the rebate could be structured to align industry incentives and provide higher rebates on fulfillment percentages or higher demand satisfaction. This simple example illustrates the savings and impact which would be passed on to the end consumer, and in turn, to underserved markets.

However, funding should not just be arbitrarily increased to achieve greater throughput and greater access to previously unprofitable classes. An optimal balance must be achieved and adjusted periodically to maintain proper alignment of incentives. If the demand changes, the formulation to ensure proper risk sharing and alignment of incentives must also change.

Since the risk of success at each phase of clinical trials varies by phase, therapeutic class, and a myriad of other factors, it is virtually impossible to know in advance the cost of a given clinical trial. However, after the clinical trial has been conducted it is easy to calculate a value and provide a reimbursement. This can be done through a series of at least three options: (1) rebates offered

---

65. Sheffi, *supra* note 62.

66. The White House, President's HIV/AIDS Initiatives, <http://www.whitehouse.gov/infocus/hiv/AIDS/> (last visited Sept. 30, 2007).

67. E. RESEARCH GROUP INC., ECONOMIC ANALYSIS OF FINAL EFFLUENT LIMITATIONS GUIDELINES AND STANDARDS FOR THE PHARMACEUTICAL MANUFACTURING INDUSTRY 3-52 (1998) available at <http://www.epa.gov/waterscience/guide/pharm/econanal/econanal.pdf>.

at each stage of clinical trials; (2) revenue sharing; and (3) option contracts.<sup>68</sup>

Rebates are probably the most standard form of synchronizing objectives. A simple example would induce the pharmaceutical firm to spend time on certain therapeutic classes or diseases that are underserved, by providing a rebate to that firm. The pharmaceutical companies could receive a portion of their expenditures back after the completion of clinical trials. The second option, revenue sharing options, which are already used, can be adjusted to properly align goals. Right now the revenue sharing contracts are not designed to optimize performance.<sup>69</sup> If the universities invested more into the clinical trial process and demanded higher revenue sharing percentages, they could operate at a more revenue-neutral profit margin and also provide drug candidates that demonstrated lower risk for potential licenses. Finally, option contracts could provide an arrangement where pharmaceutical companies would pay for an option to license a drug candidate. These options could provide an upfront payment to the university in exchange for the rights to test the candidate; upon success, the firm would pay a royalty or greater percentage, based on the drug's success, to exercise the option under licensing agreement. These types of option contracts make more sense when you consider the prospect of moving the point of transition later in the clinical trial process. In this context, the point of transition is the point at which ownership of the process is transferred to the purchaser; the purchasing of a compound after the first phase of clinical trials would be less expensive than purchasing a compound after it had passed through the second phase of clinical trials. The result is less risk, less opportunity cost, and more investment in the compound.

Using a rebate model the following would illustrate the rebate amount for a given drug substance:

---

68. *Id.*

69. John Fraser, Executive Dir. of Commercialization, Fla. State Univ., EU-US Innovation, (April 5, 2007) (presentation available at [http://www.law.fsu.edu/gpc2007/materials/EU-US\\_Innovation\\_Summit\\_07.ppt](http://www.law.fsu.edu/gpc2007/materials/EU-US_Innovation_Summit_07.ppt)).

P = retail price  
 W = wholesale price (assume this includes license royalties and associated clinical trial expenses)  
 C = supplier's cost  
 S = salvage value  
 Q = quantity ordered  
 D = actual demand  
 f(D) = demand density (retail) assume market demand  
 F(D) = retail cumulative demand distribution (normal)  
 Q<sub>r</sub>\* = optimal order for the retailer  
 Q<sub>c</sub>\* = optimal order for the channel  
 R = Rebate amount

For this example, assume the demand distribution is normally distributed. Then

$$R = \left( \frac{P - S}{P - C} \right) W - \left( \frac{P(C - S)}{P - C} \right)$$

Note: The above formulation and equation have been adapted from Yossi Sheffi's "Supply Contracts" presentation at the MIT/Zaragoza Logistics Center in December of 2006.

This could be applied at any phase or all three phases in the clinical trial process by creating a hypothetical retailer and wholesaler at each level. Specifically, in the transition from phase two to phase three, phase two would be the wholesaler (product cost would include research already conducted) and phase three would be the retailer. Subsequently this could be used to analyze the value of the drug compound at each phase in the clinical trial process.

Overall, a system of supply chain contract coordination can be applied to achieve optimal value for both the pharmaceutical firms and those funding the initial research. By seeking optimal reimbursements, these firms can properly align their respective incentives and achieve optimality for both. University and NIH efforts to generate drugs for underserved diseases and therapeutic classes can be achieved through properly rebating and pricing the drug candidates they wish to promote.

Referring again to the \$30 billion HIV/AIDS example, the application of these new principles would imply the use of NIH funded universities to conduct and self-initiate clinical trials and further advance the involvement of research institutions beyond the current threshold of nominating or isolating NMEs. University research funding provided by NIH and alternative financing/endowment programs cost significantly less in real interest terms than monies borrowed through and for profit driven phar-

maceutical firms. Assuming that the NIH borrows money at U.S. treasury bill rates, the cost of clinical trials and the associated time-value of money would be 8-10% less than the IRR for a pharmaceutical firm. This could reduce the \$22 billion in interest costs to less than \$5 billion. This proportion of savings could be passed in the rebates given to the pharmaceutical producer or through the sale of the drug candidate after successfully completing a phase of clinical trials.

### *B. The Pharmaceutical Market Parity Approach*

As contrary to market economics as it may seem, it is incumbent upon society to serve the needs of all of its members, but not necessarily at the expense of its own economic survival. The traditional approach to accomplish this in corporate America is taxation and government regulation. From the perspective of pharmaceutical firms, taxation is just a cost that is easily transcended upon the target markets through pricing strategies. Furthermore, regulatory impositions simply act as barriers to the production of drugs. Neither mechanism produces a direct incentive for pharmaceutical firms to serve special population groups through market economics. Actually, taxation and regulation tend to do quite the opposite, as these mechanisms foster the notion of market concentration. Firms narrow the scope of their products and services only to those markets capable of meeting their profitability goals. This is illustrated by the fact that LDCs remain underserved.<sup>70</sup>

So how do we induce corporations to balance the scale of market economics? The answer is properly aligned incentives that do not take more through the penal nature of taxation and regulation. Accordingly, the government must give something to firms, but with a price. Currently through NIH funding, the benefits of government-funded research are made available to specific firms for products and/or services through the licensing at the university level. Right now, licensing is paid for through a system of monetary royalties and the profitability of the products at the time of licensing is often uncertain because universities don't evaluate research on the basis of profits.<sup>71</sup> What if these pharmaceutical firms could only obtain such research in exchange for an agreement to produce and distribute other products derived from government-funded research for special interest groups? These special interest group products could include therapeutic categories, which are un-

---

70. Reichman, *supra* note 24, at 6-7.

71. Fraser, *supra* note 70.

underserved because they lack a sufficient size of market to warrant clinical trials. Often, potential NMEs are discarded or avoided because they target therapeutic classes of rare diseases, and the demand for rare disease therapy does not pass muster in a financial feasibility study. We could name this proposition of providing licensing based on an agreement to produce products underserved (i.e. rare disease therapeutic classes), the “Market Parity” theory and distinguish it from the traditional “Free-Market” theory of economics.

Under the Market Parity theory, we are essentially steering firms to produce and distribute their products to both profitable and non-profitable markets on the assumption that cost of the latter will be more than offset by that of the former. This offset presupposes foregone research and development costs since, at the point of licensing, these will be government-funded via NIH and university grants. As a deeper incentive to move forward with clinical trials, tax credits and deductions will be offered for risk losses and test markets of any government funded research. The success of this theory would necessitate a formulary by which the economic outcome of the Market Parity approach ( $M$ ) would, in some way, equate to or exceed the value of the Free-Market approach ( $F$ ); thus, if  $K$  denotes profitability then,

$$K \geq M - F$$

Under the traditional, Free-Market approach, pharmaceutical companies will generally bear all costs of R&D, as well those related to the risk of test marketing. Thus, if  $R_c$  = cost of R&D and test market costs, we can construct a typical profitability equation in which  $V_m$  = market driven demand and  $V_n$  = non-market-driven demand. We will set  $C_v$  as the variable cost of business operations, including cost of goods sold, salaries and benefits, and  $C_f$  as the fixed cost of operations. Fixed costs are assumed to be relatively equal in either the Market Parity or Free-Market approach. Additionally, assume  $P$  represents the selling price of products. In summary, the Free-Market profitability equation is:

$$F = P\Sigma V_m - (C_v\Sigma V_m + C_f) + R_c$$

The equation for the Market Parity approach is:

$$M = P\Sigma V_n - [C_v(\Sigma V_n + \Sigma V_m) + C_f]$$

The Market Parity approach foregoes  $R$  in exchange for the

variable costs associated with non-market driven demand. As a consequence, firms will not be likely to undertake and enter into any Market Parity agreement unless they can be assured that  $R \leq C_v \Sigma V_m$ . This quantity, based upon extrinsic financial value, must demonstrate that the value forgone in exchange for marketing non-profitable, yet market-serving, products will still result in a positive net profit differential. There are also many intrinsic benefits associated with the Market Parity approach that can be quantified through a more complex model that is beyond the scope of this analysis.

Opportunity cost and the time-value of money are two of the most significant intrinsic benefits that can be realized from further calculations. Aside from the cost of resources expended to conduct research and development, there is the investment of time and the other opportunities that are conceivably foregone during this period.<sup>72</sup>

The pharmaceutical industry is probably among the most suitable targets for the Market Parity approach since there are many disenfranchised population groups for which many vital pharmaceuticals are unavailable for the sake of market profitability. As mentioned before, the LDCs and many developing countries throughout the world are without access to essential medicines.

Viewing the objectives of pharmaceutical companies within the context of our Market Parity theory, suppose that government funded research projects through the NIH and universities derived a cure for the common cold. Suppose also that the government offers license agreements to pharmaceutical companies for this cure. However, instead of paying a traditional royalty or license fees as originally described, the pharmaceutical firm must produce certain other non-profitable therapeutic class products in exchange for the license. Alternately, as a condition of licensure, the company could be required to distribute or license an authorized generic to serve LDCs elsewhere in the world. Other alternatives could be used as compensation that would fulfill non-market goals and objectives of the government and university systems. A \$1 billion producing "blockbuster" drug could be licensed in exchange for the research and production of three drugs which would only breakeven or lose revenue annually. These drugs, however, would achieve political and humanitarian objectives by serving underprovided therapeutic or disease classes.

Again, through the illustration of the HIV/AIDS example, some

---

72. David R. Henderson, *The Concise Encyclopedia of Economics*, <http://www.econlib.org/LIBRARY/Enc/OpportunityCost.html> (last visited Nov. 9, 2007).

of the \$30 billion could be used to incentivize a pharmaceutical firm to produce more of the antiretroviral drugs using the Market Parity approach. However, rather than providing monetary funding or rebates, additional license opportunities could provide firms with profit opportunities. A firm could receive a license to produce an originator ED drug with an estimated \$2 billion a year market in exchange for producing two million annual treatment doses of antiretroviral medication at 3% over the marginal cost of production.

### *C. NIH/University Licensing Standards*

One of the many non-legislative tools that can be used to effect a change in the industry is the adaptation of existing licensing standards. University licensing standards and the licensure of research produced from NIH funding can be modified in a manner that properly incentivizes pharmaceutical firms to “do the right thing.” The licensing of research is quite probably the best forum through which to implement the aforementioned Market Parity theory. As a practical application of the Market Parity theory, pharmaceutical firms would receive bundles of drug candidates or drug candidate classes on which to conduct clinical trials and proceed to market. Obviously, with less than .01% of NMEs reaching the phase three clinical trials, it is very difficult to predict which drug candidates will be successful and which ones will not. However, one can determine the target populations and markets for diseases. Therapeutic classifications of diseases can be broken into segments of the population. Currently there are more than six thousand rare diseases that affect approximately twenty-five million Americans; globally there are far more people afflicted.<sup>73</sup> By approximating based on market demand for a given therapeutic class or particular disease, one can approximate the gross revenue there associated as the price multiplied by the non-market demand,  $PV_m$ . Once determining the profit potential for a given therapeutic class, the university licensing system can bundle products or research results to create a portfolio of candidates which will give an estimated rate of return for a pharmaceutical licensee.

Through the use of the portfolio approach, an approach utilized throughout the financial services industry, the pharmaceutical firms would realize better stability of revenue streams. When products go off-patent, these companies would rely on a more di-

---

73. PHARMACEUTICAL INDUSTRY PROFILE 2007, *supra* note 56, at 10.

versified portfolio of products in a wider variety of therapeutic classes to support revenue and offset the losses in years where patent protection on blockbuster drugs is lost.

Further application of market theory shows that the HIV/AIDS example would not only benefit from the exchange of licensing for blockbuster drugs but also could benefit the pharmaceutical firm through bundling, by providing a portfolio of underserved therapeutic classes of drugs bundled together. Before a university is willing to license a blockbuster drug, it must bargain for minimum production quantities of antiretrovirals at much lower profit margins, or even losses, to offset the benefits derived from licensure of a single \$1 billion drug over a fifteen to twenty year exclusivity period.

*D. Supply Chain Activity Improvement — Improving Efficiency of Research and Development*

Once a drug compound receives regulatory approval it can still take upwards of one full year for the product to reach the market. The raw material for some pharmaceutical products takes over a year to traverse the supply chain and become a finished product. Processing and distribution comprises less than twenty-five days of the lead time.<sup>74</sup> The industry needs more than ever to improve and expedite the process of launching new products. According to Forrester Research's calculations, the per-day cost in lost sales for a \$1 billion drug is \$2.74 million.<sup>75</sup>

The location of [new drug] launches affects how quickly doctors and patients can access the most advanced treatments. One study shows that the U.S. averages a [four] month delay from initial drug launch to market. In Europe, this delay ranges from [seven] to [nineteen] months.... The reason: lengthy reimbursement negotiations that follow government approval of any new drug.<sup>76</sup>

The pharmaceutical industry experiences a high level of scrap and rework in manufacturing processes. The industry average for rework and discarded product is 50%. Rework and scrap cost compa-

---

74. Singh, *supra* note 59.

75. UNITED PARCEL SERVICE, *Building Supply Chain Capabilities in the Pharmaceutical Industry*, UPS SUPPLY CHAIN SOLUTIONS 4 (2005).

76. PHARM. RES. AND MFR. OF AM., PHARMACEUTICAL INDUSTRY PROFILE 2005 20 (2005).



nies millions of dollars. Estimates place the cost of a scrapped batch of product around \$3-4 million.<sup>77</sup> The industry is also notorious for maintaining high levels of work in progress (WIP) and finished good inventory. WIP inventories of up to 100 days are not uncommon.<sup>78</sup> Pharmaceutical inventories in the U.S. have nearly doubled in the last decade and are approaching record high levels estimated around \$18 billion.<sup>79</sup>

*E. Ensuring Safety — Counterfeiting and the Radio Frequency Identification Safety*

One of the future challenges for the pharmaceutical industry involves the combating of counterfeiting. The FDA has recognized that Radio Frequency Identification (RFID) technology possesses potential to reduce the threat of counterfeit drug introduction. The FDA believes, “[m]odern electronic technology is rapidly approaching the state at which it can reliably and affordably provide much greater assurances that a drug product was manufactured safely and distributed under conditions that did not compromise its potency.”<sup>80</sup> As the FDA continues to examine alternatives to act against the counterfeiting pandemic, “[RFID] tagging of products by manufacturers, wholesalers, and retailers appears to be the most promising approach to reliable product tracking and tracing.”<sup>81</sup> Additionally, “[a]uthentication technologies for pharmaceuticals have been sufficiently perfected that they can now serve as a critical component of any strategy to protect products against counterfeiting.”<sup>82</sup> If the FDA imposed mandatory implementation of RFID, the industry on a whole could experience vast changes in the cost basis for supply chains.

Although the pharmaceutical industry would take a significant cost hit to implement the new technology, the end result, if counterfeiting were reduced, would create substantial savings and additional profit. Presently, the average price to the consumer of a bottle of prescription medication is estimated at around \$53.10. It is estimated that 76% of that profit is received by the manufacturer (\$7.60), while the wholesaler receives 3% (\$0.30), and the other 21% is retained by the retailer (\$2.10).<sup>83</sup> According to the

---

77. Singh, *supra* note 57.

78. *Id.*

79. *Id.*

80. FOOD AND DRUG ADMIN., COMBATING COUNTERFEIT DRUGS, ii, (2004) available at [http://www.fda.gov/oc/initiatives/counterfeit/report02\\_04.html](http://www.fda.gov/oc/initiatives/counterfeit/report02_04.html).

81. *Id.*

82. *Id.*

83. Singh, *supra* note 57.

previous calculations and estimates, almost \$3.10 of profit is lost per bottle due to counterfeiting.

The cost of the infrastructure to implement RFID would be a one-time sunk cost. However, the benefits would continue to contribute to the bottom line. Even if the cost of the RFID tags, which is where the main portion of the cost exists, remained high at \$.20 per tag, the benefits would still show significant increases in profit from the reduction in counterfeit products. The benefits of RFID implementation far outweigh the costs.<sup>84</sup>

In addition to the quantitative losses suffered by the pharmaceutical industry, the world also experiences immeasurable humanitarian losses as a result of counterfeit drug introduction. In China, about 192,000 lives were lost (cumulatively) throughout 2001.<sup>85</sup> The benefits of RFID seem promising in the pharmaceutical industry. The implementation may pose challenges, but with the backing and possible subsidy of regulatory agencies, these great giants of the pharmaceutical world may gracefully adopt the new technologies.

#### *F. The Bargain*

As discussed, the participants in the pharmaceutical industry in the U.S. market can take advantage of the Market Parity approach and the Supply Chain Channel Coordination theories to achieve optimality in the domestic market. This application can extend to the underserved populations of LDCs, while still allowing the pharmaceutical firms to maintain a certain degree of autonomy and control over their products. As Jerome Reichman illustrated, there are advantages of collective or regional bargaining practices that can produce benefits for underserved or least developed regions.<sup>86</sup> These countries can form regional supply and demand centers that are more attractive to pharmaceutical firms that previously would not serve small regions.<sup>87</sup> Currently the regional committee for Africa is exploring opportunities to engage in collective bargaining agreements and regional bulk purchasing of essential medicines including antiretroviral drugs used in the treatment of HIV/AIDS.<sup>88</sup> However this application of economies of

---

84. Mike D. Lagasse, IBM Consulting Services, Presentation at the First Canadian RFID Conference: RFID in the Supply Chain (2003).

85. Wertheimer et al., *supra* note 55, at 32.

86. *See generally* Reichman, *supra* note 23.

87. *Id.*

88. *See* WORLD HEALTH ORG., REPORT OF THE REGIONAL DIRECTOR ON LOCAL PRODUCTION OF ESSENTIAL MEDICINES, INCLUDING ANTIRETROVIRALS: ISSUES, CHALLENGES AND PERSPECTIVES IN THE AFRICAN REGION, 4, AFR/RC55/10 (2005).

scale should not be limited to the purchasing side of the supply chain.

Utilizing the Market Parity theory to mandate drug licenses into packages that are issued contingent upon other production fulfillment, universities can also work collectively to provide more weighty and substantial bargaining authority. When universities bind together to license multiple potential blockbuster drugs into a package with many drugs that serve unprofitable disease categories the outcome will produce economic bargaining scale. Pharmaceutical firms will not be able to license drugs for fractions of a percentage, instead they will need to fulfill other non-market demand which otherwise would have been overlooked. The economic scale gained through collective bargaining will have similar supply side results as the proposed regional bargaining for purchases.

Additionally, universities can establish blackout regions or markets where the licenses are not effective. University licensing can exclude LDCs which the licensor would not have otherwise served. This licensing can also include more creative provisions, similar to those proposed in Reichman's paper, whereby pharmaceutical companies have the option to produce the products for the underserved regions at a price close to the marginal cost of production.<sup>89</sup> The price can be set to establish a profit margin above the marginal cost of production, and using the breakeven equation presented earlier in this paper can produce an optimal market entry price that will serve the underserved population.<sup>90</sup> These countries, although not required to do so yet under TRIPS, can offer premature patent protection for the products generated for the region. Along with early assurances and use of a "breakeven plus margin" approach, these regions can attract larger pharmaceutical companies to produce genuine products at marginal profit margins. These breakeven equations would not incorporate the research and development costs associated with the region since the pharmaceutical company would not have served the region and did not account for sales in the region to offset these costs in their projections.

Underserved sovereigns and regions can also attract pharmaceutical production activities to serve their respective markets through the use of tax incentives. Pharmaceutical companies produce drugs in at least three stages. Because of the nature of the pharmaceutical industry, specifically the extremely high profit margins relative to marginal cost, the pharmaceutical companies

---

89. See generally Reichman, *supra* note 21.

90. See generally *id.*

will usually manufacture products in various different countries to take advantage of tax havens and different taxing law benefits in each unique production location. These companies rely on proper planning and transfer pricing in order to maximize production. Countries like Ireland, Puerto Rico, Brazil, and Benelux have offered such taxing incentives to attract major pharmaceutical production operations.<sup>91</sup> Since pharmaceutical companies must pay taxes in each region based on exports and transfer pricing, countries can provide substantial savings when high differentials in transfer pricing exist and low cost of labor makes conversion of pharmaceutical ingredients relatively inexpensive.

Of the [forty-six] countries in the African Region, [thirty-eight] have pharmaceutical industries; [thirty-five] have secondary level production and [twenty-five] have tertiary production (some countries having both secondary and tertiary production). Eight countries have no such industry. South Africa performs all types of local production, including primary production of chemicals and limited local production of generic active (pharmaceutical) ingredients. Generally, the majority of the production facilities are privately-owned; locally-produced medicines are mostly generic and satisfy only a small proportion of national requirements.<sup>92</sup>

The existing production facilities can be expanded or purchased by larger pharmaceutical firms and used in market expansion in the region.

Tax incentives and proper transfer pricing can be used to take advantage of beneficial tax laws and exemptions. This can be cultivated to generate a domestic pharmaceutical market and better serve the now underserved region. It is also notable to mention that as the CPI or equivalent metric grows in the now underserved regions, profitability outcome calculations will change. As these countries and regions grow over the next twenty years, these markets, now relatively small, could grow into substantial revenue centers for pharmaceutical firms. The voluntary promise of early intellectual property rights protection and the ability to gain market share in an emerging region may be sufficient to attract even

---

91. Personal interviews with industry experts at Novartis in Basel Switzerland as well as other industry contacts in the MIT Supply Chain 2020 project.

92. WORLD HEALTH ORG., *supra* note 87, at 2.

the most reluctant pharmaceutical producer.

## V. CONCLUSION

The legal and social framework establishes a representative model within which the existing domestic and global markets operate. The model establishes the constraints, and application thereof, to the participants in the market. Pharmaceutical firms act on profit motivation and aim to achieve high levels of research and development efficiency as it relates to revenue generation and cost savings. Universities and the NIH achieve research advances through the use of public funding and achieve medical advances across a broad spectrum of therapeutic categories and diseases. Meanwhile, developing and least developed countries, as well as underserved therapeutic classes, endeavor to gain access to essential medicines and promote fruitful developments on behalf of their respective afflictions.

General social welfare improvements in access to medicines, advancements in research and development, safety procedures, and political leverage can be achieved through a series of optimization techniques. Without the use of legislative remedies participants can improve their respective positions and objectives within the existing framework. Philanthropic or socially driven organizations can improve access to medicines domestically through the use of the Market Parity and optimization approaches in order to incentivize pharmaceutical companies to produce drugs for underserved diseases and therapeutic classes. These organizations can achieve risk-sharing with pharmaceutical firms and find optimal reimbursement schemas for each target therapeutic category. These incentives do not have to be monetarily or financially-oriented rebates; rather, these can be structured licenses where social non-market goals are achieved. The bargaining power of organizations entering into licensing agreements can be bolstered through the use of collective bargaining or source aggregation where universities present drug development packages to pharmaceutical companies including a portfolio of products. Least developed or underserved regions and countries can achieve improved access to medicines through a combination of threats and rewards including compulsory licensing, tax incentives, and collective regional bargaining. Further, using optimization techniques, pharmaceutical firms and licensors can share costs and risks at each stage of the clinical research process to ensure maximum throughput, efficiency, and efficacy in drug research; the gap between respective interests will be closed and better market (financial) and

non-market (social) demand fulfillment will ensue.

Pharmaceutical manufacturers can take advantage of supply chain techniques to lower work-in-progress inventories, development times, waste, and time-value of money costs associated with research and development. Finally, the safety of each pharmaceutical product in the market can be improved through the use of RFID technology to reduce counterfeit products as well as the secondary effects and losses related.

Right now \$30 billion buys \$30 billion worth of medication, far less than is required to serve all twenty-two million HIV/AIDS sufferers. Through the use of techniques illustrated in this paper, a \$30 billion initiative will provide multiple times the market value of that amount in derived benefit and quantity of treatment dosages. Through application of Market Parity, rebates, collective bargaining, responsible and bargained university licensing, and further supply chain optimization, the effect of any contribution will be amplified; the industry will prosper and the market and non-market needs of all parties will be satisfied.

Overall, through the application of the techniques listed above, the industry participants can maximize efficiency and achieve greater objective success throughout the existing framework. These changes can be effected faster than legislative proceedings and can provide near optimal results within the existing framework.

**CORPORATE ACCOUNTABILITY FOR ENVIRONMENTAL  
HUMAN RIGHTS ABUSE IN DEVELOPING NATIONS:  
MAKING THE CASE FOR PUNITIVE DAMAGES UNDER  
THE ALIEN TORT CLAIMS ACT**

AUDREY KOECHER\*

I.	INTRODUCTION.....	152
II.	CORPORATE LIABILITY UNDER THE ATCA.....	153
III.	NECESSITY OF PUNITIVE DAMAGES UNDER THE ATCA FOR ENVIRONMENTAL HUMAN RIGHTS CLAIMS AGAINST U.S. CORPORATIONS.....	156
	<i>A. Lack of Domestic and International Environmental Standards Necessitates the Need for an Alternative Regulatory Device.....</i>	156
	<i>B. The ATCA Provides a Forum to Victims of Envi- ronmental Human Rights Violations.....</i>	159
	<i>C. Actual Damages Do Not Fully Compensate Victims or Meet the Policy Objectives of Transnational Public Litigation.....</i>	161
IV.	AMENDING THE ATCA TO RECOGNIZE ENVIRONMENTAL HUMAN RIGHTS CLAIMS AGAINST U.S. CORPORATIONS..	162
	<i>A. The Unclear Scope of the ATCA.....</i>	163
	<i>B. Why Environmental Human Rights Abuse Consti- tutes a Violation of Customary International Law: The Relationship Between Extreme Environmental Harm and Human Health and Well-Being.....</i>	164
	<i>C. Proposed Amendment.....</i>	167
V.	OBJECTIONS, COSTS, AND DISADVANTAGES.....	167
	<i>A. Is the ATCA the Appropriate Vehicle for Imposing Punitive Damages on Corporate Environmental Hu- man Rights Violators? .....</i>	167
	<i>B. Are Punitive Damages the Appropriate Remedy for Environmental Human Rights Violations? .....</i>	168
	<i>C. Practical Problems Inherent in Proposed Amend- ment.....</i>	169
VI.	CONCLUSION.....	170

---

\* J.D. Candidate, Florida State University College of Law, May 2008. The author gratefully acknowledges the invaluable comments and criticisms of Professor Dan Markel, Assistant Professor, Florida State University College of Law, and the editorial contributions of Miriam Coles, a fellow classmate at Florida State University College of Law.

## I. INTRODUCTION

Professors Marc Galanter and David Luban argue that punitive damages constitute “the best available means for social control . . . of economically formidable wrongdoers.”<sup>1</sup> However, many of the most “economically formidable” corporations conduct operations outside the borders of the United States, where punitive damages are generally not available or are available in very limited circumstances.<sup>2</sup> Multinational corporations (MNCs) possess the “size, technology, and economic reach necessary to influence human affairs on a global basis” and often amass more wealth than the nation-states that supposedly regulate them.<sup>3</sup> Given the massive power and influence of MNCs and the general unavailability of punitive damages abroad, it is logical to consider whether U.S. corporations could be subject to liability in the United States for their operations abroad.

While punitive damages may be assessed against U.S. corporations for human rights violations committed outside the U.S. pursuant to the Alien Tort Claims Act (ATCA),<sup>4</sup> current judicial interpretation of the Act does not allow for a cause of action for environmental harms. In *Beanal v. Freeport-McMoran, Inc.*, the Fifth Circuit Court of Appeals held that an Indonesian citizen’s environmental human rights action against a New Orleans-based mining corporation failed to state a claim upon which relief could be granted in part because the claims for severe environmental destruction and cultural genocide were not shown to violate a *universally accepted standard or norm of customary international law* as required by the ATCA.<sup>5</sup> The plaintiff in *Beanal*, who sued on behalf of his native tribe, alleged that Freeport-McMoran, Inc. (Freeport) dumped one hundred thousand tons of toxic acid mine tailings per day into three different rivers, amounting to cultural genocide.<sup>6</sup> People living near Freeport’s mine reported increased

---

1. Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1396 (1993).

2. Barbara J. Houser, *Classification and Treatment of Foreign Claims in U.S. Bankruptcy Proceedings*, 36 TEX. INT’L L.J. 475, 491 (2001) (quoting *In re Dow Corning Corp.*, 244 B.R. 634, 660 (Bankr. E.D. Mich. 1999)).

3. Brad J. Kieserman, Comment, *Profits and Principles: Promoting Multinational Corporate Responsibility by Amending the Alien Tort Claims Act*, 48 CATH. U. L. REV. 881, 882 (1999) (quoting THOMAS DONALDSON, *THE ETHICS OF INTERNATIONAL BUSINESS* 31 (1989)).

4. See Saad Gul, *The Supreme Court Giveth and the Supreme Court Taketh Away: An Assessment of Corporate Liability Under § 1350*, 109 W. VA. L. REV. 379 (2007).

5. 197 F.3d 161, 167 (5th Cir. 1999).

6. Randi Alarcon, *Beanal v. Freeport-McMoran, Inc.*, 13 N.Y. INT’L L. REV. 141(2000).



health problems and destruction of fish and vegetation which they relied on for sustenance.<sup>7</sup> The complaint also alleged that Freeport's security force acted in concert with the Republic of Indonesia to violate international human rights.<sup>8</sup>

The harms alleged in the *Beanal* case, and the inability of the law to prevent or repair such harms, are part of a large pattern of problems the author will address in this paper. This paper suggests that Congress amend the ATCA to create a private right of action for a narrow category of environmental claims against United States corporations, in order to provide redress to victims and impose civil liability in the form of punitive damages against defendant corporations. Specifically, severe environmental harm that has a direct, substantial, and widespread effect on human health and well-being should be actionable under the statute.

In order to familiarize the reader with the ATCA, the author will first provide a background of the development of cases under the ATCA with respect to corporate liability and the assessment of punitive damages. Second, the author will argue that amending the Act is necessary to ensure the availability of punitive damages in order to achieve three distinct goals: (1) to incentivize lawsuits and provide greater accountability with regard to corporations' destructive environmental practices in developing countries; (2) to provide a forum to victims of environmental human rights violations; and (3) to provide compensation beyond actual damages in accordance with the goals of environmental and transnational public litigation. Third, the author will examine the link between severe environmental degradation and human health and well-being and propose that Congress amend the ATCA to create an express right of action for environmental human rights claims under narrowly defined circumstances. Fourth, the author will contemplate objections to, and the relative costs of, the proposed amendment.

## II. CORPORATE LIABILITY UNDER THE ATCA

The ATCA, originally part of the Judiciary Act of 1789,<sup>9</sup> provides simply that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the Law of Nations or a treaty of the United States."<sup>10</sup>

---

7. Hari M. Osofsky, *Environmental Human Rights Under the Alien Tort Statute: Redress for Indigenous Victims of Multinational Corporations*, 20 SUFFOLK TRANSNAT'L L. REV. 335, 339 (1997).

8. Alarcon, *supra* note 6, at 141.

9. Joel Slawotsky, *Doing Business Around the World: Corporate Liability Under the Alien Tort Claims Act*, 2005 MICH. ST. L. REV. 1065, 1071 (2005).

10. Alien Tort Claims Act, 28 U.S.C. § 1350 (2000).

Courts have interpreted the statute as creating a limited cause of action in addition to conferring jurisdiction upon U.S. courts.<sup>11</sup> According to the plain language of the statute, a plaintiff bringing a claim under the ATCA must establish three elements: (1) a civil suit for a tort; (2) brought by an alien plaintiff; and (3) committed in violation of the Law of Nations or a treaty of the United States.<sup>12</sup>

Punitive damages are allowed under the Act when the trier of fact finds the defendant's conduct to be especially reprehensible, malicious or reckless.<sup>13</sup> However, scholars note that as a practical matter, punitive damages are generally warranted in any ATCA claim in which the plaintiff prevails on the merits.<sup>14</sup> This is because an essential element of an ATCA claim is proof that the defendant violated the Law of Nations, which by definition requires evidence of an "egregious violation of a well-established, universal norm of international law."<sup>15</sup> Because the standards for asserting a claim for which relief can be granted under the ATCA and for awarding punitive damages overlap, the potential for punitive damage awards in cases presenting triable issues is "enormous," with punitive damage awards often exceeding \$500,000.<sup>16</sup> Punitive damage awards are also expansive because ATCA claims are often brought as class actions on behalf of entire tribes or communities.<sup>17</sup>

U.S.-based corporations have only recently become amenable to suits under the ATCA as the result of three landmark decisions: *Filártiga v. Peña-Irala*, *Kadic v. Karadzic*, and *Doe I v. Unocal Corp.*<sup>18</sup> The 1980 *Filártiga* decision, considered by some scholars to

---

11. Gul, *supra* note 4, at 399.

12. *Id.* at 394; 28 U.S.C. § 1350 (2000); *see also* *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

13. Tracy Bishop Holton, *Cause of Action to Recover Civil Damages Pursuant to the Law of Nations and/or Customary International Law*, in 21 CAUSES OF ACTION 2D 327, § 51 (2007).

14. *Id.* *See, e.g.*, *Xuncax v. Gramajo*, 886 F. Supp. 162, 202 (D. Mass. 1995) (awarding compensatory damages of \$14.75 million and punitive damages of \$27.75 million to Guatemalan nationals in wrongful death action against former Guatemalan government official); *Hilao v. Estate of Marcos*, 103 F.3d 767, 772 (9th Cir. 1996) (affirming jury award of \$766 million in compensatory damages and \$1.2 billion in punitive damages); *Paul v. Avril*, 901 F. Supp. 330, 336 (S.D. Fla. 1994) (awarding \$24 million in punitive damages to Haitian citizens for injuries resulting from torture and false imprisonment by former Haitian military leader).

15. Holton, *supra* note 13, § 51.

16. *Id.* §§ 50-51.

17. For example, in *Doe I v. Unocal Corp.*, 395 F.3d 932, 943 (9th Cir. 2002), *reh'g en banc granted*, 395 F.3d 978 (2003), *vacated, appeal dismissed per stipulation*, 403 F.3d 708 (2005), residents of Myanmar alleged human rights atrocities committed by Unocal Corporation in connection with Myanmar military.

18. Gul, *supra* note 4, at 395.

be the “*Brown v. Board of Education* of transnational public litigation,” brought the previously obscure statute into the spotlight.<sup>19</sup> In *Filártiga v. Peña-Irala*, the Second Circuit Court of Appeals held that torture perpetrated by a Paraguayan official violated the Law of Nations and created a cause of action under the Act.<sup>20</sup> The court found that a determination of a violation of the Law of Nations depends on the current international consensus on the violation’s illegality.<sup>21</sup> The current international consensus may be determined by “consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.”<sup>22</sup> Thus, new torts may become actionable under the ATCA as international law evolves.

In the second landmark ATCA decision, *Kadic v. Karadzic*, the Second Circuit determined that certain forms of conduct violate the Law of Nations regardless of whether the actions are undertaken by state officials or private individuals.<sup>23</sup> In *Karadzic*, victims of brutal human rights violations committed in Bosnia brought suit against the leader of the insurgent Bosnian-Serb forces.<sup>24</sup> The *Karadzic* court rejected the district court’s finding that application of the Law of Nations is confined to state action, stating that “[t]he [trial court] Judge appears to have deemed state action required primarily on the basis of cases determining the need for state action as to claims of official torture . . . without consideration of the substantial body of law . . . that renders private individuals liable for some international law violations.”<sup>25</sup> Under *Karadzic*, private actors may be held independently responsible for tortious violations of customary international law.<sup>26</sup>

Finally, the Ninth Circuit’s decision *Doe I v. Unocal Corp.* explicitly recognized for the first time that corporations may be held civilly liable under the ATCA for violations of international law in conjunction with state authorities.<sup>27</sup> In *Unocal*, residents of Myanmar alleged that the Myanmar military committed human rights violations in furtherance of Unocal’s oil pipeline project.<sup>28</sup> The *Unocal* decision is especially pertinent to this discussion, be-

---

19. *Id.* at 395 (citing Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2366 (1991)).

20. 630 F.2d 876, 878 (2d Cir. 1980).

21. *See id.* at 880.

22. *Id.* (quoting *U.S. v. Smith*, 18 U.S. 153, 160-61 (1820)).

23. 70 F.3d 232, 239 (2d Cir. 1995).

24. *Id.* at 236.

25. *Id.* at 239.

26. *See id.*

27. *Doe I*, 395 F.3d at 962.

28. *Id.* at 936.

cause the most significant violations of environmental human rights arise out of the operations of “hybrid state-corporate enterprise[s].”<sup>29</sup>

Together, *Filártiga*, *Karadzic*, and *Unocal* provide the “general contours” for corporate liability under the ATCA.<sup>30</sup> These decisions demonstrate that international legal norms may apply to private actors, and that private corporations may be held liable “both when they act in complicity with state actors and when they commit violations that do not require state action, such as crimes against humanity . . . .”<sup>31</sup>

### III. NECESSITY OF PUNITIVE DAMAGES UNDER THE ATCA FOR ENVIRONMENTAL HUMAN RIGHTS CLAIMS AGAINST U.S. CORPORATIONS

The availability of punitive damages under the ATCA for international environmental human rights claims serves three distinct purposes: (1) to provide greater accountability with regard to corporations’ destructive environmental practices; (2) to provide a forum and a voice to victims of environmental human rights violations with otherwise limited prospects of redress; and (3) to fully compensate plaintiffs for claims in which monetization is difficult.

#### *A. Lack of Domestic and International Environmental Standards Necessitates the Need for an Alternative Regulatory Device*

While corporations operating within U.S. borders face civil liability, including punitive damage fines, and even criminal sanctions for environmentally destructive practices,<sup>32</sup> U.S. corporations

---

29. Lillian Aponte Miranda, *The Hybrid State-Corporate Enterprise and Violations of Indigenous Land Rights: Theorizing Corporate Responsibility and Accountability Under International Law*, 11 LEWIS & CLARK L. REV. 135, 139 (2007).

30. Gul, *supra* note 4, at 394.

31. Beth Stephens, Comment, *Sosa v. Alvarez-Machain: “The Door is Still Ajar” for Human Rights Litigation in U.S. Courts*, 70 BROOK. L. REV. 533, 538 (2004-2005).

32. Civil penalties and other relief are available under several federal statutes: the Clean Air Act (CAA), 42 U.S.C. §§ 7401-7691q (2000); the Clean Water Act (CWA) of 1977, 33 U.S.C. §§ 1281a-1294 (2000); the Oil Pollution Act (OPA) of 1990, 33 U.S.C. §§ 2701-2762 (2000); the Safe Drinking Water Act (SDWA) of 1974, 42 U.S.C. §§ 300-300j-25 (2000); the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y (2000); the Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601-2692 (2000); the Solid Waste Disposal Act (SWDA), 42 U.S.C. §§ 6901-6992k (2000); the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund), 42 U.S.C. §§ 9601-9675 (2000); and the Emergency Planning and Community Right-to-Know Act (EPCRA) of 1986, 42 U.S.C. §§ 11001-11050 (2000). These statutes grant enforcement authority to the Environmental Protection Agency, and actions are generally adjudicated by administrative law judges. Civil penalties, enforcement of regulatory orders, and injunctive relief may also be obtained through claims brought in federal district court by the United States Department

operating abroad essentially operate in the absence of any enforceable international or domestic standards for such practices.<sup>33</sup>

Current international law does not hold MNCs liable for environmental destruction or its associated human rights abuses because environmental harm to individuals is not considered to be connected to a substantive right.<sup>34</sup> Moreover, as Alison Lindsay Shinsato argues, “[t]he body of international human rights law does not effectively protect against human rights violations which result from environmental degradation because it has not evolved to keep pace with the rapid advance of economic globalization and the privatization of resources.”<sup>35</sup> Therefore, Shinsato continues, “human rights violations stemming from environmental destruction by [multinational corporations] are not addressed in current international human rights law.”<sup>36</sup>

Furthermore, because international law traditionally monitors relations between nation-states, not private entities,<sup>37</sup> some scholars characterize MNCs as “legally untouchable” under international law.<sup>38</sup> While the Organization for Economic Cooperation and Development and the United Nations have attempted to fashion codes of conduct for MNCs, these guidelines are, by their own language, “voluntary and not legally enforceable.”<sup>39</sup> Thus, MNCs are not subject to any “comprehensive *mandatory* international code of corporate conduct targeting human rights practices.”<sup>40</sup>

Moreover, international efforts to hold MNCs accountable are futile against the often collusive relationships between host governments of developing countries and MNCs, who condone each other's second-rate treatment of native citizens and the environment.<sup>41</sup> According to Professor Saman Zia-Zarifi, when a develop-

---

of Justice. Some federal pollution prevention statutes include criminal sanctions under certain circumstances. John C. Cruden and Bruce S. Gelber, *Federal Civil Environmental Enforcement — Processes, Actors, and Trends*, in ALI-ABA COURSE OF STUDY MATERIALS, ENVIRONMENTAL AND TOXIC TORT LITIGATION, SM072 ALI-ABA 695 (Feb. 2007).

33. See Alison Lindsay Shinsato, *Increasing the Accountability of Transnational Corporations for Environmental Harms: The Petroleum Industry in Nigeria*, 4 NW. U. J. INT'L HUM. RTS. 186 (2005).

34. *Id.*

35. *Id.* at 195.

36. *Id.*

37. Kieserman, *supra* note 3, at 882-83.

38. Pauline Abadie, *A New Story of David and Goliath: The Alien Tort Claims Act Gives Victims of Environmental Injustice in the Developing World a Viable Claim Against Multinational Corporations*, 34 GOLDEN GATE U. L. REV. 745, 751 (2004).

39. Saman Zia-Zarifi, *Suing Multinational Corporations in the U.S. for Violating International Law*, 4 UCLA J. INT'L L. & FOREIGN AFF. 81, 85 (1999) (quoting Organization for Economic Cooperation and Development, *Declaration on International Investment and Multinational Enterprises*, 15 I.L.M. 969, 970, annex (1976)).

40. Kieserman, *supra* note 3, at 883 (emphasis added).

41. *Id.* at 884.

ing host country is eager to gain corporate capital and expertise the host government often does not monitor corporate conduct, and as a result, the corporation acts in the absence of domestic or international judicial scrutiny.<sup>42</sup> Thus, the relationship between the host country and the MNC is effectively unregulated.<sup>43</sup> Some scholars even declare that MNCs are so far beyond the control of national governments that they “operate in a legal and moral vacuum.”<sup>44</sup>

Given that international and domestic law fails to effectively regulate the environmental practices of MNCs, the availability of punitive damages for environmental human rights abuse under the ATCA provides an alternate form of indirect governance. Specifically, the availability of punitive damages for international environmental human rights abuses could provide an incentive for plaintiffs to bring suit, thereby bringing corporate environmental human rights violators under the scrutiny of U.S. courts.

The assessment of punitive damages pursuant to the ATCA is necessary to provide a check on the corporate environmental practices in developing countries given the lack of effective international and domestic environmental regulations. Because many “corporate decisions are driven by cost-benefit analysis rather than social responsibility,”<sup>45</sup> the threat of punitive damages is a fundamentally necessary check. As Professor Zygmunt J.B. Plater explains, “[w]e cannot expect people to maximize the public good and minimize the public detriments of their activities on the basis of altruism, which is why we have law.”<sup>46</sup>

Economic analysis clearly supports the notion that punitive damage awards impact corporate decision-making.<sup>47</sup> Corporate decision-making focuses primarily on economic efficiency, with utmost emphasis placed on wealth maximization.<sup>48</sup> Efficiency is the only value of relevance, and if protection of the environment is calculated to reduce efficiency, such protection will be disregarded.<sup>49</sup>

---

42. Zia-Zarifi, *supra* note 39, at 86-87.

43. Kieserman, *supra* note 3, at 883.

44. *Id.* (quoting Robert J. Fowler, *International Environmental Standards for Transnational Corporations*, 25 ENVTL. L. 1, 2 (1995)).

45. Mary Kreiner Ramirez, *The Science Fiction of Corporate Criminal Liability: Containing the Machine Through the Corporate Death Penalty*, 47 ARIZ. L. REV. 933, 935 (2005).

46. Zygmunt J.B. Plater, *Facing a Time of Counter Revolution—The Keytone Incident and a Review of First Principles*, 29 U. RICH. L. REV. 657, 694 (1995).

47. Michael Lewis Wells, *Comments on Why Punitive Damages Don't Deter Corporate Misconduct Effectively*, 40 ALA. L. REV. 1073, 1076 (1989) (responding to E. Donald Elliott, *Why Punitive Damages Don't Deter Corporate Misconduct Effectively*, 40 ALA. L. REV. 1053 (1989)).

48. See Shinsato, *supra* note 33, at 188.

49. *Id.*

However, if the threat of punitive damages is a consideration, rational actors will avoid conduct that generates punitive damages in order to minimize their liability.<sup>50</sup>

Professor Michael Lewis Wells argues that punitive damages are an efficient deterrence mechanism because the threat of punitive damage awards forces corporations to take full account of the social costs generated where compensatory damages are not sufficient to remedy the harm caused to the plaintiffs.<sup>51</sup> Actual damages cannot sufficiently account for all of the harm caused by severe environmental destruction because of the difficulty in monetization.<sup>52</sup> Therefore, punitive damages are necessary to ensure that U.S. corporations take responsibility for the full social costs of the environmental damage and threats to human health and well-being caused by the corporations' operations in developing countries.

Moreover, according to Professor A. Mitchell Polinsky and Professor Steven Shavell, punitive damages should be awarded only when an injurer has a significant chance of escaping liability for the harm he caused.<sup>53</sup> Given the unavailability of punitive damages in foreign jurisdictions, the dearth of international and domestic environmental law standards, and the lack of adequate judicial redress for victims of international environmental human rights abuses, MNCs have a significant chance of escaping liability for environmental harm and concomitant human rights abuses. Therefore, punitive damages are necessary to ensure that corporations do not continue to benefit from engaging in conduct that gives rise to environmental human rights harm.

*B. The ATCA Provides a Forum to Victims of Environmental Human Rights Violations*

Provided that the perpetrators of environmental harms are subsidiaries of U.S. corporations, and given that the victims are largely unable to obtain adequate compensation or redress internationally or domestically, it is rational to contemplate utilization of U.S. courts. By allowing foreign plaintiffs to bring suit in the United States for violations of international law, the ATCA provides a much needed forum for victims of environmental human

---

50. Wells, *supra* note 47, at 1076.

51. *See id.*

52. *See* Alex Sienkiewicz, *Toward a Legal Land Ethic: Punitive Damages, Natural Value, and the Ecological Commons*, 15 PENN ST. ENVTL. L. REV. 91, 95-96 (2006).

53. A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REVIEW 869, 873-74 (1998).

rights abuses. As Natalie Bridgeman argues, “plaintiffs should benefit from a globalization of justice, just as corporations have benefited from a globalization of resources and labor.”<sup>54</sup>

Professor Hari Osofsky argues that the ATCA offers the “best” chance of relief for victims of corporations’ environmentally destructive practices and concomitant human rights abuses who cannot obtain justice elsewhere.<sup>55</sup> The victims of environmental human rights violations are most often indigenous citizens of developing countries, where the prospects for redress are limited at best.<sup>56</sup> To the extent that domestic law protects citizens from environmental harm, the victims’ native countries often “provide little hope of recovery due to lack of democratic governance, inadequate environmental legislation, limited tort law, and low potential amounts granted from judgments.”<sup>57</sup>

A number of factors weigh against recovery in a developing nation including (1) cases are tried by judges, not juries; (2) punitive damages are generally unavailable in foreign jurisdictions or are available in very limited circumstances; (3) foreign countries do not allow American-style contingency fees; (4) foreign courts award lower tort damages and use less plaintiff-friendly standards for liability; and, (5) cultural factors lead to less litigiousness.<sup>58</sup> Professor Henry Saint Dahl notes that “[p]unitive damages for pain and suffering . . . are usually unavailable to plaintiffs in civil law systems.”<sup>59</sup> Furthermore, according to Professor Benjamin C. Zipursky, many foreign jurisdictions have eliminated punitive damages from their tort law system.<sup>60</sup>

The plaintiffs’ chances of recovery from an international tribunal are not much better, because most international tribunals generally do not recognize an individual right of action.<sup>61</sup> Efforts by individual plaintiffs seeking to represent the interests of a larger group or class are also generally unsuccessful.<sup>62</sup> Unfortunately, most international institutions limit the right of petition to state

---

54. Natalie L. Bridgeman, *Human Rights Litigation Under the ATCA as a Proxy for Environmental Claims*, 6 YALE HUM. RTS. & DEV. L.J. 1, 1-2 (2003).

55. Osofsky, *supra* note 7, at 340.

56. *See generally id.* at 336-45.

57. *Id.* at 340.

58. Houser, *supra* note 2, at 491 (quoting *In re Dow Corning Corp.*, 244 B.R. 634, 660 (Bankr. E.D. Mich. 1999)).

59. Henry Saint Dahl, *Forum Non Conveniens, Latin America and Blocking Statutes*, 35 U. MIAMI INTER-AM. L. REV. 21, 42 n. 89 (2003-2004) (quoting Antonio Gidi, *Class Actions in Brazil*, 51 AM. J. COMP. L. 311, 319-20 (Spring 2003)).

60. Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105, 155 (2005).

61. Osofsky, *supra* note 7, at 340.

62. William J. Aceves, *Actio Popularis? The Class Action in International Law*, 2003 U. CHI. LEGAL F. 353, 356 (2003).



actors.<sup>63</sup>

*C. Actual Damages Do Not Fully Compensate Victims or Meet the Policy Objectives of Transnational Public Litigation*

Because the harm caused by environmental destruction and human rights violations is difficult, if not impossible, to monetize, punitive damages are necessary to fully compensate victims. As Alex Sienkiewicz notes, once wide scale environmental harm occurs, “its scale, intensity, duration, and short and long-term effects are extremely costly to measure.”<sup>64</sup> Moreover, actual damages cannot necessarily account for the lasting health effects of consuming contaminated air or water.<sup>65</sup> Because the harms inflicted by environmental destruction and its associated human rights abuses often defy monetization, Sienkiewicz argues that punitive damages are more effective than any reactive law or policy because reactionary measures are unlikely to sufficiently compensate all of those harmed.<sup>66</sup>

In addition, the public policy implications associated with transnational public litigation and environmental litigation necessitate the use of exemplary damages to denounce socially reprehensible corporate conduct and establish conduct norms. Claims brought under the ATCA are considered a type of “transnational public law litigation”<sup>67</sup> because foreign plaintiffs seek not only redress for their harms, but a decision regarding whether a particular defendant’s actions are egregious enough to meet the ATCA threshold.<sup>68</sup>

Professor Saman Zia-Zarifi observes that transnational public law litigation “seeks redress for individual victims at the same time as articulating a norm of international law that can be applied to other violators of international law.”<sup>69</sup> Thus, transnational public litigation by its very nature seeks to make examples of corporate violators and pronounce new customary international codes of conduct. Because actual damages seek only to redress plaintiffs

---

63. *Id.*

64. Sienkiewicz, *supra* note 52, at 95.

65. *See id.* at 96.

66. *Id.* at 95.

67. Transnational public law litigation refers to claims brought by “private individuals, in U.S. courts, alleging a violation of international law.” Lyndsy Rutherford, Note, *Redressing US Corporate Harms Abroad Through Transnational Public Law Litigation: Generating A Global Discourse on the International Definition of Justice*, 14 GEO. INT’L ENVTL. L. REV. 807, 810 (2002).

68. *Id.* at 812.

69. Zia-Zarifi, *supra* note 39, at 87.

for losses incurred by reason of the defendant's unlawful conduct,<sup>70</sup> they are inadequate to meet the broad policy objectives of transnational public litigation. In contrast, the exemplary nature of punitive damages is well-aligned with the policy objectives of transnational public litigation.

Moreover, environmental claims in and of themselves encompass questions of public policy and values. Sienkiewicz characterizes the public and ethical nature of environmental law claims:

The problems and social tensions surrounding harm to the natural environment are not mere matters of private property and tortious behavior. They are ethical dilemmas of the highest order and touch upon the existential and metaphysical foundations of civil society, the rule of law, and humanity's role on earth. . . . Whether disastrous or *de minimis*, harm to the natural environment comprises an ethical problem. This holds true independent of whether environmental harm is born of a malicious crime or an unwitting act of negligence. Natural values are often public by their very nature, transcending notions of private property.<sup>71</sup>

Accordingly, actual damages cannot adequately encompass all of the ethical and public dimensions of environmental harm. Indeed, punitive damages are "particularly prevalent" in U.S. environmental torts litigation.<sup>72</sup> Accordingly, punitive damages under the ATCA should be utilized to compensate victims of environmental human rights abuse committed by U.S. corporations.

#### IV. AMENDING THE ATCA TO RECOGNIZE ENVIRONMENTAL HUMAN RIGHTS CLAIMS AGAINST U.S. CORPORATIONS

Essentially, the hesitancy of courts to recognize ATCA claims

---

70. See *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 295 (2002) (recognizing that while punitive damage awards may benefit an individual plaintiff employee, punitive damages "serve an obvious public function in deterring future violations"); see also *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001) (recognizing that while compensatory damages serve to redress harm caused to the plaintiff by the defendant, punitive damages serve as 'private fines' aimed at punishing the defendant and deterring future unlawful conduct; moreover, unlike compensatory damages, punitive damage awards are an expression of the jury's moral condemnation).

71. Sienkiewicz, *supra* note 52, at 93.

72. James R. May, *Fashioning Procedural and Substantive Due Process Arguments in Toxic and Other Tort Actions Involving Punitive Damages After Pacific Mutual Life Insurance Co. v. Haslip*, 22 ENVTL. L. 573, 583 (1992).

arising from environmental harm and the lack of judicial guidance regarding the appropriate scope of the ATCA necessitates amending the statute to provide an express right of action for environmental human rights claims against U.S. corporations. Such an amendment would help make corporations accountable for their environmental practices abroad and provide redress to victims.

#### A. *The Unclear Scope of the ATCA*

Under the current ATCA, the potential for punitive damages is great; however, successfully establishing an environmental human rights claim under the Act is difficult. In *Beanal v. Freeport-McMoran, Inc.*, where the plaintiff sought to establish a claim for cultural genocide on the basis of three different international environmental law principles—the Polluter Pays Principle, the Precautionary Principle, and the Proximity Principle<sup>73</sup>—the Fifth Circuit Court of Appeals found that these sources of international law merely referred to a general sense of environmental responsibility and lacked “articulable or discernable standards and regulations to identify practices that constitute international environmental abuses or torts.”<sup>74</sup> The *Beanal* court’s rejection of the plaintiff’s reliance on three different principles of international environmental law demonstrates the difficulty in establishing a successful environmental human rights claim.

In addition, the dearth of environmental jurisprudence under the Act and the lack of clear judicial guidance regarding the appropriate scope of the statute also disfavor environmental human rights claimants. While the Supreme Court’s recent decision in *Sosa v. Alvarez-Machain* offered clarification with respect to the intended purpose of the ATCA, the decision left many scholars questioning the scope of the Act.<sup>75</sup>

In *Sosa*, the Supreme Court held that the statute’s purpose was not simply to provide jurisdiction, but to implicitly provide a right of action for a limited number of claims.<sup>76</sup> The Supreme Court found that “[the statute’s] jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the

---

73. *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 167 n.5 (5th Cir. 1999).

74. *Id.* at 167.

75. James Boeving, Essay, *Half Full . . . or Completely Empty?: Environmental Alien Tort Claims Post Sosa v. Alvarez-Machain*, 18 GEO. INT’L ENVTL. L. REV. 109, 133 (2005).

76. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

time.”<sup>77</sup>

Based on this interpretation of legislative intent, the Court determined that any claim based on “the present-day [L]aw of [N]ations [resting] on a norm of international character *accepted by the civilized world and defined with a specificity* comparable to the features of the 18th-century paradigms [the Court has] recognized” may be actionable under the ATCA.<sup>78</sup> These eighteenth century paradigms were “violation of safe conducts, infringement of the rights of ambassadors, and piracy.”<sup>79</sup> Unfortunately, the Court offered no further guidance as to the precise meaning of this standard.

Writing for the majority in *Sosa*, Justice Souter noted that the Court “would welcome any congressional guidance in exercising jurisdiction with such obvious potential to affect foreign relations” and that “Congress . . . may modify or cancel any judicial decision [with respect to the ATCA] so far as it rests on recognizing an international norm as such.”<sup>80</sup> Therefore, before proposing an amendment to the ATCA, it is necessary to show that environmental human rights rest on international norms.

*B. Why Environmental Human Rights Abuse Constitutes a Violation of Customary International Law: The Relationship Between Extreme Environmental Harm and Human Health and Well-Being*

This section will analyze the close relationship between extreme environmental harm and human health and well-being to argue that environmental human rights abuses infringe upon indigenous citizens’ rights to health and well-being. This section will further show that these rights are recognized by “articulable or discernable” international norms, as required by the ATCA.<sup>81</sup>

Human casualties arise from corporate environmental harm in one of two ways. First, severe environmental degradation directly compromises the health and sustainable development of indigenous citizens. Alison Lindsay Shinsato describes how environmentally destructive projects are in and of themselves threatening to humans:

Environmental destruction leaves local populations with two basic options: a) to leave the degraded en-

---

77. *Id.* at 724.

78. *Id.* at 725 (emphasis added).

79. *Id.* at 724.

80. *Id.* at 731.

81. Beanal, 197 F.3d at 167.

vironment for a more habitable place and become environmental refugees or environmentally displaced people; or b) to remain in the degraded environment and risk increased morbidity and mortality through exposure to pollution and depleted, degraded, or contaminated food and water sources.<sup>82</sup>

Second, human rights violations arise in connection with environmentally destructive, large scale resource extraction projects when MNCs in search of cheap labor and lax environmental standards form alliances with some of the “most barbarous and illegitimate regimes on earth.”<sup>83</sup> The political structure and socio-economic landscape of these countries typically require MNCs to form joint ventures with government-run corporations or share ownership of a private corporation with the host nation.<sup>84</sup> International legal scholar Pauline Abadie describes a common scenario which leads to environmental and human rights abuses as a result of the relationship between the MNC and host government:

[The] MNC invests in a country with a poor human rights record, undertakes large oil or gas developments, mining or commercial forestry operations that provide substantial cash flow to the regime in power. The MNC contracts private guards (often a “subsidiary” of governmental police forces) or contracts directly with military officials to provide security on the worksite. In most cases, instead of securing the operation against potential robbers or other legitimate threats, the private guards or military junta understand their mission as eliminating any opposition against the given project. . . . In most instances, the MNC is not the violator *per se*. Most human rights reports, however, establish substantial ties exist between those who commit the atrocities and the MNC operating in the region.<sup>85</sup>

As the above example demonstrates, indigenous citizens become victims of human rights atrocities as a direct consequence of their opposition to the corporation’s large scale, environmentally

---

82. Shinsato, *supra* note 33, at 188.

83. Kieserman, *supra* note 3, at 882 (quoting John Vidal, *A Dirty Business Bogged Down in a Moral and Political Mire*, GUARDIAN, Aug. 15, 1998, at 5).

84. Holton, *supra* note 13, § 2.

85. Abadie, *supra* note 38, at 754-55.

destructive resource extraction project which threatens their health and very existence. The human rights atrocities committed by hired security personnel are likewise attributable, at least in part, to the corporation's desire to squelch opposition to the environmentally destructive project.

Thus, in some instances, corporate environmental harm leads to infringement upon indigenous citizens' rights to health, well-being, safety, and even dignity. Three international instruments arguably demonstrate that these rights are "*accepted by the civilized world and defined with . . . specificity,*" as required under *Sosa* to establish a violation of the Law of Nations.<sup>86</sup> First, the Hague Declaration expressly acknowledges "the right to live in dignity in a viable global environment."<sup>87</sup> Second, the Declaration of the Right to Development provides for "equality of access to basic resources and food."<sup>88</sup> And third, while the Stockholm Declaration allows nations the "sovereign right to exploit their own resources pursuant to their own environmental policies," it also grants citizens the "fundamental right to freedom, equality, and adequate conditions of life, in an environment of quality that permits a life of dignity and well-being. . . ."<sup>89</sup>

These international instruments show that protection of environmental human rights is recognized at the international level. However, because the determination of a violation of an internationally recognized norm requires a case-by-case analysis, a court might determine the above declarations are not sufficiently binding on the individual defendant or that these norms are not sufficiently particularized. The lack of environmental ATCA jurisprudence and the vaguely defined scope of the ATCA also make the determination of the Law of Nations in the environmental arena difficult. Therefore, an amendment to the ATCA is necessary to ensure that U.S. corporations are held accountable for environmental human rights abuses committed in developing countries and to ensure that punitive damages are available to the victims of these violations.

---

86. *Sosa*, 542 U.S. at 725 (emphasis added).

87. Shinsato, *supra* note 33, at 198 (quoting Hague Declaration on the Environment, Mar. 11, 1989, 28 I.L.M. 1308, reprinted in *Selected International Legal Materials for Global Warming*, 5 AM. U.J. INT'L L. & POL'Y 513, 567 (1990)).

88. *Id.*

89. *Id.* (quoting U.N. Conference on the Human Environment, Stockholm, Swed., June 5-16, 1972, *Declaration of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF.48/14).

### *C. Proposed Amendment*

Right of action for international human rights violations: in a civil action for tort only, an alien may establish a cause of action under the Statute for severe environmental harm, provided that the environmental harm is accompanied by a direct, substantial, and widespread effect on human health and well-being, and that the environmental harm results from the practices or operations of a publicly-traded corporation incorporated in the United States, or the subsidiary of a publicly-traded corporation incorporated in the United States, or an employee of a publicly-traded corporation incorporated in the United States.

## V. OBJECTIONS, COSTS, AND DISADVANTAGES

Admittedly, the proposed amendment is not without its weaknesses and related costs. This section will address: skepticism regarding the effectiveness of the ATCA as an effective vehicle for the imposition of punitive damages; criticism of the use of punitive damages under the ATCA as an alternative regulatory device for environmental human rights violations; and, problems inherent in the proposed amendment.

### *A. Is the ATCA the Appropriate Vehicle for Imposing Punitive Damages on Corporate Environmental Human Rights Violators?*

Even after a plaintiff establishes the threshold violation of customary international law, some judges may be hesitant to adjudicate ATCA claims, particularly environmental ATCA claims, because of the inherent political nature of the claims. In *Beanal v. Freeport-McMoran, Inc.*, the Fifth Circuit Court of Appeals determined that “federal courts should exercise extreme caution when adjudicating environmental claims under international law to ensure that environmental policies of the United States do not displace environmental policies of other governments . . . especially when the alleged environmental torts and abuses occur within the sovereign's borders and do not affect neighboring countries.”<sup>90</sup> Likewise, in *Sosa v. Alvarez-Machain*, the Supreme Court signaled

---

90. *Beanal*, 197 F.3d at 167.

that ATCA claims that would require a U.S. federal court to “go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits,” will likely fail.<sup>91</sup>

Thus, under *Sosa* and *Beanal*, ATCA claims are likely to be unsuccessful when they require U.S. courts to supplant the laws of foreign governments or limit a foreign government's sovereignty. However, because the proposed amendment only provides a right of action against publicly traded United States corporations and their subsidiaries and employees, not foreign officials or foreign corporations, these concerns are diminished. As Justice Breyer noted in his concurring opinion in *Sosa*, political concerns “normally do not arise (or at least are mitigated) if the conduct in question takes place in the country that provides the cause of action or if that conduct involves that country's own national. . . .”<sup>92</sup>

Moreover, even if all ATCA claims are regarded as political by their very nature, U.S. courts have a responsibility to regulate U.S. corporations and impose liability in the form of punitive damages for their misconduct abroad because the U.S. is in a better position to regulate the activities of MNCs than politically unstable developing nations.<sup>93</sup> As Alison Shinsato argues, “[t]he US, in particular, could put its weight behind the environmental human rights movement because it has a surplus of resources and technology that it can commit to environmental protection, unlike [developing] countries . . . which tend to focus their limited resource to provide basis services.”<sup>94</sup>

### *B. Are Punitive Damages the Appropriate Remedy for Environmental Human Rights Violations?*

The potential for very large punitive damage awards under the ATCA is naturally troublesome to corporations. The U.S. Chamber of Commerce warned that the ATCA invites “global venue shopping,” and Chamber President Thomas Donohue declared that the “U.S. is increasingly becoming the jurisdiction of choice for opportunistic foreign plaintiffs.”<sup>95</sup> Fortune magazine also expressed fear that ATCA claims “could become the next asbestos litigation,”<sup>96</sup>

---

91. *Sosa*, 542 U.S. at 726.

92. *Id.* at 761 (Breyer, J., concurring) (emphasis added).

93. See Shinsato, *supra* note 33, at 202.

94. *Id.* at 203.

95. Gul, *supra* note 4, at 382 (quoting Tony Mauro, *Justices Debate Alien Tort Law*, LEG. TIMES, Apr. 5, 2004, at 8).

96. *Id.* (citing Cait Murphy, *Is This the Next Tort Trap? Using an Ancient Statute, Lawyers Make Business Quake*, FORTUNE, June 23, 2003, § 1, p.30).



and Britain's Financial Times warned that plaintiff lawyers' efforts at expanding the ATCA were positioning the U.S. litigation system to be the "world's civil court of first resort."<sup>97</sup>

While these claims have merit, they do not necessarily present relevant objections to the proposed amendment, because the amendment only applies to a narrow range of cases. Establishing a right of action for foreign plaintiffs to sue U.S. corporate defendants for environmental harm which is accompanied by a direct, substantial, and widespread effect on human health and well-being does not provide for an overly broad expansion of the ATCA.

The argument that criminal punishment, rather than civil fines, would more efficiently punish corporate violators ignores the plight of the victims of extreme environmental degradation who are without adequate domestic or international remedies for redress. Moreover, punitive damages are necessary to provide an incentive for plaintiffs to bring suit against defendants in the United States. Under the private attorney general rationale, the availability of punitive damages "induces plaintiffs to act as 'private attorneys general,' thereby helping to increase the number of wrongdoers who are properly 'brought to justice.'"<sup>98</sup> This incentive is important, particularly with respect to environmental human rights violations committed abroad, because these misdeeds deserve punishment, but are largely beyond the reach of international and domestic regulation.

### *C. Practical Problems Inherent in Proposed Amendment*

Because the statute only provides for a right of action against *publicly-traded* corporations *incorporated in the United States*, corporations could simply reincorporate in a foreign country and offer securities in a foreign stock exchange to avoid civil liability for environmental human rights claims. Unfortunately, this is a problem which cannot be avoided within the framework of my proposed amendment. If the amendment were to include a right of action against foreign corporations, the scope of civil liability would unnecessarily infringe upon the sovereignty of foreign nations and likely compromise the success of the environmental human rights claim.

---

97. *Id.* (quoting Thomas Niles, *The Very Long Arm of American Law*, FIN. TIMES, (London), Nov. 6, 2002, at 15).

98. E. Jeffrey Grube, Note, *Punitive Damages: A Misplaced Remedy*, 66 S. CAL. L. REV. 839, 851 n.57 (1993) (quoting David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH L. REV. 1257, 1287-88 (1976)).

## VI. CONCLUSION

Despite the limitations of the proposed amendment and the ATCA itself, the assessment of punitive damages under the ATCA for international human rights abuse is the strongest available mechanism to monitor the largely unregulated environmental practices of U.S. corporations in developing countries. Likewise, the ATCA provides the best chance of redress for the victims of environmental human rights abuse who otherwise lack incentives and an adequate forum to bring claims forward. Because of the lack of judicial guidance regarding the appropriate scope of environmental claims under the ATCA, amending the statute is necessary to ensure that a narrow range of environmental harms committed by U.S. corporations are actionable under the statute.

## THE MICROFINANCE MOVEMENT: CLOSING THE GENDER GAP WITH A CLICK?

RUTH JACKSON LEE\*

“The charity that is a trifle to us can be precious to others.”<sup>1</sup>

With \$238.00 you can order an eighty gigabyte iPod on Amazon.com to play your favorite tunes.<sup>2</sup> For the same amount, or considerably less, you can extend a loan to an individual like Carolina Alfredo Bila Mazuze, a mother of six children in Maputo, Mozambique, through a nonprofit microlending website.<sup>3</sup> The credit will immediately provide Ms. Mazuze with the financial recourses necessary to expand her incipient clothing business and might eventually lift her and her family out of poverty in a society plagued by stereotypical views of gender roles and responsibilities.<sup>4</sup> And, in all likelihood, you may still be able to purchase that iPod once the loan is paid back in six months.<sup>5</sup>

Ms. Mazuze and millions of other similarly situated persons have been assisted by the growing phenomenon of microfinance.<sup>6</sup> Economist Muhammad Yunus and his Grameen Bank<sup>7</sup> won the 2006 Nobel Peace Prize for pioneering the use of microcredit, the extension of small loans<sup>8</sup> to poor entrepreneurs, helping to eradi-

---

\* J.D., Dec. 2007, Florida State University College of Law. Without the encouragement of Jared M. Lee, this article would not be possible.

1. JOAN CHITTISTER, *BECOMING FULLY HUMAN: THE GREATEST GLORY OF GOD* 120 (2005).

2. *Amazon.com: Online Shopping for Electronics, Apparel, Computers, Books, DVDs & more*, <http://www.amazon.com> (Search “Amazon.com” for “80 gb iPod”) (last visited Feb. 3, 2008).

3. *Carolina Alfredo Bila Mazuze*, <http://www.kiva.org/app.php?page=businesses&action=about&id=27369> (last visited Dec. 17, 2007).

4. *Id.* See Gary M. Woller & Warner Woodworth, *Microcredit as a Grass-Roots Policy for International Development*, 29 *POLY STUD. J.* 267 (2001). “Microcredit is one grass-roots approach that appears to hold particular promise for providing a real, immediate, and sustained impact on the financial and social status of millions of Third World poor.” *Id.* at 279. *But cf.* Bill Lucarelli, *Microcredit: A Cautionary Tale*, 35 *J. CONTEMP. ASIA* 78, 85 (2005) (noting the limits and constraints of relying too much of microcredit “as panaceas for complex developmental issues.”).

5. *Fundo De Desenvolvimento*, <http://www.kiva.org/about/aboutPartner?id=64> (last visited Dec. 17, 2007). To date, Fundo De Desenvolvimento, the microfinance institution in this case, has lent a total of \$94,950 to 244 businesses and has a delinquency rate of 0.00%. *Id.*

6. *Microcredit Summit Campaign, A Gift to the World or a Lump of Coal: Microcredit and the World Bank* 1 (2007) available at <http://www.results.org/website/navdispatch.asp?id=3112>.

7. *Grameen* means “rural” or “village” in Bangla. See Abu N. M. Wahid, *The Grameen Bank and poverty alleviation in Bangladesh: theory, evidence and limitations*, 53 *AM. J. ECON. & SOC.* 1, 1 (1994).

8. Microloans generally range in size from \$75.00 to \$100.00 depending on geo-

cate rural poverty.<sup>9</sup> The bank was formally established in 1983<sup>10</sup> and has primarily focused on offering loans to groups of destitute women in Bangladesh.<sup>11</sup> According to Dr. Yunus' model, peer monitors serve as "social collateral" in place of traditional assets by providing the necessary impetus to ensure repayment.<sup>12</sup> The entire group is responsible if any member defaults.<sup>13</sup> This lending structure has ostensibly been quite successful; as of November 2007, the Grameen Bank has 7.39 million borrowers, 97 percent of whom are women.<sup>14</sup>

Dr. Yunus' methodology contravenes with the misguided perception that indigent people are "stupid or lazy"<sup>15</sup> and should be blamed for their impoverishment.<sup>16</sup> Rather, he postulated that such individuals simply lack access to capital that would allow them to become successful business owners.<sup>17</sup> Melding the notions of capitalism and social responsibility, the Bangladeshi banker theorized that the poor will repay loans with reasonable interest rates when given the opportunity to borrow.<sup>18</sup> Meanwhile, the funds provide working capital that allows poverty stricken entrepreneurs to overcome the difficulties of starting or expanding a successful business, such as the costs of raw materials, equipment and facilities.<sup>19</sup>

In addition to the economic benefits received by individual borrowers, several scholars maintain that extending loans to women

---

graphic location. See Robin G. Isserles, *Microcredit: The Rhetoric of Empowerment, the Reality of "Development As Usual"*, 31 WOMAN Q. J. 38, 39 (2003).

9. See Jo Johnson, *Nobel Peace Prize for microcredit pioneer*, FINANCIAL TIMES (LONDON), Oct. 14, 2006, at 6. Just a year before, the United Nations commenced the "International Year of Microcredit." Press Release, UN Launches International Year of Microcredit 2005, U.N. Doc. DEV/2492 (Nov. 18, 2001) available at <http://www.un.org/News/Press/docs/2004/dev2492.doc.htm>.

10. Muhammad Yunus, *Poverty alleviation: Is economics any help? Lessons from the Grameen bank experience*, 52 J. INT'L AFF. 47, 50-51 (1998). For a comprehensive history of the Grameen Bank, see MUHAMMAD YUNUS, *Banker to the Poor: Micro-Lending and the Battle Against World Poverty* (2003) [hereinafter *Banker*].

11. *Grameen Bank*, <http://www.grameen-info.org/bank/index.html> (last visited Dec. 17, 2007).

12. Isserles, *supra* note 8.

13. *Id.*

14. *Id.*

15. *Banker*, *supra* note 10, at 50.

16. *Id.* ASIF DOWLA & DIPAL BARUA, THE POOR ALWAYS PAY BACK: THE GRAMEEN II STORY 2-3 (2006).

17. *Banker*, *supra* note 10, at 50 ("They were poor because the financial institutions in the country did not help them widen their economic base. No formal financial structure was available to cater to the credit needs of the poor.")

18. *Id.* See also *Breaking the vicious cycle of poverty through microcredit*, <http://www.grameen-info.org/bank/bcycle.html> (last visited Dec. 17, 2007).

19. *Glossary of Microfinance Related Terms*, <http://www.accion.org/netcommunity/Page.aspx?pid=257&srcid=864> (last visited Dec. 17, 2007).

has a positive social impact.<sup>20</sup> Advocates of microcredit rely on studies that show that lending money can be particularly important for women in patriarchal societies where the deeply entrenched ideologies perpetuate segregation of the sexes, dictate a strict division of labor and levy a systematic bias of male supremacy.<sup>21</sup> First, microcredit allows women to become self-employed where wage employment is unavailable or difficult for women to access.<sup>22</sup> The independent source of income generated outside the home not only improves quality of life, but also reduces economic dependency on men, enhancing autonomy.<sup>23</sup> Women can come to own assets, including land and housing.<sup>24</sup> Furthermore, by gaining control over material resources, microcredit enables women to contribute to various socio-economic activities and to further participate in the political sphere.<sup>25</sup>

Dr. Yunis' selection for the Nobel Peace Prize, which had previously never been awarded to a banker or financial institution,<sup>26</sup> spawned great international interest in microcredit.<sup>27</sup> To date, the revolutionary concept has been mirrored in "100 countries from the United States to Uganda."<sup>28</sup> According to Microcredit Summit

20. According to scholar Linda Mayoux, there are essentially four different views on the link between micro-finance and women's empowerment. See Linda Mayoux, *Micro-finance and the Empowerment of Women*, UNIFEM (2002) available at <http://www.ilo.org/public/english/employment/finance/download/wpap23.pdf>. For a critical view of microcredit, see Christopher Lingle, *Avoid the Micro-Financing Hype*, 164 FAR E. ECON. REV. 30 (2001).

21. Sohela Nazneen & Nasheeba Selim, *Women's Bargaining Power and Extreme Poverty: An Exploratory Study of Gendered Relations of Women in the Targeting of the Ultra Poor (TUP) Programme*, available at [http://www.bracresearch.org/reports/tup\\_women\\_bargaining.pdf](http://www.bracresearch.org/reports/tup_women_bargaining.pdf). See also Wahid, *supra* note 7, at 4 (Microcredit has revolutionized women in Bangladesh, an orthodox Muslim society, in which women "have been subjugated historically to many social vices such as early marriage, excessive child-bearing as well as illiteracy and unemployment.") *But cf.* Isserles, *supra* note 8 ("Turning people into indebted entrepreneurs and self-employed workers may only serve to intensify Western ideological assumptions that the developing world should mirror the First World.")

22. The World Bank, *Using Microcredit to Advance Women* (1998) available at <http://www1.worldbank.org/prem/PREMNotes/premnote8.pdf>.

23. Rae Lesser Blumberg, *Women's Economic Empowerment as the "Magic Potion" of Development 3-4* (Aug. 12, 2005) (unpublished manuscript available at [http://portal.unesco.org/shs/en/files/8696/11283330079Magic\\_Potion.pdf/Magic+Potion.pdf](http://portal.unesco.org/shs/en/files/8696/11283330079Magic_Potion.pdf/Magic+Potion.pdf)).

24. *Women and Microcredit Day*, The International Year of Microcredit 2005, available at [http://www.europarl.europa.eu/comparl/femm/press/2005/20051011\\_en.pdf](http://www.europarl.europa.eu/comparl/femm/press/2005/20051011_en.pdf).

25. Kaniz Fahmida Ahmed, *Microcredit as a Tool for Women Empowerment: The Case of Bangladesh*, <http://www.foreignaid.com/thinktank/microcredit.html> (last visited Feb. 3, 2008). *But see* Katherine N. Rankin, *Governing development: neoliberalism, microcredit, and rational economic woman*, 30 ECON. & SOC. 18 (2001).

26. See Johnson, *supra* note 9.

27. Integrated Regional Information Networks, *No Silver Bullets? The Online Funding Revolution and Microfinance Sector*, Worldpress.org, Dec. 18, 2007, <http://www.worldpress.org/Asia/3019.cfm>.

28. Jon Herskovitz, *RPT-Nobel Peace winner eyes microcredit for North Korea*, REUTERS, Oct. 20, 2006.

Campaign, “[i]n 2006 alone, 133 million families received a microloan and 93 million of those families were among the world’s poorest people.”<sup>29</sup> Approximately 465 million family members were affected.<sup>30</sup> Even more households are expected to benefit from microloans with the introduction of websites which allow charitable people to conveniently invest small amounts of money in businesses in rural countries by becoming microlenders.<sup>31</sup>

Indeed, the newest trend in microfinance is a Web 2.0 approach to lending. Kiva,<sup>32</sup> an online microfinance interface, networks individual lenders to individual borrowers much like Facebook,<sup>33</sup> a social media platform, connects people with friends and others. Kiva’s innovative logistics allows anyone to lend as little as \$25<sup>34</sup> to businessperson in 39 different nations.<sup>35</sup> A person can provide “all the money [that an entrepreneur] needs or just a portion and encourage[ing] . . . people . . . to [collectively] kick in the rest.”<sup>36</sup>

Serving administrative functions, nonprofit organizations and non-governmental organizations<sup>37</sup> conduct the initial screening of potential borrowers before their requests are made available on Kiva.<sup>38</sup> These microfinance institution (MFI) field partners then upload profiles and photos of people who are in need of capital to either start or expand their businesses.<sup>39</sup> Profiles include a risk rating for the field partner as well as the credit history of the applicant.<sup>40</sup> As default rates reflect the effectiveness of the particular field partner, if one begins to show lower recovery percentage than

29. Microcredit Summit Campaign, *A Gift to the World or a Lump of Coal: Microcredit and the World Bank 1* (2007) available at <http://www.results.org/website/navdispatch.asp?id=3112>.

30. *Id.*

31. Claudia Parsons, *Websites let you be banker to world's poor*, REUTERS, Sept. 13, 2007. Online microlending is to be considered charitable for two reasons: (1) there is no financial return on investment, and (2) repayment is not guaranteed.

32. *Kiva.org-Loans that change lives*, <http://www.kiva.org> (last visited Feb. 3, 2008).

33. *Welcome to Facebook*, <http://www.facebook.com> (last visited Feb. 3, 2008).

34. Tina Pittaway, *No more cash, please, we're drowning in it*, MACLEAN’S, Nov. 5, 2007, at 45. Kiva temporarily ran out of microenterprises seeking loans when its popularity surged after former U.S. President William Jefferson Clinton mentioned the organization in his new book and subsequently appeared on *The Oprah Winfrey Show* with the its co-founders, Matt and Jessica Flannery. As a result, the site provisionally limited individual lenders to extending only \$25 at a time. *Id.*

35. *Kiva.org-Press Center*, <http://www.kiva.org/about/facts/> (last visited Feb. 3, 2008).

36. Mark Stachiew, *Microloans made easy on the Web*, THE GAZETTE, Nov. 19 2007, at B2.

37. Kiva only partners with microfinance institutions that have a social mission of lending to the poor. See *Help Center*, <http://www.kiva.org/about/help/home> (last visited Dec. 17, 2007).

38. Stachiew, *supra* note 37.

39. Sonia Narang, *Web-Based Microfinancing*, N.Y. TIMES, Dec. 10, 2006, § 6 (Magazine), at 84.

40. Mark Bridge, *Small loans with a big impact*, THE TIMES (London), Oct. 6, 2007, at 2.

competing MFIs, it is likely that it will be avoided by lending individuals.<sup>41</sup> The transparency increases the overall efficiency of the process.

Thus, Kiva allows potential individual lenders to peruse different ventures and choose the target of their charitable ‘investment’ by offering a interest-free sum of \$25 up to the full amount of the credit requested.<sup>42</sup> With a mere click, funds are transferred to Kiva through a Paypal<sup>43</sup> account. Kiva continues to collect money from other individual lenders until the loan is fully raised. The avant-garde partnership between Kiva and Paypal tremendously facilitates peer-to-peer lending by avoiding the cost of currency exchange and the transaction fee taken by conventional mediators.<sup>44</sup>

Once the capital has been raised, it is forwarded to the MFI which disburses the full value to the recipient.<sup>45</sup> The field partner not only manages the loan and oversees the repayment,<sup>46</sup> it also maintains an online journal that informs individual lenders of the progress of the borrower’s enterprise.<sup>47</sup> As such, field partners are allowed to levy a nominal interest to business owners.<sup>48</sup> Kiva monitors the interest, refusing to partner with any organizations that impose “exorbitant” rates.”<sup>49</sup> The average interest rate is 21 percent,<sup>50</sup> rather than the 30 to 70 percent gleaned by the majority of MFIs.<sup>51</sup>

After the loan is completely repaid, the MFI conveys the money to Kiva and the original loan amount is forwarded to the individual lenders’ PayPal accounts.<sup>52</sup> The returned money can be withdrawn or re-invested.<sup>53</sup> Most lenders choose the latter.<sup>54</sup>

41. Graeme Brown, *Micro-finance gives developing world a chance to ease poverty*, THE BUSINESS, Sept. 8, 2007.

42. See Rachel Emma Silverman, *Young Money: A New Generation Reinvents Philanthropy*, WALL ST. J., Aug. 21, 2007, at D1.

43. *Online Payment, Merchant Account-PayPal*, <https://www.paypal.com/> (last visited Feb. 3, 2008).

44. Cynthia Haven, *Small Change, Big Payoff*, STAN. MAGAZINE, Dec. 2007 available at <http://www.stanfordalumni.org/news/magazine/2007/novdec/features/kiva.html>.

45. Narang, *supra* note 40.

46. Michael Duffy, *Harnessing the Power of the net to support Third World businesses*, SYDNEY MORNING HERALD, Sept. 29, 2007 available at <http://www.smh.com.au/articles/2007/09/28/1190486568269.html>.

47. Steve Hargreaves, *Be a Global Financier . . . On a Shoestring*, CNN, Jan. 17, 2006, [http://money.cnn.com/2006/01/17/pf/kiva\\_microfinance/index.htm](http://money.cnn.com/2006/01/17/pf/kiva_microfinance/index.htm). To date, Kiva has loaned more than \$1.8 million with only a 3 per-cent default rate. See Brown, *supra* note 42.

48. Bridge, *supra* note 41.

49. *Frequently Asked Questions*, [www.kiva.org/about/faq](http://www.kiva.org/about/faq) (last visited Dec. 17, 2007).

50. *Help Center*, <http://www.kiva.org/about/help/home> (last visited Dec. 17, 2007).

51. Nimal A. Fernando, *Understanding and Dealing with High Interest Rate on Microcredit* 1 (2006) available at <http://www.adb.org/Documents/Books/interest-rates-microcredit/Microcredit-Understanding-Dealing.pdf>.

52. Bridge, *supra* note 41.

53. Thomas Gryta, *Personal Business: Help Impoverished Entrepreneurs With Loans*,

Microcredit, the simple concept of offering small loans to poor entrepreneurs who lacked collateral in impoverished countries, is certainly revolutionary. However, peer-to-peer lending, a simple platform allowing individuals to become charitable microbanks, fundamentally modifies the potential scope and effectiveness of microfinance. The trifle amount of money that could purchase an iPod can now be the precious resources needed to build a business for others around the world, facilitated by the ease of point-and-click lending.

---

WALL ST. J., Sept. 23, 2007, at 2A. Loans made through Kiva aren't tax-deductible because they aren't a charitable contribution. *Id.*

54. Haven, *supra* note 45.



## RECENT DEVELOPMENTS

### PAKISTAN'S POLITICAL UPHEAVAL: THE DEMISE OF A NUCLEAR DEMOCRACY

JARED M. LEE\*

The late Benazir Bhutto, twice former Pakistani Prime Minister and outspoken advocate of democracy, declared in an interview that “[t]he next few months are critical to Pakistan's future direction as a democratic state committed to promoting peace, fighting terrorism, and working for social justice.”<sup>1</sup> While her statement addressed the state of Pakistan years ago, it could not have been more applicable at this particular time. Her tragic death only amplifies the critical nature of Pakistan’s unstable political environment.<sup>2</sup> Bhutto sacrificed her life the way she lived it—fighting to reverse the young nation’s history of oppressive leadership.<sup>3</sup>

The Islamic Republic of Pakistan gained independence from Great Britain’s colonial rule in 1947 when it was partitioned from India after religious disagreements.<sup>4</sup> Pakistan’s history of governance since becoming a sovereign state has been episodic, being governed by three constitutions in addition to several authoritative documents during recurrent military rule.<sup>5</sup> According to several legal analysts, only the most recent constitution, instituted in 1973, is democratic in form and its creation.<sup>6</sup> Although the constitution, written on the foundation of an “Islamic moral standard,”<sup>7</sup> has been in existence for over thirty years, it has been adhered to for much less time.<sup>8</sup> Yet, despite the lack of political consistency

---

\* J.D., Dec. 2007, Florida State University College of Law. Special thanks to my wife and colleague Ruth Jackson Lee.

1. Zahid Hussain, *Interview - Benazir Bhutto*, NEWSBEAT (2002), available at <http://www.newline.com.pk/NewsJuly2002%5Cnewsbeatjuly2.htm>.

2. The disagreements among Pakistanis are hardly pure politics, instead they are rooted in large tears in the nation’s social fabric over issues of religion, military, westernization and wealth. See Colum Murphy, *Pakistan’s Last Bid for Democracy*, 170 FAR. E. ECON. REV. 17, 17-18 (2007).

3. See generally, CNN, *Bhutto photographer: ‘Gunshots rang out and she went down’*, Dec. 27, 2007.

4. Jeffrey A. Redding, *Constitutionalizing Islam: Theory and Pakistan*, 44 VA. J. INT’L L. 759, 762 (2004). For a more detailed analysis of Pakistan’s history see Abdullalh Ahsan, *Pakistan Since Independence: An Historical Analysis*, 93 MUSLIM WORLD 351, 351 (2003).

5. Redding, *supra* note 4.

6. *Id.*

7. Ahsan, *supra* note 4, at 359.

8. Farooq Hassan, *Pakistan’s Federal Structure and the Constitution of 1973*, 93 MUSLIM WORLD 269, 279 (2006) (“[T]he civilian part of leadership in the country ruled under this document from 1973 to 1977, then from 1985 to 1999, and then from 2002 until the

and occasional limitations on its power, prior to 2007, Pakistan's judicial branch "has never been forced to close shop."<sup>9</sup>

Rumblings of political upheaval ensued when Pakistan's current president Pervez Musharraf, who came in to power in 1999 by effecting a military coup d'état, attempted to suspend the Chief Justice of Pakistan, Iftikhar Muhammad Chaudhry, on March 9, 2007.<sup>10</sup> Chaudhry, a leading proponent of democracy, was detained by the government when he refused to resign. Widespread protests and massive demonstrations, however, compelled the Court to reinstate the Chief Justice<sup>11</sup>

Less than a year later, on October 6, 2007, incumbent Musharraf overwhelming won the presidential election.<sup>12</sup> But at the time, Musharraf was head of Pakistan's army.<sup>13</sup> Several political parties therefore boycotted the election and much of the parliament resigned in protest.<sup>14</sup>

With rumors that the Supreme Court might invalidate the election,<sup>15</sup> Musharraf declared emergency rule on November 3, 2007, seizing complete control of the country by suspending the function of the constitution and exerting executive power over the Supreme Court.<sup>16</sup> Musharraf mandated that members of the Court take an "oath of loyalty to a new 'provisional constitutional order.'"<sup>17</sup> Several judges either refused resulting in their dismissal, or resigned.<sup>18</sup> Unsurprisingly, most prominent among those defying Musharraf's dictatorial demand was Chaudhry.<sup>19</sup>

While Musharraf could not anticipate the outcome of the election's review by the former court,<sup>20</sup> new appointments indubitably endorsed his presidency, functionally "clear[ing] the way" for

---

present time, but at all times the army remained in control of all-important state activities.").

9. Redding *supra* note 4, at 764 (citing PAULA R. NEWBERG, JUDGING THE STATE: COURTS AND CONSTITUTIONAL POLITICS IN PAKISTAN 7, 12-13 (1995)).

10. Aamir Latif, *The Revolt of the Lawyers*, U.S. NEWS & WORLD REPORT, Nov. 19, 2007, at 31.

11. *Id.*

12. *Musharraf wins presidential vote*, BBC NEWS, Oct. 6, 2007, available at [http://news.bbc.co.uk/2/hi/south\\_asia/7031070.stm](http://news.bbc.co.uk/2/hi/south_asia/7031070.stm).

13. *Id.*

14. *Id.*

15. *Pakistan Emergency*, WALL ST. J., Nov 5, 2007 at A18 [hereinafter *Pakistan Emergency*]; Lisa Curtis, *Musharraf's Emergency Rule Will Only Fuel Pakistan Crisis*, WEBMEMO 1 (2007).

16. Griff Witte, *Musharraf Declares Emergency Rule in Pakistan*, WASH. POST, Nov. 4, 2007, at A1.

17. *Pakistan politics: Emergency rule*, EIU VIEWSWIRE, Nov. 5, 2007 [hereinafter *Emergency Rule*].

18. *Id.*

19. *Id.*

20. *Pakistan Emergency*, *supra* note 15.

Musharraf to retain control.<sup>21</sup> This nominal legitimization was nevertheless refuted and condemned by the opposition.<sup>22</sup> Just before being sworn in for his next term, Musharraf caved to political pressure and resigned his military command.<sup>23</sup>

Additionally, Musharraf dispatched army rangers to command the nation's capital, arrested domestic political leaders that disagreed with his authoritarian policies and shut down all privately owned media.<sup>24</sup> Musharraf also announced that parliamentary elections scheduled for January 2008 may be delayed for up to a year, further clouding the country's political future.<sup>25</sup> Claiming that Pakistan was "out of control," the president defended his emergency decree "as a response to rising Islamic militancy and political instability caused by an interfering judiciary."<sup>26</sup>

Six weeks later, Pakistan's ruling government revoked the state of emergency and revived the country's constitution by way of a three-page order.<sup>27</sup> The "Revocation of Proclamation of Emergency Order 2007" provided that government decisions made under the emergency "shall not be called in question by or before any court."<sup>28</sup> The decree also stated that parliamentary elections will be held as previously scheduled.<sup>29</sup>

Before reinstating the constitution, however, Musharraf instituted several significant changes.<sup>30</sup> Notably, he lowered the minimum age to qualify to be a judge by five years, altering the age requirement from forty-five to forty years of age.<sup>31</sup> Analysts suspect that this gives the president a greater pool of friendly appointees; however the stated reason for the amendment is merely that it allows judges to serve longer tenures.<sup>32</sup> Also important is

---

21. *Emergency Rule*, *supra* note 17.

22. *Id.*

23. *Pakistan's Big Three - The Options*, BBC NEWS, Nov. 28, 2007, available at [http://news.bbc.co.uk/2/hi/south\\_asia/7115117.stm](http://news.bbc.co.uk/2/hi/south_asia/7115117.stm).

24. Witte, *supra* note 16; Peter Wonacott, *For Musharraf, Challenges Ahead; Emergency Rule's Legacy: A Galvanized Opposition and Warier Allies Abroad*, WALL ST. J., Dec. 17, 2007, at A4.

25. *Emergency Rule*, *supra* note 17.

26. *Pakistan Emergency*, *supra* note 15.

27. Laura King, *Musharraf lifts emergency rule, but restrictions stay*, LOS ANGELES TIMES, Dec. 16, 2007.

28. Revocation of Proclamation of Emergency Order, 2007 (2007) available at [http://www.pakistani.org/pakistan/constitution/post\\_03nov07/emergency\\_revocation\\_order.html](http://www.pakistani.org/pakistan/constitution/post_03nov07/emergency_revocation_order.html) (last visited Jan. 24, 2008).

29. *Id.*

30. Peter Goodspeed, *Expect Rigged Elections: Critics; Pakistan's Crisis*, NATIONAL POST, Dec. 15, 2007, at A24.

31. Constitution (Second Amendment) Order, 2007 (2007) available at [http://www.pakistani.org/pakistan/constitution/post\\_03nov07/po6\\_2007.html](http://www.pakistani.org/pakistan/constitution/post_03nov07/po6_2007.html) (last visited Jan. 24, 2008); Nirupama Subramanian, *Musharraf Makes Statute Changes*, HINDU, Dec. 15, 2007 available at <http://www.hindu.com/2007/12/15/stories/2007121562791900.htm>.

32. Rezaul H Laskar, *Musharraf amends Pakistan's Constitution*, REDIFF, Dec. 15,

the effect that all judges that resigned or were removed during the emergency period will not be eligible to return to office.<sup>33</sup>

In addition, the leader created a loophole for the office of president, allowing a person to run for the position immediately after resigning a civil or military position, instead of being subject to the two year waiting period previously required.<sup>34</sup> Moreover, asserting the need to keep nuclear weapons safe from Islamic extremists, Musharraf assumed control of all nuclear weapons, removing the authority from the office of the Prime Minister.<sup>35</sup>

Continuing to defend his actions, Musharraf cited an “unspecified ‘conspiracy’” as the reason for his actions.<sup>36</sup> He attempted to justify his original coup in 1999 by claiming credit for leading Pakistan towards democracy, inspiring growth and development, and empowering women and minorities.<sup>37</sup> Finally, despite his contrary policies both during and after the state of emergency, the president extolled the virtues and importance of a “free and fair” press.<sup>38</sup>

During the state of emergency, Western nations gently rebuked—at most—Musharraf’s self-serving deeds, while many remained silent.<sup>39</sup> Despite this, these same nations fervently commended the return to constitutional rule.<sup>40</sup> The United States has been particularly concerned that political upheaval in Pakistan would undermine Musharraf’s ability to serve as an ally in the war on terror.<sup>41</sup>

In attempt to regain crucial political support, Musharraf took a few of the many important steps necessary to return the nation to democratic rule.<sup>42</sup> A day before beginning his third term as president, he resigned his military post, returning the Pakistan to civilian rule for the first time in eight years.<sup>43</sup> Yet, for many in his op-

---

2007, available at <http://www.rediff.com/news/2007/dec/15pakemergency.htm>.

33. *Id.*

34. Wonacott, *supra* note 24.

35. *Id.* See also Griff Witte, *Musharraf Ends 6-Week Emergency Rule; President Claims Success on Road to Democracy, but Jan. Elections Shadowed by Doubt*, WASH. POST, Dec. 16, 2007, at A28.

36. *Id.* See also Paul Alexander, *Pakistani Leader Ends State of Emergency*, AP, Dec. 15, 2007.

37. Kim Barker, *Musharraf Ends Pakistan Emergency*, MCCLATCH — TRIBUNE BUS. NEWS, Dec. 15, 2007.

38. *Id.*

39. Matthew Jones, *Western Allies Condemn Pakistan's Musharraf*, REUTERS, Nov. 3, 2007.

40. See Ali Dayan Hasan, *Pakistan's future imperfect*, GUARDIAN UNLIMITED, Dec. 21, 2007.

41. Barker, *supra* note 37.

42. Carlotta Gall, *After Six Weeks, Musharraf Lifts State of Emergency*, NY TIMES, Dec. 16, 2007, at 3.

43. *Id.*

position, the harm is irreparable and the reforms are shallow.<sup>44</sup> This sentiment is widespread as domestic and international support for his leadership has suffered dramatically.<sup>45</sup>

Many measures of the emergency rule still linger with much of the judicial branch under house arrest.<sup>46</sup> Judicial independence remains at the forefront of criticism and Aitzaz Ahasan, one of the nation's most influential lawyers spearheading protests, remains incarcerated while other attorneys continue "sporadic boycotts of the courts."<sup>47</sup> Restrictions also remain limiting the freedom of the press and prohibiting live political coverage, with penalties of up to three years imprisonment.<sup>48</sup> Furthermore, although accusations of plans to rig the parliamentary elections have been publicly denied, members of the opposing party are unconvinced.<sup>49</sup>

Recent events, along with the catalyst of Bhutto's assassination, may trigger violent attempts to overthrow current leadership.<sup>50</sup> Whether successful or not, political uprising risks stark global consequences as neighbors and superpowers carefully eye the safety of Pakistan's nuclear stockpile.<sup>51</sup> Although parliamentary elections offer hope that the struggling nation can jettison eight years of military rule and bring "a democratically elected, civilian-led government, a breakdown of that process would leave the nuclear-armed state vulnerable to increasingly popular Islamist extremists."<sup>52</sup> Despite fears vocalized by world leaders, Pakistani intelligence officials vehemently deny the possibility that weapons could be in jeopardy.<sup>53</sup>

Certainly, the United States has a multifactor interest in Pakistan. Even though the country has served as an ally in the war on terror, its nuclear weapons present a serious threat to global stability if they were captured or should radicals take control.<sup>54</sup> This

---

44. Alistair Scrutton, *Despite emergency end, many Pakistanis feel duped*, WASH. POST, Dec. 16, 2007.

45. Wonacott, *supra* note 24.

46. *Id.*

47. *Id.*

48. *Id.*

49. Naweena A. Mangi, *Musharraf's Lifting of Emergency Rule May Not Ensure Free Vote*, BLOOMBERG, Dec. 17, 2007.

50. See *Benazir Bhutto's supporters on the attack*, Herald Sun (Dec. 29, 2007) available at <http://www.news.com.au/heraldsun/story/0,21985,22982831-661,00.html>; Cf. *Benazir Bhutto Laid to Rest Amid Violence*, NPR.org (Dec. 28, 2007) available at <http://www.npr.org/templates/story/story.php?storyId=17668008>.

51. CBC NEWS, *Mourners overwhelm Bhutto funeral*, Dec. 28, 2007, available at <http://www.cbc.ca/world/story/2007/12/28/bhutto-burial.html>.

52. Murphy, *supra* note 2.

53. Nirupama Subramanian, *N-arms in secure hands: Pakistan*, HINDU, Nov. 13, 2007 available at <http://www.hindu.com/2007/11/13/stories/2007111368841300.htm>.

54. Tayyab Siddiqui, *Pakistan's political crisis and the US*, SOUTH ASIA MONITOR (2007) available at <http://www.southasiamonitor.org/2007/nov/news/23sm2.shtml>.

concern remains an unspoken force behind the Bush Administration's foreign policies towards Pakistan. In fact, commentators suggest that the United States merely uses issues of democracy, rule of law, fair elections, and human rights as a façade for the "real objective . . . to neutralize Pakistan's nuclear capability."<sup>55</sup>

As despairingly spoken by Bhutto, perhaps Pakistan's most notable martyr for democracy, "President Musharraf's last term in office demonstrated that dictatorship has fueled extremism. The tribal areas of Pakistan have turned into havens for militants to mount attacks on NATO troops in nearby Afghanistan. Lack of governance has led to the expansion of extremism into settled areas of Pakistan."<sup>56</sup> Unlike other states that have fallen to oppressive rulers during the last century, few have presented such a broad potential for peril.<sup>57</sup> When compared to other nations in chaos such as Sudan, Iraq, Iran and Somalia, "Pakistan is a heavyweight. It's the sixth-most populous country, and one of only eight or nine with nuclear weapons."<sup>58</sup> Moreover, Pakistan's location and culture make it a uniquely attractive operations base for terror groups.<sup>59</sup>

The competing interests of nuclear security and good governance aside, Pakistan's democratic demise must not be ignored. Pakistan's crisis is the world's problem and failure to acknowledge the significance of the matter presents lasting consequences. Although overcoming instability ultimately requires the unification of the Pakistani people,<sup>60</sup> the United States and other nations must stand ready to assist, or to intervene to secure Pakistan's nuclear weapons if necessary.

---

55. *Id.*

56. Benazir Bhutto, *Why the World Needs Democracy in Pakistan*, CHRISTIAN SCIENCE MONITOR, Dec. 10, 2007, at 9.

57. James Rupert, *Reporting From Pakistan, Why you need to care about Pakistan*, NEWSDAY, Nov. 11, 2007, at A23.

58. *Id.*

59. *Id.* See also OWEN BENNETT JONES, PAKISTAN: EYE OF THE STORM (2d ed. 2003) (noting Pakistan's volatile state).

60. "Overcoming the considerable obstacles ahead will take maturity, unity and consensus among a wide swath of Pakistan society, including the political parties, the military, the legislature, the media and civil society." Murphy, *supra* note 2.

## ABSTRACTS

### PROTOCOL NO. 14 TO THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS: TOWARDS A MORE EFFECTIVE CONTROL MECHANISM?

*Patricia Egli*

On May 13, 2004, the member states of the Council of Europe agreed on Protocol No. 14 to the European Convention for the Protection of Human Rights and Fundamental Freedoms. At a time when nearly all of Europe's countries have become party to the Convention, an urgent need has arisen to adjust the control mechanism to ensure that the European Court of Human Rights can continue to fulfill its two basic aims. These are: to provide individuals who claim to be victims of human rights violations with an effective international remedy ("individual justice") and to decide cases of principle, thereby setting human rights standards for Europe ("constitutional justice").

This article acknowledges that some of the reform measures introduced by Protocol No. 14 are important steps to improve the effectiveness of the control mechanism and will prove successful shortly after Protocol No. 14 enters into force. However, this article argues that the new admissibility criterion provided in Protocol No. 14 will have a negative impact on the access of individuals to the Court, thereby compromising its function to deliver individual justice. In addition, the new admissibility criterion will scarcely contribute to reduce the excessive workload of the Court. Therefore, it will not give the Court any more room to concentrate on its constitutional function. Having concluded that Protocol No. 14 will not be sufficient to guarantee the long-term effectiveness of the Convention's control mechanism, the article offers suggestions on additional reforms beyond Protocol No. 14.

### UNITED STATES IMPLEMENTATION OF THE INTERNATIONAL CRIMINAL COURT: TOWARD THE FEDERALISM OF FREE NATIONS

*Lauren Fielder Redman*

The political winds are changing, and a more liberal United States government may very well be receptive to ratification of the Rome Statute of the International Criminal Court. The nature and scope of international law are also changing. Individuals are sharing responsibility with states for grave breaches of international law, and globalization has resulted in a marked increase in international tribunals deciding disputes affecting individual interests.

Despite these trends, Americans have been wary of the International Criminal Court (ICC).

Federal courts principles borrowed from the legal process school can and should be implemented to govern relations between ICC and domestic courts, for there is much to be gained from an international criminal court with the power to deter and punish those who commit the most severe crimes. In addition, a positive interaction between the ICC and the U.S. will contribute to what philosopher Emmanuel Kant named “the federalism of free nations,” which is a “decentralized system of cooperative relations among nations that, where possible, advances goals of democracy and respect for individual rights.”<sup>1</sup>

A BALANCING ACT: THE INTRODUCTION OF RESTORATIVE JUSTICE IN THE INTERNATIONAL CRIMINAL COURT’S CASE OF *THE PROSECUTOR V. THOMAS LUBANGA DYILO*

*Mary Will*

The International Criminal Court was established as a permanent tribunal dedicated to hearing and resolving cases involving crimes against humanity. The Court’s unique three-party system has afforded a substantial role for victims of these crimes. In addition to having a prosecution and a defense, the Court allows victims, represented by counsel, to serve as a party to the case. In its effort to help victims of mass atrocities recover and be made whole, the International Criminal Court has taken significant steps to incorporate restorative justice theory into its procedures.

The International Criminal Court recently held a Confirmation of charges Hearing in the case of *The Prosecutor v. Thomas Lubanga Dyilo* to decide whether there is enough evidence to sentence Dyilo to trial for allegedly conscripting and enlisting child soldiers. If the charges are confirmed, Dyilo’s trial will be the first full trial conducted at the International Criminal Court. This Note focuses on the role of the child victims in the Confirmation of Charges Hearing. It also examines the intent of the drafters of the Rome Statute when they created such rights for victims.

Through a detailed analysis of the role of the victims in the Confirmation of Charges Hearing, this Note will explore the extent to which victims are actually given a role in the International Criminal Court and the means by which restorative justice theory

---

<sup>1</sup> See Jenny S. Martinez, *Towards An International Judicial System*, 56 STAN. L. REV. 429, 461 (2003) (discussing Kantian philosophy in relation to international law).



actually can help make a victim whole again.

IMPROVING THE PHARMACEUTICAL INDUSTRY: OPTIMALITY INSIDE THE FRAMEWORK OF THE CURRENT LEGAL SYSTEM PROVIDES ACCESS TO MEDICINES FOR HIV/AIDS PATIENTS IN SUB-SAHARAN AFRICA

*Gourav N. Mukherjee*

The author intends to show that the current legal framework under which the United States pharmaceutical industry operates does not need to be altered in order to improve access to medicines for HIV/AIDS sufferers in underserved regions. The current framework can be optimized using the application of operations research methods including supply chain coordination, revenue optimization, licensing or contract provisions, and adequate rebates. The current systems of providing NIH funding for research as well as current licensing practices in the United States' public university system can be altered to provide reimbursements and other incentives to properly align and optimize the goals of the for-profit pharmaceutical industry with those of the public good. Additionally, the profit objectives of and general interests of public welfare can be balanced and some of the benefits of this balance are shown through an applied hypothetical in this paper.

CORPORATE ACCOUNTABILITY FOR ENVIRONMENTAL HUMAN RIGHTS ABUSE IN DEVELOPING NATIONS: MAKING THE CASE FOR PUNITIVE DAMAGES UNDER THE ALIEN TORT CLAIMS ACT

*Audrey Koecher*

According to a report by the United Nations Committee on Trade and Development, the top five corporations in 1998 had revenues more than twice the total GDP of the 100 poorest countries.<sup>2</sup> Indeed, today's multinational corporations (MNCs) often possess greater financial resources and economic influence than the countries in which they operate. While corporations operating within U.S. borders face criminal and civil sanctions, including punitive damages, for environmentally destructive practices, U.S. corporations operating in developing countries essentially operate in the absence of any mandatory environmental standards.

---

2. UN Committee on Trade and Development, *available at* <http://www.globalpolicy.org/reform/2002/modelun.pdf>.

In recent times, concerns have arisen with respect to civil liability for harms committed by United States corporations abroad. MNCs have been accused of destructive environmental practices which have led to large scale human harm in developing countries. An increasing number of lawsuits have been filed against MNCs under the Alien Tort Claims Act (ATCA), which allows foreign plaintiffs to bring suit in the United States when the plaintiffs allege a violation of the Law of Nations.

While punitive damages may be assessed against U.S. corporations for international human rights violations pursuant to the ATCA, current judicial interpretation of the Act does not allow for a cause of action for environmental harm. This paper suggests that, in order to provide redress to victims and impose civil liability in the form of punitive damages against defendant corporations, Congress should amend the ATCA to recognize a cause of action for severe environmental harm that has a direct, widespread effect on human health and well-being, whether domestic or international.